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Diocesan Asset Management Strategies: The Civil Law Perspective

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DIOCESAN ASSET MANAGEMENT STRATEGIES: THE CIVIL LAW PERSPECTIVE

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The assessment of risk and return reminds me of a story told by the late Cardinal O'Fiach, Primate of Ireland. The story was about an old fisherman from the Arran Islands who came into Galway to go to confession. The fisherman said to the priest, "Bless me father for I have sinned. It has been three years since my last confession." The priest responded, "My good man, you can't wait three years to go to confession. You have an obligation to make your Easter duty once a year." The fisherman replied, "Father, I'm out there in the Arran Islands and I came in here to Galway to find a priest. I've got to get into my little boat and I've got to row all the way across the water and the winds blow and it's awful." The priest, in turn, said, "But now there's an airplane that comes in twice a week. A little airplane that comes in and lands in Galway. You can get on that airplane and come in here and go to confession." With that, the fisherman replied, "Father, I can't use that airplane to come in here to go to confession. For venial sins it's too expensive and for mortal sins it's too dangerous!"

Just like the old fisherman, business corporations constantly reconcile risk and expense. Indeed, business corporations regularly question whether they should incorporate some portion of their enterprise into a separate entity to insulate the remaining

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portions from risk.[1] While a structure which utilizes multiple corporate entities is more expensive, at least in the sense that there are administrative costs involved in maintaining separate entities, multiple corporate entities are a viable way of providing resiliency in case major losses arise in one discreet portion of a multi-faceted enterprise.

Traditionally, church organizations have not had a similar need to reconcile risk and expense. For that reason, they have felt free to lump all assets and activities of the diocese into one or just a few corporate entities. Today, however, there are several common intra-diocesan arrangements which may be adversely impacted by a large uninsured judgment against the single diocesan entity, and the impact is not simply financial. Disruption of intra-diocesan arrangements may potentially sour the attitude of those parishes whose money may seem to be at risk—the contributions from parishioners that they expect to be devoted to their own parish. Disruption may also harm clergy morale due to concerns over provisions for their retirement and health benefits. Disruption may even draw the attention of the attorney general where funds of one charitable entity are compromised by the financial difficulties of a separate entity which was holding funds for the benefit of the first entity.

To avoid disruption by large uninsured judgments, religious organizations need, at an early point in time, to focus on the resiliency provided by multiple corporate structures. If risks from one part of the overall activity of the Church arise, then the other parts of the Church can be relatively well-insulated from adverse impact. Thus, the proper focus is not on avoiding liability generally; rather, the objective should be to limit the adverse impacts of liability in the short and long runs.

Typically, a civil dispute between two parties involves a long, drawn out series of legal battles; however, ultimately, the liabilities are going to be resolved. Usually the matter is settled. Nevertheless, what impact will these legal battles have on an organization before the matter is finally resolved? For example, is there a risk that bank accounts will be attached at the commencement of a suit resulting in significant disruptions of the diocese's activities? Similarly, what impact will this risk have on

[1] *See* Adolph A. Berle, Jr., *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 343 (1947) (noting that single, large scale businesses are conducted through constellation of corporations controlled by single holding company).

the diocese's ability to finance elderly housing projects or any other church projects requiring outside financing?

Major projects may be adversely impacted by a significant contingent liability. For instance, if a contingent liability mandates that a financial statement footnote be written in severe terms, there may be a significant impact for the whole organization, particularly where the contingent liability could exceed the fair valuation of the corporation's assets. At that point, it is difficult to modify the corporate structure because of the possibility that the corporation may later be held to have been insolvent, with the result that the transfer of an asset into a separate corporation will be subject to attack as a fraudulent conveyance.[2] There are a few concepts that a religious organization may want to consider to address these issues in advance.

TRUSTS IN THE BANKRUPTCY CONTEXT

If an asset in possession of the debtor is not property of a debtor, and is held only for the benefit of another person, arguably a transfer of this asset does not represent a transfer of property of the debtor.[3] Why do I say arguably? Because even though the corporation sole may regard itself as holding assets in trust for another entity, for example, cash in either a loan fund or an investment type fund, the actual legal relationship between the corporation sole and the other entity may be that of debtor and creditor.[4] Although there may be a perception of a trust relationship, in the absence of actual documentation of such a trust relationship, it will be difficult to establish that the asset was held under a real or constructive trust or similar arrangement.[5]

A recent example of a court refusing to recognize assets as held in an actual trust in the business context is *In re Amdura*

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[2] *See* UNIFORM FRAUDULENT TRANSFER ACT §§ 4-8 (1986); 11 U.S.C. § 548 (1995).

[3] *See* 2 DANIEL R. COWANS, BANKRUPTCY LAW AND PRACTICE 349 (6th ed., West 1994) (citing *In re* Bybee, 945 F.2d 309 (9th Cir. 1991) (observing that property in which debtor only had bare legal title but no other interest cannot be recovered for benefit of bankruptcy estate)).

[4] *See* DAN B. DOBBS, LAW OF REMEDIES 599-601 (abr. ed., West 1993).

[5] There is a strong presumption that funds in the possession of a debtor are, in fact, the legal property of the debtor. "[T]he burden rests on the claimant to establish the original trust relationship." 4 COLLIER ON BANKRUPTCY 541-75 (15th ed., 1995).

Corporation.[6] In *Amdura*, a parent corporation and its subsidiary pooled all of their liquid assets into what is called a concentration account, which was held in the parent's name.[7] After both the parent and subsidiary went bankrupt, the subsidiary's trustee sought to recover the subsidiary's share of the concentration account.[8] The court held that the trustee did not meet its burden of proving by clear and convincing evidence that some of the funds were the property of the subsidiary.[9] Particular emphasis was given to the fact that the parent corporation possessed "legal cognizable indicia of ownership."[10] Consequently, the subsidiary's rights were those of an unsecured creditor and it had no rights in the funds themselves.[11]

Thus, without careful documentation of trust arrangements between affiliated corporations, it may be difficult to establish the existence of such a trust relationship.[12] This problem arises usually after an account has been attached or after the parent corporation has gone into bankruptcy. Before any such attack is made on that account, it is wise to document formally the rights of the parties. One can argue that no transfer occurred at the time of documentation. If, however, a transfer of assets to an affiliate is made before a corporate entity files a bankruptcy case, a trustee may still seek to recover the distribution as a preference.[13] Some courts have held that if this property was held in a constructive trust, even an informal trust relationship, the "transfer" is not a transfer of property by a debtor.[14] Other

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[6] 167 B.R. 640 (D. Colo. 1994), *aff'd*, 75 F.3d 1447 (10th Cir. 1996).

[7] *Id.* at 643.

[8] *Id.*

[9] *Id.* at 644.

[10] *Id.*

[11] *Id.*

[12] *See* 11 U.S.C. § 542 (1995). Section 542 states that the party attempting to prove that funds, now attached are, in fact, not the property of the debtor must do so by clear and convincing evidence. *Id.* *See* Evans v. Robbins, 897 F.2d 966, 969 (8th Cir. 1990) (recognizing "presumption of continued possession," which creates presumption that debtor who holds back assets from his trustee continues to hold them illegally (quoting Marin v. Ellis, 33 U.S. 56, 63-64 (1948))).

[13] *See* 2 COWANS, *supra* note 3, at 389 (stating that right of recovering preference from entity which received preferential transfer stems from Section 550(a)(1) of Bankruptcy Code).

[14] *See* 4 COLLIER, *supra* note 5, at 541-74 (citing American Serve Co. v. Henderson, 120 F.2d 525 (4th Cir. 1941)); First Presbyterian Church v. Rabbitt, 118 F.2d 732 (9th Cir. 1940) (stating that estate will hold property in a trust, which is valid under terms of Code, subject to outstanding interest of beneficiaries).

courts have held that preferential transfers cannot be justified on the basis of a constructive trust theory.[15]

Nevertheless, it is best that trust relationships be recognized and formalized. One which should define the process as a formalization of pre-existing, informal relationships, rather than the creation of new entities and/or transfers of property away from a threatened entity. The objective is to insulate the maximum amount of property held for specific purposes from the claims of potential creditors. Therefore, if one entity has obligations to many other separate entities, it is imperative that its relationships, whether as custodian, trustee, or otherwise, be formalized so that, when and if such relationships are scrutinized in the context of its financial insolvency, there is very clear contractual or other documentation that proves how these relationships arose and exist.

Even if these arrangements between entities are properly categorized as debtor-creditor relationships, practitioners should address the issue before problems arise. Restructuring a debtor-creditor relationship usually does not give rise to a fraudulent conveyance, because the pre-existing debt is fair consideration for any transfer of property. However, such a restructuring can give rise to a preferential transfer under Section 547 of the Bankruptcy Code. But preferential transfers are recoverable only if made within ninety days prior to bankruptcy (or one year in the case of a transfer to an insider). Generally, if one year passes after a relationship has been formalized, the transactions involved in the formalization are no longer vulnerable to attack as preferences.

Also keep in mind that, under Section 303(a) of the Bankruptcy Code, a charitable corporation cannot be the subject of an involuntary bankruptcy petition. Because such a corporation will become a debtor in a federal bankruptcy case only if it decides to do so, it controls the timing of any filing, and could delay

[15] *But cf.* DOBBS, *supra* note 4, at 393. In truth, courts can only reject the constructive trust theory by stating that the facts do not give rise to a constructive trust at all. For if a trust is recognized, a court would not be free to allow the assets held in trust to be distributed to other creditors. *Id.* In fact, "[t]he constructive trust allows the plaintiff to recover an asset even if he has no legal title to it, so long as that asset is regarded as 'belonging' to him in an equitable sense." *Id.* *See* 4 COLLIER, *supra* note 5, at 541-76 ("[I]f it cannot first be shown that a trust has been created, there is no necessity for inquiry as to whether the property can be identified or traced.").

filing to permit the federal preference period under Section 547 to run out. This would relegate any attack on the basis of preference theory to state law, if any.

While preference issues generally arise in the federal bankruptcy context, some states have also adopted preference statutes.[16] State preference laws, however, exist in only about half of the states.[17] For example, in Massachusetts, there is no state statute providing that a trustee can recover a payment made in preference to a particular creditor.[18]

In those states that have adopted the Uniform Fraudulent Transfer Act,[19] however, there is a provision which provides that if a preferential payment is made in respect of an antecedent debt to an insider within one year before the time that the action is brought,[20] and the insider had reasonable cause to believe that the entity was insolvent when the transfer was made,[21] then the transfer may be violable.[22] There are several issues that are buried in that sequence of principles.

Significantly, what is an insider and, more specifically, what is an insider of a charitable corporation? The definition in Section 1 of the Uniform Fraudulent Transfer Act mentions a "person in control of the debtor,"[23] which means, at the very least, that someone who clearly controls an entity is an insider.[24] If you have a corporation sole and the bishop is the sole member of the corporation sole, and the bishop is also, for example, a member of the board of directors of another entity, is the corporation sole an insider of the other entity? Is the other entity an

[16] *See* David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471, 556-57 (1994) (showing national survey which shows twenty-two states having adopted general preference statutes). Commentators have suggested that the purpose of state preference laws is to reach preferences that might otherwise escape federal scrutiny. *See* David G. Carlson, *Security Interests in the Crucible of Voidable Preference Law*, 1995 U. ILL. L. REV. 211, 358.

[17] *See* Skeel, *supra* note 16, at 556-57.

[18] *See id.* at 557.

[19] UNIFORM FRAUDULENT TRANSFER ACT (1986).

[20] *Id.* § 9(c).

[21] *Id.* § 5(f).

[22] *Id.* § 7(a).

[23] *Id.* § 1(7)(ii)(C).

[24] *See* Matter of Fabricators, Inc., 926 F.2d 1458, 1465 (5th Cir. 1991) (stating that "the Bankruptcy Code and case law precedent stand for the proposition that control is a sufficient basis for insider status."); *accord* Stoumbos v. Kilimnik, 988 F.2d 949, 959 (9th Cir.), *cert. denied*, 510 U.S. 867 (1993).

insider of the corporation sole? This is a factual question that could be decided either way.[25]

Nevertheless, the possibility that there will be a future attack on a transfer based on the preference analysis or even on the Uniform Fraudulent Transfer Act is not necessarily a reason to avoid making changes in the documentation to reflect more accurately the relationship between the corporation sole and the other entity.

LOAN FUNDS

In most situations, a diocesan loan fund is perceived as a kind of separate entity. Indeed, most parishes believe that, if they have money on deposit in such a fund, those funds are really their parish's money, like a bank account, and they want to be satisfied that it is available to their parish.[26] Similar funds include clergy benefit funds, educational activities, endowment and fundraising activities, cemetery management, and separately, hospitals and nursing homes. If the corporation sole is the "bank," then the funds are funds of the corporation sole, not the parish, and the parish is just another creditor of the corporation sole. The best way to protect such funds is to incorporate separately the diocesan loan fund.

The first step in evaluating the benefits a multiple corporation structure can have on the diocesan loan fund is to survey the state's non-profit corporation law, in particular, the Revised Model Nonprofit Corporations Act.[27] However, since non-profit statutes vary from state to state,[28] the survey should assess the

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[25] "Insider" is defined under federal law in the Bankruptcy Code at 11 U.S.C. § 101(31) (Supp. V 1993). Congress amended Sections 547 and 550 of the Bankruptcy Code to specifically limit voidable preferences to situations where the insider himself stands to benefit in response to Levit v. Ingersoll Rand Financial Corp., 874 F.2d 1186 (7th Cir. 1989) (penalizing creditor who dealt with insider). *See generally* David I. Adelman, Comment, *Who is an "Insider" After the 1984 Amendments to Section 547(b)(4)(B)?*, 5 BANKR. DEV. J. 195 (1987).

[26] *See* David F. Menz, et al., *FDIC/Cash Management*, 35 CATH. LAW. 243, 256 (1994).

[27] REVISED MODEL NONPROFIT CORP. ACT (1988). The RMNCA was adopted by the Subcommittee on the Model Nonprofit Corporation Law of the Business Law Section, American Bar Association, in the summer of 1987. The revised act is based on the Model Nonprofit Corporations Act of 1954 and thirty-seven states have enacted the revised version. *See* Brenda Boykin, *The Nonprofit Corporation in North Carolina; Recognizing a Right to Member Derivative Suits*, 63 N.C. L. REV. 999, 1001 n.14 (1985).

[28] *See, e.g.*, CAL. CORP. CODE §§ 5002-12000 (West Supp. 1995); N.Y. NOT-FOR-

variations in the forms of structures that may be established. For example, under the Act, the board of directors can be established as the sole governing entity of a nonprofit corporation.[29] Similarly, under the Act, a corporation can opt out of the provisions that provide rights or powers to members,[30] limit the members' rights to inspect and copy records,[31] and eliminate the right to vote on article amendments or the right to special meetings.[32] The board can elect successors to itself and certain parties can be *ex officio* members of the board.[33] Even where the bishop appoints members or the bishop himself sits on the board, a separate non-profit corporation or entity should be considered distinct from the corporation sole.[34] By structuring the diocesan loan fund as such a distinct entity, the risk to the funds of the separate parishes can be reduced.

Indeed, separate incorporation of parishes is a further step to protect such assets, and the assets of the diocesan entity. One particular diocese has long had separate corporations for its parishes, established in an act of the Massachusetts state legislature dating from the 1870s, which predated the corporation sole statute.[35] The statute had a provision that the members of the board were to be the bishop, the vicar general, the pastor and several lay members.[36] A similar structure has been used to establish other corporations for particular purposes, for example, a separate corporation for the inter-parish loan fund.

Plate v. St. Mary Help of Christians Church[37] illustrates the benefits of multiple corporate structures. *Plate* involved a tragic situation where a toddler was playing in a cemetery and a stone fell over and crushed the toddler.[38] A wrongful death action was brought by the parents of the toddler against the parish, the

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PROFIT CORP. LAW §§ 100-1411 (McKinney 1995).

[29] REVISED MODEL NONPROFIT CORP. ACT § 8.

[30] *Id.* at § 6.

[31] *Id.* at § 16.

[32] *Id.* at § 2.

[33] *Id.* at § 8.

[34] *See* Catherine M. Knight, Comment, *Must God Regulate Religious Corporations? A Proposal for Reform of the Religious Corporation Provisions of the Revised Model Nonprofit Corporation Act*, 42 EMORY L.J. 721, 724 (1993) (describing corporation sole as placing all corporate powers and duties in hands of single person, such as the bishop).

[35] MASS. GEN. LAWS ANN. ch. 67 § 44 (West 1988) (first enacted in 1879).

[36] *Id.*

[37] 520 N.W.2d 17 (Minn. App. 1994).

[38] *Id.* at 18.

cemetery board of the parish, and the diocese.[39] The court refused to find that an agency relationship existed between the parish and the diocese and upheld the trial court's directed verdict in favor of the diocese.[40] Under the structure in Minnesota, parishes are separately incorporated, but the bishop, the vicar general, the parish priest, and two lay members are the members of the boards.[41] Even though the bishop, the vicar general, and the parish priest were on the governing board, evidence showed that the bishop and the vicar generally never attended meetings and left the parish priest to run the parish himself.[42] Neither the existence of a voluntary insurance fund nor a voluntary loan fund persuaded the court to conclude that the parish was in fact an agent of the diocese.[43] Based, in part, on the structure of the organization, the court held that the diocese should not be held liable for the torts of the parish.[44]

Although it may be preferable to provide separate corporate structures where, for example, the bishop does not appoint the board or the bishop is not a board member, the diocese may not be comfortable with such a structure. As the *Plate* case illustrates, the structure can retain a degree of ultimate control for the diocesan authority, and still provide significant insulation from liability.

One crucial question is whether the proposed entity will qualify as a Section 509(a)(3) supporting organization under the Internal Revenue Code.[45] Two of the tests for 509(a)(3)(B) supporting organization status depend upon direct or indirect supervision and control by the supported organization of the supporting organization.[46] The third, which may be described as the "operated in connection with" test[47] is much more complex and involves many more factors and considerations.

Other elements to consider include what canon law requirements may exist in these situations?[48] What are the people in-

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[39] *Id.*

[40] *Plate*, 520 N.W.2d at 20.

[41] MINN. STAT. § 315.16 (1996) (Diocesan corporations).

[42] *Id.*

[43] *Id.*

[44] *Id.* at 21.

[45] 26 U.S.C. § 509(a)(3).

[46] *Id.* § 509(a)(3)(B).

[47] *Id.*

[48] *See generally* Reverend Edward L. Buelt & Charles Goldberg, *Canon Law & Civil Law Interface: Diocesan Corporations*, 36 CATH. LAW. 69 (1995); J. Michael

volved comfortable with? What does the bishop feel comfortable doing? How great is the bishop's need to maintain some control? To what extent does history dictate very active participation by the bishop?

PENSION FUNDS

Another inter-diocesan arrangement that may be adversely impacted by insolvency is a pension fund. Issues to consider include what is the relationship of the pension plan to an insolvent business organization, or alternatively and completely distinct, what is the relationship of the pension fund to the individual beneficiary's creditors? Can the creditors reach the individual's rights under a pension plan?

Generally, in a business context, creditors of a corporation are not able to reach assets in an employee pension plan which is established using a separate trust or some other separate vehicle.[49] If a corporation, however, simply establishes a separate fund earmarked for the purpose of paying pensions in the long term, that fund is at risk in a bankruptcy of the corporation.[50]

From a creditors' rights point of view, the crucial issue is whether the fund is a separate entity. This depends on whether the plan is a qualified plan or an unqualified plan and whether there is some form of current taxation to the beneficiaries, all of which are complex issues.[51]

How to protect the pension fund? The best method is the use of a qualified plan. But if the bishop desires to retain more control, or is unwilling to meet I.R.S. requirements for qualification (such as relatively short term vesting), other structures may be of some help, although they are not "bullet-proof." In one situation, a diocesan structure included a corporation which had a long history as a corporation separate from the corporation sole. In fact, the corporation had owned and operated the diocesan seminary, but was inactive at the point in time when the pension issue came to be addressed. To provide some protection

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Fitzgerald, *The Official Catholic Directory: Civil and Canon Law Requirements*, 30 CATH. LAW. 107 (1986).

[49] *See generally* Jeffrey Raley, Note, *The ERISA Exclusion: Shielding Assets From Creditors in the Bankruptcy Estate*, 28 TULSA L.J. 893 (1993).

[50] *Cf. In re* Moore, 907 F.2d 1476, 1478 (4th Cir. 1990) (emphasizing issue of control); *In re* Daniel, 771 F.2d 1352, 1357 (9th Cir. 1985) (same).

[51] *See* Matter of Sims, 994 F.2d 210 (5th Cir. 1993), *cert. denied*, 510 U.S. 1049 (1994); *In re* Augie/Restivo Baking Co., 860 F.2d 515 (2d Cir. 1988).

for clergy benefits, while at the same time maintaining what the bishop believed was necessary in terms of control over the vesting of benefits and several other complex issues, this separate pre-existing corporation was used as the vehicle to hold the clergy pension fund which had previously been held by the corporation sole. The separate corporation assumed the pension liability and the assets which had been held separately, but in its own name, by the corporation sole to provide the benefits were transferred to the separate corporation in consideration of that assumption of liability. This is by no means the optimum solution and may be the weakest of the various solutions that may be considered.

INVESTMENT PORTFOLIOS

The subject of vehicles used to hold investment assets is a concept that many religious organizations have yet to consider; however, there are some S.E.C. private letter rulings relating to Catholic organizations in various parts of the United States which describe such structures and confirm the availability of exemption from S.E.C. regulation for them. From the creditors' rights point of view, there are some real benefits in having a captive mutual fund as the vehicle that will handle the common investments of the separate entities and organizations within a diocese. The captive mutual funds provide a definition for the separate assets of the separate entities. If accounts are commingled under the control of a corporation sole, what belongs to separate entities as opposed to the corporation sole is very difficult to define. Investment vehicles are a means of formalizing a relationship and defining the separate interests of the separate entities.[52]

The second impact from a creditors' rights point of view is that it takes the risk of prejudgment remedy—the risk of sequestration of those assets as a pressure tactic—off the table. Mutual funds, because they have stockholders' equity and virtually no other liabilities, are essentially passive vehicles.[53] They do

[52] *See* RICHARD C. DORF, THE NEW MUTUAL FUND INVESTMENT ADVISOR 32-33 (1986); *see also* KURT BROUWER, MUTUAL FUNDS: HOW TO INVEST WITH THE PROS 22-23 (1988).

[53] From an individual investor's standpoint, a mutual fund represents a passive investment; however, many types of mutual fund portfolios are actively managed. For a discussion on the different types of mutual funds and their management ten-

not engage in personal counseling, education, driving cars, etc. They do not engage in any activity involving human beings at all; they are simply investment vehicles. These entities have much less chance of incurring liability because they are passive,[54] and thus, carry less risk that creditors will be able to obtain a prejudgment remedy which impacts their assets.

The situation is quite different if, for example, the corporation sole is simply holding funds for other entities, and investing them in a common pool. A prejudgment remedy against the corporation sole could prevent strategic changes in the investments in a pool held in its name and could make it difficult to buy and sell assets when it's appropriate to do so to protect the overall value of the pool. An investment pool becomes a very rigid structure once it has been subject to an attachment or an injunction or anything else that prevents buying and selling of those assets.[55] At best, one may need to get court permission to buy and sell the assets.

Having a separate passive investment vehicle, in effect a captive mutual fund, means that if one of the "stockholders" becomes subject to financial difficulty, the shareholder's creditor can only reach the shareholder's shares or interests in the separate mutual fund.[56] When the captive mutual fund is established, its by-laws and other rules can limit the circumstances under which its shares can be transferred or redeemed. Generally, in the context of captive fund for dioceses, it is not a closed-end fund where the stockholder can transfer the shares to a third party, but is the kind of private fund in which investors are only permitted to redeem their interests at certain times. The by-laws may provide that a participant may withdraw funds, but only after giving sufficient notice to enable the fund managers to make the fund as liquid as necessary without selling assets in a bad market or taking other such steps that would adversely impact the value of the overall fund.

Such a vehicle greatly reduces the risks that the assets of one entity will be held liable to satisfy the creditors of another

dencies, see JEROME B. COHEN ET AL., INVESTMENT ANALYSIS AND PORTFOLIO MANAGEMENT 624-29 (5th ed., 1987).

[54] *See* COHEN ET AL., *supra* note 53, at 586-89 (discussing advantages and disadvantages of active and passive portfolio management).

[55] Attachments and injunctive orders to freeze assets are usually given in extremely limited circumstances. 2 DAN B. DOBBS, LAW OF REMEDIES § 6.1 (1993).

[56] *See* HOWARD L. OLECK, DEBTOR-CREDITOR LAW 31 (1986).

entity. Although these structures seem complex, they are commonly utilized and are not particularly difficult to administer.

RESTRICTED GIFTS

The last subject of discussion is the law of restricted gifts in the context of insolvent charitable organizations. In *The Bible Speaks*,[57] there were three or four separate bank accounts which were the proceeds of gifts that had been given for special purposes by various persons. Under the law of certain states, assets derived from gifts given for a restrictive purpose are not generally available to satisfy the claims of all creditors of the charitable entity. If a gift is given in an unrestricted way—money given to the collection plate on Sunday morning—then the gift is generally available to satisfy creditors. In the first instance, a clearly defined separate fund may be protected from claims of creditors.

Despite all of the best efforts to establish and operate legally separate entities, the existence of a measure of common control in the bishop leaves open the possibility that all of the distinct entities will be treated as "one ball of wax" by virtue of theories, such as piercing the corporate veil and other doctrines, such as enterprise liability. The doctrine of restricted gifts may be used as a back-up to the idea of separate incorporation. In addition to establishing separate corporate entities, one can define the purposes of those entities clearly, probably *more* specifically than one would normally want to. Most modern corporation statutes, both business and nonprofit, permit the statement of purpose to be quite general.[58] There is, however, an asset protection benefit in defining the statement of purpose narrowly. In soliciting gifts, for example, those separate corporations with a fairly specific understanding of how the gifts will be used may want to limit their organizational statement of purpose. A creditor of the corporation sole may try to tap into an endowment fund in a separate corporation. But if there is a clear record that the second corporation is not only a separate entity, but that the specific purpose of the second entity was the basis on which the do-

[57] The Bible Speaks v. Dovydenas, 81 B.R. 750 (D. Mass 1988), *modified*, 869 F.2d 628 (1st Cir. 1989), *and cert. denied*, 493 U.S. 816 (1989).

[58] *See, e.g.*, DEL. GEN. CORP. LAW § 102(3) (1995) ("It shall be sufficient to state ... that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized ....").

nors made contributions, then the doctrine of restricted gifts may serve to insulate those assets from the claims of general creditors of the "enterprise."

Archbishop Sheehan of the Archdiocese of Santa Fe mentioned that, when he is raising money, he tells the people that this money is going to be used only for the present purposes of the Church, not for the purpose of solving old problems. Whether it is the Cardinal's appeal or the Bishop's appeal or any other appeal, an entity should be separately incorporated and the purposes for which those contributions are sought should be clearly defined. It is important that the solicitation materials be written in a way that supports the proposition that these funds were given for separate and distinct purposes, and are therefore not available generally for the creditors of the diocese.

A FINAL THOUGHT ABOUT DIOCESAN STATIONARY

Many diocesan letters and contracts contain the words "Diocese of ______." This exposes the diocese to risk because when you say you are something, the law most likely will treat you as that thing. If you say it is the "Diocese of ______," the court is going to say, "well it is right on the stationery—it's the Diocese of ______." Certainly, in bankruptcy law, under the theory of consolidation of enterprises, the use of a common stationery or a common description of the entity, even though they may be a parent and subsidiary, brother and sister, and so forth, may be one of the principal factual elements used to justify consolidation.[59] It is also one of the principal factual elements used to justify piercing the corporate veil[60] or for establishing enterprise liability.[61]

Enterprise liability, particularly from the tort liability side, is a much broader and more difficult doctrine to contain than piercing the corporate veil, which is typically done in the context of business corporations, or consolidation in the context of a bankruptcy case. But all depend upon creating an impression

[59] *See* BENJAMIN WEINTRAUB & ALLEN N. RESNICK, BANKRUPTCY LAW MANUAL §§ 1.04, 1.08 (1994) (discussing treatment of subsidiary corporations in bankruptcy).

[60] *See* STEPHEN B. PRESSER, PIERCING THE CORPORATE VEIL § 1.05 (1991) (discussing theories of piercing parent and subsidiary corporations).

[61] *See* VIRGINIA E. NOLAN & EDMUND URSIN, UNDERSTANDING ENTERPRISE LIABILITY: RETHINKING TORT REFORM FOR THE TWENTY-FIRST CENTURY 147-54 (1995) (analyzing enterprise liability in contemporary tort theory).

that multiple entities function as a single enterprise. Each lawyer for the various dioceses can help the client limit their exposure in this area by thinking about what the stationery should say. When you're dealing with religious subjects, the use of stationery that states the "Diocese of _____" may be entirely appropriate. When you're negotiating a legal contract, such use of the term "Diocese of _____" in that context represents an additional risk.