

The New Bankruptcy Procedures For Rejection of Collective-Bargaining Agreements: Is The Pendulum Swinging Back?

Charlene R. Ehrenwerth*
Maureen E. Lally-Green**

TABLE OF CONTENTS

I.	INTRODUCTION.....	940
II.	BACKGROUND.....	941
	A. <i>Bankruptcy Law: An Overview</i>	941
	B. <i>Teamsters v. Bildisco & Bildisco</i>	944
III.	CONGRESSIONAL RESPONSE TO <i>Bildisco</i> : SECTION 1113 OF THE ACT.....	950
	A. <i>What are "Necessary Modifications" to Permit the Reorganization of the Debtor?</i>	952
	B. <i>What Standard Assures that All Creditors, the Debtor and All of the Affected Parties are Treated Fairly and Equitably?</i>	954
	C. <i>What Type of Information Must be Provided?</i>	956
	D. <i>What Does "To Confer in Good Faith" Mean?</i>	962
	E. <i>What Does "Without Good Cause" Mean?</i>	964
	F. <i>When Does the Balance of Equities Clearly Favor Rejection of the Collective-Bargaining Agreements?</i>	965
	G. <i>Under What Conditions May A Debtor Petition for Interim Changes?</i>	968
	H. <i>What Issues are Presented by the Timetables?</i>	970
IV.	RELATED ISSUES.....	972
	A. <i>Is the Bankruptcy Court Constitutionally Permitted to Make Binding Determinations Under Section 1113?</i>	972

* B.A., 1971, Barnard College, Columbia University; J.D., 1974, Duquesne University; Deputy Chief Counsel, Pennsylvania Department of Labor and Industry.

** B.S., 1971, J.D., 1974, Duquesne University; Adjunct Professor of Law, Duquesne University.

B.	<i>Can the Debtor Avoid Section 1113?</i>	976
C.	<i>Following Section 1113 Rejection, What Are the Employer's and the Union's Legal Duties?</i>	977
V.	CONCLUSION	979

I. INTRODUCTION

"Unions Lose as High Court Backs Companies In Bankruptcy Filings"¹ was a front page headline of the February 23, 1984 New York Times. The accompanying newspaper text announced the United States Supreme Court's decision in *Local 408 of the International Brotherhood of Teamsters v. Bildisco & Bildisco*² permitting a debtor in possession in a proceeding under Chapter 11 of the Bankruptcy Code³ to reject unilaterally existing collective-bargaining agreements. The decision was characterized in the article as a "sharp setback for organized labor."⁴

Organized labor reacted aggressively by stalling imminent congressional action on the Bankruptcy Amendments and Federal Judgeship Act of 1984.⁵ A compromise was eventually reached in

1. New York Times, February 23, 1984, at 1.

2. 104 S. Ct. 1188 (1984). For a discussion of the case, see *supra* notes 30-59 and accompanying text.

3. 11 U.S.C.A. §§ 1-151326 (West 1979 & Supp. 1985) [hereinafter "Code"]. The Code is a part of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 [hereinafter "BRA of 1978"], the first major revision of the bankruptcy laws since 1938. The BRA of 1978 consolidated three reorganization chapters of the predecessor act into a single business reorganization chapter so that business reorganizations could be completed more rapidly and efficiently while providing greater protection to the debtor, creditors, and the public interest. H.R. REP. NO. 95-595, 95th Cong., 2d Sess. 5 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 5966.

The various chapters of title 11 are referred to by their code chapter numbers 1, 3, 5, 7, 9, 11, 13, and 15, 101-109, §§ 301-365, §§ 501-554 (now -559), §§ 701-766, §§ 901-946, §§ 1101-1174, §§ 1301-1330, §§ 1501-151326 respectively.

4. See *supra* note 1.

5. The Bankruptcy Amendments and Federal Judgeship Act of 1984, P.L. No. 98-353, 98 Stat. 333 [hereinafter the "Act"]. The Act was signed by President Reagan on July 10, 1984. The House Conference Report 98-882, 98th Cong., 2d Sess. (1984) does not contain a joint explanatory statement by the Senate and House Judiciary Committees. Individual committee members, however, delivered explanatory statements which are found in the June 29, 1984 Congressional Record. Relevant comments in such statements are referred to in this article.

The 1984 amendments to Title 11 of the United States Code appear only in the United States Code Annotated (West). For the ease of the reader, all references to Title 11 will be made to U.S.C.A.

The impetus for the Act was the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50 (1982), wherein the Court ruled that the jurisdiction granted to bankruptcy court judges by the BRA of 1978 with respect to adjudication of claims arising under state law violated the United States Constitution. *Marathon*

June of 1984, whereby executory collective-bargaining agreements were removed from the operation of the rejection provisions found in section 365 of the Code⁶ and treated separately in a new Code section 1113.⁷

Was the Court's action (and the congressional reaction) in fact a "sharp setback" for labor? This article will review bankruptcy law and the *Bildisco* case, probe some of the more significant issues section 1113 presents, and conclude with an examination of whether the pendulum is indeed swinging against labor.

II. BACKGROUND

A. Bankruptcy Law: An Overview

Two types of bankruptcy proceedings are available to a commercial business: liquidation and reorganization. Liquidation, governed by Chapter 7,⁸ involves the collection and liquidation of the debtor's assets and the distribution of the proceeds to its creditors. Reorganization, governed by Chapter 11,⁹ involves the continued operation of the business under court supervision. Under Chapter 11 reorganization the debtor, designated a "debtor in possession,"¹⁰

is discussed more fully in the text accompanying notes 179-86.

6. Subsection 365(a) of the Code states:

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

11 U.S.C.A. § 365(a) (1982).

Section 365 of the Code is based on the Bankruptcy Act of 1898, sections 70b (Chapter VII), 116(1) (Chapter X), and 313(1) (Chapter XI).

While the Code does not define "executory contract," the legislative history of section 365 states that the term "generally includes contracts on which performance remains due to some extent on both sides." H.R. REP. NO. 95-595, 95th Cong., 1st Sess. 347 (1977), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6303; S. REP. NO. 989, 95th Cong., 2d Sess. 58 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844. The courts have uniformly followed the definition of Professor Vern Countryman who defines an executory contract as one "under which the obligation of both the bankrupt and the other party are so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy (Part I)*, 57 MINN. L. REV. 439, 460 (1973).

See the discussion at notes 22-26 regarding the section 365 rejection process.

7. 11 U.S.C.A. § 1113 (West Supp. 1985). Collective-bargaining agreements were removed from section 365 of the Code by section 541 of the Act. Section 541(c) of the Act provides that the new section 1113 does not apply to cases filed under Title 11 which were commenced prior to the enactment of section 541.

8. 11 U.S.C.A. §§ 701-766 (West 1979 & Supp. 1985).

9. *Id.* §§ 1101-1174.

10. *Id.* §§ 1101(1) (West 1979) and 1107(a) (West Supp. 1985). Section 1101(1) provides: "(a) 'debtor in possession' means debtor except when a person that has qualified

is given a period of time during which debt-collection efforts are stayed¹¹ and a repayment plan (*i.e.*, the reorganization plan) can be proposed.¹² Both liquidation and reorganization may be initiated voluntarily by the debtor¹³ or involuntarily by a group of the debtor's creditors.¹⁴ The proceedings may be converted from one type to the other by the debtor, upon a creditor's petition, or the court on its own motion.¹⁵

If the debtor cannot satisfy the claims of all creditors as well as the costs of the proceedings in either liquidation or a reorganization proceeding, it is required to make an equitable distribution of assets among its creditors. Secured creditors are paid first to the extent of the value of their interest in the particular collateral.¹⁶ Certain unsecured claims are paid in accordance with certain priority rules set forth in the Code,¹⁷ and are given one of six priorities.¹⁸ Administrative expenses are given first priority¹⁹ and up to \$2,000 of wages earned by each individual within ninety days before the petition's filing are given third priority.²⁰ Unsecured claims outside of the Code's specified categories are considered general claims for which the Code provides no priority. Thus, the amount and timing of a creditor's recovery will vary with the priority given to its claim.²¹

under section 322 of this title is serving as trustee in the case." *Id.*

Section 1107, "Rights, powers, and duties of debtor in possession," provides that the legal status of the debtor in possession is comparable to that of a trustee in bankruptcy, although not identical. Under circumstances where the debtor either cannot be or is not the appropriate party to operate the business, a trustee may be appointed to operate the business instead of the debtor. *Id.* § 1104 (West 1979). The debtor in possession is responsible for filing a list of creditors, a schedule of assets and liabilities, a statement of the debtor's financial affairs, and a reorganization plan, and is accountable for all property received and for evaluating proofs of claims. *Id.* § 1106. For purposes of this article, the term "debtor" will refer both to a "debtor in possession" and to a "trustee in bankruptcy" operating the business of the debtor.

11. *Id.* § 362, as amended by section 441 of the Act.

12. *Id.* §§ 1121-1129.

13. *Id.* § 301 (West 1979). The restrictions on who may become a debtor are minimal. *Id.* § 109.

14. *Id.* § 303 (West 1979 & Supp. 1985). Creditors must satisfy several requirements to commence an involuntary case, and the debtor may contest the creditor's petition.

15. *Id.* §§ 706, 1112.

16. *Id.* § 506, as amended by section 448 of the Act.

17. *Id.* § 507. See *id.* § 103(a) for rules which are applicable to both liquidation and reorganization proceedings.

18. *Id.* § 507(a)(1)-(6), as amended by section 449 of the Act.

19. *Id.* § 507(a)(1).

20. *Id.* § 507(a)(3).

21. In a liquidation proceeding under Chapter 7, all debts in each priority class must be paid in full before the debtor can distribute anything to the next priority class, 11

Bankruptcy courts are empowered to allow debtors to reject executory contracts.²² For most executory contracts, other than collective-bargaining agreements, the court need only determine that, according to the business judgment rule, rejection will benefit the estate.²³ The Code deems a rejected contract to be breached as of the day *before* the petition for reorganization was filed.²⁴ Claims for damages resulting from the rejection, including those for lost future earnings, are general nonpriority claims.²⁵ If a debtor assumes²⁶ or enters into a contract during reorganization, or neither assumes nor rejects an executory contract but does receive benefits under it, then any claim arising under the contract during the reorganization period, including a claim related to a rejection after the

U.S.C.A. § 726(a)(1) (West 1979), and all priority claims must be satisfied before the general, unsecured creditors receive payment. *Id.* § 726(a)(2). In a reorganization proceeding under Chapter 11, after secured claims are paid, all first and second priority claims must be paid, in cash, by the debtor on the effective date of the plan. *Id.* § 1129(a)(9)(A). Third, fourth, fifth and sixth priority claims may be paid as deferred cash payments. *Id.* § 1129(a)(9)(B) and (C). General, nonpriority claims are subject to impairment, *id.* § 1124, which may involve deferment or outright cancellation of the claim. *Id.* §§ 1122, 1123(a)(3).

22. *Id.* § 365(a). For the text of this section and a discussion of the term "executory contract," see *supra* note 6. In Chapter 11 proceedings, the debtor may assume or reject an executory contract at any time prior to, or as a part of, the bankruptcy court's confirmation of the plan of reorganization in accordance with 11 U.S.C.A. § 1123(b)(2) (West Supp. 1985). *Id.* § 365(d)(2). In Chapter 7 proceedings, the trustee must assume or reject an executory contract or unexpired lease within sixty days after the order for relief; otherwise, the contract or lease is deemed rejected by operation of law. *Id.* § 365(d)(1). If the debtor neither assumes nor rejects the contract, the other party may apply to the court for an order directing that the contract be assumed or rejected within a reasonable period of time. *Philadelphia Co. v. Dipple*, 312 U.S. 168 (1941).

23. Under the "business judgment" rule, a debtor may reject any executory contract if such rejection is in good faith and benefits the estate, even if the contract is profitable or generally beneficial and regardless of whether the contract is otherwise burdensome or its rejection is economically justified or causes injury to other parties. *In re Chi-Feng Huang*, 23 Bankr. 798 (9th Cir. 1982); *In re Ateco Equipment*, 18 Bankr. 915 (W.D. Pa. 1982). See also *Group of Institutional Investors v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U.S. 523, 550 (1943).

24. 11 U.S.C.A. § 365(g)(1) (West 1979).

25. *Id.* §§ 365(g)(1), 502(c) (West Supp. 1985) and (g) (West 1979), and 507 (West 1979 & Supp. 1985). Proofs of claims for damages relating to such rejection are to be presented through the normal bankruptcy administration process by which claims are estimated and classified, and, if such claims are not so presented, they are lost when a plan of reorganization is confirmed. *Id.* §§ 501, 502 and 1141. Actions on claims that have been or could have been brought before the filing of the bankruptcy petition are, with limited exceptions, stayed due to the automatic stay provisions of the Code. *Id.* § 362(a). *Cf. Countryman, Executory Contracts in Bankruptcy (Part 2)*, 58 MINN. L. REV. 479, 533, 536, 541 (1974).

26. 11 U.S.C.A. § 365(g)(2) (West 1979). If such a debtor elects to assume the executory contract, it assumes the whole contract, with all of its terms and conditions, and the expenses and liabilities incurred post-petition and pre-acceptance are to be treated as administrative expenses. *Id.* § 503(b)(1)(A).

contract has been accepted, is given first priority as a cost of administration.

A Chapter 11 debtor often views its existing collective-bargaining agreement as a major cause of its poor financial predicament, particularly if engaged in labor intensive businesses,²⁷ or where involved as a defendant in a mass tort case.²⁸ Prior to the enactment of section 1113, when a debtor sought bankruptcy court approval for the rejection of the collective-bargaining agreement pursuant to the Code's section 365, three legal issues had to be resolved: (1) whether collective-bargaining agreements are executory contracts which may be rejected pursuant to section 365(a); (2) if so, whether the ordinary business judgment rule used for other executory contracts was the applicable standard for rejection; and (3) if the debtor unilaterally modified (or terminated) the agreement post-petition and pre-approval by the bankruptcy court, whether the debtor was guilty of an unfair labor practice under the National Labor Relations Act (NLRA).²⁹ These issues were addressed and answered by the Supreme Court in *Bildisco*.

B. TEAMSTERS V. BILDISCO & BILDISCO³⁰

On April 14, 1980 Bildisco & Bildisco (Bildisco), a New Jersey general partnership in the business of distributing building supplies, filed a voluntary petition in bankruptcy for reorganization under Chapter 11 of the Code and was subsequently authorized by the bankruptcy court to operate the business as a debtor in

27. Such a debtor usually believes that certain cost-related matters, such as wage scales, health and welfare benefits, pension fund contributions, and vacation, funeral and sick leave, unreasonably balloon its operating costs and are significantly greater than those of its competitor's (and often unorganized) workforce. See, e.g., *In re Blue Ribbon Transp. Co.*, 113 L.R.R.M. (BNA) 3505 (1983); *In re Brada Miller Freight Systems*, 702 F.2d 890 (11th Cir. 1983). Often, the debtor feels that certain provisions of the agreement, particularly the seniority provisions, keep it from operating in an efficient, cost effective manner or from instituting improvements to its operations. See, e.g., *In re Southern Electronics Co.*, 23 Bankr. 348 (E.D. Tenn. 1982). Occasionally, the debtor desires to get rid of a union it dislikes. See, e.g., *In re Mamie Conti Gowns, Inc.*, 12 F. Supp. 478 (S.D.N.Y. 1935).

28. Sometimes a debtor, faced with a threat of an imposing contingent liability resulting from mass tort litigation, may believe that the present collective-bargaining agreement is too costly in the context of the expected costs of the litigation and resulting damage awards. See, e.g., *In re Johns-Manville Corp.*, 26 Bankr. 405 (S.D.N.Y. 1983). For a discussion of the use of Chapter 11 in the mass tort situation, see generally Note, *The Manville Reorganization*, 48 ALB. L. REV. 1045 (1984); Roe, *Bankruptcy and Mass Tort*, 84 COLUM. L. REV. 846 (1984).

29. 29 U.S.C. §§ 151-169 (1982).

30. 104 S. Ct. 1188 (1984).

possession.³¹

At the time the petition was filed, approximately forty to forty-five percent of Bildisco's employees were represented by Local 408 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (the Union), which had negotiated a three year collective-bargaining agreement with Bildisco. The agreement was due to expire in April, 1982 and was expressly binding on the parties and their successors even though bankruptcy should supervene.³² Bildisco failed to meet some of its obligations under the agreement, including payments of health and pension benefits, remittances to the Union of dues collected, and wage increases called for in the agreement.³³ Bildisco requested and received permission from the bankruptcy court to reject the agreement under section 365(a) of the Code.³⁴ The district court upheld the bankruptcy court's order and the Union appealed to the Court of Appeals for the Third Circuit.³⁵

The Union filed unfair labor practice charges with the National Labor Relations Board (NLRB), which found that Bildisco had violated certain provisions of the NLRA,³⁶ specifically sections 8(a)(1), 8(a)(5) and 8(d),³⁷ by unilaterally changing the terms of an

31. *Id.* at 1192.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. 29 U.S.C. §§ 151-169 (1982).

37. *Id.* § 158(a)(1), § 158(a)(5). Sections 8(a)(1) and (5) of the NLRA provide:

(a) *Unfair labor practices by employer.*

It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

....

(5) to refuse to bargain collectively with the representatives of his employees subject to the provisions of section 159(a) of this title.

Id. Section 8(d) states in relevant part:

Obligation to bargain collectively

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: *Provided*, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

existing collective-bargaining agreement, by failing to make the above-mentioned payments, and by refusing to negotiate with the Union.³⁸ The NLRB ordered Bildisco to make the payments required under the agreement and petitioned the Third Circuit to enforce its order.³⁹

Consolidating the Union's appeal and the NLRB's petition,⁴⁰ the Third Circuit held that a collective-bargaining agreement was an executory contract, and that rejection of such agreement was authorized by the Code and not qualified by section 8(d) of the NLRA. It then ruled that the applicable test for rejection was the test enunciated in *Shipman's Local Union No. 455 v. Kevin Steel Products*,⁴¹ where the debtor had to show that the collective-bargaining agreement was burdensome to the estate and that the equities balanced in favor of rejection. The Third Circuit remanded *Bildisco* to the bankruptcy court for reconsideration in light of its opinion.⁴²

The United States Supreme Court granted certiorari on January 17, 1983 to resolve the apparent conflict in the rejection standard adopted by the Third Circuit in *Bildisco* and that of the Court of Appeals for the Second Circuit in *Brotherhood of Railway Employees v. REA Express, Inc.*⁴³ The court in *REA Express*, a case decided subsequent to *Kevin Steel*, appeared to adopt a stricter test than that enunciated in the latter case by permitting rejection only if the debtor could demonstrate its reorganization would fail

. . . [complies with the requirements of subsections (1)-(4) which provide for a four step detailed process that a moving part must follow in order to terminate or modify a collective-bargaining agreement. These subsections are sometimes referred to as the notice and cooling-off provisions.]

29 U.S.C. § 158(d) (1982).

38. 104 S. Ct. at 1193.

39. *Id.*

40. *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982).

41. 519 F.2d 698 (2d Cir. 1975). In *Kevin Steel*, the defendant steel fabricating company entered into bankruptcy reorganization after its ironworkers' union filed a charge of unfair labor practices against it. The company, as debtor in possession, successfully petitioned the bankruptcy court for permission to reject its collective-bargaining agreement with the union. Thereafter, the union appealed the decision to the district court, which disallowed the rejection, holding that Congress had intended the labor laws to prevail over the bankruptcy laws. The Court of Appeals for the Second Circuit reversed the district court's ruling. It held that a test much stricter than the "benefit to the estate" standard applicable to commercial contracts applied to collective-bargaining agreements, and that rejection was permitted "only after thorough scrutiny and a careful balancing of the equities on both sides." *Id.* at 707.

42. 104 S. Ct. at 1194.

43. 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1019 (1975).

unless rejection was permitted.⁴⁴ The Supreme Court ruled that collective-bargaining agreements were executory contracts for purposes of section 365 of the Code, that the applicable rejection standard was, with certain clarifications, the *Kevin Steel* test, and that, if the debtor rejected the agreement in the period after the filing of the bankruptcy petition but before approval by the bankruptcy court of the rejection, such rejection could not be the premise of an unfair labor practice charge against the debtor.⁴⁵

Regarding the claimed executory status of collective-bargaining agreements, the United States Supreme Court ruled that the section 365(a) term "executory contract" included collective-bargaining agreements subject to the NLRA⁴⁶ and that none of the express section 365(a) limitations on such debtor's general power to reject applied to collective-bargaining agreements.⁴⁷ In addition, the Court ruled that the only collective-bargaining agreements exempted from section 365(a) were those specifically subject to the Railway Labor Act, there being no similar exemption granted to collective-bargaining agreements subject to the NLRA.⁴⁸

44. *Id.* In *REA Express*, the debtor's proposed reorganization plan called for significant cutbacks in operations, consolidation of existing facilities and work transfers. The union agreement restricted work transfers and consolidation by requiring notice, negotiation and arbitration if no agreement could be reached over proposed changes. Also, under the agreement, if an employee decided to follow his or her work on transfer, the employer had to provide for reimbursement of transportation expenses of both the employee and his or her family, time off for relocation, protection against loss from sale of home and a \$1,000 allowance. The district court ruled that, since these contract provisions accounted for 60% of the debtor's total weekly expenses, and compliance with them would be fatal to the debtor's reorganization efforts, rejection of the contract was appropriate. *Id.* at 172. The *REA Express* standard is sometimes referred to as the "business collapse" test and appears to articulate a different, tougher standard than that of *Kevin Steel*.

45. 104 S. Ct. at 1194-1201.

46. *Id.* at 1194-95. The Supreme Court noted that no party to the action argued that the collective-bargaining agreement was not an executory contract within the meaning of § 365(a). *Id.* at 1194. The Court was apparently addressing the argument made by the United Mine Workers of America in its *amicus* brief that a collective-bargaining agreement was not an executory contract since both parties to it had reciprocal obligations and, at any point during the term of the contract, each party owed the other performance. *Id.*

47. The section 365(a) limitations on a debtor's broad powers to assume or reject executory contracts are found in sections 365(b) and 365(c) which limit the debtor's power to assume in certain circumstances, and in section 365(d) which requires the trustee, in the case of liquidation, to assume or reject within sixty days of the filing of the petition.

For a discussion of the good faith bargaining standard of section 8(a)(5) and 8(d), see text accompanying notes 116-26; for a discussion surrounding the duty to bargain to impasse, see text accompanying notes 203-06.

48. 11 U.S.C.A. § 1167 (West 1979), which states:

Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C.

In addressing the appropriate standard for rejection, the Supreme Court first acknowledged that the applicable standard should be stricter than the one for ordinary executory contracts because of the special nature of a collective-bargaining contract and the consequent "law of the shop" which it creates.⁴⁹ It then adopted the "balance of the equities" test of *Kevin Steel*. The Supreme Court reasoned that the stricter *REA Express* test conflicted with the Chapter 11 policies of flexibility and equity, in that it subordinated the multiple, competing considerations underlying a Chapter 11 reorganization to a single issue, *i.e.*, whether rejection of the agreement was necessary to prevent the debtor from liquidating.⁵⁰

The Supreme Court instructed that, when acting on a petition to modify or reject such an agreement, the bankruptcy court is to: (1) be persuaded that both parties have made reasonable efforts to negotiate a voluntary modification and that a prompt and satisfactory solution is unlikely; and (2) make a decision on the rejection issue only if the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization.⁵¹ The Supreme Court also directed the bankruptcy court to make a reasoned finding on the record as to why it determined that rejection should be permitted and, in determining what would constitute a successful rehabilitation, to balance the interests of the affected parties—debtor, creditors, and employees.⁵² Factors to be considered were to include, assuming affirmance, the likelihood and consequences of liquidation for the debtor and the reduced value of claims and other hardships of creditors, and assuming rejection, the impact of rejection on the employees.⁵³ In balancing the equities, the bankruptcy court is to consider the degree of hardship

151 et seq.) except in accordance with section 6 of such act (45 U.S.C. § 156).

Id.

49. 104 S. Ct. at 1195. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 550 (1964); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578-79 (1960).

50. 104 S. Ct. at 1196.

51. *Id.* at 1196-97.

52. *Id.* at 1197.

53. *Id.* The Supreme Court indicated that the NLRA required no less because the debtor was under a duty to bargain in good faith with the union under section 8(a)(5), 29 U.S.C. § 158(a)(5), and the policies of the NLRA had been adequately served since reasonable efforts to reach agreement had been made. *Id.* In a related context, the Court cautioned that the bankruptcy court need not make any determination outside the field of its expertise, such as determining whether the parties had bargained to impasse. *Id.*

For a discussion of the duty to confer in good faith and to bargain to impasse under sections 8(a)(5) and 8(d), see text accompanying notes 116-26, 203-06.

faced by each party relevant to the success of the reorganization as well as the qualitative differences of hardship among those parties.⁵⁴

Finally, the Supreme Court ruled that when the debtor unilaterally rejects the collective-bargaining agreement after filing its bankruptcy petition but before receiving bankruptcy court approval to reject, such rejection cannot be the basis of an unfair labor practice charge.⁵⁵ The Court reasoned that the agreement was not an enforceable contract within the meaning of section 8(d) since a rejection of an executory contract relates back to immediately *before* the filing of the petition initiating the reorganization and claims relating to such rejection are processed not through a court of general jurisdiction in a suit against the debtor under the agreement but through a bankruptcy court by way of filing of a claim.⁵⁶ Also, the Court ruled that the debtor need not comply with certain provisions of the NLRA, specifically the section 8(d) mid-term modification provisions or the section 8(a)(5) duty to "bargain to impasse."⁵⁷ The Court reasoned that the "modification" in the agreement was not accomplished by the employer's unilateral action but by operation of law.⁵⁸ The Court cautioned that the debtor continues to be an "employer" within the terms of the NLRA, and is obligated to bargain collectively and in good faith with the employees' certified representative over the terms of a new contract pending and following court approval⁵⁹ of the rejection of the agreement.⁶⁰

54. 104 S. Ct. at 1197.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.* The dissent (Justices Brennan, White, Marshall and Blackmun, concurring in part and dissenting in part), argued, among other things, that the agreement was reasonably "in effect" for purposes of section 8(d) in that it supported a claim arising out of the debtor's obligations in the post-petition period, whether the contract was accepted or rejected, *id.* at 4277-78, and that, as an "employer" within the meaning of section 2(2) of the NLRA, 29 U.S.C. § 152(2), the debtor must comply with, and commits an unfair labor practice in failing to so comply with, the section 8(a)(5) duty to bargain and the section 8(d)(1)-(4) notice and "cooling-off" requirements. 104 S. Ct. at 1201-11.

60. For decisions applying the Supreme Court's *Bildisco* standard by authorizing the debtor to reject a collective-bargaining agreement, see *In re Bloss Glass Co.*, 39 Bankr. 694 (M.D. Pa. 1984) (where labor expenses were 27% of debtor's monthly budget, hourly wages were higher than those of the competition, and debtor reduced other costs of operations, equities balanced in favor of rejection); *In re Briggs Transp. Co.*, 39 Bankr. 343 (D. Minn. 1984) (where labor costs were approximately 70% of debtor's gross revenues, equities balanced in favor of rejection).

III. CONGRESSIONAL RESPONSE TO *Bildisco*: SECTION 1113 OF THE ACT

Swift congressional reaction to *Bildisco* resulted in the addition to the Code of section 1113. Little legislative history exists, however, since there was no joint explanatory statement or report submitted by the House and Senate Judiciary Committees. The only discussion of the new section is found in statements made by certain members of the Judiciary Committees (the conferees) to Congress.⁶¹

While section 1113 largely codified *Bildisco's* standard for rejection of collective-bargaining agreements, it eliminated, except in limited circumstances, the ability of the debtor to unilaterally reject such agreements. The new section requires the debtor to comply with a two-step process delineated in section 1113(b) within rather strict time periods. This two-step process is designed to save both the labor contract and the business enterprise, prior to court

For decisions applying the *Bildisco* standard and denying the debtor's motion to reject, see *In re C. & W. Mining Co.*, 38 Bankr. 496 (N.D. Ohio 1984) (burdensomeness of collective-bargaining agreement was outweighed by the bad faith actions of debtor and its principals); *In re Total Transportation Services, Inc.*, 37 Bankr. 904 (S.D. Ohio 1984) (where total claim for five employees was \$2800, equities did not balance in favor of rejection).

For decisions distinguishing the Supreme Court's decision in *Bildisco*, see *Gloria Mfg. Corp. v. International Ladies Garment Workers Union*, 734 F.2d 1020 (4th Cir. 1984) (*Bildisco* distinguished because the collective-bargaining agreement had expired pre-petition); *In re Schuld Mfg., Inc.*, 43 Bankr. 535 (W.D. Wis. 1984) (debtor not entitled to reject post-petition collective-bargaining agreement in a liquidation case); *Briggs Transp. Co. v. International Brotherhood of Teamsters*, 40 Bankr. 972 (D. Minn. 1984) (after debtor received court approval to reject collective-bargaining agreement, debtor requested court to issue injunction to prevent unions from engaging in strike-related activities designed to disrupt operations in response to debtor's attempt to institute new wage schedules; district court held that such activities grew out of a "labor dispute" within the meaning of the Norris-LaGuardia Act and since the employer did not comply with the Act's provisions, it was not entitled to an injunction; fact that employer may go out of business absent requested injunction was unfortunate side effect of labor-management strife); *In re Deluca Distributing Co.*, 38 Bankr. 588 (N.D. Ohio 1984) (debtor had authority to enter into a post-petition collective-bargaining agreement without bankruptcy court approval and was bound by that agreement); *In re Rath Packing Co.* (*Rath Packing Co. v. United Food & Commercial Workers Int'l Union, AFL-CIO*), 38 Bankr. 552 (N.D. Iowa 1984) (debtor's complaint to enjoin the Board and the union from filing an unfair labor practice charge not ripe because the charge was only threatened and not filed); *In re IML Freight, Inc.*, 37 Bankr. 556 (D. Utah 1984) (trustee's motion to reject collective-bargaining agreement entered into post-petition between trustee and various unions denied since not an executory contract within the meaning of section 365(a)).

61. See generally 130 CONG. REC. H7489-97 and S8887-91 (daily ed. June 29, 1984). See also *id.* at S8887 (statement of Sen. Dole), reprinted in 1984 U.S. CODE CONG. & AD. NEWS 588 [citations to the June 29, 1984 daily edition of the Congressional Record are hereinafter cited as CONG. REC.]. See *supra* discussion at note 5.

adjudication of rejection, by ensuring that the interests of the struggling business, its union employees, and all other creditors of the business are balanced equitably and fairly to assure the success of the reorganization.⁶²

The first step, delineated in sections 1113(b)(1)⁶³ and (b)(2)⁶⁴ occurs after the debtor files the petition in bankruptcy but before it petitions the court to approve rejection of the agreement.⁶⁵ The debtor is required to make, to the employees' authorized representative, a proposal "based on the most complete and reliable information available at the time of such proposal."⁶⁶ The proposal is to provide for "those necessary modifications in the employees' benefits and protections that are necessary to permit the reorganization of the debtor"⁶⁷ and assures that "all creditors, the debtor and all of the affected parties are treated fairly and equitably."⁶⁸ The debtor is also required to furnish the representative with such information as is necessary to evaluate the proposal.⁶⁹ The debtor has an obligation to meet at reasonable times with the authorized representative and to confer in good faith in attempting to reach mutually satisfactory modifications of the collective-bargaining agreement.⁷⁰

The second step requires the court to find that the debtor has

62. See 130 CONG. REC. S8891 (statement of Sen. Hatch), reprinted in 1984 U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 592.

63. 11 U.S.C.A. § 1113(b)(1) (West Supp. 1985) requires, in pertinent part, the debtor in possession to:

(A) make a proposal to the authorized representative of the employees . . . based on the most complete and reliable information available at the time of such proposal which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably . . . [and to]

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

Id.

64. *Id.* § 1113(b)(2) provides:

During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

Id.

65. *Id.* § 1113(b).

66. *Id.* § 1113(b)(1)(A).

67. *Id.*

68. *Id.*

69. *Id.* § 1113(b)(1)(B).

70. *Id.* § 1113(b)(2).

complied with the requirements of the first step, that the employees' representative refused to accept the proposal "without good cause," and that a "balance of the equities clearly favors rejection."⁷¹

The following discussion probes some of the more significant issues presented by section 1113 which include: what are those "necessary modifications to employees' benefits and protections that are necessary to permit the reorganization of the debtor"; what is the standard that assures the creditors, debtor and all affected parties are treated fairly and equitably; what "relevant" information can and cannot be used or furnished; what are "good faith" negotiations; what does "without good cause" mean; when does a balance of the equities clearly favor rejection; under what conditions may a debtor petition for interim changes; and when may the strict section 1113 time limitations be relaxed?⁷²

A. *What Are Necessary Modifications . . . To Permit the Reorganization of the Debtor?*

The debtor's proposal is to provide for "those necessary modifications in the employees' benefits."⁷³ While the standard is "necessary," the term is not statutorily defined. The expressed intent of the conferees was that the debtor be allowed to make those changes in the collective-bargaining agreement that are reasonably necessary to ensure the likelihood of a successful reorganization. The conferees cautioned that this is not to be an entire reorganization at an early stage of the Chapter 11 effort when it is often im-

71. *Id.* § 1113(c) provides:

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

- (1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
- (2) the authorized representative of the employees has refused to accept such proposal without good cause; and
- (3) the balance of the equities clearly favors rejection of such agreement.

Id.

72. In each of the above-enumerated issues, the question of who bears the burden of persuasion is presented, although such question is not addressed in depth in this article. Since compliance with section 1113 is the basis of the debtor's motion to reject, the debtor bears the initial burden of persuasion by a preponderance of the evidence. However, who has the burden of persuasion regarding compliance with any subsection of section 1113 will depend on the circumstances of the case. *In re American Provision Co.*, 44 Bankr. 907 (D. Minn. 1984) (where debtor-company sought bankruptcy court approval to reject collective-bargaining agreement under section 1113, *held*, pursuant to section 1113, debtor has burden of proof by preponderance of evidence that requirements of section 1113 have been met).

73. *See supra* note 63.

possible to identify all the creditors and their interests.⁷⁴

The critical question of what constitutes necessary modifications in employees' benefits and protections (so as to permit the reorganization) will likely present itself when the debtor proposes alleged cost-saving modifications to seniority rules such as those governing terminations, layoffs, intra-company transfers, job descriptions, and salaries, health and welfare benefits and pension plan contributions. For example, a debtor is likely to propose a modification or elimination of certain work rules or practices which curtail the debtor's ability to make work assignments. Also, if a debtor decides to consolidate operations by a total shut-down of inefficient plants or facilities, the debtor may propose modifications to contract provisions dealing with the impact or effect of such decision (*e.g.*, health and welfare benefits, vacation days, etc.). Finally, a debtor is likely to propose a reduction of salaries, and the reduction or elimination of expensive fringe benefits such as paid holidays, paid sick days, paid personal days, reimbursed educational or child care expenses, health and dental benefits for the employees and their families, and pension plan contributions.

The critical issue in all of the above is not whether the proposed modifications will result in a reduction of operating costs but whether they are necessary to permit the debtor's reorganization. If the ratio of labor costs under the agreement to the debtor's total operating costs is high, a number of the above-enumerated proposed modifications would probably be deemed "necessary" to permit the reorganization. Such modifications would be directly related to the debtor's financial ability to reorganize.

If such ratio is not high, as might occur when the debtor invokes Chapter 11 because of the existence of a contingent tort liability or poor financial conditions unrelated to labor costs,⁷⁵ then, although the above-proposed modifications would reduce overall costs, such modifications may not be deemed "necessary" to permit the debtor's reorganization.

Predictably, the debtor will argue for the more flexible "reasonable relationship" test while the union will urge a more stringent

74. 130 CONG. REC. S8891 (statement of Sen. Hatch), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 592.

75. *In re Johns-Manville Corp.*, 26 Bankr. 405 (S.D.N.Y. 1983); *In re American Provision Co.*, 44 Bankr. 907 (D. Minn. 1984) (savings under debtor's section 1113(b) proposal was 2% of debtor's monthly operating expenses and found not to be necessary to permit the debtor's reorganization, especially since the collective-bargaining agreement was to expire within eight months).

“direct relationship” one. While both tests would consider as relevant the question of whether or not the proposed modification saves costs, neither test would find such factor solely determinative. In the final analysis, what is “necessary” will be a case by case judgment by the affected parties (and perhaps ultimately by the court) of what will permit the reorganization in the context of the other section 1113 requirements.

B. What Standard Assures That All Creditors, the Debtor and All of the Affected Parties Are Treated Fairly and Equitably?

The new rejection procedures provide that the debtor’s proposal is to assure that all creditors, the debtor and all affected parties are treated equitably.⁷⁶ Underlying the issue of what is the applicable standard by which the debtor “assures” that all affected parties are treated “fairly and equitably,” are co-related issues such as the identity of the “affected parties,” what action, if any, is required by them,⁷⁷ and what is fair and equitable treatment.

While the Act defines none of the above words and phrases, the legislative history provides some direction. The conferees stated that the phrase “all the affected parties” describes only those parties, including union and non-union employees, affected in a direct, non-minor way,⁷⁸ such as those with contractual, legal or financial ties to the debtor that would make them “the logical parties to the equities balancing.”⁷⁹ Also, the phrase “treated fairly and equitably” means that all the affected parties are treated fairly and equitably in the concessions they are asked to make so that employees covered by the collective-bargaining agreement do not solely bear the economies of the reorganization.⁸⁰ Further, the same standard of equity balancing that is to take place during the proposal step is likewise to take place when the court finally rules on the application for rejection.⁸¹ On the other hand, where the conferees referred to “fair[] and equitabl[e]” treatment and “equities balancing,” they did not define those terms. The failure by Congress and,

76. See *supra* note 63.

77. See *infra* note 83.

78. 130 CONG. REC. S8887 (statement of Sen. Thurmond), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 583.

79. 130 CONG. REC. S8891 (statement of Sen. Hatch), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 593.

80. 130 CONG. REC. H7489 (statement of Rep. Rodino), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 577.

81. 130 CONG. REC. S8891 (statement of Sen. Hatch), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 593.

to a lesser extent, the conferees, to provide specific definitions will undoubtedly produce future litigation.

In the context of the flexible standard of fair and equitable treatment, the applicable measure for determining whether the standard is met would probably involve a comparison of the concessions asked of the union, on a dollar or percentage basis, with those sought from other affected parties. Such factors as the affected party's financial situation and ability to absorb the concessions or to spread them over a customer base would also probably be considered and compared with concessions asked of the union.

Those parties with contractual, legal or financial ties to the debtor include all secured and unsecured creditors. Such parties would include lenders, principal suppliers and trade creditors, union and non-union employees, and the debtor's management. Consequently, depending upon the circumstances of the case, the debtor might be required by section 1113 to demonstrate to the union that concessions similar to those described below have been or will be made by creditors and the other affected parties.⁸²

Secured creditors such as banks, commercial lending institutions, principal shareholders and key management, and the federal, state, and local governments, as lenders or as guarantors of loans, may be requested to release security interests in collateral such as machinery, equipment, inventory, accounts receivables, or real estate and/or to temporarily suspend principal payments and reduce or suspend interest payments. Unsecured creditors, such as lessors, principal suppliers and trade creditors, may be requested to suspend, reduce or forgive pre-petition and/or post-petition rental obligations or claims for non-payment of delivered materials for which payment is due, and to continue to extend credit, often over a longer period of time and at below market rates. Management would likely have to agree to concessions whereby salaries are cut, expense accounts, travel allowances and certain benefits are either eliminated or substantially reduced and whereby management personnel would be reduced. In summary, the quantity and quality of concessions minimally required under section 1113 will remain a function of the circumstances of each case.⁸³

82. Regarding whether and when concessions must be agreed to, and not just proposed and considered, it appears a more reasonable approach, particularly in view of the time constraints of a Chapter 11 reorganization and section 1113's fair and equitable treatment standard, to require the debtor to show that he has proposed to or received concessions from creditors which are contingent on concessions received from the union.

83. Neither section 1113 nor any provision of the bankruptcy laws require any party to

C. *What Type of Information Must Be Provided?*

While the section 1113 duties to use and to provide complete, relevant and reliable information are simply stated,⁸⁴ the issues created by such duties may be difficult to resolve. Some of those issues include the type of information which must be provided and to whom and under what circumstances must the information be supplied. While the conferees' intent was that a section 1113 information request was to be interpreted in the "most practical and workable manner possible,"⁸⁵ they gave little further direction concerning the issue, did not address what would constitute "complete and reliable information available at the time of the proposal," and generally further cautioned that "all relevant information concerning the proposal be provided the union for its evaluation purposes."⁸⁶

While there is a duty to provide adequate information under section 1125 for the creditor's analysis of a reorganization plan,⁸⁷ that

make concessions. A secured creditor's allowed claim, 11 U.S.C.A. § 502 (West 1979 and Supp. 1985), is secured to the extent of the value of the creditor's interest in the bankrupt estate's interest in the property and unsecured as to the excess of such creditor's claim in such property. *Id.* §§ 506(a) and 1129(b)(2). Certain unsecured creditors' claims receive priority over other unsecured claims. *Id.* § 507. Each claim in a particular class is to receive the same treatment under a reorganization plan, unless the holder of the claim agrees to a less favorable treatment of the claim, *id.* § 1123(a)(4), or a certain portion of the class of claims of creditors has accepted the plan even though a particular individual creditor has not. *Id.* § 1126(c) and (d). The court, however, has the authority to approve a reorganization plan that impairs certain claims when the court finds that the plan does not discriminate unfairly and is fair and equitable with respect to each class of claims that has not accepted, but is impaired under, the plan. *Id.* § 1129(b). Thus, the court has the ultimate authority to confirm a plan that impairs claims and any party that makes concessions in the context of section 1113(b)(1) will be deemed to have agreed to a less favorable treatment of its claim under 11 U.S.C.A. § 1123(a) (West Supp. 1985).

84. *Id.* § 1113(b)(1)(A) and (B). See *supra* note 63 for the text of these sections. Under section 1113(b)(1)(A), the debtor is required to base its proposal on the most complete and reliable information available at the time of the proposal. Under section 1113(b)(1)(B), the debtor is to provide the union such relevant information as is necessary to evaluate the proposal. The section 1113(b)(1)(B) requirement always encompasses all the information on which the proposal is based. Since both sections deal with the provision concerning the use of information, they will be dealt with together in the context of the information heading.

85. 130 CONG. REC. S8889 (statement of Sen. Dole), *reprinted in* U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 587.

86. 130 CONG. REC. S8892 (statement of Sen. Hatch), *reprinted in* U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 591.

87. 11 U.S.C.A. § 1125. Section 1125 provides in pertinent part:

(1) In this section—

(a) "adequate information" means information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of the debtor's books and records, that would enable a hypothetical reasonable investor typical of holders of claims or interests of the relevant class to

duty appears to be much narrower than that required by section 1113. Section 1125 defines the term "adequate information" as sufficiently detailed information that would enable a hypothetical investor to make an informed judgment about the proposed reorganization plan.

Section 1125 is not broad enough to include the type of section 1113 information needed by the union to evaluate a proposal to modify employee benefits. Section 1113 contemplates the provision of both financial and non-financial information so that the union is able to evaluate the methodology utilized by the bankrupt for both formulating and implementing modifications of employees' salaries and benefits. This is clearly distinct from modification of only the amounts of employee salaries and benefits. Also, the section 1125 definition does not speak to information concerning concessions given by creditors and affected parties, information which is relevant to a determination of whether affected parties are treated fairly and equitably. Since both the debtor and the union are presumably familiar with the broad duty to provide information under the labor laws and since section 1125 is too narrow for the purposes of section 1113, the debtor and union (as well as the court) may resolve information related issues in the context of the duty to supply requested information under the labor laws and not under section 1125.

The duty to furnish information pursuant to a good faith request derives from the duty to bargain collectively pursuant to section 8(a)(5) of the NLRA.⁸⁸ This duty obliges both employers and unions.⁸⁹ The important inquiries are whether the requested information is relevant to the legitimate collective bargaining needs of the union and, if so, whether nondisclosure is appropriate.

Regarding the relevancy inquiry, if the requested information

make an informed judgment about the plan

Id.

88. 29 U.S.C. § 158(a)(5) (1982). A refusal to disclose the requested information may constitute a refusal to bargain in good faith which would be an unfair labor practice. *International Union of Elec., Radio and Mach. Workers v. NLRB*, 648 F.2d 18, 25 (D.C. Cir. 1980). The union may file an unfair labor practice charge with the NLRB under 29 U.S.C. § 158(a)(5), *Oil, Chem. & Atomic Workers v. NLRB*, 711 F.2d 348, 357 n.18 (D.C. Cir. 1983), and once the Board orders disclosure of the information, either the charged or the charging party may seek judicial review in federal court of such order. 29 U.S.C. § 160(f). If the employer continues to refuse disclosure, the Board may enforce its order in a federal court. *Id.* § 153(d).

89. The union is also obligated to provide the employer with requested information relevant to the collective-bargaining process. *Local 13, Detroit Newspaper Printing and Graphic Communications Union v. NLRB*, 598 F.2d 267 (D.C. Cir. 1979).

concerns subjects about which the union and the employer are duty-bound to bargain, *i.e.*, "mandatory subjects of bargaining,"⁹⁰ the information is presumed relevant because it deals with the "core of the employer-employee relationship."⁹¹ Information considered presumptively relevant for bargaining purposes includes: a list of employees' names and home addresses, including non-unit employees;⁹² wage and salary data⁹³ including job classifications;⁹⁴ factors involved in determining merit increases;⁹⁵ relevant information concerning health and welfare, insurance, and pension benefit plans;⁹⁶ and relevant financial information of an employer who claims financial inability to meet the demands of a union.⁹⁷ While the relevancy presumption⁹⁸ is considered rebuttable,⁹⁹ the rebuttal is usually limited to a showing by the employer of the union's absence of good faith, harassment, or lack of necessity for the information.¹⁰⁰ Consequently, an employer would be unsuccessful,

90. "Mandatory subjects of bargaining" are items that fall within the phrase "wages, hours and other terms and conditions of employment." 29 U.S.C. § 158(d) (1976).

91. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61, 69 (3d Cir. 1965).

92. *See, e.g., Prudential Ins. Co. of America v. NLRB*, 412 F.2d 77, 84 (2d Cir.) (list of employees' names and addresses for communications purposes), *cert. denied*, 396 U.S. 928 (1969); *Boston Herald-Traveler Corp. v. NLRB*, 223 F.2d 58 (1st Cir. 1955) (names, ages and employment dates).

93. *NLRB v. F.W. Woolworth Co.*, 352 U.S. 938 (1956), *rev'g*, 235 F.2d 319 (9th Cir. 1956). If the employer does not contest the relevancy of requested information before the Board, it is foreclosed by section 10(e) of the NLRA, 29 U.S.C. § 160(e) (1982), from raising the issue before the court. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 311 & n.10 (1979).

94. *Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965) (information concerning administrative and confidential positions of employment required to be disclosed even though information related to non-unit employees).

95. *NLRB v. Whittin Mach. Works*, 217 F.2d 593 (4th Cir. 1954) (merit raises), *cert. denied*, 349 U.S. 905 (1955).

96. *NLRB v. Cone Mills Corp.*, 419 F.2d 394 (4th Cir. 1969) (statistical basis for pension plans), *cert. denied*, 397 U.S. 1040 (1970).

97. *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 151-53 (1956) (where company refused to grant a proposed wage increase due to the alleged financial situation of the company, and also refused to turn over any evidence to substantiate its claims, the employer was guilty of an unfair labor practice in failing to bargain in good faith).

98. The standard of review for relevancy issues appears to be a liberal discovery-type standard. *See NLRB v. Acme Indus. Co.*, 385 U.S. 432, 437 (1967). *See generally* Comment, *Unions' Rights to Information About Occupational Health Hazards Under the National Labor Relations Act*, 5 *INDUS. REL. L.J.* 247, 279-80 (1983); Comment, *Union's Right to Information vs. Confidentiality of Employer Trade Secrets: Accommodating the Interests Through Procedural Burdens and Restricted Disclosure*, 66 *IOWA L. REV.* 1333, 1337-42 (1981).

99. *See, e.g., Curtiss-Wright Corp. v. NLRB*, 347 F.2d 61 (3d Cir. 1965); *Prudential Ins. Co. of America v. NLRB*, 412 F.2d 77 (2d Cir.), *cert. denied*, 396 U.S. 928 (1969).

100. *Whittin Mach. Works*, 217 F.2d 593 (4th Cir. 1954) (employer should be given the opportunity to show that the request for information was made in bad faith or used as a

except in very limited circumstances, in refusing disclosure on relevancy grounds.

The second inquiry under the labor laws is whether the employer can refuse to disclose the requested information because the information is a trade secret¹⁰¹ or is otherwise confidential in that disclosure would cause a competitive disadvantage or affect significant privacy interests of employees. Regarding the competitive disadvantage issue, the burden is usually on the employer to demonstrate how disclosure would cause the claimed potential injury.¹⁰² As to the privacy issue, the employees' privacy interests (usually raised by the employer)¹⁰³ are balanced against the union's needs for the information¹⁰⁴ by weighing such factors as the sensitive nature of the requested information, the potential for harm and harassment to employees by disclosure, the availability of a less intrusive alternative, the employer's good faith in raising the privacy claim, the public labor policy favoring disclosure, and the adequacy of security provisions in guarding against the unwarranted redisclosure.¹⁰⁵

Consequently, the critical issues relating to the duty to provide relevant information under section 1113 will be whether the infor-

harassment tactic by the union and that the information sought was not relevant to the bargaining issues), *cert. denied*, 349 U.S. 905 (1955).

101. *Covey Oil Co. v. Continental Oil Co.*, 340 F.2d 998 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965); *American Cyanamid Co. (Marietta Plant)*, 129 N.L.R.B. 683, 684 (1960) (refusal to bargain charge against employer denied because employer had legitimate economic interest in nondisclosure of records containing information regarding certain unique manufacturing techniques and processes utilized in production).

102. *NLRB v. Frontier Homes Corp.*, 371 F.2d 974, 978-79 (8th Cir. 1967) (disclosure required despite confidentiality claims of employer of company's selling price lists so that the union could determine bonus computations of employees).

103. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir. 1980) (employer may be the only one with sufficient notice to assert employee privacy interests because disclosure of requested medical records would cause employees to be hesitant about supplying further medical data needed by the employer; however, employee medical records held discoverable even without the employees' consent because there was no evidence that the medical files contained any highly sensitive information, disclosure of which would be a severe invasion of employee privacy). *See generally* Comment, *The Union's Right to Information at the Expense of Employees' Privacy Rights*, 15 U. Tol. L. Rev. 755 (1984).

104. *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (company's concern with the employee privacy interests involved in the disclosure to a union of aptitude test scores accompanied by employee names was "legitimate and substantial" and outweighed union's interest in them). *Cf. United States v. Westinghouse Elec. Corp.*, 638 F.2d 570 (3d Cir. 1980).

105. In *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979), the Court ruled that, because of a lack of adequate safeguards against redisclosure by the union of aptitude test questions, the test questions were to be turned over to an intermediary instead of directly to the union. *Id.* at 316-17, 320.

mation is relevant and/or necessary and whether, if disclosed, its confidentiality can be protected. Regarding the relevancy issue, the conferees appear to endorse a liberal information disclosure policy in the context of the reorganization.¹⁰⁶ There will, however, be circumstances in which valid arguments can be made as to whether the requested information is truly relevant or necessary to the proposal evaluation process. For example, certain non-cost related information or outdated financial data may not be relevant to the proposal evaluation process.

As to the confidentiality issue, section 1113 appears to accommodate the employer's legitimate confidentiality concerns in that protective orders may be issued pursuant to section 1113(d)(3).¹⁰⁷ The conferees stated that section 1113(d)(3) granted discretion to the court to protect against any disclosure of trade secrets or other confidential information which the business perceives as a threat to its competitive standing.¹⁰⁸ However, the term "trade secret" was not defined. Furthermore, the test of what disclosures would compromise the position of the debtor or constitute a threat to competitive standing was not examined. Also, whether legitimate employees' privacy concerns are afforded the protection of a section 1113(d) protective order was not addressed.

The term "trade secret" can probably be defined as a formula, device or compilation of information which is used in a business and which would give such business an opportunity to obtain an advantage over competitors who do not know or use it.¹⁰⁹ A "threat to competitive standing" is a standard flexible enough to protect financial and otherwise commercially sensitive items such as customer lists but rigid enough to exclude any concerns about privacy

106. 130 CONG. REC. S8889 (statement of Sen. Dole), *reprinted in U.S. CODE CONG. & AD. NEWS*, *supra* note 61, at 588. *See also* 130 CONG. REC. S8891 (statement of Sen. Hatch), *reprinted in U.S. CODE CONG. & AD. NEWS*, *supra* note 61, at 594.

107. 11 U.S.C.A. § 1113(d)(3) (West Supp. 1985) provides:

The court may enter such protective orders, consistent with the needs of the authorized representative of the employee to evaluate the . . . proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

Id.

108. 130 CONG. REC. S8891 (statement of Sen. Hatch), *reprinted in U.S. CODE CONG. & AD. NEWS*, *supra* note 61, at 594.

109. A definition of the term "trade secrets" is found in the *Restatement of Torts* § 757, comment b (1939): "A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." *Id.*

issues.

As far as privacy related issues are concerned, the debtor would have to argue that, consistent with labor law concepts, it is not required to provide privacy related information under section 1113. Alternatively, if such information is required to be disclosed, the debtor might argue that the information can be protected by a section 1113(d) protective order or, at a minimum, under a protective order issued pursuant to Federal Rule of Civil Procedure 26(c).¹¹⁰ The debtor might also argue that the protective order should require that the produced information be viewed only by a limited, defined group of union personnel and consultants specializing in workouts, whom the union has employed to evaluate the proposal.

Depending on the circumstances, the section 1113 duty to disclose could require disclosure of: current balance sheets, income statements and supporting data; information such as details of expense accounts, pension and profit sharing plan contributions, long term employment or consultant contracts, or deferred compensation agreements; allegedly commercially sensitive information found in strategic plans, business plans, profit plans; and information concerning creditors and customers. The critical inquiry with each category of requested information will be a case by case analysis of whether a protective order will sufficiently protect the alleged interest in confidentiality.¹¹¹

110. The *Federal Rules of Civil Procedure* state:

Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect the party or person from annoyance, embarrassment, oppression, or undue burden or expense including one or more of the following: . . . (7) that a trade secret or other confidential research, development or commercial information not be disclosed or be disclosed only in a designated way.

FED. R. CIV. P. 26(c).

Violation of a protective order could subject the violator to a contempt of court charge. FED. R. CIV. P. 37(b)(2)(D). If the court determines a violation to be a civil contempt, the employer is allowed a compensatory recovery for losses sustained. *United States v. United Mineworkers of America*, 330 U.S. 258, 303-04 (1947). If the violator lacks funds to sufficiently compensate the employer, *e.g.*, for an unlawful disclosure of trade secrets, the court could deem the contempt as criminal, thereby allowing the court to impose a fine, or to sentence the violator to prison. It is suggested that a person with knowledge of another's confidential information or trade secret is arguably deterred from violating a protective order and disclosing it to others with the possibility of facing a prison term.

111. Another issue presented under this section is whether the employer is required to generate any information. While section 1113(b)(1) imposes no explicit requirement to generate information, a court may again look for guidance to the duty imposed under the NLRA. Under the Act, the employer is not required to furnish requested data in any specific form as long as the available data is sufficient to allow the union to clearly understand the issues and permit negotiations to proceed without undue delay. *NLRB v. International*

D. What Does "To Confer In Good Faith" Mean?

Section 1113(b)(2) requires the debtor to meet with an authorized representative of the employees to "confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."¹¹² The term "good faith" is not, however, defined in the Act.¹¹³ While the conferees emphasized that traditional concepts of labor law were not to be infused into this section,¹¹⁴ the conferees did express an intention that the provision be interpreted in the "most practical and workable manner possible."¹¹⁵ Since section 1113 deals with relationships originally created in the context of labor law, both labor law and bankruptcy law concepts of good faith may guide the bankruptcy court to a practical and workable interpretation of the section 1113 directive "to confer in good faith."

In the context of labor law, both the NLRB and the courts appear to define "good faith" by what is conspicuously absent from the parties' behavior. While an inquiry is made into the entire conduct of the parties and not just certain isolated acts,¹¹⁶ a lack of good faith has been shown where a party: has engaged in negotiations that were in "pretended good faith" with the actual intent being to frustrate the negotiations;¹¹⁷ used stall and delay tactics;¹¹⁸ was not willing to consider making concessions,¹¹⁹ even though the NLRA does not require a party to make concessions;¹²⁰

Tel. & Tel. Corp., 382 F.2d 366 (3d Cir. 1967), *cert. denied*, 389 U.S. 1039 (1968). While labor law may be useful in this regard for guidance, a bankruptcy court may review the form of the information supplied, *i.e.*, whether the debtor provided the union with summarized, intelligible information supporting its proposal in lieu of raw, often confusing data. Such review could be relevant in the course of the court's section 1113(c) "without good cause" or "balance of the equities" analysis. *See infra* notes 135-58 and accompanying text.

112. 11 U.S.C.A. § 1113(b)(2) (West Supp. 1985).

113. Note that the Supreme Court in *Bildisco* did not specifically mention a party's good faith as one of the factors to be balanced in the equities balancing process.

114. 130 CONG. REC. S8887 (statement of Sen. Thurmond), *reprinted in* U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 581.

115. *Id.*

116. *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1980); *NLRB v. American Nat'l Ins. Co.*, 343 U.S. 395 (1952).

117. *Singer Mfg. Co. v. NLRB*, 19 F.2d 131 (7th Cir.), *cert. denied*, 313 U.S. 595 (1941).

118. *A.H. Belo Corp. v. NLRB*, 411 F.2d 959 (5th Cir. 1969), *cert. denied*, 396 U.S. 1007 (1970); *NLRB v. Luisi Truck Lines*, 384 F.2d 842 (9th Cir. 1967); *NLRB v. My Store, Inc.*, 345 F.2d 494 (7th Cir.), *cert. denied*, 382 U.S. 927 (1965).

119. *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1980); *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

120. 29 U.S.C. § 158(d) (1976).

made proposals and demands that were insincere or unreasonable and had the effect of frustrating agreement or unnecessarily prolonging negotiations;¹²¹ suddenly reversed its position after a supposed agreement had been reached;¹²² insisted on unreasonable bargaining conditions¹²³ or made unilateral changes in the actual subjects being negotiated.¹²⁴ A lack of good faith has also been demonstrated where an employer communicated directly with the company employees before the union rejected the employer's final offer, thereby creating the impression that a bargaining agent was not needed;¹²⁵ or the person with the authority to bind the party is repeatedly absent from the negotiating sessions.¹²⁶

The bankruptcy courts have considered the issue of "good faith" in the context of the balancing of the equities question. The courts have found that a lack of "good faith" has been shown where a party: hired non-union employees after filing the bankruptcy petition;¹²⁷ violated the agreement to benefit the owner's family;¹²⁸ failed to remit union dues it deducted from the wages of employees;¹²⁹ employer and principals indicated desire to be rid of the union, by threatening words and by starting a competing, non-union company to which was transferred some of debtor's funds and equipment;¹³⁰ and used bankruptcy laws to escape from an inconvenient collective-bargaining agreement.¹³¹ Bad faith was not shown, however, where the debtor: asked for concessions;¹³² sought to reject the collective-bargaining agreement unilaterally;¹³³ filed petition in liquidation where the company executives were foregoing compensation;¹³⁴ or had not made its contributions to the pen-

211. NLRB v. Fant Milling Co., 360 U.S. 301 (1959); NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958); NLRB v. Truitt Mfg. Co., 351 U.S. 149 (1956); NLRB v. American Nat'l Ins. Co., 343 U.S. 395 (1952).

212. NLRB v. Texas Coca-Cola Bottling Co., 365 F.2d 321 (5th Cir. 1966).

213. NLRB v. George P. Pilling & Sons Co., 119 F.2d 32, 37 (3d Cir. 1941).

214. NLRB v. Katz, 369 U.S. 736, 737-38 (1962).

215. NLRB v. Movie Star, Inc., 361 F.2d 346, 351 (5th Cir. 1966); NLRB v. Highland Shoe, 119 F.2d 218, 222-23 (1st Cir. 1941).

216. NLRB v. Coletti Color Prints, Inc., 387 F.2d 298 (2d Cir. 1967).

217. *In re Pesce Baking Co.*, 43 Bankr. 949, 959 (N.D. Ohio 1984).

218. *Id.* at 960.

219. *Id.*

2130. *In re C. & W. Mining Co.*, 38 Bankr. 496, 503 (N.D. Ohio 1984).

2131. *In re Mamie Conti Gowns, Inc.*, 12 F. Supp. 478, 479-80 (S.D.N.Y. 1935).

2132. *In re Brada Miller Freight System, Inc.*, 702 F.2d 890 (11th Cir. 1983); *In re Pesce Baking Co.*, 43 Bankr. 949 (N.D. Ohio 1984).

2133. *Bildisco*, 104 S. Ct. at 1197.

2134. *In re Ryan Co.*, 83 Lab. Cas. (CCH) 17,948, 17,953, 16 Collier Bankr. Cas. 2d (MB) 101, 105 (D. Conn. 1978).

sion and health and welfare plans.

The issue of whether the debtor has conferred in good faith under section 1113 is not an issue which the bankruptcy court is required by section 1113 to address in its determination of whether to approve rejection of the agreement.¹³⁵ The issue will arise implicitly, however, when the bankruptcy court, pursuant to section 1113(c), determines: whether evidence exists that the union rejected the proposal without good cause, *i.e.*, did the debtor act in "bad faith" so that the union's rejection was with cause?; and, whether a balancing of the equities, one of which could be the debtor's "good faith," clearly favors rejection.

Since the purpose of section 1113 is to foster an environment wherein all the affected parties can work equitably towards a successful reorganization, such purpose would be frustrated if the debtor engaged in any of the above-enumerated activities deemed by the courts to be in "bad faith." Thus, labor law and pre-section 1113 bankruptcy law concepts of "good faith" will be useful guides for the bankruptcy court in making its section 1113(c) determinations.¹³⁶

E. *What Does "Without Good Cause" Mean?*

Section 1113(c) requires the bankruptcy court, in determining whether to approve rejection of the collective-bargaining agreement, to find that the employees' representative has refused the debtor's proposal "without good cause."¹³⁷ Neither the Act nor the conferees defined what constitutes "without good cause." The conferees did explain that the purpose of this provision was to protect the debtor from a union's rejection without good cause.¹³⁸ Also, since neither labor law nor bankruptcy law, prior to section 1113, specifically defines the phrase "without good cause," there is no judicial guide for the bankruptcy court to use in its interpretation of the phrase.

In light of the purpose of section 1113, it appears that the phrase can be interpreted to require the union to both confer in "good faith" and, at a minimum, to compromise on proposals which meet the section 1113(b)(1) test and, thus, are necessary to the debtor's

135. The section 1113(b)(2) duty "to confer in good faith" does not apply, by the terms of section 1113, to the employees' representative.

136. See generally Note, *Good Faith in Chapter Eleven Reorganizations*, 35 S.C.L. REV. 333-47 (1984).

137. 11 U.S.C.A. § 1113(c)(2) (West Supp. 1985).

138. 130 CONG. REC. S8998 (statement of Sen. Packwood).

reorganization. This interpretation would impose on the union those duties imposed on the debtor in section 1113(b). Ultimately, to the extent that the evidence supports a finding that the proposal fails to meet the section 1113(b)(1) requirements or that the debtor conferred in "bad faith," the union's rejection may, indeed, be with cause. The section 1113(c)(2) requirement that the court find that the union rejected the compromise without good cause will probably probe whether the union negotiated in good faith toward a successful reorganization of the business.¹³⁹

F. *When Does the Balance of the Equities Clearly Favor Rejection of Collective-Bargaining Agreements?*

Before a court addresses the section 1113 balancing of the equities test, it must first have determined that the debtor's proposal meets the section 1113(b)(1) requirements and that the union rejected such proposal without good cause. Thus, the issue of whether the collective-bargaining agreement, if rejected, would permit reorganization will have already been addressed and answered in the affirmative.¹⁴⁰ The rather narrow issue becomes whether the balance of the equities *clearly* favors rejection.

The balance the equities statutory standard, the conferees stated, is to be interpreted in light of the standard enunciated by the Supreme Court in *Bildisco*.¹⁴¹ Also, the conferees explained that, although the equities will almost always balance in favor of one resolution or another, use of the word *clearly* was intended to assure that rejection is not warranted where the equities balance exactly equally on each side.¹⁴² Other than to say that the *Bildisco* standard applied, the conferees gave little guidance as to what factors are to be included or excluded in the balancing process, and the weight to be assigned to each.

The standard announced by the Supreme Court in *Bildisco* is a modified *Kevin Steel* standard, where the interests of the affected parties—debtor, creditors, and employees—are to be balanced.¹⁴³

139. Query whether the debtor's failure to confer in good faith and the union's rejection without good cause could be the subject of an unfair labor practice charge by the NLRB.

140. 11 U.S.C.A. § 1113(c) (West Supp. 1985).

141. 130 CONG. REC. S8891 (statement of Sen Hatch), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 594. See also 130 CONG. REC. S8889 (statement of Sen. Dole), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 588.

142. 130 CONG. REC. S8891 (statement of Sen. Hatch), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 594.

143. *Shopmen's Local 455 v. Kevin Steel Products, Inc.*, 519 F.2d 698 (2d Cir. 1975).

In *Kevin Steel*, the Supreme Court outlined factors to be considered in the balancing process: assuming affirmance, the likelihood and consequences of liquidation of the debtor and the reduced value of claims and other hardships of creditors; and assuming rejection, the impact of rejection on the employees.¹⁴⁴ The Supreme Court in *Bildisco* also instructed the court to consider the degree of hardship faced by each party relevant to the success of the reorganization as well as the qualitative differences of hardships among such parties.¹⁴⁵

Bankruptcy courts, pre- and post-*Bildisco*, have considered the following factors in determining whether rejection of the collective-bargaining agreement would benefit or burden a party and whether the equities balance in favor of rejection: the possibility of liquidation versus a successful reorganization, with and without the rejection; the relative impact of liquidation on each creditor, employee, and shareholder group involved;¹⁴⁶ the possibility of a strike by the union against the debtor after rejection and the impact of such strike on the reorganization;¹⁴⁷ the inadequacy of relief for the employees and other claimants since many benefits under such agreements are non-monetary, such as seniority or work breaks, and generally incapable of providing a basis for a damage award;¹⁴⁸ wage and benefit levels compared to those of workers at similar companies or viewed in context of impact on the debtor's financial situation;¹⁴⁹ the parties' good faith;¹⁵⁰ whether the debtor lays off

144. *Id.*

145. *Bildisco*, 104 S. Ct. at 1197.

146. *In re Brada Miller Freight System, Inc.*, 702 F.2d 890 (11th Cir. 1983) (rejection permitted where contract obligations accounted for 50-90% of debtor's daily gross revenues and if the contract was not rejected, debtor would be unable to reach break even point); *In re Connecticut Celery Co.*, 106 L.R.R.M. (BNA) 2847 (D. Conn. 1980) (debtor's obligation to pay 3% of yearly operating expenses toward union contract not sufficiently burdensome); *In re Pesce Baking Co.*, 43 Bankr. 949 (N.D. Ohio 1984); *In re C. & W. Mining Co.*, 38 Bankr. 496 (N.D. Ohio 1984); *In re American Provision Co.*, 44 Bankr. 907 (D. Minn. 1984).

147. *In re Alan Wood Steel Co.*, 449 F. Supp. 165, 167 (E.D. Pa. 1978), *appeal dismissed*, 595 F.2d 1211 (3d Cir. 1979) (debtor had ceased operations and could satisfy union demands only from existing assets which were to be employed in an arrangement with unsecured creditors so that it was clear that reorganization would be impossible without rejection of union contracts).

148. *In re Allied Supermarkets, Inc.*, 6 BANKR. L. REP. (CCH) 968 (E.D. Mich. 1980).

149. *In re Briggs Transp. Co.*, 39 Bankr. 343, 11 BANKR. CT. DEC. (CRR) 1066 (D. Minn. 1984) (debtor's wage costs amounted to 70% of gross revenue but the industry standard was between 56% and 60%); *Bohack Corp. v. Truck Drivers Local 807 (Bohack II)*, 431 F. Supp. 646 (E.D.N.Y.) (rejection permitted where debtor had lost \$10 million and could not successfully reorganize while paying \$1 million annually to unionized drivers for whom there was no work), *aff'd per curiam*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978).

employees contrary to the terms of the collective-bargaining agreement as part of the process of shutting down part of its plant or of its total operations;¹⁵¹ whether pension and health care plans impose burdens on the debtor;¹⁵² whether the payments of benefits would prejudice the position of the unsecured creditors;¹⁵³ whether the contract is due to expire shortly;¹⁵⁴ the terms of the repayment plan entered into by the debtor;¹⁵⁵ and the cost-spreading abilities of the parties.¹⁵⁶

The cases in which such factors have been discussed have all dealt with whether the agreement should be rejected; however, the reported cases have not adequately addressed how claims for rejection-related damages are estimated.¹⁵⁷ There will, therefore, un-

150. See *supra* discussion in notes 127-34 and accompanying text.

151. *Bohack II*, 431 F. Supp. 646. Courts appear hesitant to force a debtor to continue paying employees for whom it has no work, although this situation cannot be treated summarily. See *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (the court applied the the *REA Express* standard in ruling that the debtor remained liable under the collective-bargaining agreement for substantial medical, insurance and vacation benefits as well as severance pay, even though the company had shut down operations permanently during reorganization).

152. *In re Rath Packing Co.*, 36 Bankr. 979, 11 BANKR. CT. DEC. (CRR) 498 (N.D. Iowa 1984) (if collective-bargaining agreement were rejected, employees could obtain better health insurance and debtor would significantly reduce its health care costs). Cf. *In re Pesce Baking Co.*, 43 Bankr. 949 (N.D. Ohio 1984).

153. *Id. In re Allied Technology*, 8 Bankr. 366 (S.D. Ohio 1980) (diversion of non-operating debtor's limited funds to satisfy labor agreement would work hardship on unsecured creditors and cause reorganization plan to fail).

154. *In re Pesce Baking Co.*, 43 Bankr. 949. In the context of the section 1113(b)(1) analysis of what is "necessary to permit reorganization," the time remaining on the contract would probably have to be viewed in the context of the ratio of union contract costs to the debtor's operating expenses to determine whether the savings would be minimal. See also *In re American Provision Co.*, 44 Bankr. 907 (D. Minn. 1984).

155. *In re Connecticut Celery*, 106 L.R.R.M. (BNA) 2847 (D. Conn. 1980) (where debtor substituted a repayment plan providing for contract rejection with one which failed to mention contract rejection and which provided for smaller reimbursements to creditors, such substitution was deemed a concession by the debtor such that it could maintain its labor contract without being forced into Chapter 7 bankruptcy).

156. *In re Pesce Baking Co.*, 43 Bankr. 949.

157. Damages would be difficult to measure, if measurable at all, for such non-economic items not discussed in the text such as union recognition, dues check-off provisions, pension rights, welfare rights, seniority rights, disciplinary procedures, rest breaks, meal periods, time off for jury duty and uniforms.

Damages will most likely also be difficult to measure for certain economic related matters arising under the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), Pub. L. No. 96-364, 94 Stat. 1208, amending the Employee Retirement Insurance Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1982): Under the MPPAA, when the debtor is part of an under-funded multi-employer plan, such as the Teamsters' Central States Pension Fund, the calculation of termination or partial withdrawal liabilities may be a claim in bankruptcy which must be estimated. See *In re Amalgamated Foods, Inc.*, 41 Bankr. 616 (C.D. Cal. 1984) (debtor seeking to withdraw from pension trust fund can bypass ERISA statutory

doubtedly be controversy as to how to estimate such claims, particularly claims for non-economic damages caused, for example, by loss of transfer rights, scope of work rights and grievance and arbitration procedures.¹⁵⁸

A number of the above factors, particularly the direct cost-related ones, may be considered by the bankruptcy court earlier in the two-step process contemplated by section 1113 in the context of whether the modifications are "necessary to permit the reorganization." The inquiry would be as to what the potential savings are in costs to the debtor if the agreement is modified and whether such potential savings would permit reorganization given the debtor's financial picture and other circumstances. The less direct-cost related items, such as the union's more intangible, non-compensable benefits and the parties' good faith, will probably be considered under the rubric of the balance the equities standard. In the final analysis, as long as the bankruptcy court follows the relevant directions of the *Bildisco* court, it has wide discretion under the balance the equities test to consider relevant items that do not fall neatly within the other section 1113 tests.

G. *Under What Conditions May a Debtor Petition For Interim Changes?*

Section 1113(e) provides that interim changes may be implemented in the "terms, conditions, wages, benefits, or work rules" (terms and conditions) provided by a collective-bargaining agreement, if such changes are "essential to the continuation of the debtor's business" or in order "to avoid irreparable damage to the estate."¹⁵⁹ Such changes are to be authorized by the court after

arbitration process in favor of the ordinary claims process in bankruptcy); *In re Computerized Steel Fabricators, Inc.*, 40 Bankr. 344 (S.D.N.Y. 1984) (post-confirmation effort to collect from debtor an alleged MPPAA withdrawal liability appropriate since collective agreement not rejected by debtor before order of confirmation).

158. For commentaries on the applicable tests for rejection of collective-bargaining agreements, see generally Note, *Rejection of Collective Bargaining Agreements*, 15 LOY. U. CHI. L.J. 761 (1984); Bordewieck and Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); Note, *Kevin Steel and REA Express Revisited: When is a Collective Bargaining Agreement Burdensome?*, 56 TEMP. L.Q. 252 (1983); Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981).

159. 11 U.S.C.A. § 1113(e) (West Supp. 1985) provides:

If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules

notice and a hearing scheduled in accordance with the needs of the debtor.¹⁶⁰

The conferees cautioned that the interim changes are to be authorized only with respect to terms and conditions, and only to those terms and conditions about which the debtor has made a proposed modification in its section 1113(b) proposal.¹⁶¹ Further, the conferees emphasized the temporary nature of such changes by stressing that such changes would be effective only until the court rules on the application to reject.¹⁶² If the interim changes are authorized and the application to reject the agreement is not approved, any wages or benefits withheld unilaterally are to be treated as costs of administration.¹⁶³ Finally, the conferees stated that the court is to use the *REA Express* test¹⁶⁴ as the applicable standard for interim relief.¹⁶⁵

In *REA Express*, the Second Circuit ruled that before a debtor could reject a collective-bargaining agreement, it must demonstrate that without such rejection the business would collapse.¹⁶⁶ The focus of most of the courts that employed this test was whether the costs of the labor contract were so burdensome as to probably cause the debtor's liquidation.¹⁶⁷ The Supreme Court in *Bildisco*

provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

Id.

160. *Id.* Section 1113(e) refers to the term "trustee." Section 1113(b)(1) defines "trustee" to include a debtor in possession. Also, what type of hearing is required under this section was not addressed by the conferees. The rule of construction in section 102(1) of the Code provides that a prior hearing is not required if notice is properly given and if an actual hearing is not timely requested by a party in interest or if insufficient time exists to have one under the circumstances of the case. Thus, while a hearing on the debtor's request is required by section 1113(e), it is arguable that the bankruptcy court can order such interim changes *ex parte* until the hearing is held.

161. 130 CONG. REC. H7496 (statement of Rep. Morrison).

162. The National Bankruptcy Conference urged that section 1113 contain an "escape valve" to deal with emergency situations requiring immediate relief until the court rules on the application. Congress responded by adding section 1113(e).

163. 130 CONG. REC. S8898 (statement of Sen. Packwood).

164. *REA Express*, 523 F.2d 164. See *supra* text accompanying note 44.

165. 130 CONG. REC. S8898 (statement of Sen. Packwood); *id.* at H7496 (statement of Rep. Morrison). Neither the statute nor the conferees clarify what evidence the debtor must present to meet the section 1113(e) standard, particularly in the context of the temporary nature of the relief. Also, there is no clear statement that the court is authorized to condition the interim order, to ensure that the parties continue good faith negotiations, by requiring, for example, the posting of a bond or the setting of an expiration date for the order.

166. See the discussion of the case *supra* text accompanying note 44.

167. See, e.g., *In re Brada Miller*, 702 F.2d 890 (11th Cir. 1983); *Bohack Corp. v. Truck Drivers Local 807 (Bohack II)*, 431 F. Supp. 646 (E.D.N.Y. 1977). Cf. *In re Connecti-*

specifically rejected the *REA Express* test, reasoning that it conflicted with the Chapter 11 policies of flexibility and equity in that it focused on a single issue, *i.e.*, whether rejection was necessary to prevent the debtor from liquidating.¹⁶⁸

The *REA Express* "business collapse" test may not, however, conflict with the purpose of section 1113(e). Since interim changes must be "essential to the continuation to the debtor's business" or in order "to avoid irreparable damage to the estate," the court's focus will be primarily on the debtor and not on other affected parties. Thus, the central issue will be whether the debtor will liquidate absent the authorization of the interim changes. The interests of other affected parties may, however, be considered by the court in the context of what might happen to them in the event the interim changes are authorized and the application to reject the collective-bargaining agreement is subsequently not granted.¹⁶⁹

The court should require the debtor to meet a stiff burden of proof using sound and reliable financial information and projections.¹⁷⁰ Ultimately, bona fide use of section 1113(e) will probably occur when the debtor is near collapse and unable to negotiate proposed modifications quickly or to wait for the court to approve its application to reject the collective-bargaining agreement.

H. *What Issues are Presented by the Timetables?*

Subsections (d)(1) and (2) of section 1113 deal with the precise timetables and the exceptions thereto, regarding the procedures utilized in the rejection of a collective-bargaining agreement. Once the debtor applies for rejection of the agreement, the court must schedule a hearing within fourteen days after the date of the filing of the application.¹⁷¹ The court may extend the time for the com-

cut Celery Co., 106 L.R.R.M. (BNA) 2847 (D. Conn. 1980).

168. See the discussion *supra* text accompanying notes 43-44.

169. See, e.g., *In re Wright Air Lines, Inc.*, 44 Bankr. 744 (N.D. Ohio 1984) (section 1113 interim relief denied where: debtor presented incomplete financial information, unreliable financial projections, failed to estimate savings necessary to survive, debtor failed to address the issue of what would occur in the event rejection of the collective-bargaining agreement was not granted, debtor failed to show that the cost savings associated with the program to be eliminated through interim relief was substantial, *i.e.*, more than 10% of debtor's monthly losses; court held debtor did not establish that the relief sought was essential to the continuation of the debtor either financially or administratively or that the failure to obtain relief would result in irreparable damage).

170. *Id.*

171. The Code provides:

Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application.

mencement of a hearing up to seven days, or for additional periods to which the debtor and the employees' representative agree, "where the circumstances of the case and the interests of justice require such extension."¹⁷² In addition, subsection (d)(1) requires the debtor, or the clerk of courts, to give at least ten days notice to all interested parties of the rejection hearing.¹⁷³

Subsection (d)(2) requires the court to rule upon this rejection application within thirty days after the commencement of the hearing.¹⁷⁴ The court may, however, "in the interest of justice" and where "the trustee and the employees' representative . . . agree" extend the time for a ruling.¹⁷⁵ If the court fails to rule on the application within thirty days of the commencement of the court hearing or of the agreed upon time extensions, the debtor may unilaterally terminate or alter any provisions of the collective-bargaining agreement pending the court's ruling.¹⁷⁶

Since neither the House nor the Senate conferees give guidance or direction to these various timetable provisions, some intriguing issues are presented. For example, although 1113(d)(2) allows a court-approved time extension for the hearing where "the trustee and the employees' representative . . . agree," what happens if the

All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

11 U.S.C.A. § 1113(d) (West Supp. 1985).

172. *Id.*

173. The phrase "all interested parties" has a broader meaning than that of "all affected parties." The latter term is discussed *supra* in the text accompanying notes 77-83. "All interested parties" would encompass parties who have no financial or contractual ties to the debtor, but who are quite interested in the outcome. For example, "all interested parties" may include the various creditor committees appointed by the court and their counsel, the National Labor Relations Board, the national committees of the relevant unions, and the trustees of the affected health and welfare funds.

174. The Code provides:

The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

11 U.S.C.A. § 1113(d)(2) (West Supp. 1985).

175. *Id.*

176. *Id.*

parties refuse to agree? From a practical standpoint, the possibility that the parties will agree is small since, at this point, it is not likely that the debtor and the employees' representative are on speaking terms.

A related issue is presented where the court fails to render a decision within the thirty day prescribed time period and the debtor and employee representative have not agreed to a time extension. An additional issue arises where the court fails to rule within the time prescribed, the debtor alters or modifies the existing collective-bargaining agreement and the court thereafter disallows the rejection. Is the debtor obligated to pay the costs related to the alteration or modification it may have implemented during this period? If the answer is in the affirmative, what priority would be given to these costs,¹⁷⁷ and how would non-economic alterations or modifications be estimated?¹⁷⁸ These issues remain to be resolved by future cases.

IV. RELATED ISSUES

Three related issues will be addressed in this section. The first two issues deal with whether either party can avoid having the section 1113 rejection issue heard by the bankruptcy court or even heard at all; the third issue deals with both parties' legal duties under the NLRA after the collective-bargaining agreement has been rejected in accordance with section 1113.

A. *Is the Bankruptcy Court Constitutionally Permitted to Make Binding Determinations Under Section 1113?*

There may be circumstances where a party, such as a union, desires that a matter be heard by a district court, instead of bringing it before what is perceived to be an unsympathetic bankruptcy court. Such a party may argue that, under the Supreme Court's ruling in *Northern Pipeline Co. v. Marathon Pipe Line Co.*,¹⁷⁹ the

177. Representatives Hughes and Morrison indicated that if an application for rejection is denied by the court after a hearing on the merits, the employees should then be entitled to any lost wages and benefits as an administrative expense. See 130 CONG. REC. H7496 (statement of Rep. Morrison).

178. See *supra* note 157 and accompanying text.

179. 458 U.S. 50 (1982). In *Marathon*, Northern Pipeline filed a petition for reorganization and subsequently, pursuant to the BRA of 1978, filed suit against Marathon in that bankruptcy court seeking damages for alleged breach of contract, breach of warranty, misrepresentation, coercion and duress. Marathon filed a motion to dismiss the suit, which motion the bankruptcy judge denied. On appeal, however, the United States District Court for the District of Minnesota reversed and granted the motion. On direct appeal, the United

bankruptcy court is not constitutionally permitted to make binding determinations concerning proposed rejections of collective-bargaining agreements in cases arising under Title 11.

In *Marathon*, the Supreme Court held that the bankruptcy court's exercise of jurisdiction pursuant to the jurisdictional grant under section 1471 of the BRA of 1978¹⁸⁰ violated article III of the Constitution when such jurisdiction was exercised over claims and causes of action arising under state law.¹⁸¹ The majority of the Court reasoned that section 1471 granted "essential attributes" of federal judicial powers to non-article III bankruptcy court judges who lacked the article III protections of life tenure and protection against salary diminution.¹⁸² The majority also added that bankruptcy court judges could not adjudicate state-based claims either alone as legislative courts¹⁸³ or as "adjuncts"¹⁸⁴ to the required article III courts, *i.e.* those that perform statutorily defined fact finding functions concerning a particularized area of the law.¹⁸⁵

States Supreme Court affirmed in a six-three decision.

180. 28 U.S.C. § 1471(a) (1982).

181. The two concurring Justices emphasized that the Court's holding should be restricted to the bankruptcy court's power to adjudicate claims or causes of action arising under or based on state law, there being no need to decide the constitutionality of the jurisdictional grant of other article III judicial powers. 458 U.S. 50, 89-92 (1982).

182. *Id.* at 59-63.

183. The plurality stated that since bankruptcy courts did not fall within the historically recognized exceptions to article III, *e.g.*, "territorial courts," court-martial courts or courts created by Congress to adjudicate cases involving "public rights," Congress was barred by article III from establishing legislative courts empowered to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. *Id.* at 63-76.

184. *Id.* at 76-87. The Court listed five reasons underlying its determination that the bankruptcy court was exercising powers far greater than those lodged in the adjuncts previously approved by the Supreme Court: (1) the bankruptcy court's subject matter jurisdiction was not limited to specialized, narrowly confined factual determinations about a particularized area of law but reached beyond traditional matters of bankruptcy to include civil proceedings arising in or related to cases under Title 11; (2) its jurisdiction was not limited to "statutorily channeled facting functions" but included the jurisdiction conferred by the BRA of 1978 upon the district courts; (3) its power to issue orders was not limited to certain types of orders issued pursuant to specialized procedures and enforceable only by order of the district court; rather, its power included all the ordinary powers of the district courts; (4) the scope of review applicable to its orders was not whether such orders were "supported by the evidence" but whether its orders met the more differential "clearly erroneous" standard; and (5) its judgments were not required by law to be enforced by the district court; rather, they were final and binding. *Id.*

185. Justice White, in his dissenting opinion (joined by Chief Justice Burger and Justice Powell), argued that if section 1471 was unconstitutional, it should not have been held unconstitutional on its face but only as applied to the claim against *Marathon* because "only a tiny fraction" of the cases a bankruptcy judge handles deal with state-law claims, the rest being adjudications and discharges in bankruptcy which are matters of federal law. *Id.* at 94-96.

The Bankruptcy Amendments and Federal Judgeship Act of 1984, although not section 1113, was a congressional response to the Supreme Court's ruling in *Marathon*.¹⁸⁶ It is submitted that in the context of section 1113, the constitutionality test of *Marathon* is not relevant because *Marathon* dealt with the power of the bankruptcy judge to adjudicate claims or causes of action arising under or based on state law. Since rejection of an executory collective-bargaining agreement is a matter arising under federal law, specifically 11 U.S.C. § 1113, it is not based on a cause of action arising under state law.¹⁸⁷

Since the *Marathon* decision is applicable to the Act, if the Act is found unconstitutional, it should be held unconstitutional as applied, rather than on its face. The Act deals with a variety of subjects, *e.g.*, rejection of nonresidential leases, of time-sharing agreements and of collective-bargaining agreements, and exempting

186. 130 CONG. REC. H7489 (statement of Rep. Rodino), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 576; 130 CONG. REC. H7492 (statement of Rep. Kastenmeier), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 579; 130 CONG. REC. S8887 (statement of Sen. Thurmond), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 584; 130 CONG. REC. S8889 (statement of Sen. Dole), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 587; 130 CONG. REC. S8891 (statement of Sen. Hatch), reprinted in U.S. CODE CONG. & AD. NEWS, *supra* note 61, at 590, 606.

Under the Act, the district court has original and exclusive jurisdiction over all cases under Title 11 and original but not exclusive jurisdiction over all civil proceedings arising under Title 11 or arising under or relating to a case under Title 11. (Section 101 of the Act, amending 28 U.S.C. § 1334). If the district court provides that such cases are to be referred to the bankruptcy judges for the district, 28 U.S.C. § 157(a) (1982), the bankruptcy judges, in dealing with such references, may hear and determine "all cases under Title 11 and all core proceedings arising under Title 11, or arising in a case under Title 11" and may enter appropriate orders and judgments. *See* 28 U.S.C. § 157(b)(1). The bankruptcy court judge must determine, on the judge's own motion or on timely motion of a party, whether a proceeding is a core proceeding, as defined in 28 U.S.C. § 157(b)(2), or one otherwise related to a case under Title 11. *See* 28 U.S.C. § 157(b)(3).

The district court retains the following powers concerning referral: it may withdraw a reference on its own motion or on timely motion by any party for "good cause shown," 28 U.S.C. § 157(d); it must withdraw a reference, on timely motion of a party, if resolution of the referred proceeding requires consideration of "both Title 11 and other laws of the United States," *id.*; it must enter a final order or judgment, in certain non-core proceedings related to a case under Title 11, after considering the bankruptcy judge's proposed findings and conclusions and after reviewing *de novo* those matters to which any party has timely and specifically objected, 28 U.S.C. § 157(c); and it must hear appeals from final judgments, orders and decrees of the bankruptcy court judges, *id.* § 158(a) through (d).

187. Since a bankruptcy judge's determinations concerning section 1113 occur in cases brought under Title 11, such determinations are within section 157(b)(1)'s language "all cases under Title 11." Such determinations do not fall under the section 157(b)(1) language "core proceedings," since proposed rejections of labor contracts are not specifically enumerated as one of those core proceedings. *See generally* the discussion in the immediately preceding note. *See also infra* note 194.

from discharge under Chapter 7 debts arising from a judgment or consent decree entered in a court of record in which liability was incurred as a result of the debtor having been a drunk driver.¹⁸⁸ It is not solely devoted to the creation and jurisdiction of bankruptcy courts.

If the "as applied" test is used and the *Marathon* decision is relevant to the bankruptcy court's determinations under section 1113, then it is suggested that the bankruptcy court is an adjunct to the district court for purposes of section 1113 determinations.

It is arguable that the bankruptcy court exercises power under section 1113 greater than those exercised by adjuncts previously approved by the Supreme Court.¹⁸⁹ For example, a bankruptcy court's powers are not limited to statutorily channeled fact-finding functions, but include the power to make final and enforceable orders and decrees regarding section 1113 applications to reject.¹⁹⁰

On the other hand, the bankruptcy court's subject matter jurisdiction is limited to a traditional matter of federal bankruptcy law, *i.e.*, rejection of executory contracts. Also, the bankruptcy court's jurisdiction is much more restricted than that conferred by the Act on the district courts, in that the district court has the power to withdraw the referred matter, to review *de novo* certain proceedings and to hear all appeals.¹⁹¹

The constitutionality issue would probably be presented in the context of a party arguing that the district court must withdraw the case from the bankruptcy court because the resolution of the bankruptcy proceeding requires consideration of both title 11 and another law of the United States, *i.e.*, article III of the United States Constitution.¹⁹² In any event, until the Supreme Court finally resolves this issue, the district court may be required much more frequently to "determine" section 1113 issues. The Supreme Court's decision in *Marathon* should not be applicable to section 1113. If it is held to be so, whether the statute will withstand constitutional muster will ultimately be a matter for judicial resolution.¹⁹³

188. 11 U.S.C.A. §§ 365(c)(3), (d)(3), (4); 365(h), (i); 523(a)(9).

189. *See supra* note 184.

190. *Id.*

191. *Id.*

192. *See supra* note 186.

193. Two constitutional issues beyond the scope of this article focus on whether the bankruptcy court's exercise of jurisdiction over "core" and "non-core" proceedings is unconstitutional in that the bankruptcy court is empowered to determine state-law based claims required by *Marathon* to be determined by article III courts. For example, "core" proceed-

B. *Can The Debtor Avoid Section 1113?*

Section 1113 is not applicable, by its terms, to a liquidation proceeding under Chapter 7.¹⁹⁴ Under Chapter 7, the trustee must decide whether to assume or reject the executory contract within sixty days after the order for relief.¹⁹⁵ A question which the conferees did not address is whether the debtor can avoid section 1113 by voluntarily filing under Chapter 7 and having a trustee appointed who would reject (or not accept) the collective-bargaining agreement within sixty days, and then convert the proceeding to one under Chapter 11.¹⁹⁶ While this hypothetical situation presupposes a "friendly," cooperative trustee who would willingly do the above, it may enable the debtor to unilaterally reject its collective-bargaining agreement without risking bankruptcy court disapproval of its petition to reject and/or an NLRB unfair labor practice charge.

A debtor contemplating the above action should be advised that the potential costs may outweigh the perceived benefits. In this situation, the union might perceive the debtor's actions to be designed to strip the union of its section 1113 protections, and, predictably, would exercise every economic and political muscle it had against such a debtor-employer. Also, since the Supreme Court in *Bildisco* made clear that, after rejection, the parties had to comply with the NLRA provisions to bargain in good faith until impasse, the debtor will have to deal with a now hostile, and perhaps militant, union in a negotiation context. Thus, what appears to be

ings include, among other things, proceedings to recover fraudulent transfers, even though such proceedings could be brought under state law in the absence of a bankruptcy case. 28 U.S.C. § 157(b)(2)(H). "Core" proceedings also include the bankrupt estate's counterclaims against persons having filed claims, even though such counterclaims are based on causes of action under state law. *Id.* § 157(b)(2)(C). "Non-core" proceedings, such as state law based in personam claims, can be asserted by a trustee or a debtor against third parties.

The Act sets forth no standard by which the district court reviews, on appeal, the bankruptcy court's actions in either "core" or "non-core" proceedings, except for a *de novo* review in a "non-core" context when a party timely and specifically objects. *See supra* note 186. Also, since there is no requirement that the district court conduct further hearings, the district court's standard of review appears to be the "clearly erroneous" standard in both core and non-core proceedings. *See* Bankruptcy Rule 5013. The bankruptcy court can issue final orders and the district court's scope of review of the bankruptcy court's action, except in a specific instance, is not a *de novo* review, so that definite attributes of judicial power appear to be vested in the bankruptcy court with respect to its determinations on core as well as non-core proceedings which may be violative of the *Marathon* rule. *See generally* Miller & Bienenstock, *Bankruptcy Restructuring Promises Few Reforms*, *LEGAL TIMES*, July 30, 1984, at 30.

194. 11 U.S.C.A. §§ 701-766 (West 1979 & Supp. 1985).

195. *Id.* § 365(d), as amended by the Act.

196. *Id.* § 706.

a miracle drug may have disastrous side effects.

C. *Following Section 1113 Rejection, What are the Employer's and the Union's Legal Duties?*

After the collective-bargaining agreement has been rejected in accordance with section 1113, what are the employer's and union's rights and obligations under applicable labor laws? While the conferees did not address this issue, the Supreme Court made clear in *Bildisco* that, although a rejection of a collective-bargaining agreement was not a unilateral mid-term modification or termination so as to constitute an unfair labor practice,¹⁹⁷ the requirements of the NLRA were preserved in all other respects.¹⁹⁸

In a non-Chapter 11 situation, sections 8(a)(5) and 8(d) of the NLRA¹⁹⁹ prohibit an employer²⁰⁰ from making any mid-term modifications²⁰¹ of the express terms of the collective-bargaining agreement prior to its expiration without the union's consent. Under both sections, an employer must ordinarily bargain in good faith to "impasse" with the union before implementing changes in terms and conditions of employment which were not expressly covered by the written terms of the collective-bargaining agreement or consciously discussed during negotiation of such agreement.²⁰² The duty to bargain until "impasse" has been defined as the duty to bargain on mandatory subjects of negotiation²⁰³ in "exhaustive good faith negotiations" until the parties have reached "irreconcil-

197. *Supra* notes 55-58 and accompanying text.

198. *Id.*

199. 29 U.S.C. § 158(d) (reproduced in its entirety, *supra* note 37), which provides, in part, that mid-term modifications are prohibited unless the party complies with the notice and "cooling off" provisions of section 158(d)(1)-(4).

200. The term "employer" is defined broadly in 29 U.S.C. § 152(2) as "any person acting as an agent of an employer, directly or indirectly," with the exception of governmental entities and "any person subject to the Railway Labor Act." See 45 U.S.C. §§ 151-164 (1982).

201. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1969); *NLRB v. Insurance Agents Int'l Union*, 361 U.S. 477 (1960). *Cf. Milwaukee Spring, Div. Of Illinois Coil Spring Co.*, 268 NLRB No. 87 (1984) (NLRB held that because a collective-bargaining agreement did not expressly prohibit the transfer of bargaining unit work, the employer was not required to obtain union's consent before transferring it).

202. 29 U.S.C. § 158(a)(5) (reproduced in its entirety, *supra* note 37). One should be aware that industry practice is such that the duty to bargain to impasse on such subjects is frequently precluded by a "zipper" or "wrap-up" clause. Under such a clause, both parties waive the right to raise those subjects not expressly covered by the written terms of the agreement or explicitly discussed during the negotiations.

203. For a definition of mandatory subjects, see *supra* note 90. *Cf. NLRB v. Wooster Div. of Borg-Warner Corp.*, 356 U.S. 342 (1958).

able differences."²⁰⁴ The employer cannot unilaterally impose requirements concerning terms and conditions of employment until after such bargaining. If the employer does so, his actions may constitute an unfair labor practice.²⁰⁵ Finally, the employer retains the exclusive authority to make fundamental business decisions, such as partial or total termination of operations, and has no duty under either section 8(a)(5) or 8(d) to bargain about them, unless such decisions were expressly covered by the collective-bargaining agreement.²⁰⁶

The incentives to comply with the NLRA are both legal and practical. From a legal standpoint, both the employer and union are required to comply with the NLRA under the *Bildisco* decision and, indeed, by the NLRA. Thus, even if the collective-bargaining agreement was properly rejected under section 1113 and there is no contract as of the rejection date,²⁰⁷ both parties must bargain under section 8(a)(5) to impasse concerning terms and conditions of employment. Only after an impasse is reached, no unfair labor practice is committed and a strike results, would the debtor be free to permanently replace the striking union employees under different, unbargained-for terms and conditions of employment.²⁰⁸

Practically speaking, without an agreement as to terms and conditions of employment, the law of the shop could be the "law of the jungle." There would be no agreement on, for example, allocation of overtime or work assignments, processing of grievances,

204. *NLRB v. Katz*, 369 U.S. 736 (1962); *Fetzer Television, Inc. v. NLRB*, 317 F.2d 420 (6th Cir. 1962).

205. See, e.g., *Fibreboard Paper Prod. Corp. v. NLRB*, 379 U.S. 203 (1964) (employer must bargain with union over decision to subcontract bargaining-unit work); *University of Chicago v. NLRB*, 514 F.2d 942, 949 (7th Cir. 1975) (unless work transfers "are specifically prohibited by the bargaining agreement, an employer is free to transfer work out of the bargaining unit if . . . the employer complies with *Fibreboard* . . . by bargaining in good faith to impasse").

206. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 676 (1980) (Court said that Congress did not expect that the "elected union representative would become an equal partner in the running of the business enterprise").

207. *Briggs Transp. Co. v. International Brotherhood of Teamsters*, 739 F.2d 341 (8th Cir. 1984) (union employees did strike after debtor rejected collective-bargaining agreement pursuant to section 365).

208. If the employer does not comply with its section 8(a)(5) obligation to negotiate in good faith until impasse and a strike occurs, the strike could be deemed an "unfair labor practice" strike instead of an "economic strike." Under the first scenario, the substitute hires would be employed only temporarily, as the employer would be required, when the strike is resolved, to reinstate the former union employees with back pay. Under the second situation, the substitute hires would be permanent replacements, and except for the union's limited recall rights, the employer would not have a duty to reinstate them with back pay.

prohibition of work stoppages or strikes, etc. Thus, the most minor dispute could result in decreased productivity as evidenced by reduced quantity and quality of production, physical altercations among employees or between management and employees, work stoppages and strikes,²⁰⁹ all of which could be the death knell of the employer's attempt to successfully reorganize.

Assuming no valid unfair labor practice claim exists, a union's economic or social power in this situation depends on the circumstances. Where the employer's labor force is relatively unskilled and/or where an available potential labor pool of employees who do not fear the social badge of "scab" exists, the union may have little economic or social power, including the potential economic pressure of a work slow-down or a strike, to do anything but accept the debtor's proposal. If such a union struck after impasse, the debtor could hire—without any significant set-back in its reorganization efforts—permanent replacements, subject to the union's limited recall rights.

Where, however, the labor force is relatively skilled, educated and knowledgeable in the employer's product or service and in the procedures the employer deems appropriate to follow, and/or the social stigma of being called "scab" is a significant deterrent, the union's economic and social power is significantly greater. In such circumstances, the current work force and not a substitute work force is often key to the employer's successful Chapter 11 reorganization. If such a union struck, and the debtor hired permanent replacements, the debtor's reorganization efforts would be seriously impeded.

Consequently, in most situations, both the employer and the union have both legal duties and practical incentives to negotiate a new agreement before impasse is reached. They also have incentives to agree to be governed by those provisions of the "old" contract not modified under a section 1113 proposal. Since the rights and obligations provided for under the labor laws are not substantially affected by a section 1113 rejection, the union and debtor may query, after the agreement has been rejected and a strike occurs, whether the agreement was, with the benefit of hindsight, really that burdensome.

IV. CONCLUSION

Section 1113 of the Act was a congressional response to the Su-

209. *In re C. & W. Mining Co.*, 38 Bankr. 496 (N.D. Ohio 1984).

preme Court's ruling in *Bildisco*. It reflected Congress's concern over the legitimate needs of both the debtor-employer and the union. Usually, the employer must cut costs drastically to permit a successful reorganization. Frequently, labor-related costs guaranteed by the collective-bargaining agreement (*i.e.*, salaries, benefits, etc.), are a significant portion of the debtor's costs. Prior to the enactment of section 1113, a debtor's unilateral rejection of the executory collective-bargaining agreement was a permitted procedure. Under the Supreme Court's reasoning in the *Bildisco* decision, an unfair labor practice did not occur as a result of such rejection. The unions, therefore, were virtually powerless against this type of action.

Only after the passage of section 1113 were the unions guaranteed, for the most part, that a defined, two-step process must be followed by the debtor in order to reject a collective-bargaining agreement in the context of a Chapter 11 reorganization.

Only after the passage of section 1113 were the unions given a statutory basis for demanding compliance with the first step, *i.e.*, a debtor's proposal, based on the most complete and reliable information at the time, providing only for those "necessary" modifications in the employees' benefits and protections that are "necessary" to permit the reorganization of the debtor and assuring that all creditors, the debtor and all affected parties, including the union, are treated fairly and equitably.

Only after the passage of section 1113 were the unions assured that a court would deny the application for rejection unless all of the step-one procedures were not met, the union refused to accept the proposal without good cause, and the balance of the equities clearly favored rejection.

Only after section 1113 were the unions confidently informed that unilateral modifications would be permitted as interim relief in limited circumstances for a time certain.

Indeed, section 1113 may force both the debtor and union to resolve their differences and cooperatively participate in a meaningful exchange at an earlier stage of the bankruptcy, thereby enhancing the chances of a successful Chapter 11 reorganization, and avoiding the occurrence of a Chapter 7 liquidation. Is the pendulum swinging against labor? After *Bildisco*, it might have been; after the passage of section 1113, it is not.