

## SURVIVING EXEMPTION: SHOULD THE CHURCH EXEMPTION TO ERISA<sup>1</sup> STILL BE IN EFFECT?

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*As a result of the current sexual abuse scandal in the Roman Catholic Church, financial difficulties have arisen in dioceses across the country. There is the possibility that the mounting costs of legal fees and compensation paid to sexual abuse victims will leave the Church with insufficient funds to finance pension plans for clergy and lay workers. In this note, Timothy Liam Epstein examines the Church's exemption to ERISA's minimum funding requirement for pension plans, in light of its current financial crisis. He explores the climate in which ERISA was enacted and whether, given the recent scandal and related financial difficulties, the Church exemption should stand. Mr. Epstein notes that, due to the potential costs involved for an already financially burdened institution, now may not be the most appropriate time to challenge the Church exemption, but that the question has arisen for just that*

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1. 29 U.S.C. § 1001(a) (2000). ERISA stands for the Employee Retirement Income Security Program, which focuses on benefit plans and the “lack of . . . adequate safeguards concerning their operation . . . [and] that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans.” *Id.*

reason—if ERISA provides no protection, there may be no pension funds for retiring lay workers and clergy. Additionally, Mr. Epstein suggests that it is difficult to prove the existence of an actual threat to the pensions due to the lack of reporting required of the Church by the Internal Revenue Service and because many Church financial records are sealed. Mr. Epstein concludes that without ERISA's protection, the threat will not be fully realized until it is upon the Church and its employees.

Cardinal Joseph Bernadin of Chicago, head of the second largest Catholic diocese in the country, meets members of the news media for what will be his best-remembered and most widely chronicled public appearance of the year. The subject is child sexual abuse by his priests. He announces the results of an eight-month review of the problem in his diocese, saying thirty-four priests over four decades have engaged in sexual misconduct with minors. He announces a toll-free number for complaints about sexually abusive priests. What he doesn't announce is that dealing with the public alarm over sexually abusive priests is now taking up nearly a quarter of his work time. At moments, it has reduced him to tears. And it is costing his diocese millions of dollars in legal fees, lawsuit settlements and psychiatric bills. Some priests in the Chicago area are beginning to express doubts—only half-jokingly—that there will be pension funds left for them when they retire.<sup>2</sup>

The question of the religious exemption to the Employee Retirement Income Security Program, commonly known as ERISA, is particularly appropriate now in light of the current sexual abuse scandal in the Roman Catholic Church (the Church).<sup>3</sup> If the retirement funds are not separated, or protected in some way, there is the possibility that reparations paid to sexual abuse victims will drain retirement funds, either directly or indirectly, in ways such as the sale of real estate,<sup>4</sup> of which rent monies may have been feeding the

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2. ELINOR BURKETT & FRANK BRUNI, A GOSPEL OF SHAME: CHILDREN, SEXUAL ABUSE AND THE CATHOLIC CHURCH 201 (1993).

3. See generally JASON BERRY, LEAD US NOT INTO TEMPTATION: CATHOLIC PRIESTS AND THE SEXUAL ABUSE OF CHILDREN (2000); BLESS ME FATHER FOR I HAVE SINNED: PERSPECTIVES ON SEXUAL ABUSE COMMITTED BY ROMAN CATHOLIC PRIESTS (Thomas G. Plante ed., 1999) [hereinafter BLESS ME]; INVESTIGATIVE STAFF OF THE BOSTON GLOBE, BETRAYAL: THE CRISIS IN THE CATHOLIC CHURCH (2002).

4. Real estate is, arguably, the greatest material asset of the Church. See PHILIP JENKINS, PEDOPHILES AND PRIESTS: ANATOMY OF A CONTEMPORARY CRISIS 129 (1996). "In 1984 the Chicago archdiocese alone reported assets of \$2.3 billion in real estate and securities, the New York archdiocese, \$1.2 billion – and these figures do not include property of colleges, hospitals, and religious orders located in those metropolitan areas." *Id.* "[T]he institutional continuity of the church depended on the maintenance of its property . . ." *Id.* at 134.

retirement coffers.<sup>5</sup> Further, as a result of the financial crises that have arisen in dioceses across the United States, bankruptcies also implicate retirement funds not held in trust.<sup>6</sup> It must be noted that church plans are not just for the clergy and orders, but lay workers in churches and associated projects, as well, although many dioceses and orders have separate plans within.<sup>7</sup> In *Walz v. Tax Commission of New York City*, the U.S. Supreme Court held that “[f]ew concepts are more deeply embedded in the fabric of our national life . . . than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.”<sup>8</sup> The American tradition for religious exemption runs deep, but the concept has remained largely unquestioned.<sup>9</sup> Maybe in light of the recent crisis in the Church, that exemption should be questioned.

This note will first discuss the ERISA statute and its enactment, focusing on the climate in which one of the most significant laws in this country came to fruition. Second, the note will define the Church’s exemption to ERISA coverage. Then, the note will explore how the current sexual abuse problem has put the Church in what many have regarded as a financial crisis. Finally, this note will explore whether ERISA’s exemption for the Church should stand in light of the recent scandal and accompanying financial difficulties the Church is experiencing.

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5. The dramatic aging of the clergy must be kept in mind when discussing monies devoted towards those priests “retiring,” or rather, leaving active service to a community. “The median age for the 46,041 U.S. Catholic priests today is 60. That number inevitably will creep higher as the priest population continues to grow older and the number of newly ordained fails to keep pace with the number of priests who die or resign.” John Monczunski, *The Priesthood in Peril*, NOTRE DAME MAG., Autumn 2002, available at <http://www.nd.edu/~ndmag/au2002/priests.html>.

6. Although some have threatened and others have sought advice about it, there is no record of bankruptcy by any diocese. See Walter V. Robinson & Stephen Kurkjian, *Archdiocese Weighs Bankruptcy Filing: Facing Lawsuits, Cardinal’s Aides Urge Chapter 11*, BOSTON GLOBE, Dec. 1, 2002, at A1; Victor L. Simpson, Associated Press, *Sex Abuse Claims Putting Financial Pressure on Church, but Vatican Doesn’t Bail Out Dioceses* (Dec. 11, 2002), <http://www.poynter.org/dg.lts/id.46/aid.13073/column.htm>. It may still be inferred, however, that if there was no protection of retirement monies through a trust, those monies could be seized by creditors.

7. 29 U.S.C. § 1002(33)(C)(ii) (2000).

8. 397 U.S. 664, 676–77 (1970).

9. “Legal scholarship on church plans is not prolific.” Alison M. Sulentic, *What Catholic Social Teaching Says to Catholic Sponsors of Church Plans*, 17 J. CONTEMP. HEALTH L. & POL’Y 1, 4 n.17 (2000).

For purposes of brevity and clarity, as well as current world attention on the Church, this note will focus on the Roman Catholic Church, while acknowledging that abuses and malfeasance occur in other organized religions as well.<sup>10</sup>

## I. Retirement Plans for the Church

### A. The Enactment of ERISA

“A pension is not a gift from the employer. It has become universally recognized by employers, by workers, and by unions that pension benefits are part of an employee’s compensation. It is the other half of the paycheck.”<sup>11</sup> In the congressional debates concerning ERISA, Representative Dominick Daniels (D-NJ) expressed his support for ERISA not as a regulation of an employment gratuity, but as a protection of property.<sup>12</sup> ERISA was enacted to protect pensions that were being funded by employees against the elimination or severe reduction in retirement benefits as a result of mismanaged funds, bad investments, inadequate funding, plant closures, market changes, company purchases and mergers, bankruptcies, and fraud.<sup>13</sup> In one well-publicized instance, the employer, Studebaker of South Bend, Indiana, simply was not funding pensions at all, despite telling employees that the funds were present.<sup>14</sup> Unfortunately, the Studebaker plant closure and subsequent pension plan termination were not anomalies.<sup>15</sup> A joint study by the Labor and Treasury Departments revealed that in 1972, 1227 plans were terminated at a loss of \$49 mil-

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10. The following is a list of websites devoted to abuse victims of various non-Catholic religious workers: <http://www.eskimo.com/~tlotus/ari.html> (Eastern spiritual teachers); <http://hidingbehind.home.att.net> (Episcopalian clergy); <http://www.pokrov.org> (Orthodox Church); <http://www.silentlambs.org> (Jehovah’s Witness); <http://www.theawarenesscenter.org> (Judaism); <http://www.childpro.org> (Mormon).

11. 120 CONG. REC. 29,214 (1974).

12. *Id.*

13. *Id.* at 4277, 4315, 29,211.

14. *See id.* at 4310, 4443 (explaining that Studebaker closed in 1964, with pension plan terminations following).

15. *Id.* at 4445 (stating that workers with less than thirty years of experience at General Steel and American Zinc plants in Illinois lost their entire contributions and their jobs, with many too old to find other employment, and others too young for Social Security benefits); *id.* at 4446 (describing similar situations with Westinghouse and Perkins Machine and Gear Co. plant closings); *id.* at 29,213 (discussing one of Detroit’s major newspaper’s shut down in 1960, which resulted in a lump-sum payment of merely \$160 for its more than 400 employees).

lion to 19,400 plan participants<sup>16</sup> (or 42,000 claimants when including beneficiaries).<sup>17</sup> The average loss was \$2,500 per individual.<sup>18</sup> Social Security alone could not cover the need<sup>19</sup> of those who found “disappointment [of their retirement expectations] . . . after a long and fruitful life of toil.”<sup>20</sup>

Until ERISA, private pension plans were characterized by Representative Patricia Schroeder (D-Colo.) as having “gross deficiencies in organization and gross inequities in distribution of benefits.”<sup>21</sup> “For too long we [Congress] have permitted tragedies in which the hope of a pension becomes a broken promise.”<sup>22</sup> Existing state and federal laws were ineffective in preventing most of the problems associated with private pensions.<sup>23</sup> By 1974, the year of ERISA’s enactment, 36 million American workers were participating in some type of pension or retirement plan.<sup>24</sup> From 1940 until 1970, the number of pension plan participants had nearly doubled every ten years, with combined pension resources in 1974 totaling more than \$150 billion, then annually increasing at a rate of \$10 billion.<sup>25</sup>

A special task force was assembled by the Ninety-second Congress to study all aspects of private pension plans, from fiduciary re-

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16. *Id.* at 4443.

17. *Id.* at 4445.

18. *Id.* at 4310.

19. *Id.* at 29,210.

20. *Id.* at 4308.

21. *Id.* at 4444.

22. *Id.*

23. *Id.* at 29,932. This is an important point here because one potential argument against the need of having ERISA coverage for church plans is that state contract and tort law provide adequate remedies, but ERISA was enacted because the protection afforded by the states was simply not enough. *Id.*

24. *Id.* at 4277, 4446.

25. *Id.* at 4277; *see also id.* at 4306, 4310, 4315, 4442–46. Representative Melvin Price (D-Ill.) and Representative Hugh L. Carey (D-N.Y.) suggested that the number of Americans covered by private pensions would reach 42 million by 1980, with assets exceeding \$225 billion. *Id.* at 4445–46. President Ford’s figures appeared to vary as evidenced by his statement at the bill’s signing on September 2, 1974. Statement by the President upon Signing the Employee Retirement Income Security Act of 1974, 10 WKLY. COMP. PRES. DOC. 1084 (Sept. 2, 1974).

From 1960 to 1970, private pension coverage increased from 21.2 million employees to approximately 30 million workers. During this same period, assets of these private plans increased from \$52 billion to \$138 billion. And they are now increasing at a rate of \$12–15 billion a year. It will not be long before such assets become the largest source of capital in our economy.

*Id.*