LOST IN TRANSFORMATION: THE DISAPPEARANCE OF LABOR POLICIES IN APPLYING SECTION 1113 OF THE BANKRUPTCY CODE

BABETTE A. CECCOTTI*

INTRODUCTION

A resurgence in corporate bankruptcies targeting labor costs, pension funding and retiree health benefits obligations recalls an earlier time when companies saw bankruptcy as a potent instrument in labor-management relations. In the early 1980's, the strategic use of bankruptcy in several high profile labor disputes, fueled by the Supreme Court's 1984 decision in *NLRB v. Bildisco & Bildisco*,[1] unleashed a storm of protest that companies were abusing the bankruptcy process to target collective bargaining agreements.[2] Soon after the *Bildisco* decision, Congress enacted section 1113 of the Bankruptcy Code[3] to impose restrictions on the ability of a company in bankruptcy to reject a labor agreement.[4] Two years later, LTV

---

* Babette Ceccotti is a partner at Cohen, Weiss and Simon LLP and has represented labor unions in bankruptcy cases in the airline, steel, auto supply and other industries. The author gratefully acknowledges the valuable assistance of Jacqlyn R. Rovine in the preparation of this article.

[1] 465 U.S. 513 (1984).

[2] A number of widely publicized cases brought attention to the issue. In 1983, Continental Airlines filed a chapter 11 petition, immediately laid-off its employees, and resumed operations with a reduced workforce at half of their regular pay. Wilson Foods also filed a chapter 11 petition in 1983 and unilaterally slashed wage rates under its collective bargaining agreements. *See In re* Wilson Foods Corp., 31 B.R. 269 (Bankr. Okl. 1983); Laurel Sorenson, *Chapter 11 Filing By Wilson Foods Roils Workers' Lives, Tests Law*, WALL ST. J., May 23, 1983, at 37 (leading union to file "charges of unfair labor practice [for] misuse of the bankruptcy law with the National Labor Relations Board"). Eastern Air Lines openly threatened its workers with bankruptcy to gain leverage in collective bargaining negotiations. *See* Katherine Van Wezel Stone, *Labor Relations on the Airlines: The Railway Labor Act in the Era of Deregulation*, 42 STAN. L. REV. 1485, 1491–92 (1990) (indicating mid-1980s airline management "used the threat of bankruptcy, merger or sale in negotiations to procure concessions"); Agis Salpukas, *A Wrenching Week at Airline*, N.Y. TIMES, Oct. 8, 1983, at 1.37 (reporting that "leaders of the pilot, flight attendant and machinist unions . . . charge that Frank A. Lorenzo, the airline chairman, was using bankruptcy laws to repudiate union contracts and break the power of the union"). Congressional hearings were held in which labor organizations reported growing instances of these tactics, including testimony by the president of the Teamsters union that numerous companies were "taking total advantage of the *Bildisco* decision." *See* Rosalind Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM BANKR. L. J. 293, 306, 316 (1984) (describing two subcommittees of House of Education and Labor Committee holding "a joint hearing on the subject of the growing use of federal bankruptcy law as a 'new collective bargaining weapon'").

[3] References to the Bankruptcy Code are to 11 U.S.C. §§101–1532 (2006).

[4] *See* 11 U.S.C. § 1113 (2006). Under section 1113, a collective bargaining agreement remains in effect upon a bankruptcy filing and a debtor may not unilaterally alter any term of a labor agreement without meeting the requirements of the statute. *See* 11 U.S.C. § 1113(f); *see also* Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 992 (2d Cir. 1990) (holding "that § 1113(f) precludes application of the automatic stay to disputes involving a collective bargaining agreement only when its application allows a debtor unilaterally to terminate or alter any provision of a collective bargaining agreement"); United Steelworkers of Am. v. Unimet Corp. (*In re* Unimet Corp.), 842 F.2d 879, 884 (6th Cir. 1988) ("[P]rohibiting modification of *any provision* of the collective bargaining agreement without prior court approval."). Before seeking court-approved rejection of a labor agreement, a debtor must engage in

Corporation, then the second largest domestic steel company, filed a chapter 11 bankruptcy case and immediately announced that it was ceasing the payment of retiree health benefits covering some 70,000 retirees.[5] Congress acted again, this time to forestall the elimination of retiree health, life insurance and disability benefits upon a bankruptcy filing through legislation that ultimately became section 1114 of the Bankruptcy Code.[6]

By adding these provisions to the Bankruptcy Code, Congress intended to restrict the use of bankruptcy to alter obligations that implicate two vital interests—national labor policy and retiree insurance obligations. The statutes incorporate features designed to protect these interests and *limit* the circumstances under which a debtor may alter its obligations under a labor agreement or retiree health program.[7] Sections 1113 and 1114 represent deliberate policy choices by Congress to restrain a debtor's discretion under federal bankruptcy policy by prescribing special treatment for collective bargaining agreements and retiree insurance obligations not applicable to executory contracts generally or to other types of monetary obligations.[8] Balancing these non-bankruptcy interests against federal

---

collective bargaining over proposals that meet prescribed standards. *See* 11 U.S.C. § 1113(b); *see also* Century Brass Prods., Inc. v. Int'l Union (*In re* Century Brass Prods. Inc.), 795 F.2d 265, 272 (2d Cir. 1986) (discussing reversal of *Bildisco* by section 1113 which created of "an expedited form of collective bargaining with several safeguards").

[5] *See In re* Chateaugay Corp., 64 B.R. 990, 992–93 (S.D.N.Y. 1986) (describing events surrounding LTV's bankruptcy filing); Susan J. Stabile, *Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code*, 14 CARDOZO L. REV. 1911, 1912 (1993) (indicating "heated public response" to LTV's actions and "a union strike at several LTV steel mills"). LTV contended that the health benefits obligations were pre-petition claims based on the pre-bankruptcy service of former employees. *Chateaugay*, 64 B.R. at 993 ("LTV concluded that the Retirees held pre-petition unsecured claims which could not be paid absent court order or under a confirmed plan of reorganization.").

[6] 11 U.S.C. § 1114 (2006). Temporary legislation was passed in 1986 to halt the suspension of retiree medical, life and disability coverage in pending bankruptcy cases. *See* LTV Steel Co. v. United Mine Workers of Am. (*In re* Chateaugay), 922 F.2d 86, 88 (2d Cir. 1990) ("Congress enacted temporary legislation requiring restoration of the benefits, and giving retiree benefit payments the status of administrative expenses, thereby permitting the payments during the reorganization."); *see also* Daniel Keating, *Good Intentions, Bad Economics: Retiree Insurance Benefits in Bankruptcy*, 43 VAND. L. REV. 161, 174 (1990) (noting temporary stopgap legislation providing that debtor filing for chapter 11 must continue retirees benefits payments). In 1988, Congress passed the Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat 610 (1988), which added section 1114 to the Bankruptcy Code. *See* Stabile, *supra* note 5, at 1926–27. Section 1114 requires the continuation of retiree benefits upon a bankruptcy filing and prohibits the modification of retiree benefits except as permitted under the statute. *See* 11 U.S.C. § 1114(e). The procedures and standards governing modification of retiree benefits are similar to those under section 1113. *See In re* Tower Automotive, Inc., 241 F.R.D. 162, 166–68 (S.D.N.Y. 2006); *In re* Farmland Industries, Inc., 294 B.R. 903, 915–16 (Bankr. W.D. Mo. 2003); *In re* Ionosphere Clubs, Inc., 134 B.R. 515 (Bankr. S.D.N.Y. 1991) ("When Congress enacted § 1114, it used the same procedures and standards as existed for modification or rejection of collective bargaining agreements under § 1113.").

[7] *See, e.g.*, Peters v. Pikes Peak Musicians Ass'n, 462 F.3d 1265 (10th Cir. 2006) (noting section 1113 prohibits debtors from unilaterally changing "terms and conditions of a collective bargaining agreement"); Teamsters Indus. Sec. Fund v. World Sales, Inc. (*In re* World Sales, Inc.), 183 B.R. 872, 878 (9th Cir. 1995) ("Section 1113 was enacted to protect employees during the interim between the filing of the bankruptcy petition and court-supervised modification or ultimate rejection of the [collective bargaining agreement].").

[8] *See Tower Automotive*, 241 F.R.D. at 167 (stating that "§ 1114 . . . provides retirees with rights not afforded general unsecured creditors"); Donald R. Korobkin, *Value and Rationality in Bankruptcy*

bankruptcy policy, Congress determined that labor agreements and retiree health insurance should be afforded special protections notwithstanding the prerogatives otherwise available to a debtor in a chapter 11 bankruptcy.[9]

How, then, to explain the wave of bankruptcy cases targeting significant reductions in labor costs, pension funding, and retiree health obligations that has surged through the airline industry, the steel industry, auto supply and other heavily unionized industries in recent years?[10] Restructuring professionals have denominated these cases "labor transformation" bankruptcies.[11] They have in common the strategic use of bankruptcy to bring about broad changes to a business, largely through substantial cost-cutting, to address conditions that are ascribed to fundamental industry change. In these cases, the debtor believes that the bankruptcy process will allow it to achieve long-term solutions through the tools available under the Bankruptcy Code, including the rejection of collective bargaining agreements, the reduction or elimination of retiree health obligations and transactions to downsize the business to "core" operations or facilitate other operational changes to lower labor costs.[12] In these cases, debtors have been able to

---

Decisionmaking, 33 WM. & MARY L. REV. 333, 362–63 (1992) (stating section 1113 "embodies normative constraints to promote certain strongly held values associated with the integrity of collective bargaining agreements").

[9] *See* PBGC v. LTV Corp., 496 U.S. 633, 646–47 (1990) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice . . . .") (quoting *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987)).

[10] Among the bankruptcy cases in which companies principally targeted labor, pension and retiree health costs are: *In re UAL Corp.*, No. 02-48191 (Bankr. N.D. Ill.) (United Airlines, Inc.); *In re USAirways, Inc.*, No. 02-83984 (Bankr. E.D. Va.) ("USAirways I"); *In re USAirways, Inc.*, No. 04-13819 (Bankr. E.D. Va.) ("USAirways II"); *In re Delta Air Lines, Inc.*, No. 05-17923 (Bankr. S.D.N.Y.); *In re Northwest Airlines Corp.*, No. 05-17930 (ALG) (Bankr. S.D.N.Y.); *In re Mesaba Aviation*, No. 05-39258; (Bankr. D. Minn.); *In re ATA Holding Corp.*, No. 04-19866; (Bankr. S.D. Ind.); *In re Kaiser Aluminum Corp.*, 456 F.3d 328 (3d Cir. 2006); *In re Bethlehem Steel*, No. 01-15288 (Bankr. S.D.N.Y.); *In re Tower Automotive, Inc.*, No. 05-10578 (Bankr. S.D.N.Y.); *In re Delphi Corporation*, No. 05-44481 (Bankr. S.D.N.Y.); *In re Dana Corp.*, No. 06-10354 (Bankr. S.D.N.Y.). *See, e.g.*, U.S. Gov't Accountability Office, *Employee-Sponsored Benefits: Many Factors Affect the Treatment of Pension and Health Benefits in Chapter 11 Bankruptcy*, GAO 07–1101 (2007) (identifying companies that rejected labor agreements and/or terminated pension or non-pension benefits obligations in bankruptcy).

[11] *See, e.g.*, Disclosure Statement with Respect to Joint Plan of Reorganization of Delphi Corp. and Certain Affiliates, Debtors and Debtors-in-Possession at DS 40–41, *In re* Delphi Corp., No. 05-44481(RDD) (Bankr. S.D.N.Y. Sept. 6, 2006) [hereinafter, Delphi Disclosure Statement] (describing Delphi's "labor transformation" plan to address its "legacy labor costs as part of its restructuring" through, *inter alia*, motions under section 1113 and section 1114).

[12] *See, e.g.*, Delphi Disclosure Statement at DS 30, 34–35 (describing Delphi's decision to seek relief under chapter 11 to address, *inter alia*, "U.S. legacy liabilities" and its bankruptcy transformation plan, including "labor transformation"); *see also* Declaration of Douglas M. Steenland, at ¶ 9, *In re* Northwest Airlines Corporation, No. 05-17930 (Bankr. S.D.N.Y. Sept. 14, 2005) (describing airline's intent to "use the salutary provisions of chapter 11" to "realize three major goals essential to the transformation of Northwest," including achieving a "competitive labor cost structure"); *id.* at ¶¶ 10, 12–13 (identifying "labor cost disadvantages *vis-a-vis* the [low cost carriers]"as "one of the fundamental causes of its difficulties"); Informational Brief in Support of First Day Motions, *In re* Delta Air Lines, Inc., No. 05-17923 (Bankr. S.D.N.Y. Sept. 14, 2005) (describing its "Transformation Plan" initiatives and plans to use bankruptcy to obtaining additional cost savings, including pension funding, labor cost and retiree health cost savings); Supplemental Brief in Support of First Day Motions at 9–11, *In re* USAirways, Inc., No. 04-13819 (Bankr.

extract substantial labor and benefit costs cuts, either through, or under the threat of, court-ordered relief under sections 1113 and 1114.[13] Many have involved the termination of defined benefit pension plans as well.[14]

But the proliferation of bankruptcy cases taking aim at costs attributed to collective bargaining agreements and pension and retiree health obligations is not easily squared with the special status accorded labor agreements and retiree health obligations by the addition of sections 1113 and 1114 to the Bankruptcy Code. Section 1113, in particular, was enacted to prevent companies from using bankruptcy as a strategic tool in its dealings with labor.[15] A principal purpose of both statutes is to protect employees and retirees from bearing a disproportionate burden of their employer's bankruptcy.[16] Yet the premise of the transformation bankruptcy is that bankruptcy law will enable restructuring changes that will be

---

E.D. Va. Sept. 12, 2004) (describing Transformation Plan to be achieved in US Airways II, including cuts in pay and benefits, "whether by consent or through judicial resolution"); Informational Brief of United Air Lines, Inc. at 2–3, *In re* UAL Corporation, No. 02-48191 (Bankr. N.D. Ill. Dec. 9, 2002) (describing United's intention to use bankruptcy to transform its business and asserting that "the only conceivable way for United to reorganize will be to reduce its labor and other costs dramatically").

[13] *See, e.g.*, Association of Flight Attendants-CWA v. P.B.G.C., No. Civ A 05-1036ESH, 2006 WL 89829, at *2 (D.D.C. Jan. 13, 2006) (describing United Air Lines' section 1113 and pension plan termination proceedings); *In re* Nw. Airlines Corp., 346 B.R. 307, 332 (Bankr. S.D.N.Y. 2006) (approving rejection of debtor's section 1113 motion against one union and noting section 1114 proceedings against retirees and settlements reached with other unions); *In re* Delta Air Lines, 359 B.R. 468, 473 (Bankr. S.D.N.Y. 2006) (delineating labor costs saved by section 1113 proceedings at Delta's Comair subsidiary); *see also* Delphi Disclosure Statement at DS-49–55 (describing labor settlements, including attrition programs, modified wage, benefit and worksite agreements, elimination of retiree health obligations and pension plan freeze); First Amended Disclosure Statement With Respect to First Amended Joint Plan of Reorganization of Debtors and Debtors in Possession at 29–32, *In re* Dana Corp., No. 06-10354(BRL) at 30–32 (Bankr. S.D.N.Y. Oct. 18, 2007) (describing "targeted" labor-related savings and estimating annual savings at $220-245 million per year); Second Amended Disclosure Statement with Respect to Joint Plan of Reorganization of USAirways, Inc. at 63–65, *In re* USAirways, Inc., No. 04-13819 (Bankr. E.D. Va. Aug. 9, 2005) (describing labor cost savings of over $1 billion per year achieved during USAirways II).

[14] *See Kaiser Aluminum Corp*., 456 F.3d at 332 (describing Kaiser's proceedings to terminate six pension plans in bankruptcy); *see also In re* UAL Corporation, 428 F.3d 677, 684 (7th Cir. 2005) (approving settlement between debtor and Pension Benefit Guaranty Corporation involving termination of four pension plans); *In re* Aloha Airgroup, Inc., No. 04-3063, 2005 WL 3487724, at *2 (Bankr. D. Hawaii Dec. 13, 2005) (describing Aloha's proceedings to terminate four pension plans); *In re* US Airways, Inc., 296 B.R. 734, 745 (Bankr. E.D. Va. 2003) (approving termination of debtor's pension plan).

[15] *See* Adventure Res., Inc. v. Holland, 137 F.3d 786, 797–98 (4th Cir. 1998) (Congress acted to halt use of "bankruptcy law as an offensive weapon in labor relations") (quoting *In re* Roth American, Inc., 975 F.2d 949, 956 (3d Cir. 1992)); *see also* Century Brass Prods., Inc. v. Int'l Union (*In re* Century Brass Prods. Inc.), 795 F.2d 265, 272 (2d Cir. 1986) (noting that statute imposed "several safeguards" on a debtor seeking rejection "to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion"); *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 89–90 (2d Cir. 1992) (describing section 1113 requirements which prevent debtor "from using bankruptcy as a judicial hammer to break the union").

[16] *See* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1091 (3d Cir. 1986) (citing Congressional intent in enacting section 1113 that employees "not bear either the entire financial burden of making the reorganization work or a disproportionate share of that burden"); *see also In re* Tower Automotive, Inc., 241 F.R.D. 162, 166 (S.D.N.Y. 2006) (describing Congress's intent in enacting section 1114 to "'ensure that the debtors did not seek to effect reorganization 'on the backs of retirees' for the benefit of other parties in interest'" (quoting *In re* Ionosphere Clubs, Inc., 134 B.R. 515, 523 (Bankr. S.D.N.Y. 1991)).

brought about in large part by cuts in collectively-bargained labor, pension and retiree health obligations.[17]

As a cost-cutting strategy, labor-targeted bankruptcies appear to have achieved their goals, despite the enactment of sections 1113 and section 1114. As a result, labor groups have had to absorb cumulative losses in these cases: elimination of jobs, cuts in wages and benefits, termination or freezing of pension plans and reductions in, or elimination of, retiree health benefits.[18] The long-term effects of these changes on individual workers and their families, and in turn, on the companies, have yet to fully unfold. At airlines that have emerged from bankruptcy, labor groups have already signaled their discontent over long-term concessionary contracts negotiated in section 1113 proceedings conducted in those bankruptcies.[19]

The heavy focus on labor and benefit cost cuts in the "transformation" bankruptcies offers strong proof that the substantive labor policies incorporated into the Bankruptcy Code through section 1113 are not operating as Congress intended. Despite the legislative choice made by Congress to restrain bankruptcy prerogatives where labor agreements are concerned, debtors have been free to use section 1113 and section 1114 to take broad aim at collective bargaining agreements, pension plans and retiree benefits.

In some ways this development was foreshadowed by an early split between two influential courts regarding key provisions of the statutory standard for rejection under section 1113.[20] But the recent transformation cases have highlighted the extent to which bankruptcy policy, rather than labor policy, prominently influences the application of section 1113.[21] In these cases, seeking relief from labor and benefit costs becomes closely identified with the principal aim of the restructuring case[22] and sections 1113 and 1114 become special-purpose provisions brought to bear on these obligations rather than (as they were intended) instruments of restraint.

This article reviews the background of section 1113, the early split between the Second Circuit and Third Circuit Courts of Appeals in interpreting the rejection

---

[17] *See supra* notes 11, 12.

[18] *See* Ass'n of Flight Attendants-CWA v. Mesaba Aviation, Inc., 350 B.R. 435, 443 (D. Minn. 2006) (describing "draconian" effects of airline bankruptcies on labor unions and employees); *see also supra* notes 13, 14.

[19] Corey Dade, *After Delta's Recovery, New Turbulence Stirs*, WALL ST. J., Oct. 4, 2007; Liz Fedor, *Pilots to NWA Chair: Shows Us More Money*, MINNEAPOLIS STAR TRIB., September 7, 2007; *United Workers Join For Fight*, CHI. TRIB., March 28, 2007; James Miller, *Union Chief Wants United to Start Talks*, CHI. TRIB., May 31, 2007 (reporting post-bankruptcy disputes at Northwest Airlines and United Air Lines arising from contracts negotiated during the airlines' bankruptcy cases).

[20] *See infra* pp. 427–430.

[21] *See* Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887, 894 (10th Cir. 1990) (Seymour, J. concurring) (noting majority ignored strong labor policy); *In re* Delta Air Lines, Inc., 359 B.R. 468, 475 (Bankr. S.D.N.Y. 2006) (holding section 1113 is not labor law but is bankruptcy law); *cf. In re* Horsehead Indus., 300 B.R. 573, 585 (Bankr. S.D.N.Y. 2003) (emphasizing ultimate goal of section 1113 should be reorganization of debtor).

[22] *See supra* notes 11, 12.

standard, and the application of section 1113 in recent cases. The article concludes with the proposition that the erosion of labor policies in the application of section 1113 has made bankruptcy, once again the '"new collective bargaining weapon. '"[23]

I. THE CODIFICATION OF LABOR POLICIES IN SECTION 1113

Enacted in 1984 as part of the Bankruptcy Amendments and Federal Judgeships Act,[24] section 1113 was intended to overturn the Supreme Court's decision in *NLRB v. Bildisco*[25] with respect to the treatment of collective bargaining agreements in bankruptcy.[26] In *Bildisco*, the Court confirmed that collective bargaining agreements could be rejected under bankruptcy law.[27] In addition, the Supreme Court settled a dispute among the lower courts regarding the standard to be applied to rejection of collective bargaining agreements.[28] The decision also addressed the consequences of unilateral modification by a debtor in the absence of court-approved rejection.[29]

In its ruling, the Supreme Court accepted lower court rulings that a "somewhat stricter standard" should apply to rejection of labor agreements in light of "the special nature of a collective-bargaining contract, and the consequent 'law of the

---

[23] Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1081 (3d Cir. 1986).

[24] The Bankruptcy Amendments and Federal Judgeships Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

[25] 465 U.S. 513 (1984).

[26] FBI Distribution Corp. v. Official Comm. of Unsecured Creditors (*In re* FBI Distribution Corp.), 330 F.3d 36, 44 (1st Cir. 2003) ("Congress amended the Code by adding 11 U.S.C. § 1113, which provides special treatment for collective bargaining agreements."); *see* Adventure Res., Inc. v. Holland, 137 F.3d 786, 797–98 (4th Cir. 1998) (emphasizing Congress enacted section 1113 to prevent employers from using bankruptcy filings to modify or reject collective bargaining agreements); Carpenters Health & Welfare Trust Funds v. Robertson (*In re* Rufener Constr.), 53 F.3d 1064, 1066 (9th Cir. 1995) (noting section 1113 "imposes several procedural requirements that trustees and debtors must follow in order to reject a collective bargaining agreement"); *see also*, Shugrue v. Air Line Pilots Association, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 990 (2d Cir. 1990); United Steelworkers of Am. v. Unimet Corp. (*In re* Unimet Corp.), 842 F.2d 879, 882 (6th Cir. 1988); *Wheeling-Pittsburgh*, 791 F.2d at 1076; *In re* Carey Transp., Inc., 50 B.R. 203, 206 (Bankr. S.D.N.Y. 1985).

[27] *Bildisco*, 465 U.S. at 521–23.

[28] *See, e.g., In re* Brada-Miller Freight System, Inc., 702 F.2d 890, 899 (11th Cir. 1983) ("We find . . . balancing of the equities test provides a more satisfactory accommodation of the conflicting interests at stake in a rejection proceeding."); Shopmen's Local Union No. 455 v. Kevin Steel Prod., Inc., 519 F.2d 698, 707 (2d Cir. 1975) (finding rejection standard should not be based solely on debtor's financial status but should consider balance of equities). *See generally* Bhd. of Ry., Airline and S.S. Clerks v. REA Express, Inc., 523 F.2d 164, 172 (2d Cir. 1975) ("[I]n view of the serious effects which rejection has on the carrier's employees it should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs.").

[29] *Bildisco*, 465 U.S. at 534 ("But while a debtor-in-possession remains obligated to bargain in good faith under NLRA § 8(a)(5) over the terms and conditions of a possible new contract, it is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action."); *see* 29 U.S.C. § 158 (d) (2006) ("[T]hat where 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 . . . .").

shop' which it creates [citations omitted]."[30] The Court rejected a strict standard favored by the National Labor Relations Board (NLRB) and articulated by the Second Circuit Court of Appeals in *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*[31] In that case, the court ruled that, "[i]n view of the serious effects which rejection has on the carrier's employees," rejection should be authorized "only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs."[32] The Court found this standard unacceptably narrow in its focus on whether rejection of a collective-bargaining agreement was needed to avoid liquidation, a limitation the Court saw as "fundamentally at odds with the policies of flexibility and equity" of chapter 11.[33]

Instead, the Court settled on a standard for rejection that it termed "higher than that of the 'business-judgment' rule, but a lesser one than the *REA Express*" standard.[34] The standard announced by the Court required a debtor to show that "the collective bargaining agreement burdens the estate and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."[35] In addition, before acting on a motion to reject the agreement, a bankruptcy court "should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution."[36]

The Court's nod to federal labor policy in articulating the rejection standard was overshadowed (if not undone) by its controversial ruling that a debtor does not commit an unfair labor practice by unilaterally modifying a labor agreement upon a bankruptcy filing.[37] The Court's rationale was that a labor agreement, like other executory contracts, is not an enforceable agreement upon the filing of a bankruptcy case.[38] The Court's majority did not consider its ruling to be inconsistent with federal labor policies because a debtor would still be required to bargain "over the

---

[30] *Bildisco*, 465 U.S. at 524. *See Brada Miller Freight*, 702 F.3d at 899 (accepting *Bildisco* balancing of equities test as better tool to evaluate rejection of collective bargaining agreements). *See generally* John Wiley & Sons, Inc., v. Livingston, 376 U.S. 543, 548 (1964) ("[A] collective bargaining agreement is not an ordinary contract. It is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. The collective agreement covers the whole employment relationship.").

[31] *REA Express*, 523 F.2d at 172.

[32] *Id.*

[33] *Bildisco*, 465 U.S. at 525.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] Section 8(d) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(d)(4) (2006), sets forth the "mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder . . . ." 29 U.S.C. § 158(d) (2006). Where there is an agreement in effect, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, except as set forth in the statute. The party desiring modification shall, *inter alia*, continue "in full force and effect" "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." *Id.*

[38] *Bildisco*, 465 U.S. at 521–23, 532.

terms and conditions of a new possible contract" even though "it is not guilty of an unfair labor practice by unilaterally breaching a collective-bargaining agreement before formal Bankruptcy Court action."[39]

In a dissent that drew heavily on federal labor policies, four justices strongly disagreed with the majority's ruling that a debtor does not commit an unfair labor practice by unilaterally modifying a collective bargaining agreement.[40] The dissent charged that the majority's ruling ignored the Court's long-standing recognition of the role of labor agreements in federal labor policy and would operate to "deprive[ ] the parties to the agreement of their 'system of industrial government.'"[41]

Lobbying efforts by labor organizations intensified after the *Bildisco* decision.[42] At the same time, Congress' attention was focused on another serious bankruptcy issue, this one arising from the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line*,[43] in which the Court ruled that the grant of authority to bankruptcy judges lacking the attributes of Article III judges was unconstitutional.[44] The *Marathon* decision was stayed to allow Congress to take corrective action.[45] The legislative solution to the *Marathon* issue thus became the vehicle for enacting Congress' response to *Bildisco*.[46]

As described in detailed accounts of the passage of the 1984 amendments, section 1113 was the product of compromises resulting from at least three separate bills introduced in the House and the Senate to address the *Bildisco* decision.[47]

---

[39] *Id.* at 534.

[40] *Id.* at 535–54 (Brennan, J. dissenting).

[41] *Id.* at 553–54 (Brennan, J. dissenting) (citation omitted). *See id.* at 548 (noting central role of collective bargaining in conflict resolution).

[42] Rosenberg, *supra* note 2, at 312 (noting shift in congressional interest regarding Court's *Bildisco* decision after six airline unions testified before House subcommittee and labor leaders called on Congress to adopt stricter standard under which bankrupt employer could reject collective bargaining agreement); Michael D. Sousa, *Reconciling the Otherwise Irreconcilable: The Rejection of Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code*, 18 LAB. LAW. 453, 468–69 (2003) (noting labor leaders' lobbying efforts in response to *Bildisco*); *see* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1082 (3d Cir. 1986) (reviewing legislative history of section 1113 that began with unions' "immediate and intense lobbying effort in Congress to change the law").

[43] N. Pipeline Constr. Co. v. Marathon Pipe Line, 458 U.S. 50 (1982) (holding Bankruptcy Reform Act of 1978 unconstitutional because it "impermissibly removed most, if not all, of 'the essential attributes of the judicial power'" from district court and vested those powers in adjunct bankruptcy court not found in Article III).

[44] *Id.* at 87.

[45] *Id.* at 88.

[46] *See* Bruce Charnov, *The Uses and Misuses of Legislative History of Section 1113 of the Bankruptcy Code*, 40 SYRACUSE L. REV. 925, 948–50 (1989) (observing deadline imposed by Supreme Court after *Marathon* influenced the passage of section 1113); *see also* Elizabeth P. Gilson, *Statutory Protection For Union Contracts in Chapter 11 Reorganization Proceedings:* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 19 CONN. L. REV. 401, 409–10, n.38 (1987) (noting pressure on Congress to pass bill restructuring "entire system of bankruptcy courts" in light of *Marathon*); Stabile, *supra* note 5, at 1922 n.65 (stating Congress passed section 1113 as part of legislation to resolve jurisdictional issue raised by *Marathon*).

[47] *See* Michael St. Patrick Baxter, *Is There a Claim For Damages From the Rejection of a Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code?*, 12 BANKR. DEV. J. 703, 722 (1996)

Congressman Rodino introduced H.R. 4908 when the *Bildisco* decision was announced. Congressman Rodino's bill proposed the stringent *REA Express* test as the standard to be applied to rejection of a labor agreement and included a prohibition on unilateral modification of a collective bargaining agreement.[48] The Rodino proposal was incorporated into H.R. 5174, the omnibus bankruptcy bill passed by the House.[49] In the Senate, Senator Thurmond rejected the House proposal and introduced a bill incorporating the *Bildisco* rejection standard, adding a requirement that a debtor provide 30 days notice before unilateral modification.[50] This proposal was "'reluctantly' accepted by the business community but rejected by labor."[51] Senator Packwood then introduced a separate bill with the backing of organized labor. Among other provisions, the Packwood amendment would have permitted rejection upon a showing of "minimum modifications to employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties . . . ."[52]

When fears of a deadlock led to withdrawal of both the Packwood and Thurmond amendments, the Senate passed a bankruptcy bill containing no labor provision.[53] The conference then took up H.R. 5174, which contained the Rodino *REA Express* formulation, and the Senate bill, which contained no labor provision. The conference agreement emerged overnight on June 28, 1984 and was passed on June 29, 1984 as the interim jurisdictional rule was expiring.[54]

(noting difference between new bill and original Rodino proposal); Charnov, *supra* note 46, at 946–47, 950–54 (discussing history of three different bills during legislative process); Rosenberg, *supra* note 2, 313–318.

[48] *See, e.g.*, Baxter, *supra* note 47, at 721; Charnov, *supra* note 46, at 946; Rosenberg, *supra* note 2, at 313.

[49] *See, e.g.*, 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, 844 n.21 (1994); Charnov, *supra* note 46, at 946–47.

[50] *See* Charnov, *supra* note 46, at 950–51 (describing introduction of Thurmond amendment); 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, 68 (1994) (describing Thurmond's proposal incorporating balancing of equities test and thirty day waiting period); Anne J. McClain, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L. J. 191, 196 (1991) (discussing Sen. Thurmond amendment).

[51] *See* N.Y. Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 848 F.2d 345, 353 (2d Cir. 1988) (Feinberg, J., dissenting) (describing reaction to Sen. Thurmond bill); 130 CONG. REC. 10, 13061 (1984) (statement by Sen. Thurmond) ("[T]he business community does not prefer this but they reluctantly went along. Thus, while business has made significant and conciliatory shift in its position, labor has given little or nothing in its demands."); Rosenberg, *supra* note 2, at 318 (explaining business interests opposed Packwood amendment, while labor rejected Thurmond's proposal).

[52] 130 CONG. REC. 10, 13185 (1984). *See* Charnov, *supra* note 46, at 952–53 (describing Packwood amendment).

[53] *See* Baxter, *supra* note 47, at 721 (stating both Packwood and Thurmond withdrew their amendments in order to resolve *Marathon* issue); Charnov, *supra* note 46, at 953–54 (describing withdrawal of amendments to prevent filibuster); Gilson, *supra* note 46, at 409–10, n.38 (noting withdrawal of amendments to avoid filibuster and that, at Sen. Dole's urging, a bill was passed with no labor provisions).

[54] Charnov, *supra* note 47, at 954; Rosenberg, *supra* note 2, at 318–19, 321, n.155; *see* Bill D. Bensinger, *Modification of Collective Bargaining Agreements: Does a Breach Bar Rejection?*, 13 AM. BANKR. INST. L. REV. 809, 816 (2005) ("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.").

As reflected in the principal bills under consideration and in the floor statements on final passage, the extent to which labor policies would apply to limit the application of bankruptcy policy was central to the legislative debate. The Rodino and Packwood proposals favored strict rejection standards and a prohibition against unilateral rejection. The Thurmond amendment would have codified *Bildisco* with a modest limit on unilateral modification. Accounts of the legislative events show that the text of section 1113 was considered by most of those who made statements about the bill to be, in substance, the labor-backed Packwood amendment, even if the language was not identical to Packwood's proposal.[55]

The compromise was reflected in specific provisions that made explicit the application of labor policies, while opponents of the pro-labor provisions were successful in incorporating limited circumstances in which unilateral action to implement changes could be taken.[56] On the pro-labor side, section 1113(f) prohibits unilateral modification of a collective bargaining agreement and establishes that a labor agreement remains in effect upon a bankruptcy filing.[57] In addition, a debtor seeking rejection is required to first engage in collective bargaining over proposals that must meet a standard limiting the scope of the modifications that can be sought.[58] Specifically, the statute requires the submission

---

[55] *See, e.g., In re Royal Composing Room*, 848 F.2d at 353 (Feinberg, J. dissenting) (describing current version as "tak[ing] most of its provisions from the Rodino and Packwood bills"); Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1087 (3d Cir. 1986) ("[C]ontemporaneous remarks of the conferees made it clear that the provision was based on the substance of Senator Packwood's proposal."); Charnov *supra* note 46, at 962 (noting both conferees viewed committee proposal to be same as Packwood's original amendment); *id.* at 966 (quoting Sen. Thurmond's floor statement that "the procedures and standards are essentially the same as those of the Packwood Amendment"); *id.* at 968 (quoting Sen. Packwood's floor statement that "approach contained in the amendment that [he] offered was, for the most part, adopted by the conferees."); *see also* Gilson, *supra* note 46, at 412 (stating Sen. Thurmond agreed that section 1113 was "essentially same as the Packwood amendment").

[56] *See In re Royal Composing Room*, 848 F.2d at 353 (Feinberg, J., dissenting) (describing legislative proposals and bill reported out of conference committee, "which takes most of its provisions from the Rodino and Packwood bills but contains a provision for interim relief pending a ruling on rejection application, see § 1113(e), that is inspired by the Thurmond bill"); *see also* Rosenberg, *supra* note 2, at 321 (describing new law as "a nearly perfect compromise" requiring an employer to bargain over "necessary modifications in the employees' benefits and protections" yet allowing debtor to take unilateral action if court fails to timely rule and to seek interim relief).

[57] 11 U.S.C. § 1113(f) (2006) ("No provision of this title 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 title."); *see* United Food and Commercial Workers Union v. Almac's Inc., 90 F.3d 1, 7 (1st Cir. 1996) ("In Section 1113, Congress provided that collective bargaining agreements are enforceable against the debtor after the filing of a petition for reorganization."); Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 990 (2d Cir. 1990) (construing section 1113(f) and citing statement of Sen. Packwood that "'[t]he amendments also prohibit the trustee from unilaterally altering or terminating the labor agreement prior to compliance with the provisions of the section. The provision encourages the collective bargaining process, so basic to federal labor policy.'" (quoting 130 CONG. REC. S8898 (daily ed. June 29, 1984)).

[58] 11 U.S.C. § 1113(b)(1), (2) (denoting proposal standards and bargaining requirement); *see* 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Sen. Packwood) (explaining that proposals must be limited to "necessary" proposals so that "the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwanted features of the labor agreement" not bearing on its financial condition, that word "necessary" appears twice "to emphasize[] this required aspect of the proposal" and "guarantee[ ] the

of a proposal that "is based on the most complete and reliable information available at the time" and "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[.]"[59] The statute also requires good faith bargaining following the submission of the proposal, providing that, "the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."[60] These requirements were incorporated to "place[ ] the primary focus on the private collective-bargaining process and not in the courts."[61]

---

sincerity of the debtor's good faith in seeking contract changes"); 130 CONG. REC. H7490 (statement of Rep. Morrison) ("[L]anguage makes plain that the trustee must limit his proposal . . . to only those modifications that must be accomplished [if] the reorganization is to succeed."); *see* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1087 (3d Cir. 1986) (citing Sen. Thurmond's concession that "the Senate conferees had been required to accept a bankruptcy bill, if there was to be one at all, that contained 'a labor provision acceptable to organized labor,' and that the provision was one whose 'procedures and standards are essentially the same as those of the Packwood amendment.'").

[59] 11 U.S.C. § 1113(b)(1)(A)

> Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section 'trustee' shall include a debtor in possession) shall–
>
> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, 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 . . .

Id.

[60] 11 U.S.C. § 1113(b)(2) ("During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.").

[61] 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood). *See* N.Y. Typographical Union v. Maxwell Newspapers (*In re* Maxwell Newspapers) 981 F.2d 85, 90 (2d Cir. 1992) (statute's "entire thrust" is to "ensure that well-informed and good faith negotiations occur in the market place, not as part of the judicial process."); *see also* Century Brass Prod. Inc. v. Int. Union, United Automobile, Aerospace and Agricultural Implement Workers of Am. (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 273 (2d Cir. 1986) (reaffirming section 1113 "encourages the collective bargaining process as a means of solving a debtor's financial problems insofar as they affect its union employees"); 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Sen. Kennedy) (stating intent "to overturn the Bildisco decision which had given the trustee all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process"); 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, 327 (1984) (analyzing law and legislative history and describing principal purpose to "discourage both unilateral action by the debtor and recourse to the bankruptcy court. Instead, the law seeks to encourage solution of the problem through collective bargaining").

In addition, the standard expresses Congress's intent that an employer's restructuring not disproportionately burden the employees. As expressed by Senator Packwood, the language "guarantees that the focus for cost cutting must not be directed exclusively at unionized workers. Rather the burden of sacrifices will be spread among all affected parties."[62] In ruling on a motion to reject a labor agreement, the court must find that the debtor has complied with the procedural and substantive requirements, that the union rejected the proposal "without good cause," and that the balance of the equities "clearly favors rejection" of the agreement.[63]

Opponents of the labor provisions pressed for the inclusion of terms that would accommodate time-sensitive contingencies in a bankruptcy case. Thus, a provision permitting emergency, interim relief without requiring the pre-rejection procedures was incorporated as section 1113(e).[64] Another provision permits the debtor to implement modifications unilaterally if the court fails to issue a decision in a

---

[62] 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Sen. Packwood)

> This language [fair and equitable contained in 11 U.S.C. § 1113(b)(1)(A)] guarantees that the focus for cost cutting must not be directed exclusively at unionized workers. Rather the burden of sacrifices in the reorganization process will be spread among all affected parties. This consideration is desirable since experience shows that when workers know that they alone are not bearing the sole brunt of the sacrifices, they will shoulder their fare share and in some instances without the necessity for a formal contract rejection.

Id. See Century Brass Prods., Inc. v. Int'l Union (*In re* Century Brass Prods. Inc.), 795 F.2d 265, 273 (2d Cir. 1986) (ruling purpose is "to spread the burden of savings the company to every constituency while ensuring that all sacrifice to a similar degree"); 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Senator Moynihan) (noting provision "ensures that a company's workers will not have to bear an undue burden to keep the company solvent. The union would have to make the necessary concessions. Nothing more. Nothing less.").

[63] 11 U.S.C. § 1113(c). *See In re* Mesaba Aviation, Inc., 341 B.R. 693, 755–60 (Bankr. D. Minn. 2006), *aff'd* in part, *rev'd* in part, Ass'n of Flight Attendants-CWA v. Mesaba Aviation, Inc., 350 B.R. 435 (D. Minn. 2006) (quoting *In re* American Provision Co., 44 B.R. 907, 909–10 (Bankr. D. Minn. 1984) and recognizing that section 1113(c) introduces principles of equity into the court's consideration of the facts by requiring the debtor to satisfy a burden of production and persuasion regarding the consequences of its proposals on all parties involved).

[64] 11 U.S.C. § 1113(e) (authorizing interim changes in terms of collective bargaining agreement "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate"); *see* United Food and Commercial Workers Union v. Almac's Inc, 90 F.3d 1, 4 (1st Cir. 1995) ("Congress recognized in enacting section 1113(e) that on occasion a debtor may require emergency relief from the collective bargaining agreement prior to rejection, assumption, or agreed-upon modification of the agreement."); Gibson, *supra* note 61, at 333 (describing statement of Sen. Hatch regarding interim relief provision as being critical to preserving business).

rejection proceeding within the time specified.[65] Opponents of the labor provisions also opposed the application of the new law to pending cases.[66]

Statements on final passage confirm that proponents of the labor policies deemed the resulting version of section 1113 acceptable. For example, Senator Kennedy expressed reservations about the subsections permitting unilateral action where the court fails to timely rule, as well as the interim relief provision, but was "convinced that both of these defects are sufficiently limited by appropriate safeguards that they do not detract from the overall product."[67] Senator Packwood also expressed concern about these provisions but felt they would have only limited application.[68] Those who opposed the labor provisions reluctantly accepted the labor-backed Packwood-based provisions and focused their comments on the addition of sections 1113(e) and section 1113(d)(2).[69]

II. BANKRUPTCY POLICY HAS ECLIPSED LABOR POLICIES IN APPLYING SECTION 1113

Interpretive disagreements erupted almost immediately following enactment as the courts tackled language the drafters may have understood more as markers for the respective policy interests than as precise instructions for implementing those policies.[70] The most prominent division in the application of the rejection standard occurred when the Second and Third Circuit Courts of Appeals issued conflicting rulings concerning the scope of proposed modifications permitted under section 1113—the "necessary" and "fair and equitable" standard.[71] This statutory test

---

[65] 11 U.S.C. § 1113(d)(2); *see* Charnov, *supra* note 46, at 966 (describing statement of Sen. Thurmond regarding provisions for emergency relief and unilateral action pending court ruling added "at the insistence of the Senate conferees" to "insure the flexibility and finality of the labor language"); Rosenberg, *supra* note 2, at 305–08, 317 (1984) (recounting Thurmond amendment, which included emergency relief provision); Gibson, *supra* note 61, at 331 (describing statement of Sen. Hatch that conference agreement "emphasizes the need for expedition" in process through addition of 30-day ruling deadline).

[66] Rosenberg, *supra* note 2, at 317; 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Sen. Dole) ("[I]mportantly, Mr. President, the labor provision is prospective only in application to ensure that it will not be applied to cases pending in the courts today, such as the Continental [case] . . . .").

[67] 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Sen. Kennedy).

[68] *Id.* (statement of Sen. Packwood) (adding, "on balance" the bill "should stimulate collective bargaining and limit the number of cases when a judge will have to authorize the rejection of a labor contract").

[69] *See supra* notes 50, 51; 130 CONG. REC. S8988 (daily ed. June 29, 1984) (statement of Sen. Thurmond) (stating, absent need to take corrective action in light of *Marathon Pipe Line* decision, he "could not have agreed to [the labor provisions]" but "the compromise that was reached was, in my opinion, the fairest and most equitable one that could have been reached under the circumstances").

[70] *See In re* American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984) (observing section 1113 "is not a masterpiece of drafting").

[71] *See* 11 U.S.C. § 1113(b)(1)(A) (2006). *Compare* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1088–89 (3d Cir. 1986), *with* Truck Drivers Local 807 v. Carey Trasp., Inc., 816 F.2d 82, 89 (2d Cir. 1987).

reflects the incorporation of labor policies[72] and has been a key determinant in the outcome of a rejection motion.[73]

The *Wheeling-Pittsburgh* court examined the legislative history in detail in order to resolve the disputed interpretations of the statute's "necessary" and "fair and equitable" requirements.[74] The court's opinion drew "significant guidance" from the legislative history, examining "the sequence of events leading to adoption of the final version of the bill, and the statements on the House and Senate floor of the legislators most involved in its drafting."[75] While the court defined "necessary" to mean "essential" and limited the focus of the standard to "the somewhat shorter term goal of preventing the debtor's liquidation,"[76] the significance of the court's ruling was its conclusion that the "necessary" requirement was "conjunctive with the requirement that the proposal treat 'all of the affected parties . . . fairly and equitably.'"[77] The court interpreted both the language of the statute and the legislative history to prohibit the rejection of a contract "merely because [the court] deems such a course to be equitable to the other affected parties, particularly creditors."[78] Such a construction, the court warned, "would nullify the insistent congressional effort to replace the *Bildisco* standard with one that was more sensitive to the national policy favoring collective bargaining agreements, which was accomplished by inserting the 'necessary' clause as one of the two prongs of the standard that the trustee's proposal for modifications must meet."[79] The court drew its conclusion from legislative events that pointed to a "congressional consensus that the 'necessary' language was substantially the same as the phrasing in Senator Packwood's [labor-backed] amendment."[80]

The Third Circuit's conclusion led it to reject the company's proposal for a wage cut under a five-year contract predicated on "worst-case scenario" projections by the company.[81] Based upon its "conjunctive" reading of the "necessary" and "fair and equitable" standard, the court faulted the proposal for failing to incorporate a "snap-back" provision to compensate the workers if the business fared better than

---

[72] *See supra*, notes 61, 62.

[73] Christopher D. Cameron, *How 'Necessity' 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, 920 (1994) (analysis of section 1113 opinions revealed that "necessity" requirement was "the single most important factor" in court's evaluation of rejection).

[74] *Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1082–84.

[75] *Id.* at 1086.

[76] *Id.* at 1089.

[77] *Id.*. *See* N.Y. Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 78 B.R. 671, 673–74 (S.D.N.Y. 1987) (discussing interpretation of word necessity as requiring both "necessity" and "fairly and equitable" requirements).

[78] *Wheeling-Pittsburgh Steel Corp.*, 791 F.2d at 1081.

[79] *Id.* at 1089.

[80] *Id.* at 1088. *See id.* at 1087 (commenting on Sen. Packwood's amendment "supported by labor" and concluding that "[t]he contemporaneous remarks of the conferees made it clear that the provision was based on the substance of the Senator Packwood's proposal").

[81] *Id.* at 1093.

the debtor's pessimistic projections.[82] The court ruled that the proposal could not be considered "necessary" because it consisted of "an unusually long five-year term at markedly reduced labor costs based on a pessimistic five-year projection without at least also providing for some 'snap-back' to compensate for workers' concessions."[83] The Court of Appeals was also critical of the bankruptcy court's application of a rejection standard "closer to, if not taken direct from, *Bildisco*, rather than a standard informed by the legislative history."[84]

The Second Circuit Court of Appeals took up the "necessary" and "fair and equitable" standards in *Truck Drivers Local 807 v. Carey Transportation.*[85] In *Carey* the court announced that it "declined to adopt" the *Wheeling-Pittsburgh* view that "necessary" should be construed as "'essential' or bare minimum," or that "necessary" referred to a debtor's short-term survival.[86] Unlike the Third Circuit's deference to the legislative history, the Second Circuit gave it short shrift. Instead, the court based its interpretation principally on the text of the statute itself.[87] The court did not address the *Wheeling-Pittsburgh* court's ruling that the "necessary" standard in section 1113(b)(1)(A) should be read in conjunction with the "fair and equitable" language. Instead, the *Carey* court addressed the "necessary" standard and the "fair and equitable" standards separately.[88] Focusing on the Third Circuit's "necessary means essential" formulation, the *Carey* court concluded that a debtor could not be limited to proposing "truly minimal changes" because it would be constrained from further bargaining, while a debtor that agreed to change its proposal in bargaining "would be unable to prove that its initial proposals were minimal."[89] In addition, the court compared the requirements of section 1113(b)(1) to the interim relief provision of section 1113(e) and concluded that the language difference suggested that the standard in section 1113(b)(1) was aimed at longer-term relief, again contrary to the Third Circuit's reading of the language.[90] The court summarized 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

---

[82] *Id.* at 1090 ("In failing to focus on the Union's contention about the 'snap back' provision when deciding whether the modifications were 'necessary,' the bankruptcy court erroneously treated the two prongs of the standard as disjunctive rather than conjunctive.").

[83] *Id.*

[84] *Id.* at 1090–91 (critiquing district court's failure "to appreciate Congress' substantial modification of the standard for rejection").

[85] 816 F.2d 82 (2d Cir. 1987).

[86] *Id.* at 89 ("[T]he *Wheeling-Pittsburgh* court did not adequately consider the significant differences between interim relief requests and post-petition modification proposals.").

[87] *Id.* (rejecting contention based on legislative events by noting that while legislative language might be based on Packwood proposal, precise language chosen was not same as Packwood amendment).

[88] *Id.* at 88–90 (addressing "necessary" and "fair and equitable" language as separate elements of section 1113(b)(1)(A) standard).

[89] *Id.* at 89.

[90] *Id.* The court also cited the feasibility standard for confirmation of a reorganization plan, see 11 U.S.C. § 1129(a)(11), as grounds for its view that the "necessary" standard required the court to look to the debtor's "ultimate future" and estimate its longer term financial needs. *Id.*

not absolutely minimal, changes that will enable debtor to complete the reorganization process successfully."[91]

A year later in *Royal Composing Room*,[92] a case in which a printing company sought to modify its labor agreement as a result of changing technologies in the industry, the Second Circuit held that where the debtor's proposal as a whole was determined to be "necessary" under the *Carey* standard, the union could not attack a particular element of the proposal under that standard if the union refused to bargain over it.[93] The majority opinion cited tactical considerations for this ruling.[94] The court feared that if a debtor were required to test individual components of its proposal against the standard, the union could tactically refuse to bargain and then claim that the proposal failed the statutory test.

In a strongly worded dissent, Chief Judge Feinberg criticized the majority's ruling in *Royal Composing* as contrary to the purposes underlying section 1113: "This appeal raises the question of whether a statute designed to make it more difficult for employers in bankruptcy proceedings to reject labor contracts can be used in a way that Congress obviously sought to avoid."[95] Like the opinion in *Wheeling-Pittsburgh*, the dissent's analysis was founded on a detailed review of the legislative history: "[the legislative history] reinforces what is implied by the statutory language itself: Congress intended Section 1113 to make rejection of signed labor contracts difficult (but not impossible) and was especially concerned that bankruptcy not become a union-busting tool."[96] The dissent concluded that by disregarding the backdrop of the statute, the majority had disrupted the workings of the statute in its focus only on aggregate savings and by supporting its "necessity" determination with a critique of the union's negotiating record.[97]

The Third Circuit's *Wheeling-Pittsburgh* decision and the Feinberg dissent in *Royal Composing*, each guided by a detailed review of legislative history, similarly

---

[91] *Id.* at 90. The court did not substantively address arguments regarding the proposed contract duration or the absence of a snap-back because the union had not raised these objections in the courts below. *Id.*

[92] N.Y. Typographical Union No. 6 v. Royal Composing Room, Inc. (*In re* Royal Composing Room, Inc.), 848 F.2d 345 (2d Cir. 1988).

[93] *See id.* at 348 (holding "at least in these circumstances, the focus should be at the proposal as a whole"); *see also id.* at 349 ("[S]o long as the total quantum savings is necessary under the *Carey Transportation* standard, the union may not prevent rejection by belatedly attacking a specific element."); *In re* Delta Air Lines, 342 B.R. 685, 694 (Bankr. S.D.N.Y. 2006) (applying majority test of necessity "focus[ing] . . . on the proposal as a whole").

[94] *In re Royal Composing Room*, 848 F.2d at 348 (acknowledging logic of union argument that any unnecessary modification amounts to non-compliance with section 1113, but that literal construction of statute would allow union "to play 'hit and run': refusing to negotiate toward a compromise, safe in the knowledge that it will almost certainly be able to defeat a rejection application by attacking some vital modification [as not] 'necessary'").

[95] *Id.* at 351 (Feinberg, J., dissenting).

[96] *Id.* at 352. *See id.* at 354 ("I believe [the legislative history] shows that a political battle was fought over section 1113, and that . . . those who wished to make rejecting a labor contract more difficult were successful.").

[97] *Id.* at 351–52, 354 (Feinberg, J., dissenting); *see id.* at 356–57 (criticizing majority's acquiescence to debtor's proposal in order to give debtor "flexibility," while union is forced to sacrifice contract "seniority" which is often most crucial element of collective bargaining agreements for unions in general).

concluded that the interpretation of the rejection standard must be informed by labor policies.[98] By contrast, neither the Second Circuit's formulation of the "necessary" standard in *Carey* nor the majority opinion in *Royal*, incorporated labor policies or credited the statute's legislative history.[99] But it is the *Carey* decision that has gained ground as courts that have addressed the statute have framed their analysis by selecting only from the *Wheeling-Pittsburgh* interpretation or the *Carey* interpretation.[100]

Because the more widely followed *Carey* decision was not informed by labor policy and did not follow the *Wheeling-Pittsburgh* court's "conjunctive" reading of the "necessary" and "fair and equitable" standards,[101] the split in the case law over these critical requirements has greatly weakened the application of labor policies. In the *Carey* formulation, whether a proposal is "necessary" is reviewed without regard to whether it is "fair and equitable" to the union. Viewed under *Carey*, the rejection standard tilts decidedly towards a bankruptcy-centered consideration about the prospects for a long-term reorganization and away from a labor policy frame of reference (for example, the degree to which proposed cuts invade the expectations reflected in the collective bargaining agreement or are modulated by snap-backs or other compensatory features of interest to the union).[102] Labor policies were further weakened by the *Royal Composing* decision, where the court added a limitation on the union's bargaining options to an analysis of the "necessity" standard.[103]

---

[98] *See* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1089 (3d Cir. 1986) ("The language as well as the legislative history makes plain that a bankruptcy court may not authorize rejection of a labor contract merely because it deems such a course to be equitable to the other affected parties, particularly creditors." The construction must be "more sensitive to the national policy favoring collective bargaining agreements."); *In re Royal Composing Room*, 848 F.2d at 353 (Feinberg, J. dissenting) ("[S]ection 1113 in its final form is a pro-labor law."); *see also* Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887, 894 (10th Cir. 1990) (Seymour, J., concurring) (criticizing majority opinion for construing "necessary" standard in lenient manner based on "conclusory statements, not arguments" while "ignoring strong labor policy favoring collective bargaining agreements").

[99] *But see* Shugrue v. Air Line Pilots Ass'n, Int'l (*In re* Ionosphere Clubs, Inc.), 922 F.2d 984, 989–90 (2d Cir. 1990) (looking to language of statute, legislative history and "the context in which § 1113 was enacted" to determine Congressional intent in interpreting section 1113(f)). *See* United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000) ("When the plain language and canons of statutory interpretation fail to resolve statutory ambiguity, we will resort to legislative history.").

[100] *See In re Mile Hi Metal Sys*., 899 F.2d at 892–93 (noting "majority of cases decided since *Wheeling-Pittsburgh* have declined to interpret section 1113(b)(1)(A) as requiring that a proposal be absolutely necessary"); Ass'n of Flight Attendants-CWA v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006) (contrasting Third Circuit and Second Circuit standards and concluding "the bankruptcy court correctly adopted the more flexible standard set forth in *Carey*").

[101] *See* Gilson, *supra* note 46, at 428–29 (observing that court's interpretation is based on plain language of statute).

[102] *See id.* at 89 ("[I]n virtually every case, it 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.").

[103] *In re Royal Composing Room*, 848 F.2d at 348–49 (describing unions' options to argue employer bad faith or negotiate moderation of offensive proposal and warning of risks of adopting hard-line position).

That the *Wheeling-Pittsburgh* interpretation has not gained favor may reflect too narrow a view of that court's ruling. While courts have focused on the semantic question whether "necessary" is synonymous with "essential," and whether the phrase "necessary to permit the reorganization" reflects a shorter time horizon, a court need not accept either interpretation in order to follow the more labor-sensitive *Wheeling-Pittsburgh* ruling. Instead, a court following *Wheeling-Pittsburgh* would address the "necessary" and "fair and equitable" standards together in a manner that tempers the debtor's case for its reorganization needs with a heightened regard for the effect of the proposal on the workers' labor agreement.[104]

Recent cases clearly reflect the influence of *Carey* and *Royal* and show that bankruptcy policies heavily predominate in applying section 1113. In the *Delta Air Lines* bankruptcy, Delta's affiliated regional carrier, Comair, initiated section 1113 proceedings against its unionized workforce, leading to decisions rejecting the pilots' collective bargaining agreement and the flight attendants' collective bargaining agreement.[105] In granting the motion to reject the pilots' labor agreement, the court explicitly declared that bankruptcy policy governs the application of the statute: "[t]he fact that section 1113 is a bankruptcy law and therefore instinct with the fundamental objectives of chapter 11 has consequences for the implementation of the statute . . . ."[106] The test applied by the court looked to "the long-term economic viability of the reorganized debtor . . . ."[107] Analogizing Comair's circumstances to the debtor in *Royal*, the court centered on the debtor's "long-term ability to compete in the marketplace" in its review of the statutory standards.[108] The court's focus on Comair's reorganization prospects led it to overrule the union's contention that its rejection of Comair's proposals had been justified because Comair failed to moderate its demands through a commitment to job security.[109] The court ruled that Comair could not be expected to make commitments to job security that could "further erode the airline's ability to compete."[110]

Similarly, in *Mesaba Aviation, Inc.*, the district court upheld the bankruptcy court's application of the "necessary" standard as interpreted in *Carey* and concluded that the "*Carey* interpretation provides the more accurate reading of section 1113 in its context as part of the larger bankruptcy statute aimed at

---

[104] *Wheeling-Pittsburgh Steel*, 791 F.2d at 1085 (rejecting bankruptcy court's analysis regarding effects of proposal on workers).

[105] *See generally In re* Delta Air Lines, 351 B.R. 67 (Bankr. S.D.N.Y. 2006); *In re* Delta Air Lines, Inc., 359 B.R. 468 (Bankr. S.D.N.Y. 2006). The court initially denied Comair's motion with respect to the flight attendants' labor agreement without prejudice to renewal. The denial was not based on the "necessary" standard, but on the debtor's intransigence regarding a flawed savings proposal which allocated too much of the savings to the flight attendant group. *See In re* Delta Air Lines, 342 B.R. 685, 697–99 (Bankr. S.D.N.Y. 2006).

[106] *In re* Delta Air Lines, Inc., 359 B.R. at 476. *See id.* at 475 ("It is important to bear in mind the context in which this statute operates. Section 1113 is not a labor law, it is a bankruptcy law.")

[107] *Id. at* 477.

[108] *Id.* at 478.

[109] *Id.* at 488.

[110] *Id.*

'providing for the long-term rehabilitation of distressed businesses.'"[111] Mesaba, a regional carrier providing services for Northwest Airlines, sought a 19.4% reduction in its labor costs through pay and other cuts, reductions that would have dramatically reduced pay and dropped less senior, lower-wage employees to rates comparable to poverty level.[112] The carrier sought fixed six-year agreements with its unions and refused to negotiate a snap-back or reopener provision.[113] Mesaba's case was premised on attaining an 8% profit margin as a means of attracting exit financing.[114]

In applying the statutory standard, the court defined "the real issue" as "what, in the complex and dynamic world of the current market, will best promote the longer-term viability of the Debtor. Clearly, the Debtor must be able to project a future attractive enough to a lender or investor that it can have its emergence from bankruptcy underwritten."[115] The harsh effects of the wage cuts on the labor groups were found not to constitute "good cause" for the unions' rejection of Mesaba's proposal.[116] The bankruptcy court concluded that, while the effect on the employees was "an utter horror," on "the macro-economics of this case, the [poverty-level wage] outcome is unavoidable. And that has to drive the whole analysis, under the statute."[117] While the district court reversed the bankruptcy court on appeal, in part, for its failure to "even consider" a snap-back given the proposed six-year duration of the contract, the basic elements of the debtor's case, *i.e.*, the "necessity" case premised on attaining an 8% profit margin and the unwavering demand for labor cost cuts of 19.4%, were upheld.[118]

Notwithstanding the courts' rulings regarding the necessity of the proposed savings rate and the six-year contract term, Mesaba reached negotiated resolutions with its labor groups that yielded an agreement less draconian that the proposals on which the debtor based its litigation case. The aggregate savings was estimated by the debtor at less than 16%.[119] In addition, the agreements were for four-year, rather than six-year terms and ameliorated the wage cuts with future increases tied to the number of aircraft in Mesaba's fleet.[120] In defending the settlement, the debtor asserted that the resulting agreements were "consistent with the assumptions in the

---

[111] Ass'n of Flight Attendants-CWA, v. Mesaba Aviation, Inc., 350 B.R. 435, 449 (D. Minn. 2006).

[112] *Id.* at 445.

[113] *Id.*

[114] *Id.*

[115] *In re* Mesaba Aviation, Inc., 341 B.R. 693, 740 (Bankr. D. Minn. 2006), *aff'd* in part, *rev'd* in part, Ass'n of Flight Attendants-CWA, v. Mesaba Aviation, Inc., 350 B.R. 435 (D. Minn. 2006).

[116] *See* 11 U.S.C. § 1113(c)(2) (2006) (providing court shall approve rejection motion only where court finds, among other things, that "the authorized representative of the employees has refused to accept [the debtor's] proposal without good cause").

[117] *Mesaba Aviation*, 341 B.R. at 759, n.100. The district court upheld the bankruptcy court's finding on appeal. *Mesaba Aviation*, 350 B.R. at 462.

[118] *Mesaba Aviation*, 350 B.R. at 462*; In re* Mesaba 350 B.R. 105, 106 (Bankr. D. Minn. 2006) (decision on remand).

[119] *See Mesaba Aviation*, 350 B.R. at 443 (noting Mesaba's new agreement).

[120] *See id.* at 443 (discussing new agreement).

Debtor's business plan and will put the Debtor's cost structure with respect to these employees on competitive terms with other regional carriers."[121]

The *Mesaba* case, in particular, illustrates the pitfalls of applying section 1113 with a bankruptcy-centric frame of reference. Indeed, the case exhibits attributes similar to those identified by the court in *Wheeling-Pittsburgh*. Mesaba's proposal for a long-term agreement at a specified rate of savings, with no prospect of renegotiation or snap-back, was premised on its attempt to develop conservative projections in order to attract exit financing.[122] Yet even the recognition that the 8% profit margin "would be built on the backs of" the employees, many of whom could not afford it,[123] did not divert the courts from their principal focus based upon bankruptcy concerns nor require Mesaba to provide for mitigation of its proposal as in *Wheeling-Pittsburgh*.

In these cases, rejection motions were approved without acknowledging the need for mitigating factors such as renegotiation, snap-back provisions or counterproposals reflecting particular interests of the union. They were also approved despite candid recognition regarding the effects on the employees.[124] These rulings send clear signals that the protected labor policies Congress intended to incorporate into the Bankruptcy Code through section 1113 have been lost in the application of a bankruptcy policy-centered interpretation of the rejection standard.

Mesaba and Comair based their cases for rejection of the labor agreements on attaining financial metrics the companies hoped would be attractive in winning bids and securing exit financing.[125] Defining the rejection case in the same terms as the objective for the bankruptcy case places the burden of the restructuring squarely on the shoulders of the employees by targeting their labor agreements. A debtor seeking to transform its labor costs through bankruptcy uses section 1113 as if it were an operational confirmation hearing instead of an effort to balance protected labor policies with bankruptcy policy favoring restructuring. Factors that would give effect to the policies section 1113 was designed to protect, such as mitigating the impact of a concessionary proposal, minimizing the interference with expectations created by the labor agreement, and avoiding a disproportionate and "disastrous" burden on the affected employees,[126] are given scant recognition in the larger scheme of the debtor's reorganization case.

For industries facing significant changes, or plagued by complex conditions largely beyond the control of an individual company, the emphasis on cost-cutting underscores the deficiencies in the section 1113 process as applied in the

---

[121] Motion to Approve Compromise and For Relief Under 1113(c) Approving Amended Agreements with ALPA, AFA and AMFA, at 5–7, *In re* Mesaba Aviation, Inc., No. 05-39258(GFK), (Bankr. D. Minn. Nov. 7, 2006).

[122] *Mesaba Aviation*, 341 B.R. at 740–41.

[123] *Id.* at 741 n.64.

[124] *See Mesaba Aviation*, 350 B.R. at 443 (noting effects of proposed cuts on employees, including those who will leave their jobs, "join the ranks of the uninsured," and "work too much for too little money.").

[125] *See Mesaba Aviation*, 341 B.R. at 739–40; *In re* Delta Airlines, Inc., 359 B.R. 468, 481–82 (Bankr. S.D.N.Y. 2006).

[126] *Mesaba Aviation*, 350 B.R. at 443 (noting "disastrous" results of airline bankruptcies for labor).

transformation cases. Airline debtors, for example, acknowledged that the difficulties faced by the network carriers went beyond cost-cutting, pointing to factors such as persistently high fuel prices, depressed ticket revenues, and a fall-off in business travel.[127] Unable to address these factors through bankruptcy, the airline debtors turned to substantial cost-cutting.[128] Bankruptcy allowed the airline debtors to claim control over labor, pension and retiree health costs through the use of sections 1113 and 1114 where outside forces could not be controlled.[129] The "disastrous" results for labor in these cases becomes a particularly difficult outcome to sustain as a matter of policy when the vehicle is the very statute designed to avoid those results.

CONCLUSION

The transforming business restructurings described in this article are not so different from the cases that brought attention to the need for reform after the *Bildisco* decision. Put simply, in these cases, bankruptcy has once again become a deliberate strategy used to broadly target costs associated with collective bargaining agreements and collectively-bargained pension and retiree health obligations. A bankruptcy premised upon the transformation of labor cost obligations, where the consequences to workers are sacrificed to bankruptcy policy, is plainly at odds with a statute designed to give meaningful effect to vital policies protecting labor agreements, workers and retirees.

---

[127] *See* Supplemental Brief in Support of First Day Motions at 6–5, *In re* USAirways, Inc., No. 04-13819 (Bankr. E.D. Va. Sept. 12, 2004) (ascribing failure of USAirways I bankruptcy to high fuel costs and weak domestic unit revenues); *see also id.* at 22–25 (describing cost reduction needs to meet challenges of low cost carrier competition); Information Brief of United Air Lines, Inc., No. 02-48191 at 36–44 (Bankr. N.D. Ill. December 9, 2002) (describing industry challenges, including September 11, 2001 attacks, fall-off in business travel, internet shopping, and low cost carrier competition); *id.* at 49–59 (describing labor cost issues); U.S. Gov't Accountability Office, GAO 05-945, *Bankruptcy and Pension Problems Are Symptoms of Underlying Structural Issues* (September 2005) (showing that airlines have used bankruptcy to cut costs with "mixed" results).

[128] *See supra*, note 12.

[129] *See* Daniel P. Rollman, *Flying Low: Chapter 11's Contribution to the Self-Destructive Nature of Airline Industry Economics*, 21 EMORY BANKR. DEV. J. 381 (2004) (noting airline's use of chapter 11 to obtain significant cost cuts "[enables] the carrier to delay fundamental changes to an outdated business model").