MODIFICATION OF COLLECTIVE BARGAINING AGREEMENTS: DOES A BREACH BAR REJECTION?

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I. INTRODUCTION

The Bankruptcy Code (the "Code") authorizes the bankruptcy court to approve a chapter 11 debtor in possession's ("DIP") application for rejection of a collective bargaining agreement ("CBA") upon satisfaction of the requirements of section 1113 of the Code. The DIP, however, may not be in a position early in the chapter 11 case to decide whether to reject, and if it decides to do so, the process under section 1113 can take substantial time, during which the DIP may be experiencing a shortage of cash. The DIP thus may be confronted with having to decide whether to comply with the terms of the CBA or breach the agreement and use its limited funds for other purposes. If the DIP breaches, the question arises whether its breach can result in a forfeiture of the right to reject the CBA. Some courts have foreclosed the DIP's right to reject the CBA because of its failure to comply with the CBA. This article discusses why a DIP's breach of a CBA prior to bankruptcy court approval of rejection of a CBA, or grant of interim relief from its obligations thereunder, as authorized by section 1113(e), should not foreclose the DIP's ability to obtain court approval to reject pursuant to section 1113(c).

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Rejection of a CBA is governed by section 1113 of the Code.[1] In order to reject a CBA, a DIP must make a proposal to the union which provides the "necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor,"[2] provide the union with relevant information as is necessary to evaluate the proposal,[3] and meet with the union and confer in good faith.[4] Furthermore, the union must refuse to accept the DIP's proposal without good cause[5] and the balance of the equities must clearly favor rejection of the agreement.[6] If the DIP is permitted to reject the CBA, the damages resulting from rejection are treated as pre-petition unsecured claims under Code section 365(g).[7]

Section 1113 was enacted in 1984[8] as a response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*.[9] In *Bildisco*, the Supreme Court ruled on two separate and distinct issues which arose in two separate proceedings that were heard concurrently on appeal.[10] First, the Court held that a DIP could reject a CBA under section 365(a) the Code, but that a higher standard than the generally applicable business judgment standard was required when ruling on a motion to reject a CBA.[11] This first holding concerned an important issue of bankruptcy law; the proper standard to be applied by a bankruptcy court when determining whether to approve a DIP's application to reject a burdensome executory contract.[12]

Separately, the Court in *Bildisco* ruled that after commencing a bankruptcy case, a DIP does not commit an unfair labor practice in violation of section 8(d) of

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[1] 11 U.S.C. § 1113 (2000).
[2] *Id.* § 1113(b)(1)(A).
[3] *Id.* § 1113(b)(1)(B).
[4] *Id.* § 1113(b)(2).
[5] *Id.* § 1113(c)(2).
[6] *Id.* § 1113(c)(3).
[7] *In re* Moline Corp., 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992); U.S. Truck Co., Inc. v. Teamsters Nat'l Freight Indus. Negotiating Comm. (*In re* U.S. Truck Co., Inc.), 89 B.R. 618, 623 (E.D. Mich. 1988); *In re* United Dep't Stores, Inc., 49 B.R. 462, 463 (S.D.N.Y. 1985) (recognizing debtors moved for order reclassifying claims under collective bargaining agreement and Multiemployer Pension Plan Amendments Act of 1980 as non-priority, pre-petition unsecured claims).
[8] Pub. L. No. 98-353, 98 Stat. 390 (1984) (codified at 11 U.S.C. § 1113 (2000)) (amending Code with section on rejection of collective bargaining agreements stating debtor "may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.").
[9] 465 U.S. 513 (1984).
[10] *Id.* at 516–17; *see also* Richard H. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 325 (1984) (noting two holdings in *Bildisco* opinion were delivered in separate parts).
[11] *Bildisco*, 465 U.S. at 526.
[12] *See* Mason v. Official Comm. of Unsecured Creditors (*In re* FBI Distribution Corp.), 330 F.3d 36, 42 (1st Cir. 2003) (noting decision to assume or reject executory contract has significant consequences); South Chicago Disposal, Inc. v. LTV Steel Co., Inc. (*In re* Chateaugay Corp.), 130 B.R. 162 (S.D.N.Y. 1991) ("In giving the trustee (or DIP) the option to assume or reject executory contracts, Congress sought to further the reorganization policies underlying chapter 11 of the Code."). *Cf.* Phar-Mor, Inc. v. Strouss Bldg. Assoc., 204 B.R. 948, 951–52 (N.D. Ohio 1997) (asserting whether executory contract is "favorable" or "unfavorable" is left to sound business judgment of debtor).

the National Labor Relations Act[13] ("NLRA") by unilaterally rejecting or modifying a CBA before its rejection is approved by the bankruptcy court.[14] Although unilateral rejection or modification of a CBA by a non-debtor is a violation of section 8(d) of the NLRA and is an unfair labor practice,[15] the Court held that a DIP does not commit an unfair labor practice because, unlike a non-debtor employer, the pre-petition CBA made by the debtor is not binding on the DIP.[16]

By enacting section 1113(f) of the Code, Congress reversed the Supreme Court's holding in *Bildisco* that a CBA was not an enforceable agreement against a DIP and introduced into the Code the labor law policy of ensuring industrial peace through collective bargaining reflected in the NLRA unfair labor practice provisions. Drawing on the language of section 8(d) of the NLRA, subsection (f) provides that a DIP cannot "modify or terminate" a CBA until rejection of the CBA is approved by the bankruptcy court.[17] The CBA is therefore enforceable against the DIP prior to compliance with the rejection provisions of section 1113, except to the extent that court grants interim pre-rejection relief pursuant to subsection (e).[18]

The key issue addressed in this article is whether a DIP's pre-rejection breach of a CBA precludes the rejection of the CBA because of its violation of section 1113(f) or its failure to seek interim relief under section 1113(e). Part II of this

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[13] National Labor Relations Act § 8(d), 29 U.S.C. § 158 (2000) (enumerating certain unfair labor practices that constitute violations of the Act).

[14] *Bildisco*, 465 U.S. at 532 ("Board enforcement of a claimed violation of § 8(d) under these circumstances would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a debtor-in-possession some flexibility and breathing space.").

[15] *See* 29 U.S.C. § 158(a),(d) (2000).

[16] *Bildisco*, 465 U.S. at 532 (recognizing filing of petition means CBA is no longer immediately enforceable and DIP need not comply with provisions of NLRA prior to rejection). *Contra* NLRB v. Haberman Const. Co., 618 F.2d 288, 297 (5th Cir. 1980) ("Under section 8(d) of the [NLRA], 29 U.S.C.A. § 158(d), a party to a contract who unilaterally modifies a contractual term that is a mandatory subject of bargaining commits an unfair labor practice.").

[17] 11 U.S.C. § 1113(f) (2000) ("No provision of this title shall be construed to permit trustee to unilaterally terminate or alter any provisions of collective bargaining agreement prior to compliance with provisions of this section."); *see* Teamsters Indus. Sec. Fund v. World Sales, Inc. (*In re* World Sales, Inc.), 183 B.R. 872, 876 (B.A.P. 9th Cir. 1995) (holding DIP was bound by terms of CBA until rejection was approved by bankruptcy court); *see also* 7 COLLIER ON BANKRUPTCY ¶ 1113.03, at 1113–11 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) ("a trustee or DIP must adhere to the terms of the collective bargaining agreement unless the court approves an application for rejection pursuant to section 1113(c)1 or grants interim relief under section 1113(e).").

[18] 11 U.S.C. § 1113(e) (2000):

> If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

Id.

article will analyze the history of section 1113 as a response to *Bildisco* and its intended scope and objectives. This analysis will involve a detailed study of the facts and the Supreme Court's two holdings in *Bildisco*. Part III will discuss the requirements for termination or modification of a CBA under the NLRA and whether those requirements bear on the question of whether a DIP forfeits the right to seek rejection under section 1113 by breaching the CBA. Part IV will address the misapplication of section 1113 in decisions where courts have foreclosed a DIP's ability to reject a CBA effectively because of its pre-rejection breach. This article will propose a bifurcated reading and application of section 1113 into its two parts predicated on their different underlying policies; the bankruptcy policy subsections which address rejection, and labor law policy subsections which require compliance with the CBA. Part V will discuss the remedies for a DIP's pre-rejection breach of a CBA. Finally, Part VI will propose the treatment of claims resulting from a DIP's rejection of a CBA and will be analyzed in light of the varied holdings on the subject.

II. THE HISTORY OF SECTION 1113

A. NLRB v. Bildisco & Bildisco

In order to understand the provisions of section 1113, there must be a thorough understanding of the Supreme Court's decision in *Bildisco*. In *Bildisco*, the DIP commenced a voluntary case under chapter 11 on April 14, 1980.[19] Prior to the filing of the bankruptcy petition, the debtor had negotiated a three year CBA with the union that represented approximately 45% of its employees.[20] In May of 1980, Bildisco, as a DIP, breached the CBA by refusing to pay wage increases provided for by the agreement.[21] The union filed an unfair labor practice charge against the DIP under the National Labor Relations Act ("NLRA") with the National Labor Relations Board ("NLRB").[22] Prior to the NLRB's adjudication of the unfair labor practice charge, the DIP applied for bankruptcy court approval to reject the CBA pursuant to section 365(a) of the Bankruptcy Code.[23] The bankruptcy court approved the DIP's application to reject, and the district court affirmed the rejection order.[24] The union appealed the district court's affirmance of the bankruptcy court's rejection order.

Separately, the general counsel of the NLRB issued a complaint against Bildisco for its breach of the CBA, contending that the breach constituted a

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[19] *Bildisco*, 465 U.S. at 517.
[20] *Id.* at 517–18.
[21] *Id.* at 518.
[22] *Id.*
[23] *Id.*; *see* 11 U.S.C. § 365(a) (2000) (providing for rejection of executory contracts or unexpired lease of debtor).
[24] *Bildisco*, 465 U.S. at 518.

unilateral modification of the terms of the CBA in violation of section 8(a)(5) of the NLRA.[25] Specifically, the complaint alleged that Bildisco had made unilateral modifications of the terms of the CBA when it failed to pay, among other items, the wage increases provided for in the agreement.[26] The NLRB ultimately held that the DIP had violated the NLRA, ordered it to make certain payments provided for by the CBA, and petitioned the Third Circuit to enforce the order.[27]

Thus, two independent proceedings were before the Third Circuit in *Bildisco*; the union's appeal from the district court's affirmance of the bankruptcy court's decision approving rejection of the CBA, and secondly, the NLRB's petition to have its order enforced by the Circuit Court. Ruling on the first issue, the Third Circuit held that the CBA was an executory contract which the DIP could reject in accordance with section 365(a) of the Code.[28] The Circuit Court also ruled on the second issue, holding that the DIP was not bound by the prohibition in section 8(d) of the NLRA against modification of the CBA.[29] The Third Circuit thus refused to enforce the NLRB's order directing the DIP to make the post-petition payments required by the CBA.[30]

On certiorari, the Supreme Court made two separate and distinct holdings, although the Court characterized the issues as related.[31] In a unanimous decision, the Court first held that a DIP could reject a CBA under section365(a)[32] provided that it satisfied a standard for rejection higher than the business judgment standard generally applied by courts when ruling on applications to reject executory contracts.[33] Under the business judgment standard as generally applied to executory contracts, "when reviewing a debtor's decision to assume or reject an executory contract, the court must examine the contract and circumstances and apply its best 'business judgment' to determine if the assumption or rejection would be beneficial or burdensome to the estate."[34]

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[25] *Id.* at 518–19.
[26] *Id.* at 519.
[27] *Id.* The enforcement provision of the NLRA provides in part that

> The Board shall have power to petition any court of appeals of the United States, or if all the courts of appeals to which application may be made are in vacation, any district court of the United States, within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order . . . .

29 U.S.C. § 160(e) (2000).
[28] *Bildisco*, 465 U.S. at 519.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 516.
[32] *Id.* at 526.
[33] *Id.*
[34] Westbury Real Estate Ventures, Inc. v. Bradlees, Inc. (*In re* Bradlees Stores, Inc.), 194 B.R. 555, 558 n.1 (Bankr. S.D.N.Y. 1996); *see also* Orion Pictures Corp. v. Showtime Networks, Inc. (*In re* Orion Pictures

In *Bildisco* the Court held, in a unanimous ruling, that rejection of a CBA should be permitted if the debtor establishes that the CBA burdens the estate and that after careful scrutiny, the equities balance in favor of rejecting the labor contract; a test that was later incorporated into section 1113(c)(3).[35] The Court explained that this heightened "balance of the equities" standard required the bankruptcy court to

> consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.[36]

Secondly, in a 5-4 decision, the Court held that a CBA was not enforceable against a chapter 11 DIP and that the DIP therefore did not commit an unfair labor practice in violation of section 8(d) of the NLRA[37] by unilaterally "terminating or

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Corp.), 4 F.3d 1095, 1099 (2d Cir. 1993) (viewing bankruptcy court as overseer of management by trustee or debtor-in-possession in executory contracts); Control Data Corp. v. Zelman (*In re* Minges), 602 F.2d 38, 43 (2d Cir. 1979) (holding bankruptcy court reviewing trustee's or debtor-in-possession's decision regarding executory contract should look at surrounding circumstances and apply "business judgment").

[35] *Bildisco*, 465 U.S. at 526.

[36] *Id.* at 527; *See In re* Indiana Grocery Co., Inc., 138 B.R. 40, 50 (Bankr. S.D. Ind. 1990):

> [S]ection 1113[(c)] codifies the equitable test set forth in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984), in which the Supreme Court directed that a bankruptcy court balance the interests of the debtor, creditors and employees, considering the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of creditors' claims if the CBA were affirmed, the impact on rejection on the employees, and the degree and quality of the hardship each may face.

Id.

[37] 29 U.S.C. § 158(d) provides in pertinent part

> [W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—
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> (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
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> (2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
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> (3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, . . . ; and

modifying" a CBA before obtaining bankruptcy court authorization to reject.[38] The Court discussed several bankruptcy reasons for concluding that the NLRB was precluded from enforcing the CBA under section 8(d) of the NLRA. The Court cited the DIP's freedom to assume or reject an executory contract at any time while the case was pending pursuant to section 365(d)(2).[39] The Court also considered the DIP's ability to convert a claim for breach of an executory contract upon rejection, into a pre-petition claim pursuant to section 365(g).[40] Additionally, the Court cited section 502 for the proposition that damages resulting from rejection "must be administered through bankruptcy and receive the priority provided general unsecured creditors."[41]

The Supreme Court held that the "necessary result of [discussing the foregoing sections] is that the Board is precluded from, in effect, enforcing the terms of the collective-bargaining agreement by filing unfair labor practices against the debtor-in-possession for violating section 8(d) of the NLRA."[42] The Court reasoned that if the NLRB's order requiring the DIP to pay according to the CBA were to be enforced, the practical effect would be to require adherence to the CBA and that requiring the DIP to adhere to the CBA "would run directly counter to the express provisions of the Bankruptcy Code and to the Code's overall effort to give a DIP flexibility and breathing space."[43] The Supreme Court in effect concluded that the Code overrode the provisions of the NLRA that would otherwise be applicable to the DIP as an employer.

B. Section 1113—The Congressional Response to Bildisco

At the time the Supreme Court decided *Bildisco*, Congress was working on legislation to address the issues raised by the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co*.[44] In *Marathon*, the Court held that the broad grant of jurisdiction to bankruptcy judges under the Bankruptcy Act

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> (4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
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> The duties imposed upon employers, employees, and labor organizations by paragraphs (2) to (4) . . . shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

Id.

[38] *Bildisco*, 465 U.S. at 534.

[39] *Id.* at 528.

[40] *Id.*

[41] *Id.* at 531.

[42] *Id.* at 532.

[43] *Id.*

[44] 458 U.S. 50 (1982).

of 1978[45] was unconstitutional.[46] The Court stayed its decision until October 4, 1982, and later extended the stay until December 24, 1982,[47] to afford Congress time to create a valid jurisdictional system for bankruptcy and thereafter the bankruptcy courts continued to operate under temporary emergency rules.[48]

After the Supreme Court decided *Bildisco* on February 22, 1984, organized labor lobbied members of the Democratic-controlled House of Representatives to add a provision to the *Marathon* jurisdictional legislation that would overrule *Bildisco's* holding that a DIP is not subject to section 8(d) of the NLRA.[49] The House passed such a bill on March 21, 1984.[50] The Republican-controlled Senate, however, was opposed to the labor provision, and on June 19, 1984, passed an amended version of the House bill that did not include the labor provision.[51] Ultimately a compromise was reached on June 28, to include section 1113 in the 1984 legislation that was passed by both the House and the Senate on June 29.

Approximately five months after *Bildisco* was decided, and after less than two days of consideration in House-Senate conference,[52] section 1113 of the Bankruptcy Code was signed into law on July 10, 1984, as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[53] In light of its importance and rapid enactment, however, many members of Congress expressed concern over rushing the passage

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[45] Pub. L. No. 95-598, Title I, § 101, 92 Stat. 2549 (1978) (codified as amended primarily at 11 U.S.C. §§ 101–1330 (2000)).

[46] *Marathon*, 458 U.S. at 87.

[47] *Id.* at 88 (staying judgment until Oct. 4, 1982); Northern Pipeline Constr. Co. v. Marathon Pipeline Co., 459 U.S. 813 (1982) (extending stay of judgment until Dec. 24, 1982).

[48] *See Marathon*, 458 U.S. at 88; *see also In re* Benny, 44 B.R. 581, 585 (N.D. Cal. 1984) (explaining recommendation of the Judicial Conference of the United States that bankruptcy courts promulgate temporary emergency rules).

[49] *See* Mass. Air Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 662 (D. Mass. 1996) ("[l]obbying efforts by labor interests led to enactment of this legislation restricting *Bildisco* just five months after *Bildisco* was handed down."); Steven Kropp, *Collective Bargaining in Bankruptcy: Toward an Analytical Framework for Section 113*, 66 TEMP. L. REV. 697, 702–03 (1993) ("Organized labor and its political allies in Congress secured the enactment of § 1113 . . ." to overrule *Bildisco*); *see also* Nathalie D. Martin, *The Insolvent Life Care Provider: Who Leads the Dance between the Federal Bankruptcy Code and State Continuing-Care Statues?*, 61 OHIO ST. L.J. 267, 337 (2000) ("Labor groups immediately lobbied Congress to enact legislation repealing *Bildisco*, which they claimed gutted section 8(a)(5) of the NLRA . . . ."); Donald B. Smith & Richard A. Bales, *Reconciling Labor and Bankruptcy Law: The Application of 11 U.S.C. § 1113*, 2001 MICH. ST. L. REV. 1145, 1153–54 (2001) (noting after *Bildisco* decision, "labor turned to pro-labor members of Congress to address the matter.").

[50] H.R. 5174, 98th Cong. (1984).

[51] H.R. 5174, as amended, 98th Cong. (1984).

[52] The Senate-House Conference began on June 27, 1984 and concluded on June, 28, 1984.

[53] Bruce H. Charnov, *The Uses and Misues of the Legislative History of Section 1113 of the Bankruptcy Code*, 40 SYRACUSE L. REV. 925, 926 (1989) (reporting how passage of Bankruptcy Amendments and Federal Judgeship Act of 1984 included section 1113); Michael D. Sousa, *Reconciling the Otherwise Irreconcilable: The Rejection of Collective Bargaining Agreements Under Section § 1113 of the Bankruptcy Code*, 18 LAB. LAW. 453, 469 (2003) (noting how section 1113 was passed after powerful lobbying effort by organized labor); Susan J. Stabile, *Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code*, 14 CARDOZO L. REV. 1911, 1922 (1993) (describing enactment of section 1113).

of legislation to overturn *Bildisco* without a thorough discussion of its implications. When discussing the House bill, one Congressman stated:

> A legitimate question to be addressed in the House debate on the rule is whether or not a policy issue of this complexity should be addressed in a hasty fashion, without the benefit of congressional hearings. There is nothing in the *Bildisco* decision that demands a hurried, emergency response from Congress. The issue is important enough, complex enough, that it should be handled independently and not created as a portion of a compromise package on bankruptcy reform.[54]

The Chairman of the Senate Judiciary Committee, Sen. Strom Thurmond, made it clear that were it not for the importance of addressing the *Marathon* decision, he would not have voted for section 1113.[55] The Senator stated that, "[u]nfortunately, the House injected this issue into the bankruptcy debate very late in the process. They also made it quite clear that the bankruptcy bill, if there was to be one, it would contain a labor provision acceptable to organized labor."[56]

Section 1113 was, therefore, tacked onto the *Marathon* legislation at the last minute without a thorough discussion of its provisions or possible implications. In its haste, Congress provided scant explanation of its intent in enacting section 1113.[57] The legislative history consists solely of brief comments by individual members of Congress reported in the Congressional Record.[58] Thus, no insight was provided by Congress into the meaning of the statute.

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[54] 130 CONG. REC. H1798 (daily ed. March 21, 1984) (statement of Rep. Hall).

[55] 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond):

> With regard to the labor provisions of this bill, let me first say that, were it not for the critical need to pass this bankruptcy bill, I could not have agreed to [section 1113]. I believe that the *Bildisco* decision was correctly decided and did not require legislative action by Congress.

Id.

[56] *Id.*

[57] *See* Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 990 (2d Cir. 1990) (noting no committee reports accompanied enactment of section 1113); United Food & Commercial Workers Union v. Official Unsecured Creditors Comm. (*In re* Hoffman Bros. Packing Co., Inc.), 173 B.R. 177, 182 (B.A.P. 9th Cir. 1994) (stressing section 1113 has no dependable legislative history); Judith D. Nichols, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement Under Section 1113*, 40 GA. L. REV. 967, 995 (1987) (examining legislative history of section 1113).

[58] *See* 130 CONG. REC. H7494–96 (daily ed. June 29, 1984); 130 CONG. REC. S8897–8900 (daily ed. June 29, 1984); 5 COLLIER ON BANKRUPTCY ¶ 1113.LH, at 1113-68–69 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2004) (suggesting that insight into section 1113 could be gained from congressional hearings).

C. The Meaning of Section 1113 in Light of Bildisco

In order to understand and properly apply section 1113, this statute, like the *Bildisco* opinion, should be viewed as having two independent parts; subsections (a) through (d) as one part, and separately, subsections (e) and (f). The first part of section 1113, subsections (a) through (d), deals with rejection of CBAs and promotes the bankruptcy policy of successful reorganization by giving the DIP the right to reject burdensome labor contracts. These subsections amplify the Supreme Court's first ruling in *Bildisco* regarding the heightened standard a bankruptcy court must use when determining whether a DIP should be allowed to reject a CBA and creates a specific process that a DIP must follow before seeking rejection.[59]

Subsection (a) of section 1113 reads in part, "[t]he DIP . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section."[60] More specifically, section 1113(b) establishes the requirements with which the DIP must comply before its application for rejection can be approved. The DIP must make a proposal to the union which "provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably."[61] The DIP must also provide the union with "relevant information as is necessary to evaluate the proposal."[62] Additionally, the DIP must meet with the union and confer in good faith.[63] Section 1113(c), establishes the DIP's right to reject a CBA, providing that

> The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—
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> (1) the trustee [or DIP if no trustee is serving] has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
> (2) the authorized representative of the employees has refused to accept such proposal without good cause; and

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[59] *See* Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Systems, Inc.), 899 F.2d 887, 890 n.2 (10th Cir. 1990) (finding section 1113 codified *Bildisco*'s substantive standards); Carlos J. Cuevas, *The Rehnquist Court, Strict Statutory Construction and the Bankruptcy Code*, 42 CLEV. ST. L. REV. 435, 461 (1994) (noting section 1113 embodied substantive standard adopted by Supreme Court in *Bildisco*); Shirley A. Coffee, *One Bankruptcy is Enough, 78,000 is Too Many—Protection of Retirement Benefits Under the Retiree Benefits Bankruptcy Protection Act of 1988:* In re Chateaugay Corp., 61 U. CIN. L. REV. 715, 725–26 (1993) (stating section 1113 adopted *Bildisco*'s standard of review for rejecting collective bargaining agreements).

[60] 11 U.S.C. § 1113(a) (2000).

[61] *Id.* § 1113(b)(1)(A).

[62] *Id.* § 1113(b)(1)(B).

[63] *Id.* § 1113(b)(2).

> (3) the balance of the equities clearly favors rejection of such agreement.[64]

Subsection (d) establishes the time frame in which the bankruptcy court must make its ruling on the DIP's application to reject.[65]

The second part of section 1113, subsections (e) and (f), is fundamentally different from the first part in that it promotes the labor law policy of preserving industrial peace through collective bargaining. In subsection (f) Congress provided that "[n]o provision of [the Bankruptcy Code] shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."[66] The purpose of section 1113(f) was to overturn the second holding in *Bildisco* that a CBA was not an enforceable contract against the DIP and that the DIP thus did not commit an unfair labor practice when it unilaterally terminated or modified a CBA prior to court approval.[67] Interim pre-rejection relief, however, may be available to the DIP under subsection (e). In subsection (e), Congress provided that a court may authorize the DIP to implement interim changes to the "terms, conditions, wages, benefits, or work rules provided" by a CBA if the changes were essential to the continuation of the DIP's business or would allow the DIP to avoid irreparable damage to the estate.[68] Section 1113(f) requires a DIP to comply with the terms of the CBA until the court grants permission to reject the CBA, or grants interim relief from the CBA.[69]

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[64] *Id.* § 1113(c).

[65] *Id.* § 1113(d).

[66] *Id.* § 1113(f).

[67] 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood). Senator Packwood stated that § 1113 was meant to:

> prohibit the trustee from unilaterally altering or terminating the labor agreement prior to compliance with the provisions of the section. This provision encourages the collective bargaining process, so basic to federal labor policy. The provision overrules the 5-4 portion of the Supreme Court's Bildisco decision [the second holding] and means that the labor contract is enforceable and binding on both parties until a court-approved rejection or modification.

Id.; *see also* Eagle Inc. v. United Ass'n of Journeymen, 198 B.R. 637, 639 (D. Mass. 1996) (reporting that section 1113 was enacted by Congress to overrule *Bildisco*'s holding that collective bargaining agreements are unenforceable post-petition until either assumed or rejected by debtor or trustee); Journeymen Plasterers v. Energy Insulation, Inc. (*In re* Energy Insulation, Inc.), 143 B.R. 490, 495 (N.D. Ill. 1992); Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 544 (1994) (indicating one role of section 1113 was to overrule *Bildisco*'s holding that sanctioned a chapter 11 debtor's unilateral rejection of a collective bargaining agreement).

[68] 11 U.S.C. § 1113(e) (2000).

[69] *See* Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 990 (2d Cir. 1990) (explaining how section 1113 governs the means by which debtor may assume, reject or modify its collective bargaining agreement); Teamsters Indus. Sec. Fund v. World Sales, Inc. (*In re* World Sales, Inc.),

Section 1113(f) thus advances the purpose of the NLRA of ensuring industrial peace by requiring continued compliance with the CBA. By passing section 1113(f), Congress rejected the Supreme Court's second holding in *Bildisco* that the bankruptcy policies for not requiring adherence to the contract before court approved rejection overrode the policies of the NLRA.[70] In drafting section 1113(f), Congress used almost identical language as it employed in section 8(d) of the NLRA unfair labor practice provisions. In section 1113(f), Congress stated that a DIP could not "terminate or alter" a CBA prior to rejection or interim relief. Similarly, in section 8(d) of the NLRA, Congress stated that "no party to [a CBA] shall terminate or modify such contract, . . ." prior to compliance with the terms of that section.[71]

Section 1113(f) creates an obligation for the DIP to continue to comply with the terms of the CBA, but does not specify the remedy for the DIP's failure to do so. All courts have recognized that the DIP's violation of section 1113(f) creates a claim for the employees.[72] Some courts however have also held that, in addition to creating a claim against the estate, the DIP's breach of the CBA in violation of section 1113(f) results in foreclosure of the DIP's ability to reject the CBA as a pre-

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183 B.R. 872, 876 (B.A.P. 9th Cir. 1995) (indicating that under section 1113 debtor is bound under contract terms until rejection of contract); *Journeymen*, 143 B.R. at 495:

> Section 1113 sets forth the procedure whereby a debtor can obtain authorization to reject or modify the terms of a collective bargaining agreement. Unless and until a debtor follows section 1113's procedures and obtains bankruptcy court authorization to reject or modify, section 1113(f) requires it to abide by the terms of the collective bargaining agreement.

Id.

[70] Air Line Pilots Ass'n, Int'l v. Shugrue (*In re* Ionosphere Clubs, Inc.), 22 F.3d 403, 407 (2d Cir. 1994) (recognizing section 1113(f) was intended to reverse part of *Bildisco* that held CBA was executory contract and could be unilaterally rejected); *In re* Elec. Contracting Services Co., 305 B.R. 22, 30 (Bankr. D. Colo. 2003) (noting section 1113(f) directly overrules part of *Bildisco* "which allows a debtor to resort to self help pending formal acceptance or rejection of the agreement."); United Food & Commercial Workers Union v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 891 (B.A.P. 8th Cir. 2001) (stating section 1113(f) specifically overrules "controversial" part of *Bildisco*).

[71] 29 U.S.C § 158(d) (2000).

[72] Courts, however, have differed on the type of claim a DIP's violation of section 1113(f) creates. Some courts have held that the claim has automatic administrative priority. *See* United Steelworkers of Am. v. Ohio Corrugating Co., No. 4:90CV0810, 1991 WL 213850, at *4–5 (N.D. Ohio March 15, 1991) (determining section 1113(f) provided priority for CBA retirement benefits regardless of whether they were administrative expenses under section 503); *In re* Arlene's Sportswear, 140 B.R. 25, 27–28 (Bankr. D. Mass. 1992) (holding CBA retirement benefits have administrative expense priority); *In re* Golden Distribs., Ltd., 134 B.R. 760, 765 (Bankr. S.D.N.Y. 1991) (finding section 1113(f) creates super-priority for CBA claims regardless of whether they meet the requirements of sections 503(b) or 507(a)); *In re* St. Louis Globe-Democrat, Inc., 86 B.R. 606, 609–10 (Bankr. E.D. Mo.1988) (granting CBA claims administrative expense priority). Other courts have held that the claim should be accorded administrative expense status only if it meets the section 503 requirements. *See In re* Roth American, Inc., 975 F.2d 949, 957–58 (3d Cir. 1992) (holding CBA claims must meet requirements of section 503(b) to get administrative priority); AFL-CIO v. Kitty Hawk Int'l, Inc. (*In re* Kitty Hawk, Inc.), 255 B.R. 428, 436 (Bank. N.D. Tex. 2000) (stating if Congress wanted to mandate administrative priority for CBA claims it should have done so expressly).

petition claim. The courts have improperly held that compliance with the CBA is a requirement for rejection.

III. THE REQUIREMENTS OF THE BANKRUPTCY CODE AND THE NLRA

There is an important right granted to the DIP in the Code that allows a DIP to reject burdensome executory contracts, including CBAs.[73] This right promotes the fundamental purposes of the Code which are to provide a fresh start for the DIP and maximize the estate for the creditors.[74] The goal of chapter 11 is to allow the DIP to reorganize successfully and thereby to provide creditors with going-concern value rather than the possibility of a more meager satisfaction through liquidation.[75] The ability to reject burdensome contracts is an important step in restructuring the DIP's financial arrangements so that the DIP can be afforded the opportunity to achieve renewed viability.[76]

Upon an initial inspection, the right to reject a CBA, which promotes the fundamental purposes of the Code of successful reorganization and maximization of the estate, appears to be in conflict with the practices and policies of the NLRA. The NLRA implements the federal labor law policy of ensuring industrial peace through collective bargaining by requiring an employer who wishes to terminate or modify an existing agreement to follow the statutory process for doing so.[77] The

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[73] *See* 11 U.S.C. § 365(a) (2000) (permitting debtor to reject executory contracts, generally); *Id.* § 1113 (permitting debtor to reject CBA).

[74] *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984) (discussing policy of chapter 11 to permit successful rehabilitation of debtors); *see also In re* Continental Airlines, 91 F.3d 553, 565 (3d Cir. 1996) (acknowledging strong public policy in maximizing debtor estates and facilitating successful reorganization); Syntex Corp. v. Charter Co. (*In re* Charter Co.), 862 F.2d 1500, 1502 (11th Cir. 1989) (noting goal of Bankruptcy Code is to allow debtor to be rehabilitated and reorganized, while simultaneously according fair treatment to creditors by paying claims quickly).

[75] *See In re* Alvarez, 224 F.3d 1273, 1278 n.9 (11th Cir. 2000) (distinguishing chapter 11 case from chapter 7 since in chapter 11, "[DIP] generally manages and administers his own bankruptcy estate, with the goal of reorganizing his affairs rather than liquidating them."); Canadian Pac. Forest Prod. Ltd. v. J.D. Irving, Ltd. (*In re* Gibson Group, Inc.), 66 F.3d 1436, 1442 (6th Cir. 1995) (finding purpose of chapter 11 is to provide creditors "with going-concern value rather than the possibility of a more meager satisfaction through liquidation."); *see also* Coastal Virginia Bank v. March (*In re* March), 995 F.2d 32, 34 (4th Cir. 1993) (holding DIP is trustee for all his creditors).

[76] *See* Mason v. Comm. of Unsecured Creditors (*In re* FBI Distribution Corp.), 330 F.3d 36, 42 (1st Cir. 2003) (acknowledging section 365 allows debtor latitude "to determine which of the pre-petition executory contracts are beneficial to the estate and which should be assumed or rejected."); *In re* Lafayette Radio Elec. Corp., 7 B.R. 189, 191 (Bankr. E.D.N.Y. 1980) (finding court provides relief to debtor of pre-filing contractual commitments, while also preserving some commitments, by providing debtor with option to affirm or discharge executory contracts or unexpired leases); *see also* Drewes v. FM Da-Sota Elevator Co. (*In re* Da-Sota Elevator Co.), 939 F.2d 654, 654 n.2 (8th Cir. 1991) (noting executory contracts may be found to be valid, but that trustee has, in light of advantageousness to bankruptcy estate, ability to either affirm or reject contract within certain guidelines).

[77] *See* 29 U.S.C. § 171(a), which states that it is the policy of the United States that "sound and stable industrial peace . . . can most satisfactorily be secured by the settlement of issues between employers and employees through the processes of conference and collective bargaining between employers and the representatives of their employees." *Id.*

Code requirements for rejection however, are analogous to the mid-term termination requirements in the NLRA.[78]

The mid-term termination and rejection requirements of the NLRA are set forth in section 8(d). Under section 8(d) of the NLRA, before an employer may terminate or modify a CBA, it must notify the union, meet and confer in good faith and continue to comply with the CBA unless the union consents to the proposed changes.[79] Therefore, under the NLRA, the employer must continue to comply with the terms of the CBA pending termination or modification in order to be able to terminate or modify the CBA; compliance is a requirement for termination or modification.

The Code however, is clear on the requirements for rejection, and compliance with the CBA prior to rejection is not one of those requirements. Section 1113 sets forth three general requirements for the rejection of a CBA. The DIP in a chapter 11 proceeding who wishes to reject a CBA must make a proposal to the union, provide the union with relevant information, and must meet and confer in good faith with the union. Additionally, subsections (e) and (f), the labor law provisions, require compliance with the CBA, subject to a court's determination that rejection is merited. Thus, pursuant to subsections (e) and (f), continued compliance with the CBA is required prior to rejection. However, compliance is not a requirement for rejection pursuant to subsections (a) through (d).

In cases in which the DIP attempts to reject a CBA after breaching, the statutory requirements of the Code should take precedence over the requirements of the NLRA. In *United States v. LTV Corp., (In re Chateaugay Corp.)*,[80] LTV, the debtor, commenced a case under chapter 11 and listed the Environmental Protection Agency ("EPA") as the holder of several contingent claims.[81] The EPA filed a proof of claim which represented response costs incurred pre-petition, at sites where LTV was the "potentially responsible party."[82] The EPA brought an adversary proceeding

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[78] *See* NLRB. v. Manley Truck Line, Inc., 779 F.2d 1327, 1332 n.7 (7th Cir. 1985) (describing section 1113 as implementing meticulous safeguards "to insure that the interests of the union are represented and protected before any action is taken to modify the rights of its members under the collective-bargaining agreement."); *In re* Mile Hi Metal Sys., Inc., 51 B.R. 509, 510 (Bankr. Colo. 1985) (finding goal of section 1113 to provide framework for those willing to resort to bargaining as means of resolving labor disputes rather than recourse to courts). *See generally* 20 RICHARD A. LORD, WILLISTON ON CONTRACTS § 55:26 (4th ed. 2002) (describing procedures under NLRA when party wishes to terminate or modify existing collective bargaining agreement).

[79] 20 RICHARD A. LORD, WILLISTON ON CONTRACTS § 55:26, (4th ed. 2002); *see* White v. Commc'ns Workers of Am., 370 F.3d 346, 351 (3d Cir. 2004) (discussing NLRA and section 8(d), and distinguishing between assisting framework of negotiations and controlling content); New England Cleaning Serv., Inc. v. Serv. Employees Int'l Union, 199 F.3d 537, 540 (1st Cir. 1999) (expressing purpose behind section 8(d) of NLRA was to "'facilitate agreement' by giving parties to expiring collective bargaining agreements adequate time to work out their differences, free from threats of strikes or lockouts, and to place mediation services on notice that their assistance may be necessary.")

[80] 944 F.2d 997 (2d Cir. 1991).

[81] *Id.* at 999.

[82] *Id.*

for a declaratory judgment that response cost incurred post-confirmation were not dischargeable because they do not arise from pre-petition claims.[83] In considering the EPA's assertion, the Second Circuit stated that

> If the [Bankruptcy] Code, fairly construed, creates limits on the extent of environmental cleanup efforts, the remedy is for Congress to make exceptions to the Code to achieve other objectives that Congress chooses to reach, rather than for courts to restrict the meaning of across-the-board legislation like the bankruptcy law in order to promote objectives evident in more focused statutes.[84]

Similarly, courts should not restrict the application of section 1113(c) which grants a DIP the right to reject a CBA, in order to promote the objective of ensuring industrial peace as embodies in section 8(d) of the NLRA. Section 1113 was intended to override many of the provisions of the NLRA that would apply in the absence of bankruptcy.[85] Courts should not therefore impute the section 1113(f) compliance requirement into the determination of whether rejection is appropriate or not when Congress chose not to make compliance a requirement for rejection.

IV. THE MISAPPLICATION OF SECTION 1113

Courts have typically misapplied section 1113 by limiting the DIP's rejection right under one of two theories; with the same effect on a DIP's right to reject a CBA. First, the courts have held that a DIP's violation of section 1113(f) results in the constructive assumption of the CBA. Once the CBA is assumed, the claims created by the CBA are entitled to administrative expense priority[86] which must be

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[83] *Id.* at 1000.

[84] *Id.* at 1002.

[85] *See* 130 CONG. REC. S8888 (daily ed. June 29, 1984) (statement of Sen. Thurmond). Senator Thurmond stated that:

> [T]he requirement that the union refusal to accept the proposal be 'without good cause' is obviously not intended to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy court into a version of the National Labor Relations Board. Again, the intent is for these provisions to be interpreted in a workable manner.

Id.; *see also In re* Chas. P. Young Co., 111 B.R. 410, 414 (Bankr. S.D.N.Y. 1990) (holding that "[a]t first blush it may appear that Congress intended to incorporate the good faith bargaining requirement imposed by the NLRA with the policies underlying the Code and specifically § 1113. This contention, however, has been refuted by the legislative history of § 1113.").

[86] *See, e.g.*, Tool & Die Makers v. Buhrke Indus., Inc., Nos. 94-C-5728, 94-C-5729, 1996 WL 131698, at *8 (N.D. Ill. Mar. 20, 1996) (finding once CBA is "assumed," vacation pay claims qualify as administrative expenses); *see* Adventure Resources Inc. v. Holland, 137 F.3d 786, 798 (4th Cir. 1998) (observing upon assuming collective bargaining agreement, expenses and liabilities under agreement are treated as administrative expenses and afforded highest priority on debtor's estate). *See generally* NLRB v. Bildisco &

paid in full.[87] Thereafter, if the DIP is permitted to reject the CBA, the administrative expense damages claims cannot be reclassified as pre-petition claims as they would have been had rejection occurred before assumption.[88] The administrative expense claims must still be paid in full.[89] Therefore, the DIP will not have an effective way to reject the CBA.

Other courts have held that a DIP's failure to comply with the terms of a CBA without seeking interim relief under section 1113(e) forecloses the DIP's right to reject the CBA.[90] Both rulings are incorrect because, in so holding, the courts are imputing the requirements of subsections (e) and (f), the labor law subsections of section 1113, into the requirements for rejection set forth in section 1113(c). By doing so, these courts are overriding the bankruptcy policy to encourage successful reorganization of the DIP endorsed by *Bildisco* and reinforced by Congress in section 1113. These courts have placed greater barriers to rejection of a CBA than Congress has already placed within the Bankruptcy Code.

A. DIP's Failure to Comply and Section 1113(f)

A key case on which courts rely to foreclose rejection of a CBA because of a DIP's breach in violation of section 1113(f) is *United Steelworkers of Am. v. Unimet Corp.* (*In re Unimet Corp.)*.[91] The Sixth Circuit in *Unimet*, was the first Court of Appeals to decide a case concerning section 1113(f).[92] At the time Unimet filed its bankruptcy petition, the only obligation under its CBA was the obligation to pay insurance premiums for the retirees.[93] Unimet made a proposal to the union to eliminate this obligation and the union rejected the proposal.[94] Unimet then filed an application to reject the CBA pursuant to section 1113.[95] The bankruptcy court denied Unimet's application to reject. Subsequently, the bankruptcy court held that section 1113 did not apply to retirees because they were not "employees" as that term is defined in the NLRA, and that Unimet thus could not pay the retiree's claims as an administrative expense.[96] Unimet did not appeal the court's denial of its

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Bildisco, 465 U.S. 513, 522–23 (1984) (noting collective bargaining agreements are within purview of executory contracts contemplated by Congress).

[87] 11 U.S.C. § 1129(a)(9)(A) (2000).

[88] *See id.* § 365(g)(2).

[89] *See id*.

[90] *See Holland*, 137 F.3d at 798 (holding DIP who fails to reject CBA in accordance with Code assumes CBA); Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984 (2d Cir. 1990) (ruling DIP must abide with CBA in absence of court approved rejection or interim relief); Int'l Union v. Acorn Bldg. Components, Inc. (*In re* Acorn Bldg. Compents, Inc.), 170 B.R. 317, 320 (E.D. Mich. 1994) (interpreting Code to require compliance with CBA prior to court approved rejection).

[91] 842 F.2d 879 (6th Cir. 1988).

[92] *See* Kay Standridge Kress, *Last in Line: Priority of Claims Under Unmodified Collective Bargaining Agreements*, AM. BANKR. INST. J., Feb. 1997, at 36.

[93] *In re Unimet*, 842 F.2d at 880.

[94] *Id.*

[95] *Id.*

[96] *Id.* at 880–81.

motion to reject the CBA.[97] The union appealed the bankruptcy court's holding concerning the priority of the retiree's claims to the district court.[98] The district court affirmed the judgment of the bankruptcy court that section 1113 did not apply to retirees.[99]

On appeal, the issue presented to the Sixth Circuit was whether the retiree benefits could be paid as administrative expenses. The Court reversed the district court, holding that the retiree benefits had to be paid as an administrative expense, ruling that all provisions of the CBA must be complied with, including the payment of retiree benefits, until rejection was permitted by the bankruptcy court.[100] The Court reasoned that retiree benefits, which were provided for in a CBA, must be paid because section 1113(f) prohibited the modification by the DIP of any provision of the CBA without prior court approval.[101] In essence the Court held that subsection (f) imposes an obligation on the debtor to perform all obligations of the CBA.

Significantly, the Court in *Unimet* went on to state in dicta that the DIP's breach of the CBA in violation of section 1113(f) should be considered in balancing the equities under section 1113(c)(3) when a bankruptcy court decides whether rejection is appropriate.[102] The Sixth Circuit remanded the case, stating:

> In sum, our reading of 11 U.S.C. § 1113 leads us to the conclusion that Congress intended to give broad protection to collectively bargained for rights which are threatened by a corporate reorganization under [c]hapter 11 of the Bankruptcy Code. Our conclusion that 11 U.S.C. § 1113 applies to all provisions of a collective bargaining agreement does no violence to the plain language of the statute or the legislative history as we perceive it. By requiring the debtor-in-possession to establish that the equities militate in favor of rejection of the benefits collectively bargained for on behalf of retirees, we believe we strike the appropriate balance between the interests of the debtor-in-possession in effectuating a reorganization and the interests of retirees who have achieved through the collective bargaining process some measure of security. Accordingly, the judgment of the district court is reversed to the extent that it held that 11 U.S.C. § 1113 does not protect the interests of retirees.[103]

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[97] *Id.* at 880.
[98] *Id.* at 881.
[99] *Id.*
[100] *In re Unimet*, 842 F.2d. at 885–86.
[101] *Id.* at 884.
[102] *Id.* at 885.
[103] *Id.* at 885–86.

In *Unimet*, the Sixth Circuit had no need to address the balance of the equities because rejection was simply not an issue before the Court. The only issue to be decided was whether the retiree benefits should be paid as an administrative expense. Therefore, the Court's discussion of balancing the equities, a requirement for rejection, was dicta. In dicta, the Court was considering how the compliance requirement of section 1113(f) related to the requirements for rejection. The conclusion that the court reaches is that a DIP's violation of section 1113(f) does not preclude rejection of a CBA, but should be considered in the balancing of the equities determination under section 1113(c)(3).[104]

Lower courts that have followed *Unimet*, however, have misread the Sixth Circuit's limited dicta that a DIP's non-compliance should be considered when balancing the equities.[105] In later cases, the courts have held as a matter of law that a DIP's failure to abide by the terms of a CBA without first obtaining approval for rejection of the CBA from the bankruptcy court is a violation of section 1113(f)[106] and that this violation functions as a constructive assumption of the CBA.[107] As will be discussed more fully in Section IV, C, the holdings of both *Unimet* and its progeny are incorrect because they wrongfully impute the compliance requirements of section 1113(f) into the rejection requirements of section 1113(c).

Other circuit courts have arrived at the same conclusion as the post-*Unimet* lower court decisions that a DIP constructively assumes a CBA. Those circuit courts however, have ruled that section 1113(f) causes a constructive assumption as a matter of law whether there has been a violation of section 1113(f) by the DIP or not. In *In re Roth American Inc.*,[108] the DIP filed for bankruptcy under chapter 11. The DIP subsequently ceased all operations and laid off all of its employees.[109] The union representing the DIP's employees filed claims for vacation and severance pay due under a CBA[110] and asserted that the claims should be afforded an administrative expense priority.[111] On appeal to the Third Circuit the union argued that '"[s]ection 1113(f) by operation of law (and without the need for a formal

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[104] *Id.*

[105] United Steelworkers of Am. v. Ohio Corrugating Co., No. 4:90CV0810, 1991 WL 213850, at *1 (N.D. Ohio March 15, 1991) (reading *Unimet* as holding 1113(f) grants priority to CBA claims over sections 503 and 507); *In re* Arlene's Sportswear, 140 B.R. 25, 26–28 (Bankr. D. Mass. 1992) (adopting *Unimet*'s approach but failing to acknowledge significance of DIP breach in balancing equities).

[106] *See* Mass. Air Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 664 n.13 (D. Mass. 1996) (following view that section 1113 merely establishes requirements for rejection where section 507 establishes priority).

[107] *See In re* Armstrong Store Fixtures Corp., 139 B.R. 347, 348 (Bankr. W.D. Pa. 1992) (holding DIP's failure to pay wages pursuant to CBA violated section 1113, which provides requirements of rejection of CBA). *But see In re* Moline Corp., 144 B.R. 75, 79 (Bankr. N.D. Ill. 1992) (stating DIP can breach CBA without altering or terminating it and, therefore, without violating section 1113(f)).

[108] 975 F.2d 949 (3d Cir. 1992).

[109] *Id.* at 951.

[110] *Id.*

[111] *Id.* at 954.

motion) effects assumption of the agreement.'"[112] Without explaining its reasoning, the Third Circuit agreed with the union and held that Roth American had assumed the CBA by operation of law because the DIP had not sought to reject the CBA under section 1113.[113]

Citing the Third Circuit's holding in *Roth American*, the Fourth Circuit in *Adventure Resources, Inc., v. Holland*,[114] held that a CBA was constructively assumed, reasoning that section 1113(f) causes a CBA to be assumed by operation of law.[115] In *Adventure Resources*, the Fourth Circuit found that the DIP failed to make post-petition payments as required by its CBA.[116] The DIP filed an adversary proceeding to determine the viability and priority of the union's claims for the DIP's post-petition breach.[117] The Court held that the DIP's failure to comply with the CBA was a violation of section 1113(f).[118] The Court ruled that the DIP had assumed the CBA with its union as a matter of law because, by breaching the CBA in violation of section 1113(f), the DIP failed to reject the CBA in accordance with section 1113.[119]

The decisions of the courts in *American Resources*, and *Roth American* and the lower courts that have applied *Unimet* have the effect of foreclosing a DIP's ability to reject a CBA. By holding that violations of the section 1113(f) requirements effectuates a constructive assumption of the CBA by operation of law, the DIP has no means by which it can reject the CBA without incurring an administrative expense for the full amount of the obligations of the CBA. These courts have wrongfully imputed the compliance requirement of section 1113(f) into the determination of whether a CBA is assumed. The courts have thereby foreclosed the DIP's ability to reject the CBA when the DIP fails to comply with the terms of the CBA prior to court authorized rejection.

B. DIP's Failure to Comply and Section 1113(e)

Similarly, in an important case, one court has incorrectly held that a DIP's non-compliance with the terms of a CBA forecloses a DIP's ability to seek rejection because the DIP breached the CBA, as opposed to seeking interim relief under section 1113(e). In *Birmingham Musicians' Protective Ass'n v. Alabama Symphony Association (In re Alabama Symphony Association)*,[120] the DIP failed to make post-

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[112] Brief for Appellant Local 401 at 21, *In re* Roth American, Inc., 975 F.2d 949 (3d Cir. 1992) (No. 91-5564) (quoting *In re* St. Louis Globe-Democrat, Inc., 86 B.R. 606, 610 (Bankr. E.D. Miss. 1988)).
[113] *In* re Roth, 975 F.2d at 957.
[114] 137 F.3d 786 (4th Cir. 1998).
[115] *Id*. at 798.
[116] *Id*. at 791.
[117] *Id*. at 792.
[118] *Id*. at 796.
[119] *Id*. at 798.
[120] 211 B.R. 65 (N.D. Ala. 1996).

petition payments required under a CBA and subsequently applied for rejection of the CBA.[121] The union appealed the bankruptcy court's approval of the DIP's application for rejection.[122] The district court ruled that the DIP could not reject a collective bargaining agreement which it had breached.[123] The court held that the Symphony could not reject the agreement because if "the DIP is free to breach the CBA without impairing its ability to reject the contract later, then section 1113 provides no incentive to abide by the terms of the CBA in the interim."[124] The court expanded its reasoning:

> The inclusion of the emergency modification provision in section 1113(e) would be meaningless if Congress intended the DIP to be able to breach an agreement with impunity, still able to petition successfully to reject it later. There is no reason to enact an emergency provision if the law allows the DIP to stop performing its obligation under the contract prior to court intervention. The inclusion of the emergency modification provision is strong evidence that Congress envisioned no possibility of self-help modifications prior to the bankruptcy court's consideration of the petition to reject the contract.[125]

The court thus structured a remedy for breach that barred rejection. In doing so the court failed to utilize other remedies for a DIP's failure to seek interim relief; remedies unrelated to the determination whether rejection can be sought.

The court's analysis in *Alabama Symphony* was different from that in *Unimet*, *Adventure Resources*, and *Roth American*. In *Alabama Symphony* the court held that the DIP could not seek rejection because of its failure to comply with the terms of the CBA. In the cases where the lower courts misread *Unimet*, *Adventure Resources*, and *Roth American* the courts held that the DIP had constructively assumed the contract as a result of the DIP's failure to comply. The effect was the same as in *Alabama Symphony*; the DIP had no means by which it could effectively rid itself of a burdensome CBA. These courts have incorrectly imputed the section 1113(f) requirement that a DIP comply with the terms of a CBA into the determination of whether the DIP can reject a CBA.

C. The Correct Application of Section 1113

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[121] *Id.* at 68.
[122] *Id.*
[123] *Id.* at 71.
[124] *Id.* at 70.
[125] *Id.* at 71.

1. Bifurcation of Section 1113

In order to apply section 1113 properly, courts should bifurcate the statute according to its two separate purposes. Subsections (a) through (d) provide the requirements and standards by which a bankruptcy court should approve or deny a DIP's application for rejection of a CBA. Therefore, courts should look solely to the DIP's satisfaction of those requirements in determining whether a DIP's application for rejection should be approved or denied. If the DIP has satisfied the requirements and the balance of the equities tilts in favor of rejection, the DIP should be permitted to reject the CBA notwithstanding its failure to comply with the contract.

Separately, subsections (e) and (f) provide a mechanism for interim relief and require that a DIP comply with a CBA prior to court approval of rejection. As discussed, these subsections were included in the statute to overturn the Supreme Court's holding in *Bildisco* that a CBA is no longer an enforceable contract. Because section 1113(f) makes a CBA an enforceable contract courts should look to the CBA to determine whether the compliance requirement of section 1113(f) has been satisfied. If the DIP has failed to perform its contractual duties under the CBA, then the union should be allowed a claim for the damages caused by such a failure. While no specific remedy is provided by section 1113(f), the remedy should be the legal remedy of contract damages, not the equitable remedy of foreclosure of the DIP's ability to seek and obtain approval of rejection.

The courts in *Unimet*, *Adventure Resources*, and *Roth American* each misapplied section 1113(f) by imputing the sections 1113(e) and (f) compliance requirements into the determination of whether rejection is appropriate. The misapplication of section 1113(f) is a result of the courts' failure to understand the separateness of the Supreme Court's two holdings in *Bildisco* and the congressional response of section 1113. In the *Bildisco* opinion the Court asserted:

> Two important and related questions are presented by these petitions for certiorari: (1) under what conditions can a Bankruptcy Court permit a debtor-in-possession to reject a collective-bargaining agreement; (2) may the National Labor Relations Board find a debtor-in-possession guilty of an unfair labor practice for unilaterally terminating or modifying a collective-bargaining agreement before rejection of that agreement has been approved by the Bankruptcy Court.[126]

The issues however are related only in the fact that they involved the same DIP. In its opinion, the Supreme Court separates the holding that a DIP can reject a CBA

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[126] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 516 (1984).

pursuant to section 365(a) from the holding that a DIP does not commit an unfair labor practice when it unilaterally terminates a CBA before rejection has been approved by the bankruptcy court. The dispute in the first issue, rejection of a CBA, was not whether a DIP could reject a CBA, but was what standard should be applied for rejection.[127] Neither the union nor the NLRB asserted that compliance with the terms of the CBA was a requirement for rejection. Rather the appellants argued that the standard for rejection of a CBA was stricter than the business judgment standard used by the circuit court. Thus the Court's determination of the correct standard for rejection was independent of its determination of whether a CBA was an enforceable agreement between the DIP and the union prior to rejection.

The separateness of the two issues is further evidenced by how each justice ruled in the *Bildisco* opinion. The decision concerning the appropriate standard for rejection was unanimous. The decision however, that a DIP did not commit an unfair labor practice because the CBA was not an enforceable contract, was a split decision. The four justices who dissented on the latter issue believed that a DIP was bound under the NLRA to perform prior to rejection.[128] Nonetheless, those justices were not opposed to the DIP rejecting the CBA despite its failure to comply with the CBA prior to court approval of rejection. In *Bildisco* the DIP was in breach of the CBA at the time that it sought to reject the CBA. Yet, the unanimous Supreme Court did not bar rejection of the CBA. If rejection was dependent upon full compliance prior to court authorized rejection, the dissenting justices would not have agreed with the majority that the DIP should be allowed to reject the CBA. The two issues, when before the Supreme Court in *Bildisco* were independent of each other. The application of the two parts of section 1113 (one dealing with rejection and the other with compliance) should therefore be independent of each other. The inquiry as to whether rejection is appropriate is an independent analysis from whether a DIP has complied with the terms of a CBA pending rejection.

Section 1113 addresses the two issues of rejection and compliance which that before the Supreme Court in *Bildisco.* Subsections (a) through (d) provide the requirements for rejection and codify the Supreme Court's first holding in *Bildisco*. Neither the Supreme Court in *Bildisco* nor the plain language of subsections (a) through (d) limits rejection when a DIP has breached the CBA. Subsections (e) and (f) require compliance with the CBA pending rejection of the CBA, and overturn the Supreme Court's second holding in *Bildisco*. Those requirements, however, are independent of the rejection process and should not be a factor in determining whether rejection is appropriate or not.

2. Constructive Assumption

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[127] *Id.* at 522–23.
[128] *Id.* at 535 (Brennan, J., dissenting).

The courts in *Adventure Resources* and *Roth American*, incorrectly foreclosed the DIP's right to reject by holding that a CBA is constructively assumed by operation of law pursuant to section 1113(f). The purpose of rejection is to relieve the DIP from the burdensome future obligations of a losing contract. The consequences of rejection are that the debtor is deemed to have breached his executory contract and the non-breaching party is vested with a pre-petition claim under the confirmed plan that is discharged except to the extent that it is preserved by the plan or court order.[129] It is the discharge that allows the DIP to obtain a "fresh start"; one of the primary policies of the Code.[130] Constructive assumption forecloses discharge because when an executory contract is assumed, the liabilities under the contract become post-petition obligations that cannot be discharged.[131] Therefore, by holding that section 1113(f) effectuates a constructive assumption, the courts deprive the debtor of an effective means of dealing with the debt and thereby the fundamental right in bankruptcy of the discharge.

Additionally, the constructive assumption theory of these cases is contrary to the established principles that a contract cannot be assumed except as authorized by a court. Section 1113(a) provides that a DIP "may assume or reject a collective bargaining agreement only in accordance with the provisions of this section."[132] There are no provisions in section 1113 that deal with assumption. Thus, section 365 must govern the assumption of all executory contracts, including CBAs. Most courts have recognized that a CBA must be assumed in compliance with section 365(a).[133] In order to assume a contract under section 365, the DIP must make a

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[129] *See* 11 U.S.C. § 365(g) (2000); Silk Plants, Etc. Franchise Sys., Inc. v. Register (*In re* Register), 95 B.R. 73, 74 (Bankr. M.D. Tenn. 1989) (affirming effect of rejection of executory contract is a breach on which the other party may file a claim); *see also In re* Alongi, 272 B.R. 148, 153 (Bankr. D. Md. 2001) ("All monetary claims by the non-debtor party whether existing or arising from the rejection breach, are subject to discharge, which furthers the debtor's fresh start.").

[130] *See* BFP v. Resolution Trust Corp., 511 U.S. 531, 563 (1994) (indicating core policies of Code are equitable distribution for creditors and fresh start for debtors); Grogan v. Garner, 498 U.S. 279, 286 (1991) (defining fresh start policy as procedure by which debtor can reorder affairs, make peace with creditors and enjoy 'a new opportunity in life . . . .' (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 244 (1934))); Snoke v. Riso (*In re* Riso), 978 F.2d 1151, 1154 (9th Cir. 1992) ("One of the fundamental policies of the Bankruptcy Code is the fresh start afforded debtors through the discharge of their debts.").

[131] *In re* Nat'l Gypsum Co., 118 F.3d 1056, 1070 (5th Cir. 1997) (finding section 1141(d)(1) of the Code, which states that plan confirmation discharges chapter 11 debtor from pre-confirmation debts, subject to certain exceptions, "cannot be read to provide for discharge of amounts in default under assumed executory contracts . . . .").

[132] 11 U.S.C. § 1113(a) (2000).

[133] *See, e.g.*, Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 82 (3d Cir. 1999) (holding section 365, not section 1113, governs assumption of CBAs); Wien Air Alaska, Inc. v. Bachner, 865 F.2d 1106, 1111 n.5 (9th Cir. 1989) (rejecting argument that procedures in section 1113 apply when debtor assumes CBA); United Food & Commercial Workers Union v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 901–02 (B.A.P. 8th Cir. 2001) (invoking line of authority holding section 365 governs assumption of CBAs); Mass. Air Conditioning & Heating Corp. v. McCoy, 196 B.R. 659, 662–63 (D. Mass. 1996):

motion and there must be notice and a hearing.[134] A DIP must also cure all existing defaults prior to assumption of an executory contract.[135] It has been a long-standing holding of many courts that a DIP's attempt to assume an executory contract without curing defaults and providing adequate assurance of future performance is ineffective.[136]

The Bankruptcy Appellate Panel in *United Food & Commercial Workers Union v. Family Snacks, Inc. (In re Family Snacks, Inc.)*[137] held that the denial of an application to reject did not result in the automatic assumption of the CBA;[138] an assertion that undermines the theory of constructive assumption because it affirms the need for a motion by the debtor to assume a CBA. In rejecting the automatic assumption argument, the court forcefully argued why assumption without the procedural protections of section 365 should not be permitted. The court stated:

> [T]he notion that the CBA remains operative during the course of the bankruptcy prior to rejection is wholly separate and distinct from the notion that the debtor has affirmatively assumed the CBA and undertaken all of the obligations that accompany such a decision under section 365. The debtor alone determines whether and when within the course of the bankruptcy case to seek assumption of the CBA under section 365 or rejection of that agreement under section 1113.[139]

The BAP in *Family Snacks* not only correctly ruled that a CBA cannot be assumed by any method other than that proscribed in section 365, but also affirmed the

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> [D]espite § 1113(a)'s purported applicability to both assumption and rejection, the remaining and operative subsections deal exclusively with rejection and modification . . . . [G]iven the plain language of § 1113(b)-(f) . . ., and the remedital purpose behind its enactment . . ., I find that the use of the term assumption in § 1113(a) was at most sloppy legislative drafting . . . . Section 1113 is designed to provide additional procedural requirements for rejection or modification of collective bargaining agreements, and only to that degree supersedes and supplements the provision in § 365.

Id.

[134] Chabat v. Tleel, (*In re* Tleel), 876 F.2d 769, 771 (9th Cir. 1989) ("Section 365 and Bankruptcy Rules 6006(a) and 9014 require the DIP to file a formal motion to assume, providing reasonable notice and an opportunity for a hearing.").

[135] 11 U.S.C. § 365(b)(1)(A) (2000).

[136] City of Covington v. Covington Landing Ltd. P'ship, 71 F.3d 1221, 1226 (6th Cir. 1995) (requiring debtor to cure default, compensate counterparty for pecuniary loss, and provide adequate assurance of future performance before assuming any contract); Krikor Dulgarian Trust v. Unified Mgmt. Corp. of Rhode Island, Inc. (*In re* Peaberry's Ltd.), 205 B.R. 6, 9 (B.A.P. 1st Cir. 1997) (noting section 365 allows lessor of debtor's unexpired lease to insist upon adequate assurance of cure as a prerequisite to assumption); Kroger Co. v. SuperX of Arizona, Alabama and Georgia Corp. (*In re* Defender Drug Stores, Inc.), 127 B.R. 225, 233 (B.A.P. 9th Cir. 1991) (reporting section 365(b)(1)(A) requires DIP to cure defaults before assumption).

[137] 257 B.R. 884 (B.A.P. 8th Cir. 2001)

[138] *Id.* at 907 (noting that denial of rejection application could be followed by renewed motion under changed circumstances).

[139] *Id.*

separateness of the rejection subsections (subsections (a) through (d)) of section 1113 from the compliance subsections (subsections (e) and (f)).[140]

3. Section 1113(f) and the Balance of the Equities

The courts that have followed and misapplied the dicta of the Sixth Circuit in *Unimet* are in error because they impute the section 1113(f) requirement that a DIP comply with the CBA into the requirements for rejection found in section 1113(a) through (d). In *Unimet*, the Sixth Circuit ruled that a DIP's non-compliance with the terms of a CBA should be considered in the determination of whether the balance of the equities favors rejection.[141] *Unimet's* progeny however, have held that a DIP's non-compliance is a bar to rejection as a matter of law.

Courts have widely recognized that there are nine requirements for rejection included in subsections (a) through (d).[142] The requirements for rejection include:

> 1. The [DIP] must make a proposal to the Union to modify the collective bargaining agreement.
> 2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
> 3. The proposed modifications must be necessary to permit the reorganization of the debtor.
> 4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
> 5. The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.
> 6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.
> 7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
> 8. The Union must have refused to accept the proposal without good cause.
> 9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.[143]

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[140] *Id.* at 891, 906–07

[141] United Steelworkers of Am. v. Unimet Corp. (*In re* Unimet Corp.), 842 F.2d 879, 882–86 (6th Cir. 1988)

[142] *See In re* American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (establishing nine part test); *see also In re* Lady H Coal Co., 193 B.R. 233, 241 (Bankr. S.D. W. Va. 1996) (listing courts that have previously utilized nine part test).

[143] *In re American Provision*, 44 B.R. at 909.

Compliance with the CBA pursuant to section 1113(f) is not one of these nine requirements for rejection. The assertion that compliance with the CBA is not a requirement is supported by the language of the statute itself. Subsection (a) states that a CBA can only be rejected in accordance with the provisions of section 1113.[144] Because subsections (a) through (d) contain no requirement of compliance with the CBA as a requirement for rejection, courts incorrectly apply the statute by adding such an additional requirement. It is not within the purview of the courts to place "greater barriers to assumption or rejection of executory contracts than Congress has already placed within the Bankruptcy Code."[145]

The analysis of the Sixth Circuit in *Unimet* is likewise incorrect. The Court ruled that the DIP's non-compliance should be considered in making the determination under section 1113(c)(3) whether the equities balance in favor of rejection. This ruling requires a retrospective evaluation of the DIP's conduct in determining the balance of the equities. The Supreme Court in *Bildisco* however, prescribed a prospective evaluation of the effect of rejection on the parties in interest. "While new procedural requirements have been imposed, the approach to the required balancing of the equities should not be different from the instruction provided in *Bildisco*."[146] In *Bildisco* the Supreme Court was clear that the standard for rejection is whether the equities balance in favor of rejection thereby advancing the reorganization of the DIP. Nor is there any indication that Congress intended to change the Bildisco balance of the equities standard for approval of rejection. The *Bildisco* Court stated:

> The Bankruptcy Court must make a reasoned finding on the record why it has determined that rejection should be permitted. Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance [of the DIP's application to reject] and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.
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> The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the

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[144] 11 U.S.C. § 1113(a) (2000).
[145] *In re* Concrete Pipe Mach. Co., 28 B.R. 837, 840 (Bankr. D. Iowa 1983).
[146] Int'l Bhd. of Teamsters v. IML Freight, Inc., 789 F.2d 1460, 1461 (10th Cir.1986).

> Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue.[147]

In explaining how to "balance the equities" the Court instructed the courts to look to the future effects of approving rejection or denying rejection. Nowhere did the Court hold that the courts should look to past performance of the CBA to determine whether the balance of the equities mitigate in favor of rejection. A pre-rejection breach is therefore irrelevant. The hardship that employees face in the future as a result of the DIP's rejection of the CBA is not affected by the DIP's breach. Furthermore, the DIP must fully compensate the employees for the post-petition, pre-rejection breach as an administrative claim that must be paid in full at confirmation.[148] As a result, the pre-rejection breach does not give rise to any equities that need to be balanced. The Sixth Circuit was therefore incorrect in its dicta that the DIP's non-compliance with the terms of the CBA should be considered in balancing the equities. By so ruling, the Court wrongfully imputed the section 1113(f) requirement that a debtor comply with the terms of the CBA into the determination of whether the DIP's application for rejection of a burdensome CBA should be granted.

V. REMEDIES FOR FAILURE TO COMPLY WITH THE TERMS OF A CBA.

The remedy for a DIP's violation of section 1113(f) should be a claim for the difference between what the DIP has paid, and what the CBA requires. Section 1113(f) is similar to section 365(d)(3) which does not have a prescribed remedy, but requires a DIP to "timely perform all the obligations of the DIP, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected."[149] Courts have held that section 365(d)(3) gives the landlord a claim for the full amount of the rent due under the lease during the post-petition period.[150]

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[147] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 527 (1984).

[148] 11 U.S.C. §§ 1129(a)(9), 507(a)(2) 503(b) (2000).

[149] *Id.* § 365(d)(3).

[150] Towers v. Chickering & Gregory (*In re* Pacific-Atlantic Trading Co.), 27 F.3d 401, 405 (9th Cir. 1994) (finding section 365(d)(3) secures for lessor full amount of rent during period DIP is deciding to assume or reject lease); Temecula v. LPM Corp. (*In re* LPM Corp.), 300 F.3d 1134, 1138 (9th Cir. 2002) (interpreting section 365(d)(3) broadly to give claims for post-petition rent "administrative priority, even if those claims exceed the reasonable value of the debtor's actual use of the property . . . .").

Similarly, a DIP's violation of section 1113(f) should give the employees a claim for the full amount of the payments due under the CBA.[151]

While determining the amount of the damages claim for a DIP's violation of section 1113(f) is relatively simple, courts have split over the priority to be afforded the damages claim. Some courts have held that section 1113(f) requires that the damage claim be granted an administrative expense priority.[152] These courts have reasoned that prioritizing the damages claim according to section 507 would allow the DIP to unilaterally modify the terms of the CBA in violation of section 1113(f).[153] The majority of courts however, have held that a damages claim for a violation of section 1113(f) should be granted a priority only in accordance with section 507.[154] These courts reasoned that "[j]udicial ordering of benefit claims pursuant to section 507 is not equivalent to employer avoidance of obligations under a collective bargaining agreement. The collective bargaining agreement is respected, but the financial obligations issuing from it are accorded priority consistent with the Bankruptcy Code."[155]

A DIP can avoid suffering such a claim however, by seeking interim relief pursuant to section 1113(e). Section 1113(e) provides a safe-haven for DIPs who would be faced with liquidation if they cannot be relieved to some extent of financial burdens under a CBA. The modifications made pursuant to section 1113(e) are not unilateral modifications made by the DIP. Rather, they are court sanctioned modifications to the CBA, not a final repudiation of the contract that creates a claim.[156] When the DIP comes to the court, requests and is granted interim

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[151] *See* Air Line Pilots Ass'n, Int'l v. Continental Airlines, Inc. (*In re* Continental Airlines Corp.), 901 F.2d 1259, 1260 (5th Cir. 1990) (holding difference between wages and benefits set out in agreements and wages and benefits actually paid was measure of damages); *In re* Roth, Inc., 120 B.R. 356, 360 (Bankr. M.D. Pa. 1990) (finding employees could only receive damages in amount of wages called for in the CBA less those wages actually received).

[152] *See, e.g.*, Int'l Union v. Acorn Bldg. Components, Inc. (*In re* Acorn Bldg. Components, Inc.), 170 B.R. 317, 319–20 (E.D. Mich. 1994) (determining claims under section 1113(f) should get administrative priority); *In re* Arlene's Sportswear, Inc., 140 B.R. 25, 27–28 (Bankr. D. Mass. 1992) (adopting view that claims under section 1113(f) enjoy super-priority trumping section 507); *In re* Golden Distribs., Ltd., 152 B.R. 35, 37 (S.D.N.Y. 1992) (affirming section 1113(f) creates super-priority for claims arising from post-petition payments under CBAs).

[153] *Acorn Bldg.*, 170 B.R. at 121.

[154] *See, e.g.*, Air Lines Pilots Ass'n, Int'l. v. Shugrue (*In re* Ionosphere Clubs, Inc.), 22 F.3d 403, 406 (2d Cir. 1994) (finding priority scheme of section 507 does not conflict with purpose of section 1113); *In re* Spirit Holding Co., Inc., 157 B.R. 879, 882 (E.D. Mo. 1993) ("Congress failed to either include specific language in § 1113 overriding § 507 or amend § 507 to give super-priority status to [claims] arising under collective bargaining agreements, ..."); *In re* Armstrong Store Fixtures Corp., 135 B.R. 18, 22 (Bankr. W.D. Pa. 1992) (reasoning Congress did not intend section 1113(f) to render a specific section of the Code inoperative).

[155] *Air Line Pilots Ass'n*, 22 F.3d at 407.

[156] United Food & Commercial Workers Union v. Almac's Inc., 90 F.3d 1, 5 (1st Cir. 1996) (noting section 1113(e) speaks of "interim changes" and "rejection" separately such that one could not be found to result in the other); Landmark Hotel & Casino, Inc. v. Las Vegas Culinary Workers Union (*In re* Landmark Hotel & Casino, Inc.), 872 F.2d 857, 860 (9th Cir. 1989) (holding bankruptcy court's grant of interim relief under section 1113(e) could not be reviewed because it did not constitute final order of rejection).

relief, the DIP has complied with section 1113 and obtained permission to modify the rights of the union employees and no claim is created on behalf of the injured employees.[157] Thus, 1113(e) should be viewed as a carrot, enticing the DIP to come before the court and request relief, and not a stick, as the court in *Alabama Symphony* employed the statute, which is used to beat the DIP into submission.

VI. EFFECT OF REJECTION

Courts have split over the effect of rejection of a CBA on the parties to the contract. Some courts have held that the effects of rejection are governed by section 365(g).[158] These courts hold that rejection of a CBA constitutes a pre-petition breach of the contract and that the claims arising from breach are general unsecured claims unless the claims qualify for an administrative expense under section 507.[159] Other courts however have held that the provisions of section 365(g) do not apply to CBAs and that all pre- and post-petition benefits under a CBA must be paid as an administrative expense until the DIP is allowed to reject.[160] These courts reason that treatment of employees' claims under a priority distribution scheme generally applicable to all claims against the bankruptcy estate, such as section 507, would permit the debtor to avoid payment, at least in part, in violation of the specific bankruptcy provision in section 1113(f) prohibiting any unilateral termination or modification of the terms of a CBA.[161] Still another court has held that because section 1113 does not contain a provision similar to section 365(g), no claim is created by a DIP's rejection of a CBA.[162]

The better conclusion is that the effects a DIP's rejection of a CBA is controlled by section 365(g). A CBA is an executory contract, the assumption and rejection of

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[157] *United Food*, 90 F.3d at 6.

[158] *See, e.g.*, O'Neill v. Continental Airlines, Inc. (*In re* Continental Airlines, Inc.), 981 F.2d 1450, 1460 (5th Cir. 1993) (affirming claims for CBA rejection damages are treated as pre-petition claims pursuant to section 365(g)); *see also* United Food & Commercial Workers Union v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 900 (B.A.P. 8th Cir. 2001) (reporting split among courts regarding whether section 1113 displaces section 365(g)).

[159] U.S. Truck Co., Inc. v. Teamsters Nat'l Freight Indus. Negotiating Comm. (*In re* U.S. Truck Co., Inc.), 89 B.R. 618, 623 (E.D. Mich. 1988) (reasoning claims from rejected CBAs are treated same as other pre-petition unsecured debts); *In re* Horsehead Indus., Inc., 300 B.R. 573, 587 (Bankr. S.D.N.Y. 2003) (stating rejection of CBAs relegates employee damage claims to status of unsecured debt)

[160] *See, e.g.*, Int'l Union v. Acorn Bldg. Components, Inc. (*In re* Acorn Bldg. Compents, Inc.), 170 B.R. 317, 320 (E.D. Mich. 1994) (declaring section 1113(f) gave claims for post-petition wages and benefits administrative priority); Teamsters Indus. Sec. Fund v. World Sales, Inc. (*In re* World Sales, Inc.), 183 B.R. 872, 878 (B.A.P. 9th Cir. 1995) (finding 1113(f) would be violated if claims under rejected CBAs were treated as general unsecured claims); *see also In re* Colorado Springs Symphony Orchestra Ass'n, 308 B.R. 508, 521–22 (Bankr. D. Colo. 2004) (holding rejection of CBA is breach at time of rejection, rather than time of filing).

[161] *Acorn Bldg.*, 170 B.R. at 320.

[162] Southern Labor Union v. Blue Diamond Coal Co. (*In re* Blue Diamond Coal Co.), 160 B.R. 574, 576–77 (E.D. Tenn. 1993) (suggesting Congress did not intend to allow claims for damages on rejected CBAs when it enacted section 1113).

which is still controlled by section 365 except to the extent that section is superseded by section 1113.[163] Therefore, rejection of a CBA should be considered a pre-petition breach of the CBA, and all claims resulting from the breach must be general unsecured claims except those claims that are priority claims pursuant to section 507.

VII. CONCLUSION

Courts which have imputed the section 1113(f) requirement of compliance with a CBA attempt to provide a remedy for the DIP's violation of this statute. In doing so, the courts have wrongfully established a requirement for rejection in addition to the requirements that Congress prescribed. Thus, these courts have frustrated the policies of the Bankruptcy Code by restricting a DIP's ability to reject a CBA and thereby restricting a DIP's ability to successfully reorganize.

The impetus of section 1113 was the Supreme Court's decision in the case of *NLRB v. Bildisco & Bildisco*. In that decision, the Court allowed a DIP to reject a CBA despite the fact that the DIP had breached the CBA post-petition. The Court proceeded to enumerate the standards that courts should use in deciding whether to allow a DIP to reject a CBA or not. Congress subsequently codified those requirements for rejection in section 1113(a) through (d). Congress, however, reversed the second part of the Court's holing in *Bildisco* that a DIP was not bound by a CBA post-petition.

A DIP's post-petition breach of a CBA, while a violation of section 1113(f), does not bear on the DIP's right to subsequently reject the CBA. The plain language of section 1113(a) through (d) unambiguously sets forth the requirements and procedures for rejection of a CBA. If the DIP satisfies those requirements and the balance of the equities clearly favors rejection of the CBA, courts should allow rejection regardless of whether the DIP complied with the section 1113(f) requirement.

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[163] United Food & Commercial Workers Union v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 900 (B.A.P. 8th Cir. 2001).