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A municipality's liabilities to public retirement systems may well be a focus proceedings in bankruptcy court when a municipality seeks relief from debts under Chapter 9 of the Bankruptcy Code. This article discusses under what circumstances a municipality can use Chapter 9, and what it could mean to the retirement system.

What a Public Retirement System Should Consider if a Municipality Seeks Chapter 9 Bankruptcy Relief

by Terry A. M. Mumford, Daniel R. Swetnam and Tyson A. Crist

In recent years, several municipalities have sought relief under Chapter 9 of the Bankruptcy Code.¹ One recent example is the city of Vallejo, California, which filed for relief in May 2008 and confirmed a plan of adjustment in November 2011. In February 2012, the city of Stockton, California initiated a request for neutral evaluation, a first step toward a Chapter 9 filing under California law.² The city of Stockton then filed its voluntary petition on June 28, 2012. In November 2011, Jefferson County, Alabama filed for relief as a result of problems associated with its sewer system. This article will review some basic background concerning a municipality's ability to file for relief, and factors a public retirement system should consider in the event of a filing by a municipality that participates in the system.

Eligibility to File

A proceeding under Chapter 9 is very different than under other chapters of the Bankruptcy Code. Chapter 9 is entitled "Adjustment of Debts of a Municipality," which foreshadows many of the differences. As will be more fully discussed, a bankruptcy court's role in a Chapter 9 proceeding is more limited. In short, the court must determine whether the petition was properly filed and then, at the end of the case, must determine whether a plan for adjustment of debts is confirmable. Between those two points, a bankruptcy court cannot require the sale of assets; does not oversee the use of funds; does not interfere with political or governmental powers; cannot require tax increases; and generally does not take an active role. This is largely due to the limitations of the Tenth Amendment.³

TABLE

Laws on Authorizing Municipal Filing of Chapter 9 Bankruptcy, by State

State	Statute	Provisions
Alabama	Alabama Code §11-81-3 (2012)	General grant of authorization to file to the governing body of any county, city, town or municipal authority.
Alaska	N/A	No statutory reference, thus filing is not authorized.
Arizona	Arizona Revised Statutes, Annotated §35-603 (2012)	Authorization to file is limited to taxing districts.
Arkansas	Arkansas Code, Annotated. §14-74-103 (West 2012)	General grant of authorization to file to any taxing agency or municipality.
California	California Government Code §53760 (West 2012)	A neutral evaluation process must take place prior to a local public entity receiving authorization to file.
Colorado	Colorado Revised Statutes, Annotated §37-32-102, §32-1-1403 (West 2012)	Authorization to file is limited to taxing, irrigation and drainage districts.
Connecticut	Connecticut General Statutes, Annotated §7-566 (West 2012)	A municipality must obtain prior written consent from the governor to file.
Delaware	N/A	No statutory reference, thus filing is not authorized.
Florida	Florida Statutes, Annotated. §218.01 (West 2012)	General grant of authorization to file to municipalities, taxing districts and political subdivisions.
Georgia	Georgia Code, Annotated. §36-80-5 (West 2012)	Expressly prohibits filing by any county, municipality, school district, authority, division, instrumentality, political subdivision, or public body corporate created under the laws of the state.
Hawaii	N/A	No statutory reference, thus filing is not authorized.
Idaho	Idaho Code, Annotated. §67-3903 (West 2012)	Authorization to file is limited to taxing districts.
Illinois	Illinois Compiled Statutes, Annotated. 320/5-320/9 (West 2012)	Allows filing but has established elaborate internal procedures that must occur before filing can take place with the intent to deter filing.
Indiana	N/A	No statutory reference, thus filing is not authorized.
Iowa	Iowa Code, Annotated. §§76.16-76.16A (West 2012)	Prohibits filing unless the entity is rendered insolvent as a result of a debt involuntarily incurred.
Kansas	Kansas Statutes, Annotated. §§10-1101-10-1116, §§79-2938-79-2942 (West 2012)	Establishes elaborate internal procedures or regulations regarding restructuring debt but does not authorize filing.
Kentucky	Kentucky Revised Statutes, Annotated. §66.400 (West 2012)	Prior to filing, the proposed plan must first receive approval from the state local debt officer and the state local finance officer.
Louisiana	Louisiana Revised Statutes, Annotated. §13:4741, §§39:619-620 (2012)	Depending on the entity filing, the State Bond and Tax Board and/or the governor and attorney general must give written approval for filing.
Maine	N/A	No statutory reference, thus filing is not authorized.
Maryland	N/A	No statutory reference, thus filing is not authorized.
Massachusetts	Massachusetts General Laws, Annotated. ch. 44, §14 (West 2012)	Cities and towns cannot be exempted from paying debts.
Michigan	Michigan Compiled Laws, Annotated. §§141.1512-141.1515 (West 2012),	Establishes elaborate internal procedures or regulations regarding restructuring of debt but does not authorize filing.
Minnesota	Minnesota Statutes, Annotated. §471.831 (West 2012)	General grant of authorization to file given to municipalities as "municipality" is defined in 11 U.S.C. §101.
Mississippi	N/A	No statutory reference, thus filing is not authorized.
Missouri	Missouri Annotated Statutes, §427.100 (West 2012)	General grant of authorization to file to any municipality or political subdivision.

The first issue that may come before the bankruptcy court in a Chapter 9 case is whether a debtor is eligible for relief. Section 109(c) of the Bankruptcy Code contains five requirements for

eligibility for relief.⁴ The municipality has the burden of proof and must meet each of the mandatory provisions of Section 109(c)(1) (4) plus one of the alternative provisions of Section 109(c)

(5) to be eligible for relief. A major fight in most Chapter 9 cases is whether a municipality has met all five of the requirements. These provisions are briefly summarized here.

TABLE

Laws on Authorizing Municipal Filing of Chapter 9 Bankruptcy, by State

State	Statute	Provisions
Montana	Montana Code, Annotated. §7-7-132, §85-7-2041 (West 2012)	Authorization to file is limited to local entities and irrigation districts.
Nebraska	Nebraska Revised Statutes, Annotated. §13-402 (West 2012)	General grant of authorization to file to any county, city, village, school district, agency of the state government, drainage district, sanitary and improvement district, or other political subdivision.
Nevada	Nevada Revised Statutes, Annotated. §§354.655–.354.725 (West 2012)	Establishes elaborate internal procedures or regulations regarding restructuring of debt but does not authorize filing.
New Hampshire	N/A	No statutory reference, thus filing is not authorized.
New Jersey	New Jersey Statutes, Annotated. §52:27-40 (West 2012)	Approval of the municipal finance commission is required before filing.
New Mexico	N/A	No statutory reference, thus filing is not authorized.
New York	New York Local Finance Law §85.80 (McKinney 2012)	General grant of authorization to file to a municipality or its emergency financial control board.
North Carolina	North Carolina General Statutes, Annotated. §23-48 (West 2012)	Approval of the Local Government Commission of North Carolina is required prior to filing.
North Dakota	N/A	No statutory reference, thus filing is not authorized.
Ohio	Ohio Revised Code, Annotated. §133.36 (West 2012)	The tax commissioner must approve filing.
Oklahoma	Oklahoma Statutes, Annotated. Title 62, §283 (West 2012) §23-48 (West 2012)	General grant of authorization to file to a municipal corporation or political subdivision.
Oregon	OR. Revised Statutes, Annotated. §548.705 (West 2012)	Authorization to file is limited to irrigation and drainage districts.
Pennsylvania	53 Pennsylvania Statutes, Annotated. §5571 (West 2012); 72 Pennsylvania Statutes, Annotated. §1601-D.1 (West 2012); 74 Pennsylvania Consolidated Statutes, Annotated. §1733 (West 2012)	Approval of the State Department of Internal Affairs is required prior to filing. A entity cannot file if it has outstanding bonds that were issued under 74 Pennsylvania Consolidated Statutes Chapter 17. Third-class cities are also prohibited from filing until July 1, 2012.
Rhode Island	Rhode Island General Laws, Annotated. §45-9-7 (West 2012)	If a receiver is appointed, the receiver is authorized to file.
South Carolina	South Carolina Code, Annotated. §6-1-10 (2012)	General grant of authorization to file to any county, municipal corporation, township, school district, drainage district or other taxing or governmental unit organized under the laws of the state.
South Dakota	N/A	No statutory reference, thus filing is not authorized.
Tennessee	N/A	No statutory reference, thus filing is not authorized.
Texas	Texas Local Government Code, Annotated. §140.001 (West 2012)	General grant of authorization to file to a municipality, taxing district or other political subdivision.
Utah	N/A	No statutory reference, thus filing is not authorized.
Vermont	N/A	No statutory reference, thus filing is not authorized.
Virginia	N/A	No statutory reference, thus filing is not authorized.
Washington	Washington Revised Code, Annotated. §39.64.080 (West 2012)	Authorization to file is limited to taxing districts.
West Virginia	N/A	No statutory reference, thus filing is not authorized.
Wisconsin	N/A	No statutory reference, thus filing is not authorized.
Wyoming	N/A	No statutory reference, thus filing is not authorized.

1. The Entity Must Be a Municipality

The first requirement is that the entity must be a municipality.⁵ A *municipality* is defined in the Bankruptcy Code as a “political subdivision or public agency or instrumentality of a State.”⁶ This excludes states themselves.

Disputes can arise concerning whether a particular entity,

or a particular operation, is part of a municipality.⁷ For example, in *In re City of Central Falls, R.I.*⁸ there was a dispute about whether the school system was part of the city of Central Falls. Based on various amendments to the city charter, the bankruptcy court determined that the school system was not part of the city and therefore not part of the Chapter 9



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bankruptcy.⁹ Disputes of this nature should be resolved based on state or local laws, organizational or structural documents, or agreements. This can be a critical component in determining the scope of a Chapter 9 proceeding.

2. Authorization to File

The second requirement is that the municipality must be "specifically authorized, in its capacity as a municipality or by name, to be a debtor under [Chapter 9] by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such [Chap-

ter 9]."¹⁰ The requirement of specific authorization was added in 1994, and the legislative history helps to explain this addition:

Under [former] section 901 of the Bankruptcy Code, a municipality may file for bankruptcy if, among other things, it is "generally authorized" to do so under State law. The courts have split regarding whether this provision requires express statutory authorization by State law in order for a municipality to file for bankruptcy. This section clarifies the eligibility requirements applicable to municipi-

pal bankruptcy filings by requiring that municipalities be specifically authorized by the State in order to be eligible to file for bankruptcy.¹¹

This provision is designed to ensure that states retain some control over their political subdivisions and agencies. The following is a quick overview of how the states have addressed this issue:

- Ten states expressly authorize any municipality to file for Chapter 9 relief (Alabama, Arkansas, Florida, Minnesota, Missouri, Nebraska, New York, Oklahoma, South Carolina and Texas).
- Six states grant authorization only to specific entities (Arizona, Colorado, Idaho, Montana, Oregon and Washington).
- Nine states require some specific approval or procedures to file (California, Connecticut, Kentucky, Louisiana, New Jersey, North Carolina, Ohio, Pennsylvania and Rhode Island).
- Three states prohibit filing for Chapter 9 relief (Georgia, Iowa, and Massachusetts).
- One state authorizes filing but has established elaborate internal procedures to deter filing (Illinois).
- Three states' statutes do not mention filing but have established elaborate internal procedures and regulations regarding restructuring debt (Kansas, Michigan and Nevada).
- Eighteen states have no statutory guidance regarding authorization for their municipalities to seek relief under Chapter 9; thus, these states have not authorized a filing and their municipalities are not eligible to file under Section 109(c) of the Bankruptcy Code (Alaska, Delaware, Hawaii, Indiana, Maine, Maryland, Missis-

sippi, New Hampshire, New Mexico, North Dakota, South Dakota, Tennessee, Utah, Vermont, Virginia, West Virginia, Wisconsin and Wyoming).

The table in this article identifies the specific statutory authority in each state that authorizes Chapter 9 filings, as well as those states that have not enacted such authority.

3. Insolvency

The third requirement to be eligible for Chapter 9 relief is that a municipality must be insolvent.¹² For a municipality, the Bankruptcy Code defines *insolvency* as a financial condition in which the municipality is “(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due.”¹³ Subsection (i) deals with the ability to pay current debts while Subsection (ii) is forward looking.¹⁴ Subsection (i) requires general nonpayment of debts as they become due; failure to pay a single debt or class of debts that is only a small portion of budgeted expenditures does not satisfy Subsection (i).¹⁵ Courts have held that under Subsection (ii), the municipality must prove that as of the petition date, it is unable to pay debts as they become due in the current fiscal year or, based on an adopted budget, in its next fiscal year.¹⁶ The analysis is made on a cash flow basis.¹⁷

Insolvency is a hotly contested issue in many Chapter 9 cases. For example, in *Vallejo*, there was an eight-day hearing on the motion to dismiss, much of which focused on whether the city had established insolvency. Among other things, the unions that objected to the filing argued the city had not exhausted all efforts to avoid the filing. The issue of solvency was a primary focus on appeal, and the bankruptcy appellate panel for the Ninth Circuit described the argument as follows: “According to the Unions, Vallejo should have pillaged all of its component agency funds, ignoring bond covenants, grant restrictions, and normal GASB and GAAP practices, to subsidize its General Fund. The bankruptcy court found that taking such actions defied fiscal prudence.”¹⁸ Both the bankruptcy court and the bankruptcy appellate panel rejected the unions’ arguments.¹⁹ A municipality is not required to actually run out of money and suffer a default before meeting this element.

In the next few years it may become easier for many municipalities to satisfy the insolvency requirement under the forward-looking subsection—Subsection (ii) of the Bankruptcy Code definition of *insolvency*—when two newly approved Governmental Accounting Standards Board (GASB) statements take effect.²⁰ Under these new standards, municipalities will be required to calculate and disclose under-contributions, net pension liabilities²¹ and fiduciary net po-

sition.²² This will likely become another area of controversy because of the various numbers that financial reports and actuarial valuations will be reflecting.

4. Desire to Effect a Plan

The fourth requirement is that the municipality “desires to effect a plan to adjust such debts.”²³ A Chapter 9 case cannot be filed to evade creditors or as a negotiating ploy.²⁴ This is primarily a subjective inquiry, which can be satisfied by actions before filing, such as attempting to resolve claims; submitting a draft plan of adjustment; or other similar evidence.²⁵

Negotiation With Creditors

The fifth and final requirement for eligibility, which can be met in one of several alternative ways, is that the municipality must (a) have obtained the agreement of a majority of its creditors; (b) have negotiated with its creditors in good faith, but failed to obtain the agreement of a majority of its creditors; (c) be unable to negotiate with creditors because it would be impracticable; or (d) reasonably believed that a creditor may attempt to obtain a preferential transfer.²⁶

5. Determination on Eligibility

Many of the reported cases concerning Chapter 9 deal with objections to eligibility for relief.²⁷ If any of the above five requirements is not met, the court may dismiss the petition.²⁸ If the petition is not dismissed, then the court shall enter an “order for relief” under Chapter 9.²⁹

What Happens if Eligible

If a bankruptcy court determines that a debtor (municipality) is eligible for Chapter 9 relief, the municipality is given a period of time, determined by the court on a case-by-case basis, to formulate a plan for adjustment of its debts.³⁰ Only the municipality itself can submit a plan.³¹ As an example of the timing for the submission of a plan, the city of Vallejo filed its petition in May 2008 and confirmed its plan of adjustment in November 2011 (while accruing over \$8 million in fees and expenses). More recently, Jefferson County, Alabama filed its Chapter 9 petition on November 9, 2011 and, as of the date of this article, has not submitted a proposed plan of adjustment. In very general terms, unless all classes of creditors consent, a plan of adjustment must provide creditors with all they can reasonably expect under the circumstances.³²

During this period, prior to submission and confirmation of a plan, control by a bankruptcy court is very limited. Section 901 of the Bankruptcy Code identifies those sections of

the Code that are applicable in a Chapter 9. While certain sections of the Code are applicable, some key sections that are not applicable in a Chapter 9 proceeding include Sections 327 and 330 (concerning court supervision of retention of professionals); 363 (concerning sales of assets outside the ordinary course of business and use of cash collateral³³); 541 (defining property of the estate); and many of the provisions of Chapter 11. A bankruptcy court cannot control the use of cash and cannot interfere with the political or governmental powers of the municipality, “unless the [municipality] consents or the plan so provides.”³⁴

Issues for Public Retirement Systems to Consider

Although many factors contribute to and are considered when a municipality determines to file for Chapter 9 relief, a municipality’s liabilities to public retirement systems may well be a primary focus of the proceedings.³⁵ Various studies have estimated the aggregate unfunded liabilities for public sector retirement and health benefits to be in excess of \$1 trillion.³⁶ The treatment of such benefits can arise in a number of settings. Some of these are discussed below. It is important to understand that much of this is uncharted territory. In fact, from 1986 to 2011, there were only 263 petitions for Chapter 9 relief filed nationwide, and in the last 40 years most of the petitions have been filed by utility districts.³⁷ As a result, and because these issues are often avoided through compromise, there are few cases that actually confront the issues discussed below.

Trust Funds Held by a System

Trust funds actually held by a retirement system, whether by previous contributions from the municipality or the employee, will not be part of the

Chapter 9 proceeding because they are not the municipality’s property. As previously noted, Section 541 of the Bankruptcy Code, which defines what is property of the estate, is not applicable in Chapter 9 proceedings.³⁸ Further, Section 902(1) states that “‘property of the estate,’ when used in a section that is made applicable in a [Chapter 9] case . . . means property of the debtor.”³⁹ In short, the existing trust assets in a retirement system will not be utilized to satisfy obligations owed to the municipality’s other creditors. Trustees should make sure that the parties to the bankruptcy are aware of, and do not run afoul of, this important distinction.

Benefits for Current Employees—Rejection of Collective Bargaining Agreement

One of the Code provisions available to a Chapter 9 debtor (municipality) is the power to assume or reject executory contracts⁴⁰ pursuant to Section 365 of the Bankruptcy Code.⁴¹ Current collective bargaining agreements are considered to be *executory contracts*. Thus, municipalities can seek to reject their obligations for the payment of benefits (e.g., employer pension contributions, employer health insurance contributions) under an existing collective bargaining agreement. The municipality does not have to comply with the more stringent criteria for rejecting collective bargaining agreements found in Chapter 11.⁴² Instead, the municipality only needs to satisfy the more general requirements for rejection of an executory contract under Section 365, plus an additional element added for collective bargaining agreements by the U.S. Supreme Court in *N.L.R.B. v. Bildisco & Bildisco*.⁴³

Under Section 365, a debtor (municipality) must demonstrate that rejection satisfies the business judgment test, i.e., a municipality must show that

the agreement is a burden⁴⁴ and that the equities balance in favor of rejecting the agreement. In the context of a collective bargaining agreement, *Bildisco* held that the additional element required before rejection will be permitted is that the bankruptcy court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.⁴⁵

If an executory contract is rejected, the nondebtor party (the union in the case of a collective bargaining agreement) can file a proof of claim for damages arising out of the rejection. In some cases, unions have tried to negotiate a long-term contract prior to a Chapter 9 filing so that, if approved but thereafter rejected in the Chapter 9 proceedings, the rejection damages will be higher.⁴⁶

Benefits to Existing Retirees

Existing retirees are often a major creditor constituency. As noted above, in the *City of Stockton* case, the largest unsecured creditor was identified as CalPERS with a claim of \$147,500,000 for “unfunded pension costs.” As part of a plan of adjustment, a municipality may seek to reduce contribution requirements and benefits as part of an overall cost-savings plan. Pension benefits for existing retirees are often protected by the state’s constitution or statutory authority. These protections may be enough to prevent modifications to pension benefits of existing retirees.⁴⁷ In many states, however, health care benefits do not enjoy the same protection. The National Conference on Public Employee Retirement Systems has an excellent overview of the relevant provisions in each state.⁴⁸

In the *Vallejo* case, the amount due for retiree benefit obligations was calculated to be \$215 million. Under the

plan of adjustment, pension benefits for existing retirees were kept intact, while retirees had to pay a larger portion for health benefits. Retiree benefits for new hires were reduced. In the *City of Stockton* case, the city proposes to eliminate retiree health benefits altogether. Changes of this nature often provoke a large outcry and could lead to heated debates over the use of limited resources for current services rather than benefits for retirees. Retirement system trustees should carefully monitor a municipality's filing to timely address any attempt to modify obligations that would affect the system's ability to pay benefits to existing and future retirees.

Claims

As part of a Chapter 9 case, the court may set a bar date for creditors, like retirement systems, to file claims against the debtor (municipality). This would include claims for the municipality's liabilities to retirement systems. The amounts of such claims may well be difficult to calculate and, as the case unfolds, may need to be amended. All such claims for liabilities that arose prior to the Chapter 9 proceeding are likely to be treated as general unsecured claims.⁴⁹

What if There Is a Shortfall?

When there are insufficient funds held by the retirement system to cover current and retiree benefits, the trustees should determine their contractual rights to seek contributions from the municipality. In most circumstances, the system will look to the municipality itself to cover any shortfall; however, in a Chapter 9 case the municipality may seek to alter those obligations. If the municipality is struggling to satisfy current expenses, it may be politically difficult for the municipality to overlook current needs. Ultimately, if the municipality were to have exhausted all of its resources, the unfunded benefits may go unpaid, except as provided for under any plan for adjustment that is ultimately confirmed by the bankruptcy court. Accordingly, trustees will need to assert and fully protect their system's rights as a creditor in the Chapter 9 proceeding.

While not large in size, the city of Pritchard, Alabama provides an interesting example of this issue. The city was advised in 2004 that its pension fund would be exhausted in 2009. When that occurred, the city sought relief under Chapter 9. The 2009 filing was actually the second Chapter 9 filing by the city. In its 2009 case, the city proposed to pay its retirees roughly one-third of their expected benefit.⁵⁰ The city's mayor is quoted as saying that "you can't expect to get what we don't have."⁵¹ Taken to its logical conclusion, and in the worst-case scenario, if a municipality dissolved, there were insufficient assets in its retirement system and there were no

state protections, the benefits for current retirees and employees could go unpaid.

Conclusion

Municipalities, like private sector ventures, are facing a host of financial pressures. In many cases, retirement contributions and benefits are a municipality's largest expenditure. In Chapter 9, a municipality may seek to alter these obligations. When that occurs, retirement system trustees must be vigilant to protect the interests of plan participants. Each case will be unique and will require a careful analysis of the facts and applicable state law as they interact with the provisions of the Bankruptcy Code.

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This article is intended for general information purposes only and does not and is not intended to constitute legal advice. The reader should consult with legal counsel to determine how laws or decisions discussed in the article apply to the reader's specific circumstances.

Endnotes

1. 11 U.S.C. §§901-946. Hereinafter, the *Bankruptcy Code* shall mean Title 11 of the United States Code.
2. Under Cal. Gov't. Code §53760.3 (West 2012), a municipality must provide a request for neutral evaluation to specified parties. Thereafter, a neutral evaluator is selected to attempt to mediate a resolution in lieu of a filing under Chapter 9. The process runs 60 days, but can be extended by either the municipality or a majority of creditors for an additional 30 days. Once the 60 (or 90) days have run the municipality may seek relief under Chapter 9. In June 2012, the Stockton City Council passed a resolution authorizing the commencement of a proceeding under Chapter 9 as early as June 26, 2012, the 91st day after initiating the process, and the petition was filed on June 28, 2012.
3. U.S. Const. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."). It is also partly due to the U.S. Supreme Court decision in 1936 that held the first municipal bankruptcy legislation was "unconstitutional as an improper interference with the sovereignty of the states." 6 Lawrence P. King, *Collier on Bankruptcy* §900.LH[2] at 900-26 900-27 (Alan N. Resnick and Henry J. Sommer, editors, 16th edition).
4. 11 U.S.C. §109(c)(1)-(5).
5. 11 U.S.C. §109(c)(1).
6. 11 U.S.C. §101(40).
7. For a short survey of the types of entities that have and have not been held to be *municipalities* for purposes of Chapter 9, see Sherri Dahl, *What Qualifies as a Municipality under Chapter 9 of the Federal Bankruptcy Law?*, 9 No. 6 Westlaw J. Bankr. 1 (July 6, 2012).
8. 468 B.R. 36 (Bankr. D.R.I. 2012).
9. *Central Falls*, 468 B.R. at 72 79.
10. 11 U.S.C. §109(c)(2).
11. H.R. Rep. No. 103-835, at 59 (1994) (footnote omitted) (emphasis added).
12. 11 U.S.C. §109(c)(3).
13. 11 U.S.C. §101(32).
14. See, e.g., *In re Boise County*, 465 B.R. 156, 171 (Bankr. D. Idaho 2011).
15. *Id.*
16. *Id.* at 172; see also *In re City of Vallejo*, 408 B.R. 280, 290 (B.A.P. 9th Cir. 2009).
17. *Id.*
18. *Vallejo*, 408 B.R. at 293.

19. *Id.*
20. GASB Statement No. 67, *Financial Reporting for Pension Plans* (revising existing guidelines for the financial reports of most pension plans), and GASB Statement No. 68, *Accounting and Financial Reporting for Pensions* (revising and establishing new financial reporting requirements for most governments that provide their employees with pension benefits), are both due to be published in August. Statement No. 67 will be effective for “financial statements for periods beginning after June 15, 2013” and Statement No. 68 will be effective for “fiscal years beginning after June 15, 2014.” News release, Governmental Accounting Standards Board, “GASB Improves Pension Accounting and Financial Reporting Standards” (June 25, 2012), available at www.gasb.org/cs/ContentServer?site=GASB&c=GASBContent_C&pagename=GASB%2FGASBContent_C%2FGASBNewsPage&cid=1176160126951.
21. A *net pension liability* is described by GASB as “the difference between the total pension liability (the present value of projected benefit payments to employees based on their past service) and the assets (mostly investments reported at fair value) set aside in a trust and restricted to paying benefits to current employees, retirees, and their beneficiaries.” *Id.*
22. A *fiduciary net position* is described by GASB as “the amount held in a trust for paying retirement benefits.” *Id.*
23. 11 U.S.C. §109(c)(4).
24. See 2, Lawrence P. King, *Collier on Bankruptcy* §109.04[3][d] at 109 31 (Alan N. Resnick and Henry J. Sommer, editors, 16th edition).
25. See *Vallejo*, 408 B.R. at 295.
26. 11 U.S.C. §109(c)(5)(A)-(D).
27. See, e.g., *Boise County*, 465 B.R. 156 (dismissing case due to failure to satisfy the insolvency test); *Vallejo*, 408 B.R. 280 (denying motion to dismiss); *In re Slocum Lake Drainage*

- District of Lake County*, 336 B.R. 387 (Bankr. N.D. Ill. 2006) (finding drainage district not authorized to file under state law).
28. See 11 U.S.C. §921(c).
29. See 11 U.S.C. §921(d).
30. 11 U.S.C. §941.
31. 11 U.S.C. §941.
32. See 6 Lawrence P. King, *Collier on Bankruptcy* 943.03[1] [f][i][B] (Alan N. Resnick and Henry J. Sommer, editors, 16th edition). See also 11 U.S.C. §943.
33. As defined in section 363 of the Bankruptcy Code, *cash collateral* means cash, negotiable instruments, documents of title, securities, deposit accounts, or other cash equivalents whenever acquired in which the estate and an entity other than the estate have an interest . . . whether existing before or after the commencement of a case under this title.” 11 U.S.C. §363(a).
34. See 11 U.S.C. §904.
35. In the *City of Stockton* case, the estimated shortfall owed to California Public Employees’ Retirement System (CalPERS) is \$147.5 million for unfunded pension costs. That was the largest unsecured claim in the city’s filings.
36. See, e.g., *The Widening Gap Update*, Pew Center on States (June 2012). This article estimates the unfunded pension liability to be \$757 billion and the unfunded retiree health care obligations to be \$627 billion as of the end of fiscal 2010, an increase of 9% from the previous year.
37. See “United States Courts, What Happens When Cities Go Bankrupt?” (July 13, 2012), available at <http://news.uscourts.gov/what-happens-when-cities-go-bankrupt> (stating “Chapter 9 filings are not common. From 1986-2011 there were 263 Chapter 9 bankruptcies filed nationwide with 13 filed in fiscal year 2011. The majority of the cases in the last 40 years have been for utility districts and not sovereign government entities.”).
38. See 11 U.S.C. §901(a).
39. 11 U.S.C. §902(1).

40. An *executory contract* is typically defined as a contract where performance remains due to some extent on both sides. See 3 Lawrence P. King *Collier on Bankruptcy* §365.02[2] (Alan N. Resnick and Henry J. Sommer, editors, 16th edition.); see also 11 U.S.C. § 901(a) (incorporating Section 365 into Chapter 9).
41. 11 U.S.C. §365.
42. Section 1113 of the Bankruptcy Code does not apply in Chapter 9. See *In re City of Vallejo*, 432 B.R. 262 (E.D. Cal. 2010).
43. 465 U.S. 513, 104 S. Ct. 1188 (1984).
44. As noted above, in a Chapter 9 proceeding, there is no estate. Accordingly, courts interpret this element to require a showing that performance under the agreement impairs the ability to develop a plan of adjustment. See *Vallejo*, 432 B.R. at 273.
45. 465 U.S. at 526. See also *Vallejo*, 432 B.R. at 272.
46. See *Vallejo*, 408 B.R. at 287-88.
47. A comprehensive discussion of certain of these issues can be found at Ellman and Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy To Solve Their Pension Woes?*, 27 Emory Bankr. Dev. J. 365 (2011).
48. See *State Protections for Retirement Benefits and State Protections for Health Care Benefits*, available at www.ncpers.org/ResourceCenter.
49. See 11 U.S.C. § 901(a) (omitting section 507(a) from the list of sections applicable in Chapter 9, except §507(a)(2) dealing with administrative claims).
50. See “Pritchard Bankruptcy Wouldn’t Jeopardize Agreement with Pensioners,” AL.com (April 20, 2012). Available at <http://blog.al.com>. live.
51. See Ellman and Merrett, *Pensions and Chapter 9: Can Municipalities Use Bankruptcy To Solve Their Pension Woes?*, 27 Emory Bankr. L.J. at 410.