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# We're Bankrupt.... Now What?

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In May 2008, the City of Vallejo took the bold and controversial step of filing for protection under chapter 9 of the United States Bankruptcy Code. The charter city, located about forty-five miles northeast of San Francisco, had faced years of increasing general fund costs and decreasing revenues. For several years running, Vallejo's budget "suffered multi-million dollar deficits," and by the end of the 2007-08 fiscal year, its "reserves were exhausted."<sup>1</sup> The general fund deficit hovered at around \$17 million at the end of the 2007-08 fiscal year only to grow to \$22 million in the second quarter of the next fiscal year.<sup>2</sup>

Coupled with soaring labor costs — nearly 85 percent of its general-fund budget — sales tax, real property taxes, and other fees and taxes fell, producing a projected \$10 million budget deficit in fiscal year 2008-09.<sup>3</sup> Unable to borrow from its restricted funds and unable to access private credit markets because of insufficient cash-flow, the city was technically insolvent (i.e., it would be unable to pay its general fund obligations in the coming fiscal year).<sup>4</sup> With its May 23, 2008, declaration of bankruptcy, Vallejo became the most-populated U.S. city to file for chapter 9 protection.<sup>5</sup> As Vallejo prepares to emerge from bankruptcy, its experience can provide lessons for other public agencies facing difficult fiscal shortfalls. This article examines municipal bankruptcy using the City of Vallejo as an illustrative case-study regarding the interplay between the federal Bankruptcy Code and state law, including the Meyers-Milias-Brown Act.

## ***Municipal Bankruptcy Under Chapter 9 (Not Chapter 11)***

Though chapter 11 has been used the most and has received the most bankruptcy press in recent years, with both the airline and automotive industries in the throes of reorganization, it is chapter 9 that is the focus of this article.

Chapter 11 provides for the reorganization of a corporation or a partnership, whereas chapter 9 applies solely to public agencies.<sup>6</sup> A major distinction between a chapter 11 debtor and a chapter 9 debtor is that the operations of the former may be shuttered entirely and liquidated under chapter 7. Public agencies are not eligible for chapter 7 and generally do not have that luxury under state law.<sup>7</sup>

Congress enacted the first municipal bankruptcy legislation in 1934, during the Great Depression.<sup>8</sup> Initially, this legislation was deemed an unconstitutional interference with states' immunity in violation of the 10th Amendment.<sup>9</sup> Thereafter, Congress revised the law, and the Supreme Court upheld the basic framework of today's municipal bankruptcy scheme. Since 1938, fewer than 500 municipal bankruptcy petitions have been filed.<sup>10</sup> The Bankruptcy Reform Act of 1994 produced the present version of chapter 9.<sup>11</sup>

Chapter 9 differs significantly from chapter 11 in the amount of control the bankruptcy court exerts over the debtor. Section 904 limits the power of the bankruptcy court to interfere with the day-to-day activities and operations of the municipality.<sup>12</sup> For instance, a municipality may hire consultants and other professionals without the approval of the court, and the court only reviews these fees in the context of a plan of adjustment, where the court will only determine whether fees to be paid are reasonable.<sup>13</sup>

These limitations are necessary because municipal bankruptcy law must conform to the 10th Amendment<sup>14</sup> and avoid the possibility that the federal government — through the bankruptcy court — will substitute its control over the affairs of the state and the elected officials of the municipality.<sup>15</sup> Federal bankruptcy courts cannot interfere directly in the management or the operations of the municipality. As a consequence of these constitutional concerns, the bankruptcy court in a chapter 9 case is far less involved in the conduct and operations of the municipality than it is in a chapter 11 case. The municipality continues to maintain its ability to raise revenue where it is able, borrow money, and expend its resources as it deems appropriate.<sup>16</sup>

### *The Nuts and Bolts of Municipality Bankruptcy: Eligibility*

Only municipalities may file for relief under chapter 9.<sup>17</sup> Defined as a “political subdivision or public agency or instrumentality of the state,” the term “municipality” includes cities, counties, special districts, and school districts. Section 109(c) articulates four eligibility requirements. The entity:

- (1) Must specifically be authorized as a debtor by state law or by a governmental officer or organization empowered by state law to authorize the municipality to be a debtor;
- (2) Must be insolvent, as defined in 11 USC 101(32)(c);
- (3) Must desire to effect a plan to adjust its debts; and
- (4) Must:
  - a. Have obtained the agreement of creditors holding at least a majority of the claims of each class that such entity intends to impair under a plan;
  - b. Have negotiated in good faith with creditors and have failed to obtain the agreement of creditors holding at least a majority of the claims of each class that such entity intends to impair under a plan;
  - c. Be unable to negotiate with creditors because such negotiations are impracticable; or
  - d. Have reasonably believed that a creditor may attempt to obtain a transfer that is avoidable under section 547 of the Bankruptcy Code.

If a municipality is unable to meet any one of these four requirements, a bankruptcy court may dismiss the petition.<sup>18</sup> Though structured in permissive language, bankruptcy courts have interpreted this language as mandatory.<sup>19</sup> The municipality has the burden of proving it is eligible under these criteria.<sup>20</sup>

After Vallejo filed for bankruptcy protection in May 2008, three of the four employee organizations as well as the city's other creditors quickly filed oppositions. The employee organizations were the Vallejo Police Officers Association (VPOA); the International Association of Fire Fighters, Local 1186 (IAFF); and the International Brotherhood of Electrical Workers, Local 2376 (IBEW). They contended that the city failed to meet the eligibility requirements under chapter 9.

**Authorization to be a debtor.** In California, Government Code Sec. 53760 authorizes municipal entities to file for bankruptcy relief.<sup>21</sup>

**Insolvency.** A municipality is insolvent if it is (1) generally not paying its debts as they become due unless such debts are the subject of a bona fide dispute; or (2) unable to pay its debts as they become due.<sup>22</sup>

In *Vallejo*, the court determined on a cash-flow basis that city the could not pay its debts within the next fiscal year.<sup>23</sup> The unions argued that the city had sufficient funds to pay its debts and therefore was ineligible for bankruptcy protection. The unions attempted to support their argument by asserting the city's Comprehensive Annual Financial Report (CAFR) demonstrated the city had sufficient assets.<sup>24</sup> The court found the unions' argument unavailing, as the CAFR did not, and was not required to, show the city's liabilities; it provided only a partial picture of the city's financial situation. The unions also asserted that the city could have "siphoned money from certain funds to support its general fund."<sup>25</sup> Again, the court found this argument unpersuasive. The city's restricted funds — similar to the restricted and special funds of all other cities and counties — could not be plundered to prop up the general fund.<sup>26</sup>

The unions also argued that the city could have avoided bankruptcy altogether by extending the modified memoranda of understanding with the unions and cutting discretionary spending on programs like "Meals on Wheels."<sup>27</sup> Again, the court found this argument unconvincing. The modified memoranda of understanding had "built in" wage increases of between 3 and 5 percent on top of deferred increases of up to 6.5 percent.<sup>28</sup> The city had previously slashed most of its discretionary spending on community-based programs, had ceased funding capital improvement projects, and had reduced city services.<sup>29</sup> At some point, "further funding reductions would threaten Vallejo's ability to provide for the basic health and safety of its citizens."<sup>30</sup> Based on all of

these factors, the court found that the city could not avoid the deficits faced in fiscal year 2008-09 and pay its debts, making it eligible for bankruptcy relief under chapter 9.

**Desire for a plan to adjust debts.** The municipality "must desire to effect a plan to adjust its debts."<sup>31</sup> The courts have not extensively interpreted this requirement. Municipalities have demonstrated this desire by providing courts with a draft plan of adjustment and with comprehensive settlement agreements, which evinced movement towards resolving claims.<sup>32</sup> The city filed an assertion of qualifications that included a statement of the "City's desire to effect a plan to adjust its debts."<sup>33</sup> Additionally, the court found that the city continued to negotiate and engage in mediation with the unions up until a few days prior to filing for bankruptcy protection, and as the parties' interim agreements were expiring.<sup>34</sup> The court also found the city's post-petition pendency plans demonstrated a concerted effort towards an eventual plan of adjustment, meeting the criteria set forth in the provision.<sup>35</sup>

**Pre-bankruptcy negotiations.**

One of the alternative requirements of 11 USC Sec. 109(c)(5)(B) is that the municipality demonstrate it "has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority of the claims of each class that the municipality intends to impair under a plan...." The unions asserted the city did not meet this criterion because the city failed to discuss a plan to adjust its debts. Though the court did not find the city met with its creditors to discuss and obtain an agreement on a plan of adjustment, the city did satisfy the alternative requirement that such negotiations were impracticable.<sup>36</sup> Because the city's labor costs made up the largest portion of the city's budget, the city could not practically or meaningfully negotiate with retiree creditors. Nor could it negotiate with its largest institutional creditor, which refused to enter into a workout or plan discussions until some modicum of labor peace had been achieved. Based on the foregoing, the Bankruptcy Appellate Panel affirmed

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the bankruptcy court's finding that the city was eligible for bankruptcy protection under chapter 9.

### ***The Nuts and Bolts of Municipal Bankruptcy: The Automatic Stay***

The most immediate effect of filing a petition under chapter 9 is the stay against creditor collection efforts, which is triggered automatically. This stay stops all collection actions against the municipality.<sup>37</sup> More significantly, it operates to prohibit action against officers and residents of the municipality if a creditor seeks to enforce a claim.<sup>38</sup> The stay allows a municipality to “avoid financial and operational collapse, enabling it instead to continue to provide public services to residents and others while negotiating a plan of adjustment with its creditors.”<sup>39</sup> However, the bankruptcy court may modify or terminate the stay if cause is demonstrated.<sup>40</sup>

In *Vallejo*, the city used the automatic stay to avoid grievances filed by labor unions, and maintain changes made pursuant to a “pendency plan” adopted after the city had filed its motion for permission to reject the collective bargaining agreements.

### ***The Nuts and Bolts of Municipal Bankruptcy: Ability to Reject Executory Contracts***

The ability to reject executory contracts and unexpired leases is, perhaps, one of the more controversial aspects of municipal bankruptcy. It raises federal constitutional as well as state law concerns. But because the state authorizes municipalities to use chapter 9, the municipality may make use of the *full* provisions of the Bankruptcy Code.<sup>41</sup> “California must accept chapter 9 in its totality; it cannot cherry pick what it likes while disregarding the rest.”<sup>42</sup> Chapter 9, essentially, allows municipalities to use the federal bankruptcy laws to impair contracts for the purpose of adjusting municipal debts.<sup>43</sup>

In *NLRB v. Bildisco and Bildisco*, the U.S. Supreme Court held that an employer in chapter 11 could reject a collective bargaining agreement without committing an unfair labor practice — by showing that the agreement was burdensome, that the balancing of the equities favored rejection of the agreement, and that “efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution.”<sup>44</sup> Provisions of the agreement cannot be selectively rejected, but must be rejected in their entirety.<sup>45</sup> The bankruptcy court should ensure that the employer make reasonable efforts to negotiate voluntary modifications,<sup>46</sup> and should not intercede in the process until it is clear that the parties are unable to reach agreement and reorganization is jeopardized.<sup>47</sup> Once an agreement is rejected, it is “no longer immediately enforceable, and may never be enforceable again.”<sup>48</sup> However, even if the agreement is not enforceable, it becomes the basis for the creation of claims.

Shortly after the *Bildisco* decision, Congress enacted 11 USC Sec. 1113, which reflects “Congressional displeasure with *Bildisco*’s holding....”<sup>49</sup> Section 1113 imposes a procedural and substantive requirement that a debtor-in-possession must adhere to the terms of its collective bargaining agreements pending rejection.<sup>50</sup> Significantly, this provision was not incorporated in chapter 9.<sup>51</sup> By virtue of Congress’ non-incorporation of section 1113 into chapter 9, *Bildisco* continues to be the applicable standard for rejecting executory agreements in municipal bankruptcies.<sup>52</sup>

### ***Vallejo’s Rejection of Its Labor Agreements***

On June 17, 2008, the city filed a motion to reject all four of its collective bargaining agreements. Post-filing, the city continued to bargain with its unions. From September 2008 through February 2009, the city met individually in both formal negotiations and informal discussions with IAFF, IBEW, VPOA, and CAMP.

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In July 2008 and again in October 2009, the city implemented pendency plans that modified the agreements with its employees. These plans unilaterally reduced wages, eliminated minimum staffing requirements, and set up a deferred payment plan for employees separating from city service. By virtue of accrued vacation and other compensatory leaves, many of these employees were entitled to payments of tens of thousands of dollars totaling nearly \$4 million citywide.<sup>53</sup> Under the pendency plan, the city paid separating employees for vacation and other compensatory leave in the first of two payments, while the second payment — payable at a future date — was comprised of a sick leave cash-out.<sup>54</sup> This enabled the city to hang onto necessary cash during very tight fiscal times. The city's second pendency plan, implemented in October 2009, eliminated specialty pay for firefighters. And it reduced the city's contribution towards healthcare premiums from 100 percent of any plan chosen by the employee to 75 percent of the Kaiser Bay Area rate at each level of participation for both IBEW and IAFF bargaining unit members.<sup>55</sup>

VPOA and CAMP reached agreements with the city in late-January 2009. These agreements addressed some of the costly structural issues for the city, namely eliminating minimum staffing language for VPOA, and eliminating wage increases and capping active healthcare costs for both units. Significantly, VPOA and CAMP settled their bankruptcy claims, which arose when the city unilaterally breached their agreements and implemented modifications under the pendency plans.

In February 2009, the bankruptcy court heard the motion to reject the unions' collective bargaining agreements. In light of the VPOA and CAHP settlements, only the agreements of IAFF and IBEW were subject to the motion, and the bankruptcy court permitted the city to reject both. The court concluded that a municipality in Chapter 9 could seek to reject a collective bargaining agreement under 11 USC section 365. Following *Bildisco*, the court ruled that the municipality must show that the agreement

burdens the estate, that after balancing the equities, the equities favored rejection of the agreement, and "reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."<sup>56</sup> Before the court determined whether the city satisfied the legal requirements for rejection, however, it ordered the city, IAFF, and IBEW to participate in another round of mediation. The parties engaged in mediation during the summer of 2009 with a judge from the U.S. Bankruptcy Court for the District of Oregon. While the parties were unable to reach agreement on a new contract, the city and IAFF agreed to reject the IAFF agreement in exchange for expedited interest arbitration pursuant to the city charter.<sup>57</sup> On August 31, 2009, the bankruptcy court rejected IBEW's agreement as burdensome to the city under the standards set forth in *Bildisco*, concluding that absent rejection of the IBEW agreement, it was likely the city could emerge from bankruptcy.<sup>58</sup>

Federal bankruptcy law does not provide a specific process for collective bargaining under bankruptcy. Instead, pursuant to *Bildisco*, applicable federal (or state) law controls the conduct of the parties at the bargaining table.<sup>59</sup>

The city and IAFF engaged in five days of mediation and five days of hearing in early-January 2010. The arbitration hearing was continued to March 2010, but the parties continued informal discussions to attempt to settle. The parties reached agreement on March 23, 2010, thereby leaving the matter of the status of the rejected agreement unresolved.

The new IAFF agreement includes a two-tier pension benefit and calls on employees to contribute a portion of the employer's share of pension funding. Other significant provisions in the IAFF agreement include reduced and capped city contributions towards medical premiums and wage freezes for the term of the agreement. The agreement addresses other structural issues including the reduction of accrual rates for sick leave and holiday pay, and the

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elimination of citywide minimum staffing requirements. These changes provide the city with some necessary flexibility to manage its workforce. Critics of the agreement challenge the city's failure to modify pension benefits for existing employees and retirees. However, the California Government Code specifically provides that no contracting agency that is subject to the bankruptcy provisions of chapter 9 shall reject any contract or agreement between the agency and CalPERS.<sup>60</sup> While such a prohibition may not withstand a constitutional challenge, no court has yet interpreted it.

As of the date of this article, IBEW and the city have been unable to reach agreement through negotiations and began mediation and arbitration pursuant to the city charter on March 31, 2010.

### *Negotiations Under the Purview of Bankruptcy or the Meyers-Milias-Brown Act*

As the law currently stands, once a municipality files a petition under chapter 9, it may unilaterally modify collective bargaining agreements.<sup>61</sup> The court in *In re County of Orange* looked to state law to determine whether the county's actions were appropriate. Though the *County of Orange* court concluded that *Bildisco* applied in chapter 9 cases, the court was not persuaded that municipalities could unilaterally breach collective bargaining agreements without limitations; instead, it required a showing consistent with the fiscal emergency language in the California Supreme Court's decision in *Sonoma County Organization of Public Employees v. County of Sonoma*.<sup>62</sup>

Unlike the court in *In re County of Orange*, the court in *Vallejo* dismissed this rationale finding that the imposition of state labor law onto 11 USC Sec. 365 would be unconstitutional.<sup>63</sup> Only the federal government is empowered to enact a uniform bankruptcy law.<sup>64</sup> "Incorporating state substantive law into chapter 9 to amend, modify or negate substantive provisions of chapter 9 would violate Congress' ability to enact uniform bankruptcy laws."<sup>65</sup> The Supremacy Clause invalidates state laws that "interfere with or are contrary to federal law."<sup>66</sup> Only

the federal government — not the states — may impair contracts.<sup>67</sup> Because Congress is provided the exclusive authority to enact 11 USC Sec. 365, state law is preempted. Rejecting the insertion of state law into the bankruptcy laws, the court concluded that inflexible and conflicting state law must yield to the purposes and the explicit provisions of the bankruptcy law.<sup>68</sup>

Significantly, *Vallejo* is factually distinguishable from *County of Orange* because the city took great pains to negotiate with the unions both prior to and after filing its chapter 9 petition. The county unilaterally eliminated

employee seniority and grievance rights while instructing department heads to terminate employees.<sup>69</sup> Only after many months of negotiations and mediation did the city modify its agreements with its unions. Though the city could have outright rejected the agreements, the modifications it made were circumspect and principally aimed at controlling costs — deferring increases and ultimately reducing

wages, eliminating minimum staffing that generated tremendous overtime costs, and implementing a payment schedule to employees leaving city service. These economically driven modifications were substantially different from the modifications made by the County of Orange.

Neither *NLRB v. Bildisco and Bildisco* nor *In re City of Vallejo* eliminate the requirement that the parties meet and confer in an attempt to resolve disputes prior to unilateral modifications. As noted above, both in the eligibility phase and the rejection phase of chapter 9, there are clear requirements that the municipality engage its creditors — including its unions — in negotiations at all stages of the process. This requirement is found in the *Bildisco* decision: A municipality "should continue to try to negotiate with key creditors to avoid [bankruptcy], and it should carefully document what steps are taken to reach agreement."<sup>70</sup> Under the protection of the automatic stay in bankruptcy, any "unfair labor practice" with regard to negotiations is not heard by the Public Employment Relations Board, but is brought to the bankruptcy court as an adversary

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proceeding for a determination whether the disputes merit a modification or lifting of the stay.<sup>71</sup>

IBEW has appealed the bankruptcy court's rejection of its collective bargaining agreement to the U.S. District Court. Oral argument was heard on March 17. That decision may resolve the distinctions between the *Vallejo* and *Orange County* decisions.

### Conclusion

As revenues continue to decline and expenditures continue to increase, municipalities are looking to Vallejo's instructive path and possibly contemplating bankruptcy for themselves. Some believe that bankruptcy is "the most effective tool in the drawer" for lowering costs, especially pension obligations.<sup>72</sup> But bankruptcy is neither an easy nor an inexpensive option. Vallejo's bankruptcy thus far has cost the city approximately \$7 million.<sup>73</sup> Nor is it a popular option. State Senator Mark DeSaulnier sponsored Senate Bill 88, which would require that municipalities seek permission from the California Debt and Investment Advisory Commission to file for bankruptcy protection.<sup>74</sup> S.B. 88 is similar to Assembly Bill 155, which was pulled from the Senate when support waned.<sup>75</sup> Both bills are a reaction to the outcry by public labor unions incensed by the City of Vallejo's bankruptcy petition.<sup>76</sup> Local governments are strongly opposed to the bill. Bills like S.B. 88 and A.B. 155 are not new and not specific to California.<sup>77</sup>

Commentators believe that many municipalities will contemplate how to address insolvency in the coming fiscal year. The question of bankruptcy will be raised in many jurisdictions. However, bankruptcy is no panacea. In addition to its cost, the disruption to a city's normal functioning should not be underestimated. In many cities, productive negotiations with labor unions and the city's ability to unilaterally implement changes pursuant to the MMBA may make bankruptcy unnecessary, limiting chapter 9's impact to cities with unexpected fiscal challenges or those, like Vallejo, that are restricted by minimum staffing provisions or mandatory interest arbitration. \*

1 *In re City of Vallejo* (B.A.P. 9th Cir. 2009) 408 B.R. 280, 286.

2 *Id.*

3 *Id.*

4 *Id.*

5 Steven Greenhut, "Vallejo's Painful Lessons in Municipal Bankruptcy," *Wall Street Journal*, March 26, 2010.

6 U.S. Courts Bankruptcy Basics, found at [http://www.uscourts.gov/bankruptcy\\_basics/chapter9.html](http://www.uscourts.gov/bankruptcy_basics/chapter9.html). Last visited March 26, 2010. Individuals are eligible to use chapter 11, but they rarely do because it is designed for corporate entities.

7 While the specter of disincorporation remains a possibility in a municipal bankruptcy situation, it is a complicated and untested process.

8 U.S. Courts Bankruptcy Basics found at [http://www.uscourts.gov/bankruptcy\\_basics/chapter9.html](http://www.uscourts.gov/bankruptcy_basics/chapter9.html), *supra*.

9 *Ashton v. Cameron County Water Improvement Dist. No. 1* (1936) 298 U.S. 513.

10 U.S. Courts Bankruptcy Basics, *supra*.

11 Pub. L. No. 103-394, 108 stat. 4106 (1994). Prior to the City of Vallejo, the County of Orange's 1994 filing was the most significant municipal bankruptcy. At the time of filing, the county was the fifth most populous in the United States. *In re County of Orange* (Bankr. C.D. Cal. 1995) 179 B.R. 177, 179. For additional analysis of the County of Orange bankruptcy, see Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 *Hastings L.J.* 885 (2002).

12 11 USC Sec. 904.

13 U.S. Courts Bankruptcy Basics, *supra*.

14 The Tenth Amendment of the Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. X.

15 U.S. Courts Bankruptcy Basics, *supra*.

16 11 USC Secs. 364, 901(a).

17 11 USC Sec. 109(c).

18 11 USC Sec. 921(c).

19 *In re County of Orange* (Bankr. C.D. Cal. 1995) 183 B.R. 594.

20 *In re Valley Health Sys.* (Bankr. C.D. Cal. 2008) 383 B.R. 156.

21 Gov. Code Sec. 53760 provides: "Except as otherwise provided by statute, a local public entity in this state may file a petition and exercise powers pursuant to applicable federal bankruptcy law."

22 11 USC Sec. 101(32)(c).

23 *In re City of Vallejo*, *supra*, 408 B.R. at 289-290.

24 *Id.* at 290-291.

25 *Id.* at 291.

26 *Id.* at 293.

27 *Id.* at 294.

28 *Id.*

29 *Id.*

30 *Id.*

31 11 USC Sec. 109(c)(4).

32 *In re Sullivan County Reg'l Refuse Disposal Dist.* (Bankr. D.N.H. 1994) 165 B.R. 60, 76 (draft of plan), and *In re County of Orange, supra*, 183 B.R. at 607 (settlement agreements).

33 *In re City of Vallejo, supra*, 408 B.R. at 296.

34 *Id.*

35 The city implemented a series of pendency plans, which reduced pay and benefits, but permitted the city to balance its budget.

36 11 USC Sec. 109(c)(5)(C).

37 11 USC Sec. 362(a), 901(a).

38 11 USC Sec. 922(a).

39 Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law, supra*, 53 Hasting L.J., at 893.

40 John Knox and Marc Levinson, *Municipal Bankruptcy: Avoiding and Using Chapter 9 in Times of Fiscal Distress*, Orrick Herrington and Sutcliffe LLP (2009).

41 *In re City of Vallejo* (Bankr. E.D. Cal. 2009) 403 B.R. 72, 76.

42 *In re County of Orange, supra*, 191 B.R. at 1021.

43 11 USC Sec. 365, made applicable to Chapter 9 by 11 USC Sec. 901(a).

44 *NLRB v. Bildisco and Bildisco* (1984) 465 U.S. 513, 521-522.

45 11 USC Sec. 365(a); see also *Stewart Title Guar. Co. v Old Republic Natl. Title Ins. Co.* (5th Cir. 1996) 83 F.3d 735, 741.

46 *NLRB v. Bildisco and Bildisco, supra*, 465 U.S. at 526.

47 *Id.*

48 *Id.* at 532. Indeed, once a motion for permission to reject the collective bargaining agreement is filed, the employer need not comply with the terms of the agreement and may make unilateral modifications to the terms and conditions of employment. However, it does so at its peril as the terms of the agreement will be binding if not rejected.

49 *In re County of Orange, supra*, 179 B.R. at 181 fn. 8.

50 *Id.*

51 *Id.*; see also *In re City of Vallejo, supra*, 403 B.R. 72.

52 Congress considered amending chapter 9 to include a requirement that a municipality exhaust state labor law procedures prior to rejecting a collective bargaining agreement. *In re County of Orange, supra*, 179 B.R. at 182-183. Congress did not enact the Municipal Employee Protection Amendments of 1991. H.R. 3949, 102nd Cong., 1st Sess. (1991) (its legislative goal was the “‘contemplated enact[ment of] a section 1113-like’ statute for chapter 9.”).

53 July 2008 and October 2009 City of Vallejo Pendency Plans.

54 *Id.*

55 *Id.*

56 *NLRB v. Bildisco and Bildisco, supra*, 465 U.S. at 526; see also *In re City of Vallejo, supra*, 403 B.R. 78.

57 City of Vallejo Charter Sec. 809.

58 *In re City of Vallejo* (Bankr. E.D. Ca. Aug. 31, 2009) No. 08-26813-A-9, on appeal (findings of facts and conclusions of law rejecting International Brotherhood of Electrical Workers collective bargaining agreement). IBEW appealed this decision, and Judge John Mendez of the United States District Court Eastern District of California heard oral argument on March 17, 2010. A decision is expected sometime this summer.

59 *NLRB v. Bildisco and Bildisco, supra*, 465 U.S. at 527.

60 Gov. Code Sec. 20487.

61 *In re City of Vallejo, supra*, 403 B.R. 77.

62 *Id.* at 183-184. *County of Sonoma* established the following four-pronged test: (1) a declared emergency must be based on an adequate factual foundation; (2) the agency’s actions must be designed to protect a basic social interest and not benefit a particular individual; (3) the law must be appropriate for the emergency and obligation; and (4) the agency decision must be temporary and limited to the immediate exigency that caused the action.

63 *In re City of Vallejo, supra*, 403 BR 72, 76-77.

64 U.S. Const. art. 1, sec. 8, cl. 4.

65 Alan N. Resnick and Henry J. Sommers, eds. 15th ed., *Collier on Bankruptcy*, par. 903.01.

66 U.S. Const. art. VI, cl. 2; see also *Baker & Drake Inc. v. Pub. Serv. Comm’n of Nev.* (9th Cir. 1994) 35 F.3d 1348, 1352.

67 U.S. Const., art. VI; see also *Cont’l Illinois Nat’l Bank & Trust v. Chicago R.I. & P. Rv. Co.* (1935) 294 U.S. 648, 680-681.

68 *In re City of Vallejo, supra*, 403 B.R. at 77.

69 *In re County of Orange, supra*, 179 B.R. 180.

70 John Knox and Marc Levinson, *Municipal Bankruptcy: Avoiding and Using Chapter 9 in Times of Fiscal Distress, supra*, at 13

71 *Id.* at 9-10.

72 Steven Greenhut, “Vallejo’s Painful Lessons in Municipal Bankruptcy,” *supra*.

73 City of Vallejo Finance Department, “City of Vallejo, California Comprehensive Annual Financial Report for the Fiscal Year Ended June 30, 2008” available at: <http://www.ci.vallejo.ca.us/uploads/48/Comprehensive%20Annual%20Financial%20Report%20CAFR%20June%2030%202008.pdf>.

74 “SB 88 Rears Its Ugly Head Again,” Vallejo Times Herald, September 19, 2009.

75 *Id.* A.B. 155 passed the Senate Local Government Committee in April 2010, and will pass the full Senate soon. What the governor will do is unclear.

76 *Id.*

77 See generally Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law, supra*, 53 Hasting L.J. 885.