

IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: : Case No. 11-06938-MDF  
: Chapter 9  
CITY OF HARRISBURG, PA, :  
Debtor :  
: Hearing Date: 11/23/11 at 9:30 AM

**THE COUNTY OF DAUPHIN'S BRIEF IN SUPPORT OF ITS OBJECTIONS TO  
THE DEBTOR'S CHAPTER 9 BANKRUPTCY PETITION AND REQUEST TO  
DECLARE THE DEBTOR'S BANKRUPTCY PETITION VOID *AB INITIO***

Pursuant to the Bankruptcy Code, 11 U.S.C. §§ 109(c)(2) and 921(c), the County of Dauphin submits this Brief in support of its Objection to the chapter 9 bankruptcy petition filed on behalf of the "City of Harrisburg, PA" (the "Debtor").

**I. Statement of Facts:**

On October 11, 2011, the Debtor, by and through Susan Wilson on behalf of the city council of the Debtor ("City Council"), filed a Chapter 9 bankruptcy petition along with a statement of qualifications (the "Petition") under 11 U.S.C. §§ 109(c) and 921(c). City Council filed the Petition after passing a resolution titled "Resolution of the City Council of City of Harrisburg, PA Authorizing Filing Of A Petition Under Chapter 9 Of The United States Bankruptcy Code" (the "Resolution"), a copy of which was attached to the Petition.

The Resolution "authorized and directed" City Council's attorney to "prepare and file a petition for protection under chapter 9 of the United States Bankruptcy Code on behalf of the City of Harrisburg." The Resolution further authorized Councilperson Wilson, the chair of City Council's Budget and Finance Committee, to sign the Petition "...on behalf of and in the name of the City of Harrisburg."

The Petition was signed by Councilperson Wilson and filed by attorney Mark D. Schwartz on behalf of the Debtor. According to the Petition, Harrisburg is a municipality

authorized by state law to file a chapter 9 bankruptcy petition because: (1) it is in imminent jeopardy of actions by creditors likely to substantially interrupt its ability to provide health or safety services to its citizens; (2) its “financial problems can only be solved by utilizing the cram-down remedies available under the [Bankruptcy] Code;” and, (3) City Council has refused to accept the recommendations proposed in a plan developed pursuant to the Commonwealth of Pennsylvania's Municipalities Financial Recovery Act, Act 47 of 1987, 53 P.S. § 11701.101, *et seq.* (“Act 47”).

The County of Dauphin objects to the filing of the Petition because there was no statutory authority for the Debtor to file for bankruptcy protection. In the event this Court believes there was a statutory basis for the Debtor to file for bankruptcy protection under applicable Pennsylvania law, the County of Dauphin alternatively objects to the Petition because it was not filed pursuant to an approved ordinance authorizing such action and not signed and filed by the mayor of the Debtor (the “Mayor”).

**II. Questions Presented:**

- A. Was the Debtor authorized to file for federal bankruptcy protection under Pennsylvania law?

Suggested answer: No.

- B. Was City Council authorized to sign and file the Petition by passing its own resolution authorizing such action instead of passing an ordinance authorizing such action?

Suggested answer: No.

- C. Was City Council authorized to sign and file the Petition on behalf of the Debtor instead of the Mayor?

Suggested answer: No.

### III. Legal Standard:

Section 109(c) requires a chapter 9 debtor meet, *inter alia*, the following requirements:

(1) be a municipality; and, (2) be “specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor.” 11 U.S.C.

§ 109(c). The authorization for a municipality to file for bankruptcy must be “...exact, plain, and direct with well-defined limits so that nothing is left to inference or implication.” *In re Slocum*, 336 B.R. 387, 390 (Bankr. N.D. Ill. 2006).

#### A. *Limited Eligibility for Chapter 9 Cases.*

This Court must exercise careful scrutiny in determining whether Harrisburg is eligible to file a chapter 9 petition:

Bankruptcy courts should review chapter 9 petitions with a jaded eye. Principles of dual sovereignty, deeply embedded in the fabric of this nation and commemorated in the Tenth Amendment of the United States Constitution, severely curtail the power of bankruptcy courts to compel municipalities to act once a petition is approved.

*In re New York City Off-Track Betting Corp.*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010).

Therefore, in determining whether a debtor is eligible for chapter 9 bankruptcy, the Court “should not [exercise its jurisdiction] lightly . . . Considering the bankruptcy court's severely limited control over the debtor, once the petition is approved, access to Chapter 9 relief has been designed to be an intentionally difficult task.” *In re Sullivan County Reg'l Refuse Disposal Dist.*, 165 B.R. 60 (Bankr. D.N.H. 1994). *See also In re Cottonwood Water and Sanitation Dist., Douglas County, Colo.*, 138 B.R. 973, 979 (Bankr. D. Colo. 1992) (“Congress consciously sought to limit accessibility to the bankruptcy court by municipalities.”).

*B. Dismissal of the Petition Upon Lack of Eligibility.*

This Court must dismiss the Petition if the Debtor does not meet the eligibility requirements of 11 U.S.C. §§ 109(c)(2) and 921(c). *See New York City Off-Track Betting Corp.*, 427 B.R. at 264; *In re City of Vallejo*, 408 B.R. 280, 289 (B.A.P. 9th Cir. 2009) (“Despite the permissive statutory language, courts have construed § 921(c) to require the mandatory dismissal of a petition filed by a debtor who fails to meet the eligibility requirements under § 109(c.”); *In re Valley Health Sys.*, 383 B.R. 156, 160 (Bankr. C.D. Cal. 2008) (“Although the language of § 921(c) is permissive, the case law indicates that § 921(c) 'must be given a mandatory effect if the defect in the filing is in the debtor's eligibility to file chapter 9.’”).

*C. The Debtor Bears the Burden of Proving it is Eligible for Chapter 9 Bankruptcy Protection.*

The burden of proving eligibility under 11 U.S.C. § 109(c) rests squarely on a debtor. *City of Vallejo*, 408 B.R. at 289. *See also In re Connector 2000 Ass'n, Inc.*, 447 B.R. 752, 758 (Bankr.D.S.C. 2011) (“[I]n order to be a debtor under chapter 9, Debtor must ... meet section 101(40)'s definition of municipality ... “); *In re City of Bridgeport*, 129 B.R. 332, 334 (Bankr.D.Conn. 1991) (city filing under Chapter 9 had burden of proving that mayor was properly authorized to file the petition).

**IV. Argument:**

*A. The Debtor was not authorized to file for federal bankruptcy protection under Pennsylvania law.*

Act 47 is the sole statute in Pennsylvania that authorizes a Pennsylvania municipality to file for federal bankruptcy protection. *See City of Scranton v. Firefighters Local Union No. 60, of Intern. Ass'n of Fire Fighters, AFL-CIO*, --- A.3d ----, Nos. 35 MAP 2010-38 MAP 2010, 2011 WL 4954251, at \*1 (Pa. Oct. 19, 2011); *Wilksburg Police Officers Ass'n By and Through*

*Harder v. Com*, 636 A.2d 134, 135-36 (Pa. 1993). Absent Act 47 authorization, there is no other state or federal right for a municipality in Pennsylvania to file for chapter 9 bankruptcy protection. For the Court's convenience, a copy of the relevant portion of Act 47 is attached hereto as **Exhibit A**.

On June 30, 2011, Pennsylvania passed Act 26 to prohibit distressed cities of the third class, such as the Debtor, from filing for federal bankruptcy protection. *See* Act 26 of 2011, 72 P.S. § 1601-D.1, amending the Act of April 9, 1929 (P.L. 343, NO. 176) (“Act 26”). A copy of Act 26 is attached hereto as **Exhibit B** for the Court's convenience.

Act 26 applies to any “city of the third class which is determined to be financially distressed under [Act 47].” 72 P.S. § 1601-D.1(a).

Act 26 explicitly bars such cities from filing a petition under chapter 9:

Notwithstanding any other provision of law, including section 261 of [Act 47], no distressed city may file a petition for relief under 11 U.S.C. Ch. 9 (relating to adjustment of debts of a municipality) or any other Federal bankruptcy law, and no government agency may authorize the distressed city to become a debtor under 11 U.S.C. Ch. 9 or any other Federal bankruptcy law.

72 P.S. § 1601-D.1(b). The plain language of Act 26 indicates distressed cities of the third class are barred from filing under chapter 9 regardless of any other law that previously authorized such cities to file for federal bankruptcy protection.

The Debtor is a city of the third class under the provisions of the Third Class City Code<sup>1</sup> and was determined to be a “distressed city” under Act 47 by the Pennsylvania Department of Community & Economic Development on December 15, 2010. *See* Petition at 2 and Order of Department of Community & Economic Development regarding Harrisburg's Request for Determination of Financial Distress Under Act 47, attached hereto as **Exhibit C**. Act 26

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<sup>1</sup> 53 P.S. § 35101, *et seq.* The Debtor operates under the Mayor-Council Plan A of the Optional Third Class City Charter Law, 53 P.S. § 41101, *et seq.*

explicitly forbids the Debtor from filing for federal bankruptcy protection and therefore, the Debtor lacked authority under 11 U.S.C. § 109(c)(2) to file for federal bankruptcy protection. This Court must dismiss the Petition and declare such filing void *ab initio* because the Debtor was not eligible to file for federal bankruptcy protection.

***B. City Council May Not Sign and File the Petition Pursuant to a Resolution Authorizing Such Action.***

Bankruptcy courts look to state law to determine who is authorized to file for bankruptcy protection. *In re Corporate and Leisure Event Productions, Inc.*, 351 B.R. 724, 731 (Bankr.D.Ariz. 2006). This Court must dismiss the Petition if it was filed without proper authority. *In re Joseph Feld & Co.*, 38 F.Supp. at 507; *In re Carolina Park Associates, LLC*, 430 B.R. 744, 748 (Bankr.D.S.C. 2010) (“A bankruptcy petition by an entity may only be filed under authority of those with the lawful power to so act.”). *See also In re City of Bridgeport*, 129 B.R. 332, 334 (Bankr.D.Conn. 1991). The Petition was signed and filed by City Council after City Council passed a resolution authorizing such action. City Council could not authorize the signing and filing of the Petition by passing a resolution and must pass an ordinance to allow such action.

***i. City Council Violated Their Own Rules In Passing a Resolution Instead of an Ordinance***

The Codified Ordinance of the City of Harrisburg (the “City Code”) contain rules and requirements that govern actions by City Council. In *Title One - Legislative Code*, Section 1-301.3, the City Code sets forth rules which “control” the construction of actions by City Council; in item (10) thereof, it is provided that : “A resolution is an expression of opinion of Council. It does not have the force and effect of law and violation of a resolution does not subject the violator to penalties.” (emphasis added.). For the Court’s convenience, a copy of the relevant

portions of the City Code is attached hereto as **Exhibit D**. The City Code has the force of law by which City Council is bound; City Council cannot avoid its requirements, except by repeal. City Council is required to operate under its own rules, as codified in the City Code; it cannot waive those requirements.

Pennsylvania case law supports the limitation upon resolutions as contained in the City Code. *Fox vs. Chace*, 168 A.2d 569, 572 (Pa. 1961) (“[A] resolution is merely the formal expression of the will of the majority of an official body.”); *Com. ex rel. Tarner v. Bitner*, 144 A. 733, 735 (Pa. 1929) (“A resolution or order, as sometimes called, is an informal enactment of a temporary nature, providing for the disposition of a particular piece of the administrative business of a municipal corporation.”). Furthermore, ordinances that are adopted by City Council must be submitted to the Mayor, who is vested with authority to veto ordinances. 53 P.S. § 41413; *see also*, Harrisburg City Charter at § 413. No such requirement is made for resolutions. *See Bitner*, 144 A. at 735 (“[A resolution] is not a law, and there is no difference between a resolution and a motion. As such it is not an original exercise of governmental duty, and does not require the written approval of the burgess.”).

**ii. Pennsylvania Law Requires Municipalities to Pass an Ordinance to Approve Significant Governmental Action**

In *Eddy v. Borough of Ashley*, the Pennsylvania Supreme Court held that ordinances which involve the expenditure of money relating to government welfare and the prosperity of the borough must be reviewed by the city's executive branch before passage. 125 A. 308, 309-10 (Pa. 1924). Furthermore, any act that “may be considered an original exercise of governmental duty, power, or obligation” requires the approval of the executive branch. *Id.* The holding in *Eddy* clearly requires an ordinance be passed when a city undertakes significant government action.

City Council attempted to side-step the magnitude of the filing by passing a resolution and to avoid any participation by the Mayor in connection with the filing of the Petition. In doing so, City Council violated its own rules and Pennsylvania law. The Pennsylvania Supreme Court has held that: “the Mayor of Harrisburg . . . is part of Harrisburg’s government and one of the officers with ultimate control.” *Reed v. Harrisburg City Council*, 995 A.2d 1137, 1142 (Pa. 2010) (emphasis added). The Petition must be dismissed and deemed void *ab initio* because City Council lacked authority to authorize the signing and filing of the Petition through a resolution instead of an ordinance.

**C. City Council was not authorized to sign and file the Petition on behalf of the Debtor.**

The question of whether City Council was authorized to file the Petition on behalf of the Debtor hinges on the scope of City Council's powers under state and local law.

**i. Only the Mayor, not City Council, could sign and file the Petition for the Debtor.**

The Debtor operates under the Mayor-Council Plan A option<sup>2</sup> under Pennsylvania law and the “executive power” of the Debtor is “exercised by the mayor,” 53 P.S. § 41411 and the “legislative power” is reserved to City Council. 53 P.S. § 41407. City Council's unilateral filing of the Petition usurped the Mayor's executive role, a result “inconsistent with the [separation of] the executive and legislative powers between the Mayor and City Council, respectively.” *City of Erie v. Dept. of Env. Prot.*, 844 A.2d 586, 591 (Pa. Commw. Ct. 2004).

In *City of Erie*, Erie's city council hired special counsel to file an appeal on behalf of the city, but the Commonwealth Court held that state and municipal laws prevent the city council of a third class city from unilaterally hiring legal counsel or filing an action on behalf of the city.

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<sup>2</sup> This form of government for cities of the third class is often referred to as a “strong mayor” form of government.

*Id. at 590-91.* In so holding, the Commonwealth Court reviewed all relevant laws governing the City of Erie and concluded that under Erie's chosen "Mayor-Council Plan A" form of government "City Council does not have the express or implied authority to retain special counsel, and only the Mayor can authorize legal action on behalf of the City of Erie and only the City Solicitor can initiate that action." *Id. at 591.* The court accordingly granted Erie's City Solicitor's motion to withdraw the appeal.

In all relevant aspects, Harrisburg's governing laws are identical to the City of Erie; both cities operate under "Mayor-Council Plan A" pursuant to the Optional Third Class City Charter Law (the "State Charter Law"), 53 P.S. §§ 41101-41625, and the relevant portions of the city's codes and charters are identical. Under the holding in *City of Erie*, only the Mayor and City Solicitor of the Debtor are empowered to file legal action on behalf of the Debtor. City Council's filing of the Petition was not in compliance with state law and made without proper legal authority.<sup>3</sup> City Council had not legal authority to sign and file the Petition and therefore, the Petition should be dismissed and deemed void *ab initio*.

**ii. Act 47 Does Not Bestow Executive Power upon City Council to file the Petition.**

City Council contends that its unilateral filing of the Petition is authorized by Act 47. This position is incorrect. Section 261 of Act 47 (attached hereto as Exhibit A) authorizes a municipality to file under chapter 9 only upon the fulfillment of at least one of five enumerated conditions. 53 P.S. § 11701-261(a). Should any of those conditions be fulfilled, the Act states that the municipality may exercise such authorization to file "only upon the vote by a majority of

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<sup>3</sup> Indeed, Harrisburg's City Council had no statutory authorization to hire special counsel to represent the City and file the Petition. *See Erie*, 844 A.2d at 590 ("City Council does not have the express or implied authority to retain special counsel . . .").

the municipality's governing body.” *Id.* at § 11701.261(b). Act 47 does not bestow executive power upon City Council to sign and file the Petition itself.

Act 47 only establishes that a majority of city council must vote in favor of a municipality's chapter 9 filing before the municipality may actually file a bankruptcy petition. Act 47 does not suggest that City Council may file the petition itself despite having no executive power under the general or local law concerning how a municipality actually conducts its affairs.

As the Third Circuit has explained, a legislature's use of the conditional “only if” (or, as here, “only upon the vote [of City Council]” (emphasis added)) sets a necessary, but not sufficient, condition. *See Twp. of Tinicum v. U.S. Dep't of Transp.*, 582 F.3d 482, 488-89 (3d Cir. 2009). The Third Circuit continued:

The phrase “only if” describes a necessary condition, not a sufficient condition. A necessary condition describes a prerequisite ... For example, making the playoffs is a necessary condition for winning the Major League Baseball World Series because a team cannot win the World Series if it does not make the playoffs. Using the “only if” form: a team may win the World Series only if it makes the playoffs. But, a team's meeting the necessary condition of making the playoffs does not guarantee that the team will win the World Series.

The word “if” describes a sufficient condition. A sufficient condition is a guarantee. For example, winning the division is a sufficient condition for making the playoffs because a team that wins the division is ensured a spot in the playoffs. Using the “if” form: a team makes the playoffs if it wins its division.

*Id.* (citations omitted). *see also Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1176 n.8 (8th Cir. 1986) (noting that “only upon” indicates a necessary but not sufficient condition), *rev'd on other grounds*, 485 U.S. 112 (1988).

Act 47 does not state that a chapter 9 petition may be filed “upon the vote of [City Council],” rather, it states that a filing may be made “only upon the vote of City Council.” 53 P.S. § 11701-261(b) (emphasis added). City Council's vote was a necessary precondition to a

chapter 9 filing by Debtor, but, Act 47 does not replace the laws that control how the Debtor actually conducts its affairs.

Under the State Charter Law, legal action, such as the filing of the Petition, may only be done by the Mayor and not by City Council unilaterally. *See City of Erie*, 844 A.2d at 591. Unilateral action by the City Council is contrary to the intent of the State Charter Law which expressly invests executive authority for the Debtor in the office of the Mayor. City Council's unilateral filing of the Petition was therefore not a filing on behalf of the “municipality” of Harrisburg, as required by § 109(c) of the Bankruptcy Code, and the Petition should be dismissed and declared void *ab initio*.

V. **Conclusion:**

The Petition should be dismissed and declared void *ab initio* because the Debtor was not authorized to file for bankruptcy protection under Pennsylvania law, City Council was not authorized to sign and file the Petition on behalf of the Debtor, and City Council must pass an ordinance to allow the Petition to be signed and filed.

McNEES, WALLACE & NURICK LLC

Date: October 28, 2011

By: /s/ Clayton W. Davidson

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**CERTIFICATE OF SERVICE**

I, Clayton W. Davidson, of the firm of McNees Wallace & Nurick, LLC, hereby certify that I served a true and correct copy of The County of Dauphin's Brief in Support of its Objection To The Debtor's Chapter 9 Bankruptcy Petition upon the parties listed below by filing it with the Clerk of the Bankruptcy Court using the CM/ECF system.

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