PROTECTING RETIREE WELFARE BENEFITS DURING BANKRUPTCY: THE EVOLUTION OF A PROTECTIONIST READING OF § 1114

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THE EVOLUTION OF A PROTECTIONIST READING OF § 1114

By Samantha I. Kent

In 1988, Congress acted to protect retirees by passing the Retiree Benefits Bankruptcy Protection Act after 78,000 retirees’ health and welfare benefits were terminated after their employer filed for Bankruptcy. After public outrage and hasty Congressional response, the Retiree Benefits Bankruptcy Protection Act added § 1114 into the Bankruptcy Code, which expressly prohibits debtors and trustees from modifying or terminating any retiree benefits without following a proscribed set of procedures.

After its incorporation into the Bankruptcy Code in 1988, the statute was challenged and defined in the LTV Bankruptcy case, In re Chateaugay. The court held that § 1114 does not apply to benefits that are contractually terminable outside of bankruptcy. Since then, the majority of courts have followed this minimalist reasoning and continued to restrict the application of § 1114, rendering it virtually powerless to protect retirees. Recently, however, in In re Visteon, the Court of Appeals for the Third Circuit removed itself from the shadow of Chateaugay and broadened the scope of § 1114 protection by holding that it applies regardless of whether or not retiree benefits are terminable outside of bankruptcy. Thus, for the first time a Federal Circuit Court applied § 1114 according to Congressional intent and did not restrict the statute’s application based on the Chateaugay precedent and personal biases as to the statute’s appropriate operation. This interpretation leads to the proper application of § 1114. Based on the legislative history of § 1114, the uniqueness of retirees as a class, and the inadequacy of applicable nonbankruptcy law, it is apparent that § 1114 should be applied uniformly to protect all retiree benefits regardless of contractual rights outside of bankruptcy.
INTRODUCTION

Since the early 1980s the skyrocketing costs of health care in the United States has been a major social problem. While all Americans feel the high cost of health insurance, retired employees who relied on the promise of continued coverage by their employers are often the most vulnerable to prior employers later terminating those benefits.

In 1988, Congress acted to protect retirees when LTV Corporation suspended 78,000 retirees’ health and welfare benefits after filing for bankruptcy. LTV believed it had the right to do so because no section of the Bankruptcy Code applied to these workers. This action demonstrated to Congress that all too often corporate debtors “cannot or will not see the human suffering caused by their actions [in bankruptcy],” and little protection could be found in the Employee Retirement Income Security Act of 1974, Bankruptcy Code provisions and other statutes. Thus, after a series of temporary pieces of legislation, President Reagan signed into effect the Retiree Benefits Bankruptcy Protection Act of 1988.

Prior to the passage of this Act, when companies filed for bankruptcy they had the potential to discharge retirement health care benefits as debt during bankruptcy proceedings. After the LTV termination and the subsequent passage of the Retiree Benefits Bankruptcy Protection Act, LTV’s bankruptcy proceedings continued, including the seminal § 1114 case, In re Chateaugay, which challenged and defined the new statute. There, the court defined the scope

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of the statute in a way that rendered it virtually powerless, holding that if an employer reserved a contractual right to terminate or modify retiree benefits, then bankruptcy proceedings do not alter that contractual right.\(^8\)

Now, more than two decades have passed since the incorporation of the Retiree Benefits Bankruptcy Protection Act into the Bankruptcy Code as 11 U.S.C. § 1114 in 1988\(^9\). The majority of bankruptcy courts continue to follow the minimalist precedent set by *In re Chateaugay*.\(^10\) However, not all courts are following this trend. In fact, division among the bankruptcy courts has been growing since the enactment in 1988. Section 1114 has “spawned diverse and sometimes inconsistent interpretations and theories as to the substantive and procedural standards necessary for the modification of retiree benefits,”\(^11\) and the courts are split as to Congress’s intentions and the statute’s scope.\(^12\) The culmination of the clashing interpretations came with the holding of *In re Visteon*, which created a circuit split and “mark[ed] the first time that any federal appeals court has squarely addressed the scope of Section 1114 and, by demanding a plain reading of the law, could reverse [the] strong trend among bankruptcy and district court judges to avoid the requirements of Section 1114.”\(^13\) This decision has “alter[ed]
the playing field in big corporate bankruptcies by mandating compliance with Section 1114 of the Retiree Benefits Bankruptcy Protection Act without exception.”

This Comment will discuss the current split between the Second and Third Circuits and examine how each interpretation developed. This Comment will establish that the minority approach, most notably seen in *In re Visteon*, is the proper and intended application of § 1114. Like the court in *In re Visteon*, this Comment will argue that in reaching the contrary conclusions the majority courts “mistakenly relied on their own views about sensible policy, rather than on the congressional policy choice reflected in the unambiguous language of the statute.” Further, this Comment will argue that the primary reason that the majority approach dominated judicial interpretation of § 1114 for so many years is because after the decision of *In re Chateaugay*, later courts simply relied on their reasoning rather than taking a fresh look at the statute without the bias of the *Chateaugay* decision in their minds. This Comment will ultimately conclude that § 1114 protects all retiree benefits during bankruptcy proceedings and thus prevents the modification and termination of such benefits without adherence to the modification procedures set forth in § 1114.

Section I will discuss the history of § 1114 including the LTV bankruptcy and resulting public outcry and legislative response Section II discusses the content and application of § 1114. Section III will lay out the traditional, minimalist approach to § 1114 and section IV the new, more protective, minority approach as found in *In re Visteon*. Finally, Section V will compare the two approaches and present evidence in support of the conclusion that the new minority approach is the correct application due to the legislative history of § 1114, the unique nature of

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15 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 219-20 (3d Cir. 2010).
retirees as the covered class, and the inadequacy of applicable nonbankruptcy and bankruptcy law to protect retirees.

I. THE HISTORY AND ADOPTION OF § 1114

This section will discuss the background and facts of the LTV Bankruptcy, followed by the congressional response to the 78,000 retirees left without welfare benefits.

A. The LTV Corporation Bankruptcy: The Backdrop of In re Chateaugay

In July 1986, LTV filed under Chapter 11 seeking protection and in the same year three of its mining subsidiaries closed permanently. LTV continued to operate as a debtor in possession pursuant to the Bankruptcy Code. As such, LTV immediately terminated the retirement benefits of 78,000 retired employees of LTV and its subsidiaries. LTV claimed that it was forbidden to pay retiree benefits without the express permission of a bankruptcy court because no provision of the Code authorized it. Among those retirees were former employees who received welfare benefits pursuant to collective bargaining agreements and those who received benefits in accordance with non-collectively bargained plans. LTV paid mine employees and administered retiree benefits pursuant to a collectively bargained Wage Agreement, which included provisions for the funding of a Benefit Trust. The Wage Agreement required LTV to continue paying retiree benefits and contributing to the Benefit Trust for either the term of the Wage Agreement or until LTV was no longer in business. It was

16 The LTV Corp. v. United Mine Workers of America (In re Chateaugay I), 922 F.2d 86 (2d Cir. 1990).
21 The LTV Corp. v. United Mine Workers of America (In re Chateaugay I), 922 F.2d 86 (2d Cir. 1990).
22 The LTV Corp. v. United Mine Workers of America (In re Chateaugay I), 922 F.2d 86 (2d Cir. 1990).
set to expire on January 31, 1988.\footnote{The LTV Corp. v. United Mine Workers of America (In re Chateaugay I), 922 F.2d 86 (2d Cir. 1990).} Despite the presence of the agreement, LTV ceased benefit payments to all retirees,\footnote{LTV ceased benefit payments and the Benefit Trust was required to take over the payments to retirees covered by the collective bargaining agreement, thus the Trust brought suit arguing that the Act required the debtor to continue paying until the case was dismissed or until a reorganization plan was confirmed. 61 U. Cin. L. Rev. 715, 730. Coffey, Shirley A. One Bankruptcy is Enough, 78,000 is too many—Protection of Retirement Benefits Under the Retiree Benefits Bankruptcy Protection Act of 1988. (1992).} without speaking to or negotiating with their representatives.\footnote{The LTV Corp. v. United Mine Workers of America (In re Chateaugay I), 922 F.2d 86 (2d Cir. 1990).} LTV later petitioned the bankruptcy court for an order permitting payment of the benefits, which the court granted and LTV recommenced payment of retiree benefits.\footnote{The LTV Corp. v. United Mine Workers of America (In re Chateaugay I), 922 F.2d 86 (2d Cir. 1990).}

Later, with the expiration of the Wage Agreement, approaching, LTV notified the Benefit Trust that it would be terminating its payments of benefits. The Benefit Trust refused to take over, and LTV continued to pay welfare benefits for a time. In August of 1988, the bankruptcy court concluded that § 1114 did not require them to continue paying benefits, so they once again terminated payment, this time permanently.

\textbf{B. A National and Congressional Response to a Generation in Crisis}

The LTV action captured much attention throughout the United States, drawing concerns not only about the death of the steel industry, but also from individuals worried about the 78,000 retired individuals.\footnote{Marlowe, Dick. LTV Opens Scary New Chapter on Rewards of Bankruptcy Protection. Orlando Sentinel. July 30, 1986. http://articles.orlandosentinal.com.} And for the first time, Americans were forced to consider whether they might incur the same fate.\footnote{Marlowe, Dick. LTV Opens Scary New Chapter on Rewards of Bankruptcy Protection. Orlando Sentinel. July 30, 1986. http://articles.orlandosentinal.com.} These public concerns prompted Congress to examine what obligations, if any, the Bankruptcy Code placed on a reorganizing company to provide insurance benefits to retired employees.\footnote{S. Rep. No. 119, 100TH Cong., 1ST Sess. 1987.} Congress initially responded by introducing specific legislation
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directing LTV and its subsidiaries to continue paying retiree benefits\(^{30}\) to give Congress time to determine how retirement benefits should be dealt with in the overall bankruptcy context.\(^{31}\)

In the following months Congress continued to pass amendments, which consisted primarily of temporary stopgap measures in order to ensure that LTV and other steel companies in a similar position continued to pay retiree benefits and give Congress the necessary time to develop appropriate, permanent legislation.\(^{32}\) Congress finally passed permanent legislation, the Retiree Benefits Bankruptcy Protection Act of 1988, on June 16, 1988, which retroactively applied to the LTV bankruptcy.\(^{33}\)

During the time between the termination of benefits and prior to the passage of the Retiree Benefits Bankruptcy Protection Act, Congress held hearings to determine what kind of protective legislation was necessary. One such hearing was held on July 28, 1986, in Cleveland, Ohio (“LTV Hearing”).\(^{34}\) At the LTV Hearing, a bill ordering LTV to continue payment of welfare benefits was placed on the Senate floor while Congress heard testimony on LTV’s actions.\(^{35}\) The LTV Hearing was expedited as LTV’s actions had created “an intolerable situation for LTV retirees… [and] put at risk the very men and women who spent their lives...

\(^{30}\) On July 25, 1986 a bill was introduced, S. 2690, which directed LTV and its subsidiaries who had filed chapter 11 petitions to continue paying all medical and life insurance benefits to retirees, as provided by any agreement, until a court of competent jurisdiction ordered the cessation of such payments. S. 2690, 99th Cong., 2d. Sess. (1986).


\(^{33}\) LTV commenced an adversary proceeding in the US Bankruptcy Court for the Southern District of New York on June 23, 1988, which eventually reached the US Court of Appeals for the Second Circuit in 1990. LTV Steel Co., v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205 (2d Cir. 1991). The resulting case, In re Chateaugay will be discussed in detail below.


working to make LTV strong.” At the hearing, union officials and various LTV retirees gave “lengthy and unsettling testimony” about how they were hurt by LTV’s actions, and a bankruptcy expert testified that LTV was violating bankruptcy law by terminating retiree benefits without negotiating with retiree representatives first.37

Before the retirees testified, Congress heard the testimony of the national union officials of the United States Steelworkers and the United States Mineworkers Unions. Richard Trumka, National President of the United Mineworkers of America was one of the first to testify at the hearing,38 and set the tone for the hearing. The actions of the LTV Corp. raise some serious, economic, legal, and moral questions. The intentions of the LTV directors, I believe, are very clear. Through the mechanism of the bankruptcy proceeding, they intend to terminate the health care benefits of tens of thousands of retired steelworkers, autoworkers, and coal miners. This is not the only goal in their effort to make workers pay for the mistakes of management, but it is perhaps the cruelest aspect of the LTV plan.39

Mr. Trumka testified to the vulnerable nature of retirees as a whole, as opposed to other creditors, thus setting the stage for the retirees to tell their stories about the tragic effect of LTV’s action.

In addition to Mr. Trumka’s testimony, Congress heard from Vern Countryman, one of the nation’s leading bankruptcy experts.40 Mr. Countryman told Congress that in his professional opinion, LTV was flat out wrong in concluding that the Bankruptcy Code prohibited

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LTV from continuing to pay retiree benefits. According to Mr. Countryman, there was a recently added provision to the Code, which required LTV to negotiate with retiree representatives before modifying or terminating their benefits. Additionally, Mr. Countryman raised the issue of retiree claims for their lost health insurance against LTV. Many of the retirees had received checks, however they could not cash the checks because LTV was protected in Chapter 11 and all bank accounts were frozen. Mr. Countryman informed Congress that these payments were merely unsecured claims against LTV, which have no priority over the 20,000 secured creditor claims against LTV. Thus, while the retirees were given small checks as compensation for their losses, the checks were worthless in reality because as unsecured creditors the retirees were not likely to ever receive payment.

To begin the retiree testimony portion of the LTV Hearing, Senator Metzenbaum began by reading a letter he received from the wife of a retiree suffering from bone cancer who lost her health insurance as a result of LTV’s actions. She wrote,

I am 69. He worked, I stayed home, tried to run the house and raise our children the way they should be raised, thinking in our old age that we at least would be

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41 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 2 (testimony of Vern Countryman).
42 Mr. Countryman was referring to the addition of § 1113 to the Code in 1984, which governs the treatment of collective bargaining agreements in bankruptcy. Section 1113 is discussed in detail below in Section II, Part B. At the time, there were also questions about whether § 1113 covered retirees; this discussion can also be found below.
able to live decently. Mr. Metzenbaum, do you know if my husband would have
to go to the hospital, it would take our home that we worked all our lives to get.48

Senator Metzenbaum noted that this woman was not at all unique in this situation, and that
Congress would have no difficulty finding hundreds, if not thousands, of individuals who had
similar stories to share.49

One witness to testify was the wife of an LTV union retiree, Mrs. Fredericy, who suffered
from Crohn’s disease as well as frequent heart problems.50 After forcing her husband into early
retirement after thirty-three years of service, LTV terminated his health insurance, leaving the
couple to pay out of pocket for thousands of dollars worth of Crohn’s disease treatments in
addition to the costs of Mr. Fredericy’s diabetes medications.51 Further, Mrs. Fredericy testified
that the couple had recently legally adopted their granddaughter who needed vaccinations before
she could start school.52 She too was left with no health coverage after LTV terminated her
grandfather’s benefits.53 Thus, Mr. and Mrs. Fredericy were forced to take out a new mortgage
on their home, which they had paid off years prior, in order to pay all of their family medical
expenses.54

Another witness to testify at the LTV Hearing was retiree Richard Fisher, who worked at
LTV’s predecessor corporation for twenty years until he was forced to retire due to a stroke,

48 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
49 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 44-46 (statement of Senator
Metzenbaum).
50 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 44-46.
51 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 44-46.
52 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 44-46.
53 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 44-46.
54 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal
Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 44-46.
which left his left hand paralyzed. Mr. Fisher also lost his left leg in an accident and the use of his right leg due to polio, yet Mr. Fisher continued to maintain his own apartment with the assistance of medical staff, paid for in part by his health insurance. After LTV terminated his insurance, however, Mr. Fisher could no longer afford to pay for his own health insurance nor could he afford to keep any of the medical staff to assist him in remaining in his own home. Of his own future, and likely reflecting the sentiments of many other uninsured retirees, Mr. Fisher said,

Myself, I will probably end up in bankruptcy... my doctor wants me to go to a nursing home. The social worker at Kaiser investigated. She said I’m not making enough money to afford to go into a nursing home. What am I going to do, shoot myself? I can’t live with what I have. I’ve got nothing to look forward to.

At the closing of the witness testimonies, Senator Metzenbaum vowed to the LTV retirees that he would get the bill passed and restore the health benefits to them and the 78,000 other retirees affected by LTV’s actions. Two days after the conclusion of the LTV Hearing, the bill was received and LTV was ordered to reinstate retiree benefits.

Less than a month later, on August 7, the Senate Special Committee on Aging held a hearing addressing various solutions for the problems facing retirees (“Fair Weather Promise Hearing”), which were thrust to the forefront due to LTV’s actions. There, the main focus was the inadequate protections available to retirees and how to prevent a situation like LTV’s

58 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 51
59 LTV Bankruptcy: Hearing on Oversight on the LTV Corp Filing for Bankruptcy Under Chapter 11 of the Federal Bankruptcy Code Before the Senate Comm. on the Judiciary, 99th Cong., 2d Sess. 51
bankruptcy actions from occurring again in the future.\textsuperscript{62} Senator Glenn pointed out that there really are no protections for health insurance for retirees.\textsuperscript{63} And while some pension benefits are guaranteed by federal statute, no such health insurance protection exists.\textsuperscript{64} Congress was concerned that, like LTV, employers were not paying into health insurance plans, instead operating unfunded, “pay-as-you-go system[s] of private health insurance coverage” plans.\textsuperscript{65} This meant that when companies went under, they could just stop providing benefits.\textsuperscript{66} Further, Congress feared that due to the ever-increasing costs of health care, employers might stop providing health benefits to future employees altogether.\textsuperscript{67}

Like at the LTV Hearing, Congress heard the testimony of various retirees who suffered from loss of health insurance and the inadequacies of Medicare, and COBRA plans. Mrs. Grimaldi was promised health coverage through her husband’s employer, and was guaranteed that this coverage would last throughout his retirement.\textsuperscript{68} The company he worked for closed its doors, moved to another state and issued notice to all retirees that they had one month until their health benefits would terminate.\textsuperscript{69} No group plan was offered.\textsuperscript{70} Mrs. Grimaldi explained to Congress how unhelpful Medicare was, as she and her husband were “forced to purchase

coverage with Blue Cross because Medicare was grossly inadequate.” 71 For example, Medicare approved $200 of their $800 anesthesiologist bill and then only paid 80 percent of that. 72 Mrs. Grimaldi testified that their out-of-pocket expenses, in addition to their premiums to Blue Cross, which alone were about $900 a year, totaled $14,000. 73 Their monthly income was $1,200, of which at least 1/3 was spent on medical expenses, and nearly everything left over was spent on taxes, utilities and other bills; however, they did not qualify for Medicaid or any other form of state aid. 74 Mrs. Grimaldi illustrated “the reality of retirement without benefits—insecurity, stress, humiliation and frustration.” 75

With these sentiments in mind, Congress continued to act to protect retired Americans already affected and prevent future retirees from suffering the same fate. In 1988, after years of stopgap and temporary legislation, the Retiree Benefits Bankruptcy Protection Act was passed.

In addition, Congress passed amendments to § 1114 with BAPCA in 2005, further demonstrating Congress’s continued intent to protect retirees throughout the bankruptcy process in ways they may not necessarily be protected outside of bankruptcy. 76 Subsection (l) was added in 2005 and prevents an insolvent debtor from terminating retiree benefits in the six-month period before filing for bankruptcy. 77 Like the rest of the statute, the new subsection (l) does not

76 See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 225 (3d Cir. 2010).
77 See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 225 (3d Cir. 2010) (citing 11 USC § 1114(l)).
include any limitation based on pre petition rights to terminate retiree benefits.\textsuperscript{78}

II. \textsection 1114 PROTECTION: CONTENT & APPLICATION

This section will lay out the relevant provisions of \textsection 1114, followed by it’s relationship with \textsection 1113 in subsection B. Subsection C discusses applicable nonbankruptcy law, namely the Employee Retirement Income Security Act (ERISA), and how it effects the application of \textsection 1114.

A. \textsection 1114 Provisions

Section 1114 applies to both union and nonunion employees and is both substantive and procedural in nature.\textsuperscript{79} It requires a trustee or debtor in possession to timely pay retiree benefits and prohibits the modification of retiree benefits unless there is a court order.\textsuperscript{80} Additionally, \textsection 1114 requires that employers or trustees go through a series of procedural steps before requesting an application to modify or terminate retiree benefits during bankruptcy proceedings.\textsuperscript{81} Section 1114 contains thirteen provisions, which can be separated into those that define the necessary terms, provisions that govern the representation of retirees, and provisions that govern the payment of benefits under the section. Subsection 1 will provide the relevant definitions, subsection 2 will discuss the representation provisions, and subsection 3 the payment or modification of benefits under \textsection 1114.

I. Definitions

Section 1114 (a) defines the term “retiree benefits” as payments to any entity or person,

\textsuperscript{78} See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 225 (3d Cir. 2010) (citing 11 USC \textsection 1114(l)).
\textsuperscript{79} 1 NORTON BANKR. L. \& PRAC. 3d \textsection 3:14 (2010).
\textsuperscript{80} 7 COLLIER ON BANKRUPTCY. P 1114.01 (2010).
\textsuperscript{81} 1 NORTON BANKR. L. \& PRAC. 3d \textsection 3:14 (2010).
including retirees and their dependants, for medical, disability or death under plans funds and programs maintained by the debtor prior to the filing in Chapter 11.\textsuperscript{82} There is no distinction between types of employees in regards to type of position held, degree of control exercised by employees or the size of the group.\textsuperscript{83} While subsection (a) does not distinguish based on degree of control, \S 1114(m)\textsuperscript{84} dictates that \S 1114 is not applicable to any retiree or his dependants if his gross income for the twelve months preceding the petition equals or exceeds \$250,000, unless he can demonstrate that he cannot obtain comparable benefits elsewhere.\textsuperscript{85} The term does not encompass pension benefits nor does it include deferred compensation, retirement adjustment payments that replace loss in retirement benefits that occur due to salary deferral, or other compensation payments made after retirement.\textsuperscript{86} The definition includes both direct and indirect payments to the retiree and the reimbursement of third parties for certain benefits.\textsuperscript{87} Section 1114(a) does not provide a definition for “any plan, fund or program,” however, courts have used

\begin{itemize}
  \item \textsuperscript{82} 11 USC \S 1114(a) (2010).
  \item \textsuperscript{83} 7 COLLIER ON BANKRUPTCY. P 1114.02 (2010) (citing In re New York Trap Rock Corp., 126 B.R. 19 (Bankr. S.D.N.Y. 1991)).
  \item \textsuperscript{84} Originally subsection (l), but in 2005 it was redesignated to subsection (m). 7 COLLIER ON BANKRUPTCY. P 1114.02 (2010).
  \item \textsuperscript{85} 11 USC \S 1114(m)
  This section shall not apply to any retiree, or the spouse or dependents of such retiree, if such retiree's gross income for the twelve months preceding the filing of the bankruptcy petition equals or exceeds \$250,000, unless such retiree can demonstrate to the satisfaction of the court that he is unable to obtain health, medical, life, and disability coverage for himself, his spouse, and his dependents who would otherwise be covered by the employer's insurance plan, comparable to the coverage provided by the employer on the day before the filing of a petition commencing a case under this title.
  \item \textsuperscript{86} 7 COLLIER ON BANKRUPTCY. P 1114.02 (2010).
  \item \textsuperscript{87} 7 COLLIER ON BANKRUPTCY. P 1114.02 (2010).  
\end{itemize}
the definition of “employee welfare benefit plan” found in ERISA.\textsuperscript{88}

\textit{II. Representation}

The representation of employees is discussed in § 1114(b)-(d) and provides that retirees covered by a collective bargaining agreement will have different authorized representatives than those who are not receiving benefits pursuant to a collective bargaining agreement.\textsuperscript{89} Further, subsection (b) states that committees appointed by the court or the United States Trustee have the same rights, powers, and duties as committees appointed under § § 1102 and 1103 of the Bankruptcy Code for the purposes of carrying out the provisions of § § 1114, and shall “have the power to enforce the rights of persons under this title as they relate to retiree benefits.”\textsuperscript{90}

If there is a collective bargaining agreement, the labor union will ordinarily be the authorized representative unless it elects not to serve or the court determines that different representation is appropriate.\textsuperscript{91} If the union will not be the authorized representative for either reason, the court may appoint a committee of retired employees to serve.\textsuperscript{92}

When there is no collective bargaining agreement, the court is directed, on motion of a party in interest and after notice and a hearing, to order the appointment of a representative committee of retired employees if the debtor seeks to modify or terminate retiree benefits, or if the court otherwise determines it to be appropriate.\textsuperscript{93} The United States Trustee appoints the committee.\textsuperscript{94}

\textit{III. Treatment of Retiree Benefits}

\textsuperscript{89} 11 U.S.C. § 1114(b)(1) (2010). “[T]he term ‘authorized representative’ means the authorized representative designated pursuant to subsection (c) for persons receiving any retiree benefits covered by a collective bargaining agreement or subsection (d) in the case of persons receiving retiree benefits not covered by such an agreement.”
\textsuperscript{91} \textit{7} Collier on Bankruptcy. P 1114.04 (2010).
\textsuperscript{92} 11 U.S.C. § 1114(c) (2010).
\textsuperscript{93} \textit{7} Collier on Bankruptcy. P 1114.04 (2010).
\textsuperscript{94} \textit{7} Collier on Bankruptcy. P 1114.04 (2010).
Section 1114(e)(1) simply states the rule that the debtor in possession or trustee “shall timely pay and shall not modify any retiree benefits” with the exception of a court order or agreement between the parties.95

A new version of § 1114(l)96 was added in 2005 as part of the BAPCA amendments to prevent debtors from modifying retiree benefits prepetition to evade the requirements of § 1114(e).97 It allows courts to undo any modifications an insolvent debtor made within 180 days before the date of the filing of the petition if the balance of equities does not favor modification.98 While § 1114(l) does place some restrictions on the debtor’s ability to modify retiree benefits, the balancing test applied is far less stringent than the one imposed for post petition modification, and it is often difficult to prove that the balance of equities does not favor modifications.99

Post-petition, the debtor must show that (1) the modification is necessary to permit the debtor’s reorganization, (2) the parties are treated fairly and equitably, and (3) that modification is clearly favored by a balance of the equities.100 Additionally, post-petition the debtor is required to file a motion requesting modification and court approval. Before filing the petition, however, the debtor must (1) make a proposal to the authorized representative of the retirees providing the modifications in the retiree benefits are necessary, and (2) provide the authorized representative with all necessary relevant information needed to evaluate the proposal.101 The Trustee or debtor

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96 The 2005 Amendments redesignated the original subsection (l) as subsection (m) and inserted the new subsection (l) that remains in effect today.
97 7 COLLIER ON BANKRUPTCY. P 1114.03 (2010).
99 7 COLLIER ON BANKRUPTCY. P 1114.03 (2010).
100 The term “modify” includes termination where the debtor has a legal right under a prebankruptcy retirement plan to terminate benefits unilaterally and it does so within 180 days before bankruptcy. 7 COLLIER ON BANKRUPTCY. P 1114.03 (2010).
in possession must attempt to reach an agreement with the retirees regarding the modification of benefits before it can ask the court to modify or terminate them.\footnote{102}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 217 (3d Cir. 2010).}

A court shall enter an order for modification if it finds that, (1) the trustee has made a proposal that fulfills the requirements of § 1114(f), (2) the authorized representative has refused to accept such proposal without good cause, and (3) such modification is necessary to permit the reorganization of the debtor and assures all creditors and affected parties are treated equitably and is favored by the balance of equities.\footnote{103}{11 U.S.C. § 1114(g) (2010).} The courts vary on determining whether modifications are “necessary,” resulting in two distinct tests. The Third Circuit has applied a test in \textit{Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, AFL-CIO}, which considers “necessary” only those minimum modifications that are necessary to prevent the debtor’s liquidation.\footnote{104}{7 COLLIER ON BANKRUPTCY. P 1114.06 (2010).} The Second Circuit set forth a less stringent approach that does not require that the proposed modifications be the absolute minimum required.\footnote{105}{7 COLLIER ON BANKRUPTCY. P 1114.06 (2010) (citing Truck Drivers Local 807 v. Carey Transportation, Inc.).}

Further, a court may authorize interim modifications prior to the debtor going through the normal necessary steps if modification is essential to the continuation of the debtor’s business or
to avoid irreparable damage to the debtor’s estate.\textsuperscript{106}

\section*{B. The Relationship between \textsection{} 1113 and \textsection{} 1114}

This section will discuss the relevant provisions of \textsection{} 1113 and their effect on the application of \textsection{} 1114.

\subsection*{I. What is \textsection{} 1113?}

Section 1113 was added to the Bankruptcy Code in 1984 as part of the Bankruptcy Amendments and Federal Judgeships Act of 1984.\textsuperscript{107} It provides the procedures for the rejection of collective bargaining agreements in Chapter 11.\textsuperscript{108} It provides that a trustee or debtor in possession is required to adhere to the terms set forth in collective bargaining agreements unless relieved of the obligation pursuant to \textsection{} 1113. Additionally, \textsection{} 1113 creates an “emergency mechanism” allowing the debtor in possession or trustee to seek judicial approval of temporary changes to the collective bargaining agreement.\textsuperscript{109}

The procedural requirements placed on the trustee under \textsection{} 1113 to reject a collective bargaining agreement are set forth in subsection (b) and state that the trustee or debtor in possession must make a proposal to the representative of the employees covered by the agreement and provide the representative with the necessary information to fully consider the proposal.\textsuperscript{110} Then the trustee or debtor in possession must meet with the representative during a predetermined period of time and exercise good faith efforts to reach an agreement on the modification of the agreement.\textsuperscript{111} Following these negotiations, the court may approve the

\begin{footnotesize}
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\item \textsuperscript{106} \textsc{Norton Bankr. L.} \& \textsc{Prac.} 3d \textsection{} 11 U.S.C. \textsection{} 1114 (2010).
\item \textsuperscript{107} 7 \textsc{Collier on Bankruptcy.} \textsection{} P1113.LH (2010).
\item \textsuperscript{108} 7 \textsc{Collier on Bankruptcy.} \textsection{} P1113.01 (2010).
\item \textsuperscript{109} 7 \textsc{Collier on Bankruptcy.} \textsection{} P1113.01 (2010).
\item \textsuperscript{110} 7 \textsc{Collier on Bankruptcy.} \textsection{} P1113.01 (2010).
\item \textsuperscript{111} 11 USC \textsection{} 1113(b) (2010).
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rejection only if the court finds that, “(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1); (2) the authorized representative of the employees has refused to accept such proposal without good cause; and (3) the balance of the equities clearly favors rejection of such agreement.”

Based on the procedures that Congress set forth in § 1113, mandating good faith negotiations to modify an agreement before rejecting it, “it is clear that the preferred outcome… is a negotiated solution rather than contract rejection.” The provisions of § 1113 do also reflect that sometimes there is not time for such procedures without causing irreparable harm to the estate, and thus Congress included subsection (e), which allows the court, after notice and a hearing, to authorize the trustee or debtor in possession to implement changes without following the guidelines set forth in (b) and (c).

II. How do §§ 1113 and 1114 coexist?

“trustee” shall include a debtor in possession), shall--
(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.
(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

112 7 COLLIER ON BANKRUPTCY. P 1113.01 (2010).
113 7 COLLIER ON BANKRUPTCY. P 1113.01 (2010).
114 11 USC 1113(e) (2010).

If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.
There is no statutory provision stating whether § 1114 is the exclusive section of Chapter 11 governing the modification of retiree benefits and it is unclear whether trustees must also comply with the provisions of § 1113.\textsuperscript{115} Without a clear indication from Congress regarding the interplay between the two sections,\textsuperscript{116} the courts are left to their own means to settle the issue through statutory construction principles.\textsuperscript{117} According to the Supreme Court, "courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective."\textsuperscript{118} According to the United States Bankruptcy Court for the Southern District of New York, application of this principle leads to the conclusion that § 1114 is the exclusive provision relating to the modification or termination of retiree benefits because it “specifically and unequivocally addresses retiree issues that are otherwise generally covered by § 1113.”\textsuperscript{119}

The Supreme Court has held that if there is “no clear intention otherwise, a specific statute will not be controlled or nullified by a general one.”\textsuperscript{120} Here, because § 1114 deals specifically with retiree benefits, it renders the application of § 1113 to those benefits a “moot


\textsuperscript{116} On August 7, 1986, the House Judiciary’s Subcommittee on Monopolies and Commercial Law had an oversight hearing where it became apparent that § 1113 of the Bankruptcy Code was intended to apply to both current employees and retirees but the ambiguous language did not portray that intent.\textsuperscript{116} Thus, on September 9, 1986, H.R. 5490 was passed by the House to state that it was Congress’s intent in 1984 that § 1113 would include protecting retirement benefits from termination and modification.\textsuperscript{116} On October 3, 1986, the Senate considered the bill and amended it to direct specific debtors to continue paying retiree benefits rather than as a statement of congressional intent. In its final form, the bill did not contain anything regarding the substance of § 1113. Any further attempts to clarify the language of § 1113 ended with the 99\textsuperscript{th} Congress because it was believed that further study was necessary to make changes to the Code. Winkler, Andrea J. Legislative History of the Retiree Benefits Bankruptcy Protection Act of 1988, reprinted in App. E-1 Collier on Bankruptcy App. Pt. 8(b) (2010).


Following this understanding, the court in *In re Ionosphere* concluded that it would be a waste of time and resources to require compliance with both § 1113 and § 1114 because Congress recognized the potential for conflict if a union represents both current employees and retirees during a bankruptcy. Thus § 1114 includes a scheme to insure that retirees are adequately represented, regardless of whether they were union or non-union employees.

Finally, because the procedural requirements of the two statutes are similar, compliance with the requirements for modification under § 1114 also satisfies those requirements for rejection of a collective bargaining agreement under § 1113.

**C. Effects of ERISA in Bankruptcy**

ERISA is the principal federal statute that regulates the maintenance and administration of welfare plans that provide medical, accident, disability, death, unemployment, pensions and certain other specified benefits that provide retirement income. Section 1 discusses ERISA protection of pensions, and Section 2 discusses ERISA’s treatment of welfare benefits.

**1. Protection of Pension Plans**

Title IV of ERISA protects employees who have covered pension plans from the termination of such plans before sufficient funds have accumulated to pay anticipated benefits. The Pension Benefits Guaranty Corporation (PBGC) acts as a “national insurer” and guaranties the payment of nonforfeitable pension benefits under terminated plans. Because pensions are viewed as a form of income replacement for retired workers, they are afforded a high amount of

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123 *In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 519 (Bankr. S.D. N.Y. 1991) (citing 11 U.S.C. § 1114(c)(2) (“where the labor organization… elects not to serve as the authorized representative… the court… shall appoint a committee of retired employees… to serve as the authorized representative of such persons under this section.”)).
125 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
126 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
127 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
protection under ERISA. For example, ERISA requires that traditional pension plans be funded in advance by employers and also includes strict vesting requirements. These ERISA protections of pensions extend to the bankruptcy forum. Courts have held that a pension plan may not be rejected by a trustee in bankruptcy but rather may be terminated through the provisions provided by ERISA. Under ERISA, an employer may terminate a pension plan with a “distress termination” by demonstrating “necessary distress criteria,” which is defined in ERISA. Liquidation and reorganization in bankruptcy or any insolvency proceedings are among these criteria. Thus if the court finds that if the pension plan is not terminated the debtor will be unable to successfully reorganize, the termination will be permitted under ERISA.

The Supreme Court has held that ERISA preempts the Bankruptcy Code for claims that arise from an employer’s lawful termination of a plan under ERISA. In In re Lineal Group, Inc., the employer sought to eliminate supplemental benefits to employees who had accepted

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129 67 Am. Bankr. L.J. 17, 20. Keating, Daniel. Bankruptcy Code § 1114: Congress’ Empty Response To The Retiree Plight (Winter, 1993), 29 USC 1053, which states that “Each pension plan shall provide that an employee’s right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age…”
130 See 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
131 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
132 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
133 7 COLLIER ON BANKRUPTCY. P 1114.10 (2010).
134 29 U.S.C. § 1341(c)(2)(A)(ii), For reorganization in bankruptcy,[t]he requirements of this clause are met by a person or entity if—

(I) such person has filed, or has had filed against such person, as of the proposed termination date, a petition seeking reorganization…, (II) such case has not, as of the proposed termination date, been dismissed, and (III) such person timely submits to the corporation any request for the approval of the bankruptcy court (or other appropriate court in a case under such similar law of a State or political subdivision) of the plan termination, and (IV) the bankruptcy court (or such other appropriate court) determines that, unless the plan is terminated, such person will be unable to pay all its debts pursuant to a plan of reorganization and will be unable to continue in business outside the chapter 11 reorganization process and approves the termination.

early retirement prior to filing for Chapter 11. After filing, the debtor sought to modify retiree benefits under §§ 1114(e) and (g) but the bankruptcy court denied the motions. Subsequently, however, the IRS allowed the employer to eliminate the entire supplemental benefit program according to ERISA guidelines, including the employer’s pension plan, which would then be administered by the PBGC. The retirees who had accepted early retirement sought to collect the difference between the plan benefits promised and the benefits they would receive after plan termination from the PBGC. The bankruptcy court disallowed these claims as preempted under ERISA.

2. **Protection of Welfare Benefits**

While ERISA specifically provides protection for pension plans with the establishment of the PBGC and other elaborate vesting requirements, no such protections are awarded to other welfare benefit plans such as health and life insurance benefits. At the time ERISA was passed, the emerging judicial view was that retiree benefits, including welfare benefits, would vest at retirement unless the employer clearly indicated a contrary intent. Congress did not require that these benefits vest with retirement but rather left it open for employers to indicate otherwise. Congress intentionally excluded such a vesting requirement because,

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139 7 COLLIER ON BANKRUPTCY. P 1114.10 n. 5 (2010) (citing In re Lineal Group, Inc., 226 B.R. 608 (Bankr. M.D. Tenn. 1998)).
140 7 COLLIER ON BANKRUPTCY. P 1114.10 n. 5 (2010) (citing In re Lineal Group, Inc., 226 B.R. 608 (Bankr. M.D. Tenn. 1998)).
141 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 232 (3d Cir. 2010).
142 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 233 (3d Cir. 2010).
143 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 233 (3d Cir. 2010).
it determined that [t]o require the vesting of those ancillary benefits would seriously complicate the administration and increase the cost of plans whose primary function is to provide retirement income... in rejecting the automatic vesting of welfare plans, Congress evidenced its recognition of the need for flexibility with regard to an employer’s right to change medical plans.\footnote{144}

Congress believed that imposing the same strict requirements on these benefits and taking away employers’ flexibility would result in employers simply refusing to offer any welfare benefits at all.\footnote{145} But, the vesting question became crucial with the adoption of § 1114 because employers knew that the new Bankruptcy Code section might not apply if a retiree benefits program is terminable-at-will under state law.\footnote{146} Because there was no vesting requirement included, nearly every employer includes explicit reservation of rights clauses in benefit plans giving the employer the authority to alter or terminate the plan.\footnote{147} Thus, under ERISA\footnote{148}, employers are generally free to adopt, modify, or terminate welfare plans at any time regardless of their reason.\footnote{149}

II. WHY RETIREES HAVE not TRADITIONALLY BEEN PROTECTED: THE EVOLUTION OF A MINIMALIST INTERPRETATION

The majority of courts apply the minimalist interpretation of § 1114, which was first established by In re Chateaugay. This means the courts use a contextual approach when reading § 1114 and do not apply its protections to benefits that are terminable outside of bankruptcy

\footnote{144} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 232 (3d Cir. 2010) (quoting In re Unisys Corp. Retiree Med. Benefit ERISA Litig., 58 F.3d 896, 901 (3d Cir. 1995)(“Unisys II”)).
\footnote{145} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 232 (3d Cir. 2010).
\footnote{148} Under ERISA alone, ignoring the Bankruptcy Code
\footnote{149} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 232 (3d Cir. 2010) (quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995)).
proceedings.\textsuperscript{150} The courts read the statute against a broad understanding of the way parties’
rights and obligations are created as a matter of law.\textsuperscript{151} They take into account two fundamental
principles of bankruptcy law as their starting point.\textsuperscript{152} “First, pre-petition contract rights should
not be expanded or improved solely as a result of a debtor’s bankruptcy filing. Second, statutory
priorities should be narrowly construed.”\textsuperscript{153} Further, the contextual or “vested contract” approach
argues that a statute should be construed in a manner that does not interfere with the established
contractual relationship of the parties.\textsuperscript{154} It is assumed that Congress was aware of these
bankruptcy principles when drafting § 1114, and courts have been reluctant to interfere with
established contracts and expand the rights of retirees at the expense of other creditors when,
according to the courts, the statute is ambiguous as to the scope of protection.\textsuperscript{155}

Part A of this section discusses the decision and holding in the LTV bankruptcy
proceeding, \textit{In re Chateaugay}, the case that first defined the scope and application of § 1114.
Part B discusses the adoption and expansion of the \textit{Chateaugay} holding by subsequent courts.
Finally, part C discusses the continued evolution and most recent applications of the traditional
interpretation of § 1114.

\textbf{A. \textit{The Creation of the Minimalist Approach: The Chateaugay Decision}}\textsuperscript{156}

\textsuperscript{150} 14 Cardozo L. Rev. 1911, 1933. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993).
\textsuperscript{151} 14 Cardozo L. Rev. 1911, 1933. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993).
\textsuperscript{152} 29-7 ABIJ 24. Jackson, Partrick A., \textit{In re Visteon Corp.: Contractual Modification of Retiree Benefits Subject to § 1114.} (September 2010).
\textsuperscript{153} 29-7 ABIJ 24. Jackson, Partrick A., \textit{In re Visteon Corp.: Contractual Modification of Retiree Benefits Subject to § 1114.} (September 2010).
\textsuperscript{154} 14 Cardozo L. Rev. 1911, 1933. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993).
\textsuperscript{155} See 29-7 ABIJ 24. Jackson, Partrick A., \textit{In re Visteon Corp.: Contractual Modification of Retiree Benefits Subject to § 1114.} (September 2010), and 14 Cardozo L. Rev. 1911, 1933. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993).
\textsuperscript{156} The Chateaugay Decision here refers to The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay I}), 922 F.2d 86 (2d Cir. 1990), which was one of the bankruptcy proceedings in the LTV case which occurred after the passing of the Retiree Benefits Bankruptcy Protection Act.
Within a week of the enactment of the Retiree Benefits Bankruptcy Protection Act, LTV sought a declaratory judgment that the Act did not require it to continue paying health benefits to certain union retirees and their dependants after the expiration of the Wage Agreement on January 31, 1988. LTV did not attempt to terminate the benefits of nonunion employees. The US Bankruptcy Court issued an order in agreement, and stated that the Act did not require LTV to continue providing benefits to retirees after the mining subsidiaries where they had been employed ceased operations and the Wage Agreement expired. On appeal, the United States District Court for the Southern District of New York affirmed the judgment. The District Court framed the issue as, “whether [the Retiree Benefits Bankruptcy Protection Act] requires a debtor in possession to continue to pay retiree health benefits pursuant to a collective bargaining agreement for the duration of the Chapter 11 case if the collective bargaining agreement, and thus the contractual basis of the benefits, expires during the proceeding.”

Part 1 will consider the reasoning the majority utilized in reaching its decision and Part 2 will discuss the dissenting opinion of Judge Restani.

1. **The Majority Opinion: Contract Rights Prevail**

On appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment in a two-to-one decision. The Court looked to case law involving retiree benefits during bankruptcy, but because it was only a few short years after the passage of the Retiree

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158 “The argument is that no “unilateral” action is involved where a contract expires by its own terms, whereas ‘unilateral’ action is required for a debtor to terminate or modify a plan, even though he legally has the right to do so.” 14 Cardozo L. Rev. 1911, n. 146. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993).
161 The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205 (2d Cir. 1991).
Benefits Bankruptcy Protection Act, those cases were not decided in light of its recently added protections.\textsuperscript{162} Thus, the majority analysis, as written in the opinion by Judge Maskill, centered on the statutory interpretation of the Retiree Benefits Bankruptcy Protection Act and only looked to earlier cases to decide whether the Wage Agreement itself required LTV to continue paying benefits beyond its expiration.\textsuperscript{163}

The court rejected the Benefit Trust’s argument that the Retiree Benefits Bankruptcy Protection Act required the debtor to continue paying benefits until the case was dismissed or a reorganization plan was confirmed, relying on the statutory language of § 1114.\textsuperscript{164} The court explained that, the Act “requires that during reorganization the parties continue to provide benefits according to the plan in effect at the time of the declaration of bankruptcy; the [Act] does not alter the terms of that plan.”\textsuperscript{165} Thus, the court reasoned, LTV’s obligations must be determined by the provisions of the plan LTV had in place when it filed for bankruptcy in July, 1986.\textsuperscript{166} As a result, the court found that LTV had no obligation to continue payments past the expiration of the Wage Agreement, because under the provisions of the Agreement, which was in effect at the time of the bankruptcy filing, LTV was only obligated to pay benefits for the term of the Agreement.\textsuperscript{167} And according to the Agreement, once the term of the Agreement ended, LTV was no longer obligated to pay benefits.\textsuperscript{168} Because this was the plan in effect at the time of filing, the court did not believe that § 1114 should alter the terms of the plan in any way by

\textsuperscript{162} The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1209 (2d Cir. 1991).
\textsuperscript{164} The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1208-09 (2d Cir. 1991).
\textsuperscript{165} The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1209 (2d Cir. 1991) (internal quotation marks omitted).
\textsuperscript{167} The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1209 (2d Cir. 1991).
\textsuperscript{168} LTV “was obligated to pay retiree benefits under the terms of the Wage Agreement. The Benefit Trust was to pay benefits if the Mining Companies were no longer in business. No provision in the agreement discusses coverage upon the expiration of the Wage Agreement without adoption of a subsequent agreement.” The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1208 (2d Cir. 1991).
requiring the payment of benefits throughout the bankruptcy proceedings past the expiration. The court argued that this would give retirees more rights in bankruptcy than they have under the Wage Agreement alone. Further, because upon expiration the provision of retiree health benefits shifted from the debtor to the Benefit Trust, the court concluded there was no actual termination of benefits, and the retirees were receiving “exactly what they bargained for.”

To support this conclusion, the court also looked to the legislative history of the Retiree Benefits Bankruptcy Protection Act to determine if its interpretation was consistent with congressional intent. The court found that the Act was created to “insure that promises made to employees during their working years are not broken during their retirement years.” Further, the court focused on individual remarks by representatives, and stressed that the Retiree Benefits Bankruptcy Protection Act was intended to prevent companies from using bankruptcy to renege on collectively bargained obligations to retired workers. The representatives quoted, however, never mentioned a difference between collectively bargained and non-collectively bargained agreements, instead referring only to “contractual obligations” and “legal obligations.” Here, because the retirees received what they were promised under the Wage

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169 See, The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1209 (2d Cir. 1991).
170 The Court stated that whether or not the retirees actually receive benefits (depending on if the plan is able to fully fund the benefits - it was not) is a separate issue. The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1210 (2d Cir. 1991).
171 See The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205 (2d Cir. 1991).
172 The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1210 (2d Cir. 1991) (quoting 133 Cong. Rec. H1262 (daily ed. Mar. 11, 1987) (remarks by Representative Frost)).
173 See The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1210 (2d Cir. 1991) (quoting 133 Cong. Rec. H1262 (daily ed. Mar. 11, 1987) (remarks by Representative Eckart) (“Bankruptcy Court has become an increasingly popular vehicle allowing companies to renege on their contractual obligations to their retired workers.; and 132 Cong. Rec. H5259 (daily ed. July 31, 1986) (remarks by Representative Regula) (Companies must be put on notice that they cannot unilaterally ignore their legal obligations to their former employees.”)).
Agreement, which did not provide for LTV’s payment of benefits after its expiration, the court insisted that the outcome of its decision was consistent with Congress’s intended purpose.\textsuperscript{175}

2. \textit{The Dissent}

In his dissent, Judge Restani stated that he would reverse the lower court’s decision because he “[did] not find any intent on the part of Congress to distinguish between a contract right which never existed and one which terminated.”\textsuperscript{176} He pointed out that the district court and majority here found that the Retiree Benefits Bankruptcy Protection Act applied to health benefits that were terminable-at-will, but that it did not apply to an expired contract obligation.\textsuperscript{177}

In other words, the courts found that benefits being paid prior to bankruptcy that were not governed by a Wage Agreement could not be terminated but those paid pursuant to a Wage Agreement that expired during bankruptcy could be terminated.\textsuperscript{178} This reliance on unilateral termination, according to the dissent, directly contravened Congress’s intent to protect all retiree benefits in bankruptcy.\textsuperscript{179}

The dissent concluded that the two pieces of legislative history that the district court initially relied upon in reaching its conclusion did not even address the question at hand.\textsuperscript{180} The quoted legislators made no mention of whether a debtor in possession continues to be liable for

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175 See, The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1210 (2d Cir. 1991).
176 The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge Restani).
177 The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge Restani).
179 61 U. CIN. L. REV. 715, 733. Coffey, Shirley A. \textit{One Bankruptcy is Enough, 78,000 is too many—Protection of Retirement Benefits Under the Retiree Benefits Bankruptcy Protection Act of 1988}. (1992). The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1211 (2d Cir. 1991)(dissenting opinion by Judge Restani) (“LTV’s decision not to continue its 1984 Wage Agreement obligations to the retirees was no less unilateral than the decision to terminate ‘at will’ benefits, and certainly LTV’s original attempt to reject the Wage Agreement pursuant to the trustee’s ordinary bankruptcy powers was a unilateral action. But even more persuasive is the absence of the limiting word ‘unilateral’ from the statutory language. Of course the Act does protect workers against unilateral termination of benefits, but the plain language of the statute does not limit it to this purpose.”)
180 The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge Restani).
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benefits after the expiration of a bargained for collective agreement.\footnote{The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1212 (2d Cir. 1991) (dissenting opinion by Judge. Restani).} Like the district court, the majority could not truly look to the language of the statute because if they had, it would have called for LTV to continue paying benefits.\footnote{See The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1212 (2d Cir. 1991) (dissenting opinion by Judge. Restani).} The dissent did not deny that the majority did look to the statutory language, but argued that the majority applied it in “a circular manner, thereby defeating the purpose of the statute.”\footnote{The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1212 (2d Cir. 1991) (dissenting opinion by Judge. Restani).} Like the district court, the majority looked to pieces of legislative history that did not touch upon the difference between collectively bargained and non-collectively bargained agreements.\footnote{See The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani).} The dissent concluded that the legislative history the majority used was actually consistent with the language of the statute. However, the majority “seized upon the concept of the unilateral nature of certain termination benefits,” to create a distinction that is unfounded in the language of the statute.\footnote{The LTV Corp. v. United Mine Workers of America (\textit{In re Chateaugay}), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani).}

\textbf{B. Expanding the Scope of the Chateaugay Decision}

After the initial proceeding and ruling of \textit{In re Chateaugay}, a later proceeding occurred and the bankruptcy court was faced with the question of whether the earlier ruling that § 1114 did not require a debtor to pay benefits to union employees also extended to non-union employees.\footnote{See 14 Cardozo L. Rev. 1911. 1937 Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993) (citing \textit{In re Chateaugay Corp.}, 140 B.R. 64 (S.D.N.Y. 1992))} Based on its earlier focus on the “unilateral” aspect of termination and modification of collectively bargained for benefits, the court found that non-union, salaried
employees were indeed protected from the termination of benefits.187 Because their benefits were at will and not in an agreement that had expired, the court found that unilaterally terminating such benefits was in violation of § 1114.188 This decision, and the anomaly it created, was just what the dissent in the earlier Chateaugay pointed to as the major flaw of the majority’s reasoning. This result came as a product of the majority’s focus on the “unilateral nature of certain termination benefits,” and thus created an anomalous interpretation of § 1114 which did not uniformly protect retirees and offered protection to some and not others.189

In the interim between the two Chateaugay decisions, the Bankruptcy Court for the District of Kansas reached the opposite conclusion, instead extending the ruling of the original Chateaugay decision and holding that § 1114 did not protect non-union employee benefits either.190 By doing so, the court avoided the obvious contradiction apparent in the two Chateaugay decisions, and effectively stripped § 1114 of any power it had to protect retiree benefits. The court framed the issue as whether the court must appoint a Retiree Committee under § 1114(d) and follow the modification procedure set forth therein when the debtor “has reserved the power to amend, modify or terminate ERISA welfare plan benefits by unambiguous language in the plan.”191

When the company, Doskocil, filed for Chapter 11, it was paying benefits to two categories of retiree: salaried non-union employees and hourly union employees.192 The court appointed a committee under §§ 1113 and 1114 to negotiate modifications regarding the

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187 See The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani); See also 14 Cardozo L. Rev. 1911. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993) (citing In re Chateaugay Corp., 140 B.R. 64 (S.D.N.Y. 1992)).
188 In re Chateaugay Corp., 140 B.R. 64 (S.D.N.Y. 1992)
189 The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani).
collectively bargained plan governing the benefits of the hourly union employees.193 There was no contention regarding the union employees, however the debtor asked the court to determine that it had no contractual obligation under the non-union plan that would prevent the debtor from modifying retiree benefits for the non-union employees.194

In its analysis, the court first looked to the language of the benefits plan, which clearly reserved the debtor’s right to modify benefits.195 Next, the court looked to ERISA and determined that, according to case law, an employer does not breach a fiduciary duty to retirees when it exercises the power it unambiguously reserved to modify or terminate plan benefits.196 The court looked to legislative history regarding health benefits to determine congressional intent, pointing to Congress’s appreciation that flexibility regarding welfare benefits was necessary when drafting ERISA.197 Under these circumstances with an unambiguous reserved right to terminate benefits, and nothing preventing such termination under ERISA, the court was left to determine whether § 1114 placed any additional obligations on the debtor.198 The court had no guidance on the issue except that of In re Chateaugay, which dealt only with a collectively bargained agreement, but still concluded that § 1114 was intended to operate only in those situations where a debtor had a continuing legal obligation to pay the retiree benefits.199

Like the court in In re Chateaugay, this court clung to the “unilateral termination” language and found that in this instance, modification was not a unilateral action but a “preexisting contractual provision.”200 This court, too, relied on similar tidbits of legislative history to conclude that Congress did not intend for § 1114 to reach the unambiguous contractual

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rights of employers or give retirees more rights in bankruptcy than they had under applicable non-bankruptcy law.\textsuperscript{201} The court provided one statement made by a co-sponsor of the Retiree Benefits Bankruptcy Protection Act, Senator Byrd, to support this conclusion. Senator Byrd stated that,

while thousands of retirees could lose their medical and life insurance benefits as a result of their employer's actions under Chapter 11 bankruptcy filing, these companies have a legal and contractual obligation to their retirees. This legislation will not guarantee continuation of these benefits, but it will provide a mechanism that will allow the retirees' position to be heard.\textsuperscript{202}

The court interpreted this one statement to mean that none of § 1114 is applicable, and thus Doskocil had an undeterred right to modify and terminate retiree benefits.\textsuperscript{203} In fact, however, the mechanism to allow the retirees’ position to be heard that Senator Byrd referred to are the procedures encompassed in § 1114(d) and (e).

To support the conclusion that Congress intended § 1114 to operate this way, the court noted that the language of § 1114 shadows that of § 1113 governing the modification of collective bargaining agreements, with “a few grammatical exceptions.”\textsuperscript{204} Thus the court concluded that it could infer that “Congress intended to focus primarily on the modification of debtor's legal obligations to retirees as opposed to creating for the debtor some new obligation not already imposed by the terms of the retiree benefit plan.”\textsuperscript{205} So like the court in \textit{In re Chateaugay}, this court looked beyond the language of the statute and referred to snapshots of legislative history to support its preconceived correct result.\textsuperscript{206}

\textsuperscript{201} \textit{In re Doskocil Comp. Inc.}, 130 B.R. 870, 875 (Bankr. D. Kan. 1991).
\textsuperscript{202} \textit{In re Doskocil Comp. Inc.}, 130 B.R. 870, 875-76 (Bankr. D. Kan. 1991) (quoting 133 Cong. Rec. S 2237-38 (Feb 19, 1987) (remarks of cosponsor Senator Byrd upon the introduction of the Senate version of the bill)).
C. Continued Application of the Minimalist Precedent

After the Chateaugay and Doskocil decisions, various district and circuit courts across the nation adopted versions of their minimalist interpretation of § 1114 because there was no opposing case law to guide courts in adopting any other reading of the statute.207 For example, in 2002, the United States Bankruptcy Court for the Eastern District of Tennessee, Southern Division, once again restricted the application of § 1114, stating that if the debtor has the contractual right to terminate under § 554 or § 363, the existence of § 1114 does not apply, thus the debtor may terminate without complying with any of the negotiation procedures set forth therein.208 The court justified this conclusion arguing that because § 1114 does not limit the debtor’s right under the contract to terminate it, “[c]ompliance with § 1114 is irrelevant to the issue of termination in accordance with the contract’s terms.”209 The court here mimicked the reasoning of Doskocil, also concluding that where there is a right to modify or terminate benefits in the Wage Agreement or Employment Agreement, it is not a “unilateral” action but rather just a preexisting contractual right that the debtor has chosen to exercise.210 This court also concluded that the negotiation procedures of § 1114 were irrelevant in protecting retirees in such a situation, because it did not believe there was “convincing evidence” that Congress intended such

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210 See In re North American Royalties, Inc., 276 B.R. 860 (E.D. Tenn. S.Div. 2002), In re Doskocil Comp. Inc., 130 B.R. 870, 875-76 (Bankr. D. Kan. 1991). Here the court argued that if § 1114 were allowed to “nullify a debtor’s right to terminate a retiree benefits contract, they may provide better protection in chapter 11 cases for retiree welfare benefits than § 1113 provides for pension benefits created under a collective bargaining agreement,” and that if Congress intended such “unusual results” there would be clear evidence of such an intent. What the court fails to recognize is that pension benefits do not require the same protection under the Bankruptcy Code as do retiree welfare benefits because there is applicable nonbankruptcy law, namely ERISA, which does protect retiree pensions. Such law does not exist for retiree welfare benefits, thus the need for and creation of § 1114. This matter will be discussed further in Section IV-B.
III. THE BIRTH OF THE PROTECTIONIST APPROACH

While the Visteon decision was not the first time a court determined that § 1114 was applicable to all retiree benefits,\(^{212}\) it did mark the first time any Federal Circuit Court ruled that the restrictions on modification of retiree benefits under § 1114 apply notwithstanding the debtor's contractual rights outside of bankruptcy.\(^{213}\) The courts that read § 1114 in a protectionist way took a plain language approach to the statute, finding that the language was neither unclear nor ambiguous.\(^{214}\) Additionally, because of the challenge of so many other courts, the courts reaffirmed this approach by looking to the rich legislative history of the Retiree Benefits Bankruptcy Protection Act, which supports their reading.\(^{215}\) This Section will first discuss some small glimpses of the protectionist approach prior to the Visteon decision. Section B will provide the details and holding of the Visteon case in which the United States Court of Appeals for the Third Circuit held that § 1114 protects all retiree benefits regardless of other contractual rights.

\(^{214}\) See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212 (3d Cir. 2010).
\(^{215}\) See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212 (3d Cir. 2010), The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani).
A. Pre-Visteon Glimpses of the Protectionist Approach

The minority plain meaning approach is not a novel idea that just took form with the Visteon decision.\(^{216}\) In fact, Judge Restani articulated this precise interpretation of § 1114 in *In re Chateaugay*. Like the Visteon court, Judge Restani believed that the plain language of § 1114 resulted in the application of the statute’s procedural requirements to all retiree benefits.\(^{217}\) He believed a real look at the full legislative history of the statute demonstrated Congress’s intent for § 1114 to apply to all retiree benefits.\(^{218}\)

In 2003, the United States Bankruptcy Court for the Western District of Missouri also concluded that the legislative history of § 1114 is consistent with its plain language and thus did not provide an exception to the procedural requirements of § 1114 simply because the debtor had a prepetition right to terminate those benefits.\(^{219}\) If such an exception did exist, the court argued, “the statute would be eviscerated and rendered virtually meaningless. Any debtor -- most debtors, more than likely -- would be able to point to language in the underlying documents establishing voluntary programs…giving them the right to unilaterally terminate the programs.”\(^{220}\)


\(^{217}\) See The LTV Corp. v. United Mine Workers of America (*In re Chateaugay*), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani).

\(^{218}\) The LTV Corp. v. United Mine Workers of America (*In re Chateaugay*), 945 F.2d 1205, 1211 (2d Cir. 1991) (dissenting opinion by Judge. Restani). According to the legislative history,

> the Act continues all retiree health benefits which are in effect immediately prior to bankruptcy… The clear purpose of the Act is to give the bankruptcy court power to resolve the competing interests of retirees, debtors and creditors, if agreement as to continuation and level of benefits cannot be reached. The health benefits of retirees are not to be terminated by any action until the bankruptcy court has time to act… The passages of legislative history cited by the majority do not reveal an intent other than that reflected in the plain language of the statute…


\(^{220}\) In re Farmland, 294 B.R. 903, 917 (Bankr. W.D. Missouri 2003).
B. A New Era of Protection: In re Visteon

Part 1 of this section will introduce the background of In re Visteon, when a court was once again faced with retirees losing their benefits, and Part 2 will discuss the groundbreaking holding of the case.

1. Facts and Background

Visteon Corporation was originally formed as a division of Ford Motor Corporation, but has since separated from Ford and was one of the world’s largest automotive parts suppliers. For decades, Visteon and its predecessors provided certain welfare benefits to retirees, including those represented by the Industrial Division of the Communications Workers of America (IUE-CWA) at its Connersville and Bedford, Indiana plants. Their agreement to provide welfare benefits to retirees “has been memorialized in successive collective bargaining agreements, as well as in summary plan descriptions.” The most recent summary plan descriptions at the Indiana plants provided that retiree medical coverage would “continue during retirement” or “continue during retirement until... death,” and the latest collective bargaining agreements included express commitments to provide retiree benefits. The most recent

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221 Visteon split from Ford in 2000 to become its own entity and took over operation of plants in Indiana that were previously run by Ford or its wholly-owned subsidiaries.
222 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212 (3d Cir. 2010).
223 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212 (3d Cir. 2010).
224 Summary plan descriptions are for non union employee benefit plans and are required by ERISA. The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212 (3d Cir. 2010).
225 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212-13 (3d Cir. 2010) (citing J.A. 434, 1076).
226 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212-13 (3d Cir. 2010) (citing J.A. 691, 1355).
summary plan descriptions also included language reserving Visteon’s right to modify or terminate the coverage.227

Visteon closed its Connersville plant in 2007 and the Bedford plant in 2008.228 Prior to both closings, Visteon negotiated Closing Agreements, which set forth the terms for closing.229 The Closing Agreements did not refer to retiree benefits except to include a Waiver and Release that Visteon may amend benefit plans in the future, which could affect retiree eligibility.230 On May 28, 2009, Visteon filed for Chapter 11 bankruptcy in the District of Delaware and continued to operate its business as a debtor in possession to facilitate a successful reorganization.231 On June 26, 2009, Visteon moved the bankruptcy court for permission to terminate all United States retiree benefit plans pursuant to § 363(b)(1) of the Code.232 On December 10, 2009, over the objections of more than 2,100 Visteon retirees, the bankruptcy court granted the motion and

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227 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 212 (3d Cir. 2010). The second page of each Summary Plan Description provides in part as follows:

Visteon Systems, LLC intends to continue the Plan as described in this handbook. However, the Company reserves the right to suspend, amend or terminate the Plan—or any of the coverages or any features provided under the Plan—at any time and in any manner to the extent permitted by law (subject to the collective bargaining requirements). As a result, this handbook is not a contract, nor is it a guarantee of your coverages.

The Summary Plan Description also included another reminder of the Company’s reservation of its right to modify, suspend or terminate later in the agreement. J.A. 417, 1060.

228 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 213 (3d Cir. 2010).

229 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 213 (3d Cir. 2010).

230 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 213 (3d Cir. 2010) (quoting J.A. 575, 1328) (“Visteon may in the future amend its benefit plans and make available different retirement, placement or separation benefits for which I may not be eligible. The Plant Closure Agreement does not limit or in any way modify the provisions of any benefit plan.”).

231 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 213 (3d Cir. 2010).

232 Section 363(b)(1) provides that the bankruptcy trustee “after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate. The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 213 (3d Cir. 2010) (quoting 11 U.S.C. § 363).
concluded that since Visteon had the right to unilaterally terminate benefits outside of bankruptcy, § 1114 protections did not apply.\textsuperscript{233}

While Visteon could terminate its benefit payments immediately after the bankruptcy court order, it still was required to provide lifetime COBRA coverage to retirees whose benefits it discontinued during the Chapter 11 proceedings.\textsuperscript{234} Thus, retirees could only continue their Visteon health coverage by electing COBRA coverage and paying the full cost of that coverage plus a two percent administrative fee.\textsuperscript{235} This caused irreparable harm to the non-Medicare eligible retirees,\textsuperscript{236} 840 of whom were left without health coverage because they could not afford the extraordinarily high costs of COBRA health insurance.\textsuperscript{237} The rest were forced to pay huge chunks of their monthly income for health insurance they could not forego, regardless of the high cost.\textsuperscript{238} For example, the cost of COBRA coverage for the retirees ranged from $670.85 to $2,012.54 a month, constituting twenty-three to eighty-six percent of the retirees’ monthly incomes.\textsuperscript{239}

2. \textit{The Decision}

The Court of Appeals for the Third Circuit concluded, in a unanimous decision by the three-judge panel, that § 1114 applies to all retiree benefits, regardless of pre-petition contractual

\textsuperscript{233} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 213-14 (3d Cir. 2010).
\textsuperscript{234} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 214 (3d Cir. 2010).
\textsuperscript{235} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 214 (3d Cir. 2010).
\textsuperscript{236} As of August 2009, approximately forty percent of the retirees were not yet eligible for Medicare. The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 215 (3d Cir. 2010) (citing J.A. 3690).
\textsuperscript{237} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 215 (3d Cir. 2010).
\textsuperscript{238} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 214 (3d Cir. 2010).
\textsuperscript{239} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 215 (3d Cir. 2010) (citing J.A. 3688-95).
rights. The court ordered that the retiree’s welfare benefits be reinstated immediately, and that any further attempts to modify them be subject to negotiations with the IUE-CWA.

The court found that the plain language of § 1114 “is unambiguous and clearly applies to any and all retiree benefits.” When the language of a statute is clear and unambiguous the “sole function” of the courts is to apply and enforce the statute according to its terms. The language, according to the court, “could hardly be clearer.” The court said that based on the language, Congress did not restrict the application of § 1114. While Visteon’s unsecured creditors argued that § 1114 is ambiguous because it does not specifically address whether it applies to benefits that can be terminated outside of bankruptcy, the court concluded that the statute is not ambiguous because “language is ambiguous only if it is reasonably susceptible of different interpretations.” Here, “payments to any entity or person” is not susceptible to different interpretations. Additionally, a statute is not ambiguous solely because it is broad. Rather, “[b]y using the word ‘any’ three separate times, Congress ensured that the statute would apply to all benefits, absent the few exceptions directly addressed, without its having to itemize the entire universe of benefits.” Thus, Congress intentionally created a broad, all

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242 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 214 (3d Cir. 2010).
244 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 220 (3d Cir. 2010).
245 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 220 (3d Cir. 2010).
247 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 221 (3d Cir. 2010) (citing In re Philadelphia newspapers, 599 F.3d at 310).
248 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 221 (3d Cir. 2010)
encompassing statute to avoid a laundry list that could potentially exclude certain benefits or retirees.

According to the court, it is clear that if Congress intended to include a limitation for benefits terminable outside of bankruptcy, they would not have used the phrase “payments to any entity or person… under any plan, fund or program” as it does not imply any such limitation. If Congress wanted such a limitation, they would have expressly stated one. The court noted that Congress did indeed place restrictions where it wanted such restrictions to exist. For example, they ensured that the protections included under § 1114 do not extend to benefits other than health, accident, disability or death benefits, nor do they apply to high income retirees who can obtain comparable coverage elsewhere. Thus, the “breadth of the statute’s language requires that it be universally applied absent the few exceptions included in the text; it does not create a license to disregard the statute’s plain language.”

The court considered previous cases that followed the majority view on the application of § 1114 and was “convinced that in reaching… contrary conclusions as to the scope of § 1114, [previous] courts mistakenly relied on their own views about sensible policy, rather than on the congressional policy choice reflected in the unambiguous language of the statute.” Those courts began with their own assumptions about the limitations of § 1114 and what debtors should

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249 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 220 (3d Cir. 2010) (quoting 11 USC § 1114(a)) (“It is impossible to read the plain language of § 1114 as excluding benefits which are terminable outside of bankruptcy because, as we have explained they are plainly ‘payments to any entity or person… under any plan, fund or program.’

250 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 220 (3d Cir. 2010).

251 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 220 (3d Cir. 2010).

252 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 220 (3d Cir. 2010).

253 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 221 (3d Cir. 2010).

254 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 219 (3d Cir. 2010).
be able to do in and out of bankruptcy and then looked to statutory language and found it unpersuasive in altering their preconceived conclusions.\footnote{255}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 226 (3d Cir. 2010).} Proper statutory interpretation, according to the court, does not include preconceived notions by the courts, but rather an unbiased look at Congress’s chosen language to determine whether it is plain and unambiguous.\footnote{256}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 226 (3d Cir. 2010).} If the language is found to be clear and unambiguous, the statute should be applied in the manner proscribed by Congress, without an injection of the court’s personal beliefs on how the statute should operate.\footnote{257}{See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 226 (3d Cir. 2010).}

Finally, the court looked to the legislative history of § 1114, noting that “‘only the most extraordinary showing of contrary intentions in the legislative history will justify a departure’ from the unambiguous plain language of a statute.”\footnote{258}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 226 (3d Cir. 2010).} Visteon and its other unsecured creditors argued that the legislative history supported the traditional application of § 1114.\footnote{259}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 227 (3d Cir. 2010) (quoting United States v. Albertini, 472 U.S. 675, 680).} The Court said that the statements they provided were inadequate inasmuch as they could not “point to a single statement anywhere in the legislative history suggesting that the safeguards of § 1114 are triggered only in those instances where the debtor is legally or contractually obligated to provide benefits.”\footnote{260}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 227 (3d Cir. 2010).} The Court said the legislators who spoke of obligations to retirees were not speaking of only contractual obligations enforced by law.\footnote{261}{The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 227 n. 19 (3d Cir. 2010) (citing Retiree Health Benefits: The Fair-Weather Promise: Hearing Before the S. Spec. Comm. On Aging, 99th Cong. 2d Sess. (1986))} Solely because there was discussion
and debate between senators evidencing their concern about unilateral termination of benefits does not mean it was the only concern. Finally, the Court stated that Visteon failed to take notice of many pieces of legislative history that were far more significant and persuasive than those it included in its argument. For example, the Report drafted to accompany the Senate version of the bill said the section is clear that “retiree benefit payments must be continued without change and unless a modification is agreed to by the parties or ordered by the court,” and that “Section 1114(e)(1) rejects any other basis” for modification or termination. Thus, the Court concluded, that a total consideration of the rich background and legislative history of § 1114, does not justify a departure from the plain language of the statute.

IV. JUSTIFICATION FOR THE PROTECTIONIST APPROACH

It is evident that Congress intended for § 1114 to be applied the way it was by the court in In re Visteon for several reasons. The plain language of the statute unambiguously proscribes this application, and this reading of the statutory language is supported by other contributing factors. Despite majority arguments to the contrary, “the plain language of § 1114 produces a

when Congress enacted the RBBPA, at lease some legislators seemed to have a quite different understanding of what a legal or contractual obligation, or promise to provide retiree benefits constituted than we do today. Then, the emergent judicial view was that retiree benefits were presumed to vest at retirement, unless the employer included in its Summary Plan Descriptions a clear indication of intent not to vest those benefits. Legislators expressed concern about an employer’s ability to avoid “promises” and “obligations” through manipulation of contractual language… In this context, we think the discussions of legal and contractual obligations and promises that Appellees point to may not have referred only to those benefits we would now call “vested,” but likely also encapsulated certain legislators’ opinions that an employer had an “obligation” once an employee retired, to continue payment of retiree benefits, notwithstanding contractual language to the contrary.

262 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 227 n. 21 (3d Cir. 2010).
263 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 229 (3d Cir. 2010).
265 See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 230 (3d Cir. 2010).
result which is neither at odds with legislative intent, nor absurd.” First, everything about the legislative history of § 1114 demonstrates that Congress intended such an application. Further, because retirees are a unique class of citizens and are not properly protected by other legislation such as ERISA, this application is necessary and proper. Section A will discuss how the legislative history of § 1114 supports a protectionist approach to the statute. Section B will discuss the shortcomings of applicable non-bankruptcy law, and Section C will discuss the unique nature of retirees as a class and how this unique nature requires the added protections of § 1114.

D. *The Rich Legislative History of § 1114*

When considering the legislative history of the Retiree Benefits Bankruptcy Act as a whole, it becomes apparent that § 1114 was intended to apply to all benefits from the overwhelming response to the LTV bankruptcy and the rush to get legislation passed. In addition, statements of various legislators on the House and Senate floor in support of the Retiree Benefits Bankruptcy Protection Act show that Congress intended § 1114 to apply in this way because that such protections were the sole reason why it was drafted and passed. If § 1114 is not to be used to protect retiree welfare benefits during bankruptcy, then what purpose does it serve at all? Virtually every employer reserves the right to terminate and modify benefits outside of the bankruptcy context, thus the majority argument that § 1114 does not apply in those situations based on the language and the “absurd result” a plain reading would create, renders the statute entirely meaningless.

A plain language reading of § 1114 does not produce an “absurd result” nor is it at odds with the will of Congress. After the outpouring of support in the aftermath of the LTV

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266 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 219 (3d Cir. 2010).
termination, it is clear that Congress did not intend to pass a statute that is incapable of aiding other retirees in similar situations. Congress, clearly concerned with the actions of corporations like LTV, made an explicit determination to give special treatment to retirees who were in need of greater protection.\textsuperscript{267} Thus, to suggest that the judiciary should essentially repeal the very protections that Congress intended by interpreting it to exclude almost all retirees is a far more absurd result.\textsuperscript{268}

The traditional approach rests in large part on the doctrine of absurdity, in that Congress could not possibly have intended to give retirees more rights in bankruptcy than they are afforded outside of bankruptcy.\textsuperscript{269} However, given Congress’s hasty response to LTV’s actions in 1986: the numerous hearings on retiree welfare, the emergency stopgap legislation that was passed, and the extreme force behind the passage of the Retiree Benefits Bankruptcy Protection Act, it appears that is precisely what Congress intended to do. Congress recognized that in the bankruptcy arena, additional safeguards were both necessary and appropriate for retirees. Additionally, reading §1114 to provide these protections does not create an absurd result due to an unwarranted expansion of retiree rights because the protections afforded retirees in bankruptcy are temporary and are not “permanently in derogation of underlying contractual rights.”\textsuperscript{270} But rather the protections terminate upon plan confirmation and simply ensure a

\textsuperscript{267} 14 Cardozo L. Rev. 1911, 1949-50 Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993)
\textsuperscript{268} See The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 225 (3d Cir. 2010).
\textsuperscript{270} 29-7 ABIJ 24. Jackson, Partrick A., \textit{In re Visteon Corp.: Contractual Modification of Retiree Benefits Subject to §1114.} (September 2010) (n. 28) (quoting The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 229 (3d Cir. 2010)).
“minimal amount of leverage, in a process that could otherwise be nothing short of devastating.” 271

The courts that read the statute to afford minimal protections to retirees also failed to adhere to the plain language rule they initially purported to be following, and erroneously applied small snapshots of legislative history to prove a Congressional intent that never existed. 272 For example, the court in In re Chateaugay asserted that the legislative history showed that collectively bargained and non-collectively bargained for benefits should be treated differently because certain legislators spoke about not allowing employers to use bankruptcy to renge on existing promises to retirees. 273 Just because certain legislators made statements as to what they felt one of the purposes of the statute was does not mean that Congress did not intend § 1114 to apply in the absence of such promises or obligations. 274 Section 1114 was broadly written in order to encompass the various purposes of Congress in its entirety, not just the ideas of individual legislators. Further, “only the most extraordinary showing of contrary intentions in the legislative history will justify a departure from the unambiguous plain language of a statute.” 275 Citing a few misplaced snippets of legislative history “fall[s] woefully short of such an extraordinary showing of contrary intentions.” 276

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271 29-7 ABIJ 24. Jackson, Partrick A., In re Visteon Corp.: Contractual Modification of Retiree Benefits Subject to § 1114, (September 2010) (n. 28) (quoting The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 229 (3d Cir. 2010)).


273 See The LTV Corp. v. United Mine Workers of America (In re Chateaugay), 945 F.2d 1205 (2d Cir. 1991).

274 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 226-27 (3d Cir. 2010).


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A more accurate, all encompassing picture of the legislative history of the Retiree Benefits Bankruptcy Protection Act demonstrates that Congress intended for § 1114 to protect all retirees regardless of collectively bargained or not collectively bargained agreements. None of the cases that followed the majority approach were able to point to a single piece legislative history that implied that the safeguards of § 1114 are triggered only in situations where the debtor employer is contractually obligated to provide benefits. To the contrary, when one looks at the entire scope of legislative history, there are numerous references to a much more broad-based concern of the “legitimate expectations of former workers.” Most significantly, while those courts could find no legislative history to suggest limiting § 1114 to only contractual obligations, there is legislative history to the contrary. For example, “Senator Metzenbaum explained that the bill requires a company to continue paying for these [retiree] benefits even after the termination of a collective bargaining agreement. Only if a company can prove a modification is absolutely necessary and that it treats everyone fairly can a court… order any modification.” Even more authoritative than any individual statements, the Report drafted to accompany the bill stated that,

Section 1114 makes it clear that when a Chapter 11 petition is filed, retiree benefit payments must be continued without change until and unless a modification is agreed to by the parties or ordered by the court. Section 1114(e)(1) rejects any other basis for trustees to cease or modify retiree benefit payments.

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277 The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 227 (3d Cir. 2010).
Thus, the minimalist camp’s argument that there is an exception for debtors who reserve the contractual right to terminate benefits is unfounded. The Report makes it clear that the only way to modify benefits in Chapter 11 is through the established § 1114 procedures.\(^{281}\)

E. **The Detrimental Shortcomings of Applicable Non-bankruptcy Law**

A large reason for the passage of § 1114 was the fact that there was nothing to protect the welfare benefits of retirees at the time of the LTV benefits disaster. First, retirees are not considered employees under the National Labor Relations Act, so employers are not obligated to negotiate with their union regarding their welfare benefits.\(^{282}\) Additionally, ERISA does little to protect retiree welfare benefits.

ERISA offers explicit protection for pension plans so that employers cannot unilaterally alter or cancel those, and requires employers to prefund such plans, guaranteeing the employee’s right to the pension upon vesting.\(^{283}\) Effectually, this means that even if an employer files for bankruptcy the pension benefits would not be compromised because the employer already paid for the benefits.\(^{284}\) To the contrary, ERISA is silent on retirees’ right to continued health benefits in a similar situation and refers to health benefits only in a general fashion.\(^{285}\) This mere reference to welfare benefits thereby preempts any state laws that might help in aiding retirees and protecting their health benefits, and it does not replace the preempted laws with national

\(^{281}\) The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 229 (3d Cir. 2010).


minimum rules.\textsuperscript{286} “In some sense, [without § 1114] retirees have less protections for their health benefits after ERISA than before the statute was passed.”\textsuperscript{287} Due to the preemption of state law, state common law became inapplicable and the protection of retiree welfare benefits was left to federal common law.

For a short while after the passage of ERISA, it seemed as though federal courts were “on the verge of creating a common-law rule that unequivocally vested promised insurance benefits to retirees immediately upon their retirement,” however it later became clear that the courts were not going to create law on when welfare benefits vest, thus leaving it to a contractual approach.\textsuperscript{288} In other words, if an employer reserved the right to terminate retiree welfare benefits within the contract he was free to do so as he pleased.\textsuperscript{289} It became increasingly evident that employers all reserved this right, and without Congress’s intervention, employers would continue to follow LTV’s lead use bankruptcy as an avenue to terminate existing benefits obligations without any delay.

Congress was aware of and “deeply troubled by the social problems that had resulted in the bankruptcy forum due to the exclusion of retiree benefits from ERISA’s protections.”\textsuperscript{290} In fact, one of the main focal points of the Fair Weather Promise Hearing was ERISA’s inadequacy and evaluating the sufficiency of other retiree benefit protections.\textsuperscript{291} Congress noted that in 1974 it had to step forward to guarantee pension benefits for retirees by enacting ERISA, and that after

\textsuperscript{286} Retiree Health Benefits: The Fair-Weather Promise: Hearing Before the S. Spec. Comm. on Aging, 99\textsuperscript{th} Cong. 2d Sess. at 28-29 (1986) (testimony of Neal S. Dudovitz, Director of the National Senior Citizens Law Center,).

\textsuperscript{287} Retiree Health Benefits: The Fair-Weather Promise: Hearing Before the S. Spec. Comm. on Aging, 99\textsuperscript{th} Cong. 2d Sess. at 28-29 (1986) (testimony of Neal S. Dudovitz, Director of the National Senior Citizens Law Center,).


\textsuperscript{290} The Industrial Division of the Communications Workers of America, AFL-CIO, CLC v. Visteon Corp., 612 F.3d 210, 232 (3d Cir. 2010).

LTV’s actions demonstrated the lack of protection for retiree health benefits, the time may have come for Congress to act again this time to protect health benefits.292 Congress and expert witnesses expressed their concern about allowing the courts to determine the scope of protection afforded to retiree benefits by ERISA, because that only helps the retirees who are able to bring lawsuits in court.293 They expressed concern for the “thousands of retirees who have been unable to file expensive lawsuits against well-funded employers to protect their right to continued health benefits[.]”294 Further, Congress noted that the courts continually said that it is the role of the legislature, not the courts, to decide and determine the nation’s retiree benefits policies.295 Thus, retirees were awarded no protection by ERISA nor from courts reluctant to tread on legislative duties.

F. Retirees as a Unique Class that Requires Special Protections

Retirees present difficult problems to the legislature as they encounter issues and situations entirely unique to their societal role. Retirees are no longer employees, however many are still dependent on their old employers. “Unlike the active workers and the major creditors, there is nothing that retirees have that the company needs. In fact, some companies are more likely to view retirees as some kind of an albatross.”296 As a former employee, a retiree does not

295 Retiree Health Benefits: The Fair-Weather Promise: Hearing Before the S. Spec. Comm. on Aging, 99th Cong. 2d Sess. at 31 (1986) (testimony of Neal S. Dudovitz, Director of the National Senior Citizens Law Center,) (citing In re White Farm Equipment 788 F.2d 1186, 1193) (“We believe that the legislature, rather than the courts, should determine whether mandatory vesting of retiree welfare benefits is appropriate.”).
have much bargaining power when negotiating with the debtor. Due to this weaker negotiating position, retirees are less able to protect their interests, especially welfare benefits. More problematic is that many retirees have no source of income other than what they receive from their former employers. Because retirees are uniquely vulnerable and without leverage, they are not on equal footing with other creditors without added protections, and the Bankruptcy Code requires that creditors receive equal treatment. Providing special protection to retirees places their class on equal footing with other creditors, thus meeting the fair creditor treatment requirements of the Bankruptcy Code.

Retirees are guaranteed nothing by the National Labor Relations Act, and very little by ERISA, leaving retirees the most vulnerable as they can lose almost everything if a former employer goes out of business or relocates. Because of considerations of cost and uninsurability, the employer is often the retiree's only source of private health insurance particularly in the case of retirees under the age of 65 who are not yet eligible for Medicare. Even those retirees eligible for Medicare are hard hit by the loss of employer-sponsored retiree medical benefits. Retirees who are over 65 and covered by Medicare but not by an employer plan spend up to one-third of their income on additional medical coverage and out-of-pocket medical expenses. Congress recognized retirees as a unique class of individuals deserving of some added protection in

299 Scholars have expressed concern that Congress granting special status and priority to a particular class as counter to Chapter 11’s goal of treating creditor groups equally, however there are already several groups that receive priority in Chapter 11 and it is well established that it is proper to grant particular groups a superior position if necessary. 14 Cardozo L. Rev. 1911, 1948-49. Stabile, Susan J. Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code (May, 1993).
bankruptcy. “Congress responded to the particular vulnerability of retirees by passing a statutory provision that gives all retirees a protection they would not otherwise have had but for the fact that their former employer filed for bankruptcy.”

Another reason for the need to protect retirees separately from other creditors is because retirees are not like any other class of creditors in bankruptcy. When one considers the list of creditors who are owed payment from the debtor, he will find no more deserving or more vulnerable parties than the retired workers. The large banks, the insurance companies, and the corporations that do business with [the debtor], no doubt have legions of attorneys and accountants working long hours to insure that their financial interests are protected... [the debtors] will allocate substantial corporate resources to promote the interests of management and the stockholders. The workers have only themselves...

Unlike other players in corporate bankruptcies, retirees are not business creditors. Banks, shareholders, and other corporate entities usually have other forms of income and are able to stay afloat regardless of the bankruptcy of any one debtor at a given time. Retirees, on the other hand, are often dependent on their supplemental income like pensions, social security, Medicare and welfare benefits. They do not have additional sources of income when their former employer is in bankruptcy, and they likely do not have an abundance of additional resources that corporate creditors usually have. These men and women suffer greatly when their welfare benefits are taken away because “health care for these retirees is not a luxury. It’s not a golden

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parachute, it is a vital lifeline that protects them from a free fall into disease and into misery.”

That human necessity should not and cannot take a back seat to other secured creditors.

Additionally, other creditors are often individuals and entities that are aware of the risks of investment and weigh those with the possible benefits. They enter the relationship with the debtor by choice, aware of possible consequences. Workers do not enter into their employer-employee relationships with the same understanding of risk and return. Workers “sign binding agreements that contain explicit terms and provisions. The use of the words ‘guarantee’ and ‘entitled for life’ and ‘until death’ is not accidental. Such language implies no risk; no risk because none was intended.”

Employees went to work building companies that promised to provide them with health insurance for themselves and their dependants for the rest of their lives. Other corporate creditors have the ability to spread their risk, pass it on to other creditors, or use it for certain tax advantages. Retirees have no such options. They had no reason to plan for a day when they would lose all of their welfare benefits because they were told they were guaranteed. When those guaranteed benefits are taken away there is often no back up plan or rainy day fund for that purpose. Additionally, a retiree who needs immediate medical attention may not be able to wait out a bankruptcy proceeding to determine the status of his health insurance be it through a private insurer or COBRA coverage.

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310 Section 1114 of the Bankruptcy Code (May, 1993).


312 Section 1114 of the Bankruptcy Code (May, 1993).

One will most likely never discover “declarations [of risk], explicit or implicit, in the stock prospectus… So which party has the greatest claim to justice and equity, those who freely chose to assume the risk or those who sought and received guarantees for life?”

**CONCLUSION**

At the LTV Hearing, Richard Trumka voiced a sentiment that was shared by many other individuals, including members of Congress, stating that

*A society that does not take care of it’s elderly, that discards its parents and its grandparents after it has ruined them from a lifetime of labor, must hang its head in shame. Can we honestly look at these men and women in the eye and tell them that there is justice in America? Can we hold ourselves up as a shining example of freedom and morality to the rest of the world if we allow corporations to steal from our senior citizens?*

The LTV Bankruptcy alerted the nation to problems that had been slowly bubbling below the surface for years. Retirees have always been extraordinarily vulnerable to the whims of their former employers, and there is little protection afforded them by federal or state statute. Congress enacted the Retiree Benefits Bankruptcy Protection Act with the foregoing reasons in mind.

Unfortunately, almost immediately after the Act was passed the *Chateaugay* decision prevented it from providing the kind of protections that Congress envisioned. The later courts that continued to expand and apply the same reasoning as *Chateaugay* were unable to depart from the only precedent they had to work with. The courts used bits and pieces of legislative

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history to portray a picture that Congress did not intend to create.

The Supreme Court has repeatedly held that courts are supposed to interpret statutes based on their plain language in order to not read meaning into statutes that Congress did not intend to be there. Courts may stray from this reading, however, if the language is ambiguous or unclear. Here, the language of the statute is very clear, and Congress explicitly kept the language broad enough to apply in all bankruptcy situations. Yet, the courts still brought in their own biases and used various small snapshots of legislative history as support for their own personal interpretations.

Finally, in July 2010 the Court of Appeals for the Third Circuit removed itself from the Chateaugay precedent and read the statute the way it was intended. The court looked to the plain language and found it neither ambiguous nor the cause for an absurd result. The Visteon decision reflects the most significant departure from the Chateaugay precedent and marks the turning point for the application of § 1114. Now, because other courts have other precedent to look to other than Chateaugay, they too can begin reading § 1114 the way it was supposed to be read.