

**UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ALASKA**

In re: Case No. F08-00110-DMD

Chapter 11

CATHOLIC BISHOP OF NORTHERN
ALASKA,

Debtor.

**Filed On
12/13/10**

ROBERT L. BERGER, in his capacity as the
Settlement Trustee,

Plaintiff,

v.

CATHOLIC MUTUAL RELIEF SOCIETY
OF AMERICA, and TRAVELERS
CASUALTY AND SURETY COMPANY,
f/k/a AETNA CASUALTY AND SURETY
COMPANY,

Defendants.

USDC Case No. 4:08-cv-0038-RRB
Adv. No. F08-90019-DMD

CATHOLIC MUTUAL RELIEF SOCIETY,

Counter-Claimant,

v.

ROBERT L. BERGER, in his capacity as the
Settlement Trustee,

Counter-Defendant.

**BANKRUPTCY COURT'S PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

**[Re: Second Motion for Partial Summary Judgment and Motion to
Compel Arbitration, filed by Catholic Mutual Relief Society]**

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TO: THE UNITED STATES DISTRICT COURT

Debtor Catholic Bishop of Northern Alaska (“CBNA”) filed for chapter 11 relief on March 1, 2008. The primary reason for CBNA’s bankruptcy filing was to deal with numerous claims of sexual abuse which had been asserted against it. On April 24, 2008, CBNA filed the instant action for declaratory relief against its insurers, seeking to determine the scope of its insurance coverage for the abuse claims. Defendant Travelers Casualty & Surety Company moved to withdraw the reference.¹ The District Court granted withdrawal of the reference, but directed that the proceeding be retained by the Bankruptcy Court for the handling of all pre-trial matters, including motions for summary judgment.² If summary judgment motions were filed, the Bankruptcy Court would “issue proposed findings of fact and conclusions of law thereon to the District Court, pursuant to 28 U.S.C. § 157(c)(1).”³

CBNA’s Third Amended and Restated Joint Plan of Reorganization was confirmed on February 17, 2010.⁴ Consistent with plan provisions regarding the treatment of the abuse claims, a Settlement Trust was established which provided a mechanism for the allowance and satisfaction of certain abuse claims categorized as Settling Tort Claims. In accordance with the provisions of the Settlement Trust, Robert L. Berger, the settlement

¹ Mot. to Withdraw the Reference, filed Jun. 16, 2008 (Docket No. 17).

² Order Regarding Mot. to Withdraw Reference, entered Oct. 21, 2008 (Docket No. 5 in U.S.D.C. Case No. 4:08-cv-0038-RRB; Docket No. 40 in Adv. No. F08-90019-DMD).

³ *Id.* at 2.

⁴ Order Approv. Third Am. and Restated Disclosure Statement and Confirming Third Am. and Restated Joint Plan of Reorganization, entered Feb. 17, 2010 (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

trustee, has been substituted into this action as plaintiff in place of CBNA, by order entered May 4, 2010.⁵

Catholic Mutual filed a second motion for partial summary judgment on March 31, 2010.⁶ It asks for a judicial determination that: 1) CBNA has breached its obligations under the occurrence-based insurance policies issued by Catholic Mutual by agreeing to settle the abuse claims, under the provisions of its confirmed chapter 11 plan, without Catholic Mutual's consent; 2) by virtue of CBNA's breach, it has forfeited its right to any coverage from Catholic Mutual for the abuse claims; and 3) Catholic Mutual has no duty to defend CBNA or its successor, the Settlement Trustee, in connection with the arbitration proceedings established under the plan.

Mr. Berger opposes Catholic Mutual's second motion for partial summary judgment. He contends CBNA's conduct was permissible even absent Catholic Mutual's consent because Catholic Mutual had previously breached its duty of good faith and fair dealing. Mr. Berger further asserts that there are genuine issues of material fact which preclude entry of partial summary judgment.

Catholic Mutual has also filed a motion to compel arbitration and stay proceedings with regard to the post-1990 abuse claims.⁷ The "post-1990 abuse claims" are those claims based on acts of sexual abuse which are alleged to have occurred on or after July 1, 1990. Only a small number of the abuse claims filed in CBNA's bankruptcy case fall

⁵ Order Substituting the Settlement Trustee as the Real Party in Interest/Plaintiff and Dismissing CBNA, entered May 4, 2010 (Docket No. 198).

⁶ Catholic Mutual's Second Mot. for Partial Summ. J., filed Mar. 31, 2010 (Docket No. 176).

⁷ Mot. to Compel Arbitration and Stay Proceedings Related to the Post-1990 Abuse Claims Pending Arbitration, filed June 11, 2010 (Docket No. 206).

into this category, and they involve just one “claims-made” insurance certificate issued by Catholic Mutual, for the period from July 1, 2008, through July 1, 2009. Catholic Mutual says the provisions of this certificate require that these claims be submitted to arbitration. It asks for an order compelling Mr. Berger to submit any dispute regarding these claims to the arbitration procedure outlined in the certificate and for a stay of any further proceedings regarding these claims pending such arbitration.

Mr. Berger opposes this motion as well. He contends it is premature and that the arbitration provision in the policy is unconscionable and unenforceable.

After oral argument on the motions, held on August 19, 2010, and in accordance with the District Court’s order, the bankruptcy court now submits its proposed findings of fact and conclusions of law on these two motions. The bankruptcy court proposes that:

- 1) Catholic Mutual’s second motion for partial summary judgment be granted.
- 2) Catholic Mutual’s motion to compel arbitration be granted, in part, to require Mr. Berger to submit all disputes regarding the claims made policy to Catholic Mutual as provided for under the dispute resolution provision found in the policy. However, as there is no pending, adjudicable dispute implicating the claims made policy at this time, Catholic Mutual’s request for a stay of this adversary proceeding should be denied.

I. PROPOSED FINDINGS OF FACT:

A. The Parties:

1. Catholic Bishop of Northern Alaska (“CBNA”), the initial plaintiff in this action, is an Alaskan religious corporation sole headquartered in Fairbanks. CBNA was dismissed from this adversary proceeding by order entered in the bankruptcy court on May 4, 2010.⁸

2. Robert L. Berger (“Berger”), the Settlement Trustee, is a citizen of the State of California. Mr. Berger was substituted into this action as plaintiff by order entered on May 4, 2010.⁹

3. Defendant Catholic Mutual Relief Society (“Catholic Mutual”) is a Nebraska non-profit corporation with its principal place of business in Omaha, Nebraska.

4. Three of the other defendants named in this adversary proceeding have been dismissed, with prejudice. The Catholic Relief Insurance Company of America was dismissed on August 13, 2010.¹⁰ Continental Insurance Company reached a settlement with CBNA and was dismissed on February 24, 2010.¹¹ Alaska National Insurance Company also reached a settlement with CBNA and was dismissed on April 28, 2010.¹²

⁸ Order Substituting the Settlement Trustee as the Real Party in Interest/Plaintiff and Dismissing CBNA, entered May 4, 2010 (Docket No. 198).

⁹ *Id.*

¹⁰ Order re: Summ. J. Mots., entered Aug. 13, 2010 (Docket No. 12 in U.S.D.C. Case No. 4:08-cv-000038-RRB; Docket No. 219 in Adv. No. F08-90019-DMD).

¹¹ Order Dismissing the Continental Ins. Co. with Prejudice, entered Feb. 24, 2010 (Docket No. 173).

¹² Order for Dismissal with Prejudice of Defendant ANIC, entered Apr. 28, 2010 (Docket No. 190).

5. CBNA, the Settlement Trustee and defendant Travelers Casualty and Surety Company, f/k/a Aetna Casualty and Surety Company, have reached a settlement which was approved by the bankruptcy court on October 13, 2010.¹³ Upon consummation of the settlement, Travelers will also be dismissed from this adversary proceeding.

6. The only active defendant remaining in this adversary proceeding is Catholic Mutual.

B. The Occurrence Based Insurance Policies (4/15/79 - 4/15/83):

7. CBNA was issued two general liability and umbrella excess liability insurance policies covering the period from April 15, 1979, to April 15, 1983:

- a) Certificate No. SMP 6594, with an effective period of April 15, 1979, to April 15, 1982,¹⁴ and
- b) Certificate No. SMP 7093, with an effective period from April 15, 1982, to April 15, 1983.¹⁵

8. Under the primary policy provisions of Certificate No. SMP 6594, Catholic Mutual has the right and duty to defend suits against CBNA seeking damages for bodily injury caused by an occurrence:

¹³ Order Approving Settlement Agreement Among the Debtor, Settlement Trustee, Other Releasing Parties and Travelers Including the Sale of Insurance Policies, entered Oct. 13, 2010 (Docket No. 814), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

¹⁴ Certification of Ray L. Miller, filed Mar. 31, 2010 (Docket No. 178), Ex. A.

¹⁵ *Id.*, Ex. B. Certificate No. SMP 7093 was initially issued for a three-year period, but was reduced to a one-year term on Nov. 1, 1982. *Id.* at CMCBNA-000129.

The Company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or property damage to which this insurance applies, caused by an occurrence, and the Company shall have the right and duty to defend any suit against the insured seeking damages on account of such bodily injury or property damage, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and settlement of any claim or suit as it deems expedient, but the Company shall not be obligated to pay any claim or judgment or to defend any suit after the applicable limit of the Company's liability has been exhausted by payment of judgments or settlements.¹⁶

9. Similar language can be found in the primary policy provisions of Certificate No. SMP 7093.¹⁷

10. The primary policy provisions in Certificate SMP 6594 contain a number of general conditions. One specifies that “[a]ssignment of interest under this policy shall not bind the Company until its consent is endorsed hereon.”¹⁸

11. A similar clause is not found in the primary coverage provisions to Certificate SMP 7093. One provision refers to an “assignment condition found in the

¹⁶ *Id.*, Ex. A at CMCBNA-001862, ¶ I.

¹⁷ *Id.*, Ex. B at CMCBNA-000092, ¶ I.

¹⁸ Miller Certification (Docket No. 178), Ex. A at CMCBNA-001864, ¶ 5.

Certificate General Conditions,”¹⁹ but no assignment condition can be found in the “Certificate Conditions and Definitions - General Conditions” portion of the certificate.²⁰

12. The Umbrella Excess Liability Coverage policies for both Certificates SMP 6594 and SMP 7093 provide that “[a]ssignment of interest under this Certificate shall not bind the Society until its consent is endorsed hereon.”²¹

13. The primary policy provisions of Certificate SMP 6594 require CBNA to promptly report claims or suits made against it and to cooperate with Catholic Mutual regarding such claims and suits:

4. Insured’s Duties in the Event of Occurrence, Claim or Suit.

(a) In the event of an occurrence, written notice containing particulars sufficient to identify the insured and also reasonably obtainable information with respect to the time, place and circumstances thereof and the names and addresses of the injured and of available witnesses shall be given by or for the insured to the Company or any of its authorized agents as soon as practicable.

(b) If claim is made or suit is brought against the insured, the insured shall immediately forward to the Company every demand, notice, summons or other process received by him or his representative.

(c) The insured shall cooperate with the Company and, upon the Company’s request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any

¹⁹ *Id.*, Ex. B at CMCBNA-000113, ¶ 18.

²⁰ *Id.*, Ex. B at CMCBNA-000115 - 000120.

²¹ *Id.*, Ex. A at CMCBMA-000047, ¶ H; Ex. B at CMCBNA-000107, ¶ H.

person or organization who may be liable to the insured because of injury or damage with respect to which insurance is afforded under this policy; and the insured shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of accident.²²

14. Similar provisions regarding the insured's duties to report claims and cooperate with Catholic Mutual are found in the primary policy of Certificate SMP 7093.²³

15. The same duties are imposed upon the insured under the Umbrella Excess Liability Coverage provisions for both Certificates SMP 6594 and SMP 7093.²⁴ Both umbrella policies impose a duty of cooperation upon the insured as follows:

The Named Entity shall cooperate with the Society and, upon the Society's request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity against any person or organization who may be liable to the Named Entity because of personal injury . . . with respect to which coverage is afforded under this Certificate; and the Named Entity shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The Named Entity shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense; however, in the event that the amount of ultimate net loss becomes certain either through trial court judgment or agreement among the Named Entity, the claimant and the Society, then, the Named Entity may pay the amount of ultimate net

²² Miller Certification (Docket No. 178), Ex. A at CMCBNA-001866, ¶ 4.

²³ *Id.*, Ex. B at CMCBNA-000118, ¶ 4.

²⁴ *Id.*, Ex. A at CMCBNA-000047; Ex. B at CMCBNA-000107.

loss to the claimant to effect settlement and, upon submission of due proof thereof, the Society shall indemnify the Named Entity for that part of such payment which is in excess of the retained limit, or, the Society will, upon request of the Named Entity, make such payment to the claimant on behalf of the Named Entity.²⁵

16. The primary policy provisions of Certificate SMP 6594 contain preconditions to bringing an action against Catholic Mutual:

6. Action Against Company. No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the Company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or organization shall have any right under this policy to join the Company as a party in any action against the insured to determine the insured's liability, nor shall the Company be impleaded by the insured or his legal representative. Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the Company of any of its obligations hereunder.²⁶

²⁵ *Id.*, Ex. A at CMCBNA-000047, ¶ C(3); Ex. B at CMCBNA-000107, ¶ C(3) [substituting "Assured" for "Named Entity"].

²⁶ Miller Certification (Docket No. 178), Ex. A at CMCBNA-001867, ¶ 6.

17. A virtually identical provision is found in the primary coverage provisions of Certificate SMP 7093.²⁷

18. These preconditions are reiterated in the Umbrella Excess Liability Coverage provisions of both Certificates SMP 6594 and SMP 7093, which provide, in part:

E. ACTION AGAINST THE SOCIETY

No action shall lie against the Society with respect to any occurrence unless, as a condition precedent thereto, the Named Entity shall have fully complied with all the terms of this Certificate, nor until the amount of the Named Entity's obligation to pay an amount of ultimate net loss in excess of the retained limit shall have been finally determined either by judgment against the Named Entity after actual trial or by written agreement of the Named Entity, the claimant and the Society.²⁸

19. The Umbrella Excess Liability Coverage policies for both Certificates SMP 6594 and SMP 7093 also provide that Catholic Mutual will indemnify CBNA “for all sums which [CBNA] shall be legally obligated to pay as damages, all as more fully defined by the term ‘ultimate net loss’ on account of:

1. Personal Injuries,
2. Property Damage,
3. Advertising Offense,

²⁷ *Id.*, Ex. B at CMCBNA-000118, ¶ 6.

²⁸ *Id.*, Ex. A at CMCBNA-000047, ¶ E; Ex. B at CMCBNA-000107, ¶ E [substituting “Assured” for “Named Entity”].

to which this Certificate applies, caused by an occurrence.”²⁹

20. The Umbrella Excess Liability Coverage policies for both Certificates SMP 6594 and SMP 7093 define “ultimate net loss” as follows:

The term “Ultimate Net Loss” means the sum actually paid or payable in cash in the settlement or satisfaction of losses for which [CBNA] is liable either by adjudication or compromise with the written consent of the Society, after making proper deduction for all recoveries and salvages collectible, but excludes all loss expenses and legal expenses (including attorneys’ fees, court costs and interest on any judgment or award) and all salaries of employees and office expenses of [CBNA], the Society or any underlying insurer so incurred.³⁰

21. Catholic Mutual has agreed to defend 22 of the abuse claims filed in CBNA’s bankruptcy case under a reservation of rights, as these claims appear to be based on incidents of sexual abuse alleged to have occurred during the coverage periods for Certificates SMP 6594 and SMP 7093.³¹

22. The primary liability and umbrella excess liability coverage policies for Certificates SMP 6594 and SMP 7093 are collectively referred to herein as the “occurrence based policies.”

C. CBNA’s Confirmed Chapter 11 Plan:

²⁹ *Id.*, Exhibit A at CMCBNA-000044, ¶ I; Exhibit B at CMCBNA-000104, ¶ I.

³⁰ Miller Certification (Docket No. 178), Exhibit A at CMCBNA-00046, ¶ 11; Exhibit B at CMCBNA-000106, ¶ 11.

³¹ Miller Certification (Docket No. 178), ¶ 7.

23. CBNA and the Official Committee of Unsecured Creditors filed a third amended and restated joint plan of reorganization on December 17, 2009.³² Following a hearing, the plan was confirmed on February 17, 2010.³³

24. The plan had a number of provisions regarding the treatment of the abuse claims which had been filed in CBNA's chapter 11 case. The abuse claims were classified as "Tort Claims" under the plan.³⁴ Such claims were "Class 10 Claims" and were split into three subclasses: Convenience Tort Claims, Settling Tort Claims and Litigation Tort Claims.³⁵

25. Under the plan, the Tort Claims would be treated as Settling Tort Claims unless CBNA had filed an objection to the Tort Claim prior to a disclosure statement hearing held on December 4, 2009, or the Tort Claimant had affirmatively elected to have his or her claim treated as a Litigation Tort Claim or a Convenience Tort Claim.³⁶

26. According to CBNA's ballot report, of the 256 abuse claimants who voted to accept the plan, just one opted to participate as a Convenience Tort Claim; the

³² Debtor's and the Official Comm. of Unsecured Creditors' Third Am. and Restated Joint Plan of Reorg. for the Catholic Bishop of N. Alaska, filed Dec. 17, 2009 (Docket No. 602), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

³³ Order Approving Third Am. and Restated Discl. Statement and Confirming Third Am. and Restated Joint Plan of Reorg., entered Feb. 17, 2010 (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

³⁴ *Id.*, Ex. 1 at 32, ¶ 2.142.

³⁵ *Id.*, Ex. 1 at 42, ¶ 13.1.

³⁶ *Id.*

remaining 255 voting claimants were placed in the Settling Tort Claim class.³⁷ One Tort Claimant elected to have his/her Tort Claim treated as a Litigation Tort Claim, and a Litigation Reserve was established for the treatment of this claim, to be administered by a Settlement Trustee.³⁸

27. The plan provided that CBNA would contribute \$9.8 million to a Fund on the effective date of the plan.³⁹ The Fund would also include the net proceeds from the sale by auction of real property commonly known as Pilgrim Springs, proceeds from settlements with the parishes and the Monroe Foundation, payments from settling insurers and “Participating Third Parties,” contributions received from a special appeal to be made to CBNA’s charitable donors, and net recoveries from Contribution Claims.⁴⁰

28. Proceeds in the Fund are to be used to pay a number of expenses, including allowed administrative claims, and to fund a Settlement Trust.⁴¹

³⁷ CBNA’s Certified Ballot Report, Non-Tort Ballots, and Certification of Acceptances and Rejections of Third Am. and Restated Joint Plan of Reorg., filed Jan. 20, 2010 (Docket No. 644), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, at 4. According to CBNA’s ballot report, it received 262 ballots concerning Class 10 claims; two ballots voted to reject the plan and a handful were not counted for various reasons. *Id.*

³⁸ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, at 12, ¶¶ 38, 39.

³⁹ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, Ex. 1 at 53, ¶17.1.

⁴⁰ *Id.*, Ex. 1 at 13-14, ¶ 2.60.

⁴¹ *Id.*

29. The claims of the Settling Tort Claimants are to be allowed and paid from the Settlement Trust, under procedures specified in the Plan.⁴²

30. The Settlement Trust is the only source of recovery for the Settling Tort Claimants.⁴³ All of the claimants whose claims Catholic Mutual has agreed to defend under a reservation of rights are Settling Tort Claimants.

31. The plan provides for the discharge of all Tort Claims and releases CBNA from all liability for such claims.⁴⁴ Under the plan, the Tort Claims are permanently enjoined against CBNA, the settling insurers and other settling parties, and such claims are channeled into the Settlement Trust, Litigation Trust, the Litigation Reserve or to the Future Claims Reserve “as the sole source of recovery.”⁴⁵

32. Paragraph 13.4(a) of the plan provides for the allowance of Settling Tort Claims and the assignment of such claims to the Settlement Trustee.⁴⁶ CBNA’s rights against “Non-Settling Insurers” are also assigned to the Settlement Trustee:

(a) Allowance and Assignment to Settlement Trustee. Settling Tort Claims will be deemed Allowed, and each Settling Tort Claimant will be deemed to have assigned his or her Allowed Settling Tort Claim to the Settlement Trustee regardless of

⁴² *Id.*, Ex. 1, Articles 13, 18.

⁴³ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, Ex. 1 at 42, ¶ 13.2.

⁴⁴ *Id.*, Ex. 1 at 42, ¶ 13.2.

⁴⁵ *Id.*

⁴⁶ *Id.*, Ex. 1 at 43, ¶ 13.4(a).

whether such Tort Claimant votes on the plan or votes to reject the Plan. As a result of such assignment, the Settlement Trustee will succeed to all rights of the Settling Tort Claimants against the Debtor and Any [Non-Settling Insurer]. The Allowed Settling Tort Claim will have the same effect as a judgment against CBNA; provided, however, that any recoveries to the Settlement Trustee or any Settling Tort Claimant with an Allowed Settling Tort Claim against the Debtor or the Reorganized Debtor will be limited to and by the Fund, the terms of the Plan and the discharge received by the Debtor pursuant to the Plan and applicable provisions of the Bankruptcy Code. By way of clarification, notwithstanding the foregoing, neither the Settlement Trustee nor the Settling Tort Claimant will have any right to seek recoveries directly against CBNA and are limited to recoveries provided for in the Plan. In addition, on the Effective Date, the Debtor will assign all of its rights against any [Non-Settling Insurer]. The Settlement Trustee will then succeed to all of the rights of the Debtor and the Settling Tort Claimant for purposes of pursuing the claims against [Non-Settling Insurers].⁴⁷

33. Robert L. Berger was appointed as the trust's first Settlement Trustee.⁴⁸
34. Catholic Mutual is a Non-Settling Insurer.⁴⁹

⁴⁷ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, Ex. 1 at 43, ¶ 13.4(a) (emphasis in original). Paragraph E.8 of the order confirming the plan replaced "Great Divide Candidate Insurer" with "Non-Settling Insurer" wherever it appeared in the plan.

⁴⁸ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, at 17; Ex. 5.

⁴⁹ *Id.*, Ex. 1 at 17, ¶ 2.71.

35. The amount of each Settling Tort Claim is to be liquidated by a Special Arbitrator pursuant to a binding arbitration process.⁵⁰

36. The Special Arbitrator must “base allowance of a Settling Tort Claim on the risks to CBNA and the Settling Tort Claimant in light of the facts bearing on the liability and damage aspects of the Settling Tort Claim.”⁵¹ Additionally,

in determining the amount of the Arbitration Award, the Special Arbitrator must consider all of the circumstances affecting the Debtor’s potential liability and available defenses regarding the Tort Claim of a Settling Tort Claimant, including but not limited to:

(i) the substance and credibility of the Tort Claim,

(ii) the Debtor’s legal responsibility for the actions of the perpetrator under Alaska law,

(iii) the severity of the abuse suffered,

(iv) the impact of the abuse on the Tort Claimant including any bodily injury, shock, fright, mental injury, disability, mental anguish, humiliation, sickness or disease sustained by the Tort Claimant, and

(v) the risks to CBNA and the Settling Tort Claimant had the Settling Tort Claim otherwise been the subject of a trial, including the existence of affirmative defenses such as the statute of limitations; provided, however, that the statute of limitation defense may be waived by the Settlement Trustee as part of the process subject to the Settlement Trustee’s right to seek a determination from the Court at the Confirmation Hearing or after as to whether

⁵⁰ *Id.*, Ex. 1 at 44, ¶ 13.4(b).

⁵¹ *Id.*

such a waiver of the statute of limitations defense and/or any other provision of the Plan objected to by the Insurance Company violates the provision of any Insurance Policy and/or any duty of an insured under an Insurance Policy issued by the objecting Insurance Company. If the Settlement Trustee seeks a determination by the Bankruptcy court as to the merits of any such waiver(s) and no objection regarding the statute of limitations and/or any other provision of the Plan or otherwise is filed with regard to any Insurance Company's obligation to provide a defense to CBNA or its assignee and/or to provide liability insurance to CBNA or its assignee, then the waiver and all other provisions of the Plan will be automatically and conclusively deemed not to violate any Insurance Policy provision and/or any duty owed by CBNA or its assignee under any and all Insurance Policies . . .

(vi) The Special Arbitrator may also consider any other factors the Bankruptcy Court may determine as part of the confirmation process or in connection with approval of any Claim Allowance Agreements.⁵²

37. To liquidate any Settling Tort Claims which are being defended under a reservation of rights by a Non-Settling Insurer, the Special Arbitrator must conduct a formal arbitration under J.A.M.S. rules and procedures.⁵³ Further, CBNA does not have to participate in the formal arbitration process unless its defense costs are paid by a Non-Settling Insurer.⁵⁴

⁵² Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, Ex. 1 at 44-45 (emphasis in original).

⁵³ *Id.*, Ex. 1 at 65, ¶ 18.1.

⁵⁴ *Id.*

38. The order confirming the third amended and restated joint plan of reorganization contained insurance neutrality provisions which reserved Catholic Mutual's right to assert that provisions in the confirmed plan constituted a breach of the insurance policies by CBNA.⁵⁵

39. To date, Berger has not indicated that he would waive the statute of limitations defense, nor has he sought a determination from the bankruptcy court regarding whether a waiver of the statute of limitations defense would violate the provision of any CBNA insurance policy or any duty of CBNA under such insurance policies.

40. On September 24, 2010, CBNA filed a motion for entry of final decree in Main Case No. F08-00110-DMD, in which it represented that the bankruptcy estate had been fully administered.⁵⁶ A Final Decree and Order Closing Bankruptcy Case was entered by the Bankruptcy Court on November 4, 2010,⁵⁷ and the case was closed on November 19, 2010.

D. Catholic Mutual's Second Motion for Partial Summary Judgment:

41. In its second motion for partial summary judgment, Catholic Mutual contends CBNA's confirmed plan constitutes a breach of CBNA's obligations under the

⁵⁵ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD, at 13-16.

⁵⁶ CBNA's Motion for Entry of Final Decree, filed Sept. 24, 2010 (Docket No. 808), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

⁵⁷ Docket No. 817 in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

occurrence based insurance policies.⁵⁸ Catholic Mutual says CBNA has breached its duty of cooperation by entering into a plan, without its consent, which settled the abuse claims and provided for liquidating arbitrations of those claims. Catholic Mutual also says the plan provisions which permit CBNA to assign its rights under the occurrence based policies to Berger violate anti-assignment provisions in those policies. Catholic Mutual contends CBNA has forfeited any coverage it might have under the policies due to these breaches.

42. Berger denies that CBNA has breached its duties under the occurrence based policies.⁵⁹

43. Berger contends CBNA's conduct is excused because Catholic Mutual has breached its duty of good faith and fair dealing, in particular with its failure "to even respond to a reasonable settlement offer" made prior to the time the plan was filed.⁶⁰

44. Berger also contends Catholic Mutual's motion is procedurally flawed because it raises issues outside the scope of the pleadings and impermissibly seeks adjudication of only a portion of a claim or cause of action.⁶¹

E. Settlement Negotiations / Breach of Duty of Good Faith and Fair Dealing:

⁵⁸ Catholic Mutual's Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 177), at 1.

⁵⁹ Berger's Mem. in Opp'n to Catholic Mutual's Second Mot. for Partial Summ. J., filed May 3, 2010 (Docket No. 194), at 1.

⁶⁰ *Id.*, at 7.

⁶¹ *Id.*, at 9-12.

45. Since this adversary proceeding was initiated on April 24, 2008, there has been a dispute between CBNA and its insurers regarding the scope of coverage available to CBNA for the abuse claims.⁶² In particular, CBNA contended there was coverage under its insurance policies for claims based upon incidents of abuse alleged to have occurred outside a policy period, based upon a “continuous trigger” theory of recovery. Catholic Mutual contested this position.⁶³

46. On March 12, 2009, the bankruptcy court entered a mediation scheduling order directed to counsel for CBNA, the Unsecured Creditors’ Committee, various tort claimants and the insurance companies.⁶⁴ The order designated Judges Kurtz and Bettinelli (Retired) as mediators and scheduled an initial mediation conference to start on April 20, 2009, in Seattle, Washington.⁶⁵

47. The Seattle mediation was unsuccessful.⁶⁶

⁶² CBNA’s Compl. for Declaratory Judgment, filed Apr. 24, 2008 (Docket No. 1).

⁶³ Catholic Mutual’s Answer, Affirmative Defenses and Jury Demand, filed Jun. 16, 2008 (Docket No. 24).

⁶⁴ Mediation Scheduling Order, entered Mar. 12, 2009 (Docket No. 410), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

⁶⁵ *Id.*

⁶⁶ Catholic Mutual’s Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. H at 1-2.

48. On July 31, 2009, counsel for Catholic Mutual wrote a letter to CBNA's counsel which advised that the proofs of claim filed in CBNA's bankruptcy case were not "complaints that would trigger a duty to defend on the part of Catholic Mutual."⁶⁷

49. The letter also stated Catholic Mutual's position that the umbrella coverage certificates of policies SMP 6594 and SMP 7093 would provide coverage of "\$2,000,000 in limits per occurrence and in the aggregate, after the Diocese pays a self-insured retention of \$10,000 per occurrence."⁶⁸

50. CBNA contended the \$2 million in coverage under the Catholic Mutual policies was a per-occurrence limit only, and filed a motion for partial summary judgment on this issue on October 2, 2009.⁶⁹

51. On October 21, 2009, Catholic Mutual's counsel received a telephone voice mail message from Judge Bettinelli. Judge Bettinelli stated:

I have been working kind of unsuccessfully with the Creditors Committee in the Fairbanks Diocese trying to get some momentum on resolving this case. Want to give you a call and see if Catholic Mutual was interested in getting together for a real mediation and/or settlement conference, not kind of the waste of time we had in Seattle a couple of months ago. And so just making some calls to see if there is any interest so I can try to

⁶⁷ Miller Certification (Docket No. 178), Ex. C at 1.

⁶⁸ *Id.*

⁶⁹ CBNA's Mot. for Partial Summ. J., filed Oct. 2, 2009 (Docket No. 99).

get this thing off center. If you would give me a call I would appreciate it.⁷⁰

52. Catholic Mutual did not respond to Judge Bettinelli's October 21, 2009, voice mail.

53. Also on October 21, 2009, counsel for the Official Committee of Unsecured Creditors ("UCC") in CBNA's bankruptcy case made a written settlement proposal to CBNA on behalf of 28 abuse claimants whose claims alleged that sexual abuse had occurred during periods when various Catholic Mutual policies were in effect.⁷¹

54. The UCC transmitted a copy of the settlement proposal to counsel for Catholic Mutual the same day.⁷²

55. The settlement proposal advised, in part:

In exchange for the collective settlement sum of \$18,266,998 (the "Settlement Amount"), the Claimants will each execute a full and complete mutual general release with CBNA, including a release of CBNA's insurers

In addition to the foregoing, the settlement will also provide that the Settlement Amount shall be deposited in Committee counsel's client trust account and shall be allocated in accordance with a confirmed plan of reorganization acceptable to the Claimants. The mutual release shall specifically provide that CBNA shall have no

⁷⁰ Catholic Mutual's Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. M.

⁷¹ Certification of Paul Sievers in Supp. of Settlement Trustee's Opp'n to Catholic Mutual's Second Mot. for Partial Summ. J., filed May 3, 2010 (Docket No. 196), Exhibit 2.

⁷² *Id.*, Ex. 1.

right to object to the allocation of the Settlement Amount.

Attached hereto as Exhibit B is a spreadsheet which should assist in explaining how the Claimants arrived at the Settlement Amount. In particular, you will notice that each of the Claimants alleges sexual abuse by CBNA's agents during the periods of the various policies issued to CBNA by [Catholic Mutual]. Rather than attempt to estimate values for the various claims asserted by the Claimants, they utilized an average value of \$600,000 per claim. Given that the Jesuit settlement of a portion of many of the same claims averaged \$440,000 per claim, we believe the per-claim settlement value to be reasonable.

Further, and by way of comparison, it is worth noting when the Committee's estimated tiered values are used, the average value of each claim jumps to \$2,127,679. Deducting a generous 40% discount for the Jesuit settlement (or liability) from this number results in an average value per claim of \$1,276,607 – or just over twice the \$600,000 utilized in this settlement offer. Using the Committee's estimates, and assuming the coverage position on the umbrella policies asserted in CBNA's Motion for Partial Summary Judgment, renders a total covered liability in excess of thirty five million dollars! If you wish to see the per Claimant value estimates, let me know. They can be provided through Judge Bettinelli.⁷³

⁷³ *Id.*, Ex. 2 at 1-2 (emphasis in original).

56. The letter advised that the settlement offer would only remain open for acceptance until 5:00 p.m. (Pacific Time) on Tuesday, October 27, 2009.⁷⁴ This deadline was just six calendar days, or four business days, after the letter was written.

57. At the time the offer was made, Catholic Mutual had complete copies of the proofs of claim which had been filed by the abuse claimants in this case through February 23, 2009, including the claims which were encompassed in the settlement offer.⁷⁵ The court takes judicial notice of the fact that, as of Feb. 23, 2009, when CBNA transmitted full copies of all the claims which had been filed by the abuse claimants in this bankruptcy case to Catholic Mutual, a total of 295 claims had been filed.

58. The confidential proof of claim forms submitted by the abuse claimants contained the following information: 1) the claimant's personal identifying information, including name, date of birth, and the claimant's attorney, if any; 2) the nature of the complaint, including the name and title of the alleged perpetrator, the locations and dates on which the alleged abuse occurred, and a brief description of the events giving rise to the claim; 3) a description of how the events had injured the claimant, including whether the claimant had sought counseling or treatment; and 4) additional information, such as whether

⁷⁴ Sievers Certification (Docket No. 196), Ex. 2 at 3.

⁷⁵ Plaintiff CBNA's Statement of Facts in Supp. of Mot. for Partial Summ. J., filed Oct. 2, 2009 (Docket No. 101), Ex. 3 at 98:8-22, Ex. 6.

the claimant had filed suit against any party or entered into any settlement as a result of the claim.⁷⁶

59. The confidential proof of claim form used by the abuse claimants in CBNA's bankruptcy case did not ask the claimants to specify a dollar amount for their claim.

60. At the time the settlement offer was made, Catholic Mutual had already agreed to defend, under a reservation of rights, 22 of the claims encompassed within the settlement offer: 16 claims under the occurrence based policies, and 6 claims under the 2008 "claims made" policy which is discussed further below.⁷⁷

61. At the time the settlement proposal was made, Catholic Mutual's position was that the excess/umbrella liability policies would provide \$2,000,000 in coverage per occurrence *and* in the aggregate, after CBNA paid a self-insured retention of \$10,000 per occurrence.⁷⁸ Under Catholic Mutual's interpretation of the umbrella policies, the settlement proposal was for sums in excess of policy limits at the time it was made.

62. Under CBNA's interpretation of the umbrella policies, the settlement proposal was within policy limits at the time it was made.⁷⁹ Further, when the UCC's settlement offer was made, CBNA's position was that the occurrence based policies covered

⁷⁶ See, e.g., Supplemental Certification of Miller, filed May 17, 2010 (Docket No. 204), Ex. 1 (redacted copies of 20 abuse claims which potentially implicate Catholic Mutual's occurrence based policies).

⁷⁷ Miller Certification (Docket No. 178), Ex. C.

⁷⁸ *Id.*, Ex. C at 1, Ex. D at 2. The aggregate limit issue was raised in the parties' first cross-motions for partial summary judgment, which were pending at the time the UCC's settlement offer was made. Catholic Mutual did not prevail on this issue.

⁷⁹ CBNA's Motion for Partial Summ. J., filed Oct. 2, 2009 (Docket No. 99), at 1.

substantially more than the 28 abuse claims encompassed in the offer, under a “continuous trigger” theory of liability.⁸⁰

63. Catholic Mutual did not respond to the UCC’s settlement proposal by October 27, 2009.

64. On November 17, 2009, Catholic Mutual filed a request for status conference in CBNA’s main bankruptcy case, No. F08-00110-DMD.⁸¹ In its request, Catholic Mutual stated that it had been advised by Judge Bettinelli on November 9, 2009, that the bankruptcy court had directed an additional mediation or settlement conference.⁸²

Catholic Mutual sought a status conference to find out whether the bankruptcy court had in fact ordered a subsequent mediation or settlement conference.⁸³

65. The Bankruptcy Court held a status conference in CBNA’s main bankruptcy case, No. F08-00110-DMD, on November 24, 2009.⁸⁴ Three attorneys, David Spector, Dennis LaGory, and Louis DeLucia, attended on behalf of Catholic Mutual. Counsel for CBNA, the UCC, and other parties in interest also attended, as did Judge Bettinelli (by telephone).

⁸⁰ *Id.*

⁸¹ Catholic Mutual’s Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. H.

⁸² *Id.*, Ex. H at 2.

⁸³ *Id.*

⁸⁴ Proceeding Mem., filed Nov. 24, 2009 (Docket No. 572), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

66. At the status conference, counsel for CBNA advised the court that a settlement had been reached between CBNA, the Monroe Foundation, the Parishes, the tort claimants, the UCC, Alaska National Insurance Company and Continental Insurance Company.⁸⁵ The terms of the settlement were put on the record and the hearing on the amended disclosure statement, previously set for December 4, 2009, was kept on the court's calendar.⁸⁶

67. On the same day as the status conference, Catholic Mutual's vice president, Ray Miller, wrote a letter to Reverend Bowder of CBNA.⁸⁷ The letter enclosed a copy of a news article from the *Fairbanks Daily News-Miner* dated November 20, 2009, which reported that a "settlement between [CBNA] and a creditors committee representing nearly 300 alleged sex abuse victims might be resolved by early next week."⁸⁸

68. In his letter to Reverend Bowder, Miller wrote:

Catholic Mutual has been and remains willing to explore the means by which the claims asserted against CBNA may be settled globally, on terms that are fair to all interested parties. [Catholic Mutual] is concerned that CBNA may have entered into a settlement with the creditors committee without prior notice to or approval of Catholic Mutual. If this is in fact the case, it could constitute material breaches of the CBNA's

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ Supplemental Certification of Ray L. Miller in Supp. of Catholic Mutual's Second Mot. for Partial Summ. J., filed May 17, 2010 (Docket No. 204), Ex. 2.

⁸⁸ *Id.*, Ex. 2 at 2.

contractual obligations as a Catholic Mutual Certificate holder resulting in voiding of all coverages of the claims subject to that settlement.

If CBNA wishes to pursue a global settlement without imperiling its coverage, we strongly encourage you to contact us.⁸⁹

69. Miller says he never received a response to his letter from Reverend Bowder or any other representative of CBNA.⁹⁰

70. On December 11, 2009, David Paige, counsel for CBNA, wrote a follow-up letter to Catholic Mutual's attorney, Dennis LaGory, which noted that more than seven weeks had passed since a copy of the UCC's October 21, 2009, settlement proposal had been sent to Catholic Mutual, without a response.⁹¹ The letter stated that "seven weeks is more than a reasonable period of time for Catholic Mutual to decide on a course of action" with regard to the settlement proposal and concluded, "[w]e can only assume then that Catholic Mutual is not intending to agree to the proposed settlement, nor does Catholic Mutual intend to otherwise respond" to the October 21, 2009, letter.⁹²

71. On December 16, 2009, Mr. LaGory wrote Mr. Paige a letter in response which stated, in part:

⁸⁹ *Id.*, Ex. 2 at 1.

⁹⁰ Miller's Supplemental Certification (Docket No. 204), ¶ 7.

⁹¹ Catholic Mutual's Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. N.

⁹² *Id.*

Please rest assured that Catholic Mutual is, as always, willing to discuss the potential settlement of the insurance claims asserted against it by its certificate holder, [CBNA]. However, since last April, Catholic Mutual has received no communications of any kind from CBNA relating to settlement. Catholic Mutual has no contractual relationship with the [UCC] or its members and, for that reason among others (including the lack of a request from its certificate-holder that it do so), believes it would not be prudent to deal directly with [UCC] counsel. We interpret your December 11 letter as an invitation for Catholic Mutual to engage in discussions with CBNA and, to that end, have made arrangements for a telephone conference with you tomorrow.

Catholic Mutual also wishes to take this opportunity to supplement the letter we wrote to you on July 31, 2009 . . . In that letter, as you will recall, Catholic Mutual agreed to defend 22 claims asserted against CBNA which, based on the Proofs of Claim (“POCs”) submitted prior to the bar date in [CBNA’s bankruptcy case], appeared to allege abuse within time-frames that would potentially implicate coverage under Catholic Mutual’s certificates. Reading the list of claims attached as an exhibit to the [UCC’s settlement proposal] in conjunction with your December 11, letter, it appears CBNA is of the view six additional claimants allege abuse during Catholic Mutual’s coverage periods. Accordingly, we have re-reviewed the relevant POCs. Although Catholic Mutual does not believe these additional claims can be fairly read to present a potential for coverage, in an effort to give CBNA every benefit of the doubt, Catholic Mutual will agree to defend [five additional] claims under the occurrence based certificates

which it issued during the period from April 15, 1979 to April 15, 1983.⁹³

72. Of the 28 claims encompassed in the UCC's October 16, 2009, settlement proposal, Catholic Mutual declined to defend, under a reservation of rights, just one, Claim No. 1061, because the claim alleged that the event of sexual abuse occurred in 1978, before the effective period of the Catholic Mutual certificates.⁹⁴

73. In its December 16, 2009, letter, Catholic Mutual reiterated that the abuse claims did not "constitute complaints that would trigger a duty to defend" on its part, but that it was willing to defend the claims until "there is no longer any potential for coverage."⁹⁵

74. Catholic Mutual's December 16, 2009, letter concludes:

Our investigation and analysis of the claims against the Diocese are ongoing. Accordingly, if the stay in bankruptcy is lifted and litigation against the Diocese resumes, Catholic Mutual will fund the defense of the Diocese subject to a full reservation of rights with respect to any duties or obligations Catholic Mutual may have under its certificates . . .

We remain willing to discuss any concerns you may have and will consider any additional information you may wish to forward to Catholic Mutual. If you should wish to discuss this or any

⁹³ Miller Certification (Docket No. 178), Ex. D at 1-2.

⁹⁴ *Id.*, Ex. D at 2.

⁹⁵ *Id.*

other matter further, please do not hesitate to contact us.⁹⁶

75. CBNA filed its Third Amended and Restated Disclosure Statement and a Third Amended and Restated Joint Chapter 11 Plan on December 17, 2009.⁹⁷

76. David Spector, counsel for Catholic Mutual, certifies that, on December 17, 2009, CBNA's counsel David Paige advised that Catholic Mutual should direct all future settlement discussions to the UCC.⁹⁸

77. Mr. Spector further certifies that on January 22, 2010, as part of settlement negotiations with counsel for the UCC, he made a settlement offer to the UCC on behalf of Catholic Mutual, but received no response to this offer.⁹⁹

78. The bankruptcy court held a hearing on the Third Amended and Restated Disclosure Statement and confirmation of the Third Amended and Restated Joint

⁹⁶ *Id.* at 3.

⁹⁷ Third Am. and Restated Disclosure Statement in Supp. of CBNA's and the UCC's Third Am. and Restated Joint Plan of Reorganization, filed Dec. 17, 2009 (Docket No. 599); Third Am. and Restated Joint Plan of Reorganization, filed Dec. 17, 2009 (Docket No. 602), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

⁹⁸ Catholic Mutual's Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. L (Certification of David M. Spector), ¶ 5.

⁹⁹ *Id.*, Ex. L at ¶ 6.

Chapter 11 Plan on January 25, 2010.¹⁰⁰ Counsel for Catholic Mutual attended this hearing by telephone.¹⁰¹

79. The Third Amended and Restated Joint Plan of Reorganization was confirmed by an order of the Bankruptcy Court entered on February 17, 2010.¹⁰²

80. On March 19, 2010, Catholic Mutual's counsel, David Spector, had a telephone conversation with attorney Paul Sievers, who had served as special insurance counsel to the UCC in CBNA's bankruptcy case and was subsequently retained as Berger's insurance coverage counsel.¹⁰³ During this conversation, Spector told Sievers of Catholic Mutual's intention to file a second motion for partial summary judgment and the basis for this motion.¹⁰⁴

81. Sievers offered to speak to Berger about seeking a modification of CBNA's confirmed plan so that the claims which Catholic Mutual had agreed to defend could be tried in state court rather than under the arbitration provisions found in the plan.¹⁰⁵

82. Spector confirms that Sievers made this suggestion, but says he did not

¹⁰⁰ Proceeding Mem., filed Jan. 25, 2010 (Docket No. 663), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

¹⁰¹ *Id.*

¹⁰² Order, DE 689, in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

¹⁰³ Certification of Paul Sievers in Supp. of Berger's Opp'n to Catholic Mutual's Second Mot. for Partial Summ. J., filed May 5, 2010 (Docket No. 199), ¶ 1, 5; *see also* Catholic Mutual's Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. L (Certification of David Spector), at ¶ 2.

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

respond to it, either during the phone conversation or afterwards, because he assumed it was “casual and spontaneous.”¹⁰⁶

83. On March 26, 2010, Spector, on behalf of Catholic Mutual, wrote a letter to Sievers, insurance counsel to Berger, to follow up on a number of issues they had previously discussed.¹⁰⁷ In the letter, Catholic Mutual agreed to defend an additional abuse claim, Claim No. 1253, because it had been amended by the claimant to allege abuse which may have occurred within the effective period of one of the occurrence based policies Catholic Mutual had issued to CBNA.¹⁰⁸

84. Catholic Mutual’s March 26, 2010, letter further stated:

This brings the total number of suits Catholic Mutual has agreed to defend to 28, including the six Proofs of Claim that appear to raise a potential for coverage under the limited, claims-made sexual misconduct coverage available to CBNA under the certificate Catholic Mutual issued for the period from July 1, 2008 through July 1, 2009.¹⁰⁹

85. Catholic Mutual’s March 26, 2010, letter reiterated its coverage position, as stated in its prior letters to CBNA’s counsel dated July 31 and December 16,

¹⁰⁶ Catholic Mutual’s Mem. in Supp. of Second Mot. for Partial Summ. J. (Docket No. 203), Ex. L (Certification of David Spector), at ¶ 2.

¹⁰⁷ Miller Certification (Docket No. 178), Ex. E.

¹⁰⁸ *Id.*, Ex. E at 1.

¹⁰⁹ *Id.*, Ex. E at 1-2.

2009, and stated that Berger, as “purported assignee of CBNA’s rights under the certificates,” was subject to any of the coverage defenses Catholic Mutual might have against CBNA.¹¹⁰

86. The March 26, 2010, letter outlined Catholic Mutual’s position that several provisions in the confirmed plan might vitiate coverage and Catholic Mutual’s duty to defend the 28 abuse claims.¹¹¹ The points stated in the letter are identical to those raised in Catholic Mutual’s second motion for partial summary judgment. The letter concluded by stating that “Catholic Mutual remains willing to explore the means by which the claims may be settled globally, on terms that are fair to all interested parties.”¹¹²

87. Berger’s counsel, Paul Sievers, certified on May 3, 2010, that no arbitrations had been commenced to liquidate any of the tort claims as provided under the plan.¹¹³ Sievers reiterated this point at oral argument on August 18, 2010.

F. Scope of Pleadings:

88. CBNA’s initial complaint sought a declaratory judgment adjudicating “all of the provisions of all the Defendants’ respective primary and excess/umbrella liability

¹¹⁰ *Id.*, Ex. E at 2.

¹¹¹ Miller Certification (Docket No. 178), Ex. E at 2.

¹¹² *Id.*, Ex. E at 4.

¹¹³ Sievers Certification (Docket No. 199), at 3, ¶ 6.

insurance policies, as to which CBNA is an insured,” to determine scope of coverage issues pertaining to the abuse claims which had been asserted against CBNA.¹¹⁴

89. Catholic Mutual’s answer to CBNA’s initial complaint contained a fifth affirmative defense which asserted that no action would lie against it unless CBNA had first complied with all terms of the occurrence based policies, nor until the amount of CBNA’s liability had been finally determined either by court judgment or by written agreement of CBNA, the claimant and Catholic Mutual.¹¹⁵ Catholic Mutual also asserted that CBNA would not be covered under the occurrence based policies to the extent that CBNA had breached those policies “without, first, complying with the conditions precedent set forth” in the fifth affirmative defense.¹¹⁶

90. CBNA’s Third Amended and Restated Joint Plan of Reorganization was confirmed by an order of the bankruptcy court entered on February 17, 2010.¹¹⁷

91. Catholic Mutual filed its second motion for partial summary judgment on March 31, 2010.¹¹⁸

¹¹⁴ CBNA’s Compl. for Declaratory Judgment, filed Apr. 24, 2008 (Docket No. 1), at 13.

¹¹⁵ Catholic Mutual’s Answer, Affirmative Defenses and Jury Demand, filed Jun. 16, 2008 (Docket No. 24), at 20.

¹¹⁶ *Id.*

¹¹⁷ Order Confirming Third Am. Plan (Docket No. 689), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

¹¹⁸ Catholic Mutual’s Second Motion for Partial Summ. J., (Docket No. 177).

92. On April 26, 2010, CBNA filed its first amended complaint for declaratory relief.¹¹⁹ The amended complaint sought the same relief as the initial complaint, specifically, an adjudication of all issues which needed to be addressed, with regard to all of the defendants' insurance policies, to determine the scope of CBNA's insurance coverage for the abuse claims.¹²⁰

93. Berger filed his opposition to Catholic Mutual's second motion for partial summary judgment on May 3, 2010.¹²¹ In his opposition, he argued that Catholic Mutual's motion was procedurally flawed because it raised issues outside the scope of the pleadings and impermissibly sought adjudication of only a portion of a claim or cause of action.¹²²

94. In its answer to CBNA's first amended complaint, filed on May 10, 2010, Catholic Mutual again alleged that no action could be brought against it unless, as a condition precedent, CBNA had complied with all the terms of the occurrence-based certificates.¹²³

95. Catholic Mutual's answer to the first amended complaint also contained a counter-claim which alleged that CBNA had breached the terms of the occurrence-based

¹¹⁹ CBNA's First Am. Compl., filed Apr. 26, 2010 (Docket No. 189).

¹²⁰ *Id.* at 11.

¹²¹ Berger's Opp'n to Catholic Mutual's Second Motion for Partial Summ. J., filed May 3, 2010 (Docket No. 194).

¹²² *Id.*, at 9-12.

¹²³ Catholic Mutual's Answer to First Am. Compl., filed May 10, 2010 (Docket No. 200), at 18.

policies by settling its disputes with the tort claimants, through the third amended plan, without Catholic Mutual's consent.¹²⁴ Catholic Mutual's counter-claim seeks an order declaring that CBNA's breach has relieved it of its duty under the occurrence-based policies to defend or indemnify CBNA, or Berger as CBNA's assignee, from the abuse claims.¹²⁵

G. The "Claims Made" Policy:

96. Catholic Mutual has issued annual, "claims made" liability coverage to CBNA from July 1, 1990, to the present, and each of these certificates contains an arbitration provision.¹²⁶

97. Catholic Mutual issued CBNA a claims made insurance certificate covering a one-year period from July 1, 2008, through July 1, 2009 (the "claims made policy").¹²⁷ This certificate provided CBNA with limited, claims-made coverage for

¹²⁴ *Id.* at 24, ¶ 20.

¹²⁵ *Id.* at 25.

¹²⁶ Certification of Ray L. Miller in Supp. of the Catholic Mutual Defendants' Resp. to CBNA's Mot. for Partial Summ. J. and Cross-Mot. for Partial Summ. J., filed Nov. 2, 2009 (Docket No. 113), ¶¶ 9, 10; CBNA's Response to Catholic Mutual's Statement of Facts, filed Nov. 16, 2009 (Docket No. 123), 4 at B.13, B.14.

¹²⁷ Miller Certification re CBNA's Mot. for Partial Summ. J. (Docket No. 113), Ex. M.

negligence claims arising from sexual misconduct.¹²⁸ The policy limit was \$500,000.00 per claim and in the aggregate.¹²⁹ Defense costs erode these limits.¹³⁰

98. Under the terms of the claims made policy, coverage was triggered if a claim was made against CBNA during the annual coverage period and it was based upon an act of abuse that took place after the “retroactive date” of July 1, 1990.¹³¹

99. The 2008 claims made certificate was the eighteenth claims made policy CBNA obtained from Catholic Mutual and, like its predecessors, it contained a dispute resolution provision which required arbitration of any unresolved difference between CBNA and Catholic Mutual. The claims made policy provided:

17. DISPUTE RESOLUTION

This Certificate is not intended to benefit any third party and, as such, it creates no rights in anyone other than a **Certificate Holder** or **Protected Person(s)**.

Any unresolved difference between a **Certificate Holder** or **Protected Person(s)** and us, including but not limited to participation, termination or cancellation, coverages, defenses, or interpretations of Certificate language shall be subject to resolution only as herein provided.

Any dispute shall first be submitted by you in writing to the President of Catholic Mutual Relief Society of

¹²⁸ *Id.*, at ¶ 9, Ex. M.

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ Miller Certification re CBNA’s Mot. for Partial Summ. J. (Docket No. 113), Ex. M.

America, with a copy of the Chairman of its Board of Trustees.

If the President is unable to resolve the dispute to your satisfaction within 30 days after submittal to him, you may appeal in writing within 30 days thereafter to the Chairman of the Board of Catholic Mutual Relief Society of America. The Chairman shall thereupon appoint an arbitration committee (the Arbitration Committee) consisting of:

- (a) Himself; and
- (b) Two (2) other members of the Board of Trustees who are not involved in the dispute.

The Arbitration Committee will review the appeal and finally resolve the matter within ninety (90) days after submittal to the Chairman.

The Arbitration Committee shall not be bound by judicial formalities and, in addition to considering applicable rules of law, the customs and practices of the self-insurance and insurance industry and such other expert or other evidence as it deems appropriate to resolve the issue fairly, it shall make its decision with a view to effecting the underlying intent of the Catholic Mutual program of self-insurance which is to best protect the material assets of all the Certificate Holders participating in the Catholic Mutual program.

Failure to pursue an appeal at any level within the time specified shall constitute a waiver of the right to appeal. The decision of the President or Arbitration Committee, as applicable, shall be final and binding on you and us.¹³²

H. Organization of Catholic Mutual:

¹³² *Id.*, Ex. M at CMCBNA-002018 (emphasis in original).

100. Catholic Mutual “operates as a self-insurance fund of the Catholic Church in the United States and Canada,” and counts 111 of the 195 United States dioceses among its members.¹³³ Its affairs are governed by a Board of Trustees which consists of bishops and archbishops from 23 dioceses and archdioceses in the United States and Canada.¹³⁴ “Each of the dioceses and archdioceses represented on the Board of Trustees, as well as all other members of the Society, has coverage under various property and casualty certificates.”¹³⁵ The Archbishop of Anchorage, who is the current head of the Alaska Conference of Catholic Bishops, Inc., has served on the Board since 2007.¹³⁶

101. The restated and amended articles of association for Catholic Mutual provide, in part:

The purposes of this Society shall be to function as a nonprofit, religious and charitable Benevolent Association, operated by an Ecclesiastical Body, composed of Members of the Hierarchy of the Roman Catholic Church and other organizations of the Roman Catholic Church in the United States, its Territorial Sees, and Canada, for the protection and preservation of the properties of such Church or dedicated to the use and service of such Church, and to further aid and assist the Members of the Hierarchy and Religious in the discharge of their Canonical Duties with respect to such properties, and the

¹³³ Certification of Ray Miller in Supp. of Catholic Mutual’s Mot. to Compel Arbitration, filed July 23, 2010 (Docket No. 216-2), at 1.

¹³⁴ *Id.* at 2.

¹³⁵ *Id.*

¹³⁶ *Id.*

religious, members, employees, agents, organizations and institutions of such Church and other organizations of the Roman Catholic Church in the United States, its Territorial Sees, and Canada.

For such purposes, the objects of this Society, and accordingly, its powers shall include:

- (a) To accumulate, invest, enlarge and husband a common central fund for the preservation and protection of the properties of its Members or under their charge or administration.
- (b) To extend Relief to its Members with respect to the properties under their charge or administration in any misfortune, calamity, disaster, damage, destruction or loss, in the judgment of its Officers or its Board of Trustees, entitling the Members to aid.¹³⁷

102. Any Diocese or Religious Order which contributes money to Catholic Mutual becomes a member of the organization.¹³⁸

103. The business affairs of Catholic Mutual are under the general control of its Board of Trustees, consisting of no less than nine members.¹³⁹ All members of the Board are Diocesan Archbishops or Diocesan Bishops.¹⁴⁰ The ex-officio Chairman of the

¹³⁷ Certification of Paul J. Sievers, filed Jul. 9, 2010 (Docket No. 214), Ex. 1 at 1.

¹³⁸ *Id.* at 2-3.

¹³⁹ *Id.* at 3.

¹⁴⁰ *Id.* at 3.

Board is the Ordinary of the Diocese in which Catholic Mutual's general office is located, and the remaining members of the Board are elected annually by Catholic Mutual's members.¹⁴¹

104. The officers of Catholic Mutual consist of "a Chairman of the Board, President, one or more Vice Presidents, a Secretary, a Treasurer and such other officers and assistants thereto as the Board of Trustees might . . . deem necessary or advisable."¹⁴² With the exception of the Chairman of the Board and at least one Vice President, the officers are not required to be members of Catholic Mutual.¹⁴³ All officers of Catholic Mutual, other than the Chairman of the Board, are elected or appointed by the Board of Trustees.¹⁴⁴

I. Catholic Mutual's Second Motion to Compel Arbitration:

105. On June 1, 2010, Catholic Mutual's counsel sent a letter to counsel for the Settlement Trustee, Robert Berger, in which it demanded that Berger follow the dispute resolution procedures found in the claims made policy. The letter listed the following matters as disputes which had to be resolved by arbitration:

1. Whether [Catholic Mutual's] response to the Creditors Committee's October 21, 2009 settlement demand constitutes a breach of its

¹⁴¹ Sievers Certification (Docket No. 214), Ex. 1 at 3-4.

¹⁴² *Id.* at 3.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

express or implied obligations under the 2008-2009 certificate.

2. Whether there are six or seven post-1990 abuse claims, as well as the identity of those claims.

3. Whether CBNA has committed material breaches of its obligations, which vitiate coverage under the 2008-2009 certificate.

4. Whether the release from liability that CBNA received pursuant to the Plan extinguishes [Catholic Mutual's] defense and indemnity obligations under the 2008-2009 certificate.¹⁴⁵

106. The letter advised Mr. Berger that he was required to submit the disputes which Catholic Mutual had delineated to its president, in accordance with the arbitration provisions found in the claims made policy.¹⁴⁶

107. Catholic Mutual filed its motion to compel arbitration 10 calendar days, or 8 business days, after this letter was sent.¹⁴⁷ It noted that its prior motion to compel arbitration had been denied as premature, but stated that an arbitrable dispute had recently emerged between the parties with respect to the post-1990 abuse claims.¹⁴⁸

¹⁴⁵ Catholic Mutual's Mem. in Support of Mot. to Compel Arbitration (Docket No. 207), Ex. 1 at 2.

¹⁴⁶ *Id.*

¹⁴⁷ Catholic Mutual's Mot. to Compel Arbitration, filed Jun. 11, 2010 (Docket No. 206).

¹⁴⁸ Catholic Mutual's Mem. in Supp. of Mot. to Compel Arbitration, filed Jun. 11, 2010 (Docket No. 207), at 4.

108. Catholic Mutual says the arbitrable disputes arose in Berger's opposition to its second motion for partial summary judgment.¹⁴⁹ Its motion reiterates the same four disputes that it outlined in its June 1, 2010, arbitration demand letter to Berger.¹⁵⁰

109. Catholic Mutual says the first dispute with regard to the claims made policy arose when Berger, in his opposition to the second motion for partial summary judgment, asserted that Catholic Mutual had breached the duty of good faith and fair dealing under "the Certificates" by failing to respond to the UCC's October 21, 2009, settlement proposal.¹⁵¹

110. The phrase "the Certificates," as used in Catholic Mutual's second motion for partial summary judgment and Berger's opposition thereto, refers to "certain coverage certificates" issued by Catholic Mutual to CBNA "which provide 'occurrence-based' primary and Umbrella/Excess Liability coverage . . . for the coverage period from April 15, 1979 to April 15, 1983."¹⁵² The phrase does not include the 2008 claims made policy.

111. The third and fourth disputes asserted by Catholic Mutual consist of issues which Catholic Mutual raised in its second motion for partial summary judgment with regard to the occurrence based policies, *e.g.*, whether CBNA's confirmed plan breached the

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 5.

¹⁵¹ *Id.* at 4.

¹⁵² Catholic Mutual's Mem. in Support of Second Mot. for Partial Summ. J. (Docket No. 177), at 1.

duty of cooperation under the occurrence based policies and whether the plan provisions releasing CBNA from liability have terminated Catholic Mutual's duties under the occurrence based policies. Neither Catholic Mutual's second motion for partial summary judgment nor Berger's opposition to that motion implicate or seek relief under the 2008 claims made policy.

112. Catholic Mutual says the second arbitrable dispute which it has delineated arose because Berger asserted, in Footnote 5 of his opposition to Catholic Mutual's second motion for partial summary judgment, that the UCC's settlement proposal was "advanced on behalf of 21 Tort Claimants who, at that time, alleged actual abuse during Catholic Mutual's Certificate period, plus 7 claims by Tort Claimants whose claims were potentially covered under subsequent Catholic Mutual 'claims made' Certificates."¹⁵³

113. The UCC's settlement proposal encompassed just six abuse claims falling within the effective period of the 2008 claims made policy.¹⁵⁴ Catholic Mutual had already agreed to defend these six claims, Nos. 1107, 1187, 1188, 1223, 1224 and 1236, under a reservation of rights.¹⁵⁵

114. The UCC's settlement letter also encompassed 16 abuse claims which Catholic Mutual had previously agreed to defend under the occurrence based policies: Claims

¹⁵³ *Id.*, citing Berger's Mem. in Opp'n to Catholic Mutual's Second Mot. for Partial Summ. J. (Docket No. 194), at 7, n.5.

¹⁵⁴ Certification of Paul Sievers in Supp. of Berger's Opp'n to Catholic Mutual's Second Mot. for Partial Summ. J (Docket No. 196), Ex. 2 at 5-6.

¹⁵⁵ Miller Certification (Docket No. 178), Ex. C.

Nos. 1083, 1085, 1086, 1091, 1095, 1108, 1199, 1201, 1212, 1214, 1217, 1237, 1239, 1260, 1263, and 1273.¹⁵⁶

115. The UCC's settlement letter included six claims which Catholic Mutual had not yet agreed to defend: Claims Nos. 1039, 1061, 1080, 1218, 1226 and 1269.¹⁵⁷

116. On December 16, 2009, Catholic Mutual advised CBNA that it would agree to defend five of these six claims, under a reservation of rights and under the occurrence based policies covering the period from April 19, 1979, through April 15, 1983.¹⁵⁸ The additional claims Catholic Mutual agreed to defend were Claims Nos. 1039, 1080, 1218, 1226 and 1269.¹⁵⁹

117. Catholic Mutual declined to defend only one of the claims encompassed in the UCC's settlement proposal, Claim No. 1061, because the claim did not allege that abuse occurred during any period when a Catholic Mutual policy with CBNA was in effect.¹⁶⁰

118. In Claim No. 1061, the claimant alleged that the incidents of abuse occurred in 1978, at least one time per month, for a period of at least a year. The claimant, who was born in April of 1970, further alleges that the abuse occurred when he was 8 to 9

¹⁵⁶ *Id.*

¹⁵⁷ See Sievers Certification (Docket No. 196), Ex. 2 at 5-6 (listing all claims encompassed in the UCC's settlement proposal).

¹⁵⁸ Miller Certification (Docket No. 178), Ex. D.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

years old. This claim could not, under any interpretation, fall within the effective period of the 2008 claims made policy.¹⁶¹

119. There is nothing in the record to show that CBNA, the UCC or Berger have contested Catholic Mutual's position on Claim No. 1061 or asserted that this claim is covered under the 2008 claims made policy.

120. In sum, of the 28 claims encompassed in the UCC's settlement proposal, Catholic Mutual ultimately agreed to defend 21 under the occurrence based policies and six under the 2008 claims made policy. It declined to defend just one.

121. Footnote 5 in Berger's opposition to Catholic Mutual's second motion for partial summary judgment is contradicted by the evidence, and there is nothing else in the record to indicate that either CBNA or Berger contend that seven, rather than six, claims are covered under the 2008 claims made policy.

122. Footnote 5 is erroneous and does not create a dispute as to whether there are six or seven abuse claims covered under the 2008 claims made policy.

123. The issues addressed in Catholic Mutual's second motion for partial summary judgment are whether certain provisions in CBNA's confirmed plan violate express provisions in the occurrence based policies. Neither Catholic Mutual's motion nor Berger's opposition directly implicate the 2008 claims made policy, aside from Berger's erroneous statement that seven abuse claims are covered under that policy.

¹⁶¹ The information on the claim form is ambiguous and could possibly be construed to assert incidents of abuse occurring in 1979 when the first occurrence based policy was in effect.

124. CBNA's first amended complaint contains only one allegation pertaining to the Catholic Mutual claims made policies: "Catholic Mutual also has issued various "claims made" liability insurance policies/certificates to CBNA which provide liability coverage to CBNA for certain sexual abuse related claims previously brought against CBNA."¹⁶² CBNA does not allege that any of its other insurers issued it claims made policies, nor does its complaint seek any relief regarding the Catholic Mutual claims made policies.

125. In its answer to CBNA's first amended complaint, Catholic Mutual admitted that it issued various claims made policies to CBNA.¹⁶³ As its eighth affirmative defense, Catholic Mutual asserted that the claims made policies provided that arbitration was the sole remedy for resolving disputes involving any claim for coverage under those policies.¹⁶⁴

¹⁶² CBNA's First Am. Compl. (Docket No. 189), ¶ 22.

¹⁶³ Catholic Mutual's Answer to CBNA's First Am. Compl., filed May 10, 2010 (Docket No. 200), at 10.

¹⁶⁴ *Id.* at 19.

II. PROPOSED CONCLUSIONS OF LAW:

A. Jurisdiction:

1. This is a non-core, related proceeding under 28 U.S.C. § 157(c)(1).¹⁶⁵
2. The district court has original, but not exclusive, jurisdiction over this proceeding.¹⁶⁶
3. The bankruptcy court has limited jurisdiction over this proceeding pursuant to 28 U.S.C. § 1334(b) and the district court's order of reference. The bankruptcy court may hear argument on Catholic Mutual's motions for partial summary judgment and to compel arbitration, but must submit its proposed findings of fact and conclusions of law to the district court.¹⁶⁷
4. The district court's review of the bankruptcy court's findings and conclusions is de novo, in accordance with 28 U.S.C. § 157(c)(1).
5. After considering the bankruptcy court's proposed findings and conclusions, the district court shall enter an order and judgment disposing of Catholic Mutual's motions.¹⁶⁸

¹⁶⁵ *Montana v. Goldin (In re Pegasus Gold Corp.)*, 394 F.3d 1189, 1193-94 (9th Cir. 2005) (discussing "related to" jurisdiction); *Dunmore v. United States*, 358 F.3d 1107, 1113-14 (9th Cir. 2004); *Sec. Farms v. Int'l Bhd. of Teamsters*, 124 F.3d 999, 1008 (9th Cir. 1997).

¹⁶⁶ 28 U.S.C. § 1334(b).

¹⁶⁷ 28 U.S.C. § 157(c)(1); *see also Dunmore*, 358 F.3d at 1115.

¹⁶⁸ 28 U.S.C. § 157(c)(1).

B. Summary Judgment Standard:

6. In this adversary proceeding, federal law governs the standard of review for summary judgment.¹⁶⁹

7. Fed. R. Civ. P. 56, made applicable to adversary proceedings pursuant to Fed. R. Bankr. P. 7056, provides that summary judgment should be entered “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law.”¹⁷⁰

8. Summary judgment can be sought on a claim or defense, or a part of a claim or defense.¹⁷¹

9. The moving party has the burden of showing that there is no genuine dispute as to any material fact for trial.¹⁷²

¹⁶⁹ *Bell Lavalin, Inc. v. Simcoe and Erie Gen'l Ins.*, 61 F.3d 742, 745 (9th Cir. 1995).

¹⁷⁰ Fed. R. Civ. P. 56(a) (effective Dec. 1, 2010). This standard is also found in former Fed. R. Civ. P. 56(c)(2) (Summary judgment should be rendered “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”) Under 28 U.S.C. § 2074(a) and the Order of the United States Supreme Court dated April 28, 2010, amended Fed. R. Civ. P. 56 applies to proceedings pending at the time the rule became effective, “insofar as just and practicable.” See Order of the Supreme Court of the United States, dated April 28, 2010, regarding amendments to the Federal Rules of Civil Procedure, found at <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/Overview/RulesForms120110.aspx>.

¹⁷¹ Fed. R. Civ. P. 56(a) (effective Dec. 1, 2010). Former Rule 56(b) also permitted a plaintiff or a defending party to seek summary judgment “on all or part of the claim.”

¹⁷² *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986) (referring to language found in former Fed. R. Civ. P. 56(c)(2) that there be “no genuine issue as to any material fact.”).

10. To defeat a motion for summary judgment, the non-moving party must establish the existence of material factual issues by producing evidence that would support a jury verdict in its favor.¹⁷³

11. In considering a motion for summary judgment, the court should not engage in credibility determinations or weigh the evidence.¹⁷⁴ Further, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.”¹⁷⁵

12. “A genuine issue of material fact exists if, viewing all the evidence in the light most favorable to the nonmoving party, a reasonable fact-finder could decide in that party’s favor.”¹⁷⁶

13. Conversely, there is no need for trial if the nonmoving party fails to produce sufficient evidence to support a jury verdict in its favor.¹⁷⁷

14. The applicable substantive law identifies which facts are material, and only disputes over facts which might affect the outcome of the suit under governing law will preclude entry of summary judgment.¹⁷⁸

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 255.

¹⁷⁵ *Anderson*, 477 U.S. at 255.

¹⁷⁶ *Joye v. Calif. Franchise Tax Board (In re Joye)*, 578 F.3d 1070, 1074 (9th Cir. 2009), *citing Barboza v. New Form, Inc. (In re Barboza)*, 545 F.3d 702, 707 (9th Cir. 2008).

¹⁷⁷ *Anderson*, 477 U.S. at 249.

¹⁷⁸ *Id.* at 248.

C. Governing Law:

15. Alaska state law governs the interpretation of the insurance policies.¹⁷⁹

16. Contract interpretation presents a question of law, reviewed de novo.¹⁸⁰

17. “To the extent that there are no relevant unresolved or controversial facts, the construction of an insurance contract is a matter for the court.”¹⁸¹

18. The liability of an insurer is generally determined by the language of the insurance policy, and a restriction on coverage is recognized “if an insurer by plain language limits the coverage of its policy.”¹⁸²

19. Coverage under a policy is construed broadly, and exclusions narrowly, because of inequities in bargaining power between the insured and the insurer.¹⁸³

20. Insurance policies are considered adhesion contracts and, even where a policy provision is not ambiguous, it is construed liberally “to give effect to the insured’s objectively reasonable expectations.”¹⁸⁴

¹⁷⁹ 28 U.S.C. § 1652; *see also* *Stanford University Hosp. v. Federal Ins. Co.*, 174 F.3d 1077, 1083 (9th Cir. 1999); *Bell Lavalin Inc.*, 61 F.3d at 745.

¹⁸⁰ *Nelson v. Progressive Cas. Ins. Co.*, 162 P.3d 1228, 1231 (Alaska 2007).

¹⁸¹ *Great Divide Ins. Co. v. Carpenter*, 79 P.3d 599, 606 (Alaska 2003), *citing* *Fejes v. Alaska Ins. Co.*, 984 P.2d 519, 522 (Alaska 1999).

¹⁸² *Whittier Prop., Inc. v. Alaska Nat’l Ins. Co.*, 185 P.3d 84, 88 (Alaska 2008).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 91.

D. No Breach of Good Faith and Fair Dealing:

21. “Ordinarily, an insured’s breach of [a] cooperation clause relieves a prejudiced insurer of liability under the policy.”¹⁸⁵

22. The occurrence based policies contained a provision which required CBNA to “cooperate with [Catholic Mutual] and, upon [Catholic Mutual’s] request, assist in making settlements, in the conduct of suits and in enforcing any right of contribution or indemnity” which might be available.¹⁸⁶ These certificates also provided that no action would lie against Catholic Mutual unless CBNA had fully complied with the policy terms nor until CBNA’s obligation to pay had been “finally determined either by judgment against [CBNA] after actual trial or by written agreement of [CBNA], the claimant and [Catholic Mutual].”¹⁸⁷

23. These policy provisions are not ambiguous.

24. Catholic Mutual contends CBNA breached the cooperation clause in the occurrence based policies because, under the confirmed chapter 11 plan, CBNA has been discharged and released from liability with respect to the abuse claims, the abuse claims have been deemed allowed, and the abuse claims will be liquidated under a binding arbitration process without the right to appeal. Catholic Mutual also contends CBNA has breached the anti-assignment clause in the occurrence based policies because it has assigned its rights under the policies to Berger as the settlement trustee.

¹⁸⁵ *Grace v. Ins. Co. of N. America*, 944 P.2d 460, 464 (Alaska 1997), citing *Arizona Property & Cas. Ins. Guar. Fund v. Helme*, 735 P.2d 451, 458-59 (Az. 1987); see also *Great Divide Ins. Co.*, 79 P.3d at 608.

¹⁸⁶ See Proposed Findings of Fact, ¶¶ 13 - 15, *supra*.

¹⁸⁷ Proposed Findings of Fact, ¶¶ 16 - 18, *supra*.

25. By entering into the plan, CBNA has breached its duty to cooperate with Catholic Mutual and to assist, at Catholic Mutual's request, in making settlements and in the conduct of suits. Further, under the provisions of the plan, Catholic Mutual is deprived of its right and duty to defend suits against CBNA.¹⁸⁸

26. Berger contends Catholic Mutual has suffered no prejudice under the plan.

27. Catholic Mutual says it has been prejudiced here because, under the confirmed plan, CBNA has been discharged of liability for the abuse claims. This fact alone is insufficient to find prejudice. The discharge of a debt in bankruptcy is personal to the debtor¹⁸⁹ and "does not affect the liability of any other entity on . . . such debt."¹⁹⁰ An insurer's liability under a policy is not reduced or eliminated because of an insured's bankruptcy discharge.¹⁹¹

28. "An insured may breach a cooperation clause by confessing liability in a dispute in which an insurer had a duty to defend."¹⁹² Catholic Mutual says it has been prejudiced because, under the terms of the confirmed plan, the abuse claims have been deemed allowed and the claims of the Settling Tort Claimants have the same effect as judgments against CBNA. However, the plan distinguished between allowance of claims

¹⁸⁸ See Proposed Findings of Fact, ¶¶ 8, 9, *supra*.

¹⁸⁹ 11 U.S.C. § 524(a).

¹⁹⁰ 11 U.S.C. § 524(e).

¹⁹¹ *Brannon v. Continental Cas. Co.*, 137 P.3d 280, 288 n.37 (Alaska 2006).

¹⁹² *Allstate Inc. Co. v. Herron*, 393 F.Supp.2d 948, 951 (D. Alaska 2005), *citing Grace*, 944 P.2d at 464.

against CBNA and the liquidation of damages, which would be determined through a binding arbitration process.

29. An allowed claim is “similar to a federal judgment” against the bankruptcy estate, but it is not the equivalent of a judgment that would be collectible outside of the bankruptcy process.¹⁹³ Further, all defenses against the abuse claims, including the statute of limitations, were preserved for consideration in the arbitration process provided for under the plan. Because the plan itself did not result in liquidation of the abuse claims nor in the entry of a judgment that would be collectible against CBNA, Catholic Mutual has not been prejudiced by the fact that the abuse claims have been deemed allowed against CBNA.

30. Catholic Mutual says it has been prejudiced because, under the terms of the confirmed plan, the abuse claims are to be liquidated under a binding arbitration procedure. These plan provisions violate CBNA’s duty to cooperate under the occurrence based policies and prejudice Catholic Mutual because they preclude Catholic Mutual’s right to conduct suits regarding the abuse claims.

31. Berger notes that a plan modification was offered to Catholic Mutual so the claims covered under the occurrence based policies could be tried in state court instead.

32. While it is possible to modify a plan after confirmation, this option must be exercised before substantial consummation of such plan.¹⁹⁴

¹⁹³ See *Onink v. Cardelucci (In re Cardelucci)*, 285 F.3d 1231, 1235 (9th Cir. 2002); see also *Zino v. Baker*, 613 F.3d 1326, 1328-29 (11th Cir. 2010).

¹⁹⁴ 11 U.S.C. § 1127(b).

33 Three factors must be satisfied for “substantial consummation” of a plan:

(A) transfer of all or substantially all of the property proposed by the plan to be transferred;

(B) assumption by the debtor or by the successor to the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and

(C) commencement of distribution under the plan.¹⁹⁵

34. These three factors are included within the six factors a court should consider in deciding whether a final decree should be entered.¹⁹⁶

35. When CBNA moved for entry of a final decree on September 24, 2010, it stated that all six of the factors required for entry of the final decree had been satisfied.¹⁹⁷

36. CBNA’s plan can no longer be modified because it has been both substantially consummated and fully administered. The arbitration provisions which are found in the plan cannot be modified and are prejudicial to Catholic Mutual.

37. CBNA has breached the cooperation clause of the occurrence based policies, and this breach has prejudiced Catholic Mutual. However, an insured’s breach of

¹⁹⁵ 11 U.S.C. § 1101(2).

¹⁹⁶ See *Ground Systems, Inc. v. Albert (In re Ground Systems, Inc.)*, 213 B.R. 1016, 1019 (B.A.P. 9th Cir. 1997).

¹⁹⁷ CBNA’s Mot. for Entry of Final Decree, filed Oct. 7, 2010 (Docket No. 808), in *In re Catholic Bishop of N. Alaska*, Main Case No. F08-00110-DMD.

the cooperation clause may be excused by the insurer's prior misconduct.¹⁹⁸ The focus is on whether the insurer "has materially breached its contractual obligation to the insured."¹⁹⁹

38. An insured may enter into a settlement agreement without consent of the insurer if the insurer has breached one of its defense obligations.²⁰⁰

39. Catholic Mutual has not breached its defense obligations. Berger does not contend that it has, and there is nothing in the record to support such a finding.

40. Berger contends Catholic Mutual has breached its duty of good faith and fair dealing under the policies, in particular with regard to its "refusal to even respond to a reasonable settlement offer on those claims it did agree to defend."²⁰¹ Berger is specifically referring to Catholic Mutual's actions regarding the UCC's October 21, 2009, settlement proposal.

41. An insurer has a "legal duty to act in good faith to protect the interests of the insured."²⁰² Further, the covenant of good faith and fair dealing applies to all insurance contracts.²⁰³

¹⁹⁸ *Allstate v. Herron*, 393 F.Supp.2d at 951, *citing Grace*, 944 P.2d at 464.

¹⁹⁹ *Great Divide*, 79 P.3d at 609-10, *citing Grace*, 944 P.2d at 464-65.

²⁰⁰ *Great Divide*, 79 P.3d at 608.

²⁰¹ Berger's Mem. in Opp'n to Catholic Mutual's Second Mot. for Partial Summ. J. (Docket No. 194), at 7.

²⁰² *Schultz v. Travelers Indem. Co.*, 754 P.2d 265, 267 (Alaska 1988).

²⁰³ *Jackson v. American Equity Ins. Co.*, 90 P.3d 136, 142 (Alaska 2004).

42. The covenant of good faith and fair dealing requires “an insurer to inform the insured of all settlement offers and to inform the insured of the possibility the injured claimant may recover a judgment in excess of the insured’s policy limits.”²⁰⁴

43. Further, an insurer has a duty to settle a claim against its insured in instances where there is a “great risk of a recovery beyond the policy limits.”²⁰⁵ In such a case, the insurer must determine the likely amount of the money judgment that could be entered against the insured, and tender in settlement that portion of the projected judgment which it would be required to pay under the policy.²⁰⁶

44. Catholic Mutual did not fail to inform CBNA of settlement offers; both CBNA and Catholic Mutual were served with a copy of the UCC’s settlement proposal on the same day.

45. At the time the UCC’s settlement proposal was made, there were significant unresolved issues between the parties which precluded a reasonable determination as to whether CBNA was at risk of having a judgment in excess of policy limits entered against it. These issues regarded the scope and amount of coverage under the Catholic Mutual policies, specifically: whether the \$2 million in coverage under the umbrella policies was an aggregate limit.

²⁰⁴ *Id.*

²⁰⁵ *Id.*, citing *Crisci v. Sec. Ins. Co.*, 426 P.2d 173, 176 (Cal. 1967).

²⁰⁶ *Jackson*, 90 P.3d at 142.

46. Another unresolved issue at the time the UCC made its settlement proposal was whether the occurrence based policies would cover substantially more than the claims involved in the UCC's offer, under a "continuous trigger" theory of liability.

47. These issues were not conclusively resolved until July 30, 2010, when the United States District Court entered its Order Regarding Summary Judgment Motions.²⁰⁷

48. Further, the automatic stay under 11 U.S.C. § 362(a) was in effect at the time the UCC's offer was made. The stay precluded Catholic Mutual from conducting an inquiry into the abuse claims and limited it to the information contained in the Proofs of Claim for purposes of evaluating the likely amount of any monetary judgment that might ultimately be rendered against CBNA.

49. The stay also precluded the abuse claimants from prosecuting their claims while CBNA's bankruptcy case was pending. During the pendency of CBNA's bankruptcy case, none of the abuse claimants obtained relief from stay so that they could initiate or continue civil actions against CBNA.

50. Based on the limited information contained on the Proofs of Claim filed by the abuse claimants, the statute of limitations appears to be a viable defense to the abuse claims encompassed in the UCC's offer.

51. "Before 2001, AS 09.10.060(c) – the predecessor to AS 09.10.065 – provided for a three-year statute of limitations for actions for damages against perpetrators

²⁰⁷ Order Regarding Summary Judgment Motions, entered Jul. 30, 2010 (Docket No. 12 in USDC Case No. 4:08-cv-0038-RRB; Docket No. 219 in Adv. No. F08-90019-DMD).

of sexual abuse.”²⁰⁸ The statute was amended to eliminate the three-year limitation period and permit a victim of felony sexual abuse or felony sexual assault to bring an action for damages “at any time.”²⁰⁹ The amendment is not retroactive and does not apply to abuse claims which were time-barred as of October 1, 2001.²¹⁰ However, for such claims, under the discovery rule, the date on which the prior, three-year limitation period begins to run is a question of fact.²¹¹

52. While it is possible that the limitation period may have been tolled, under the discovery rule, for some of the abuse claims encompassed in the UCC’s offer, the automatic stay precluded any investigation by Catholic Mutual into this issue.

53. At the time the UCC’s settlement offer was made, there were substantial and unresolved disputes between CBNA and Catholic Mutual regarding the scope of coverage available under the occurrence based policies. These issues needed to be resolved before it could be determined whether CBNA was at risk of a judgment in excess of policy limits. Further, at the time the offer was made, the automatic stay not only precluded Catholic Mutual from investigating the merits of the abuse claims but also prevented the claimants from prosecuting their claims against CBNA. Accordingly, there was no

²⁰⁸ *Catholic Bishop of N. Alaska v. Does 1-6*, 141 P.3d 719, 722 (Alaska 2006).

²⁰⁹ *Id.* at 723.

²¹⁰ *Id.* at 725.

²¹¹ *Id.*

immediate risk that CBNA would be subjected to a civil judgment in favor of any of the abuse claimants.

54. Viewing the evidence in this case, and drawing all inferences in favor of Berger, a fact-finder could not reasonably conclude that Catholic Mutual's conduct with regard to the UCC's settlement proposal breached any duty imposed under the covenant of good faith and fair dealing. Accordingly, CBNA's conduct in entering into the third amended plan was not excused by a prior, material breach of the occurrence based policies by Catholic Mutual.

E. Defenses Outside the Pleadings and Partial Summary Judgment:

55. In his opposition, Berger argues that Catholic Mutual's second motion for partial summary judgment raises issues which are outside the pleadings because none of its affirmative defenses allege breach of the cooperation or anti-assignment clauses found in the occurrence based policies.

56. Berger's opposition was filed prior to the date that Catholic Mutual filed its answer to CBNA's first amended complaint. The answer contained a counterclaim which clearly raises all of the issues addressed in Catholic Mutual's second motion for partial summary judgment. Moreover, the facts giving rise to Catholic Mutual's counterclaim did not occur until CBNA's plan was confirmed, on February 17, 2010.

57. In considering a motion for summary judgment, the “complaint does not control the issues” which may be raised and “the court must consider the issues presented in other material offered by the parties.”²¹²

58. In support of his position, Berger cites *Old Stone Capital Corp. v. John Hoene Implement Corp.*²¹³ In that case, the court found that summary judgment could not be granted on a statute of frauds defense because it was not raised in a responsive pleading.²¹⁴

59. *Old Stone* is distinguishable. In the instant case, Catholic Mutual raised as an affirmative defense, in both of its answers, that no suit could be brought against it unless CBNA had complied with all of the requirements of the insurance certificates, nor until CBNA’s liability had been determined by either court judgment or a written agreement between CBNA, the claimant and Catholic Mutual.

60. Berger argues that Catholic Mutual’s second motion for partial summary judgment has “nothing to do with the scope of coverage issues that forms the basis of this adversary proceeding.”²¹⁵ However, scope of coverage would also encompass the issue raised by Catholic Mutual, e.g., whether CBNA has breached certain of its obligations under the occurrence based policies.

²¹² *Apache Survival Coalition v. United States*, 21 F.3d 895, 910-11 (9th Cir. 1994), citing 10A Wright & Miller, Fed. Prac. & Procedure Civ. § 2721 at 43-46.

²¹³ 647 F.Supp. 916 (D. Idaho 1986).

²¹⁴ *Id.* at 919. The statute of frauds is a defense that must be affirmatively pled under Fed. R. Civ. P. 8(c).

²¹⁵ Berger’s Mem. in Opp’n to Catholic Mutual’s Second Mot. for Partial Summ. J. (Docket No. 194), at 10.

61. Berger also argues that Catholic Mutual's second motion for partial summary judgment impermissibly seeks to determine only a portion of a claim or cause of action because it only seeks an adjudication of issues under the occurrence based policies, and not the claims made policies.

62. Catholic Mutual may move for summary judgment on part of a claim.²¹⁶

63. Catholic Mutual's second motion for partial summary judgment seeks adjudication of issues involving CBNA's purported breach of the occurrence based policies, based upon provisions in the confirmed chapter 11 plan. The motion does not address any claims made policies issued by Catholic Mutual.

64. The claims made policies are contracts which are separate and distinct from the occurrence based policies, and a claim for breach under one of the policies is independent of a claim for breach under the other.²¹⁷

65. Berger's contentions regarding procedural deficiencies in Catholic Mutual's second motion for partial summary judgment lack merit and should be overruled.

F. The Motion to Compel Arbitration:

²¹⁶ Fed. R. Civ. P. 56(a).

²¹⁷ *Bertschinger v. Nat'l Surety Corp.*, 449 F.2d 746, 747 (9th Cir. 1971).

66. Catholic Mutual has filed a motion to compel arbitration and to stay proceedings related to the claims made policy.²¹⁸ Catholic Mutual says a dispute regarding the 2008 claims made policy arose because of contentions Berger made in opposition to Catholic Mutual's second motion for partial summary judgment.

67. Catholic Mutual's second motion for partial summary judgment focuses on whether CBNA has breached its duty of cooperation under the occurrence based policies by entering into the third amended chapter 11 plan. None of the claims made policies are implicated in the motion.

68. Neither Berger's opposition nor CBNA's first amended complaint specifically seek relief regarding the 2008 claims made policy. Berger's opposition addresses only the issues Catholic Mutual has raised with regard to the occurrence based policies, which do not contain an arbitration provision. Further, Berger's erroneous statement in Footnote 5 of his opposition does not create a dispute as to whether there are six or seven claims covered under the 2008 claims-made policy.

69. There are no genuine issues before the court at this time regarding the claims made policies. However, both parties agree that the 2008 claims made policy contains a provision which requires that all disputes regarding coverage be resolved by an arbitration procedure set out in the policy.

²¹⁸ Catholic Mutual's Mot. to Compel Arbitration (Docket No. 206).

70. Arbitration agreements are “valid, irrevocable, and enforceable,” except “upon such grounds that exist at law or in equity for the revocation of any contract.”²¹⁹ To determine the validity of an arbitration agreement, federal courts should apply state law principles governing contract formation and “general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate” the agreement.²²⁰

71. Berger contends the arbitration provision in the claims made policy is unenforceable because it is unconscionable.²²¹ He says unconscionability can be found because the claims made policy is an adhesion contract, offered to CBNA on a “take it or leave it” basis.²²² He also says the arbitration clause is unreasonably favorable to Catholic Mutual because it provides that the arbitration will be conducted by an officer or directors of Catholic Mutual, so that Catholic Mutual is “both party and judge” in any dispute concerning the policy.²²³

72. “A determination of unconscionability is made as a matter of law.”²²⁴

²¹⁹ *Circuit City Stores, Inc. v. Adams*, 279 F.3d 889, 892 (9th Cir. 2002), *citing* the Federal Arbitration Act, 9 U.S.C. § 2 (emphasis omitted); *see also* AS 09.43.330(a).

²²⁰ *Circuit City*, 279 F.3d at 892 (citations omitted).

²²¹ Berger’s Opp’n to Catholic Mutual’s Mot. to Compel Arbitration, filed Jul. 9, 2010 (Docket No. 213).

²²² *Id.* at 6-7.

²²³ *Id.* at 7-8.

²²⁴ *Vockner v. Erickson*, 712 P.2d 379, 382 n.6 (Alaska 1986).

73. Alaska courts have “relied on the Restatement approach . . . when applying the doctrine of unconscionability.”²²⁵ The Restatement does not define unconscionability but states that “[t]he determination that a contract or term is or is not unconscionable is made in the light of its setting, purpose and effect.”²²⁶

74. A contract term is not unconscionable “merely because the parties to it are unequal in bargaining position, nor even because the inequality results in an allocation of risks to the weaker party.”²²⁷ However, unconscionability can be found “if the circumstances indicate a ‘vast disparity of bargaining power coupled with terms unreasonably favorable to the stronger party.’”²²⁸

75. Insurance contracts are considered contracts of adhesion due to the disparity in bargaining power between the parties.²²⁹ Such contracts are typically “standard form printed contracts prepared by one party and submitted to the other on a ‘take it or leave it’ basis.”²³⁰

76. For the purpose of evaluating whether the arbitration provision in the claims made policy is unconscionable, it will be assumed that a vast disparity of bargaining

²²⁵ *Askinuk Corp. v. Lower Yukon School Dist.*, 214 P.3d 259, 268 (Alaska 2009).

²²⁶ *Id.*, citing RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. a (1981).

²²⁷ *Askinuk*, 214 P.2d at 268, citing *Vockner v. Erickson*, 712 P.2d 379, 382 (Alaska 1986).

²²⁸ *Askinuk*, 214 P.2d at 268, citing *OK Lumber Co. v. Alaska R.R. Corp.*, 123 P.3d 1076, 1081 n. 17 (Alaska 2005).

²²⁹ *Stordahl v. Government Employees Ins. Co.*, 564 P.2d 63, 65 (Alaska 1977).

²³⁰ *Id.*, n.4.

power existed at the time the policy was made. If the arbitration clause is found to be unreasonably favorable to Catholic Mutual, it would be unconscionable and thus unenforceable.

77. The arbitration clause requires CBNA to submit disputes regarding the claims made policy to Catholic Mutual under a two-step procedure.²³¹ First, CBNA is to submit the dispute, in writing, to Catholic Mutual's president. If Catholic Mutual's president cannot resolve the dispute to CBNA's satisfaction, CBNA has the right to appeal, in writing, within 30 days thereafter to the Chairman of the Board of Catholic Mutual. The Chairman will appoint an arbitration committee consisting of himself and two other members of Catholic Mutual's board of trustees. The arbitration committee will review the appeal and issue a decision within 90 days of its submission to the chairman of the board.

78. The arbitration committee is not bound by judicial formalities and can consider, in addition to applicable rules of law, the customs and practices of the self-insurance industry and such other evidence it deems necessary to resolve the dispute fairly. The committee is to make its decision "with a view to effecting the underlying intent of the Catholic Mutual program of self-insurance which is to best protect the material assets of all the Certificate Holders participating in the Catholic Mutual program."²³²

79. Berger says the arbitration provision is unconscionable because it gives Catholic Mutual unlimited authority to adjudicate claims against it. He cites *Gibson v. Nye*

²³¹ See Proposed Findings of Fact, ¶ 99, *supra*.

²³² *Id.*

Frontier Ford, Inc.,²³³ in support of this contention. *Gibson* involved an arbitration clause in an employment contract. The employee contended the clause was unconscionable because it gave his employer the unilateral authority to change the arbitration agreement, and cited several cases in support of his position.²³⁴ Those cases are all distinguishable because the claims made policy does not contain such a provision.

80. The arbitration provision in *Gibson* was found to be unconscionable because it contained a \$50,000.00 threshold for appeals and required employees to pay half of the costs of arbitration.²³⁵ There are no similar provisions in the claims made policy.

81. As noted above, Catholic Mutual's Board of Trustees consists entirely of Diocesan Archbishops or Diocesan Bishops, and Catholic Mutual's president is elected by this Board.²³⁶

82. Under the arbitration provision in the claims made policy, CBNA has the right to appeal a decision rendered by Catholic Mutual's president regarding policy disputes to an arbitration committee consisting of the Chairman of the Board and two other Board members. Given that all Board members on the arbitration committee would be Diocesan Archbishops or Diocesan Bishops, it cannot be concluded that the arbitration provision is unreasonably favorable to Catholic Mutual. Instead, the arbitration panel could

²³³ 205 P.2d 1091 (Alaska 2009).

²³⁴ *Id.* at 1096, n.19.

²³⁵ *Id.* at 1098-1101.

²³⁶ See Proposed Findings of Fact, ¶¶ 103, 104.

appear to be more aligned with the interests of the Archdioceses and Dioceses insured by Catholic Mutual, including CBNA.

83. Both the Federal Arbitration Act and Alaska law provide that if an arbitration agreement sets out the method of appointing an arbitrator, that method should be followed.²³⁷ Further, both the Federal Arbitration Act and Alaska law provide for judicial review of arbitration awards and for vacation of an award if there was “evident partiality,” corruption or other misconduct by an arbitrator.²³⁸ Under state law, the arbitration award can only be set aside if there is “evident partiality by an arbitrator appointed as a *neutral* arbitrator.”²³⁹

84. The party seeking to set aside an arbitration award on the ground of evident partiality “must establish specific facts which indicate improper motives on the part of [the arbitration board]. The appearance of impropriety, standing alone, is insufficient.”²⁴⁰ Further, when there is a contractual agreement which provides a particular method of dispute resolution, it is generally presumed to be fair.²⁴¹

85. Berger’s contention that the claims made policy contains a “one-sided” arbitration provision presumes a bias which, at this point, is unsupported by the record. The

²³⁷ 9 U.S.C. § 5; AS 09.43.380(a).

²³⁸ 9 U.S.C. § 10(a); AS 09.43.500(a).

²³⁹ AS 09.43.500(a)(2)(A) (emphasis added).

²⁴⁰ *Sheet Metal Workers Int’l Ass’n v. Kinney Air Conditioning Co.*, 756 F.2d 742, 746 (9th Cir. 1985).

²⁴¹ *Id.*

arbitration provision is not unreasonably favorable to Catholic Mutual and, therefore, is not unconscionable.

86. Catholic Mutual is entitled to an order directing Berger to submit all disputes regarding the claims made policy to Catholic Mutual as provided for under the dispute resolution provision found in the policy. However, Catholic Mutual's request for a stay should be denied, as there are currently no pending, adjudicable claims before the court which implicate the claims made policy.

Conclusion

Catholic Mutual's second motion for partial summary judgment should be granted. Further, Catholic Mutual's motion to compel arbitration should be granted, in part, to require Berger to submit all disputes regarding the claims made policy to Catholic Mutual as provided for under the dispute resolution provision found in the policy.

DATED: December 13, 2010

BY THE COURT

/s/ Donald MacDonald IV
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United States Bankruptcy Judge

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