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Determining the Meaning of "Instrumentality" in the Bankruptcy Code

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Introduction

The Bankruptcy Code dictates who is eligible to be a debtor in bankruptcy. Section 109(a) generally provides that "a person that resides or has a domicile, a place of business, or property in the United States, or a municipality, may be a debtor under [the Bankruptcy Code]."[1] Although a debtor that is a "person" or a "municipality" maybe eligible to file for bankruptcy, section 109 restricts which chapters that a debtor may file under. In particular, subject to various restrictions, a "person" may be a debtor under chapter 7, 11, 12, or 13. A municipality, however, is only eligible to be a debtor under chapter 9, and then only if the municipality can meet section 109(c)'s strict eligibility requirements. Accordingly, a court's determination of whether a debtor is a person or municipality will determine which chapter the debtor may file under.

Courts' determinations of whether a debtor is a person or a municipality is particularly important because, recently, private non-profit organizations are increasingly carrying out tasks traditionally performed by governments.[2] Private non-profits working closely with governments pose an interesting problem in the Bankruptcy Code, because they seem to fulfill some public

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[1] 11 U.S.C. § 109(a) (2012).
[2] *See e.g.* David M. Halbfinger, *City Sets Up a Corporation to Oversee Its Tech Projects*, N.Y. TIMES, Aug. 23, 2012, http://www.nytimes.com/2012/08/24/nyregion/new-york-city-sets-up-nonprofit-corporation-to-oversee-tech-projects.html.

function, while retaining the features of a private company. Such entities may resemble municipalities in the sense that they are subject to extensive governmental oversight and regulation, while at the same time retaining characteristics of private entities, such as the ability to select their own corporate officers, set their own budget, and manage their own day-to-day operations. Therefore, the question is whether such non-profits are "persons," eligible to pursue chapter 7, 11, 12, or 13 bankruptcy, or "municipalities," restricted to filing under chapter 9.

Given that the Bankruptcy Code imposes different eligibility requirements for each chapter, which vary in difficulty, this Article discuss courts' recent interpretations of the term "governmental unit" and "municipality." Part I examines the eligibility requirements for chapter 9 and chapter 11. Part II will discuss the test applied by the courts when determining whether an entity is a "governmental unit." Part III examines the requirements for being a municipality. Part IV discusses the implications for a debtor.

Part I: Eligibility Requirements for Chapter 9 and Chapter 11

Section 109 of the Bankruptcy Code provides that only a "person" may be a debtor under chapters 11.[3] Section 101(41) defines "person" as an "individual, partnership, and corporation," but specifically excludes "governmental unit."[4] Chapter 11 debtors have relatively relaxed requirements as compared to chapter 9 debtors. Generally, any individual, corporation, partnership or LLC is eligible to be a chapter 11 debtor.[5] Unlike chapter 9 debtors, chapter 11 debtors do not need to demonstrate that they are specifically authorized to file.[6] They must have

[3] 11 U.S.C. § 109(a) (2012).
[4] 11 U.S.C. § 101(41) (2012).
[5] *See* Kenneth E. Noble & Kevin M. Baum, *Municipal Bankruptcies: An Overview and Recent History of Chapter 9 of the Bankruptcy Code*, 9 Pratt's J. Bankr. L. 513 (2013) (discussing the provisions that govern chapter 11's eligibility requirements).
[6] *Id*.

received credit counseling from an approved agency during the 180 days prior to filing.[7] They must also file schedules and a statement of financial affairs.[8]

Section 109(c) provides that only a "municipality" may be a debtor under chapter 9. Chapter 9 debtors must meet section 109(c)'s strict eligibility requirements. Specifically, the municipality must demonstrate that it is authorized to be a chapter 9 debtor by state law, that it is insolvent, and it wants to effect a plan to adjust its debts.[9] Furthermore, the municipality must meet one of four creditor-negotiation requirements.[10] A chapter 9 debtor must also file a list of the creditors holding the 20 largest unsecured claims, and a list of all of its creditors.[11]

While courts generally define "department," "agency" and "political subdivision" based on the plain meaning of those terms[12], the dictionary definition of instrumentality has proved too general to be instructive.[13]

Part II: What is a "governmental unit"?

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[7] 11 U.S.C. §109(h) (2012).
[8] *See* Kenneth E. Noble & Kevin M. Baum, *Municipal Bankruptcies: An Overview and Recent History of Chapter 9 of the Bankruptcy Code*, 9 Pratt's J. Bankr. L. 513 (2013).
[9] 11 U.S.C. § 109 (c) (2012).
[10] *Id*. (The debtor must either: (a) obtain the agreement of creditors holding at least a majority in amount of the claims of each class that the debtor intends to impair under a plan in case of chapter 9; (b) negotiate in good faith with creditors and fail to obtain the agreement of creditors holding at least a majority in amount of the claims of each class that the debtor intends to impair under a plan; (c) be unable to negotiate with creditors because such negotiation is impracticable; or (d) reasonably believe that a creditor may attempt to obtain a preference).
[11] *See* Kenneth E. Noble & Kevin M. Baum, *Municipal Bankruptcies: An Overview and Recent History of Chapter 9 of the Bankruptcy Code*, 9 Pratt's J. Bankr. L. 513 (2013).
[12] *See e.g. In re* Seven Counties Servs., Inc., 511 B.R. 431,464–66 (Bankr. W.D. Ky. 2014); *In re* Las Vegas Monorail Co., 429 B.R. 770, 775 (Bankr. D. Nev. 2010).
[13] *See e.g. In re Seven Counties Servs., Inc.*, 511 B.R. at 466 ("Courts that have analyzed the term 'governmental unit' within the Code have focused on the term 'instrumentality.' These cases find the plain meaning of 'instrumentality' to be of little assistance."); *In re Las Vegas Monorail Co.*, 429 B.R. at 776 ("[T]he nonlegal definition of instrumentality is, unfortunately, anything but ordinary or plain . . . Given this state of affairs, there really is no 'plain meaning' of the term 'instrumentality'—or, to be somewhat puckish, there are too many plain and accepted meanings—and it thus makes sense to look at the context and background of that term's use in the Bankruptcy Code.").

The term "governmental unit" includes, among others, a "department, agency, or instrumentality of . . . a State."[14] It also includes "municipality."[15] The legislative history of section 101 indicates that Congress intended to define "governmental unit" in the "broadest sense."[16] The legislative history, however, further provides that a "department," "agency," or "instrumentality" "does not include any entity that owes its existence to state action, such as the granting of a charter or license but that has no other connection with a State . . . The relationship must be an active one in which the [entity] is actually carrying out some governmental function."[17]

Recently, in *In re Seven Counties Services, Inc.*[18], a bankruptcy court addressed whether a Kentucky community mental healthcare provider was a "governmental unit" under section 101(27).[19] There, the court denied a motion by a state retirement system seeking a determination that the debtor was a "governmental unit" under section 101(27), and therefore barred from seeking chapter 11 relief. The retirement system argued that the healthcare provider was a "governmental unit" only eligible for chapter 9 relief because the healthcare provider sought to reject its executory contract with the retirement system in order to stop contributions to the state retirement fund. The court held that because the debtor was not a department, agency, or instrumentality of the State, it was not a "governmental unit."[20]

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[14] 11 U.S.C. § 101(27) (2012) ("The term 'governmental unit' means United States; State; Commonwealth; District; Territory; municipality; foreign state; department, agency, or instrumentality of the United States . . . a State, a Commonwealth, a District, a Territory, a municipality, or a foreign state; or other foreign or domestic government.")
[15] *Id*.
[16] S. REP. NO. 95-989, AT 24 (1978).
[17] *Id*.
[18] *In re Seven Counties Servs., Inc.*, 511 B.R. 431 (Bankr. W.D. Ky. 2014).
[19] *Id*. at 463.
[20] *Id*. at 470.

Seven Counties Services, Inc. ("Seven Counties"), the debtor, was a nonprofit organization that provided behavioral health services to Kentucky residents pursuant to a state law, which was designed to begin the privatization of mental health services in Kentucky[21] Because many employees of the new non-profit community health centers were previously state employees, and had already paid into the state retirement system, KERS, the State designated the community health centers as "departments" of the State, thereby allowing them to participate in the state retirement system.

Kentucky exercised limited oversight over community mental health centers, such as Seven Counties. They were approved by the State Secretary for Health and Family Services through an administrative process that required that the non-profits' bylaws, board of directors, and operations met certain minimum standards.[22] The non-profits' day-to-day operations, however, were isolated from state control. The State did not have the ability to control the non-profits' boards of directors. It also did not exercise any control over health care providers' budgets, and did not appropriate funds directly to the non-profits. The only control the State exercised was whether to designate or de-designate non-profits as community mental health centers.[23]

This part will examine in turn why the bankruptcy court determined that Seven Counties was not a department, agency, or instrumentality of the State, and thus not a "governmental unit."

A. "Department"

[21] *Id*. at 436.
[22] *Id*. at 446.
[23] *Id*. at 437.

The court held that Seven Counties was not a "department," despite the existence of a State law defining it as such.[24] It reached its decision based primarily on the *Black's Law Dictionary* definition of the word. Furthermore, the court reasoned that the debtor was not a "department" because a private individual incorporated it, and because it was not administered by individuals that are accountable to public officials or the electorate.[25] The state retirement system argued that Seven Counties was a "department" since a state statute[26] defined "department" to include any entity participating in the state retirement system. The court found this argument unpersuasive, however, because federal law, not state law, determines the meaning of the terms used in the Bankruptcy Code.[27]

The Bankruptcy Code does not define the term "department." However, the court reasoned, "[w]hen Congress uses a familiar legal expression and does not provide a definition, that connotes Congress' intent that words be given their usual legal meaning."[28] Therefore, courts, such as the *Seven Counties* court, have relied on the plain meaning rule of statutory construction to determine its meaning.[29] *Black's Law Dictionary* defines "department" as a "principal branch or division of government."[30] The Seven Counties court found that this dictionary meaning of "department" comports with federal statutory interpretation of the term in

[24] *In re Seven Counties Servs., Inc.*, 511 B.R. at 464.
[25] *Id*. at 465.
[26] K.R.S. § 61.510(3) (" 'Department' means any state department or board or agency participating in [a state pension system] in accordance with appropriate executive order.").
[27] *In re Seven Counties Servs., Inc.*, 511 B.R. at 464.
[28] *In re* LTV Steel Co., Inc., 264 B.R. 455, 473 (Bankr. N.D. Ohio 2001).
[29] *See e.g. In re Seven Counties Servs., Inc.*, 511 B.R. at 464 ("The first rule of statutory construction is to look at the 'plain meaning' of the word.").
[30] BLACK'S LAW DICTIONARY (9th ed. 2009).

case law.[31] Therefore, in order to be a "department" within the meaning of the Bankruptcy Code, a debtor must be a branch or division of the government.

B. "Agency"

The Bankruptcy Code also does not define the term "agency." Therefore, the Seven Counties court relied primarily on the plain meaning of the term to determine its meaning. *Black's Law Dictionary* defines "agency" as including "state offices, departments, divisions, bureaus, boards and commissions."[32] However, a state law denominating a debtor as such is not dispositive.

In *In re Seven Counties*, the state retirement system argued that because the debtor was also defined as a "board" under state law, that it was an "agency" according to the plain meaning found in *Black's Law Dictionary*.[33] The court relied on a Kentucky Supreme Court case[34] that held that community mental health centers were not agencies.[35] There, the Kentucky Supreme Court reasoned that CMHCs were "not claimed to be state agencies for any purpose other than retirement system participation," and that their employees were "not under the merit system, state salary schedules, or any other state personnel regulations."[36] Accordingly, the Seven Counties court found that the CMHC debtor was not an agency after applying the same reasoning.[37]

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[31] *See e.g.* Hubbard v. United States, 514 U.S. 695, 699 (1995) (interpreting 18 U.S.C. §6 by equating the use of "department" to refer to a component of the Executive Branch); *In re Seven Counties Servs., Inc.*, 511 B.R. at 464 ("The *Black's Law Dictionary* (9th ed. 2009) definition of 'department' as a 'principal branch or division of government,' comports with federal statutory interpretation of the term in case law.").
[32] BLACK'S LAW DICTIONARY (9th ed. 2009).
[33] *In re Seven Counties Servs., Inc.*, 511 B.R. at 465.
[34] *Kentucky Region Eight v. Commonwealth of Kentucky*, 507 S.W.2d 489 (Ky. 1974).
[35] *In re Seven Counties Servs., Inc.*, 511 B.R. at 465.
[36] *Kentucky Region Eight*, 507 S.W.2d at 491.
[37] *In re Seven Counties Servs., Inc.*, 511 B.R. at 466.

C. "Instrumentality"

The Bankruptcy Code does not define the term "instrumentality." Furthermore, courts have found that the plain meaning of the term provides little assistance.[38] Therefore, in recent decisions, courts, including the Seven Counties court, have identified three factors for determining whether an entity is an "instrumentality" of the State: (1) "whether the entity has any of the powers typically associated with sovereignty, such as eminent domain, the taxing power, or sovereign immunity"; (2) "whether the entity has a public purpose, and if so, the level of control exerted by the state on the entity's activities in furthering the purpose"; and (3) "the effect of the State's own designation and treatment of the entity."[39]

For example, in applying these factors the court in *In re Seven Counties* concluded that the debtor was not an "instrumentality" because (a) the debtor did not exercise any powers typically associated with sovereignty, and (b) Kentucky exerted very little control over the debtor's operations.[40] In particular, the debtor was a private organization, and Kentucky did not appoint or approve its board of directors, officers, executives, or employees.[41] Indeed, the only power that Kentucky exercised over the debtor was the power to remove the debtor's recognition as a mental health services provider.[42] Furthermore, Kentucky did not allocate any funds to the debtor. Rather, the debtor obtained funding pursuant to contracts that it negotiated with Kentucky at arm's length.[43]

Part III: What is a "municipality"?

[38] *Supra* note 8.
[39] *In re Seven Counties Servs., Inc.*, 511 B.R. at 467.
[40] *Id*.
[41] *Id*. at 468.
[42] *Id*. at 469.
[43] *Id*. at 465.

Section 101(40) defines municipality as a "political subdivision or public agency or instrumentality of a State."[44]

The three-part test discussed above was initially developed in *In re Las Vegas Monorail* by the United States Bankruptcy Court for the District of Nevada to determine whether an entity was a "municipality" (i.e. "political subdivision or public agency or instrumentality of a State") under section 109(c).

In *In re Las Vegas Monorail*, the United States Bankruptcy Court for the District of Nevada denied a creditor's motion to dismiss debtor's chapter 11 case.[45] The creditor argued that the debtor was a "municipality" as defined by section 101(40), and therefore ineligible to seek anything other than chapter 9 relief.[46] The court held that because the debtor was not a political subdivision, public agency, or instrumentality of the State, it qualified for chapter 11 relief.[47]

The Las Vegas Monorail Company ("LVMC"), the debtor, owned and operated a 3.9 mile long monorail that connected nine hotels in Las Vegas.[48] LVMC acted pursuant to a Nevada law that allowed private companies to operate a public monorail, and obtained a franchise from the local county government to operate the monorail.[49] In an effort to expand the monorail's length, LVMC arranged for structured financing to acquire the existing monorail and expand it.[50] The financing required the Director of the Nevada Department of Business and Industry to sponsor the issuance of around $650 million of municipal bonds.[51] Ambac Assurance Corp. ("Ambac"), the creditor, insured payment of the principal and interest on the first series of

[44] 11 U.S.C. 101(40) (2012).
[45] *In re Las Vegas Monorail Co.*, 429 B.R. at 800.
[46] *Id*. at 774.
[47] *Id*. at 800.
[48] *Id*. at 773.
[49] *Id*.
[50] *In re Las Vegas Monorail Co.*, 429 B.R. at 773.
[51] *Id*.

bonds.[52] As part of its effort to obtain tax-exempt status, LVMC signed a "Tax Certificate and Agreement" that stated that LVMC was "an instrumentality of the State of Nevada . . . controlled by the Governor of the State of Nevada."[53] Over time, LVMC was unable to make the payments on the bonds from its revenues.[54] As a result, it filed for chapter 11 bankruptcy protection.[55] Ambac immediately moved to dismiss LVMC's case on the ground that LVMC was a "municipality," and thus ineligible for chapter 11 relief.[56]

In *In re Las Vegas Monorail*, the court examined the history of the Bankruptcy Code's use of the terms "municipality" and "instrumentality" and identified three distinct threads.[57] The first thread addresses "whether the entity has any of the powers typically associated with sovereignty, such as eminent domain, the taxing power, or sovereign immunity."[58] If the entity has such power, the court determined that it is likely a political subdivision or State agency.[59] The court found that LVMC did not have the power to tax, the power of eminent domain, and did not have sovereign immunity, and therefore was not a political subdivision or agency of the state.[60]

The second thread focuses on whether the entity has a public purpose and the degree of control that the State exercises over the entity's activities in furtherance of that purpose.[61] The

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[52] *Id*. at 774.
[53] *Id*. Additionally, LVMC's by-laws allowed the Governor to inspect and audit LVMC's records annually, disapprove of any by-law amendments, disapprove of LVMC's rates, and rejected LVMC's budget. Furthermore, the Governor could reject proposed board members, refuse to reappoint board members, and remove directors for cause. *Id*. at 774 n.3.
[54] *Id*.
[55] *Id*.
[56] *In re Las Vegas Monorail Co.*, 429 B.R. at 774.
[57] *In re Las Vegas Monorail Co.*, 429 B.R. at 788.
[58] *Id*.
[59] *Id*.
[60] *Id*. at 795.
[61] *Id*. at 788.

court stated that the more control the State has over an entity's day-to-day operations, the more likely it is to be an instrumentality of the State under section 101(40).[62] Moreover, the type of control retained by the State is critical. The court explained, "If the control retained or exercised is necessary or designed to allow the State to manage its finances . . . then the entity is an instrumentality. If the control, however, is more akin to oversight or regulation, then the entity is not an instrumentality."[63] In *In re Las Vegas Monorail*, the court found that LVMC performed an acknowledged public function, public transportation, but that the State's control was "primarily strategic and periodic, rather than operational and constant."[64] While the Governor of Nevada had the power to approve LVMC's fares, approve its budget, and appoint its directors, LVMC operated its day-to-day business in isolation from the State.[65] Furthermore, while Nevada's involvement in LVMC was significant, it was not designed to protect public finances.[66]

The final thread analyzes the effect of the State's designation and treatment of the entity. The court stressed that while some deference is given to the State's categorization of the entity, it is not determinative. In *In re Las Vegas Monorail*, although LVMC signed a "Tax Certificate and Agreement" that stated that it was an instrumentality, the court found that Nevada statutory law regarding monorails does not support that classification.[67] Therefore, because LVMC did not satisfy any of the prongs of the three-part test, it was not a municipality under 109(c).

Part IV: Implications

In conclusion, determining whether an entity is a "department" or "agency" under section 101(41)'s definition of "governmental unit" or a "political subdivision" or "public agency" under

[62] *Id*.
[63] *Id*. at 789.
[64] *Id*. at 797.
[65] *Id*.
[66] *Id*.
[67] *Id*. at 799.

the section 101(40) definition of "municipality" requires a straightforward plain meaning analysis. When determining whether an entity is an "instrumentality" under either section, however, courts have used the three-part test developed in *In re Las Vegas Monorail*, and applied in *In re Seven Counties*. The Seven Counties decision demonstrates that while Congress intended to define the term "governmental unit" in the "broadest sense," the definition is not broad enough to encompass an independent, private non-profit entity that works closely with a state or the federal government, even if the entity participates in a government pension system. Accordingly, an independent, private non-profit entity, even those working closely with state governments, and providing services traditionally performed by the government will likely be eligible for chapter 11 relief. That eligibility for chapter 11 is important because a governmental unit is only eligible for chapter 9 relief if the governmental unit can meet the strict statutory requirements for being a chapter 9 debtor.[68] For example, chapter 9 relief may not be available to a governmental unit in a state that does not authorize chapter 9 filings.[69] Only twelve states specifically authorize chapter 9 filings.[70] Fifteen state offer some limited form of chapter 9 filings for municipalities.[71] The remaining 23 states do not authorize chapter 9 filings for municipalities.[72] Thus, an independent, private non-profit entity will likely be entitled to bankruptcy relief under chapter 11 even if the entity would not be entitled to file for bankruptcy had the entity been found to be a governmental unit. This is important for non-profit entities working closely with governments because chapter 11 debtors may either reorganize or liquidate

[68] 11 U.S.C. 109(a) (2012).
[69] *See* Kenneth E. Noble & Kevin M. Baum, *Municipal Bankruptcies: An Overview and Recent History of Chapter 9 of the Bankruptcy Code*, 9 Pratt's J. Bankr. L. 513 (2013) (discussing the provisions that govern chapter 9's eligibility requirements).
[70] *Id*.
[71] *Id*.
[72] *Id*.

through a plan, whereas a chapter 9 debtor cannot liquidate, but can only adjust its debts through a plan.[73] Furthermore, chapter 11 debtors do not have to comply with chapter 9's strict creditor-negotiation requirements.[74]

Conclusion

Governmental units and municipalities are not eligible to file bankruptcy under chapter 11, but must instead pursue bankruptcy under chapter 9 if authorized by state law.[75] A governmental unit is a department, agency, or instrumentality of a State.[76] A municipality includes political subdivisions, public agencies, and instrumentalities of a State.[77] While department, agency, and political subdivision are defined by the plain meaning of those terms, whether an entity is an "instrumentality" of the State is determined by a three-part test: (1) "whether the entity has any of the powers typically associated with sovereignty, such as eminent domain, the taxing power, or sovereign immunity"; (2) "whether the entity has a public purpose, and if so, the level of control exerted by the state on the entity's activities in furthering the purpose"; and (3) "the effect of the State's own designation and treatment of the entity."[78] Based on cases such as *In re Seven Counties* and *In re Las Vegas Monorail*, private, non-profit organizations working closely with state governments are not likely to be considered "governmental units" or "municipalities" under the Bankruptcy Code. This is significant because such entities will not have to satisfy the strict eligibility requirements involved in chapter 9, and may pursue chapter 11 relief, which has more relaxed eligibility requirements, and allows debtors to reorganize or liquidate.

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[73] *Id*.
[74] *Id*.
[75] 11 U.S.C. 109(a) (2012).
[76] 11 U.S.C. 101(27) (2012).
[77] 11 U.S.C. 101(40) (2012).
[78] *In re Seven Counties Servs., Inc.*, 511 B.R. at 467.