HONORABLE PATRICIA C. WILLIAMS

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF WASHINGTON AT SPOKANE

In re THE CATHOLIC BISHOP OF SPOKANE a/k/a THE CATHOLIC DIOCESE OF SPOKANE, a Washington corporation sole, Debtor.	No. 04-08822-PCW-11 FUTURE CLAIMS REPRESENTATIVE'S OBJECTION TO DEBTOR'S MOTION FOR ORDER SETTING CLAIMS BAR DATE; APPROVING CLAIMS FORM AND APPROVING MANNER AND FORM OF NOTICE

INTRODUCTION

The Future Claims Representative ("FCR") objects to the Debtor's Motion for Order Fixing New Time for Filing Proofs of Claim; Approving Claim Forms; and Approving Manner of Form of Notice (the "Motion"). Specifically, the FCR objects to the portion of the Motion that asks for a bar date on certain categories of tort claims and to the Proof of Claim form and process proposed in the Motion.

ARGUMENT

The most cogent analysis of the issues raised by the Debtor and Insurers is contained in Judge Elizabeth Perris's Memorandum re Appointment of Future Claims

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

Representative in the Archbishop of Portland bankruptcy. A reading of that memorandum addresses the most salient issues, and likely is more helpful than the collective briefing of all parties. A copy of the memorandum is attached hereto as Exhibit A. That being said, the FCR respectfully submits the following arguments.

A. The Debtor's Proposal

The Motion places the possible Tort Claimants into six categories and seeks to create a bar date of 90 days following the entry of an order for five of the six. The FCR objects to setting such a bar date for claims falling under category v ("Category v claims"), which are defined in the Motion as follows: "claims of persons who know that they are victims of sexual abuse by an alleged agent of the Diocese while the claimant was a minor yet, prior to any claims bar date established in this matter, fail to make the connection between the abuse and injuries arising therefrom."

The FCR also objects to setting a bar date for certain claims covered under category iii ("Category iii claims") in the Motion. Such claims include "claims of persons who have contacted the Diocese regarding potential abuse claims but who have not sought counseling or other services offered by the Diocese." The FCR objects to setting a bar date to those claimants covered by this category who have not yet made a causal connection between the alleged abuse and any resulting injuries. The claims described above fall squarely within the aegis of the FCR as they are "Causal Link" claimants.

Barring the claims of Categories v and iii is contrary to the due process and the policy goal of protecting victims of childhood sexual abuse required by Washington state law.

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

B. Rights of Causal Link Claimants

1. Due Process

The Debtors and their Insurers are seeking to require Category v and certain Category iii claimants to come forward and file proofs of claim, or to give up their right to claim damages before they are even aware that they have been damaged, in contravention of their due process rights.

These claimants are entitled to more statutory protection than almost any other class of tort claimants, yet the Debtor and its Insurers seek to cut off their claims before the claimants know they exist. As explained in analogous bankruptcy cases involving asbestos claims, the requirements of section 524(g) of the Bankruptcy Code are specifically in place to protect the due process rights of future claimants. In re Combustion Engineering, Inc., 391 F.3d 190, 234, n.45 (3rd Cir.2005). One of the 524(g) requirements is the appointment of a future claims representative. Further, section 524(g) makes it possible for future claimants to obtain substantially similar recoveries as current claimants in a manner consistent with due process. Id at 234.

Future claimants in mass tort cases must be adequately represented throughout the judicial process. Id; see also, Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 625-28; 117 S. Ct. 2231 (1997). To cut off their claims prematurely would not only

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

undermine the entire purpose of the FCR's appointment, it would directly violate their due process rights.

2. State Law Protection

Due to the nature of childhood sexual abuse, victims require special consideration and protection. Psychologists have long been aware that, as Dr. Jon Conte states, "adverse childhood events, such as... childhood sexual abuse, do not become issues which some children deal with until much later in life." Dr. Conte was retained in connection with the Archbishop of Portland bankruptcy, and the declaration he filed in connection with that case has been filed herewith as Exhibit B. The FCR respectfully requests this Court to take Judicial Notice of the Declaration of Dr. Conte. That victims of childhood sexual abuse make take years to connect their abuse to their injuries has been repeatedly acknowledged in state law and in courts.

a. Washington State Law

The Washington State Legislature, in crafting the statute of limitations on actions based on childhood sexual abuse, took notice of the unique issues presented in such cases. As the legislature stated in its findings of intent for the statute of limitations:

> (3) The victim of childhood sexual abuse may repress the memory of the abuse or be unable to connect the abuse to any injury until after the statute of limitations has run.
> (4) The victim of childhood sexual abuse may be unable to understand or make the connection between childhood sexual abuse and emotional harm until many years after the abuse occurs.

Laws of 1991, c 212.

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

Recognizing these singular issues in childhood sexual abuse cases, the Washington Legislature allowed actions in such cases to be brought

> (b) Within three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by said act; or
> (c) Within three years of the *time the victim discovered that the act caused the injury* for which the claim is brought.

RCW 4.16.340 (emphasis added). In other words, the three-year statute of limitations begins to run upon discovery of the injury or upon discovery of the causal link between the abuse and the injury. In addition, in instances of repetitive abuse, the statute allows victims some latitude with regard the discovery date:

> (2) The victim need not establish which act in a series of continuing sexual abuse or exploitation incidents caused the injury complained of, but may compute the date of discovery *from the date of the last act* by the same perpetrator which is part of a common scheme or plan of sexual abuse or exploitation.

Id (emphasis added).

b. Portland Case

The need for special protection of victims of childhood sexual abuse was similarly recognized by Judge Perris. See Exhibit A. Judge Perris found that "when childhood sexual abuse causes an injury, the injury may not be manifest for many years." In re Roman Catholic Archbishop of Portland in Oregon, 2005 WL 148775, 3 (Bankr. D. Or. 2005). Indeed, a victim of childhood sexual abuse may be "incapable of

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

recognizing that he or she has been injured or of identifying the causal connection between the abuse and the injury." Id at 4.

The Court also took notice that Oregon's statute of limitations, like Washington's, begins to run at the point that the victim discovers the causal connection between the abuse and his or her injury. Id, citing ORS 12.117(1). Judge Perris found that the Oregon statute of limitations would be "pertinent to all the possible Tortious Misconduct" alleged in the case. Id.

C. The Nature of Sexual Abuse and Causal Link Claims

Causal linkage issues are unique to sex abuse cases. There are few similar linkage issues in other mass tort cases. For instance, asbestosis is easy to link with asbestos exposure. In contrast, because the injuries flowing from sexual abuse are often psychological and affect the thought process, the connection is made even harder for the victim to perceive. The latency period between the victim's abuse and his or her connection of the abuse to any injury is frequently years, or even decades.

As Dr. Conte states:

> Understanding the connection between an event and an injury requires a level of psychological mindedness. It requires some level of insight or appreciation that behavior and other psychological processes are causally associated with events that may not have been thought about for years. It requires a degree of openness or willingness to forgo cognitive processes such as defenses (e.g., denial) that serve to protect the individual from acknowledging the thoughts that cause anxiety....

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

Conte Decl., p. 9.

D. The Proposed Claims Bar Date and Registration Requirement Violate the Policy of Protecting Victims of Childhood Sexual Abuse

Here, the Debtor and its Insurers are seeking to require the Categories v and iii claimants to file proofs of claim *before the statute of limitations even begins to run*, and before a claimant knows of his injury. This is manifestly unfair and harsh to such claimants. Indeed, the Debtor and its Insurers are seeking to accomplish what Judge Perris disallowed in the Archbishop of Portland case- placing a limitation on the ability of Causal Link claimants to pursue claims against the bankruptcy estate. In the Archbishop of Portland case, the diocese and its insurers sought to restrict claims of the Causal Link claimants limiting the role of the Future Claims Representative in that case to representation of only minors and those victims who have repressed their memory. The Court rejected that limitation, and the diocese and its insurers have appealed.

Judge Perris's memorandum relied upon the same cases as those relied upon by the Debtor and the Insurers here, specifically In re Jensen, 995 F.2d 925 (9th Cir. 1993) and In re Hassanally, 208 B.R. 53 (9th Cir. B.A.P. 1997), in finding that claims on behalf of the Causal Link claimants should be pursued by the FCR in the same manner as future claims were dealt with in In re Johns-Manville Corp., 36 B.R. 743 (Bankr. D. N.Y. 1984). Indeed, this case is more like tort claims related to asbestos exposure than damage from breast implants, a comparison suggested by the Insurers. The Insurers seek to place this most shameful conduct on par with an elective surgical procedure. Additionally, as Judge Perris pointed out, "a long latency period before which injury

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

becomes manifest is an important factual similarity" between childhood sexual abuse cases and asbestos cases. In re Roman Catholic Archbishop of Portland, 2005 WL 148775 at 3. Finally, many asbestos claimants know well of their exposure, sometimes having worked an entire career in a particularly dangerous environment, yet are not required to come forward and assert a claim.

While Judge Perris' ruling technically related to the scope of the FCR's role rather than the claims bar date, the issues are virtually identical. When the issue was brought before this Court when the FCR was appointed, it was deferred to the bar date hearing.

1. The FCR Should File Proofs of Claim on Behalf of Causal Link Claimants and a Trust Fund Should be Created

The FCR agrees with the approach taken by Judge Perris in the Archbishop of Portland case. There, Judge Perris acknowledged that the sexual abuse victims had claims, even if they had not made a connection. In order to protect their rights, the Judge allowed the FCR to file Proofs of Claim on behalf of those who had not made the connection between the abuse and their injuries. See In re Roman Catholic Archbishop of Portland, 2005 WL 148775 at 5. She found that

> When there is a class of claimants that is incapable of asserting a claim, either because of a long latency period between the wrongful conduct and the manifestation of damages, or because the nature of the wrongful conduct is such that it disables the claimant from being reasonably able to recognize the injury, it is appropriate for the court to appoint an FCR to protect the interest of the class.

Id.

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

This approach was followed in the seminal mass tort bankruptcy, In re Johns-Manville Corp., 36 B.R. 743. In Johns-Manville, the Court found that an FCR should be appointed to protect the claimants who "maybe unaware of their entitlement to recourse against Manville due to the latency period of many years characterizing manifestation of all asbestos related diseases." Id at 745. As the approach has been successfully used in other cases, including cases larger and more complicated than this one, the Debtor's argument that it is necessary and essential for Causal Link claimants to file a Proof of Claim is of questionable validity.

The Bankruptcy Code allows Debtors to deal with future claims by creating a trust through the plan of reorganization. Section 524(g) prevents future claimants from pursuing the Debtor except for claims against the trust fund. This is the proper mechanism for limiting and controlling future claims. Creating a trust fund and allowing the FCR to file proofs of claim on behalf of victims protects the victims' due process rights.

2. The Debtor's Proposed Treatment of the Sexual Abuse Claimants is Harsh and Unnecessary

The Debtor's alleged reason for requiring the sexual abuse claimants to file claims is to allow it to make a rational sizing of any funds to be set aside for such claimants. In reality, it appears that the Debtor is seeking to bar, and thereby eliminate, virtually all claimants who do not file a proof of claim. We are informed that of the pending litigation cases, as few as one of the plaintiffs asserts a repressed memory. Nearly, if not virtually all of the pending litigation plaintiffs fall into the Causal Link

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

category. It appears that the Debtor, by its Motion, therefore is attempting to bar all or nearly all un-filed claims.

In seeking such an outcome, the Debtor seeks to treat sexual abuse claimants in this case differently than claimants in ordinary mass tort cases. Typically, a future claims representative is appointed to represent claimants who have been exposed to something that can cause injury, but those injuries have not manifested themselves. In those cases, the future claims representative can file claims for potential claimants who did not file their own.

The Debtor's proposal recognizes that certain claimants should not be required to come forward (i.e. minors and Repressed Memory claimants). The reason for a distinction between such claimants and Causal Link claimants is unclear. One can only assume it is to eliminate the Causal Link claims.

3. Debtor's Proposed Claim Form will Discourage Victims From Filing

The Debtor's proposed Proof of Claim form will require victims to produce detailed personal information not typically included in proofs of claim. It reasons that such detailed information will allow the Debtor and its Insurers to investigate the claims. Again, the Debtor's reasoning is flawed. The Debtor wants the victims to come forward and file claims- that assumes a perfect world. These victims do not live in that perfect world.

All some persons know is they were sexually assaulted, but have no connective link to damages. The Debtor and its Insurers seemingly fail to recognize the extraordinary difficulty victims of sexual abuse face in disclosing the abuse and its

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

particulars. Indeed, their proposal in effect equates sexual abuse at the hands of a trusted spiritual advisor and authority to a car accident or other physical injury. It is not that simple.

The claimants who have suffered sexual abuse should not be expected to follow the same logical thought process as the Debtor's lawyers:

> A victim's reaction to abuse does not follow a logical, cognitively predictable pattern. The abuse causes trauma, and trauma is irrational. Resistance to disclosing abuse is grounded in the intense shame the victim feels- shame based on the feeling of being flawed, and largely responsible for the abuse... Intermingled with all of this is fear, or even terror, invoked by the abuser. The cleric is a mysteriously powerful person with an uncanny ability to manipulate the victim's feelings.

Catholic Clergy Sexual Abuse Meets the Civil Law, 31 Fordham Urb. L.J. at 613.

The Debtor and its Insurers assert their financial interests are so compelling that it justifies imposing one of two harsh alternatives on these victims: (1) Come forward within 90 days and make a record, in explicit detail of the most ungracious act(s); or (2) Lose all compensatory rights pursuant to the Claims Bar.

It is unclear at this stage of the case whether investigations proposed by the Debtor will be necessary. It is also unclear whether the Debtor would require such information now, in the event that such investigations do become necessary in the future. Certainly, Debtor and its Insurers must plan for a number of repressed memory and minor claims. The argument that causal link claims require such specificity, while repressed memory and minors remain undefined, requires a better explanation.

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

There is a high probability that the proposal of the Debtor and Insurers would result in the elimination of a number of meritorious claims, perhaps as high in value as existing claims. By way of example, assume that possible future claimants do not file claims because they do not know of the damage. Those claimants will suffer an immediate, potentially substantial loss on the bar date. Because we have no credible estimation as to the number of future claims, we should assume that there are a significant number. These claims can be dealt with on the merits through a claim filed by the FCR, as in so many other mass tort bankruptcies.

The Debtor and its Insurers express a need for accuracy in the process of determining the number and extent of claims in this case. Assume, for the sake of argument, that there are a small number of claims, e.g., 10. It is possible that there could be significantly large claims within that small number. It is not inconceivable that even out of this small number, one to four could be very large, even totaling millions of dollars.

The Debtor and the Insurers contend that un-filed claims be barred. What is different in this case from a typical mass tort claim where future claims are un-filed and undetermined? This case is no more complicated than those.

The Debtor states that the victims will be given confidentiality; however, the claimants were the victims of a terrible breach of trust, and the Debtor wants to require

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

them to trust the same institution involved in the breach. In addition, the Debtor proposes to have such claimants make that decision in 90 days, and without the benefit of knowing that they will receive compensation.

E. Objections to Insurers' Statement

The FCR objects to the Statement of Certain Insurance Carriers ("Insurers") in support of the Debtor's Motion because they have no standing and they are attempting to use the process of determining a claims bar dates as a way to restrict their liability. Finally, the FCR objects to the "Alternative Approach" suggested by the Insurers in section IV of their Statement.

1. The Insurers Have No Standing to Argue

The Insurers do not have standing to make the arguments in their Statement because their only interest in this case is to protect themselves from having to reimburse the Debtor for any damages it had to pay. The Insurers are not creditors, but occupy virtually the same status as an account debtors . The Court should afford little, if any weight to their position on these issues. Accordingly, the FCR joins the Tort Claimants in objecting to the Insurers being heard on this issue.

2. The "Alternative Approach" Suggested by the Insurers is Unacceptable

The "registration" suggested by the Insurers implicates all of the issues discussed above. Registering is no less painful than filing a proof of claim, because the form of registration proposed by the Insurers requires the same level of detailed information as the Proof of Claim form. The only difference between filing a proof of claim and registering would be that the claimant could opt not to seek damages at the time of

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104

registration. Yet the harsh result for the claimant, and corresponding benefit to the Insurers remains the same—failure to register by someone who is incapable of filing a claim forever bars the claim from being pursued. The court should reject this graceless proposition.

F. A Bar Date is Not Required

Contrary to the Debtor's statement that a claims bar date is mandated, the Court is not required to set such a date. While in most cases a claims bar date is set, it is "by no means an absolute." In re Eagle-Picher Industries, Inc., 137 B.R. 679, 680-81(Bankr. D. Oh. 1992). This is because the Court may, at its discretion, extend the bar date for cause shown. Id, citing Reid v. White Motor Corp., 886 F.2d 1462, 1472 (6th Cir. 1989).

CONCLUSION

Based upon the foregoing, the FCR respectfully requests that this Court deny the Debtor's Motion to set a claims bar date for Categories v and iii claimants, and to reject the form of Proof of Claim proposed by the Debtor.

DATED this 15th day of June, 2005.

BUSH STROUT & KORNFELD

By _____
Gayle E. Bush, WSBA #07318
Devra D. Featheringill, WSBA #32182
Attorneys for Future Claims Representative

BUSH STROUT & KORNFELD
LAW OFFICES
5500 Two Union Square
601 Union Street
Seattle, Washington 98101-2373
Telephone (206) 292-2110
Facsimile (206) 292-2104