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Client Alert

7th Circuit: Milwaukee Archdiocese's cemetery trust fund not off limits from abuse victims in bankruptcy court

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In the latest opinion interpreting the federal Religious Freedom Restoration Act (RFRA), the Seventh Circuit concluded that the 1993 law does not require the court to exclude a \$55 million cemetery trust fund from the Archdiocese of Milwaukee's bankruptcy estate. The case, *Listecki v. Official Committee of Unsecured Creditors*, involves the question of whether a 2008 transfer of the money from the archdiocese's general fund to a newly created trust.

Archdiocese transferred funds in light of sex-abuse cases, filed for bankruptcy.

In seeking Vatican approval of the transfer, then-Archbishop Timothy Dolan (now Archbishop of the Archdiocese of New York) wrote, "By transferring these assets to the Trust, I foresee an improved protection of these funds from any legal claim and liability." At the time of the transfer, the archdiocese found itself amid a series of lawsuits arising from sexual abuse by priests. It had settled with ten victims for \$17 million in 2006. Then, after the Wisconsin Supreme Court held that applicable statutes of limitations did not bar certain other claims, various sexual-misconduct suits went forward.

Due in part to the sex-abuse cases, the archdiocese filed for Chapter 11 bankruptcy in 2011. As part of the bankruptcy procedure, the bankruptcy trustee appointed a group of abuse victims to a committee to represent the archdiocese's unsecured creditors. The Archbishop then sought to protect the cemetery fund from the creditors, arguing that to use the funds to satisfy the committee's claims would violate the Archbishop's free-exercise rights and RFRA. The archdiocese argued that the archbishop has a canonical duty to maintain the cemeteries and mausoleums in perpetuity. The committee argued that the transfer was fraudulent and should be voided.

The district court had concluded that RFRA and the First Amendment protected the funds because the archbishop's exercise of religion would be substantially burdened if



the money was used to satisfy the archdiocese's debts and that the committee was acting under color of law, or that it had the authority of the government. In response, the committee moved to reverse the ruling and recuse the judge, who has nine family members buried in archdiocese-owned cemeteries.

Appeal from summary judgment challenged RFRA and First Amendment claims.

On appeal, the Seventh Circuit did not consider whether the transfer was fraudulent, only whether RFRA or the First Amendment protected the funds in bankruptcy. In deciding the RFRA issue, it concluded that RFRA does not apply because, contrary to the district court's holding, the government is not involved. Because the committee is not the government, RFRA does not apply. In deciding whether the First Amendment's Free Exercise Clause prevents application of the bankruptcy code to the cemetery funds, the Seventh Circuit concluded it does not, explaining, "there is a compelling governmental interest in the application of the relevant portions of the Code that is narrowly tailored to achieving that interest."

RFRA's language states, "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." 42 U.S.C. § 2000bb-1(a). The exception requires that the government show a compelling governmental interest and that the burden is the least-restrictive means to advance that interest. The Seventh Circuit pointed out that the government cannot meet this burden if it is not a party, and private parties cannot "step into the shoes of the 'government'" to meet that burden. It also pointed to the relief provided by RFRA, which calls for "relief against a government." 42 U.S.C. § 2000bb-1(c). Support for this position is also found in the legislative history, which only includes examples of suits against governments, and in other circuits.

Seventh Circuit held RFRA does not apply to the bankruptcy case.

In concluding that the committee did not qualify as the "government," the Seventh Circuit looked to RFRA's definition of government. The archdiocese pointed to the definition's inclusion of "other person acting under color of law" to argue the committee could qualify. The court rejected this interpretation, instead applying a meaning consistent with 42 U.S.C. § 1983, which provides relief for other constitutional claims. That precedent requires a close relationship between the state and challenged action, so that the action "may be fairly treated as that of the State itself." The committee, "a combination of private decisions, Trustee appointment, and court supervision, with the private actions providing the qualifying criteria for



appointment, is not action that meets this test. In other words, appointment and supervision do not make a party the "government."

Court held that the Free Exercise Clause does not protect cemetery funds.

Turning to the Free Exercise Clause, the court held that it was applicable because it allows for certain actions where the government is not a party. But the court rejected the archdiocese's argument that the First Amendment prohibited the court from questioning the transfer because it was a religious matter. The question of whether the transfer was fraudulent is not an intrachurch dispute, so there are no religious issues involved. Further, the court questioned whether the intrachurch doctrine even applies where fraud is alleged.

Most important the Seventh Circuit's Free Exercise analysis was its conclusion that the bankruptcy code is of general and neutral applicability. Because the First Amendment allows neutral, generally applicable laws to "be applied to religious practices even when not supported by a compelling governmental interest," the Free Exercise Clause does not prohibit use of the funds under Supreme Court precedent.

The court went a step further than Supreme Court precedent requires, however, based on Seventh Circuit precedent that requires courts to consider "whether a law 'unduly burdens' the religious practice." Citing *Vision Church v. Village of Long Grove*, the court applied the same test as found in RFRA, which was established in caselaw before the Supreme Court abandoned it in 1990. The court found a compelling governmental interest in the bankruptcy code, pointing to the number of entities that avail themselves of its protections, including the archdiocese, and its importance to assisting those in "a certain financial condition" and need assistance with debts. In doing so, it disagreed with an Eighth Circuit opinion excluding tithes from a bankruptcy estate.

The court additionally concluded that the code's provisions at issue are narrowly tailored and that adopting the proposed exception "would undermine the narrowly tailored purpose of the Code." It would not aid creditors, would favor dishonest debtors, and "pose a logistical nightmare" of determining whether each bankruptcy provision affects the archbishop's beliefs, making the code piecemeal rather than unified.

The opinion allows the case to move forward, leaving the question of whether the transfer ran afoul of the bankruptcy code for the district court to decide.



Court addressed district-court judge's relatives buried in affected cemeteries.

Finally, the court addressed the recusal allegations, even though its reversal meant that another judge would automatically be assigned to the case. But because the deciding judge's buried relatives were close, including his parents, sisters, uncle, aunt, and his mother-, father-, and brother-in-law, the court characterized his participation as "problematic." The judge had even purchased his parents' graves. The court stated, "The image of the graves containing someone's father and mother crumbling is a powerful one indeed, regardless of one's beliefs, and could reasonably call into question a judge's impartiality."

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