An "Immeasurable Sign of Great Hope": The Detroit Institute of the Arts, Municipal Bankruptcy and "Cultural Assets"

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I. INTRODUCTION

On July 18, 2013, the City of Detroit (the City) filed a voluntary Chapter 9 bankruptcy petition.[1] Although certainly not the first municipality with large debts to turn to bankruptcy,[2] the City's filing is on a historic scale, as the City attempts to manage its estimated $18.5 billion in debt through the bankruptcy court.[3] The scale of the City's bankruptcy is unprecedented.[4] For that very reason, this case is certain to create precedent for the management of large-scale municipal bankruptcies, both during and after the bankruptcy process has officially concluded.

Municipal bankruptcy differs from other bankruptcy contexts because of the public nature of the entity in financial distress.[5] Due to

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* J.D. (2016), Washington University School of Law. I am indebted to Chief Judge Phillip J. Shefferly and his staff for providing me with invaluable insight into the bankruptcy system and Detroit. I am also deeply grateful to my family and friends: thanks and love to you all.

1. *In re* City of Detroit, Mich. 504 B.R. 97, 128 (Bankr. E.D. Mich. 2013).

2. Other large-scale municipal bankruptcy filings include Jefferson County, Alabama in 2011, Orange County, California in 1994, San Bernardino, California in 2012, and Stockton, California in 2012. Alexander E.M. Hess, Michael B. Sauter & Samuel Wrigley, *The Largest Municipal Bankruptcies in U.S. History*, 24/7 WALL ST. (July 9, 2013), http://247wallst.com/special-report/2013/07/19/the-largest-municipal-bankruptcies-in-u-s-history/2/. Jefferson County's estimated liabilities were only $3.2 billion dollars, compared to Detroit's estimate of $18.5 billion. *Id.*

3. *Id.*; *see also In re* City of Detroit, 504 B.R. at 113.

4. Hess et al., *supra* note 2. Jefferson County's bankruptcy of $3.2 million dollars is the second largest municipal bankruptcy; the City's estimated debt is almost six times greater than that amount. *Id.*

5. 6 COLLIER ON BANKRUPTCY, ¶ 900.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014), *see infra* note 61. One of the most drastic ways that individual citizens have

the important roles citizens play, already complex legal issues can be further complicated by the very human concerns of a municipal population. One such complex issue in the City's bankruptcy case was the public debate over the impressive art collection of the Detroit Institute of the Arts (DIA).[6] Creditors hoping to receive higher payments on the substantial debts owed to them have argued that the collection should be monetized in some fashion.[7] Others have argued that this cultural asset is essential to the future of the City.[8] Therefore, the decision reached about whether monetizing the DIA art collection was permissible or appropriate could potentially serve as a model for other cities facing dire financial situations.

One of the many reasons the art collection of the DIA became such a divisive issue was because the debate actually centered on the tension between competing versions of what cities are expected to provide to their citizens.[9] When municipalities are insolvent, citizens can lose essentials: police and firemen, sanitation services, and pension payments.[10] Yet many expect more from their cities.[11] For example, citizens also place a premium on the cultural aspects of a city, viewing it as a place where art and culture can flourish.[12] The

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been affected by the bankruptcy in this case is in the cuts made to city employee pension plans. For further discussion of this issue, *see infra* note 72.

6. *In re* City of Detroit, Mich., 524 B.R. 147, 176 (Bankr. E.D. Mich. 2014).

7. *Id.*

8. *Id.* at 167.

9. Khalil AlHajal, *Bankruptcy Judge Prods Creditors to Reveal Exactly What They Want from Detroit*, MLIVE.COM (Sept. 3, 2014, 7:56 PM), http://www.mlive.com/news/detroit/index.ssf/2014/09/bankruptcy_judge_prods_credito.html. Before Judge Rhodes, creditors argued that the art collection was not an asset needed for "health, welfare and safety;" therefore, it could be monetized. *Id.* The DIA, however, argued that protecting the collection was "about respecting people's right to art and culture." *Id.*

10. *In re* City of Detroit, 524 B.R. at 261. "A large number of people in this City are suffering hardship because of what has been antiseptically called service delivery insolvency." Service delivery insolvency is defined as the inability "to provide basic municipal services, such as police, fire, and emergency medical services to protect the health and safety of the people here. Detroit's inability to provide adequate municipal services runs deep and has for years. It is inhumane and intolerable, and it must be fixed." *Id*. at 261–62.

11. *See* AlHajal, *supra* note 9. Citizens may argue, like the DIA did, that people have a "right to art and culture." *Id.*

12. In the case approving the bankruptcy plan, the court noted that culture, education and civic pride are all values that "[e]very great city in the world actively pursues." *Id*. at 218. Furthermore, "[t]hey are the values that Detroit must pursue to uplift, inspire and enrich its

City's bankruptcy case provided an excellent example of the tension between the desire for high culture and the need for basic services. Amid bankruptcy discussions about what to do with the City's world-class art collection, a national outcry arose over the City's decision to turn off the water of residents with outstanding water bills.[13] And while "Detroit-loyal philanthropists" have invested a great deal in the City,[14] the median household income between 2010 and 2014 was only $26,095, with 39.8 percent of the population living in poverty in 2014.[15] Considering the need for basic services now along with problems that may arise in the future raises questions about the proper weighing of short-term necessities against long term "viability."[16] The art collection of the DIA, which became a central issue in the City's bankruptcy case,[17] is a vivid example of these tensions and is especially interesting in the context of a municipal bankruptcy proceeding under Chapter 9 of the Bankruptcy Code.

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residents and its visitors. They are also the values that Detroit must pursue to compete in the national and global economy to attract new residents, visitors and businesses." *Id*.

13. Joe Guillen & Matt Helms, *Detroiters Testify About Water Shutoffs, Lack of Aid*, DETROIT FREE PRESS (Sept. 22, 2014), http://www.freep.com/story/news/local/detroit-bankruptcy/2014/09/22/bankruptcy-water-hearing/16045643/.

14. Holman Jenkins, *A Solvent Detroit Isn't a Self-Sustaining Detroit*, WALL ST. J. (Nov. 14, 2014), http://www.wsj.com/articles/holman-jenkins-a-solvent-detroit-isnt-a-self-sustaining-detroit-1416006470.

15. *Detroit (City) QuickFacts from the US Census Bureau*, U.S. CENSUS BUREAU, http://quickfacts.census.gov/qfd/states/26/2622000.html (last visited Nov. 17, 2014). Detroit has obvious economic problems, especially when compared to the medians in the rest of the state. The median household income in Michigan for 2010 to 2014 was $49,087, with 16.2 percent of the population living below the poverty level. *Michigan (State) QuickFacts from the US Census Bureau*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/26,2622000 (last visited Apr. 20, 2016).

16. Joe Guillen & Brent Snavely, *Rhodes Signals DIA Is Crucial for Detroit's Viability*, DETROIT FREE PRESS (Sept. 18, 2014), http://www.freep.com/story/news/local/detroit-bankruptcy/2014/09/17/bankruptcy-dia-plummer/15799233/. In order for a municipal bankruptcy plan to be approved, the municipality must show that the plan will lead to a "viable" city. *Id.* "Experts argue that a 'viable' city is not just a city that can deliver fire and police protection. *Id.* 'Viable' cities also must offer other services such as parks and recreation and cultural attractions if they are going to retain residents and attract businesses." *Id.* This argument indicates the tension inherent in the word "viability." Is something more than economic stability and growth crucial to the understanding? Does viability include culture as well? The answers to these questions impact how one will analyze the overall success of the City's bankruptcy plan. *Id*.

17. *In re* City of Detroit, Mich., 524 B.R. 147, 176 (Bankr. E.D. Mich. 2014).

This Note will begin, in Part II, by giving a brief history of the City and the DIA. It will also provide an overview of the bankruptcy process and specific concepts underlying municipal bankruptcies. Further, Part II will discuss the bankruptcy court's decision that approved the City's proposed plan to exit bankruptcy. Next, Part III offers an analysis of the impacts this case will have in future large-scale municipal bankruptcies. Finally, Part IV outlines a proposal for statutory changes to Chapter 9 of the Bankruptcy Code. These proposed changes would better reflect the complex balancing act municipalities face during bankruptcy: the tensions between essentials and culture, as well as economic and social viability. With new provisions in place, future municipalities may be able to avoid embroilment in problems, like the City's,[18] in the future.

II. HISTORY

A. The City of Detroit

The City was incorporated in 1815.[19] In 1896, Henry Ford built his first car in the City.[20] Of course, it was "the method of building cars that he would later devise—the moving assembly line—that put the world on wheels".[21] Due to Henry Ford's influence, the City became "Motor City;"[22] it played a "key role" in the industrialization of America throughout the twentieth century.[23] The automobile industry became a key employer for many Americans, and "Detroit was its epicenter."[24] With changes in how the automobile industry

18. Matthew Dolan, *Cost of Detroit's Historic Bankruptcy Reaches $126 Million*, WALL ST. J. (Sept. 12, 2014), http://www.wsj.com/articles/costofdetroitshistoricbankruptcyreach126million1410557043. In September of 2014, legal fees for the City were already estimated to be about $126 million. *Id.*

19. *Choose Detroit,* DTOURS, http://www.dtoursdetroit.com/choose-detroit/ (last visited Mar. 31, 2016). The City began as a French fort and remained French until it passed into the hands of the British in 1760. It officially became American as a result of Jay's Treaty in 1796. *Id*.

20. *Id*.

21. *Id*.

22. *Id.*

23. *Id*.

24. Thomas J. Sugrue, *Motor City: The Story of Detroit*, GILDER LEHRMAN INST. OF AM. HIST., https://www.gilderlehrman.org/history-by-era/politics-reform/essays/motor-city-story-detroit

functioned and losses in entry level jobs, the City began a decline to becoming "the embodiment of America's urban woes."[25] The City was also severely tested by the financial crisis of 2008.[26] Fear that inaction would lead to the loss of "more than one million jobs, billions in lost personal savings, and significantly reduced economic production"[27] sparked the "controversial 2008–09 government bailout of the auto industry."[28]

Since the wake of the financial crisis, the City's population has also been declining.[29] In 1940, the City was the fourth most populous in the United States.[30] By 2012, it had fallen to the eighteenth most populous city in the country.[31] This decline in population has been accompanied by extensive blight, which is currently pervasive in the City.[32] After decades of "population loss, rampant debt and financial mismanagement,"[33] the City was left "struggling to provide basic services to residents."[34] It was during this climate of decline that the City filed for bankruptcy.[35]

(last visited Mar. 31, 2016). Around the 1950s, one in six working Americans were employed by the auto industry. *Id.*

25. *Id.*

26. Peter Weber, *The U.S. Auto Bailout Is Officially Over. Here's What America Lost and Gained*, THE WEEK (Dec. 10, 2013), http://theweek.com/articles/454749/auto-bailout-officially-over-heres-what-america-lost-gained.

27. *Id*.

28. *Id*.

29. *Population of the 20 Largest U.S. Cities, 1900–2012*, INFOPLEASE http://www.infoplease.com/ipa/A0922422.html (last visited Nov. 5, 2014).

30. *Id*. Detroit reached its highest population in 1940, when it had approximately 1.6 million people, placing it behind only New York, Chicago, and Philadelphia. *Id*.

31. *Id*. By 2012, the City's population had dropped to only 701,475. *Id*.

32. *In re* City of Detroit, Mich., 524 B.R. 147, 166–67 (Bankr. E.D. Mich. 2014). The Court found that "blight in Detroit is extensive." *Id.* The Court also painted a vivid picture of the problem, saying that "[t]he statistics do not fully convey its extent or impact. In neighborhood after neighborhood, short and long stretches of streets have abandoned structures—they can no longer be called homes—that are intimidating hulks." *Id*. Succinctly summarizing the situation, the Court stated "it is heartbreaking, maddening and sad." *Id*.

33. Lisa Lambert, *Detroit Wins Court Approval for Plan to Exit Bankruptcy*, CHI. TRIB., Nov. 7, 2014, at 2.

34. *Id*.

35. Stephen Eide, *Detroit's Bankruptcy and Its Painful Reforms*, AM. INTEREST (Dec. 4, 2014), http://www.the-american-interest.com/2014/12/04/detroits-bankruptcy-and-its-painful-reforms/. Amongst the problems that led to bankruptcy were "the collapse of the auto industry, rising poverty, blight and crime, the white and black middle class' flight to the suburbs, and a legendarily dysfunctional city government." *Id*.

B. The Detroit Institute of the Arts

The DIA began as an independent nonprofit in 1885; seeking financial help, the DIA became a city department in 1919.[36] From 1919 until 1998, the DIA's art collection was considered property of the City, with the City paying for some future acquisitions by the DIA.[37] However, in 1998, the DIA regained control of its own operations; thus, it is not currently directly affiliated with the City.[38] In evaluating the assets available to the City in bankruptcy, the City's previous "ownership makes the DIA's governance structure different from almost all other major American museums, organized as nonprofit private entities."[39] This history also makes the absence of any provisions about what to do in case of municipal bankruptcy especially problematic, as the question of what impact the DIA's past involvement with the municipality helped create the potential for the monetization of the art collection.[40]

The City owns the museum building and the art collection.[41] Under the current operating agreement between the City and the DIA, however, which is in effect until 2023, "art institute services" are overseen by The Detroit Institute of Arts, a non-profit corporation.[42]

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36. Guillen & Snavely, *supra* note 16, at 1.

37. Dan Austin, *Detroit Museum of Art*, HIST. DETROIT, http://www.historicdetroit.org/building/detroit-museum-of-art/ (last visited Oct. 10, 2014). From 1919 until 1998, the "art was to become property of the city . . . and just as important, the city would be in charge of picking up the tab for future acquisitions." However, there was some dispute over whether the art collection was property of the City or if, instead, the DIA merely held the art in trust for the City. *Id*.

38. Guillen & Helms, *supra* note 13, at 1. While now clearly separated from the City, there is no clear contractual provision in the operating agreement about what happens to the DIA or its art collection in the case of a municipal bankruptcy.

39. Beverly S. Jacoby, *In Detroit Bankruptcy, Why DIA Art Values Varied So Much*, DETROIT FREE PRESS (Oct. 4, 2014), http://www.freep.com/story/opinion/contributors/2014/10/04/dia-art-value-detroit-bankruptcy/16670663/. Even though the DIA is no longer a city department, the fact that it once was one makes the governing structure different from many other American museums.

40. *Id.*

41. Melanie Kruvelis, *Timeline: The Complicated Relationship Between the DIA and the City of Detroit*, MICH. RADIO NEWSROOM (Mar. 27, 2014), http://michiganradio.org/post/timeline-complicated-relationship-between-dia-and-city-detroit#stream/0.

42. *Art Institute Service Agreement Between the Wayne County Art Institute Authority and the Detroit Institute of Arts, Inc.*, http://www.dia.org/user_area/uploads/Wayne%20County%20Service%20Agreement.pdf (last visited Mar. 31, 2016).

According to the website, the non-profit corporation is "run by a volunteer board of directors, which appoints and supervises the museum's director."[43]

The DIA's art is widely regarded as a "world-class collection"[44] and an important cultural landmark of the City.[45] The bankruptcy court found the art museum so important that it described the DIA as a "critical and immeasurable sign of great hope and determination in the City."[46]

Of more interest to creditors, however, is the estimated value of the collection's pieces.[47] Estimations of the collection's value vary widely.[48] One creditor assessed the collection as up to $8.5 billion dollars.[49] An appraisal from 2014 found a more modest estimate of between $2.7 billion and $4.6 billion.[50] Some experts caution that these are inflated figures, as "donor lawsuits, weakness in the market for some kinds of paintings, and lower sale prices because of the sheer bulk that would flood into the market" could affect actual sale prices.[51] For these various reasons, if the DIA sold the collection, reports indicate that it "might raise as little as $850 million."[52]

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43. *Museum Fact Sheet,* DETROIT INST. ARTS, http://www.dia.org/about/facts.aspx (last visited Oct. 15, 2014) [hereinafter *Museum Fact Sheet*].

44. Jim Kiertzner, *Live Blog: Testimony Continues in Detroit Bankruptcy Trial*, WXYZ DETROIT (Sept. 16, 2014), http://www.wxyz.com/news/region/detroit/live-blog-testimony-continues-in-detroit-bankruptcy-trial. Some of the most famous pieces held by the museum include "The Wedding Dance" by Pieter Bruegel the Elder, one of Vincent van Gogh's self-portraits, and "The Visitation" by Rembrandt. Matisse, Poussin, and Warhol are other famous artists represented in the collection. *Art at the DIA: Collections*, DETROIT INST. ARTS, http://www.dia.org/art/ (last accessed Sept. 13, 2016).

45. Kiertzner, *supra* note 44. *See also* Guillen & Snavely, *supra* note 16, at 2 ("But if the museum is forced to sell its works of art, its reputation as one of the nation's top museums would evaporate.").

46. *In re* City of Detroit, Mich., 524 B.R. 147, 167 (Bankr. E.D. Mich. 2014).

47. AlHajal, *supra* note 9.

48. *See, e.g.*, Jacoby, *supra* note 39, at 1; Randy Kennedy, *New Appraisal Sets Value of Detroit Institute Artworks at Up to $8.5 Billion*, N.Y. TIMES (July 28, 2014), http://artsbeat.blogs.nytimes.com/2014/07/28/new-appraisal-sets-value-of-detroit-institute-artworks-at-up-to-8-5-billion/?_r=0.

49. Kennedy, *supra* note 48.

50. *Id*.

51. *Id*.

52. *Id*.

C. Bankruptcy

Bankruptcy is, ultimately, a process that "serves to mitigate the effects of financial failure."[53] The Bankruptcy Code provides debtors and the creditors of the debtors a structured way to decide which creditors should be paid, the amount each creditor should receive, and the order in which creditors should be paid.[54] In order to file for bankruptcy, a debtor must select the applicable chapter under which to file.[55] The different chapters are designed to protect and apply to different kinds of debtors, and therefore, each chapter has specific rules that do not apply universally.[56] For debtors, the Supreme Court has made clear that "[t]he principal purpose of the Bankruptcy Code is to grant a fresh start to the honest but unfortunate debtor."[57] Creditors of the debtor may also benefit from bankruptcy.[58] Through the process of bankruptcy, in either a liquidation or reorganization, "creditors of equal priority receive ratable and equitable distributions."[59]

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53. 1 COLLIER ON BANKRUPTCY ¶ 1.01[1] (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

54. *Id*. Because the Bankruptcy Code is found in the United States Code, "United States bankruptcy law is federal law." *Id*.

55. *Id.* ¶ 1.01[2].

56. 2-103 COLLIER ON BANKRUPTCY ¶ 103.01(Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014). Besides the chapters under which bankruptcy is actually filed, "Chapters 1, 3, and 5, the first three chapters, contain general provisions that apply, with some exceptions, to all the other chapters of the Code." *Id*. "Chapters 7, 9, 11, 12, 13, and 15 are the chapters that offer relief under the Code, and are the chapters under which cases are actually filed." *Id*.

57. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367 (quoting Grogan v. Garner, 498 U.S. 279, 286–87 (1991)).

58. 1 COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 1.01[1]. Creditors are those with secured or unsecured claims against the debtor at the time of bankruptcy. *Id.* In the City's bankruptcy case, there are seventeen separate classes of creditors, some with multiple divisions within a class. Some of these classes of creditors have secured claims; others' claims are unsecured. *In re* City of Detroit, Mich., 524 B.R. 147, 199–200 (Bankr. E.D. Mich. 2014).

59. 1 COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 1.01[1]. This serves another prime bankruptcy policy: the "equality of distribution among creditors of the debtor." *Id*. (quoting Union Bank v. Wolas, 502 U.S. 151, 161 (1991) (quoting H.R. Rep. No. 595, 95th Congress., 1st Sess. 177-78 (1977))).

The purposes behind the chapters of the Bankruptcy Code differ.[60] For instance, Chapter 7 is titled "Liquidation."[61] Under this chapter, the bankruptcy process liquidates the available assets of the debtor to repay debts.[62] Compare this to Chapter 13, titled "Adjustment of Debts of an Individual with Regular Income."[63] Here, a bankruptcy court will try to devise a plan that decreases the debt owed and allows the debtor to pay back the debt owed by paying regularly into a plan.[64] The titles of these chapters alone indicate that each chapter of the Bankruptcy Code has a distinct function.[65]

D. Municipal Bankruptcy

The City filed bankruptcy under Chapter 9 of the Bankruptcy Code, which is titled "Adjustment of Debts of a Municipality."[66] The primary goal behind municipal bankruptcy is to ensure that the essentials of a city, namely the "continued provision of public services," remain intact.[67] This goal means that the chapter exists "to permit a financially distressed public entity to seek protection from its creditors while it formulates and negotiates a plan for adjustment of its debts."[68] Municipal bankruptcy can be most closely analogized to corporate reorganization, which occurs under Chapter 11 of the

60. *See generally* 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 700.01; 8 COLLIER ON BANKRUPTCY ¶ 1300.01 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

61. 11 U.S.C. § 701 (1986).

62. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 700.01. This type of relief involves the "collection, liquidation, and distribution of nonexempt property of the debtor." *Id*.

63. 11 U.S.C. § 1301 (1984).

64. 8 COLLIER ON BANKRUPTCY, *supra* note 60, ¶ 1300.01. The plan, in cases dealing with individuals, sets out how the debtor will make payments to creditors, and this is usually done by distribution of income, as opposed to the liquidation of assets, although both are possible. *Id*.

65. *See* 11 U.S.C. § 701; 11 U.S.C. § 1301. Because the Bankruptcy Code serves different types of debtors, different chapters are necessary in order for the process to be tailored to each case. 1 COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 1.01[1].

66. *In re* City of Detroit, Mich., 524 B.R. 147, 159–60 (Bankr. E.D. Mich. 2014); 11 U.S.C. § 901 (2010).

67. *In re* Mount Carbon Metropolitan Dist., 242 B.R. 18, 34 (Bankr. D. Colo. 1999). The goal of continuing services takes precedence over future profit. *Id*.

68. *In re* Magma Irr. & Drainage Dist., 193 B.R. 528, 535–36 (Bankr. D. Ariz. 1994) (quoting 4 COLLIER ON BANKRUPTCY, ¶ 900.02 (15th Ed. 1994)).

Bankruptcy Code.[69] However, "unlike chapter 11, chapter 9 does not attempt to balance the right of the municipality and its creditors."[70]

Chapter 9 is also not a chapter focused primarily on an individual debtor or a corporation, and therefore, the public has a greater role to play. It is the "public nature of the entity experiencing financial difficulties" that ensures that "there is no provision in the law for liquidation of its assets and distribution of the proceeds to creditors."[71] Indeed, the public whom the municipality serves can be a creditor of the municipality.[72] When the public becomes a creditor, the municipality must balance the tension between serving the public and being indebted to it. This tension makes municipal bankruptcy singular amongst other bankruptcy processes,[73] and Chapter 9 ensures that the courts undergo unique considerations whenever it is utilized.[74]

E. The City's Bankruptcy Case

The first step in filing bankruptcy was for the City to establish that it was eligible to file for bankruptcy.[75] After establishing eligibility, the City next filed a bankruptcy plan, which is simply an organized

69. *Id.* at 535–36.

70. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 900.01[2] ("In fact, a dissatisfied creditor is in large measure provided with only one remedy in a chapter 9 case, i.e., seeking dismissal of the chapter 9 case.").

71. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 900.01[1].

72. *See generally* 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 901.04[12]. This was the case for the City. Since the City owed former city employees pension payments and did not have money to pay for these pensions, the City became in debt to these employees. Therefore, they were creditors of the City for purposes of the bankruptcy case. *In re* City of Detroit, Mich., 524 B.R. 147, 169–70 (Bankr. E.D. Mich. 2014).

73. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 900.01[1].

74. *Id.* One key consideration is the public nature of the entity; due to that public element, the municipality cannot be liquidated in the same way a corporation might. *Id.* Furthermore, such a liquidation, if somehow carried out, would raise Constitutional concerns. *Id.*

75. *In re* City of Detroit, Mich., 504 B.R. 97, 190 (Bankr. E.D. Mich. 2013). The court decided that the City was eligible to file bankruptcy and that bankruptcy law may trump the Michigan constitutional provisions that protect pension benefits. *Id*. *See also* Matt Helms, *Federal Judges Put a Halt to Appeals in Detroit Bankruptcy Case*, DETROIT FREE PRESS (Aug. 1, 2014), http://www.freep.com/article/20140801/NEWS01/308010161/1001/news. This decision was immediately appealed, but has been stayed until the current trial about the City's bankruptcy plan's feasibility concludes. *Id*.

structuring of debt repayment that must be approved by the court before the municipality may officially exit bankruptcy.[76] "Every creditor group" objected to the first plan filed, which included no settlement agreement with any creditor."[77] Subsequently, and only after court-ordered mediation, the City reached settlements with virtually every objecting creditor;[78] these settlements allowed the City to file an eighth amended plan[79] for the court's approval.[80]

Chief amongst the settlements made between the City and various creditor groups was what has come to be known as the "Grand Bargain."[81] In this agreement, the State of Michigan agreed to donate approximately $194.8 million to the City to help satisfy creditors.[82] Furthermore, various philanthropic foundations and benefactors of the DIA pledged to contribute $466 million to the City to prevent the art collection from being monetized.[83] In return, the City has agreed

76. 11 U.S.C. § 941 (1978) reads: "The debtor shall file a plan for the adjustment of the debtor's debts. If such a plan is not filed with the petition, the debtor shall file such a plan at such later time as the court fixes."

77. *In re* City of Detroit, 524 B.R. at 160. Some creditors also filed objections to the plan before such a plan was even filed. This was one of the reasons why the Court ordered mediation, to try to have the City reach settlements with the various creditor classes. The creditors varied greatly in this case, ranging from entities such as Oakland County and the United States, to financial groups like Syncora and FGIC, and including organizations representing the City's firefighters and police officers. *Id*. at 163–65.

78. *Id*. at 160. The City achieved settlement with every group who was represented by counsel, with the exception of some creditors who asserted Constitutional claims against the plan. The court addressed these objections in its opinion that approved the plan. *Id*.

79. The City filed multiple plans because, as it reached settlements and agreements with creditors, each proposed plan had to be adjusted to reflect new settlements between the City and its creditors. *Id*. at 161.

80. *Id*. at 160. The eighth amended plan included the settlements that the City had reached with the creditor groups at that time. These settlements ensured "the settling creditors' support of the plan and their withdrawal of their litigation against the City and their objections to the plan." *Id*.

81. *Id*. at 169. This term refers to the "collection of settlements among a number of parties with an interest in the City's two pension plans and in protecting the City's art at the DIA." *Id*.

82. *Id*. at 170.

83. *Id*. at 176. Of the total $466 million being contributed to the City's pension plans under the DIA settlement, $366 million will come from various local and national organizations. *Id*. The DIA itself has pledged to secure $100 million of the total $466 million from "individuals, local foundations and the business community." *Id*. This amount will be equally divided between the two pension plans over twenty years. *Id*.

to transfer any right to the DIA's art collection to a perpetual charitable trust for the benefit of the City.[84]

The Grand Bargain offered a solution to what was one of the most "contentious issues" of the City's bankruptcy case.[85] In any bankruptcy case, establishing the assets available to creditors is crucial in determining the amount of money that will be ultimately available to creditors.[86] This issue was discussed at trial, as the City argued it had submitted a plan that would allow the City to exit bankruptcy without using the DIA's art collection as an asset to pay creditors.[87] After weeks of trial, on November 7, 2014, "Detroit won U.S. Bankruptcy Court approval . . . for a road map to end its fiscal free fall and revitalize a city sinking under a huge debt load."[88] The Grand Bargain saved the art collection of the DIA from the threat of future creditor recoveries.[89]

The court was ultimately of the opinion that in any litigation "concerning the City's right to sell the DIA art, or concerning the creditors' rights to access the art to satisfy its claims, the positions of . . . the DIA almost certainly would prevail."[90] The Grand Bargain ensured that the DIA is contributing to the overall amount being paid to the creditors.[91] However, the court determined that this contribution would not come from the monetization of the art collection.[92] This meant that the court approved the City's bankruptcy plan, which included the Grand Bargain, despite the fact that the art collection of the DIA was not utilized in paying back the City's extreme debt.[93]

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84. *Id*. Specifically, the "City has agreed to transfer all of its right, title and interest in the art to the DIA to be held in a perpetual charitable trust for the benefit of the people of the City and the State." *Id*. It was expressly stated that "[t]his will be a permanent transfer, free and clear of all liens, encumbrances, claims and interests of the City or its creditors." *Id*.

85. *Id*. The court itself acknowledged that the "extent to which the bankruptcy code requires the City to sell or otherwise monetize the art at the DIA to pay creditors" was a central issue of the bankruptcy case. *Id*.

86. 1 COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 1.03.

87. *In re* City of Detroit, 524 B.R. at 175.

88. Lambert, *supra* note 33.

89. *In re* City of Detroit, 524 B.R. at 175.

90. *Id.* at 179.

91. *Id.* at 176.

92. *Id.*

93. *Id*. at 175.

In analyzing whether the art could be an asset, conflicting positions arose about whether the art could be accessed by the City in any way.[94] The court found that "the creditors did submit substantial evidence and legal grounds supporting the . . . view that the City can legally sell or monetize the DIA art."[95] The most compelling support for this argument came from the facts that the DIA was a branch of the city government for many years and the municipality acquired much of the art during more prosperous days.[96] In 11 U.S.C. § 902, the Bankruptcy Code defines "property of the estate" for purposes of a Chapter 9 bankruptcy.[97] Section 902 states that "'property of the estate', when used in a section that is made applicable in a case under this chapter by section 103(e) or 901 of this title, means property of the debtor."[98] Applying this simple definition, if the City "owned" the art collection, then the art collection would meet the definition of being "property of the debtor,"[99] and it would be deemed accessible to the City.

Contradicting this argument, the DIA argued that the art collection could not be sold to satisfy the City's debts.[100] First, although the DIA had been a City department for many years, "in 1955 Detroit stopped contributing anything to its operation and in 1997 the independent DIA board was given sole management responsibility."[101] Second, the DIA argued that "all of the art at the

94. *Id*. at 176. "Several parties, including at times the City itself, have taken the position that the City holds title to several significant pieces of art in the DIA and has the right to sell them outright to pay its obligations to creditors." Several other parties, including, but not limited to, the DIA, "have taken the position that the art that the City purchased or that others contributed to it is held in public trust for the citizens of the City and the State, and cannot be sold to satisfy the City's debts." *Id*.

95. *Id*. at 178. The most compelling example of this evidence expressly addressed by the court was that the operating agreement for the DIA stated: "[t]he *City* shall retain title to and ownership of the (a) *City art collection* and (b) the *DIA properties*." *Id.* at 178.

96. *See* Kruvelis, *supra* note 41.

97. 11 U.S.C. § 902 (2006). Due to the special nature of Chapter 9 bankruptcy proceedings, the definition of what is "property of the estate" varies between chapters. *Compare* 11 U.S.C. § 902 *with* 11 U.S.C. § 541, which has a much more complex set of rules for what becomes property of the bankruptcy estate.

98. § 902.

99. *Id.*

100. *In re* City of Detroit, 524 B.R. at 176.

101. Daniel Fisher, *How Detroit Saved Its Art From the Bill Collectors*, FORBES (Nov. 7, 2014), http://www.forbes.com/sites/danielfisher/2014/11/07/how-detroit-saved-its-art-collection-

DIA is held in charitable trust for the benefit of the people of the State and so it cannot be sold to pay the City's debts."[102]

This claim tied into the City's third argument, which was that any plan that monetized the art collection would come at the cost of drawn out legal battles.[103] When Annmarie Erickson, the executive vice president of the DIA, testified at trial about the feasibility of the current bankruptcy plan, she explained the risk of potential litigation.[104] This risk existed because the DIA would challenge any decision to monetize the art collection because, as Erickson testified, "protect[ing] the collection . . . is an obligation that we cannot shirk."[105] In such litigation, extensive analysis over whether the City or the DIA "owns" each individual painting might have ensued.[106] For instance, the "DIA contended that many donors of art pieces to the DIA had given with the expectation that the art would be in the DIA in perpetuity."[107] To support their claim, "[f]or months, the museum's lawyers and staff pored through old files to find donor histories for many of the collection's greatest works."[108] The hope

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from-the-bill-collectors. This evidence, the Court found, supported the contention that the art collection was being held in a public trust. *In re* City of Detroit, 524 B.R. at 177.

102. *In re* City of Detroit, 524 B.R. at 177. The predecessor to the DIA was the Detroit Museum of Art, and Public Act 67 of 1919 spelled out the details of the transfer of the DIA real property and its art from the Detroit Museum of the Art (later to be the DIA) to the City. *Id*. at 177. This act required that that "property so conveyed shall in the hands of said city be faithfully used." *Id*. At a meeting about the conveyance of this property, the Detroit Museum of the Art trustees agreed to "encourage and receive in trust and to administer future gifts and legacies." *Id*.

103. *Id*. "[T]he DIA itself and even many of its individual donors would vigorously challenge any attempt by the City to sell any of the art." *Id*. The sale of the art collection could also result in more than the cost of future litigation. The DIA's operating budget is largely dependent on tri-county millage taxes; any sale could "result in the cancellation" of these taxes, which make up almost 70 percent of the DIA's budget. *Id*.

104. Guillen & Helms, *supra* note 13.

105. *Id*.

106. There is evidence that "[m]ost of the art in the collection was donated by private citizens . . . and they probably never thought of their gifts as contributions to the city treasury." Fisher, *supra* note 101.

107. Rick Cohen, *Kresge's Rapson Explains "Grand Bargain" at Detroit Bankruptcy Trial*, NONPROFIT Q. (Oct. 9, 2014), https://nonprofitquarterly.org/2014/10/09/kresge-s-rapson-explains-grand-bargain-at-detroit-bankruptcy-trial/.

108. Randy Kennedy, *'Grand Bargain' Saves the Detroit Institute of Arts*, N.Y. TIMES (Nov. 7, 2014), http://www.nytimes.com/2014/11/08/arts/design/grand-bargain-saves-the-detroit-institute-of-arts.html. Erickson further stated that the DIA "would have been combing the archives for everything we could find if this had gone on." *Id*.

was to find "provisions that would, at the very least, tie up in court for years attempts to sell the works."[109]

In addition to these arguments, the DIA and City further argued that the creditors' position went against national museum standards. The DIA argued, and the court later agreed that "nationally accepted standards for museums prohibit the de-acquisition of art to pay debt."[110] Contrary to this point, creditors suggested that the DIA is already an exception to "nationally accepted standards"[111] for art museums, as the corporate governance structure is different from most other American museums.[112] Furthermore, Erickson has stated that DIA board members have considered the sale of art from the collection previously.[113] A more convincing argument that the court cited, however, was that the "creditors also admitted, perhaps grudgingly, that no creditor had ever considered the value of the art as a possible source of repayment when it decided to lend money to the City or to acquire City debt."[114]

Ultimately, the court agreed with the DIA and approved the City's bankruptcy plan. In approving the bankruptcy plan, the court found that the DIA and its art collection were "critical to the feasibility of

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109. *Id*. One example of the sort of restrictions found was for a painting called "The Dreams of Men" by Tintoretto. *Id*. The DIA found "restrictions imposed by the Italian government in the 1923 sale to the institute." *Id*.

110. These nationally accepted standards for museums spring from the DIA's membership with the Association of Art Museum Directors (the AAMD), which represents more than 150 art museums in North America. *In re* City of Detroit, Mich., 524 B.R. 147, 176 (Bankr. E.D. Mich. 2014). The AAMD standards allow the sale of art to be used only "to replenish the collection through the acquisition of other works of art." *Id*. Erickson testified at trial that the sale of art for the purpose of paying city debt could lead to the imposition of sanctions or penalties, which could, in turn, lead to the suspension of "all professional interchange." *Id*. This suspension would mean that "the national and international art community would refuse to do business with the DIA." *Id*.

111. *In re* City of Detroit, 524 B.R. at 178.

112. *See* Jacoby, *supra* note 39.

113. Kennedy, *supra* note 108. Ms. Erickson stated: "There were times over the years when even members of our own board would say, 'Why don't we sell a piece of art to put a scab on our financial wounds.' . . . [I]f your own board members come to that, you've been in deep trouble for a long time." *Id*.

114. Nathan Bomey, *The Best Quotes from Detroit's Bankruptcy Ruling*, DETROIT FREE PRESS (Nov. 9, 2014), file:///Users/Leah/Downloads/The%20best%20quotes%20from%20 Detroit's%20bankruptcy%20ruling.webarchive.

the City's plan and to the City's future."[115] Thus, the DIA and its art collection were not monetized to pay the City's debts.

Despite the court's holding, the decision still raises questions of both law and policy. Was it proper to allow the art collection to be excluded from the bankruptcy plan? More importantly, what sort of policy impacts will, and should, this historic bankruptcy case have not only on municipality-owned art, but municipal bankruptcy?

III. ANALYSIS

A. Was it Proper to Allow the Art Collection to be Excluded from the Bankruptcy Plan?

Based on the relevant provisions of the Bankruptcy Code, it was proper for the court to find that the DIA art collection was not an asset of the City that could be accessed by creditors.[116] This conclusion is based on two sections of Chapter 9 of the Bankruptcy Code, which outline two independent tests that must be met by any municipality before a court may approve a bankruptcy plan for the municipality.[117]

Several creditors of the City ensured that this issue did not disappear, as the creditors believed that they would receive more money from the sale of the art collection than they would from the amount promised to them under the so-called Grand Bargain.[118] Creditors therefore objected to the plan, asserting that the City's failure to include the art collection of the DIA as an asset of the estate meant the plan was not feasible.[119]

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115. *In re* City of Detroit, 524 B.R. at 218. The Court was effusive in praise of the DIA and the positive effect it had upon the City, stating "the DIA stands at the center of the City as an invaluable beacon of culture, education for both children and adults, personal journey, creative outlet, family experience, worldwide visitor attraction, civic pride and energy, neighborhood and community cohesion, regional cooperation, social service, and economic development." *Id*.

116. 11 U.S.C. § 943 (1988).

117. *Id.*

118. *In re* City of Detroit, 524 B.R. at 177 (explaining that existing objections were because creditors wanted claims paid completely).

119. Matthew Dolan, *Detroit Municipal Bankruptcy Trial Begins*, WALL ST. J. (Sept. 2, 2014), http://www.wsj.com/articles/detroit-municipal-bankruptcy-trial-begins-1409673491. The article also states that objections to feasibility have been raised by the treatment of city pension holders under the current plan. *Id.* The objectors argue "the plan unfairly benefits city pension

The relevant provision of the Bankruptcy Code, which was the subject of drawn out trials, is 11 U.S.C. § 943, which lists the requirements that must be satisfied before a bankruptcy plan may be approved in Chapter 9. Section 943(b)(7) presents a two-part test, stating that the "court shall confirm the plan if—the plan is in the best interest of creditors and is feasible."[120] This relatively simple-sounding final requirement before confirmation was actually the most complicated hurdle for the City to overcome.[121]

In order for a plan to be "in the best interest of creditors," in most bankruptcy contexts, "the payments under the plan to creditors would yield at least as much as would be received on a liquidation of the debtor's business and the distribution of the proceeds to creditors."[122] However, the circumstances of a Chapter 9 bankruptcy are quite different from that of a Chapter 11 bankruptcy.[123] Therefore, "[t]he same interpretation does not work for a chapter 9 case."[124] Instead,

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holders over other creditors." *Id.* Additionally, the plan is not feasible as it "fails to maximize fully the value of the city's world-class art collection." *Id.*

120. 11 U.S.C. § 943(b) (1988) reads in its entirety:

> The court shall confirm the plan if—(1) the plan complies with the provisions of this title made applicable by sections 103(e) and 901 of this title; (2) the plan complies with the provisions of this chapter; (3) all amounts to be paid by the debtor or by any person for services or expenses in the case or incident to the plan have been fully disclosed and are reasonable; (4) the debtor is not prohibited by law from taking any action necessary to carry out the plan; (5) except to the extent that the holder of a particular claim has agreed to a different treatment of such claim, the plan provides that on the effective date of the plan each holder of a claim of a kind specified in section 507(a)(2) of this title will receive on account of such claim cash equal to the allowed amount of such claim; (6) any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provision of the plan has been obtained, or such provision is expressly conditioned on such approval; and (7) the plan is in the best interest of creditors and is feasible.

121. Much of this difficulty arose from the complicated history of ownership of the DIA art collection. *See supra* Part II.B.

122. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 943.03. This best interest of creditors test is used elsewhere in the Bankruptcy Code and is "codified in section 1129(a)(7) of chapter 11 . . . as the general financial standard for confirmation of business reorganization plans where all classes of creditors and equity security holders accept the plan." *Id*.

123. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 900.01[1] ("Municipal debt adjustment is unlike that for individuals or private corporations").

124. 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 943.03[7][a]. The reason a similar interpretation does not "work" is that a "municipality cannot be liquidated, its assets sold, and the proceeds used to pay its creditors." *Id*.

"[t]he concept should be interpreted to mean that the plan must be better than the alternative that creditors have. In the chapter 9 context, the alternative is dismissal of the case."[125] Dismissal would essentially leave creditors left without a structured plan of repayment.

Therefore, in order to evaluate whether the proposed plan meets the "best interest of creditors" test, it is important to understand what would happen if the bankruptcy case had been dismissed. If this had happened, the Grand Bargain, which saved the art collection, would probably have failed.[126] It is arguable that creditors would have received more money via dismissal than they will under the current plan which approved the Grand Bargain.

The other aspect of § 943(b) is whether the plan is feasible, which meant that the City needed to "demonstrate its ability to make the payments required under the plan and still maintain its operations at the level that it selects as necessary to continued viability of the municipality."[127] The court, assessing the arguments that the plan was not feasible, stated "[s]ome creditors have argued that the City could pay more to creditors . . . by monetizing . . . the art of the DIA. No provision of law allows the creditors to access the DIA art to satisfy their claims."[128] Ultimately, the provisions of the Great Bargain, which the court called "miraculous," provided creditors a plan that was in the best interest of creditors and was feasible, meaning the plan has now been approved.[129]

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125. *Id*. In evaluating the alternative, however, "one must not be so carried away with the potentially adverse consequences of the alternative to a chapter 9 plan that one reaches the conclusion that *any* plan is better than the alternative." *Id*. (emphasis in original). Furthermore, "[a] plan that makes little or no effort to repay creditors over a reasonable period of time may not be in the best interest of creditors." *Id*.

126. *In re* City of Detroit, Mich., 524 B.R. 147, 175 (Bankr. E.D. Mich. 2014).

127. *Id*.

128. *In re* City of Detroit, Mich. 504 B.R. 97, 128 (Bankr. E.D. Mich. 2013). The court also stated this was the reason it found "[t]he market value of the art, therefore, is irrelevant in this case." *Id*.

129. *Id*. at 181. "The pension reductions in the pension settlement are minor compared to any reasonably foreseeable outcome for these creditors without the pension settlement and the Grand Bargain." *Id*.

B. What Sort of Policy Impacts Will, and Should, This Historic Bankruptcy Case Have Not Only on Municipality-Owned Art, but Municipal Bankruptcy?

Part of the reason the City's case was successful and occurred relatively quickly was that many creditors withdrew objections to the proposed plan, some of them directly because of the Grand Bargain.[130] The court called these settlements with bond insurers "an extraordinary accomplishment in bankruptcy and an ideal model for future municipal debt restructurings."[131] Yet, this miraculous agreement is based primarily on charitable groups who were able to create the money for the Grand Bargain,[132] and charity will no doubt continue to play a role as the City recovers from the bankruptcy.[133] There is some argument that the City needs to become revitalized through self-sufficiency, not charity.[134] Furthermore, some argue that the DIA acted blindly in insisting on keeping the DIA exactly intact, instead of exploring possibilities for utilization of the art collection.[135]

Some creditors also feel that the price of saving the art collection of the DIA was too high, as it came at the cost of a reduction in

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130. Bomey, *supra* note 114. "The plan's proposal is only possible because of the pension settlement and the Grand Bargain." *Id. See also In re* City of Detroit, 524 B.R. at 177 ("Most of the objections to the DIA settlement have been withdrawn as part of settlements reached with those objecting creditors").

131. *In re* City of Detroit, 524 B.R. at 248. The court was specifically speaking to the settlements reached with bond insurers.

132. These charitable groups are local and national foundations who have pledged to help the DIA make payments to the pension plans. *Id.* at 176.

133. Jenkins, *supra* note 14. Interestingly, "Detroit is in the same ballpark as San Francisco and New York as a recipient of municipal charity", despite its drastically smaller population. *Id*. One example of contributing charity may come from Dan Gilbert, owner of Quicken Loans, who has focused on revitalizing the City's downtown. *See* Joann Muller, *Gilbertville: A Billionaire's Drive To Rebuild The Motor City*, FORBES (Sept. 29, 2014), http://www.forbes.com/sites/joannmuller/2014/09/29/gilbertville-a-billionaires-drive-to-rebuild-the-motor-city/#7b536a9c64eb.

134. Jenkins, *supra* note 14. "If Detroit is going to become a going proposition again, taxpayers and investors want to see a self-sustaining city, not a city overcommitted to restoring lost grandeur or dependent on pitying strangers." *Id.*

135. *Id*. "The DIA could still have been Detroit's art museum, just not in Detroit. The possibilities are endless: How about the Detroit Institute of the Arts of Guangdong Province, from which the city could be collecting a nifty royalty while bearing none of the costs?" *Id*.

pension benefits to city employees.[136] The DIA and other benefactors have pledged to contribute to city employee pension plans as part of the DIA settlement.[137] However, the City has enacted "modest" pension cuts that affect many city employees.[138] For these creditors, the potential of millions from the monetization of the DIA art collection is not a debate about culture or bankruptcy assets; instead, it represents a source of funds that is not being pursued at potentially huge costs to those who have been planning their futures while relying on a certain amount of money to be available to them from their city employee pension plans.[139]

Many, however, are happy that the art collection will remain in the City, which has held the art for many years. Citizens of the City, as well as proponents of the DIA, have argued that selling the art collection would have had negative consequences for the City long after the bankruptcy has run its course.[140] The purpose of the City's case was to "reverse this decline in basic services, to attract new residents and businesses, and to revitalize and reinvigorate itself."[141] Stripping the City of works of art that draw tourists and showcase the cultural highlights of Detroit could derail that purpose.[142] Indeed, some argued that removing a key cultural aspect of the City would undercut the effort to "revitalize" and "reinvigorate" the City.[143] Furthermore, experts have testified about the long-term effects that selling the art collection could have for the City.[144] It is possible that, along with serving the DIA with a severe blow to its reputation,

136. Christine Ferretti, *Bankruptcy Protestors Call Pension Cuts 'Mass Robbery'*, DETROIT NEWS (Nov. 10, 2014), http://www.detroitnews.com/story/news/local/wayne-county/2014/11/10/detroit-bankruptcy-protesters-pension-cuts/18800657/. *See also In re* City of Detroit, 524 B.R. at 177.

137. *In re* City of Detroit, 524 B.R. at 176.

138. Eide, *supra* note 35. "Thanks to these funds, Detroit's bankruptcy plan contained only modest pension cuts (for non-uniformed workers, 4.5 percent . . . for uniformed workers, no cuts to the basic benefit, just a reduction to cost of living increases)." *Id*.

139. *In re* City of Detroit, 524 B.R. at 276.

140. *See* AlHajal, *supra* note 9.

141. *In re* City of Detroit, Mich. 504 B.R. 97, 112 (Bankr. E.D. Mich. 2013).

142. The DIA reports that in the 2013 fiscal year alone, it received 619,441 visitors. *Museum Fact Sheet*, *supra* note 43.

143. *In re* City of Detroit, 504 B.R. at 112.

144. Guillen & Snavely, *supra* note 16.

attendance would have decreased and donors would have ceased contributing art or contributing financially.[145]

IV. PROPOSAL

Municipal bankruptcy can be important for public entities in severe financial distress.[146] Lawmakers, however, should be cognizant of the public nature of the municipality, because municipal Chapter 9 bankruptcy, more than any of the other chapters, balances the needs of the public with the needs of the creditor.[147] Indeed, all other chapters strive to balance the needs of an individual or corporation with those of creditors; in Chapter 9, however, the individual is the public and the needs are those of the residents of the municipality itself.[148] Perhaps because Chapter 9 bankruptcies are much fewer in number than any other chapter,[149] this area of law is somewhat unexplored. The Bankruptcy Code needs to reflect the unique challenges of a Chapter 9 municipal bankruptcy; specifically, the code should provide more guidance about what to do when, as in the City's case, there is a question of balancing the fundamental services of a city with the demands of culture and other unquantifiable qualities of a municipality.

These sorts of distinctions are made in other chapters of the Bankruptcy Code. For example, the Bankruptcy Code allows a debtor to exempt certain property because the lawmakers have placed a higher value than liquidation upon it.[150] The goal of bankruptcy is to

145. *Id.*

146. *See* 6 COLLIER ON BANKRUPTCY, *supra* note 5, ¶ 900.01[1].

147. *Id.*

148. *Id.*

149. *U.S. Bankruptcy Courts—Judicial Business 2012*, U.S. COURTS, http://www.uscourts.gov/Statistics/JudicialBusiness/2012/us-bankruptcy-courts.aspx (last visited Nov. 17, 2014). In the year 2008, for instance, there were a total of 1,042,806 bankruptcies filed; only 52 of that total were filed under Chapter 9 or 15. Even at its highest, only 107 of the 1,596,355 bankruptcies filed in 2010 were Chapter 9 or Chapter 15. The most number of times a Chapter 9 or 15 bankruptcy has been filed was in 2012, when there were 144 filed. These figures show how few cases that deal specifically with municipal bankruptcy exist, which creates a skimpy body of case law and a less robust discussion of the benefits and problems associated with a Chapter 9 bankruptcy. *Id*.

150. 11 U.S.C. § 522 (2010). A person's jewelry and clothes are exempted up to a certain amount, as the law recognizes that we do not want those who turn to bankruptcy to be completely destitute in order to satisfy creditors. *Id*.

allow the debtor a "fresh start"; when there is an honest debtor, the goal is to help them manage those debts in a way that will benefit the greatest number of people, including creditors.[151]

The City's case highlights the deficiencies of Chapter 9 in dealing with the intangible benefits that cultural assets provide a municipality. Part of the reason the City's case was able to highlight these deficiencies is because of the scale of the case. Because there has never been a municipal bankruptcy that has attempted to deal with the sheer amount of debt present here, the bankruptcy system had never before been called on to evaluate what value should be placed on the cultural highlights of a city without its cultural assets.[152]

The court indirectly expressed the hope that "what happened in Detroit never happens again."[153] While one can certainly hope that a municipal bankruptcy of this scale will not be repeated in Michigan or any other state, the possibility exists. Therefore, we should think about the solution to the sort of crisis which was brought into being the moment the art collection of the DIA was potentially an asset of City.

The DIA's art collection has enormous cultural value to the City.[154] It would seem unthinkable that if New York City were to file for bankruptcy, the Statue of Liberty could be sold to pay the city's debts. While not nearly the iconic landmark that the Statue of Liberty is, the DIA art collection nevertheless has enormous cultural significance to the citizens of Detroit.[155] As it is written, Chapter 9 of the Bankruptcy Code has no provisions that could save culturally significant assets of a municipality when bankruptcy is the only option forward. While the Grand Bargain certainly was "miraculous,"[156] lawmakers should not rely on miracles to save the cultural assets of America's great cities. Negotiations and agreements are always important in law, but there must be some recourse for cities when negotiations fail.

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151. Marrama v. Citizens Bank of Mass., 549 U.S. 365, 367; 1 COLLIER ON BANKRUPTCY, *supra* note 53, ¶ 1.01[1].

152. *See* Hess, Sauter, & Wrigley, *supra* note 2.

153. *In re* City of Detroit, Mich., 524 B.R. 147, 161 (Bankr. E.D. Mich. 2014).

154. *See supra* note 115 and accompanying text.

155. *In re* City of Detroit, 524 B.R at 176.

156. *Id*. at 181.

For this reason, I propose new legislative additions to the Bankruptcy Code, to create limited and specific exemptions for "cultural assets" of a municipality that files for Chapter 9 bankruptcy.[157] One difficulty with such a provision will be, of course, defining exactly what qualifies as a "cultural asset" in municipal bankruptcy.[158] One way is to look to the definition of "culture." Culture is defined as "the arts, beliefs, customs, institutions, and other products of human work and thought considered as a unit, especially with regard to a particular time or social group." This definition should serve as the basis for lawmakers while crafting the term "cultural asset." I also believe there can be a compromise reached with such legislation by exempting "cultural assets" only up to a certain dollar amount. Furthermore, to determine if something is a "cultural asset," the legislature may require a vote of residents of the municipality. This vote would ensure that the assets protected in municipal bankruptcy actually have cultural significance to the residents of the municipality.

The City's bankruptcy case can serve as an important warning about the dangers of bankruptcy, but it can also serve as a model for the way cultural assets should be handled when these cases are inevitably filed. By adding provisions to the current bankruptcy code that would allow for "cultural assets" to be exempted, we can provide a way for bankruptcy courts to protect national treasures in those cases where no Grand Bargain exists. By doing so, our legislative body can ensure that we strike a balance in Chapter 9 bankruptcy cases between the importance of essential services to a community

157. It could be argued that this approach is an essentially optimistic view of the goals of bankruptcy, one which places value on idealistic visions of what a municipality can offer over the very real basic human needs of the citizens of these cities. I believe it is a compromise between the two. Furthermore, the "leniency of the U.S. bankruptcy code has long been unique in the Western world" and "it was our approach to bankruptcy that was chiefly responsible for allowing the U.S. to compete with other highly-developed European economies in the decades following the American Revolution." Adrian Shirk, *The Surprising Ways Bankrupt Cities Make Money*, THE ATLANTIC (Jan. 10, 2015), http://www.theatlantic.com/business/archive/2015/01/selling-art-and-cutting-pensions-how-cities-get-money-when-theyre-bankrupt/384311/. Chapter 11, for example, provides "in the most idealistic scenarios . . . entrepreneurial protection and encourages bold ventures." *Id.* My proposal similarly encourages cities to invest in cultural assets by ensuring that those same assets would receive protection in case of bankruptcy.

158. The American Heritage Dictionary of the English Language, *Culture*, https://www.ahdictionary.com/word/search.html?q=Culture (last visited Feb. 8, 2016).

and the importance of culture, which cities are so uniquely able to create. To ignore this essential balance between two conflicting interests would be to simplify municipal bankruptcy to something that it is not. Without such a provision, "cultural assets" could be lost from our cities, which would be a lasting and irreparable harm.

V. CONCLUSION

The City's case has been decided, but it will be a long time before the ramifications of this historic bankruptcy filing cease to be felt.[159] We should not allow this case to pass by without considering what we value as citizens of municipalities, and how to balance the competing interests of basic human needs with the higher cultural aspirations many have for our cities. Finding and protecting that balance in the midst of bankruptcy may seem ironic. Yet it is what we protect at our weakest, most vulnerable moments as a society that truly showcases what we value most as a society. Crafting legislative protection for the "cultural assets" of municipalities will ensure that, even during the most trying times, cities are able to protect the value added by culture, whether that be through music, architecture or even art.

159. This statement is not merely about the impact of the case. Simply deciding whether the plan was feasible required projections into the City's projected forty-year expenses. *In re* City of Detroit, 524 B.R. at 225. The problems that led to the City filing bankruptcy were years in the making; extricating itself from the situation will also require many years and a great deal of effort. *Id*.