Who Pays for Police Misconduct in Bankrupt Cities?

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Introduction

In March 2015, the United States Department of Justice released a report finding racial bias and discrimination pervading police and court practices in Ferguson Missouri.[1] When asked to comment shortly thereafter, Ferguson's mayor suggested that an unduly aggressive stance by DOJ could push Ferguson into bankruptcy.[2] It was not clear from the interview that Mayor Knowles was actually considering filing a chapter 9 petition in federal court.[3] But Ferguson's financial challenges are not a secret.[4] And the publicity surrounding Detroit's bankruptcy, as well as several smaller cities in California, Rhode Island, and elsewhere, no doubt has seeped into the consciousness of mayors of cities and towns around the country.

Bond market participants and employees have long been aware that a financially distressed city might use the federal bankruptcy system to restructure debts. But, as we will show in this piece, a municipal bankruptcy also alters the rights of plaintiffs pursuing causes of action under 42 U.S.C. § 1983 for alleged deprivations of constitutional rights.

The Bankruptcy Code contains no special rules for the treatment of civil rights claims in any kind of bankruptcy, opening the door to the possibility that a debtor will shed liability

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[1] U.S. Dept. of Justice, Civil Rights Division, Investigation of the Ferguson Police Department, March 4, 2015.

[2]

> Block: Well, Attorney General Eric Holder said that the government would use all the power it has, including dismantling the Ferguson Police Department if necessary. Would you agree to that?
> Knowles: Well, first of all, my understanding is that he does not have the power to dismantle the Ferguson Police Department. He has the power to sue us as a city into bankruptcy and submission and whatnot….

Bill Chappell, *Ferguson Mayor Knowles Slams 'Hostile Language' From Eric Holder*, NATIONAL PUBLIC RADIO, (March 13, 2015 5:13 PM) http://www.npr.org/sections/thetwo-way/2015/03/13/392835913/ferguson-mayor-ferguson-mayor-slams-hostile-language-from-eric-holder.

[3] Cities need express authorization from states to file for chapter 9, 11 U.S.C. § 109(c), but Missouri law preemptively has taken the necessary steps to provide such authorization. Missouri Rev. Stat. 427.100 ("The consent of the state is hereby granted to, and all appropriate powers are hereby conferred upon, any municipality or political subdivision organized under the laws of the state to institute any appropriate action authorized by any act of the Congress of the United States relating to bankruptcy on the part of any municipality or political subdivision.").

[4] Moody's Investors Service, Rating Action: Moody's downgrades to Ba3 Ferguson, MO's GO rating; negative outlook assigned, MOODY'S (April 26, 2016) (reporting that Ferguson's financial position could deteriorate in the next twelve to eighteen months).

without paying even close to the full amount of a debt. The published case law on this question remains modest at best. At the time of this writing, San Bernardino is seeking court approval of a plan that would pay just one cent on the dollar to § 1983 plaintiffs, while releasing both the city and police officers from their liability.[5] The U.S. Court of Appeals for the Ninth Circuit has just weighed in on whether a plaintiff holding a § 1983 judgment and fee award against a police officer can be prohibited from enforcing that judgment because its employer, the City of Vallejo, has gone through bankruptcy.[6] Although it refused to shield the officer from liability based on the facts of the Vallejo restructuring plan, the Ninth Circuit's decision leaves the door open to such an outcome in future cases.[7]

Perhaps because of the rarity of municipal bankruptcy, scholars evaluating forms of police officer indemnity and insurance have not included bankruptcy within their scope.[8] We show in this piece that scholars and civil rights lawyers need to pay closer attention to the way in which the bankruptcy system affects civil rights claims *ex post*, as well as how it might skew incentives *ex ante*. Our goal is to provide a roadmap for what is sure to be a new area for many civil rights lawyers.

This piece examines the doctrine, settled and unsettled, relating to the impact of bankruptcy on civil rights claims, with a particular emphasis on municipal bankruptcy and on police misconduct claims. In Part I, we review the basics of § 1983 litigation. In Part II, we walk through how phases of a bankruptcy affect civil rights litigation and the payment of judgments. Part III takes a closer look at the treatment of police misconduct claims in the Detroit, Vallejo,

[5] Third Amended Disclosure Statement at 4, *In re* City of San Bernardino, 12-28006-MJ (Bankr. C.D. Cal. May 27, 2016), ECF No. 1836 ("the City will make a distribution of 1% on General Unsecured Claims"); *id*. at 120 (non-debtor release disclosure); Katy Stech, *San Bernardino Bankruptcy Leaves Little for Police-Brutality Payouts*, Wall St. J., Jan. 7, 2016.
[6] Deocampo v. Potts, -- F.3d. ---, 14-16192, 2016 WL 4698299 (9th Cir. Sept. 8, 2016).
[7] *Id.* at *8. See also infra Part III.B.3 (discussing panel's rationale).
[8] Joanna C. Schwartz, *How Governments Pay: Lawsuits, Budgets, and Police Reform*, 63 UCLA L. REV.1144_ (2016); John Rappaport, *How Private Insurers Regulate Public Police*, __ HARV. L. REV. __ (forthcoming 2017).

and San Bernardino bankruptcies using primary source materials. The piece concludes with a preliminary research agenda for future study.

I. Section 1983

A. History of Section 1983

After the Civil War, Congress passed and the states ratified the Thirteenth, Fourteenth, and Fifteenth Amendments to the United States Constitution.[9] The Fourteenth Amendment states, in pertinent part:

> Section 1:
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.
> …
> Section 5:
> The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.[10]

Subsequently, Congress enacted legislation to enforce these amendments. As part of the Civil Rights Act of 1871, Congress enacted what is now codified as 42 U.S.C. § 1983 to enforce the provisions of the Fourteenth Amendment.[11]

B. Liability under Section 1983

The text of § 1983 reads, in pertinent part, as follows:

> Every person who, *under color of* any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the *deprivation of any rights, privileges, or immunities secured by the Constitution and laws,* shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .[12]

[9] Jack M. Balkin, *The Reconstruction Power*, 85 N.Y.U. L. REV. 1801, 1808 (2010).
[10] U.S. Const. amend. XIV, §§ 1, 5.
[11] *Monell v. Dep't of Soc. Servs*., 436 U.S. 658, 665 (1978).
[12] 42 U.S.C. § 1983 (emphasis added).

Under this statute, a plaintiff may sue "every person, who under color of [law]" deprived him or her of his or her rights under the Constitution.[13] A "person" can be a private person, public official, or governmental entity.[14] Thus, a plaintiff can sue a police officer, as a public official, and a municipality, as a government entity, under § 1983 for redress of constitutional rights instead of using a traditional tort theory, such as conversion, trespass, or battery. To hold the government entity liable, a plaintiff can name either a public official in his or her "official capacity" or the government entity itself as a defendant.[15] As explained below, suing officers in their individual capacities, as opposed to their official capacities, affects the arguments that must be made to prevail and, at least in theory, expands the number of sources from which any judgments might be paid.

Qualified immunity protects public officials from liability for civil damages if, at the time of their conduct, the conduct did not violate clearly established statutory or constitutional rights.[16] The right must be clear enough for every reasonable public official to understand that what he or she is doing violates that right.[17] There does not have to be a published case directly on point, but "the existing precedent must have placed the statutory or constitutional question beyond debate."[18] The precedent must establish the violative nature of the particular conduct in

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[13] *See id*.
[14] VINCENT R. FONTANA, MUNICIPAL LIABILITY: LAW AND PRACTICE 450 (2nd ed. 1996). A state or state agency cannot be sued as a person under § 1983 because of the Eleventh Amendment. *See* U.S. Const., amend XI; *Hafer v. Melo*, 502 U.S. 21, 30 (1991); Martin A. Schwartz, *Should Juries Be Informed that Municipality Will Indemnify Officer's § 1983 Liability for Constitutional Wrongdoing?*, 86 IOWA L. REV. 1209, 1214 (2001) (citing *Edelman v. Jordan*, 415 U.S. 651 (1974); *Quern v. Jordan*, 440 U.S. 332, 345 (1979)).
[15] *Brandon v. Holt*, 469 U.S. 464, 471-72 (1985) ("a judgment against a public servant 'in his official capacity' imposes liability on the entity that he represents provided, of course, the public entity receive notice and an opportunity to respond."); *Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("Official-capacity suits, in contrast, 'generally represent only another way of pleading an action against an entity of which an officer is an agent.'"); Karen M. Blum & Kathryn R. Urbonya, SECTION 1983 LITIGATION, Federal Judicial Center 56 (1998).
[16] *Mullenix v. Luna*, 136 S. Ct. 305, 308 (2015); *Messerschmidt v. Millender*, 132 S. Ct. 1235, 1244 (2012); *Riechle v. Howards*, 132 S. Ct. 2088, 2093 (2012); *Estate of Armstrong v. Village of Pinehurst*, No. 15-1191, 2016 WL 105386 (4th Cir. Jan. 11, 2016).
[17] *Mullenix*, 136 S. Ct. at 308; *Riechle*, 132 S. Ct. at 2093.
[18] *Mullenix*, 136 S. Ct. at 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)).

the situation confronted by the public official.[19] In other words, public officials will not be subject to suit unless they are on notice that their conduct is unlawful.[20] The doctrine protects public officials in the "hazy border between excessive and acceptable force."[21] As a practical matter, therefore, qualified immunity prevents many plaintiffs from recovering damages from public officials.[22] Insofar as qualified immunity rulings are immediately appealable, parties may have to resolve that issue through the appellate process before returning, if at all, to the underlying substantive claim.

Municipal governments have been subject to suit directly under § 1983 since 1978 when the U.S. Supreme Court decided *Monell v. Department of Social Services*.[23] In *Monell*, the Court concluded that Congress intended § 1983 to impose liability on a municipality for its "own actions" but not for the "acts of others."[24] Therefore, a municipality is not vicariously liable for the actions of its employees, but it can be held directly liable if the municipality's policy or custom caused the deprivation of constitutional rights.[25] Thus, when a plaintiff prevails against a

[19] *Id.* at 308-10 (finding that none of the court's precedent on the use of deadly force in car chases "squarely governs" the facts in the case, where the fugitive "had led the police on a 25-mile chase at extremely high speeds, was reportedly intoxicated, had threatened twice to shoot officers, and was racing toward an officer's location").
[20] *Hope v. Pelxer*, 536 U.S. 730, 739 (2002).
[21] *Mullenix*, 136 S. Ct. at 312 (citing *Brosseau v. Haugen*, 543 U.S. 194, 201 (2004)). Qualified immunity does not protect the incompetent or those who knowingly violate the law. *Id.* at 308 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)); *Messerschmidt v. Millender*, 132 S. Ct. at 1244.
[22] For a study reviewing appellate court decisions weighing in on qualified immunity and the role of judicial discretion, *see* Greg Sobolski & Matt Steinberg, Note, *An Empirical Analysis of Section 1983 Qualified Immunity Actions and Implications of Person v. Callahan*, 62 STAN. L. REV. 523, 539-545 (2010).
[23] 436 U.S. 658, 663 (1978). This timing is important to the intersection with bankruptcy law. Municipal bankruptcy was very restrictive at its inception in the 1930s. It was not until 1976 and 1978 that it was substantially expanded in a way that increased the likelihood that a larger city could use bankruptcy, and could do so in such a way that would sweep in a wider range of debts. Given the timing of *Monell*, legislative drafters of the revised municipal bankruptcy law would not have been likely to contemplate the need to address the treatment of civil rights claims directly against a city.
[24] *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 24-35 (2010) (citing *Monroe v. Pape*, 365 U.S. 167, 190 (1961)); *see Monell*, 436 U.S. at 683.
[25] *See Connick v. Thompson*, 131 S.Ct. 1350, 1359 (2011); *Los Angeles County, Cal.*, 562 U.S. at 34; *Board of County Com'rs of Bryan Ctny., Okl. v. Brown*, 520 U.S. 397, 404 (1997).

municipality, by either naming as a defendant the municipality or an official in his official capacity, the plaintiff can recover damages and costs from the municipality itself.[26]

Assuming no qualified immunity, liability for civil damages can be imposed on a public official in his or her individual capacity if the individual, acting under the color of law, caused a deprivation of constitutional rights.[27] As a matter of basic debt collection law, a judgment for damages or associated costs can be executed against only the losing party—the individual public official and the official's personal assets.[28] As a practical matter, however, municipalities often indemnify employees, especially police officers, from their personal liability resulting from § 1983 judgments,[29] as well as handle the litigation.[30] The reason frequently offered is that hiring and retaining officers absent such assurances would be very difficult.[31] Some states, such as California,[32] or Illinois,[33] have enacted statutes that require municipalities to indemnify their employees if certain requirements are met. Other states permit, rather than mandate, municipal

[26] *Graham*, 473 U.S. at 166, 164.
[27] *Hafer*, 502 U.S. at 25.
[28] *Kentucky*, 473 U.S. at 164-67.
[29] Joanna C. Schwartz, *Police Indemnification*, 89 N.Y.U. L. REV. 886 (2014).
[30] *Id.* at 915, 916 n.133. Although Schwartz's public requests did not seek information about who bears the cost of defense counsel, some responses noted that officers are almost always represented by the city's or county's attorney or attorneys hired by union representatives. Additionally, a few state statutes, such as New York, Ohio, and California, provide that police officers are entitled to a legal defense under specific circumstances, when acting in good faith and within the scope of their employment. NY. Pub. Off. Law § 17 (Consol. 2005); Ohio Rev. Code Ann. § 27744.07 (West 2013); Cal. Gov't Code § 825(a) (West 2015); *see also Duncton v. Suffolk County, NY*, 729 F.2d 903, 907 (2d Cir. 1984) ("Municipalities commonly provide counsel for their employees and themselves when both municipality and employee are sued."); *Gordon v. Norman*, 788 F.2d 1194, 1120 n.5 (6th Cir. 1986) (observing that government attorneys and insurance counsel routinely represent police officers sued in their individual capacity).
[31] *See Monell*, 436 U.S. at 713 n.9 (1978) (Powell, J., concurring) ("[I]t reasonably may be assumed that most municipalities already indemnify officials sued for conduct within the scope of their authority, a policy that furthers the important interest of attracting and retaining competent officers, board members, and employees.").
[32] Cal. Gov't Code § 825(a) (West 2015). The statutory requirements are (1) the claim arises out of an act or omission occurring within the scope of the employee's employment; (2) the employee requests in writing that the public entity defend the employee at least 10 days before the trial; and (3) the employee reasonably cooperates in good-faith with the defense or settlement.
[33] 65 Ill. Comp. Stat. Ann. 5/1-4-5 (West 2015) (requiring municipalities with over 500,000 residents to indemnify their police officers). The municipality must indemnify the police officer when the plaintiff's injury is caused by the officer while engaged in the performance of his or her duties. The municipality is not required to indemnify the police officer if there was contributory negligence by the injured person or if the injury resulted from willful misconduct by the police officer.

indemnification[34] or create an optional shared risk pool as self-insurance for judgments against employees.[35]

Whatever the legal basis, a recent empirical study of municipal liability found that governments, rather than individuals, pay the vast majority of § 1983 judgments—even in the absence of an indemnification mandate.[36] In large departments, officers contributed to the settlements or judgments in only .41% of the actions. In small departments, officers did not contribute at all to settlements or judgment payments.

II. Bankruptcy Law

The United States has had a bankruptcy law continuously since 1898. Municipal bankruptcy law's life has been shorter. Congress enacted the first municipal bankruptcy law in 1934, but the Supreme Court invalidated it.[37] Congress enacted a very similar municipal bankruptcy law in 1937 that withstood Supreme Court scrutiny,[38] and was made permanent in 1946.[39] That early law was invoked by several hundred municipal entities, but they were far more likely to be water, sewer or hospital districts than actual cities or towns, let alone of any

[34] Mich. Comp. Laws Ann. § 691.1408 (West 2015); *Hirych v. State*, 376 Mich. 384, 393, 136 N.W.2d 910, 914 (1965) ("The act is permissive, containing the word 'may' which distinguishes it from the Illinois indemnity statute").

[35] *See* Mo. Ann. Stat. § 537.705.1 (West 2015). Missouri's Public Entity Risk Management Fund (MOPERM) provides self-insurance for "payments and settlement of tort claims against any officer or employee of a participating public entity for which coverage has been obtained by any public entity in accordance with coverage offered by the board when the claim is upon conduct of such officer or employee arising out of and performed in connection with his or her official duties on behalf of the participating public entity." Thus, if the memorandum of coverage for MOPERM for that year covers violations of federal civil rights, a participating municipality may obtain funds to pay an employee's § 1983 judgment. *See Mo. Pub. Entity Risk Mgmt. Funds (MOPERM) v. S.M.*, 473 S.W.3d 161, 162 (Mo. Ct. App. 2015).

[36] Schwartz, *supra* note 29, at 885, 889-90. Schwartz sent record requests to the nation's seventy largest law enforcement agencies plus seventy small and midsized agencies seeking information on the amount of money spent for settlements and judgments from 2006 to 2011 and information on any instances where officers were required to financially contribute to the settlement or judgment. Forty-four of the largest law enforcement agencies and thirty-seven of the small-to mid-size agencies answered her requests.

[37] Ashton v. Cameron County Water Improvement District No. 1, 298 U.S. 513 (1936) (invalidating Act of May 24, 1934, Pub. L. No. 251, 48 Stat. 798 (1934)).

[38] Act of Aug. 16, 1937, Pub L. No. 302, 50 Stat. 653 (1937) (upheld by United States v. Bekins, 304 U.S. 27 (1938)).

[39] Joseph Patchan & Susan B. Collins, *The 1976 Municipal Bankruptcy Law*, 31 U. MIAMI L. REV. 287, 289 (1977) (reviewing history and citing relevant legislation).

appreciable size.[40] In addition, the restructuring power was directed to bond market debt and its equivalents, not other kinds of liabilities.[41] In 1976 and 1978, Congress made municipal bankruptcy law more like corporate reorganization law, and thus more accessible for cities with a high volume and diversity of creditors.[42] Among the changes was enabling a city to file before having a firm restructuring plan and the requisite creditor support.[43]

The timing of this expansion of municipal bankruptcy law is notable relative to the Supreme Court's decision in *Monell* in 1978.[44] Prior to *Monell*, a city would not have had direct liability for § 1983 violations. Thus, drafters of municipal bankruptcy law likely would have had little reason to focus on the treatment of § 1983 claims. Since the 1970s, Congress has amended municipal bankruptcy law from time to time,[45] these amendments have not specifically addressed civil rights debts. This state of affairs prompted a three-judge panel of the Ninth Circuit to offer the following dicta:

> Bankruptcy has been available to cities since the 1930's. Congress has restructured the bankruptcy act several times and has never sought to restrain cities from using bankruptcy as a tool to restructure debts incurred by civil rights judgments. Municipal bankruptcies are extremely rare when compared to the number of civil rights judgments levied against municipalities. If, in the future, municipalities use chapter 9 as a way to flout Congress's will, we are confident that Congress would address the issue. We are also confident that the bankruptcy courts would dismiss chapter 9 petitions if it is clear that a municipality is abusing the process in such a manner.[46]

In the following subparts, we set forth the elements that determine whether an entity that files for bankruptcy can remain there and receive its protections, and the treatment of civil rights liabilities.

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[40] Juliet M. Moringiello, *Goals and Governance in Municipal Bankruptcy*, 71 WASH & LEE L. REV. 403, 406 (2014).
[41] Id. at 440.
[42] Melissa B. Jacoby, *Municipal Bankruptcy and Bankruptcy Judges: Then and Now*, __ AM. BANKR. L. J. __ (forthcoming 2017).
[43] Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L.J. 1157, 1158, 1161 (1977).
[44] Supra note 23.
[45] Amendment years for chapter 9 have included 1984, 1988, 2005 and 2010. Jacoby, Then and Now, supra note 42.
[46] *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 339 F.3d 782, 791 (9th Cir. 2003) (dicta in decision holding that it had no jurisdiction to grant relief requested from prevailing plaintiff in Fair Housing Act challenge).

A. Eligibility for Municipal Bankruptcy

To be eligible for bankruptcy relief, municipalities must meet a conjunctive list of statutory requirements.[47] First, the entity must fit the Bankruptcy Code's definition of a municipality.[48] Second, state law must authorize the municipality to file the chapter 9 petition.[49] Some states - like Missouri, home of Ferguson - have made that step relatively straightforward. In many other states, however, more state action is required. For example, currently there is no express authorization in Illinois law for the City of Chicago to file for bankruptcy.

Third, the municipality must be insolvent,[50] a requirement that is enforced quite rigorously. Some courts have adopted a supplemental *service delivery* insolvency element.[51] The insolvency requirement prevents a city in stable financial condition from filing for bankruptcy solely as leverage to manage one particular type of debt, such as civil rights liability. Fourth, the municipality must desire to develop a plan to adjust debts, rather than using bankruptcy as a delay tactic.[52] Fifth, the municipality must have negotiated in good faith prior to bankruptcy or meet one of the statutory alternatives.[53] In addition, at the eligibility stage, a court typically addresses the requirement that the debtor has filed the petition in good faith.[54] This requirement can serve as a backstop to ensure that a case is not motivated solely by the goal of dispensing liability from police misconduct in the absence of other financial problems.

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[47] 11 U.S.C.§ 109(c); Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L.J. 849 (2014) (reviewing history).
[48] 11 U.S.C. §§ 101(40), 109(c)(1).
[49] *Id*. § 109(c)(2) (requiring the filing to be "specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter…"). This language was added by the Bankruptcy Reform Act of 1994 section 402. Previously the statute referred to "generally authorized."
[50] *Id*. §§ 109(c)(3); 101(32)(C) (defining insolvency for a municipality as not paying or unable to pay debts as they become due).
[51] *In re* City of Detroit, 504 B.R. 191, 263 (Bankr. E.D. Mich. 2013); *In re* City of Stockton, 493 B.R. 772, 789-90 (Bankr. E.D. Cal. 2013).
[52] 11 U.S.C. § 109(c)(4).
[53] *Id*. § 109(c)(5).
[54] *Id*. § 921(c).

Usually, eligibility is determined after a significant evidentiary trial, at which creditors of any kind present evidence that the debtor does not meet the statutory requirements.[55] For example, the holder of a judgment arising from a Fair Housing Act violation (unsuccessfully) challenged the good faith of the City of Desert Hot Springs bankruptcy filing after the City publicly attributed its filing to the creditor's attempt to enforce its judgment.[56]

B. Enjoining Litigation During a Bankruptcy

1. The General Automatic Stay

To promote collective resolution of financial distress, the filing of any kind of bankruptcy petition triggers an automatic stay enjoining the commencement or continuation of litigation and other collection and enforcement actions against the debtor and the debtor's property.[57] The Bankruptcy Code contains no exception to the automatic stay for litigation seeking to vindicate constitutional rights. Holders of civil rights claims can file motions to lift the automatic stay "for cause" as to their litigation.[58] Grants of a lift-stay motion to creditors lacking collateral securing their debts are likely rare, however.

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[55] Jacoby, *supra* note 47, at 851-853.

[56] Motion to Dismiss and Notice of Motion Filed by Judgment Creditors Silver Sage Partners LTD, et al., *In re* City of Desert Hot Springs, No. 6:01-bk-30756 (Bankr. C.D. Cal. Jan. 17, 2002), ECF No. 24; Motion to Dismiss Denied, *In re* City of Desert Hot Springs, No. 6:01-bk-30756 (Bankr. C.D. Cal. Feb. 15, 2002), ECF No. 45; *Silver Sage*, 339 F.3d at 787. The bankruptcy court ultimately confirmed a plan of adjustment for this debtor. Third Amended Plan for the Adjustment of Debts of the City of Desert Hot Springs, *In re* City of Desert Hot Springs, No. 6:01-bk-30756 (Bankr. C.D. Cal. May 3, 2004), ECF No. 304; Findings of Fact and Conclusions of Law and Order Confirming Third Amended Plan of Adjustment of Debts of the City of Desert Hot Springs, *In re* City of Desert Hot Springs, No. 6:01-bk-30756 (Bankr. C.D. Cal. July 26, 2004), ECF 342. However, the City's difficulties have continued. James Nash, *Desert Hot Springs Debates Police Versus Bankruptcy: Muni Credit*, BLOOMBERG NEWS ENTERPRISE, (June 18, 2014, 8:04 AM), https://www.bloomberglaw.com/document/N7D5JU6S972D.

[57] 11 U.S.C. §§ 362; 901(a) (extending the automatic stay to chapter 9). Litigation is thus enjoined after the municipality has filed but before the court has found the municipality eligible for relief – a period that can span many months or over a year.

[58] Motion of Creditor Deborah Ryan, An Interested Party, For Relief from this Court's Order Staying Proceedings, *In re* City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 19, 2013), ECF No. 0800 (seeking to lift the stay "for cause"); *see generally* Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 YALE J. REG. 55 (2016) (reviewing civil rights plaintiff Ryan's efforts to continue district court litigation during the Detroit bankruptcy).

The automatic stay applicable in all chapters of the Bankruptcy Code does not protect non-debtor third parties from collection or litigation.[59] Courts sometimes enjoin actions against third parties upon the finding of special circumstances, such as when permitting the action to continue would interfere with the debtor's reorganization, or when the non-debtor is a necessary party or the real party in interest to the action.[60] Courts have stayed proceedings against employees or officers of the debtor when the debtor contractually or statutorily is obligated to indemnify the officer or employee, which a court might find is a special circumstance resulting from the "identity of interests" between the non-debtor and debtor.[61] For example, in *Hittle v. Stockton* and *Smith-Downs v. Stockton*, § 1983 claims against the municipality's employees were stayed due to the identity of interests between the parties.[62] Courts have also stayed actions against indemnified employees as an action against property of the estate.[63] For instance, in *Williams v. Kenny*, the court concluded that the stay prevented § 1983 individual capacity claims against police officers from going forward during the Vallejo bankruptcy because of Vallejo's statutory indemnification obligation.[64]

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[59] Collier on Bankruptcy § P.362.03(3)(d) (16th ed. 2012) available at LexisNexis. Usually the source of authority for the expanded protection is 11 U.S.C. § 105(a).
[60] *Id.*
[61] *Smith-Downs v. City of Stockton*, No. 2:10-cv-02495, 2012 WL 3202265, at *2 (E.D. Cal. Aug. 3, 2012); *Hittle v. City of Stockton*, No. 2:12-cv-00766, 2012 WL 3886099, at *2-3 (E.D. Cal. Sept. 6, 2012); *Tavake v. Allied Insurance Company*, No. CIV S-11-3259, 2013 WL 35611, at *2 (E.D. Cal. Jan. 3, 2013).
[62] *Hittle*, 2012 WL 3886099, at *2-3; *Smith-Downs*, 2012 WL 3202265, at *2; Second Amended Complaint for Damages for Violation of Civil Rights, *Smith-Downs v. Stockton*, No. 2:10-cv-02495 (E.D. Cal. Feb. 16, 2011), ECF No. 26.
[63] Chapter 9 cases do not produce bankruptcy estates, but courts appear to apply the provision by analogy. *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999, 1001-02 (4th Cir. 1986) ("proceedings against . . . officers or employees of the debtor who may be entitled to indemnification under [an insurance] policy . . . are to be stayed under section 362(a)(3)"); *William v. Kenny*, No. CIV S-07-0100, 2008 WL 3540408, at *1, *8 (E.D. Cal. Aug. 12, 2008) report and recommendation adopted, 2008 WL 4482862 (E.D. Cal. Sept. 29, 2008) (staying action against police officer entitled to be defended and indemnified by the municipality under Cal. Gov't Code § 825 and § 995); *In re* Jefferson County, Ala., 491 B.R 277, 295-96 (Bankr. N.D. Ala. 2013) (holding that due to J.P. Morgan's indemnification claim against the debtor, the action against J.P. Morgan is an action against the property of the debtor's estate).
[64] *William*, 2008 WL 3540408, at *1, *8.

2. The Supplemental Stay in Municipal Bankruptcy

In municipal bankruptcies, section 922(a)(1) of the Bankruptcy Code enjoins any proceeding or collection action against an "officer or inhabitant of the debtor" to the extent that the action seeks to enforce a claim against the debtor.[65] Essentially, it is "designed to preclude actions not taken directly against the [municipality], but those that may be taken against certain others that would have the effect of enforcing a claim against the [municipality]."[66]

Neither the Bankruptcy Code nor case law defines the term "officer" or whether a police officer fits within the provision. In the Stockton bankruptcy, the court construed the City Manager and Deputy City Managers to be municipal officers of the debtor.[67] The governor-appointed Emergency Manager was an officer of Detroit for purposes of § 922(a)(1),[68] and three

[65] 11 U.S.C. § 922(a)(1). Only subsections (c), (d), (e), (f), and (g) of § 362 apply to actions or proceedings covered by § 922(a). *Id.* § 922(b).

[66] *In re* Jefferson County, Ala., 474 B.R. 228, 248 (Bankr. N.D. Ala. 2012); *In re* City of Stockton, 484 B.R. 372, 376 (Bankr. E.D. Cal. 2012) (asserting that "[t]he action against the individual officers is an exercise of the well-known strategy of suing a sovereign by falsely pretending to sue an officer. To the extent that there is a judgment against the individuals, the City, having undertaken their defense, will be required to pay.").

[67] *Stockton*, 484 B.R. at 375 (wrongful discharge action).

[68] *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 4761053, at *1-2 (Bankr. E.D. Mich. July 25, 2013). Neither the court nor Detroit's motions defined "officer" or "City Officer." *See* Motion of Debtor, Pursuant to Section 105(a) of the Bankruptcy Code, for Entry of an Order Confirming the Protections of Section 362, 365, and 922 of the Bankruptcy Code at 13, 15, *In re* City of Detroit, Mich., No. 13-53846 (Bankr. E.D. Mich. July 19, 2013), ECF No. 53 (noting that the Bankruptcy Code does not define the term "officer"); Debtor's Reply in Support of: (I) Motion of Debtor, Pursuant to Section 105(a) of the Bankruptcy Code, for Entry of an Order Extending the Chapter 9 Stay to Certain (A) State Entities, (B) Non-Officer Employees and (C) Agents and Representatives of the Debtor; and (II) Motion of Debtor, Pursuant to Section 105(a) of the Bankruptcy Code, For Entry of an Order Confirming the Protections of Section 362, 365, and 922 of the Bankruptcy Code, *In re* City of Detroit, Mich., No. 13-53846 (Bankr. E.D. Mich. July 23, 2013), ECF No. 128. The City of Detroit also asked the court to use its power under § 105 to extend the stay to proceedings and actions against employees of the City that were neither officers nor inhabitants of the City. Motion of Debtor, Pursuant to Section 105(a) of the Bankruptcy Code, for Entry of an Order Extending the Chapter 9 Stay to Certain (A) State Entities, (B) Non-Officer Employees and (C) Agents and Representatives of the Debtor at 1, 12, 15, *In re* City of Detroit, Mich., No. 13-53846 (Bankr. E.D. Mich. July 19, 2013), ECF No. 56. The Detroit Fire Fighters Association and Detroit Police Officers Association filed a joint concurrence in favor of both motions and requested that the stay be extended to cover non-officer retirees. Joint Concurrence in Motion of Debtor, Pursuant to Section 105(a) of the Bankruptcy Code, for Entry of an Order Confirming the Protections of Section 362, 365, and 922 of the Bankruptcy Code and Concurrence in and Limited Objection to Motion of Debtor, Pursuant to Section 105(a) of the Bankruptcy Code, for entry of an Order Extending the Chapter 9 stay to certain (A) State Entities, (B) Non-Officer Employees and (C) Agents and Representatives of the Debtor at 1, 5, *In re* City of Detroit, Mich., No. 13-53846 (Bankr. E.D. Mich. July 23, 2013), ECF No. 138. The court found that unusual circumstances warranted extending the stay to non-officer employees. Order Pursuant to Section 105(a) of the Bankruptcy Code Extending the Chapter 9 Stay to Certain (A) State Entities and (B) Non

County Commissioners were deemed to be municipal officers of Jefferson County.[69] One might extrapolate from these decisions that an "officer" must be more than a mere employee of the municipality and instead have a supervisory role. While the chief of police surely qualifies, rank and file police officers might not. In that instance, debtors would have to request a stay protecting non-debtor third-parties under the grounds set forth in the preceding discussion. Or, to the extent that police officers are inhabitants of the debtor municipality, proceedings against them would be stayed under § 922(a)(1) on that alternative basis.

Even if police officers are officers or inhabitants, § 922(a)(1) enjoins actions against them only if the action is "to enforce a claim against the debtor." In the Stockton bankruptcy, the court characterized that term as "encompass[ing] both direct and indirect claims against a municipality."[70] The court held that a proceeding against the City Manager and Deputy City Manager was stayed under § 922 because Stockton was obligated to pay the resulting settlement or judgment under California law.[71] In the Jefferson County bankruptcy, the court held that a proposed action against County Commissioners for a violation of a state statute that, "on its face," gives rise to a right of payment from the municipality could be stayed under this provision.[72] These decisions suggest that proceedings during a bankruptcy case are likely to be stayed when indemnification laws or agreements obligate a municipal debtor to pay judgments against police officers. To pursue litigation in another court during the bankruptcy, plaintiffs must ask the bankruptcy court to lift the stay for cause.[73]

Officer Employees and (C) Agents and Representatives of the Debtor, *In re* City of Detroit, Mich., No. 13-53846 (Bankr. E.D. Mich. July 25, 2013), ECF No. 166.

[69] *In re* Jefferson County, Ala., 484 B.R. 427, 451 (Bankr. N.D. Ala. 2012) (citing Ala. Code § 11-2-1(a)(2); *Cook v. St. Clair Cnty*., 384 So.2d 1, 5 (Ala. 1980)).

[70] *Stockton*, 484 B.R. at 378.

[71] *Id.* at 376, 378, 379 (citing Cal. Gov't Code §§ 825, 825.2).

[72] *In* re Jefferson County, Ala., 484 B.R. at 450-51.

[73] *See* text associated with footnote 58.

C. Debt Restructuring and Discharge

In a municipal bankruptcy, only the debtor can propose a plan to restructure debts, although it requires substantial creditor support, as well as compliance with a long list of statutory requirements; the list is conjunctive and thus all must be satisfied.[74] If a court confirms a municipality's plan as adhering to all statutory requirements, "the debtor is discharged from all debts as of the time when the plan is confirmed . . . ."[75] Such a discharge voids any judgment at that time and operates as an injunction against collection.[76] The Bankruptcy Code defines a debt as a "liability on a claim."[77] A "claim" is broadly defined as "a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured . . . ."[78] In the event of a dispute, courts may have to determine whether any particular obligation constitutes a debt of the municipality, including those arising from indemnity obligations.[79]

There is no explicit exception to discharge for civil rights debts in municipal bankruptcy. The Bankruptcy Code contains an exception to discharge for debts "for willful and malicious injury by the debtor to another entity or to the property of another entity."[80] That provision applies only to *individuals*, who may be debtors in a variety of chapters. Chapter 7 involves the liquidation of non-exempt assets and the distribution of the proceeds, if any, to creditors.[81] If a

[74] 11 U.S.C. § 901 (extending chapter 11 voting and plan confirmation rules to chapter 9); *id.* § 1129(a)(10) (requiring majority support of at least one impaired class of claims); *id.* § 943 (listing seven additional plan confirmation requirements, some with multiple parts, including feasibility and a finding that the plan is in the best interest of creditors).
[75] *Id*. § 944.
[76] *Id*. §§ 524(a)(1),(2), 944.
[77] *Id*. § 101(12).
[78] *Id*. § 101(5)(a).
[79] Memorandum of Decision on City's Motion to Enforce Confirmation Order with Regard to Indemnification Claims of Mayor and City Council at 25, 45, *In re* City of Central Falls, Rhode Island, No. 11-13105-FJB (Bankr. D. R.I. Nov. 13, 2015), ECF No. 816 (finding that a right to indemnification or a right to a court order that requires the City to pay attorneys' fees is a right to payment and thus a "claim" subject to discharge).
[80] 11 U.S.C. § 523(a)(6).
[81] *Id*. § 726(a).

police officer engaged in misconduct and later filed a chapter 7 petition, depending on the facts a court could find that a § 1983 judgment against an individual is nondischargeable.[82] Assuming that individual has been relieved of liability for other debts, the officer would have greater means post-bankruptcy to pay the judgment.

The "willful and malicious" exception to discharge operates somewhat differently in a chapter 13 case. In a chapter 13, an individual submits a payment plan proposes payment of future income, which is distributed amongst its creditors.[83] The court must confirm the plan.[84] Among other requirements, the plan must have been proposed in good faith and not by any means forbidden by law, and the action of the debtor in filing the petition must be made in good faith.[85] The "willful and malicious" exception to discharge does not apply if an individual completes a chapter 13 payment plan.[86] Many debtors do not complete such plans, however, and occasionally such a debtor seeks what is known colloquially as a "hardship discharge;" in that instance, all of the exceptions to discharge are operable.[87] In *Todd*, a police officer filed a chapter 13 case after the entry of a § 1983 judgment that offered a 26% payout to the unsecured holder of the § 1983 judgment.[88] When considering whether to confirm the payment plan in the first instance, the court noted that the acts alleged likely would support finding the debt non-

[82] *Thornton v. City of Philadelphia*, No. 04-2536, 2005 WL 2716484, at *4 (E.D. Pa. Oct. 20, 2015) (rejecting argument that liability based on sexual assault would have been discharged in individual prison officer defendant's bankruptcy, court rejects city prison officer's motion for summary judgment in § 1983 action); *In re* Todd, 65 B.R. 249, 250 (Bankr. N.D. Ill. 1986); *Bruner v. Taylor* (*In re* Taylor), 72 B.R. 696 (Bankr. E.D. Tenn. 1987) (setting trial on whether § 1983 judgment against police officer for violent confrontation fits willful and malicious exception to discharge because state court action denying indemnity did not explicitly rule on this issue).
[83] 11 U.S.C. §§ 1321, 1322.
[84] *Id.* § 1325(a).
[85] *Id*. § 1325(a)(3), (7).
[86] *Id*. § 1328(a)(2) (excluding section 523(a)(6) from exceptions to discharge that apply at the end of a chapter 13).
[87] *Id*. §§ 523(a)(6), 1328(b).
[88] *Todd*, 65 B.R. at 250.

dischargeable if filed as a chapter 7.[89] This influenced and shaped the court's decision to reject the payment plan for lack of good faith.[90] The court also found that the nature of claim, as a § 1983 judgment, requires the court to make "a most searching inquiry into the good faith issue":

> The inescapable conclusion is that § 1983 judgments are very hard to win, and one can therefore doubt they achieve the deterrent effect that Congress intended. In view of the heavy burden which § 1983 plaintiffs already bear, bankruptcy courts should be reluctant further to weaken the effectiveness of § 1983 to any greater extent than the language of the Code forces them to do. The important public policy served by § 1983 is to make constitutional protections into realities.[91]

Because corporate and municipal debtors are not considered individuals under the Bankruptcy Code, the exceptions to discharge cited above do not apply to corporate and municipal cases.[92] As a panel of the Eighth Circuit has explained in interpreting a provision on property exemptions, construing individual debtor to include legally fictional entities would make Congress' use of the term "meaningless."[93]

Although the Bankruptcy Code lacks specific exceptions to discharge for civil rights claims in municipal bankruptcies, 11 U.S.C. § 944(c)(1) provides that a municipal debtor is not discharged from any debt "excepted from the discharge by the plan or the order confirming the

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[89] *Id*. at 250-51. A § 1983 judgment alone does not support a holding that debt resulted from a 'willful and malicious injury' because such intent is not required under § 1983. In *Todd*, however, the jury had awarded punitive damages, which likely required the jury to find that the defendant acted willfully or maliciously.

[90] *Id*. at 252 ("where a debt is dischargeable in a Chapter 13 but nondischargeable in Chapter 7, and where debtor fails to propose a plan for the maximum period permissible, the plan will be denied confirmation on grounds of bad faith") (citing In re Chase, 28 B.R. 814 (Bankr. Md. 1983).

[91] *Id*. at 254. The court suggested that a plan proposing a longer and more generous payout to creditors would be better received. *Id*. at 256.

[92] *See e.g.*, *Garrie v. James L. Gray Inc.*, 912 F.2d 808, 812 (5th Cir. 1990); *Spring Valley Farms, Inc. v. Crow*, 863 F.3d 832, 834 (11th Cir. 1989); *Selman v. Delta Airlines*, No. CIV 07-1059, 2008 U.S. Dist. LEXIS 108754, at *36 (D. N.M. Aug. 13, 2008); *Smith v. Delta Airlines, Inc*., No. 2:07CV843, 2010 WL 2976075, at *1 (D. Ut. July 28, 2010); *Adam Glass Service, Inc. v. Federated Department Stores, Inc*., 173 B.R. 840, 842 (E.D.N.Y. 1994); *Century Motor Coach v. Hurst Lincoln-Mercury, Inc.*, 73 B.R. 825, 826 (Bankr. S.D. Ohio 1987); *In re* Kuempel Co., 14 B.R. 324, 325-27 (Bankr. S.D. Ohio 1981). Chapter 11 contains a limited exception to discharge for corporate debtors for a debt of the "kind specified in (2)(A) or (2)(B) of section 523(a) that is owned to a domestic government unit or person …" or a "tax or custom duty" if the debtor filed a fraudulent return or attempted to evade taxes. 11 U.S.C. § 1141(d)(6).

[93] *Yamaha Motor Corp. U.S.A. v. Shadco, Inc*., 762 F.2d 668, 670 (8th Cir. 1985) (citation omitted); see also 11 U.S.C. § 1141(d)(2) (providing that exceptions to discharge in section 523 apply to individual debtors in chapter 11); *In re* Automatic Plating of Bridgeport, Inc., 202 B.R. 540, 541, 542 (Bankr. D. Conn. 1996) (declining plaintiff's request to use § 105(a) to order gender and pregnancy discrimination claim nondischargeable against a corporate debtor).

plan." The Detroit bankruptcy court interpreted this provision as giving it the discretion to create an exception to discharge for Takings Clause claims arising from land use restrictions but, as explained in Part III.A, declined to do so for § 1983 claims.[94] Claim holders with neither notice nor actual knowledge of the case also are protected under 11 U.S.C. § 944(c)(1).

III. Key Cases

A. City of Detroit

Few municipal filings have received as much attention as the Detroit bankruptcy, and thus for present purposes we focus directly on the treatment of civil rights claims. At this time, Detroit's bankruptcy is the only case we can find producing a published decision that specifically addresses the constitutionality of discharging § 1983 claims.

In its restructuring plan, Detroit classified claims arising from § 1983 litigation as general unsecured claims and proposed issuing new debt to them in the form of notes, with an estimated recovery of ten to thirteen cents on the dollar.[95] Plaintiffs objected that this treatment violated the Fourteenth Amendment.[96] The bankruptcy court asked the United States Attorney General to weigh in on the question.[97] The Attorney General responded that

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[94] *In re* City of Detroit, 524 B.R. 147, 267-70 (Bankr. E.D. Mich. 2014) (holding that Takings Claims would be excepted from discharge by the Court's confirmation order to avoid holding Chapter 9 unconstitutional for violating the Fifth Amendment of the U.S. Constitution). *Cf. Ortiz v. County of Orange*, 152 F.3d 928, 928 (9th Cir. 1998) (because, among other reasons, the plaintiff did not argue that its § 1983 claim fits the exception to discharge in 944(c), "confirmation of the County's plan thus erases the County's liability for damages on Ortiz's § 1983 claims").

[95] Holders of claims in class 14 would receive a pro rata share of 16.48 million in New B Notes. Eighth Amended Plan for Adjustment of Debts of the City of Detroit at 51, *In re* City of Detroit, Mich. (Bankr. E.D. Mich. Oct. 22, 2014) (No. 13-53846), ECF No. 8045. Some might have opted into class 15, a convenience class, paying a higher percentage to limited dollar claims.

[96] *See* Objections of Creditors Deborah Ryan, Walter Swift, Cristobal Mendoza, and Annica Cuppetelli, Interested Parties, to Amended Plan for the Adjustment of Debts of the City of Detroit, *In re* City of Detroit, Mich., (Bankr. E.D. Mich. April 15, 2014) (No. 13-53846), ECF No. 4099; Brief in Concurrence of Creditors Dwayne Provience, Richard Mack, and Gerald and Alecia Wilcox, Mendoza and Annica Cuppetelli, Interested Parties, Supplemental Brief in support of the Instant Creditors' Previously Filed Objections to Debtor, City of Detroit's Plan for the Adjustment of Debts of the City of Detroit and Certificate of Service, *In re* City of Detroit, Mich. (Bankr. E.D. Mich. June 30, 2014) (No. 13-53846), ECF No. 5693.

[97] The court certified to the Attorney General of the United States that the "constitutionality of Title 11 of the United States Code is drawn into question in this case" and requested that the Attorney General file a brief addressing the

> [b]ecause section 1983 creates a damage remedy and not substantive rights and because the remedy arises from congressional enactment and not constitutional mandate, the United States submits that the Plan's treatment of section 1983 claims does not raise an issue arising under the Fourteenth Amendment.[98]

The bankruptcy court agreed, holding that the plan's treatment of § 1983 claims did not amount to a constitutional violation.[99]

Detroit's restructuring plan also sought to release the individual capacity liability of non-debtor defendants, individual officers, to whom the city had indemnification obligations.[100] The court sustained objections and refused to approve this part of the plan because Detroit had not met the Sixth Circuit's non-debtor release standard for chapter 11 corporate bankruptcies.[101] Among other factors, a release cannot be approved unless the debtor shows it is essential or crucial to reorganization.[102] Detroit's plan had to be revised accordingly. But the court also held that Detroit would remain responsible to cover claims against public safety officers in their

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issues. Order of Certification Pursuant to 28 U.S.C. § 2403(a) at 1, *In re* City of Detroit, Mich., (Bankr. E.D. Mich. July 11, 2014) (No. 13-53846), ECF No. 5925; United States of America Brief in Response to Order of Certification Pursuant to 28 U.S.C. § 2403(a) at 5, *In re* City of Detroit, Mich., (Bankr. E.D. Mich. Aug. 12, 2014) (No. 13-53846), ECF No. 6664.

[98] United States of America Certification Brief, *supra* note 97, at 5.

[99] *In re* City of Detroit, 524 B.R. 147, 262-65 (Bankr. E.D. Mich. 2014).

[100] Eighth Amended Plan, *supra* note 95, at 28-29. Such claims, also in class 14, were defined as "any claim against an employee or former employee of the City to which such employee has an Allowed Claim against the City for indemnification or payment or advancement of defense costs based upon, arising under or related to any agreement, commitment, or other obligation, whether evidence by contract, agreement, rule, ordinance, statute or law." *Id*. at 10, 18.

[101] *In re* City of Detroit, 524 B.R. at 173, 266. The Sixth Circuit has held that a non-consenting creditor's claims against a non-debtor could be impaired in a corporate bankruptcy only in "unusual circumstances" and only when seven factors were present. *In re* Dow Corning Corp., 280 F.3d 648, 658 (6th Cir. 2002) ("(1) There is an identity of interests between the debtor and the third party, usually an indemnity relationship, such that a suit against the non-debtor is, in essence, a suit against the debtor or will deplete the assets of the estate; (2) The non-debtor has contributed substantial assets to the reorganization; (3) The injunction is essential to reorganization, namely the reorganization hinges on the debtor being free from indirect suits against the parties who would have indemnity or contributory claims against the debtor; (4) The impacted class or classes, has overwhelmingly voted to accept the plan; (5) The plan provides a mechanism to pay for all, or substantially all, of the classes or classes affected by the injunction; (6) The plan provides an opportunity for those claimants who choose not to settle to recover in full and; (7) The bankruptcy court made a record of specific factual findings that support its conclusions.").

[102] *In re* City of Detroit, 524 B.R. at 147, 266.

individual capacities because Detroit had assumed collective bargaining agreements with public safety unions that contained indemnification obligations.[103]

To summarize, Detroit was permitted to impair and discharge direct liability for § 1983 claims and to treat them like other general unsecured creditors – breach of contract or lease, state law tort actions, and the like. Detroit had not met the court's adopted legal standard for releasing claims against non-debtor defendants, and would remain responsible to indemnify public safety officers, in 100% dollars, to the extent an assumed collective bargaining agreement so provided. Functionally, indemnity claims of police officers got a non-statutory priority over other claims, but this result should increase recoveries for § 1983 plaintiffs beyond the 10-13% they were predicted to receive as holders of class 14 claims.

B. City of Vallejo

Although this bankruptcy is long over, individual § 1983 lawsuits continue to raise questions about the impact of Vallejo's bankruptcy and discharge. The following timeline of the bankruptcy is relevant for the disputes discussed thereafter. On May 23, 2008, Vallejo filed for bankruptcy. [104] On August 4, 2011, the bankruptcy court confirmed Vallejo's plan of adjustment.[105] The effective date of the plan was November 1, 2011.[106] Section 1983 claims were considered general liability claims and placed in class seven of the plan.[107] Claims in that class

[103] *Id.* at 266.
[104]Chapter 9 Voluntary Petition, *In re* City of Vallejo, Cal. (Bankr. E.D. Cal. May 23, 2008) (No. 2008-26813), ECF No. 1.
[105] Order Confirming the City of Vallejo's Second Amended Plan for the Adjustment of Debts of City of Vallejo, California as Modified Aug. 2, 2011, *In re* City of Vallejo, Cal., No. 2008-26813 (Bankr. E.D. Cal. Aug. 4, 2011), ECF No. 1113.
[106] *See* Second Amended Plan for the Adjustment of Debts of the City of Vallejo, California, as Modified August 2, 2011 at 49, *In re* City of Vallejo, Cal., No. 2008-26813 (Bankr. E.D. Cal. Aug. 2, 2011), ECF No. 1109; *V.W. ex rel. Barber v. City of Vallejo*, No. CIV. S-12-1629, 2013 WL 3992403, at *1 (E.D. Cal. Aug. 2, 2013).
[107] Second Amended Plan, *supra* note 106, at 5, 35-37. The plan defines "General Liability Claim" as "a tort or contract Claim filed against the City pursuant to the Government Claims Act, California Government Code section 810 et seq." 810 et seq is Division 3.6 on Public Liability. It includes in Part 2, Liability of Public Entities & Public Employees, in Chapter 1, General Provisions, and Article 4, Indemnification of Public Employees, section 825, duty of public entity to pay judgment, compromise, or settlement.

were entitled to an estimated twenty to thirty cents on the dollar for the first $500,000 of the claim.[108] The amount above $500,000 would be paid in full by the excess risk-sharing pool of which Vallejo was a member.[109] The plan had no explicit third-party release provision.[110]

1. V.W. ex rel. Barber v. City of Vallejo

While Vallejo's bankruptcy was underway, Vallejo's police officers allegedly killed Michael White during his arrest.[111] On June 18, 2012, after the bankruptcy was over, the surviving daughter of Michael White ("Plaintiff") filed a complaint against Vallejo and Police Chief Robert Nichelini, in his official and individual capacity, alleging a violation of Michael White's and his daughter's civil rights.[112] Vallejo and Nichelini moved for dismissal of the complaint, asserting that Plaintiff's only remedy for these claims lay with the bankruptcy court, as Vallejo's bankruptcy discharged Plaintiff's causes of action against Vallejo and Nichelini.[113] They argued that even the causes of action against Nichelini in his individual capacity were discharged because Vallejo's statutory obligation to defend and pay a claim or judgment against Nichelini amounts to a "debt" of Vallejo.[114]

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[108] *Id.* at 25, 35-37 ("The SIR Claim portion of each Allowed General Liability claim will be paid on the Payment Dates from the Risk Management Internal Service Fund, and will receive the same percentage payment on the dollar of Allowed Claims as the holders of Allowed Class 6B Claims [, estimated to be 30 or 40 cents per dollar]. The Insured Portion of each Allowed General Liability Claim is not Impaired, and shall be paid by the applicable excess risk-sharing pool.").

[109] *Id.*

[110] The plan provided that "the City shall be discharged of all debts (as defined in the Bankruptcy Code) of the City and Claims against the City …" "the rights afforded in this Plan and the treatment of all Holders of Claims, be the Claims Impaired or Unimpaired under this Plan, shall be in exchange for in complete satisfaction, discharge and release of all Claims of any nature whatsoever arising on or before the Effective Date … whether against the City or any of its properties, assets or interests in property." "[U]pon the Effective Date, all Claims against the City [that arose prior to the Confirmation Date ("Pre-Effective Date Claims") shall be and shall be deemed to be satisfied, discharged and released in full, by they Impaired or Unimpaired under this Plan." *Id*. at 45. Likewise, the order confirming the plan contains no third-party release language. Order Confirming City of Vallejo's Second Amended Plan (ECF No. 1113) and Notice of Entry of 1113 Order Confirming Plan (ECF No. 1114). For more discussion of the absence of express non-debtor release language, *see infra* Part III.B.3.

[111] *V.W. ex rel. Barber v. City of Vallejo*, No. CIV. S-12-1629, 2013 WL 3992403, at *1 (E.D. Cal. Aug. 2, 2013).

[112] *Id.* at *1. The plaintiff was a minor and thus the suit was brought through her Guardian Ad Litem.

[113] Defendants' Motion For Judgment on the Pleadings at 2, 7, V.W. ex rel. Barber v. City of Vallejo, No. S-12-1629 (E.D. Cal. Nov. 8, 2012), ECF No. 13.

[114] *Id*. at 5-6.

United States District Judge Lawrence K. Karlton granted the motion for judgment on the pleadings on plaintiffs' causes of action against Vallejo and Nichelini in his official capacity because those claims, having arisen before chapter 9 plan confirmation, were in the temporal scope of the discharge and the plaintiff conceded as much.[115] The court nonetheless called that outcome "remarkable" and "extraordinary":

> Thus, alarming as it is, as the bankruptcy statute appears to be written, a municipality may erase its own liability to persons whom it and its officers have willfully and maliciously deprived of their civil rights—and even their lives—by filing for bankruptcy. This extraordinary result would appear to exalt the bankruptcy laws over the civil rights laws (even though the civil rights laws, like the bankruptcy laws, are anchored in the constitution).[116]

The court denied the motion for judgment on the pleadings regarding the cause of action against Nichelini in his individual capacity, finding Vallejo's arguments flawed. The court viewed Vallejo's obligation to indemnify officers for individual capacity judgments as being conditioned on statutory requirements that the pleadings had not established were met; the obligation to indemnify was not automatic.[117] The statutes also allow the city to decline to represent the employee in some circumstances.[118] Further, based on a Ninth Circuit ruling in the sovereign immunity context, the court did not see a claim against a state official as the same as one against the government, even when state law required indemnification.[119] Insofar as Vallejo's discharge

[115] *V.W. ex rel. Barber v. City of Vallejo*, No. CIV. S-12-1629, 2013 WL 3992403, at *2-3 (citing *O'Loghlin v. County of Orange*, 229 F.3d 861 (9th Cir. 2000)).
[116] *Id.* at *2-3 (E.D. Cal. Aug. 2, 2013).
[117] *Id.* at *4-7; *see also id.* at n.13 ("Although no document before the court asserts that Nichelini has requested that the defendant City defend him, the court apparently can presume that he has done so, perhaps from the fact that the City is representing him in these pretrial proceedings. However the court notes that the "defense" contemplated in the statute is the defense to the trial, not simply to these pretrial proceedings. Moreover, if defendants are correct about the effect of bankruptcy, the discharge would appear to wipe out the City's duty to defend, leaving Nichelini to provide for his own defense." (citations omitted)).
[118] *Id.* at *2 (citing *Kentucky*, 473 U.S. at 165-66, 105; *Community House, Inc. v. City of Boise, Idaho*, 623 F.3d 945, 967-68 (9th Cir. 2010)).
[119] *Id.* at *6 (citing *Demery v. Kupperman*, 735 F.2d 1139 (9th Cir. 1984); *Ronwin v. Shapiro*, 657 F.2d 1071 (9th Cir. 1981)).

did not justify stopping the litigation against Nichelini in his individual capacity, the motion for judgment on the pleadings was denied.[120]

The Plaintiff filed an amended complaint adding causes of actions against several other police officers in their individual capacity.[121] After discovery was completed, Defendants moved for summary judgment.[122] Defendants assert that all the factual issues raised by the Judge in his order denying the motion for judgment on the pleadings have been resolved and establish Vallejo's obligation to pay the judgment is not voluntary.[123] Defendants contend that this motion does not raise issues of sovereign immunity under the Eleventh Amendment because they are not requesting total immunity from suit: instead, Vallejo's discharge and California's state law limits plaintiff's pursuit of liability against the officers to claims in the bankruptcy. The Plaintiff opposes the motion.[124] The matter remains pending.

2. Wilson v. City of Vallejo

On July 17, 2010, while Vallejo was in bankruptcy, police officers allegedly committed acts that deprived Toby Wilson of his constitutional rights.[125] After Vallejo's plan of adjustment

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[120] *Id.* at *6.

[121] First Amended Complaint for Damages and Demand for Jury Trial, V.W. ex rel. *Barber v. Nichelini* (E.D. Cal. Oct. 25, 2013) (No. 2:12-cv-01629), ECF No. 32; Answer to Plaintiff's First Amended Complaint for Damages and Demand for Jury Trial, V.W. ex rel. *Barber v. Nichelini* (E.D. Cal. Nov. 18, 2013) (No. 2:12-cv-01629), ECF No. 36.

[122] Defendants' Memorandum of Points & Authorities in Support of Motion for Summary Judgment and/or Partial Summary Judgment at 6, V.W. ex rel. *Barber v. Nichelini*, No. 2:12-cv-01629 (E.D. Cal. Mar. 24, 2016), ECF No. 64. The Defendants also assert that they are entitled to summary judgment based on qualified immunity.

[123] *Id.* at 4-8. Defendants have plead that they requested representation from the City and the City agreed to represent them as they were acting within the course and scope of their duties, and the City cannot withdraw from representation anymore because no conflict of interest has arisen and discovery has been completed. *Id*. at 5-6.

[124] Plaintiff's Opposition to Defendants' Motion for Summary Judgment at 6, V.W. ex rel. *Barber v. Nichelini*, No. 2:12-cv-01629 (E.D. Cal. Apr. 14, 2016), ECF No. 76.

[125] *Wilson v. City of Vallejo*, No. 2:12-cv-00547, 2013 WL 4780742, at *1 (E.D. Cal. Sept. 5, 2013). In his complaint, Wilson alleges that because of a verbal dispute with his neighbor, the police were called. Upon arriving, the police officer defendants observed him and requested that he come down and talk with them. Instead, he went inside his second-floor apartment, locked the door, and went to sleep. Later, the police officer defendants made a forcible entry into his apartment where they proceeded to tase him and released a K-9 dog to apprehend Wilson. Wilson was "wounded by the assault of the K-9 and traumatized by being tased and punched in the face." Complaint for Damages at 3-4, Wilson v. City of Vallejo, No. 2:12-cv-00547 (E.D. Cal. Feb. 29, 2012), ECF No. 11. The court considered other facts omitted from the complaint, but apparently undisputed, in a subsequent summary judgment

became effective, Toby Wilson filed a § 1983 complaint in federal district court against Vallejo and several police officers ("Police Officer Defendants") in their individual capacities.[126] Vallejo and the Police Officer Defendants moved for a judgment on the pleadings on the basis that the lawsuit was barred by Vallejo's discharge.[127]

United States District Judge John A. Mendez granted the motion as to Vallejo but denied the motion as to the Police Officer Defendants.[128] Because the claims arose before the confirmation of the bankruptcy plan, and the plaintiff conceded that his suit against Vallejo was barred, the court dismissed the claims against Vallejo.[129] However, the court rejected the Police Officer Defendants' argument that the individual capacity claims against the Police Officer Defendants were in effect claims against Vallejo and thus discharged in its bankruptcy.[130] First, "[t]he Ninth Circuit has found that section 1983 claims against public officials in their individual capacities are distinguishable from claims against the employing public entity regardless of California's indemnification laws."[131] Second, "an award of damages against an official in his individual capacity can be executed only against the official's personal assets."[132] Third, "California's indemnification is 'a claim separate and apart from the Section 1983 liability claim that underlies it.'"[133] Thus, the Vallejo bankruptcy did not discharge the claims against the officers.

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motion by the Police Officer Defendants. Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment at 2-3, *Wilson v. City of Vallejo*, No. 2:12-cv-00547 (E.D. Cal. Sept. 6, 2013), ECF No. 31.

[126] *Id.* at *1.

[127] Motion for Judgment on the Pleadings, *Wilson v. City of Vallejo*, No. 2:12-cv-00547 (E.D. Cal. July 19, 2013), ECF No. 15.

[128] Order Granting in Part and Denying in Part Defendants Motion for Judgment on the Pleadings at 5, *Wilson v. City of Vallejo*, No. 2:12-cv-00547 (E.D. Cal. Sept. 5, 2013), ECF No. 30.

[129] *Id* at 5, (citing *O'Laughlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000)).

[130] *Id*.

[131] *Wilson v. City of Vallejo*, No. 2:12-cv-00547, 2013 WL 4780742, at *3 (E.D. Cal. Sept. 5, 2013) (citing *Demery*, 735 F.2d at 1145-48).

[132] *Id.* (citing *Kentucky*, 473 U.S. at 166).

[133] *Id.* (citing *V.W. ex rel. Barber v. City of Vallejo*, No. CIV. S-12-1629, 2013 WL 3992403, at *7 (E.D. Cal. Aug. 2, 2013)).

The Police Officer Defendants subsequently filed a motion for summary judgment.[134] The court dismissed several claims on grounds unrelated to the fact of Vallejo's bankruptcy and discharge.[135] The court did not dismiss Wilson's excessive force claims,[136] but the parties ultimately settled, and the suit was dismissed with prejudice.[137]

3. Deocampo v. Potts

Before Vallejo filed for bankruptcy, Jason Eugene Deocampo, Jaquesz Tyree Berry, and Jesus Sebastian Grant ("Plaintiffs") brought § 1983 individual capacity claims against police officers Jason Potts, Jeremy Patzer, and Eric Jensen ("Police Officer Defendants" or "Police Officer Appellants"), and § 1983 official capacity claims against Vallejo and the Chief of Police, Robert Nichelini.[138] On July 22, 2007, the court ordered the dismissal of all claims against Vallejo and the Chief of Police pursuant to the parties' stipulation.[139] The Police Officer Defendants' continued to be represented by counsel provided by the City even though the City was no longer a defendant in the litigation.[140]

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[134] Notice of Motion and Motion for Summary Judgment, or in the Alternative, Summary Adjudication, *Wilson v. City of Vallejo*, No. 2:12-cv-00547 (E.D. Cal. July 23, 2013), ECF No. 17.

[135] Order Granting in Part and Denying in Part Defendants' Motion for Summary Judgment, *Wilson v. City of Vallejo*, No. 2:12-cv-00547 (E.D. Cal. Sept. 6, 2013), ECF No. 31. The court dismissed all individual claims against Chief Nichelini because the plaintiff's allegations and evidence were insufficient to support supervisorial liability pursuant to § 1983. *Id*. at 9. The court also dismissed all § 1983 claims against individual officers relating to their warrantless entry into the plaintiff's apartment, holding it was objectively reasonable under the circumstances to enter the apartment without a warrant. *Id*. at 12. Further, the court dismissed all claims relating to the arrest of Wilson because it was supported by probable cause. *Id.* at 12-13.

[136] *Id.* at 19. The court did not address whether the officers had qualified immunity.

[137] Order re Settlement & Disposition, *Wilson v. City of Vallejo*, No. 2:12-cv-00547 (E.D. Cal. Feb. 20, 2014), ECF No. 72; Stipulation and Order for Dismissal with Prejudice, Wilson v. City of Vallejo, No. 2:12-cv-00547 (E.D. Cal. Mar. 20, 2014), ECF No. 74.

[138] *Deocampo v. Potts*, No. 2:06-1283, 2014 WL 2118193, at *1 (E.D. Cal. May 21, 2014). It should be noted that plaintiff Jason Deocampo filed other actions against the City of Vallejo that are not addressed here. *See Deocampo v. City of Vallejo,* No. 07-cv-01348 (E.D. Cal. July 5, 2007); *Deocampo v. City of Vallejo,* No. 06-cv-00404 (E.D. Cal. Apr. 7, 2006).

[139] Stipulation and Order Dismissing Monell Claims and Parties, *Deocampo v. Potts* (E.D. Cal. July 22, 2007) (No. 2:06-1283), ECF No. 60; Brief for Appellants at 10, Potts v. Deocampo (9th Cir. Sept. 29, 2014) (No. 14-16192), ECF No. 13; Answering Brief for Appellees at 11, Potts v. Deocampo (9th Cir. Dec. 17, 2014) (No. 14-16192), ECF No. 26-1.

[140] Defendants' Memorandum of Points and Authorities for Relief from Judgment or Order at 7, No. 2:06-cv-01283, *Deocampo v. City of Vallejo* (E.D. Cal. Apr. 2, 2014), ECF No. 206-1.

As noted earlier, Vallejo entered bankruptcy on May 23, 2008,[141] and a few months later, the district court entered an order pursuant to the parties' stipulation to stay the action pursuant to 11 U.S.C. § 362.[142] Apparently as a precaution, plaintiffs filed proofs of claim in Vallejo's bankruptcy on August 16, 2010.[143] Vallejo objected that the claimed amounts "do not accurately reflect the extent of the City's liability to each individual tort claimant."[144] Vallejo also requested the bankruptcy court abstain from deciding their objections until the Plaintiffs completed litigation in federal district court.[145] The bankruptcy court stayed the objection pending resolution of the claims in district court as requested by Vallejo, but the bankruptcy court concluded that it did not have that subject matter jurisdiction over any part of the litigation involving claims pending in federal district court.[146] Therefore, the court stayed the objection until the claim was resolved in district court.[147]

After Vallejo's plan had been confirmed, the Police Officer Defendants' filed a notice that the automatic stay had been lifted due to the confirmation of Vallejo's plan,[148] and the

[141] Brief for Appellants, *supra* note 139, at 10; Answering Brief for Appellees, *supra* note 139, at 11.
[142] Stipulation and Order to Stay Entire Action Pursuant to 11 U.S.C. Section 362, *Deocampo v. City of Vallejo* (E.D. Cal. Aug. 5, 2008) (No. 2:06-cv-01283), ECF No. 70; Stipulation and Proposed Order to Stay Entire Action Pursuant to 11 U.S.C. Section 362, Deocampo v. City of Vallejo, No. 2:06-cv-01283 (E.D. Cal. July 28, 2008), ECF No. 69; Order to Show Cause at 2, Deocampo v. City of Vallejo, No. 2:06-cv-01283 (E.D. Cal. July 25, 2008), ECF No. 68 ("If all of the non-bankrupt parties agree that the entire action should be stayed, . . . the pretrial conference and trial dates will be vacated."); Brief for Appellants, *supra* note 139, at 11.
[143] Brief for Appellants, *supra* note 139, at 11.
[144] City's Objection to Litigation Claims; Request for Stay of Litigation Claims Pending Withdrawal of Reference and/or Abstention at 2, *In re* City of Vallejo, Cal., No. 2008-26813 (Bankr. E.D. Cal. Apr. 27, 2012), ECF No. 1267.
[145] City's Objection to Litigation Claims, *supra* note 144, at 1-2.
[146] Order Regarding City's Objection to Litigation Claims at 3, *In re* City of Vallejo, Cal., No. 2008-26813 (Bankr. E.D. Cal. Aug. 2, 2012), ECF No. 1371 (citing 28 U.S.C. § 157(b)(5), which provides for personal injury tort and wrongful death claims to be tried in district court).
[147] *Id*. at 5.
[148] Notice of Automatic Bankruptcy Stay Being Lifted at 2, *Deocampo v. Potts*, No. 2:06-1283 (E.D. Cal. Aug. 24, 2012), ECF No. 73. The notice stated:

> PLEASE TAKE FURTHER NOTICE that this case or proceeding was classified in the Confirmed Plan as a Class 7 General Liability Claim, making Plaintiffs herein general unsecured creditors of the City. The Confirmed Plan provides that Class 7 creditors like Plaintiffs would be allowed to prosecute their lawsuit against the City following the lifting of the automatic stay. The Confirmed Plan also provides, that any judgment subsequently obtained by Plaintiffs would receive the same treatment as the claims held by all other unsecured creditors, a recovery estimated to be 20 to 30

Plaintiffs and the Police Officer Defendants filed a Joint Status Report that included the following language:

> Due to the Classification as a Class 7 General Liability Claim in the Confirmed Plan, Plaintiffs are general unsecured creditors of the City, meaning that any judgment subsequently obtained by Plaintiffs would receive the same treatment as the claims held by all other unsecured creditors, a recovery estimated to be 20 to 30 cents on the dollar of Plaintiffs' allowed claims.
>
> Once Plaintiffs' claims have been reduced to judgment (whether by settlement; trial; verdict; or dismissal of this case), the City will return to the Bankruptcy Court for entry of an order resolving Plaintiffs' claim against the City in a manner consistent with the terms of the Confirmed Plan.[149]

Plaintiffs' claims against the Police Officer Defendants then went to trial.[150] The Police Officer Defendants were represented by Vallejo, which had agreed to defend and indemnify them for non-punitive damages.[151] Plaintiff Deocampo prevailed in a jury trial.[152] He obtained a final judgment for $50,000 and an award of attorneys' fees of $314,497.73.[153]

Subsequently, the Police Officer Defendants filed for relief from the final judgment and the award of attorneys' fees in the § 1983 litigation pursuant to Federal Rule of Civil Procedure 60(b).[154] The Police Officer Defendants requested that the district court relieve them from the judgment because the judgment is void; the judgment is satisfied, released or discharged; and/or

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> cents on the dollar of Plaintiffs' allowed claims. PLEASE TAKE FURTHER NOTICE that on April 27, 2012, the City objected to Plaintiff's proof of claim in the Bankruptcy Court. On August 2, 2012, the Bankruptcy Court stayed the City's objection "pending resolution of the litigation in district court" for the purposes of establishing the amount of Plaintiffs' claim against the City. The Bankruptcy Court then ordered that "when the litigation is finally resolved, the debtor shall come back to this court for entry of an order on this claim objection consistent with the disposal of the claims by the district court.

[149] Joint Status Report at 6-7, *Deocampo v. Potts*, No. 2:06-1283 (E.D. Cal. Sept. 4, 2012), ECF No. 75.

[150] *Id.* at 7; Answering Brief for Appellees, *supra* note 139, at 12. Some claims had been dismissed pursuant to party stipulation. *See* Stipulation and Order to Dismiss Certain Claims, *Deocampo v. City of Vallejo*, No. 2:06-cv-01283 (E.D. Cal. May 9, 2013), ECF No. 83.

[151] Verdict Form for Jason Deocampo, *Deocampo v. City of Vallejo*, No. 2:06-cv-01283 (E.D. Cal. Aug. 23, 2013), ECF No. 166; Brief for Appellants, *supra* note 139, at 13.

[152] Verdict Form for Jason Deocampo, supra note 151, at 4. The jury found that the Police Officer Defendants had not violated the other Plaintiffs' constitutional rights. Verdict Form for Jesus Grant, *Deocampo v. City of Vallejo*, No. 2:06-cv-01283 (E.D. Cal. Aug. 23, 2013), ECF No. 165-1; Verdict Form for Jaquezs Berry, *Deocampo v. City of Vallejo*, No. 2:06-cv-01283 (E.D. Cal. Aug. 23, 2013), ECF No. 165-2.

[153] Verdict Form for Jason Deocampo, *supra* note 151, at 4; Brief for Appellant, *supra* note 139, at 13; Answering Brief for Appellees, *supra* note 139, at 12.

[154] *Deocampo v. Potts*, No. 2:06-1283, 2014 WL 2118193, at *1 (E.D. Cal. May 21, 2014).

for any other reason that justifies relief.[155] In the alternative, the Police Officer Defendants requested that the court refer the matter to the bankruptcy court.[156] In other words, they left to the district court the decision as to "whether to decide this matter itself, or refer the matter to the Bankruptcy Court."[157] The Police Officer Defendants contended that the judgment and fee award were discharged in Vallejo's bankruptcy because, essentially, the final judgment and fee award were liabilities of Vallejo given that California's law required Vallejo to pay the judgment when it agreed to represent the Police Officer Defendants in the litigation.

The Plaintiff contended that California's state laws cannot supersede federal civil rights law, which imposes liability on individual police officers.[158] The U.S. Supreme Court has made a city liable only for *Monell* claims, said the Plaintiff.[159] To hold otherwise would essentially extend sovereign immunity to public officials contrary to Ninth Circuit precedent on the Eleventh Amendment.[160] Plaintiff did not mention or explain why the plaintiff filed a proof of claim in the bankruptcy or filed a joint status report stating that the judgment would be classified as a class 7 claim under Vallejo's Plan.

United States District Judge William B. Schubb denied the Defendants' Rule 60(b) request.[161] Relying on interpretations of Ninth Circuit case law from *Wilson* and *Barber*, the court held that Vallejo's plan did not discharge liabilities of officers in their individual capacities

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[155] Defendant's Notice of Motion for Relief From a Judgment or Order at 2, *Deocampo v. City of Vallejo* (E.D. Cal. Apr. 2, 2014) (No. 2:06-cv-01283), ECF No. 206.
[156] *Id*. (citing 28 U.S.C. §§ 157(a), (b)(2)(L)).
[157] Defendant's Memorandum of Points and Authorities in Support of Motion for Relief from Judgment or Order, *supra* note 140, at 17.
[158] Plaintiffs' Opposition to Defendants' Motion for Relief from Judgment or Order at 5, *Deocampo v. City of Vallejo* (E.D. Cal. May 5, 2014) (No. 2:06-cv-01283), ECF No. 208.
[159] *Id*. at 8.
[160] *Id*. at 10.
[161] The court decisions cited by the Police Officer Defendants, which held that the automatic stay in a municipal bankruptcy applied to § 1983 proceedings against individual officers, did not support their argument that the individual claims were liabilities of the City. Instead, the court interpreted those decisions as temporarily applying the automatic stay to avoid duplicative litigation and to avoid disaggregation of litigation against the officer from litigation against the municipality, among other reasons. *Deocampo*, 2014 WL 2118193, at *2.

even if Vallejo had an indemnification obligation.[162] The district court did not address why it declined to refer the matter to the bankruptcy court.[163]

The Police Officer Defendants appealed the district court's denial of their motion (the "Appellants"), arguing federal bankruptcy law, not state law or federal civil rights law, determines what constitutes a "claim" and thus a discharged debt for purposes of § 944.[164] They noted that Congress intended the Bankruptcy Code's definition of claim to be broad enough "to ensure that 'all legal obligations of the debtor, no matter how remote or contingent, will be able to be dealt with in the bankruptcy case.'"[165] California Government Code § 825 and § 995 require municipalities to defend and indemnify their employees.[166] These provisions, asserted the Police Office Appellants, turn a judgment against an officer into a dischargeable claim against Vallejo.[167] Citing opinions extending the automatic stay *during* a municipal bankruptcy to temporarily enjoin proceedings against individual public officials, the Police Officer Appellants alleged that these cases recognize that a claim against an official in his individual capacity affects the debtor and potentially the debtor's property.[168] The Appellants' brief distinguished

[162] *Deocampo*, 2014 WL 2118193, at *2 (citing *Wilson v. City of Vallejo*, No. 2:12-547, 2013 WL 478072 (E.D. Cal. Aug. 2, 2013); *V.W. ex rel. Barber v. City of Vallejo*, No. 2:12-1629, 2013 WL 3992403 (E.D. Cal. Aug. 2, 2013)).
[163] Memorandum and Order Re: Motion for Relief from Final Judgment, Deocampo v. City of Vallejo, No. 2:06-cv-01283 (E.D. Cal. May 21, 2014), ECF No. 211.
[164] Brief for Appellants, *supra* note 139, at 16; Reply Brief of Appellants at 3, *Potts v. Deocampo,* No. 14-16192 (9th Cir. Jan. 15, 2015), ECF No. 30 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 83 (1991); *In re* Zilon, Inc., 450 F.3d 996, 1000 (9th Cir. 2006)).
[165] Brief for Appellants, *supra* note 139, at 16 (citing *Hassanly v. Republic Bank*, 208 B.R. 46, 50 (B.A.P. 9th Cir. 1997)).
[166] *Id.* at 19-22 (citing Cal. Gov't Code §§ 995, 825); Reply Brief of Appellants, *supra* note 164, at 4, 11.
[167] Brief for Appellants, *supra* note 139, at 16; Reply Brief of Appellants, *supra* note 164, at 4, 11.
[168] Brief for Appellants, *supra* note 139, at 23-29 (citing *A.H. Robins Co., Inc. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986); *William v. Kenny*, 2008 WL 3540408 (E.D. Cal. Aug. 12, 2008); *Smith-Downs v. City of Stockton*, 2012 WL 3202265 (E.D. Cal. Aug. 3, 2012); *Hittle v. City of Stockton*, 2012 WL 3886099 (E.D. Cal. 2012); *In re* City of Stockton, 484 B.R. 372 (E.D. Cal. 2012); *Tavake v. City of Stockton*, 2013 WL 35611 (E.D. Cal. 2013); *In re* Jefferson County, Ala., 491 B.R 277 (Bankr. N.D. Ala. 2013)).

Barber and *Wilson*, noting that, unlike in the instant case, these decisions were rendered when the city's indemnity obligation remained contingent, before entry of a final judgment.[169]

Deocampo (the "Plaintiff" or "Appellee") by contrast, asserted that in individual capacity suits, officials must "be personally responsible for their liabilities out of their own assets."[170] State law cannot change the nature of a federal claim for a violation of § 1983.[171] The Police Officer Appellants' interpretation would fly in the face of the intent and purpose of § 1983,[172] said the Plaintiff, exalting the Bankruptcy Code over the Civil Rights Act.[173] Deocampo also argued that indemnification, a separate claim, is not automatically provided under California's statute.[174]

At oral argument on May 10, 2016, the Ninth Circuit panel's questions evidenced doubts about the Police Officer Appellants' arguments.[175] One recurring question was whether the judgment could be enforced against Vallejo. The panel also asked why the Plan did not expressly deal with the indemnification obligations owed to officers. Counsel for Appellee Deocampo conceded that the Appellee could not enforce the judgment against Vallejo and sought to enforce it only against the Police Officer Appellants; to Deocampo, the fact that the Police Officer Defendants would seek indemnity from the City is a separate issue. Counsel for the Police Officers tried to focus the court on the broad definition of "claim" under the Bankruptcy Code.[176] A plan did not have to address, expressly or directly, indemnification obligations because the

[169] Brief for Appellants, *supra* note 139, at 29-35.
[170] Answering Brief for Appellees, *supra* note 139, at 13, 17-18 (citing *Kentucky*, 473 U.S. at 165-68).
[171] *Id.* at 13, 20 (citing *Demery*, 73 F.2d at 1148-49).
[172] *Id.* at 13, 19-22.
[173] *Id.* at 28.
[174] *Id.* at 23-24, 26.
[175] Oral Argument, *Deocampo v. Potts*, 2016 WL 2118193 (May 10, 2016) (No. 14-16192), http://www.ca9.uscourts.gov/media/view_video.php?pk_vid=0000009653.
[176] 11 U.S.C. § 101(5) ("claim means a right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured; or right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured disputed, undisputed, secured, or unsecured.").

definition of claim under the Bankruptcy Code encompasses the city's statutory obligation to indemnify its employees. Counsel for Police Officers, at the very end of rebuttal, also noted that unlike other chapters of the Bankruptcy Code, chapter 9 does not incorporate a provision that expressly disallows a discharge from impacting the liability of another entity.[177] Vallejo is required by state law to pay judgments in litigation in which the employee was represented by the City.[178] The Police Officers thus argued that Vallejo's Plan, which discharged all "debts" of the city as defined by the Bankruptcy Code, can and does void the judgment against the Police Officer Appellants, an entity other than the bankrupt City, and operates as an injunction against any attempts to collect from the city and Police Officer Appellants.[179] As a consequence, argued the Police Officers, the Plaintiff is left with the sole remedy of collecting a pro rata share under Vallejo's plan of adjustment.

The California Government Code seemed to support the Appellee's representation that he cannot enforce their judgment against Vallejo. Because the final judgment rendered was against the Police Officer Defendants in their individual capacity, the judgment would not be a judgment rendered against a local public entity (Vallejo). The California Government Code expressly allows plaintiffs to file a writ of mandate to compel payment of a judgment against a public entity, but we are unsure whether California's common law would allow a plaintiff to also file a writ of mandate to compel payment of a judgment against the police officers when Vallejo is statutorily required to pay the judgment. State law authorizes the police officer defendants to

[177] *Id*. § 901(a) (excluding reference to § 524(e)).
[178] Cal. Gov't Code § 825(a) (West 2015) ("If the public entity conducts the defense of an employee or former employee against any claim or action with his or her reasonable good-faith cooperation, the public entity shall pay any judgment based thereon or any compromise or settlement of the claim or action to which the public entity has agreed.").
[179] 11 U.S.C. § 524(a), (b).

seek recovery of any amount paid for the judgment,[180] but whether that employee is the only party with standing to sue the city was unclear.

At oral argument, the Ninth Circuit panel focused on the Police Officer Appellants' claim against Vallejo for indemnification. This perspective raises a timing question: when does a claim arise for indemnification by an employee under California's Government Code when neither the plan nor the disclosure statement lists or discusses the possibility that employees may hold claims for such obligations? For purposes of a bankruptcy discharge in the Ninth Circuit, a claim arises "at the time of the events giving rise to the claim, not at the time plaintiff is first able to file suit on the claim."[181] Section 825.2 of the California Government Code entitles an employee to recover from the city if the employee has paid any part of a judgment or claim when the city represented the employee in the litigation or settlement.[182] The Police Officer Defendants could argue that their claim against Vallejo was not discharged because it had not yet arisen at the time of Vallejo's plan confirmation. If this interpretation withstood court scrutiny, the Police Officer Defendants could recover from Vallejo and Deocampo's judgment would be paid in full.

In an opinion filed on September 8, 2016, the Ninth Circuit panel addressed the impact of Vallejo's bankruptcy on both Deocampo's claim against the Police Officer Defendants and those defendants' claim against Vallejo. Affirming the district court, the Ninth Circuit held that Vallejo's plan did not relieve the Police Officer Defendants of their direct liability. Rejecting the argument of the Police Officer Defendants that California law functionally made the judgment against the Police Officer Defendants a personal liability of Vallejo, the panel concluded:

> The Judgment embodies the jury's determination, by a preponderance of the evidence, that the Officers, acting in their personal capacities, seriously injured Deocampo while acting under the color of state law, as well as a concomitant Section 1988 fee award… Deocampo is entitled to

[180] Cal. Gov't Code § 825.2.
[181] *O'Loghlin v. County of Orange*, 229 F.3d 871, 874 (9th Cir. 2000).
[182] See Cal. Gov't Code § 825 (West 2015). There are additional requirements but representation by the City is the main requirement.

> enforce the Judgment against the Officers personally, but he has no right to enforce it directly against Vallejo or its property.[183]

The Ninth Circuit also rejected the argument that Vallejo's chapter 9 plan released the Police Officer Defendants of liability because of the lack of any such language in the plan. Notably, though, the panel explicitly declined to weigh in on the outcome in the event a plan included such express language:

> We have not previously addressed the question of whether, in a proceeding to which Section 524(e) does not apply, Section 105 authorizes a bankruptcy court to confirm a plan that effects the adjustment or discharge of the debts of non-debtor third parties. We need not, and do not, answer this question here. Because the Plan does not, by its terms, purport to effect the third-party discharge advocated by the Officers, we do not opine on the power of the bankruptcy court to confirm a hypothetical plan that does so.[184]

That reservation of decision is notable in light of the pending proposed restructuring plan of the City of San Bernardino, also within the Ninth Circuit, that contains express non-debtor release language. The Ninth Circuit decision indicated awareness of San Bernardino's plan and its features:

> While we reserve judgment on the validity of an express third-party release in a Chapter 9 proceeding within our jurisdiction, we observe that at least two large municipalities that have filed for bankruptcy, Detroit and San Bernardino, have included in their proposed plans the express discharge of claims against indemnifiable employees [citations omitted]. Thus, when Vallejo filed the Plan, it was not beyond fathom that it should propose a putative third-party release. Vallejo simply failed to include such a proposal.[185]

This assertion is somewhat ahistorical, as the filing and confirmation of Vallejo's plan preceded the filing of the Detroit and San Bernardino bankruptcies, and the latter case is still pending. Perhaps more significantly, the Ninth Circuit panel's characterization of Detroit, taken alone, could be misleading: as previously discussed, the Detroit bankruptcy court rejected the portion of the plan that would have released non-debtor third parties for section 1983 liability.[186] The Ninth

[183] *Deocampo*, 2016 WL 4698299, at *7.
[184] *Id.* at *8.
[185] *Id.*
[186] *See supra* notes 101-103.

Circuit's Deocampo decision includes a footnote that obliquely acknowledges that outcome, but perhaps too subtly:

> Detroit's proposal of this third-party discharge did not result in its automatic confirmation, underscoring the critical role bankruptcy courts play in adjudicating whether a plan shall be confirmed [citing Detroit decision sustaining section 1983 plaintiffs' objection to the plan].[187]

The Ninth Circuit panel decision also addressed whether the Police Officer Defendants will be able to seek indemnification from Vallejo. The answer was "yes:"

> The Officers will not be required to pay the Judgment out of their own pockets. Our conclusion that the Judgment is against the Officers personally, and not Vallejo, does not relieve Vallejo of the obligation to indemnify the Officers under California law…. Critically, under California law, the event giving rise to the Officers' claim for indemnification is Vallejo's provision of a defense for the Officers, not the alleged injury by the Officers or the plaintiffs' filing of a lawsuit…. Because this triggering event occurred after the discharge, Vallejo's indemnification obligation is a post-petition [sic.] debt that is not subject to adjustment, discharge, or the bankruptcy injunction.[188]

In any event, the Ninth Circuit's refusal to foreclose the possibility of non-debtor releases in municipal bankruptcy plans is undoubtedly significant for the still-pending San Bernardino case, discussed below.

C. City of San Bernardino

San Bernardino filed its chapter 9 petition on August 1, 2012.[189] Its financial troubles led it to reduce police department funding, prompting a representative to tell residents to "[l]ock your doors and load your guns."[190] San Bernardino seeks to impair and discharge police misconduct claims, and the case is still ongoing.

[187] Deocampo, 2016 WL 4698299, at n.14.
[188] Id. at *10. Although the text of the opinion refers to "post-petition," the context indicates that the panel meant post-discharge or post-bankruptcy.
[189] Chapter 9 Voluntary Petition, *In re* City of San Bernardino, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. Aug. 1, 2012), ECF No. 1.
[190] Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1120 (2014) (citation omitted).

San Bernardino filed its Third Amended Plan for the Adjustment of Debts ("the Plan") on May 27, 2016.[191] Under the Plan, which has not yet been approved by the court, General Unsecured Claims in class 13 would receive a "distribution equal to 1%" of a claimant's allowed claim.[192] General Unsecured Claims include all claims unless excluded from the definition in the plan.[193] The class includes litigation claims,[194] which includes pending pre-petition or post-petition lawsuits against San Bernardino that seek monetary damages. Litigation claims include any § 1983 lawsuits against the city pending as of the confirmation date.[195] Thus, by the terms of the Plan, there is little doubt that San Bernardino intends the 1% treatment to apply to claimants who have alleged unconstitutional police misconduct.

Additionally, San Bernardino would assume its executory contract for Excess Liability Insurance with the Big Independent Cities Excess Pool Joint Powers Authority ("BICEP") if necessary to protect the rights of litigant claimants to any insurance proceeds from BICEP to which they are entitled.[196] This contract requires the city to self-insure for the first $1 million of costs, settlements and judgments per claim but provides for any claim exceeding that $1 million up to $9 million of coverage per claim.[197] The Excess Liability Insurance memorandum period

[191] Third Amended Plan for the Adjustment of Debts of the City of San Bernardino, California, *In re* City of San Bernardino, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. July 29, 2016), ECF No. 1880. The disclosure statement was approved on June 16, 2016, paving the way for a hearing on the plan itself.
[192] *Id.* at 27.
[193] *Id*. at 26 ("General Unsecured Claims include all claims except Administrative Claims, Professional Claims, Secured Claims, CalPERs Claims, POB Claims, Class 9 PARS Claims, Convenience Claims, those Claims payable from a Restrictive fund, and those Claims relating to the 1996 Refunding Bonds or the Refunding Certificates of Participation.").
[194] *Id*.
[195] See Third Amended Disclosure Statement with Respect to the Third Amended Plan for the Adjustment of Debts of the City of San Bernardino at 46-47, *In re* City of San Bernardino No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. July 29, 2016), ECF No. 1881.
[196] Third Amended Plan for the Adjustment of Debts of the City of San Bernardino, California at 52, *In re* City of San Bernardino, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. July 29, 2016), ECF No. 1880. San Bernardino will assume the contract with BICEP only if it is an executory contract under § 365 of the Bankruptcy Code. Third Amended Disclosure Statement, supra note 195, at 49. BICEP contends that the contract with the City is executory, and as an executory contract, the City must assume the contract without modification, and approval of assumption is conditioned on a finding that the City cured any defaults and met any adequate assurance requirements. *Id*. at 50-51.
[197] *Id*. at 48-49.

extends from July 1, 2014 to July 1, 2015 and covers claims against employees and the city for acts and omissions.[198] The city and BICEP currently dispute how coverage will be impacted by the city's bankruptcy and the Plan.[199] BICEP contends that litigants cannot make direct claims against BICEP and that BICEP has no obligation to pay the amount of claim exceeding $1 million unless the City fulfills its obligation to pay 100% of the self-insurance amount of $1 million per claim.[200] Because of this dispute, a litigant claimant with a claim in excess of $1 million will be paid 1% of the claim as a class 13 General Unsecured Claim, but further procedures or negotiation will be necessary to determine whether the claimant can recover from BICEP for the claim amount in excess of $1 million.[201] Therefore, a § 1983 claimant may be limited to recovering only its 1% distribution even if the judgment exceeds $1 million.

Instead of permitting litigation against San Bernardino to continue to determine the amount of the litigant's claim and any coverage afforded by the Excess Liability Insurance, the proposed Plan enjoins any suit, action, or other proceeding against the city or an Indemnified Party after the effective date of the Plan.[202] The claim amount is to be determined by alternative dispute resolution procedures.[203] San Bernardino will include an offer to settle the claim in the notice to the claimant after the Plan is confirmed.[204] If the city's initial offer or a revised offer is not accepted or the city rejects the claimant's counter offer, the claim will be resolved through

[198] Appendix of Exhibits in Support of Third Amended Plan and Third Amended Disclosure Statement, , *In re* City of San Bernardino No. 6:12-bk-28006-MJ at 89 (Bankr. C.D. Cal. July 29, 2016) ECF No. 1882-5 (Big Independent Cities Excess Pool Joint Powers Authority Policy).
[199] *See* Third Amended Disclosure Statement, supra note 195, at 50-53.
[200] *Id.* at 51.
[201] *Id*. at 53.
[202] Third Amended Plan, *supra* note 191, at 57.
[203] *Id*. at 53; Third Amended Disclosure Statement, *supra* note 195, at 49. The City may choose not to designate a claim as subject to the ADR procedures but the litigant claimant cannot choose to opt out of the ADR procedures. See Appendix of Exhibits to Disclosure Statement, *supra* note 198, at 25 (ADR Procedures).
[204] Appendix of Exhibits to Disclosure Statement, *supra* note 198, at 26.

mediation, with the city paying half of the mediation fee.[205] If mediation fails, San Bernardino would file an objection to the claim, and the claim would be "administered in accordance with the claims allowance procedure."[206]

San Bernardino's Plan also contains a third-party release provision that, if approved, would expressly broaden the impact of confirmation. It provides that upon plan confirmation, any holder of a claim waives and discharges any and all claims against "indemnified parties."[207] Indemnified parties include all current and former officers and employees entitled to indemnification.[208] As stated in the Disclosure Statement describing the Plan, this provision "has the effect of relieving employees from personal liability on claims that arose within the scope of their employment."[209] San Bernardino's Disclosure Statement says the release is appropriate because the identity of interest between the city and third-party employees is so strong that to permit claims against the employees would significantly undermine the city's rehabilitation.[210] Because California's law requires the city to indemnify its employees, it would be forced to repay the claims obtained against their employees one hundred cents on the dollar, which the city declares it cannot afford. Additionally, San Bernardino points out that any reluctance to approve third-party releases and injunctions is unwarranted in municipal bankruptcies because chapter 9 does not incorporate the statutory provision, section 524(e) of the Bankruptcy Code, often

[205] Third Amended Plan, *supra* note 191, at 50 ("[t]he City will pay for the costs of the mediators that are used in the ADR Procedures"); *but see* Appendix of Exhibits to Disclosure Statement, *supra* note 195, at 33 ("The ADR Procedures also require [claimants] and the City to each pay one-half of the mediation fee.").
[206] Appendix of Exhibits to Disclosure Statement, *supra* note 198, at 29.
[207] Third Amended Disclosure Statement, *supra* note 195, at 124.
[208] *Id*.
[209] *Id.* at 125.
[210] *Id*. at 125-26.

associated with the prohibition on such a release.[211] Indeed, the city notes, chapter 9 expressly extends the stay to protect non-debtor parties during the bankruptcy, as discussed earlier.[212]

If the court confirms a plan containing the proposed non-debtor release, a creditor with a § 1983 lawsuit pending or a judgment against a police officer in his individual capacity likely would be enjoined from continuing litigation or collection.[213] San Bernardino's earlier response to objections to this outcome characterizes its requested relief as business as usual: "[t]here is certainly plenty of precedent for the discharge of civil rights claims in chapter 11 cases, and the discharge of Section 1983 claims in chapter 9 cases was resolved in favor of discharge in the City of Detroit chapter 9 cases."[214]

This filing seems to misconstrue the outcome of the Detroit bankruptcy as applied to civil rights claims.[215] As reviewed earlier, the court in Detroit applied the Sixth Circuit's standard for chapter 11 third-party releases and found it was not met.[216] Although section 524(e) of the Bankruptcy Code does not apply to chapter 9, that statutory distinction did not stop the Detroit court from applying the chapter 11 non-debtor release jurisprudence. The Sixth Circuit non-debtor release standard is more permissive of non-debtor releases than the Ninth Circuit

[211] *Id*. The filing of this document preceded the Ninth Circuit's Deocampo ruling, discussed earlier.
[212] 11 U.S.C. § 922(a).
[213] Some plaintiffs holding judgments for civil rights violations or engaged in pending litigation had filed objections to the Second Amended Plan and Disclosure Statement. Notice of Objection to Adequacy of Second Amended Plan and Amended Disclosure Statement and Vote to Reject, *In re* City of San Bernardino, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. Apr. 4, 2016), ECF No. 1781; Objection to Adequacy of Disclosure Statement and Plan, *In re* City of San Bernardino, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. Apr. 13, 2016), ECF No. 1795. The City's response observes that these objections contain errors of fact and law. Response of City of San Bernardino to Objections to City's Second Amended Disclosure Statement with Respect to Second Amended Plan for the Adjustment of Debts, *In re* City of San Bernardino, No. 6:12-bk-28006-MJ (Bankr. C.D. Cal. Apr. 20, 2016), ECF No. 1814. The remaining objection -- that the third-party release and injunction is not necessary for the rehabilitation of the City – was set to be addressed in later pleadings. *Id*. at 11.
[214] Response of City of San Bernardino to Objections to City's First Amended Disclosure Statement, *supra* note 213, at 5 (citing 11 U.S.C. § 901(a)).
[215] *Supra* Part III.A.
[216] *Supra* notes 100-102.

standard, which does not rely solely on section 524(e) in any event.[217] Requesting such an expansive release of liability, coupled with the extremely low proposed payout, would set a new (low) bar for the treatment of civil rights claims in municipal bankruptcy.[218]

Conclusion and Next Steps

Civil rights lawyers tend not to be familiar with bankruptcy law. Given some cities' attempts to shed liability for police misconduct claims in recent bankruptcy cases, while other cities' police departments are found to have a pattern or practice of unconstitutional and discriminatory activity,[219] that gap in knowledge must be filled.

We wrote this article to provide a doctrinal foundation for the intersection, setting forth the key questions to be asked when the city defendant in a § 1983 action files for bankruptcy. As we have shown, key details of the law remain unsettled. Yet, there is case law support for the proposition that a discharge of debt in bankruptcy can include a release of a city's liability stemming from police misconduct claims. Due to the other requirements associated with municipal bankruptcy, including the eligibility threshold and good faith, it is unlikely that a city could file for bankruptcy solely for the purpose of shedding liability associated with unconstitutional police practices. On the other hand, it is entirely possible that a city facing

[217] *In re* American Hardwoods, 855 F.2d 621, 627 (9th Cir. 1989) (upholding district court conclusion that it lacked jurisdiction and power to enjoin creditor from enforcing state court judgment against non-debtor). In *Deocampo*, the panel cited In re Lowenschuss, 67 F.3d 1394 (9th Cir. 1995) for the same proposition, while acknowledging that the lack of application of section 524(e) to chapter 9 offers a distinction. Deocampo, 2016 WL 4698299, at *8.

[218] In addition to the objections described above, some creditors filed an adversary proceeding asserting that San Bernardino is blocked from discharging civil rights claims and associated attorneys' fees because they stem from a willful and malicious injury. Complaint for Non-Dischargeability of Debt Incurred by Debtor for a Willfull[sic], Mass Violation of Civil Rights and Non-Dischargeability of Fees Incurred Under 42 U.S.C. § 1988, Newberry et al. v. City of San Bernardino, 15-01283 (Bankr. C.D. Cal. Oct. 6, 2015). As explained in Part II, the provision of the Bankruptcy Code that expressly excludes such debts from discharge does not apply to municipalities. The original complaint did not contain a constitutional challenge to section 944 of the Bankruptcy Code but the plaintiffs later sought to raise that issue was well. This dispute seems headed for resolution in summary judgment unless it gets settled as part of the plan process. Stipulation between Newberry Plaintiffs and Defendant City of San Bernardino to Continue the Hearings on the Motion for Summary Judgment and the Motion to Reopen Discovery, Newberry et al. v. City of San Bernardino, 15-01283 (Bankr. C.D. Cal. July 26, 2016), ECF No. 67.

[219] U.S. Dept. of Justice, Civil Rights Division, Investigation of the Baltimore City Police Department, August 10, 2016.

lawsuits for widespread police misconduct is also in dire straits financially and thus far more likely to be eligible for the extraordinary relief offered by the federal bankruptcy system.

Needless to say, a variety of policy implications flow from the treatment of civil rights debts in bankruptcy. An initial list might look as follows:

1. What tools and methods should scholars and advocates use to assess the impact of bankruptcy, or the possibility of bankruptcy, on the frequency and severity of police misconduct and the goals of § 1983?
2. What theories should be used to decide whether claims arising from violations of constitutional rights be treated differently than the range of other types of creditors affected by municipal bankruptcies? In all types of bankruptcies? How should a record of systemic problems be factored into the equation?
3. To what extent is statutory reform necessary to resolve questions about the intersection of § 1983 and the Bankruptcy Code?
4. What mechanisms should be used to ensure civil rights claimants have a seat at the table in financial restructuring negotiations, both inside and outside of bankruptcy?
5. Cities need express permission from states to file for bankruptcy. How can state officials incorporate civil rights objectives into a strategy of debt relief and financial reform?
6. Should police officers ever be entitled to a legal release of liability for civil rights violations through the bankruptcy of their employers, as San Bernardino is requesting? Should any such release be conditioned on financial contributions to the debt restructuring plan by the officers, third party insurance, or others? What if the debt would not have been dischargeable in the police officer's individual bankruptcy because a jury found the police officer's action was not merely negligent as required for § 1983 claims but was also willful and malicious?

We hope scholars and advocates will consider these and other questions as they build on the foundation we have established here.