Navigating Chapter 9 of the Bankruptcy Code

Federal Judicial Center

2017

first printing

Contents

Preface

It is not an easy decision for a municipality to file bankruptcy. The ramifications for the municipality itself, and for its citizens, are vast. When such a decision to file bankruptcy is made, that filing puts a weighty responsibility on the bankruptcy court.

During the past few years, the Judicial Conference Committee on the Administration of the Bankruptcy System has watched with interest the Chapter 9 cases around the country, as well as the developments in Puerto Rico. We found it to be a complicated arena, with many competing concerns and areas with incomplete legislative and rule guidance—all against considerations stemming from the reservation of powers to the states under the Tenth Amendment.

In June 2016, the Bankruptcy Administration Committee determined that additional resources could help courts handling Chapter 9 cases, and so suggested engaging the Federal Judicial Center in the development of a manual. I was named project liaison.

In September 2016, a working group of Chapter 9 experts assembled at the Federal Judicial Center in Washington, D.C., to talk about what information would be most helpful to the courts in handling Chapter 9 cases. The working group included judges, clerks of court, attorneys, financial experts, and academics.

This manual reflects the sense of that meeting, and the hard work that followed that meeting.

The following experts participated and served as consultants on the manual: Judge Thomas B. Bennett (Ret.) (Bailey Glasser LLP); William A. Brandt, Jr. (Development Specialists, Inc.); James Doak (Miller Buckfire); David Dubrow (Arent Fox LLP); Robert M. Fishman (Shaw Fishman); Kristin K. Going (DrinkerBiddle); Katherine B. Gullo (Clerk of Court, Bankr. E.D. Mich.); Judge Shon K. Hastings (Bankr. D.N.D.); Mark S. Kaufman (King & Spaulding LLP); Richardo I. Kilpatrick (Kilpatrick & Associates, P.C.); Judge Christopher M. Klein (Bankr. E.D. Cal.); Martha E. M. Kopacz (Phoenix Management Services); Lawrence A. Larose (Norton Rose Fulbright US LLP); Sharon L. Levine (Saul Ewing LLP); Marc A. Levinson (Orrick, Herrington & Sutcliffe LLP); Vincent J. Marriott III (Ballard Spahr LLP); Dana McWay (Clerk of Court, Bankr. E.D. Mo.); Claude D. Montgomery (Dentons); Judge Neil P. Olack (Bankr. S.D. Miss.); Kevyn D. Orr (Jones Day); Judge Elizabeth L. Perris (Ret.) (D. Ore.);

Judge Gerald E. Rosen (E.D. Mich.); and Judge Alan C. Stout (Bankr. W.D. Ky.).

Additional participants from the Federal Judicial Center were Jason A. Cantone, Denise M. Neary, and Elizabeth C. Wiggins. Participants from the Administrative Office of the U.S. Courts were Elizabeth Abdelmasieh (Court Services Office); Mathew R. Hindman (Judicial Services Office); Karen Kremer (Legislative Affairs Office); Vanessa A. Lantin (Judicial Services Office); Patricia Levy (Office of the General Counsel); Mary Louise Mitterhoff (Chief, Court Services Office); Michele Reed (Chief, Judicial Services Office); and Holly Sellers (Legislative Affairs Office).

Our thanks to the participants are endless.

We also thank others who provided input on the manuscript: Judge Frank J. Bailey (Bankr. D. Mass.); Therese Buthod (Clerk of Court, Bankr. E.D. Okla.); Judge Arthur Gonzalez (Ret.) (N.Y.U. Law School); Prof. Melissa B. Jacoby (U.N.C. School of Law); Matthew Loughney (Clerk of Court, Bankr. M.D. Tenn.); Judge Cynthia A. Norton (Bankr. W.D. Mo.); Judge Steven W. Rhodes (Ret.) (Bankr. E.D. Mich.); Judge Thomas L. Saladino (Bankr. D. Neb.); Susan Thurston (Bankruptcy Clerk of Court, D.R.I.); Jed Weintraub (Clerk of Court, Bankr. N.D. Tex.); Margaret Williams (Federal Judicial Center); and Diane Zech (Clerk of Court, Bankr. D. Neb.).

The Judicial Conference Committee on Federal–State Jurisdiction also supported the effort.

Special acknowledgment is due then-Professor (now Bankruptcy Judge) Michelle Harner. She served as a reporter for the meeting; she prepared the first significant draft of this manual; she reconciled and synthesized competing views; and she developed the final product. Her substantive expertise as well as her quick and meticulous work were the key drivers to keeping this project on task.

Beth Wiggins and Denise Neary of the Federal Judicial Center are also due special thanks for their dedication and professionalism. They identified the key players who should be involved in this process and assembled an extraordinary group of experts; organized the September meeting; helped to process, address, and reconcile feedback on the manuscript through innumerable emails and phone calls; and kept all aspects of the project on a quick timeline. They also developed an online repository of materials that accompanies the

manual. And in doing so, they relied on the guidance and good work of many Center colleagues.

Throughout the process, all of us involved were heartened by the dedication of those working to bring this guide into being. And all in one year's time.

We hope you find this manual useful.

Judge Eduardo C. Robreno
U.S. District Judge, Eastern District of Pennsylvania

Member and Project Liaison
Judicial Conference Committee on the Administration of the Bankruptcy System

I. Introduction

Chapter 9 of the U.S. Bankruptcy Code applies to "municipalities," which the Bankruptcy Code defines as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40). Chapter 9 is a critically important but relatively untested area of bankruptcy law. Its primary objectives of providing a breathing spell for, and adjusting the debts of, a distressed municipality are familiar to bankruptcy professionals, but its substance and process differ in meaningful ways from other plan chapters under the Bankruptcy Code. These differences, the unique circumstances of each Chapter 9 case, and the dearth of statutory and case-law guidance can make navigating a Chapter 9 case somewhat challenging for all parties, including the judge and the clerk of court.

A. Goals for This Manual

This manual strives to provide a clearer path for judges and clerks of court handling a Chapter 9 case. The manual outlines the statutory requirements and processes that apply in any Chapter 9 case and provides examples of relevant cases and resources. It does *not* provide an exhaustive listing of the applicable case law or commentary.

Readers should recognize that many aspects of Chapter 9 practice are untested or not clearly established by statute or precedent. This manual does not attempt to fill those gaps or clarify the law in any substantive way.

The manual cannot resolve, and does not attempt to resolve, the open questions that may exist in Chapter 9 practice. It is intended to provide useful information to assist judges in developing their own answers and approaches to these questions.

The manual aims to sensitize judges and clerks of court to important considerations by identifying key issues and highlighting where ambiguity or uncertainty exists and to provide (1) probative questions for judges to evaluate as they plan for, and work through, a Chapter 9 case, and (2) reference resources, including representative case cites and commentary addressing the issues.

B. Some Chapter 9 Basics

There are only a small number of Chapter 9 cases, and those are not concentrated in any one district. Seventy-eight Chapter 9 cases were

filed during FY 2008 through FY 2016 (see the list of cases in Appendix B). This number includes five reopened cases and six cases that appeared to be filed improperly under Chapter 9 by debtors appearing pro se. The 78 cases were filed across 30 different districts and involved 44 different judges, including at least one district in which municipalities are not authorized by state law to file bankruptcy.

The varieties of Chapter 9 cases compound the futility of prescribing a single approach to their management. Cities, townships, and counties of various sizes filed 15 of the FY 2008 through FY 2016 Chapter 9 cases, medical-related entities (e.g., county hospitals, hospital authorities, and districts) filed another 18 filed, and a variety of political subdivisions (e.g., sanitary and improvement districts, water districts, property owners improvement districts, off-track betting) filed the remaining cases.

It is thus incumbent upon each judge to have a basic understanding of Chapter 9 issues and to be prepared to develop an overarching approach to resolving the Chapter 9 issues unique to any case that is assigned to him or her.

C. Structure of Manual

The manual is organized as follows:

- Part II summarizes the history of Chapter 9. This section discusses the constitutional challenges to the original municipal bankruptcy laws enacted in 1934 and the structural and constitutional issues analyzed by lower courts in the context of Chapter 9.

- Part III presents an overview of the Chapter 9 process, contrasting it with the Chapter 11 process and providing several primers on issues unique to a Chapter 9 case. This section includes basic information on matters such as municipal accounting, the municipal bond market, and public pension obligations.

- Part IV identifies several key administrative matters for the judge and the clerk of court in a Chapter 9 case. Some of these issues can be addressed very early in (or even prior to) the Chapter 9 filing; others will permeate the Chapter 9 case.

- Part V explains what transpires after the filing of a Chapter 9 petition and the appointment of the bankruptcy judge. It focuses not only on the legal steps required at the beginning of the case and the eligibility determination, but also on questions, issues, and information the judge may want to consider as the case starts down the Chapter 9 path.

- Part VI discusses the administration of the case—i.e., what happens after the order for relief but before the plan confirmation process. The kinds of matters that might be brought before the judge during this period are more limited than in a Chapter 11 case, but issues may still develop and their resolution may affect plan formulation and confirmation.

- Part VII covers the end of a case: it examines the plan, the disclosure statement, and the confirmation process. It includes information on postconfirmation jurisdiction and implementation issues. It also includes information on modification of the plan or, if the debtor is unable to confirm a plan within a reasonable time, dismissal of the case.

- Part VIII is devoted to smaller municipal cases and cases involving special purpose entities or instrumentalities of a state. Although the general rules and issues discussed in the previous parts of this manual also apply, these cases can present factors and considerations unique to the size of, and stakeholders in, these cases.

- Part IX is devoted to larger municipal cases. Although the general rules and issues discussed in the previous parts of this manual also apply, these cases can present factors and considerations unique to the size of, and stakeholders in, these cases.

- Part X summarizes key takeaway points for judges and clerks of court handling Chapter 9 cases.

The manual is accompanied by an online repository of Chapter 9 reference materials, available on the Federal Judicial Center's intranet site (http://fjc.dcn) and its Internet site (http://www.fjc.gov). The repository contains information about how to access and contribute materials.

II. History of Chapter 9

Prior to the 1930s, federal bankruptcy laws did not address municipal bankruptcy. The widespread financial distress associated with the Great Depression, however, caused many cities, counties, and townships to default on their financial obligations. The insolvency powers of the states and, in turn, their municipalities proved inadequate to address these issues, in large part because of the restriction placed on states by the Contract Clause of the U.S. Constitution. Specifically, the Contract Clause provides, "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. Congress is not subject to the Contract Clause, and it is granted the power to enact national bankruptcy laws under the Bankruptcy Clause. U.S. Const. art. I, § 8, cl. 4. Nevertheless, prior to the early 1930s, federal legislation of municipal bankruptcy was untested. Municipal bankruptcy legislation also raised potential issues under the Tenth Amendment, which provides, "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. 10. For a thoughtful review of the constitutional and federalism issues potentially involved in municipal bankruptcies, see, e.g., Andrew B. Dawson, *Beyond the Great Divide: Federalism Concerns in Municipal Insolvency*, 32 Harv. L. & Pol. Rev. 31 (2017); Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 Yale J. on Reg. 55 (2016); Hon. Thomas B. Bennett, *Consent: Its Scope, Blips, Blemishes, and a Bekins Extrapolation Too Far (Keynote Address),* 37 Campbell L. Rev. 3 (2015).

Congress enacted its first municipal bankruptcy provisions in 1934, adding Chapter IX to the 1898 Bankruptcy Act. The 1934 legislation contemplated a voluntary bankruptcy filing by a municipality, with the contemporaneous filing of a plan of adjustment supported by a fixed threshold of certain of the debtor's creditors. The legislation also set forth confirmation standards for the plan and stated that nothing in the legislation should "be construed to limit or impair the power of any State to control, by legislation or otherwise, any political subdivision thereof in the exercise of its political or governmental powers, including expenditures therefor, and including the power to require the approval by any governmental agency of the State of the filing of any petition hereunder and of any plan of

readjustment." Act of May 24, 1934, Pub. L. No. 73-251, § 80(k), 48 Stat. 798, 802–03.

A group of bondholders successfully challenged the 1934 legislation in *Ashton v. Cameron County Water Improvement District No. 1*, 298 U.S. 513 (1936). In *Ashton*, a majority of the U.S. Supreme Court held that the 1934 legislation violated core federalism principles by, among other things, impeding state sovereignty and diminishing the protections of the Contract Clause. The Court explained:

> If obligations of states or their political subdivisions may be subjected to the interference here attempted, they are no longer free to manage their own affairs; the will of Congress prevails over them; although inhibited, the right to tax might be less sinister. And really the sovereignty of the state, so often declared necessary to the federal system, does not exist. . . .
>
> The Constitution was careful to provide that 'no State shall . . . pass any . . . Law impairing the Obligation of Contracts.' This she may not do under the form of a bankruptcy act or otherwise. . . . Nor do we think she can accomplish the same end by granting any permission necessary to enable Congress so to do.

Ashton, 298 U.S. at 531 (citations omitted).

Notably, the dissent in *Ashton* also focused on the Contract Clause. Justice Cardozo explained: "The Constitution prohibits the states from passing any law that will impair the obligation of existing contracts, and a state insolvency act is of no avail as to obligations of the debtor incurred before its passage. . . . Relief must come from Congress if it is to come from any one." *Id.* at 534 (J. Cardozo, dissenting) (citations omitted). Most commentators view the dissent in *Ashton* as a more practical approach to allowing distressed municipalities an opportunity to restructure their debt obligations while respecting core federalism principles.

In 1937, Congress responded to *Ashton* by passing legislation addressing municipal bankruptcy in a new Chapter X to the 1898 Bankruptcy Act. The 1937 legislation was similar to the 1934 legislation in several key respects. It permitted only voluntary municipal bankruptcy filings; it required the debtor to file a plan of adjustment (actually called a "plan of composition" under the 1937 Act) supported by creditors holding at least 51% of the kind of debt affected

by the plan; and it provided creditors with notice of, and an opportunity to vote on, the plan of adjustment. In fact, many commentators find little, if any, substantive distinctions between the two pieces of federal legislation. *See, e.g.*, Clayton P. Gillette & David A. Skeel, Jr., *Governance Reform and the Judicial Role in Municipal Bankruptcy*, 125 Yale L.J. 1150, 1173–77 (2016). Nevertheless, the Supreme Court upheld the 1937 legislation in *United States v. Bekins*, 304 U.S. 27 (1938). The Court focused on the long history of compositions under federal bankruptcy law and the consensual nature of the 1937 legislation. It concluded:

> In the instant case we have co-operation to provide a remedy for a serious condition in which the States alone were unable to afford relief. Improvement districts, such as the petitioner, were in distress…. The natural and reasonable remedy through composition of the debts of the district was not available under state law by reason of the restriction imposed by the Federal Constitution upon the impairment of contracts by state legislation. The bankruptcy power is competent to give relief to debtors in such a plight and, if there is any obstacle to its exercise in the case of the districts organized under state law it lies in the right of the State to oppose federal interference. The State steps in to remove that obstacle. The State acts in aid, and not in derogation, of its sovereign powers.

Bekins, 304 U.S. at 53–54.

Lower courts generally have acknowledged the constitutionality of municipal bankruptcy laws since *Bekins*. *See, e.g.*, *In re* City of Detroit, Mich., 504 B.R. 97 (Bankr. E.D. Mich. 2013); *In re* Jefferson County, Ala., 474 B.R. 228 (Bankr. N.D. Ala.), *aff'd*, 2012 WL 3775758 (N.D. Ala. 2012); *In re* City of Cent. Falls, R.I., 468 B.R. 36 (Bankr. D.R.I. 2012); *In re* City of Harrisburg, Pa., 465 B.R. 744 (Bankr. M.D. Pa. 2011). The Supreme Court also addressed the general application of Chapter 9 in *Puerto Rico v. Franklin California Tax-Free Trust*, 136 S. Ct. 1938 (2016) (holding that Puerto Rico is a state for purposes of § 903 of the Bankruptcy Code and that § 903(1) preempts the Puerto Rico Public Corporation Debt Enforcement and Recovery Act). The substance of the statute has changed some over the years. The statutory location of municipal bankruptcy in the federal legislation also has changed. In 1938, the Chandler Act redes-

ignated it as Chapter IX of the 1898 Bankruptcy Act. Congress then revamped municipal bankruptcy laws in 1976 and carried those laws forward in the 1978 Code, reenacting them as Chapter 9. For additional discussion of the history of municipal bankruptcy laws, see, e.g., Hon. Thomas B. Bennett, *Consent: Its Scope, Blips, Blemishes, and a Bekins Extrapolation Too Far (Keynote Address),* 37 Campbell L. Rev. 3 (2015).

III. Overview of the Chapter 9 Process

Chapter 9 incorporates familiar elements of federal bankruptcy law, including an automatic stay to provide a breathing spell for the debtor and a plan process to enable the debtor to adjust its debt obligations. As suggested by its history, however, a Chapter 9 case is different in certain key respects from other kinds of bankruptcy cases. The primary differences relate to the identity of the debtor and the federalism issues discussed at Part II. These differences are perhaps most evident in §§ 903 and 904.

Section 903, Title 11 of the U.S. Code, acknowledges the continued authority of the state over its municipalities (limited only with respect to nonconsensual compositions), providing:

> This chapter does not limit or impair the power of a State to control, by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental powers of such municipality, including expenditures for such exercise, but—
> (1) a State law prescribing a method of composition of indebtedness of such municipality may not bind any creditor that does not consent to such composition; and
> (2) a judgment entered under such a law may not bind a creditor that does not consent to such composition.

11 U.S.C. § 903. Section 904 then limits the powers of the judge, explaining:

> Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—

(1) any of the political or governmental powers of the debtor;
(2) any of the property or revenues of the debtor; or
(3) the debtor's use or enjoyment of any income-producing property.

11 U.S.C. § 904. Together, §§ 903 and 904 provide general guidance about the roles of the state, the debtor, and the judge in any Chapter 9 case. These sections also inform many of the other issues that arise in a Chapter 9 case, a number of which are addressed in this part of the manual. The meaning and application of these sections and their relationship to other sections of Chapter 9 are subject to various interpretations.

A. The Role of the Bankruptcy Code in Chapter 9 Cases

It is important to check any assumptions about how a bankruptcy case works against the sections of the Bankruptcy Code applicable in Chapter 9 cases. For example, a municipal debtor cannot liquidate under the Bankruptcy Code. Certain kinds of municipal debt (i.e., pledged special revenues) are not subject to the Chapter 9 automatic stay (11 U.S.C. § 922(d)) and the automatic stay is expanded to protect certain third parties (11 U.S.C. § 922(a)(1)). Perhaps most notably, Chapters 3 and 5 of the Bankruptcy Code do not apply wholesale in the Chapter 9 context. Rather, § 103(f) provides, "[e]xcept as provided in section 901 of this title, only Chapters 1 and 9 of this title apply in a case under such chapter 9." Section 901, in turn, identifies specific sections and portions of sections of Chapters 3, 5, and 11 that apply in Chapter 9 cases. The following charts summarize the interplay between the Bankruptcy Code and Chapter 9.

Chart 1: Sections of the Bankruptcy Code Applicable in Chapter 9

This chart shows the key Bankruptcy Code sections incorporated in § 901(a); a complete list is provided at 11 U.S.C. § 901(a).

Applicable Chapter 3 Sections	Applicable Chapter 5 Sections	Applicable Chapter 11 Sections
Section 301(a)–(b), commencement of the case and the order for relief; but see § 921(c)–(d), modifying the timing of the order for relief	Section 501, filing of proofs of claims or interests	Sections 1102–1103, relating to committees
Section 333, appointment of patient care ombudsman	Section 502, allowance of claims or interests	Section 1109, the right to be heard
Section 344, immunity from self-incrimination	Section 503, allowance of administrative expenses	Section 1111(b), relating to claims and interests
Section 347(b), unclaimed property	Section 504, sharing of compensation	Sections 1122–1129, either in their entirety or parts thereof, relating to the contents of the plan and the plan and confirmation process
Section 349, effect of case dismissal	Section 506, determination of secured status	Sections 1142(b)–1145, postconfirmation matters
Section 350(b), reopening a case	Section 507(a)(2), administrative expense priority	
Section 351, disposal of patient records	Section 509, claims of codebtors	

cont'd

Chart 1: Sections of the Bankruptcy Code Applicable in Chapter 9 *(continued)*

Applicable Chapter 3 Sections	Applicable Chapter 5 Sections	Applicable Chapter 11 Sections
Section 361, adequate protection	Section 510, subordination	
Section 362, the automatic stay; but see § 922 (which both enlarges and narrows the scope of the stay)	Section 524(a)(1)–(2), the effect of discharge	
Section 364(c)–(f), obtaining credit	Sections 544 to 562 (except §§ 549(b), 554, and 558)	
Section 365, executory contracts and unexpired leases		
Section 366, utility service		

Chart 2: Sections of the Bankruptcy Code Not Applicable in Chapter 9

This chart shows the key Bankruptcy Code sections that are *not* incorporated in § 901(a). In addition, § 901(a) incorporates only parts of some key Code sections identified in Chart 1.

Chapter 3 Sections	Chapter 5 Sections	Chapter 11 Sections
Sections 327–331, professionals and compensation; but see § 943(b)(3), relating to payment of services and expenses	Section 521 duties including schedules and statements of affair	Section 1104, relating to the appointment of a trustee or examiner
Section 341, meeting of creditors	Section 541, definition of property of the estate is not applicable in Chapter 9 (defined in § 902(1) as "property of the debtor")	Section 1107, concerning the rights, powers, and duties of the debtor in possession
Section 342, notice; but see § 923		Section 1112, relating to conversion or dismissal; but see § 930
Section 364(a)–(b), obtaining credit		Section 1113, relating to the rejection of collective bargaining agreements (*note:* § 365 may apply; see Part VI.C)
		Section 1114, relating to the payment of insurance benefits to retired employees (*note:* § 365 may apply; see Part VI.C)

B. The Role of the Chapter 9 Debtor

The debtor in a Chapter 9 case plays a pivotal role in the direction and outcome of the case. The prominence of the debtor stems, in part, from the constitutional limitations on the role of the judge and other parties in the case. These limitations are described at Parts II and III.C. The Chapter 9 debtor can continue to use its assets, pay its obligations, and manage its affairs with minimal intervention by the judge or creditors. As discussed at Part VI.C, the debtor does not need court approval for most postpetition decisions. The primary action by the debtor that is subject to creditor review and court approval is the debtor's plan of adjustment, although only the debtor may file or modify a plan. In addition, as discussed at Part V.F, the debtor may seek court approval or creditor support of various decisions at different points in the Chapter 9 case.

C. The Role of the Judge

The role of the judge in a Chapter 9 case is different than in other bankruptcy cases. As discussed above, § 904 of the Bankruptcy Code specifically precludes the judge from interfering with the debtor in ways that would be permissible in, for example, a Chapter 11 case. The Chapter 9 case also generally proceeds with less oversight from, and proceedings before, the judge. These differences stem in large part from the reservation of powers to the states under the Tenth Amendment and the delicate balance struck by Congress in enacting Chapter 9. In general, the judge can decide matters relating to the petition, the plan of adjustment, and the implementation of the plan. The debtor and creditors also may ask the judge to determine other matters traditionally within the judge's purview in a bankruptcy case, such as the rejection of executory contracts. It is important to recognize that different perspectives exist concerning the appropriate role of the judge in a Chapter 9 case, and judges have adopted different approaches to this particular issue. For cases presenting different approaches, see the related documents in the online repository.

D. The Role of the State

The state may play an important role in a Chapter 9 case, either directly or indirectly. First and foremost, as discussed at Part V.C, a state must expressly authorize its municipalities to file a bankruptcy

case. Second, "representatives of the state in which the debtor is located may intervene in a chapter 9 case with respect to matters specified by the court." Fed. R. Bankr. P. 2018(c). Moreover, the state's support may assist the debtor in developing and confirming a feasible plan of adjustment from both a financial and a political perspective.

Each state and each judge may approach the state's role in a Chapter 9 case differently. Some states may want more involvement in the process than others, and judges may perceive the value of state involvement differently in different cases. In many cases, the state may be an essential component of the legal and political mix in a Chapter 9 case. Judges may benefit from considering earlier rather than later in the case the role of the state and the value to a collaborative process among the state, the debtor, and other stakeholders. For cases presenting different approaches, see the related documents in the online repository.

Finally, it is important to remember the prominent role of state law in a Chapter 9 case. State and local rules and regulations continue to apply to the debtor and its operations, both postpetition and postconfirmation. A comprehensive review of potentially applicable state and local rules and regulations is beyond the scope of this manual, but a list of potential resources on these issues is included in the online repository.

E. Other Major Stakeholders

A Chapter 9 case involves some stakeholders that also appear in other kinds of bankruptcy cases, including lenders, bondholders, lessors, employees, retirees, trade creditors, and judgment creditors. These familiar stakeholders may, however, present differently in a Chapter 9 case. For example, municipal bonds are different than private bond issuances in several key respects and may involve a bond insurer (see Part III.F). The employees may include those who work for the police department, the fire department, and other service providers that are critical to the debtor's operations in very real, but less substantially economic ways. Accordingly, as discussed at Part III.E, it is important to understand the scope, nature, and interests of even common stakeholders early in the Chapter 9 process.

A Chapter 9 case also implicates the interests of others who may not otherwise be involved in the bankruptcy process. For example, although most Chapter 11 entity debtors have a board of directors

or similar governing body, the governance structure of a Chapter 9 debtor may be very different, and those governing the Chapter 9 debtor continue to have a prominent role in its operations and in the debt adjustment plan process. In addition, the governing body of a Chapter 9 debtor likely is an elected body, which introduces different dynamics into the process. A Chapter 9 case also typically has a broad and significant impact on individuals living within the jurisdiction of the debtor or who receive services from and pay taxes, fees, and other assessments to the debtor. Judges and debtors have taken different approaches to the involvement of public citizens in the Chapter 9 process. For cases presenting different approaches, see the related documents in the online repository. For a discussion of parties in interest and standing in Chapter 9 cases, see Part V.E.

F. Key Differences Between Chapter 9 and Chapter 11 Cases

The preceding sections discuss differences in the application of the Bankruptcy Code, the role of the judge, and the major stakeholders in Chapter 9 cases. This section briefly summarizes other key differences that relate more to the mechanics and substantive issues that may arise in a Chapter 9 case. A table comparing the key differences between Chapter 9 and Chapter 11 is included at Appendix A.

1. Political Aspects of the Case

The public nature of a Chapter 9 debtor often affects the dynamics of the case, as well as the discourse, negotiations, and ultimate outcome in the case. Moreover, elected officials often approach problems from a political perspective rather than the business-driven perspective that judges see in Chapter 11 cases. Although the judge is not involved in any of the political decisions made by or regarding the debtor, those decisions have consequences for the case and for the parties appearing before the judge. An understanding of the political process underlying the debtor's rehabilitation efforts may assist the court in resolving issues brought to its attention. Such an understanding also may help the judge identify the parties that need to be involved in the process and the appropriate time for their involvement. Again, different judges approach these matters differently, but all judges should be sensitive to the political and very public nature of the Chapter 9 process.

2. Municipal Accounting

As in any bankruptcy case, a judge needs to understand the debtor's finances and the contours of the proposed plan of adjustment. As such, a judge should recognize at the outset that municipal finance is different than that used in the private sector. A comprehensive review of municipal finance is beyond the scope of this manual. Nevertheless, the following summarizes certain aspects of municipal finance to try to sensitize judges to potential issues in the Chapter 9 case. In addition, a list of resources on these issues is in the online repository.

- *General Guidance.* The Governmental Accounting Standards Board (GASB) sets the generally accepted accounting principles (GAAP) for governmental entities. However, many accounting methods used for commercial enterprises are nonapplicable or nonexistent in the government accounting world. For more information on GASB, see www.gasb.org. Although state and local governments are not required to follow GASB recommendations, many public entities may have an obligation to follow GAAP under their respective state constitutions, regulations, or applicable enabling legislation. Accordingly, GASB may guide public entity accounting, but there is much more latitude in public sector than there is in the private sector for financial reporting. In addition, state or local law may require public entities to present a variety of different kinds of financial information—such as budget-to-actual financial information, multiyear financial plans, and capital plan—which may be in addition to, or in lieu of, GAAP accounting.
- *Basic Presentation of Financial Information.* In general, governmental financial information is reported on both a government-wide basis and a fund-specific basis. The concept of "funds" is unique to a governmental accounting and generally breaks down into governmental, proprietary, and fiduciary funds. For a description of these kinds of funds, see www.gasb.org/cs/ContentServer?pagename=GASB/GASBContent_C/UsersArticlePage&cid=1176156735732. For a discussion of fund accounting in the context of a Chapter 9 case, see *In re Jefferson County, Ala.*, 503 B.R. 849 (Bankr. N.D. Ala. 2013) (examining the accounting treatment of operating ex-

penses incurred by municipality). A typical municipality will have (1) a general fund that will capture most of the entity's activities and (2) many specialized funds that reflect a variety of specialized government activities. General fund reporting is often presented on a full accrual basis, with proprietary and fiduciary fund reporting being presented on an accrual or modified accrual basis. Cash basis accounting generally is not used.

- *Budgeting.* Governments often use different approaches for budgeting than they do for financial reporting. An annual budget often includes both recurring revenues and expenses as well as one-time and capital expenditures. Appropriations, which are typically the way in which a budget translates to spending, often cover more than the single year in which financial results are reported. Governmental entities often have disjointed reporting around budget-to-actual variances and cash-flow-to-general-ledger reconciliations, that is much less frequent than that seen with commercial enterprises.

- *Comprehensive Annual Financial Report.* A good source of information on a municipality's financial health is its comprehensive annual financial report (CAFR). The CAFR has three basic components: an introduction, financial data, and statistical data. Although a municipality is not required to prepare a CAFR, most do. For additional information on CAFRs, see www.gfoa.org/coa.

Judges need to be sensitive to the variations associated with government accounting as well as the likelihood that financial information will be less timely and more incomplete than what is typical in commercial cases.

3. Municipal Bonds

Most governmental entities meet at least some portion of their budgetary needs through the municipal bond market. Governmental entities generally can issue bonds only for a public purpose, and most municipal bonds are exempt from federal taxation under the Internal Revenue Code. Notably, a municipal bond may be exempt from federal taxation, but taxable by the state.

Governmental entities generally issue one or both of two kinds of municipal bonds: general obligation bonds and revenue bonds. In its simplest form, this dichotomy breaks down as follows:

- *General obligation bonds* are typically not secured obligations in the traditional sense. There is generally no specific revenue stream or other collateral backing a general obligation bond. Rather, general obligation bonds are backed by the "full faith and credit" of the issuer—e.g., a pledge by the issuer to use its ability to tax its citizens to repay the bonds. Notably, there are multiple variations of general obligation bonds, including UTGOs and LTGOs, described below. Moreover, general obligation bonds may be secured by a revenue source, restricted funds, or a statutory lien. The specific terms of any bond issuance depend on, among other things, the indenture language and applicable state or local law.
- *Revenue bonds*, on the other hand, are generally backed by the revenues generated from a specific project or revenue source—e.g., the revenue generated by a public transit system. Revenue bonds may be secured by a pledge of the specified revenues. Such bonds, in turn, may be characterized as debt secured by a lien on special revenues under § 927. The Bankruptcy Code defines the term "special revenues" in § 902(2), and not all revenue bonds necessarily qualify as special revenue bonds or as secured obligations. These issues frequently turn on the facts of the particular case and the terms of the particular bond issuance. For discussions concerning issues particular to special revenue bonds in Chapter 9 cases, see Parts VI.A, VI.C, VI.D, and VII.D. In addition or as an alternative to a lien on special revenues, some bonds are secured by a statutory lien on certain revenue streams of the municipality (for example, state aid). For a discussion concerning issues particular to statutory liens in Chapter 9 cases, see Part VI.C.

Municipal bonds may raise a number of issues in a Chapter 9 case. For example, bondholders have argued that general obligation bonds supported by the full faith and credit of the governmental entity *and* its unlimited *ad valorem* taxing power (generally called an "unlimited tax general obligation bond" or "UTGO") create a pledge by the governmental entity to raise funds to repay the bonds through

property taxes. Bondholders, in turn, have asserted a lien in *ad valorem* taxes raised by the governmental entity under these circumstances. (*Note:* A governmental entity's ability to repay obligations from *ad valorem* taxes may be capped or limited by applicable law—generally called a "limited tax general obligation bond" or "LTGO"—or the bonds may not invoke the governmental entity's *ad valorem* taxing powers. These bonds often are considered differently than bonds with an obligation to use unlimited *ad valorem* taxing powers for repayment.) The nature and extent of general obligation bonds supported by an unlimited *ad valorem* taxing power was raised, but settled by the parties, in the *Detroit* Chapter 9 case. Judges need to be sensitive to potential issues concerning the secured or unsecured status of municipal bonds.

In certain instances, applicable law may require voter approval of the issuance of general obligation bonds, but generally no such voter approval is required for revenue bonds. A governmental entity also may issue bonds (typically revenue bonds) on behalf of a quasi-public, or even private, entity such as a hospital. This kind of revenue bond in which the governmental entity (often called the "conduit issuer") serves as a conduit for the quasi-public or private entity (often called the "conduit borrower") must satisfy certain requirements to maintain a tax-exempt status. Also, in most conduit issuances, the governmental entity is not directly or indirectly obligated on the bond. For additional information on conduit issuances, see, e.g., www.sec.gov/investor/alerts/municipalbondsbulletin.pdf; www.oregon.gov/treasury/Divisions/DebtManagement/Documents/OBEC/2%20-%20Financing%20Team%20-%20Municipal%20Bond%20Specialists.pdf.

Governmental entities are exempt from most federal securities laws, including the requirement that the issuer prepare and receive the Securities and Exchange Commission's approval of a prospectus for distribution to investors prior to any public sale of bonds. Governmental entities generally produce an official statement in connection with bond issuances. As with any entity issuing securities, governmental entities are subject to the antifraud provisions of federal securities laws. Municipal bonds also are subject to rules established by the Municipal Securities Rulemaking Board (MSRB), which is not a governmental unit, and the enforcement of these rules by the Financial Industry Regulatory Authority (FINRA). In addition, SEC Rule

15c2-12 requires certain ongoing disclosures to MSRB regarding municipal bonds. *See* www.msrb.org/msrb1/pdfs/SECRule15c2-12.pdf.

Historically, private insurance companies insured the principal and interest due on municipal bonds. The issuer paid for this insurance, which enhanced the ratings of the bonds and thus lowered the interest rate. The insurance policies generally obligate the insurance company to cover any missed payments but do not impose an obligation to pay off the bonds upon a missed payment (i.e., the insurance cannot be accelerated without the consent of the insurer). Moreover, agreements entered into simultaneously with the insurance policies generally give the insurance companies control over the remedies available upon a default by the issuer, sometimes explicitly including any voting rights associated with the claims of the bondholders in a Chapter 9 case. This practice applies to many outstanding municipal bond issuances, but this trend may change in the future. The number of private insurers for the municipal bond market has diminished significantly, as many of these insurers encountered financial difficulties of their own. If a municipal bond issuance is insured, the private insurance company may pay the bondholders when the debtor defaults, making the insurer the real party in interest in any Chapter 9 case. This scenario may create interesting subordination issues.

General obligation and revenue bonds may present unique challenges in a Chapter 9 case. Some of these issues are addressed at Parts V.F (potential conflicts involving bondholders), VI.A (discussing the automatic stay and special revenue bonds), VI.C (discussing special issues with special revenue bonds and statutory liens), VI.D (discussing avoidance actions and special revenue bonds), and VII.D (discussing confirmation issues with respect to special revenue bonds).

4. Restricted Funds and Payment of Expenses

A municipality may be required by applicable nonbankruptcy law to use certain "restricted," "limited use," or "enterprise" funds for identified purposes. For example, if the municipality assessed a tax for the construction of a new project, applicable nonbankruptcy law may require that the municipality use those tax revenues only for that particular project. Although a municipality may, in certain circumstances, be permitted to use restricted funds in a pooled account for other purposes during an accounting period if sufficient revenue

is projected in the general obligation or other fund to cover such expenses, these matters are typically dependent on local law and may be subject to dispute or uncertainty. There is generally no dispute, however, that federal bankruptcy law cannot override any such applicable state or local law or otherwise allow a municipality to use restricted funds for unauthorized purposes. *See, e.g., In re* Sanitary & Improvement Dist. No. 7 of Lancaster Cty., Neb., 96 B.R. 967, 972 (Bankr. D. Neb. 1989) ("The Code does not override state law concerning the use [a Chapter 9] debtor may make of its property."); *In re* City of San Bernardino, Cal., 499 B.R. 776, 789 (Bankr. C.D. Cal. 2013). An open issue is how courts should view bondholders' rights in restricted funds for determining the nature of their claims.

5. Commencement of the Case

A Chapter 9 case must be filed by the municipality and must be voluntary. A municipality must meet the statutory elements of § 109(c) to be eligible for an order for relief. A Chapter 9 debtor does not file the typical schedules of assets and liabilities and statement of financial affairs. Rather, it files only a list of creditors under § 924, and any claim listed is deemed a proof of claim under § 501, unless it is listed as contingent, disputed, or unliquidated. 11 U.S.C. § 925. Finally, § 923 requires publication of the notice of commencement in compliance with that section. Additional information is provided at Parts IV.C and V.A.

6. Oversight of the Case

As is the role of the judge, the role of the U.S. trustee or bankruptcy administrator (in Alabama and North Carolina) is greatly limited so as not to infringe on the powers of the states. The U.S. trustee or bankruptcy administrator has no formal oversight role in the case. It is, however, responsible for appointing a creditors' committee or other committee in the case. Notably, the U.S. trustee or bankruptcy administrator may not appoint a committee until after the judge determines the municipality's eligibility to be a debtor and enters the order for relief. Additional information is provided at Parts III.C and V.

7. Creditors' Committees

General unsecured creditors' committees have rarely been formed in Chapter 9 cases. A major reason is that the debtor is not obligated to pay the fees of the committee. In addition, most creditor groups are well organized. Some cases have, however, involved committees. For example, retiree committees have been formed in several cases with the debtor voluntarily agreeing to pay the fees.

8. No Trustee, Examiner, or Receiver

As noted at Part III.A, § 1104 is not applicable in Chapter 9 cases. Accordingly, except in the limited context of avoiding powers discussed at Part VI.D, the judge lacks the authority to appoint a trustee or examiner in a Chapter 9 case. In addition, the judge may not appoint a receiver in a Chapter 9 case under §§ 105(b) and 103(f).

9. No Liquidation or Conversion

A Chapter 9 case may not be converted to a case under another Chapter of the Bankruptcy Code, and the debtor may not be forced to liquidate its assets in the Chapter 9 case. *See, e.g.,* Silver Sage Partners, Ltd. v. City of Desert Hot Springs (*In re* City of Desert Hot Springs), 339 F.3d 782, 789 (9th Cir. 2003) ("Chapter 9 makes no provision for conversion of the case to another chapter or for an involuntary liquidation of any of the debtor's assets."). *See also In re* City of Detroit, Mich., 504 B.R. 97, 147 (Bankr. E.D. Mich. 2013); *In re* Richmond Unified School Dist., 133 B.R. 221 (Bankr. N.D. Cal. 1991). These limitations stem, in part, from the constitutional issues discussed at Part II and § 904 of the Bankruptcy Code. Accordingly, a Chapter 9 case can end in one of two ways: a confirmed plan of adjustment or a dismissal.

10. Pension and Labor Issues

One significant role of a municipality is as an employer to the many individuals who serve it in one way or another. For example, they may be members of the police, fire, or transportation districts; teachers in secondary or higher education institutions; or health care providers. These employees may participate in a defined benefit plan or a defined contribution plan, and they may be entitled to other postemployment benefits ("OPEB") such as health care.

Many public employees participate in defined benefit plans, in which the plan sponsor—i.e., the state or local government—promises a specified pension payment to each participating employee that is "typically determined by a formula based on the employee's salary history and years of service." William G. Gale & Aaron Krupkin, *Financing State and Local Pension Obligations: Issues and Options*, at 2, July 2016 (discussing basic issues with state and local pension plans), *available at* www.brookings.edu/wp-content/uploads/2016/07/PB-Pension-shortfalls-and-SL-budgets.pdf. A trust holds the funds dedicated to paying pension obligations under defined benefit plans, which primarily consists of contributions by the employer, perhaps the employees (levels of employee contributions vary by municipality), and investment returns. *Id.* at 2–3. If the level of contributions lags behind increases in benefits or longevity and/or if investment returns are depressed, the municipality's pension plan may lack the funds necessary to satisfy all anticipated obligations under the plan.

Municipal pensions come in a variety of forms, with each having implications for restructuring and for attracting and retaining skilled employees. Some municipalities may participate in a multiemployer plan; other municipalities may have their own plans. Some municipalities have different "tiers" of pension plans, depending on the start date of the employee. Some municipal plans are defined benefit plans, others are defined contribution plans. A state and its municipalities may participate in a single pension plan or the municipality may have its own plan.

Each structure presents potential issues. For example, a state and its municipalities may participate in a multiemployer defined benefit pension plan that is administered as either an agent plan or a cost-sharing plan. In an agent plan, "assets are pooled for investment purposes but the plan maintains separate accounts so that each employer's share of the pooled assets is legally available to pay benefits only for its employees." Alicia H. Munnell & Jean-Pierre Aubry, *GASB 68: How Will State Unfunded Pension Liabilities Affect Big Cities?,* January 2016, at 2, *available at* crr.bc.edu/wp-content/uploads/2016/01/SLP_47.pdf. In contrast, in a cost-sharing plan, "the pension obligations, as well as the assets, are pooled, and the assets can be used to pay the benefits of any participating employer." *Id.* In 2015, the GASB changed how governmental entities report unfunded pension obligations. Governmental entities must now report any unfunded

pension obligations in the balance of the employer, including in the context of cost-sharing plans. *Id.* at 1.

In addition to providing and managing employee pension benefits and OPEBs, municipalities also must address matters common to any employment relationship. These issues include the hiring and firing of employees; claims arising out of employees' conduct or the employment relationship itself; and labor issues that may involve claims under, or the renegotiation of, a collective bargaining agreement. Indeed, employees of larger municipalities may be represented by several different labor organizations and be covered by several different collective bargaining agreements.

Any or all of these pension and labor issues may present unique challenges in a Chapter 9 case. Some of these issues are addressed below at Part VI.C.

11. Plan Process

Only a debtor may file or modify a Chapter 9 plan of adjustment, and competing plans are prohibited. The Bankruptcy Code does not contain any filing deadlines with respect to the plan. Rather, if the plan is not filed with the petition, the judge can establish appropriate deadlines under § 941 of the Bankruptcy Code. Additional information is provided at Part VII.

IV. General Administrative Matters

A. Appointment of the Bankruptcy Judge

Under § 921(b) of the Bankruptcy Code, the chief judge of the court of appeals designates the bankruptcy judge to administer the case. According to legislative history, the purpose of this provision is to ensure that the selection of the judge in a Chapter 9 case takes into account calendar demands and the judges' levels of experience. S. Rep. No. 95-989, at 5896 (1978). Moreover, there is no authority suggesting that the chief judge must appoint a bankruptcy judge from the district in which the case is filed. Section 921(b) states only that, "[t]he chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case." In fact, the chief judge of the U.S. Court of Appeals for the First Circuit appointed a

bankruptcy judge from the U.S. Bankruptcy Court for the District of Massachusetts to preside over the Chapter 9 case of Central Falls, Rhode Island. Therefore, the bankruptcy court should not configure its case management/electronic case filing (CM/ECF) system to automatically or randomly assign Chapter 9 cases to a bankruptcy judge as it does with other kinds of cases. (See the related discussion in Part IV.D.)

The bankruptcy clerk of court needs to understand the process used in his or her circuit to request the appointment of a bankruptcy judge in a Chapter 9 case. If no such process exists, the bankruptcy clerk of court may want to consider discussing with the bankruptcy chief judge and the court of appeals the value of adopting appropriate procedures to ensure the timely designation of the bankruptcy judge. The online repository provides resources regarding the appointment of the bankruptcy judge, including general guidance for the bankruptcy clerk of court in requesting the designation of a bankruptcy judge from the court of appeals, CM/ECF event codes needed for the designation, a sample request and order for designation, and requests and designation orders used in a selection of cases.

B. Potential Resource Issues

As suggested by the legislative history to § 921(b) discussed immediately above, a Chapter 9 case may be time- and resource-intensive. Such cases might take up almost all of a judge's time and involve complex legal questions. S. Rep. No. 95-989, at 5896 (1978). Similar resource concerns are present for the clerk's office. The extent of additional resources required by the judge and the clerk of court will vary depending on the kind and size of the municipality and the number of stakeholders involved in the case, along with the need for continued management of the court's existing caseload. In assessing the court's ability to handle any kind of Chapter 9 case, the judge and the clerk of court should consider the matters discussed below.

1. Dedicated Staff

Staffing concerns are present for both chambers and clerk's offices. At the chambers level, the judge may decide an additional law clerk and/or judicial assistant is needed to handle the additional workload created by the Chapter 9 case. Options for obtaining temporary ad-

ditional chambers staff assistance include (1) using staff from another judge in the court (with that judge's permission); (2) submitting a request for law clerk assistance through the Law Clerk Assistance Program on the JNet; (3) requesting temporary personnel from the circuit judicial council (funded by the circuit's temporary emergency fund); and (4) requesting an additional temporary bankruptcy law clerk from the AO's Judicial Services Office (funded by the AO's temporary bankruptcy law clerk fund).

The clerk of court faces similar concerns of balancing workload. The scheduling, coordination, and other logistical challenges that may be associated with a Chapter 9 case may warrant the assignment of a single individual whose primary responsibilities focus on the Chapter 9 case during the case's pendency. That person may be a member of the court's existing staff or may be an employee of the debtor, as contemplated under 28 U.S.C. § 156(c). Alternatively, responsibilities may be shared among a small group of bankruptcy court staff. Because of the need for timely completion of docketing activity, consideration might be given to instituting alternative work schedules and granting compensatory time.

The clerk of court may want to consider assigning specific individuals within the clerk's office to handle all inquiries relating to the Chapter 9 case. Perhaps one of the most time-consuming, yet important, aspects of a Chapter 9 case is responding to requests for information from stakeholders and individual citizens who may not be familiar with the bankruptcy process. Helping these parties to obtain timely and accurate information about the case can help the case itself run more efficiently. The clerk of court may want to consider contacting the debtor and its counsel because the debtor may have a website and/or public information officer to deal with inquiries. The clerk of court may consider workload issues related to other areas of the clerk's office, including the information technology staff and their role in supporting management of the case. Where appropriate, the clerk of court may consider sharing arrangements with other court units to address workload concerns.

2. Courtroom Space and Access to the Proceedings

The court may need to weigh the management of its existing caseload against the necessity for dedicated space for the Chapter 9 case. Depending on the size of the Chapter 9 case, the judge and the clerk

of court may want to consider whether existing courtroom space sufficiently accommodates the number of parties in interest, as well as public observers (including media) who may be interested in the proceedings. To the extent existing courtroom space is insufficient, the judge and the clerk of court may want to consider whether alternative space at the district court, the court of appeals (if in the same location), or a state court would be available and suitable for proceedings in the Chapter 9 case. Similarly, the judge and the clerk of court may want to consider the feasibility of establishing overflow rooms, in which observers can watch the proceedings via internal video and audio feeds. In addition, posting the audio recording of court proceedings, after their conclusion, to the case docket in a timely manner allows stakeholders and public observers access to the recordings through the judiciary's Public Access to Court Electronic Records (PACER) system. In all matters concerning access to court proceedings, the judge and the clerk of court should take care to consult the policies of the Judicial Conference.

3. Website Issues

Intense interest in the case may warrant the court adding information to its website or highlighting information already available on the court's website as a way to aid the bar, media, and public. Examples include the dates, times, and locations of hearings; the court's local rules, including those concerning *pro hac vice* admission; points of contact to order transcripts and obtain CM/ECF logins and passwords; and links to the website of the Chapter 9 debtor or to the website of a third-party noticing agent employed pursuant to 28 U.S.C. § 156(c). See discussion below and in Part IV.D.

4. Teleconferencing or Videoconferencing for Hearings

An issue closely related to general access to court proceedings is the judge's ability and willingness to allow parties in interest and perhaps others to participate in court proceedings via either teleconference or videoconference. Teleconferencing or videoconferencing may increase efficiency but may also introduce challenges in a Chapter 9 case. For example, given the number of parties in interest that may want to participate in any given Chapter 9 proceeding, teleconferencing or videoconferencing may save both time and costs for the case

and parties. However, if a large number of parties want to participate actively in the court proceeding via teleconference or videoconference, the proceeding could become unmanageable and inefficient.

Accordingly, a judge using teleconferencing or videoconferencing for hearings should consider establishing appropriate protocols to safeguard the process. Any such protocols might:

- restrict active telephonic participation to parties in interest or their professionals with permission of the court, and allow participation by others, if at all, in a passive or "listen only" mode;
- limit all remote participation to a passive or "listen only" mode;
- prohibit, in accordance with Judicial Conference policy, the recording of any proceedings, including those in which teleconferencing or videoconferencing is permitted;
- restrict the distribution of, and access to, the conferencing line;
- enable the administrator of the conferencing line to disconnect any participant who is being disruptive to the proceedings; and
- permit videoconferencing only for parties necessary to a proceeding who are unavailable to appear in person for good cause in compelling circumstances. In all matters concerning participation in and access to court proceedings, the judge and the clerk of court should take care to consult the policies of the Judicial Conference and the Rules of Procedure. For more information, see *Remote Participation in Bankruptcy Court Proceedings* (Federal Judicial Center 2017), a copy of which is included in the online repository.

5. Media Communications

Because many Chapter 9 cases involve matters that may touch the general public directly or indirectly, these cases can garner more media coverage than the typical Chapter 11 case. This kind of media coverage, in turn, means that the judge and the clerk of court may receive an increased number of media inquiries during the pendency (and perhaps even in anticipation) of a Chapter 9 case. The judge

and the clerk of court may want to consider establishing a protocol for addressing media inquiries. The court may also want to consider designating a particular qualified individual to handle all media inquiries, thereby ensuring appropriate, consistent, and accurate responses to media inquiries. To help prepare any such designated individual, the clerk of court may want to consider training opportunities for the individual or for the clerk of court's office generally. In addition, the district court may already have a media officer or individual designated to handle media inquiries that could be available to the bankruptcy clerk of court either to handle the media matters in the Chapter 9 case or to help train individuals within the bankruptcy clerk of court's office for such matters. The court or the clerk of court also should know the point of contact for the Chapter 9 entity in order to refer inquiries that do not fall within the court's purview.

In addition, the court may want to consider entering an administrative order governing media conduct, courtroom procedure, and decorum. Such an order could address issues such as the permitted timing and security screening for entering court sessions; procedures regarding media identification badges; use of electronic devices; prohibitions against recording, photography, and broadcasting in accordance with Judicial Conference policies, including any limitations regarding "contemporaneous" blogging; permitted areas for interviews and press conferences and restrictions on conducting them inside the courthouse; and consequences for violating the order. See, for example, the online repository for an administrative order entered by the chief district judge and chief bankruptcy judge for the Eastern District of Michigan in connection with the Detroit case.

6. Coordination with the District Court

A good line of communication between the bankruptcy court and the district court can be helpful in many Chapter 9 cases. Prior to any Chapter 9 filings in the district, the chief bankruptcy judge and the bankruptcy clerk of court may discuss with the district court how best to handle a Chapter 9 case. For example, discussion could cover the space, access, and media issues identified above. Other points could include identifying collective resources that may be available to assist the bankruptcy judge and bankruptcy clerk of court, or identifying a process through which such resources could be requested

and secured at the time of any filing. Although the timing and nature of discussions between the bankruptcy and district courts and the clerks of court will depend on the customs and practices of each individual district, establishing those lines of communications can greatly assist the administration of the Chapter 9 case.

7. Security Issues

Depending on the kind and size of the Chapter 9 entity, additional security measures may be needed to manage the case. The judge and the clerk of court should consult the U.S. Marshals Service in their district about the use of existing security protocols and the possible need for new security protocols as the case proceeds. Any protocols employed or established for the case should be disseminated to appropriate chambers and clerk's office staff to ensure maximum safety for all concerned. Examples include a court security officer (CSO) escort for the judge; a CSO presence in the courtroom for the duration of the hearings; a CSO directing seating for attorneys, press, and the public in the courtroom; U.S. marshals providing security advice/tips to the judge and staff; and protocol for alerting the U.S. Marshals Service to potential threats.

8. Claims Agent

Depending on the size and volume of assets and liabilities and on the number of creditors, the clerk of court may consider employing an agent to provide claims-processing services pursuant to 28 U.S.C. § 156(c). This statutory provision was enacted in the days when proofs of claims were only submitted to the court in paper form. With the widespread use of CM/ECF for filing proofs of claim, clerks of court should examine whether employing a claims agent adds value to the court. If so, the clerk of court should work with the judge to ensure that the terms of any order appointing the claims agent address only those duties possessed by the clerk of court that are delegated to the claims agent. If a claims agent is employed, the clerk of court must arrange for all claims in the case to be added to the court's CM/ECF system at the end of the case, before any proofs of claim can be disposed of by the claims agent. If employing a claims agent is not perceived to aid the court, the Chapter 9 debtor may consider employing a claims analytics professional as a case or confirmation

requirement instead of seeking appointment of a claims agent under 28 U.S.C. § 156(c). Such employment is subject to the provisions of full disclosure and reasonableness found in 11 U.S.C. § 943(b)(3).

9. Noticing Agent

The clerk of court may consider employing an agent to provide noticing services pursuant to 28 U.S.C. § 156(c). Although courts typically use the Bankruptcy Noticing Center for noticing in bankruptcy cases, the size of a particular Chapter 9 case may warrant additional resources. Not all Chapter 9 cases require use of a noticing agent, but employing an agent in cases involving thousands of creditors may greatly assist the clerk of court in exercising statutory noticing duties. Under the terms of the statute, a noticing agent is the agent of the clerk of court and not the debtor, meaning the clerk of court should work with the judge to ensure that the terms of any order appointing the noticing agent address only those duties possessed by the clerk of court that are delegated to the noticing agent. One potential issue with the appointment of a noticing agent is the payment of the agent's fees, as the court may not be able to direct the Chapter 9 debtor to pay such fees.

C. Required Notices in Chapter 9 Cases

Section 923 of the Bankruptcy Code mandates three separate notices in Chapter 9 cases. Specifically, it requires notice of (1) the commencement of the case, (2) an order for relief, and (3) any dismissal of the case. Section 923 further provides that such notice shall be given by publication "at least once a week for three successive weeks in at least one newspaper of general circulation within the district in which the case is commenced, and in such other newspaper having general circulation among bond dealers and holders as the court designates." 11 U.S.C. § 923.

The legislative history and comment to § 923 states that "[t]he exact contours of the notice to be given under chapter 9 are left to the Rules." H.R. Rep. No. 95-595, at 6354 (1978). Federal Rule of Bankruptcy Procedure 2002 addresses generally the time, the circumstances, and to whom notice must be given. Bankruptcy Rule 9007, General Authority to Regulate Notices, permits the judge to regulate all other aspects of the time and manner of such notice.

Bankruptcy Rule 9008, Service or Notice by Publication, authorizes the judge to determine the form and manner of publication unless otherwise specified in the rules. Some districts have local rules designating the newspapers in which notice is to be published. Other judges have designated the newspapers on a case-by-case basis as the need arises. In addition, the judge and the clerk of court may want to identify other mediums that may better reach potential stakeholders and interested members of the public—such mediums include the court's webpage, any electronic information boards available to municipal employees or other stakeholders, and any local print mediums that may reach a broader or different population than the local newspaper. Although neither the Bankruptcy Code nor the Bankruptcy Rules require such additional noticing, it may, as a practical matter, facilitate better information to those interested in the case and ease the burden on the clerk of court's office to respond to one-off inquiries.

The publication requirement can be expensive. Particularly in smaller cases, the bankruptcy judge must balance considerations of due process and the cost of compliance in determining what publication will suffice. The judge and the clerk of court should address together the details of the notice of commencement (including the place of publication, the content, and the parties to be served) to address any potential cost or service issues. This discussion should cover not only modifications to the substance of the notice itself, but also the implications for the court's CM/ECF program in the creation and service of the notice.

D. Electronic Filing and Docket Issues

The clerk of court should anticipate and consider several potential issues with the court's electronic case filing system. Among the most important concerns, the clerk must ensure the electronic case filing system is not set up to automatically assign a judge to a Chapter 9 case as it is set up to do so for cases in all other chapters. Staff who are involved in CM/ECF configuration may not have been aware that Chapter 9 cases should not be automatically assigned a judge. For this reason, the clerk must investigate and test the CM/ECF system on this point before a Chapter 9 case is filed. Additionally, the clerk must ensure the proper CM/ECF event codes are created in advance of the Chapter 9 filing so that the filing proceeds smoothly. Examples

include event codes for designation of the judge, request for designation, and order of designation. See the related materials in the online repository.

The judge and the clerk of court should recognize that many stakeholders and members of the public who are interested in the case will not be registered users in the electronic filing system. As such, many individuals may not have access to view and monitor activities in the Chapter 9 case through CM/ECF. This need can be addressed by educating this population about the PACER system and how it is used to view and monitor case-related activities. If the court has employed a third-party agent under 28 U.S.C. § 156(c), it can consider what documents it wants the agent to make available on its website for the general public to view. This approach was taken, for example, in the *Detroit* case. Similarly, the Chapter 9 debtor itself may maintain a website to provide free access to all key pleadings, such as was done by the cities of Stockton and Vallejo. See the related documents in the online repository.

A related issue concerns the information disclosed with respect to certain of the debtor's creditors and employees. Many states and municipalities have rules or regulations prohibiting the disclosure of personal information for at least certain kinds of employees, typically members of the police, fire, and other safety-related districts. Further, some Chapter 9 entities are considered "covered entities" under the Health Insurance Portability and Accountability Act (HIPAA), requiring protection of personally identifiable health information by the Chapter 9 debtor. Although the court needs at least a mailing address for these employees and any patients, the disclosure of such information beyond the court should comply with any applicable federal, state, or local rules intended to protect the privacy of such individuals. To anticipate and address this issue, the court may want to establish protocols when considering motions to file under seal a portion of the debtor's list of creditors under § 924 and any other pleadings, such as proofs of claim containing personal creditor, patient, or employee information. For example, in the *Stockton* and *Vallejo* cases, by agreement with those debtors, the unions representing safety officers received all the notices. (*Note:* It is important to try to address this issue before any list, schedule, or other paper is filed through the court's electronic filing system because even if the clerk of court subsequently removes the filing, secondary sources of court

dockets may have picked up the filing and made it available to the public or subscribers.) See examples and related information in the online repository.

V. The Beginning of the Case

The primary issue at the beginning of the case is the debtor's eligibility to receive an order for relief. Eligibility often is a heavily litigated issue in Chapter 9 cases, and to some extent, the case does not really begin until the judge determines the debtor's eligibility. Accordingly, the judge should consider how to approach any dispute concerning eligibility. For example, should the judge establish a specific timetable for the litigation or let the parties determine the timing? Should the judge allow discovery or appoint a mediator at this early stage of the case? Should the judge dismiss the case? These and other important first-day issues are addressed below.

A. Commencement of the Case

The Bankruptcy Code defines "municipalities" as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40). Only a municipality may file a voluntary bankruptcy case under Chapter 9 of the Bankruptcy Code. Involuntary petitions against a municipality are not permitted. 11 U.S.C. § 109(c). Notwithstanding §§ 109(d) and 301, a Chapter 9 case concerning an unincorporated tax or special assessment district that does not have its own officers is commenced by such district's governing authority or body that has authority to levy taxes or assessments to meet the obligations of such district. 11 U.S.C. § 921(a). Notice of the commencement of the case, as governed by § 923, must be given and published, as discussed at Part IV.C.

B. Order for Relief or Dismissal of the Petition (Including for Lack of Good Faith)

The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) amended § 921(d) to eliminate the automatic entry of an order for relief in Chapter 9 cases, notwithstanding § 301(b). Under the amended § 921 procedure, upon objection, the judge may dismiss the petition, after notice and hearing, if the debtor did not

file the petition in good faith or if the petition does not meet the requirements of the Bankruptcy Code. 11 U.S.C. § 921(c). If the petition is not dismissed, the judge shall enter an order for relief notwithstanding § 301(b). 11 U.S.C. § 921(d).

Section 921 does not define *good faith*, but judges in Chapter 9 cases have been guided by similar determinations in Chapter 11 cases. *See, e.g., In re* County of Orange, Cal., 183 B.R. 594, 608 (Bankr. C.D. Cal. 1995). For example, the judge may consider the debtor's ability to confirm a plan of adjustment and whether the filing is intended to hinder or delay creditors. *See, e.g., In re* Sullivan County Regional Refuse Disposal Dist., 165 B.R. 60, 80–83 (Bankr. D.N.H. 1994). Other factors include "(i) the debtor's subjective beliefs; (ii) whether the debtor's financial problems fall within situations contemplated by chapter 9; (iii) whether the debtor filed its chapter 9 petition for reasons consistent with the purpose of chapter 9; (iv) the extent of the debtor's prepetition negotiations, if practical; (v) the extent that alternatives to chapter 9 were considered; (vi) the scope and nature of the debtor's financial problems." 6 Collier on Bankruptcy ¶ 921.04[2] (16th ed. 2017). *See also In re* City of Detroit, Mich., 504 B.R. 97, 180–81 (Bankr. E.D. Mich. 2013) (collecting cases) (additional cases addressing the good-faith determination are available in the online repository). In addition, if a debtor has satisfied all of the other eligibility requirements, some cases suggest that the debtor enjoys a presumption of good faith, which an objecting party must overcome. *See Detroit,* 504 B.R. at 180 ("'[I]f all of the eligibility criteria set forth in § 109(c) as described above are satisfied, it follows that there should be a strong presumption in favor of chapter 9 relief.'") (quoting *In re* City of Stockton, Cal., 493 B.R. 772, 794–95 (Bankr. E.D. Cal. 2013)). Likewise, a failure to satisfy one or more of the § 109(c) elements may support a finding of a lack of good faith in filing the Chapter 9 petition. *See Sullivan County Disposal Dist.*, 165 B.R. at 80 (dismissing the petition because of a lack of good faith under both §§ 109(c)(5)(B) and 921(c)). A collection of pleadings and orders addressing eligibility and good-faith issues is available in the online repository.

C. Eligibility Issues

A municipality is not automatically eligible to proceed as a debtor in a Chapter 9 case. Rather, the Bankruptcy Code contains detailed

statutory requirements that the municipal debtor must satisfy before the judge may enter an order for relief in the case. 11 U.S.C. § 109(c). The municipal debtor has the burden of proof on the elements of its eligibility by a preponderance of the evidence. *See, e.g., In re* City of Detroit, Mich., 504 B.R. 97, 128–29 (Bankr. E.D. Mich. 2013); *In re* City of Stockton, Cal., 493 B.R. 772, 794 (Bankr. E.D. Cal. 2013); *In re* City of Vallejo, Cal., 408 B.R. 280, 289 (B.A.P. 9th Cir. 2009); *In re* City of Bridgeport, 129 B.R. 332, 334 (Bankr. D. Conn. 1991). A municipality's eligibility for Chapter 9 is perhaps one of the most contested aspects of a Chapter 9 case. As noted above, a collection of pleadings and orders addressing eligibility and good-faith issues is available in the online repository.

To be eligible, the municipality must be an "entity" and must satisfy the five elements of § 109(c)(1)–(5). Section 101(15) defines entity to include "person, estate, trust, governmental unit, and United States trustee." The requirements of § 109(c)(1)–(5) are discussed below.

1. Meet the Definition of a Municipality (§ 109(c)(1))

The entity must be a municipality, which is defined in § 101 as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. §§ 109(c)(1), 101(40). The Bankruptcy Code does not offer any guidance as to what kinds of entities qualify as a municipality for purposes of Chapter 9. Judges have relied on, among other things, prior municipal bankruptcy legislation to inform their analysis and application of the § 101(40) definition of municipality. *See, e.g., In re* Cty. of Orange, Cal., 183 B.R. 594, 601 (Bankr. C.D. Cal. 1995); *In re* N.Y.C. Off-Track Betting Corp., 427 B.R. 256, 265 (Bankr. S.D.N.Y. 2010); *In re* Las Vegas Monorail Co., 429 B.R. 770, 795 (Bankr. D. Nev. 2010).

2. Be Specifically Authorized (§ 109(c)(2))

The entity must be "*specifically authorized*, in its capacity as a municipality or by name, to be a debtor under [Chapter 9] by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under [Chapter 9]." 11 U.S.C. § 109(c)(2) (emphasis added). Therefore, the relevant state statutes must be carefully analyzed. For example, Connecticut re-

quires a municipality to obtain the "express prior written consent of the Governor." Conn. Gen. Stat. § 7–566 (1993). Kentucky requires the state debt and finance officer to approve the proposed plan before a Chapter 9 petition is filed. Ky. Rev. Stat. Ann. § 66.400 (West 1994). Louisiana requires a municipality to obtain the consent of the governor and the state attorney general before filing for Chapter 9. La. Rev. Stat. Ann. § 39:619 (2005). California requires mediation or a "fiscal emergency." Cal. Gov't Code §§ 53760.1, .3, .5, .7, .9. For an example of the kinds of issues that can arise in interpreting a state's authorization statute, see *In re Jefferson County, Alabama*, 469 B.R. 92, 100–11 (Bankr. N.D. Ala. 2012).

Three issues worth noting on this second requirement:

- First, prior to 1994, the Bankruptcy Code required only that the municipality be "generally authorized" to file a Chapter 9 case. At least two courts have interpreted the post-1994 language of "specifically authorized" to require the authorization to be "exact, plain, and direct with well-defined limits so that nothing is left to inference or implication." *In re* County of Orange, Cal., 183 B.R. 594, 604 (Bankr. C.D. Cal. 1995). *See* Suntrust Bank v. Allegany-Highlands Econ. Dev. Auth. (*In re* Allegany-Highlands Econ. Dev. Auth.), 270 B.R. 647 (W.D. Va. 2001) (following the reasoning of *In re County of Orange*).

- Second, a state's authorization statute cannot condition a municipal's ability to file a Chapter 9 case on requirements that conflict with the Bankruptcy Code. *See, e.g., In re* City of Stockton, Cal., 478 B.R. 8, 16–17 (Bankr. E.D. Cal. 2012) (collecting cases); *In re* City of Detroit, Mich., 504 B.R. 97, 161–62 (Bankr. E.D. Mich. 2013). If a municipality is authorized to file a Chapter 9 case, once such a case is filed, the Bankruptcy Code governs the case in its entirety. A state can, however, condition authorization for a municipality to file bankruptcy on prerequisites to the filing of a Chapter 9 case, such as engaging in a neutral evaluation process with creditors. *See, e.g., In re* City of Stockton, Cal., 475 B.R. 720 (Bankr. E.D. Cal. 2012) (explaining such a statute, California Government Code § 53760).

- Finally, states differ significantly on their approaches to authorization. Some states have enabling legislation, but that

legislation may be outdated and, for example, reference the Bankruptcy Act. Some states require approval specific to the particular municipality seeking Chapter 9 protection. And almost half the states have no legislation. A summary of each state's legislation, if any, is in the online repository. The absence of legislation does not preclude a state from passing legislation for one municipality.

3. Be Insolvent (§ 109(c)(3))

The entity must be insolvent. 11 U.S.C. § 109(c)(3). Section 101(32)(c) defines insolvency of municipalities as a financial condition such that the municipality is "(i) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (ii) unable to pay its debts as they become due." Under the second prong, the municipality must utilize a prospective analysis of its expenses and available resources. Neither the Bankruptcy Code nor the legislative history provides guidance regarding the time period for the analysis, but judges generally use a relatively narrow time span, i.e., the current fiscal year or an adopted budget for the subsequent fiscal year, in order to ensure the reliability of the projections on which the analysis is based. *See In re Vallejo, Cal.*, 408 B.R. at 289–94 (affirming bankruptcy court's finding that debtor had demonstrated insolvency on a going-forward cash flow basis in light of, inter alia, a current year deficit of over $10 million in its general fund and an inability to utilize its special funds because of grant and accounting restrictions); *In re Bridgeport*, 129 B.R. at 337–38 (concluding, after adopting a prospective cash-flow or budget-gap analysis and not a budget-deficiency analysis, that the debtor had not met its burden of proving that it was insolvent, i.e., that it would be unable to pay its debts as they became due in its current fiscal year, or based on an adopted budget its next fiscal year). *See also In re* Ravenna Metro. Dist., 522 B.R. 656, 676–80 (Bankr. D. Colo. 2014) (holding that the district failed to show its insolvency under a forward-looking test because of, among other things, the district's access to facilities-acquisition fees on property owners in amount sufficient to pay lease obligations in full). The specific period for analysis, however, may depend on the kind and size of the municipality and other case-specific factors.

For the time period utilized, the debtor should do more than simply show that its expenditures will exceed its revenue as it might be able to pay debts as they become due by, for example, getting state or federal assistance, concessions by labor unions, voluntary suspension of tax abatements, savings through efficiency, increased tax-collection rates, and borrowing funds to offset budget gaps. *In re Bridgeport*, 129 B.R. at 338. At least one judge has observed that the insolvency requirement does not require the municipality to exhaust its taxing or assessment authority. *In re* Pleasant View Util. Dist. of Cheatham Cty., 24 B.R. 632, 639 n.6 (Bankr. M.D. Tenn. 1982); *see also In re* City of Vallejo, Cal., 408 B.R. at 293 (B.A.P. 9th Cir. 2009) (bankruptcy court reasoned that showing of insolvency does not require debtor first to have taken actions that defy fiscal prudence). Notwithstanding the § 101 definition, some courts have looked beyond financial condition to "service insolvency," that is, whether a municipality has the resources to provide basic civic services such as police and fire protection. *See In re* City of Detroit, Mich., 504 B.R. 97, 169–70 (Bankr. E.D. Mich. 2013); *In re* City of Stockton, Cal., 493 B.R. 772, 789 (Bankr. E.D. Cal. 2013).

4. Desire to Effect a Plan (§ 109(c)(4))

The municipality "desires to effect a plan to adjust such debts." 11 U.S.C. § 109(c)(4).

5. Demonstrate Progress (§ 109(c)(5))

The municipality must demonstrate its progress toward a plan of adjustment and why those efforts have failed to date. Specifically, § 109(c)(5) requires that the municipality

> (A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
>
> (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;

> (C) is unable to negotiate with creditors because such negotiation is impracticable; or
>
> (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

11 U.S.C. § 109(c)(5). Notably, the § 109(c)(5) factors are stated in the alternative. A debtor needs to establish only one of the four factors to satisfy this requirement. For cases addressing the negotiation factors of § 109(c)(5)(B) and (C), see, e.g., *In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. 60, 78 (Bankr. D.N.H. 1994) (explaining that debtor must propose a plan that can be effectuated in Chapter 9 to satisfy § 109(c)(5)); *In re City of Vallejo, Cal.*, 408 B.R. 280 (B.A.P. 9th Cir. 2009) (analyzing § 109(c)(5)(B) and finding that negotiations need to revolve around at least the outline of a proposed plan of adjustment; mere good-faith negotiations are not enough); *In re New York City Off-Track Betting*, 427 B.R. 256 (Bankr. S.D.N.Y. 2010) (noting that a term sheet or outline of a plan suffices for purposes of § 109(c)(5)(B)); *In re City of Detroit, Mich.*, 504 B.R. 97 (Bankr. E.D. Mich. 2013) (observing that good-faith plan negotiations were not required under state enabling legislation and that although the debtor did not meet the good-faith negotiation requirement of § 109(c)(5), such negotiations were impracticable under § 109(c)(5)(C)). At least one court has held that the duty to negotiate in good faith over a proposed plan is reciprocal. *See In re* City of Stockton, Cal., 493 B.R. 772, 793 (Bankr. E.D. Cal. 2013).

D. Objections to the Petition

As suggested at Parts V.B and V.C, the municipality's eligibility to be a debtor under Chapter 9, as well as whether the debtor filed the Chapter 9 petition in good faith, may be vigorously contested. This creates a flurry of activity on the court's docket at the outset, and the judge must determine how to manage this litigation. The judge should consider adopting a bar date and a procedure for objections to the petition. Neither the Bankruptcy Code nor the Bankruptcy Rules specify the time within which objections to the petition must be filed. To ensure adequate opportunity to file objections, judges may want to set a bar date in conjunction with an order approving the form of notice of the Chapter 9 filing. For example, judges have

set the bar date fifteen days after the third and final publication of the initial notice of the case. *See, e.g., In re* City of Harrisburg, Pa., Case No. 11–06938 (Bankr. M.D. Pa. Oct. 11, 2011); *In re* City of Vallejo, Cal., Case No. 2008–26813 (Bankr. E.D. Cal. May 30, 2008). A collection of sample notices is in the online repository.

It might be useful to hold a pretrial conference with the parties to narrow the issues presented by an objection and to manage discovery, pretrial submissions, trial procedure, and trial scheduling. It also might be efficient and cost effective to bifurcate hearings where several issues are raised by an objection. For example, if an objection challenges both the debtor's authorization to file a Chapter 9 petition and its insolvency, the judge might first determine the essentially legal issue of the municipality's authorization before considering the more fact-sensitive insolvency issue. *See In re* City of Bridgeport, 129 B.R. 332, 334 & n.3 (Bankr. D. Conn. 1991).

The judge may not delay any proceeding in a Chapter 9 case in the event an appeal is taken from an order overruling an objection to the petition and subsequent entry of an order for relief. 11 U.S.C. § 921(e). Specifically, § 921(e) provides,

> The court may not, on account of an appeal from an order for relief, delay any proceeding under this chapter in the case in which the appeal is being taken; nor shall any court order a stay of such proceeding pending such appeal. The reversal on appeal of a finding of jurisdiction does not affect the validity of any debt incurred that is authorized by the court under section 364(c) or 364(d) of this title.

E. Standing Issues

Section 901(a) incorporates § 1109 in Chapter 9 cases. Accordingly, the term "parties in interest" in Chapter 9 includes, among others, "the debtor, the trustee, a creditors' committee, . . . a creditor . . . or any indenture trustee." 11 U.S.C. § 1109. It also includes parties whose interests may be affected by the Chapter 9 case. *See, e.g., In re* Addison Community Hosp. Auth., 175 B.R. 646 (Bankr. E.D. Mich. 1994) (explaining the broad approach to "party in interest" for standing purposes under § 1109). In addition to traditional creditors and other Chapter 11 stakeholders, citizens and organizations representing citizens or community interests may request standing to ap-

pear and be heard in Chapter 9 cases. Such requests may require the judge to consider the scope of § 1109 and permissive intervention under Bankruptcy Rule 2018(a). Cases addressing these issues include *Addison Community Hospital Authority*, 175 B.R. at 650 ("The Court concludes that the members of Concerned Citizens who are not creditors do not have standing to be heard under § 1109. This Court should not be so liberal in granting applications to be heard as to overburden the debt adjustment process.") and *In re Barnwell County Hospital*, 459 B.R. 903 (Bankr. D.S.C. 2011) (holding that a citizens group lacked standing to object to debtor's eligibility to file Chapter 9 case).

In addition, Bankruptcy Rule 2018 provides certain parties the right to intervene or be heard in Chapter 9 cases. Bankruptcy Rule 2018(c) states, "The Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a chapter 9 case . . ." It further provides that the state may intervene in the case "with respect to matters specified by the court." In addition, Bankruptcy Rule 2018(d) states, "In a chapter 9, 11, or 12 case, a labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees . . ." The judge may enter an order under Rule 2018(e) directing service on parties permitted to intervene or be heard in the case. Fed. R. Bankr. P. 2018.

F. Other Issues in the Beginning of the Case

In addition to making the eligibility determination, the judge may be asked to establish certain basic administrative matters early in the Chapter 9 case. In each instance, the judge may need, or benefit from, additional information and disclosures that are not readily accessible from the petition or other pleadings. Accordingly, the judge may want to request various kinds of information and obtain the parties' proposed approach to administrative matters at the outset (or at least relatively early in the process). The following summarizes a few such issues, but is not intended to be an exhaustive list.

1. Understanding Events Leading up to the Filing

Although it is always helpful for the judge to understand the genesis of a debtor's financial distress, it is particularly useful in the Chapter

9 context. A variety of factors may contribute to a municipality's financial issues, including a single economic shock such as a judgment against it, a long-term budget deficit, a declining population, a loss of economic opportunities, a large uninsured claim, and/or accounting issues. The municipality, its stakeholders, and the state also may have been engaged in a variety of different dealings, discussions, and negotiations prior to the filing. The history behind the municipality's decision to file will help the judge determine if the municipality is eligible to be a Chapter 9 debtor under § 109(c) and may help the judge understand any objections to the debtor's eligibility or petition. Knowing the history may also help the judge understand the political structure of the municipality and its relation with the state, and to anticipate potential issues the case may encounter as it moves forward.

2. Understanding the Debtor's Objectives for the Case

In addition to understanding where the municipality has been in its financial journey, it is equally important for the judge to understand where the municipality intends to go during its case. Chapter 9 is focused on helping a municipal debtor achieve a plan of adjustment.

Municipal debtors are fundamentally different from Chapter 11 debtors in that municipal debtors are "mission-based"—not all of the municipality's activities can be measured in economic terms, or reduced to dollars and cents, the way a commercial enterprise's activities can. Municipalities have a broader role and different responsibilities than a business that is obligated only to shareholders or in the case of insolvency, to creditors. This may present a dilemma for parties when they try to resolve conflicts and develop a plan of adjustment. Public safety is the classic example of a government activity that cannot be measured solely on a cost basis. Public K–12 education can be another. Bottom line, almost everything that occurs in the context of restructuring "mission-based" enterprises has to pass through two filters: necessity of the activity and economic reasonableness.

Although the role of the judge is in many respects more limited in a Chapter 9 case (than, for example, in a Chapter 11 case), the judge still will be called on to confirm the plan of adjustment. The judge can best prepare for the plan process, including any deadlines established under § 941 and any decisions made with respect to status conferences and case-management orders, if he or she has

information concerning the debtor's view of its strategy for emerging from Chapter 9, as well as creditors' and potentially other parties' views of that proposal. (*See* Part VII.)

3. Payment of Prepetition Claims

As discussed above, the Tenth Amendment and § 904 limit the judge's authority over a municipal debtor and its property. Accordingly, a Chapter 9 debtor generally may pay prepetition obligations postpetition without court approval. Often the Chapter 9 debtor will pay its ordinary course trade creditors and employees as those debts come due, but may not pay its other prepetition creditors.

4. Payment of Postpetition Claims and Administrative Expenses

A municipality may pay postpetition claims without court approval. In addition, § 503 of the Bankruptcy Code governing the allowance of administrative claims is incorporated into Chapter 9 by § 901(a). Some uncertainty exists, however, concerning the scope and role of § 503(b) (administrative expense claims) in a Chapter 9 case. The issue relates to the language of § 503(b), which speaks to "the actual, necessary costs of preserving the estate." 11 U.S.C. § 503(b). As discussed at Part VI.B, there is no "estate" in a Chapter 9 case. As such, some courts have limited § 503(b) to expenses relating to the Chapter 9 case itself, and have excluded the debtor's postpetition operating expenses. *See, e.g., In re* N.Y.C. Off-Track Betting Corp., 434 B.R. 131 (Bankr. S.D.N.Y. 2010); Bank of N.Y. Mellon v. Jefferson Cty., Ala. (*In re* Jefferson Cty.), 2013 Bankr. LEXIS 2596 (Bankr. N.D. Ala. 2013). A Chapter 9 debtor also may voluntarily request that the judge grant an administrative expense claim in connection with postpetition financing under § 364. 11 U.S.C. §§ 364, 901. Moreover, § 901 incorporates § 506(b), allowing a secured creditor to request the payment of postpetition interest, fees, and costs under certain circumstances.

5. Identifying Key Stakeholders and Potential Conflicts of Interest

As explained at Part III.E, a variety of stakeholders may have an interest in the Chapter 9 case. These stakeholders may interact with a municipal debtor in several different capacities and/or have similar relationships with other solvent municipalities that factor into

their dealings with the debtor. For example, a creditor may hold both general obligation and revenue bonds; some of those bonds may be insured, limiting the creditor's exposure on one issuance but not others; and the bond insurer may or may not be the real party in interest with respect to the insured issuance. The return objectives of creditors within the same bond issuance may differ depending on whether the creditor bought the bond at par or at a discount and whether the creditor holds any derivative positions related to the bonds. A creditor also may hold bonds of other municipalities that may experience financial distress. Similarly, the interests of the municipality's active employees may be different than those of retirees, yet all may be participants in the same pension or other benefits plans. Moreover, the unions representing these employees may cover employees in other states and municipalities. The different interests of stakeholders likely will color their perspectives on issues in the case, whether they are focused just on the outcome of the pending case or considering how that outcome might affect their interests in other municipal cases. Disclosure of these interests to the judge and other parties early in the case may help move the case forward and may mitigate potential surprises at the plan confirmation stage.

6. "First-Day" Orders

As discussed at Part VI.C, a Chapter 9 debtor does not need court approval to continue to pay prepetition or postpetition obligations or to continue its operation. Section 904, however, provides that the judge may enter an order affecting the debtor's property or its governmental powers if the debtor consents to such action. Accordingly, a Chapter 9 debtor may ask the judge to approve certain transactions, including requests to make certain payments or to take certain actions that otherwise would typically be requested during the early days of a Chapter 11 case. A debtor may seek such a court order for a variety of reasons, including to mitigate political issues, encourage consensual resolution of disputed issues with creditors, and to resolve disputes with a party in interest that might otherwise arise in the context of, and potentially delay, plan confirmation. *See, e.g., In re* City of Stockton, Cal., 486 B.R. 194, 199 (Bankr. E.D. Cal. 2013) ("Hence, § 904 means that the City can expend its property and revenues during the chapter 9 case as it wishes. . . . When a chapter 9 debtor files a Rule 9019 motion to have the court approve a compro-

mise or settlement, the municipality 'consents' for purposes of § 904 to judicial interference with the property or revenues of the debtor needed to accomplish the proposed transaction.").

G. Retention and Payment of Professionals

A debtor may employ professionals without court approval, and the judge reviews fees only within the context of plan confirmation. Sections 327 through 331 are not applicable in Chapter 9 cases. *See* 11 U.S.C. § 901(a). There are two important caveats to this general rule:

- First, § 1103(b) governing professionals appointed to represent an official committee of unsecured creditors applies in Chapter 9. Thus, "[a]n attorney or accountant employed to represent a committee appointed under section 1102 of [the Bankruptcy Code] may not, while employed by such committee, represent any other entity having an adverse interest in connection with the case." *See* 11 U.S.C. § 1103(b). The Bankruptcy Code does not, however, mandate the debtors to pay a committee's professionals' fees or expenses. In cases where a committee is appointed, the debtor may consent to the payment of such fees and expenses, recognizing the value of being able to negotiate with a collective body representing diverse interests and perhaps having a supportive party in the plan process. A debtor may cap the aggregate amount of professionals' fees and expenses that it will agree to pay in the case.
- Second, the judge is authorized to review professional fees in connection with confirmation of a plan of adjustment. Specifically, § 943(b)(3) provides that the judge shall confirm the plan if "all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable."

The extent of the judge's authority under § 943(b)(3) is subject to debate. Specifically, a question exists under the statute concerning whether the judge's review of fees for purposes of plan confirmation entails a review of all postpetition professionals' fees or just those yet "to be paid" by the debtor or other person. Some judges have determined that the debtor is only obligated—and disclosures are only required—with respect to professional fees to be paid after confirmation. *See In re* Valley Health Sys., 381 B.R. 756, 765 n.10 (Bankr. C.D.

Cal. 2008); *In re* Cty. of Orange, Cal., 179 B.R. 195, 199–200 (Bankr. C.D. Cal. 1995). The debtor also may disclose more than future professionals' fees, which the judge may decide to review in the context of plan confirmation. *See In re* Jefferson Cty., Ala., No. 11–05736 at 42–43 (Bankr. N.D. Ala. Nov. 22, 2013) [ECF No. 2248] ("All the amounts disclosed by the County at or in connection with the Confirmation Hearing that have been paid or are to be paid for services or expenses in the Case or incident to the Plan are reasonable and have been paid and may appropriately be paid" by the debtor.). Other judges have required or inferred that § 943(b)(3) requires disclosure of all professionals' fees incurred in connection with the case. *See, e.g., In re* City of Detroit, Mich., 524 B.R. 147, 208–10 (Bankr. E.D. Mich. 2014) (reviewing different approaches to review of professional fees in Chapter 9 cases). The judge in the *Detroit* case appointed a fee examiner to create a procedure for the submission and review of invoices of professionals to be paid by the city of Detroit, and to review those professional fees (see the related documents in the online repository), but then reviewed professional fees on an independent basis. *Detroit*, 524 B.R. at 210 ("The Court concludes that because its obligation under § 943(b)(3) is so closely linked to its obligation to determine whether the plan is fair and equitable, the Court simply cannot outsource this responsibility to the fee examiner."). In addition, some judges have permitted the filing of interim fee applications by professionals during the pendency of the case.

H. Potential Tools for Managing the Case

Although the judge has a more limited role in a Chapter 9 case, the judge still may find it helpful or necessary to use certain tools to control the docket or to help the case, or litigated matters within the case, move forward. A judge invoking case-management tools in a Chapter 9 case should remain sensitive to the potential Tenth Amendment issues and whether the debtor consents to, or opposes, the use of such tools. (*See* Parts II, III.B, and III.C.) The following discussion highlights different approaches of judges to these issues and provides examples where helpful or available.

1. Case-Management Orders

As a general matter, judges have the inherent authority to enter orders that enhance the efficiency of the cases before them. A case-management order may, among other things: establish a service list; specify the means and manner of service for serving or noticing parties on the service list; provide for omnibus hearings and procedures for particular kinds of hearings, such as hearings on motions for relief from the automatic stay; and address access to the docket, telephonic hearings, and other administrative matters. Judges have adopted different approaches to this particular issue. A collection of case-management orders is in the online repository. (*Note:* As discussed at Part IX.C, intercreditor issues may result in litigation external to the Chapter 9 case, but resolution of that litigation may be a prerequisite to plan confirmation. Courts should consider intercreditor issues, regulatory or electoral approvals, or other such nonbankruptcy matters that may impact the timing of the Chapter 9 case in structuring any case-management order.)

2. Scheduling Orders and Status Conferences

A judge may find value in entering a scheduling order governing the filing of the plan of adjustment and confirmation process, as well as any contested matters in the Chapter 9 case. Such a scheduling order could include filing deadlines, status conferences, and hearing dates. These kinds of orders may assist the parties in narrowing the issues, thereby avoiding stalemates in discussions or negotiations and possibly helping facilitate a more efficient resolution. In addition, pursuant to Bankruptcy Rule 7016, Civil Rule 16 applies in any adversary proceedings in the Chapter 9 case. A collection of scheduling orders is in the online repository.

3. Discovery Issues and Pretrial Orders

In addition to a general scheduling order, the judge may want to anticipate potential discovery disputes in adversary proceedings, contested matters, and any litigation concerning eligibility or confirmation of the plan of adjustment. Unlike a Chapter 11 debtor, a Chapter 9 debtor is obligated to provide only limited financial and operational information with its petition. Because of a Chapter 9 debtor's limited disclosure obligations, creditors may request additional infor-

mation through discovery during the case. The judge should balance sovereignty issues and the debtor's limited obligations under the Bankruptcy Code with the creditors' need for additional information to address the particular matter in dispute. Judges have granted limited discovery to creditors in, among others, the following cases: *In re City of Detroit, Mich.,* Case No. 13–53846 (Bankr. E.D. Mich. July 18, 2013) [ECF No. 642]; *In re County of Orange, Cal.*, 179 B.R. 185, 189 (Bankr. C.D. Cal. 1995). In addition, Bankruptcy Rule 2004 applies in Chapter 9 cases, *see, e.g., In re* City of Vallejo, Cal., Case No. 08–26813 (Bankr. E.D. Cal. Aug. 9, 2010) [ECF No. 758], as do any state or local laws concerning public access to information.

4. Mediation

Some judges (e.g., in the *Detroit*, *Vallejo*, *Stockton*, and *San Bernardino* cases) have used mediation in Chapter 9 cases to help the parties reach a consensus, or at least narrow the issues, regarding the plan of adjustment. Such mediation can take a variety of forms. The judge may appoint another judge or former judge to serve as the mediator. Although third-party mediators also are available, the judge cannot compel the debtor to pay for such a mediator. The judge could use mediation for a particular issue in the case or, more globally, for facilitating the plan of adjustment. It is important that both the mediator and the parties understand the rules governing the mediation. These rules should address

- the scope of the mediation;
- the confidential nature of the mediation procedures;
- what, if any, communications the mediator or any of the parties will have with the judge or others outside of the specific mediation;
- the timetable for the mediation;
- the use of discovery or the sharing of information among the mediator and parties to the mediation; and
- the parties required to attend the mediation.

Judges have adopted different approaches to the use of mediation. Some have ordered mediation of particular issues in the case. The judge in *Detroit* used a mediation team approach that assigned

different mediators to oversee the debtor's mediation with different creditor groups. In addition, in *Stockton*, the U.S. Court of Appeals for the Ninth Circuit appointed a bankruptcy judge from another district to serve as a judicial mediator in the case, with the power to enter orders on matters subject to the mediation. See *In re* City of Stockton, Cal., Case No. 12–32118 (Bankr. E.D. Cal. 2012) [ECF Nos. 384, 385], included in the online repository.

The use of a sitting judge to mediate matters within a bankruptcy case implicates Canon 4A(4) of the Judicial Code of Conduct, which provides: "A judge should not act as an arbitrator or mediator or otherwise perform judicial functions apart from the judge's official duties unless expressly authorized by law." The Canon's requirement that the judge's official duties as mediator are "authorized by law" may be met by adopting a local rule pursuant to § 652(a) of the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§ 651–658, that establishes the use of judicial mediators. Another approach might be to enter a general administrative order to the same effect and some courts have concluded an appointment order is sufficient. For a local rule, see U.S. District Court for the District of Maine, Local Rule 83.11(c) (Court-Annexed ADR); for a general order, see Administrative Order Authorizing Judicial Mediation, U.S. Bankruptcy Court for the Eastern District of Michigan (Aug. 2, 2013); both documents are in the online repository. If the judge to be appointed as mediator is from outside the district, other requirements must be met. To ensure judicial mediators are acting with authority and with immunity, the court may wish to consult its circuit executive or the AO Office of the General Counsel.

The use of mediation is a fact-intensive determination made on a case-by-case basis. Mediation may not be appropriate or warranted in every Chapter 9 case. At least one judge has denied a party's request for mediation concerning the debtor's rejection of its proposal for reopening the debtor's hospital. *In re* Palm Drive Health Care Dist., 14-10510 (Bankr. N.D. Cal., May 16, 2014) (Chapter 9 debtor opposed requested mediation). This order and the supporting and opposing briefs are in the online repository.

VI. The Administration of the Case

The judge's different role in a Chapter 9 case, as discussed at Part III.C, is apparent in the operational aspects of the case, as a Chapter 9 debtor does not need the judge's approval to continue to pay prepetition or postpetition obligations or to continue its operations. Rather, a Chapter 9 debtor can continue to conduct its affairs with less interruption from the bankruptcy process, other than in connection with the confirmation of its plan of adjustment and the assumption or rejection of executory contracts and unexpired leases. Some common aspects of bankruptcy cases during the administrative phase of the case are addressed below.

A. The Automatic Stay

The automatic stay is applicable in Chapter 9 cases. Two provisions, however, enlarge its scope. Section 922(a)(1) expands the automatic stay to prohibit actions against officers and inhabitants of the debtor if the action seeks to enforce a claim against the debtor. Section 922(a)(2) prohibits attempts to enforce a "lien on or arising out of taxes or assessments owed to the debtor." Those provisions prevent creditors (including other governmental units) from bringing mandamus actions to require the debtor to collect taxes and from bringing direct actions against taxpayers on behalf of the debtor to collect taxes or to enforce a tax lien imposed by the debtor. *See, e.g., In re* City of Stockton, Cal., 484 B.R. 372 (Bankr. E.D. Cal. 2012).

Section 922(d), on the other hand, narrows the scope of the stay with respect to special revenues. Under that subsection, neither the provisions of § 362 nor those of § 922(a) stay the "application of pledged special revenues in a manner consistent with section 927. . . to payment of indebtedness secured by such revenues." 11 U.S.C. § 922(d) (note that the reference to § 927 is likely a reference to § 928 of the Bankruptcy Code, which addresses the continuation of a prepetition lien in special revenues); *In re* Jefferson Cty., Ala., 474 B.R. 228, 269–71 (Bankr. N.D. Ala. 2012) (explaining legislative history and operation of §§ 922 and 928 of the Bankruptcy Code and holding that bondholders have the right to receive special revenues in the possession of the debtor during the case). Debt secured by special revenues can raise a number of issues in a Chapter 9 case beyond the automatic stay. For example, it is unclear whether such

claims can be impaired or crammed down in the plan confirmation process. *See also* Parts VI.C (discussing special issues with special revenue bonds), VI.D (discussing avoidance actions and special revenue bonds), and VII.D (discussing confirmation issues with respect to special revenue bonds).

In addition, § 901(a) incorporates §§ 555, 556, 557, 559, 560, 561, and 562, which, by their own terms, except the unwinding of certain financial transactions from the automatic stay.

B. The Lack of an Estate

Section 541 (Property of the Estate) is not applicable in Chapter 9 cases. To address instances in which the Bankruptcy Code uses "property of the estate" in a section applicable in a Chapter 9 case, § 902 explains that "'property of the estate' means property of the debtor." Notably, the jurisdictional provision of 11 U.S.C. § 1334(e)(1) does grant jurisdiction to the bankruptcy court over "property of the debtor." The lack of an estate underscores the more limited role of the judge and U.S. trustee or bankruptcy administrator in the Chapter 9 case—there is no estate or property of the estate for the judge to administer.

C. The Continued Operation of the Debtor

In general, the Chapter 9 debtor may continue to operate as it did prior to the bankruptcy case, with little involvement from the judge or creditors. Indeed, the judge may not exercise jurisdiction over the debtor's property because of § 904, among other reasons. The judge may, however, be called upon to address discovery disputes or issues under § 365. Similarly, the debtor may consent to or invoke the assistance of the judge to resolve issues otherwise subject to § 904—for example, to facilitate plan negotiations. The following explains the treatment of certain operational matters in a Chapter 9 case, particularly those that differ from a Chapter 11 case.

1. The Debtor as Limited-Purpose Trustee

Section 902(5) states that "trustee" when used in a section made applicable to Chapter 9 cases by § 103(f) or 901 means "debtor," except as provided by § 926. 11 U.S.C. § 902(5).

2. Obtaining Postpetition Credit

A Chapter 9 debtor has the same power to obtain unsecured credit as it does outside of bankruptcy. Therefore, subsections (a) and (b) of § 364 are not made applicable to Chapter 9 cases because to do so would give the judge supervisory authority over the amount of unsecured debt the debtor incurs in its operation. The judge may become involved in these matters, however, when "the [debtor] needs special authority, such as subordination of existing liens, or special priority for the borrowed funds." H.R. Rep. No. 95–595, at 394–95 (1977). Thus, § 364(c)–(f) is made applicable to Chapter 9 cases. *See* 11 U.S.C. § 901(a).

3. Postpetition Effect of a Security Interest; Special Issues with Special Revenue Bonds and Statutory Liens

Although § 901(a) incorporates § 552, § 928 limits its application. Section 928(a) states that a lien on special revenues acquired by the debtor after the commencement of the case cannot be avoided under § 552(a). Section 552(a), in turn, provides, "Except as provided in subsection (b) of this section, property acquired by the estate or by the debtor after the commencement of the case is not subject to any lien resulting from any security agreement entered into by the debtor before the commencement of the case." Accordingly, without the limitation set forth in § 928(a), a lien on special revenues might be avoided and a special revenue bond might be effectively turned into a general obligation bond. H.R. Rep. No. 100–1011, at 7–8 (1988). Nevertheless, § 928(b) does subject special revenue bonds to the payment of certain operating expenses, stating, "Any such lien on special revenues, other than municipal betterment assessments, derived from a project or system shall be subject to the necessary operating expenses of such project or system, as the case may be." Exactly what expenses constitute "necessary operating expenses" for purposes of § 928(b) may be disputed. *See, e.g., In re* Jefferson Cty., Ala., 503 B.R. 849 (Bankr. N.D. Ala. 2013) (discussing whether postpetition professional fees can be paid as "necessary operating expenses" under § 928(b)).

Section 928(a) was enacted, in part, to avoid converting special revenue bonds into nonrecourse or general revenue bonds that could otherwise violate state constitutional or statutory debt limitations. It also is important to understand that the limitation in § 552(a) *only*

applies to consensual liens, i.e., "any lien resulting from any security agreement entered into by the debtor before the commencement of the case." By its terms, § 552(a) does not apply to liens arising solely by force of statute. These so-called "statutory liens" arise automatically by force of law and are not based on or derived from a prepetition security agreement or other contract or judicial action. Thus, statutory liens are not cut off by § 552(a) and continue to attach to revenues or property postpetition. However, the § 922(d) exception to the automatic stay applies only to liens on "special revenues" and not to statutory liens. Although some municipal debtors have chosen to continue to pay statutory lien debt during the bankruptcy case, that outcome is not dictated by the Bankruptcy Code. The extent to which revenues subject to a statutory lien may be diverted by the debtor without providing "adequate protection" to bondholders during the case has yet to be adjudicated.

4. Limitation on Recourse; Special Issues with Special Revenue Bonds

Section 901(a) of the Bankruptcy Code adopts § 1111(b) as a provision of Chapter 9, but § 927 limits its application to ensure that nonrecourse revenue bonds cannot be converted under § 1111(b) into recourse or general obligation debt. *See* H.R. Rep. No. 100–1011, at 7 (1988). Specifically, § 927 states, "The holder of a claim payable solely from special revenues of the debtor under applicable nonbankruptcy law shall not be treated as having recourse against the debtor on account of such claim pursuant to section 1111(b) of this title."

5. Sales of Assets

Chapter 9 does not incorporate § 363. As such, a Chapter 9 debtor can sell assets outside of the bankruptcy process in accordance with applicable nonbankruptcy law, or it can sell assets—typically major assets—under the plan of adjustment. Section 901 incorporates § 1123(a)(5)(D), which allows the debtor to sell assets free and clear of liens under the plan. As discussed at Part VII.D, a debtor must consider—and obtain any regulatory or electoral approvals required by—applicable nonbankruptcy law in connection with plan confirmation. *See, e.g.,* 11 U.S.C. § 943(b)(4), (6); Parts VII.D (discussing plan confirmation process), VIII.D (discussing hospital sale under Chapter 9 plan).

6. *Executory Contracts and Unexpired Leases*

With court approval, a Chapter 9 debtor may assume or reject executory contracts and unexpired leases, as may a debtor in Chapter 11. 11 U.S.C. §§ 365, 901(a). However, a lease to a debtor "shall not be treated as an executory contract or unexpired lease for the purposes of section 365 or 502(b)(6)" solely because the agreement is subject to termination if rent is not appropriated by the debtor. 11 U.S.C. § 929. Section 929 recognizes the potential that a municipality is party to a financing lease rather than a true lease. As the legislative history explains, "[S]ection . . . 929 bring[s] treatment of municipal leases in bankruptcy into conformity with how such leases are treated and used in the world of municipal finance . . . [S]ection 929 says that a lease to a municipality shall not be treated as an executory contract or unexpired lease that could be subject to assumption or rejection under section 365, or that could give rise to a claim for damages limited by section 502(b)(6), just because it is subject to termination in the event the [municipal] debtor fails to appropriate rent." *See* H.R. Rep. No. 100-1011, 100th Cong., 2d Sess. 8 (1988).

7. *Collective Bargaining Agreements and Retiree Benefits*

Section 901(a) does not make sections 1113 and 1114 applicable to Chapter 9 cases. As a result, the judges in the *San Bernardino* and the *Vallejo* cases concluded that § 365 of the Bankruptcy Code governs the Chapter 9 debtor's proposed treatment of collective bargaining agreements and retiree benefits. *See, e.g., In re* City of Vallejo, Cal., 403 B.R. 72, 78–79 (Bankr. E.D. Cal. 2009), *aff'd*, 432 B.R. 262 (E.D. Cal. 2010); *In re* City of San Bernardino, Cal., 530 B.R. 474, 480–82 (C.D. Cal. 2015). Consequently, a Chapter 9 debtor may seek to reject collective bargaining agreements without going through the procedures provided in § 1113, and also may reject retiree benefit plans without complying with the procedure in § 1114.

Judges confronting a Chapter 9 debtor's request to reject a collective bargaining agreement have been guided by the Supreme Court's decision in *N.L.R.B. v. Bildisco & Bildisco,* 465 U.S. 513 (1984). *Bildisco* provides that, in evaluating a debtor's request under § 365, the judge should consider whether "the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract." *Id.* at 526. The bankruptcy

court "should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution." *Id*. *See also San Bernardino*, 530 B.R. at 480–82 (relying on *Bildisco* and authorizing rejection of collective bargaining agreement); *In re* City of Vallejo, Cal., 432 B.R. 262 (E.D. Cal. 2010) (affirming bankruptcy court's order authorizing debtor's rejection of collective bargaining agreement). Questions remain, however, concerning the limitations of a municipality's ability to unilaterally reject a collective bargaining agreement, as well as the evidence necessary to support a rejection determination under § 365. *See, e.g.*, *Vallejo*, 432 B.R. at 273–75; *In re* Cty. of Orange, 179 B.R. 177, 182–83 (Bankr. S.D. Cal. 1995).

Judges also may face requests concerning a debtor's proposed modification of a collective bargaining agreement or retiree benefits prior to a formal request to reject the underlying agreement. At least one judge has determined that he did not have authority to require the Chapter 9 debtor to continue to pay retiree benefits. *See In re* City of Stockton, Cal., 478 B.R. 8 (Bankr. C.D. Cal. 2012) (discussing issues raised by request to require payments, including § 904's restriction on the bankruptcy court's ability to interfere with the debtor's property or revenue). In addition, at least one bankruptcy judge and one district judge have determined that the automatic stay applies to a prepetition action concerning the debtor's alleged breach of a memorandum of understanding with a labor union. *See San Bernardino*, 530 B.R. at 489 (affirming bankruptcy court's decision denying union's request for relief from stay). As with most decisions in Chapter 9 cases, the judge should be aware of the issues that might arise and be sensitive to the competing issues at play, including the potential Tenth Amendment issues discussed above. (*See* Parts II, III.B, and III.C.)

Moreover, issues concerning relations between the Chapter 9 debtor and its labor unions and retirees may arise during the eligibility determination at the beginning of the Chapter 9 case. Specifically, the judge may be asked to determine whether the debtor negotiated in good faith with its labor unions and retirees prior to filing the Chapter 9 case. *See, e.g., In re* City of Detroit, Mich., 504 B.R. 97 (Bankr. E.D. Mich. 2013); *In re* City of Stockton, Cal., 493 B.R. 772 (Bankr. E.D. Cal. 2013).

8. Pension-Specific Issues

In addition to the §§ 1113 and 1114 employee-related issues previously discussed, unique and challenging issues may arise in connection with a Chapter 9 debtor's pension obligations. Most public employees are entitled to receive some form of pension payments—i.e., retirement income typically based on years of service or other qualifications established by the municipality or state—from the Chapter 9 debtor. *See* Part III.F (discussing nature of public pension plans). Such pension obligations may be protected by state or local law through constitutional and statutory restrictions on modifications to the pension plans, the recognition of a property right in the pension that cannot be modified without due process of law, or similar structures intended to secure the payment of pensions to public employees. (*Note:* Issues also may exist concerning whether OPEBs are pension obligations.) These protections make it very difficult for municipalities to modify or reduce their pension obligations outside of a Chapter 9 case, and such protections may present obstacles in the Chapter 9 case as well. They also evidence a policy at the state or local level to prioritize payments to public employees.

A Chapter 9 debtor may be able to achieve some structural changes to its pension plans prepetition, such as by increasing the retirement age to require employees to work longer before receiving pension payments and adjusting the formula for calculating pension payments (e.g., basing payments on an average salary over a certain period, rather than the last year of service). *See, e.g., In re* City of Stockton, Cal., 493 B.R. 772, 779–80 (Bankr. E.D. Cal. 2013) (explaining prepetition steps taken by city with respect to its pension plans). These changes, however, may not be adequate to address the debtor's projected shortfall. And unlike private employers' pension plans, public pension plans are not protected by the Employee Retirement Income Security Act of 1974 (ERISA) or backstopped by the Pension Benefit Guaranty Corporation. The treatment of a debtor's pension obligations thus can be an important and controversial issue in the Chapter 9 case.

Whether and to what extent a Chapter 9 debtor can modify its pension obligations is subject to different approaches. The judge in the *Detroit* case held that the debtor's pension obligations were subject to impairment in the Chapter 9 case despite state constitutional or statutory protections for the same. *See In re* City of Detroit, Mich.,

524 B.R. 147, 211 (Bankr. E.D. Mich. 2014). *See also In re* City of Stockton, Cal., 526 B.R. 35, 50–55 (Bankr. E.D. Cal. 2015) (discussing potential impairment of contract with CalPERS). A debtor may not, however, want to use the Chapter 9 process to impair pension obligations for a variety of reasons. Moreover, a judge may confront certificates of obligation issued by the debtor prepetition to fund its pension obligations, which essentially are bonds that shift part of the risk of underfunded pension obligations away from employees and to the bondholders. Some courts treat such bonds separately from the underlying pension obligations. *See In re* City of Stockton, Cal., 542 B.R. 261 (9th Cir. BAP 2015) (discussing separate classification and treatment of bondholder's claim).

9. Settlements

Bankruptcy Rule 9019 provides, "On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement." At least one judge has determined that a Chapter 9 debtor does not need to seek approval of settlements reached during the Chapter 9 case, even with respect to disputed issues. *See In re* City of Stockton, Cal., 486 B.R. 194 (Bankr. E.D. Cal. 2013). This result stems, in part, from the failure of Chapter 9 to incorporate § 363 of the Bankruptcy Code and the procedural nature of Bankruptcy Rule 9019. *Id*. Nevertheless, as discussed at Part V.F (discussing debtor consent to court action), a Chapter 9 debtor may request court approval of a settlement, particularly those resolving potential impediments to confirmation of the plan of adjustment. Despite this ability, one should consider whether the judge is prepared to approve the settlement preconfirmation when the plan is likely to encompass the same terms as the settlement. *See Detroit*, 524 B.R. at 257–58.

D. The Chapter 5 Avoiding Powers

Section 926(a) provides that the judge may appoint a trustee if the debtor refuses to pursue a cause of action under § 544, 545, 547, 548, 549(a), or 550 for the limited purpose of pursuing such cause of action. The statute expressly requires that such appointment be "on the request of a creditor" and thus arguably does not permit appointment of a trustee *sua sponte*. *See* 11 U.S.C. § 926(a); *In re* N.Y.C. Off-

Track Betting Corp., 2011 WL 309594 at *4 (Bankr. S.D.N.Y. 2011) (questioning role of trustee in light of § 904).

Section 926(b) bars the avoidance, pursuant to § 547, of transfers made "to or for the benefit of any holder of a bond or note, on account of such bond or note." Although the terms "bond" and "note" are included in the definition of "security" in § 101, neither is defined. The legislative history suggests that the limitation in § 926(b) was intended to protect special revenue bonds, but there is nothing in the statute that restricts avoidance to such bonds. *See* H.R. Rep. No. 100–1011, at 4121 (1988).

E. The Claims Process

As in a Chapter 11 case, one objective of a Chapter 9 case is to identify creditors holding claims against the debtor and to provide for the treatment of those claims under the plan. Key aspects of the Chapter 9 claims process are listed below, noting some similarities and differences with the process in Chapter 11.

1. List of Creditors

Section 924 requires the debtor to file a list of creditors as prescribed by Federal Rule of Bankruptcy Procedure 1007. Bankruptcy Rule 1007(a)(1) requires the debtor to "file with the petition a list containing the name and address of each entity included or to be included on Schedules D, E/F, G, and H . . ." In addition, Bankruptcy Rule 1007(d) requires the debtor to file a list of the creditors with the twenty largest unsecured claims, excluding insiders. This information is needed in connection with the possible appointment of a creditors' committee under § 1102, made applicable to Chapter 9 by § 901.

2. Creditors Affected by Adjustment of Assessments

If a proposed plan requires a revision of assessments such that the proportion of special assessments or special taxes to be assessed against some real property will be different from the proportion in effect on the date the petition is filed, the debtor must also file, pursuant to Bankruptcy Rule 1007(e), a list showing the name and address of each known holder of title, legal or equitable, to real property ad-

versely affected. On motion, the judge may modify the requirements of Bankruptcy Rule 1007(a) and (e).

3. Proofs of Claim

Section 901(a) makes § 501 applicable in Chapter 9 cases. As in Chapter 11, many creditors may not be required to file a proof of claim in a Chapter 9 case. A proof of claim is deemed filed under § 501 for any claim that appears on the list of creditors filed by the debtor, except a claim that is listed as disputed, contingent, or unliquidated. 11 U.S.C. § 925. Creditors whose claims are listed as disputed, contingent, or unliquidated or are not listed at all must file proofs of claim to be treated as creditors with respect to such claims for purposes of voting and distribution. Fed. R. Bankr. P. 3003(c)(2). "Any creditor or indenture trustee may file a proof of claim . . ." Fed. R. Bankr. P. 3003(c)(1). Disputed, contingent, or unliquidated claims must be filed within the time fixed by the judge—this time frame may be extended for cause. Fed. R. Bankr. P. 3003(c)(2)–(3). Even if the time has expired, a proof of claim may be filed to the extent and under the conditions set forth in Bankruptcy Rule 3002(c)(2)–(4) and (6). Not less than twenty-one days' notice of the time fixed for filing proofs of claim must be given by mail to the debtor, the trustee, all creditors, and indenture trustees. Fed. R. Bankr. P. 2002(a)(7) & 3003(c)(3).

4. Claims Bar Date

If the debtor applies for a claims bar date at the time of the filing of the petition and the request is granted, notice of the established claims bar date can be included in the initial notice of the commencement of the case. *See, e.g.*, D. Neb. L. Bankr. R. 2080–1(A)(2).

5. Notice and Discharge

Despite the notice requirements in Bankruptcy Rules 2002 and 3003, it has been held that although creditors did not receive notice that all claims were listed as disputed, contingent, or unliquidated, they were barred from participating in distribution because they had actual knowledge of the case before the plan was confirmed. Nebraska Sec. Bank v. Sanitary & Improvement Dist. No. 7, 119 B.R. 193, 195 (D. Neb. 1990). The judge reasoned that in contrast to oth-

er discharge provisions in the Bankruptcy Code, § 944(c)(2) does not require creditors to have a reasonable opportunity to file timely proofs of claim prior to confirmation and that the only limitation on discharge in Chapter 9 is for those obligations owed to creditors who did not have notice or actual knowledge of the case before confirmation. *Id*. The judge also held that the creditors' constitutional right to due process was not violated because they had an opportunity to be heard at a meaningful time. Once the opportunity had presented itself, it was the responsibility of the creditors to make whatever inquiry and/or response necessary to protect their claims. *Id. See also* Holmon v. Vill. of Alorton, 66 N.E.3d 841 (Ill. App. Ct. 5th Dist. 2016) ("A bankruptcy plan operates as an absolute settlement, and the failure to pay unpaid obligations created by the plan will not revive the old debts.").

VII. The End of the Case: Plan Confirmation, Postconfirmation, and Dismissal Issues

Judges generally recognize that "[t]he purpose of reorganization under Chapter 9 is to allow municipalities created by state law to adjust their debts through a plan voted on by creditors and approved by the Bankruptcy Court." *In re* Mount Carbon Metro. Dist., 242 B.R. 18, 32 (Bankr. D. Colo.1999). The Chapter 9 plan process mirrors the Chapter 11 process in several key respects, including the disclosure statement and solicitation process. Some differences, however, exist. For example, in Chapter 9 only the debtor may file or modify a plan, and § 943 of the Bankruptcy Code imposes additional confirmation requirements. In addition, not every Chapter 9 debtor will be able to achieve confirmation of a plan. In those instances, the judge may need to consider grounds supporting dismissal of the case. Each of these issues is addressed in further detail below.

A. The Plan Proponent

Section 941 of the Bankruptcy Code provides that the debtor "shall" file a plan. Section 1121 is not incorporated into Chapter 9 and there is no provision similar to § 1121 that would allow creditors or other parties in interest to file a plan. The plan may be filed with the petition or at a later time fixed by the judge. 11 U.S.C. § 941. The remedy

if a debtor does not timely file a plan is dismissal of the case. 11 U.S.C. § 930(a)(3).

Section 942 provides that the debtor (and implicitly no other party) may modify a plan at any time before confirmation. *See* Fed. R. Bankr. P. 3019(a). In addition, § 901(a) incorporates § 1127(d) providing that creditors' votes in favor or against a plan continue to apply to the modified plan unless the vote is changed by the court-established deadline. For a discussion of a debtor's ability to modify a plan postconfirmation, see Part VII.E.

B. The Disclosure Statement

Section 901(a) adopts the disclosure statement provisions of § 1125 in their entirety. Federal Rules of Bankruptcy Procedure 2002, 3016, and 3017 set forth related requirements and procedures. Consequently, the Chapter 9 disclosure statement and solicitation process is akin to that in a Chapter 11 case.

C. Objections to Confirmation

Objections to confirmation of the plan must be filed with the clerk and served on the debtor, on any committee appointed under § 1102, and on any entity designated by the judge, within a time fixed by the judge. Fed. R. Bankr. P. 3020(b)(1). A copy of the objection need not be transmitted to the U.S. trustee or bankruptcy administrator in Chapter 9 cases. *Id.* An objection to confirmation is deemed to be a contested matter governed by Federal Rule of Bankruptcy Procedure 9014. *Id.*

Section 943(a) provides that a "special tax payer" may object to confirmation of a plan. A special tax payer is a "record owner or holder of legal or equitable title to real property against which a special assessment or special tax has been levied the proceeds of which are the sole source of payment of an obligation issued by the debtor to defray the cost of an improvement relating to such real property." 11 U.S.C. § 902(3). The right of a special tax payer to object to confirmation is in addition to the rights of other parties in interest to appear and be heard on any issue in the case, including confirmation, because § 901(a) makes §§ 1109 and 1128 applicable in Chapter 9 cases.

D. The Confirmation Process

After notice, the judge must hold a hearing on the confirmation of a Chapter 9 plan. 11 U.S.C. §§ 901(a), 1128(a); Fed. R. Bankr. P. 3020(b)(2). This part of the manual discusses the general standards governing plan confirmation, as well as some procedural and substantive issues that may arise in the process.

The standards for plan confirmation are a combination of the Chapter 9-specific requirements of § 943(b) and those portions of § 1129 made applicable by § 901(a). In addition, the plan confirmation process may require the judge to consider the interplay of federal and state law. For example, similar to confirmation under Chapter 11, a Chapter 9 debtor must propose the plan "in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3) (incorporated by § 901(a)). In addition, § 943(b) states that the court shall confirm a plan if, among other things, applicable law does not prohibit the debtor from carrying out the plan and any regulatory or electoral approvals required to carry out the plan have been (or will be) obtained. Thus, for example, if the plan is predicated on revenue raise, state law often dictates the process for approving such a revenue raise, which often requires a vote of the public. If state and federal law conflict, the judge may have to make a determination regarding preemption. *See In re* Cty. of Orange, Cal., 191 B.R. 1005, 1018–23 (Bankr. C.D. Cal. 1996) (holding that state statute dictating priority of distribution of property held in trust by Chapter 9 debtor conflicted with and thus was preempted by federal bankruptcy law on the rationale that state legislatures cannot create bankruptcy priorities); *see also In re* Sanitary & Improvement Dist. #7 of Lancaster Cty., Neb., 98 B.R. 970, 974–75 (Bankr. D. Neb. 1989) (denying confirmation of Chapter 9 plan because it did not provide that bondholders would be paid in full prior to payment to warrant holder, as required by state law).

Section 943(b) of Title 11 provides that

> the court shall confirm the plan if:
>
> (1) the plan complies with the provisions of this title made applicable by sections 103(e) and 901 . . . ;
>
> (2) the plan complies with the provisions of [Chapter 9];

> (3) all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable;
>
> (4) the debtor is not prohibited by law from taking any action necessary to carry out the plan;
>
> (5) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in section 507(a)(2) . . . will receive on account of such claim cash equal to the allowed amount of such claim;
>
> (6) any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval; and
>
> (7) the plan is in the best interests of the creditors and is feasible.

11 U.S.C. § 943(b). For a discussion of § 943(b)(3) and the approval of professionals' fees, see Part V.G. In addition, under § 901(a) the following sections apply in Chapter 9 cases: § 1129(a)(2), (3), (6), (8), and (10), and § 1129(b)(1), (2)(A), and (2)(B).

In applying the foregoing standards to evaluate confirmation of a plan of adjustment, the judge may confront one or more of the following issues.

1. Classification of Claims

Section 1122(a) applies in a Chapter 9 case. Claims classification can be challenging in a Chapter 9 case. Specifically, courts often face three kinds of issues. First is the effect of § 901, which only incorporates one category of administrative expense claims, i.e., § 507(a)(2). Does this mandate only one class of administrative expense claims (i.e., § 507(a)(2) claims) or can the debtor separately classify other priority claims? *See, e.g., In re* Cty. of Orange, Cal., 191 B.R. 1005, 1020 (Bankr. C.D. Cal. 1996) (explaining that "there are valid reasons why Congress only incorporated § 507(a)[(2)] into chapter 9, and those reasons do not lead to the conclusion that Congress intended to eliminate federal priorities under chapter 9"). Second is whether the debtor can classify all general unsecured claims in one class,

even though some claimants are bondholders, some are retirees, and some are other types of unsecured creditors. *See, e.g., In re* City of Stockton, Cal., 542 B.R. 261 (9th Cir. BAP 2015) (rejecting creditor's argument that the debtor was required to classify its unsecured claim separate from other general unsecured claims). Third is whether the debtor can classify general unsecured creditors separately, including different treatment for creditors who settle and those who do not. *See, e.g.*, *In re* City of Detroit, Mich., 524 B.R. 147 (Bankr. E.D. Mich. 2014); *In re Stockton*, 542 B.R. at 280–83 (discussing separate classification and treatment of bondholder's claim). Courts generally have allowed separate classification if it is reasonable or supported by a business or economic justification. *See, e.g., In re* City of Colo. Springs Spring Creek Gen. Improvement Dist., 187 B.R. 683 (Bankr. D. Colo. 1995) (reviewing two different approaches to § 1122(a)—one that requires justification for separate classification and one that permits it as a general matter—and finding the latter approach more consistent with statutory language; citing cases). At least one court has, however, determined that the Bankruptcy Code preempts any state or local law priorities for claims that conflict with the Bankruptcy Code. *See Cty. of Orange*, 191 B.R. 1005.

2. Good Faith

Section 1129(a)(3) applies in a Chapter 9 case, requiring that the plan "be proposed in good faith and not by any means forbidden by law." 11 U.S.C. § 1129(a)(3). Courts generally consider all factors relevant to the debtor's proposed plan of adjustment in assessing the debtor's good faith. *See, e.g., In re* City of Detroit, Mich., 524 B.R. 147, 248 (Bankr. E.D. Mich. 2014) (explaining that inquiry focuses on issues pertinent to plan but includes the "'totality of the circumstances,' and the court's own 'common sense and judgment'"). As explained by one court, the guiding principle is "that a Chapter 9 plan proposed in good faith must treat all interested parties fairly and that the efforts used to confirm the plan must comport with due process." *In re* Mount Carbon Metro. Dist., 242 B.R. 18, 39 (Bankr. D. Colo. 1999).

3. Not Prohibited by State Law

Section 943(b)(4) focuses on whether the debtor is prohibited by state, local, or other nonbankruptcy law from taking actions necessary to implement the plan. Accordingly, the judge should review any actions of the debtor proposed under, or in connection with, the plan of adjustment, including new financing, to ensure that applicable law does not prohibit the debtor from carrying out the plan. *See In re* Sanitary & Improvement Dist. #7 of Lancaster Cty., Neb., 98 B.R. 970 (Bankr. D. Neb. 1989); 11 U.S.C. § 943(b)(4). The Bankruptcy Code may preempt, however, certain aspects of applicable nonbankruptcy law. *See, e.g., In re Detroit,* 524 B.R. at 211–12 (explaining that a plan could impair unsecured pension obligations under § 1123(b)(1), notwithstanding § 943(b)(4)).

4. Regulatory or Electoral Approval

Section 943(b)(6) speaks to the implementation of the plan and requires the debtor to obtain any regulatory or electoral approvals required by state or local law to carry out any provision of the plan. As noted above, this could include compliance with state or local law processes for the approval of revenue raises necessary to implement the plan.

5. Best Interests and Feasibility Requirements

Section 943(b)(7) requires that the proposed plan is "in the best interests of creditors and is feasible." 11 U.S.C. § 943(b)(7). According to one case, the "'best interests' test acts as a floor requiring a reasonable effort at payment of creditors by the municipal debtor and that the 'feasibility' requirement sets a corresponding ceiling which prevents the Chapter 9 debtor from promising more than it can deliver." *In re* Mount Carbon Metro. Dist., 242 B.R. 18, 34 (Bankr. D. Colo. 1999). Each element raises potential issues in the Chapter 9 context.

"Best interests of creditors" is not defined for purposes of Chapter 9. In Chapter 11, a plan is said to be in the best interests of creditors if creditors would receive at least as much under the plan as they would if the debtor were liquidated under Chapter 7. 11 U.S.C. § 1129(a)(7)(A)(ii). Courts generally have refused to apply the same definition in the Chapter 9 context because § 1129(a)(7) is not incorporated into Chapter 9 and liquidation is not available to the Chapter

9 debtor. *See, e.g., In re* City of Stockton, Cal., 542 B.R. 261, 270 (9th Cir. B.A.P. 2015). A similar but less extreme definition of the best interest of creditors test is that a Chapter 9 debtor's plan must pay creditors more than they would receive if the case were dismissed, which would permit "every creditor to fend for itself in the race to obtain the mandamus remedy and to collect the proceeds." 6 Collier on Bankruptcy ¶ 943.03[7][a] (16th ed. 2017). *See also In re* City of Detroit, Mich., 524 B.R. 147, 213 (Bankr. E.D. Mich. 2014) ("Courts generally agree that the best interests of creditors test in § 943(b)(7) requires 'that a proposed plan provide a better alternative for creditors than what they already have.'") (citations omitted). Moreover, although creditors often argue that the best-interests-of-creditors test should be applied on a creditor-by-creditor basis, courts generally have performed the analysis on a class basis. *See In re Stockton,* 542 B.R. at 283 ("By its terms, the 'best interests' test in Chapter 9 is collective rather than individualized, and that interpretation is supported by the very context of chapter 9.").

Despite the differences between the Chapter 9 and the Chapter 11 statutory language, it is suggested that a best-interests objection may be asserted by a dissenting creditor in a class that has otherwise accepted the Chapter 9 debtor's plan. 6 *Collier on Bankruptcy* ¶ 943.03[7] (16th ed. 2017). This approach affords statutory protection to dissenting members of an accepting impaired class and is similar to the § 1129(a)(7) objection, which is available to a dissenting creditor of a class that has accepted a Chapter 11 plan.

Section 943(b)(7) also requires that the proposed plan be feasible. The Chapter 11 formulation of feasibility in § 1129(a)(11) is not incorporated into Chapter 9. In evaluating a plan's feasibility, the judge must determine whether the revenue and expense projections submitted by the debtor are reasonable and whether, based on those numbers, the debtor should be able to make payments called for under the plan while also continuing to provide services to the public. *See In re* Mount Carbon Metro. Dist., 242 B.R. 18, 35 (Bankr. D. Colo. 1999) (reasoning that a finding of feasibility in a Chapter 9 case "should prevent confirmation of visionary schemes which promise creditors . . . more under a proposed plan than the debtor can possibly attain after confirmation . . . this requires a practical analysis of whether the debtor can accomplish what the plan proposes and provide governmental services") (internal quotations and citations

omitted); *see also* H.R. Rep. No. 94–686, at 571 (1977); *In re* City of Detroit, Mich., 524 B.R. 147, 219 (Bankr. E.D. Mich. 2014) (explaining the unique challenges under the feasibility requirement in Chapter 9 cases, including that the debtor must not only be able to repay its creditors in accordance with the plan, but also continue to provide public services).

6. Cramdown

A Chapter 9 debtor may seek confirmation of its plan under the cramdown provisions of § 1129(b) if the plan satisfies the requirements of § 1129(a) (other than subsection (a)(8)) and has been accepted by at least one class of impaired claims. As in the Chapter 11 context, § 1129(b) requires that the Chapter 9 plan of adjustment be "fair and equitable" with respect to each class of impaired claims. Section 1129(b)(2)(A) and (B) define "fair and equitable" for secured and unsecured claims, respectively. Nevertheless, the fair and equitable determination may present different issues in a Chapter 9 case, as compared to a Chapter 11 case, because of the inability to liquidate a municipality, the limited markets in which to sell municipal assets, valuation issues generally, and different terms and expectations in the municipal bond market.

Under § 1129(b)(2)(A), the judge must determine that the plan provides one of the following for secured claims: (1) deferred cash payments equal to the present value of the creditor's collateral; (2) the sale of the collateral, with a lien in proceeds and cash payments equal to the present value of the creditor's collateral; or (3) the indubitable equivalent of the secured claim. The judge must ascertain the present value of the revenue stream associated with revenue bonds, including special revenue bonds. As with most valuation issues, there is no one generally accepted valuation methodology for revenue streams associated with revenue bonds. Rather, the judge will make the determination and evaluate the proposed treatment of the secured claim against that valuation. In addition, with respect to special revenue bonds, it is unclear whether, and to what extent, such bonds can be impaired through the cramdown process. *See also* Part VI.A (discussing automatic stay and special revenue bonds).

Under § 1129(b)(2)(B), the fair and equitable determination may entail a more general assessment of the proposed treatment for unsecured creditors. Municipal cases do not involve traditional eq-

uity interests against which to compare the treatment of unsecured creditors. The absolute priority rule does apply, however, with respect to different tranches of unsecured debt. In addition, judges tend to consider factors such as whether "the amount to be received by the bondholders is all that they can reasonably expect in the circumstances." Lorber v. Vista Irrigation Dist., 127 F.2d 628, 629 (9th Cir. 1942) (citations omitted).

7. Use of Court-Appointed Experts

Each judge should assess the need for, and use of, any court-appointed experts based on the circumstances of the particular case. The use of an independent court-appointed expert may be helpful, for example, in situations in which the quality of the information available from the debtor is poor or untimely, the nature of the prefiling negotiations or interactions with stakeholders has been antagonistic or unproductive, and/or there has been a general lack of transparency around the debtors' operations, activities, and financial condition. The court-appointed expert may facilitate better and more timely information, which may assist progress in the case and with resolving plan confirmation issues.

The judge may invoke Rule 706 of the Federal Rules of Evidence to appoint an expert witness to assess these or other specifically identified matters for the judge. Evidence Rule 706 provides, "On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing." It is made applicable in bankruptcy cases by Federal Rule of Bankruptcy Procedure 9017. Judges have used Evidence Rule 706 witnesses for valuation issues in Chapter 9 and Chapter 11 cases. *See, e.g.*, *In re* Gainy Corp., 400 B.R. 576 (Bankr. W.D. Mich. 2008) (reviewing the use of Evidence Rule 706 in bankruptcy cases and ordering the appointment of such witness).

In evaluating the use of an expert witness under Evidence Rule 706, the judge should consider, among other things, the appropriate process for identifying and retaining the expert, the scope of the expert's assignment, how the judge will use the information produced by the expert and who will have access to it, whether parties will be able to cross-examine the expert witness, who will pay for the expert's

services, and other issues potentially impacting the use of an expert witness. Evidence Rule 706 answers some of these questions, such as the ability of parties to depose and cross-examine an expert witness, as well as the payment of such witness's fees by the parties. Fed. R. Evid. 706(b), (c). Other questions are not specifically addressed and judges have adopted different approaches to these issues. For an example of an appointment under Evidence Rule 706, see *In re City of Detroit, Mich.*, No. 13–53846 [ECF No. 4215 and 4747] (Bankr. E.D. Mich. Apr. 22, 2014) (order appointing expert under Evidence Rule 706, and order supplementing the appointment), included in the online repository.

In addition, at least one court has appointed an unpaid finance expert as a non-testifying consultant to the court who was not subject to the requirements of Evidence Rule 706. See *In re City of Detroit, Mich.,* No. 13–53846 [ECF No. 4216] (Bankr. E.D. Mich. Apr. 22, 2014) (order appointing expert as "the Court's consultant on issues of municipal finance and viability"), included in the online repository. Judges and stakeholders in the case may have different perspectives on the use of such experts and on what information/advice given by the expert to the judge should be disclosed to parties/stakeholders. For a discussion of certain issues relating to the use on a nontestifying consultant, see Melissa B. Jacoby, *Federalism Form and Function in the Detroit Bankruptcy*, 33 Yale J. on Reg. 55, 92–94 (2016).

E. Implementation and Postconfirmation Issues

After the entry of the confirmation order, the judge's jurisdiction over the Chapter 9 case continues for purposes of implementation of the plan and closing the case. Section 901 also incorporates several sections of Chapter 11—§§ 1142(b), 1143, 1144, and 1145—that address postconfirmation matters. The following summarizes a few key aspects of the postconfirmation period.

1. Scope of Discharge

Except as provided in § 944(c), a "debtor is discharged from all debts as of the time when – (1) the plan is confirmed; (2) the debtor deposits any consideration to be distributed under the plan with a disbursing agent appointed by the court; and (3) the court has de-

termined that – (A) any security so deposited will constitute, after distribution, a valid legal obligation of the debtor; and (B) that any provision made to pay or secure payment of such obligation is valid." 11 U.S.C. § 944(b). Section 944(c) in turn provides that the debtor is not discharged from any debt that is carved out from the discharge under the plan or confirmation order or that is "owed to an entity that, before confirmation of the plan, had neither notice nor actual knowledge of the case." 11 U.S.C. § 944(c).

2. Continuing Jurisdiction of Court and Closing of Case

Under § 945(a), "the court may retain jurisdiction over the case for such period of time as is necessary for the successful implementation of the plan." *See also* Fed. R. Bankr. P. 3020(d). Except as provided in § 945(a), the court "shall close the case when the administration of the case has been completed." 11 U.S.C. § 945(b). The judge's postconfirmation jurisdiction, however, remains subject to the sovereignty of the state and the potential Tenth Amendment issues discussed at Part II. At least one judge has confirmed a plan of adjustment that provides, "pursuant to Bankruptcy Code section 945(a), the Court shall retain jurisdiction over the Case and as provided in Section 6.4 of the Plan." *In re* Jefferson Cty., Ala., No. 11–05736 at 77–78 (Bankr. N.D. Ala. Nov. 22, 2013) [ECF No. 2248]. The *Jefferson County* confirmation order and section 6.4 of the debtor's plan extended the court's postconfirmation jurisdiction to, among other things, matters involving the implementation of, and distributions under, the plan. Similarly, the bankruptcy court in *In re City of Central Falls, R.I.,* No. 11–13105 (Bankr. D.R.I.) [ECF No. 572], retained jurisdiction for the life of the plan (six years), conducts an annual status conference postconfirmation, and requires quarterly attestation forms be filed demonstrating that the city remains in material conformity with the terms of the six-year financial projections.

3. Postconfirmation Modification of the Plan

As discussed at Part VII.A, Chapter 9 addresses a debtor's ability to modify a plan prior to confirmation. 11 U.S.C. §§ 942, 1127(d). It does not, however, speak to postconfirmation modifications. Indeed, § 942 does not mention postconfirmation modifications, and Chapter 9 does not incorporate § 1127(b) addressing postconfirma-

tion modifications in the Chapter 11 plan context. Consequently, the Bankruptcy Code does not expressly recognize authority for a Chapter 9 debtor to modify its plan postconfirmation. *See, e.g., In re* East Shoshone Hosp. Dist., No. 98–20934–9, 2000 WL 33712301, at *3 (Bankr. D. Idaho Apr. 27, 2000) (concluding that "the absence of a correlative [chapter 11] provision in chapter 9 was intentional" and "indicates that, in chapter 9, postconfirmation modifications are not allowed"). *But see, e.g., In re* Barnwell Cty. Hosp., 491 B.R. 408 (Bankr. D.S.C. 2013) (permitting debtor to modify plan after confirmation to substitute purchaser when sale approved in confirmed plan failed to close); Ault v. Emblem Corp. (*In re* Wolf Creek Valley Metro. Dist. IV), 138 B.R. 610, 619–20 (D. Colo. 1992) (declining to adopt per se rule against postconfirmation amendments in the Chapter 9 context).

4. Revocation of Confirmation Order

Section 1144 of the Bankruptcy Code is made applicable to Chapter 9 cases by § 901. Accordingly, on request of a party in interest and filed within 180 days after entry of the confirmation order, the judge, after notice and hearing, may revoke the order of confirmation if, and only if, the order was procured by fraud. 11 U.S.C. §§ 901(a), 1144.

5. Application of Equitable Mootness in Appeals

If a party appeals the confirmation order, the status of the debtor's plan of adjustment and the debtor's emergence from Chapter 9 may be thrown into limbo. Parties relying on the terms of the plan may not know whether the appellate court will uphold the confirmation order or how the appeal affects their rights under the plan. Most courts consider these factors under the doctrine of equitable mootness in the Chapter 11 plan context. The application of the doctrine of mootness in Chapter 9, however, is unsettled. Not many courts have addressed this issue. Of the courts that have, the U.S. Court of Appeals for the Sixth and Ninth Circuits have applied the doctrine of equitable mootness to a Chapter 9 plan of adjustment, and the U.S. District for the Northern District of Alabama has declined to apply it. *Compare In re* City of Detroit, Mich., 838 F.3d 792 (6th Cir. 2016) (dismissing appeal of plan of adjustment); *In re* City of Vallejo, Cal.,

551 F. App'x 339 (9th Cir. 2013); *In re* City of Stockton, Cal., 542 B.R. 261, 273–74 (9th Cir. BAP 2015) *with* Bennett v. Jefferson Cty., 518 B.R. 613 (N.D. Ala. 2014) (declining to apply the doctrine of equitable mootness). As of the publication of this manual, an appeal of the latter decision was pending before the U.S. Court of Appeals for the Eleventh Circuit. *See* Bennett v. Jefferson Cty., Ala., 518 B.R. 613 (N.D. Ala. 2014), *appeal granted* (11th Cir. 14–90024).

F. Dismissal of the Case

Section 930(a) authorizes the dismissal of a Chapter 9 case, after notice and a hearing, for (1) want of prosecution, (2) unreasonable delay by the debtor that is prejudicial to the creditors, (3) failure to propose a plan within the time fixed under § 941, (4) nonacceptance of a plan within the time fixed by the judge, (5) material default by the debtor under a confirmed plan, or (6) termination of a confirmed plan by the occurrence of a condition specified in the plan. These factors are not exhaustive and the judge has discretion to dismiss for cause based on other grounds. 6 Collier on Bankruptcy ¶ 930.01 (16th ed. 2017).

Section 930(b) provides for mandatory dismissal of the case "if confirmation . . . is refused." The distinction between permissive and mandatory dismissal under this section is not apparent. Commentary ascribes the two provisions to probable "legislative oversight . . . [because] [t]he House bill did not contain the mandatory dismissal provision . . . [and] [t]he Senate bill did not contain the . . . permissive dismissal provision . . . ." 6 Collier on Bankruptcy ¶ 930.03 (16th ed. 2017). At least one judge has read the two provisions of § 930 as alternatives in the confirmation context by denying confirmation of the debtor's fourth amended plan of adjustment with leave to amend or modify the plan under § 930(a)(5), thus not invoking the mandatory dismissal provision of § 930(b). *In re* Sanitary & Improvement Dist. No. 7 of Lancaster Cty., Neb., 98 B.R. 970 (Bankr. D. Neb. 1989). In addition, at least one judge found cause for dismissal under § 930 when the debtor in a special district case requested dismissal, despite opposition from creditors. *In re* Richmond Unified Sch. Dist., 133 B.R. 221 (Bankr. N.D. Cal. 1991).

VIII. Issues Common in Smaller and Special Purpose Entity Cases

Chapter 9 cases present unique issues and, in general, no two Chapter 9 cases are exactly alike. Some common themes emerge, however, in Chapter 9 cases depending on the size of the case and the kind of debtor. For example, a case involving a smaller city, township, or a special purpose entity may not warrant the space and resource needs of a larger municipal case. That does not suggest that the substantive issues will be any easier, but it may ease logistical, staffing, and other resource issues for the judge and the clerk of court. This section discusses some key aspects of smaller and special purpose entity cases. As used in this section, the term *special purpose entity* refers to special districts and other entities that might constitute a public agency or instrumentality of the state under § 101(40) of the Bankruptcy Code, such as transportation districts, water and sewer districts, public utilities, public improvement districts, public hospitals, and public schools. Appendix B contains a list of Chapter 9 cases filed since 2008 and includes smaller and special purpose entity Chapter 9 cases.

A. Resources and Scaling Case to Size of Debtor

A smaller or special purpose entity case may not require the additional staffing and resources discussed above at Part IV.B. It may be sufficient for the clerk of court to identify specific staff members to handle inquiries regarding the case and docketing associated with the case. The judge and the clerk of court should assess the needs of each case and tailor any of the resource and staffing issues discussed in this manual accordingly.

B. Importance of Status Conferences and Timelines

In a smaller or special purpose entity case, the judge may find additional value in case-management and scheduling orders. Each judge should determine his or her own approach, but these cases may benefit from the judge providing more rather than less procedural guidance. Because of the limited judicial oversight in a Chapter 9 case and the potential for fewer active stakeholders in a smaller or special purpose entity case, such a case may linger or stall more readily

than larger cases. Although the judge does not have any additional oversight capacity in smaller or special purpose cases and should be mindful of state sovereignty issues, detailed deadlines relating to the plan of adjustment in accordance with § 941 of the Bankruptcy Code and periodic "check-ins" with the judge through scheduled status conferences may help the debtor continue its progress in the case or identify barriers to its successful exit from bankruptcy. A collection of case-management orders is in the online repository.

C. Issues Specific to State-Owned or State-Controlled Entities or Districts

In addition to the potential difference in size or scope of the case, a special purpose entity case may present different issues concerning eligibility, authorization to file, and financing arrangements. The following summarizes a few of these key issues.

1. Eligibility Issues

As discussed at Part V.C, whether an entity constitutes a public agency or instrumentality of the state is a fact-dependent and often disputed matter. Issues frequently arise with entities that constitute public–private partnerships or that introduce special tax entities or unique financing structures. For examples of how courts approach these issues, see, e.g., *In re Las Vegas Monorail Co.,* 429 B.R. 770 (Bankr. D. Nev. 2010) (although bonds qualified as tax exempt because debtor was identified as an "instrumentality of the state" in the bond documents, the debtor did not possess other characteristics of being a municipality for purposes of Chapter 9 eligibility); *In re New York City Off-Track Betting Corp*., 427 B.R. 256 (Bankr. S.D.N.Y. Mar. 22, 2010) (debtor, which was a public benefit corporation created by the state, was a municipality for purposes of Chapter 9); *In re County of Orange, Cal.: Orange County Investment Pools*, 183 B.R. 605 (Bankr. C.D. Cal. 1995) (Orange County Investment Pools was an instrumentality of the county and not state; thus it was not eligible to be a debtor under Chapter 9); *In re Suffolk Regional Off-Track Betting Corp*., 462 B.R. 397 (Bankr. E.D.N.Y. 2011) (local law authorizing municipalities to file Chapter 9 cases did not include public benefit corporations).

2. Authorization

As with any municipal debtor, special purpose entities must be authorized to file Chapter 9 by applicable state law and by the officials charged with running the entity (typically elected officials). Some special purpose entities, however, may be organized more like a business entity and lack the kind of public official that oversees the business of cities, townships, and counties. Section 921(a) of the Bankruptcy Code addresses this potential by providing, "Notwithstanding sections 109(d) and 301 of this title, a case under this Chapter concerning an unincorporated tax or special assessment district that does not have such district's own officials is commenced by the filing under § 301 of this title of a petition under this chapter by such district's governing authority or the board or body having authority to levy taxes or assessments to meet the obligations of such district." 11 U.S.C. § 921(a).

3. Financing Issues

A general overview of municipal finance is provided at Part III.F. Notably, states may issue revenue bonds on behalf of quasi-governmental entities such as special purpose entities or districts (e.g., transportation or hospital districts), or authorize such entities or districts to issue bonds directly. These bonds often qualify for tax-exempt treatment under federal law, but the state is not directly or indirectly liable on the debt. Rather, the special purpose entity or district typically is liable on the debt, or the debt is secured by the assets of the entity or district, which may limit the assets available to satisfy other creditors. In general, these bonds may be either general obligation bonds (subject to payment from tax revenue in the district) or revenue bonds (supported by revenue from the particular project or identified source within the district). Such bonds also raise the issues common to all general obligation and revenue bonds discussed at Parts III.F, V.F, VI.A, VI.C, VI.D, and VII.D.

D. Issues Specific to Hospital Bankruptcies

Public hospitals generally qualify as municipalities that may file Chapter 9 cases, provided they satisfy the eligibility requirements of § 109(c) of the Bankruptcy Code. For a discussion of § 109(c), see Part V.C. A public hospital debtor may introduce additional public

policy issues into a Chapter 9 case relating to the ongoing care of existing patients and the continued availability of care to affected communities. In addition, these cases also may raise the following issues.

1. Treatment of Patient Information

A Chapter 9 debtor may seek relief to protect from disclosure certain patient information. This kind of relief may be warranted under both federal and state law protecting patient information from public disclosure. Debtors have requested and obtained orders protecting certain patient information from disclosure in several Chapter 9 cases. *See also* 11 U.S.C. § 351 (addressing the disposal of patient records); Fed. R. Bankr. P. 2015 (governing requests to transfer patients); Part IV.D (discussing privacy and docketing issues with patient information). This kind of relief may be requested at the time of the petition or shortly thereafter.

2. Appointment of a Patient Care Ombudsman

Section 333(a)(1) of the Bankruptcy Code provides that, "If the debtor in a case under chapter 7, 9, or 11 is a health care business, the court shall order, not later than 30 days after the commencement of the case, the appointment of an ombudsman to monitor the quality of patient care and to represent the interests of the patients of the health care business unless the court finds that the appointment of such ombudsman is not necessary for the protection of patients under the specific facts of the case." 11 U.S.C. § 333(a)(1). Bankruptcy Rule 2007.2 governs requests for, and the appointment of, a patient care ombudsman. Bankruptcy Rule 2015.1 addresses periodic reports from, and requests to review confidential patient information by, a health care ombudsman. Section 333 was added to the Bankruptcy Code by the 2005 amendments to ensure that patients who are not creditors in the case still have some voice in the process. A patient care ombudsman is not mandatory in every case, however, as § 333 permits the judge to decline such an appointment for cause. Judges in health care business cases, including those under Chapter 9, have considered a variety of factors in determining whether cause exists to grant a debtor's motion not to appoint an ombudsman. For example, in *In re Bamberg County Memorial Hospital*, No. 11–03877 [ECF No. 60] (Bankr. D.S.C. June 20, 2011), the judge analyzed,

among other things, the reasons for the hospital's Chapter 9 filing, the existing oversight of patient care, and the hospital's history with patient care and regulatory compliance. On balance, the judge determined that the appointment of an ombudsman would be redundant and would not serve the interests of creditors. *Id. See also In re* Barnwell Cty. Hosp., 2011 WL 5443025 (Bankr. D.S.C. Nov. 8, 2011); *In re V*alley Health Sys., 381 B.R. 756 (Bankr. C.D. Cal. 2008). This kind of relief may be requested at the time of the petition or shortly thereafter. One issue for the court to consider in the Chapter 9 context is who will pay the fees and expenses of a patient care ombudsman, as the court can only direct payment by the debtor if the debtor consents. *See* 11 U.S.C. § 904.

3. Sales of Hospitals in Chapter 9

In the context of a proposed sale of a health care business, the judge should consider applicable nonbankruptcy law and whether the debtor has obtained any regulatory or electoral approvals required by such law. *See* Part VI.C. These considerations are important because, in a Chapter 9 case, the debtor will likely pursue a sale of the hospital under its plan of adjustment, as § 363 does not apply in Chapter 9 cases. *See* Parts III.A & VI.C. For example, the judge approved the proposed sale of the hospital under a Chapter 9 plan in *In re Bamberg County Memorial Hospital*, 2012 WL 1890259 (Bankr. D.S.C. May 23, 2012). In connection with confirmation, the judge evaluated whether the debtor had obtained all necessary regulatory and electoral approvals required for the proposed sale in accordance with §§ 943(b)(6) and 1129(a)(6). *Id*. Based on the evidence and the waiver of the certificate-of-need requirement under state law, the judge determined that the debtor had satisfied all requirements and confirmed the plan. *Id*. *See also In re* Barnwell County Hosp., 471 B.R. 849 (Bankr. D.S.C. 2012) (confirming plan of adjustment that contemplated a sale of the hospital to same purchaser as that involved in *Bamberg County Memorial Hospital*).

IX. Issues Common in Larger Cases

Larger municipal cases often involve cities or counties with large citizen populations and increased service obligations, which may magnify the policy implications of the issues raised in the case. The cases

of *Detroit*, *Stockton*, *Vallejo, San Bernardino,* and *Jefferson County* provide examples of the issues in larger Chapter 9 cases. In addition to the issues discussed throughout this manual, these cases also may present the following considerations for the judge and the clerk of court. Appendix B contains a list of Chapter 9 cases filed since 2008, including larger Chapter 9 cases.

A. Logistical Issues

The kinds of space and staffing issues discussed at Part IV.B are of particular importance in larger Chapter 9 cases. These cases generally involve cities or counties with large populations that rely on the city or county for basic yet critical services. In such cases the judge and the clerk of court may want to consider utilizing some or all of the following tools.

- *Website.* In a larger Chapter 9 case, providing access to online information may be an important means for communicating information to the community and other parties who might be affected directly or indirectly by the case. See Parts IV.B and IV.D for additional information on the use of websites and on other online issues in Chapter 9 cases.

- *Access to Information.* Some or even many parties that are interested in larger Chapter 9 cases may not have ready access to PACER or even the Internet to read information about the case or to review pleadings or other filings in the case. The clerk of court may want to consider other modes of communicating key information about the case to stakeholders and interested parties. These efforts could include publishing information in the local newspaper, posting in the clerk's office or other space in the courthouse generally available to the public, or disseminating information through organizations (such as labor unions or citizens groups), or webpages hosted by the city, townships, or county.

- *Space.* Similar to providing access to paper filings, the judge and the clerk of court may want to consider whether the court has sufficient space to accommodate all parties that may want to attend a hearing in the Chapter 9 case. As discussed above, the judge and the clerk of court may want to consider alter-

native courtroom space or establishing overflow rooms that would provide a live stream of the proceedings taking place in the main courtroom.

- *Appearance by Teleconference or Videoconference*. The judge and the clerk of court may receive an increased number of requests to participate remotely in court proceedings in larger Chapter 9 cases. The judge and the clerk of court may want to consider establishing protocols for these matters at the beginning of the case. In all matters concerning access to court proceedings, the judge and the clerk of court should take care to consult the policies of the Judicial Conference. *See also* Remote Participation in Bankruptcy Court Proceedings (Federal Judicial Center 2017) (a copy is available in the online repository).

- *Media*. Media coverage of Chapter 9 cases has been extensive. For example, virtually every hearing in the *Stockton* case was the subject of an article in the *Stockton Record*. And national publications such as *The Bond Buyer* have closely followed and reported on the *Detroit*, *Jefferson County*, and *Stockton* cases. Media issues tend to be more prevalent in larger Chapter 9 cases. The judge and the clerk of court should consider how to handle media requests for information, as well as requests to attend or record court proceedings. The judge and the clerk of court may want to consider establishing protocols for these matters at the beginning of the case. In all matters concerning access to court proceedings, the judge and the clerk of court should take care to consult the policies of the Judicial Conference.

- *Security*. Depending on the kind and size of the Chapter 9 entity, additional security measures may be needed to manage the case.

- *Claims and Noticing Agents*. Depending on the total number of assets and liabilities of the Chapter 9 debtor and the number of creditors, the clerk of court may consider employing an agent to provide claims-processing services, noticing services, or both services pursuant to 28 U.S.C. § 156(c).

B. Coordination Issues

Depending on the circumstances of the case, the judge and the clerk of court may want to consider proactively coordinating matters in the Chapter 9 case with the district court. The district court may be able to assist the judge and the clerk of court with, among other things, space and staffing issues, as well as potentially addressing media inquiries. *See* Part IV.B.

C. Intercreditor Issues

Similar to larger Chapter 11 cases, larger Chapter 9 cases may involve significant intercreditor disputes that potentially impact the timing or outcome of the Chapter 9 case. A judge should consider whether such issues exist or whether they have the potential to exist in any given Chapter 9 case. The judge may be able to make such a determination through the kinds of disclosures discussed at Part V.F. Intercreditor issues raise several important questions in the context of a Chapter 9 case. For example, does the intercreditor dispute involve issues that should be resolved as part of the Chapter 9 case or, rather, are they more appropriately addressed in separate proceedings unrelated to the Chapter 9 case? Regardless, are the intercreditor disputes likely to influence creditors' positions regarding the debtor's proposed plan of adjustment? Notably, in the municipal bond context, these issues may involve a bond insurer and considering which party holds the claim on the bonds or is entitled to vote on the plan. *See* Parts III.F and V.F (discussing bond insurance). In all contexts, the court may want to consider whether mediation may help to mitigate or resolve any intercreditor disputes. As discussed at Part V.H, intercreditor disputes can impact the timetable of the Chapter 9 case and potentially delay confirmation of a plan of adjustment, particularly if the disputes are being litigated in a forum other than the bankruptcy court.

X. Key Takeaways

Although Chapter 9 cases follow the general structure of Chapter 11 cases, judges and clerks of court need to be sensitive to the key differences between a Chapter 9 case and a Chapter 11 case and need to plan accordingly. As discussed in this manual, the following points

may help judges and clerks of court prepare for, and administer, any Chapter 9 case filed in their district:

- *Mechanics of the Case*. Before the case is filed and in its early stages, the clerk of court needs to understand the process for the bankruptcy judge's appointment, identify potential docketing and access-to-information issues, and consider how to manage potential logistical issues. Likewise, the judge initially needs to understand the effect of a Chapter 9 petition for relief (i.e., not an order for relief) and the issues surrounding a debtor's eligibility for an order for relief.

- *The Roles of the Parties*. In a Chapter 9 case, the role of the debtor and the judge, in particular, differ from the roles of those parties in a Chapter 11 case. The judge needs to understand the parameters of §§ 903 and 904 of the Bankruptcy Code and the underlying constitutional issues, particularly those related to the reservation of powers to the states under the Tenth Amendment.

- *Applicable Law*. One of the most significant differences between a Chapter 9 case and a Chapter 11 case is the law governing the case. First, not every section of Chapters 3 and 5 of the Bankruptcy Code apply in Chapter 9 cases. Second, not every section of Chapter 11 is incorporated into Chapter 9, and the confirmation standards differ in certain respects. Finally, state and local law play a significant role in Chapter 9 cases; the judge needs to determine when deference to state or local law is required and when the Bankruptcy Code may preempt such law.

- *The Dynamics of the Case*. Perhaps even more so than in Chapter 11 cases, a judge should be sensitive to the dynamics among the debtor, the state, and the various stakeholders in the case. Although not a substantive point, this sensitivity may allow a judge to better assess timelines for, and potential barriers to, the resolution of disputed matters—either in or outside of the Chapter 9 case.

- *Case Management*. Effective case management is critical to the timely disposition of Chapter 9 cases; absent such man-

agement, these cases may last longer than necessary and not provide the municipality the relief it needs.

- *Mediation*. Mediation may be an effective case-management tool. Some cases have used it extensively and some have not. Early in the case the trial judge needs to decide whether the municipality may benefit from court-annexed mediation and how the mediation should be structured. In large cases, disputes and creditors are likely to be divided such that settlements can be reached.

- *The End Game*. Given the more limited role of the judge in a Chapter 9 case, the judge should try to assess the debtor's proposed exit strategy early in the case. This may help the judge determine the parameters of any case-management order, as well as the central issues in matters brought before the judge by the debtor or other stakeholders prior to the confirmation process. In addition, the judge should consider potential post-confirmation issues, such as any retention of jurisdiction to consider issues arising under the confirmed plan.

Appendix A: Comparison of Chapter 9 and Chapter 11 of the U.S. Bankruptcy Code

Chapter 9	Chapter 11
Commencement of the Case	
• Municipalities cannot be put into Chapter 9 involuntarily.	• Involuntary cases permitted.
- Only a municipality can initiate a Chapter 9 case. Section 303 of the Bankruptcy Code, which provides for the commencement of involuntary cases, is not applicable in Chapter 9.	
- A Chapter 9 case cannot be converted to one under another chapter.	- A Chapter 11 case can be converted to one under Chapter 7.
• Chapter 9 debtors are not required to file schedules or statement of financial affairs.	• Debtor required to file schedules and statement of affairs.
- Pursuant to § 924, a Chapter 9 debtor is required to file a list of creditors.	
- Under § 925, any claim listed on the list of creditors is a proof of claim deemed filed under § 501, unless listed as contingent, disputed or unliquidated.	- Under § 1111(a), no proof of claim required unless debt is listed in schedules as contingent, disputed, or unliquidated.
- No reporting requirements.	- Debtor must submit quarterly statements of disbursements and make other disclosures (Rule 2015).
• Publication of the notice of commencement of the case.	• No publication of notice of commencement of the case required.
- Section 923 requires publication of a Notice of Commencement for three consecutive weeks in a local newspaper and in a newspaper having general circulation among bond dealers and bondholders.	

Note: This chart was prepared based on materials provided by Marc A. Levinson, Esq., Orrick, Herrington & Sutcliffe LLP, Sacramento, California.

Chapter 9	Chapter 11
- The notice must provide a date by which objections to eligibility must be filed.	
• Bankruptcy judge is designated by the chief judge of the circuit rather than by the clerk of the bankruptcy court. § 921(b).	• Judge assigned at random by the clerk of the bankruptcy court.
Eligibility	
• Must be a municipality (political subdivision, public agency, or instrumentality of a state). § 109(c)(1).	• Sole eligibility requirement relates to nature of the debtor (such as railroads and persons eligible to be Chapter 7 debtors). § 109(d).
• Legislative Authority - The specific municipality, or municipalities generally, must be authorized under state law to be a Chapter 9 debtor. § 109(c)(2). - Certain state statutes contain limitations as to the type of entity that may file (i.e., such as a water district), and some require further approval from the state or a state official prior to any filing.	
• Insolvency - Debtor bears the burden of proving that it is insolvent as of the petition date. § 109(c)(3). A municipality is insolvent if it is (1) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute, or (2) unable to pay its debts as they become due. § 101(32)(C).	• No insolvency requirement.
• Must desire to effect a plan to adjust its debts. § 109(c)(4).	
• Must satisfy one of the requirements of § 109(c)(5).	

Chapter 9	Chapter 11
• A bankruptcy judge may dismiss a Chapter 9 petition if the debtor did not file the petition in good faith. § 921(c).	• No statutory good-faith filing requirement.
• In the event of an appeal from the entry of an order for relief, the bankruptcy court may not delay any proceeding in the Chapter 9 case, nor may any court issue a stay. § 921(e).	• No Chapter 11 equivalent.
Limitations on Powers of Court	
• Because of limitations imposed by the Tenth Amendment to the U.S. Constitution on Congress's power over the states, the Bankruptcy Code provisions with respect to municipality debtors place restraints on the powers of a federal bankruptcy court to interfere with the operations of a municipality.	
• State maintains its powers to control municipalities, subject to specific Bankruptcy Code provisions (such as the power to reject contracts). § 903.	
• Absent consent by the debtor, the court may not interfere with (1) any of the political or governmental powers of the debtor, (2) any of the property or revenues of the debtor, (3) the debtor's use or enjoyment of any income-producing property. § 904.	
- A Chapter 9 debtor does not need court approval to use, sell, or lease property, including cash collateral (§ 363 is not incorporated into Chapter 9).	• Chapter 11 debtors subject to § 363.

Chapter 9	Chapter 11
- The debtor maintains complete control of most of its financial affairs and operations (in bankruptcy, a municipality will still need freedom to operate and provide services to citizens).	
• Court cannot appoint an examiner or a trustee (except relating to the recovery of avoidable transfers [§ 926(a)]).	• Trustee or examiner may be appointed.
Limited Role of U.S. Trustee (or Bankruptcy Administrator)	
• The U.S. trustee (or bankruptcy administrator) has no general supervisory authority in a Chapter 9 case (reason being that it would be an improper interference with the political and financial affairs of the municipality debtor). - Does not examine the debtor at a meeting of creditors—there is no meeting of creditors. - Does not have the authority to move for appointment of a trustee or examiner or for conversion of the case. - Does not monitor the financial operations of the debtor or review the fees of professionals retained in the case. • The U.S. trustee's most important role in Chapter 9 cases is to appoint a creditors committee or other committee(s) in the event court orders appointment of a committee.	• The U.S. trustee (or bankruptcy administrator) plays an active role in overseeing the bankruptcy case. - Conducts first meeting of creditors. - Appoints members of official committees. - May move for appointment of a trustee or examiner. - May move to convert the case. - Monitors financial operations and fee requests from estate professionals.

Chapter 9	Chapter 11
Case Administration	
• Chapter 9 does not create an estate. - Section 541 is not incorporated into Chapter 9. - Section 902(1) defines "property of the estate" to mean "property of the debtor."	• Commencement of the case creates an estate.
• Retention of Professionals - Sections 327 through 331 of the Bankruptcy Code are not applicable in a Chapter 9 case. - The only provision of Chapter 9 governing the compensation of professionals provides as a confirmation requirement that all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable. § 943(b)(3).	• Sections 327 through 331 apply.
• Automatic Stay - Automatic stay provisions apply. - Section 922(a) adds automatic stay provisions that prohibit actions against officers and inhabitants of the debtor if the action seeks to enforce a claim against the debtor. - Section 922(d) limits the applicability of the stay. — Chapter 9 petition does not operate to stay application of pledged special revenues to payment of indebtedness secured by such revenues. — An indenture trustee or other paying agent may apply pledged funds to payments coming due or distribute the pledged funds to bondholders without violating the automatic stay.	• Automatic stay applies only to the debtor and its property.

Chapter 9	Chapter 11
• Committees - Creditors committee has powers and duties similar to those of a committee in a Chapter 11 case. - Cannot be appointed until after the entry of the order for relief, which may take months in a Chapter 9 case in which eligibility is challenged.	
• Right to be heard more expansive in Chapter 9. - Section 1109 applies. - Rule 2018(c) provides that: — The Secretary of the Treasury of the United States may, or if requested by the court shall, intervene in a Chapter 9 case. — Representatives of the state in which the debtor is located may intervene in a Chapter 9 case with respect to matters specified by the court.	
• Dismissal - Court may dismiss a Chapter 9 petition if it concludes the debtor did not file the petition in good faith or if the petition does not meet the requirements of Chapter 9. - Court also may dismiss the petition for cause. § 930.	• Court may convert to Chapter 7 or dismiss as specified in § 1112.
Avoidable Transfers	
• Bankruptcy Code avoidance powers are applicable, with one exception. – In Chapter 9 cases, a transfer of property by a municipality to or for the benefit of a bondholder on account of such bond may not be avoided as a preference. § 926(b).	• Bankruptcy Code avoidance powers are applicable.

Chapter 9	Chapter 11
Executory Contracts and Unexpired Leases	
• Section 365 applies in Chapter 9 cases.	
• Collective bargaining agreements. - Section 1113 does not apply in Chapter 9 cases. - Most courts analyze under § 365.	• A Chapter 11 debtor cannot unilaterally abrogate a collective bargaining agreement. - Section 1113 requires a Chapter 11 debtor to negotiate proposed modifications of a collective bargaining agreement with the authorized representative of the employees covered by such agreement.
• Section 1114 does not apply in Chapter 9 cases.	• Section 1114 enumerates the stringent ground rules for treatment of retiree benefits.
Special Revenues	
• Obligations secured by a lien on special revenues retain such lien postpetition in Chapter 9. However, the security interest is subject to the necessary operating expenses of the project involved. § 928(b). • The holder of a claim payable solely from special revenues does not have recourse against the debtor. § 927. This prevents the conversion of revenue bonds into general obligation bonds.	• A creditor with a nonrecourse claim may, under certain circumstances, be treated as having recourse against the debtor. § 1111(b).
Plan of Adjustment	
• Only the debtor may file a plan for adjustment of debts—creditors may not propose and file competing plans.	• Creditors may file a plan after termination of exclusivity. • A trustee may file a plan because such appointment terminates exclusivity.

Chapter 9	Chapter 11
• The Bankruptcy Code does not fix a specific deadline by which the debtor must file a plan. If a plan is not filed with the petition, the debtor shall file such plan at such later time as the court fixes. § 941. • Plan content and confirmation requirements in Chapter 9 cases are similar to those applicable in Chapter 11 cases.	
Discharge	
• A municipality debtor receives a discharge of all debts as of the time when: (1) the plan is confirmed; (2) the debtor deposits any consideration to be distributed under the plan with the disbursing agent appointed by the court; and (3) the court determines that securities deposited with the disbursing agent will constitute valid legal obligations of the debtor and that any provision made to pay or secure payment of such obligations is valid. § 944(b). • A municipality debtor is not discharged from any debt (1) excepted from discharge by the plan or the order confirming the plan, or (2) owed to an entity that, before confirmation of the plan, had neither notice nor actual knowledge of the case. § 944(c).	• Confirmation of a plan discharges a debtor from most debts that arose before the date of confirmation. § 1141(d). After confirmation, the debtor is required to make plan payments and is bound by the provisions of the plan.

Appendix B: Chapter 9 Cases Filed During Fiscal Years 2008–2016

District	Case Number	Name of Debtor
Fiscal Year 2016		
E.D. Cal.	16-10015	Southern Inyo Healthcare District
W.D. Ky.	13-10940	Adair County Public Hospital District Corporation (reopen)
W.D. Mo.	16-42357	Lake Lotawana Community Improvement District
D. Neb.	16-80010	Sanitary and Improvement District No. 10, Washington County, Nebraska
E.D. Okla.	16-81001	Pushmataha County – City of Antlers Hospital Authority
Fiscal Year 2015		
E.D. Cal.	15-23888	Community Facilities District No. 1990-1 (Wildwood Estates), Nevada County, California
W.D. Ky.	15-32679	City of Hillview, Kentucky
D. Neb.	10-82794	Sanitary and Improvement District #507 of Douglas County, Nebraska (reopen)
D. Neb.	12-81926	Sanitary and Improvement District No. 270 of Sarpy County, Nebraska (reopen)
E.D. Okla.	12-80061	Rural Water District No. 1, Cherokee County, Oklahoma (reopen)
N.D. Okla.	15-10277	Craig County Hospital Authority
D.R.I.	14-12785	Central Coventry Fire District
Fiscal Year 2014		
W.D. Ark.	14-70015	Ozark Mountain Solid Waste District
W.D. Ark.	14-71606	Washington County Municipal Properties Owners Improvement District No. 14
N.D. Cal.	14-10510	Palm Drive Health Care District
D. Colo.	14-14207	Ravenna Metropolitan District
M.D. Fla.	13-13032*	Whalen, Bruce Thomas
S.D. Miss.	14-01048	Natchez Regional Medical Center
E.D. Mo.	14-46094	Lakeside 370 Levee District a political subdivision of the State of Missouri

District	Case Number	Name of Debtor
Fiscal Year 2014 *(cont'd)*		
D. Neb.	14-80658	Sanitary and Improvement District #501, Douglas County, Nebraska
D. Neb.	14-81592	Sanitary and Improvement District #521, Douglas County, Nebraska
D.S.C.	14-03299	Union Hospital District
Fiscal Year 2013		
E.D. Ark.	13-13751	Pulaski County Property Owners' Improvement District No. 4 (Villages of San Luis Project)
W.D. Ark.	12-73750	Siloam Springs Municipal Property Owners' Improvement District No. 1 - Gabriel Park
N.D. Cal.	12-12753	Mendocino Coast Health Care District
M.D. Fla.	12-07123*	Hall, Darrell L.
M.D. Fla.	13-03044*	Le, Long Thanh
W.D. Ky.	13-10939	Adair County Hospital District
W.D. Ky.	13-10940	Adair County Public Hospital District Corporation
E.D. Mich.	13-53846	City of Detroit, Michigan
D. Neb.	13-81167	Sanitary & Improvement District No 494, Douglas County, Nebraska
D. Neb.	13-81668	Sanitary and Improvement District No. 249 of Sarpy County, Nebraska
W.D. Okla.	13-10791	Pauls Valley Hospital Authority d/b/a Pauls Valley General Hospital
N.D. Tex.	13-70103	Hardeman County Hospital District d/b/a Hardeman County Memorial Hospital
Fiscal Year 2012		
N.D. Ala.	11-05736	Jefferson County, Alabama
E.D. Ark.	12-12309	Sylamore Valley Water Association Public Facilities Board of Izard County, Arkansas
W.D. Ark.	11-74614	Centerton Municipal Property Owners' Improvement District No. 3 - Versailles
C.D. Cal.	12-28006	City of San Bernardino, California
E.D. Cal.	12-15132*	Barry Halajian SS Municiple Corporation
E.D. Cal.	12-32118	City of Stockton, California

District	Case Number	Name of Debtor
Fiscal Year 2012 *(cont'd)*		
E.D. Cal.	12-32463	Town of Mammoth Lakes, California
N.D. Cal.	11-14625	Mendocino Coast Recreation and Park District
M.D. Fla.	12-11403*	Mendoza Guerrero, Ana Milena
S.D. Ga.	12-50305	Hospital Authority of Charlton County (reopen)
S.D. Ga.	12-50305	Hospital Authority of Charlton County
D. Neb.	11-82739	Sanitary and Improvement District #512 of Douglas County, Nebraska
D. Neb.	12-80115	Sanitary and Improvement District No. 268 of Sarpy County, Nebraska
D. Neb.	12-81249	Sanitary and Improvement District #523, Douglas County, Nebraska
D. Neb.	12-81926	Sanitary and Improvement District No. 270 of Sarpy County, Nebraska
E.D. N.Y.	12-43503	Suffolk Regional Off-Track Betting Corporation
E.D. Okla.	12-80061	Rural Water District No. 1, Cherokee County, Oklahoma
M.D. Pa.	11-06938	City of Harrisburg, Pa.
D.S.C.	11-06207	Barnwell County Hospital
Fiscal Year 2011		
D. Idaho	11-00481	Boise County
D. Neb.	10-83596	Sanitary and Improvement District No. 528 of Douglas County, Nebraska
D. Neb.	11-80953	Sanitary and Improvement District No. 517 of Douglas County, Nebraska
D. Neb.	11-82460	Sanitary and Improvement District No. 258 of Sarpy County, Nebraska
D. Neb.	11-82482	Sanitary and Improvement District No. 513 of Douglas County, Nebraska
E.D.N.Y.	11-42250	Suffolk Regional Off-Track Betting Corporation
D.R.I.	11-13105	The City of Central Falls, Rhode Island
D.S.C.	11-03877	Bamberg County Memorial Hospital
Fiscal Year 2010		
S.D. Ala.	09-15000	City of Prichard, Alabama
E.D. Cal.	09-19728	Sierra Kings Health Care District

District	Case Number	Name of Debtor
Fiscal Year 2010 *(cont'd)*		
D. Idaho	10-40344	Lost Rivers District Hospital
W.D. Mo.	10-44629	Lake Lotawana Community Improvement District,
D. Neb.	09-83145	Sanitary and Improvement District 509 of Douglas County, Nebraska
D. Neb.	10-82794	Sanitary and Improvement District #507 of Douglas County Nebraska
S.D.N.Y.	09-17121	New York City Off-Track Betting Corporation
E.D. Okla.	09-81814	Town of Moffett
E.D. Pa.	09-23077*	Coral, Leticia
D.S.C.	10-04467	Connector 2000 Association, Inc.
S.D. Tex.	10-31933	Grimes County MUD #1
Fiscal Year 2009		
S.D. Ill.	09-31744	Village of Washington Park
S.D. Miss.	09-00477	Natchez Regional Medical Center
D. Neb.	09-80404	Sanitary and Improvement District 452 of Douglas County, Nebraska
D. Neb.	09-81825	Sanitary and Improvement District No. 251 of Sarpy County, Nebraska
M.D. Pa.	09-02736	Westfall Township
W.D. Wash.	08-45227	Pierce County Housing Authority
Fiscal Year 2008		
E.D. Ark.	08-12413	City of Gould, Arkansas
W.D. Ark.	08-72841	Benton County Property Owners' Improvement District No. 6 - Sunset Bay Division
E.D. Cal.	08-26813	City of Vallejo, California

* Case appeared to be or was filed improperly under Chapter 9.

Note: Three CM/ECF test cases filed in the District of Minnesota (docket numbers 05-11111, 05-22222, 05-55555) were deleted from the sample. Data include five re-opened cases.

The Federal Judicial Center

About the Federal Judicial Center

The Federal Judicial Center is the research and education agency of the federal judicial system. It was established by Congress in 1967 (28 U.S.C. §§ 620–629), on the recommendation of the Judicial Conference of the United States.

By statute, the Chief Justice of the United States chairs the Center's Board, which also includes the director of the Administrative Office of the U.S. Courts and seven judges elected by the Judicial Conference.

The organization of the Center reflects its primary statutory mandates. The Education Division plans and produces education and training for judges and court staff, including in-person programs, video programs, publications, curriculum packages for in-district training, and Web-based programs and resources. The Research Division examines and evaluates current and alternative federal court practices and policies. This research assists Judicial Conference committees, who request most Center research, in developing policy recommendations. The Center's research also contributes substantially to its educational programs. The Federal Judicial History Office helps courts and others study and preserve federal judicial history. The International Judicial Relations Office provides information to judicial and legal officials from foreign countries and informs federal judicial personnel of developments in international law and other court systems that may affect their work. Two units of the Director's Office—the Information Technology Office and the Editorial & Information Services Office—support Center missions through technology, editorial and design assistance, and organization and dissemination of Center resources.