



## netDockets Note: Las Vegas Monorail Company Not a Municipality, Eligible for Chapter 11 Protection

*Originally posted on April 26, 2010*

<http://www.netdocketsblog.com/2010/04/nevada-bankruptcy-court-refuses-to.html#axzzomKlzYsy7>

On April 26, 2010, Bankruptcy Judge Bruce Markell of the District of Nevada bankruptcy court entered an opinion denying the motion of Ambac Assurance Company which sought the dismissal of the chapter 11 bankruptcy case of Las Vegas Monorail Company. In its motion, which was joined by Wells Fargo Bank, N.A., Ambac had asserted that Las Vegas Monorail was ineligible for chapter 11 bankruptcy protection because the company constituted a "municipality" under the Bankruptcy Code. As such, Las Vegas Monorail could only file for bankruptcy protection under chapter 9 of the Bankruptcy Code according to Ambac.

More information regarding the bankruptcy filing, Ambac's motion, and earlier proceedings in the cases can be found in these earlier posts on our blog:

- Las Vegas Monorail Files Chapter 11; 2 Parties Quickly Seek Dismissal. Read more: <http://www.netdocketsblog.com/2010/01/las-vegas-monorail-files-chapter-11-2.html#ixzz0mHjOzWHn>
- Las Vegas Monorail Seeks Exclusivity Extension; Ambac's Dismissal Motion Still Not Decided. Read more: <http://www.netdocketsblog.com/2010/04/las-vegas-monorail-seeks-exclusivity.html#ixzz0mHjVKAcJ>

In analyzing Ambac's motion, Judge Markell acknowledged that Las Vegas Monorail Company had entered into a Tax Certificate and Agreement in connection with its

financing expressly acknowledging that the company "is an instrumentality of the State of Nevada" and that it is "controlled by the Governor of the State of Nevada." Judge Markell deemed the level of control which the Governor has over the company to be "fairly expansive" and includes the authority to reject its rate schedule and proposed budget and, "more importantly," to reject proposed board members and remove directors for cause. Nonetheless, the Judge quickly determined that the only subcategory of "municipalities" (as defined in section 101(40) of the Bankruptcy Code) that might cover LV Monorail is "instrumentality of a State." In attempting to define the specific scope of "instrumentality," he noted that "there really is no 'plain meaning' of the term 'instrumentality' – or, to be somewhat pucky, there are too many plain and accepted meanings" and, therefore, turned to the context and background of the term's usage in the Bankruptcy Code.

In that analysis, Judge Markell noted that Congress amended the Municipal Bankruptcy Act in 1947 in response to the advent of revenue bonds by removing an earlier requirement that an entity have the power to tax from the requirements to qualify as a municipality in order to expand the scope to encompass entities that issued revenue bonds. That modification, he determined, "created a negative inference that entities such as LVMC were also to be considered municipalities; otherwise, the legislation could have been easily extended to the entities to whom the public financing was lent, or from whom project revenues

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were to be received." The House and Senate Reports accompanying the amendment also noted that entities receiving this type of public financing were "essentially business enterprises" that would be eligible for relief under other bankruptcy chapters. Judge Markell found similar support for later changes to municipal bankruptcy provisions, including changes made in 1976, 1978, 1988, and 1994.

In collecting his determinations gleaned from legislative history and prior case law, Markell held that the use of the terms "municipality and instrumentality show three distinct threads:"

1. Does the entity have "any of the powers typically associated with sovereignty, such as eminent domain, the taxing power or sovereign immunity"?
2. If not (or barely), does the entity have a public purpose? If yes, "the level of control exerted by the State (or its agreed agents) on the entity's activities in furtherance of that purpose is relevant; the more control over day-to-day activities, the more likely the entity is an instrumentality under Section 101(40)."
3. How does the State designate and treat the entity?

In applying this test to Las Vegas Monorail Co., Judge Markell began by rejecting Ambac's assertion that the company's acknowledgement in the Tax Certificate and Agreement that it "is an instrumentality of the State of Nevada" was determinative, finding instead that the Supreme Court had expressly rejected similar assertions and that the term was used in a different context than whether the company was ineligible for chapter 11 protection. While the court noted

that there were some similarities in the use of the term for tax purposes and the use of the term in the Bankruptcy Code, the court ultimately determined that "the instrumentality test under the Bankruptcy Code is separate and independent."

In applying the Bankruptcy Code test set forth above, Judge Markell first determined that the first thread was not met because "LVMC is a creature of general nonprofit corporation laws rather than of a specific legislative enactment." However, he then determined that LVMC does serve a public purpose, requiring an analysis of the State of Nevada's level of control over the company. In considering that issue, Markell found that the State's ability to control LVMC was "attenuated" and that LVMC "operates its day-to-day business in significant isolation from the State." He also noted that the company's creditors "are not, and do not expect to be, creditors of the State" and that "the State is insulated from any of LVMC's operating losses." As such, he found that the State of Nevada exercised a "low level" of control which did not rise to the level required for LVMC to be deemed a municipality. Finally, in considering the last thread of the analysis, the court held that "Nevada statutory law would likely not imbue LVMC with sufficient municipal qualities to make LVMC a municipality."

The table of contents to Judge Markell's opinion is attached as an exhibit to this note. The complete opinion, as well as every other pleading filed in this case and over 950 other major chapter 11 cases (over 1.75 million pleadings in total) can be researched and downloaded using netDockets. Learn more and sign up for a trial account at [www.netdockets.com](http://www.netdockets.com).



Entered on Docket  
April 26, 2010

Hon. Bruce A. Markell  
United States Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT

DISTRICT OF NEVADA

\*\*\*\*\*

In re:	)	Case No.: BK-S-10-10464-BAM
	)	
LAS VEGAS MONORAIL COMPANY,	)	Chapter 11
	)	
Debtor.	)	<b>Date: February 17, 2010</b>
	)	<b>Time: 8:30 a.m.</b>

**ORDER REGARDING AMBAC’S MOTION TO DISMISS**

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4 I. INTRODUCTION

5 Las Vegas Monorail Company (“LVMC”), the debtor and debtor in possession in this case,  
 6 owns and operates a 3.9 mile long monorail which connects nine hotels in Las Vegas. LVMC  
 7 seeks to serve the transportation needs of the Las Vegas resort corridor, and caters mostly to  
 8 tourists and other visitors to Las Vegas. The monorail, however, does not connect to the local  
 9 airport, and it does not connect to Las Vegas’ downtown area. While it does connect to the local  
 10 convention center, the closest it gets to the principal thoroughfare in Las Vegas, the Las Vegas  
 11 Strip, is approximately 1,000 to 1,500 feet.

12 LVMC’s somewhat complicated capital structure, and its disappointing ridership, has  
 13 hampered its ability to expand to better serve its goals. LVMC’s immediate predecessor was a  
 14 joint venture between two local hotels. Starting in 1998, this predecessor took advantage of a  
 15 change in Nevada law that allowed private companies to operate a public monorail, and obtained  
 16 a franchise from the local county government to operate the then-one-mile-long monorail. In  
 17 2000, the private joint venture sought to expand to its present length. As part of that expansion,  
 18 the joint venture merged with a nonprofit corporation to form the present LVMC.<sup>1</sup> LVMC then  
 19 arranged for structured financing to acquire the existing track and to expand it.

20 The financing required the participation of the Director (“Director”) of the Nevada  
 21 Department of Business and Industry (“Department”). This participation consisted of the  
 22 Director’s sponsoring the issuance of around \$650 million of municipal bonds (“Bonds”). These  
 23 Bonds were offered for sale pursuant to an Offering Statement dated September 12, 2000 (the  
 24

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25  
 26 <sup>1</sup>LVMC is a private, nonprofit corporation, formed under Nevada’s nonprofit corporation law. Its  
 27 income is exempt from taxation under 26 U.S.C. § 503(c)(4). LVMC’s articles of incorporation state that  
 28 LVMC is not organized for profit, and that no part of its net earnings can “inure to the benefit” of any  
 individual or entity other than the State of Nevada or one of its agencies.

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<input type="checkbox"/> DPH Holdings Corp. (f/k/a Delphi Corporation) New York - Southern District Case Number: 05-44481	10/08/2005	19715 Documents
<input type="checkbox"/> Federal-Mogul Corporation Delaware Case Number: 01-10578	10/01/2001	16911 Documents
<input type="checkbox"/> Hayes Lemmerz International, Inc. (2001) Delaware Case Number: 01-11490	12/05/2001	4992 Documents
<input type="checkbox"/> Mark IV Industries, Inc. New York - Southern District Case Number: 09-12795	04/30/2009	685 Documents
<input type="checkbox"/> Motors Liquidation Company (f/k/a General Motors Corporation) New York - Southern District Case Number: 09-50026	06/01/2009	5167 Documents
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Randall G. Reese  
Restructuring Concepts LLC  
(866) 981-4997  
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