

**A PUBLIC JURIDIC PERSON IN CANON LAW SEEKING CHAPTER 11
BANKRUPTCY PROTECTION IN THE UNITED STATES:
THEORY, PROCESS, AND APPLICATION**

by
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A thesis submitted to the Faculty of Canon Law
Saint Paul University, Ottawa, Canada
in partial fulfillment of the requirements for the degree of
Doctor of Philosophy in Canon law

Saint Paul University

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ABSTRACT

According to the 1983 *Code of Canon Law*, public juridic persons in the Catholic Church are erected by competent ecclesiastical authority. Endowed with the right to acquire, retain, administer, and alienate ecclesiastical goods (i.e., properties), public juridic persons receive their mission from the Church, speak in the name of the Church, and make available their ecclesiastical goods to further the mission of the Church. In the United States of America, administrators of public juridic persons generally have the option to be incorporated under civil law. When civilly incorporated, these institutions are afforded the same legal rights and protections that other corporations have under civil law. The right to file for reorganization bankruptcy under Chapter 11 of *Title 11* of the federal Bankruptcy Code of the United States is among those rights.

This dissertation proposes that civilly incorporated public juridic persons should file for reorganization bankruptcy under Chapter 11 of the Bankruptcy Code when faced with insurmountable pressures from claimants and creditors and when their stable patrimonial condition is at risk. To achieve this objective, this dissertation begins by providing a survey understanding of public juridic persons (chapter one) and the care of their ecclesiastical goods (chapter two) according to the *CIC/83*. Next, this dissertation surveys the nature and the process of reorganization bankruptcy under Chapter 11 of the Bankruptcy Code (chapter three). Finally, in light of the technical principles and the theories developed in the previous chapters, this dissertation proposes a method for civilly incorporated public juridic persons to file for reorganization bankruptcy under Chapter 11 (chapter four).

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ACKNOWLEDGMENTS

I acknowledge my sincere gratitude to my dissertation director, Msgr. John A. Renken, whose expertise, understanding, and patience have been invaluable to the completion of this project. His passion for the discipline of canon law has indisputably been a source of inspiration to me.

I also acknowledge the assistance of the Faculty of Canon Law, particularly Dean Anne Asselin, JCD/PhD for her leadership and wonderful sense of hospitality. I also wish to extend my deepest gratitude to Prof. Yuji Sugawara, S.J., and Prof. Augustine Mendonça for their wisdom and support in helping me develop this work in its early stages. I am also grateful to Scott Santarosa, S.J., Provincial Superior of the USA West Province of the Society of Jesus, and to Patrick Lee, S.J., John Whitney, S.J., Robert Grimm, S.J., Michael Tyrrell, S.J., Charles Phipps, S.J., Paula Lustbader, J.D., Chantal Labrèche, JCD/PhD, Dolly Hunt, J.D., and Darlina Vu for their encouragement, thoughtfulness, and assistance.

Access to research material for a dissertation project is critical. Therefore, I extend my sincere appreciation to the Library staff of Saint Paul University, the Library Staff of the Pontifical Gregorian University, the Library staff of Seattle University School of Law, the Library staffs of Gonzaga University, and William Lockyear and the dedicated staffs of the Oregon Province's curia in Portland, Oregon.

I appreciate the encouragement of many friends, fellow students, and colleagues. I would especially like to mention particularly Michael Rosinski, S.J., Hasiniaina Rakotoarisoa, S.J., Joseph Gavin, S.J., Archbishop Terrance Prendergast, S.J., Margo Brousseau, Nadia Delicata, Lori Hunt, as well as all of my Jesuit brothers for their kind encouragement and generous support.

Finally, I would like to thank my family for their love and encouragement.

ABBREVIATIONS

<i>AAS</i>	<i>Acta Apostolicae Sedis</i> , Rome: 1909–
APR	Absolute Priority Rule
<i>ASS</i>	<i>Acta Sanctae Sedis</i> , Rome, 1865–1908
<i>BAFJA</i>	<i>Bankruptcy Amendments & Federal Judgeship Acts</i>
Bankruptcy Code	<i>Title 11</i> of the United States Code (1978)
<i>BAPCPA</i>	<i>Bankruptcy Abuse Prevention & Consumer Protection Act of 2005</i>
can.	canon
cann.	canons
<i>CCEO</i>	<i>Codex canonum Ecclesiarum orientalisum</i>
<i>CIC/17</i>	<i>Codex iuris canonici</i> , Pii X Pontificis Maximi iussu digestus
<i>CIC/83</i>	<i>Codex iuris canonici</i> auctoritate Ioannis Pauli PP. II promulgates
<i>CLD</i>	<i>Canon Law Digest</i>
CLSA	Canon Law Society of America
DIP	Debtor-in-Possession
FACSI	Charitable & Apostolic Fund of the Society of Jesus
FDIC	Federal Deposit Insurance Corporation
<i>FRBP</i>	<i>Federal Rules of Bankruptcy Procedure</i>
<i>FRCP</i>	<i>Federal Rules of Civil Procedures</i>
<i>IAG</i>	<i>Instruction on the Administration of Goods</i>
<i>In re</i>	In the matter of...
NCUA	National Credit Union Administration
PACER	Public Access to Court Electronic Records

<i>RFRA</i>	<i>Religious Freedom Restoration Act of 1993</i>
<i>U.S.C.</i>	<i>The Code of Laws of the United States of America</i>
USCC	United States Catholic Conference (prior to 1 July 2001)
USCCB	United States Conference of Catholic Bishops (since 1 July 2001)

GENERAL INTRODUCTION

According to the 1983 *Code of Canon Law*,¹ public juridic persons in the Catholic Church are erected by competent ecclesiastical authority. Endowed with the right to acquire, retain, administer, and alienate ecclesiastical goods (i.e., properties), public juridic persons receive their mission from the Church, speak in the name of the Church, and make available their ecclesiastical goods to further the mission of the Church.² In the United States of America, administrators of public juridic persons generally have the option to be incorporated under civil law. As civilly incorporations,³ these institutions are afforded the same legal rights and protections that other corporations have under civil law—including the right to file for reorganization bankruptcy under Chapter 11 of *Title 11* of the federal Bankruptcy Code.⁴

¹ *Codex iuris canonici auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione et indice analytico-alphabetico auctus*, Libreria editrice Vaticana, 1989, English translation, *Code of Canon Law: Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 1999, (= *CIC/83* or the Code).

² S. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” in *Studia Canonica*, 49 (2015), 490. Cf. J.J. CONN, *Catholic Universities in the United States and Ecclesiastical Authority*, JCD diss., Rome, Editrice Pontificia Università Gregoriana, 1991, 37-39; cann. 116 and 1254. Unless otherwise specified, all canons are taken from the *CIC/83*.

³ It should be noted that a public juridic person itself, as such, has no recognized right or legal capacity to incorporate in the United States. Rather, an individual natural person (e.g., an administrator of a public juridic person) can file certificates of incorporation, articles of incorporation, and bylaws which create the civil corporation that corresponds to the public juridic person. Furthermore, even after an administrator civilly incorporates a public juridic person, it is the civil corporation that is recognized under civil law of the United States, not the juridic person as such (which continues to be recognized under canon law). For the purpose of this work, a public juridic person which has been civilly incorporated in the United States will be referred to as a “civilly incorporated public juridic person.”

⁴ *11 U.S.C.*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf> (2013) (last accessed 23 February 2016), (= the Bankruptcy Code or *Title 11*). Chapter 11 is a chapter of *Title 11* of the Bankruptcy Code that permits reorganization bankruptcy under federal bankruptcy law. Chapter 11 is available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11-chap11.pdf> (last accessed 23 February 2016), (= Chapter 11, Chapter 11 bankruptcy, or reorganization bankruptcy).

Historically, bankruptcy is associated with financial failure or with business ineptitude on the part of insolvent businesses. Solvent businesses were not perceived to have a need for bankruptcy protection because they could meet their financial obligations with their creditors. Under current Bankruptcy Code, which was implemented in 1978, insolvency is no longer required.⁵ Rather, reorganization bankruptcy today has evolved into more of a business strategy—a strategy that allows corporations, whether solvent or not—to remain intact while reorganizing their debts with creditors.⁶

Civily incorporated public juridic persons in the United States are accountable to both canon law and civil law. Conforming to canon law, public juridic persons are “constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfill in the name of the Church, according to the norm of the prescripts of the law, the proper function entrusted to them in view of the public good.”⁷ Moreover, unless otherwise stipulated, public juridic persons are perpetual once erected.⁸ In essence, because of their nature, public juridic persons have both an incentive and an obligation to remain intact and to continue their ministries in the name of the Church indefinitely.⁹

⁵ M.J. WHITE, “Abuse or Protection? Economics of Bankruptcy Reform under *BAPCPA*,” in *University of Illinois Law Review*, 2007 (2007), 285.

⁶ K.J. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, Berkeley, CA, University of California Press, 1999, 161.

⁷ Can. 116.

⁸ Cf. can. 120.

⁹ M.M. MOREY and J.J. PIDERIT, *Catholic Higher Education: A Culture in Crisis*, New York, NY, Oxford University Press, Inc., 2006, 201. Cf. W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today’s Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 107-111; P.J. GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, PhD diss., Ottawa, Saint Paul University, 2001, 87.

In the United States, civil corporations are accountable to civil law. Although there are some exemptions because they are religious-based corporations (e.g., tax exemption), simply being public juridic persons associated with the Catholic Church does not exempt these institutions from having to follow civil law—particularly the laws of torts and negligence.¹⁰ The recent sexual abuse scandal involving some members of the clergy of the Catholic Church in the United States demonstrates the implication of what it means for public juridic persons to be held accountable to civil law. As a consequence of litigations related to this scandal, a number of Catholic institutions (e.g., public juridic persons such as dioceses, parishes, religious institutes, etc.) have had a difficult time managing the financial fallout that ensued subsequently.¹¹ Some of these institutions had to liquidate a great deal of their assets to cover legal fees and to settle claims with victims of clergy sex abuse.¹² It has been noted that the sexual abuse scandal has cost the Catholic Church in the United States close to three billions dollars.¹³

¹⁰ C.P. WELLS, “Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,” in *Boston College Law Review*, 44 (2003), 1214. Cf. I.C. LUPU and R.W. TUTTLE, “Sexual Misconduct and Ecclesiastical Immunity,” in *Brigham Young University Law Review*, 5 (2004), 1797-1883; P. JENKINS, *Pedophiles and Priests: Anatomy of a Contemporary Crisis*, New York, NY, Oxford University Press, Inc., 1996, 15, 125-138. Tort is defined as “[A] civil wrong other than breach of contract, for which a remedy may be obtained, [usually] in the form of damages; a breach of a duty that the law imposes on persons who stand in a particular relation to another person.” B.A. GARNER and H.C. BLACK (eds.), *Black’s Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 1717. William Rademacher and colleagues write: “‘tort’ is a catch-all for many different forms of civil action, each with its own rules regarding liability, defenses, and damages. Torts may be intentional or unintentional. [...] Unintentional torts are grouped under the general heading of negligence. Negligence is probably the most common claim made in the civil law arena. It involves failure to meet required standard of care in a wide variety of situations.” RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 145.

¹¹ T.D. LYTTON, “Clergy Sexual Abuse, Tort Law Making Policy,” in *Connecticut Law Review*, 39 (2007), 813. Cf. LUPU and TUTTLE, “Sexual Misconduct and Ecclesiastical Immunity,” 1792; S.J. ROSSETTI, “The Catholic Church and Child Sexual Abuse,” in *America*, 22 April 2002, available at: <http://americamagazine.org/issue/369/article/catholic-church-and-child-sexual-abuse> (last accessed 12 December 2015).

¹² JENKINS, *Pedophiles and Priests: Anatomy of a Contemporary Crisis*, 126. Cf. P. DOYLE, “Resurrection: The Archdiocese of Boston Rebuilds,” in *Boston Magazine*, November 2012, available at: <http://www.bostonmagazine.com/2012/10/archdiocese-catholic-church-rebuild-after-scandal/4/> (last

Unequivocally, persons and organizations responsible for any atrocious act against vulnerable persons should be held accountable to both canon law and civil law.¹⁴ However, to use ecclesiastical goods to pay for damages related to these litigations is incompatible with canon law. The Code distinctly states that the purposes of ecclesiastical goods are divine worship, the care and the decent support of the clergy and other ministers, and works of the sacred apostolate and charity.¹⁵ To use ecclesiastical goods to settle civil litigation would go beyond the scope and the purposes intended by canon law.¹⁶ Nevertheless, how should Catholic institutions in the United States follow the mandates of canon law (particularly regarding the care of ecclesiastical goods) while also be held accountable to their creditors (e.g., victims of abuse, creditors, etc.)?

accessed 3 March 2016); K. LAILAW, “Antigonish Diocese to Sell Property to Settle \$18.5M Sex Case,” in *National Post*, 29 May 2010, available at: <http://news.nationalpost.com/holy-post/antigonish-diocese-to-sell-property-to-settle-18-5m-sex-case> (last accessed 3 March 2016).

¹³ N.M. GAUNCE and R. LUTHER, “Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors,” in *Valparaiso University Law Review*, 43 (2009), 641. Cf. J.R. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, New York, NY, Palgrave Macmillan, 2014, 137; LUPU and TUTTLE, “Sexual Misconduct and Ecclesiastical Immunity,” 1792.

¹⁴ LUPU and TUTTLE, “Sexual Misconduct and Ecclesiastical Immunity,” 1820. It is worth noting that some Church officials have expressed that the “clergy sex abuse [should be seen as] a matter of sin, a moral failing that is best addressed by Church doctrines of repentance and forgiveness, rather than as a crime or a civil wrong to be turned over to the secular justice system.” LYTTON, “Clergy Sexual Abuse, Tort Law Making Policy,” 846. This dissertation, however, does not share that view.

¹⁵ Cf. G.J. ROCHE, “The Poor and Temporal Goods in Book V of the Code,” in *The Jurist*, 55 (1995), 313; FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 140; can. 1254. Furthermore, Sahayaraj Lourdasamy writes: “If [ecclesiastical] goods were to be allocated to or used for objectives other than the Church’s proper objectives [that is, those articulated in canon 1254], they would lose their status as ecclesiastical goods.” LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” 491.

¹⁶ D.J. MARCINAK, “Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporate Sole,” in *Catholic University Law Review*, 55 (2006), 858. Cf. P.J. BROWN, “The Perils of Bankruptcy: Rights and Obligations Regarding Clergy Support,” in *Studia canonica*, 45 (2011), 46; N.P. CAFARDI, “The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis. (Symposium: Bankruptcy in the Religious Non-Profit Context),” in *Seton Hall Legislative Journal*, 29 (2005), 372; T. REESE, “Extending the Statute of Limitations,” in *National Catholic Reporter*, 16 June 2016, available at <http://ncronline.org/blogs/faith-and-justice/extending-statute-limitations> (last accessed 17 June 2016).

This dissertation proposes that public juridic persons that have been civilly incorporated should file for reorganization bankruptcy under Chapter 11 of the Bankruptcy Code when faced with insurmountable pressures from claimants and creditors and when their stable patrimonial condition is at risk. In particular, reorganization bankruptcy under Chapter 11 is a sound strategy and a viable option because it permits civilly incorporated public juridic persons to achieve three principal goals: 1) to remain intact in order to continue their work in the name of the Church; 2) to ensure that adequate precautions can be taken to protect their patrimonial condition; and 3) to compensate creditors equitably.¹⁷

The objective of this dissertation is to contribute to the discipline of canon law by deepening the discussion regarding the intersection of canon law and civil law in the United States. As a starting point of discussion, this dissertation will focus on the canonical and the civil processes in which civilly incorporated public juridic persons must engage when they file for reorganization bankruptcy under Chapter 11.¹⁸ In this respect, the subject of this dissertation is original. To achieve the stated objective, this dissertation requires a careful examination of the nature of public juridic persons and the

¹⁷ J.E. JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” in *Catholic Lawyer*, 37 (1997), 155. Cf. P. FOOHEY, “When Churches Reorganize,” in *American Bankruptcy Institute Law Review*, 88 (2014), 277-306; D.A. SKEEL, “When Should Bankruptcy Be an Option (for People, Places, or Things)?” in *William and Mary Law Review*, 55 (2014), 2238; C.M. DAVITT, “Whose Steeple Is It? Defining the Limits of the Debtor’s Estates in the Religious Bankruptcy Context,” in *Seton Hall Legislative Journal*, 29 (2005), 531; FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 138.

¹⁸ Disclaimer: This dissertation covers the general principles of the federal Bankruptcy Code and some aspects of state laws. Particularly, the dissertation treats the subject of reorganization bankruptcy in a broad and condensed way by emphasizing general themes and key concepts; this level of detail should be sufficient and accessible for most discussions that include components of state debtor/creditor law. Those who would like to know more are encouraged to do further readings on the subject. Furthermore, the materials provided in this dissertation are for information only and not for the purposes of providing legal advice. Should legal advice be necessary, please contact an attorney to obtain advice with respect to any particular issue or problem.

care of their ecclesiastical goods according to the *CIC/83*. Additionally, this work will examine the principal mechanisms in reorganization bankruptcy pursuant to Chapter 11 of *Title 11* of the Bankruptcy Code and how these mechanisms can facilitate public juridic persons to navigate the bankruptcy process in a manner that is consistent with canon law.

This dissertation is divided into four chapters: Chapter one will focus on public juridic persons according to the *CIC/83*. In particular, this chapter will look at the theological and the historical developments of public juridic persons, their canonical erection, how public juridic persons are distinct from private juridic persons, and their rights and the obligations under canon law. Moreover, this chapter will survey the various civil corporate structures available to public juridic persons in the United States and the implications that civil incorporation may have on their juridical status in canon law.

Chapter two will continue the focus on public juridic persons but will shift the discussion to their ecclesiastical goods in different contexts. Thus, in addition to universal (canon) law, chapter two will also discuss other types of law (e.g., proper law, particular law, etc.) and how they affect the administration of ecclesiastical goods. Finally, as a way to introduce reorganization bankruptcy, chapter two will look at canon 1295 and transactions qualified under this canon—that is, transactions that may not readily fit into one of the stipulated acts of administration involving ecclesiastical goods but could endanger the stable patrimonial condition of a public juridic person nevertheless.

Focusing on civil law, chapter three will survey the nature and the process of reorganization bankruptcy under Chapter 11 of the Bankruptcy Code. In particular, this chapter will address the fundamental theories and the general history of reorganization

bankruptcy in the United States. Chapter three will also provide an overview of the Bankruptcy Code and will emphasize some of the principal mechanisms that are critical in a bankruptcy reorganization proceeding. Additionally, this chapter will highlight some of the principal participants and key events in a Chapter 11 reorganization bankruptcy.

Finally, bringing together canon law and civil law, chapter four will apply the technical principles and the theories developed in the previous chapters and will propose a method for civilly incorporated public juridic persons to file for reorganization bankruptcy under Chapter 11. Specifically, this chapter will address some important considerations that are unique to the experience of public juridic persons when they seek reorganization bankruptcy. These considerations include: the potential conflicts between canon law and civil law; the canonical status and the civil status of civilly incorporated public juridic persons; issues regarding ownership and control of ecclesiastical goods; the importance of legal consultation; the mandate under both canon law and civil law to obtain permission to file for bankruptcy; and the inherent risks that are associated with any corporation bankruptcy filing—that is, the conversion of a Chapter 11 bankruptcy into a Chapter 7 bankruptcy, the piercing of the corporate veil, etc. In addition, in order to contextualized the discussion regarding how civil courts treat key issues pertaining to civilly incorporated public juridic persons, the ownership of properties, and canon law, chapter four will also present two case studies.

While this dissertation hopes to contribute to the field of canon law by assisting public juridic persons in the United States navigate a Chapter 11 proceeding, there are limitations. These limitations are intended to narrow the scope of this work and to focus the discussion on some of the more critical areas that most civilly incorporated public

juridic persons will encounter when they file for reorganization bankruptcy. Among the limitations, first, this dissertation will not debate extensively the merits of—or the distinctions within—corporate and business laws in the United States. Second, while there are fifty states in the United States,¹⁹ this dissertation will focus mainly on federal bankruptcy law; any relevant state law will be addressed only when deemed necessary to make important distinctions. Third, while private juridic persons will be discussed, this dissertation will tackle the situations pertaining primarily to public juridic persons. Fourth, this dissertation will not address concerns that may arise from 1990 *Code of Canons of the Eastern Churches*;²⁰ however, when necessary and useful, references to the *CCEO* will be made, but only to demonstrate distinctions and/or parallels to the Latin Code. Finally, while the *CIC/17* will be referred to where necessary or useful, this dissertation will principally deal with the *CIC/83*.

¹⁹ It is worth noting that each state has its own laws pertaining to corporations and property ownership. When necessary, a bankruptcy court, which is federal jurisdiction, does take into consideration state legislations.

²⁰ *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione actus*, Libreria editrice Vaticana, 1995, English translation, *Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 2001, (= *CCEO*).

Chapter 1—PUBLIC JURIDIC PERSONS IN CANON LAW

Introduction

The desire for collaboration with others is a fundamental part of what it means to be a human person. Some would argue that a human person is incapable of surviving independently from others; society and social structures are needed in order for people not only to survive, but also to thrive as persons.¹ People have an innate desire to collaborate and share experiences, working towards a common objective—a sense of communion that is generally both practical and spiritual in nature.² These common objectives may include, for example, the need to find food, seek shelter, or preserve self and others.³ Gathering to collaborate, people would form covenants and associations. These associations begin informally, but then become more formal as relationships become more complex. Regardless of how associations begin, what is known is that they emerge both naturally and deliberately, and their objective is usually the same: to further the aspiration or mission of members, something that is bigger than just a single individual's aspiration or mission.⁴

In fact, without the ability to form associations, human society would not be possible. Associations are the building blocks that form the bedrock of any society,

¹ P.J. BROWN, “The 1983 Code and Vatican II Ecclesiology: The Principle of Subsidiarity in Book V—The 1983 Code of Canon Law: Twenty-Five Years Later,” in *The Jurist*, 69 (2009), 586.

² M. LÓPEZ ALARCÓN, “Introduction, cc. 1254-1258,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 13. Cf. D.H.J. HERMANN, “The Code of Canon Law Provisions on Labor Relations,” in *The Jurist*, 44 (1984), 159, 161.

³ J.M. ZANE, *The Story of Law*, 2nd ed., Indianapolis, IN, Liberty Fund, 1998, 21.

⁴ Cf. M.S. MONSANTO, “Theologico-Canonical Reflections on the Basic Ecclesial Communities (BECs),” in *Philippine Canonical Forum*, 15 (2014), 44-47.

helping to carry out the various activities and functions of that society. These activities include providing organizational structures and leadership, and governing individuals or groups, mediating their interactions. Associations with structures are capable of organizing the multitude of people into collective entities. These collectives form organic and dynamic communities. In the secular world, these collectives emerge as governments, unions, nations, and corporations. In the *CIC/83*, collectives are organized as communities of believers, parishes, dioceses, religious institutes,⁵ associations of the Christian faithful, etc.,⁶ and they play an indispensable role in the life of the Church—not just for what these associations do, but also because of what they are. As such, the Church holds such associations in high regard. Przemysław Michowicz notes that: “[the]

⁵ There exists in canon law religious institutes, secular institutes, and societies of apostolic life. These juridic entities are distinct from dioceses and parishes. Moreover, it is important to note that religious institutes, secular institutes, and societies of apostolic life are not synonymous. Libero Gerosa summarizes the distinction between religious institutes and secular institutes by noting that religious institutes “comprise the faithful who profess the three evangelical counsels with public vows in common life; secular institutes comprise of those who *in saeculo viventes* (can. 710) profess the evangelical counsels with non-public but recognized vows or other sacred bonds comparable to such vows and without expressing them in the practice of canonical common life [....]” L. GEROSA, *Canon Law*, London, Continuum, 2002, 228. Distinguishing religious institutes from societies of apostolic life, Chad Glendinning writes: “Societies of apostolic life resemble [religious institutes; however, the] principal difference is that members of societies of apostolic life do not profess public vows of poverty, chastity, and obedience. They nevertheless resemble religious institutes inasmuch as members share a common life and pursue the apostolic purpose proper to the society (can. 731 §1). In clerical societies of apostolic life, clerics are incardinated in the society itself unless the constitutions establish otherwise (can. 736 §2). Major superiors of clerical societies of apostolic life are ordinaries (can. 134). Consequently, they can confer the ministries of lector and acolyte (can. 1034 §2), and issue dimissorial letters for the ordination to the diaconate and priesthood to their subjects who are enrolled perpetually or definitely in the society (can. 1019 §1).” C.J. GLENDINNING, “The Priestly Society of Saint Pius X: The Past, Present, and Possibilities for the Future,” in *Studia Canonica*, 48 (2014), 365. Nevertheless, there are, in fact, some societies of apostolic life whose members do, in fact, profess the evangelical counsels. However, Glendinning notes that: “[these] are not public vows of religious (cann. 654-658) or simple private vows (cf. can. 1192 and 1196), but some other form of bond which is approved by the Church and regulated according to the constitutions [of the society].” *Ibid.*, 365 fn. 94. For the purpose of this thesis and as otherwise noted, religious institutes, secular institutes, and societies of apostolic life will be referred to collectively as “religious institutes” or simply as “institutes.” Cf. L. ÖRSY, *Receiving the Council: Theological and Canonical Insights and Debates*, Collegeville, MN, Liturgical Press, 2009, 12-13.

⁶ Cf. R. PAGÉ, “Associations of the Faithful in the Church: Symposium on Laity in Church Law, Canon Law Society of America,” in *The Jurist*, 47 (1987), 165-203.

associative phenomenon of the faithful occupies a not irrelevant part of the lived experience of the Church, as the right to associate comes from the natural law.”⁷ Consequently, many of these communities have juridical personality and have official recognition in the Church.

1.1 — Juridic Person in Canon Law

The existence of the juridic person (or juridical person) is a given in the majority of our social legal systems.⁸ This is true in both civil law and ecclesiastical law. According to Black’s Law Dictionary, a juridic person is an artificial person and is defined as “an entity, such as a corporation, created by law and given certain legal rights and duties of a human person; a being, real or imaginary, who for the purpose of legal reasoning is treated more or less as a human being.”⁹ From this definition, two aspects of a juridic person are discernable: first, a public juridic person is a legal construct of positive law, and second, it has recognized rights and duties similar to those of a human or natural person. It is important to keep these two aspects in mind in the subsequent discussions.

The concept of the juridic person existed in the tradition of the Church almost from the beginning. However, the current legal definition of a juridic person was not fully

⁷ P. MICHOWICZ, “Legal Difficulties and/or Impossibility Concerning New Forms of Consecrated Life (c. 605),” in *Studia Canonica*, 48 (2014), 179.

⁸ The term “juridic person” is believed to be used for the first time by the nineteenth century German jurist A. Hiese. A. GAUTHIER, *Roman Law and Its Contribution to the Development of Canon Law*, 2nd ed., Ottawa, Saint Paul University, 1996, 52. The terms “juridic person” and “juridical person” are interchangeable. This work will use “juridic person” unless quoting sources that use, in the original, the term “juridical person.”

⁹ B.A. GARNER and H.C. BLACK (eds.), *Black’s Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 1325.

developed until the twentieth century when canon law was codified. The *CIC/17* referred to the physical person and the moral person or juridic person—that is, a non-physical person that possessed juridic personality.¹⁰ The *CIC/17*, however, provided no definition for what may constitute a juridic person.¹¹ In the *CIC/83*, however, the notion of the juridic person became much more developed. Canon 113 §2 of the *CIC/83* reads: “In the Church, besides physical persons, there are also juridic persons, that is, subjects in canon law of obligations and rights which correspond to their nature.” With this general introduction provided by canon 113 §2, the juridic persons became distinct from the moral persons.

1.1.1 — Historical Evolution of the Concept of the Juridic Person

A brief survey of the history of the early Christian community reveals that the concept of the juridic person did not emerge in a vacuum.¹² Considering that human beings have always been drawn together to form communities, however loose these communities were, it is inevitable that these gatherings would be formalized into collective bodies in order to strengthen their survival efforts. The Christian community gathered because they were followers of Jesus Christ and His teachings, and wanted to find a forum where they could live their faith freely and with the support of one another. As such, the early Christians sought one another out and gathered because they were

¹⁰ It is important to note that, although the term *juridic person* can be found in canons 687, 1489, and 1495 §2 of the *CIC/17*, the meaning of that term does not correspond exactly with how the *CIC/83* uses it. This distinction will be discussed later. Cf. R.T. KENNEDY, “Chapter II: Juridic Persons [cc. 113-123],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, 154-156.

¹¹ T.J. KILCULLEN, *The Collegiate Moral Person as Party Litigant*, CLS no. 251, Washington, DC, The Catholic University of America, 1947, 2.

¹² GAUTHIER, *Roman Law and Its Contribution to the Development of Canon Law*, 49.

looking for and wanted to be among people of a common mindset who shared a similar worldview.¹³

Some of the first Christian gatherings took place in private homes of individual members of the Church.¹⁴ They gathered for communal worship and to share their faith.¹⁵ These gatherings would later become known by the group's name or other corporate identity—usually associated with the name of the host's home. These gatherings would eventually become publicly identifiable communities and distinct house-churches.¹⁶ In fact, these early gatherings are the precursors of the local churches.¹⁷ Gatherings like these not only provided structures and formats of worship for the early Christians, but they also provided ways to initiate and integrate new members into the community.¹⁸

Working with what they had and absorbing what was available to them, these early communities were influenced by Roman society and law, and the worldview of the Mediterranean. These influences had a long-lasting impact on the development of early Christian communities.¹⁹ Over time, however, these communities developed their own

¹³ J. LÖSSL, *The Early Church: History and Memory*, New York, NY, T&T Clark International, 2010, p. 20. Cf. SECOND VATICAN COUNCIL, Decree on the Pastoral Office of Bishops *Christus Dominus*, 28 October 1965, in *AAS*, 58 (1966), 673-696, English translation in *ABBOTT*, 396-429, n. 36.

¹⁴ G.F. SNYDER, "Early Christian Meeting Places: Constantinian Basilicas and Anabaptist Restorationism," in *Mennonite Quarterly Review*, 73 (1999), 167.

¹⁵ W.A. MEEKS, "Social and Ecclesial Life of the Earliest Christians," in M.M. MITCHELL and F.M. YOUNG (eds.), *The Cambridge History of Christianity: Origins to Constantine*, Cambridge, Cambridge University Press, 2006, 151.

¹⁶ LÖSSL, *The Early Church: History and Memory*, 145.

¹⁷ Cf. SNYDER, "Early Christian Meeting Places: Constantinian Basilicas and Anabaptist Restorationism," 168.

¹⁸ MEEKS, "Social and Ecclesial Life of the Earliest Christians," 152.

¹⁹ LÖSSL, *The Early Church: History and Memory*, 119.

version of community structure and life, thus making them distinct from other groups of their time.²⁰

As the Christian communities gained self-confidence, their communal structures also became mature with their own distinctions. Although during the first few centuries of history of Christianity communities were not uniformly organized, by the third century, however, collective ecclesial bodies were relatively institutionalized in the various regions of the Mediterranean world.²¹ One of the developments that gave ecclesial communities a more solid foundation was the development of a clear organizational leadership structure.²² This structure included overseers, elders, and servers/helpers (bishops, priests, and deacons, respectively).²³ With these roles and functions, the community began to evolve and relationships became institutionalized. By the third century, we begin to see within Christian communities established groups that resemble corporations with administrators—i.e., leaders and elders with defined roles and functions, with rituals to initiate and incorporate members, and with a clear focus of activities.²⁴

Being self-sufficient in order to resolve conflicts was one of the motivating factors for corporations to develop. Within these corporate bodies, there were channels and protocols that helped bring disagreements to light and to facilitate resolution as

²⁰ Ibid., 43.

²¹ Cf. J.A. CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, New York, NY, Paulist Press, 1997, 18-24.

²² G. GHIRLANDA, *Il diritto nella Chiesa, mistero di comunione: Compendio di diritto ecclesiale*, 4th ed., Rome, Pontificia Università Gregoriana, 2006, 41.

²³ MEEKS, “Social and Ecclesial Life of the Earliest Christians,” 153.

²⁴ Cf. J.F. PRICE, “Structured to Flourish: Organization Design Lessons from the Early Church,” in *Journal of Strategic Leadership*, 4 (2012), 43-45.

needed. Furthermore, while having corporations helped resolve internal conflicts, they also helped resolve conflicts that took place between different groups.²⁵ Thus, even well before the third century, early corporations appeared to be relatively self-sufficient with established internal self-regulating mechanisms similar to that of an independent corporation, developing ways to deal with disagreements and providing protocols to address differences. We can see this through the various letters written by St. Paul the Apostle to the Corinthians (1 Cor 5:1-13; 1 Cor 5:5), Thessalonians (2 Thess 3:14-15), and Galatians (Gal 2:1-13).

One of the critical functions of early corporate bodies was to carry out ministries and works of charity of the early Church. These activities included responding to the dire needs of the poor in the community, especially those who were impoverished; these included the orphans, the widows, and strangers/foreigners to the community. The early Christians organized efforts to assist and care for such persons.²⁶ Such efforts required the ability to gather funds and resources and to redistribute them to the needy in the community.²⁷ Developments such as these continued throughout the early years of the young Christian Church, and lasted well after the conversion of the Emperor Constantine in the early third century.²⁸ During this time, the structure of incorporation became increasingly institutionalized.

²⁵ MEEKS, "Social and Ecclesial Life of the Earliest Christians," 155.

²⁶ *Ibid.*, 158.

²⁷ D. SALACHAS, "The Temporal Goods of the Church in the Light of Oriental Canon Law of the First Centuries (Application in the 'Codex canonum Ecclesiarum Orientalium')," in J. FOX (ed.), *Render unto Caesar: Church Property in Roman Catholic and Anglican Canon Law*, Rome, Pontifical University of St. Thomas Aquinas, 2000, 19.

²⁸ R. MARKUS, "From Rome to the Barbarian Kingdoms (330-700)," in J. MCMANNERS (ed.), *The Oxford History of Christianity*, New York, NY, Oxford University Press, Inc., 1993, 80.

It is generally undisputed among legal scholars that Roman law provided the foundation of our Western legal system.²⁹ This influence is still felt today in our modern Western legal systems. For example, under the Roman Empire, law became a systematized discipline for the first time in Western civilization's history.³⁰ Of all of the influences of Roman law in our modern legal tradition (this would include canon law as well), its major contribution is in the area of property. Under the umbrella of property law, Roman law redefined the basic structure of the family under the patriarch of the household. Private property passed from one generation to the next through inheritance practices, and the contracts aided in the transference of property.

Under Roman law, the notion of family became institutionalized, transforming a loose network of connections into a recognized legal unit with rights, privileges, and obligations.³¹ The family was a legal entity under Roman law.³² Of course, the idea of family has always existed, however loosely that term may have been understood. For example, in early Roman society, the notion of the family included not just the immediate family or the extended family, but also slaves, former slaves, and/or others who may be connected to the household by law, employment, or otherwise.³³ This usage was more in line with the notion of clan than family.³⁴ However, as Roman law developed, the law of inheritance became much more influential in defining familial relationship, centering on

²⁹ F. WIEACKER, "The Importance of Roman Law for Western Civilization and Western Legal Thought," in *Boston College International and Comparative Law Review*, 4 (1981), 257.

³⁰ ZANE, *The Story of Law*, 148.

³¹ *Ibid.*, 155.

³² J.A.C THOMAS, *Textbook of Roman Law*, New York, NY, North-Holland Publishing Company, 1976, 410.

³³ CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, 11.

³⁴ ZANE, *The Story of Law*, 155.

the *patria* of the family. The role of the *patria*, or the patriarch, became the foundation of the Roman family: everyone (and everything) in the family was subordinate to the *patria* of the clan (*paterfamilias*).³⁵ The right of ownership, administration, and transfer of property rested with the patriarch of the family, and no other members of the family enjoyed any of these rights.³⁶ Moreover, the law provided a legal process where the patriarchs could alienate their properties.³⁷

As a way to protect inheritance rights, the Romans developed a system of contract law that allowed interested parties to act in partnership-like arrangements. Under Roman law, *societas*, or contract law of partnership, was used to protect the inheritance interests of persons.³⁸ Since the type of partnership forged in a contract was practiced more in the area of private property and among families, it is arguably the first corporate-like body with legal recognition under Roman law.³⁹ With *societas*, Roman law gave groups of persons collective authority and rights.⁴⁰

The formation of *societas*, as a form of partnership among interested parties, served as a practical mechanism to protect property interests for members of a family. When the head of a household died, his property would be divided among his heirs. However, legal customs during that time dictated that the heirs may not own any of the property associated with the inheritance, at least until the inheritance could be divided.

³⁵ THOMAS, *Textbook of Roman Law*, 414.

³⁶ ZANE, *The Story of Law*, 160.

³⁷ *Ibid.*, 157.

³⁸ A. WATSON, *The Evolution of Law*, Baltimore, MD, Johns Hopkins University Press, 1985, 20.

³⁹ ZANE, *The Story of Law*, 157.

⁴⁰ L.J. SPITERI, *Comparison and Implications for a Roman Catholic Diocese in the United States of America as a Civil Corporation Sole and as a Canonical Public Juridic Person*, JCD diss., Rome, Pontificia Universitas Lateranensis, 2007, 28.

This process often took time. Consequently, in order to protect their claims to the deceased's estate, the contract law of partnership allowed the surviving heirs to be in partnership with one another until legitimate claims to the estate were resolved.⁴¹

1.1.2 — Right of Christians to Form Associations

The right of association and the right to form associations are generally held by most Western societies as natural human rights. Both the Catholic Church and many secular democracies today recognize and defend these rights.⁴² In the United States of America, for example, the First Amendment of the Constitution guarantees the right of assembly and free association.⁴³ In 1958 in *National Association for the Advancement of Colored People v. Alabama*, the United States Supreme Court affirmed that the freedom of speech, which is another constitutionally protected right, is intrinsically connected to the freedom and right of association.⁴⁴ Canon law acknowledges persons' rights to form and join associations. According to canon 215, the faithful Christians "may freely establish and direct associations which serve charitable or pious purposes or which foster the Christian vocation in the world, and they may hold meetings to pursue these purposes by common effort."

The Church's recognition of the right of the Christian faithful to form associations precedes the first codification of canon law in 1917. Various ecumenical councils and

⁴¹ WATSON, *The Evolution of Law*, 21.

⁴² SECOND VATICAN COUNCIL, Pastoral Constitution on the Church in the Modern World *Gaudium et spes*, 7 December 1965, in *AAS*, 58 (1966), 1025-1115, English translation in *ABBOTT*, 199-308, n. 68.

⁴³ The First Amendment (*U.S. CONST. amend. I*), along with the other parts of the *U.S. Constitution*, available at: http://www.senate.gov/civics/constitution_htm/constitution.htm (last accessed 4 March 2015).

⁴⁴ Cf. *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958).

papal documents have acknowledged the right of all human persons to join and to form associations. In the modern era, the first official document to acknowledge this right is Pope Leo XIII's 1891 encyclical letter entitled *Rerum novarum*, which stated:

The experience of his own weakness urges man to call in help from without. We read in the pages of Hoy Writ: "It is better that two should be together than one; for they have the advantage of their society. If one fall he shall be supported by the other. Woe to him that is alone, for when he falleth he hath none to lift him up." (cf. Eccl. 4:9-10). And further: "a brother that is helped by his brother is like a strong city." (cf. Prov. 18:19). It is this natural impulse which unites men in civil society; and it is this also which makes them band themselves together in associations of citizen with citizen; association which, it is true, cannot be called societies in the complete sense of the word, but which are societies nevertheless.⁴⁵

As prophetic document, *Rerum novarum* addressed the historical, economic, and social challenges that were taking place during the late 1800s. *Rerum novarum* became the foundation of modern Catholic social teaching.⁴⁶ At the height of the industrial revolution, the economies of the industrialized West were growing rapidly and transforming the face of human society.⁴⁷ Factories sprouted everywhere in order to satisfy the demand for products fueling the high demand for human labor. This led to a massive migration of persons from the rural countryside into cities and sprawling urban centers where jobs were easily found. Accompanying this growth, however, were some detrimental consequences: abuses and other violations of the rights of persons emerged. The lack of governmental oversight led to the exploitation of cheap human labor and unsafe working conditions for workers.⁴⁸

⁴⁵ LEO XIII, "Rerum Novarum – Encyclical Letter of Pope Leo XIII on the Conditions of Labor," in *Historical Catholic and Dominican Documents*, Book 13 (1891), 28, available at: http://www.digitalcommons.providence.edu/catholic_documents/13 (last accessed 29 May 2016).

⁴⁶ C. GILLIS, *Roman Catholicism in America*, New York, NY, Columbia University Press, 1999, 72.

⁴⁷ Cf. LEO XIII, "Rerum Novarum – Encyclical Letter of Pope Leo XIII on the Conditions of Labor," 1.

⁴⁸ *Ibid.*, 2. Cf. HERMANN, "The Code of Canon Law Provisions on Labor Relations," 154.

It was within this context that *Rerum novarum* was written. Pope Leo XIII in 1891 addressed the concerns of workers regarding their working conditions because of some of the negative effects that accompanied the industrial revolution. *Rerum novarum* noted that, in the past, safe working condition was championed by associations—that is, organizations such as craft guilds and trade associations; however, these organizations were subsequently suppressed and the abuse and neglect of workers’ rights resurfaced. Pope Leo XIII wrote:

But all agree, and there can be no question whatever, that some remedy must be found, and quickly found, for the misery and wretchedness which press so heavily at this moment on the large majority of the very poor. The ancient workman’s Guilds were destroyed in the last century, and no other organization took their place. Public institutions and the laws have repudiated the ancient religion. Hence by degrees it has come to pass that Working Men have been given over, isolated and defenseless, to the callousness of employers and the greed of unrestrained competition.⁴⁹

It is an understatement to say that *Rerum novarum* made an immediate and palpable impact on the Church’s understanding of the role of associations and the integral role they play in people’s lives. This encyclical was praised and reaffirmed by Pius XI in 1931 when he encouraged “Christian workers to found mutual associations according to their various occupations.”⁵⁰ *Rerum novarum* provided the Church’s first modern unequivocal affirmation of the right of persons to establish organizations to pursue higher purposes.

While *Rerum novarum* offered the first glimpse of the Church’s recognition of persons’ rights to form associations in the modern world, it was not until the Second Vatican Council that one sees a comprehensive explanation of this right—both

⁴⁹ LEO XIII, “*Rerum Novarum* – Encyclical Letter of Pope Leo XIII on the Conditions of Labor,” 2.

⁵⁰ “[...] quod christianos opifices ad mutuas secundum varia atrium genera consociationes instituendas hortatae sunt modumque id praestandi eos docuerunt.” PIUS XI, encyclical letter *Quadragesimo Anno*, 15 May 1931, in *AAS*, 23 (1931), 186.

theologically and philosophically. In *Apostolicam actuositatem*, Vatican II explained the role of the laity in relationship to the rest of the Church in which all have a shared mission. The Council noted:

In the Church, there is diversity of service but unity of purpose. Christ conferred on the apostles and their successors the duty of teaching, sanctifying, and ruling in His name and power. However, the laity, too, share in the priestly, prophetic, and royal office of Christ and therefore have their own role to play in the mission of the whole People of God in the Church and in the world. They [the laity] exercise a genuine apostolate by their activity on behalf of bringing the gospel and holiness to men, and on behalf of penetrating and perfecting the temporal sphere of things through the spirit of the gospel.⁵¹

The Council noted that the laity receives their rights and duties with respect to their roles and functions in the apostolate from Christ Himself.⁵² *Apostolicam actuositatem* demonstrates the significant role of the laity in the mission of the Church. Being baptized into the Church and becoming full members of the Body of Christ, the laity are not passive participants in the mission of the Church. Rather, it is acknowledged that the laity are called forth to engage fully in the work of the Church appropriate to them in their various conditions and states of life. The Council affirmed that the laity “should hold in high esteem and, according to their ability, aid the works of charity and projects for social assistance, whether public or private, including international programs whereby effective help is given to needy persons. In so doing, they [the laity] should cooperate with all men of good will.”⁵³ Moreover, not only are the laity cooperate with others when they engage in the apostolic work of the Church, but also they should be aware that, when they act in collaboration with others, they do so in union with God.⁵⁴

⁵¹ SECOND VATICAN COUNCIL, Declaration on the Apostolate of the Lay People *Apostolicam actuositatem*, 18 November 1965, in *AAS*, 58 (1966), 76-85, English translation in *ABBOTT*, 489-521, n. 2.

⁵² Cf. *ibid.*, n. 2.

⁵³ Cf. *ibid.*, n. 8.

⁵⁴ Cf. *ibid.*, n. 10.

The Fathers at Vatican II recognized that members of the Christian community have the right to engage in the apostolate⁵⁵ of the Church and to do so in associations.⁵⁶ To work in collaboration and to cooperate with one another and with the hierarchy of the Church is how believers respond to God's invitation to live their faith.⁵⁷ Therefore, the Fathers contended that, at various times and junctions, when demanded by the apostolate, individuals have the right to form groups and communities of shared vision and mission.

Apostolicam actuositatem notes:

The faithful are called upon to engage in the apostolate as individuals in the varying circumstances of their life. They should remember, nevertheless, that man is naturally social and that it has pleased God to unite those who believe in Christ in the People of God (see 1 Pet. 2:5-10) and into one body (see 1 Cor. 12:12). Hence the group apostolate of Christian believers happily corresponds to a human and Christian need and at the same time signifies the communion and unity of the Church in Christ, who said, "Where two or three are gathered together for my sake, there am I in the midst of them" (Mt. 18:20)⁵⁸...Thus, in an unequivocal term, the Council asserted that "as long as the proper relationship is kept with Church authorities, the laity have the right to found and run such associations and to join those already existing."⁵⁹

The Christian community, however, is not a community for the sake of community. Purposefulness is an ideal strived for by Church associations according to *Apostolicam actuositatem*. Associations in the Church must have a purpose consistent with the mission of the Church. As *Apostolicam actuositatem* makes clear, the purpose or

⁵⁵ According to James Coriden: "[An apostolate] is the term which the Second Vatican and the Code use to describe what active (as over against contemplative) religious communities are engaged in. Globally, apostolate signifies all the activity of the church directed toward the attainment of the goal of spreading the kingdom of Christ everywhere, of causing everyone to share in Christ's saving redemption. Within that larger purpose, each religious community has its own characteristic services, ministries and works to perform; these constitute the corporate apostolates of the community, e.g., evangelization, teaching, parish ministry, care for the poor or the sick (can. 676)." J.A. CORIDEN, *An Introduction to Canon Law*, Mahwah, NJ, Paulist Press, 1991, 98. Cf. S. LOURDUSAMY, "Canonical Perspective on Social Justice and Charity," in *Studia Canonica*, 49 (2015), 498-499.

⁵⁶ Cf. *Apostolicam actuositatem*, n. 19.

⁵⁷ PAGÉ, "Associations of the Faithful in the Church: Symposium on Laity in Church Law, Canon Law Society of America," 167.

⁵⁸ *Apostolicam actuositatem*, n. 18

⁵⁹ *Ibid.*, n. 19.

mission of each association must be consistent with the end of the Church itself. Associations in the Church can never be selfish or self-absorbed. These associations must not exist merely for the sake of existence. *Apostolicam actuositatem* states:

Associations are not ends unto themselves; rather they should serve to fulfill the Church's mission to the world. Their apostolic dynamism depends on their conformity with the goals of the Church as well as on the Christian witness and evangelical spirit of the individual member and of the association as a whole.⁶⁰

In summary, we see that the ability to associate freely with others to form groups, units, or organizations is natural to each human person.⁶¹ This freedom enjoys the recognition and the protection of the law—both secular law and Church law. Specifically for Church-related associations, there is an added requirement for persons who join or form associations: namely, their mission is a shared common apostolate in which each member is considered a disciple of Christ. In their collective apostolic work is found a sign of the Church itself.⁶²

1.1.3 — Juridic Persons in the Church before the *CIC/17*

It is worth noting that even before the first codification of canon law in 1917, the concept of the juridic person had already existed in some fashion. Customary law up to this time had already given recognition to entities created artificially by charters and acknowledged that they had rights similar to those enjoyed by natural persons.⁶³ While

⁶⁰ Ibid., n. 19.

⁶¹ It is worth noting that the Second Vatican Council also directed its attention to the ability of priests to form associations. Cf. SECOND VATICAN COUNCIL, Decree on the Ministry and Life of Priests *Presbyterorum ordinis*, 7 December 1965, in *AAS*, 58 (1966), 991-1024, English translation in *ABBOTT*, 531-576.

⁶² W.J. KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, JCD diss., Rome, Pontificia Universitas Gregoriana, 2002, 208.

⁶³ Nicholas Cafardi writes: “The Canon Law of the Roman Catholic Church was the first legal system in the world to develop the notion of a fictitious legal personality. Although there are roots in the Roman

initially Roman law did not specifically have the concept of a (public) juridic person or corporation in the modern sense,⁶⁴ almost from the beginning of the Roman Empire, Roman law recognized the existence of entities other than the natural/physical persons.⁶⁵

Thomas Harrington writes:

Collectivities, consisting of a plurality of “persons” or individuals, did exist in Roman society and in order for such entities to participate in the activities of a society which was organized on a system of law depending upon *status* and *caput* [or capacity], it was necessary for a mode of “personality” to be devised to govern such bodies. Over time, there emerged the concept of the “juristic personality.”⁶⁶

Thus, it is no surprise that the Roman Republic itself was referred to as *res publica*—that is, a created person with legal recognition.⁶⁷ Moreover, the Roman Republic recognized in customary law the religious organization (*sodalitas*), the public corporation (*societas*), the local civil corporation (*municipium*), as well as the non-commercial public corporation (*collegium*).⁶⁸

collegium sodalitas and *municipium*, the term *persona ficta*, meaning a fictitious or legal person, is actually used for the first time in legal history by the canonist, Sinibaldo Fieschi in the mid-thirteenth century. That concept of legal personality has endured and grown in Church law.” N.P. CAFARDI, “The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis. (Symposium: Bankruptcy in the Religious Non-Profit Context),” in *Seton Hall Legislative Journal*, 29 (2005), 362.

⁶⁴ THOMAS, *Textbook of Roman Law*, 469.

⁶⁵ G. LO CASTRO, “Chapter II: Juridical Persons, cc. 113-123,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. I, 763. Cf. M. RADIN, “Fundamental Concepts of the Roman Law,” in *California Law Review*, 13 (1925), 119.

⁶⁶ T.J. HARRINGTON, “Stewardship and Ownership of Material Goods: Discipline and Order in the Pre-Constantinian Church,” in *Catholic Lawyer*, 33 (1990), 117.

⁶⁷ A.J. MAIDA and N.P. CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, St. Louis, MO, Catholic Health Association of the United States, 1984, 21. Thomas Harrington cautions against holding the view that modern legal theories of legal personality existed already in Roman society during that time. Nevertheless, he concedes that “there were features analogous to contemporary civil law structures to regulate collectives [i.e., the juridic persons] which did emerge in the Roman system.” HARRINGTON, “Stewardship and Ownership of Material Goods: Discipline and Order in the Pre-Constantinian Church,” 117.

⁶⁸ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 21. Max Radin writes: “Whether corporate personality is a fiction or a reality has been largely discussed in the nineteenth century. [...] But fiction or not, and whatever it turns out to be, corporate personality in form and substance was a thoroughly Roman concept. [...] The power of forming

The early Christian communities provided a wide range of examples of how juridic persons developed as corporations (or juridically recognized corporate bodies). These communities took the Roman models of organization and made them their own.⁶⁹ These included early communities such as parishes, dioceses, religious movements, or monastic communities. These provided the foundational understanding of what and how corporations, as juridic persons or moral persons as referred to in the *CIC/17*, existed in relation to both the natural person and the hierarchical structure of the Church. These communities set the tone for how future juridic persons would subsequently exist in the Church.

As discussed earlier, the development of house churches during the apostolic period of Christianity was perhaps the first and most basic community model of corporation in early Christianity. These models of associations and corporations provided the places and formats for worshiping in the early Church. In these structures, persons would informally gather in private homes, and some elders would usually be designated to lead the community in prayers and worship. These models made sense because the number of believers in the community was relatively small. Over time, however, as more joined the community and the relative ease of worship afforded by the secular authority

corporations freely—the *liberté d'associer*—existed in Roman from time immemorial. Once formed, these corporations were entities. The individual members had obligations toward them and claims upon them. The corporation acted through its duly elected officers, control of whom was vested in the corporations. The latter met at regular intervals and acted in a formally determined way. By the statute of Augustus, this right of corporation activity was made dependent upon a formal state license in which both senate and princeps cooperates. From that time on, only such corporations as were duly licensed possessed the powers and privileges enumerated. All other persons who assumed to exercise corporate functions were guilty of an offense and succeeded only in creating the joint obligations of partners, in the Roman sense of the word.” RADIN, “Fundamental Concepts of the Roman Law,” 119.

⁶⁹ It is worth noting that the term *persona ficta*, or fictitious (or juridic) person, is believed to have been coined in the 13th century by the canonist Sinidbald Fieschi, who later would become Pope Innocent IV. MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 22.

emerged, the community was freed to move from a house-prayer center to larger and more communal centers in major cities and towns.⁷⁰ Larger public houses of worship emerged as parishes.⁷¹ These parishes needed to have priests and deacons ordained to lead public worship and to provide other pastoral care for the community.⁷²

Besides the development from the early house churches, parishes, and dioceses, the establishment of religious and monastic communities also provided initial models for the later development of juridic persons.⁷³ While parishes emerged and grew in city centers, religious and monastic communities were erected on the outskirts of towns and villages. What slowly emerged would be the forefathers and foremothers of some of the religious institutes that remain to this day.⁷⁴

As a means of financial support and stability, parishes and monasteries acquired properties and other temporal goods. Often times, properties were given to them by wealthy landowners through deeds and bequests. Taking ownership of properties meant that the communities had to find means to retain, administer, and cultivate the properties. This led to the development of organizational corporate structures. These communities turned to Roman law, adapting its language and models of organization for their own

⁷⁰ CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, 20.

⁷¹ According to William Rademacher and colleagues, the word “parish” is a Greek verb meaning “to dwell by, beside, or near; to dwell as a stranger or alien without citizenship.” W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today’s Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 5. Rademacher further adds that the New Testament, the word “Church” (*ekklesia*, an assembly) and “parish” (*paroikia*, a sojourn) have similar meaning. He writes: “Since the early Christian communities are awaiting the imminent return of their Lord, they think of themselves as pilgrims or sojourners without a permanent homeland here on earth; that is, they see themselves as a *paroikia* (a parish). Ibid., 7.

⁷² KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 14.

⁷³ W.J. KING, “Sponsorship by Juridic Persons,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States: Theory and Praxis*, Washington, DC, Canon Law Society of America, 2006, 52. Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 11-14.

⁷⁴ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 13.

communities. As we shall discuss later, the influence of Roman law on the notions of property, ownership, corporate partnership, and contract provide the early blueprint for canon law's legal development of the juridic person.

1.2 — Juridic Persons in the *CIC/17*

In order to understand the notion of juridic person in the *CIC/83*, it is crucial that one understands how the first codification of canon law considered the juridic person. The first official codification of canon law took place on May 27, 1917, when Pope Benedict XV promulgated the apostolic constitution *Providentissima Mater Ecclesia*. Before that, there was no official code of canon law.⁷⁵ Before the twentieth century, there had been collections of canons—most notably the collection compiled by Gratian, as well as several writings from different papacies. However, there was nothing that was considered a single official body of law that was legally enforceable by the Church.⁷⁶ With the 1917 codification, the Latin Church had an official body of law that was, for its time and place, something coherent, clear, modern, and applicable universally.⁷⁷ This was innovative because juridical matters and procedures, at least at the common or universal level, were both accessible and applicable uniformly throughout the whole Latin Church.

⁷⁵ L.T. BOUSCAREN, A.C. ELLIS, and F.N. KORTH, *Canon Law: A Text and Commentary*, 4th rev. ed., Milwaukee, WI, Bruce Pub. Co., 1966, 4.

⁷⁶ Gratian, a 12th century Camaldolese monk from Bologna, gathered together a collection of Church laws in what would later be known as the *Decree* of Gratian. This decree, although never considered authoritative, became for basis for the unification and subsequent codification of canon law in 1917. It should be noted that subsequent collections of law expanded upon Gratian's *Decree* and contributed to the unification of canon law. These include the writings of Pope Gregory IX (1227-1241), Pope Innocent IV (1243-1254), *Liber sextus* of Boniface VIII (1230-1303), the *Clementinae* of Clement V (1264-1314), the *Extravagantes communes* of Pope John XXII (1244-1334), in addition to decrees from the Council of Trent (1545-1563) and the First Vatican Council (1869-1870). Cf. G.J. WOODALL, *A Passion for Justice: An Introductory Guide to the Code of Canon Law*, Herefordshire, Gracewing, 2011, 28.

⁷⁷ BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 4.

John O'Malley notes that the *CIC/17* "was the first...one volume, handy organization of ecclesiastical ordinances in history, and it in effect ended the tradition of customary law in the Church. It professed to do nothing more than put existing legislation into a manageable order...."⁷⁸

The *CIC/17*, however, was not the only innovation in the Church in 1917. A commission of cardinals called the *Pontificia Commissio ad Codicis Canones Authentice Interpretandos* (or the *Commissio*) was established in September of the same year. This *Commissio* was charged with the sole responsibility of being the official interpreter of the newly promulgated *Code of Canon Law*.⁷⁹ Thus, while it was important to have a common set of laws applicable and accessible to the Church, it was also believed that the interpretation of the code should also be streamlined and uniformly available for the entire Church. This meant that the *Commissio* had the authority to give definitive or official interpretations to questions on the meaning of the newly codified law. Since the Catholic Church is a universal Church, its *Code of Canon Law* and the interpretation commission have now also become universal, crossing diocesan boundaries.

1.2.1 — Recognition of Persons

One of the more important contributions of the *CIC/17* was that it provided for a more comprehensive understanding of persons in the Church. Prior to the 1917 codification, the law of the Church recognized that there were physical persons and everything else (i.e., non-physical persons). Specifically, physical (or natural) persons

⁷⁸ J.W. O'MALLEY, *What Happened at Vatican II*, Cambridge, MA, Belknap Press of Harvard University Press, 2008, 65.

⁷⁹ BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 5.

were born and were capable of receiving the sacraments. On the other hand, non-physical persons (which included organizations and institutions) were created either by God or by the Church itself. With the *CIC/17*, the Church acknowledged this distinction, and formally categorized persons into two categories: 1) the natural or physical person, and 2) the moral person. Canon 99 of the *CIC/17* offered the first description of this distinction. It stated: “In the Church, besides physical persons, there are also moral persons, established by public authority, that are distinguished as collegial moral persons and non-collegial ones, such as churches, seminaries, benefices, and so on.” In their commentary on the *CIC/17*, Lincoln Bouscaren, Adam Ellis, and Francis Korth note that: “moral person means a juridical entity, a subject of rights, distinct from all physical or natural persons.”⁸⁰

While the understanding of the physical person was generally not a point of debate among scholars, the understanding of the moral person was less clear. According to the *CIC/17*, any entity that did not constitute a physical or natural person is a moral person. This meant that any collection of persons (such as religious orders and institutes, and other institutions in the Church, including the Church itself as well as parishes and dioceses) belonged to the category of the moral person.⁸¹ Accordingly, a moral person can be an aggregate of things or an aggregate of persons, and the latter can be either collegial or non-collegial.⁸² An aggregate of things would include foundations or associations such as hospitals and schools. An aggregate of persons would include a religious institute or

⁸⁰ *Ibid.*, 89.

⁸¹ Cf. cann. 99 and 100 of the *CIC/17*.

⁸² F. DELLA ROCCA, *Manual of Canon Law*, translated by A. THATCHER, Milwaukee, WI, The Bruce Publishing Company, 1961, 106.

congregation. The term “collegial” and “non-collegial” referred to the ways in which moral persons make decisions. Moral persons were collegial if they determined their actions by having members vote, according to procedures determined either by particular law or by common law. Physical persons who were members of non-collegial moral persons did not vote; decisions for the moral person were usually made by the physical person or the group of physical persons determined by proper/particular law.⁸³

The description offered by the *CIC/17* of the moral person was comparable to that of a minor (i.e., a non-adult physical person) with regard to its behavior.⁸⁴ Specifically, while the moral person had full personhood under the law, it was incapable on its own to behave as a full person. In practical terms, this meant that a moral person was incapable of acting on its own behalf; rather, legal representative (that must also be a natural person) must act on its behalf.⁸⁵ The situation was similar to that a parent-minor relationship. Bouscaren and colleagues writes:

Since moral persons are by nature incapable of acting for themselves, they must of necessity act through physical persons; either through individuals endowed with authority to act for them, or through a group as such, similarly authorized.⁸⁶

⁸³ Cf. J.F. HITE, “The Temporal Goods of Religious Institutes,” in K.E. MCKENNA, L.A. DiNARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 45-52.

⁸⁴ F.K. SAVIGNY, *Jural Relations, or, The Roman Law of Persons as Subjects of Jural Relations*, translated by W.H. RATTIGAN, reprint ed., Westport, CT, Hyperion Press, 1979, 232. Cf. BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 79, 90. Canon 88 §1 of the *CIC/17* distinguishes an adult natural person from a minor natural person in the follow way: “A person who has completed the twenty-first year of life is an adult; below this age, a minor.” Additionally, canon 89 of the *CIC/17* reads: “An adult person has the full exercise of his rights; a minor remains under the authority of parents or guardians in the exercise of his rights, except in those things in which the law exempts minors from the authority of parents.” E.N. PETERS, (ed.), *The 1917 or Pio-Benedictine Code of Canon Law: In Translation with Extensive Scholarly Apparatus*, San Francisco, CA, Ignatius Press, 2001, 53-54.

⁸⁵ DELLA ROCCA, *Manual of Canon Law*, 107.

⁸⁶ BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 90.

Consequently, each moral person had to have a physical person (or in some cases a group of physical persons) who was authorized to administer on its behalf and to represent it in the public forum.

Concerning the establishment of persons, a physical person was born and gained legal personhood in the Church through the sacrament of baptism. A moral person, on the other hand, is a creature of law—positive or divine—that “can exist without being officially recognized by another authority.”⁸⁷ A moral person must be established either by a formal decree of a competent ecclesiastical authority or by provision of the law.⁸⁸ Examples of moral persons erected by formal decrees included dioceses and parishes. Examples of moral persons erected by provision of the law itself included the college of cardinals and the Roman curia.⁸⁹

1.2.2 — Kinds of Moral Persons

While the distinctions between a physical person and a moral person were clear in the *CIC/17*, the distinction between the different kinds of moral persons was less clear. As alluded to already, there was no distinction between public moral persons and private moral persons in the *CIC/17*,⁹⁰ and the category of public juridic persons and private

⁸⁷ P.J. GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, PhD diss., Ottawa, Saint Paul University, 2001, 87.

⁸⁸ Cf. can. 102 of the *CIC/17*.

⁸⁹ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 34.

⁹⁰ GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 81. However, according to Brendan Brown, all moral persons as understood in the *CIC/17* were, by the nature, public in that they speak in the name of the Church and carried on the mission of the Church in the public forum. Cf. B.F. BROWN, *The Canonical Juridic Personality with Special Reference to Its Status in the United States of America*, CLS no. 39, Washington, DC, The Catholic University of America, 1927, 89.

juridic persons will not be introduced until the *CIC/83*. Rather, the *CIC/17* merely asserted that the Catholic Church and the Apostolic See were moral persons, and that they that were erected by divine law.⁹¹ Other institutions in the Church such as parishes, dioceses, religious congregations, and Catholic universities, were also moral persons; however, instead of being erected by divine law, these institutions were erected by positive law. A commentary on canon 100 of the *CIC/17* noted: The [Catholic] Church and the [Apostolic] See are naturally exceptions to this rule since both derive their moral personality, and the subsequent title to rights and powers, directly from divine law (cann. 100, §1; 196; 1322; 1375; 1495, §1; 1553).⁹²

As such, under the *CIC/17*, while non-physical persons may also have recognition in canon law as moral persons, there appear to be two types of moral person. This was challenging because, by placing the different kinds of institutions based on how they were erected under the one umbrella of the moral person, it caused some confusion and did not provide the adequately or necessary distinctions between the different types of moral persons.⁹³ How do the faithful distinguish or discern for themselves which institution was erected by divine law and which was not?

To alleviate the apparent confusion, Lincoln Bouscaren, Adam Ellis, and Francis Korth made a distinction based on the notion of superiority and inferiority. These commentators contended that the Catholic Church and the Holy See are moral persons because divine law erected them. Consequently, since it was divine law that erected them, the Catholic Church and the Holy See constituted superior moral persons. On the other

⁹¹ This is the position in both the *CIC/17* and the *CIC/83*.

⁹² DELLA ROCCA, *Manual of Canon Law*, 106.

⁹³ BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 89.

hand, however, other church institutions such as parishes, dioceses, religious congregations, Catholic universities, etc., were juridic persons that were erected by positive law, these would constitute the inferior moral persons.⁹⁴ Thus, following this argument, what made distinguished the superior moral persons from that of the inferior moral persons rested on how they were erected.⁹⁵ However, while commentators use the term “superior moral persons” and “inferior moral persons” and ascribe certain traits to each, the *CIC/17* did not use those terms. Nevertheless, it is important to note that the canons of the *CIC/17* dealt primarily with the so-called inferior moral persons.⁹⁶

1.2.3 — Moral Persons in General

Having established the existence of moral persons in the Church, the *CIC/17* asserted these institutions’ rights, privileges, and obligations in the Church. While natural persons have the capability to gain canonical personhood in the Church through the reception of the sacrament of baptism, the sacrament of baptism is obviously not available to moral persons—that is, a moral person is incapable of receiving the sacrament of baptism. Thus, the law itself would need to articulate what rights, privileges, and obligations moral persons can possess. Patsy Gonsorcik writes:

The [Catholic] Church and the Apostolic See are [superior] moral persons of divine origin, while other inferior moral persons are created by ecclesiastical authority; certain requirements are necessary to constitute [inferior moral persons] and for them to enjoy the protection afforded to minors under the law. There should be a minimum of three incorporators of an inferior moral person and canon 687 [of the *CIC/17*] also indicates the necessity of a formal decree of erection. Since canonical personality arises from God or through the action of the Church, the moral person is not dependent upon

⁹⁴ *Ibid.*, 89. Cf. BROWN, *The Canonical Juristic Personality with Special Reference to Its Status in the United States of America*, 92-93.

⁹⁵ GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 81.

⁹⁶ *Ibid.*, 83.

human authority for existence and is above the range of civil rights developed by any system of jurisprudence. The moral person is dependent only on God or His representatives (the Church).⁹⁷

As creatures created and subject to positive law, the *CIC/17* asserted that inferior moral persons such as parishes, dioceses, religious congregations, and other similar bodies were subjects of rights and obligations in the law.⁹⁸ Some of the rights of moral persons included the right to acquire, to retain, and to administer property. These rights came with their erection as moral persons and did not rely on any other secular sources.⁹⁹ Other rights included the right to have a physical person or persons act on their behalf, and the right to have recourse as provided by the law if they had been wronged.¹⁰⁰ It is worth mentioning that *CIC/17* recognized that, as also with physical persons, grave external force or fear could influence the will and actions of moral persons, and thus invalidate persons' actions because their freedom to act was compromised.¹⁰¹

Finally, moral persons were perpetual once erected¹⁰² and can only be suppressed by competent authority.¹⁰³ In fact, the law did not even allow for the imposition of a time limit on a moral person when it was created.¹⁰⁴ There was no such thing as a “temporary” moral person. In theory, once created, a moral person could exist indefinitely, outliving the existence of the physical person(s) who founded it. That being said, the *CIC/17* made

⁹⁷ *Ibid.*, 81.

⁹⁸ It should be noted, however, that the rights enjoyed by the moral persons were distinct from the rights enjoyed by the physical/natural persons who comprised the moral persons. BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 89.

⁹⁹ *Ibid.*, 806.

¹⁰⁰ *Ibid.*, 90.

¹⁰¹ Cf. can. 103 of the *CIC/17*.

¹⁰² Cf. cann. 494, 498, and 699 of the *CIC/17*.

¹⁰³ Cf. cann. 1470 and 1494 of the *CIC/17*.

¹⁰⁴ DELLA ROCCA, *Manual of Canon Law*, 107.

provisions for the suppression of a moral person. Thus, according to the *CIC/17*, a moral person could be suppressed in one of two ways: 1) by decree of the competent ecclesiastical authority, or 2) by ceasing to act for more than one hundred years.¹⁰⁵

1.3 — Public Juridic Person in the *CIC/83*

If the *CIC/17* gave the Catholic Church its first single, complete code that systematized the law of the Latin Church in an orderly fashion, then the *CIC/83* updated this code and perfected it.¹⁰⁶ Between the *CIC/17* and the *CIC/83*, countless changes took place both inside and outside the Church. Increasingly, the Church found itself in the midst of the secular world—Catholics and their institutions existed in ways that seemed incompatible with their missions. The *CIC/83* brought about a much-needed updating of canon law as well as a synchronizing of the legal practices of the Church with the modern world.¹⁰⁷ Although not promulgated until 1983, the process of its creation began over two decades prior by Pope John XXIII in 1959 with his solemn allocution *Venerabili fraterelli*.¹⁰⁸ There is an “intimate connection” between the revision of canon law and the Second Vatican Council (1962-1965);¹⁰⁹ both are concrete examples of the Church reading the signs of times and being more in synchronicity with the modern world.

¹⁰⁵ Cf. can. 102 §1 of the *CIC/17*.

¹⁰⁶ GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 88.

¹⁰⁷ W.W. BASSETT, “Relating Canon Law and Civil Law,” in *The Jurist*, 44 (1984), 7.

¹⁰⁸ ÖRSY, *Receiving the Council: Theological and Canonical Insights and Debates*, 85. Cf. JOHN XXIII, solemn allocution *Venerabili fraterelli*, 25 January 1959, in *AAS*, 51 (1959), 65-69.

¹⁰⁹ B.E. FERME, “The Decree on the Bishops’ Pastoral Office in the Church, *Christus Dominus*,” in Matthew L. LAMB and Matthew LEVERING (eds.), *Vatican II: Renewal within Tradition*, New York, NY, Oxford University Press, 2008, 189.

The word *aggiornamento*—Italian for *updating* or *modernizing*—best describes the spirit of Vatican II.¹¹⁰ John O’Malley notes that with Vatican II there “was a shift from the integralism that marked most Catholic thinking from the early nineteenth century well into the twentieth and saw almost everything stemming from the Enlightenment and the French Revolution as incompatible with the Church.”¹¹¹ The *CIC/83* was, in fact, an updating of the laws of the Church *based on* the spirit of Vatican II.¹¹²

After having called for the revision of the *CIC/17*, John XXIII established the *Pontificia Commissio Codici Iuris Canonici Recognoscendo* to lead the revision process. With the appointment of Cardinal Pietro Ciriaci as the first president, the purpose of this *Commissio* was to assist in the reviewing, restructuring, and rewriting of the *CIC/17*. One of the first discussions that took place centered on the nature of the legal personality of moral persons. Specifically, the *Commissio* delved into the questions of how the so-called *inferior moral persons* were understood in relation to the *superior moral persons* found in the *CIC/17*.¹¹³ The only real distinctions made by the *CIC/17* with regard to moral persons were collegial versus non-collegial, and aggregates of persons versus aggregates of things.¹¹⁴ The *Commissio*, however, deemed that these distinctions were insufficient since they failed to resolve the differences between moral persons created by positive law

¹¹⁰ O’MALLEY, *What Happened at Vatican II*, 37.

¹¹¹ *Ibid.*, 38.

¹¹² Cf. E. CORECCO, “Aspects of the Reception of Vatican II in the Code of Canon Law,” in G. ALBERIGO, J.P. JOSSUA, and J. KOMONCHAK (eds.), *The Reception of Vatican II*, translated by Matthew J. O’CONNELL, Washington, DC, The Catholic University of America Press, 1987, 250.

¹¹³ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 46.

¹¹⁴ *Ibid.*, 48.

(i.e., the inferior moral persons) and those created by divine law (i.e., the superior moral persons).

Ultimately, the *Commissio* wanted a solution that was both theoretical in nature and practical in application.¹¹⁵ The *Commissio* wanted to highlight the right of the Christian faithful to form associations that are able to enjoy the privilege of being connected to the Church.¹¹⁶ Consequently, the challenge was to devise practical ways to establish and govern associations and institutions to enable them to share in the mission of the Church (locally and globally, officially and unofficially), with varying degrees of closeness to the hierarchical and ecclesiastical structure and authority. Subsequent work led to the development of a corporate structure that mirrored the civil corporate structure.¹¹⁷

The fruit of the work of the *Commissio* resulted in the concept of the juridic person that is distinct from that of the moral person. Or, more precisely, there is now a clearer understanding that moral personality could be attained by natural law (e.g., the state), divine positive law (e.g., the Church), or by human authority (e.g., a parish).¹¹⁸ From this, the *CIC/83* provides an adequate understanding of the different categories of juridic personalities. According to canon 113 §1, the Catholic Church and the Apostolic See are the only two recognized moral persons because they were created by divine law. Other entities in the Church such as dioceses, parishes, and Catholic universities, etc.,

¹¹⁵ Ibid., 47.

¹¹⁶ Ibid., 48. Cf. C. GALLAGHER, “Canon Law and the Christian Community II: Current Views on the Role of Canon Law,” in *The Heythrop Journal*, 12 (1971), 406-407.

¹¹⁷ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 50.

¹¹⁸ GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 86.

while moral persons according to the *CIC/17*, are now juridic person since they were erected by human authority recognized by the Church. Consequently, as entities that were lawfully erected by competent authority recognized by the Church, these juridic persons are subject to the regulation of the Church's laws.¹¹⁹ Jerald Doyle elaborates:

Any society within which the members have rights and obligations can structure for itself a juridical order to determine their existence and protection. In this juridical order it will specify who has rights and obligations both as individuals and as collective or juridical persons. Individual will have their rights and obligations by means of their proper incorporation into the society. Non-physical persons will have them according to their recognition by the proper authority within the society.¹²⁰

Consequently, the *Commissio* proposed that instead of having two categories of persons in the Church (the physical person and the moral person), there should be three: the moral person, the physical person, and the juridic person.¹²¹

1.3.1 — Classifications of Juridic Persons in the *CIC/83*

While the broad designation of juridic person applies to any legal entity erected as such in the Church, all juridic persons are classified into different categories with specific distinctions. As such, not all juridic persons are identical in canon law. As entities within the ecclesial community, juridic persons vary in their structures, behaviors, and relationships. In the Code, juridic persons are distinguished by categories. These categories include: how juridic persons are organized with regards to membership (*universitates personarum* or *universitates rerum*), how they behave with regards to

¹¹⁹ F.G. MORRISEY, "Acquiring Temporal Goods for the Church's Mission," in *The Jurist*, 56 (1996), 591.

¹²⁰ J.A. DOYLE, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, PhD diss., Ottawa, Saint Paul University, 1989, 10.

¹²¹ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 51.

decision-making process (collegiate or non-collegiate), and how they relate to the mission of the Church and the hierarchical structure of the Church (public or private).

1.3.1.1 — *Universitates personarum* and *Universitates rerum*

Canon 114 of the *CIC/83* classifies juridic persons as either *universitates personarum* or *universitates rerum*—that is, aggregates of persons or aggregates of things, respectively.¹²² Unlike a physical person, each juridic person is an aggregate—of persons or of things. The Code understands *universitates personarum*, or aggregates of persons, to designate the coming together of natural or physical persons to form a single entity. Examples of aggregates of persons include parishes, conferences of bishops, religious institutes, associations of the Christian faithful, etc. The Code understands *universitates rerum*, or aggregate of things, on the other hand, to designate the coming together of things to form a group of things.¹²³ Examples of aggregates of things include pious foundations, hospitals, schools, charitable trusts, etc.

Knowing whether a juridic person is an aggregate of persons or an aggregate of things is important in canon law. The specific classification identifies the nature of the institution that embodies the aggregate. For example, a physical person can join a religious congregation (which is an aggregate of persons), but he or she is excluded from joining a healthcare network (which would be an aggregate of things—e.g., hospitals and

¹²² The terms *universitates personarum* and *universitates rerum* (*universitates bonorum*) were first developed by canonists in the twelfth century. These terms did not exist in either Roman law or Germanic law. Cf. H.J. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1983, 239.

¹²³ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 76.

clinics). On the other hand, an educational institution cannot join or take vows in a religious community (which is an aggregate of persons exclusively).

Another important distinction between aggregates of persons and/or of things concerns temporal goods. Aggregates of things cannot exist without material possessions but aggregates of persons can.¹²⁴ This is so because aggregates of things are established to provide support—primarily financial support—for a properly identifiable purpose; aggregates of persons, however, are not established to provide financial support.¹²⁵ Take, for example, a Catholic healthcare system. Such a system may include several hospitals and health clinics which provide much needed services for a particular community; in order to be financially feasible, a number of hospitals and clinics may choose to join together to form a system or network rather than to act as individuals. By coming together, the shared resources of the several will be available to all the member institutions, thus making them more efficient and more cost-effective. On the other hand, an aggregate of persons is theoretically capable of carrying out its mission such as preaching or caring for the needy without owning any material goods.¹²⁶ Consequently, an aggregate of persons can, in theory, have no material possession whatsoever.

¹²⁴ *Ibid.*, 77.

¹²⁵ *Ibid.*, 76.

¹²⁶ This point is clearly a theoretical point rather than a practical one to demonstrate the fundamental nature of aggregates of persons and the aggregates of things. Canons in the *CIC/83* pertaining to the erection of new institutes and communities, as juridic persons, stipulate that the competent ecclesiastical authority must ensure that new juridic persons erected not only have the hope of carrying out the mission of the Church, but they also have the resources to provide suitable support for their members. Cf. cann. 113 §3 and 610 §2.

1.3.1.2 — Collegial and Non-Collegial

The Code additionally distinguishes aggregates of persons based on how they make decisions. Canon 115 §2 says that such juridic persons make decisions either collegially or non-collegially. This distinction is applicable to both private juridic persons and public juridic persons. If a juridic entity is collegial, then the decision-making process requires the participation of all the members. Participation may be direct or indirect, and the Code does not presume that all members will participate equally. The statutes of the juridic person will dictate how collegial acts are carried out.

On the other hand, there is no membership participation when a juridic person is erected as non-collegial.¹²⁷ Canon law recognizes that the authority to make decisions in a non-collegial juridic person is a physical person. Designated by the approved statutes, this person is usually the legal representative of the juridic person. He or she often possesses executive power of governance to make decisions and to act in the name of the institution,¹²⁸ and is usually the superior of the community or the director of the work of the juridic person.

¹²⁷ Catholic parishes and dioceses are examples of non-collegial juridic persons. William Rademacher and colleagues write: “[Parishes and dioceses] are not democracies [...]. Each is a *non-collegial* juridic person. This means that not everyone in the parish or the diocese can get together and vote on everything with an equal voice. Someone must be the decision maker. For the parish church, it is the pastor (canon 532). For the diocesan or particular church, it is the bishop (canon 381, §1). For the universal church it is the Roman Pontiff (canon 332, §1). Each is like the sole trustee for the trust.” RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 109.

¹²⁸ Of course, as we shall see later with regard to the role of finance councils, the approved particular statutes may stipulate or mandate that this person be required to have consultation—and at times permission—with others, prior to making a decision; otherwise, his or her decision is void. In general, however, in the everyday operation of the juridic person, this designated “leader” acts on his or her own authority on behalf of the juridical person.

1.3.1.3 — Public and Private

As discussed earlier, one of the inadequacies of the *CIC/17* was that it did not provide coherent distinctions among moral persons in the Church. To remedy this, commentators of the *CIC/17* sought clarity by classifying the different moral persons as either superior moral persons (e.g., the Catholic Church and the Apostolic See) or inferior moral persons (e.g., dioceses parishes, religious institutes, Catholic schools, etc.). However, confusions remained since not all inferior moral persons relate to the Church in same way. And as discussed earlier, in order to demonstrate the nature of their origin (e.g., how they were erected), the *CIC/83* classified the Catholic Church and the Apostolic See as moral persons, and the “inferior moral person” as juridic persons. Moreover, in order to describe each juridic person’s unique relationships to the Church, the *CIC/83* classifies all juridic persons as either public juridic persons or private juridic persons.¹²⁹ The public or private distinction is akin to the official face of an entity.¹³⁰ The distinction is both theoretical and practical, and ultimately affects the relationship that the juridic entity has within the larger Christian community.¹³¹

¹²⁹ DOYLE, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, 89. Cf. GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 88.

¹³⁰ Thomas Harrington notes that the distinction between public collectivities and private collectivities already existed in early Roman law. He writes: “The special ‘public’ collectivities functioned in accord with ‘public’ law, which differed in significant respects from the ‘private’ law, which governed individual persons and other collectivities.” HARRINGTON, “Stewardship and Ownership of Material Goods: Discipline and Order in the Pre-Constantinian Church,” 118.

¹³¹ It should be noted that the Code of Canons of the Eastern Churches, promulgated in 1990, does not make this public/private distinction. Cf. *Codex canonum Ecclesiarum orientalium, auctoritate Ioannis Pauli PP. II promulgatus, fontium annotatione actus*, Libreria editrice Vaticana, 1995, English translation, *Code of Canons of the Eastern Churches: Latin-English Edition, New English Translation*, prepared under the auspices of the Canon Law Society of America, Washington, DC, Canon Law Society of America, 2001. However, it is worth noting that, while it does not distinguish between a public juridic person and a private juridic person, the CCEO does distinguish between a public association of the faithful and a private

The means of erecting a public or private juridic person differ. A public juridic person is erected either by the law itself or by a decree from a competent ecclesiastical authority. A private juridic person, on the other hand, is erected only by a special decree issued by a competent ecclesiastical authority.¹³² That a juridic person is public or private has ramifications in its relationship to the Church. The critical issue is one of autonomy. Robert Kennedy summarizes this in the following way:

The distinction between a public and a private juridic person is essentially the distinction between a juridic person that is closely governed by ecclesiastical authority (public juridic person) and one that, although subject to authority in certain respects, enjoys more autonomy and is governed primarily by its own statutes (private juridic person). The distinction is essentially a difference in relationship to the hierarchy.¹³³

An important consequence of being *closely governed* by an ecclesiastical authority is that a public juridic person engages in activities that intend to further the mission of the Church. For this reason, a public juridic person acts as a matter of right in the name of the Church. This public status binds the entity canonically to the hierarchical authority of the Church. Therefore, as a public juridic person, the entity is missioned and privileged to carry out the work of the Church in the most public fashion.¹³⁴

A private juridic person, on the other hand, does not enjoy such close canonical proximity with the ecclesiastical authority. While a private juridic person does, in theory, enjoy a relationship with the hierarchical structure of the Church because competent ecclesiastical authority has approved its statutes and has erected it, it nevertheless acts in

association of the faithful. KING, "Sponsorship by Juridic Persons," 53 fn. 10. Cf. cann. 573-583 of the *CCEO*.

¹³² Cf. can. 116 §2.

¹³³ KENNEDY, "Chapter II: Juridic Persons [cc. 113-123]," 161.

¹³⁴ LO CASTRO, "Chapter II: Juridical Persons, cc. 113-123," 769.

its own name rather than in the name of the Church.¹³⁵ When the competent ecclesiastical authority erects a public juridic person, this authority acts in the name of the Church and formally commissions the public juridic person to be an extension of Church, acting and speaking in the name of the Church. A private juridic person, however, always has its own mission.¹³⁶

It is worth noting that, in his doctoral thesis, William King asserts that the distinctions between these juridic personalities are more descriptive than substantive.¹³⁷

He reflects upon the difference between the public or private juridic status of an entity:

It is not an absolute and defining concept, but rather a *legal descriptor*, helpful in elucidating qualifications rather than qualities, and responsibilities rather than realities in se. Indeed, the concept is not only descriptive but also *relative*, that is, denoting ideas that can be understood correctly only in theoretical opposition.... One can describe but not define the distinction [...]¹³⁸

While King's work makes an important point, one should not underestimate the importance of the distinction between the public and private juridic persons. It is not just theoretical but also practical. A public juridic person and a private juridic person are significantly different: they are erected differently, the juridic acts available to them differ, their missions in relation to the Church differ, and their legal proximities to the hierarchy differ. To identify a few examples to elaborate this point: a public juridic person receives its mission from the Church but a private juridic person's mission is its

¹³⁵ It should be clear that, while it does not act in the name of the Church, a private juridic person may, on its own, engage in works that also further the mission of the Church. Patsy Gonsorcik writes: "Every juridic person has purposes congruent with the apostolic goals and mission of the Church." GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 88.

¹³⁶ It should be noted that, while private ecclesiastical juridic persons do not speak in the name of the Church, at the same time they should not speak *against* the Church.

¹³⁷ KING, *Public and Private Juridic Personality: A Comparative Legal Analysis*, 90.

¹³⁸ *Ibid.*, 90.

own; a public juridic person acts in the name of the Church, but a private juridic person acts in its own name; and finally, the temporal goods belonging to the public juridic person are considered ecclesiastical goods governed primarily by *Book V* of the *CIC/83*. On the other hand, the temporal goods belonging to a private juridic person are not considered ecclesiastical goods and are governed primarily by their own statutes, not by the canons of *Book V*.

1.3.2 — Public Juridic Persons and Juridic Acts

In canon law, all persons are capable of carrying out acts in some form or another. It is a fact for all persons recognized by the law.¹³⁹ Legally, when an act intends a juridic effect or consequence, this is called juridic act. A juridic act is defined as “an intentional act performed by a capable person and which, when all requirements for performing the act validly have been observed, has juridic effects specified by the law.”¹⁴⁰

1.3.2.1 — Representative to Act on Behalf of the Juridic Person

As an aggregate of persons or things, a juridic person is not capable of speaking and acting on its own behalf. Rather, its will and desired actions can only be achieved through its lawfully appointed representative—that is, a physical person who has the legitimate authority to act on behalf of the juridic person. There are many examples where we see a physical person speaking on behalf of a juridic person: a diocesan bishop representing the public juridic person that is the diocese, a pastor representing the

¹³⁹ M. THÉRIAULT, “Title VII: Juridic Acts,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. 1, 797.

¹⁴⁰ J.M. HUELS, *Empowerment for Ministry: A Complete Manual on Diocesan Faculties for Priests, Deacons, and Lay Ministers*, New York, NY, Paulist Press, 2003, 264.

parish,¹⁴¹ an abbot or an abbess representing the monastery, etc. While a juridic person has the capacity to acquire, retain, administer, and alienate temporal goods, these actions can only be carried out by the juridic person's administrator. Thus, it is the legal representative, a physical person, who signs the official documents on behalf of the juridic person.

The physical person who represents the juridic person is determined legitimately. According to canon 118, the representative of a public juridic person is determined by universal or particular law, or by the statutes of the juridic person itself.¹⁴² The representative of a private juridic person is determined solely by its statutes.¹⁴³ Identifying this legal representative is essential for the juridic person to perform its acts validly.

1.3.2.2 — Elements of a Juridic Act

A juridic act is defined as “an intentional act performed by a capable person and which, when all requirements for performing the act validly have been observed, has

¹⁴¹ It is important to note that, while parishes are distinct juridic persons in canon law, this does not undermine the hierarchical relationship between parish and the diocese, or the pastor and the diocesan bishop. John Coughlin writes: “Although the parish is a separate juridic person with the right to private property (*dominium* or *proprietas*), it remains part of the diocese and subject to the authority (*imperium*) of the diocesan bishop.” J.J. COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, New York, NY, Oxford University Press, Inc., 2011, 122.

¹⁴² The distinction among the different types of law is important to consider. Patricia Dugan writes: “[*Universal law*] is also sometimes referred to as common law which is the law that is found in the [CIC/83] and in subsequent, universal, legal texts. Canon law also provides for *particular law* which applies to a territory like a diocese, or the territory included in a nation's conference of bishops. Finally, canon law also includes *proper law* which relates to religious institutes and their members. Proper law is usually found specifically in the constitutions and rules of various religious institutes [...].” P.M. DUGAN, “The Sponsorship Relationship: Incorporation and Dissolution Civil and Canon Law Perspectives,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States: Theory and Praxis*, Washington, DC, Canon Law Society of America, 2006, 74. More will be discussed on the distinction between these types of law in chapter two and chapter four of this dissertation.

¹⁴³ Cf. can. 118.

juridic effects specified by the law.”¹⁴⁴ According to the *CIC/83*, a juridic act is validly placed when it is placed by a person capable of placing it, when it includes those elements that essentially constitute it, and when it observes the formalities and requisites imposed by law for its validity.¹⁴⁵ There are four fundamental elements that constitute a valid juridic act: 1) it is performed by a human person; 2) who has the capacity (or competence) to place the act lawfully; 3) who has followed formalities required when placing it; and 4) the act intends to have some juridic effects.

A juridic person can act neither on behalf of itself nor on behalf of another juridic person. An act of a juridic person must be carried out by a physical person(s) on behalf of the juridic person.¹⁴⁶ Canon 96 describes physical persons in the Church: “By baptism one is incorporated into the Church of Christ and is constituted a person in it with the duties and rights which are proper to Christians in keeping with their condition, insofar as they are in ecclesiastical communion and unless a legitimately issued sanction stands in the way.” From this description, we note that this person must be both a *physical* person and one who has received the sacrament of *baptism*. As a legal construct, a juridic person cannot be considered a physical (or natural) person because it is a creature of positive law and it is incapable of receiving the sacrament of baptism (or any sacrament for obvious

¹⁴⁴ HUELS, *Empowerment for Ministry: A Complete Manual on Diocesan Faculties for Priests, Deacons, and Lay Ministers*, 264.

¹⁴⁵ Cf. can. 124 §1. Related to the notion of validity is the notion of liceity. Canon law makes a distinction between validity (or invalidity) and liceity (or illicitly) in a way that American civil law does not. William Rademacher and colleagues write: “In the United States, something is either legal or illegal. If it is illegal then it is punishable and can be thrown out as not binding. For the church, ‘illicit’ means that it is against the law and is punishable, but it is still effective. The one who did it can be punished for breaking the law. ‘Invalid’ is deeper and more radical in its effect. It is not only illicit, but it is also not effective and does not exist.” RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 113.

¹⁴⁶ HUELS, *Empowerment for Ministry: A Complete Manual on Diocesan Faculties for Priests, Deacons, and Lay Ministers*, 43.

reasons).¹⁴⁷ As such, a juridic person is incapable of placing a juridic act. And as before, canon 118 dictates that the representative of a public juridic person is determined by universal law, particular/proper law, and/or the statutes of the juridic person, and that the representative of the private juridic person is determined solely by its approved statutes.¹⁴⁸

Being a physical person is, however, not the only requirement to place a valid juridic act on behalf of a juridic person. That physical or natural person must also have the *capacity* or *competency* to place the juridic act. According to Black's Law Dictionary, capacity is defined as "the legal qualification [...] that determines one's ability" to engage in a legal transaction.¹⁴⁹ According to the *CIC/83*, a physical person who represents a juridic person must have the competency or capacity to do so. Competency to act in the name of a juridic person is determined legitimately—either by universal or particular law, or by the approved statutes of the juridic person. One scholar describes the competency as either having the capacity to produce legal consequences, or the capacity to be held liable or accountable for torts or criminal offenses.¹⁵⁰ Canon 124 states that the act must be placed by a qualified person.

To be qualified or have the capacity to place a juridic act on behalf of a juridic person, the Code considers, among other things, the age, canonical status, state of life, office or position, and rite¹⁵¹ of the physical person to determine if he or she has the

¹⁴⁷ J.M. KUZIONA, *The Nature and Application of Juridical Acts According to Canon 124 of the Code of Canon Law*, PhD diss., Ottawa, Saint Paul University, 1998, 127.

¹⁴⁸ Cf. can. 118.

¹⁴⁹ *Black's Law Dictionary*, 249.

¹⁵⁰ H. PREE, "On Juridic Acts and Liability in Canon Law, Part One," in *The Jurist*, 58 (1998), 51.

¹⁵¹ KUZIONA, *The Nature and Application of Juridical Acts According to Canon 124 of the Code of Canon Law*, 34.

capacity to place the act. Moreover, depending on the nature or gravity of the juridic act, the representative may need to receive permission from a higher ecclesiastical authority before placing the act. Placing an act of extraordinary administration and an act of alienation of ecclesiastical goods are juridic acts that often require, for validity, permission before the administrator places the act. Seeking Chapter 11 bankruptcy protection is an example of this, which we will discuss in subsequent chapters.¹⁵²

Formalities are the external manifestations of an internal intent on the part of the actor to place an act that intends a juridic effect and are important in any legal transaction. They memorialize a public event and signify that a transaction took place. The requirement to have some formality associated with an act is not only to verify that an act (or a transaction) took place in the external forum, but also to legally demonstrate that an act was valid.¹⁵³ Examples of formalities may include requiring that the act be put into writing, having eyewitnesses, or using precise terminology to certify that a juridic act takes place.¹⁵⁴ The formality must be something observable that objectively testifies to the existence and validity of the act.¹⁵⁵ It allows all interested parties to be put on notice that the action performed is now accomplished, verifiable, and enforceable.

¹⁵² Understanding the essential elements of a valid juridic act is important. As it will become apparent later when Chapter 11 reorganization bankruptcy is discussed, the role and function of the Debtor-in-Possession is a critical mechanism that makes reorganization bankruptcy a viable option for a civilly incorporated public juridic person under canon law.

¹⁵³ Z. COMBALIÁ, "Title II: The Administration of Goods, cc. 1273-1289," in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 107.

¹⁵⁴ KUZIONA, *The Nature and Application of Juridical Acts According to Canon 124 of the Code of Canon Law*, 145. Cf. PREE, "On Juridic Acts and Liability in Canon Law, Part One," 78.

¹⁵⁵ HUELS, *Empowerment for Ministry: A Complete Manual on Diocesan Faculties for Priests, Deacons, and Lay Ministers*, 42.

Finally, the intention behind an act is required also to determine the juridic nature of an act. It is not possible for an act to have juridic effect if the intention for it is missing; there has to be intentionality to the act. The intent of the person performing an act speaks to the intended effect(s) of the action.¹⁵⁶ Emphasizing the critical relationship between the external juridic act and the intention (or the intended juridic effect) of the act, Hulmuth Pree writes: “according to canonical tradition, the main and essential element of a juridic act is the intention or will, consisting of two indispensable elements: the intention itself as an interior, subjective element; and the declaration of will as an external, objective element.”¹⁵⁷ Following this logic, any act that is motivated by anything that undermines free intentionality, such as grave fear or fraud, would render the act not a juridic act. Juridic acts must intend, in the mind of the person performing them, some juridic effects in order to be valid.

1.3.3 — Public Juridic Persons in General

The *CIC/17* made the legal distinction between the physical/natural person and the moral person. This legal distinction was important because it took into consideration associations and institutions established in the Church as moral persons which had capacities similar to those of physical persons. However, in the same code, grouping all persons created by the law (whether divine law or positive law) into the category of moral person was an ambiguous construction; specifically, the informal reference to the so-called *inferior moral persons* in relation to the *superior moral persons* lacked legal precision. Consequently, as alluded before, the second codification of canon law in 1983

¹⁵⁶ PREE, “On Juridic Acts and Liability in Canon Law, Part One,” 43.

¹⁵⁷ *Ibid.*, 46.

sought to remedy this by recognizing three types of persons in canon law rather than two.

Patsy Gonsorcik writes:

In the 1984 Code of Canon Law, only the Catholic Church and the Apostolic See are recognized as moral persons by divine law. The 1983 Code provides that, besides physical and moral persons, there are also juridic persons in the Church, that is, subjects to Canon law of obligations and rights which are in accord with their nature. The element of the fictitious person created by law [...] is found in the notion of the juridic person as distinct from the natural or physical person.¹⁵⁸

Accordingly, besides physical/natural persons and moral persons, a third category of persons was recognized: juridic persons.¹⁵⁹ Additionally, within the category of juridic persons, a further distinction is made: juridic persons are either public or private. We have already referred to some of the distinctions between public and the private juridic persons in prior discussions. Canon 116 introduces public and private juridic persons in the following way:

§1. Public juridic persons are aggregates of persons (*universitates personarum*) or of things (*universitates rerum*) which are constituted by competent ecclesiastical authority so that, within the purposes set out for them, they fulfill in the name of the Church, according to the norm of the prescripts of the law, the proper function entrusted to them in view of the public good; other juridic persons are private.

¹⁵⁸ GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 85. Additionally, it is worth noting that, in the context of Book V of the *CIC/83*, moral persons are treated—when necessary—in the context of juridic persons.

¹⁵⁹ Cf. can 113. Additionally, William King notes that the *CIC/83* “continues to use the term ‘moral person’ to denote those entities which exist prior to and apart from any operation of the law, especially the Catholic Church and the Apostolic See (canon 113).” KING, “Sponsorship by Juridic Persons,” 53 and fn. 11. Gonsorcik adds: “In addition to these [juridic] persons recognized by law, we must note that there are other unrecognized entities, such as numerous voluntary associations, which play a significant part in the mission of the Church. J. Doyle, commenting on the observations of M. Condorelli and F. Coccopalmerio, states that the exclusive use of the term ‘juridic person’ is inadequate because of the existence of ‘moral’ (or canonically unrecognized) entities without juridical personality, but which nevertheless should be acknowledged. To help respond to this rather unclear situation, a distinction has been made in the 1983 Code between ‘public’ and ‘private’ juridic persons. Nevertheless, even this distinction has not been entirely satisfactory, and the discussion continues. As greater understanding arise in this area, further clarifications will probably evolved regarding the use of ‘public’ and ‘private’ in relation to juridic persons.” GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 88. Cf. F. COCCOPALMERIO, “De Persona Iuridica iuxta Schema Codicis Novi,” in *Periodica*, 71 (1981), 397-410.

§2. Private juridic persons are given this personality only through a special decree of competent authority expressly granting it.

Canon 116 §1 concerns the public juridic person, while canon 116 §2 concerns the private juridic person. According to canon 116 §1, within the limits articulated in its statutes, a public juridic person fulfills the specific task entrusted to it in view of the public good.¹⁶⁰ In doing so, the juridic entity has the authority and the obligation to act in the name of the Church when it carries out its mission. In other words, the mission of the public juridic person comes from the Church itself because its activity is an extension of the mission of the Church. Consequently, when a public juridic person engages in its apostolates, it acts in the name of the Church.¹⁶¹

1.3.3.1 — Statutes of the Public Juridic Persons

According to the *CIC/83*, an entity seeking juridic status must have its statutes approved by a competent ecclesiastical authority. The *CIC/17* did not have this requirement.¹⁶² The approval of the statutes of the public juridic person is an important step that cannot be bypassed or ignored; in fact, canon 117 of the *CIC/83* stipulates an entity cannot be approved as a juridic person if the competent ecclesiastical authority has not approved its statutes.¹⁶³ In other words, before having its statutes approved, an entity

¹⁶⁰ Cf. GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 92-93.

¹⁶¹ For a comprehensive analysis of what it means to be a Catholic institution and right to use the name “Catholic,” see E.A. RINERE, “Catholic Identity and the Use of the Name Catholic,” in *The Jurist*, 62 (2002), 131-158.

¹⁶² J.A. RENKEN, “The Statutes of a Parish,” in *Studia Canonica*, 44 (2010), 104.

¹⁶³ Commenting on canon 117 of the *CIC/83* and the requirement of approved statutes, Robert T. Kennedy writes: “Canon 117 makes no distinction between juridic personality that is to be conferred by operation of law (*a iure*) and [juridic personality] which is to be conferred by decree of competent authority (*ab homine*); it would seem, therefore, that all juridic persons, public or private, whether their juridic personality is conferred *a iure* or *ab homine*, should have their statutes approved as a prerequisite for the

is not a public juridic person. Thus, it may not use the title Catholic, nor can it act in the name of the Church.¹⁶⁴ When the competent ecclesiastical authority approves the juridic entity's statutes, it is exercising executive power of governance.¹⁶⁵ Thus, the act of approving statutes of the public juridic person is not a useless formality. Rather, its juridic effect is the formal erection of a public juridic person in the Church. Consequently, no public juridic status exists if an entity seeking public canonical status has not received approval of its statutes.¹⁶⁶

The statutes of the public juridic person are essentially the norms governing the entity. Canon 94 of the Code addresses statutes in the following manner:

§1. Statutes in the proper sense are ordinances which are established according to the norm of law in aggregates of persons (*universitates personarum*) or of things (*universitates rerum*) and which define their purpose, constitution, government, and methods of operation.

conferral of juridic personality. The implication is clear that all parishes and all dioceses, as juridic persons, should have statutes though, as a matter of fact, many do not. The absence of statutes is no doubt largely due to the absence in the 1917 code, under which most presently existing dioceses and parishes were established, of any general norm requiring statutes.” KENNEDY, “Chapter II: Juridic Persons [cc. 113-123],” 163.

¹⁶⁴ Cf. RINERE, “Catholic Identity and the Use of the Name Catholic,” 131-158.

¹⁶⁵ LO CASTRO, “Chapter II: Juridical Persons, cc. 113-123,” 773.

¹⁶⁶ It is worth noting that there are some debates among commentators concerning canon 117 and whether or not the *CIC/83* requires that public juridic persons established *a iure* are, in fact, required to have statutes. John Renken writes: “Canonical commentators vary in their opinion whether or not [canon 117] requires statutes for public juridic persons established *a iure*. A careful reading of canon 117 can lead to the conclusion that the Code does not require statutes for public juridic persons established *a iure* inasmuch as canon 117 refers to aggregates intending to acquire juridic personality. This phrase may imply that the aggregate itself is petitioning for juridic personality (which would exclude public juridic persons established *a iure* since these juridic personas are not typically established by petition of the aggregate but by decision of a competent ecclesiastical authority—e.g., a diocesan bishop establishing a parish: see [canon] 515 §2). Further, reference can be made to *CCEO* canon 933 §1, which requires statutes *only* for juridic persons established by special concession (i.e., *ab homine*): ‘Every juridic person erected by a special concession of the competent ecclesiastical authority must have its own statutes approved by the authority that is competent to erect it as a juridic person.’ All this can lead to a responsibly reasoned conclusion that canon 117 *does not* require statutes for juridic persons established *a iure* (such as parishes), but that it requires statutes *only* for juridic persons established *ab homine*, whether public or private, at the petition of the aggregate itself (e.g., an association of the Christian faithful, a school, a hospital, etc.)” RENKEN, “The Statutes of a Parish,” 100.

§2. The statutes of an aggregate of persons (*universitas personarum*) bind only the persons who are its legitimate members; the statutes of an aggregate of things (*universitas rerum*), those who direct it.

§3. Those precepts of statutes established and promulgated by virtue of legislative power are governed by the precepts of the canons on laws.

Commenting on the nature of statutes referred to in canon 94, one commentary notes that statutes “are essentially laws governing the operation of a public juridic person” and they “are not to be confused with diocesan particular laws promulgated by the diocesan bishop for the entire diocese.”¹⁶⁷ Statutes provide the internal framework that allows the juridic person to function as a distinct and independent body. Consequently, statutes include a statement of purpose of the juridic person, and a description of its work or apostolate. Statutes also provide the structure, protocol, and process that allow a juridic person to function. Statutes also serve to identify a juridic person’s administrator(s) or officers, membership and membership incorporation, and decision-making process (collegial or non-collegial), etc.¹⁶⁸ Commenting on the functions of statutes, Gonsorcik writes:

When it comes to church-related associations, the approved of the statutes, given by competent ecclesiastical authority, guarantees the orthodoxy of the organization and the authenticity of its purpose. At times, though, statutes are not approved; they are simply “recognized” by church authority; this occurs when juridical personality is not granted to an association, although the group receives some form of recognition. Nevertheless, recognition of the statutes also implies their conformity with church law and purposes.¹⁶⁹

Finally, the Code recognizes that the statutes of a public juridic person may provide provisions allowing the juridic entity to merge or unite with another public

¹⁶⁷ Ibid., 105.

¹⁶⁸ Ibid., 107.

¹⁶⁹ GONSORCIK, *The Canonical Status of Separately Incorporated Healthcare Apostolates in the United States: Current Status and Future Possibilities for the Public and Private Juridic Person*, 90.

juridic person. The Code also envisions that a public juridic person can be suppressed.¹⁷⁰ In the case of a public juridic person being suppressed, its statutes should address how or what part(s) can be suppressed (if the entire juridic entity were to not be suppressed), as well as the procedure(s) taken to achieve the suppression.¹⁷¹ Such procedures may involve the identification of the superior or ordinary with the competent authority to perform this act of executive power of governance.

1.3.3.2 — Rights and Obligations

Once lawfully erected, all juridic persons are subjects of canon law.¹⁷² As subjects of the law, there are legal consequences that are applicable to all juridic persons. These legal consequences can be understood in terms of rights and obligations. These rights and obligations are implicit by the very fact of their erection.¹⁷³ These rights and obligations are stipulated in both the universal law and in particular or proper law. Obviously, the rights and obligations enjoyed by juridic persons are distinct from the rights and obligations enjoyed by physical persons in the Church. Canons 208 through 223 articulate the rights and obligations that belong to all physical persons in the Church,¹⁷⁴ these rights and obligations do not apply to juridic persons in the Church.

Canons 115 through 123, along with the introductory canons in *Book V* of the *CIC/83*, stipulate the rights and obligations that a public juridic person possesses. These

¹⁷⁰ Cf. can. 120 §1.

¹⁷¹ It is worth noting that, regardless of whether or not they have statutes, juridic entities such as parishes can only be suppressed by the diocesan bishop. Cf. J.A. CORIDEN, “Parish Communities and Reorganizations,” in *Studia canonica*, 44 (2010), 38.

¹⁷² CORIDEN, *An Introduction to Canon Law*, 151.

¹⁷³ CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, 71.

¹⁷⁴ CORIDEN, *An Introduction to Canon Law*, 56.

include the right to be an aggregate of persons or of things,¹⁷⁵ the obligation to have statutes approved by a competent authority before official recognition as a juridic person,¹⁷⁶ the right and obligation to be represented by those with the competency to do so as recognized by universal and/or particular law,¹⁷⁷ the right and obligation to carry out acts that are collegial or non-collegial according to universal and/or particular law,¹⁷⁸ the right and obligation to exist in perpetuity once legitimately erected,¹⁷⁹ the right and obligation to change by joining, merging, or uniting with other aggregates according to universal and/or particular law,¹⁸⁰ and the right and obligation to have its ecclesiastical goods handled according to particular or universal law upon extinction.¹⁸¹

1.3.3.3 — Public Juridic Persons and Temporal Goods

One of the more tangible rights that a public juridic person can have is the right to possess temporal goods.¹⁸² The Church asserts its innate ability to acquire, retain, administer, and alienate temporal goods. This right is independent of any civil

¹⁷⁵ Cf. can. 115.

¹⁷⁶ Cf. can. 117.

¹⁷⁷ Cf. can. 118.

¹⁷⁸ Cf. can. 119.

¹⁷⁹ Cf. can. 120. Stability is a critical to the definition of what it means to be a public juridic person; thus, the right and obligation to exist in perpetuity once legitimately erected are essential. Using the parish as an example, James Coriden writes that “stability is a part of the canonical definition of a parish: a ‘certain community of the Christian faithful *stably* constituted in a particular church’ (c. 515 §1). The expression *stabilter constituta* implies permanence.” CORIDEN, “Parish Communities and Reorganizations,” 38.

¹⁸⁰ Cf. cann. 121 and 122.

¹⁸¹ Cf. can. 123.

¹⁸² D. TIRAPU, “Title I: The Acquisition of Goods, cc. 1259-1272,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 44.

authority.¹⁸³ The basis for this claim comes from both natural and positive law, which are guaranteed for all political communities, one of which is the Catholic Church. Thus, the Church contends that it should not be discriminated against when it asserts this innate freedom in order to fulfill its objectives in the world. These objectives include the right to engage in divine worship, to provide the adequate support of the clergy and other ministers, and to engage in apostolic works, especially the works of charity.¹⁸⁴

Ownership is an important concept in any legal system. Notions of the ownership of temporal goods are based on the right of persons to take private possession of tangible and intangible things for which they had bargained or labored. The Church asserts its right and freedom to possess and to use temporal goods, but the notion of ownership in canon law does not involve exclusive ownership—at least, not in the way secular law understands this.¹⁸⁵ Consequently, any discussions about public juridic persons and temporal goods must acknowledge the inherent tension that exists between the Church’s claim to have the freedom and right to have temporal goods, and how secular laws understand the exercise of this kind of right.

As we have already mentioned, much of canon law is rooted in Roman law. This is especially true in the law on the ownership of temporal goods. In classical Roman legal

¹⁸³ Cf. can. 1254 §1.

¹⁸⁴ Cf. can. 1254 §2.

¹⁸⁵ F.G. MORRISEY, “Various Types of Sponsorship,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States: Theory and Praxis*, Washington, DC, Canon Law Society of America, 2006, 20. According to the Black’s Law Dictionary, [property] ownership is defined as a collection of rights allowing one to use and enjoy property, including the right to convey it to others. Ownership implies “the right to possess a thing, regardless of any actual or constructive control. Ownership rights are general, permanent, and inheritable.” *Black’s Law Dictionary*, 1280. Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1451-1525; A.J. MAIDA, *Ownership, Control and Sponsorship of Catholic Institutions: A Practical Guide*, Harrisburg, PA, Pennsylvania Catholic Conference, 1975.

tradition, ownership of property was defined by the term *dominium*. At its root, *dominium* is defined as the “ultimate legal title beyond and above which there was no other.”¹⁸⁶ The implication is that, when a person had *dominium* over some property, that person enjoyed actual possession of, and complete control over,¹⁸⁷ the property.¹⁸⁸ *Dominium*, however, was distinct from *possessio* (or possession). John Coughlin writes:

Roman law distinguished between *possessio* and *dominium*. *Possessio* was a question of fact, while *dominium* meant that one had an enforceable legal title and ultimate right to the land. *Possessio* could be terminated through a legal process by one who had *dominium*.¹⁸⁹

John Renken points out that the exercise of *dominium* over temporal goods has to be complete. In other word, the person having *dominium* over a temporal good must have the capability of (1) acquiring, (2) retaining, (3) administering, and (4) alienating that temporal goods—all at the same time. If any one of these four elements is missing, then there is no full ownership.¹⁹⁰ Scholars, however, noted that the usage of *dominium* in a strict sense evolved over time within Roman law tradition. Robert Kennedy notes that the later usage of *dominium* eventually became less prevalent, becoming synonymous with

¹⁸⁶ THOMAS, *Textbook of Roman Law*, 134.

¹⁸⁷ It is worth noting that the law distinguishes possession, control, and ownership. A person may take possession of a property without claiming ownership of it. That person, however, has ownership if he or she exercises both possession and control of the property. Actual possession, however, is not necessary to establish ownership; constructive possession has the same effect in law as actual possession. Cf. *Pierson v. Post*, 3 Cai. Rptr. 1975 (N.Y. Sup. Ct. 1805).

¹⁸⁸ According to the Encyclopedic Dictionary of Roman Law, *dominium* is defined as ownership that “denotes full legal power over a corporeal thing, the right of the owner to use it, to take proceeds therefrom, and to dispose of it freely;” however, the description adds that a “fundamental feature of the Roman doctrine of ownership is the distinction between the legal power over a thing and the factual holding of a thing (*possessio*) which do not always meet together in the same person. Hence, conflicting situations might arise between the owner (*dominus*, *proprietaries*) and the possessor.” Cf. A. BERGER (ed.), *Encyclopedic Dictionary of Roman Law*, Philadelphia, PA, American Philosophical Society, 1953, 441. As it will become more apparent, this distinction between owner and possessor is important to how the Church understands a public juridic person’s capacity to own temporal goods.

¹⁸⁹ COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 102.

¹⁹⁰ J.A. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, Staten Island, NY, St. Pauls, 2009, 55.

the term *proprietas*. As such, *proprietas* had a much broader and less technical connotation than *dominium*; it included not only full or exclusive ownership of temporal goods, but also “several inferior modes of limited or partial ownership as well.”¹⁹¹

The *CIC/83* uses the term *dominium* but not according to the classical Roman law’s understanding.¹⁹² *Dominium* as understood in the *CIC/83* to imply a limited right over the exercise of ownership of temporal goods. The reason for this is grounded in how the Church understands the nature and purpose of ownership of temporal goods. Francis Morrissey writes:

The [Code] prefers to use the Latin *dominium*, a word that implies limited rights, as distinct from the full rights which we often associate with full ownership (such as the right to use and to *abuse* property). According to Catholic theology and canonical practice, temporal goods in the Church are not “owned” by individuals, but are entrusted to their care for a specific mission. Goods belonging to the Church cannot be distributed to family members, nor are they part of the administrator’s estate upon death.¹⁹³

Thus, the term *dominium* in canon law is less restrictive and more in line with the term *proprietas*.¹⁹⁴ Under *proprietas*, a public juridic entity may acquire, retain, administer, and alienate temporal goods, but there is no exclusive ownership. As noted by Renken, no public juridic person has the absolute authority to exercise complete ownership over its ecclesiastical goods.¹⁹⁵ Thus, in the Church, the ability to acquire,

¹⁹¹ KENNEDY, “Chapter II: Juridic Persons [cc. 113-123],” 1458.

¹⁹² Cf. can. 1256.

¹⁹³ MORRISSEY, “Various Types of Sponsorship,” 20.

¹⁹⁴ Civil law is also moving in this direction in its understanding of *dominium* as well. In his majority opinion in *Marsh v. Alabama*, 326 U.S. 501 (1946) at 506, Supreme Court Justice H. Black wrote that “ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional powers of those who use it.” The implication of *Marsh v. Alabama* is that ownership of property may start out as exclusive dominion, but that exclusivity may become less as a result of the decision of the owner to loosen up his control over his property. Cf. *Black’s Law Dictionary*, 1280.

¹⁹⁵ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 55. Furthermore, the *CIC/17* noted that “all church property is held [owned] by moral persons,” the administration of those properties are always subject to the supervision of the local

retain, administer, and alienate temporal goods is always subject to a higher authority designated in canon law¹⁹⁶—even if these higher authorities have only a fiduciary relationship over the juridic persons and their temporal goods.¹⁹⁷

The right to acquire temporal goods by the Church is found in two separate canons. Canon 1254 asserts that the Catholic Church has the innate right (*iure nativo*), independent of any civil authority, to acquire, retain, administer, and alienate temporal goods.¹⁹⁸ Canon 1255 states that institutions such as the universal Church, the Apostolic See, the particular churches, and other public and private juridic persons are capable (*sunt capacia*) of acquiring, retaining, administering, and alienating temporal goods.¹⁹⁹ Canon 1255 does not mention the innate right of these institutions to temporal goods.

Why does the Code distinguish the fact that the Catholic Church “has the innate” right to acquire temporal goods in canon 1254, while other juridic persons “have the capacity” to acquire temporal goods in canon 1255? In other words: Is there a difference between the Catholic Church, on the one hand, and the universal Church, the Apostolic See, the particular churches, and other public and private juridic persons, on the other hand?

ordinary and according to canon law. Cf. BOUSCAREN, ELLIS, and KORTH, *Canon Law: A Text and Commentary*, 829-836.

¹⁹⁶ CORIDEN, *An Introduction to Canon Law*, 165.

¹⁹⁷ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 55.

¹⁹⁸ Can. 1254: §1. “Ecclesia catholica bona temporalia iure nativo, independenter a civili potestate, acquirere, retinere, administrare et alienare valet ad fines sibi proprios prosequendos.”

¹⁹⁹ Can. 1255: “Ecclesia universa atque Apostolica Sedes, Ecclesiae particulares necnon alia quaevis persona iuridica, sive publica sive privata, subiecta sunt capacia bona temporalia acquirendi, retinendi, administrandi et alienandi ad normam iuris.”

Some definitions can be helpful. The term “Catholic Church” has more of a theological implication than a juridical implication. According to the *Catholic Encyclopedia*, the Catholic Church is “no mere human invention, but the community called into being by Jesus Himself [...] The Catholic Church [is understood] in every period of [its] history as a living community, many members united by one faith, professing one doctrine, sharing the same seven sacraments and governed by the Vicar of Christ on earth and the successors of the Apostles.”²⁰⁰ The term “Apostolic See” refers to the Petrine office.²⁰¹ The term “particular church” was used by the Second Vatican Council²⁰² and is used to signify two particular groupings within the universal Church.²⁰³ The first group includes dioceses,²⁰⁴ apostolic vicariates, apostolic prefectures, territorial abbasies, territorial prelatures, and personal prelatures.²⁰⁵ The second grouping includes the 23 *Ecclesiae rituali sui iuris*, which the Code refers to simply as “particular Churches” or “rites.”²⁰⁶ Regarding the *Ecclesiae rituali sui iuris*, the Dogmatic Constitution *Lumen gentium* from the Second Vatican Council notes:

²⁰⁰ Peter M. J. STRAVINSKAS (ed.), *Catholic Encyclopedia*, Huntington, IN, Our Sunday Visitor, Inc., 1991, 185.

²⁰¹ Cf. *ibid.*, 88.

²⁰² Cf. SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964, in *AAS*, 57 (1965), 5-75, English translation in *ABBOTT*, 9-101; *Christus Dominus*.

²⁰³ For an extensive analysis on the particular churches and their groupings, see J.A. RENKEN, *Particular Churches: Their Groupings, Commentary on Canons 431-459*, Ottawa, ON, Saint Paul University, 2012 and J.A. RENKEN, *Particular Churches: Their Internal Ordering, Commentary on Canons 460-572*, Ottawa, ON, Saint Paul University, 2011.

²⁰⁴ It is worth noting how the concept of particular church applies to a diocese and a parish. According to canon law, a diocese constitutes a particular church while a parish does not. Rather, a parish is a juridic entity that is established within a particular church. Cf. COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 119.

²⁰⁵ Cf. cann. 294 and 368-370.

²⁰⁶ Cf. cann. 111-112.

[...] within the [Catholic] Church particular Churches hold a rightful place. These Churches retain their own traditions without any lessening of the primacy of the Chair of Peter. This Chair presides over the whole assembly of charity and protects legitimate differences, while at the same time it sees that such differences do not hinder unity but rather contribute toward it.²⁰⁷

From the above definitions, the distinction made in Latin canons 1254 and 1255 is grounded in the fact that the Catholic Church and the Apostolic See are of divine origin. The implication is that institutions such as the particular churches and the (private and public) juridic person are not of divine origin. Since the Catholic Church and the Apostolic See are of divine origin, their right to acquire property is innate. On the other hand, however, since the particular churches and other juridic persons are created by competent authorities within the Catholic Church, they do not have the innate right to acquire temporal goods. Rather, the Catholic Church gives them the capacity to acquire temporal goods.

Renken succinctly points out that canon 1254 “asserts a foundational principle which permeates the entire legislation of the code on temporal goods: ‘the Church has the innate right to own temporal goods.’”²⁰⁸ While the Catholic Church’s right to acquire temporal goods is innate or inherent, the right to acquire temporal goods and the capacity to exercise that right by a juridic person comes from the Catholic Church itself when the Church lawfully erects the juridic person. Thus, while the rights to acquire and retain temporal goods are innate for the Church, the Church in turn mediates those rights and

²⁰⁷ *Lumen gentium*, n. 13.

²⁰⁸ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 12.

capacities to the juridic persons that it creates so they, in turn, can possess temporal goods.²⁰⁹

In summary, while the Church and its canonically erected entities have the right and capacity to acquire, retain, administer, and alienate temporal goods, this is not synonymous with private ownership. A public juridic person never enjoys unfettered control over its temporal goods. *Dominium* (or *proprietas*) as ownership in canon law must be qualified as *ownership for a purpose* rather than ownership for the sake of ownership. In canon law, ownership can never be defined as total control and possession of temporal goods.²¹⁰

1.3.3.4 — Competent Authority

Any public juridic person can own property. Since property belonging to a public juridic person is considered ecclesiastical goods rather than private goods, *Book V* of the *CIC/83* determines how ecclesiastical goods are owned and administered. Ownership of ecclesiastical goods is never total or exclusive, and the administrator of a public juridic person acts as a canonical steward of the goods—never as their exclusive owner. As a steward, the identity and *munus* of the administrator over temporal goods are subjects of canon law.²¹¹

²⁰⁹ It is worth noting what is noticeably missing in canon 1255's listing of who are capable of owning temporal goods. The canon lists the universal Church, the Apostolic See, the particular Churches, and the other juridic persons. Physical or natural persons are excluded from this list. John Renken points out that "physical persons cannot own the temporal goods of the Church; they can only be the superior, legal representative, or administrator of the juridic persons which own them [...] Physical persons may not acquire, retain, administer, or alienate ecclesiastical goods in their own name. Ecclesiastical goods are owned by a public juridic person." *Ibid.*, 26.

²¹⁰ *Ibid.*, 54.

²¹¹ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 63.

Universal or particular law identifies the authority competent to act on behalf of a public juridic person and how that right is exercised. The identity of this physical person will depend largely on the public juridic person and its approved statutes. Universal law dictates, for example, that the diocesan bishops are the legal representatives of their respective dioceses.²¹² Pastors who have been lawfully appointed by their diocesan bishops represent their parishes, as public juridic persons, in all juridical matters.²¹³ For religious institutes and societies of apostolic life, their proper laws determine the persons competent to represent them in all juridical matters. For example, the statutes of the Society of Jesus clearly indicate: “Those who are administrative officers for goods of the Society are responsible for the financial/economic aspects as well as the juridical/legal implications of that management.”²¹⁴ These administrative officers are identified in the *Manual for Juridic Practice of the Society of Jesus*. This document describes these superiors or administrators in the following manner:²¹⁵

§1. In the Society, Superiors ordinarily constituted are of three categories: 1° he who is at the head of the whole Society and is called “Superior General” (or General); 2° those who are at the head of Provinces and Regions (Missions) and are called “Provincial Superior” (or Provincial) and “Regional (Mission) Superior;” and 3° those who are at the head of houses and are called “Superiors” or “local Superiors” (by whatever other title they are called in ordinary life). Similar to these is the “Vice-Superior” of a house not canonically erected and dependent on another house.

§2. Those in §1, 1°-2° are “major Superiors,” and for members subject to their respective jurisdiction they are understood in common law to be Ordinaries.

²¹² Cf. can 393.

²¹³ Cf. can. 532.

²¹⁴ *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, Rome, General Curia of the Society of Jesus, 2005, 42.

²¹⁵ *Manual for Juridical Practice of the Society of Jesus*, translated by C.J. MOELL, Rome, Curia of the Superior General of the Society of Jesus, 1997, 14.

For other public juridic persons, their respective statutes determine the representatives who will act on their behalf in juridical matters.²¹⁶

1.4 — Public Juridic Persons as Corporations in the United States

Institutions of the Catholic Church in the United States are typically accountable to two different legal systems. They function under both canon law and civil law. While their recognition under canon law provides rights, protections, and obligations for the juridic persons within the Church, those rights, protections, and obligations are not necessarily recognized in a civil legal system. In fact, canonically erected juridic persons usually are not given this same kind of recognition or status under civil law in the United States. Since there is no concordat between the Holy See and the United States concerning property, Catholic institutions may, at times, experience a conflict of law that is irreconcilable. In order to gain legal recognition and protection under civil law, a juridic person would need to be incorporated in civil law in a jurisdiction in the United States if civil incorporation is available.²¹⁷

Consequently, it is always good to be mindful that when conflict arises between canon law and civil law, the compromise should never be at the expense of canon law.²¹⁸

²¹⁶ LO CASTRO, “Chapter II: Juridical Persons, cc. 113-123,” 775.

²¹⁷ E.L. BUELT and C. GOLBERO, “Canon Law & Civil Law Interface: Diocesan Corporations,” in *Catholic Lawyer*, 36 (1996), 69.

²¹⁸ Addressing some general concerns regarding juridic persons seeking civil incorporation, Phillip Brown writes: “Any model employed for structuring [juridic persons] in civil law should attend to the following concerns: First and foremost that church governance be respected and preserved according to the models and underlying theological presuppositions of canon law. Parallel structures that do not reflect the true nature of ecclesial institutions and their relationships as understood theologically and ecclesiologically should be avoided in the civil structuring of church entities. This is especially to be avoided when parallel structures might threaten to ‘trump’ Church’s governance in ways that would in effect alter its constitution, or at least the constitution and ecclesial governance of individual canonical entities.” P.J. BROWN, “Square Pegs in Round Holes: Towards a Better Model of Parish Civil Law Structures,” in *The Jurist*, 69 (2009),

As mentioned before: the canonization of civil law is only possible when the civil law does not go against divine law or the Code itself. Moreover, canon law should never be dismissed in order to satisfy a mandate of civil law. Rather, especially when dealing with temporal goods: “Church administrators [must] take as their starting point the ecclesial polity as set forth in canon law and then endeavor to safeguard the ecclesiastical goods acquired by their church entity through the best civil structures available to them in their given locale.”²¹⁹

1.4.1 — Civil Incorporation in General

Since the time of the first Catholic corporation in the United States under Archbishop James Whitfield of Baltimore, a number of Catholic institutions have been utilizing civil corporate structures (when available) to gain civil recognition, rights, and protection under civil law.²²⁰ The McGrath-Maida debate (which will be discussed later) notwithstanding, canon law does, in fact, permit Church institutions to follow civil law if doing so would be to their advantage (i.e., to gain the proper recognition and protection under civil law) and if the specific civil law does not contradict divine law or canon law.²²¹ William Bassett writes:

263. Cf. can. 205; R.J. KASLYN, “Part I: The Christian Faithful [cc. 204-329], Introductory Canons [cc. 204-207],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, 248-250.

²¹⁹ J.J. FOSTER, “Canonical Issues Relating to the Civil Restructuring of Dioceses and Parishes,” in *The Jurist*, 69 (2009), 314.

²²⁰ It is interesting to note that the modern notion of corporate ownership was, however, an invention of the medieval canonists; these canonists also developed the notions of trusts, foundations, and possessory remedies that are the used today in secular property laws. Cf. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, 240.

²²¹ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 41. It is interesting to note that some commentators suggests that canon law itself should make clearer and stronger provisions to assist juridic persons to have civil recognition. Cf.

Incorporation itself is religiously and legally neutral. It does not secularize a religious organization, nor within the Church itself does it change the canonical status of its assets. Incorporation has no more legal significance in this respect than inclusion of a church in a local fire district. [...]. Incorporation, indeed, is a valuable tool to protect the religious nature of the organization, when properly done, to assure by charters and bylaws choices of board members and officers who believe in the charism of the sponsoring, faith-based community, as well as operation of the organization according to the discipline of the church.²²²

As civil corporations, Church entities have the same protections, rights, and obligations under civil law as other non-church/religious related corporations.²²³ While the laws of incorporation are determined by state/local legislatures and can vary from state to state in some finer details, the fundamental concept of a corporation and the method of incorporating are commonly similar. The corporate model that seems most suitable for Church entities is the non-profit model.²²⁴

What is a corporation and how does a juridic person under canon law become one? In American corporate law, a corporation is defined as:

[An] entity (usually a business) having authority under law to act as a single person distinct from the shareholders who own it and having rights to issue stock and exist indefinitely; a group or succession of persons established in accordance with legal rules into a legal or juristic person that has legal personality distinct from the natural persons who make it up, exists indefinitely apart from them, and has the legal powers that its constitution gives.²²⁵

Elaborating further, Roger Michalski writes:

Corporations [in the United States] are treated under the law as persons unless the context indicates otherwise. As artificial persons, [corporations] are treated presumptively like actual persons. Corporate personhood is, of course, a legal fiction. But

F.G. MORRISEY, "Challenges for the Administration of Temporal Goods in the Light of Changing Circumstances," in *Studies in Church Law*, 6 (2010), 47.

²²² W.W. BASSETT, "The American Civil Corporation, the 'Incorporation Movement' and the Canon Law of the Catholic Church," in *Journal of College and University Law*, 25 (1999), 743.

²²³ Cf. BROWN, "Square Pegs in Round Holes: Towards a Better Model of Parish Civil Law Structures," 270-271.

²²⁴ Disclaimer: As an academic work, this thesis is not intended to offer legal advice on matters pertaining to corporate law. For legal advice on this matter, one must consult a licensed attorney in each respective locale.

²²⁵ *Black's Law Dictionary*, 415.

this legal fiction, like many other legal fictions, has important consequences. By designating a corporation as a kind of person, the law grants corporations the capacity for legal actions and relations. As persons, corporations have legal standing to hold property, to enter into contracts, to conduct businesses, and ultimately, to sue and be sued.²²⁶

Corporations in civil law are divided into categories that are based on their intended purposes. A corporation is structured either as a for-profit or as a non-profit. The non-profit model appears to be best suited for public juridic persons, as will be discussed in greater detail below. While for-profit and non-profit address the fundamental purposes of the corporation, however, the structure of a corporation must also be considered. These available structures include, for example, corporation sole, a religious corporation, limited liability, and general partnership.²²⁷ As we shall consider later, the corporation sole and the religious corporation seem to be the most suitable business structures for the public juridic persons.

There is no civil law in the United States that requires religious entities to be civilly incorporated. At the same time, there is no requirement in canon law that juridic persons in the Church be incorporated in civil law.²²⁸ There have been and will continue

²²⁶ R.M. MICHALSKI, “Rights Comes with Responsibilities: Personal Jurisdiction in the Age of Corporate Personhood,” in *San Diego Law Review*, 50 (2013), 131.

²²⁷ Cf. P.J. BROWN, “Structuring Catholic Schools: Creative Imagination Meets Canon Law,” in *Catholic Education: A Journal of Inquiry and Perspective*, 13 (2010), 499.

²²⁸ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 133. It is important to note that, in secular society, religious organizations have no official recognition by the civil state. Consequently, in order to gain recognition—and therefore, rights and privileges—religious organizations may need to be civilly incorporated. John Coughlin writes: “[...] the law of the secular state does not recognize the church as a coequal partner in advancing societal interests. Rather, the state tends to view the church as any other corporate structure created under the auspices of state law. In what is perhaps the most benign approach to religion in secular political theory, the state encourages the church to function as one of different types of mediating structures between itself and the individual citizens...The state may grant tax-exempt status to the church, and in some interpretations of the separation doctrine, the state may give public aid to the church, but the state treats the church no differently than it might any other nonprofit organization.” J.J. COUGHLIN, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, New York, NY, Oxford University Press, Inc., 2012, 191.

to be religious institutions that do not consider incorporation as an option.²²⁹ That is their prerogative. For institutions wanting civil protection and tax benefits, however, various forms of civil incorporation may be available in their respective jurisdictions.

1.4.2 — Purpose of the Corporation: Non-Profit Corporations

In the United States, Church entities such as religious congregations or associations, parishes, dioceses, or other Catholic charitable organizations are typically incorporated as non-profit corporations.²³⁰ A non-profit corporation can be defined as “a corporation organized for some purpose other than making a profit, and usually afforded special tax treatment.”²³¹ While other corporate models are available, the non-profit corporate model seems to be most consistent with canon law.²³²

As non-profit corporations, religious institutions can qualify as tax-exempt religious and charitable organizations under federal and state income tax laws.²³³ However, to qualify for such exemptions, non-profit corporations must behave like non-profits. This means that three key concepts must be observed; these are private inurement, private benefit, and excess benefit transactions. Private inurement means that

²²⁹ M.E. CHOPKO, “Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures,” in *The Jurist*, 69 (2009), 242.

²³⁰ Among the motivations for seeking civil incorporation, it is worth noting that, depending on state legislation, civilly incorporated Catholic educational institutions (e.g., Catholic colleges and universities) may have to demonstrate that they are independent and free from any forms of “denominational control” (or being under the governance of a religious organization) in order to be eligible for government financial aid. The state of New York is one such example. For more information on this topic, see J.J. CONN, *Catholic Universities in the United States and Ecclesiastical Authority*, JCD diss., Rome, Editrice Pontificia Università Gregoriana, 1991, 174-183.

²³¹ *Black’s Law Dictionary*, 417.

²³² J.S. MANNY, “Governance Issues for Non-Profit Religious Organizations,” in *Catholic Lawyer*, 40 (2000), 2. Cf. can. 1254.

²³³ Cf. §501(a) and §501(c)(3) of the *U.S. Code Title 26*, available at: <http://www.irs.gov/Tax-Professionals/Tax-Code,-Regulations-and-Official-Guidance#irc> (2011) (last accessed 3 May 2015).

excess earnings of the non-profit corporation cannot be given to those in control of the corporation to be used for non-exempt purposes.²³⁴ Similar to but legally distinct from private inurement, private benefit restriction “prohibits the receipt of anything more than incidental private benefits by an individual or entity other than an intended beneficiary of the organization, and other than as reasonable compensation for goods or services.”²³⁵ Finally, when individuals or entities in a position of influence in a corporation that is non-profit receive too much compensation, this constitutes excess benefit transactions and the corporation will lose its non-profit exempt status.²³⁶

It should be pointed out that, although the purpose of non-profit corporations is not primarily about making profits or having surplus at the end of the fiscal year, this does not preclude these institutions from acquiring profits. In other words, non-profit corporations can have earnings, even if they result from profits accumulated. However, the profits acquired cannot be the intent of the non-profit corporation. One commentary points out that these profits “stay in the corporation. They are simply capitalized. They are not treated as are the profits of a business corporation, which can be distributed to shareholders in the form of dividends.”²³⁷

²³⁴ MANNY, “Governance Issues for Non-Profit Religious Organizations,” 5. Cf. *U.S. Code Title 26* §4958.

²³⁵ MANNY, “Governance Issues for Non-Profit Religious Organizations,” 7.

²³⁶ Cf. *U.S. Code Title 26* §4958.

²³⁷ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 119.

1.4.3 — Structures of Civil Corporations

The structure of a civil corporation that a public juridic person assumes must be consistent with canon law and the proper laws of the juridic entity. This includes how the corporation is organized, its owner(s), its decision-making process, etc. These details must be clearly stated in the civil articles of incorporation (or the Certificate of Incorporation) or the bylaws of the corporation. The civil structures that appear to be most suitable for the public juridic persons are the corporation sole, the parish corporation, and the religious corporation.

1.4.3.1 — Corporation Sole

A corporation sole can be defined as “a series of successive persons holding an office; a continuous legal personality that is attributed to successive holders of certain monarchical or ecclesiastical positions, such as kings, bishops, rectors, vicars, and the like. This continuous personality is viewed, by legal fiction, as having the qualities of a corporation.”²³⁸ As mentioned already, the laws of corporation are, more or less, legislated at the local level. Currently, twelve states in the United States have statutory laws that govern the corporation sole.²³⁹

²³⁸ *Black’s Law Dictionary*, 416.

²³⁹ SPITERI, *Comparison and Implications for a Roman Catholic Diocese in the United States of America as a Civil Corporation Sole and as a Canonical Public Juridic Person*, 143. The following 12 states have specific statutory laws governing the corporation sole in the year indicated; the relevant statutes are in parenthesis: Alaska as of 2013 (*AZ Rev Stat §10-11901*); Arizona as of 2013 (*AZ Rev Stat §10-11901*); California as of 2013 (*CA Corp Code §10002*); Colorado as of 2014 (*C.R.S. 7-52-102*); Hawaii as of 2013 (*HI Rev Stat §419-1*); Michigan, where corporation sole is referred to as *ecclesiastical corps*, as of 2014 (*MI Comp L §458.2*); Montana as of 2013 (*MT Code §35-3-201*); Nevada as of 2013 (*NV Rev Stat §84.010*); Oregon as of 2013 (*OR Rev Stat §65.067*); Utah as of 2012 (*UT Code §16-7-1*); Washington as of 2013 (*WA Rev Code §24.12.010*); and Wyoming as of 2014 (*WY Stat §17-8-112*). Cf. J.L. RYAN, “The Delicate Balance Between Religious Freedom and Legal Accountability in an Increasingly Litigious Society,” in *Journal of Civil Rights and Economic Development*, 24 (2009), 244.

One of the first corporate models that a Catholic institution in the United States embraced was, in fact, the corporation sole model. Under the guidance of Archbishop James Whitfield, the Archdiocese of Baltimore was incorporated as a corporation sole in 1832.²⁴⁰ Leading up to this historic event, many meetings were held among the American bishops to discuss the pressing problem of how to protect the Catholic Church's properties and holdings in the United States. Catholic institutions in the United States knew that the Church had to find ways to protect its assets, and that incorporation was a feasible method.²⁴¹ Having to deal with the controversies surrounding trusteeism,²⁴² the corporation sole model was a feasible way to transfer ecclesiastical assets from one vicar to his successor without losing any property to a third party.²⁴³ Membership of the corporation sole involves, as the name indicates, a sole/single series of persons (as opposed to one single person) "who, one after another, hold the same office."²⁴⁴

²⁴⁰ Cf. T.W. SPALDING, *The Premier See: A History of the Archdiocese of Baltimore, 1789-1989*, Baltimore, MD, The Johns Hopkins University Press, 1989, 103-120.

²⁴¹ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 139.

²⁴² Cf. R.F. MCNAMARA, "Trusteeism in the Atlantic States, 1785-1863," in *Catholic Historical Review*, 30 no. 2 (1944), 135-154.

²⁴³ Cf. M. PERCIACCANTE, "The Courts and Canon Law," in *Cornell Journal of Law and Public Policy*, 6 (1996), 178 fn. 32.

²⁴⁴ J.B. O'HARA, "The Modern Corporate Sole," in *Dickinson Law Review*, 93 (1998), 25. Thomas Harrington suggests that the modern concept of *corporation sole* can be traced to the Roman system's notion of the *public collective*. He writes: "[The] 'public' collectivity had, understandably, a comprehensive *caput*; it could acquire and dispose of land and chattels (including slaves), make contracts, be creditor or debtor and be appointed or instituted heir in a will. Emerging which the passage of time from this venerable 'public collectivity,' there came to be recognized a special legal personality identified, in imperial times, with the head of state, at the time of Alexander Severus, technically, the *princeps*. In certain aspects, the public juristic personality associated with the head of state can be understood as being analogous to the modern legal entity known as 'corporation sole.' The *princeps* was understood as enjoying competence to dispose of the funds (not lands) which were destined for public purposes. These funds were maintained in a public treasury known as the *fiscus* (literally a 'basket,' and more particularly, a 'money basket'), and passed, on the death of the *princeps*, not to his heirs at civil law, but to his successor in the imperial office." HARRINGTON, "Stewardship and Ownership of Material Goods: Discipline and Order in the Pre-Constantinian Church," 117.

Regarding why the corporation sole was a viable option for Catholic dioceses in the United States in the 19th century, William Doheny writes:

[The corporation sole] system of property ownership was resorted to by the dioceses [in the United States] in an effort to liberate church property from the control of trustees, when the system of lay-trusteeism became a menace, as well as to concentrate the management of temporal affairs in the hands of bishops. This was a necessary precaution at a time when much property was being lost to the Church through insecure means of incorporation.²⁴⁵

Nevertheless, for the Catholic Church of the 19th century in the United States, the reception of the corporation sole model as a means to hold property in civil law was ambivalent. Although appearing to have favored Protestant institutions, different U.S. states' constitutions made allowances for Catholic institutions to be incorporated under state laws dating back to 1777.²⁴⁶ The corporation sole model did not conform exactly to the Church's understanding of how ecclesiastical property was to be held.

One of the alternative models to the corporation sole, however, was the fee simple. A fee simple is defined as “an interest in land that, being the broadest property interest allowed by law, endures until the current holder dies without heirs.”²⁴⁷ The basic formula of conveying property using the fee simple method must include the following words: “To A and his heirs.” Here, “A” refers to the inheritor. Any language of conveyance short of this formula would mean that a smaller estate was transferred.²⁴⁸ If the current property holder dies with heirs, however, the property would go to his heirs.

²⁴⁵ W.J. DOHENY, *Church Property: Modes of Acquisition*, CLS no. 41, Washington, DC, The Catholic University of America, 1927, 39.

²⁴⁶ SPITERI, *Comparison and Implications for a Roman Catholic Diocese in the United States of America as a Civil Corporation Sole and as a Canonical Public Juridic Person*, 72.

²⁴⁷ *Black's Law Dictionary*, 733.

²⁴⁸ These smaller estates would include the fee simple conditional and the fee simple defeasible. Cf. *ibid.*, 734.

Using this method of holding of property would place the legal title of the Church property in the name of a single person—usually a pious parishioner or the parish priest.

The fee simple method of transferring property was not without serious problems. In fact, using this method led to much confusion, especially when the person whose name was on the title had a falling out with the Church, or when the person had died without a will (and then the heirs had legitimate legal claim over the title of the land), etc. In these circumstances, questions would arise about who owned the church property. Fee simple did not appear to conform to the Church's understanding of property ownership.²⁴⁹ Moreover, the fifth decree of the First Provincial Council of Baltimore in 1829 made it clear that all title to Church property must be vested in the name of the diocesan bishop.²⁵⁰ Consequently, the decision to incorporate the Archdiocese of Baltimore as a corporation sole was made out of necessity because, at the time, there were not many viable corporate legal structures for Catholic institutions that could be used to protect their assets in civil law.

Corporation sole creates a corporation out of an office, and there is no distinction between the person holding the office and the corporation. This office holder, in turn, has exclusive authority over the property title of the corporation.²⁵¹ Corporation sole seems to be a popular style of corporation for many Catholic dioceses in the United States because it appears to be the more useful, less cumbersome, and seemingly more straightforward

²⁴⁹ O'HARA, "The Modern Corporate Sole," 29. Cf. DOHENY, *Church Property: Modes of Acquisition*, 40-41.

²⁵⁰ H. DE COURCY, *The Catholic Church in the United States: Pages of Its History*, translated by J.G. SHEA, 2nd ed., New York, NY, Edward Dunigan & Brother, 1857, 126. Cf. SPALDING, *The Premier See: A History of the Archdiocese of Baltimore, 1789-1989*, 116-117.

²⁵¹ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 129.

means than the other options.²⁵² Decision-making authority rests in only one person. In corporation sole institutions, membership rests in one person—the sole incorporator; there is no board of directors or board of trustees. If the corporation sole is the diocese, the sole member is the diocesan bishop; if the corporation sole is the parish, the sole member is the pastor; if the corporation is a province of a religious institute, the sole member is the major superior of that institute (according to proper law). Effectively, the physical person who is the sole member of the corporation, for a lack of a better word, becomes the corporation; he or she becomes the *alter ego* of the corporation. Consequently, there is no required meeting, which means there are no minutes of meetings or reporting.²⁵³ All decisions are made by the sole member in accordance with the corporation's bylaws.

Any Catholic institution can become, in theory, a corporation sole in the United States. The models or arrangements have varied greatly. For example, an entire diocese could be incorporated as a corporation sole, and this corporation could include all the parishes and other diocesan institutions such as Catholic schools and hospitals. On the other hand, a diocese could be a corporation sole with just the diocesan bishop's residence, major diocesan offices, or works, but without the inclusion of the parishes or other institutions such as schools or hospitals. In the latter scenario, each parish and each school/hospital would be separately incorporated as individual corporations sole not under the umbrella of the corporation sole that is the diocese.

²⁵² O'HARA, "The Modern Corporate Sole," 93.

²⁵³ CHOPKO, "Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures," 246.

Corporation sole is not without major risks. The danger of a corporation sole is that, when one entity in the corporation is exposed to legal liability, those assets of the other entities belonging to the corporation sole are also exposed. For example, if civil legal action is brought against one parish, that would mean the assets of not just that parish, but all the assets belonging to the corporation sole will also be vulnerable; the vulnerable assets may include schools, hospitals, other parishes, or the entire diocese. This is so because, in a corporation sole, an act of one part of the corporation extends to the whole corporation, thus rendering the entire corporation sole liable.²⁵⁴

Although the corporation sole model may be simple, this option is not ideal from the perspective of canon law. Already in the early days of Church institutions seeking civil incorporation, the corporation sole model was discouraged. In fact, on July 29, 1911, the Vatican Congregation for the Council expressed that, when possible, the corporation sole model should not be used in the United States if there were other options. Instead of a corporation sole, the Congregation favored the *parish corporation* model as a way for the Church and the various entities within a diocese to hold and administer property under secular law. The Congregation wrote:

Only in those places where the civil law does not recognize Parish Corporations, and until such recognition is obtained, the method commonly called Corporation sole is allowed, but with the understanding that in the administration of ecclesiastical property the Bishop is to act with the advice, and in more important matters with the consent, of those who have an interest in the premises and of the diocesan consultors, this being a conscientious obligation for the Bishop in person.²⁵⁵

²⁵⁴ Ibid., 244.

²⁵⁵ Cf. *CLD*, vol. 2, 443.

But why did the Congregation harbor such reservation regarding the corporation sole model for Church institutions in the United States? Commenting on this, Phillip Brown writes:

The Congregation's directives recognized that corporation sole provided necessary security for the ownership of ecclesiastical property, but it was also apparent it [the corporation sole model] did not correspond adequately to the requirements of canon law. the model did not recognize local congregations as distinct legal entities especially when canonically organized as parishes; and [the corporation sole model] obscured the canonical distinction between the bishop's administrative oversight and his more limited powers of direct administration of the property of ecclesiastical entities other than the diocese itself. In other words, the corporation sole allowed the bishop more control over church property in civil law than he had in canon law, and for this reason the Congregation's attitude toward it was lukewarm at best.²⁵⁶

1.4.3.2 — Parish Corporation

An alternative to the corporation sole is the parish corporation. The parish corporation is a non-stock, religious corporation model in which each parish is incorporated under civil law as a non-profit corporation with its own statutes and bylaws, and it is usually governed by a board of some sort.²⁵⁷ Regarding the parish corporation, the Congregation for the Council in 1911 wrote:

Among the methods which are now in use in the United States for holding and administering church property, the one known as Parish Corporation is preferable to the other, but with the conditions and safeguards which are now in use in the State of New York.²⁵⁸ The Bishops therefore should immediately take steps to introduce this method for the handling of property in their diocese, if the civil law allows it.²⁵⁹

²⁵⁶ BROWN, "Square Pegs in Round Holes: Towards a Better Model of Parish Civil Law Structures," 284.

²⁵⁷ P. MADRID, "The Liability of Catholic Parishes in America: What Went Wrong and How to Fix It," in *Review of Litigation*, 28 (2009), 722.

²⁵⁸ The refers to the *Civil Code of the State of New York* addressing the Catholic Church's concerns regarding the appointment of trustees, their tenure in office, and how to deal with parish property in the event of division. Cf. E.L. HESTON, *The Alienation of Church Property in the United States: An Historical Synopsis and Commentary*, CLS no. 132, Washington, DC, The Catholic University of America, 1941, 47 fn. 38.

²⁵⁹ *CLD*, vol. 2, 444. Additionally, Robert Kealy notes that the Congregation for the Council had another concern; he writes: "[The] Congregation was [also] concerned about the possibility or perception that bishops might overstep their canonical authority because of the broader, unlimited grant of authority

The first recorded Catholic parish to be separately incorporated from a Catholic diocese was the parish of St. Rose of Lima in the Archdiocese of Baltimore. In 1956, during an event known as the St. Rose of Lima Oyster Roast, Arundel Hall, a wooden structure belonging to the parish, was damaged in a fire. Eleven people were killed and around 250 people were hospitalized as a result.²⁶⁰ Fearing that legal liability would extend to the other parishes in the archdiocese as well as to the Archdiocese of Baltimore itself, risk assessors for the parish decided that St. Rose of Lima Parish would be separately incorporated as a distinct parish corporation. In 1963, all of the remaining parishes in the Archdiocese of Baltimore became separately incorporated as parish corporations.²⁶¹

While it is the preferred incorporation model in jurisdictions where it is available, the parish corporation model is not without challenges.²⁶² Different civil jurisdictions may have different requirements concerning how a parish corporation can be established. These varying expectations may conflict with canon law. For example, some jurisdictions may mandate racial, ethnic, or gender diversity of the membership of a board of trustees

given to them in the civil corporation, [i.e., the corporation sole]. The Congregation thus recommended that where possible a corporation sole be changed to a corporation aggregate. Where this was not possible, the bishop was reminded of his obligation in conscience, ‘to proceed in the administration of ecclesiastical goods, after having heard interested parties and the diocesan consulters, and in matters of greater importance, with their consent.’ [P.J. DIGNAN, *A History of the Legal Incorporation of Catholic Church Property in the United States (1784-1932)*, New York, NY, P.J. Kennedy & Sons, 1935, 267].” R.L. KEALY, “Methods of Diocesan Incorporation,” in *CLSA Proceedings*, 48 (1986), 169.

²⁶⁰ E. LOWE, “Parish Milestone: St. Rose of Lima Celebrates 100 Years,” in *Catholic Review*, 22 February 2014, available at <http://www.catholicreview.org/article/news/local-news/parish-milestones-st-rose-of-lima-celebrates-100-years> (last accessed 7 June 2016).

²⁶¹ M.E. CHOPKO, “An Overview on the Parish and the Civil Law,” in *The Jurist*, 67 (2007), 200. Cf. SPALDING, *The Premier See: A History of the Archdiocese of Baltimore, 1789-1989*, 430-431.

²⁶² RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 48. It should be noted that state laws governing boards vary regarding boards’ structures and their independence from parishes and dioceses. Cf. MANNY, “Governance Issues for Non-Profit Religious Organizations,” 11-12; *Filetto v. St. Mary of the Assumption Church*, 305 N.Y.S. 2d. 403 (Sup. Ct. 1969).

of a parish corporation.²⁶³ Such demands may be viewed as being in conflict with the nature of the public juridic person in canon law. To remedy challenges such as these, there are options available to Catholic institutions. First, when it is an option, the public juridic person can try to seek a jurisdiction which has incorporation laws consistent with canon law. As we shall see below, an entity can be incorporated in any civil jurisdiction it chooses, so long as it has an office address in that jurisdiction. For example, the State of Delaware has the reputation of a relatively liberal law of incorporation. A public juridic person in the State of Texas could easily open an office in the State of Delaware, be incorporated under that state's incorporation law, and still have its main place of operation in the State of Texas.

The second option is to become creative so that the mandates of both canon law and civil law can be met. Concerning diversity, for example, this does not necessarily result in a board of a public juridic person composed exclusively of priests;²⁶⁴ board membership can be mixed with regard to race, gender, and profession.²⁶⁵ It is easy enough to have the corporate bylaws stipulate that membership on the board of trustees is to include the bishop of the diocese, the vicar general of the diocese, the pastor of the parish, and two lay persons chosen from the parish itself; the lay persons may be of either

²⁶³ Cf. D. LILIENFELD and N. BEEKMAN, "The Imperative of Gender Diversity on Boards," in *Law, Business and Economics*, 22 no. 3 (2014), 19-22.

²⁶⁴ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 172.

²⁶⁵ Already in 1786, the Church in the United States began dealing with the challenge of having lay trustees owning parish properties. This debate continues to shape the way the Church navigates the needs of the Church to protect her temporal goods using the instruments of secular law. Cf. John Carroll's letter on lay trusteeism in New York City, found in M. MASSA and C. OSBORNE, (eds.), *American Catholic History: A Documentary Reader*, New York, NY, New York University Press, 2008, 31.

gender.²⁶⁶ Furthermore, in order to ensure that the governing structure of the civil parish corporation is consistent with canon law, the corporation's bylaws can designate that the president of the parish corporation must always be the diocesan bishop, the vice president must always be the pastor, and the two lay parishioners on the board must always be the treasurer and the secretary.²⁶⁷

1.4.3.3 — Religious Corporation

The religious corporation is similar to the parish corporation. A religious corporation can be defined simply as “a corporation created to carry out some religious purpose.”²⁶⁸ A religious corporation can be used in jurisdictions which allow for it by any entity that can justify its religious activities; it does not possess an *alter ego* like the corporation sole.²⁶⁹ The corporate identity is the corporate entity itself, and not in the physical person who “represents” it. As the name implies, any religious body can choose to be incorporated as a religious corporation in jurisdictions which allow for it. Thus, even a Catholic parish can be incorporated as a religious corporation rather than a parish corporation.

If such is available under civil law, a religious corporation can be either a non-member corporation or a member corporation. If it is a non-member corporation, then the

²⁶⁶ It should be noted that some scholars suggest that the requirements of canon law should be expressed explicitly and unequivocally in order to avoid ambiguity. Thus, instead of simply stating that canon law should be followed, the corporation's bylaws should spell out clearly what are to be required in order to ensure that the interests of the Church are protected; the risk is always, of course, a “co-mingling” of the two legal systems that can cause complications in the civil court system. Cf. P.M. SHANNON, “Canon Law - Civil Law,” in *The Jurist*, 45 (1985), 623; RENKEN, “The Statutes of a Parish,” 99-148.

²⁶⁷ BUELT and GOLBERO, “Canon Law & Civil Law Interface: Diocesan Corporations,” 77.

²⁶⁸ *Black's Law Dictionary*, 418.

²⁶⁹ CHOPKO, “Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures,” 249.

corporation can determine the director of the corporation by its own bylaws. Thus, rather than being governed by a board, a non-member religious corporation is governed by a director. For a diocese or a parish, the director could be the bishop of the diocese and the pastor of the parish, respectively.²⁷⁰ If, on the other hand, the religious corporation is a member-governed corporation, the membership board can be composed of one person only, which would usually be the bishop of a diocese or the pastor of the parish.²⁷¹ This sole member may, according to the corporation's bylaws, hold certain reserved powers to act under certain situations, which may include what one scholar termed "extraordinary administration."²⁷² When such extraordinary administration is not involved, the corporation's bylaws can stipulate who is authorized to direct the corporation in its day-to-day operations²⁷³—generally the pastors for parishes, local superiors for religious institutes, etc.

²⁷⁰ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 84. Cf. CHOPKO, "Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures," 249.

²⁷¹ The Archdiocese of Portland (Oregon), which filed for Chapter 11 Bankruptcy protection in 2004 and emerged from it in 2007, chose reorganization (diocese and parishes) using this model. Originally, the Archdiocese was a corporation sole with all assets (including parishes, a few schools, and retreat houses) under the diocesan bishop. To see the 2007 letter written by John Vlazny, Archbishop of Portland during that time, addressing the priests and parishioners of the diocese, explaining the rationale for why this model was selected and how it would look, visit <http://www.archdpdx.org/bankruptcy/ABletter.Restr.031408.pdf>. last accessed 22 November 2014. Cf. S.M. SANDERS, "Charisms, Congregational Sponsors, and Catholic Higher Education," in *Journal of Catholic Higher Education*, 29 (2010), 9-10.

²⁷² CHOPKO, "Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures," 251. It is important to note, however, that there can be some exposure to legal and financial liability with having reserve powers in a corporate structure; Adam Maid and Nicholas Cafardi write: "In reserving corporate powers to themselves, the canonical stewards should bear in mind the degree of economic control such powers will give them in the eye of a civil law court determining liability for an incorporated apostolate's activities." MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 204.

²⁷³ CHOPKO, "Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures," 251.

Finally, an important distinction should be made between the religious institute and the civil corporation that is the religious institute. These entities are distinct and should not be confused as one and the same. The purpose of civil incorporation is to protect the religious institution under civil law and to allow it to hold property under such law; the purpose of the religious institute erected as a public juridic person goes beyond mere property holding.²⁷⁴ Consequently, different issues or concerns may arise, and they must be tackled in the appropriate forum (civil or canonical).

1.4.4 — Civil Incorporation Process

Although the scope of this thesis is not specifically the civil incorporation process of public juridic persons, an overview of the topic is helpful to contextualize the discussion. As mentioned before, the law of incorporation is determined by the local civil jurisdictions.²⁷⁵ While the processes can vary somewhat among jurisdictions, the general processes are similar. In a broad fashion, we will discuss some of the principal steps a public juridic person would take to be incorporated in the United States.

²⁷⁴ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 143. Cf. KEALY, “Methods of Diocesan Incorporation,” 163.

²⁷⁵ Almost every state in the United States has available online a guide to help potential businesses or corporations incorporate. Resources from how to organize, structure, and register a business are usually available via the Secretary of State’s office of the respective state. For Washington State, the relevant website is <http://business.wa.gov/start-your-business> (last accessed 8 October 2015). Furthermore, the various Bar Associations such as the Washington Attorneys Assisting Community Organizations and the King County Bar Association Young Lawyers Division also have information to assist in this matter; their websites are available at: <http://www.kcba.org>, and <http://www.waaco.org> (last accessed 8 October 2015), respectively. For the State of Oregon, the relevant website is available at: <http://sos.oregon.gov/business/pages/default.aspx> (last accessed 8 October 2015.)

1.4.4.1 — Preparing for Civil Incorporation

Although it is not impossible for an organization that has been civilly incorporated previously to seek canonical status as a juridic person, commonly, before being incorporated as a non-profit corporation, a Catholic entity or association has already been canonically erected as a public juridic person by a competent ecclesiastical authority.²⁷⁶ Further, one can also assume that this public juridic person has approved statutes,²⁷⁷ a name or title, lawfully appointed representative(s), perhaps ownership of some temporal goods (such as a physical residence or place of business/dwelling), and perhaps bylaws, etc. Documents are important because they will be reflected in the establishment of the civil incorporation.

The first step towards civil incorporation is to select an available civil structure. Depending on the law of the local civil jurisdiction, the options will vary. In general, the structures available in most jurisdictions include the sole proprietor, the corporation sole, a trust, a religious or charity corporation, a general partnership, or a limited liability company. In selecting which corporate structure will fit the juridic person, the administrator of the juridic person should consult universal law, the particular law of the diocese, or the proper law of the religious institute, if applicable. Many dioceses provide

²⁷⁶ It should be noted that it is not impossible for an entity that was already a corporation under civil law to seek to be erected (or recognized) as a juridic person under canon law. Being incorporated under civil law has no status under canon law, so when an association or institution wishes to be recognized as a juridic person under canon law, the competent ecclesiastical authority will treat the entity as he would any group wanting juridic status. Thus, all the provisions under canon law (i.e., canons 114-123) pertaining to the erection of a public or private juridic person must be duly observed.

²⁷⁷ With regard to statutes, canon law does not require dioceses and parishes to have statutes when they are erected, so there is no presumption that these entities will have statutes already written before seeking civil incorporation. Nevertheless, even though canon law does not require institutions such as parishes to have statutes, it is widely suggested that, as best practices, they write and have their own statutes. For a more detailed discussion on this matter and an argument in favor of this practice, as well as an example of parish statutes, see RENKEN, “The Statutes of a Parish,” 111-148.

civil incorporation guidelines, based on the guidelines of the conference of bishops, to assist the juridic person in this matter. These guidelines may include creating bylaws to stipulate how authority is recognized, who can be members on the board of the corporations (if such a board exists), what kind of secular regulatory mandate the civilly incorporated public juridic person may or must manifest, etc.²⁷⁸

Once the civil structure has been selected, the juridic person must select an official name for the corporation. Generally, the original name of the juridic person that has been approved and recognized under canon law is suitable as the name of the civil corporation. Some civil jurisdictions, however, may have their own regulations governing the selection of a name suitable for corporations. For example, the regulation of the Corporation Division of the Secretary of State of the State of Oregon noted that only names that are “distinguishable upon the record”²⁷⁹ are allowed. The regulation further notes that a business name should be distinguishable if it does not exactly copy a name already on record.²⁸⁰ Consequently, for example, if there are two Catholic hospitals canonically erected in the same state that want to be civilly incorporated as two different entities, they may not both use the name the *Catholic Hospital Corporation*. One can use that name while the other can use another name that is distinguishable, such as *St. Joseph’s Catholic Healthcare System*. Once an available name is chosen by the entity, it is important for the administrator of the juridic person to register the name immediately in order to exclude others from using it.

²⁷⁸ DOYLE, *Civil Incorporation of Ecclesiastical Institutions: A Canonical Perspective*, 163. Such bylaws should necessarily be consistent with canon law.

²⁷⁹ SECRETARY OF STATE OF OREGON, *How to Start a Business in Oregon*, Salem, OR, Corporation Division, 2014, 7.

²⁸⁰ *Ibid.*, 7.

Besides selecting a suitable name for the corporation, issues pertaining to membership, the structure and the nature of the governing board, and decision-making style of the corporation must also be addressed. In this regard, the juridic person should look at its statutes that were approved by the competent ecclesiastical authority, in addition to its decree of erection. These ecclesiastical documents should have already indicated membership requirements/involvements, method of governance, etc. Care should be taken to reconcile the mandates of the civil law of incorporation with those of canon law. It will be the task of the administrator of the juridic person to exercise due diligence, making sure that civil regulatory requirements do not undermine canon law and that they are not contrary to canon law. Each diocese should have guidelines to assist the juridic person to implement these issues.

1.4.4.2 — Articles of Incorporation

Once all the groundwork to prepare the public juridic person for civil incorporation is completed, the actual act of incorporation—the creation of the non-profit corporation—is straightforward. Again, civil jurisdictions may vary on some points, but for the most part, the process is simple: the entity must file the necessary documentation with the Office of the Secretary of State of the jurisdiction in which it will be a corporation.²⁸¹ This document is called the articles of incorporation. The articles of incorporation can be defined as “a document that sets forth the basic terms of a corporation’s existence, including the number and classes of shares [when applicable]

²⁸¹ Cf. J.L. ANDREWS, P. BARBER, and J.P. CLARKE, (eds.), *Washington Nonprofit Handbook: How to Form and Maintain a Nonprofit Corporation in Washington State*, Seattle, WA, Washington Attorneys Assisting Community Organizations and the King County Bar Association Young Lawyers Division, 2009.

and the purpose and duration of the corporation.”²⁸² At a minimum, the articles of incorporation should include the following information:²⁸³

The official name of the corporation: This is the name that will be registered in the secular jurisdiction and will be the official secular name of the public juridic person. All public documents associated with this entity must carry this name.

Period of existence: Like a juridic person in canon law, a secular corporation is also considered perpetual once it is created. However, secular law does allow for the number of the years of existence of the corporation to be limited to a specific number. Here, the secular corporation may either be “perpetual” or exist for a specific number of years.²⁸⁴

The purpose of the organization: Secular jurisdictions may require the corporation to describe its purpose(s). In general, any lawful purpose provided is suitable; purposes may include charitable, benevolent, educational, religious, fraternal, professional, etc.

Registered Agent and Office: The name and office address of the initial agent who registered the corporation should be provided, along with the physical address of this agent. The registered agent can be either a physical person or a corporation. If the registered agent is a physical person, he or she will need to be a resident of that state; if the corporation is the registered agent, then it must have been incorporated in that state. Furthermore, there should be a consent form verifying that the person or company consented to be the registered agent of the new corporation; that form should also be filed along with the articles of incorporation. Finally, in order to be incorporated in a particular jurisdiction, an entity must be a resident of that jurisdiction; thus, the address of the office of the registered agent must be an address in that same state. However, while the registered agent and address of the place of business of the corporation are bound in that jurisdiction, the corporate entity is free to operate in other jurisdictions.

Directors: The articles of incorporation require that a number be given for the initial Board of Directors. That number may change subsequently, but the law requires that a number of directors be given, even if the initial board has only one director. For example, in a corporation sole, the number of directors would be the one person. Here, the statutes of the public juridic person will be helpful and should be consulted to determine how many directors there are.

Incorporator: An incorporator is the person (or a group of persons) who initially organizes the incorporating process for the business entity. This person gathers the required documents and does the actual filing of the documents in the Secretary of State’s office.²⁸⁵ In most cases, until the corporation has been established, the incorporator is usually the person who acts on behalf of the soon-to-be incorporated business entity. The

²⁸² *Black’s Law Dictionary*, 134.

²⁸³ Cf. ANDREWS, BARBER, and CLARKE, (eds.), *Washington Nonprofit Handbook: How to Form and Maintain a Nonprofit Corporation in Washington State*, 14-16.

²⁸⁴ Regarding the period of existence, in the context of canon law, it is important to remember that a public juridic person is perpetual once erected; therefore, there can be no restriction regarding how long a public juridic person can exist. Cf. can. 120.

²⁸⁵ *Black’s Law Dictionary*, 770.

only real requirement is that this person be 18 years of age or older. For the public juridic person seeking civil incorporation, the administrator would usually be this person. For example, if a parish wants to be civilly incorporated, the lawfully appointed pastor of that parish would be the incorporator, and until the parish has been civilly incorporated, the pastor would have the authority to act on behalf of the parish.

Dissolution: Similar to canon law, secular law recognizes that corporations may be established as perpetual. Nevertheless, the articles of incorporation should include a plan for how the corporation can be dissolved. This provision is primarily a way to deal with what to do with the assets of the corporation if and when it is dissolved. As non-profit corporations are generally tax-exempt organizations under a *501(c)(3) exemption*,²⁸⁶ it is important to consult both the state and federal tax codes in order to ensure that the dissolution plan is legitimate and when/how assets can be distributed.

From the brief description given above, there is a presumption that a public juridic person can obtain status in civil corporate law without much difficulty. The process of civil incorporation is very similar to the process of becoming a public juridic person in canon law. In fact, documents used by the Church to erect a public juridic person can be included for the formation of the articles of incorporation.²⁸⁷ Of course, regulations set by the Code and the particular laws of the conference of bishops and the diocese (and proper laws for religious institutes when applicable) should always be observed; additionally, expert opinions from canon lawyers and civil attorneys who practice in this area of the law should also be sought. What should be clear, however, is what happens to the Catholic nature of the public juridic person when it becomes civilly incorporated. Patricia Dugan writes:

From the perspective of Catholic identity, the [public juridic person] and its sponsor must make certain that any essential and non-negotiable characteristics of Catholic identity are precisely enunciated in the legal documents of corporate formation. This is to ensure that Catholic identity is maintained and influences the delivery of services for which the ministry was established in the first place. Canon law does not

²⁸⁶ A *501(c)(3)* is a designation of the Internal Revenue Code [26 U.S.C. § 501(c)] for a tax-exempt non-profit organization/corporation in the United States. Specifically, this designation is applicable to religious, educational, charitable, scientific, and literary organizations, to name a few. Cf. 26 U.S.C. §501(c), available at: <http://www.gpo.gov/fdsys/granule/USCODE-2011-title26/USCODE-2011-title26-subtitleA-chap1-subchapF-partI-sec501/content-detail.html> (last accessed on 20 January 2015).

²⁸⁷ Cf. RENKEN, “The Statutes of a Parish,” 101.

supply a list of Catholic values to include in legal documents. Instead, these are generally accepted principles which should be tailored to the particular work of the corporation.²⁸⁸

Nevertheless, issues that can present some challenges to the public juridic persons seeking civil incorporation tend to include the control and right of ownership of the juridic person and the regulation of its temporal goods.²⁸⁹ These issues are important to consider, especially in the event of bankruptcy filing, alienation of temporal goods, and the decision-making authority over the public juridic persons which have been civilly incorporated, etc. This thesis will address these “concerns” in subsequent chapters.

1.4.5 — McGrath’s Thesis – Maida’s Response

While civil incorporation has become a viable option for many public juridic persons, the process is not without controversy. Any discussions concerning Church entities and civil incorporation are incomplete without referencing the Maida/McGrath debate. While the debate between Monsignor John J. McGrath and (now Cardinal) Adam J. Maida took place in the 1960s and the 1970s, and had been resolved by the mid-1970s, the significance of the debate continues to be relevant to those dealing with Church

²⁸⁸ DUGAN, “The Sponsorship Relationship: Incorporation and Dissolution Civil and Canon Law Perspectives,” 77.

²⁸⁹ Concerning issues of the right of ownership, Francis Morrisey notes that conflicts between the juridic entity and the civil entity should be anticipated and addressed in both the corporate charter as well as in the appropriate documents of the juridic person. Morrisey writes: “At times, though, the issue is complicated because the canonical ownership of goods does not correspond to the civil ownership. A corporate charter can cover the entire institute, a province, or even an apostolic work carried out by a house (for instance, a separately incorporated hospital). If the civil and the canonical ownerships do not coincide, it would be most important to determine clearly which mechanisms are to be observed in each case so that the formalities prescribed by both laws—civil and canonical—are observed.” F.G. MORRISEY, “The Directory for the Administration of Temporal Goods in Religious Institutes,” in L. GERMAIN, M. THÉRIAULT, and J. THORN (eds.), *Unico Ecclesiae servitio: Canonical Studies Presented to Germain Lesage, O.M.I., on the Occasion of his 75th Birthday and the 50th Anniversary of his Presbyteral Ordination*, Ottawa, ON, Saint Paul University, 1991, 273.

institutions, temporal goods, and corporate law—especially in the context of the United States.²⁹⁰

The debate began with a thesis proposed by John McGrath that theorized what happens when juridic persons become civilly incorporated in the United States. McGrath postulated that, when Catholic institutions become civilly incorporated, they lose their canonical status, thus putting them beyond the reach of the Church. William Bassett writes:

McGrath's thesis was that the civil incorporation of public benefit institutions automatically created purely secular entities, independent of their sponsoring churches or religious orders, constitutionally able to receive public funding under the Supreme Court's interpretation of the First Amendment. They were no longer religious, no longer impliedly subject to internal church discipline, but only to the law of their own individual civil charters, as interpreted and subject to state court construction.²⁹¹

Consequently, the temporal goods that were once held by the public juridic persons now cease to be ecclesiastical property.²⁹² Moreover, no longer juridic entities under Church law, these secularized institutions have no need to seek permission from ecclesiastical authorities if they were to make decisions such as to reorganize under secular law. McGrath seemed to suggest, however, that one of the ways religious institutes can maintain relationships with the (now) non-Catholic institutions is through legal documents stipulating how members of the religious institute can serve on the governing board.²⁹³

²⁹⁰ Cf. R.T. KENNEDY, "McGrath, Maida, Michiels: Introduction to a Study of the Canonical and Civil Law Status of Church Related Institutions in the United States," in *The Jurist*, 50 (1990), 351-401.

²⁹¹ BASSETT, "The American Civil Corporation, the 'Incorporation Movement' and the Canon Law of the Catholic Church," 728. Cf. *Bradfield v. Roberts*, 175 U.S. 291 (1899).

²⁹² J.J. MCGRATH, *Catholic Institutions in the United States: Canonical and Civil Law Status*, Washington, DC, Catholic University of America Press, 1968, 24.

²⁹³ CONN, *Catholic Universities in the United States and Ecclesiastical Authority*, 199. Cf. SANDERS, "Charisms, Congregational Sponsors, and Catholic Higher Education," 10.

Disagreeing with McGrath's thesis, Adam Maida responded with his own thesis.²⁹⁴ Maida proposed that nothing changes canonically when juridic persons become incorporated under civil law. Maida offered as an example a religious congregation that operates a hospital. If the hospital were to be civilly incorporated, it remains nonetheless an apostolate/ministry of the religious congregation. With civil incorporation, the hospital is protected under civil law, but the canonical identity of the hospital remains unchanged because the religious community that operates that hospital remains the owner of the hospital.²⁹⁵ To emphasize this point, Maida contended that: "Nowhere does the canon law refer to the apostolates of public juridic persons as juridic entities separate from their sponsor, either expressly or by implication."²⁹⁶

The McGrath/Maida impasse was resolved when Gabriel-Marie Cardinal Garrone, Prefect of the Sacred Congregation for Catholic Education, issued a response on behalf of the Sacred Congregation for Catholic Education and the Sacred Congregation for Religious and Secular Institutes in 1974. Cardinal Garrone unequivocally favored Maida's position.²⁹⁷ In the letter issued to the Conference of Major Superiors of Men and

²⁹⁴ Cf. A.J. MAIDA, "Canonical and Legal Fallacies of the McGrath Thesis on the Reorganization of Church Entities," in *Catholic Lawyer*, 19 (1973), 275-286.

²⁹⁵ MAIDA, *Ownership, Control and Sponsorship of Catholic Institutions: A Practical Guide*, 24.

²⁹⁶ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 148.

²⁹⁷ It is worth noting that the position held by Maida was not without its detractors. Two of those detractors are noted canonists James Coriden and Frederick McManus. They pointed to a critical flaw in Maida's argument itself. They wrote: "It is Maida's exclusive focus and strong emphasis on control in the hands of the bishop (or the religious superior and council) which tends to distort the notion of the church and its relationship to temporal goods. [Maida] recommends [...] that the bishop be the sole member of the charitable corporations established to own or manage the enterprises carried on in the name of the church, and then he counsels that all of the radical controlling decisions be reserved to the member(s) of the corporation. Nowhere in his suggested models of relationships between sponsoring religious bodies and their charitable institutions does he mention the modern organs of collegiality and subsidiarity which he mentioned earlier [...], e.g., priest' senates, diocesan pastoral councils or those more traditional collegial agencies mandated by the Code, e.g., diocesan consultors (cc. 423-428 [of the *CIC/17*]), the council of

Women in the United States, in collaboration with the National Catholic Conference of Bishops, the Sacred Congregation asked that the issue be studied further, and added:

We know that in the course of the study, the influence of the so-called “McGrath thesis” will emerge as one of the principal bases for the action of some institutions in regard to alienation, etc. We wish to make it clear that this thesis has never been considered valid by our Congregations and has never been accepted.²⁹⁸

We can appreciate from the debate between McGrath and Maida the apparent confusion that can occur when juridic persons become civilly incorporated.²⁹⁹ One of the possible reasons for this confusion is the fact that, whereas before the juridic person operated under only canon law, after being incorporated the corporation functions in two legal systems. These two legal systems can contradict one another on some matters. Learning how to navigate between the two systems is challenging for Catholic institutions having civil incorporation in the United States. The confusion will become much greater as incorporated Church entities find themselves increasingly in civil

administrator (c. 1520 [of the *CIC/17*]), or the administrators of church properties (cc. 1521-1523 [of the *CIC/17*]). Neglect of these canonical institutes, which are intended as a restraint upon unitary episcopal power, may render actions of the bishop unlawful or even invalid [under] ecclesiastical law [...]. After reading Maida’s practical applications one is left with the strong impression that the bishop alone speaks for, decides for, and exclusively represents the local church (and the religious superior and council do the same for a religious community), and that ecclesiastical property is legally safe and surely applied to its proper purposes only when the bishop has total control over it. This is a vision and misconception of the local church...It is a model of church organization which inadequately embodies the renewed ecclesiology of the Second Vatican Council at the practical level—where it counts.” J.A. CORIDEN and F.R. MCMANUS, “The Present State of Roman Catholic Canon Law Regarding Colleges and Sponsoring Religious Bodies,” in P.R. MOOTS and E.M. GAFFNEY (eds.), *Church and Campus: Legal Issues in Religiously Affiliated Higher Education*, Notre Dame, IN, Notre Dame Press, 1979, 147. Cf. P.L. GOLDEN, “Sponsorship in Higher Education,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States: Theory and Praxis*, Washington, DC, Canon Law Society of America, 2006, 95; M. WELCH, “Sponsorship,” in P.J. COGAN (ed.), *Selected Issues in Religious Law*, Washington, DC, Canon Law Society of America, 1997, 101-112.

²⁹⁸ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 44.

²⁹⁹ While the McGrath and Maida debate has been resolved, it is arguable that the McGrath’s thesis influenced a whole generation of Church leaders and a multitude of Catholic institutions in the United States. For a more detailed discussion on this, see D.C. CONLIN, “The McGrath Thesis and Its Impact on a Canonical Understanding of the Ownership of Ecclesiastical Goods,” in *CLSA Proceedings*, 64 (2002), 73-96.

litigation and other civil proceedings, such as the filing of Chapter 11 Bankruptcy protection.

Conclusion

The ability to form associations and the ability to join movements are recognized rights as legal entities under both canon law and civil law. In canon law, these endeavors are among the various ways by which the Christian faithful can gather with like-minded individuals to live out their faith in ministerial engagement. Developments and history from before the codification and after promulgation of the *CIC/17* and the *CIC/83* demonstrate that the recognition of the juridic persons has been an important element of the evolution of canon law.

Once canonically erected, juridic persons have juridical status in canon law and are connected to both the local Church as well as the universal Church. Erected by competent ecclesiastical authorities, those that are designed as public juridic persons speak in the name of the Church since their mission originates in and from the Church. In order to carry out their mission, canon law recognizes and defends these juridic entities' right to acquire, retain, administer, and alienate temporal goods. Moreover, once lawfully erected, public juridic persons are perpetual.

In the United States, administrators of public juridic persons can incorporate public juridic persons as civil corporations. As civil corporations, public juridic persons in the United States are not only institutional rights, but also added protection under civil law. Guided by their particular articles of incorporation and corporate bylaws, Church institutions that are civilly incorporated enjoy all the rights, benefits, and obligations

other corporations enjoy. Usually incorporated as non-profit corporations, the benefits enjoyed by these institutions range from owning property and certain tax exemption, in addition to the ability to have legal standing to litigate and to be heard by a civil court.

As public juridic persons, these institutions are governed by the Code, but as civilly incorporated entities, the laws of the United States (including the laws of relevant jurisdictions) also apply as well. However, as noted in the resolution to the McGrath and Maida debate, public juridic persons do not forfeit their canonical juridical status when they are civilly incorporated. Consequently, the challenge for Catholic institutions in the United States that have civil incorporation status is how to navigate both canon law and civil law—especially when the two legal systems appear to conflict with one another. One of the ways this can be achieved is for public juridic persons to have clear canonical statutes and policies that are reflected in their civil articles of incorporation and bylaws.

Nevertheless, the tension between canon law and civil law experienced by Catholic institutions in the United States today is real and urgent. The areas of the law where this tension is most palpable are those involving ecclesiastical goods of the civilly incorporated public juridic persons—especially in situations that involve tortious litigations that may result in the need to file for bankruptcy protection. In most cases, however, the conflict is not impossible to resolve. However, as subsequent chapters will show, abiding by both legal systems takes a level of nuances and finesse.

Chapter 2— ECCLESIASTICAL GOODS AND PUBLIC JURIDIC PERSONS

“After a long time the master of those servants came back and settled accounts with them. The one who had received five talents came forward bringing the additional five. He said, ‘Master, you gave me five talents. See, I have made five more.’ His master said to him, ‘Well done, my good and faithful servant. Since you were faithful in small matters, I will give you great responsibilities. Come, share, your master’s joy...For to everyone who has, more will be given and he will grow rich; but from the one who has not, even what he has will be taken away.’”¹

Introduction

The concepts of law and property ownership go hand in hand. They are so intrinsically connected that philosopher Jeremy Bentham noted that they “are born together, and die together.”² One of the fundamental purposes of law is to ensure the distribution of resources among persons. This involves creating a legal system that can foster a “stable relationship between persons and assets.”³ Property law can thus be defined as the legal relationship between persons and objects,⁴ and one of the purposes of the civil state or government is to ensure a system of distribution of those properties such that, according to one theory, all persons “will have a minimum necessary for subsistence and a maximum possibility of living well.”⁵ Articulated in another way, property law is the public relationship between a person and a thing that can be owned by that person.

¹ Matthew 25: 19-21, 29.

² J. BENTHAM, *The Theory of Legislation*, translated by Richard HILDRETH, London, Trübner & Co., 1931, 113.

³ A. BELL and G. PARCHOMOVSKY, “A Theory of Property,” in *Cornell Law Review*, 90 (2005), 538.

⁴ *Ibid.*, 544.

⁵ R. MCKEON, “The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution,” in *Ethics*, 48 (1938), 306. The Second Vatican Council contends: “It is in full accord with human nature that juridical-political structures should, with ever better success and without any discrimination, afford all their citizens the chance to participate freely and actively in establishing the constitutional bases of a political community, governing the state, determining the scope and purpose of various institutions, and choosing leaders.” Furthermore, the Council emphatically notes that “because of the increased complexity of modern circumstances, government is...required to intervene in social and economic affairs, by way of bringing about conditions more likely to help citizens and groups freely attain to complete human fulfillment with greater effect.” SECOND VATICAN COUNCIL, Pastoral Constitution on

Since canon law recognizes juridic entities as persons, it also recognizes that juridic persons have the right to possess temporal goods. By giving such recognition, canon law not only acknowledges the relationship between juridic persons and physical persons, it also affirms that relationships exist among juridic persons. The recognition of such relationships is the foundation of the Church's legal understanding of temporal goods, their ownership, and their administration.

Consequently, this chapter will focus on canon law's treatment of property as ecclesiastical goods owned by public juridic persons. Specifically, the chapter will discuss the nature of ecclesiastical goods, as well as the rights and obligations that public juridic persons have over the acquisition, the retention, the administration, and the alienation of these goods. The first part of this discussion, however, will focus on the nature of ownership and how that influences the development of personhood—the personhood of both the physical person and the juridic person.

2.1 — Ownership and Personhood

The development of a person's sense of self correlates with property law. In order to understand property law, which includes canon law's treatment of property, one must appreciate how ownership of property is interconnected to the development of the person.

Margaret Radin writes:

Most [persons] possess certain objects they feel are almost part of themselves. These objects are closely bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities in the world...One may gauge the strength or significance of someone's relationship with an object by the kind of pain that

the Church in the Modern World *Gaudium et spes*, 7 December 1965, in *AAS*, 58 (1966), 1025-1115, English translation in *ABBOTT*, 199-308, n. 75.

would be occasioned by its loss. On this view, an object is closely related to one's personhood if its loss causes pain that cannot be relieved by the object's replacement.⁶

Christopher Bertram contends that there is an intrinsic connection between human persons' moral development and their need to have possession of things that they can call their own—in order to work, to develop, to possess, to control, and to alienate.⁷ If there were no law to legislate property ownership, or no recognition of legal proprietorship, human persons would “continually [be] exposed to extremely painful spiritual wrenches”⁸ because their existence would be deprived of any true meaning. As such, an understanding of property law requires an understanding of how property and proprietorship affect human nature and human organizations.⁹ It is not coincidental that property law tends to be not only more developed, but also more technical and more practical among the different bodies of law.¹⁰

One must not underestimate the contribution of the Catholic Church to the development of property law in the modern Western world. Through customary practices, canon law, and other exchanges between the Church and secular society throughout the centuries, contemporary secular property law has benefited greatly from the Church's legal practices almost from the very beginning.¹¹ That being said, however, it would be a

⁶ M.J. RADIN, “Property and Personhood,” in *Stanford Law Review*, 34 (1982), 959.

⁷ Cf. C. BERTRAM, “Property in the Moral Life of Human Beings,” in *Social Philosophy and Policy*, 30 (2013), 404-424.

⁸ S. WEIL, *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind*, translated by A.F. WILLS, Boston, MA, Routledge and Kegan Paul, 1978, 33.

⁹ MCKEON, “The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution,” 302.

¹⁰ J.A.C THOMAS, *Textbook of Roman Law*, New York, NY, North-Holland Publishing Company, 1976, 125.

¹¹ H.J. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1983, 237.

mistake to hold that the Church developed its property law (among other areas of canon law) for the benefit of secular society; the Church's own interest is also served by a well-developed system of property law. As a social and political body,¹² the Church understands itself primarily as a community of believers which is missioned to carry out the Gospel message as proclaimed by Jesus Christ.¹³ The possession of temporal goods is one of the many methods utilized by the Church to pursue its mission. For the Church, property is nothing more than a means to an end.¹⁴

The Church's existence and its ability to engage in ministry are intrinsically connected.¹⁵ Libero Gerosa summarizes it well when he writes: "Without ministry, even the Church, with its definitive and eschatological presence of Christ in the world and in history, would cease to exist."¹⁶ The Church's ability to acquire and to possess temporal goods allows it to carry out its ministry in a practical and tangible manner. For this reason, it is both natural and imperative that the Catholic Church asserts its innate right to acquire, to retain, to administer, and to alienate temporal goods.¹⁷

¹² Cf. JOHN PAUL II, apostolic constitution promulgating the new Code of Canon Law *Sacrae disciplinae leges*, 25 January 1983, 75 (1983), vii-xiv.

¹³ Cf. SECOND VATICAN COUNCIL, Dogmatic Constitution on the Church *Lumen gentium*, 21 November 1964, in *AAS*, 57 (1965), 5-75, English translation in *ABBOTT*, 9-101, nn. 6-7; *Gaudium et spes*, n. 76; SECOND VATICAN COUNCIL, Decree on the Church's Missionary Activity *Ad gentes divinitus*, 7 December 1965, in *AAS*, 58 (1966), 947-990, English translation in *ABBOTT*, 584-630.

¹⁴ Cf. *Lumen gentium*, n. 8; *Gaudium et spes*, n. 69.

¹⁵ *Lumen gentium*, n. 8 teaches: "Just as Christ carried out the work of redemption in poverty and under oppression, so the Church is called to follow the same path in communicating to men the fruits of salvation... Thus, although the Church needs human resources to carry out her mission, she is not set up to seek earthly glory, but to proclaim humility and self sacrifice, even by her own example."

¹⁶ L. GEROSA, *Canon Law*, London, Continuum, 2002, 13.

¹⁷ Cf. can. 1254.

As a political and social entity, the Church exercises its rights to acquire, retain, administer, and alienate temporal goods independently from any civil authority.¹⁸ The Church asserts that these rights are based on both natural law and divine law.¹⁹ The Church neither asked for, nor was it given, a secular charter to justify these rights. The Second Vatican Council notes that the Church, unbounded by any secular political community, has the right to “employ the things of time [that is, temporal goods] to the degree that [its] own proper mission demands.”²⁰ The mission of the Church involves acts of divine worship, providing decent support for the clergy and other ministers of the Church, and works of charity.²¹

The Church further holds the right to grant to entities under its jurisdiction the capacity to acquire, retain, administer, and alienate temporal goods,²² and to allow these entities to engage in works that are consistent with the mission of the Church.²³ Specifically, these entities are the ones that have been canonically erected as public juridic persons. As such, they can be understood as institutional extensions of the Church in the secular world.²⁴ Because of their close proximity to the Church, the ecclesiastical

¹⁸ J.T. MARTÍN DE AGAR and J.T. VALVERDE, *A Handbook on Canon Law*, 2nd ed., Montréal, Wilson & Lafleur Ltée, 2007, 241.

¹⁹ G. VROMANT, *De bonis Ecclesiae temporalibus ad usum utriusque cleri, praesertim missionariorum*, Vol. 6, Louvain, Museum Lessianum, 1934, 1. Cf. *Gaudium et spes*, nn. 69-72.

²⁰ Cf. *Gaudium et spes*, n. 76.

²¹ Cf. can. 1254 §2.

²² Cf. can. 1255.

²³ M. LÓPEZ ALARCÓN, “Introduction, cc. 1254-1258,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 2. Cf. SACRA CONGREGATIO PRO RELIGIOSIS ET INSTITUTIS SAECULARIBUS ET SACRA CONGREGATIO PRO EPISCOPIS, *Mutuae Relationes Notae Directivae pro Mutuis Relationibus inter Episcopos et Religiosos in Ecclesia*, 14 May 1978, in *AAS*, 70 (1978), 473-506, n. 17. Cf. VROMANT, *De bonis Ecclesiae temporalibus ad usum utriusque cleri, praesertim missionariorum*, 13.

²⁴ Cf. *Ad gentes divinitus*, nn. 35-41.

goods that belong to public juridic persons are governed by the 56 canons found in *Book V* of the *CIC/83*.²⁵

2.2 — Categories of Temporal Goods

Book V of the *CIC/83* contains 56 canons. These are the canons that govern how the Catholic Church and its public juridic persons can acquire, retain, administer, and alienate temporal goods. Consistent with canon 1495 of the *CIC/17*, *Book V* of the *CIC/83* uses the term “temporal goods” to mean property. While the Code itself offers no definition, temporal goods are generally understood as any useful material things that can be subjects of the law.²⁶ James Coriden contends that temporal goods can include any physical properties that have economic value and can be owned or controlled by a physical or juridic person.²⁷ Perhaps the most complete definition of temporal goods is offered by Robert Kennedy, who writes:

By “temporal goods” is meant all non-spiritual assets, tangible or intangible, that are instrumental in fulfilling the mission of the Church: land, buildings, furnishings, liturgical vessels and vestments, works of art, vehicles, securities, cash, and other categories of real or personal property.²⁸

The Code recognizes that temporal goods can have different values, qualities, or purposes. Similar to the *CIC/17*, the *CIC/83* distinguishes categories of temporal goods based on who owns them and on how they are used.²⁹ Temporal goods owned by public

²⁵ Cf. can. 1257 §1.

²⁶ G. GHIRLANDA, *Il diritto nella Chiesa, mistero di comunione: Compendio di diritto ecclesiale*, 4th ed., Rome, Pontificia Università Gregoriana, 2006, 498.

²⁷ J.A. CORIDEN, *An Introduction to Canon Law*, Mahwah, NJ, Paulist Press, 1991, 165.

²⁸ R.T. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, 1451.

²⁹ J.A. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, Staten Island, NY, St. Pauls, 2009, 23.

juridic persons are classified as ecclesiastical goods, and some of these goods are classified, based on their intended purposes, as stable patrimony. Temporal goods owned by private juridic persons or private natural persons are not considered ecclesiastical goods.³⁰

Moreover, temporal goods can be further categorized based on their physical or functional descriptions.³¹ While physical descriptions include corporeal (which include movable and immovable properties) or incorporeal, functional descriptions include sacred or profane. Examples include the following: automobiles and furniture are movable corporeal properties; church buildings and monasteries are immovable corporeal properties; legal titles, trademarks, or patents are incorporeal properties; and finally, liturgical vestments, chalices and patens for the celebration of the Eucharist, and land that has been consecrated and dedicated as a Catholic cemetery, are sacred properties. These descriptions are important because different laws in the Church regulate how such properties are to be used and/or managed.

³⁰ Ibid., 56.

³¹ In civil law, properties are generally classified under the categories of real property (or realty), personal property (or personalty), or fixture. Fixture is personalty such as a dishwasher or a refrigerator that has been permanently secured onto a property; fixtures can be removed. In a place of worship, for instance, a fixture can include an altar or a pew that has been permanently screwed into the floor of the church or chapel. Personal property is either tangible or intangible. Intangible personal property includes things that cannot be touched but have economic value nonetheless, and they are usually represented in writings; these include stocks or bonds, patents, copyrights, wills, contract rights, etc. For example, the Jesuits may have copyrighted the name “Jesuit,” thus making that word an intangible personal property of the Jesuits; that word is a property of the Jesuits and that property right is protected by law. As such, an organization using that word “Jesuit” (or other attributes of that word) in its name without the permission of the Jesuits would be in violation of copyright law and could be sued for damages.

2.2.1 — Ecclesiastical Goods

As mentioned earlier, the Code designates temporal goods that belong to a public juridic person as ecclesiastical goods (*bona ecclesiastica*).³² Ecclesiastical goods can be defined as “temporal goods that are subject to the authority of the Church because they pertain to some moral or public juridic person.”³³ Consequently, all temporal goods belonging to a public juridic person are ecclesiastical goods and are governed by *Book V*. These temporal goods can include *any* property—whether movable or immovable, corporeal or non-corporeal, sacred or profane.³⁴

Since only temporal goods that belong to public juridic persons can be considered ecclesiastical goods, it stands to reason that only public juridic persons are capable of having ownership of ecclesiastical goods.³⁵ This is an important distinction to make: not only can the temporal goods of private juridic persons never be considered ecclesiastical goods, but private juridic persons also do not have the capacity to possess ecclesiastical goods. Thus, if a private juridic person alienates some of its temporal goods, regardless of how much money is involved, canon law does not intervene since no ecclesiastical goods

³² Can. 1257 §1: “Bona temporalia omnia quae ad Ecclesiam universam, Apostolicam Sedem aliasve in Ecclesia personas iuridicas publicas pertinent, sunt bona ecclesiastica et reguntur canonibus qui sequuntur, necnon propriis statutis.”

³³ A.J. MAIDA, “Canon Law Implications of Real Estate Transactions – Impact on the New Canon Law. (Diocesan Attorneys: 17th Annual Meeting) (transcript),” in *Catholic Lawyer*, 27 (1982), 220.

³⁴ R. SMITH, “Temporal Goods and Their Administration [cc. 634-640],” in J.P. BEAL, J.A. CORIDEN, and T.J. GREEN (eds.), *New Commentary on the Code of Canon Law*, New York, NY, Paulist Press, 2000, 799.

³⁵ Sahayaraj Lourdusamy writes: “Hence, in the Church, the property or temporal goods are owned not by any individual physical person, like a parish priest or the diocesan bishop, but by a juridic person, and its administration is governed by the approved statutes.” S. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” in *Studia Canonica*, 49 (2015), 490.

are part of the transaction.³⁶ If, on the other hand, there is a transfer of goods from a public juridic person to a private juridic person, depending on the amount involved and nature of the goods, canon law may stipulate how this transfer is to be done since ecclesiastical goods are involved.

Ecclesiastical goods are a part of the common heritage of the Church.³⁷ These goods can only be used in ways that are consistent with the mission of the Church and cannot be for the exclusive advantage of any private physical person.³⁸ For this reason, ecclesiastical goods are governed by the discipline of universal law (i.e., *Book V*), in addition to any other applicable ecclesiastical law—e.g., the particular law of a diocese or the proper law of a religious institute.³⁹ A public juridic person may not use its ecclesiastical goods for any purposes that go beyond the scope of the principle purposes stated the same Code, which includes divine worship, the decent support of the clergy and other ministers, and the exercise of works of the sacred apostolate and of charity.⁴⁰ Sahayaraj Lourdusamy writes: “If [ecclesiastical] goods were to be allocated to or used for objectives other than the Church’s proper objectives [that is, those articulated in canon 1254], they would lose their status as ecclesiastical goods.”⁴¹

³⁶ However, it is important to remember that, unless a provision is expressly made in the Code, temporal goods belonging to private juridic persons are governed by their own statutes. Cf. can. 1257 §2; A. PERLASCA, “I beni delle persone giuridiche private,” in *Quaderni di diritto ecclesiale*, 12 (1999), 380-393.

³⁷ SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 799.

³⁸ F.G. MORRISEY, “Basic Concepts and Principles,” in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 7. Cf. VROMANT, *De bonis Ecclesiae temporalibus ad usum utriusque cleri, praesertim missionariorum*, 9.

³⁹ Cf. J. MONCION, “L’Institute religieux et les biens temporels,” in *Studia Canonica*, 20 (1986), 355-365.

⁴⁰ Cf. can. 1254.

⁴¹ LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” 491.

The Code presumes that natural persons possess temporal goods. It is taken for granted that the material care and support of the Church is a *burden* shared by all the baptized in the Church.⁴² Canon 222 states that the Christian faithful have an obligation to “assist with the needs of the Church...[and] to assist the poor from their own resources.” The term “resources” implies temporal goods. The Code, however, does not legislate how natural persons are to acquire, retain, administer, or alienate their personal temporal goods.

Since the category of the private juridic person does not exist in the *CCEO*, the distinctions between temporal goods and ecclesiastical goods are not as complicated as in the *CIC/83*.⁴³ Given the absence of the private juridic person, all temporal goods of juridic persons are ecclesiastical goods according to the *CCEO*.⁴⁴

2.2.2 — Stable Patrimony

The term *stable patrimony* (*patrimonium stabile*) appears in both canons 1285 and 1291.⁴⁵ It refers to a category of ecclesiastical goods belonging to the public juridic

⁴² J.N. PERRY, “Support for the Church,” in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 71. Cf. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Stewardship: A Disciple’s Response*, Washington, DC, United States Conference of Catholic Bishops, Inc., 1992; *Lumen gentium*, nn. 30-33; *Gaudium et spes*, nn. 64-72.

⁴³ J. ABBASS, “Alienating Ecclesiastical Goods in the Eastern Catholic Churches,” in *Folia Canonica*, 5 (2002), 127. Can. 1009 §2 of the *CCEO*: “All temporal goods which belong to juridic persons are ecclesiastical goods.”

⁴⁴ G. NEDUNGATT, (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, Rome, Pontificio Istituto Orientale, 2002, 693.

⁴⁵ It should be noted that, while canons 1285 and 1291 use the term *stable patrimony*, canons 638 §3 and 1295 use the term *patrimonial condition* instead. These two terms, however, appear to be synonymous. Cf. N.P. CAFARDI, “Alienation of Church Property,” in Kevin E. MCKENNA, Lawrence A. DINARDO, and Joseph W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 249. In the *CCEO*, canons 1026, 1029, and 1035 §3 use the term *stable patrimony*, while canon 1042 uses *patrimonial condition* instead; similar to the *CIC/83*, these two terms are also use synonymously in the *CCEO*. Interestingly, canon 122 of the *CIC/83* uses neither *stable patrimony* nor *patrimonial condition*;

persons. While the Code does not define stable patrimony,⁴⁶ there is a presumption that all public juridic persons have some form of it. Consequently, while all goods belonging to a public juridic person are considered ecclesiastical goods, some of these goods are also designated as stable patrimony.

The term stable patrimony did not appear in the *CIC/17*. This concept is an invention of the *CIC/83*.⁴⁷ However, the idea that there were categories of property that either had enduring value or that they should be protected and preserved as imperishable did exist in the *CIC/17*.⁴⁸ Commenting on the development of canon 1291 with regard to the inclusion of the term stable patrimony, John Renken writes:

The term *stable patrimony* was introduced into the proposed legislation by the *coetus De bonis Ecclesiae temporalibus* in order to identify goods which are protected against irresponsible alienation by an administrator. *CIC/1917*, canon 1530 §1, which is the predecessor of canon 1291, spoke of “immovable ecclesiastical goods and movable ecclesiastical goods which can be saved by preserving them” (*res ecclesiasticas immobiles et mobiles, quod servando servari possunt*). The term *stable patrimony* may be considered the successor to this phrase, in which case one understands that stable patrimony includes both immovable and movable goods.⁴⁹

The decision to replace the term *res ecclesiasticas immobiles aut mobiles*⁵⁰ in the *CIC/17* with *patrimonium stabile*⁵¹ in the *CIC/83* was not without debates. These debates

instead, it uses the term *patrimonial goods*. Cf. J.A. RENKEN, “Temporal Goods in the Latin and Eastern Codes: A Comparative Study,” in *Studies in Church Law*, 5 (2009), 79-118.

⁴⁶ CAFARDI, “Alienation of Church Property,” 247.

⁴⁷ For a detailed study of the origin of this term, how it was used and applied, and how it became a fundamental part of the language of temporal goods in the Church in the *CIC/83*, see J.A. RENKEN, “The Stable Patrimony of Public Juridic Persons,” in *The Jurist*, 70 (2010), 131-162.

⁴⁸ CAFARDI, “Alienation of Church Property,” 247. Cf. can. 1530 §1 of the *CIC/17*.

⁴⁹ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 221 fn. 146.

⁵⁰ Can. 1530 §1 of the *CIC/17*: “Salvo praescripto can. 1281, §1, ad alienandas res ecclesiasticas immobiles aut mobiles, quae servando servari possunt, requiritur: 1° Aestimatio rei a probis peritis scripto facta; 2° Iusta causa, id est urgens necessitas, vel evidens utilitas Ecclesiae, vel pietas; 3° Licentia legitimi Superioris, sine qua alienatio invalida est.”

centered on the practical and theoretical merits of using that term. Had immovable and mobile ecclesiastical goods been understood as being synonymous with stable patrimony, there would have been little or no debate regarding the change in terminology. However, there were concerns among the members of the *coetus* regarding whether or not the term “stable patrimony” would best describe how both the Church envisioned ecclesiastical goods and how canon law actually understood ecclesiastical goods.⁵² This was because, while the *CIC/17* was primarily concerned about the potential loss in value of immovable ecclesiastical goods, the *coetus* thought it was more appropriate to focus on the “enduring possession” of goods, regardless of their physical or movable nature, or even their economic value.⁵³ Furthermore, the *coetus* was also concerned that too many restrictions would be placed upon what an administrator can and cannot do if some temporal goods were designated as stable patrimony—thus hindering the administrator’s ability to exercise his or her administrative function.⁵⁴ In the end, however, the *coetus* adopted the term *patrimonium stabile* for the revised Code in order “to protect ecclesiastical goods from being alienated by irresponsible administrators.”⁵⁵

⁵¹ Can. 1291: “Ad valide alienanda bona, quae personae iuridicae publicae ex legitima assignatione patrimonium stabile constituunt et quorum valor summam iure definitam excedit, requiritur licentia auctoritatis ad normam iuris competentis.”

⁵² Cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, “Coetus studiorum ‘De bonis Ecclesiae temporalibus’,” in *Communicationes*, 12 (1980), 420.

⁵³ G.J. WOODALL, *A Passion for Justice: An Introductory Guide to the Code of Canon Law*, Herefordshire, Gracewing, 2011, 458.

⁵⁴ Cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, “Coetus studiorum ‘De bonis Ecclesiae temporalibus’,” in *Communicationes*, 37 (2005), 120-121; LÓPEZ ALARCÓN, “Introduction, cc. 1254-1258,” 6.

⁵⁵ RENKEN, “The Stable Patrimony of Public Juridic Persons,” 155.

As mentioned before, although it uses *patrimonium stabile*⁵⁶ and assumes that all public juridic persons have stable patrimony, the Code does not define it. There is, however, a general agreement among commentators as to what this term intends. Accordingly, temporal goods designated as stable patrimony are intended for conservation—that is, to provide the juridic entity a sense of stability or security.⁵⁷ In other words, stable patrimony is the minimum amount of assets, financial or otherwise, that a public juridic person should have in order to exist and to carry out its intended purpose.⁵⁸ The following four commentators provide perhaps some of the more succinct descriptions of the current understanding of stable patrimony. Mariano López Alarcon writes:

Stable patrimony is comprised of those goods that constitute the minimum secure financial basis to enable the juridical person to subsist autonomously and to attend to the purposes and services proper to it; there are no absolute rules, however, for establishing the stability of a patrimony, since this depends not only on the nature and the quality of the goods, but also on the financial requirements for the fulfilling of the objectives, as well as on the stationary or expansive situation of the institution.⁵⁹

Nicolas Cafardi writes:

Stable patrimony is the inheritance of a public juridic person – the permanent goods (real estate and imperishable personalty) that the current administrators either have received from prior administrators or have accrued themselves. Such goods are to be used by them to benefit the public juridic person and are to be preserved by them for the future benefit of the public juridic person.⁶⁰

John Renken writes:

⁵⁶ Can. 1285: “Intra limites dumtaxat ordinariae administrationis fas est administratoribus de bonis mobilibus, quae ad patrimonium stabile non pertinent, donationes ad fines pietatis aut christianae caritatis facere.”

⁵⁷ V. DE PAOLIS, *De bonis Ecclesiae temporalibus: Adnotationes in Codicem, Liber V*, Rome, Pontificia Universitas Gregoriana, 1986, 100.

⁵⁸ RENKEN, “The Stable Patrimony of Public Juridic Persons,” 32.

⁵⁹ M. LÓPEZ ALARCÓN, “Book V: Temporal Goods of the Church,” in E. CAPARROS and H. AUBÉ (eds.), *Code of Canon Law Annotated*, 2nd rev. ed., Montréal, Wilson and Lafleur, 2004, 993.

⁶⁰ CAFARDI, “Alienation of Church Property,” 249.

The purposes of a juridic person are “works of piety, of the apostolate, or of charity, whether spiritual or temporal” (c. 114 §2) which are in keeping with the mission of the Church and transcend the purpose of the individual persons or things (c. 114 §1). The law envisions not only that the aggregate has the capacity to possess patrimony, but that some of it would be “stable” patrimony. Stable patrimony provides the self-sufficient means to achieve the designated purpose of the juridic person, not just for a while but perpetually. It is a true category of ecclesiastical goods, distinct from non-stable patrimony.⁶¹

And Velasio De Paolis writes:

The concept of stable patrimony is a new notion introduced to answer the needs of our modern economy, which no longer rests prevalently on goods once defined as immovable. Jurisprudence needs to define the concept of stable patrimony further. One thing is certain: the new code presupposes that every juridical person has a stable patrimony which can be made up of either moveable or immoveable goods. The determination of these goods depends on the organs of the juridical person itself, in as much as a legitimate ascription is required for those goods to become a part of the stable patrimony. When we speak of legitimate ascription, we mean that such an ascription is done according to the norms of law and even according to particular law.⁶²

De Paolis’ point is particularly poignant: A mere physical description of property alone is no longer sufficient. This is true especially in the economic system where the methods of measuring value have changed in recent years.⁶³ In addition to the descriptions of the physical attributes of temporal goods—that is, moveable or immovable—perhaps descriptive attributes of the purposes of the temporal goods can also be useful as well. Considering the modern economy referred to by De Paolis above,

⁶¹ RENKEN, “The Stable Patrimony of Public Juridic Persons,” 147. Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1501-1503.

⁶² V. DE PAOLIS, “Temporal Goods of the Church in the New Code with Particular Reference to Institutes of Consecrated Life,” in *The Jurist*, 43 (1983), 356.

⁶³ For example, until recently, gold was used as the standard to measure monetary value and its stability. By the early 1900s, however, most nations had adopted the method of measuring the health of their monetary systems based on the global value of gold. With the modernization and economic changes that took place after World War II, nations are developing new ways to measure their wealth and are looking for a new “gold-standard” that is not based on the value of gold. Cf. S. KNAFO, “The Gold Standard and the Origins of the Modern International Monetary System,” in *Review of International Political Economy*, 13 (2006), 78-102; F. BRADBURY, “The Dynamic Economy: The Case for a New Economic Order Based on Dynamics and Related to the Value of Energy,” in *International Journal of Environmental Studies*, 15 (1980), 287-292; Nathan LEWIS, “The 1870-1914 Gold Standard: The Most Perfect One Ever Created,” 3 January 2013, available at <http://www.forbes.com/sites/nathanlewis/2013/01/03/the-1870-1914-gold-standard-the-most-perfect-one-ever-created/> (last accessed 1 May 2015).

the creation of trust funds, for example, could be one means by which juridic persons maintain their stable patrimony. Depending on how trust funds are created, their bylaws can be made to reflect the desire of canon law to protect the stable patrimony of the public juridic persons.

It has already been noted that ecclesiastical goods become a part of the stable patrimony through legitimate designation. The Code does not explicitly state how an administrator should go about designating temporal goods as stable patrimony.⁶⁴ One can assume that *legitimate designation* could be carried out by an official decree, explicitly stating that a specific piece of property is now to be considered a part of the juridic person's stable patrimony. There is no such thing as a constructive stable patrimony. Renken writes: "There is no method other than lawful designation to determine if an ecclesiastical good is stable or non-stable patrimony."⁶⁵ Moreover, as De Paolis notes in *I beni temporali della Chiesa*, acts of lawful designation of ecclesiastical goods as stable patrimony could be done even implicitly (and not only explicitly).⁶⁶ Implicitly, ecclesiastical goods can be considered a part of the stable patrimony when the nature of the goods is such that it is intended to be retained indefinitely (i.e., land, buildings, highly valuable moveable items, etc.). Mark Reeves writes:

[A reasonable] argument can be made to support the proposition that the allocation of ecclesiastical goods to the stable patrimony of a public juridic person, *ex legitima assignatione*, could result implicitly. This argument presupposes that a public juridic person, constituted pursuant to [canon 114 §1 of the *CIC/83*], pursues a useful purpose and has the means foreseen to be sufficient to achieve that purpose pursuant to [canon 114 §3 of the *CIC/83*]. The minimum resources foreseen to be sufficient to

⁶⁴ Cf. F. GRAZIAN, "Patrimonio stabile: Istituto dimenticato?" in *Quaderni di diritto ecclesiale*, 16 (2003), 282-296.

⁶⁵ RENKEN, "The Stable Patrimony of Public Juridic Persons," 149.

⁶⁶V. DE PAOLIS, *I beni temporali della Chiesa*, edited by Alberto PERLASCA, Bologna, Edizione Dehoniane Bologna, 2011, 258.

achieve the purpose for which the public juridic person was constituted are, by their nature, part of the stable patrimony of such public juridic person. Consequently, such resources may become part of the stable patrimony of such public juridic person *ex legitima assignatione* implicitly as a result of other acts.⁶⁷

Thus, even if no explicit declaration of stable patrimony has been made concerning some specific ecclesiastical goods, they still may indeed be constituted implicitly as part of the stable patrimony.⁶⁸ Nicholas Cafardi notes that one can always look to the implications of the law itself to discern whether the temporal goods in question fall under the designation of stable patrimony.⁶⁹ For example, if canon law requires that a public juridic person keeps a list or an inventory that identifies stable patrimony, then properties designated on such a general list constitute, by implication, stable patrimony.⁷⁰ Moreover, Cafardi also notes that if properties are used in ways to indicate that they are stable patrimony, or if a donor gives properties with the intention that such properties become a part of the stable patrimony and they are so accepted, then by implication, such properties constitute stable patrimony.⁷¹

⁶⁷ M.T. REEVES, "Satisfaction of Civil Judgments Against Public Juridic Persons in the United States in Light of Canon 22 and 1291: Aliud Iure Canonico Caveatur?" in *Catholic Lawyer*, 42 (2002), 159.

⁶⁸ This is especially true for the Catholic Church and its institutions in countries where they are not allowed to own property.

⁶⁹ CAFARDI, "Alienation of Church Property," 250.

⁷⁰ Having an inventory that identifies church property is good practice; such inventory can help the juridic entity to be more transparent about ownership or control of temporal goods. Of course, one could always argue that the very act of including a piece of property on such a list itself constitutes an explicit decree of designation of stable patrimony.

⁷¹ CAFARDI, "Alienation of Church Property," 251. It is also important to note that, in some situations, although temporal goods may not have been explicitly designated as stable patrimony under canon law, those same goods may nevertheless implicitly be considered stable patrimony because of how they have been designated or used under civil law. Cf. can. 22.

2.2.3 — Alienation of Stable Patrimony

When stable patrimony is to be alienated, the Code has specific regulations governing how the act of alienation is to be carried out. Canon 1291 stipulates the need for permission when alienating stable patrimony. Commenting on the provision and the limitation of canon 1291, Joaquín Mantecón writes:

Not included in this provision are goods that, even though they may have a value greater than the amount established by law, are not a part of the [juridic] person's stable patrimony; this would be quite a rare case. Also not included are goods that belong to the stable patrimony but do not exceed the established sum.⁷²

From the above, the requirement to obtain permission from a competent ecclesiastical authority is needed for the validity of alienation only when one is alienating stable patrimony that exceeds the limits determined by law.⁷³ Consequently, it is important to note two implications when dealing with the alienation of stable patrimony. The first implication is that no permission is required when alienating stable patrimony that has an economic value below the amount established by law. The second implication

⁷² J. MANTECÓN, “Title III: Contracts and Especially Alienation, cc. 1290-1298,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 131.

⁷³ However, the Code stipulates that, in addition to acts of alienation, in any transaction that can worsen the stable patrimonial condition of the juridic person, the provisions of canons 1291-1294 are also applicable. This will be discussed in subsequent sections. Concerning the maximum and minimum limits for the alienation of ecclesiastical goods, canon 1292 gives the conferences of bishops the authority to establish these parameters for their specific region. As of 1 December 2011, the USCCB decreed the following maximum and minimum limits for acts of alienation of stable patrimony for dioceses in the United States: The maximum limit for alienation and any transaction which, according to the norm of law, can worsen the patrimonial condition is \$7,500,000 for dioceses with Catholic populations of half a million persons or more; for other dioceses, the maximum limit is \$3,500,000. The minimum limit for alienation and any transaction which, according to the norm of law, can worsen the patrimonial condition is \$750,000 for dioceses with Catholic populations of half a million persons or more; and for other Dioceses, the minimum limit is \$250,000. For other public juridic persons subject to the Diocesan Bishop, the maximum limit for the alienation of property is \$3,500,000 while the minimum limit is \$25,000 or 10% of the prior year's ordinary annual income, whichever is greater. Cf. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Canon 1292 §1 – Minimum and Maximum Sums, Alienation of Church Property*, 1 December 2011, available at: <http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/complementary-norms/canon-1292-1-minimum-and-maximum-sums-alienation-of-church-property.cfm> (last accessed 21 December 2014).

is that, since canon 1291 applies to stable patrimony only, regardless of the amount involved, permission is not required for validity when alienating ecclesiastical goods not designated as stable patrimony.

2.3 — Care of Ecclesiastical Goods

According to the Code, each public juridic person must have an administrator of its ecclesiastical goods. The administrator's responsibility is to administer and manage the ecclesiastical goods on behalf to the juridic person.⁷⁴ The Code compares this administrator of ecclesiastical goods of the public juridic person to a *good steward of the household*.⁷⁵ Canon 1279 stipulates that statutes of the public juridic person should identify the administrator. The same canon also stipulates that if the statutes make no provision for this, then it is the role of the ordinary of the juridic person to appoint a suitable person to perform that role. Once appointed, an administrator is to care for the public juridic person's ecclesiastical goods in ways that are consistent with the principle purposes articulated by universal law.⁷⁶

The Code articulates extensively the role of the administrator of ecclesiastical goods of the public juridic person. Canon 1284 mandates that administrators have the responsibility to “exercise vigilance so that the goods entrusted to their care are in no way lost or damaged, taking out insurance policies for this purpose insofar as necessary,” and to “take care that the ownership of ecclesiastical goods is protected by civilly valid

⁷⁴ Cf. G. NEDUNGATT, “Who Is the Administrator of Church Property? The Answer of the Ecumenical Councils,” in *Folia Canonica*, 4 (2001), 117-133.

⁷⁵ Cf. can. 1284.

⁷⁶ Z. COMBALIÁ, “Title II: The Administration of Goods, cc. 1273-1289,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, vol. IV/1, 100.

methods.”⁷⁷ Recognizing that Catholic institutions in the United States exist in different civil jurisdictions, the Code appreciates the nuances of these different civil jurisdictions; thus, an administrator has some flexibility to utilize various methods available in civil law in order to protect the ecclesiastical goods of the juridic entity. However, the appropriation of civil law methods is only possible if such methods are not contrary to divine law and unless canon law provides otherwise.⁷⁸

2.4 — Retention of Temporal Goods

John Locke asserted that human persons have the right to pursue *life, liberty, and property*.⁷⁹ Inspired by Locke, Thomas Jefferson included in the *American Declaration of Independence* that all persons have the inalienable right to *life, liberty, and the pursuit of happiness*.⁸⁰ It is arguable that Locke’s “pursuit of property” and Jefferson’s “inalienable right to the pursuit of happiness” are inter-connected. In a similar fashion, philosopher Simone Weil saw an integral connection between a person’s sense of self in the world and the possession of physical property. Referring to a person’s soul and its need for private property, Weil noted that having property is a vital need of the soul.⁸¹ Weil contended that the human soul has a fundamental need to be connected or to feel

⁷⁷ Can. 1284: “§1. All administrators are bound to fulfill their function with the diligence of a good householder. §2. Consequently they must: 1° exercise vigilance so that the goods entrusted to their care are in no way lost or damaged, taking out insurance policies for this purpose insofar as necessary; 2° take care that the ownership of ecclesiastical goods is protected by civilly valid methods; [...]”

⁷⁸ Cf. can. 22; T.E. MOLLOY, “The Canonization of Civil Law: The Law on Labor Relations,” in *CLSA Proceedings*, 46 (1984) 43-45.

⁷⁹ J. LOCKE, *Second Treatise of Government*, edited by C.B. MACPHERSON, Indianapolis, IN, Hackett Publishing Company, Inc., 1980, 68.

⁸⁰ Cf. C.L. BECKER, *The Declaration of Independence: A Study of the History of Political Ideas*, New York, NY, Vintage Books, 1958, 3-79.

⁸¹ WEIL, *The Need for Roots: Prelude to a Declaration of Duties Towards Mankind*, 33.

connection; she argued that the soul gravitates toward being connected with its surroundings, its environment, and with other souls.⁸²

Following Weil's analysis, it is arguable that having access to property is one of the most practical ways in which the human soul connects with the world. Access to tangible property allows the human soul to extend itself into the physical world, allowing the soul the opportunity to interact with its surroundings and to have introspection. Without this tangible connection to world, the soul experiences disconnection and isolation.⁸³ Consistent with this theme, John Coughlin writes: "Without material things, the person [that is, the human soul] would be unable to survive, to care for family, to develop potentiality, to fulfill his or her ultimate end."⁸⁴

As mentioned earlier, the Catholic Church has an obligation to mediate the Good News as proclaimed by Jesus Christ. This requires the Church to have access to temporal goods.⁸⁵ Having access to property affords the Church a tangible connection to the temporal world. With property such as a church building, a hospital, or a convent, the Church becomes physically identifiable, with tangible presence.⁸⁶ Thus, the act of entering or becoming a member of the Church is more than a metaphorical notion. The possession or retention of property is for the purposes of living outwardly and socially.⁸⁷

⁸² Ibid., 33.

⁸³ Ibid., 33.

⁸⁴ J.J. COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, New York, NY, Oxford University Press, Inc., 2011, 98.

⁸⁵ PERRY, "Support for the Church," 69.

⁸⁶ J.A. CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, New York, NY, Paulist Press, 1997, 26.

⁸⁷ MCKEON, "The Development of the Concept of Property in Political Philosophy: A Study of the Background of the Constitution," 305.

Those who enter the Church do, in fact, enter a physical building that is a house of worship—which is the Church; but this entrance into the Church also means entering into the grand mission of the Church. Having possession or access to temporal goods allows the Church to live outwardly and socially—through its structure, through its members—and to provide adequate care for its members. Moreover, the ability to own temporal goods also allows both the Church and its members to develop potentialities and to thrive—as an institution and as persons.⁸⁸

Throughout the centuries, the Church has always recognized its right and its need to have access to material goods and proprietorship of property. In order to articulate this, the Church has developed extensive laws to regulate ecclesiastical goods.⁸⁹ Pope Leo XIII's *Rerum novarum* was a recognition of this right in contemporary language.⁹⁰ As discussed in Chapter One, the Church acquires temporal goods in order to pursue its proper purposes,⁹¹ which canon 1254 §2 identifies as acts of divine worship, the adequate care and support of the clergy and other ministers, and the works of the sacred apostolate and of charity. In order to achieve these purposes, the Church must be able not only to acquire and to administer temporal goods, but it must also be able to retain them.⁹² The obligation of the Church to retain temporal goods is equally as essential to the mission of the Church as its obligation to acquire, administer, or alienate them.

⁸⁸ CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, 39.

⁸⁹ Cf. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, 237-250.

⁹⁰ Cf. LEO XIII, “*Rerum Novarum* – Encyclical Letter of Pope Leo XIII on the Conditions of Labor,” in *Historical Catholic and Dominican Documents*, Book 13 (1891), available at: http://www.digitalcommons.providence.edu/catholic_documents/13, (last accessed 29 May 2016).

⁹¹ Cf. *Gaudium et spes*, no. 76; W.M. ABBOTT, (ed.), *The Documents of Vatican II*, New Revised Edition, New York, NY, Herder & Herder, 1966, 984-985.

⁹² COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 124.

2.4.1 — *Retinere*

Canon 1254 uses the Latin term *retinere*,⁹³ which is the active infinitive form of *retineō*. Translated into English, *retinere* means *to restrain, to hold back, or to retain*.⁹⁴ *Black's Law Dictionary* defines retain as “to hold in possession or under control; to keep and not lose, part with, or dismiss.”⁹⁵ Adolf Berger’s *Encyclopedic Dictionary of Roman Law* provides a more extensive definition. According to Berger, *retention* means “the retaining of a thing by a person who normally is obligated to return it to its owner. This kind of self-help could occur in various situations, especially when a person had to bear expenses on another’s thing which he was temporarily holding.”⁹⁶ Berger’s definition makes a distinction between retention and ownership; this seems to be closer to how canon law understands *retinere*. As St. Thomas Aquinas contended, since God has *dominium* over all created things, the right to retain property is nothing more than “a power of stewardship over what belongs to God, who intends material goods to be for the benefit of all men.”⁹⁷ Following this Thomistic logic, this means that public juridic persons retain or possess ecclesiastical goods, not for their own benefit, but for the benefit of others.

⁹³ Can. 1254 §1: “Ecclesia catholica bona temporalia iure nativo, independenter a civili potestate, acquirere, retinere, administrare et alienare valet ad fines sibi proprios proseguendos.”

⁹⁴ Leo F. STELTEN (ed.), *Dictionary of Ecclesiastical Latin*, Peabody, MA, Hendrickson Publishers, 2007, 231.

⁹⁵ B.A. GARNER and H.C. BLACK (eds.), *Black's Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 1509.

⁹⁶ A. BERGER (ed.), *Encyclopedic Dictionary of Roman Law*, Philadelphia, PA, American Philosophical Society, 1953, 683.

⁹⁷ D. MACLAREN, *Private Property and Natural Law, Aquinas Papers No. 8*, Oxford, Blackfriars, 1948 at 15.

The history of the Church retaining temporal goods goes back a long way. According to Harold Berman, starting around the eleventh century, there already existed the recognition that the Church had a legal right to retain temporal goods given to it in the form of “free alms.” A donor usually would donate the temporal goods as free alms—usually land—by specifying that the donation was given “to God” and to a specific ecclesiastical body.⁹⁸ An example of this would be a donor giving a piece of property “to God and to the Society of Jesus, English Canada Province, its Jesuit Provincial Superior, and all the members of the Province.” In this manner, the gifted property was seen as something held in trust—first for God, and then for the ecclesiastical body and its members, but never for only a specific person. Such donations were not received as property belonging to one individual physical person for his or her exclusive usage.

Moreover, in a more recent development, donors’ intentions also played a key factor in determining how the gifts were retained.⁹⁹ Typically, a donor might require, as a condition of donation, that the temporal goods be used for some specific purpose(s). It is clear that past customary practices of canon law recognized that the church institution which accepted and retained a conditional gift acted as a trustee rather than an exclusive owner.¹⁰⁰ As Berman notes, “the person to whom the property was transferred ‘owns’ it, but he was required by canon law...to administer it for the benefit of those for whose

⁹⁸ BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, 238. Cf. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” 496.

⁹⁹ Cf. R.E. JENKINS, “Gifts, Donations and Donor Intent in the Canon Law of the Catholic Church,” in *The Jurist*, 72 (2012), 84-85. For more information regarding donations, the need to observe the intention of the donor, and the legal implications for failing to observe donor intent, see S.N. GARY, “The Problems with Donor Intent: Interpretation, Enforcement, and Doing the Right Thing,” in *Chicago-Kent Law Review*, 85 (2010), 977-1043.

¹⁰⁰ BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, 239.

‘use’ it had been given.”¹⁰¹ This understanding of non-exclusive retention of temporal goods continues to this day, and it is very much reflected in the current Code’s understanding of how public juridic persons can retain temporal goods.

2.4.2 — Act of Retention

As mentioned before, an administrator of ecclesiastical goods is to act as diligently as a *good householder*.¹⁰² This includes taking action to help the public juridic person retain its ecclesiastical goods. The Code does not provide specific guidelines regarding how a public juridic person is to retain ecclesiastical goods. Perhaps the Code viewed it as unnecessary to address this since the retention of any ecclesiastical goods by institutions in the Church must always be consistent with the Church’s mission.¹⁰³ In other words, how juridic persons retain their ecclesiastical goods is implied in how they are to acquire, to administer, or to alienate such goods: by any just means (*omnibus iustis modis*)¹⁰⁴ available under natural and positive law.¹⁰⁵ Thus, there is no need to address specifically the issue of retention. Commenting on this, Mariano López Alarcón writes:

The objectives, public function, and social and economic principles...converge in an economic system of mediations, befitting ecclesial patrimony, where goods—goods acquired and preserved as well as profit-producing goods—should not be accumulated unless they constitute stable patrimony. Instead, they should be used according to their proper destination. Prevailing in this system are gratuitous juridical acts and the broad

¹⁰¹ Ibid., 239.

¹⁰² Cf. can. 1284.

¹⁰³ One could argue that by creating the category of stable patrimony, the Code intends to help the public juridic persons retain temporal goods; at the very least, by making it difficult to alienate stable patrimony, the Code wants to protect certain ecclesiastical goods from being invalidly alienated. Cf. J. GONZÁLEZ, “Alienation of Church Goods: Why and How?” in *Boletín Eclesiástico de Filipinas*, 8 (2005), 426-435.

¹⁰⁴ Can. 1259: “Ecclesia acquirere bona temporalia potest omnibus iustis modis iuris sive naturalis sive positivi, quibus aliis licet.”

¹⁰⁵ Cf. J.C. PÉRISSET, *Les biens temporels de l’Église: Commentaire des canons ‘1254-1310’*, Paris, Tardy, 1996, 68-71.

social function of property, all ordained to serving the Church's and men's needs, especially the needs of the poorest...Public juridical persons, being required to act in the name of the Church, are obliged to operate in a strictly licit manner when acquiring, using, and trading in goods. They must refuse possession or use of goods that, depending on the circumstances, may cloud the Church's clear image, whether because of their nature or their volume...The repugnance once felt for business activities of ecclesial or filial entities that benefit their own objectives must be overcome.¹⁰⁶

While church institutions are not encouraged to accumulate profits, the canons concerning stable patrimony and the need to protect it can be interpreted as relating to acts of retention. In fact, the idea of declaring some temporal goods as stable patrimony is itself an act to foster the retention and protection of such goods.¹⁰⁷ Understood in this way, acts associated with the retention of temporal goods can be understood in the negative—that is, by identifying what cannot be done to a specific category of temporal goods. For example, canon 1293 asserts that, prior to the alienation of goods, there must be a demonstration of just cause (i.e., urgent necessity, evident advantage, piety, charity, or some other grave pastoral reason), a written appraisal from an expert of the goods involved, etc. Canon 1294 prohibits the alienation of any assets for less than what was appraised. Moreover, one can argue that the purpose of canon 1295 is to help protect “ecclesiastical goods which one wishes to retain as stable patrimony.”¹⁰⁸

Nevertheless, as long as a public juridic person has what it needs to fulfill its purposes and does not engage in any transactions which can worsen its stable patrimonial condition, the focus of the Code is generally not about the retention or building up of the

¹⁰⁶ LÓPEZ ALARCÓN, “Introduction, cc. 1254-1258,” 15.

¹⁰⁷ RENKEN, “The Stable Patrimony of Public Juridic Persons,” 155.

¹⁰⁸ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 282.

juridic entity's wealth.¹⁰⁹ Coughlin notes that a Gospel preference for poverty is fundamental in the very nature of the Church; this preference is one that facilitates a spiritual detachment from the material world because the innate rights to acquire and to retain property are not grounded in accumulation of wealth here on earth.¹¹⁰ Thus, when the Church seeks to retain ecclesiastical goods, it does so in order to ensure that the proper purposes of the Church can be carried out.¹¹¹ Retention of ecclesiastical goods for the Church can never solely be for the sake of accumulation of wealth.

2.5 — Acts of Administration Concerning Ecclesiastical Goods

Administrators of public juridic persons exercise power of governance when they place juridic acts in the name of public juridic persons. As mentioned earlier, the power of governance, or jurisdiction, is power “connected with ecclesiastical offices or granted to persons for the performance of specific juridic acts.”¹¹² Acts that involve the administration of ecclesiastical goods usually involve the power of governance. Joseph Martín de Ager and José Valverde note that acts intending to “conserve [or] increase a patrimony and to make it serve the aims for which [the ecclesiastical goods have] been designated”¹¹³ can be considered acts of administration of ecclesiastical goods. Similarly, Edwin Omorogbe notes that an act of administration of ecclesiastical goods is one that

¹⁰⁹ Cf. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, *Socially Responsible Investment Guidelines* 12 November 2003, available at: <http://www.usccb.org/about/financial-reporting/socially-responsible-investment-guidelines.cfm> (last accessed 2 February 2015).

¹¹⁰ COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 114.

¹¹¹ Cf. can. 1252 §2.

¹¹² J.M. HUELS, *Empowerment for Ministry: A Complete Manual on Diocesan Faculties for Priests, Deacons, and Lay Ministers*, New York, NY, Paulist Press, 2003, 268. Cf. cann. 129-144.

¹¹³ MARTÍN DE AGAR and VALVERDE, *A Handbook on Canon Law*, 248.

involves preserving Church property, improving property or resources, managing the collection and the distribution of income, keeping accurate records, properly reporting income and expenses to the faithful and the competent authority.¹¹⁴

The Code distinguishes three kinds of acts of administration pertaining to the ecclesiastical goods of public juridic persons. Of the three kinds of acts, two are applicable universally: these are *acts of ordinary administration* and *acts of extraordinary administration*. The third kind of acts of administration applies only to dioceses and is referred to as *acts of administration which are more important in light of the economic condition of the diocese*. Below will be a discussion of each of these acts of administration.

2.5.1 — Acts of Ordinary Administration

Acts of ordinary administration are certainly the most common among the three kinds of acts of administration of ecclesiastical goods. Acts of ordinary administration are activities performed on a routine basis for the basic maintenance of any public juridic person. Such acts include the paying of utility bills, ensuring the regular and routine maintenance of the physical structures such as buildings, balancing financial records, paying of employee salaries, contributing to employee's pension funds and health insurance, etc.¹¹⁵ Administrators who carry out acts of ordinary administration do not

¹¹⁴ E.N. OMOROGBE, *The Power of the Diocesan Bishop with Regard to the Administration of Ecclesiastical Goods of Public Juridic Persons Subject to Him: An Analysis of Canon 1276, §2*, PhD diss., Ottawa, Saint Paul University, 2010, 258.

¹¹⁵ W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today's Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 117.

need to obtain permission¹¹⁶ from a higher ecclesiastical authority before placing such acts.¹¹⁷ In some circumstances and if not contrary to universal law, administrators of ecclesiastical goods may delegate acts of ordinary administration to others.

It is interesting to note that neither the *CIC/17* nor the *CIC/83* use the term “act of ordinary administration.” Canon 1527 of the *CIC/17* noted that administrators of ecclesiastical goods acted invalidly if their actions went beyond what was considered ordinary administration. Similar to the *CIC/17*, the *CIC/83* refers to acts that go beyond ordinary administration but does not actually call them acts of ordinary administration.¹¹⁸ Suggesting that it was intentional on behalf of the revision committee not to be specific about the criterion regarding the determination of acts of ordinary administration, Zoila Combalía writes:

[There should be distinctions] between ordinary and extraordinary administrative acts, and the Code offers no clear criterion. Although some in the committee for revising the Code suggested that the two kinds of acts be listed, the proposal was rejected due to its practical impossibility. It appears, however, that the Code followed a qualitative criterion by indicating that an extraordinary administrative act is one that goes beyond the object and mode of fulfillment of an ordinary administrative act.¹¹⁹

Since the Code does not provide explicit criteria for acts of ordinary administration, John Myers suggests that these acts could be determined implicitly by

¹¹⁶ For a detailed analysis of the terms *faculty*, *licentia*, and *permission* and how they relate to the power of governance, see J.M. HUELS, “Permissions, Authorizations and Faculties in Canon Law,” in *Studia Canonica*, 36 (2002), 25-58. For the scope of this work, the term *faculty* is aptly defined as “an ecclesiastical power or authorization necessary for performing lawfully an act of ministry or administration in the name of the Church.” *Ibid.*, 29. *Licentia*, used in canon law to mean *permission*, is defined as “an authorization or permission that enables a person lawfully to perform an act either in the name of the Church or in one’s own name.” *Ibid.*, 44.

¹¹⁷ F.G. MORRISSEY, “Ordinary and Extraordinary Administration: Canon 1277,” in *The Jurist*, 48 (1988), 716.

¹¹⁸ Cf. cann. 1281 and 1285. It should be noted that the source of canon 1282 of the *CIC/83* comes from canon 1527 of the *CIC/17*.

¹¹⁹ COMBALÍA, “Title II: The Administration of Goods, cc. 1273-1289,” 105.

using curial decrees and past practices.¹²⁰ For example, on July 21, 1956, the Sacred Congregation of Propaganda approved a list of acts that were *not considered* acts of ordinary administration for a diocese in the Netherlands. These acts included the buying of property, the accepting/rejecting of inheritance or donations, and the buying/selling of sacred art and items that possess important historical or religious significance.¹²¹ From such a list, Myers contends that administrators of ecclesiastical goods can compare various acts of administration: if a proposed act does not rise to the level of importance of those acts on the list, then, by implication, such an act is to be considered an act of ordinary administration.¹²²

Zoila Combalía recommends something similar to Myers. Noting that the Code compares an administrator of temporal goods of the juridic person to a *good householder*,¹²³ Combalía proposes that one can know the fundamental characteristics of acts of ordinary administration by looking at the Code's treatment of acts of extraordinary administration. He writes:

By giving a general description of the obligations and duties of the administrator, this canon may serve as a guideline to determine the scope of 'the purpose and methods of ordinary administration' and, therefore, to clarify what must be understood by extraordinary administration.¹²⁴

Regardless of whatever criteria are employed to determine acts of ordinary administration, one thing is clear: these criteria should be flexible, depending on place,

¹²⁰ Cf. J.J. MYERS, "Book V: The Temporal Goods of the Church (cc. 1254-1310)," in J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary* New York, NY, Paulist Press, 1985, 874.

¹²¹ Cf. W.J. DOHENY, *Practical Problems in Church Finance: A Study of the Alienation of Church Resources and of the Canonical Restrictions on Church Debt*, Milwaukee, WI, Bruce Pub. Co., 1941, 26.

¹²² Cf. MYERS, "Book V: The Temporal Goods of the Church (cc. 1254-1310)," 874.

¹²³ Cf. can. 1284.

¹²⁴ COMBALÍA, "Title II: The Administration of Goods, cc. 1273-1289," 114.

time, objectives, and customary practices already in place. Francis Morrissey notes that, since jurisdictions can vary, criteria used to determine acts of ordinary administration should take into consideration those unique and diverse circumstances. In a North American context, for example, Morrissey suggests that acts of ordinary administration should most likely include: the collection and the banking of money acquired in approved ways; the collection of debts from creditors; the collection of annual income from stocks, shares, or bonds; the buying and selling of what is required for daily maintenance; the repairing of damage done to real estate; the administration of money and goods belonging to the juridic person; the acceptance of donations; and those acts involving certain minor leases.¹²⁵

As already stated, administrators of ecclesiastical goods do not need permission before carrying out acts of ordinary administration. According to canon 1279 §1, unless particular law or statutes determine otherwise, administrators who immediately govern juridic persons have the authority to carry out acts of ordinary administration. By implication, then, valid acts of ordinary administration are those that have been placed by persons who have been lawfully appointed as administrators of ecclesiastical goods.¹²⁶ Take, for example, a Catholic parish: Canon 532 stipulates that pastors of Catholic parishes have the authority to represent parishes in all juridic affairs according to the norms of canon law, and to care for the ecclesiastical goods of the parishes according to

¹²⁵ MORRISEY, “Ordinary and Extraordinary Administration: Canon 1277,” 711.

¹²⁶ Of course, lawful procedure pertaining to the act itself, as required by both canon law and civil law, should be followed.

the norms of the law.¹²⁷ Thus, while canon 532 points to the validity of the appointment of a pastor to represent a parish canonically, canon 1279 explains that this juridic representation includes acts of ordinary administration of the parish's temporal goods.

Acts of ordinary administration of parish property can include a wide range of activities. Working from Morrisey's suggestions above, acts of ordinary administration in parishes would typically include such activities as paying salaries to parish staff, hiring a company to make basic repairs of the parish church, hiring a youth coordinator or music coordinator, paying utility bills, paying property taxes, etc. Furthermore, one may argue that acts of ordinary administration also include acts that relate the parish to the diocese: such acts include the filing of monthly and annual reports to the diocesan curia, the paying of routine diocesan taxes, etc. These are all acts of administration of ecclesiastical goods that pastors do not need permission from a higher ecclesiastical authority to carry out.¹²⁸

2.5.2 — Acts of Extraordinary Administration

In the administration of ecclesiastical goods of public juridic persons, acts that go beyond the manner and scope of acts of ordinary administration are called acts of extraordinary administration. They are *extraordinary* because, by their nature, they exceed what would be constituted as ordinary (or routine) acts of ordinary administration

¹²⁷ CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, 84. Cf. J.M. HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, 4th ed., Montréal, Wilson & Lafleur Ltée, 2009, 407; RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish* 104. If, however, there is no pastor assigned to the parish, then the parochial administration represents the parish in juridic affairs. Cf. GHIRLANDA, *Il diritto nella Chiesa, mistero di comunione: Compendio di diritto ecclesiale* 620; HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, 405-406. Regarding acts of ordinary administration for religious institutes, see canon 638.

¹²⁸ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 118.

required for the basic maintenance of a juridic person.¹²⁹ These acts are determined by universal law, particular law, or proper law. While the Code does refer to acts of extraordinary administration (or acts that exceed the limit/manner of ordinary administration),¹³⁰ it does not define them.¹³¹

Among commentators, there is agreement regarding the general nature of acts of extraordinary administration. Robert Kennedy, for example, holds that acts of extraordinary administration are those acts which occur irregularly or whose financial consequences are considerable.¹³² Recognizing the fact that the Code prefers a qualitative approach to a quantitative approach when determining what constitutes acts of extraordinary administration,¹³³ John Hite remarks that acts of extraordinary administration are “those which because of the nature or importance of the action or its financial value require the permission of a higher authority.”¹³⁴ Summarizing the meaning of acts of extraordinary administration in the *CIC/83*, John Renken writes:

Concerning *all* acts of extraordinary administration (i.e., whether they are established *iure universalis* or *iure particulari*): (1) Acts of extraordinary administration are understood to be those acts of administration which exceed the limits and manner of ordinary administration. (2) Acts of extraordinary administration are performed by the administrator of the juridic person. (3) The administrator needs the consent of one or

¹²⁹ COMBALIA, “Title II: The Administration of Goods, cc. 1273-1289,” 105.

¹³⁰ Cf. cann. 1277 and 1281.

¹³¹ Renken proposes the following as acts of extraordinary administration by their very nature: to refuse gifts of greater importance (can. 1267 §2); to invest surplus funds (can. 1284 §2); to initiate or contest civil litigation (can. 1288); to enter some threatening contracts (can. 1295); to lease ecclesiastical goods (can. 1297); to invest goods in an endowment (can. 1305); and to erect a new church building (can. 1215). Cf. J.A. RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the *CIC*,” in *Studia canonica*, 49 (2015), 593-595.

¹³² KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1470.

¹³³ J.L. SANTOS DIEZ, “La administración extraordinaria de los bienes eclesiásticos,” in J. SANCHEZ Y SANCHEZ (ed.), *El derecho patrimonial canónico en España: XIX Semana Española de derecho canónico, celebrada en Salamanca del 17 al 21 de septiembre de 1984*, Salamanca, Universidad Pontificia de Salamanca, 1985, 44.

¹³⁴ Cf. J.F. HITE, “Church Law on Property and Contracts,” in *The Jurist*, 44 (1984), 121.

more other physical persons, whether as individuals or as members of group, in order to perform acts of extraordinary administration.¹³⁵

Additionally, to further distinguish acts of extraordinary administration from acts of ordinary administration, Zoila Combalía notes that administrators should ask the following questions: How much of assets would be diminished by the act? How serious is the risk of financial loss? What is the potential danger to the actual stable patrimony? How complex is the nature of the act of administration? What is the duration of the terms of the execution of the act—especially if it involves loans or leases that the juridic person may have to be accountable for?¹³⁶

Because of their nature or importance, the Code identifies how acts of extraordinary administration are to be determined. Accordingly, for dioceses it is the conference of bishops that has the responsibility of defining acts of extraordinary administration.¹³⁷ For religious institutes, it is their proper law that defines and determines acts of extraordinary administration.¹³⁸ For other public juridic persons subject to the diocesan bishop, it is their statutes that determine acts of extraordinary administration; but if the statutes are silent, the diocesan bishop has competency to define acts of extraordinary administration for public juridic persons subject to him.¹³⁹ The following subsections discuss each of these in turn.

¹³⁵ RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the CIC,” 590.

¹³⁶ COMBALÍA, “Title II: The Administration of Goods, cc. 1273-1289,” 105.

¹³⁷ Cf. can. 1277.

¹³⁸ Cf. can. 638 §1; R. McDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” in *The Jurist*, 69 (2009), 447.

¹³⁹ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 180. More will be discussed about the role of proper law and statutes in the determination of acts of extraordinary administration in subsequent subsections.

2.5.2.1— Dioceses

The Code gives the conference of bishops the authority to determine the acts of extraordinary administration for dioceses.¹⁴⁰ Why does the *CIC/83* not define acts of extraordinary administration which can be applicable universally to all dioceses? John Beal contends that one of the primary reasons why the Code leaves it to the individual conference of bishops to make this determination is because the “[economic] conditions and circumstances of the many particular churches are too varied to permit a ‘one-size-fits-all’ determination of those acts which exceed the limits and manner of ordinary administration.”¹⁴¹ Consequently, the Code recognizes that any attempt to set a universal standard for all dioceses for such acts would be impractical.¹⁴² Each conference of bishops enjoys great independence in setting the standards for its own specific region—depending on the local customs, traditions, and laws.¹⁴³

The USCCB started the process of defining and setting guidelines for acts of extraordinary administration for dioceses in the United States at their annual meeting in

¹⁴⁰ *Ibid.*, 179. Cf. cann. 1277 and 1291-1294.

¹⁴¹ J.P. BEAL, “Ordinary, Extraordinary and Something in Between: Administration of the Temporal Goods of Dioceses and Parishes,” in *The Jurist*, 72 (2012), 115

¹⁴² Cf. PONTIFICAL COMMISSION FOR THE REVISION OF THE CODE OF CANON LAW, *Relatio complectens synthesim animadversionum*, Vatican City, Typis Polyglottis Vaticanis, 1981, 285-286.

¹⁴³ The ability of each conference of bishops to establish particular laws unique to its own region fosters the principle of subsidiarity. Thomas Paprocki writes: “One of the guiding principles for the revision of the [*CIC/83*] was the principle of subsidiarity, whereby a healthy autonomy of local authority is recognized as proper and necessary to provide suitably for a ‘healthy decentralization,’ while respecting legislative unity and universal law. When the revised [*CIC/83*] was promulgated by Pope John Paul II in 1983, it contained eighty-four canons that called for or permitted legislative action by episcopal conferences. Since that time the [USCCB] has taken action on many of these canons, thereby establishing particular legislation for the dioceses in the United States.” T.J. PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” in *CLSA Proceedings*, 70 (2008), 259. Cf. S. EUART, “Complementary Norms Implementing the 1983 Code of Canon Law by the National Conference of Catholic Bishops,” in *The Jurist*, 53 (1993), 396-397; C.J. RITTY, “Changing Economy and the New Code of Canon Law,” in *Catholic Lawyer*, 12 (1966), 341.

2007. What resulted from this experiment was a document entitled *Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishop*.¹⁴⁴ This document was forwarded to the Congregation of Bishops for its *recognitio*, which was granted in 2009. In 2010, *Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishop* was promulgated in the United States. The document identifies four acts of extraordinary administration for dioceses:

- 1) When initiating a program of financing by the issuance of instruments such as bonds, annuities, mortgages, or bank debt in excess of the minimum amount set in accord with canon 1292, §1.
- 2) When resolving an individual or aggregate claim(s) by financial settlement in excess of the minimum amount set in accord with canon 1292, §1.
- 3) When engaging in the regular management or operation of a trade or business that is not substantially related to the performance of the religious, spiritual, educational or charitable purposes of the Church, for the purpose of generating income to carry on such activities.
- 4) When entering into any financial transaction or contractual agreement, the terms of which address matters involving an actual or potential conflict of interest for the diocesan bishop, auxiliary bishop(s), vicar(s) general, episcopal vicar(s), or diocesan finance officer.¹⁴⁵

¹⁴⁴ Interestingly, the conference of bishops in the United States had, in fact, approved complementary norms in accordance with canon 1277 in 1985 in a document entitled *Memorandum to All Bishops* (= *Memorandum*). Promulgated in the U.S. in 1986, the *Memorandum* identified six acts of extraordinary administration by a diocesan bishop, which included acts of alienation, acts of indebtedness, acts that may encumber stable patrimony, and leases. Cf. UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, “Memorandum to All Bishops, Canon 1277: Acts of Extraordinary Administration; promulgated 27 June 1986,” in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 305. However, Thomas Paprocki notes that, while the *Memorandum* was promulgated in 1986 in the United States, it was never submitted to the Holy See for a *recognitio*. Consequently, some commentators assert that the *Memorandum* was never law. Other commentators, however, argue that the *Memorandum* had the force of law in the United States simply because it had been approved by the USCCB for dioceses in the United States. Cf. PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” 279; D.J. WALKOWIAK, “Ordinary and Extraordinary Administration,” in Kevin E. MCKENNA, Lawrence A. DINARDO, and Joseph W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 189 fn. 6.

¹⁴⁵ UNITED STATES CONFERENCE OF CATHOLIC BISHOPS, “Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishops,” available at: <http://www.usccb.org/beliefs-and-teachings/what-we-believe/canon-law/complementary-norms/canon-1277-acts-of-extraordinary-administration-by-diocesan-bishop.cfm> (last accessed 22 July 2015). It is worth noting that the original *Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishop* was sent to the Congregation of Bishops for a *recognitio* (that is, a recognition or approval) included a fifth item: the filing for Chapter 11 bankruptcy protection. Cf. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 183-184. However, when the USCCB promulgated *Canon 1277 – Acts of*

2.5.2.2 — Religious Institutes

Since they are public juridic persons, religious institutes are capable of carrying out acts of extraordinary administration.¹⁴⁶ Canon 638 affirms that religious institutes have the authority to define and determine acts of extraordinary administration for themselves. Because of the manner of their erection and the nature of their relationship to the Church, religious institutions and their structures are distinct from those of dioceses.¹⁴⁷

James Coriden writes:

[Religious institutes] have manifested the impulses of the Holy Spirit by which the [Church] has been enlivened, enriched and sometimes reformed. Religious [institutes] are not unique to the Catholic Church, but they are one of its distinctive features and strengths. They are not part of the [Church's] hierarchical structure, but pertain to its life and striving for holiness.¹⁴⁸

Addressing the specific relationship between universal law and property law of a religious institute, Rose McDermotte writes:

The universal law provides each religious institute with an autonomy of life and governance in order to carry on [...] renewal and adaptation not only in its internal life, but also in its apostolic commitments to the Church. Furthermore, the [universal] law enjoins on ecclesiastical authorities the obligation to preserve and safeguard this autonomy. This autonomy of life and governance is protect not only in universal law, but in the proper law of each institute through a careful ordering of the structures of governance that provides for the participation and cooperation of the members called to live the patrimony of the institute.¹⁴⁹

extraordinary Administration by Diocesan Bishop in 2010 with the *recognitio* from the Congregation for Bishops, the act of filing for Chapter 11 was not included, and no explanation was given.

¹⁴⁶ LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” 498. Cf. cann. 634 and 638.

¹⁴⁷ A.J. MAIDA and N.P. CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, St. Louis, MO, Catholic Health Association of the United States, 1984, 43. Cf. SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 802.

¹⁴⁸ CORIDEN, *An Introduction to Canon Law*, 93.

¹⁴⁹ MCDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” 447.

Consequently, within the scope of universal law, a religious institute's proper law defines and determines the scope of acts of extraordinary administration.¹⁵⁰ The Code does not say how proper law should define and determine acts of extraordinary administration. It simply takes for granted that such definition and determination are included in the institutes' proper law.

What constitutes a act of extraordinary administration would most certainly vary among religious institutes. Factors that are important to consider for the variation of definition and determination of an act of extraordinary administration would include the nature of the religious institutes, their ministries and apostolates, their membership, their geographical locations, whether they are of diocesan right or pontifical right, etc.¹⁵¹ The only apparent criterion that the Code provides is that of canon 638, which requires that the definition and determination must be within the scope of universal law.

Commentators offer some important insights regarding proper law and acts of extraordinary administration for religious institutes. For example, John Renken notes that the proper law of each religious institute must not only define what constitutes an act of

¹⁵⁰ SMITH, "Temporal Goods and Their Administration [cc. 634-640]," 802. Cf. cann. 94, 117, 638 §1, and 678-681. Commenting on the role of proper law of religious institutes in the context of universal law, Przemysław Michowicz emphasizes that: "We are speaking of [religious institutes] of consecrated life which [are] canonically erected by the competent ecclesiastical authority, in which the members profess the evangelical counsels through sacred bonds (vows, promises, oaths) and live a life in common, obeying the universal laws of the Church and, above all, the laws proper to themselves as elaborated by the [institutes] to which they belong. This affirmation implies the existence of a fundamental code of life, formulated by the [religious institutes] and approved by the Holy See, which guarantees the just autonomy of life, especially that of governance. We can further deduce that every institute of consecrated life must be governed by an internal superior whose power should be determined not only by universal law but, above all, by the law proper to the institute." P. MICHOWICZ, "Legal Difficulties and/or Impossibility Concerning New Forms of Consecrated Life (c. 605)," in *Studia Canonica*, 48 (2014), 174.

¹⁵¹ M.A. O'REILLY, "The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life," in L. GERMAIN, M. THÉRIAULT, and J. THORN (eds.), *Unico Ecclesiae servitio: Canonical Studies Presented to Germain Lesage, O.M.I., on the Occasion of his 75th Birthday and the 50th Anniversary of his Presbyteral Ordination*, Ottawa, ON, Saint Paul University, 1991, 296.

extraordinary administration, but it must also describe what processes must be taken in order for an administrator of ecclesiastical goods of a religious institute to place a valid act of extraordinary administration.¹⁵² Expanding on this, Rosemary Smith writes:

In a manner which is in keeping with the universal law, each institute must determine what is ordinary and what is extraordinary administration and clarify the further authorizations necessary before placing acts of extraordinary administration. Because of the great differences between institutes, what is extraordinary administration in one institute could be ordinary administration in another (e.g., limitations on expenditures). Similarly, some institutes reserve authorization for acts of extraordinary administration to the superior alone, while other institutes require the permission of the superior with the consent of the council.¹⁵³

Moreover, while religious institutes are only bound to follow their proper law and universal law with regards to defining and determining acts of extraordinary administration, religious institutes can and should utilize guidelines established by other entities such as the conference of bishops or diocesan particular law, in addition to their own proper laws, when they determine these acts. Hence, Francis Morrisey suggests that it is a good practice for religious institutes to be aware of any guidelines, if they exist, that have been established by the conference of bishops as the institutes determine acts of extraordinary administration and acts of alienation of ecclesiastical goods, and perhaps to include those guidelines into their own statutes or proper law.¹⁵⁴ An example of this can be found in the proper law of the Society of Jesus. Proper law and the administration of ecclesiastical goods will be discussed in greater detail in Section 2.6.

¹⁵² RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 180 fn. 75.

¹⁵³ SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 802.

¹⁵⁴ Cf. F.G. MORRISEY, “The Directory for the Administration of Temporal Goods in Religious Institutes,” in L. GERMAIN, M. THÉRIAULT, and J. THORN (eds.), *Unico Ecclesiae servitio: Canonical Studies Presented to Germain Lesage, O.M.I., on the Occasion of his 75th Birthday and the 50th Anniversary of his Presbyteral Ordination*, Ottawa, ON, Saint Paul University, 1991, 278; E. GAMBARI, *Religious Life According to Vatican II and the New Code of Canon Law*, Boston, MA, the Daughters of St. Paul, 1986, 572.

2.5.2.3 — Public Juridic Persons Subject to the Diocesan Bishops

The focus now turns to public juridic persons that are neither dioceses nor religious institutes. Such public juridic persons include parishes, diocesan hospitals, schools, seminaries, retreat centers, social service agencies, etc.¹⁵⁵ It is clear that neither canons 638 nor 1277 apply to them with regards to acts of extraordinary administration. Rather, it is canon 1281 that is applicable. Canon 1281 stipulates that public juridic persons subject to the diocesan bishops are capable of acts of extraordinary administration,¹⁵⁶ and that the definition and determination of such acts should be included in their statutes.

The Code presumes that public juridic persons subject to a diocesan bishop have statutes,¹⁵⁷ and such presumption extends to include that these statutes determine acts of extraordinary administration for them. Such statutes should not only address the nature the transaction that is an act of extraordinary administration, but also they should include any procedures that administrators of ecclesiastical goods must observe to perform the act validly.¹⁵⁸

The above presumption notwithstanding, the Code asserts that, if the statutes the public juridic persons subject to the diocesan bishop are silent regarding acts of extraordinary administration, then it is the diocesan bishop who has the authority to determine acts of extraordinary administration. However, the diocesan bishop may make

¹⁵⁵ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 201.

¹⁵⁶ However, since these public juridic persons are not dioceses, they are incapable of placing an act of administration of more importance in light of the economic condition of the diocese. Cf. WALKOWIAK, “Ordinary and Extraordinary Administration,” 192.

¹⁵⁷ Cf. cann. 94 and 117.

¹⁵⁸ KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1483.

such determination only after having heard from his finance council.¹⁵⁹ Consequently, if a diocesan bishop were to make such a determination on behalf of a public juridic person without having first heard from his financial council, such determination is invalid.¹⁶⁰

It is interesting to consider why the Code does not give the diocesan bishop the authority to determine acts of extraordinary administration for all public juridic persons subject to him. As diocesan institutions, these include parishes and diocesan schools, for example—all of which are under the supervision of the diocesan bishop.¹⁶¹ For these institutions, acts of extraordinary administration would include the purchasing of land, the construction of new buildings or extensive repair of buildings, having expenditures over a designated financial amount, the refusal of a major bequest, the purchasing or replacing of major equipment, the dedication of surplus.¹⁶² Would it not be more practical to give the diocesan bishop the authority to determine acts of extraordinary administration for them and include these acts in the particular law of his diocese?

While giving the diocesan bishop the authority to identify and determine acts of extraordinary administration for public juridic persons subject to him regardless of their statutes may have practical value in many respects, such has not been common in canonical tradition. Indeed, Robert Kennedy cautions against implementing diocesan-wide policy to make determinations for acts of extraordinary administration for public juridic persons subject to the diocesan bishop. He writes:

¹⁵⁹ Cf. can. 1281 §2.

¹⁶⁰ As Eithne D’Auria notes, while the Code allows a diocesan bishop to dispense disciplinary law, the dispensation of procedural law is reserved to the Holy See or some other authority. E. D’AURIA, “Alienation of Temporal Goods in Roman Catholic Canon Law: A Potential for Conflict,” in *Ecclesiastical Law Journal*, 12 (2010), 37.

¹⁶¹ Cf. can. 1276.

¹⁶² WALKOWIAK, “Ordinary and Extraordinary Administration,” 193.

It seems unnecessary, and often ecclesiological and economically inappropriate, for all parishes (or other public juridic persons) in the same diocese to have identical designations of acts of extraordinary administration; what is an extraordinary financial transaction, in kind or amount, for an inner-city parish may be quite routine, and hence ordinary, in an affluent suburban parish. Recognition of financial diversity is but one facet of truly catholic unity-in-diversity, even as such unity leads, or should lead, to effective concern on the part of rich ecclesial units for poorer ones.¹⁶³

2.5.2.4 — Conditions for Validity

A valid juridic act is one that is done in accordance to the prescription of the law.¹⁶⁴ In order for an act of extraordinary administration to be juridically efficacious, it must be done validly. In practical terms, this means that in order for an administrator of ecclesiastical goods to place a valid act of extraordinary administration, he or she must follow the procedures as required by the law. The validity of the acts requires following the proper procedures prescribed by the law.

Canon 1277 stipulates the conditions necessary for a diocesan bishop to place a valid act of extraordinary administration for his diocese. First, the diocesan bishop is limited only to those acts which have been determined by the conference of bishops as acts of extraordinary administration for dioceses; for dioceses in the United States, these acts are listed in the *Canon 1277 – Acts of Extraordinary Administration by Diocesan Bishop* promulgated in 2010 by the USCCB. Any other acts are not acts of extraordinary administration. The second condition that canon 1277 stipulates is that, before placing an act of extraordinary administration, the diocesan bishop must secure the consent of both

¹⁶³ KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1483.

¹⁶⁴ HUELS, *Empowerment for Ministry: A Complete Manual on Diocesan Faculties for Priests, Deacons, and Lay Ministers*, 272.

the finance council and the college of consultors. Canon 1277 provides no exception.¹⁶⁵ Consultation alone is insufficient.¹⁶⁶

For religious institutes, since the Code stipulates that their proper law defines and determines acts of extraordinary administration, the same proper law should also stipulate the conditions—that is, the procedure(s)—necessary in order to place such acts validly. Of course, the presumption is that the proper law of the religious institutes is within the limits of universal law.¹⁶⁷ In addition to what universal law mandates, proper law can vary since different religious institutes may have different definitions of what acts constitute acts of extraordinary administration and have different requirements for the valid implementation of such acts. Thus, the proper law of each religious institute should be consulted in order to understand better what conditions are needed in order for the

¹⁶⁵ If there were any permitted exceptions or deviations, then the law must clearly allude to this fact.

¹⁶⁶ As already noted, the Code does not specifically identify acts of extraordinary administration. However, by looking at the requirements that are necessary in order to place certain acts (i.e., the requirements stipulated in canon 1277), it is clear that the Code considers these acts to have exceeded acts of ordinary administration. Such acts include erecting a new church building (can. 1215), refusing of gifts of greater importance (can. 1267 §2), the acceptance of gifts that are burdened by a modal obligation or condition (can. 1267 §2), initiating or contesting civil litigation (can. 1288), entering threatening contracts (can. 1295), as well as leasing ecclesiastical goods (can. 1297). Commenting on these specific six acts, Renken writes: “A study of the Code makes it clear that no act of extraordinary administration is precisely called such in the Code...[However, a] further study of the Code...reveals that the Code itself identifies six acts of administration which obviously exceed the limits and manner of ordinary administration and which require the administration of a public juridic person to receive the consent/permission of one or more other physical persons, whether as individuals or as members of group, in order to perform the act. These rightly may be called acts of extraordinary administration *iure universalis* for the entire Latin Church.” RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the CIC,” 592.

¹⁶⁷ For example, canon 1281 §1 requires that, without prejudice to the prescripts of the statutes, a written permission is required in order to place an act of extraordinary administration. Also see O'REILLY, “The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life,” 297-298; SACRA CONGREGATIO PRO RELIGIOSIS ET INSTITUTES SAECULARIBUS, Decree *Iuris canonici codici*, 2 February 1984, in *AAS*, 76 (1984), 498-499.

administrator of ecclesiastical goods to place a valid act of extraordinary administration.¹⁶⁸

For public juridic persons subject to the diocesan bishop, since the Code stipulates that the approved statutes of these juridic persons define and determine acts of extraordinary administration, these same statutes should also stipulate the conditions—that is, the procedure(s)—necessary in order to place such acts validly.¹⁶⁹ Similar to the religious institutes' proper law, the conditions for validity stipulated in the statutes of public juridic persons subject to the diocesan bishop can vary. After all, the nature of a parish is distinct from that of a diocesan-operated hospital; the needs of diocesan high school are different from those of a diocesan-operated university. Thus, the statutes of these public juridic persons must be consulted in order to identify the conditions needed to place a valid act of extraordinary administration.

The Code is clear about two conditions concerning acts of extraordinary administration of public juridic persons subject to the diocesan bishop. The first condition stipulates that the administrator of such a public juridic person cannot place valid acts of extraordinary of administration without having first obtained a written faculty from the ordinary.¹⁷⁰ The second condition stipulates that, when the statutes of the public juridic

¹⁶⁸ Rose McDermott notes that what is generally required in order to place a valid act of extraordinary administration is that the administrator obtain permission from the competent superior (e.g., a general or a provincial) of the religious institute. On the part of the competent superior, he or she would generally be required to obtain the consent of his or her council before he or she could grant the administrator the permission to place an act of extraordinary administration. R.M. MCDERMOTT, *The Consecrated Life: Cases, Commentary, Documents, Readings*, Washington, DC, Canon Law Society of America, 2006, 116. Again, proper law will be discussed in Section 2.6.

¹⁶⁹ Again, it is important to remember that in situations where the statutes of public juridic persons subject to the diocesan bishop are silent concerning the limit and manner of acts of ordinary administration, the Code gives the diocesan competence to determine such acts. Cf. can. 1281 §2.

¹⁷⁰ Cf. can. 1281 §1.

persons are silent on the matter, the diocesan bishop can determine what constitute acts of extraordinary administration for a public juridic person subject to him—but he can do so only after having heard (*audito*)¹⁷¹ his finance council. Consequently, if the diocesan bishop neglects to hear from his finance council before making such determination, his act is invalid.

Finally, it is important to address how conditions for validity of acts of administration intersect with canon law and civil law. As ecclesiastical public juridic persons in the United States become civilly incorporated, acts of administration may have legal consequences under both canon law and civil law.¹⁷² At times, conditions that canon law may require a public juridic person to fulfill in order to place a valid act of administration may not be deemed necessary or even advisable in civil law. For example, the statutes of a diocesan parish require that the pastor obtain written permission from the diocesan bishop before he can purchase more land in order to expand the parish hall.

Consequently, when considering a civil legal system like that of the United States and canon law's requirements for juridic acts to be valid, it is important to remember that issues arising from a conflict of laws are inevitable.¹⁷³ Thus, while it is probable that an act of administration could be invalid under both canon law and civil law, the challenge

¹⁷¹ Can. 1281 §2 of the *CIC/83*: “In statutis definiantur actus qui finem et modum ordinariae administrationis excedunt; si vero de hac re sileant statuta, competit Episcopo dioecesano, audito consilio a rebus oeconomicis, huiusmodi actus pro personis sibi subiectis determinare.”

¹⁷² Cf. RITTY, “Changing Economy and the New Code of Canon Law,” 347.

¹⁷³ For a detailed discussion regarding the conflict between civil law and canon law in the context of bankruptcy and the care of the clergy in the Catholic Church in the United States, see P.J. BROWN, “The Perils of Bankruptcy: Rights and Obligations Regarding Clergy Support,” in *Studia canonica*, 45 (2011), 26-66, 283-284.

will most likely come when such act is valid under one legal system but not the other.¹⁷⁴ Commentators suggest that, when there is a potential for conflict of law, especially in nations where canon law does not have civil recognition, the civilly incorporated church entities may need to devise mechanisms or to have provisions in their statutes that mandate decisions to be made in accordance with canon law, and vice versa. The process may require some “canonization of civil law.”¹⁷⁵ The result may include having the civil statutes of a public juridic person clearly identifying certain *reserved powers* in a civilly entity.¹⁷⁶

2.5.2.5 — Corrective Actions

What results if an administrator of ecclesiastical goods invalidly places an act of extraordinary administration? Can such an invalid act of extraordinary administration become valid under canon law? The answer appears to be in the affirmative; there is certainly precedent to think that retroactive remedy is possible. For example, in dealing with an act of invalid alienation of ecclesiastical goods, the Sacred Congregation of the

¹⁷⁴ D’AURIA, “Alienation of Temporal Goods in Roman Catholic Canon Law: A Potential for Conflict,” 36.

¹⁷⁵ When canon law incorporates some aspects of civil law, making civil law a part of the canonical process, this is called the “canonization of civil law.” This practice is permitted under canon 22, and the only stipulations are that civil law is not contrary to divine law or that the Code does not provide otherwise. Cf. E. McDONOUGH, “Addressing Irregularities in the Administration of Church Property,” in K.E. MCKENNA, L.A. DiNARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 224-233; D’AURIA, “Alienation of Temporal Goods in Roman Catholic Canon Law: A Potential for Conflict,” 34; can. 1290.

¹⁷⁶ M. WELCH, “Sponsorship,” in P.J. COGAN (ed.), *Selected Issues in Religious Law*, Washington, DC, Canon Law Society of America, 1997, 107. Cf. P.J. BROWN, “Structuring Catholic Schools: Creative Imagination Meets Canon Law,” in *Catholic Education: A Journal of Inquiry and Perspective*, 13 (2010), 501; F.G. MORRISSEY, “Various Types of Sponsorship,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States: Theory and Praxis*, Washington, DC, Canon Law Society of America, 2006, 22-24; B.C. HUGER, “Canon Law Issues of Sponsorship, Governance Control and Alienation as They Relate to Catholic Church Entities in the United States: A Diocesan Attorney’s Perspective,” in *Catholic Lawyer*, 41 (2002), 23.

Council in 1917 asserted that an invalid juridic act could become valid if a competent ecclesiastical authority so provided. In such a case, the Council identified the Apostolic See as the competent ecclesiastical authority to validate an invalid act of alienation.¹⁷⁷ In the *CIC/83*, canon 1296 addresses the remedy for acts of alienation that are placed invalidly under canon law (e.g., canonical formalities not followed) but are deemed valid under civil law.

Granted that both the Sacred Congregation of the Council in 1917 and canon 1296 of the *CIC/83* apply to acts of alienation of ecclesiastical goods and not to acts of extraordinary administration, it is nevertheless plausible to argue that the same principle can apply to cases involving acts of extraordinary administration.¹⁷⁸

Corrective actions can vary. If a specific canonical formality was not followed—for example, if an administrator failed to obtain the required written faculty—then the corrective action may include petitioning the competent ecclesiastical authority to provide the needed validation for the invalid juridic act by granting a sanation.¹⁷⁹ This would be the case if the juridic act itself were a good one with the only missing element

¹⁷⁷ Cf. SACRA CONGREGATIO CONCILII, *Albinganen Et Aliarum Sanationis Alienationum*, 17 May 1919, in *AAS*, 11 (1919), 383-387.

¹⁷⁸ Cf. R.H. HELMHOLZ, *The Spirit of Classical Canon Law*, Athens, GA, University of Georgia Press, 1996, 88-115. Moreover, Robert Kennedy writes: “Canon 1296 speaks only of alienation; its wording does not include canon 1295 transactions, which the wording of canon 1295 makes clear are not alienation. [...] The possibilities of corrective action of which canon 1296 speaks, however, could by analogy be applied to many canon 1295 transactions as well.” KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1505.

¹⁷⁹ MYERS, “Book V: The Temporal Goods of the Church (cc. 1254-1310),” 875. In addition, the conflict that emerged between the Missouri Province of the Society of Jesus and the Holy See concerning St. Louis University provides a good illustration of this type of corrective action. Cf. J.F. RIGALI, “St. Louis University Hospital Sold to For-Profit Corporation,” in *Origins*, 27 (1998), 629-633; HUGER, “Canon Law Issues of Sponsorship, Governance Control and Alienation as They Relate to Catholic Church Entities in the United States: A Diocesan Attorney’s Perspective,” 19-27; can. 1296.

being the permission from the competent ecclesiastical authority.¹⁸⁰ Another corrective action, when available and especially in cases involving contracts, could be to renegotiate the terms of the transaction in a way that is viable and acceptable under both canon law and civil law. Regarding to accountability and liability for an invalid act of administration, John Myers notes that “when an administrator invalidly performs an administrative action, the juridic person is held to account...only to the degree that it benefited from the invalid transaction...[but if the juridic act] was illegitimate but not invalid, the juridic person will be [fully] accountable.”¹⁸¹

Finally, it is important to make the distinction between a faculty and a mandate. The faculty, as required by canon 1281 before placing an act of extraordinary administration, is not a mandate. An administrator who asks for and receives the faculty to place a particular act (e.g., an act of extraordinary administration) acts in his or her own capacity; the local ordinary who grants the requested power cannot be held responsible for the juridic act.¹⁸² On the other hand, if an administrator acts as directed by a mandate issued by the local ordinary, then his or her local ordinary could be held responsible for that act.¹⁸³ Thus, while a faculty protects the authority who grants the

¹⁸⁰ Robert Kennedy notes, however, that this corrective action may not always be an option. He writes: “Canonically invalid alienations cannot usually be sanated by ecclesiastical authority, since sanation cannot supply the missing consents of consultative bodies or individuals, often among the causes of canonical invalidity.” KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1506 fn. 174.

¹⁸¹ MYERS, “Book V: The Temporal Goods of the Church (cc. 1254-1310),” 875.

¹⁸² DE PAOLIS, *I beni temporali della Chiesa*, 213.

¹⁸³ This distinction is important to note because of how civil corporate law works in the United States. When an administrator of a public juridic person that has been civilly incorporated seeks the permission of a (higher) competent ecclesiastical authority that is separately incorporated, a civil court may view the two corporations as one since they are perceived as not acting as separate corporate entities.

power to perform the act from certain vicarious liabilities, a mandate does not provide such protection.¹⁸⁴

2.5.3 — Acts of Ordinary Administration Which Are More Important in Light of the Economic Condition of the Diocese

In addition to acts of ordinary administration and acts of extraordinary administration, the Code also recognizes a third category of acts of administration *for dioceses only*. Canon 1277 defines acts of ordinary administration *which are more important in light of the economic condition of the diocese (attento statu oeconomico dioecesis, sunt maioris momenti)*.¹⁸⁵ These are acts of ordinary administration that are considered potentially weightier than those acts generally associated with the routine maintenance of a diocese. In other words, acts of administration that fall under this category involve more than the paying of utility bills or ensuring that employee's salaries and pensions are paid monthly. Since these acts pertain only the juridic person that is the diocese,¹⁸⁶ the only person who can perform them is the diocesan bishop; without

¹⁸⁴ This distinction is important to make when dealing with civil actions involving tort litigation and the theory of vicarious liability. Cf. C.P. WELLS, "Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy," in *Boston College Law Review*, 44 (2003), 1217-1218.

¹⁸⁵ Can. 1277 reads: "Episcopus dioecesanus quod attinet ad actus administrationis ponendos, qui, attento statu oeconomico dioecesis, sunt maioris momenti, consilium a rebus oeconomicis et collegium consultorum audire debet; eiusdem tamen consilii atque etiam collegii consultorum consensu eget, praeterquam in casibus iure universalis vel tabulis foundationis specialiter expressis, ad ponendos actus extraordinariae administrationis. Conferentiae autem Episcoporum est definire quinam actus habendi sint extraordinariae administrationis." The *CCEO's* equivalent to canon 1277 of the *CIC/83* is canon 263 §4, which states: "The eparchial bishop, in the more important acts concerning financial matters, is not to fail to hear the financial council. The members of this council have only a consultative vote, unless their consent is required by common law in cases specifically mentioned or by the founding document."

¹⁸⁶ Other public juridic persons (i.e., religious institutes) which are not dioceses are not covered under canon 1277. However, as Renken notes, "nothing prevents particular [laws of these religious institutions]

delegation, no one else may validly do carry out these acts on behalf of the diocesan bishop.¹⁸⁷

The Code, however, does not define acts of ordinary administration which are more important in light of the economic condition of the diocese.¹⁸⁸ Commentators, however, have offered their reflections about these acts. For example, Zoila Combalía notes that, while these should belong in the category of acts of ordinary administration, they tend to be risky in nature.¹⁸⁹ Federico Aznar Gill suggests that such risky transactions could potentially be detrimental to the stable patrimonial condition of the juridic person and ought not to be considered mere acts of ordinary administration.¹⁹⁰

Canon 1277 relegates the responsibility of determining acts of ordinary administration which are more important in light of the economic condition of the diocese to the diocesan bishop. Thomas Paprocki notes that the diocesan bishop should make this determination in a prudent manner; he opines that the diocesan bishop should consult with the finance council, the college of consultors, and perhaps other parties with a stake in the matter.¹⁹¹ One of the main reasons why the Code gives the diocesan bishop competency to determine these acts because he is in the best position to determine what

from making such determinations.” RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 179.

¹⁸⁷ *Ibid.*, 178.

¹⁸⁸ It should be noted that *CIC/17* did, in fact, refer to “acts of major importance.” It can be argued that such acts are the same ones referred to by canon 1277 as acts of ordinary administration which are more important in light of the economic condition of the diocese. However, the *CIC/17* provided no parameters to establish what constituted these acts of major importance. Cf. MORRISEY, “Ordinary and Extraordinary Administration: Canon 1277,” 716.

¹⁸⁹ COMBALIA, “Title II: The Administration of Goods, cc. 1273-1289,” 97.

¹⁹⁰ F.R. AZNAR GIL, *La administración de los bienes temporales de la Iglesia: Legislación universal y particular española*, Salamanca, Universidad Pontificia de Salamanca, 1984, 383.

¹⁹¹ PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” 281.

warrants being considered as *more important in light of the economic condition of his diocese*.¹⁹² The economy and civil legislation do vary from place to place. The experience in the United States attests to this: the economy of one part of the country can be in better shape than the economy of another part. Factors such as state taxes, local history, environmental issues, and type of industries and their regulations can vary. Given these diverging contexts and circumstances, a conference of bishops similar to the USCCB may not be the best body to determine a uniform standard for these acts.¹⁹³ Rather, the Code offers the presumption that the diocesan bishop is in the best position to know and to understand the needs and unique circumstances of his people and institutions. A national standard for such acts would be impractical. Moreover, if any general patterns of determination do emerge within a diocese, those patterns of determination can be included in the particular law for that particular diocese.¹⁹⁴

While the process of determining acts of ordinary administration which are more important in light of the economic condition of the diocese is done at the diocesan level instead of at the level of the conference of bishops, Paprocki contends that there can be some basic standard or norms that a diocesan bishop could use as a guidelines to determine these acts.¹⁹⁵ For example, depending on the issue, some transactions are governed by federal law rather than state law (e.g., the federal minimum wage law,

¹⁹² MYERS, “Book V: The Temporal Goods of the Church (cc. 1254-1310),” 873. Cf. RITTY, “Changing Economy and the New Code of Canon Law,” 342.

¹⁹³ LÓPEZ ALARCÓN, “Book V: Temporal Goods of the Church,” 985.

¹⁹⁴ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 178.

¹⁹⁵ Cf. PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” 257-284.

bankruptcy, etc.);¹⁹⁶ in such circumstances, the economic conditions may not be so different, and a national standard may be more practical. Consequently, Paprocki suggests the following seven examples as guidelines to help diocesan bishops in the United States:¹⁹⁷

1. Approving an unbalanced operating budget.
2. Any financial transaction that involves an amount in excess of the minimum amount set in accord the canon 1291, §1, including, but not limited to, purchasing real estate; construction, alteration, or demolition of a building; making a loan, secured or unsecured; long-term (over 2 years) investments; acting as a guarantor or surety for the obligation of another juridic person.
3. Initiating a capital campaign.
4. Accepting or refusing a donation or bequest of real estate.
5. Accepting or refusing a donation or bequest with accompanying financial obligations that could last for more than five (5) years.
6. The erection of a diocesan cemetery.
7. The conferral by decree of a public or private juridic personality.

Once such acts are determined, they should be included in the statutes of the diocese. Robert Kennedy writes:

Accordingly, the proper place in which to find a precise determination is in the statutes of each diocese. Well-drafted statutes (ideally the result of widespread consultation themselves) should indicate what kinds of ordinary transactions, and above what monetary limits, are considered [acts of ordinary administration which are more important in light of the economic condition of the diocese]. The law of the Church expects such a determination to be made; without it, the first part of canon 1277 cannot be implemented. Such a determination, whether made in diocesan statutes or elsewhere, serves to remind the diocesan bishop, the finance council, and the college of consultors of the need for consultation, an exercise of shared responsibility without which the administration of diocesan property and finance may be qualitatively flawed.¹⁹⁸

Although the Code gives diocesan bishops the authority to determine acts of ordinary administration which are more important in light of the economic condition of

¹⁹⁶ J.C. LIPSON, “Debts and Democracy: Towards a Constitutional Theory of Bankruptcy,” in *Notre Dame Law Review*, 83 (2008), 627.

¹⁹⁷ PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” 281.

¹⁹⁸ KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1478.

the diocese, it regulates the steps diocesan bishop must take before placing such acts.¹⁹⁹ The first part of canon 1277 articulates the requirement: the diocesan bishop must hear (*audire debet*) the finance council and the college of consultors before he can perform an act of ordinary administration which is more important in light of the economic condition of the diocese.²⁰⁰ Because of the forceful *audire debet*, consultation with both the finance council and the college of consultors *before* placing such acts is required for validity.²⁰¹ Note, however, that while the mandate is only to seek consultation and not consent, the consultation is not optional.²⁰² Failing to consult before placing the juridic act renders the act invalid.²⁰³ Consequently, if a diocesan bishop has not consulted both the finance council and the college of consultors, he may not validly place an act of ordinary

¹⁹⁹ PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” 281.

²⁰⁰ LÓPEZ ALARCÓN, “Book V: Temporal Goods of the Church,” 985.

²⁰¹ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 176. Additionally, the first part of canon 1277 should be read in conjunction with canon 127 §1, which states: “When it is established by law that in order to place acts a superior needs the consent or counsel of some college or group of persons, the college or group must be convoked according to the norm of [canon] 166 unless, when it concerns seeking counsel only, particular or proper law provides otherwise. For such acts to be valid, however, it is required that the consent of an absolute majority of those present is obtained or that the counsel is sought.”

²⁰² PAPROCKI, “Recent Developments Concerning Temporal Goods, Including Complementary USCCB Norms,” 281. It is important to highlight the distinction between *acts of ordinary administration which are more important in light of the economic condition of the diocese* and *acts of extraordinary administration* with regard to consultation and consent. For acts of ordinary administration which are more important in light of the economic condition of the diocese, only a consultation with the finance council and the college of consultors is required by the Code. Consultation does not mean consent, and the law requires only consultation, not consent. Thus, for example, after consulting them, even if one or both of the bodies advise against placing a specific act of ordinary administration which is more important in light of the economic condition of the diocese, the diocesan bishop may still place the act, and it would be valid. In the case of placing an act of extraordinary administration, consent is required. Thus, if the law requires the consent of both the finance council and the college of consultors, and both bodies did not provide the consent, the diocesan bishop cannot place the act of extraordinary administration; if he does place such act, it is invalid. Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1477-1479; for an additional explanation and distinction between what constitutes a *consultative vote* and what constitutes a *consensual vote*, see J.A. RENKEN, “Pope Francis and Participative Bodies in the Church: Canonical Reflection,” in *Studia Canonica*, 48 (2014), 213-214.

²⁰³ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 176.

administration which is more important in light of the economic condition of the diocese.²⁰⁴

2.6 — Proper Law and the Care of Ecclesiastical Goods

As discussed in chapter one, the Code presumes that all public juridic persons have statutes. Statutes are defined in canon 94 §1 as “ordinances which are established according to the norm of law in aggregates of persons (*universitates personarum*) or of things (*universitates rerum*) and which define their purpose, constitution, government, and methods of operation.” For religious institutes, their statutes form the basis of their proper law,²⁰⁵ and one of the clearest places in the Code where proper law plays a prominent role in the lives of religious institutes is in the care of ecclesiastical goods. According to canon 635, the care of ecclesiastical goods belonging to all public juridic persons that are religious institutes is governed by both universal law and their own proper law.²⁰⁶

While the universal law of the Code is common to the entire Latin Church, the proper law of religious institutes is unique to each institute.²⁰⁷ The proper law (*ius*

²⁰⁴ P.M. SHANNON, “Canon Law - Civil Law,” in *The Jurist*, 45 (1985), 622.

²⁰⁵ CORIDEN, *An Introduction to Canon Law*, 161. Cf. J.I. ARRIETA, “Neocatechumenal Way’s Sized Up by Canon Law Expert,” in *Zenith*, 30 June 2002, available at: <http://www.zenit.org/en/articles/neocatechumenal-way-s-statutes-sized-up-by-canon-law-expert> (last accessed 16 August 2015).

²⁰⁶ J.F. HITE, “The Temporal Goods of Religious Institutes,” in K.E. MCKENNA, L.A. DINARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 45. Cf. canon 425 of the *CCEO*, which parallels canon 635 of the *CIC/83*. While canon 638 addresses only religious institutes, other canons address the care of ecclesiastical goods for secular institutes and societies of apostolic life. For secular institutes, the relevant canon is canon 718; for societies of apostolic life, the relevant canons are 734 and 741.

²⁰⁷ CORIDEN, *An Introduction to Canon Law*, 95. Cf. SACRA CONGREGATIO PRO RELIGIOSIS ET INSTITUTIS SAECULARIBUS, *Essentials in the Church’s Teaching on Religious Life as Applied to Instituteds Dedicated to Works of the Apostolate*, 31 May 1983, in *Origins*, 13 (1983), 133-142.

proprium)²⁰⁸ of religious institutes “applies the Church’s general law to a particular institute, expressing its charism, its spirit, and the intent of the founder.”²⁰⁹ Thus, it is helpful to consider the interplay between universal law and proper law. John Sundara Raj writes:

Naturally, the proper law flows from the general [or universal] law and puts the flesh on the character of the particular religious institute which is not found in the common [or universal] law. The *ius proprium* of each institute of consecrated life complements the common [or universal] law of the institutes of consecrated life and does not repeat or rewrite the canons of the [Code].²¹⁰

Consequently, it is critical that the proper law of religious institutes should always be understood in the context of the universal law.²¹¹ If there is a gap within their proper law, religious institutes must look to the universal law for guidance.²¹² Obviously, it is necessary for administrators of ecclesiastical goods of public juridic persons to be knowledgeable of both universal law and proper law.²¹³

²⁰⁸ Can. 598 §2 reads: “§Sodales vero omnes debent non solum consilia evangelica fideliter integreque servare, sed etiam secundum ius proprium instituti vitam componere atque ita ad perfectionem sui status contendere.”

²⁰⁹ SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 780. It is important to understand that proper law is distinct from particular law. Particular law is the body of law made by a conference of bishops that is applicable to entities located within that conference, or by a diocesan bishop that is applicable only to entities within his diocese—e.g., a particular law regarding the care of temporal goods applies only in the geographic territory that is the episcopal conference or the diocese and is not enforceable outside. Cf. J.A. RENKEN, “Particular Laws on Temporal Goods,” in *Studies in Church Law*, 4 (2008), 447-454; GAMBARI, *Religious Life According to Vatican II and the New Code of Canon Law*, 75-77, 82-84.

²¹⁰ J. SUNDARA RAJ, *The Juridical Nature of the Religious Constitutions in the New Law System of the Church*, JCD diss., Rome, Pontificia Universitas Lateranensis, 1991, 9.

²¹¹ Cf. MCDERMOTT, *The Consecrated Life: Cases, Commentary, Documents, Readings*, vii-viii.

²¹² SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 802.

²¹³ Elio Gambari writes: “Every institute, even female—especially the larger institutes—should have members who are experts, or who are at least familiar with the whole law of the Church. They would be of great help for understanding all the concerns of consecrated life and would preclude the too frequent recourse to outsiders. The recognition of a great autonomy from the bishops and of a position on the same level as the male religious institutes require that sister superiors should be better equipped to carry out their commitment in compliance with the laws of the Church [...]” GAMBARI, *Religious Life According to Vatican II and the New Code of Canon Law*, 81.

Nevertheless, while universal law regulates ecclesiastical goods belonging to all religious institutes that are public juridic persons,²¹⁴ in recognizing the function of proper law, the Code accepts and respects the independence of each religious institute and its unique charism. The Sacred Congregation for Religious and for Secular Institutes and the Sacred Congregation for Bishops in 1978 jointly acknowledged that each religious institute has the right to autonomy and the right to be governed internally according to its proper law.²¹⁵ An example of the right to autonomy can be seen in how the evangelical counsels are practiced by members of religious institutes: while the Code holds that members of all religious institutes make public profession of the evangelical counsels, each religious institute has the right to interpret—within the confines of the universal law—how the counsels are understood and practiced within the institute.²¹⁶ The other example—already mentioned above—is found in canon 635. This canon reads:

§1. Since the temporal goods of religious institutes are ecclesiastical, they are governed by the prescripts of Book V, The Temporal Goods of the Church, unless other provision is expressly made.

§2. Nevertheless, each institute is to establish suitable norms concerning the use and administration of goods, by which the poverty proper to it is to be fostered, protected, and expressed.

²¹⁴ C. GALLAGHER, “Temporal Administration in the New Code,” in *The Way (Supplement)*, 50 (1984), 71.

²¹⁵ Cf. *Mutuae relationes*, n. 13(c); J. ROUSSEAU, “Le Code fondamental des Constitutions des Instituts religieux,” in *Studia Canonica*, 8 (1976), 200-201. For a detailed analysis of the development of proper law in the context of the Code and religious institutes, see E.J. HAYES, *Rightful Autonomy of Life and Charism in the Proper Law of the Norbertine Order*, CLS no. 532, Washington, DC, The Catholic University of America, 1990.

²¹⁶ Cf. SACRA CONGREGATIO PRO RELIGIOSIS ET INSTITUTIS SAECULARIBUS, *Essentials in the Church’s Teaching on Religious Life as Applied to Instituteds Dedicated to Works of the Apostolate*, nn. 13-25. It is also important to note that, while members of religious institutes and secular institutes profess the evangelical counsels but most members of the societies of apostolic life do not, many societies of apostolic life have norms regulating temporal goods in the spirit of poverty for the sake of the apostolate. Cf. GEROSA, *Canon Law*, 228.

Clearly, the Code leaves it to religious institutes to define their unique manner of life within the scope of universal law.²¹⁷

2.6.1— Constitutions, Statutes, and Directories

The constitution of a religious institute is its fundamental code representing its proper law.²¹⁸ It is in its constitution that the primary purpose or mission of the institute is articulated.²¹⁹ As the principal internal legislative text, an institute's constitution expresses not only its spiritual patrimony, but also provides its juridic orientation.²²⁰ Apart from the constitution, however, there are other documents that comprise the proper law of a religious institute. These documents include the institute's statutes, complementary norms, directories, and other similar documents.²²¹ Once an institute's proper law has been approved by the competent ecclesiastical authority, the Church not only guarantees that the religious institute has a right to exist with a certain autonomy as it was founded, but the Church also requires local ordinaries to preserve and safeguard this autonomy.²²²

²¹⁷ GAMBARI, *Religious Life According to Vatican II and the New Code of Canon Law*, 79. Cf. R. RIGHINI, "'Testimonium caritatis et paupertatis quasi collectivum' (can. 640). La testimonianza collettiva di povertà negli istituti religiosi," in *Quaderni di diritto ecclesiale*, 14 (2001), 51-76; HITE, "The Temporal Goods of Religious Institutes," 46; *Mutuae relationes*, n. 10.

²¹⁸ MAIDA and CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, 43. Cf. can. 587.

²¹⁹ In response to the Second Vatican Council, Pope Paul VI issued guidelines for the revision of the constitutions for religious institutes. For more details regarding the guidelines, see PAUL VI, apostolic letter *Ecclesiae Sanctae*, 6 August 1966, in *AAS*, 58 (1966), 757-758.

²²⁰ SUNDARA RAJ, *The Juridical Nature of the Religious Constitutions in the New Law System of the Church*, 37.

²²¹ Cf. MORRISEY, "The Directory for the Administration of Temporal Goods in Religious Institutes," 269-271. It should be noted that canon 94 of the *CIC/83* also addresses statutes; however, the category of statutes referred to in canon 94 is more of a generic category which may include constitutions of religious institutes.

²²² MCDERMOTT, "Governance in Religious Institutions: Structures of Participation and Representation, Canons 631-633," 447. Cf. *Mutuae Relationes*, n. 13(c); can. 586 §2.

Furthermore, any changes in an institute's approved constitution must have the consent of the competent ecclesiastical authority.²²³

Norms pertaining to the care of goods can usually be found in directories rather than in the constitution of a religious institute. As Francis Morrisey points out, nowhere in canon law does it explicitly “state that [norms pertaining to the care of temporal goods] must be [included] in the constitutions. Rather, the most common form is for an institute to have a directory for the administration of temporal goods.”²²⁴ While an institute's constitution may refer briefly to ecclesiastical goods, a directory of temporal affairs may provide detailed norms about how ecclesiastical goods can be acquired, retained, administered, or alienated.²²⁵ When a religious institute has a province spreading over multiple civil jurisdictions, especially if the laws of the civil jurisdictions vary, it may be helpful for that province to have multiple directories to address the unique situations found in different civil jurisdictions.²²⁶ However, whether everything is addressed in a

²²³ O'REILLY, “The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life,” 300. Cf. can. 587 §2. As a recent example, a congregation known as the Legion of Christ (Legionaries) founded in Mexico in 1959 went through a major over-haul of its constitution. The cause of the rewriting of the constitution of the Legionaries came after the finding of an apostolic visitation initiated by the Holy See that ended in 2010. The change or rewriting process involved many legal experts from both inside the Legion as well as from outside, and took over four years to complete. The Legionaries' revised constitution was approved by the Congregation for the Institutes of Consecrated Life and Societies of Apostolic Life in November of 2014, available at: http://www.legrc.org/regnum_db/archivosWord_db/DecretorignaeItaliano.pdf (last accessed 14 April 2015).

²²⁴ F.G. MORRISEY, “Temporal Goods and Their Administration, cc. 634-640,” in Á. MARZOA, J. MIRAS, and R. RODRIGUEZ-OCAÑA (eds.), *Exegetical Commentary on the Code of Canon Law*, 5 vols., Montréal, Wilson & Lafleur, 2004, Vol. II/2, 1676. Cf. can. 634.

²²⁵ MCDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” 459.

²²⁶ Cf. “Section IV: Economic Administration” in *The Constitutions of the Nuns of the Order of Preachers*, (1987 edition), available at: http://www.op.org/sites/www.op.org/files/public/documents/fichier/nuns_constitutions_020311.pdf (last accessed 14 April 2015); “Chapter V: The Administration of Temporal Goods” in *The Constitutions and Practical Rules of the Congregation of Jesus and Mary* (1984 edition in French), available at: <http://www.eudistes.org/ConstAng.-copie.pdf> (last accessed 14 April 2015).

single constitution or is spread out through a series of directories, what is important is that there exist some norms in the institute's proper law to address how ecclesiastical goods are to be cared for.²²⁷

2.6.2 — The Jesuits' Instruction on the Care of Goods

An example of how a religious institute incorporates the administration of its ecclesiastical goods into its proper law may be helpful to contextualize the function of proper law. Like all other religious institutes, the Jesuits have their own proper law that includes its constitution, which is called the *Constitutions of the Society of Jesus*.²²⁸ However, while the *Constitutions of the Society of Jesus* addresses some aspects of the nature of the Order's ecclesiastical goods, the actual norms concerning the care of the Order's ecclesiastical goods are found in the Order's *Instruction on the Administration of Temporal Goods* (or the *IAG*).

²²⁷ As we will see in the Section 2.6.2 concerning the Society of Jesus (= the Jesuits, or the Order), guidelines pertaining to the administration of temporal goods are found in the form of "instructions" and "statutes" rather than in the Jesuits' Constitutions or Complementary Norms. In the introduction of the Jesuits' *Instruction on the Administration of Goods* (= *IAG*), it notes: "As with all documents of this type in the Society, the Instruction, in its entirety, has only advisory force. Each of its provisions, in particular, has the force of its source; be it Canon Law, the Society's pontifical law, the Constitutions of the Society and Complementary Norms, Decrees of General Congregations, or Ordinances of the Superior General." *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, Rome, General Curia of the Society of Jesus, 2005, 39.

²²⁸ It is worth noting that for the Society of Jesus, its *Constitutions* is actually not its fundamental legislative text; rather, it is the *Formula of the Institute* that is considered the Jesuits' fundamental code. Contained in sections 3 through 8 of *Regimmi militantis ecclesiae* and sections 3 through 6 of *Exposcit debitum*, the *Formula of the Institute* is the "rule" of the Society of Jesus. It is in this document where basic structure of the order can be found, as well as the authority delegated to the Superior General of the Order to establish an additional code of legislation, statutes, and the *Constitutions*. J.B. BLANGIARDI, *The General Congregation as an Instrument of Governance in the Society of Jesus*, Ottawa, Saint Paul University, 1997, 26. Cf. J.W. PADBERG, (ed.), *The Constitutions of the Society of Jesus and Their Complementary Norms: A Complete English Translation of the Official Latin Texts*, St. Louis, MO, The Institute of Jesuit Sources, 1996.

Updated in 2005, the *IAG* is intended to be read in the context of other documents that comprise the proper law of the Jesuits.²²⁹ These other documents include the *Constitutions of the Society of Jesus*, the *Statutes on Religious Poverty in the Society of Jesus*, the *Complementary Norms*, decrees from the General Congregations,²³⁰ along with other official letters issued by the General Superior of the Jesuits.²³¹ Following sound canonical practice, the *IAG* makes frequent references to the Code—oftentimes quoting directly from the Code in order to ensure that the Jesuits’ proper law is consistent with universal law.²³²

²²⁹ Cf. *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, 38-40.

²³⁰ For the Society of Jesus, a general congregation is the highest authority and is an assembly of Jesuit representatives from all the provinces of the Order in the world. General congregations are only held for one of two reasons: the election of a new superior general, or to update the proper law of the order. Held infrequently and only as needed, there have only been 35 general congregations since the mid-1500s, the time of the founding of the Society of Jesus. PADBERG, (ed.), *The Constitutions of the Society of Jesus and Their Complementary Norms: A Complete English Translation of the Official Latin Texts*, 345, no. 333. Why have there been so few general congregations? Ladislav Örsy writes: “St. Ignatius was eager to prevent his Society from prolonged introspection at the expense of its apostolic activities.” L. ÖRSY, “Some Questions about the Purpose and Scope of the General Congregation,” in *Studies in the Spirituality of Jesuits*, 4 no. 3 (1972), 87. Cf. BLANGIARDI, *The General Congregation as an Instrument of Governance in the Society of Jesus*, 47-62.

²³¹ Strictly speaking, the laws that constitute the proper law of the Society of Jesus are identified in the “Preamble” of the *Manual for Juridical Practice of the Society of Jesus*. It reads: “The Society [of Jesus] is governed by the universal law for institutes of consecrated life in general and for religious in particular and by its own proper law whether approved or confirmed by the Supreme Pontiffs in specific form or not (and which is contained in the Formula of the Institute and other Apostolic letters and in the Constitutions and their Complementary Norms, still existing decrees of General Congregations, the formulas of Congregations, rules, ordinances and instructions of the Superior General.” *Manual for Juridical Practice of the Society of Jesus*, translated by C.J. MOELL, Rome, Curia of the Superior General of the Society of Jesus, 1997, 3. Moreover, individual Jesuit provinces may have additional rules or policies that are unique to their particular region; these rules or policies are enforceable only to those provinces and do not apply to the rest of the Society of Jesus. Cf. R.J. KASLYN, “The Jesuit Ministry of Publishing: Overview of Guidelines and Praxis,” in *Studies in the Spirituality of Jesuits*, 40 no. 3 (2008), 4-20.

²³² The importance of ensuring consistency between proper law and universal law should not be underestimated. For this very purpose, commentators suggest that it is good practice to cite or to reference the Code in proper law. Michael O’Reilly writes: “Sometimes, canons of the Code are cited in the proper law, in which case it is necessary that they be quoted exactly or, alternatively, that the proper law merely give a reference to the canons. A concrete illustration of this is the rather complex and most important universal law regarding the dismissal of members of [religious] institutes. Apart from the concession in [can 696 §2] allowing the institute’s own law to assign less grave reasons for the dismissal of a member in temporary vows, the universal laws on the dismissal reasons and procedures are of obligation. Should it be

As a directory for the administration of ecclesiastical goods for the Jesuits, the *IAG* goes into greater depth than the *Constitutions of the Society of Jesus*.²³³ The *IAG* not only covers the organizational operation of the order, but it also addresses: the different levels of financial administration within that organizational structure; the roles of local and major superiors; how apostolates relate to the leadership of both the Jesuits and the local hierarchy; guidelines for financial investments; mandates concerning the surplus or the excess of goods; directives on fundraising, income, and stipends; and the obligation to provide financial assistance to other provinces/regions of the Jesuits as needs arise.²³⁴ Moreover, in recognizing local customs and civil laws, the *IAG* notes that individual provinces of the order are free to make appropriate adaptations in order to fit their individual needs and circumstances. The following are excerpts from the *IAG* pertaining to the care of ecclesiastical goods:²³⁵

[11] The temporal goods of the Society are to be considered as belonging to Our Lord Jesus Christ and as the patrimony of His poor. On these, the spiritual goods and the well being of the Society greatly depend. The Society of Jesus can scarcely exercise its spiritual ministry without them.

desired to have the exact text of the universal law about this and other matters inserted into the book containing the proper law, it might be clearer and save from any ambiguity, if the canons were simply inserted verbatim as an appendix of relevant canons, with a reference, at least in some cases, at the respective norms of the proper law.” O’REILLY, “The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life,” 298.

²³³ According to the proper law of the Society of Jesus, although the *IAG* is part of the proper law of the order, it does not have the same standing as the *Constitutions of the Society of Jesus*. The Preface of the *IAG* explains: “As with all documents of this type in the Society, the [*IAG*], in its entirety, has only advisory force. Each of its provisions, in particular, has the force of its source; be it Canon Law, the Society’s pontifical law, the Constitutions of the Society and Complementary Norms, Decrees of General Congregations, or Ordinances of the Superior General.” *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, 39.

²³⁴ This is the Charitable and Apostolic Fund of the Society of Jesus, commonly referred to as the FACSI. Individual Jesuits as well as communities are asked to make annual contributions to the FACSI, which is a grant based out of the office of the General Superior of the Jesuits. Different apostolates or works are all eligible to apply for this grant through one of the major Superiors.

²³⁵ *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, 41. Note that the numbers in brackets correspond to the paragraphs found in the *IAG*.

[12] The Society of Jesus is totally directed toward the realization of its end – the glory of God and the help of souls. Financial management is a fundamental and necessary apostolic service in the Society. Financial administration promotes and achieves this end as it helps the members of the Society of Jesus, its houses, works and provinces, to practice faithfully the religious poverty that is appropriate.

[14] Those who administer the goods of the Society should do so with diligence and faithfulness. They are not owners managing their own goods as they please; they are persons with a mandate to administer goods entrusted to their care in accord with the laws of the Church and the Society.

[21] The apostolic works of the Society, as distinct from communities (for example, a university, a high school, a spirituality center, a social center, a publishing company or magazine) are not in themselves canonically juridic persons. The canonical status of these institutions depends on the community to which they pertain. In order to become a juridic person independent of a community, an institution would have to have special permission from the competent authority.

[38] Ordinary financial administration encompasses all those acts normally necessary and useful for the conservation of resources, the generation of a reasonable return on the assets and a systematic application of any income created.

[39] Extraordinary financial administration encompasses those acts that go beyond what is normally necessary for simple conservation and a reasonable return on the goods.

[40.1] By reason of their appointment, financial administrators receive the necessary authority to acts of ordinary financial administration.

[40.2] To perform acts of extraordinary financial administration, financial administrators require the special permission of the competent authority.

[41] As determined by the Holy See, the General has a maximum limit on the value of goods he can allow to be alienated. This limit has come to be, for practical reasons, the limit established by the Episcopal Conference in each country. For instances that exceed this limit, it is necessary to appeal to the Holy See.

[43] For purely administrative acts (that contain no alienation) that are financed by available resources (without the need for outside debt financing), the General has no limit.

[44] The General can delegate to Provincials the administrative faculties he has. However, if he judges it better, he can delegate lesser faculties (a lower established limit).

[52] Goods owned by the Society of Jesus are those that pertain to a canonically juridic person of the Society. These goods are: [52.1] those belonging to the universal Society, as distinct from provinces and regions; [52.2.] those belonging to provinces and regions (missions) as distinct from houses-communities and the apostolic works; [52.3] those belonging to houses and communities; [52.4] those belonging to apostolic works owned by the Society; and [52.5] those belonging to pious foundations, autonomous or non-autonomous, of the Society.

[56] Administration of the ecclesiastical goods is the responsibility of the person (Superior/director) who has most immediate charge of the canonically juridic person, unless particular law, statutes or lawful custom provide otherwise and with due regard for the right of the Ordinary to intervene in case of negligence by the financial administrator.

[57] In the Society, each administrative entity manages its own goods in the areas of its competency. This is accomplished within a system of subordination whereby, according to their respective competence, superiors in government and administration orient the administration of their subordinates, supervise them, and grant authorizations and necessary permissions.

[46.1] The alienation of goods (either in the strict or broad sense)²³⁶ when the value of the transaction is over the established limit that each Superior or Director has been delegated, requires the permission of the immediate superior, or depending upon the amount of the transaction, of the Holy See.

[46.2] Though their value may not exceed the established limit, alienation of goods that have been given to the Church as the result of a vow, are of high historical, artistic value, or are important relics, always needs the permission of the Holy See.

2.6.3 — Conflict of Laws: Proper Law and Universal Law

From the brief example above taken from the proper law of the Jesuits, it is clear that efforts should be made to ensure that the proper law of an institute does not conflict with the universal law. After all, as Michael O'Reilly notes, the mandate is clear: “[as] a general principle, the proper law must be in accord with the universal law [and that proper law’s] prescriptions may not be contrary to prescriptions of the universal law (cf. can. 6 §1).”²³⁷ Thus, the principle of subsidiarity best describes the relationship between proper law and universal law. Rosemary Smith writes:

The principles of stewardship, subsidiarity, and accountability permeate Book V and should be evident also in administering the [ecclesiastical] goods of a religious institute. One example of the principle of subsidiarity, found in the second paragraph of [canon 635], is its emphasis on the institute’s taking responsibility for expressing its particular charism. This paragraph links [the] concern about the appropriate handling of ecclesiastical goods with [the] concern for the special character of a religious institute. Each institute is to apply the [universal] law of the Church, found in [Book V], in such a way that the poverty characteristic of that particular institute is fostered, protected, and expressed. Community practices, the manner of acquiring temporal goods (e.g., begging), modes of sharing within the institute and with those in need, the balance of dependence

²³⁶ Alienation in the *strict* sense is understood in the *IAG* as any transfer of ownership over something. In the *broad* sense, alienation is understood as any transactions that can cause harm to the goods of a juridic person. Cf. *ibid.*, 47.

²³⁷ O'REILLY, “The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life,” 297. Cf. MCDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” 470. However, it is important to remember that, when proper law and universal law are not in conflict, the proper law of a religious institute supersedes universal law. Take, for instance, the requirement to have the appropriate permission before placing an act of alienation; Francis Morrissey writes: “there must be appropriate *permission* granted beforehand. Such permission may be either internal to the organization, or external as, for instance, when the authorization of the Holy See is required. In the case of [ecclesiastical] goods belonging to a religious institute, [canon] 638 §3 supersedes [canon] 1291 and the norms prescribed in the proper law of the institute are to be followed; these would indicate whose permission is required before the transaction can take place.” F.G. MORRISEY, “The Alienation of Temporal Goods in Contemporary Practice,” in *Studia Canonica*, 29 (1995), 298.

and interdependence, and the like are to be integrated into the [proper] law of each institute.²³⁸

Nevertheless, some conflicts between universal law and proper law cannot be avoided or even anticipated. When such conflicts arise, there must be some mechanisms in place to resolve them equitably. In anticipation of such conflicts, the Code implements ways to resolve them preemptively. For example, as a safeguard, the Code clarifies and definitively places certain acts of administration under the authority of an institute's proper law. This is arguably the objective canon 581 where the Code specifically assigns to the constitution of a religious institute the authority to determine the competent ecclesiastical authority within the religious institute, to decide how the institute can be divided into parts, what these parts are called, when and how to erect new parts, join parts, or when to redefine juridic boundaries.²³⁹ Another example can be found in canon 634 where the Code specifically assigns to the constitution of a religious institute establishing limits and restrictions concerning the capacity of that institute (and presumably institutions belonging to that institute) to acquire, possess, administer, and alienate temporal goods. Moreover, the Code forbids a diocesan bishop from approving or altering the constitution of a religious institute subject to him in a way that would be contrary to what is provided in universal law.²⁴⁰ In all of these situations, the motivating factor is to clarify jurisdiction—i.e., to identify where universal law ends and where proper law begins. As O'Reilly points out: “[There] is a clear distinction made as regards

²³⁸ SMITH, “Temporal Goods and Their Administration [cc. 634-640],” 799.

²³⁹ Cf. S. HOLLAND, “Section I: Institutes of Consecrated Life (cc. 573-730),” in J.A. CORIDEN, T.J. GREEN, and D.E. HEINTSCHEL (eds.), *The Code of Canon Law: A Text and Commentary*, New York, NY, Paulist Press, 1985, 457.

²⁴⁰ MCDERMOTT, *The Consecrated Life: Cases, Commentary, Documents, Readings*, 50.

what should be decided by [universal law] and what may rather be decided...by the proper law of the [religious] institute.”²⁴¹

Even so, what happens when there are conflicts between universal law and proper law? What happens when such conflicts had not been anticipated? While each institute has its own unique charism, that uniqueness cannot displace universal law. For this reason, the proper law of a religious institute is always subject to (or subordinate to) the legislation of the Church.²⁴² Thus, if conflicts do exist (or if they arise due to ambiguities) between what universal law intends and what proper law demands, proper law has the burden to provide adequate solutions to the conflicts.²⁴³

2.7 — Canon 1295

As mentioned before, the stable patrimony of a public juridic person constitutes “the minimum secure financial basis to enable the juridical person to subsist autonomously and to attend to the purposes and services proper to it.”²⁴⁴ Therefore, it is critical for a public juridic person to safeguard its stable patrimony. Nonetheless, while not intending to endanger the stable patrimony, an administrator of ecclesiastical goods could very well engage in transactions which could worsen the patrimonial condition of the public juridic person. Thus, canon 1295 requires that certain precautions be taken in

²⁴¹ O'REILLY, “The Proper Law of Institutes of Religious Life and of Societies of Apostolic Life,” 299. Cf. W.J. KING, “Sponsorship by Juridic Persons,” in R. SMITH, W. BROWN, and N. REYNOLDS (eds.), *Sponsorship in the United States: Theory and Praxis*, Washington, DC, Canon Law Society of America, 2006, 63.

²⁴² GHIRLANDA, *Il diritto nella Chiesa, mistero di comunione: Compendio di diritto ecclesiale*, 211.

²⁴³ MORRISEY, “Temporal Goods and Their Administration, cc. 634-640,” 1675. Cf. can. 135 §2; MCDERMOTT, “Governance in Religious Institutions: Structures of Participation and Representation, Canons 631–633,” 467-468.

²⁴⁴ LÓPEZ ALARCÓN, “Book V: Temporal Goods of the Church,” 993.

order to safeguard the stable patrimony of the public juridic person in such circumstances.

2.7.1 — Requirements of Canon 1295

Canon 1295 reads:

The requirements of cann. 1291-1294, to which the statutes of juridic persons must also conform, must be observed not only in alienation but also in any transaction²⁴⁵ which could worsen the patrimonial condition²⁴⁶ of a juridic person.²⁴⁷

²⁴⁵ While canon 1295 uses the term *transactions*, its precursor—canon 1533 of the *CIC/17*—used the term *contracts* instead. It is important to note that even in the *CIC/17*, however, the term *contract* was used broadly to refer to a variety of financial transactions to include not only bilateral transactions, but also unilateral transactions involving the transfer of rights and obligations as well. Cf. VROMANT, *De bonis Ecclesiae temporalibus ad usum utriusque cleri, praesertim missionariorum*, 316-317. In the *CIC/83*, canon 1295 picks up this same theme but uses the term *transaction* instead of *contract* in order to dispel any confusion concerning what types of transacts fall under canon 1295. However, in following in the spirit of the *CIC/17*, the notion of contract is not lost in the *CIC/83*; in fact, “Title III” of *Book V* of the *CIC/83*—which includes canons 1290 to 1298—is entitled “Contracts and Especially Alienation.” In his commentary on canon 1295, Renken refers to canon 1295 transactions as *threatening contracts*. He writes: “First, canon 1295 concerns contracts. Canon 1290, the first canon of ‘Title III,’ makes it clear that the remaining canons in the same title concern three distinct kinds of contracts: that is, those involving alienation ([canons] 1291-1294; 1296, 1298), threatening transactions which are not alienation ([canon] 1295), and leases ([canons] 1297-1298).” J.A. RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” in *Studia Canonica*, 45 (2011), 506. To learn more about how the term *contracts* was used in the *CIC/17*, see J.L. JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, CLS no. 553, Washington, DC, The Catholic University of America, 1997, 126-134.

²⁴⁶ This canon uses the term *patrimonial condition* instead of *stable patrimony*. It should be noted that these two terms have the same meaning in *Book V*. Robert Kennedy writes: “From the canonical point of view, economic well-being is rooted in stable patrimony, namely, in all property destined to remain in the possession of its owner for a long or indefinite period of time and, hence, property on which the financial future of a public juridic person depends. That is the meaning of ‘patrimonial condition’ referred to in canon 1295.” KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1502.

²⁴⁷ Canon 1295 uses the term *juridic person* without distinguishing whether this refers to a public juridic person or a private juridic person. Merely using the term *juridic person* can lead to speculation whether or not transactions of private juridic persons fall under this canon. It should be clear, however, that canon 1295 pertains exclusively to the public juridic persons. Kennedy writes: “There is nothing in the wording of canon 1295 that either explicitly or implicitly expresses an intention to include private juridic persons within its scope. Moreover, canon 1291 makes clear that the norms governing alienation found in canons 1291-1294 apply only to the stable patrimony of public juridic persons, and it is the chief purpose of canon 1295 to apply canons 1291-1294 to transactions other than alienation. That would seem to make clear that canon 1295 is similarly limited to public juridic persons. It is also noteworthy that the modifier ‘public,’ absent in canon 1295, is also absent in canons 1292-1294, though there can be no doubt that those canons, forming a cluster with canon 1291, apply only to public juridic persons. Canon 1295, explicitly referring to canons 1291-1294, seems clearly to be part of the same cluster.” *Ibid.*, 1502.

What is required by canon 1295 is clear: any transactions which could somehow have a negative impact on the stable patrimony of a public juridic person must follow the requirements what are articulated in canons 1291 to 1294. As such, it is important to consider what are the scope and expectations of canon 1295.

The first observation to note is that canon 1295 pertains only to goods designated as stable patrimony.²⁴⁸ Therefore, ecclesiastical goods that have not been designated as stable patrimony do not fall under the scope of this canon. The second observation to note is that canon 1295 applies only to transactions involving stable patrimony whose spending amounts exceed the minimum limit as established by the conference of bishops.²⁴⁹ Thus, transactions that do not exceed the minimum limit established by the conference of bishops remain outside the scope of canon 1295. However, for all transactions that exceed the minimum amount established by the conference of bishops, canon 1295 requires that written permission from the competent ecclesiastical authority be obtained prior to placing them.²⁵⁰

The competent authority to grant the necessary permission to place transactions which can worsen the patrimonial condition of a public juridic person will depend on the public juridic person which is seeking such permission. For example, if the public juridic person is a diocese or an institution that is subject to the diocesan bishop, the competent

²⁴⁸ Cf. can. 1291.

²⁴⁹ JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, 88. Cf. can. 1292 §1. For religious institutes, the requirements necessary to place transactions which can worsen the patrimonial condition of the juridic person should be addressed in their proper law—which should be in conformity with the requirements stipulated by universal law (i.e., canons 1291 through 1294). Cf. RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 281.

²⁵⁰ HUELS, *The Pastoral Companion: A Canon Law Handbook for Catholic Ministry*, 416. Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1505; can. 1291.

authority to grant the necessary permission would be the diocesan bishop. However, before he can grant such permission, the diocesan bishop must first have the consent of the diocesan financial council and the college of consultors—along with any interested party who may be affected by the transaction if the situation demands it.²⁵¹ If the public juridic person is an institution not subject to the diocesan bishop, the competent authority to grant the permission is designated in the institution's statutes.²⁵² If the public juridic person is a religious institute, the competent authority is designated in the institute's proper law.²⁵³ Moreover, for all of these public juridic persons (i.e., a diocese, an institution subject to the diocesan bishop, an institution not subject to the diocesan bishop, or a religious institute), if the transaction in question exceeds the maximum spending limit as determined by the conference of bishops, then permission from the Holy See is also (*insuper*) needed before an administrator of ecclesiastical goods can place such a transaction.²⁵⁴

Apart from the nature of ecclesiastical goods involved (i.e., stable patrimony or not) and the spending limits, the Code provides additional requirements that must be met before permission can be granted for transactions which can worsen the patrimonial condition of the public juridic person. For example, if a transaction involves divisible

²⁵¹ Cf. can. 1292 §1.

²⁵² Cf. can. 1292 §1.

²⁵³ The proper law of a religious institute should also include provisions concerning the spending limits. Generally, these limits mirror those set by the conference of bishops. Moreover, the proper law of a religious institute may also require that the superior who has the authority to grant permission to an administrator to place a transaction which may worsen the patrimonial condition of the public juridic person to have first the consent of his or her council before granting such permission. Cf. can. 638 §3; *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, 47; BLANGIARDI, *The General Congregation as an Instrument of Governance in the Society of Jesus*, 119-121.

²⁵⁴ Cf. can. 1292 §2.

assets, canon 1292 §3 requires that all related information be disclosed before permission can be granted. Canon 1292 §4 stipulates that those who have the authority to give consent or counsel should be thoroughly informed of the economic status or condition of the public juridic person—including any relevant financial history that may affect the proposed transaction—before permission can be granted. Canon 1293 §1, 1° only permits transactions which can worsen the patrimonial condition of the public juridic person whose value exceeds the defined minimum amount in situations where there is a *just cause, urgent necessity, evident advantage, piety, charity, or other grave pastoral reasons*. Finally, in order to avoid harm to the Church and as a matter of policy, canon 1293 §2, 2° requires that there be written appraisals of assets by at least two experts, and canon 1294 §1 stipulates that the appraised price of the assets should be the price sought.²⁵⁵

The requirements to place valid transactions which could worsen the patrimonial condition of a public juridic person are both exact and stringent. While canon 1295 concerns acts of administration and not acts of alienation, the requirements stipulated in this canon are the same as those established for acts of alienation. Consequently, the Code holds transactions that can worsen the patrimonial condition of a public juridic person and acts of alienation of the stable patrimony of a public juridic person on the same level of importance or seriousness.²⁵⁶ The risk to the stable patrimony of the public juridic person and the need to preserve and protect this patrimony all point to the fact that the Code does not consider canon 1295 transactions as acts of ordinary administration.

²⁵⁵ RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 510. Cf. MYERS, “Book V: The Temporal Goods of the Church (cc. 1254-1310),” 881-882.

²⁵⁶ Cf. DE PAOLIS, *De bonis Ecclesiae temporalibus: Adnotationes in Codicem, Liber V*, 107.

Although the Code does not specifically say it, one can nevertheless argue that, because of the grave nature involved, any transaction which can worsen the patrimonial condition of a public juridic person constitutes an act of extraordinary administration. Supporting this conclusion, Renken writes:

Acts of extraordinary administration must be clearly defined; absent the clear designation that a certain act of administration is extraordinary, one must conclude that it is ordinary and that its administrator can perform the act validly without the prior written faculty of the ordinary. Still, given the significant threat to the patrimonial condition of a public juridic person involved in canon 1295, it seems that the canon concerns an act which by its very nature is an act of extraordinary administration.²⁵⁷

2.7.2 — Canon 1295 Transactions

The Code stipulates that *any transaction* which could worsen the stable patrimonial condition of a juridic person must follow the requirements articulated in canons 1291-1294.²⁵⁸ The Code, however, does not identify these transactions. What is clear, however, is that canon 1295 concerns contracts—specifically *threatening contracts*.²⁵⁹ The *Black's Law Dictionary* defines a contract as “[an] agreement between two or more parties creating obligations that are enforceable or otherwise recognizable at law [...]; or a promise or set of promises by a party to a transaction, enforceable or otherwise recognizable at law [...]”.²⁶⁰ In the case of canon 1295, what makes a contract *threatening* is the risk or the potential loss of ownership or control of the stable

²⁵⁷ RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 513.

²⁵⁸ The equivalent of canon 1295 of the *CIC/83* in the *CCEO* is canon 1042. Cf. NEDUNGATT, (ed.), *A Guide to the Eastern Code: A Commentary on the Code of Canons of the Eastern Churches*, 703-707.

²⁵⁹ RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 506. Cf. JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, 108.

²⁶⁰ *Black's Law Dictionary*, 389.

patrimony.²⁶¹ What is important to note is that the actual loss of ownership or control of the stable patrimony is not necessary. The risk or threat of such a loss of the stable patrimony—however remote—is sufficient to place a transaction under the scope of canon 1295.²⁶² Renken writes:

When a transaction governed by canon 1295 occurs, ownership is not transferred—but the ownership is reasonably judged to be threatened by the transaction. Alienation focuses *ad extra*—on passing ecclesiastical goods to another; a transaction governed by canon 1295 focuses *ad intra*—on protecting ecclesiastical goods which one wishes to retain as stable patrimony.²⁶³

Consequently, transactions that fall under the scope of canon 1295 are transactions that involve risky or threatening contracts that expose or make vulnerable the stable patrimony of a public juridic person. When an administrator of ecclesiastical goods engages in such transactions, the stable patrimony of the public juridic person is particularly at risk of being diminished. In the United States, the USCCB issued the following guidelines for discerning what constitutes transactions falling under the scope of canon 1295:

The application of canon 1295 is contingent on the level of risk and on the economic condition of the public juridic person. The canon deals with such matters as the transfer of rights such as easements, mortgages, liens, and options as well as with incurring debt, including guarantees, surety and gift annuities, and the making of unsecured loans. The canon encompasses accepting an obligation, giving up a right, assuming a debt, or being responsible for the liability of another.²⁶⁴

Apart from the USCCB, moreover, it may be helpful to consider what some commentators have observed regarding canon 1295 transactions. Francis Morrisey writes:

²⁶¹ RENKEN, “Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295,” 507.

²⁶² Cf. KENNEDY, “Book V: The Temporal Goods of the Church [cc. 1254-1310],” 1503.

²⁶³ RENKEN, *Church Property – A Commentary on Canon Law Governing Temporal Goods in the United States and Canada*, 282.

²⁶⁴ USCCB, *Diocesan Financial Issues*, 2002 (Revised January 2009), p. XV-6, available at: <http://www.usccb.org/about/financial-reporting/upload/Diocesan-Financial-Issues-Manual.pdf> (last accessed 26 August 2015).

Among the acts which would certainly come under [canon] 1295, we could list the following: (a) borrowing money; (b) taking out mortgages; (c) entering into long-term leases; (d) changing the status of ownership (such as turning over certain properties to secular boards).

These acts would be subject to the prescriptions of the canon because, in one way or another, they risk jeopardizing the stable patrimony of the [juridic] person. Three elements usually enter into account when determining whether there is a risk of jeopardy: (a) loss or diminishing of *ownership*; (b) loss or diminishing of *sponsorship*; (c) loss or diminishing of *control*.²⁶⁵

Robert Kennedy writes:

Mortgaging a parcel of real estate or pledging valuable items of personal property as collateral to secure the repayment of a loan are often given as examples of canon 1295 transactions, as are granting easements, licenses, liens, or options to purchase, contracting to pay annuities, making unsecured loans, acting as guarantor or surety, transferring operational control of one's assets while retaining ownership, and incurring debts even if unsecured by collateral. Such a listing can be misleading, however, since each of the examples may or may not be a canon 1295 transaction depending upon the potential impact upon the overall patrimonial condition of the public juridic person. The application of canon 1295 is necessarily relative, depending on both the degree of risk involved and the economic condition of the public juridic person.²⁶⁶

Finally, Jerome Jung writes:

Canon 1295 makes the [canonical] requirements for alienation applicable to transactions which, although not alienations, may nonetheless worsen the patrimonial condition of a public juridic person. The [canon] is intentionally general and open-ended. It purports to cover a large class of transactions which are not alienations as such, but which can generate effects (sometimes inadvertently) similar to alienations, or which can otherwise expose a public juridic person to the risk of economic harm. The most obvious examples of such transactions include mortgaging or pledging property, granting easements, and corporate restructuring.²⁶⁷

²⁶⁵ MORRISEY, "The Alienation of Temporal Goods in Contemporary Practice," 311.

²⁶⁶ KENNEDY, "Book V: The Temporal Goods of the Church [cc. 1254-1310]," 1502. While Kennedy makes a strong argument concerning the subjective nature regarding the application of canon 1295, it is important to note that this does not mean that the applicability of canon 1295 is based solely on a subjective criteria. Canon 1295 refers to canon 1292—which specifically refers to the minimum and maximum spending limits defined by the conference of bishops, and that these spending limits are to be used as criteria to determine whether or not permission is required in order to place such transactions. Thus, it is arguable that canon 1295 does have an objective criteria to determine what constitutes a threatening contract or transaction which can worsen the patrimonial condition of a public juridic person. Renken writes: "Inasmuch as canon 1295 requires also the observance of canon 1292, however, there can be no doubt that canon 1295 requires permission from superior authorities only for threatening transactions beyond certain legitimately determined amounts. The universal law does not require permission from competent authority to enter threatening contracts if the monetary amount involved is below the legitimately established figure." RENKEN, "Contracts Threatening Stable Patrimony: The Discipline and Application of Canon 1295," 512.

²⁶⁷ J.L. JUNG, "Property Transactions That May Jeopardize the Patrimonial Condition of Public Juridic Persons in the Church," in *Catholic Lawyer*, 41 (2001), 86.

Along with the USCCB, the above commentators seem to agree that all canon 1295 transactions share two major characteristics. These transactions are both risky and they are full of uncertainties. Canon 1295 transactions are risky because they can potentially expose the stable patrimony of a public juridic person to being reduced or to being completely depleted. Moreover, these transactions—e.g., unsecured loans, mortgaging or pledging property, corporate restructuring—are full of uncertainties because they provide no guarantee that the patrimonial condition of a public juridic person will remain uncompromised in the end. Consequently, the risks and the uncertainties involved in canon 1295 transactions definitely make them threatening to the patrimonial condition of the public juridic person—thus, the need to safeguard the stable patrimony of a public juridic person is justified.²⁶⁸

2.7.3 — Reorganization Bankruptcy as a Canon 1295 Transaction

In addition to transactions involving the acquisition of unsecured loans, the mortgaging/pledging of property, the changing the status of ownership, and the act of entering into long-term leases as mentioned above, one could argue that the filing of a Chapter 11 bankruptcy is also included among the transactions falling under the scope of canon 1295.²⁶⁹ The term *bankruptcy* does not appear in the *CIC/83*, and there is nothing in the Code that comes near to a bankruptcy process. Still, several civilly incorporated public juridic persons have filed for bankruptcy in the United States in recent years. Consequently, it is practical to ask the following questions: How should a public juridic

²⁶⁸ Cf. DE PAOLIS, *De bonis Ecclesiae temporalibus: Adnotationes in Codicem, Liber V*, 107.

²⁶⁹ Madeline Welch observes that canon 1295 “provides that any decision that would jeopardize the patrimonial condition of [a Catholic religious institution] requires the same approvals as are needed for the sale of the property of [that institution].” WELCH, “Sponsorship,” 106.

person that has civil incorporation deal with the prospect of having to file for bankruptcy in the United States? Is the filing of bankruptcy contrary to canon law? How will the patrimonial condition of a public juridic person be impacted in a bankruptcy filing and can there be any guarantee that it will not be worsened in the process? Finally, should the filing of bankruptcy be considered an act of extraordinary administration under canon law?

As it will become more apparent in the subsequent chapters, one of the goals of a Chapter 11 bankruptcy is to arrive at a viable reorganization plan. A reorganization plan is “[a] financial restructuring of a corporation, [especially] in the repayment of debts, under a plan created by a trustee and approved by a court.”²⁷⁰ Consequently, one of the primary purposes of a reorganization plan is to establish a contractual agreement between the interested parties in a bankruptcy filing in order to reorganize outstanding debts and pave a way to move forward. This is, after all, the main reason why any corporation would file for a Chapter 11.²⁷¹

For public juridic persons in the United States, the filing of a Chapter 11 bankruptcy is a process that involves risks and uncertainties. This is particularly true because these public juridic persons must inevitably operate under two different systems of law—civil law and canon law—which, at times, can appear to be in conflict with one another. The area where the conflict of laws is most obvious usually involves property.

²⁷⁰ *Black's Law Dictionary*, 1490.

²⁷¹ Harvey Miller and Shai Waisman write: “The use of Chapter 11 [reorganization bankruptcy] persists because of its unique ability to bring all parties in interest to the table [...], marshal assets and liabilities of a debtor, and effect an efficient resolution of all of the claims against the debtor. Chapter 11, through procedures such as estimation and the use of reserve, can even address and resolve unknown or contingent liabilities.” H.R. MILLER and S.Y. WAISMAN, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” in *American Bankruptcy Law Journal*, 78 (2004), 195.

Specifically, how canon law understands property—particularly concerning the issues of ownership and control—can be at odds with how civil law understands property. For example, it is conceivable that some particular assets owned by a civil corporation may be required by a bankruptcy court in civil law system to be included in the bankruptcy estate. However, those same assets may be considered a part of the stable patrimony of the public juridic person under canon law and, for whatever reasons—albeit legitimate reasons—the competent ecclesiastical authority will not grant the administrator of ecclesiastical goods of that public juridic person the necessary permission to alienate these goods or to put them at risk.²⁷² Such a situation would make it difficult if not impossible for the public juridic person, because to follow one legal system entails the violation of another.

Presumably, concerns regarding the patrimonial condition of the public juridic person necessarily come to the forefront in any bankruptcy filing. The bankruptcy process would inevitably put the patrimonial condition of a public juridic person in a vicarious predicament since, among other things, there is very little guarantee in a bankruptcy process that the stable patrimony of the public juridic person will be protected. But even if there can be some guarantee that no stable patrimony will be diminished in a Chapter 11 proceeding, the diminishment of the other ecclesiastical goods could nevertheless have an indirect and oftentimes negative impact on the patrimonial condition of the public juridic person. As Jung clearly notes: “any transaction which may adversely affect the value of the patrimony may be subject to canon 1295,

²⁷² Cf. F.A. NADBORNY, “‘Leap of Faith’ Into Bankruptcy: An Examination of the Issues Surrounding the Valuation of a Catholic Diocese’s Bankruptcy Estate,” in *American Bankruptcy Institute Law Review*, 13 (2005), 839-894.

even though the patrimony in question is not subject to physical loss or damage.”²⁷³ Consequently, the involvements of risks and uncertainties—however slight—in a Chapter 11 bankruptcy filing are enough to constitute a canon 1295 transaction because, *by its very nature*, the filing of bankruptcy will worsen the patrimonial condition of the public juridic person—thus qualifying such act as an act of extraordinary administration.²⁷⁴

Conclusion

Juridic persons in canon law have the right to acquire, retain, administer, and alienate temporal goods. For public juridic persons in particular, their goods—referred to as ecclesiastical goods—play a central role in the life of the Church and its mission in the world. To this end, canon law is clear: the ecclesiastical goods of public juridic persons are to be used for divine worship, for the care and decent support of the clergy and other ministers, and for the works of the sacred apostolate and charity. Furthermore, in order to ensure that public juridic persons possess a minimum amount of assets, financial or otherwise, in order to exist and to carry out its intended purpose, the Code asserts that public juridic persons designate some portions of the their ecclesiastical goods as stable patrimony.

In order to ensure that ecclesiastical goods are properly maintained, protected, and used appropriately, the Code distinguishes acts of ordinary administration from acts of

²⁷³ JUNG, *Transactions Which May Worsen the Patrimonial Condition of a Public Juridic Person in the United States: A Study of Canon 1295*, 320. Additionally, there is no reason to justify that the requirements of canon 1295 are not applicable to public juridic persons engaging in civil litigation; rather, Jung argues that these requirements do apply. *Ibid.*, 133.

²⁷⁴ Cf. RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the CIC,” 594.

extraordinary administration based on the nature and gravity of the acts, and requires extra measure are taken when acts of extraordinary administration are carried out. The Code also recognizes the unique local economic circumstances and grants conferences of bishops the right to determine what constitutes acts of ordinary administration and acts of extraordinary administration for juridic persons under them. Under the same principle, the Code also grants diocese bishops and major superiors of religious institutes—through their particular law or their proper law, respectively—the competency to determine for themselves acts of administration that rise above acts of ordinary administration.²⁷⁵ In the case of diocese, for example, the diocesan bishop has the competency to determine for juridic persons in his diocese what constitute acts of ordinary administration which are more important under the economic condition of the diocese; criteria for such acts should, in theory, be included in the particular law of a diocese.²⁷⁶

Beyond acts of extraordinary administration and acts of alienation of ecclesiastical goods, however, there are transactions that fall under canon 1295. These are transactions which can worsen the patrimonial condition of public juridic persons. Since transactions under this category can harm the patrimonial condition of public juridic person, canon 1295 stipulates that the same kind of precautions should be taken for them as if they are acts of extraordinary administration or acts of alienation of the stable patrimony of a public juridic person.

As it will become more apparent in subsequent chapters, the filing of reorganization bankruptcy (under a Chapter 11 of *Title 11* of the Bankruptcy Code) most

²⁷⁵ Cf. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” 498.

²⁷⁶ Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 111-116.

appropriately fit under canon 1295. Unlike in a liquidation bankruptcy—where assets are liquidated completely—a reorganization bankruptcy allows the bankrupt corporation to retain both ownership and control of its assets while reorganizing its debts. It is arguable that, for civilly incorporated public juridic persons in financial distress, petitioning for reorganization bankruptcy under a Chapter 11 bankruptcy is the most viable alternative under both civil law and canon law. Moreover, language of canon 1295 opens that opportunity and makes the filing of bankruptcy protection possible.

Chapter 3 — REORGANIZATION: PROCEDURE AND PROCESS

“Bankruptcy is about financial death and financial rebirth. Bankruptcy is the great American story rewritten. We’re a nation of debtors.”¹

Elizabeth Warren

Introduction

The term *bankrupt* comes from the Italian term *banca rotta*, which is translated to mean *broken bench*.² According to the practice in Italy during the medieval period, a merchant would display his goods on benches or stalls in the market place. When the debtor had incurred debts and was unable to meet his debt obligations, his creditors would literally smash or break his benches as retribution and whatever useable goods remained would be taken as restitution. The debtor would be without goods to sell and no place to conduct his business; he would be left with no viable options but to close shop—at least until he could rebuild again by acquiring new benches and goods to sell.

Bankruptcy is understood as the quality, state, or condition of being without enough money to pay back what one owes.³ The filing of bankruptcy is thus a legal proceeding available to persons—both natural and legal—when their total liabilities

¹ Gretchen GAVETT, “Elizabeth Warren: Essential Interviews,” in *Frontline*, 14 September 2011, available at: <http://www.pbs.org/wgbh/pages/frontline/business-economy-financial-crisis/breaking-the-bank/elizabeth-warren-the-essential-interviews/> (last accessed 25 June 2015).

² J. HONSBERGER, “The Nature of Bankruptcy and Insolvency in a Constitutional Perspective,” in *Osgoode Hall Law Journal*, 1 (1972), 202. While not referring to bankruptcy specifically, both the Old Testament and the New Testament contain several examples of debts and how debtors were dealt with. For instance, Exodus 22:14 refers to the need to make full restitution for things borrowed that had been destroyed while in the possession of the borrower; Proverbs 22:7 refers to how the borrower becomes the lender’s slave; Ecclesiastes 5:5 contends that it is better for a person not to vow than to vow and be made to repay; and in Matthew 18:21-35, Jesus tells the parable of an unmerciful servant who imprisoned his fellow servants who were unable to pay their debts to him.

³ B.A. GARNER and H.C. BLACK (eds.), *Black’s Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 174. Laws governing debtor-creditor formation and relationship are jurisdiction dependent, and may touch on other legal aspects such as contracts, torts, security (including liens), suretyships, etc. The scope of this work presumes that a debtor-creditor relationship exists, and does not consider how it developed in the first place.

exceed their total assets. Bankruptcy is motivated by two objectives: (1) to resolve competing claims multiple creditors, and (2) to free debtors from their financial past.⁴ Ultimately, what debtors seek in a bankruptcy filing is a second chance—a *fresh start*.⁵

Rather than an indication of financial failure as it was perceived in the past, the filing of bankruptcy (particularly reorganization bankruptcy) has become a business strategy—one in which the financial interests of both debtors and creditors can be protected.⁶ For debtors, a successful bankruptcy filing can include a reorganization of debts, a discharge of debts, or both. For creditors, a successful bankruptcy entails not only the recovery of debts, but it can also include the ability to participate in the creation of a reorganization plan—one which protects their economic interests.⁷ Richard Sauer writes:

[Bankruptcy] measures have the additional salutary effect of preventing costly squabbles among creditors over their mutual debtors' property by imposing a comprehensive, equitable scheme of distribution. Under a state "grab law" regime, each creditor, fearing that he who grabs last grabs least, will incur the costs of constantly monitoring his debtors so as to be first on the ground when insolvency looms, as well as litigation expenses when other creditors rush to compete for the debtor's assets. This practice is injurious to credit because it produces a feeling of insecurity [...]. Bankruptcy remedies this through the mechanism of "preference avoidance," which defeats the advantage of creditors who were quicker on the draw by returning their takings to the bankruptcy estate to be distributed equally among all claims [...]. The threat of

⁴ C.J. TABB, *The Law of Bankruptcy*, 2nd ed., New York, NY, Thomas Reuters/Foundation Press, 2009, 1.

⁵ K.J. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, Berkeley, CA, University of California Press, 1999, 22. Cf. *Stellwagen v. Clum*, 245 U.S. 605 (1917) at 617; R.S. DAVIS, "Protection of a Debtor's 'Fresh Start' under the New Bankruptcy Code," in *Catholic University Law Review*, 29 (1980), 843-866; D.A. SKEEL, "Bankruptcy Phobia," in *Temple Law Review*, 82 (2010), 341.

⁶ C.J. TABB, "The Future of Chapter 11," in *South Carolina Law Review*, 44 (1993), 802. Cf. E.M. DOWDELL, "The Chapter 11 'Shuttle'—Coincidence or Competitive Strategy?" in *Journal of Air Law and Commerce*, 71 (2006), 669-690.

⁷ L.E. LEVINHAL, "The Early History of Bankruptcy Law," in *University of Pennsylvania Law Review and American Law Register*, 66 (1918), 225. Cf. S.J. LUBBEN, "The 'New and Improved' Chapter 11," in *Kentucky Law Journal*, 93 (2005), 848-856; R.M. HYNES, "Optimal Bankruptcy in a Non-Optimal World," in *Boston College Law Review*, 44 (2002), 5; R.M. HYNES, "Reorganization as Redemption," in *Virginia Law & Business Review*, 6 (2011), 192-193.

preference avoidance, moreover, discourages creditors from the premature liquidation of their collateral, and thus keeps debtors in gainful control of assets that have greater going concern than liquidation value [...].⁸

For corporations⁹ in the United States, bankruptcy typically involves two kinds:

(1) liquidation bankruptcy or (2) reorganization bankruptcy. *Title 11* of the *United States Code*¹⁰—also referred to as the Bankruptcy Code—governs both of these types of bankruptcies. Liquidation bankruptcy is found under Chapter 7 of the Bankruptcy Code,¹¹ while reorganization bankruptcy is found under Chapter 11 of the Bankruptcy Code.¹² Since this thesis deals with civilly incorporated public juridic persons in the United States and their ability to filing for reorganization bankruptcy, the scope of this chapter will be Chapter 11 bankruptcy.¹³

⁸ R.C. SAUER, “Bankruptcy Law and the Maturing of American Capitalism,” in *Ohio State Law Journal*, 55 (1994), 299.

⁹ Bankruptcy can be either personal or corporate. Corporate bankruptcy typically refers to medium and large sized firms, while personal bankruptcy typically refers to individual natural person and/or small businesses owned by individual persons or partnership. Cf. M.J. WHITE, “Corporate and Personal Bankruptcy Law,” in *Annual Review of Law and Social Science*, 7 (2011), 141. In this thesis, corporate bankruptcy will refer to any types of businesses that have been civilly incorporated, while personal bankruptcy will refer to individual natural persons that have not been civilly incorporated.

¹⁰ *United States Code*, available at: <http://www.gpo.gov/fdsys/browse/collectionUScode.action?collectionCode=USCODE&searchPath=Title+42%2FCHAPTER+21&oldPath=Title+42%2FCHAPTER+2&isCollapsed=true&selectedYearFrom=2013&ycord=2533> (2013), (= the U.S Code or U.S.C).

¹¹ Chapter 7 of *Title 11*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11-chap7.pdf>, (= Chapter 7, Chapter 7 bankruptcy, or liquidation bankruptcy).

¹² Chapter 11 of *Title 11*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11-chap11.pdf>, (= Chapter 11, Chapter 11 bankruptcy, or reorganization bankruptcy).

¹³ Note: While the information presented herein is accurate as of the date of completion of this work, it should not be cited or relied upon as legal authority. Therefore, this information should not be used as a substitute for reference to the *United States Bankruptcy Code (Title 11 of the United States Code)* and the Bankruptcy Rules, both of which may be reviewed at local law libraries, or at any local rules of practice adopted and disseminated by each bankruptcy court. Finally, the fact of this work should not substitute for the advice of competent legal counsel.

In order to have a better appreciation for the complexity of a Chapter 11 bankruptcy, this chapter will highlight some important historical developments of bankruptcy law. Specifically, this chapter will review early bankruptcy legislation in the United States, and will present a brief outline of the current Bankruptcy Code as enacted in 1978. Furthermore, this chapter will briefly look at some of the major elements of Chapter 7 bankruptcy in order to provide a reference point to understand better Chapter 11 bankruptcy.

3.1 — A Brief History of Bankruptcy Law

Modern bankruptcy law differs from nation to nation. The reasons for the differences are both historical and cultural.¹⁴ For example, early American bankruptcy law was similar (and in some ways identical) to that of eighteenth century English bankruptcy law. One of the reasons for this was because the United States had been a colony of the British Empire, and English commercial and mercantile laws had been implemented in what would become the United States.¹⁵ Consequently, early English bankruptcy laws served as a framework for the initial bankruptcy laws in the United States.¹⁶

Nevertheless, before there was the British Empire, there was the Roman Empire. Since all of Western civilization contains traces of the influence of Roman law, any

¹⁴ N. MARTIN, “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation,” in *Boston College International and Comparative Law Review*, 28 (2005), 2.

¹⁵ However, it is important to note that, while they were subjects of the English Crown, the early American colonists did enjoy a considerable amount of autonomy concerning business transactions within and among the colonies in America. Cf. T.A. FREYER, “Debt Failure and the Development of American Capitalism: Bruce Mann’s Pro-Debtor Republic,” in *Law & Social Inquiry*, 30 (2005), 741.

¹⁶ *Ibid.*, 743.

understanding of bankruptcy law should consider first how bankruptcy (or something akin to it) was practiced under Roman law.¹⁷ Although the term *bankruptcy* did not actually appear in Roman law, the first recognizable legislation concerning insolvent debtors can be traced back to around 450 B.C.E. in a collection of law known as the *Twelve Tables*. Rather like a legal procedural manual, the *Twelve Tables* had provisions to resolve conflicts between citizens in Roman society. In its treatment of the creditor/debtor relationship, the *Twelve Tables* essentially considered debtors as common criminals. Creditors had the right to demand restitution from their debtors; if restitution was not an option, the *Twelve Tables* gave creditors the right to seek retribution against their debtors—which usually meant corporal punishment or imprisonment of some sort.¹⁸

Louis Levinthal writes:

In the law of Rome, as set forth in the *Twelve Tables* (B.C. 451-450), the borrower was said to be *nexus* to his creditor, i.e., his own person was pledged for the repayment of the loan. If the borrower failed to fulfill his obligation, the creditor might arrest him by *manus injectio*, by the “laying on the hands,” a mode of execution which proceeded directly and with inexorable rigor against the person of the debtor. After having thrice publicly invited someone to come forward and pay the debt, the creditor might, in default of any one appearing, and after the lapse of sixty days, regard the debtor as his slave, and might either kill him or sell him into a foreign country Not only freedom and honor, but [also] life itself was at the mercy of the creditor.¹⁹

After the fall of the Roman Empire, there was not much development by way of formal bankruptcy or insolvency legislation in the Western world. While bankruptcy or insolvency laws existed at the local level in various European kingdoms (particularly in

¹⁷ S.J. LUBBEN, “A New Understanding of the Bankruptcy Clause,” in *Case Western Reserve Law Review*, 64 (2013), 326. Cf. H.J. BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, Cambridge, MA, Harvard University Press, 1983, 8-9.

¹⁸ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 12. Cf. C.J. TABB and R. BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 2nd ed., Newark, NJ, Matthew Bender & Company, Inc., 2006, 59.

¹⁹ LEVINTHAL, “The Early History of Bankruptcy Law,” 231. Cf. S.P. SCOTT, *Civil Law: Including the Twelve Tables, the Institutes of Gaius, the Rules of Ulpian, the Opinions of Paulus, the Enactments of Justinian, and the Constitutions of Leo*, Vol. 1, New York, NY, AMS Press, 1973, 62-64.

England) by the eleventh and twelfth centuries,²⁰ it was not until towards the end of the reign of King Henry VIII of England that bankruptcy practices began to resemble modern bankruptcy legislation.²¹ These laws primarily addressed the methods or the procedures by which creditors could collect outstanding debts and could deal with debtors who had committed fraud.²² Since these laws tended to be creditor-friendly and treated debtors with mistrust, it would not be an exaggeration to argue that these early English bankruptcy laws reflected the influence of Roman law from many centuries past.

Nevertheless, there are three important characteristics of medieval English bankruptcy laws that influenced the initial development of modern bankruptcy laws.²³ These characteristics are worth noting here. First, bankruptcy was an involuntary proceeding. Under medieval English bankruptcy laws, only creditors had the right to initiate and to force bankruptcy proceedings against their debtors; debtors had no choice in the matter. Second, early bankruptcy law favored creditors over debtors and did not include the discharge of debts. The discharge of debts was not officially introduced into English bankruptcy practice until the eighteenth century with the enactment of the *Statutes of Anne*.²⁴ However, even after the concept was institutionalized, the practice of

²⁰ BERMAN, *Law and Revolution: The Formation of the Western Legal Tradition*, 349.

²¹ E. KADENS, "The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law," in *Duke Law Journal*, 59 (2010), 1239.

²² HONSBERGER, "The Nature of Bankruptcy and Insolvency in a Constitutional Perspective," 199. Cf. FREYER, "Debt Failure and the Development of American Capitalism: Bruce Mann's Pro-Debtor Republic," 743-744; LUBBEN, "A New Understanding of the Bankruptcy Clause," 326-333; TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 60.

²³ C.J. TABB, "The History of the Bankruptcy Laws in the United States," in *American Bankruptcy Institute Law Review*, 3 no. 5 (1995), 6. Cf. L. HOFFMAN, "Cross-Border Insolvency: A British Perspective," in *Fordham Law Review*, 62 (1996), 2507, 2511.

²⁴ Cf. TABB, "The History of the Bankruptcy Laws in the United States," 11. Noting that only the so-called honest debtors' debts could be discharged, Levanthals writes: "The [development of the concept of debt] discharge was the result of the gradual realization of the fact that in many cases the bankrupt might be

discharging of debts was rarely used. Although it was a major advancement in bankruptcy during the early 1700s, the *Statutes of Anne* was considered by many scholars as draconian since it favored creditors to the detriment of debtors.²⁵ Charles Tabb writes:

Paradoxically, given its historical importance in the evolution of a more humane treatment of distress debtors, the [*Statutes of Anne*] was motivated largely by concerns for creditors' welfare, and may have a limited beneficial effect for most debtors. When enacted it contained a sunset provision of only three years, and was apparently intended as only a temporary or trial measure. Furthermore, efforts were made almost immediately to lessen the utility of the provision for debtors.²⁶

Third, medieval English bankruptcy law did not treat all creditors equally. The laws favored creditors who acted first against their debtors.²⁷ Early English bankruptcy law not only promoted and protected the interests of creditors who were quick enough to secure claims against debtors, but they also provided literally no protection concerning the legal and proprietary rights of creditors who were late in filing claims against debtors. Thus, unless there were some prior agreement among the creditors (which rarely happened), creditors who moved first to initiate involuntary bankruptcy against their debtors stood to gain the most (restitution and retribution), unlike slower creditors. Subsequently, creditors who were not quick enough usually got very little restitution—if any.²⁸

properly an object of pity, and that the unlimited incarceration of the debtor did not tend to reimburse the creditors at all." L.E. LEVINTHAL, "The Early History of English Bankruptcy Law," in *University of Pennsylvania Law Review and American Law Register*, 67 (1919), 18.

²⁵ LUBBEN, "A New Understanding of the Bankruptcy Clause," 336. Cf. H.R. MILLER and S.Y. WAISMAN, "Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?" in *American Bankruptcy Law Journal*, 78 (2004), 157; KADENS, "The Last Bankrupt Hanged: Balancing Incentives in the Development of Bankruptcy Law," 1269.

²⁶ C.J. TABB, "The Historical Evolution of the Bankruptcy Discharge," in *American Bankruptcy Law Journal*, 65 (1991), 333.

²⁷ LEVINTHAL, "The Early History of Bankruptcy Law," 233.

²⁸ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 60. Cf. J.C. LIPSON, "Debts and Democracy: Towards a Constitutional Theory of Bankruptcy," in *Notre Dame Law Review*, 83 (2008), 628-629.

By the time the thirteen American colonies declared their independence from England in 1776, English bankruptcy law was already well developed and had been implemented more or less throughout England as well as throughout the colonies under English rule. Consequently, it would be an understatement to say that early bankruptcy law in the United States relied heavily on the English bankruptcy law and practices.²⁹ Almost from the beginning of the history of America, the ability to file for bankruptcy was seen as an integral part of the nation's political and economic self-identity and growth—not because of bankruptcy itself, but because of the sense of security that bankruptcy provides.³⁰ Nathalie Martin observes:

The expansion of the United States' market economy, however, depended heavily upon "the credit system"—an intricate tangle of obligations that extended through the country's financing, production, distribution, and consumption. The United States saw itself as a land of great potential, and was thus taken by optimism and a willingness to build and spend far beyond its actual wealth. Thus, the antebellum economy was structured as much around borrowed money and promises to pay, as it was around rivers, roads, and canals.³¹

It should come as no surprise that bankruptcy is referred to in the Constitution of the United States.³² Commonly referred to as the *Bankruptcy Clause*, Article I, §8, Clause 4 of U.S. Constitution gives the legislative branch of the federal government the authority

²⁹ FREYER, "Debt Failure and the Development of American Capitalism: Bruce Mann's Pro-Debtor Republic," 743. Cf. TABB, "The History of the Bankruptcy Laws in the United States," 7; E. WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, New York, NY, Aspen Publishers, 2008, 7.

³⁰ D.A. SKEEL, "The Genius of the 1898 Bankruptcy Act," in *Bankruptcy Development Journal*, 15 (1999), 325. Cf. FREYER, "Debt Failure and the Development of American Capitalism: Bruce Mann's Pro-Debtor Republic," 754-759; MARTIN, "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation," 12; TABB, "The History of the Bankruptcy Laws in the United States," 12; HYNES, "Optimal Bankruptcy in a Non-Optimal World," 1-78.

³¹ MARTIN, "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation," 8.

³² SAUER, "Bankruptcy Law and the Maturing of American Capitalism," 298. Cf. E.J. BALLEISEN, *Navigating Failure: Bankruptcy and Commercial Society in Antebellum America*, Chapel Hill, NC, University of North Carolina Press, 2001, 13.

to establish uniform laws on the subject of bankruptcies throughout the United States.³³

James Madison observed:

[The] power of establishing uniform laws of bankruptcy is so intimately connected with the regulation of commerce, and will prevent so many frauds where the parties or their property may lie or be removed into different states that the expediency of it seems not likely to be drawn into question.³⁴

However, as important as bankruptcy was to the emerging nation, it was not until over a decade after the founding of the nation that any federal bankruptcy legislation was enacted in the United States.³⁵ The first federally enacted bankruptcy legislation was the *Bankruptcy Act of 1800*. However, when it was enacted, the *Bankruptcy Act of 1800* was neither innovative nor unique. In fact, the act was practically identical to the English bankruptcy legislation in use at the time—particularly concerning the discharging of debts.³⁶ Tabb writes:

[The] Bankruptcy Act of 1800 closely followed the 1732 English Statute of 5 George 2. Indeed, it was a commonly held view at the time that the English law extant at the time of the adoption of the [U.S.] Constitution defined the outer limits of permissible bankruptcy legislation, a view which broke down only gradually in the nineteenth century. [The Bankruptcy Act of 1800] thus contributed very little to the evolution of the bankruptcy discharge. Like its English forebears, it was principally designed to assist creditors. Its only real historical significance is that it represented the first federal intervention in the bankruptcy arena in the United States.³⁷

³³ For an extensive study of the constitutional and historical development of the *Bankruptcy Clause*, see LIPSON, “Debts and Democracy: Towards a Constitutional Theory of Bankruptcy,” 605-696.

³⁴ A. HAMILTON, J. MADISON, and J. JAY, *The Federalist Papers*, edited by M.C. WALDREP and J. MILLER, Mineola, NY, Dover Publications, Inc., 2014, 341. It is important to note that bankruptcy law today is governed by federal statutes; states are forbidden to legislate in these matters. For a more extensive analysis of the relationship between the states, the federal government, and the Bankruptcy Clause, see LUBBEN, “A New Understanding of the Bankruptcy Clause,” 319-411.

³⁵ Up until this time, different states had bankruptcy laws in place that dealt with insolvency issues. These state laws continued to be in effect until later when the Supreme Court overruled them. Cf. LUBBEN, “A New Understanding of the Bankruptcy Clause,” 341-343; *Ogden v. Saunders*, 25 U.S. 213 (1827).

³⁶ MILLER and WAISMAN, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” 158. Cf. TABB, “The History of the Bankruptcy Laws in the United States,” 12.

³⁷ TABB, “The Historical Evolution of the Bankruptcy Discharge,” 345.

Under the *Bankruptcy Act of 1800*, bankruptcy was involuntary, and while the discharge of debts was available, it was rarely done.³⁸ Moreover, only merchants (i.e., those engaged in trades) were permitted to file for bankruptcy.³⁹ The *Bankruptcy Act of 1800* was repealed in 1803. Absent any federal bankruptcy legislation, individual states' legislation filled the gap and governed bankruptcy proceedings for persons under each respective jurisdiction.⁴⁰

The next significant federal bankruptcy legislation in America was the *Bankruptcy Act of 1841*. Unlike the *Bankruptcy Act of 1800*, the *Bankruptcy Act of 1841* was considered debtor-and-creditor friendly legislation. A clear divergence from the existing English bankruptcy law, the *Bankruptcy Act of 1841* was thought to be something uniquely American and was thus considered an American contribution to the early development of the modern bankruptcy legal system.⁴¹ Under the *Bankruptcy Act of 1841* debtors had the right to file voluntarily for bankruptcy,⁴² the discharging of debts became an essential part of the bankruptcy process,⁴³ and the filing of bankruptcy itself

³⁸ TABB, "The History of the Bankruptcy Laws in the United States," 12.

³⁹ TABB, "The Historical Evolution of the Bankruptcy Discharge," 334.

⁴⁰ *Ibid.*, 354. Cf. SKEEL, "The Genius of the 1898 Bankruptcy Act," 323.

⁴¹ Cf. C. PRIEST, "Law and Commerce, 1580 – 1815," in M. GROSSBERG and C. TOMLINS (eds.), *The Cambridge History of Law in America, Volume I: Early America (1580-1815)*, New York, NY, Cambridge University Press, 2008, 400-446; MARTIN, "The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation," 4.

⁴² It is important to note that while the *Bankruptcy Act of 1841* permitted debtors to file for bankruptcy voluntarily, creditors still had the option to force their debtors into involuntary bankruptcy. Thus, the *Bankruptcy Act of 1841* did not do away with involuntary bankruptcy.

⁴³ B.H. MANN, "The Transformation of Law and Economy in Early America," in M. GROSSBERG and C. TOMLINS (eds.), *The Cambridge History of Law in America, Volume I: Early America (1580-1815)*, New York, NY, Cambridge University Press, 2008, 391.

was made available to all persons⁴⁴ rather than just being limited to merchants.⁴⁵ However, like its predecessor, the *Bankruptcy Act of 1841* was repealed in 1843. One of the criticisms that led to its repeal was that too many debtors had their debts discharged—to the detriment of creditors’ interests.

After the *Bankruptcy Act of 1841*, two events took place that are directly related to the topic of this thesis and therefore deserve some attention. The first event took place in 1865, when the U.S. Congress made provision to allow companies and corporations to file for bankruptcy. This was significant because, whereas before only natural persons could file for bankruptcy, now the right of filing had been expanded to all persons—natural and legal.⁴⁶ The second event was the enactment of the *Bankruptcy Act of 1867*. The *Bankruptcy Act of 1867* was very detailed when compared with the previous federal bankruptcy legislation; it authorized provisions to cover almost every situation imaginable at the time. The *Bankruptcy Act of 1867* was innovative in two important ways. First, debtors were now given the option of keeping some of their assets (in order to keep their business in operation) while at the same time pledging a specific percentage of their remaining assets to be liquidated in order to repay outstanding debts. Second, with the permission of their creditors, debtors could now propose workable repayment schedules in order to pay outstanding debts.⁴⁷ These two innovations drastically altered

⁴⁴ By *persons*, the *Bankruptcy Act of 1841* was specifically referring to the natural or physical persons only; legal persons were excluded from filing for bankruptcy under this legislation.

⁴⁵ For an in-depth study of the developments of voluntary bankruptcy in the United States, see J.C. MCCOY, “The Origins of Voluntary Bankruptcy,” in *Bankruptcy Development Journal*, 5 (1988), 361-390.

⁴⁶ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 20.

⁴⁷ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 61. Concerning the discharging of debts, in the first few years after the passage of the *Bankruptcy Act of 1867*, permission from

the nature of bankruptcy from a debt-repayment-only system to also include reorganizing debts in such a way that would allow debtors to maintain current business operation each.

As innovative as the *Bankruptcy Act of 1867* was, however, it was short-lived and was repealed in 1878. Similar to the *Bankruptcy Act of 1841*, the *Bankruptcy Act of 1867* was criticized for being too debtor-friendly to the detriment of creditors.⁴⁸ Again, absent any federal bankruptcy legislation, individual states' legislation filled the gap and governed bankruptcy proceedings for persons under each respective jurisdiction.⁴⁹

Twenty years after the repeal of the *Bankruptcy Act of 1867*, the U.S. Congress promulgated what would be considered America's first permanent federal bankruptcy law: the *Bankruptcy Act of 1898*.⁵⁰ Also referred to as the *Nelson Act*,⁵¹ the *Bankruptcy Act of 1898* was considered the most debtor-friendly legislation yet. It not only made the discharging of debts a fundamental principle of bankruptcy filing, it also allowed debtors to retain any property that qualified as exempt under applicable state laws.⁵² David Skeel suggests that the unique form of American federalism paved the way to make possible pro-debtor legislation such as the *Nelson Act*. Skeel writes:

The most obvious effect of [America's form of] federalism was to give voice to pro-debtor views that might not otherwise have played a substantial role. The agrarian and populist movements of the nineteenth century were largely local in nature, but the influence of farmers at the state level quickly translated into national influence through

creditors before debts could be discharged was generally not required. Later, however, the practice changed to require the permission from creditors in certain situations before debts could be discharged.

⁴⁸ SKEEL, "The Genius of the 1898 Bankruptcy Act," 335.

⁴⁹ TABB, "The Historical Evolution of the Bankruptcy Discharge," 354. Cf. SKEEL, "The Genius of the 1898 Bankruptcy Act," 323.

⁵⁰ For a detail historical and legal analysis of the *Bankruptcy Act of 1898*, see SKEEL, "The Genius of the 1898 Bankruptcy Act," 321-341.

⁵¹ The *Nelson Act* was named after Knute Nelson, the U.S. Senator who was instrumental in the formation of the *Bankruptcy Act of 1898*.

⁵² DAVIS, "Protection of a Debtor's 'Fresh Start' under the New Bankruptcy Code," 847.

the states' representatives in Congress. In the bankruptcy debates, populist rhetoric surfaced in attacks on the harshness of the creditors' proposals, and complaints that farmers and small merchants would be ruined.⁵³

The *Nelson Act* was innovative in many ways. Previous bankruptcy legislation, for example, had provisions requiring creditors to give consent before any debt could be discharged; moreover, there were also provisions that required debtors to set aside a minimum amount of money to be used as payment to creditors. The *Nelson Act* not only abolished all such provisions, but it also placed severe restrictions on when debtors' requests for the discharge of debts could be denied.⁵⁴ In addition, the *Nelson Act* instituted a system of trustees and referees. These trustees and referees were given the authority to intervene in a bankruptcy proceeding as the need arises in order to keep the process moving.⁵⁵ The *Nelson Act* also made provision for the creation of a bankruptcy bar. Membership to a bankruptcy bar typically included attorneys who specialized in bankruptcy law who could make available their services to assist creditors and debtors through the bankruptcy process.⁵⁶

The Great Depression in the United States took place while the *Nelson Act* was in effect. It would be remiss not to mention how the Great Depression affected the development of bankruptcy laws in the United States. It goes without saying that the Great Depression in the 1930s presented new economic challenges for the United States. Harvey Miller and Shai Waisman write:

⁵³ SKEEL, "The Genius of the 1898 Bankruptcy Act," 331.

⁵⁴ TABB, "The History of the Bankruptcy Laws in the United States," 25.

⁵⁵ It should be noted that the function of these so-called referees eventually evolved into bankruptcy judges by 1973. Cf. *ibid.*, 25.

⁵⁶ SKEEL, "The Genius of the 1898 Bankruptcy Act," 338.

No factor had more influence on the adoption of federal bankruptcy legislation than the “boom or bust” nature of the domestic economy. It was only in the face of financial crisis and economic depression that bankruptcy legislation passed. In times of economic turmoil, Congress quickly enacted bankruptcy laws to alleviate the effects of widespread depression and panic.⁵⁷

Thus, faced with potential financial ruin during the Great Depression, both private businesses and the government in the United States understood that the nation’s economic survival depended on creating and expanding safety nets in order to help businesses and corporations stay afloat.⁵⁸ Among other things, this meant encouraging more spending across the board in order to stimulate the economy.⁵⁹ Consequently, at the height of the Great Depression, the U.S. Congress saw an opportunity to expand the nation’s bankruptcy laws—which inevitably meant introducing amendments to the *Nelson Act*.⁶⁰ One such amendment was the *Frazier-Lemke Act* (passed in 1934); this act helped insolvent farmers keep their farms while in bankruptcy. Another example was the *Chandler Act* (passed in 1938); among other things, this act made voluntary bankruptcy filing more accessible and attractive to potential debtors.⁶¹ Amendments such as these, along with the *Nelson Act* itself, not only made bankruptcy filing more attractive and

⁵⁷ MILLER and WAISMAN, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” 159.

⁵⁸ SKEEL, “Bankruptcy Phobia,” 344.

⁵⁹ MARTIN, “The Role of History and Culture in Developing Bankruptcy and Insolvency Systems: The Perils of Legal Transplantation,” 13.

⁶⁰ Cf. D.A. SKEEL, *Debt’s Dominion: A History of Bankruptcy Law in America*, Princeton, NJ, Princeton University Press, 2001, 71-100. Examples of legislation enacted during the Great Depression included a number of amendments to the *Nelson Act*, the *Frazier-Lemke Act* passed in 1934 and its amendments that helped insolvent farmers keep their farms.

⁶¹ Cf. V.L. LEIBELL, “The Chandler Act – Its Effect upon the Law of Bankruptcy,” in *Fordham Law Review*, 9 (1940), 380-409.

accessible, but they also permitted companies filing for bankruptcy to reorganize or “rewrite [their debts] while remaining in business.”⁶²

After its promulgation in 1898, some fifty amendments introduced to the *Nelson Act*, which remained in effect until it was replaced with the *Bankruptcy Reform Act of 1978*. Although it was ultimately replaced, it should be acknowledged that the *Nelson Act* made lasting contributions to bankruptcy law and brought the practice of American bankruptcy law into the modern era—thus solidifying bankruptcy laws in the United States for the next century and beyond.

3.2 — The Bankruptcy Code

The source of the current bankruptcy law in the United States is the *Bankruptcy Reform Act of 1978*⁶³ which became effective on 1 October 1979.⁶⁴ Also referred to as the Bankruptcy Code, the *Bankruptcy Reform Act of 1978* can be found under *Title 11* of the *United States Code*.⁶⁵ Since its enactment, a number of amendments have been introduced to the Bankruptcy Code.⁶⁶ None of these amendments, however, have effectively repealed

⁶² WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 7.

⁶³ Cf. *Bankruptcy Reform Act*, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

⁶⁴ All bankruptcy cases that took place before 1 October 1979 were governed by the *Bankruptcy Act of 1898*. Bankruptcy cases that took place on or after 1 October 1979 are governed by *Bankruptcy Reform Act of 1978*.

⁶⁵ Cf. *11 U.S.C.*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf> (2013). In the interest of clarity, the *Bankruptcy Reform Act of 1978*, including all of the subsequent amendments, will be referred to in this thesis as the Bankruptcy Code or *Title 11*.

⁶⁶ Cf. *The Bankruptcy Amendments and Federal Judgeship Act*, Pub. L. No. 98-353, 98 Stat. 333 (1984), (=BAFJA); the *Bankruptcy Abuse Prevention and Consumer Protection Act of 2005*, Pub. L. No. 109-8, 119 Stat. 23 (2005), (=BAPCPA).

the Bankruptcy Code. Thus, the Bankruptcy Code is still the official bankruptcy law in the United States.⁶⁷

While retaining many important elements from its predecessor, the *Bankruptcy Act of 1898*, the Bankruptcy Code (and the subsequent amendments that followed) was also innovative in many ways. For example, the Bankruptcy Code gives original bankruptcy jurisdiction to the federal district courts and requires that all district courts create bankruptcy courts in their jurisdiction.⁶⁸ In addition, the Bankruptcy Code institutes the trustee program and makes the role of the trustee an essential part of the bankruptcy process. The Bankruptcy Code also revises a number of procedures that were necessary in order to accommodate the changes that had taken place during the eighty years since the *Bankruptcy Act of 1898* was implemented. However, perhaps the most innovative contribution of the Bankruptcy Code is the introduction of Chapter 11 bankruptcy under *Title 11*. In effect, Chapter 11 revolutionizes how businesses file bankruptcy in the United States.

3.2.1 — Structure and Organization of the Bankruptcy Code

Structurally, the Bankruptcy Code is divided into eight chapters. These eight chapters are classified systematically into three practical categories. The first category

⁶⁷ When the *Bankruptcy Reform Act of 1994* was enacted, the U.S. Congress made it clear that this act fits within the framework of the Bankruptcy Code and therefore does not repeal the Bankruptcy Code. However, the *Bankruptcy Reform Act of 1994* did provide for the creation of the National Bankruptcy Review Commission, which is tasked with reviewing and proposing reforms to the Bankruptcy Code. Cf. *National Bankruptcy Review Commission Act*, Pub. L. No. 103-393 §601–§702, 108 Stat. 4147 (codified at 11 U.S.C. §101; TABB, “The History of the Bankruptcy Laws in the United States,” 42.

⁶⁸ D.P. CURRIE, “Bankruptcy Judges and the Independent Judiciary,” in *Creighton Law Review*, 16 (1983), 441. Cf. W.L. TRUGMAN, “The Bankruptcy Act of 1984: Marathon Revisited,” in *Yale Law & Policy Review*, 3 (1984), 231-244; A.J. MAIDA, “Canon Law Implications of Real Estate Transactions – Impact on the New Canon Law. (Diocesan Attorneys: 17th Annual Meeting) (transcript),” in *Catholic Lawyer*, 27 (1982), 218-223; the *BAFJA*.

includes Chapters 1, 3, and 5. These chapters are definitional and administrative in nature and are considered the universal chapters because they apply to the entire Bankruptcy Code.⁶⁹ The second category includes Chapters 7, 9, 11, and 13. These chapters are operative in nature because each of these chapters designates the kind of bankruptcy that a particular petitioner is seeking.⁷⁰ For example, Chapter 7 deals with liquidation, Chapter 9 deals with financially distressed municipalities such as cities, counties, and school districts, and Chapters 11 and 13 deal with the reorganization or the readjustment of debts.⁷¹ Finally, the last category contains only Chapter 15, which addresses the appointment and the function of the United States trustee (U.S. trustee).⁷²

The nomenclature of these chapters is unique and noteworthy. The *Bankruptcy Act of 1898* used Roman numerals to identify the chapters. The Bankruptcy Code, however, uses Arabic numerals to distinguish the eight chapters. Take, for instance, liquidation bankruptcy: cases that took place under the *Bankruptcy Act of 1898* are referred to as Chapter VII cases. On the other hand, cases that took place under the Bankruptcy Code (i.e., after 1978) are referred to Chapter 7 cases. Moreover, the eight

⁶⁹ M.A. FREY and S.K. SWINSON, *An Introduction to Bankruptcy Law*, 6th ed., Clifton Park, NY, Thomson/Delmar Learning, 2013, 5.

⁷⁰ *Ibid.*, 5.

⁷¹ It is important to note that Chapter 11 and Chapter 13 both deal with organization bankruptcy. However, while Chapter 11 deals with business or corporate reorganization bankruptcy, Chapter 13 deals with individual (physical) persons filing for reorganization bankruptcy. Sole proprietorships and some limited partnerships, however, are not considered separate legal entities that are distinct from their owners; therefore, these may qualify to file for bankruptcy under both Chapter 11 and Chapter 13. Cf. *11 U.S.C.* §1304.

⁷² The function of a U.S. trustee is primarily managerial. Cf. *11 U.S.C. §1501(a)*; FREY and SWINSON, *An Introduction to Bankruptcy Law*, 7.

chapters of the Bankruptcy Code are identified with odd numbers only—from 1 to 15; even numbers are not used.⁷³

3.2.2 — Understanding the Terminology

Before going further into the intricacies of Chapter 11 bankruptcy, it is important to note some basic terms that are paramount in a bankruptcy filing. These terms can be found in the Bankruptcy Code, the *Black's Law Dictionary*, or the common usage of practitioners in the area of bankruptcy law.

A **bankruptcy petition** is an official public document that indicates that a corporation has initiated bankruptcy proceeding and is seeking the bankruptcy court's protection.⁷⁴ Once the petition has been filed, the automatic stay is triggered immediately.

Debtors and **creditors** are the two principal parties in a bankruptcy proceeding. The debtor is the party that is liable for a debt. The creditor is the party to whom the debtor owes money. Both debtor and creditor can be either natural persons or legal (juridic) persons.⁷⁵ In addition, creditors are distinguished as either secured or unsecured.⁷⁶ This distinction is important because it will determine the repayment scheme in accordance with the Absolute Priority Rule (or the APR).⁷⁷ Furthermore, some creditors can be further designated as **impaired** or **unimpaired**. Impaired creditors are creditors whose legal rights can be made worse by a reorganization plan. By default, unimpaired creditors are creditors whose legal rights are unaffected by the reorganization plan.⁷⁸

⁷³ Consequently, there are no Chapters 2, 4, 6, 8, or 10 in the Bankruptcy Code. However, there is a Chapter 12. In 1986, Congress passed the *Bankruptcy Judges, United States Trustees, and Family Farmer Bankruptcy Act* which effectively created a Chapter 12 in the Bankruptcy Code. Designed particularly for farmers who are in financial distress, Chapter 12 made it easier for them to reorganize their debts, help them keeping their farms, and gave them time to devise a schedule for repaying debts. Cf. Chapter 12 of *11 U.S.C.*; TABB, "The History of the Bankruptcy Laws in the United States," 40.

⁷⁴ Cf. *Black's Law Dictionary*, 1329.

⁷⁵ Cf. *ibid.*, 449, 490.

⁷⁶ Cf. WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 46-49.

⁷⁷ According to the Absolute Priority Rule (= APR), when a debtor files for bankruptcy, un-secured creditors/debts are paid on a *pro-rata* basis—but only after all secured creditors/debts are satisfied. For a complete analysis of how bankruptcy court's treatment of non-profit corporations with regard to the APR, see P. FOOHEY, "Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities," in *St. John's Law Review*, 86 (2012), 31-85.

⁷⁸ HYNES, "Reorganization as Redemption," 185. It is worth noting that unimpaired creditors do not vote. This is because, regardless of how the vote turns out, unimpaired creditors will not be affected because they will still get what was due to them. As Lawrence Weiss observes: unimpaired creditors are those who "will [usually] receive payment in full with interest or who have had their claims reinstated in full with any defaults cured." L.A. WEISS, "Bankruptcy Resolution: Direct Costs and Violation of Priority

An **interested party** (or a **real party in interest**) refers to an actor who has legal standing before a bankruptcy court.⁷⁹ An interested party would typically include debtor, creditor, the U.S. trustee, the case trustee, or the bankruptcy administrator.

A **bankruptcy estate** is created once a debtor files for bankruptcy. This estate constitutes a separate legal entity and is distinct from the debtor. Ordinarily, such an estate is placed under the control of a trustee (or a debtor-in-possession in the case of Chapter 11).⁸⁰ In theory, all of the assets in a bankruptcy estate can be liquidated to repay debts. However, any assets that the bankruptcy court has exempted are excluded from this estate.⁸¹ Within the bankruptcy estate, the bankruptcy court may allow the debtor to possess funds referred to as **cash collateral**.⁸² Frequently, cash collateral—which can be actual cash or cash equivalent and is subject to the liens of third parties—can be used by the debtors to satisfy pre-bankruptcy petition expenses.⁸³

A **claim** is an umbrella term that refers to the rights to payment made by a creditor against a debtor.⁸⁴ A claim can be distinguished as a liquidated claim, unliquidated claim, fixed claim, contingent claim, matured claim, un-matured claim, secured claim, unsecured claim, subordinated claim, legal claim, or equitable claim. In a bankruptcy proceeding, claims are grouped into classes and are prioritized according to their nature—e.g., secured claims have priority over non-secured claims.

Automatic stay (or **stay**): When a corporation files for bankruptcy, an automatic stay is triggered and all actions against the debtor (e.g., debt collections, enforcement of foreclosures, etc.) must be suspended. Designed to protect debtors from creditors seeking to take possession of their assets, an automatic stay requires creditors to act via proper channels—i.e., the bankruptcy court.⁸⁵ An automatic stay can always be challenged in court by any interested party; consequently, for just cause, a bankruptcy court has the authority to lift an automatic stay.⁸⁶

A **workout** occurs when an administrator or manager of a corporation makes alternative arrangements to deal with outstanding debts in the hope of averting the need to file for bankruptcy.⁸⁷ Such arrangements may include anticipating and prioritizing

of Claims,” in J.S. BHANDARI and L.A. WEISS (eds.), *Corporate Bankruptcy: Economic and Legal Perspectives*, New York, NY, Cambridge University Press, 1996, 260.

⁷⁹ Cf. *Black’s Law Dictionary*, 1298.

⁸⁰ Cf. *ibid.*, 175.

⁸¹ Cf. 11 U.S.C. §541. For an example of how the State of Oregon law treats a bankruptcy estate, see §18.322 of the *Oregon Revised Statutes*, (2013), available at: http://www.oregonlaws.org/oregon_revised_statutes, (last accessed 22 May 2015).

⁸² Cf. HYNES, “Reorganization as Redemption,” 206.

⁸³ Cf. *Black’s Law Dictionary*, 318; 11 U.S.C. §363(a).

⁸⁴ Cf. J.J. RICE and N.W. DAVIS, “The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims,” in *South Carolina Law Review*, 50 (1999), 429.

⁸⁵ Cf. *Black’s Law Dictionary*, 1639; 11 U.S.C. §362(a)–(b).

⁸⁶ Cf. TABB, *The Law of Bankruptcy*, 244-331; WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 30-37.

⁸⁷ Cf. *Black’s Law Dictionary*, 1843; WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 207.

outstanding debts, speculating on financial and legal risks of defaulting on loans, specifying and/or clarifying any debtor's obligations and perhaps renegotiating those obligations by suggesting a revision of payment schedules, etc.⁸⁸ A workout takes place during the pre-filing stage and is not considered part of the bankruptcy process. However, the blueprint of an unsuccessful workout can usually be incorporated into the reorganization plan.

A **creditors committee** is an official body that represents the creditors. The U.S. trustee determines who can be members on the creditors committee—usually based on the nature of claims. Depending on the number of interests involved or the complexity of the claims, the size of the committee can vary.⁸⁹ The tasks of a creditors committee include making administrative decisions on behalf of all the creditors and negotiating a reorganization plan.⁹⁰

A **trustee** is an agent of the bankruptcy court who manages the bankruptcy estate for the benefit of the creditors.⁹¹ There are two types of trustees that the Bankruptcy Code distinguishes. In all bankruptcy filings, the U.S. Department of Justice appoints a **U.S. trustee**. The functions of a U.S. trustee includes making appointments of parties to sit on the different committees, supervising (as needed) examiners and case trustees as they scrutinize documents relevant to the bankruptcy case, making sure that the relevant bankruptcy laws are being followed, as well as ensuring that fraud and other crimes associated with the bankruptcy case are handled appropriately and expeditiously.⁹² Appointed by the U.S. trustee, there should be a **case trustee** assigned to all bankruptcy cases except for Chapter 11 cases. The function of a case trustee (also referred to as a bankruptcy trustee) is to make sure that all nonexempt property is seized and liquidated for the benefit of creditors, to make sure that all the bankruptcy paperwork is complete and accurate, to schedule and to lead creditors' meetings, and administer the bankruptcy case for the court. It is worth noting that a U.S. trustee and case trustee are private (interested) parties in a bankruptcy proceeding; they are not judges—even though they may enjoy some judicial immunity from personal liability similar to that of judges.⁹³

⁸⁸ A successful workout means bankruptcy filing can be avoided. However, in the event where attempts at a workout were unsuccessful and bankruptcy proceeding commenced, the efforts put into a workout may nevertheless provide a basic blueprint for the future reorganization plan.

⁸⁹ Cf. *Black's Law Dictionary*, 450; 11 U.S.C. §1102. Not every Chapter 11 case needs to have a creditors' committee. Depending on the size of case, the number of claims and creditors, and the complexity of the case, the decision whether to have a creditors' committee is based on the discretion of the U.S. trustee. Generally, a case involving only a small number of claims and/or creditors, and is relatively uncomplicated, no creditors' committee is necessary. Cf. S.J. LUBBEN, "The Types of Chapter 11 Cases," in *American Bankruptcy Law Journal*, 83 (2010), 242.

⁹⁰ Cf. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 31-33.

⁹¹ S. WICKOUSKI, *Bankruptcy Crimes*, 3rd ed., Washington, DC, Beard Books, 2007, 94. Cf. *Black's Law Dictionary*, 1748.

⁹² Jurisdictions can vary with regard to the appointment of a U.S. trustee, however. For example, as of 2002, bankruptcy filings in North Carolina and Alabama are not required to have appointment of a U.S. trustee.

⁹³ S. RHODES, "The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee," in *American Bankruptcy Law Review*, 80 (2006), 152-153.

Debtor-in-possession (or **DIP**): Common in a Chapter 11 bankruptcy, a DIP refers to the debtor—that is, the entire (insolvent) corporation that is in bankruptcy—who has the right to retain the control of the operation of the corporation while it is in bankruptcy.⁹⁴ As will be discussed later, the notion of a DIP is important for a juridic person in canon law filing for bankruptcy protection because of the issue of ownership or control of property that may also have been designated as ecclesiastical goods.⁹⁵

First meeting of creditors (or a **341 meeting**) is a mandatory meeting between creditors and debtors. Such a meeting is usually held within the first 30 days of the filing of a Chapter 11 petition.⁹⁶ With proper notification, however, a 341 meeting can also be held after the debtor has filed statement(s) or schedule(s) of financial information—which should list all known assets, liabilities, and other financial information belonging to the debtor.

A **confirmation** refers to the final approval of the reorganization plan by the bankruptcy court. The confirmation should include some clarifications regarding the debtor's discharge of indebtedness. Once the bankruptcy court has confirmed a reorganization plan, an **effective date** is given; this is the date on which a plan of reorganization is implemented, which is usually within thirty days after the bankruptcy court confirms the reorganization plan. It is presumed that the reorganization plan has already been voted on by the creditors (except in situations where cramdown was used). After a confirmation is given, the reorganization plan becomes legally effective.⁹⁷

A **cramdown** occurs when a bankruptcy court confirms a reorganization plan over the objections of one or more classes of impaired creditors. In such a situation, it is presumed that the court has made other concessions to the disagreeing creditors before using cramdown to confirm the reorganization plan.⁹⁸

3.2.3 — Federal Law and State Law

As already mentioned, bankruptcy law is federal law in the United States because Article I, §8 of the U.S. Constitution gives to the U.S. Congress the authority to establish “[...] uniform laws on the subject of bankruptcies throughout the United States.” In

⁹⁴ Cf. *Black's Law Dictionary*, 490; R.J. BERDAN and B.G. ARNOLD, “Displacing the Debtor in Possession: The Requisites for and the Advantages of the Appointment of a Trustee in Chapter 11 Proceedings,” in *Marquette Law Review*, 67 (1984), 469; S. DAHIYA et al., “Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence,” in *Journal of Financial Economics*, 69 (2003), 260.

⁹⁵ For an extensive historical analysis of the function of a DIP under both the *Bankruptcy Act of 1898* and the Bankruptcy Code, see T.E. PLANK, “The Creditor in Possession Under the Bankruptcy Code: History, Text, and Policy,” in *Maryland Law Review*, 59 (2000), 253-351. For the sake of simplicity, when this thesis refers to the DIP, it is referring specifically to the physical person who has been legally designated to be the administrator or the manager to act on behalf of the DIP.

⁹⁶ Cf. WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 66.

⁹⁷ Cf. TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 767.

⁹⁸ Cf. 11 U.S.C. §1129(b); WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 204; TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 779.

addition, *Title 28* of the *U.S. Code*⁹⁹ gives the U.S. Supreme Court the authority to “prescribe by general rules, the forms, process, writs, pleadings, and motions, and the practice and procedure in cases under *Title 11*.”¹⁰⁰ The interplay between bankruptcy proceedings and the authority of the federal government leads some commentators to contend that bankruptcy law in the U.S. is, in effect, an extension of the commerce power of the federal government.¹⁰¹

The supremacy of federal law notwithstanding, however, state laws do have some impact on bankruptcy cases and how they are decided by bankruptcy courts. Ordinarily, state laws regulate many aspects of (non-bankruptcy) business transactions within the particular state’s jurisdiction.¹⁰² Hence, laws governing contracts, property ownership, sales and business transactions, rental and lease agreements, billings, etc., are all governed by state statutes. Nevertheless, although bankruptcy falls under federal jurisdiction, bankruptcy courts often must refer—and at times even defer—to state’s statutes for working definitions or clarifications when rendering their decisions. Jackie Gardinar writes:

The question of the appropriate choice of law rule in federal question cases is more than academic. There is a variety of federal laws that explicitly or implicitly

⁹⁹ *Title 28 U.S. Code* is the portion of the U.S. Code that governs the federal judicial system. Cf. *28 U.S.C.*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title28/pdf/USCODE-2013-title28.pdf> (2013), (= *Title 28* or *28 U.S.C.*).

¹⁰⁰ Cf. §2075 of *Title 28* or *28 U.S.C.*

¹⁰¹ M.S. KRIEGER, “‘The Bankruptcy Court Is a Court of Equity’: What Does That Mean?” in *South Carolina Law Review*, 50 (1999), 287. It is important to note that both the *Federal Rules of Bankruptcy Procedure* (= *FRBP*) and the *Federal Rules of Civil Procedure* (= *FRCP*), when relevant, are applicable in all bankruptcy procedures. *Ibid.*, 297. Cf. TABB, *The Law of Bankruptcy*, 77-79; *Federal Rule of Bankruptcy Procedure*, available at: <http://www.uscourts.gov/uscourts/rules/bankruptcy-procedure.pdf> (December 2014); *Federal Rules of Civil Procedure*, available at: <http://www.uscourts.gov/RulesAndPolicies/rules.aspx> (December 2014).

¹⁰² Cf. S. AGARWAL et al., “Impact of State Exemption Law and Small Business Bankruptcy Decision,” in *Southern Economic Journal*, 71 (2005), 620-635.

reference state law.¹⁰³ The Bankruptcy Code is perhaps one of the best instances of this intersection of state and federal law; although it is a comprehensive federal statute, it repeatedly points to state law to define the rights and obligations of the debtor and the debtor's creditor. In the absence of any overriding federal interest, the Bankruptcy Code attempts to maintain these state-created rights in the process of granting bankruptcy relief.¹⁰⁴

Perhaps one of the more pronounced areas where bankruptcy courts utilize state law is in the determination of property exemptions. For example, §522(d) of the Bankruptcy Code provides a federal exemption list—i.e., a list of property that can be excluded from the bankruptcy estate. Thus, according to the federal exemption list as of 2013, a Chapter 7 petitioner may request the following exemptions: Up to \$3,675 of the value of a motor vehicle, up to \$1,550 for jewelry, up to \$12,250 aggregated value on household goods, furnishings, appliances, clothes, books, pets/animals, crops, or musical instruments, and up to \$2,300 for tools for trades.¹⁰⁵ However, §522(b) of the Bankruptcy Code allows states to substitute or opt-out of the federal exemption list with their own lists—as long as these exemptions are not contrary to federal law.¹⁰⁶ The State of Oregon is an example of a jurisdiction that gives debtors the option of using either the federal exemption list or the state's own exemption list.¹⁰⁷ Under the Oregon exemption list as articulated in the *Oregon Revised Statutes*,¹⁰⁸ as of 1 July 2013, debtors filing for Chapter 7 bankruptcy in Oregon may request the following exemptions: Up to \$7,500 of wages

¹⁰³ K.A. ALCES, "Enforcing Corporate Fiduciary Duties in Bankruptcy," in *Kansas Law Review*, 56 (2007), 88.

¹⁰⁴ J. GARDINA, "The Perfect Storm: Bankruptcy, Choice of Law, and Same-Sex Marriage," in *Boston University Law Review*, 86 (2006), 882.

¹⁰⁵ 11 U.S.C. §522 – Exemptions.

¹⁰⁶ Cf. FREY and SWINSON, *An Introduction to Bankruptcy Law*, 241-242.

¹⁰⁷ TABB, "The History of the Bankruptcy Laws in the United States," 36. As of 2014, besides Oregon, other states such as Arkansas, Connecticut, Hawaii, Massachusetts, Michigan, Minnesota, New Hampshire, New Jersey, New Mexico, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin also have statutes allowing debtors to either use their state's or the federal exemptions.

¹⁰⁸ Cf. *Oregon Revised Statutes*, §18.300.

deposited into a bank account,¹⁰⁹ up to \$3,000 in value of any motor vehicle,¹¹⁰ up to \$3,000 in household goods,¹¹¹ up to \$1,800 in jewelry,¹¹² up to \$1,000 in animals, poultry, and a 60-day supply of animal feed,¹¹³ and up to \$600 in books, pictures, and musical instruments,¹¹⁴ and up to \$7,500 in a qualified and limited tuition savings program.¹¹⁵

3.2.4 — Bankruptcy as Strategy

The perception of bankruptcy has changed over the years. No longer seen as a desperate final act of a business facing financial ruin, the negative stigma traditionally associated with bankruptcy no longer lingers as before.¹¹⁶ One of the reasons for the change of perception has to do with who can file for bankruptcy under the Bankruptcy Code. Under the *Bankruptcy Act of 1898*, only debtors who demonstrated that they were insolvent and had no other viable options could file for bankruptcy.¹¹⁷ The Bankruptcy

¹⁰⁹ Cf. *ibid.*, §18.348.

¹¹⁰ Cf. *ibid.*, §18.345(1)(d).

¹¹¹ Cf. *ibid.*, §18.345(1)(f).

¹¹² Cf. *ibid.*, §18.345(1)(b).

¹¹³ Cf. *ibid.*, §18.345(1)(e).

¹¹⁴ Cf. *ibid.*, §18.345(1)(a).

¹¹⁵ Cf. *ibid.*, §18.348.

¹¹⁶ M.J. WHITE, “Abuse or Protection? Economics of Bankruptcy Reform under *BAPCPA*,” in *University of Illinois Law Review*, 2007 (2007), 285. Cf. SKEEL, “Bankruptcy Phobia,” 333-350; M.D. SOUSA, “Bankruptcy Stigma: A Socio-Legal Study,” in *American Bankruptcy Law Journal*, 87 (2013), 435-482.

¹¹⁷ The term *insolvency* derives from the Latin *in*, meaning “not,” and *solvere*, meaning “to loosen or pay.” Thus, insolvency means “not to pay.” As will become more apparent later, there could be many reasons why debtors become unable or unwilling to pay, so the meaning of insolvency is much broader than the meaning of bankruptcy. Cf. HONSBERGER, “The Nature of Bankruptcy and Insolvency in a Constitutional Perspective,” 200-202.

Code effectively removed the insolvency restriction and made it possible for any corporation to file for bankruptcy.¹¹⁸

Consequently, while it may still be a last resort for some insolvent debtors, the filing of bankruptcy can also be motivated by other compelling interests.¹¹⁹ In fact, it is a generally acceptable practice for corporations to file for bankruptcy—particularly a Chapter 11—as a way to control or avoid mass tort liability, or to breach contractual obligations with minimum or no penalty attached.¹²⁰ Thus, since the need to prove insolvency is no longer necessary, bankruptcy has essentially evolved into a business strategy¹²¹—in order to achieve some particular legal, political, or financial goal—rather than a desperate last resort option.¹²² Jerry Sheppard writes:

In a great many cases, bankruptcy is no longer seen as failure but a strategy that can be employed to give the firm a fresh start. In other words, bankruptcy is now viewed as a way of turning an old, flabby, tired, and docile firm into a new, lean, mean fighting machine. [It is] almost as though Chapter 11 were a fitness center and some huckster

¹¹⁸ J.E. JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” in *Catholic Lawyer*, 37 (1997), 153. Cf. DOWDELL, “The Chapter 11 ‘Shuttle’—Coincidence or Competitive Strategy?” 685.

¹¹⁹ Cf. M. HAMILTON, “Did the Portland Catholic Archdiocese Declare Bankruptcy to Avoid or Delay Clergy Abuse Suits?: The Risk of Bad-Faith and Noncooperative Church Bankruptcies,” in *FindLaw*, 13 July 2004, available at: <http://writ.news.findlaw.com/hamilton/20040713.html> (last accessed 5 May 2015).

¹²⁰ SKEEL, *Debt’s Dominion: A History of Bankruptcy Law in America*, 217. For information regarding Catholic institutions and torts and the law of negligence, see W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today’s Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 145-155.

¹²¹ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 161.

¹²² AGARWAL et al., “Impact of State Exemption Law and Small Business Bankruptcy Decision,” 630. Cf. J.P. SHEPPARD, “When the Going Gets Tough, the Tough Go Bankrupt: The Questionable Use of Chapter 11 as a Strategy,” in *Journal of Management Inquiry*, 1 (1992), 183-192; *In re Continental Airlines Corporation*, 38 B.R. 67 (1984); T.H. JACKSON and R.E. SCOTT, “On the Nature of Bankruptcy: An Essay On Bankruptcy Sharing and the Creditors’ Bargain,” in *Virginia Law Review*, 75 (1989), 155-204; *Pennzoil v. Texaco, Inc.*, 481 U.S. 1 (1987); T. EISENBERG, “Commentary on ‘On the Nature of Bankruptcy’: Bankruptcy and Bargaining,” in *Virginia Law Review*, 75 (1989), 205-218. Apart from using bankruptcy as a strategy, however, there has to be some realistic indication that the corporation has a future—that is, the corporation is worth more as an ongoing concern rather than being liquidated. Cf. D.G. BAIRD and E.R. MORRISON, “Bankruptcy Decision Making,” in *Journal of Law, Economics, and Organization*, 17 (2001), 364.

were singing the praises of the companies that have “emerged from the bankruptcy spa with great new figures.”¹²³

The quintessential post-*Bankruptcy Reform Act of 1978* example of a corporation using Chapter 11 bankruptcy protection as a strategy is the bankruptcy case involving the Johns-Manville Corporation. Founded in the mid-1800s, Johns-Manville¹²⁴ was a corporation that manufactured fire-resistant materials that were used to make insulation and fireproofing homes and naval vessels.¹²⁵ These products were made from a material known as asbestos. It later became known that asbestos directly caused illnesses such as asbestosis (the scarring of the lungs) and mesothelioma (a rare cancer of the lining of the chest or abdominal cavity).¹²⁶ Unfortunately, but perhaps predictably, a number of people who had contact with the asbestos materials (e.g., employees of Manville or consumers who used the materials) developed these debilitating illnesses and many had died as the result.

By early 1982, there were already well over 16,500 civil lawsuits filed against Manville. Legal experts at the time were expecting that about 120,000 more lawsuits would be filed against Manville. The company’s liability was anticipated to exceed \$3

¹²³ SHEPPARD, “When the Going Gets Tough, the Tough Go Bankrupt: The Questionable Use of Chapter 11 as a Strategy,” 184.

¹²⁴ Cf. *In re Johns-Manville Corporation*, 66 B.R. 517 (S.D.N.Y. 1986). In 1982, the Johns-Manville Corporation changed its name to Manville Corporation (=Manville).

¹²⁵ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 60.

¹²⁶ It was believed that, although Manville’s management was aware of the health implications of being exposed to asbestos, it did nothing to protect its employees. Moreover, the company did not warn its customers of the potential health risks involved with using its hazardous products. Cf. J.W. WEISS, *Business Ethics: A Stakeholder and Issues Management Approach*, 6th ed., San Francisco, CA, Berrett-Koehler Publishers, Inc., 2014, 218-220.

billion.¹²⁷ Even though it was solvent with a reported \$2 billion in total revenue by the end of 1981, Manville nonetheless decided to file for Chapter 11 bankruptcy protection in early 1982.¹²⁸

Considering that it was solvent, many creditors felt that Manville was more concerned about the preservation of its corporation rather than the costs of life and livelihood caused by the asbestos poisoning.¹²⁹ However, Manville's usage of Chapter 11 was clearly strategic: not only did the corporation manage to remain solvent, keep its business operation going, and avoid what could easily have been a corporate meltdown, but also Manville was able to reorganize its debts and to be accountable to some of its creditors.¹³⁰ According to a published affidavit that accompanied the company's proposed reorganization plan, Manville justified the filing of Chapter 11 in the following manner:

It is thus Manville's intention to formulate effective procedures to accomplish precisely that in a manner which will not improperly favor any creditor over any other creditor similarly situated, be consistent with the fundamental bankruptcy tenet of equality of distribution, and permit Manville to emerge as a viable and profitable business it has been and expects to be once again.¹³¹

¹²⁷ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 61.

¹²⁸ *Ibid.*, 71-74. For an analysis of the Manville reorganization plan, see *In re Johns-Manville Corporation*.

¹²⁹ Cf. ASBESTOS LITIGATION GROUP, "The Manville Bankruptcy: Using Chapter 11 as Escape Hatch," in *Trial*, 19 (February 1983), 72-73; D.G. BAIRD, "The Uneasy Case for Corporate Bankruptcy," in *Journal of Legal Studies*, 15 (1986), 127-147.

¹³⁰ JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," 154.

¹³¹ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 70, quoting from the debtor's affidavit that accompanied *In re Johns-Manville Corporation*.

Regardless of the motives, however, it is arguable that the Manville bankruptcy case embodied precisely the primary objectives of the Bankruptcy Code: to keep the debtor afloat while at the same time to devise an equitable way to handle creditors' claims.¹³²

3.2.5 — Chapter 7 Liquidation Bankruptcy

As discussed, the two primary types of bankruptcy filings available in the Bankruptcy Code are liquidation bankruptcy (Chapter 7) and reorganization bankruptcy (Chapter 11 or Chapter 13). While the primary focus of this work is Chapter 11 corporate reorganization bankruptcy, it is important to be able to compare and contrast a Chapter 11 bankruptcy with a Chapter 7 bankruptcy. Thus, the following is a brief outline of a Chapter 7 bankruptcy.

Ordinarily, a corporation files for a Chapter 7 bankruptcy because it has gone past the point where Chapter 11 bankruptcy is feasible or even an option.¹³³ In a Chapter 7 filing, a corporation must take relatively drastic measures. These measures include closing the business operation and liquidating its assets in order to repay outstanding debts. When a corporation files for bankruptcy, a number of events are set in motion. First, the automatic stay is triggered. As the name implies, an automatic stay stops all creditors from harassing the debtor—which includes commencing or continuing any legal

¹³² DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 70.

¹³³ What constitutes *feasible*, however, is relative to each corporation and its financial situation. Cf. DOWDELL, “The Chapter 11 ‘Shuttle’—Coincidence or Competitive Strategy?” 688. The *BAPCPA* introduced, among other things, the so-called *means test* to help determine which type of bankruptcy a petitioner is qualified for—a liquidation bankruptcy or a reorganization bankruptcy, and the feasibility of such a filing. While the technical nature of the *means test* is beyond the scope of this work, it is important to appreciate the significance of the *BAPCPA*. For a detailed analysis of the *BAPCPA* and its ramifications, see WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 11, and R. RUSER, “Analysis of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA),” in *SPNA Review*, 2 (2006), 89-91.

proceedings to reclaim any of the debtor's assets. Effectively, an automatic stay provides the debtor with an immediate sense of relief—a sort of breathing room—presumably in order for the debtor to focus on the bankruptcy process itself. Once the automatic stay is in place, all claims must go through the bankruptcy court through the various mechanisms provided by the bankruptcy process.¹³⁴

The second event to take place once a Chapter 7 has been filed is that the debtor must cease all business operations and all assets are placed in a bankruptcy estate.¹³⁵ Essentially, this means that the corporation closes its doors and stops functioning as a business. Take, for example, a soup kitchen: once a Chapter 7 bankruptcy has been filed, the soup kitchen may not serve a single meal or provide any services to its clients. The reason for this is that the bankruptcy court considers everything—from the ingredients that go into making the soup, to a charity event already organized to raise money for an outreach program—as assets which now must now be placed in the bankruptcy estate to be liquidated in order to pay creditors. As such, even utility bills and salaries cannot be paid during this time without first having the bankruptcy court's permission.

The third event to take place after a Chapter 7 has been filed is the appointment of a case or bankruptcy trustee.¹³⁶ The administration and the operation of the business and the entire bankruptcy estate are typically handed over to the case trustee. It is important to

¹³⁴ M.J. WHITE, "Bankruptcy Law," in A. M. POLINSKY and S. SHAVELL (eds.), *Handbook of Law & Economics*, Oxford, Elsevier B.V., 2007, 1019.

¹³⁵ M.J. WHITE, "Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change," in *University of Chicago Law Review*, 65 (1998), 687.

¹³⁶ As already mentioned, a case trustee appointed in a Chapter 7 bankruptcy is distinct from a U.S. trustee; U.S. Trustees are required to appoint "a panel of trustees that are eligible and available to serve as [case] trustees" in Chapter 7 cases. Cf. 28 U.S.C. §586(a)(1).

note, however, that the legal title of the business is not transferred; rather, only control of the business and its assets are transferred. Consequently, the former administrator of the now bankrupt corporation continues to retain the legal title to the business entity—at least until the bankruptcy estate has been liquidated.

Concerning the bankruptcy estate, the case trustee either supervises or personally carries out the liquidation of all non-exempt assets in the bankruptcy estate. In carrying out his or her responsibility to liquidate assets in the bankruptcy estate, the case trustee has a duty to seek to maximize the value of the claims. In other words: the case trustee has the legal obligation to make sure that the assets in the bankruptcy estate are sold at the highest price possible in order to ensure the maximization of payment to creditors.¹³⁷

Conceivably, creditors are to be reimbursed once the entire bankruptcy estate has been liquidated. The order, the priority, and the amount of money due to each creditor are determined by the APR.¹³⁸ For example, according to the APR, the highest priority of reimbursement goes to reimburse administrative expenses related to the bankruptcy filing; these may include filing fees, attorneys' fees, fees to the trustees, etc. The next highest priority includes creditors with tax claims, rents and benefit claims, along with other secured creditors (e.g., bank loans with collateral attached to them), and perhaps unpaid wages. Usually, the lowest priority would be the unsecured creditors. Unsecured creditors include bondholders and shareholders, etc. Claims in each class of creditors are to be paid in full before moving down on the priority scale. This pattern continues until

¹³⁷ RHODES, "The Fiduciary and Institutional Obligations of a Chapter 7 Bankruptcy Trustee," 155. Cf. *Dechert v. Cadle Co.*, 333 F.3d 801 (7th Cir. 2003); *In re Luongo*, 259 F.3d 323 (5th Cir. 2001); A.C. EBERHART, W.T. MOORE, and R.L. ROENFELDT, "Security Pricing and Deviations from the Absolute Priority Rule in Bankruptcy Proceedings," in *The Journal of Finance*, 45 (1990), 1457-1469.

¹³⁸ Cf. J.C. LIPSON, "Directors' Duties to Creditors: Power Imbalance and the Financially Distressed Corporation," in *UCLA Law Review*, 50 (2003), 1229.

the bankruptcy estate has been completely depleted. Thus, if no more funds remain, creditors lower in the priority scale get nothing.

After the bankruptcy estate has been liquidated and all funds distributed, the remaining eligible debts are discharged.¹³⁹ While the Bankruptcy Code does not specify exactly when the remaining (eligible) debts are discharged, the *FRBP* requires that any objection or appeal related to the debt discharge must be made within 60 days after the final creditors' meeting.¹⁴⁰ If such objection or appeal is made, the bankruptcy court must hold a special hearing and would rule accordingly.¹⁴¹ However, once the expiration date has passed and no objection or appeal has been made, the debt discharged is considered final.

Once all debts are either reimbursed or discharged, Chapter 7 bankruptcy proceedings come to an end. The corporation is now defunct and possesses no assets—except those assets that were exempted by the bankruptcy court. There is no re-emerging from bankruptcy after a Chapter 7 filing since the corporation legally ceases to exist. However, this does not mean that the now-defunct corporation cannot reconstitute again as a new and distinct entity. If the bankrupt corporation or business does reconstitute under a new name and as a new corporation, the new corporation does not assume the debts of its predecessor. The new corporation is entitled to a fresh start, free from all previous debt obligations.

¹³⁹ However, debts that cannot be discharged in a Chapter 7 bankruptcy (e.g., secured debts owed on real property) must be dealt with equitably.

¹⁴⁰ Cf. Rule 4004 of the *FRBP*.

¹⁴¹ Cf. *11 U.S.C.* §502; Rule 4008 of the *FRBP*.

3.3 — Chapter 11 Reorganization Bankruptcy

While the statutory language of debt reorganization and debt discharge was already present in the *Chandler Act of 1936*, it was not until the introduction of Chapter 11 under *Title 11* of the Bankruptcy Code (i.e., the *Bankruptcy Reform Act of 1978*) that debt reorganization and debt discharge became essential parts of reorganization bankruptcy for businesses.¹⁴² Reorganization bankruptcy as articulated in Chapter 11 of the Bankruptcy Code is distinctively American.¹⁴³ The notion that a corporation in financial distress could receive legal protection, could remain in business, could reorganize its debts, and could resurface as a vital business venture free of previous debts is truly the hallmark of the Bankruptcy Code that has contributed to the developments of bankruptcy laws globally.¹⁴⁴ Typically, corporations that file for a Chapter 11 bankruptcy are specifically seeking for something a Chapter 7 bankruptcy cannot provide: to stay intact. Kevin Kordana and Eric Posner write:

[Chapters 7 and 11] serve the same bankruptcy purpose of maximizing the payments to interest holders while respecting contractual entitlements as much as possible. The difference is that Chapter 7 is intended to apply when the [corporation] is worth more in pieces than as a going concern, and Chapter 11 is intended to apply when the [corporation] is worth more as a going concern.¹⁴⁵

¹⁴² J. Rice and N. Davis observe: “The *Chandler Act of 1936* codified the equity receivership procedure as the Chapter XI reorganization [in the *Bankruptcy Act of 1898*]. The *Bankruptcy Reform Act of 1978* amended and further refined statutory reorganization into the Chapter 11 of the Bankruptcy Code which we know today.” RICE and DAVIS, “The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims,” 427. Cf. TABB, “The History of the Bankruptcy Laws in the United States,” 35.

¹⁴³ SKEEL, *Debt’s Dominion: A History of Bankruptcy Law in America*, 1.

¹⁴⁴ Cf. K.M.J. KAISER, “European Bankruptcy Laws: Implications for Corporations Facing Financial Distress,” in *Financial Management*, 25 (1996), 67-86; M. HOOGLAND, “Recent Trends in International Chapter 11 Cases: Pragmatic Reorganizations,” in *Texas International Law Journal*, 41 (2006), 145-169; M.E. BURKE, W. CUI, and P. JONES, “International Legal Developments in Review: 2006 Regional & Comparative Law: China,” in *The International Lawyer*, 41 (2007), 787.

¹⁴⁵ E. POSNER and K.A. KORDANA, “A Positive Theory of Chapter 11,” in *New York University Law Review*, 74 (1999), 161.

The *House of Representatives Report* in 1977 noted:

The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of...business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap.¹⁴⁶

Thus, a Chapter 11 bankruptcy is not about the winding up of a business in order to end it. Rather, the underlying objective for a corporation to file for a Chapter 11 bankruptcy is to have a fresh start without having to rebuild from scratch. Or, as Eva Dowell puts it: “[Reorganization bankruptcy] is premised on the notion that a troubled business can be reorganized and rehabilitated under Chapter 11 protection, [then] return thereafter as a viable economic unit.”¹⁴⁷

A number of important elements make a Chapter 11 bankruptcy particularly attractive to business and corporate debtors and are worth considering. As alluded to already, the first element is that businesses filing for Chapter 11 bankruptcy do not need to close their doors, lay off employees, cease all operations, or stop making profits for themselves or their investors. Rather, these businesses could continue to operate under the protection or supervision of the bankruptcy court. This means that such businesses could, for instance, keep their doors open, retain current management and employees (or even perhaps hire new employees), contribute to employees' pensions, and continue to make profits while reorganizing their debts.¹⁴⁸ Moreover, because of the automatic stay, creditors are prohibited from interfering with the debtors' business operations; creditors

¹⁴⁶ Cf. *House of Representatives Report*, No. 595, 9th Congress, 1st Session 220 (1977), quoted in TABB, “The Future of Chapter 11,” 802.

¹⁴⁷ DOWDELL, “The Chapter 11 ‘Shuttle’—Coincidence or Competitive Strategy?” 683.

¹⁴⁸ SKEEL, “Bankruptcy Phobia,” 341.

may only intrude if they have permission from the bankruptcy court and, even then, the intrusion would be minimal.¹⁴⁹

The second element that makes a Chapter 11 bankruptcy attractive to debtors is that these debtors can maintain both possession and control of their businesses while reorganizing their debts.¹⁵⁰ As debtors-in-possession,¹⁵¹ debtors can retain ownership of the bankruptcy estate and operation of their business. Practically speaking, this means that debtors could continue to determine how to operate the businesses, where to invest funds, how to restructure management, how many loans to take out, etc. Furthermore, not only do debtors retain ownership of their businesses, but also the Bankruptcy Code gives them the authority to propose—within some limitations—their own reorganization plan.¹⁵² Chapter 11 gives debtors a great deal of discretion over how their debts can be reorganized.¹⁵³

The final element that makes a Chapter 11 bankruptcy attractive to debtors is that, when compared to a Chapter 7 bankruptcy, a Chapter 11 bankruptcy has fewer restrictions concerning the types of debts which can be discharged. For example, debts that are associated with punitive damages or for willful or malicious injury usually cannot be discharged in a Chapter 7 bankruptcy; under a Chapter 11 bankruptcy, however, some of these debts may be dischargeable. Moreover, both pre-petition debts and post-petition

¹⁴⁹ Automatic stays will be discussed in more detail in the subsequent section.

¹⁵⁰ SKEEL, *Debt's Dominion: A History of Bankruptcy Law in America*, 1.

¹⁵¹ Debtors-in-possession will be discussed in the next section.

¹⁵² For example, debtors have an exclusive right to propose their own reorganization plan during the first 120 days after filing for a Chapter 11 bankruptcy petition.

¹⁵³ POSNER and KORDANA, "A Positive Theory of Chapter 11," 162. Cf. E. WARREN, *Business Bankruptcy*, Washington, DC, Federal Judicial Center, 1993, 63-69. However, in some circumstances and with cause, creditors can request the court to let them play a more prominent role in reorganizing of a business' operations.

debts (incurred before the reorganization plan is confirmed) can also be discharged in a Chapter 11, whereas they are not necessarily dischargeable under a Chapter 7 bankruptcy.¹⁵⁴

While any type of partnership or corporation can file for a reorganization bankruptcy under Chapter 11, the timing of such a filing is a matter of strategy.¹⁵⁵ When to file for Chapter 11 must always consider the issues of solvency and liabilities. Typically, a corporation filing for a Chapter 7 bankruptcy is already insolvent; the corporation's liabilities already outweigh its assets.¹⁵⁶ In a Chapter 11, however, actual insolvency is not required. This is one of the major distinguishing features of a Chapter 11 bankruptcy. For a corporation contemplating filing for Chapter 11 protection, it is generally not the actual liabilities but rather the potential liabilities that determine the timing of the filing. In other words: a corporation's decision to file for bankruptcy under

¹⁵⁴ JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," 158. Cf. *11 U.S.C. §727(a)*; TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 569; K.L. BALLOBIN, "Line Drawing and the Bankruptcy Discharge: Why Prepetition Stipulations Are Enforceable But Prepetition Waivers Are Not," in *University of Kansas Law Review*, 59 (2011), 369-405.

¹⁵⁵ Cf. *11 U.S.C. §109(d)* and (c); M.M. HARNER and J.M. GRIFFIN, "Facilitating Successful Failures," in *Florida Law Review*, 66 (2014), 206-260. For individual persons seeking reorganization bankruptcy, the Bankruptcy Code provides two options: a Chapter 11 or a Chapter 13. Cf. S.L. DALY, "Post-Petition Earnings and Individual Chapter 11 Debtors: Avoiding a Head Start," in *Fordham Law Review*, 68 (2000), 1758. This thesis will not elaborate on the details concerning individual persons filing for reorganization bankruptcy under either Chapter 11 or Chapter 13. For more information regarding personal reorganization bankruptcy under both Chapter 11 and Chapter 13, see WHITE, "Why It Pays to File for Bankruptcy: A Critical Look at the Incentives Under U.S. Personal Bankruptcy Law and a Proposal for Change," 691-692; *11 U.S.C. §109(e)*. Also see *Toibb v. Radloff*, 502 U.S. 157 (1991) and E. WARREN and J.L. WESTBROOK, "The Success of Chapter 11: A Challenge to the Critics," in *Michigan Law Review*, 107 (2009), 610.

¹⁵⁶ Cf. M.J. WHITE, "The Corporate Bankruptcy Decision," in *Journal of Economic Perspectives*, 3 (1989), 132-138.

Chapter 11 is dependent on its ability to anticipate when future potential liabilities will outweigh its future potential assets.¹⁵⁷ Kevin Delaney observes:

[The] interesting question is not “Do liabilities outweigh assets” but rather “When does a liability become a liability?” That is to say: when do future [...] liabilities become recognized and acted upon as real liabilities by the firm, its creditors, and the bankruptcy court?¹⁵⁸

As already noted, since the *Bankruptcy Reform Act of 1978*, the rate of solvent corporations filing for Chapter 11 protection has not only increased, but such filings have also become much more common.¹⁵⁹ In a survey published by Elizabeth Warren and Jay Westbrook in 1999, one in four debtors who entered any type of bankruptcy was reported to be solvent at the time of filing; among debtors who specifically filed for reorganization bankruptcy, that number grew to one in three.¹⁶⁰ Asserting that the current bankruptcy legislation has become too debtor-friendly, a numbers of scholars have suggested that some changes are in order.¹⁶¹ Among the suggested changes or reforms, two stand out in particular. The first suggestion argues that bankruptcy judges should be encouraged to utilize more readily the provisions already in the Bankruptcy Code to dismiss Chapter 11 petitions or to convert Chapter 11 cases to Chapter 7 cases based on the recommendations

¹⁵⁷ Naturally, there are a number of factors that can determine when or how a corporation files for Chapter 11, and the issue concerning when potential liabilities become actual liabilities is one way to factor into the equation the issue of solvency. Cf. MILLER and WAISMAN, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” 195.

¹⁵⁸ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 74.

¹⁵⁹ Cf. RICE and DAVIS, “The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims,” 428; DOWDELL, “The Chapter 11 ‘Shuttle’—Coincidence or Competitive Strategy?” 685.

¹⁶⁰ E. WARREN and J.L. WESTBROOK, “Financial Characteristics of Businesses in Bankruptcy,” in *American Bankruptcy Law Journal*, 73 (1999), 500.

¹⁶¹ Cf. WHITE, “Corporate and Personal Bankruptcy Law,” 147-151.

of the U.S. trustee.¹⁶² The second suggestion argues that bankruptcy judges should be given greater latitude to dismiss Chapter 11 cases when they deem those cases not to be feasible.¹⁶³ As of now, however, no major reforms have been implemented. Thus, the Bankruptcy Code (and all subsequent legislation until now) continues to be in effect.¹⁶⁴

3.4 — Participants in a Chapter 11 Bankruptcy

As in any legal proceeding, a Chapter 11 bankruptcy involves a number of participants. Parties become participants either because they have a legal mandate to be involved (e.g., debtors, creditors, trustees, etc.) or they were enjoined into the process by the bankruptcy court (e.g., third party lenders, etc.) because of special circumstances.¹⁶⁵ The following is an overview of the functions and nature of some of the principal participants in a Chapter 11 bankruptcy.

3.4.1 — Debtors

A debtor is one who owes an obligation to another. Whether the obligation is one of money or of performance, there is a debtor in every bankruptcy case. In a voluntary

¹⁶² TABB, “The Future of Chapter 11,” 836. Cf. *11 U.S.C.* §1112(b).

¹⁶³ TABB, “The Future of Chapter 11,” 835. Michelle White, a professor of economics at the University of California, San Diego, proposes that, in deciding whether to file a Chapter 7 bankruptcy or a Chapter 11 bankruptcy, corporations should assess their level of efficiency based on economic theories. She argues that corporations that are not efficient economically should file for a Chapter 7 bankruptcy because their assets—once liquidated—can be better put to use in ways that are more efficient. In other words: economically inefficient corporations should cease to exist in order to make way for more economically efficient corporations. On the other hand, however, if corporations are economically efficient, it is preferable for them to file for a Chapter 11 bankruptcy because they are economically viable and should be given the chance to be rehabilitated. Cf. WHITE, “The Corporate Bankruptcy Decision,” 129-151.

¹⁶⁴ It is worth noting that on 4 December 2004, the American Bankruptcy Institute issued some recommendations for reform of Chapter 11. For an analysis of these recommendations, see R.J. DE WEIJS and B. WESSELS, “Proposed Recommendations for the Reform of Chapter 11 U.S. Bankruptcy Code,” Centre for the Study of European Contract Law Working Paper Series No. 2015-05, Amsterdam Law School, 17 April 2015, available at: <http://ssrn.com/abstract=2595577> (last accessed 15 September 2015).

¹⁶⁵ Cf. Rule 7020 of the *FRBP*.

bankruptcy filing, the debtor initiates the process. In an involuntary bankruptcy filing, however, the initiator is an agency other than the debtor (e.g., creditors).¹⁶⁶ The Bankruptcy Code defines a debtor as any “person or municipality concerning which a case under [*Title 11*] has been commenced.”¹⁶⁷ The term “person” refers to either a natural person or a legal person.¹⁶⁸ Examples of legal persons are partnerships or corporations.¹⁶⁹

In theory, any legal person can be a debtor in a bankruptcy proceeding. For a variety of reasons, however, the Bankruptcy Code specifically excludes banks, credit unions, insurance companies, the so-called “family farmers,” “family fishermen,” and municipalities from filing for reorganization bankruptcy under Chapter 11. Instead, these types of persons can file for reorganization bankruptcy under other chapters of *Title 11*. Take, for instance, persons who own and operate family farms. The Bankruptcy Code considers the economic reality of farmers in the United States to be unique since many farms have historically been handed down from one generation to the next. Moreover, for many farmers, not only can the filing for bankruptcy entail the prospect of losing their businesses (i.e., the family farm corporation), but also it could very well mean losing their family homes since, in addition to being businesses and places of employment, these farms are also residences for farmers and their families. Consequently, Chapter 12 of *Title 11* of the Bankruptcy Code addresses the unique circumstances and needs of farmers in financial distress, and ensures a reorganization plan that permits the debtors/farmers to

¹⁶⁶ *Black's Law Dictionary*, 490.

¹⁶⁷ *11 U.S.C.* §101 (13).

¹⁶⁸ Cf. *ibid.*, §109.

¹⁶⁹ What constitutes a natural or physical person is self-evident. Typically, however, a natural person files for Chapter 11 only if his or her personal debts are too high to qualify under a Chapter 7 or a Chapter 13 filing as mentioned before.

retain their family homes.¹⁷⁰ Similarly, municipalities such as counties and cities are places where citizens live and where basic services are made available to them (e.g., public schools, hospitals, social welfare programs, etc.). Thus, when counties or cities file for bankruptcy, they cannot be treated like regular corporations filing for reorganization bankruptcy. Therefore, the Bankruptcy Code allows municipalities to file for reorganization bankruptcy protection under Chapter 9 of *Title 11* of the Bankruptcy Code.¹⁷¹ Concerning foreign businesses incorporated elsewhere than the United States, if they have business dealings in the United States they may file for bankruptcy protection in the United States under Chapter 15 of *Title 11* of the Bankruptcy Code.¹⁷²

Dissimilar to family farmers and municipalities, the Bankruptcy Code prohibits banks, credit unions, and certain types of insurance companies from filing for bankruptcy protection.¹⁷³ Financial institutions in the United States are regulated differently than other corporate entities. For example, banks in the United States are required by law to be members of the Federal Deposit Insurance Corporation (FDIC), which is part of the

¹⁷⁰ For social and historical reasons, the Bankruptcy Code considers the economic reality of farmers unique. Therefore, the Bankruptcy Code regulates how farmers can reorganize under the protection of the bankruptcy court under Chapter 12 of *Title 11*. Generally, a Chapter 12 bankruptcy is less complicated and less expensive than a Chapter 11 bankruptcy. A “Family Farmer” designation includes individual persons and/or their spouses who own and operate together a family farm. Furthermore, a partnership, a trust, or a corporation that has more than fifty percent of its stock held by one family can also be qualified as a debtor in a Chapter 12 bankruptcy. Similar to the Family Farmers, the so-called “Family Fishermen” could file for reorganization bankruptcy under Chapter 12 as well. Cf. *11 U.S.C.* §1201–1231.

¹⁷¹ Cf. *ibid.*, §901–§946. States, however, are excluded from filing for bankruptcy under the Bankruptcy Code. For a thorough explanation of this and some recent proposals to amend the Bankruptcy Code to allow states to file for bankruptcy, see R.M. HYNES, “State Default and Synthetic Bankruptcy,” in *Washington Law Review*, 87 (2012), 657-705.

¹⁷² Cf. *11 U.S.C.* §1501–§1532; HOOGLAND, “Recent Trends in International Chapter 11 Cases: Pragmatic Reorganizations,” 145-169.

¹⁷³ This is uniquely an American bankruptcy practice. Many foreign nations do have bankruptcy legislations allowing banks and similar financial institutions to file for bankruptcy. Cf. R.M. HYNES and S.D. WALT, “Why Banks Are Not Allowed in Bankruptcy,” in *Washington and Lee Law Review*, 67 (2010), 985-1051.

federal government of the United States. When a bank becomes (or is heading towards) insolvency, the FDIC will intervene and act as the receiver. Similar to an insurance company, once the FDIC acts with receivership of an insolvent bank, it assumes the debts of the banks and deals with them accordingly.¹⁷⁴

As financial institutions, credit unions are treated similar to banks; however, banking laws in the United States do not require credit unions to be insured by the FDIC. Instead, the FDIC equivalent receivership body for insolvent credit unions is the National Credit Union Administration (NCUA). Consequently, when credit unions that are members of the NCUA become insolvent, the NCUA assumes any outstanding debts.¹⁷⁵

3.4.2 — Claims, Creditors, and Creditors' Committees

The Bankruptcy Code defines a creditor as any person—natural or legal—who has one or more claims against an estate.¹⁷⁶ By claims, the Bankruptcy Code is referring to any harm that can be redressed by the legal process. It is worth mentioning that there is a long history of case law in the United States that defines claims broadly;¹⁷⁷ many

¹⁷⁴ The bankruptcy case involving the Caledonian Bank is worth considering. The Caledonian Bank, Ltd., was a financial institution based in the Cayman Islands that filed for reorganization bankruptcy protection in New York in early 2015. Two things to note: The first thing is that, while it was a bank, Caledonian Bank was incorporated in the Cayman Islands and was therefore not subject to U.S. banking laws (e.g., it did not have to be FDIC insured) or U.S. bankruptcy law (e.g., being excluded from filing for bankruptcy protection). The second thing is that, when Caledonian Bank, Ltd. filed for reorganization bankruptcy protection in New York, it did so under Chapter 15 of the Bankruptcy Code—that is, it filed as a foreign business with operations in the United States. Cf. A. ZAJAC, “Cayman’s Caledonian Bank Files for Bankruptcy after SEC Freeze,” in *Bloomberg Business*, 16 February 2015, available at: <http://www.bloomberg.com/news/articles/2015-02-16/cayman-islands-caledonian-bank-files-for-bankruptcy-in-u-s-> (last accessed 10 June 2015).

¹⁷⁵ While banks, credit unions, and insurance companies generally do not qualify as debtors in a Chapter 11, parent or holding companies of these institutions may qualify as debtors in a Chapter 11.

¹⁷⁶ Cf. *11 U.S.C.* §101 (10).

¹⁷⁷ P.C. BLAIN and D.H. O’GAWA, “Creditors’ Committees under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties,” in *Marquette Law Review*, 73 (1990), 584.

commentators have observed that the courts in the United States have routinely held that creditors' claims are legitimate regardless of how remote or contingent these claims may be.¹⁷⁸ Other commentators argue that, by having a broad definition of what constitute claims, the courts are protecting a fundamental right of creditors: as a matter of due process, creditors have the right to be heard, and the remote nature of their claims is irrelevant because the right to due process prevails.¹⁷⁹

While there is usually one debtor in any bankruptcy case, there can be multiple creditors. When there are multiple creditors, however, these creditors are not all considered equal under the law. Creditors differ from one another based on the nature of their claims since some claims are more *secured* than others. Creditors who hold secured claims are creditors who have one or more liens on a debtor's property; the bankruptcy court considers these creditors to have secured interests. For example, in order to acquire a loan from a lending institution, a debtor would typically need to pledge a piece of property that the lending institution could hold as collateral. Once there is collateral, the lending institution has the right to place a lien on the debtor's property in the event that the debtor defaults on the loan.¹⁸⁰ Consequently, when that debtor becomes insolvent and files for bankruptcy—thus defaulting on the loan—the lending institution becomes a

Cf. *Grady v. A.H. Robins Co.*, 839 F.2d 198 (1988); *Pennsylvania Department of Public Welfare v. Davenport*, 495 U.S. 552 (1990); *Johnson v. Home State Bank*, 501 U.S. 78 (1991).

¹⁷⁸ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 232.

¹⁷⁹ L.B. BARTELL, "Due Process for the Unknown Future Claim in Bankruptcy: Is This Notice Really Necessary?" in *American Bankruptcy Law Journal*, 78 (2004), 341. Cf. 11 U.S.C. § 101 (5). For more information concerning claims and their nature (i.e., remoteness, contingent, etc.), see BARTELL, "Due Process for the Unknown Future Claim in Bankruptcy: Is This Notice Really Necessary?" 339-372.

¹⁸⁰ A lien is defined as the "legal right or interest that a creditor has in [the debtor's] property [that lasts] until the debt...is satisfied." *Black's Law Dictionary*, 1063.

creditor with a secured claim since the creditor's claim is backed by the debtor's pledged property.¹⁸¹

On the other hand, what about a creditor who has claims against a debtor but has no liens attached? Such claims usually arise from credit card debts,¹⁸² medical bills, back rents (unless the debtor is in a jurisdiction that allows for landlord liens), previous court judgments that have yet to be enforced involving remedies such as garnishment of income or attachments, or personal loans that did not require a security agreement or mortgage to obtain. These claims are considered unsecured, and creditors holding such claims are referred to as unsecured creditors; they do not have as much priority as the secured creditors in a bankruptcy procedure.

In order to safeguard the interests of all creditors and give them something akin to a collective-bargaining power, the Bankruptcy Code contains provisions for the recreation of creditors' committees.¹⁸³ The creditors' committees represent the interests of all the creditors by being the primary bodies that deal with debtors when negotiating reorganization plans. Accordingly, regardless of whether they have secured or unsecured claims, all classes of creditors can benefit from being part of creditors' committees. Peter Blain and Diane O'Gawa write:

The right to commence actions enables [creditors'] committees to exert a considerable degree of control over the Chapter 11 proceeding. Debtors in possession may be reluctant or even unwilling to seek recovery of assets, such as avoidable

¹⁸¹ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 29.

¹⁸² This would also include advance lines of credit and/or cash.

¹⁸³ Cf. BLAIN and O'GAWA, "Creditors' Committees under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties," 603-605. In general, membership on a creditors' committee is usually composed of secured creditors. However, in some circumstances, a bankruptcy court is entitled to erect a committee for unsecured creditors as well. T.J. SALERNO and J.A. KROOP, *Bankruptcy Litigation and Practice: A Practitioner's Guide*, Vol. I, 4th ed., New York, NY, Aspen Publishers, 2007, 8-16. Cf. 11 U.S.C. §1102.

preferences or fraudulent transfers, from trade creditors whose good-will may be vital to their post-reorganization prospects. Such reluctance may prejudice the creditor body as a whole. A [creditors'] committee, designed to be a temporary body and charged with ensuring equal treatment for all creditors, may be the ideal party to prosecute such actions. In so doing, the [creditors'] committee may improve the prospects of creditors generally, either by increasing the total distribution creditors receive or, at a minimum, by facilitating a successful reorganization which will cure the financial ills of a valued customer or supplier.¹⁸⁴

It is the responsibility of the U.S. trustee to appoint members to sit on a creditors' committee.¹⁸⁵ The diversity of membership on a creditors' committee can vary; among other considerations, the number and type of creditors who can be selected to sit on a creditors' committee would be determined by the facts of the case, the presiding judge, and the volume and nature of the creditors involved. Additionally, there can be more than one creditors' committee in a bankruptcy case. For instance, there could be one creditors' committee that includes only the secured creditors and a second creditors' committee that includes only the non-secured creditors.¹⁸⁶ However, it is worth noting that in bankruptcy cases where there is only a limited number of creditors, the bankruptcy judge may forgo the formation of a creditors' committee altogether. This is not uncommon—especially in situations involving small businesses and/or where the facts of the cases and the law involved are not complicated.¹⁸⁷

¹⁸⁴ BLAIN and O'GAWA, "Creditors' Committees under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties," 606.

¹⁸⁵ 11 U.S.C. §1102(a)(1).

¹⁸⁶ Cf. BLAIN and O'GAWA, "Creditors' Committees under Chapter 11 of the United States Bankruptcy Code: Creation, Composition, Powers, and Duties," 582-584. Although it has been constituted, the composition of a creditors' committee can be altered. For example, in *In re Texaco, Inc.*, the bankruptcy court in the Southern District of New York granted the debtor's motion to combine two separate (unsecured) creditors' committees to form a new committee. Cf. *In re Texaco, Inc.*, 79 Bankr. 560 (S.D.N.Y. 1987) at 566; *In re Swolsky*, 55 Bankr. 144 (N.D. Ohio 1985).

¹⁸⁷ Cf. *In re Haskell-Dawes*, 188 B.R. 515 (Bankr. E.D. PA 1995).

One of the objectives of a creditors' committee is to safeguard the interest(s) of all of the creditors in a bankruptcy proceeding.¹⁸⁸ As mentioned earlier, a creditors' committee represents the interests of all creditors, and this committee is tasked with the responsibility to negotiate with the debtor to come to an agreeable reorganization plan on behalf of all the creditors. The duties entrusted to a creditors' committee include: exercising due diligence to investigate or review debtor's assets, identifying liabilities, inquiring about the financial status of the bankruptcy estate, and reviewing all financial activities of the debtor's business before and during the bankruptcy process. The committee also participates in the reorganization of debts by reviewing, rejecting, or approving reorganization plans proposed by the debtor; after the first 120 days after the bankruptcy petition has been filed, a creditors' committee can present its own reorganization plan to the bankruptcy court for its consideration.¹⁸⁹ To carry out its objective, a creditors' committee may hire professionals such as attorneys, accountants, appraisers, or other experts to assist as needed.¹⁹⁰

3.4.3 — Trustees and Debtors-in-Possession

In a bankruptcy filing, usually an impartial actor represents the collective interest of all parties involved. In the past, this was the role of a commissioner or the assignee. In

¹⁸⁸ G.G. TRIANTIS, "A Theory of the Regulation of Debtor-in-Possession Financing," in *Vanderbilt Law Review*, 46 (1993), 917.

¹⁸⁹ During the first 120 days after the bankruptcy petition has been filed, the debtor has the exclusive right to propose a reorganization plan. After 120 days, creditors and creditors' committees may present their own proposal as well. Cf. *11 U.S.C.* §1103.

¹⁹⁰ The bankruptcy court considers a creditors' committee a "party in interest" in a Chapter 11 bankruptcy. This means that the committee has the right to appear before the bankruptcy court and be heard on any issues that may arise during the bankruptcy proceeding. WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 67.

the Bankruptcy Code, this impartial party is a trustee. Functioning more like an over-seer, a trustee is defined as a natural person “who stands in a fiduciary or confidential relationship to another...especially one who, having legal title to property, holds it in trust for the benefit of another and owes a fiduciary duty to that beneficiary.”¹⁹¹ There are two types of trustees under *Title 11*: a U.S. trustee and a case trustee. Assigned to all bankruptcy cases is a U.S. trustee; it is the U.S. trustee who supervises the entire bankruptcy process. In a Chapter 7 bankruptcy, the U.S. trustee appoints a case trustee.¹⁹² In a Chapter 11 bankruptcy, however, there is usually no case trustee appointed.¹⁹³

The primary reason why there is no case trustee assigned in a Chapter 11 bankruptcy is that such an appointment would be redundant. In a Chapter 7 bankruptcy, a case trustee has two primary duties. First, a case trustee takes over control of the bankruptcy estate from the debtor, and second, the case trustee initiates the liquidation of the assets in the bankruptcy estate in order to repay debts. This is usually what happens in a Chapter 7 bankruptcy. These events, however, do not occur in a Chapter 11 bankruptcy. In a Chapter 11 bankruptcy, the bankruptcy estate remains in the possession and control of the debtor, and the debtor assumes the role and function of a “debtor-in-possession” (DIP).¹⁹⁴ As a DIP, the debtor continues to manage the day-to-day operation of the

¹⁹¹ *Black's Law Dictionary*, 1748. Cf. D.P. PRIMACK, “Confusion and Solution: Chapter 11 Bankruptcy Trustee’s Standard of Care for Personal Liability,” in *William & Mary Law Review*, 43 (2002), 1299-1301.

¹⁹² *11 U.S.C.* §701 (a).

¹⁹³ PRIMACK, “Confusion and Solution: Chapter 11 Bankruptcy Trustee’s Standard of Care for Personal Liability,” 1297. However, at the request of a party in interest, or if there are concerns regarding fraud or incompetency, the bankruptcy court may appoint, through the U.S. trustee’s office, a case trustee to take over the supervision of the bankruptcy case. Cf. *11 U.S.C.* §1104 (a).

¹⁹⁴ The term DIP usually refers to the entire business or corporation that has filed for Chapter 11 rather than to one specific physical person; nevertheless, the administrator who speaks on behalf of the corporation is usually also the same person who speaks on behalf of the “debtor in possession.” Cf. *11*

bankrupt business and to care for the bankruptcy estate while at the same time negotiating with the creditors' committee to formulate a reorganization plan.¹⁹⁵ Thus, the bankruptcy estate remains intact and under the ownership and administration of the DIP. Consequently, appointment of a case trustee in a Chapter 11 bankruptcy would be a redundancy since the DIP functions in an identical capacity.¹⁹⁶ According to the Bankruptcy Code:

Subject to any limitations on a trustee serving in a case under this chapter, and to such limitations or conditions as the court prescribed, a [DIP] shall have all the rights, other than the right to compensation under section 330 of this title, and powers, and shall perform all the functions and duties, except the duties specified in section 1106 (a) (2), (3) and (4) of this title, of a trustee serving in a case under this chapter.¹⁹⁷

Since ownership and control of a business do not change in a Chapter 11 but remain in the hands of the DIP, nothing essentially needs to be changed in the actual operation of the business while it is reorganizing its debts. In fact, it is typical for a DIP to keep the same administrator or manager¹⁹⁸ and to retain the same business operation in order to ensure continuity. Furthermore, having DIP status allows a debtor in a Chapter 11 bankruptcy access to special financing—the so-called DIP financing.¹⁹⁹ With the

U.S.C. §1101(1) and (2); DAHIYA et al., “Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence,” 260; *Black’s Law Dictionary*, 490.

¹⁹⁵ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 55. Cf. LUBBEN, “The ‘New and Improved’ Chapter 11,” 848; *In re Ionosphere Clubs, Inc.*, 113 B.R. 164 (Bankr. S.D.N.Y. 1990).

¹⁹⁶ C.J. WHITE and W.W. THEUS, “Chapter 11 Trustees and Examiners after BAPCPA,” in *American Bankruptcy Law Journal*, 80 (2006), 292. Cf. PRIMACK, “Confusion and Solution: Chapter 11 Bankruptcy Trustee’s Standard of Care for Personal Liability,” 1299-1301.

¹⁹⁷ *11 U.S.C.* §1107(a).

¹⁹⁸ DAHIYA et al., “Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence,” 262.

¹⁹⁹ Cf. U.S. DHILLON, T. NOE, and G.G. RAMÍREZ, “Debtor-in-Possession Financing and the Resolution of Uncertainty in Chapter 11 Reorganizations,” in *Journal of Financial Stability*, 3 (2007), 242; DAHIYA et al., “Debtor-in-Possession Financing and Bankruptcy Resolution: Empirical Evidence,” 262-263; TRIANTIS, “A Theory of the Regulation of Debtor-in-Possession Financing,” 901-936.

approval of the bankruptcy court, DIP financing includes certain types of loans and/or credits made available only to DIP. The purpose of providing for such loans or credits is so that businesses in Chapter 11 bankruptcy will have access to funding in order to stay in operation. In order to encourage lending institutions to make DIP financing available, bankruptcy courts typically guarantee that lending institutions be classified as secured creditors, and such a status would essentially allow them to bypass the APR rule to advance ahead of others to get their money back.²⁰⁰

The Bankruptcy Code has clear expectations for a DIP, and it is important to consider some of them. First, there is an expectation that the debtor (and by extension, the DIP) will act in good faith. This means that the DIP will not act in any way that would pervert the spirit of the Bankruptcy Code. Second, the Bankruptcy Code holds that a DIP, in addition to having a fiduciary duty to manage the bankrupt business and the bankruptcy estate, also has to safeguard the interests of all of the creditors in a bankruptcy case.²⁰¹ Third, the Bankruptcy Code holds a DIP accountable to the bankruptcy court, the U.S. trustee, and the creditors' committee; because of this accountability, the bankruptcy court, the U.S. trustee, and the creditors' committee have the right to scrutinize the DIP's action and the status of the bankruptcy estate. Fourth, the Bankruptcy Code expects a DIP to provide an accurate account of all the non-exempt properties in the bankruptcy estate, to receive and/or to object to creditors' claims, to file reports to the courts and to the U.S. trustee's office, and to be accountable to a creditors'

²⁰⁰ TRIANTIS, "A Theory of the Regulation of Debtor-in-Possession Financing," 905. Cf. MILLER and WAISMAN, "Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?" 178-179 and 185.

²⁰¹ HYNES, "Reorganization as Redemption," 210. Cf. ALCES, "Enforcing Corporate Fiduciary Duties in Bankruptcy," 96; *11 U.S.C.* §1107.

committee in all matters pertaining to the bankruptcy case. Fifth, the Bankruptcy Code expects that a DIP gets the necessary approval from the bankruptcy court before it places acts on behalf to the bankruptcy estate that go beyond the ordinary course of business.²⁰² Finally, the Bankruptcy Code expects the DIP to receive the approval of the bankruptcy court before it can hire experts (e.g., attorneys, accountants, appraisers, auctioneers, etc.) to assist it in carrying out its duties as a DIP aptly and judiciously.

It is important to note that, while having the debtor assume the role and function of a DIP is typical in most Chapter 11 bankruptcy proceedings, there are exceptions.²⁰³ In certain situations, the bankruptcy court could replace a DIP with a trustee. The Bankruptcy Code explains:

- (a) At any time after the commencement of the case but before confirmation of a plan, on request of a party in interest or the United States trustee, and after notice and a hearing, the court shall order the appointment of a trustee—
 - (1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case, or similar cause, but not including the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor; or
 - (2) if such appointment is in the interests of the creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.²⁰⁴

Keli Alces adds:

Courts have faithfully observed a presumption in favor of retaining the DIP to manage a Chapter 11 debtor. The appointment of a [case] trustee [in addition to or in place of a DIP] is considered an extreme remedy and a party moving for appointment of a trustee must establish its necessity by clear and convincing evidence. If a trustee is appointed, she [or he] usually takes over for the DIP completely and becomes primarily

²⁰² ALCES, “Enforcing Corporate Fiduciary Duties in Bankruptcy,” 130.

²⁰³ BERDAN and ARNOLD, “Displacing the Debtor in Possession: The Requisites for and the Advantages of the Appointment of a Trustee in Chapter 11 Proceedings,” 458. Cf. ALCES, “Enforcing Corporate Fiduciary Duties in Bankruptcy,” 86-87, 94, and 98-104.

²⁰⁴ *11 U.S.C.* §1104(a)(1) and (2).

responsible for operating the debtor and for negotiating and composing a plan of reorganization.²⁰⁵

When the circumstance necessitates, the Bankruptcy Code provides for two possible alternatives. The first is to retain the DIP but with the U.S. trustee appointing a case trustee to work in conjunction with the DIP. This first alternative is viable in cases involving issues of incompetency or mismanagement on the part of the DIP. The second option is to replace the DIP completely, with the U.S. trustee appointing a case trustee to assume complete ownership and management of the bankruptcy estate. This second alternative is viable in cases involving issues of fraud or dishonesty on the part of the DIP.²⁰⁶

3.4.4 — Party-in-Interest and Permissive Intervention

The term “party-in-interest” refers to a participant who is formally a part of the bankruptcy proceeding. A person (natural or legal) becomes a party-in-interest through an intervention. There are two types of interventions: mandatory intervention or permissive intervention. Parties-in-interest with mandatory intervention typically include debtors, creditors, creditors’ committees, and trustees.²⁰⁷ If a party-in-interest should be part of the bankruptcy process through mandatory intervention but is, in fact, not part of the process,

²⁰⁵ ALCES, “Enforcing Corporate Fiduciary Duties in Bankruptcy,” 96.

²⁰⁶ *In re Ionosphere Clubs, Inc.* at 167. Cf. BERDAN and ARNOLD, “Displacing the Debtor in Possession: The Requisites for and the Advantages of the Appointment of a Trustee in Chapter 11 Proceedings,” 457-490; PRIMACK, “Confusion and Solution: Chapter 11 Bankruptcy Trustee’s Standard of Care for Personal Liability,” 1297; 11 U.S.C. §1108; *In re Curlew Valley Associates*, 14 B.R. 506 (Bankr. D. Utah 1981) at 514; I. MILLHISER, “Catholic Church Claims It Can Refuse to Pay Victims of Sex Abuse Because of Religious Freedom,” in *Think Progress*, 11 March 2015, available at: <http://thinkprogress.org/justice/2015/03/11/3632147/catholic-archdiocese-claims-can-refuse-pay-victims-sex-abuse-religious-freedom/> (last accessed 2 January 2016).

²⁰⁷ This list, however, is neither exhaustive nor exclusive. Cf. 11 U.S.C. §1109 (b); T.J.P. RADWAN, “Keeping the Faith: The Rights of Parishioners in Church Reorganizations,” in *Washington Law Review*, 82 (2007), 100.

then the bankruptcy court considers the situation and determines whether or not there is justification to move forward with the bankruptcy case.²⁰⁸

When a person is not part of the bankruptcy proceeding through mandatory intervention but wants to be included nevertheless, this person may petition the bankruptcy court to become a party-in-interest through permissive intervention. In order to determine whether a person who is not a party-in-interest should be given permission to intervene in a bankruptcy proceeding, the bankruptcy court must ascertain the legal significance of the petitioner's request for intervention. In this situation, the bankruptcy court asks: Does the petitioner have a financial stake in the outcome of this particular bankruptcy case? Is there a conflict of interest if the intervention is granted? Will the intervention have any direct effect on the argument(s) in the case before the bankruptcy court?²⁰⁹ If the answer to any of these questions is in the affirmative, then the bankruptcy court may permit the petitioner to intervene.²¹⁰

It is worth noting that even if the bankruptcy court does grant a petitioner permission to intervene in the bankruptcy case and to become a party-in-interest, the court has the discretion to determine the nature and extent of the permissive intervention.

²⁰⁸ For example, if a debtor refuses to be part of the case, then the bankruptcy court could consider the case an involuntary bankruptcy case and could proceed according to §303 of the Bankruptcy Code.

²⁰⁹ RADWAN, "Keeping the Faith: The Rights of Parishioners in Church Reorganizations," 97-100. Cf. *11 U.S.C.* §1109(b). It is important to note that, oftentimes, debtors themselves have debtors. Would these debtors' debtors be considered co-debtors in a bankruptcy proceeding? Or should just the value of these debts in question be included in the current bankruptcy estate? How (if at all) to bring in these debtors can be complicated and the bankruptcy courts must consider the legal ramification of whether or not these third parties should be brought into a bankruptcy case.

²¹⁰ However, if a petitioner does not meet any of the justifications for permissive intervention as articulated in the Bankruptcy Code—i.e., § 1109(b)—but still wants permission to intervene in the bankruptcy case, then the bankruptcy court can grant the petition permission to intervene; bankruptcy courts have this discretion. Cf. Rule 2018 of the *FRBP*; Rule 24(b) of the *FRCP*; *In re Addison Community Hospital Authority*, 175 B.R. 646 (Bankr. E.D. Mich. 1994) at 650; RADWAN, "Keeping the Faith: The Rights of Parishioners in Church Reorganizations," 75-121.

Simply having the permission to intervene does not necessarily mean that a petitioner enjoys the same rights or privileges as the other parties-in-interest. For example, it is possible for the bankruptcy court to grant a party's petition for permissive intervention but to restrict the intervention to the act of providing an impact statement or to give a testimony on a specific matter. Additionally, the bankruptcy court can grant permissive intervention to a party but only in the capacity of serving on a specific committee (e.g., an unsecured creditors' committee).²¹¹

3.4.5 — Bankruptcy Courts and Judges

Both bankruptcy courts and bankruptcy judges are specialized entities that are essential actors in a bankruptcy proceeding. As mentioned before, since bankruptcy courts are units of the U.S. district courts, their authority arises from the district courts. Bankruptcy courts have both subject matter jurisdiction and personal jurisdiction over all bankruptcy matters.²¹² Currently, there are 99 district courts in the United States.²¹³ All cases that come under the jurisdiction of the district courts automatically come under the jurisdiction of the bankruptcy court if there is an issue involving bankruptcy.²¹⁴

²¹¹ Cf. *Official Unsecured Creditors' Committee v. Michaels (In re Marin Motor Oil, Inc.)*, 689 F. 2d. 445 (3rd Cir. 1982) at 457.

²¹² Cf. Article I, §8 of the *Constitution of the United States*; 28 U.S.C. §151.

²¹³ R.R. MABEY, "The Evolving Bankruptcy Bench: How are the 'Units' Faring?" in *Boston College Law Review*, 49 (2005), 106.

²¹⁴ A court's jurisdiction is typically understood as its power to exercise authority—that is, to preside, hear, and adjudicate—over a person or subject matter. Generally, in order to hear, determine, and enter an order for a case presented before it, a court must have both personal jurisdiction and subject-matter jurisdiction. Personal jurisdiction is understood as "a court's power to bring a person into its adjudicative process; jurisdiction over a defendant's personal right, rather than merely over property interests," while subject-matter jurisdiction is understood as "jurisdiction over the nature of the case and the type of relief sought; the extent of which a court can rule on the conduct of persons or the status of things." *Black's Law Dictionary*, 980, 983. Particular to bankruptcy cases, while they automatically come under the jurisdiction of the bankruptcy court if there is an issue involving bankruptcy, the district courts retain ultimate control

Moreover, there are presently 372 statutory bankruptcy judgeships serving in the 99 district courts in the United States.²¹⁵ Typically specialists in the area of bankruptcy law, bankruptcy judges are appointed to bankruptcy courts based on a merit-selection process. According to recent studies, most bankruptcy judges had been practitioners as bankruptcy attorneys before their appointments to the bench.²¹⁶ Usually, bankruptcy judges are appointed to the bench for a term lasting 14 years, renewable.²¹⁷ While serving in bankruptcy courts, bankruptcy judges preside exclusively on bankruptcy matters.²¹⁸ Consequently, as a matter of practice, bankruptcy courts do not deal with other areas of the law, and bankruptcy judges typically do not preside over cases involving other areas of the law—for instance, criminal law or family law—while they are serving as in bankruptcy courts.

As specialists, bankruptcy judges have the authority—subject to appeal—to hear all cases arising under *Title 11* as well as any core proceeding that may arise under a *Title 11* filing.²¹⁹ The term “core proceeding” is defined as “a proceeding involving claims that substantially affect the debtor-creditor relationship, such as an action to recover a

over all of these cases—even the cases that went directly to the bankruptcy courts. Consequently, the implication that any party in a bankruptcy proceeding has the right to file a motion—with a showing of cause—to have a case (or a portion of a case) be withdrawn from a particular bankruptcy court and have that case moved to a district court instead. Cf. 28 U.S.C. §157(d).

²¹⁵ MABEY, “The Evolving Bankruptcy Bench: How are the ‘Units’ Faring?” 106.

²¹⁶ *Ibid.*, 107.

²¹⁷ J.J. RACHLINSKI, C. GUTHRIE, and A.J. WISTRICH, “Heuristics and Biases in Bankruptcy Judges,” in *Journal of Institutional and Theoretical Economics*, 163 (2007), 170. *Title 28 U.S.C* §152 regulates the selection and the appointment of bankruptcy judges, where may these judges hold court, the authority that they have over the case and the process, and how/when they can be removed from the bench.

²¹⁸ *Ibid.*, 181.

²¹⁹ HYNES, “Reorganization as Redemption,” 212. Cf. 28 U.S.C. §157(b)(1).

preferential transfer.”²²⁰ However, what happens in the event that an issue surfaces which does not pertain to any core proceeding, but is otherwise related to the bankruptcy case? If such a situation were to occur, the bankruptcy judge has the right to hold a fact-finding hearing to determine if the case should be heard in bankruptcy court. If the judge definitively concludes that the bankruptcy court is competent to hear the case, and if all parties are in agreement with this judgment, then the case may proceed in bankruptcy court. However, as a matter of due process, if any party were to contest the judge’s finding of fact and/or conclusions, the contesting party always has the right to petition the appropriate district court for a review.²²¹

3.5 — Key Events in a Chapter 11 Bankruptcy

The length of time that a Chapter 11 bankruptcy takes can vary greatly. Typically, a Chapter 11 bankruptcy could take anywhere between six months and one year—from start to finish. According to some legal scholars, however, what is considered “timely or ‘prompt’ lies to some extent in the eyes of the beholder.”²²² What motivates different parties either to accept or to reject a reorganization plan in order to bring a bankruptcy filing to an end is difficult to gauge. There are, nevertheless, factors that can help to gauge how long a bankruptcy case may last. These factors include the number of creditors involved in the case, the size and the complexity of the case, the nature of unresolved issues concerning assets, etc. Additionally, it is important to remember that, even before it files the petition for bankruptcy, the corporation’s administrator or

²²⁰ *Black’s Law Dictionary*, 413.

²²¹ Cf. 28 U.S.C. §157(c).

²²² WARREN and WESTBROOK, “The Success of Chapter 11: A Challenge to the Critics,” 627.

manager has probably invested many months (if not years) analyzing financial data, revising contracts, exploring options, and debating the merits of reorganization bankruptcy.²²³

Rather than speculating on the length of time it takes to go through a bankruptcy process to measure progress, the success or the failure of a Chapter 11 bankruptcy should be ascertained by other means. There can be a number of critical events that take place as a corporation reorganizes under a typical Chapter 11 bankruptcy that provide a better indication as to how well a bankruptcy process is going and/or if the end is near. Such events serve as milestones to anticipate the progress of a bankruptcy case. The following is an overview of some of the principal events in a Chapter 11 bankruptcy.

²²³ Take, for instance, the bankruptcy cases involving the Archdiocese of Portland and the Oregon Province of the Society of Jesus. The Archdiocese of Portland filed for Chapter 11 bankruptcy protection in July of 2004 and did not emerge from bankruptcy until April of 2007. The Oregon Province of the Society of Jesus filed for Chapter 11 bankruptcy protection in February of 2009 and did not emerge until March of 2011. Both the Archdiocese of Portland and the Oregon Province of the Society of Jesus spent years in financial distress as they dealt with legal issues related to clergy sexual abuse claims. While the bankruptcy filings of the Archdiocese of Portland and the Oregon Province of the Society of Jesus were considered average in terms of the length of time, the bankruptcy filing of the Archdiocese of Milwaukee, on the other hand, was considered too lengthy. The Archdiocese of Milwaukee filed for Chapter 11 bankruptcy protection in July of 2011 and did not emerge from bankruptcy until November of 2015. On the other hand, the bankruptcy filing of the Catholic Diocese of Helena is considered one of the shortest bankruptcy cases thus far. The Diocese of Helena filed for Chapter 11 bankruptcy protection on January of 2015 and by March of 2015, the creditors' committee gave its approval of the proposed reorganization plan, which the bankruptcy court quickly confirmed; after a mandatory two-week waiting period, the bankruptcy court approved the reorganization plan and put it into effect on March 19. Cf. M. ROHDE, "In Bankruptcy Dealings, Helena Diocese Sets Alternate Example," in *National Catholic Reporter* (22 February 2016), available at: <http://ncronline.org/news/accountability/bankruptcy-dealings-helena-diocese-sets-alternate-example> (last accessed 22 February 2016); BARTELL, "Due Process for the Unknown Future Claim in Bankruptcy: Is This Notice Really Necessary?" 339-372; *In re Roman Catholic Bishop of Helena, Montana*, No. 14-60074 (Bankr. D. Mont. March 4, 2015); M. ROHDE, "Judge Approves Milwaukee Archdiocese's Plan to Emerge from Bankruptcy," in *National Catholic Reporter* (10 November 2015), available at: <http://ncronline.org/news/accountability/judge-approves-milwaukee-archdioceses-plan-emerge-bankruptcy> (last accessed 16 November 2015); *Statement from Most Rev. John G. Vlazny, Archbishop of Portland in Oregon*, April 17, 2007 press release, available at: <https://web.archive.org/web/20070702084351/http://www.archdpdx.org/cpo/joint-newsconfer-0417.html> (last accessed on March 18, 2015); *Oregon Province of the Society of Jesus, Third Modified Joint Plan of Reorganization* (July 18, 2011), available at: <http://image.jesuits.org/OREPROV/media/Third%20Modified%20Plan031315.pdf#page=89> (last accessed on March 18, 2015).

3.5.1 — Pre-Filing Workouts

While the filing of reorganization bankruptcy is a strategy for some debtors in financial distress, avoiding the need to file for bankruptcy is always preferable. Bankruptcy of any kind can be costly, and the unpredictability of the process can cause irreversible harm. Accordingly, if there is a viable alternative to declaring bankruptcy, debtors should most certainly consider it. A pre-filing workout is one such option.

A successful workout is similar to a reorganization plan under Chapter 11—but without the need to go through the bankruptcy process.²²⁴ A workout involves no trustee, bankruptcy court, bankruptcy judge, DIP, bankruptcy estate, or creditors' committee. Instead, a debtor gathers all the known creditors, attempts to resolve pressing financial problems, and comes to an agreement to resolve differences to the satisfaction of all the parties involved. A successful workout typically entails the renegotiation of contracts²²⁵ that allows the debtor to repay some or all of the outstanding debts under a new timeline. Inexplicably, revised contracts will involve compositions or extensions of the terms of previous contracts. A composition is an “agreement between a debtor and two or more creditors for the adjustment or discharge of an obligation for some lesser amount.”²²⁶ An extension, on the other hand, is an agreement “between the debtor and two or more creditors, pursuant to which all of the participating creditors agree to extend the time for

²²⁴ This means that the workouts will need to make distinctions between creditors (e.g., secured creditors or unsecured creditors, etc.), as well as make use of the APR to protect the rights of certain classes of creditors. Cf. A. SCHWARTZ, “Bankruptcy Workouts and Debt Contracts,” in *Journal of Law and Economics*, 36 (1993), 615.

²²⁵ Sometimes, the process may involve creating new contracts in addition to or instead of revising former contracts.

²²⁶ *Black's Law Dictionary*, 346.

repayment of their claim.”²²⁷ Essentially, what a debtor is seeking in a workout is one of two things: either to be permitted not to repay debts in full (i.e., composition), or to revise the repayment schedule (i.e., extension). It is possible that some workouts may include a combination of both composition and extension. If creditors were to agree to a composition and/or an extension, this means the workout was successful and the need to file bankruptcy is averted. For debtors, the advantage of having a successful workout is the avoidance of a potentially costly bankruptcy process that is full of uncertainties. For the creditors, the advantage of a successful workout is being able to participate in a process by which their rights and interests are preserved while holding their debtors accountable.²²⁸

Considered an alternative option to bankruptcy filing, most businesses in financial distress do propose workouts with their creditors. In fact, it is a common practice for bankruptcy judges to encourage debtors to attempt workouts before filing for bankruptcy. Parties are likely to take this route since workouts are usually less adversarial, less contentious, and certainly less expensive than bankruptcies.²²⁹ According to a survey taken in 1990 involving 169 private corporations and businesses that were considering reorganization bankruptcy, approximately fifty percent of these corporations and

²²⁷ TABB, *The Law of Bankruptcy*, 34.

²²⁸ SCHWARTZ, “Bankruptcy Workouts and Debt Contracts,” 604.

²²⁹ P. FOOHEY, “When Churches Reorganize,” in *American Bankruptcy Institute Law Review*, 88 (2014), 304. Cassandra Mott identifies four typical ways by which a bankruptcy case is sent to mediation: by referral from the bankruptcy judge assigned to the case; by motion made by one of the parties; by motion made by the U.S. trustee, or by a stipulation of the bankruptcy court. C.G. MOTT, “Macy’s Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case,” in *Ohio State Journal of Dispute Resolution*, 14 (1998), 201.

businesses successfully averted bankruptcy because they were able to resolve their differences in workouts.²³⁰

It is important to note that the success or failure of a workout depends largely on the creditors' willingness either to accept or to reject a proposed reorganization plan.²³¹ In deciding whether to accept or reject a workout proposal, creditors must consider whether their rights and interests are better protected in the proposed workout, or whether those rights and interests would be better protected in bankruptcy court. Practically speaking, creditors have to assess the true degree of insolvency of their debtor before they can decide if a proposed workout plan will allow them to retain more rights over their debtor rather than going to bankruptcy court. In other words: which option will allow creditors to reclaim more of what is owed to them—the workout plan, or the reorganization plan?

Michelle White writes:

[Models] of strategic default assume that there is asymmetric information about corporations' financial status, meaning that managers know whether their corporations are solvent, but creditors do not [...]. Creditors have an incentive to accept workout proposals because bankruptcy costs are assumed to be high, and therefore creditors receive little if corporations file for bankruptcy. But [creditors] also have an incentive to reject workout proposals in order to discourage strategic default. In equilibrium, creditors reject some or all workout proposals, and this means that at least some insolvent corporations end up in bankruptcy.²³²

However, even if creditors reject a workout and the debtor files for bankruptcy, the rejected workout plan could still be useful. As will become more apparent later, a rejected workout could potentially be converted into a reorganization plan. Thus, all is not lost.

²³⁰ Cf. S.C. GILSON, K. JOHN, and L.H.P. LANG, "Troubled Debt Restructuring: An Empirical Study of Private Reorganization of Firms in Default," in *Journal of Financial Economics*, 27 (1990), 345.

²³¹ However, Alan Schwartz notes that sometimes debtors themselves can be responsible for jeopardizing the process and making it difficult for creditors to agree to proposed workouts. Debtors do this by making offers that maximize their gain (or minimize their loss—depending on the situation). Schwartz refers to these offers as "greedy offers." SCHWARTZ, "Bankruptcy Workouts and Debt Contracts," 604-608.

²³² WHITE, "Corporate and Personal Bankruptcy Law," 145.

3.5.2 — The Bankruptcy Estate

When a natural person dies intestate,²³³ an estate is created to hold and protect all of the deceased person's properties until issues related to outstanding debts and inheritance disputes are resolved. Only then can the properties in the estate—however much remains—be divided among the surviving heirs.²³⁴ When a legal person—e.g., a business, a corporation—files for bankruptcy, the law considers that person dead and treats whatever property it has in the same manner as a natural person having died intestate. A bankruptcy estate is automatically created in order to hold and to protect all the properties of a corporation after it has filed for bankruptcy protection.²³⁵

According to Charles Tabb, there are two primary reasons for having a bankruptcy estate in a Chapter 11 bankruptcy. The first reason is to protect the properties of the debtor from being liquidated needlessly. Since the bankruptcy estate is legally distinct from the debtor and the debtor's other assets (e.g., exempted properties), it is kept intact and protected by bankruptcy law—thus it is inaccessible without the approval of the bankruptcy court. The second reason for having a bankruptcy estate in a Chapter 11 bankruptcy filing is that the estate provides “the baseline dividend which creditors are entitled to receive pursuant to a confirmed reorganization plan.”²³⁶ In other words, the total value of a bankruptcy estate reflects the total net value of the debtor's financial worth. Creditors can use the information to compute the actual value of the debtor's

²³³ A person dies intestate when he or she dies without a valid will, or when the person had revoked his or her will without having a new one before he or she dies. *Black's Law Dictionary*, 949.

²³⁴ Cf. TABB, *The Law of Bankruptcy*, 145-147.

²³⁵ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 28. Cf. 11 U.S.C. §541(a).

²³⁶ TABB, *The Law of Bankruptcy*, 396.

assets that could potentially be available for distribution in the end in a reorganization plan.²³⁷

While the presumption is that all of the debtor's properties would automatically be placed in a bankruptcy estate, there are exceptions. When petitioned, the bankruptcy court can exempt certain properties from being included in a bankruptcy estate. Properties that could be exempted typically include those that are held in trusts, or those that had been gifted to debtors from donors with the intent that they be earmarked for specific use—e.g., for academic scholarships, for the care of the elderly, or for the operation of a particular program.²³⁸ It is important to keep in mind, however, that exempted properties are not afforded the same level of protection as properties in a bankruptcy estate; creditors could move to gain control of non-exempt properties.

It is the responsibility of a debtor to petition the bankruptcy court for the exemption of certain properties from being included in a bankruptcy estate.²³⁹ Exemption

²³⁷ Cf. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 160-190; BARTELL, "Due Process for the Unknown Future Claim in Bankruptcy: Is This Notice Really Necessary?" 339-372; AGARWAL et al., "Impact of State Exemption Law and Small Business Bankruptcy Decision," 620-635.

²³⁸ It is worth noting that determining what property is to be exempt and what is not can a point of contention between debtors and creditors. For example, in a Chapter 11 bankruptcy, unrestricted donations or gifts bequeathed to the business entity are considered a part of the bankruptcy estate. On the other hand, charity trusts—established as trusts where the corporation stands as a trustee—are typically considered restricted gifts; these would generally not be considered a part of the bankruptcy estate because the bankruptcy corporation does not really own them. In a Chapter 7 bankruptcy, however, charity trusts are not liquidated. Rather, such trusts would go to another business entity that engages in similar charity work. However, since state laws pertaining to trusts and donations vary in this matter, outcome of each case will also vary. For a detailed analysis of how bankruptcy impacts charitable trust, gifts, and donor's intent, see E. BRODY, "Charity in Bankruptcy and Ghosts of Donors Past, Present, and Future," in *Seton Hall Legislative Journal*, 29 (2005), 471-530. Cf. 11 U.S.C. §541(b); *Parkview v. St. Vincent Medical Center*, 211 B.R. 619 (Bankr. N.D. Ohio, 1997) at 629; *In re Winsted Memorial Hospital*, 249 B.R. 588 (Bankr. D. Conn. 2000) at 594.

²³⁹ TABB, *The Law of Bankruptcy*, 395.

is not automatic.²⁴⁰ Moreover, in addition to federal law, different states have different laws regulating property exemption. Usually, criteria for exemptions are based on the nature of the properties and/or the monetary value of the properties. Once the court has granted an exemption, it is the debtor's responsibility not to commingle the exempted property with the bankruptcy estate.²⁴¹

3.5.3 — Automatic Stay

Once a corporation files for bankruptcy, the immediate relief comes in the form of an automatic stay.²⁴² The bankruptcy petition itself triggers the automatic stay, so no formality is required. Once in place, the effects of an automatic stay last until the case ends or when the debts are discharged,²⁴³ and until one of these two things happens, only the bankruptcy court has the authority to alter the nature and the scope of an automatic stay if motioned to do so by a party-in-interest.²⁴⁴

²⁴⁰ Cf. 11 U.S.C. §522.

²⁴¹ The notion of property exemption runs at the heart of a Chapter 11 bankruptcy. Specifically, since an important aim of a Chapter 11 bankruptcy is to provide debtors with opportunities to start afresh, assets that have been exempted—and therefore excluded from the bankruptcy estate—would allow debtors to restart their businesses once they have emerged from bankruptcy. Cf. DAVIS, “Protection of a Debtor’s ‘Fresh Start’ under the New Bankruptcy Code,” 850-852.

²⁴² TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 332.

²⁴³ D.A. O’CONNOR, “Application of the ‘Feasibility’ Test under Section 362(d)(2): Did *Timbers* Really Change Anything?” in *Bankruptcy Developments Journal*, 9 (1992), 135.

²⁴⁴ K.L. NELSON, “Abusive Filings: Can Courts Stop the Abusive within the Confines of the Bankruptcy Codes?” in *Bankruptcy Development Journal*, 17 (2000), 332. Cf. D.G. BAIRD and R.C. PICKER, “A Simple Noncooperative Bargaining Model of Corporate Reorganizations,” in J.S. BHANDARI and L.A. WEISS (eds.), *Corporate Bankruptcy: Economic and Legal Perspectives*, New York, NY, Cambridge University Press, 1996, 176; *United States Savings Association v. Timbers of Inwood Forest*, 484 U.S. 365 (1988).

An automatic stay serves two primary purposes: to give debtors breathing room, and to level the playing field among creditors.²⁴⁵ First, an automatic stay gives debtors breathing room by placing an injunction against creditors' actions directed at debtors and their bankruptcy estates. This type of immediate relief is critical in a reorganization bankruptcy process because, absent such breathing room, debtors would not be able to reorganize effectively.²⁴⁶ It is common that businesses in financial distress must constantly be dealing with demands from creditors and collection agencies. Such harassments not only place unwanted strains on debtors, but they can also have negative impacts on the debtors' business operations. Once an automatic stay is in place, however, creditors are prevented from harassing their debtors.²⁴⁷ This means that, with some exceptions, legal actions that creditors may have against debtors must stop immediately.²⁴⁸ Additionally, related to providing debtors with breathing room, an automatic stay also allows debtors to forego paying any current expenses—including debt-service payments or other obligations attached to certain prior contracts.²⁴⁹ This

²⁴⁵ J.F. MURPHY, "The Automatic Stay in Bankruptcy," in *Cleveland State Law Review*, 34 (1986), 568.

²⁴⁶ K. THORNE, "Automatic Stay: Section 362," in *Bankruptcy Development Journal*, 3 (1986), 181. Cf. O'CONNOR, "Application of the 'Feasibility' Test under Section 362(d)(2): Did *Timbers* Really Change Anything?" 134.

²⁴⁷ However, legal actions against a debtor resulting from criminal prosecutions can still take place even after an automatic stay becomes effective. Cf. THORNE, "Automatic Stay: Section 362," 181-198.

²⁴⁸ Cf. 11 U.S.C. §101(15), §361(a). For more information concerning certain kinds of legal actions that may fall outside of the scope of an automatic stay, see MURPHY, "The Automatic Stay in Bankruptcy," 572-588, and S.R. MAIZEL and T.J. WHITAKER, "The Government's Contractual Rights and Bankruptcy's Automatic Stay: Irreconcilable Differences," in *Public Contract Law Journal*, 25 (1996), 711-751.

²⁴⁹ There are, however, certain types of contracts that are not subject to an automatic stay. For example, certain pre-petition contracts or contracts between a government agency and the DIP are not subject to an automatic stay. Cf. MAIZEL and WHITAKER, "The Government's Contractual Rights and Bankruptcy's Automatic Stay: Irreconcilable Differences," 714-715.

means that debtors may renege on these contracts without having to pay the usual penalties for breaching them.²⁵⁰

The second purpose of an automatic stay is to level the playing field among creditors and to give all creditors the same advantages once a bankruptcy petition has been filed. An automatic stay puts all creditors at the same starting point with regards to when their claims are filed. After a bankruptcy petition has been filed with the court, the court sets a deadline for all claims to be filed against the debtor. Before that deadline is reached, the court will not consider any claims. Consequently, as long as they are made known to the bankruptcy court before the deadline passes, claims that were filed earlier in the process had no advantage over claims that were filed later. Moreover, an automatic stay can bar all creditors from taking actions against a bankruptcy estate. This means that a creditor with better resources is not able to coerce a repayment from a debtor any more than a creditor with limited resources; the bankruptcy estate is off-limits to both of them. Thus, it is clear that an automatic stay effectively undermines the principles of “might makes right” and “first in time, first in line.” All creditors must follow the process as set out in the Bankruptcy Code and as supervised by the bankruptcy court. Consequently, an automatic stay treats all creditors identically by equally restricting their actions against not only their common debtor, but also against one another.²⁵¹

²⁵⁰ DOWDELL, “The Chapter 11 ‘Shuttle’—Coincidence or Competitive Strategy?” 674. It should be noted, however, that the *Bankruptcy Amendment of 1984* specifically restricts the right of companies to terminate certain types of labor contracts when the companies file for Chapter 11 bankruptcy. For more information concerning contracts in a bankruptcy proceeding, see R.J. VERGA, “Section 365 Versus 362: Applying the Automatic Stay to Prevent Unilateral Termination in a Bankruptcy Setting,” in *Fordham Law Review*, 61 (1993), 935-962, and MAIZEL and WHITAKER, “The Government’s Contractual Rights and Bankruptcy’s Automatic Stay: Irreconcilable Differences,” 711-751.

²⁵¹ It is worth mentioning that an automatic stay also applies equally to government agencies such as the Internal Revenue Service, the U.S. Marshall, the sheriff’s department, etc. Similar to other creditors, these government agencies are all prevented from taking actions against debtors once an automatic stay is

What happens, however, if creditors have mistakenly thought—in good faith—that an automatic stay is no longer in effect and, therefore, they initiate actions against a debtor? In such cases, could these creditors validly enforce their claims against a debtor and/or a bankruptcy estate? Here, courts have held that even if creditors erroneously believed—albeit in good faith—that an automatic stay has been lifted, any actions taken against a debtor and/or a bankruptcy estate would be deemed null and void.²⁵² Consequently, creditors have the onus to determine accurately whether an automatic stay is in effect before executing any action against a debtor or a bankruptcy estate.²⁵³

In addition to the debtor and creditors, an automatic stay extends protection to a third class of persons: the non-filing parties.²⁵⁴ The bankruptcy court may extend the reach of an automatic stay to protect a non-filing party because, without that protection, the collection efforts against the non-filing party could pose a real risk to the bankruptcy estate.²⁵⁵ Thus, the extension of the effect of an automatic stay is not intended to protect a

in effect. But as already noted, however, certain types of government contracts that were agreed to before debtors file the petition for bankruptcy protection may not fall under the scope of an automatic stay.

²⁵² Cf. *In re Kaneb*, 196 F.3d 265 (1st Cir. 1999).

²⁵³ J.M. TYSON, “Automatic Stays and Administrative Expenses: Rights and Remedies Available to Landlords and Tenants in Bankruptcy Proceedings,” in *Campbell Law Review*, 31 (2009), 415. Opinions, however, differ in this regard. Some jurisdictions do not hold acts that violate an automatic stay as *void*. Instead, these jurisdictions consider such acts as *voidable*. MAIZEL and WHITAKER, “The Government’s Contractual Rights and Bankruptcy’s Automatic Stay: Irreconcilable Differences,” 744. Cf. *Bronson v. United States*, 46 F.3d 1573 (Fed. Cir. 1995); *Picco v. Global Marine Drilling Company*, 900 F.2d 846 (5th Cir. 1990) at 850; *Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989).

²⁵⁴ Daniel Keating presents an impassioned argument highlighting how an automatic stay can be abused by debtors; he notes that some debtors use an automatic stay in order to avoid accountability towards creditors. Moreover, Keating observes from case law how bankruptcy judges consistently have misconstrued the Bankruptcy Code’s intention when ruling on creditors’ petitions to lift automatic stays. While Keating’s assessment took place before the *BAPCPA* of 2005, some of his points are, nevertheless, valid. To read more about this, see D. KEATING, “Offensive Use of the Bankruptcy Stay,” in *Vanderbilt Law Review*, 45 (1992), 71-129.

²⁵⁵ WARREN, *Business Bankruptcy*, 44. Cf. *In re A.H. Robinson Company*, 880 F.2d 769 (4th Cir. 1989).

non-filing party *per se*; instead, such action intends to protect the filing party and the bankruptcy estate. Non-filing parties to whom the bankruptcy court typically extends the protection of an automatic stay commonly include officers of the corporation in Chapter 11 bankruptcy.²⁵⁶ For example, a creditor may sue a tortfeasor who is a manager of a corporation; in addition to the tortfeasor, the lawsuit also names as co-defendants the corporation that employs the tortfeasor, the tortfeasor's supervisor, and other managers/directors of the tortfeasor.²⁵⁷ If, however, the tortfeasor's corporation files for bankruptcy under Chapter 11, the automatic stay that covers the corporation's bankruptcy estate could extend to cover any claims against the tortfeasor as well. The rationale is that any claim against the tortfeasor could result in the depletion of the bankruptcy estate of the now-bankrupt company; such harm to the bankruptcy estate would be impermissible with the automatic stay in effect.²⁵⁸

As critical as it may be, however, an automatic stay is not an end in itself, nor is it intended to prevent creditors from making claims, determining the validity of claims, or disposing of claims. Rather, an automatic stay simply funnels all creditors' claims to the proper mechanisms provided by the Bankruptcy Code—e.g., the trustee, the DIP, the

²⁵⁶ RICE and DAVIS, "The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims," 437. Cf. *United States v. Seitles*, 106 B.R. 36 (Bankr. S.D.N.Y. 1989) at 41; *In re Ms. Kipps, Inc.*, 34 B.R. 91 (Bankr. S.D.N.Y. 1983); *In re A.H. Robinson Company*.

²⁵⁷ Cf. *In re Ms. Kipps, Inc.*; *United States v. Seitles* at 41.

²⁵⁸ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 29. In cases involving dioceses or parishes, for example, non-filing parties may include parishioners. Theresa Radwan writes: "Church bankruptcies, however, affect parishioners, who differ from individuals and entities involved in most other Chapter 11 bankruptcies. Although similar to shareholders in that they have some (albeit extremely limited) control over the debtor as well as some long-term stake in the debtor, they differ in that they do not 'own' the debtor nor do they have a clear financial interest in it. [...]. Typical bankruptcies [involving churches] may not include parishioners, but [they] strongly affect parishioners' interests, and bankruptcy cases can and should take these interests into account." RADWAN, "Keeping the Faith: The Rights of Parishioners in Church Reorganizations," 78.

creditors' committee, the bankruptcy court, etc. Nonetheless, two things are important to consider. First, while the effect of an automatic stay is immediate and covers all parties involved, in cases involving fraud or the filing of bankruptcy in bad faith, for example, a bankruptcy court has the discretion to alter the scope of an automatic stay, even to lift it completely.²⁵⁹ Second, while an automatic state typically prevents both creditors and debtors from having access to the bankruptcy estate, a bankruptcy court can grant a party permission to have access to properties or assets in a bankruptcy estate. In a Chapter 11 bankruptcy, the bankruptcy court commonly grants a DIP permission to access some of the assets in a bankruptcy estate. The rationale is that, unlike a Chapter 7 bankruptcy, a business in Chapter 11 bankruptcy continues to operate; thus, salaries, rents, and utility bills have to be paid, and repairs and other routine maintenance have to be addressed. In order to have funds available for these activities, a DIP would need access to some or most of the assets in the bankruptcy estate. In order to gain access to a bankruptcy estate, a DIP must present a business plan with a proposed budget to both the bankruptcy court and the creditors' committee for their review and approval.

3.5.4 — Continuation of Operation of Business

Continuity of business is important for a corporation in bankruptcy under Chapter 11. In fact, bankruptcy under Chapter 11 allows a corporation to reorganize with as little disruption as possible to the corporation's business operation. Otherwise, if a corporation cannot continue to operate as a business while reorganizing, employees would be laid off,

²⁵⁹ Cf. *11 U.S.C.* §362(d); MURPHY, "The Automatic Stay in Bankruptcy," 592-618; NELSON, "Abusive Filings: Can Courts Stop the Abusive within the Confines of the Bankruptcy Codes?" 334-336, 339-340; *Ellis v. Consolidated Diesel Electric Corporation*, 894 F.2d 371 (10th Cir. 1990); *In re Schwartz*, 954 F.2d 569 (9th Cir. 1992); *Jones v. Cain*, 804 A.2d 322 (D.C. Ct. of App. 2002).

relationships with vendors would end,²⁶⁰ and the flow of business that the particular corporation had once contributed to would end. Such disruption completely undermines the purpose of a reorganization bankruptcy under Chapter 11.

In the interest of continuity and to minimize interruption to the business, a corporation reorganizes under Chapter 11 under a DIP. As the title implies, the control and the administration of the bankrupt entity remain in the possession of the debtor. Having a DIP comes with several advantages. First, the natural person who served as the administrator or the manager of the corporation before it filed for bankruptcy usually becomes the person who represents the DIP in a Chapter 11 bankruptcy.²⁶¹ This practice allows for a relatively smooth transition from pre-filing to post-filing, with minimal disruption to the leadership and the every-day functioning of the business.²⁶² Second, there are special lending institutions that will only make certain types of loans and/or credits (i.e., DIP financing) available to a corporation in a Chapter 11 bankruptcy with a DIP. Consequently, in bankruptcy cases where there is no DIP, DIP financing generally is not available.²⁶³ Finally, a DIP has an exclusive right to propose reorganization plans during the first 120 days after the bankruptcy petition has been filed. This option is important for two reasons. First, a DIP can take its time coming up with a reorganization plan rather than having to rush to get a reorganization plan submitted to a creditors'

²⁶⁰ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 53. Cf. TRIANTIS, "A Theory of the Regulation of Debtor-in-Possession Financing," 916-918.

²⁶¹ As mentioned before, while the DIP refers to the entire corporation in bankruptcy, it can also be used to refer to the administrator or manager who represents the DIP when this administrator or manager acts on behalf of the DIP.

²⁶² As it will become clearer in Chapter 4, the option of having a DIP rather than a trustee is a critical consideration for any public juridic person in canon law that wants to file for bankruptcy protection under Chapter 11 in the United States.

²⁶³ TRIANTIS, "A Theory of the Regulation of Debtor-in-Possession Financing," 904.

committee. Second, this reserved time period allows a DIP to set the tone of the bankruptcy process. In cases where there is no DIP, any party can submit a reorganization plan once the bankruptcy petition has been filed.²⁶⁴

3.5.5 — 341 Meetings

The first formal opportunity for debtor and creditors to meet is at a 341 meeting. Referred to sometimes as a meeting of creditors, a 341 meeting is mandated under §341 of *Title 11*—hence the reference “341 meeting.” According to the Bankruptcy Code, a 341 meeting is to convene at a reasonable time after the bankruptcy petition is filed, and “reasonable time” means within the first 20 to 40 days after the filing of the petition.²⁶⁵ The U.S. trustee is the person responsible for arranging and conducting a 341 meeting.

Besides serving as a way to introduce all the key players, a 341 meeting is intended to give creditors an opportunity to ask the DIP (or the bankruptcy trustee if one is appointed) questions and to clarify the situation. While the bankruptcy court does not provide strict criteria concerning what sorts of demands are allowed, creditors’ inquiries should generally be limited to the scope of the bankruptcy petition itself. It is entirely appropriate, however, for creditors to inquire about the debtor’s financial situation and fiscal projections.²⁶⁶ The bankruptcy court could impose penalties on a debtor if the debtor or its representative fails to answer creditors’ questions truthfully. Such penalties

²⁶⁴ The DIP’s exclusive right to propose a reorganization plan will be discussed later in the following subsection of this chapter.

²⁶⁵ Cf. Rule 2003 of the *FRBP*. The bankruptcy court, however, can extend this time if a party in interest requests it with cause. Additionally, according to Rules 2002 of the *FRBP*, the clerk of the bankruptcy court must give creditors at least 20 days notice before the meeting.

²⁶⁶ Cf. Rule 2004 of the *FRBP*.

could include the dismissal of the bankruptcy petition, the denial of the discharge of debts, or even criminal prosecution in some instances.²⁶⁷

Attending a 341 meeting is important for debtors, creditors, and equity security holders.²⁶⁸ One of the reasons why attending a 341 meeting is important is because appointments or elections of members to sit on creditors' committee takes place at a 341 meeting. Moreover, appointments to other committee appointments such as a committee for the unsecured creditors may take place at a 341 meeting as well.²⁶⁹ Parties that want to influence the bankruptcy process have a better chance of doing so if they are on these committees—the creditors' committee in particular. It should be noted, however, that members of the bankruptcy court (e.g., judges, clerks, or other representatives of the bankruptcy court) are not allowed to attend a 341 meeting, nor are they eligible to be members of a creditors' committee.²⁷⁰

3.5.6 — Reorganization Plan: Proposal, Approval, and Confirmation

The apex of a Chapter 11 bankruptcy occurs when a reorganization plan is confirmed. The plan, when implemented, provides the blueprint for how the reorganization of debts will take place—i.e., which debts will be repaid, which debts will be repaid but in reduced amount, which debts will be discharged, and what the repayment schedule will look like. In theory, creditors want a reorganization plan that allows them to

²⁶⁷ WICKOUSKI, *Bankruptcy Crimes*, 149. Rule 2004 of the *FRBP* addresses the procedures for how 341 meetings are to be conducted.

²⁶⁸ Attending a 341 meeting is mandatory for debtors, however.

²⁶⁹ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 66.

²⁷⁰ Cf. *11 U.S.C.* §341. It is interesting to note that, prior to 1978, judges presided over these creditors' meetings. After the Bankruptcy Code was promulgated along with the institutionalization of the function of the U.S. trustee, however, the responsibility of presiding over these creditors' meetings was relegated to the U.S. trustees.

retain (or to extend) as much as possible their legal rights over their debtors.²⁷¹ Typically, this means full recovery of what is owed to them. In reality, however, most debts will not be recovered fully; in fact, many debts will be discharged completely once the bankruptcy process is over.²⁷²

Building of consensus among the parties and being willing to compromise are two of the most effective ways to reach a suitable reorganization plan. Ideally, most parties want to reach a consensus on a reorganization plan sooner rather than later and to have that plan confirmed by the bankruptcy court with as little antagonism as possible.²⁷³ While such an ideal is rarely achievable, parties should try to give the process their best efforts—which means that the parties should be willing to compromise and to negotiate in good faith, and perhaps even to attempt mediation when necessary.²⁷⁴ After all, the alternative would be a long and protracted litigation process. Cassandra Mott writes:

A main goal of bankruptcy law is to “maximize the value of the [bankruptcy] estate for the benefit of the creditors”²⁷⁵ as quickly as possible. More specifically, in a

²⁷¹ D.R. WONG, “Chapter 11 Bankruptcy and Cramdowns: Adopting a Contract Rate Approach,” in *Northwestern University Law Review*, 106 (2012), 1931.

²⁷² RADWAN, “Keeping the Faith: The Rights of Parishioners in Church Reorganizations,” 78. Cf. FOOHEY, “Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities,” 31-85; M. BOEHM, “Detroit’s Creditors Want Entire Art Museum Collection to be Fair Game,” in *Los Angeles Times*, 30 May 2014, available at: <http://www.latimes.com/entertainment/arts/culture/la-et-cm-detroit-institute-of-arts-city-bankruptcy-20140530-story.html> (last accessed 9 September 2015).

²⁷³ If negotiation for a reorganization plan breaks down for whatever reasons, the debtor may be forced to foreclose its properties. Such foreclosure of properties benefits neither the debtor or its creditors. Pamela Foohey writes: “[Reorganization bankruptcy] seems worthwhile, even when balancing the costs of bankruptcy to creditors and to the [debtor] that perhaps should start over. Assuming the market for their property is illiquid, particularly given the recent recession, that property is more valuable to the debtor or other businesses in [similar] industries. As to the debtor, this is especially true if it holds equity in the property. A foreclosure sale will generate less money, possibly not enough to return any of that equity to the [debtor’s bankruptcy estate]. Secured creditors also should have an incentive to negotiate a [reorganization plan] for similar reasons, such as wanting to avoid the frustration and value loss of the foreclosure process.” P. FOOHEY, “Bankrupting the Faith,” in *Missouri Law Review*, 78 (2013), 773.

²⁷⁴ Cf. WICKOUSKI, *Bankruptcy Crimes*, 118.

²⁷⁵ Quoting from C.M. DIDOMENICO, “Mediation in Bankruptcy Court,” in *New York Law Journal*, 11 April 1997, at 1.

Chapter 11 case, bankruptcy law is designed to rehabilitate the debtor. Mediation furthers these goals by offering the parties “a confidential, non-confrontational means of resolving disputes without the expense and business consequences of protracted litigation.”²⁷⁶ The process also saves precious time, priceless energy and preserves the integrity of relationships. Specifically in the Chapter 11 context, bankruptcy law requires consensual plans of reorganization. Mediation fosters this goal because the mediator helps parties understand each other’s position in an effort to come to a consensual resolution of the dispute.²⁷⁷

Nevertheless, even with the best of intentions, a protracted litigious process in bankruptcy court may be unavoidable. Mediation and compromise may not work in every situation.²⁷⁸ Different parties can have different priorities. Since anticipating what motivates a creditor to accept or to reject a reorganization plan is not an exact science, some cases may require arbitration and intervention from the bankruptcy court in order to resolve incompatible differences.

Unlike a Chapter 7 bankruptcy where the bankruptcy estate is liquidated in order to repay debts, the bankruptcy estate remains intact in a Chapter 11 bankruptcy. Thus, details concerning the repayment of debts are always a major concern in a Chapter 11 bankruptcy. The pressing question is: How will a debtor repay outstanding debts? This is something that a reorganization plan must address to the satisfaction of not only all parties in interest, but to the bankruptcy court as well. Typically, a reorganization plan will make provisions to allow some non-essential assets from the bankruptcy estate to be liquidated in order to repay outstanding debts.²⁷⁹ Moreover, if insurance policies are

²⁷⁶ Quoting from C.M. DiDOMENICO, “Mediation in Bankruptcy Court,” in *New York Law Journal*, 11 April 1997, at 1.

²⁷⁷ MOTT, “Macy’s Miracle on 34th Street: Employing Mediation to Develop the Reorganization Plan in a Mega-Chapter 11 Case,” 197.

²⁷⁸ Cf. M. ROHDE, “In Bankruptcy Dealings, Helena Diocese Sets Alternate Example,” in *National Catholic Reporter* (22 February 2016), available at: <http://nronline.org/news/accountability/bankruptcy-dealings-helena-diocese-sets-alternate-example> (last accessed 22 February 2016).

²⁷⁹ Cf. WHITE, “Corporate and Personal Bankruptcy Law,” 141.

involved, these policies should be calculated into the reorganization plan.²⁸⁰ However, the key sources of funding that can be used to meet debt obligations in a Chapter 11 bankruptcy will inevitably come from a corporation's future earnings.²⁸¹ John Jarboe writes:

The significance of a plan of reorganization is that it allows the debtor to offer other value as a [substitute] for assets which the debtor does not wish to relinquish. "Other value" includes, for instance, future earnings.²⁸² Although the value that has to be offered to the creditors in the plan must be equal to the assets of the debtor on the date of filing, not every asset must necessarily be surrendered in the process. Since the plan can be paid out over time, future revenues may be substituted for those assets which a trustee would otherwise take in a liquidation bankruptcy.²⁸³

As alluded to already, the Bankruptcy Code grants the debtor the exclusive right to propose a reorganization plan during the first 120 days after the bankruptcy petition has been filed.²⁸⁴ After 120 days, however, any interested party may submit a reorganization plan for consideration. In the event that a trustee is appointed to the bankruptcy case instead of a DIP, however, then the 120 day restriction does not apply. In such case, any party in interest (including the trustee) is entitled to submit a reorganization plan as soon as the bankruptcy petition is filed with the court.²⁸⁵ In order

²⁸⁰ Certainly, if insurance companies are involved in a bankruptcy process, then those insurance companies may need to be involved in the composition of the debtor's reorganization plan. Cf. M.S. QUINN and B.S. MARTIN, "Insurance and Bankruptcy," in *Tort & Insurance Law Journal*, 36 (2001), 1025-1104.

²⁸¹ F.M. LUPER and K.M. RICHARDS, "Valuation of Property Issues in Bankruptcy," in *Commercial Law Journal*, 98 (1993), 42. Cf. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 177.

²⁸² Cf. *11 U.S.C.* §1129(b)(2)(A)(i-ii).

²⁸³ JARBOE, "Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments," 156.

²⁸⁴ With cause, the bankruptcy court has the authority to extend this period to 180 days. For a small business debtor, however, the initial period when that debtor has the exclusive right to propose a reorganization plan is 180 days. Cf. *11 U.S.C.* §1121(a), (b), and (e).

²⁸⁵ Cf. *ibid.*, §1121(c).

for a proposed reorganization plan to be valid, it needs to include all pertinent disclosures.²⁸⁶

When a reorganization plan is presented to the creditors, the voting process begins. Creditors, however, do not vote as individuals. Since the Bankruptcy Code separates creditors into distinct classes based on their claims, creditors must vote within their assigned classes. If the majority of the creditors in one class votes to approve a reorganization plan, then that plan is considered approved by that entire class. Once all the voting is completed and the majority of the classes have voted to approve the proposed reorganization plan, that plan is presented to the bankruptcy court for confirmation. If the bankruptcy court confirms the reorganization plan, then the plan becomes legally binding to all parties since it is now the “controlling legal document that dictates the financial structure and all obligations of the reorganized debtor...[and all of the] debtor’s pre-confirmation structure and obligations are replaced.”²⁸⁷

The interests of creditors who voted against a reorganization plan, however, are not ignored. In order to protect the interests of the dissenters, the bankruptcy court has the right to gauge the merits of the presented reorganization plan—even if the plan was approved by an overwhelming majority of the creditors. Therefore, before confirming any reorganization plan, the court has the authority to evaluate the plan to see if it is fair and equitable—particularly concerning the unsecured creditors. The court measures or

²⁸⁶ This requirement is critical because creditors need to have all the relevant information before they can vote on the proposed plan. Consequently, if such a vote on a confirmation plan takes place before all of the proper disclosures are made, that vote is considered void.

²⁸⁷ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 767.

calculates “fair and equitable” by using the so-called *best interests test*. Nathalie Martin and Ocean Tama write:

Thus, to calculate whether the [reorganization] plan passes the *best interest test*, the [bankruptcy court] must perform a liquidation analysis by doing a hypothetical liquidation of all [of the debtor’s] assets, and subtracting all the secured claims [the debtor] owes from the sales price of [the debtor’s] assets. Also, remember that whether the [reorganization] plan is consensual or not, the [Bankruptcy] Code requires the debtor to pay all priority claims in full, usually on the effective date of [reorganization] plan. Once all the claims that must be paid are subtracted from the hypothetical liquidation of the assets, the result yields the amount the general unsecured creditors would receive if the debtor liquidated rather than reorganized.²⁸⁸

Thus, in applying the *best interest test*, the concern of the bankruptcy court is: Does this proposed reorganization plan give creditors at least as much as they would have gotten under a Chapter 7 liquidation bankruptcy?²⁸⁹ If the answer is no, then the proposed reorganization plan has failed the *best interest test* and the bankruptcy court would be justified in rejecting the plan. If the answer is yes, however, then the bankruptcy court would be justified in confirming it.²⁹⁰

Assuming that a reorganization plan passes the *best interest test*, could a bankruptcy court, nevertheless, confirm the plan—even if there is still one (or more) *unsecured creditor objecting to the plan*? Unquestionably, the bankruptcy court has a

²⁸⁸ N. MARTIN and O. TAMA, *Inside Bankruptcy Law: What Matters and Why*, New York, NY, Aspen Publishers, 2008, 183.

²⁸⁹ Cf. 11 U.S.C. §1129(a)(7)(A)(ii). In applying the *best interest test*, the bankruptcy court makes two presumptions. The first presumption is that, because of the creditors’ committee, the legal rights and interests of the secured creditors were included in the approved reorganization plan. The second presumption is that the legal rights and interests of the unsecured creditors were not included in the approved reorganization plan since a bankruptcy court may or may not have created a committee to represent the unsecured creditors.

²⁹⁰ It is important to note that the purpose of the best interest test is not about making sure that all creditors get back everything that the debtors owe them. Rather, the test is about ensuring that creditors are receiving as much value as they reasonably can with what is available in the bankruptcy estate or its equivalent in value. Put another way: The *best interest test* is designed to make sure that the debtors are not able to get away with having to pay back as little as possible to the detriment of the creditors. Additionally, since some debts are discharged and the debtors are allowed to retain some of their assets in a Chapter 11 bankruptcy, it is reasonable to assume that the calculus of the *best interest test* serves more as a guideline to help the bankruptcy court determine the fairness of a reorganization plan.

duty to consider any legitimate objection raised by a creditor; nonetheless, the court could still confirm a reorganization plan over the objection of one or more class of creditors by the imposition of a cramdown.²⁹¹ Walter Miller writes:

Cramdown is a relatively simple concept. It is a partial application of the old strict priority rule. Three basic principles run through it. First, [the objecting class] must receive either a promise of future cash payments or other property. Second, the present value of the deferred payments or other property must equal but not exceed the amount of claims or the value of interest. Third, if it is not possible to give this property, then no class [of creditors] below the [objecting] class [may take anything].²⁹²

In order to be valid, a cramdown must satisfy the following three conditions: (1) that the reorganization plan has been accepted by at least one impaired class of creditors; (2) that the reorganization plan does not discriminate unfairly; and (3) that the reorganization plan is both fair and equitable.²⁹³ Moreover, according to Miller, in order for a reorganization plan to be considered “fair and equitable” to a dissenting class (i.e., the unsecured creditors), “[it] must provide that each [objecting] class member receive property with a present value equal to the claim or that no subordinate class take anything.”²⁹⁴

Of the three conditions mentioned above, the first condition is the most objective and it is worth considering.²⁹⁵ According to §1129(b) of *Title 11*, the bankruptcy court

²⁹¹ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 73. Cf. *Black’s Law Dictionary*, 447.

²⁹² W.W. MILLER, “Bankruptcy Code Cramdown under Chapter 11: New Threat to Shareholder Interest,” in *Boston University Law Review*, 62 (1982), 1077.

²⁹³ Cf. *11 U.S.C.* §1129(b).

²⁹⁴ MILLER, “Bankruptcy Code Cramdown under Chapter 11: New Threat to Shareholder Interest,” 1080.

²⁹⁵ The second and third criteria, while more subjective, are also important since they address the general public policy in bankruptcy law that should not put debtors’ rights over the rights of creditors. For a more detailed analysis of what constitutes “unfair discrimination” and “fair and equitable” when considering whether a cramdown should be used or not, see R.F. BROUDE, “Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative,” in *Business Lawyer*, 39 (1984), 450-454.

cannot impose a cramdown if no impaired class of creditors voted in favor of it.²⁹⁶ The logic is straightforward: no creditor—particularly a creditor belonging in an impaired class—would vote in favor of a reorganization plan that could severely limit its legal rights and/or hurt its interests.²⁹⁷ According to Pamela Foohey, requiring that there be at least one impaired class that agrees to a reorganization plan before a bankruptcy court could impose a cramdown serves two important policy interests: to restrain the authority of the bankruptcy court; and to protect the rights of the party that has the most to lose—i.e., the impaired creditors.²⁹⁸ Subsequently, if one impaired class of creditors did, in fact, vote to confirm a reorganization plan, then that plan is not *unreasonable*; thus, a court is justified in using a cramdown to confirm the plan.

The Honorable Marcia Krieger notes that, unlike other courts, a bankruptcy court is a court of equity. Thus, as a court of equity, a bankruptcy judge may “justify expansion, restriction, or modification of statutory law to achieve justice in a particular case.”²⁹⁹ In this sense, a bankruptcy court serves an important function in a bankruptcy process: to uphold the spirit of the Bankruptcy Code by protecting the rights and interests of all parties—especially the dissenting creditors or the impaired creditors.³⁰⁰ Therefore,

²⁹⁶ 11 U.S.C. §1129(b).

²⁹⁷ A reorganization plan would be considered limiting the rights of a class of creditors if, under the proposed plan, creditors in this particular class will get less in the settlement than they would get in an alternative plan. Cf. BROUDE, “Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative,” 453.

²⁹⁸ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 777.

²⁹⁹ KRIEGER, “‘The Bankruptcy Court Is a Court of Equity’: What Does That Mean?” 297.

³⁰⁰ FOOHEY, “Chapter 11 Reorganization and the Fair and Equitable Standard: How the Absolute Priority Rule Applies to All Nonprofit Entities,” 38. Cf. BROUDE, “Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative,” 448. However, while the bankruptcy judge has the authority to gauge the feasibility of a reorganization plan, there are constraints. Harvey Miller and Shai Waisman write: “Despite the requirement that a [reorganization] plan only be confirmed if it is feasible, the bankruptcy judge is dependent upon the parties presenting the necessary facts to enable the court to apply

in addition to having the right to use a cramdown to approve a reorganization plan over the objection of a class of impaired creditors, a bankruptcy court also has the discretion to negate the wish of the majority and not confirm a reorganization plan by applying the *true feasibility* test to the plan. Essentially, this means that a bankruptcy judge could countermand the will of the majority in the interests of *true feasibility* if—as an issue of equity—the proposed reorganization plan does not live up to the spirit of the Bankruptcy Code. Richard Broude writes:

Generally, [a bankruptcy judge could assess the feasibility of a reorganization plan] at the confirmation hearing by the presentation of testimony, perhaps from investment bankers, other professionals, or management, regarding the projected earnings and cash flow of the reorganized debtor and the probability of successful operation in the outside world and fulfillment of the obligations called for in the plan. The feasibility of the plan has nothing to do with the valuation of the debtor; the plan seeks to insure that the parties have been realistic in settling their differences.³⁰¹

Charles Tabb and Ralph Brubaker add:

The requirement that the [reorganization] plan *proposes* to pay creditors or equity security holders liquidation value does not guarantee that they actually will *receive* that value. If the plan fails, [these creditors] may not receive the liquidation value of their claim or interest. The harm suffered by the affected creditor or interest holder then could be quite high. Perhaps the court should be able to provide a countermajoritarian projection against such a risk for minority class members, by passing independently on the feasibility of the plan.³⁰²

Consequently, the plan for the reorganization of debts as proposed in the reorganization plan should be realistic.³⁰³ Factors to be considered include: the adequacy

the law. The bankruptcy judge possesses no resources or capacity to undertake financial and operational analysis of a Chapter 11 plan's feasibility. In judging the feasibility of the proposed reorganization, the bankruptcy court is a captive of the principal parties and the professionals these parties retain. [The court] must rely upon the parties to present the relevant facts." MILLER and WAISMAN, "Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?" 189.

³⁰¹ BROUDE, "Cramdown and Chapter 11 of the Bankruptcy Code: The Settlement Imperative," 448.

³⁰² TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 778.

³⁰³ Cf. *Travelers Life & Annuity Company v. Ritz-Carlton, Inc. (In re Ritz-Carlton, Inc.)*, 98 B.R. 170 (Bankr. S.D.N.Y. 1989) at 172; O'CONNOR, "Application of the 'Feasibility' Test under Section 362(d)(2): Did *Timbers* Really Change Anything?" 143-144; M. PORCELLI, "Bankruptcy the Inside Job: Alternatives to the *Washington Mutual* Approach to Policing Creditor Committee Insider Trading," in *NYU Journal of*

of the debtor's current and future sources of income; the debtor's business structure, the economic conditions; the ability of the debtor to manage the business; any changes proposed in order to make the business more efficient, profitable, sustainable, etc.³⁰⁴

3.6 — Discharge of Debts and Emerging from Chapter 11

The terms articulated in an approved reorganization plan are binding on all parties. Unless otherwise specified, these terms replace all previous agreements between debtors and creditors. Once a bankruptcy court confirms a reorganization plan, debts that have not been reorganized or otherwise stipulated in the confirmed reorganization plan are discharged.³⁰⁵ This discharging of debts is integral to the ability of a bankrupt corporation to start anew since “[modern] bankruptcy law is premised on the idea that a fresh start should be available to honest debtors, even when their own bad judgment cause their financial difficulties.”³⁰⁶

Law & Business, 9 (2012), 295-330; N. NOKE, “Bankruptcy Court Decision May Impact Claims Trading and Plan Negotiation,” in Harvard Law School Forum on Corporate Governance and Finance Regulation, 6 October 2011, available at: <http://corpgov.law.harvard.edu/2011/10/06/bankruptcy-court-decision-may-impact-claims-trading-and-plan-negotiation/> (last accessed 10 October 2015).

³⁰⁴ P. LEAKE, “The Examiners: Chapter 11 Doesn’t Guarantee Success,” in *The Wall Street Journal*, 7 November 2014, available at: <http://blogs.wsj.com/bankruptcy/2014/11/07/the-examiners-chapter-11-doesnt-guarantee-success/> (last accessed 11 October 2015). Cf. LUPER and RICHARDS, “Valuation of Property Issues in Bankruptcy,” 47-48.

³⁰⁵ J.T. O'REILLY and M.S.P. CHALMERS, *The Clergy Sex Abuse Crisis and the Legal Responses*, New York, NY, Oxford University Press, Inc., 2014, 106. Cf. DALY, “Post-Petition Earnings and Individual Chapter 11 Debtors: Avoiding a Head Start,” 1752.

³⁰⁶ D.G. BAIRD, “Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Credit Law,” in *The University of Chicago Law Review*, 73 (2006), 31. Cf. M.D. SOUSA, “The Principle of Consumer Utility: A Contemporary Theory of Bankruptcy Discharge,” in *University of Kansas Law Review*, 58 (2010), 587-589. Furthermore, Giacomo Elgueta notes that the discharging of debts serves three specific goals. It allows and encourages debtors, free from their debts, to become productive once again as members of society, it provides debtors with insolvency insurance, and it promotes the debtor to cooperate with the creditors (and the bankruptcy trustee if relevant) regarding debt collection and asset liquidation (if applicable) during the bankruptcy proceeding. G.R. ELGUETA, “The Paradoxical Bankruptcy Discharge: Rereading the Common Law–Civil Law Relationship,” in *Fordham Journal of Corporate & Financial Law*, 19 (2014), 319.

There are two elements to a debt discharge: the actual forgiving of debts, and the relinquishing of any legal responsibility that a debtor has toward those debts.³⁰⁷ These two elements are critical in a reorganization bankruptcy procedure because, once the bankruptcy proceeding is over, they provide debtors with a fresh start that is unhindered by prior legal obligations associated with the debt.³⁰⁸ Charles Tabb writes:

Two primary justifications usually are given [for the discharging of debts in a bankruptcy proceeding]. First, it is considered humane not to require the debtor to spend the rest of his life buried under the weight of hopeless insolvency. Second, being humane to the debtor by discharging his debts actually indirectly benefits the rest of society. This social utility occurs because the debtor who has been freed from his debts has an incentive to work more and be a productive member of society, because he may keep from his creditors the product of his labors.³⁰⁹

The discharging of debts has implications to both debtors and creditors. For debtors, having their debts discharged means that they are no longer liable for those debts and they are no longer legally required to repay them.³¹⁰ The only debts that debtors are responsible for in a Chapter 11 bankruptcy are those stipulated in the reorganization plan that has been confirmed by the bankruptcy court.³¹¹ For creditors, the discharging of a debtor's debts signifies that creditors can no longer claim any legal rights over those debts. Essentially, this means that creditors may not initiate legal actions to reclaim debts

³⁰⁷ Cf. 11 U.S.C. §1141(d)(1).

³⁰⁸ J.C. MCCOID, "Discharge: The Most Important Development in Bankruptcy History," in *American Bankruptcy Law Journal*, 70 (1996), 164.

³⁰⁹ TABB, *The Law of Bankruptcy*, 959.

³¹⁰ Discharge in bankruptcy is understood as "the release of a debtor from personal liability for pre-bankruptcy debts; specifically, discharge under the United States Bankruptcy Code, or [when] a bankruptcy court's decree releasing a debtor from that liability." *Black's Law Dictionary*, 562.

³¹¹ TABB, *The Law of Bankruptcy*, 957.

that have been discharged. In fact, creditors are not even permitted to communicate with the debtor concerning these debts.³¹²

The discharging of debts becomes effective the moment the bankruptcy court confirms the reorganization plan that had been approved by the creditors' committee.³¹³ No action on the part of the debtor is necessary to commemorate this moment.³¹⁴ As noted before, since a confirmed reorganization plan replaces all prior contractual agreements, in the act of confirming the reorganization plan, the bankruptcy court replaces all previous contracts with new (or revised) terms and conditions as stipulated in the reorganization plan. Any actions or terms that deviate from the terms found in the confirmed reorganization plan are not permitted and are unenforceable by law.³¹⁵

While the effect of a reorganization plan is immediate, in some instances, the bankruptcy court can attach conditions to the plan and/or the debtor's performance. If there are conditions, then they must be met before certain or all debts can be lawfully discharged. Such conditions may include a waiting period before the implementation of the terms of the confirmed reorganization plan, the liquidation of certain assets in the bankruptcy estate, resolving disputes concerning insurance settlements, etc.³¹⁶ Failing to

³¹² As already noted, under some circumstances, certain debts cannot be discharged or be discharged fully. Douglass Boshkoff writes: "One should also be aware that the bankruptcy discharge does not always provide complete relief from collection activity. Certain claims continue to be enforceable, notwithstanding the existence of a discharge, because they are especially meritorious or are the result of debtor misconduct." D.G. BOSHKOFF, "Fresh Start, False Start, or Head Start?" in *Indiana Law Journal*, 70 (1995), 552.

³¹³ TABB, *The Law of Bankruptcy*, 952. However, the bankruptcy court may issue a formal decree to close a bankruptcy case officially.

³¹⁴ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 160.

³¹⁵ Cf. *ibid.*, 160.

³¹⁶ Cf. 11 U.S.C. §727, §1141. It is worth noting that §727 is found under Chapter 7 of *Title 11*, and there is nothing comparable to it in Chapter 11 *Title 11*; however, if liquidation is required under a Chapter

meet conditions imposed by the bankruptcy court would be considered a breach of the terms of the reorganization plan. In the event of such a breach, the bankruptcy court may impose a penalty in the form of damages.³¹⁷ Additionally, if there is evidence that fraud was involved at any part of the bankruptcy process, the bankruptcy court has the authority to revoke a confirmed reorganization plan completely.³¹⁸ Also, if there are valid liens attached—i.e., if specific properties had been used to secure payments on a debt—these liens may still be enforceable if the reorganization plan permits it.³¹⁹ Finally, some debts that may have been acquired after the petition for bankruptcy had been filed may not be discharged. However, this is something that should be clearly articulated in the reorganization plan.³²⁰

Assuming that the bankruptcy court confirms the reorganization plan, that all attached conditions have been met, that the debtor successfully carried out the reorganization plan, and that no fraud was detected, all outstanding debts will have been discharged. With the discharging of debts, the corporation is considered to have emerged from bankruptcy.

11 reorganization plan, the Bankruptcy Code permits that the liquidation process as described in §727 of Chapter 7 can be used.

³¹⁷ Cf. *ibid.*, §1142(a).

³¹⁸ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 161. It is important to note that §1144 of the Bankruptcy Code allows any interested party to petition the bankruptcy court for a review if fraud is suspected.

³¹⁹ Cf. *Long v. Bullard*, 117 U.S. 617 (1886).

³²⁰ TABB, *The Law of Bankruptcy*, 956. Cf. TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 568-570; WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 161-162; R.S. GOLDMAN, et al., “Discharging False Claims Liability in Bankruptcy, Section 1141(D)(6)(A) of the Bankruptcy Code: An Incentive to Settle FCA Cases?” in *ABA Journal*, October 2010, available at: www.abajournal.com (last accessed 8 August 2014).

Conclusion

In a credit-driven economy such as the one that exists in the United States, bankruptcy plays a significant role in supporting a stable economy.³²¹ Regardless of whether the economy is robust or weak, the possibility of filing for bankruptcy protection both allows corporations to take financial risks and to provide them with a safety net if they were to become insolvent—or if they are moving towards insolvency—as a result of taking those financial risks.³²² Of the different bankruptcy filing selections available under *Title 11* of the federal Bankruptcy Code discussed in this chapter, two were introduced as viable for non-profit religious-based corporations: a Chapter 7 bankruptcy and a Chapter 11 bankruptcy. The primary distinction between a Chapter 7 bankruptcy and a Chapter 11 bankruptcy is that, while a Chapter 7 allows for the complete liquidation of assets in order to repay outstanding debts, a Chapter 11 proposes to keep the bankrupt corporations intact while permitting them to reorganize and repay their outstanding debts under approved reorganization plans.

As a strategy to keep a corporation intact and functioning, a Chapter 11 bankruptcy is the preferred over a Chapter 7 bankruptcy.³²³ Chapter 11 bankruptcy is the least disruptive to the operation of a corporation. When reorganizing under Chapter 11, the immediate relief provided by the automatic stay allows a corporation to reorganize its

³²¹ DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 18. Cf. M.J. GORDON and J.S. ROSENTHAL, “Capitalism’s Growth Imperative,” in *Cambridge Journal of Economics*, 27 (2003) 25-48; T.A. DURKIN et al., *Consumer Credit and the American Economy*, New York, NY, Oxford University Press, Inc., 2014, 6-9.

³²² Cf. D. WESSEL, “Bankruptcy Is Vital to Capitalism,” in *The Wall Street Journal*, 2 April 2009, available at: <http://www.wsj.com/articles/SB123860761117578957> (last accessed 2 November 2015).

³²³ Cf. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 177.

debts free of harassment from creditors. This automatic stay also prevents the depletion of the bankruptcy estate in order to keep the corporation's assets intact. Moreover, giving the bankrupt corporation a second life once it emerges from bankruptcy is also one of the things that makes a Chapter 11 bankruptcy attractive. Subsequently, in order to support the continuity of the operation of its business while it reorganizes, a corporation in bankruptcy under Chapter 11 is permitted to retain control and manage its business and assets as a DIP under the supervision of the both the U.S. trustee and the bankruptcy court.

As noted in this chapter, while bankruptcy laws started out favoring creditors and imposed severe punishment on debtors, these laws have changed over the centuries. While debtors had been treated as no better than common criminals at one time, bankruptcy legislations in the United States from the late 1800s onward tend to view debtors as "honest but unfortunate" persons who have been burdened with such an insurmountable amount of debt that they cannot seem to get out from under.³²⁴ Today, if corporations in financial distress are worth more when they are kept intact and operating rather than as piece meal and liquidated, current bankruptcy legislation favors giving such corporations a reprieve and a fresh start by permitting them to reorganize their debts under a Chapter 11 bankruptcy.³²⁵

³²⁴ SOUSA, "The Principle of Consumer Utility: A Contemporary Theory of Bankruptcy Discharge," 564. Cf. BAIRD, "Discharge, Waiver, and the Behavioral Undercurrents of Debtor-Credit Law," 21-25.

³²⁵ Cf. RICE and DAVIS, "The Future of Mass Tort Claims: Comparison of Settlement Class Action to Bankruptcy Treatment of Mass Tort Claims," 427. David Skeel suggests five factors to help assess whether or not filing for reorganization makes sense in any given context. These factors include: 1) unsustainable debts; 2) the benefits (and costs) of reshaping decision-making incentives; 3) the risk of premature liquidation; 4) the dignity of the debtor; and 5) spillover effects. To read more about these factors, see D.A. SKEEL, "When Should Bankruptcy Be an Option (for People, Places, or Things)?" in *William and Mary Law Review*, 55 (2014), 2232-2243.

Certainly, the interests and the legal rights of creditors cannot be ignored in any bankruptcy process. Motivated to protect creditors, current bankruptcy legislation has mechanisms in place to protect the interests and the legal rights of creditors. As described in this chapter, these mechanisms include the creditors' committee, the different classifications of creditors, the prioritization of creditors' claims, as well as voting schemes for the approval of reorganization plans. Additionally, as an issue of equity, the Bankruptcy Code gives the bankruptcy court the discretion to negate the wish of a creditors' committee and not confirm an approved reorganization plan if there is fraud involved or if the proposed reorganization plan fails the *true feasibility* test.

Unquestionably, corporations should not aspire to go into bankruptcy. When possible, corporations should seek alternative methods to settle financial disputes and to avert the need to seek the court's protection by filing for bankruptcy. This is particularly true for solvent corporations. As discussed before, a workout where contractual terms can be renegotiated may be one such option that allows corporations to avoid the need to file for bankruptcy. Nevertheless, bankruptcy may be unavoidable in some circumstances. This is particularly true when corporations have become insolvent. When bankruptcy is unavoidable, corporations wanting to remain intact rather than be liquidated should consider filing for bankruptcy protection under Chapter 11.

Civily incorporated public juridic persons such as dioceses, parishes, and religious institutes in the United States have been the subjects of a number of civil lawsuits in recent years. These civil lawsuits have placed many of these institutions in financial distress—some to the point of becoming insolvent. Since these institutions are creatures of both civil law and canon law, the filing of reorganization bankruptcy under

Chapter 11 is the most viable option for them.³²⁶ The following chapter will discuss how Catholic institutions which are civilly incorporated public juridic persons in the United States can file for reorganization bankruptcy under canon law and under Chapter 11 of the federal Bankruptcy Code.

³²⁶ SKEEL, *Debt's Dominion: A History of Bankruptcy Law in America*, 217. Cf. C.M. DAVITT, "Whose Steeple Is It? Defining the Limits of the Debtor's Estates in the Religious Bankruptcy Context," in *Seton Hall Legislative Journal*, 29 (2005), 531.

Chapter 4 — PUBLIC JURIDIC PERSONS IN CHAPTER 11 BANKRUPTCY

Introduction

Bankruptcy procedure is a process that provides a collective forum for resolving financial concerns as well as a framework to modify the debtors' relationship with most or all of their creditors.¹ The decision to file for bankruptcy, however, is not a simple one. For civilly incorporated Catholic institutions in the United States, the decision to file for bankruptcy protection can be predicated on a variety of reasons.² For example, the Archdiocese of Portland in Oregon and the Oregon Province of the Society of Jesus declared bankruptcy in response to the overwhelming number of allegations related to sexual abuse.³ Other institutions may file for bankruptcy protection as the result of financial distresses not related to sexual abuse.⁴ But whatever the reason which motivates Catholic institutions to seek bankruptcy protection may be, bankruptcy could and should be understood as a strategy to achieve three objectives: (1) to ensure that stable patrimonial condition of the public juridic person is not endangered of diminishment by

¹ D.A. SKEEL, "When Should Bankruptcy Be an Option (for People, Places, or Things)?" in *William and Mary Law Review*, 55 (2014), 2223.

² J.T. O'REILLY and M.S.P. CHALMERS, *The Clergy Sex Abuse Crisis and the Legal Responses*, New York, NY, Oxford University Press, Inc., 2014, 111. For some extensive analysis, including statistical data, of the reasons why religious institutions file for bankruptcy in the United States, see P. FOOHEY, "Bankrupting the Faith," in *Missouri Law Review*, 78 (2013), 719-776 and J.C. LIPSON, "When Church Fails: The Diocesan Debtor Dilemmas," in *Southern California Law Review*, 79 (2006), 364-455.

³ Cf. *In re Roman Catholic Archbishop of Portland in Oregon and Successor, a Corporation Sole, dba Archdiocese of Portland in Oregon*, No. 04-37154-elp11 (Bankr. Dist. Ore. 2007); *In re Society of Jesus, Oregon Province*, No. 09-30938-elp11 (Bankr. Dist. Ore. 2011); T.D. LYTTON, "Clergy Sexual Abuse, Tort Law Making Policy," in *Connecticut Law Review*, 39 (2007), 809-895.

⁴ C.P. WELLS, "Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy," in *Seton Hall Legislative Journal*, 29 (2005), 397. Cf. *In re Saint Vincent's Catholic Medical Centers of New York*, Case No. 10-11963 (Bankr. S.D.N.Y. April 14, 2010); K. O'BRIEN, "St. Michael's Medical Center Files for Bankruptcy Protection," in *NJ.com*, 10 August 2015, available at: http://www.nj.com/healthfit/index.ssf/2015/08/st_michaels_medical_center_files_for_bankruptcy_pr.html (last accessed 14 December 2015).

retaining possession and control of the juridic person and its assets; (2) to continue the work of the institution; and (3) to equitably compensate creditors.⁵

By declaring bankruptcy, civilly incorporated public juridic persons place themselves under the rigorous scrutiny of both civil law and canon law. Specifically, when civilly incorporated public juridic persons such as parishes, dioceses, or religious institutes contemplate filing for bankruptcy, they must take into consideration particular law (or proper law for a religious institute), guidelines established by the conference of bishops, canon law, and civil law. While there is a presumption that the particular law of a diocese, the proper law of a religious institute, or the guidelines established by a conference of bishops are not contrary to universal law as articulated in the Code, there is no assurance that civil law will be receptive toward canon law. In fact, as recent legal history demonstrates, bankruptcy courts have consistently held that canon law does not have legal standing in civil courts in the United States.⁶ Thus, while the *Constitution* of the United States affords religious persons and corporations a level of freedom in the name of religion (e.g., the *Establishment Clause*), this does not mean that they are

⁵ J.E. JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” in *Catholic Lawyer*, 37 (1997), 155. Cf. P. FOOHEY, “When Churches Reorganize,” in *American Bankruptcy Institute Law Review*, 88 (2014), 277-306.

⁶ WELLS, “Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy,” 385. Cf. JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” 161-164; K. CULLEN, “Canon Law Said to be of Little Legal Weight,” in *The Boston Globe*, 5 October 2002, available at: http://www.boston.com/globe/spotlight/abuse/stories2/051002_canon_law.htm (last accessed 18 February 2016). Some commentators have questioned whether or not canon law should be considered foreign law and, therefore, could be included in civil proceedings in the United States under Rule 44.1 of the *FRCP*. To date, none of the thirteen bankruptcy cases involving Catholic dioceses in the United States brought up this issue. For further reading on Rule 41.1 of the *FRCP*, see L.E. TEITZ, “Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation,” in *New York University Journal of International Law and Politics*, 45 (2013), 1081-1109; J.E. PRINCE, “Chipping Away at the ‘Wall of Stone’: Foreign Country Law and Federal Rule of Civil Procedure 44.1,” in *the Advocate (Idaho)*, 52 (2011), 30-33; C.B. LAMM and K.E. TANG, “Rule 44.1 and Proof of Foreign Law in Federal Court,” in *Litigation*, 30 (2004), 31-35; G.K. WALKER, “The Federal Rules of Civil Procedures in the Context of Transnational Law. (The Hague Conference on Private International Law),” in *Law and Contemporary Problems*, 57 (1994), 183-208.

exempted from having to observe civil law.⁷ Consequently, the potential conflict of laws implies that, while civilly incorporated public juridic persons may gain bankruptcy protection under the Bankruptcy Code in the United States, the risk that these institutions may need to circumvent canon law in order to reap the benefit from bankruptcy filing is a real concern.⁸

The objective of this chapter is to provide an overview of how civilly incorporated public juridic persons in the United States can navigate through reorganization bankruptcy under Chapter 11 of the Bankruptcy Code in a way that is consistent with canon law. Specifically, the chapter examines some critical areas that public juridic persons such as parishes, dioceses, or religious institutes may encounter as their alter egos—i.e., the civilly incorporated non-profit corporations—seek protection under Chapter 11 of the Bankruptcy Code.⁹

⁷ D.L. CARETTI, *Ownership, Control, Sponsorship, and Trusteeship: Governance Relationships within Private Catholic Religious-Sponsored Secondary Schools in the United States*, Ed. D diss., San Francisco, CA, University of San Francisco, 2013, 39. Cf. C.P. WELLS, “Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,” in *Boston College Law Review*, 44 (2003), 1214.

⁸ M.E. CHOPKO, “An Overview on the Parish and the Civil Law,” in *The Jurist*, 67 (2007), 204. Cf. L.M. LOPUCKI, “The Debtor in Full Control — Systems Failure Under Chapter 11 of the Bankruptcy Code?” in *American Bankruptcy Law Journal*, 57 (1983), 106; M. ROHDE, “Judge: Using Cemetery Funds to Pay for Bankruptcy Violates Religious Rights,” in *National Catholic Reporter*, 31 July 2013, available at: <http://ncronline.org/news/accountability/judge-using-cemetery-funds-pay-bankruptcy-violates-religious-rights> (last accessed 14 December 2015).

⁹ P.J. BROWN, “Structuring Catholic Schools: Creative Imagination Meets Canon Law,” in *Catholic Education: A Journal of Inquiry and Perspective*, 13 (2010), 499. It is important to note that this chapter is only concerned with the liability of corporations and not with physical persons who may be associated with the corporations—e.g., owners, board members, etc. Moreover, this chapter will not address other forms of liabilities associated with other business models such as a sole proprietorship, a partnership, or a limited liability company.

4.1 — Bankruptcy and Catholic Institutions in the United States

Civilly incorporated public juridic persons in the United States have the right to file for bankruptcy under the Bankruptcy Code. Applicable to all business entities, the Bankruptcy Code stipulates how incorporated institutions—religious or otherwise—may file for bankruptcy protection and how state laws are applicable when necessary to determine property rights and contractual agreements.¹⁰ Since civilly incorporated public juridic persons are also accountable to canon law, seeking bankruptcy protection for these institutions can be a complicated process.

As a process, reorganization bankruptcy does not fit within the current framework of canon law. A search of the word “bankruptcy” in the *CIC/83* will yield nothing. In similar light, David Skeel points out that the word “church” does not appear anywhere in the current Bankruptcy Code.¹¹ Consequently, as recent bankruptcy cases involving Catholic institutions demonstrate, it should come as no surprise that canon law does not control civil proceedings in the United States. While the *Constitution* of the United States discourages civil courts from deciding on matters relating to the internal affairs of religious organizations,¹² nevertheless, cases involving religious institutions appear before civil courts regularly. This means that issues relating to conflicts of law are

¹⁰ Cf. 11 U.S.C. §541, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf> (last accessed 12 October 2015).

¹¹ D.A. SKEEL, “‘Sovereignty’ Issues and the Church Bankruptcy Cases,” in *Seton Hall Legislative Journal*, 29 (2005), 346.

¹² Cf. *Watson v. Jones*, 80 U.S. 679 (1872); *Serbian Orthodox Diocese v. Milivojevich*, 426 U.S. 696 (1976); *Jones v. Wolf*, 443 U.S. 595 (1979); *In re Roman Catholic Archbishop of Portland in Oregon and Successor, a Corporation Sole, dba Archdiocese of Portland in Oregon*; *In re Society of Jesus, Oregon Province*.

unavoidable—particularly on issues of Church ownership, control, and jurisdiction over property.¹³

To be sure, the notion of bankruptcy is foreign to canon law. Indeed, some of the concepts and procedures used in a bankruptcy filing even appear to contradict canon law. For instance, the Bankruptcy Code requires that a bankruptcy estate be created immediately for the bankrupt entity when it submits its petition for reorganization bankruptcy in bankruptcy court. As a legally separate entity from the bankrupt corporation, a bankruptcy estate holds legal title and to protect all non-exempted properties of the now-bankrupt corporation; without the bankruptcy court's permission, no person may access this bankruptcy estate. Canon law, however, considers these properties as ecclesiastical goods—some of which may also have been designated as stable patrimony—belonging to the public juridic person, and according to canon law, the surrendering of legal titles and control of stable patrimony to another entity constitutes an alienation of ecclesiastical goods. If such a transaction were to take place, the Code mandates that certain canonical procedures prescribed in Book V of the Code be followed in order to protect the proprietary interests of the public juridic person. Therefore, the mere creation of a bankruptcy estate where ecclesiastical goods are deposited and where they are under the direction of the bankruptcy court as required by the Bankruptcy Code would be contrary to canon law.

¹³ C.M. DAVITT, "Whose Steeple Is It? Defining the Limits of the Debtor's Estates in the Religious Bankruptcy Context," in *Seton Hall Legislative Journal*, 29 (2005), 533. Cf. P.J. BROWN, "The Perils of Bankruptcy: Rights and Obligations Regarding Clergy Support," in *Studia canonica*, 45 (2011), 45-46; C.L. GROSSMAN, "Bishops Must Balance Civil, Canon Law in Sex Cases," in *U.S.A Today*, May 7, 2002, available at: <http://usatoday30.usatoday.com/news/nation/2002/05/07/church.htm> (last accessed November 2, 2014); E. LANGLOIS, "Civil, Church Law May Come in Conflict in Church's Bankruptcy Filing," in *Catholic News Service*, July 22, 2004, available at: <http://www.catholicnews.com/data/stories/cns/0404046.htm> (last accessed November 2, 2014).

Thus, while freedom of religion is protected under the *Constitution* of the United States, the status of canon law in a bankruptcy court and a bankruptcy proceeding is tenuous at best. When civilly incorporated public juridic persons appear before a bankruptcy court seeking protection from their creditors, issues concerning the status of canon law in a bankruptcy proceeding are inevitable. Even though the United States is a “modern democracy that respects religious freedom while purporting to maintain neutrality about religion,”¹⁴ it can be challenging sometimes to see how the government (through its civil court system) can actually respect religious freedom and maintain neutrality towards religious institutions.¹⁵ Therefore, it is vital that the status of canon law in civil court is considered.

Catholic canon law is binding only on Catholic institutions and individuals wherever they are found. An American civil court, however, is neither bound by canon law, nor is it required to consider canon law in its deliberations.¹⁶ In fact, most civil courts prefer to avoid having to deal with ecclesiastical questions and ecclesiastical laws altogether, and would intervene only when the risk of a constitutional violation can be averted.¹⁷ The general perception is that canon law has no place in a civil courtroom in

¹⁴ J.J. COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, New York, NY, Oxford University Press, Inc., 2011, 129.

¹⁵ P. MADRID, “The Liability of Catholic Parishes in America: What Went Wrong and How to Fix It,” in *Review of Litigation*, 28 (2009), 710. Cf. L. UNDERKUFFLER-FREUND, “The Separation of the Religious and the Secular: A Foundational Challenge to First Amendment Theory,” in *William & Mary Law Review*, 36 (1995), 837-988. It is important to note that, just as civilly incorporated public juridic persons are accountable to both canon law and civil law, ecclesiastical authorities (e.g., diocesan bishops who are administrators dioceses or pastors who are administrator of parishes that have civil incorporation, etc.) are also subject to both canon law and civil law. WELLS, “Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,” 1226.

¹⁶ WELLS, “Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy,” 387.

¹⁷ B.I. BITTKER, S.C. IDLEMAN, and F.S. RAVITCH, *Religion and the State in American Law*, New York, NY, Cambridge University Press, 2015, 368.

America, and there should really be no need to involve canon law in any civil legal proceeding. Marianne Perciaccante writes:

Courts should not have to turn to canon law, as long as secular documents, such as constitutions and contracts, are available for judicial interpretation. Use of the latter prevents the free exercise and establishment problems which occur when courts examine canon law; it also provides courts with the most accessible and easily understood documents for determining church-related secular problems.¹⁸

Nevertheless, litigious situations are usually never so well defined. Ambiguities still abound. Consequently, it is important to address how civil courts in the United States have traditionally handled litigation involving religious institutions, canon law, and property ownership. This will help to anticipate better what may happen when civilly incorporated public juridic persons in the United States file for bankruptcy protection under Chapter 11 of the Bankruptcy Code.

4.1.1 — Guaranteed Rights under the Constitution

From the perspective of constitutional law, two amendments to the *Constitution* of the United States are worth considering: the First Amendment and the Fourteenth Amendment. Under the First Amendment, the government is prohibited from establishing any religion—also referred to as the *Establishment Clause*—or to impede the free exercise of religion of any of its citizens (as well as securing freedom of speech, freedom of the press, the right to peaceably assemble, and the right to petition for governmental redress of grievances). In practical terms, this means that courts in the United States, as secular institutions, must be ultimately guided by secular principles rather than by

¹⁸ M. PERCIACCANTE, “The Courts and Canon Law,” in *Cornell Journal of Law and Public Policy*, 6 (1996), 178.

theological principles, which are the orientation of canon law.¹⁹ Dennis Goldford notes that under the *Establishment Clause* of the First Amendment, the “government is secular in that it does not take a position on the truth or worth of religion [...] This means, therefore, that democratic majorities may not exercise their religious values in and through the institutions and instrumentalities of the government.”²⁰ In addition to the First Amendment, persons have the right both to equal protection and to procedural due process under the law of the Fourteenth Amendment to the *Constitution*.²¹ The Fourteenth Amendment requires that a state must treat persons residing within its territory in the same manner as it would any other persons in similar conditions or circumstances.

Essentially, both the First Amendment and the Fourteenth Amendment form the basis for the free exercise of religion and beliefs in the United States for all natural persons. Paul Madrid notes that, as legal persons, corporations in the United States are also afforded, to some extent, the same rights as natural persons.²² In other words, as legal

¹⁹ Cf. *Ibid.* 176-177.

²⁰ D.J. GOLDFORD, *The Constitution of Religious Freedom: God, Politics, and the First Amendment*, Waco, TX, Baylor University Press, 2012, 219. However, there is a nuance to this. Andrew Koppelman makes an interesting point when he asserts that, strictly speaking, the *Establishment Clause* does not prevent the state from favoring a particular religion. Koppelman writes: “The *Establishment Clause* permits the state to favor religion so long as ‘religion’ is understood very broadly, forbidding any discrimination or preference among religions or religious propositions. This understanding makes it possible to defend accommodations without running into the free exercise/establishment dilemma. The state is recognizing the value of religion, but it is making no claims about religious truth. It is the making of such claims that violates the Establishment Clause.” A. KOPPELMAN, “The Troublesome Religious Roots of Religious Neutrality,” in *Notre Dame Law Review*, 84 (2009), 882.

²¹ Specifically, the principle of procedural due process requires that when the state or federal government acts in a way that denies a citizen of his or her life, liberty, or a property interest, he or she must first be given proper notice and the opportunity to be heard. The Supreme Court noted that certain factors need to be considered when determining due process. These factors include the private interest of the party affected by the governmental action, the risk of an erroneous deprivation of such interest through the procedures and the value of additional procedural safeguards, and the stated government interest involved. Cf. W.W. BASSETT, “Relating Canon Law and Civil Law,” in *The Jurist*, 44 (1984), 14; *Morrisey v. Brewer*, 408 U.S. 471 (1972); *Mathews v. Eldridge*, 424 U.S. 319 (1976).

²² MADRID, “The Liability of Catholic Parishes in America: What Went Wrong and How to Fix It,” 720. Some commentators, however, have reservations regarding the extent of rights enjoyed by legal

persons, corporations in the United States enjoy the right to freedom of speech, freedom from government entanglement (e.g., interfering with internal church affairs, etc.), as well as the right to have equal protection and due process under the law.²³ Thus, the First Amendment and the Fourteenth Amendment establish that the role of a secular government—both at the local level and at the federal level—“is not to make theological judgments but to protect the right of [persons] to pursue their own understanding of truth, within the limits of the common good.”²⁴ Thus, religion and the practice of faith in the United States become subsets of a person’s conscience, and the adherence to any set of religious tenets becomes a matter of each individual’s conscience.²⁵ Andrew Koppelman writes:

The Supreme Court has repeatedly said that neither it nor any other branch of the state can decide matters relating to the interpretation of religious practice or belief. The state may not attempt to determine the “truth or falsity” of religious claims, courts may not try to resolve controversies over religious doctrine and practice, may not undertake interpretation of particular church doctrines and the importance of those doctrines to the religion, may make no inquiry into religious doctrine, and may give no consideration of doctrinal matters, whether the ritual of a liturgy of worship or the tenets of faith.²⁶

Additionally, Marianne Perciaccante notes:

persons. For more information, see Z. TEACHOUT, *Corruption in America: From Benjamin Franklin’s Snuff Box to Citizens United*, Cambridge, MA, Harvard University Press, 2014; G.R. STONE, “Citizens United and Conservative Judicial Activism,” in *University of Illinois Law Review*, 2012 (2012), 485-500; G. SITARAMEN, “Contracting Around Citizens United,” in *Columbia Law Review*, 114 (2014), 755-806.

²³ A. WINKLER, “Corporation Personhood and the Rights of Corporate Speech,” in *Seattle University Law Review*, 30 (2007), 864. Cf. *Noble v. Union River Logging R.R.*, 147 U.S. 165 (1893) at 176; *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578 (1896) at 592; *Hale v. Henkel*, 201 U.S. 43 (1906) at 76; *McCabe v. Atchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914) at 161-162; *Metro. Life Ins. Co. v. Ward*, 470 U.S. 869 (1985) at 880-881; *Pacific Gas & Electric Company v. Public Utilities Commission of California*, 475 U.S. 1 (1986) at 4 and 20-21.

²⁴ M.W. MCCONNELL, “Why Protect Religious Freedom?” in *Yale Law Journal*, 123 (2013), 781.

²⁵ J.J. COUGHLIN, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, New York, NY, Oxford University Press, Inc., 2012, 192. Cf. MCCONNELL, “Why Protect Religious Freedom?” 782-786; P.J. BROWN, “Square Pegs in Round Holes: Towards a Better Model of Parish Civil Law Structures,” in *The Jurist*, 69 (2009), 271-272.

²⁶ KOPPELMAN, “The Troublesome Religious Roots of Religious Neutrality,” 865.

[Public] policy considerations stemming from the *Free Exercise* and *Establishment* clauses of the First Amendment should discourage courts from interpreting canon law in any form. When courts interpret canon law, they violate the *Free Exercise* clause by dictating to a religion what meaning the government sanctions for their beliefs as codified in canon law. Furthermore, courts violate the *Establishment* clause when they interpret canon law, because the courts establish an official position on the religious beliefs stated in the law.²⁷

Nevertheless, as adamant as civil courts in the United States may be in wanting to avoid deciding cases involving religious matters, what happens when issues relating to canon law emerge in civil proceedings, such that civil courts cannot avoid canon law?²⁸ In such situations, it is important to note that, although the First Amendment and Fourteenth Amendment preclude civil courts from interpreting theological doctrines, they do not prohibit courts from intervening when necessary. Such intervention should only be taken, however, when civil courts can treat canon law in a way that does not violate the First or the Fourteenth Amendments. In other words, it is conceivable for civil courts to consider canon law if the courts regard canon law as a kind of private ordering, an internal policy, or as a by-law of a corporation.²⁹ In *Serbian Orthodox Diocese v. Milivojevich*, the Supreme Court of the United States explains:

The First and Fourteenth Amendments permit hierarchical religious organizations to establish their own rules and regulations for internal discipline and government, and to create tribunals for adjudicating disputes over these matters. When the choice is exercised and ecclesiastical tribunals are created to decide disputes over the government and direction of subordinate bodies, the *Constitution* requires that civil courts accept their decisions as binding upon them.³⁰

²⁷ PERCIACCANTE, “The Courts and Canon Law,” 172.

²⁸ Cf. K.E. REEDER, “Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits,” in *Columbia Journal of Law and Social Problems*, 40 (2006), 125-174.

²⁹ WELLS, “Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy,” 385. Cf. W.J. RADEMACHER, J.S. WEBER, and D. MCNEILL, *Understanding Today’s Catholic Parish*, New London, CT, Twenty-Third Publications, 2007, 132.

³⁰ *Serbian Orthodox Diocese v. Milivojevich* at 724.

Therefore, when particular norms of canon law can be incorporated into the articles of incorporation or into the bylaws of a civilly incorporated public juridic person, a bankruptcy court could intervene since the court would interpret those norms as internal secular policy of a civilly incorporated business entity. Additionally, a number of scholars have made recommendations for how civil courts should treat religious matters—particularly in areas of internal affairs of religious organizations. These recommendations include: to encourage civil courts to give more deference to ecclesiastical tribunals and hierarchical religious bodies regarding internal matters—including the control of property; in the absence of fraud, collusion, or arbitrariness, to encourage civil courts to consider any decision formulated by church tribunals as conclusive; to make it unconstitutional for states to use their legislative power to intrude into a church’s internal affairs—including questions of property ownership under canon law; and to allow the First Amendment of the *Constitution* to circumscribe the role that civil courts play in resolving internal church property disputes.³¹

4.1.2 — The Neutral Principles

As already alluded, civil courts are not prohibited from deciding cases involving religious matters. In order to ensure that the rights protected by the First and Fourteenth Amendments are preserved, however, precautions need to be in place. Thus, the Supreme Court stipulates that civil courts need to apply one of the two so-called “neutral principles

³¹ Cf. K. GREENAWALT, “Hands Off! Civil Court Involvement in Conflicts over Religious Property,” in *Columbia Law Review*, 98 (1998), 1843-1907; *Watson v. Jones*; *Gonzalez v. Roman Catholic Archbishop of Manila*, 280 U.S. 1 (1929) at 16; *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952); *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Hospital*, 393 U.S. 440 (1969) at 449.

of law” if they are to intervene in and decide cases involving religious matters—i.e., when questions concerning canon law arise.³² Boris Bittner and associates write:

Neutral principles are mechanisms courts can use to avoid getting into ecclesiastical questions, including those related to the governance of churches. Thus, the Court held that such principles are consistent with the long-standing principles that civil courts cannot determine ecclesiastical issues without running afoul of the *Free Exercise* and *Establishment Clauses*, and in fact, a neutral principles approach will better avoid crossing the boundary between secular and ecclesiastical matters than the traditional approach. Moreover, a neutral principles approach that relies on deeds, state corporations law, trust documents, church bylaws, and so on [...], would allow hierarchical as well as congregational churches to spell out the ownership of church property before disputes arise, thus essentially determining the outcomes of such cases.³³

The first neutral principle can be referred to as the “trust principle.”³⁴ The trust principle is applicable in situations involving disputes regarding the ownership of property between a local church and a parent or an umbrella church that oversees that local church. In these situations, the legal issue frequently centers on the actual rightful owner of particular property in question. Does the local church that is physically located on the property in question own the property? Alternatively, does the umbrella church that supervises the local church from afar own the property? In applying the trust principle, state courts simply disregard the religious language and look only to the plain secular language of the ownership documents. Charles Whalen writes:

State courts may disregard all of the religious language in the constitution of the local church and in the constitution of the mother church, and may look instead for civil law terminology that either creates or does not create a trust. Under this trust principle, the states are free to hold that unless there is sufficient civil law language to create a trust in favor of the mother church, local church property does not belong to, nor is under the supervision and control of, the mother church.³⁵

³² *Jones v. Wolf* at 597.

³³ BITTKER, IDLEMAN, and RAVITCH, *Religion and the State in American Law*, 373.

³⁴ *Jones v. Wolf* at 600. This principle can also be referred to as the “polity approach.” Cf. J.L. RYAN, “The Delicate Balance Between Religious Freedom and Legal Accountability in an Increasingly Litigious Society,” in *Journal of Civil Rights and Economic Development*, 24 (2009), 261.

³⁵ C.M. WHELAN, “Current Attitudes of the Courts Toward Church Properties and Liabilities,” in *Catholic Lawyer*, 26 (1981), 221.

The second neutral principle is referred to as the “majoritarian principle.” The majoritarian principle is useful in situations where the governance of a church community—i.e., its decision-making—is based on the building of consensus through a voting process. Under the majoritarian principle, the hierarchical structure of a religious organization usually does not matter so much. According to the majoritarian principle, state courts adopt the presumption that the governing mechanism of a local church is based on a voting system involving the majority of the members with voting rights of the congregation. The results of all decisions of governance are based on the decision of the majority rather than on the decision of an umbrella supervising body that has the authority to veto the decision of the local members.³⁶ According to the majoritarian principle, the presumption that the decision of the majority can be vetoed only if there exists sufficiently clear civil language to counter the presumption. Whelan writes:

If the charter of the local church or the constitution of the mother church explicitly rejects the majoritarian principle, and does so quite clearly in language that any civil lawyer would understand, one can overcome the majoritarian principle. In the absence of such “plain English,” however, the courts may hold that the vote of the majority of the Church’s members accurately reflects its government.³⁷

Both the trust principle and the majoritarian principle are beneficial to church institutions since they allow civil courts to enter into the internal working of religious institutions and to decide on internal disputes without having to violate either the First Amendment or the Fourteenth Amendment.

Whether a religious institution has documents (e.g., articles of incorporation, constitutions, bylaws, etc.) that civil courts find useful in order to apply either the trust

³⁶ *Jones v. Wolf* at 608. Cf. BITTKER, IDLEMAN, and RAVITCH, 384.

³⁷ WHELAN, “Current Attitudes of the Courts Toward Church Properties and Liabilities,” 222.

principle or the majoritarian principle depends on each institution.³⁸ Not all institutions will have documents available for any number of reasons, and there should be no presumption that such documentations—while desirable—would always be available for the courts to inspect. Nevertheless, Whelan suggests that the way civil courts have used these two neutral principles to help resolve religious issues should, by default, encourage “church attorneys to write documents in a way that will be comprehended easily by the civil courts in the event” that legal disputes concerning ownership of properties may occur.³⁹

4.2 — Case Studies

It is worth considering two bankruptcy cases to demonstrate how civil courts may rule concerning the standing of canon law in bankruptcy proceedings. The two cases involve the Roman Catholic Archdiocese of Portland in Oregon and the Oregon Province of the Society of Jesus. These two bankruptcy cases are chosen because both these institutions are civilly incorporated public juridic persons, the legal issues that they had to deal with were essentially the same, the bankruptcy petitions for these two cases were filed in the same bankruptcy district, and the two cases were heard by the same

³⁸ It is important to note that two neutral principles are not mutually exclusive. Boris Bittker and associates note that, in some circumstances, civil courts have been known to combine the different elements from both of the neutral principles in order to help them deliberate. Cf. BITTKER, IDLEMAN, and RAVITCH, *Religion and the State in American Law*, 380; *Serbian Orthodox Diocese v. Milivojevich*.

³⁹ WHELAN, “Current Attitudes of the Courts Toward Church Properties and Liabilities,” 222. Along the same rationale, John Renken suggests that “it would seem entirely prudent that *all* acts of extraordinary administration also be identified in civil legal articles of incorporation of public juridic persons, so that the same discipline be operative in both the ecclesiastical and civil fora.” J.A. RENKEN, “Acts of Extraordinary Administration of Ecclesiastical Goods in *Book V* of the CIC,” in *Studia canonica*, 49 (2015), 596. Cf. R.L. KEALY, “Methods of Diocesan Incorporation,” in *CLSA Proceedings*, 48 (1986), 167.

bankruptcy judge. The similarities between these two bankruptcy cases will help to compare and contrast some of the legal arguments.

The first case study involves the Archdiocese of Portland in Oregon⁴⁰ bankruptcy filing. The Archdiocese of Portland in Oregon filed for Chapter 11 in 2004 in the Bankruptcy Court of the District of Oregon.⁴¹ Since 1874, the Archdiocese had been incorporated as a corporation sole under Archbishop François Norbert Blanchet and continued to be the same under subsequent archbishops.⁴² The corporation sole adopted by the Archdiocese included all the parishes and their properties.⁴³ The issue before the bankruptcy court was the determination of the bankruptcy estate under §541 of the Bankruptcy Code⁴⁴—specifically, the property (diocesan and parochial) that would be included in the bankruptcy estate at the time of the bankruptcy filing.⁴⁵

Based on the First Amendment freedom of religion clause, attorneys for the Archdiocese contended that the bankruptcy should not ignore canon law. As a Catholic institution, the Archdiocese was bound to follow the teachings of the Catholic Church and to follow canon law. In following canon law, the Archdiocese was exercising its freedom of religion. Erected as a public juridic person in canon law, the Archdiocese was

⁴⁰ Herein, the Archdiocese.

⁴¹ Cf. *In re Roman Catholic Archbishop of Portland in Oregon*, 335 B.R. 842 (Bankr. D. Ore 2005).

⁴² In 2004, the Archbishop of Portland in Oregon was Archbishop John Valzny.

⁴³ All parishes were included with one exception: St. Elizabeth of Hungary Parish in Portland, Oregon. Atypical of any parish in the Archdiocese of Portland in Oregon, St. Elizabeth of Hungary Parish was not incorporated as part of the corporation sole that is at Archdiocese of Portland in Oregon; rather, St. Elizabeth of Hungary Parish was separately incorporated as a domestic non-profit corporation in the State of Oregon since 1953. Consequently, St. Elizabeth of Hungary Parish was not a part of the Archdiocese of Portland's bankruptcy case in 2004.

⁴⁴ Cf. *11 U.S.C. §541* *U.S.C.*, available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title11/pdf/USCODE-2013-title11.pdf> (2013) (last accessed 12 February 2016).

⁴⁵ Attorneys for the Archdiocese of Portland in Oregon argued that, while the debtor is a corporation sole under civil law, under canon law, each parish is a distinct public juridic person.

legally distinct from the public juridic persons that were the parishes. Moreover, since canon law recognizes that each public juridic person has the right to acquire, retain, administer, and alienate properties, the properties of the parishes logically belong to the parishes while the properties of the Archdiocese logically belong to Archdiocese.⁴⁶ Therefore, under the right guaranteed by the First Amendment, the bankruptcy court should rely on canon law and should exclude properties belonging to the parishes from the bankruptcy estates of the Archdiocese.⁴⁷

Attorneys for the Archdiocese also argued that if the bankruptcy court were to disregard canon law and to use only the neutral principles in determining property ownership and the bankruptcy estate of the Archdiocese, this would be a violation of the Archdiocese's right under the *Religious Freedom Restoration Act*.⁴⁸ Similar to the argument above, this argument was also based on the premise that, as a Catholic institution, the Archdiocese has the right to exercise its freedom of religion—i.e., to follow canon law. If the bankruptcy court were to ignore canon law in a §541

⁴⁶ William Rademacher and colleagues write: “The [diocesan] bishop cannot, therefore, claim parish property, money, or investments for diocesan use. Why? The diocese is one [public] juridic person and the parish is another [public] juridic person. Each of them has the right to own its own property. No one can just take from another. [The diocesan bishop] can ‘moderately tax’ but not ‘immoderately’ so.” RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 112.

⁴⁷ *In re Roman Catholic Archbishop of Portland in Oregon* at 853. Cf. J.R. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, New York, NY, Palgrave Macmillan, 2014, 140; S. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” in *Studia Canonica*, 49 (2015), 490.

⁴⁸ The *Religious Freedom Restoration Act* (=RFRA) was enacted in 1993 to ensure that interests in religious freedom were protected. As articulated in *Goehring v. Brophy*, when the government imposes a substantial burden on the free exercise of religion, it must show that the imposition satisfies strict scrutiny. In other words, the RFRA prohibits laws that substantially burden religious exercise unless they can demonstrate that they further a compelling state interest that cannot be achieved by less restrictive means. The Supreme Court ruled in 1997 in *City of Boerne v. Flores* that the RFRA applies only to federal law and does not apply to state law. Cf. Chapter 21B of the *U.S. Code Title 42*, available at: <http://www.gpo.gov/fdsys/granule/USCODE-2010-title42/USCODE-2010-title42-chap21B> (1993); *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Goehring v. Brophy*, 94 F.3d 1294 (9th Cir. 1996); *Worldwide Church of God v. Philadelphia Church of God, Inc.*, 227 F.3d 1110 (9th Cir. 2000).

determination, this would constitute a substantial burden because the Archdiocese would not be able to freely exercise its religion. Therefore, even if the bankruptcy were to use either of the neutral principles to determine which properties to be included in the bankruptcy estates, this would, nevertheless, impede the Archdiocese's freedom of religion—i.e., to follow canon law. Essentially, the Archdiocese contended that, “in determining what is property of a bankruptcy estate under §541 of the Bankruptcy Code, the court's failure to recognize the separation of Archdiocese of Portland in Oregon assets from the assets of the parishes, as is required by canon law, would be a substantial burden on religious exercise.”⁴⁹

Predictably, attorneys representing the creditors (or claimants) in the Archdiocese bankruptcy case argued the reverse. Instead of involving canon law, creditors' attorneys argued that the bankruptcy court should simply look at how the Archdiocese was incorporated (i.e., corporation sole) and should apply the appropriate Oregon State's property law to determine issues of property ownership. Michael Morey, one of the attorneys representing some of the claimants, opined:

All parish assets are owned, including real estate, in the name of the Archbishop of Portland for the Portland Archdiocese. There is no other legal entity that is the legal owner of those properties. They have always been fully owned and controlled by the [Archdiocese of Portland in Oregon].⁵⁰

The bankruptcy court disagreed with the Archdiocese's argument in favor of the creditors' argument regarding how canon law and the neutral principles are applicable in the court's deliberation concerning property ownership. The court plainly stated that it

⁴⁹ *In re Roman Catholic Archbishop of Portland in Oregon* at 860.

⁵⁰ J.B. FRAZIER, “Ore. Parishes Battle to Keep Assets” in *Associated Press*, 8 May 2005, available at http://wireservice.wired.com/wired/story.asp?section=Breaking&storyId=1030765@tw=wn_wire_story (last accessed 10 October 2014).

considered canon law to be a kind of private ordering.⁵¹ Considering the facts and the circumstance in the Archdiocese's bankruptcy case, the bankruptcy court saw neither an obligation nor a necessity to consider canon law. Instead, the bankruptcy court saw that it was appropriate and necessary to apply only the neutral secular principles to interpret the relevant property laws of Oregon State. Judge Elizabeth Perris, the presiding judge in the Archdiocese of Portland in Oregon bankruptcy case, writes:

Therefore, consistent with First Amendment jurisprudence and the Bankruptcy Code, I will apply neutral secular principles of state law in order to determine the issues presented in this adversary proceeding. [The Archdiocese] argues that, in applying neutral principles of law, I must consider not only state corporate and property law, [but] also canon law, because that law defines the relationship between the Archbishop and the parishes. [...]. However, neutral principles of law require application of secular neutral principles, not sacred ones. The religious organization's internal law is not relevant to the dispute, unless neutral principles of civil law make it so. There is no constitutional requirement that internal church law be considered in determining a purely secular dispute.⁵²

Regarding the argument of the role of the *RFRA* in a §541 determination in the Archdiocese bankruptcy case, the bankruptcy court did not see the merit in the Archdiocese's position that there was a substantial burden on religious exercise if the bankruptcy court were to disregard canon law in a §541 determination. In fact, the bankruptcy court called into question whether the *RFRA* was even applicable in a §541 determination. Judge Perris writes:

Section 541 merely defines what property is included in a bankruptcy estate; issues such as ownership of property are determined by application of state law. It is not clear to me how *RFRA* applies to determination of a status, that is, ownership of property, that is a result of application of state law.⁵³

⁵¹ WELLS, "Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy," 385.

⁵² *In re Roman Catholic Archbishop of Portland in Oregon* at 854. Cf. *Jones v. Wolf*; WHELAN, "Current Attitudes of the Courts Toward Church Properties and Liabilities," 222.

⁵³ *In re Roman Catholic Archbishop of Portland in Oregon* at 860.

In the end, Judge Perris concludes that, even if *RFRA* did apply, application of “[the] neutral secular principles of law to determining rights in property for purposes of this bankruptcy case would not violate *RFRA*.”⁵⁴ The consequences of Judge Perris’ ruling meant that all the parishes’ properties were included in the bankruptcy estate of the Archdiocese of Portland bankruptcy case.⁵⁵

The second case study involves the Society of Jesus, Oregon Province.⁵⁶ As a non-profit corporation, the Oregon Province was incorporated in the State of Oregon since 1918. In 2009, the Oregon Province filed for Chapter 11 bankruptcy protection in the Bankruptcy Court of the District of Oregon.⁵⁷ At the time of its bankruptcy filing, there were six educational institutions that were “affiliated” with the Oregon Province: that is, Gonzaga University, Seattle University, Gonzaga Preparatory School, Seattle Preparatory School, Bellarmine Preparatory School (all in Washington State), and Jesuit High School (in Oregon).⁵⁸ Although these six institutions identified themselves as “Catholic” and “Jesuit,” under civil law, they had been separately incorporated either in the State of Washington or in the State of Oregon; none of these educational institutions was included as part of the corporation that was the Oregon Province since they had all been separately

⁵⁴ *Ibid.*, at 862. Cf. N.M. GAUNCE and R. LUTHER, “Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors,” in *Valparaiso University Law Review*, 43 (2009), 642.

⁵⁵ As mentioned earlier, the properties that belonged to St. Elizabeth of Hungary Parish in the Archdiocese of Portland in Oregon were not included in the bankruptcy estate of the Archdiocese.

⁵⁶ Herein, the Oregon Province or the Province.

⁵⁷ *In re Society of Jesus, Oregon Province*. Cf. T. ROBERTS, “Jesuits’ Oregon Province Files for Bankruptcy,” in *National Catholic Reporter*, 23 February 2009, available at: <http://ncronline.org/news/accountability/jesuits-oregon-province-files-bankruptcy> (last accessed 10 July 2015).

⁵⁸ Cf. J.I. TU, “Northwest Jesuits File for Bankruptcy,” in *Seattle Times*, 18 February 2009, available at <http://www.seattletimes.com/seattle-news/northwest-jesuits-file-for-bankruptcy/> (last accessed 21 December 2015).

incorporated.⁵⁹ All six of these institutions had their own distinct boards of members who were the corporate owners of the respective institutions. Additionally, there was no evidence of commingling of assets between or among any of these six institutions.

While the separate incorporation status of the six educational institutions from the Oregon Province took place several decades prior to the Oregon Province filing for bankruptcy in 2009, nevertheless, the attorneys representing the creditors in the Oregon Province bankruptcy case argued that all the assets of all six educational institutions should be included in the bankruptcy estate in the Oregon Province. They contended that any apparent separation between the Oregon Province and the six educational institutions is “illusory.”⁶⁰ Using an argument like that which the attorneys for the Archdiocese of Portland in Oregon had presented, the creditors’ attorneys reasoned that under canon law, these institutions are under the supervision of the moderator of Oregon Province—i.e., the Provincial—since he missioned Jesuits to work at these institutions.⁶¹ Essentially, plaintiffs’ attorneys argued that the bankruptcy court should not only look at the separate incorporated nature of these six schools, but also it should rely on canon law to see the true relationship between the Oregon Province and the six educational institutions—i.e.,

⁵⁹ Seattle University was incorporated in 1898 in Washington State, Gonzaga University was incorporated in 1914 in Washington State, and Jesuit High School—the youngest of the six institutions—was incorporated in 1956 in Oregon.

⁶⁰ E. LANGLOIS, “Schools Should Not be Part of Bankruptcy, Jesuits Say,” in *Catholic Sentinel*, 26 February 2009, available at: <http://www.catholicsentinel.org/main.asp?SectionID=2&SubSectionID=35&ArticleID=9854> (last accessed 21 December 2015).

⁶¹ Cf. V. SCHMALZ, “Sex Abuse Claims Threaten Jesuit Universities: Northwest Jesuit Province Files for Bankruptcy, But the Plaintiffs’ Lawyers Cast a Wider Net,” in *OSV Newsweekly*, 4 March 2009, available at <https://www.osv.com/OSVNewsweekly/Story/TabId/2672/ArtMID/13567/ArticleID/8786/Sex-abuse-claims-threaten-Jesuit-universities.aspx> (last accessed 22 December 2015).

they are really a single entity rather than seven distinct entities. An attorney representing some of the creditors was quoted as saying:

The Gonzaga [University's] argument is that [the university is] not really part of the Oregon Province is like Pontiac arguing [it is] not really part of General Motors. Yeah, [Gonzaga University] may be a separate corporation, but [the university] functions as part and parcel of the same organization [that is the Oregon Province].⁶²

It just so happened, however, that the judge presiding over the bankruptcy case involving the Oregon Province was also Judge Perris—the same judge who presided over the bankruptcy case involving the Archdiocese of Portland in Oregon. Referring to her previous ruling on the same issue in the Archdiocese's bankruptcy case, Judge Perris applied the neutral secular principles to interpret Oregon State's property law. Predictably, Judge Perris held that, according to their distinct articles of incorporation, Gonzaga University, Seattle University, Gonzaga Preparatory School, Seattle Preparatory School, Bellarmine Preparatory School, and Jesuit High School were, in fact, separate corporations under state law. Therefore, since civil law controls and canon law does not control, Judge Perris held that properties belonging to those six educational institutions were not to be included in the bankruptcy estate of the Oregon Province.⁶³

In the final analysis, however, what role does canon law play in a civil proceeding? More precisely: Is it possible for a civil court to consider canon law without

⁶² D. NADVORNICK, "Jesuits Bankruptcy Brings Anxiety to Catholic Institutions," in *OPB*, 3 March 2009, available at <http://www.opb.org/news/article/jesuit-bankruptcy-brings-anxiety-catholic-institutions/> (last accessed 24 December 2015).

⁶³ Cf. *In re Society of Jesus, Oregon Province*; W. YARDLEY, "Catholic Order Reaches \$166 Million Settlement with Sexual Abuse Victims," in *The New York Times*, 25 March 2011, available at: http://www.nytimes.com/2011/03/26/us/26jesuits.html?_r=0 (last accessed 10 July 2015); N. HAUGHT, "Northwest Jesuit Bankruptcy Settlement Won't Affect Beaverton's Jesuit High, Seattle University or Gonzaga, Officials Say," in *The Oregonian*, 28 March 2011, available at: http://www.oregonlive.com/portland/index.ssf/2011/03/northwest_jesuit_bankruptcy_se.html (last accessed 10 July 2015).

violating the *Establishment Clause*? Reviewing case law that has appeared before the United States Supreme Court, Perciaccante suggests that this is possible. She writes:

In the cases concerning canon law which have come before the Supreme Court, the Supreme Court has not avoided canon law, and has recognized its applicability. However, the Court reached holdings in these cases which allowed canon law as evidence, but which did not involve interpretations of canon law.⁶⁴

As the examples of the bankruptcy cases involving the Archdiocese of Portland in Oregon and the Oregon Province and Judge Perris’ analysis appear to demonstrate, however, while a civil court has the right to intervene in cases involving canon law, the court will do this only if it chooses to do so.⁶⁵

4.3 — Pre-Filing Considerations

Before filing for reorganization bankruptcy protection under Chapter 11, administrators of civilly incorporated public juridic persons should consider a number of factors that can have a critical impact on the bankruptcy process. These factors include the canonical status of the juridic entities, how they relate to the diocesan bishop and other Catholic institutions, their civil corporate structure, their financial status, etc. It is judicious for administrators to familiarize themselves with these factors in order to anticipate any potential challenges that may arise in a bankruptcy process—particularly when there are conflicts between canon law and civil law.

⁶⁴ PERCIACCANTE, “The Courts and Canon Law,” 183. Cf. TEITZ, “Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation,” 1089.

⁶⁵ WHELAN, “Current Attitudes of the Courts Toward Church Properties and Liabilities,” 222. As noted before, canon law could, in theory, be included in a civil proceeding in the United States under Rule 44.1 of the *FRCP*. For more information on Rule 44.1, see TEITZ, “Determining and Applying Foreign Law: The Increasing Need for Cross-Border Cooperation,” 1081-1109; PRINCE, “Chipping Away at the ‘Wall of Stone’: Foreign Country Law and Federal Rule of Civil Procedure 44.1,” 30-33; LAMM and TANG, “Rule 44.1 and Proof of Foreign Law in Federal Court,” 31-35; WALKER, “The Federal Rules of Civil Procedures in the Context of Transnational Law. (The Hague Conference on Private International Law),” 183-208.

4.3.1 — Canonical Status of Catholic Institutions

The canonical status of a Catholic institution signifies the rights and the obligations it has within the Catholic Church,⁶⁶ and determines whether or not certain canons in the Code are applicable. For example, if an institution was erected as a private juridic person, the canons in Book V of the *CIC/83* do not apply. However, if an institution is a public juridic person, then its properties constitute ecclesiastical goods and the canons of Book V of the *CIC/83* do apply. Consequently, in a reorganization bankruptcy process, knowing the canonical status of an institution can help determine which canonical procedure is required and which ecclesiastical authority is competent to give permission.

A civilly incorporated public juridic person is a subject of both civil law and canon law. In civil law, documents such as the articles of incorporation that the public juridic person filed with the secretary of state and its approved bylaws identify what kind of corporation the public juridic person is, who owns it, its director and/or governing board, and how corporate decisions (such as the decision to file for bankruptcy) are made. In canon law, the decree of erection issued by a competent ecclesiastical authority and the approved statutes of a public juridic person function similarly to the articles of incorporation and bylaws of a civil corporation.⁶⁷ Specifically, a juridic person's canonical decree of erection and approved statutes indicate what type of institution the

⁶⁶ Concerning whether an institution needs a special mandate before it can be considered “Catholic” in canon law, Phillip Brown writes: “[An institution] does not have to have any particular juridic or legal identity in canon law to be considered a Catholic [institution] so long as it receives recognition of its Catholicity from a Church authority (which again should be the Holy See, the diocesan bishop, or any other ecclesial authority competent to grant such recognition).” BROWN, “Structuring Catholic Schools: Creative Imagination Meets Canon Law,” 475. Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 107-108.

⁶⁷ BROWN, “Structuring Catholic Schools: Creative Imagination Meets Canon Law,” 500.

juridic person is in canon law (e.g., association of the Christian faithful, a religious institute, a private juridic person, a public juridic person, an institution of pontifical right, an institution of diocesan right, etc.). Such documents also identify the administrator of the juridic person (e.g., the diocesan bishop, the provincial superior, the mother abbess, etc.), its purpose or mission (e.g., education, health care, social services, etc.), its governing structure (e.g., how decisions are made, who can grant permission and for what purpose, etc.), and its stable patrimony (if any exists). Thus, simply acknowledging that an institution is “Catholic” is insufficient to determine how that institution is canonically associated with the Catholic Church, or whether certain canonical procedures must be followed if the institution were to file for reorganization bankruptcy.⁶⁸

Identifying the canonical status of a Catholic institution is not always a simple task.⁶⁹ A civilly incorporated public juridic person may not necessarily include canonical language or norms in its articles of incorporation. Under canon law, for example, parishes are *ipso iure* public juridic persons; however, the language that may appear in the civil documents of a civilly incorporated parish may not reflect its ecclesiastical public juridic status.⁷⁰ In other words, one can read the civil articles of incorporation of a parish corporation and not be aware that the parish corporation is, in fact, a public juridic person under canon law.

⁶⁸ Ibid., 479. Cf. D. BRIEL, K.E. GOODPASTER, and M. NAUGHTON, “Our Reason for Being: Restoring the Pillars of Catholic Education,” in *America*, 214 no. 3 (2016), 14-17; E. TRANCIK and R. BARINA, “What Makes a Catholic Hospital Catholic?” in *U.S. Catholic*, 1 March 2015, available at: <http://www.uscatholic.org/articles/201503/what-makes-catholic-hospital-catholic-29861> (last accessed 12 June 2015).

⁶⁹ RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 108.

⁷⁰ Cf. COUGHLIN, *Canon Law: A Comparative Study with Anglo-American Legal Theory*, 134.

To complicate the situation even more, some parishes and religious communities may also have apostolates or ministries attached to them. Such apostolates usually include schools, hospitals, and other works of charity.⁷¹ Under civil law, it is common for most of these apostolates to be incorporated separately under civil law from the parishes or the religious communities that started them.⁷² However, while they are separately incorporated under civil law, these apostolates are very often not canonically independent from the religious institutions (i.e., the public juridic persons) that started them. Canon law still considers these apostolates as properties belonging to the public juridic persons. Thus, unless they were alienated according to the norms of canon law, the properties of the apostolates remain the properties of the public juridic persons.⁷³ Nevertheless, even if a civil institution that is also a public juridic person does not have any language in its articles of incorporation to indicate that it is a Catholic institution, the norms of canon law are still applicable.

4.3.2 — Inventory of Assets and Debts

While insolvency is no longer required for a corporation to file for bankruptcy, simply knowing that a civilly incorporated public juridic person's debts outweigh its assets is not enough to petition for bankruptcy protection. Not all debts are weighted the same and not all assets have the same level of liquidity. Therefore, before filing for Chapter 11 bankruptcy protection, it is important for a civilly incorporated public juridic

⁷¹ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish* 107. Cf. J.A. CORIDEN, *An Introduction to Canon Law*, Mahwah, NJ, Paulist Press, 1991, 98-99.

⁷² BROWN, "Structuring Catholic Schools: Creative Imagination Meets Canon Law," 481.

⁷³ S.M. SANDERS, "Charisms, Congregational Sponsors, and Catholic Higher Education," in *Journal of Catholic Higher Education*, 29 (2010), 11. Cf. J.F. RIGALI, "St. Louis University Hospital Sold to For-Profit Corporation," in *Origins*, 27 (1998), 629-633.

person to conduct an inventory and an assessment of all of its assets, holdings, and any outstanding debts. Such an assessment is critical because the administrator of a public juridic person needs to be cognizant of the overall financial status of his or her institution—what Francis Morrisey refers to as “due diligence” on the part of the administrator.⁷⁴

A civilly incorporated public juridic person such as a parish contemplating reorganization bankruptcy should first ascertain its true net asset worth.⁷⁵ This means the pastor should, as the administrator of the parish corporation, investigate how much unrestricted funds (i.e., cash) the parish has in its checking and/or saving accounts, the value of all of the parish’s real estate properties, the status of the parish’s investments, stocks, or bonds (if any), the value of any automobile registered under the parish’s corporate title, etc.⁷⁶ Such an inventory should also include outstanding debts for which the parish is responsible.⁷⁷ Thus, any outstanding loans, mortgages, liens, or any creditors who may have other legal claims over the debts should all be taken into account.⁷⁸

⁷⁴ Cf. F.G. MORRISEY, “Planning for the Demise or Diminishment of Canadian Religious Institutes: Canonical Issues,” in *Studia Canonica*, 49 (2015), 439.

⁷⁵ Douglas Baird and Edward Morrison write: “When a [corporation] first enters bankruptcy, the decision maker has very little information about the [corporation’s] assets and its prospects. The decision maker will not know the extent of the [corporation’s] assets. The demand for the [corporation’s] products is uncertain, as are its costs. The [corporation] needs to make significant changes in its operations, perhaps because of mismanagement in the past. Similarly, mismanagement may make it hard for anyone to have a grasp on the [corporation’s] prospects. Only time will tell whether efforts to clean house are successful.” D.G. BAIRD and E.R. MORRISON, “Bankruptcy Decision Making,” in *Journal of Law, Economics, and Organization*, 17 (2001), 363.

⁷⁶ CORIDEN, *An Introduction to Canon Law*, 167.

⁷⁷ It has been noted that many people are entering religious communities today who are also heavily indebted with student loans. While different religious communities have different policies concerning this, it is worth noting that debts resulting from student loans cannot be discharged in a bankruptcy filing. Cf. D. JESSE, “Religious Aspirants Get Help with Student Loan Debt,” in *Detroit Free Press*, 20 July 2014, available at: <http://www.usatoday.com/story/news/nation/2014/07/20/catholic-group-religious-aspirants-student-debt/12909507/> (last accessed 14 December 2015); J. MITCHELL, “White House Floats Bankruptcy Process for Some Student Debt: Current Law Largely Prohibits Federal, Private Loans from Being

Insurance may factor prominently in any bankruptcy filing and should not be disregarded. Most businesses in the United States cannot operate without some kind of insurance. Civilly incorporated public juridic persons is no exception. Insurance that is common among businesses includes general liability insurance, property insurance, worker's compensation, professional liability insurance, and directors and officers insurance. As recent reorganization bankruptcy cases involving dioceses in the United States demonstrate, bankruptcy courts do permit insurance policies held by the dioceses to be included as part of their bankruptcy estate. Thus, if there is insurance money available, the bankruptcy courts may permit that money to be included as part of the bankruptcy estate.⁷⁹ In *In re Edgeworth*, the bankruptcy court held:

Discharged in Bankruptcy,” in *WSJ*, 10 March 2015, available at: <http://www.wsj.com/articles/white-house-studying-new-bankruptcy-options-for-student-loan-borrowers-1426004272> (last accessed 14 December 2015); M. SIMKOVIC, “Risk-Based Student Loans,” in *Washington and Lee Law Review*, 70 (2013), 607-617.

⁷⁸ It may be helpful for an administrator to keep a current inventory of properties owned by the juridic person, and another current inventory of outstanding debts. Cf. L.A. DiNARDO, “The Inventory of Property,” in K.E. MCKENNA, L.A. DiNARDO, and J.W. POKUSA (eds.), *Church Finance Handbook*, Washington, DC, Canon Law Society of America, 1999, 279-303. While inventories of assets and debts will be helpful when filing the actual petition for bankruptcy, the compilation of these inventories is not mandatory by the Bankruptcy Code—at least not before a corporation files for bankruptcy. Consequently, these pre-filing inventories are not legal documents. Nevertheless, this information can be used during the post-petition period when the bankruptcy court typically requires debtors to disclose debt and asset information and to make such information available to creditors at the 341 meetings. C.J. TABB and R. BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 2nd ed., Newark, NJ, Matthew Bender & Company, Inc., 2006, 93. Cf. §1746 of the 28 U.S.C., available at: <http://www.gpo.gov/fdsys/pkg/USCODE-2013-title28/pdf/USCODE-2013-title28.pdf> (2013) (last accessed 17 February 2016).

⁷⁹ R.L. EPLING, K.A. BRENNAN, and B. JOHNSON, “Intersections of Bankruptcy Law and Insurance Coverage Litigation,” in *Norton Journal of Bankruptcy Law and Practice*, 21 (2012), 103. Cf. *MacArthur Co. v. Johns-Manville Corp.*, 837 F.2d 89 (2d Cir. 1988) at 92; *In re Titan Energy, Inc.*, 837 F.2d 325 (8th Cir. 1988) at 328. A recent survey indicates that insurance companies have paid between percent to 85 percent of the settlements in bankruptcy cases involving Catholic dioceses in the United States between 2004 and 2015. In the bankruptcy case involving the Archdiocese of Portland in Oregon, for example, the insurance company paid \$52 million of a \$75 million settlement. In the Diocese of Davenport bankruptcy case, the insurance company paid \$19 million of a \$37 million settlement. Likewise, in the Diocese of Wilmington bankruptcy case, the insurance company paid \$15 million of a \$77 million settlement. J. HOPFENSBERGER, “Insurance Policies Play Major Role in Archdiocese Bankruptcy,” in *Star Tribune*, 25

The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When a payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate.⁸⁰

Debtors should not presume, however, that insurance policies would automatically be included in a bankruptcy estate.⁸¹ If nothing else, insurance companies would most likely protest against having to pay. Among their arguments—particularly cases involving dioceses where the sexual abuse of minors by church personnel was one of the contributing factors that led to the bankruptcy filing—insurance companies contend that their policies do not cover intentional acts or criminal acts.⁸² Nonetheless, administrators of civilly incorporated public juridic persons should be familiar with their insurance policies, read the fine print, and seek legal counsel as needed in order to protect the interests of the policyholders—i.e., the public juridic persons.⁸³

February 2015, available at: <http://www.startribune.com/insurance-plays-big-role-in-archdiocese-bankruptcy/291169851/> (last accessed 14 May 2015).

⁸⁰ *In re Edgeworth*, 993 F.2d 51 (5th Cir. 1993) at 55.

⁸¹ Cf. P.J. SCHILTZ, “The Impact of Clergy Sexual Misconduct Litigation on Religious Liberty,” in *Boston College Law Review*, 44 (2003), 956-957; FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 143.

⁸² M. MOYLAN, “Charges May Let Archdiocese Insurers Avoid Abuse Payout,” in *MPRNews*, 24 June 2015, available at: <http://www.mprnews.org/story/2015/06/24/archdiocese-insurers> (last accessed 12 December 2015). Cf. *Interstate Fire & Casualty Company, Inc. v. Roman Catholic Church of the Diocese of Phoenix*, F.3D, 2014 W.L. 3733544 (9th Cir. 2014); D. COLLINS, “Catholic Archdiocese vs. Insurer in Priest Sex Abuse Cases,” in *Associated Press*, 8 April 2016, available at: <http://bigstory.ap.org/article/f852265c0d13412c8cb9aa466861c9d2/catholic-archdiocese-vs-insurer-priest-sex-abuse-cases> (last accessed 11 April 2016).

⁸³ EPLING, BRENNAN, and JOHNSON, “Intersections of Bankruptcy Law and Insurance Coverage Litigation,” 118. However, jurisdictions in the United State can vary and some jurisdictions do not permit insurance to cover punitive damages; as such, the availability of insurance coverage used as settlement is case-specific and/or jurisdiction-specific. Cf. *Home Insurance Company v. Am. Home Prods. Corp.*, 550 N.E.2d 930 (N.Y. 1990) at 932; *PPG Industry, Inc. v. Transamerican Insurance Company*, 975 P.2d 652 (Cal. 1999) at 657.

4.3.3 — Property Ownership

Property ownership is one of the major areas where canon law and civil law differ from one another.⁸⁴ Canon law recognizes that each public juridic person has the right to acquire, retain, administer, and alienate temporal goods. Civil law, too, recognizes that each corporation has the right to acquire, retain, administer, and sell properties. The point of contention between canon law and civil law on the issue of property ownership, however, is when one civil corporation is a composition of multiple public juridic persons in canon law. When a civilly incorporated public juridic person files for reorganization bankruptcy, it is the task of the bankruptcy court to determine which properties would be included in the bankruptcy estate at a Section 541 hearing. In making that determination, the bankruptcy court has to take into consideration constitutional law, property law, trust law, and perhaps even canon law.

Take, for example, a Catholic diocese that had been civilly incorporated as a corporation sole (with the diocesan bishop serving as the sole officer of the corporation) that includes all the parishes within the geographical territory of the diocese. Canon law recognizes that the diocese and all the parishes within its territory are all distinct public juridic persons.⁸⁵ Under civil law, however, through civil incorporation, all of these entities (i.e., the diocese and all the parishes within the territory of the diocese) may, in fact, be considered a single entity—that is, a corporation sole in the person of the diocesan bishop. In such a setting, while canon law recognizes that each public juridic

⁸⁴ Cf. COUGHLIN, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 227-233.

⁸⁵ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 104. Cf. J.A. CORIDEN, *The Parish in Catholic Tradition: History, Theology, and Canon Law*, New York, NY, Paulist Press, 1997, 64-66; can. 373; can. 515 §3.

person owns and controls its own properties, under civil law, all of the properties (including those of the parishes) belong to a single entity—the diocesan corporation sole under the person of the diocesan bishop. Consequently, when the diocese in such a case files for bankruptcy, all the properties—including the properties of parishes—are included in the bankruptcy estate. The bankruptcy case of the Archdiocese of Portland in Oregon already discussed is a perfect example of this scenario.⁸⁶

For dioceses and parishes that are in situations as described above, defending each public juridic person’s right to retain its own ecclesiastical goods as understood under canon law is an important priority. What legal argument could be used to protect the parishes’ assets? Two arguments are available. The first is a constitutional argument based on the First and Fourteenth Amendments already discussed in this chapter. In short, the diocese could argue that the bankruptcy court should rely on canon law and should hold that each public juridic person owns and administers its own ecclesiastical goods.⁸⁷ Accordingly, only the assets of the diocese, as a distinct public juridic person under canon law, should be included in the bankruptcy estate since it is the corporation sole that is the diocese that is filing for bankruptcy. The assets of the parishes—as distinct public juridic persons—should be excluded from the bankruptcy estate of the diocese. Nicholas Cafardi writes:

⁸⁶ T. CORRIGAN, “Parishes Win Greater Role in Archdiocese’s Bankruptcy,” in *WSJ*, 14 May 2015, available at: <http://blogs.wsj.com/bankruptcy/2015/05/14/parishes-win-greater-role-in-archdioceses-bankruptcy/> (last accessed 17 February 2016). Cf. §541 of *11 U.S.C.*; GAUNCE and LUTHER, “Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors,” 648-650.

⁸⁷ A.C. CARMELLA, “Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse about Religion Matters. (Symposium: Bankruptcy in the Religious Non-Profit Context),” in *Seton Hall Law Review*, 29 (2005), 467. Cf. COUGHLIN, *Law, Person, and Community: Philosophical, Theological, and Comparative Perspectives on Canon Law*, 228.

The Church's own Canon law will not permit parish assets to be used to pay diocesan debts. To do so would destroy the autonomy of separate juridic persons, on which the law insists. It would also be a misappropriation of assets, raised for one purpose, and used for another. Strong canonical arguments, tied to First Amendment rights, can be made that the general laws of the state should respect this internal law [i.e., canon law], so that we do not have the intolerable situation where the state, in a bankruptcy or any other proceeding, is forcing the Catholic Church to function under an ecclesial polity not of its own choosing.⁸⁸

The second argument that the diocese could use is based on charitable trust law. In civil law, a trust is defined as “the right, enforceable solely in equity, to the beneficial enjoyment of property to which another person holds the legal title; a property interest held by one person (the *trustee*) at the request of another (the *settlor*) for the benefit of a third party (the *beneficiary*).”⁸⁹ Arguing that a charitable trust exists, the diocesan bishop could assert that, although the assets of the parishes fall within the control of the diocesan bishop as a corporation sole, the bankruptcy court should exclude these assets from the diocese's bankruptcy estate because the diocesan bishop holds the assets belonging to the parishes only as a trustee. It is the parishioners who are the beneficiaries of this charitable trust rather than the diocesan bishop.⁹⁰ The diocesan bishop could strengthen his position

⁸⁸ N.P. CAFARDI, “The Availability of Parish Assets for Diocesan Debts: A Canonical Analysis. (Symposium: Bankruptcy in the Religious Non-Profit Context),” in *Seton Hall Legislative Journal*, 29 (2005), 373.

⁸⁹ B.A. GARNER and H.C. BLACK (eds.), *Black's Law Dictionary*, 10th ed., St. Paul, MN, West Group, 2014, 1740. Each state has its own law regulating how trusts can be established and managed. In *Watson v. Jones*, the United States Supreme Court held that a trust could be expressed or implicit. Cf. *Watson v. Jones* at 722 and 725; GREENAWALT, “Hands Off! Civil Court Involvement in Conflicts over Religious Property,” 1847-1859.

⁹⁰ B. SCHMALZBACH, “Confusion and Coercion in Church Property Litigation,” in *Virginia Law Review*, 96 (2010), 448. Cf. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” 490. The type of trust is also referred to as a “constructive trust” or an “implied trust.” A constructive trust is an “equitable remedy by which a court recognizes that a claimant has a better right to certain property than the person who has legal title to it. This remedy is commonly used when the person holding the property acquired it by fraud, or when property obtained by fraud or theft (as with embezzled money) is exchanged for other property to which the wrongdoer gains title. The court declares a constructive trust in favor of the victim of the wrong, who is given a right to the property rather than a claim for damages. The obligation of the constructive trustee is simply to turn the property over to the constructive beneficiary; the device does not create a ‘trust’ in any usual sense of the word.” *Black's Law Dictionary*, 1742. Cf. *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378 (N.Y. 1919) at 380.

by underscoring the fact that, when donors give to the church, their intentions are usually for the spiritual and the material support of the people of the parishes and the diocese rather than for the diocesan bishop's personal use.⁹¹ Ronny Jenkins writes:

When it comes to making donations or offerings to the Church, the specific intent or will of the giver is usually to assist in a pious cause. Hence, in canon law a gift transfer constitutes a gratuitous contract entered into for a pious reason in support of the Church's mission. For these two reasons—the contractual and supernatural characteristics of gift giving—the Church has long placed a very serious obligation on the recipient of gifts to respect donor intent, including the destination of the gifts and all the legitimate stipulations associated with it. Failure to observe donor intent is a grave wrong in justice since it violates binding agreements and harms the good of the Church.⁹²

If a charitable trust was, in fact, lawfully created under the relevant state law, this second argument is plausible. In such a case, the bankruptcy court would simply need to look at the language found in the documents creating the trust to make its determination.

But what happens when a charitable trust was not, in fact, created according to the relevant state law? In such a case, this second argument hinges on whether or not the bankruptcy court finds sufficient evidence to hold that a so-called “constructive trust” exists. Accordingly, the charitable trust argument asserts two things: (1) that a trustee-beneficiary relationship does, in fact, exist between the diocesan bishop and the parishioners (i.e., an actual trust was created under civil law); and (2) that legal titles alone do not necessarily determine ownership interests. In addition to legal titles, other factors should also be considered—e.g., donors' intents, usage, etc.⁹³ In summation, the diocesan position is that, even though no actual charitable trust was explicitly created,

⁹¹ WELLS, “Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,” 1215. Cf. SKEEL, “‘Sovereignty’ Issues and the Church Bankruptcy Cases,” 349; REEDER, “Whose Church Is It, Anyway? Property Disputes and Episcopal Church Splits,” 165-167.

⁹² R.E. JENKINS, “Gifts, Donations and Donor Intent in the Canon Law of the Catholic Church,” in *The Jurist*, 72 (2012), 89.

⁹³ WELLS, “Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy,” 390-392. Cf. SCHMALZBACH, “Confusion and Coercion in Church Property Litigation,” 447-450; JENKINS, “Gifts, Donations and Donor Intent in the Canon Law of the Catholic Church,” 89.

since the diocesan bishop acted in such a manner that clearly demonstrated that the parishioners (not the diocesan bishop) are the beneficiaries of the parishes' assets, a constructive trust does, in fact, exist.⁹⁴ Andrew Kull writes:

In the orthodox U.S. view, constructive trust vindicates equitable interests in property that, being enforceable against the debtor outside bankruptcy, are enforceable to the same extent against the debtor's general creditors. Nothing is removed from the bankruptcy estate—and there is accordingly no prejudice to creditors—because the valuable interest in the property in question never belonged to the debtor.⁹⁵

In determining whether or not constructive trusts exist, civil jurisdictions vary.⁹⁶

One of the reasons for the variation is because constructive trusts are defined according to state law, and state legislation differs. Nevertheless, it is important to remember that, once the argument is presented, it is the bankruptcy court that has the competency and the discretion to determine whether or not a constructive trust exists.⁹⁷

4.3.4 — Seeking Legal Counsel

A Chapter 11 reorganization bankruptcy is a complicated process. As discussed before, while bankruptcy is federal law, the bankruptcy court usually defers to state law's interpretation of things pertaining to property ownerships and contracts. Moreover, the

⁹⁴ D.J. MARCINAK, "Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporate Sole," in *Catholic University Law Review*, 55 (2006), 586. It is worth noting that, if a corporation sole that is a diocese files for Chapter 11, it is the responsibility of the diocesan bishop and/or the parishioners of the diocese to put forth the argument that a constructive trust exists. How such an argument is formulated is fact-specific and depends on the state law regulating the matter. Cf. *Watson v. Jones* at 722 and 725; GREENAWALT, "Hands Off! Civil Court Involvement in Conflicts over Religious Property," 1847-1859.

⁹⁵ A. KULL, "The Metaphorical Constructive Trust," in *Trusts & Trustees*, 18 (2012), 946.

⁹⁶ GAUNCE and LUTHER, "Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors," 656. Cf. CARMELLA, "Constitutional Arguments in Church Bankruptcies: Why Judicial Discourse about Religion Matters. (Symposium: Bankruptcy in the Religious Non-Profit Context)," 469 fn. 109; *In re Roman Catholic Archbishop of Portland in Oregon*.

⁹⁷ H. DAGAN, *The Law and Ethics of Restitution*, New York, NY, Cambridge University Press, 2004, 299. Cf. *XL/DATACOM, Inc. v. Wilson*, 16 F.3d 1443 (6th Cir. 1994)

bankruptcy process may include elements of constitutional law as well—particularly when church institutions and religious doctrines are involved.⁹⁸ With many nuances, the bankruptcy process can be both formidable and complicated. Additionally, when a public juridic person files for bankruptcy in the United States, canon law cannot be ignored either. Therefore, employing the services of legal experts—particularly those trained in bankruptcy law and in canon law—is advantageous when civilly incorporated public juridic persons file for bankruptcy protection in the United States.⁹⁹

When employing the services of legal experts, it is important to remember that in the United States, a licensed attorney practicing civil law (e.g., a bankruptcy attorney) is considered an officer of the civil court who is granted the right to appear before it in a legal proceeding. A canon lawyer, on the other hand, is not considered an officer of the civil court. In a Chapter 11 bankruptcy filing, therefore, it should be clear to all parties that it is the bankruptcy attorney who acts as the primary legal counsel in a bankruptcy proceeding.¹⁰⁰ The official capacity of the canonist should primarily be advisory or as

⁹⁸ Typically, attorneys in the United States engage in a variety of areas of the law such as family law, estate law, criminal law, or employment law. Bankruptcy attorneys, however, tend only to practice bankruptcy law. This phenomenon can also be seen in judges. Frequently, judges preside over a variety of cases covering a wide spectrum of laws; however, bankruptcy judges typically only preside over bankruptcy proceedings and nothing else. This is because bankruptcy law is a highly specialized area of the law that requires additional training. Cf. J.J. RACHLINSKI, C. GUTHRIE, and A.J. WISTRICH, “Heuristics and Biases in Bankruptcy Judges,” in *Journal of Institutional and Theoretical Economics*, 163 (2007), 167-186; D.A. SKEEL, “Bankruptcy Lawyers and the Shape of American Bankruptcy Law,” in *Fordham Law Review*, 67 (1998), 497-522.

⁹⁹ It has been observed that one of the most challenging experiences for civil attorneys representing religious organizations is to understand the governing structure of religious organizations. Religious organizations tend not to operate in the same model or sensibility that secular organizations operate. Thus, having access to a canon lawyer would be helpful to the civil attorneys navigating the intricacies of canon law and managing expectations. Cf. FOOHEY, “When Churches Reorganize,” 291-292.

¹⁰⁰ Clarity of roles and functions of legal counsel is important to avoid possible conflicts of interests. While the notion of conflicts of interests is implicit in canon law, it is explicit in civil law. All state bar associations have ethical codes or rules of professional conduct that are binding to all licensed attorneys in their respective jurisdictions. Cf. OREGON BAR ASSOCIATION, *Oregon Rules of Professional Conduct*, 19 February 2015, available at: http://www.osbar.org/_docs/rulesregs/orpc.pdf (last accessed 14 May 2015);

someone who can provide expertise in the area of canon law and the inner workings of the Catholic Church. Thus, when necessary, the canonist may provide affidavits or give testimony in the capacity of an expert witness.

When considering seeking legal services, the issue of compensation for the legal services rendered can be a sensitive topic to broach when dealing with church institutions in civil legal proceedings.¹⁰¹ A civil attorney has different methods of billing for his or her legal services. Such billing practices are generally governed by approved rules of professional conduct promulgated by the bar association of the state where the attorney practices law or by the American Bar Association. Billable services can include providing legal advice, court appearances, legal research, or any other kind of work done in preparation for the case. In short, any measurable amount of time spent on a case can be considered billable time. This is the general practice in the legal profession, whether an attorney works with a for-profit corporation or a religious based non-profit corporation.¹⁰²

Misunderstandings can arise, however, concerning payments and compensation for services rendered when bankruptcy attorneys represent religious organizations as clients. There may be an expectation on the part of the religious institution that the attorneys who are willing to work with them would do so *pro bono* or at a discount.¹⁰³ It is

WASHINGTON STATE BAR ASSOCIATION, *Washington Rules of Professional Conduct*, 14 April 2015, available at: http://www.wsba.org/~media/Files/Resources_Services/Ethics/RPC%20booklet.ashx (last accessed 14 May 2015).

¹⁰¹ It is important to keep in mind that the sensitivity around compensation for legal services is also applicable to canon lawyers as well.

¹⁰² B.R. HOPKINS and D.O. MIDDLEBROOK, *Nonprofit Law for Religious Organizations: Essential Questions & Answers*, Hoboken, NJ, John Wiley & Sons, Inc., 2008, 6.

¹⁰³ Cf. KEALY, "Methods of Diocesan Incorporation," 172.

important to address any concerns regarding compensation for legal services early in the representation process. Pamela Foohey writes:

Though many Chapter 11 debtors may pay their bankruptcy attorneys reluctantly, some religious organization clients seemed to believe they had a religious right to a break on fees. Some leaders asked for a reduction in attorneys' fees, claiming that attorneys were "doing it for the better good of the community" or should "have mercy" on the congregation. Attorneys likewise had taken on the representations with the assumption that there was a "little bit higher risk of not being paid in full" as compared to small business [non-religious] clients. In fact, attorneys were willing to cut religious organizations breaks: 63% of the attorneys reduced their hourly rate, lowered their retainer fees, were "more generous" with time, or otherwise adapted their fees...In contrast, a few attorneys did not believe the nature of the client's business should influence the fees they charged.¹⁰⁴

It is worth noting, however, that many bankruptcy law firms do provide the initial consultation free of charge. Additionally, some of these law firms may also have service contracts available which usually cover a variety of legal services for a single fee. These are pre-packaged deals, and the fees for the packages are usually negotiable. Administrators of public juridic persons should consider carefully the terms of the payment and the language of the service contracts before making any commitment. Moreover, it is also common practice for administrators to get a second or even a third opinion concerning their legal situations before agreeing on a particular course of action with a particular bankruptcy attorney or law firm.

4.3.5 — Seeking Permission to File for Bankruptcy

Once all the information has been compiled and the administrator of the public juridic person decides that the best course of action is to seek bankruptcy protection under Chapter 11, the next step in the process is to obtain the necessary permission from the competent authority. This permission should be granted before the bankruptcy

¹⁰⁴ FOOHEY, "When Churches Reorganize," 298.

petition is filed in bankruptcy court. Both canon law and civil law have norms regulating how such permission is to be obtained. Compliance with these norms is necessary for validity.

Under civil law, obtaining the required permission for a corporation to file for bankruptcy is uncomplicated. Depending on the state's corporation law, the corporation's articles of incorporation, internal policies, guidelines, and bylaws determine the process needing to occur before a major decision such as filing for bankruptcy is made. Thus, an administrator or a manager of the civil corporation would simply need to follow the protocol(s) articulated in these documents when he or she makes a decision on behalf of the corporation. Generally, this entails the administrator or the manager presenting to the corporation's governing board all the proper information and asking the board for a vote on the matter; if the governing board agrees, then the administrator may proceed with the bankruptcy filing process. If questions arise subsequently concerning whether or not a particular administrator was authorized by the governing board to file for bankruptcy on behalf of the corporation, the bankruptcy court would review the protocol(s) taken by the administrator to ascertain whether or not established corporate formalities were followed.

Regarding canon law, since the Code does not address bankruptcy, the challenge is to identify what type of act of administration described in the Code appropriately describes the filing of reorganization bankruptcy.¹⁰⁵ As already noted in previous chapters, reorganization bankruptcy fits best under canon 1295—a *transaction that can worsen the patrimonial condition of a public juridic person*. Accordingly, an

¹⁰⁵ RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 118.

administrator of a civilly incorporated public juridic person would need to obtain permission from the competent ecclesiastical authority before filing for bankruptcy.¹⁰⁶

As discussed in chapter 2, determining who is the competent authority to grant the permission will depend on the nature of the public juridic person seeking such permission. In addition to universal law, proper law and particular law should also be consulted. Thus, for example, if the public juridic person is a diocese or an institution that is subject to the diocesan bishop, the competent authority to grant the necessary permission would be the diocesan bishop. However, before he can grant such permission, the diocesan bishop must first have the consent of the diocesan financial council and the college of consultors—along with any interested party who may be affected by the transaction if the situation demands it.¹⁰⁷ If the public juridic person is an institution not subject to the diocesan bishop, the competent authority to grant the permission is designated in the institution's statutes.¹⁰⁸ If the public juridic person is a religious institute, the competent authority is designated in the institute's proper law.¹⁰⁹

¹⁰⁶ Cf. M. WELCH, "Sponsorship," in P.J. COGAN (ed.), *Selected Issues in Religious Law*, Washington, DC, Canon Law Society of America, 1997, 106. Furthermore, the rationale and the procedures required for transactions falling under canon 1295 were discussed in chapter 2 of this dissertation.

¹⁰⁷ Cf. can. 1292 §1.

¹⁰⁸ Cf. can. 1292 §1.

¹⁰⁹ The proper law of a religious institute should include provisions concerning spending limits. Generally, these limits mirror those set by the conference of bishops. Moreover, the proper law of a religious institute may also require the superior who has the authority to grant permission to an administrator to place a transaction which may worsen the patrimonial condition of the public juridic person to have the consent of his or her council before granting such permission. Cf. can. 638 §3; *Statutes on Religious Poverty in the Society of Jesus & Instruction on the Administration of Goods*, Rome, General Curia of the Society of Jesus, 2005, 47; J.B. BLANGIARDI, *The General Congregation as an Instrument of Governance in the Society of Jesus*, Ottawa, Saint Paul University, 1997, 119-121.

4.4 — Piercing the Corporate Veil

Ownership implies possession and control. In corporate law, when a business entity is incorporated, it becomes a distinct legal person with recognizable rights under the law. These rights include the right to possess and to control properties.¹¹⁰ The articles of incorporation and the bylaws of an incorporated business define and regulate the duties and the responsibilities of the administrator of the corporation—particularly those duties and responsibilities that concern the care of the corporation’s assets. If a corporation has a governing board (e.g., a board of directors, a board of members, etc.), the duties and the responsibilities of this board should also be articulated in these same documents.

What is important to remember, however, is that a civilly incorporated business is both legally and physically distinct from other corporations. As a legal construct, a corporation has recognition as an independent legal person. Virginia Ho writes:

Defining the corporation itself is, of course, fairly simple—it is a legal entity possessing the characteristics defined by the corporate law of its state of incorporation, or if beyond the United States, by the law of the jurisdiction in which it was formed. Although what constituencies together form the “corporation” is at times unclear, state corporate law, the terms of the corporate charter, and other contractual mechanisms establish the corporation as a separate legal person and delimit its formal boundaries.¹¹¹

Consequently, when a business entity is incorporated, a proverbial veil “covers” it, forming a clear boundary that separates this business corporation from other business corporations. A corporate veil essentially gives the business corporation legal distinction. With a corporate veil in place, the administrator of the corporation acts on behalf of the corporation in accordance with the approved documents (e.g., articles of incorporation,

¹¹⁰ R.A. BOOTH, “Who Owns a Corporation and Who Cares?” in *Chicago-Kent Law Review*, 77 (2001), 150.

¹¹¹ V.H. HO, “Theories of Corporate Groups: Corporate Identity Reconceived,” in *Seton Hall Law Review*, 42 (2012), 885.

bylaws, statutes, constitutions, etc.) which govern the internal structure of the corporation. Respecting a corporation's distinct legal identity implies that the corporation has an obligation to observe its corporate formalities. The corporation is not to be controlled or managed by any entity that is external to the ordinary structure of corporation.¹¹²

Maintaining a distinctive corporate identity can be precarious for civilly incorporated public juridic persons.¹¹³ This is one of the areas where being accountable to both canon law and civil law can be challenging for Catholic institutions. For example, when a public juridic person that is a parish initiates a civil legal proceeding or engages in a transaction that can worsen its stable patrimonial condition, canon law requires that the pastor must first obtain written permission from the diocesan bishop.¹¹⁴ Under civil law, however, this is problematic because, if civilly incorporated, civil law recognizes the parish as a distinct corporation that is separate from the diocese—which, if civilly incorporated, is another distinct corporation. When the pastor (who is the administrator of the parish corporation) seeks permission from the diocesan bishop (who is the administrator of another corporation) before filing for bankruptcy, the implication may be that the parish and the diocese are actually one corporation rather than two distinct and

¹¹² S. OTTOLENGHI, "From Peeping Behind the Corporate Veil, to Ignoring It Completely," in *The Modern Law Review*, 53 (1990), 346.

¹¹³ Cf. M.E. CHOPKO, "Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures," in *The Jurist*, 69 (2009), 250. As discussed in chapter 1, when a public juridic person is civilly incorporated, while its canonical status does not change under canon law, its corporate status is now recognized under civil law. Similar to other corporations, a veil covers the public juridic person and makes it legally distinct from other corporation. With that recognition, the civilly incorporated public juridic person is expected to behave like any other corporations under the law—that is, a civilly incorporated public juridic person must act in accordance with its articles of incorporation as well as its approved bylaws.

¹¹⁴ Cf. cann. 1276, 1288, and 1295.

separate legal corporations.¹¹⁵ Such a transgression implies that corporate formalities have been disregarded. With the absence of a clear separation between the two or more corporations, the proverbial corporate veil has been compromised and could be pierced.¹¹⁶

It is important to remember, however, that it is the responsibility of the civil court to determine if a corporate veil has been pierced. In order to ascertain whether or not the corporate veil has been pierced, the civil court would look at the degree “of economic, financial, personnel, and administrative integration [between the two or more corporate entities], as well as the use of a common public persona.”¹¹⁷ Thus, “piercing the corporate veil” requires a demonstration that a corporation has violated certain corporate formalities—e.g., purposefully filing inaccurate corporate records to conceal or to misrepresent information concerning partnership with others outside the corporation, failing to maintain a critical arm’s length relationship with other corporation entities, the intermingling or the commingling of assets, etc.¹¹⁸

¹¹⁵ Cf. OTTOLENGHI, “From Peeping Behind the Corporate Veil, to Ignoring It Completely,” 338-353. Moreover, when the diocesan bishop asserts his authority and imposes a moderate tax that all parishes and other public juridic persons in his diocese are expected to pay (even for the sake of some diocesan needs), this action can be problematic under civil law with regards to separate incorporation and corporate formalities. Cf. CORIDEN, *An Introduction to Canon Law*, 166; RADEMACHER, WEBER, and MCNEILL, *Understanding Today’s Catholic Parish*, 109; DAVITT, “Whose Steeple Is It? Defining the Limits of the Debtor’s Estates in the Religious Bankruptcy Context,” 540-543.

¹¹⁶ The piercing of a corporate veil is defined as “[a] judicial act of imposing personal liability on otherwise immune corporate officers, directors, or shareholders for the corporation’s wrongful acts.” *Black’s Law Dictionary*, 1332. Cf. WELCH, “Sponsorship,” 109-110.

¹¹⁷ HO, “Theories of Corporate Groups: Corporate Identity Reconceived,” 889.

¹¹⁸ Cf. H.G. HENN, *Handbook of the Law of Corporations*, St. Paul, MN, West Publishing Co., 1970, 250-255; T.J.P. RADWAN, “Keeping the Faith: The Rights of Parishioners in Church Reorganizations,” in *Washington Law Review*, 82 (2007), 120 fn. 221; A.J. MAIDA and N.P. CAFARDI, *Church Property, Church Finances, and Church-Related Corporations: A Canon Law Handbook*, St. Louis, MO, Catholic Health Association of the United States, 1984, 203; SKEEL, “‘Sovereignty’ Issues and the Church Bankruptcy Cases,” 353-355. However, it is important to point out that piercing the corporate veil is not an easy task. Peter Oh writes: “[From] its inception, veil piercing has been an abysmal failure. There is no uniform test for veil-piercing, which typically requires demonstrating that a corporation was an “alter ego” or “instrumentality,” controlled or dominated by a shareholder to perpetuate a fraud, wrong, or injustice that proximately caused loss or injury to a plaintiff. To apply this complex test, courts have compiled an

Nevertheless, Catholic institutions should understand that they are not exempt from having to follow established civil norms.¹¹⁹ Following civil laws governing corporate behaviors (e.g., making a financial decision) should be also be a priority in addition to following canon law. Both civil law and canon law must be followed. This means that the administrators of these institutions must make a concerted effort to reconcile, as much as possible, the norms of both civil law and canon law in all legal documents (articles of incorporation, bylaws, etc.).¹²⁰

4.5 — The Bankruptcy Petition and Schedules

After the permission of the competent ecclesiastical authority has been obtained, the administrator may proceed with filing the petition for reorganization bankruptcy on behalf of the civilly incorporated public juridic person.¹²¹ After making sure that all information is accurate and that all required signatures are accounted for,¹²² the administrator should file the bankruptcy petition with the clerk of the bankruptcy court in the appropriate jurisdiction.¹²³ Additionally, a filing fee must be paid to the clerk at the

expansive list of *ex post facto*-specific factors, none of which is dispositive, weighted, or necessarily related to the underlying harm.” P.B. OH, “Veil-Piercing Unbound,” in *Brigham Young University Law Review*, 93 (2013), 90.

¹¹⁹ RYAN, “The Delicate Balance Between Religious Freedom and Legal Accountability in an Increasingly Litigious Society,” 259.

¹²⁰ Cf. KEALY, “Methods of Diocesan Incorporation,” 167.

¹²¹ It is worth noting that the actual filing of the bankruptcy petition with the bankruptcy court’s clerk is what initiates the bankruptcy process. Thus, the filing of the bankruptcy petition itself constitutes the order of relief. Cf. TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice* 102; 11 U.S.C. §301.

¹²² The bankruptcy petition, also referred to as *Form 1* of the *Official Bankruptcy Forms*, is a standard petition and is available on most bankruptcy courts’ websites. For the United States Bankruptcy Court, District of Oregon, the *Form 1* is available at: <http://www.orb.uscourts.gov/forms> (last accessed 15 December 2015).

¹²³ TABB and BRUBAKER, *Bankruptcy Law: Principles, Policies, and Practice*, 92; 28 U.S.C. §1408.

time of filing.¹²⁴ Once filed, the bankruptcy case is assigned a number; the bankruptcy court uses this case number for identification and tracking purposes.¹²⁵

With the bankruptcy petition filed, the administrator of the civilly incorporated public juridic person will need to submit schedules to the bankruptcy court. Schedules are a series of documents containing information regarding the debtor's assets and debts, and are designated as *Schedule A*, *Schedule B*, *Schedule C*, and so forth.¹²⁶ For example:

Schedule A lists all real property to be included in the bankruptcy estate. When the bankrupt corporation is a religious institute, for example, real properties such as convents, houses, or any other buildings or lands owned by the religious institute could be included in *Schedule A*.

Schedule B lists all personal property belonging to the debtor. For a religious institute, items such as automobiles, books, and artifacts in the community's library and archive, furniture, light fixtures, lawnmowers, microwaves, refrigerators, freezers, etc., could all be included in *Schedule B*.¹²⁷

Schedule C lists all assets for which the debtor wants exemption from the bankruptcy estate.¹²⁸ Examples of assets that may be included in *Schedule C* are charitable trusts, major gifts with specific donors' intent, retirement accounts, formation accounts, etc.

Schedule D identifies all creditors with secured claims. The bankruptcy court gives secured claims in this schedule higher priority (based on the APR) than those listed in *Schedules E* and *F*.

¹²⁴ D.A. SKEEL, *Debt's Dominion: A History of Bankruptcy Law in America*, Princeton, NJ, Princeton University Press, 2001, 229. As of January 2016, the fee for a reorganization bankruptcy petition under Chapter 11 is \$1,717.00; this fee covers both the bankruptcy petition and a one-time administrative fee. Cf. Rule 1002 of the *FRBP*; 28 U.S.C. §1930 (a); <http://www.insb.uscourts.gov/webforms/newlaw/FeeSchedule.pdf> (last accessed 15 January 2016).

¹²⁵ PACER uses case numbers to identify and to track bankruptcy cases.

¹²⁶ S.M. HENRY, *The New Bankruptcy Code: Cases, Developments, and Practice Insights Since BAPCPA*, Chicago, IL, American Bar Association, 2007, 461. Cf. S. WICKOUSKI, *Bankruptcy Crimes*, 3rd ed., Washington, DC, Beard Books, 2007, 35; *Black's Law Dictionary*, 1546; 11 U.S.C. §521(a)(1)(B).

¹²⁷ Depending on the situation, it is worth noting that individual members of a religious institute may be required to compile an accurate list of personal items in their possession to be included in a *Schedule B*. Thus, a religious sister who is a member of a religious institute in reorganization bankruptcy may be required to submit a list of all the items in her possession that she had acquired since entering the religious institute. Sister's list may include her television, her radio, her computer, her printer, her cell phone, her e-reader, her textbooks, etc.

¹²⁸ It should be clear that any property exemption would need the approval of the bankruptcy court. Cf. R.K. WEISBORD, "Charitable Insolvency and Corporate Governance in Bankruptcy Reorganization," in *Berkeley Business Law Journal*, 10 (2014), 305-362; *Hobbes et al., Trustees v. Bd. of Ed.*, 253 N.W. 627 (Neb. 1934); *Freme v. Maher*, 480 A.2d 783 (Maine 1983); *Parkview v. St. Vincent Medical Center*, 211 B.R. 619 (Bankr. N.D. Ohio, 1997); *In re Winsted Memorial Hospital*, 249 B.R. 588 (Bankr. D. Conn. 2000).

Schedule E identifies creditors with non-secured claims. Examples of non-secured claims to be included in *Schedule E* are unpaid wages, salaries, commissions, contributions allotted to employee benefit plans, certain taxes owed to government, etc.

Schedule F also identifies non-secured creditors but only those with claims based on service fees, unpaid tort settlements, credit card balances, etc. While both *Schedule E* and *Schedule F* are reserved for non-secured creditors, the bankruptcy court considers creditors listed in *Schedule E* to have more priority than creditors listed in *Schedule F*.¹²⁹

It is ultimately the responsibility of the administrator of the civilly incorporated public juridic person to collect all the relevant information properly and accurately, and to submit completed schedules to the bankruptcy court in a timely manner.¹³⁰ Moreover, some schedules may require supplementary documentation such as financial reports, property titles, or official physical descriptions of the properties (e.g., official blueprints, land surveys, etc.). It is the responsibility of the administrator to make sure that all additional documents are submitted promptly to the bankruptcy court along with the schedules.¹³¹ Once filed with the bankruptcy court, schedules and accompanying documents become public documents which are available to creditors, creditors' committees, and all other interested parties.

4.6 — A Public Juridic Person Reorganizing

Once the bankruptcy petition has been filed and schedules have been submitted, the bankruptcy process is well underway with some of the major events in a bankruptcy

¹²⁹ Cf. HENRY, *The New Bankruptcy Code: Cases, Developments, and Practice Insights Since BAPCPA*, 462-463.

¹³⁰ J.C. LIPSON, "The Shadow Bankruptcy System," in *Boston University Law Review*, 89 (2009), 1621. It is important to note that the bankruptcy court considers any purposeful misrepresentation of information or any concealment of facts relating to schedules as a criminal act, subject to criminal prosecution. WICKOUSKI, *Bankruptcy Crimes*, 35.

¹³¹ Other supplementary documentation may include current financial statements and balance sheets, recent cash-flow statements, the most current statement of operations and the previous year's federal income tax return (when applicable), corporate resolutions, corporation ownership statement (if the corporation is owned by a parent corporation), etc.

proceeding shifting into high gear. These events—such as the creation of the bankruptcy estate, the automatic stay, and the 341 meeting—have already been addressed in the previous chapter and do not need to be repeated here. Three events, however, are particularly relevant to a civilly incorporated public juridic person in reorganization bankruptcy and deserve special attention. These include the civilly incorporated public juridic person becoming the DIP in a reorganization bankruptcy proceeding, its ability to continue operating as a business while reorganizing its debts, and its initial exclusive rights to formulate and to propose reorganization plans.

4.6.1 — Public Juridic Person and Debtor-in-Possession

The option of having a DIP makes reorganization bankruptcy under Chapter 11 is particularly appealing to a civilly incorporated public juridic person. As discussed in chapter 3, when any business corporation files for bankruptcy under Chapter 11, the Bankruptcy Code permits it to become a DIP.¹³² In the same manner, when a civilly incorporated public juridic person files for reorganization bankruptcy, it becomes the DIP. This means that the public juridic person retains ownership and control of its assets. In canon law, this means that the relationship between a public juridic person and its ecclesiastical goods does not change: the ecclesiastical goods remain in the possession of the public juridic person. Thus, there is no alienation of ecclesiastical goods because the ownership and control of ecclesiastical goods are not transferred to a third party.¹³³

¹³² E. WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, New York, NY, Aspen Publishers, 2008, 54. Cf. *11 U.S.C.* §1107. As mentioned in chapter 3, for the sake of simplicity, when this dissertation refers to the DIP, it is referring specifically to the physical person who has been legally designated to be the administrator or the manger to act on behalf of the DIP.

¹³³ Cf. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 146. It is important to remember that, even though no alienation of ecclesiastical goods take

Furthermore, having a DIP permits the administrator of a civilly incorporated public juridic person to continue as the administrator of the bankruptcy corporation after it enters reorganization bankruptcy. No change of administration or management is necessary. This means that, for example, the pastor of a parish corporation filing for reorganization bankruptcy remains the administrator of the DIP (the bankrupt parish); likewise, the provincial superior of the religious institute remains the administrator of the DIP (the bankrupt religious institute), etc.¹³⁴

On rare occasions, however, a bankruptcy court may replace the DIP with a case trustee.¹³⁵ The implication here is that the option of having a DIP instead of having a case trustee cannot always be guaranteed.¹³⁶ For a public juridic person, having the bankruptcy court replace the DIP with a case trustee to exercise ownership and control over the bankruptcy estate can be problematic since that may constitute an alienation of ecclesiastical goods under canon law. Such intervention, however, is rare. As discussed in chapter 3, the bankruptcy court would typically not take such a drastic measure unless,

place after bankruptcy is declared, this does not necessarily mean that there will not be alienation of some ecclesiastical goods later in the bankruptcy process. For example, a reorganization plan may require that the public juridic person sell off some assets in order to repay some debts. Cf. T. CORRIGAN, "Gallup Diocese Seeking to Sell Land to Pay Victims," in *The Wall Street Journal*, 26 May 2015, available at: <http://blogs.wsj.com/bankruptcy/2015/05/26/gallup-diocese-seeking-to-sell-land-to-pay-victims/> (last accessed 2 March 2016).

¹³⁴ In some cases and depending on the language of the statutes or particular law of the juridic person, the treasurer or the bursar of the public juridic person could be designated as the administrator or the manager of the DIP. For more information regarding the roles and functions of treasurers in religious institutes, see R. GEISINGER, "Some Ongoing Considerations in Canon Law for Treasurers General of Religious Institutes," in *Periodica*, 95 (2006), 227-258.

¹³⁵ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 56. It is worth noting that, when a DIP is replaced with a trustee in a Chapter 11 bankruptcy proceeding involving a Church/religious entity, this may be a violation of the Establishment Clause of the U.S. Constitutions because such an action may be viewed as an entanglement of a state actor (i.e., the trustee) in a church affair. Cf. LIPSON, "When Church Fails: The Diocesan Debtor Dilemmas,"

¹³⁶ Cf. R.J. BERDAN and B.G. ARNOLD, "Displacing the Debtor in Possession: The Requisites for and the Advantages of the Appointment of a Trustee in Chapter 11 Proceedings," in *Marquette Law Review*, 67 (1984), 457-490.

after giving notice and holding a hearing, there is convincing evidence of wrong doing on the part of the debtor (e.g., fraud, the mishandling of the bankruptcy estate, etc.) which warrants replacing a DIP with a case trustee.¹³⁷

4.6.2 — Continuation of Ministries

One of the advantages of a Chapter 11 bankruptcy is that the bankrupt corporation remains in operation while reorganizing its debts.¹³⁸ For a civilly incorporated public juridic person such as a parish, a diocese, or a religious institute, the ability to maintain its ministry is preferable.¹³⁹ As discussed previously, a public juridic person is perpetual by its nature.¹⁴⁰ Thus, once a Catholic diocese, parish, hospital, or a school has been erected as a public juridic person in canon law, it has obligations to keep itself, including its assets intact, and to continue its work in the name of the Church.¹⁴¹ Reorganization bankruptcy under Chapter 11 permits a civilly incorporated public juridic person to continue its works while it reorganizes its debts. In fact, the ability to keep the business going while reorganizing is one of the hallmarks of a Chapter 11 bankruptcy proceeding.

The continuation of operations while in Chapter 11 reorganization bankruptcy, however, is not without some constraints. A DIP is subject to the supervisory authority of

¹³⁷ Cf. *11 U.S.C.* §1105.

¹³⁸ Cf. *ibid.*, §1108.

¹³⁹ Cf. WELLS, “Churches, Charities, and Corrective Justice: Making Churches Pay for the Sins of Their Clergy,” 1213.

¹⁴⁰ Cf. *can.* 120.

¹⁴¹ M.M. MOREY and J.J. PIDERIT, *Catholic Higher Education: A Culture in Crisis*, New York, NY, Oxford University Press, Inc., 2006, 201. Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 107-111.

both the bankruptcy court and the U.S. trustee.¹⁴² Moreover, creditors, through the creditors' committee, will also want to play a role in supervising how a debtor spends money; after all, creditors have the right to protect their legal and financial interests by making sure that the bankruptcy estate is not being misappropriated by the DIP. Consequently, a creditors' committee will also have some oversight authority over the DIP as well. David Skeel writes:

Under the bankruptcy laws, any proposal to use, sell, or lease property that is outside the "ordinary course of business" is subject to a hearing and "approval by the bankruptcy court [and the creditors' committee]."¹⁴³ This suggests that a church could not start a substantial new soup kitchen ministry or close and sell a school during the bankruptcy case unless the bankruptcy judge gave it the go ahead.¹⁴⁴

Consequently, any business transaction done by a DIP while in reorganization bankruptcy is subject to supervision and to some restrictions.¹⁴⁵ Thus, in order to remain in operation, the debtor is usually required to submit a business plan and a proposed budget to both the bankruptcy court and the creditors' committee for approval.¹⁴⁶ In the case of a diocese, for example, the diocesan bishop (or his designee) would need to submit a business plan detailing how the diocese intends to operate its ministries and to carry out its various administrative functions while reorganizing its debts. Additionally, the diocesan bishop would need to propose a budget detailing projected expenses. After the approval of the business plan and the operating budget by both the bankruptcy court and the creditors' committee, the diocese is able to continue to operate while it is in

¹⁴² As discussed before, having the DIP under the supervision of the U.S. trustee does not necessarily mean that the public juridic person has alienated its ecclesiastical goods. Supervision does not necessarily imply control.

¹⁴³ Citing *11 U.S.C. §363(b)(1)*.

¹⁴⁴ SKEEL, "'Sovereignty' Issues and the Church Bankruptcy Cases," 354.

¹⁴⁵ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 55.

¹⁴⁶ *Ibid.*, 69.

bankruptcy proceeding. Moreover, in order to have sufficient funds to keep the bankrupt diocese in operation, the bankruptcy court may allow the diocese to access the bankruptcy estate and/or take out loans through the various DIP financing schemes.

4.6.3 — Reorganization Plan

The centerpiece of a Chapter 11 reorganization bankruptcy is a confirmed reorganization plan. The length of time a corporation remains in bankruptcy court is dependent on how long it takes for the interested parties to come to a consensus regarding a reorganization plan and for the bankruptcy court to confirm it. The Bankruptcy Code does not provide a template for a reorganization plan. As discussed in chapter three, the determination of a viable reorganization plan is ultimately in the hand of the debtor and the debtor's ability to negotiate with its creditors. Once confirmed by the bankruptcy court, however, a reorganization plan signals the termination of the bankruptcy process and the bankrupt corporation emerges from bankruptcy.

As explained in chapter 3, in order to confirm a reorganization plan, the bankruptcy court must be satisfied that certain objectives have been met (or will be met) in the proposed reorganization plan. The court looks to three specific areas. First, the bankruptcy court must be satisfied that the proposed reorganization plan is both reasonable and feasible.¹⁴⁷ Second, the bankruptcy court must be satisfied that the plan passes the *best interest test*.¹⁴⁸ Finally, the bankruptcy court must be satisfied that fraud or

¹⁴⁷ Cf. H.R. MILLER and S.Y. WAISMAN, “Does Chapter 11 Reorganization Remain a Viable Option for Distressed Businesses for the Twenty-First Century?” in *American Bankruptcy Law Journal*, 78 (2004), 189.

¹⁴⁸ Again, the interests of creditors—especially those that have the most to lose—must be protected, and the *best interest test* provides this assurance. Cf. N. MARTIN and O. TAMA, *Inside Bankruptcy Law: What Matters and Why*, New York, NY, Aspen Publishers, 2008, 183.

any illegal or unjust dealing had not been involved in the process leading up to the confirmation of the reorganization plan.¹⁴⁹ If there is evidence that fraud is involved, the bankruptcy court has the right to revoke the reorganization plan completely—even if the creditors have unanimously approved the same plan beforehand.¹⁵⁰ Once the bankruptcy court is confident that a reorganization plan is reasonable, feasible, fair, and that no fraud was involved, however, the court will confirm it.

A confirmed reorganization plan binds all parties involved. It replaces all previous contracts and agreements between the debtor and the creditors. In other words, a confirmed reorganization plan provides a blueprint for how the reorganization of debts will take place—i.e., which debts will be repaid fully, which debts will be repaid at a reduced amount, which debts will be discharged, and what any repayment schedule will be. Once the bankruptcy court has confirmed the reorganization plan, it is critical that the administrator of a civilly incorporated public juridic person take steps to ensure that the terms of the confirmed reorganization plan are carried out promptly and effectively.

An administrator of a public juridic person also has the obligation to make sure that the terms of a confirmed reorganization plan are implemented in ways that are consistent with canon law. For example, a reorganization plan may require the alienation of some stable patrimony or some ecclesiastical goods in an amount that exceeds the limit set by the conference of bishops; or when, in order to execute one or more terms

¹⁴⁹ Cf. *11 U.S.C.* §1104(a)(1) and (2).

¹⁵⁰ WARREN, *Chapter 11: Reorganizing American Businesses (Essentials)*, 161. Cf. *11 U.S.C.* §1144. There are times when a debtor is required to submit a disclosure statement to the bankruptcy court in addition to the confirmation plan. In such a case, a disclosure statement must provide “adequate information” concerning the affairs of the debtor to enable the holder of a claim or interest to make an informed judgment about the plan. However, it is more likely that the bankruptcy court will consider the reorganization plan itself sufficient and not require any additional disclosure statement. *Ibid.*, §1125.

stipulated in the reorganization plan the administrator of the public juridic person is required to place an act of extraordinary administration (or an act of ordinary administration which is more important in light of the economic condition of the diocese). In such a case, it is the responsibility of the administrator of the public juridic person to ensure that the proper canonical procedures are observed. As discussed in chapter 2, such canonical procedures may include, among others, obtaining the proper permission from the competent ecclesiastical authority before the administrator can validly place the act.

4.7 — Emerging from Chapter 11 Bankruptcy

Once a reorganization plan has been approved by the creditors' committee and confirmed by the bankruptcy court, and once the statutory waiting period is over (usually thirty days), the bankruptcy process officially ends. The civilly incorporated public juridic person is then said to have emerged from a Chapter 11 bankruptcy.¹⁵¹ One of the most notable consequences of emerging from a Chapter 11 bankruptcy is that, unless they were addressed in the reorganization plan, all pre-petition and permitted post-petition debts are officially discharged.¹⁵² Moreover, it is important to remember that the discharging of debts is intended to serve three specific goals, as explained by Giacomo Elgueta, who writes:

¹⁵¹ G. ZHANG, "Emerging from Chapter 11 Bankruptcy: Is It Good News or Bad News for Industry Competitors?" in *Financial Management*, 39 (2010), 1722.

¹⁵² Cf. *11 U.S.C.* §502(g), (h), and (i). To see an example of the language of used by a reorganization plan obligating a debtor, see §7.6 of the "Plan of Reorganization Confirmed" from the bankruptcy case involving the Archdiocese of Portland in Oregon, available at: <https://www.archdpx.org/bankruptcy/5005%20third%20amended%20joint%20plan.pdf> (last accessed 21 May 2015). Cf. *In re Roman Catholic Archbishop of Portland in Oregon*, *11 U.S.C.* §1142.

It is commonly accepted that bankruptcy discharge aims to achieve three different goals. One is to allow and encourage debtors, free from their debts, to once again become productive members of society. The underlying premise is that the cost of the discharge is less than the cost that society would bear if debtors, without the availability of discharge, were excluded from economic activity due to the perpetual obligation to repay their debts. This theoretical justification for discharge, explained in terms of “freedom of opportunity,” has primarily developed in the United States. [...] The second goal of discharge is to provide debtors with insolvency insurance. Third, the [discharging of debts is the] device [that] seeks to promote debtor cooperation with the bankruptcy trustee and creditors regarding debt collection and asset liquidation during bankruptcy proceedings.¹⁵³

Even after it has emerged from bankruptcy, however, the work of the public juridic person regarding bankruptcy should not be considered done. While emerging from reorganization bankruptcy clearly provides an opportunity for a corporation to restart, the post-bankruptcy period is also an opportunity for a public juridic person to reassess the strengths and the weaknesses of its corporate model.¹⁵⁴ Depending on the situation, perhaps this is an appropriate time to consider adopting a new corporate model altogether. For instance, the administrator of the public juridic person and his or her advisors may explore what corporate structure would provide the best protection under civil law with regard to its assets, or which civil corporate model is most consistent with canon law.¹⁵⁵ Additionally, the post-bankruptcy period may also be the occasion to incorporate the norms of canon law into the civilly incorporated public juridic person’s articles of incorporation and bylaws in order to ensure that its corporation protocols are consistent with both civil law and canon law.

¹⁵³ G.R. ELGUETA, “The Paradoxical Bankruptcy Discharge: Rereading the Common Law–Civil Law Relationship,” in *Fordham Journal of Corporate & Financial Law*, 19 (2014), 319.

¹⁵⁴ Cf. MADRID, “The Liability of Catholic Parishes in America: What Went Wrong and How to Fix It,” 707-735.

¹⁵⁵ J.S. MANNY, “Governance Issues for Non-Profit Religious Organizations,” in *Catholic Lawyer*, 40 (2000), 4. Cf. D. BROUWER, “Financial Future—Bishop: Diocese Will Emerge from Bankruptcy Poor but Stronger,” in *Independent Record*, 3 March 2014, available at: http://helenair.com/news/local/bishop-diocese-will-emerge-from-bankruptcy-poorer-but-stronger/article_18d7f398-a2a1-11e3-a58e-0019bb2963f4.html (last accessed 27 February 2016).

The experience of Archdiocese of Portland in Oregon provides an excellent example of a post-bankruptcy re-evaluation of corporation structure. As it was emerging from Chapter 11 bankruptcy in 2008, Archbishop John Vlazny, the then-Archbishop of Portland in Oregon, sent a letter to all the parishes of the archdiocese regarding the need to reform the civil corporate structure of both the archdiocese and the parishes. The letter notes the need to restructure the corporate structure of the archdiocese as well as that of the parishes in order to provide better legal protection for each entity. The Archbishop commissioned an advisory group to assist him in this matter. Archbishop Vlazny writes:

The goal of this Advisory Group was to recommend a civil legal structure for each parish that, to the extent possible, would: 1) be consistent with canon law and best mirror the canonical structures under which the parishes presently operate; and 2) clarify under civil law the separation of assets of each parish one from another and from those of the Archdiocese. After considering various potential organizational structures, the Advisory Group recommended to me the non-profit “member corporation” structure [...].¹⁵⁶

Additionally, Archbishop Vlazny’s letter described, in detail, what a non-profit member corporation means, how it is to be governed, how properties are to be cared for, and what practical implications the new corporate structure of the parish would have on the roles and functions of both pastors of parishes and parishioners.¹⁵⁷

To be sure, the Archbishop’s letter effectively signaled that the Archdiocese of Portland in Oregon was emerging from bankruptcy. More importantly, however, the letter served as a way to articulate and to clarify questions of property ownership under both canon law and civil law. It was important for the Archbishop to address these questions since they were points of contention between the archdiocese and the parishioners

¹⁵⁶ Archbishop J. VLAZNY, “Letter to Pastors and Parishioners,” 14 March 2008, available at: <https://www.archdpx.org/bankruptcy/ABletter.Restr.031408.pdf> (last accessed 21 May 2015).

¹⁵⁷ Cf. N. HAUGHT, “Archdiocese of Portland Hands Over Deed to 124 Parishes,” in *National Catholic Reporter*, 15 April 2008, available at: <http://ncronline.org/news/archdiocese-portland-hands-over-deeds-124-parishes> (last accessed 2 March 2016).

throughout the entire bankruptcy process.¹⁵⁸ Consequently, in presenting this letter to the people of his Archdiocese, the Archbishop not only articulated a way for people in the pews to move forward, but he also presented a concrete plan to reform the civil corporate structure of both the archdiocese and the parishes in a way that is consistent with both canon law and civil law.

Conclusion

A civilly incorporated public juridic person has two legal identities: it is a public juridic person under canon law, and it is a civil corporation under civil law. Under canon law, not only does it have the right to acquire, retain, administer, and alienate ecclesiastical goods, but as a public juridic person, it also has an obligation to use its ecclesiastical goods for the purposes articulated in the Code.¹⁵⁹ Under civil law, a civil corporation has the right to hold title to properties and to care for those properties according to its articles of incorporation and bylaws. Additionally, when a civil corporation is in financial distress, Chapter 11 of *Title 11* of the Bankruptcy Code permits it to seek bankruptcy protection.¹⁶⁰ Considering the financial distress that a number of civilly incorporated public juridic persons have experienced in recent years, the right to file for reorganization bankruptcy is critical to their survival in the United States.

As this chapter explains, the prospective of filing for reorganization bankruptcy under Chapter 11 is both critical and appealing to a civilly incorporated public juridic

¹⁵⁸ RADWAN, “Keeping the Faith: The Rights of Parishioners in Church Reorganizations,” 81.

¹⁵⁹ Cf. can. 1254.

¹⁶⁰ Pamela Foohey writes: “The driving force behind the [Chapter 11] filings of [religious organizations] was to protect the organization’s real property [...], thereby saving money that congregants had invested in buildings and the congregation itself.” FOOHEY, “When Churches Reorganize,” 283.

person for a number of reasons. First, an institution in reorganization bankruptcy is provided an opportunity to continue its works. As discussed above, a public juridic person receives its mission from the Church and is perpetual once it has been erected.¹⁶¹ Once a Catholic institution such as a diocese, parish, hospital, or a school has been erected as a public juridic person in canon law, it has an obligation to keep itself, including its assets, intact and to continue its work in the name of the Church.¹⁶² Consequently, among the bankruptcy options available in the Bankruptcy Code, a Chapter 11 reorganization bankruptcy is particularly appealing and fitting because it permits a civilly incorporated public juridic person to continue its work while reorganizing its debts.

Second, reorganization bankruptcy under Chapter 11 allows a civilly incorporated public juridic person to negotiate which of its assets in the bankruptcy estate are to be retained and which are to be liquidated. This is possible because the Bankruptcy Code gives the juridic person (as the DIP) the exclusive right in the first 120 days of filing for bankruptcy to propose a reorganization plan. In selecting which assets to retain (e.g., stable patrimony), the juridic person is free to take into consideration canon law, proper law, or even the particular interests of the juridic person, especially if those interests involve retaining assets that have sentimental value to a juridic person such as the parish church, the mother house of a religious institutes, etc. Pamela Foohey writes:

[Reorganization bankruptcy under] Chapter 11 provides [religious organizations] with a venue to work with their secured creditors to save property that is both financially and emotionally valuable to them and perhaps difficult to sell. True, like an entrepreneur, the pastor (or congregant) could shut down the ministry and try again,

¹⁶¹ Cf. can. 120.

¹⁶² MOREY and PIDERIT, *Catholic Higher Education: A Culture in Crisis*, 201. Cf. RADEMACHER, WEBER, and MCNEILL, *Understanding Today's Catholic Parish*, 107-111.

starting from scratch and gathering in rented space in a community center or a building owned by a different church. Such a transition may be beneficial. It may allow for shifts in leadership, relieve internal strife, or remedy over-expansion or lax management. But the years of work it took to build an organization capable of purchasing and servicing a building, the specificity of that property to religious and community organizations, and the congregation's desire to remain in a particular building, make their Chapter 11 cases more of an effort to save going-concern value than typical small business debtors' case.¹⁶³

Finally, reorganization bankruptcy under Chapter 11 provides a civilly incorporated public juridic person the opportunity to start afresh. As explained in chapter 3, a confirmed reorganization plan replaces all previous contracts and agreements between the debtor and its creditors. Once it has emerged from bankruptcy, the debtor is legally responsible only for those debts specified in the confirmed reorganization plan. All other debts are discharged, and creditors no longer have any legal claim over those debts. This means that a public juridic person emerging from bankruptcy can restart again without interference or harassment from former creditors.

There can be any number of reasons why Catholic institutions in the United States that have been civilly incorporated should seek bankruptcy protection. Considering the financial difficulties that Catholic institutions have experienced in recent years as the result of civil litigation, in the United States the filing of reorganization bankruptcy under Chapter 11 is the best strategy to retain and to secure the patrimonial condition of these institutions. As demonstrated in this chapter, the mechanisms available in a reorganization bankruptcy under Chapter 11 permit a civilly incorporated public juridic person to achieve three goals that are consistent under both canon law and civil law. These goals are: 1) to remain intact in order to continue the work of the public juridic person; 2) to ensure that adequate precautions are taken when the patrimonial condition is

¹⁶³ FOOHEY, "Bankrupting the Faith," 773.

at risk; and 3) to compensate secured creditors equitably.¹⁶⁴ Thus, reorganization bankruptcy is a viable option, and it should be considered by a civilly incorporated public juridic person when appropriate.

¹⁶⁴ JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” 155. Cf. FOOHEY, “When Churches Reorganize,” 277-306.

GENERAL CONCLUSION

The filing of bankruptcy protection is associated with financial failure or with business ineptitude on the part of insolvent businesses. With the enactment of the current Bankruptcy Code in 1978, however, reorganization bankruptcy is no longer predicated on whether or not corporations are insolvent.¹ Rather, reorganization bankruptcy has evolved into more of a business strategy—a strategy that allows corporations to remain intact while renegotiating their debts with creditors.²

Entangled in the recent clergy sexual abuse scandal in the United States, a number of Catholic institutions (e.g., dioceses, parishes, religious institutes, etc.) became defendants in a series of tort litigations that resulted in them having to pay damages to victims of clergy sex abuse.³ Unavoidably, a number of these institutions had to liquidate a great deal of their ecclesiastical goods in order to cover legal fees and to settle claims with victims and their families.⁴ Most notable among the settlements include the Archdiocese of Boston agreeing to pay \$85 million in 2003 to over 500 claimants, the Diocese of Orange agreeing to pay \$100 million in 2005 to over 80 claimants, and the

¹ M.J. WHITE, “Abuse or Protection? Economics of Bankruptcy Reform under *BAPCPA*,” in *University of Illinois Law Review*, 2007 (2007), 285.

² K.J. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, Berkeley, CA, University of California Press, 1999, 161.

³ T.D. LYTTON, “Clergy Sexual Abuse, Tort Law Making Policy,” in *Connecticut Law Review*, 39 (2007), 813. Cf. S.J. ROSSETTI, “The Catholic Church and Child Sexual Abuse,” in *America*, 22 April 2002, available at: <http://americamagazine.org/issue/369/article/catholic-church-and-child-sexual-abuse> (last accessed 12 December 2015).

⁴ P. JENKINS, *Pedophiles and Priests: Anatomy of a Contemporary Crisis*, New York, NY, Oxford University Press, Inc., 1996, 126. Cf. P. DOYLE, “Resurrection: The Archdiocese of Boston Rebuilds,” in *Boston Magazine*, November 2012, available at: <http://www.bostonmagazine.com/2012/10/archdiocese-catholic-church-rebuild-after-scandal/4/> (last accessed 3 March 2016); K. LAILAW, “Antigonish Diocese to Sell Property to Settle \$18.5M Sex Case,” in *National Post*, 29 May 2010, available at: <http://news.nationalpost.com/holy-post/antigonish-diocese-to-sell-property-to-settle-18-5m-sex-case> (last accessed 3 March 2016).

Archdiocese of Los Angeles agreeing to pay \$660 million to over 500 claimants in 2007.⁵ According to some estimates, Catholic institutions in the United States have spent close to three billion dollars to deal with the clergy sexual abuse scandal—mainly in the forms of legal fees and settlements.⁶

While Catholic institutions are not immune from civil litigation and the financial fallout that ensues, the use of ecclesiastical goods to settle tortious claims is incompatible with canon law.⁷ The Code unambiguously states that the purposes of ecclesiastical goods are divine worship, the care and the decent support of the clergy and other ministers, and works of the sacred apostolate and charity;⁸ to use ecclesiastical goods for other purposes goes beyond the scope and the intentions articulated in the Code.⁹ But how should Catholic institutions in the United States follow the mandates of canon law (particularly

⁵ In addition to the \$660 million that it had used to settle with the 500-plus claimants in 2007, the Archdiocese of Los Angeles also spent an additional \$60 million in 2006 to settle with 45 additional claimants. For more information on these and similar settlements, see <http://www.bishop-accountability.org/settlements/> (last accessed 15 January 2016).

⁶ N.M. GAUNCE and R. LUTHER, “Deliver Us from Evil: Why Bankruptcy Judges May Properly Rely on the Free Exercise Clause & RFRA to Protect Church Property from the Grasps of Tort-Creditors,” in *Valparaiso University Law Review*, 43 (2009), 641. Cf. J.R. FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, New York, NY, Palgrave Macmillan, 2014, 137.

⁷ Cf. D.J. MARCINAK, “Separation of Church and Estate: On Excluding Parish Assets from the Bankruptcy Estate of a Diocese Organized as a Corporate Sole,” in *Catholic University Law Review*, 55 (2006), 585. Thomas Reese adds: “The church’s money for the most part comes from donations from ordinary people. They gave this money to support the liturgical, evangelical, and charitable ministries of the church. A loss of money means a loss of services. Investment portfolios that took decades or generations to build up are suddenly gone. The revenue stream from these investments dries up and, if not replaced, results in programs being shut down.” T. REESE, “Extending the Statute of Limitations,” in *National Catholic Reporter*, 16 June 2016, available at <http://ncronline.org/blogs/faith-and-justice/extending-statute-limitations> (last accessed 17 June 2016).

⁸ Can. 1254.

⁹ Cf. G.J. ROCHE, “The Poor and Temporal Goods in Book V of the Code,” in *The Jurist*, 55 (1995), 313; FORMICOLA, *Clerical Sexual Abuse: How the Crisis Changed U.S. Catholic Church–State Relations*, 140; S. LOURDUSAMY, “Canonical Perspective on Social Justice and Charity,” in *Studia Canonica*, 49 (2015), 491.

regarding the care of ecclesiastical goods) while at the same time being held accountable to their creditors (e.g., victims of abuse and their families, legal fees, etc.)?

When faced with insurmountable pressures from claimants and creditors, when their debts outweigh their assets, or when their stable patrimonial condition can worsen, it is appropriate for public juridic persons such as dioceses, parishes, or religious institutes that have been civilly incorporated to file for reorganization bankruptcy under Chapter 11. Doing so would permit civilly incorporated public juridic persons to achieve three principal objectives: 1) to remain intact in order to continue their work in the name of the Church; 2) to ensure that adequate precautions can be taken to protect their patrimonial condition; and 3) to compensate creditors equitably.

The justifications for a civilly incorporated public juridic person to file for reorganization bankruptcy under Chapter 11 can be summarized in the following three points. First, a public juridic person that has been civilly incorporated has the same legal rights and privileges as any other corporation in the United States. This includes the right to seek bankruptcy protection under Chapter 11. There is nothing in the civil law of the United States that precludes a civilly incorporated diocese, parish, religious institute, etc., from seeking bankruptcy protection.¹⁰ Thus, regardless of whether it is solvent or insolvent, a civilly incorporated public juridic person is justified in filing for reorganization bankruptcy simply because the Bankruptcy Code gives such right to all corporations.

¹⁰ According to her analysis, Pamela Foohey notes that approximately ninety religious-based non-profit corporations file between 2006 and 2011 for reorganization bankruptcy under Chapter 11 in the United States annually. Cf. P. FOOHEY, "Bankrupting the Faith," in *Missouri Law Review*, 78 (2013), 732-733.

Second, a civilly incorporated public juridic person is justified in filing for reorganization bankruptcy because it is an effective business strategy. Canon law stipulates that the administrator of a public juridic person is “bound to fulfill [his or her] function [to care for the public juridic person’s ecclesiastical goods] with the diligence of a good householder.”¹¹ In dire circumstances, having a sound business strategy is synonymous with being a good householder. Consequently, when faced with insurmountable pressures from claimants and creditors, when its debts outweigh its assets, or when its stable patrimonial condition can worsen, reorganization bankruptcy enables a public juridic person to retain ownership and control of its ecclesiastical goods and to preserve its patrimonial condition.¹² With a DIP in a Chapter 11 bankruptcy, for example, a civilly incorporated public juridic person does not need to transfer or to alienate ownership and control of its ecclesiastical goods while reorganizing its debts. Essentially, a Catholic parish in reorganization bankruptcy is permitted to retain both its parish church and its pastor (as administrator or manager) while reorganizing its debts. Additionally, with the automatic stay being triggered the moment the bankruptcy petition is filed with the bankruptcy court, any interruption to the actual ordinary business operation of the public juridic person is minimal. Thus, any creditor wishing to harass or to enforce a claim against a debtor outside of the bankruptcy proceeding would be prevented from doing so by the bankruptcy court.¹³

¹¹ Can. 1284 §1.

¹² Cf. DELANEY, *Strategic Bankruptcy: How Corporations and Creditors Use Chapter 11 to Their Advantage*, 161.

¹³ Additionally, having a DIP also means that the public juridic person can qualify for DIP financing. This means that the bankrupt public juridic person will have access to funding that it would otherwise not have in order to keep its business in operation while in reorganization bankruptcy.

Third, reorganization bankruptcy under Chapter 11 gives the debtor (i.e., the civilly incorporated public juridic person) the exclusive right to propose a reorganization plan during the first 120 days after the reorganization bankruptcy petition has been filed with the bankruptcy court. This exclusive right places the public juridic person in a prime position to achieve two critical objectives: 1) to make sure that the interests of the public juridic person are attended to, and 2) to make sure that the norms of canon law are followed. For example, the public juridic person is free to formulate a reorganization plan that would exclude the liquidation of certain properties that have sentimental value or are historically significant to the juridic entity.¹⁴ Additionally, the right to formulate a reorganization plan will also allow the public juridic person to ensure that the mandates of canon law will be observed.¹⁵

Nevertheless, for a civilly incorporated public juridic person, reorganization bankruptcy can be full of uncertainties and ambiguities. Many issues can arise in a bankruptcy proceeding that can complicate the process—particularly in places where canon law and civil law interface. How to navigate between these two legal systems can be challenging. Civil law understands canon law to be an internal policy or bylaws of a private—albeit religious—corporation. Once it has been civilly incorporated, civil law

¹⁴ A religious institute, for example, could make sure that it retains the motherhouse of the institute in the reorganization plan. Such a property, regardless of its monetary value, may have sentimental value only to the religious institute, and that is justification enough to retain it rather than allowing it to be liquidated as part of the reorganization plan. Of course, the creditors' committee and the bankruptcy court must agree with such a plan first before it can be implemented.

¹⁵ For example, the public juridic person can propose a reorganization plan that stipulates that the repayment of debts will only come from future earnings. Such a stipulation (if accepted by creditors' committee and confirmed by the bankruptcy court) would guarantee that current assets—especially assets that have been designated as stable patrimony—will not be liquidated in the reorganization process to be used to repay outstanding debts.

holds a public juridic person accountable to the standards established by civil law.¹⁶ On the other hand, canon law expects a public juridic person to behave in ways that are consistent with canon law. Even after civil incorporation, canon law holds that the canonical status of a public juridic person does not change; thus, assets belonging to a public juridic person are still considered ecclesiastical goods and are subject to the *CIC/83*.¹⁷ Consequently, uncertainties that arise may include: Should canon law be considered ancillary to civil law since reorganization bankruptcy is a civil legal proceeding? Should a civilly incorporated diocese, for example, behave like a civil corporation first, or should it behave like a public juridic person under canon law first? Is there a danger of violating civil corporate protocols if the norms of canon law are followed to the detriment of civil law—thus risking piercing the corporate veil? Regarding stable patrimony and ecclesiastical goods: Can there be any precaution taken to ensure that the stable patrimony of the public juridic person is excluded from the bankruptcy estate and from the reorganization plan? Additionally, what would happen if—not in the beginning but only towards the end of the bankruptcy process—it becomes obvious that the total value of the assets belonging to the public juridic person (i.e., its ecclesiastical goods) exceeds the spending limit established by the conference of bishops and/or proper law? Without definitively resolving these issues before filing for

¹⁶ Cf. C.P. WELLS, “Who Owns the Local Church? A Pressing Issue for Dioceses in Bankruptcy,” in *Seton Hall Legislative Journal*, 29 (2005), 385; J.E. JARBOE, “Bankruptcy—The Last Resort: Protecting the Diocesan Client from Potential Liability Judgments,” in *Catholic Lawyer*, 37 (1997), 161-164; K. CULLEN, “Canon Law Said to be of Little Legal Weight,” in *The Boston Globe*, 5 October 2002, available at: http://www.boston.com/globe/spotlight/abuse/stories2/051002_canon_law.htm (last accessed 8 March 2016).

¹⁷ Cf. M.E. CHOPKO, “Principal Civil Law Structures: A Review – Getting Civil Law Right: Canonical Criteria for Parish Civil Structures,” in *The Jurist*, 69 (2009), 250.

reorganization bankruptcy, these uncertainties make it difficult to see how such a reorganization bankruptcy process fits within the context of the Code.

Is reorganization bankruptcy under Chapter 11 compatible with canon law? Specifically, what type of transaction would the filing of reorganization bankruptcy be under the *CIC/83*? This dissertation proposes that the act of filing for reorganization bankruptcy qualifies as a transaction falling under canon 1295. To be precise: A reorganization bankruptcy under Chapter 11 of the Bankruptcy Code fits absolutely as a “transaction which can worsen the patrimonial condition of a juridic person.”¹⁸ Indeed, when a civilly incorporated public juridic person files for bankruptcy under Chapter 11, its stable patrimony is certainly at risk. Thus, the precautions stipulated in canon 1295 provide adequate mechanisms to help protect the patrimonial conditional of the public juridic person when it files for reorganization bankruptcy.¹⁹

Catholic institutions in the United States will continue to face civil litigations. There is nothing to indicate that this trend will cease. To use ecclesiastical goods to settle civil litigations is contrary, however, to the intention of canon law. Indubitably, while civilly incorporated public juridic persons should be accountable under civil law for damages due resulting from tortious acts, to use ecclesiastical goods and/or to put the patrimonial condition of the public juridic person at risk would be improper. Consequently, as a way to comply with the norms of both canon law and civil law, when faced with insurmountable pressures from claimants and creditors, and when their stable patrimonial condition is at risk, this dissertation proposes that civilly incorporated public

¹⁸ Can. 1295.

¹⁹ Cf. cann. 1291-1294.

juridic persons should consider filing for reorganization bankruptcy under Chapter 11 of the Bankruptcy Code.

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BIOGRAPHICAL NOTE

Born in Da Lat, Viet Nam in 1975, Bryan V. Pham came to the United States in 1982. He entered the Society of Jesus in 1993 and was ordained to the Presbyterate in Seattle, Washington in June of 2004. Bryan made his Tertianship in Weston, Massachusetts in 2011, and took his final vows in Rome in 2013.

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An active member of the Washington State Bar Association, Bryan had served as the Jesuit Provincial's Liaison to Social and International Ministries for the Oregon Province of the Society of Jesus, and was a member on the Board of Directors of Bellarmine Preparatory and the Board of Directors of the Ignatian Spiritual Center in Seattle. Bryan began his doctoral studies in canon law at Saint Paul University in Ottawa, Canada, in the Winter of 2014.