AN ILLINOIS LAW FIRM

HEYL ROYSTER GOVERNMENTAL NEWSLETTER

 April 2014

WELCOME LETTER

Dear Friends:

Spring is finally here, but a long, cold winter did not slow the Illinois Legislature from proposing bills that could seize local authority and control. You can subscribe to periodically receive our e-advisories, which provide up-to-date information on bills and court decisions, as well as an electronic version of this newsletter, by registering with your email address at www.heylroyster.com/subscribe. This quarter, we issued client advisories on legislation that involved wind farm regulations, an expansion of the Freedom of Information Act (FOIA), concealed carry, drastic changes to the Motor Fuel Tax law, and a filing requirement that local entities submit every ordinance and resolution enacted locally, with the state.

This edition of the newsletter begins with an article by Mark McClenathan on bankruptcy as it applies to public entities. While the headlines of most newspapers would lead you to believe that bankruptcy is a viable solution for communities overburdened by pension debt, the intricacies of the law may indicate otherwise. Next, John Redlingshafer discusses proposed legislation that would require public bodies to submit all ordinances and resolutions to the state and maintain certain information on its website. While we all strive to be transparent and accountable, the proposed bills may stretch local budgets past their breaking points, without any funding for the legislature's mandates. On a more encouraging note, a new FOIA case ruled favorably for public bodies. Stacy Crabtree analyzes the Fourth District Appellate Court's decision in *Chicago Tribune Company v. the Department of Financial and Professional Regulation* and the court's ruling that public bodies are required to disclose documents, not information. The last article provides a basic understanding of a public entity's rights and responsibilities when they employ a member of the military. With many Reserve and Guard members returning from service and others being called for temporary duty to deal with natural disasters at home, it is important that you know how to compensate, and preserve the rights of, your military employees.

Chrissie L. Peterson

Chrissie L. Peterson
Governmental Practice Group

Lunch & Learn Seminar

Medical Cannabis: A Primer for Employers and Governmental Entities

The Illinois Compassionate Use of Medical Cannabis Pilot Program Act became effective on January 1, 2014. While much of the Act will be governed by state agencies, there are immediate concerns that any employer should be aware of, as well as specific matters that local public bodies must address, such as zoning issues. The first session of this seminar/webinar will be focused on what employers need to know about the Act, and the second session will address issues specific to governmental entities. Attendees are invited to attend the first and second sessions, or just the first session (if the second session is not relevant to your profession). Please join us from **11:30 a.m. – 1:00 p.m.** for a seminar and lunch at the location nearest you

Peoria: (Also via webinar on this date only.)
Wednesday, April 30, 2014

Urbana: Monday, May 5, 2014

Rockford: Tuesday, May 13, 2014

Lunch will be provided to those attending in person.

Contact Rachel Ford to register at rford@heylroyster.com or 309-677-9514

We hope to see you there!

IN THIS ISSUE

MUNICIPAL BANKRUPTCY - CAN AN ILLINOIS MUNICIPALITY FILE FOR BANKRUPTCY PROTECTION?

By: Mark J. McClenathan
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Introduction

The cities of Detroit, Michigan and Stockton, California recently grabbed headlines when they filed for bankruptcy protection under Chapter 9 of the U.S. Bankruptcy Code. What is Chapter 9? Most of us have only heard of *individuals* and *private companies* filing for bankruptcy protection under Chapter 7 (liquidation), Chapter 11 (business reorganization), or even Chapter 13 (individual reorganization). In short, Chapter 9 governs bankruptcy relief for municipalities.

While Chapter 9 petitions are extremely rare, the recent recession and resulting municipal budget imbalances have raised the question of whether bankruptcy is an option for cities and other local units of government across the country. In 2009, there were only 12 municipalities seeking reorganization under Chapter 9, while there were 819,000 Chapter 7 petitions and 11,700 Chapter 11 petitions in that year.

Can an Illinois municipality file for bankruptcy protection? The short answer is "maybe," but it is not easy.

Chapter 9 – Municipal Bankruptcy Protection

Chapter 9 of the United States Bankruptcy Code provides for reorganization of municipalities, defined as a "political subdivision or public agency or instrumentality of a State" 11 U.S.C. § 101(40), such as cities, townships, villages, counties, school districts, taxing districts, municipal utilities, and revenue-producing bodies that provide services which are paid for by user fees rather than by general taxes, such as bridge and highway authorities.

There are four eligibility requirements for a municipality to file for Chapter 9 bankruptcy, found in Section 109(c) of the Bankruptcy Code. They are:

1. The municipality must be specifically authorized to be a debtor by state law or by a governmental officer or organization empowered by State law to authorize the municipality to be a debtor;
2. The municipality must be insolvent, as defined in 11 U.S.C. § 101(32)(C);
3. The municipality must desire to effect a plan to adjust its debts; and
4. The municipality must either:
   - 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 a case under chapter 9
   - 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
   - be unable to negotiate with creditors because such negotiation is impracticable
   - reasonably believe that a creditor may attempt to obtain a preference.

Does Illinois law authorize a unit of government to file for Chapter 9?

Under federal law, units of local government cannot petition for bankruptcy unless they have express and specific authority from the state to do so. The bankruptcy courts have strictly construed this to mean that authorization must be "exact, plain, and direct with well-defined limits so that nothing is left to inference or implication." *In re County of Orange*, 183 B.R. 594, 604 (Bankr. C.D. Cal. 1995). Citing this ruling, the U.S. Bankruptcy Court for the Northern District of Illinois dismissed the Slocum Lake [IL] Drainage District's petition for Chapter 9 bankruptcy since it could not point to any specific Illinois law that allowed it to directly petition for relief under Chapter 9. *In re Slocum Lake Drainage District of Lake County*, 336 B.R. 387, 390 (N.D. IL 2006). That court ruled:

> The Debtor has the burden of proof to establish that it is eligible to be a debtor under Chapter 9. …the Court finds

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What New Requirements May Your Public Body Have in 2014 and 2015?

By: John M. Redlingshafer
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Members of the Illinois General Assembly have been busy filing new bills that, if passed (and signed by the Governor), will influence your unit of government. The spectrum of topics is too broad for one article, but it is apparent the legislature is actively considering ways to further promote the common themes of "transparency" and "accountability."

For example, what does your Board or Council do when it passes an ordinance? Does it publish it? Does it file it in the official record book of your public body? What if you would be required to file everything you pass with the State of Illinois?

As you may have read in an earlier update from our firm, the Illinois House of Representatives (House Bill 4572) and Illinois Senate (Sentate Bill 2967) are currently considering similar bills that would require your body to file any new law (whether by ordinance, resolution, etc.) with the office of the State Comptroller. Your clerk would need to file these electronically, and there is no clear language in the bill if you would be required to submit only the new laws you pass, or if you would also be responsible for provide copies of local laws already in existence. What is clear is that if this bill becomes law, the first deadline to file will be on or before June 1, 2015, with quarterly updates required beginning October 15, 2015. Any entity failing to do so could face financial penalties.

While these bills would alone require many public bodies to invest in additional software/computers, it would appear that they would not remove any obligation for the public bodies to continue to house the records in their offices (under the Local Records Act) or to provide this information to anyone who should request it in a Freedom of Information Act.

On a related note, the Illinois Senate is also considering a series of bills related to the Local Records Act. In some form, Senate Bills 3291, 3292, 3293, state a unit of local government (in a county with a population of 100,000 or more) shall have a website. The website must contain such things as contact information for officials, meeting notices, FOIA-related procedures, and other notices as required by law. At least one bill also establishes the right of someone living in your city, etc., to bring a lawsuit to compel the public body to post this information.

John M. Redlingshafer concentrates his practice on governmental law, representing numerous townships, fire districts, road districts, and other governmental entities. John currently serves on the Tazewell County Board and is a past President of the Illinois Township Attorneys' Association.

Jensen Joins Peoria Office

Beth Jensen is the newest addition to the firm's Governmental Practice. Beth practices in all aspects of Municipal, School, and Labor & Employment law. She frequently speaks on employment and school law matters, including education reform and its impact on school districts. She provides in-service training for administrators on various areas of education and employment law. She is the author of the Public Employees chapter of the Illinois Institute for Continuing Legal Education's publication on Employment Termination. Prior to joining Heyl Royster, Beth served as the managing partner of the Peoria office of another regional law firm where she represented school districts throughout the state. Before entering private practice, Beth served as law clerk to Third District Appellate Court Justice Daniel L. Schmidt and was an Assistant Corporation Counsel for the City of Peoria. Beth currently serves on the Peoria City Council.

FOIA REQUIRES DISCLOSURE OF PUBLIC RECORDS, NOT INFORMATION

By: Stacy E. Crabtree
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Despite being called the Freedom of Information Act ("FOIA"), an appellate court in Illinois recently reminded us that FOIA really entitles the public to records, but not necessarily information. In *Chicago Tribune Company v. The Department of Financial and Professional Regulation*, 2014 IL App (4th) 130427, the Chicago Tribune filed suit after The Department of Financial and Professional Regulation denied the Tribune's FOIA request for the number of initial claims received by the Department against certain named physicians. In defense of the lawsuit, the Department argued that it did not maintain any record tracking the number of claims made to enable them to respond to plaintiff's request. The Court ruled in favor of the Department and in doing so relied on the legislative intent behind FOIA, as set forth in Section 1 of FOIA, which includes the following:

> This Act is not intended to create an obligation on the part of any public body to maintain or prepare any public record which was not maintained or prepared by such public body at the time when this Act becomes effective, except as otherwise required by applicable local, State or federal law.

5 ILCS 140/1.

Consequently, FOIA requests to public bodies must reasonably identify a public record to be produced and not general data, information, or statistics. The fact that the Department would have had to compile the information and essentially create a new document in order to respond indicated the FOIA request was not in fact for a public record in the Department's possession.

This case also provides us with one other reminder, and that is the importance of citing all reasons for the denial of a FOIA request in the initial response. By way of background, the Department initially denied the Chicago Tribune's request claiming the documents were exempt as part of the Department's investigative files. Prior to filing a lawsuit, the Chicago Tribune filed a request for review with the Public Access Counselor at the Attorney General's Office who ultimately issued a letter finding against the Department. The Chicago Tribune then filed the subject lawsuit, and for the first time, the Department raised the argument that it does not actually maintain such information. The Chicago Tribune argued that the Department could not now raise such a defense because the Department did not raise it in its denial letter or even with the Public Access Counselor. The Court found however, that it was proper for the Court to consider all possible defenses under FOIA, not just those initially claimed by the Department with the Public Access Counselor, based on the language of the statute. More importantly, though, the Court points out that had the Public Access Counselor issued a binding opinion as opposed to letter, the Department may have in fact lost its right to claim such a defense.

In conclusion, it is important when responding to FOIA requests to assess whether the request is actually for a public record or an inquiry for information not already maintained or created by the public body; if the latter, a denial may be in order but any such denial letter should reference the fact that the request is not for a public record which the public body possesses. Due to the potential for financial penalties and the requester's ability to collect attorney's fees and costs, public bodies should consult with their attorney if there is any question as to the appropriate basis for a denial.

Stacy E. Crabtree concentrates her practice on governmental affairs as well as tort litigation and representation of corporate and individual clients in the areas of commercial and contract law.

Military Leave Obligations for Public Employers

By: Chrissie L. Peterson
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As a public employer in Illinois, are you aware of your rights and responsibilities when an employee is called to military service? While there are dozens of laws that protect the rights of service members and their families there are also laws that dictate how employers, particularly public employers, must compensate and preserve the rights of military employees.

The Uniformed Services Employment and Reemployment Rights Act of 1994 is the principal federal law ensuring that persons who serve or have served in the Armed Forces, Reserves, National Guard or other "uniformed services": (1) are not disadvantaged in their civilian careers because of their service; (2) are promptly reemployed in their civilian jobs upon their return from duty; and (3) are not discriminated against in employment based on military service. 38 U.S.C. § 4301–4335.

USERRA states that if a member leaves his civilian job to perform military service, he is entitled to return to that employer, with accrued seniority, if he meets the following criteria:

1. The service member held a full or part-time civilian job before beginning the period of military service. 38 U.S.C. §4312(d)(1)(C)
2. The service member gave notice that he would be leaving for training or service. Notice must be given in advance, unless impossible under the circumstances or due to military necessity. 38 U.S.C. §4312(a)(1) and §4312(b).
3. The member's military leave cannot exceed a five-year limit, with exceptions for war or national emergency. 38 U.S.C. §4312(a)(2).
4. The member must be released with an Honorable or General discharge. 38 U.S.C. §4304.
5. The member must report back to work or make a request for reemployment within certain time frames:
    a. For service of 30 days or less, the member must report back to work on the next regularly scheduled work day after (i) transportation back home plus (ii) an 8 hour rest period. 38 U.S.C. §4312(e)(1)(A)(i-ii).
    b. For service ranging from 31-180 days, the member must report for work or apply for reemployment no later than 14 days after completion of service. 38 U.S.C. §4312(e)(1)(C).
    c. For military service of 181 days or more, the member must report for work or apply for reemployment not later than 90 days after completion of service. 38 U.S.C. §4312(e)(1)(D).
    d. The time to report to work or apply for employment is extended if the member is recovering from an illness or injury that occurred during their military service. 38 U.S.C. §4312(e)(2)(A).

If a member fails to report to work within the timeframes allotted, the member does not forfeit his or her rights and benefits under USERRA, but is subject to the employer's rules concerning absences from work. 38 U.S.C. §4312(e)(1)(3).

If a member meets the criteria for reemployment rights under §4312, he will be reemployed according to the priorities outlined under §4313:

1. For service of 90 days or less, the member is entitled to reemployment in the same position he left or in a position of like seniority, status and pay. 38 U.S.C. §4313(a)(1)(A-B).
2. For service of 90 days or more, the member is entitled to reemployment in the same position in which the member would have been employed if their employment had not been interrupted by military service or in a position of like seniority, status and pay, if the person is qualified to perform the duties. 38 U.S.C. §4313(a)(2)(A). In other words, if the service members' peers were promoted and given raises, then the returning member is entitled to the same. If the service member is entitled to a position which he is not qualified to perform, the employer has a duty to take reasonable efforts to train.
3. For a member that is disabled due to military service, the employer must make reasonable accommodations for the disability and reemploy the member in the

position to which is the nearest approximation to the position they would have held but for the service. 38 U.S.C. §4313(a)(3)(A-B).

Section 4313 does not give a definitive timeline for when employers must reemploy members. It only states when members must report back for work. It does state they must be reemployed "promptly."

While reemployment of the service member is the general rule of USERRA, §4313 does contain limited exceptions when the original employment was temporary or the employer's circumstances have changed to an extent which would make reemployment impossible or unreasonable or impose an undue hardship on the employer. 38 U.S.C. §4312(d)(1)(A-C).

USERRA not only protects employment rights, it protects employment benefits as well. For example, §4316 states that while service members are performing military service, they are considered to be on furlough and the member is entitled to the most favorable seniority rights that are provided to other employees on non-military leave of absence. 38 U.S.C. §4316(a) and (b)(1)A-B).

While members are entitled to use paid time off (vacation, sick, personal, etc.) while they are on military service, an employer cannot require them to use it. 38 U.S.C. §4316(d).

For military service periods of 30 days or less, the employer must continue the service member's health insurance and may only charge the member the employee's share, if any, for coverage. 38 U.S.C. §4317(a)(2). For military service periods of 31 days or longer, the service member can continue coverage for up to 24 months, however, the employer can charge up to 102% of the full premium under the plan. 38 U.S.C. §4317(a)(1)(A-B) and §4317(a)(2). Upon return to employment, the member is entitled to reinstatement of healthcare coverage, if there was a lapse, with no waiting period and no exclusions. 38 U.S.C. §4317(b)(1).

Service members also have a right to continued service credit for any pension plans. 38 U.S.C. §4318(a)(2)(A). Both members and employers are liable for their respective portions of the pension contribution for the military service period once the member returns to employment. §4318(b)(1).

USERRA also protects the service member from termination upon reemployment. Members who serve a period of 31-181 days cannot be discharged when they return to employment, except for cause, for a period of 180 days following reemployment. 38 U.S.C. §4316(c)(2). Employees who serve 181 days or more cannot be discharged, except for cause, for a period of one year following reemployment. 38 U.S.C. §4316(c)(1).

While most employers proudly support their service member employees, there are occasions where a member looks to outside assistance to enforce USERRA rights. Subchapter III of USERRA is dedicated to the procedures for assistance, enforcement and investigation. 38 U.S.C. §4321 to §4327. In general, a service member who believes his or her rights have been violated can contact the Employer Support of the Guard and Reserve (ESGR) where an ombudsman will contact the employer and attempt to informally resolve the problem. The service member also has a right to file a complaint with the U.S. Department of Labor, Veterans' Employment and Training Service (VETS). While service members often enforce USERRA through the VETS program, they are not required to and can retain an attorney and initiate legal action against their employer at any time.

Finally, while USERRA allows State and local laws to supplement the minimum regulations set forth in USERRA, it supersedes any laws that attempt to eliminate or diminish the benefits contained in USERRA. 38 U.S.C. §4302(a). Therefore, employers need to be familiar with specific Illinois laws and any local regulations that involve military benefits.

The Illinois Human Rights Act prohibits discrimination based on race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, ***military status***, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit and the availability of public accommodations. 775 ILCS 5/1-102. While USERRA and the Illinois Human Rights Act apply to all employers, Illinois also has statutes that *apply only to public employers* with Guard and Reserve employees.

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Unlike USERRA, which does not require employers to pay service members compensation when they are called into active duty, the Local Government Employees Benefits Continuation Act states that any employee of a local government who is a member of the Guard or Reserve and is called into active service shall receive his or her regular compensation minus the amount of military pay. 50 ILCS 140 *et. seq*. Health insurance and other benefits also must continue during the time of active service.When a collective bargaining agreement or an employment policy is more generous than the Act, the agreement or policy will control. The only exemption from the Act is when 20% or more of the employees are mobilized. Then the local governmental body does not have to comply the Act. 50 ILCS 140/2.

The Municipal Employees Military Active Duty Act authorizes a local public body to make pension payments on behalf of service members during periods of active duty, in lieu of normal pension deductions from the employee's salary. 50 ILCS 120/3. Similar to USERRA, the Act also contains language restoring service members to their positions without loss of seniority, just as if they had been continuously employed by the municipality. 50 ILCS 120/2. The definition of municipality is unusually broad under the Act, making it clear the Act applies to all public bodies, not just municipalities. 50 ILCS 120/4.

The Public Employee Armed Services Rights Act protects (1) insurance coverage and its continuation immediately upon reemployment, (2) pension rights and (3) employment and promotional rights for employees who are called to active duty. It entitles the member to any promotion, pension or contractual benefit that would have accrued while the member was gone on active duty. 5 ILCS 330/5 *et. seq*. Unlike the Municipal Employee's Military Active Duty Act, which has a broad definition, this Act defines "public employee" as one who is employed by the State or any state agency, a unit of local government or a school district. 5 ILCS 330/3.

Illinois public employers should also be aware of the financial requirements of the Military Leave of Absence Act. 5 ILCS 325 *et. seq*. The Act is similar to USERRA by providing protected leave from employment for time spent in active service and training and provides that seniority and other benefits continue to accrue while serving. 5 ILCS 325/1(a)(1-4). The Act applies to all State of Illinois, local government, school districts or higher education employees.

While the Local Government Employees Benefits Continuation Act provides compensation for service members who are called to active duty, the Military Leave of Absence Act also requires a public employer to compensate a member for training activities. Section 325/1(a) of the Military Leave of Absence Act provides the following in regards to compensation for training:

> During leaves for annual training, the employee shall continue to receive his or her regular compensation as a public employee.During leaves for basic training, for up to 60 days of special or advanced training, and for any other training or duty required by the United States Armed Forces, if the employee's daily rate of compensation for military activities is less than his or her daily rate of compensation as a public employee, he or she shall receive his or her regular compensation as a public employee minus the amount of his or her base pay for military activities. 5 ILCS 325/1(a)

To Illinois public employers, knowing the classification of the training your member is attending is key to getting payroll right and avoiding violations of the statute. ***When a member is gone for annual training, they must be paid their regular compensation.*** There is no off set for military pay.

Neither USERRA nor any Illinois statute defines "annual training." One can look to the federal code section that implements training requirements for the National Guard to better define annual training. 32 U.S.C. §502(a)(2) requires a member to "participate in training at encampments, maneuvers, outdoor target practice, or other exercises, at least 15 days each year."

For all basic, special, advanced and any other training, the employer must pay the member regular compensation with an off set for military pay. To illustrate, consider Firefighter Smith who is employed by the City of Blazeville. If Smith's normal 24 hour shift falls on a weekend that is scheduled for weekend training (otherwise known as "drill"), Blazeville would have to pay Smith for the twenty-four (24) hour shift that was missed, but would be able to deduct any military pay. If Smith's regular compensation was $600 ($25.00 per hour for 24 hours) but the military compensated Smith with $150, then Blazeville would only pay Smith $450.

Similar to the Local Government Employees Benefits Continuation Act, the Military Leave of Absence Act also provides compensation for members called to active duty, but allows for an off set of military pay. 5 ILCS 325/1(b). Keep in

mind that depending on rank and length of service, it is possible for an employee to have active duty pay exceeding his or her regular compensation. In those instances, the employer does not have to make regular compensation payments to the member.

There is one final point to the Military Leave of Absence Act of interest to public bodies near Illinois borders. In 1991, Attorney General Roland Burris issued an opinion that the Act applies to employees of the State of Illinois who were members of the National Guard units of other states. The pay provisions of the Act apply even if your member is a Guard or Reserve member in another state. 1991 Ill.Atty.Gen.Op. 36 (Ill. A.G.), 1991 WL 495498.

Quick Reference for Illinois Public Employers of Guard and Reserve Members

- **Active Duty**. When an employee is called to active duty, the public body pays the employee the regular rate of compensation, less the employee's base military pay.
- **Annual Training**. When an employee reports for annual training, the public body pays the employee their regular compensation during the fifteen (15) day period of annual training. There is no off set for military pay.
- **Basic, Special, Advanced or Other Training (including weekend drill).** When an employee reports for any training (other than annual training) the public body pays the employee their regular rate of compensation, less the employee's base military pay.
- **Paid Time Off (PTO).** When an employee is required to report for active duty or training, the public body must grant his or her time off and cannot require the employee to use PTO. An employee may elect to use PTO.
- **Health Insurance.** If an employee is in military service less than 31 days, the employer can only charge him/her the employee's share (if any) of the cost of the coverage. If the period of service is 31 days or more, the employer is permitted (but not required) to charge the employee up to 102% of the entire premium, including the part that the employer normally pays.
- **Pension.** The period of military service cannot be considered a break in service for vesting and accrual purposes. If an employee elects to continue making pension contribution plans while on military duty, the employer is also required to make the employers' proportionate share for that time period, but is only required to actually fund the pension once the employee returns. The employee is given a grace period (up to 5 years) after returning to make up the contributions.
- **Reemployment.** In general, public bodies must reemploy the employee upon return from active service.
- **Employer Support of the Guard and Reserve (ESGR).** The ESGR is a good resource for employers with questions specific to USERRA. They operate outreach and education programs for employers and employees. You can view the webpage at http://www.esgr.mil.

Chrissie L. Peterson practices in all aspects of Municipal law. Prior to joining Heyl Royster, Chrissie served as the City Attorney for Canton, Illinois, where she provided guidance on the Freedom of Information and Open Meetings Acts, construction contracts, franchise agreements and utility infrastructure. She was also responsible for drafting all resolutions, ordinances, policy updates and managing all legal aspects of economic development including zoning and land use.

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Municipal Bankruptcy continued from page 2

> that the Debtor has not met that burden. … the Court finds that the general authority contained in the cited Illinois statutes is insufficient to meet the "specifically authorized" requirement of § 109(c)(2). The language utilized in the Illinois Drainage Code and the Illinois Public Water District Act constitutes general authorization to exercise the powers and manage and control the affairs of the municipal corporations subject to those statutes. However, neither statute contains specific authorization for entities to seek relief under Chapter 9 of the Bankruptcy Code. Moreover, under the Illinois Local Government Financial Planning and Supervision Act, there has not been a commission or financial advisor appointed to recommend that the Debtor file a Chapter 9 petition. …**Had the Illinois General Assembly intended to specifically authorize this Debtor or other municipalities to seek relief under Chapter 9, it could have easily drafted appropriate legislation, but has not done so.**

In re Slocum Lake, 333 B.R. at 390-391. (Emphasis added).

In Illinois, there is no specific statute authorizing any municipality to file for bankruptcy, **except for the** Illinois Power Agency, recently created in 2007 to, among other things, develop electricity procurement plans to ensure reliable and affordable environmentally sustainable electric service to customers, including municipalities. The Illinois Power Agency Act provides that the IPA is granted authority to "file a petition under Chapter 9 of Title 11 of the United States Bankruptcy Code or take other similar action for the adjustment of its debts." 20 ILCS 3855/1-20(b)(15).

The Village of Washington Park [IL] filed for Chapter 9 bankruptcy petition in 2009, citing assets of less than $50,000 and debt of more than $1 million, but that petition was dismissed after the presiding bankruptcy judge held that there was no state law enabling a municipality in Illinois to declare bankruptcy. (There have been a couple of "successful" bankruptcies in Illinois involving municipalities, including the Village of Brooklyn – filed in October 2003 – which apparently survived because no one objected to the filing of the petition or raised this issue.)

Illinois Local Government Financial Planning and Supervision Act

Until such time as the State of Illinois legislature provides specific authority to units of local government to directly petition for bankruptcy protection under Chapter 9, the only opportunity for financial "relief" for small communities may be found in the Illinois "Local Government Financial Planning and Supervision Act." 50 ILCS 320/1 et seq. Moreover, that Act appears to set up a condition that certain units of government in Illinois should consider, and might even need to meet, before seeking authority to file for Chapter 9 protection.

The Illinois Local Government Financial Planning and Supervision Act allows for the establishment of a "financial planning and supervision commission" if the governing body of a unit of local government determines that a **fiscal emergency** exists. The Act provides:

> Any unit of local government upon a 2/3 vote of the members of its governing body may petition the Governor for the establishment of a financial planning and supervision commission if the governing body of the unit of local government determines that a fiscal emergency, as defined in Section 3, exists or will exist within 60 days. A petition shall include the conditions of fiscal emergency and a list of all creditors of the unit of local government, which list shall indicate the names, addresses, amounts and types of indebtedness or claims of such creditors, and which of such creditors are subject to the stay provisions of Section 7 of this Act.

50 ILCS 320/4(b). However, this only applies to municipalities that have a population *under 25,000*. 50 ILCS 320/3(d).

Upon receipt of a petition for establishment of a financial planning and supervision commission, the Illinois Governor then "*may* direct the establishment of such a commission if the Governor determines that a fiscal emergency exists." 50 ILCS 320/5(a)(1). (Note that this statute does not *require* the Governor to establish a financial planning and supervision commission.)

Prior to making such a determination, the Governor is required to "give reasonable notice and opportunity for a hearing to all creditors of the petitioning unit of local government." 50 ILCS 320/5(a)(2). Further, the Act provides that the Governor's "determination shall be entered not less than 60 days after the filing of the petition" and that the "commission

shall convene within 30 days of the entry by the Governor of his or her determination of the fiscal emergency." *Id*.

The commission would consist of 11 members, including the Governor, the State Comptroller, the Director of Revenue, the Director of the Governor's Office of Management and Budget, the State Treasurer, the Executive Director of the Illinois Finance Authority, the Director of the Department of Commerce and Economic Opportunity and the presiding officer of the governing body of the unit of local government, or their respective designees, *plus* three additional qualified members nominated by the governing body and chief governing officer of the unit of local government and appointed by the chairperson of the commission. 50 ILCS 320/5(b).

The financial planning and supervision commission has several powers, duties and functions to help the distressed municipality create a financial plan to overcome its debts and return to financial stability. However, in the event that the commission "determines that the proposed budget, tax levy, bond or note issuance or revenue estimates do not comply with the financial plan of the unit of local government," *Id*., the financial planning and supervision commission is authorized (among other things) to:

> **Recommend** that the unit of local government file a petition under Chapter 9 of the United States Bankruptcy Code. Not later than 30 days after the conclusion of its investigation, the commission shall make a written report to the unit of local government of all findings, determinations and recommendations.

50 ILCS 320/9(b)(4). (Emphasis added).

Unfortunately, this statute is more than likely not going to be specific enough to satisfy the requirement in the U.S. Bankruptcy Code authorizing a municipality to actually file for Chapter 9 bankruptcy. Rather, the Illinois Local Government Financial Planning and Supervision Act only authorizes the "financial planning and supervision commission" to recommend that the municipality file a petition under Chapter 9. It has no specific power to authorize the municipality to file a Chapter 9 petition.

As noted above, the authorization to file a bankruptcy petition must be "exact, plain, and direct," as held in the *County of Orange* and the *Slocum Lake* decisions. However, while the Illinois Local Government Financial Planning and Supervision Act does not provide the necessary authority, it is clear that before any municipality considers filing for Chapter 9 protection, it is recommended that it seek the recommendation to file under Chapter 9. It is important to point out that although the bankruptcy court in *Slocum Lake* held there was no Illinois state law that would allow Slocum Lake to seek reorganization under Chapter 9, the court also noted that Slocum Lake hadn't sought to take advantage of the Illinois Local Government Financial Planning and Supervision Act. "Moreover," the court stated, "under the Illinois Local Government Financial Planning and Supervision Act, there has not been a commission or financial advisor appointed to recommend that the Debtor file a Chapter 9 petition."

Conclusion

The U.S. Bankruptcy Code provides that a municipality may seek to reorganize its debts under Chapter 9 of the Code only if the municipality is specifically authorized to be a debtor by state law, or by a governmental officer or organization empowered by state law to authorize the municipality to be a debtor. In Illinois, there is no such statute that authorizes any municipality to seek protection under Chapter 9, unless it is the Illinois Power Agency.

Any municipality (with a population under 25,000) that has a "fiscal emergency" might want to seek assistance under the Illinois Local Government Financial Planning and Supervision Act. If relief is not likely under any financial plan, then the municipality should seek the recommendation from the Commission to file a petition under Chapter 9. Whether that recommendation is a prerequisite to filing under Chapter 9 is not clear. What is clear is that, at present, there is no law in the State of Illinois that authorizes **any** unit of government in Illinois to petition to reorganize under Chapter 9 of the U.S. Bankruptcy Code (again, except for the newly created Illinois Power Agency).

Mark J. McClenathan has represented municipalities and clients before various governmental bodies, and has experience in annexations, subdivisions and developments, zoning, and intergovernmental agreements. Mark joined Heyl Royster in 1989, and became a partner with the firm in 1998. Prior to joining Heyl Royster, Mark worked for the legal departments of the Defense Logistics Agency (Defense Contract Services) of the Department of Defense, Land O'Lakes, Inc. and 3M Corporation.

Two Recent Cases Focus on Liability for Bullying in School

By Elizabeth L. Jensen
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On March 10, 2014, Illinois' Fourth District Appellate Court dismissed a student's lawsuit that claimed his high school failed to provide a safe environment against bullying (*Malinksi v. Grayslake Community High School District 127,* 2014 IL App (2d) 130685-U.) The student had reported to the school counselor and dean that he had been subjected to verbal and physical abuse at school. He alleged that the school failed to provide a safe environment by ignoring his complaints of bullying which was willful and wanton conduct. The court found that the school district was immune from liability under the Tort Immunity Act, and dismissed the lawsuit. The court specifically found that school personnel decisions and actions regarding instances of student bullying are discretionary acts and therefore protected under the Tort Immunity Act.

In a recent case out of New Jersey, *V.B. v. Flemington Raritan Regional Board of Education*, NO. HNT-L-95-13, N.J. Super. Ct. Law (March 12, 2014), a judge held that parents of eleven students could be named as defendants in a school bullying lawsuit. The student and his mother claim that he was bullied and tormented by other students from fourth grade until he graduated early, as a junior. They allege that the school district failed to take appropriate action to prevent the misconduct by fellow students. The school district filed a motion seeking to add, as co-defendants, the parents of eleven students who were accused of harassing the student who brought the lawsuit against the school district. This first-of-its-kind ruling has the potential to impact the outcome of bullying cases throughout the country, including those filed in Illinois.

The final ruling in *V.B. v. Flemington Raritan Regional Board of Education* could impact a school district's ability to seek contribution from other parties and minimize their liability in similar bullying cases. We will monitor this case and keep you apprised of the outcome.

Elizabeth L. Jensen practices in all aspects of Municipal, School, and Labor & Employment law. She frequently speaks on employment and school law matters, including education reform and its impact on school districts. She is the author of the Public Employees chapter of the Illinois Institute for Continuing Legal Education's publication on Employment Termination. Prior to joining Heyl Royster, Beth served as the managing partner of the Peoria office of another regional law firm where she represented school districts throughout the state.

Client Success Stories

Since the beginning of the year, our Governmental Practice attorneys have helped clients in a number of venues, including:

- Helped landowners protect their property values by defeating an application pending before a zoning board of appeals for a special use permit by a landscaping and snow removal business. The proposed business would have constructed a 4,000 sf building and would have had at least 12 employees entering and exiting the property daily.
- Succeeded in securing an agreement to having our clients, a Sheriff's Office and County, dismissed from a federal civil rights lawsuit with prejudice with no payment.
- Secured an Order from the 7th Circuit Court of Appeals reversing the District Court's denial of our Motion to Dismiss the Plaintiff's Federal Equal Protection and Due Process Claims against our clients – the Sheriff, his Office, and 15 of his officers. As a result, the case was dismissed from Federal Court.
- Defended the rights of a regional agricultural cooperative in a zoning trial, with the court awarding it the right to construct its requested grain storage facility.
- Successfully negotiated a collective bargaining agreement with a union representing teachers and all support staff on behalf of a school board client.

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