NO. 15-11690

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ANDREW BENNETT, *ET AL.*,
Appellees,

v.

JEFFERSON COUNTY, ALABAMA,
Appellant.

On Certified Order from the United States District Court for the Northern District of Alabama, Southern Division (Case No. 2:14-cv-00213-SLB)

BRIEF FOR *AMICUS CURIAE* SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF JEFFERSON COUNTY, ALABAMA SUPPORTING REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, and 11th Circuit Rules 26.1-1, 26.1-2, and 26.1-3, the undersigned attorney for *amicus curiae* Securities Industry and Financial Markets Association certifies that, in addition to those entities identified in the brief previously filed in this matter, the following persons or entities may have an interest in the outcome of this case:

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Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned attorney states that Securities Industry and Financial Markets Association has no parent corporation and does not issue stock.

Dated: June 22, 2015

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STATEMENT OF AMICUS CURIAE

The Securities Industry and Financial Markets Association (SIFMA) brings together the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA). Most SIFMA members have been or will be affected by a proceeding brought by an insolvent municipality seeking to adjust its obligations pursuant to the provisions of 11 U.S.C. § 901, et seq. ("Chapter 9"). Because SIFMA believes the district court's ruling is inconsistent with the statutory framework, accepted practices, and established case law around which Chapter 9 has developed and on which participants in the municipal financing arena rely, SIFMA respectfully urges this Court to reverse.

No counsel for any party in this case authored this brief in whole or in part, and no party, party's counsel, or any other person, other than SIFMA, its members, or its counsel, contributed money intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUE

"Whether the Ratepayers' appeal of the Confirmation Order is moot—either constitutionally, statutorily, and/or equitably—based on consummation [of the Plan] and/or the Ratepayers' failure to obtain a stay pending appeal." Doc. 48 at 6.[1]

PROCEEDINGS BELOW[2]

Petitioner Jefferson County ("County") appeals from the district court's order ("Order"), Doc. 36, and memorandum opinion ("Opinion"), Doc. 35, denying its motion to dismiss an appeal of a bankruptcy court order ("Confirmation Order"), Bankr. Doc. 2248.[3] The bankruptcy court confirmed the County's Chapter 9 Plan of Adjustment ("Plan") on November 6, 2013. *Id.* Although the Ratepayers timely appealed to the district court, they never sought a stay of the Confirmation Order in any court. The County substantially consummated the Plan on December 3, 2013, in a series of transactions including

[1] Record citations to "Doc." are to the entries on the docket of Case No. 2:14-cv-00213-SLB ("Ratepayer Appeal"), an appeal brought in the United States District Court for the Northern District of Alabama, Southern Division by a group of users of the Jefferson County sewer system ("Ratepayers").

[2] For a full recital of the background and proceedings below, SIFMA relies on the statement contained in the County's briefing. Capitalized terms not defined herein have the meanings assigned to them in the County's briefing.

[3] Record citations to "Bankr. Doc." are to the entries on the docket of Case No. 11-bk-05736-TBB9 in the United States Bankruptcy Court for the Northern District of Alabama, Southern Division.

the issuance of some $1.8 billion in new sewer revenue warrants, Doc. 7-1 at 1, which the Ratepayers now seek to unwind.

The County moved to dismiss the Ratepayers' appeal on mootness grounds, but the district court denied the motion. Doc. 35, 36. Nonetheless, the district court certified its Order and Opinion for immediate appeal under 28 U.S.C. § 1292(b). Doc. 48. The Eleventh Circuit granted permission to appeal on April 22, 2015. Doc. 52. On that date, the Court of Appeals also granted SIFMA's motion for leave to file a brief as *amicus curiae*. *Id.*

SUMMARY OF THE ARGUMENT

SIFMA seeks to foster stability in, and the continued availability of, a robust municipal bond market to assist local governments in financing necessary infrastructure and providing vital services. Even municipalities in financial distress need financing to maintain critical day-to-day functions. A municipality's ability to adjust its obligations pursuant to known, tested provisions of, and final proceedings under, Chapter 9 is critical to restoring investor confidence in a municipality's ability to repay its obligations and allowing its re-entry into the municipal market for funding pursuant to and following consummation of a confirmed plan.

By holding that a reviewing court may revise and rewrite selected portions of a confirmed, substantially consummated Chapter 9 plan of adjustment, the

district court's Order threatens the efficient operation of the municipal securities marketplace. There are three principal defects in the Order that counsel reversal. First, the district court's ruling disrupts the rights of those who invested in the newly issued warrants. Second, it significantly increases the risk associated with future Chapter 9 debt issuances. Third, the Order undermines Chapter 9 itself by discouraging municipal debtors from seeking bankruptcy protection.

If the district court's decision is allowed to stand, one of two outcomes is likely: either the market will not purchase new bond issues from a municipality exiting Chapter 9 because of the risk that a court could later "line-item veto" portions of the municipality's plan, or the risk premium imposed by the market on such bond issuances will be so high that municipalities could fail the feasibility requirement necessary for confirmation under Chapter 9. In either case, the purpose of Chapter 9 will be thwarted as distressed municipalities find themselves effectively unable to adjust their debts.

Chapter 9 cannot properly function in the face of a significant risk that reviewing courts may selectively interfere with the implementation of plans of adjustments that are already substantially consummated—particularly when the party that seeks to undo portions of a confirmed plan has not availed itself of the opportunity to seek a stay in the first instance. Accordingly, the district court's Order denying in pertinent part the County's motion to dismiss should be reversed.

The case should be remanded to the district court with instructions to dismiss the Ratepayers' appeal of the Confirmation Order.

ARGUMENT

I. THE MUNICIPAL BOND MARKET FILLS A UNIQUE ECONOMIC NEED

The district court's Order should be reversed because it is wrong on the merits: the Ratepayers' appeal is moot.[4] Moreover, as detailed below, profound negative consequences on the municipal bond market would result if the district court were affirmed.

Appreciation of the economic threat posed by the ruling below requires an understanding of the breadth of interests it potentially affects. The issues raised in the County's brief impact all participants in the municipal bond market, including not only issuers such as the County, but also investors who purchase municipal bonds and residents of municipalities who effectively utilize bond proceeds daily in their consumption of vital public services.

"Municipal bonds are debt securities issued by states, cities, counties and other governmental entities to finance capital projects, such as building schools,

[4] The Ratepayers' appeal is constitutionally, statutorily, and equitably moot, for the reasons described in the County's opening brief. *See* Opening Br. of Appellant Jefferson County, Alabama 27-33 (constitutional mootness); *id.* at 33-40 (statutory mootness); *id.* at 40-55 (equitable mootness). SIFMA submits this *amicus* brief to underscore the negative consequences that would come about if the district court were affirmed and permitted to reach the merits of the Ratepayers' appeal.

highways or sewer systems, and to fund day-to-day obligations." *Municipal Bonds*, SEC, http://www.sec.gov/answers/bondmun.htm;[5] *see also Report on the Municipal Securities Market*, SEC, i (July 31, 2012), https://www.sec.gov/news/studies/2012/munireport073112.pdf. Roughly two-thirds of bond investors are individual, rather than institutional, investors, who typically seek "a steady stream of income payments, and compared to stock investors . . . may be more risk-averse and more focused on preserving rather than accumulating wealth." *Municipal Bonds*, *supra*.[6] Municipal bond buyers extend credit or make loans to the issuing municipality in consideration for regular interest payments and an eventual return of principal, typically over a multi-year term.[7] Bond proceeds are then used for a variety of public purposes. Bonds may be tax-exempt or taxable, and may be secured by specified taxes or revenues from a financed project or issued as "general obligations" backed by the issuer's "full

[5] Unless otherwise noted, any reference to material located on the internet refers to such sources as they existed on June 22, 2015.

[6] Indeed, Jefferson County's initial debt offering focused on individual investors. *See* Mike Cherney & Al Yoon, *Municipal Bonds: Jefferson County Sells Sewer Debt*, Wall St. J., Nov. 19, 2013, at C4.

[7] As of June 2015, more than a million different municipal bonds were outstanding, with an aggregate principal exceeding $3.6 trillion. *U.S. Bond Market Issuance & Outstanding*, SIFMA, http://www.sifma.org/research/statistics.aspx.

faith and credit."[8] But however municipal securities are labeled, the ultimate beneficiaries are users of the funded governmental services.

II. Chapter 9 Allows Insolvent Municipalities to Adjust Debt Obligations

Local governments are not immune from financial distress. Among other factors, diminished tax revenues due to declining property values or loss of industry, the increased cost and heightened demand for public services, and the high cost of existing credit facilities have squeezed limited governmental resources. Like private borrowers, municipalities may need to restructure their debt obligations to facilitate repayment under terms that are feasible.

Congress recognized the unique needs of such borrowers in enacting Chapter 9 and its predecessor statutory schemes addressing municipal insolvency. Chapter 9 provides a financially distressed, eligible municipality[9] with protection from its creditors while it negotiates a plan for adjusting its debts. Those creditors include the municipality's bondholders. Although Chapter 9 draws from, and has marked similarity to, the more commonly invoked chapters available to non-municipal debtors, it has a unique constitutional overlay:

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[8] *See General Obligation Bond*, Mun. Sec. Rulemaking Bd., http://www.msrb.org/Glossary/Definition/general-obligation-bond-or-go-bond.aspx.

[9] The Bankruptcy Code defines a "municipality" as a "political subdivision or public agency or instrumentality of a State." 11 U.S.C. § 101(40). Eligibility to file Chapter 9 is governed by 11 U.S.C. § 109(c).

> [D]ue to the severe limitations placed upon the power of the bankruptcy court in chapter 9 cases (required by the Tenth Amendment and the Supreme Court's decisions in cases upholding municipal bankruptcy legislation), the bankruptcy court generally is not as active in managing a municipal bankruptcy case as it is in corporate reorganizations under chapter 11. The functions of the bankruptcy court in chapter 9 cases are generally limited to approving the petition (if the debtor is eligible), confirming a plan of debt adjustment, and ensuring implementation of the plan.

Chapter 9 – Bankruptcy Basics, U.S. Courts, http://www.uscourts.gov/FederalCourts/Bankruptcy/BankruptcyBasics/Chapter9.aspx. However, "to obtain the protection of court orders and eliminate the need for multiple forums to decide issues," *id.*, a municipal debtor may expand the powers of the bankruptcy court by consent, 11 U.S.C. § 904. Moreover, the bankruptcy court "may retain jurisdiction over the case for such period of time as is necessary for the successful implementation of the plan." 11 U.S.C. § 945(a).

Here, Jefferson County sought protection from its creditors while successfully negotiating a plan to adjust its debts. Both the confirmed Plan and the Confirmation Order reflect the County's consent to the bankruptcy court's retention of jurisdiction to enforce the terms of the Plan and resolve any disputes that may arise under it. Bankr. Doc. 2182 at 90, § 6.4(f); *id.* at 91, § 6.4(l); Bankr. Doc. 2248 at 67-68, ¶ 25; *id.* at 77-78, ¶ 38.

In direct reliance on the bankruptcy court's waiver of the otherwise applicable 14-day stay of effectiveness of the Confirmation Order, Fed. R. Bankr.

P. 3020(e), the County issued approximately $1.8 billion in new sewer warrants, paying off approximately $3.2 billion of then-outstanding warrants at an agreed-upon discount, thereby substantially consummating the Plan. Investors purchased the new warrants against the backdrop of the confirmed Plan, which set forth key terms and conditions under which the warrants were to be issued. Those terms included an "Approved Rate Structure" adopted by the County and, pursuant to the Plan, made expressly subject to continued enforcement by the bankruptcy court. *See, e.g.,* Bankr. Doc. 2182 at 63, § 4.3; *id.* at 85, § 5.11; *id.* at 91, § 6.4(l).

The Approved Rate Structure is an integral component of the new sewer warrants. It provides for periodic rate increases in increments that are specified in the Plan. Doc. 35 at 14-15. Because the Approved Rate Structure offers buyers of the warrants confidence that the County will generate revenue to meet its obligations, it is "inextricably bound" with other provisions of the Plan. Bankr. Doc. 2248 at 24, ¶ K.1. The same is true of the bankruptcy court's retained jurisdiction, which gives warrant holders an additional forum to enforce the confirmed Plan's terms and conditions of the new sewer warrants. *See id.* at 40, ¶ N.1.(c)(vi).

III. THE DISTRICT COURT'S RULING THREATENS THE INTERESTS OF ALL PARTICIPANTS IN THE MUNICIPAL BOND MARKET

By questioning the validity of a confirmed and substantially consummated Plan, the district court upset the rights of new warrant holders in a manner that

threatens the core protections of Chapter 9, along with the stability of the municipal bond market. Because the ruling is fundamentally in tension with accepted principles of the mootness doctrine and Chapter 9 jurisprudence, this Court should reverse.

The district court recognized that the mootness doctrine militates against appellate review where a decision would produce a "perverse outcome" such as "significant injury to third parties." Doc. 35 at 37 (quoting *In re Semcrude, L.P.*, 728 F.3d 314, 320 (3d Cir. 2013)). Here, new investors purchased the County's warrants in reliance on, among other things, an Approved Rate Structure and the bankruptcy court's retained jurisdiction to enforce the County's obligations in the bankruptcy court. Yet the district court contended that it could simply excise those portions of the Plan and Confirmation Order. *See, e.g.*, *id.* at 29 (noting that the district court could vacate "the portion of the Confirmation Order that retains jurisdiction in the bankruptcy court"); *id.* at 29 n.21 ("Vacating the Approved Rate Structure of the Confirmation Order would grant [the Ratepayers] th[eir] relief."). By threatening to excise certain components of the substantially consummated, confirmed, non-stayed plan, the district court's Order effectively imposed terms and conditions on the new warrant holders that are different from the ones to which they agreed. *See, e.g.*, Christopher Coviello, *Jefferson County, Alabama, Sewer Ratepayers' Appeal Proceeds, a Credit Negative for Sewer Warrant Holders*,

Moody's Credit Outlook, Oct. 6, 2014, at 23, *available at* https://www.fiasi.org/resources/doc_view/259-moodys-investors-service-credit-outlook-october-6-2014 ("The court's decision is credit negative for sewer warrant holders because it raises the possibility that a successful appeal will undo the county's aggressive rate increases, which are critical to its ability to pay the new debt service."). This outcome constitutes precisely the type of "injury to third parties," Doc. 35 at 37, that weighs in favor of mootness, as the Order itself acknowledged.

In addition, the district court's Order threatens to reintroduce certain of the very problems that gave rise to this Chapter 9 proceeding. The County entered bankruptcy because it "did not timely and sufficiently increase customer sewer rates and failed to collect monies from sewer customers some of whom/which the County did not even know were using the sewer system." Bankr. Doc. 554 at 9. "The repercussion of all of these and other failures by the County was to decrease monies available to pay the warrants." *Id.* The Approved Rate Structure and the bankruptcy court's retained jurisdiction address this problem: they create a mechanism to enforce in the bankruptcy court the County's obligation under the new warrant indenture to generate revenue that will cover expenses and debt service.

The Order also works a broader harm by distorting the marketplace for municipal debt arising out of Chapter 9 bankruptcies. As a general matter, "market structure should inspire confidence in investors and companies that they will be treated fairly and that the system will work efficiently. Without this confidence, [the] market structure can act as a headwind that will impede capital formation." Mary Jo White, *Focusing on Fundamentals: The Path to Address Equity Market Structure*, Sec. Traders Ass'n 80th Annual Market Structure Conf. (Oct. 2, 2013). For this reason, Congress has made clear that a "fundamental" principle animating the Bankruptcy Code is "customer confidence in commodity markets." *See* S. Rep. No. 95-989, at 7-8 (1978). The district court's Order impairs this confidence, suggesting that consummated transactions relying on confirmed debt adjustment plans are subject to unpredictable judicial revision.

This uncertainty and the costs it imposes threaten the viability of Chapter 9 itself. The markets require sufficient confidence in a municipality's willingness and ability to perform its obligations before access to financing will be allowed at a feasible rate. For that reason, the very act of filing a Chapter 9 petition has severe market consequences:

> A Chapter 9 filing immediately raises the likelihood of a credit rating downgrade and, as a result, higher future borrowing costs for the government. The damage to a municipality's image may result in an exodus of residents or less business investment, which can hit government tax collections and make the underlying budget crisis worse. Public workers worry about slashed salaries or benefits, and

> all residents could see higher taxes, loss of services or deferred maintenance on necessities such as schools, roads and bridges—although those consequences can precede bankruptcy, too.

John Gramlich, *Municipal Bankruptcy Explained: What it Means to File for Chapter 9*, The Pew Charitable Trusts (Nov. 22, 2011), http://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2011/11/22/municipal-bankruptcy-explained-what-it-means-to-file-for-chapter-9. Nonetheless, under favorable conditions, a careful debt adjustment plan can spur new investment, allowing a municipality to emerge from bankruptcy.

But the district court's Order tilts the playing field, suggesting that a reviewing court can excise selected portions of even a confirmed, consummated, non-stayed plan. It is not possible to set aside or undo the thousands of warrant and other transactions that took place in reliance on the terms of that Plan, including the bankruptcy court's retained jurisdiction. But if a reviewing court has the ability to change material aspects of a deal after a plan has been confirmed and substantially consummated, and after thousands of transactions have closed in reliance on that confirmed plan, future market participants will be less likely to purchase securities of a municipality to facilitate its emergence from a Chapter 9 proceeding, or after it has gone through a Chapter 9 adjustment. Thus, if the Order stands, two perverse results are likely: either the market will not purchase new bond issues from a municipality exiting Chapter 9 because the risk premium

offered is insufficient, or the risk premium imposed by the market on such new issues will be so great that any debt adjustment plan could fail the feasibility requirement of the confirmation process, leaving municipalities without recourse to bankruptcy protection in the first place, *see* 11 U.S.C. § 943(b)(7).

In either case, the promise of Chapter 9 will go unfulfilled. Chapter 9 was designed to ensure that distressed municipalities have a meaningful ability to adjust their debts, *see, e.g.*, H.R. Rep. No. 95-595, at 263 (1977) ("Chapter 9 provides a workable procedure so that a municipality of any size that has encountered financial difficulty may work with its creditors to adjust its debts."), and in appropriate circumstances (as here), that will include access to capital markets. Congress has repeatedly underscored this objective: for example, the Municipal Bankruptcy Amendments of 1988 specifically addressed the possibility that 11 U.S.C. § 552 might deter investors who feared the loss of secured status if a municipality filed Chapter 9. *See* H.R. Rep. No. 100-1011, at 4-5 (1988) ("Proponents of the legislation argue that in the absence of the changes contained therein, municipalities—particularly the small to medium-sized cities—may have trouble raising money through special revenue bonds, disrupting the municipal finance market and harming the municipalities.").

The district court's Order will foment uncertainty, creating the potential for a federal court to strike retroactively—without a stay in place—select portions of a

substantially consummated plan. It will open the door again to the very structural risk Congress sought to prevent in enacting and amending Chapter 9 and significantly constrain distressed municipalities' access to vital capital markets.

* * *

Properly functioning financial markets are essential to our country's economy, both in the public and private sectors. The district court's decision suggests that the "private" reliance interests of bondholders must yield to the "public" interests of the Ratepayers. *See, e.g.*, Doc. 35 at 39, 42. But this is a false dichotomy. If the district court's decision is affirmed, it will be increasingly difficult for municipalities to restructure their debt obligations, access the capital markets, and emerge from financial distress. Everyone—citizens, investors, and municipalities—will be worse off. Accordingly, the district court's decision should be reversed.

CONCLUSION

For the foregoing reasons, SIFMA respectfully requests that the district court's Order denying in pertinent part the County's motion to dismiss be reversed and the matter remanded to the district court with instructions to dismiss the Ratepayers' appeal of the Confirmation Order.

Dated: June 22, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(b)(i), the typeface requirement of Federal Rule of Appellate Procedure 32(a)(5), and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief contains 3,386 words, as determined by the word-count function of Microsoft Word 2010, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and 11th Circuit Rule 32-4, and is prepared in a proportionally spaced typeface (14-point Times New Roman).

Dated: June 22, 2015

/s/ Caitlin J. Halligan
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Counsel for Amicus Curiae *Securities Industry and Financial Markets Association*

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of June, 2015, a true and correct copy of the foregoing Brief for *Amicus Curiae* Securities Industry and Financial Markets Association was filed in accordance with the Court's CM/ECF Guidelines and served via the Court's CM/ECF system on all counsel of record. I further certify that on the same date I have caused seven copies of the foregoing brief to be delivered to the Clerk of the Court.

Dated: June 22, 2015

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