

Future Claims Representative
ORS 12.117(1)
Claim
Creditor
§ 101(10)
§ 101(5)

In re Roman Catholic Archbishop of Portland in Oregon, and
Successors, A Corporation Sole, dba the Archdiocese of Portland
in Oregon, Case No. 04-37154-elp11

01/10/05

ELP

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The bankruptcy court approved the appointment of a future claims representative ("FCR") to represent the interests of certain unknown individuals holding claims against the debtor arising from tortious misconduct by representatives of the debtor, specifically including priests. The purpose of the memorandum opinion is to explain the basis for including within the scope of representation those persons who know they were subjected to sexual contact as children, but who have not discovered the resulting injury or the causal connection between the injury and the child abuse, nor in the exercise of reasonable care should have discovered the injury or causal connection.

The court explains that the alleged victims of prepetition sexual abuse by representatives of the debtor are "creditors" holding "claims" against the debtor within the meaning of the Bankruptcy Code. The court then describes the scope of the FCR's representation, noting that the approach taken by the court is consistent with that taken in the bankruptcy case of the Catholic Diocese of Tucson and other mass tort bankruptcy cases, and with debtor's stated purpose in invoking chapter 11 relief.

P05-1(14)

CLERK, U.S. BANKRUPTCY COURT,
DISTRICT OF OREGON

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF OREGON

In Re:) Bankruptcy Case
) No. 04-37154-elpl1
ROMAN CATHOLIC ARCHBISHOP OF)
PORTLAND IN OREGON, AND) MEMORANDUM RE APPOINTMENT
SUCCESSORS, A CORPORATION) OF FUTURE CLAIMS REPRESENTATIVE
SOLE, dba the ARCHDIOCESE OF)
PORTLAND IN OREGON,)
) Debtor.)

At the November 19, 2004 hearing, I approved the appointment of a future claims representative ("FCR") to represent the interests of certain unknown individuals holding claims against debtor who will fail to formally assert those claims by the bar date. The pertinent claims result from "Tortious Misconduct^[1] by any priest,

¹ Debtor defines the phrase "Tortious Misconduct" to mean the following:

any claim, demand, suit, cause of action, proceeding, or any other rights or asserted right to payment against the Debtor, based upon or in any manner arising from or related to any tortious act or acts, including, but not limited to, personal injury, wrongful death, assault, battery, negligence,

(continued...)

1 representative, agent, volunteer, or employee of the Debtor which
2 occurred prior to the Petition Date." Debtor's Amended Motion for
3 an Order (1) Fixing a Bar Date for Filing Proofs of Claim, and (2)
4 Approving a Proof of Claim Form, Bar Date Notices, Actual Notice
5 Procedure, and Mailing and Media Notice Program, 9:12-14. There is
6 no dispute that the FCR should represent the interest of individuals
7 who are currently minors and whose parent or legal guardian does not
8 file a timely claim (hereinafter "minors") and those with repressed
9 memory who have no knowledge of the wrongful conduct resulting in
10 their claim against debtor.²

11 Debtor's position is that the scope of the FCR's authority
12 should be limited to minor and repressed memory claimants. The Tort
13 Claimants Committee ("the TCC") advocated for a broader scope of
14 representation. At the November 19 hearing, I sustained the TCC's
15 objection and ruled that, in addition to minors and those with
16 repressed memory, the FCR would represent the interests of those

18 ¹(...continued)
19 intentional infliction of emotional distress, defamation,
20 conversion, child abuse as defined in ORS 419B.005(1)(a))
21 [sic], or any sexual misconduct with a person which is alleged
22 to be inappropriate or nonconsensual, including, without
limitation, any of the offenses defined in ORS Chapter 163

23 Debtor's Amended Motion for an Order (1) Fixing a Bar Date for
24 Filing Proofs of Claim, and (2) Approving a Proof of Claim Form, Bar
Date Notices, Actual Notice Procedure, and Mailing and Media Notice
Program, 8:11-18.

25 ² Debtor has reserved the right to challenge the validity of
26 the repressed memory theory.

1 persons who know they were subjected to sexual contact as children
2 but who have "not discovered the [resulting] injury or the causal
3 connection between the injury and the child abuse, nor in the
4 exercise of reasonable care should have discovered the injury or the
5 causal connection between the injury and the child abuse[.]"³ This
6 language comes from an Oregon statute, ORS 12.117(1), which would be
7 pertinent to all the possible Tortious Misconduct for which debtor
8 may be liable, because of the geographic location of debtor's
9 operations. ORS 12.117(1) states as follows:

10 Notwithstanding ORS 12.110, 12.115 or 12.160, an action based
11 on conduct that constitutes child abuse or conduct knowingly
12 allowing, permitting or encouraging child abuse accruing
13 while the person who is entitled to bring the action is under
14 18 years of age shall be commenced not more than six years
15 after that person attains 18 years of age, or *if the injured*
16 *person has not discovered the injury or the causal connection*
17 *between the injury and the child abuse, nor in the exercise*
18 *of reasonable care should have discovered the injury or the*
19 *causal connection between the injury and the child abuse,* not
20 more than three years from the date the injured person
21 discovers or in the exercise of reasonable care should have
22 discovered the injury or the causal connection between the
23 child abuse and the injury, whichever period is longer.

24 (Emphasis added).

25 The purpose of this memorandum is to explain the basis for my
26 decision and to point out that the scope of the FCR's representation
is more limited than some of the lawyers' arguments would suggest.

³ For ease of reference, I will hereafter refer to these
individuals as "future claimants."

1 A. All Alleged Victims of Prepetition Sexual Abuse Have Claims
2 Within the Meaning of the Bankruptcy Code

3 As an initial matter, I acknowledge, and all parties appear
4 to agree, that the alleged victims of prepetition sexual abuse by
5 priests or other representatives of debtor are "creditors" holding
6 "claims" against debtor as those terms are defined under the
7 Bankruptcy Code.

8 A creditor includes an "entity that has a claim against the
9 debtor that arose at the time of or before the" petition date.

10 § 101(10).⁴ "While state law determines the existence of a claim
11 based on a cause of action, federal law determines when the claim
12 arises for bankruptcy purposes." In re Hassanally, 208 B.R. 46, 50
13 (9th Cir. BAP 1997). The Bankruptcy Code defines a claim to be a

14 (A) right to payment, whether or not such right is reduced to
15 judgment, liquidated, unliquidated, fixed, contingent,
16 matured, unmatured, disputed, undisputed, legal, equitable,
17 secured, or unsecured; or

18 (B) right to an equitable remedy for breach or performance if
19 such breach gives rise to a right to payment, whether or not
20 such right to an equitable remedy is reduced to judgment,
21 fixed, contingent, matured, unmatured, disputed, undisputed,
22 secured or unsecured[.]

23 § 101(5). Congress adopted the expansive definition of claim set
24 forth above

25 to ensure that "all legal obligations of the debtor, *no*
26 *matter how remote or contingent*, will be able to be dealt
with in the bankruptcy case." H.R.Rep. No. 595, 95th Cong.,

25 ⁴ Unless otherwise indicated, all chapter and section
26 references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330.

1 2d Sess. 1, 309 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963,
2 6266 (emphasis added)[.]

3 In re Jensen, 995 F.2d 925, 929 (9th Cir. 1993). Indeed, the
4 breadth of the definition of claim is essential to achieve the
5 Bankruptcy Code's goal of providing debtors with a fresh start. Id.
6 at 930.

7 In Jensen, the Ninth Circuit applied a "fair contemplation
8 test" to determine when an environmental claim arose. The fair
9 contemplation test has been described as equivalent to the test set
10 forth in In re Piper Aircraft Corp., 58 F.3d 1573 (11th Cir. 1995),
11 see Hassanally, 208 B.R. at 52, which requires some prepetition or
12 preconfirmation relationship, such as "contact, exposure, impact, or
13 privity" between the debtor and the claimant. Piper, 58 F.3d at
14 1577. Under this test, "[t]he debtor's prepetition conduct gives
15 rise to a claim to be administered in a case only if there is a
16 relationship established before confirmation between an identifiable
17 claimant or group of claimants and that prepetition conduct."⁵ Id.
18 There is no dispute that this requirement is met in this case.
19 Therefore, all the future claimants to be represented by the FCR,
20 including the minors and those with repressed memory, hold claims
21 against debtor within the meaning of § 101(5).

22
23 ⁵ The fair contemplation and Piper tests are considered
24 compromises between the "conduct" test, under which a claim arises
25 at the time the conduct occurs, and the "accrued state law test,"
26 which provides that "a claim does not arise in bankruptcy until an
action has accrued under relevant substantive nonbankruptcy law."
In re Hassanally, 208 B.R. 46, 51 (9th Cir. BAP 1997).

1 B. Scope of the FCR's Representation

2 As I stated at the hearing, the fact that the future
3 claimants have claims does not answer the question of whether there
4 should be a FCR or of the appropriate scope of the FCR's authority.
5 The debtor sought the appointment of a FCR, because it had unknown
6 creditors who might be unaware that they had claims. Memorandum in
7 Support of Debtor's Amended Motion for an Order (1) Fixing a Bar
8 Date for Filing Proofs of Claim, and (2) Approving a Proof of Claim
9 Form, Bar Date Notices, Actual Notice Procedure, and Mailing and
10 Media Notice Program, 18:11-13. Debtor recognized that, absent the
11 appointment of a FCR, it was questionable whether it could
12 accomplish through this bankruptcy a global resolution and discharge
13 of the abuse claims. The narrow scope of representation proposed by
14 debtor for the FCR is inconsistent with the approach taken in other
15 bankruptcy cases, and with debtor's stated purpose in invoking the
16 relief afforded under chapter 11.

17 In October of this year, the United States Bankruptcy Court
18 for the District of Arizona entered an order approving the
19 appointment of an Unknown Claims Representative ("the UCR") in the
20 chapter 11 case of the Catholic Diocese of Tucson ("the Tucson
21 case"). The UCR in the Tucson case has wide-ranging duties,
22 including the authority to file a proof of claim on behalf of the
23 class he represents, which class is comprised of "those persons who
24 are of adult age whose claims currently exist but who do not realize
25 and who will not realize, prior to the April 15, 2005 deadline for
26 filing claims, that they have claims against the estate[.]" Case

1 No. 4-04-bk-04721-JMM, Order Appointing an "Unknown Claims"
2 Representative and a Guardian Ad Litem, 1:12-14. The scope of
3 representation approved by the court in the Tucson case is even
4 broader than that which I approved. In this case, the FCR will
5 represent only those individuals who, "in the exercise of reasonable
6 care," have failed to discover that they have been injured by
7 debtor's conduct or the causal connection between debtor's conduct
8 and their injury. ORS 12.117(1). There is no such limitation
9 imposed in the Tucson case.⁶

10 The approach taken in the Tucson case, and in this case, is
11 consistent with that taken in the "mass tort" asbestos bankruptcy
12 cases. The seminal asbestos bankruptcy case is that of the Johns-
13 Manville Corporation. In that case, the court, citing § 105(a)⁷ and
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16 ⁶ At the November 19 hearing, counsel for ACE Property &
17 Casualty Insurance Company implied that the Tucson court made some
18 kind of error in drafting the terms of the order specifying the
19 scope of the UCR's authority. Transcript of November 19, 2004
20 Hearing, 120:14 - 121:15. According to counsel, the court in the
21 Tucson case meant to limit the UCR's scope of representation to
22 repressed memory claimants. Counsel provided no evidence of any
such error, and the written terms of the order entered in the Tucson
case are unambiguous. In addition, the order appointing the UCR in
the Tucson case was entered in October of 2004, and no clarification
or correction appears in the docket.

23 ⁷ Section 105(a) states that "[t]he court may issue any
24 order, process, or judgment that is necessary or appropriate to
25 carry out the provisions of this title." The court in the Manville
26 case noted that the power to appoint a representative "for parties
in interest whose identities are yet unknown . . . is inherent in
every court." In re Johns-Manville Corp., 36 B.R. 743, 757 (Bankr.
S.D.N.Y. 1984), aff'd, 52 B.R. 940 (S.D.N.Y. 1985).

1 § 1109(b),⁸ approved the appointment of a future claims
2 representative to represent all persons who, on or before a certain
3 date,
4 came into contact with asbestos or asbestos-containing
5 products mined, fabricated, manufactured, supplied or sold by
6 Manville and who have not yet filed claims against Manville
7 for personal injuries or property damage. These claimants
8 may be unaware of their entitlement to recourse against
9 Manville due to the latency period of many years
10 characterizing manifestation of all asbestos related
11 diseases.

12 In re Johns-Manville Corp., 36 B.R. 743, 745 (Bankr. S.D.N.Y. 1984),
13 aff'd, 52 B.R. 940 (S.D.N.Y. 1985). Other bankruptcy courts
14 followed suit, appointing representatives for those who, whether
15 knowingly or not, had already been exposed to asbestos, but for whom
16 injury had not yet manifested itself. See, e.g., In re Forty-Eight
17 Insulations, Inc., 58 B.R. 476 (Bankr. N.D. Ill. 1986); In re UNR
18 Indus., Inc., 46 B.R. 671 (Bankr. N.D. Ill. 1985).⁹ In In re Amatex
19 Corp., 755 F.2d 1034 (3d Cir. 1985), the Third Circuit affirmed the
20 bankruptcy court's appointment of a representative for future
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22 ⁸ Section 1109(b) states that "[a] party in interest . . .
23 may raise and may appear and be heard on any issue in a case under
24 this chapter."

25 ⁹ The courts in many of the early asbestos cases declined to
26 decide whether the future claimants had bankruptcy claims against
the debtors, holding that the future claimants were entitled to
representation even if they did not have claims against the debtor.
As I discuss above, there is no dispute in this case that the
pertinent unknown claimants are creditors holding claims against
debtor as those terms are defined in the Ninth Circuit. This is an
additional factor weighing in favor of the appointment of a FCR with
a broad scope of responsibility.

1 claimants who had been exposed to asbestos but who had not yet
2 manifested an injury.

3 The possibility of a long latency period before which injury
4 becomes manifest is an important factual similarity between this
5 case and the asbestos cases. The Oxford English Dictionary Online
6 (2002) defines "manifest" as follows: "Clearly revealed to the eye,
7 mind, or judgement; open to view or comprehension; obvious." The
8 evidence in this case is that, when childhood sexual abuse causes an
9 injury, the injury may not be manifest for many years.¹⁰

10 Debtor cites In re Dow Corning Corp., 211 B.R. 545 (Bankr.
11 E.D. Mich. 1997), in support of its position that a future claims
12 representative is not necessary to represent the interests of those
13 potential claimants who know they have been subjected to abuse, but
14 have not yet manifested an injury. The Dow Corning chapter 11 case
15 arose out of a flood of lawsuits connected to the debtor's
16 involvement with silicone breast implants. The court in that case
17 explained that it had not appointed a future claims representative,
18 because "[a]ll who have received a breast implant are cognizable of
19 this fact." Id. at 598 n.55. However, the court also explained
20 that a future claims representative was unnecessary, because

21 [i]t has been the consistent view of the official committee
22 representing all tort claimants that "any person who has
received a silicone-gel breast implant . . . has already

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24 ¹⁰ Not everyone who is subjected to childhood sexual abuse
25 will be damaged in a legal sense. As pointed out by debtor's expert
26 witness, "some people are quite resilient and do not become
psychologically disabled or traumatized by episodes of sexual
abuse." Declaration of Kevin McGovern, Ph.D., 2:22-23.

1 suffered an injury and is therefore a present, as opposed to
2 a future claimant. . . ." Order Dismissing Motion of Alan B.
Morrison for Appointment as the Legal Representative of
Future Breast Implant Claimants, Oct. 10, 1995.

3 Id.

4 This case is distinguishable from the Dow case for at least
5 two reasons. First, the very nature of the tortious conduct alleged
6 in this case can result in cognitive and psychological injuries,
7 making the injured person incapable of recognizing that he or she
8 has been injured or of identifying the causal connection between the
9 abuse and the injury. Declaration of Jon R. Conte, Ph.D., 8; 9; 13-
10 14. The potential injuries resulting from exposure to silicone
11 breast implants are not of this type. Second, in this case, unlike
12 the Dow case, the TCC does not take the position that all those
13 exposed to childhood sexual abuse have been damaged in a legal
14 sense, or purport to represent the interests of such persons. The
15 Dow court did not disapprove of the approach taken in the asbestos
16 cases. In fact, the court in Dow acknowledged that "[f]uture tort
17 claims problems come in all shapes and sizes[,] and cautioned
18 against an oversimplified approach to such problems. Dow, 211 B.R.
19 at 598 n.55.

20 In a chapter 11 case involving future claims, a court must
21 "balance the competing interests of the debtor's fresh start with
22 the creditor's right to compensation. Largely, the issue of
23 adequate notice to inform and bind the future claimant and notions
24 of fundamental fairness determine the outcome." Hassanally, 208
25 B.R. at 53 n.9. As I discuss above, the appointment of a FCR is
26

1 appropriate, given that the tortious conduct at issue in this case
2 does not consistently produce injury, and that when injury does
3 result, it can take many years for it to become manifest. In
4 addition, childhood sexual abuse can result in cognitive and
5 psychological injuries making the injured person incapable of
6 currently recognizing that he or she has been injured or of
7 identifying the causal connection between the abuse and the injury.

8 ORS 12.117(1) recognizes the unique nature of the potential
9 damages caused by childhood sexual abuse by providing an unusually
10 extended period to assert claims based on such conduct. Oregon case
11 law acknowledges that decades may pass between the childhood abuse
12 and the date the victim either manifests the injury or reasonably
13 should have known of the casual connection between the abuse and the
14 injury. See, e.g., P.H. v. F.C., 873 P.2d 465 (Or. Ct. App. 1994).

15 While counsel for ACE is correct that the bankruptcy claims
16 bar dates operate regardless of state statutes of limitation, that
17 does not address the question of whether a FCR is appropriate. When
18 there is a class of claimants that is incapable of asserting a
19 claim, either because of a long latency period between the wrongful
20 conduct and the manifestation of damages, or because the nature of
21 the wrongful conduct is such that it disables the claimant from
22 being reasonably able to recognize the injury, it is appropriate for
23 the court to appoint a FCR to protect the interests of the class.

24 It is important to point out that the FCR does not represent
25 all alleged childhood abuse victims who do not assert claims. The
26 representation is much more limited. The only claimants represented

1 are (1) minors; (2) those with repressed memory; and (3) those
2 persons who know they were subjected to sexual contact as children
3 but who have "not discovered the [resulting] injury or the causal
4 connection between the injury and the child abuse, nor in the
5 exercise of reasonable care should have discovered the injury or the
6 causal connection between the injury and the child abuse[.]" ORS
7 12.117(1). Counsel for debtor and the insurance companies argue
8 that, by including the third category, the court effectively excuses
9 from filing individual childhood abuse victim claimants "who know
10 that the conduct took place, people who do have the memory of that
11 conduct, but . . . are ashamed, embarrassed, reluctant, [or] don't
12 want to come forward" Transcript of November 19, 2004
13 Hearing, 118:5-10. This is incorrect.

14 I am not authorizing the FCR to represent claimants who
15 decline to assert their own claims because of embarrassment, shame
16 or a desire not to come forward. It is only those child abuse
17 claimants who are minors, have repressed memory, or who have not
18 discovered, "nor in the exercise of reasonable care should have
19 discovered" their injury or that the abuse caused the injury. ORS
20 12.117(1). The limited scope of the third category, qualified by
21 the objective requirement of the exercise of reasonable care,
22 prevents the wholesale vitiation of the claims bar date that counsel
23 for the insurance companies and debtor assert may happen.

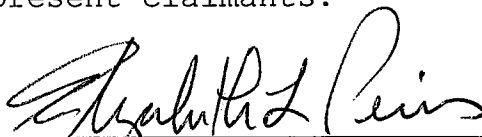
24 C. Conclusion

25 Debtor's representatives and counsel have stated on numerous
26 occasions in this court, that debtor's purpose in filing a chapter

1 11 petition was to resolve, fairly, finally and in a global fashion,
2 the sexual abuse claims asserted against it. For example, debtor's
3 Director of Business Affairs stated as follows in connection with
4 the November 19 hearing:

5 One of the principal reasons for seeking relief under
6 chapter 11 was to enable the Debtor to use the chapter 11
7 process to address in a comprehensive manner all tort claims
8 asserted against it in one forum, determine the extent of the
9 Debtor's liability with respect thereto, and address such
10 claims and all other claims against the Debtor in a fair and
11 equitable manner.

12 Declaration of Paulette Furness in Support of Debtor's Motion for an
13 Order (1) Fixing a Bar Date for Filing Tort Proofs of Claim, and (2)
14 Approving a Tort Proof of Claim Form, Bar Date Notices, Actual
15 Notice Procedure, and Media Notice Program, 3:5-9. The appointment
16 of a FCR to represent the interests of those persons who know they
17 were subjected to abuse but who have not discovered the resulting
18 injury or the causal connection between the injury and the abuse
19 will effectuate debtor's stated goals and will assure equitable
20 treatment of future as well as present claimants.¹¹

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ELIZABETH L. PERRIS
Bankruptcy Judge

¹¹ In addition, the TCC's position is that the limited scope
of the FCR's representation and notice procedure proposed by debtor
would not satisfy the requirements of due process. While I am not
convinced that the extensive Victim Outreach Plan proposed by the
TCC would be necessary to satisfy the requirements of due process,
the appointment of a FCR will address the TCC's concerns, to the
extent they have merit.

1 cc: Pamela Griffith
2 Thomas Dulcich
3 Albert Kennedy
4 Thomas Stilley
5 Peter McKittrick
6 David Slader
7 Jerry Hodson
8 David Foraker
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