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Rush to Judgment: Congressional Response to Judicial Recognition of Rejection of Collective Bargaining Agreements under Chapter 11 of the Bankruptcy Code

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RUSH TO JUDGMENT: CONGRESSIONAL RESPONSE TO JUDICIAL RECOGNITION OF REJECTION OF COLLECTIVE BARGAINING AGREEMENTS UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

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I. INTRODUCTION

A. *National Labor Legislation*

The National Labor Relations Act (NLRA)[1] established federal protection of "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."[2] Congress enacted the NLRA to prevent industrial strife by encouraging collective bargaining and employee freedom in choosing bargaining representatives.[3] The statute establishes and

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1. Pub. L. No. 198, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-69 (1982)).
2. 29 U.S.C. § 157 (1982).
3. *See* S. Rep. No. 573, 74th Cong., 1st Sess. 1-3 (1935); Section 1 of the NLRA states: It is hereby declared to be the policy of the United States to eliminate the causes of certain

protects collective bargaining as a process directed to achieving an agreement defining the circumstances of the employer-employee relationship.[4] Congress intended that collective bargaining agreements[5] regulate the terms and conditions of employment: seniority, vacations, holidays, pensions, layoff and recall procedures, and grievance and arbitration rights.[6]

Sections 8(a)(5)[7] and 8(d)[8] of the NLRA mandate that both parties must bargain in good faith with respect to "wages, hours, and other terms and conditions of employment."[9] Generally, before a labor contract is consummated an employer may not institute unilateral changes regarding these mandatory bargaining subjects unless the employer first bargains in good faith to impasse with the employees' representative.[10] Once a collective bargaining agreement is in effect, neither party may unilaterally modify or ter-

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substantial obstruction to the free flow of commerce to mitigate and eliminate those obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purposes of negotiating the terms and conditions of their employment or other mutual aid or protection. 29 U.S.C. § 151 (1982). Hereinafter, the terms "bargaining representative," "employee representative" and "union" will be used interchangeably.

4. For a summary of case law interpreting the collective bargaining agreement to be markedly different from the ordinary commercial contract, see Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in* NLRB v. Bildisco, 25 B.C.L. REV. 539, 546-47 (1984).

5. Hereinafter, the terms "collective bargaining agreement," "agreement" and "labor contract" will be used interchangeably.

6. *See* R. GORMAN, *Labor Law: Unionization and Collective Bargaining* 540 (1976).

7. 29 U.S.C. § 158(a)(5) (1982). Section 8(a)(5) provides that "[i]t shall be an unfair labor practice for an employer . . . to refuse to bargain collectively with the representatives of his employees . . . ."

8. 29 U.S.C. § 158(d) (1982). Section 8(d) states in pertinent part:

[W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event . . . prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith . . . notifies any state or territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

. . . the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of their terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.

9. 29 U.S.C. § 158(d) (1982). Section 8(d) provides that

[f]or the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . .

10. *See* NLRB v. Katz, 369 U.S. 736 (1962). Thus, an employer commits an unfair labor practice in violation of § 8(a)(5) of the NLRA if, for example, it unilaterally enacts a change in a mandatory subject of bargaining after a labor contract has expired but before a new contract is finalized.

minate the terms and conditions contained in the labor contract without first following certain protracted procedures.[11]

The employer's duty to bargain established by section 8(a)(5) originally was viewed as incidental to the duty to recognize the union.[12] The duty to bargain, however, continues during the term of the agreement.[13] The National Labor Relations Board is authorized to prevent repudiation of the union or the collective bargaining agreement.[14] The NLRB[15] extends the prohibition on outright repudiation of the agreement, precluding unilateral modifications of fundamental provisions not specifically provided for within the collective bargaining agreement.[16]

Section 8(d) establishes a duty to bargain during the term of the collective bargaining agreement. The Act requires the parties to bargain regarding matters which are classified as "mandatory." These subjects are "wages, hours and other terms or conditions of employment."[17] Employers are not required to bargain on permissive or voluntary subjects. Employers may modify the terms and practices of non-mandatory subjects during the term of the agreement without negotiating with the union.[18]

Determining what constitutes a mandatory subject of bargaining is a hotly disputed and rapidly changing area of labor-management relations.[19] How broadly the parameters are defined affects both daily employment conditions and the continuing existence of jobs and unions.[20] Over the last twenty years, the courts and the NLRB have limited the mandatory areas of bargaining. In a far-reaching decision delimiting the scope of mandatory issues of bargaining, the United States Supreme Court held in *Textile Workers Union of America v. Darlington Manufacturing Co.*[21] that an employer possesses an absolute right of managerial discretion to terminate its entire business without being obligated under the NLRA to bargain over the decision with its employees' representative.[22] Subsequently, the Supreme Court

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11. *See supra* note 8.

12. *See supra* note 6, at 455.

13. *Id.*

14. *See* NLRB v. Hyde, 339 F.2d 568 (9th Cir. 1964).

15. Hereinafter referred to as "NLRB" or "the Board." The NLRB was created by the NLRA to effectuate the policies of the NLRA. *See* 29 U.S.C. § 153 (1982).

16. *See* Oak Cliff-Golman Baking Co., 207 N.L.R.B. 1063, 85 L.R.R.M. (BNA) 1035, *enforced mem.*, 505 F.2d 1302 (5th Cir. 1974), *cert. denied*, 423 U.S. 826 (1975).

17. 29 U.S.C. § 158(a) (1982).

18. *See, e.g.*, Chemical Workers, Local No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971).

19. *See generally*, Christensen, *New Subjects and New Concepts in Collective Bargaining*, ABA Section of Labor Relation Law Proceedings 245 (1970).

20. See A. COX, D. BOK and R. GORMAN, LABOR LAW 434-37 (1981), where the authors observe:

> The substitution of business machines for clerks in the office of an electric utility or insurance company would eliminate hundreds, if not thousands, of jobs; so would moving a plastics or textile manufacturing concern from Rhode Island to a new place in Mississippi. Dropping a line of products as commercially unprofitable may cause temporary or even permanent unemployment for workers whose skills are limited.

Id. at 434.

21. 380 U.S. 263 (1965).

22. The Court, however, limited its holding where the employer is affiliated with other plants:

> If the persons exercising control over a plant that is being closed for anti-union reasons (1) have an interest in another business, whether or not affiliated with or engaged in the

ruled in *First National Maintenance Corp. v. NLRB*[23] that an employer is not obligated to bargain over a decision to close part of its business for solely economic reasons.[24] Overruling its precedents to the contrary, the NLRB extended the *First National Maintenance* holding.[25] In *Milwaukee Spring Division of Illinois Coil Spring Company and Local 547, UAW*,[26] the Board ruled that an employer may transfer operations from a union facility to a non-union workplace in midcontract to avoid high labor costs without first gaining the union's consent, unless the labor contract specifically prohibits such relocation. Similarly, in *Otis Elevator Co. and Local 989, UAW*,[27] the Board found that an employer transferring work from one plant to another in midcontract had no duty to bargain with the union over the move unless the employer's motivation was solely to reduce labor costs.[28]

As a result of these decisions, employers enjoy a number of alternative strategies they may adopt to avoid high labor costs arising under collective bargaining agreements. Union employees, on the other hand, are denied the right to compel employers to bargain with them or to make available to them relevant information concerning such management decisions. Such subject matter constitutes a non-mandatory subject of bargaining.[29] A corollary rule is that unions cannot strike when employers refuse to discuss non-mandatory subjects of bargaining.[30]

Recent limitations on a union's ability to compel bargaining are not

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> same line of commercial activity as the closed plant, of sufficient substantiality to give promise of their reaping a benefit from the discouragement of unionization in that business; (2) act to close their plant with the purpose of producing such a result; and (3) occupy a relationship to the other business which makes it realistically foreseeable that its employees will fear that such business will be closed down if they persist in organization activities, we think that an unfair labor practice has been made out.

Id. at 275-76.

23. 452 U.S. 666 (1981).

24. The Court found that "the harm likely to be done to an employer's need to operate freely in deciding whether to shut down part of its business purely for economic reasons outweighs the incremental benefit that might be gained through the union's participation in making the decision." *Id.* at 686.

25. Milwaukee Spring Div. of Illinois Coil Spring Co. and Local 547, UAW, 268 N.L.R.B. 601, 115 L.R.R.M. (BNA) 1065 (1984), *aff'd sub nom.* International Union v. NLRB, 765 F.2d 175 (D.C. Cir. 1985), overruled Los Angeles Marine Hardware Co., 235 N.L.R.B. 720, 98 L.R.R.M. (BNA) 1571 (1978), *enforced*, 602 F.2d 1302 (9th Cir. 1979) (employer that relocated work covered by a collective bargaining agreement in midcontract to avoid contractual wage rates violated §§ 8(a)(3), 8(a)(5), and 8(d) of the NLRA), and Milwaukee Spring Div. of Illinois Coil Spring Co., 265 N.L.R.B. 206, 111 L.R.R.M. (BNA) 1486 (1982) (employer is prohibited from transferring operations and laying off union employees in midcontract without first obtaining the union's consent).

26. 268 N.L.R.B. 601, 115 L.R.R.M. (BNA) 1065 (1984), *aff'd*, 765 F.2d 175 (D.C. Cir. 1985).

27. 269 N.L.R.B. 891, 115 L.R.R.M. (BNA) 1281, *corrected*, Otis Elevator Co., Wholly Owned Subsidiary of United Technologies and Local 989, UAW, 269 N.L.R.B. 891, 116 L.R.R.M. (BNA) 1075 (1984).

28. The Board relied on Justice Stewart's concurrence in Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 217 (1964) (Stewart, J., concurring):

> If, as I think clear, the purpose of Section 8(d) is to describe a limited area subject to the duty of collective bargaining, those management decisions which are fundamental to the basic direction of a corporate enterprise or which impinge only indirectly upon employment security should be excluded from the area.

379 U.S. at 223.

29. *See* Rhine, *Business Closings and Their Effects on Employees—The Need for New Remedies*, 35 LAB. L.J. 270 (May 1984).

30. See, e.g., NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958), holding that

limited to the narrow definition of mandatory subjects. The NLRB has subordinated the rights of organized labor regarding permissible conduct of strikers,[31] the definition of concerted activity,[32] allowable activity during elections and organizing campaigns,[33] issuance of non-majority bargaining orders,[34] and Board deferral of disputes to arbitration.[35]

B. *The Bankruptcy Statutes and Collective Bargaining Agreements*

In light of these legal developments, it is not surprising that organized labor reacted strongly to the recognition of a new means for employers to avoid the strictures on their activity. The new means of avoidance resulted from judicial adoption of a rule permitting repudiation of the collective bargaining agreement in a bankruptcy reorganization under Chapter 11 of the Bankruptcy Code.[36] Although bankruptcy courts have permitted the rejection of collective bargaining agreements since 1959,[37] only within the last five years have employers increasingly sought to reject such contracts.[38] The well-publicized financial remedies sought by Continental Airlines, the nation's eighth largest air carrier,[39] and Wilson Foods Corporation, the na-

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under some circumstances, insisting upon bargaining to agreement on a non-mandatory subject may be a *per se* violation of either section 8(a)(5) or 8(b)(3).

31. See Clear Pine Moulding, Inc., 268 N.L.R.B. 1044, 115 L.R.R.M. (BNA) 113 (1984), where the Board held that an employer may terminate or refuse to reinstate a striker who makes verbal threats that reasonably tend to coerce or intimidate others.

32. See Meyers Industries, Inc., 268 N.L.R.B. 493, 115 L.R.R.M. (BNA) 1025 (1984), where the Board overturned long-standing precedent in ruling that an employee's action is not protected under section 7 of the NLRA as concerted activity if not done with or on the authority of other employees. Thus, the Board upheld the discharge of a truck driver who refused to drive an unsafe truck and filed a complaint with the state safety commission. But see NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984), where the Supreme Court held that where a labor contract allows employees to refuse to operate unsafe equipment, an employee acting alone to enforce those rights is engaged in concerted activity.

33. See Our Way, Inc., 268 N.L.R.B. 394, 115 L.R.R.M. (BNA) 1009 (1983), where the Board held that an employer's rule prohibiting union solicitation and distribution during "working time" as opposed to "working hours" is presumptively valid. *See also* Industrial Dispute Service, 226 N.L.R.B. 100, 112 L.R.R.M. (BNA) 1257 (1983) (union threats may interfere with a union election even though they are not directed to how employees vote); Rossmore House, 269 N.L.R.B. 1176, 116 L.R.R.M. (BNA) 1025 (1984) (employer questioning known union supporters regarding their union sympathies is not an unfair labor practice absent threats or promises), *aff'd*, 760 F.2d 1006 (9th Cir. 1985). All three cases overruled prior Board decisions.

34. See Gourmet Foods, 270 N.L.R.B. 578, 116 L.R.R.M. (BNA) 1105 (1984), where the Board reversed an earlier decision and held that it lacked the power to issue a bargaining order despite employer unfair labor practices in the absence of a previously established majority showing of union support.

35. See United Technologies Corp., 268 N.L.R.B. 557, 115 L.R.R.M. (BNA) 1049 (1984) and Olin Corp., 268 N.L.R.B. 573, 115 L.R.R.M. (BNA) 1056 (1984), where the Board signaled a trend in favor of greater deference toward arbitration awards and contractual dispute resolution rather than NLRB consideration of labor-management controversies.

36. 11 U.S.C. §§ 1101-74 (1982).

37. *See In re* Klaber Bros., Inc., 173 F. Supp. 83 (S.D.N.Y. 1959).

38. Not coincidentally, the number of bankruptcy reorganization petitions has increased greatly. *See* Note, *Rejection of Collective Bargaining Agreements in Bankruptcy:* NLRB v. Bildisco & Bildisco *and the Legislative Response*, 33 CATH. U.L. REV. 943, 961-62 n.83 (the number of Chapter 11 petitions filed between June 30, 1981 to June 30, 1982, and June 30, 1982 to June 30, 1983 increased from 12,385 to 18,306, according to the Admin. Office, U.S. Courts Statistical Analyses and Reports Div.). The number of Chapter 11 petitions filed by the end of 1983 reached 20,837. Browning, *Using Bankruptcy to Reject Labor Contracts*, 70 A.B.A.J. 60 (Feb. 1984).

39. *See In re* Continental Airlines Corp., 38 Bankr. 67 (Bankr. S.D. Tex. 1984). Upon filing its Chapter 11 petition, Continental immediately rejected its labor contracts with several unions. The

tion's largest pork processor and fifth largest meat packer,[40] were particularly condemned by union advocates who pointed to the rejection of their labor contracts as examples of employer abuse of Chapter 11.[41]

The successful reorganization of a debtor is the declared policy underlying Chapter 11.[42] To achieve this end, section 365(a) of the Bankruptcy Code[43] allows a debtor-in-possession or a trustee to assume or reject executory contracts.[44] Courts have uniformly found collective bargaining agreements to be executory contracts under section 365(a).[45] Thus, a fundamental conflict arose when bankruptcy courts allowed debtors to reject collective bargaining agreements under section 365(a) of the Bankruptcy Code without first requiring adherence to the procedures outlined in section 8(d) of the NLRA for midterm modification or termination of labor contracts.[46]

C. *The* Bildisco *Decision and Its Aftermath*

The Supreme Court addressed the clash of the bankruptcy and the labor statutes in *National Labor Relations Board v. Bildisco & Bildisco*.[47] In *Bildisco*, the Court held that a bankruptcy court should approve rejection of a collective bargaining agreement under section 365(a) if the debtor-in-possession[48] or trustee proved the labor contract burdened the estate, showed the equities balanced in favor of rejection, and made reasonable efforts to negotiate a voluntary modification of the contract.[49] The Court ruled that a debtor did not violate section 8(d) of the NLRA by unilaterally rejecting the collective bargaining agreement before obtaining bankruptcy court

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company retained less than half of its employees while cutting the wages of the retained employees in half. Browning, *supra* note 38, at 60. For analysis and criticism of Continental's use of Chapter 11 to reject its labor contracts, see Oswald, *The Effects of Chapter 11 on Collective Bargaining*, 35 LAB. L.J. 522 (Aug. 1984); Countryman, *Is the National Labor Policy Headed for Bankruptcy?*, 1984 ANN. SURV. BANKR. L. 159; Neilson, *America's Airlines Discover Chapter 11: Is It Reorganization or Union Busting?*, 11 J. CONTEMP. L. 375 (1984).

40. Wilson Foods rejected its labor contracts immediately upon filing its Chapter 11 petition and then slashed wages by 40% to 50%. *See* Gregory, *supra* note 4, at 541-42 n.14.

41. *See supra* note 39. *See also* Sorenson, *Chapter 11 by Wilson Foods Raids Workers' Lives, Tests Law*, Wall St. J., May 23, 1983, § 2 at 29, col. 10.

42. Report of the Commission on Bankruptcy Laws of the United States, H.R. Doc. No. 137 pt. 1, 93rd Cong., 1st Sess. 71 (1973), *reprinted in* COLLIER ON BANKRUPTCY 2 app. (15th ed. 1983).

43. 11 U.S.C. § 365(a) (1982).

44. A generally recognized definition of an executory contract calls it a contract "under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete 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). For a discussion of the legislative background, mechanics, and court interpretation of § 365(a), see Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1, 6-11 (1984).

45. See, e.g., Shopman's Local Union No. 445 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975), holding that a collective bargaining agreement is an executory agreement within the scope of the Bankruptcy Act and, therefore, subject to rejection. *See also* Local Joint Executive Bd. v. Hotel Circle, Inc., 613 F.2d 210 (9th Cir. 1980). *See generally* Countryman, *supra* note 39, at 159-60.

46. *See supra* notes 10-16 and accompanying text.

47. 104 S. Ct. 1188 (1984).

48. Hereinafter the term "debtor" will refer to either the debtor-in-possession or trustee that is in charge of the debtor's post-petition business.

49. *See infra* note 107 and accompanying text.

approval.[50]

Labor union advocates condemned *Bildisco* for creating a means for employers to evade duties under the NLRA by permitting them to file Chapter 11 petitions whenever they desired to avoid their labor contracts.[51] In essence, organized labor interpreted *Bildisco* as the untoward culmination of a long line of pro-management decisions by the NLRB and courts.[52] Members of Congress acted swiftly to propose a new bankruptcy section to overturn the Court's holding.[53] After a compromise between pro-labor and pro-management legislators, Congress passed Section 1113 to the Bankruptcy Amendments and Federal Judgeship Act of 1984 (Bankruptcy Amendments Act).[54] Section 1113 requires an employer to satisfy a number of conditions before the bankruptcy court approves labor-contract rejection and prohibits unilateral labor-contract modification or termination.[55] An employer may disregard the required conditions only if the bankruptcy court grants permission.

This Article determines whether section 1113 was an appropriate response to the *Bildisco* decision in light of subsequent interpretation of *Bildisco* by bankruptcy courts. Further, this Article questions whether labor union advocates, members of Congress, and legal commentators underestimated the abilities of bankruptcy court judges to fairly balance the objectives of the federal labor and bankruptcy laws. To this end, this Article examines the holdings and rationale of bankruptcy cases decided under *Bildisco* and section 1113.

II. PRE-*BILDISCO* STANDARD OF REJECTION

Although courts unanimously find that collective bargaining agreements are subject to rejection as executory contracts,[56] judicial opinions differ widely on the standard that courts should apply to allow rejection.[57]

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50. *See infra* notes 113-18 and accompanying text.

51. *See infra* notes 123-42 and accompanying text.

52. For example, Machinists Union President William Winpisinger called the *Bildisco* decision "the most outrageous goddamned thing I ever heard. We didn't even get out our friends on that one." 36 Daily Lab. Rep. (BNA) AA-3 (Feb. 23, 1984).

53. *See infra* notes 146-54 and accompanying text.

54. H.R. Rep. 882, 98th Cong., 2d Sess. 61-63 *reprinted in* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, U.S. Code Cong. & Ad. News 98 Stat. 333, 390-91.

55. *See infra* notes 156-74 and accompanying text.

56. *See supra* note 45 and accompanying text.

57. See R. GINSBERG, BANKRUPTCY ¶ 7305 (1985), where the author notes that federal courts spent decades wrestling with the standard for rejection of collective bargaining agreements. The author identifies three general approaches taken by federal courts prior to *Bildisco*. These were:

(1) that collective bargaining agreements were exactly the same as any other executory contract and therefore subject to an ordinary business judgment rule permitting rejection upon a showing that rejection was in the best economic interest of the debtor and creditors;

(2) that collective bargaining agreements were specially protected in light of a public policy favoring their enforcement so that rejection was permitted only upon a showing of absolute necessity for a successful reorganization;

(3) a balancing of equities approach in light of a public policy approval of enforcement of collective bargaining agreements while at the same time recognizing a need for debtors or trustees to have a reasonable ability to achieve a reorganization which required a determination of whether the benefits that would inure to the estate and its creditors

Section 365(a) does not list a standard for rejection of executory contracts. Generally, courts apply a business judgment test to determine whether to permit rejection of executory contracts.[58] Under this test, a debtor may reject an executory contract if rejection is in the best interests of the estate and benefits the general unsecured creditors.[59] A debtor may even replace profitable contracts with more profitable ones.[60] A number of bankruptcy courts apply a business judgment test to collective bargaining contracts, explaining that section 365(a) does not differentiate between labor contracts and ordinary commercial contracts and, thus, both should undergo the same test for rejection.[61]

Most courts, however, require the debtor to make a greater showing than business judgment to reject a labor contract. The first generally accepted standard for rejection of collective bargaining agreements was set forth in *Shopmen's Local 455 v. Kevin Steel Products, Inc.*[62] In *Kevin Steel*, the United States Court of Appeals for the Second Circuit ruled that a more stringent test than business judgment was warranted because of the public policy implicit in Congress' establishment of the labor contract as the central element of the employment relationship.[63] The *Kevin Steel* court stated that a bankruptcy court should only permit rejection of a collective bargaining agreement if the equities—the benefits to the estate and creditors—outweigh the detriments suffered by workers.[64] In determining whether the balance of equities clearly favors rejection, the *Kevin Steel* court suggested that courts should consider any anti-union animus of the employer, proof of the employer's financial status, the cause of the employer's financial difficulties, and the hardship of rejection on the employees, including their loss of rights and intangible benefits under the labor contract.[65]

One month after the *Kevin Steel* decision, another panel of the Second Circuit examined the standard for rejection of a labor contract in *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*[66] The court employed the test established by *Kevin Steel* as a threshold determination debtors must satisfy before any labor contract rejection obtains judicial approval.[67] The court, however, added a requirement that the debtor must prove it had no other viable alternative to prevent total business collapse and

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outweighed the detriments imposed on employees that would result from rejection of the collective bargaining agreements.

58. *See In re* Chi-Feng Huang, 23 Bankr. 798, 800 (Bankr. 9th Cir. 1982), and cases cited therein.

59. *Id.* at 800, 801.

60. *Id.* at 800.

61. *See, e.g.*, Local Joint Executive Bd. v. Hotel Circle, Inc., 419 F. Supp. 778 (S.D. Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980); *In re* Concrete Pipe Mach. Co., 28 Bankr. 837 (Bankr. N.D. Iowa 1983); *In re* Reserve Roofing Florida, Inc., 21 Bankr. 96 (Bankr. M.D. Fla. 1982); *In re* Ateco Equip., Inc., 18 Bankr. 915 (Bankr. W.D. Pa. 1982).

62. 519 F.2d 698 (2d Cir. 1975). *Kevin Steel* arose under § 713 of the Bankruptcy Act, the precursor to § 365(a) of the Bankruptcy Code.

63. 519 F.2d at 707.

64. *Id., citing In re* Overseas Nat'l Airways, 238 F. Supp. 359 (E.D.N.Y. 1965).

65. *Id.* For an example of how another court applies these factors, see *In re* Parrot Packing Co., 42 Bankr. 323, 332-35 (Bankr. N.D. Ind. 1983).

66. 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975), *cert. denied*, 423 U.S. 1073 (1976). *REA Express* also was decided under § 713 of the Bankruptcy Act.

67. 523 F.2d at 169.

loss of jobs than rejection of the collective bargaining agreement.[68] This "last resort" test significantly increased the debtor's burden for proving that rejection was appropriate.

Although *Kevin Steel* and *REA Express* articulated two very different standards for rejection, most courts initially interpreted *REA Express* as merely a more complete expression of the *Kevin Steel* standard.[69] In *Matter of Brada Miller Freight Systems, Inc.*,[70] however, the Eleventh Circuit favored the *Kevin Steel* balancing of the equities test over the stricter *REA Express* "last resort" standard. The court admitted that the possibility that the debtor's business could fail if the agreement was not rejected was an important factor, but found the debtor's inability to sustain the burden of the "last resort" test should not determine whether a court should grant rejection.[71] Instead, the *Brada Miller* court held that the bankruptcy judge should balance the following factors: 1) the possibility of liquidation if rejection is granted or denied and the impact of liquidation on all parties;[72] 2) the impact of resulting claims on the debtor and their adequacy for employees and other creditors;[73] 3) the cost-spreading abilities of the parties;[74] and 4) the good or bad faith of the debtor and the union.[75]

III. THE *BILDISCO* DECISION

In *National Labor Relations Board v. Bildisco & Bildisco*,[76] the United States Supreme Court resolved the conflict between the circuits and determined the standard courts should apply in deciding whether a collective bargaining agreement could be rejected. The debtor, Bildisco, was a general partnership engaged in the distribution of building supplies.[77] At the time Bildisco filed its petition for reorganization under Chapter 11 of the Bank-

68. *Id.*

69. *See* Matter of Brada Miller Freight System, Inc., 702 F.2d 890, 898-99 (11th Cir. 1983), and cases cited therein.

70. 702 F.2d 890 (11th Cir. 1983). For a more detailed discussion of *Brada Miller*, see Drake & Massey, *Bankruptcy*, 35 MERCER L. REV. 1129 (1984).

71. 702 F.2d at 899.

72. *Id.* The court stated: "We do not envision a particularized consideration of the effect of liquidation on individual employees, creditors, and shareholders, but rather a weighing of the impact on these groups in the aggregate." *Id.* The court also noted that because the debtor is still obligated to bargain with the union after rejection, the court should consider the probable effect of a strike on the debtor's business if rejection is approved. *Id.*

73. *Id.* at 899-900. The court noted that "[t]his factor is especially important since many of the benefits received by employees under collective bargaining agreements are non-monetary and generally incapable of providing a basis for a damage award." *Id.* at 900.

74. *Id.* The court spelled out its concern:

> Certainly, a $50,000 loss to a group of employees averaging $20,000 a year in salary may have a far more devastating impact than a $100,000 loss suffered by a group of large banks and other major creditors or by the debtor-employer itself. The consideration of this factor seems especially appropriate since it was the discrepancy in economic power between labor and management that provided the impetus behind the establishment of the labor law policies we now seek to preserve.

75. *Id.* The court stated that good or bad faith could be determined from such action as whether the employer sought union concessions prior to rejection and the union's response to any such overtures. The court also stated that the tone of prior negotiations between the parties might be relevant. *Id.* These factors are not exhaustive. *Id.* at 899.

76. 104 S. Ct. 1188 (1984).

77. *Id.* at 1192. Bildisco was authorized to act as debtor-in-possession under 11 U.S.C. § 1107.

ruptcy Code, forty to forty-five percent of its workforce were union members.[78] Bildisco had negotiated a three-year contract with the union one year before filing its petition.[79]

A few months before filing its petition, Bildisco failed to pay health and pension benefits and remit dues to the union as required under the collective bargaining agreement.[80] One month after filing its petition, Bildisco refused to grant a wage increase scheduled under the labor contract.[81] As a result, the union filed unfair labor practice charges with the NLRB, claiming the company's breaches constituted unilateral changes in the collective bargaining agreement in violation of sections 8(a)(1) and 8(a)(5) of the NLRA.[82] The Board agreed with the union and ordered Bildisco to pay health and pension benefits and remit dues to the union.[83] The Board then petitioned the United States Court of Appeals for the Third Circuit for enforcement of its order.[84]

In the meantime, Bildisco requested permission from the bankruptcy court to reject its labor contract as an executory contract pursuant to section 365(a) of the Bankruptcy Code.[85] The bankruptcy court granted permission and the district court affirmed.[86] The union appealed to the Third Circuit, which consolidated the union's appeal with the NLRB's petition for enforcement of its order.[87] The Third Circuit[88] rejected the strict *REA Express* "last resort" standard in favor of a more liberal test for determining the appropriateness of repudiation of a collective bargaining contract in a bankruptcy proceeding. The court found *REA Express* inadequate on two grounds. First, the Third Circuit held that it might be impossible for a court to predict the success of a reorganization until the later stages of the arrangement proceedings; thus, the *REA Express* requirement that rejection be denied unless reorganization would fail was unworkable.[89] Second, the court stated the *REA Express* standard could ultimately harm the employees by forcing marginal companies into liquidation when bankruptcy court permis-

78. *Id.*

79. *Id.* The contract specifically stated that it was binding on the parties and their successors even though one party filed for bankruptcy.

80. *Id.*

81. *Id.*

82. *Id.* at 1192-93. Section 8(a)(1) of the NLRA, 29 U.S.C. § 158 (1982), states that "[i]t 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."

Section 7 of the NLRA, 28 U.S.C. § 157 (1982), provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." The statutory language of § 8(a)(5) is set forth *supra* note 7.

83. 104 S. Ct. at 1192-93.

84. *Id.*

85. *Id.* The bankruptcy court held a hearing at which the sole witness was one of Bildisco's general partners who testified that rejection would save the company about $100,000 in 1981. The union presented no witnesses.

86. *Id.* The bankruptcy court allowed the union 30 days to file a claim for damages against Bildisco arising from the labor contract rejection.

87. *Id.* at 1193.

88. *In re* Bildisco, 682 F.2d 72 (3d Cir. 1982), *aff'd sub nom.* NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984).

89. 682 F.2d at 80.

sion to reject their labor contracts would allow them to stay in business.[90] The court reasoned such forced liquidation would result in the loss of all employment.[91]

The Third Circuit endorsed the *Kevin Steel* balancing of the equities test on the ground that it provided greater likelihood of achieving the public policy objective of labor law than did the business judgment test. Furthermore, it did so without subordinating the interests of the other parties affected by bankruptcy proceedings.[92] The court thus ruled that initially a debtor must show that the collective bargaining contract burdens the estate subject to the bankruptcy proceedings.[93] The debtor must then present sufficient information about its financial situation to allow the bankruptcy court to balance the equities.[94] The Third Circuit remanded the case to the bankruptcy court for reconsideration in light of these standards.

The Third Circuit also considered the NLRB's argument that Bildisco, as debtor-in-possession, was the alter-ego of the pre-petition employer and was liable for any Board enforcement orders pertaining to unfair labor practice charges of the previous employer.[95] The court, rejecting this argument and denying enforcement, found that the debtor-in-possession was a new entity and not an alter-ego of the pre-petition employer.[96] The court compared Bildisco's status to that of a successor employer, which may be required to recognize and bargain with the union but which is not a party to the predecessor's labor contract without specifically assuming it.[97] After noting that rejection of an executory contract dates back to the filing of the bankruptcy petition,[98] the Third Circuit held that the Board could not premise an unfair

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90. *Id.*
91. *Id.*
92. *Id.* at 81.
93. *Id.*
94. *Id.* Judge Aldisert, writing for the Third Circuit, stated:

> The polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible "sacrifices which other creditors are making" in the effort to bring about a successful reorganization and that the courts must make a reasoned determination that rejection of the labor contract will assist the debtor-in-possession or the trustee to achieve a satisfactory reorganization.

682 F.2d at 81 (quoting Group of Investors v. Milwaukee R. Co., 318 U.S. 523, 550 (1943)).

95. *Id.* at 82. The NLRB found as a matter of fact that the debtor-in-possession was the alter ego in bankruptcy to Bildisco. *Id.* at 76. The NLRB had previously ruled that alter-ego status exists when two enterprises have "substantially identical management, business purpose, operation, equipment, customers, and supervision as well as ownership." Crawford Door Sales Co., 226 N.L.R.B. 1144 (1976). The United States Supreme Court endorsed this view in Howard Johnson Co. v. Hotel Employees, 417 U.S. 249, 259 n.5 (1974), where the court noted that there is no legal consequence to a mere technical change in the identity of an employing entity undertaken to avoid the effect of the labor laws.

96. *Bildisco*, 682 F.2d at 82. An employer with successor status is only required to recognize and bargain with the exclusive representation of the employees. *See, e.g.*, NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972). An employer with alter-ego status is required to assume its predecessor's collective bargaining agreement. *See, e.g.*, Marquis Printing Corp. and Mutual Lithograph Co., 213 N.L.R.B. 394 (1974).

97. *Bildisco*, 682 F.2d at 83. Some commentators have correctly criticized the viewpoint that a Chapter 11 debtor-in-possession is a type of successor employer entitled to reject its predecessor's labor contract as being unsupported by Supreme Court labor law precedents. *See* Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293, 304-10 (1983).

98. 682 F.2d at 83.

labor practice on Bildisco's rejection of the collective bargaining agreement if the bankruptcy court approved that rejection.[99]

The Supreme Court granted certiorari to resolve the conflict between the Third Circuit in *Bildisco* and the Second Circuit in *REA Express*.[100] Writing for the majority, Justice Rehnquist noted at the outset that a collective bargaining agreement is an executory contract covered by section 365(a) of the Bankruptcy Code.[101] Justice Rehnquist reasoned that the failure to draft an exclusion in section 365(a) for labor contracts, as done in other statutes,[102] indicated that Congress intended section 365(a) to apply to collective bargaining agreements.[103]

The Court next focused on the appropriate standard of rejection for labor contracts. Justice Rehnquist stated that although section 365(a) did not specify that debtors must meet a stricter standard to reject collective bargaining agreements than ordinary commercial contracts, the special nature of the labor contract necessitated a more stringent test than the business judgment standard.[104] The majority, however, rejected the contention of the union and NLRB that the *REA Express* "last resort" standard was the proper test.[105] Justice Rehnquist called the *REA Express* standard "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code."[106] Instead, the Court endorsed the Eleventh Circuit's test in *Brada Miller* which permitted the bankruptcy court to approve rejection only if it was shown that the labor contract burdens the estate and that the equities between the benefits to the estate and the detriment to labor balance in favor of rejection.[107] The Court additionally required the

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99. *Id.* For a more detailed discussion of the Third Circuit's opinion, see Note, Kevin Steel *and* REA Express *Revisited: When Is a Collective Bargaining Agreement Burdensome?*—In re Bildisco, 56 TEMP. L.Q. 252 (1983).

100. Bildisco, 104 S. Ct. at 1194.

101. *Id.* The Court rejected the argument of *amicus curiae* United Mine Workers of America that a labor contract does not qualify as an executory contract under § 365(a). The Court pointed out that both Bildisco and the union had reciprocal obligations and each owed performance at any time under the collective bargaining agreement. *Id.* at 1194 n.6.

102. *Id.* at 1194-95. The Court stated that 28 U.S.C. § 1167 (1982) expressly exempts collective bargaining agreements subject to the Railway Labor Act, but not those subject to the NLRA. Section 1167 of the Bankruptcy Code provides:

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

103. 104 S. Ct. at 1195.

104. *Id.*

105. *Id.* The union also argued that Bildisco must comply with the procedural requirements of § 8(d) of the NLRA, or at least bargain to impasse, before the bankruptcy court allows it to assume or reject a labor contract.

106. *Id.* at 1196. Justice Rehnquist further criticized *REA Express*:

> The rights of workers under collective-bargaining agreements are important, but the *REA Express* standard subordinates the multiple, competing considerations underlying a Chapter 11 reorganization to one issue: whether rejection of the collective-bargaining agreement is necessary to prevent the debtor from going into liquidation. The evidentiary burden necessary to meet this stringent standard may not be insurmountable, but it will present difficulties to the debtor-in-possession that will interfere with the reorganization process.

107. *Id.* The Court elaborated on the factors a court should consider:

> The Bankruptcy Court must consider the likelihood and consequence of liquidation for the debtor absent rejection, the reduced value of the creditor's claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the

debtor to prove it had made reasonable efforts to negotiate a voluntary modification with the union and that such negotiations were not likely to succeed in the near future.[108]

Justice Rehnquist next examined the issue that divided the Court five to four: whether a debtor commits an unfair labor practice by unilaterally modifying or terminating a collective bargaining agreement before the bankruptcy court approves such rejection.[109] The union tried to persuade the Court that the debtor-in-possession assumes the same position as an alter-ego of the predecessor corporation.[110] Because an alter-ego must abide by the terms of a labor contract, the union argued that Bildisco should be prohibited from unilaterally rejecting the contract.[111] Bildisco countered by claiming that the Court should uphold the Third Circuit's determination that the debtor-in-possession is a new entity, holding successor status. Successor status requires the debtor-in-possession to bargain in good faith with the union; the debtor-in-possession is not bound to honor any pre-petition labor contract unless it specifically assumes that contract under section 365(a) of the Bankruptcy Code.[112]

The majority rejected both the alter-ego and the successor status or new entity arguments. Justice Rehnquist stated that a debtor-in-possession was the same entity that existed before the petition was filed, but was authorized by the Bankruptcy Code to treat labor contracts differently than if the petition was not filed.[113] The majority noted that Congress intended Chapter 11 to prevent the debtor's liquidation, the misuse of economic resources, and the loss of jobs.[114] Because immediate infusion of capital may be necessary to sustain the business, the majority reasoned it would be counterproductive to force the debtor to comply with the labor contract until a bankruptcy judge finally authorized rejection.[115] Therefore, Justice Rehnquist concluded that the filing of a Chapter 11 petition abrogates the collective bargaining agreement.[116] Moreover, after the petition is filed and before court approval for rejection is sought, the debtor does not have to comply with the

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> employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative difference between the types of hardship each may face.

Id. at 1197.

108. *Id.* at 1196. The Court derived this requirement from § 8(a)(5) of the NLRA, requiring good faith bargaining, and from the NLRA policy to prevent industrial strife by encouraging collective bargaining. *Id.*

109. Justice Brennan writing for himself, and Justice White, Justice Marshall and Justice Blackmun, concurred in the holding of the majority that the bankruptcy court should permit a debtor to reject a collective bargaining agreement upon a showing that the agreement burdens the estate and that the equities balance in favor of rejection. However, Justice Brennan, along with Justices White, Marshall and Blackmun dissented from the holding that a debtor-in-possession does not commit an unfair labor practice if it unilaterally alters the terms of an existing collective bargaining agreement after a bankruptcy petition has been filed, but before a bankruptcy court has authorized rejection of the agreement. 104 S. Ct. at 1201 (Brennan, J., concurring in part and dissenting in part).

110. *Id.* at 1197.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 1198.

116. *Id.* at 1200-01.

procedures of section 8(d) of the NLRA because the labor contract is deemed rejected on a date immediately prior to the filing of the petition.[117] Consequently, the NLRB cannot base a section 8(d) violation on the debtor's lawful right to reject a labor contract upon the filing of a Chapter 11 petition.[118] The majority, nevertheless, recognized that because the debtor remains an "employer" under the NLRA, it must bargain in good faith with the union over the terms of a new contract both before and after the bankruptcy court approves rejection of the collective bargaining agreement.[119]

Justice Brennan, in dissent, complained that a rule permitting unilateral rejection undermines the NLRA goal of preventing industrial strife.[120] Brennan suggested that the majority inadequately balanced the competing policies of the federal labor and bankruptcy statutes. Further, he argued that the bankruptcy court should require the debtor to honor the procedures in section 8(d) of the NLRA even after a Chapter 11 petition is filed.[121] The dissent reasoned that the debtor may seek immediate permission from the bankruptcy court to reject the labor contract if it is so burdensome that it threatens the company's economic survival.[122]

IV. REACTION TO *BILDISCO*

Labor leaders immediately denounced *Bildisco* and predicted catastrophic effects on organized labor. Jackie Presser, president of the Teamsters, forecasted "disastrous consequences for the working men and women of this country and the health of the American economy."[123] Bruce Simon, counsel for the Air Line Pilots Association, called the decision "the single greatest threat to collective bargaining since the passage of the Wagner Act fifty years ago."[124] Laurence Gold, special counsel to the AFL-CIO, commented that *Bildisco* will "give debtors a practical assurance that collective bargaining agreements may be repudiated with impunity."[125] One legal commentator accurately summarized organized labor's reaction in this manner:

> These people suggested that companies who had formerly not considered the use of Chapter 11 would now be motivated to go into reorganization in order to avoid burdensome labor contracts. They suggested implicitly, if not explicitly, that courts formerly resistant to the rejection of a contract in reorganization would now routinely permit the

117. *Id.*

118. *Id.* The Court reasoned that the modification of the labor contract is not accomplished by the employer's unilateral action, but rather by the operation of law.

119. *Id.* at 1201.

120. *Id.* at 1204 (Brennan, J., dissenting).

121. *Id.* at 1211. Therefore, the dissent feels a debtor-in-possession who unilaterally alters the terms of a collective bargaining agreement is guilty of an unfair labor practice.

122. *Id.* at 1209. Justice Brennan claimed that "because unilateral modification of a collective-bargaining agreement will often lead to labor strife, such unilateral modifications may more likely *decrease* the prospects for a successful reorganization." *Id.* (emphasis in original).

123. 70 Daily Lab. Rep. (BNA) F-3 (Apr. 11, 1984).

124. *See* Browning, *supra* note 38, at 60.

125. 70 Daily Lab. Rep. (BNA) F-3 (Apr. 11, 1984). *See also supra* note 52 (comment of Machinists Union President William Winpisinger).

rejection of such contracts.[126]

Many other legal commentators fueled the furious assault on the *Bildisco* decision. Professor David Gregory called *Bildisco* a "thoughtless and insidious distortion of core federal labor policy"[127] that delivered not only a "devastating blow,"[128] but also a "fatal blow"[129] to the now "gravely wounded"[130] labor policy. Professor Gregory's doomsday prediction continued: "The recent bankruptcy-labor conflict is only symptomatic of a far more crucial problem. Many aspects of labor and employment law jurisprudence are in conflict. Unless rectified, labor doctrine risks becoming wholly incoherent."[131] Much of Professor Gregory's gloomy forecast resulted from his perception that *Bildisco* would cause bankruptcy courts to express their "overt ownership biases"[132] in such a fashion as to "obviate their entrepreneurial prejudices at the expense of labor."[133] The clear implication of this view was that bankruptcy courts would consistently balance the equities in favor of rejection in all but the most egregious cases.[134]

Douglas Bordewieck and Professor Vern Countryman also expressed little faith in the abilities of bankruptcy judges to balance the equities fairly.[135] The authors decried the bankruptcy courts' apparent ignorance of basic labor law concepts, and concluded that "[a]s a result, one can expect that collective bargaining agreements will be rejected more often than not, even when rejection follows and results from unfair labor practices committed by the debtor post-petition."[136] The authors argued that unilateral rejection of labor contracts causes federal labor policy to be "grossly flouted."[137]

Professor James White was even more succinct in his view concerning

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126. White, *The* Bildisco *Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1182 (1984).

127. Gregory, *supra* note 4, at 606.

128. *Id.* at 588.

129. *Id.* at 590.

130. *Id.* at 592.

131. *Id.* at 606.

132. *Id.* at 593.

133. *Id.* at 594.

134. *Id.* Gregory suggested that Congress legislatively overturn *Bildisco* by only allowing rejection in extreme cases and after the union has unjustifiably refused a contract modification. *Id.* at 603, *citing* Bordewieck & Countryman, *supra* note 97, at 300. Gregory also advised bankruptcy courts to employ labor arbitrators to assess the value of contract rights such as seniority, pensions, vacations and severance pay. He argued this process would make the final decision on rejection more agreeable to the parties. Gregory, *supra* note 4, at 603-04. It is more likely, however, that Gregory's suggestion would unduly complicate the bankruptcy proceeding, where the two heads, for the purposes of efficiency and finality, are probably not better than one.

Gregory also stated that unions should negotiate one year labor contracts as opposed to the normal three year agreements. *Id.* at 596. Unions are likely to reject this idea since one year contracts only secure the union's all-important representation status one-third as long as three year contracts.

135. Bordewieck & Countryman, *supra* note 97. Their Article was written before the Supreme Court decided *Bildisco*.

136. Bordewieck & Countryman, *supra* note 97, at 329.

137. *Id.* at 294. The authors set forth standards for courts to follow when determining whether to allow rejection of collective bargaining agreements. *See supra* note 134. In addition, the authors argued that employers must provide unions with financial data so that unions may adequately evaluate the employer's proposal for modification. Moreover, the authors suggested that courts should not permit rejection if the debtor's primary motive is to eliminate the union or if the debtor could successfully reorganize without rejection. Bordewieck & Countryman, *supra* note 97, at 317.

the consequences of *Bildisco* and the abilities of bankruptcy judges to reach fair results.[138] Professor White claimed that it was irrelevant whether the Supreme Court adopted the *Kevin Steel* balancing of the equities test or the strict *REA Express* standard: "As long as the Code grants debtors and the courts the power to abrogate collective bargaining agreements, such agreements will be rejected and the courts will approve such rejection almost without regard to the test proposed."[139]

The criticism of *Bildisco* continued. Some critics were kinder to the Supreme Court than others. One commentator observed: "The decision of the Court in *NLRB v. Bildisco* has already joined the ranks of that mercifully small group of labor law decisions so demonstrably wrong that Congress immediately enacts corrective legislation."[140] Another warned that *Bildisco* "increases the likelihood of labor unrest."[141] Perhaps Professor Countryman painted the darkest picture, proclaiming that if bankruptcy judges allow labor-contract rejection, "the National Labor Policy will indeed be headed for bankruptcy."[142]

Despite this general outrage, some commentators cautioned against overreacting to *Bildisco*. An editorial in the Employee Relations Law Journal noted that employers will still rarely seek to reject a labor contract by filing for bankruptcy and speculated that "*Bildisco* may well turn out to be the mouse that roared."[143] The Supreme Court merited praise from at least one legal commentator who complimented the Court for issuing "practical guidelines . . . consistent with economic reality."[144] Another writer warned Congress to resist the temptation to overturn *Bildisco* by amending the Bankruptcy Code.[145]

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138. White, *supra* note 126.

139. *Id.* at 1182-83.

140. Hardin, *Labor and Employment Law Decisions: The October 1983 Term of the Supreme Court of the United States*, 1 THE LABOR LAWYER 49, 77 (Winter 1985). The author stated, "commercial contracts were vindicated and the labor interests were negated . . . . The opinion rests on the Court's assumption, rather than its conclusion, that the labor interests must yield." *Id.* at 83.

141. Simon & Mehlsack, *Bankruptcy and the Collective Bargaining Agreement: A Union View—Workers Rights in a Chapter 11 Proceeding: Beyond the Labor Laws*, 37th ANN. NAT'L CONF. LAB. 6-1, 6-43 (1984). The authors denounced their perception that "[r]eorganization under Chapter 11 of the Code has become much more common—indeed almost commonplace—as an 'acceptable' business strategy in response to the economic gyrations of the 70's and 80's." *Id.* at 6-4; *see also* Simon & Mehlsack, *Filing a Post-*Bildisco *Chapter 11 Petition to Reject a Labor Contract*, 52 FORDHAM L. REV. 1134 (1984) ("Bankruptcy reorganization, designed to be a shield for a financially distressed business against its creditors—to give it time to regroup, adjust debt obligations and reorganize operations—is now a weapon in the hands of corporate strategists seeking a competitive advantage or trying to avoid legal obligations.").

142. Countryman, *supra* note 39, at 175.

143. Issacson, *Chapter 11: A Haven for Beleaguered Employers?*, 10 EMPLOYEE REL. L.J. 1, 3-4 (Summer 1984).

144. Saad, *The* Bildisco *Decision—Balancing Political Interests*, 10 EMPLOYEE REL. L.J. 200, 209 (Autumn 1984). The author emphasized that:

> The Court properly noted that the policy of the NLRA is to protect the *process* of labor negotiations, not to impose particular results on the parties. The purpose of the Bankruptcy Code, on the other hand, is to achieve a *result*—successful reorganization, which is something that all parties involved have a stake in. Accordingly, the Court was quite correct in accommodating the two statutes by giving union contracts special but subordinate status to the policy underlying Chapter 11.

Id. at 207 (emphasis in original).

145. Miller, *The Rejection of Collective Bargaining Agreements Under the Bankruptcy Code—An*

Nevertheless, members of Congress proposed to rearticulate the standard for labor contract rejection the very day *Bildisco* was handed down.[146] Representative Peter Rodino introduced H.R. 4908, designed to prohibit rejection without the approval of the bankruptcy court by employing the *REA Express* "last resort" test.[147] Representative Rodino later introduced H.R. 5174, containing many of the earlier bill's provisions.[148] The House of Representatives passed H.R. 5174 two days later without any hearings and little discussion,[149] prompting one commentator to exclaim that "[t]o the best of my knowledge, there is no other example in the history of this republic where Congress has shown such flagrant disregard for a *unanimous* Supreme Court ruling, reversing it without even a transparent appearance of deliberation."[150]

In the Senate, however, H.R. 5174 met resistance from pro-management legislators. Senate Judiciary Chairman Strom Thurmond countered H.R. 5174 with a proposal retaining *Bildisco*'s balancing of the equities test.[151] Senator Bob Packwood proposed an alternative bill utilizing the *Bildisco* balancing of the equities approach which was more favorable to la-

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Abuse of Proper Exercise of the Congressional Bankruptcy Power?, 37th ANN. NAT'L CONF. LAB. 5-1, 5-7, to 5-8 (1984). The author argued that "such special interest legislation . . . invariably reduces the effectiveness of a statute by granting preferential treatment to some group to the detriment of other parties in interest." *Id.*

For other legal commentary on the *Bildisco* decision, see Note, *Bankruptcy-Rejection of Collective Bargaining Agreements Before and After the 1984 Code Amendments*, 68 MARQ. L. REV. 351 (1985); Miller, *Chapter 11 of the Bankruptcy Act and Collective Bargaining Agreements*, 52 FORDHAM L. REV. 1120 (1984); Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293 (1984); Comment, *The Rejection of Collective Bargaining Agreements Within Bankruptcy Reorganization: Reconciling a Legislative Dilemma*, 17 AKRON L. REV. 761 (1984); Note, Bildisco*: Are Some Creditors More Equal Than Others?*, 35 S.C.L. REV. 573 (1984); Note, NLRB v. Bildisco & Bildisco*: Rejection of Collective Bargaining Agreements by Chapter 11 Debtors Receives High Court Approval*, 4 N.I.U.L. REV. 295 (1984); Note, *Bankruptcy Law and Labor Law—Resolving the Conflict Between the Bankruptcy and Labor Laws in Rejecting Collective Bargaining Agreements:* NLRB v. Bildisco & Bildisco, 18 CREIGHTON L. REV. 191 (1984).

146. *See* 130 CONG. REC. H780-81 (daily ed. Feb. 22, 1984) (statement of Rep. Rodino) where Congressman Peter Rodino argued for legislation to replace the *Bildisco* balancing of equities approach with a standard permitting rejection of collective bargaining contracts only if the jobs covered by the collective bargaining agreement would otherwise be lost and any financial reorganization would fail; rejection under such a proposal would merit court approval. Congressman Rodino's response to the Supreme Court's opinion was immediate, but Congressional hearings to determine the desirability of making the law more restrictive concerning labor contract rejections dates back to the fall of 1983. *See* Gregory, *supra* note 4, at 560.

147. *See* H.R. 4908, 98th Cong., 2d Sess. § 3, 130 CONG. REC. H780-81 (Feb. 22, 1984).

148. H.R. 5174, 98th Cong., 2d Sess., § 1113, 130 CONG. REC. H721-03 (March 19, 1984).

149. H.R. 5174 was passed on March 21, 1984, without hearing and without a separate vote on the bill's labor provision. 130 CONG. REC. H1806-1854.

150. Lunnie, *Chapter 11 and Collective Bargaining*, 1984 LAB. L.J. 516, 520 (Aug. 1984) (emphasis in original). The author recounted how the pro-labor Rodino bill was rushed through House approval, an event he blamed partly on "misrepresentations" by newspapers and organized labor. *Id.* at 518. *See also* White, *supra* note 126, at 1203, where the author stated:

> It is unfortunate and ironic that the *Bildisco* decision became a pawn in the bankruptcy jurisdiction game. That Congress, which wasted two years in fruitless efforts to resolve the jurisdiction question, should find it appropriate to reverse the Supreme Court before the ink had dried on the decision is ironic. That it should act in hasty response to union pressure and to the need for continuing the bankruptcy court is unfortunate.

Id. at 1203.

151. Amendment No. 3083, and amendment to H.R. 5174, 130 CONG. REC. S6081-95 (May 21, 1984).

bor. Senator Packwood's proposal also required the debtor to fulfill certain requirements prior to rejection in order to prevent a debtor from acting unilaterally.[152] The Senate and House of Representatives eventually passed a modified version of the Packwood Amendment, enacting the Bankruptcy Amendments Act on June 29, 1984.[153] The President signed the new law on July 10, 1984.[154]

V. SECTION 1113

Section 1113 of the Bankruptcy Amendments and Federal Judgeship Act of 1984 responds to most aspects of the *Bildisco* decision, but raises a number of questions. Vague language in the section and a failure to address certain labor-bankruptcy conflicts relating to the rejection of collective bargaining agreements make the section unclear.[155] Congress enacted section 1113 to govern labor contract rejections in place of section 365(a).[156] On its face, the new section appears to decrease the likelihood that employers will be able to reject their collective bargaining agreements under the authority of a bankruptcy proceeding.

Section 1113(b)(1) and (2) specify the actions an employer *must* take after filing its bankruptcy petition, but before seeking court approval, to reject its collective bargaining agreement. Section 1113(b)(1) requires[157] the debtor to make a proposal to the union, "based on the most complete and reliable information,"[158] which provides for those "necessary modifications"[159] in the labor contract the debtor needs to reorganize. The debtor's proposal must treat creditors, the debtor, and all "affected parties" fairly and equitably.[160] Additionally, the debtor must offer the union any relevant information it needs to evaluate the debtor's proposal,[161] although the bank-

152. S. 3112, 98th Cong., 2d Sess., 130 CONG. REC. S6181-82 (May 22, 1984).

153. H.R. 5174, 98th Cong., 2d Sess. § 1113, 130 CONG. REC. H7488 (June 29, 1984).

154. *See* President's Statement on Signing H.R. 5174 Into Law, 20 Weekly Comp. Pres. Doc. 101-11 (July 10, 1984).

155. *See infra* notes 175-81 and accompanying text.

156. Section 1113(a) states:

> (a) The debtor-in-possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

The Bankruptcy Amendments, including § 1113, are prospective in application. 11 U.S.C. § 541(c) (1978).

157. 11 U.S.C. § 1113(b)(1) (1984) provides that the debtor "shall" follow the procedures contained in subsections (A) and (B).

158. 11 U.S.C. § 1113(b)(1)(A) (1984) requires the debtor to base its proposal on information "available at the time of such proposal." Whether the debtor is required to revise its proposal based on information gained after it submits the proposal to the union is unclear.

159. Members of Congress used the phrase "necessary modifications" to prevent debtors from discarding bothersome aspects of the labor contract having no bearing on the success of the company's reorganization. 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood).

160. The term "affected parties" refers particularly to non-union employees and is "not meant to include any party which might conceivably be affected in any minor way. . . ." 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Thurmond). By including a provision requiring fair and equitable treatment of all parties, the legislators wished to prevent employers from cutting costs at the expense of only union employees. *See* 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood).

161. 11 U.S.C. § 1113(b)(1)(B) (1984). Douglas Bordewieck and Vern Countryman suggested

ruptcy court may enter a protective order to prevent the disclosure of trade secrets.[162] Section 1113(b)(2) requires the debtor to meet with the union at reasonable times and bargain in good faith in an effort to reach an agreeable modification of the collective bargaining agreement.[163]

The new section precludes the bankruptcy court from allowing rejection of the labor contract unless the debtor delivers a proposal satisfying section 1113(b)(1)[164] and the union rejects the proposal "without good cause."[165] Moreover, the court must determine that the equities clearly balance in favor of rejection of the collective bargaining agreement.[166] Thus, the balancing of equities standard adopted by *Bildisco* is incorporated into the statute as the ultimate test for permissible rejection of collective bargaining agreements.[167]

Section 1113 also utilizes a rigid time schedule intended to enable the debtor to receive a relatively expeditious resolution of the labor contract's status. Section 1113(d)(1) provides that the bankruptcy court must hold a hearing on the debtor's application for rejection within fourteen days of the filing of the application.[168] The court may extend this time period for up to seven days or for any additional period agreed to by the bankruptcy trustee

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that such a provision could prevent the union from making an honest misappraisal of the employer's financial status. Bordewieck & Countryman, *supra* note 97, at 319. This requirement is not likely to please employers, who are required to offer financial information to the union during negotiations only when arguing an inability to pay. As one commentator stated, "[M]ost employers have become very skilled in saying 'no' to contract proposals without uttering the key phrases that would require them to share financial information with his workers." Oswald, *supra* note 39, at 524. Section 1113(b)(1)(B) apparently would not tolerate such employer reluctance. For a discussion of the employer's obligation to provide a variety of information to workers, see White & Meyer, *Employer Obligation to Provide Information*, 35 LAB. L.J. 643 (1984).

162. 11 U.S.C. § 1113(d)(3) (1984). Specifically, this subsection provides that a court may enter a protective order that is "necessary to prevent disclosure of information . . . where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged." *Id.*

163. 11 U.S.C. § 1113(b)(2) (1984). This subsection substantially parallels a portion of § 8(d) of the NLRA. *See supra* note 9. Both sections require the employer and union to meet "at reasonable times" and "confer in good faith."

164. 11 U.S.C. § 1113(c)(1) (1984). Subsection (c) does not require courts to find that the debtor satisfied subsection (b)(2) before the court can approve rejection. It appears, however, that the debtor must fulfill the requirements of subsection (b)(2) as a prerequisite to rejection because that subsection provides that the debtor "shall" meet with the union.

165. 11 U.S.C. § 1113(c)(2) (1984). Congress intended the requirement of good faith not only to protect the union from bad faith proposals, but also to ensure that the union does not unjustifiably reject a reasonable offer. *See* Note, *supra* note 38, at 958-59 n.77. Congress did not desire this standard "to import traditional labor law concepts into a bankruptcy forum or turn the Bankruptcy Courts into a version of the National Labor Relations Board." 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Thurmond).

166. 11 U.S.C. § 1113(c)(3) (1984). One legal commentator listed various factors for courts to weigh based on the *Bildisco* balancing of the equities test: "(1) The sacrifice made by nonunion workers and management; (2) the good faith of the parties in their negotiations to reach an accommodation; (3) the possibility of a strike and its impact on reorganization; (4) the impact of liquidation on creditors and stockholders; (5) the degree of hardship faced by each party and the qualitative difference between the types of hardship each may face; (6) the likelihood of success of the reorganization efforts; and (7) the economic dislocations which may be caused by liquidation." Saad, *supra* note 144, at 208; *see also supra* note 107.

167. *See supra* note 107 and accompanying text.

168. 11 U.S.C. § 1113(d)(1) (1984) also requires that all interested parties receive adequate notice at least ten days before the hearing and that they be given an opportunity to speak at the hearing.

and the labor representative.[169] The court then rules on the petition for rejection within thirty days of the hearing unless the parties agree to an extension, and the extension is merited by the interests of justice.[170] If the bankruptcy court does not rule within thirty days and an extension is not sought by the parties, the debtor may unilaterally modify or terminate the collective bargaining agreement until the court rules on the application.[171]

Congress recognized that in certain circumstances the debtor's dire financial situation necessitates a more immediate ruling on the rejection request. As a result, the legislature included section 1113(e). Under this section, the debtor may seek interim changes in the collective bargaining agreement prior to the court's ruling on the application for rejection of the labor contract.[172] So long as the collective bargaining agreement remains in effect, the court will grant interim changes only if the debtor proves the changes are "essential to the continuation of the debtor's business" or are needed "to avoid irreparable damage to the estate."[173] Under no circumstances may the debtor unilaterally reject the collective bargaining agreement without following the procedures set out in section 1113.[174]

Although section 1113 was enacted to correct the perceived inadequacies of *Bildisco*, it too did not escape sharp criticism. Many commentators complained that Congress failed to define certain crucial terms in the statute, such as "necessary modifications,"[175] "affected parties,"[176] and "without good cause."[177] The balancing of the equities test continued to be an object of scorn. One commentator wrote: "[T]here is only one 'equity' that the bankruptcy courts consider worth 'balancing': will rejection of the labor contract aid the reorganization of the debtor? If the answer to that question is 'yes,' it is almost certain that the court will find that the other equities

169. The court may extend the time period of the hearing date only if required by the circumstances of the case and in the interests of justice. 11 U.S.C. § 1113(d)(1) (1984).

170. 11 U.S.C. § 1113(d)(2) (1984).

171. *Id.* This provision was not contained in any prior congressional bills. *See* White, *supra* note 126, at 1196. One commentator noted that there is precedent under 11 U.S.C. § 105(a) for the bankruptcy court to extend the 30 day deadline. Section 105(a), which provides that relief from the automatic stay is granted automatically if the court does not rule within 30 days of the creditor's motion to lift the stay, has been interpreted to allow the court the power to extend that deadline or to reinstate the stay. *See* Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 332 (1984).

172. 11 U.S.C. § 1113(e) (1984) specifically provides that " [t]he implementation of such interim changes shall not render the application for rejection moot."

173. 11 U.S.C. § 1113(e) (1984). This requirement closely resembles the *REA Express* "last resort" test. *REA Express*, 523 F.2d at 169. *See supra* note 68 and accompanying text.

174. 11 U.S.C. § 1113(f) (1984). Thus, the most controversial aspect of *Bildisco* was flatly overruled.

175. *See* Saad, *supra* note 144, at 216; Kaye, *Compromise Bankruptcy Legislation on Rejection of Labor Agreements*, LAB. EMPL. L. NEWSLETTER 7, 8 (Aug. 1984); *see also* note 159 and accompanying text.

176. *See* Saad, *supra* note 144, at 216; Kaye, *supra* note 175, at 8; *see also supra* note 160 and accompanying text.

177. *See* White, *supra* note 126, at 1197-98 ("Is the union's refusal 'with good cause' if nonunionized workers of competing businesses are accepting terms similar to those offered? Are all refusals 'for a good cause' if the management proposal was too niggardly? The legislation provides no answers to these questions."). *Id.* at 1198. Another commentator questioned whether "the draftsmanship and procedural requirements imposed may make its application difficult unless the courts construe its provisions pragmatically." Miller, *supra* note 145, at 5-21. *See also supra* note 146 and accompanying text.

balance in favor of rejection."[178] Professor Countryman asserted that the balancing of the equities test "directs the Bankruptcy Court to balance apples, oranges, and prunes. It gives no meaningful guidance to that court and provides no standard by which its action can be reviewed."[179] Professor White, ever skeptical of any test for rejection because of his view that bankruptcy courts are hopelessly biased in favor of debtors, remained pessimistic after the passage of section 1113: "[T]he most certain consequence of the new enactment is that the already loose jointed law will be made even more so. We have turned the bankruptcy judges loose in the garden to do what they please . . . courts will continue routinely to reject collective bargaining agreements."[180] Therefore, Professor White concluded, "If my analysis is correct, namely that the bankruptcy courts are skeptical of union claims and, deep down, believe that unionized employees should not be treated better than others, the new law will have no significant impact."[181]

VI. POST-*BILDISCO* CASES

Much of the criticism of *Bildisco* and section 1113 consisted of bleak projections for organized labor, often based on nothing more than speculation regarding how bankruptcy courts would interpret the various rejection requirements.[182] The case law applying *Bildisco*, however, reveals that labor

178. Gibson, *Chapter 11 is a Two-Edged Sword: Union Options in Corporate Chapter 11 Proceedings*, 35 LAB. L.J. 624, 629 (1984).

179. Countryman, *supra* note 39, at 168 (referring to the *Bildisco* balancing of the equities test).

180. White, *supra* note 126, at 1198. Professor White also suggested that the union might attempt to circumvent the timetable set up in § 1113 by seeking a stay if the bankruptcy court permits rejection, provided rejection is considered an appealable final order. *Id.* at 1199.

181. *Id.* at 1200. *Accord* Note, *supra* note 38, at 990 (under the balancing of the equities standard, "it appears that most collective bargaining agreements will be rejected. The majority of debtors should be able to prove that the contract burdens the estate simply by showing a high union wage scale and a consequent deprivation of assets.").

Section 1113 is also criticized for neglecting to guide courts asked to consider certain ramifications of labor contract rejection. For example, in light of the new law, bankruptcy courts will undoubtedly face such issues as whether the employer's contractual duty to arbitrate disputes survives the filing of a Chapter 11 petition and eventual rejection of the collective bargaining agreement.

Most commentators argue that the employer's duty to arbitrate remains after the filing of a petition and even after court authorized rejection. *See generally* Berger, *The Collective Bargaining Agreement in Bankruptcy: Does the Duty to Arbitrate Survive?*, 35 LAB. L.J. 685, 691 (1984) (duty to arbitrate definitely survives petition, should survive rejection); *see also* Sweig & Munitz, *Executory Contracts and Unexpired Leases*, Fifth Annual Bankruptcy Litigation Institute—The 1984 Bankruptcy Amendments and Their Impact 48-49 (1984) (duty to arbitrate survives rejection although broad language of *Bildisco* suggests no part of contract retains vitality); Hardin, *supra* note 140, at 82, 83, where the author states:

> It is not inevitable that the filing of a petition for reorganization demands the ouster of the arbitrator and the submission of *all* claims to the bankruptcy court. On the contrary, we may be skeptical that a tribunal created and equipped to adjust commercial conflicts can adequately adjust disputes that flow from nonperformance of the labor agreement.
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> How are the bankruptcy courts to estimate the value, for example, of a contractual right to funeral leave, or to assignment by seniority to a preferred day or evening shift, when that right has been lost by a worker with strong family ties.

(emphasis in original). Litigants also undoubtedly will seek to determine whether NLRB proceedings are subject to the automatic stay provision of the Bankruptcy Code.

See Sweig & Munitz, *supra*, at 50-53, for a summary of relevant case law. The automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362, provides that government proceedings to enforce police or regulatory powers are not subject to the stay. 11 U.S.C. § 362(b)(4) (1979).

182. *See supra* notes 123-42 and 178-81 and accompanying text. Although a few commentators

sympathizers, some legal commentators, and members of Congress overreacted to the perceived threat of the *Bildisco* decision. A close examination of reported cases reveals that bankruptcy courts interpreting *Bildisco* neither blindly approved the rejection of collective bargaining agreements,[183] nor ignored the policies of the NLRA.[184] Bankruptcy judges, in fact, took painstaking measures to establish the burdensomeness of the labor contract, to balance the interests of the union employees with the debtor's interest in reorganization and to analyze the reasonableness of the debtor's efforts to negotiate voluntary modifications in the collective bargaining agreement.[185] A few courts even supplemented the *Bildisco* requirements with other prerequisites to rejection.[186]

The debtor in *In re C. & W. Mining Co., Inc.*[187] operated a coal mine and owned real estate.[188] The bankruptcy court denied the debtor's request to reject its labor contract after the court's balancing of the equities favored the union workers. The court determined that when balancing the equities, the good or bad faith of the parties is a highly persuasive factor, although this factor was not mentioned in *Bildisco*.[189] The court found that the union's good faith was demonstrated by its offer to reduce wages, to waive certain benefits, and to assist in procuring orders for coal.[190] The debtor, conversely, appeared to hold anti-union sentiments.[191] In particular, the debtor's bad faith was evidenced by its forming a competing non-union coal mine and transferring funds and some of the best equipment from C. & W. Mining Co. to the new firm.[192] The court stated that these bad faith acts could jeopardize a successful reorganization by diminishing employee motivation and good will.[193] Thus, while recognizing denial of rejection might increase the possibility of liquidation, the bankruptcy court ruled that the debtor must remain bound to perform its obligations under the collective bargaining agreement and refused to consider the merits of unfair labor

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partly based their concerns on how bankruptcy courts treated labor interests before *Bildisco*, none analyzed bankruptcy cases interpreting *Bildisco* or § 1113.

183. *See, e.g., In re* C. & W. Mining Co., Inc., 38 Bankr. 496 (Bankr. N.D. Ohio 1984), discussed *infra* notes 187-194 and accompanying text.

184. *See, e.g.*, Briggs Transp. Co. v. Int'l Brotherhood of Teamsters, 40 Bankr. 972 (Bankr. D. Minn.), *aff'd* 739 F.2d 341 (8th Cir.), *cert. denied*, 105 S. Ct. 295 (1984), discussed *infra* notes 213-215 and accompanying text.

185. *See, e.g., In re* Pesce Baking Co., Inc., 43 Bankr. 949 (Bankr. N.D. Ohio 1984), discussed *infra* notes 195-204 and accompanying text.

186. *See, e.g., In re* Briggs Transp. Co., 39 Bankr. 343 (Bankr. D. Minn. 1984), discussed *infra* notes 235-243 and accompanying text.

187. 38 Bankr. 496 (Bankr. N.D. Ohio 1984).

188. *Id.* at 497-98. The debtor belonged to a multi-employer bargaining unit.

189. *Id.* at 503. In fact, the court stated that the good or bad faith of the parties was arguably irrelevant under *Bildisco*. *Id.*

190. *Id.* The court stated that "[t]he Union appreciates the financial hardship of the debtor and is willing to sacrifice." *Id.*

191. *Id.* The court found that the debtor had previously threatened to bust the union by filing for bankruptcy under Chapter 11. *Id.*

192. *Id.* The court, stating that "our free enterprise system encourages the formation of new enterprises," was not as disturbed about the existence of the new mine as it was about the transfer of funds and equipment. *Id.*

193. *Id.* at 502-03. In particular, the court noted that reorganization might be threatened if production declined or the employees went on strike because the court approved rejection of the labor contract. *Id.* at 503.

practice charges pending before other tribunals.[194]

The same bankruptcy judge applied the *Bildisco* standard similarly in *In re Pesce Baking Co., Inc.*[195] to deny rejection of two labor contracts.[196] The court noted that one might assume that all collective bargaining agreements burden an estate but maintained that this assumption was too simplistic. Rather, the *Pesce* court found that collective bargaining agreement provisions, such as union agreements not to strike, impose benefits and burdens on both parties.[197] The court held that the contract entered into between the debtor, which operated a family-owned Italian bakery, and the union was an example of a contract that did not burden the estate. Evidence revealed the workers were probably underpaid even though they received excellent health and welfare benefits.[198] The debtor, however, proposed eliminating the health and welfare benefits and the employees' pension plans to save $35,000. The court noted that the benefits portion of the collective bargaining agreement burdened the estate, but determined that the labor contract as a whole was not burdensome because any savings realized by rejection would be minimal when compared to gross sales.[199] Although finding that the debtor did not meet *Bildisco*'s first requirement, the court nevertheless proceeded to balance the equities and concluded that they favored retention of the collective bargaining agreement. The court, as it did in *C. & W. Mining*, listed instances of the employer's bad faith: the debtor replaced union employees with non-union workers,[200] allowed the owner's son to remain in the union to become eligible for union benefits even though prohibited by the NLRA because he was a general manager,[201] and failed to remit union dues.[202] The judge found that the union, on the other hand, acted in good faith by acceding to a number of the employer's proposals, including a wage freeze.[203] Finally, the court concluded that rejection could cause the employees to suffer a disproportionate loss compared to the minimal benefits gained by the debtor and the creditors, especially since it could lead to liqui-

194. *Id.* at 504. The bankruptcy court specifically refused to consider the merits of unfair labor practice charges pending before the district court and the NLRB stating, "[t]he court has tried to stay within the field of its expertise and its decision is grounded solely in bankruptcy law." *Id. Cf.* Hardin, *supra* note 140, at 82, 83 (bankruptcy judges might be unable to weigh labor-related matters; hence, arbitration should survive labor contract rejection).

195. 43 Bankr. 949 (Bankr. N.D. Ohio 1984).

196. The court held that a third contract had expired and was no longer executory. *Id.* at 962. *See infra* note 225 and accompanying text.

197. *Presce Baking*, 43 Bankr. at 958.

198. *Id.* The employees had agreed to a wage freeze.

199. *Id.* at 959. The savings would be less than four percent of gross sales.

200. *Id.* at 960.

201. *Id.* Supervisors are prohibited from participating in union activities. *See* NLRB v. Bell Aerospace Co. Div. of Textron, Inc., 416 U.S. 267 (1974). The term "supervisors" is defined in 29 U.S.C. § 152(11) (1982):

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

202. *Pesce Baking*, 43 Bankr. at 960.

203. *Id.* The union also agreed to a reduction in holidays and vacation days. *Id.*

dation by destroying employee morale.[204]

The bankruptcy court in *Matter of Fitzgerel*[205] focused on the debtor's failure to produce evidence showing the labor contract burdened the estate. The only testimony presented was the conclusory statement by the debtor indicating his business was declining because his competitors were able to hire non-unionized workers at lower wages.[206] The court found that *Bildisco* required "more particularization" about how the collective bargaining agreement burdens the estate than just the debtor's unsubstantiated allegations.[207] Furthermore, the court held that rejection was denied because the debtor failed to prove that he used reasonable efforts to negotiate a modification of the labor contract with the union.[208]

Rulings by bankruptcy courts favoring union workers are not confined to the denial of petitions to reject collective bargaining agreements. In *In re The Rath Packing Co.*,[209] the court refused to enjoin the union and the NLRB from processing unfair labor practice charges filed against the debtor.[210] The judge ruled that the Norris-LaGuardia Act prohibited federal courts, including bankruptcy courts, from enjoining any actions "involving or growing out of a labor dispute."[211] The court held that this proscription included the NLRB proceeding.[212]

A short time later, in *Briggs Transportation Co. v. International Brotherhood of Teamsters*,[213] the debtor argued that *Bildisco* authorized the court to balance the competing policies of the Bankruptcy Code and the Norris-LaGuardia Act when deciding whether to grant an injunction against post-rejection picketing.[214] Both the district court and the court of appeals used the same basis and refused to enjoin union picketing that occurred after the bankruptcy court approved rejection of the collective bargaining agreement. Both courts agreed that the Norris-LaGuardia Act's anti-injunction provi-

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204. *Id.* at 961. The court noted that the debtor had not sought concessions elsewhere, had continued to pay the owner's country club dues, and had hired four non-union employees, including the owner's son-in-law, since it filed the bankruptcy petition. *Id.* at 960.

205. 44 Bankr. 628 (Bankr. W.D. Mo. 1984). This case was filed under Chapter 13 of the Bankruptcy Code. Chapter 13 is available to individual debtors (including sole proprietorships) with regular income and fixed debts of no more than $100,000 in unsecured claims and $350,000 in secured claims.

206. *Id.* at 629. The debtor also admitted that he raised his salary by $6,000 to $48,000 since filing the petition and that his wife served as a bookkeeper at an annual salary of $15,600. *Id.* at 630.

207. *Id.* at 631.

208. *Id.* at 632.

209. 38 Bankr. 552 (Bankr. N.D. Iowa 1984).

210. The unfair labor practice charge arose when the debtor negotiated a wage deferral with the local union without inviting the international union to participate. *Id.* at 554.

211. *Id.* at 559, *citing* 29 U.S.C. § 101 (1932).

212. *Id.* (citing 29 U.S.C. § 113(c) (1932), defining "labor dispute.") The term "labor dispute" includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee. The bankruptcy court also held that 11 U.S.C. § 362(b)(4) exempted the NLRB hearing from the Bankruptcy Code's automatic stay provision. *Id.* at 560. *See also supra* note 181.

213. 40 Bankr. 972 (Bankr. D. Minn.), *aff'd*, 739 F.2d 341 (8th Cir.), *cert. denied*, 105 S. Ct. 295 (1984).

214. 40 Bankr. at 974. The debtor specifically relied on FED. R. CIV. P. 64(e), which states in part that "[t]hese rules do not modify any statute of the United States relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee. . . ."

sions take precedence over any policies of the Bankruptcy Code.[215]

Organized labor interests prevail in other areas of legal dispute since *Bildisco*. For example, bankruptcy courts uniformly rule that a debtor cannot reject a labor contract entered into after it files a bankruptcy petition.[216] The court in *In re IML Freight, Inc.*[217] refused to allow the debtor to reject a post-petition collective bargaining agreement for three reasons: 1) section 365, under which the debtor sought to reject the labor contract, applies only to executory contracts of the *debtor*, not the debtor-in-possession or trustee;[218] 2) section 365, by requiring court approval for the making or breaking of such contracts, impinges on the authority of the debtor-in-possession or trustee to enter into contracts in the ordinary course of business under section 363(c)(1);[219] and 3) section 365 discourages creditors and others from entering into contracts with debtors-in-possession or trustees because section 365(g) might prevent claims for breach of contract from being considered administrative expenses.[220]

In *In re DeLuca Distributing Co.*,[221] the debtor attempted to repudiate a post-petition collective bargaining agreement by arguing that it lacked the power to enter into such a contract.[222] The debtor claimed that it needed court approval under section 363(c)(1) because the labor contract was not entered into in the ordinary course of business.[223] The bankruptcy judge rejected that argument in part and relied on general labor law precepts: "Given our national labor policy of encouraging collective bargaining agreements and avoiding labor strife . . . , the court finds that the reasonable expectation of creditors is that the debtor will enter into collective bargaining agreements."[224]

Bankruptcy courts also have dismissed debtors' arguments that expired collective bargaining agreements constitute executory contracts.[225] Debtors

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215. *Id.; see also* 739 F.2d at 344.

216. *In re* IML Freight, Inc., 37 Bankr. 556 (Bankr. D. Utah 1984); *In re* DeLuca Distrib. Co., 38 Bankr. 588 (Bankr. N.D. Ohio 1984); *In re* Schuld Mfg. Co., 43 Bankr. 535 (Bankr. W.D. Wis. 1984).

217. 37 Bankr. 556 (Bankr. D. Utah 1984).

218. *Id.* at 558-59.

219. *Id.* at 559. The court found such court approval "a time-consuming waste of resources both of the estate and of the court system." *Id.*

220. *Id.* Debts incurred prior to the filing of a bankruptcy petition are generally classified as unsecured claims and have a low priority. *See* 11 U.S.C. § 365(g)(1) and § 502(g) (1982). Debts incurred after the debtor files the petition are often classified as "administrative expenses" and receive high priority. 11 U.S.C. § 507(a)(1) (1982). Priority determines how the debtor must make payments. *See* R. GINSBERG, BANKRUPTCY, ¶ 12,351 *et seq.* (1985).

221. 38 Bankr. 588 (Bankr. N.D. Ohio 1984).

222. *Id.* at 590.

223. *Id.* at 592.

> If the business of the debtor is authorized to be operated under section 721, 1108, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

Id. at 591 (citing 11 U.S.C. § 363(c)(1) (1982)).

224. *Id.* at 594 (citations omitted). The bankruptcy court also recognized NLRB rulings that a trustee does not need bankruptcy court approval to enter into a labor contract as part of the ordinary course of business. *Id.* at 592 (citing Sealift Maritime, Inc., 265 N.L.R.B. 1219, 112 L.R.R.M. (BNA) 1017 (1982)).

225. *In re* Total Transp. Serv., Inc., 37 Bankr. 904 (Bankr. S.D. Ohio 1984); *In re* Pesce Baking

assert this argument hoping for court approval to reject expired labor contracts. Any claim arising thereunder is then classified as a pre-petition debt, rather than an administrative claim.[226] Bankruptcy judges reject this contention, holding that the labor contract continues to be effective on the date the court rules on its rejection or else it is not executory within the meaning of section 365(a).[227] Nevertheless, the court in *In re Total Transportation Service, Inc.*[228] stated that even if an expired labor contract was considered executory, the court would deny rejection after applying the *Bildisco* standard:

> Because we are not viewing the equities from the point of view of what would be most beneficial to a successful rehabilitation since operations of [the debtor] have ceased, it is the policies of the Labor Act which ought in the present case to have predominance. Rejection of that agreement, then, should not be permitted for it will serve no rehabilitative end for the employer contracting party.[229]

Even in cases that applied *Bildisco* and allowed rejection, the bankruptcy courts carefully scrutinized the debtor's claims. In *In re Bloss Glass Co., Inc.*,[230] the court found not only that collective bargaining agreements burdened the estate, but also that liquidation was likely to occur absent rejection.[231] The debtor, a small glass contractor, proved it realized little, if any, profits because the debtor's high labor costs exceeded those of its competitors.[232] Additionally, the debtor attempted to renegotiate its business lease and eliminate one of three management positions to reduce costs.[233] Therefore, after analyzing the debtor's adverse financial situation and failed attempts to negotiate a voluntary modification of the labor contract, the court approved rejection.[234]

In *In re Briggs Transportation Co.*,[235] after carefully analyzing the burdens imposed by the contract and the likely effect that continued enforcement of the contract would compel liquidation, a bankruptcy court concluded that the labor contract was properly repudiated. The court found the labor contract burdensome because labor costs accounted for seventy percent of the debtor's gross revenues.[236] Most trucking companies similar to the debtor's strived for a figure of fifty-four percent.[237] The judge then balanced the equities and found that liquidation, a likelihood absent rejec-

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Co., Inc., 43 Bankr. 949 (Bankr. N.D. Ohio 1984). *See also* Gloria Mfg. Co. v. Int'l Ladies Garment Workers' Union, 734 F.2d 1020 (4th Cir. 1984).

226. *See Total Transp. Serv.*, 37 Bankr. at 905. For a discussion of the different treatment given pre-petition and post-petition claims, see *supra* note 220.

227. *See supra* note 225.

228. 37 Bankr. 904 (Bankr. S.D. Ohio 1984).

229. *Id.* at 907.

230. 39 Bankr. 694 (Bankr. M.D. Pa. 1984).

231. *Id.* at 695-96. The debtor probably even satisfied the *REA Express* "last resort" test. *REA Express*, 523 F.2d at 169. *See supra* note 68 and accompanying text.

232. *Id.* at 695. The debtor paid a base wage of about $14.00 per hour plus about $1.50 per hour in benefits. *Id.*

233. *Id.*

234. *Id.* at 695-96.

235. 39 Bankr. 343 (Bankr. D. Minn. 1984).

236. *Id.* at 351, 355.

237. *Id.* at 351.

tion, would cause almost all employees to lose their jobs immediately.[238] The court found that liquidation would have particularly harsh consequences on the union employees for three reasons: 1) employees would probably be unable to find similar work elsewhere;[239] 2) employees and their families owned seventy-five percent of company stock that would be worthless in liquidation;[240] and 3) employees and their union pension and health funds had substantial pre-petition claims that would be treated as general unsecured claims in liquidation.[241] In addition to the three-tiered test in *Bildisco*, the bankruptcy court added a fourth requirement that rejection must serve the Chapter 11 policy of encouraging successful reorganizations.[242] After finding that rejection increased the probability of reorganization and that the debtor made reasonable efforts to negotiate voluntary modifications in the labor contract, the court approved rejection.[243]

VII. POST-SECTION 1113 CASES

The emerging case law involving the application of section 1113 demonstrates that bankruptcy courts continue to balance fairly the policies of federal labor and bankruptcy laws. Moreover, these cases indicate that courts will interpret various provisions of the new law in a non-biased manner. For example, in *In re American Provision Co.*,[244] the court construed section 1113 to require nine conditions before a court may approve rejection of a collective bargaining agreement:

1) The debtor in possession must make a proposal to the union to modify the collective bargaining agreement;
2) The proposal must be based on the most complete and reliable information available at the time of the proposal;
3) The proposed modifications must be necessary to permit the reorganization of the debtor;
4) The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably;
5) The debtor must provide to the union such relevant information as is necessary to evaluate the proposal;
6) Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union;
7) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement;

238. *Id.* The court cited figures showing that in April, 1983, an estimated 28.58% to 35.74% of Teamsters Trucking Company employees were laid off. *Id.*
239. *Id. See also supra* note 238.
240. *Id.* Employees previously purchased company stock to help their employer remain in operation. *Id.* at 356.
241. *Id.* at 351. *See also supra* note 220.
242. *Id.* at 357.
243. *Id.* at 358-59.
244. 44 Bankr. 907 (Bankr. D. Minn. 1984).

8) The union must have refused to accept the proposal without good cause; [and]
9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.[245]

In *American Provision*, the labor contract covered only two workers out of a total work force of seventeen.[246] The debtor offered the union a proposal substantially reducing wages and insurance benefits at a savings of $1,185 each month, about two percent of the debtor's monthly operating expenses.[247] The court held that this amount of savings was so insubstantial that it could not be considered necessary to the debtor's reorganization as required by section 1113(b)(1)(A).[248] Additionally, the court found that the debtor failed to confer in good faith with the union. The two parties met only once even though the union was willing to continue discussions.[249] Thus, the debtor did not fulfill the requirements of section 1113(b)(2).[250] Moreover, the bankruptcy judge sternly criticized the debtor for failing to continue union negotiations.[251]

The facts in *In re Fiber Glass Industries, Inc.*[252] favored rejection more than the facts in *American Provision*; nevertheless, the *Fiber Glass* court held that the debtors were not entitled to reject their collective bargaining agreement. The debtors, four related companies involved in glass manufacturing, entered into a court-approved agreement to transfer temporary ownership to an individual with experience in reviving financially troubled companies.[253] Final sale was subject to various conditions, including the modification of the collective bargaining agreement.[254]

The prospective purchaser calculated that the companies faced losses in the current fiscal year of $1.5 million.[255] In response, he reduced the non-union office and factory supervisory staffs by fifty percent.[256] Additionally,

245. *Id.* at 909. The court analyzed which party has the burden of production regarding each element. The court found the debtor carries the burden of production for elements 1, 2, 3, 4, 6 and 9. Elements 5, 7 and 8 initially burden the debtor but that burden can be shifted to the union. Concerning element 5, if the debtor proves it provided information to the union, the union must prove the information was irrelevant. *Accord In re* Allied Delivery System Co., 49 Bankr. 700 (Bankr. N.D. Ohio 1985). As to element 7, if the debtor proves it met with the union, the union must prove the debtor did not confer in good faith. As to element 8, if the debtor shows the union refused to accept its proposal, the union must prove it did so with good cause. If the union presents evidence satisfying these three elements, the ultimate burden of persuasion rests with the debtor, as it does for the other five elements. *American Provision*, 44 Bankr. at 909-10. The court remarked that § 1113 was "not a masterpiece of draftsmanship." *Id.* at 909.

246. *Id.* at 910.

247. *Id.*

248. *Id.* The court also noted that the parties could attempt to resolve their differences when the collective bargaining agreement expired in eight months. *Id.* at 910-11. For a discussion of § 1113(b)(1)(A), see *supra* note 158 and accompanying text.

249. *American Provision*, 44 Bankr. at 911. *See also In re* S.A. Mechanical, Inc., 51 Bankr. 130 (Bankr. D. Ariz. 1985) (debtor's "take it or leave it" offer did not constitute good faith bargaining).

250. For a discussion of § 1113(b)(2), see *supra* note 163 and accompanying text.

251. See *American Provision*, 44 Bankr. at 911, where the judge remarked: "Frankly, I am left with the impression that the debtor's attempts to confer were perfunctory only and meant only to literally meet the requirements of the statute."

252. 49 Bankr. 202 (Bankr. N.D. N.Y. 1985).

253. *Id.* at 204.

254. *Id.*

255. *Id.*

256. *Id.* at 205. The debtors employed 90 non-unionized workers. *Id.* at 204.

he calculated that the companies needed savings of $130,000 in the fiscal year or savings of ninety-nine cents of the hourly wage of each of their sixty union employees.[257] When the union would only agree to twenty-two percent of the reductions sought, the debtors filed an application to reject the collective bargaining agreement in its entirety.[258]

The bankruptcy court criticized the debtors for proposing modifications without formulating a general scheme to advance reorganization.[259] The court stated: "Merely demonstrating a resultant savings to the debtor to justify a modification does not appear to meet the statutory standard without the additional showing that but for the particular savings reorganization cannot be achieved."[260] The court ruled that the debtors failed to provide the union with all relevant information necessary to evaluate the proposed modifications as required by section 1113(b)(1)(b).[261] In particular, the court referred to the debtors' nondisclosure of their intention to lay off one-third of the union work force.[262]

The court rejected the debtors' contention that the attitude of non-union workers would be adversely affected if the debtors required that only non-union workers make concessions.[263] The court pointed out that non-union workers run the risk of changed employment conditions because they work without the protection of a collective bargaining agreement.[264] The court also rejected the debtors' argument that the court must permit rejection to enable the debtors to consummate the sale of their businesses.[265] The court held that it could not allow rejection of the labor contract where the debtor failed to satisfy section 1113.[266]

Other courts have approached the rejection issue by applying the nine-point test established in *American Provision*.[267] For example, the bankruptcy court in *In re K & B Mounting, Inc.*[268] did not need to engage in a complete discussion of all nine requirements because it found that the debtor failed to supply the union with the most complete and reliable information necessary to evaluate the debtor's proposal pursuant to section 1113(b)(1)(A). The court elaborated on this requirement: "The union should be supplied with detailed projections and recommendations, perhaps made by a management consultant, preferably one who is independent of the interested parties. The debtor should present full and detailed disclosures of its difficulties and its

257. *Id.* at 205. The average employee cost under the labor contract consisted of $6.03/hour in wages and $3.14/hour in fringe benefits. *Id.* The court held that the allegedly necessary savings calculation was unreliable, stating that "the testimony reflects that [the prospective purchaser] first predetermined what concessions he wanted from the Union." *Id.* at 207.

258. *Id.* at 206.

259. *Id.*

260. *Id.* The court stated that the debtor failed to demonstrate how the $130,000 savings fit into an overall reorganization plan. *Id.*

261. *Id.* at 207.

262. *Id.*

263. *Id.* at 206-07.

264. *Id.* at 207.

265. *Id.*

266. *Id.*

267. *See supra* text accompanying note 245. *See also In re* Kentucky Truck Sales, Inc., 52 Bankr. 797 (Bankr. W.D. Ky. 1985) (applying the *American Provision* nine-point test).

268. 50 Bankr. 460 (Bankr. N.D. Ind. 1985).

proposed short-run and long-run solutions."[269] The court also stated that the debtor must disclose the potential consequences of liquidation.[270] Because the debtor failed to satisfy these requirements, the court denied the rejection motion.

The bankruptcy courts in *In re Carey Transportation, Inc.*[271] and *In re Wheeling-Pittsburgh Steel Corp.*[272] also utilized the *American Provision* framework. In both cases, the debtors' drastically declining incomes, high labor costs, and compliance with section 1113 persuaded the courts to grant rejection. In *Carey*, the debtor operated a bus service between New York City, John F. Kennedy International Airport, and LaGuardia Airport. The debtor lost $2,500,000 in the past fiscal year and projected losses of $746,000 in the current fiscal term.[273] Company officials testified that labor costs for Carey Transportation exceeded the industry average by sixty percent.[274]

In *Wheeling-Pittsburgh*, the debtor employed about 8,500 union workers at the country's seventh largest steel manufacturing corporation.[275] The steel industry depression had exacerbated the debtor's financial woes to a point where the company owed $125 million to unsecured creditors, $547 million to secured creditors and between $121 million and $363 million to pension funds.[276] The debtor's labor costs, including fringe benefits and payroll deductions, amounted to $21.40 per hour per union worker.[277]

Both courts methodically analyzed and compared the debtors' acts toward compliance with the section 1113 requirements. First, the courts found that the debtors made proposals to the unions to modify the collective bargaining agreements prior to seeking rejection. Second, the courts held that the debtors based those proposals on the most complete and reliable information available. In *Carey*, for instance, the court rejected the union's argument that the requirements were not satisfied because the debtor failed to adopt one of the union's counter-proposals.[278]

Third, both courts held that the proposed modifications were necessary for the debtors' reorganizations. The *Carey* court stated that this requirement must be analyzed on a case-by-case basis because the court would not speculate "what proportion of costs to revenues would be *de minimis* and thus not necessary to permit a reorganization."[279] The *Wheeling-Pittsburgh* court adopted a different approach. It rejected the union's suggestion that looking at whether the debtor could continue to pay the prevailing wage rate

269. *Id.* at 467. The court pointed out that § 1113 empowers the court to grant a protective order if needed. *Id.*

270. *Id.* Additionally, the court ruled that the debtor failed to satisfy § 1113(c)(2) by proposing a modification failing to treat creditors and all affected parties fairly. The court found that the debtor's only major debt was a commitment to pay employee benefits under the collective bargaining agreement. As such, it appeared to the court that only the employees would be forced to make concessions. *Id.* at 468.

271. 50 Bankr. 203 (Bankr. S.D.N.Y. 1985).

272. 50 Bankr. 969 (Bankr. W.D. Pa.), *aff'd*, 52 Bankr. 997 (W.D. Pa. 1985).

273. *Carey*, 50 Bankr. at 208.

274. *Id.* at 213.

275. *Wheeling-Pittsburgh*, 50 Bankr. at 973.

276. *Id.* at 979.

277. *Id.* at 973.

278. *Carey*, 50 Bankr. at 211. *See also infra* note 318.

279. *Carey*, 50 Bankr. at 209. The court stated: "There can be no pat formula." *Id.*

during the contract term and still cover all operational expenses determined whether this requirement was fulfilled.[280] Instead, the court stated that section 1113 required it to consider whether the debtor's proposed modification was necessary for reorganization.[281]

Fourth, each court ruled that the proposed modifications assured fair and equitable treatment of all creditors, the debtor, and all other affected parties. In *Carey*, the court noted that non-union personnel had not received pay cuts, but their numbers had been reduced by sixty five.[282] Moreover, the court noted that the debtor renegotiated several agreements with creditors.[283] In *Wheeling-Pittsburgh*, the court found fair and equitable treatment since creditors faced losses of fifty percent or $250 million.[284] In addition, non-union employees were underpaid compared to their industry counterparts and had not received a pay increase since 1981.[285]

Fifth, both courts found the debtors provided the unions with the relevant information necessary to evaluate their proposals. The *Wheeling-Pittsburgh* court found this requirement partly satisfied by relevant information provided by the debtor to the union before the debtor filed its Chapter 11 petition.[286] Sixth, the courts held that the debtors and unions had met on numerous occasions between the making of the proposals and the time of the labor contract rejection hearings.

Seventh, the courts stated the debtors had conferred in good faith at these meetings to reach mutually satisfactory contract modifications.[287] Eighth, each court ruled that the unions refused to accept the proposed modifications without good cause. The *Wheeling-Pittsburgh* court stated the obvious conclusion that once a court finds the debtor has fulfilled the first seven requirements of section 1113, it is "constrained by logic" to hold the union rejected the debtor's proposal without good cause.[288]

Ninth, both courts found that the equities clearly favored rejection of the collective bargaining agreements. The *Carey* court acknowledged that the union should shoulder a substantial burden since union members comprised two-thirds of the debtor's work force.[289] The *Wheeling-Pittsburgh* court, on the other hand, referred to the reorganization goal of Chapter

280. *Wheeling-Pittsburgh*, 50 Bankr. at 978-79.

281. *Id.* at 979. The court stated that the union's suggested approach ignored the debtor's need to possess enough cash on hand to meet current operating expenses *after* the labor contract expired. *Id.* at 978. *See also In re* Valley Kitchens, Inc., 52 Bankr. 493 (Bankr. S.D. 1985) (debtor's proposal must contain only modifications needed to reorganize).

282. *Carey*, 50 Bankr. at 209-10. The court also mentioned that the union failed to present evidence that the debtor's administrative expenses were excessive. *Id.* at 210.

283. *Id.*

284. *Wheeling-Pittsburgh*, 50 Bankr. at 980.

285. *Id.* The court also placed weight on the fact that the debtor's proposed salary modification failed to provide for downward adjustment if conditions worsened. *Id.*

286. *Id.* at 981-82. The court also held that three weeks was sufficient time to evaluate the debtor's proposal. *Id.* at 982.

287. The *Wheeling-Pittsburgh* court held that a debtor fulfills this requirement by showing that it made "reasonable efforts to negotiate a voluntary modification, and those efforts were not likely to produce a prompt and satisfactory solution." 50 Bankr. at 976. The court adopted this test from *Bildisco*, 104 S. Ct. at 1196-97. 50 Bankr. at 976.

288. *Id.* at 983.

289. *Carey*, 50 Bankr. at 213.

11[290] and to the effect of liquidation on employees if it denied rejection[291] as reasons to balance the equities in favor of the debtor.

Thus, in both *Carey* and *Wheeling-Pittsburgh*, the bankruptcy courts granted the debtors' relief only where reorganization was seriously imperiled by the continued effect of the collective bargaining agreements. A similar situation was presented to the bankruptcy court in *In re Allied Delivery System Co.*[292] The debtor in *Allied* paid between 87% and 100% of its gross revenues for union labor costs, including pension and health and welfare benefits.[293] The debtor's financial burden was further compounded by a $287,000 loss in 1984 and an expected twenty percent revenue reduction in 1985.[294]

The debtor sought to reverse its losses by modifying the collective bargaining agreement to reduce union members' wages by twenty percent.[295] The bankruptcy court, after analyzing the debtor's labor costs and bleak financial outlook, found such a contract modification necessary to reorganization.[296] The court also found that the modification was fair and equitable even though it did not impose wage reductions for non-union employees which the union had requested.[297] The court ruled that although section 1113(b)(1)(A) required that the debtor's proposal treat all creditors, the debtor, and all other affected parties fairly and equitably, it did not mandate identical or equal treatment.[298] Thus, because the debtor's proposed contract modification was necessary, fair, and equitable, the court held that the union's refusal to accept the proposal was without good cause.[299]

As a final matter, the bankruptcy court balanced the equities. The court found that the labor contract imposed a severe burden on the debtor and that the cutting of labor costs was essential to successful reorganization.[300] Moreover, the debtor lacked other areas where costs could be substantially reduced.[301] As a result, the court permitted the debtor to modify

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290. *Wheeling-Pittsburgh*, 50 Bankr. at 984.

291. *Id.*

292. 49 Bankr. 700 (Bankr. N.D. Ohio 1985).

293. *Id.* at 702.

294. *Id.* at 703.

295. *Id.*

296. *Id.* at 702. The court stressed that the debtor did not have to meet the more stringent "essential to reorganization" test required for interim relief under § 1113(e). *Id.* The court reasoned:

> To find otherwise, would be to render the subsequent requirement of good faith negotiation, which the statute requires must take place after the making of the original proposal and prior to the date of the hearing, meaningless, since the debtor would thereby be subject to a finding that any substantial lessening of the demands made in the original proposal proves that the original proposal's modifications were not "necessary."

Id.

297. *Id.* at 703.

298. *Id.* The court also noted that the union would be forced to grant greater concessions because union labor costs were such a high percentage of gross revenues. *Id.*

299. *Id.*

300. *Id.* at 713. It seems somewhat inconsistent for the court to expend effort to differentiate between the applicable "necessary" and the inapplicable "essential" modification tests only to characterize the contract modification as essential. *See supra* note 296. In any event, this characterization suggests the court would approve interim relief under § 1113(e) if requested by the debtor.

301. 49 Bankr. at 713.

the collective bargaining agreement.[302]

Debtors also have asked bankruptcy judges to consider requests for interim relief from collective bargaining agreements under section 1113(e).[303] In the first case to interpret section 1113(e), *In re Wright Air Lines, Inc.*,[304] the debtor sought interim relief from the labor contract with its airline pilots. At the hearing, however, the debtor presented little evidence of why it needed such changes. The debtor failed to offer any concrete evidence of future income and expenses expected or future savings needed to survive.[305] The debtor alleged only that the elimination of the pilot training program required by the labor contract would save a total of $71,000. Testimony, however, revealed that the debtor was losing more than $800,000 each month; thus, the savings from the interim changes would amount to less than ten percent of one month's losses.[306] As a result, the court ruled that under section 1113(e) the debtor failed to prove that rejection was essential to the continuation of business or that the debtor would suffer irreparable harm if the court denied rejection.[307]

The debtor in *In re Salt Creek Freightways*[308] presented sufficient proof that it needed interim changes. The debtor, a trucking company, suffered losses exceeding $1.7 million in 1984 and projected losses exceeding $300,000 each month in 1985.[309] To curb these losses the debtor instituted numerous cost-saving measures at the expense of its management and non-union employees.[310] In addition, the debtor saved more than $2 million over three years through voluntary wage deferral programs.[311] The debtor requested the bankruptcy court to approve interim changes in six areas regarding its 250 unionized workers: reduction in wages, elimination of health and welfare fund payments, elimination of pension fund payments, elimination of sick leave payments, reduction in the number of paid holidays, and reduction in paid vacation.[312] The debtor provided evidence that these interim changes, plus wage cuts for all non-union employees, would reduce the debtor's current operating ratio of 117% to 95.4%.[313] The debtor's president testified that the company could not stay in business for more than one week if the court denied the interim changes.[314]

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302. *Id.*

303. For a discussion of § 1113(e), see *supra* notes 172-73 and accompanying text.

304. 44 Bankr. 744 (Bankr. N.D. Ohio 1984).

305. *Id.* at 745.

306. *Id.*

307. *Id.* The court acknowledged the pilot training required by the labor contract was "burdensome and uneconomical." *Id.*

Although the court did not base its holding on this issue, it expressed concern that the pilot training program would be jeopardized for some pilots if the court granted interim relief but later denied rejection of the collective bargaining agreement. *Id.* at 745-46.

308. 46 Bankr. 347 (Bankr. D. Wyo. 1985).

309. *Id.* at 348-49.

310. *Id.* at 349. For management, the cutbacks discontinued the payment of club dues, eliminated the use of company cars, shortened vacation time, and reduced the number of officers from eleven to two. For non-union employees, the cutbacks changed insurance coverage, discontinued pension programs, and cut wages. *Id.*

311. *Id.*

312. *Id.* at 351.

313. *Id.* at 349. The current operating ratio reflects the percentage of expenses to revenue. *Id.*

314. *Id.* at 350.

The bankruptcy court in *Salt Creek Freightways* construed section 1113(e) as requiring the debtor to satisfy the *REA Express* "last resort" test for interim changes in the labor agreement since section 1113(e) provides that "during a period when the collective bargaining agreement continues in effect" changes can be made only "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."[315] The court concluded: "Thus, a debtor seeking interim relief must show a more immediate level of economic emergency than it would need to show as support for an application for rejection."[316] The court held that the debtor met this higher standard because the uncontradicted statements of its president indicated that the company would have to cease operations in one week if the court denied its motion.[317] The court approved interim relief.[318]

In *In re Russell Transfer, Inc.*,[319] the debtor, an interstate trucking company, presented uncontroverted testimony that it needed immediate salary reductions to continue operations.[320] The debtor requested a twenty percent cutback of union wages but did not seek reduction in administrative salaries.[321] The court recognized its limitations to authorize interim relief: "The Congress did not intend that this Court undertake the rewriting on a permanent basis of collective bargaining agreements. Even if the Court should undertake such a chore, there is in this Court a lack of expertise making such permanent adjudications impractical."[322] The court nonetheless found that the debtor's financial situation warranted interim relief, albeit

315. *Id.* at 349-50. The union argued that the court should apply the nine requirements of *American Provision*. The court, however, stated that *American Provision* was inapplicable because it addressed whether a debtor could reject a labor contract, not whether it could implement interim changes under § 1113(e). *Id.* at 350.

316. *Id.* at 350.

317. *Id.* The judge also noted that the union failed to offer alternatives to allow the debtor to remain in business. *Id.*

318. *Id.* The union also unsuccessfully argued that the debtor could not seek interim changes until after it failed to gain rejection of the labor contract. The court based its argument partly on the language in § 1113(e) that a debtor can seek relief "during a period when the collective bargaining agreement continues in effect." *Id.* at 351. The court correctly noted that the word "a" used in that section refers to any period when the labor contract is in effect, including the time period when the debtor sought interim relief. *Id.* at 350-51.

The judge also stated that the parties must continue to bargain in good faith under § 1113(b) and that the granting of interim relief did not render a potential application for rejection of the collective bargaining agreement moot. The court approved interim relief for a period of about six and a half weeks or until both parties agreed to a new labor contract. *Id.* at 351.

Six weeks later the bankruptcy court approved rejection of the collective bargaining agreement. *In re* Salt Creek Freightways, 47 Bankr. 835 (Bankr. D. Wyo. 1985). Several findings in that case warrant mention. First, the court held that § 1113(b)(1)(B) does not require the debtor to provide the union with written estimates of the cost of the union's counter-proposals. *Id.* at 839. Second, the court listed three factors that a court should consider when balancing the equities under § 1113(c)(3): 1) union allegations that the debtor filed the bankruptcy petition solely to rid itself of the labor contract (*but see In re* Carey Transp., Inc., 50 Bankr. at 209); 2) findings that rejection of the collective bargaining agreement will further reorganization; and 3) the estimation of losses under § 502(c) if the court permits rejection. 47 Bankr. at 841. Thus, the court noted that even after rejection of the labor contract, the union remains the exclusive bargaining representative which the debtor must bargain with in good faith. *Id.* at 842.

319. 48 Bankr. 241 (Bankr. W.D. Va. 1985).

320. *Id.* at 242. The only testimony presented by either side was by the debtor's comptroller.

321. *Id.* at 243. Administrative non-union employees had not received any salary increase in the past three years, as union members had. *Id.* at 242.

322. *Id.* at 243-44.

on a more equitably apportioned basis than that requested by the debtor.[323] The court ordered a reduction of union members' salaries by twenty percent and administrative employees' salaries by only ten percent, a lesser percentage because the administrative employees, unlike the union employees, had not received a raise in the past three years.[324] At least one court criticized this resolution, charging that the *Russell Transfer* court overstepped its bounds *in favor of the union*.[325]

VIII. CONCLUSION

The bankruptcy court decisions applying *Bildisco* and section 1113 should dispel the fears held by labor sympathizers, legal commentators, and some members of Congress that bankruptcy judges would routinely subordinate the interests of organized labor to the reorganization goals of Chapter 11.[326] Likewise, there has not been a dramatic increase of employers seeking to reject collective bargaining agreements through Chapter 11 since the *Bildisco* decision.[327] Indeed, Chapter 11 remains an extreme and risky remedy for a company's financial woes. As a result, employers will be reluctant to invoke the bankruptcy law when only their financial condition requires reorganization.[328]

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323. *Id.* at 244.

324. *Id.*

325. The *Carey* court criticized the *Russell Transfer* court for employing this remedy, calling it "an unsanctioned exercise of discretion in forcing management givebacks." *Carey*, 50 Bank. at 208 n.4. The *Carey* court stated that § 1113 does not permit a court to order a debtor to reduce salaries. The bankruptcy court in *In re* Mile Hi Systems, Inc., 51 Bankr. 509 (Bankr. D. Colo. 1985) found another limitation on a court's powers under § 1113. In *Mile Hi*, the court granted the debtor's motion to reject its labor contract but refused to give the rejection retroactive effect to the date the debtor filed its petition. The court relied on the availability of emergency relief under § 1113(e) and the time constraints of § 1113(d) to conclude that retroactive relief could not be granted under § 1113. *Id.* at 510.

326. *See supra* notes 182-83 and accompanying text.

327. *See supra* note 182 and accompanying text. It seems clear that even at the time of the House debate on H.R. 5174, available evidence did not support the claims that firms were using the bankruptcy law as a subterfuge to avoid labor contracts nor that bankruptcy courts were cavalierly approving rejection of collective bargaining agreements. Congressman Erlenborn, sitting on the Committee of the Whole House for consideration of H.R. 5147, reported that:

> Organized labor has criticized the Supreme Court's decision [in *Bildisco*]. The AFL-CIO's special counsel stated; "The ruling obviously enhances the opportunity for union busting." Prior to the Court's ruling, our Subcommittees on Labor-Management Relations and Labor Standards held a joint oversight hearing on bankruptcy and collective bargaining. It was then asserted that Continental Airlines acted immorally if not illegally, in filing for bankruptcy and rejecting its collective bargaining contracts. Since the Court's ruling, organized labor has asserted that the bankruptcy law is used for "union busting".
>
> These claims just do not accord with the facts. Subsequent to our oversight hearings, a bankruptcy judge found that Continental had lost $521.9 million over a 5-year period and ruled that Continental had no acceptable alternative if it expected to keep the airline flying—"the Court further finds the there was no intent or motive to abuse the purpose of the Bankruptcy Code."
>
> Furthermore, while there were 5,765 filings for bankruptcy reorganization in 1980, ballooning up to 17,608 in 1983, testimony at our oversight hearings produced allegations of only two instances of findings that an employer filed strictly for the purpose of escaping a labor contract. In those two instances, before *Bildisco*, the bankruptcy court refused to approve the petition. This is certainly not a wholesale abuse of the bankruptcy law to "bust" unions.

130 CONG. REC. 1815-16 (daily ed. March 21, 1984).

328. *See* Miller, *supra* note 145, at 5-18 ("Notwithstanding the cries of anguish and the large-

Although there are some pitfalls in section 1113,[329] it overturned the most controversial aspect of *Bildisco* which allowed debtors to unilaterally reject labor contracts before seeking court approval. Interim relief appears to be a wise approach to relieving a debtor's immediate financial needs. Interim relief allows the debtor to prevent draining of the estate's assets while protecting union workers from unjustified labor-contract changes violative of core federal-labor policy. Nevertheless, Congress' haste to pass section 1113, spurred in part by unfounded speculation about the dangers of *Bildisco*, is cause for concern.

The haste with which legislative repeal was adopted necessarily undermines the authority of the courts. One may question the desirability of adopting such far-reaching legislative action without hearings and significant legislative debate. Moreover, the performance of the bankruptcy courts under *Bildisco* reveals that the concern and criticism directed at the courts are unwarranted. Perhaps Congress should direct its attention and energies to the real source of tension in labor-management relations—why companies must file Chapter 11 petitions.[330] Only when Congress acts to improve the economic bases of industries hardest hit by financial setbacks will the competing needs of labor and management gain a more satisfactory resolution.

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scale public relations campaign by organized labor, viable and well-capitalized businesses do not resort to the bankruptcy courts to resolve their labor disputes. A board of directors does not pass a resolution to file a Chapter 11 petition with any sense of ecstasy. Despite the era of the liberal society, bankruptcy still bears the stigma of failure."); *see also* Isaacson, *supra* note 143, at 3-4 ("Employers will, with few exceptions, not resort to bankruptcy unless they are *in extremis*. Nor will employers generally threaten bankruptcy as a bargaining ploy. Aside from the stigma that attaches to bankruptcy, the effect on an employer's credit ratings, and the discouragement of investment, bankruptcy proceedings, even with the debtor continuing in possession, subject the employer to control and overview by the bankruptcy court."); Lunnie, *supra* note 150, at 520, where the author stated:

> First, one must understand that filing for bankruptcy is by no means a desirable or enviable state, and no employer in its right mind would lightly scheme, as organized labor would have it, to use Chapter 11 for that purpose. Chapter 11 is an onerous, expensive, and unpredictable procedure that any employer would rather avoid. It results in the court's looking over management's shoulder at every stage—in a creditor's committee wrangling about how the employer's liabilities should be apportioned; in banks and other creditors being unwilling to extend credit and capital needed for survival; in suppliers unwilling to deal with the debtor except on a cash basis; in customers seeking other, more reliable sources of supply; and in skilled management and workers looking for other job opportunities to ensure the security of their futures. Just on the basis of logic, I think no one would accept the premise that an employer would casually file for a Chapter 11 reorganization.

329. *See supra* notes 175-81 and accompanying text.

330. For example, many employers seeking to reject collective bargaining agreements are involved in recently deregulated industries, especially transportation. As a result, new competitors have entered those industries, causing decreased revenues for pre-deregulation companies. *See In re* Briggs Transp. Co., 39 Bankr. at 350-51.