

Federalism Form and Function in the Detroit Bankruptcy

Melissa B. Jacoby*

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*Graham Kenan Professor of Law, University of North Carolina at Chapel Hill. Errors in this manuscript, still under revision, are entirely my responsibility, but I am grateful to those who commented on prior drafts or discussed relevant issues with me: Donald Bernstein, Susan Block-Lieb, Bernard Burk, John Conley, Frederic Bloom, Andrew Dawson, Adam Feibelman, Anna Gelpert, Nicholas Georgakopoulos, Elizabeth Gibson, Sara Sternberg Greene, Paul Hage, Michelle Harner, Mirya Holman, Rich Hynes, Ted Janger, Richardo Kilpatrick, Heather Lennox, Richard Levin, Marc Levinson, Mia Lipsit, Bill Marshall, Thomas Moers Mayer, Juliet Moringiello, Gene Nichol, John Pottow, Dana Remus, Hon. Steven Rhodes, David Skeel, Stephen Spencer, Michael Temin, Adrian Walters, Mark Weidemaier, Jay Westbrook, several anonymous reviewers, and participants in law school faculty workshops of earlier versions at University of California-Irvine, University of Colorado, University of Miami, University of North Carolina, University of Texas, and William & Mary. My seminar students at UNC School of Law also made excellent suggestions. Thanks to Robert El-Jaouhari, Graham Ford, Tim Gallina, Dave Hansen, Britton Lewis, Michael Maloney, Dana Messinger, Leigh Edwards Miller, Brett Neve, Tyler O'Hara, Rachel Rogers, Safa Sajadi, and Andy Swanson for library, research, and editorial assistance.

Introduction

On July 18, 2013, at 4:06 pm Eastern Time, the City of Detroit entered bankruptcy without a friend in the world. Its restructuring plan had no creditor support.¹ No government bailout was on the horizon, unlike for General Motors and Chrysler just a few years earlier.² Sidelined by a controversial state financial emergency law, residents and Detroit's elected officials deemed the bankruptcy illegitimate.³ Unions, retiree groups, and the city's pension funds were fighting in state court to block cuts they feared would come from a city bankruptcy.⁴

On November 7, 2014, the judge presiding over the Detroit bankruptcy declared the turnaround of circumstances nothing short of miraculous.⁵ All organized

¹ Supplemental Opinion Regarding Plan Confirmation, Approving Settlements, and Approving Exit Financing at 1, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 31, 2014), ECF No. 8993 (“Both before and after [the court’s eligibility determination], nearly every creditor group filed litigation against the City seeking the full protection of its claims”).

² Transcript of In Re: Trial-Objections to Chapter 9 Plan at 26, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 1, 2014), ECF No. 7850 (testimony of Dan Gilbert about meeting with high-ranking official in President Obama’s administration); Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L. J. 862, 884 (2014) (discussing “extraordinary government intervention” in Chrysler).

³ Robin Erb, *Crowd Expresses Anger Over Detroit’s Bankruptcy at Forum*, DET. FREE PRESS, Sept. 7, 2013 (describing assertions by local lawmakers and residents that bankruptcy was premature, unfair and destructive); Matt Helms & Joe Guillen, *Lawsuit Challenges Michigan Emergency Manager Law*, USA TODAY, March 28, 2013 (discussing responses to Michigan Public Act 436).

⁴ *Flowers v. Snyder*, No. 13-729-CZ July 3, 2013; *Webster v. Snyder*, No. 13-734-CZ July 3, 2013; *General Retirement Systems of the City of Detroit v. Orr*, 13-768-CZ July 17, 2013; Christine Sgarlata Chung, *Zombieland/The Detroit Bankruptcy: Why Debts Associated with Pensions, Benefits, and Municipal Securities Never Die... and How They Are Killing Cities Like Detroit*, 41 FORD. URB. L. J. 771, 819-820 (2014) (discussing state court litigation).

⁵ Oral Opinion on the Record at 7, In re City of Detroit, Bankruptcy Judge Steven Rhodes, Nov. 7, 2014 (pension settlement “borders on the miraculous. No one could have foreseen this result for the pension creditors when the City filed this case”); Nathan Bomey, Matt Helms, & Joe Guillen, *Judge Deems Detroit Bankruptcy Fair and Feasible; a ‘Miraculous’ Outcome*, DETROIT FREE PRESS, Nov. 7, 2014; Nathan Bomey, John Gallagher, & Mark Stryker, *How Detroit Was Reborn: The Inside Story of the Detroit Bankruptcy Case*, DETROIT FREE PRESS, Nov. 9, 2014 (“confirmation was a slam dunk”). Later writings of the court also illustrate the notable turnaround. Supplemental Opinion, *supra* note 1, at 125 (\$7 billion reduction in debt “a truly remarkable achievement for the City, unprecedented in the history of municipal bankruptcy”); In re City of Detroit, No. 13-53846, 2015 WL 603888 (Bankr. E.D. Mich. Feb. 12, 2015) (in supplemental fee approval decision, concluding by noting “[i]n utter contrast to the community sense when the case was filed, the residents of the City as well as its community and political leaders now justly feel and express a strong and genuine sense of enthusiasm, optimism and confidence about the City’s future”).

creditor groups, including bondholders of various kinds, workers, and retirees, had stopped fighting and signed on to the city's revised plan.⁶ The city's elected officials committed to effectuate the plan.⁷ With strings attached, the state of Michigan contributed funds to the effort.⁸ So did the Ford Foundation, the Kresge Foundation, the W.K. Kellogg Foundation, the Knight Foundation, and others.⁹ The federal government had chipped in a bit of grant money.¹⁰ The city obtained new private financing.¹¹ Approval of the plan cleared Detroit to shed more than \$7 billion in debt and to embark on reinvestment initiatives to improve substandard municipal services.¹² And all of this happened in well under two years – a timeframe thought by many to be impossible.

In their in-depth retrospective analyses, major Detroit newspapers gave significant credit for this transformation to the federal court overseeing the case.¹³ Such a story line is jarring because it defies the conventional wisdom about chapter 9 in the legal world. Commentators have asserted for decades that

⁶ Supplemental Opinion, *supra* note 1, at 1, 6 (city has settled with “every major creditor group”).

⁷ Gabe Leland, Councilman, Detroit City Council, Comments at December 10, 2014 Press Conference on Emergence from Bankruptcy (Dec. 10, 2014) (“I’m not the biggest proponent of bankruptcy, but at the end of the day, from a budget perspective we are better off today than we were 18 months ago”); Mike Duggan, Mayor, City of Detroit, Comments at December 10, 2014 Press Conference (Dec. 10, 2014) (Mayor and Detroit City Council support financial review commission that accompanies emergence from bankruptcy); Matt Helms & Joe Guillen, *Detroit mayor: Bankruptcy exit plan ‘not without risk’*, DETROIT FREE PRESS, Oct. 6, 2014 (Mayor Duggan: “I support this plan, and I believe it is feasible”); Transcript of Trial Re. Objections to Chapter 9 Plan, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 6, 2014), ECF No. 7917 (testimony of City Council President Brenda Jones and Mayor Duggan).

⁸ Supplemental Opinion, *supra* note 1, at 20 (state contribution of \$194.8 million to the Detroit retirement systems).

⁹ *Id.* at 18 (listing foundations that made financial contributions).

¹⁰ Chris Isidore, *Detroit to get \$300 Million in Federal Help*, CNN Money, Sep. 27, 2013.

¹¹ Supplemental Opinion, *supra* note 1, at 210 (discussing city's postpetition financing and exit financing).

¹² *Id.* at 6.

¹³ Bomey, Gallagher & Stryker, *supra* note 5; Daniel Howes, Chad Livengood & David Shepardson, *Bankruptcy and Beyond: The Inside Story of the Deals that Brought Detroit Back from the Brink in Fifteen Months*, DETROIT NEWS, Dec. 13, 2014. See also Steven Church, *Detroit Judge's Tough Tack Said to Speed Bankruptcy*, BLOOMBERG, Nov. 6, 2014 (discussing impact of presiding judge and lead mediator on Detroit's restructuring on eve of plan confirmation decision announcement); David Ashenfelter, *Meet Gerald Rosen, The Judge Trying to Save Detroit* Deadline Detroit, Dec. 6, 2013 (discussing Chief Judge Rosen, the lead mediator).

the municipal bankruptcy system abides by Constitutional commands and federalism principles only if it involves minimal federal court intervention.¹⁴ Expressly reflecting this policy, section 904 of the Bankruptcy Code prohibits the court from using a stay, order, or decree to interfere in municipal decision making, expenditures, asset deployment, and the like, without municipal consent.¹⁵ A companion provision, section 903, emphasizes this principle through its converse: chapter 9 does not limit or impair the power of a state to control a municipality or its expenditures.¹⁶ Moreover, many provisions that empower a judge to oversee a corporate bankruptcy do not apply to chapter 9.¹⁷ Judges' role in chapter 9, we are told, is to rule on disputes after evidentiary trials -- first on a municipality's eligibility, later on the confirmation of a restructuring plan, and occasionally on discrete disputes in between.¹⁸ When critics have expressed concern about the lack of oversight in chapter 9, their proposed correctives have operated in largely the same vein: courts should expressly withhold support for eligibility and plan confirmation, the proposals say, unless a municipality promises to change its ways and pay its creditors more.¹⁹

Whatever one's view of the outcome in Detroit, the case shows that Congress's approach to constraining federal court intervention in municipal bankruptcy is

¹⁴ *Infra* Part I.A.

¹⁵ 11 U.S.C. § 904.

¹⁶ *Id.* § 903.

¹⁷ *Infra* Part I.A.

¹⁸ Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281, 291, 293 (2012); Michael W. McConnell & Randal C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425, 435-36 (1993); 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); 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*, 71 WASH. & LEE L. REV. 403 (2014); Zack A. Clement & R. Andrew Black, *How City Finances Can Be Restructured: Learning from both Bankruptcy and Contract Impairment Cases*, 88 AM. BANKR. L. J. 41, 47-48 (2014); Lawrence P. King, *Municipal Insolvency: The New Chapter IX of the Bankruptcy Act*, 1976 DUKE L. J. 1157 (1976); John Knox and Marc Levinson, *Avoiding and Using Chapter 9 in Times of Fiscal Stress*, Orrick, Herrington & Sutcliffe LLP (2009).

¹⁹ *Infra* Part I.C.

far more impotent than typically claimed. This article documents the court's extensive involvement and oversight of the Detroit bankruptcy using tools and techniques common among federal courts but overlooked in municipal bankruptcy scholarship.²⁰ The research gathered during the Detroit bankruptcy and set forth in this article shows that a court can adhere formally to the noninterference rules of section 904, while functionally becoming quite involved in the restructuring. Notwithstanding the oft-stated policy of judicial minimalism in this context, the plain language of section 904 restricts only certain formal court interventions rather than less formal methods of oversight that civil procedure, mass tort, and institutional reform litigation scholars have been discussing for decades.²¹ Furthermore, the Detroit bankruptcy court used section 904's consent exception as a judicial management tool. Although Detroit's chapter 9 produced relatively little new doctrine,²² it generated procedural precedent - we'll call it the Detroit Blueprint - now in play in municipal distress situations going forward.

²⁰ The article focuses on the court and is not meant to be a comprehensive account of the institutions that shaped Detroit's bankruptcy. Some institutional reform scholarship has been criticized for undue court-centrism. Margo Schlanger, *Beyond the Hero Judge: Institutional Reform Litigation as Litigation*, 97 MICH. L. REV. 1994 (1999).

²¹ Marc Galanter, *The Emergence of the Judge as a Mediator in Civil Cases*, 69 JUDICATURE 257 (1985) (discussing "sea change. . . in the way judges talk about settlement and think about their roles as judges"); Tobias Barrington Wolff, *Managerial Judging and Substantive Law*, 90 WASH. U. L. REV. 1027 (2013) ("proactive jurist" has replaced "passive umpire" as dominant paradigm in federal district courts); Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 374, 378 (1982); Judith Resnik, *Trial As Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976); Marc Galanter, "... A Settlement Judge, not a Trial Judge:" *Judicial Mediation in the United States*, J. L. & SOC'Y 1, 6 (1985); Robert G. Bone, *The Process of Making Process; Court Rulemaking, Democratic Legitimacy, and Procedural Efficiency*, 87 GEO. L. J. 887, 900 (1999); Jonathan T. Molot, *An Old Judicial Role for a New Litigation Era*, 113 YALE L. J. 27 (2003).

²² The resulting doctrine, while limited in scope, was not trivial. The bankruptcy court held that pensions could be impaired in a federal bankruptcy case. *In re City of Detroit*, 504 B.R. 97, 150-54 (Bankr. E.D. Mich. 2013) (holding Michigan Constitution characterizes pension claims as contract rights, and contract rights may be impaired in bankruptcy). The court's plan confirmation ruling sets forth new interpretations of the statutory requirements for nonconsensual chapter 9 plans. Supplemental Opinion, *supra* note 1, at 169-184 (discussing unfair discrimination and fair and equitable standards). The court also made new law on the dischargeability of statutory civil rights claims and the nondischargeability of Takings Clause claims. *Id.* at 191, 201.

I studied the court's oversight by listening, in near-real time, to digital recordings of hearings, status conferences, and adversary proceedings from the initial bankruptcy filing through the effective date of the confirmed restructuring plan.²³ To my knowledge, no other academic project employs this labor-intensive approach to study the Detroit bankruptcy, or any complex federal civil action for that matter. This method is more revealing of context and nuance than exclusive reliance on published opinions and secondary accounts, or even after-the-fact transcript review, and offers a rich picture of chapter 9 court-party interactions not reported elsewhere.

The channels of federal court influence at work identified through this research, and documented in this article, included active case management,²⁴ deal-making and heavy settlement promotion,²⁵ building teams of court adjuncts who interacted extensively with city officials and other parties,²⁶ and offering a "court of the people" through which information was gathered, policy changes recommended.²⁷ Although this article does not dive deeply into competing theories of federalism,²⁸ which bankruptcy scholarship and case law deploy

²³ The study fits within a broader project comparing the the work bankruptcy courts do with their federal district judge counterparts. Other components of that project include Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, 2015 U. ILL. L. REV. 571(2015); Melissa B. Jacoby, *Fast, Cheap, and Creditor-Controlled: Is Corporate Reorganization Failing?*, 54 BUFF. L. REV. 401 (2006); Melissa B. Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, 41 FORDHAM URB. L. J. 849 (2014); Melissa B. Jacoby, *Superdelegation and Gatekeeping in Bankruptcy Courts*, __ TEMPLE L. REV. __ (forthcoming 2015).

²⁴ Part III.B.

²⁵ Part III.C.

²⁶ Part III.D.

²⁷ Part III.E.

²⁸ Jessica Bulman-Pozen & Heather K. Gerken, *Uncooperative Federalism*, 118 YALE L.J. 1256 (2009); Heather K. Gerken, *Slipping the Bonds of Federalism*, 128 HARV. L. REV. 85 (2014); Alison L. LaCroix, *The Interbellum Constitution: Federalism in the Long Founding Moment*, 67 STAN. L. REV. 397 (2015); Ernest A. Young, *The Rehnquist Court's Two Federalisms*, 83 TEX. L. REV. 1 (2004); Abbe R. Gluck, *Our [National] Federalism*, 123 YALE L. J. 1996 (2014); Robert A. Schapiro, *Toward a Theory of Interactive Federalism*, 91 IOWA L. REV. 243 (2005); Neil S. Seigel, *Commandeering and its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629 (2006); Roderick M. Hills Jr., *The Political Economy of Cooperative Federalism: Why State Autonomy Makes Sense and "Dual Sovereignty" Doesn't*, 96 MICH. L. REV. 813 (1998); Andrew B. Coan, *Commandeering, Coercion, and the Deep Structure of American Federalism*, 95 BOSTON UNIV. L. REV. 1 (2015).

rather bluntly in this context,²⁹ documenting the use of these channels in a municipal bankruptcy context exposes fertile ground for federalism scholars.³⁰ The court's oversight strategy arguably was facilitated by a special rule in chapter 9, section 921(b), requiring hand-selection of the judge to preside over the case.³¹ That obligation, imposed on the chief circuit judge, creates, as a practical matter, opportunities for the establishment of an oversight philosophy and coordination among the bankruptcy, district, and circuit courts.³²

The article proceeds as follows. Part I offers the prevailing account of the limited role of federal judges in chapter 9 and the contours of section 904. Part II illustrates a competing narrative of federal courts more generally -- even in cases involving state actors -- that should prompt us to scrutinize the conventional wisdom about municipal bankruptcy. Part II then introduces the Detroit bankruptcy, providing a brief background about the case and the methods I used to study it. Part III presents the results of the observational and primary source research as a case study of the court's activity. It is organized by a set of levers of control, identified earlier,³³ comprising the procedural blueprint of the Detroit bankruptcy.

Part III offers too much information to be evaluated in one article.³⁴ Part IV thus considers the relevance of the Detroit Blueprint to the conventional wisdom,

²⁹ *Infra* Part I.A; Richard M. Hynes & Steven D. Walt, *Pensions and Property Rights in Municipal Bankruptcy*, 33 REV. BANKING & FIN. L. 609, 624-25 (2014)(discussing for another purpose most authors' "maximalist" view of Bankruptcy Code section 904); Kevin A. Kordana, *Tax Increases in Municipal Bankruptcies*, 83 VA. L. REV. 1035, 1059 (1997)(arguing for broad interpretation of section 904, even in the plan context).

³⁰ Gerken, *Slipping the Bonds*, *supra* note 28, at 113-114 (calling on the U.S. Supreme Court to develop a more relational account of federalism).

³¹ 11 U.S.C. § 921(b) ("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").

³² Part III.A.

³³ *Supra* notes 24-27.

³⁴ The first follow-up project is Melissa B. Jacoby & Dana Remus, *Judges as Mediators* (early stage draft on file with author) (evaluating Detroit's mediation within broader judicial mediation trends, including how typical constraints on federal judges operate in mediation setting).

particularly as expressed in section 904. Answering that question requires first considering whether Detroit is *sui generis*. The Detroit Blueprint is likely to affect other cases, out-of-court negotiations, and states' propensity to allow their municipalities to file for chapter 9 at all. The extent to which such active oversight is possible in any particular case, however, depends on two intersecting variables: federal court coordination around a particular oversight philosophy,³⁵ and state law on the governance of financially distressed municipalities.³⁶ Second, I return to section 904's regulatory failings and isolate the components of which the Detroit Blueprint prompts reconsideration: its distinction between formal and informal judicial acts,³⁷ and its consent exception.³⁸

I. Municipal Bankruptcy: Doctrinal Framework and the Standard Account

A. A Chapter Not Like The Others

An enduring feature of chapter 9 is its distinction from types of bankruptcy available to individuals and business entities. Certain fundamental bankruptcy principles and powers are still operational, in that the filing of a chapter 9 petition immediately shields a city from its creditors,³⁹ and, if a court ultimately confirms a debtor's plan of adjustment, the city can impair contracts and shed debt.⁴⁰ Yet, Congress excluded from chapter 9 many Bankruptcy Code provisions that typically structure and amplify court oversight. For example, a chapter 9 debtor can sell property, even outside of the ordinary course of business, without court permission.⁴¹ Unilateral actions that could trigger the appointment of a

³⁵ Part IV.A.1.

³⁶ Part IV.A.2.

³⁷ Part IV.B.1.

³⁸ Part IV.B.2.

³⁹ 11 U.S.C §§ 362(a), 922; *In re Jefferson County, Ala.*, 484 B.R. 427 (Bankr. N.D. Ala. 2012); Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, *supra* note 23, at 855 (discussing court's expansion of the automatic stay to other parties working for the debtor and to the state).

⁴⁰ 11 U.S.C § 944(c) (providing for discharge of debts unless otherwise provided).

⁴¹ *Id.* § 901 (excluding section 363 from chapter 9). *But see id.* § 549 (subsections incorporated by section 901 and thus restricting some post-petition transactional freedom to a limited extent).

trustee in a chapter 11, or a forced liquidation, generate no such consequence in a chapter 9.⁴² In other words, chapter 9 is marked by considerably more judicial restraint than any other chapter of the Bankruptcy Code.

Even with these distinctions, chapter 9 is far more like chapter 11 than it used to be. Originally, the statutory provisions applicable to municipal bankruptcy were self-contained; the text did not reach into other chapters for other provisions as chapter 9 does today. Since the 1970s, many provisions that live elsewhere in the Bankruptcy Code apply in chapter 9 cases.⁴³ That change has made chapter 9 look considerably more like its counterparts. In addition, prior to 1976, municipalities were expected to come into bankruptcy with a debt restructuring plan already hammered out, bondholder votes counted.⁴⁴ That structure not only made chapter 9 more difficult for municipalities to use, but left less for a court to do or oversee if they did file. In 1976, Congress rewrote chapter 9 to make it easier to initiate,⁴⁵ an approach then incorporated thereafter into the 1978 Bankruptcy Code. Three details are worth noting here. First, a chapter 9 no longer had to be prepackaged. Negotiations could continue and the municipality could solicit votes during the bankruptcy. Second, as already noted, some provisions from and for chapter 11 would extend to chapter 9; chapter 9 would no longer be fully self-contained. And third, Congress added an exception for debtor consent to section 904, to be discussed in Part I.B.2, below.

⁴² *Id.* § 901 (excluding section 1104). States can dissolve municipalities, however, and it is possible a municipality could go through bankruptcy and then be dissolved. Michelle Wilde Anderson, *Dissolving Cities*, 121 YALE L. J. 1364, 1386-88 (2012) (“[t]he records gathered for this Article indicate that more municipalities dissolved in the past fifteen years than at any time before that”); John H. Knox & Chris Hutchison, *Municipal Disincorporation in California*, 32 PUB. L.J. 1, 4 (2009).

⁴³ 11 U.S.C § 901 (containing the list).

⁴⁴ King, *supra* note 18; Opinion Regarding Confirmation and Status of CalPERS at 28, In re City of Stockton, No. 12-32118-C-9 (Bankr. E.D. Cal. Feb. 4, 2015) (prior to 1976, municipal debt adjustment was limited, required prepackaged plans); Hon. Thomas B. Bennett, *Consent: Its Scope, Blips, Blemishes, and a Bekins Extrapolation Too Far*, 37 CAMPBELL L. REV. 3, 11 (2015)(1937 Act “was designed to be essentially a prepackaged plan”). Judge Bennett observes that current chapter 9 goes well beyond the limited municipal bankruptcy statute the Supreme Court upheld in *United States v. Bekins*, 304 U.S. 27 (1938).

⁴⁵ King, *supra* note 18, at 1158.

The statute nonetheless retained elements of earlier law that highlight the distinctness of a government unit bankruptcy. An involuntary petition, filed by creditors rather than by the debtor, is not available against a municipality.⁴⁶ That exclusion reflects the sovereign state's inherent role in determining whether its municipalities can seek the benefits and burdens of a federal bankruptcy regime.⁴⁷ As already noted, neither the court nor creditors can force a liquidation of a municipality's assets in bankruptcy. And, unlike in chapter 11, parties other than the municipality are never authorized to file and solicit votes on their own plan of adjustment.⁴⁸

B. *The Express Federalist Command of Section 904*

1. The Role of Section 904

In addition to being selective in extending other Bankruptcy Code provisions to municipal bankruptcy, the 1976 revisions to chapter 9 and the 1978 Bankruptcy Code continued to contain a provision affirmatively limiting federal court intervention. Section 904 prohibits the federal court from “interfering” with political governmental powers, property or revenues, or use of income-producing property during the case, without municipal debtor consent.⁴⁹ The required is often attributed to the Tenth Amendment, and sometimes to federalism principles more generally.⁵⁰ Adherents to the Tenth Amendment foundation cite *Ashton* and *Bekins*, the U.S. Supreme Court decisions that, in turn, invalidated America's first municipal bankruptcy law and upheld the second.⁵¹

⁴⁶ 11 U.S.C § 901 (excluding § 303).

⁴⁷ National Bankruptcy Conference Statement on State Bankruptcy Proposal, Feb. 14, 2011.

⁴⁸ Tung, *supra* note 18, at 899.

⁴⁹ 11 U.S.C. § 904.

⁵⁰ *Ass'n of Retired Employees v. City of Stockton*, 478 B.R. 8, 17 (Bankr. E.D. Cal. 2012); Tung, *supra* note 18, at 890; Moringiello, *supra* note 18, at 410; *In re Jefferson County, Ala.*, 474 B.R. 228, 278 (Bankr. N.D. Ala. 2012); *see also* *In re New York City Off-Track Betting Corp.*, 434 B.R. 131 (Bankr. S.D.N.Y. 2010) (capacity to consent limited by section 903 and principles of federalism).

⁵¹ *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531 (1936); *United States v. Bekins*, 304 U.S. 27, 46, 52 (1938). *But see* Thomas Moers Mayer, *State Sovereignty, State Bankruptcy, and a Reconsideration of Chapter 9*, 85 AM. BANKR. L. J. 363, 370 (2011) (noting that these decisions

The *Bekins* courts' ability to uphold the successor depended on further reducing the power of the federal court.⁵² The presence of section 904 indicates that a state's consent to its municipality's bankruptcy does not eliminate or resolve federalism concerns.⁵³ In other words, by authorizing its municipality to file for bankruptcy, a state does not succumb to any and all acts the federal court might wish to take.⁵⁴ A companion statutory provision, section 903, emphasizes this principle through expressing its converse: chapter 9 does not limit or impair the power of a state to control a municipality or its expenditures.⁵⁵ Cognizant of the Supreme Court's expression of "a stronger policy of Federalism and States' Rights," reads a House Judiciary Committee Report from 1977, "this bill takes greater care to insure that there is no interference in the political or governmental functions of a municipality that is proceeding under chapter 9, or of the State in its power to control its municipalities."⁵⁶

The interferer to be blocked is, again, the federal court. In the bankruptcy of Stockton, California, the court called section 904 the functional equivalent of the "cleanup hitter in baseball" in walling off courts from the affairs of bankrupt

barely mention the Tenth Amendment); Bennett, *supra* note 44, at 6 (*Ashton* does not say specifically what part of 1934 Act "transgressed the demarcations set by the Tenth Amendment").

⁵² National Bankruptcy Conference, *supra* note 47, at 8.

⁵³ Some writings suggest it is an open question whether the Tenth Amendment itself requires the restrictions in section 904. David L. Dubrow, *Chapter 9 of the Bankruptcy Code: A Viable Option for Municipalities in Financial Crisis?* 24 URB. LAWYER 549, 553 (1992); Gillette, *supra* note 18, at 296 (referring to questions "that allegedly underlie the nonintervention principle"); *id.* at 327 (rejecting idea that "the shibboleth of federalism" prevents consideration of his proposals). Judge Rhodes' plan confirmation decision suggests some ambivalence. Supplemental Decision, *supra* note 1, at 164. Under present understandings, scholars say, the Tenth Amendment is not an independent or additional limit on Congressional authority to legislate. Alison L. LaCroix, *The Shadow Powers of Article I*, 123 YALE L. J. 2044 (2014); Adam Feibelman, *Involuntary Bankruptcy for American States*, 7 DUKE J. CONST. L. & PUB. POL'Y 81, 106 (2012) (discussing shifts in scope and meaning of Tenth Amendment).

⁵⁴ Bennett, *supra* note 44, at 6.

⁵⁵ 11 U.S.C. § 903; Juliet Moringiello, *Chapter 9 Plan Confirmation Standards and the Role of State Choices*, 37 CAMPBELL L. REV. 71 (2015).

⁵⁶ 1977 House Judiciary Comm. Rpt. at 262-63 (citing the later-overruled *National League of Cities v. Usery*, 426 U.S. 833 (1976), and Note, *Municipal Bankruptcy, The Tenth Amendment and the New Federalism*, 89 HARV. L. REV. 1871 (1976)); *id.* at 321 (prohibiting creditor-initiated involuntary municipal bankruptcy petitions "because to do so may constitute an invasion of State sovereignty contrary to the Tenth Amendment, and would constitute bad policy").

municipalities.⁵⁷ The provision, the court explained, overrides other sources of power on which courts draw.⁵⁸ Unless the debtor has consented (an exception discussed next), “a federal court can use no tool in its toolkit—no inherent authority power, no implied equitable power, no Bankruptcy Code § 105 power, no writ, no stay, no order.”⁵⁹ Juliet Moringiello has explained the view that an active federal judicial role is unnecessary: chapter 9 has the limited job to impair claims over the objection of holdout creditors.⁶⁰ The rest of municipal finance reform, she says, is up to the states.⁶¹

2. The Consent Exception

Congress amended section 904 in 1976 to add a consent exception that continues in the statute today.⁶² According to a House Report and a highly authoritative treatise, the addition was conceptualized as a clarification of existing law, not as a weakening of the proscription against court interference.⁶³ The amendment was to ensure that section 904 remained a shield for the state and municipality, rather

⁵⁷ Stockton, 478 B.R. at 13 (section 904 forbids bankruptcy court from enjoining health benefit reductions).

⁵⁸ *Id.* at 19.

⁵⁹ *Id.* at 20; Kupetz, *supra* note 18, at 300. A few decisions have addressed these issues a bit differently. In *Castle Pines*, a creditors’ committee requested that the debtor pay the committee’s professional fees. The court called such a payment the municipality’s “price of admission” for the right to impair contracts; if the municipality did not want to pay, it could dismiss the case, said the court. In re *Castle Pines North Metro. Dist.*, 129 B.R. 233, 235 (Bankr. D. Colo. 1991). *Castle Pines* does not seem to have attracted a following. In *Orange County*, an employee association successfully requested that the court enjoin the city from making a unilateral change to a collective bargaining agreement. Based on the opinion, it appears that the parties disputed the standard to apply rather than whether section 904 prevented the imposition of an injunction without debtor consent. In re *County of Orange*, 179 B.R. 177 (Bankr. C.D. Cal. 1995). However, in a separate dispute, the court declined the creditors’ request to order Orange County to pay compensation to committee professionals on an interim basis because the debtor had not consented. In re *County of Orange*, 179 B.R. 195, 199 (Bankr. C.D. Cal. 1995).

⁶⁰ Moringiello, *supra* note 18, at 409 (“Chapter 9 was designed to complement, rather than replace, state financial intervention plans”); *id.* at 452 (“No one intended for federal legislation to operate alone to solve the municipal debt problem”); Bekins, 304 U.S. at 53 (“we have co-operation to provide a remedy for a serious condition in which the States alone were unable to afford relief”); Kordana, *supra* note 29, at 1106.

⁶¹ Moringiello, *supra* note 18.

⁶² Section 904 thus includes the clause “unless the debtor consents...”

⁶³ 6 COLLIER ON BANKRUPTCY 904.02 (citing *Leco Properties v. Crummer*, 128 F.2d 110 (5th Cir. 1942)); House Report No. 94-686, 94th Cong. 1st Sess. Dec. 1, 1975, at 18.

than a sword for a recalcitrant creditor seeking for its own ends to limit what a court could do.⁶⁴ In other words, there is no indication that the consent exception was meant to be a big change, or really any change, in the law.⁶⁵ In a typical court decision applying section 904, a creditor has asked a court to instruct the debtor to do something that the debtor does not want to do, and the court has responded it lacks that authority.⁶⁶ But, as amended in 1976, the provision expressly gives a municipality the power to ask for the court's assistance.⁶⁷ For example, a municipal debtor may ask the court to review and approve a settlement with creditors.⁶⁸

Whereas the history and case law contain examples of debtor or creditor requests for intervention, I have found no parallel discussion of courts making *sua sponte* requests to use the consent exception. *Sua sponte* requests involve different dynamics, and a potentially larger encroachment on federalist principles, largely stemming from the perceived costs of refusing the court's request. Consent (and waiver, its cousin) has become a hotly contested issue across the bankruptcy system, including whether parties can validly consent to the final adjudication of certain matters by non-Article III bankruptcy judges.⁶⁹ But if we look more broadly, whether in the constitutional realm or the law of private contract

⁶⁴ COLLIER ON BANKRUPTCY, *supra* note 63.

⁶⁵ House Report No. 94-686, *supra* note 63, at 18 (noting intention to codify *Leco* and to maintain the holding of *Spellings v. Dewey*, 122 F.2d 652 (8th Cir. 1941), which reversed injunctions the court had imposed on a local election because challengers would not execute the plan of adjustment).

⁶⁶ *Stockton*, 478 B.R. at 20; *Kupetz*, *supra* note 18, at 300. Rejecting a creditor's request to force the debtor to pay certain commissions, a New York judge noted, "[s]ection 904's command is clear." *In re New York City Off-Track Betting Corp.*, 434 B.R. 131, 140 (Bankr. S.D.N.Y. 2010) (section 904 protects debtors from a federal court "meddling with their political or governmental powers").

⁶⁷ *Knox & Levinson*, *supra* note 18, at 22.

⁶⁸ *In re City of Stockton*, 486 B.R. 194, 199 (Bankr. E.D. Cal. 2013) (municipality may, but is not required to, seek approval of a settlement); *In re Barnwell Co. Hospital*, 491 B.R. 408, 417 (Bankr. D.S.C. 2013) (evaluating settlement at debtor's request).

⁶⁹ The Supreme Court ruled in 2015 that parties' consent is valid, and that consent need not be express. *Wellness International Network Ltd. v. Sharif*, 135 S. Ct. 1932 (2015). For a discussion of consent across a wider range of bankruptcy contexts preceding that decision, see Daniel J. Bussel & Kenneth N. Klee, *Recalibrating Consent in Bankruptcy*, 83 AM. BANKR. L. J. 663, 679 (2009).

enforcement, nominal agreement is not always taken at face value.⁷⁰ Concern about potential compulsion by government actors is particularly longstanding.⁷¹ The Supreme Court recently reinforced that federalism protects individuals as well as a state,⁷² expanding the scope of parties potentially harmed by federal court overreach who cannot consent for themselves. Moreover, *NFIB v. Sebelius* illustrates that even requests for consent can have coercive effects.⁷³ In *NFIB*, the Supreme Court invalidated portions of the Affordable Care Act that conditioned existing Medicaid funding on states' expansion of their programs. Writing for the majority, Chief Justice Roberts explained that if "conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."⁷⁴ Whatever one thinks of that particular decision, it reminds us that withholding consent when a powerful federal actor so requests can be perceived as costly. Although the exercise of judicial discretion is a different context than a national legislative command, concern about federal compulsion has salience in both. In addition, the line between congressional command and court action can be blurry; for example, in oral arguments on a later Affordable Care Act challenge, Justices raised concerns about how the Supreme Court's ruling on that dispute might impose undue pressure on states as a practical matter.⁷⁵

⁷⁰Mitchell N Berman, *Coercion, Compulsion, and the Medicaid Expansion: A Study in the Doctrine of Unconstitutional Conditions*, 91 TEX. L. REV. 1283, 2189 (2013). See also Jacoby & Janger, *supra* note 2, at 943 (discussing economic duress).

⁷¹Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

⁷²*Bond v. United States (Bond I)*, 131 S. Ct. 2355, 2363-64 (2011) (without quoting Tenth Amendment, stating, "The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a state"); Mayer, *supra* note 51, at 364.

⁷³*Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 256 (2012).

⁷⁴*Id.* at 2604 (analogizing inducement to a "gun to the head").

⁷⁵Oral Argument at 15-18, *King v. Burwell*, No. 14-114 (March 4, 2015) (questions of Justices Sotomayor and Kennedy). The case was decided in a way that obviated that concern. *King v. Burwell*, No. 14-114, 2015 WL 2473448 (June 25, 2015).

These consent considerations will return in Part IV.B.2. For now, let us bear in mind that debtor municipalities appear to be the intended beneficiaries and users of the statutory consent exception.

3. What Remains?

Even with these constraints, the conventional wisdom bestows on judges an indispensable role. The judge presiding over the Stockton bankruptcy called the eligibility determination the initial judicial task in chapter 9.⁷⁶ A judge determines whether the debtor is eligible for chapter 9 on the front end of a case, albeit not necessarily right away.⁷⁷ The eligibility assessment is not *pro forma*, particularly when creditors or the state challenge the filing.⁷⁸ The conjunctive statutory test includes many fact-intensive factors, including express authorization from the state, and municipal insolvency.⁷⁹

On the back end, the judge decides whether to confirm the municipality's plan of adjustment.⁸⁰ Like the eligibility test, the plan confirmation requirements are multi-faceted and generally require the presentation of evidence. The confirmation standards, many of which mirror the chapter 11 standards, are notoriously controversial as applied to a municipality.⁸¹

⁷⁶ *In re City of Stockton, California*, 475 B.R. 720 (Bankr. E.D. Cal. 2012) (calling eligibility the initial judicial task in every chapter 9).

⁷⁷ *Jacoby, Detroit Pre-Eligibility*, *supra* note 23, at 852-53 (reviewing criteria, noting that the timing of the eligibility determination is variable, and identifying multiple matters the court addressed before deciding Detroit was eligible, or before even beginning the trial).

⁷⁸ *In re City of Bridgeport*, 129 B.R. 332, 339 (Bankr. D. Conn. 1991) (Bridgeport not insolvent, thus ineligible); *In re Boise County*, 465 B.R. 156 (Bankr. D. Idaho 2011) (same); *In re Harrisburg*, 465 B.R. 744 (Bankr. M.D. Pa. 2011) (city ineligible because city council lacked authority to file the petition).

⁷⁹ 11 U.S.C § 109(c) (listing eligibility requirements).

⁸⁰ 11 U.S.C § 943(b) (identifying plan confirmation requirements); *Gillette*, *supra* note 18, at 294; *Kupetz*, *supra* note 18, at 300; *In re Mount Carbon Metropolitan Dist.*, 242 B.R. 18, 30 (Bankr. D. Colo. 1999).

⁸¹ C. Scott Pryor, *Municipal Bankruptcy: When Doing Less is Doing Best*, 88 AM. BANKR. L. J. 85 (2014); Richard M. Hynes & Steven D. Walt, *Fair and Unfair Discrimination in Municipal Bankruptcy*, 37 CAMPBELL L. REV. 25 (2015); Andrew B. Dawson, *Pensioners, Bondholders, and Unfair Discrimination in Municipal Bankruptcy*, 17 U. PA. J. BUS. L. 1 (2014).

Experts also note that disputes requiring judicial attention may arise in the middle of a chapter 9. A well-known municipal bankruptcy lawyer recently listed the scope of a bankruptcy court's powers, in addition to eligibility and plan confirmation, as contract assumption or rejection, and dismissal.⁸² In the contract rejection context, requests to reject collective bargaining agreements have attracted special attention.⁸³ In addition, creditors or other parties might file motions for relief from the automatic stay on which a court must rule.⁸⁴

C. *The Prevailing Critiques*

Critiques of municipal bankruptcy tend to be oriented toward disutility and moral hazard: debtors are insufficiently constrained and incentivized to reform and maximize payments to creditors. Accordingly, some scholarship has advocated for greater judicial intervention. Yet, like the conventional wisdom, the resulting proposals have focused on the big evidentiary trials.⁸⁵ In a frequently-cited article from the 1990s, McConnell and Picker suggested that, “[b]ankruptcy could be used to force politically unpopular, but sensible, decisions such as elimination of municipal functions, privatization, and changes in tax law.”⁸⁶ Their path to doing so, however, involved judges aggressively scrutinizing restructuring plans, usually in ways that would push debtors to

⁸² Patrick Darby, *Restructuring Municipal Debt in Chapter 9*, Nat'l Conf. of Bankr. Judges Ann. Mtg. 2013, at 24; *id.* at 25 (“the bankruptcy judge’s lack of power to tell the debtor what to do... means that the debtor cannot simply lay its difficulties on the desk of the bankruptcy judge to be solved”).

⁸³ *In re City of Vallejo*, 432 B.R. 262 (E.D. Cal. 2010); Knox & Levinson, *supra* note 18, at 22, 25; Ryan Preston Dahl, *Collective Bargaining Agreements and Chapter 9 Bankruptcy*, 81 AM. BANKR. L. J. 295 (2007).

⁸⁴ Sources cited *supra* note 39.

⁸⁵ McConnell & Picker, *supra* note 18, at 427, 470; Gillette, *supra* note 18, at 291, 295, 326. This view contrasts with discussions about *corporate* bankruptcy in the 1990s, in which scholars complained that judges were more obstacle than facilitator to efficient outcomes. Susan Block-Lieb, *The Logic and Limits of Contract Bankruptcy*, 2001 U. ILL. L. REV. 503 (2001)(reviewing and analyzing literature).

⁸⁶ McConnell & Picker, *supra* note 18, at 472.

make bigger payments to creditors.⁸⁷ More recently, Clayton Gillette has argued that courts should require municipalities to pay “affordable, if unpopular, obligations,” to counter the strategic behavior of local officials.⁸⁸ His focal points were, again, eligibility and plan confirmation.⁸⁹

These proposals accurately reflect that judges have considerable untapped leverage.⁹⁰ As just reviewed, the debtor needs court acquiescence to be eligible for chapter 9 and to get a discharge of debt at the end.⁹¹ But these critics did not explicitly engage with how that leverage could play out quite indirectly, via informal oversight routes throughout the case. And, as we will see, when a court does exercise its leverage, it may not be a one-way ratchet to increase creditor returns.

II. What’s Wrong With This Picture? Beyond the Standard Account

A. Managerial Judging and Beyond

Federal court and procedure scholars have spoken a different language than municipal bankruptcy scholars about how courts oversee their cases.⁹² In the second half of the Twentieth Century, the federal court system came to evaluate judges by how well they avoided trials and closed matters on their dockets rather

⁸⁷ *Id.* at 474. They focused particularly on the best interest of creditors test. 11 U.S.C § 943(b)(7). *But see* Kordana, *supra* note 29, at 1058-59, 1106 (disagreeing that judges should push for municipal tax increases in chapter 9).

⁸⁸ Gillette, *supra* note 18, at 291, 295, 326.

⁸⁹ *Id.* at 293-95, 296, 325-27 (noting courts would have few incentives to impose excessive resource adjustments); Clayton P. Gillette, *What States Can Learn from Municipal Insolvency*, in *WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS* 107 (PETER CONTI-BROWN & DAVID A. SKEEL JR., EDS. 2012) (court “obviously retains substantial discretion to condition that confirmation on the inclusion of tax increases or service reductions”).

⁹⁰ McConnell and Picker recognized that their proposals would constitute a “radical revision in the theory of Chapter 9, but also reconsideration of some of the basic common law principles of municipal debt collection.” McConnell & Picker, *supra* note 18, at 775.

⁹¹ *Supra* Part I.B.3.

⁹² *Supra* note 21.

than how well they presided over them.⁹³ By the late 1970s, district judges were encouraged to take active control over their dockets and cases through a variety of measures.⁹⁴ With varying levels of enthusiasm, scholars have documented courts' heavy use of informal and non-adversarial techniques to expedite proceedings, discourage litigation, direct fact-gathering, and encourage settlement.⁹⁵ By some accounts, the courts moved from dispute resolution to problem solving.⁹⁶ All together, such techniques, often discretionary, afford the judiciary significant control in ways that are much harder to track and substantiate than rulings after trials or injunctive orders.

The chapter 9 scholarship often conveys the sense that, because the debtor is a municipality, a unit of a sovereign state, judges will sit idly by while a case proceeds at whatever pace a debtor sets for it. In other contexts, the presence of state actors has not prevented the application of docket-moving norms and the use of associated techniques. Indeed, institutional reform litigation – aimed at curing alleged constitutional violations in prisons, schools, or the like – was a significant forum for federal court experimentation. When Abram Chayes famously but controversially identified the characteristics of “public law litigation” in the 1970s, he observed a more sprawling party structure, a predictive rather than retrospective factual inquiry, and a negotiated rather than imposed remedy.⁹⁷ Chayes characterized the judge presiding over such cases as having the obligation to shape the process to ensure a just and viable outcome.⁹⁸

⁹³ The work of Judith Resnik has been persuasive on this point. Resnik, *Managerial Judges*, *supra* note 21; Resnik, *Trial as Error*, *supra* note 21; Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494 (1986).

⁹⁴ Jacoby, *What Should Judges Do in Chapter 11?*, *supra* note 23, at 575-76 (documenting how federal district judges changed their way of conceptualizing their roles).

⁹⁵ *Supra* note 21; Molot, *supra* note 21, at 89 (discussing “regularization of judicial management tactics that fall between formal and informal extremes”).

⁹⁶ Edward H. Levi, *The Business of Courts: A Summary and a Sense of Perspective*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE* 269, 270-71 (A. Leo Levin & Russell R. Wheeler eds., 1979).

⁹⁷ Chayes, *supra* note 21, at 1302.

⁹⁸ *Id.*

Since then, hundreds of articles and books have described and evaluated how judges have overseen cases with those characteristics. The techniques for a wide variety of federal actions (including but not limited to institutional reform) span detailed case management orders;⁹⁹ express statements, whether in public or in chambers, pushing settlement and sometimes offering the terms;¹⁰⁰ *ex parte* communication;¹⁰¹ recruiting and delegating to teams of helpers who expand the court's reach and interaction with parties;¹⁰² inquisitorial methods;¹⁰³ public statements through unconventional channels and press conferences;¹⁰⁴ and hearings for non-parties and in locations away from the court's home base.¹⁰⁵

⁹⁹ *Supra* note 93.

¹⁰⁰ Jacoby & Remus, *supra* note 34; RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY 25 (1991) (documenting settlement promotion in A.H. Robins); RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 75 (2007) (discussing role of Judge Weinstein in Agent Orange, such as providing the dollar figure for settlement on the eve of trial and playing an active role in orchestrating settlement); Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 55 U. Chi. L. Rev. 337, 343 (1986) ("From the moment that Judge Weinstein replaced Judge Pratt. . . the goal of settlement was uppermost in his mind").

¹⁰¹ SOBOL, *supra* note 100, at 32 (discussing judicial practices in A.H. Robins).

¹⁰² Robert E. Buckholz, Jr. et al., *Special Project, The Remedial Process in Institutional Reform Litigation*, 78 COLUM. L. REV. 784, 826 (1978) (discussing use of masters, special masters, hearing officers, monitors, various committees, and ombudspersons); Elwood Hain, *Sealing off the City: School Desegregation in Detroit*, in LIMITS OF JUSTICE: THE COURTS' ROLE IN SCHOOL DESEGREGATION 234-74, 282 (HOWARD I. KOLODNER & JAMES J. FISHMAN, EDS. 1978) (in Detroit school desegregation case *Bradley v Milliken*, Judge DeMascio used non-testifying expert advisors); SOBOL, *supra* note 100 (court recruitment of help in A.H. Robins). To manage the Agent Orange litigation, Judge Jack Weinstein created a "special bureaucracy" that included extra law clerks, paralegals, a magistrate, at least seven special masters, and consultants. PETER SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 342-44 (1986); Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010, 2014, 2019 (1997); Linda Silberman, *Judicial Adjuncts Revisited: The Proliferation of Ad Hoc Procedures*, 137 U. PA. L. REV. 2131, 2148 (1989).

¹⁰³ Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181 (2005) (exploring roots of inquisitorial techniques in American and English jurisprudence); Frederic M. Bloom, *Information Lost and Found*, 100 CAL. L. REV. 635, 667 (2012) (American civil practice is not adversarial "from bottom to top"); John H. Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823, 858 (1985) (discussing inquisitorial features of American courts that lack safeguards of German system); Howard Erichson, *Mass Tort Litigation and Inquisitorial Justice*, 87 GEO. L. J. 1983 (1999).

¹⁰⁴ Hain, *supra* note 102, at 277 (in Detroit school desegregation case, Judge DeMascio held meetings with school board president, other local officials before releasing high-profile court decision); *id.* at 242 (Judge Roth press conference explaining plan implementation, deflecting NAACP criticisms).

¹⁰⁵ Jack Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 541 (1994) (in both mass tort and institutional reform, "[a] rigid and unresponsive judiciary, blind to the needs

This laundry list is meant to convey that judges have taken active and wide-ranging roles -- even in cases, like institutional reform, which generate complex interactions between the federal court and state and local institutions and actors.¹⁰⁶

Although long identified as a relevant counterpoint,¹⁰⁷ institutional reform litigation is not fully analogous to bankruptcy of any kind, including chapter 9. In a prison or school reform case, an active role for judges is arguably necessary to help remedy a constitutional violation, filling a gap left by failures in the political process.¹⁰⁸ In municipal bankruptcy, the federal court's involvement, rather than the underlying financial problem, is the element more likely to provoke constitutional challenge.¹⁰⁹ In addition, some courts' oversight methods and levels of involvement in institutional reform cases have been wildly controversial, provoking efforts to curb courts' power. These elements, however,

of various communities and of society at large, is far more likely to cause an erosion of public confidence in legal institutions than a judiciary perceived as overly interested in resolving the problems before it"); *id.* at 542 (discussing public hearings he held in school desegregation case); *id.* at 543 (in mass tort case, held hearings all over the country).

¹⁰⁶ PHILIP J. COOPER, *HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS* 20 (1988) (challenges associated with developing adequate remedy while limiting interference with local government policy and practice); DONALD L. HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 468 (1980) (clash between "steely-eyed judge of national prominence" and a "recalcitrant state bureaucracy"); Chayes, *supra* note 21, at 1309 ("Can the disinterestedness of the judge be sustained, for example, when he is more visibly part of the political process?").

¹⁰⁷ Scholars identifying corporate restructuring as a useful analogy for purposes of understanding institutional reform litigation include Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465 (1980); Susan Sturm, *Resolving the Remedial Dilemma: Strategies of Judicial Intervention by Prisons*, 138 U. PA. L. REV. 805 (1990); Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L. J. 1355, 1432 n402 (1991); Charles F. Sabel & William H. Simon, *Destabilizing Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016, 1057, 1061-66 (2004).

¹⁰⁸ Hon. A. Leon Higginbotham, Jr., *The Priority of Human Rights in Court Reform*, in *THE POUND CONFERENCE: PERSPECTIVES ON JUSTICE IN THE FUTURE*, PROCEEDINGS OF THE NATIONAL CONFERENCE ON THE CAUSES OF POPULAR DISSATISFACTION WITH THE ADMINISTRATION OF JUSTICE 107 (A. LEO LEVIN & RUSSELL R. WHEELER, EDS. 1979).

¹⁰⁹ *Ashton v. Cameron County Water Improvement Dist.*, 298 U.S. 513, 531 (1936); *United States v. Bekins*, 304 U.S. 27, 46, 52 (1938).

do not explain or justify the dramatic difference in scholarly analysis of judicial oversight.

In bankruptcy research, scholars have been only modestly and intermittently engaged with federal court trends.¹¹⁰ The gap between these fields persists notwithstanding widespread agreement that negotiation, compromise and litigation avoidance are hallmarks of bankruptcy, making it amenable or vulnerable to judicial creativity to cultivate these norms. Rather than connecting such dynamics to the larger complex litigation universe,¹¹¹ corporate bankruptcy scholars tend to characterize bankruptcy as an extension of the private transactional realm and see judges as external to that world.¹¹² As Part I conveyed, chapter 9 literature is even further removed from the debates about how federal courts exercise power in the modern judiciary, notwithstanding the sense that chapter 9 is even more dependent on negotiation and compromise.¹¹³

B. Detroit Bankruptcy Background

Detroit is the biggest municipal bankruptcy in U.S. history to date.¹¹⁴ To put it mildly, the city's financial troubles were decades in the making,¹¹⁵ intertwined

¹¹⁰ Melissa B. Jacoby, *What Should Judges Do in Chapter 11?*, *supra* note 23. Exceptions to this claim include John D. Ayer, *The Forms of Action in Bankruptcy Practice: An Exposition and a Critique*, in 1985 ANN. SURV. BANKR. L. 307 (William L. Norton ed., 1985); John D. Ayer, *How to Think About Bankruptcy Ethics*, 60 AM. BANKR. L.J. 355 (1986); Jacoby, *Fast, Cheap, and Creditor-Controlled*, *supra* note 23; Ted Janger, *Crystals and Mud in Bankruptcy Law: Judicial Competence and Statutory Design*, 43 ARIZ. L. REV. 559 (2001); Jonathan C. Lipson, *Debt and Democracy: Towards a Constitutional Theory of Bankruptcy*, 83 NOTRE DAME L. REV. 605, 657-58 (2008); and Daniel Bussel, *A Third Way: Examiners as Inquisitors*, 90 AM. BANKR. L. J. __ (forthcoming 2016). See also sources cited *infra* note 107 (sources focusing on other areas of law analogizing to bankruptcy).

¹¹¹ Exceptions largely arise from those who study mass tort and other aggregate litigation. S. ELIZABETH GIBSON, FED. JUDICIAL CTR., CASE STUDIES OF MASS TORT LIMITED FUND CLASS ACTION SETTLEMENTS & BANKRUPTCY REORGANIZATIONS 106, 152 (2000); Troy McKenzie, *Toward a Bankruptcy Model for Non-Class Aggregate Litigation*, 87 N.Y. U. L. REV. 960 (2012).

¹¹² For an example of the transactional frame, see David A. Skeel, Jr., *Welcome Back, SEC?* 18 AM. BANKR. INST. L. REV. 573, 576 (2010).

¹¹³ Reporter's Transcript of Daily Proceedings at 515, *In re City of Stockton*, 12-321118-C-9, (Bankr. E.D. Cal. March 27, 2014) ("the Chapter 11 negotiation model applies in Chapter 9 cases on steroids"); *In re City of Stockton, California*, 475 B.R. 720, 724, 731-32 (Bankr. E.D. Cal. 2012) (federal policy favoring settlement and compromise in chapter 9 cases).

¹¹⁴ Detroit, 504 B.R. at 178.

with social and political challenges.¹¹⁶ The state's response to Detroit's troubles was ultimately quite severe legally and practically; in appointing emergency managers for Detroit and other municipalities in Michigan under that state's financial emergency law, the governor disempowered the elected representatives of a majority of Michigan's African-American residents.¹¹⁷ It was the emergency manager and governor, not Detroit's elected officials, who made the decision to file chapter 9 on the city's behalf. To many Detroit residents, that filing signified that a federal court was aiding and abetting state efforts to strip residents of their rights and home rule.¹¹⁸ The judge who presided over Detroit's bankruptcy from its filing through the plan effective date was acutely aware of this political context.¹¹⁹

As noted in the introduction, Detroit significantly reduced its debt in this bankruptcy case. But the emergency manager used the time and the space created by the bankruptcy to tackle more than that. The city undertook operational and management changes affecting police response time, the repair

¹¹⁵ *Id.* at 112; Heather Lennox, *Panic in Detroit – Chapter 9 Process From Soup to Nuts* (April 2015), at 6.

¹¹⁶ THOMAS J. SUGRUE, *ORIGINS OF THE URBAN CRISIS: RACE AND INEQUALITY IN POSTWAR DETROIT* (PRINCETON CLASSICS EDITION 2014); Peter J. Hammer & Michael Schank, *Detroit on the Brink*, THE HILL, Oct. 29, 2014; Letter from Peter Hammer to Judge Steven W. Rhodes (Sep. 1, 2014) *available at* <http://www.d-rem.org/wp-content/uploads/2014/09/Hammer-Ltr-2-Rhodes-final-09-01-14.pdf> (expressing concern that “issues of race and regionalism would be marginalized” in Detroit's plan of adjustment). Poverty is common among cities facing bankruptcy or other state interventions. Anderson, *Dissolving Cities*, *supra* note 42, at 1415 (discussing Vallejo); Michelle Wilde Anderson, *The New Minimal Cities*, 123 YALE L. J. 1118, 1133-34, 1137-38 (2014).

¹¹⁷ Chris Savage, *The Scandal of Michigan's Emergency Managers*, THE NATION, March 5-12, 2012; Chris Lewis, *Does Michigan's Financial Emergency Law Disenfranchise Black Citizens?*, THE ATLANTIC, May 9, 2013. *See generally* David Unkovic, *Municipal Distress: Reflections of a Receiver*, 24 WIDENER L. J. 9 (2015) (recognizing undemocratic nature of Harrisburg receivership, but arguing it was essential to city's recovery).

¹¹⁸ I saw this reaction firsthand when, in September 2013, I traveled to Detroit, at the invitation of U.S. House Judiciary Committee counsel, to participate in a forum about the bankruptcy, attended by several hundred people. Fellow panelists included elected officials who, like most of the audience, were staunchly opposed to the bankruptcy. To them, the most important fact about the bankruptcy was that it was filed by an unelected emergency manager appointed under a controversial and expansive state takeover statute that the NAACP and others were seeking to invalidate.

¹¹⁹ Supplemental Opinion, *supra* note 1, at 212-213.

of street lights, and many other services.¹²⁰ Investment initiatives were planned and funded.¹²¹ The city and outlying counties negotiated the establishment of a regional water authority,¹²² although the city's water department was a source of controversy during the bankruptcy because of the high rate of water shutoffs on low-income residents.¹²³

Detroit managed to cut massive amounts of debt without sacrificing its prized and valuable Detroit Institute of Art. The art was protected through a series of linked settlements, known as the Grand Bargain, which became a public focal point of the case.¹²⁴ The challenges the Grand Bargain sought to address were twofold. First, the Detroit Institute of Arts was an asset of the City of Detroit. Creditors of many kinds claimed that they should be entitled to the value of the art if Detroit was going to get bankruptcy relief, while others such as the State Attorney General balked at such a prospect.¹²⁵ Second, at least initially, Detroit's emergency manager called for dramatic cuts to the pensions of retired city workers.¹²⁶

The Grand Bargain protected the DIA collection from creditors and permanently put it in a trust.¹²⁷ And the Grand Bargain minimized the cuts to pensions that public workers and retirees would face from the bankruptcy.¹²⁸ The funding for the Grand Bargain came from private foundations, and, to a lesser extent, for-profit corporations with operations in and around Detroit. The DIA was

¹²⁰ *Id.* at 134-35.

¹²¹ *Id.* at 7 (investment of approximately \$1.7 billion in initiatives over ten years, predicted to result in approximately \$841 million in revenue savings); Lennox, *supra* note 115.

¹²² *Id.* at 72.

¹²³ *Infra* Part III.D.

¹²⁴ Supplemental Opinion, *supra* note 1, at 30-32 (describing DIA settlement component of Grand Bargain).

¹²⁵ *Id.* at 30.

¹²⁶ City of Detroit, Proposal for Creditors 109 (June 14, 2013) ("there must be significant cuts in accrued, vested pension amounts for both active and currently retired persons").

¹²⁷ Supplemental Opinion, *supra* note 1, at 30.

¹²⁸ *Id.* at 36.

responsible for raising some of the money itself. A contribution from the State of Michigan was tied to the establishment of the Detroit Financial Review Commission as well as the release of certain potential liabilities of the state.

The Grand Bargain was controversial among financial creditors because they would not receive a share of the funds, even if their investments had shored up the pension system, and even when financial creditors had a colorable argument of equal priority to pension claimants under bankruptcy law. In addition, financial creditors contended that pension claimants were getting a much higher return than the city and retiree parties were acknowledging. Because the most vocal opponents of the Grand Bargain and the city's plan ultimately settled, the airing and evaluation of these issues through the plan confirmation process was reduced. The estimated value of treatment under the plan for creditors that were clearly or potentially unsecured varied greatly, ranging from 10% to over 90%.

C. Studying the Detroit Bankruptcy

From the outset of the Detroit bankruptcy, I listened to court hearings in near-real time, contemporaneous with the case unfolding.¹²⁹ This method was made possible by the fact that the Eastern District of Michigan bankruptcy court produces and releases digital recordings. The presiding judge also held most status and pretrial conferences in Detroit's bankruptcy on the record in open court, increasing the amount of court activity that was visible to the public.¹³⁰ By

¹²⁹ The closest analogy is conversation analysis, from sociolinguistics. JOHN M. CONLEY & WILLIAM M. O'BARR, *JUST WORDS; LAW, LANGUAGE, AND POWER* 20 (2D ED. 2005); John M. Conley & William M. O'Barr, *Fundamentals of Jurisprudence: An Ethnography of Judicial Decision Making in Informal Courts*, 68 N. C. L. REV. 468 (1987).

¹³⁰ United States Bankruptcy Court for the Eastern District of Michigan, Judge Information, Status Conferences, available at www.mieb.uscourts.gov/judges-info/judge-rhodes. Transcript of Hearing Re. Status Conference at 8-9, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 2, 2013) (court committing to "facilitate, to the greatest extent possible, public access to the Court's proceedings"); Transcript of Hearing, In Re Motion of the Debtor for a Final Order at 10, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 18, 2013), ECF No. 2280 (judge explaining intent not to have off-the-record conversations in Detroit's bankruptcy, but holding

my count, digital audio recordings of only two official court hearings were not made available.¹³¹ To facilitate application and verification of my research, I have replaced citations to audio files with transcript citations as they come available, but, in nearly all instances, drew inferences about tone and context primarily from audio recordings.¹³² Relying exclusively on transcripts not only would have been less revealing of the dynamics and tone, but expensive. Obtaining written transcripts within a week of a hearing cost nearly five dollars per page.

Although some court activities were transparent, the oversight strategy to be described in Part III posed barriers to direct observation. The first was confidential mediation overseen by the Chief Judge of the Eastern District of Michigan.¹³³ Behind-the-scenes negotiation is part of all bankruptcies; watching court never reveals all. As we will see, however, the mediation in Detroit was expansive, and the lead mediator took an especially active role. By installing a powerful Article III judge to supervise such a broad range of negotiations and activities, the court produced almost unlimited opportunities for federal court control and influence beyond public view.¹³⁴ In addition, court-appointed adjuncts – particularly the feasibility expert and non-testifying consultant –

sidebar with lawyers for Detroit and Syncora due to undisclosed circumstance). *See also* sources cited *supra* note 131 (non-public hearings).

¹³¹ An oral argument relating to water and sewer bonds was held in chambers rather than the courtroom on July 17, 2014. In response to a UNC Law Library query, the court reported that no recording would be released. A bus tour for the court on August 8, 2014, requested by the debtor and opposed by some creditors, was part of the plan confirmation trial. Order Regarding Site Visit, *In re City of Detroit*, 13-53846 (Bankr. E.D. Mich. June 27, 2014), ECF No. 5629. A brief video excerpt was released shortly after the tour, but a full written transcript was not filed on the docket until months later, after the plan of adjustment went into effect. Notice of Filing Record of Site Visit, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Dec. 11, 2014), ECF No. 8673. A third example was not expressly a court hearing. Judge Rhodes held in-courtroom-interviews with finalists for the job of court-appointed feasibility expert on April 18, 2014. Order Regarding the Solicitation of Applications to Serve as the Court’s Expert Witness on the Issue of Feasibility, *In re City of Detroit* at 3, No. 13-53846 (Bankr. E.D. Mich. April 2, 2014), ECF No. 3610 (specifying interview date and procedure). A full recording was not released to the public.

¹³² There is one exception to this method: for the evidentiary portions of the eligibility and plan confirmation trials – the portion most likely to fit a traditional adversarial paradigm, and the most publicized by the news media – I relied heavily on transcripts.

¹³³ *Infra* Part III.C.

¹³⁴ *Id.*

engaged in significant interactions with city officials and other parties far beyond the courthouse.¹³⁵

These considerations notwithstanding, the digital audio record, combined with docket entries and third-party sources, provided a rich source of information, context, and insight, particularly when compiled contemporaneous to the case unfolding. The account in Part III illustrates the subtle and varied ways in which the federal court was a significant institutional actor throughout Detroit's municipal bankruptcy. The court sometimes played a traditional adjudicative role.¹³⁶ But it often did much more.

III. The Detroit Blueprint: Overlooked Avenues of Federal Court Involvement

A. Judicial Selection Process

An account of the court's role in Detroit's bankruptcy begins with a decision that necessarily transpired before the first hearing.¹³⁷ In federal courts, judges usually are assigned cases randomly within districts and divisions. Some exceptions arise by statute, such as the assignment of pretrial matters in multidistrict litigation,¹³⁸ while others result from allocation of labor in on a district-by-district basis.¹³⁹ Chapter 9 contains a statutory exception: section 921(b) instructs the chief judge

¹³⁵ *Infra* Part II.D.3 (discussing feasibility team interaction with city officials). The feasibility expert explained those interactions during her plan confirmation trial testimony. The non-testifying consultant – as the label would suggest – did not, but other witnesses offered clues. *Id.*

¹³⁶ The handling of discrete disputes and evidentiary objections in the first few months of the case is documented in Jacoby, *Detroit Bankruptcy, Pre-Eligibility*, *supra* note 23, at 855-861.

¹³⁷ By necessity, this section is based on a review of the docket of cases and traditional research rather than on audio recordings of hearings.

¹³⁸ John C. Heyburn II, *A View from the Panel: Part of the Solution*, 82 TUL. L. REV. 2225, 2240 (2008); Daniel A. Richards, *An Analysis of the Judicial Panel on Multidistrict Litigation's Selection of Transferee District and Judge*, 78 FORDHAM L. REV. 311 (2010). MDL assignments to district judges are not rare. Jaime L. Dodge, *Facilitative Judging: Organizational Design in Mass-Multidistrict Litigation*, 64 EMORY L. J. 229, 332, 337 (2014) (nearly one third of active district judges have a pending MDL assignment).

¹³⁹ For example, some local districts promulgate special assignment rules for larger chapter 11 cases. Jacoby, *Fast, Cheap, and Creditor-Controlled*, *supra* note 23, at 432 n123. Also, in districts with low chapter 13 filing rates, all such filings might be assigned to a single judge on a rotating basis.

of the circuit court of appeals to select the judge.¹⁴⁰ Concerns about judge capability have dominated the explanations for this provision.¹⁴¹

When the clerk of the bankruptcy court received Detroit's chapter 9 filing, she made a formal request to the chief circuit judge for a designation of a judge.¹⁴² Then, the chief circuit judge, Alice Batchelder, filed a notice of the judicial selection on the court docket of the case.¹⁴³ Notices in other chapter 9 cases have served no expressive or explanatory function; they simply have identified the judge for the record.¹⁴⁴ The Detroit designation is longer and more substantive. In addition to confirming Judge Rhodes' availability,¹⁴⁵ Chief Judge Batchelder wrote that the selection followed a review of the "levels of experience and the

¹⁴⁰11 U.S.C. § 921(b) ("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").

¹⁴¹6 COLLIER ON BANKRUPTCY ¶ 921.03 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2012) (citing S. REP. NO. 94-458, 94th Cong., 1st Sess. 15 (1975), for provision aiming to "insure that a municipal case would be handled by a judge capable of doing so."); House Report 94-686, *supra* note 63, at 2 (maximize flexibility to account for volume of business); Knox & Levinson, *supra* note 18, at 10 (case likely to be assigned to "one of the most qualified and experienced judges within the applicable federal circuit"); King, *supra* note 18, at 1165 (circuit's chief judge can "review the calendars of the particular judges and ... make a selection based on whatever criteria he deems important"); David S. Kupetz, *Municipal Debt Adjustment under the Bankruptcy Code*, 27 URB. LAW. 531, 551 (1995). Cf. Harry D. Dixon, Jr. & Joanne L. Manthe, *Municipal Adjustments*, 1981 NORTON SURV. BANKR. L. 5, fn 40 (1981) (in contrast to other sources, attributing provision to concern about judges "jockeying" for cases).

¹⁴²Request for Designation of Bankruptcy Judge, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. July 19, 2013), ECF No. 0035.

¹⁴³Designation of Bankruptcy Judge, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. July 19, 2013), ECF No. 0052.

¹⁴⁴Designation of Bankruptcy Judge, In re Adair Co. Hospital Dist., No. 13-10939 (Bankr. W.D. Ky. Aug. 1, 2013) (Sixth Circuit, no explanation); Order Designating Bankruptcy Judge Christopher Klein to conduct the City of Stockton Case, In re City of Stockton, No. 12-32118 (June 29, 2012); Designation of Presiding Judge, In re Jefferson County, No. 11-5736 (Bankr. N.D. Ala. Nov. 9, 2011); Assignment of Bankruptcy Judge to Conduct a Case Under 11 U.S.C. § 921(b), In re Hardeman Co. Hospital Dist., No. 13-70103 (Bankr. N.D. Tex. Mar. 27, 2013); Designation of a Bankruptcy Judge to Preside Over a Chapter 9 Case, In re Pauls Valley Hospital Authority, No. 13-10791 (Bankr. W.D. Okla. Mar. 4, 2013); In re City of San Bernardino, No. 12-28006 (Bankr. C.D. Cal. Jul. 31, 2012); In re Town of Mammoth Lakes, No. 12-32463 (Bankr. E.D. Cal. Jul. 3, 2012); In re Suffolk Regional Off-Track Betting Corp., No. 12-43503 (Bankr. E.D.N.Y. May 17, 2012); Order Designating Bankruptcy Judge, In re City of Harrisburg, No. 11-06938 (Bankr. M.D. Pa. Oct. 12, 2011); In re City of Vallejo, No. 08-26813 (Bankr. E.D. Cal. May 23, 2008).

¹⁴⁵Designation, *supra* note 143. Judge Rhodes deferred his retirement from the bench to take the case. David McLaughlin, *Detroit Bankruptcy Judge is Ponzi-Law Scholar*, BLOOMBERG NEWS, July 20, 2013.

respective caseloads of the judges” in the Eastern District of Michigan, as well as of the opinions of other judges.¹⁴⁶

Chief Judge Batchelder appended a letter from the Chief Judge of the Eastern District of Michigan, Gerald Rosen. Remember his name, because he will be a central figure in Detroit’s bankruptcy as well.¹⁴⁷ Judge Rhodes has said he was willing to preside over the case only if Chief Judge Rosen would be the lead mediator.¹⁴⁸ Noting that he and Chief Judge Batchelder had already spoken directly about Judge Rhodes taking the case, Chief Judge Rosen’s letter explained that Judge Rhodes was a consensus choice among judges to handle the Detroit bankruptcy, and that he had “outstanding *administrative and case management skills*, which of course will be necessary in handling a case of this magnitude.”¹⁴⁹ Although not specifically mentioned, these attributes are consistent with Judge Rhodes’ background as a former magistrate judge, among other roles.¹⁵⁰ Chief Judge Rosen also thanked Chief Judge Batchelder for her offer of resource support for the Detroit bankruptcy.¹⁵¹

Chief Judge Batchelder’s notice also included a letter from the Chief Bankruptcy Judge, Phillip Shefferly. In addition to indicating unanimous support of the selection among bankruptcy judges in the district, Chief Judge Shefferly wrote that Judge Rhodes presided over the only chapter 9 previously filed in the

¹⁴⁶ Designation, *supra* note 143.

¹⁴⁷ *Infra* Part III.C.

¹⁴⁸ *Judge Rhodes Reflects on the Detroit Case*, American Bankruptcy Institute (video interview by Lois Lupica), available at <http://news.abi.org/videos> (3:30-6:00). Chief Judge Rosen has told the same story. Jim Lynch, *Rosen Gives Behind-the-Scenes Look at Bankruptcy Case*, DETROIT NEWS, Nov. 10, 2014.

¹⁴⁹ Designation, *supra* note 143 (emphasis added) (“[f]ollowing up on our conversation this morning,” reporting the “wholehearted” endorsement of a “large cross section” of the district court); Bomey, Gallagher, & Stryker, *supra* note 5, at Chapter 4: Rosen’s Son Asks “What Would Churchill Do?” (“Rosen told colleagues he believed Rhodes had the temperament and management skills to keep the monster case on track”).

¹⁵⁰ Interview by WDET 101.9 fm with Judge Steven Rhodes, U.S. Bankruptcy Judge for the Eastern District of Michigan (Feb. 17, 2015) (reviewing Judge Rhodes’ non-bankruptcy experience before joining the bankruptcy bench).

¹⁵¹ Designation, *supra* note 143.

district, and has expertise on the relationship between bankruptcy and state constitutional law.¹⁵²

In summary, the Chief District Judge, and perhaps the Chief Sixth Circuit Judge, believed Detroit's bankruptcy required considerably more than a traditional umpire of trials. None of the appointment materials mentions any special constraints on the federal judiciary when overseeing chapter 9 cases. The non-random appointment, required by statute, offered an opportunity for the bankruptcy, district, and circuit courts to discuss and collaborate on management of the case, including, potentially, the appellate process (a subject to which we will return).¹⁵³

B. Case Management

*I had a reputation for moving my cases along and I think that the people who were responsible for making the selection understood that reputation and understood its need ... in this case to be expedited and accelerated.*¹⁵⁴

*Always be closing.*¹⁵⁵

In early August 2013, Judge Rhodes made an introductory statement in open court emphasizing the court's limited responsibility: to resolve disputes between the parties, not to make policy decisions for the city.¹⁵⁶ But he went on to identify other roles the court would play, including "to facilitate, to the extent possible, the consensual resolution of disputes" and to apply "procedures of judicial management" to ensure efficient and inexpensive resolution to the extent

¹⁵² *Id.*

¹⁵³ *Infra* text associated with notes 255-259.

¹⁵⁴ WDET interview, *supra* note 149 (2:00 into recording).

¹⁵⁵ Hon. Steven Rhodes, ABI Spring Meeting Lunch Talk April 18, 2015 (citing Glengarry Glen Ross).

¹⁵⁶ Transcript of Hearing Re. Status Conference, *supra* note 130, at 7 (explaining that a judge plays a "very limited role" in a municipal bankruptcy and the primary role was to resolve disputes, especially eligibility and confirmation); *id.* at 9-10 (no role in running the city or its services. "There is nothing the Court can do about any of these matters.... The city's officials are not accountable to this Court for how they run the city").

possible.¹⁵⁷ Detroit’s circumstances, he noted, made that goal “imperative and one that the Court intends to fulfill with the highest degree of commitment” with the help of the attorneys.¹⁵⁸

The court followed through on the intentions associated with these other identified roles. One of the main lessons from the Detroit Blueprint, consistent with the quotations beginning this section, is that a court overseeing a chapter 9 can be “managerial” in the way that procedure scholars use that term.¹⁵⁹ It would be a mistake to infer, however, that the court valued speed to the exclusion of other considerations. The management strategy involved ongoing, active substantive engagement that, through a range of examples, this section will aim to reflect.

Chapter 9 of the Bankruptcy Code mentions the establishment of only one deadline: the due date for the filing of a plan of adjustment.¹⁶⁰ The statute makes setting that deadline optional, not mandatory.¹⁶¹ Some judges defer setting even that date.¹⁶² Early in the case, Judge Rhodes set not only the plan deadline, but many others. His scheduling order for the entire case was ambitious and detailed.¹⁶³ Parties had the opportunity to comment on the proposed order, including the dates, but there could have been no doubt that such an order would be entered in some form.¹⁶⁴ Pursuant to the terms of the order, the court

¹⁵⁷ *Id.* at 8.

¹⁵⁸ *Id.*

¹⁵⁹ *Supra* note 93.

¹⁶⁰ 11 U.S.C. § 941. Setting a time “supplies the necessary incentives to both sides in the negotiations to arrive at a mutually agreeable plan within a reasonable time.” House Report 94-686, *supra* note 63, at 11.

¹⁶¹ 11 U.S.C. § 941.

¹⁶² Bill Rochelle & Sherri Toub, *San Bernardino Police Want Deadline for Filing Plan*, BLOOMBERG, Oct. 7, 2014 (two years into case, no plan filing deadline set).

¹⁶³ First Order Establishing Dates and Deadlines, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Aug. 2, 2013), ECF No. 0280 (proposing March 1, 2014 for plan filing); Transcript of Hearing Re. Status Conference, *supra* note 130.

¹⁶⁴ Judge Rhodes sometimes cited FED. R. CIV. P. 1, which calls for a just, speedy, and inexpensive process for federal civil litigation. Rule 16 of the Federal Rules of Civil Procedure, which

would extend dates and deadlines only on a motion establishing good cause.¹⁶⁵ Because extension requests had to be justified, they served an information-forcing function that increased the court's knowledge.¹⁶⁶

Although delays were inevitable, the case's pace adhered remarkably well to the court's initial scheduling order.¹⁶⁷ To keep the case moving forward, the court sought to prevent parties from unnecessarily belaboring procedural matters.¹⁶⁸ As will be discussed more in Part III.C, Judge Rhodes strongly encouraged settlement as preferable to litigation.¹⁶⁹ In addition, the court, rather than the debtor or a moving party, almost always proposed the order in which to address the scheduled items. The judge would ask the lawyers if that order was

authorizes pretrial conferences and scheduling orders, applies only to adversary proceedings, FED. R. BANKR. P. 7016, 9014(c), but section 105(d) of the Bankruptcy Code generally authorizes case management.

¹⁶⁵ The standard reflects FED. R. CIV. P. 16(b)(4), which, as stated in note 164, does not directly apply to the case as a whole, but also is not expressly prohibited. Later in the Detroit bankruptcy, the standard for deferral requests increased to "extraordinary cause." Fifth Amended Order Establishing Procedures, Deadlines, and Hearing Dates Relating to the Debtor's Plan of Adjustment at 4, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 9, 2014), ECF No. 5259.

¹⁶⁶ Compare Resnik, *Managerial Judges*, supra note 21, at 378 (noting how courts get information much earlier through case management).

¹⁶⁷ The lead mediator, Chief Judge Rosen, wished the case had wrapped up in just a year. Christine Ferretti & Chad Livengood, *Rhodes: Pension Plans Too Costly for Cities*, DETROIT NEWS, Feb. 25, 2015 ("I thought it would have had a nice symmetry to it because of the one-year anniversary"); Nathan Bomey, *Kevin Orr defends Pension Moves in Detroit Bankruptcy*, DETROIT FREE PRESS, Feb. 25, 2015 (same).

¹⁶⁸ For example, creditors and insurers got bogged down in debating the details of the city's proposed notice to creditors of the deadline to file claims – a quite important notice. Perhaps sensing a risk that these debates would postpone the finalization of the notice and circulation to all claim holders, the court established set a process for finalizing the remaining details, noting, "I don't want this held up. Do you hear me?" Hearing Re. Motion of Debtor at 49, In re City of Detroit, No. 13-53846, (Bankr. E.D. Mich. Nov. 14, 2013), ECF No. 1771.

¹⁶⁹ Transcript of In Re: Trial Re: Objections to Chapter 9 Plan at 10, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 3, 2014), ECF No. 7894 (regarding dispute between the city and MIDD, court stating, "Well, if I can speak bluntly here.... This \$26,000,000 claim ought to be settled"); Transcript of In re: Continued Trial Re: Objections to Chapter 9 Plan at 3-4, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 20, 2014), ECF No. 8031 (regarding matter involving UAW and treatment of approximately 330 library employees, court saying, "I don't want an explanation, I want you to resolve it.... I want you to resolve it now, go resolve it.... Go resolve it"). See also Transcript of In re: Trial at 172, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 3, 2014), ECF No. 7345 (telling Syncora's lawyer that "I want a percentage and I want it now" of the amount Syncora would have to be paid for Syncora to agree the plan is confirmable).

acceptable to them, and the lawyers generally agreed. This approach diverged both from the court's handling of a very large chapter 11,¹⁷⁰ as well as another judge's handling of a contemporaneous chapter 9 case.¹⁷¹ The judge also shaped the language of the courtroom. For example, he sometimes asked lawyers to refrain from using violent analogies and shorthand expressions, such "death spiral," or "drop dead" clauses or deadlines.¹⁷² The court originally had proposed that the federal court continue to have a role in monitoring the restructuring even after a restructuring plan went into effect,¹⁷³ although that idea was dropped once it was clear that the State of Michigan would appoint an oversight commission.¹⁷⁴

Judge Rhodes creatively managed portions of the case otherwise difficult to reach, especially in light of section 904's proscriptions. For example, after the city declined the court's suggestion to establish a tort claimant committee but had not

¹⁷⁰ In *Collins & Aikman*, the debtor filed its own detailed agendas for the order of matters at hearings. Notice of Agenda Matters Scheduled for First Day Hearing on May 17, 2005 (All First Day Motions and Applications to Employ), In re Collins & Aikman Corp., No. 05-55927 (Bankr. E.D. Mich. May 17, 2005), ECF No. 20.

¹⁷¹ In *Jefferson County*, the debtor filed detailed agendas for hearings that included the order of agenda items. Jefferson County's Agenda for Hearing Scheduled for May 9, 2013, In re Jefferson Co., No. 11-05736 (Bankr. N.D. Ala. May 7, 2013), ECF No. 1766; Jefferson County's Agenda for Hearing Scheduled for November 15, 2012, In re Jefferson Co., No. 11-05736 (Bankr. N.D. Ala. Nov. 13, 2012), ECF No. 1420; Jefferson County's Amended Agenda for Hearing Scheduled for November 15, 2012, No. 11-05736 (Bankr. N.D. Ala. Nov. 14, 2012), ECF No. 1423; Jefferson County's Agenda for Hearing Scheduled for April 16, 2012 at 9:00AM, In re Jefferson Co., No. 11-05736 (Bankr. N.D. Ala. Apr. 12, 2012), ECF No. 0905; Jefferson County's Agenda for Hearing Scheduled for November 21, 2011 at 8:00AM, In re Jefferson Co., No. 11-05736 (Bankr. N.D. Ala. Nov. 17, 2011), ECF No. 0231.

¹⁷² Transcript on Trial Re: Objections to Chapter 9 Plan at 129, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 2, 2014), ECF No. 7878 (asking lawyers to substitute another term for "death spiral"); Status Conference, August 12, 2014, approx. 8:01 into conference (telling lawyer that "drop dead" phraseology is not used in this court).

¹⁷³ Transcript on Hearing Re Wayne County's Motion for ... Appointment of a Facilitative Mediator at 182, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Apr. 17, 2014), ECF No. 4209 ("we have to think about what the appropriate role is for the Bankruptcy Court to monitor implementation of the plan post-confirmation assuming there is an order of confirmation").

¹⁷⁴ Transcript, *supra* note 172, at 148-50 (emergency manager testifying why monitor was eliminated from earlier version of plan).

yet made public an alternative plan for managing tort actions,¹⁷⁵ Judge Rhodes used a request to lift the automatic stay – a key element of chapter 9 protection of the debtor – to achieve his broader oversight objective, illustrating that a court need not enter the kind of order identified in section 904 to make a debtor act.

The movant, Deborah Ryan, had asked the bankruptcy court to lift the stay so she could continue her constitutional tort litigation in federal district court.¹⁷⁶ The litigation stemmed from a tragic set of facts: Ryan’s son-in-law had killed her daughter and then himself, both Detroit police officers. The city defended against the motion by arguing that the suit would be too distracting for lawyers busy with the restructuring. Surprised by, and perhaps dubious of, the city’s assertion that the same lawyers worked on constitutional tort actions and financial restructuring,¹⁷⁷ Judge Rhodes called for an evidentiary hearing to examine the workload of the city’s in-house lawyers.¹⁷⁸ Detroit called as its witness the city’s deputy corporation counsel.¹⁷⁹ Ryan’s lawyer cross-examined. Just when the lawyers likely thought the hearing was over, Judge Rhodes called a witness of his own.¹⁸⁰ That witness was Michael Muller, one of the city’s in-house lawyers,

¹⁷⁵ Transcript of Hearing Re. Status Conference, *supra* note 130, at 117 (court noting that a flood of motions for relief from stay is the “last thing any of us wants,” and suggesting a tort claimant committee); Transcript of Hearing Regarding Amended Motion of Creditor Ryan at 16, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 2, 2013), ECF No. 1118 (re-raising question of tort claims: “what’s the plan?”).

¹⁷⁶ Motion of Creditor Deborah Ryan, An Interested Party, For Relief from This Court’s Order Staying Proceedings, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 10, 2013), ECF No. 0800 (seeking to lift the stay “for cause”).

¹⁷⁷ Transcript of Hearing Regarding Amended Motion of Creditor Deborah Ryan at 13-14, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 2, 2013), ECF No. 1118.

¹⁷⁸ Order Setting Evidentiary Hearing Regarding Amended Motion of Creditor Deborah Ryan for Relief from this Court’s Order Staying Proceedings, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 2, 2013) (“The Court concludes that the record is not adequate with regard to the potential prejudice to the City if the motion is granted”).

¹⁷⁹ Evidentiary Hearing Regarding Amended Motion of Creditor Deborah Ryan at 62-66, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 8, 2013), ECF No. 1177.

¹⁸⁰ A judge calling his or own witness is rare but authorized under Federal Rule of Evidence 614. FED. R. EV. 614; WEINSTEIN’S FEDERAL EVIDENCE § 614.02[1] (2013)(describing practice as “particularly desirable in bench trials or when the interest of others than the immediate parties may be at stake, such as in class actions, or matters involving public policy”). Discussion of this rule in bankruptcy court opinions is infrequent. *Northeast Alliance Fed. Credit Union v. Garcia*,

who had been identified as present in the courtroom earlier that day.¹⁸¹ Muller was responsible for the city's defense to Ryan's lawsuit. When Judge Rhodes asked Muller what he was doing with his time,¹⁸² the latter's answer boiled down to "not much."¹⁸³

Judge Rhodes ruled he would lift the stay to allow Ryan to proceed in its lawsuit against Detroit if Detroit failed to make substantial progress on a comprehensive plan for all tort claims in thirty-five days.¹⁸⁴ Strictly speaking, the court did not enter an order requiring the city to develop a plan. But if the city did nothing, and the stay was lifted, the city would have to contend not only with the Ryan litigation, but with requests from hundreds of other plaintiffs.¹⁸⁵ Right on cue, Detroit filed its tort plan.¹⁸⁶

As this example suggests, the court was not opposed to using inquisitorial techniques (calling one's own witness) to keep the case moving and under control. Judge Rhodes used another inquisitorial technique (a court-appointed

260 B.R. 622, 628-30 (Bankr. D. Conn. 2011)(court calling debtors' former lawyer regarding omissions on bankruptcy schedules); *In re Michelson*, 141 B.R. 715, 722 (Bankr. E.D. Cal. 1992) (discussing right of judge to call own witness but not doing so).

¹⁸¹ Evidentiary Hearing, *supra* note 179, at 47 (court indicating that he would like to call Muller and beginning direct examination).

¹⁸² *Id.* at 49 ("So I feel compelled to ask you how are you spending your time these days?").

¹⁸³ *Id.* Although the city's in-house legal department apparently been preparing a plan, Muller did not so indicate.

¹⁸⁴ Evidentiary Hearing, *supra* note 179, at 63-64. An extension was possible but the standard for obtaining one was high. *Id.* at 64. The court left it to the discretion of the city to develop a process and reminded the city of the possibility of a tort claims committee. *Id.* at 65.

¹⁸⁵ Understanding the dynamics, Ryan's lawyer told the press that the court "basically used our motion as a vehicle to push the city a bit harder to come up with a [tort claimant] plan and liquidate these outstanding claims against the city." Tresa Baldas, *Detroit Bankruptcy Judge Gives City 35 Days to Develop Plan to Clear Lawsuits*, DETROIT FREE PRESS, Oct 8, 2013.

¹⁸⁶ Motion of Debtor, Pursuant to Sections 105 and 502 of the Bankruptcy Code, for Entry of an Order Approving Alternative Dispute Resolution Procedures to Promote the Liquidation of Certain Prepetition Claims, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Nov. 12, 2013), ECF No. 1665 (setting forth claim exchange procedure, plus arbitration). After filing its tort claimant plan, the city agreed to let Ryan proceed in district court. Stipulation for an Order Resolving Motion of Creditor Deborah Ryan, An Instant Party, For Relief from this Court's Order Staying Proceedings, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Jan. 27, 2014), ECF No. 2568. But the dispute had served its function for the court.

expert) to illustrate and fulfill his intention to exercise an independent duty to evaluate the feasibility of Detroit's ultimate restructuring plan. His reasoning:

The Court will not permit the confirmation of the city's plan to be another bad deal like all the previous ones the city entered into with which we are now all too familiar...¹⁸⁷

Now is not the time for defiant swagger or for dismissive pound-the-table, take-it-or-leave-it proposals that are nothing but a one-way ticket to Chapter 18...If the plan... promises more to creditors than the city can reasonably be expected to pay, it will fail, and history will judge each and every one of us accordingly.¹⁸⁸

The court directed this message not only to financial creditors, but also retiree representatives.¹⁸⁹ At a later hearing, in April 2014, the court explained that creditors were unlikely to provide an adequate adversarial presentation on the issue of plan feasibility, justifying the appointment of an expert for the court under Federal Rule of Evidence 706.¹⁹⁰ The judge conducted the direct examination of his expert himself.¹⁹¹

¹⁸⁷ Transcript on Motion of Creditors for Entry of an Order Pursuant to Section 105(a) of the Bankruptcy Code.... to Establish a Benchmark Valuation at 38, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan. 22, 2014), ECF No. 2562.

¹⁸⁸ *Id.* at 39-40.

¹⁸⁹ *Id.* at 38 (feasibility concerns are "why the Court ordered the members of the Retiree Committee and its advisors here this afternoon").

¹⁹⁰ Transcript of Hearing Regarding Notice of Presentment of Order at 17, In re City of Detroit, 13-53846 (Bankr. E.D. Mich. April 2, 2014), ECF No. 3817; FED. R. EV. 706, Advisory Committee Notes on Proposed Rules (1975) ("the availability of the procedure in itself decreases the need for resorting to it" due to its "sobering effect on other witnesses and parties"); Erichson, *supra* note 103, at 1987-88 (discussing relative infrequency of court-appointed experts but use increasing in mass tort cases after Supreme Court's *Daubert* decision). See also Reporter's Daily Transcript of Proceedings at 177, In re City of Stockton, No. 12-32118-C-9 (Bankr. E.D. Cal. May 13, 2014) ("When I decide...whether to confirm the plan, I need to think about what are the alternatives. Otherwise, I'd just mindlessly be rubber-stamping a plan. You might as well hire a potted palm to preside in the courtroom."); Jacoby, *What Should Judges Do in Chapter 11?*, *supra* note 23 (discussing divergent views of courts on whether they have a duty to scrutinize feasibility of plans and how that duty is fulfilled).

¹⁹¹ Transcript of Status Conference at 12, In re City of Detroit, No. 13-53846 (Bankr. E.D. Aug. 6, 2014), ECF No. 6585 (asking for objections to his conducting the direct examination, none heard); Transcript of Continued Trial at 137-186, In re City of Detroit, No. 13-53846 (Bankr. E.D. Sept. 15, 2014), ECF No. 7617 (court leading *Daubert* examination of Kopacz); Transcript of In Re: Continued Trial at 8-84, In re City of Detroit, No. 13-53846 (E.D. Mich. Oct. 22, 2014), ECF No. 8082 (court leading direct examination of Kopacz).

More generally, Judge Rhodes took an active, affirmative questioning role at status conferences, oral arguments, and hearings in ways that could help the court gather and clarify information as well as convey it. The August 21, 2013 hearings in Detroit's bankruptcy, early in the case, offer examples that reflect, and perhaps set, the tone and expectations for future hearings.

In the morning session, creditors briefly complained that access to Detroit's financial data room had been conditioned on nondisclosure agreements and, in some instances, legal releases.¹⁹² When Detroit started to respond to the creditors' complaint with a reference to "sensitive financial documents," the judge asked Detroit's lawyers why every piece of paper that is not privileged shouldn't be discoverable in a bankruptcy case.¹⁹³ When asked for examples of what the city was calling "competitively sensitive," the lawyer identified cash projections.¹⁹⁴ When the court asked the lawyer why cash projections would be sensitive, why it wouldn't be in the city's best interest to share them with the public, and what the harm to the city would be, the lawyer did not respond adequately for the court.¹⁹⁵ Ultimately, the judge paused the inquiry and instructed the lawyer to confer with his colleagues and his client and return with a more specific answer at 3pm that day.¹⁹⁶ When the lawyer returned that afternoon, he reported that Detroit would lift the restrictions to an even greater extent than creditors had requested.¹⁹⁷

¹⁹² Transcript of Hearing Regarding Emergency Motion for Clarification at 44-45, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 21, 2013) ECF No. 0685.

¹⁹³ *Id.* at 52 ("Give me an example of a document that parties can see, but you don't want disseminated, whatever that means").

¹⁹⁴ *Id.* ("Your Honor, there are cash projections relating to the city's future. There are expert reports").

¹⁹⁵ *Id.* at 52-53.

¹⁹⁶ *Id.* at 53-54 ("This is bankruptcy. What's not relevant? All right. I'm going to -- I'm going to just pause this inquiry now because I sense the need for it").

¹⁹⁷ *Id.* at 56-57; Order Granting Motion of Debtor for a Protective Order, In re City of Detroit, No. 13-53486 (Bankr. E.D. Mich. Aug. 29, 2013), ECF No. 0685 ("[a]ll interested parties shall have unrestricted access to the data room").

An afternoon hearing on August 21, 2013, scheduled that morning at the court's encouragement due to the issue's time sensitivity,¹⁹⁸ focused on Detroit's rights in casino revenues. Judge Rhodes asked detailed questions throughout the movant's presentation, exhausting the bankruptcy knowledge of the creditor's lawyer by that lawyer's own admission.¹⁹⁹ Although the city's lawyer was capable of rebutting the creditor's arguments, the court did much of that work itself.²⁰⁰ Again, intensive court questioning, illustrating active engagement and the two-way flow of information, was typical throughout the case.

The court's involvement varied during the big evidentiary trials, sometimes going beyond the task of resolving evidentiary disputes,²⁰¹ or asking clarifying questions. During the plan confirmation trial, the judge asked detailed substantive questions to a variety of witnesses, including City Council President

¹⁹⁸ Transcript of Hearing Regarding Emergency Motion, *supra* note 192, at 33-34.

¹⁹⁹ *Id.* at 76-93 (back and forth between court and Syncora's lawyer); *id.* at 92-93 ("Your Honor, I have said my piece. I think we - may have exhausted my knowledge of - bankruptcy law as well"); *id.* at 105 ("Just to the extent there was any failing in my presentation today to respond to some of your questions, I wanted you to know that we would be happy to submit additional pleadings...there were some questions you posed that if you'd like more, we'd be happy to prepare").

²⁰⁰ The response from the city's lawyer can be found *id.* at 96-103, with comparatively fewer questions from the court. The city prevailed. Excerpt of Hearing Re. Opinion Re. Stay Issue, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 28, 2013), ECF No. 0692; Order Regarding Casino Revenues and Automatic Stay, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 28, 2013), ECF No. 0670. The city also won on appeal after the Sixth Circuit directed the district judge to hear and decide it. In re Syncora Guarantee Inc., 14-1719, 2014 WL 2959242 (6th Cir. July 2, 2014). Judge Friedman affirmed the bankruptcy court's order on July 11, 2014.

²⁰¹ As just one example illustrating the frequent resolution of evidentiary disputes: Transcript of Re: Evidentiary Trial, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 24, 2013), ECF No. 1490. The court sometimes raised evidentiary objections *sua sponte*. Transcript of Continued Trial Re: Confirmation of Chapter 9 Plan at 247-51, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 16, 2014) (court and Wagner debating at some length the relevance of Wagner's questions to Kim Nicholl; no input from retiree committee lawyer or city). A bit later, as the court explains the problem with the answer the witness just gave, Wagner jokes that he will let the court finish the cross-examination. *Id.* at 261. See also Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 57-58 (court raising and sustaining its own objection).

Brenda Jones,²⁰² Mayor Mike Duggan,²⁰³ Emergency Manager Kevyn Orr,²⁰⁴ Director/Chief Executive Officer of Detroit's water and sewerage department,²⁰⁵ Chief Operating Officer of the Detroit Institute of Arts,²⁰⁶ investment banker Ken Buckfire,²⁰⁷ Ernst and Young managing director Guarav Malhotra,²⁰⁸ Michael Plummer from ArtVest,²⁰⁹ and a water and sewer system consultant.²¹⁰ The court's questions to three witnesses about public pension practices and discount rates prompted witness re-examination by objecting creditors (who later settled).²¹¹

²⁰² Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 58-59 (court asking City Council President Brenda Jones whether she is committed to carrying out the plan and whether art in the DIA should be sold or preserved for the city).

²⁰³ Transcript of In re: Continued Trial at 144-149, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich Sept. 18, 2014), ECF No. 7634.

²⁰⁴ Transcript of In Re: Trial Re: Objections to Chapter 9 Plan, *supra* note 169, at 15-28; Trial Re. Objections to Chapter 9 Plan at 131-136, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich Oct 21 2014), ECF No. 8098.

²⁰⁵ Transcript of Trial Re: Objections to Chapter 9 Plan at 127-138, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 17, 2014), ECF No. 7638. The questions included open-ended queries about whether the creation of the regional water system would be a positive development, *id.* at 130-31, 137, and what challenges she foresaw in the next ten years. *Id.* at 131. Judge Rhodes also asked, "I'm going to speak perhaps a little more bluntly... Is it fair to say, in your estimation, that certain customers, communities, and others carried a certain amount of distrust or lack of confidence or skepticism about the department's ability to carry out its mission in the most efficient way?" *Id.* at 135.

²⁰⁶ Transcript of Continued Trial Re: Objections to Chapter 9 Plan at 156, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 18, 2014), ECF No. 7634.

²⁰⁷ Transcript of Trial Re: Objections to Chapter 9 Plan at 54-59, 79-80, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 30, 2014), ECF No. 7821; *id.* at 94 (asking witness to think during recess about advantages and disadvantages of deferring exit financing for six months or a year); *id.* at 115-17, 211-223 (asking, among other things, about cost associated with granting security interest in income tax revenues).

²⁰⁸ Transcript of Trial re: Objections to Chapter 9 Plan at 59, 69, 78-79, 80-85 (Bankr. E.D. Mich. Oct 21, 2014), ECF No. 8098.

²⁰⁹ Transcript of In re: Continued Trial at 64-66, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich Sept. 18, 2014), ECF No. 7634.

²¹⁰ Transcript of Trial Re: Objections to Chapter 9 Plan at 32-35, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 30, 2014), ECF No. 7821.

²¹¹ Transcript of Continued Trial Re: Confirmation of Chapter 9 Plan at 50-57, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 16, 2014), ECF No. 7618 (testimony of Alan Perry in response to court questions); *id.* at 54 (court asking "[i]s the industry doing anything about re-examining its standard practices in - in setting investment return assumptions to deal with this very large as you characterized it, UAAL?"); *id.* at 56 ("Do you have an opinion on whether the 6.75% investment return assumption in this case is prudent?"); *id.* at 57 ("Are you telling me that given Detroit's insolvency your - your view might be that prudence would suggest an even lower rate?"); *id.* at 57-58 (objector re-cross examination); Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 234-37 (testimony of Cynthia Thomas in response to court

While Judge Rhodes often expected precise answers to his questions, he afforded witnesses latitude under some circumstances. The exchange with the DIA's Chief Operating Officer Annmarie Erickson offers an example.²¹² Clarifying that his use of the word "value" was to mean non-economic value, Judge Rhodes asked Erickson, "[w]hat is your opinion on what the value of the museum is to the 60,000 school children you said comes [sic.] there...,"²¹³ and then, "[w]hat is the value to the children of participating in the programming that the museum offers apart from just the opportunity to see the art?"²¹⁴ Erickson was able to talk generally about the importance of the museum for families with school age children,²¹⁵ for adults,²¹⁶ and to the city and region as a whole.²¹⁷ The court credited that testimony in its written decision confirming the plan.²¹⁸

The court's case management approach illustrates the extent to which the presiding judge was not a passive bystander waiting to be asked to get involved in the case. From the outset, it seems that Judge Rhodes was determined to set the pace of the case and prevent its derailment if at all possible. His oversight approach incorporated considerations other than a quick exit; to that end, he

questions); *id.* at 237 (objector redirect examination); Transcript of at 125-134, 136-38, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct 14, 2014), ECF No. 8004 (testimony of William Fornia in response to court questions); *id.* at 134-135 (objector redirect examination).

²¹² Transcript of Continued Trial Re: Objections to Chapter 9 Plan at 156-57, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 18, 2014), ECF No. 7634 (starting with disclosure that Erickson had shown Judge Rhodes the museum as part of the city tour, but they had not otherwise talked about the museum).

²¹³ *Id.* at 157. She gave a lengthy response, including anecdotes.

²¹⁴ *Id.* at 158.

²¹⁵ *Id.* at 159-160.

²¹⁶ *Id.* at 161.

²¹⁷ *Id.* at 161-164.

²¹⁸ Supplemental Opinion, *supra* note 1, at 106 ("[The court] also accepts the testimony of Ms. Erickson on the priceless value that the DIA and the art create for the City, the region and the state.... The evidence unequivocally establishes that the DIA stands at the center of the City as an invaluable beacon of culture, education for both children and adults, personal journey, creative outlet, family experience, worldwide visitor attraction, civic pride and energy, neighborhood and community cohesion, regional cooperation, social service, and economic development. Every great city in the world actively pursues these values. They are the values that Detroit must pursue to uplift, inspire and enrich its residents and its visitors").

demonstrated active substantive engagement on a regular basis throughout the life of the case.

C. Dealmaking

*I felt it was necessary to appoint the strongest possible mediator that I could. And I felt that Chief Judge Rosen had all of the necessary qualities. Weight of office. Weight of personality. Commitment to the city. Personal and professional contacts. Political contacts. He was the right person.*²¹⁹

Part of the second hearing in Detroit's bankruptcy was dedicated to considering the mediation process Judge Rhodes had proposed a few days after the case was filed.²²⁰ Litigation could be "bitter and expensive," he explained, while settlements could stabilize and strengthen long-term relationships.²²¹ His proposed order identified Chief Judge Rosen as his choice for lead mediator.²²² The arrangement is striking: a bankruptcy court is a unit of a district court, and a district court is generally the first court to hear an appeal from a bankruptcy court order. If a bankruptcy judge appoints his own chief district judge as mediator with expansive powers, third parties may perceive the mediator as having relatively unfettered authority, and may wonder about their odds in the appellate process. Arguably the bankruptcy judge would be delegating more

²¹⁹ Nathan Bomey, *Q&A: Detroit Bankruptcy Judge on Pensions, DIA, Fees*, DET. FREE PRESS, Feb. 20, 2015.

²²⁰ Transcript of Hearing Re. Status Conference, *supra* note 130, at 8.

²²¹ *Id.* at 44. That view was expressed throughout the case. *E.g.*, Order Granting the City's Motion to Vacate the Appointment of the Official Committee of Unsecured Creditors at 11, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Feb. 28, 2014), ECF No. 2626 ("As this Court has emphasized, litigation is costly and time-consuming, and most often its results are that the winner takes all and the loser gets nothing").

²²² Order Establishing Amended Initial Status Conference Agenda at 4, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., July 23, 2013), ECF No. 0129 (citing 11 U.S.C. § 105, stating "[I]t is necessary and appropriate to order the parties to engage in the facilitative mediation of any matters that the Court refers in this case"); Order Regarding Comment Period on Revised Mediation Order, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Aug. 2, 2013), ECF No. 0278 (amended proposed order with request for comments). The amended version refers to consultation with the parties before ordering mediation of particular matters. As noted in note 230, that consultation process, if it occurred, is not apparent from the public record.

power to the chief district judge than the bankruptcy judge could have exercised himself.²²³

Judge Rhodes presented mediation to the parties in the form of a proposed order, not a done deal. His order required, however, that party comments about the order be delivered to the court in sealed envelopes rather than filed on the public docket.²²⁴ In open court, a lawyer for the city expressed support for mediation and the court's order exactly as written.²²⁵ A lawyer for a union also supported mediation to the extent it was one of several tracks on which the union could protect its constituents.²²⁶ The Detroit Retirement Systems' lawyer suggested unease, characterizing the proposal as premature.²²⁷ In response, Judge Rhodes emphasized the facilitative nature of the process; nothing, and no one, would be

²²³ Owen M. Fiss, *The Bureaucratization of the Judiciary*, 92 YALE L. J. 1442, 1446-47 (1983) (calling bankruptcy judges "subjudges," falling "somewhere between judges and law clerks"); Church, *supra* note 13 (business school professor stating that Chief Judge Rosen was "a second judge who can do things the first judge can't").

²²⁴ Order Regarding Comment Period at 1, *supra* note 222 ("Interested parties may submit comments regarding the attached Proposed Revised Mediation Order as well as comments regarding a proposed Mediator directly to Judge Rhodes in care of the Bankruptcy Clerk's office by August 9, 2013. Comments should be sealed in an envelope and labeled 'CONFIDENTIAL MEDIATION ORDER COMMENTS.' Comments should not be filed through CM/ECF"); Transcript of Hearing Regarding Status Conference at 45-46, *supra* note 220 ("I do want to solicit the comments of others regarding the concept of mediation and the particulars of the order. It is probably not, however, appropriate to seek your comments in this forum regarding the proposed mediator, and so I am going to ask you if you have any comments, either - on either side of the question of the proposed mediator, I'm going to give you a seven-day opportunity to submit to my chambers sealed and confidentially any such comments"). For implications of this protocol, including the ability to appeal the mediation order, see Jacoby & Remus, *supra* note 34.

²²⁵ Transcript of Hearing Regarding Status Conference at 45, *supra* note 220 ("Obviously you articulated better than I could possibly why we support mediation. We want resolution. We don't want protracted litigation. We want to move swiftly. Time is our enemy, as I said.... With respect to the order, which is your second question, we have no desire to change any of the language presented in the order as you've stated it.").

²²⁶ *Id.* at 46-47 (also expressing hope that the mediator would be a "full-service mediator that can help us with process issues as well as substance issues").

²²⁷ *Id.* at 51-52 (asking that parties have the chance to engage in negotiations to narrow the issues and gather more information before being sent to mediation.... "We want to caution against expediency merely for the sake of expediency. We all have a sense of urgency. How could we not? But there is proceeding with all due dispatch, and then there's proceeding in haste and endangering parties' due process rights").

coerced, he said.²²⁸ Also, Judge Rhodes posited that the mediator rather than the presiding judge would be better situated to handle some of the Detroit Retirement Systems' concerns.²²⁹ After the expiration of a comment period, Judge Rhodes named Chief Judge Rosen the lead facilitative mediator and authorized him to "enter any order necessary for the facilitation of mediation proceedings" on major issues, and to appoint other mediators at his discretion.²³⁰ The order also rendered privileged and confidential "all proceedings, discussions, negotiation, and writings incident to mediation."²³¹

The first mediation occurred on September 17, 2013.²³² Speaking in his courtroom in a session open to reporters, Chief Judge Rosen reiterated the virtues of settlement: "years of litigation, disputing issues in the courts, is horrendous."²³³ At that introductory event, Chief Judge Rosen also shared that he and other mediators he had appointed had taken a bus tour of the "good, the bad, and the ugly" of the city.²³⁴

²²⁸ *Id.* at 53-54 ("please understand what I'm referring to here and what I envision here is entirely facilitative mediation. There's nothing that this mediator will have the authority to do in terms of compelling any particular outcome..... The ultimate deliverable is a plan, assuming we get past eligibility.... And in that regard, there may be other disputes that should be better referred to a mediation panel than to the mediator who is working on debt adjustment, and I think we want to keep that option open also").

²²⁹ *Id.* at 53.

²³⁰ Mediation Order, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Aug. 13, 2013), ECF No. 0322. The order refers to consultation with the parties before matters are sent to mediation, but, for nearly all mediation orders that followed, there is no evidence in the public record that such consultation occurred.

²³¹ *Id.* at 1 clause 4.

²³² First Order Referring Matters to Facilitative Mediation, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 16, 2013), ECF No. 0333; *see also* 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 (Bankr. E.D. Mich. Aug. 23, 2013), ECF No. 0593.

²³³ Ed White, Associated Press, *Judge Acting as Mediator in Detroit Bankruptcy: Deals are Better than 'Horrendous' Litigation*, STAR TRIBUNE (Sept. 17, 2013); Robert Snell, *Mediator Tells City Creditors: "Open Your Minds"; Team of Judges Will Try to Settle Disputes Over Debt Restructuring*, THE DETROIT NEWS, Sept. 18, 2013, at A1. Chief Judge Rosen cited perils of litigation at other junctures. Howes, Livengood & Shepardson, *supra* note 13, at Ch. 4: The Umpires Arrive (Chief Judge Rosen warned Grand Bargain funders that litigation would be devastating to the city).

²³⁴ White, *supra* note 233.

By about two months into the bankruptcy, dozens of creditor groups or representatives, including the State of Michigan and Michigan's Attorney General, had been sent to mediation on almost everything of significance in the case.²³⁵ The numbers of parties in mediation or alternative dispute resolution grew with hundreds of tort claimants,²³⁶ counties negotiating a regional water authority,²³⁷ and parties seeking to enjoin residential water shutoffs.²³⁸ Mediation would continue throughout the case and long after the court confirmed the city's plan of adjustment.²³⁹ When Detroit's emergency manager was asked at the plan confirmation hearing which issues the court had sent to mediation, he replied, "[a]ll of them."²⁴⁰ The mediation process may even have re-incorporated the presiding judge. For example, the press reported that a district judge mediator (appointed by Chief Judge Rosen for the mediation team) asked Judge Rhodes to meet with union representatives to explain bankruptcy law and their rights.²⁴¹

²³⁵ First Order Referring Matters to Facilitative Mediation, *supra* note 232; Second Order Referring Matters to Facilitative Mediation, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 22, 2013), ECF No. 0562; Order to Certain Parties, *supra* note 232; Third Order Referring Matters to Facilitative Mediation, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 7, 2013), ECF No. 1101 (listing 20 unions whose disputes with Detroit would be referred to Chief Judge Rosen for facilitative mediation).

²³⁶ Order, Pursuant to Sections 105 and 502 of the Bankruptcy Code, Approving Alternative Dispute Resolution Procedures to Promote the Liquidation of Certain Prepetition Claims, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 24, 2013), ECF No. 2302; Alternative Dispute Resolution Notice, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 30, 2014), ECF No. 5681 (directing recipient's tort claim to be submitted to ADR, dividing costs of the facilitator).

²³⁷ Order of Referral to Mediation, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Apr. 17, 2014), ECF No. 4156 (entering an order broader than Wayne County had requested).

²³⁸ Mediation Order, Lyda v. City of Detroit, No. 14-04732 (Bankr. E.D. Mich. Sept. 2, 2014), ECF No. 34 (referring matter to Chief Bankruptcy Judge Shefferly rather than to Chief Judge Rosen's mediation team).

²³⁹ After ruling that plan confirmation required a review of all professional fees, even if already paid, Judge Rhodes immediately sent that process to Chief Judge Rosen. Oral Opinion on the Record at 27, *supra* note 5. Judge Rhodes also sent to mediation post-bankruptcy matters relating to the establishment of regional water authority. Mediation Order, In re City of Detroit, No. 14-53846 (Bankr. E.D. Mich. Nov. 26, 2014), ECF No. 8468; Mediation Confidentiality Order, In re City of Detroit, No. 14-53846 (Bankr. E.D. Mich. Feb. 6, 2015), ECF No. 9176 (lease negotiations relating to water authority).

²⁴⁰ Transcript of In re Trial: Objections to Chapter 9 Plan at 169, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 1, 2014), ECF No. 7850.

²⁴¹ Howes et al., *supra* note 13, The Umpires Arrive Chapter ("Could she invite Judge Rhodes to meet privately with union leaders to provide a primer on Chapter 9 and his powers, answering questions and concerns? The city agreed, mindful that continued delay benefited no one. On April 16, Rhodes walked into the judges conference room on the seventh floor. For two hours,

Chief Judge Rosen regularly entered orders on the bankruptcy court docket. Some memorialized agreements between parties or sent tort claimants into a separate arbitration process.²⁴² Most orders directed parties to attend mediation sessions,²⁴³ including some calling for continual attendance until released by the mediator.²⁴⁴ In a deposition, Detroit's emergency manager reported that Chief Judge Rosen told him that he would hold an interest-rate-swap counterparty in contempt if it did not accept a particular settlement.²⁴⁵

Chief Judge Rosen seems to have initiated and maintained contact with individual parties and political actors outside of the official mediation sessions. Several news stories reported that Chief Judge Rosen called the Emergency Manager over a weekend to urge him to cancel a planned pension freeze that was rattling the parties.²⁴⁶ Later in the year, Judge Rosen quipped at a press conference that he and Detroit's emergency manager probably talk to each other

Roberts confirmed, he described Chapter 9, quashing any notion that he could excise individual labor contracts from a restructuring plan he might otherwise confirm. It helped").

²⁴² E.g., Order Regarding Provision of Actuarial Data, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Apr. 11, 2014), ECF No. 3959 (setting forth terms by which Retiree Committee's actuary will provide data to Detroit Retirement Systems).

²⁴³ Jacoby & Remus, *supra* note 34, contains a comprehensive list.

²⁴⁴ Order for Continuing Mediation, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 11, 2014), ECF No. 7419 (ordering mediation for 11 parties "continuing day-to-day thereafter as deemed necessary, until released by the mediators").

²⁴⁵ Deposition of Emergency Manager Kevyn Orr at 41, Dec. 31, 2013 ("We again asked if it was possible to get to 155 [million], the mediators told us, 'No, 165 is the number. That's the best number you're going to get today and I'm going to hold them in contempt if they don't agree to it.'"), available at

<https://www.detroitmi.gov/Portals/0/docs/EM/Reports/OrrDeposition123113.pdf>.

²⁴⁶ Matt Helms, *Orr issues stay on freezing pensions for Detroit workers as mediation continues*, DETROIT FREE PRESS, Jan 6, 2014 (quoting spokesperson for Emergency Manager Kevyn Orr as saying "Judge Rosen asked Kevyn [Orr] – I think they had a long conversation over the weekend – and Rosen asked if he would consider staying it,"); Christine Ferretti, *Pension officials frustrated with lack of Communication from Detroit EM over Freeze*, THE DETROIT NEWS, Jan 8, 2014 ("Chief U.S. District Court Judge Gerald Rosen, who is mediating Detroit bankruptcy talks, urged Orr over the weekend to halt the benefit freeze to allow for a possible debt-cutting deal with pensioners, Orr spokesman ... has said").

more than to their wives.²⁴⁷ Chief Judge Rosen actively solicited donations from private foundations, not otherwise parties to the bankruptcy, for what became the Grand Bargain.²⁴⁸ In other contexts, such activity would fall to officials from other branches of government, and, even then, be potentially controversial.²⁴⁹ Chief Judge Rosen reached out to the Michigan Governor and members of the state legislature about potential state financial contributions.²⁵⁰ These contributions materialized after legislative sessions in Lansing for which Chief Judge Rosen was on hand.²⁵¹ He held meetings in his chambers with Michigan House and Senate majority leaders.²⁵² When Judge Rhodes read into the record his decision confirming Detroit's plan of adjustment, Chief Judge Rosen hosted Michigan Governor Snyder and other politicians in his chambers to listen.²⁵³ In

²⁴⁷ Press Conference, June 3, 2014 (approximately 10:30 into video), available at http://www.mlive.com/lansing-news/index.ssf/2014/06/snyder_hails_historic_day_for.html.

²⁴⁸ John Gallagher & Mark Stryker, *Foundation leaders, Detroit bankruptcy mediator meet behind closed doors*, DETROIT FREE PRESS, Nov. 6, 2013; Mark Stryker & John Gallagher, *DIA joins deal in works with mediators that would protect art, pensions in Detroit Bankruptcy*, DETROIT FREE PRESS, Dec. 11, 2013 ("DIA leaders said they had pledged at a Tuesday meeting with mediators, including U.S. Chief Judge Gerald Rosen..., to help refine the proposal that Rosen has been pushing behind closed doors since November.... Rosen has been lobbying leaders of at least 10 foundations"); Bomey, Gallagher, & Stryker, *supra* note 5, at Chapter 11: After Tough Persuasion, Lansing Commits to Grand Bargain; Howes, Livengood & Shepardson, *supra* note 233, at Ch. 4 (foundation leader recalling Chief Judge Rosen telling her, "I need a lot of money fast").

²⁴⁹ Kenneth Lovett, *Ravitch Hits Up Foundations for Thousands in Grants to Pay Consultants to Fix N.Y.'s Fiscal Mess*, NEW YORK DAILY NEWS, Dec. 15, 2009 (reporting on Lieutenant Governor Richard Ravitch raising money from foundations to hire the Rockefeller Institute); Kenneth Lovett, *Ethics Board Head Urges Patterson to Set Rules on Lt. Gov. Richard Ravitch's Fundraising For Staff*, NEW YORK DAILY NEWS, Dec. 23, 2009.

²⁵⁰ Howes, Livengood & Shepardson, *supra* note 233, at Introduction ("I think we will get \$350 [million] and I think you should match it," Chief Judge Rosen said to Governor Snyder); Steven Church & Chris Christoff, *Michigan Republicans in Talks with Detroit Mediator*, BLOOMBERG NEWS, Jan. 16, 2013.

²⁵¹ Kathleen Gray, *Michigan Senate Oks Historic \$195M Detroit Aid Package; Snyder's Signature Next*, DETROIT NEWS, June 4, 2014 ("U.S. District Judge Gerald Rosen, the chief federal negotiator on the bankruptcy case, met with senators Tuesday morning and stayed to witness the bills passage"); Press Conference Jun 9, 2014 ("Big Three" Automaker contribution, transcript on file with author) (Rosen: "I was up there as I think some of you know last week when the legislation was passed and it was just remarkable..."); Church, *supra* note 13 ("Rosen also met with Michigan lawmakers about the deal. The agreement required the Legislature's approval because the state was required to contribute \$195 million").

²⁵² Howes, Livengood & Shepardson, *supra* note 13, at Chapter 7: Pensions are Fair Game.

²⁵³ Bomey, Gallagher, & Stryker, *supra* note 5 ("Cheers and applause broke out down the hallway in Rosen's stately chambers, where he and a large reception of dignitaries, including Gov. Snyder, Sen. Majority Leader Richardville and others watched the ruling on closed circuit TV").

fall 2014, local reporters spotted Chief Judge Rosen heading into a closed-door Detroit City Council meeting, apparently to advocate for a continued role for the emergency manager.²⁵⁴

The lead mediator and mediation activity also played distinctive roles in the appellate process. When objectors sought expedited review directly from the Sixth Circuit of the bankruptcy court order finding Detroit eligible for chapter 9, Judge Rhodes asked the Circuit to confer with Chief Judge Rosen on the timing of the appeal: “the Court remains convinced that the interests of the City, its residents and its creditors are better served by adjusting the pace of the legal process, including the appeals, to meet the needs of the mediation process.”²⁵⁵ The assigned panel of Sixth Circuit judges agreed to do just that.²⁵⁶ The concept seems to be to suspend significant appeals while the bankruptcy and mediation processes forge ahead to resolve all matters and render the appeals moot. The acts of the district court, as the intermediate level of appeals from other Detroit bankruptcy court orders, are consistent with that view. The district judge who received appeals from the Detroit bankruptcy had stayed them *sua sponte* pending the Sixth Circuit’s review of Detroit’s eligibility on direct appeal.²⁵⁷ Eventually, a particularly bold creditor (successfully) filed a writ of mandamus

²⁵⁴ Joe Guillen, *Duggan, Council Meet on Orr’s Fate as Emergency Manager*, DETROIT FREE PRESS, Sept. 23, 2014 (“Rosen... seen walking into the Detroit City Council Chambers, where a closed council session started at 2pm. Rosen oversees private mediation talks in the city’s bankruptcy case. He helped fashion the so-called ‘grand bargain.’ His involvement in this afternoon’s private meeting makes clear the interconnection between the city’s ongoing bankruptcy case and the talks to oust Orr”); Darren A. Nichols, *City Leaders Meet to Discuss Orr’s Future in Detroit*, DETROIT NEWS, Sept. 25, 2014 (referring to Chief Judge Rosen’s presence).

²⁵⁵ *In re City of Detroit*, 504 B.R. 191, 200 (Bankr. E.D. Mich. 2013) (“The Court recommends that similarly, the Court of Appeals. . . . consult with Chief Judge Rosen on whether expediting these appeals will facilitate or impede the mediation, and be guided accordingly”).

²⁵⁶ Letter from Deborah S. Hunt, Clerk to Counsel Re: City of Detroit Michigan, Petition for Permission to Appeal, City of Detroit, 13-116, 13-118, 14-101/102/103/104/105 (6th Cir. Feb. 7, 2014) (“I advise you that [the panel] will consult with the Honorable Gerald Rosen in his capacity as Judicial Mediator for the underlying bankruptcy”).

²⁵⁷ *In re Syncora Guarantee Inc.* 757 F.3d 511, 514-15 (6th Cir. 2014) (discussing how district court allowed appeal to languish from November 2013, when it was full briefed, until April 2014, when the district court formally suspended the appeal pending the eligibility determination).

to compel the district court to hear and decide an appeal.²⁵⁸ And, by the summer of 2014, the Sixth Circuit threatened to push forward with the eligibility appeal before plan confirmation.²⁵⁹ In any event, the strategy prevailed: virtually all appeals were dropped through settlements and confirmation of Detroit's plan of adjustment.

Although parties were barred from discussing negotiations by the mediation order's confidentiality clause, the lead mediator communicated with the media and public through several channels. Written statements from the "Detroit Bankruptcy Mediators" were issued through the district court's press officer to report on the state of negotiations, particularly any new big contributions or settlements.²⁶⁰ The final statement ended by stating, "[f]or us, it has been a labor of love for the City and its residents."²⁶¹ Another outlet was press conferences, at which Chief Judge Rosen appeared and spoke alongside the Governor, members of the state legislature, the emergency manager, Mayor Duggan, and others.²⁶²

²⁵⁸ *Id.* at 516 ("the prospect that a panel of this court may declare the city to be ineligible for the protections of Chapter 9 of the Bankruptcy Code is no reason to stay other appeals that present independent questions of law.... judicial resources are not so scarce as to justify the risks that arise from the stay.... We must intervene to protect our appellate jurisdiction and to ensure that the district court does not deprive Syncora of its statutory right to judicial review"); *id.* at 517 ("The question presented in Syncora's appeal ... is precisely the type of issue that should be reviewed before the bankruptcy court confirms the plan of adjustment"). A concurring opinion emphasized that "governing case law" necessitated the mandamus order. *Id.* at 517-18. The district court quickly affirmed the bankruptcy court's judgment in favor of the city, the parties argued the matter before the Sixth Circuit, but then settled all disputes and the Sixth Circuit did not rule.

²⁵⁹ Letter from Hon. Julia Smith Gibbons, *In re City of Detroit*, No. 14-1208 et al. (6th Cir. July 29, 2014) (expressing reservation about postponing oral argument, suggesting it might be difficult to reschedule and the court might have to decide the matter without oral argument or argument via telephone, but canvassing appellants to submit position on what to do with appeal by July 31, 2014, even though "panel does not consider further delay in rendering a decision an option at this time").

²⁶⁰ Jacoby & Remus, *supra* note 34, contains a list of press releases.

²⁶¹ Final Statement of the Detroit Bankruptcy Mediators (E.D. Mich. Dec. 11, 2014).

²⁶² Jacoby & Remus, *supra* note 34, contains more description and analysis of conferences in which Chief Judge Rosen participated, speeches, and interviews. At the June 3, 2014 press conference, after the state legislature had approved the Grand Bargain funding, Chief Judge Rosen recognized it was unusual for judges to meet with the media, but said he was making an exception because the matter was so important. Press Conference, *supra* note 247, at approximately 10:00 into video.

Judge Rhodes was not a rubber stamp of settlements reached in mediation in his absence.²⁶³ Indeed, the court rejected the first deal overseen and openly endorsed by Chief Judge Rosen as not meeting the legal standard for a settlement,²⁶⁴ a dynamic on which Chief Judge Rosen commented at a university speech thereafter,²⁶⁵ and was surely uncomfortable for the presiding judge.²⁶⁶ Nonetheless, at least based on the public record, the bankruptcy court's support of the mediation process overseen by Chief Judge Rosen could not have been stronger. After the court rejected the settlement mentioned above, the court sent the parties directly back to mediation.²⁶⁷ In a decision granting the city's request

²⁶³ Transcript at 4, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan. 22, 2014), ECF No. 2562 ("Well, in case you haven't noticed, I don't do faits accomplis"). As noted *supra* note 241, Judge Rhodes participated in some mediation activities. If he participated in the development of particular settlements, as opposed to serving an educational function, that of course would reduce the likelihood of rejecting those settlements as the presiding judge.

²⁶⁴ On December 24, Chief Judge Rosen announced that the parties had agreed on a new swap termination price. Chief Judge Rosen called the parties into a courtroom, where a court reporter transcribed the settlement. Transcript, Settlement Between Debtor and Swap Counter Parties, In re City of Detroit Michigan, 13-53846, at 10 (E.D. Mich. Dec. 24, 2013). Reporters were understandably unclear about the procedure, referring to this court transcription as a "settlement hearing." Joe Guillen, *City of Detroit, Banks Reach New Settlement in 2005 Financial Deal*, DETROIT FREE PRESS, Dec. 24, 2013. Chief Judge Rosen filed a memorandum in the bankruptcy court strongly encouraging Judge Rhodes to approve the agreement and overrule all objections. Mediators' Recommendation for Approval of Settlement Between the Debtor and Swap Counterparties, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 30, 2013), ECF No. 2343-1. Applying the case law standards, Judge Rhodes rejected the settlement. Transcript of Bench Opinion, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan. 16, 2014), ECF No. 2521; Order Denying Debtor's Assumption Motion, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan 17, 2014), ECF No. 2511. The court approved a reformulated swaps settlement on April 11, 2014. Transcript of Bench Opinion Regarding Motion to Approve Compromise, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Apr. 11, 2014), ECF No. 4057.

²⁶⁵ Matthew Dolan & Emily Glazer, *Mediator Walks Fine Line Between City, Creditors*, WALL ST. J. Feb. 14, 2014 ("I've settled a lot of cases as a judge. But as a mediator it's different," Judge Rosen said in a speech at Wayne State University Law School in Detroit on Feb. 4. "You don't have a gavel. And I found that out with Steve Rhodes three weeks ago").

²⁶⁶ Bomey, Gallagher, & Stryker, *supra* note 5 ("Afterward, away from the news media, Rhodes addressed creditors privately, asking them what they were willing to settle for. 'He goes around to each person and goes, 'What's your number, what's your number, what's your number?'" said one person familiar with the matter. "Then he says, 'Guys, don't ever do that to me again with Rosen'"). This media account may be referring to the creditors' lawyers, as at the end of hearing denying the settlement, the court announced a closed conference and cleared the courtroom of anyone who was not an attorney. Transcript of Bench Opinion (Jan. 16) at 28, *supra* note 264.

²⁶⁷ Transcript of Bench Opinion at 28, *supra* note 264 ("The Court agrees that the settlement of the swaps claims is better for everyone than litigation and hopes that everyone still agrees with that.

to dissolve the creditor's committee, the court listed the committee's insufficient enthusiasm for mediation as one of two reasons for doing so.²⁶⁸ Whenever news emerged of settlements, the court encouraged non-settling creditors to do the same.²⁶⁹ A concern about angering or disappointing Chief Judge Rosen could be used to prod parties back into negotiations.²⁷⁰ When a lawyer suggested early in the case that Chief Judge Rosen was assigned to "crack heads," the presiding judge did not reject the characterization.²⁷¹ At the end of the case, Judge Rhodes called his own best act to be recruiting Chief Judge Rosen to work on it.²⁷² After this oversight strategy had generated a potentially confirmable plan, his ultimate approval of that plan was not in doubt.²⁷³ This is not to say that crafting the plan

If the city feels the need to pursue immediate litigation, so be it, but even so, litigation and negotiation can and should be pursued at the same time. In any event, the Court strongly encourages the parties to continue to negotiate").

²⁶⁸ Transcript, Motion of Debtor for Entry of an Order Vacating the Appointment of Official Committee of Unsecured Creditors at 27, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. February 19, 2014), ECF No. 2717 (committee's statement that it would not participate in the mediation was an "extraordinary lack of understanding"); *id.* at 31 ("I already have a mediator that's a consensus builder. Give me something else that I can say to the City will add value to this case"); In re City of Detroit, 519 B.R. 673, 680 (Bankr. E.D. Mich. 2014) ("The Committee's stated disavowal of the mediation process is extraordinary in its manifest disrespect for the importance of mediation in this chapter 9 case").

²⁶⁹ Transcript of Bench Opinion (April 11), *supra* note 264, at 26 (telling parties not to wait until the eve of confirmation, commending parties that already settled).

²⁷⁰ Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 241-42 (in response to information that a matter had not settled, court says "Does Judge Rosen know that?....One does not want to surprise Judge Rosen especially with that kind of news").

²⁷¹ Transcript of Hearing Re. Motion by Official Committee of Retirees to Stay Deadlines at 26, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Sept. 19, 2013), ECF No. 1037 ("LAWYER: Your honor has already dealt with, in effect, the possibility of delay by asking Judge Rosen to crack heads and move people, which is what he is doing. COURT: Well, that's not exactly the language I used with him. Okay. I'll accept it. LAWYER: If I misunderstood, please tell me. COURT: No. I did tell him that his - I'll share this with you. I did tell him that his deliverable is a confirmable plan"). *Id.* at 44 (court asking city lawyer, "[h]ow do you deal with Mr. Montgomery's argument that there's nothing about the relief he requests here today that would have any impact on the negotiations for a plan and Judge Rosen is going to crack heads at my request?").

²⁷² Oral Opinion on the Record at 45, *supra* note 5 ("I have said publicly and repeat now that the smartest thing I did in this case was to ask Judge Rosen to be the mediator"); *id.* at 44 ("These words of thanks cannot begin to express the depth of gratitude that I, and all of the parties and attorneys, feel about what Chief Judge Rosen and his mediation team put into this case—the work, the time, the creativity, the commitment, the nights, the weekends, and the holidays").

²⁷³ *Cf.* SOBOL, *supra* note 100, at 224 (discussing how approval of A.H. Robins chapter 11 plan was not in doubt because "[i]n every respect except technically, Merhige had been a party to the agreement in support of the plan" and necessary changes would have been incorporated already).

confirmation decision was a simple task. And the court did condition final approval of the plan on some changes.²⁷⁴ But the direction was clear.

The comprehensive details of the mediators' involvement in Detroit's restructuring may never be fully known. But the available information shows that a federal judge as mediator, under some circumstances, can wield enormous influence over, and be deeply involved in, the details of a municipal restructuring. The existing literature on chapter 9 does not take this potential channel of influence into account.

D. Team Building

Recruitment of assistance to oversee and evaluate a large complex litigation can substantially increase the reach of the federal court and its ongoing interaction with parties, including state and local officials. Judge Rhodes recruited help in three categories to oversee and evaluate the Detroit bankruptcy: professional fee and expense review, mediation, and plan feasibility evaluation. The court usually gave parties the opportunity to be heard before making these appointments. The exception was the appointment of a non-testifying consultant to the court – who, as we will learn, not only advised the court on his assessment of the plan's feasibility, but apparently advised city officials on restructuring and personnel decisions.²⁷⁵ Moreover, three of the court's appointees put their own teams in place, probably without a mechanism for party input, and some of those team members also interacted with public officials and parties as well. The point of these observations, again, is to further our understanding in how the role of a federal court in a chapter 9 can be more multifaceted than a traditional adjudicative model.

²⁷⁴ Oral Opinion on the Record, *supra* note 5, at 25-28, 36-37.

²⁷⁵ *Infra* Part III.D.3.

1. Professional Fee Team

Early in Detroit's bankruptcy, the court *sua sponte* proposed appointing a lawyer to review the fees and expenses of legal and financial professionals who would be paid out of the city's coffers.²⁷⁶ Not clearly authorized even in chapter 11 where courts have the duty to review fees,²⁷⁷ the "fee examiner" an especially awkward fit with chapter 9. A municipal case creates no bankruptcy estate and most provisions that regulate fee awards chapter 11 do not apply.²⁷⁸ Prior to the Detroit bankruptcy, it was thought that a court had no fee oversight duties in a chapter 9 until a modest obligation at plan confirmation.²⁷⁹ How a municipality spends its money during chapter 9 is not supposed to be the federal court's concern. As a first step to altering that approach, Judge Rhodes apparently was the first to propose a fee examiner in a chapter 9.²⁸⁰

Due to section 904, the judge needed the debtor's consent to make the appointment and enter the order with which the city would be expected to comply. In open court, Judge Rhodes expressed hope that the city would not

²⁷⁶ Order Establishing Amended Initial Status Conference Agenda at 4, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., July 23, 2013), ECF No. 0129 (listing authority for a fee examiner as 11 U.S.C. §§ 105(a), 943(b)(3) and 1129(a)(3), applicable to chapter 9 via § 901(a)).

²⁷⁷ Fee examiners resemble special masters, who are not permitted in bankruptcy cases. FED. R. BANKR. P. 9031; In re Continental Airlines et al., 150 B.R. 334, 342 (D. Del. 1993) (characterizing chapter 11 fee reviewer as "more in the nature of a special master" and reversing bankruptcy court's decision to restrict access to report). Courts nonetheless appoint them in chapter 11. Order Appointing Fee Examiner and Establishing Related Procedures for Compensation and Reimbursement of Expenses for Professionals and Consideration of Fee Applications, In re Nortel Networks, Inc., No. 09-10138(KG) (Bankr. D. Del. July 10, 2013); In re Collins & Aikman Corp, 368 B.R. 623, 625-626 (Bankr. E.D. Mich. 2007) (Judge Rhodes appointing fee examiner later in case over objections).

²⁷⁸ 11 U.S.C. § 901 (excluding the incorporation of 11 U.S.C. § 330).

²⁷⁹ In re Colorado Centre Metropolitan Dist., 139 B.R. 534, 535 (1992) (interpreting 11 U.S.C. § 943(b)(3)). In his plan confirmation decision, Judge Rhodes interpreted the statute to give him the ability to review fees and expenses already paid throughout the case. Supplemental Opinion, *supra* note 1, at 81-92; Order Regarding Process to Determine the Reasonableness of Fees Under 11 U.S.C. § 943(b)(3), In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Jan. 5, 2015), ECF No. 8999.

²⁸⁰ Steven Church, *Detroit Fee Examiner Gets Paid to Second Guess Bills*, BLOOMBERG NEWS, Oct. 21, 2013 ("Keach and the other bankruptcy lawyers ... can't remember such a system being used in ... Chapter 9, which ... doesn't require cities to submit their fees to the judge for approval").

object.²⁸¹ He justified the proposal on media scrutiny, and invited collaboration on the details of the appointment.²⁸² The city did not oppose the proposal, and agreed to pay the fee examiner team's hourly rates and expenses.²⁸³

For the role of fee reviewer, Judge Rhodes appointed Chicago lawyer Robert Fishman. Fishman obtained access to detailed records for dozens of legal and financial professionals representing the City and the retiree committee.²⁸⁴ At least twenty-nine additional lawyers and paraprofessionals at his law firm were listed as potential contributors to the job.²⁸⁵ The team also included an accountant in Florida and twenty-three of the accountant's employees.²⁸⁶

2. Mediation Team

Already the subject of significant discussion in this article,²⁸⁷ we must return only briefly to mediation here. The master mediation order gave Chief Judge Rosen the authority to appoint more mediators of his own choosing.²⁸⁸

Shortly after being appointed, Chief Judge Rosen announced five other mediators, mostly other federal judges, including one with experience mediating

²⁸¹ Transcript of Hearing Re. Status Conference, *supra* note 130, at 57.

²⁸² *Id.*

²⁸³ *Id.* at 58.

²⁸⁴ Order Appointing Fee Examiner, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Aug. 19, 2013), ECF No. 0383; Fee Review Order, In re In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Sept. 11, 2013), ECF No. 0810. The scope expanded to cover the retiree committee's investment banker, for which the city would pay. Hearing Re. Application to Employ Lazard Freres & Co., LLC at 4-9, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 16, 2013), ECF No. 2229 ("So what will you and the others... do for \$175,000 a month?" ... "are we paying for your learning curve?"); *id.* at 10 (fee examiner had no questions, saw no unique problems). Judge Rhodes later decided that the Detroit Retirement Systems' fees should be reviewed. Opinion and Order Determining that the Fees and Expenses of Retirement Systems' Professionals are Subject to 11 U.S.C § 943(b)(3), In re In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich., Nov. 26, 2014), ECF No. 8470.

²⁸⁵ Order Appointing Fee Examiner, *supra* note 284.

²⁸⁶ *Id.*

²⁸⁷ See *supra* Part III.C.

²⁸⁸ Mediation Order, *supra* note 230, clause 3.

in the California municipal bankruptcies.²⁸⁹ These appointments further increased the off-the-record federal court interaction with state and local officials, creditors, and other parties and stakeholders. Chief Judge Rosen later added another judge to the mediation team, and retained a consultant who eventually served as a mediator as well.²⁹⁰ Arbitrators resolving tort claims against the city also were formally under Chief Judge Rosen’s umbrella.²⁹¹ Another consultant came to light at a press conference late in the case: Chief Judge Rosen mentioned that Richard Ravitch had been advising the mediators until he was made a non-testifying consultant to the court.²⁹²

3. Feasibility Team

As previously mentioned, Judge Rhodes committed to an independent inquiry into the feasibility of Detroit’s restructuring plan – a condition of confirmation²⁹³ To this end, Judge Rhodes issued an order to show cause, *sua sponte*, for why he shouldn’t name a court-appointed expert to evaluate the feasibility of Detroit’s restructuring plan.²⁹⁴ No party opposed this idea outright, but they did suggest

²⁸⁹ Detroit Chapter 9 Mediation Team Announced, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 20, 2013), ECF No. 0542. More details about the team are provided in Jacoby & Remus, *supra* note 34.

²⁹⁰ Transcript at 10, Settlement Between Debtor and Swap Counter Parties, In re City of Detroit, 13-53846 (E.D. Mich. Dec. 24, 2013) (mentioning “our consultant, Professor Torielli”); Fourth Amended Disclosure Statement with Respect to Fourth Amended Plan for the Adjustment of Debts of the City of Detroit at 141, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. May 5, 2014), ECF No. 4391 (mentioning Torielli as consultant on public finance issues); Press Conference Nov. 7, 2014 (Chief Judge Rosen explaining that Professor Torielli had become a mediator).

²⁹¹ Press Conference Nov. 7, 2014 (between 14:00-15:25) (thanking Judge David Lawson for overseeing tort claimant process).

²⁹² *Id.* (approximately 15:25) (joking that Judge Rhodes “stole” Ravitch from the mediation team, but before then, Ravitch’s wisdom and advice were invaluable).

²⁹³ Text associated with notes 188- 191; 11 U.S.C. § 943(b)(7).

²⁹⁴ Order to Show Cause Why Expert Witnesses Should Not Be Appointed, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Mar. 24, 2014), ECF No. 3170. Judge Rhodes has used Rule 706 before. Collins & Aikman, 368 B.R. at 625 (fee examiner appointment). For other bankruptcy court decisions discussing or ordering court-appointed experts, see D&M Steel v. Neilson (In re Peck/Jones Constr. Corp.), No. BAP CC-09-1414KiTaPa, 2010 WL 6245626 (9th Cir. BAP Aug. 26, 2010) (appointing expert to determine whether a pre-bankruptcy transfer could be construed as being in the ordinary course of business, insulating it from voidable preference attack); In re Gainey Corp., 400 B.R. 576, 577 (Bankr. W.D. Mich., Dec. 10, 2008) (appointing expert to advise on

adjustments. Reporting that it had planned to file its own Rule 706 request,²⁹⁵ Detroit suggested the use of a panel of experts and made a specific recommendation on a person to lead the panel.²⁹⁶ More reticent about the focus on feasibility, other parties asked that the expert consider whether the plan was in the best interests of creditors.²⁹⁷ Judge Rhodes accepted some narrower suggestions to modify the procedure, but adopted neither the panel approach nor the expanded parameters.²⁹⁸

The court filed a solicitation for candidates in early April 2014.²⁹⁹ With party participation, Judge Rhodes interviewed five candidates in the courtroom.³⁰⁰ He selected Martha Kopacz.³⁰¹ As described by Kopacz at the plan confirmation trial, her job was to “render an opinion on the feasibility of the plan of adjustment for the City of Detroit and to render an opinion on the reasonableness of the assumptions that underlie the revenues, expenses, and the plan payments.”³⁰²

whether to approve a debtor’s contested request to use cash collateral); *In re Loehwing*, 320 B.R. 281, 284 (Bankr. D.N.J. 2005)(expert to conduct survey on sheriffs’ foreclosure sale commissions); *In re Roman Catholic Archbishop of Portland*, 339 B.R. 215, 223 (Bankr. D. Or. 2006) (discussing possibility of appointing expert to develop form questionnaire and matrix for claims’ settlement value and jury trial value); *In re McMullen*, No. 00-1051-WCW, 2009 WL 1490581 at *20 (Bankr. D. Mass. May 27, 2009) (entering order to show cause why accountant should not be appointed); *In re Peck/Jones Constr. Corp.*, No. BAP CC-09-1414KiTaPa, 2010 WL 6245626 at *8 (9th Cir. BAP Aug. 26, 2010) (affirming authority of court to use Rule 706, but expressing concerns about court disallowing party experts and replacing with court-appointed expert).

²⁹⁵ Transcript of Hearing Regarding Notice of Presentment of Order at 14-15, *In re City of Detroit*, 13-53846 (Bankr. E.D. Mich. April 2, 2014), ECF No. 3817. Other parties did not object, but argued, unsuccessfully, that the expert should evaluate the best interests of creditors too.

²⁹⁶ Debtors’ [sic] Concurrence with the Court’s Appointment of Experts Pursuant to Fed. R. Evid. 706 at 4, 5-6, *In re City of Detroit*, 13-53846 (Bankr. E.D. Mich. March 30, 2014), ECF No. 3328.

²⁹⁷ Transcript of Hearing, *supra* note 295, at 17, 19, 22.

²⁹⁸ Order Regarding the Solicitation of Applications to Serve as the Court’s Expert Witness on the Issue of Feasibility, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. April 2, 2014), ECF No. 3610. Multiple experts could be appointed, however, if no single expert had all of the required qualifications. *Id.* at 2.

²⁹⁹ Order Regarding the Solicitation of Applications, *supra* note 298.

³⁰⁰ Notice Regarding Interviews of Expert Witness Applicants, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. April 14, 2014), ECF No. 4068.

³⁰¹ Order Appointing Expert Witness, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Apr. 22, 2014), ECF No. 4215.

³⁰² Transcript of Continued Trial at 138, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Sept. 15, 2014), ECF No. 7617.

Kopacz' duties led her to have *ex parte* contact with both the presiding judge and city officials and other parties. With advance notice, Judge Rhodes reviewed her expert report before it was circulated to the parties.³⁰³ And during the plan confirmation trial, the Judge Rhodes expressly asked Kopacz to describe their contact.³⁰⁴ She testified that they discussed the confirmation trial but not her testimony, that he had emailed her a list of his questions in advance, and that he had invited feedback on the questions but she did not provide it.³⁰⁵

With respect to private contact with city officials and other parties, Kopacz testified to participating in over two hundred meetings.³⁰⁶ The parties included the Detroit mayor, the Detroit emergency manager, Detroit City Council members, most department heads, representatives of the DIA, foundations funding the Grand Bargain, lawyers for the pension systems, and others.³⁰⁷ Mayor Duggan's plan confirmation testimony likewise painted a picture of extensive interaction, in which Kopacz or her staff

sat in on every single meeting with every department head. She was invited to all cabinet meetings. She had open access to all of our departments and all of their – our numbers. And I relied in reaching my conclusion both on my own assessment of this but also on the report that she wrote, which was really my only independent verification from a financial expert of what I experienced in those interviews.³⁰⁸

³⁰³ Order Regarding Report of Court's Expert, In re City of Detroit, No. 13-53846 (Bankr. E.D. July 16, 2014), ECF No. 6090; Transcript of Hearing Regarding Motion for Costs Relating to Clawback of Debtor's Document Production at 43, In re City of Detroit, 13-53856 (Bankr. E.D. Mich. July 14, 2014), ECF No. 6054. Syncora's lawyer expressed surprise, and asked whether the discussion would be discoverable. The court said yes. *Id.*

³⁰⁴ Kopacz kept a log of her communications with the court. Transcript of Continued Trial, *supra* note 302, at 139.

³⁰⁵ *Id.* at 139 (they discussed logistics, such as whether her attorney would be present).

³⁰⁶ *Id.* at 159.

³⁰⁷ *Id.* at 159-61.

³⁰⁸ Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7.

Kopacz employed seven or more professionals or paraprofessionals at Kopacz's firm to work on this project,³⁰⁹ and at least three lawyers.³¹⁰ The assistance of other people supplied more channels for information flow to and from the court's team.³¹¹

Richard Ravitch, a lawyer known for his role in New York City's turnaround in the 1970s, had applied to be the court's feasibility expert, and the court had interviewed him for that job.³¹² Judge Rhodes instead appointed Ravitch to a position that had not been advertised: a non-testifying consultant.³¹³ The court did not seek consent from the parties before making this appointment. No parties objected publicly when the appointment was announced. Ravitch's charge was to focus on "issues of municipal finance and viability."³¹⁴ The court order provided that, "[a]ll interested parties and their professionals shall fully and promptly cooperate with the Court's consultant and shall promptly comply with any requests for information made by the consultant."³¹⁵

The information would flow only in one direction; Ravitch would be insulated from responding to requests from a creditor to testify, or providing other

³⁰⁹ Phoenix Management Services, LLC invoice, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 30, 2014), ECF No. 5662; Letter from Martha E.M. Kopacz to Judge Rhodes, re: invoice for April 22, 2014-April 30, 2014, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 12, 2014), ECF No. 5293 (eight professionals); Invoice, Phoenix Management Services, LLC, invoice for October 2014, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan. 9, 2015), ECF No. 9018 (five); Transcript of Continued Trial at 155-58, In re City of Detroit, No. 13-53846 (Bankr. E.D. Sept. 15, 2014), ECF No. 7617 (reporting professionals who worked on court-appointed Detroit assignment as Brian Gleason, Bob Childree, Al Mink, Mike Gaul, Kevin Barr, Jack Murdoch).

³¹⁰ Letter from Stephen D. Lerner to Judge Rhodes, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 24, 2014), ECF No. 5606; Order Approving Compensation and Reimbursement of Expenses of Attorneys to the Court's Expert Witness, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. July 9, 2014), ECF No. 5869.

³¹¹ Transcript of Continued Trial at 160, In re City of Detroit, No. 13-53846 (Bankr. E.D. Sept. 15, 2014), ECF No. 7617 (testifying on high frequency of meetings between members of Kopacz's team and parties to the case and their professionals).

³¹² Notice Regarding Interviews, *supra* note 300.

³¹³ Order Appointing Non-Testifying Consultant, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Apr. 22, 2014), ECF No. 4216.

³¹⁴ *Id.* clause 1.

³¹⁵ *Id.* clause 2.

information unless the Court entered an order later to that effect.³¹⁶ This procedure afforded the parties no opportunity to rebut Ravitch's specific analyses or contributions because they were not identified. This is especially notable because of the tenuous and complex nature of the issue on which Ravitch was consulting: helping to predict the future financial viability of Detroit and its pension systems. The absence of procedural protections rendered the appointment vulnerable to challenge, at least measured by the law in other circuits.³¹⁷ Ravitch offered and agreed to serve without compensation.³¹⁸ The arrangement therefore generated no public documents on how he spent his time, or how he influenced the outcome of the plan confirmation trial.³¹⁹ The relevance of this structure is the lack of transparency regarding the influence of this federal court adjunct.

³¹⁶ *Id.* clause 6 ("unless the Court enters otherwise, the consultant shall not be subject to any discovery proceedings and shall not be called as a witness at any hearing in this case").

³¹⁷ *Conservation Law Foundation v. Evans*, 203 F. Supp. 2d 27, 30, 32 (D.D.C. 2002)(advisor "shall not give any advice to the Court on the ultimate issue" and court committing to "summarize the amount and nature of its reliance on the technical advisor"); *Techsearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1377-1378 (Fed. Cir. 2002) (goal of appointment was "so that the court can better understand scientific and technical evidence in order to properly discharge its gatekeeper role of determining the admissibility"); *id.* at 1377-79 n6 (appellate court must review whether "district court has established safeguards to prevent the technical advisor from introducing new evidence and to assure that the technical advisor does not influence the district court's review of the factual disputes"); *Ass'n Mexican-Am. Educators v. California* 231 F.3d 572, 590-91 (9th Cir. 2000)(upholding district court's authority to appoint technical advisor, for outside technical expertise would be helpful, noting split in court is over procedures); *Id.* at 590-91 (dissent articulating safeguards for appointment even if for "exceptionally technically complicated cases" as majority held); *Reilly v. United States*, 682 F. Supp. 150 (D. R.I. 1998) (appointing economist to provide neutral technical advice to help determine loss of earning capacity of an infant); *Fed. Trade Comm'n v. Enforma Natural Products, Inc.*, 362 F.3d 1204, 1215, 1219 (9th Cir. 2004) (record unclear on basis on which advisor was appointed, vacating injunction, identifying safeguards to ensure court "is proceeding openly and fairly" and instructing court to "clarify the role of any expert it appoints").

³¹⁸ *Order Appointing Non-Testifying Consultant*, *supra* note 313, clause 4, 7 ("The consultant has agreed to serve without expense to the City....The Court expresses its thanks and appreciation to Mr. Ravitch for his willingness to serve the Court in this capacity without compensation").

³¹⁹ When Ravitch attended a status conference telephonically, he was silent other than to indicate his presence at the judge's request. Transcript of Hearing Regarding Status Conference Regarding Plan Confirmation Process at 7, *In re City of Detroit*, No. 13-53846 (Bankr. E.D. Mich. Aug. 6, 2014), ECF No. 6585.

In a speech in San Francisco in June 2014, Ravitch offered the following insight on his appointment and the case:

Well I'm somewhat constrained in being too specific. My role in Detroit is simply to advise the bankruptcy judge about the feasibility of the plan that ultimately gets finalized in the next few weeks. Suffice it to say that there are a lot of very very good people who are trying very hard to adjust the limited resources equitably amongst the various creditors, whether they're money creditors or retirees.... If the bankruptcy plan does not go through I think it would be a tragedy. Whether it's this one or a modified one is something I can't comment on.³²⁰

Testimony during the plan confirmation trial in the fall of 2014 suggests that Ravitch and the court's feasibility expert, Kopacz, were in close touch. She reported that, after delegating some of the pension review to her staff, "I reinserted myself into the pension discussions when I met and got to know Dick Ravitch because Dick has some interesting views."³²¹ Indeed, a lawyer for the city sought to bolster Kopacz's credibility as an expert on pensions by pointing out that she had conferred with "Mr. Ravitch, who needs no introduction because of his enormous expertise."³²² As noted earlier, Kopacz, in turn, had extensive interactions with the city.

Hearing testimony also indicates, however, that Ravitch gave policy advice directly to city officials while serving as the court's non-testifying consultant. Detroit Mayor Mike Duggan testified during the plan confirmation trial that:

³²⁰ Interview by David Crane with Richard Ravitch (June 6, 2014), *available at* <http://podcasts.jccsf.org/2014/08/richard-ravitch/> (podcast interview with JCCSF).

³²¹ Transcript of Continued Trial at 161-62, In re City of Detroit, No. 13-53846 (Bankr. E.D. Sept. 15, 2014), ECF No. 7617.

³²² *Id.* at 202.

the Court was good enough to bring in Mr. Dick Ravitch, who I spent a great deal of time with, and who educated me on just how far we have to go to rebuild the finance system.³²³

Mayor Duggan's testimony also indicated that Ravitch had set up a meeting for Duggan in New York with the person Ravitch recommended for the position of Detroit's finance director.³²⁴ In response to the court's question about the use of exit financing for city operations and reinvestment, Mayor Duggan testified to "extensive conversations" with Ravitch about the city's exit financing and the need to keep the financing at the lowest possible amount.³²⁵ The interaction between Mayor Duggan and Ravitch was later reported in the local news: "[Ravitch] has had great influence on me already," Duggan said, speaking of the advice received during the bankruptcy.³²⁶

Upon confirming the plan, the court indicated that Ravitch had influenced his evaluation of the case as well:

His commitment, knowledge, wisdom, expertise, and spirit of public service were remarkable and helped me to more fully understand this case. I hope a way is found for him to contribute to fiscal health and revitalization of this City. He would be a valuable resource in any capacity.³²⁷

This wish was granted: Ravitch was named as a consultant to the Detroit Financial Review Commission soon thereafter.³²⁸

³²³ Transcript of Trial Re. Objections to Chapter 9 Plan, *supra* note 7, at 76-77.

³²⁴ *Id.* at 77 (Mayor Duggan testifying that he had asked Ravitch, "if you could hire anybody in America to come in here to redo the finances, who would it be," and Ravitch responded "There's no question. The former finance director of the City of New York, Carol O'Cleireacain, would be the top choice"); *id.* ("Mr. Ravitch was kind enough to set up lunch for me, and I flew out to New York...").

³²⁵ *Id.* at 144-45.

³²⁶ Matt Helms, *He Rescued New York. Up Next: Detroit*, DETROIT FREE PRESS, Nov. 17, 2014. The story also mentions Ravitch's recommendation for Detroit's finance director.

³²⁷ Oral Opinion on the Record at 46, *supra* note 5.

³²⁸ Press Release, Gov. Rick Snyder taps public, private fiscal experts for Detroit Financial Review Commission (Nov. 10, 2014), available at http://www.michigan.gov/snyder/0,4668,7-277-57577_57657-340967--,00.html. Kopacz also was selected as a consultant to this Commission.

E. Court of the People

...when a judge feels and sees injustice, I believe that a judge has a responsibility to do what he or she can about it I felt that by calling out the water department and asking to speak personally with the decision makers and highlighting this problem in open court with the full attention of the media on the issue I was doing what I could even if I didn't have jurisdiction to deal with it.³²⁹

*It was as much a political case as a legal case... The residents of the city had a great stake in [the] outcome of the case, a personal stake, each and every one of them*³³⁰

At the second hearing of the bankruptcy, Judge Rhodes emphasized the role the court would play to “recognize and appreciate the enormous public interest in this case.”³³¹ Fulfilling that commitment, Judge Rhodes’ court procedures were inclusive, allowing participation by individual retirees as well as residents, the latter of whom lack creditor status.³³² The court held a hearing for individual objectors to Detroit’s bankruptcy eligibility,³³³ did the same for plan confirmation,³³⁴ and invited some individuals to present evidence at the plan confirmation trial itself.³³⁵ Early in the case, Judge Rhodes invited courtroom

³²⁹ WDET Interview, *supra* note 149.

³³⁰ Ferretti & Livengood, *supra* note 167 (quoting Judge Rhodes).

³³¹ Transcript of Hearing on Status Conference, *supra* note 130, at 8-9.

³³² *Compare* In re Addison Comm. Hosp. Auth., 175 B.R. 646 (Bankr. E.D. Mich. 1994) (Judge Rhodes declined residents’ request to speak on chapter 9 plan of adjustment because they were not creditors).

³³³ Transcript of Hearing Re. Objections to Eligibility Before the Honorable Steven W. Rhodes at 2, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 19, 2013), ECF No. 1034; Jacoby, *The Detroit Bankruptcy, Pre-Eligibility*, *supra* note 23, at 864-65 (recounting hearing testimony and Judge Rhodes’ admonition to Michigan’s Governor and Detroit’s emergency manager to listen to a recording). Other municipal bankruptcies have included resident testimony, although on a more ad hoc basis. Cate Long, Jefferson County’s Bankruptcy Confirmation Hearing, <http://blogs.reuters.com/muniland/2013/11/21/jefferson-countys-bankruptcy-confirmation-hearing/> (audience members speaking at hearing on Nov. 20, 2013).

³³⁴ Notice of Hearing to Individuals Who Filed Plan Objections, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. June 10, 2014), ECF No. 5264; Supplemental Opinion, *supra* note 1, at 11 (“At the hearing, 46 of these 79 objectors appeared before the Court.”). Of the 1159 objections submitted by unrepresented individuals, 836 were timely filed. *Id.* at 10.

³³⁵ Order Regarding Motions to Participate in the Confirmation Hearing, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Aug. 20, 2014), ECF No. 6896 (referring back to solicitation of interest in presenting evidence, document 6584); Plan Confirmation Decision at 12 (“Parties filed 36 such motions. Upon its review of each motion, the Court allowed seven parties to testify”). Three selected objectors did not appear. *Id.* Most of those selected were workers or retirees; two were residents. Transcript of In Re: Trial Re: Objections to Chapter 9 Plan, *supra* note 169 (individual objector examining emergency manager on Oct. 3); Trial Re. Objections to Chapter 9 Plan, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 15, 2014), ECF No. 8033 (main day for

audience questions – not a typical part of hearings – after speaking about the role of a judge in chapter 9.³³⁶ Judge Rhodes reminded professionals to draft notices clearly for individual claimants, interjecting at one point, “I can’t emphasize enough the importance of plain language in this document. . . I wish you had an eighth grade English teacher on staff to edit this for you.”³³⁷ He encouraged Detroit’s lawyers to be proactive in ensuring accurate press reporting of retiree treatment.³³⁸ In closing arguments on a motion to approve a settlement, Judge Rhodes interjected to clarify a lawyer’s assertions, noting that he wanted to make sure the public understood the issue.³³⁹ That interjection was representative of Judge Rhodes’ efforts to ensure that the financial and legal jargon of professionals and witnesses was more broadly comprehended.³⁴⁰ When bond insurers argued that retirees should be barred from filing proofs of claim because pension funds would do so, the court defended retirees’ rights to directly participate.³⁴¹ When creditors raised objections to a debtor’s proposal, Judge Rhodes expressed concern that the residents would have to wait even one additional day for basic service restoration.³⁴² If nothing else, these activities

individual objectors to present sworn testimony or ask questions of witnesses during plan confirmation trial).

³³⁶ Brent Snavelly, *Judge Steven Rhodes Explains His Limited Role in Detroit Case*, DETROIT FREE PRESS, Aug. 2, 2013; Transcript of Hearing Re. Status Conference, *supra* note 130, at 7-10.

³³⁷ Hearing Re. Motion of the Objectors for Leave to Conduct Limited Discovery at 29, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Nov. 14, 2013), ECF No. 1771.

³³⁸ Transcript at 74-75, In re City of Detroit, 13-53846 (Bankr. E.D. Mich. April 2, 2014), ECF No. 3817.

³³⁹ Transcript of Evidentiary Hearing Regarding Motion of the Debtor for a Final Order at 10, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan. 13, 2014), ECF No. 2447 (in response to swap counterparty assertion that termination payment was part and parcel with the fixing of interest rates).

³⁴⁰ Transcript of Hearing Re: Eligibility Trial at 193, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 23, 2013), ECF No. 1411 (during testimony at eligibility trial, asking witness to explain “liquidity was tight” “so that the record is clear and everyone understands”); *id.* at 229-231 (seeking clarification of expressions “P-O-C,” “cash burn,” and “unpool”).

³⁴¹ Hearing Re. Motion of the Objectors for Leave to Conduct Limited Discovery at 29, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Nov. 14, 2013), ECF No. 1771.

³⁴² Hearing Re. City of Detroit’s Motion for Entry of an Order Establishing Pre-Trial at 35, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Nov. 27, 2013), ECF No. 1875 (“hundreds of thousands of people victims of crime while we wait?” ... “I wonder if you’ll ever be satisfied”). *See also* Transcript of Evidentiary Hearing Regarding Motion of the Debtor for a Final Order at 110, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Jan. 13, 2014), ECF No. 2447 (in closing

demonstrate the mismatch between the perception of what judges do in chapter 9 and the more complex reality: ongoing interaction and dialogue.

These types of inclusive measures increase not only the information flow between the court, parties, and the public, but a court's temptation to weigh in on local matters. For example, after an individual complained about residential water shutoffs in Detroit at a hearing for individual objectors to plan confirmation, and a lawyer for the city could not answer Judge Rhodes' questions about water shutoff policies, the judge asked the city to bring a water department representative to court that very afternoon.³⁴³ Judge Rhodes asked the representative a detailed set of questions about the department's policies, made suggestions about those policies,³⁴⁴ and asked the representative to return the next week with more answers and updates.³⁴⁵ The return trip to court left little doubt that the court had influenced the city's water shutoffs, at least in the

arguments on swap termination agreement and financing, court asking city lawyer, "Is it your position that the people of the City of Detroit have to wait for safe lighting for a plan of adjustment?"); *id.* at 112 ("So the citizens of Detroit have to wait for safe lighting when the city manager - or the city emergency manager decides that it's necessary or appropriate to get court permission because that then would have to wait for plan confirmation?...What about the safety of the citizens?... So in deciding between necessary and appropriate process in Bankruptcy Court and citizen safety, he's got to choose one or the other?").

³⁴³ Transcript of Hearing Re. Objections to Chapter 9 Plan at 54, *In re City of Detroit*, 13-53846 (Bankr. E.D. Mich. July 15, 2014), ECF No 6141 ("I'm going to ask you, if it's at all possible, to have someone here at this afternoon's session who can advise the Court and the public about the specifics of the program"). Judge Rhodes noted at the outset that he hesitated to raise the issue because he was "reasonably sure it was probably not in my jurisdiction, but I'm going to do so anyway." *Id.* at 53.

³⁴⁴ *Id.* at 55 ("What can you tell me about the water department's program for water shutoffs for customers who haven't paid their bills?"); *id.* at 58 ("Does the program itself have a program to defer payment of delinquencies or amortize them over a period of time?"); *id.* at 59 (soliciting information on the average delinquency among people who seek a payment plan); *id.* at 61 (asking if there is any flexibility in the 36-month amortization period); *id.* at 63 (asking about outreach efforts and staffing).

³⁴⁵ *Id.* at 65 ("Well, I'll just comment for whatever it's worth to you that it seems to me that there's much more you can do than just that, and I encourage you to work with community leaders to come up with a whole list of initiatives that can be effective at solving this problem. In fact, I have to say to you I'm feeling the need to ask you to come back"); *id.* at 66 ("Are you willing to do that, sir?").

short term.³⁴⁶ Detroit imposed a brief moratorium on residential water shutoffs and increased efforts to educate the public about financial assistance programs.³⁴⁷ Apparently encouraged by this course of events, resident advocates sought even more help from the court: they requested an order enjoining residential water shutoffs.³⁴⁸ Judge Rhodes allowed the parties to file papers and make oral arguments before denying the request for reasons that included, but were not limited, to section 904,³⁴⁹ presumably hoping that the city and the plaintiffs would forge a compromise in the meantime.

Water shutoffs were not the only local affairs issue on which the bankruptcy court expressed a substantive opinion. For example, when it became clear that the emergency manager appointment would expire before the bankruptcy was over, and the city's continued retention of the law firm Jones Day seemed less than certain, the court said,

Well, I just want to say for the record that it would be a really bad idea for the city, the mayor, to terminate Jones Day's services at such a critical phase in this process... I hope the mayor hears me. Feel free to communicate my view of this to him.³⁵⁰

³⁴⁶ Transcript of Hearing Regarding Motion for Temporary Allowance of Claim at 17-24, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. July 21, 2014), ECF No. 6244 (Lattimer reporting what city had done to respond to judge's concerns); Alisa Priddle, *Judge Rhodes: Water Shutoffs are Hurting Detroit's Reputation Internationally*, DETROIT FREE PRESS, July 15, 2014.

³⁴⁷ Zenobia Jeffreys, *Detroit Water Department Places 15-Day Moratorium on Water Shutoffs*, NEW AMERICA MEDIA, July 23, 2014 ("announcement came following Federal Judge Steven Rhodes' order for the department and Emergency Manager Kevyn Orr to come up with a solution to what he called an embarrassment to the city and the bankruptcy").

³⁴⁸ Lyda v. City of Detroit, No. 14-04732 (Bankr. E.D. Mich. July 21, 2014).

³⁴⁹ Minute Entry: Case Dismissed, Lyda v. City of Detroit, No. 14-04732 (Bankr. E.D. Mich. Sept. 29, 2014); Transcript of Hearing Regarding Motion for Temporary Restraining Order at 5-24, Lyda et al. v. City of Detroit, 14-04732 (Bankr. E.D. Mich. Sept. 29, 2014), ECF No. 84; Lyda et al. v. City of Detroit, 14-04732, 2014 WL 6474081 (Bankr. E.D. Mich. Nov. 19, 2014) (denying motion for rehearing and supplementing initial bench decision).

³⁵⁰ Hearing Transcript, at 270-271, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. May 28, 2014), ECF No. 5183; Joe Guillen & Mark Stryker, *Bankruptcy Judge Scolds Duggan, Calls Any Plan to Fire Law Firm a 'Bad Idea'*, DETROIT FREE PRESS, May 29, 2014.

Mayor Duggan quickly made clear that they would continue to use the law firm's services. At the express request of Wayne County, the court ordered mediation on the creation of a regional water authority.³⁵¹ Going beyond what was strictly necessary to order the counties and the city to mediation, especially given the prevalence of mediation in this case, the court said its decision to send the matter to mediation reflected a sense,

unrebutted in the record here, that the creation of a regional water authority is not only in the best interest of the city but also in the best interest of all of the customers in the city's Water Department... I also have a sense that this bankruptcy offers a unique opportunity for the creation of that regional authority and that if we do not take advantage of this unique opportunity, the opportunity will, in all likelihood, be lost forever...³⁵²

Such a statement does not bind the city to reach a deal, of course. The interest of some parties in a regional water authority long preceded the bankruptcy.³⁵³ But awareness of the court's support for such an authority, as the parties continued to negotiate a variety of issues, was hardly irrelevant.

Judge Rhodes' approach to oversight also reflected a view that state and city actors do not get preferential treatment as litigants, even in municipal bankruptcy. When the Governor of Michigan raised new objections in a last-minute filing, the court reacted with the same frustration that would have been directed toward any party.³⁵⁴ The judge questioned the assumption that the

³⁵¹ Transcript of Hearing, *supra* note 173, at 18-19.

³⁵² *Id.*

³⁵³ John Wisely & Matt Helms, *Proposed Regional Water Authority Could Be \$50M Boost for Detroit*, DETROIT FREE PRESS, March 10, 2013 (in story preceding bankruptcy filing, reporting on confidential plan for regional authority, and interest in such a regional system that had been brewing for years).

³⁵⁴ Transcript of Hearing, In Re: Notice of Proposed Fee Review Order et. al at 62-63, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Sept. 10, 2013), ECF No. 948 (Judge to lawyer for Governor Snyder: "You filed a brief yesterday for a hearing today and you want the parties to respond and me to rule on this? ... at 20 minutes till 5:00"); *id.* at 66 ("But you -- you made the conscious decision to get a ruling on -- on -- on relevance and then if you lose that to assert the

Governor should get special flexibility in scheduling court testimony.³⁵⁵ When the state had delayed getting approval through its own processes for essential city transactions, the court expressed disappointment that the state's lack of action risked wasting time and money in the bankruptcy court process dedicated to reviewing those transactions.³⁵⁶ These matters, of course, cut closely to the heart of the federal court proceedings. But that is precisely the point: during a chapter 9, the federal court and state and local officials are in an ongoing relationship, not just encountering each other at distinct litigation points.

F. Summary

The preceding sections have presented active engagement with and involvement in a city's restructuring and reform by a federal court that also regularly cited the conventional wisdom about chapter 9 and judges.³⁵⁷ For those steeped in high

privilege"); *id.* at 68 ("Is it really in the best interest of the city and the people of the State of Michigan for the Governor to be asserting a deliberative process privilege in this case, Ma'am?").

³⁵⁵ Transcript of Hearing, Re. Eligibility Trial, at at 51, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct 23, 2013), ECF No. 1411 (court to Governor's lawyer: "it's not for a witness who appears in any court to condition his appearance on a specific time limit").

³⁵⁶ Transcript of Hearing, In Re Motion of the Debtor for a Final Order at 8, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Dec. 18, 2013), ECF No. 2280 (expressing displeasure to Michigan's lawyer that Emergency Loan Board did not approve Detroit's proposed loan before commencement of hearing; "someone actually made the decision to potentially risk wasting the Court's time and all of the attorney fees in this case?").

³⁵⁷ Transcript of Hearing Re. Status Conference, *supra* note 130, at 9-10 ("the Court has no role to play in managing or running the city or any of the services it provides. Any compliments, complaints, suggestions, or requests regarding city services should continue to be directed to the city. There is nothing the court can do about any of those matters... The city's officials are not accountable to this Court for how they run the city"); *id.* at 10 (It is not the Court's role to dictate to the city what its plan should state or even to suggest anything about it. That is entirely for the city to decide after, of course, discussing and attempting to negotiate the plan with its creditors"); Opinion and Order Regarding the Reasonableness of Fees Under 11 U.S.C. § 943(b)(3) at 4, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Feb. 12, 2015), ECF No. 9256; Supplemental Opinion, *supra* note 1, at 153 (recommending future steps for city "while remaining cautious due to the limits on the Court's authority"); *id.* at 165 ("under the Tenth Amendment, however, it is for the City, not this Court, to supervise the execution of that recovery"); Lyda et al. v. City of Detroit, 14-04732, 2014 WL 6474081 at *2, *4 (Bankr. E.D. Mich. Nov. 19, 2014) ("The [section 904] limitation means that the Court cannot interfere with the choices a municipality makes as to what services and benefits it will provide," although section 904 does not protect city from plaintiffs' constitutional claims); Supplemental Opinion, *supra* note 1 at 162 (responding to Kopacz's concern about the case being too swift by stating that his managerial approach was "entirely consistent with the limitations of federalism that the Tenth Amendment of the United States Constitution imposes and that §§ 903 and 904 manifest").

profile mass tort or institutional reform cases, the Detroit Blueprint may resonate.³⁵⁸ But the case study clashes with the professional or academic literature on chapter 9.³⁵⁹

The judicial appointment materials indicate that Judge Rhodes was chosen in part for his case management and administrative skills. By necessity, that selection was preceded by discussion among judges from the circuit, district, and bankruptcy courts.³⁶⁰ Judge Rhodes could therefore handle the case with something of a blessing from the courts, including the chief judge of the district court who would be a participant in overseeing the case as well.³⁶¹ Upon establishing an optimistic and detailed timeline, Judge Rhodes managed the case on micro and macro levels, creatively using inquisitorial techniques to accomplish indirectly what could not be done directly.³⁶² Information flowed between the court and parties in the full range of hearings and status conferences, educating the judge about important facts and conveying to the parties the judge's beliefs and preferences.

Issues at the core of the debt restructuring and the city's reform underwent a confidential mediation process heavily supervised by Chief Judge Rosen and other federal judges. In crafting and pushing for the central settlement in the case, Chief Judge Rosen met and worked with politicians, raised funds from foundations, and became an outspoken public advocate for the resulting restructuring plan.³⁶³ In the meantime, the typical appellate pipeline for

³⁵⁸Peter H. Schuck, *The Role of Judges in Settling Complex Cases: The Agent Orange Example*, 53 U. CHI. L. REV. 337, 347 (1986) (about Agent Orange, stating, "the judge and special masters displayed a degree of skill, sophistication, imagination, and artistry in fashioning the settlement that almost all the participants viewed as highly unusual").

³⁵⁹ *Supra* Part I.

³⁶⁰ *Supra* Part III.A.

³⁶¹ *Supra* Part III.C.

³⁶² *Supra* Part III.B.

³⁶³ *Supra* Part III.C.

bankruptcy court orders was all but suspended, in anticipation that settlement would moot the appeals.³⁶⁴

By enlisting teams of people to assist with the court's work, the federal bankruptcy court further increased involvement with state and local affairs. In addition to the mediation team, the feasibility team opened additional lines for information flow between the court, the city, and other parties. The resulting discourse generated close collaboration of the city and the court's feasibility expert and the provision of direct policy and personnel advice by the court's non-testifying consultant.³⁶⁵

Back at the courthouse, Judge Rhodes created an inclusive process that gave more public credibility to a case that was highly controversial at its inception. The court's receptivity to stakeholder input and awareness of the broader public discourse led, perhaps inevitably, to the expression of substantive opinions on policy (e.g., regional water authority, residential water shutoffs) and personnel (the retention of restructuring professionals).³⁶⁶

IV. Implications of the Detroit Blueprint for the Conventional Wisdom

The main contribution of this article is the case study, enriched through observational methods, which illustrates the many informal and unconsidered channels through which a federal court can be involved in a municipal restructuring. Analysis of various implications belongs in separate writings. To bring this article full circle, I contend that it is a mistake to consider the Detroit Blueprint *sui generis* and identify two variables particularly affecting its viability. I then return to the regulatory shortcomings of section 904, a central component of chapter 9's federalist command center. The Detroit Blueprint forces us to

³⁶⁴ Text associated with notes 255-259.

³⁶⁵ *Supra* Part III.D.

³⁶⁶ *Supra* Part III.E.

reconsider section 904's distinction between formal and informal judicial acts, and its consent exception.

A. *The Sui Generis Fallacy*

In addition to departing from the conventional wisdom about chapter 9, the Detroit Blueprint is not necessarily representative of contemporaneous chapter 9 cases.³⁶⁷ That latter point may increase the temptation to categorize Detroit as an exceptional case, with little broader application. In the history of bankruptcy, though, the truly one-off case may not exist. Judicial creativity in challenging situations lays tracks for the future.³⁶⁸ As already noted, the tools and techniques may be unexpected to municipal bankruptcy scholars but are far from new; most have been used in other complex litigation settings, such as institutional reform and class actions. The Detroit Blueprint not only will be in play in out-of-court negotiations surrounding other distressed municipalities, but is likely to be a factor in shaping state decisions about whether their municipalities should be able to file bankruptcy at all. No other case will look exactly like Detroit.³⁶⁹ But attributes of the Detroit Blueprint are portable.³⁷⁰

³⁶⁷ The mediations in chapter 9 cases are compared in more detail in Jacoby & Remus, *supra* note 34. See also Transcript of In re Trial: Objections to Chapter 9 Plan at 163-64, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Oct. 1, 2014), ECF No. 7850 (Detroit emergency manager testimony recalling awareness of and concern about lengthy timelines in other contemporaneous chapter 9). An apples-to-apples comparison of the cases using the methods of this article is not possible. Digital audio recordings are not consistently produced and released by other courts. Courts have not adopted and implemented the technology to the extent hoped. Pilot Project Update: Digital Audio Recordings Online, The Third Branch, June 2008 (quoting Judge Rich Leonard: "It's gone from a novel tool to an anticipated product, with fairly high usage ... I consider it a great advance in making our federal courts transparent"). The chief circuit judges who selected other chapter 9 judges did not put reasons on the public record. *Supra* Part III.A.

³⁶⁸ Railroad equity receiverships are an early example. Stephen J. Lubben, *Railroad Receiverships and Modern Bankruptcy Theory*, 89 CORNELL L. REV. 1420 (2004). More recently, cases like Lehman Brothers, General Motors, and Chrysler were influential for chapter 11 practices even though they were considered exceptional. Jacoby & Janger, *supra* note 2.

³⁶⁹ Kevyn Orr, Detroit's former emergency manager, has said, "I caution everyone as taking Detroit as a template or a precedent for anywhere else." November 7, 2014 Press Conference, approximately 4:20PM, WDET DetNext report. Chief Judge Rosen, by contrast, has expressed hope that after the Grand Bargain legislation passed on a bipartisan basis in the state legislature, that "we've set a template for how things can be accomplished in a political environment and in a non-political way," Press Conference June 3, 2014. Judge Rhodes has said, "I think it is also true

Portability is increased by the fact that Detroit's protagonists are out and about. Especially since leaving the bench, the presiding judge has spoken about the case on television,³⁷¹ on the radio,³⁷² on a video podcast,³⁷³ in a newspaper interview,³⁷⁴ at a college graduation,³⁷⁵ and at sponsored events at which he was honored,³⁷⁶ in addition to a variety of professional conference settings.³⁷⁷ He has been retained to advise the financially distressed Commonwealth of Puerto Rico.³⁷⁸ As already recounted in Part III, and discussed in a separate paper,³⁷⁹ the lead mediator was publicly vocal about the case and his role.³⁸⁰ Professionals and parties are speaking about the Detroit Blueprint, whether at educational programs or in interviews.³⁸¹ In addition, the world of municipal bankruptcy

that many cities around the country will not be able to put together what we did in Detroit, which was the grand bargain which resulted in over \$800 million from the state and from private sources coming into our pension plans." Tavis Smiley Show Interview with Judge Rhodes, PBS, March 24, 2015 (transcript on file with author).

³⁷⁰ Cf. David Zaring, *National Rulemaking Through Trial Courts: The Big Case and Institutional Reform*, 51 UCLA L. REV. 1015 (2014) (discussing transmission of norms across institutional reform cases).

³⁷¹ Tavis Smiley Show, *supra* note 369.

³⁷² Interview by WDET 101.9 fm, *supra* note 150.

³⁷³ Judge Rhodes Reflects on the Detroit Case, *supra* note 148.

³⁷⁴ Nathan Bomey, *Q&A: Detroit bankruptcy judge on pensions, DIA, Fees*, DETROIT FREE PRESS, Feb. 20, 2015 (excerpts of video interview).

³⁷⁵ Judge Rhodes to Graduates: Lessons Learned from the Detroit Bankruptcy Case, WDET Next Chapter Detroit, Jan 24, 2015 (Walsh College speech), <http://www.nextchapterdetroit.com/012415-detroit-bankruptcy-judge-rhodes-speech/>.

³⁷⁶ Holly Fournier, *Rhodes on Bankruptcy: We love to give a second chance*, DETROIT FREE PRESS, April 22, 2015 (Bank of Ann Arbor breakfast, in Judge Rhodes' honor, at Barton Hills Country Club); Christine Ferretti & Chad Livengood, *Rhodes: Pension Plans Too Costly for Cities*, DETROIT NEWS, Feb. 25, 2015 (Crain's Detroit Business Newsmakers of the Year Lunch, Motor City Casino).

³⁷⁷ ABI Spring Meeting Lunch Talk, *supra* note 155, is one example.

³⁷⁸ Reuters, *Puerto Rico Signals Chapter 9 Push with Ex-Detroit Judge on Board*, N.Y. TIMES DEALBOOK, July 3, 2015. The Bankruptcy Code currently does not give Puerto Rico the ability to authorize its municipalities to use chapter 9, but pending legislation would change that. H.R. 870; S. 1774.

³⁷⁹ Jacoby & Remus, *supra* note 34.

³⁸⁰ Lynch, *supra* note 148 (reporting on speech at Christ Church in Grosse Pointe Farms Michigan as part of the Rector Forum lecture series); Caitlin Devitt, *It's Never Too Soon to Restructure, Say Detroit Bankruptcy Vets*, THE BOND BUYER, May 7, 2015 (reporting on panel discussion in which Chief Judge Rosen participated at the Union League Club of Chicago).

³⁸¹ For example, in an interview, Detroit's former emergency manager defended the Detroit mediation against strong-arming critiques offered by financial creditors. Andrew Scurria, *Jones Day's Orr Champions Muni Settlement Model*, LAW 360, April 29, 2015 ("Speaking generally, Orr said that capital markets creditors were mistaken to think that closed-door mediations, often

remains relatively small. Repeat players abound. Current and retired judges known to be experienced mediators in a particular context are likely to get more mediation appointments.³⁸² In early 2014, the New Jersey Governor named Orr as a consultant to a new emergency manager for Atlantic City. Orr's tenure spanned just four months, at which point he returned to his former law firm.³⁸³ But Atlantic City's emergency manager hired Bill Nowling, who worked with Orr in Detroit. And if and when another big city or school district were to file chapter 9, it is not hard to predict the cast of lawyers and financial professionals who would be involved.

The temptation of the Detroit Blueprint is derived in part from its association with speed. As reviewed earlier, gone are the days when a municipality had to file its petition with a confirmable plan already in hand, votes counted.³⁸⁴ Today's municipal bankruptcies can be, like Detroit, "free fall," with elements of the restructuring in flux.³⁸⁵ The possibility that a chapter 9 could last many years is real, especially given that the substantive law on many relevant attributes remains underdeveloped.³⁸⁶ In a variety of contexts, parties cite, and courts perceive, the need for a trip through bankruptcy to be brief.³⁸⁷ Speed is not without its own costs; the court's own expert opined that the case's swift pace

overseen by current or former judges, can strong-arm bondholders into forfeiting valid repayment rights").

³⁸² Jacoby & Remus, *supra* note 34.

³⁸³ Hilary Russ, *Orr to Leave Atlantic City Management Team*, REUTERS, April 27, 2015.

³⁸⁴ *Supra* Part I.A.

³⁸⁵ *In re Genco Shipping & Trading Ltd*, 509 B.R. 455, 461 (Bankr. S.D.N.Y. 2014) (contrasting free fall cases, with no recorded creditor support, and cases that are prearranged or prepackaged).

³⁸⁶ For example, how to account for residential interests and measuring the adequacy of municipal services remain unclear. Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L. J. 889, 907, 909 (2012); C. Scott Pryor, *Who Bears the Cost? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L. J. 81 (2015); Christine Sgarlata Chung, *Municipal Bankruptcy, Essential Municipal Services, and Taxpayers' Voice*, 24 WIDENER L. J. 43 (2015).

³⁸⁷ Jacoby & Janger, *supra* note 5 (discussing the difficulties of sorting between cases in which the need for speed is legitimate and cases in which the argument is used strategically).

made Detroit's plan less feasible.³⁸⁸ Nonetheless, the potential to expedite will not escape the attention of other states, municipalities, and courts.

Two dynamic variables made Detroit's bankruptcy unusually amenable to the oversight strategy documented in Part III. They may help us anticipate the presence of the Detroit Blueprint in other municipal distress contexts.

1. Impact of Court Cooperation

Federal courts can create the conditions in which replication of the Detroit Blueprint is more, or less, likely. A presiding bankruptcy judge's ability to implement the major elements of the Detroit Blueprint would depend on tacit or explicit support from the judge's district court and circuit court.³⁸⁹ The special judicial selection rule of section 921(b) produces an opportunity for discussion and coordination.³⁹⁰

The Detroit Blueprint reflects some shared oversight philosophy and cooperation up the chain of appellate command. The Chief Judges of the Circuit and District courts asked Judge Rhodes to take the case and we can only speculate on that discussion.³⁹¹ Judge Rhodes has said, though, that he agreed to take the case on the condition that Chief Judge Rosen would be the mediator.³⁹² Chief Judge Rosen's letter discussing managerial and administrative skills, and his agreement

³⁸⁸ Transcript of In Re: Continued Trial at 24-26, In re City of Detroit, No. 13-53846 (E.D. Mich. Oct. 22, 2014), ECF No. 8082 (calling speed two-edge sword, win-lose situation where parties keep coming back to city for higher payout).

³⁸⁹ Similar dynamics were observed in the mass tort case A.H. Robins. SOBOL, *supra* note 100.

³⁹⁰ The selection rule is not immune from calls for reform. In the 1990s, a nine-member federal commission, divided on many other issues, unanimously proposed that Congress revert to the ordinary random selection rule and norm for chapter 9. Report of the National Bankruptcy Review Commission, proposal 4.3.4 (1997)). The group's final report explained: "Concern over the ability and sophistication of bankruptcy judges to handle a Chapter 9 case is no longer well-founded. As a result, this provision of the statute should be eliminated. Chapter 9 cases should be assigned according to the local rules and practices governing the assignment of other bankruptcy cases." *Id.*

³⁹¹ *Supra* Part III.A.

³⁹² *Supra* note 148.

to be the mediator, reinforce the notion that he and Judge Rhodes shared at least an oversight philosophy, and possibly a more detailed strategy, from the outset.³⁹³

In deferring appeals of significant orders in the Detroit bankruptcy, the Sixth Circuit panel attempted to accommodate those judges' strategy to a considerable extent, even if not willing to defer indefinitely.³⁹⁴ The district judge who received appeals from bankruptcy court orders halted them *sua sponte* until the Sixth Circuit ordered him to rule on one of them in response to a writ of mandamus.³⁹⁵ Parties to the bankruptcy reasonably could have perceived that they could not look to the appellate process as a corrective route to reach their desired results.³⁹⁶

A presiding judge seeking to implement elements of the Detroit Blueprint may not always find reviewing courts so congenial. Also, bear in mind that a chief circuit judge has the flexibility to select a judge from a district or even state far removed from the bankrupt municipality.³⁹⁷ Such an appointment does not thwart coordination, but changes the dynamics. Active federal court oversight also might affect states' willingness to submit their distressed municipalities to

³⁹³ District judges and bankruptcy judge have had to coordinate and collaborate in other contexts, using a different arrangement. For example, a district judge and bankruptcy judge jointly presided over the A.H. Robins chapter 11, *In re A.H. Robins Co.*, 59 B.R. 99, 105 exhibit A (Bankr. E.D. Va. 1986) (reprinting district court's Administrative Order #1), but there was little question that the district judge was taking a firm hand of the case. Gibson, *supra* note 111, at 190.

³⁹⁴ *Supra* notes 256, 259.

³⁹⁵ *Supra* note 258. Judge Friedman also did not rule on the retiree committee's motion to withdraw the reference from the bankruptcy judge such that the district court would have to hear and decide Detroit's eligibility.

³⁹⁶ On the difficulty of using the appellate process for exercises of procedural discretion as opposed to other kinds of court decisions, see Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WISC. L. REV. 631 (1994); Jacoby & Remus, *supra* note 34.

³⁹⁷ Report Together with Separate and Supplemental Views to Accompany H.R. 10624, H.R. Rep. No. 94-686, at 2 (1975)(expressing intent to give chief circuit judge flexibility to appoint judge sitting in a different district). For example, the chief judge of the First Circuit appointed a bankruptcy judge from the District of Massachusetts to preside over the chapter 9 of Central Falls, Rhode Island. *City of Central Falls v. Central Falls Teachers Union*, 468 B.R. 36 (Bankr. D.R.I. 2012).

the bankruptcy system in the first place, with some finding it useful while others seeking to avoid it at nearly all cost.

2. Impact of State Law

To state the obvious, the restructuring of government debt has quite contextual political elements.³⁹⁸ But if state law gives control of a municipality to an unelected emergency manager – especially if that emergency manager also happens to be a bankruptcy lawyer – it stands to reason that the Detroit Blueprint becomes more viable.³⁹⁹ Part of that hypothesis is attributable to a court’s reaction: a federal judge might be more comfortable exercising a high level of oversight when a municipality already has experienced a “contraction of democracy,” as Judge Rhodes has phrased it.⁴⁰⁰ The federalist costs of the Detroit Blueprint may be perceived as more modest when the state already has blocked a municipality’s right to self-rule.

On the municipality side, an unelected emergency manager is more likely than elected officials to be amenable to significant reform,⁴⁰¹ and thus less resistant to collaboration with, say, a federal court’s mediators or feasibility team. In Detroit’s case, the limited duration of the emergency manager appointment was consistent with the timeline proposed by presiding judge, further encouraging cooperation.

³⁹⁸ Caitlin Devitt, *One Year Later: Lessons from Detroit’s Bankruptcy*, THE BOND BUYER, July 18, 2014 (“In Detroit’s bankruptcy, politics has driven everything from the fast-paced schedule to anti-bondholder rhetoric from city and state officials”). See generally Adam J. Levitin, *Fiscal Federalism and the Limits of Bankruptcy*, in WHEN STATES GO BROKE: THE ORIGINS, CONTEXT, AND SOLUTIONS FOR THE AMERICAN STATES IN FISCAL CRISIS 214-15, 226 (PETER CONTI-BROWN & DAVID A. SKEEL JR., EDS. 2012) (discussing limits of bankruptcy law’s potency in political contexts); Gelpern, *supra* note 386 (discussing difficulty of imposing bankruptcy framework on states).

³⁹⁹ Melissa B. Jacoby, *What Are the Costs of Detroit’s Rise from Bankruptcy*, THE CONVERSATION, Nov. 20, 2014, at <http://theconversation.com/what-are-the-costs-of-detroits-rise-from-bankruptcy-34171>.

⁴⁰⁰ ABI Spring Meeting Lunch Talk, *supra* note 155; Supplemental Opinion, *supra* note 1, at 213 (“It is now time to restore democracy to the people of the City of Detroit”).

⁴⁰¹ Whether such reform and turnaround under emergency management is actually achieved is a separate issue. The experiences of other Michigan municipalities under emergency management have provoked many questions and concerns.

State law on distressed municipalities is in flux, to say the least. It is not far-fetched to imagine some states seeking to replicate Michigan's approach to emergency management, however controversial its features and uncertain its track record overall. Governor Christie's tapping of Orr for Atlantic City after his emergency manager role in Detroit prompted the municipal finance community to expect some replication of Michigan's techniques.⁴⁰² As already noted, states can make it easier, harder, or impossible for their municipalities to enter chapter 9, and may do so depending on what they see in cases like Detroit. Municipal creditors may also lobby states to adopt measures that give them more priority in an effort to limit federal court discretion, although the enforceability of such laws is far from certain.⁴⁰³

B. Section 904 as Regulatory Failure

Whatever one's view of the substantive results in Detroit, the case highlights ways in which section 904 has failed to fulfill its purpose. The constraints it imposes remain significant, but not nearly as far-reaching as often claimed. Absent restrictions from appellate courts or pushback from municipal debtors and states, the Detroit Blueprint invites the exercise of further judicial creativity, treating section 904 as a formality to be worked around rather than as a standard of limited involvement.

Some readers less interested in federalism as an independent value might wonder whether this alleged regulatory failure is a problem only a law professor could love. For example, the Grand Bargain, the centerpiece of Chief Judge Rosen's efforts, brought hundreds of millions of dollars into the restructuring.⁴⁰⁴

⁴⁰² Russ, *supra* note 383.

⁴⁰³ Moringiello, *supra* note 55.

⁴⁰⁴ *Supra* Part II.B.

If federal court intervention creates value, they might ask, what is the harm? Don't the ends justify the means?

Several responses should be considered. First, it was not universally accepted that the Grand Bargain generated sufficient value in exchange for shielding the city's art collection from city creditors in perpetuity. Second, one must ask not only whether the Grand Bargain created value, but whether and how the court's intervention affected the distribution of that value. Before they settled, financial creditors argued the mediators rather than the funders structured the Grand Bargain in such a way to exclude them from sharing in the proceeds.⁴⁰⁵ The variation in recoveries in Detroit and the circumstances that led to that variation led one lawyer involved in the case to call chapter 9 the "Wild West."⁴⁰⁶ It is always possible, but hard to predict, whether discretionary judicial interventions will maximize welfare.⁴⁰⁷ Section 904 does not, and logistically cannot, proscribe only federal interventions that would be viewed as negative after the fact.⁴⁰⁸

Also, Part III demonstrated that federal court intervention went beyond the Grand Bargain. Quantifying the value and distributional effects of other elements of the Detroit Blueprint would be difficult.⁴⁰⁹ How do we evaluate the impact of policy and personnel advice provided to Mayor Duggan by Richard Ravitch in

⁴⁰⁵ Dolan & Glazer, *supra* note 265. See generally Pryor, *supra* note 22, at 123 (chapter 9 "operates as a federally-sponsored forum for a game of chicken").

⁴⁰⁶ Puerto Rico Chapter 9 Uniformity Act of 2015: Hearing on H.R. 870 Before the Subcomm. On Regulatory Reform, Commercial and Antitrust Law of the H. Judiciary Comm, 114th Cong. 6 (2015) (testimony of Thomas Moers Mayer).

⁴⁰⁷ Robert G. Bone, *Who Decides? A Critical Look at Procedural Discretion*, 28 CARDOZO L. REV. 1961, 1988 (2007) (discussing how judges may be overconfident in ability to predict settlement effects, leading them to take bolder-than-optimal steps, and arguing for more detailed federal rules); *id.* at 1994 (difficulty of judges measuring impact of their own discretionary measures); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Inside the Bankruptcy Judge's Mind*, 86 B. U. L. REV. 1127, 1130 (2006) (finding bankruptcy judges vulnerable to anchoring and framing effects).

⁴⁰⁸ Whether courts or market actors are better arbiters of what should happen to a financially distressed entity is an age-old debate. Jacoby & Janger, *supra* note 2.

⁴⁰⁹ Evaluating the judicial "decisionmaking" in managerial contexts is known to be difficult. Andrew J. Wistrich, *Defining Good Judging*, in THE PSYCHOLOGY OF JUDICIAL DECISION MAKING 258 (DAVID KLEIN & GREGORY MITCHELL, EDS. 2010).

his capacity as the court's non-testifying consultant, or the effects of the court's feasibility advisor working collaboratively with the full range of city officials? Existing research on chapter 11 suggests the appointment of professional fee examiners is not associated with lower costs.⁴¹⁰ If that holds for chapter 9, how does one evaluate the benefit of the Detroit fee examination process, particularly given that, at the end, the court ultimately required a more extensive, retrospective review?⁴¹¹ As for the court's approach to case management, the court's own feasibility expert worried that the intentionally swift pace of the case made the settlements more, and potentially too, expensive for the city.⁴¹²

Another response to "what's the harm" is in the form of a return question pursued in a separate article: even if a federal judge generated the idea for the Grand Bargain, why did the federal judge have to participate in the solicitation of non-parties and closing of the deal?⁴¹³

Ultimately, one needs to be more deliberate about the costs, federalist and otherwise, to the Detroit Blueprint, a full analysis of which this article does not undertake. What can be said, for now, is that the Detroit Blueprint reveals two particular problems with section 904.

1. Formal versus Informal Measures of Oversight

Bankruptcy Code section 904, the main Congressional policy statement about the federal-state balance in municipal bankruptcy, does not map onto how judges

⁴¹⁰ Stephen Lubben, *What We Know About Chapter 11 Costs Is Wrong*, 17 FORDHAM J. CORP. & FIN. L. 141, 146, 182 (2012).

⁴¹¹ *Supra* notes 239 (ordering mediation on professional fees after oral plan confirmation decision), 284 (Detroit Retirement Systems ordered to retroactively submit bills for review after oral plan confirmation decision).

⁴¹² *Supra* note 388.

⁴¹³ Jacoby & Remus, *supra* note 34; Church, *supra* note 13 ("Rosen's position as chief federal judge of the district would be 'critical' in such negotiating sessions," said lawyer not involved in the case).

manage cases, particularly complex cases, in the modern judiciary.⁴¹⁴ Section 904 sets forth a principle of judicial constraint by proscribing formal judicial acts associated with traditional adjudication: “stay, order, or decree.”⁴¹⁵ Some components of the Detroit Blueprint do not fit those acts, as one would expect from the federal judiciary’s handling of other complex cases. On the other hand, I have uncovered no evidence that Congress referred to these formal acts with a wink or nod to courts that they otherwise were encouraged to exercise heavy control through other means. As reviewed earlier, the message has consistently been that courts are not to be involved with the day-to-day activity of municipal restructuring; their roles are supposedly confined to ruling on a municipality’s eligibility for bankruptcy and the legality of its plan of adjustment, and occasionally other disputes.⁴¹⁶ Whatever benefits might flow from a highly experimental chapter 9 system, the history of chapter 9 and section 904 does not suggest that Congress intended to create such a laboratory, particularly one that does not contain a mechanism for systematic evaluation of such innovations.⁴¹⁷

2. Rethinking the Consent Exception

Until now, the consent exception of section 904 has not been conceptualized as a tool of, or invitation for, judicial control; it was additional debtor protection.⁴¹⁸ Insofar as provision does not distinguish between court requests and debtor requests, a creative court can use the exception as an oversight tool. Such a use of the consent clause puts a premium on a municipality exercising free choice. As previously reviewed, however, sometimes the presentation of options to a state actor by a federal government actor is perceived as no real choice at all.⁴¹⁹ In any kind of case, a litigant weighs the benefits of asserting rights against the risks of

⁴¹⁴ *Supra* Part II.A.

⁴¹⁵ 11 U.S.C. § 904.

⁴¹⁶ Sources cited *supra* Part I.B.1, 2.

⁴¹⁷ Charles F. Sabel & William H. Simon, *Minimalism and Experimentalism in the Administrative State*, 100 GEO. L. J. 53 (2011).

⁴¹⁸ *Supra* notes 64-65.

⁴¹⁹ *Supra* note 69-75.

disappointing the judge and the anticipated impact, whether or not accurate.⁴²⁰ As stated earlier, chapter 9's critics were correct that a federal court's traditional gatekeeping role gives it considerable leverage.⁴²¹ What they overlooked was the broad proliferation of means and ends through and for which a court might put that leverage to use.

For example, perhaps foundational to his case management strategy, Judge Rhodes offered draft language and rationales for a fee examiner order,⁴²² and a mediation order.⁴²³ Those proposals came early, the bankruptcy petition's ink barely dry, before a rhythm or rapport had been established between the court and the parties. Once a court proposes reviewing the bills of Detroit's lawyers, is it truly feasible for those professionals to stand up in court and resist, while the news media records every move? Even if the city did fully embrace the mediation order at that time, as its lawyer announced, could the debtor have anticipated the full scope of the mediators' activities identified in Part III.C? Later in the case, would it be consequence-free for the emergency manager to reject Chief Judge Rosen's urgings to cancel a planned pension freeze and ask him not to call again?⁴²⁴ The role of consent is further complicated by shifts in municipal authority. Detroit's City Council probably never had a say on the mediation order. Could it later complain, upon the reemergence of its authority, if the lead mediator was trying to go where he arguably did not belong?⁴²⁵

⁴²⁰ Jacoby & Remus, *supra* note 34 (discussing limited constraints on judiciary and implications for litigants).

⁴²¹ *Supra* Part I.C.

⁴²² *Supra* Part III.D.1.

⁴²³ *Supra* Part III.C.

⁴²⁴ *See supra* note 246.

⁴²⁵ *See supra* note 254 (discussing presence of Chief Judge Rosen at closed door City Council meeting).

The city strongly asserted its section 904 rights in several formal litigation settings during the bankruptcy.⁴²⁶ But the response understandably differed when the court made the request. Recall that Judge Rhodes asked the city, in the middle of a hearing, to bring a water department representative to discuss residential water shutoffs, posed a series of questions to that representative, and then asked him to return the following week.⁴²⁷ It is unimaginable that, in the middle of the bankruptcy, the city would simply refuse to produce that representative.⁴²⁸ When that representative arrived, presumably with little time to prepare, we would not expect to hear, “not your business, Your Honor,” in response to the judge’s questions.

The subtle tussle over managing tort claims against the city also illustrates how a court can leverage other acknowledged powers to obtain consent to actions the court could not otherwise require. Concerned that hundreds of tort claims against Detroit could derail the schedule for the bankruptcy, the court suggested a tort claimant committee.⁴²⁹ The city did not embrace that idea. Before it publicly proposed any alternative, the court indirectly forced the city’s hand through the Ryan lift-stay dispute.⁴³⁰ That example also shows how creditor requests can be used by the court to coax the debtor in one direction or another. Prohibiting *sua sponte* actions would not eliminate that possibility.

⁴²⁶ The city raised a section 904 defense when third parties filed an adversary proceeding asking the bankruptcy court to impose a moratorium on water shutoffs, documented *supra* notes 348-349. The city also fought creditors’ efforts to control the process of valuing the art collection in the DIA in part by arguing section 904. *E.g.*, Debtor’s Objection to Motion of Creditors at 6, In re City of Detroit, No. 13-53846 (Bankr. E.D. Mich. Apr. 28, 2014), ECF No. 4290 (“The Moving Creditors’ request that the Court compel the City to cooperate in their due diligence efforts is in direct conflict with section 904”).

⁴²⁷ *Supra* notes 343-346.

⁴²⁸ *Cf.* G. Heileman Brewing Co. v. Joseph Oat Corp., 871 F.2d 648, 657 (7th Cir. 1989) (Judge Posner dissent to en banc decision noting limited effect of majority opinion because “it is the rare attorney who will invite a district judge’s displeasure by defying a request to produce the client for a pretrial conference”).

⁴²⁹ *Supra* note 175.

⁴³⁰ *Supra* notes 184-186.

However a debtor's permission is obtained, federal court involvement sometimes incites more alarm for a creditor than for the debtor.⁴³¹ If the result is not to creditors' liking, they might perceive the court as too closely aligned with the state and municipality.⁴³² The identity of creditors asserting disadvantage may vary from case to case: they could be capital markets claimants in some instances, pension claimants in others. In other words, judicial reliance on section 904's consent exception provokes a menu of issues, not all of which are federalism-related.

Conclusion

This article has offered an in-depth study of judicial oversight in the historic Detroit bankruptcy. The oversight channels forming the procedural precedent, termed the Detroit Blueprint here, reflect tools and methods that have long occupied federal court and procedure scholars but have escaped the focus of the municipal bankruptcy world. Contrary to the conventional wisdom, the federal court was a significant institutional actor throughout Detroit's restructuring, via official court proceedings as well as behind the scenes. The Detroit Blueprint is sure to have ripple effects in other municipal distress contexts even if it is never fully replicated, and shows that statutory provisions meant to enforce the federalist structure of municipal bankruptcy are not nearly as strong as typically claimed. In reframing the discussion of what judges do in chapter 9, the article raises a new set of questions about the optimal level of federal control when a distressed municipality comes calling for debt relief.

⁴³¹ That possibility should not be surprising, as those dynamics generated the *Leco Properties* case and, in turn, the consent exception. *Supra* notes 63-65. See also Jacoby & Remus, *supra* note 34 (discussing mediation-related complaints made in writing by creditors to the Detroit bankruptcy court).

⁴³² Dolan & Glazer, *supra* note 265 (reviewing creditor complaints, particularly about Grand Bargain mediation).