EMPLOYEE INTERESTS IN BANKRUPTCY

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This Article examines the treatment of employee interests in bankruptcy proceedings and, in particular, in reorganization under chapter 11 of the Bankruptcy Code FN1 (the "Code"). Employees have various kinds of interests in the bankruptcy setting. Some interests arise from specific rights and remedies that employees already have under nonbankruptcy law. For example, an employee has both a right and an interest to be paid contractually required wages and benefits. Employees also have interests, however, that derive from expectations or needs that nonbankruptcy law may not specifically protect. An employee has a genuine interest in retaining her job, for example, even if she may have no contractual or other basis under nonbankruptcy law to demand that this expectation be protected. FN2

The major effort of this Article will be to describe how current law seeks to protect the varied kinds of employee interests. Part I focuses on the interests of employees as creditors and, more specifically, as holders of *prepetition* claims against their financially distressed employers. These prepetition claims include those for direct compensation, FN3 unpaid contributions to, and benefits from, welfare FN4 and pension FN5 plans, and damage claims arising from prepetition breach of employment contracts. FN6 Part II then examines the law's treatment of interests that accompany *postpetition* operation of a business. The interests at stake here include not only formal legal rights that arise after the bankruptcy filing such as the right to receive wages and benefits as they are earned but also encompass an employee's informal expectation of continued benefits and future employment.

This survey will identify gaps in protections under current law. Most of these gaps affect nonmanagerial workers who lack union representation and, therefore, have the least power to protect themselves. The special predicament of non−managerial, nonunion workers suggests that if Congress wants to improve conditions for employees of financially distressed firms, it should focus primarily on the treatment of such workers. Part III of this Article will briefly outline a few ideas for increasing protections afforded to both union and nonunion workers in bankruptcy cases.

I. EMPLOYEES AS CREDITORS

A. General Reasons to Afford Special Treatment to Employee Claims

With good reason, current bankruptcy law affords special treatment to certain prepetition claims of employees. FN7 Consider a worker's right to receive wages earned shortly before the company files for bankruptcy. Compared to the typical claim in bankruptcy, these wages represent a large part of an employee's wealth. In addition, unlike the ordinary trade creditor, the typical employee does not have other sources of income, and thus cannot effectively diversify the risk of the employer's default. A short period of unpaid wages, therefore, may bring immediate and severe harm to an employee and her family.

Furthermore, unlike sophisticated commercial creditors, most employees do not meaningfully "assume the risk" of their debtor's default. Most employees accept employment on the basis of severely limited information and have little ability to protect themselves in advance of an employer's possible default. Generally, employees are unable to assess the present or future creditworthiness of their employer, and it is often difficult for them to monitor their employer's financial condition during the course of their employment. Even if they happen to learn of an employer's financial troubles in time to act, workers may lack the mobility to change jobs. Indeed, businesses reap important benefits from the fact that many workers suffer constraints in information and mobility. If employees had full information and total mobility, they might be inclined to abandon such businesses at the earliest signs of financial distress, or based on rumor rather than fact.

Another reason for affording special treatment to employee claims relates to the financially distressed business's dependence on its workers. Employees typically discover a company's financial troubles when the company is already in a state of crisis. A natural reaction for an employee in such a situation might be to seek employment elsewhere. Assuring that employee claims will receive special treatment if and when the company files for bankruptcy may help

prevent employee defections during this difficult time. FN8

B. Assumption of Prepetition Employment Contracts

Current law affords special treatment to prepetition claims of employees in limited circumstances. One such circumstance does not involve employees either uniquely or universally; rather, it may apply with regard to anyone who provides either services or goods to a bankruptcy debtor pursuant to a prepetition contract. The Code recognizes that the debtor generally has the right to "assume" or "reject" any executory contract or unexpired lease. FN9 Since a reorganizing (or liquidating) company will have an array of contracts some valuable, some less so the company will want to continue to perform the more valuable contracts, while terminating others. On some contracts, however, the company may already be in default. To encourage the other party's future performance and to promote fairness, current law requires that the company cure prepetition defaults as a condition to its assumption of any executory contract or unexpired lease. FN10

This general rule applies to the assumption of prepetition employment contracts, and affords a basis upon which some employees might recover the full amount of their prepetition claims. This particular advantage, however, would only inure to a select group of employees those who are parties to an individual or collectively bargained contract. Most workers are employed "at will," and thus cannot benefit from the Code's protections regarding the assumption of formal employment contracts. FN11

C. Employee Priorities

Outside the situation involving an assumed contract, the prepetition claims of employees generally have the same status as those of most other creditors they are general unsecured claims. Each of these claims is entitled to receive an equal, pro rata share of available assets. Nonetheless, the Code gives priority treatment to certain types of general unsecured claims even if they are not involved in the debtor's assumption of a contract. FN12

1. Direct Compensation

At the time of a company's filing in bankruptcy, a current or former employee may have wages, salaries or commissions that have been earned but not yet paid. Under section 507(a)(3), the Code gives priority to these types of claims, limited to $4,000 per individual, earned in the 90 days prior to the bankruptcy filing (or cessation of business, whichever is earlier). FN13 These claims for direct compensation have "third priority" status, FN14 behind the current administrative expenses of the bankruptcy estate and certain claims arising in involuntary bankruptcy cases. FN15 All claims for direct compensation that fall outside the language of section 507(a)(3) are general unsecured claims.

2. Benefit Plans

Employers often provide workers with other compensation, usually as part of a pre−established plan. These additional benefits take the form of either pensions or welfare benefits. The difference between these two forms of compensation lies in their nature and timing. A pension pays income either upon retirement or at some time following termination of employment. FN16 In contrast, welfare benefits either take a form other than income, or are contingent on some event other than retirement. FN17 Welfare benefits thus include medical, health, accident, disability, or death benefits, severance pay, training or apprenticeship programs, day care, and prepaid legal services. **FN18** In the bankruptcy setting, workers may have prepetition claims against the debtor either for benefits themselves, whether or not pursuant to a pre−established plan, or for unpaid and owing plan contributions owed by an employer to a benefit plan.

The Code provides a limited priority for certain welfare benefit claims. The third priority claim under section 507(a)(3) covers not only claims for direct compensation, but also for "vacation, severance, and sick pay leave." FN19 But the priority appears limited to these particular kinds of fringe benefits. FN20 Furthermore, the total claim including both direct compensation and fringe benefits is subject to a limit of $4000 for each employee, and must be earned in the 90 days before the bankruptcy filing. FN21

The Code also extends a limited priority to a plan trustee or employee for prepetition contributions required by a benefit plan. FN22 The claim must arise from services rendered to the company within 180 days before the filing of the bankruptcy petition, and may not exceed $4000 for each employee enrolled in such plan. FN23 Protection to the employee under this priority is further limited by requiring that the amount of the priority claim be reduced by any amounts paid to covered employees under section 507(a)(3). FN24

3. Damage Claims

An employer often files a bankruptcy petition already having breached its obligations under formal employment agreements. These breaches may give rise to damage claims. The treatment of such claims depends on whether the debtor decides to assume or reject the underlying contract. FN25 As noted earlier, a debtor who assumes a prepetition contract must cure any default and pay any damages as a condition to formal assumption. FN26 In the absence of an assumption, however, the debtor has no special obligation to pay damages immediately upon breach. Under the provisions described above, some of these claims arising from contractual breach including wage and certain benefit−related claims may qualify for priority treatment. Beyond these limited priorities, however, prepetition damage claims typically constitute general unsecured claims.

This treatment also applies to a special category of postpetition damage claims arising from the formal rejection of a prepetition contract. Although such breaches occur in the postpetition period, the Code treats such a claim *as if* the breach occurred prior to the filing of the bankruptcy petition. FN27 As a result, absent a special priority, damage claims arising from the formal rejection of a prepetition contract will constitute nonpriority general unsecured claims. FN28

D. Emergency Payments to Employees

The priority provisions of sections 507(a)(3) and (4) have two practical limits. The first limitation, as previously discussed, is that the employee's priority claim cannot exceed $4000. FN29 The second limitation relates to the *timing* of the actual payment. As a general rule, prepetition employee priority claims are treated like all other priority and nonpriority prepetition obligations: the debtor generally may not pay these claims until the time of formal distribution. FN30 In a liquidation case, that time does not occur until the assets are finally liquidated and dividends paid. **FN31** In a reorganization case, distribution occurs under the plan of reorganization, FN32 and thus must await formal confirmation of the plan. Confirmation may be months or years after the time that the debt has been incurred.

The delayed payment of these prepetition employee claims contrasts with the treatment extended to ordinary postpetition expenses. Such postpetition expenses are generally paid on a current basis pursuant to a rule that permits the debtor to enter into transactions in the ordinary course of business. FN33 This general rule reflects the practical reality that, without the assurance of timely payment, few suppliers of goods and services would be willing to deal with a bankruptcy debtor. The same exigency, however, does not ordinarily extend to the debtor's payment of prepetition claims. On the contrary, the estate generally benefits from delaying payment of prepetition claims until the time of formal distribution. The delay makes scarce resources available to the estate during the pendency of the case. At the same time, it prevents a piecemeal distribution that might undermine the goal of equal treatment among similarly situated creditors.

Nonetheless, there are situations in which the immediate payment of prepetition employee claims seems especially warranted. In some cases, a worker may face particularly dire consequences if she does not obtain immediate payment of overdue wages. Furthermore, a debtor may need to pay prepetition wage claims as a response to plausible threats of employee defection or work stoppages.

Upon debtor's motion, some courts have authorized the immediate payment of certain prepetition obligations to employees and other parties. FN34 A few courts have even authorized payment of prepetition wage and benefit claims beyond those specified in sections 507(a)(3) and (4). FN35 But other courts have refused requests for immediate payment of prepetition obligations. FN36

II. CONSTITUENCY INTERESTS OF EMPLOYEES

A. The Nature of Constituency Interests

A chapter 11 case generally contemplates continuation of the business. The most pressing concern for employees in this situation may involve not the firm's performance of past obligations, but the firm's ability and willingness to perform its commitments in the future. Employees, like other groups, represent a constituency with various interests that may be promoted or frustrated by the ongoing operations of the reorganizing debtor. Let us call such interests "constituency interests."

Employees have constituency interests that are particularly vital. A business makes various kinds of commitments to its employees for wages, benefits, and even future employment. These commitments include both formal obligations such as the company's duty to pay agreed−upon wages in a timely fashion and also the many informal understandings that typically exist between an employer and its employees. In financial distress, however, a business may find it increasingly difficult to honor its commitments; the business may decide to close plants, lay off employees, or reduce certain wages or benefits.

The economic and noneconomic impact of these decisions on the lives of individual employees and their families is often profound. That impact varies, of course, depending on the employee's circumstances. Some managers and other highly compensated workers may have the resources to support themselves and their families during any extended period of unemployment. But most workers face severe constraints. Laid−off workers sometimes face lengthy periods of un−employment, and state unemployment compensation affords only partial relief. **FN37** Even workers who do find employment elsewhere often must accept substantially reduced wages. FN38

Job loss is sometimes unavoidable. When a company is beyond rescue, the owners of a company might have no choice but to go out of business, whether by nonbankruptcy dissolution or bankruptcy liquidation. This decision effectively renders the company incapable of performing its future obligations to its employees. While the company may be liable in damages for contractual breach, it is free to dissolve the business without legal constraint. FN39 Under applicable labor law, an employer has an absolute right to go completely out of business, regardless of motive. FN40 As a general matter, the employer must bargain with an existing union over the *effects* of such a decision, but not the decision itself. FN41

By filing a chapter 11 petition, however, the managers of a company indicate their hope that the business will continue. The managers further indicate that they are no longer capable of operating the company under normal conditions, and therefore need the protection of a law tailored to permit operation of a business under distressed conditions. A financially distressed company in reorganization inevitably will make operational decisions that will directly affect the wages, benefits, and job security of its employees. The question thus arises to what extent bankruptcy law will protect the constituency interests of employees affected by the corporation's financial distress.

B. Indirect Protections of Constituency Interests

Some of the most important sources of protection for constituency interests of employees (as well as other parties) are indirect. These indirect protections advance constituency interests not by giving any special rights to the protected parties, but rather by increasing the likelihood that the company will survive as a going concern. When bankruptcy law improves the chances that viable businesses will survive financial distress as going concerns, it indirectly benefits employees of those businesses. Conversely, if Congress moves in directions that make successful reorganizations more difficult to achieve, employees as a group are likely to suffer. FN42

The indirect protections of employee constituency interests are varied. Most importantly, corporate reorganization frees managers from the immediate need to solve the firm's financial difficulties and allows them to focus on finding additional financial resources to manage a turnaround. The filing of the bankruptcy petition stays all individual collection efforts. FN43 Instead of having to defend these actions at different times and places, the company has the benefit of a streamlined and centralized administrative process for adjudicating claims. Furthermore, the Code places the company in the position to offer assurances to its suppliers, lenders, and employees in order to induce their continued support and cooperation. The reorganizing debtor may offer special priority to those who are willing to lend money and extend credit in the postpetition period. FN44

With its operations thus stabilized, the debtor may concentrate more of its energies on working out a plan of reorganization that may be acceptable to its prepetition creditors. As an especially critical advantage of reorganization, the Code provides a statutory means by which a debtor may bind individual creditors to a repayment plan, notwithstanding their dissent. A plan may be confirmed as long as a sufficient number of creditors in a given class who hold a minimum amount of claims vote in favor of the plan. FN45 In some circumstances, the plan may even be confirmed over the opposition of an entire dissenting class of creditors. FN46

In these indirect, but essential ways, corporate reorganization recognizes and promotes the constituency interest of employees and other persons who benefit from the survival of the firm as a going concern.

C. Direct Protections Right to Postpetition Compensation

Bankruptcy law also includes various provisions that are specifically designed to minimize the harms suffered by specific groups as a result of the debtor's continuing operations. FN47 One of the more important forms of direct protections of employees assures current employees that they will be paid for services rendered during the reorganization case. An employee's claim for wages and other benefits earned postpetition has administrative expense priority. FN48 As a practical matter, however, employees rarely have the occasion to assert a formal claim against the estate to recover these postpetition obligations. Any debtor who wants to continue to reorganize will be sure to pay these priority debts as they come due. FN49

Because administrative expense priority only extends to the debtor's *postpetition* obligations, it becomes critical to determine exactly when the wages or benefits are earned. The classification of wages is not usually difficult, because they are ordinarily tied to the clear moment when the services are rendered. More difficult issues have arisen in classifying benefits that are partially "earned" before the filing of the petition, but that first become payable upon the happening of some postpetition event. For example, consider the worker's right to severance pay arising from a postpetition termination of employment. If the severance pay is provided in lieu of notice, courts generally agree that the right to severance pay accrues upon termination and thus constitutes an administrative expense claim. FN50 But how should courts classify severance pay based on the worker's length of service?

Most courts have limited the administrative expense priority to that portion of the severance pay attributable to postpetition service. FN51 According to this approach, the employee's right to the remainder of the severance pay is a general unsecured claim which, at best, receives third priority status under section 507(a)(3). FN52 In contrast, other courts have held that the entire amount of severance pay is entitled to the status of an administrative expense priority claim. FN53

D. Direct Protections Right to Participate

Another form of direct protection increases an affected party's ability to participate in the significant decisions in a company's life. Outside of bankruptcy, the managers, directors, and owners may have the only formal right to participate. The scope of participation expands, however, when the company files under chapter 11. Many events that would be private outside of bankruptcy may now require notice and a hearing under the Code. The debtor thus must seek court approval of certain decisions that are essentially business decisions, such as the decision to reject an executory contract or unexpired lease, FN54 to sell, use or lease property other than in the ordinary course of business, FN55 to incur obligations having special priority, FN56 or to compromise individual actions. The Code protects constituency interests by giving certain persons or groups a right to be heard on these critical matters.

Employees are among the parties that enjoy this kind of protection. As a formal matter, any "party in interest, including the debtor, the trustee, a creditors' committee, an equity security holders' committee, a creditor, an equity security holder, or any indenture trustee, may raise and may appear and be heard on any issue" in a chapter 11 case. FN57 If an individual employee is also a creditor, the employee presumably would have the right to speak on any issue. Furthermore, Bankruptcy Rule 2018(d) specifically provides that "a labor union or employees' association, representative of employees of the debtor, shall have the right to be heard on the economic soundness of a plan affecting the interests of the employees," but "shall not be entitled to appeal any judgment, order, or decree relating to the plan, unless otherwise permitted by law." FN58

The formal right to be heard, however, does not necessarily translate into genuine participation in the debtor's decisionmaking. By the time the matter gets to court, the decision often has already been made. Moreover, many of the most critical operational decisions occur without a formal hearing or even notice. Genuine participation in the debtor's decisionmaking in chapter 11 depends on having an "inside track" being in a position to influence the framing of business problems and the development of solutions.

To provide this kind of inside track to groups of interested parties, the Code primarily relies on the device of official committees. Soon after the start of most chapter 11 cases, the United States trustee must appoint a creditors' committee "consist[ing] of the persons, willing to serve, that hold the seven largest claims against the debtor of the kinds represented on such committee." **FN59** The creditors' committee has a potentially wide sphere of influence that includes consulting with the debtor on the case's administration and investigating the financial condition and operation of the reorganizing debtor. **FN60** In order to perform these functions, the committee has both formal and informal access to current information about the business. Significantly, the committee may also hire attorneys, accountants, and other professionals, whose expenses and fees constitute administrative expenses charged to the estate. **FN61**

Employee creditors should be able to gain a seat on the creditors' committee, where it is requested. Their claims differ from ordinary trade claims and thus would seem to be one of the "kinds" that the committee must represent. FN62 Additionally, courts generally permit a union representative to serve on the creditors' committee. FN63 For both union and nonunion workers, membership on the creditors' committee provides an important channel to the inner workings of the debtor's business.

Nonetheless, employee membership on this particular committee does not assure that employee interests will have a real voice. Employees are likely to have interests that differ significantly from those of typical creditors. Yet the committee must speak for creditors as a group. In the process, the employee's unique perspective may be overridden or lost.

Some kinds of employees have alternative means of participation. A union may have the organizational and financial resources to take an active role in the case on behalf of its membership. In addition, under section 1114, the Code specifically provides for the appointment of a committee of retirees as needed. **FN64** In contrast, nonunion current employees often lack organization, and the Code does not require the appointment of a formal committee to represent their interests. Courts may appoint special committees as it deems appropriate, which they occasionally have done upon finding that a group is not "adequately represented" by existing committees. FN65 Nonetheless, the appointment of a special committee to represent employee interests appears to be rare. FN66 As a general matter, the filing of a reorganization petition does not significantly improve the ability of most workers to participate in the critical decisions of their employer.

E. Direct Protections Operational Constraints

Having a say is quite different from having the power to decide. It follows that affording a formal right to participate in critical decisions is not the most direct way in which bankruptcy law might protect the constituency interests of employees. As an additional possibility, bankruptcy law might directly constrain the managerial prerogative to operate the business entirely as the managers see fit.

1. The Baseline of Operational Freedom

The Code generally preserves the authority and discretion that a manager enjoys under normal conditions. For one thing, the current managers retain control of the business after the filing of a reorganization petition FN67 and, in most cases, are not displaced by a court−appointed trustee. FN68 While the Code requires that managers report to the court at regular intervals, FN69 most ordinary business decisions may be made without prior notice and a hearing. **FN70** Subject to certain limited constraints discussed below, FN71 a chapter 11 debtor may freely alter the wages and benefits of its employees, and retains broad discretion to make hiring and firing decisions as it sees fit. The debtor must obtain the court's approval to reject formal contracts, FN72 but in most cases need only show that rejection of the contract will benefit the estate. FN73 This standard called the "business judgment rule" is relatively easy for a debtor to satisfy. FN74

The filing of a bankruptcy petition also reduces the practical constraints associated with the decision to breach a contract. Consider, for example, the reorganizing debtor's decision to reject an individual employment contract. Outside of bankruptcy, this action may give rise to liability for damages. Under the Code, this claim arising from the debtor's rejection generally is deemed to have arisen *before* the filing. FN75 As a result, the debtor need neither pay this claim immediately nor pay it dollar−for−dollar. Instead, the debtor may treat this claim along with all other unsecured claims in the reorganization plan. As part of such a plan, the holders of most unsecured claims will ultimately receive less than full payment, extended over a period of years. In deciding whether or not to honor most existing contracts, the debtor thus enjoys additional flexibility in the bankruptcy context.

The current operational freedom allowed to managers has several justifications. Such flexibility may increase the chances that the business can effectively respond to financial distress. Furthermore, if managers suffered significant losses of decisionmaking control by virtue of filing, they may be less willing to submit a business to reorganization in the first place. Nonetheless, it seems that special circumstances and overriding policy concerns might justify the imposition of certain limited constraints on managerial decisionmaking.

2. Protecting the Constituency Interests of Union Workers

The collective bargaining process gives voice to unionized workers and provides a measure of stability in the sometimes uneasy relations between the company and its workers. The National Labor Relations Act ("NLRA") FN76 regulates this process and protects workers covered by such agreements against unilateral changes in the conditions or terms of their employment. First, under section 158(a)(5) of the NLRA, an employer covered by a collective bargaining agreement ordinarily may not alter the terms of employment without first bargaining to impasse with the union representative. FN77 Second, section 158(d) of the NLRA bars an employer from unilaterally modifying the specific terms of a binding collective bargaining agreement without the consent of the union. FN78

Difficult questions can arise when the policies that support the collective bargaining process collide with those favoring managerial flexibility in corporate reorganization. In *NLRB v. Bildisco & Bildisco,* FN79 the Supreme Court faced the question of whether a reorganizing debtor could treat a collective bargaining agreement like other contracts in particular, whether the debtor could reject such an agreement upon the simple showing that such rejection benefits the estate. FN80 The Court held that the reorganizing debtor could only reject a collective bargaining agreement if the court finds that "the equities balance in favor of rejecting the labor contract." FN81 The Court also held that the debtor does not commit an unfair labor practice when it unilaterally alters the terms of a collective bargaining agreement in the interim period between the filing of the petition and the entry of the order authorizing rejection. FN82

In response to *Bildisco*, Congress enacted section 1113 of the Bankruptcy Code. FN83 This provision generally bars the debtor from altering the terms of a collective bargaining agreement in the period before a court's decision on rejection. FN84 Following notice and a hearing, however, the court might authorize the debtor to implement interim changes in the terms of the agreement "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate." FN85

Section 1113 of the Code imposes both procedural and substantive conditions on the rejection itself. Procedurally, section 1113 imposes upon the reorganizing debtor bargaining obligations that parallel those imposed upon employers under the NLRA. Under section 1113, the debtor must bargain "in good faith in attempting to reach mutually satisfactory modifications" of the agreement. FN86 In initiating that negotiation, the debtor must make a 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." FN87 The authorized representative of the employees may refuse this proposal with good cause. FN88 If the employee representative rejects the debtor's proposal "without good cause," the court will authorize the debtor's rejection of the collective bargaining agreement if and only if "the balance of the equities clearly favors rejection of such agreement." FN89

As a result of section 1113, unionized workers protected by existing collective bargaining agreements enjoy important advantages over most nonunion workers. These agreements typically cover a broad range of topics they may establish wages, pension or welfare benefits, require arbitration, provide security against unjust dismissal or deviation from

seniority, and regulate subcontracting. Most nonunion workers have no formal contractual rights in any of these areas. While the reorganizing debtor may freely modify the wages and benefits of most nonunion workers, the debtor may only modify the terms of collective bargaining agreements under special conditions and after good faith negotiations.

3. Restrictions on Modifying or Terminating Pension Plans

After filing under chapter 11, a reorganizing debtor may want to terminate or modify an existing pension plan. The protections of section 1113, as previously discussed, apply to any pension plan covered by an existing collective bargaining agreement. If the pension plan in question does not fall under the umbrella of an existing collective bargaining agreement, the debtor need not confront the procedural and substantive hurdles of section 1113. Nonetheless, the debtor's effort to terminate its obligations under an ERISA−qualified pension plan remains subject to the constraints imposed by that federal statute. FN90

ERISA distinguishes between two kinds of pension plans defined benefit and defined contribution plans. FN91 Defined benefit plans promise employees a certain level of retirement income, often based on the employee's years of service. Such plans may pay benefits, for example, in the form of a life annuity payable at a specified retirement age. In contrast, a defined contribution plan does not guarantee a particular level of income upon retirement. Instead, the employer promises to make certain contributions to an individualized account during the course of the worker's employment. Thus, under a defined contribution plan, the actual level of benefits depends on the amount of funds actually contributed to the account, together with the investment experience of the account. FN92

Over years of service, employees rely on the promise that pension benefits will be available at retirement. ERISA safeguards these expectations against two types of risk, the second of which has particular relevance in the context of plan termination. First, there is the risk that employers may impose unreasonable qualification or forfeiture rules, or amend plans to deny previously promised benefits. In response, ERISA imposes standards on both defined contribution and defined benefit plans that govern employee participation, as well as the vesting and accrual of benefits under pension plans. FN93

The second type of risk applies mainly to defined benefit plans the risk that the plan may contain insufficient funds to pay the promised benefits to the worker upon retirement. FN94 In response, ERISA imposes minimum funding standards for defined benefit plans, FN95 and establishes two different pension insurance programs one governing single−employer plans, the other governing multi−employer plans that guarantee that retirees receive at least some percentage of their earned benefits if and when an employer terminates an underfunded defined benefit plan. FN96 A "single−employer plan" is one established by an individual employer to benefit its own workers, while a "multi−employer plan" often arises from an industry−wide collective bargaining agreement and covers workers of more than one employer. FN97 The Pension Benefit Guaranty Corporation ("PBGC") administers each of these programs.

Generally, a reorganizing debtor may voluntarily terminate a single−employer pension plan subject to the rules governing distress terminations under ERISA. **FN98** When a single−employer plan terminates with insufficient assets to pay benefits, the PBGC steps in and pays "guaranteed benefits" up to a statutory maximum amount. FN99 In 1995, the maximum guaranteed pension benefit for single employer plans was $2,573.86 per month (about $31,000 per year). FN100 The PBGC then has a statutory claim against the debtor−employer for any amounts paid. **FN101**

To similar effect, when one of the employers withdraws from a multi−employer plan, the plan must continue to pay certain guaranteed benefits to the workers of the withdrawing company. FN102 If the multi−employer plan itself becomes insolvent, the PBGC will then provide financial assistance to the plan to enable it to pay certain guaranteed benefits. FN103 The level of guaranteed benefits for multi−employer plans, however, is substantially lower than for single−employer plans approximately $6000 a year. FN104 As a result, when a multi−employer plan becomes insolvent, its beneficiaries may remain largely unprotected.

Whichever entity pays off these benefits the PBGC or the plan itself then typically asserts a claim for reimbursement against the debtor's bankruptcy estate. Under ERISA, the PBGC may obtain a lien to secure its claim by making a demand and filing a public notice. FN105 Typically, however, the PBGC's claim has unsecured status, because the

automatic stay prevents the PBGC from perfecting its lien in the case of a postpetition termination or withdrawal. **FN106**

4. Modifying Welfare Benefits

Most companies provide welfare benefits to their employees in the form of medical, health, accident or life insurance, severance pay, and other fringe benefits. While these welfare benefit plans are subject to structural, reporting and disclosure requirements under ERISA, FN107 they are not subject to ERISA's participation, vesting, and funding requirements. FN108 As one important implication of this fact, employers have no obligation under ERISA or other nonbankruptcy law to prefund welfare benefit plans. Furthermore, nonbankruptcy law gives employers considerable freedom to alter the benefits offered to employees. FN109 An employee's right to continued benefits depends on the terms of the contract or company policy establishing the benefit plan in question. FN110 Many plan documents covering nonunion employees explicitly provide that the employer may modify or terminate benefits at any time. FN111 Even in those cases in which employees have reasonably relied on continued benefits, courts generally enforce the literal terms of the plan and permit termination where the plan so provides. FN112

In seeking to cut expenses, a chapter 11 debtor may wish to reduce employee welfare benefits or eliminate them entirely. Bankruptcy law generally preserves the nonbankruptcy right of an employer to terminate a welfare benefit plan, or modify its benefits. FN113 The reorganizing debtor may be constrained, however, in two situations. First, the assurance of continued benefits may arise from an existing collective bargaining agreement. As discussed above, the debtor's modification of the terms of such an agreement is subject to the procedural and substantive constraints contained in section 1113. FN114 Second, section 1114 specifically protects the expectations of the reorganizing debtor's retirees to receive health and medical benefits earned before their retirement. FN115

Section 1114 is modeled after section 1113. It provides that the company in chapter 11 "shall timely pay and shall not modify any retiree benefits," and further provides that such obligations to pay retiree benefits shall have the status of administrative expenses of the estate. FN116 The debtor may not modify retiree benefits unless the retirees' representative agrees to such modification or the court specifically authorizes modification. FN117

The court may authorize such modifications only under restricted conditions. It may grant a temporary, interim modification of benefits "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate." FN118 In order to obtain a permanent modification of retiree benefits, the debtor−in−possession must comply with a particular bargaining procedure. The debtor−in−possession must "confer in good faith" with the retiree representative "in attempting to reach mutually satisfactory modifications" of benefits. FN119 As part of the negotiation, the debtor−in−possession must offer a proposal "which provides for those necessary modifications in the retiree benefits that are necessary to permit the reorganization of the debtor." FN120 The court will grant the request for a modification only if it finds that the retiree representative "has refused to accept such proposal without good cause" and "such modification is necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all the affected parties are treated fairly and equitably, and is clearly favored by the balance of equities." FN121 Absent such a finding, the debtor must continue to pay its retiree benefits as promised.

Section 1114 represents a meaningful source of protection for certain retirees. In particular, it prevents a reorganizing debtor that has a continuing contractual obligation to provide retiree benefits from unilaterally modifying or terminating the plan. Nonetheless, section 1114 has significant limitations. Obviously, it does not prevent the reorganizing debtor from modifying the benefits of its current employees, or former employees without retirement status. Furthermore, several courts have found section 1114 inapplicable to situations in which the company has specifically reserved the contractual right to terminate or modify benefits to its retirees. FN122 According to these courts, the debtor that has a right under nonbankruptcy law to terminate or modify retiree benefits may do so under nonbankruptcy law without regard to section 1114. FN123 As a practical matter, this reading of section 1114 has its greatest effect on nonunion retirees who, compared with union retirees, are less likely to have agreements that protect their anticipated benefits against unilateral modification or termination.

5. Constraints on Fundamental Business Decisions

Obviously, when a reorganizing debtor institutes layoffs or reduces wages, its decision immediately affects the welfare of its employees. But a debtor also affects its employees when it takes other kinds of actions. Some business decisions are simply fundamental, in that they determine the company's future direction. Thus, for example, the debtor may compromise significant disputes, reject important leases, sell major assets, or decide to alter existing arrangements with suppliers and trading partners. These actions may lead to cutbacks and layoffs in the near or distant future, and so legitimately concern employees. If a proposed action would modify an existing collective bargaining agreement, it will trigger the protections of section 1113. In the absence of such protections, however, do any existing legal constraints safeguard the interests of employees?

In this regard, it is important to distinguish between business decisions made during the interim period between the filing of the petition and the confirmation of the plan, and those embodied in the plan itself. Most significant decisions in the former category will represent either efforts to reject existing contracts or leases, FN124 or proposals to use, sell, or lease property of the estate outside the ordinary course of business. FN125 In either case, the court will impose a standard that, in some form or another, asks whether the proposed action represents a reasonable business decision that will benefit the interests of the estate. In the reorganization of viable businesses, the interests of the estate will be to increase the chances of the business's survival and thus the ultimate repayment of nonpriority creditors. Such a standard sometimes may protect the interests of employees who depend on the continuation of the business as a going concern. At the same time, this constraint is not rigorous, nor specially sensitive to employee concerns. As a result, it may routinely allow actions that promote the short−term interests of prepetition creditors over the long−term interests of employees as a group.

The constraints that operate in the confirmation setting mainly protect the rights of prepetition creditors. Thus, any holder of a claim may vote on the plan, and the plan must provide that each holder must either accept the plan or receive at least as much as that holder would have received if the business had been liquidated under chapter 7. FN126 In addition, the absolute priority rule applies, and essentially prohibits shareholders from retaining any interest (absent new capital contribution) unless all classes of unsecured creditors either vote to accept the plan or receive payment in full. FN127 It is of course logical that confirmation of a plan that proposes restructuring of prepetition debt should focus primarily on protecting the interests of the prepetition creditors.

Nonetheless, in addition to its restructuring provisions, a plan of reorganization may also embody critical business decisions in which employees have a direct stake. The requirements of confirmation contain one direct protection of employee interests. As an extension of the protections afforded to retirees under section 1114, the Code provides that the plan must continue paying promised benefits at the level to which it is contractually committed. **FN128**

Other than this isolated requirement, the protection afforded to employee welfare in the confirmation setting is indirect. The Code does not require, for example, that the plan be fair to employees, or that the confirmation of the plan be in their long−term interests. FN129 Instead, the statutory language requires that the plan be viable that the plan's confirmation "is not likely to be followed by the liquidation, or the need for further financial reorganization." FN130 As noted above, representatives of employees do have the specific right to be heard on the "economic soundness" of the plan as it affects their interests. FN131

III. EMPLOYEE INTERESTS AND BANKRUPTCY REFORM

Employees have distinct concerns, and bankruptcy law recognizes the distinctness of these concerns by means of direct protections. The remainder of this Article proposes some tentative ideas for expanding the direct protection of employee interests under bankruptcy law. These ideas each require further development, and their usefulness ultimately depends on empirical questions for which we currently lack good answers. The purpose of this discussion is to indicate a few of the directions that warrant further study.

A. Payment of Prepetition Employee Claims

As a general rule, the Code prohibits the payment of prepetition debts prior to formal distribution. FN132 Nonetheless, some courts have authorized early payment of prepetition debt of employees and other parties necessary to the reorganization effort. FN133 The law in this area is unclear, however, and other courts have refused to authorize

such payments. FN134 Congress could clarify the law in this area by adopting one of three alternative versions of a rule that would authorize early payment of prepetition employee debt. FN135

The first alternative would follow the approach of recent decisions and formalize what is essentially a rule of necessity. This rule would authorize a debtor to make immediate payment of a prepetition claim upon the court's finding that the payment of such claim is necessary to a successful reorganization. The rule need not be restricted to employee claims, but might encompass the claims of all parties whose efforts are potentially critical to a reorganization effort. FN136 The worry immediately arises, however, that this rule might be counterproductive. The "necessity" standard for payment tends to reward parties for making credible threats not to perform. As a result, this rule might actually increase the difficulties faced by debtors in winning the cooperation of their critical suppliers and employees.

As a second alternative, the Code might simply require the payment of priority employee claims within some specified time (such as 30 days) after the filing of a reorganization petition. This categorical rule may be justified on the equitable ground that debtors should not be permitted to incur additional debt while employees remain unpaid. Furthermore, the rule does not work by rewarding credible threats to stop performance, and so does not seem to suffer the same disability as the first alternative. One worry of this variation, however, is that it may impose a too heavy burden on fledgling reorganization efforts. The wisdom of a categorical rule thus depends on whether most debtors could reasonably manage to pay their prepetition employee debt in the early stages of a case.

As a way of minimizing the financial burden on debtors, a final alternative does not categorically require payment of prepetition employee claims. Instead, it concentrates on the needs of employees who face the worst harms. This rule, which might apply in both liquidation and reorganization settings, would permit a current or former employee to ask the court to authorize immediate payment of past due wages and benefits. The court then would have the power to permit early payment, but only upon the employee's showing that she faces "severe hardship" (or other comparable standard). The maximum amount of such payment could be restricted by statute and might be limited to priority debt owed to the employee under the Code's section 507(a)(3). This alternative would presumably impose less financial burdens on debtors than a categorical rule. On the negative side, however, courts may apply this hardship rule in an inconsistent and ad hoc fashion, and the requirement of notice and a hearing would increase the legal costs incurred by all parties.

Furthermore, a rule that authorizes early payment to only some employees may compromise the rights of those employees who do not qualify for special treatment. There is always the risk that, when the time of distribution finally arrives, the estate will have insufficient assets to pay all the remaining prepetition employee debt. FN137 If Congress wants to protect those employees who do not qualify for special treatment, it might condition early payment to one employee on the court's finding that all other similarly situated employees are likely to receive eventual payment of their priority claims.

B. Increasing Employee Voice in Reorganization Cases

In a typical reorganization case, managers make many ordinary decisions. At the same time they occasionally make major operational decisions that determine the company's future direction and profoundly affect the interests of the corporation's various constituencies. These decisions include making collective dismissals of employees, altering production processes in basic ways, selling major assets, and closing stores or plants.

As noted earlier, managers of reorganizing debtors generally retain control over fundamental business decisions. FN138 Nonetheless, secured creditors often have substantial leverage and may be able to take an active role in the case on their own behalf. FN139 In addition, unsecured creditors as a group are sometimes able to exert influence in business decisions that directly affect their interests. They assert this influence mainly through the creditors' committee. As discussed earlier, the unsecured creditors' committee has broad investigative powers, and also has access to the kind of information that enables intelligent and timely responses to major business decisions. FN140 It has formal standing to object to many of these decisions, including corporate decisions to incur priority debt to postpetition lenders and to use, sell, or lease property outside the ordinary course of business. FN141 As to other decisions, the committee's influence may be less direct. In any event, on major decisions that directly affect the

interests of unsecured creditors as a group, managers have reason to consult with the creditors' committee or at least seriously weigh its perspective in their deliberations. FN142

In contrast, workers as a group have little meaningful input in business decisions that vitally affect their interests. Individual nonmanagerial employees lack the time or money to take an active role in the bankruptcy case on their own behalf. In some instances, an individual employee may be appointed to the creditors' committee and thereby gain access to essential information about the business's plans and operation. But the employee's voice is only one among many, and ultimately the committee exists to represent creditors, not current employees. Consequently, most managers can afford to ignore or discount the perspective of nonmanagerial employees.

The major qualification to this generalization relates to workers represented by an active union. As discussed above, union workers enjoy special protections in bankruptcy that nonunion workers do not. FN143 As a result of this special treatment, a union may sometimes exert a certain degree of leverage in the reorganization case. The majority of employees, however, are nonunion workers who lack even the limited voice that union membership may bring. FN144 Furthermore, the influence of a union is generally limited to subjects covered by the collective bargaining agreement. Fundamental business policy remains securely within the zone of "managerial prerogative." As a consequence, even employees represented by a union may have only a marginal voice on many of the debtor's most important decisions.

The filing of a reorganization petition shifts power in a way that may further disadvantage employee interests. Especially in smaller businesses, shareholders may be employees themselves or at least identify with the position of employees. Like employees, these shareholders may view the company's long−term survival as a special priority. But a reorganization petition tends to empower creditors at the expense of shareholders. Compared to shareholders, creditors are less likely to identify with employees, and may view the company's survival as merely instrumental to their ultimate payment. Certainly, some managers may perceive themselves as having an independent professional duty to minimize harms to workers. In responding to the immediate and pressing demands of creditors, however, even these managers may tend to discount the worker's perspective.

Congress might consider various measures to give a more meaningful voice to employees of reorganizing debtors. As a first step in such an effort, the Code could provide nonmanagerial employees as a group with formal representation in the reorganization case. Congress could accomplish this goal by requiring the appointment of an employees' committee, either in all reorganization cases or upon request of a party in interest. The size of this employees' committee could range with the number of workers and their variety of interests. In companies with union employees, the union representative would be a necessary member of the committee. The nonunion employee representative might then be elected by the employees themselves, or selected by the court from a list of candidates nominated by the workers. Hopefully, the process would lead to the selection of committee members that fairly represents nonmanagerial employees as a group.

The specific rights and powers of the employees' committee would need to be specified. At the minimum, the committee would have the status of a party in interest on any issue affecting the welfare of employees. It also would need to have the same kind of access to financial information enjoyed by other official committees and, like the official creditors' committee, have the reasonable fees of its lawyers, accountants and other professional persons paid by the estate.

The idea of increasing employee involvement in reorganization cases derives support from developments in corporate practices generally. Increasingly, companies have adopted power−sharing strategies that involve employees in planning, production, and personnel decisions traditionally reserved to management. FN145 Many of the companies have adopted these practices as a response to immediate or anticipated economic challenges. FN146 These efforts establish patterns of cooperation between employer and employee, and encourage employees to assist management in developing innovative approaches and identifying sources of inefficiencies. FN147 In the bankruptcy setting, an increase in employee participation may serve a similar function. It may increase the quality of critical decisionmaking by encouraging creditors and managers in a reorganization to take into account an inside operational perspective that they might otherwise discount.

Absent other changes, however, the creation of an employees' committee may not be sufficient to increase the employees' voice in the strategic decisions that most vitally affect their interests. As it stands, the Code does not specifically require that managers weigh the impact of fundamental operational decisions on current employees. In the absence of such requirements, managers may be unlikely to perceive a need or occasion to consult with an employees' committee. The employees' committee would be limited to the role of reacting to fundamental decisions, rather than participating in their formulation.

For this reason, Congress might consider imposing certain carefully limited constraints on those major operational decisions that materially disadvantage a significant part of the debtor's labor force. It might require, for example, that managers consult with the employees' committee before making a final decision on any collective dismissal. Such a consultation should be designed to inform the employees' committee about the factors that inform the manager's thinking, and to afford the committee with a meaningful opportunity to develop possible approaches for minimizing the harms associated with the decision. **FN148** As an additional possibility, just as managers must currently obtain approval of any decision to sell, use, or lease property "out of the ordinary course" of business, FN149 the Code might require managers to obtain court approval of any "extraordinary measures" affecting the jobs, wages or benefits of employees. The standard for approval should not be rigorous. It need only assure that the proposed measure have a rational business purpose and show a "reasonable regard" for employee interests. FN150 Such a lax requirement hopefully would not frustrate managers from pursuing directions that they rationally believe to be justified. Instead, it would be designed merely to increase the likelihood that managers engage the employees' committee in a serious dialogue in conjunction with their decisionmaking.

Before expanding employee protections along these general lines, Congress would need to address several concerns. First, there is the problem of cost. The fees and expenses of an official committee consume resources that would otherwise be available to the business and ultimately to creditors. Would the advantages of having an employees' committee be worth this cost? Second, there is the question of how these changes in bankruptcy would affect managerial incentives outside of bankruptcy. Constraining managerial flexibility in these areas might lead more managers to delay filing reorganization petitions, or to implement collective dismissals and other major decisions affecting employees immediately prior to filing. In that case, the effort of making managers more accountable to employee interests in bankruptcy may be largely in vain.

Third and finally, there is the question of whether these changes would impair the ability of managers to reorganize. As discussed earlier, the general absence of constraints on managerial decisionmaking reflects the legitimate concern that managers must be free to respond effectively to financial distress. FN151 Obviously, an effective response is in the interests of employees as a group. It would be entirely counterproductive to make managers directly accountable to employees if such accountability comes at the cost of effective reorganizations. Congress inevitably must address the tension between increasing accountability and retaining flexibility.

Of course, this tension is not unique to the effort to increase employee protections. The Code must balance these concerns whenever it regulates the debtor's actions. For example, it does not freely permit debtors to assume or assign contracts on which there is a default, FN152 nor does it freely authorize debtors to confirm a plan of reorganization over the objection of a dissenting class of creditors. FN153 The question here, as always, is not whether the Code should restrict managerial prerogatives for the sake of protecting the constituency interests of an individual group. Instead, the essential question remains how to strike the appropriate balance between the competing needs of specific protection and general flexibility.

C. Delivering Assistance to Displaced Workers

The bankruptcy system is not the only means by which society seeks to prevent or minimize the harms associated with job loss. Other responses to job loss are both private and public. Certain companies, for example, use work−sharing as an alternative to lay−offs, FN154 and private and public organizations make affirmative efforts to assist displaced workers to find new employment in related or other industries. Congress recently enacted an "advance warning" statute that requires qualifying employees to give prior notice to employees of plant closings. FN155 The state and federal government administers various programs which provide subsidized training and counseling for displaced workers. FN156 In certain jurisdictions, employees may obtain informational and financial support to assist employee

buyouts, where feasible. FN157

Obviously, these varied programs have a purpose and structure that is independent of bankruptcy law. Nonetheless, the concerns of these programs and of bankruptcy law overlap to some extent. These overlapping concerns suggest the possibility that the bankruptcy system may be a useful resource in the development and effective implementation of these job loss remedies.

In particular, the bankruptcy system might assist in the delivery of these remedies to displaced workers. A "worker's agency," established within the bankruptcy system, might serve several functions of this kind. As a preliminary matter, the agency could serve as an informational and counseling resource for displaced workers, and perform a useful service in channeling workers to the appropriate program. It might also provide professional advice to managers on possible strategies for effecting layoffs so as to minimize impact on workers individually and as a group. FN158

As a final service, the worker's agency might take an affirmative role in identifying and testing new job initiatives. Under certain limited circumstances, for example, employee buyouts may represent a viable alternative to forced liquidation. Although not free from potential difficulties, such an initiative may warrant further exploration. As a means of doing so, Congress might develop a limited pilot program designed to facilitate employee buyouts in reorganization cases. In this way, the bankruptcy case may offer a laboratory for testing possible responses to problems faced by employees in financially distressed businesses.

CONCLUSION

Through a variety of measures, current bankruptcy law responds to the concerns of employees. These concerns are varied. For one thing, workers sometimes go unpaid in the weeks and months prior to a bankruptcy petition. In response, bankruptcy law gives priority status to prepetition debt for wages or benefits, at least up to a specified maximum amount. At the same time, however, the law does not require the debtor to pay this debt until the time of final distribution, which may be months or even years after the bankruptcy filing. This Article has suggested several alternative means by which Congress might remedy this situation.

In addition to an interest in collecting prepetition debt, employees also have concerns that arise from the postpetition operation of the business. Most importantly, employees have interests in maintaining their current level of wages and benefits, and in preserving their jobs. Bankruptcy law contains certain direct protections of these interests, but the protections are piecemeal in coverage. Bankruptcy law recognizes the special status of collective bargaining agreements, and also seeks to safeguard the rights of retirees in contractually vested health benefits. Many workers, however, are neither members of unions nor retirees. Current bankruptcy law protects the jobs and wages of those nonunion workers largely through indirect means: it increases the chance that the financially distressed business will survive.

This kind of indirect protection is obviously important and should be maintained. Nonetheless, such protections are not specifically attuned to employee concerns, and may routinely allow short−term financial interest to prevail over the interests of employees as a group. Meanwhile, most employees continue to lack a meaningful voice in a reorganization process that vitally affects their welfare. In response, Congress might follow the lead of corporate developments outside bankruptcy and consider implementing certain power−sharing initiatives in the reorganization case. While giving due recognition to the need for managerial flexibility, these initiatives would seek to give employees a more active and constructive role in the reorganization process. At the same time, the bankruptcy system could go beyond its traditional role in an effort to respond specifically to problems created by joblessness. At least potentially, bankruptcy law represents a valuable resource in the development and delivery of programs designed to retrain and employ displaced workers.

Footnotes

FN* Professor of Law, Western New England College School of Law. My thanks to Martin Malin for his useful comments on an earlier version of this Article.

FN1 11 U.S.C. §§ 101−1330 (1994).

FN2 When it enacted the Code, Congress expressed concern about protecting employee interests in this broader sense:

The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap . . . . It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. REP. NO. 595, 95th Cong., 2d Sess. 220 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6179.

FN3 11 U.S.C. § 507(a)(3) (1994); *see infra* notes 13−15 and accompanying text (discussing priority for direct compensation).

FN4 Employer−subsidized welfare benefits include medical, health and accident insurance, severance pay, and training program benefits. *See, e.g.*, Jeannette Corp. v. Gilardi (*In re* Jeannette Corp.), 118 B.R. 327, 329−30 (Bankr. W.D. Pa. 1990) (affording priority to portion of former employee's severance pay).

FN5 *See In re* B & F Constr., Inc., 165 B.R. 745, 746 (Bankr. D.R.I. 1994) (calculating priority claim for unpaid contributions to employee pension fund).

FN6 *See* Maxwell MacMillan Realization Liquidating Trust v. Aboff (*In re* MacMillan), 186 B.R. 35, 47−48 (Bankr. S.D.N.Y. 1995) (denying summary judgment on claim arising from breach of employment agreement). Other prepetition obligations of the debtor include liability for wrongful discharge, or under federal or state workers' compensation, anti−discrimination, minimum wage, fair pay, early warning or other employment−related statutes.

FN7 *See* 11 U.S.C. § 507(a)(3), (4) (1994) (prioritizing certain employee claims); *see also* United States v. Embassy Restaurant, Inc., 359 U.S. 29, 33 (1959) (suggesting that priority provisions for wages are intended to provide "protective cushion" for workers).

FN8 *See* Northwest Eng'g Co. v. United Steel Workers, 863 F.2d 1313, 1315 (7th Cir. 1988) ("If employees were treated in all respects as unsecured creditors, they would be inclined to desert a leaky ship, speeding up the firm's collapse.").

FN9 11 U.S.C. § 365(a) (1994).

FN10 *Id.* § 365(b)(1).

FN11 About 85% of nonagricultural workers do not belong to unions and so are not covered by collective bargaining agreements. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 439 (114th ed. 1994).

FN12 For additional discussion of these statutory priorities as well as related case law, see THOMAS R. HAGGARD & MARK S. PULLIAM, CONFLICTS BETWEEN LABOR LEGISLATION AND BANKRUPTCY LAW 229−37 (Labor Relations and Public Policy No. 30, 1987); Daniel Keating, *The Fruits of Labor: Worker Priorities in Bankruptcy*, 35 ARIZ. L. REV. 905, 907−19 (1993).

FN13 11 U.S.C. § 507(a)(3) (1994).

FN14 *Id.*

FN15 *See id.* § 507(a)(1), (2).

FN16 *See* 29 U.S.C. § 1002(2)(A) (1994); *see also* 2 MARK A. ROTHSTEIN ET AL., EMPLOYMENT LAW § 11.2 (1994) (discussing ERISA's treatment of pension plans).

FN17 *See* 29 U.S.C. § 1002(1); *see also* 1 ROTHSTEIN ET AL., *supra* note 16, § 4.19 (describing ERISA's coverage of welfare benefit plans).

FN18 *See* 1 ROTHSTEIN ET AL., *supra* note 16, § 4.19.

FN19 11 U.S.C. § 507(a)(3) (1994).

FN20 *Id.*

FN21 *Id.*

FN22 *Id.* § 507(a)(4)(A).

FN23 *Id.* § 507(a)(4)(B).

FN24 11 U.S.C. § 507(a)(4)(B) (1994).

FN25 *See id.* § 365(a).

FN26 *See supra* note 10 and accompanying text.

FN27 11 U.S.C. §§ 365(g)(1), 502(g) (1994).

FN28 There is an additional limitation, which affects only the more highly compensated employees of a business. If laid−off, these employees may assert sizable damage claims under terminated employment contracts. The Code limits such damage claims to an amount equal to one year of the employee's compensation. *Id.* § 502(b)(7).

FN29 *Id.* § 507(a)(3), (4).

FN30 *See id.* § 549(a) (authorizing trustee to avoid any postpetition transfer of property of estate "that is not authorized under this title or by the court"); *see also* DAVID G. EPSTEIN ET AL., BANKRUPTCY § 4−15 (1993) (discussing statutory basis for conclusion that debtor may not pay any prepetition claim until final distribution).

FN31 *See* 11 U.S.C. § 726(a)(1) (1994) (providing for payment of priority claims in connection with final distribution).

FN32 *See id.* § 1129(a)(9) (requiring that plan provide for payment of priority claims as condition of confirmation).

FN33 *Id.* § 363(c)(1) (permitting debtor to "enter into transactions . . . in the ordinary course of business, without notice or a hearing").

FN34 *See, e.g.*, Michigan Bureau of Workers' Disability Compensation v. Chateaugay Corp. (*In re* Chateaugay Corp.), 80 B.R. 279, 286−87 (S.D.N.Y. 1987) (holding that bankruptcy judge has authority to order early payment of prepetition debts); *In re* Gulf Air, Inc., 112 B.R. 152, 154 (Bankr. W.D. La. 1989) (authorizing immediate payment of prepetition claims for employee wages and expenses); *see also* EPSTEIN ET AL., *supra* note 30, § 4−15 (indicating that despite apparent statutory prohibitions, debtors may be "routinely" paying prepetition employee claims out of postpetition assets). At least arguably, this practice finds statutory support in the court's equitable powers under 11

U.S.C. § 105 (1994), as well as its right to authorize expenditures not in the ordinary course of business under 11 U.S.C. § 363(b) (1994). *See* Russell A. Eisenberg & Frances F. Gecker, *The Doctrine of Necessity and its Parameters*, 73 MARQ. L. REV. 1, 4−9 (1989) (sketching different statutory grounds for permitting emergency payments). *But see* Charles Jordan Tabb, *Emergency Preferential Orders in Bankruptcy Reorganizations*, 65 AM. BANKR. L.J. 75, 98−102 (1991) (criticizing position that court has equitable power to vary statutory priority scheme by making direct payments).

FN35 *See* Eisenberg & Gecker, *supra* note 34, at 12−15 (describing decisions in which such payments were authorized).

FN36 *See, e.g., In re* FCX, Inc., 60 B.R. 405, 411−12 (E.D.N.C. 1986) (reversing bankruptcy court order authorizing debtor to pay certain unsecured employee claims); *In re* Structurlite Plastics Corp., 86 B.R. 922, 932 (Bankr. S.D. Ohio 1988) (denying debtor's motion for payment of prepetition medical claims).

FN37 Under individual state laws regulating unemployment compensation, employees generally are entitled to receive less than one−half of their previous wages, and the duration of coverage is typically limited to six months. *See* Clyde W. Summers, *Worker Dislocation: Who Bears the Burden? A Comparative Study of Social Values in Five Countries*, 70 NOTRE DAME L. REV. 1033, 1036 (1995) (citing U.S. DEP'T OF LABOR, COMPARISON OF STATE UNEMPLOYMENT INSURANCE LAWS (1991)).

FN38 *See* PAUL OSTERMAN, EMPLOYMENT FUTURES: REORGANIZATION, DISLOCATION AND PUBLIC POLICY 21−25 (1988) (discussing study that found one−quarter of prime−age male workers had not located new employment within year after lay−off, and one−third of workers who found new jobs had wage decreases of 25% or more).

FN39 Many companies do have an obligation to give advance notice of plant closings under applicable nonbankruptcy law. For a general discussion of state and federal advance warning statutes, see 2 ROTHSTEIN ET AL., *supra* note 16, §§ 10.4−10.5.

FN40 *See* Textile Workers Union v. Darlington Mfg. Co., 380 U.S. 263, 273−74 (1965) (holding employer closing entire business not unfair labor practice even if "motivated by vindictiveness toward union").

FN41 *See* First Nat'l Maintenance Corp. v. NLRB, 452 U.S. 666, 681−82 (1981) (requiring meaningful bargaining over effects of decision to close part of business); Kirkwood Fabricators, Inc. v. NLRB, 862 F.2d 1303, 1306 (8th Cir. 1988) (holding that employer had obligation to bargain with union over effects of decision to close business).

FN42 For this reason alone, Congress should look skeptically at "free−market" proposals for altering bankruptcy law in fundamental ways. *See, e.g.*, Michael Bradley & Michael Rosenzweig, *The Untenable Case for Chapter 11*, 101 YALE L.J. 1043, 1078 (1992) (advocating repeal of chapter 11). These proposals generally do not consider the interests of noncreditor constituencies. *See, e.g.*, Elizabeth Warren, *The Untenable Case for Repeal of Chapter 11*, 102 YALE L.J. 437, 467−77 (1992) (faulting Bradley and Rosenzweig's free market proposal for failing to consider redistributive goals served by bankruptcy law).

FN43 11 U.S.C. § 362(a) (1994).

FN44 *Id.* § 364.

FN45 *Id.* §§ 1129(a), 1126(c).

FN46 *Id.* § 1129(b).

FN47 *See, e.g., id.* §§ 503, 1113, 1114.

FN48 11 U.S.C. § 503(b)(1)(A) (1994).

FN49 The debtor has a right to pay ordinary postpetition expenses of the estate without notice or a hearing. *Id.* § 363(c)(1). This right is subject, however, to restrictions imposed on the debtor's use of cash collateral. *Id.* § 363(c)(2).

FN50 *See, e.g.*, Teamsters Local No. 310 v. Ingrum (*In re* Tucson Yellow Cab Co.), 789 F.2d 701, 703 (9th Cir. 1986) (holding that termination pay in lieu of notice is entitled to priority treatment).

FN51 *See, e.g.*, *In re* Mammoth Mart, Inc., 536 F.2d 955, 955 (1st Cir. 1976) (holding that severance pay only entitled to priority to the extent it arises from services performed postpetition).

FN52 11 U.S.C. § 507(a)(3) (1994).

FN53 *See* Rodman v. Rinier (*In re* W.T. Grant Co.), 620 F.2d 319, 321 (2d Cir.) (holding that severance pay claims are entitled to priority in their entirety), *cert. denied*, 446 U.S. 983 (1980).

FN54 11 U.S.C. § 365(a) (1994).

FN55 *Id.* § 363(b).

FN56 *Id.* § 364.

FN57 *Id.* § 1109(b).

FN58 FED. R. BANKR. P. 2018(d).

FN59 11 U.S.C. § 1102(b)(1) (1994).

FN60 *Id.* § 1103(c).

FN61 *Id.* §§ 330(a), 503(b)(2), 1103(a).

FN62 *See id.* § 1102(b)(1).

FN63 *See, e.g.*, *In re* Altair Airlines, Inc., 727 F.2d 88, 90−91 (3d Cir. 1984) (holding that union representative may serve as member of creditors' committee). The issue is not free from doubt, however. Those parties opposed to union appointment argue that the union is not a "creditor" in its own right and that its appointment will create unacceptable conflicts of interest among committee members. *See In re* Enduro Stainless, Inc., 59 B.R. 603, 604−05 (Bankr. N.D. Ohio 1986) (rejecting debtor's arguments in opposition to union appointment to the creditors' committee).

FN64 11 U.S.C. § 1114(b)−(d) (1994).

FN65 *Id.* § 1102(a)(2). Section 1102(a)(2) authorizes the court to appoint "additional committees of creditors or of equity security holders." *Id.* In addition, the Code does not prevent the court from appointing other, special committees. *See* Kenneth N. Klee & K. John Shaffer, *Creditors' Committees under Chapter 11 of the Bankruptcy Code*, 44 S.C. L. REV. 995, 1030−31 (1993) (discussing appointment of employee committees).

FN66 *Compare, e.g.*, *In re* Salant Corp., 53 B.R. 158, 161 (Bankr. S.D.N.Y. 1985) (denying request for appointment of special employees' committee, but ordering appointment of employee representative to regular creditors' committee) *with In re* Mansfield Ferrous Castings, Inc., 96 B.R. 779, 781 (Bankr. N.D. Ohio 1988) (appointing special committee of employees when employees appointed were also shareholders).

FN67 11 U.S.C. § 1107 (1994).

FN68 The debtor in possession may be replaced by a trustee, "for cause, including fraud, dishonesty, incompetence, or gross mismanagement" *Id.* § 1104(a).

FN69 *Id.* §§ 1106(a), 1107(a).

FN70 *Id.* § 363(c)(1).

FN71 *See infra* notes 76−131.

FN72 *Id.* § 365(a).

FN73 *In re* Patterson, 119 B.R. 59, 60 (E.D. Pa. 1990) (applying business judgment rule); *In re* Del Grosso, 115 B.R. 136, 138 (Bankr. N.D. Ill. 1990) (same).

FN74 *See* cases cited *supra* note 73.

FN75 11 U.S.C. § 365(g) (1994).

FN76 ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151−169 (1994)).

FN77 29 U.S.C. § 158(a)(5) (1994); *see* NLRB v. Katz, 369 U.S. 736, 742 (1962) (holding that employer's unilateral change of terms of employment for union employees violates duty "to bargain collectively" under 29 U.S.C. § 158(a)(5)).

FN78 29 U.S.C. § 158(d) (1994).

FN79 465 U.S. 513 (1984).

FN80 *Id.* at 516.

FN81 *Id.* at 526.

FN82 *Id.* at 532−33.

FN83 There are many articles analyzing § 1113 and its effects. *See* 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, 845−46 (1994) (listing recent articles on § 1113).

FN84 11 U.S.C. § 1113(e), (f) (1994).

FN85 *Id.* § 1113(e).

FN86 *Id.* § 1113(b)(2).

FN87 *Id.* § 1113(b)(1)(A).

FN88 *Id.* § 1113(c)(2).

FN89 11 U.S.C. § 1113(c) (1994).

FN90 Employee Retirement Income Security Act of 1974, Pub. L. No. 93−406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001−1461 (1994)). For further discussion of the treatment of pension−related obligations of bankruptcy debtors, see HAGGARD & PULLIAM, *supra* note 12, at 235−37; Daniel Keating, *Chapter 11's New Ten−Ton*

Monster: The PBGC and Bankruptcy, 77 MINN. L. REV. 803, 804 (1993); Robin E. Phelan, *Employer/Employee Problems in Bankruptcy Cases*, *in* ADVANCED BANKRUPTCY WORKSHOP 1993 (PLI Com. L. & Practice Course Handbook Series, 1993), *available in* WESTLAW, 649 PLI/Comm 43; Harold S. Novikoff & Beth M. Polebaum, *Pension−Related Claims in Bankruptcy Code Cases*, 40 BUS. LAW. 373 (1985).

FN91 29 U.S.C. § 1002(34), (35) (1994).

FN92 Examples of defined contribution plans include profit sharing and stock bonus plans.

FN93 For a discussion of these varied rules, see 2 ROTHSTEIN ET AL., *supra* note 16, § 11.3.

FN94 This risk of underfunding is not significant in a defined contribution plan, at least as long as the employer makes required annual payments under the plan.

FN95 29 U.S.C § 1082 (1994).

FN96 *See* 2 ROTHSTEIN ET AL., *supra* note 16, § 11.7−11.8 (discussing single− and multi−employer plans).

FN97 29 U.S.C. § 1002(37), (41) (1994).

FN98 *Id.* § 1341(c).

FN99 *See id.* §§ 1341, 1342. To have the status of a "guaranteed benefit," a benefit must meet various formal requirements. *See* 2 ROTHSTEIN ET AL., *supra* note 16, § 11.7, at 461−63.

FN100 *See* 29 C.F.R. § 2621 (App. A) (1995).

FN101 29 U.S.C. § 1362(a), (b)(1)(A) (1994).

FN102 When a company withdraws from a multi−employer plan, it remains liable to the plan for unfunded, vested liabilities. *See id.* §§ 1382, 1393(c).

FN103 *Id.* §§ 1361, 1426(f), 1431. *See* 2 ROTHSTEIN ET AL., *supra* note 16, § 11.8, at 473−74.

FN104 This maximum figure has remained unchanged since 1980. *See Funding: PBGC Guarantee Rate Should be Doubled for Multiemployer Plans, Slate Suggests*, 22 Pens. & Ben. Rep. (BNA) 2259 (Oct. 16, 1995). The Executive Director of the PBGC has recently called for a doubling of that maximum rate. *Id.*

FN105 Keating, *supra* note 90, at 827−28.

FN106

FN107 29 U.S.C. §§ 1101−1114 (1994).

FN108 *Id.* § 1051(1) (excluding welfare benefit plans from participation and vesting requirements); *id.* § 1081(a)(1) (excluding welfare benefit plans from funding requirements).

FN109 *See* 1 ROTHSTEIN ET AL., *supra* note 16, § 4.24.

FN110 *See* Coonce v. Aetna Life Ins. Co., 777 F. Supp. 759, 765 (W.D. Mo. 1991) (stating that company's right to terminate welfare benefits depended entirely on terms of agreement); Adcock v. Firestone Tire & Rubber Co., 616 F. Supp. 409, 417−18 (M.D. Tenn. 1985) (analyzing contractual basis of employee's right to severance pay), *aff'd in part, vacated in part*, 822 F.2d 623 (6th Cir. 1987).

FN111 *See, e.g.*, Musto v. American Gen. Corp., 861 F.2d 897, 906−07 (6th Cir. 1988) (finding that unambiguous language in welfare benefit plan established employer's right to terminate benefits), *cert. denied*, 490 U.S. 1020 (1989).

FN112 *See, e.g.*, Cinelli v. Security Pac. Corp., 61 F.3d 1437, 1444 (9th Cir. 1995) (concluding that, when words of plan are unambiguous, termination provisions not to be altered by extrinsic evidence). The employer may not, however, terminate benefits merely to prevent employees from attaining rights under established plans, or in a way that discriminates against a protected group. *See* 29 U.S.C. § 1140 (1994). For further discussion of the law in this general area, see Janilyn S. Brouwer, Note, *Retiree Health Benefits: The Promise of a Lifetime?*, 51 OHIO ST. L.J. 985 (1990); Debra Y. Carlascio, Note, *Reading the Fine Print: The Effect of Disclaimers on Employee Welfare Plans*, 1991 COLUM. BUS. L. REV. 387.

FN113 *See supra* notes 107−112; *see infra* notes 122−123 and accompanying text.

FN114 11 U.S.C. § 1113 (1994); *see supra* notes 83−89 and accompanying text.

FN115 11 U.S.C. § 1114 (1994).

FN116 *Id.* § 1114(e)(1), (2).

FN117 *Id.* § 1114(e)(1).

FN118 *Id.* § 1114(h).

FN119 *Id.* § 1114(f)(2).

FN120 11 U.S.C. § 1114(f)(1)(A) (1994).

FN121 *Id.* § 1114(g)(2), (3).

FN122 *See, e.g.*, LTV Steel Co. v. United Mine Workers (*In re* Chateaugay Corp.), 945 F.2d 1205, 1210 (2d Cir. 1991), *cert. denied*, 502 U.S. 1093 (1992) (holding that company's obligation to provide benefits under nonbankruptcy law limits the workers' right to receive benefits under predecessor provision to § 1114(e)); *In re* Doskocil Cos., 130 B.R. 870, 876 (Bankr. D. Kan. 1991) (noting § 1114(e) creates no new obligations, but merely requires debtor to pay benefits in accordance with its nonbankruptcy obligations). *But see* Ames Dep't Stores, Inc. v. Employees' Comm. of Ames Dep't Stores (*In re* Ames Dep't Stores, Inc.), No. 92 Civ. 6145, 1992 U.S. Dist. LEXIS 18275 (S.D.N.Y. 1992) (holding debtor's motion to terminate life insurance welfare benefit plan was properly denied, notwithstanding debtor's claim that it had contractual right to terminate plan).

FN123 Commentators have disagreed on whether this conclusion is either correct or desirable as a matter of bankruptcy policy. *Compare, e.g.*, Daniel Keating, *Bankruptcy Code § 1114: Congress' Empty Response to the Retiree Plight*, 67 AM. BANKR. L.J. 17, 41−43 (1993) (arguing in favor of an interpretation of § 1114 that limits debtor's duty to provide benefits to its obligations under contract) *with* Susan J. Stabile, *Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code*, 14 CARDOZO L. REV. 1911, 1945−57 (1993) (arguing that legislative history and policy considerations support a broader reading of protections afforded by § 1114(e)).

FN124 11 U.S.C. § 365 (1994).

FN125 *Id.* § 363(b)(1).

FN126 *Id.* § 1129(a)(7).

FN127 *Id.* § 1129(b).

FN128 *Id.* § 1129(a)(13).

FN129 The rules governing railroad reorganizations include an exception. One of the requirements of confirmation in such cases is that the plan be "consistent with the public interest." *Id.* § 1173(a)(4).

FN130 11 U.S.C. § 1129(a)(11) (1994).

FN131 FED. R. BANKR. P. 2018(d).

FN132 *See supra* notes 30−32 and accompanying text.

FN133 *See supra* notes 34−35 and accompanying text.

FN134 *See supra* note 36 and accompanying text.

FN135 Other countries have recognized the special status of obligations of insolvent businesses for past due wages. A directive issued by the European Community, for example, requires member states to assure payment of past due wages and other benefits owed to employees of insolvent businesses. *See* Council Directive, 80/987, 1980 O.J. (L 283) 23, *as amended by* Council Directive 87/164, 1987 O.J. (L 66) 11. For discussions of this and related directives, see Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHI.−KENT. L. REV. 1427, 1449 (1993); Michele Floyd, *The Scope of Assistance for Dislocated Workers in the United States and the European Community: WARN and Directive 75/129 Compared*, 1991/1992 FORDHAM INT'L L. J. 436 (describing Council Directive No. 80/987); *see also* Juha Hayha, *Finnish Report*, 5 CONN. J. INT'L LAW 149, 154 (1989) (describing Finnish law that guarantees payment of past due priority claims owed by bankrupt or insolvent businesses).

FN136 One commentator, although opposing such a rule, argues that any rule that Congress might adopt along these lines should include the following limitations: "(1) rigorous procedural protections for the adversely affected unsecured creditors, (2) a clear showing of necessity, (3) the likelihood of a successful reorganization, and (4) a showing that a successful reorganization is in the public interest." Tabb, *supra* note 34, at 115.

FN137 At least arguably, discriminating among employees in this way may be justified by resort to the same kinds of reasons that justify affording priority treatment to employee claims in the first place. In contrast to other creditors, employees have the least ability to diversify the risk of default. Some employees have even less ability to diversify that risk than others. When default exposes certain employees and their dependents to severe harms, it seems reasonable that the Code should extend further protections to those employees.

FN138 *See supra* notes 67−75 and accompanying text.

FN139 *See, e.g.*, Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669, 737 (1993) (indicating that "creditors `participated' in causing the departure of [18] of the [40] tainted CEOs who left office before or during the reorganization").

FN140 *See supra* notes 60−61 and accompanying text.

FN141 The creditors' committee ordinarily qualifies as a "party in interest" in such matters. 11 U.S.C. § 1109 (1994).

FN142 For a general discussion of the powers and functions of the creditors' committee, see Klee & Shaffer, *supra* note 65, at 1040−53.

FN143 Most importantly, a debtor may only modify the terms of a binding collective bargaining agreement under restricted conditions. *See supra* notes 77−89 and accompanying text.

FN144 This claim assumes that the relative population of union and nonunion workers in reorganization cases is not dramatically different from that in the general economy. *See supra* note 11 (stating that 85% of nonagricultural workers are nonunion).

FN145 *See, e.g.*, PAUL C. WEILER, GOVERNING THE WORKPLACE 31−32 (1990) (describing emergence of employee involvement programs); Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor−Management Cooperation*, 78 CORNELL L. REV. 899, 911 (1993) (describing shift in corporations from "the conventional bureaucratic form of work organization to more flexible, participatory work programs"); Commission on the Future of Worker−Management Relations, *Employee Participation and Labor−Management Cooperation in American Workplaces*, CHALLENGE−THE MAG. OF ECON. AFF., Sept.−Oct. 1995, at 41−44 [hereinafter *Employee Participation*] (listing kinds of employee−participation arrangements in current use).

FN146 *Employee Participation*, *supra* note 145.

FN147 The available evidence, while far from conclusive, suggests that power−sharing strategies may increase employee performance and overall business productivity. *See, e.g.*, Jeffrey Kling, *High Performance Work Systems and Firm Performance*, MONTHLY LAB. REV., May 1995, at 29 ("A comprehensive survey on the existing research on the effects of workplace participation on productivity suggests that the effects are positive.").

FN148 There is substantial precedent internationally for establishing a duty to consult as a means of reducing the harms of collective dismissals. One directive of the European Community, for example, requires that employers contemplating collective dismissals "begin consultations with the workers' representatives in good time with a view of reaching an agreement," and further provides that "[t]hese consultations shall, at least cover ways and means of avoiding collective redundancies or reducing the number of workers affected, and of mitigating the consequences by recourse to accompanying social measures aimed, inter alia, at aid for redeploying or retraining workers made redundant." *See* Council Directive 75/129, 1975 O.J. (L 48) 29. A number of countries, including Great Britain, have implemented this directive by imposing a duty on employers to consult with employee representatives prior to collective dismissal. *See* Summers, *supra* note 37, at 1040−41. Meanwhile, German employees in most workplaces elect "works councils," which have relatively broad statutory rights and duties. *See* Clyde W. Summers, *An American Perspective of the German Model of Worker Participation*, 8 COMP. LAB. L. 333, 337, 342 (1987) [hereinafter Summers, *German Model*]. Employers must consult with the works council prior to any individual or collective dismissal. Summers, *supra* note 37, at 1044. Furthermore, when an employer with 20 or more employees contemplates a change that will disadvantage a significant part of its workers, the employer must consult with the work council "in full and good time" and must affirmatively seek to work out a "social plan" agreeable to both parties. *See* Summers, *German Model*, *supra*, at 347.

FN149 11 U.S.C. § 363(b)(1) (1994).

FN150 As one analogue of such a rule, German law requires that any collective dismissal have "social justification." Summers, *supra* note 37, at 1043.

FN151 *See supra* notes 67−75 and accompanying text.

FN152 *See* 11 U.S.C. § 365(b), (f) (1994).

FN153 *See id.* § 1129(b).

FN154 *See* Summers, *supra* note 37, at 1062.

FN155 Worker Adjustment and Retraining Act ("WARN"), Pub. L. No. 100−379, 102 Stat. 892 (1988) (codified as amended at 29 U.S.C. §§ 2101−2109 (1994)). For a discussion of the limitations and apparent failures of WARN, together with suggestions for improvement, see Fran Ansley, *Standing Rusty and Rolling Empty: Law, Poverty, and America's Eroding Industrial Base*, 81 GEO. L. J. 1757, 1868−78 (1993).

FN156 *See* Ansley, *supra* note 155, at 1878−82 (describing governmental job programs, including those contained in Economic Dislocation Worker Adjustment Act and Trade Adjustment Assistance Act of 1974, 29 U.S.C. §§ 1651−1662c (1988)).

FN157 *See, e.g.*, Ansley, *supra* note 155, at 1830−33 (outlining both promise and pitfalls of employee buyouts); Virginia L. Duquet, Note, *Advantages and Limitations of Current Employee Ownership Assistance Acts to Workers Facing a Plant Closure*, 36 HASTINGS L.J. 93, 109−14 (1984) (describing employment ownership statutes in several states).

FN158 A more aggressive approach would be to require management to consult in good faith with the worker's agency in conjunction with any dismissal affecting a substantial portion of the workforce. Such a requirement raises the kind of concerns mentioned earlier, which accompany any constraint on managerial discretion. *See supra* notes 67−75, 151 and accompanying text.