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## The Detroit Bankruptcy, Pre-Eligibility

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# THE DETROIT BANKRUPTCY, PRE-ELIGIBILITY

*Melissa B. Jacoby\**

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## INTRODUCTION

On July 18, 2013, the City of Detroit, Michigan filed the largest municipal bankruptcy in history.<sup>1</sup> The filing fueled a national

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1. *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931, at \*20 (Bankr. E.D. Mich. Dec. 5, 2013); Monica Davey & Mary Williams Walsh, *Billions in Debt, Detroit Tumbles into Insolvency*, N.Y. TIMES, July 19, 2013, at A1 (reporting that Detroit is the largest city to ever file for bankruptcy in terms of both size and debt).

conversation about ailing governmental units and the gap between pension promises and financial realities. Eyes were trained primarily on one major court decision: after a trial, the judge would determine whether Detroit met the statutory eligibility requirements for Chapter 9 bankruptcy. If the City jumped that hurdle, then parties would resume negotiations over a plan of adjustment, which would require court review and approval to be effective.

Fast-forward several months, and the script already diverged from expectations. As predicted, the City of Detroit has been deemed eligible for bankruptcy.<sup>2</sup> Not as predicted, the court's lengthy eligibility decision tackled, head-on, the issue of pension obligations. The court held that the Michigan Constitution made pension entitlements contractual obligations that could be modified and impaired in a Chapter 9 plan of adjustment.<sup>3</sup> Whether a proposed plan could and would satisfy the legal requirements remained to be seen.

As the rest of the world looks ahead, however, this brief commentary looks back. Specifically, it examines Detroit's bankruptcy from its commencement through the eve of the eligibility trial. I draw significantly on a review of primary source documents on the court's docket and digital audio recordings of every court hearing through that time. This analysis sets a foundation to examine the interaction between federal courts, a major metropolitan city in serious financial distress, and its creditors and stakeholders.

Part I lays the groundwork by briefly discussing eligibility, the front-end flashpoint in Chapter 9 bankruptcies. Part II examines activity in Detroit's bankruptcy in the pre-eligibility-trial period that history otherwise might omit. Representative and relevant judicial acts of this period are divided into two groups. Part II.A reviews the court's dispute resolution activity. The willingness to rule quickly and either from the bench or quickly thereafter has been essential to the progress of the case. Part II.B identifies other elements to watch in this case beyond traditional dispute resolution.

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2. See *In re City of Detroit*, 2013 WL 6331931, at \*83. The written opinion followed a ninety-minute ruling read into the record. Oral Argument at 1:29:16, *In re City of Detroit*, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Dec. 3, 2013), available at <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket1917.pdf>.

3. See *In re City of Detroit*, 2013 WL 6331931, at \*44.

### I. THE FIRST MAIN EVENT: ELIGIBILITY

The Chapter 9 eligibility requirement for municipalities is not merely a pro forma hurdle.<sup>4</sup> A debtor municipality bears the burden of proof on each element of the Chapter 9 eligibility test by a preponderance of the evidence.<sup>5</sup> This routine expectation of front-end judicial gatekeeping has no analogue in voluntary Chapter 11 cases.<sup>6</sup> Creditors sometimes allege that a Chapter 11 case should be dismissed because the debtor lacks good faith.<sup>7</sup> But judges rarely preside over trials about the entitlement of businesses to *file* bankruptcy.

In a voluntary Chapter 11, the entry of an order for relief occurs simultaneously with the filing of the petition.<sup>8</sup> In a Chapter 9, the court does not enter the order for relief until it makes the eligibility finding.<sup>9</sup> The order for relief rather than the petition date is the trigger for some Bankruptcy Code provisions.<sup>10</sup> The cloud of potential ineligibility can stall negotiations with creditors and make it impossible to complete some transactions.<sup>11</sup> After all, a finding of

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4. See Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 461 (1993) (noting the “serious obstacles to municipal filing beyond those faced by private debtors”).

5. See *In re City of Stockton, Cal.*, 475 B.R. 720, 726 (Bankr. E.D. Cal. 2012) (“The quantum of proof [for establishing eligibility under 109(c)], there being no contrary indication in statute or in controlling decisional law, is the familiar preponderance-of-evidence standard of basic civil litigation.”).

6. See 11 U.S.C. § 109 (2012) (determining who may be a debtor under various Chapters of title 11, and setting forth no threshold requirements for non-individual Chapter 11 debtors other than excluding entities such as insurance companies and banks). As the judge presiding over Detroit’s bankruptcy has observed, however, Chapter 13—repayment plans for individuals with regular income—does have an eligibility requirement. He suggested that case law on Chapter 13 eligibility might be relevant to some of the issues in Detroit’s case. Hearing Re. Objections to Eligibility to Chapter 9 Petition at 83–84, *In re City of Detroit, Mich.*, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Oct. 15, 2013) (citing *Matter of Pearson*, 773 F.2d. 751 (6th Cir. 1985)).

7. See *In re SGL Carbon Corp.*, 200 F.3d 154, 160–61 (3d Cir. 1999) (reversing district and bankruptcy courts, and finding that debtor lacked a valid reorganizational purpose).

8. See 11 U.S.C. § 301(b) (2012).

9. See *id.* § 921(d).

10. See *id.* § 1102(a)(1) (conditioning appointment of committee to represent unsecured creditors on entry of order for relief); *id.* § 365 (measuring running of time periods for deciding on contracts and leases from order for relief); *id.* § 546 (measuring time limit on avoiding powers from entry of order for relief).

11. Detroit’s counsel argued in this vein in response to the retiree committee’s assertions that Detroit would not be prejudiced if eligibility proceedings were stayed. See Oral Argument, *supra* note 2, at 58:20.

ineligibility will generate case dismissal—back to the world of state law and races to the courthouse.<sup>12</sup>

The eligibility test for Chapter 9 has five components.<sup>13</sup> First, the Chapter 9 debtor must actually be a municipality.<sup>14</sup> Second, applicable state law must authorize the municipality to file for Chapter 9 bankruptcy.<sup>15</sup> Third, the municipality must be insolvent.<sup>16</sup> The fourth and rather subjective requirement is that the municipality “desires to affect a plan to adjust such debts;” no specific metric measures this prong’s satisfaction.<sup>17</sup> Fifth, the municipality must meet one of four alternative tests relating to good faith pre-filing negotiations. The municipality need not have successfully negotiated a prepackaged plan with the requisite proportion of creditors; this used to be the law and was considered unworkable.<sup>18</sup> One possible fulfillment is to show the impracticability of negotiating with all creditors, a fact-sensitive inquiry that arises if a delay would put the assets at risk, or under other such circumstances.<sup>19</sup>

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12. See § 921(c); *In re City of Vallejo*, 408 B.R. 280, 289 (B.A.P. 9th Cir. 2009) (interpreting § 921(c)); *In re N.Y.C. Off-Track Betting Corp.*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010).

13. See 11 U.S.C. § 109(c) (2012).

14. See § 109(c)(1). The Bankruptcy Code defines municipality in § 101(40) as a political subdivision or public agency or instrumentality of the state. 11 U.S.C. § 101(40) (2012).

15. This was the primary eligibility challenge in the Jefferson County bankruptcy. See *In re Jefferson Cnty., Ala.*, 469 B.R. 92, 97 (Bankr. N.D. Ala. 2012) (reporting that judge orally ruled on all other elements of eligibility at conclusion of trial, and that objectors primarily challenged authorization). For a state-by-state guide, see H. SLAYTON DABNEY ET. AL., *MUNICIPALITIES IN PERIL: THE ABI GUIDE TO CHAPTER 9* 75–88 (2d ed. 2012).

16. See § 101(32)(C) (defining the insolvency for municipalities as generally not paying debts as they become due or unable to pay debts as they become due); see also *In re Mount Carbon Metropolitan Dist.*, 242 B.R. 18, 32–33 (1999) (discussing the need for a functional rather than balance sheet focus for municipal insolvency).

17. See *In re Off-Track Betting*, 427 B.R. at 272 (citing *In re Vallejo*, 408 B.R. at 295).

18. See Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L. J. 1157, 1158, 1161; see also *In re Off-Track Betting*, 427 B.R. at 281 (rejecting the argument that Chapter 9 was filed in bad faith merely because restructuring wasn’t fully buttoned up before the filing of the petition, noting “There simply is no requirement, in the Chapter 9 or Chapter 11 context, for a debtor to have solved the riddles of its business woes prior to filing for bankruptcy protection.”).

19. See § 109(c)(5)(C); *In re City of Detroit, Mich.*, No. 13-53846, 2013 WL 6331931, at \*176–79 (Bankr. E.D. Mich. Dec. 5, 2013) (part XVI of opinion) (finding that impracticability of negotiation supported Detroit’s eligibility); *In re Off-Track Betting*, 427 B.R. at 276–77 (citing various authorities).

The eligibility test is amplified by 11 U.S.C. § 921(c), which provides that a court may dismiss a Chapter 9 petition if the debtor did not file the petition in good faith or meet other requirements of Title 11.<sup>20</sup> The failure to exhaust “every possible option” before filing a petition is generally not perceived as lack of good faith in modern cases.<sup>21</sup>

Given the multiple prongs and thin case law, the eligibility-plus-good-faith hurdle gives judges considerable discretion over continuation of the bankruptcy—whether or not judges are eager for it.<sup>22</sup> The time period before the eligibility determination can be lengthy for a variety of reasons, including the demands of objectors for sufficient discovery to prepare adequately for a trial. In Detroit’s bankruptcy, objectors filed 109 timely objections to eligibility.<sup>23</sup> The written decision finding Detroit eligible for Chapter 9 responded to a remarkable number of objections in detail.<sup>24</sup>

## II. BEFORE THE MAIN EVENT: DETROIT’S BANKRUPTCY, PRE-ELIGIBILITY

Although the bankruptcy case itself is in limbo until an eligibility finding, a Chapter 9 municipal debtor has far more freedom than a Chapter 11 debtor to continue to operate and make decisions. The distinction stems in part from the Tenth Amendment to the United States Constitution, which reserves for states and the people any powers not expressly delegated to the federal government.<sup>25</sup> Congress put constraints on federal courts more explicitly and affirmatively through Sections 903 and 904 of the Bankruptcy Code.

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20. See *In re Vallejo*, 408 B.R. at 289; *In re City of Stockton, Cal.*, 475 B.R. 720, 725–26 (Bankr. E.D. Cal. 2012).

21. See *In re Off-Track Betting*, 427 B.R. at 282.

22. See generally *In re City of Bridgeport*, 129 B.R. 332 (Bankr. D. Conn. 1991); Clayton P. Gillette, *Fiscal Federalism, Political Will, & Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 293–94 (2012) (discussing the discretion exercised in the determination that Bridgeport was not insolvent, and in the determination of whether Sullivan County had negotiated in good faith).

23. Order Regarding Eligibility Objections, Notices of Hearings, & Certifications Pursuant to 28 U.S.C. § 2403(a) & (b), at 3, *In re City of Detroit*, No. 13–53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 26, 2013). As discussed later, individual resident and retiree objectors were invited to present their concerns directly to the court, whether or not they had counsel, on Sept. 19, 2013. See Oral Argument, *In re City of Detroit*, Mich., No. 13–53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 19, 2013), available at <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket964.pdf>.

24. See generally *In re City of Detroit*, Mich., 2013 WL 6331931 (part VIII.C.5.b of opinion).

25. See U.S. CONST. amend. X.

Section 903 provides that Chapter 9 does not limit a state's power to control a municipality.<sup>26</sup> Section 904 prohibits a federal court from interfering, absent debtor consent, with the debtor's political powers, the debtor's property or revenues, or the debtor's use of income-producing property.<sup>27</sup> The judge presiding over the bankruptcy is not authorized to be a gatekeeper of municipal expenditures or deployment of assets. This restriction holds even with respect to unusual projects or when the city wants to hire expensive professionals. For these reasons, scholars almost universally observe that, whether before or after an eligibility finding, federal courts have limited control over municipalities in bankruptcy.<sup>28</sup> Detroit's case illustrates, however, the significance of the debtor consent caveat and other potential strategies.

The Emergency Manager for the City of Detroit filed a bankruptcy petition on July 18, 2013.<sup>29</sup> For every Chapter 9 that is filed, the chief judge of the applicable court of appeals hand-picks a judge.<sup>30</sup> The Chief Judge of the Sixth Circuit, the Honorable Alice M. Batchelder, selected Judge Steven W. Rhodes, based in part on the strong endorsement of the Chief District Judge of the Eastern District of Michigan, Gerald E. Rosen.<sup>31</sup>

Had Detroit been a corporation, its lawyers would have immediately rushed to bankruptcy court with a sky-high stack of first-day motions to authorize expenditures and acts. Instead, Detroit's

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26. See 11 U.S.C. § 903 (2012).

27. See *id.* § 904.

28. See Gillette, *supra* note 22, at 291; Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. REG. 351, 357 (2010); David S. Kupetz, *Standards for Confirming a Chapter 9 Plan of Debt Adjustment: Incorporating and Diverging from Chapter 11 Plan Standards*, 32 CAL. BANKR. J. 289, 300 (2012); McConnell & Picker, *supra* note 4, at 435–36; Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 HASTINGS L. J. 885, 998–99 (2002); Juliet Moringiello, *Goals and Governance in Municipal Bankruptcy* 3 (Widener Law Sch. Legal Studies Research Paper Series no. 13–66, 2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2318017](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2318017).

29. Voluntary Petition at 3, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. July 18, 2013).

30. 11 U.S.C. § 921(b) (2012) (“The chief judge of the court of appeals for the circuit embracing the district in which the case is commenced shall designate the bankruptcy judge to conduct the case.”).

31. Designation of Bankruptcy Judge at 1, *In re City of Detroit*, Mich. No. 13–53846, 2013 WL 6331931 (Bankr. E.D. Mich. July 19, 2013) (attaching letter from Judge Rosen).

first court hearing was six days into the case, with a more limited amount of in-court business to conduct.<sup>32</sup>

### A. Dispute Resolution

In the early days of Detroit's case, requests by the debtor frequently prompted multiple objections, putting various matters into a traditional adversarial posture. The pre-eligibility phase of Detroit's bankruptcy presented an array of disputes between the City and various other creditors and parties. This subpart offers examples of those disputes. Had Judge Rhodes not been so efficient in his resolution, the case would have bogged down quickly.

#### 1. *The Automatic Stay and an Additional Injunction*

The day after the bankruptcy was filed, the City sought a clarification of the scope of the existing automatic stay under Sections 362 and 922 of the Bankruptcy Code (which extend the stay to officers and inhabitants of the debtor), as well as a supplemental injunction to enjoin a range of actions against the City and related actors.<sup>33</sup> Creditors filed objections, particularly because they had already commenced litigation in other fora and wanted those matters to ride their course.<sup>34</sup>

At the first hearing in Detroit's bankruptcy, the court ruled in favor of the debtor after argument, counterargument, and rebuttal on these motions.<sup>35</sup> Two written orders were entered the following day.<sup>36</sup>

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32. See generally Oral Argument, *In re* City of Detroit, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. July 19, 2013).

33. See Debtor's Brief in Opposition to Catherine Phillips, et al.'s Motion for Relief from Order Pursuant to Section 105(a) of the Bankruptcy Code Extending the Chapter 9 Stay to Certain (A) State Entities, (B) Non-Office Employees and (C) Agents and Representatives of the Debtor, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 26, 2013); Order Pursuant to Section 105(a) of the Bankruptcy Code Confirming the Protections of Sections 362, 365 and 922 of the Bankruptcy Code, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. July 25, 2013) [hereinafter Order Confirming the Protections].

34. Prominent examples were lawsuits in Michigan state court that sought to prevent defendants from authorizing a Chapter 9 that might impair vested pension rights. *Flowers v. Snyder*, No. 13-729-CZ (Ingham Cnty. Cir. Ct., July 3, 2013); *Webster v. Michigan*, No. 13-734-CZ (Ingham Cnty. Cir. Ct., July 3, 2013).

35. See generally Oral Argument, *supra* note 32.

36. See Order Pursuant to Section 105(a) of the Bankruptcy Code Extending the Chapter 9 Stay to Certain (A) State Entities, (B) Non Officer Employees and (C) Agents and Representatives of the Debtor, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. July 25, 2013); Order Confirming the Protections, *supra* note 33.



The orders channeled creditors to the bankruptcy court to seek permission before they pursued relief elsewhere. Such motions were filed and contested with regularity, and usually resolved quite expeditiously.<sup>37</sup>

## 2. *Establishing a Retiree Committee*

Immediately after the Chapter 9 filing, the City of Detroit requested the creation of a retiree committee.<sup>38</sup> The City also offered to pay the committee's professional expenses.<sup>39</sup> Retiree committees have been appointed in some other contemporary Chapter 9 cases, but usually at the request of unions or retiree associations.<sup>40</sup>

Others raised a variety of questions and concerns about the details, including whether it was even permissible to authorize and appoint a committee before a finding of eligibility.<sup>41</sup> Although some concerns were resolved before the August 2, 2013 hearing, the International Union, United Automobile, Aerospace and Agricultural Implement

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37. See, e.g., Order Denying Motion for Relief from Stay [Dkt. # 308], *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 24, 2013) (denying relief to judgment creditor from traffic accident who alleged Detroit filed for bankruptcy to avoid paying his judgment and this bad faith justified lifting the stay as to him alone); Mich. Council 25 of the American Federation of State, County & Municipal Employees, AFL-CIO, Motion for Entry of an Order Modifying the Automatic Stay Solely to Allow Admin. Law Judge to Execute His Opinion & Liquidate Damage Award Before He Retires on Oct. 4, 2013, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 24, 2013); Petition for Order Lifting Stay, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 6, 2013).

38. See Motion of Debtor, Pursuant to § 1102(a)(2) of the Bankruptcy Code, for Entry of an Order Directing the Appointment of a Comm. of Retired Employees at 2, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich., July 19, 2013). The provision authorizing the creation of the committee, 11 U.S.C. § 1102(a)(2), applies to Chapter 9 cases. See 11 U.S.C. § 901(a) (2012) (including reference to § 1102).

39. Oral Argument at 2:02:06, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 2, 2013), available at <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket273.pdf>.

40. In the bankruptcy of Stockton, California, a retiree committee was appointed at the request of a retired employee association. Appointment of Official Comm. of Retirees at 2, *In re Stockton*, No. 12-32118 (Bankr. E.D. Cal. Apr. 1, 2013). In *City of Vallejo*, unions requested the retiree committee. Amended Appointment of Official Unsecured Creditor Comm. of Retirees at 1, *In re City of Vallejo*, No. 08-26813, 432 B.R. 262 (Bankr. E.D. Cal. Oct. 23, 2008). The *Vallejo* court denied the unions' request to allow their lawyers to represent the retirees. See Civil Minutes: [107]—Motion/Application for Order Appointing Unions as Retiree Benefit Representatives for Retirees from their Work Units, Doc. 189 at 1, *In re City of Vallejo*, No. 08-26813, 432 B.R. 262 (Bankr. E.D. Cal. July 25, 2008).

41. Oral Argument, *supra* note 39, at 1:56:30.

Workers of America (UAW) argued that the court should direct the United States Trustee's composition of the committee to include union representation.<sup>42</sup>

Initially ruling from the bench and following up with an order, the bankruptcy court approved the City's request to authorize a retiree committee, but declined to direct the U.S. Trustee in its appointment choices.<sup>43</sup> The court also encouraged the U.S. Trustee to act quickly in selecting the members, pressing for a date certain.<sup>44</sup> The U.S. Trustee solicited applications, and selected nine people.<sup>45</sup> Soon thereafter, the committee picked counsel and quickly emerged as an active objector to Detroit's eligibility for Chapter 9. The people of Detroit will pay for both sides of many disputes.

### 3. Access to Casino Revenues

Detroit filed for bankruptcy as it was running out of cash. It was also in the midst of a dispute over whether it was entitled to access certain casino revenues or whether Syncora, an insurer, was entitled to trap them.<sup>46</sup> Central to this dispute was whether the casino revenues were property of the debtor and thus protected by the automatic stay that came into effect upon the bankruptcy filing. The parties had oral argument—earlier than they expected, at the encouragement of the court—on the afternoon of August 21, 2013.<sup>47</sup> This hearing reflected the judge's active questioning style, which indicated close familiarity with both the facts and law, and ensured he got exactly the information he needed to make the decision.<sup>48</sup>

The court took the matter under advisement, providing that the status quo would be maintained in the meantime. A week later, the

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42. *See Id.*

43. Order, Pursuant to § 1102(a)(2) of the Bankruptcy Code, Directing the Appointment of a Comm. of Retired Emps., *In re City of Detroit*, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich., Aug. 2, 2013).

44. *Id.*

45. Corrected Appointment of Official Comm. of Retirees, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931, (Bankr. E.D. Mich., Aug. 22, 2013). Two members of the committee are identified on the appointment list as representing the AFSCME/AFL-CIO & UAW, respectively. *Id.*

46. *See City of Detroit v. Syncora Guar. Inc.*, No. 13-12987 (E.D. Mich.) (referred to bankruptcy court on Aug. 8, 2013, and given the number 13-04942).

47. That morning, the court strongly suggested that that the urgency of the issue and the fairly full briefing weighed in favor of proceeding that afternoon. Oral Argument at 0:00:19, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 21, 2013), available at <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket554.pdf>.

48. *See generally id.*

court issued an oral ruling followed by a written order in the City's favor,<sup>49</sup> which Syncora appealed.<sup>50</sup> Other ongoing disputes with Syncora have been assigned to a mediator.<sup>51</sup>

#### 4. *Discovery Generally*

At the outset of the case, the bankruptcy judge expressed hope that extensive discovery would not be required to determine eligibility.<sup>52</sup> But objectors persuaded the judge that they needed substantially more, in part because they characterized their concerns as having factual dimensions—even issues like the constitutionality of Chapter 9, as applied. The greater volume of discovery, in turn, produced a series of disagreements requiring court intervention.

For example, government officials asserted privileges in connection with depositions.<sup>53</sup> Detroit's Emergency Manager objected to a limited number of questions in a deposition, which led the court to set guidelines for future depositions and to offer to resolve disputes in real time on the phone if necessary.<sup>54</sup> The State of Michigan also challenged whether it must disclose the identities of parties who were under consideration for the Detroit Emergency Manager position.<sup>55</sup>

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49. *See generally* Oral Argument, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 28, 2013), *available at* <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket669.pdf>; Order Regarding Casino Revenues & Automatic Stay, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 28, 2013) (“[T]he Court concludes that the Casino Revenues are property of the estate and are subject to the automatic stay.”).

50. *See* Notice of Appeal from Order Regarding the Automatic Stay, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 10, 2013).

51. Second Order Referring Matters to Facilitative Mediation, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 22, 2013); Order to Certain Parties to Appear for Mediation of Certain Disputes before Special Mediator U.S. Bankruptcy Judge Elizabeth Perris, *In re* City of Detroit, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 8, 2013).

52. *See generally* Oral Argument, *supra* note 39.

53. The parties consensually resolved a privilege argument of the Michigan governor. *See* Oral Argument at 56:23, *In re* City of Detroit, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 10, 2013), *available at* <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket795.pdf>; *see generally* State's Response to (I) AFSCME's Objections to Motion to Quash (Doc. 701), & (II) UAW & AFSCME's Objections to August 26, 2013 Order (Docs. 741, 747), *In re* City of Detroit, No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 9, 2013) (raising new privilege defenses on the eve of the hearing).

54. *See generally* Oral Argument, *supra* note 23.

55. *See* State of Michigan's Motion for Protective Order Pursuant to Fed. R. Civ. Proc. 26(c)(1)(D) at 2, *In re* City of Detroit, Mich., No. 13-53848, 2013 WL 6331931 (Bankr. E.D. Mich. Oct. 4, 2013).

This dispute was resolved with a protective order filed a few days later.<sup>56</sup>

### 5. Pre-Trial Eligibility Matters

Finally, the lead-up to Detroit's eligibility trial produced significant work for the court. The major creditors objecting to eligibility were unions, the retirement system, and other worker- and retiree-related parties. As noted, the bankruptcy judge initially anticipated that many of the issues could be resolved without substantial discovery.<sup>57</sup> In early August, the court set October 23, 2013, as the date for an eligibility trial.<sup>58</sup> At the end of August, however, the court identified a list of issues that it conceived as purely legal, and set a much earlier date, September 18, for an oral argument on those issues.<sup>59</sup> Parties troubled by this schedule were permitted to file objections or comments by September 6.<sup>60</sup>

After objectors predicted that the bifurcated and expedited approach would produce more protracted discovery disputes and other difficulties, Judge Rhodes accommodated their requests to a considerable extent, and deferred oral argument on legal issues until mid-October.<sup>61</sup>

While the bankruptcy judge was accommodating these requests, however, the newly appointed counsel for the retiree committee (another eligibility objector) was finishing a motion to take the matter away from Judge Rhodes altogether. This motion, filed with the

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56. See generally Protective Order, *In re* City of Detroit, Mich., No. 13-53848, 2013 WL 6331931 (Bankr. E.D. Mich. Oct. 8, 2013) (permitting redaction of names and providing procedure by which certain parties could seek names).

57. See generally Oral Argument, *supra* note 39.

58. See First Order Establishing Dates & Deadlines at 1, *In re* City of Detroit, Mich., No. 13-543846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 2, 2013), available at <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket280.pdf>.

59. See Order Regarding Eligibility Objections, Notices of Hearings, & Certifications Pursuant to 28 U.S.C. § 2403(a) & (b), at 3, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 26, 2013).

60. *Id.* at 7.

61. See First Amended Order Regarding Eligibility Objections Notices of Hearings & Certifications Pursuant to 28 U.S.C. § 2403(a) & (b) at 3–4, *In re* City of Detroit, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich., Sept. 12, 2013), available at <http://www.mieb.uscourts.gov/apps/detroit/SelectedOrder.cfm>. The court agreed to hear “prompt oral argument,” on the legal issues, at the conclusion of which “the Court will not rule on legal issues, but will announce its determination as to which of the objections raise only legal issues and which require the resolution of genuine issues of material fact at the eligibility hearing.” *Id.*

district court, sought to withdraw the reference on eligibility.<sup>62</sup> The intent to file this motion was not disclosed to the judge until the end of the September 10, 2013 hearing.<sup>63</sup>

The retiree committee also filed a motion asking the bankruptcy court to halt movement on the eligibility proceedings pending the district court's consideration of its withdraw-of-the-reference motion.<sup>64</sup> The request for a stay of the proceedings would be assessed using the same standards as any preliminary injunction.<sup>65</sup> Judge Rhodes agreed to schedule an expedited hearing, held the hearing on the afternoon of September 19, 2013, and took the matter under advisement.<sup>66</sup>

On September 26, 2013, a week after the hearing, the bankruptcy court issued a substantial decision for publication—the only one before commencement of the eligibility trial—denying the retiree committee's request for a stay of the eligibility proceedings scheduled for October.<sup>67</sup> Judge Rhodes found that none of the four factors to consider in determining whether to grant a stay weighed in favor of granting the committee's motion.<sup>68</sup> Of the three bases the committee had set forth for withdrawing the reference, none was likely to succeed.<sup>69</sup> The court's decision pointed out that the retiree committee

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62. See generally The Official Comm. of Retirees' Motion to Withdraw the Reference, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 11, 2013).

63. See Oral Argument at 38:47, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Sept. 10, 2013), available at <http://www.mieb.uscourts.gov/apps/detroit/DetroitAudio.cfm>.

64. See generally Motion by Official Comm. of Retirees to Stay Deadlines & the Hearings Concerning a Determination of Eligibility Pending Decision on Motion to Withdraw the Reference, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich., Sept. 13, 2013).

65. The factors are: (1) whether the movant is likely to succeed on the merits of the underlying motion; (2) whether the movant is likely to suffer irreparable harm if the stay is denied; (3) whether the counterparty will suffer substantial harm if the stay is granted; and (4) whether the public interest will be served by granting a stay. *Moltan Co. v. Eagle-Picher Indus.*, 55 F.3d 1171, 1175 (6th Cir. 1995).

66. See Order Setting an Expedited Hearing on Motion of the Official Comm. of Retirees to Stay Proceeding Pending Determination of Motion to Withdraw the Reference at 1, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich., Sept. 16, 2013); Oral Argument, *supra* note 23.

67. See generally *In re City of Detroit*, Mich., 498 B.R. 776 (Bankr. E.D. Mich. 2013). The judge issued an additional decision for publication after commencement of the eligibility trial but before ruling on eligibility. See *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 5963141 (Bankr. E.D. Mich. Nov. 6, 2013) (denying NAACP request to lift automatic stay to permit lawsuit challenging Emergency Manager statute to go forward in another court).

68. *In re City of Detroit*, 498 B.R. at 780.

69. *Id.* at 793.

did not cite any specific federal law affecting interstate commerce as the mandatory withdrawal provision required.<sup>70</sup> The court also characterized the retiree committee's argument based on the U.S. Supreme Court's recent *Stern v. Marshall* decision as a stretch, but analyzed the issue anyway, lest there be any doubt that it was carefully considered.<sup>71</sup>

## B. Other Elements

If one looks beyond discrete disputes, the pre-eligibility phase of Detroit's bankruptcy provides additional insight. Originally a magistrate in the 1980s,<sup>72</sup> Judge Rhodes clearly is familiar with managerial judging techniques. Moreover, the bankruptcy judge made requests of the City not strictly necessary for umpiring discrete disputes.

### 1. Litigation Avoidance

Barely two weeks into the case, Judge Rhodes proposed a broad mediation order.<sup>73</sup> He explained that settlements could stabilize and strengthen long-term relationships, while "bitter and expensive" litigation might accomplish just the opposite.<sup>74</sup> Supporting mediation over litigation was framed in terms of city boosting—to help Detroit's recovery.<sup>75</sup> He invited comments about the proposed order and his proposed lead mediator.<sup>76</sup>

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70. *Id.* at 789. The retiree committee argued that the restructuring of the City of Detroit affects interstate commerce more generally. Withdrawal of the reference is mandatory if the "resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce," and only if the matter would require substantial and material consideration of the federal law regulating interstate commerce. 28 U.S.C. § 157(d) (2012).

71. *In re City of Detroit*. 489 B.R. at 781–88.

72. *Hon. Steven Rhodes*, U.S. BANKR. COURT E. DISTRICT MICH., <http://www.mieb.uscourts.gov/sites/default/files/detroit/Rhodes%20Bio.pdf> (last visited Mar. 15, 2014).

73. Order Regarding Comment Period on Revised Mediation Order at 2–3, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 2, 2013).

74. *See* Oral Argument, *supra* note 39, at 6:40.

75. *Id.*

76. *Id.* Comments about the proposed lead mediator had to be submitted privately to chambers.

On August 13, 2013, the bankruptcy court entered an order naming Chief Judge Rosen as lead mediator.<sup>77</sup> The first order referring matters to mediation reflected an ambitious agenda: (1) the treatment of the claims of the various creditor classes in a plan of adjustment, and (2) the negotiation and renegotiation of collective bargaining agreements.<sup>78</sup> Chief Judge Rosen met with major parties for the first time on August 23, 2013.<sup>79</sup> At a session for the press he held beforehand, Chief Judge Rosen characterized the litigation path to confirmation of Detroit's plan of adjustment as "horrendous".<sup>80</sup>

## 2. Team-Building

The mediation order authorized Chief Judge Rosen to scout out a team of mediators.<sup>81</sup> He swiftly enlisted five people: two district judges, one on senior status from Denver, and one additional judge from Detroit; one bankruptcy judge from Oregon who mediated three California Chapter 9 cases;<sup>82</sup> one retired district judge (and former bankruptcy judge) from Chicago; and one private lawyer from Detroit.<sup>83</sup>

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77. Mediation Order at 1–2, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 13, 2013).

78. First Order Referring Matters to Facilitative Mediation, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 16, 2013).

79. *Id.*; Order to Certain Parties to Appear for Mediation of Certain Disputes Before Special Mediator U.S. Bankruptcy Judge Elizabeth Perris, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 23, 2013).

80. Ed White, *Judge Acting as Mediator in Detroit Bankruptcy: Deals are Better than 'Horrendous' Litigation*, GLOBAL POST (Sept. 17, 2013), <http://www.globalpost.com/dispatch/news/the-canadian-press/130917/judge-acting-mediator-detroit-bankruptcy-deals-are-better-ho> ("A judge told a courtroom packed with lawyers Tuesday that deals between Detroit and its creditors would be better than years of 'horrendous' litigation in the largest public bankruptcy in U.S. history . . . . He said 'years of litigation, disputing issues in the courts, is horrendous.'").

81. First Order Referring Matters to Facilitative Mediation, *supra* note 78, at 3 (referring to mediators that could be appointed by the lead judicial mediator).

82. Order Appointing Mediator & Setting Mediation Conference at 3, *In re City of Stockton*, Cal., No. 12-32118-C-9 (E.D. Cal. July 11, 2012) (ordering counsel for debtor and other parties to submit to Judge Perris's law clerk a list of matters that would benefit from mediation and pertinent parties and their counsel, but providing that this order was without prejudice to the right of parties to pick their own private mediator); Steven Church, *Detroit Judge Creates Team to Help Mediate Bankruptcy Fights*, BLOOMBERG (Aug. 20, 2013), <http://www.bloomberg.com/news/2013-08-20/detroit-judge-creates-team-to-help-mediate-bankruptcy-fights-1.html> (listing Mammoth Lakes and City of Vallejo as other cases in which Judge Perris mediated).

83. Detroit Chapter 9 Mediation Team Announced at 2, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 20, 2013).

The number of people overseeing the Detroit bankruptcy pre-eligibility grew quickly in other respects. Stressing the importance of transparency and accountability, Judge Rhodes proposed the appointment of a fee examiner at the very first hearing in Detroit's bankruptcy on July 23, 2013.<sup>84</sup> At the August 2, 2013 hearing, the second hearing of the case, Detroit's lawyer indicated that the City would neither oppose the court's proposal nor make suggestions about who should receive the appointment.<sup>85</sup>

The bankruptcy judge selected the examiner: a Chicago lawyer who agreed to discount his regular hourly rate to \$600 per hour.<sup>86</sup> The court's fee examiner order includes a lengthy list of others at the lawyer's firm authorized to work on this assignment.<sup>87</sup> The order also includes the services of an accounting firm in Florida.<sup>88</sup> The scope of the fee examiner's scrutiny would extend to the retiree committee's professionals, whom the City agreed to pay.<sup>89</sup>

The bankruptcy judge suggested the addition of more people when he floated the idea of a tort claimant committee.<sup>90</sup> On this matter, the City's lawyers demurred, and suggested they had a different idea.<sup>91</sup>

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84. Order Establishing Amended Initial Status Conference Agenda at 4, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. July 23, 2013). Judges appoint fee examiners in large Chapter 11 cases to assist in reviewing and approving expenditures from the bankruptcy estate, but a Chapter 9 fee examiner is an unfamiliar concept. Steven Church, *Detroit Fee Examiner Gets Paid to Second Guess Bills*, BLOOMBERG (Oct. 21, 2013), <http://www.bloomberg.com/news/2013-10-21/detroit-fee-examiner-gets-paid-to-second-guess-bills.html> (“Keach and the other bankruptcy lawyers contacted for this story said they can’t remember such a system being used in cases under Chapter 9, which covers municipalities and doesn’t require cities to submit their fees to the judge for approval”). Bankruptcy judges overseeing Chapter 9 bankruptcies have neither a professional fee review obligation nor power, other than in the most limited sense in connection with plan confirmation. 11 U.S.C. § 943(b)(3) (2012); *In re Colorado Centre Metro. Dist.*, 139 B.R. 534 (Bankr. D. Colo. 1992) (emphasizing limited nature of this plan confirmation review).

85. See Oral Argument, *supra* note 39, at 1:21:30.

86. Order Appointing Fee Examiner at 6, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich., Aug. 19, 2013), available at <http://www.mieb.uscourts.gov/sites/default/files/detroit/docket383.pdf>.

87. *Id.* at 11.

88. *Id.* at 9–14.

89. See generally Notice of Appearance & Demand for Notice & Papers, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 29, 2013); Order Appointing Fee Examiner at 1, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 19, 2013), available at <http://www.creditslips.org/files/feexaminerappointment.pdf>.

90. See Oral Argument, *supra* note 39, at 0:31:38–0:34:12, 1:30:37.

91. See *id.* The court ultimately coaxed the Debtor to develop a protocol for tort claimants, albeit through arbitrators and not a committee.



### 3. *Keep Things Moving*

Judge Rhodes explained to the public that he does not control the City's operations.<sup>92</sup> But in the pre-eligibility period, he forecasted a significant judicial oversight role for the bankruptcy case itself by demonstrating that he would set its pace. He took the lead in proposing an ambitious timeline and benchmarks.<sup>93</sup> A skeptic of extensive discovery requests, the judge was keen to ensure that discovery was not used for delay.

### 4. *Interactivity*

The bankruptcy judge called his own witness at the first evidentiary hearing in Detroit's bankruptcy on a motion to lift the automatic stay to permit a § 1983 action to go forward in district court.<sup>94</sup> He also actively questioned lawyers during oral arguments, ensuring that remarks remain focused on the issues at hand.<sup>95</sup>

### 5. *Procedural Justice*

From the earliest days of the case, Judge Rhodes projected an understanding of the impact on citizens, retirees, and businesses in the region. For example, he convened a hearing to permit individuals and retirees who filed eligibility objections to speak directly to the court.<sup>96</sup> Each was assigned three minutes, although many spoke longer.<sup>97</sup> The subjects of their presentations varied.<sup>98</sup> A lawyer for Detroit gave a global response.<sup>99</sup> At the end of the hearing, Judge

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92. *See id.*; Brent Snavelly, *Judge Steven Rhodes Explains His Limited Role in Detroit Case*, DETROIT FREE PRESS, Aug. 2, 2013, <http://www.freep.com/article/20130802/NEWS01/308020140/Judge-Steven-Rhodes-explains-his-limited-role-Detroit-case>.

93. *See generally* First Order Establishing Dates & Deadlines, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Aug. 2, 2013).

94. *See* Oral Argument at 0:31:38 (standing), 0:33:27 (ripeness), 0:34:12 (expediting the case), 1:30:37 (the great human cost of the bankruptcy), *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Oct. 8, 2013); Order Regarding Amended Motion of Creditor Deborah Ann Ryan For Relief From Automatic Stay (Dkt. #819), *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Oct. 8, 2013). The practice is authorized by Federal Rule of Evidence 614(a), but is thought to be rare.

95. *See generally* Oral Argument, *In re City of Detroit*, Mich., No. 13-53846, 2013 WL 6331931 (Bankr. E.D. Mich. Oct. 8, 2013).

96. *See generally* Oral Argument, *supra* note 23.

97. *Id.*

98. *Id.*

99. *Id.*

Rhodes strongly encouraged Michigan's Governor and Detroit's Emergency Manager to listen to the digital recording of the hearing.<sup>100</sup>

#### CONCLUSION

Detroit is a historic Chapter 9 case. As objecting creditors often note with the hope of appealing to a judge's sense of destiny, what happens in this bankruptcy could set a blueprint for future municipal cases. But many such predictions have likely been fueled by the wrong kind of gas, assuming that the legacy of Detroit lies exclusively with published, possibly ground-breaking case law.

An examination of the pre-eligibility period of Detroit's bankruptcy suggests far more to watch. Umpiring is inevitable in a case of this magnitude. Detroit's bankruptcy judge fulfilled this role with speed and proficiency in the first few months of the bankruptcy. But the use of other tools and techniques suggests that judges exercise more oversight and control, and play more roles in Chapter 9 bankruptcies, than is generally acknowledged.

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100. *Id.*