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Unbalanced Bargaining: Trump Entertainment Resorts Unite Here Local 54 and Expired Collective Bargaining Agreements Under § 1113

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UNBALANCED BARGAINING: *TRUMP ENTERTAINMENT RESORTS UNITE HERE LOCAL 54* AND EXPIRED COLLECTIVE BARGAINING AGREEMENTS UNDER § 1113

ABSTRACT

In Trump Entertainment Resorts Unite Here Local 54*, the Third Circuit recently considered, as an issue of first impression, whether a chapter 11 debtor-employer is able to reject the continuing terms and conditions of an expired collective bargaining agreement with its unionized employees under 11 U.S.C. § 1113. The court affirmed the United States Bankruptcy Court for the District of Delaware's finding that the debtor-employer had such authority even though the agreement expired after the petition date. By upholding this decision, the Third Circuit joins a growing majority of bankruptcy courts that is diluting the special status collective bargaining agreements have in our bankruptcy scheme and tipping the scales to debtor-employers to unilaterally erode the employee's bargaining power. In so doing, the court has usurped the authority and jurisdiction of the National Labor Relations Board and undermined the standing of organized labor in our national social policy.*

This Comment argues that expired collective bargaining agreements are not subject to rejection or modification through § 1113. In so doing, this Comment considers the conflicting statutory concerns between chapter 11, which seeks to lessen financial obligations that would impede reorganization, and the protections of the National Labor Relations Act as it relates to unequal bargaining and unfair labor practices. This Comment proposes legislative revisions to § 1113 to resolve this conflict and correct the unartful drafting of its creators. Finally, if courts continue to follow the Third Circuit's lead, this Comment provides recommendations for judges, debtor-employers, and unions that attempt to balance these conflicting policy concerns and reinforces the bankruptcy court's role as a court of equity.

INTRODUCTION

With the rubbing of a giant genie's lamp,[1] a real-estate mogul and New York gossip-column personality opened his third hotel and casino in New Jersey's Atlantic City.[2] At a cost of one billion dollars, Trump Taj Mahal towered over the boardwalk with seventy minarets sculpted in neon and tipped in gold.[3] Donald J. Trump referred to it as the "eighth wonder of the world.[4]" It was also heavily loaded with debt.[5] The gamble did not payoff and, after a year in business, the Taj Mahal and Trump's other casino properties entered bankruptcy for the first time.[6]

By 2009, Trump casino holding corporations had gone through the revolving doors of bankruptcy three times.[7] Mr. Trump took a minority interest in the newly reorganized Trump Entertainment Resorts, Inc.[8] Bondholders, along with other creditors, received an ever-shrinking return on their investments.[9] Trump Taj Mahal continued to weather competition by the eleven other casinos surrounding it in Atlantic City.[10] Furthermore, the emergence of casinos inside and outside the state of New Jersey caused tourism to fade from the famed

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[1] Dan McQuade, *The Truth About the Rise and Fall of Donald Trump's Atlantic City Empire*, PHILA. MAG. (Aug. 16, 2015), https://www.phillymag.com/city/2015/08/16/donald-trump-atlantic-city-empire.

[2] Russ Buettner, *How Donald Trump Bankrupted His Atlantic City Casinos, but Still Earned Millions*, N.Y. TIMES (June 11, 2016), http://www.nytimes.com/2016/06/12/nyregion/Donald-trump-atlantic-city.html.

[3] *See id.*

[4] *Id.*

[5] Trump Taj Mahal's debt was estimated at exceeding $820 million and analyst estimated that the casino needed to generate $1.3 million of revenue a day to meet its interest payment. *See id.*

[6] Along with the Taj Mahal, Trump's various corporations maintained the Trump Plaza and Trump Castle. *See id.*

[7] Trump Taj Mahal Associates, LLC filed in 1991; Trump Plaza Associates, LLC filed in 1992; Trump Hotels & Casino Resorts, Inc. filed in 2004; and Trump Entertainment Resorts, Inc. filed in 2009. *See Trump Settles for 10% of Casino Company*, N.Y. Times (Nov. 17, 2009), http://www.nytimes.com/2009/11/18/business/18casino.html*;* Edward I. Altman, *Revisiting the Recidivism—Chapter 22 Phenomenon in the U.S. Bankruptcy System*, 8 BROOK. J. CORP. FIN. & COM. L. 253, 276 (2014).

[8] *See Trump Settles for 10% of Casino Company*, N.Y. Times (Nov. 17, 2009), http://www.nytimes.com/2009/11/18/business/18casino.html.

[9] Trump Taj Mahal Associates, LLC filed in 1991; Trump Plaza Associates, LLC filed in 1992; Trump Hotels & Casino Resorts, Inc. filed in 2004; and Trump Entertainment Resorts, Inc. filed in 2009. *See Trump Settles for 10% of Casino Company*, N.Y. Times (Nov. 17, 2009), http://www.nytimes.com/2009/11/18/business/18casino.html. *See* Altman, *supra* note 7, at 276.

[10] *See* Craig Karmin et al., *Trump Entertainment Casino Bankruptcy Stands to Change Rivals' Luck*, WALL ST. J. (Sep. 10, 2014, 12:34 AM), https://www.wsj.com/article/trump-entertainment-resorts-files-for-chapter-11-bankrupcy-1410262286.

boardwalk.[11] In 2012, tourism was further affected by inaccurate reporting[12] that Hurricane Sandy had partially destroyed Atlantic City.[13] In the aftermath of the hurricane, "plans for further casino construction dwindled."[14]

This combination of competition, natural disaster, and neglect caused the once opulent casino to fall into such disrepair that Mr. Trump sued to have his name, emblazoned in neon, removed from the Taj Mahal's façade.[15] In September 2014, Trump Entertainment Resorts, Inc. shuttered the Trump Plaza and, despite Trump Taj Mahal generating "the fifth-highest gambling revenue on the boardwalk," the company filed for chapter 11 reorganization.[16] Company executives stated that, without modifications from its labor union's collective bargaining agreements,[17] the Taj Mahal would close in November.[18] Unite Here

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[11]

> [F]our of Atlantic City's 12 casinos shut down in 2014 amid completion in neighboring states . . . A study commissioned by Resorts Casino Hotel for an anti-expansion group predicts that northern New Jersey casinos would cause three to five of Atlantic City's eight casinos to close. A study by an independent Wall Street firm predicts as many as four could close.

Associated Press, *What will Happen if Atlantic City Casino Workers Strike?*, NJ.COM (Jan. 26, 2016), https://www.nj.com/atlantic/index.ssf/2016/06/what_impact_will_an_atlantic_city_casino_workers_s.html; *see* Karmin et al., *supra*, note 10.

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> Journalists on the ground, not necessarily familiar with Atlantic City, found a section of the boardwalk that Sandy had battered. . . . journalists from NBC's Al Roker to ABC's George Stephanopoulos declaring devastation for Atlantic City's historic boardwalk. But . . . the actual historic part of [the] boardwalk was not devastated at all.

Amy McKeever, *Atlantic City Post-Sandy: The Myths and Facts of Hurricane Sandy's Damage*, EATER (Feb. 4, 2013, 10:30 AM), https://www.eater.com/2013/2/4/6485937/atlantic-city-post-sandy-the-myths-and-facts-of-hurricane-sandys.

[13] *See* Scott Bixby, *Trump Taj Mahal closing after multiple bankruptcies and union strike*, THE GUARDIAN (Aug. 3, 2016, 3:41 PM), https://www.theguardian.com/us0news/2016/aug/03/trump-taj-mahal-casino-closing-atlantic-city.

[14] *Id.*

[15] *See* Karmin et al., *supra*, note 10 ("Mr. Trump—who owns 5% of Trump Entertainment's stock, according to the bankruptcy filings—has been trying to distance himself from the failing company. He filed suit this year asking a New Jersey Court to remove his name from the casinos.").

[16] *Id.*

[17] "In 2011, Taj Mahal's earnings before interest, taxes, depreciation, and amortization (EBITDA) were approximately $32 million. The casino's earnings plummeted to a loss of $6.1 million in 2013. As of June 30, 2014, Taj Mahal's twelve-month EBITDA was a loss of $27.5 million." *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d 161, 164 n.4 (3d Cir. 2016).

[18] Other Atlantic City properties were affected by the changing economic conditions suffered by Trump Entertainment Resorts, Inc. with three other casinos closing in 2014. Analyst estimated that the closures would result in a loss of 8,000 of Atlantic City's 32,000 casino jobs. Karmin et al., *supra*, note 10.

Local 54, representing 1,200 Taj Mahal employees,[19] disagreed with management's assessment and fought against modifications to its agreement.[20]

The unionized laborers affected by the modifications served as "housekeepers, bartenders, cooks, cocktail servers, and other service workers" at Trump Taj Mahal.[21] The majority of this workforce were middle-age women whose labor supported their children, families, and homes.[22] In 2015, the average unionized worker's hourly pay was approximately $11.74.[23] According to Unite Here, many workers, even those with seniority, have only seen eighty cents "in total raises over the last twelve years."[24] However, over the same period, "the cost of living in Atlantic City has risen over 25 percent."[25] During the financial recession, the casino-workers union agreed with Atlantic City casino operators "to wage freezes and benefit reductions totaling at least $40 million over the last five years."[26] The Union, and many of its representatives, saw a large disparity between the casino industry and company executives generating larger profits and bonuses, while union wages remained stagnant.[27]

In the aftermath of Trump Entertainment Resorts, Inc.'s bankruptcy case, its unionized employees were faced with financial and emotional hardships. In the first half of 2016, the state of "New Jersey's foreclosure rate was 0.98 percent of housing units, or one in every 102 homes."[28] Atlantic City "had the highest foreclosure rate of any major U.S. metropolitan area at 1.8 percent."[29] Tina Condos, a unionized cocktail waitress who had worked at Trump Taj Mahal since its grand opening, is only one of many workers who had lost their homes to foreclosure in the wake of this case.[30]

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[19] *Id.*

[20] *See* Randall Chase, *Judge rejects Trump Entertainment pension motion*, SAN DIEGO UNION TRIBUNE (Oct. 3, 2014, 9:48 AM), http://www.sandiegouniontribune.com/sdut-judge-reject-trump-entertainment-pension-motion-2014oct-3-story.html.

[21] Press Release, Unite Here! Local 54, Atlantic City Casino Workers: Little Progress in Contract Negotiations, as 6,000 Servers & Housekeepers Continue Preparations to Strike July 1 (June 28, 2016), http://www.uniteherelocal54.org/press-release-atlantic-city-casino-workers-little-progress-in-contract-negotiations-as-6000-servers-housekeepers-continue-preparations-to-strike-july-1.

[22] *See id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] *See id.*

[28] Hillary Russ, *New Jersey and Atlantic City area top U.S. foreclosures: report*, REUTERS (July 14, 2016, 12:10 AM), https://www.reuters.com/article/us-new-jersey-foreclosures/new-jersey-and-atlantic-city-area-top-u-s-foreclosures-report-idUSKCN0ZU09T.

[29] *Id.*

[30] The Guardian, *The Trump Taj Mahal is closing: did it make Atlantic City great?*, YOUTUBE (Sep. 2,

The subsequent labor dispute and legal challenge reaffirmed the courts' conflicting applications of collective bargaining agreements under bankruptcy law and the National Labor Relations Act (hereinafter the "NLRA").[31] In a matter of first impression, the Court of Appeals for the Third Circuit addressed whether "a Chapter 11 debtor-employer is able to reject the continuing terms and conditions of a collective bargaining agreement (CBA) under [11 U.S.C.] § 1113 after the CBA has expired."[32] Collective bargaining agreements are not considered "executory contracts" under the Bankruptcy Code and are not subject to the assumption or rejection procedures outlined in § 365.[33] The NLRA "prohibits an employer from unilaterally changing the terms and conditions of a CBA even after its expiration."[34] Therefore, "key terms and conditions of an expired CBA continue to govern the relationship between the debtor-employer and its unionized employees until the parties reach a new agreement or bargain to impasse."[35]

The Court of Appeals for the Third Circuit affirmed the United States Bankruptcy Court for the District of Delaware's holding that the debtor had authority to reject an expired collective bargaining agreement even though the agreement expired after the petition date.[36] The bankruptcy court further held that the debtor met its burden under § 1113 to reject the collective bargaining agreement.[37] By upholding this decision, the Third Circuit joined a growing majority of bankruptcy courts that have determined that § 1113 provisions extend to the status quo terms of expired collective bargaining agreements.[38]

This growing majority has diluted the special status collective bargaining agreements have in our bankruptcy scheme and tips the scales to debtor-

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2016), https://youtu.be/discK6FLnrc.

[31] *See In re* Trump Entm't Resorts, Inc. 519 B.R. 76 (Bankr. D. Del. 2014); *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d 161 (3d Cir. 2016), cert. denied, 136 S. Ct. 2396 (2016).

[32] *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 164.

[33] *See* 11 U.S.C. § 365(d)(2) (2012). Municipal bankruptcies, governed by chapter 9 of the Bankruptcy Code, do not have an equivalent to 11 U.S.C. § 1113. Therefore, the rejection or modification of public unions is subject to § 365 as well as the holdings in *NLRB v. Bildisco & Bildisco*. *See* Ryan Dahl, *Collective Bargaining Agreements and Chapter 9 Bankruptcy*, 81 AM. BANK. L.J. 295, 296–97 (Oct. 2007).

[34] *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 163. *See* 29 U.S.C. § 158(a)(5), (d) (2012); Litton Financial Printing Div. v. Nat'l Labor Relation Bd., 501 U.S. 190, 198 (1991).

[35] *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 164.

[36] *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 76.

[37] *See id.*

[38] *See* San Rafael Baking Co. v. N. Cal. Bakery Drivers Sec. Fund (*In re* San Rafael Baking Co.), 219 B.R. 860, 866 (B.A.P. 9th Cir. 1998); *In re* 710 Long Ridge Road Operating Co. II LLC, 518 B.R. 810, 831 (Bankr. D. N.J. 2014); *In re* Karykeion Inc., 435 B.R. 663, 674 (Bankr. C.D. Cal. 2010); United Food & Commercial Workers Union, Local 770 v. Official Unsecured Creditors Comm. (*In re* Hoffman Bros. Packing Co.), 173 B.R. 177, 184 (B.A.P. 9th Cir. 1994).

employers to unilaterally erode employee's hard-won bargaining power. These recent developments mirror Justice Brennan's concern that when courts hold that an employer "may disregard the terms of a collective bargaining agreement after a bankruptcy petition had been filed," this "deprives the parties to the agreement of their 'system of industrial self-government'" and without that systematic "resolution of the parties' disputes will indeed be left to 'the relative strength . . . of the contending forces.'"[39]

Private employer collective bargaining agreements are still common in various industries including, in the case of Trump Entertainment Resorts, Inc., hospitality. According to the Bureau of Labor Statistics, union wage and salary employees made up 10.7 percent of the American workforce in 2016.[40] The hospitality industry, as of 2016, consisted of 389,000 union members.[41] In Atlantic City, Trump Taj Mahal's competitors all had a portion of their workforce composed of union workers.[42] Collective bargaining agreements provide benefits for both management and union members.[43] Management is able to centralize labor negotiations directly through the representing unions as opposed to individual employees. In exchange for certain employment protections, management is able to set specific pay scales and performance standards based on seniority.[44] By negotiating collectively, union workers have structured grievance and arbitration procedures to resolve disputes and secure robust benefits packages, including pensions, which are becoming less common in the private-sector. Furthermore, the NLRA structures the negotiation process between the employer and employees with the National Labor Relations Board (hereinafter the "NLRB") to mitigate disputes and maintain the balance between management and union members.[45]

Since its inception, § 1113, intended to protect labor's bargaining power and uphold the authority of the NLRA,[46] has stood out like a sore thumb in a

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[39] NLRB v. Bildisco & Bildisco, 465 U.S. 513, 554 (1984) (Brennan, J., dissenting).

[40] *Union Members Summary—2016*, BUREAU OF LABOR STATISTICS (Jan. 26, 2017), https://www.bis.gov/news.release/union2.nr0.htm.

[41] *Id.*

[42] Unite Here states that it represents 100,000 casino workers making it "the largest union of gaming workers in the world." The union also states that it "represents significant numbers of workers" with the largest gaming companies, including: MGM Resorts; Creasers Entertainment; Wynn Resorts; and, Boyd Gaming. UNITE HERE! Gaming, UNITEHERE.ORG, htttps://unitehere.org/industry/gaming (last visited Jan. 24, 2018).

[43] *See generally* Clyde W. Summers, *Collective Agreements and the Law of Contracts*, 78 YALE L. 523, 538–39 (1969) ("The union and the employer clearly intend to provide benefits for the individual employees, and the individual employees acquire legally enforceable rights under the agreement.").

[44] *See generally* A. H. Raskin, *Twilight Zones for Unions*, 1987 DET. C.L. REV. 637 (1987).

[45] *See generally* Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1969).

[46] *See* Bruce H. Charnov, *The Uses and Misuses of the Legislative History of Section 1113 of the*

bankruptcy chapter focused upon the debtor's ability to reorganize.[47] Reorganization, outside of collective bargaining agreements, generally favors the debtor's ability to escape from pre-petition contractual obligations, as demonstrated in § 365.[48] The majority view demonstrates that, despite legislative intention, bankruptcy courts have favored a debtor's reorganization over the interest of labor in their application of § 1113.[49] This perspective further adds to commentators' concerns that "an overly pro-debtor interpretation of this statute would allow debtors to use bankruptcy as a 'union-busting' tool."[50] Since § 1113 entered the Code, private employers have seen chapter 11 as a means to reshape their labor costs.[51] An empirical study by the United States Government Accountability Office in 2007 found that requests by debtors to modify or reject collective bargaining agreements under § 1113 were generally granted.[52]

The *In re Trump Entertainment Resorts Unite Here Local 54* opinion ignores the intent of Congress in drafting § 1113, undermines the authority of the NLRA,

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Bankruptcy Code, 40 SYRACUSE L. REV. 925 (1989). Section 1114 also addresses labor unions in the context of the Bankruptcy Code. Specifically, it addresses payment of insurance benefits of retired employees. Although §§ 1113 and 1114 are commonly considered by courts when evaluating rejection of collective bargaining agreements, § 1114 will not be addressed in this Comment. *See* 11 U.S.C. § 1114 (2012).

[47] *See generally* Bank of America Nat. Trust and Sav. Ass'n v. 203 North LaSalle Street Partnership, 526 U.S. 434, 465 n.4 (1999) (Stevens, J., dissenting) ("Confirmation of a plain of regionalization is the statutory goal of every chapter 11 case") (quoting 7 Collier on Bankruptcy ¶ 1129.01, 1129-10 (rev. 15th ed. 1998)). *But see In re* Insilco Tech., Inc., 480 F.3d 212, 214 n.1 (3d. Cir. 2007) ("While we typically think of Chapter 11 as the 'reorganization' section of the Bankruptcy Code . . . it is not uncommon for debtors to use Chapter 11 process to liquidate.").

[48] *See* Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 AM. BANKR. L.J. 103, 105 (2010).

[49] *Compare In re* Hostess Brands, 477 B.R. 378, 383 (Bankr. S.D.N.Y. 2012) (holding that an expired agreement leaves parties under the fallback provisions of otherwise applicable, including the NLRA), *with In re* 710 Long Ridge Rd. Operating Co., LLC, 518 B.R. at 813 (holding that § 1113 provides the authority to reject and modify continuing terms of an expired CBA).

[50] Dawson, *supra*, note 48, at 103.

[51]

> How, then, to explain the wave of bankruptcy cases targeting significant reductions in labor costs, pension funding, and retiree health obligations that has surged through . . . heavily unionized industries in recent years? Restructuring professional have denominated these cases "labor transformation" bankruptcies. They have in common the strategic use of bankruptcy to bring about broad changes to a business, largely through substantial cost-cutting to address conditions that are ascribed to fundamental industry changes. In these cases, the debtor believes that the bankruptcy process will allow it to achieve long-term solutions through the tools available under the Bankruptcy Code.

Babette A. Ceccotti, *Lost in Transformation: The Disappearance of Labor Polices in Applying Section 1113 of the Bankruptcy Code*, 15 AM. BANKR. INST. L. REV., 415, 417 (2007).

[52] *See* Dawson, *supra*, note 48, at 113. ("It found that eight of the twenty-eight, or 29% of the debtors with CBAs sought to reject the labor agreement in bankruptcy, and that these § 1113 motions generally resulted in negotiated modifications.").

and further unbalances the bargaining position of labor unions to the point of absurdity. Although both the debtor and union would benefit from successfully reorganizing through bankruptcy, the Third Circuit's decision places the interest of the debtor's desire for speed and, more importantly, the interest of DIP financers[53] over the union-employees' whose interests are not being "treated fairly and equitably"[54] under § 1113. Furthermore, this decision ignores the employer's dual obligations—specifically, its contractual obligations under the terms of the collective bargaining agreement and its statutory obligations under the NLRA which survive the agreement's expiration.

Instead, expired collective bargaining agreements should fall outside the control of § 1113, as supported by the minority view,[55] and disputes regarding key terms and conditions should remain under the jurisdiction of the NLRB. However, if the majority view persists, Congress should reform § 1113 to address this bargaining imbalance and courts should reconsider how it is applied in practice.

This Comment, in Part I, explains the structural and procedural underpinnings of § 1113 and relevant portions of the NLRA as well as the conflicting arguments and the court's reasoning for *In re Trump Entertainment Resorts Unite Here Local 54*. Part II asserts the argument that expired collective bargaining agreements should remain outside of § 1113. In Section A, the legislative response to *NLRB v. Bildisco & Bildisco* and the construction of § 1113 are analyzed. Section B addresses conflicting circuit interpretation of what a "necessary modification" is as well as its limitations. Section C examines the status quo terms of an expired collective bargaining agreement as statutory obligations under the NLRA as opposed to the four-corners of the agreement. The minority view, recently asserted in *In re Hostess Brands*,[56] is evaluated as well. In Section D, the scope of the NLRB's ability to address both debtor-employers and union-employee's concerns, as they relate to collective bargaining agreements, is explored. Section E revisits the failure of Trump

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[53] Investor Carl Icahn was the first-lien holder in Trump Entertainment Resorts, Inc. "The company lists $285.6 million in principle and $6.6 million in unpaid interest outstanding on a $346.5 first-lien secured credit facility administered by the Icahn Agency." Mr. Icahn, for concessions for the collective bargaining agreement and tax cuts, would provide a $100 million cash infusion. Jamie Santo, *Trump Resorts Aims to Ax Union Pact, Add $100M Icahn Stake*, LAW360 (Sept. 29, 2014, 6:01 PM), https://www.law360.com/articles/581977/trump-resorts-aims-to-ax-union-pact-add-100m-ichan-stake.

[54] 11 U.S.C. § 1113(b)(1)(A) (2012).

[55] *See In re* Hostess Brands, Inc., 477 B.R. at 383; *see also In re* Sullivan Motor Delivery Inc., 56 B.R. 28, 29 (Bankr. E.D. Wis. 1985); Gloria Mfg. Corp. v. In'l Ladies' Garment Workers' Union, 734 F.2d 1020 (4th Cir. 1984).

[56] *See In re* Hostess Brands, Inc., 477 B.R. at 378.

Entertainment Resorts, Inc.'s reorganization and how the court's administration of the case exacerbated the relationship between the debtor-employer and the labor union. Finally, Section F provides recommendations as to how § 1113 should be applied, or, if the majority view remains unchallenged, reformed.

I. BACKGROUND AND LEGAL DOCTRINE

A. 11 U.S.C. § 1113. *Rejection of Collective Bargaining Agreements*

Section 1113 outlines the negotiating relationship between the debtor-in-possession, or trustee, and the "authorized representative of the employees covered by" the collective bargaining agreement.[57] The section defines the obligations of the debtor-in-possession to negotiate in "good faith" with the labor union for "necessary modifications" that are "mutually satisfactory" to the parties prior to seeking court approval for rejection of the collective bargaining agreement.[58] The parameters of what constitutes a "necessary modification" are addressed later in this Comment.

Sub-section (c) outlines the fact-specific analysis a court must consider regarding approval of a debtor-in-possession's § 1113 motion to reject a collective bargaining agreement.[59] The court must consider whether the debtor-in-possession fulfilled its obligations of negotiating with the labor union prior to filing the motion, if the union refused to accept the proposed modifications "without good cause," and "the balance of the equities clearly favors rejection of such agreement."[60]

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[57] 11 U.S.C. § 1113(b)(1)(A) (2012).

[58] The relevant portion of the statute states:

> (b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee . . . shall—
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> (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 the *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 . . . the representative of the employee with such relevant information as is necessary to evaluate the proposal.
>
> (b)(2) During the period beginning on the date of the making of a proposal . . . and ending on the date of the hearing . . . 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.

11 U.S.C. § 1113 (b)(1)–(2) (2012) (emphasis added).

[59] *See* 11 U.S.C. § 1113(c) (2012).

[60] *Id*.

The statute does not specify which equities the court should evaluate. However, the Supreme Court, in *NLRB v. Bildisco & Bildisco*, provided a framework that is commonly cited by courts considering § 1113 motions.[61] The Court stated that:

> The Bankruptcy Court is a court of equity, and in making this determination it is in a very real sense balancing the equities, as the Court of Appeals suggested. Nevertheless, the Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equites relate to the success of the reorganization. The Bankruptcy Court's inquiry is of necessity speculative, and it must have great latitude to consider any type of evidence relevant to this issue.[62]

Beyond considering applications for rejection, the court is authorized to enter protective orders to prevent disclosure of information[63] and allow for interim changes to the agreement if it is "essential to the continuation of the debtor's business" or to protect the value of the estate.[64] Sub-section (e) refers to "when the collective bargaining agreement continues in effect"[65] which suggests that such agreements may be in differing states depending on the term of the agreement, or the state of the agreement prior to formal rejection. This "in effect" language is discussed later in the Comment as it relates to expired collective bargaining agreements.

Section 1113 ends stating that "[n]o provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective

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[61] Many courts and commentators have identified specific equities based on the factors considered by the *Bildisco & Bildisco* Court. *See* Niraj R. Ganatra, Deputy Gen. Counsel, UAW, Address at American Bar Association—Section of Labor and Employment Law National Conference on Equal Employment Opportunity Law: Bankruptcy and the Workplace: The Intersection of Bankruptcy and Labor Law—A Primer, (Apr. 5, 2013) (available at https://www.americanbar.org/content/dam/aba/events/labor_law/2013/04/nat-conf-equal-empl-opp-law/25_ganatra.pdf.)

> The likelihood and consequences of liquidation if rejection is not permitted; The likely reduction in the value of creditor's claim if . . . [the] agreement remains in force; The likelihood and consequences of a strike if the . . . agreement is voided; The possibility and likely effect of any employee claims for breach of contract if rejection is approved; The cost-spreading abilities of the various parties . . . [and] The good or bad faith of the parties in dealing with the debtor's financial dilemma.

[62] Nat'l Labor Relations Board v. Bildisco & Bildisco, 465 U.S. at 527.

[63] *See* 11 U.S.C. § 1113(d)(3) (2012).

[64] *Id*. § 1113(e).

[65] *Id.*

bargaining agreement prior to compliance with the provisions of this section."[66] This language mirrors the NLRA protections against employers unilaterally modifying or canceling agreements without engaging in the negotiating process.[67]

Judge Kressel, in *In re American Provision Co.*,[68] established "nine requirements for court approval of the rejection of collective bargaining agreements [that] can be gleaned from § 1113."[69] Judge Kressel's analysis has been adopted by many courts when evaluating § 1113 applications.[70] Such universal adoption[71] is, in part, due to the fact that the *In re American Provision Co.* decision occurred shortly after the Bankruptcy Amendments and the Federal Judgeship Act of 1984 added §1113 to the Code.[72] Judge Kressel's analysis expanded subsections (b)(1), (b)(2), and (c) of § 1113 into nine identified steps.[73]

Judge Kressel, acknowledging that § 1113 was "not a masterpiece of draftsmanship," identified the following analytical steps.[74] First, "[t]he debtor in possession must make a proposal to the Union to modify the collective bargaining agreement."[75] Second, "[t]he proposal must be based on the most complete and reliable information available at the time of the proposal."[76] Third, "[t]he proposed modifications must be necessary" for the debtor's reorganization.[77] Fourth, the "modifications must assure that all creditors, the

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66 11 U.S.C. § 1113(f) (2012).

67 *See* 29 U.S.C. § 158(d) (2012).

68 *In re* Am. Provision Co, 44 B.R. 907 (1984).

69 *Id.* at 909.

70 *See, e.g.*, *In re* PJ Rosaly Enters., 578 B.R. 682, 690–700 (Bankr. D. P.R. 2017); *In re* Carey Transp., Inc., 50 B.R. 203, 207–13 (Bankr. S.D. N.Y. 1985); *In re* 710 Long Ridge Rd. Operating Co., LLC, 518 B.R. at 832–42; *In re* Alpha Nat. Res., Inc., 552 B.R. 314, 325 (Bankr. E.D. Va. 2016); *In re* SAI Holdings Ltd., 2007 Bankr. LEXIS 1051 (Bankr. N.D. Ohio 2007); *In re*. Chi. Constr. Specialties, Inc. 510 B.R. 205, 216 (Bankr. N.D. Ill. 2014); Ass'n of Flight Attendants-CWA v. Mesaba Aviation, Inc., 350 B.R. 435, 448 (D. Minn. 2006); *In re* Patriot Coal Corp, 493 B.R. 65, 112 (Bankr. E.D. Mo. 2013); *In re* Big Sky Transp. Co., 104 B.R. 333, 339 (Bankr. D. Mont. 1989); *In re* Walter Energy, Inc., 542 B.R. 859, 878 (Bankr. N.D. Ala. 2015).

71 *But see In re* Royal Composing Room Inc., 62 B.R. 403, 406 (Bankr. S.D. N.Y. 1986) ("This court eschews the talismanic nine-step analysis of Bankruptcy Code §1113 first used in [*In re* American Provision Co.]. Instead, this court looks to the three interdependent findings required by CodCode §1113(c).").

72 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333390 (1984).

73 *In re* Am. Provision Co, 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

74 *Id.*

75 *Id. See* 11 U.S.C. § 1113(b)(1)(A) (2012) ("make a proposal to the authorized representative of the employees covered by such agreement").

76 *In re* Am. Provision Co, 44 B.R. at 909. *See* 11 U.S.C. § 1113(b)(1)(A) (2012) ("make a proposal . . . based on the most complete and reliable information available at the time of such proposal").

77 *Id.* ("make a proposal . . . which provides for those necessary modifications . . . that are necessary to

debtor and all of the affected parties are treated fairly and equitably."[78] Fifth, the "debtor must provide to the union such relevant information as is necessary to evaluate the proposal."[79] Sixth, "the debtor must meet at reasonable times with the Union" prior to the § 1113 hearing.[80] Seventh, "the debtor most confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement."[81] Eighth, the "Union must have refused to accept the proposal without good cause."[82] Finally, the "balance of the equities must clearly favor rejection of the collective bargaining agreement."[83]

Along with identifying the nine requirements, Judge Kressel identified the burden of proof and which party bears the burden on each element.[84] As the debtor initiates a § 1113 motion, the ultimate burden rested on the debtor by a "preponderance of the evidence on all nine elements."[85] However, the Union must provide (1) evidence countering whether the information provided by the debtor was not relevant or necessary to the evaluation of the proposal, (2) proof that "the debtor did not confer in good faith," and (3) that its rejection of the proposed modifications "was not without good cause."[86]

B. 29 U.S.C. § 158. *Unfair Labor Practices*

The NLRA provides the foundation of fair labor practices and dictates the relationship between employers and union-employees outside of the Bankruptcy Code.[87] The NLRA identifies the refusal to bargain collectively as an unfair

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permit the reorganization of the debtor.").

[78] *Id.* (assure that "all creditors, the debtor and all of the affected parties are treated fairly and equitably").

[79] *In re* Am. Provision Co, 44 B.R. at 909. *See* 11 U.S.C. § 1113(b)(1)(B) (2012) (The debtor shall "provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal."). *See In re* Am. Provision Co, 44 B.R. at 909 n.2 ("This requirement is very similar to the second requirement, although somewhat different. The second requirement dictates that the proposal be *based* on certain information and the fifth requirement requires the debtor to *provide* that information to the Union." (emphasis in original)).

[80] *In re* Am. Provision Co, 44 B.R. at 909. *See* 11 U.S.C. § 1113(b)(2) ("During the period beginning on the date of the making of a proposal . . . and ending on the date of the hearing . . . the trustee shall meet, at reasonable times, with the [Union].").

[81] *Id.* ("the debtor . . . shall . . . confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.").

[82] *In re* Am. Provision Co, 44 B.R. at 909. *See* 11 U.S.C. § 1113(c)(2) (2012) ("the authorized representative of the employees has refused to accept such proposal without good cause").

[83] *In re* Am. Provision Co, 44 B.R. at 909. *See* 11 U.S.C. § 1113(c)(3) (2012) ("the balance of the equites clearly favors rejection of such agreement.").

[84] *In re* Am. Provision Co, 44 B.R. at 909 ("Section 1113 does not discuss the burden of proof of showing that the requirements have been met.").

[85] *In re* Am. Provision Co, 44 B.R. at 909.

[86] *Id.*

[87] *See generally* 29 U.S.C. §§ 153–56 (2012). Although not discussed in this Comment, an employer

labor practice as it relates to the employer[88] or the bargaining labor organization.[89]

Sub-section (d) outlines the obligations of both sides to bargain collectively.[90] Congress incorporated the requirements of the parties to "meet at reasonable times" and "confer in good faith" into § 1113 of the Bankruptcy Code.[91] Unlike the Code, the NLRA provides an extensive time period for the parties to bargain collectively as well as an appealing hierarchy to address negotiation disputes through the Federal Mediation and Conciliation Service.[92]

The NLRA also establishes a negotiating structure when the current agreement is set to expire or if a party seeks to terminate or modify an existing agreement.[93] Finally, the terms of the agreement remain in "full force and effect" until the dispute is resolved, either among the parties or through formal mediation, or the agreement is appropriately terminated.[94]

C. In re Trump Entertainment Resorts

On September 9, 2014, Trump Entertainment Resorts, Inc. filed a petition for chapter 11 reorganization.[95] Prior to filing for bankruptcy, the debtor sent notice to the labor union, Unite Here Local 54, to begin negotiations to modify the existing collective bargaining agreement which was set to expire in September 2014.[96] Five days after filing, the collective bargaining agreement "expired by its own terms."[97] Based on the debtor-in-possession's expert testimony, Trump Entertainment Resorts, Inc. had twelve million dollars of

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threatening to file bankruptcy if its workforce attempts to unionize is, in itself, considered an unfair labor practice. *See* 29 U.S.C. § 158(a)(1); *see also* Jennifer J. Froehlich, *Bankruptcy Brinkmanship: Employer's Threats of Bankruptcy in the Context of Collective Bargaining and the National Labor Relations Act*, 57 LAB. L. J. 89 (2006).

88 29 U.S.C. § 158(a)(5) (2012).

89 *Id*. § 158(b)(3).

90 *Id*. § 158(d) ("to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable time and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement").

91 *Compare* 29 U.S.C. § 158(d), *with* 11 U.S.C. § 1113(b)(2) (2012) (regarding reasonable times for parties to meet and confer).

92 *See* 29 U.S.C. § 158(d)(2)–(3) (2012).

93 *Id*. § 158(d)(1) ("serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification").

94 *Id*. § 158(d)(4).

95 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 79.

96 The collective bargaining agreement was initiated in November 2011 and was set to expire in September 2014. *In re* Trump Entm't Resorts, Inc., 519 B.R. at 81.

97 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 83.

capital cash which would allow the Taj Mahal to operate for two months.[98] The testimony further emphasized that, without modification, the terms of the collective bargaining agreement would require the casino to close and initiate liquidation.[99]

Outside of the collective bargaining agreement, the debtor sought other concessions from creditors and the state of New Jersey to ensure reorganization.[100] The collective bargaining agreement required that the debtor:

> make pension contributions of more than $4 million every year, and $12 million to $15 million per year in health and welfare contributions. The payments applicable to Taj Mahal are $3.5 million for pension contributions and $10 to $12 million for health and welfare contributions. The Debtors have also incurred potential liabilities to the pension fund of nearly $197 million for withdrawal because the fund is underfunded.[101]

From March 2014 until the § 1113 hearing that took place in October 2014, the debtor actively sought to schedule meetings with and provide documentation to union representatives to addresses these financial concerns.[102]

The debtor's proposed modifications "included elimination of the pension contributions to be replaced by a 401K program; and substituting the health and welfare program with [Affordable Care Act] coverage which Debtors would subsidize."[103] Such modifications would result in savings of $14.6 million per year.[104] Although not stated in the opinion, the modified collective bargaining agreement would be for a term of four years.[105] Prior to filing for bankruptcy, the union stated that it was prepared only to discuss pension changes.[106]

As to the court's determination that granting a § 1113 application to reject a collective bargaining agreement is a factual inquiry, Judge Gross's opinion was heavily influenced by the behavior of the parties during the negotiation period

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98 *Id*. at 80.

99 *Id.*

100 These concessions included "assistance from the first lien secured creditor in the form of converting $286 million of outstanding secured debt and making an equity investment of $100 million; property tax relief from Atlantic City and the State of New Jersey; and $25 million of tax credits." The opinion notes that the tax concessions were still a "work-in-progress" .*In re* Trump Entm't Resorts, Inc., 519 B.R. at 80–81.

101 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 81.

102 *See id*. at 81–82.

103 The Debtor's proposal is included in the opinion as Attachment A. *Id*. at 81.

104 *Id*. at 80.

105 *See id*. at 93 (Attach. A).

106 *Id*. at 81.

prior to the hearing. It is evident from the language of Judge Gross's factual analysis that he viewed the Union as not acting in good faith as an uncontroverted fact.[107] Judge Gross found the correspondence between the debtor and union representatives as "alarming" evidence "showing the Debtors were literally begging the Union to meet while the Union was stiff-arming the Debtors."[108] Judge Gross goes on to state:

> It is significant that while debtors were imploring the Union to engage with them in discussions, offering to meet "24/7," the Union was engaging in picketing, a program of misinformation and, most egregiously, communicating with customers who had scheduled conferences at the [Taj Mahal] to urge them to take their business elsewhere. It is thus clear that the Union was not focusing its efforts on negotiating to reach agreement with Debtors.[109]

Furthermore, the Union harmed its own argument by not providing its own witnesses at the hearing to counter this evidentiary interpretation.[110]

However, the opinion notes that the union's reason for failing to negotiate may be related to the fact that it represents laborers at other Atlantic City casinos.[111] The union's collective bargaining agreements associated with Trump Entertainment Resorts, Inc., and other casino owners, contain a "most favored nation" or "most favored employee" provision.[112] Such a provision would "give an employer the benefit of employer beneficial amendments in another casino's collective bargaining agreement."[113] In the context of *Trump Entertainment Resorts*, such a provision may require the union to apply the modifications forced upon them by § 1113 not only to Trump Entertainment Resorts, Inc. but to all of its agreements with other casino employers.

It is understandable that the union, faced by such a sea-change to negotiated benefits across an industry or geographic market, may be disinclined to give the

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107 *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 82.

108 *Id*. at 82–81.

109 *Id*. at 82 (internal citations omitted).

110 *See id*. at 79.

111 *See id*. at 92 n.4.

112 Judge Gross noted:

> Debtors and the Union discussed at the hearing, at some length, the existence of "most favored nation" or "most favored employer" provisions in collective bargaining agreements at other casinos in Atlantic City. The Court has not reached any conclusion whether such provisions—which give an employer the benefit of employer beneficial amendments in another casino's collective bargaining agreement played a role in the Union's failure to negotiate.

In re Trump Entm't Resorts, Inc., 519 B.R. at 92 n.4.

113 *Id*. at 92 n.4.

appearance of consent by negotiating with the debtor. Furthermore, the existence of a "most favored nation" clause demonstrates that a bankruptcy court, when rejecting a collective bargaining agreement under § 1113, should consider whether, by granting the motion, they may be altering union benefits outside of the instant case.[114]

As an initial matter, the court addressed whether it had jurisdiction to apply § 1113 to collective bargaining agreements which have expired, but the status quo terms and obligations are maintained under the NLRA.[115] "The Union argues that the Debtors' obligations under the expired CBA which remain in effect are statutory, as opposed to contractual, in nature because they arise only by virtue of the Debtors' *status quo* obligations under the NLRA."[116] Therefore, the Union reasoned that there was no collective bargaining agreement for the court to reject and the status quo obligations remain under the exclusive jurisdiction of the NLRB.[117] The Union presented *In re Hostess Brands* as support for its argument that § 1113 does not apply to expired collective bargaining agreements and that the "continues in effect" language of subsection (c) further demonstrates that point.[118]

The court rejected the Union's reasoning, instead finding that it did have the jurisdiction to reject expired collective bargaining agreements through § 1113.[119] The court determined that, in drafting § 1113, "Congress struck a balance between affording debtors the flexibility to restructure their labor costs on a comparatively expedited basis . . . while interposing a certain level of court oversight and requirements for good faith bargaining."[120] Furthermore, the Union's argued position would "give labor unions the power to hold up a debtor's bankruptcy cases" and lead to absurd results.[121]

The court subsequently found that the debtor met its § 1113 obligations and rejected the collective bargaining agreement.[122] Initially, the court considered whether the debtor-in-possession's proposed modifications were "necessary to

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114 *See, e.g.*, *In re* Landmark Hotel & Casino, Inc., 78 B.R. 575, 581 (B.A.P. 9th Cir. 1987) ("Referring to the 'most favored nations' problem, the [lower] court said that although it was 'very receptive to the union's concerns . . . it cannot be good cause for rejecting the proposals. It does have relevance to me in a couple of other areas, and it's principally in good faith areas.") (internal quotation marks omitted).

115 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 83.

116 *Id.*

117 *Id.*

118 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 84–85; s*ee In re* Hostess Brands, 477 B.R. at 383.

119 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 87–88.

120 *Id*. at 85.

121 *Id*. at 87.

122 *Id*. at 91–92.

permit the reorganization of the debtor."[123] Under precedent from the Third Circuit Court of Appeals, the debtor must demonstrate that the modifications are "essential to reorganization" as opposed to merely desirable.[124] Judge Gross found the debtor's expert testimony credible that, without alterations to the collective bargaining agreement, the debtor would be forced to liquidate.[125] Therefore, the modifications were "essential to the Debtors' short-term survival."[126]

The court then considered[127] "whether the . . . proposal would impose a disproportionate burden on the employees."[128] Although Judge Gross acknowledged that the proposed modifications would alter the union's bargained benefits, the debtor's current financial situation, if unaltered, would force all parties in interest, including trade creditors, the State of New Jersey, non-union employees, and management, to receive nothing.[129] The Union countered by arguing that the debtor's proposal does not include a "snap back" provision.[130] "A 'snap back' provision increases the employees' wages or benefits in the event its employer has greater financial success than expected."[131] The court found that a "snap back" provision was not required for a § 1113 proposal to be granted.[132]

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123 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 88 (quoting 11 U.S.C. § 1113(b)(1)(A)).

124 *Id.* (citing Wheeling-Pittsburg Steel Corp., 791 F.2d 1074).

125 *See In re* Trump Entm't Resorts, Inc. 519 B.R. at 88–89.

126 *Id*. at 88.

127 Prior to evaluating whether the proposal treated the parties fairly, the Court quickly found that the debtor provided the union with the "most complete" and "relevant information necessary to evaluate [the debtor's] proposal." *In re* Trump Entm't Resorts, Inc. 519 B.R. at 89 (citing 11 U.S.C. § 1113(b)(1)(A)–(B)).

128 *In re* Trump Entm't Resorts, Inc. 519 B.R. at 90 (quoting Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1091 (3d Cir. 1986)).

129 *Id.*

130 *Id.*

131 *Id.*

132 *Id.* The Third Circuit denied the district court's order approving the debtor's § 1113 application, in part, due to the lack of a "snap back" provision. The court stated:

> The bank creditors argue that the proposal contains a "snap back" in that the Union's claim as a pre-petition unsecured creditor for the reduction in wages and benefits during the 13-month period left on the old contract, could be repaid at a higher level. *But an unsecured claim is not equivalent in kind to a "snap back"* which is based on the principle that all of the concessions sought may not turn out to be necessary . . . the bankruptcy court's failure to recognize the need for some parity in this regard flaws the court's conclusion that the proposal was "fair and equitable."

Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1093 (3d Cir. 1986) (emphasis added).

Subsequently, the court found that the Union rejected the debtor's proposed modifications "without good cause."[133] The Union's conduct, including delaying negotiations, refusing to respond when the debtor provided proof of the imminent threat of liquidation, and actively protesting against the debtor's business was found as proof that the proposals rejection was in bad faith.[134] Finally, the court placed significance on the fact that the debtor would be forced into liquidation if its motion was denied.[135] Therefore, the "balance of the equities clearly favor rejection" of the collective bargaining agreement.[136] Based on this analysis, Judge Gross granted the debtor's motion to unilaterally alter the terms of the expired collective bargaining agreement.[137] The Union appealed the decision to Third Circuit Court of Appeals.[138]

D. In re Trump Entertainment Resorts Unite Here Local 54

The Third Circuit Court of Appeals granted the parties' petition for direct appeal on December 15, 2014.[139] In its petition, the Union challenged whether "a Chapter 11 debtor-employer [is] able to reject the continuing terms and conditions of a CBA under § 1113 after the CBA has expired."[140] Judge Roth's opinion[141] affirmed the bankruptcy court's interpretation of §1113 and concluded that "§1113 does not distinguish between the terms of an unexpired CBA and the terms and conditions that continue to govern after the CBA expires."[142]

Initially, the court analyzed § 1113 to determine Congress's intent based on the "plain language of the statute."[143] Although the court acknowledged that bankruptcy courts are divided on the issue, such "divergence in statutory construction does not render § 1113 ambiguous."[144] The Union argued that a

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133 *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 90 (quoting 11 U.S.C. § 1113(c)(2)).

134 *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 90–91 ("The Union's refusal to negotiate qualifies for the finding that it rejected the Proposal without good cause.") (citing *In re* Garofalo's Finer Foods, 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990)).

135 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 91.

136 *Id.* (quoting 11 U.S.C. § 1113(c)(3)).

137 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 92.

138 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d 161 (3d Cir. 2016).

139 *Id*. at 166.

140 *Id*. at 163.

141 The appeal was before Judges Roth, Schwartz, and Scirica. *See id*. at 162.

142 *Id*. at 163.

143 *Id*. at 167 ("When statutory 'language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms'") (quoting Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A., 530 U.S. 1, 6 (2000)).

144 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 167–68.

CBA is an agreement between management and the Union and, when it expires, "there is no 'contract' to be rejected under § 1113."[145] Furthermore, the Union asserted that, once expired, the status quo terms are governed by the statutory obligations of NLRA as opposed to the contract.[146] The opinion acknowledged that § 1113 "does not mention the continuing obligations imposed by the NLRA."[147] However, the statute makes no mention of whether the collective bargaining agreement is "unexpired" or "executory."[148] The court rejected applying the Union's "hyper-technical parsing" of the statute and, instead, looked to the historical context under which the statue was enacted.[149]

After analyzing the *NLRB v. Bildisco & Bildisco* decision and the drafting of § 1113 that occurred in response,[150] the court found that the instant case "exemplifies the process that Congress intended."[151] The debtor's ability to reject the collective bargaining agreement was necessary for a successful reorganization.[152] The court identified that the "first lien secured creditor 'has made it clear that it will perform only if the CBA and tax relief continues are achieved because the business will not succeed without the relief.'"[153] Furthermore, the court found that it was clear that Congress intended to "incorporate expired CBAs in the language of § 1113."[154] Congress enacted § 1113 to "balance the needs of economically-stressed debtors in avoiding liquidation and the union's need in preserving labor agreements and safeguarding employment for their members."[155] The court found that approval process, under § 1113, was more robust than the standard in *Bildisco & Bildisco* and approval would only be granted if the debtor's modifications were necessary.[156]

The court asserted that, since the modification of the collective bargaining agreement[157] hinders the debtor's reorganization, "it is the expertise of the

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145 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 168.

146 *Id.*

147 *Id.*

148 *Id.*; *see also* 11 U.S.C. § 365 (2012).

149 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 163.

150 These issues are addressed in further detail later in the Comment.

151 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 171.

152 *Id.* at 171–72.

153 *Id.* at 172.

154 *Id.* at 173.

155 *Id.*

156 *Id.*

157 This consideration applies to the status quo terms of an expired collective bargaining agreement as well.

Bankruptcy Court which is needed rather than that of the NLRB."[158] This outcome further supported a purpose of chapter 11 reorganization to allow "a debtor with an opportunity to extend its debts so its business can achieve *long-term viability*" and that holding otherwise would hinder that purpose.[159] Similarly, the court found that reorganizations contain a matter of some urgency and § 1113 approval quickly resolves matters related to collective bargaining agreements as opposed to the "protracted process" under the NLRA.[160] Finally, the court noted that bankruptcy law prefers "to preserve jobs through a rejection of a CBA, as opposed to losing the positions permanently by requiring the debtor comply with continuing obligations set out by the CBA."[161] Thus, the Third Circuit affirmed the judgment of the bankruptcy court allowing rejection of the agreement.

II. ANALYSIS

A. Legislative Intent of § 1113

Section 1113 entered the Bankruptcy Code following the swift reaction of labor unions and Congress on the Supreme Court's decision in *National Labor Relations Board v. Bildisco & Bildisco*.[162] In *Bildisco & Bildisco*, the Court determined "under what conditions can a bankruptcy court permit a debtor-in-possession to reject a collective bargaining agreement."[163] The Court found that collective bargaining agreements are "executory contract[s]" under § 365 of the Bankruptcy Code and that such contracts are subject to assumption or rejection as the section dictates.[164] The majority's rationale was based on the debtor being "empowered by virtue of the Bankruptcy Code to deal with its contracts and

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158 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 173.

159 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 173–74 (emphasis added).

160 *Id*. at 174.

161 *Id*.; *see also In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 174 n.55 (quoting 130 CONG. REC. 20, 230 (1984) (statement of Rep. Lungren, discussing § 1113) ("the primary purpose of chapter 11; that is, to maintain the debtor's business so that both the debtor and his employees can keep their jobs . . . In essence, it is the best way to protect the jobs of the workers of the company as then constituted.").

162 *See* Anne J. McClain, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J., 191, 191 (1991).

163 NLRB v. Bildisco & Bildisco, 465 U.S. at 516. *But see* KENNETH N. KLEE & WHITMAN L. HOLT, BANKRUPTCY AND THE SUPREME COURT 40 (2008) (quoting Justice Rehnquist, who drafted the majority opinion in *Bildisco & Bildisco*, in a note to Justice Stevens that "I do not feel that I am qualified to make any sort of exegesis on the meaning of the Bankruptcy Code . . . .").

164 The Court also found that the debtor-in-possession does not commit an unfair labor practice under the NLRA when it unilaterally modifies or terminates a collective bargaining agreement. NLRB v. Bildisco & Bildisco, 465 U.S. at 516.

property in a manner it could not have employed absent a bankruptcy filing."[165] However, the Court did find that, due to the "special nature" of labor union agreements, as evidenced by the unfair labor practice protections instilled into the NLRA, that a "somewhat stricter standard" than § 365 should apply when a court considers modifying or terminating a collective bargaining agreement under the Bankruptcy Code.[166] Justice Brennan, in his dissent, stated that the conflict between NLRA and the Bankruptcy Code "would be better reconciled" if the debtor-in-possession had to seek authorization from the bankruptcy court prior to unilaterally modifying or terminating such agreements.[167]

Bildisco & Bildisco is one of a few Supreme Court decisions where the Court has been called upon to balance the Bankruptcy Code and labor law.[168] Commentators suggest that the Court is cognizant of labor law's "tremendous importance as matters of social policy" but that the Court tends to "construe the specific provisions and policies of the Bankruptcy Code to prevail over more general provisions and polices of the labor laws."[169] The *Bildisco & Bildisco* decision reflects the Court's priorities. The Court drafted its decision through the lens of § 365 while attempting to balance the policy goals that define the NLRA.[170] In its attempt to harmonize the Bankruptcy Code and the NLRA, the Court was attempting to avoid a direct conflict between two congressional priorities.[171]

In response to *Bildisco & Bildisco*, Congress sought to provide clearer procedures that a debtor-in-possession must follow in order to reject collective bargaining agreements.[172] The result was § 1113 being incorporated into the Bankruptcy Code through the passing of the Bankruptcy Amendments and Federal Judgeship Act of 1984.[173] Various amendments considered by the legislature established the *Bildisco & Bildisco* test as a foundation with

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165 NLRB v. Bildisco & Bildisco, 465 U.S. at 528; *see also* Charnov, *supra* note 46, at 944.

166 Christopher D. Cameron, *How Necessary Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV., 841, 864 (1994); NLRB v. Bildisco & Bildisco, 465 U.S. at 524.

167 Charnov, *supra* note 65, at 945.

168 *See e.g.*, Nathanson v. NLRB, 344 U.S. 25 (1952); United States v. Embassy Rest., Inc., 359 U.S. 29 (1959).

169 KLEE & HOLT, *supra* note 163, at 59.

170 For example, the Court rejected the debtor-in-possession's argument that it was a new entity and, therefore, had no duty to bargain under the existing collective-bargaining agreement. *See* NLRB v. Bildisco & Bildisco, 465 U.S. at 528.

171 KLEE & HOLT, *supra* note 163, at 40.

172 Charnov, *supra* note 46, at 950–51.

173 *See* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

alterations and additions to balance the authority of the debtor-in-possession and the labor union.[174]

Senator Robert W. Packwood, after consultation with labor unions, introduced an amendment that included important language that was incorporated into § 1113.[175] Packwood's amendment stated that the balance of equities "clearly favors rejection of such agreement."[176] This balancing language was incorporated into § 1113(c)(2).[177] The amendment also included significant alternative language regarding the level of modification that can be approved through the bankruptcy court.[178] The amendment required the debtor-in-possession to provide proposals to the union representatives that provide for "*the minimum modifications* in such employee's benefits and protections that would permit the reorganization."[179] The language in § 1113(b)(1)(A) speaks to these modifications as necessary stating that a proposal "provides for those *necessary* modifications in the employee benefits and protections that are *necessary* to permit the reorganization."[180]

By defining modifications as those that permit reorganization at a minimum degree, Senator Packwood's amendment ensured that alterations to the collective bargaining agreement would allow the majority of terms of the agreement to survive reorganization. Furthermore, the focus on minimum modifications implies that the court should broaden its evaluation of the debtor's proposed changes. Thus, the modifications should not be granted simply from the narrow lens of the debtor's future financial performance but instead should also be balanced against the employee's negotiated benefits.

By contrast, § 1113's emphasis on modifications that are necessary for reorganization places the emphasis on the debtor's reorganization alone. Referring to modifications as necessary, as opposed to minimum, has the unintended consequence that additional employee benefits may be modified or

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174 Joseph L. Cossetti & Stanley A. Kirshenbaum, *Rejecting Collective Bargaining Agreements under Section 1113 of The Bankruptcy Code—Judicial Precession or Economic Reality?*, 26 DUQ. L. REV. 181, 190–91 (1988).

175 Charnov, *supra* note 46, at 952–53.

176 Charnov, *supra* note 46, at 953.

177 *See* 11 U.S.C. § 1113(c)(3) (2012).

178 *See* Marcia J. Massco, *From Legislation to Consternation: Has Section 1113 Really changed Bildisco*, 12 DEL. J. CORP. L., 167, 185 n.110 (1987) ("the [Wheeling-Pittsburg] court noted the support of labor for the Packwood Amendment . . . which required that a trustee's (debtor's) proposal make the 'minimum modifications' . . . This standard was seen as a victory for labor.") (quoting Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1087).

179 Charnov, *supra* note 46, at 952 (emphasis in original).

180 11 U.S.C. § 1113(b)(1)(A) (2012) (emphasis added).

rejected, including those that could have survived under the proposed minimum modification language of Packwood's amendment.

Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, presented the counter-point to the Packwood amendment.[181] Senator Thurmond stated that *Bildisco & Bildisco* was "correctly decided"[182] and raised concerns, mirrored by Representative John N. Erlenborn,[183] that a modification standard favored by national labor unions would "encourage filings under Chapter 7 liquidation [by making] excessive labor contracts too difficult to set aside."[184] Senator Thurmond introduced an amendment[185] based on the recommendations of the National Bankruptcy Conference, which was a consortium of "bankruptcy judges, full-time professors of law, and practicing [bankruptcy] attorneys."[186] Representation from organized labor are absent from the National Bankruptcy Conference's ranks.[187] However, Senator Orrin Hatch, who co-sponsored the amendment, remarked that these experts are "without any bias or prejudice regarding labor issues."[188]

Senator Thurmond's amendment states, in part, that "reasonable efforts to negotiate a change in the contractual terms . . . are not likely to produce a prompt and feasible alternative to rejection."[189] Second, the failure of the parties to "reach an agreement threatens" the debtor's ability to successfully reorganize.[190] Third, if the "agreement is burdensome to the estate," based on the "needs of the debtor, the employees . . . and other parties in interest," then "the equities balance in favor of rejection."[191] The only concession to the concerns of organized labor was including a "thirty-day waiting period" between the hearing and the court's

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181 Cossetti & Kirshenbaum, *supra* note 174, at 190–91.

182 Charnov, *supra* note 46, at 951.

183 Charnov, *supra* note 46, at 925, 951 ("Thurmond felt that *Bildisco* was correctly decided—a filling shared by Rodino's opponents in the House").

184 Charnov, *supra* note 46, at 951 n.146 (quoting 130 CONG. REC. H1816 (daily ed. Mar. 21, 1984) (comment of Rep. Erlenhorn)).

185 Cossetti & Kirshenbaum, *supra* note 174, at 191 n.77; 130 CONG. REC. S6081 (daily ed. May 21, 1984).

186 Charnov, *supra* note 46, at 950 n.143.

187 *Cf. About Us*, NATIONAL BANKRUPTCY CONFERENCE, nbconf.org/about-us/ (last visited Feb. 10, 2018) ("The National Bankruptcy Conference is a non-profit, non-partisan, self-supporting organization of approximately sixty lawyers, law professors and bankruptcy judges . . . . Its primary purpose is to advise Congress on the operation of bankruptcy and related laws and any proposed changes to those laws.").

188 Charnov, *supra* note 46, at 951–52 n.148.

189 Charnov, *supra* note 46, at 951 n.144.

190 *Id.*

191 Charnov, *supra* note 46, at 951 n.144 (emphasis omitted).

ruling on the debtor's petition to reject the collective bargaining agreement.[192] This concession is reflected in the enacted statute.[193]

The amendment proposed by Senator Thurmond provides no framework to determine whether a modification is necessary.[194] Instead, the amendment refers to an agreement being "burdensome on the estate."[195] Such a broad interpretation leads to the question what collective bargaining agreement would not be a burden on the estate regardless of whether the business was healthy or seeking the protection of bankruptcy. Title I of the modified Bankruptcy Reform Act of 1978[196] defined "burdensome" as "involving some loss or detriment to the estate."[197] However, prior to the *Bildisco & Bildisco* decision, courts found that a collective bargaining agreement could not be considered as a burden if it imposed both benefits and burdens on the parties to the agreement.[198]

Ultimately, the question of what standard bankruptcy courts should apply when considering rejecting a collective bargaining agreement was left unresolved by Congress. The Senate was so divided between the amendments proffered by Thurmond and Packwood that "both [amendments] were withdrawn for fear of leading to a filibuster."[199] The Senate's fear of filibuster and delay in the enactment of the Bankruptcy Amendment and Federal Judgeship Act of 1984[200] was understandable. The Supreme Court, in *Northern Pipeline v. Marathon Pipe Line*,[201] found the jurisdiction of bankruptcy judges an unconstitutional usurpation of Article III judicial authority to a non-Article III court.[202] The *Northern Pipeline* decision placed "the bankruptcy court system on an emergency" continuation basis while Congress sought to resolve the constitutional issue.[203] A statutory response to the *Bildisco & Bildisco* decision was a concern of far less interest given the risk that the nation's bankruptcy scheme could be dissolved.[204]

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192 Charnov, *supra* note 46, at 951.

193 *See* 11 U.S.C. § 1113(d)(2) (2012) ("The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing.").

194 *See* Charnov, *supra* note 46, at 951 n.144.

195 *Id.*

196 Charnov, *supra* note 46, at 932–33.

197 Charnov, *supra* note 46, at 932 n.39.

198 *See id.* (quoting *In re* Peace Baking Co., 42 B.R. 949, 958 (Bankr. N.D. Ohio 1984)).

199 Charnov, *supra* note 46, at 953.

200 Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984).

201 Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982).

202 Cossetti & Kirshenbaum, *supra* note 174, at 182.

203 Charnov, *supra* note 46, at 926–27, 927 n.4.

204 Due to concerns of the approaching Northern Pipeline deadline, "[t]he Senate acted by passing an emergency bankruptcy court restructuring bill lacking any labor provision." Charnov, *supra* note 46, at 953–54.

This sense of urgency and divided-interest is present in the unartful drafting of § 1113. Bankruptcy courts were left to interpret the intent of Congress by "reading the tea-leaves" of congressional statements and committee reports. However, it is the Packwood amendment, as opposed to Thurmond, that courts should look to when analyzing congressional intent as it relates to § 1113. Senator Packwood announced the conference committee's draft of the finalized statue "to be substantially the same as his original amendment."[205] More importantly, Senator Thurmond, also stated that "section 1113 was essentially the same as the Packwood amendment."[206]

It should be stated that the Supreme Court and lower courts, when interpreting the meaning of a statute drafted by Congress, are hesitant to delve into legislative history.[207] This reticence is further hardened against an amendment that was withdrawn from consideration, as is the case of Senator Packwood.[208] However, the "various characterizations of the legislative intent of section 1113 created difficulty for legal commentators and gave little guidance for judicial decisionmaking."[209] It was apparent, based on early decisions applying § 1113,[210] that the judiciary needed to look beyond the "plain-meaning" of the statute.[211] In particular, early decisions centered upon whether a modification to the collective bargaining agreement was "necessary" or not.[212] Such ambiguity warranted courts to move beyond the words of the statute and evaluate the congressional record. For statutory interpretation purposes, congressional materials are evaluated on whether they provide evidence of "relevance, competence, and probative value."[213] Based on these

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[205] Charnov, *supra* note 46, at 955–56.

[206] Charnov, *supra* note 46, at 956.

[207] *See* Leigh Ann McDonald, *The Role of Legislative History in Statutory Interpretation: A New Era after the Resignation of Justice William Brennan*, 56 MO. L. REV. 121, 126 (1991) ("Probably the most controversial area of statutory interpretation is deciding at what point, if at all, it is appropriate to consider extrinsic materials in interpretation a statute.").

[208] *See* McDonald, *supra* note 207, at 129 ("The Court also used the Conference Committee report nothing that the House withdrew from an amendment that expressly excluded employees.").

[209] Charnov, *supra* note 46, at 970–71.

[210] Charnov, *supra* note 46, at 970–73.

[211] *See* McDonald, *supra* note 207, at 129 ("The 'plain-meaning rule' requires that if the words of a statue are clear, and the construct of those words will not lead to an absurd result, the words are assumed to be the 'final expression of the meaning intended.'").

[212] *See* Charnov, *supra* note 46, at 970–73 (1989); *see also In re* Am. Provisions Co., 44 BR at 910 (finding that labor cost savings of two percent of the operating budget was not a necessary modification); *In re* Salt Creek Freightways, 47 BR 835, 841–42 (Bankr. D.Wyo. 1985) (stating that the company was under the threat of immediate liquidation any modification would be deemed necessary); *In re* Valley Kitchens, Inc., 52 BR 493 (Bankr. S.D. Ohio 1985) (denying the debtor's motion because five of the nine proposed modifications would not generate savings for the debtor).

[213] McDonald, *supra* note 207, at 128.

factors, committee reports have been found to be the "most reliable form of legislative history in determining legislative intent."[214]

Therefore, Senator Packwood's withdrawn amendment is pivotal to understanding the legislative intent of § 1113 for three reasons. First, the early cases suggest that the "plain-meaning" of § 1113 does not elucidate the definition of which modifications are necessary. Second, Senator Packwood's amendment and floor statements are relevant, competent, and probative as it relates to the modification definition. Third, Senator Packwood's amendment closely aligns with the committee's finalized draft of the statute.

B. "Necessary" Modifications

Despite legislative intent to structure modifications of collective bargaining agreements,[215] the Bankruptcy Code does not provide a definition of a "necessary" modification.[216] As a consequence, bankruptcy courts had to develop their own standard as to what constitutes a "necessary" modification. The Courts of Appeals for the Second and Third Circuits both addressed the issue and reached differing conclusions.[217] The Third Circuit considered the question as an issue of first impression in *Wheeling-Pittsburgh Steel v. United Steelworkers of America* in 1986.[218] The Second Circuit responded a year later in *Truck Drivers Local 807 v. Carey Transportation, Inc.*[219]

1. Third Circuit

In *Wheeling-Pittsburgh Steel*, the debtor-employer began negotiating a modified collective-barging agreement with union representatives prior to filing for bankruptcy.[220] Among the concessions, the employer was seeking to "lower its average labor costs from over twenty-one dollars to nineteen dollars an hour."[221] In tandem with these negotiations, the employer was seeking

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[214] *Id.*

[215] *See* Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1086 (citing 130 CONG. REC. S6181 (daily ed. May 22, 1984)); *see also* Charnov, *supra* note 46, at 981.

[216] *See* 11 U.S.C. §§ 101, 1113; *see also* Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a Collective Bargaining Agreement in a Corporate Reorganization*, 64 AM. BANKR. L.J. 133, 166 (1990).

[217] Matthew Elster, *Just How Necessary is Necessary: The Question of Interpretation in 11 U.S.C. Section 1113(B)(1)(A)*, 35 J. LEGIS. 170, 177 (2009).

[218] Wheeling-Pittsburg Steel Corp., 791 F.2d at 1074; Elster, *supra* note 217, at 177.

[219] Truck Drivers Local 807 v. Carey Transportation, Inc., 816 F.2d 82 (2d Cir. 1987); Elster, *supra* note 217, at 178.

[220] Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1077; Elster, *supra* note 217, at 177.

[221] *Id.*

concessions from its lenders to stabilize its financial interactions, but these efforts failed.[222] After filing for bankruptcy, the employer revised its agreement proposal which sought to reduce labor costs to fifteen and a half dollars as well as other reductions in benefits.[223] Therefore, the debtor sought a total labor cost reduction that was double what it proposed outside of the bankruptcy process.[224] This modification demonstrates that the debtor-in-possession sought to utilize § 1113 to strengthen its bargaining power. The court approved the debtors § 1113 motion, and the union subsequently appealed to Third Circuit.[225]

The Third Circuit evaluated the legislative intent of § 1113 to determine what standard should apply for what constitutes "necessary."[226] The Third Circuit found that:

> [The] 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. Such an indulgent standard would inadequately differentiate between labor contracts, which Congress sought to protect, and other commercial contracts, which the trustee can disavow at will.[227]

Furthermore, a "necessary" modification should not be based on concern for the "general long-term viability of the company."[228] Instead, modifications to the collective bargaining agreement should be focused on the "shorter term goal of preventing the debtor's liquidation."[229]

This analysis mirrors Senator Packwood's amendment's use of the word "minimal" instead of "necessary" regarding the scale and purpose of agreement modifications.[230] It also suggests that bankruptcy courts should apply a more detailed § 1113 determination to ensure that the debtor-in-possession is only seeking modifications to the extent that it avoids liquidation, as opposed to seeking to overhaul its labor costs to be in line with industry standards to ensure long-term financial stability.[231]

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222 *Id.*

223 Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1078; Elster, *supra* note 217, at 177.

224 Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1078.

225 *Id.*

226 Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1088.

227 *Id.* (emphasis added).

228 *Id.*

229 *Id.* at 1089 ("the . . . choice of the words '*permit* the reorganization,' which places the emphasis on the reorganization, rather than the longer-term issue of the debtor's ultimate future.") (emphasis in original).

230 Charnov, *supra* note 46, at 952.

231 *See* Cuevas, *supra* note 215, at 178 ("The [Third Circuit in *Wheeling-Pittsburg Steel Corp.*] also held that the term necessary modification was related to preventing the liquidation of a debtor, and not the long-term

However, the Third Circuit did not follow its own precedent when it considered the necessary modifications in *Trump Entertainment Resorts*.[232] In particular, the court evaluated the labor cost reduction as means to satisfy DIP-financers and creditors as opposed to determining what amount of union concessions would allow plan confirmation and avoid liquidation.[233] It is evident that the court was focused on the debtor's long-term financial health, as opposed to resolving its current bankruptcy concern, by granting a modified collective bargaining agreement that would extend for four years.[234] This further suggests that courts are willing to avoid an extensive examination of the necessary modifications when the debtor is able to demonstrate it met the factual requirements of § 1113(c) and can make a compelling argument that union representatives failed to accept the proposal without good cause.[235]

2. Second Circuit

The Second Circuit, in *Truck Drivers Local 807*, developed a looser "necessary" standard that placed the emphasis on the long-term financial viability of the debtor in possession.[236] In *Truck Drivers Local 807*, the employer, "facing a rapidly declining business, asked for and received numerous concessions from its representative union, enabling it to reduce operating costs."[237] Despite these concessions, financial conditions continued to deteriorate and the employer filed for a chapter 11 petition.[238] The debtor-in-possession then sought to utilize § 1113 to add additional, extensive, modifications to the collective bargaining agreement.[239]

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success of the debtor.").

[232] *In re* Trump Entm't Resorts Unite Here Local 54, at 161.

[233] "The first lien secured creditor 'has made it clear that it will perform only if the CBA and tax relief contingencies are achieved' . . . A successful reorganization, therefore, depends on the rejection of the terms that the Debtor are required to maintain under the NLRA." *In re* Trump Entm't Resorts Unite Here Local 54, at 172 (quoting *In re* Trump Entm't Resorts, Inc., 519 B.R. at 83).

[234] The Court incorporates the proposed modifications to the collective bargaining agreement in its decision. These proposed terms were made on behalf of Trump Entertainment Resorts, Inc. Among the modified terms, the proposal states that the term of the contract is four years "such that the benefits of the proposed modifications are realized over a necessary period of time." *In re* Trump Entm't Resorts, Inc., 519 B.R. at 92. The Court acknowledged that DIP-financers would only provide financing if modification to the collective bargaining agreement are achieved. *Id.* at 83. The Court made no independent inquiry if a four-year term was a necessary modification for the purpose of reorganization or was merely desirable to the debtor and DIP-financers.

[235] 11 U.S.C. § 1113(c)(2) (2012).

[236] Elster, *supra* note 217, at 182–83; *see also* Truck Drivers Local 807, 816 F.2d at 82.

[237] Elster, *supra* note 217, at 178; *see also* Truck Drivers Local 807, 816 F.2d at 85.

[238] Elster, *supra* note 217, at 178; *see also* Truck Drivers Local 807, 816 F.2d at 86.

[239] The modifications included "proposing freezes or cuts in wages, reductions in overtime and vacation time, and the elimination of various employee benefits, in an effort to save approximately $1.8 million per year

The Second Circuit upheld the bankruptcy court's granting the § 1113 motion and rejected the Third Circuit's interpretation of the necessary standard.[240] The court held that the *Wheeling-Pittsburgh Steel* decision incorrectly focused on the "debtor's short-term survival," as opposed to the Code's focus on long-term financial health,[241] and requiring the debtor to only request minimum modifications conflicts with its requirement to negotiate in good faith.[242] It further stated that, as Congress did not enact Senator Packwood's amendment, the proposal's focus on "bare-minimum modifications" was not relevant in the analysis.[243]

3. Tenth Circuit and Beyond

The Tenth Circuit, with its decision in *Sheet Metal Workers' International Association, Local 9 v. Mile Hi Metal Systems, Inc.*,[244] aligned itself with the Second Circuit's "more debtor-friendly definition."[245] The court held that, in the context of a chapter 11 bankruptcy, "necessary modifications must enable the debtor to reorganize successfully, without being absolutely minimal."[246] However, the court did distinguish between modifications that "directly related to the debtor's financial condition" and those that would merely be beneficial.[247]

Since the Tenth Circuit's decision in *Mile Hi Metal*, "no other circuit courts have addressed the issue of necessity . . . and Bankruptcy Courts have been split between the two approaches."[248] In his analysis of the necessary modification standard, Matthew Elster suggests a definition that sits between the Third and Second Circuits'.[249] This alternative approach,[250] according to Elster, would

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for three years." Elster, *supra* note 217, at 178–79; *see also* Truck Drivers Local 807, 816 F.2d at 86.

240 Elster, *supra* note 217, at 179; *see also* Truck Drivers Local 807, 816 F.2d at 86.

241 Elster, *supra* note 217, at 179; *see also* Truck Drivers Local 807, 816 F.2d at 89–90.

242 Elster, *supra* note 217, at 179; *see* Truck Drivers Local 807, 816 F.2d at 89 ("an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposals were minimal.").

243 Elster, *supra* note 217, at 179.

244 Sheet Metal Workers' Int'l Ass'n, Local 9 v. Mile Hi Metal Syst., Inc., 899 F.2d 887 (10th Cir. 1990).

245 Elster, *supra* note 217, at 179.

246 Elster, *supra* note 217, at 180.

247 *Id.* (quoting Sheet Metal Workers' Int'l Ass'n, Local 9, 899 F.2d at 893).

248 *Id.*

249 *Id.*

250 Elster states:

> A better interpretation of § 1113(b)(1)(A) would first require the economic proposals be "reasonably necessary" for the successful reorganization of the debtor, and second, permit the debtor to propose non-economic modifications that are not required for reorganization. This standard would impose clearer obligations on the debtor . . . [and would] encourage the parties to engage in more robust negotiations, giving full effect to both national labor policy and § 1113

prevent absurd results on one extreme and prevent bankruptcy courts from reverting to *Bildisco & Bildisco*-era practice.[251] This Comment suggests that bankruptcy courts are not applying a "happy medium" interpretation of the statute. Rather, due to underlying policy goal of chapter 11 to reform the debtor, courts are giving an unbalanced weight of deference to the debtor-employer.

4. DIP Financers & "Necessary" Modifications

As stated above, the court has given deference to the debtor-in-possession to determine the scope of what modifications are "necessary" for a successful reorganization. What is ignored in this analysis is the great control that the DIP-financer, or dominant secured creditor,[252] has in dictating what modifications are "necessary." In essence, Dip-fiancers act as the invisible hand driving the bargaining process between the employer and its labor force.

The Third Circuit based its statutory interpretation of § 1113 on a belief that Congress intended the NLRA to "yield to the Bankruptcy Code . . . only for reasons that will permit the debtor to stay in business."[253] In other words, the complexity of this bankruptcy case is better served in the jurisdiction of the court as opposed to that of the NLRB. This in turn reflects the Supreme Court's limited deference to administrative agencies which "will grant no deference to any agency outside the area of its expertise."[254] In this statement, the court is making a policy justification that, in practice, would always favor the debtor's chapter 11 reorganization over the NLRA statutory protections of the unionized-employees.[255] If a chapter 11 debtor is at risk of liquidation, the Third Circuit's interpretation suggests that any modification would be reasonable, provided that it would assist the "debtor's ability to reorganize and remain in business."[256]

Based on that standard, does it matter whether the union bargained in good faith? In *Trump Entertainment Resorts*, both the bankruptcy court and the Third

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> while reducing the chances that the debtor will end up rejecting the collective bargaining agreement, causing the union to go on strike.

Elster, *supra* note 217, at 188.

[251] *See* Elster, *supra* note 217, at 180.

[252] Which may be the same entity as the DIP-financer.

[253] *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 171.

[254] KLEE & HOLT, *supra* note 163, at 85.

[255] *In re* Trump Entm't Resorts, Inc. 519 B.R. at 86 ("the Bankruptcy Code gives debtors broad powers to restructure their affairs and preserve value as a going concern. Subjecting the Debtors to a complex and time consuming process overseen by another administrative body in the midst of their restructuring efforts would surely thwart this overriding policy.") (internal citations omitted).

[256] *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 173.

Circuit greatly emphasized a factual finding that the union failed to negotiate in good faith.[257] However, the debtor's primary secured creditor and DIP-financer stated that they would not provide DIP-financing without the extensive modifications to the collective bargaining agreement.[258] Therefore, the DIP-financers, not the debtor, dictate the terms of the collective bargaining negotiations.[259] As they are not parties to the collective bargaining agreement, the DIP-financers are not subject to the fair labor practices enforced by the NLRA.[260] The DIP-financers' interest in modifications to the collective bargaining agreement are not the same as those of the debtor.

Debtor's seek these modifications to prevent the risk of liquidation and to exit bankruptcy with a successfully reorganized business. Unlike DIP- financers, the debtor-in-possession is receiving a benefit from its unionized employees through their labor. The debtor must also consider how the negotiation process, under the Bankruptcy Code's condensed bargaining process, may increase the hostilities with the union which may further harm the debtor's ability to successfully implement its reorganization plan. A court may decline to confirm the debtor's reorganization plan if, in light of the fractured relationship between management and labor, the court finds that such labor issues may cause the debtor to enter liquidation or require "further financial reorganization" after the plan is confirmed.[261]

Although DIP-financers want to ensure the debtor continues as a "going concern," this concern extends only to protecting the return on its investment.[262] DIP-financers are free to walk away from the debtor if negotiated modifications do not satisfy those investment concerns. The DIP-financer does not have a fiduciary duty to the estate.[263] Furthermore, DIP-financers are free to place

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[257] *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 90–91; *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 166.

[258] *In re* Trump Entm't Resorts, Inc., 519 B.R. at 80.

[259] Under the control of the secured creditor "[t]he debtor is thus a spectator at its own funeral, with most of its creditors weeping at the graveside." Jay Lawrence Westbrook, *Secured Creditor Control and Bankruptcy Sales: An Empirical View*, 2015 U. ILL. L. REV. 831, 836 (2015).

[260] *See* 29 U.S.C. § 185 (2012).

[261] 11 U.S.C. § 1129(a)(11) (2012).

[262]

Westbrook states:

> Prior to default, constraint over all assets gives a dominant secured party a pre-default check upon any substantial changes in the business activates of its debtor. The post-default collateral control given to a dominate secured party gives the secured creditor control of an entire enterprise and makes it possible for the creditor to realize going-concern value.

See Jay Lawrence Westbrook, *supra* note 259, at 809–10.

[263] However, legal counsel to DIP-financers and creditor committees may have such a duty. *See* Susan M.

outside pressure on the negotiation process, through the debtor, free from the NLRB's oversight.[264] Through such pressure, DIP-financers can further harm the already fragile negotiating relationship between the debtor and union representatives without the statutory and business outcome incentives which are intended to keep the "good faith" bargaining relationship in check.

In *Trump Entertainment Resorts*, the bankruptcy court's opinion demonstrates great concern that the union was taking advantage of the debtor's financial situation.[265] The court found the debtor's expert witnesses' testimony credible regarding the necessity of these modifications to the collective bargaining agreement.[266] However, the court did not inquire whether the DIP-financers were taking advantage of the debtor's financial situation to render concessions from the union that would be "desirable" to their investment as opposed to "necessary" for funds to be released to the debtor.[267] It stands to reason that DIP-financers would seek to invest on terms that most favor and protect its investment. Because the court did not inquire into the motivations of the DIP-financers, the bankruptcy court's determination that the extensive modifications to the collective bargaining agreement were "necessary" is questionable. The court did not consider whether the debtor could have proposed less severe modifications that may have been more agreeable to union representatives but would have appeased the concerns of the DIP-financers.[268]

C. Post-Contract Statutory Obligations

The unions in *Hostess Brands* and *Trump Entertainment Resorts* argued that, as the collective bargaining agreement had expired, there was no agreement for the debtor to modify.[269] Therefore, the post-expiration terms and conditions were not governed by the collective-bargain agreement but by the NLRA.[270] The terms remained in effect until a party sought a determination from the NLRB

Freeman, *Are DIP and Committee Counsel Fiduciaries for Their Client's Constitutes or the Bankruptcy Estate? What is a Fiduciary, Anyway?*, 17 AM. BANKR. INST. L. REV. 291 (2009).

[264] *See* 29 U.S.C. § 185 (2012).

[265] *In re* Trump Entm't Resorts, Inc., 591 B.R. at 82.

[266] *Id*. at 88.

[267] *See In re* Trump Entm't Resorts, Inc., 591 B.R. 76; *see also* Wheeling-Pittsburgh Steel Corp., 791 F.2 at 1088 ("[the] 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.") (emphasis added).

[268] *See generally In re* Trump Entm't Resorts, Inc., 519 B.R. 76.

[269] *In re* Hostess Brands Inc., 477 B.R. at 379; *In re* Trump Entm't Resorts, Inc., 519 B.R. at 83.

[270] *In re* Hostess Brands Inc., 477 B.R. at 379.

that a side was not bargaining in good faith or that bargaining was at an impasse.[271]

Under the NLRA, employers retain statutory obligations to bargain in good faith with the employee representative and are barred from unilaterally terminating or altering the collective bargaining agreement.[272] These employer obligations, which survive the expiration of the collective bargaining agreement, are not governed by the agreement. Rather they derive from the employer's obligations to the NLRA and extend beyond to the four-corners of the agreement.[273]

In 2012, Judge Drain articulated the minority view that status quo terms exist outside of § 1113's application in *Hostess Brands, Inc.*[274] In *Hostess Brands* the debtor argued that the text of § 1113 demonstrates congressional intent to apply both the collective bargaining agreement itself as well as the underlying continuing obligations dictated by the NLRA in the event of expiration.[275] The debtor-employer's union argued that these post-contractual obligations are not governed by the collective bargaining agreement itself, "but, rather, that the NLRB governs in a way that leaves key provisions, but not all of the provisions, of the collective bargaining agreement in effect under the law."[276]

Judge Drain found the existing "case law in this area is far from controlling" when he embarked on his textual analysis of the statute.[277] Judge Drain states:

> I view the language in Section 1113(e)[278] to create a distinction between provisions that continue in effect and the agreement as a whole. In construing the statute, it would appear to me to be more reasonable to view Section 1113(e) as an exception to Section 1113's other provisions that generally focus on the contract itself and not on

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271 *Id.*

272 29 U.S.C. § 185 (2012).

273 *See* Petition for Writ of Certiorari at 12, Unite Here Local 54 v. Trump Entm't Resorts, Inc., 136 S. Ct. 2396 (2016) (No. 15-1286), 2016 U.S. S. Ct. Briefs LEXIS 1686, at *20–21; *see also* Laborers Health and Welfare Tr. Fund for N. Cal. v. Advanced Lightweight Concrete Co., Inc., 484 U.S. 539 (1988) (holding that an employer's statutory bargaining obligations, as opposed to contractual duties, can be enforced only by the National Labor Relations Board).

274 *In re* Hostess Brands, Inc., 477 B.R. at 378.

275 *Id*. at 379.

276 *Id.*

277 *Id.*

278 The relevant sub-section states: "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*." 11 U.S.C. § 1113(e) (2012) (emphasis added).

> term that would be in effect, except for the instances, as set forth in 1113(e), where, if it is essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court may authorize, on an interim basis, the implementation of interim changes to terms, conditions, waves, benefits or work rules.[279]

He was also unconvinced by the debtor-employer's argument that the "uncertainty of a subsequent NLRB determination and an inevitable litigation . . . would so chill the debtor's reorganization efforts and, in particular, the debtor's efforts to raise exit financing" that Congress would have been explicit if it meant to distinguish the difference between the collective bargaining agreement and the status quo terms and obligations.[280] Although Judge Drain recognized that, on an intuitive level, the negotiation process under the NLRA "could well be more lengthy or create more risk of uncertainty" than the process outlined in § 1113, he rejected this consideration as it was a factual issue that the debtor failed to provide "any real evidence" of such an outcome.[281]

Judge Drain voiced a concern that was ignored by the *Trump Entertainment Resorts* court. In its determination that the NLRB process would so frustrate the debtor-employer's prospects of a successful reorganization, the Third Circuit rejected the NLRB as an alternative form of resolution that may be appropriate when the agreement has expired.[282] Although *Trump Entertainment Resorts* makes such an assumption, Judge Drain demonstrated that an assumption is all that this determination is based on. No exploration of NLRB case law and practice was initiated, and the debtor was not compelled to provide evidence of the assumed hindrance.

D. National Labor Relations Board Authority and Jurisdiction

In support of its decision in *Trump Entertainment Resorts*, the Third Circuit stated that, when it comes to matters that determine whether a debtor can remain in business, "it is the expertise of the Bankruptcy Court which is needed rather than that of the NLRB."[283] This suggests that either the NLRB is unable to understand the complexity of chapter 11 cases, or the NLRB is not responsive to the business need for a quick resolution. A review of NLRB case law suggests these assumptions do not reflect reality and have denied the NLRB of its

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279 *In re* Hostess Brands, Inc., 477 B.R. at 382.
280 *Id.* at 381.
281 *Id.*
282 *In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 173.
283 *Id.*

statutory duties and court-created enforcement obligations in bankruptcy matters.

Commentators have read the Supreme Court's decision in *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*[284] to hold that "an employer's statutory obligations, as opposed to its contractual promises, can be enforced only by the NLRB."[285] In *Advanced Lightweight Concrete* the Court stated that questions regarding whether an employer's actions "constitutes a violation of the statutory duty to bargain in good faith is the kind of question that is routinely resolved by the administrative agency with expertise in labor law."[286] The Court acknowledges that "district judges must occasionally resolve labor issues" but this should be "the exception rather than the rule."[287] In cases involving "either an actual or an 'arguable' violation of [29 U.S.C. § 158], federal courts typically *defer to the judgment of the NLRB*."[288] This holding runs counter to the Third Circuit's argument that the NLRB's expertise is not needed when determining § 1113 applications. Furthermore, "[a]ppellate courts have uniformly found NLRB enforcement proceedings to prevent, adjudicate, and remedy unfair labor practices to be exempt under [11 U.S.C.] § 362(b)(4)[289] from the automatic . . . stay."[290]

Regarding the Third Circuit's concern that the debtor-employer's financially precarious position warrants having the Bankruptcy Code supersede the employer's statutory obligations under the NLRA, NLRB precedent suggests that it is capable of quickly rendering decisions due to economic urgency.[291] The NLRB has held that some unilateral changes by an employer may still be in good

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284 Laborers Health and Welfare Tr. Fund for N. Cal., 484 U.S. 539 (1988).

285 Petition for Writ of Certiorari at 26–27, Unite Here Local 54 v. Trump Entm't Resorts, Inc., 136 S. Ct. 2396 (2016) (No. 15-1286), 2016 U.S. S. Ct. Briefs LEXIS 1686, at *44–47. *See* Laborers Health and Welfare Tr. Fund for N. Cal.,484 U.S. at 551.

286 Laborers Health and Welfare Tr. Fund for N. Cal., 484 U.S. at 552.

287 *Id*. at 554.

288 *Id*. at 552 (emphasis added); *see* San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959).

289 The relevant subsection states: "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(b)(4) (2012).

290 Petition for Writ of Certiorari at 27, Unite Here Local 54 v. Trump Entm't Resorts, Inc., 136 S. Ct. 2396 (2016) (No. 15-1286), 2016 U.S. S. Ct. Briefs LEXIS 1686, at *44–46. *See e.g.* NLRB v. 15th Avenue Iron Works, Inc., 964 F.2d 1336, 1337 (2d. Cir. 1992); NLRB v. Continental Hagen Crop., 932 F.2d 828, 832-35 (9th Cir. 1991); NLRB v. P*I*E Nationwide, Inc., 9234 F.2d 506, 511–12 (7th Cir. 1991); NLRB v. Edward Cooper Painting Inc., 804 F.2d 934, 939–41 (6th Cir. 1986); Ahrens Aircraft Inc., v. NLRB, 703 F.2d 23, 24 (1st Cir. 1983); NLRB v. Evans Plumbing Co., 639 F.2d 291, 292–93 (5th Cir. 1981).

291 Petition for Writ of Certiorari at 28, Unite Here Local 54 v. Trump Entm't Resorts, Inc., 136 S. Ct. 2396 (2016) (No. 15-1286), 2016 U.S. S. Ct. Briefs LEXIS 1686, at *46–48.

faith when the employer is under "exigent circumstances."[292] Such circumstances include "extraordinary events which are an unforeseen occurrence, having a major economic effect requiring the company to take immediate action."[293] Even if the circumstances do not rise to the level of a "unforeseen occurrence," an employee's failure to bargain, although not fully excused, may be warranted if the circumstances "require prompt action" that "cannot await" bargaining to an impasse as required by the NLRA.[294] In another decision, the NLRB has stated that "the amount of time and discussion required to satisfy the statutory obligation 'to meet at reasonable times and confer in good faith' may vary" depending upon "the exigencies of the particular business situation involved."[295] Furthermore, 29 U.S.C. § 160(m) states that the NLRB charges of unfair labor practice "shall be given priority over all other cases."[296]

It is unclear whether the NLRB would view Trump Entertainment Resort's petition for chapter 11 bankruptcy as an "unforeseen event" in which unilateral action would be excused given the corporation's history of precarious solvency and its awareness of the termination deadline of its collective bargaining agreement. It is equally uncertain if Unite Here would prevail if the forum were moved from the bankruptcy court to oversight of the NLRB. The Union's refusal to negotiation with Trump Entertainment Resort's management is also identified as an unfair labor practice in the NLRA.[297]

1. 29 U.S.C. § 165. *Conflict of laws.*

The NLRA, as enacted in 1935, contains a conflict of laws provision.[298] The statute states that whenever "provisions of section 272 of chapter 10 of the Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898 . . . conflicts with the application of [the NLRA], [the NLRA] shall prevail."[299]

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[292] RBE Electronics of S.D., Inc., 320 NLRB 80 (1995).

[293] *Id.* at 81 (quoting Hankins Lumber Co., 316 N.L.R.B. 837, 838 (1995)) (internal quotations omitted).

[294] *Id.* at 81–82.

[295] Shell Oil Company, 149 NLRB 305, 307 (1964); *see* Petition for Writ of Certiorari at 28, Unite Here Local 54 v. Trump Entm't Resorts, Inc., 136 S. Ct. 2396 (2016) (No. 15-1286), 2016 U.S. S. Ct. Briefs LEXIS 1686, at *46–48.

[296] 29 U.S.C. § 160 (2012).

[297] *See id.* § 158(b)(3).

[298] *See id.* § 165.

[299] *Id.* § 165.

Granted, this provision refers to the Bankruptcy Act of 1898,[300] which was succeeded by the modern Bankruptcy Code in 1978.[301] Furthermore, even in practice, the Bankruptcy Act usurped the authority of 29 U.S.C. § 165. In *In re Kalber Brothers, Inc.* the bankruptcy court found that "[t]he fact that the Union filed with the National Labor Relations Board . . . a charge of unfair labor practice based upon the application for the rejection of the contract and refusal to bargain" was "immaterial."[302] In the opinion of the *Kalber Brothers* court, the NLRB "has no jurisdiction here to interfere with the rejection of an executory contract."[303]

However, it is evident that, when Congress enacted the NLRA, it was concerned about the relationship between organized labor and a uniformed bankruptcy scheme. Although 11 U.S.C. § 1113 was meant to create that balance, practice continues to show that the NLRA has been placed in the shadows. This imbalance further places the onus on Congress to addresses this conflict through revising and clarifying the role of collective bargaining agreements, and the underlying statutory obligations, in the Bankruptcy Code.

After evaluating the NLRB's role in governing status quo terms and its jurisdictional authority, the following Section evaluates the aftermath of Trump Entertainment Resort, Inc.'s successful § 1113 motion and its unexpected consequences.

E. Trump Entertainment Resorts, Inc. Goes Bust

Despite the Third Circuit Court of Appeals' affirming the debtor-in-possession's modifications to the collective bargaining agreement,[304] Trump Entertainment Resorts, Inc.'s survival was far from certain. What occurred afterwards calls into question whether the bankruptcy court properly evaluated the debtor's likelihood of reorganization if the § 1113 motion were granted.[305]

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300 The Bankruptcy Act of 1898, ch. 541, 30 Stat. 544 (repealed 1978).

301 The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92. Stat. 2549 (Nov. 6, 1978).

302 *In re* Klaber Bros., Inc., 173 F.Supp. 83, 85 (S.D.N.Y. 1959).

303 *Id.*

304 *See generally In re* Trump Entm't Resorts Unite Here Local 54, 810 F.3d at 161.

305 *See, e.g.*, Preliminary Response of the Official Committee of Unsecured Creditors to Debtor's Motion at 3–4, *In re* Trump Entm't Resorts, Inc., 591 B.R. at 76 (No. 241). In its response to the Debtor's motion for rejecting the collective bargaining agreement, the Committee of Unsecured Creditors approved the motion but pointed out that the rejection was:

> not a sufficient condition to maintaining operations at the Taj Mahal. Indeed, the second major contingency articulated in the Plan requires $175 million in concessions from taxing and other authorities, which (unlike CBA modification under section 1113) cannot be accomplished without the consent of the relevant authorities. Moreover, the Plan proposed by the Debtors does

Likewise, by granting the motion, the bankruptcy court may have inadvertently fractured the relationship between the debtor and the union representatives which contributed to the debtor's final free-fall into oblivion.

Less than a month after granting the debtor's § 1113 motion, Judge Gross "ordered Trump Entertainment Resorts Inc. to show why [the debtor's] Chapter 11 case shouldn't be converted to a Chapter 7 liquidation."[306] This order was prompted by a series of missteps.[307] The "committee of unsecured creditors withdrew its support for the [debtor's] disclosure statement."[308] Concerns over delays in the approval process were shared by the court and the U.S. Trustee.[309] Finally, tax concessions from Atlantic City and the State of New Jersey, which were vital for the reorganization plan to succeed, remained unresolved.[310] Unite Here Local 54 also announced that its 1,500 employees would be protesting outside Trump Taj Mahal.[311] Despite such animosity, Judge Gross urged all parties involved, including the Union, to find a "common ground" to develop a confirmation plan to prevent the casino from closing its doors the following month.[312] Judge Gross withdrew his threat of chapter 7 conversion due to Mr. Icahn offering a $20 million loan to the debtor.[313]

> not provide any return to general unsecured creditors, regardless of whether or not the Taj Mahal remains open for business.

Preliminary Response of the Official Committee of Unsecured Creditors to Debtor's Motion at 3–4, *In re* Trump Entm't Resorts, Inc., 591 B.R. 76 (Bankr. D. Del. 2014) (No. 241) (emphasis omitted).

306 Matt Chiappardi, *Trump Resorts Must Prove Case Shouldn't Become Ch. 7*, LAW360 (Nov. 19, 2014, 4:57 PM), https:/www.law360.com/articles/597827/trump-resorts-must-prove-case-shouldn-t-become-ch-7.

307 As stated by the Committee of Unsecured Creditors, the debtor-in-possession's ability to successfully reorganize did not rest on rejection of the collective bargaining agreement alone. Instead, the debtor, while seeking court approval to reject the agreement, was seeking major concessions from the state taxing authority. The Union should have attempted to leverage this uncertainty by seeking relief from Judge Gross's order on the grounds of newly discovered evidence, as it relates to the current tax negotiations. *See* FED. R. CIV. P. 60(b)(2). Although this would not "affect the judgement's finality," it would provide an opportunity to review the § 1113 motion if the tax concessions were not granted. *See* FED. R. CIV. P. 60(c)(2). Alternatively, the Union could have suggested the court consider implementing "interim changes" to the collective bargaining agreement that would stave off rejection of the agreement, and lessen the debtor's cash-flow concerns, while negations with the taxing authority continued. *See* 11 U.S.C. §1113(e) (2012).

308 Chiappardi, *supra* note 306.

309 *Id.*

310 *Id.*

311 *Id.*

312 Peg Brickley, *Bankruptcy Judge Threatens to Kick Trump Entertainment into Liquidation*, WALL ST. J. (Nov. 20, 2014, 6:43 PM), https://www.wsj.com/articles/judge-threatens-to-kick-trump-entertainment-out-of-chapter-11-1416495746.

313 Jamie Santo, *Trump Resorts Gets Nod for Plan Handing Taj Mahal to Icahn*, LAW360 (Mar. 12, 2015, 9:22 PM), https://www.law360.com/articles/630645/trump-resorts-gets-nod-for-plan-handing-taj-maal-to-icahn.

In March 2015, Judge Gross granted Trump Entertainment Resorts, Inc.'s chapter 11 reorganization plan.[314] Judge Gross stated, upon confirming the plan, that "[a]nyone who wouldn't confirm this [plan] would not be very smart."[315] The restructuring plan called for Mr. Icahn's $292.3 million debt converted to a first-lien debt on 100 percent of reorganized company's common stock.[316] Although the plan was confirmed, it would not go into effect unless the Third Circuit Court of Appeals affirmed the bankruptcy court's modifications of the union's collective bargaining agreement.[317] The threat of the DIP-financer added additional pressure on the Union's ability to raise a successful argument on appeal.

While awaiting the Third Circuit's decision, Unite Here Local 54 protested against Mr. Icahn in front of the Taj Mahal.[318] The Union was informing potential customers that Taj Mahal's employees were unhappy and had been stripped of healthcare and other benefits by the billionaire investor.[319] Trump Entertainment Resorts, Inc. sought to block the protest as a violation of the automatic stay.[320] Judge Gross sided with the Union that its actions were protected by federal labor law.[321] The denial of the debtor's injunction motion demonstrates that the statutory intent of federal labor law and the Bankruptcy Code can co-exist. Judge Gross, however, does not acknowledge that the Union's current protest, which is harming the debtor's ability to successfully reorganize, is a direct consequence of his granting of the debtor's § 1113 modifications. Some of the factors Judge Gross evaluated were whether "the balance of the equites clearly favor[ed] rejection"[322] of the agreement and "the likelihood and consequences of a strike if the bargaining agreement is

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314 *Id.*

315 *Id.*

316 Carl Icahn also provided DIP financing, in the amount of $82.5 million, to refurbish the Taj Mahal and continue operations. Santo, *supra* note 313.

317 *Id.*

318 Brickley, *supra* note 312.

319 *Id.*

320 *Id.*; *see also* 11 U.S.C. § 362 (2012).

321 *Id.*

> Congress intended to allow 'the natural interplay of the competing economic forces of labor and capital' to operate without the threat of injunctions from the federal courts. Applying the automatic stay of bankruptcy to the action by Trump Entertainment's unionized workforce would have the same effect as an injunction . . . Trump Entertainments battle with the casino union, 'centers mainly on the reduction of pension and health care benefits' . . . That is standard labor dispute, so the union's efforts to publicize the existence of the fight with [the debtor] is protected by federal law.

Brickley, *supra* note 312 (quoting *In re* Trump Entm't Resorts, Inc., 534 B.R. 93, 99 (Bankr. D. Del. 2015)).

322 11 U.S.C. § 1113(c)(3) (2012).

voided."[323] I would suggest that Judge Gross's factual focus on the Union's "bad faith" prevented him from truly evaluating this crucial factor and its potential consequences. Essentially, by approving the § 1113 application, the court exacerbated an already frayed employer-employee relationship. Although the Union had a legal remedy to appeal, which Judge Gross expedited to the Third Circuit in order to protect the debtor's reorganization timeline,[324] the only recourse the Union had against the debtor, and Mr. Icahn, was to appeal to the court of public opinion by striking.

This rising hostility between the debtor's unionized employees and the debtor-in-possession should have been considered by the court when determining whether a reorganization plan should be confirmed based on whether the plan would be financially feasible.[325] A protesting workforce would have a likely negative effect on the total numbers of guests to the property. The decreasing revenues that prompted Trump Entertainment Resorts, Inc. into bankruptcy may be worse upon exit. Although 11 U.S.C. § 1129(a)(11) does not speak to potential employment disruption directly, it is apparent that a "judge could consider employment implications" when determining whether liquidation or further financial reorganization may occur.[326]

This threat of liquidation or reorganization suggests an interplay between §1129(a)(11) and "necessary modifications" in §1113.[327] Courts should be mindful that, by granting §1113 proposals that are "necessary to permit reorganization," it may make the debtor-in-possession's subsequent reorganization plan financially unfeasible. One commentator suggests that judges can limit this risk by focusing on necessary modifications that would reduce their risk of liquidation as opposed to allowing a "successful reorganization."[328]

Carl Icahn's plans to renovate Trump Taj Mahal never came to fruition due to the Union placing pressure on New Jersey's state legislature to draft a bill that would prevent a casino owner from holding a gambling license in the state if it

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323 *In re* Trump Entm't Resorts, Inc., 519 B.R. at 91 (quoting Truck Drivers Local 807, 816 F.2d at 93).

324 Chiappardi, *supra* note 306.

325 *See* 11 U.S.C. § 1129(a)(11) (2012) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan.").

326 Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1486 n.101 (2016).

327 *See* Judith DeMeester Nichols, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement under Section 1113*, 21 GA. L. REV. 967, 993 (1987).

328 *Id.* at 995.

had filed for bankruptcy protection in the last ten years.[329] Mr. Icahn, along with owning the Taj Mahal, also owns the Tropicana casino in Atlantic City.[330] Mr. Icahn announced that he would close Trump Taj Mahal, after which he sold the property to Hard Rock Corporate, which plans to open a Hard Rock casino,[331] for $50 million.[332] As the DIP-financer, Mr. Icahn dictated the terms of the modified agreement. Also, as a casino owner himself, Mr. Icahn was aware of the precarious nature of the Atlantic City gambling industry and its impact on management's relationship with unionized labor. Despite such involvement and knowledge, Mr. Icahn placed the blame of the failure of Trump Taj Mahal solely on Unite Here. Through an open letter posted on his website, Mr. Icahn stated that the union members "kill[ed]" their own jobs.[333]

The once lavish lobby of the Trump Taj Mahal was covered with worn pool-side loungers, "marble-like" trash cans, and other hotel-room décor at the beginning of its liquidation sale.[334] Hundreds of people lined up in front of the shuttered casino in order to get a bargain and explore the gilded floors of the ill-fated property.[335] The Trump Taj Mahal's final act was not the result of the Union's unwillingness to negotiate and consent to the debtor-in-possession's modifications to its collective bargaining agreement. The debtor's financial viability was lost over a series of bankruptcy filings and ill-thought-out reorganization plans.[336] However, the debtor, and its DIP-financers, accelerated that descent by seeking to use the shield of bankruptcy to force these modifications upon its unionized employees. The Union's revolt in response to this unilateral action should have been an obvious consequence to the bankruptcy court, the debtor, and the debtor's financers. In the end, § 1113 did not benefit the debtor, its creditors, or the Union. They risked it all and lost.

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329 *See Union got Trump Taj Mahal casino works to kill own jobs: Icahn*, CHICAGO TRIBUNE (Aug. 5, 2016, 9:47 AM), https://www.chicagotribune.com/business/ct-trump-taj-mahal-workers-20160805-story.html.

330 *See id.*

331 *Sale of Trump Taj Mahal to Hard Rock Finalized*, NJ.COM (Mar. 31, 2017, 6:59 PM), https://nj.com/atlantic/index.ssf/2017/03/2sale_of_trump_taj_mahal_to_hard_rock_finalized.html; *see also* Christopher Palmeri, *Carl Icahn to Sell His Shuttered Trump Taj Mahal Casino in Atlantic City*, BLOOMBERG (Feb. 6, 2017. 4:34 PM), https://www.bloomberg.com/news/articles/2017-02-06/ichan-will-sell-trump-taj-mahal-even-after-christie-casino-veto.

332 Nick Corasaniti, *Foraging for Treasure in Trump's Atlantic City Ruins*, NY TIMES (July 6, 2017), https://www.nytimes.com/2017/07/06/nyregion/foraging-for-treasure-in-trumps-atlantic-city-ruins.html.

333 *Union got Trump Taj Mahal casino works to kill own jobs: Icahn*, CHICAGO TRIBUNE (Aug. 5, 2016, 9:47 AM), https://www.chicagotribune.com/business/ct-trump-taj-mahal-workers-20160805-story.html; *see also* Carl Icahn, *Letter to Local 54 Employees of the Trump Taj Mahal*, CARLICAHN.COM (Mar. 19, 2015), http://carlicahn.com/employees-of-trump-taj.

334 Corasaniti, *supra* note 332.

335 *Id.*

336 *See* Karmin et al., *supra* note 10.

F. Recommendations

1. Legislative changes to § 1113

Due to how courts have consistently applied § 1113 outside of its legal intent, Congress needs to revise the section to define "necessary" modifications or revise the language to follow the Third Circuit precedent. This precedent is to only allow minimum modifications to protect the debtor's short-term stability by ensuring it is able to maintain reorganization viability. This will help retain the balance between the NLRA and the Bankruptcy Code which Congress intended to strike in the aftermath of *Bildisco & Bildisco*.[337] Furthermore, re-drafting the section to support only minimum modifications will safeguard the union's private agreement with management from being swallowed whole by § 1113. It will provide protections for the debtor to successfully exit bankruptcy through reorganization without sacrificing the benefits the Union bargained for simply due to the *desirability* of the debtor to make such unilateral actions with the approval of the court.

Congress should also consider explicitly removing expired collective bargaining agreements from falling under § 1113 based on the reasoning of *Hostess Brands*. Barring that outcome, Congress should incorporate NLRB oversight and ensure the debtor-in-possession meets its statutory obligation under federal labor law when the collective bargaining agreement has expired post-petition.

Congress may want to consider allowing breaches of collective bargaining agreements, due to § 1113 modification or rejection, as a monetary damage that can serve as a priority claim or administrative expense.

"Section 1113 is silent on the amount or priority of the claim to be afforded for employees whose collective bargaining agreement has been rejected or breached."[338] As the agreement "imposes a legal duty on the debtor to honor the terms of the bargaining agreement, at least until that agreement is properly rejected" some courts have found an implied claim "on behalf of the debtor's employees in the event that the debtor fails to comply" with its legal obligations.[339] Furthermore, even though § 1113 was created to deal with the unique nature of collective bargaining agreements, such an agreement is still a form of executory contract. Therefore, under § 502(g)(1) a claim should be

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337 NLRB v. Bildisco & Bildisco, 465 U.S. at 513.

338 Robert E. Ginsberg & Robert D. Martin, *Ginsberg & Martin on Bankruptcy* § 7.04 (E)(4) (2018).

339 *Id.*; *see* Adventure Res. v. Holland, 137 F.3d 786, 796 (4th Cir. 1998).

allowed for rejection of the agreement as if it were rejected under § 365 and treated "the same as if such claim had arisen before the date of the filing of the petition."[340] Although the Bankruptcy Code is silent on the issue of priority, a few courts have found claims "arising under § 1113" as having "super-priority" status[341] whereas others believe these claims are "subject to the general priority scheme" of § 507.[342]

In contrast, § 1114, the sister provision to § 1113 that relates to benefit payments for retired employees, states that "[a]ny payment for retiree benefits required to be made before a plan confirmed under section 1129 of this title is effective has the status of an allowed administrative expense as provided in section 503 of this title."[343] Based on the similar nature of these twin sections, classifying the breach resulting from § 1113 as an administrative expense may be appropriate. However, at least one bankruptcy court has held that a § 1113 claim is not an administrative claim since the debtor does not receive services "preserving the estate"[344] once the agreement is rejected.[345] Also, by classifying the breach as an administrative expense, the requirement to pay the claim in whole, on the date of confirmation,[346] may be too burdensome on the estate and negate the legislative intent of § 1113.

Based on judiciary confusion and the glaring oversight of the drafters of § 1113, it would be prudent for Congress to provide clarity to the Bankruptcy Code by identifying a claim for rejection of a collective bargaining agreement and its subsequent priority status.

Beyond giving the Union financial compensation for the breach, such a remedy will ensure management and union representatives are mindful of the possibility of modification if the employer files for chapter 11 bankruptcy. This will also ensure the Union has a voice in the debtor's reorganization plan. Since § 1113 adjusts the terms of the Union's collective bargaining, the Union should be kept informed of the viability of the debtor-in-possession's ability to successfully exit bankruptcy and be placed on a firm footing to allow for post-plan confirmation negotiations.

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340 11 U.S.C. § 502(g)(1) (2012).

341 Ginsberg & Martin, *supra* note 338; *see In re* Unimet Corp., 842 F.2d 879, 882 (6th Cir. 1988).

342 Ginsberg & Martin, *supra* note 338; *see In re* Certified Air Techs., Inc., 300 B.R. 355, 366 (Bankr. C.D. Cal. 2003) (holding that § 1113(f) does not "trump" § 507 priority); *see also* 11 U.S.C. § 507 (2012).

343 11 U.S.C. § 1114(e)(2) (2012) (internal reference omitted).

344 *See generally* 11 U.S.C. § 503(b)(1)(A) (2012).

345 Ginsberg & Martin, *supra* note 338; *see In re* Kitty Hawk Inc., 255 B.R. 428 (Bankr. N.D. Tex. 2000).

346 *See* 11 U.S.C. § 1129(a)(9)(A) (2012).

a. American Bankruptcy Institute Recommendations

In 2014, the American Bankruptcy Institute released its final report and recommendations from its commission established to study reforms to chapter 11 of the Bankruptcy Code.[347] As part of its study, the Institute provided the following recommendation principles as they relate to § 1113.[348]

The report states § 1113 should be amended to require the debtor-employer to file a request for an initial conference with the court and the authorized representative of the unionized workforce when it is contemplating rejection of a collective bargaining agreement.[349] This initial conference not only places all parties on notice, but places the bankruptcy judge in a central position at the onset of the negation process.[350] At the scheduling conference, the court and the affected parties can establish a reasonable "timeline" for negotiations to take place and establish a deadline for court intervention through a § 1113 hearing if those negotiations break-down.[351]

By focusing on the negotiation process, the Institute sought to separate the bargaining process from the litigation process.[352] Many commentators to the commission suggested that bargaining under § 1113 was "shallow and perceived as a formality" with the parties focused upon preparing its arguments for the expected court hearing instead of engaging in a meaningful negotiation on the merits of the proposed modifications.[353] As the Second Circuit stated in *In re Maxwell Newspapers Inc*., § 1113 was intended to "ensure that well-informed and good faith negotiations occur in the market place, not as part of the judicial process."[354]

The Institute also propose that a debtor-employer's "rejection of a collective bargaining agreement under § 1113 should be treated as a breach of such agreement" and that an "authorized representative may assert a claim for monetary damages" arising from the breach in the form of a "general unsecured

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[347] *See generally* American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11: Final Report and Recommendations,* (2014), http://commission.abi.org/full-report.

[348] *See* American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11: Final Report and Recommendations,* 162–65 (2014), http://commission.abi.org/full-report.

[349] *Id.* at 162–63.

[350] *Id.*

[351] *Id.*

[352] *Id.* at 162.

[353] *Id.* at 162–63.

[354] N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 90 (2d Cir. 1992); *see also* American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11: Final Report and Recommendations,* 162 n.608 (2014), http://commission.abi.org/full-report.

claim."[355] The commission's report does not provide recommendations regarding the status quo terms and obligations of an expired collective bargaining agreement within the context of a § 1113 application.[356]

2. Application of § 1113 by Bankruptcy Courts

In the event that Congress does not provide clarity to § 1113 through revision, debtor-employers, unions, and bankruptcy courts must find ways to apply the existing provision based on the dual priorities of the Bankruptcy Code and federal labor law as well as the equitable power entrusted to its judiciary. This Section provides recommendations on how the court and the respective parties may best apply § 1113 in a fair and equitable manner.

Due to their very nature, bankruptcy courts touch upon various aspects of non-bankruptcy law in their jurisprudence in order to properly address the needs of a particular case. Therefore, it is certainly possible for the courts to incorporate aspects of labor law, beyond § 1113 of the Code, when considering reorganizations that may require modification to labor agreements. However, based on the legislative goals of the Bankruptcy Code and the needs of the debtor, a bankruptcy court is myopically focused on the debtor's successful reorganization which may blind it from other case concerns.

a. Factual Finding of "Non-Core" Issues

As a bankruptcy court may send a factual finding to a district court for judgment in the event an issue concerns a subject matter outside of the court's limited jurisdiction,[357] a similar method can be applied to § 1113 applications. Such analysis would particularly be useful in cases where the collective bargaining agreement has expired either prior to or post-petition since the parties' negotiations are existing outside of NLRA protections and precedent.

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355 Prof. Michelle M. Harner & Marc Salvia, *ABI Commission: Creating More Certainty in Ch. 11 for All Parties*, 34 AM. BANKR. INST. J. 12, 13 (April 2015).

356 *See generally* American Bankruptcy Institute, *Commission to Study the Reform of Chapter 11: Final Report and Recommendations,* 162–65 (2014), http://commission.abi.org/full-report.

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> A bankruptcy judge may hear a proceeding that is not a core proceeding but that is otherwise related to a case under title 11. In such proceeding, the bankruptcy judge shall submit proposed findings of fact and conclusions of law to the district court, and any final order or judgment shall be entered by the district judge after considering the bankruptcy judge's proposed findings and conclusions and after reviewing de novo those matters to which any party has timely and specifically objected.

Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (July 10, 1984).

Furthermore, as argued by the union in *Trump Entertainment Resorts*, the question of whether a bankruptcy court has jurisdiction over expired collective-barging agreements remains a question of interpretation.[358]

After a § 1113 hearing, the bankruptcy court has thirty days to render a verdict.[359] Courts should consider utilizing that time to send the factual finding to the District Court, which may have more familiarity with labor law.

b. Appointment of a Trustee or Examiner

Although debtors-in-possession retain control during a chapter 11 reorganization, bankruptcy courts should utilize their authority[360] and appoint a Trustee, Examiner, or another neutral party, to serve as the debtor-in-possession's negotiator during the collective bargaining process prior to the submission of a § 1113 motion if the modifications are rejected by the Union.[361]

I suggest a neutral party in this instance, instead of the debtor, due to the lopsided bargaining position that is built into the structure of § 1113. Both parties to the agreement are hampered by the bankruptcy process with competing goals and the demands of parties that exist outside the agreement. In the case of the debtor-in-possession, the debtor is not the true party negotiating for the agreement. As we saw in *Trump Entertainment Resorts*, the debtor's DIP-financiers and dominant secured creditors are setting the terms of what is an acceptable modification.[362] Based on how bankruptcy courts typically accept that the debtor's modifications are necessary when evaluating a § 1113 motion, the debtor will likely agree to whatever terms its DIP-financers set. In *Trump Entertainment Resorts*, the debtor's primary creditor threatened to remove his $100 to $200 million cash infusion, thereby thwarting the debtor's attempts to avoid liquidation, if the Third Circuit reversed the decision of the lower court.[363]

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358 *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 83.

359 11 U.S.C. § 1113(d)(2) (2012).

360 *See id*. § 1104(a)(2). The court shall order the appointment of a trustee "if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate."

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> Code §1113 provides no mechanism for the court to appoint anyone to assist the parties in their negotiations or to mediate their disputes. Until Congress provides for the appointment of a mediator in the event of a motion for rejection in a Chapter 11, the negotiations remain in the hands of the debtor and the union.

In re Royal Composing Room Inc., 62 B.R. 403, 405 (Bankr. S.D. N.Y. 1986).

362 *See, e.g.*, *In re* Trump Entm't Resorts, Inc., 519 B.R. at 81.

363 *Union Got Trump Taj Mahal Casino Workers To Kill Own Jobs: Icahn*, CHICAGO TRIBUNE (Aug. 5,

Likewise, as evidenced by *Trump Entertainment Resorts*, the typical tools that a union can rely on during the negations process, such as protesting, striking, media campaigns, or delaying the negotiations, are unavailable when negotiating under the § 1113 framework. Similarly, the Union must consider how to properly safeguard the employees it represents. Under a typical collective bargaining arrangement, management and employees are both able to make concessions. As this process takes place the status quo provisions and the employer's financial stability allow for a measured negotiating process free from financial "time bombs." However, when the employer's possible existence will be determined on whether the Union agrees to necessary modifications, the Union must consider whether to safeguard its hard-bargained benefits from being eroded or to ensure the represented laborers retain employment through the reorganized employer.

By appointing a neutral party like a trustee, the court will help rebalance the negotiating position of the parties. The trustee may be able to gain concessions from DIP-financiers or creditors that the debtor, in its diminished state, cannot. Likewise, the Union may be less hostile to an outside negotiator. This may lessen the possibility that hostility between the parties will erupt, resulting in the relationship between management and its union representatives devolving to the point where reorganization is no longer possible. The relationship between Mr. Icahn and the Union in *Trump Entertainment Resorts* is a strong example of that concern.

The trustee overseeing the negotiations may also serve an important role for the court when it considers approval of § 1113 motion. The § 1113 approval process is fact-intensive, requiring the court to consider the testimony and evidence of both the debtor and the union representatives. By utilizing a trustee, the court may call upon this neutral party at the § 1113 hearing to provide an unbiased account of the negotiating relationship between the parties, if the debtor provided adequate documentation for the union to consider, whether the modifications were truly "necessary," and if the union rejected the proposal with good cause or not. This may lead to better adjudicated outcomes.

2. Debtor-Employers

Assuming the majority interpretation remains unchallenged, debtor-employers should follow *Trump Entertainment Resorts* as a model regarding its bargaining conduct prior to seeking a § 1113 motion. Debtors must demonstrate

2016 9:47 AM), http://www.chiagotribune.com/business/ct-trump-taj-mahal-wokers-20160805-story.html.

that they conducted, or sought to conduct, negotiations in "good faith." The debtor must provide evidence to the court that it was the "willing party" in the negotiations. Similarly, presenting expert testimony that demonstrates that delaying the negotiation process will exasperate cash-on-hand and may force liquidation, as evident in *Trump Entertainment Resorts*, diminishes the union's counterargument and will likely persuade the court to approve the § 1113 application instead of allowing negotiations to take its own course.

However, debtors should be cautioned that, if collective bargaining began prior to filing for bankruptcy protection, the modification terms proposed should stay relatively consistent when bargaining post-petition.[364]

3. Unions

a. Good Faith and Union Conduct

Unions must negotiate in "good faith" with the debtor to demonstrate to the court that they did not hinder the process or take advantage of the debtor's financial difficulty to improve their negotiating position.[365] Such behavior runs counter to a labor union's non-bankruptcy negotiating techniques and it behooves union representatives and its counsel to advise them of the serious ramifications if it does not conduct itself appropriately.

In these negotiations unions fail to recognize that, once the employer files for chapter 11 protections, the dynamics between the negotiating parties are dramatically transformed.[366] Although unions may see the debtor as "being the same recalcitrant with whom they have had to contend in the past," the debtor-employer is transferred into "a statutory fiduciary for all of [its] creditors."[367] Unions are "no longer engaged in a mere two-way skirmish" instead they are "engaged in a multilateral conflict" between the debtor, its financers, and the varying class of creditors.[368] Therefore, although the collective bargaining agreement negotiations take place between the two central parties, unions must structure this negotiation strategy based on the transformative dynamics of the bankruptcy process.

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[364] The Third Circuit rejected the employer's § 1113 motion in part due to disparate between the labor cost reduction sought in negotiations prior and post-petition. *See* Wheeling-Pittsburgh Steel, 791 F.2d at 1074.

[365] *See In re* Trump Entm't Resorts, Inc. 519 B.R. at 79.

[366] *See* Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 19 J. MARSHALL L. REV. 301, 319 (1986).

[367] *Id.*

[368] *Id.*

As evident in *Trump Entertainment Resorts*,[369] the union's actions, or lack thereof, in the two months after the debtor filed its petition were the deciding factor with the bankruptcy court. The Supreme Court "has held that for many purposes 'courts of bankruptcy are essentially courts of equity, and their proceedings inherently proceedings in equity.'"[370] As such, the emphasis on the union's failure to negotiate suggests the court utilizing the equitable defense of "unclean hands."[371]

Thomas Fielding, in his analysis of rejection of collective bargaining agreements, found that the debtor "has everything to gain and nothing to lose by seeking" a § 1113 motion.[372] However, unions are "placed in a precarious position" between loss of benefits and the risk of failed reorganization with the subsequent loss of employment.[373] Therefore, Fielding suggests that "[courts] should be hesitant in finding the union's refusals to accept the trustee's proposals unjustifiable."[374] Although unions should be cognizant of this balance, the decision in *Trump Entertainment Resorts* demonstrates that Unite Here's hesitation or concern did not meet the court's interpretation of "good cause" as stated in § 1113(c)(2).

b. Most Favored Nation Clause

As suggested in *Trump Entertainment Resorts*, the union was hesitant to negotiate, in part, due to the union's collective bargaining agreement with other Atlantic City casino employers containing a "most favored nation" clause.[375] During a § 1113 motion hearing, the union should argue that, if the motion is granted, the bankruptcy court would not only alter the agreement with the debtor but will result in a cascading effect that would alter the union's negotiated benefits with employer's across an industry. The possibility of such sweeping labor-relationship changes may lead the bankruptcy court to be less inclined to grant the debtor's motion. The court, when balancing the equities, would not

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369 *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 90–91.

370 Pepper v. Litton, 308 U.S. 295, 304 (1939) (quoting Local Loan Co. v. Hunt, 292 U.S. 234, 240 (1934)).

371 *See generally* Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 244–45 (1933) ("The governing principle [of the doctrine] is that whenever a party who . . . seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine.") (internal emphasis and quotations omitted).

372 Thomas Fielding, *Rejection of Collective Bargaining Agreements in the Aftermath of 11 U.S.C. Section 1113: What does Congress Intend*, 9 DEL. J. CORP. L. 701, 721 (1984).

373 *Id.*

374 *Id.*

375 *See In re* Trump Entm't Resorts, Inc., 519 B.R. at 92 n.4.

only need to consider the relationship between the debtor and the union but also expand its analysis to consider how this impacts the union's bargaining power with employers outside of chapter 11 protections. However, in *In re Landmark Hotel & Casino, Inc.*, the court found that the existence of such a clause is not sufficient as evidence that the Union had "good cause for rejecting the proposals."[376] But, a "most favored nations" clause may be relevant, among other facts, in determining the Union's good faith.[377]

Unions should also consider eliminating "most favored nation" or "most favored employer" clauses from their collective bargaining agreements. Attempts to alter the provision by stating that employer beneficial amendments, which are the result of § 1113 motions, are excluded from the "most favored nation" clause would be a fruitless exercise. Such an action would be similar to an ipso facto clause—"a 'contract clause that specifies the consequences of a party's bankruptcy.'"[378] Section 365(e)(1) of the Bankruptcy Code states that "any right or obligation under [an executory contract] may not be terminated . . . solely because of a provision in such contract or lease that is conditioned on" the debtor's financial insolvency or "commencement of a [bankruptcy] case."[379] Therefore, even if the Union attempts to modify the parameters of a "most favored nation clause," once the collective bargaining agreement is pulled into the debtor's estate through the bankruptcy process, the modification would not stop the unwanted effect.

c. Snap Back Provision

During the § 1113 proposal process, unions should argue for a "snap back" provision. By incorporating a "snap back" provision into the debtor's proposed modifications, the union may be able to temper the financial hardship such modifications may impose upon its members.[380] Such a provision may also benefit the debtor-in-possession as it will incentivize the debtor's labor-workforce to participate fully in achieving the reorganization plan. As stated in *Wheeling-Pittsburgh Steel Corp*., the lack of a "snap back" provision suggested that the debtor's proposed modifications were not "fair and equitable."[381]

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376 *In re* Landmark Hotel & Casino, Inc., 78 B.R. at 581.

377 *Id.*

378 Michael J. DiGennaro & Harley J. Goldstein, *Can Ipso Facto Clauses Resolve the Discharge Debate: An Economic Approach to Novated Fraud Debt in Bankruptcy*, 1 DEPAUL BUS. & COMM. L. J. 417, 419 (2003).

379 11 U.S.C. § 365(e)(1) (2012).

380 *See e.g.* Charles B. Craver, *The Impact of Financial Crises upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 499 (1988) ("The financial sacrifices must be shared in a relatively equal manner by all company personnel and by outside creditors.").

381 Wheeling-Pittsburgh Steel Corp., 791 F.2d at 1093.

d. Breach of Contract Claim

In general, unions should consider adding provisions to their collective bargaining agreements that contemplate the possibility that an employer may file for bankruptcy and the potential risks and outcomes (reorganization or liquidation) during the negotiation process. I suggest unions should seek to include breach of contract provisions[382] in their collective bargaining agreements that would trigger monetary penalties in the event an employer, upon seeking chapter 11 protections, utilizes § 1113 to unilaterally modify the agreements' terms.[383] This will ensure the parties are considering the serious possibility that bankruptcy may rupture their agreement and attempt to negotiate around that assumption. Furthermore, this will allow the union to file a claim as unsecured creditor[384] which may offset the unequal bargaining process in § 1113 by providing the union a vote in the plan confirmation process.[385]

CONCLUSION

With the Third Circuit's decision in *Trump Entertainment Resorts*, the court has strengthened the majority opinion and will benefit similarly situated debtor's efforts to alter unfavorable collective bargaining agreements without the statutory obligation to bargain to an impasse. Section 1113 does not specify whether both current and expired collective bargaining agreements fall under its control. However, statutory interpretation, the intent of Congress in drafting the provision, and the NLRA favor the conclusion that expired collective bargaining agreements fall outside of § 1113 and that the NLRB, not the bankruptcy court,

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382 *See* Fielding, *supra* note 372, at 723–34. Fielding stating:

> A breach of a collective bargaining agreement has an impact quite different from a breach of a commercial contract. The rights provided the employees, such as seniority and grievance procedures, are not reduced readily to monetary terms. Therefore, monetary damages for a rejection of a collective bargaining agreement may not adequately compensate employees for the loss of these rights . . . [Unlike a commercial entity] the employees are unable to spread their risk of loss, and they bear a heavy burden if there is a rejection.

383 *But see In re* Northwest Airlines Corp., 483 F.3d 160 (2d Cir. 2007) (Debtor's rejection of collective bargaining agreement under §1113 abrogated the agreement. In contrast to a § 365, where rejection is treated as a breach, not termination, of a contract, under § 1113, rejection is the termination of a collective bargaining agreement thus allowing the debtor to impose new terms of employment.); United Foods and Commercial Workers Union, Local 328, AFL-CIO v. Almac's Inc., 90 F.3d 1 (1st Cir. 1996) (Court approved interim changes in a labor contract under § 1113(e) do not constitute a rejection or breach of the contract for the purpose of § 365(g) and unless the contract is ultimately rejected there is no claim against the estate.).

384 *See* 11 U.S.C. § 1102 (2012).

385 *See id*. § 1129.

has jurisdiction to determine if the parties have bargained, in good-faith, to an impasse.

Resolution of this issue is crucial since whether the parties have bargained to an impasse is a difficult, fact-finding determination best left to the expertise of the NLRB. Without a definitive judicial or legislative mandate, an inter-circuit court split is likely to occur. As a consequence, debtors, instead of negotiating an expired collective bargaining agreement in good faith, will utilize chapter 11 to unilaterally remove its obligations to maintain the status quo terms and, thus, free itself from NLRB oversight. DIP-financers, not the debtor-employer, will continue to drive the negotiation process seeking modifications that, though financial beneficial, are not necessary for the debtor's successful reorganization.

Union representatives, regardless of whether they bargain in good faith or not, are placed in an unbalanced bargaining position that favors complying with the interest of creditors and DIP-financers over the interest of the very employees it represents. Such a rapid and uneven negotiation process has the unintended consequence of Union's walking away from the bargaining table and going on strike. A revolt of its employees, and the resulting negative publicity, only further harms the debtor-employee's chance of a successful reorganization and is of no benefit to the debtor, its creditors, and, ultimately, its employees.

This unnecessary and avoidable outcome runs counter to the public policy of both chapter 11 bankruptcy as well as federal labor law. It is ultimately up to Congress to address the unartful drafting of § 1113, correct the unbalanced negotiating positions of the parties, and prevent the bankruptcy court from usurping the NLRB's statutory authority as it relates to expired collective bargaining agreements. If a solution is not found, organized labor's unique position in our economy will continue to diminish. The American worker, like the cocktail waitresses and housekeepers at Trump's Taj Mahal, will be forced to make a Hobson's choice between consenting to their benefits being stripped away or find their place of work shuttered.

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