

## **The Boy Scouts Bankruptcy: From Fame and Respect to Shame: A Trap for Sponsoring or Chartered Organizations?**

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### **Abstract**

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*The Boy Scouts of America (BSA) is one of the largest organizations serving youth in the United States, with 2.3 million youth members and approximately 889,000 adult volunteers. On February 18, 2020 the Boy Scouts of America filed for Chapter 11 bankruptcy—or more precisely, financial restructuring—to offer “equitable compensation” to survivors of sex abuse and their families. The Boy Scouts of America partners with various community organizations, religious congregations, churches, fraternal groups, service clubs, and other civic groups to provide Scouting programs for a particular neighborhood or community. These organizations hold charters issued by the BSA and are known as Chartered Organizations. The relationship between the Chartered Organization and the Boy Scouts is symbiotic and is memorialized in “The Annual Unit Charter Agreement.” This paper discusses the various provisions of the Bankruptcy Act as it relates to the Boy Scouts and poses an important question: Given the nature of the relationship between the BSA and Chartered Organizations, should a Chartered Organization seek to be protected by filing a “placeholder” claim in the Boy Scouts bankruptcy proceeding?*

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**Key Words:** Boy Scouts of America, bankruptcy, sex abuse, indemnification, chartered organization, chapter 11

### **1. Introduction**

According to the *Encyclopaedia Britannica* (2020), “The Boy Scout movement was founded in Great Britain in 1908 by a cavalry officer, Lieutenant General Robert S.S. (later Lord) Baden-Powell, who had written a book called *Scouting for Boys* in 1908.” Boy Scouts was originally formed for boys from 11 to 14 or 15 years of age and aimed to develop members in “good citizenship, chivalrous behavior, and skill in various outdoor activities.”

The Boy Scouts of America (BSA) is one of the largest organizations serving youth in the United States (Jordan, 2012), with 2.3 million youth members and approximately 889,000 adult volunteers. “Founded in 1910, the Boy Scouts grew under a rare congressional charter in 1916 that detailed scouting values of ‘patriotism, courage, self-reliance and kindred virtue’” (Baker, 2020). In 1979 there were over 5 million youths in BSA (Boy Scouts of America, 2017); however, its membership plunged to less than half across its 266 local councils—down from 2.9 million in 2006 (Boy Scouts, 2006) to roughly 2.3 million youth members just over a decade later (see Butt, 2019).

Wamsley and Goodwyn (2020) report that “The Scouts’ most recent tax filing shows total revenue of more than \$285 million, with significant land holdings across the U.S., the organization’s assets in 2018 totaled 1.4 billion” (see also Manierre, 2020). Citing the *Wall Street Journal*, Wamsley and Goodwyn (2020) added that the “Local Boy Scout councils and other affiliated nonprofits separately hold \$3.3 billion in assets.”

On February 18, 2020 the Boy Scouts of America filed for a Chapter 11 bankruptcy—or more precisely, financial restructuring—to offer “equitable compensation” to survivors of sex abuse and their families in Case No. 20-10343 in the Bankruptcy Court in Delaware (see Crew Janci, 2020). This would be accomplished by “establishing a trust to pay sex abuse claims”—over 90% of the claims dating back more than 30 years (Butler, 2020).

Chandler (2020) notes that despite provisions of the *Resolution Regarding Insurance and Indemnification of Chartered Organizations* providing that “in addition to [the Corporation] maintaining and providing ... liability insurance... The Corporation shall defend and indemnify Chartered Organizations and their employees, directors, officers, members and volunteers, who act in good faith and against whom claims are asserted based upon the Corporation’s membership standards.” Further, the *Resolution* provides that the Corporation “will indemnify to the fullest extent permitted by the law of the state where the Chartered Organization is domiciled against an award of punitive damages against any Chartered Organization, its employees, directors, officers, members and volunteers who act in ‘good faith,’”

However, Chapter 11 might also serve to limit the BSA’s liability in cases where indemnification clauses protected Chartered Organizations, but which might now be subsumed into the bankruptcy filing unless a third party “gains access to the trust by filing a ‘placeholder’ claim with the Bankruptcy Court.” [See Appendix I for the *Resolution Regarding Insurance and Indemnification of Chartered Organizations and Use of Charter Agreement in Civil Litigation.*] Butler (2020) noted: “Though indemnification clauses in the charter agreements historically protected churches from liability, bankruptcy could leave those churches vulnerable.” Issues related to Chartered Organizations will be discussed more fully in Section 5 of this study.

**TABLE 1: 2013 Chartered Organizations Associated with the Boy Scouts of America<sup>1</sup>**

Name of Organization	Total Units	% Total Units	Total Youth	% Total Youth
The Church of Jesus Christ of Latter-day Saints	37,933	36.99%	437,160	17.98%
United Methodist Church	10,703	10.44%	349,614	14.38%
Catholic Church	8,131	7.93%	259,297	10.67%
Parent-teacher groups other than PTAs	3,076	3.00%	126,207	5.19%
Presbyterian Church (U.S.A.)	3,520	3.43%	119,879	4.93%
Lutheran churches	3,728	3.64%	111,483	4.59%
Private schools	2,579	2.51%	91,828	3.78%
Baptist churches	3,532	3.44%	91,526	3.76%
Groups of citizens	2,633	2.57%	84,497	3.48%
American Legion and American Legion Auxiliary	2,477	2.42%	64,864	2.67%
Lions Clubs International	2,200	2.15%	60,671	2.50%

Parent-Teacher Association/Parent Teacher Organization	1,473	1.44%	60,171	2.47%
Business and industry	2,555	2.49%	57,266	2.36%
Episcopal Church (United States)	1,180	1.15%	41,340	1.70%
Unnamed community organizations	1,503	1.47%	41,180	1.69%
Rotary International	1,289	1.26%	40,996	1.69%
United Church of Christ	1,154	1.13%	36,194	1.49%
VFW, Auxiliary, Cootie	1,078	1.05%	30,686	1.26%
Community churches	1,009	0.98%	30,114	1.24%
Christian Church (Disciples of Christ)	1,083	1.06%	30,113	1.24%
Fire departments	1,156	1.13%	29,752	1.22%
Kiwanis International	857	0.84%	26,587	1.09%
Elks lodges (BPOE)	794	0.77%	21,892	0.90%
Unnamed churches	802	0.78%	21,804	0.90%
Community centres	818	0.80%	19,661	0.81%
Boys & Girls Clubs of America	547	0.53%	16,628	0.68%
Nonprofit agencies	570	0.56%	15,286	0.63%
Church of Christ	495	0.48%	13,559	0.56%
Athletic booster clubs	353	0.34%	11,201	0.46%
Playgrounds, recreation centers	379	0.37%	9,561	0.39%
Chamber of commerce, business associations	303	0.30%	8,892	0.37%
Homeowner associations	242	0.24%	8,786	0.36%
Optimist International	244	0.24%	8,300	0.34%
Masons - Eastern Star	260	0.25%	8,018	0.33%
Evangelical/independent churches	299	0.29%	7,740	0.32%
YWCA, YMCA	257	0.25%	7,362	0.30%
Church of God	207	0.20%	4,354	0.18%

Reformed Church in America	124	0.12%	3,921	0.16%
Church of the Nazarene	154	0.15%	3,841	0.16%
Jewish synagogues and centers	146	0.14%	3,268	0.13%
Church of the Brethren	101	0.10%	2,614	0.11%
Islam, Muslim, Masjid	75	0.07%	2,226	0.09%
African Methodist Episcopal Church	128	0.12%	2,053	0.08%
Christian Methodist Episcopal Church	91	0.09%	2,004	0.08%
The Salvation Army	101	0.10%	1,721	0.07%
Community of Christ	66	0.06%	1,718	0.07%
Buddhist Churches of America	69	0.07%	1,698	0.07%
Assemblies of God USA	74	0.07%	1,620	0.07%

(Chartered Organizations and the Boy Scouts of America" (PDF). Boy Scouts of America. March 2014.)

Table I indicates that 65% of all youth members are chartered to faith-based organizations; 23.5% of all youth members are chartered to civic organizations; and 11.5% of all youth members are chartered to educational organizations.

While the Boy Scouts bankruptcy filing may have come at a surprise to many Americans, in actuality, Goodwyn (2020) reported that the “Boy Scouts had been exploring the possibility of bankruptcy since at least December 2018 when the group hired a law firm for a possible Chapter 11 filing” (see also Villarreal, 2018).

Why was bankruptcy considered as the only realistic and viable option for the Boy Scouts? As Rae (2019) writes: “Can Bankruptcy save the Boy Scouts of America?” Citing its *2017 Annual Report* (Boy Scouts of America, 2017), Butt (2019) noted that the “BSA has been mired in lawsuits brought by former members alleging inappropriate conduct by its employees or volunteers dating back to the 1960s” (see also Salzman, 1991; Kline, 2009). The BSA cited approximately 300 pending or potential lawsuits in state and federal district courts across the United States and 1700 potential claimants in total. In May of 2020, the U.S. Bankruptcy Court for the District of Delaware set November 16, 2020 at 5pm EST as the “bar date” for all survivors of sexual abuse to file claims. As of November 2020, Axon (2020), reporting on *CBS News*, stated that “Boy Scouts face nearly 90,000 sex abuse claims in bankruptcy case,” far surpassing the numbers predicted (see also Baker, 2020).

## 2. A Chronology of Major Events Leading to the February 2020 Bankruptcy Filing

### 2.1. Early Warnings: The 1920s through the 1970s

- **1920: Blacklist of Volunteer Abusers Created**

Around the 1920's the BSA began compiling reports of volunteers considered ineligible to serve in the Boy Scouts due to claims of child sexual abuse.

- **1935: List of BSA Abusers First Referenced**

AVA Law Group (2020) reported that “at a gala honoring the 25th anniversary of the BSA's founding, President Theodore Roosevelt's son gave a speech that referenced Boy Scout ‘Red Files.’ At a separate press conference, the BSA explained they were keeping ‘Red Files’ of child molesters in the Boy Scouts. The BSA admitted to removing thousands of abusers from the Boy Scouts already, just by 1935.” What became known only later was the Kermit Roosevelt was not referring to suspected “reds” in the federal government but to abusers in the Boy Scouts.

- **1971: Thousands of Perversion Files Destroyed**

Scouting executives admitted to destroying thousands of "Perversion Files"—files naming sexual abusers in the Scouts—if they were deemed "too old" or "outdated" (see generally Von Bargen, 2014). Interestingly, if an abuser was older than 80 years old or likely deceased, the BSA destroyed the sexual abuser's file.

## 2.2. "Scouts Honor": The Dam Bursts

In May 1991, *The Washington Times* published a major five-part investigative series entitled "*Scouts Honor*" on alleged sex abuse in the BSA (see Boyle, 1994). The 1991 report was limited to the reported cases of male Scout leaders abusing Boy Scouts before the introduction of its Youth Protection Program. In its summation, the author wrote: "*The Boy Scouts are a magnet for men who want to have sexual relations with children...Pedophiles join the Scouts for a simple reason: it's where the boys are*" (Boyle 1994).

The series drew on three important sources:

- Historical "confidential files" (formerly known as the "Ineligible Volunteer Files") within Scout records, with details on 231 Scout leaders banned from Scouting for sexual misconduct from 1975 through 1984;
- 50 lawsuits against the Scouts filed by families of boys who had been molested from around the United States; and
- A list from the BSA of more than 350 men banned for sexual misconduct from 1971 to 1986.

The series, written shortly *after* the creation of the BSA's *Youth Protection Program*, concluded that "After decades of shying away from the problem, the Scouts have created what many child abuse experts call one of the best sex abuse education programs in the country. The program teaches boys, leaders and parents about resisting, recognizing and reporting abuse." Potts (1992) commented that "This program involves a booklet for parents, and preparation and distribution of two videos for boys aged 6 to 9 and 10 to 14 respectively; formal policies to protect scouts from abuse within the organization; and a prompt reporting and communication system."

The Youth Protection Program included:

- **Leadership Selection:** The adult application requests background information that should be checked by the unit committee or the chartered organization before accepting an applicant for unit leadership in a "multilayered adult leader selection process that includes criminal background checks administered by a nationally recognized third party and other screening efforts."
- **Required Training** for all BSA registered volunteers and is a joining requirement that must be taken every two years. If a volunteer's Youth Protection training record is not current at the time of re-charter, the volunteer will not be re-registered.
- **Youth Protection Reporting Procedures for Volunteers:** There are two types of Youth Protection-related reporting procedures all volunteers must follow: When a volunteer witnesses or suspects that any child has been abused or neglected; and when a volunteer witnesses a violation of the BSA's Youth Protection policies.
- **Mandatory Report of Child Abuse:** All persons involved in Scouting are required to report to local authorities "any good-faith suspicion or belief that any child is or has been physically or sexually abused, physically or emotionally neglected, exposed to any form of violence or threat, exposed to any form of sexual exploitation, including the possession, manufacture, or distribution of child pornography, online solicitation, enticement, or showing of obscene material." This reporting responsibility is not delegable to any other person or persons.
- **Reporting Violations of BSA Youth Protection Policies:** If a volunteer thinks any of the BSA's Youth Protection policies have been violated, the volunteer must notify your local council Scout executive or his/her designee so appropriate action can be taken for the safety of our Scouts.
- **Steps to Reporting Child Abuse:** A policy was created in order to ensure the child is in a safe environment. It included:
  1. In cases of child abuse injury or medical emergencies, the volunteer should call 911 immediately;
  2. If the suspected abuse occurred in the Scout's home or within a Scout's family, the volunteer is required by state law to immediately report/contact the local child abuse hotline;
  3. Notify the Scout executive or his/her designee (if he/she cannot be reached, call the 24/7 *Scouts First Helpline* at 1-844-726-8871 or email, [scoutsfirst@scouting.org](mailto:scoutsfirst@scouting.org))

In light of what we have learned from the bankruptcy filing and other anecdotal evidence, it may be fair to ask if the program was simply “too little, too late”? However, it is also fair to ask: “Had the Program been. Implemented sooner, could the abuse have been prevented?”

### 2.3. *Lewis v. Boys Scouts of America et al.* (2010): The Floodgates Begin to Open

*Lewis v. Boys Scouts of America et al.* (2010) was filed in Multnomah County, Oregon, by Kerry Lewis, a former member of the BSA, who alleged having been abused by a former scout leader in the 1980s. In 1983, the abuser had actually confessed to the local BSA coordinator that he had molested 17 Boy Scouts, but was allowed to continue working with the Scouts where he subsequently abused Lewis. In 2010, a jury ordered the Scouts pay \$1.4 million in actual damages and \$18.5 million in punitive damages to Lewis – the largest punitive damages award to a single plaintiff in a child abuse case in the United States to that date. [Green (2019) reported that the jury had voted 9-3 in favor of Lewis. Jurors “found the Boy Scouts of America 60 percent liable, the Cascade Pacific Council 15 percent liable, and the Mormon Church 25 percent liable.” The Mormon was not required to pay its share of the verdict, amounting to \$350,000 because it had settled with Lewis and seven other of the victims more than a year before the trial. The Scouts contended that the abuser had been “booted out of the Scouting program almost immediately after his confession. However, the evidence indicated the abuser had been “allowed to continue to associate with the program even though he confessed in January 1983 to Bishop Gordon McEwen,” who at that time was bishop of the Southeast Portland ward of the Church of Jesus Christ of Latter-day Saints and coordinator of the ward’s Scouting program.]

Attorney Kelly Clark who represented Lewis commented: “We saw numerous examples of the Scouts writing to law enforcement saying 'it would be best for the good of Scouting if this could avoid being made too public’” (cited in McGreal, 2010). Patrick Boyle, who had authored *Scout's Honor: Sexual Abuse in America's Most Trusted Institution*, commented: "Until this case, the Boy Scouts of America had managed to keep these cases largely underwater nationally. All of a sudden, it's gotten blown out of the water and the public knows that the Scouts have had this problem, too – just like the Catholic Church" (cited in Green, 2019).

The trial provided a rare glimpse into the confidential files held by BSA—although BSA had fought to keep the files secret on unspecified “privacy grounds.” They indicated that BSA had knowledge of abuse dated back to the 1920s in which the Scouts had settled about 60 similar cases out of court over recent years. This verdict resulted in the release of the so-called “Perversion Files” or “Perversion List” that had been maintained by the Boy Scouts for about ninety years. The files, which were released for the period 1965 through 1985, detailed the sexual abuse of scouts by their adult leaders (see Chapman, 2019).

### 2.4. 2012 Release of "Ineligible Volunteer" Files—Also Known as the “Perversion List”

Since the 1920s, the BSA had maintained a highly confidential set of "ineligible volunteer" files, also known derisively as the "perversion files" (see Von Barger, 2014). On October 19, 2012, the Boy Scouts of America were ordered to release over 20,000 pages of documentation on 1247 alleged child sexual abuse cases within the organization, covering the time period from 1965 to 1985 (Associated Press, 2012; Johnson, 2012). Laufersweiler-Dwyer and Mackinem (2015) write that “The BSA data represented a unique opportunity to examine demographic information from a large sample of purported sexual offenders from across the country over a vast period of time, Additionally, the sexual offenders were not exclusively located in the criminal justice system since BSA officials referred only a small percentage of offenders to law enforcement.” The files highlighted incidents where accused abusers were allowed to continue in the Scouts and, in more than a third of the cases covered in the documents, information about the allegations was not passed on to police (Crew Janci, 2020).

### 3. The Matter Comes to a Head: “*Boy Scouts file for bankruptcy protection from sex-abuse lawsuits*” (see Siemaszko, 2020)

A spokesman for the Boy Scouts of America noted that the bankruptcy filing had two key objectives: “to equitably compensate victims who were harmed during their time in Scouting” and to permit the Boy Scouts to “continue carrying out its mission for years to come. The BSA intends to use the Chapter 11 process to create a Victims Compensation Trust that would provide equitable compensation to victims” (reported in SVI News Service, 2020) by restructuring its finances while it continues to operate.

However, as Christensen (2020) reported: “In addition to its liability from abuse claims, the organization has been hit hard by the COVID-19 pandemic, which ruined this year’s camping season and the revenue it would have generated, and by the departure of Scouts in troops sponsored by the Church of Jesus Christ of Latter-day Saints, which has cut ties to the program. The Church announced that despite the Church being “one of the Boy Scouts’ “greatest allies and largest sponsor of troops,” it will pull out “more than 400,000 young people and move them into a new global program of its own” (McCombs & Crary, 2019).

### 3.1 The Boy Scouts and Chapter 11

Chapter 11 of the Bankruptcy Code is ordinarily selected by commercial enterprises that desire to continue operating a business (known as a “debtor in possession”) (Shachmurove, 2019) under Section 363 of the Bankruptcy Code and repay creditors concurrently through a court-approved plan of reorganization (see Hunter & Shannon, 2020a). Even though the Boy Scouts are not ordinarily thought of as a “commercial enterprise,” it is nevertheless eligible to seek Chapter 11 bankruptcy protection (see Hunter, Amoroso, Shannon, & Lozada, 2020). The objectives of the BSA bankruptcy differs from a typical commercial bankruptcy in that the prime objective of the BSA is to ensure that it emerges from bankruptcy with the ability to “continue its vital charitable mission, to establish an orderly compensation structure for victims of past sexual abuse, and to consolidate litigation against the BSA and others.”

The same strategy for protecting assets against legal claims has been utilized by more than two dozen Catholic dioceses which were involved in the church’s sex abuse scandal. According to the nonprofit advocacy organization *BishopAccountability.org*, the average settlement amount for victims of clergy sex abuse is approximately \$268,000. Gjeltlen (2018) reported that by 2018 “Lawsuits by abuse victims have so far forced dioceses and religious orders in the United States to pay settlements totaling more than \$3 billion, and at least 19 have filed for bankruptcy protection.” The list had grown to 29 by November of 2020. Two of the most recent filings involved the Camden Diocese in New Jersey (Heyboer, 2020) and the Rockville Centre Diocese in New York (Brean, 2019). [Appendix II provides a list of the Dioceses and religious communities which have declared bankruptcy at least in part because of sex abuse claims (see Smith, 2005; King, 2017; Hidalgo, 2019; Reilly, 2019)].

The Third Circuit Court of Appeals in *In re Roth* (1992, p. 952, note 42) noted: “The framework of Section 363 is designed to allow a trustee (or a debtor-in-possession) the flexibility to engage in ordinary transactions without unnecessary creditor and bankruptcy court oversight, while protecting creditors by giving them an opportunity to be heard when transactions are not ordinary.”

Under Chapter 11, the debtor usually has the exclusive right to file a *plan of reorganization* for the first 120 days after it files the bankruptcy case (*Gaines v. Perkins*, 1987; *In re Cwnevada LLC*, 2019) and must provide creditors with a disclosure statement containing financial information sufficient to enable them to evaluate the plan (*Concannon v. Constantini*, 1996; see also Lubben, 2019, Chapter 11). The bankruptcy court ultimately must approve (confirm) or disapprove the plan of reorganization.

The BSA Chapter 11 Plan framework provided for the following:

- Information regarding filing abuse claims would be “channeled” or directed to victims;
- A Compensation Trust will be created by the Plan;
- The injunction or stay and releases will protect the BSA and other specified groups from being sued by abuse claimants filed outside of the bankruptcy proceeding;
- Abuse claimants will only recover from the Victims Compensation Trust and not against any released party;
- General unsecured creditors (see generally Hunter & Shannon, 2020b) and will receive a percentage of a “pot” of money, the amount yet to be determined after the Trust is funded.

The Plan provides for the creation of following official committees of unsecured creditors:

- Abuse Claimants Committee;
- Trade Creditors Committee;
- Other Stakeholders, including Chartered Organizations who form units such as Cub Scout Packs (ages kindergarten through 5<sup>th</sup> grade) and Scout Troops (6<sup>th</sup> grade and above).

Under the current, non-final Plan, these parties will receive the benefit of the injunction and releases:

- BSA Debtors
- Local Councils
- Certain Non-Debtor related entities or Contributing Chartered Organizations

Chase (2020) reported that local councils, which run the day-to-day operations for local troops, are not listed as debtors and are considered by the Boy Scouts as legally separate entities, even though they are “related parties.” Under an agreement approved by the presiding judge in June of 2020, the injunction halting the sex abuse lawsuits against the organization’s 261 local councils was extended until November 16 as well. However, as Chase (2020) also notes, any local council seeking continued protection must sign agreements requiring them to “provide information to the Boy Scouts about their finances, including real estate holdings, for sharing with creditor committees.... Attorneys for abuse victims have made it clear that they will try to go after campsites and other properties owned by local councils to contribute to the fund for victims.” (Chase, 2020).

Under a confirmed plan, the debtor can reduce its debts by repaying a portion of its obligations and discharging others. As a distinct advantage to a debtor, the debtor can also terminate burdensome contracts and leases (*Top Rank, Inc. v. Ortiz*, 2009), recover assets, and repurpose its operations in order to return to profitability. As a result, under Chapter 11, the debtor normally goes through a period of consolidation or reorganization and emerges with a reduced debt load and a restructured business. That was the primary objective of the Boy Scouts.

### 3.2. Confirmation

If the judge approves the reorganization plan and the creditors all agree, the plan can be confirmed. “In effect, the debtor’s plan of reorganization becomes the governing document setting forth the treatment of the rights and obligations of interested parties after conformation of the plan” (McKenzie, 2012, p. 1006). If at least one class of creditors objects and votes against the plan, it may nonetheless be confirmed if the requirements of what is known as “cramdown” are met (see, e.g., Maloy, 2003). In order to be confirmed over the creditors’ objection, the plan must not discriminate against that class of creditors, and the plan must be found fair and equitable to that class—in this case, the victims of the abuse.

Upon final confirmation, the plan becomes binding and identifies the treatment of debts and operations of the business for the duration of the plan. If a plan cannot be confirmed, the court may either convert the case to a straight liquidation under Chapter 7 (see *Czyzewski v. Jevic Holding Corporation*, 2017), or, if in the best interests of the creditors and the estate, the case may be dismissed, resulting in a return to the status quo before bankruptcy. Neither of these prospects seems realistic in the case of the BSA. If the case is ultimately dismissed (however, an unlikely eventuality), creditors will look to non-bankruptcy law in order to satisfy their claims. A barrage of perhaps 90,000 individual suits might be expected (see, e.g., Sforza 2020).

In a traditional Chapter 11 business bankruptcy, in order to proceed to the confirmation hearing, a disclosure statement must be approved by the bankruptcy court. Once the disclosure statement is approved, the plan proponent will solicit votes from the various classes of creditors. Solicitation is the process by which creditors vote on the proposed confirmation plan. This process can be complicated if creditors fail or refuse to vote, in which case, the plan proponent might tailor his or her efforts in obtaining votes, or attempt to file a plan of its own. The plan may be modified before confirmation, so long as the modified plan meets all the requirements of Chapter 11 relating to “fairness and equity.”

### 3.3. Automatic Stay

Napoli (2005, p. 749) writes: “The Bankruptcy Code was designed not only to give the ‘honest but unfortunate’ debtor a fresh start but also to provide an orderly rehabilitation or liquidation procedure under which similarly situated creditors would be treated equally.” Like other forms of bankruptcy, petitions filed under Chapter 11 invoke the automatic stay of Section 362 of the Bankruptcy Code (see Lubben, 2019). The automatic stay requires all creditors to cease collection attempts, and makes many post-petition debt collection efforts void or voidable.

The bankruptcy filing by the Boy Scouts put an automatic hold (stay) on any pending lawsuits while a potential “global settlement” was being negotiated. The filing on February 18, 2020 also required any new abuse claims to be adjudicated in the United States Bankruptcy Court for the District of Delaware rather than in state courts, where the Boy Scouts had faced a mounting number of lawsuits after several states, most notably California and New York, had expanded legal options for childhood victims to sue.

The situation has been further compounded since some of the Scouts' insurers have refused to cover payouts in sex abuse cases, contending that the organization could have prevented the abuse that led to the claims or that the Boy Scouts had failed to provide them with complete information concerning the state of their knowledge when insurance policies were renewed or written records show (see, e.g., Crary, 2019).

In the case of the Boy Scout Chapter 11 filing, several events merit attention. On June 8, 2020, the "Judge presiding over the Boy Scouts of America bankruptcy has agreed to extend the injunction [automatic stay] halting child sex abuse lawsuits against the Texas-based organization's 261 local council until November 16" (Chase, 2020). The Judge also ordered local councils to sign agreements by July 6, 2020 to provide information to Boy Scouts about their finances, including any real estate holdings, in order to share them with creditor committees. In addition, the Associated Press (2020) reported that the Boy Scouts had apologized to victims of sexual abuse by scout leaders "before the selection of an official committee to represent tort claimants in the Boy Scouts' bankruptcy case." Nine men who had reported that they were "sexually abused as children were selected to serve on the committee" (see Casone, 2020). A separate official committee was also appointed "to represent the interests of other unsecured creditors, such as suppliers, vendors and pensioners. Members of that committee are the Girl Scouts of America, the Pension Benefit Guaranty Corporation, Pearson Education, former BSA executive Roger Ohmstede, and Lion Brothers, an apparel brand manufacturer that provides merit badges and patches" (Associated Press, 2020).

### 3.4. Priority

Chapter 11 follows the same priority scheme as other bankruptcy chapters. The priority structure is defined primarily by Section 507 of the Bankruptcy Code (see Witte, 1994; *Howard Delivery Service v. Zurich American Insurance Co.*, 2006). As a general rule, administrative expenses (the actual, necessary expenses of preserving the bankruptcy estate, including expenses such as employee wages, and the cost of litigating the Chapter 11 case) are paid first. Secured creditors—creditors who have a security interest, or collateral, in the debtor's property—will be paid before unsecured creditors. Unsecured creditors' claims are prioritized by Section 507. For instance the claims of suppliers of products or employees of a company may be paid before other unsecured creditors are paid. Each priority level must be paid in full before the next lower priority level may receive payment. Obviously, the prime "priority group" in the Boy Scouts bankruptcy will be victims of the sexual abuse and their families.

### 4. The Proof of Claim

A proof of claim is a signed statement describing a creditor's claim. If an individual was a child under the age of 18 at the time of the sexual abuse, that individual (or if still a minor, his parent or guardian) must file a Sexual Abuse Survivor Proof of Claim. Sexual abuse means, with respect to a child under the age of 18 at the time of the sexual abuse:

- Sexual conduct or misconduct, sexual abuse or molestation, sexual exploitation, sexual touching, sexualized interaction, sexual comments about a person's body, or other verbal or non-verbal behaviors that facilitated, contributed to, or led up to abuse, regardless of whether or not such behavior was itself sexual or against the law, and regardless of whether the child thought the behavior was sexual abuse at the time.
- Sexual abuse includes behavior between a child and an adult and between a child and another child, in each instance without regard to whether such activity involved explicit force, whether such activity involved genital or other physical contact, and whether the child associated the abuse with any physical, psychological, or emotional harm.
- Sexual abuse involves behaviors including penetration or fondling of the child's body, other body-on-body contact, or non-contact, behaviors such as observing or making images of a child's naked body, showing or making pornography, or having children behave in sexual behavior as a group.

As noted, the United States Bankruptcy Court entered an order, the "Bar Date Order," establishing *November 16, 2020 at 5:00 p.m.* (Eastern Time) as the last date and time for each person or entity (with certain exceptions) to file a General Proof of Claim against the Boy Scouts of America and Delaware Boy Scouts, LLC. The BSA has undertaken extensive efforts to provide "notice" to currently "unknown" victims of sexual abuse of the Bar Date to file an Abuse Claim through television announcements aired on national broadcasts, cable networks and streaming services; radio, print, and online advertisements; and social media advertisements in "commonly used networks" such as Facebook, Twitter and Instagram (see, e.g., Johnson, 2019).

## 5. Chartered Organizations and Units of the Boy Scouts of America: The Danger Lurking for Churches and Other Affiliated Organizations

Chandler (2020) noted that “Churches who chartered or have ever hosted a Boy Scouts of America (BSA) troop should seek legal counsel ... in case they are named in future sex abuse claims against the BSA.” Filing what is known as a “placeholder claim” [Form 410] would potentially maintain their indemnification and potentially gain access to the trust in case a chartered organization is sued in its own right.

According to the *Chartered Organizations Guidebook* (Boy Scouts of America, 2015), the Boy Scouts of America partners with various community organizations, such as religious congregations, churches, fraternal groups, service clubs, and other community associations and groupings, to provide the Scouting program for a particular neighborhood or community in which the particular organization engages in programming to reach out to youth and families. These organizations hold *charters* issued by the BSA and are known as *chartered organizations*. Each chartered organization agrees to provide the meeting place or “appropriate facilities” for BSA youth, oversees the volunteer leaders, encourages “adult leaders to receive additional applicable training,” and agrees to follow the basic BSA safety policies and values-based program.

The relationship between the Chartered Organization and the Boy Scouts is symbiotic and is embodied in “*The Annual Unit Charter Agreement*,” a copy of which found in Appendix III. The Chartered Organization agrees to sponsor and promote scouting to further the Chartered Organization’s aims and values for youth relating to one or more objectives:

- Youth character development
- Career skill development
- Community service
- Patriotism and military and veteran recognition
- Faith-based youth ministry

Within each chartered organization, there may be one or more units. Each unit is chartered by a *local branch* of an organization, not at the national level. A unit is a group of youth and adults which are collectively designated as a Cub Scout pack, a Boy Scout troop, a Venturing crew, or a Sea Scout ship. Each chartered organization may charter as many units as it wishes, but usually only 3 or 4, with one unit for each program level. According to the *Guidebook*, “The BSA council provides the leader training, inter-unit activities, camping programs, volunteer and professional support, and insurance coverage.” Each unit may also create their own activities (monthly camping trips, outings, or service projects), and most units will meet weekly at the place of the chartered organization.

Given the nature of the relationship between the BSA and Chartered Organizations, should a Chartered Organization seek protection by filing a claim? A claim arises when “an individual is exposed ... conduct giving rise to an injury, which underlies a ‘right to payment’ under the bankruptcy Code” (Radwan et al., 2020, p. 248). Even if no notice of a claim has been made and no suit has been filed to date, if there is the possibility that “conduct giving rise to injury” exists, a so-called “placeholder” claim should be filed by the Chartered Organization in the bankruptcy proceeding “out of an abundance of caution.”

In addition, Carroll (2013) suggested that Chartered Organizations undertake the following proactive strategies:

“Review your sponsorship agreement that describes the legal relationship between the church and the BSA. When a church agrees to sponsor a troop, the church assumes responsibility and liability that goes beyond merely providing a place for the troop to meet. You need to be aware of the responsibilities the agreement places on the church—including the liability it assumes for scouting activities and the actions of the scout leader and volunteers. It is preferable to review the agreement with your church’s attorney.

Treat scout troops like other youth activities involving volunteers. While the church does not manage the scouting program, it needs to verify that the BSA has performed background checks on all scout leaders and that training and supervision procedures are being followed. The church should keep a record of when and how it has verified these items with the BSA.

Review your insurance coverage. In some abuse suits, insurance doesn’t cover all forms of damages. For example, in ... many ... other states, insurance doesn’t cover punitive damages.

If a case is brought against the church, immediately contact the BSA's insurer and request that the insurer retain an attorney chosen by the church to defend the church."

## 6. Concluding Comments

The BSA bankruptcy is fraught with questions and uncertainties. Sforza (2020) reminds us that: "It's unclear how the national Boy Scouts of America's finances will bear the coming burden. The nonprofit organization has been operating in the red for years, spending more than it takes in — running a \$58.3 million deficit in 2018, and a \$41 million deficit the year before, according to its most recent tax returns. Its bankruptcy petition lists assets of more than \$1 billion, with estimated liabilities of \$500 million to \$1 billion — which attorneys for the victims fear may not be nearly enough."

Adding to the uncertainty is the fact that BSA is battling with its own insurers who have argued that they shouldn't have to pay abuse-related claims. As noted by Crary (2019): "The Boy Scouts filed lawsuits last year against six of its own insurers, saying they have improperly refused to cover some of the sex abuse liabilities incurred by the organization. The insurers say the coverage obligation is voided because the BSA failed to take effective preventive measures such as warning parents that scouts might be abused."

Another "wild card" is what effect the BSA bankruptcy will have on the 270 local Boy Scout councils and the sponsoring organizations. These parties generally operate under the national organization's umbrella but are independent entities, owning property worth billions of dollars in their own names.

With the deadline of November 16, 2020 for filing claims having come and gone, the focus will now shift to the Delaware Bankruptcy Court which will be called upon to resolve these and many other unanticipated questions and provide justice for the Scouts who were abused.

## APPENDIX I:

### **BOY SCOUTS OF AMERICA RESOLUTION REGARDING INSURANCE AND INDEMNIFICATION OF CHARTERED ORGANIZATIONS AND USE OF CHARTER AGREEMENT IN CIVIL LITIGATION**

WHEREAS Chartered Organizations and local councils play a critical role in the delivery of the Scouting program; and

WHEREAS the Corporation (The Boy Scouts of America) and its Chartered Organizations have experienced litigation trends and issues arising out of the interdependent relationships that have caused potential legal conflicts; and

WHEREAS the Corporation provides a general liability insurance program to Chartered Organizations so as to protect their interests in connection with the delivery of the Scouting program; and

WHEREAS it is in the best interests of the Corporation, Chartered Organizations to avoid some of the predictable and inherent conflicts arising out of their interdependent roles and obligations so as to strengthen the relationships and deliver the Scouting program without the uncertainty of potential conflicts;

NOW THEREFORE, it is hereby RESOLVED, as follows:

I. That the Corporation will endeavor to continue to maintain and provide primary general liability insurance for Chartered Organizations for those organizations in connection with covered claims made as a result of the delivery in connection with official scouting activities.

II. That in addition to maintaining and providing the aforesaid liability insurance, the Corporation shall defend and indemnify Chartered Organizations, and their employees, directors, officers, members and volunteers, who act in good faith and against whom claims are asserted based upon the Corporation's membership standards.

III. That the Corporation will indemnify to the fullest extent permitted by the law of the state where the Chartered Organization is domiciled against an award of punitive damages against any Chartered Organization, its employees, directors, officers members and volunteers who act in "Good Faith". This provision would not apply to any conduct or occurrences prior to the adoption date of this Resolution.

IV. "Good Faith" as used herein shall require: (i) the Chartered Organization Representative take steps to remove from any involvement in the Scouting program any employee, officer, member or other person known or suspected of engaging in conduct that poses a risk of harm to others, including, but not limited to, actual or alleged acts of criminal conduct, violence, substance abuse, or reckless conduct involving motor vehicles or firearms. Reasonable inquiry shall include at a minimum determining whether the religious and chief officers of the Chartered Organization have any such knowledge or information of the conduct described above.

The Chartered Organization shall timely disclose to the local council, and the BSA upon request any such knowledge or information it obtains; (ii) prompt disclosure of any occurrence which may give rise to a legal action against the Corporation, Chartered Organization, local council or any of their employees, officers, volunteers or members; (iii) prompt written notice to the Corporation and an opportunity to participate in any settlement discussions related to claims for damages which arise in the course of the delivery of the Scouting program and (iv) adherence to applicable laws and the Rules and Regulations of the Boy Scouts of America.

V. This Resolution shall not be construed to require the Corporation or any insurance provided for the benefit of Chartered Organizations to indemnify any Chartered Organization or its employees, officers or members for acts intended or expected to result in harm or actions which are not in Good Faith as defined by this Resolution.

VI. In civil actions filed or threatened against a Chartered Organization after the date of this Resolution, the Corporation's legal counsel, or his or her designee, shall confer with the Chartered Organization over the selection of legal counsel to defend the Chartered Organization, its employees, officers, members and volunteers. The Corporation and the Chartered Organization shall make a good faith effort to mutually agree upon legal counsel to represent the Chartered Organization and its employees, officers, members and volunteers. This good faith discussion shall include the question of whether or not separate counsel should be retained to represent the interests of the Chartered Organization, its employees, officers, members or volunteer.

VI. In civil actions pending or filed against a Chartered Organization, the Corporation's legal counsel will not use the language of the Charter Agreement or the Charter Renewal Agreement, or any similar document outlining the responsibilities of the parties, to shift liability from the Corporation to the Chartered Organization.

VIII. The Corporation shall give not less than nine (9) months' notice to Chartered Organizations of any action to be taken to change the words or effect of this Resolution.

Provided, however, that should general liability insurance become unavailable or unaffordable, the Corporation shall be required to provide such notice as is reasonably possible.

Provided, however, that this Resolution shall become effective only after financial institutions to whom the Corporation is obligated agree that the indemnification requirements in this Resolution do not violate any loan covenants or other agreements.

The undersigned, being duly elected and qualified Secretary of the Corporation, hereby certifies that the foregoing Resolution was duly adopted by the Board of Directors of the Corporation effective

October 30, 2013.

**APPENDIX II:****Dioceses and Religious Orders That Have Filed for Bankruptcy Protection**

1. Archdiocese of Portland **OR** (filed 7/6/04)
2. Diocese of Tucson **AZ** (9/20/04)
3. Diocese of Spokane **WA** (12/6/04)
4. Diocese of Davenport **IA** (10/10/06)
5. Diocese of San Diego **CA** (2/27/07)
6. Diocese of Fairbanks **AK** (3/1/08)
7. Oregon Province of the Jesuits (2/17/09)
8. Diocese of Wilmington **DE & MD** (10/18/09)
9. Archdiocese of Milwaukee **WI** (1/4/11)
10. Congregation of the Christian Brothers (4/28/11)
11. Diocese of Gallup **NM** (11/12/13)
12. Diocese of Stockton **CA** (1/15/14)
13. Diocese of Helena **MT** (1/31/14)
14. Archdiocese of St. Paul and Minneapolis **MN** (1/16/15)
15. Diocese of Duluth **MN** (12/7/15)
16. Diocese of New Ulm **MN** (3/3/17)
17. Diocese of Great Falls-Billings **MT** (3/31/17)
18. Crosier Fathers and Brothers **MN & AZ** (6/1/17)
19. Diocese of St. Cloud **MN** (intention 2/28/18; filed 6/15/20)
20. Archdiocese of Agana, **Guam** (1/16/19)
21. Diocese of Winona-Rochester **MN** (12/3/18)
22. Archdiocese of Santa Fe **NM** (12/3/18)
23. Diocese of Rochester **NY** (9/12/19)
24. Diocese of Harrisburg **PA** (2/19/20)
25. Diocese of Buffalo **NY** (2/29/20)
26. Archdiocese of New Orleans **LA** (5/1/20)
27. Diocese of Syracuse **NY** (6/19/20)
28. Diocese of Rockville Centre **NY** (10/1/20)
29. Diocese of Camden **NJ** (10/1/20)

**APPENDIX III:****THE ANNUAL UNIT CHARTER AGREEMENT BETWEEN:**

\_\_\_\_\_ and the \_\_\_\_\_ Council, BSA  
 Chartered Organization Local Council

Pack No. \_\_\_\_\_ Troop No. \_\_\_\_\_ Crew No. \_\_\_\_\_ Shop No. \_\_\_\_\_  
 (Please identify those units chartered by the Chartered Organization.)

The purpose of the Boy Scouts of America (BSA) program is to prepare young people to make ethical and moral choices over their lifetimes by instilling in them the values and principles taught in the Scout Oath and Scout Law.

The Chartered Organization, as a duly constituted organization that serves youth, desires to use the program(s) of the BSA to further its mission respecting the youth it supports. The Local Council provides the support and service necessary to help the Chartered Organization succeed in its use of Scouting.

**The Chartered Organization agrees to:**

- Use Scouting to further the Chartered Organization’s aims and values for youth.
- Chartered organizations must utilize the Scouting program to accomplish specific objectives related to one or more of the following:
  - o Youth character development
  - o Career skill development
  - o Community service
  - o Patriotism and military and veteran recognition
  - o Faith-based youth ministry
- Conduct the Scouting program consistent with BSA rules, regulations, and policies. They may be found on the My.Scouting website and at the following location: [www.scouting.org/about/membership-standards/](http://www.scouting.org/about/membership-standards/).
- Chartered organizations must not use the Scouting program to pursue any objectives related to political or social advocacy, including partisan politics, support or opposition to government action, or controversial legal, political, or social issues or causes.
- Be represented in the Local Council and the local Scouting district by a Chartered Organization Representative (COR), who will be appointed by the Chartered Organization. The COR will be the point of contact between the Chartered Organization and the Local Council; will serve as a voting member of district and council committees on which the COR serves; and will, with the Chartered Organization, select and approve volunteer leaders for submission to the Local Council for its consideration. The COR will work with the unit committees sponsored by the Chartered Organization.
- Support unit committee(s) made up of at least three persons for each unit.
- Assure that adults selected as unit leaders are suitable by, at a minimum, having the appropriate leaders of the Chartered Organization review and sign each application.
- Ensure appropriate facilities for the unit for its regular meetings to facilitate the aims of the Chartered Organization and Scouting.
- Encourage adult leaders to receive additional applicable training made available by the council.

**The Local Council agrees to:**

- Respect the aims and objectives of the Chartered Organization and assist the Chartered Organization by making available Scouting resources.
- Make available to the Chartered Organization and its units and members program training, program resources, and other Scouting support services.
- Make available training and support for the Chartered Organization and for the COR, the primary link between the Chartered Organization, the Local Council, and the BSA. Track and require all unit leaders to attend BSA Youth Protection Training.
- Conduct criminal background checks on adult leaders approved by the Chartered Organization.
- Provide camping opportunities, administrative support, and professional staff to assist the Chartered Organization in developing a successful Scouting program.
- Provide primary general liability insurance to cover the Chartered Organization, its board, officers, COR, employees, and Scouting members and volunteers for authorized Scouting activities. Indemnify the Chartered Organization in accordance with the resolutions and policies of the National Executive Board of the Boy Scouts of America.

Signed \_\_\_\_\_ Title \_\_\_\_\_ Date \_\_\_\_\_  
For the chartered organization

Signed \_\_\_\_\_ Title \_\_\_\_\_ Date \_\_\_\_\_  
For the BSA local council

Signed \_\_\_\_\_ Title \_\_\_\_\_ Date \_\_\_\_\_

Chartered Organization Representative

Signed \_\_\_\_\_ Title \_\_\_\_\_ Date: \_\_\_\_\_

### Annual Meeting With Chartered Organization

The annual meeting between the executive officer of a chartered organization and the district professional, or in appropriate cases his or her designee, should be scheduled at least 90 days prior to the renewal date of the unit's charter. If problems in renewing the unit's charter are anticipated or there is significant corrective action needed, the discussion should be held early enough to allow time to take positive corrective action before the renewal deadline.

The meeting must be a face-to-face discussion, as the concept of working together is central to mutual long-term success.

1. Chartered organizations must use the Scouting program to accomplish their objectives in a manner consistent with the Bylaws, Rules and Regulations, guidelines, policies, and other publications available on the BSA national website located at [www.scouting.org/about/membership-standards/](http://www.scouting.org/about/membership-standards/).

- The Charter and Bylaws of the Boy Scouts of America
- The Mission of the Boy Scouts of America
- The Rules and Regulations of the Boy Scouts of America
- The Scout Oath and the Scout Law, including Duty to God o BSA youth protection policies and guidelines, including mandatory reporting
- The Guide to Safe Scouting
- The Sweet Sixteen of BSA Safety
- Scouter Code of Conduct

2. Chartered organizations must not use their chartered organization affiliation or the Scouting brand as a means to imply Scouting's endorsement of the objectives of their organization except with respect to youth development consistent with the goals and objectives of the Scouting program.

3. Chartered organizations must not use the Scouting program to obtain financial support or assistance except as authorized for the chartered unit.

All new organizations applying for a charter must have an approved code issued by the National Council. As a private organization, the Boy Scouts of America is the sole arbiter of whether it will issue a charter to any organization. The Boy Scouts of America may deny a charter for any reason or revoke a previously issued charter for failure to abide by these guidelines.

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