UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

IN RE:	)	
	)	
JEFFERSON COUNTY, ALABAMA,	)	
	)	CASE NO.: 11-5736-TBB-9
Debtor.	)	
	)	CHAPTER 9
	)	
	)	
	)	
	)	

OBJECTION TO ELIGIBILITY AND MOTION TO DISMISS CHAPTER 9 PETITION BY THE INDENTURE TRUSTEE

The Bank of New York Mellon, in its capacity as Indenture Trustee for the Sewer Warrants (the "Trustee"), hereby objects, pursuant to sections 109(c)(2) and 921(c) of the Bankruptcy Code,[1] to Jefferson County, Alabama's (the "County") eligibility for relief under chapter 9 of the Bankruptcy Code, and moves this Court to dismiss the chapter 9 petition filed by the County on November 9, 2011 (the "Petition Date"), based upon the absence of specific authorization by the State of Alabama.

In support of its Objection and Motion, the Trustee states as follows:

I. OBJECTION

A. Summary Of Objection To Eligibility

1. For the County to be eligible for relief under chapter 9 of the Bankruptcy Code, among other requirements, it must have been specifically authorized under Alabama state law to

[1] All references herein to the "Bankruptcy Code" mean Title 11 of the United States Code, 11 U.S.C. §101, *et seq.*

file a chapter 9 petition. *See* 11 U.S.C. § 109(c)(2).[2] The County is not and was not specifically authorized by Alabama state law to file a petition under chapter 9. Under Alabama Code Section 11-81-3, only counties, cities or towns in Alabama that have refunding or funding *bonds* are eligible to file a chapter 9 petition. As set forth in more detail below, the County has acknowledged to this Court and to the Supreme Court of Alabama that it does not have any refunding or funding bonds; it only has outstanding *warrants.* Warrants are not the same as bonds under Alabama law, as the County has repeatedly argued in prior litigation with the Trustee. Accordingly, because the County does not satisfy the eligibility requirements of Alabama law, it lacks specific authorization required by section 109(c) of the Bankruptcy Code and its petition must be dismissed pursuant to section 921(c).

B. Basis For The Objection

2. The County is a political subdivision of the State of Alabama. On the Petition Date, the Commission passed a Resolution purporting to authorize the Commission President, pursuant to Alabama Code Section 11-81-3, to execute and file a petition for relief under chapter 9 of the Bankruptcy Code on behalf of the County. On that same date the Commission President caused a voluntary petition to be filed by the County under chapter 9.

[2] Sections 109 and 921 provide other requirements for eligibility under chapter 9, including, without limitation, that the debtor filed its petition in good faith. The Trustee has not challenged the "good faith" filing of the County's petition. If a determination is made that the County is eligible for chapter 9 relief, the Trustee expressly reserves all rights it has under the Bankruptcy Code, including, without limitation, to hereafter seek dismissal of this case under section 930 and/or to object to confirmation of any plan proposed by the County on the grounds such plan is not proposed in good faith or does not comply with other provisions of the Bankruptcy Code. In addition, the Trustee reserves its rights in respect of the County's characterization of the history of the sewer debt crisis and the pre-petition negotiations among the County and the holders of the Sewer Warrants and general obligation warrants as set forth in the County's Memorandum in Support of Eligibility (Docket No. 10). Finally, in the event the County raises issues not previously raised in its Memorandum of Eligibility to support its eligibility to file for Chapter 9 relief, The Trustee hereby reserves the right to be heard and respectfully requests that it be given additional opportunity to further object and brief such issues to this Court.

3. Under section 109(c) of the Bankruptcy Code, a municipality such as the County may only be a debtor under chapter 9 of the Bankruptcy Code if it is "specifically authorized . . . to be a debtor under such chapter by State law . . . ." 11 U.S.C. § 109(c)(2).

4. As set forth in more detail below under the Arguments and Authorities section, that authorization must be "exact, plain, and direct with well-defined limits so that nothing is left to inference or implication." *In re County of Orange*, 183, B.R. 594, 604 (Bankr. C.D. Cal. 1995). Moreover, the municipality has the burden of proving eligibility to file under chapter 9. *In re Allegheny-Highlands Econ. Dev. Auth.*, 270 B.R. 647, 649 (Bankr. W. D. Va. 2001); *In re City of Bridgeport*, 129 B.R. 332, 339 (Bankr. D. Conn. 1991).

5. The County is not, and cannot establish that it is, specifically authorized under Alabama state law to seek relief under chapter 9.

6. Alabama Code Section 11-81-3 is the only authority under which an Alabama municipality can qualify under section 109(c)(2) of the Bankruptcy Code as eligible to file a chapter 9 petition. Section 11–81–3 of the Alabama Code, which is fully quoted below in the Arguments and Authorities section, requires that in order to be eligible to file a chapter 9 petition, the subject municipality must have funding or refunding bonds issued under Chapter 81 of the Alabama Code.

7. If a municipality has no funding or refunding bonds as of the petition date, then a petition filed by a municipality in Alabama must be dismissed pursuant to section 921(c), because the petition does not meet the threshold requirement under section 109(c)(2) of the Bankruptcy Code. *In re City of Prichard, Alabama*, Case No. 09-1500, United States Bankruptcy Court for the Southern District of Alabama (Judge William Shulman), ("*City of Prichard* Case") discussed below.

8. Simultaneously with the filing of its petition, the County filed a Memorandum in Support of Eligibility, which also contained a summary of the County's finances and debt structure as Exhibit A. The Memorandum and Exhibit A make clear that the County had no funding or refunding bonds as of the Petition Date.

9. In light of the County's lack of funding or refunding bonds and the resulting failure of specific authorization to file its chapter 9 petition, the County's chapter 9 petition must be dismissed pursuant to sections 109(c) and 921(c) of the Bankruptcy Code.

II. ARGUMENT AND AUTHORITIES

A. The County Must Be Specifically Authorized Under Alabama State Law To Be Eligible For Chapter 9 Relief

There are a number of hurdles a municipality must clear before it can avail itself of the protections of chapter 9; they are found in section 109(c) and section 921(c) of the Bankruptcy Code. "The hurdles to Chapter 9 were undoubtedly designed to prevent the 'capricious filing' of municipal petitions." *In re Sullivan County Regional Refuse Disposal District*, 165 B.R. 60, 82 (Bankr. D. N. H. 1994). In addressing access to chapter 9 relief the *Sullivan County Regional Refuse Disposal District* court stated:

> Municipal bankruptcy is quite unlike bankruptcy for individuals or private corporations. The bankruptcy court's jurisdiction should not be exercised lightly in Chapter 9 cases, in light of the interplay between Congress' bankruptcy power and the limitations on federal power under the Tenth Amendment. Considering the bankruptcy court's severely limited control over the debtor, once the petition is approved, access to Chapter 9 relief has been designed to be an intentionally difficult task.

Id.; s*ee also*, *N.Y.C. Off-Track Betting Corporation*, 427 B.R. 256, 264 (Bankr. S.D.N.Y. 2010) ("In determining eligibility, the chapter 9 petition should be viewed 'with a jaded eye' given that the '[p]rinciples of dual sovereignty, deeply embedded in the fabric of this nation and commemorated in the Tenth Amendment of the United States Constitution, severely curtail the

power of bankruptcy courts to compel municipalities to act once a petition is approved.'"). One of the primary hurdles Congress has set up for a municipality to clear before it can seek the benefits of chapter 9 is that it be "specifically authorized" under State law to file a chapter 9 petition. 11 U.S.C. §109(c)(2).

Any analysis of the requirement of specific authorization by the State for a municipality within its borders to file a chapter 9 case must begin with recognition that such access to chapter 9, if any, is within the absolute discretion and control of the State. The Tenth Amendment commands, and the Bankruptcy Code expressly recognizes, that the State is the initial gatekeeper to chapter 9 relief for municipalities. *In re City of Vallejo*, 403 B.R. 72, 76 (Bankr. E.D. Cal. 2009), *aff'd Int'l Brotherhood of Electrical Workers, Local 2376 v. City of Vallejo, Cal. (In re City of Vallejo)*, 432 B.R. 262 (E.D. Cal. 2010); *City of Bridgeport*, 128 B.R. 688, 691 (Bankr. D. Conn. 1991). Indeed, approximately half of the States do not even permit their municipalities to file a chapter 9 petition under any circumstances, even when a municipality is in financial distress.[3] Other States, in the exercise of this absolute control, have authorized their municipalities to file for chapter 9 relief upon satisfaction of a variety of statutory conditions imposed by such States.[4]

Indeed, this absolute control by the State is so clear, that in 1994 Congress amended the Bankruptcy Code to clarify that a "general authorization" by the State was not sufficient. Rather, a municipality has to be "*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

[3] Georgia prohibits municipal filings altogether, and several states have no provisions on bankruptcy at all. *See*, Frederick Tung, *After Orange County: Reforming California Municipal Bankruptcy Law*, 53 Hastings L.J. 885, 886 (2002).

[4] *See* Henry C. Kevane, *Chapter 9 Municipal Bankruptcy, The "New Thing" Part I*, ABA Business Law Today, May 19, 2011 at 2 http://apps.americanbar.org/buslaw/blt/content/2011/05/article-kevane.shtml. For example, Pennsylvania has a detailed list of triggers; Connecticut requires prior written consent of the Governor; Louisiana requires the pre-approval of the Governor and the Attorney General; New Jersey requires the pre-approval of a municipal finance commission. *Id.*

empowered by State law to authorize such entity to be a debtor under such chapter." 11 U.S.C. §109(c)(2) (emphasis added); *see also In re County of Orange*, 183 B.R. 594, 603-04 (Bankr. C.D. Cal. 1995) (Congress amended §109(c) to require specific authorization so the courts could no longer find the requisite authorization for the filing by implication.).

Prior to the 1994 amendments to the Bankruptcy Code, almost any grant of responsibility to a municipality by a State over fiscal matters, or a broad grant of powers including the ability to sue and be sued, was deemed sufficient general authority for a municipality to file a chapter 9 petition. *E.g.*, *In re City of Bridgeport*, 128 B.R. at 695; In *re Villages at Castle Rock Metro District No. 4*, 145 B.R. 76, 82 (Bankr D. Colo. 1990); *In re Pleasant View Utility Dist*., 24 B.R. 632, 638 (Bankr. M.D. Tenn. 1982). Since the 1994 amendments, however, courts that have considered the issue of specific authorization under State law have found that such authorization must be "exact, plain, and direct with well-defined limits so that nothing is left to inference or implication." *County of Orange*, 183 B.R. at 604. In addition, the municipality has the burden of proving eligibility to file under chapter 9. *See In re Allegheny-Highlands Econ. Dev. Auth.*, 270 B.R. 647, 649 (Bankr. W. D. Va. 2001); *In re City of Bridgeport*, 129 B.R. 332, 339 (Bankr. D. Conn. 1991). If specific authorization by State law is lacking, then the Bankruptcy Code requires that the chapter 9 petition be dismissed pursuant to section 109(c) and 921(c). *See e.g.*, *In re City of Harrisburg, Pennsylvania*, Case No. 11-bk-06938 (MDF), 2011 WL 6026287, at *16 (Bankr. M.D. Pa. Dec. 5, 2011) (holding that the City of Harrisburg was not specifically authorized under Pennsylvania law to be a debtor under chapter 9 of the Bankruptcy Code as required by section 109(c)); *In re Suffolk Regional Off-Track Betting Corp.*, Case No. 11-42250-CEC, at p. 24 (Bankr. E.D.N.Y., Dec. 2, 2011) (Decision attached as Ex. 1); *see also*, *In re Sullivan County Regional Refuse Disposal Dist.*, 165 B.R. at 83 ("The debtors failed to establish

the requisites for Chapter 9 relief, both under §109(c) and § 921(c), and therefore their petitions must be dismissed under the former and should be dismissed under the latter."); 4 *Collier on Bankruptcy* ¶921.04 at 921-7 (L. King 15th ed. 1994) (Section 921(c) "must be given a mandatory effect if the defect in the filing is in the debtor's eligibility to file Chapter 9.").[5]

Consistent with other States, the Alabama legislature has imposed, under Alabama Code Section 11-81-3, specific pre-conditions for an Alabama municipality, such as the County, to be eligible for chapter 9 relief. Section 11-81-3 requires that a municipality must have funding or refunding bond debt to be eligible to file for chapter 9 relief. This pre-condition has been in place since 1935 when the Alabama Legislature enacted the first iteration of Section 11-81-3, and has remained substantively unchanged. (See discussion in Section II.C. below). In its first day presentation to this Court and in its Memorandum of Eligibility filed with its petition, the County represented to the Court that it is "indisputably within the protections of Section 11-81-3." However, the County undoubtedly knows there is, at the very least, a genuine issue as to whether the County was specifically authorized to file its chapter 9 petition due to a lack of bond debt. Not until footnote 23 on page 41 of its Eligibility Memorandum does the County note that in the *City of Prichard* Case, the United States District Court for the Southern District of Alabama recently certified to the Alabama Supreme Court the specific question of

> [w]hether Ala. Code § 11-81-3 (1975) (as amended) requires that an Alabama municipality have funding or refunding **bond** indebtedness as a condition of

[5] As a result of the more exacting requirement of "specific authorization" now found in Section 109(c)(2), a significant number of chapter 9 petitions have been dismissed since 1994 due to a lack of specific authorization to file. *See e.g., E.g., In re Suffolk Reg. Off-Track Betting Corp.*, Case No. 11-42250 (Bankr. E.D.N.Y. Dec. 2, 2011); *In re Town of Marion, MS*, Case No. 07-50141 (Bankr. S.D. Miss. June 12, 2007); *In re Slocum Lake Drainage Dist. of Lake County*, Case No. 05-63193 (Bankr. N.D. Ill. Jan. 19, 2006); *In re Timberon Water and Sanitation Dist.*, Case No. 07-12142 (Bankr. N.M. Nov. 3, 2009); *In re City of Prichard*, Case No. 09-15000 (Bankr. S.D. Ala. Aug. 31, 2010), *appeal filed*; *In re Village of Washington Park*, Case No. 09-31744 (Bankr. S.D. Ill. Dec. 21, 2010); *In re City of Harrisburg, PA*, Case No. 11-06938 (Bankr. M.D. Pa. Nov. 23, 2011).

> eligibility to proceed under Chapter 9 of Title 11 of the United States Code. (emphasis added).

(Jefferson County Doc. # 10, Memo. of Eligibility at 41 n. 23) (emphasis added). The Alabama Supreme Court has accepted the certified question. In clear recognition of the impact of the *City of Prichard* decision on the County's ability to file for chapter 9 relief, the County has appeared in that case as an *amicus curiae* in favor of the City, whose chapter 9 case was dismissed. In support of its request to appear as an *amicus curiae* before the Alabama Supreme Court, **the County admitted** that

> although it has substantial debt in the form of warrants, **it does not maintain any bond debt**. Accordingly, [the Supreme Court's] conclusion in [the Prichard Case] may have some relevance to whether Jefferson County can, if necessary, commence federal bankruptcy proceedings to reorganize its debt.

(Ex. 2, Prichard Ala. Sup. Ct. R. at 67-68, County's Amicus Br. at i-ii) (emphasis added).[6]

As discussed below, the bankruptcy court's decision in the *City of Prichard* Case was correct. Because the County was well aware of the authorization issue raised by the *City of Prichard* Case, it filed its Eligibility Memorandum on the first day of this case and sought to obtain a prompt eligibility hearing in an effort to avoid the impact of the *Prichard* case.

B. Only Municipalities With Bond Debt Have Express Authority Under Alabama Law To Proceed Under Chapter 9

Unless an Alabama municipality falls within the limited authorization provided by Section 11-81-3 of the Alabama Code, it is not eligible to file a chapter 9 petition. Section 11-81-3 provides as follows:

> The governing body **of *any county***, city or town, or municipal authority organized under Article 9, Chapter 47 of this title ***which shall authorize the issuance of refunding or funding bonds may exercise all powers deemed necessary by the governing body for the execution and fulfillment of any plan or agreement for the settlement, adjustment, refunding, or funding of the indebtedness of the***

[6] If the Alabama Supreme Court answers the certified question in the affirmative, the County clearly did not have authority to file its petition since it is has no bond debt.

> ***county***, city or town, or municipal authority organized under Article 9, Chapter 47 of this title ***not inconsistent with the provisions of law relating to the issuance of refunding or funding bonds***. ***Without limiting the generality of any of the foregoing powers, it is expressly declared that the governing body shall have the power to take all steps and proceedings contemplated or permitted by any act of the Congress of the United States relating to the readjustment of municipal indebtedness,*** and the State of Alabama hereby gives its assent thereto and hereby authorizes each county, city or town, or municipal authority organized under Article 9, Chapter 47 of this title in the state to proceed under the provisions of the acts for the readjustment of its debts.

Ala. Code § 11-81-3 (2009) (emphasis added).[7] This statute requires that, in order for a municipality, such as the County, to be authorized to file a chapter 9 petition, the municipality must have funding or refunding **bonds**.[8]

While there are no Alabama State Court cases applying this statute, the United States Bankruptcy Court for the Southern District of Alabama, in the *City of Prichard* Case, recently interpreted section 11-81-3. In *City of Prichard*, a group of the city's employees moved to dismiss the city's chapter 9 petition because the city did not have any funding or refunding bond debt. The movants argued that section 11-81-3 allowed only municipalities that have outstanding refunding or funding bonds to file a chapter 9 petition. (*See* Ex. 3, City of Prichard, Bankr. Ct. Doc. # 193, Memo. in Supp. Mot. to Dismiss, at 4). The city opposed the motion and argued, as the County does here, that the second sentence of Section 11-81-3 should be read as a blanket authorization to allow all political subdivisions of the State of Alabama to file for relief under chapter 9. Judge Shulman rejected this argument finding in favor of the employees and holding that only Alabama municipalities with funding or refunding bonds were specifically authorized under section 11-81-3 to file a chapter 9 petition. (Ex. 4, City of Prichard Bankr. Ct. Doc. # 220, Transcript of Aug. 31, 2010 Hrg. at 16:18-18:2). Because the city did not have any

[7] The reference to "Article 9, Chapter 47" in the statute refers to parks and recreational authorities, and is not germane to the issue before the Court.

[8] As set forth in Section II.D. below, the County does not have any funding or refunding *bond* debt, as that term is used in Ala. Code §11-81-3.

funding or refunding bonds, the court dismissed the city's chapter 9 petition for lack of specific authorization under Alabama law to file the chapter 9 petition. (Ex. 4, City of Prichard Bankr. Ct. Doc. # 220, Transcript of Aug. 31, 2010 Hrg. at 17:23 – 18:2). After the city's case was dismissed the city asked the court to alter or amend its ruling. (Ex. 5, City of Prichard Bankr. Ct. Doc. # 223, Transcript of Sept. 27, 2010 Hrg. at 2:5-8). After a second review, the Court denied the Motion to Alter or Amend. (Ex. 5, City of Prichard Bankr. Ct. Doc. # 223, Transcript of Sept. 27, 2010 Hrg. at 18:6-12).

Judge Shulman's reasoning and conclusions correctly interpreted section 11-81-3 and apply equally to this case. In short, for a county, city or town in Alabama to be authorized to file a chapter 9 petition, that municipality must have funding or refunding bond debt. Based upon its prior pleadings, the Trustee expects the County, however, will make the same argument before this Court that the City made in *City of Prichard* and that the Court rejected — that the second sentence in section 11-81-3 extends bankruptcy authorization to each county, city or town in the State of Alabama, regardless of whether the municipality has funding or refunding bonds. (Ex. 2, Prichard Ala. Sup. Ct. R. at 74, County's Amicus Br. at 2). Indeed, the County devotes approximately 25 pages of its *Amicus Curiae* Brief to its argument that the first and second sentences of section 11-81-3 must be read independently; that the first sentence, which refers to funding and refunding bonds, simply establishes that a county, city or town that may issue bonds can restructure its debts in accordance with applicable law regarding the issuance of refunding or funding bonds, and the second sentence enables <u>every</u> county, city or town in the State of Alabama to avail itself of relief under chapter 9, regardless of whether it has issued bonds or not. (Ex. 2, Prichard Ala. Sup. Ct. R. at 88, County's Amicus Br. at 16). The County's interpretation of section 11-81-3, however, runs afoul of well recognized canons of statutory construction,

including rendering the first sentence unnecessary. It is also contrary to the legislative intent behind Section 11-81-3 (and its predecessors).

C. Rules of statutory construction under Alabama law support the *City of Prichard* decision.

The second sentence of section 11-81-3 is where the statute ostensibly references the Bankruptcy Code. Principles of statutory construction and the plain language of the statute demand that this sentence cannot be read in a vacuum. A basic tenet of statutory construction under Alabama law "is to ascertain and give effect to the legislature's intent as expressed in the words of the statute." *BP Exploration & Oil, Inc. v. Hopkins*, 678 So.2d 1052, 1054 (Ala. 1996); *Dekalb County LP Gas Co. v. Suburban Gas*, 729 So. 2d 270, 275 (Ala. 1998) (A court should look to the plain meaning of the words as written by the legislature.); *see also, Gholston v. State*, 620 S.W.3d 719, 721 (Ala. 1993). In so doing, however, a court cannot ignore one section of a statute to interpret another. The court should "consider the statute as a whole and . . . construe the statute reasonably so as to harmonize [its] provisions" with other provisions of the statute. *Proctor v. Riley*, 903 So. 2d 786, 789 (Ala. 2004); *Kinard v. Jordan*, 646 So.2d 1380 (Ala.1994). Moreover, a court cannot treat language in the statute as "mere surplusage," but must instead "give effect to every word . . . , if possible." *Proctor v. Riley*, 903 So. 2d at 791. "When determining legislative intent from the language used in a statute, a court may explain the language but it may not detract from or add to the statute." *Siegelman v. Chase Manhattan Bank (USA), Nat. Ass'n*, 575 So. 2d 1041, 1045 (Ala. 1991). A court's role is not to amend the statute to express what the court believes the legislature should have done, nor to try to correct defective legislation. *Id*.

Section 11-81-3 and Chapter 81 of Title 11, deal with "Municipal and County Bonds." The context of 11-81-3 suggests at the outset that it was intended to address rights of

municipalities related to bonds. A reading of Chapter 81 further demonstrates clearly and unambiguously that the Alabama Legislature was cognizant of the clear difference between bonds and warrants. Chapter 81 contains seven Articles, which provide authorization for and limitations upon the issuance of various species of bonds (e.g., "Municipal Bonds Generally," "County Bonds Generally," "Public Improvement Bonds," and "Revenue Bonds for Waterworks, Gas, Sewer or Electric Systems"). The various sections of Chapter 81 almost exclusively deal with bonds. Some sections, however, contain limited references to warrants.[9] The references in Chapter 81 to warrants do not blur but instead enhance the clear distinction between bonds and warrants, affirming that the Alabama Legislature was well able to include warrants in its enactments when it choose to do so. Thus far, the Legislature has not chosen to enact authorization for the filing of a chapter 9 petition by a municipality that does not have bonds.

A close review of section 11-81-3 reveals that the only authorization provided to municipalities to seek chapter 9 relief is to municipalities with funding bonds or refunding bonds as of the petition date. The first sentence of the statute outlines the general authority granted to certain counties, cities or towns to ***settle, adjust, refund, or fund their bond indebtedness.*** The first sentence clearly confers the general authority only on "the governing body of any county . . . which shall authorize the issuance of refunding or funding bonds." Ala. Code § 11-81-3. Moreover, it further limits the authority of those specified counties, cities or towns by providing they cannot settle, adjust, refund, or fund their indebtedness in a manner ***inconsistent with the provisions of law relating to the issuance of refunding or funding bonds***. *Id*. Clearly, the Legislature's objective in the first sentence was addressing only municipalities with bonds. The initial phrase of section 11-81-3's second sentence, "[w]ithout limiting the generality of any of

[9] For example, section 11-81-4 provides that under certain conditions municipalities can refinance utility revenue bonds issued under Title 5 of Chapter 81 by means of refunding warrants.

the foregoing powers," confirms that the first sentence provides the general authority to the specified counties, cities or towns — those that have refunding or funding bonds. The second sentence then provides specific authority included within that general authority as to what actions a covered county, city or town may take; specifically, file a petition for relief under the Bankruptcy Code. Accordingly, "the governing body" mentioned in the second sentence (emphasis added) is limited to the "governing body of any county. . . which shall authorize the issuance of refunding or funding bonds" mentioned in the first sentence. Any other reading would render both the entirety of the first sentence and the introductory phrase in the second sentence impermissibly meaningless and superfluous. *See Proctor v. Riley*, 903 So. 2d at 791. (The court cannot treat language in the statute as "mere surplusage" but must instead "give effect to every word . . . , if possible"). It would also ignore the obvious reference to the preceding sentence by the use of the term "the governing body," rather than a reference to "all counties, cities or towns" or "every county, city or town in the state of Alabama."

The historical context in which section 11-81-3 was enacted provides further confirmation for the Legislature's limitation of the authorization to counties, cities or towns to file for chapter 9 relief is to those with bonds. Congress first created "Chapter IX" in May 1934 to address widespread municipal **bond** defaults during the Depression by providing a vehicle for the readjustment of municipal security indebtedness as part of federal bankruptcy law. In September of the following year, the Alabama Legislature enacted the first version of what is now section 11-81-3 to permit "the governing body of any county . . . which shall authorize the issuance of refunding or funding bonds" to avail itself of "any act of the Congress of the United States then in force relating to the readjustment of municipal indebtedness." Since 1935,

through its various subsequent iterations,[10] the Alabama statute has always limited authorization to only the governing bodies of Alabama counties, cities or towns "which shall authorize the issuance of refunding or funding bonds," confirming the Legislature's intent and consistent contemplation that chapter 9 could be utilized only by these political subdivisions with **bond** debt. Despite the enactment of a number of statutes authorizing and governing warrant financing (e.g., 11-28-1, et seq.), the Alabama Legislature never chose to expand the authorization to include warrant debt.

Significantly, in the 2011 Regular Session, two members of the Jefferson County Legislative Delegation, Representatives John Rogers and Oliver Robinson, proposed H.B. 671 (attached hereto as Ex. 7) in the Alabama Legislature to broaden Alabama Code Section 11-81-3 in order "to specifically provide that a county may file for bankruptcy under certain financial situations." (Ex. 7, H.B. 671). The proposed addition to Section 11-81-3 stated as follows:

> (c) In addition to any other authorization provided to counties by this section, a county in [Alabama] that is delinquent or in default on its public indebtedness, or which accepts forbearance of creditors of its public indebtedness in lieu of default, is specifically authorized to file for bankruptcy or enter into a debt restructuring in the nature of a bankruptcy.

Id. Tellingly, the proposed amendment was directed broadly to all "public indebtedness," and not, as presently the case, a specific type of indebtedness, refunded or funded bond debt. The bill was proposed on May 24, 2011, shortly after the dismissal of the City of Prichard's chapter 9 petition, and just days after the question regarding the scope of the authorization provided by section 11-81-3 was certified to the Alabama Supreme Court. H.B. 671 died in committee. Thus, the Legislature declined to broaden the current law, which is well-defined and limits its

[10] Attached hereto as Ex. 6 are copies of various iterations of Section 11-81-3 and its predecessors since it was originally enacted.

authorization to counties, cities or towns that may seek chapter 9 relief to those municipalities with bonds.[11]

The County argued at length in its *amicus curiae* brief that the interpretation adopted by the *City of Prichard* court would be fundamentally unfair because it would permit chapter 9 access to a financially distressed municipality with bond debt, but would deny such access to a similarly distressed municipality with warrants but no bond debt. (Ex. 2, Prichard Ala. Sup. Ct. R. at 94, County's Amicus Br. at 22). While such an outcome might seem unfair, this argument ignores the dictates of the 10th Amendment and the Bankruptcy Code's codification of the State's absolute control as gate keeper of a municipality's access to chapter 9 relief. "The fundamental importance in our federal system, of proper deference to state sovereignty, outweighs [the debtor's] arguments concerning the benefits whch may flow to creditors and others from this chapter 9 case." *In re Suffolk Regional Off-Track Betting Corp.*, Case No. 11-42250-CEC, at p. 36 (Bankr. E.D.N.Y., Dec. 2, 2011). Any perceived unfairness in the current Alabama statutory framework is not a matter within the power of a bankruptcy court to rectify. Rather, any such inequality is a matter for the County to take up with the Alabama legislature. Unfortunately for the County in this instance, as discussed above the Alabama Legislature just six months ago considered and declined to act on a proposed bill that would have provided the requisite specific authorization necessary in order for the County to be eligible for chapter 9 relief.

D. The County Has No Bond Debt As That Term Is Used In Section 11-81-3

The Trustee further anticipates the County will also argue, even if bonds are required for eligibility under Section 11-81-3, the County's outstanding warrants satisfy that requirement.

[11] The Trustee understands there may have been chapter 9 cases in Alabama where the municipality did not have bonds but the cases were not dismissed. However, to the best of the Trustee's knowledge, there was no objection to eligibility in those cases based on a lack of specific authorization. Unless a timely objection to specific authorization is made, it is waived. To the best of the Trustee's knowledge, the only case in Alabama, prior to this case, where a lack of bonds was raised as an objection to specific authorization was the *City of Prichard* case.

The Alabama Constitution, its Legislature and its courts have long recognized the distinction between bonds and warrants. Section 222 of the Alabama Constitution provides that no bonds shall be issued under the authority of a general law unless such issue of bonds be first authorized by a majority vote by ballot of qualified voters. Generally, warrants may be issued without such referendum. *See O'Grady v. City of Hoover*, 519 So.2d 1292 (Ala. 1987). Historically, several characteristics have differentiated bonds from warrants. In *Littlejohn v. Littlejohn,* 71 So. 448 (Ala. 1916), the Alabama Supreme Court noted that a warrant is "the command of one duly authorized officer to another, whose duty it is to obey, to pay, from county funds, a specified sum to a designated person whose claim therefore has been allowed by the court of county commissioners." *Id.* at 449. A bond, on the other hand, is "an obligation in writing to pay a sum of money" that "imports, necessarily, a promise to pay a certain sum of money at a future date, and commonly bears no specific designation of the person or entity in whose favor its promise runs." *Id.* [12]

More recently, in *O'Grady v. City of Hoover* the Supreme Court considered squarely whether the historical distinctions between bonds and warrants had lost their meaning, and whether Alabama law should treat them as the same. 519 So. 2d 1292 (Ala. 1987). *O'Grady* involved general obligation warrants issued by the City of Hoover to finance construction of a municipal baseball stadium and other public improvements. The Supreme Court noted that under Alabama law the City could have financed the construction with either bonds or warrants. If the city had chosen to issue bonds, however, Alabama law would have required a public referendum. *O'Grady*, 519 So. 2d at 1299; *see also* Ala. Const. art. XII, § 222. The city chose

[12] Other Alabama cases have for decades acknowledged the differences between warrants and bonds. See e.g., *Cochran v. Marshall County*, 6 So. 2d 489 (Ala. 1942); *In re Opinions of the Justices, 164 So. 572 (Ala. 1935); State ex rel. Radcliff v. City of Mobile*, 155 So. 872 (Ala. 1934); *Parsons v. City of Birmingham*, 137 So. 665 (Ala. 1931) (holding that in "financial circles," bond issues are distinct from negotiable notes).

to issue warrants, which, on the other hand, can be issued without a vote of the public. *Id*. The *O'Grady* plaintiffs argued that bonds and warrants are functionally the same in modern finance, and, therefore, the warrants should have been subject to the public referendum requirements as if they were bonds. After careful consideration of the historical and present-day differences between bonds and warrants, the Court upheld the issuance of the warrants without a bond election, and left to the Legislature to decide whether to abandon the different treatment of bonds and warrants under Alabama law . *Id*

Because Alabama law has recognized for more than 80 years the distinction between bonds and warrants and the inapplicability of Section 222 of the Alabama Constitution to warrants, the Supreme Court concluded:

> We are not informed why the framers of the Constitution included only bonds, and not other negotiable instruments, within the provisions of § 222, but it applies only to bonds, and our function is to apply the constitutional provision as enacted and to determine whether these instruments are bonds. We cannot, by judicial interpretation, amend § 222 of the Constitution to make it applicable not only to bonds, but also to <u>those instruments similar to bonds</u>.

O'Grady, 519 So.2d at 1299 (emphasis in the original).

In numerous Alabama statutes, the Alabama Legislature has afforded different treatment between bonds and warrants. For example, in the Alabama Code §§ 11-81-1, *et seq.* which authorizes counties and municipalities to issue bonds, the Alabama Legislature specifically requires that funding bonds be approved by a majority vote by ballot of qualified voters prior to the issuance of the bonds. *See* Alabama Code §§ 11-81-81 - 91. In the section 11-28-1, *et seq.*, however, the Alabama Legislature has authorized each county to issue warrants without requiring any public referendum prior to their issuance. As previously observed, the Alabama

Supreme Court confirmed that Alabama law recognizes this very distinction between a bond and a warrant, and the appropriateness that each is treated separately. *O'Grady*, 519 So. at 1297-99.

Because of its acute awareness of the longstanding differences in the treatment of bonds and warrants under Alabama law, the Alabama Legislature also has specified when the legislation is to apply to both bonds and warrants. For example, in 2009 the Alabama Legislature enacted a comprehensive set of requirements to be complied with by a county wishing to issue indebtedness that "constitutes or creates an obligation, debt or charge against the credit or taxing power of the county." *See* Ala Code §§ 11-8A-1, *et seq.* It specifically made the requirements applicable to any financing, whether it took the form of "[b]onds, bond anticipation notes, warrants, warrant anticipation notes, or indebtedness issued or entered into on behalf of the county commission for a term of at least three years or more." Ala. Code §§ 11-8A-1(3); 11-8A-2.

Section 11-81-3 of the Alabama Code is the only place the Alabama Legislature authorizes counties, cities and towns to file a petition under chapter 9, and it limits that authority to such municipalities that have <u>bonds</u> as of the petition date. Nowhere in Chapter 81 of Title 11, nor in any other part of the Alabama Code, does the Legislature give comparable authority to counties, cities and towns if they have only warrants. *See e.g.*, Ala. Code §§ 11-28-1, *et seq.* (authorizing the issuance of warrants by counties). The Legislature's omission of any reference to warrants in its authorization to these municipalities to file a chapter 9 petition cannot be presumed to be because the Legislature intended for the reference to "bonds" to mean "bonds, but also to <u>those instruments similar to bonds</u>." *O'Grady*, 519 So. 2d at 1299 (emphasis in the original). As discussed above, the Legislature was already well aware of the distinction between a bond and a warrant when it enacted Section 11-81-3. Indeed, on the same day the Alabama

Legislature first enacted the predecessor to Alabama Code Section 11-81-3 authorizing counties, cities and towns to file a chapter 9 if they had bonds, *see* Ala. Act. No. 197 (H. 450 – Staples, Approved July 17, 1935), the very next act approved by the Alabama Legislature authorized municipalities to issue, without an election, warrants for purposes of refunding certificates of indebtedness or interest bearing warrants or notes, *see* Ala. Act. No. 198 (H. 451 – McDermott, Approved July 17, 1935). However, no reference was made in that latter act about bankruptcy authorization for municipalities that had only authorized warrants.

To interpret Alabama Code section 11-81-3 as using the term "bonds" to also mean "those instruments similar to bonds" requires one to ignore established Alabama law. In essence, this interpretation would require a court to add terms to the limited authorization given by the Alabama Legislature to specific counties, towns and cities to file a chapter 9 petition. Such an interpretation would not only be contrary to the long-standing recognition of the different treatment afforded bonds and warrants under Alabama law, it also would be contrary to the Congressional mandate that specific authorization of any entity to be a debtor under chapter 9 must be "exact, plain, and direct with well-defined limits so nothing is left to inference or implication." *County of Orange*, 183 B.R. at 604.

The County cannot credibly maintain that its warrants count as "bonds" for purposes of Section 11-81-3. Indeed, the County has consistently admitted that it does not have bond debt. It has stated this fact in pleadings filed in previous litigation with the Trustee, in its *amicus curiae* filing with the Alabama Supreme Court, in its Memorandum of Eligibility, and most recently in testimony before this court during the hearing on the Trustee's motion for stay relief and other relief.[13] Moreover, the County itself has expressly recognized the distinction between

[13] The County Attorney, Jeff Sewell, testified that the County had no bond debt as of the Petition Date, and that all long term debts of the County are warrants. (Ex. 9, Nov. 21, 2011 Hearing Tr., at 289:10-15)

warrants issued under another Chapter of the Alabama Code and bonds issued under Chapter 81 of Title 11 of the Alabama Code. In objecting to the Trustee's prior reference to Alabama Code §§ 11-81-1, *et seq*. in the federal receivership action before Judge Proctor, the County acknowledged that "bonds are a different financial instrument from the ***warrants*** the County issued to finance its sewer construction." (Ex 8, Federal Action Doc. #11, County Resp. in Opp., at 4-5 (emphasis in original)). When the Trustee in the Federal Action alleged that Ala. Code § 11-81-180 authorized the court to appoint a receiver over the System, the County wrote

> Plaintiffs' argument that Alabama law supports the appointment of a receiver relies entirely on the Kelly Act, Ala. Code § 11-81-180, the Alabama statute cited by Plaintiffs in their complaint and in the motion. That statute, however, pertains to default in the payment of ***bonds***. While the Kelly Act does provide for the appointment of a receiver upon a default on the payment of bonds, bonds are not at issue here. The instruments the County used to finance its sewer construction are ***warrants***. The Indenture and the official statements under which these warrants were sold to the public make this clear: the warrants were issued pursuant to Chapter 28 of Title 11 of the Alabama Code, titled "Warrants for Public Construction." See Indenture, Sec. 1.1 (Definition of the "Act"). Plaintiffs simply have the wrong statute.

(Ex. 8, Federal Action, Doc. #11, County Resp. in Opp., at 13 (emphasis in original)). The County further explained the distinction between bonds and warrants as follows:

> The distinction makes a difference. Bonds and warrants are separate, legally distinguishable debt instruments, authorized and governed by different statutes, ***with different legal consequences under Alabama law.*** The Alabama Supreme Court has consistently recognized these differences. *Littlejohn v. Littlejohn*, 195 Ala. 614, 617 (Ala. 1916) ("There is ... a marked fundamental difference between county warrants and ... county bonds .... One, the warrant, is an order to pay when in funds; while the other, the bond, is a promise to pay."). *See also O'Grady v. City of Hoover*, 519 So. 2d 1292, 1297-98 (Ala. 1987). Among other differences, bonds and warrants have different rules governing their transferability, and different remedies for their enforcement.

Id.

In further recognition of the distinction between warrants and bonds, the County asserted in its *amicus curiae* filings before the Alabama Supreme Court that "although it has substantial

debt in the form of warrants, **it does not maintain any bond debt**." (Ex. 2, Prichard Ala. Sup. Ct. R. at 67, County's Amicus Br. at i). Nowhere in its Amicus Curiae Brief did the County assert that its warrants constitute bonds for purposes of Section 11-81-3.

For many decades, Alabama law has recognized a meaningful distinction between bonds and warrants, and that distinction was plainly observed in Alabama Code Section 11-81-3. A municipality without refunding or funding bonds is not eligible to seek chapter 9 relief in Alabama.

As stated above, although the County may argue that such an outcome would potentially limit the options avaialble to the County to address its financial problems, the State of Alabama is the gate keeper of an Alabama municipality's access to chapter 9 relief. The Alabama statutory restrictions are not subject to change as a result of the County's decision to file chapter 9. Only the Alabama Legislature can change the limited authority granted to Alabama municipalities, but the Alabama Legislature has not done so.

III. CONCLUSION

WHEREFORE, for the reasons set forth herein, the Trustee prays this Court enter an order dismissing the County's chapter 9 petition, and that it grants the Trustee such other and further relief as this Court deems just and appropriate.

Respectfully submitted this the 9th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing was filed and served by the Court's electronic case filing and noticing system to all parties registered to receive electronic notices in this matter and via email or via first class mail as stated below to the following, this 9th day of December 2011.

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UAB Health System 619 19th Street South Jefferson Tower, Room J306 Birmingham, AL 35249-6805	Augmentation, Inc. 3415 Independence Drive, Suite 101 Birmingham, AL 35209-8315
AMCAD 15867 North Mountain Road Broadway, VA 22815	Brice Building Co., LLC 201 Sunbelt Parkway Birmingham, AL 35211
John Plott Company Inc. 2804 Rice Mine Road NE Tuscaloosa, AL 35406	Laboratory Corporation of America 430 South Spring Street Burlington, NC 27215 Attention: Legal Department
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