

**HOW MUNICIPALITIES IN FINANCIAL DISTRESS SHOULD
DEAL WITH
UNFUNDED PENSION OBLIGATIONS AND
APPROPRIATE FUNDING OF ESSENTIAL SERVICES**

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I. SUMMARY

In this article, I discuss what a financially distressed city, town, or other municipality¹ (collectively a "*municipality*") must do to survive a financial crisis and how to develop a viable recovery plan. One common point of contention is how to appropriately continue to pay for essential public services, including infrastructure improvements and repairs (collectively "*public services*"), while paying out of current revenues unfunded public employee pension obligations that have built up over many

1. The same principals apply to the individual states as sovereigns. As a result, the question of whether state employee legacy costs for pensions and OPEBs, as defined herein, should have priority over or should be on an equal footing with essential governmental services is also presented to the states.

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years (referred to variously as “*public pensions*,” “*pension benefits*,” “*pension obligations*” or “*pension liabilities*”).

A practical approach is critical and must be based on a determination of what pension benefits and obligations are *sustainable and affordable*. Only sustainable and affordable obligations can continue to be paid—only sustainable and affordable benefits can continue to be provided. For the sake of simplicity, other post-employment benefits (“*OPEBs*”) such as retiree health care are not dealt with here as w210 Tw 9.96 0 0 [(lu9 658. 2)-12(P)6(e)5.4118

municipalities.

Legally, assessment of a municipality's ability to adjust pension benefits begins with the Contract Clause in the U.S. Constitution³ (the "*Contract Clause*") and the mission of state and local governments to provide mandated public services at an acceptable level. Various Supreme Court decisions suggest that if promised pension benefits are unrealistic, it is reasonable to conclude that there is no prohibited impairment under the Contract Clause if such rights are adjusted to what is sustainable and affordable.⁴ Such decisions indicate that municipalities cannot be required to honor pension obligations if funding them impairs the ability to provide essential public services.⁵ Continually raising taxes is not the answer. Very recently, courts have examined attempts to modify public pensions for the general good.⁶ Some recent decisions favor some ability to modify, reasoning that if an unaffordable public pension crowds out the ability to pay for essential public services, it must be modified in order for the municipality to survive.⁷ Resolution of these issues currently is under way in various proceedings; these cases will be litigated in the courts for many years to come.

It is critical for all parties working on a municipality's financial recovery to look at current reality rather than second-guess decisions made in past compromises. It is in the best interest of all parties to determine what pension benefits are sustainable and affordable going forward, acknowledging that the resulting adjustment is simply recognition of reality. The relevant issue for discussion is what level of pension benefits and liabilities is realistic in light of other competing demands for the municipality's available funds? If public employees insist upon payment of unsustainable and unaffordable benefits, the resulting cutback of public services may result in a decline in the number of taxpayers available to fund the desired benefits. This process can lead to a death spiral for the municipality. In the long run, an approach to pension benefits based on what is sustainable and affordable will

3. U.S. CONST. art. I, § 10, cl. 1.

4. *See, e.g.*, *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502 (1942).

5. *See id.*

6. *See In re City of Detroit, Mich.*, 504 B.R. 97 (Bankr. E.D. Mich. 2013); *In re City of Stockton, Cal.*, 478 B.R. 8, 14 (Bankr. E.D. Cal. 2012).

7. *Id.*

be more beneficial than any litigation strategy. Any viable plan of debt adjustment must provide an adequate level of public services for the long term. Restructuring that does not provide for adequate public services will be doomed to failure. At the same time, pension benefits should be modified in the least drastic manner available so as much as the municipality can afford to pay will be paid to meet promised pension obligations. Further, public employees must be assured that pension funding obligations, as modified, will be paid so long as they are affordable and sustainable for the municipality going forward.

II. THE CURRENT SITUATION

Municipalities in the United States are not strangers to economic downturns. Since our nation's birth, units of local government have faced six panics, thirty-eight recessions and four depressions, the last being the Great Depression of the 1930s and the Great Recession of 2008. Since 1949, there have been eleven economic downturns. Each downturn (with the exception of the last) has been marked by increased borrowing by state and local governments. This borrowing stimulated a year-over-year increase in the gross domestic product and the percentage of people employed. Notwithstanding this history, few major municipalities have filed for bankruptcy protection.⁸

Recent bankruptcies of Detroit, Michigan; Jefferson County, Alabama; Stockton, California; San Bernardino, California; and

8. Since the advent of Chapter 9 in a constitutionally acceptable form in 1937, there have been 657 Chapter 9s. Most have been small special tax districts, smaller cities and counties. Rarely has any city or county of size filed, and over the last sixty years the largest city and county debtors have been Orange County in 1994, Bridgeport, Connecticut in 1991 (which was dismissed f2.2(st)-1n1.2(he)-3n Or.8(he)eO.8(sc72(y8)91.151y6(s)-12.3(se)-2.8(a)-14(a1.8(ona)O.8(sc72(yng)s)-12.3,(t)-10.2

Vallejo, California have called into question the long-term sustainability of our municipalities. One pivotal issue raised in these cases is the affordability of maintaining public services at an acceptable level while simultaneously meeting the ever-increasing embedded costs for public pensions.⁹ This issue is not merely of

the proposition that pension benefits are sacred and immutable and cannot be adjusted (this notion, which may be based upon perceived judicial, contractual, statutory, or constitutional interpretation) has pitted public employees against the citizens they serve, the sources of financing necessary to reinvest in the municipality, and unsecured lenders.

I will attempt to provide a new look at how to approach the important competing interests and propose a practical approach to resolving these seemingly unresolvable conflicts. I suggest a possible path forward that could lead to a consensual resolution of the problem or, if necessary, to a solution that will withstand judicial scrutiny and a legal challenge to such pension reform. The focus is on what needs to be done so that a municipality can survive a financial crisis and concurrently develop a viable recovery plan based on what is sustainable and affordable. I will first review the fundamental purposes of local government in the United States and the evolution of retirement benefits for local government workers. In section IV, I will explore the legal protections provided for public pensions, and analyze the leading judicial authorities impacting the ability to modify municipal legacy costs. With the treatment of pension obligations in recent municipal bankruptcies as background, in Section V, I will conclude with suggestions for dealing with pensions, both during a Chapter 9 and before—the last resort to—Chapter 9 is necessary. The observations are designed to encourage the future economic stability of municipalities and the payment of pension obligations that reasonably can be paid.

III. MUNICIPALITIES AND THE EVOLUTION OF PUBLIC PENSIONS

A. *Growth of Municipalities and Public Services*

Among the reasons for creation of the federal government as articulated in the preamble to the United States Constitution were, the establishment of justice, providing for the common defense, and promoting the general welfare.¹² Many of the same concerns led to the establishment of local municipalities after the

had no seat at the table and enjoy little deference to their long-term interests. Girard Miller, *Pension Reform: Stop Billing the Grandkids*, GOVERNING (Mar. 2012), <http://www.governin g.com/columns/public-money/col-Pension-Reform-Stop-Billing-the-Grandkids.html>.

12. U.S. CONST. pmbl.

Revolutionary War when state governments, acting as co-sovereigns with the federal government, began issuing municipal charters.¹³ With early American roots in principles of local self-government, municipalities developed to exert a dominating influence upon the quality of life of United States citizens.¹⁴

Today, municipalities function pursuant to applicable state law to serve their citizens by providing public services perceived to be necessary for a civilized society. As a result, it is up to states and municipalities to provide the basic building blocks of society; specifically, to provide essential governmental services at an acceptable level in order to foster a business climate that will stimulate new jobs and growth of the local economy and population. This, in turn, will provide the necessary tax dollars to fund governmental services. Constant vigilance is required to ensure that public services are at an acceptable level.¹⁵

Residents understandably expect maintenance of such local public services at an acceptable level to meet basic human needs (generally including sanitation, water, streets, schools, food inspection, fire department, police, ambulance, health, and transportation). While satisfactory provisions are expected to lead to a content citizen base, collateral benefits are also expected, *i.e.*, the growth of business, creation of good jobs in the service and construction industries, a healthy local economy, and new taxpayers.¹⁷

Infrastructure spending by the state or municipality generates significant economic returns. In the short run, a dollar spent on infrastructure construction produces roughly double the initial spending in economic output.¹⁸ In the long run, over a twenty year period, generalized “public investment” generates in aggregate \$3.21 of economic activity per \$1.00 spent.¹⁹ In addition, infrastructure spending substantially increases ultimate tax revenues. For example, over 20 years, investing \$1.00 in sewer systems and water infrastructure returns a full \$2.03 in tax revenue to federal and state/local governments, of which \$1.35 specifically accrues at the federal level.

B. Growth of Public Pensions

As municipalities have matured and become providers of basic public services, the compensation provided to public employees has grown to include pensions. Public pensions differ from the pension systems common in the private sector.²⁰

17. See PAUL BAIROCH, *CITIES AND ECONOMIC DEVELOPMENT* (1988); BRENDAN O’FLAHERTY, *CITY ECONOMICS* (2005).

18. ISABELLE COHEN, THOMAS FREILING & ERIC ROBERSON, *THE ECONOMIC IMPACT AND FINANCING OF INFRASTRUCTURE SPENDING 1* (2012), *available at* <http://www.wm.edu/as/publicpolicy/documents/prs/aed.pdf>.

19. *Id.*

20. Generally, public pension funds are defined benefit plans where the risk of loss and market volatility is on the public employer. On the other hand, private corporations generally provide (if any) a 401k defined contribution plan where a fixed sum is paid by the employer with no risk of loss or market volatility. BARBARA D. BOVBJERG, U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *STATE AND LOCAL GOVERNMENT PENSION PLANS: CURRENT STRUCTURE AND FUNDED STATUS 3* (2008); Robert Novy-Marx & Joshua D. Rauh, *Public Pension Promises: How Big Are They and What Are They Worth?*, 66 J. FIN. 1211, 1219 (2011). Some have argued that the payment of higher pension benefits to public workers

Understandably, workers required more protection, and the view that a pension is a gift has been abandoned by most states. The rationale for the abandonment may include political or policy grounds or even state laws prohibiting making a gift to an individual.³⁰ The advent of public employee unions that negotiated defined benefit plans for their members played no small part in the development of the public pensions that exist today.³¹

B. Current State of the Law

1. Public Pensions as Contracts

Currently, it is widely accepted that public pensions are in the nature of a contract and therefore entitled to the protection of the Contract Clause.³² Some states have adopted constitutional provisions specifically protecting public pensions from impairment or modification.³³ Certain state courts have held that statutes establishing public pensions have created contracts with the public employees that prohibit any detrimental changes to the benefits provided to current employees. Some cases have held that even prospective modification is precluded.³⁴

As noted, a few states (*e.g.*, Alaska, Arizona, Hawaii, Illinois, Louisiana, Michigan, and New York) have specific state

30. Amy B. Monahan, *Public Pension Plan Reform: The Legal Framework*, 5 EDUC. FIN. & POL'Y 617 (2010), available at <http://ssrn.com/abstract=1573864>. Only Texas and Indiana retain the gratuity position.

31. As noted, "the burden is placed on the employer to contribute funds on an actuarially sound basis." Paul M. Secunda, *Constitutional Contracts Clause Challenges in Public Pension Litigation*, 28 HOFSTRA LAB. & EMP. L.J. 263, 268 (2011); see Stephen F. Befort, *Unilateral Alteration of Public Sector Collective Bargaining Agreements and the Contract Clause*, 59 BUFF. L. REV. 1 (2011).

32. Monahan, *supra* note 30, at 7.

33. 16A CJS *Constitutional Law* § 466 (2014). See, *e.g.*, ILL. CONST. art. XIII, § 5 ("[m]embership in any pension or retirement system of the state, any unit of local government or school district, or any agency or instrumentality thereof, shall be an enforceable contractual relationship, the benefits of which shall not be diminished or impaired."); MICH. CONST. art. IX, § 24 ("The accrued financial benefits of each pension plan and retirement system of the state and its political subdivision shall be a contractual obligation thereof which shall not be diminished or impaired thereby."); N.Y. CONST. art. V, § 7 ("[M]embership in any pension or retirement system of the state or a local division thereof shall be a contractual relationship, the benefits of which shall not be diminished or impaired.").

34. Courts in California and in twelve other states have adopted the view that state retirement statutes create contracts as of the first day of employment. See Amy B. Monahan, *Statutes as Contracts? The "California Rule" and Its Impact on Public Pension Reform*, 97 IOWA L. REV. 1029, 1032 (2012).

constitutional provisions prohibiting impairment or diminishment of public employee pensions, although the provisions differ with respect to the protection afforded future benefits.³⁵ Nine other states (*e.g.*, California) have general constitutional prohibitions against impairment of contracts.³⁶ The remaining states, with the exception of those retaining the gratuity analysis, generally have state statutes or case law prohibiting some forms of impairment of public pensions.³⁷ Importantly, absent from the legislative history supporting the state constitutional or statutory provisions is any notion of the intent to elevate pension obligations as super-priority claims over all other obligations of the local government.

2. Protections Afforded by the Contract Clause

Pensions deal with the payment of a sum in the future from funds to be levied and collected in the future and are best dealt with as a contractual right to a future payment since no property is pledged or dedicated to payment. Any assessment of the ability to adjust the pension benefits of public employees begins with the Contract Clause, which provides that “[n]o [s]tate shall . . . pass any . . . [l]aw impairing the [o]bligation of [c]ontracts.”³⁸ States that have enacted specific constitutional provisions dealing with contracts have, in large part, included a similar concept. The current financial difficulties facing municipalities have renewed interest in the scope of protections afforded pension benefits by this language. Specifically, the question currently under discussion is whether public pension obligations can be adjusted, modified, or eliminated so that a municipality can fulfill its duty of providing

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period from 1890 to 1977.³⁹ Significant in that de-emphasis was a line of United States Supreme Court cases holding that the states

unchanged, nor is any such right implied in any express contract.⁴⁸
There is an implied reservation of rights that cannot be abrogated,
surrendered or bargained away by contractual provisions.⁴⁹

In an extension of this view, the Supreme Court in

The Supreme Court has already applied these principles in an instance of municipal distress. In *Faitoute Iron & Steel Co. v. City of Asbury Park, N.J.*, the Supreme Court upheld a challenge by the unsecured bondholders of Asbury Park to a New Jersey law that provided for a plan of adjustment in which they received refunding bonds that represented a haircut from their original securities.⁵⁶ The Supreme Court specifically rejected the bondholders' claims that the original bonds "constituted contracts, the obligation of which was impaired by the denial of their right to recovery thereon and by the transmutation without their consent into the securities authorized by the plan of adjustment."⁵⁷ The Supreme Court also rejected the view that the Contract Clause barred "the only proven way for sure payment of unsecured municipal obligations."⁵⁸ According to the *Asbury Park* court, the state retains police power for the maintenance of its political subdivisions and for the protection of all creditors.⁵⁹ The court specifically noted that its holding did not apply to secured claims, claims secured by property (revenues) dedicated or pledged for the obligation by statute or contract such as revenue bonds.⁶⁰ Further, the court commented that, in view of the slump of the collections from the exercise of the city's taxing power, the original bonds had little value.⁶¹

The court in *El Paso v. Simmons* cited these cases when summarizing that not every modification of a contractual promise impairs the obligation of a contract under the Contract Clause.⁶² The court cited *Blaisdell* for the proposition that the prohibition against impairment of contract "is not . . . absolute . . . and is not to be read with literal exactness like a mathematical formula."⁶³

c. The United States Trust Test

Many view

case in which the Supreme Court refined its analysis of the ability to impair public contracts. The trustee and holder of port authority bonds brought suit claiming that a New Jersey statute impaired the obligation of the state's contract with bondholders in violation of the Contract Clause.⁶⁵ Citing *Blaisdell*, the Supreme Court confirmed that the Contract Clause was not absolute.⁶⁶ However, the court noted that the New Jersey statute, in fact, totally eliminated an important security provision for the bonds.⁶⁷ The court specified that, when a state impairs the obligations of its own contract, the "reserved-powers doctrine has a different basis."⁶⁸ Impairment may be constitutional if it is reasonable and necessary to serve an important public purpose.⁶⁹ However, in the case of the state impairing its own contract, complete deference to the legislative assessment of reasonableness and necessity is not always appropriate because the state's self-interest is at stake.⁷⁰ The court found that the *extent* of impairment is a relevant factor in determining its reasonableness.⁷¹ The court then distinguished the case from *Asbury Park*

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Proponents of public pension plans should welcome the rule that any contractual impairment must be reasonable and based on an important public purpose as an indication that there will not be whole-cloth jettisoning of pension rights. The distinction drawn in the *U.S. Trust Co.* case between the illusory rights of the *Asbury Park* bondholders and the substantial rights of the *U.S. Trust Co.* holders is particularly relevant. As previously mentioned, the Supreme Court dismissed the argument that an important security provision for the *Asbury Park* bondholders had been impaired because those rights were only theoretical since taxes could not be raised sufficient to meet the obligations.⁸¹ Accordingly, there was no interference with a property right.⁸² Such analysis is especially applicable to unaffordable and unsustainable public pension plans. If promised pension benefits are unrealistic and unattainable, then there is no prohibited impairment if such rights are adjusted to what is sustainable and affordable.

Courts that have grappled with the issue have recognized that, for municipalities to survive, where unaffordable pension benefits crowd out essential governmental services and needed infrastructure, those pension programs must be modified. Very recently, courts both within the Chapter 9 context and outside of bankruptcy have examined the ability of courts to modify public pension provisions for the general good.

a. The Chapter 9 Experience

Recent municipal bankruptcies have fueled a growing public debate as to the long-term ability of local governments to provide essential public services. Attention has focused on the seemingly insurmountable problems created by the ever-increasing costs of public employees' salaries, benefits, unfunded pensions, and OPEB liabilities in light of the very limited ability municipalities have to raise taxes. Public concern is increasing that reducing or postponing public services in favor of funding pension obligations may severely compromise the municipalities' future if it results in an exodus of both individual and corporate taxpayers.

The City of Vallejo, California, faced a dramatic decline in revenues coupled with rising public safety costs and overwhelming

81. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 515417 (1942).

obligations to its employees, which led to a Chapter 9 filing.⁸³ In that Chapter 9 case, Vallejo modified its collective bargaining agreements and saved substantial sums otherwise owed to current employees.⁸⁴ Public safety expenditures were cut. Vallejo also reduced retiree healthcare obligations.⁸⁵ The pension obligations to existing retirees were not modified or addressed. Two years after bankruptcy, pension obligations (a major expense that created the problem) have not been addressed, and Vallejo still is mired in pension debt, calling into question the viability of the plan of adjustment in that case.⁸⁶ Likewise, in the recent *Jefferson County* bankruptcy, while the county approved a plan of adjustment, the county's significant problem of reduction in government services was not dealt with.⁸⁷

In *San Bernardino* and *Stockton*, both filed in 2012, the tension between public employees and representatives of public debt initially played out in disputes over the eligibility of the debtors to file for Chapter 9.⁸⁸ Both cases ultimately resulted in decisions affirming the validity of the petitions. As a result, the next battle looming in those cases is whether the cities can propose and confirm a viable plan that would impair the rights of the California Public Employees Retirement System ("*CalPERS*"). The two cities appear to be taking different approaches; with *Stockton* keeping current on all payments to the pension fund while *San Bernardino*, which had halted bi-weekly payments and failed to make timely payments to *CalPERS*, desires to achieve an adjustment of the *CalPERS* debt in the Chapter 9 proceeding.⁸⁹

The court in the *Stockton* case has examined the issue of the

83. *See In re City of Vallejo, Cal.*, 408 B.R. 280 (B.A.P. 9th Cir. 2009).

84. *Id.* at 287.

85. *Id.*

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b. Treatment of Pensions Outside Chapter 9

Attempts also have been made to modify pension rights outside of Chapter 9 proceedings. The Supreme Court of Puerto Rico has approved legislation modifying pension rights. Moreover, in the State of Illinois, legislation to amend the Illinois Pension Code, signed into law on December 5, 2013, is subject to a number of lawsuits currently making their way through the Illinois state courts. As previously noted, Rhode Island recently agreed to settle lawsuits brought by state workers challenging the 2011 legislation reforming the public pension system.¹⁰⁴ Labor's court challenge to the constitutionality of this reform now appears headed for trial given the breakdown in the mediation resulting from the police union rejection of a proposed settlement. It is always possible that mediation efforts could resume.

Interestingly, the Puerto Rican Constitution contains language similar to that in California, explicitly stating, "No laws impairing the obligations of contract shall be enacted."¹⁰⁵ When the Puerto Rican government passed legislation reforming the Commonwealth's pension system, the new legislation was challenged on the basis of the Puerto Rican cons

the Supreme Court of Puerto Rico in *In the Matter of Trinidad Hernandez v. Commonwealth* upheld the retirement system reform as constitutional.¹⁰⁶ The Puerto Rican Supreme Court relied upon the previously discussed *U.S. Trust* case, in which the United States Supreme Court held that a government can impair its contractual obligations if that impairment is reasonable and necessary to serve a more important public purpose.¹⁰⁷

Relying upon this rational basis standard, the Puerto Rican Supreme Court upheld the retirement system reform as constitutional, holding that the measure was taken to prevent the retirement system collapse and Puerto Rico's credit being downgraded to junk.¹⁰⁸ The Puerto Rican court reasoned that such purposes were necessary and reasonable to adequately address the financial crisis that threatened the actuarial solvency of the system.¹⁰⁹ Additionally, the Puerto Rican court stated, "[T]he protection of contractual obligations is not absolute, as it should be harmonized with the regulatory role of the state in the public interest" and, "[f]or this reason, it is standard law that not [every compromise would constitute] an unconstitutional impairment of contract."¹¹⁰ The court noted that the pension adjustments were necessary to maintain credibility in the financial markets and the solvency of the retirement system.¹¹¹

On December 5, 2013, Governor Pat Quinn of Illinois signed into law legislation that amended the Illinois Pension Code.¹¹² The bill reduces the annual three percent compounded COLA for

as a violation of the Illinois Constitution.¹¹⁴

The impact of the Illinois Supreme Court's decision in *Kanerva v. Weems*¹¹⁵ is subject to speculation. As noted, in that case, the court ruled six to one that the state constitution's prohibition against the diminishment of the benefit of any pension or retirement system applies to contributions to the cost of health care benefits. The issue is whether this decision will guide the court's consideration of the recent amendments to the Pension Code. Setting aside the question of the correctness of the court's holding,¹¹⁶ the arguments in the pension reform litigation, namely that economic necessity and a higher public purpose required the modification, were simply not raised in *Kanerva v. Weems* on appeal. It is possible these issues may be raised on remand before the trial court. To the degree that health care benefits are to be treated the same as pension obligations, they should appropriately be adjusted just like pension costs so that they are sustainable and affordable for the reasons set forth herein.

The opponents to pension reform will also likely cite to the tentative decision in *San Jose Public Officers' Association v. City of San Jose*, which took an approach different from the Puerto Rican Supreme Court.¹¹⁷ Specifically, the court found invalid provisions which, among other thi

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promissory estoppel.¹¹⁹ The voters had approved all of these provisions. While referring to budget and economic crises that had precipitated the enactment of the

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prudent government. That interpretation would prevent the state or local government from providing for the health, safety, and welfare of its citizens; its fundamental mandated mission. Such an interpretation cannot be justified and clearly the exercise of a government's sovereign power to protect the general welfare of its people is paramount to any rights created by legislation for elected officials or others.¹³³

The United States Supreme Court has long observed that it is beyond the authority of the state or a municipality to abrogate its sovereign power so necessary to the public to protect its citizens and to provide essential public services.¹³⁴ This principle is not limited to the Contract Clause and is a basic, founding principle of both constitutional interpretation and practical governance. There can be no after-the-fact interpretation that—in saying retirement

hard deserve to be paid for past efforts, and as much as can be paid should be paid to meet previously promised obligations. Pension obligations can and must be adjusted if the payment level frustrates the fundamental purposes of government. Reductions should be based upon the municipality's realistic ability to pay pension benefits and, at the same time, assure that the ability to provide essential public services at an acceptable level is not impaired. This is to the benefit of workers as well. Workers and retirees rely on the continued success and growth of the municipality for continued employment and pension payments.

It is in the best interest of all parties working on the recovery and future success of the municipality to determine what is sustainable and affordable, acknowledging that the resulting adjustment is simply recognition of reality. Reasonable adjustment is to the benefit of workers and retirees — if the municipality continues to erode and fails with its attempted recovery, there will be less money, not more, available to fund pensions and to keep workers employed. Fair-minded persons obviously will regret that some promises made to public employees were not attainable, realistic, or founded on any prudent notion of government.

B. The Current Challenge Facing Municipalities Is Determining the Level of Pension Benefits and Obligations That Is Sustainable and Affordable

The current challenge is determining the appropriate level of pension benefits that will permit municipalities to prosper. Pensions are long-term obligations that need to be addressed for the long term. Rushing to pay unfunded pension obligations while crowding out payments for essential public services obviously can be counterproductive. To be viable, a plan of debt adjustment must include the notion that adequate public services can be provided for the long term.

1. Standard for “Feasibility” under Chapter 9

While corporate bankruptcy (Chapter 11) may judge feasibility as the ability to pay pursuant to the plan over the short

which would lead to an exodus of taxpayers. Sarah Burns, *In 1991, Bankruptcy was best for Bridgeport*, CONNECTICUT POST, Sept. 14, 2012, <http://www.ctpost.com/opinion/article/In-1991-bankrupt-cy-was-best-for-Bridgeport-3866176.php>.

term,¹³⁷ the standard for Chapter 9 should be the assurance that the municipality can provide for essential public services at an acceptable level going forward, specifically in the foreseeable future. Following this standard should provide sufficient economic stimulation to grow business opportunities and increase employment, thus fostering growth of municipal taxpayers so the municipality will survive and, hopefully, thrive. The solution should be a permanent fix, not a Band-Aid. A court-approved debt restructuring that does not embody a recovery plan that provides for essential public services at the required level for economic growth and increased tax revenues for the foreseeable long term will be doomed to failure. If a plan of debt adjustment does not address the systemic problems that led to the Chapter 9, it will fail.¹³⁸

2. Same Standard for Addressing Financial Obligations in an Out-of-Court Restructuring

The same test should be applied in an out-of-court restructuring. The solution is not really filing for Chapter 9 and a

allowing the municipalities to invest in that which will help them recover and grow. As in *Asbury Park*, pensions are not impaired or diminished through implementation of such a plan because, realistically, all that can be paid is being paid.¹³⁹

affordable is the hardwiring of pension funding going forward. The municipality must identify and dedicate a sustainable and sufficient revenue source for the funding of pension obligations. This will ensure that it will never again repeat the unfortunate scenario of balancing budgets by forgoing pension contributions and promising future pension benefits that are not sustainable and affordable. Instead, pension obligations are funded on an agreed-upon, ongoing basis from an agreed-upon source which the municipality is obligated to fund to ensure the payment of the pensions.¹⁴¹ Thus, the burden of unfunded pension obligations is not put on our children and grandchildren to the detriment of the workers, especially the youngest.¹⁴²

What is required to achieve this realistic solution is everyone coming together as we have always done in times of crisis in the past. All concerned must work together in a selfless way to achieve the recovery of the municipality first and, hopefully, the increased revenues second, all premised upon a restructured debt that will allow this realistic resolution to happen.

VI. CONCLUSION: THE PROBLEM ISv0319(15 0 0 re11 T)15(acTINUE TO0 0 9 238)4.5(ppe)4.5(n.)JT430811 Tm(P)Tj0

funding of essential costs for current public services may well render any later attempt at financial restructuring futile. The touchstone must be pension benefits that are sustainable and affordable and public services that are at a level to develop and foster growth in businesses and new jobs. Such growth will allow the municipality to increase i esseaseea i r(se)4.v(se)4.nu(se)4.s(r)-10(a)4.n