The Catholic Lawyer

Volume 35
Number 3 *Volume 35, Number 3*

Article 4

FDIC/Cash Management

David F. Menz

Joseph E. Kane

Thomas Drought

FDIC/CASH MANAGEMENT

DAVID F. MENZ*
JOSEPH E. KANE**
THOMAS DROUGHT***

INTRODUCTION: BY DAVID MENZ

The topic discussed in this article holds particular interest for those lawyers who, like myself, practice in the southwest which contains most of the recent failures of financial institutions. The National Diocesan Attorney's Association visited this topic in Monterey in 1987, and there is an excellent outline which was published in the 1987 book.

In the past five or six years, the southwest has suffered more than its share of financial institution failures. In contrast, according to Joe Kane, the Cincinnati area has seen only two such failure during that same period.[1] In December 1985, the southwest had a large savings and loan fail, which at that time was largest such failure in the United States's history.[2] Since that failure, two additional major savings and loans have also failed along with several smaller ones. The failures have

---

* David F. Menz is a partner in the law firm of Williams & Anderson which is located in Little Rock, Arkansas. He received both his undergraduate and graduate degrees from the University of Notre Dame and his law degree from Vanderbilt University.
** Joseph E. Kane is a partner in the law firm of Graydon, Head & Ritchey which is located in Cincinnati, Ohio. He received his undergraduate degree from the University of Notre Dame, a Certificate in English in American Law from the University of London, and his law degree from the University of Notre Dame.
*** Thomas Drought is a partner in the law firm of Brite & Drought which is located in San Antonio, Texas. He received his undergraduate degree from the University of Texas and his law degree from St. Mary's University.

[1] *See* Marianne Lavelle, *S&L Legal Shake-Up*, NAT'L L.J., July 13, 1992, at 1; *Savings Institutions, Thrift Losses Hit $6.35 Billion in First Half, Shesnunoff Reports*, Daily Report for Executives (BNA), D.E.R. No. 195, A-1 (1990).

[2] *See* Peter Carbonara, *Down and Out in Dallas and Washington*, AM. LAW., March 1991, at 80; Marianne Lavelle, *S&L Legal Shake-Up*, NAT'L L.J., July 13, 1991, at 1; Peter Carbonara, *Down and Out in Dallas and Washington*, AM. LAW., March 1991, at 80 (identifying the biggest failure as that of First South F.A., a Pine Bluff, Arkansas, savings and loan).

caused numerous uninsured losses.[3] For example, one of the biggest losers in Arkansas was the State government because the State treasury had been following a policy of placing State money with financial institutions across the State. Consequently, these failures have been a sobering experience for the Arkansas State government, which reportedly lost $2-3 million from the failures.

According to Deirdre Halloran, several Diocesan attorneys have written the to the Federal Deposit Insurance Company ("FDIC"), posing questions as to whether coverage would be available in the event of a failure by a financial institution. It would be wise for those interested individuals to sit down with diocesan finance officers to review their accounts in order to make certain that the diocese would not lose money if there is a failure by a financial institution or brokerage house.

This article will give a brief overview of a new law passed in November 1991 regarding FDIC insurance and will discuss how the new law modifies past policy. Next, it will briefly discuss present coverage afforded to dioceses by the Securities Investors Protection Corporation ("SIPC"). The article will then address Canon Law considerations and will be presented by Joe Kane. Finally, Tom Drought will provide several practical tips by discussing how various Texas dioceses have protected their assets.

I. COMPREHENSIVE DEPOSIT INSURANCE REFORM & TAXPAYER ACT OF 1991

In November of 1991, Congress passed the Comprehensive Deposit Insurance Reform and Taxpayer Act of 1991 ("Act").[4] After years of protecting large deposits from losses in bank failures, the FDIC decided to change its policy. Today, the FDIC is frequently protecting individual and business depositors only up to the insured maximum of $100,000 for each insured account.[5] Accordingly, hundreds of bank depositors have been unpleasantly surprised by the change.[6]

---

[3] *See generally Savings Institutions, FDIC Named Managing Agent for 37 More FSLIC-Insured S&Ls; Total Rises to 73,* Daily Report for Executives (BNA), D.E.R. No. 42, March 06, 1989; *Savings Institutions, Recent Thrift Closings, Acquisitions Will Cost $141 Million, FSLIC Estimates,* Daily Report for Executives (BNA), D.E.R. No. 233, Dec. 05, 1988; Dennis Cavchon & Julie Morris, *Part 2: Salvaging the S&Ls,* USA TODAY, Feb. 14, 1989, at 1A.

[4] 12 U.S.C. § 1811 (1991).

[5] Cartwell F. Muckenfuss, III et al., *The Federal Deposit Insurance Corporation Improvement Act of 1991; A Summary Overview of Key Provisions,* MAG. OF BANK MGMT., January 1992, at 27. *See also* Donald G. Simonson, *Making Regulatory Sausage, U.S. Banker,* June 1992, at 49; Steve Colheo, *Resolving Failures in a Least-Cost World,* ABA BANKING J., May 1992, at 62.

[6] *Id.*

A. Impact of the New Act

In theory, uninsured bank deposits have always been at risk when a bank fails, yet until recently the losses were infrequent because the FDIC usually located another bank to assume all deposits of the failed bank.[7] However, in an effort to minimize losses at the FDIC, the 1991 Act requires the FDIC to close banks by the least costly method for the insurance fund.[8] Therefore, as the FDIC has concentrated on limiting the losses of the insurance fund rather than limiting the losses to the depositors, big depositors are now sharing the losses with the insurance fund when a bank fails.[9]

In early portion of 1992, the proportion of bank failures that resulted in losses for individual depositors increased sharply.[10] On March 25, 1992, a representative of the FDIC predicted in a speech that approximately fifty percent of bank failures during that year would result in losses to uninsured depositors. This percentage represented a dramatic increase from about fifteen percent the previous year. In the past, the FDIC would generally transfer all failed bank deposits to a new buyer, since that approach was less costly than closing the bank and paying off the insured deposits of $100,000 or less.[11] In contrast, the new law requires the FDIC to sell *only* the insured deposits of a failed bank because since that results in a smaller loss to the government.[12]

The FDIC expected that there would be about two hundred bank failures in 1992, up from one hundred and twenty-four in 1991.[13] By the time of writing this article, the FDIC had already closed twenty-one banks.[14] Due to those closures, depositors have suffered a loss in nine of the twenty-one cases, or forty-three percent, compared with twenty-one cases in all of 1991, or seventeen percent. Losses often amount to fifteen to twenty cents on the dollar, but sometimes losses are as much as fifty

---

7 *Id.*

8 *Id.*

9 *See generally* Dennis Cavchon & Julie Morris, *Part 2: Salvaging the S&Ls*, USA TODAY, Feb. 14, 1989, at 1A; Cartwell F. Muckenfuss, III et al., *The Federal Deposit Insurance Improvement Act of 1991; A Summary Overview of Key Provisions*, MAG. OF BANK MGMT., Jan. 1992, at 37.

10 *Id.*

11 *See* Cartwell F. Muckenfuss, III et al., *The Federal Deposit Insurance Corporation Improvement Act of 1991; A Summary Overview of Key Provisions*, MAG. OF BANK MGMT., Jan. 1992, at 37; Steve Cocheo, *Resolving Failures in a Least-Cost World*, ABA BANKING J., May 1992, at 62.

12 *Id.*

13 *See* Suzanne, *How to Break the Bank: With Loose Lending, Which Put First Hanover in a Tight Squeeze. To Ease Pressure, Regulators Pulled the Plug*, BUS. DATELINE, Vol. 12, at 24.

14 *Id.*

cents on the dollar.[15] The amount of loss depends on how much the FDIC can recover by selling assets of the failed bank, such as securities, loans, or office furniture.[16] Typically, the losses fall on those people least able to indemnify the risk because the more sophisticated businesses and individuals had already pulled their money out of the institution.[17]

1. Examples of Recent Failures

One example of a bank failure occurred in March of 1992. The Broadway Bank and Trust Company of Paterson, New Jersey, was closed on March 13.[18] The City of Paterson had evidently employed a sharp financial officer, because the City withdrew $900,000 immediately before the failure. In contrast, one depositor, North New Jersey Community Coordinated Childcare ("NNJCCC"), lost about $170,000. NNJCCC is a nonprofit agency that acts as a clearing house for government money for eight hundred child-care centers. Immediately prior to the bank's failure, NNJCCC had deposited $270,000 in the bank for payroll and other bills that its paid once a month. As evidenced by this transaction, the unsophisticated depositors lose their money in these failures, whereas sophisticated depositors, such as the City of Patterson, are more likely to know if something is going to happen to the Bank.

B. FDIC's List of Troubled Banks

Due to the unsophistication of certain parties, a question is raised: Why does the FDIC not publish its list of troubled banks? Publishing such a list would alleviate the hardship on the unsophisticated depositor. Unfortunately, however, the list would also create alarm and would cause a run on withdrawals. Therefore, some troubled banks that would ordinarily not have failed, would definitely fail when the list was published.

The troubled bank list of the FDIC is a closely guarded secret. FDIC has a five-point scale, with those banks that come in the bottom two categories classified as "troubled."[19] At the end of 1991 the list included

---

15 *Id.*

16 *See* Cartwell F. Muckenfuss, III et al., *The Federal Deposit Insurance Corporation Improvement Act of 1991; A Summary Overview of Key Provisions*, MAG. OF BANK MGMT., Jan. 1992, at 37; Peter G. Gusselin, *Big-Bank Failures Ahead OMB Says; Assessment for FDIC Will Have to Rise*, BOSTON GLOBE, March 10, 1992, at 35.

17 *Id.*

18 *See* Michael Quint, *Two S&Ls and a Bank Are Closed*, N.Y. TIMES, March 14, 1992, § 1, at 40.

19 *See* Suzanne, *How to Break the Bank: With Loose Lending, Which Put First Hanover in a Tight Squeeze. To Ease Pressure, Regulators Pulled the Plug*, BUS. DATELINE, Vol. 12, at 24; Peter G. Gusselin, *Big-Bank Failures Head, OMB Says; Assessment for FDIC Will Have to Rise*, BOSTON GLOBE, March 10, 1992, at 35.

1,069 banks and savings and loans with assets of $611 billion.[20] Although the number of problem banks is down from a peak of 1,575 in 1987, the amount of assets is at a record high.[21] Since there are approximately 12,000 banks in the country, one out of twelve financial institutions is classified as "troubled" by the FDIC.

C. FDIC's Wide Latitude

The new Act provides the FDIC with significant latitude because, in the case of the failed bank in New Jersey, the purchasers of the bank were not able to buy the uninsured deposits. It is the custom in the banking industry for the takeover institution to minimize the bad publicity by taking both then insured and the uninsured deposits.[22]

In 1991, there were two large bank failures in New York.[23] The Immigrant Savings Bank ("Immigrant") paid $34.9 million to buy $3.7 billion in deposits of the Dollar Dry Dock Savings Bank. The FDIC acquiesced to the demand of Immigrant's chairman that they buy all of the deposits because Immigrant wanted to purchases all of the deposits to avoid any bad publicity which would accompany the takeover.[24] In another situation involving Crossland Savings Bank, the FDIC pumped $1.2 billion into the institution in order to keep all the depositors happy and to keep the bank in better shape for resale. As of this address, Crossland has not been sold.[25]

As can be seen, the FDIC has a great deal of latitude under the Act. It appears that they protect the big banks and depositors and let the little ones go in order to avoid negative publicity.

II. THE ARCHDIOCESE OF LITTLE ROCK AND SIPC

One thing that was not covered at the Monterey conference was the Securities Investors Protection Service ("SIPS"). The Diocese of Little Rock may be unique in that it has three or four brokerage accounts in which it holds its securities. The accounts are not kept at the Chancery offices, but are listed under street names with various brokerage houses. It is advisable and a matter of good practice, for those reviewing this

20 *Id.*

21 *Id.*

22 *Id.*

23 *See* Steve Cocheo, *Resolving Failures in a Least-Cost World*, ABA BANKING J., May, 1992, at 62; Michael Quint, *U.S. Shift on Deposit Insurance*, N.Y. TIMES, March 26, 1992, § D, at 1.

24 *See* Michael Quint, *U.S. Shift on Deposit Insurance*, N. Y. TIMES, March 26, 1992, § D, at 1.

25 *See* Steve Cocheo, *Resolving Failures in a Least-Cost World*, ABA BANKING J., May, 1992, at 62.

article to do so with the financial administrators of the dioceses, in order to assess the situation in this regard.

A. *Securities Investors Protection Act*

The Securities Investors Protection Act ("SIPA") was passed in 1970.[26] From 1968 to 1970, there had been a series of failures in the brokerage industry.[27] Accordingly, SIPA was passed in order to put more confidence into the brokerage industry. The Securities Investors Protection Corporation ("SIPC") is not a governmental agency or a regulatory authority, but is a nonprofit membership corporation funded by its member securities firms.[28] The SIPC is a little more liberal in its coverage than the FDIC.[29] When there is a failure of a SIPC protected firm or member, the SIPC usually asks the federal court to appoint a trustee to liquidate the firm.[30]

1. What the SIPC Protects

SIPC protects a customer's cash and securities by protecting cash up to $100,000 but the cash has to be used in a brokerage account with the intent to purchase securities.[31] Evidently, from the SIPC's perspective, there is always a presumption that if the cash is in a brokerage account it is there to purchase securities, so they are usually liberal in their interpretation.[32] SIPC will only protect securities that are registered with the SEC or have an exemption. Consequently, it will not protect gold, silver, or any other commodities.[33] For example, a diocese that invested in cotton futures will not be protected. With SIPC, a customer can have several accounts with one brokerage house, and, if there are multiple

---

26 15 U.S.C. §§ 78aaa-78lll (1988).

27 *See* Glen E. Mercer, *Violation of Rule 10b-5 as a Predicate Act Under Civil RICO*, 51 LA. L. REV. 1111 (1991); Brian T. Corbett, *Donaldson's Troublesome Legacy: Whether to Afford Targets of SEC Investigations Notice of Third Pary Subpoenas*, 33 CATH. U. L. REV., 667, 672 (1984); Stefan Fatsis, *Little-Known Federal Agency Covers Investors; Insurance: The Securities Investor Protection Corporation was set up After a Rash of Brokerage Failures in the 60's. However it is Used as a Last Resort*, L.A. TIMES, April 17, 1990, D8; Walder Werner, *The SEC as a Market Regulator*, 70 VA. L. REV. 755, 770-773 (1984).

28 *Id.*

29 *Id.*

30 *See* Adam F. Ingber, *10b-5 or Not 10b-5?: Are the Current Efforts to Reform Securities Litigation Misguided?*, 61 FORDHAM L. REV. S351 n.178; Glen E. Mercer, *Violation of Rule 10b-5 as a Predicate Act Under Civil RICO*, 51 LA. L. REV. 1111 (1991); Leonard Sloane, *Checking on Money's Safety Net*, CHIC. TRIB., Feb. 24, 1991, § N, at 15.

31 *Id.*

32 *Id.*

33 *See* Ingber, *supra* note 30; at 5351 n.178; Stefan Fatsis, *Little-Known Federal Agency Covers Investors; Insurance: The Securities Investor Protection Corporation was Set Up After a Rash of Brokerage Failures in the 60's. However it is Used as a Last Resort.*, L.A. TIMES, April 19, 1990, § D, at 8.

accounts in separate capacities, those will also be covered.[34] The customer can also have accounts with more than one SIPC member.[35]

There are several different ways to protect assets under SIPC. A claim is valued on the date that the protection starts.[36] Note, however, that a diocese will not be paid for its market loss. For example, if a diocese bought IBM stock in 1989 at $120 but when the institution fails the value is only $80, it will only get paid back for the $80. As for statistics, customer protection proceedings were initiated for eight SIPC members in 1990, bringing the total to two hundred and twenty since SIPC's inception proceedings commenced under the Act. The two hundred and twenty members represent less than one percent of the approximately 27,800 broker-dealers that have been SIPC members during the last twenty years. Currently, there are about 10,000 members. There are almost as many brokerage firms as there are commercial banks and savings and loans.[37]

III. CANON LAW CONSIDERATIONS: THE OWNERSHIP OF PROPERTY: BY: JOSEPH E. KANE

In analyzing any FDIC insurance coverage issue, the primary and initial question that needs to be answered is who owns the funds? This analysis of asset ownership begins with a bit of history, examining the bankruptcy of John B. Purcell, the first Archbishop of Cincinnati.[38]

A. *The Bankruptcy of John B. Purcell*

John Baptist Purcell was appointed Bishop of Cincinnati in 1833 at the age of 33, just seven years after his ordination. In 1855, he was appointed its first Archbishop. For fifty years, from 1833 until 1883, he presided over the transformation of a scattered missionary diocese into a vigorous, well-developed and influential Archdiocese. Archbishop Purcell's younger brother, Edward—a former lawyer—came to Cincinnati in 1837. In 1838, after less than two years of preparation, he was ordained a priest by his brother. Bishop Purcell immediately appointed Edward as Vicar General with complete power to act for the Bishop in all financial matters. In the aftermath of the general financial panic of 1837, many persons were uneasy with the shaky condition of banks and were eager to place their small personal savings in the hands of the Bishop and his priest/brother for safekeeping. It is estimated that during the

[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *See* Leonard Sloane, *Checking on Money's Safety Net*, CHIC. TRIB., Feb. 24, 1991, N15.
[38] *See* Mannix v. Purcell, 46 Ohio St. 102, 19 N.E. 572 (1888).

next 40 years, from 1837 until 1877, the total deposits in the Purcell Bank exceeded $25 million.[39]

During the depression of 1878, the Purcell Bank failed. Archbishop Purcell, now 78 years old, assumed the bank's debt as his own. After claims were submitted, it was discovered that the bank's liabilities exceeded $3,800,000—a staggering sum in those days. As a result, Archbishop Purcell made a general assignment for the benefit of his creditors. He conveyed all of his property "not including such property as is held by me in trust." The problem was that all ecclesiastical property in the Archdiocese of Cincinnati was held in his name in fee simple by deed absolute, which simply said: "John B. Purcell." No reference to the fact that he was a cleric, priest, or bishop. Realizing that settlement could not be made of the outstanding claims, John Mannix, the court-appointed trustee for the creditors, filed a suit to foreclose on two hundred and eleven churches, convents, schools, and orphanages. The trial lasted an unprecedented sixty-six days.[40]

The key to the case was the fact that the court allowed Archbishop Purcell to introduce as parol evidence the rules, regulations, and Canons of the Roman Catholic Church. The Archbishop was permitted to demonstrate that Church law at that time required that all property used for ecclesiastical purposes be held in the bishop's individual name to be held in trust for the various congregations.[41] Archbishop Purcell died on July 4, 1883, before the decision of the court was rendered. Six months after his death and almost 18 months after the end of the trial, the three-judge panel decreed that, indeed, Archbishop Purcell held the various ecclesiastical properties in trust for the various congregations and that the property was not subject to sale as his individual property.[42]

The case was affirmed by the Ohio Supreme Court and an appeal to the United States Supreme Court was denied.[43] Ever since the early 1900's, the Archbishops of Cincinnati, not wanting to rely solely on *Mannix v. Purcell*, have taken title to real property for the various parishes pursuant to a trust form deed that clearly defines the powers of the archbishop as trustee relative to that property.

---

39 *Id.*
40 *Id.*
41 *Id.*
42 *Id.*
43 *Id.*

B. The 1983 Code of Canon Law

1. Acquisition and Ownership of Temporal Goods

Mannix v. Purcell is more than 100 years old and Canon Law regarding the ownership of temporal goods has changed since 1888.

Several Canons are pertinent to a discussion of acquisition and ownership. Canons 113 and 114 provide for the creation of public "juridic persons," which are separate entities with rights and obligations compatible with their nature. A "juridic person" in Canon Law is roughly equivalent to a corporation in civil law. Canon 373 provides that the diocese is a juridic person and Canon 515 provides that the parish is also a juridic person. Canon 1255 provides that any juridic person is capable of acquiring, retaining, administering, and alienating temporal goods. Canon 1259 provides that any public juridic person may employ any legitimate means to acquire temporal goods. Canon 1256 provides that the right of ownership over goods belongs to that juridic person who has lawfully acquired them.

The commentary to Canon 1256 states that an issue raised by this Canon is the *nature* of ownership. Canon Law relies on ancient Roman law and speaks of *dominium*. *Dominium* in the Roman legal system was close to being absolute, *i.e.* the owner was clearly identifiable over all other persons and his interest was undivided and complete. No other person was entitled to regard the thing as his and no other person could have taken possession of or made use of the thing without the consent of the person having *dominium*. Three rights are usually included in the concept of *dominium*. They are the right to make physical use of the thing and possess it, the right to the income gained from it, and the right to manage it—well or badly—including conveying it to someone else. When it speaks of ownership, the Code of Canon Law, and specifically Canon 1256, presumes *dominium*. This means that the temporal goods of a juridic person belong to the juridic person who acquired them and that no other juridic person has any rights to those goods.

2. Supervision and Administration of Juridic Persons at the Various Levels of the Hierarchy

a. The Pope

At one time or another, we have all heard someone say, "The Pope owns it all." That is incorrect. Canon 1273 declares that the Pope is the supreme *administrator and manager* of all ecclesiastical goods. Clearly this Canon does not declare that the Pope has *dominium* or ownership of all ecclesiastical goods for, under Canon 1256, that is proper to the juridic person to which the goods belong. Nor does Canon 1273 declare that the Pope has primary responsibility for administration.

b. The Bishop

Canon 1276 provides that it is the responsibility of the bishop—the ordinary—to *supervise the administration* of all the goods which belong to the public juridic persons subject to him. He is to see to the organization of the entire administration of the ecclesiastical goods by issuing special instructions within the limits of universal or particular law. An ordinary is the administrator of those goods which belong to the juridic person *of which he is immediately in charge, e.g.*, the diocese. However, he is not the administrator of those juridic persons subject to him, *e.g.* the parish. But, he does have the duty of supervising that administration.

c. The Pastor

Canon 532 provides that the pastor represents the parish in all juridic affairs. It is he who is to insure that the goods of the parish are administered in accordance with the norms of Canon Law. In most dioceses, and Cincinnati is no exception, the bishop, pursuant to his supervisory functions under Canon 1276, will have promulgated particular law, *i.e.* synod law, that would stipulate many, if not all, of the duties of the pastors in regard to the legal matters pertaining to the parish.

Canon 1279 provides that the principal administration of ecclesiastical goods is the primary responsibility of the person who is immediately in charge of the juridic person who owns the goods, *i.e.* the pastor for the parish and the bishop for the diocese, subject to the right of the bishop to intervene in the event of negligence by the administrator. The commentary to this Canon states that

> [s]ome members of the consultation committee wanted to declare the right of the [bishop] to intervene and act instead of the immediate administrator if the administrator refuses to act or neglects something which the [bishop] judges to be good for the juridic person or for the common good. Other consulters disagreed, maintaining that . . . such a provision would in effect make the [bishop] the administrator of all the ecclesiastical goods in the diocese.
>
> Canon 1279 § 1 is a compromise. In case of the administrator's negligence, the [bishop] may intervene since the public good may be affected. . . . [A]ctual administration is kept at the lowest appropriate level. Higher levels function primarily for supervision and coordination.

3. Duties of the Administrators

Canon 1284 provides that "all administrators are bound to fulfill their office with the diligence of a good householder." For this reason, they must, "among other duties, take care that the ownership of ecclesiastical goods is safeguarded through civilly valid methods." Observing the prescriptions of both Canon and civil law, "they must especially be on guard lest the Church be harmed through the nonobservance of civil laws." The Chancellor of the Archdiocese of Cincinnati, analogizes the ownership and administrative structure to that of a parent corporation with many subsidiary corporations. Each subsidiary is a separate entity and owns its own property. The president of each manages the corporation in accordance with the administrative guidelines promulgated by the parent corporation. While the president of the parent corporation has the overall responsibility for the supervision and administration of the subsidiaries, the parent does not own the assets of subsidiaries and cannot appropriate them to its own use. However, the president of the parent corporation can fire the president of a subsidiary for mismanagement and appoint a replacement.

C. *The Neutral Principles of Law Approach*

As mentioned earlier, the case of *Mannix v. Purcell* allowed the rules, regulations, and Canons of the Roman Catholic Church to be introduced as parol evidence to show the manner in which an Archbishop held title to real estate. It is certainly arguable that *Mannix* would be decided differently under the neutral principles of law approach, first explicitly endorsed in 1979 in *Jones v. Wolf.* The neutral principles of law approach is an analysis used in deciding church property disputes, while avoiding incursions into "matters of religious dogma, doctrine, or practice." Under the neutral principles approach of *Jones*, the court will examine deeds to the property and other relevant documents, including the church constitution or bylaws, in order to determine where title to the property is vested and whether it is held in trust. The neutral principles of law approach has been used in Ohio in at least one church property dispute.

The lesson to be learned from the neutral principles of law approach is that civil law documents, whether they be deeds, declarations of trust, trust agreements, or signature cards for bank accounts, should clearly reflect how the property and the funds are actually owned. The challenge is to incorporate Canon Law *dominium*—to incorporate Canon Law ownership principles—into civil law documents based on State laws, which might take the form of trust documents or might take the form of separate corporations. Each diocese must make that decision based upon the state laws and how the bishop wants to manage the affairs of the diocese. With the possible exception of corporation sole, civil law documents can be created and bank accounts structured in such a way as to withstand the challenge by the FDIC that all the money belongs to the bishop, or for that matter, to the Pope.

III. FUND STRUCTURE IN THE ARCHDIOCESE OF CINCINNATI

The accounts in the Archdiocese of Cincinnati are structured so as to allow for little likelihood that a parish or the archdiocese will ever need to rely on FDIC insurance coverage. Basically, the Archdiocese has five separate funds—all of which were set up for investment purposes and not for accounting purposes. With the exception of the pooled fund none of the funds has any exposure on the commercial side of a bank. They are all maintained with the trust department of the bank and are not an asset of the bank subject to the claim of creditors in the event of bank failure. The money is invested exclusively in U.S. Government securities and high-grade commercial paper.

Only the pooled fund allows any exposure on the commercial side of the bank. Participation in the pooled fund is voluntary for each parish because it is the parish's money. Each parish in the pooled fund has two separate accounts: a "payable through" account that operates as a standard commercial checking account; and a pooled interest-bearing savings account. It is up to each parish that chooses to participate in the pooled fund to choose one of the following two alternatives.

A. *Quasi-Sweep Account*

The first pooled fund is referred to as a quasi-sweep account. In this account, each participating parish chooses its own maximum checking account balance based upon the average amount of checks written per week. This amount is kept in the checking account. Any deposits in excess of this amount are "swept" over into the parish's saving account in an interest-bearing pool maintained in the trust department of the bank. The parish is at risk *only* for the amount on deposit in the checking account. There is no transaction fee to the parish due to the compensating balance that is always in the checking account.

B. *Pure Sweep Account*

The second pooled fund alternative is referred to as the pure sweep account. All funds for each parish that chooses this alternative are deposited in the pooled interest-bearing savings account, again, on the trust side of the bank. The pastor writes checks against a checking account with a zero balance. Daily, the bank automatically transfers funds out of the pooled savings account and "sweeps" them into the checking account in order to cover the parish's checks that had come in that day. At the end of any day, there are no funds in the checking account. The disadvantage to this account is that the parish pays the service fee for each and every transaction due to the fact that there is no compensating balance in the checking account.

Each parish that is a member of the pooled fund has a separate checking and a separate savings account in the name of the parish, a separate trust fund agreement with the bank's trust department, and a separate taxpayer identification number. In addition, Cincinnati parishes are not separately incorporated, though the archbishop does execute a separate document for each parish called a "Declaration of Ownership."

1. Declaration of Ownership

The "Declaration of Ownership" sets forth in a civil law document that which is provided under Canon Law, *i.e.* each parish is a separate entity under Canon Law; that it owns funds in its own right, and that the funds are not owned by or administered by the Archbishop; that the parish's funds are not held in common with or for the benefit of other parishes or the Archdiocese and that the Archbishop has no authority to appropriate the funds of one parish and use them for another parish or for the Archdiocese. This document is not a matter of public record. The Archbishop signs a Declaration of Ownership for each and every parish. There is one copy on deposit at each parish with the official records of the parish, kept with the documents that go to setting up the parish. It is in those official records, but it is not of record at the county courthouse.

The Declaration of Ownership deals only with personal property—cash, assets. The deeds for real estate are handled by separate trust form deeds that are, of course, recorded for each and every piece of real estate acquired. Real estate is usually acquired in a two-step transaction because the grantor does not want to use the complicated trust form deed but would prefer to use a standard general warranty deed form. The grantor conveys the property by general warranty deed to the Chancellor, without reference to the fact that he is a cleric. The Chancellor then immediately conveys the property, using the trust form deed, to the Archbishop, in trust for the specific parish. Those deeds are recorded simultaneously, in the proper sequence, so that there is a trust form deed of record for every piece of real property in the Archdiocese.

2. Declaration of Trust

There are situations where the diocese will acquire real property by gift directly in the name of the Archbishop. In that situation, a declaration of trust is recorded to indicate the Archbishop's trust powers as they relate to the ownership of that property. This observes the current state of Canon Law in that the parish still owns that piece of property. By synod law, because of the case of *Mannix v. Purcell*, all real estate is held in the name of the Archbishop, as Trustee, in trust for the specific parish.

Even though the parish owns it, it is held in the name of the Archbishop in trust for the parish.

B. Financial Councils

Finally, the Code of Canon Law mandates that both parishes and dioceses have financial councils. In addition to maintaining the minimum amount of funds absolutely necessary on the commercial side of a bank, the Archdiocese's financial council routinely reviews the bank's performance and its strength. At the first sign of any financial problems with the bank, the Archdiocese would not hesitate to transfer its funds to a stronger bank. In the last analysis, the best protection is to keep funds in the strongest bank possible.

IV. THE TEXAS EXPERIENCE: BY THOMAS DROUGHT

In Texas, we like to tell Aggie jokes. Aggie jokes are similar to and probably interchangeable with Chicago Polish jokes, Boston Irish jokes, and New York Italian jokes. The obvious difference is that Aggies are not a separate ethnic group. These two Aggies were driving a big truck down a Texas highway and they came to an underpass and the sign on the underpass said, "maximum height 14 feet 6 inches." They said, "Well we better get out and measure this thing." They got out—14 feet 8 inches. They then said, "What do we do?" They said, "Well, there's not a cop within a mile of here, let's go for it." The Texas banks went for it and I am here to tell you what happened when the lid flew off and the cops came.

Actually, it was a bit of an anti-climax. Texas has fourteen dioceses and one archdiocese. Many of the dioceses had over $100,000 on deposit, aggregating the parish accounts. A few of the smaller dioceses did not reach that level yet, in all there was a great deal of exposure. All our major banks failed with perhaps one exception but there was not one loss in the whole group. The problem was avoided when the FDIC arranged mergers, takeovers, and buy-outs, so that the issue was never presented. There was never a confrontation with the FDIC in light of these dioceses, but there was considerable exposure.

The Archdiocese has well over one hundred parishes, fifty missions, and a number of agencies. The aggregate funds from all of those are vastly in excess of $100,000. Of course, there is a right of offset in Texas, as presumably there is in most states, that would exceed the $100,000 maximum, but this would only apply if the loan happened to be in the same bank. There is no way to guarantee, perhaps without putting on the face of the note, that it is subject to the right of offset. This would then make it nonnegotiable by the bank and the bank probably would not accept that. The response by the diocese to the recognized risk now is primarily to adopt centralized cash management. Only a very few of the dioceses have done that as there is considerable resistance to it, apparently on the part of the pastors. Also, at the present time, it appears that the crisis is over, and there is not much incentive to proceed with what might be a difficult situation. The system that they use in Cincinnati—the actual cash management by the bank and the daily "sweep"—is not unlike the systems that had been adopted by the Texas dioceses.

Texas has not, however, adopted the principal that the funds are owned by the parishes. Texas attorneys, certainly in the San Antonio Archdiocese, still take the position that all of the property belongs to the bishop. This is because of two Texas cases that were handed down around the turn of the century. Attorneys in Texas rely on those cases in opinion letters to banks for a loan, when the bishop needs to execute collateral agreements, or when the bishop needs to execute a deed to a piece of property that happens to be in the name of a parish because that is the way it was devised. Texas attorneys rely on the cases to show that the bishop is the owner of the property in the diocese and it would be very inconvenient to suddenly take the opposite position with respect to the FDIC. The FDIC would succeed in saying that all of the cash aggregated from the parishes was the property of the bishop in a Texas diocese.

Until very recently, Texas did not have any out-of-state banks. Texas did not even have in-state branch banking. The bank where are applied for a loan processed the application. It was probably processed by someone the applicant knew, maybe someone he had known for years. It was all handled on a local basis. Today, the smallest matters may be handled locally, but anything of consequence is sent for action to the headquarters banks of the out-of-state institutions that now control the major statewide banks. Texans control none anymore. They are controlled by banks in Ohio, North Carolina, New York. It brings to mind a story my grandmother would tell me when I was a little boy about when the carpetbaggers came the first time.