

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

IN RE: : CASE NO. 1:11-bk-06938 MDF
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CITY OF HARRISBURG, PA : CHAPTER 9
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**THE COMMONWEALTH OF PENNSYLVANIA’S REPLY BRIEF
IN SUPPORT OF ITS OBJECTION TO THE DEBTOR’S PETITION**

The Commonwealth of Pennsylvania (the “Commonwealth”) files this Reply Brief in Support of Its Objection to the Harrisburg City Council’s (the “Council’s”) Chapter 9 Petition (the “Petition”).

I. INTRODUCTION

On October 12, 2011, the Council filed its Petition for relief under Chapter 9 of the United States Code (the “Bankruptcy Code”). Chapter 9 of the Bankruptcy Code limits filing for relief to instances where a municipality is “specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter . . . by State law” 11 U.S.C. § 109(c)(2). Historically, Commonwealth municipalities could seek bankruptcy protection upon meeting certain conditions under Pennsylvania’s Municipalities Financial Recovery Act, commonly known as “Act 47.” However, on June 30, 2011 — over three months before the Petition was filed — the Commonwealth, in an exercise of its sovereign power, passed a law revoking authorization for municipalities to file for bankruptcy. Because of this law, known as “Act 26,” Commonwealth law prohibited the Petition when filed, and the Commonwealth continues to prohibit the Petition today.

Bankruptcy courts emphasize that they must remain “keenly aware of the federalism concerns that underlie Chapter 9 bankruptcy cases.” *In re New York City Off-Track Betting*

Corp., 434 B.R. 131, 146 (Bankr. S.D.N.Y. 2010) (holding that, due to federalism concerns, the bankruptcy court would exercise permissive abstention under 28 U.S.C. § 1334(c)(1) and not interpret a New York state statute); *see also id.* at 149 (“Federalism concerns resonate loudly in Chapter 9 bankruptcies. **Indeed, this Court can think of no instance where respect for State law is more paramount than in a municipal bankruptcy case under Chapter 9 of the Bankruptcy Code.**”) (emphasis supplied). In its responsive brief, however, the Council essentially asks this Court to demonstrate its “awareness” of Act 26 by declaring it unconstitutional in an effort to release the City from the clear prohibition of the Petition. The Council’s effort is wholly unconvincing, and this Court should not accept the invitation to swing a wrecking ball at important principles of comity and state sovereignty.

II. ARGUMENT

A. The “Specific Authorization” Requirement of Chapter 9 of the Bankruptcy Code Should Not Be Liberally Construed.

The Council’s argument that the eligibility criteria for a Chapter 9 debtor should be liberally construed finds no support under present law. Unable to find support under *present* law, the Council relies heavily on the now-outdated *In re City of Bridgeport*, 128 B.R. 688 (Bankr. D. Conn. 1991) to argue that this Court must take a lenient view of the requirements of section 109(c) of the Bankruptcy Code. (Council’s Resp. Br. at 3). Twenty years ago in *Bridgeport*, the court concluded that the applicable state law “generally authorized” a municipality to declare bankruptcy.

Bridgeport is of no moment to the matter at hand, however, because Congress amended section 109(c) in 1994 to introduce the “specific authorization” requirement which governs this inquiry, and which Harrisburg has failed to satisfy. *See, e.g., In re County of Orange*, 183 B.R. 594, 604 (Bankr. C.D. Cal. 1995). As courts have uniformly recognized, specific authorization

is a much more rigorous standard than general authorization. *Id.* (“[T]he courts [can] no longer find the requisite authorization for the filing by implication. The amendment requires that the state give the municipality express authority to file”).

The Council points to no authority to support the proposition that the “specific authorization” language of section 109(c)(2) should be liberally construed. This absence of any post-1994 authority in support of the Council’s position is not surprising, precisely because the federalism concerns inherent in Chapter 9 cases — codified in the 1994 amendment to section 109(c) — demand a strict construction. As set forth above, the Council’s reliance on a *Bridgeport* case that pre-dates the very statutory provision on which the Commonwealth’s objection turns is wholly improper and unavailing.

More fundamentally, a liberal construction of this provision would contravene core principles animating Chapter 9. Section 903 of the Bankruptcy Code acknowledges that Chapter 9 “does not limit or impair the power of a State to control by legislation or otherwise, a municipality of or in such State in the exercise of the political or governmental power of such municipality” 11 U.S.C. § 903. On one level, such a provision underscores the deference to be afforded to state police power, as reflected by the 10th Amendment and other provisions of the federal Constitution. Going deeper, Section 903 reflects a recognition that , within any given state, a municipality is nothing more than a creation of the state and has no independent authority separate from or beyond what the state bestows upon it.¹

¹ It is black-letter law that municipalities are “agents of the state” and that they are “created, governed, and the extent of their powers determined by the legislature, and subject to change, repeal, or total abolition at its will.” *Commonwealth v. Moir*, 49 A. 351, 352 (Pa. 1901); *see also City of Philadelphia v. Schweiker*, 817 A.2d 1217, 1222 (Pa. Commw. Ct. 2003) (“[A] municipality is merely a creature of the sovereign”). This point has been underscored by the Pennsylvania General Assembly’s enactment of Senate Bill 1151 — signed into law by Governor Corbett on October 20, 2011 — which *again* provides that financially distressed municipalities cannot file a bankruptcy petition and mandates resort to specific remedial procedures *other than* bankruptcy. *See, e.g.*, 53 P.S. §§ 11701.609(b) & 11701.706(a).

The Council's Petition and its arguments in support of that Petition completely miss the point of section 109(c)(2) of the Bankruptcy Code, in particular, and fundamental issues of federal-state balance in our republic, in general.

B. Act 26 is a Prospective, Procedural Law That Does Not Violate the Ex Post Facto Clauses of the Pennsylvania or United States Constitutions.

The Council cannot escape the clear command of Act 26 by resort to the federal or state constitutions' Ex Post Facto Clauses.² A legislative enactment violates the Ex Post Facto Clause only if it operates (a) retrospectively and (b) substantively impairs existing contractual rights. *See, e.g., Myers v. Lohr*, 72 Pa. Super. 472 (Pa. Super. Ct. 1919). An Ex Post Facto challenge must fail unless it meets both of these conditions. In this case, the Council's challenge satisfies neither of the conditions, much less both.

1. Act 26 is Not Retrospective.

As an initial matter, Act 26 does not operate retrospectively. Rather, by its plain terms, Act 26 was a forward-looking, prospective command prohibiting distressed cities from taking certain actions in the future. Thus, as a matter of law, the Act does not violate the Ex Post Facto Clauses.

Contrary to the Council's misstatement of applicable law, a statute is not retroactive simply because it "appl[ies] to events occurring before its enactment." (Council's Resp. Br. at 21); *see also, e.g., Lehman v. Pennsylvania State Police*, 839 A.2d 265 (Pa. 2003). Under that simplistic standard, virtually all legislation would trigger Ex Post Facto scrutiny. Indeed, Pennsylvania courts have soundly rejected this argument in various factual contexts over the

² The Ex Post Facto Clauses of the Pennsylvania and U.S. Constitutions — including the attendant Contract Clauses for non-penal matters — are interpreted in parallel fashion. *See, e.g., Commonwealth v. Young*, 637 A.2d 1313, 1317 n.7 (Pa. 1993). The federal Constitution provides simply that "[n]o Bill of Attainder or ex post facto Law shall be passed." Art. I, Section 9. The Seventeenth Amendment to the Pennsylvania Constitution explains this right a bit more expansively: "No ex post facto law, nor any law impairing the obligation of contracts, or making irrevocable any grant of special privileges or immunities, shall be passed."

years. *See, e.g., Wood v. City of Pittsburgh*, 460 A.2d 390 (Pa. Commw. Ct. 1983) (rejecting Ex Post Facto challenge to city's retroactive application of building code to a building constructed before enactment); *Philadelphia Chewing Gum Corp. v. Commonwealth, Dep't of Envtl. Res.*, 387 A.2d 142 (Pa. Commw. Ct. 1978), *aff'd in part & rev'd in part*, 414 A.2d 37 (Pa. 1978) (rejecting Ex Post Facto challenge to state law imposing liability on landowners for environmental cleanup even though the polluting condition was created before the legislation was enacted); *see also, e.g., Commonwealth v. Derk*, 895 A.2d 622 (Pa. Super. Ct. 2006) (rejecting Ex Post Facto challenge to legislation requiring collection of prisoners' DNA even though prisoners committed their crimes before enactment of the legislation); *Del Valle v. Workers' Compensation Appeal Bd.*, 687 A.2d 1211 (Pa. Commw. Ct. 1997) (rejecting Ex Post Facto challenge to suspension of workers' compensation benefits during plaintiff's incarceration because suspension was applied prospectively, even though the plaintiff's incarceration began prior to statute's effective date).

2. Act 26 Did Not Impair Substantive Contractual Rights.

Moreover, under well-established Pennsylvania law, Act 26 cannot be said to have impaired the City's contractual rights for two independent reasons. **First**, there could be no "impairment of contractual obligations" because each of the City's contracts, by definition, took account of the possibility of state intervention. That is necessarily the case whenever the Commonwealth's police power is invoked, as it was here to ensure the provision of vital services to Pennsylvania citizens in financially distressed cities. *See, e.g., Primoli v. Philadelphia Bronze & Brass Corp.*, 238 A.2d 29 (Pa. Super. Ct. 1967) (holding that the constitutional protection against the impairment of contracts is inapplicable when the State legitimately exercises its police power); *Beaver Co. Bldg. & Loan Ass'n v. Winowich*, 187 A. 481 (Pa. 1936) (obligations of contract cannot impede exercise of police power, which is always paramount); *see also, e.g.,*

DePaul v. Kauffman, 272 A.2d 500 (Pa. 1971) (statutes enacted as legitimate exercise of police power will be upheld even if they incidentally destroy existing contractual rights).

This power — like that of eminent domain — is a police power that overlays every contract involving the Commonwealth or one of its municipal subsidiaries, regardless whether the power is expressly acknowledged in the terms of the contract. *See, e.g., Contributors of Pa. Hosp. v. City of Philadelphia*, 98 A. 1077 (Pa. 1916) (holding “impairment of contracts” provision inapplicable to eminent domain actions because every agreement contains an unwritten condition that it is subordinate to the right of appropriation to a public use). Indeed, this line of authority is an outgrowth of the more basic, fundamental notion — utterly unrebutted by the Council in its voluminous responsive brief — that municipalities exist only as “creature[s] of the sovereign,” *Pittsburgh v. Commonwealth*, 535 A.2d 680, 682 (Pa. Commw. Ct. 1987), that are “fully subject to the control of the legislature, who may enlarge or diminish ... [their] functions ... or destroy [their] very existence.” *Philadelphia v. Fox*, 64 Pa. 169, 180 (Pa. 1870).

Second, and more fundamentally, there can be no contractual right impaired by a command that a municipality *not* file a bankruptcy petition in the future. *See, e.g., Vansciver v. Sharon Hill Borough*, 33 Pa. D. & C. 383, 386 (Pa. Common Pleas 1938) (“It is true that the legislature cannot impair the obligation of contracts of private citizens, but it is universally held that municipal corporations are not within the protection of this restriction. This is because municipal corporations, such as counties, cities and boroughs, are merely subdivisions of the Commonwealth itself and created solely for the convenience of local government.”). Furthermore, even assuming it could avail itself of this constitutional remedy, the Council improperly conflates common-law notions of “detrimental reliance” with the Ex Post Facto

Clause's requirement of impairment of contracts.³ But under the Council's wildly expansive theory, City contracts were impaired simply because — after the enactment of Act 26 — it could no longer take an action (filing for bankruptcy) that had previously been available to it. (Council's Resp. Br. at 22.) If this theory were taken to its logical end, it would be unconstitutional to enact *any* forward-looking restriction on conduct. At even this fundamental, theoretical level, the Council's unpersuasive theory cannot withstand the slightest scrutiny.

* * * * *

Because the Council fails to establish either essential element of an Ex Post Facto Clause violation, much less both, its constitutional challenge to Act 26 must fail.

C. Because Act 26 Applies to All Third Class Cities, It is Not Special Legislation as Defined by the Pennsylvania Constitution.

The Council cannot overcome the strong presumption in favor of the constitutionality of Act 26 by attacking it as “special legislation.” The Supreme Court of Pennsylvania, in noting this strong presumption, explained that this presumption “reflects on the part of the judiciary the respect due to the legislature as a co-equal branch of government.” *School Dists. of Deer Lakes & Allegheny Valley v. Kane*, 463 A.2d 554, 562 (Pa. 1975). In applying this presumption, therefore, Pennsylvania courts instruct each other that “courts may refuse to enforce a statute, but only if it clearly, palpably, and plainly violates the Constitution.” *Id.* at 562-63 (quotation omitted). The policy considerations that justify this strong presumption in favor of constitutionality *within* Pennsylvania state courts apply with even more potency to review by a federal court, which must also take into account important principles of comity and respect for state law.

³ Moreover, if the Council's argument is that it had a vested interest in being a “financially distressed city,” nothing about Act 26 changed that status. Indeed, Harrisburg remains a “financially distressed city” to this day.

Act 26 does not qualify as “special legislation” under the Pennsylvania Constitution. The prohibition against special legislation is set forth in Article III, Section 32: “The General Assembly shall pass no local or special law in any case which has been or can be provided for by general law and specifically the General Assembly shall not pass any local or special law . . . [r]egulating the affairs of [municipalities].” Reasonably recognizing, however, that municipalities of different populations have different needs, the Constitution also includes Article III, Section 20: “The Legislature shall have power to classify [municipalities] according to population, and all laws passed relating to each class . . . shall be deemed general legislation within the meaning of this Constitution.”

A comparison of two Pennsylvania Supreme Court decisions shows that Act 26 is generally applicable to third class cities and, therefore, is not special legislation. In *Harrisburg School District v. Hickok*, 761 A.2d 1132, 1136 (Pa. 2000), the Pennsylvania Supreme Court concluded that legislation applicable to “a school district of the second class with a history of low test performance which is coterminous with the city of the third class which contains the permanent seat of government” was impermissible special legislation because there is only one capital city, and the law was therefore aimed only at Harrisburg. In response to this decision, the General Assembly changed the law in question to apply to “cities that have opted for a mayor-council form of government under the Charter Law, have a population between 45,000 and 250,000, and have a mayor who is accountable to the same electorate as that which makes up the school district.” *Harrisburg Sch. Dist. v. Zogby*, 828 A.2d 1079, 1089 (Pa. 2003). The Pennsylvania Supreme Court found that this new law was not special legislation applicable only to Harrisburg and held:

Even to the extent that the Harrisburg School District is the only member of the class so far to be automatically certified . . . it is possible for other school districts to be subject to automatic certification in the future. Hence the class is not ‘closed,’ but open for other members to come in.

Id. at 1091.

By the same reasoning, Act 26 plainly does not qualify as special legislation. The anti-bankruptcy provision of Act 26 applies generally to “a city of the third class which is determined to be financially distressed under [Act 47].” 72 P.S. § 1601-D.1.⁴ When the General Assembly enacted Act 26, there were a number of third class cities in Pennsylvania that were financially distressed,⁵ and it is unfortunately possible that any number of additional third class cities of the Commonwealth could become financially distressed in the future.⁶ Act 26 does not apply only to Harrisburg, nor does it apply to a closed class. As a result, Act 26 is general legislation that is permissible under the Pennsylvania Constitution.

⁴ Debt Watch Harrisburg, as an Interested Party, incorrectly argues in passing that the legislation’s application only to third class cities violates the federal and state Equal Protection Clauses. At the state level, legislation applying to specific classes of cities is not only permissible, it is specifically contemplated and endorsed by the Pennsylvania constitution. *See* Art. III, Sec. 20 (“The Legislature shall have power to classify counties, cities, boroughs, school districts, and townships according to population, and all laws passed relating to each class, and all laws passed relating to, and regulating procedure and proceedings in court with reference to, any class, shall be deemed general legislation within the meaning of this Constitution.”). At the federal level, the Supreme Court has held, in a case squarely on point, that legislation applying to specific classes of cities does not violate the Equal Protection Clause. *See North v. Russell*, 427 U.S. 328, 338-39 (1976) (rejecting equal-protection challenge because “all people within a given city and within cities of the same size are treated equally”).

⁵ *See* Pennsylvania Department of Community and Economic Development, “Municipalities Financial Recovery Act 47 of 1987,” available at <http://www.newpa.com/get-local-gov-support/technical-assistance/request-assistance/act-47>, attached hereto as Exhibit A.

⁶ The Council incorrectly asserts that the phrase “which is determined to be financially distressed” is an impermissible subcategory. (Council’s Resp. Br. at 29.) Under Pennsylvania law, the only *possible* avenue to municipal bankruptcy is through Act 47, of which a determination of financial distress is a necessary precursor. Therefore, “financial distress” is not part of the class definition but is simply a triggering condition necessary to bring *any* third class city into the proscription of Act 26 in the first place.

D. Act 26 Deals with a Single Subject as Reflected in Its Title, and It Provided Adequate Notice of Its Contents.

Likewise, the Council cannot overcome the strong presumption in favor of the constitutionality of Act 26 by arguing that it contains multiple subjects outside the scope of its title. Article III, section 3 of the Pennsylvania Constitution sets forth the relevant prohibition: “No bill shall be passed containing more than one subject, which shall be clearly expressed in its title” Legislation satisfies this rule when its provisions are relevant to the bill’s single unifying subject, as reflected in its title. *See Stilp v. Commonwealth*, 905 A.2d 918, 954 (Pa. 2006).

The decision in *Common Cause/Pennsylvania, et al. v. Commonwealth*, 710 A.2d 108 (Pa. Commw. Ct. 1998), is instructive in determining the scope of the single subject rule. In that case, the plaintiffs challenged the constitutionality of legislative amendments to the Public Transportation Law under the single-subject requirement. Emphasizing that the requirement is violated only if “no reasonable person would have been on notice as to the act’s contents,” *id.* at 120, the Commonwealth Court held that the legislation — which dealt with an exceedingly broad range of topics,⁷ like Act 26 in this case — did not violate the single subject rule because

⁷ The title of the bill was: “AN ACT Amending Titles 74 (Transportation) and 75 (Vehicles) of the Pennsylvania Consolidated Statutes, further providing for annual appropriation and computation of subsidy and for distribution of funding; providing for distribution of supplemental funding; further providing for use of funds distributed; providing for public transportation grants management accountability, for competitive procurement and for the Public Transportation Assistance Fund; further providing for period of registration, for duties of agents, for registration and other fees, for requirements for periodic inspection of vehicles, for limits on number of towed vehicles, for operation of certain combinations on interstate and other highways, for width and length of vehicles; providing for liquid fuels and fuels permits and bond or deposit of securities, for imposition of liquid fuels and fuels tax, for taxpayer, for distributor's report and payment of tax, for determination of tax, penalties and interest, for examination of records and equipment, for retention of records by distributors and dealers, for disposition and use of tax, for discontinuance or transfer of business, for suspension or revocation of permits, for lien of taxes, penalties and interest, for collection of unpaid taxes, for reports from common carriers, for violations and reward for detection of violations, for refunds, for diesel fuel importers and transporters, for prohibiting use of dyed diesel fuel, for disposition

everything in the bill could be characterized as dealing with the single general subject of “vehicular transportation.” *See id.* at 120.

Similarly, all of the provisions of Act 26 deal with a single unifying topic. All of the provisions amend the Fiscal Code as clearly expressed in the title. All of the provisions deal with the financial matters of Commonwealth programs and entities, including municipalities. It is difficult to see how the capacity of the Commonwealth’s municipalities to adjust their debts – a topic of critical importance to the Commonwealth’s fiscal health – does not fit neatly under this umbrella.

The constitutionality of Act 26 is even more apparent when it is viewed in light of the purpose of the single subject rule. “[T]he primary purpose of Article III, Section 3, [is] to provide adequate notice both to the members of the General Assembly and to the public of the subjects contained in proposed acts so as to prevent passage of secretive measures.” *In re Commonwealth, Dep’t of Transp.*, 515 A.2d 899, 902 (Pa. 1986). Accordingly, a bill’s title must put “a reasonable person on notice of the general subject matter of the act.” *Common Cause*, 710 A.2d at 120.⁸

Act 26 not only meets, but exceeds, this constitutional standard. The title of Act 26, after laying out the general purpose of amending the Fiscal Code, *lists with particularity* the specific Commonwealth programs affected by the legislation. Among them, the title explicitly references

of fees, fines and forfeitures, for certified copies of records and for uncollectible checks; further providing for distribution of State highway maintenance funds and for standards and methodology for data collection; providing for dirt and gravel road maintenance; further providing for imposition of tax and additional tax; providing for tax on alternative fuels; further providing for disposition of tax revenue; making an appropriation; and making repeals.” *Common Cause/Pennsylvania v. Commonwealth*, 710 A.2d 108, 112-13 (Pa. Commw. Ct. 1998).

⁸ This distinguishes the present case from *City of Philadelphia v. Commonwealth*, 838 A.2d 566 (Pa. 2003), where the Pennsylvania Supreme Court found a violation of the single subject rule. In that instance, the Act’s title did not include reference to the provisions in dispute and, therefore, did not give clear notice of the Act’s contents.

“Financially Distressed Municipalities,” which is the same designation given to affected municipalities under Act 47. It is the very opposite of secretive to highlight with particularity the programs that a bill will affect in the title of the bill. Furthermore, the anti-bankruptcy provision was not slipped into the legislation at the last minute, but was added at least two days before the bill was finally passed. (*See* Council’s Resp. Br. Ex. 3 at 1, 6-7) (showing anti-bankruptcy provision in the bill as reported on June 28, 2011, before passage on June 30, 2011.) Based on these factors, both the General Assembly and the general public were provided notice of the general subject matter of the bill. Consequently, Act 26 does not violate the Pennsylvania Constitution’s requirement that a bill must deal with a single subject as reflected in its title.

III. CONCLUSION

For all of the foregoing reasons, this Court should grant the Commonwealth’s Objection and dismiss the Petition.

Respectfully submitted,

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Dated: November 18, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on November 18, 2011, a true and correct copy of the foregoing **Commonwealth of Pennsylvania's Reply Brief in Support of Its Objection to the Debtor's Petition** was served by electronic means upon all parties on the ECF service list.

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