Hearing on H.R. 4677:

The “Protecting Employees and Retirees in Business Bankruptcies Act of 2010”

Before the Subcommittee on Commercial and Administrative Law

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Mr. Chairman Conyers and members of the Subcommittee, thank you for inviting me to testify at your hearing on H.R. 4677, the "Protecting Employees and Retirees in Business Bankruptcies Act of 2010." My name is James H.M. Sprayregen. I am a senior partner at the law firm of Kirkland & Ellis LLP and co-head of the firm's Restructuring Group.[1] Though Kirkland's Restructuring Group primarily represents large and mid-market companies in a wide variety of insolvency, bankruptcy, and restructuring matters, our practice also includes the representation of equity holders, creditors, committees, investors, and other parties. I have represented numerous U.S. and international companies across various industries, including manufacturing, technology, transportation, energy, media, and real estate in connection with both in- and out-of-court restructuring matters and in connection with matters involving the intersection of labor and bankruptcy law.

For example, some of my more recent and significant engagements include representing affiliates of General Growth Properties, Inc., Japan Airlines Corporation, Visteon Corporation, Lear Corporation, YRC Worldwide, Inc., UAL Corporation (the parent company of United Airlines) ("United"), Conseco, Inc., and Trans World Airlines, Inc. in its sale to American Airlines. Certain of these engagements, United in particular, presented unique issues both with respect to the application of sections 1113 and 1114 of the Bankruptcy Code and with respect to the sometimes difficult task of balancing the policy of protecting employees and retirees with the underlying policies of the Bankruptcy Code.

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[1] The views expressed herein are solely those of the author, and do not necessarily represent the views of my firm or any of its clients.

In addition to my client representations, I have lectured and spoken frequently and published a number of articles on insolvency, fiduciary duties, and distressed and international transactions. I also have served as an Adjunct Professor at the University of Chicago Booth School of Business and the New York University School of Law.

I offer my testimony from the perspective of the debtor/company. The debtor's perspective is different than the others testifying today because the debtor is charged with the responsibility of weighing the interests of creditors, employees, retirees, and consumers, among many others.

I. Executive Summary.

H.R. 4677, the "Protecting Employees and Retirees in Business Bankruptcies Act of 2010," would modify a number of the provisions of the Bankruptcy Code dealing with the treatment of collective bargaining agreements ("CBAs"), the insurance benefits of retired employees, employee claims, and executive compensation in Chapter 11. Contrary to the laudable desire to protect employees and retirees, the proposed modifications would have a number of negative effects on a company's ability to utilize Chapter 11 to reorganize, including, but not limited to, undermining the network of checks and balances originally put in place to enable a company to reorganize while protecting the interests and rights of various stakeholders.

As an initial matter, the proposed modifications would disrupt the well-established and successful negotiating process that bankruptcy judges, practitioners, lenders, labor unions, and authorized representatives have developed since the introduction of sections 1113 and 1114 into the Bankruptcy Code. The changes will negatively alter the negotiating dynamics at the bargaining table such that a consensual deal through which all parties are forced to share some sacrifice for the benefit of all stakeholders may be unobtainable. As a consequence, the proposed modifications would make it more difficult for a company to manage and rationalize its

labor and retiree benefit obligations. Without the ability to reduce all of its costs (not just labor and retiree costs), a company may be unable to raise new capital in the market, likely forcing the company into liquidation, a result that would be detrimental to all of the company's stakeholders, most notably its employees and retirees.

With respect to employee compensation, H.R. 4677 will make it more burdensome, in an already difficult situation, to retain or recruit key employees necessary to guide a company through a successful reorganization. Experienced personnel are not only necessary to help a company navigate the Chapter 11 process, but are necessary to provide comfort to financiers looking to invest in the company. The proposed modifications limit the ability of a company to offer employees market-based compensation where a company obtains relief under sections 1113 or 1114. To have a chance at a successful reorganization, a company must have the concomitant flexibility to attract or retain employees with the requisite skills to lead the company through Chapter 11 and the ability to reduce burdensome and above-market costs.

Finally, the proposed modifications force a company to include additional, and possibly quite burdensome, post-reorganization costs and liabilities in its post-Chapter 11 capital structure. Creating additional post-reorganization claims does not enhance a company's ability to generate cash going forward, nor does it increase a company's value. Instead, these claims simply put at risk a company's long-term viability and make it difficult for the company to raise capital and demonstrate that its plan of reorganization is feasible. Such a result undermines the primary tenet of Chapter 11: maximization of value for all stakeholders.

II. Collective Bargaining Rights Outside Bankruptcy.

Since the 1930s and the enactment of, among other laws, the National Labor Relations Act (the "NLRA") and the Railway Labor Act, it has been recognized that an employee's right to bargain collectively deserves special protection. In other words, an employee's freedom of

association should be safeguarded with a concomitant imposition on employers to refrain from interfering with an employee's choice in that regard. It also has been well-recognized, however, that federal laws should not impose substantive obligations upon these parties. Rather, the parties should be required only to meet and negotiate; the federal government should have no role in determining the specific terms of any agreement, nor oblige the parties to reach an agreement.

III. CBAs and Retiree Benefits in Bankruptcy.

Generally, companies that enter Chapter 11 have made certain promises and taken on certain obligations that they are incapable of satisfying in full. With a limited amount of value to distribute, it is important to consider how changes to the Bankruptcy Code will affect the recovery all of stakeholders.

As initially conceived and, in my opinion, properly brought to fruition in the form of the Bankruptcy Reform Act of 1978, as codified in Title 11 of the United States Code, a primary tenet of Chapter 11 is to allow a company to restructure its debt in a way that maximizes value for all parties with an interest in the company. To accomplish this, Chapter 11 establishes an elegant set of checks and balances to ensure that no single party accumulates too much leverage or power in the reorganization process.[2] For instance, on the one hand, once a company files for bankruptcy, Chapter 11 provides the tools necessary for the now "debtor in possession" to reorganize its operations, if necessary, restructure its balance sheet, and emerge from bankruptcy as a going-concern for the benefit of creditors, equity holders, employees, and consumers. On

[2] The importance of these checks and balances in a bankruptcy system cannot be underestimated. Indeed, the recent enactment of the new bankruptcy laws in China—which closely track the U.S. Chapter 11 structure—was delayed because of a philosophical debate concerning priority levels of secured creditor and employee claims. It was finally determined, approximately two years later, that giving priority to secured debt claims is better for the long-term viability of the company and, therefore, its employees, by encouraging the development of a market for secured debt.

the other hand, Chapter 11 provides certain protections to various parties in interest, such as section 1129(a)(7) of the Bankruptcy Code, otherwise known as the "Best Interest Test," requiring a debtor to show that every creditor or equity interest holder will recover as much under the proposed Chapter 11 plan than such party would recover in a hypothetical liquidation under Chapter 7 of the Bankruptcy Code. Put simply, allowing a debtor to reorganize effectively under Chapter 11 of the Bankruptcy Code ensures that all stakeholders, including secured debt holders, suppliers, customers, and employees, are not harmed more than necessary by the Chapter 11 process.

There is an inherent policy conflict between the Bankruptcy Code and the labor statutes. For example, prior to the enactment of sections 1113 and 1114, section 365 of the Bankruptcy Code governed the treatment of CBAs and retiree benefits. Section 365 allows generally for the unilateral rejection/termination of executory contracts, *i.e.*, a court-approved breach of certain contracts based on a debtor's business judgment with respect to whether rejection is appropriate. In contrast, employers cannot reject or modify CBAs under the NLRA before their natural expiration and the parties to a CBA are subject to a detailed process of negotiating and resolving labor disputes. Thus, while the Bankruptcy Code provides a company with tremendous leverage in negotiating with contract counterparties, the labor statutes force management to "break bread" with organized labor and prohibit an employer from "refusing to bargain collectively with the representative of his employees."[3]

In 1984, the Supreme Court in *In re Bildisco* issued an opinion holding that a debtor could reject a CBA unilaterally without thereby committing unfair labor practice.[4] The Supreme

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[3] NLRA § 8(a)(5).

[4] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

Court set forth additional guidelines prior to rejection: a court must find that reasonable efforts to achieve voluntary modification were made, an accord was not likely, and an inability to reach agreement will impede reorganization.

Congress reacted swiftly to the *Bildisco* opinion, enacting section 1113 of the Bankruptcy Code to prohibit a company's unilateral rejection of CBAs by establishing certain procedural requirements that the parties must follow before rejection a CBA is proper. Congress subsequently enacted section 1114 in 1988 to protect vested retiree medical benefits, putting into place procedural mechanisms that are substantially similar to those included in section 1113. Indeed, the proposed modifications to sections 1113 and 1114 are substantially similar and generally can be analyzed by reference only to section 1113.

Section 1113 balances the need to reorganize the company, encourages collective bargaining, and reconciles the goals of Chapter 11 with the framework established by the labor statutes to protect the interests of employees in preserving, among other things, their wages and benefits. Indeed, in many ways, section 1113 attempts to mirror the forced negotiation process under federal labor statutes.

In general, section 1113 allows a bankruptcy judge to exercise discretion when evaluating the proposed termination of CBAs. This flexibility, as opposed to a one-size-fits-all approach, is necessary to allow parties to negotiate freely and develop a consensual deal that (1) requires all parties to make a sacrifice, (2) permits a company to cut costs and preserve going-concern value, and (3) protects, to the maximum extent possible, the rights and interests of labor unions (and retirees under section 1114).

Under section 1113, before presenting a bankruptcy judge with a motion seeking rejection of a CBA, a debtor must make a proposal to the union. Between the proposal and

hearing on a motion to reject the CBA, a debtor must provide unions with relevant information and meet at reasonable times. Upon the filing of a motion to reject, a bankruptcy court must schedule a hearing within 14 days, and notice must be provided to interested parties at least 10 days before the hearing. The bankruptcy court may then continue the hearing for not more than 7 days, and the hearing may be continued further if the debtor and unions agree. After the first day of the hearing, the bankruptcy court has 30 days to rule on the motion, and, again, the debtor and unions can agree to extend the time for the ruling. If no ruling is made, the debtor may terminate or modify the CBA pending a ruling by the bankruptcy court.

Section 1113 covers three basic areas: (1) the need for cost reductions to permit reorganization; (2) the fairness of the proposed reductions; and (3) the propriety of the bargaining process, including its timing, the sharing of information, and the parties' good faith. Within these three areas are nine requirements for rejecting CBAs:

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

8. the union must have refused to accept the proposal without good cause; and

9. the balance of the equities must clearly favor rejection of the collective bargaining agreement.

In addition, courts have identified other considerations for determining whether to allow termination of a CBA, including, but not limited to, the good faith of the parties during the negotiation process, the amount saved through rejection versus other means of cost-cutting, the possibility that the employees may strike after rejection, and the impact the rejection damages claim may have on plan feasibility.

With respect to the third enumerated requirement above, the Circuit Courts of Appeals are split over the interpretation of the word "necessary." On one hand, the Third Circuit in *Wheeling Pittsburg Steel Corp. v. United Steelworkers of Am.*, concluded that Congress intended the word "necessary" to be construed strictly and suggested that use of the word equated to "essential" and that rejection under section 1113 was to be used only when necessary to prevent liquidation.[5] On the other hand, the Second Circuit in *Truck Drivers Local 807 v. Carey Transp. Inc.* applied a less stringent standard, concluding that "necessary" means the debtor has the burden of proving that its proposal is made in good faith and that the proposal contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.[6] Irrespective of jurisdiction or interpretation of "necessary," however, in practice courts generally impose a high burden on debtors to satisfy the various procedural requirements of section 1113.

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[5] *Wheeling-Pittsburg Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1088 (3d Cir. 1986).

[6] *Truck Drivers Local 807 v. Carey Transp. Inc.*, 816 F.2d 82, 89–90 (2d Cir. 1987).

As mentioned above, Congress designed section 1113 to balance the conflicting policies underlying the Bankruptcy Code and the labor statutes. Considering the difficulty in accomplishing this task, it is my belief that the extant version of section 1113 appropriately balances the interests of protecting employees' interests with fostering a reorganization of the company for the benefit of all parties. Not only has Congress required parties to come to the bargaining table to negotiate the terms of their CBAs, courts have further enforced this requirement by holding the parties' feet to the fire to make a proper showing that they have engaged in good faith negotiations. This requirement both provides cover to unions to negotiate with debtors on necessary wage and work rule concessions and ensures that the potential rejection by a debtor of its CBAs will be held to a high burden. Indeed, at hearings on section 1113 motions, courts typically require extensive testimony and the proffer of substantial evidence regarding the extent and course of negotiations, the details of the proposed terms, and the amount of information exchanged. Moreover, in most cases courts require substantial evidence regarding the extent of the reduced labor costs and how these reductions will affect the debtor's ultimate bottom line. Section 1113 also gives the bankruptcy judge the power to order the parties back to the negotiating table if it is believed that further negotiations are likely to be successful.

The forced negotiation process in sections 1113 and 1114 means that the termination and modification provisions of sections 1113 and 1114 become operative only when the parties are unable to reach a consensual deal. The power of these sections, therefore, lies in their effects on the out-of-court negotiation process. At bottom, altering these sections in the manner outlined by H.R. 4677 will only serve to make it harder to get deals done.

IV. The Proposed Modifications of H.R. 4677.

The modifications to the Bankruptcy Code proposed by H.R. 4677 would, in my opinion, upset the delicate balance of stakeholder interests enforced in Chapter 11 and thereby impede a company's ability to reorganize in Chapter 11. Labor and retiree interests are, of course, important and absolutely deserving of protection, as recognized by Congress in its original enactment of sections 1113 and 1114. The proposed modifications, however, alter significantly the leverage points between the debtor, labor, retirees, and other stakeholders, tilting the scale significantly in favor of labor and retirees.

For example, provisions such as the one that prevents a bankruptcy judge from granting stronger cost-cutting measures than those requested by a debtor in its last offer removes the litigation downside that parties normally consider when negotiating. With the elimination of this litigation risk, labor unions, for example, would lack the incentive to make a deal if the worst result would be the last offer proposed by the company. Additionally, the proposed modifications include an explicit authorization for "self help" remedies, *e.g.*, a labor strike, in the event that a court authorizes rejection of a CBA. This would undermine any incentive a labor union has to negotiate because it could always turn to the threat of a strike knowing that the court is prevented from issuing an injunction, even where necessary to preserve the company's chances for reorganization.

These changes to the leverage points will alter the dynamics of negotiations that occur outside the purview—but within the shadow—of the Bankruptcy Code, as well as the dynamics of the negotiations that take place once a company seeks Chapter 11 relief. In my view, these changes will diminish the chance that parties will consummate deals and will ultimately stand in the way of a debtor successfully reorganizing. And, to be clear, failure to reorganize may force

the debtor to liquidate, thereby harming all constituencies. Thus, enactment of H.R. 4677 likely would be detrimental to the very interests it is aimed at protecting.

Together with the changes to the leverage points, the proposed modifications alter what types of modifications a debtor can propose and change the standard for determining what is "necessary" for successful reorganizations. For example, the proposed modifications permit a bankruptcy court to approve termination of CBA or changes to vested retiree benefits only if, among other things, the relief is "not more than the minimum savings essential to permit the debtor to exit bankruptcy," such that the confirmation of a plan is not likely to be followed by liquidation or further financial restructuring of the debtor in the "short-term." This standard goes further than the already restrictive standard articulated in *Wheeling-Pittsburg* by explicitly limiting the time period courts can consider when evaluating what is "necessary." By applying these restrictions on a debtor's ability to terminate CBAs or modify vested retiree benefits, a debtor is forced to propose only what is the bare minimum required to stave off an immediate liquidation or imminent restructuring. Moreover, these limitations make it more difficult for debtors to meet the "feasibility" requirement under section 1129(a)(11), which does not permit a debtor to look only to the "short-term" viability of the reorganized company. Instead, as a majority of courts have held, a debtor should be able to propose modifications that will help to ensure the long-term viability of the debtor's business, which further supports the overall policy of the Bankruptcy Code. In contrast to H.R. 4677, which would force the company to limp out of Chapter 11 without being fully competitive, the current framework affords sufficient flexibility to a company to fix its business properly with a view towards lasting survivability, thereby creating more value for the business ultimately inuring to the benefit of all stakeholders.

Further limiting a company's flexibility, the proposed modifications in H.R. 4677 inextricably link the evaluation of a debtor-proposed compensation program for certain key employees with the evaluation of the propriety of terminating CBAs and/or modifying vested retiree benefits. In other words, if a company wants to provide its key employees with a certain type of compensation program, the proposed modifications would make it difficult to utilize sections 1113 and 1114 of the Bankruptcy Code to rationalize its labor and pension obligations. Thus, under this framework, to preserve its right to section 1113 and 1114 relief, a company is forced to consider whether to offer below-market compensation to its current key employees or, for that matter, new talent.

Offering below-market compensation is problematic because it makes it harder to attract or retain key employees. Key employees, for example, senior executive officers and managers, are "at will" employees, unlike those employees subject to a CBA. In my experience, once a company becomes financially distressed and begins to consider Chapter 11, it is more often than not the case that the key employees a company wants and needs to retain (or recruit) are those that are most likely to leave for (or go to) financially stable companies that are paying market-based compensation. It is incumbent, therefore, upon a debtor to make an effort to retain or recruit the best and brightest managers who would be willing to work at will for a company operating in the complex and sometimes unpredictable universe of Chapter 11. Companies also must consider that potential financiers may be reticent to invest in a company if they are not comfortable that their investment will be managed by individuals with the requisite experience and know-how. The resulting limited access to financing could have negative effects on a company's chances for reorganization.

To attract the necessary talent in the environment leading up to and during Chapter 11, a company must be willing to offer market-based compensation. Indeed, the most desired managers with the greatest ability to lead a company through Chapter 11 likely will demand such compensation. A company's ability to offer market-based compensation is not without its limits and excessive compensation, especially for executive level employees, is a concern as it is not in the company's interest to pay above-market compensation. In the current regime, Congress already polices inappropriate compensation under the restrictions contained in section 503(c) of the Bankruptcy Code and various other clawback provisions. However, to ensure the Bankruptcy Code's objectives of successful long-term rehabilitation, preservation of going-concern value, and the emergence of a streamlined debtor ready to compete in its respective industry, a debtor must have the ability to rationalize its labor and retiree obligations while at the same time compete, within reason, for employees who have the skill-set necessary to usher the debtor through the Chapter 11 process. Hamstringing a company in this regard simply puts at risk a company's ability to manage the Chapter 11 process as well as the likelihood that a company will be able to raise funds in the capital markets to finance a successful reorganization process that ultimately results in the preservation of jobs.

In addition, the proposed modifications assume that specific and detailed facts are unimportant in determining the propriety and/or extent of management cuts. Bankruptcy judges must have the discretion to analyze these facts. For example, the Bankruptcy Code requires that any modifications to a CBA not be disproportionately burdensome to employees covered by a CBA. H.R. 4677 goes one step further and puts in place a mechanism by which compensation can be recovered from a director equaling the percentage diminution in value of the company's obligations effectuated by sections 1113 or 1114. Though forcing the constituencies of a debtor

to share the sacrifice is a fair and necessary concept, legislating the removal of a bankruptcy judge's discretion to tailor relief in a specific set of circumstances may cause unnecessary harm.

Because at will employees and employees covered by a CBA may not be starting from a level playing field in terms of compensation, judicial discretion is necessary to ensure just and appropriate relief. For instance, a company can address costs related to employees at will both in and out of Chapter 11. Conversely, outside of Chapter 11, a company cannot adjust its obligations under a CBA without the consent of its employees. Thus, leading up to a bankruptcy filing, a company may have and likely effectuated certain employee cost reduction programs that negatively affected wages and benefits of at will employees. Forcing a company to make proportionate reductions to already reduced payments would, therefore, result in at will employees shouldering a disproportionate cut in wages. As I explained above, offering market-based compensation is important to the overall restructuring of the company. Limiting a company's ability to offer this type of compensation (*i.e.*, by tying a bankruptcy judge's hands), makes liquidation a more likely outcome. This result is detrimental to all parties' interests and runs contrary to the well-settled policies behind Chapter 11.

Finally, the proposed modifications create additional post-reorganization costs and materially alter and amend the current priority scheme in Chapter 11. For example, the proposed modifications create administrative priority for prepetition severance pay obligations and WARN Act damages. In addition, under the proposed section 1113(g), a company would be required to pay the fees and expenses incurred by a labor union. Because these priority claims could be substantial and must be paid in full before a debtor can emerge from Chapter 11, the costs of Chapter 11 could increase significantly. Moreover, lenders considering whether to finance the Chapter 11 process (*e.g.*, in the form of "DIP financing") or whether to finance the company

once it exits from Chapter 11 will consider the effect of these increased post-reorganization liabilities on the company's capital structure when evaluating whether and on what terms to lend funds to the company. Such financing generally is necessary for debtor companies to fund their restructuring; making this financing less available and more expensive may prevent some debtors from reorganizing successfully.

By the same token, increasing priority claims for one constituency has the necessary effect of decreasing the recovery for another constituency. Put another way, increasing the obligations of a debtor to pay employees may, in fact, reduce the recoveries for certain taxing authorities and quasi-governmental agencies (*e.g.*, Pension Benefit Guaranty Corporation), trade vendors, customers, or tort victims.

V. Conclusion.

It is important to consider H.R. 4677 in the context of the principal goal of Chapter 11—to reorganize the debtor and maximize value for all stakeholders. In my view, the proposed modifications undercut this principal goal.

As I discussed above, bankruptcy judges, practitioners, lenders, labor unions, and authorized representatives have adapted to the particular provisions of sections 1113 and 1114 and have been operating within its framework for approximately 25 years. It is important not to tip the balance disproportionately in favor of one party over another such that the dynamics of negotiations are altered. The bankruptcy judge must be able to, and currently has the power to, ensure that neither party utilizes either procedural or substantive leverage to affect the outcome of negotiations. The proposed modifications curtail the discretion of the bankruptcy judge.

More to that point, bankruptcy courts need flexibility to implement workable solutions for distressed companies. It is a well-recognized principle that the exigencies of bankruptcy require bankruptcy judges to retain flexibility to deal with the unique or particular issues that

may arise in a specific case. The limited discretion afforded to bankruptcy judges under the current forms of sections 1113 and 1114 is the specific corollary to this principle within the context of negotiations related to collective bargaining obligations. Including provisions such as the ones described above that eliminate litigation risk and authorize "self help" remedies creates perverse incentives and negatively affects the deal dynamics, possibly undermining the entire negotiation process, which as I have discussed, ultimately harms both the company and its stakeholders.

Loss of jobs and decreased wage and benefit packages for employees, while certainly the less-preferred alternative, may be an economic reality for certain companies, and it certainly is more preferable than liquidation and a complete loss of jobs and wages. A company's decision to undertake the dramatic step of filing for bankruptcy is likely the result of the company's inability to obtain painful but necessary cost reductions outside the bankruptcy process. Restricting a company's ability to take full advantage of the panoply of tools the Bankruptcy Code provides only will force more companies to liquidate under Chapter 7 of the Bankruptcy Code. This will harm all stakeholders, especially the employees, who, in the event of liquidation, will be employees no longer. Not only will employees lose their jobs in such an event, but sections 1113 and 1114 are inoperative under Chapter 7, offering zero protection to employee interests. Thus, these interests will be better-served in the long-run by a financially healthy and operationally viable employer that is competitive in the global marketplace. Unfortunate as it may be to resort to section 1113 and 1114 to cut costs, the Honorable Bankruptcy Judge Eugene R. Wedoff has observed that bankruptcy generally "involves choosing the least bad among a number of unfortunate choices."[7]

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[7] Hearing Testimony, May 10, 2005, *In re UAL Corp.*, Case No. 02-48191 (Bankr. N.D. Ill. 2005).

Finally, in my experience, companies do not take the strictures of sections 1113 and 1114 lightly. The procedural and substantive requirements of sections 1113 and 1114—overseen and enforced by an actively involved bankruptcy judge—require companies to consider carefully all options before beginning the process of termination or modification. And, once this process has begun, sections 1113 and 1114 provide significant, meaningful opportunities for the parties to reach a consensual resolution prior to the rejection of a CBA or modification of vested retiree benefits.