Hearing on American Workers in Crisis: Does the Chapter 11 Business Bankruptcy Law Treat Employees and Retirees Fairly?

Before the Subcommittee on Commercial and Administrative Law

Statement of:

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Madam Chairman Sánchez, Congressman Cannon, and members of the Subcommittee, thank you for inviting me to testify at your hearing on "American Workers in Crisis: Does the Chapter 11 Business Bankruptcy Law Treat Employees and Retirees Fairly?" My name is Michael Bernstein. I am a partner in the law firm of Arnold & Porter LLP and the chair of the firm's national bankruptcy and corporate reorganization practice.[1] We represent debtors, creditors, committees, investors and other parties in a wide variety of bankruptcy and corporate restructuring matters. I have advised and represented debtors and other parties in connection with matters at the intersection of bankruptcy and labor law, and I have lectured on this subject, as well as on numerous other bankruptcy-related subjects. I have also written various books and articles. For example, I am co-author of "Bankruptcy in Practice," a comprehensive treatise on bankruptcy law and practice published by the American Bankruptcy Institute.

Section 1113 of the Bankruptcy Code addresses particularly difficult issues. It attempts to balance the interest of employees in preserving the wages, benefits and work rules for which their unions negotiated against the need of a chapter 11 debtor to achieve a cost structure that enables it to reorganize and emerge as a viable business that is able to compete in the marketplace. Section 1114 presents similar issues involving retiree benefits. The interests of employees, retirees, companies seeking to reorganize and their creditors and other stakeholders are all legitimate, and often compelling, but they are frequently difficult to reconcile.[2] Sections

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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.

[2] The balancing is more complex than simply a desire on the part of labor for more pay and benefits and a desire by management to reduce costs. Labor also has an interest in the company having a cost structure that enables it to remain viable, because otherwise it will likely be forced to liquidate and employees will lose their jobs. Similarly, management has an interest in providing wages, benefits and

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1113 and 1114 of the Bankruptcy Code are the mechanism that Congress established to address these competing interests. While the process of negotiating labor agreement modifications in bankruptcy is a difficult one, these provisions have proven to be effective mechanisms to balance the competing interests and to promote negotiated resolutions.

An important tool available to debtors seeking to reorganize in chapter 11 cases is the ability to reject contracts. Rejection (essentially, a court-approved breach or abrogation) is often necessary to enable a debtor to restructure its business and to emerge from bankruptcy as a viable going concern. For example, a debtor may be burdened by an expensive long-term lease for space it no longer needs or an agreement to purchase some product at what has turned out to be an above-market price. Section 365 of the Bankruptcy Code permits a debtor to reject such contracts with court permission. Under § 365, the court uses a "business judgment" standard to determine whether to approve a rejection of a contract. This is a relatively deferential standard.

Section 1113 was enacted in response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), which held that a debtor could unilaterally alter the terms of its collective bargaining agreements under § 365 of the Bankruptcy Code without having thereby committed an unfair labor practice. When the decision in *Bildisco* was announced on February 22, 1984, "labor groups mounted an immediate and intense lobbying effort in Congress to change the law."[3] Several months later, § 1113 was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[4] Section 1113 was enacted to

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work rules that are at least at a market level, so that the company will be able to retain its employees and attract new employees.

[3] *See In Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1082 (3d Cir. 1986).

[4] Pub. L. No. 98-353 (1984).

ensure that debtors could not unilaterally alter the terms of a collective bargaining agreement, but instead could do so only after satisfying a heightened standard and obtaining bankruptcy court approval.

The standard for modification or rejection of a collective bargaining agreement under § 1113 is far more difficult to satisfy than the business judgment standard.[5] Further, § 1113 provides that unilateral termination or alteration of any provision of a collective bargaining agreement is prohibited.[6] Instead, a debtor is required, under the Bankruptcy Code, to adhere to the terms of a collective bargaining agreement until it has complied with all the procedural and substantive requirements of § 1113 and obtained court approval for rejection, or negotiated consensual modifications with its employees.[7]

Based on the text of § 1113, courts have established a stringent nine-part test to determine whether a collective bargaining agreement may be rejected.[8] The test is:

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[5] *See Comair, Inc. v. Air Line Pilots Ass'n, Int'l* (*In re Delta Air Lines, Inc.*), 359 B.R. 491, 498 (Bankr.S.D.N.Y.2007) ("Congress enacted Section 1113 not to eliminate but to govern a debtor's power to reject executory collective bargaining agreements, and to substitute the elaborate set of subjective requirements in Section 1113(b) and (c) in place of the business judgment rule as the standard for adjudicating an objection to a debtor's motion to reject a collective bargaining agreement.").

[6] *See* 11 U.S.C. § 1113(f), which reverses the portion of the *Bildisco* opinion holding that a debtor could unilaterally modify or terminate provisions of a collective bargaining agreement.

[7] Where a debtor requires interim relief from a collective bargaining agreement, it may apply for such relief under § 1113(e), but such interim relief is available only when it is "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."

[8] The test was initially articulated by the court in *In re Am. Provision Co.*, 44 B.R. 907, 908 (Bankr. D. Minn. 1984), and has subsequently been adopted by many other courts. *See, e.g., In re Family Snacks, Inc.*, 257 B.R. 884 (B.A.P. 8th Cir. 2001); *In re Appletree Mkts., Inc.*, 155 B.R. 431 (S.D. Tex. 1993); *In re Elec. Contracting Servs. Co.*, 305 B.R. 22 (Bankr. D. Colo. 2003); *In re Nat'l Forge Co.*, 289 B.R. 803 (Bankr. W.D. Pa. 2003); *In re Blue Diamond Coal Co.*, 131 B.R. 633 (Bankr. E.D. Tenn. 1991); *In re Ind. Grocery Co.*, 138 B.R. 40 (Bankr. S.D. Ind. 1990); *In re Big Sky Transp. Co.*, 104 B.R. 333 (Bankr. D. Mont. 1989); *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847 (Bankr. N.D. Ohio 1987); *In re Salt Creek Freightways*, 47 B.R. 835 (Bankr. D. Wyo. 1985). Other courts have combined factors one, two, and five from the *American Provision* analysis, resulting in a seven-part analysis. *See, e.g., In re Carey Transp., Inc.*, 50 B.R. 203, 207 (Bankr. S.D.N.Y. 1985), *aff'd sub nom Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987).

1. The debtor in possession must make a proposal to the union to modify the collective bargaining agreement.
2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
3. The proposed modifications must be necessary to permit the reorganization of the debtor.
4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.[9]
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.
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

[9] *See, e.g., In re Century Brass Prods., Inc.*, 795 F.2d 265, 273 (2nd Cir. 1986) ("The purpose [of § 1113(b)(1)(A)] is to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree."); *see also In re Maxwell Newspapers, Inc.*, 981 F.2d 85, 89 (2nd Cir. 1992) ("This statute [§ 1113] requires unions to face those changed circumstances that occur when a company becomes insolvent, and it requires all affected parties to compromise in the face of financial hardship. At the same time, § 1113 also imposes requirements on the debtor to prevent it from using bankruptcy as a judicial hammer to break the union.").

The debtor must satisfy *all nine* of these standards in order to obtain relief. Failure to satisfy *any* of the factors will result in denial of the debtor's motion to modify or reject the collective bargaining agreement.[10]

Some courts, in deciding whether to allow rejection of the collective bargaining agreements, have focused on the term "necessary" in § 1113(b). In *Wheeling-Pittsburgh Steel*

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[10] Most often when courts deny § 1113 relief to a debtor it is on the grounds of failure to negotiate or bargain in good faith, failure to show that the debtor's proposal was "fair and equitable," and/or failure to meet the "necessary" or "essential" standard. *See In re Delta Air Lines* (*Comair*), 342 B.R. 685 (Bankr. S.D.N.Y. 2006) (debtor failed to confer in good faith); *In re Nat'l Forge Co*., 279 B.R. 493 (Bankr. W.D. Pa. 2002)(debtor did not meet its burden of proving that the proposed modifications were fair and equitable); *In re U.S. Truck Co., 165 L.R.R.M.* (BNA) 2521 (Bankr. E.D. Mich. 2000) (debtor failed to meet its burdens of proving the proposal to be necessary, fair and equitable); *In re Jefley, Inc*., 219 B.R. 88 (Bankr. E.D. Pa. 1998) (court concluded "that the proposal, as presented, is not 'necessary' to the Debtor's reorganization; [and] does not treat the union workers 'fairly and equitably'"); *In re Liberty Cab & Limousine Co.,* 194 B.R. 770 (Bankr. E.D. Pa. 1996) (debtor's proposal was not fair and equitable); *In re Lady H Coal Co*., 193 B.R. 233 (Bankr. S.D. W. Va. 1996) (debtor failed to treat all parties fairly and equitably and did not bargain in good faith); *In re Schauer Mfg. Corp.,* 145 B.R. 32 (Bankr. S.D. Ohio 1992) (debtor "has failed to show that the Proposal which it made to the Union makes 'necessary modifications . . . that are necessary to permit the reorganization of the debtor . . . ."); *In re Sun Glo Coal Co.,* 144 B.R. 58 (Bankr. E.D. Ky. 1992) ("the debtors have failed to sufficiently quantify the results of such proposed changes to allow this Court to find that they are 'necessary' to the reorganization of the debtors."); *In re GCI, Inc*., 131 B.R. 685 (Bankr. N.D. Ind. 1991) (debtor failed to negotiate in good faith); *In re George Cindrich Gen. Contracting, Inc*., 130 B.R. 20 (Bankr. W.D. Pa. 1991) (debtor "did not provide sufficient information to enable union to determine whether the specific concessions sought by debtor were reasonable or necessary"); *In re Pierce Terminal Warehouse, Inc*., 133 B.R. 639 (Bankr. N.D. Iowa 1991) (debtor failed to prove that the proposed collective bargaining agreement modifications were "necessary" to permit reorganization and failed to ensure that all affected parties were treated fairly and equitably); *In re Express Freight Lines, Inc*., 119 B.R. 1006 (Bankr. E.D. Wis. 1990) (debtor's proposal contained modifications that were not necessary to reorganization and the proposal was not fair and equitable to all concerned); *In re Ind. Grocery Co*., 136 B.R. 182 (Bankr. S.D. Ind. 1990) (debtor "has not borne its burden of proof that it is fair and equitable to ask for wage cuts . . . ."); *In re William P. Brogna and Co*., 64 B.R. 390 (Bankr. E.D. Pa. 1986) (proposal was not fair and equitable); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC,* 791 F.2d 1074 (3d Cir. 1986) (reversing decision authorizing rejection because the bankruptcy court failed to consider and determine whether the proposed modifications both were necessary and treated all parties fairly and equitably); *In re Cook United, Inc*., 50 B.R. 561 (Bankr. N.D. Ohio 1985) (debtor failed to show that its proposed collective bargaining agreement modifications were necessary to permit reorganization and that its proposal was fair and equitable); *In re Valley Kitchens, Inc.*, 52 B.R. 493 (Bankr. S.D. Ohio 1985) (debtor failed to satisfy the requirement that the proposal deal only with modifications necessary to permit reorganization); *In re Fiber Glass Indus., Inc.*, 49 B.R. 202 (Bankr. N.D.N.Y. 1985) (debtor had failed to show how its proposed reductions were necessary to reorganization); *In re K & B Mounting, Inc.,* 50 B.R. 460 (Bankr. N.D. Ind. 1985) (debtor failed to show the proposed changes were fair and equitable); *In re Am. Provision Co*., 44 B.R. 907 (Bankr. D. Minn. 1984) (debtor failed to show that the proposed collective bargaining agreement modifications were necessary).

Corp. v. United Steelworkers of Am., AFL-CIO-CLC, 791 F.2d 1074, 1088 (3d Cir. 1986), the court focused on the word "necessary" and concluded that Congress intended the word "necessary" to be construed strictly. The court commented that "[t]he 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs." *Id.* The court suggested that the use of the word "necessary" equated to "essential" and that rejection under § 1113 was to be used only when necessary to prevent liquidation. In 1987, the Second Circuit rejected the Third Circuit's approach. In *Truck Drivers Local 807 v. Carey Transp. Inc*., 816 F.2d 82, 89–90 (2d Cir. 1987), the court concluded that "'necessary' should not be equated with 'essential' or bare minimum….[rather] the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully." While the "necessary" standard outlined by the Third Circuit in *Wheeling* is more stringent than the standard articulated by the Second Circuit (and other courts), in practice, even outside of the Third Circuit, courts impose a heavy burden upon a debtor that is seeking to modify its collective bargaining agreements, and if the changes go beyond what is needed in order to reorganize and emerge as a viable and competitive business, then -- regardless of precisely how the term "necessary" has been defined -- the changes are unlikely to be authorized by the courts.

Section 1113 was designed to encourage negotiated resolutions. It requires the company to engage in good faith negotiation before it seeks relief under § 1113 and to continue such negotiations even after filing a § 1113 motion. In practice, courts have been vigilant to assure that a debtor seeking § 1113 relief is not just "going through the motions" of negotiation, but is in fact engaging in good faith negotiation. At § 1113 hearings, the courts typically hear

extensive testimony about the course of negotiations, the details of each proposal and counterproposal, the number and length of meetings, and the information exchanged. If a court is left with the impression that the company did not negotiate in good faith -- making every reasonable effort to reach agreement -- it will ordinarily deny relief. If the court believes that further negotiations might yield an agreement, it may defer ruling on a rejection motion and order the parties back to the negotiating table. The strong emphasis that the bankruptcy courts place on negotiated resolution of labor issues appears to be consistent with the goal of Congress in enacting § 1113. While no Senate or House Report was submitted with the legislation, statements made at the time of enactment suggest that Congress intended the provision to encourage negotiated resolutions.[11]

In practice, the goal of encouraging negotiated resolutions has been achieved. In the overwhelming majority of situations where a debtor sought to modify a collective bargaining agreement, the issues have been resolved by agreement of the company and the union. This is true, in large part, because both the debtor and its employees face substantial risks absent a consensual resolution.

The company's risks include the following:

First, absent an agreement, the company's request for § 1113 relief may be denied by the bankruptcy court, with the result that the company cannot obtain any relief from the terms of its collective bargaining agreement. Even if the court is convinced that the changes proposed by the

[11] For example, in discussing the legislation, Senator Hatch stated "I feel that the conference version is a practical, workable mechanism. This provision will require negotiations to attempt to save both the labor contract and the business prior to court adjudication to reject the contract . . . . Only if these good faith negotiations fail does the court get involved in granting an application to reject the contract." *See* 130 Cong. Rec. H7489 (June 29, 1984), *reprinted in* 1984 U.S.C.C.A.N. 576, 591. Congressman Rodino, Chairman of the House Committee on the Judiciary, also commented that the provision would work to ensure "that a process of negotiation will take place between the employer and the union in a reorganization case . . . ." *Id*. at 577.

debtor are necessary, relief may be denied if the court believes that the debtor has failed to negotiate in good faith, to provide the union with sufficient information, to spread the sacrifice among labor and other constituencies in a fair and equitable manner, or to satisfy any of the other requirements for relief. Companies reviewing the case law will observe that denial by the courts of § 1113 relief is not uncommon. If a company cannot modify its collective bargaining agreements, its reorganization effort may be doomed to failure. Thus, if the company can achieve adequate (even if not ideal) cost savings through negotiation, it has every incentive to do so.

Another risk to the company is that, even if it prevails in court, the company could face a break-down in employee relations, which may imperil the company's future. It is difficult for a company -- particularly one trying to rebound from bankruptcy -- to prosper with an unhappy and resentful workforce. Any time there are modifications to a collective bargaining agreement, there is likely to be some unhappiness among the labor group that was called upon to make a sacrifice, but the extent of acrimony is likely to be much greater where the modifications were imposed by a court, after litigation, as opposed to having been agreed upon by the parties, as a result of open and good-faith negotiations.

Finally, there may be a risk that the union will strike after a collective bargaining agreement is rejected. Unions often threaten to strike if § 1113 relief is granted. Particularly, in the case of a company that is already suffering financial distress, a strike may destroy the company. Of course, destroying the company is not in labor's interest any more than it is in the interests of any other constituency, but the company nonetheless faces a risk that an employee group, perhaps acting out of anger or resentment or with any eye toward influencing the outcome

in future cases, will strike even if doing so would destroy the business.[12] Avoiding a strike is another incentive for a company to seek an agreement rather than litigate against its unions.

The unions, and the employees they represent, also face risks if no agreement is reached. First, they run the risk that the company may prevail in rejection litigation, leaving the employees without any collective bargaining agreement or potentially with more substantial pay and benefits reductions and work rule modifications than could have been achieved through negotiation.

Another risk to the union is that in litigation the court is forced to make "up or down" decisions, while in negotiations the union has more flexibility to construct an agreement that is responsive to the particular concerns of its membership, prioritizing those issues that are most important to the employees it represents.[13]

The union also faces the risk that, even if it wins the litigation, it may destroy the company in the process. Many companies that seek § 1113 relief do in fact need that relief in order to remain viable and competitive. Typically, these companies are paying wages and benefits and offering work rules that are more generous than their competitors, and they need to adjust their wages, benefits and work rules to a market level in order to reorganize and remain in

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[12] In some recent airline bankruptcy cases, courts have enjoined threatened strikes following § 1113 decisions, where a strike would have been likely to have put the airline out of business. *See Northwest Airlines Corp. v. Assn. of Flight Attendants--CWA, AFL--CIO* (*In re Northwest Airlines Corp*.), 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir.2007); *Comair, Inc. v. Air Line Pilots Ass'n, Int'l* (*In re Delta Air Lines, Inc.*), 359 B.R. 491(Bankr. S.D.N.Y. 2007)*; In re Mesaba Aviation Inc*., 350 B.R. 112 (Bankr. D. Minn. 2006). Because they involved airlines, these cases were governed by the Railway Labor Act ("RLA") rather than the National Relations Labor Act ("NRLA"). It is less clear that the federal courts could enjoin a strike against a company whose labor relations are governed by the NRLA rather than the RLA. *See Northwest Airlines Corp.*483 F.3d at 173 (Commenting that "[i]n cases governed by the NLRA, we have also hinted that a union is free to strike, even following contract rejection under § 1113.").

[13] In negotiations, it is not uncommon for a debtor to try to establish a level of cost savings that it needs to achieve in order to be viable, but then to give the union considerable flexibility in how to achieve that level of cost savings so that the union can prioritize those items that are of greatest concern to its membership. The union is obviously better able to do this than a court would be.

business. If the union refuses to make concessions and succeeds in defeating the company's § 1113 motion, the result may be a liquidation of the company and loss of all jobs. Thus, the union faces not only the risk of losing the § 1113 litigation, but often the equally great risk of winning.

These risks, faced by the company and its employees, create bargaining leverage for both sides. As a result, § 1113 cases are settled much more often than they are litigated. In the best of circumstances, they are treated by the parties as "business problems" rather than "us versus you" disputes, with the company and the union sharing information and analysis and collaborating to arrive at a solution that will result in a workable, fair and market-competitive labor cost structure. Even in those cases with more hostility, though, the parties eventually tend to come to the conclusion that a negotiated solution is preferable to the alternatives. The fact that the unions, as well as companies, tend to be advised by experienced counsel, financial advisors, and other professionals, who recognize the risks to each side, promotes consensual resolutions. Finally, the courts tend to push all the parties for consensual resolution. Most judges seem to prefer a solution crafted by the parties to one imposed by the court. The courts recognize that encouraging consensual resolutions is consistent with the intent of Congress in enacting § 1113 and also that an arrangement worked out between the parties is likely to be more responsive to each of their concerns, and more workable in practice, than one imposed by the court.

In the relatively few cases where the parties are not able to reach agreement, and the court must therefore rule on a § 1113 motion, the debtors sometimes prevail and the unions sometimes prevail. Each case that is litigated will, of course, be decided based on its own particular facts. However, as a general matter it would be fair to say that the burden imposed on

a debtor seeking to reject a collective bargaining agreement over a union's objection has been a heavy one, and the courts have rigorously imposed the requirements set forth in the statute.

Many of the same concerns and competing issues are raised by § 1114. Section 1114 provides that the debtor "shall timely pay and shall not modify any retiree benefits," unless the parties all agree to the modifications or the debtor follows the procedures in the statute and receives court approval to modify such benefits.[14] The requirements for obtaining court approval to modify retiree benefits are similar to the requirements set forth in § 1113, including the need to first attempt to negotiate before seeking court approval, the requirement that any modifications be "necessary", and the fair and equitable requirement.[15] In fact, § 1114, which was enacted approximately four years after § 1113, tracks the language of § 1113 in important respects.[16] Judicial interpretation of § 1114, as well as legislative statements made at the time of enactment, suggest that the standards are intended to be very similar or identical.[17]

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[14] *See* 11 U.S.C. § 1114(e).

[15] Prior to attempting to modify the benefits, the debtor must "make a proposal to an authorized representative of the retirees," the proposal can only provide for "those necessary modifications in retiree benefits that are necessary to permit reorganization of the debtor," and the debtor must assure "all of the affected parties are treated fairly and equitably." *See* 11 U.S.C. § 1114(f)(1)(A).

[16] Compare § 1113(b) to § 1114(f), setting forth the conditions precedent to requesting modification of retiree benefits. Also, compare § 1113(c) to § 1114(g), establishing the standards for modification of retiree benefits.

[17] *See In re Horsehead Indus., Inc.*, 300 B.R. 573, 583 (Bankr. S.D.N.Y. 2003) ("The statutory requirements under both sections [1113 and 1114] are the same. Accordingly, the discussion relating to requirements under 1113 also applies to 1114."); *In re Ionosphere Clubs, Inc*., 134 B.R. 515, 519-20 (Bankr. S.D.N.Y. 1991) ("[C]ompliance with 1114 is substantially and procedurally the same as compliance with 1113."). The Senate Report (Judiciary Committee) No. 100-119, provides the following comment about the intent of § 1114: "These standards are intended to be identical to those contained in Section 1113. In adopting this standard the Committee believes that it is important to use a standard with which the courts are already familiar. The Committee believes that the Section 1113 standards strike a fair and reasonable balance between the need to protect the rights of retirees and the rights of other creditors." *See* S. Rep.100-119 (July 17, 1987), *reprinted in* 1988 U.S.C.C.A.N. 683, 687-88.

In practice, § 1114 issues are treated much like § 1113 issues. The retirees are represented either by a labor union or by a retiree committee. The union or committee engage counsel and other professionals to represents its interests. Most often, the company and the retirees' representatives reach agreement on modifications that are necessary to give the company a workable cost structure and that "spread the pain" among present workers, retirees, creditors and other constituencies.

In conclusion, issues involving modification of collective bargaining agreements or retiree benefits are among the most difficult issues faced by the parties, and the courts, in chapter 11 cases. The prospect of reducing employees' wages and benefits, or retirees' benefits, is not something the courts take lightly. A debtor proposing to do this faces a heavy procedural and substantive burden. At the same time, courts recognize, as they must, that some debtors are so hamstrung by above-market or otherwise unaffordable labor and retiree costs that, without relief from such costs, they will not be able to emerge from bankruptcy as viable and competitive enterprises. If these companies are forced to liquidate because they cannot reduce these costs, all constituencies will suffer, including workers who will lose their jobs, retirees who will lose their benefits, creditors and shareholders whose recoveries will be diminished or eliminated, suppliers and customers, taxing authorities, and local communities. Sections 1113 and 1114 provide a framework for the parties, and when necessary the courts, to balance these competing concerns and interests.

While in any given case, one party or the other may be more or less satisfied with the outcome, as a general matter §§ 1113 and 1114 have worked well in achieving a balance between the objectives of preserving bargained-for wages, benefits and work rules to the maximum extent possible and achieving a cost structure that will enable chapter 11 debtors to

reorganize. Congress' goal of placing a heightened burden on debtors seeking to modify labor agreements, providing all parties with bargaining leverage, and encouraging negotiated resolutions has been largely achieved.