IGNORED CONSEQUENCES—THE CONFLICTING POLICIES OF LABOR LAW AND BUSINESS REORGANIZATION AND ITS IMPACT ON ORGANIZED LABOR

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INTRODUCTION

Labor law is founded on the principal of equalizing the bargaining power between employers and employees. The primary goals of labor law are to foster labor stability through protecting employees' rights to collectively bargain, to require an employer to bargain in good faith with organized labor before acting unilaterally to modify wages or other conditions of employment under a collective bargaining agreement, promoting industrial peace and avoiding industrial strife which interfere with the normal flow of commerce.[1]

Bankruptcy law is founded on the similarly laudable principal of enabling a debtor to obtain an economic "fresh start" while ensuring equitable treatment of creditors.[2] Within the chapter 11 reorganization context of the Bankruptcy Code,[3] one of the primary goals of bankruptcy law is to enable the rehabilitation of the debtor's operations.[4] To do so, a debtor may need to eliminate certain burdensome obligations, including obligations under executory contracts.[5]

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[1] *See* 29 U.S.C. § 151 (2006) (stating that commerce and industry are promoted by protecting employees' right to bargain collectively); Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a Collective Bargaining Agreement in a Corporate Reorganization*, 64 AM. BANKR. L.J. 133, 139–40 (1990) (discussing the goal of The National Labor Relations Act ("NLRA") to foster labor stability through the enforcement of collective bargaining agreements); *see also* Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 349 B.R. 338, 372 (Bankr. S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007) (noting that the NLRA is concerned with promoting industrial peace and protecting employees' rights).

[2] *See, e.g.*, Magic Valley Evangelical Free Church, Inc. v. Fitzgerald (*In re* Hodge), 220 B.R. 386, 392 (D. Idaho 1998) (pointing to the two main principles of the Bankruptcy Code ("Code"): (1) to ensure equitable treatment of the creditors of bankrupt creditors; and (2) to provide the debtor with a fresh start financially); *see also* Ascencio v. Ramirez, 36 B.R. 943, 945 (D.V.I. 1984) (emphasizing that "[t]he Bankruptcy Code was drafted to provide for an efficient, final resolution of debtor-creditor problems, as well as to grant the debtor a fresh start"); Daniel S. Ehrenberg, *Rejecting Collective Bargaining Agreements Under Section 1113 of Chapter 11 of the 1984 Bankruptcy Code: Resolving the Tension Between Labor Law and Bankruptcy Law*, 2 J.L. & POL'Y 55, 59 (1994) (acknowledging the primary purpose of the Code is to allow debtor to relieve itself of its debts and begin fresh start).

[3] *See generally* 11 U.S.C. § 1101 (2006) *et seq.*

[4] *See, e.g.*, FBI Distribution Corp. v. Official Comm. of Unsecured Creditors (*In re* FBI Distribution Corp.), 330 F.3d 36, 41 (1st Cir. 2003) ("The paramount objective of a Chapter 11 reorganization is to rehabilitate and preserve the value of the financially distressed business."); *In re* Ionosphere Clubs, Inc., 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989) ("[T]he paramount policy and goal of Chapter 11, to which all other

When these two venerable bodies of law collide, friction is likely to result. This tension is most evident when a debtor in bankruptcy seeks to modify the terms of its contractual relationship with its organized labor force. Specifically, section 1113 of the Bankruptcy Code permits a debtor to reject a collective bargaining agreement, after making a proposal to the union accompanied by the kind of relevant and reliable information needed to evaluate the proposal and bargaining in good faith with the union, if the Bankruptcy Court determines (among other things) that the union refused to accept the debtor's proposal without good cause, the balance of the equities clearly favors rejection of the collective bargaining agreement and that rejection is necessary to permit the reorganization of the debtor.[6]

The decisions addressing section 1113 of the Bankruptcy Code reflect the struggle of courts in attempting to reconcile the competing policy goal of labor law to protect the collective bargaining process with the bankruptcy law goal to allow a debtor to reorganize its business by relieving itself of burdensome obligations. Some courts describe the impact of section 1113 of the Bankruptcy Code as "draconian to labor unions."[7] While other courts view modification of a collective bargaining agreement under section 1113 of the Bankruptcy Code like "naval damage control" to a ship torpedoed at sea—the loss of certain bargained for labor benefits is not something good or pleasing to contemplate, but without it the debtor together with its labor force will sink.[8]

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bankruptcy policies are subordinated, is the rehabilitation of the debtor."); *see also* Ehrenberg, *supra* note 2, at 59 ("The primary purpose of Chapter 11 of the Bankruptcy Code is to permit a debtor, under court supervision, to rehabilitate and reorganize its business.").

[5] *See* 11 U.S.C. § 365 (2006); Johnson v. Fairco Corp., 61 B.R. 317, 319 (N.D. Ill. 1986) (stressing that 11 U.S.C. § 365(a) provides for debtor's right to reject any executory contract); Cuevas, *supra* note 1, at 134 ("[T]he Bankruptcy Code . . . allows a business to purge itself of burdensome executory contracts"); Ehrenberg, *supra* note 2, at 60 (stating that debtor may unilaterally reject executory contract under chapter 11 proceeding).

[6] *See* 11 U.S.C. § 1113(b) (2006); Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (*In re* Nw. Airlines Corp.), 483 F.3d 160, 166 (2d Cir. 2007) (setting forth factors necessary for bankruptcy court to determine that debtor may reject collective bargaining agreement in favor of reorganization of debtor's business); Century Brass Prods., Inc. v. Int'l Union (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 273 (2d Cir. 1986) (enumerating standards set out in section 1113 for rejection of labor contract in favor of business reorganization of debtor).

[7] Ass'n of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc., 350 B.R. 435, 443 (D. Minn. 2006). *See* Anthony Michael Sabino, *"Sound Collision": Federal Labor Law and the Bankruptcy Code Collide in This Year's Airline Bankruptcies*, 1 ANN. SURV. BANKR. L. § 2 (2007) (examining Judge Davis' opinion in *Association of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc.*). *See generally* Simon C. Parker, *Law and the Economics of Entrepreneurship*, 28 COMP. LAB. L. & POL'Y J. 695, 710 (2007) (discussing benefits of non-draconian bankruptcy laws in relation to debtor).

[8] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 87 (2d Cir. 1992) (acknowledging that modification of collective bargaining agreement is not an ideal resolution, but it is often a necessary step to ensure that both debtor and labor union survive bankruptcy proceedings intact). *See In re* Delta Air Lines, 351 B.R. 67, 76 (Bankr. S.D.N.Y. 2006) (holding that a modification to labor agreement was necessary to permit reorganization of debtor in order for it to compete in airline market); *see also* Jeffrey W. Berkman, Note, *Nobody Likes Rejection Unless You're a Debtor in Chapter 11: Rejection of Collective Bargaining Agreements Under 11 U.S.C. 1113*, 34 N.Y.L. SCH. L. REV. 169, 184 (1989) (observing how congressional intent behind section 1113 of the Code was meant to promote

Regardless of the benefits that a debtor may receive in bankruptcy from section 1113 of the Bankruptcy Code, the impact is only temporary for if the debtor is successful in emerging from bankruptcy, it will still be bound by and must bargain with labor for future services within the constraints of the National Labor Relations Act or the Railway Labor Act, as applicable.

I. EVENTS LEADING TO THE ENACTMENT OF SECTION 1113 OF THE BANKRUPTCY CODE

The National Labor Relations Act ("NLRA")[9] was a New Deal enactment which sought to provide labor unions an enforceable voice at the bargaining table with respect to negotiated terms and conditions of employment by entities meeting the definition of "employer".[10] Once recognized or certified by the collective bargaining agent, collective bargaining is mandatory[11] and courts are without jurisdiction to enjoin lawful strikes in support of the collective bargaining right.[12]

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compromise between labor and bankruptcy law which, is necessary to reach a suitable resolution for the parties involved).

[9] *See generally* 29 U.S.C. §§ 151–169 (2006). The Railway Labor Act ("RLA"), which was enacted prior to the NLRA, similarly establishes the rights of railway and air carrier employees to join labor unions and bargain collectively, and sets forth procedures for the orderly resolution of all disputes concerning rates of pay or working conditions. *See* 45 U.S.C. §§ 151–188 (2006); Bhd. of Maint. of Way Employees Div./IBT v. Union Pac. R.R. Co., 460 F.3d 1277, 1282 (10th Cir. 2006) (discussing general framework of the RLA, which was meant to resolve labor disputes between employers and carrier employees through collective bargaining). *See generally* Kenneth A. Sprang, *Beware the Toothless Tiger: A Critique of the Model Employment Termination Act*, 43 AM. U. L. REV. 849, 855 n.21 (1994) (noting that the RLA established the right of railway and airline workers to join unions to resolve labor disputes through collective bargaining).

[10] 29 U.S.C. § 152(2) ("The term 'employer' includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization."). *See generally In re* San Rafael Baking Co., 218 B.R. 860 (B.A.P. 9th Cir. 1998) (highlighting that the purpose of the NLRA is to give employees equal bargaining power, thereby prohibiting employers from refusing to bargain collectively with employees' representatives); *In re* Allied Supermarkets, Inc., 32 B.R. 286, 294 (Bankr. Mich. 1983) (noting that the NLRA provides for the selection of employee representatives for the purpose of collectively bargaining with employers).

[11] *See* Ariz. Governing Comm. for Tax Deferred Anuity and Deferred Comp. Plans v. Norris, 463 U.S. 1073, 1090 (1983) (citing Ford Motor Co. v. N.L.R.B., 441 U.S. 488, 497, 501 (1979)) (noting that those items found to be an aspect of the relationship between employer and employee are subject to mandatory collective bargaining under NLRA); *In re* Delta Air Lines, Inc., 359 B.R. 491, 506–07 (Bankr. S.D.N.Y. 2007) (mentioning mandatory nature of collective bargaining); 48A AM. JUR. 2D *Labor and Labor Relations* § 2226 (providing rule that employers cannot refuse to bargain with certified union).

[12] *See* 29 U.S.C. §§ 101–115 (2006). The Norris-LaGuardia Act, enacted in 1932, deprives federal courts of jurisdiction to issue injunctions in most circumstances relating to labor disputes. *See* 29 U.S.C. § 104 (enumerating specific acts involving or growing out of any labor dispute that are not subject to restraining orders or injunctions); U.S. Steel Corp. v. United Mine Workers of America, 519 F.2d 1236, 1242 (5th Cir. 1975) ("In broad language, the [Norris-Laguardia] Act removed from federal courts jurisdiction to issue injunctions 'in any case involving or growing out of any labor dispute . . . .'").

This right of employees to organize and to bargain with their employer over terms and conditions of employment became the congressionally stated public policy.[13]

When Congress enacted the Bankruptcy Reform Act in 1978, reorganization of a distressed business under a new model (chapter 11) became a competing statement of public policy. Under the new chapter 11, rejection of executory contracts was a powerful tool in the process of reorganizing a distressed business.[14] It does not appear that much thought was given to whether an executory labor agreement could be rejected. This question was settled by the United States Supreme Court in *NLRB v. Bildisco & Bildisco,*[15] in 1984 when the Supreme Court held that a collective bargaining agreement under the NLRA was an "executory contract" within the meaning of section 365 of the Bankruptcy Code and that a chapter 11 debtor could reject a collectively bargained agreement so long as the debtor showed the existing agreement was a burden to debtor's estate and that a balance of equities favored rejection.[16] The Court also sought to reconcile the competing public policy considerations by holding that a chapter 11 debtor's rejection of the labor agreement or its unilateral altercation of terms of the agreement prior to the Bankruptcy Court's authorizing rejection of the contract did not amount to an unfair labor practice under the NLRA.[17]

The *Bildisco* decision was (rightly) viewed by labor as altering the public policy stated by Congress in enacting the NLRA. Labor appealed to Congress and in the very next session, Congress responded by enacting section 1113 of the Bankruptcy Code.[18] Although labor sought a legislative overrule of *Bildisco,* what it got was a statute which expanded and codified the ruling in *Bildisco*.

II. REQUIREMENTS FOR REJECTION OF A COLLECTIVE BARGAINING AGREEMENT PURSUANT TO SECTION 1113 OF THE BANKRUPTCY CODE

The requirements precedent to the rejection of a collective bargaining agreement are specific and mandatory. After the commencement of the bankruptcy case but prior to filing a motion seeking rejection of the collective bargaining

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[13] *See* 29 U.S.C. § 151 (2006) (declaring that the public policy of the United States is "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining").

[14] *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 550 (1984) (Brennan, J., concurring in part and dissenting in part) ("As the Court correctly points out, the primary goal of Chapter 11 is to enable a debtor to restructure his business so as to be able to continue operating. Unquestionably, the option to reject an executory contract is essential to this goal.") (citations omitted); s*ee also* Johnson v. Fairco Corp., 61 B.R. 317, 319 (Bankr. N.D. Ill. 1986) (referring to section 365(a) and the ability of debtor to assume or reject an executory contract); Ehrenberg, *supra* note 2, at 60.

[15] 465 U.S. 513 (1984).

[16] *See id.* at 516.

[17] *See id.* at 516–17.

[18] *See In re* Family Snacks, Inc., 257 B.R. 884, 890 (B.A.P. 8th Cir. 2001) ("Given this legislative history, it is often said that § 1113 is designed to 'prevent [the debtor] from using bankruptcy as a judicial hammer to break the union.'" (quoting New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992))).

agreement, the debtor must make a proposal to the authorized representative of the union that is "based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employee benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all affected parties are treated fairly and equitably."[19] The debtor must also provide the authorized representative with "such relevant information as is necessary to evaluate the proposal."[20] After making the proposal and continuing until such time as a hearing is held on a motion seeking rejection of the collective bargaining agreement, the debtor must "meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."[21] As such, section 1113(b) of the Bankruptcy Code reinforces the principle of bargained resolutions but, where there is a legitimate impasse, provides for rejection or modification of the collective bargaining agreement.[22]

In order for a Bankruptcy Court to approve a proposed rejection of a collective bargaining agreement, the following requirements must be met: (i) the debtor must make a proposal for modifications necessary to its reorganization based on the most reliable information available at the time; (ii) the union must reject the proposal without good cause; and (iii) the balance of the equities must clearly favor rejection of the agreement.[23]

In interpreting the requirements of section 1113(c) of the Bankruptcy Code, courts have developed the following nine-factor test:

> (1) The debtor-in-possession 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;

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[19] 11 U.S.C. § 1113(b)(1)(A) (2006).
[20] 11 U.S.C. § 1113(b)(1)(B).
[21] 11 U.S.C. § 1113(b)(2).
[22] *See* Royal Composing Room, Inc. v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 848 F.2d 354, 354–55 (2d Cir. 1988) (stating that, "although section 1113 does require bargaining between employees and financially unsuccessful management, it does not absolutely obligate a union to negotiate regardless of the terms of management's proposal"); Adventure Res. Inc. v. Holland, 137 F.3d 786, 796 n.13 (noting that, in the event of an impasse, the bankruptcy court may permit debtor's rejection, provided they have complied with section 1113(c)); *see also* Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 90 (2d Cir. 1987) (concluding debtor has burden to justify rejection of collective bargaining agreement in good faith with necessary changes to allow for successful reorganization).
[23] *See* 11 U.S.C. § 1113(c) (2006) (stating circumstances when court shall approve rejection of collective bargaining agreement).

> (5) The debtor must provide the union with such relevant information as is necessary to evaluate the proposal;
> (6) Between the time for the making of the proposal and the time of the hearing on the 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 to attempt to reach mutually satisfactory modifications of the collective bargaining agreement;
> (8) The union must have refused to accept the proposal without good cause; and,
> (9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.[24]

Timing is an important consideration. A motion to reject may be filed by a debtor at any time but, once filed, requires the Bankruptcy Court to schedule a hearing within fourteen days, with a possible extension of an additional seven days if circumstances "where the circumstances of the case, and the interests of justice" so require.[25] The parties to the dispute may agree to further extensions of time for the commencement of the hearing,[26] though the statute mandates a court ruling within thirty days of opening of the hearing, again with the parties able to agree to an extension of that time.[27] If the Bankruptcy Court does not rule on the motion seeking rejection within the prescribed time period (or such extended period as agreed to by the parties), the debtor may terminate or alter any provision of the collective bargaining agreement pending a ruling by the Bankruptcy Court on the motion.[28]

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[24] *In re* Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (dictating nine requirements for court approval of rejection of collective bargaining agreement under section 1113). *See In re* Horizon Natural Res. Co, 316 B.R. 268, 280 (Bankr. E.D. Ky. 2004) (acknowledging nine requirements courts have historically applied under section 1113(b)(1)); *In re* Sun Glo Coal Co., 144 B.R. 58, 62 (Bankr. E.D. Ky. 1992) (applying nine-part test courts employ to assess section 1113(b)); *see also In re* Amherst Sparkle Market, Inc., 75 B.R. 847, 849 (Bankr. N.D. Ohio 1987).

[25] 11 U.S.C. § 1113(d)(1) (2006).

[26] *See id.*

[27] *See* 11 U.S.C. § 1113(d)(2).

[28] *See id.*

III. DOES THE ADOPTION OF SECTION 1113 OF THE BANKRUPTCY CODE ALTER THE RELATIVE POSITION OF LABOR TO NEGOTIATE FOR AND RELY UPON COLLECTIVELY BARGAINED FOR WAGES AND BENEFITS?—"TO THIS QUESTION THERE IS NO CONVINCING ANSWER EXCEPT PERHAPS THAT NOTHING IS FOREVER TODAY."[29]

Has the enactment of section 1113 of the Bankruptcy Code altered the relative position of labor in the collective bargaining process? The short answer is "yes," but only temporarily. Section 1113 of the Bankruptcy Code clearly does not entirely divest labor of a meaningful role in collective bargaining process. Nor can a debtor's actions under section 1113 of the Bankruptcy Code "fairly be described as unilateral, or as unmoored from negotiations."[30] Section 1113 of the Bankruptcy Code requires the debtor to meet and confer with the authorized bargaining representative in an effort to reach agreement on mutually satisfactory modifications to the collective bargaining agreement before seeking authorization from the Bankruptcy Court to reject the collective bargaining agreement.[31] The procedure prescribed in section 1113 of the Bankruptcy Code "is essentially collective bargaining on wheels."[32]

A. The Debtor's Continuing Obligation to Negotiate with Labor

Moreover, modification or rejection of a collective bargaining agreement does not alter the debtor's continuing duty to negotiate with the certified bargaining representative. In *Bildisco*, the Supreme Court said that a debtor "is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court."[33]

It is not entirely clear from the decisional law whether the rejection of a collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code has the effect of completely rejecting the collective bargaining agreement or simply rejecting (i.e., modifying) those provisions of the collective bargaining agreement that the debtor sought to amend in its proposal to the union. Several courts[34] have

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[29] New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 87 (2d Cir. 1992).

[30] Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA (*In re* Nw. Airlines Corp.), 483 F.3d 160, 179 (2d Cir. 2007).

[31] *See* 11 U.S.C. § 1113(b)(2) (2006); *see also In re* Delta Air Lines, Inc. 359 B.R. 468, 487 (Bankr. S.D.N.Y. 2006) (acknowledging debtor's compliance with statutory "good faith" obligation while "repeatedly show[ing] its bargaining flexibility on all issues."); Michael D. Sousa, *Reconciling the Otherwise Irreconcilable: The Rejection of Collective Bargaining Agreements Under Section 1113 Of the Bankruptcy Code*, 18 LAB. LAW 453, 456 n.173 (2003) (acknowledging union has two options if it objects to debtors modifications of collective bargaining agreement: prove debtor's bad faith or propose more acceptable provision).

[32] *In re Nw. Airlines Corp.*, 483 F.3d at 179.

[33] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 534 (1984).

[34] *See, e.g.*, Colo. Iron Workers Pension Fund v. Sierra Steel Corp. (*In re* Sierra Steel Corp.), 88 B.R. 314, 317 (D. Colo. 1987) (disallowing Court authority to modify collective bargaining agreement); *In re* Ala.

held that section 1113 of the Bankruptcy Code does not authorize a Bankruptcy Court to judicially modify a collective bargaining agreement on a permanent basis.[35] These courts note that, while a debtor must make a proposal under section 1113(b) of the Bankruptcy Code which provides for only necessary modifications, "nothing on the face of the statute indicates that the modification language is folded in to [section 1113(c) of the Bankruptcy Code], which on its face speaks only in terms of rejection."[36] In addition, these courts note that important "policy considerations dictate that the Bankruptcy Court not act as an arbitrator between management and labor."[37] Sitting at the head of the bargaining table is not a function that is within the Bankruptcy Court's area of expertise.[38] Nor would the Bankruptcy Court have the time to handle the tedious process of rewriting a collective bargaining agreement within the time constraints imposed by section 1113(d) of the Bankruptcy Code for the Bankruptcy Court to render a decision regarding a section 1113 motion.[39] As such, these courts conclude that the

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Symphony Assoc., 155 B.R. 556, 573 (Bankr. N.D. Ala. 1993) (holding it inappropriate for Court to alter provisions in collective bargaining agreement); *In re* Sun Glo Coal Co., 144 B.R. 58, 61 (Bankr. E.D. Ky. 1992) (stating case law rejecting notion that bankruptcy court may modify collective bargaining agreements for parties); *In re* Russell Transfer, Inc., 48 B.R. 241, 243 (Bankr. W.D. Va. 1985) (declaring that "Congress did not intend that this Court undertake the rewriting on a permanent basis of collective bargaining agreements"); *In re* Durastone Flexicore Corp., 159 B.R. 102, 103 (Bankr. D.R.I. 1993) (noting that section 1113(c) does not "authorize the Court to make permanent modifications").

[35] The debtor may request that the Bankruptcy Court approve interim changes in the terms, conditions, wages, benefits or work rules of a collective bargaining agreement if essential to the continuation of the debtor's business or to avoid irreparable damage to the debtor's bankruptcy estate. *See* 11 U.S.C. § 1113(e) (2006) (stating bankruptcy court's authority authorizing debtor to implement "interim changes" to collective bargaining agreement); *In re* Hoffman Bros. Packing Co. v. Official Unsecured Creditors Comm. (*In re* Hoffman Bro. Packing Co.), 173 B.R. 177, 184 (B.A.P. 9th Cir. 1994) (authorizing interim modifications under section 1113 in order to "forestall immediate liquidation"). *See generally In re* United Press Int'l. Inc., 143 B.R. 507 (Bankr. S.D.N.Y. 1991) (concluding Congress' intent in section 1113(e) "to balance the conflicting demands of bankruptcy and labor policy").

[36] *Ala. Symphony Assoc.*, 155 B.R. at 572. *See Russell Transfer, Inc.*, 48 B.R. at 243 (Bankr. W.D. Va. 1985) (discussing limitations in section 1113 on court's power in disputes over collective bargaining agreements).

[37] *Ala. Symphony Assoc.*, 155 B.R. at 572. *See* Chi. Dist. Council of Carpenters Pension Fund v. Cotter, 914 F. Supp. 237, 243 (N.D. Ill. 1996) (noting that Congressional intent behind section 1113 was to place burden upon debtor, rather than court, to resolve collective bargaining agreements).

[38] *See Ala. Symphony Assoc.*, 155 B.R. at 572–73 (proclaiming that "[i]t would be inappropriate for this Court to sit at the head of a bargaining table"); *In re* N. Am. Royalties, Inc., 276 B.R. 587, 592 (Bankr. E.D. Tenn. 2002) (analyzing Supreme Court precedent cautioning bankruptcy courts to restrict evaluation of collective bargaining agreements to their role in reorganization process); *Russell Transfer, Inc.*, 48 B.R. at 243–44 ("Even if the Court should undertake [the rewriting on a permanent basis of collective agreements], there is in this Court a lack of expertise making such permanent adjudications impractical.").

[39] *See* 11 U.S.C. § 1113(d)(2) (2006) (imposing a duty upon court to render its decision within 30 days); *Ala. Symphony Assoc.*, 155 B.R. at 572 (pointing to the fact that if courts could modify collective bargaining agreements, the entire 30 day time period would consist of negotiations); *cf.* 130 CONG. REC. S20, 081–82 (daily ed. June 29, 1984) (statement of Sen. Thurmond) (expressing expectation that courts interpret language of section 1113 in practical fashion considering time frame imposed by statute and multiplicity of interests to be considered); 130 CONG. REC. S20, 085 (daily ed. June 29, 1984) (statement of Sen. Hatch) (noting that legislation includes specific time limits to prevent negotiation process or court resolution from "dragging on indefinitely").

Bankruptcy Court may grant or deny a debtor's request to reject a collective bargaining agreement, but that the Bankruptcy Court may not create an agreement for the parties.[40] Presumably, under this approach, the parties start with a clean slate and the debtor and the union must negotiate the terms and conditions of their future association.

Other courts implicitly[41]—and in the case of *Northwest Airlines Corp.*[42]—explicitly, modify the terms and conditions of the collective bargaining agreement consistent with the debtor's section 1113 proposal. In an effort to harmonize the policies of bankruptcy law and labor law, under this approach, section 1113 "requires an abrogation of [labor law] principles only with respect to those changes in working conditions that a bankruptcy court found were 'necessary' to

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[40] *See In re* Sun Glo Coal Co., 144 B.R. 58, 61 (Bankr. E.D. Ky. 1992) (acknowledging contention that section 1113 does not permit "judicially-constructed" modifications of collective bargaining agreements); *Ala. Symphony Assoc.*, 155 B.R. at 573 ("The Court is here merely to decide whether [the debtor and union] shall be divorced, subject to further out-of-court negotiations, and not to decide the terms under which they shall live together."); *In re* Mile Hi Metal Sys, Inc., 51 B.R. 509, 510 (Bankr. D. Colo. 1985) (presenting parameters of relief court may grant in dispute over collective bargaining agreement).

[41] *See* AFL-CIO-CLC v. Ormet Corp. (*In re* Ormet Corp.), Case 2:04-cv-1151, 2005 U.S. Dist. LEXIS 42573, at *19, *21 (S.D. Ohio Aug. 19, 2005) (finding that bankruptcy court rightly approved modifications sought by debtor in granting debtor's application to reject collective bargaining agreement under section 1113(c) of Code, and denying union's appeal of order confirming debtor's plan of reorganization since section 1113 modifications were necessary to debtor's implementation of plan); *In re* Garofalo's Finer Foods, 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990) (stating, in dicta, that "not only may [collective bargaining] agreements be rejected under section 1113(c), but that if all the requirements are met, such agreements can be alternatively modified in the exercise of the Court's discretion in balancing the equities under section 1113(c) and rendering its judgment as deemed necessary and appropriate under section 105(a)").

[42] 346 B.R. 307 (Bankr. S.D.N.Y. 2006). The bankruptcy court in *Northwest Airlines Corp.*, explicitly conditioned the rejection of the debtors' collective bargaining agreement with the Professional Flight Attendants Association ("PFAA") on terms of the last section 1113 proposal made by the debtors to PFAA, which was the proposal that the Bankruptcy Court found that the PFAA refused to accept without good cause within the meaning of section 1113 of the Bankruptcy Code. *See id.* at 331–32. The Debtors sought approval from the Bankruptcy Court to incorporate the terms of an earlier proposal to PFAA rather than the proposal presented in the Debtors' section 1113 motion to reject the collective bargaining agreement. *See id.* at 331. The Debtors expressed concern that "if a union can fall back upon a compromise that its membership rejects, it will have no incentive to get the membership to ratify an agreement as, at worst, the unratified agreement will be imposed on it." *Id.* at 332. While acknowledging this concern, the Bankruptcy Court found that resorting back to the earlier proposal was not in keeping with the spirit of the parties' negotiations, nor was it consistent with the proposal that the Bankruptcy Court reviewed in making its decision to authorize rejection of the collective bargaining agreement. *See id.* Neither party appealed the Bankruptcy Court's decision rejecting the collective bargaining agreement and imposing the terms of the last section 1113 proposal on the parties. In passing, the Court of Appeals for the Second Circuit commented on rejection order in it's opinion affirming the District Court's granting of a preliminary injunction enjoining the PFAA from striking upon rejecting the Debtors' subsequently proposed agreement. *See* Nw. Airlines Corp. v. Ass'n of Flight Attendants-CWA, AFL-CIO (*In re* Nw. Airlines Corp., 483 F.3d 160, 171 n.5 (2d Cir. 2007). The Court of Appeals for the Second Circuit noted that it assumed without deciding so, that a bankruptcy court had the authority to impose new terms of a collective bargaining agreement upon both the debtors and the union. *See id.* The Court of Appeals simply noted that "the text of § 1113 is not explicit on this score, *cf.* 11 U.S.C. § 1113(e) (explicitly permitting the bankruptcy court to impose 'interim changes'), and that the bankruptcy court must look elsewhere in the Bankruptcy Code to find such authority, *cf. In re Garofalo's Finer Foods, Inc.*, 117 B.R. at 370." *Id.*

reorganization."[43] As such, a debtor is free to implement the changes contained in the section 1113 proposal following rejection of the collective bargaining agreement by the Bankruptcy Court without further bargaining with the union, but must adhere to bargaining obligations imposed by applicable labor laws with respect to any changes to the collective bargaining agreement that were not encompassed in the section 1113 proposal.[44]

Accordingly, under either approach, while a debtor in bankruptcy may obtain a temporary reprieve from specific burdensome obligations under a collective bargaining agreement, the debtor remains obligated to bargain collectively with the union with respect to the parties' ongoing affiliation.

B. The Road to Resolution of Conflict Between Labor and Bankruptcy Principles—The Honest Compromise[45]

Any perceived advantage that a debtor may attain from the threat of rejecting a collective bargaining agreement in bankruptcy is checked by the substantive requirements that the debtor must meet before a court may order rejection of a collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code. "Collective bargaining agreements are not to be set aside lightly [and a] debtor seeking such relief bears a heavy burden."[46] Specifically, (i) the debtor must make a proposal for modifications necessary to its reorganization based on the most reliable

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[43] AppleTree Markets, Inc., Case 16-CA-15724, 1994 NLRB GCM LEXIS 68, at *7 (NLRB Gen Counsel Nov. 30, 1994). *See* Amherst Sparkle Mkt., Cases 8-CA-20323 et al., 1988 NLRB GCM LEXIS 167, at *13 (NLRB Gen Counsel Feb. 25, 1988) (analyzing section 1113 "in an effort to harmonize the policies expressed in section 1113, with those of the NLRA"); Royal Composing Room, Inc., Case 2-CA-21808, 1987 NLRB GCM LEXIS 139, *3 (NLRB. Gen. Counsel Sept. 30, 1987) ("After a bankruptcy court authorizes rejection of a collective-bargaining agreement, the employer is free to implement the changes contained in its Section 1113 proposal without further bargaining with the union.").

[44] *See, e.g.*, *AppleTree Markets, Inc.*, 1994 NLRB GCM LEXIS 68, at *7 n.9 (finding that while the employer is free to implement changes not contained in its proposal after an authorized rejection, they must adhere to bargaining obligations, such as first bargaining to impasse); *see also Amherst Sparkle Mkt.*, 1988 NLRB GCM LEXIS 167, at *13 ("With respect to proposed changes not contained in the Section 1113 proposal . . . we concluded that requiring an employer to comply with the traditional NLRA obligation to bargain to impasse before implementing such changes is consistent with the policies and purposes of Chapter 11 and Section 1113."); *Royal Composing Room, Inc.*, 1987 NLRB GCM LEXIS 139, *4 (concluding that debtor's implementation of changes not included in section 1113 proposal to rejected collective bargaining agreement to be violation of NLRA). Under NLRA law, "most terms and conditions of employment established in a collective bargaining agreement survive expiration of the agreement and cannot be changed by the employer without first bargaining to impasse with the union." *AppleTree Markets, Inc.*, 1993 NLRB GCM LEXIS 54, at *5 (NLRB Gen. Counsel Feb. 26, 1993) (citing NLRB v. Katz, 369 U.S. 736 (1962) and NLRB v. Compton-Highland Mills, Inc., 337 U.S. 217, 225 (1949)). Accordingly, unless modified by the section 1113 proposal, such terms or conditions of a collective bargaining agreement also survive the expiration (*i.e.*, rejection) of the collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code. Presumably, if such terms or conditions would not survive the expiration of the collective bargaining agreement, the debtor is free to unilaterally institute changes in those areas.

[45] *See* Century Brass Prods., Inc. v. Local 1604 (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 276 (2d Cir. 1986) ("[T]he Senate and House Conferees made the point clear that the road to resolution of the conflict between labor and bankruptcy principles lies in honest compromise.").

[46] Local 1431 v. Gatke Corp., 151 B.R. 211, 215 (N.D. Ind. 1991).

information available at the time; (ii) the union must reject the proposal without good cause; and (iii) the balance of the equities must clearly favor rejection of the agreement.[47] How effectively do these substantive requirements balance the competing goals of labor and business reorganization where a debtor seeks to modify or reject a collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code?

1. Section 1113(c)(1)—Is the proposal for modifications necessary to the debtor's reorganization based on the most reliable information available at the time?

In interpreting the requirements of section 1113(c) of the Bankruptcy Code, courts have developed a nine-factor test.[48] Section 1113(b) encompasses the first seven factors of this test.[49] The two most often contested factors and the two that raise the most policy considerations are whether the proposed modifications to the collective bargaining agreement are "necessary" and "fair and equitable."[50]

a. "Necessary Modifications"

Further illustrating the inherent conflict between labor and bankruptcy policies are the courts' efforts to interpret what are "necessary modifications" in the context of modifying or rejecting a collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code. Labor wants to maintain the benefit of that for which it has bargained. Due to dire financial circumstances, the debtor needs to change

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[47] *See* 11 U.S.C. § 1113(c) (2006); *In re* Horizon Natural Res. Co., 316 B.R. 268, 279–80 (Bankr. E.D. Ky. 2004) (presenting conditions under which a collective bargaining agreement may be rejected); N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992) (outlining elements of analysis bankruptcy court must undertake before approving debtor's rejection of collective bargaining agreement).

[48] *See supra* pp. 399–400; *see also* United Food & Commercial Workers Union, Local 211 v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 892 (B.A.P. 8th Cir. 2001) (observing that courts "seem to agree that an application to reject a [collective bargaining agreement] under section 1113 is judged against a nine factor test"); *In re* Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (enumerating nine necessary factors that bankruptcy court must find before approving application for rejection of collective bargaining agreement).

[49] *See* 11 U.S.C. § 1113(b); *see also* Bill D. Bensinger, *Modification of Collective Bargaining Agreements: Does a Breach Bar Rejection?*, 13 AM. BANKR. INST. L. REV. 809, 818–19 (2005) (proposing framework for understanding role of provisions in section 1113 in rejection of collective bargaining agreement); Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 511–12 (1994) (explaining that test used to determine whether chapter 11 debtor may reject collective bargaining agreement is based on standards found in section 1113(b) and (c)).

[50] *See, e.g.*, *In re* Delta Air Lines, 359 B.R. 468, 477–79, 485–86 (Bankr. S.D.N.Y. 2006) (scrutinizing case law elucidating guidelines court should following in determining whether terms in debtor's section 1113 proposal are necessary, as well as fair and equitable); Sheet Metal Workers' Int'l Ass'n, Local 9 v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887, 892 (10th Cir. 1990) ("Just what Congress meant when it used the word 'necessary,' which appears twice in section 1113(b)(1)(A), has been a source of confusion."); Cuevas, *supra* note 1, at 199 ("In its rush to enact a statute Congress left undefined the most important substantive provision in section 1113. The courts that have addressed the issue have disagreed regarding what constitutes a necessary modification.").

that bargain. Two opposing tests for determining what are "necessary modifications" have been developed based on how the courts interpret the policy goals of section 1113 of the Bankruptcy Code.[51]

The Third Circuit test, espoused in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*,[52] favors minimal impact on collectively bargained rights in connection with a debtor's reorganization efforts by adopting a strict interpretation of "necessary."[53] Under the Third Circuit test, "necessary" is viewed as synonymous with the term "essential."[54] "Necessary" modifications are not merely those modifications that are desirable to the debtor to lower costs but rather are those directly related to the debtor's financial condition and reorganization.[55] With respect to the goal of the modifications, the Third Circuit test focuses on a shorter term goal of preventing the debtor's liquidation rather than on what modifications are necessary to permit the long-term viability of the debtor.[56]

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[51] *See, e.g.*, Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 90 (2d Cir. 1987) ("[W]e conclude that the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."); Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1088 (3d Cir. 1986) (holding that term necessary must "be construed *strictly* to signify only modifications that the trustee is constrained to accept because they are directly related to the Company's financial condition and its reorganization") (emphasis added). *See generally* Christopher D. Cameron, *How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 869–70 (1994) (discussing conflicting interpretations of "necessary" requirement in section 1113).

[52] 791 F.2d 1074 (3d Cir. 1986).

[53] *Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1094 (finding that bankruptcy court had erred in failing to strictly construe "necessity," as intended by Congress). *See In re* Kaiser Aluminum Corp., 456 F.3d 328, 342 n.10 (3d Cir. 2006) (referring to the *Wheeling-Pittsburgh* holding that section 1113 "necessary" requirement must be construed strictly); *In re* Liberty Cab & Limousine Co., 194 B.R. 770, 776 (Bankr. E.D. Pa. 1996) (explaining that the "Court in *Wheeling-Pittsburgh*, specifically noted that the term 'necessary' as used in Section 1113(b)(1)(A) was synonymous with the term 'essential,' thus permitting only those modifications to a contract which are limited to the short term goal of preventing a Debtor's liquidation, as opposed to broader modifications focuses on the long term economic health of a debtor").

[54] *See Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1088 (finding that the words "necessary" and "essential" are synonymous.); *see also In re* Pierce Terminal Warehouse, Inc., 133 B.R. 639, 646 (Bankr. N.D. Iowa 1991) (referring to Third Circuit approach in finding that "necessary" and "essential" are the same); *In re* Nw. Airlines Corp., 346 B.R. 307, 321 (Bankr. S.D.N.Y. 2006) ("In developing this standard, the Second Circuit specifically rejected the Third Circuit's narrower construction of § 1113 in *Wheeling-Pittsburgh Steel* . . . where that Court construed the term 'necessary' to encompass only those modifications essential to the debtor's short-term survival or necessary to prevent liquidation.").

[55] *See Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1088 ("The 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs . . . . The congressional consensus . . . requires that 'necessity' be construed strictly to signify only modifications that the trustee is constrained to accept because they are directly related to the Company's financial condition and its reorganization."); *In re* Tex Sheet Metals, Inc., 90 B.R. 260, 265 (Bankr. S.D. Tex. 1988) (citing to the court in *Wheeling-Pittsburgh*, which explained that legislative history shows that emphasis is placed on debtor's reorganization); *In re* Royal Composing Room, Inc., 62 B.R. 403, 417 (Bankr. S.D.N.Y. 1986) (quoting Third Circuit's discussion in *Wheeling-Pittsburgh* regarding legislative history and ultimate strict construction of "necessity").

[56] *See Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1089 ("While we do not suggest that the general long-term viability of the Company is not a goal of the debtor's reorganization, it appears from the legislators'

Conversely, the Second Circuit test, articulated in *Truck Drivers Local 807 v. Carey Transp. Inc.*,[57] adopts a less restrictive interpretation of "necessary" modifications with an eye towards the debtor's ultimate future and what the debtor needs to attain financial health.[58] Under the Second Circuit test, "the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization successfully."[59] The debtor's proposed modifications must have a significant impact on the debtor's operations,[60] but the debtor need not prove that each element of the proposal is necessary to the debtor's reorganization.[61] Rather, "a court must focus on the total impact of the changes in the debtor's ability to reorganize, not on whether any single proposed change will achieve that result."[62] As opposed to the Third Circuit test, necessary modifications may include changes to the collective bargaining agreement which

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remarks that they placed the emphasis in determining whether and what modifications should be made to a negotiated collective bargaining agreement on the somewhat shorter term goal of preventing the debtor's liquidation, the mirror image of what is 'necessary to permit the reorganization of the debtor.'").

[57] 816 F.2d 82 (2d Cir. 1987).

[58] *See id.* at 89 ("[I]t becomes impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimating what the debtor needs to attain financial health."); *see also In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 893 (10th Cir. 1990) (finding that the Court of Appeals for Tenth Circuit has likewise adopted Second Circuit interpretation of "necessary" modifications in that it does not mean absolutely necessary); *In re* Amherst Sparkle Mkt., Inc., 75 B.R. 847, 851 (Bankr. N.D. Ohio 1987) (stating that they are adopting Second Circuit's interpretation of "necessary" modifications by understanding it as meaning something less than "essential").

[59] Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 90 (2d Cir. 1987) ("In sum, we conclude that the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."). *See* Int'l Union, United Auto., Aerospace and Agric. Implement Workers of Am. v. Gatke Corp., 151 B.R. 211, 213 (Bankr. N.D. Ind. 1991) (citing to court's interpretation of the Second Circuit test in *Carey Transp Inc.*); *Nw. Airlines Corp.*, 346 B.R. at 321.

[60] *See Royal Composing Room, Inc.*, 848 F.2d at 348 (stating that "debtor's proposal need not be limited to 'absolutely minimal' modifications . . . ."); *Nw. Airlines Corp.*, 346 B.R. at 321 ("[A] debtor's proposed modifications are considered necessary if they have a significant impact on the debtor's operations . . . ." (quoting *Royal Composing Room, Inc.*, 848 F.2d at 348)); *Gatke Corp.*, 151 B.R. at 213 (citing to holding in *Carey Transp Inc.* that debtor's proposal need not be limited to bare minimal modifications).

[61] *See Royal Composing Room, Inc.*, 848 F.2d at 348 ("[F]ocusing on a particular element vital to the proposal when the union does not bargain to change that element, rather than on the necessity for the package taken *in toto*, would undermine the interpretation of § 1113 articulated in *Carey Transportation*."); *see also Nw. Airlines Corp.*, 346 B.R. at 321 (citing to *Royal Composing Room, Inc.*, 848 F.2d at 348) ("The Second Circuit has also held that a debtor need only make a showing as to the overall necessity of the proposal, rather than prove that each element of the proposal is necessary to reorganization."); United Food and Commercial Workers Local Union Nos. 455, 408, 540 and 1000 (*In re* Appletree Mkts., Inc.), 155 B.R. 431, 441 (S.D. Tex. 1993) (stating that "[t]o determine whether a debtor's proposed modifications to a CBA are necessary, a court must focus on total impact of the changes in debtor's ability to reorganize, not on whether any single proposed change will achieve that result").

[62] *Appletree Mkts., Inc.*, 155 B.R. at 441 (S.D. Tex. 1993). *See In re* Horsehead Indus., Inc., 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003) ("In determining 'necessity,' the proposal must be viewed as a whole, and not by its specific elements."); *see also Gatke Corp.*, 151 B.R. at 214 (Bankr. N.D. Ind. 1991) (stating "[t]he court properly looked to the modification offer as a whole"); *Nw. Airlines Corp.*, 346 B.R. at 321 ("The Second Circuit has also held that a debtor need only make a showing as to the overall necessity of the proposal, rather than prove that each element of the proposal is necessary to reorganization.").

are non-economic in nature if such changes, on whole, are necessary to the debtor's reorganization.[63]

The Third Circuit test seeks to protect the sanctity of the collective bargaining process by ensuring minimal alteration of collectively bargained-for rights.[64] This approach views section 1113 of the Bankruptcy Code as a "victory for labor"[65] and an effort by Congress to protect collective bargaining agreements and to differentiate collective bargaining agreements from other commercial contracts.[66] However, the Third Circuit test subordinates (and perhaps eliminates) the bankruptcy goal of facilitating the successful reorganization of distressed companies.

The Second Circuit test focuses on protecting labor interests but does so within the overall goal of fostering the debtor's reorganization efforts.[67] This approach

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[63] *See Nw. Airlines Corp.*, 346 B.R. at 321–22 ("A proposal may be deemed necessary for purposes of § 1113(b) even if it includes non-economic modifications."); *see also Royal Composing Room, Inc.*, 848 F.2d at 350 (finding that bankruptcy court's ruling permitting changes to priority provisions was not clearly erroneous); *Gatke Corp.*, 151 B.R. at 214 (holding that Gatke's inclusion of non-monetary changes to their transfer policies did not cause its proposal to fail section 1113 requirements); *Appletree Mkts., Inc.*, 155 B.R. at 441 (approving proposal with non-economic changes that were "intended to have a direct economic effect on [the debtor's] ability to reorganize successfully by lowering its labor costs and improving its level of customer service"); *In re* Hoffman Bros. Packing Co., 173 B.R. 177, 187–88 (B.A.P. 9th Cir. 1994) (approving proposal with non-economic changes that "related to the economic benefit of the debtor"). *But see In re* William P. Brogna & Co., 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986) (following the Third Circuit test, "[t]he debtor's proposal contains numerous provisions which are non-economic in nature [*e.g.*, changes in the grievance procedure, union security and apprentice ratios] and which we find and conclude are not necessary to prevent the liquidation of the debtor . . . [since such] proposed changes have no direct impact on its labor costs and would have no direct bearing on its ability to prevent liquidation").

[64] *See generally* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074 (3d Cir. 1986) (finding that modifications to collective bargaining agreement must be necessary and essential).

[65] *Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1087 ("[S]ection 1113 provides, that the debtor's proposal provide 'for those necessary modifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor' . . . . This was seen as a victory for labor."). *See In re* Tex. Sheet Metals, Inc., 90 B.R. 260, 265 (Bankr. S.D. Tex. 1988) (referring to Senator Packwood's amendment that "looked to the 'minimum modifications . . . that would permit the reorganization,' requiring 'necessary' be construed strictly").

[66] *See Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1088 ("The 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs. Such an indulgent standard would inadequately differentiate between labor contracts, which Congress sought to protect, and other commercial contracts, which the trustee can disavow at will."); *see also In re* Mile Hi Metal Sys., Inc., 67 B.R. 114, 118 (Bankr. D. Colo. 1986) (citing to and agreeing with court in *Wheeling-Pittsburgh Steel Corp.*); *In re* Pierce Terminal Warehouse, Inc., 133 B.R. 639, 647 (Bankr. N.D. Iowa 1991) (agreeing with *Wheeling-Pittsburgh Steel Corp*. that rejecting labor contract simply to lower costs is insufficient and adding that debtor should also show that costs not associated with union contracts have been reduced).

[67] *See Gatke Corp.*, 151 B.R. at 213 (finding that Second Circuit test, "which encompasses the ultimate success of reorganization rather than merely the avoidance of immediate liquidation, is more consistent with the statute"); *In re* Walway Co., 69 B.R. 967, 973 (Bankr. E.D. Mich. 1987) ("Case law supports the conclusion that 'necessary' means a modification that will result in a greater probability of a successful reorganization than if the contract were allowed to continue in force."); *Appletree Mkts., Inc.*, 155 B.R. at 440–41 (finding that the purpose of section 1113, in allowing debtor to reject collective bargaining agreement, is to enable debtor to successfully reorganize).

concentrates on the realities of reorganization[68] and promoting realistic negotiations that will advance the reorganization process.[69] Courts endorsing the Second Circuit test view the restrictive Third Circuit test as thwarting the negotiation process[70] and giving labor to much power over negotiations and the debtor's ultimate ability to reorganize.[71] In total, the Second Circuit approach seems to best balance the competing interests of labor and bankruptcy[72] and is the approach most widely adopted by courts.[73]

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[68] *See Appletree Mkts., Inc.*, 155 B.R. at 441 ("[T]he Second Circuit's test for necessity is more consistent with the history and purpose of section 1113 and with the realities of a reorganization under Chapter 11 than the Third Circuit's 'bare minimum' test. [C]reditors are not likely to extend additional funds to a reorganized debtor unless there is a reasonable basis to conclude that the reorganization will be successful and not merely a prelude to another reorganization or a liquidation."); *see also In re* Delta Air Lines, Inc., 359 B.R. 468, 477 (Bankr. S.D.N.Y. 2006) (citing *Appletree Mkts., Inc.*, 155 B.R. at 441); *In re* Valley Steel Prod. Co., Inc., 142 B.R. 337, 341 (Bankr. E.D. Mo. 1992) (stating that "[t]o hold that 'necessary' requires minimal changes in the collective bargaining agreement may well result in meaningless and unsuccessful reorganizations").

[69] *See Appletree Mkts., Inc.*, 155 B.R. at 440 ("The Second Circuit also explained that under the Third Circuit's test a debtor would have no room to engage in good faith negotiations. Since any concession from its 'bare minimum' proposals would arguably mean that those proposals were not really the bare minimum to stave off liquidation, the debtor's proposals would have to be a 'take-it-or-leave-it' ultimatum, not the first step in good faith negotiations."); *see also* Truck Drivers Local 807 v. Carey Transp. Inc., 816 F.2d 82, 89 (2d Cir. 1987) ("Because the statute requires the debtor to negotiate in good faith over the proposed modifications, an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposal were minimum. Thus, requiring the debtor to propose bare-minimum modifications at the outset would make it virtually impossible for the debtor to meet its other statutory obligations."); *In re* Nw. Airlines Corp., 346 B.R. 307, 321 (Bankr. S.D.N.Y. 2006) ("The *Carey Transp.* court explained that the term 'necessary' could not be synonymous with 'essential' or 'bare minimum' because if a debtor were constrained to propose only the most minimal changes to a collective bargaining agreement, it would have no room to engage in the good faith negotiations required by § 1113.").

[70] *See Gatke Corp.*, 151 B.R. at 213 ("[The Third Circuit's] bare minimum requirement would thwart the collective bargaining process . . . . Bargaining is not a practicable goal if one negotiating party is barred from advancing anything other than the absolute minimum that can be accepted if it is to survive.").

[71] *See Nw. Airlines Corp.*, 346 B.R. at 321 ("[R]equiring that each element of a proposal be necessary would allow a union to defeat a rejection application by singling out an element as unnecessary where it could be reasonably substituted with an alternative." (citing Royal Composing Room, Inc. v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 848 F.2d 345, 348 (2d Cir. 1988))); *see also In re Royal Composing Room, Inc.*, 848 F.2d at 348 ("[N]o proposal could ever truly be 'necessary', since any single vital element of a proposal can hardly be 'necessary' if it can be replaced by some alternative not included in the package which would achieve the same dollar savings for the debtor."); *Delta Air Lines, Inc.*, 359 B.R. at 477.

[72] *See Carey Transp. Inc.*, 816 F.2d at 90 (considering "fairness to all parties" and noting that a court must "ensur[e] that all sacrifice to a similar degree." (citing *In re* Century Brass Prods., Inc., 795 F.2d 265, 273 (2d Cir. 1986))); Ehrenberg, *supra* note 2, at 85 ("The Second Circuit's *Carey* decision is more apt to promote bargaining and consensual resolution of the situation than the Third Circuit's *Wheeling-Pittsburgh* decision . . . . Meaningful negotiations between debtor company and union can only occur if the 'necessity' requirement is interpreted in a manner similar to that of the Carey court."); c*f.* Ass'n of Flight Attendants–CWA v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006) (holding that the *Carey Transp. Inc.* approach best serves the overall goal of chapter 11—"rehabilitation of distressed businesses") (internal quotation marks omitted).

[73] *See Mesaba Aviation, Inc.*, 350 B.R. at 449 (agreeing with lower court that majority of decisions have favored the Second Circuit approach); John D. Ayer, et al., *The Intersection of Chapter 11 and Labor Law*, 26 MAY AM. BANKR. INST. J. 22, 56 (May 2007) (stating that more courts have followed the approach of *Carey* than that of *Wheeling-Pittsburgh*).

b. Fair and Equitable

The fair and equitable element of section 1113 of the Bankruptcy Code serves the purpose of "spread[ing] the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree."[74] This requirement "recogniz[es] that labor should not have to bear a disproportionate share of the burden of saving a debtor."[75] The fair and equitable element, however, does not require identical or equal treatment.[76] Rather, the debtor may satisfy this criterion by showing that the debtor's proposal is fair to the union in comparison with the burden imposed on other constituencies in the reorganization process.[77] By acknowledging that labor must make some concession in connection with the debtor's reorganization efforts, this element erodes the favored position of labor to the overall goal of economic survival of the debtor for the benefit of all constituencies (including labor). The degree of this erosion will depend on how the Bankruptcy Court balances the competing interests of labor and reorganization based on relative equities of the case.

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[74] *Carey Transp. Inc.*, 816 F.2d at 90 (quoting *In re Century Brass Prods., Inc.*, 795 F.2d at 273). *See In re* Horsehead Indus., Inc., 300 B.R. 573, 584 (Bankr. S.D.N.Y. 2003) ("The requirement of fair and equitable treatment forces the debtor to spread the hurt."); *Nw. Airlines Corp.*, 346 B.R. at 325 (quoting *Carey Transp. Inc.*, 816 F.2d at 90).

[75] *Nw. Airlines Corp.*, 346 B.R. at 325. *See* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1091 (3d Cir. 1986) (agreeing with bankruptcy court below that equitability hinges on "whether the Company's proposal would impose a disproportionate burden on the employees" (citing *In re* Wheeling-Pittsburgh Steel Corp., 50 B.R. 969, 980 (Bankr. D. Pa. 1985))); *In re* Kaiser Aluminum Corp., 456 F.3d 328, 341 (3d Cir. 2006) (agreeing with *Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1091); 130 CONG. REC. H7496 (daily ed. June 29, 1984) (remarks of Congressman Morrison), *reprinted in* 10 BANKRUPTCY REFORM AMENDMENTS 20231 (Bernard D. Reams, Jr. & Eugene M. Wypyski eds., William S. Hein & Co., Inc. 1992) ("[Section 1113] ensure[s] that, where the trustee seeks to repudiate a collective bargaining agreement, the covered employees do not bear either the entire financial burden of making the reorganization work or a disproportionate share of that burden . . . .").

[76] *See In re* Allied Delivery System Co., 49 B.R. 700, 702–03 (Bankr. N.D. Ohio 1985) (holding larger wage cuts for union than nonunion employees equitable when the large majority of the debtor's gross revenue is required to pay union labor costs); *In re* Amherst Sparkle Mkt., Inc., 75 B.R. 847, 851 (denying that equitable treatment requires identical treatment); *Nw. Airlines Corp.*, 346 B.R. at 325 ("[I]t is not necessary for all affected parties to receive identical modifications, and concessions asked of various labor groups may reflect differences in the groups' wage and benefit levels.").

[77] *See Allied Delivery System Co.*, 49 B.R. at 702–03 (holding greater burden on union than nonunion employees equitable when based on scale that matched wage reductions in earnings); *Carey Transp. Inc.*, 816 F.2d at 90 (holding that salary and benefit reductions need not be equal among union, nonunion and management employees when nonunion and management took on additional responsibilities, and union compensation exceeded industry standard while nonunion and management compensation did not); *Nw. Airlines Corp.*, 346 B.R. at 326 (explaining that, in reorganization, the union must be treated "fairly" in comparison with other parties).

2. Section 1113(c)(2)—Did the union reject the proposal without "good cause"?

Pursuant to section 1113(c)(2) of the Bankruptcy Code, a Bankruptcy Court may only authorize rejection of a collective bargaining agreement if the debtor establishes that the union rejected the debtor's proposal without "good cause."[78] While "good cause" is not defined in the Bankruptcy Code, it is understood to be a determination of whether the parties have negotiated in good faith.[79] Even though the ultimate burden of persuasion is on the debtor, the union must come forward with some basis for its refusal to accept the debtor's proposal.[80] Where the union offers alternative proposals that meet the debtor's reorganization needs, it is unlikely that the union's refusal to accept the debtor's proposal will be found to be lacking good cause.[81] Conversely, where the union refuses to compromise or attempts to stalemate negotiations, the union may be found to have acted without good cause in refusing to accept the debtor's proposal.[82] Similarly, a debtor is not permitted to propose a "take it or leave it" proposal if the debtor hopes to establish that the union rejected the debtor's proposal without good cause.[83] The "good cause" requirement promotes both labor and bankruptcy law policies by encouraging good faith

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[78] *See* 11 U.S.C. § 1113(c)(2) (2006); *Kaiser Aluminum Corp.*, 456 F.3d at 341–42 n.8 (noting that section 1113 is "inapplicable" unless rejection by union made "without good cause") (internal quotation marks omitted); Nw. Airlines Corp. v. Ass'n of Flight Attendants—CWA, 483 F.3d 160, 180 (2d Cir. 2007) (listing lack of good cause as necessary to court-ordered modifications of agreement).

[79] *See In re* Maxwell Newspapers, Inc., 981 F.2d 85, 89 (2d Cir. 1992) (equating "good faith" and "good cause" under section 1113); *Nw. Airlines Corp.*, 346 B.R. at 327 (finding "good cause" requirement of section 1113(c)(2) "closely related" to "good faith" of section 1113(b)(2)); *Horsehead Indus., Inc.*, 300 B.R. at 585 ("The 'good cause' requirement in subparagraph (1) [of section 1113(c)] fosters the goals of good faith negotiations . . . .").

[80] *See Carey Transp. Inc.*, 816 F.2d at 92 (requiring union to present evidence of "its reason for declining to accept the debtor's proposal in whole or in part" (quoting *In re* Royal Composing Room, Inc., 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986))); *Horsehead Indus., Inc.*, 300 B.R. at 585 (explaining that "good cause" language ensures debtor's proposal will not be rejected "without a good reason"); *In re* Blue Diamond Coal Co., 131 B.R. 633, 646 (Bankr. E.D. Tenn. 1992) (holding union's refusal, based on the fact that proposal failed to guarantee jobs to bargaining unit employees, was without "good cause" because the union produced no evidence to contradict debtor's clear proof that such demands were economically infeasible).

[81] *See* New York Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 848 F.2d 345, 349 (2d Cir. 1988) ("If the union seeks to negotiate compromises that meet its needs while preserving the debtor's required savings, it would be unlikely that its rejection of the proposal could be found to be lacking good cause."); *Maxwell Newspapers*, 981 F.2d at 91 (stating that if union makes compromise proposals throughout the negotiation process which preserve debtor's savings, it's rejection of debtor's proposal would be with good cause).

[82] *See In re Royal Composing Room, Inc.*, 848 F.2d at 349 (finding it almost certain that union refusal to negotiate equals lack of good cause); *Carey Transp. Inc.*, 816 F.2d at 92 (holding that union "stonewalling" showed it's subsequent refusal lacked good cause); s*ee also Nw. Airlines Corp.*, 346 B.R. at 327 (reiterating *Royal Composing Room, Inc.* finding that lack of union negotiation shows absence of good cause).

[83] *In re* Delta Air Lines, 342 B.R. 685, 697 (Bankr. S.D.N.Y. 2006) (announcing rule that debtor has not negotiated in good faith when its initial proposal is non-negotiable). *See Nw. Airlines Corp.*, 346 B.R. at 327 ("The 'good cause' and good faith requirements have been held to preclude a debtor from simply offering a 'take it or leave it' proposal."); *In re* S.A. Mechanical, Inc., 51 B.R. 130, 132 (Bankr. D. Ariz. 1985) (denying debtor's motion to reject collective bargaining agreement because debtor's "take it or leave it" proposal did not satisfy good faith bargaining requirements).

negotiations and voluntary modifications to facilitate a debtor's successful reorganization.[84]

3. Section 1113(c)(3)—Does the balance of the equities clearly favor rejection of the agreement?

The final element that a debtor must establish when seeking to reject a collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code is that the balance of equities clearly favors rejection of the collective bargaining agreement.[85] This element is the codification of the *Bildisco* equitable standard for rejection of a collective bargaining agreement.[86] While the effect on employees of the rejection of the collective bargaining agreement and the policies of collective bargaining under labor law are appropriate considerations, the primary focus of this inquiry is the bankruptcy goal of chapter 11—that being the effect that rejection of the agreement will have on the debtor's reorganization efforts.[87] This balancing of

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[84] *See Carey Transp. Inc.*, 816 F.2d at 92 (holding union stonewalling "unacceptable" in light of Congressional intent that good-faith negotiations occur); *Horsehead Indus., Inc.*, 300 B.R. at 585 ("[T]he 'good cause' requirement . . . fosters the goals of good faith negotiations and voluntary modifications."); *Royal Composing Room, Inc.*, 62 B.R. at 406 (citing legislative history of section 1113 in support of proposition that parties required to negotiate in good faith before court can reject collective bargaining agreement).

[85] *See* 11 U.S.C. § 1113(c)(3) (2006); *In re* Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (listing requirement that "balance of the equities must clearly favor rejection of the collective bargaining agreement" last among nine requirements); Colo. Iron Workers Pension Fund v. Sierra Steel Corp. (*In re* Sierra Steel Corp.), 88 B.R. 314, 316 (D. Colo. 1987) ("Section 1113(c)(3) of 11 U.S.C. dictates the court shall only approve an application for rejection of a collective bargaining agreement if it is satisfied the balance of the equities 'clearly favors the rejection of such agreement.'" (quoting 11 U.S.C. § 1113(c)(3))).

[86] *See Carey Transp. Inc.*, 816 F.2d at 92–93 (stating that section 1113 was "a codification of the *Bildisco* standard" and discussing continuing vitality of case law interpreting N.L.R.B. v. Bildisco & Bildisco, 465 U.S. 513 (1984)); *Nw. Airlines Corp.*, 346 B.R. at 329 (remarking that the requirement is a "codification of [the] portion of *Bildisco* that established an equitable standard for rejection of a collective bargaining agreement"); *In re* Ind. Grocery Co., Inc., 136 B.R. 182, 196 (S.D. Ind. 1990) (holding that section 1113 codified the *Bildisco* test); *In re* Century Brass Prods., Inc., 795 F.2d 265, 273 (2d Cir. 1986) (mentioning that section 1113 was passed within five months of *Bildisco* opinion).

[87] *See Nw. Airlines Corp.*, 346 B.R. at 329; *Horsehead Indus., Inc.*, 300 B.R. at 585 ("Although § 1113 implicates the concerns of the labor laws, the bankruptcy courts 'must focus on the ultimate goal of Chapter 11 when considering these equities . . . and how the equities relate to the success of the reorganization.'" (quoting *Bildisco*, 465 U.S. at 527)); *In re* Blue Diamond Coal Co., 131 B.R. 633, 647 (Bankr. E.D. Tenn. 1992) ("The primary question in a balancing test is the effect rejection of the contract will have on the debtor's prospect for reorganization."); *In re* Kentucky Truck Sales, Inc., 52 B.R. 797, 806 ("[T]he primary question in a balancing test is the effect the rejection of the agreement will have on the debtor's prospects for reorganization."). Courts generally consider the following six equitable considerations in determining whether the balance of equities favor rejection of the collective bargaining agreement: "(1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of creditors' claims if the bargaining agreement remains in force; (3) the likelihood and consequences of a strike if the bargaining agreement is voided; (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtor's financial dilemma." *Carey Transp. Inc.*, 816 F.2d at 93 (interpreting *Bildisco* and setting forth six

the equities places labor's interest on par with the interests of the debtor and other constituents in the bankruptcy proceeding, and requires labor to "face up to the economic reality" of the debtor's financial condition.[88]

CONCLUSION

In summary, has section 1113 of the Bankruptcy Code weakened labor in the United States post-*Bildisco*? The answer may be "yes". The airline reorganization cases provide a good case study. Auto industry related reorganizations seem to likewise support such a conclusion, as do the steel reorganization cases. Nonetheless, section 1113 does not completely abrogate a debtor's obligation to collectively bargain with labor prior to or following rejection of a collective bargaining agreement. Moreover, the requirements to reject a collective bargaining agreement pursuant to section 1113 of the Bankruptcy Code are not insignificant and provide adequate checks and balances on the competing interests of labor and bankruptcy law. So perhaps the answer is "yes" in the short run. But in the long run, *Bildisco* and section 1113 of the Bankruptcy Code are a benefit to labor in that they inject labor act concepts in the reorganization process. This provides a list of rules which must be followed if a debtor seeks to modify or reject a pre-petition collective bargaining agreement. In the end, a union's effort in forestalling a debtor's reorganization is a hollow victory if the debtor's reorganizing efforts ultimately fail.[89]

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permissible equitable considerations). *See In re* Texas Sheet Metals, Inc., 90 B.R. 260, 272 (S.D. Tex. 1988) (laying out the six-part balancing test); *see also* 7 COLLIER ON BANKRUPTCY, ¶ 1113.07, at 1113–67 (Alan N. Resnick et al. eds., 15th ed. rev. 2006) (agreeing with reasoning of the *Carey* six-part test).

[88] *Nw. Airlines Corp.*, 346 B.R. at 331 (granting rejection of collective bargaining agreement when debtor had "faced up to the economic reality," but union had not). *See Ind. Grocery Co., Inc.*, 136 B.R. at 196 (holding debtor could not reject collective bargaining agreement when it did not show that creditors and management would "shoulder[] a fair share of the burden of reorganization"); c*f. In re* Walway Co., 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987) (finding union and management treated fairly by proposal when president of company made himself personally liable on loans and made "substantial financial concessions").

[89] *See Blue Diamond Coal Co.*, 131 B.R. at 648 (holding a liquidation would be "hollow" victory for union, and a "detriment [to] all parties including the union"); *cf.* Ass'n of Flight Attendants–CWA v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006) (emphasizing goal of chapter 11, section 1113, and modification of collective bargaining agreement is avoiding liquidation); Shy v. Navistar Int'l. Corp., No. C-3-92-333, 1993 U.S. Dist. LEXIS 21291, at *45–46 (D. Ohio 1993) (reasoning that, if court rejected settlement agreement at behest of retirees, retirees' victory would be hollow, in that Debtor would be forced into liquidation, and retirees would suffer more than under approval of agreement).