CHAPTER 9: MUNICIPAL BANKRUPTCY RELIEF

Chapter 9 of title 11 provides relief for municipal entities, defined as a "political subdivision or instrumentality of a state."[2414] Chapter 9 is a rarely used part of the Bankruptcy Code. Only 141 Chapter 9 cases have been filed since 1980.[2415] The Commission's Chapter 9 Proposals are technical in nature and attempt to fill statutory gaps that have been brought to light in recent Chapter 9 cases, most notably the one involving Orange County, CA.

[2414] 11 U.S.C. § 101(40) (1994).

[2415] Administrative Office of the United States Courts, Statistics Division (Oct.9, 1997).

RECOMMENDATIONS

4.3.1 ***Incorporation of the Securities Contract Liquidation Provisions - 11 U.S.C. §§ 555, 556, 559 & 560***

The securities contract liquidation provisions in 11 U.S.C. §§ 555, 556, 559 & 560 should be applicable in Chapter 9 cases and should be added to the list contained in section 901(a).

4.3.2 ***Chapter 9 Petition as Order for Relief***

Section 921(d) should be deleted. Section 921 authorizes the court to dismiss a Chapter 9 petition for (1) lack of good faith; or (2) failure to meet the requirements of title 11. Deletion of section 921(d) will eliminate the statutory conflict between section 301 providing that a voluntary petition constitutes an order for relief and section 921(d) authorizing the court to order relief only if the petition is not dismissed under section 921(c). Deletion of section 921(d) will also conform Chapter 9 to all other chapters of the Bankruptcy Code where a voluntary petition is the order for relief.

4.3.3 ***Eligibility of Municipalities to Serve on Creditors' Committees***

11 U.S.C. § 101(41) should be amended to permit municipalities to serve on creditors' committees in Chapter 9 cases under the provisions of 11 U.S.C. § 1102.

4.3.4 ***Elimination of 11 U.S.C. § 921(b)***

Section 921(b) should be deleted. Bankruptcy judges should be appointed to preside over Chapter 9 cases in the same manner as they are appointed to supervise all other cases under the Bankruptcy Code.

4.3.5 ***Inclusion of "Employees" in 11 U.S.C. § 922(a)***

11 U.S.C. § 922(a)(1) should be amended to provide stay protection to nonresident "employees" of municipalities that have filed for Chapter 9 relief. Section 922(a)(1) should read:

> **(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer, employee, or inhabitant of the debtor that seeks to enforce a claim against the debtor[.]**

4.3.6 *Treatment of Municipal Obligations in Chapter 9*

Chapter 9 should be amended to provide comparable protection to all types of tax-exempt obligations sold in the municipal marketplace. The Recommendation will not affect the right of a municipality to use special revenues for the provision of necessary municipal services.

DISCUSSION

Municipal bankruptcy relief is a relatively recent addition to the federal bankruptcy scheme. For more than one hundred and forty years after the adoption of the Constitution, no municipal bankruptcy legislation existed either on the federal or state level.[2416] Debt restructuring legislation could not exist on the state level, because states are prohibited from impairing contract obligations under the Contracts Clause of the Constitution.[2417] Federal legislation relating to municipal bankruptcy was similarly hamstrung by Tenth Amendment considerations of state sovereignty.

It was not until the early 20th century that overwhelming economic crises demanded that this legislative vacuum be filled. The land development boom of the 1920s followed by the depression of the 1930s sent over 2,019 municipalities, counties and other governmental units into default on their obligations.[2418] In response, Congress enacted Chapter IX as temporary emergency legislation to help these municipalities restructure their debt.[2419] This emergency relief was held unconstitutional by the Supreme Court in *Ashton v. Cameron County Water Dist.* finding that Chapter IX impermissibly interfered with a state's sovereignty.[2420] The constitutional faults were remedied[2421] and Congress' second attempt to provide

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[2416] For a complete discussion of the municipal creditors' remedies that were available prior to 1933, see Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 713 PLI/COMM. 35 (March 1995).

[2417] *Id.* at 39-40, *citing* Hanover Nat'l Bank v. Morses, 186 U.S. 181, 188 (1902) ("[Congress's power under the Bankruptcy Clause includes the power to discharge the debtor from his contracts and legal liabilities, as well as to distribute his property. The grant to Congress involves the power to impair the obligations of contracts, and this the States were forbidden to do.")

[2418] Ashton v. Cameron County Water Improvement District, 298 U.S. 513, 533-34 (1936) (Cardozo, J., dissenting) (citing the "breadth and depth" of the municipal fiscal crises).

[2419] The Bankruptcy Act of 1898, 30 Stat. 544 was amended to include Chapter IX, titled *Provisions for the Emergency Temporary Aid of Insolvent Public Debtors and to Preserve the Assets Thereof and for Other Related Purposes*. *See* 48 Stat. 798 (1934).

[2420] Ashton, 298 U.S. 532 (holding that Chapter IX of the Bankruptcy Act was unconstitutional; Congress' enactment of a municipal debt restructuring statute impermissibly abridged a state's sovereignty).

[2421] Chapter IX was redesignated as Chapter X by the Municipal Corporation Bankruptcy Act, Pub. L. No. 302, 75th Cong., 1st Sess., 50 Stat. 653 (1937). The principal differences between temporary municipal bankruptcy relief was upheld.[2422] Congress extended the sunset provision twice before making Chapter IX a permanent part of the Bankruptcy Act in 1946.[2423]

During the revisions to Chapter IX, the Committee Reports succinctly acknowledged the narrow line municipal bankruptcy legislation treads between the states' limitation under the Contract Clause and the federal government's limitation under principles of state sovereignty.

> There is no hope for relief through statutes enacted by the States, because the Constitution forbids the passing of State laws impairing the obligations of existing contracts. Therefore relief must come from Congress, if at all. The Committee is not prepared to admit that the situation presents a legislative no man's land. ... It is the opinion of the Committee that the present bill removes the objections to the unconstitutional statute, and gives a forum to enable those distressed taxing agencies which desire to adjust their obligations and which are capable of reorganization, to meet their creditors under necessary judicial control and guidance and free from coercion, and to affect such adjustment on a plan determined to be mutually advantageous.[2424]

Tenth amendment concerns in legislating municipal bankruptcy provisions remain as vital today as in 1937. Any municipal debt-restructuring scheme must balance a bankruptcy court's power to restructure municipal debts with the sovereignty of the municipal entity to control its own affairs.

1976 Amendments to Chapter IX. Chapter IX remained virtually "unchanged and virtually unused for thirty years."[2425] In response to New York City's fiscal crisis in the 1970s, Chapter IX was revised in 1976 to permit a large municipality to restructure its debt without having to comply with certain filing requirements, which

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the two were a reduction in the number of consents needed for confirmation of a plan, from 75% to 66.66%, and a small expansion of protection for states' sovereign immunity.

[2422] United States v. Bekins, 304 U.S. 27 (1938) (holding the Municipal Corporation Bankruptcy Act constitutional under both the Fifth and the Tenth Amendments).

[2423] *See* Pub. L. No. 481, § 2, 60 Stat. 409, 416 (1946) (amending sections 81, 82, and 83, and repealing section 84 of Chapter IX).

[2424] H. REP. NO. 75-517 (1937); S. REP. NO. 75-911 (1937). Chapter X was redesignated as Chapter IX in the 1938 Chandler Act amendments to the Bankruptcy Act, Pub. L. No. 696, § 3(a), 52 Stat. 840, 939 (1938).

[2425] 4 COLLIER ON BANKRUPTCY ¶ 900.01[4], at 900-7 (Lawrence P. King et al. eds., 15th rev. ed. 1996) (citing H.R. REP. NO. 94-686, at 4 (1975)).

would have made a large municipal debtor's filing under Chapter IX all but impossible. Amendments included an automatic stay upon the filing of a Chapter IX petition[2426] as well as a provision permitting a debtor to file if prepetition negotiation with each class of its creditors was impractical.[2427] The 1976 amendments to Chapter IX were part of the process of bankruptcy law reform that culminated in the 1978 Bankruptcy Code. "Thus, the 1976 revision was incorporated into the Bankruptcy Code in almost identical form and substance."[2428]

Current Provisions of Chapter 9

Eligibility for Relief. Only municipalities, defined as a "political subdivision or public agency or instrumentality of a state", are eligible for Chapter 9.[2429] A municipality must satisfy four threshold requirements in order to obtain Chapter 9 relief:[2430]

1. have specific state authorization to be a debtor under Chapter 9;[2431]
2. be insolvent;[2432]

[2426] Bankruptcy Act of 1898, § 85(e)(1) (repealed 1979).

[2427] *Id.* at § 84(3) (repealed 1979).

[2428] COLLIER, ¶ 900.01[4], at 900-9.

[2429] 11 U.S.C. § 101(40) (1994).

[2430] *Id.* § 109(c).

[2431] The 1994 Amendments to Chapter 9 changed the pre-approval requirement from "general" to "specific" state authorization of the municipality "in its capacity as a municipality or by name." Bankruptcy Reform Act of 1994, P.L. No. 103-394, 108 Stat. 4107, § 402 (1994), 11 U.S.C. § 109 (c)(2) (1994). Twelve states have specifically authorized their municipalities to file for Chapter 9 relief: Alabama (ALA. CODE § 11-81-3) (1996); Arizona (ARIZ. REV. STAT. ANN. § 35-603) (1997); Arkansas (ARK. CODE ANN. § 14-74-103) (1995); California (CAL. GOV'T CODE § 43739) (1997); Colorado (COLO. REV. STAT. § 32-1-1402) (1996); Florida (FLA. STAT. § 218.01) (1997); Idaho (IDAHO CODE § 67-3903) (1997); Kentucky (KY. REV. STAT. ANN. §66.400) (Michie 1996); Montana (MONT. CODE ANN. §7-7-4111) (1995); Oklahoma (OKLA. STAT. tit. 62, § 283) (1997); South Carolina (SC CODE ANN. § 6-1-10) (1996); and, Texas (TEX. LOCAL GOV'T CODE ANN. § 140.001) (1997). Only Georgia has specifically barred its municipalities from Chapter 9 relief (GA. CODE ANN. § 36-80-5) (1997).

[2432] Municipal insolvency is defined as "financial condition such that 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"

11 U.S.C. § 101(32)(C) (1994).

3. desire to effect a plan to adjust its debts;[2433] and
4. satisfy one of four alternatives:
    a. Has obtained the consent of at least a majority in amount of impaired claimholders under the proposed plan; or
    b. has negotiated in good faith but has failed to reach any agreement with a majority of the impaired claimholders under the proposed plan; or
    c. negotiation with such claimholders is impractical; or
    d. has a reasonable belief that a creditor may attempt to obtain a preference.[2434]

Chapter 9 has principally been used by special purpose municipal taxing vehicles, such as school districts, water districts, and hospital authorities to reorganize their financial affairs and restructure their debts.[2435] Chapter 9 has rarely been utilized by an entire city or county.[2436]

Scope of the Bankruptcy Court's Involvement in a Chapter 9 Case

The scope of the bankruptcy court's involvement in a Chapter 9 case is severely limited by the Tenth Amendment's preservation of state sovereignty. Section 903 preserves the political and governmental power over a municipality to the respective state, including decisions related to expenditures.[2437] Section 904 prohibits the court (unless the debtor consents or the plan so provides) from interfering with (1) the political or governmental powers of the debtor; (2) the debtor's revenues; or (3) the debtor's use of any income-producing property.[2438]

The United States trustee is similarly constrained from extensive involvement in Chapter 9. The only explicit role the U.S. trustee has in Chapter 9 is official

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[2433] 11 U.S.C. § 109(c)(4) (1994).

[2434] *Id.* at § 109(c)(5).

[2435] *See, e.g. In re* Addison Community Hosp. Auth., 175 B.R. 646 (Bankr. E.D. Mich. 1994); In re Richmond Sch. Dist., 133 B.R. 221 (Bankr. N.D. Cal. 1991); *In re* Cottonwood Water & Sanitation Dist., 138 B.R. 973 (Bankr. D. Colo. 1992).

[2436] *See*, *e.g.*, *In re* County of Orange, 183 B.R. 594 (Bankr. C.D. Cal. 1995); *In re* City of Bridgeport, 129 B.R. 332 (Bankr. D. Conn. 1991).

[2437] 11 U.S.C. § 903 (1994). Section 903 reiterates a state's inability to bind a nonconsenting creditor to a municipal debt restructuring.

[2438] 11 U.S.C. § 904 (1994).

committee appointments under section 1102.[2439] This limited role is consistent with Chapter 9's explicit avoidance of interference with state sovereignty.[2440] Sections 327, 328 and 330 related to the retention and compensation of professionals do not apply in Chapter 9, rendering the U.S. trustee's traditional involvement in this area nonexistent.

Substantive Bankruptcy Code Provisions Applicable in Chapter 9

Chapter 9 debtors do not have access to all of the substantive provisions of the Bankruptcy Code. Section 901 lists the Code sections and subsections that are applicable in Chapter 9, including, in relevant part:

- Adequate protection (11 U.S.C. § 361);
- Automatic stay (11 U.S.C. § 362 as supplemented by section 922);
- Obtaining postpetition credit on a superpriority or priming lien basis (11 U.S.C. § 364(c) & (d));
- Executory contracts (11 U.S.C. § 365);
- Allowance of claims or interests and administrative expenses (11 U.S.C. §§ 502, 503);
- Administrative expense priorities (11 U.S.C. § 507(a)(1));
- Avoidance powers (11 U.S.C. §§ 544-548);
- Creation and powers of creditors' committees (11 U.S.C. §§ 1102 & 1103);
- Classification of claims and interests (11 U.S.C. § 1122);
- Relevant provisions relating to the contents of a municipal debtor's plan (11 U.S.C. § 1123(a)(1) -(b));
- Impairment of claims or interests (11 U.S.C. § 1124);
- Postpetition disclosure and solicitation (11 U.S.C. § 1125);
- Provisions regarding acceptances of a plan (except those governing acceptances of interestholders of the debtor) (11 U.S.C. § 1126 (a), (b), (c), (e), (f), and (g));
- Deemed acceptance or rejection of plan as modified unless notification of change within time set by the court (11 U.S.C. § 1127(d));
- Confirmation requirements for municipalities are as follows:

[2439] *See* David S. Kupetz, *Municipal Debt Adjustment Under the Bankruptcy Code*, 27 URB. LAW. 531, 566 (Summer 1995) ("The one limited area where the United States trustee has been granted an explicit role in Chapter 9 cases involves the requirement that the United States trustee appoint creditors' committees. It does not appear to have been contemplated that the United States trustee would have any role in Chapter 9 cases beyond the limited role of appointing an official committee or committees of creditors.").

[2440] *Id.* at 565-6 ("The omission of Chapter 9 cases from the general administrative and supervisional authority of the United States trustee is consistent with other limitations in the Chapter 9 context designed to avoid interference with state sovereignty. Giving the United States trustee any general supervisory authority in a Chapter 9 case could be deemed to be improper interference with the political and financial affairs of the municipal debtor.").

- The proponent must comply with the applicable provisions of title 11 (11 U.S.C. § 1129(a)(2));
- The plan has been proposed in good faith and not by any means forbidden by law (11 U.S.C. § 1129(a)(3));
- Governmental regulatory commission with jurisdiction over the rates of the debtor has approved any rate change in the plan or such rate change is conditioned on such approval (11 U.S.C. § 1129(a)(6));
- Each class of claims and interests has either accepted the plan or is not impaired under the plan (11 U.S.C. § 1129(a)(8));
- If any classes are impaired under the plan, at least one impaired class has accepted the plan (11 U.S.C. § 1129(a)(10));
- Cramdown of secured and unsecured claims (11 U.S.C. § 1129(b)(1)(a), (b)(2)(A) & (b)(2)(B)).

While Chapter 9 debtors do not enjoy the full range of relief and powers offered by the Bankruptcy Code, the above list indicates a careful application of only those provisions that are necessary to complete a municipal restructuring while balancing the state sovereignty concerns.

4.3.1 *Incorporation of the Securities Contract Liquidation Provisions 11 U.S.C. §§ 555, 556, 559 & 560*

The securities contract liquidation provisions in 11 U.S.C. §§ 555, 556, 559 & 560 should be applicable under Chapter 9 and should be added to the list contained in section 901(a).

After the enactment of the Bankruptcy Code in 1978, certain securities contract liquidation provisions were added to the Bankruptcy Code by subsequent legislation in sections 555, 556, 559 and 560.[2441] Each of these provisions permits the liquidation or termination of securities contracts, commodity or forward contracts, repurchase agreements and swap agreements, notwithstanding certain provisions of the Bankruptcy Code, including the automatic stay.[2442] These provisions protect both the debtor as well as the nondebtor parties to these securities contracts by minimizing

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[2441] Sections 555 and 556 were added in the *Technical and Substantive Change in Bankruptcy with Respect to Securities and Commodities*, Pub. L No. 97-222 (1982). Section 559 was added as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984). Section 560 was added in 1990 by *An Act To Amend Title 11 of the United States Code Regarding Swap Agreements and Forward Contracts*, Pub. L. No. 101-311, 104 Stat. 267 (1990).

[2442] Where provided, however, the right to terminate certain securities' contracts under these provisions are still subject to the limitations under the Securities Investor Protection Act of 1970.

losses due to market fluctuations. By encouraging the mitigation of damages immediately, these provisions prevent a chain reaction of defaults due to a single insolvency.

Rationale. These provisions permit the liquidation of the above-listed types of securities contracts notwithstanding contrary provisions in the Bankruptcy Code, including the automatic stay, avoiding powers, and the anti-*ipso facto* provisions of section 365(e)(1).[2443] In addition, if a repurchase agreement is liquidated at a price above the repurchase price in the underlying agreement, section 559 permits a repo participant to recover "all expenses in connection with the liquidation of such repurchase agreement."[2444] This provision grants an expanded recovery to repo participants, above the "reasonable expenses" provided to secured creditors under section 506(b).[2445]

The Orange County crisis was triggered by risky investments in precisely the types of securities covered by these provisions.[2446] After it filed its Chapter 9 petition, Orange County contested the liquidation of certain repurchase agreements on the ground that section 559 did not apply under Chapter 9 of the Bankruptcy Code.[2447] This assertion caused a short-lived disruption in the U.S. government securities market.[2448]

[2443] 4 COLLIER ON BANKRUPTCY ¶ 559.01, at 559-7 (Lawrence P. King et al. eds., 15th rev. ed. 1996).

[2444] *Id.*, *citing* 11 U.S.C. § 559 (1994).

[2445] *Id.*

[2446] The Orange County investment pool leveraged its investments through the use of reverse repurchase agreements. In a "reverse repo" the County borrowed money from a broker by lending the broker U.S. government securities owned by the County and then reinvested the cash it received in derivative securities. As long as the cost of borrowing the money from the broker is less than the return obtained on the derivative instrument, the transaction is profitable. *See County of Orange*, 183 B.R. 594, 598 n.4 (Bankr. C.D. Cal. 1995).

[2447] *See* County of Orange v. Nomura Securities Int'l, Inc., Adv. No. 94-02480 (Bankr. S.D. Cal.) (complaint dismissed) (challenging close-out of repurchase agreements under section 559).

[2448] *See, e.g.*, Peter Heap, *Court Ruling on Collateral Could Hinder Repurchase Trading*, THE BOND BUYER, December 14, 1994, at 4 (stating that an adverse ruling on the liquidation of Orange County's reverse repo positions could have adverse impact on market; "The market has been premised on the fact that there's an exemption (for collateral) from bankruptcy."); *Orange County Suit Scars Markets*, CHARLESTON GAZETTE, Dec. 17, 1994, at 5A (stating that Orange County's suit against certain broker/dealers for liquidation of reverse repo positions would affect the entire yield curve).

To the extent that municipalities invest in these types of securities, there is no reason why the Code provisions relating to them should not be applicable in Chapter 9. *Orange County* demonstrates that municipal finance and investment strategies are taking advantage of these sophisticated yield-enhancing instruments. The liquidation provisions protect *both* parties to the transaction by mitigating any possible damages due to market shifts and preserve the efficiency and operation of the market for everyone else. The chain reaction potential for disruption and defaults caused by another "Orange County" type filing necessitates inclusion of these provisions in Chapter 9. The omission of these sections from Chapter 9 was a legislative oversight and should be corrected.

Competing Considerations. It may be argued that where a municipal debtor's market position would have improved postpetition, any liquidation reduces property available to the debtor. A response to this argument, however, is that a postpetition movement in the market *against* a Chapter 9 debtor's position will increase creditors' claims, prevent mitigation of damages, and could possibly lead to a string of insolvencies based on a single default. The securities contract liquidation provisions protect both parties to the contract by fixing possible profits or losses and preserving the efficient operation of the market. These benefits have not prevented lawsuits over the alleged wrongful liquidation of securities contracts. For example, Orange County sued certain repo participants who liquidated certain securities contracts after the commencement of Orange County's Chapter 9 case. The complaint (which was later dismissed) sought to recover damages resulting from (1) stay violations, (2) contempt of court, and (3) avoidance and recovery of postpetition transfer of property of the debtor.[2449] The same reasons for their applicability in Chapter 7 liquidation and Chapter 11 reorganization cases apply to a Chapter 9 case.

4.3.2 *Chapter 9 Petition as Order for Relief*

Section 921(d) should be deleted. Section 921 authorizes the court to dismiss a Chapter 9 petition for (1) lack of good faith; or (2) failure to meet the requirements of title 11. Deletion of section 921(d) will eliminate the statutory conflict between section 301 providing that a voluntary petition constitutes an order for relief and section 921(d) authorizing the court to order relief only if the petition is not dismissed under section 921(c). Deletion of section 921(d) will also conform Chapter 9 to all other chapters of the Bankruptcy Code where a voluntary petition is the order for relief.

[2449] *See* Complaint of Orange County v. Nomura Securities Int'l (Dec. 9, 1994) (reprinted in Robert A. Greenfield & Michael H. Goldstein, *Chapter 9: Municipal Bankruptcies, Orange County and More*, 714 PLI/COMM 37 (April-May 1995)).

Section 301 of title 11, applicable in a Chapter 9 case under section 901(a), provides that the "commencement of a voluntary case under a chapter of this title constitutes an order for relief under such chapter."[2450] In contradistinction, section 921(d) provides that the court shall order relief if a Chapter 9 petition is not dismissed for lack of good faith or failure to comply with the requirements of title 11.[2451]

Rationale. Statutory confusion exists over whether a Chapter 9 petition constitutes an order for relief. Despite the incorporation of section 301, which states that the filing of a voluntary petition constitutes an order for relief,[2452] section 921(d) states that if the judge does not dismiss the municipal petition on good faith grounds or for failure to meet the other requirements of the Bankruptcy Code, an order for relief will be entered.[2453] Commentators agree that "[t]here should be no need for the court to actually enter an order for relief. Requiring the actual entry of an order for relief could result in unnecessary delay and could impair the administration of the case."[2454]

The use of the language "after the order for relief" in other parts of the Bankruptcy Code exacerbates this confusion. A creditor is defined as "an entity that has a claim against the debtor that arose at the time of or before the order for relief."[2455] A number of time periods applicable in Chapter 9 begin to run upon the entry of an order for relief. For example, the debtor's time to commence certain avoidance actions is limited to the later of (among other things) two "years after the entry of the order for relief."[2456] In addition, creditors' committee formation by the U.S. trustee can not begin until after the entry of the order for relief.[2457] The court in *Colorado Centre Metro. Dist.,* held that the creditors' committee did not have

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[2450] 11 U.S.C. § 301 (1994).

[2451] 11 U.S.C. § 921(d) (1994)("If the petition is not dismissed under subsection (c) of this section, the court shall order relief under this chapter.")

[2452] 11 U.S.C. § 301 (1994).

[2453] 11 U.S.C. § 921(d) (1994).

[2454] *Kupetz*, *supra*, note 2439, at 557 (citing 4 COLLIER ON BANKRUPTCY ¶ 921.04, 921-6 (Lawrence P. King eds. et al. 15th rev. ed. 1994) "That language [set forth in Section 301] should make it unnecessary for the court to enter an 'order for relief' under section 921(d). The only issue upon an objection should be whether the court dismisses the petition or overrules the objection.").

[2455] 11 U.S.C. § 101(10)(A) (1994).

[2456] 11 U.S.C. § 546(a)(1)(A) (1994).

[2457] *Id.* § 1102(a)(1) (1994).

standing to object to the Chapter 9 petition because the committee could not be formed until after an order for relief was entered.[2458]

Only involuntary petitions do not constitute an order for relief under the Bankruptcy Code.[2459] Involuntary petitions can not be filed against municipalities.[2460] All voluntary petitions under the Bankruptcy Code constitute an order for relief under section 301 and Chapter 9 municipalities should not be an exception. The authority of the court to dismiss a Chapter 9 petition under section 921 adequately safeguards the policy of preserving Chapter 9 as the avenue of last resort for municipal entities.

Competing Considerations. A municipality must satisfy more prerequisites in order to file a Chapter 9 petition than any other person or entity under the Bankruptcy Code.[2461] Strong policy considerations against municipal filings led to creation of the hurdles that a municipality must comply with prior to being eligible for Chapter 9 relief. It may be argued that these strong policy considerations against municipal filings warrants the denial of an order for relief prior to a court determination that these prerequisites have been satisfied. If this is the prevailing view, section 301 should not be applicable under Chapter 9 and section 921 should be clarified to provide the circumstances under which an order for relief should be entered in a Chapter 9 case. However, a Chapter 12 and 13 debtor must satisfy certain eligibility requirements; yet, the petition in those chapters operates as the order for relief even though the court may subsequently dismiss the petition due to lack of eligibility.

The result under the Recommendation preserves the status quo during any court evaluation of a municipality's Chapter 9 eligibility. Because certain protections under the Bankruptcy Code are triggered at "the order for relief" as discussed above, delay could result in prejudice to the debtor that would have been avoided if the order for relief were granted upon the filing of a Chapter 9 petition. In addition, under the Recommendation a dismissal order could remedy any possible prejudice that resulted from an ineligible Chapter 9 petition.

[2458] *In re* Colorado Centre Metro. Dist., 113 B.R. 25, 26-27 (Bankr. D. Colo. 1990) (ruling that a Chapter 9 petition does not constitute an order for relief and that the creditors' committee could not be formed until the order for relief was entered; section 1102(a)(1) provides that a committee shall be appointed "as soon as practicable after the order for relief").

[2459] 11 U.S.C. § 303 (1994).

[2460] 11 U.S.C. § 901(a) (1994).

[2461] *See, e.g.*, 11 U.S.C. § 109(c) (1994).

4.3.3 *Eligibility of Municipalities to Serve on Creditors' Committees*

11 U.S.C. § 101(41) should be amended to permit municipalities to serve on creditors' committees in Chapter 9 cases under the provisions of 11 U.S.C. § 1102.

Section 1102(b)(1) provides that a creditors' committee "shall ordinarily consist of the persons, willing to serve, that hold the seven largest unsecured claims against the debtor...." Section 101(41) defines "person" as including an "individual, partnership, and corporation, but does not include governmental unit, except that a governmental unit that:

(A) acquires an asset from a person
  (i) as a result of the operation of a loan guarantee agreement; or
  (ii) as receiver or liquidating agent of a person;
(B) is a guarantor of a pension benefit payable by or on behalf of the debtor or an affiliate of the debtor; or
(C) is the legal or beneficial owner of an asset of
  (i) an employee pension benefit plan that is a governmental plan, as defined in section 414(d) of the Internal Revenue Code of 1986; or
  (ii) an eligible deferred compensation plan, as defined in section 457(b) of the Internal Revenue Code of 1986;

shall be considered, for purposes of section 1102 of this title, to be a person with respect to such asset or such benefit." Section 101(41) thus carves out certain circumstances under which a municipality shall be considered a person for purposes of service on a creditors' committee in a Chapter 9 or Chapter 11 case. The Commission has concluded, however, that these circumstances are insufficient and that municipalities should be eligible to serve on committees under a broader range of circumstances.

Rationale. When Orange County filed its Chapter 9 petition some of its biggest creditors were other municipal entities located both in and outside the County. The anomaly in the statute excluding municipalities from creditors' committees was discovered when the U.S. trustee was forming the Orange County committees. In an effort to come to a reasonable solution that would permit the municipalities to represent their interests in the case, the U.S. trustee formed a committee composed entirely of the largest municipal creditors. No parties in interest objected to the formation of this committee despite the statutory prohibition against governmental units serving on a creditors' committee. The result in Orange County was equitable, but the statutory limit that created the problem should be corrected.

Competing Considerations. It may be argued that the current statutory exceptions to governmental units serving on creditors' committees are narrowly drawn to permit service when the municipality is acting in certain capacities, equally applicable in Chapter 9. As a consequence, there may be no reason to expand this exception in Chapter 9. Orange County may have been an unusual circumstance that was properly addressed by the U.S. trustee.

4.3.4 *Elimination of 11 U.S.C. § 921(b)*

Section 921(b) should be deleted. Bankruptcy judges should be appointed to preside over Chapter 9 cases in the same manner as they are appointed to supervise all other cases under the Bankruptcy Code.

Section 921(b) of title 11 provides that "The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case."[2462]

Rationale. Circuit court selection of a Chapter 9 judge was first enacted in the 1976 amendments to Chapter IX that arose out of New York City's fiscal crisis. Legislators at that time were concerned that a bankruptcy judge who was ill-equipped to handle a sophisticated Chapter 9 case (namely, New York City) might be assigned to preside over one and that legislation required the appointment of a United States district judge. In order to diminish the influence of local politics on the selection decision, section 921(b) empowered the chief judge of the relevant circuit to designate the district judge who would hear a Chapter 9 case. The 1978 Bankruptcy Code substituted the bankruptcy judge for the district judge as the one to preside over a Chapter 9 case, but retained the appointing power in the chief judge of the circuit. There is no reason for a special procedure in Chapter 9 cases. The bankruptcy judge should be selected as in all other chapters.

Concern over the ability and sophistication of bankruptcy judges to handle a Chapter 9 case is no longer well-founded. As a result, this provision of the statute should be eliminated. Chapter 9 cases should be assigned according to the local rules and practices governing the assignment of other bankruptcy cases. The flexibility of the chief judge to assign any judge in the circuit to preside over a Chapter 9 case is not necessary.

4.3.5 *Inclusion of "Employees" in 11 U.S.C. § 922(a)*

11 U.S.C. § 922(a)(1) should be amended to provide stay protection to nonresident "employees" of municipalities that have filed for Chapter 9 relief. Section 922(a)(1) should read:

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other

[2462] 11 U.S.C. § 921(b) (1994).

> **action or proceeding against an officer, employee, or inhabitant of the debtor that seeks to enforce a claim against the debtor[.]**

Section 922(a) alters the Chapter 9 application of the automatic stay under section 362. In addition to the protections listed in section 362(a), a Chapter 9 petition operates as a stay against

> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor[.]

The first municipal bankruptcy legislation in 1937 referred to the stay of actions against officers and inhabitants and it has remained a feature of all subsequent municipal bankruptcy legislation, though it was discretionary with the court up until the 1978 Code. Protection for officers and inhabitants of distressed municipalities was necessary to prevent prepetition creditors from commencing or continuing mandemus actions against them. There is a question, however, whether the statute applies to nonresident employees of a Chapter 9 municipality. This question should be resolved by extending protection to nonresident employees.

Rationale. The Commission received this Recommendation from a California attorney who represented an individual that had a claim against Orange County as the result of an auto accident. At the time Orange County filed for Chapter 9 relief, the attorney came across this gap in the scope of automatic stay protection for nonresident employees of municipalities in Chapter 9. Approximately 50 individuals who had been named in various suits pending on the petition date were not protected by the automatic stay. As a result, the County's attorneys brought proceedings under section 105 to extend the stay to protect these individuals. Without such protection, presumably these nonresident individuals were vulnerable to suit by Orange County's creditors.

To the extent section 922(a)(1) protects officers and inhabitants of the municipality, such protection should extend to employees as well. Prepetition municipal creditors should not be permitted to evade the automatic stay to continue or commence actions to recover against resident or nonresident employees. The policy reasons that favor protecting officers and inhabitants of municipalities in Chapter 9 apply equally to resident and nonresident employees.

4.3.6 *Treatment of Municipal Obligations in Chapter 9*

> **Chapter 9 should be amended to provide comparable protection to all types of tax-exempt obligations sold in the municipal marketplace. The**

Proposal will not affect the right of a municipality to use special revenues for the provision of necessary municipal services.

Municipalities typically obtain debt financing through two different routes. One type, commonly known as "general obligation" debt is backed by the general taxing power of the entity; no particular assets or stream of revenues is specifically dedicated to payments of interest and principal on the debt. The other type, commonly known as "revenue bond financing" involves the dedication of a particular stream of revenues to the municipality's debt service. Holders of revenue bonds do not have any recourse to other assets or payment streams in the event that the pledged revenue stream is insufficient to retire the debt. The capital markets have historically accorded general obligation debt better credit ratings than revenue debt. This is because a more diverse stream of actual and potential municipal revenue-generating capability backs the repayment of general obligation debt.

In 1988, Congress passed "An Act to Amend the Bankruptcy Law to Provide for Special Revenue Bonds and for Other Purposes."[2463] The purpose of the amendment was to protect the liens on special revenues granted under municipal revenue bonds.[2464] This legislation strengthened the protections for revenue bonds in three principal ways.

First, it added a definition for "special revenues" in 11 U.S.C. § 902(2). Five types of special revenue obligations qualify as special revenues under the definition:

A. receipts derived from the ownership, operation or disposition of projects or systems of the debtor that are primarily (or primarily intended) to be used to provide transportation, utility, or other services, including the proceeds of borrowings to finance the projects or systems;

B. special excise taxes imposed on particular activities or transactions;

C. incremental tax receipts derived from the benefitted area in the case of tax-increment financing;

D. other revenues or receipts derived from particular functions of the debtor, whether or not the debtor has other functions; or

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[2463] Pub. L. No. 100-597 (1988).

[2464] 4 COLLIER ON BANKRUPTCY ¶902.01A, 902-3 (Lawrence P. King et al. eds, 15th ed. 1996).

E. taxes specifically levied to finance one or more projects or systems excluding receipts from general property, sales, or income taxes (other than tax-increment financing) levied to finance the general purposes of the debtor[.][2465]

Second, Section 922(d) was added. It provides that the automatic stay does not prevent the application of "special revenues" to pay the debt service on the obligations they secure.[2466]

Third, section 928(a) exempts special revenues from the lien avoidance provisions on postpetition property in section 552(a). Section 552(a) provides that floating liens cease to apply to collateral obtained by the debtor postpetition. Section 928(a) alleviated a major fear in the municipal credit market about the reliability of revenue bonds in the event the issuer filed a Chapter 9 petition. Absent this amendment, the fear was that the lien on special revenues securing repayment of the revenue debt would be stopped by operation of section 552(a). These provisions essentially grant special revenues preferred status because the filing of a Chapter 9 petition does not interrupt the payment of, or postpetition security interest in, pledged special revenues.

In addition, holders of special revenue obligations may only look to the designated repayment source in Chapter 9. Section 927 suspends the operation of section 1111(b) and prevents the creation of a recourse claim in favor of holders of special revenues in the event the dedicated revenue stream is insufficient.[2467]

Rationale. The definition of special revenues should be expanded to include a broader range of municipal obligations. Municipalities issue a variety of

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[2465] 11 U.S.C. § 902(2) (1994).

[2466] Section 922 (d) provides:

> Notwithstanding section 362 of this title and subsection (a) of this section, a petition filed under this chapter does not operate as a stay of application of pledged special revenues in a manner consistent with section 927 of this title to payment of indebtedness secured by such revenues.

11 U.S.C. § 922(d) (1994).

[2467] Section 927 provides:

> The holder of a claim payable solely from special revenues of the debtor under applicable nonbankruptcy law shall not be treated as having recourse against the debtor on account of such claim pursuant to section 1111(b) of this title.

11 U.S.C. § 927 (1994).

obligations that are similar to special revenues but are not included within the Bankruptcy Code definition.[2468] For example, tax or revenue anticipation notes (secured by a pledge of the current year's tax receipts or other identified revenues) are similar to special revenues and should receive the same treatment under Chapter 9.

Credit analysis is often turned on its ear by the effect of these provisions. Chapter 9's grant of preferred status to special revenues is contrary to the credit quality expectations in the municipal marketplace. General obligation bonds (secured by a pledge of the municipality's power to tax without limitation as to rate or amount at the level required to repay the bonds) are viewed as stronger credit investments than special revenue obligations, which are only secured by a pledge of repayment from a limited source. This analysis is reversed in Chapter 9, because special revenues continue to be paid even though the debt is prepetition.

The above credit-analysis results in lower borrowing costs for municipalities who issue these types of instruments. Revising the definition of special revenues is designed to ensure that tax-exempt funding arrangements and the credit decisions that went into those funding arrangements are respected in Chapter 9. The Recommendation will not prevent a municipality in Chapter 9 from using these dedicated revenues for the provision of necessary municipal services when necessary. The Recommendation (1) reflects the expectations of the tax-exempt bond market; (2) will improve issuers' access to the municipal market; and (3) will result in lower borrowing costs to issuers. The Recommendation may also limit the flexibility of a municipality in Chapter 9, because the payment of a wider variety of obligations will not be stayed by the filing. The Recommendation does not prevent the use of special revenue funds under all circumstances. It specifically preserves a Chapter 9 municipality's right to use special revenues to provide necessary services notwithstanding the special revenue provisions in the Bankruptcy Code.

Competing Considerations. It has been argued that special revenues should be treated differently under Chapter 9 because the holders of those obligations have a lien against the dedicated revenue stream. As a result, special revenues should be treated as though they are encumbered by the interest created under the indenture and an intervening Chapter 9 petition should not interfere with the operation of these rights. It is a misnomer, however, to classify all other municipal obligations as "unsecured." Tax-backed bonds, for example, are secured by the pledge of a local

[2468] On the treatment of municipal obligations in Chapter 9, the Commission heard from, among others, Bruce Bennett of Hennigan, Mercer & Bennett, Los Angeles, CA who served as counsel to Orange County. Mr. Bennett stated that at the time of its filing, Orange County had $2.8 billion dollars worth of municipal obligations, and of that amount, only $1.8 million was general obligation debt. As a result of Proposition 13 and other tax limits, he continued, there is virtually no general obligation debt at the municipal level in California. *See* Discussion Notes of Government Working Group Meeting February 21, 1997, at 6.

government to pay those bonds from available tax-derived sources. Similarly, the holders of special revenue obligations do not have recourse against the municipality (in the form of an unsecured deficiency claim) to the extent the revenue generated is insufficient to cover the underlying obligation. Special revenue advantages are thus tempered to protect the interests of the municipality and other creditors. The Recommendation preserves the result outside Chapter 9 for a broader range of municipal obligations than currently covered under the Bankruptcy Code definition.

[Commissioner notes from Babette Ceccotti]

In the Commission's study of Chapter 9, one issue raised but not resolved was the omission of section 1113 from the Bankruptcy Code sections made explicitly applicable in Chapter 9.[2469] Section 1113, enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984,[2470] sets forth the applicable procedures and standards when a Chapter 11 debtor proposes modifications to an existing collective bargaining agreement or seeks court-approved rejection of the agreement. The statute overruled key elements of the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*.[2471] In *Bildisco*, the Court held that collective bargaining agreements were executory contracts that could be rejected under section 365, although at a standard different than that applicable to commercial contracts.[2472] The Court also ruled that, upon the filing of the bankruptcy petition and prior to court-approved rejection, the agreement was not considered an enforceable contract.[2473]

By contrast, section 1113 establishes that a collective bargaining agreement remains in effect upon the filing of a bankruptcy petition and requires an expedited form of collective bargaining prior to seeking rejection.[2474] The procedural

[2469] *See* Memorandum from Stephen H. Case & Elizabeth I. Holland to National Bankruptcy Review Commission (February 25, 1997).

[2470] Pub. L. No. 98-353, Title III, §541(a), 98 Stat. 333, 390 (1984).

[2471] 465 U.S. 513 (1984).

[2472] *Bildisco*, 465 U.S. at 526 (rejection may be authorized where the "debtor can show that the collective bargaining agreement burdens the estate, and that, after careful scrutiny, the equities balance in favor of rejection of the labor contract.").

[2473] *Id.* at 532. As a consequence, a debtor would not commit an unfair labor practice by unilaterally modifying a labor contract upon the filing of the bankruptcy petition.

[2474] Under section 1113(f), "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section." 11 U.S.C. § 1113(f) (1994).

and substantive standards set forth in the statute[2475] are designed to promote the collective bargaining process, rather than court intervention, when the debtor seeks modifications, and to ensure that companies do not use bankruptcy to do away with unwanted labor contract obligations.[2476] By the time of its enactment in 1984, Congress had heard testimony regarding the use of Chapter 11 as "'a new collective bargaining weapon'" by companies in the private sector.[2477] The use of Chapter 9 to reduce labor costs in the *public* sector does not appear to have been considered in the Congressional deliberations, although one such instance had already occurred in the bankruptcy filing by the San Jose Unified School District in June, 1983.[2478] More recent Bankruptcy Code amendments have not included protection for labor agreements in Chapter 9.[2479] Nevertheless, other attempts by municipal entities to use bankruptcy to reduce their labor costs have been documented.[2480]

Whether or not labor costs are the principal focus of a Chapter 9 case, the lack of a clear expression of the law governing collective bargaining agreements leaves the courts with little guidance in ruling on collective bargaining matters. For example, in an action filed by labor unions against Orange County, the bankruptcy court held that the *Bildisco* decision applies in Chapter 9 in the absence of Congressional action to incorporate section 1113, but then ruled that the county could not unilaterally modify the seniority and grievance provisions of the labor

[2475] *See* 11 U.S.C. § 1113(b) & (c) (1994).

[2476] *See In re* Century Brass Products, Inc., 795 F.2d 265, 273 (2d Cir. 1986); *see also* 130 . CONG. REC. S 8898 (daily ed. June 29, 1984) (remarks of Sen. Packwood).

[2477] *See* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1084 (3d Cir. 1986) (describing events leading to the enactment of section 1113).

[2478] Barry Winograd, *San Jose Revisited: A Proposal for Negotiated Modification of Public Sector Bargaining Agreements Rejected Under Chapter 9 of the Bankruptcy Code*, 37 HASTINGS L.J. 231 (1985). Upon its bankruptcy filing, the school district withheld scheduled pay increases due under collective bargaining agreements and under commitments to its nonunion employees, all without court approval. According to Winograd, the San Jose school district was the first public sector employer to use bankruptcy in an attempt to circumvent labor contract obligations. Eventually, the labor issues were settled and the bankruptcy was dismissed.

[2479] *See* Orange County Employees Association, v. County of Orange, 179 B.R.177, 183, n.15 (Bankr. C.D. Cal. 1995).

[2480] S*ee* W. Richard Fossey & John M. Sedor, *In re Copper River School District: Collective Bargaining and Chapter 9 Municipal Bankruptcy*, 6 ALASKA L.REV. 133 (1989) (describing the school district's bankruptcy reorganization and successful reduction of teachers' salaries); David A. Roby, *Municipal Bankruptcy: Will Labor be Forced to Take the Proverbial Haircut*? 26 GA. L. REV.. 959 (1992) (describing a proposed reorganization plan that sought unilateral modifications in the city's labor contracts while proposing to pay bondholders in full).

agreements.[2481] Drawing upon state law standards applicable to financial emergencies, the court held that unilateral modification of contractual rights under labor agreements must be viewed as "a last resort."[2482]

The *Orange County* decision and other commentary reveal an acute concern regarding whether, and under what conditions, a Chapter 9 debtor may unilaterally modify a labor agreement.[2483] The issue of whether contract changes can be imposed on municipal employees, despite a municipality's duty under state law to negotiate, is often expressed as a conflict between federal bankruptcy law and the powers reserved to the states under the Tenth Amendment.[2484] Thus, as summarized by one commentator, "[i]f the Bankruptcy Code does not override state labor laws during the bankruptcy proceeding, a municipality could be prevented by state statute from imposing new terms on its labor force."[2485]

The constitutional tensions presented by this issue should not obscure the effort to protect collective bargaining agreements in Chapter 9. The policies favoring collective bargaining that led to the enactment of section 1113 are no less important in the local government context. Public sector labor principles share the vital policy goals of improving labor-management relations and the delivery of public services.[2486] Significant policy concerns justify a similar rule prohibiting the *Bildisco*-type contract repudiation. Permitting unilateral modifications may distort the public sector bargaining process to an even greater degree than in the private sector because public employees frequently do not have a right to strike. If unilateral modifications were permitted without strict limitation, the continuing duty to bargain would be

[2481] *Orange County*, 179 B.R. at 183.

[2482] *Orange County*, 179 B.R. at 184. The court ordered the parties to bargain over the changes sought by the county. Id. at 185.

[2483] *See* Winograd, *supra* note 2478, at 234 (proposing a framework for negotiation rather than unilateral modification of labor agreements in Chapter 9).

[2484] Under the Tenth Amendment, "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." U.S. Const. Amend. X. Section 903 of the Bankruptcy Code provides, in part, that Chapter 9 "does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures in such exercise . . . ." 11 U.S.C. § 903 (1994). Under section 904, "the court may not . . . interfere with -- (1) any of the political or governmental powers of the debtor . . . ." 11 U.S.C. § 904.

[2485] *See* Roby, *supra* note 2480, at 973-4 (calling the impact of the Tenth Amendment the "central issue" in determining the effect of rejection under the bankruptcy laws on state labor laws).

[2486] Winograd, *supra* note 2478, at 322-3.

"virtually nullif[ied]."[2487] Moreover, clarifying the protection of collective bargaining agreements in Chapter 9 cases and encouraging collective bargaining can only improve the chances of a successful reorganization where the employees are an integral part of the reorganization process rather than treated as adversaries.[2488]

Defining the rules for the protection of collective bargaining agreements in Chapter 9 would require incorporating public sector labor relations into the complex interrelationship between the state and federal laws, and accommodating the different labor laws *among* the states. Unlike the private sector, where unionized workers are covered by either of two federal statutes defining their right to organize and engage in collective bargaining, the laws governing the rights of the public employees vary from state to state. For example, in some states, public employees enjoy full collective bargaining rights, while in others, public employers and employees operate under a different set of "meet and confer" rules. Developing one set of procedures for permitting the modification of labor agreements -- aside from the Tenth Amendment concerns -- may not be practical given the variety of collective bargaining systems in the various states. Nonetheless, the Code already provides for the application of section 365 in Chapter 9, and at least one court has held that the *Bildisco* ruling applies,[2489] a court decision Congress rejected in enacting Section 1113.

Ultimately, the *Orange County* court's willingness to apply the procedures established by the state may be the most instructive lesson to date. The *Orange County* decision recognized goals similar to those embodied both in Section 1113 and state law by requiring the parties to "meet and confer and attempt to resolve their differences."[2490] As this decision demonstrates, the procedures that Congress might consider for labor agreements in Chapter 9 can permit state procedures to operate, consistent with both labor relations and bankruptcy goals. Defining the rules where the parties fail to reach agreement, and for bargaining post-rejection (where unilateral modification also comes into play) requires careful consideration. Balancing competing policies and a realistic appraisal of the debtor's reorganization needs should

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[2487] *Id*. at 323.

[2488] *See* Fossey & Sedor, *supra* note 2480, at 138 (describing efforts by the employees to challenge the bankruptcy "at every turn" where wages were unilaterally reduced).

[2489] *Orange County*, 179 B.R. at 183.

[2490] *Orange County*, 179 B.R. at 185. Indeed, the court's instruction reflects the balance of both reorganization and labor relations policies: "the [unions] must take into consideration the fiscal and reorganization needs of the County, and the County must recognize that seniority and grievance rights need to be preserved to the extent possible. Lastly, due process protection for employees is of paramount importance." *Id.*

result in rules that are both workable and legally defensible in light of the special concerns raised by Chapter 9.

The Commission's inability to recommend a proposal should not be interpreted as a decision that no reform is needed. Rather, the complexity of the issues involved required more time for deliberation.