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RECOGNIZING TAXPAYERS AS STAKEHOLDERS IN MUNICIPAL BANKRUPTCIES

Diane Lourdes Dick

INTRODUCTION

Recent large municipal bankruptcy cases have called into question the rights of debtor-cities to impair their capital markets creditors, on the one hand, and beneficiaries of their unfunded public pension promises, on the other. As I show in a companion work,¹ federal bankruptcy law generally allows debtors to impair each of these obligations. However, heightened judicial scrutiny may apply to plans that are crammed down on public pension benefit recipients.² Moreover, debtors and their stakeholders may still agree for a variety of reasons to pursue restructuring plans that preserve public pensions and impair the claims of capital markets creditors.³

But for all the focus on these two dominant creditor classes,⁴ an important stakeholder—the debtor-city’s taxpaying residents—has been largely overlooked in the public discourse. By “taxpaying resident,” I mean persons who reside in the debtor-city and are subject to taxes (such as sales and property taxes) that are assessed and levied by the debtor-city to support services and infrastructure. This key stakeholder is likely to play a central role in the case, and is not only substantially impacted by the bankruptcy filing but also capable of substantially impacting any proposed restructuring plan. This is because, in an emerging prototype of municipal bankruptcy restructuring, debtor-cities slash services in the years and months leading up to the bankruptcy filing, and also rely in large part on tax increases to support their plans to exit bankruptcy with a stronger fiscal

¹ Diane Lourdes Dick, *Bondholders vs. Retirees in Municipal Bankruptcies: The Political Economy of Chapter 9*, AM. BANKR. L.J. (forthcoming 2018).

² See Amended Opinion Regarding Confirmation and Status of CalPERS at 47, *In re City of Stockton*, California, No. 12-32118 (Bankr. E.D.Cal. Feb. 4, 2015).

³ See, e.g., Daniel Gill, *San Bernardino’s Debt Adjustment Plan Approved*, BLOOMBERG BNA (Feb. 22, 2017) (reporting on San Bernardino’s consensual Chapter 9 plan of adjustment that severely impairs capital markets creditors while maintaining public pensions).

⁴ On the primacy of the conflict between bondholders, on the one hand, and public pension claimants, on the other in municipal bankruptcy, see, e.g., Maria O’Brian Hylton, *Central Falls Retirees v. Bondholders: Assessing Fear of Contagion in Chapter 9 Proceedings*, 59 WAYNE L. REV. 525 (2014); Daniel Fisher, *Municipal Bankruptcies Set Up War Between Pensioners and Bondholders*, FORBES (Apr. 3, 2013, 9:49 AM), <http://www.forbes.com/sites/danielfisher/2013/04/03/muni-bankruptcies-set-up-war-between-pensionersand-bondholders/>.

foundation.⁵ This Article considers whether and to what extent a debtor-city's taxpaying residents are considered parties to the bankruptcy case, and whether they should have formal representation and a seat at the bankruptcy negotiation table. I join a small chorus of scholars and practitioners who argue that taxpaying residents should be granted standing and formal representation in the proceedings. To this body of work, I contribute an examination of whether and to what extent taxpaying residents are "stakeholders" of municipal debtor-cities under prevailing stakeholder analysis methodology.

This Article proceeds as follows. Part I introduces a detailed case study of a recent large municipal bankruptcy, that of the City of Stockton, California, paying particular attention to the ways in which taxpaying residents attempted unsuccessfully to interject in the proceeding and obtain an official taxpayers committee. Part II introduces recent scholarly and practice-oriented literature exploring the role of taxpaying residents in Chapter 9 bankruptcy, and considers how these interested persons may be classified under the Bankruptcy Code. This Part also contemplates the prevailing wisdom and methods of stakeholder analysis to determine whether the interests of taxpayers are adequately represented in prevailing Chapter 9 law and practice. Part III concludes.

I. CASE STUDY: STOCKTON, CALIFORNIA

This section introduces a large and prominent municipal bankruptcy case—that of the City of Stockton, California—to provide a recent example of taxpaying residents attempting to gain influence in a Chapter 9 bankruptcy proceeding. By examining the arguments these taxpayers raised and the responses they received from the other parties, I attempt to provide richer context for the legal and theoretical questions taken up in subsequent sections.

On June 28, 2012, Stockton filed for bankruptcy protection in the U.S. Bankruptcy Court for the Eastern District of California.⁶ The city's council had disclosed earlier that year that the city was unable to meet its financial obligations as they became due.⁷ After months of mediation, city officials determined that only bankruptcy would offer the necessary breathing room

⁵ The emerging prototypical municipal bankruptcy restructuring is described in Dick, *supra* note 1.

⁶ Voluntary Petition of City of Stockton, California, *In re* City of Stockton, California, No. 12-32118 (Bankr. E.D.Cal. June 28, 2012).

⁷ Declaration of Marc A. Levinson at 2, *In re* City of Stockton, California, No. 12-32118 (Bankr. E.D.Cal. June 29, 2012).

to deal with spiraling public pension costs, burdensome bond debts, and other crippling secured and unsecured short- and long-term liabilities.⁸

In declarations explaining the decision to file for bankruptcy, city officials painted a bleak picture of a municipality that had been severely impacted by the housing bubble and bust. They described how tax revenues dried up while expenses swelled, leaving residents to endure “severe reductions in staffing and services, with serious repercussions to the safety and welfare of the City’s residents,”⁹ delayed response by public safety departments, which “potentially places people and structures at greater risk,”¹⁰ and drastic reductions in community educational and recreational programming.¹¹ One official summarized the city’s condition at the time of its bankruptcy filing thusly: “The City is not only already cash-insolvent. It is service-insolvent as well.”¹² In other words, not only was the city unable to *pay* for necessary services; it was also failing to provide them.

Stockton’s petition for relief—like all municipal bankruptcy filings—was governed by Chapter 9,¹³ a portion of the U.S. Bankruptcy Code¹⁴ devoted exclusively to the reorganization of municipalities, villages, counties, taxing districts, municipal utilities, and school districts.¹⁵ Tucked between Chapter 7,¹⁶ which addresses individual and business liquidations, and Chapter 11,¹⁷ which deals primarily with individual and business reorganizations, Chapter 9 strikes a delicate constitutional balance between the federal government’s authority to regulate bankrupt persons and the state’s power to govern its political affairs.¹⁸ In legislative history, drafters acknowledged that in Chapter 9, “[t]he powers of the court are subject to a strict limitation—that no order or decree may in any way interfere with the political or governmental powers of the petitioner, the property or revenue of the petitioner, or any income producing powers.”¹⁹

Precisely because of these federalism concerns, Stockton’s bankruptcy would follow a different path than most consumer and business bankrupt-

⁸ *Id.*

⁹ Declaration of Laurie Montes at 8-9, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. June 29, 2012).

¹⁰ *Id.* at 9.

¹¹ *Id.*

¹² *Id.* at 14.

¹³ 11 U.S.C. §§ 901–946.

¹⁴ All references herein to the “Bankruptcy Code” or the “Code” are to the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 101 et. seq.).

¹⁵ On the definition of “municipality,” see Michael J. Deitch, *Time for an Update: A New Framework for Evaluating Chapter 9 Bankruptcies*, 83 *FORDHAM L. REV.* 2705 (2015).

¹⁶ 11 U.S.C. §§ 701–784 (providing for liquidations of bankrupt persons).

¹⁷ 11 U.S.C. §§ 1101–1174 (providing for reorganizations and liquidations of bankrupt persons).

¹⁸ See generally 11 U.S.C. §904; *Ashton v. Cameron County Water Improvement Dist. No. 1*, 298 U.S. 513, 538 (1936) (articulating the federalism issues inherent in municipal bankruptcy law).

¹⁹ 121 *CONG. REC.* H39409–10 (daily ed. Dec. 9, 1975) (statement of Rep. Edwards).

cies. For instance, unlike Chapter 7, Chapter 9 offers no mechanism for liquidating assets and distributing proceeds to claimants. Instead, municipal debtors must negotiate with their creditors and obtain consensus to (and judicial confirmation of) a plan of adjustment to restructure debts and other obligations.²⁰ To this end, Chapter 9 bankruptcy process is similar to Chapter 11, in that the outcome of the case is determined to a large extent by party negotiations and settlements rather than judicial edict.²¹

But in Chapter 9, the U.S. Trustee and the bankruptcy court have even *less* control over the conduct of the debtor.²² In fact, the court's exercise of its judicial powers over a municipal debtor primarily occurs at the commencement of the case, when the court must decide if the debtor is even eligible for bankruptcy protection. A city such as Stockton seeking to obtain relief under Chapter 9 must show that it is a municipality²³ authorized by the state to file for bankruptcy protection,²⁴ that it is "insolvent" (meaning for these purposes that the municipality is "generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or...unable to pay its debts as they become due."),²⁵ that it desires to effect a plan to adjust its debts,²⁶ and that it has negotiated in good faith with its creditors or that such negotiations would be futile.²⁷ The city bears the burden of proving that it satisfies each eligibility requirement.²⁸

In *Stockton*, the city's eligibility for bankruptcy protection was hotly contested.²⁹ In first-day filings, the city identified the California Public Employees' Retirement System ("CalPERS")—overseer of the city's employee pension plan—as its largest creditor, holding an estimated \$148 million contingent, unliquidated claim for unfunded pension costs.³⁰ The city's next largest debts consisted of approximately \$124 million in pension obligation bonds, \$40 million in variable rate demand obligations, \$35 million in public facilities fees bonds, and \$32 million in parking garage construc-

²⁰ Plan confirmation requirements are set forth in 11 U.S.C. §943(b).

²¹ I explore this phenomenon in the Chapter 11 context in Diane Lourdes Dick, *The Chapter 11 Efficiency Fallacy*, 2013 B.Y.U. L. REV. 759 (2013).

²² See, e.g., Clayton P. Gillette, *Fiscal Federalism, Political Will, and Strategic Use of Municipal Bankruptcy*, 79 U. CHI. L. REV. 281 (2012); Michael W. McConnell & Randall C. Picker, *When Cities Go Broke: A Conceptual Introduction to Municipal Bankruptcy*, 60 U. CHI. L. REV. 425 (1993).

²³ 11 U.S.C. §109(c)(1).

²⁴ 11 U.S.C. §109(c)(2).

²⁵ 11 U.S.C. §109(c)(3).

²⁶ 11 U.S.C. §109(c)(4).

²⁷ 11 U.S.C. §109(c)(5).

²⁸ See, e.g., *Int'l Ass'n of Firefighters, Local 1186 v. City of Vallejo*, 408 B.R. 280, 289 (9th Cir. BAP 2009).

²⁹ See, e.g., National Public Finance Guarantee Corporation's Objection to the City of Stockton's Qualifications, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Aug. 8, 2012).

³⁰ List of Creditors Holding 20 Largest Unsecured Claims, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. June 28, 2012).

tion bonds.³¹ Certain of these capital markets creditors³² complained that the city had failed to negotiate in good faith with its creditors in an effort to avoid bankruptcy; they pointed to the fact that the city sought concessions from its capital markets creditors without seeking concessions from CalPERS.³³ In a pointed objection, one creditor alleged, “the City’s entire purpose in filing this case has been to force...the...Capital Markets Creditors to pay for otherwise-unfunded benefits to labor—including CalPERS’ ever-increasing pension benefit costs.”³⁴ CalPERS, for its part, argued that the city’s decision to pay pension-related claims in full and thereby maintain the relationship for the benefit of employees and retirees was a lawful exercise of business judgment.³⁵ Following a three day trial, the court decided in March 2013 that the city was eligible for Chapter 9 bankruptcy.

Attention then shifted to negotiating and finalizing the city’s plan of adjustment so that it could exit bankruptcy with restructured finances. In *Stockton*, as in most large and complex bankruptcy cases, the most important, preliminary question was *who* would be recognized as having a seat at the negotiation table. In other words, who would the debtor and the court recognize as parties to the case, and what role would they be permitted to play in the proceedings?

The question is more complex than it may initially appear. For instance, although the debtor identified CalPERS as its largest creditor, the true owners of retirement benefit claims were the city’s approximately 2,400 retirees. These individuals were initially represented in pre- and post-petition negotiations by the Association of Retired Employees of the City of Stockton, which advocated not only with respect to public pension benefits, but also with respect to retiree health care benefits.³⁶ And of course, CalPERS and the various employee labor unions advocated powerfully on behalf of public pension benefit recipients. But the U.S. Trustee would eventually appoint an official committee to also represent retirees. The U.S. Trustee has the authority to form this and other official commit-

³¹ *Id.*

³² I use the term “capital markets creditors” to refer generally to persons holding claims that originated from capital markets transactions, such as bond issuances. In many bankruptcy cases, such claims are held by bond insurers and other providers of financial guaranty insurance.

³³ CalPERS is the country’s largest government worker pension fund. On the fund’s history, see generally Steven Malanga, *The Pension Fund That Ate California: CalPERS’s corruption, insider dealing, and politicized investments have overwhelmed taxpayers with debt*, CITY JOURNAL, Winter 2013 (alleging that the fund’s poor investment choices and mismanagement have crippled California’s public finances).

³⁴ Supplemental Objection of Assured Guaranty Corp. and Assured Guaranty Municipal Corp., *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Dec. 14, 2012).

³⁵ CalPERS Brief in Support of the City of Stockton’s Petition, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Feb. 15, 2013).

³⁶ See, e.g., Complaint for Declaratory and Injunctive Relief, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. July 1, 2013).

tees because Chapter 9 broadly incorporates³⁷ a provision of Chapter 11 that authorizes formation of “committees of creditors or of equity security holders as the [U.S. Trustee] deems appropriate.”³⁸ Meanwhile, the city’s capital markets creditors advocated on their own behalf during the proceedings. This is because, in contrast to Chapter 11, unsecured creditors’ committees are not mandatory in Chapter 9. In further contrast to Chapter 11, Chapter 9 does not require debtors to shoulder the costs of attorneys and other professionals retained by official committees,³⁹ although debtors frequently agree to do so anyway.

Of course, even if the debtor-city declines to assume the costs of committee professionals, statutory committees still provide important benefits for stakeholders.⁴⁰ For one thing, official committees are generally regarded as having a seat at the negotiation table, meaning that courts will expect debtors to work with them to achieve consensual resolution of conflicts. Moreover, so-called statutory committees have important discovery rights, including the power to “investigate the acts, conduct, assets, liabilities, and financial condition of the debtor.”⁴¹

In light of these important benefits, another group attempted to gain official committee status in *Stockton*. The self-described “Ad Hoc Taxpayers of Stockton Working Group” began to interject in the proceedings and also petitioned for an official taxpayers committee.⁴² Initially, the members of the working group—five taxpaying residents of Stockton—were concerned that the city’s plan of adjustment contemplated tax increases; later, they were concerned about the nature of the financial disclosures provided by the city to the voting public.

Although a Chapter 9 plan of adjustment may depend on tax increases for increased revenue, the plan itself is not necessarily capable of implementing the tax increase. This is because debtors are required to satisfy any legal conditions precedent to taking proposed actions under a plan of restructuring,⁴³ and this includes compliance with state or local laws requiring

³⁷ 11 U.S.C. §901.

³⁸ 11 U.S.C. §1102.

³⁹ 11 U.S.C. §901 (omitting sections 327 through 331 of the Bankruptcy Code, which govern matters relating to employment and compensation of professionals). It is important to note, however, that Chapter 9 incorporates Section 503 of the Bankruptcy Code, which contemplates that any person who can demonstrate that they have made a “substantial contribution” to the case may seek payment of costs and expenses, including professional fees. 11 U.S.C. §901.

⁴⁰ I’ve considered this argument in the somewhat analogous context of Chapter 11. Diane Lourdes Dick, *Grassroots Shareholder Activism in Large Commercial Bankruptcies*, 40 J. CORP. L. 1 (2014). On recent developments in leading cases, see Ana Lucia Hurtado, *The Equity Committee Trend: When Shareholders of a Bankrupt Company Hope to Get More Than Nothing*, FORBES, Oct. 14, 2016.

⁴¹ 11 U.S.C. §1103(c).

⁴² City’s Submission of Response to Request for Appointment of Official Taxpayers’ Committee at 1, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. July 1, 2013).

⁴³ 11 U.S.C. §943(b)(4).

voter approval of tax increases. Under the California State Constitution, cities must obtain the approval of a majority of voters for any new or increased general taxes, with a two-thirds majority approval required for any new or increased special taxes.⁴⁴ In first-day filings, city officials acknowledged the difficulty of meeting or exceeding these vote thresholds: “Obtaining voter approval for new taxes...is highly speculative under normal circumstances. It is even more uncertain given the City’s historically high rates of foreclosures and unemployment and public concern over the City’s past practices, including in establishing an overly generous retiree health program and incurring debt it now cannot afford to pay.”⁴⁵

Despite the political challenges, Stockton’s proposed plan of adjustment relied upon a three-quarter cent sales tax increase (“Measure A”).⁴⁶ The debtor explained, “[t]his Plan is predicated upon passage of Measure A. If Measure A fails to pass, the City will be compelled to implement a plan of adjustment that further slashes staffing and services provided by the City to its residents and will likely be unable to consummate the proposed settlements.”⁴⁷ Then, to comply with California law, the plan also contemplated that the city would place the tax measure on the November 2013 ballot to gain the requisite majority approval.

In the months leading up to the November 2013 election, members of the taxpayers’ working group were concerned that the city would not provide sufficient information about the nature of the increases and the intended uses of funds raised.⁴⁸ Specifically, the working group complained that the city publicly characterized tax increases as necessary to hire additional police officers, but did not actually file detailed plan-related disclosures containing any “enforceable commitment to hire and train police officers.”⁴⁹ They argued that an official taxpayers committee was necessary to help the debtor overcome these and other deficiencies.

But the city vehemently opposed the appointment of an official taxpayers committee on the grounds that such a committee was not explicitly authorized by the Bankruptcy Code and, even if the Bankruptcy Code per-

⁴⁴ Declaration of Vanessa Burke at 10, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. July 3, 2012).

⁴⁵ *Id.*

⁴⁶ Plan of Adjustment at 76, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Oct. 10, 2013). Although the draft proposed plan was not released until October, the City Council had introduced Measure A months earlier at an emergency meeting. Ad Hoc Taxpayers Working Group’s Submission of Reply to City’s Response to Request to Appoint Official Taxpayer Committee at 2, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. July 8, 2013).

⁴⁷ Plan of Adjustment at 76, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Oct. 10, 2013).

⁴⁸ Ad Hoc Taxpayers Working Group’s Submission of Reply to City’s Response to Request to Appoint Official Taxpayer Committee at 2, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. July 8, 2013).

⁴⁹ *Id.* at 3.

mitted formation of such a committee, “such an appointment would be an affront to the only legitimate representatives of the taxpayers of Stockton—the duly elected City Council.”⁵⁰ Drawing an analogy to a 2001 case in which a court overseeing a utility company’s bankruptcy restructuring declined to order the appointment of an official ratepayers committee, the city argued that there is simply no legal basis for forming a taxpayers committee.⁵¹ Moreover, the debtor pointed to the City Charter, which establishes a City Council, concluding that it is “flat out wrong” to claim that taxpayers have no representation.⁵²

In a responsive pleading, the members of the working group agreed to table their demand for an official taxpayers committee.⁵³ However, they rearticulated their view that the debtor “needs the support of the taxpayers” in order to realize its plan of adjustment, and admonished the debtor for its outright “hostility” towards the working group.⁵⁴ Suggesting that taxpayers could not rely upon elected leaders to adequately represent them, the working group described the findings of a recent state audit of city finances: “The audit found the City’s audit controls were ineffective....In summary, the audit report states, ‘We found the potential for waste, fraud and abuse of public resources is extremely high due to numerous deficiencies.’”⁵⁵ The working group also emphasized its demand that “adequate information [be made] available for all of the City’s taxpayers to review the City’s plan of adjustment and make a decision on the tax increase.”⁵⁶ Finally, the working group argued that the members of the working group—whether as an ad hoc or official committee—had an important role to play in the case: “The Working Group stands for transparency regarding the tax increase and the bankruptcy process—which the residents of Stockton are not receiving and the City seems determined to prevent.”⁵⁷

In the weeks and months that followed, the working group continued to intervene in the case to advance three goals: “to analyze and review on behalf of taxpayers the proposed tax increase...to ensure the Debtor’s proposed plan provides the taxpaying residents a sufficient and reasonably acceptable level of health, safety and welfare services, and...to work with

⁵⁰ City’s Submission of Response to Request for Appointment of Official Taxpayers’ Committee at 2, *In re* City of Stockton, California, No. 12-32118 (Bankr. E.D.Cal. July 1, 2013).

⁵¹ *Id.* at 3. (discussing Memorandum Decision Regarding Motion for Order Vacating Appointment of Committee of Ratepayers, *In re* Pacific Gas & Electric Co., No. 01-30923 (Bankr. N.D.Cal. May 21, 2001).

⁵² *Id.*

⁵³ Ad Hoc Taxpayers Working Group’s Submission of Reply to City’s Response to Request to Appoint Official Taxpayer Committee at 3, *In re* City of Stockton, California, No. 12-32118 (Bankr. E.D.Cal. July 8, 2013).

⁵⁴ *Id.* at 1.

⁵⁵ *Id.* at 2.

⁵⁶ *Id.* at 2.

⁵⁷ *Id.* at 3.

the Debtor and all of the constituencies to ensure the plan of adjustment is feasible...and fiscally sustainable.”⁵⁸ Over the working group’s objections, the City Council unanimously approved putting the sales tax increase on the November 2013 ballot, clarifying that 35% of the associated tax revenues would go towards the city’s general fund, while 65% would be used to enhance public safety.⁵⁹ Meanwhile, the City Council warned that if the tax measure failed to pass, financial consequences for the city would be profound: “Parks and libraries would be shut altogether. The fire department budget, already reduced 37 percent, would be cut an additional 14 percent.”⁶⁰ In the campaigning period, supporters of the tax measure primarily argued that the new revenue was needed to bring about an end to the bankruptcy case, and that it was the only way to prevent additional service reductions and restore services that had been cut in the months and years leading up to the bankruptcy case.⁶¹

But it also appears that there was at least some misinformation circulated during the campaign. For instance, the “Secure Stockton” movement argued: “Municipal Bankruptcy (Chapter 9) does not eliminate the City’s debt. Rather, it will restructure those debts in a way that buys time for our economy and revenues to grow, enabling the City to pay off the debt in the most equitable manner possible.”⁶² This statement was made notwithstanding the fact that the city had already proposed severely impairing its capital markets creditors.⁶³

In a November 2013 election with a mere 21 percent voter turnout,⁶⁴ the Measure A narrowly passed, with just under 52 percent of voters favoring the tax increase.⁶⁵ And in early 2015, Stockton gained court approval of a plan of adjustment that implemented the tax increase, preserved the city’s relationship with CalPERS in order to maintain retiree and employee pen-

⁵⁸ Joinder of Ad Hoc Taxpayers Working Group to Dean Andal’s Motion for Relief From Automatic Stay, Ad Hoc Taxpayers Working Group’s Submission of Reply to City’s Response to Request to Appoint Official Taxpayer Committee at 2, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Aug. 5, 2013).

⁵⁹ Ian McDonald, *Stockton City Council Votes Unanimously to Put Sales Tax Hike on Ballot*, FOX40 (July 10, 2013).

⁶⁰ Alan Greenblatt, *What It’s Like Living in a Bankrupt City*, NPR (Sept. 6, 2013).

⁶¹ CITY OF STOCKTON SALES TAX INCREASE AND ASSOCIATED ADVISORY VOTE, MEASURES A AND B (November 2013), [https://ballotpedia.org/City_of_Stockton_Sales_Tax_Increase_and_Associated_Advisory_Vote_Measures_A_and_B_\(November_2013\)](https://ballotpedia.org/City_of_Stockton_Sales_Tax_Increase_and_Associated_Advisory_Vote_Measures_A_and_B_(November_2013)) (last visited Feb. 19, 2017).

⁶² *Id.*

⁶³ See, e.g., Plan of Adjustment, *In re City of Stockton, California*, No. 12-32118 (Bankr. E.D.Cal. Oct. 10, 2013).

⁶⁴ *Stockton Election Measures Pass, Election Turnout At 21 Percent*, CBSLOCAL (Nov. 5, 2013).

⁶⁵ CITY OF STOCKTON SALES TAX INCREASE AND ASSOCIATED ADVISORY VOTE, *supra* note 60; see also Alison Vekshin, *Stockton Approves Sales-Tax Hike to Ease Bankruptcy Exit*, BLOOMBERG (Nov. 5, 2013).

sions, terminated certain ancillary retiree health care benefits, and also impaired capital markets creditors.⁶⁶

In the years following *Stockton*, several prominent lawyers and academics have revisited the question of whether and to what extent taxpayers should participate as parties in interest to their city's Chapter 9 proceedings. The following Part explores these works and also contributes a novel theory of taxpayer participation and representation in municipal bankruptcies that is grounded in stakeholder analysis.

II. DISCUSSION: RECONSIDERING TAXPAYERS AS STAKEHOLDERS

The issue of taxpayer participation and representation in Chapter 9 bankruptcy cases continues to be relatively understudied. However, although this is still fairly uncharted terrain, there have been some thoughtful and highly germane scholarly and practice-oriented contributions in the years following *Stockton*. Through legal, historical, and empirical analysis, these works help to shed new light on the questions surrounding taxpayer participation in municipal bankruptcy cases.

For instance, in a 2014 piece, bankruptcy attorney Christine Schleppegrell explored the threshold question: whether taxpaying residents are even “parties in interest” to a Chapter 9 case.⁶⁷ The inquiry is not as straightforward as it may initially appear, as Chapter 9 only explicitly confers party status on a narrow subcategory of taxpayers. In a municipal bankruptcy case, “special tax payers”⁶⁸— meaning the owners of property that is the subject of a special assessment or tax levy—may object to confirmation of a plan that affects their interests.⁶⁹

Beyond this narrow provision, taxpayers of a bankrupt municipality have standing to the extent they come within a much broader definition of “party in interest,” which originates in Chapter 11 and is incorporated by reference into Chapter 9.⁷⁰ That provision provides that only a “party in interest” has a right to “raise and...appear and be heard on any issue.”⁷¹ The term “party in interest” is defined to include “the debtor, the trustee, a creditors’ committee, an equity security holders’ committee, a creditor, an equity security holder, or any indenture trustee.”⁷² Courts have traditionally construed the inclusive definition broadly to permit board participation in

⁶⁶ Amended Opinion Regarding Confirmation and Status of CalPERS, *In re City of Stockton*, California, No. 12-32118 (Bankr. E.D.Cal. Feb. 27, 2015).

⁶⁷ Christine A. Schleppegrell, *Can Taxpayers Leverage the Ambiguity of “Party-in-Interest” to Enter the Chapter 9 Arena?*, 33 AM. BANKR. INST. J. 20 (2014).

⁶⁸ 11 U.S.C. §902(3).

⁶⁹ 11 U.S.C. §943(a); 11 U.S.C. §902(4).

⁷⁰ 11 U.S.C. §901.

⁷¹ 11 U.S.C. §1109.

⁷² *Id.*

the case.⁷³ Meanwhile, federal rules of bankruptcy procedure also authorize courts to allow intervention by persons that do not otherwise have standing to participate in the case.⁷⁴ In exercising their discretion, courts should “balance the needs of a potential intervenor against any delay or prejudice which [will] result from such intervention.”⁷⁵ In making the determination, courts typically focus on economic interests and whether the intervenors are already represented by parties in interest.⁷⁶

Despite these broad and permissive standards for intervention in bankruptcy proceedings, Schleppegrell’s survey of case law shows how, because of federalism concerns unique to Chapter 9, taxpayers have struggled to overcome a judicial presumption that they are merely “peripheral parties” to municipal bankruptcy cases.⁷⁷ The greatest challenges appear to be at the eligibility stage of a Chapter 9 case, when it may not be clear whether and to what extent the plan of adjustment will impact taxpayers. In contrast, landowning taxpayers have had some success intervening at the confirmation stage of the proceedings, particularly if the debtor has proposed tax increases as part of its plan of adjustment. Where courts have refused to grant taxpayers standing, they have cited the narrow purposes of Chapter 9 bankruptcy to effectuate debt adjustments, and the importance of respecting the municipality’s right to manage its own policy choices and political affairs.⁷⁸ In order to make the requisite showing of a practical stake and pecuniary interest in the outcome of the case sufficient to overcome these judicial trepidations, the author recommends that taxpayers seeking to intervene in a Chapter 9 case emphasize “the effect that [any proposed] tax will have on individual citizens’ finances,” particularly as it relates to ongoing tax obligations and any impacts on property values.⁷⁹ Similarly, they should address any reductions in services that have occurred or that are likely to occur.⁸⁰

Professor Christine Sgarlata Chung also argues in a 2015 article⁸¹ that taxpaying residents should have standing in Chapter 9 cases; moreover, Professor Chung responds to arguments that taxpaying residents are already adequately represented by their elected officials. Examining legislative history of Chapter 9, she reminds that the drafters *always* recognized the

⁷³ See, e.g., *In re Ionosphere Clubs*, 101 B.R. 844 (Bankr. S.D.N.Y. 1989); *In re FRG, Inc.*, 107 B.R. 461 (Bankr. S.D.N.Y. 1989); *In re Public Service Co.*, 88 B.R. 546 (Bankr. D.N.H. 1988).

⁷⁴ FED. R. BANKR. P. 2018.

⁷⁵ *In re Addison Cmty. Hosp. Auth.*, 175 B.R. 646, 651 (citing *In re City of Bridgeport*, 128 B.R. 686, 687 (Bankr. D. Conn. 1991)).

⁷⁶ See *id.*

⁷⁷ Schleppegrell, *supra* note 67, at 20.

⁷⁸ See *In re Addison Community Hosp. Authority*, 175 B.R. 646 (1994).

⁷⁹ Schleppegrell, *supra* note 67, at 61-62.

⁸⁰ *Id.*

⁸¹ Christine Sgarlata Chung, *Municipal Bankruptcy, Essential Municipal Services, and Taxpayers’ Voice*, 24 WIDENER L.J. 43 (2015).

important role residents and taxpayers play in the case, given the municipal debtor's unique status as a provider of essential public services.⁸² She presents a compelling case study from Detroit's recent Chapter 9 filing, parsing through judicial decisions that emphasize the city's service insolvency and the devastating effects of the lack of basic services and infrastructure on city residents and taxpayers. Professor Chung argues that notwithstanding the obvious federalism issues that likely prevented the drafters of the Bankruptcy Code from requiring formal representation of taxpaying residents in bankruptcy proceedings, courts should use their discretion to grant taxpayers standing in appropriate cases. For instance, taxpaying residents should have standing to intervene where "[e]lected representatives may be compromised by corruption or special interest[, or where...a]ppointed officials may lack political legitimacy."⁸³

In a similar way, Professor Scott Pryor also tackled the question of taxpayer participation in Chapter 9 in a 2015 article.⁸⁴ He pushed the envelope even further, arguing that taxpaying residents should not only be granted standing, but should also be afforded an opportunity to participate meaningfully in the proceedings through official taxpayers committees. He notes that because taxpayers are not classified as creditors under the Bankruptcy Code,⁸⁵ they are not entitled to vote on the debtor's proposed plan of adjustment, "which weakens whatever bargaining power they have."⁸⁶ He then considers the essential role of taxpayers in systems of governance, comparing and contrasting them to equity security holders of corporate debtors: "Taxpayers do not, of course, have a residual interest in municipal assets. On the other hand, taxpayers' long-term losses are not limited to the amount of their investment; their property is liable in perpetuity for the financial misfortunes of their municipality."⁸⁷ Moreover, he theorizes that while taxpayers do not receive distributions of property from the municipal debtor, they arguably receive distributions in the form of the ongoing services provided by the city to all residents.⁸⁸ Thus, "[a] plan that increases taxes is like a capital call on corporate shareholders, something that is not required under state or federal bankruptcy law."⁸⁹ For all of these reasons, he argues that taxpaying residents should be presumed to be parties in interest, entitled to an official taxpayers committee to represent them in the pro-

⁸² *Id.* at 55-56.

⁸³ *Id.* at 79.

⁸⁴ C. Scott Pryor, *Who Pays the Price? The Necessity of Taxpayer Participation in Chapter 9*, 24 WIDENER L.J. 81 (2015).

⁸⁵ In deciding that taxpayers are not creditors, Professor Pryor considers the Bankruptcy Code's definition of the term "creditors" which refers to persons holding "claims" against the debtor. *Id.*; see also 11 U.S.C. §101(5); 11 U.S.C. §101(10).

⁸⁶ *Id.* at 82.

⁸⁷ *Id.* at 108.

⁸⁸ *Id.* at 111.

⁸⁹ *Id.*

ceedings.⁹⁰ He also argues that the debtor should bear the reasonable costs and expenses of the official taxpayers committee, including attorneys' fees.⁹¹

Meanwhile, Professor Jack Beermann has also examined the role of taxpayers in Chapter 9 in the course of an ambitious scholarly project yielding two recent articles on the public pension crisis.⁹² Professor Beermann frames the issues regarding taxpaying residents and their interests in the case differently, though, arguing that, to the extent public pensions remain unfunded, the city's residents and taxpayers have been the primary beneficiaries. After all, they have enjoyed the services of city employees without fully compensating them for their labor.⁹³ In his view, the public pension crisis is the result of a deliberate, political strategy: "The primary pathology that led to the underfunding of public pensions is the political desire to provide more services to the public than the public is willing to pay for in current taxation."⁹⁴ Thus, to the extent a financially distressed municipality must allocate economic burdens between employees and retirees, on the one hand, and taxpaying residents, on the other, the economic burdens should be allocated to the latter.⁹⁵

But the question of whether and how to allocate economic burdens in Chapter 9 is a separate question; presumably, this will be the focus of plan-related negotiations and confirmation proceedings. Thus, whether one believes that taxpaying residents should bear some, most, or even *all* of the economic burdens of the city's financial condition, it seems that taxpaying residents would still be recognized as important stakeholders, with more than a mere peripheral interest in the outcome of the case. To this end, an exercise known as stakeholder analysis,⁹⁶ which derives from business management studies, may provide additional assistance for courts seeking to determine whether and to what extent taxpaying residents should join the bankruptcy negotiation table.

This theoretical approach, which has been applied in recent years to other legal questions,⁹⁷ invites the analyst to focus on identifying and map-

⁹⁰ *Id.* at 118-19.

⁹¹ *Id.*

⁹² Jack M. Beermann, *Resolving the Public Pension "Crisis,"* 41 *FORDHAM URBAN L. J.* 999 (2015) [hereinafter "2015 Article"]; Jack M. Beermann, *The Public Pension Crisis,* 70 *WASH. & LEE L. REV.* 3 (2013) [hereinafter, "2013 Article"].

⁹³ Beermann, 2013 Article, *supra* note 92.

⁹⁴ Beermann, 2015 Article, *supra* note 92.

⁹⁵ *Id.*

⁹⁶ See generally R. K. Mitchell, et. al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts,* 22 *ACAD. OF MANAGEMENT REV.* 853 (1997).

⁹⁷ See generally Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms),* 87 *VA. L. REV.* 1279

ping the stakeholders who are likely to be impacted by a plan, project, or transaction. Thoughtful consideration is given to how these stakeholders may influence the transaction, as well as how the transaction is likely to influence their interests. Sophisticated stakeholder analyses do not simply take it as a given that a particular stakeholder is represented by another stakeholder; rather, these direct and indirect relationships are explored so that parties may be properly classified as primary and secondary stakeholders.⁹⁸ Although the precise terms may vary, most analysts recognize some category of primary stakeholders, who are generally those likely to be most affected by the transaction and most critical for its long-term success, and some category of secondary stakeholders, who are less impacted by the transaction and less vital for its long-term success.⁹⁹ Meanwhile, leading proponents of stakeholder analysis urge analysts to appreciate the “intrinsic value” of stakeholders, reminding them that “they need to be treated as ‘ends’ rather than ‘means’ to succeed in achieving...objectives.”¹⁰⁰

Applying the prevailing insights and methods of stakeholder analysis to Chapter 9 bankruptcy, it appears that taxpaying residents are classifiable as one of the most important, primary stakeholders of a debtor-city. In their capacity as residents, they have likely endured reductions in services caused by the municipality’s financial distress, and may have even suffered through service insolvency in the months or years leading up to the bankruptcy filing. They also depend on the city for its continued provision of necessary services and infrastructure. And, in their capacity as taxpayers, they are critical to the success of the plan of adjustment, particularly to the extent that it relies on tax increases. To the extent the debtor-city must obtain voter approval, then those taxpaying residents who are also voters will be even more directly critical to the success of the plan of adjustment. But even where a plan does *not* contemplate tax increases, it most likely relies on the continued maintenance of the city’s existing tax revenue base, which is often the dominant source of municipal revenue. To the extent the debtor-city proposes impairing capital markets creditors, tax revenue will likely be even more important to the city in the future, as debt financing may not be as readily available.

Of course, within or outside of bankruptcy, taxpaying residents continue to be represented by their elected officials. But is this representation adequate for the purposes of representing their interests in bankruptcy? Like Professor Chung, I believe taxpayer representation in Chapter 9 is especially important when the political legitimacy of the municipal government has

(2001); Christopher R. Yukins, *Cross-Debarment: A Stakeholder Analysis*, 45 GEO. WASH. INT’L L. REV. 219 (2013).

⁹⁸ See, e.g., GREGOR GOSSY, A STAKEHOLDER RATIONALE FOR RISK MANAGEMENT 6 (2007) (summarizing stakeholder analysis literature).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 8.

been compromised. But even where political legitimacy is not at issue, stakeholder analysis cautions that city officials are *also* stakeholders in their own right, with unique interests and motivations that may conflict with the interests and motivations of taxpaying residents. For instance, city officials may feel pressure to satisfy the demands of other, powerful stakeholders, such as public pension claimants or capital markets creditors. These interests may compel them to work towards a plan of adjustment that placates powerful parties by allocating economic burdens to more widely dispersed stakeholders who do not have their own seat at the bankruptcy table, such as taxpaying residents. City officials may also overemphasize short-term goals and outcomes, particularly to the extent they are focused on their reelection prospects or on salvaging their own political or professional reputations. Taxpaying residents, on the other hand, are likely to focus on longer-term goals and outcomes, such as factors impacting property values over time and the quality of services and infrastructure that may benefit their children and grandchildren.¹⁰¹

Rather than causing a breakdown in democratic governance functions, bankruptcy courts that recognize taxpaying residents as parties in interest and grant them official committee status may actually help to facilitate important conversations between and among these important stakeholder classes. For instance, in jurisdictions that require voter approval of tax increases, allowing taxpaying residents to participate in the bankruptcy case may help to improve communication between municipal debtors and the voting public, and increase voter turnout for these important decisions. An official committee may, for instance, provide review of official statements from city officials to the voting public with respect to any proposed tax increases, and may also help to translate complex bankruptcy documents—including the debtor's proposed plan of adjustment—into information that taxpaying residents can more readily understand and appreciate. Similar to an advisory committee or citizen commission outside of bankruptcy, an official taxpayers committee may give taxpaying residents a vehicle to share their perspectives, consider proposals, and make recommendations to the debtor-city. For instance, an official committee could be empowered to collect public testimony and commission studies to help inform the debtor and the court on the needs and concerns of taxpaying residents. These are the roles presently played by official retirees committees in municipal bankruptcy, based upon the tacit recognition by bankruptcy courts that city officials, labor unions, and even the pension plan administrator may not be able to engage fully with the constituency to advance its interests. Taxpaying resi-

¹⁰¹ The unique interests and concerns of taxpayers is more broadly recognized in longstanding laws governing taxpayer standing outside of bankruptcy. See generally Joshua G. Urquhart, *Disfavored Constitution, Passive Virtues? Linking State Constitutional Fiscal Limitations and Permissive Taxpayer Standing Doctrines*, 81 *FORDHAM L. REV.* 1263 (2012) (exploring federal and state laws governing taxpayer standing).

dents are a similarly dispersed class of interested persons, and would benefit from comparable treatment. And, by enhancing stakeholder participation in this way, bankruptcy courts may also enhance the fairness and transparency of municipal bankruptcy process for the benefit of all constituents.

CONCLUSION

A Chapter 9 debtor-city's taxpaying residents are key stakeholders who should be recognized as parties in interest with standing to participate in the bankruptcy proceedings. Taxpaying residents should also be entitled to form an official committee, which may serve an important advisory and communication function with respect to important decisions in the case. Although taxpaying residents continue to be represented by their elected officials within and outside of bankruptcy, stakeholder analysis suggests that this may not be adequate representation for the purposes of the bankruptcy case and the difficult decisions that must be made to restructure municipal finances. Whether or not a plan of adjustment contemplates tax increases, and whether or not those increases require voter approval, taxpaying residents are among the most important stakeholders with unique interests that do not necessarily align with the interests of other stakeholders.