Volume 121 | Issue 3 Article 8

April 2019

Is the Gate Open for West Virginia Counties and Cities to File for Chapter 9 Bankruptcy Relief

Bill Pepper
Pepper and Nason

IS THE GATE OPEN FOR WEST VIRGINIA COUNTIES AND CITIES TO FILE FOR CHAPTER 9 BANKRUPTCY RELIEF?

Bill Pepper[*]

I. INTRODUCTION

During the Great Depression, Congress established the first municipal bankruptcy legislation as a way for the nation's municipalities to seek protection from creditors so they could continue to provide some level of minimal services to their constituencies.[1] Today, some counties, cities, public service districts, and other governmental subdivisions and agencies in West Virginia are facing budgetary shortfalls arising from declining property values, foreclosures, real property tax sales, unemployment, declining and aging population, and the opioid epidemic. Unfunded pensions, aging infrastructure, massive statutory jail fees, and other escalating financial obligations are leading them to consider the feasibility of filing for bankruptcy relief under Chapter 9 of the United States Bankruptcy Code.[2]

Chapter 9 cases are very rare—an average of less than 10 cases are filed nationally per year and less than 500 cases[3] have been filed since the 1934

---

* AB WVU 1973; J.D. WVU College of Law 1976. The author has since 1979 practiced bankruptcy law in Charleston, West Virginia, and is a partner in the firm of Pepper and Nason. He offers special thanks to his friend, Tim Murphy, for his invaluable research and analysis central to this article.

1 Bankruptcy Act of 1898, amendments, Pub. L. No. 251, 48 Stat. 798 (1934).

2 FRANCIS J. LAWALL & J. GREGG MILLER, DEBT ADJUSTMENTS FOR MUNICIPALITIES UNDER CHAPTER 9 OF THE BANKRUPTCY CODE: A COLLIERS MONOGRAPH § 1, at 6 (2012); H. SLAYTON DABNEY ET AL., MUNICIPALITIES IN PERIL: THE ABI GUIDE TO CHAPTER 9 (2d ed. 2012) [hereinafter MUNICIPALITIES IN PERIL].

3 *Chapter 9 – Bankruptcy Basics*, U.S. CTS., https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-9-bankruptcy-basics (last visited Mar. 20, 2019).

legislation.[4] One explanation might be that Congress, in deference to the Tenth Amendment right of each state to exercise its sovereign powers, limits access to Chapter 9 only to counties, cities, and political subdivisions or agencies vested by their state with appropriate authority to file.[5]

Chapter 9 is a forum of last resort that utilizes a mixture of sections of the Bankruptcy Code, and Chapter 9 cases are vastly different than any other type of bankruptcy case, with many surprising and unique qualities.[6] Most

---

[4] Notable Chapter 9 filings by counties include Orange County, California (*In re* Cty. of Orange, 189 B.R. 499 (Bankr. C.D. Cal. 1995)), Boise County, Idaho (*In re* Boise Cty., 465 B.R. 156 (Bankr. D. Idaho 2011)), and Jefferson County, Alabama (*In re* Jefferson Cty., 474 B.R. 228 (Bankr N.D. Ala. 2012)). Multiple cities have filed for Chapter 9, including Detroit, Michigan (*In re* City of Detroit, 504 B.R. 191 (Bankr. E.D. Mich. 2013)), Stockton, California (*In re* City of Stockton, 526 B.R. 35 (Bankr. E.D. Cal.)), *aff'd in part, dismissed in part*, 542 B.R. 261 (B.A.P. 9th Cir. 2015)), San Bernardino, California (*In re* City of San Bernardino, No. 12-28006 (Bankr. C.D. Cal. 2012)), Central Falls, Rhode Island (*In re* City of Central Falls, 468 B.R. 36 (Bankr. D.R.I. 2012)), Westfall Township, Pennsylvania (*In re* Westfall Township, No. 09-02736 (Bankr. M.D. Pa. 2009)), Gould, Arkansas (*In re* City of Gould, No. 08-12413 (Bankr. E.D. Ark. 2008)), Moffett, Oklahoma (*In re* Town of Moffett, No. 09-81814 (Bankr. E.D. Okla. 2009)), Harrisburg, Pennsylvania (*In re* City of Harrisburg, No. 11-06938 (Bankr. M.D. Pa. 2011)), Vallejo, California (*In re* City of Vallejo, 432 B.R. 262 (Bankr. E.D. Cal. 2010)), Hillview, Kentucky (*In re* City of Hillview, No. 15-32679 (Bankr. W.D. Ky. 2015)), Mammoth Lakes, California (*In re* Town of Mammoth Lakes, No. 12-32463 (Bankr. E.D. Cal. 2012)), Prichard, Alabama (*In re* City of Prichard, No. 09-15000 (Bankr. S.D. Ala. 2009)), and Washington Park, Illinois (*In re* Vill. of Washington Park, No. 09-31744 (Bankr. S.D. Ill. 2009)). A comprehensive list that includes governmental subdivisions other than counties and cities appears in Appendix B of *Navigating Chapter 9 of the Bankruptcy Code*, a 2017 publication of the Federal Judicial Center, published by the Government Printing Office. FED. JUDICIAL CTR., GOV'T PRINTING OFFICE, NAVIGATING CHAPTER 9 OF THE BANKRUPTCY CODE (2017) [hereinafter NAVIGATING CHAPTER 9], www.Fjc.gov/sites/default/files/2017/Navigating_Chapter_9_for_Web.pdf. A review of records in the Bankruptcy Clerk's Offices in West Virginia reveals that three Chapter 9 cases have been filed in the Southern District of West Virginia: *In re* Arbuckle Pub. Serv. Dist., No. 88-50151(Bankr. S.D. W. Va. 1988); *In re* Claywood Park Pub. Serv. Dist., No. 91-40339 (Bankr. S.D. W. Va. 1991); *In re* Procious Pub. Ser. Dist., No. 95-20222 (Bankr. S.D. W. Va. 1995). In the Northern District of West Virginia only one case was found: *In re* Jefferson Cty. Solid Waste Auth., No. 92-30352 (Bankr. N.D. W. Va. 1992).

[5] As of 2012, 10 states had statutes generally authorizing Chapter 9; seven states had statutes authorizing Chapter 9 for specific entities only; nine states had statutes prohibiting Chapter 9; and 23 states were reported as silent on the matter, neither authorizing nor prohibiting Chapter 9. LAWALL, *supra* note 2, at app. B.

[6] 11 U.S.C. § 901(a) (2018) makes only certain provisions of the Bankruptcy Code applicable in Chapter 9 cases. Notable provisions specifically inapplicable include §§ 327–331, regarding professionals and compensation; § 341, requiring a meeting of creditors; § 1104, relating to the appointment of a trustee or examiner; § 1107, setting out rights, powers and duties of a debtor; and § 1112, providing for conversion or dismissal. *But see* 11 U.S.C. § 930(a) and (b), where courts can dismiss a Chapter 9 for delineated grounds or for good cause. Also, Chapter 9 cases are not automatically assigned to the Bankruptcy judge presiding in the district where the debtor is situated. *See* 11 U.S.C. § 921(b), where the chief judge of the court of appeals designates the bankruptcy judge to handle a filed Chapter 9.

notably, there is no liquidation of assets of the municipality or distribution to creditors as there is in most bankruptcy cases.[7] And the power of the Bankruptcy Court is severely limited, as is the oversight role usually provided the Office of the United States Trustee.[8] Neither can interfere with the debtor's property, revenues, or use and enjoyment of revenue-producing property.[9] But the goal is a familiar one—to protect the municipality from its creditors and to implement a plan of debt adjustment and repayment.[10] The final result can be the reduction of principal or interest, extension of the term with re-amortization of debt, or the refinancing of existing debt. Liquidation is not an alternative.[11]

Commentators routinely include West Virginia in the list of states where specific authorization to file a Chapter 9 case is lacking.[12] The purpose of this article is to challenge that view and suggest that counties and cities under West Virginia law may actually be authorized to file for Chapter 9 bankruptcy relief should the need arise.

Section 109(c) of the United State Bankruptcy Code is referred to as a "gateway provision" that requires states to authorize their "municipalities" (defined to include cities, counties, and an endless number of governmental subdivisions, such as public service districts and boards[13]) to seek relief under Chapter 9 before the "municipality" may file its bankruptcy petition.[14]

---

7 *See* 11 U.S.C. § 904, which deprives the court of the power to "interfere" with any property of the debtor and 11 U.S.C. § 930, which allows only dismissal of an unworthy filing, not conversion to Chapter 7 for liquidation. By contrast, under 11 U.S.C. § 1112(e), the United States trustee in Chapter 11 cases is specifically empowered to seek conversion of a problem Chapter 11 Reorganization case to a Chapter 7 liquidation.

8 11 U.S.C. § 307 provides that "the United States trustee may raise and may appear and be heard on any issue in any case or proceeding . . . ." This section is rendered inapplicable to Chapter 9 cases by 11 U.S.C. § 901. By contrast, the powers of the United States trustee in Chapter 7 cases are considerable. *See, e.g.*, 11 U.S.C. § 704(b), § 707(b)(1) and § 727(c), (d) and (e). *See also* 28 U.S.C. § 586(a). "The Chapter 9 case also generally proceeds with less oversight from, and proceedings before, the judge. These differences stem in large part from the reservation of powers to the states under the Tenth Amendment and the delicate Balance struck by Congress in enacting Chapter 9." NAVIGATING CHAPTER 9, *supra* note 4, at 12.

9 11 U.S.C. § 904.

10 11 U.S.C. § 922 indicates the filing of the Chapter 9 petition activates an automatic stay that immediately terminates virtually all debt collection action against the municipality. Section 922(a)(1) expands the scope of the automatic stay to protect officers and inhabitants of the debtor.

11 *See* 11 U.S.C. §§ 941, 942, 943. *See also* 11 U.S.C. § 904 (proscribing liquidation of assets).

12 *See, e.g.*, LAWALL, *supra* note 2, at app. B; MUNICIPALITIES IN PERIL, *supra* note 2, at app. 8.

13 "The term 'municipality' means political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40).

14 The full text of 11 U.S.C. § 109(c) reads as follows:

> (c) An entity may be a debtor under chapter 9 of this title if and only if such entity—

The focal point of this article is the second prong of the five-part test in 11 U.S.C. § 109(c), which sets forth what entity may be a debtor and seek bankruptcy relief under Chapter 9:

> (c) An entity may be a debtor under chapter 9 of this title if and only if such entity—
> (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter.[15]

The Bankruptcy Reform Act of 1994 amended this second prong of the five-part test by changing one word in subsection (c)(2).[16] The prior law required that a municipality merely be "*generally* authorized . . . to be a debtor under [chapter 9] by State law."[17] This was changed to require that it had to be "*specifically* authorized," effective October 22, 1994, the date of enactment.[18]

There are only a handful of reported opinions on Chapter 9 cases, but the majority of the cases, both before and after the Bankruptcy Reform Act of 1994, deal with whether the municipality that filed was lawfully authorized to do so under its state law.

> (1) is a municipality;
> (2) is specifically authorized, in its capacity as a municipality or by name, to be a debtor under such chapter by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter;
> (3) is insolvent;
> (4) desires to effect a plan to adjust such debts; and
> (5)(A) has obtained the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
> (B) has negotiated in good faith with creditors and has failed to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that such entity intends to impair under a plan in a case under such chapter;
> (C) is unable to negotiate with creditors because such negotiation is impracticable; or
> (D) reasonably believes that a creditor may attempt to obtain a transfer that is avoidable under section 547 of this title.

11 U.S.C. § 109(c) (2018).

15 *Id.* § 109(c)(2).

16 11 U.S.C. § 109(c)(2) (1994).

17 *Id.* (emphasis added).

18 11 U.S.C. § 109(c)(2) (2018) (emphasis added).

II. ARE COUNTIES "SPECIFICALLY AUTHORIZED"?

Counties have certain inherent organic powers granted by the West Virginia Constitution[19] and echoed in statute[20] to control the supervision and administration of their fiscal affairs. While this inherent power is subject to restriction "under such provisions *as may be provided* by law,"[21] the general power to control its own fiscal affairs is decidedly expansive.[22] In essence, a county can do all things reasonably included in a general grant unless and until the Legislature expressly restrict such power.[23] Indeed, the courts have noted the "wide discretion" of county commissions in administration of their fiscal duties, a power the performance of which is often "circumscribed by a county's financial ability."[24] The court in *County Commission of Greenbrier County v. Cummings*[25] explained:

> That "the county courts [now county commissions] of this State are vested with a wide discretion in the superintendence and administration of the internal police and fiscal affairs of their counties" is well established. The founders of this State . . . "were concerned with an assurance of local self-government." To preserve that selected form of governance, the state constitution provides: "The county commissions . . . shall . . . under such regulations as may be prescribed by law, have the superintendence and administration of the internal police and fiscal affairs of their counties . . . ."[26]

Most courts have held that the general power of "municipalities" (as that term is broadly defined in the Bankruptcy Code) to control their own fiscal affairs does not amount to the level of "specific authorization" now required under the 1994 Bankruptcy Code amendments.[27] It is submitted that these cases are not

---

19 W. VA. CONST. art. IX, § 11.

20 W. VA. CODE ANN. § 7-1-3 (West 2018).

21 Meador v. Cty. Court of McDowell Cty., 87 S.E.2d 725, 734 (W. Va. 1955) (emphasis added).

22 W. VA. CONST. art. IX, § 11.

23 *Id.*; W. VA. CODE ANN. § 7-1-3 (West 2018).

24 *Meador*, 87 S.E.2d at 734.

25 720 S.E.2d 587(W. Va. 2011).

26 *Id.* at 592 (internal citations omitted).

27 *See, e.g.*, *In re* Timberson Water & Sanitation Dist., No. 9-07-12142 ML, 2008 WL 5170581, at *2 (Bankr. D.N.M. June 18, 2008) (authority relied upon by municipal debtor must leave nothing "to inference or implication"); *In re* Alleghany-Highlands Econ. Dev. Auth., 270 B.R. 647, 649 (Bankr. W.D. Va. 2001) (rejecting economic development authority's argument that its statutory "powers of a body corporate" and "power to sue and be sued" constituted "specific

controlling in West Virginia since they involved the asserted authority by only one subcategory of "municipalities," those that are purely creatures of statute—public service districts, public benefit corporations, cities, and towns—and not a county, an entity whose basic powers emanate from our state's organic law.[28]

There has been only one Chapter 9 case filed in West Virginia since the 1994 amendment of section 109(c) requiring specific authorization in order to file. In March 1995, the Clay County Commission approved a resolution granting the Procious Public Service District's Board the authority to "conduct all business related to the operation" of the Public Service District ("PSD"), "including [the filing of] a petition for protection under the United States Bankruptcy Code," and on April 7, 1995, the PSD's Board filed a petition for Chapter 9 relief in the Southern District of West Virginia.[29] After a hearing on a creditor's motion to dismiss on grounds that, *inter alia*, the PSD did not qualify as a debtor under section 109(c)(2), the bankruptcy court held that "[u]nder West Virginia law, a county commission can properly authorize a public service district which it has created to file a petition for relief under Chapter 9 of the United States Bankruptcy Code."[30] This ruling was not appealed, and the case proceeded to confirmation of its Chapter 9 plan in 2000 and closure of the case in 2001.[31]

The only logical basis for the bankruptcy court's ruling—that *as a matter of West Virginia state law* a county has the requisite authority to authorize a subdivision created by it to file for Chapter 9 protection—is either (1) that the *county itself* was "specifically authorized" to file and that such authority was delegable to political subdivisions created by the county, or (2) that the county commission—whose resolution clearly gave "specific authorization" for the PSD filing—was "a governmental officer or organization empowered by State law to authorize" the PSD filing.[32] Either theory supports the notion that West Virginia supports the right of a county to file for Chapter 9 protection.

---

authority" to file under Chapter 9); *see also* Seena Foster, Annotation, *Eligibility for Chapter 9 Bankruptcy Relief, Applicable to Municipalities, Pursuant to 11 U.S.C.A. § 109(c)*, 57 A.L.R. Fed. 2d 121, 152 (2011).

28 *See* W. VA. CODE ANN. §§ 8-2-1, 8-2-8 (West 2018), entitled "Creation of Municipalities." Counties as discussed above were established and empowered by W. VA. CONST. art. IX, § 11.

29 *In re* Procious Pub. Serv. Dist., No. 2:95-BK-20222 (Bankr. S.D. W. Va. Apr. 7, 1995). A Chapter 9 plan was confirmed January 27, 2000, and the case was closed November 8, 2001.

30 Order Denying Motion to Dismiss, *In re* Procious Pub. Serv. Dist., No. 2:95-BK-20222 (Bankr. S.D. W. Va. Oct. 24, 1995).

31 Final Decree and Order Closing Case, *In re* Procious Pub. Serv. Dist., No. 2:95-BK-20222 (Bankr. S.D. W. Va. Oct. 9, 2001).

32 11 U.S.C. § 109(c)(2) (2018).

Other courts have similarly ruled. In *In re New York City Off-Track Betting Corp.*,[33] the governor issued an executive order specifically authorizing the state-created off-track betting corporation (conceded to be a "municipality" for Chapter 9 purposes) to file for bankruptcy protection.[34] In response to assertions that such authorization did not pass muster under section 109(c)(2), the court first set the stage by noting that the legislative history of the 1994 Act demonstrated that Congress "clearly intended to expand 'the applicability of chapter IX as much as possible.'"[35] The court then discussed at length why the governor, who clearly did *not* have any express statutory authority to authorize a Chapter 9 filing, nevertheless was "a governmental officer . . . empowered by State law to authorize" the filing.[36] After noting various legislative statements and acts to the effect that the continued operation of the off-track betting entity was crucially important to the state, the court concluded that in authorizing the filing, the governor was "merely implement[ing] a valid stated policy objective of the . . . Legislature."[37] The court further explained that had Congress wished to circumscribe the general authority of state officials *as found in state law* then it could have done so.[38]

The same reasoning applies in West Virginia. A county commission shares a defining characteristic with the New York governor in *Off-Track Betting,* namely, certain inherent powers, grounded in each state's *constitution*, that permit it to act expansively in certain areas unless and until otherwise circumscribed by the Legislature.[39]

---

33 427 B.R. 256 (Bankr. S.D.N.Y. 2010).

34 *Id.* at 267.

35 *Id.* at 265 (citation omitted); *see also* City of San Bernardino, 499 B.R. 776, 786 (Bankr. C.D. Cal. 2013) (holding that such laws should be construed broadly to provide access to protection offered by the Bankruptcy Code in furtherance of the Code's underlying purpose).

36 *Off-Track Betting*, 427 B.R. at 263.

37 *Id.* at 269.

38 *Id.* at 268.

39 *Compare* W. VA. CONST. art. IX, § 11 (permitting county commissions to exercise some powers "as may be prescribed by law" and others "until otherwise provided by law"), *with Off-Track Betting*, 427 B.R. at 269 ("The Governor's executive power is broad . . . . [S]o long as the Governor stays within the policies stated by the legislature and does not seize its legislative role, his acts are constitutional."). In *Off-Track Betting*, the court noted that "a municipality cannot rely upon generalized statutory powers to issue specific resolutions permitting it to file" under Chapter 9. *Id.* at 271. The court, however, noted that the cases in support of this proposition "all address instances where municipalities filed Chapter 9 petitions pursuant to general grants of power *in a state statute*." *Id.* at 267 (emphasis added). The argument in support of a West Virginia county's powers relies on the state constitution, not a state statute.

III. ARE CITIES "SPECIFICALLY AUTHORIZED"?

In 2004, the West Virginia Legislature enacted a statutory finding unequivocally indicating that West Virginia cities and towns could file for Chapter 9 bankruptcy relief.[40] It enacted a new article to the state code that authorized certain "qualifying municipalities" to impose various taxes—occupational, use, service, sales[41]—for the stated purpose of addressing the perceived crisis presented by "severe unfunded police and fire pension fund liabilities."[42] Specifically included in the legislative findings is the concern that the "steeply rising pension obligations and the stagnant revenue sources raise the real possibility of municipal bankruptcy in the near and predictable future."[43] It is a well-established maxim of statutory construction that the Legislature is presumed to be familiar with the law at the time of passage of a bill.[44] It is submitted that this legislative finding is an express recognition of the possibility of municipal bankruptcy and demonstrates that the Legislature believed that the required specific authorization for such filings already exists in state law.

In West Virginia, cities are purely creatures of statute and possess *only* those powers expressly granted by the Legislature.[45] They have no inherent powers with regard to the exercise of the functions of government.[46] And state law is extremely reluctant to find powers that are not readily apparent from the text of the state code:

> A municipal corporation possesses and can exercise only the following powers: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but *indispensable*.[47]

---

40 *See* W. VA. CODE ANN. § 8-13C-1(i) (West 2018).

41 *Id.* §§ 8-13C-3–8-13C-5.

42 *Id.* § 8-13C-1(e)–(h).

43 *Id.* § 8-13C-1(i).

44 *See, e.g.*, Appalachian Power Co. v. State Tax Dep't, 466 S.E.2d 424, 436 (W. Va. 1995) ("[T]he Legislature is presumed to have known and understood the laws they had earlier enacted.").

45 Robinson v. City of Bluefield, 764 S.E.2d 740, 742 (W. Va. 2014) (quoting Booten v. Pinson, 89 S.E. 985, 989 (W. Va. 1915)); *see* W. VA. CODE ANN. §§ 8-1-5–8-1-6 (West 2018).

46 *See* Syl. Pt. 2, Hogan v. City of S. Charleston, 260 S.E.2d 833, 833 (W. Va. 1979) ("[T]he Legislature intended that the provisions of the State municipal law should have primacy over conflicting provisions in a municipal charter.").

47 Maxey v. City of Bluefield, 151 S.E.2d 689, 693 (W. Va. 1966) (quoting Syl. Pt. 2, Hyre v. Brown, 135 S.E. 656, 656 (W. Va. 1926) (emphasis in original)).

In attempting to determine whether the second hurdle has been cleared—whether the claimed power is found to be "necessarily or fairly implied in or incident to" the city's express powers—doubts about the implication are construed against the city, and the courts are required to deny such a power if there is a "fair, substantial, reasonable doubt . . . as to whether such corporation is possessed of [such] power."[48] And finally, the third hurdle is that, even if the claimed power is fairly implied or incident to an express power, the claimed power must also be "indispensable."[49] Little wonder, then, that few cities' claims of non-express powers are approved.[50]

Although a "municipality" (as defined by section 8-1-2 of the West Virginia Code to include a city, but not a county) derives all its powers from the Legislature,[51] and while any reasonable doubt that a city has a given power must result in a finding that it does not,[52] a power that is "expressly granted or necessarily or fairly implied" will be upheld.[53] When the West Virginia Legislature, as part of a major fiscal bill, gave cities broad taxing authority as a means of staving off or ameliorating a pension-funding crisis, its express inclusion of a finding that the filing for bankruptcy by cities and towns is a "real possibility" must be presumed to demonstrate that the Legislature recognized that such a possibility existed at the time of passage.[54]

IV. SUMMARY

This difference in the origins of counties' and cities' respective powers to control their fiscal affairs—between the plenary power granted to counties by the constitution, which is subject to restriction only by *further* action by the Legislature, and the same general power of the cities, which is *only* found in statute—results in differing analyses of questions involving whether a particular power claimed by one of these entities—one which is not expressly granted in the constitution (to counties) or by statute (in either case)—is "necessarily," "reasonably," or "fairly" implied and, in the case of cities, "indispensable."[55]

---

48 *Id.* (quoting Syl. Pt. 3, Hyre v. Brown, 135 S.E. 656, 656 (W. Va. 1926)).

49 *Id.* (quoting Syl. Pt. 3, Hyre v. Brown, 135 S.E. 656, 656 (W. Va. 1926)).

50 *See supra* text accompanying note 29.

51 Robinson v. City of Bluefield, 764 S.E.2d 740, 742 (W. Va. 2014).

52 Calabrese v. City of Charleston, 515 S.E.2d 814, 825 (W. Va. 1999) (citing Syl. Pt. 2, State *ex rel.* Charleston v. Hutchinson, 176 S.E.2d 691, 691 (W. Va. 1970)).

53 McCallister v. Nelson, 411 S.E.2d 456, 460 (W. Va. 1991) (quoting Syl. Pt. 1, City of Fairmont v. Inv'rs Syndicate of Am., Inc., 307 S.E.2d 467, 467 (W. Va. 1983)).

54 *See supra* text accompanying note 43.

55 Maxey v. City of Bluefield, 151 S.E.2d 689, 693 (W. Va. 1966).

In other words, a county starts from the position of having all powers reasonably necessary to carrying out its duty to control its fiscal affairs, and it can only be denied such powers in the face of an affirmative legislative decision—a statute—to clearly deny the power claimed.

In the case of a city claiming a particular fiscal-affairs power, any "fair, substantial, reasonable doubt" must be resolved against the city.[56] A court is obliged to consider first whether such claimed power is "reasonably and necessarily implied in the full and proper exercise of the powers so expressly given."[57] The third prong applicable to cities—is such claimed power "indispensable" to carrying out the broader and more general express power—simply does not apply to counties.[58]

The authority to file a bankruptcy petition is clearly a power "incident to" a city's express power to supervise and control its fiscal affairs.[59] The 2004 statute recognizing the possibility of municipal bankruptcies is a clear legislative determination that the power to file such a petition is indeed an "indispensable" element of cities' more general statutory power to oversee and control fiscal affairs.

V. CONCLUSION

It appears to this author that the feasibility of filing a Chapter 9 case in West Virginia is far from crystal clear. But there are viable arguments, at least in the case of a county and city—two of many types of "municipalities" as defined in the Bankruptcy Code—that each is "specifically authorized" under West Virginia law to file for Chapter 9 relief within the meaning of 11 U.S.C. § 109.

Admittedly, the basis of the required "specific authorization" is unconventional, with counties relying on a constitutional grant and cities relying on a codified legislative finding in a preamble to a pension-funding statute. So perhaps a more traditional grant of specific authorization by statute or the empowerment of a designated officer or board to grant specific authorization would more clearly open the gate to allow for the filing of a Chapter 9. Conversely, if cities and counties are currently not authorized to file for Chapter 9 relief, perhaps for the sake of clarity the Legislature should say so.

---

56 *Id.* (quoting Syl. Pt. 1, Hyre v. Brown, 135 S.E. 656, 656 (W. Va. 1926)).

57 State *ex rel.* Cty. Court of Cabell Cty. v. Arthur, 145 S.E.2d 34, 37 (W. Va. 1965) (quoting Syl. Pt. 3, Barbor v. Cty. Court of Mercer Cty., 101 S.E. 721, 721 (W. Va. 1920)).

58 *Compare id.* (finding that counties have the powers reasonably and necessarily implied for the full exercise of their express powers), *with Maxey*, 151 S.E.2d at 693 (finding that cities have the powers reasonably and necessarily implied for the full exercise of their express powers, as well as those indispensable to the accomplishment of their objects).

59 *Maxey*, 151 S.E.2d at 693 (quoting Syl. Pt. 2, Hyre v. Brown, 135 S.E. 656, 656 (W. Va. 1926)).