

# **BANKRUPTCY FOR JEFFERSON COUNTY?**

## **THE BASIC ANATOMY OF A CHAPTER 9 BANKRUPTCY**

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## **BANKRUPTCY FOR JEFFERSON COUNTY? THE BASIC ANATOMY OF A CHAPTER 9 BANKRUPTCY**

### **I. LIMITS OF COURT POWER IN CHAPTER: The 10<sup>th</sup> Amendment and Section 904**

A Chapter 9 debtor enjoys much greater power and protection than a debtor under any other chapter of the Code. Much of this is the result of the constitutional mandate of the Tenth Amendment, which states:

*The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.*

This reservation of power is echoed in § 904 of the Code, which provides:

*Notwithstanding any power of the court, unless the debtor consents or the plan so provides, the court may not, by any stay, order, or decree, in the case or otherwise, interfere with—*

- (1) any of the political or governmental powers of the debtor;*
- (2) any of the property or revenues of the debtor; or*
- (3) the debtor's use or enjoyment of any income-producing property.*

Congress does have the sole power to establish bankruptcy law under Article I of the U.S. Constitution, which also prohibits states from impairing contractual obligations. But due to the Tenth Amendment's protections, the Chapter 9 debtor (in contrast to the Chapter 11 debtor) can continue to spend at will, use its property outside the ordinary course of business, borrow money, and employ and compensate professionals, all to the potential detriment of its creditors.<sup>1</sup>

### **II. MAJOR DIFFERENCES FROM OTHER CHAPTERS**

Chapter 9 of the Code is the exclusive Chapter for the voluntary adjustment of a municipality's debts and differs substantially from other Chapters. Even, the Court's procedural options are severely limited. No liquidation or Trustee can be forced upon a municipality under

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<sup>1</sup> David S. Kupetz, *Municipal Debt Adjustment Under the Bankruptcy Code*, 27 URB. LAW. 531, 534 (1995).

Chapter 9. The municipality is allowed to continue operating as usual, without restriction. Only certain Code sections apply to Chapter 9 cases (see attached list).

At A Glance: The Differences between Chapter 9 and Chapter 11<sup>2</sup>

<u>Provision</u>	<u>Chapter 11</u>	<u>Chapter 9</u>
Abandonment Power	Yes	No
Admin Expense (operating)	Yes	No
Conversion of case (§ 1112)	Yes	No
Court Control	Yes	No
Cramdown of equity (§ 1129(b))	Yes	No
Creditors can file plan (§ 1121)	Yes	No
Deposit/confirmation	No	Yes
DIP (§ 1107)	Yes	No
Discharge automatic on confirmation (§ 1141)	Yes	No
Employment of professionals, court must approve	Yes	No
Estate created (§ 541)	Yes	No
Examiner (§ 1106)	Yes	No
Exclusivity limited (§ 1121)	Yes	No
Insolvency required (§ 109(c)(3))	No	Yes
Involuntary filing (§ 303)	Yes	No
Liquidation plan (§ 1141(d))	Yes	No
Meeting of creditors (§ 341)	Yes	No
Priority for wages, etc. (§ 507(a)(4)(A))	Yes	No
Rejection of labor contracts, limitations (§ 1113)	Yes	No
Statement of affairs & schedules (Rule 1007(b))	Yes	No
Trustee, operating (§ 307)	Yes	No

## II. HISTORY OF CHAPTER 9

Since the implementation of Chapter 9 in 1937, only 625 municipalities have successfully sought refuge under the Chapter compared to more than 13,000 debtors who successfully filed Chapter 11 in 2010 alone.<sup>3</sup> Only a little more than forty have filed since 1976 (mostly small general-purpose municipalities), with roughly thirty filings being approved.<sup>4</sup> The largest Chapter 9 filing to date was that of Orange County, California, which filed in December of

<sup>2</sup> Table adapted from William L. Norton Jr. & William L. Norton III, *Norton Bankruptcy Law and Practice* (2008-2011 3d ed.), § 90:3.

<sup>3</sup> Evan Belanger, *Experts: Bankruptcy May Not Top Latest Offer*, BIRMINGHAM BUSINESS J. (Aug. 19, 2011), 1.

<sup>4</sup> Omer Kimhi, *Chapter 9 of the Bankruptcy Code: A Solution in Search of a Problem*, 27 YALE J. ON REG. 351, 359 (2010).

1994.<sup>5</sup> In order to dig itself out of bankruptcy, the County's newly appointed chief executive was required to make severe staff and budget cuts to keep a balanced budget (sound familiar?), and eventually the State of California passed a bill which diverted State tax dollars to a recovery fund. The County's confirmed plan provided for the selling of nearly a billion dollars in bonds to pay down and refinance existing debt, as well as the costs of the bankruptcy filing itself.<sup>6</sup>

### III. SOON TO JOIN THE CLUB?

A. Jefferson County, Alabama: Jefferson County is currently under billions of dollars in debt with some loans already in default.<sup>7</sup> Much of Jefferson County's financial crisis developed from the poor management of its sewer system overhaul, which employed financial schemes similar to those that led to the Orange County filing.<sup>8</sup> Jefferson County's financial problems have been exacerbated by sever the subprime mortgage crisis,<sup>9</sup> the repeal of the county's occupational tax,<sup>10</sup> and public corruption.<sup>11</sup>

B. Detroit, Michigan: The City of Detroit currently faces a yawning budget deficit of approximately \$300 Million.<sup>12</sup> Detroit's has recently put effort into reducing its budget deficit, including approving a plan to close half of the city's schools by 2014.<sup>13</sup>

C. Los Angeles, California: The Los Angeles officials have stated publicly that the city faces a \$1 billion deficit by 2010-2011 unless significant action is implemented.<sup>14</sup>

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<sup>5</sup> PUB. POL'Y INST. OF CAL., *When Government Fails: The Orange County Bankruptcy, A Policy Summary*, 2, Mar. 18, 1998, available at [http://www.ppic.org/content/pubs/op/op\\_398op.pdf](http://www.ppic.org/content/pubs/op/op_398op.pdf).

<sup>6</sup> *Id.* at note 6, at 5-6.

<sup>7</sup> For a more detailed discussion on the debts arising from Jefferson County's sewer project, see Symposium articles in 40 CUMB. L. REV.

<sup>8</sup> See Michael D. Floyd, *A Brief History of Jefferson County, Alabama Sewer Financing Crisis*, 40 CUMB. L. REV. 691, 705-12 (2010) (discussing the interest rate swaps, municipal bond insurance transactions, and speculation in swap contracts that Jefferson County engaged in).

<sup>9</sup> See *id.* at note 13, at 710.

<sup>10</sup> See Jeff Hansen, *Timeline: How Jefferson County's Financial Crisis Unfolded*, BIRMINGHAM NEWS (Aug. 5, 2011), [http://blog.al.com/birmingham-news-stories/2011/08/timeline\\_how\\_jefferson\\_countys.html](http://blog.al.com/birmingham-news-stories/2011/08/timeline_how_jefferson_countys.html).

<sup>11</sup> See *id.* at note 15.

<sup>12</sup> Kimhi, *supra* note 4, at 352.

<sup>13</sup> See Ben Rooney, *Michigan approves plan to close half of Detroit schools*, CNN MONEY (Feb. 22, 2011), [http://money.cnn.com/2011/02/22/news/economy/detroit\\_school\\_restructuring/index.htm](http://money.cnn.com/2011/02/22/news/economy/detroit_school_restructuring/index.htm).

#### IV. NOT AS EASY AS IT SOUNDS: The Five Eligibility Requirements of § 109(c)

Access to Chapter 9 relief is intentionally limited. In order to enjoy the protections afforded a Chapter 9 debtor (and much greater autonomy than the average Chapter 11 or 13 debtor), it must meet some threshold criteria, which are laid out in § 109(c) of the Code. The debtor must be: (1) a municipality; (2) specifically authorized to be such a debtor; (3) insolvent; (4) desiring to effect a plan to adjust its debts; and (5) one who has tried and failed to negotiate debt readjustment with its creditors or such negotiations are impracticable.<sup>15</sup>

A. Municipality: Municipality is defined in the Code to mean “political subdivision or public instrumentality of a State,” which includes cities and counties, and is intended to be interpreted broadly. At least one court has applied the following three-part analysis in defining municipality:

- (i) Does the “entity [have] any of the powers typically associated with sovereignty, such as eminent domain, the taxing power, or sovereign immunity[?]”
- (ii) Does the entity serve a public purpose and does the state control it?
- (iii) How does the state itself treat the entity?<sup>16</sup>

B. Specific Authorization: The municipality must be “specifically authorized in its capacity as a municipality or by name . . . by State law, or by a governmental officer or organization empowered by State law to authorize such entity to be a debtor under such chapter.”<sup>17</sup> Courts have held this requirement demands that a municipality must be able to point to express written state law authority for it to file, where nothing is left to inference or

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<sup>14</sup> Kimhi, *supra* note 4, at 352.

<sup>15</sup> *See id.* at 356.

<sup>16</sup> Lawrence P. King (ed.), *COLLIER ON BANKRUPTCY*, ¶ 900.02[2][a] (quoting *In re Las Vegas Monorail*, No. BK-S-10-10464-BAM (Bankr. D. Nev. Apr. 26, 2010)).

<sup>17</sup> 11 U.S.C § 109(c)(2).

implication.<sup>18</sup> Good or bad, Alabama is one of the 24 states that authorize their municipalities to file bankruptcy by state law; such blanket authorization is on the decline.<sup>19</sup>

C. Insolvency: Insolvency for a Chapter 9 debtor is either (i) generally not paying debts as they become due, or (ii) being unable to pay its debts as they become due. Chapter 9 does not employ the traditional balance sheet or assets vs. liabilities test, and a municipality need not be exercising its powers to generate revenues to the fullest extent either.<sup>20</sup>

D. Willing to Effect a Plan: The Chapter 9 requirement that a debtor desire to effect a plan to adjust its debts is traditionally viewed as a “good faith” requirement. The purpose of the filing must not be simply to buy time or avoid creditors. Not to anyone’s surprise, this test is highly subjective and liberally construed, as some courts have read it only to mean that the Chapter 9 debtor must at some point propose a plan.<sup>21</sup>

E. Impracticability or Prior Failure in Efforts to Negotiate with Creditors: The debtor must satisfy one of four statutory requirements for this prong to be satisfied: (1) the debtor may get the consent of its creditors whose interest the debtor intends to impair under its plan (the pre-approval option); (2) the debtor must have negotiated in good faith but failed to reach an agreement with its creditors which it intends to impair in its plan; (3) the debtor is unable to negotiate with its creditors, or such negotiations would be impracticable (they may be too numerous or they may take too long); or (4) the debtor believes a creditor may attempt to obtain a preference.

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<sup>18</sup> See *In re County of Orange*, 183 B.R. 594, 604 (Bankr. C.D. Cal. 1995).

<sup>19</sup> Luke Baker, Mike Ginestro and Brendan O’Sullivan, *Municipal Bankruptcy: Chapter 9* (February 22, 2010), available at: <http://www.davieswealthms.com/new/daviesfinancial/WF.%20Municipal%20Bankruptcy.%202-22-10.pdf>.

<sup>20</sup> King, *supra* note 16, ¶ 900.02[2][c].

<sup>21</sup> See *id.* at ¶ 900.02[2][d].

## V. COMMENCEMENT OF THE CHAPTER 9 CASE

The Chapter 9 case begins with the filing of a voluntary petition for Chapter 9 relief (there is no provision for involuntary filings under Chapter 9).<sup>22</sup> In a case under all other chapters of the Code, the filing of the petition would be followed shortly by schedules setting forth the debtors assets and liabilities, current income and liabilities, executory contracts and unexpired leases, and statement of financial affairs.<sup>23</sup> The Chapter 9 debtor must only file, along with the petition, a list of its twenty largest unsecured creditors and their names, addresses, and claim amounts.<sup>24</sup> At a later date determined by the Court, the debtor must file a list of the name and address of each or its creditors.<sup>25</sup>

## VI. NOTICE

Section 923 of the Code provides the notice requirements for a Chapter 9 case. Under § 923, notice must be given of the commencement of a Chapter 9 case, of dismissal of a Chapter 9 case, and of any order for relief granted under Chapter 9.<sup>26</sup> Such notice, under 923, must be “published at least once a week for three successive weeks, in at least one newspaper of general circulation published within the district . . . and in such other newspaper having a general circulation among bond dealers and bondholders.”<sup>27</sup> Bankruptcy Rule 2002 applies to these notices and requires 25 days notice of the deadline for filing objections to and the hearing to consider a Chapter 9 plan.<sup>28</sup>

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<sup>22</sup> See 11 U.S.C. § 301.

<sup>23</sup> FED. R. BANKR. P. 1007.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See 11 U.S.C. § 923.

<sup>27</sup> *Id.*

<sup>28</sup> FED. R. BANKR. P. 2002.

## VII. THE AUTOMATIC STAY

Once the case has commenced, the § 362 automatic stay goes into effect. For the most part, the stay is the very same stay that goes into effect in all other chapters. However, under § 922(a), the automatic stay is expanded to include:

*(i) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against an officer or inhabitant of the debtor that seeks to enforce a claim against the debtor; and*

*(ii) the enforcement of a lien or arising out of taxes or assessments owed to the debtor.*<sup>29</sup>

The 922 stay also stays “a creditor from bringing an action against an inhabitant of the debtor who owes taxes to the debtor, whereby the creditor seeks to collect his debt by collection of the taxes that are owed to the municipality.”<sup>30</sup> The stay also halts “a creditor from undertaking the function of the municipality, if such an undertaking is permissible under state law, of attempting to collect delinquent taxes and foreclosing tax liens on property within the district, but not owned by the district.”<sup>31</sup> The stay does not stop, however, the application of “pledged special revenues” to debt secured thereby.<sup>32</sup>

Relief from the stay can still be sought by motion, and the Court may terminate or modify the stay as it could under other chapters.<sup>33</sup> Further, § 922(c) provides a creditor who has been provided adequate protection under § 362 . . . with an administrative claim to the extent it has nevertheless suffered loss.”<sup>34</sup>

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<sup>29</sup> See 11 U.S.C. § 922.

<sup>30</sup> 4 Collier on Bankruptcy, ¶ 922-4 (15th ed. 1994).

<sup>31</sup> *Id.*

<sup>32</sup> See 11 U.S.C. § 922.

<sup>33</sup> See 11 U.S.C. § 362(d).

<sup>34</sup> See 11 U.S.C. § 922.

## VIII. THE TRUSTEE

Chapter 9 is omitted completely from 28 U.S.C. § 586(a), the federal statute setting forth the duties of the United States trustee. Thus, the United States trustee (our Bankruptcy Administrator) has no general supervisory power whatsoever in a Chapter 9 case. The only involvement by the United States trustee in a Chapter 9 case is in the appointment of creditors' committees.<sup>35</sup>

## X. DISMISSAL OF THE CASE

Seeking dismissal of the Chapter 9 case is in many ways the only recourse for creditors in a Chapter 9 case once the debtor is eligible. Two statutes in Chapter 9 provide separate avenues for a court to dismiss the case.

### A. Lack of Good Faith:

Section 921(c) provides that a court “may dismiss the petition if the debtor did not file the petition in good faith or if the petition does not meet the requirements of this title.”<sup>36</sup> While “good faith” is not defined in the code, courts typically apply the same good faith analysis applied in cases filed under Chapter 11, using a totality of the circumstances approach.

### B. Section 930:

Section 930 provides:

- (a) After notice and a hearing, the court may dismiss a case under this chapter for cause, including –*
- (1) want of prosecution;*
  - (2) unreasonable delay by the debtor that is prejudicial to creditors;*
  - (3) failure to propose a plan within the time fixed under section 941 of this title;*
  - (4) if a plan is not accepted within any time fixed by the court;*
  - (5) denial of confirmation of a plan under section 943(b) of this title and denial of additional time for filing another plan or a modification of a plan; or*

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<sup>35</sup> Kupetz, *supra* note 1, at 566.

<sup>36</sup> 11 U.S.C. § 921(c).

*(6) if the court has retained jurisdiction after confirmation of a plan -  
(A) material default by the debtor with respect to a term of such plan;  
or  
(B) termination of such plan by reason of the occurrence of a  
condition specified in such plan.  
(b) The court shall dismiss a case under this chapter if confirmation of a  
plan under this chapter is refused.<sup>37</sup>*

All of these avenues for dismissal are permissive, and there exists no mandatory dismissal provision for Chapter 9 cases.

## **XI. THE PLAN**

If a plan is not filed with the petition, it must be filed by some later date specified by the Court. The Chapter 9 debtor has the exclusive right to submit a plan.<sup>38</sup> However, failure to timely file a plan may result in dismissal.<sup>39</sup> The contents of the plan are primarily governed by the same provisions that govern plans submitted in Chapter 11 cases. There are very limited notice requirements for transmission of the plan and for notice of a hearing on confirmation thereof.<sup>40</sup>

### **A. Confirmation Requirements:**

Section 943(b) provides that “the court shall confirm the plan if –

- the plan complies with the provisions of other chapters made applicable to Chapter 9 by certain provisions of the Code.
- the plan complies with the provisions of Chapter 9.
- 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.
- the debtor is not prohibited by law from taking any action necessary to carry out the plan.
- 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 the Code as a “secondary-priority claim,” which is to say, an administrative expense,

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<sup>37</sup> 11 U.S.C. § 930.

<sup>38</sup> H.R. Rep. No. 95-595, p. 399.

<sup>39</sup> 11 U.S.C. § 930.

<sup>40</sup> FED. R. BANKR. P. 3017.

will receive on account of such claim cash equal to the allowed amount of such claim.

—any regulatory or electoral approval necessary under applicable nonbankruptcy law in order to carry out any provisions of the plan has been obtained or such provision is expressly conditioned on such approval.

—the plan is in the best interests of creditors and is feasible.<sup>41</sup>

#### B. Acceptance:

Section 1129(a)(8), as applicable to Chapter 9 cases, requires that each class of creditors either accept the plan or not be impaired by it.

#### C. Best Interest of Creditors, Cramdown, and the Absolute Priority Rule:

Chapter 9 incorporates Chapter 11's cramdown protections for secured and unsecured creditors. For the plan to be "crammed down" it must be in the "best interests of creditors," which in the case of Chapter 9 simply means that they would be better off under the plan than under any alternatives. For secured creditors, this means that they are to receive at least the value of the property securing their claims. For unsecured creditors there is no clear standard. The plan must also not "discriminate unfairly" and must be "fair and equitable" to any class of creditors impaired under the plan.<sup>42</sup>

The "absolute priority rule" works differently when a municipality is the debtor in a bankruptcy proceeding. Contrary to an ordinary bankruptcy case "[m]unicipalities have no shareholders, and the unsecured creditors are essentially the lowest priority creditors (the residents . . . are not considered creditors). Consequently, the absolute priority rule is met even when the unsecured creditors are impaired under the plan."<sup>43</sup>

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<sup>41</sup> AM JUR. 2D (Bankruptcy) § 3195.

<sup>42</sup> 11 U.S.C. § 1129(b)(1).

<sup>43</sup> Kimhi, *supra* note 4, at 358.

D. Confirmation and Discharge:

The effect of confirmation of the plan is as set forth in § 944 of the Code. This includes that the plan is binding upon all creditors. Upon confirmation, “new obligations arise under the plan and pre-confirmation obligations are discharged [accordingly].”<sup>44</sup>

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<sup>44</sup> Kupetz, *supra* note 1, at 602.

Sections Incorporated into Chapter 9 via Section 901(a)

In addition to Chapters 1 and 9, the following sections of the Code are explicitly incorporated into Chapter 9 cases, via § 901(a).<sup>45</sup>

- (1) § 301 – Voluntary Cases.
- (2) § 333 – Appointment of Patient Care Ombudsman.
- (3) § 344 – Self-Incrimination; Immunity.
- (4) § 347 – Unclaimed Property.
- (5) § 349 – Effect of Dismissal.
- (6) § 350 – Closing and Reopening Cases.
- (7) § 351 – Disposal of Patient Records.
- (8) § 361 – Adequate Protection.
- (9) § 362 – Automatic Stay.
- (10) § 364 – Obtaining Credit.
- (11) § 365 – Executory Contracts and Unexpired Leases.
- (12) § 366 – Utility Service.
- (13) § 501 – Filing of Proofs of Claims or Interests.
- (14) § 502 – Allowance of Claims or Interests.
- (15) § 503 – Allowance of Administrative Expenses.
- (16) § 504 – Sharing of Compensation.
- (17) § 506 – Determination of Secured Status.
- (18) § 507 – Priorities.
- (19) § 509 – Claims of Codebtors.
- (20) § 510 – Subordination.
- (21) § 524 – Effect of Discharge.
- (22) § 544 – Trustee as Lien Creditor and as Successor to Certain Creditors and Purchasers.
- (23) § 545 – Statutory Liens.
- (24) § 546 – Limitations on Avoiding Powers.
- (25) § 547 – Preferences.
- (26) § 548 – Fraudulent Transfers and Obligations.
- (27) § 549 – Postpetition Transactions.
- (28) § 550 – Liability of Transferee of Avoided Transfer.
- (29) § 551 – Automatic Preservation of Avoided Transfer.
- (30) § 552 – Postpetition Effect of Security Interest.
- (31) § 553 – Setoff
- (32) § 555 – Contractual Right to Liquidate, Terminate, or Accelerate a Securities Contract.

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<sup>45</sup> 11 U.S.C. § 901(a), “Sections 301, 333, 344, 347(b), 349, 350(b) 351, 361, 362, 364(c), 364(d), 364(e), 364(f), 365, 366, 501, 502, 503, 504, 506, 507(a)(2), 509, 510, 524(a)(1), 524(a)(2), 544, 545, 546, 547, 548, 549(a), 549(c), 549(d), 550, 551, 552, 553, 555, 556, 557, 559, 560, 561, 562, 1102, 1103, 1109, 1111(b), 1122, 1123(a)(1), 1123(a)(2), 1123(a)(3), 1123(a)(4), 1123(a)(5), 1123(b), 1123(d), 1124, 1125, 1126(a), 1126(b), 1126(c), 1126(e), 1126(f), 1126(g), 1127(d), 1128, 1129(a)(2), 1129(a)(3), 1129(a)(6), 1129(a)(8), 1129(a)(10), 1129(b)(1), 1129(b)(2)(A), 1129(b)(2)(B), 1142(b), 1143, 1144, and 1145 of this title apply in a case under” Chapter 9. 11 U.S.C. § 901(a).

- (33) § 556 – Contractual Right to Liquidate, Terminate, or Accelerate a Commodities Contract or Forward Contract.
- (34) § 557 – Expedited Determination of Interests in, and Abandonment or Other Disposition of Grain Assets.
- (35) § 559 – Contractual Right to Liquidate, Terminate, or Accelerate a Repurchase Agreement.
- (36) § 560 – Contractual Right to Liquidate, Terminate, or Accelerate a Swap Agreement.
- (37) § 561 – Contractual Right to Terminate, Liquidate, Accelerate, or Offset Under a Master Netting Agreement and Across Contracts; Proceedings Under Chapter 15.
- (38) § 562 – Timing of Damage Measurement in Connection With Swap Agreements, Securities Contracts, Forward Contracts, Commodity Contracts, Repurchase Agreements, and Master Netting Agreements.
- (39) § 1102 – Creditors’ and Equity Security Holders’ Committees.
- (40) § 1103 – Powers and Duties of Committee.
- (41) § 1109 – Right to be Heard.
- (42) § 1111 – Claims and Interests.
- (43) § 1122 – Conversion or Dismissal.
- (44) § 1123 – Contents of Plan.
- (45) § 1124 – Impairment of Claims or Interests.
- (46) § 1125 – Postpetition Disclosure and Solicitation.
- (47) § 1126 – Acceptance of Plan.
- (48) § 1127 – Modification of Plan.
- (49) § 1128 – Confirmation Hearing.
- (50) § 1129 – Confirmation of Plan.
- (51) § 1142 – Implementation of Plan.
- (52) § 1143 – Distribution.
- (53) § 1144 – Revocation of an Order of Confirmation.
- (54) § 1145 – Exemption from Securities Laws.