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# 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

Christopher D. Cameron\*

## I. INTRODUCTION

Nearly a decade has passed since organized labor successfully lobbied Congress for what have turned out to be the most sweeping changes in the law governing private-sector collective bargaining since the Taft-Hartley Act of 1947.<sup>1</sup> The Bankruptcy Amendments and Federal Judgeship Act of 1984,<sup>2</sup> codified in relevant part at section 1113 of the Bankruptcy Code, was passed to accomplish two goals: (1) halt unilateral changes by employers in the collectively bargained terms and conditions of employment during reorganization proceedings,<sup>3</sup> and (2) reduce the perceived tendency of bank-

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1. Labor-Management Relations (Taft-Hartley) Act of 1947, Ch. 120, 61 Stat. 136 (1947) *codified as amended* at 29 U.S.C §§ 141-187 (1993) [hereinafter Taft-Hartley Act]. Although Congress enacted several labor law reforms after 1947, until 1984 none of them substantially altered the basic presumption that the federal government should supervise the *process*, but not the *product*, of collective bargaining. See *infra* notes 256-257 and accompanying text.

2. Pub. L. No. 98-353, 98 Stat. 333 *codified as amended* at 11 U.S.C. §§ 101-1113 (1988) [hereinafter Bankruptcy Code].

3. See THOMAS R. HAGGARD & MARK S. PULLIAM, CONFLICTS BETWEEN LABOR LEGISLATION AND BANKRUPTCY LAW 69 & n.53 (1987).

ruptcy judges to approve rejection of collective bargaining agreements without due regard for national labor policy.<sup>4</sup>

This article presents the first empirical analysis of the most basic of questions about the statute: is section 1113 working?

During the late 1970's and early 1980's, labor leaders watched anxiously as bankruptcy judges and district courts approved the rejection of collective bargaining agreements with some of the nation's biggest employers in key unionized industries, including air passenger service,<sup>5</sup> food packaging and processing,<sup>6</sup> interstate ground transportation,<sup>7</sup> steel,<sup>8</sup> and others.<sup>9</sup> Then in 1984, the Supreme Court decided a case that seemed to confirm labor's worst fears. *NLRB v. Bildisco & Bildisco*<sup>10</sup> held that collective bargaining agreements were executory contracts capable of being rejected under the Bankruptcy Code,<sup>11</sup> and more importantly, the unilateral act of rejection prior to bankruptcy court approval did not itself constitute a violation of the duty to bargain ordinarily imposed by the National Labor Relations Act (NLRA).<sup>12</sup> *Bildisco* effectively pre-empted labor's remedies under the NLRA

4. *Id.*

5. *See, e.g., In re Continental Airlines*, 38 B.R. 67 (Bankr. S.D. Tex. 1984); *In re Braniff Airlines, Inc.*, 25 B.R. 216 (Bankr. N.D. Tex. 1982).

6. *See, e.g., In re Parrot Packing Co.*, 42 B.R. 323 (N.D. Ind. 1983); *In re Wilson Foods Corp.*, 31 B.R. 269 (W.D. Okla. 1983); *In re Penn Fruit Co.*, 1 B.R. 714 (E.D. Pa. 1976).

7. *See, e.g., In re Briggs Transp. Co.*, 39 B.R. 343 (Bankr. D. Minn.), *aff'd*, *Briggs Transp. Co. v. Local 710, Int'l Bhd. of Teamsters*, 40 B.R. 972 (D. Minn.), *aff'd*, 739 F.2d 341 (8th Cir.), *cert. denied*, 469 U.S. 917 (1984); *In re Brada Miller Freight Sys., Inc.*, 16 B.R. 1002 (N.D. Ala. 1981), *rev'd*, 702 F.2d 890 (11th Cir. 1983); *In re Gray Truck Line Co.*, 34 B.R. 174 (Bankr. M.D. Fla. 1983); *In re Blue Ribbon Transp. Co.*, 30 B.R. 783 (Bankr. D.R.I. 1983); *In re U.S. Truck Co.*, 24 B.R. 853 (Bankr. E.D. Mich. 1982); *Brotherhood of Ry., Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

8. *See, e.g., In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978), *appeal dismissed*, 595 F.2d 1211 (3d Cir. 1979). *See also Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 381 F. Supp. 336 (S.D.N.Y. 1974) (denying rejection), *rev'd*, 519 F.2d 698 (2d Cir. 1975) (granting rejection).

9. For a summary of decisions approving rejection of collective bargaining agreements before the enactment of § 1113, see HAGGARD & PULLIAM, *supra* note 3, at 52-53 & nn.236-37. For a discussion of economic distress in unionized industries during this period, see Charles B. Craver, *The Impact of Financial Crises Upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465, 470-71 (1988).

10. 465 U.S. 513 (1984).

11. *Id.* at 530.

12. *Id.* at 532-33.

against a debtor-employer attempting to reorganize his or her financial affairs under Chapter 11.<sup>13</sup>

Although there were many criticisms of *Bildisco*,<sup>14</sup> labor's loudest complaint was that the decision unfairly permitted resort to economic self-help.<sup>15</sup> An employer-debtor could ignore his union bargaining partner and unilaterally change the terms and conditions of employment without penalty.<sup>16</sup> But federal labor policy, as enshrined in the National Labor Relations Act, requires the opposite: the employer must bargain *before* he is permitted to implement changes.<sup>17</sup> Unilateral modifications in the terms and conditions of employment during the term of a collective bargaining agreement may constitute not only a breach of contract,<sup>18</sup> but also an independent violation of federal labor law.<sup>19</sup> *Bildisco*, however, virtually eliminated the duty to bargain under the NLRA whenever an employer could claim inconvenience due to financial distress.<sup>20</sup> Labor's criticism was so swift and strenuous that a bill to overturn *Bildisco* was introduced in Con-

13. See *El San Juan Hotel Corp.*, 274 N.L.R.B. No. 3, 118 L.R.R.M. (BNA) 1320 (1985); *Edward Cooper Painting, Inc.*, 273 N.L.R.B. No. 224 (1985), *enforced*, 123 L.R.R.M. (BNA) 2905 (6th Cir. 1986); *Briggs Transp. Co.*, 276 N.L.R.B. No. 149, 120 L.R.R.M. (BNA) 1267 (1985). See also generally HAGGARD & PULLIAM, *supra* note 3, at 127-30 (arguing that extent of debtor-employer's unfair labor practice liability for making unilateral changes once Chapter 11 petition has been filed is extremely limited).

14. For two excellent summaries of labor's fears about *Bildisco*, see David L. Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in NLRB v. Bildisco*, 25 B.C. L. REV. 539, 554-55 & n.75 (1984), and James J. White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1202-03 (1984).

15. See B. Glenn George, *Collective Bargaining in Chapter 11 and Beyond*, 95 YALE L.J. 300, 303 (1985). Of course, as in any rejection of executory obligations, the debtor's rejection of a collective bargaining agreement constitutes a breach of contract creating a general unsecured claim for damages. *Bildisco*, 465 U.S. at 530 & n.12. Numerous commentators have argued that *Bildisco* merely reflects a fundamental "conflict" between federal labor policy favoring bilateral negotiations, and federal bankruptcy policy favoring unilateral action by the debtor to help him get back on his feet. See *infra* notes 41-42 and accompanying text.

16. *Id.*

17. National Labor Relations Act § 8(d), 29 U.S.C. § 158(d) (1988) [hereinafter NLRA].

18. *Id.* § 8(a)(5).

19. A unilateral change is a per se violation of the duty to bargain imposed by NLRA § 8(d), 29 U.S.C. § 158(d) (1988). See *NLRB v. Katz*, 369 U.S. 736, 743 (1962).

20. See HAGGARD & PULLIAM, *supra* note 3, at 115-170.

gress the same day the decision was announced.<sup>21</sup> Less than five months later, in what many observers considered to be record time,<sup>22</sup> section 1113 became law. Although organized labor did not get everything it wanted in the new legislation,<sup>23</sup> many of labor's supporters immediately proclaimed victory as to labor's twin goals of reversing the right of employers to engage in economic self-help during Chapter 11, and making it harder for bankruptcy courts to approve the rejection of collective bargaining agreements.<sup>24</sup>

Section 1113 purports to place nine new steps before a Chapter 11 debtor who wishes to reject his or her collective bargaining agreement.<sup>25</sup> The debtor must (1) make the union a proposal that (2) is based on the most complete information available, (3) provides for those modifications in the existing contract that are necessary to permit the debtor's reorganization, and (4) assures that all creditors, the debtor, and all affected parties are treated fairly and equitably.<sup>26</sup> The debtor must also (5) provide the union with such relevant information as is necessary to evaluate the proposal<sup>27</sup> and (6) meet

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21. See H.R. 4908, 98th Cong., 2d Sess., 103 CONG. REC. H809 (daily ed. Feb. 22, 1984) (bill introduced by Rep. Rodino). Congressman Rodino later incorporated this bill into omnibus legislation that, after substantial amendment, became law. See H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H7491 (daily ed. Mar. 19, 1984) (bill introduced by Rep. Rodino). For a comprehensive summary of the legislative history, see Bruce H. Charnov, *The Uses and Misuses of the Legislative History of Section 1113 of the Bankruptcy Code*, 40 SYR. L. REV. 925, 946-69 (1989).

22. One Congressman called the speed at which the House bill was acted upon "mind-boggling." 130 CONG. REC. H1798 (daily ed. Mar. 21, 1984) (statement of Rep. Hyde).

23. See HAGGARD & PULLIAM, *supra* note 3, at 69-70, 81.

24. Senator Kennedy said that the intent of § 1113 was "to overturn the *Bildisco* decision which had given the [employer] all but unlimited discretionary power to repudiate labor contracts and to substitute a rule of law that encourages the parties to solve their mutual problems through the collective bargaining process." 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Kennedy).

25. The nine-step characterization was conceived by Judge Kressel in *In re American Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984). Most bankruptcy courts refer to these nine steps when analyzing applications to rejection collective bargaining agreements under § 1113. See *infra* text accompanying note 291. For a careful analysis of the statute and the socioeconomic context of which it is a product, see generally Martha West, *Life After Bildisco: Section 1113 and the Duty to Bargain in Good Faith*, 47 OHIO ST. L.J. 65 (1986).

26. Bankruptcy Code, 11 U.S.C. § 1113(b)(1)(A); 11 U.S.C. § 1113(b)(1)(4) (1988).

27. *Id.* § 1113(b)(1)(B).

and confer with the union (7) in good faith.<sup>28</sup> If the union has refused to accept such proposal (8) without good cause,<sup>29</sup> and if (9) the balance of equities clearly favors rejection,<sup>30</sup> then and only then may the bankruptcy judge issue an order granting rejection.

Section 1113's dramatic changes in the law governing collective bargaining for employers in financial distress has generated substantial litigation.<sup>31</sup> In the decade since its passage, the bankruptcy courts have reported forty-six decisions in which the debtor filed at least one application under section 1113 for relief of some type from a collective bargaining agreement.<sup>32</sup> In thirty-eight of those decisions, the debtor filed at least one application to reject a union contract altogether.<sup>33</sup>

The litigation of these applications has also generated a considerable volume of scholarly comment. Some has pronounced the statute a success for labor,<sup>34</sup> and some, a failure,<sup>35</sup> but the lion's share has focused on a rather narrow is-

28. *Id.* § 1113(b)(2).

29. *Id.* § 1113(c)(2).

30. *Id.* § 1113(c)(3).

31. See *infra* text accompanying notes 199-252.

32. See *infra* apps. B & C.

33. See *infra* app. B.

34. See, e.g., Charlene R. Ehrenwerth & Maureen E. Lally-Green, *The New Bankruptcy Procedures for Rejection of Collective Bargaining Agreements: Is the Pendulum Swinging Back?*, 23 DUQ. L. REV. 939, 980 (1985) (arguing "pendulum" no longer "swinging against labor"); David L. Gregory, *Legal Developments Since NLRB v. Bildisco: Partial Resolution of Problems Surrounding Labor Contract Rejection in Bankruptcy*, 62 DEN. U. L. REV. 615, 625 (1985) (discussing "significant rectification" of *Bildisco*, although labor interests remain "subordinated to those of ownership"); Donald H.J. Hermann & David M. Neff, *Rush to Judgment: Congressional Response to Judicial Recognition of Rejection of Collective Bargaining Agreements Under Chapter 11 of the Bankruptcy Code*, 27 ARIZ. L. REV. 617, 643 (1985) (believing decisions "continue to balance fairly" labor and bankruptcy policy); Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 91 COM. L.J. 169, 176-77 (1986) (arguing union claims enlarged at the expense of other creditors' claims); D'Anne Haydel, Note, *Bildisco: Are Some Creditors More Equal Than Others?*, 35 S.C. L. REV. 573, 613-14 (1984) (believing "dramatically pro-labor" statute treats some creditors, in "Orwellian" sense, "more equally than others"); Judith DeMeester Nichols, Note, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement Under Section 1113*, 21 GA. L. REV. 967, 1000-01 (1987) (arguing § 1113 is unneeded "pro-labor" enactment).

35. See, e.g., Andrew Stewart, *Title III, Subtitle J of the 1984 Bankruptcy Amendments and Federal Judgeship Act: An Adequate Compromise Between the Bankruptcy Act and National Labor Relations Act?*, 1985 DET. C. L. REV. 735, 764, 766 (discussing early post-enactment concern that bankruptcy courts "have shown tendency to completely disregard labor law concerns," although

sue: the meaning of the term "necessary," and whether the debtor's proposed changes are "necessary" to permit reorganization as required in step three.<sup>36</sup>

The focus on "necessary" is curious. Can it be that one step out of the nine established by the statute is so important that it must be studied to the exclusion of all the others? Or are the other steps merely window-dressing for what is really a one-step inquiry?<sup>37</sup>

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adequacy "remains to be seen"); White, *supra* note 14, at 1198 (believing bankruptcy courts "will continue routinely to reject collective bargaining agreements"); Anne J. McClain, Note, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J. 191, 191 (1991) (arguing statute "has actually placed laborers in a worse position than before its enactment"); Gary M. Roberts, Note, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements*, 39 STAN. L. REV. 1015, 1041 (1987) (believing law "improperly" limits union's right outside bankruptcy to "firm" guarantee of integrity of contract); Raymond N. Hulser, Note, *The Rejection of Collective Bargaining Agreements in Chapter 11 Reorganizations: The Need for Informed Judicial Decisions*, 134 U. PA. L. REV. 1235, 1236 (1986) (contending § 1113 is "inadequate" because bankruptcy judges have little or no experience applying labor law).

36. See, e.g., 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, 135 & n.5 (1990) (discussing "focus" of article); John Vian, *The Rejection of Collective Bargaining Agreements Since the 1984 Amendments: The Case Law Under Bankruptcy Code Section 1113*, 91 COM. L.J. 252, 266 (1986) (arguing steps three and four are "two most important requirements"); Nichols, *supra* note 34, at 972 & n.13 (half of 15 decisions studied "turned on" step three); Hulser, *supra* note 35, at 1249 (arguing bankruptcy courts collapse steps four and eight into step three). For other commentary analyzing the meaning of "necessary," see, e.g., Charnov, *supra* note 21, at 975-1002; William A. Wines, *An Overview of the 1984 Bankruptcy Amendments: Some Modest Protections for Labor Agreements*, 36 LAB. L.J. 911, 917 (1985); Elizabeth P. Gilson, Note, *Statutory Protection for Union Contracts in Chapter 11 Reorganization Proceedings: Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 19 CONN. L. REV. 401, 425-26 (1987); Jay M. Rector, Comment, *Bankruptcy—How Necessary Is "Necessary" Under Section 1113? Truck Drivers Local 807 v. Carey Transportation*, 13 J. CORP. L. 941, 941, 947-52 (1988); Jeffrey D. Berman, Note, *Rejection of Collective Bargaining Agreements Under the Bankruptcy Amendments of 1984*, 71 VA. L. REV. 983, 1009 (1985); Roberts, *supra* note 35, at 1048. But see Jeffrey W. Berkman, Note, *Nobody Likes Rejection Unless You're a Debtor in Chapter 11: Rejection of Collective Bargaining Agreements Under 11 U.S.C. § 1113*, 34 N.Y.L. SCH. L. REV. 169, 174, 187 & nn.149-51 (1989) (arguing that although meaning of "necessary" is "paramount issue" to bankruptcy courts, steps four, eight, and nine seem most important); McClain, *supra* note 35, at 208 (criticizing courts for focusing on step three). For one of the more thoughtful considerations of the "necessary" requirement, see Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 526-34 (1994).

37. At least one commentator has recently so concluded. See McClain, *supra* note 35, at 208.

This article reports and analyzes empirical data gathered to evaluate section 1113. Part II explores the ideology of section 1113 by examining the law before the statute, the enactment of the statute, and the statute's unique alterations to basic American labor law. Part III explains the methodology of the study, including how the data were gathered and analyzed. Part IV reports what the data show regarding three central hypotheses:

**Hypothesis #1**—That fewer collective bargaining agreements are rejected now than before section 1113 was enacted. The reason: placing nine new steps between debtors and rejection, if only because debtors have more work to do, seems intuitively to mean that the rejection rate would decrease. The data show that, although rejection continues to be granted more often than not, there is support for the hypothesis. Union contracts are less likely to be rejected today than before the passage of the statute.<sup>38</sup>

**Hypothesis #2**—That the employer's conduct at the bargaining table, not the merit of his arguments for rejection, most determines the fate of the collective bargaining agreement under the typical section 1113 application. The procedural steps debtors must climb before rejection under section 1113 (steps one, two, five, six, and seven) should be at least as important as the new substantive ones (steps three, four, eight, and nine), including the "necessary" requirement in step three. The reason: procedural obligations nominally similar to those found in section 1113 are the heart and soul of the long-established duty to bargain under the NLRA. Surprisingly, the data show that the hypothesis is largely unsupported.<sup>39</sup> In the average case, the opposite is true: substantive steps, particularly step three, are more significant than procedural ones.

**Hypothesis #3**—The more bargaining that fails to produce a settlement, the more likely that rejection will be granted. The reason: if the parties engage in good-faith negotiations, but are unable to arrive at a mutually acceptable solution, the bankruptcy court will "reward" the debtor for having at least engaged in the effort. The data strongly support this hypothesis.<sup>40</sup>

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38. See *infra* text accompanying notes 330-367.

39. See *infra* text accompanying notes 373-390.

40. See *infra* text accompanying notes 394-405.



Part V considers potential limitations of the data, offers some reflections on the findings, and suggests areas for further research. Finally, Part VI concludes that, although section 1113 is a substantial improvement over the pre-*Bildisco* regime, it is not working as well as it should. The bankruptcy courts, with Congress' assistance, should focus their attention on the process, rather than the product, of collective bargaining during reorganizations.

## II. THE IDEOLOGY OF SECTION 1113

The ideology of section 1113 is the product of accommodation. In enacting the statute, Congress attempted to reconcile a perceived conflict<sup>41</sup> between federal labor policy, which preserves the making and enforcement of collective bargaining agreements, and federal bankruptcy policy, which is said to favor the rehabilitation of debtors, even at the expense of such agreements.<sup>42</sup> To understand how section 1113 has attempted to accommodate the clash of these competing policies, it is important to understand the pressure points that existed between these bodies of law before the statute was passed.

### A. *Treatment of Collective Bargaining Agreements Before Section 1113*

For years, the settled interpretation of section 8(a)(5)<sup>43</sup> of the NLRA has been that an employer must bargain to impasse with the union representing its employees before he

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41. See *infra* note 42. The commentary notwithstanding, there is no irreconcilable "conflict" between national labor policy and bankruptcy law policy, because it is not axiomatic that the Bankruptcy Code reflects the type of substantive policy choices that labor law does. Although this article must leave exploration of the matter for another time and place, the groundwork supporting the point has been thoughtfully laid by others. See Thomas H. Jackson, *Translating Assets and Liabilities to the Bankruptcy Forum*, 14 J. LEGAL STUD. 73, 97-98 (1985); Roberts, *supra* note 35, at 1041. But see Donald R. Korobkin, *Value and Rationality in Bankruptcy Decision-Making*, 33 WM. & MARY L. REV. 333, 339-41 (1992) (criticizing "economic account" of bankruptcy theory and offering a "value-based" account).

42. There is no shortage of commentators remarking upon this perceived conflict. See, e.g., George, *supra* note 15, at 311 (arguing a "direct conflict"); Gregory, *supra* note 14, at 547 (discussing "fundamentally different" policy perspectives); Stewart, *supra* note 35, at 737-41 (believing there is a "basic conflict").

43. "It shall be an unfair labor practice for an employer to refuse to bargain collectively with the representatives of his employees . . . ." NLRA § 8(a)(5), 29 U.S.C. § 158(d) (1988).

may implement changes in the terms and conditions of employment.<sup>44</sup> Moreover, as defined in section 8(d)<sup>45</sup> of the Act, section 8(a)(5) forbids mid-term unilateral changes in a collective bargaining agreement.<sup>46</sup> The employer may not terminate or modify the contract prior to expiration without the union's consent.<sup>47</sup> Together, these provisions impose a duty to bargain that prohibits self-help by employers. The union's only recourse for violation of this duty is to pursue an unfair labor practice charge, the exclusive jurisdiction for which lies with the National Labor Relations Board.<sup>48</sup> The duty to bargain has often been cited as the cornerstone of our national labor policy.<sup>49</sup>

Chapter 11 of the Bankruptcy Code permits financially troubled employers to avoid liquidation by reorganizing their affairs under the supervision of the bankruptcy court.<sup>50</sup> Ordinarily, under section 365(a)<sup>51</sup> of the Code (and its predecessor, section 313(1)<sup>52</sup> of the old Bankruptcy Act), a debtor-in-

44. See generally *NLRB v. Katz*, 369 U.S. 736 (1962).

45. Section 8(d) of the NLRA states in pertinent part:

[W]here there is in effect a collective bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification . . . continues in full force and effect . . . all the terms of the existing contract . . . until the expiration date of such contract . . .

NLRA § 8(d), 29 U.S.C. § 158(d) (1988).

46. The purpose of § 8(d) is to avoid interruptions to interstate commerce caused by industrial warfare, especially strikes. See, e.g., *Allied Chemical & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 187 (1971).

47. *Id.*

48. The same conduct constituting an unfair labor practice in violation of the statutorily imposed duty to bargain, however, may also constitute a breach of contract for which the union may pursue a separate and independent remedy under the grievance and arbitration machinery established by the contract itself.

49. See, e.g., George, *supra* note 15, at 328.

50. See generally Hal Hughes, *Wavering Between the Profits and the Loss: Operating a Business During Reorganization Under Chapter 11 of the New Bankruptcy Code*, 54 AM. BANKR. L. J. 45, 69 (1980).

51. "Except as provided [herein], the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." Bankruptcy Code, § 365(a), 11 U.S.C. § 365(a) (1988).

52. Section 313(1) of the old Bankruptcy Act states, in pertinent part: Upon the filing of a petition [for reorganization under Chapter XI], the court may, in addition to the jurisdiction, powers, and duties conferred and imposed upon it by this chapter . . . permit the rejection of the executory contracts of the debtor, upon notice to the parties to such

possession may assume or reject any executory contract<sup>53</sup> or unexpired lease, subject to bankruptcy court approval. Such approval is rarely denied.<sup>54</sup> Under the "business judgment" test, the debtor must show merely that rejection of the executory contract will benefit the estate.<sup>55</sup> It is not necessary to show that the contract is burdensome by any objective economic measure.<sup>56</sup> Although rejection is treated as a breach of contract,<sup>57</sup> it permanently relieves the debtor of having to perform any remaining obligations thereunder.<sup>58</sup> The creditor's only recourse for such breach lies in pursuing a general unsecured claim for pre-petition damages,<sup>59</sup> for which the exclusive jurisdiction lies in the bankruptcy court—notwithstanding any arrangements to the contrary that either the parties or nonbankruptcy law has made.<sup>60</sup>

The duty to bargain under the NLRA and the treatment of executory contracts under the Bankruptcy Code co-exist in perfect harmony until the employer becomes a debtor-in-possession who seeks to benefit the estate by rejecting his

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contracts and to such other parties in interest as the court may designate.

HAGGARD & PULLIAM, *supra* note 3, at 16-17 (citing Chandler Bankruptcy Amendments Act of 1938, Ch. 575, 52 Stat. 840, § 313(1), 11 U.S.C. § 713(1) (repealed 1978) [hereinafter Chandler Act]). Section 313(1) governed all bankruptcies filed prior to October 1, 1979, the effective date of the Bankruptcy Code now in force. *Id.* at 16 & n.49. The Chandler Act restated the authority to reject executory contracts provided in the old Bankruptcy Act and pre-1938 amendments to it. *Id.* at 16 & n.48 (citing Bankruptcy Act of July 1, 1898, Ch. 541, 30 Stat. 544, *codified as amended* at 11 U.S.C. §§ 1-1200 (repealed 1978)). For a summary of this history, *see id.* at 16.

53. Although the term "executory contract" was defined in neither the Bankruptcy Act nor the Bankruptcy Code, it has been generally understood to include contracts on which performance remains due to some extent on both sides. *See Vern Countryman, Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

54. *Id.*

55. *See, e.g., Group of Inst'l Investors v. Chicago, Milwaukee, St. Paul & Pac. R.R.*, 318 U.S. 523, 550 (1943).

56. *See, e.g., In re Lafayette Radio Elec. Corp.*, 8 B.R. 528, 533 (Bankr. E.D. N.Y. 1981).

57. Bankruptcy Code, § 365(g)(1), 11 U.S.C. § 365(g)(1) (1988).

58. *NLRB v. Bildisco*, 465 U.S. 513, 532 (1984).

59. Bankruptcy Code, § 502(c), 11 U.S.C. § 502(c) 1988 (providing for estimation of claims).

60. The proper priority of workers' claims in bankruptcy only recently has received significant attention. *See, e.g., Daniel Keating, The Fruits of Labor: Worker Priorities in Bankruptcy*, 35 ARIZ. L. REV. 905 (1993). *See* Bankruptcy Code § 362(a), 11 U.S.C. § 362(a) (1988) (providing for automatic stay).

unexpired collective bargaining agreement.<sup>61</sup> Then the pressure points appear: is a collective bargaining agreement an executory contract capable of rejection under section 365(a)?<sup>62</sup> If so, does the business judgment test set the standard for rejection, or does national labor policy require a higher one?<sup>63</sup> In either case, does rejection (or an attempt to reject) constitute an unfair labor practice under section 8(a)(5)?<sup>64</sup> And finally, who has jurisdiction to decide these questions—the NLRB, the bankruptcy court, or neither?

Remarkably, even though Congress codified both of the relevant labor and bankruptcy law provisions during the mid-1930's,<sup>65</sup> these pressure points did not appear, and therefore were not widely discussed, for the better part of the next forty years.<sup>66</sup> The development of the law governing the intersection of the duty to bargain under the NLRA and the treatment of collective bargaining agreements as executory contracts in reorganization proceedings may be divided into roughly three periods: inactivity (1935-1975), activity (1975-1984), and reform (1984-present).

### 1. *Inactivity: 1935-1975*

The Wagner Act, which established collective bargaining as the cornerstone of our national labor policy, became law in 1935.<sup>67</sup> The Chandler Act, which included among its amendments to the old Bankruptcy Act of 1898 a recodification of

61. See HAGGARD & PULLIAM, *supra* note 3, at 68.

62. See *infra* text accompanying notes 69-171.

63. See *infra* text accompanying notes 69-171.

64. See *infra* text accompanying notes 69-171.

65. Section 8(5) of the Wagner Act, which first imposed the duty to bargain, was enacted in 1935. National Labor Relations (Wagner) Act, ch. 372, § 8(5), 49 Stat. 449, 452-53 (1935), *codified as amended at* 29 U.S.C. § 158(a)(5) (1988). Section 313(1) of the Chandler Act, which recodified the power to reject executory contracts, was enacted in 1938. Chandler Act, § 313(1), 11 U.S.C. § 713(1) (1988). Although § 8(d) of the Taft-Hartley Act, which prohibits mid-term modifications without the union's consent, was not added to the NLRA until 1947, its passage, too, had little immediate effect in demonstrating the potential pressure points between the two statutory schemes.

66. In only one area was Congress explicit about the treatment of collective bargaining agreements in reorganization proceedings: the Act excluded from the rejection power contracts covering railroad employees. See Bankruptcy Act Ch. 774, § 77(n), 49 Stat. 911, 923 (1935), *codified as amended at* 11 U.S.C. § 205(n) (1976) (repealed 1978). This exception has been preserved in the Bankruptcy Code. See Bankruptcy Code, § 1167, 11 U.S.C. § 1167 (1988).

67. Wagner Act, *supra* note 65, §§ 151-169. See also HAGGARD & PULLIAM, *supra* note 3, at 12 n.26.

the trustee's power to reject executory contracts, became law in 1938.<sup>68</sup> Although the New Deal Congress passed both measures in the space of three years, neither law made any reference to the other, much less addressed the pressure points raised above. As far as anyone can tell, the legislative history did not address these potential conflicts, either.<sup>69</sup>

For a while it did not matter, for no reported decision involving rejection of a collective bargaining agreement appeared until 1945.<sup>70</sup> Even then, the trustee's power to reject the contract, exercised under Chapter X of the old Act, was not questioned.<sup>71</sup> Instead, the district court was mainly concerned with the proper treatment of severance pay claims arising in a proceeding where the trustee had explicitly failed to accept or reject the contract in a timely manner.<sup>72</sup>

In fact, no reported decision squarely addressed the pressure points between the two statutory schemes until 1959. In *In re Klaber Brothers, Inc.*,<sup>73</sup> the employer had filed for reorganization under Chapter XI of the old Act.<sup>74</sup> As part of its reorganization, and pursuant to section 313(1) of the old Act, the trustee sought to reject an unexpired collective bargaining agreement.<sup>75</sup> The referee ruled that the contract was "a burden on the estate" and summarily granted rejection.<sup>76</sup> On appeal to the district court, the union made three arguments: (1) the NLRA pre-empted section 713(1); (2) the NLRB had

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68. Chandler Act, *supra* note 53, §§ 1-1103 (repealed 1978). *See also* HAGGARD & PULLIAM, *supra* note 3, at 11 n.18.

69. For a summary, see HAGGARD & PULLIAM, *supra* note 3, at 24-48.

70. *See In re Public Ledger, Inc.*, 63 F. Supp. 1008 (E.D. Pa. 1945), *rev'd in part on other grounds*, 161 F.2d 762 (3d Cir. 1947). Dicta in at least two other early cases reaffirmed that settled bankruptcy law principles apply to proceedings involving debtors party to collective bargaining agreements. *See, e.g.*, *NLRB v. Baldwin Locomotive Works*, 128 F.2d 39, 43 (3d Cir. 1942) (holding debtor-employers are responsible for unfair labor practices occurring during reorganizations); *In re Mamie Conti Gowns, Inc.*, 12 F. Supp. 478, 480 (S.D.N.Y. 1935) (holding rejection is to be denied where debtor-employer's motivation in filing petition is simply to avoid improvident contract).

71. *See Public Ledger*, 63 F. Supp. at 1008.

72. *Id.* at 1013 ("The instant case demonstrates the difficulties which are likely to arise when Trustees in bankruptcy fail to expressly adopt or reject executory contracts as expediently as possible.")

73. 173 F. Supp. 83 (S.D.N.Y. 1959).

74. *Id.*

75. *Id.*

76. *Id.* at 85.

exclusive jurisdiction over rejections of such contracts in bankruptcy; and (3) the referee abused his authority.<sup>77</sup>

The district court rejected all three arguments.<sup>78</sup> As to pre-emption, it quoted with approval from the decision of the referee, who ruled:

"The Bankruptcy Act makes no distinction among classes of executory contracts. The power to permit rejection of an executory contract should be exercised where rejection is to the advantage of the estate . . ." I likewise conclude that there should be no differentiation in the treatment of executory employment or collective bargaining contracts as to termination under the circumstances of this case.<sup>79</sup>

As to the argument that the NLRB had exclusive jurisdiction, the district court was equally conclusory. It characterized as "immaterial" the union's filing unfair labor practice charges for unilateral rejection and refusal to bargain,<sup>80</sup> noting, "[t]he National Labor Relations Board, in my opinion, has no jurisdiction here to interfere with the rejection of an executory contract . . . It is not attempting to do so."<sup>81</sup>

Finally, as to the argument that the referee abused his authority, the district court acknowledged the testimony of a union witness, who had recognized the burden the contract placed on the estate and offered the employer certain concessions.<sup>82</sup> But citing Collier's bankruptcy treatise for the proposition that an executory contract cannot be accepted or rejected piecemeal,<sup>83</sup> the district court concluded that the referee's grant of rejection was "fully justified."<sup>84</sup>

Another six years passed before the next key decision. In *In re Overseas National Airways, Inc.*,<sup>85</sup> the referee had permitted the debtor, a commercial air carrier operating under the old Chapter XI, to reject two collective bargaining agreements under section 313(1) because they were "onerous and burdensome."<sup>86</sup> The district court reversed.<sup>87</sup> Section 77(n)<sup>88</sup>

77. *Id.* at 84-85.

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

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

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

84. *Id.* at 85.

85. 238 F. Supp. 359 (E.D.N.Y. 1965).

86. *Id.* at 359.

of the Act exempted from rejection under section 313(1) contracts entered into by carriers operating under the Railway Labor Act (RLA),<sup>89</sup> which governed then, as it does now, collective bargaining in both the air and rail transportation industries.<sup>90</sup> The district court ruled that under section 77(n), a debtor was prohibited from making mid-term modifications in any collective bargaining agreement, no matter how "onerous and burdensome," except in accordance with the elaborate procedures for negotiation, mediation, and arbitration prescribed by section 6 of the RLA.<sup>91</sup> *Klaber Brothers*<sup>92</sup> was distinguished as involving a contract governed by the NLRA, for which the Bankruptcy Act provided no exemption.<sup>93</sup> Section 77(n),<sup>94</sup> together with section 1167,<sup>95</sup> its successor under the Bankruptcy Code, was Congress' only pre-section 1113 rule providing explicitly for special treatment of collective bargaining agreements in bankruptcy.

What made *Overseas National Airways*<sup>96</sup> an important case was not its narrow holding—for attempts to reject labor contracts have been rare in both the railway and, until the

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87. *Id.* at 362.

88. "No judge or trustee acting under this title shall change the wages or working conditions of railroad employees except in the manner prescribed in The Railway Labor Act." Bankruptcy Act, § 77(n), 11 U.S.C. § 205(n) (1976) (repealed 1978).

89. 45 U.S.C. §§ 151-164 (1988).

90. *Id.*

91. *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359, 359-61 (E.D.N.Y. 1965). See also Railroad Labor Act § 6, 45 U.S.C. § 156 (1988) (setting forth procedures).

92. 173 F. Supp. 83 (S.D.N.Y. 1959).

93. *Overseas Nat'l Airways*, 238 F. Supp. at 360-61.

94. Bankruptcy Act, Ch. 774, § 77(n), 49 Stat. 911, 923 (1935), codified as amended at 11 U.S.C. § 205(n) (1976) (repealed 1978).

95. Bankruptcy Code, § 1167, 11 U.S.C. § 1167 (1988). Although it is undisputed that § 1167 exempts from rejection labor contracts with rail carriers, it is an unresolved question whether the same is true of labor contracts with air carriers. Most courts confronted with the question have held § 1167 does not exempt such contracts. See, e.g., *In re Air Fla. Sys., Inc.*, 48 B.R. 440, 443 (Bankr. S.D. Fla. 1985); *In re Braniff Airways, Inc.*, 25 B.R. 216, 217 (Bankr. N.D. Tex. 1982); accord *In re Funding Sys. Railcars, Inc.*, 15 B.R. 611, 616 (Bankr. N.D. Ill. 1981) ("[Section] 1168 [like section 1167] is applicable only to cases proceeding under Subchapter IV of Chapter 11," i.e., those cases concerning a railroad.). But see *In re Michigan Interstate Ry. Co., Inc.*, 34 B.R. 220, 227 (Bankr. E.D. Mich. 1983). At least one commentator agrees with the majority. See, e.g., James J. McDonald, Jr., *Bankruptcy Reorganization: Labor Considerations for the Debtor-Employer*, 11 EMPLOYEE REL. L.J. 7, 30 (1985).

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

early 1980's, airline industries<sup>97</sup>—but rather its dicta. Without citing authority,<sup>98</sup> the district court stated that a bankruptcy court, when it does have the power to reject a collective bargaining agreement,

should do so *only after thorough scrutiny, and a careful balancing of the equities on both sides*, for, in relieving a debtor from its [contractual] obligations . . . it may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of the forming the basis of a provable claim for money damages. That would leave the employees without compensation for their losses, at the same time enabling the debtor, at the expense of the employees, to consummate what may be a more favorable plan of arrangement with its other creditors.<sup>99</sup>

The district court's "thorough scrutiny, and a careful balancing of the equities"<sup>100</sup> dictum marked the first published departure from the "business judgment" rule for evaluating an application to reject a collective bargaining agreement in bankruptcy. Of course, since the enactment of the Code in 1978, the difficulty of proving actual damages is no longer a legal obstacle to the claims of employees under a rejected collective bargaining agreement; the bankruptcy court must estimate them anyway.<sup>101</sup> But this was not true under the Act, and the district court's dictum may have been born of genuine concern for the fate of the employees' claims under then-existing law. Or, as at least one pair of commentators has suggested, it may have been nothing more than a barb directed at "the learned Referee."<sup>102</sup> In any event, the district court offered no explanation for what appeared to be a new test.

97. See, e.g., *In re Continental Airlines*, 38 B.R. 67 (Bankr. S.D. Texas 1984); *In re Braniff Airlines, Inc.*, 25 B.R. 216 (Bankr. N.D. 1982).

98. Before offering a new test for rejection, the district court, also in dicta, reviewed the evidence and declared clearly erroneous the referee's finding that the contract was "onerous and burdensome." *Overseas Nat'l Airways*, 238 F. Supp. at 361. The district court then dismissed the union's argument that the contract was not "executory," and therefore, the contract was not rejectable. *Id.*

99. *Id.* at 361-62 (emphasis added).

100. *Id.*

101. Compare Chandler Act, 11 U.S.C. § 713(1) (repealed 1978), § 57d (permitting disallowance of claim if too difficult to estimate) with 11 U.S.C. § 502(c) (1982) (requiring estimation of "any" contingent or unliquidated claim). See also, e.g., *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 530 n.12 (1984).

102. HAGGARD & PULLIAM, *supra* note 3, at 28 (quoting *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359 (E.D.N.Y. 1965)).



The last significant decision of the inactivity period was issued in 1968. In *Carpenters Local Union No. 2746 v. Turney Wood Products, Inc.*,<sup>103</sup> the employer, involved in a "straight" bankruptcy proceeding for liquidation under section 70b<sup>104</sup> of the Act, sought to reject a collective bargaining agreement whose enforcement outside bankruptcy ordinarily would have been governed by the NLRA.<sup>105</sup> The union responded by bringing an action against the trustee for specific performance on the theory that the NLRA pre-empted the Bankruptcy Act.<sup>106</sup> Meanwhile, the employer filed a voluntary petition in bankruptcy, the trustee resumed operations, and the referee authorized rejection.<sup>107</sup>

The district court saw the principal issue as whether the referee had the power to reject the contract.<sup>108</sup> The answer, the district court held, was yes:

It is clear that to uphold the contention of the Union would imply a conflict between federal legislation in the labor relations field, on the one hand, and the Bankruptcy Act, on the other hand. The Court does not believe that any such conflict exists if the two bodies of legislation are read together and properly construed.

The National Labor Relations Act was adopted in 1935. The Chandler Bankruptcy Act was passed in 1938; . . . The Taft-Hartley Act [amending the NLRA] was adopted in 1947 . . . .

Neither the labor legislation of the Congress nor the Bankruptcy Act contains any language which would generally exclude collective bargaining agreements from the operation of section 70b. Had Congress desired that there be such general exclusion, it surely would have said so.<sup>109</sup>

As the district court noted, the only place in which Congress had "said so" was section 77(n), which exempted labor contracts governed by the RLA—but not the NLRA—from

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103. 289 F. Supp. 143 (W.D. Ark. 1968).

104. Chandler Act, *supra* note 101, § 70b.

105. *See Turney Wood*, 289 F. Supp. at 144.

106. *Id.*

107. *Id.* at 145-46.

108. The proper standard for rejection was not addressed.

109. *Carpenters Local Union No. 2746 v. Turney Wood Prods.*, 289 F. Supp. 143, 148-49 (W.D. Ark. 1968).

the rejection power.<sup>110</sup> Therefore, rejection here was appropriate.<sup>111</sup>

Thus, the groundwork had been laid for future analyses of the pressure points. During most of this early period, bankruptcy courts, and the district courts supervising them, saw no particular need to accommodate any perceived conflicts between labor and bankruptcy law. Outside those industries governed by the RLA, the courts permitted debtors to exercise essentially the same power to reject collective bargaining agreements that they enjoyed regarding other contracts.

## 2. Activity: 1975-1984

In contrast to the handful of pertinent decisions issued during the previous forty years, from 1975 to 1984, the bankruptcy courts, presented with a wave of reorganization petitions by debtor-employers, produced fifty-four reported decisions, in which at least one application to reject a collective bargaining agreement was filed.<sup>112</sup> The floodgates broke with the publication in 1975 of two separate decisions by the Second Circuit: *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*<sup>113</sup> and *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*<sup>114</sup>

In *Kevin Steel*, the employer, a steel fabricator, attempted to cut labor costs by making unilateral changes in its collective bargaining agreement.<sup>115</sup> After the union responded by filing unfair labor practice charges contending that the changes violated the duty to bargain under section 8(a)(5) of the NLRA, the employer filed a petition for reorganization and successfully sought permission to reject the contract under section 313(1) of the Bankruptcy Act.<sup>116</sup>

110. *Id.* at 149.

111. *Id.*

112. See *infra* text accompanying notes 336-345 & app. D.

113. 519 F.2d 698 (2d Cir. 1975), *rev'g* 381 F. Supp. 336 (S.D.N.Y. 1974).

114. 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1975). For a summary of the impact of these two cases, see Stephan E. Becker, Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391 (1981).

115. *Kevin Steel*, 519 F.2d at 700.

116. *Id.*

The two matters proceeded separately.<sup>117</sup> The union appealed the rejection order, and the district court reversed.<sup>118</sup> Notwithstanding section 313(1), the district court ruled that "Congress intended to distinguish collective bargaining agreements as a class from all other contracts," even if the contract, like the one in question, is "burdensome and onerous."<sup>119</sup> Meanwhile, the Board determined that the debtor had committed an unfair labor practice and issued a standard make-whole order setting aside the changes and requiring the employer to bargain.<sup>120</sup> The Board's decision gave little, if any, weight to the orders of either the bankruptcy or district judges.<sup>121</sup>

The debtor appealed the district court's order disallowing rejection,<sup>122</sup> the Board petitioned for enforcement of its order finding an unfair labor practice,<sup>123</sup> and the proceedings were consolidated.<sup>124</sup> Writing for the Second Circuit, Judge Wilfred Feinberg framed the issue dramatically: "This case squarely presents to an appellate court, apparently for the first time, the question whether section 313(1) of the Bankruptcy Act allows rejection of a collective bargaining agreement as an executory contract. We conclude that the answer is yes . . . ."<sup>125</sup>

But the Second Circuit's "yes" was not unequivocal, for Judge Feinberg's opinion considered the arguments of the parties at length.<sup>126</sup> In fact, the appellate court actually considered two questions: *whether* collective bargaining agreements may be rejected, and if so, *when* they may be rejected.<sup>127</sup>

The union and the Board argued that the NLRA and the Bankruptcy Act were in conflict and could be reconciled only

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117. *Id.* at 701.

118. *Id.*

119. *In re Kevin Steel Prods., Inc.*, 381 F. Supp. 336, 338 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 698 (2d Cir. 1975).

120. *Kevin Steel Prods., Inc.*, 209 N.L.R.B. 493, 499-500 (1974).

121. *Id.*

122. *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698, 701 (2d Cir. 1975), *rev'g* 381 F. Supp. 336 (S.D.N.Y. 1974).

123. *Id.*

124. *Id.*

125. *Id.* at 700.

126. *See id.* at 701-06. *See also* HAGGARD & PULLIAM, *supra* note 3, at 30.

127. *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698, 706 (2d Cir. 1975), *rev'g* 381 F. Supp. 336 (S.D.N.Y. 1974).

by restricting the rejection power of section 313(1);<sup>128</sup> that the lower court authorities, including among others *Klaber Brothers*, *Overseas National Airways*, and *Turney Wood Products*, were “few,” “not controlling,” or “wrongly decided;”<sup>129</sup> and that Congress had recognized the special status of collective bargaining agreements by enacting section 77(n).<sup>130</sup> The debtor argued that the plain language of section 313(1) was broad and admitted of no explicit exceptions,<sup>131</sup> that the lower court authorities were unanimous and correctly decided,<sup>132</sup> and that section 77(n) supported rather than undermined the debtor’s position by explicitly granting favorable status to labor contracts governed by the RLA while implicitly denying the same to those governed by the NLRA.<sup>133</sup>

As to the question of whether the collective bargaining agreements may be rejected, the Second Circuit acknowledged that “the debtor has the better of it in these volleys back and forth” and held that section 313(1) plainly permitted the rejection of collective bargaining agreements.<sup>134</sup> The appellate court suggested that support for so holding lay in what soon became known as the “new entity” theory:<sup>135</sup> because the act of filing a petition for reorganization transforms the pre-petition debtor into a post-petition debtor-in-possession—with all the attendant rights and obligations of bankruptcy law—the employer becomes a “new entity” for purposes of determining its continuing contractual obligations, if any, under labor law.<sup>136</sup> By analogy to decisions interpreting section 8(d) of the NLRA,<sup>137</sup> the Second Circuit suggested that a debtor-in-possession is permitted to reject the contract because it was never party to the contract in the first

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128. *Id.* at 702.

129. *Id.*

130. *Id.* at 703.

131. *Id.* at 701.

132. *Id.*

133. *Id.* at 702.

134. *Id.* at 703, 706.

135. *Id.* at 704.

136. For an explanation of the “new entity” theory, see HAGGARD & PULLIAM, *supra* note 3, at 35-36.

137. See, e.g., *Howard Johnson Co. v. Hotel Employees & Restaurant Employees Int’l Union*, 417 U.S. 249, 259 & n.5 (1974); *NLRB v. Burns Int’l Security Servs., Inc.*, 406 U.S. 272, 281-91 (1972).

place.<sup>138</sup> At best, the debtor-in-possession may be a "successor employer" having a duty merely to bargain with the union rather than to assume the whole contract.<sup>139</sup>

But as to the question of when collective bargaining agreements may be rejected, the Second Circuit did not agree that the traditional business judgment test governed rejection.<sup>140</sup> Citing *Overseas National Airways*<sup>141</sup> rather than any statutory or doctrinal authority, the *Kevin Steel* panel held that rejection of a collective bargaining agreement requires "thorough scrutiny, and a careful balancing of the equities on both sides."<sup>142</sup> It warned: "The decision to allow rejection should not be based *solely* on whether it will improve the financial status of the debtor. Such a narrow approach totally ignores the policies of the [NLRA] and makes no attempt to accommodate them."<sup>143</sup> The *Kevin Steel* panel, however, did not define what level of scrutiny would be considered "thorough," which "equities" should be balanced, and which factors, other than financial status, should influence the decision to grant or deny rejection.

In *REA Express*,<sup>144</sup> issued only a month later, a separate panel of the Second Circuit attempted to flesh out the missing details.<sup>145</sup> The employer, a freight carrier whose labor relations were governed by the RLA rather than the NLRA, sought rejection under section 313(1)<sup>146</sup> of a pair of collective bargaining agreements guaranteeing supplemental unemployment benefits and restricting the carrier's power to consolidate its operations.<sup>147</sup> The carrier considered these provisions obstacles to reorganization.<sup>148</sup> The bankruptcy court

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138. *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698, 704 (2d Cir. 1975), *rev'g* 381 F. Supp. 336 (S.D.N.Y. 1974).

139. See Haggard & Pulliam, *supra* note 3, at 35-36.

140. *Kevin Steel*, 519 F.2d at 707.

141. 238 F. Supp. 359 (S.D.N.Y. 1965).

142. *Kevin Steel*, 519 F.2d at 707 (quoting *Overseas Nat'l Airways*, 238 F. Supp. at 359).

143. *Id.* (emphasis added).

144. 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

145. *Id.*

146. 11 U.S.C. § 713(1) (repealed 1978).

147. *REA Express*, 523 F.2d at 166-67.

148. *Id.*

granted rejection, and the district court affirmed.<sup>149</sup> The affected unions appealed.<sup>150</sup>

This time, the Second Circuit seemed more determined to uphold rejection.<sup>151</sup> Writing for the *REA Express* panel, Judge Walter Mansfield had to distinguish *Overseas National Airways*, which had held that section 77(n) forbids any changes in labor contracts in the railway and airline industries except in accordance with the elaborate mediation, negotiation, and arbitration procedures of section 6 of the RLA.<sup>152</sup> He did so by treating section 8(d) of the NLRA as the virtual equivalent of section 6 of the RLA,<sup>153</sup> an unprecedented—and certainly inaccurate—interpretation of the Railway Labor Act.<sup>154</sup> This permitted the RLA to stand in as a representative of all federal labor laws, including the NLRA. Now the *REA Express* panel could resolve the perceived conflict between federal labor law on the one hand and bankruptcy law on the other, by reference to *Kevin Steel*.<sup>155</sup>

Faced with this apparent conflict, in the language and purposes of [section 6 of] the RLA and [section 313(1) of] the Bankruptcy Act, we must give effect to both statutes to the extent that they are not mutually repugnant. In the present case we are persuaded, as we were in *Kevin Steel*, that this can be accomplished by holding that where, *after careful weighing of all the factors and equities involved*, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement

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149. *Brotherhood of Ry., Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164, 167 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

150. *Id.*

151. See HAGGARD & PULLIAM, *supra* note 3, at 33.

152. *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359 (S.D.N.Y. 1965) (citing Bankruptcy Act § 77(n), 11 U.S.C. § 205(n) (repealed 1978) and Railway Labor Act § 6, 45 U.S.C. § 156 (1988)).

153. *REA Express*, 523 F.2d at 168-69.

154. The RLA establishes a distinctive system of industrial relations that has often been misunderstood by lower federal court judges who are more familiar—and therefore, more comfortable—with the NLRA. See generally THE RAILWAY LABOR ACT (Douglas Leslie ed.) (forthcoming 1994). At least one expert on labor and bankruptcy issues believed that section 77(n) made rejection under section 313(1) virtually impossible. See Vern Countryman, *Executory Contracts in Bankruptcy* (pt. 2), 58 MINN. L. REV. 479, 498 (1974) (“[T]he RLA seems also to preclude any interim relief from the onerous collective bargaining contract of a railroad or an airline in bankruptcy proceedings.”).

155. *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698, 704 (2d Cir. 1975), *rev'g* 381 F. Supp. 336 (S.D.N.Y. 1974).

*will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement.*<sup>156</sup>

Of course, the *Kevin Steel* panel did hold that rejection required "thorough scrutiny, and a careful balancing of the equities on both sides."<sup>157</sup> But it never purported to set the standard for rejection at when the contract "will thwart efforts to save a failing carrier in bankruptcy from collapse"<sup>158</sup>—or, for that matter, at any other level. This gloss on *Kevin Steel* was something new.

For good measure, the *REA Express* panel borrowed and elaborated on the "new entity" theory first offered by the *Kevin Steel* panel: "When REA, after going into Chapter XI proceedings, was authorized to operate as the debtor-in-possession, it acted as a new juridical entity. It was not a party to and was not bound by the terms of the collective bargaining agreement entered into by REA as debtor . . . ."<sup>159</sup>

Hence, federal courts presented with applications to reject collective bargaining agreements during reorganization proceedings began to feel the pull of labor law policy. If these courts did not explicitly try to accommodate labor law, at least now they felt compelled to say why. By the time the Supreme Court decided *Bildisco* in February 1984, all three circuits that had considered the matter<sup>160</sup> agreed that collective bargaining agreements could be rejected with the proviso that employers ought to pass a stricter test than business judgment to secure rejection.<sup>161</sup> The Third<sup>162</sup> and Eleventh<sup>163</sup> Circuits, following *Kevin Steel*, required the debtor to

156. *Brotherhood of Ry., Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164, 169 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975) (emphasis added).

157. *Kevin Steel*, 519 F.2d at 707.

158. The *REA Express* panel stated the reason for the standard this way: "Unless the debtor-in-possession is permitted to act promptly, albeit unilaterally, in avoiding onerous employment terms that will prevent it from continuing as a going concern, the enterprise, and with it the employment of its workers, may fail." *REA Express*, 523 F.2d at 170-71.

159. *Id.* at 170.

160. The Ninth Circuit was presented with, but did not reach, the question. *Local Joint Executive Bd. v. Hotel Circle, Inc.*, 613 F.2d 210, 213-14 & n.2 (9th Cir. 1980).

161. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 523-24 (1984).

162. *See NLRB v. Bildisco & Bildisco (In re Bildisco)*, 682 F.2d 72, 81 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

163. *See In re Brada Miller Freight Sys., Inc.*, 702 F.2d 890, 899-900 (11th Cir. 1983).

show that the contract burdened the estate and that the equities balanced in favor of rejection; the Second Circuit, following *REA Express*, required the debtor to show that the reorganization will fail unless rejection were permitted.<sup>164</sup>

The split in the circuits between the “higher-than-business-judgment” standard of *Kevin Steel* and the even higher standard of *REA Express* set the stage for the beginning of the reform period—a period that began with the Supreme Court’s decision in *Bildisco*.<sup>165</sup>

### 3. Reform: 1984-Present

The details of the *Bildisco* story have been recounted elsewhere and need no repetition here.<sup>166</sup> In sum, the debtor, a building supplies distributor, failed to remit pension and benefit contributions and to comply with other obligations under a collective bargaining agreement.<sup>167</sup> The union filed unfair labor practice charges alleging breach of the duty to bargain under section 8(a)(5),<sup>168</sup> and the NLRB issued an order so finding.<sup>169</sup> Meanwhile, the debtor filed a petition for reorganization under Chapter 11.<sup>170</sup> Afterward, he also refused to pay wage increases as they became due under the contract.<sup>171</sup> The debtor sought, and the bankruptcy court granted, rejection, and the district court affirmed.<sup>172</sup>

The Board’s petition for enforcement and the union’s appeal attacking the district court’s grant of rejection were consolidated. After holding that a collective bargaining agreement is an executory contract capable of being rejected under section 365(a) of the Code, the Third Circuit nevertheless declared the business judgment test too lenient a standard by which to measure rejection of such a contract.<sup>173</sup> Instead, the majority embraced the “thorough scrutiny, and a careful bal-

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164. See *Truck Drivers Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 320 (2d Cir. 1976), cert. denied, 439 U.S. 825 (1978).

165. *Bildisco*, 465 U.S. at 513.

166. See *supra* notes 15, 16, & 34.

167. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 517-18 (1984).

168. *Id.* at 518-19.

169. *Bildisco & Bildisco*, N.L.R.B. 1203, 1205-06 (1981).

170. *Bildisco*, 465 U.S. at 517.

171. *Id.* at 518.

172. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 518 (1984).

173. *NLRB v. Bildisco & Bildisco*, 682 F.2d 72, 78, 80 (3d Cir. 1982), *aff'd*, 465 U.S. 513 (1984).



ancing of the equities" standard articulated in *Kevin Steel*,<sup>174</sup> but pointedly dismissed as "illegitimate progeny" the "business-will-fail" standard articulated in *REA Express*.<sup>175</sup> The Third Circuit also adopted the "new entity" theory.<sup>176</sup>

The Supreme Court affirmed the Third Circuit's decision.<sup>177</sup> Speaking through Justice Rehnquist, the Court issued a decision in two parts. First, a unanimous Court<sup>178</sup> agreed that, due to the "special nature" of the collective bargaining agreement under federal law, a "somewhat stricter standard" should govern the bankruptcy court's decision to grant rejection.<sup>179</sup> That standard, the Court held, should be the one expressed in *Kevin Steel*; the stricter standard announced in *REA Express*, it reasoned, was "fundamentally at odds with the policies of flexibility and equity built into Chapter 11."<sup>180</sup> The Court, however, added something new:

Before acting on a petition to modify or reject a collective-bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less.<sup>181</sup>

Thus, the Court agreed, at minimum, that reasonable efforts to negotiate voluntary modifications, and thorough scrutiny together with careful balancing of the equities by the bankruptcy judge, must all precede the grant of rejection.<sup>182</sup>

Second, a closely divided Court ruled that the debtor's resort to self-help—breaching the contract first, and seeking bankruptcy court approval for rejection afterward—did not violate the duty to bargain under section 8(a)(5).<sup>183</sup> Writing now for a majority of five Justices,<sup>184</sup> Justice Rehnquist summarily dismissed the "new entity" theory as a rationale for

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174. *Id.* at 80.

175. *Id.* at 81.

176. *Id.*

177. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 517 (1984).

178. *Id.* at 515, 521-27.

179. *Id.* at 524.

180. *Id.* at 525.

181. *Id.* at 526.

182. *Id.*

183. *Id.* at 527-34.

184. *Id.* at 515, 527-34 (Rehnquist, J., joined by Burger, C.J., Powell, Stevens, & O'Connor, JJ.).

this ruling.<sup>185</sup> He reasoned that enforcement of an NLRB order finding a breach of the duty to bargain “would run directly counter to the express provisions of the Bankruptcy Code and to the Code’s overall effort to give a debtor-in-possession some flexibility and breathing space.”<sup>186</sup> According to the majority,

the practical effect of the enforcement action would be to require adherence to the terms of the collective bargaining agreement. But the filing of the petition in bankruptcy means that the collective-bargaining agreement is no longer immediately enforceable, and may never be enforceable again.<sup>187</sup>

Justice Brennan dissented from this part of the majority opinion.<sup>188</sup> Writing for four Justices,<sup>189</sup> he professed not to understand how the majority could accommodate the “special nature” of the collective bargaining agreement when considering the proper standard for rejection on the one hand, but ignore the same when considering the propriety of unilateral conduct on the other.<sup>190</sup> The majority, Justice Brennan wrote, had decided to subordinate labor law to bankruptcy law when it should have tried to resolve the “unavoidable conflict” between the two statutory schemes by giving some effect to both.<sup>191</sup> “One could as easily, and with as little justification, focus on the policies and provisions of the NLRA alone and conclude that Congress must have intended that section 8(d) remain applicable.”<sup>192</sup>

Justice Brennan also doubted that rejecting the contract before securing bankruptcy court approval was so vital to the debtor’s flexibility in getting reorganized that it trumped the duty to bargain.<sup>193</sup> In most cases, he argued, the affected union, already worried about impending job losses among its

185. *Id.* at 528. “Obviously if the [debtor-in-possession] were a wholly ‘new entity’ it would be unnecessary for the Bankruptcy Code to allow it to reject executory contracts, since it would not be bound by such contracts in the first place.” *Id.* With this, even the four dissenters agreed. *See id.* at 544 (Brennan, J., dissenting).

186. *Id.* at 532.

187. *Id.*

188. *Id.* at 535 (Brennan, J., dissenting).

189. *Id.* (Brennan, J., joined by White, Marshall & Blackmun, JJ., dissenting).

190. *Id.* at 541.

191. *Id.* at 540-41.

192. *NLRB v. Bildisco*, 465 U.S. 513, 541 (Brennan, J., dissenting).

193. *Id.* at 550-51.

membership, would have enough incentive to negotiate such flexibility with the debtor.<sup>194</sup>

Organized labor immediately denounced *Bildisco*.<sup>195</sup> Due to a fortuitous combination of these protests, publicity about the wave of bankruptcy court decisions granting contract rejections during the activity period, and the already pending constitutional crisis in the bankruptcy courts that had been created by the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*,<sup>196</sup> Congress reacted quickly.<sup>197</sup> The result, in what many observers considered to be record time, was the enactment of section 1113 less than five months after *Bildisco*.<sup>198</sup>

### B. Structure of Section 1113

Congress reacted to *Bildisco* by passing a law "creat[ing] an expedited form of collective bargaining with several safeguards designed to insure that employers did not use Chapter 11 as medicine to rid themselves of corporate indigestion."<sup>199</sup> Section 1113 codified, modified, and overruled parts of *Bildisco*.

Section 1113 codified the unanimous portion of the opinion holding that a bankruptcy court considering rejection should apply a more stringent test than business judgment, be persuaded that the debtor has undertaken some effort to negotiate a voluntary settlement, and be convinced that the equities affecting all parties balance in favor of rejection (steps four, six, and nine).<sup>200</sup>

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194. *Id.* at 552.

195. *See supra* note 15 (citing authorities therein).

196. 458 U.S. 50 (1981) (holding subject matter jurisdiction of the bankruptcy courts over certain civil claims, as established by Congress under the Bankruptcy Reform Act of 1978, violated judicial power clause of U.S. CONST. art. III, § 1). The *Marathon Pipe Line* decision set off a congressional scramble to fix the problem, which was not resolved until after *Bildisco*. *See generally* Rosalind Rosenberg, *Bankruptcy and the Collective Bargaining Agreement: A Brief Lesson in the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293, 309-11 (1984).

197. For a summary of the confluence of these events, see generally HAGGARD & PULLIAM, *supra* note 3, at 59 & n.2, 68-71, 73-76 (citing authorities therein).

198. *See supra* text accompanying notes 2-4.

199. *Century Brass Prods., Inc. v. UAW*, 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 947 (1986).

200. *See* 11 U.S.C. § 1113(b)(1)(A), (b)(2), (c)(3) (1988).

Section 1113 also modified the Court's adoption of the *Kevin Steel* standard.<sup>201</sup> Instead, Congress inserted the "necessary" requirement (step three).<sup>202</sup> Congress also modified *Bildisco* by requiring the debtor to submit to the union a proposal (step one) based on information made available to the union (steps two and five),<sup>203</sup> imposing a duty to meet and confer in good faith (steps six and seven),<sup>204</sup> and prohibiting rejection unless the union refused the proposal without good cause (step eight).<sup>205</sup>

Third, section 1113 overruled the five-Justice majority's holding that a debtor could unilaterally reject first and seek bankruptcy approval afterwards.<sup>206</sup> Self-help is now prohibited; rejection is conditioned not only upon satisfying the above requirements,<sup>207</sup> but also upon prior bankruptcy court approval following notice and a hearing.<sup>208</sup>

The structure of section 1113 not only makes it unique among federal labor legislation, but also provides the major analytical tool of this study. Therefore, the statute requires some detailed discussion.

### 1. *The Nine Steps of American Provision*

In *American Provision*,<sup>209</sup> Judge Kressel characterized section 1113 as placing nine separate steps between the debtor and a bankruptcy court order authorizing rejection.<sup>210</sup> The debtor must climb each step in order to prevail.<sup>211</sup>

201. *See id.* § 1113(b)(1)(A).

202. *See id.*

203. *See id.* §§ 1113(b)(1)(A)-(B).

204. *See id.* § 1113(b)(2).

205. *See id.* § 1113(c)(2).

206. *See* Haggard & Pulliam, *supra* note 3 at 80.

207. *See* 11 U.S.C. § 1113(f).

208. *See id.* § 1113(d)(1).

209. 44 B.R. 907 (Bankr. D. Minn. 1984).

210. *Id.* at 909. Judge Kressel was careful, however, to say that § 1113 "is not a masterpiece of draftsmanship." *Id.* Numerous commentators have agreed, and some have proposed extensive reforms. *See, e.g.,* Marc S. Kirschner, et al., *Tossing the Coin Under Section 1113: Heads or Tails, the Union Wins*, 23 SETON HALL L. REV. 1516, 1519 (1993).

211. At least one bankruptcy judge has analogized the collective bargaining process under § 1113 to a "barrier" that must be "scaled" before rejection may be granted. *See In re K & B Mounting, Inc.*, 50 B.R. 460, 464 (Bankr. N.D. Ind. 1985) (citing STANLEY B. BERNSTEIN, *BANKRUPTCY PRACTICE AFTER THE AMENDMENT ACTS OF 1984* 122 (1984)).

(a) *Step One: Proposal*

Section 1113 requires that after filing for Chapter 11, but before filing an application for rejection, the debtor must take the first step toward getting negotiations under way. That step is presenting to the union a proposal outlining modifications to the collective bargaining agreement.<sup>212</sup> Although the statute requires that the proposal meet the requirements set forth below in steps two, three, and four,<sup>213</sup> the first proposal need not necessarily be the one that climbs those steps. If, during the course of negotiations, the debtor makes other proposals, those will also be considered by the bankruptcy court. So long as a satisfactory proposal is made "prior to the hearing," the bankruptcy court may grant rejection.<sup>214</sup>

(b) *Step Two: Complete Information*

The debtor's proposal must be more than an afterthought; it is supposed to be based on the most complete and reliable information available.<sup>215</sup> Litigation focusing on this step has been relatively rare, and the decisions interpreting it are few.<sup>216</sup> Judge Kressel, in *American Provision*, noted the similarity of step two to step five but also explained the key difference: the former instructs that the proposal be based on certain information; the latter requires the debtor to provide such information to the union.<sup>217</sup>

(c) *Step Three: Necessary Modifications*

The "necessary" requirement actually appears twice in the statute. The debtor's proposal must provide for "those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor."<sup>218</sup> As one bankruptcy court stated, "[a] debtor can

212. 11 U.S.C. § 1113(b)(1)(A) (1988).

213. *Id.*

214. *Id.* § 1113(c)(1). See also, e.g., *In re Maxwell Newspapers, Inc.*, 146 B.R. 920, 929 (Bankr. S.D.N.Y.), *aff'd in relevant part*, *New York Typographical Union No. 6 v. Maxwell Newspapers, Inc.*, 149 B.R. 334 (S.D.N.Y.), *aff'd in part and rev'd in part*, 981 F.2d 85 (2d Cir. 1992).

215. 11 U.S.C. § 1113(b)(1)(A) (1988).

216. See, e.g., *In re American Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984).

217. *Id.* at 909 & n.2.

218. 11 U.S.C. § 1113(b)(1)(A) (1988) (emphasis added).

live on water alone for a short time but over the long haul it needs food to sustain itself and retain its vigor."<sup>219</sup>

Exactly what "necessary" means has been the subject of vigorous judicial and academic debate,<sup>220</sup> although the nuances of that debate need not be repeated here. Suffice it to say that the debate actually raises two separate questions.<sup>221</sup> The first question is *necessary for what*: must the proposed modifications ensure the complete rehabilitation of the debtor, merely help the debtor avoid liquidation, or do something in between? Early during Chapter 11 proceedings, when section 1113 applications are filed, it is difficult, if not impossible, to know exactly what will ensure a successful reorganization.

The second question is *how necessary*: must the debtor's proposed modifications be essential to the reorganization, merely helpful, or something in between? This inquiry is complicated by the existence of section 1113(e), which explicitly permits interim modifications to the contract when "essential" to the continuation of the debtor's business.<sup>222</sup> Presumably, if Congress had intended that the application for rejection under section 1113(c) be granted only upon a showing that the proposed changes were "essential," it would have used "essential" therein instead of twice using the word "necessary."

The lower federal courts that have considered these questions are divided between two leading cases: the Third Circuit's 1986 decision in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*<sup>223</sup> and the Second Circuit's 1987 decision in *Truck Drivers Local 807 v. Carey Transportation Co.*<sup>224</sup> The Third Circuit's answer to *necessary for what* is the short-term goal of avoiding liquidation; its answer to *how necessary* is that which is essential to the continuation of the busi-

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219. *In re Royal Composing Room, Inc.*, 62 B.R. 403, 418 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, New York Typographical Union No. 6 v. Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

220. See *supra* note 36.

221. See *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 88 (2d Cir. 1987); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074, 1088 (3d Cir. 1986).

222. 11 U.S.C. § 1113(e) (1988).

223. *Wheeling-Pittsburgh*, 791 F.2d at 1074.

224. *Carey Transp.*, 816 F.2d at 82.

ness.<sup>225</sup> By contrast, the Second Circuit's answer to *necessary for what* is the long-term goal of increasing the chances for successful rehabilitation; its answer to *how necessary* is necessary, but not absolutely minimal.<sup>226</sup> The Tenth Circuit has lined up behind *Carey Transportation*,<sup>227</sup> the other circuits have yet to speak. So far, the Supreme Court has declined to resolve the split.<sup>228</sup>

(d) *Step Four: Fair and Equitable*

The proposed modifications must assure "that all creditors, the debtor, and all affected parties are treated fairly and equitably."<sup>229</sup> The debtor must "spread the burden of saving the company to every constituency while ensuring that all sacrifice to a similar degree."<sup>230</sup> This means that non-union and union employees, labor and management, secured and unsecured creditors, and owners and non-owners must each contribute in some measure to the reorganization.<sup>231</sup> But it does not mean that each constituency's contribution must match every other constituency's contribution dollar-for-dollar.<sup>232</sup> Instead, the focus is on whether the proposal "exact[s] more of an economic tribute from [unionized] employees . . . than from the debtor and from other creditors."<sup>233</sup>

(e) *Step Five: Necessary Information*

The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.<sup>234</sup> This means sharing detailed financial data about the debtor's business that in most circumstances is not required to be dis-

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225. *Wheeling-Pittsburgh*, 791 F.2d at 1074.

226. *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987).

227. *See Sheet Metal Workers' Int'l Ass'n, Local No. 9 v. Mile Hi Metal Sys., Inc.*, 899 F.2d 887 (10th Cir. 1990).

228. *See New York Typographical Union No. 6 v. Royal Composing Room, Inc.*, 848 F.2d 345, 348-49 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

229. 11 U.S.C. § 1113(b)(1)(A) (1988).

230. *Century Brass Prods., Inc. v. UAW*, 795 F.2d 265, 273 (2d Cir. 1986), *cert. denied*, 479 U.S. 947 (1986).

231. *See, e.g., In re Indiana Grocery Co.*, 138 B.R. 40, 48-49 (Bankr. S.D. Ind. 1990); *In re Big Sky Transp. Co.*, 104 B.R. 333, 336-37 (Bankr. D. Mont. 1989).

232. *See In re Walway Co.*, 69 B.R. 967, 974 (Bankr. E.D. Mich. 1987); *In re Allied Delivery Sys. Co.*, 49 B.R. 700, 703 (Bankr. N.D. Ohio 1985).

233. *In re William P. Brogna & Co.*, 64 B.R. 390, 392 (Bankr. E.D. Pa. 1986).

234. 11 U.S.C. § 1113(b)(1)(B) (1988).

closed under the NLRA.<sup>235</sup> Information providing only some indication of the debtor's financial condition is not enough; the debtor must provide "sufficient information to enable [the] union to determine whether the specific concessions sought . . . [are] reasonable or necessary."<sup>236</sup>

(f) *Step Six: Meet and Confer*<sup>237</sup>

During the period between the making of a proposal and the date of the hearing on the application for rejection, the debtor has the duty to meet and confer with the union to attempt to reach a voluntary settlement.<sup>238</sup> This is the "expedited form of collective bargaining"<sup>239</sup> referred to above. The requirement reflects Congress's preference for private solutions over judicially imposed resolutions.<sup>240</sup> As Chief Judge Joseph L. Cosetti of the United States Bankruptcy Court for the Western District of Pennsylvania has stated: "Labor negotiations occur at the bargaining table. Courts clearly do not settle labor disputes by judicial process . . . . At best, a motion to reject the contract is an invitation to bargain."<sup>241</sup>

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235. See *NRLB v. Truitt Mfg. Co.*, 351 U.S. 149, 153 (1956).

236. *In re George Cindrich Gen'l Contracting, Inc.*, 130 B.R. 20, 23 (Bankr. W.D. Pa. 1991).

237. *American Provision* actually states that the "confer" part of this step belongs in step seven along with the good-faith requirement. *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984). But the study moved "confer" to step six along with "meet" because, in the parlance of the duty to bargain familiar to labor attorneys outside Chapter 11, the terms "meet and confer" are so interdependent as to mean little unless they are considered together. See, e.g., NLRA § 8(d), 29 U.S.C. § 158(d) (1988) ("[T]o bargain collectively is the performance of the mutual obligation . . . to meet at reasonable times and confer in good faith . . ."). In any event, the move does not alter the meaning of step seven, for Judge Kressel's focus there was on whether the debtor's bargaining posture was sincere or merely perfunctory. *American Provision*, 44 B.R. at 911.

238. 11 U.S.C. § 1113(b)(2) (1988).

239. See *Century Brass Prods., Inc. v. UAW*, 795 F.2d 265, 272 (2d Cir.), cert. denied, 479 U.S. 947 (1986).

240. See, e.g., *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 373 (Bankr. N.D. Ill. 1990) (opining that the debtor "should continue labor negotiations and business operations as a union employer"); *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 802 (Bankr. W.D. Ky. 1985) (recessing the rejection hearing for further negotiations).

241. Joseph L. Cosetti & Stanley A. Kirshenbaum, *Rejecting Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code—Judicial Precision or Economic Reality?*, 26 DUQ. L. REV. 181, 208 (1987).



(g) *Step Seven: Good Faith*

The debtor must meet and confer with the union regarding the proposal in good faith.<sup>242</sup> Few cases have attempted to clarify what this step means. Most discuss what it does *not* mean.<sup>243</sup> The consensus is that the term does not mean here what it does under section 8(a)(5) of the NLRA: the duty to bargain in good faith to impasse.<sup>244</sup> Congress, according to the consensus, intended "good faith" to be interpreted by the bankruptcy courts "in a nontechnical fashion."<sup>245</sup> The duty is satisfied if the debtor "has seriously attempted to negotiate reasonable modifications in the existing collective bargaining agreement with the union prior to the rejection hearing."<sup>246</sup>

(h) *Step Eight: Good Cause Refusal*

If the debtor's proposal satisfies the foregoing steps, then the bankruptcy court may authorize rejection if the union has refused to accept the proposal without good cause.<sup>247</sup> This is not the same as saying that the union has acted in bad faith. In fact, according to one bankruptcy court,

the Union may often have a principled reason for deciding to reject the debtor's proposal . . . . However, the [bankruptcy] court must review the Union's rejection utilizing an objective standard which narrowly construes the phrase "without good cause" in light of the main purpose of Chapter 11, namely reorganization of financially distressed businesses.<sup>248</sup>

(i) *Step Nine: Balance of Equities*

Finally, the balance of equities must "clearly" favor rejection of the collective bargaining agreement.<sup>249</sup> Much of step

242. 11 U.S.C. § 1113(b)(2) (1988).

243. See *infra* note 244.

244. See, e.g., *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 801 (Bankr. W.D. Ky. 1985); *In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969, 976 (Bankr. W.D. Pa.), *aff'd*, 52 B.R. 997 (W.D. Pa. 1985), *vacated and remanded*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986).

245. *Kentucky Truck Sales*, 52 B.R. at 801.

246. *Id.* See also *In re American Provision Co.*, 44 B.R. 907, 911 (Bankr. D. Minn. 1984) (debtor's participation in only one meeting is "perfunctory," and therefore not in good faith).

247. 11 U.S.C. § 1113(c)(2) (1993).

248. *In re Salt Creek Freightways, Inc. (Salt Creek II)*, 47 B.R. 835, 840 (Bankr. D. Wyo. 1985).

249. 11 U.S.C. § 1113(c)(3) (1988).

nine duplicates the ground covered by step four.<sup>250</sup> Citing *Bildisco*, bankruptcy courts have construed this requirement to mean not a "freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization."<sup>251</sup> Such equities include the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of creditors' claims, the hardship rejection would work upon employees, and the hardships faced by other affected parties.<sup>252</sup>

## 2. *How the Nine Steps Make Section 1113 Unique*

The nine steps to rejection of *American Provision* make section 1113 a unique, if not revolutionary, piece of labor legislation<sup>253</sup> in three respects. First, the statute stirs an unprecedented admixture of substantive as well as procedural elements into the bargaining process. Steps three, four, eight, and nine each require the debtor to establish, to the satisfaction of a federal bankruptcy judge, that his proposal has merit.<sup>254</sup> These steps make section 1113 the only federal labor law governing the private sector that allows the government to decide whether the debtor's bargaining proposals are good enough to be adopted by the union. For example, in step three, rejection is conditioned on the debtor's establishing to the satisfaction of a bankruptcy judge that his proposed changes are "necessary" to permit the debtor's reorganization.<sup>255</sup> By contrast, under the NLRA, the government is never allowed to pass upon the merits of the employer's proposals, or to state whether the union is justified in refusing them.<sup>256</sup> Under limited circumstances, the NLRB may

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250. *Id.* § 1113(b)(1)(A).

251. *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 805 (Bankr. W.D. Ky. 1985) (quoting with approval *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 527 (1984)).

252. *Id.* at 806; accord *In re Maxwell Newspapers, Inc.*, 146 B.R. 920, 933 (Bankr. S.D.N.Y.), *aff'd in relevant part*, *New York Typographical Union No. 6 v. Maxwell Newspapers, Inc.*, 149 B.R. 334 (S.D.N.Y.), *aff'd in relevant part*, 981 F.2d 85 (2d Cir. 1992); *In re Sierra Steel Corp.*, 88 B.R. 337, 341-43 (Bankr. D. Colo. 1988).

253. Section 1113 is federal labor law, even though it amends the Bankruptcy Code rather than the NLRA.

254. See *supra* text accompanying notes 218-233, 247-252.

255. 11 U.S.C. § 1113(b)(1)(A) (1988).

256. NLRA § 8(d), 29 U.S.C. § 158(d) (1988) ("[The] obligation [to bargain collectively] does not compel either party to agree to a proposal or require the

supervise the *process*, but not the *product*, of collective bargaining.<sup>257</sup>

Second, the statute redefines the once-settled meaning of the employer's duty to bargain. Although steps one, two, five, six, and seven certainly impose a duty to bargain with language borrowed from the traditional law of collective bargaining procedure,<sup>258</sup> the virtually identical terms in the Bankruptcy Code do not mean what they do in the NLRA.<sup>259</sup> The section 1113 duty to bargain is narrow and truncated. Under section 1113, once the debtor-employer's application to reject has been filed, bargaining must take place within a brief, statutorily defined period of time, whose length and duration is controlled primarily by the employer.<sup>260</sup> If the time expires

making of a concession." See also, e.g., *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 107 (1970); *NLRB v. Katz*, 369 U.S. 736, 747 (1962).

257. One proponent of the original Wagner Act expressed the limits of the law in this manner:

When employees have chosen their organization, when they have elected their representatives, all the bill proposes to do is to escort them to the door of the employer and say, "Here they are, the legal representatives of your employees." What happens behind that door is not inquired into, and the bill does not seek to inquire into it.

79 CONG. REC. 7660 (1935) (statement of Sen. Walsh). But see Archibald Cox & John T. Dunlop, *Regulation of Collective Bargaining by the National Labor Relations Board*, 63 HARV. L. REV. 389 (1950) (discussing how Board developed the law of mandatory bargaining subjects, which law calls for a measure of inquiry into what goes on behind "that door").

258. Compare, e.g., NLRA § 8(d), 29 U.S.C. § 158(d) (1988) ("[T]o bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith . . .") with Bankruptcy Code § 1113(b)(2), 11 U.S.C. § 1113(b)(2) (1988) ("[T]he trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications . . .").

259. The legislative history seems to support this interpretation. See, e.g., 130 CONG. REC. S8888 (daily ed. June 29, 1984) (remarks of Sen. Thurmond) ("[The bargaining requirement] is obviously not intended to import traditional labor law concepts into a bankruptcy forum or to turn bankruptcy courts into a version of the National Labor Relations Board."). In any event, the few courts that have considered the matter agree. See, e.g., *Century Brass Prods., Inc. v. UAW*, 795 F.2d 265, 273 (2d Cir.), cert. denied, 479 U.S. 949 (1986). So have commentators. See, e.g., Richard H. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325, 329 (1984). But see Keating, *supra* note 36, at 548 (claiming rule under NLRA requiring notice and bargaining is "fairly similar" to the standard under § 1113).

260. Upon the filing of an application for rejection under § 1113(c), the bankruptcy court is required to schedule a hearing not later than 14 days after the filing date. Bankruptcy Code § 1113(d)(1). All interested parties, including the union, may appear and be heard. *Id.* Adequate notice must be provided to

before the union is satisfied with the product of negotiations, the debtor may be permitted to implement his proposal anyway—even if impasse, the traditional point at which the duty to bargain is suspended under the NLRA, has not yet been reached.<sup>261</sup> By contrast, the NLRA neither gives the employer such control nor imposes firm limits on the duration of negotiations.<sup>262</sup>

Finally, section 1113 transfers responsibility for regulating collective bargaining, at least between Chapter 11 employers and their unions, from a forum of experts in labor relations (the NLRB) to a forum of nonexperts (the federal bankruptcy courts).<sup>263</sup> Thus the statute, following *Bildisco*, has effectively codified the elimination of a whole class of cases over which the NLRB reserved its exclusive unfair labor practice jurisdiction for nearly fifty years.<sup>264</sup>

These unique aspects of section 1113 are bound to affect collective bargaining during Chapter 11 proceedings. This article describes why this is occurring.

### III. THE METHODOLOGY

#### A. *Some Thoughts About Empiricism and Legal Scholarship*

The goal of the following study was to collect answers to a series of simple questions: How do collective bargaining agreements actually fare when presented to bankruptcy judges for rejection under section 1113? Are contracts usually rejected or not? Are they rejected more often today than

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these parties at least 10 days before the hearing. *Id.* The bankruptcy court may extend the time for commencing the hearing for a period not to exceed 7 days when justice so requires, or for a longer period by mutual agreement of the employer and union. *Id.* A ruling on the application is required within 30 days of the commencement of the hearing, unless the employer and union agree otherwise. *Id.* If the bankruptcy court fails to rule within 30 days or, when applicable, the time mutually agreed to, then the employer may terminate or alter any provisions of the contract pending such ruling. *Id.* § 1113(d)(2). Although the reported decisions show that as many as six months may elapse between the employer's first proposal and the first hearing date, the statute, if adhered to strictly by an employer-debtor, can produce a result in as few as 24 days. *See, e.g., In re United Press Int'l, Inc.*, 134 B.R. 507, 513 (Bankr. S.D.N.Y. 1991).

261. *But see* NLRB v. Katz, 369 U.S. 736, 741-42 (1962); Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967).

262. For a discussion of the law of "impasse," see 1 CHARLES J. MORRIS, *THE DEVELOPING LABOR LAW* 691-99 (3d ed. 1992).

263. *See infra* text accompanying notes 462-466.

264. *See supra* text accompanying note 13.

they were before the statute was enacted? Which, if any, of the statute's nine steps are most important in the bankruptcy judge's decision-making calculus, and how do they affect the likelihood of rejection?

Section 1113 is an ideal vehicle for undertaking a modest empirical study of such questions.<sup>265</sup> There is no problem deciding when to begin the study; it begins with the July 10, 1984 effective date of the statute.<sup>266</sup> There is no problem finding a suitable control group; we have the considerable body of case law relating to pre-section 1113 rejections under section 365(a) of the Bankruptcy Code and section 313(1) of the old Bankruptcy Act.<sup>267</sup> There is no problem identifying a manipulated variable; we have the enactment of section 1113 itself, which, as we have seen, breaks sharply with prior law in its nine-step treatment of executory labor contracts under bankruptcy law and the collective bargaining process under labor law.<sup>268</sup> And finally, there is (or should be) no problem collecting sufficient data; we have almost ten years of bankruptcy court decisions interpreting and applying section 1113 to applications to reject collective bargaining agreements.<sup>269</sup>

Accordingly, this article has left to other commentators any observations and conclusions about section 1113 using the more traditional tools of legal scholarship.<sup>270</sup> Such methods are primarily three: surveying the "major" reported appellate decisions; surveying a handful of interesting, but perhaps non-representative, reported bankruptcy court decisions; and attempting to divine the meaning of various words or phrases in the statute by looking at Congress's "intent." Each of these time-honored methods has a normative element—that is, it assumes there is a "right" answer, result, or interpretation, and that the goal of scholarship is to figure out what such answer, result, or interpretation ought to be.

By contrast, this article tries to take an empirical approach. It assumes that surveys and assays at legislative intent, while having their place, often fail because we need to

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265. For a discussion of empirical scholarship in bankruptcy law, see generally Teresa A. Sullivan, et. al., *The Use of Empirical Data in Formulating Bankruptcy Policy*, 50 J.L. & CONTEMP. PROB. 195 (1987).

266. See *supra* note 2.

267. See *infra* app. D.

268. See *supra* text accompanying notes 253-264.

269. See *infra* apps. B-C.

270. See *supra* text accompanying notes 34-36.

know where we have been before we can decide where we should be going. Statutes do not interpret themselves. They have no life until judges apply them to live controversies. At some point after a statute's enactment, how it was *supposed* to be interpreted, or what the collective conscience of Congress *intended* it to mean, is less relevant than how, in fact, the courts are applying it in actual cases. If we first draw an accurate baseline depicting what bankruptcy judges are actually doing with section 1113 applications, we will then be positioned to criticize their work, and hence, the effectiveness of the statute. That is the object here.

The traditional tools of legal scholarship are particularly inadequate with regard to section 1113. First, like most surveys, the survey literature on section 1113 is based on non-representative data. Try as they may, commentators cannot purport to say what courts *as a group* are doing in an area of law, because the survey method rarely bases its conclusions on either a scientific sample of the universe of relevant cases, or the universe itself. Without this most basic element of rigor, we can have little confidence in making generalized statements about what the cases seem to hold.

Second, the traditional attempt to divine the "intent" of Congress is particularly useless here. Under the best of circumstances, decoding legislative intent is difficult.<sup>271</sup> But it is irrelevant, if not impossible, in the matter of section 1113, which for purposes of this inquiry has no legislative history. The absence of committee reports from either chamber of the legislative branch eliminates the only truly useful divining rod of legislative intent.<sup>272</sup>

Thus, the focus of this study is on what bankruptcy courts are really doing, not what they should be doing. The article reviews *all* reported bankruptcy court decisions on applications to reject collective bargaining agreements under section 1113, with candid acknowledgment of the limits such

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271. Which may explain why, of late, the Supreme Court has focused on the "plain meaning" doctrine when interpreting statutes, at least on a selective basis. See, e.g., Kevin R. Johnson, *Responding to the "Litigation Explosion": The Plain Meaning of Executive Branch Primacy Over Immigration*, 71 N.C. L. REV. 413, 425-31 (1993).

272. See Charnov, *supra* note 21, at 1002. See also *Sheet Metal Workers' Int'l Ass'n, Local No. 9 v. Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 895 (10th Cir. 1990) (Seymour, J., dissenting).

a sample may contain.<sup>273</sup> The hope is that this sample is representative of—if not constitutive of—the universe of decision-making at the ground level of the Chapter 11 process regarding the fate of collective bargaining agreements under section 1113. The more that the data studied reflect the universe of all decisions under section 1113, the more confidence we may have in the answers offered to the questions posed above—and, in turn, our praise or criticism of section 1113.

A cautionary note is in order. Although this article is more empirical than normative, it is not designed to be the definitive scientific statement on section 1113. The tools of the scientific method have their limits everywhere, but especially here as applied by an author who is trained in the social rather than the physical sciences. For that reason, the article relies on some simple calculations that anyone so inclined could perform to measure how the statute is working.<sup>274</sup> Indeed, to those more rigorously trained, these calculations may seem simplistic. Nevertheless, they are an important first step in an effort to study the processes of the law as they actually operate, rather than as how we might believe them to operate.

### B. *How the Study Was Conducted*

The study examined every bankruptcy court decision<sup>275</sup> reported between July 10, 1984 and July 10, 1993 in which the debtor-employer filed an application for relief from the obligations of a collective bargaining agreement under section 1113.<sup>276</sup>

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273. See *infra* text accompanying notes 411-424. Legal scholars too often omit candid discussion of the limits of their empirical work. See, e.g., Christopher D. Cameron, *How the "Language of the Law" Limited the American Labor Movement*, 25 U.C. DAVIS L. REV. 1141, 1150-51 n.43 (1992); Lee E. Teitelbaum, *An Overview of Law and Social Research*, 35 J. LEGAL EDUC. 465, 476-77 (1985).

274. This approach has worked well for other labor-related scholarship. See, e.g., Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1786 (1983).

275. The narrower term "decision," rather than the broader term "case," was used by the study to convey that an employer's § 1113 application was actually presented to and usually ruled upon by the bankruptcy court. Similarly, the broader term "proceeding," rather than the narrower term "case," was used to refer to each petition for reorganization under Chapter 11 filed by a debtor-employer.

276. Decisions involving applications to reject individual employment agreements, agreements between employers and groups of independent contractors, and other employment-related executory contracts, were not analyzed mainly because § 1113 does not apply to such arrangements. See, e.g., *In re Metro*

For purposes of the study, the term "reported," when used in referring to reported bankruptcy court decisions, has two dimensions.<sup>277</sup> First, it includes all section 1113 bankruptcy court decisions published or otherwise made available through the facilities of the Bureau of National Affairs,<sup>278</sup> Commerce Clearing House,<sup>279</sup> Matthew Bender Company,<sup>280</sup> Mead Data Corporation,<sup>281</sup> and West Publishing Company.<sup>282</sup> It was assumed that West's *Bankruptcy Reporter* was the most widely relied-upon reporting service. Consequently, the study examined the version of every decision reported there and used the other services to examine additional decisions not reported by West. Second, "reported" includes all *un*-reported bankruptcy court decisions for which there were related reported appellate decisions (by district courts, bankruptcy appellate panels, and circuit courts of appeal, where applicable) providing significant data about what happened below when the bankruptcy court was presented with a section 1113 application.

During the study period, bankruptcy courts issued forty-six reported decisions in which the debtor filed at least one application to reject under section 1113(c), one application for interim relief under section 1113(e), or both.<sup>283</sup> Of these decisions, thirty-eight considered at least one section 1113(c) application filed by a debtor to reject a collective bargaining agreement.<sup>284</sup> These thirty-eight section 1113(c) decisions

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Transp. Co., 87 B.R. 338, 344 & n.3 (Bankr. E.D. Pa. 1988) (agreements between committee of independent drivers and debtor taxi firm, though executory, were not collective bargaining agreements).

277. Although conducting empirical research based only on reported decisions is somewhat unusual, it is by no means without precedent. See, e.g., WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991) (studying reported decisions on challenges to labor protective legislation and anti-strike and boycott injunctions).

278. Including the Labor Relations Reference Manual and Bankruptcy Court Decisions.

279. Including Labor Cases and Bankruptcy Law Reports.

280. Including Collier's Bankruptcy Cases.

281. Including the computerized service LEXIS.

282. Including the Bankruptcy Reporter and the computerized service WESTLAW.

283. See *infra* apps. B & C.

284. See *infra* app. B. In 20 of the 46 decisions, there was an overlap in which the debtor filed *both* at least one application for interim relief from the collective bargaining agreement under § 1113(e) *and* at least one application for permanent rejection of the contract under § 1113(c). See *infra* note 317 & app. C.



form the crux of the study. Each of the thirty-eight was inventoried for data tending to show not only the fate of the section 1113(c) application, but also the factors that could have influenced the decision.

Each inventory was conducted by at least two researchers,<sup>285</sup> who recorded short answers to twenty-eight separate questions about each decision on an inventory sheet.<sup>286</sup> The questions sought data concerning four areas: (1) general information, (2) information about the nine steps to rejection under *American Provision*, (3) information about bargaining during bankruptcy proceedings, and (4) other information.

### 1. General Information

The study inventoried three types of general information about each decision. First, the study identified the most basic information: the name of the case and its citation; the docket number; the identity of the bankruptcy judge who issued the decision; the particular circuit of the United States Court of Appeals having supervisory jurisdiction over the bankruptcy court; the date that the Chapter 11 petition was filed; and whether a section 1113(c) application had been filed by the debtor.<sup>287</sup>

Next, the study inventoried pertinent data about the various applications to reject that might be filed in a given proceeding: the reported section 1113(c) application; any prior section 1113(c) applications; and any prior or pending section 1113(e) applications for interim relief.<sup>288</sup> For each such application, the filing date, hearing dates, decision date, outcome, and existence or non-existence of opposition to the application were recorded.<sup>289</sup>

Finally, the study inventoried information about the fate of the bankruptcy court's decision on appeal, if any, to the

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285. Each answer on each inventory sheet was recorded after the decision had been carefully reviewed by both the author and at least one research assistant. In most cases, the initial review was by a research assistant, whose work was reviewed for accuracy by the author.

286. For a sample inventory sheet, see *infra* app. A. For the actual data, see Cameron Labor/Bankruptcy Project, First Revised Case Inventory Sheet Nos. 1-38 (Apr.-Aug. 1993) (on file with author).

287. See *infra* app. A (questions 1-7).

288. Although some key data were recorded about applications for interim relief, for the most part § 1113(e) was not the focus of the study. See *infra* text accompanying notes 353-367.

289. See *infra* app. A (questions 8 through 10).

district court, bankruptcy appellate panel, or circuit court of appeals, and miscellaneous issues, including but not limited to the priority treatment of union wage and benefit claims and motions to reject the obligation to pay health and welfare benefits under section 1114.<sup>290</sup>

## 2. American Provision Information

The singular contribution of the case law to the organization of the study is Judge Kressel's opinion in *American Provision*,<sup>291</sup> which characterizes section 1113 as placing nine separate analytical steps between the debtor and a bankruptcy court order approving rejection of the collective bargaining agreement. Most bankruptcy judges now refer specifically to the nine steps of *American Provision* in their reported decisions.<sup>292</sup> Accordingly, the study inventoried every reported section 1113(c) decision by the bankruptcy courts for the relative importance that each of *American Provision's* nine steps seemed to play in the decision-making process.<sup>293</sup>

The object of the study was to measure the decision-making process at the bankruptcy court level; accordingly, appeals to the district court, bankruptcy appellate panel,<sup>294</sup> and circuit courts of appeals were not separately inventoried.

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290. See *id.* (questions 11 and 12). Neither the priority of general union claims, see Bankruptcy Code § 507(a), 11 U.S.C. § 507(a) (1988) nor the treatment of employer obligations to pay pension and welfare benefits during reorganizations, see Retiree Benefits Protection Act of 1988, P.L. 100-224, § 2(a), 102 Stat. 610 (June 16, 1988), codified at 11 U.S.C. § 1114 (1988), were examined in this study.

291. 44 Bankr. 907 (Bankr. D. Minn. 1984).

292. The nine steps of *American Provision* were specifically referred to by the bankruptcy court in 26 of 38 (68.4%) reported decisions. But see *In re Royal Composing Room, Inc.*, 62 Bankr. 403, 406 (Bankr. S.D.N.Y. 1986) ("This court eschews the talismanic nine-step analysis of Bankruptcy Code § 1113 . . ."), *aff'd on other grounds*, 78 Bankr. 671 (S.D.N.Y. 1987), *aff'd*, New York Typographical Union No. 6 v. Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989). Even when the bankruptcy court did not refer specifically to *American Provision*, however, its decision was susceptible to examination in terms of the nine steps. See, e.g., *In re Pierce Terminal Warehouse, Inc.*, 133 Bankr. 639, 646 (Bankr. N.D. Iowa 1991).

293. See *infra* app. B (questions 14 and 15).

294. To date, only two circuits have established bankruptcy appellate panels. See Gordon Bermant & Judy Beckner Sloan, *Bankruptcy Appellate Panels: The Ninth Circuit's Experience*, 21 ARIZ. ST. L.J. 181, 187 (1989), but no such panel has reported an appeal from a ruling on a section 1113(c) application. See app. A. For a discussion of how the Bankruptcy Reform Act of 1978 provides for potentially three separate avenues of appeal, see Judy Beckner Sloan, *Appellate*

This was because, appeals notwithstanding, the bankruptcy judge has the final word on almost every discrete issue ruled upon during a Chapter 11 proceeding, including the section 1113(c) application.<sup>295</sup> Appeals, if any, and their respective impacts on the outcomes were recorded solely for the purpose of indicating whether the bankruptcy judge's ruling survived the appeal.

Each *American Provision* step suggests a discrete factor that could be important in the bankruptcy judge's calculus when deciding whether to grant or deny a section 1113(c) application. Indeed, the collective existence of these steps suggests a certain predictive power. Assume for the moment (Part IV will test this assumption) that some steps are more determinative of the fate of a section 1113(c) application than others—that is, a few of these steps are more likely to trip up the debtor, thereby affecting the decision to grant or deny rejection. Recall also that, should the debtor fail to climb any one of the nine steps, rejection is not to be granted.<sup>296</sup> If these things are true, the likely outcome of any future section 1113(c) application should be foreseeable given advance information about the content of the debtor's proposal and the bargaining history of the parties.

For example, if most of the commentators are correct, then bankruptcy courts consider the "necessary" requirement of step three to be the most important step in any section 1113(c) inquiry.<sup>297</sup> A discrete analysis of whether the debtor's proposal is necessary to permit his reorganization could be expected to provide the strongest single predictor of success or failure for the application as a whole. In other words, if the debtor cannot persuade the bankruptcy judge that his proposal is necessary to permit reorganization, then he might as well pack his litigation bags and go home, because he is going to lose no matter how well he can climb the other steps. Conversely, if the debtor's arguments have the

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*Jurisdiction of Interlocutory Appeals in Bankruptcy* 28 U.S.C. Section 158(d): A Case of *Lapsus Calami*, 40 CATH. U.L. REV. 265, 272-73 (1991).

295. From the 38 decisions studied, only twelve appeals were reported. Of the twelve appeals, only six ultimately produced reversals of the bankruptcy court's decision. In other words, the rate at which bankruptcy judges' decisions on § 1113(c) applications are reversed is 15.8%—but the rate at which their decisions stand, whether appealed or not, is a remarkable 84.2%.

296. See *supra* text accompanying note 211.

297. See *supra* note 36.



the step seemed to play in how the application was contested. On the inventory sheet, this was noted as an inquiry into "contested factors,"<sup>300</sup> because the study recorded the importance of the step as contested by the union and the debtor.<sup>301</sup>

Second, the importance of the step from the bankruptcy judge's point of view was recorded.<sup>302</sup> That is, irrespective of whether and to what degree the parties thought they were fighting over a given step, the study attempted to take the long view and ascertain what the bankruptcy judge actually had considered in deciding the application. On the inventory sheet, this was noted as an inquiry into "overall factors,"<sup>303</sup> because the study recorded the importance of the step from the overall standpoint of the neutral officer assigned to hear the application. Although in some decisions the bankruptcy judge appeared to attach to each step the same degree of importance that the parties did,<sup>304</sup> in others the bankruptcy judge's view differed markedly from those of the parties.<sup>305</sup>

In recording the relative importance of each step, the study was initially unconcerned with whether the bankruptcy court ruled for or against the debtor-applicant. It was assumed that the relationship, if any, between the importance of a given step and the outcome could be analyzed once a baseline describing the relative importance of all steps was established.

### 3. *Information About Bargaining During Bankruptcy*

The study inventoried more specific information about the bankruptcy court's evaluation of both the content and the process of collective bargaining negotiations between the parties at each step in the climb.<sup>306</sup> For each decision, data were

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300. See *infra* app. A (question 15).

301. See, e.g., *In re Sun Glo Coal Co.*, 144 Bankr. 58, 62 (Bankr. E.D. Ky. 1992) (holding that union did not contest employer's showing as to steps one, two, five and six; union raised but did not present evidence regarding step seven; remaining contested steps were three, four, eight and nine).

302. See Memorandum from Chris Cameron to Corey Robins and Laura Kerschenbaum (Apr. 5, 1993) (on file with author).

303. See *infra* app. A (question 15).

304. See, e.g., *In re George Cindrich Gen'l Contracting, Inc.*, 130 Bankr. 20 (Bankr. W.D. Pa. 1991). See also Cameron Labor/Bankruptcy Project, First Revised Case Inventory Sheet No. 16 (Apr. 16, 1993) (on file with author).

305. See, e.g., *In re Valley Kitchens, Inc.*, 52 Bankr. 493 (Bankr. S.D. Ohio 1985). See also Cameron Labor/Bankruptcy Project, First Revised Inventory Sheet No. 2 (Apr. 6, 1993) (on file with author).

306. See *supra* text accompanying notes 209-211.

recorded about the format and number of proposals made by the debtor; the content of proposed modifications to the collective bargaining agreement sought by the debtor; the union's response; the number of meet-and-confer sessions held; the type and quality of information provided by the debtor to the union; the "necessariness" of the debtor's proposal; the bankruptcy court's evaluation of how fairly and equitably the proposal treated the debtor, the union, and other creditors; whether the union had good cause for refusing the proposal; and whether the balance of equities favored rejection.<sup>307</sup>

Of particular interest were data collected about the nature of the bargaining and the "necessariness" of the debtor's proposal. As to the former, the study sought to record the total number of employer-union "meet-and-confer" sessions: of these, the number engaged in before the Chapter 11 filing; the number of days from the date of the debtor's first proposal to the date of the bankruptcy court's first hearing on the section 1113(c) application; whether the debtor had conferred in good faith; and whether the union had refused to meet and confer at all. As to the last, the study sought to record whether the bankruptcy court had defined "necessary" as meaning either *essential* (the standard prevailing in the Third Circuit<sup>308</sup>) or *non-essential* (the standard prevailing in the Second<sup>309</sup> and Tenth<sup>310</sup> Circuits).<sup>311</sup> In either case, the study recorded whether such standard had been satisfied.<sup>312</sup>

In a number of decisions, some or all data about bargaining during the bankruptcy was either not available or not reported by the bankruptcy court in its decision. For those cases, the researcher was instructed to record nothing and instead to leave the inventory sheet blank.

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307. See *infra* app. A (questions 16 through 23).

308. See *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074, 1088-89 (3d Cir. 1986).

309. See *New York Typographical Union No. 6 v. Royal Composing Room, Inc.*, 848 F.2d 345, 350 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Truck Drivers Local 807 v. Carey Transp.*, 816 F.2d 82, 89 (2d Cir. 1987).

310. See *Sheet Metal Workers' Int'l Ass'n, Local 9 v. Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 891 (10th Cir. 1990).

311. For a discussion of the split of authority, see *supra* text accompanying notes 218-228.

312. See *infra* app. A (questions 18 and 20).

#### 4. *Other Information*

The study recorded miscellaneous data about each decision, including the type of industry and craft or class of workers involved; the number of workers affected by the section 1113(c) application;<sup>313</sup> whether a plan of reorganization had been filed, and if so, whether it had been confirmed by the bankruptcy court; whether the application had been settled rather than adjudicated; the identity of counsel for the parties in interest; and the identity of the researchers conducting the inventory and the date thereof.<sup>314</sup>

In many decisions, some or all miscellaneous data was either not available or not reported by the bankruptcy court. It was rare, for example, to find reported information about settlements and confirmed plans of reorganization.<sup>315</sup> This was expected due to the early stage during Chapter 11 proceedings at which section 1113(c) applications are typically filed. For all such decisions, the researcher was instructed to record nothing and instead to leave the inventory sheet blank.

### IV. THE RESULTS

#### A. *General Information*

The study examined forty-six reported bankruptcy court decisions in which a debtor filed at least one section 1113 application: thirty-eight decisions in which complete contract rejection was sought under section 1113(c),<sup>316</sup> and twenty in which interim modification of the contract was sought under section 1113(e).<sup>317</sup>

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313. These data were recorded on the inventory sheet in the space provided for data about the industry and craft or class of workers involved because no separate space had been allocated on the form. See app. A (question 24).

314. See *infra* app. A (questions 24 through 28).

315. See, e.g., *In re Apple Tree Mkt., Inc.*, 155 B.R. 431 (Bankr. S.D. Tex. 1993).

316. See *infra* app. B.

317. See *infra* app. C. There was an overlap of 12 reported decisions in which a bankruptcy court was presented with separate applications for both rejection under § 1113(c) and interim relief under § 1113(e). See, e.g., *In re Maxwell Newspapers, Inc.*, 146 B.R. 920 (Bankr. S.D.N.Y. 1992); *In re Sun Glo Coal Co.*, 144 B.R. 50 (Bankr. E.D. Ky. 1992); *In re Blue Diamond Coal Co. (Blue Diamond I)*, 147 B.R. 720 (Bankr. E.D. Tenn. 1992), *later proceeding, In re Blue Diamond Coal Co. (Blue Diamond II)*, 131 B.R. 633 (Bankr. E.D. Tenn. 1991), *aff'd mem.*, Civ. No. 3-91-0741 (E.D. Tenn. Apr. 20, 1992) *appeal docketed*, No. 92-5747 (6th Cir. 1992); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363 (Bankr. N.D. Ill. 1990); *In re Chas. P. Young Co.*, 111 B.R. 410 (Bankr.

Applications for rejection rather than modification of collective bargaining agreements draw more critical fire,<sup>318</sup> so the study focused on the thirty-eight decisions under section 1113(c). They affected over 10,000 bargaining unit employees in all major industries except agriculture.<sup>319</sup> The fifteen debtor-employers engaged in the service industries, represented here by firms in air transportation, ground transportation, and retail sales, accounted for nearly forty percent of the decisions.<sup>320</sup> By contrast, six construction and five manufacturing debtor-employers accounted for roughly sixteen and thirteen percent of the decisions, respectively.<sup>321</sup> Figure 1 describes the industries studied in detail.

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S.D.N.Y. 1990); *In re Big Sky Transp. Co.*, 104 B.R. 333 (Bankr. D. Mont. 1989); *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847 (Bankr. N.D. Ohio 1987); *In re Royal Composing Room, Inc.*, 62 B.R. 403 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, *New York Typographical Union No. 6 v. Royal Composing Room, Inc.*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *In re Landmark Hotel & Casino, Inc.*, Case No. S-85-01113, slip op. (Bankr. D. Nev. June 9, 1986) (Jones, J.), *aff'd*, *Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. of Las Vegas*, 78 B.R. 575 (Bankr. 9th Cir. 1987), *appeal dismissed*, 872 F.2d 857 (9th Cir. 1989); *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28 (Bankr. E.D. Wis. 1985); *In re Mile Hi Metal Sys., Inc.*, 51 B.R. 509 (Bankr. D. Colo. 1985), *related appeal*, *Sheet Metal Workers' Int'l Ass'n, Local No. 9 v. Mile Hi Metal Sys., Inc.*, 67 B.R. 114 (D. Colo. 1986), *vacated and remanded*, 899 F.2d 887 (10th Cir. 1990); *In re Salt Creek Freightways, Inc. (Salt Creek I)*, 46 B.R. 347 (Bankr. D. Wyo.), *later proceeding*, *In re Salt Creek Freightways, Inc. (Salt Creek II)*, 47 B.R. 835 (Bankr. D. Wyo. 1985).

318. See *supra* note 35 (citing critical commentary).

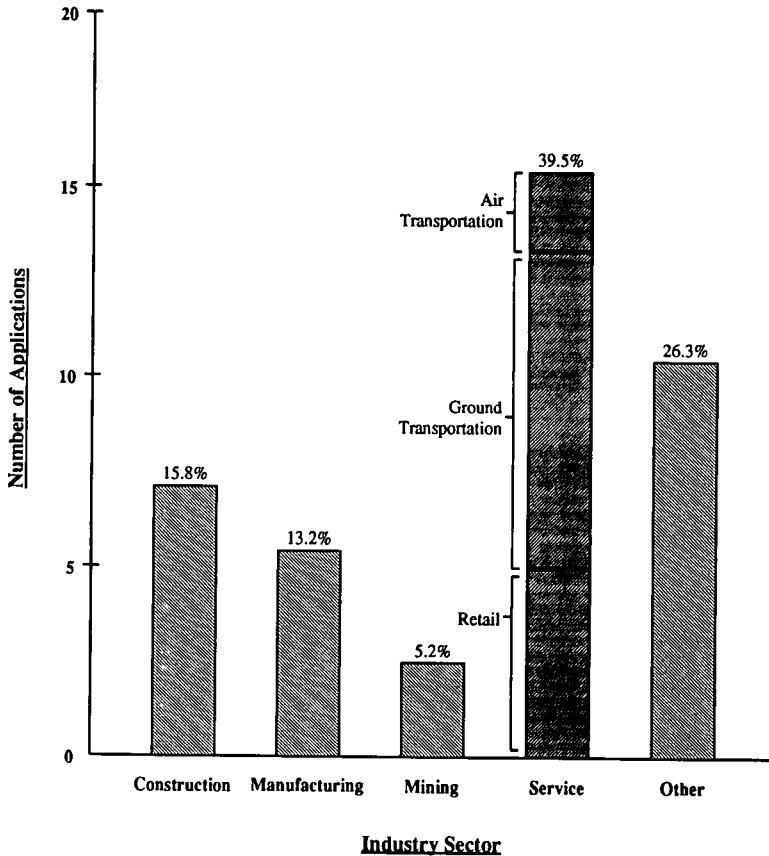
319. Although the actual total number of bargaining unit employees affected by all § 1113(c) applications studied was at least 10,843, this finding must be viewed with caution. First, data about the number of bargaining unit employees affected was available in only half the decisions studied. See Cameron Labor/Bankruptcy Project Inventory Sheet Nos. 3, 4, 8-9, 14, 18, 19-21, 24-25, 28, 30-34, 38 (1993) (on file with author). Second, the tremendous range in the data, even where available, makes it difficult to generalize about the number of affected employees per decision. Compare, e.g., *In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969 (Bankr. W.D. Pa. 1985) (8,500 employees), *aff'd*, 52 B.R. 997 (Bankr. W.D. Pa. 1985), *vacated and remanded*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986), *with*, e.g., *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639 (Bankr. N.D. Iowa 1991) (2 employees).

320. See fig. 1.

321. *Id.*



FIGURE 1  
INDUSTRIES AFFECTED BY REJECTION APPLICATIONS  
1984-1993



Perhaps a better measure of which sector of the economy was most affected by section 1113 is the identity of the international labor organization with which the local union opposing the section 1113(c) motion was affiliated.<sup>322</sup> In at least a dozen decisions—nearly one-third of the total—a local affiliated with the International Brotherhood of Teamsters, America’s union of truck drivers, made an appearance opposing a section 1113(c) application.<sup>323</sup> No other international

322. In most, but not all, organized workplaces an “international” charters local unions representing workers in the same general trade, craft, or class. A chartered “local” is then considered to be affiliated with the international, and thereby agrees to be governed by the constitution and by-laws laid down by the international.

323. See fig. 2.

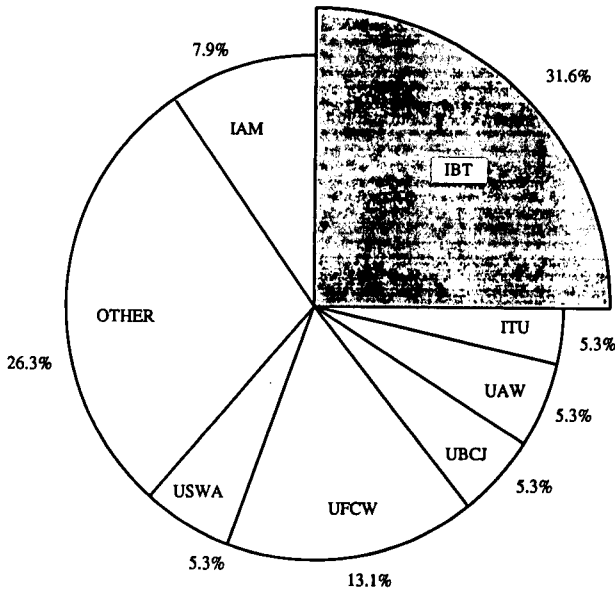
union came close to this number. These decisions occurred mostly in Chapter 11 proceedings filed by interstate ground transportation firms,<sup>324</sup> whose declining fortunes in the years since Congress deregulated the industry in 1978 have coincided closely with the loss of membership in Teamster-affiliated trucking locals during the same period.<sup>325</sup> Figure 2 describes the representation of international labor organizations in more detail.

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324. Nine of the 38 decisions studied—nearly one-fourth—fit this category.

325. See, e.g., Tim W. Ferguson, *Deregulation Delivers the Goods*, WALL ST. J., June 29, 1993, at A15 (Teamsters' truck driver membership "is down to about 5% of total commercial drivers in the U.S. after a loss of at least 100,000 in the 1980's.").

FIGURE 2  
AFFECTED UNIONS BY INTERNATIONAL AFFILIATION  
(PERCENTAGE) 1984-1993



**LEGEND**

- IAM = International Association of Machinists and Aerospace Workers
- IBT = International Brotherhood of Teamsters
- ITU = International Typographers Union
- UAW = International Union, United Automobile, Aerospace, and Agricultural Implement Workers
- UBCJ = United Brotherhood of Carpenters and Joiners
- UFCW = United Food and Commercial Workers International
- USWA = United Steelworkers of America

Close to two-thirds of the decisions were reported by bankruptcy courts in the Second, Sixth, and Seventh Circuits,<sup>326</sup> which may reflect the financial distress suffered by residents of the industrial Midwest and Northeast during the 1980's.<sup>327</sup> By contrast, no section 1113(c) decisions at all were reported by bankruptcy courts in the First, Fourth, or District of Columbia Circuits during the study period. Figure

326. See fig. 3.

327. The busiest bankruptcy courts were in the Northern District of Ohio and the Southern District of New York, each of which reported four decisions on § 1113(c) applications.

3 describes the geographical distribution of the decisions in more detail.

FIGURE 3  
REJECTION DECISIONS BY CIRCUIT AREA  
(NUMBER AND PERCENTAGE) 1984-1993

Judicial Circuit	Number of Decisions	Percentage
1	0	0.0%
2	7	18.4%
3	3	7.9%
4	0	0.0%
5	2	5.3%
6	10	26.3%
7	7	18.4%
8	3	7.9%
9	2	5.3%
10	3	7.9%
11	1	2.6%
DC	0	0.0%

The timing of section 1113(c) decisions seemed to be distributed randomly throughout the study period. Although the thirteen decisions issued in 1985 were more than in any other year,<sup>328</sup> four of them were issued in Chapter 11 proceedings that were originally filed in 1984.<sup>329</sup> Figure 4 describes the timing of these decisions in more detail.

328. See fig. 4.

329. *Id.*

FIGURE 4  
TIMING OF REJECTION APPLICATION DECISIONS BY CHAPTER  
11 AND DECISION DATES 1984-1993

		By Chapter 11 Date									
		5	10	5	3	0	5	1	4	4	1
Year	19	84	85	86	87	88	89	90	91	92	93
		1	13	3	2	4	1	4	4	4	1
		By Decision Date <sup>†</sup>									

<sup>†</sup> = One decision date unknown.

### B. *How the Three Hypotheses Fared*

#### 1. *Hypothesis #1: Fewer Collective Bargaining Agreements Are Rejected Now Than Before Section 1113 Was Enacted*

Hypothesis #1 presented the opportunity to study whether section 1113 is accomplishing organized labor's twin goals of halting unilateral employer modifications of collectively bargained terms and conditions of employment during reorganization proceedings, and reducing the perceived tendency of bankruptcy courts to reject collective bargaining agreements without due regard for national labor policy.

The data confirm the general impression among commentators that applications to reject collective bargaining agreements are granted more often than not.<sup>330</sup> But contrary to what many of them feared,<sup>331</sup> bankruptcy courts are not routinely approving such applications. Although the rejection rate—that is, the rate at which applications under section 1113(c) to reject collective bargaining agreements were granted—was about fifty-eight percent,<sup>332</sup> the denial-of-rejection rate was almost forty percent.<sup>333</sup> In absolute terms, only seven more applications were granted than were denied:

330. See *supra* notes 14, 35.

331. See, e.g., White, *supra* note 15, at 1198.

332. See fig. 5.

333. *Id.*

bankruptcy courts granted twenty-two, denied fifteen, and declined to rule on one.<sup>334</sup>

These figures are more interesting when compared to the fate of union contracts during the pre-section 1113 era.<sup>335</sup> The only significant empirical review of the rejection rate before the enactment of the statute was conducted by Professor James White.<sup>336</sup> Professor White reviewed thirty-three cases<sup>337</sup> reported between January 1, 1975 and mid-1984 in which "proposals"<sup>338</sup> to reject collective bargaining agreements were made. He found that, whereas the employer won an "outright victory" in nearly sixty-seven percent of those cases, the union won in only twenty-four percent.<sup>339</sup> In absolute terms, almost three times as many proposals were granted as were denied: bankruptcy courts granted twenty-two and denied only eight.<sup>340</sup>

By one reckoning, then, it can be estimated that before section 1113, about two-thirds of all requests to reject collective bargaining agreements were granted.<sup>341</sup> Citing these

334. In one decision—accounting for 2.6% of the sample—the bankruptcy court declined to rule on the § 1113(c) application because the collective bargaining agreement had already expired. See *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28 (Bankr. E.D. Wis. 1985). But see *In re Chas. P. Young, Inc.*, 111 B.R. 410 (Bankr. S.D.N.Y. 1990) (ruling on application even though contract had expired).

335. See fig. 5.

336. White, *supra* note 14, at 1184-85 & n.49. But see also Joshua L. Sheinkman, Note, *Rejection of Collective Bargaining Agreements in Chapter 11 and the Probability of Strikes: Tipping the Balance of Equities*, 15 N.Y.U. REV. L. & SOC. CHANGE 513, 524 (1986-1987) (reporting that, between adoption of the Code in 1978 and enactment of § 1113 in 1984, debtor-employers succeeded in obtaining rejection in 22 of 35 cases); *Statements on Rejection of Union Contracts in Bankruptcy Reorganization, 1984*, 1984 DAILY LAB. REP. (BNA) No. 70, at F-9 (Apr. 11, 1984) (statement of Robert T. Thompson, U.S. Chamber of Commerce, reporting that debtors obtained rejection in 19 of 22 cases decided during the period 1982 to 1984).

337. Professor White surveyed the outcome as reported by the highest court—whether bankruptcy, district, or appellate—to rule on the proposal in each case. See White, *supra* note 15, at 1184 n.49.

338. This term was used by Professor White. White, *supra* note 14, at 1184. Although in practice a "proposal" to reject under § 365(a), or old Act § 313(1), probably accomplishes the same purpose as an "application" under § 1113(c), the difference in terminology is noted here to account for possible variations in the samples compared.

339. *Id.*

340. In the remainder, according to Professor White, the employer won some type of victory tempered by remand from an appellate court for additional proceedings. *Id.*

341. See fig. 5.

figures, Professor White characterized the bankruptcy courts' disposal of these requests as "routine."<sup>342</sup> He expressed doubt that the enactment of section 1113 would make a critical difference to federal judges, whom he predicted "will continue routinely to reject collective bargaining agreements."<sup>343</sup>

To confirm Professor White's figures, the study independently reviewed fifty-four reported bankruptcy court decisions in which the debtor filed an least one application to reject a collective bargaining agreement under the executory contract provisions of either section 365(a) of the Bankruptcy Code or its predecessor, section 313(1) of the old Bankruptcy Act, during the years 1975 to 1984.<sup>344</sup> The results were remarkably similar to those obtained by Professor White: the rejection rate was nearly sixty-seven percent, while the denial-of-rejection rate was just under twenty-eight percent. In absolute terms, more than twice as many applications were granted as were denied: bankruptcy courts granted thirty-six, denied fifteen, and declined to rule on three.<sup>345</sup> Figure 5 compares the pre- and post-section 1113 rejection rates in more detail.

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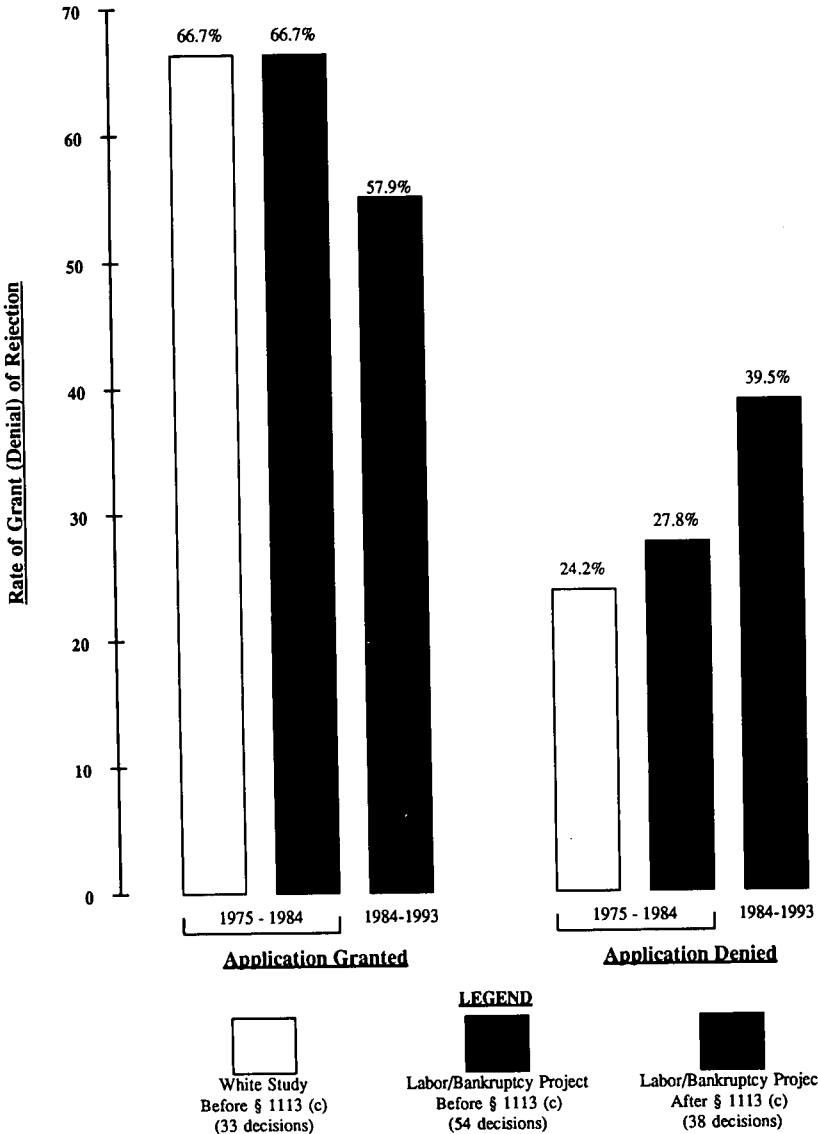
342. White, *supra* note 14, at 1198.

343. *Id.*

344. *See infra* app. D.

345. In three decisions—accounting for 5.5% of the sample—the bankruptcy court declined to rule on the application. *See In re S.A. Mechanical, Inc.*, 51 B.R. 130 (Bankr. D. Ariz. 1985), *aff'd*, 104 Lab. Cas. (CCH) ¶ 11,974 (Bankr. 9th Cir. 1986); *In re St. Croix Hotel Corp.*, 18 B.R. 375 (Bankr. D.V.I. 1982); *In re Hers Apparel Indus.*, Case No. 74-B-831, *mem. order* (Bankr. S.D.N.Y. Oct. 2, 1974), *aff'd*, 88 L.R.R.M. (BNA) 3254 (S.D.N.Y. 1975).

FIGURE 5  
 OUTCOMES OF APPLICATIONS TO REJECT COLLECTIVE  
 BARGAINING AGREEMENTS BEFORE AND AFTER § 1113(c)



In sum, the study shows that the rate of rejection has declined about nine percentage points since the enactment of the statute—from about sixty-seven percent during the period 1975-1984 to about fifty-eight percent during the period



1984-1993.<sup>346</sup> This is a substantial, if not radical, improvement in the prospects for the survival of collective bargaining agreements in Chapter 11.

Three pieces of anecdotal evidence provide further support for the hypothesis. First, in at least seven of the twenty-two decisions granting rejection during the study period, the bankruptcy judge nevertheless expressed sensitivity to the union's position and reluctance to grant rejection absent the parties having undertaken substantial negotiations.<sup>347</sup> In a decision involving the much-publicized reorganization of the New York Daily News, Judge Tina Brozman of the United States Bankruptcy Court for the Southern District of New York wrote:

It is with sorrow that I issue this opinion today. The risk that the Daily News will cease publishing shortly if Local 6's contract is not rejected is extremely high. That will cause all 1,850 employees [including 167 affected bargaining unit employees] to lose their jobs . . . I had hoped that the parties could see the wisdom [of] settling. And I gave them that opportunity twice, once [during] the middle of the trial and then again at its close when I held off ruling until after the weekend had passed. Unfortunately, they remain at impasse.<sup>348</sup>

Similarly, in a decision involving the reorganization of a typographical firm struggling with the same union that fought rejection in the Daily News decision, Judge Prudence B. Abram, a member of the same court as Judge Brozman, wrote:

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346. See fig. 5.

347. See, e.g., *In re Maxwell Newspapers, Inc.*, 146 B.R. 920, 922 (Bankr. S.D.N.Y.), *aff'd in part and rev'd in part*, New York Typographical Union No. 6 v. Maxwell Newspapers, Inc., 149 B.R. 334 (S.D.N.Y.), *aff'd in part and rev'd in part*, 981 F.2d 85 (2d Cir. 1992); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 373-74 (Bankr. N.D. Ill. 1990); *In re Walway Co.*, 69 B.R. 967, 975 (Bankr. E.D. Mich. 1987); *In re Royal Composing Room, Inc.*, 62 B.R. 403, 405 & n.2, 406 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, New York Typographical Union No. 6 v. Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 802, 806 (Bankr. W.D. Ky. 1985); *In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969, 984 (Bankr. W.D. Pa.), *aff'd*, 52 B.R. 997 (W.D. Pa. 1985), *vacated and remanded*, Wheeling-Pittsburgh Steel Corp. v. United Steelworkers, 791 F.2d 1074 (1986); *In re Carey Transp., Inc.*, 50 B.R. 203, 209 (Bankr. S.D.N.Y. 1985), *aff'd*, Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82 (2d Cir. 1987).

348. *Maxwell Newspapers*, 146 B.R. at 922 (Brozman, J.). For a discussion of the *Daily News* litigation, see Kirschner, et al., *supra* note 210, at 1524-33.

The tragedy of this case is that despite the high stakes the Debtor and the Union have been unable to negotiate a solution either before the trial started or thereafter. The Debtor made it clear that it would close its doors if rejection were not permitted because of its inability to obtain necessary modifications from the Union. The Union made it clear that the workers would in all likelihood strike if rejection were permitted, which strike alone could force the Debtor to close permanently. In either case, the jobs of the present 31 Union workers and 40 non-Union workers would be lost, with resulting hardships on themselves and their families and possible losses to creditors, and the shareholders will lose a business to which they have devoted the whole of their working lives. Reasonable people faced with these stakes should have been able to effect a workable compromise.<sup>349</sup>

Second, in at least twelve of the twenty decisions granting rejection, the union rather than the debtor effectively opted out of the collective bargaining process made available by the statute—by resisting the debtor's bargaining overtures, declining to offer at the section 1113(c) hearing any evidence rebutting the debtor's reasons for rejection, or failing even to oppose the section 1113(c) application.<sup>350</sup> Although

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349. *Royal Composing Room*, 62 B.R. at 405 & n.2, 406 (Abrams, J.).

350. See *In re Alabama Symphony Ass'n*, 155 B.R. 556, 576 (Bankr. N.D. Ala. 1993) (union refused to meet following debtor's transmittal of proposal); *In re Valley Steel Prods. Co.*, 142 B.R. 337, 338, 341 (Bankr. E.D. Mo. 1992) (union "ignored" debtor's proposals and never requested additional negotiations or discussions); *In re Blue Diamond Coal Co. (Blue Diamond II)*, 131 B.R. 633, 649 (Bankr. E.D. Tenn. 1991) (union did not employ accountant to review debtor's financial data and was "intransigent" regarding contracting out proposals), *aff'd mem.*, 147 B.R. 720 (Bankr. E.D. Tenn.), *appeal docketed*, No. 92-5747 (6th Cir. 1992); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 373 (Bankr. N.D. Ill. 1990) (all debtor's evidence as to necessity of labor cost reductions and willingness to negotiate was undisputed by union); *In re Texas Sheet Metals, Inc.*, 90 B.R. 260, 270 (Bankr. S.D. Tex. 1988) (despite its numerous requests to negotiate, debtor was successful in obtaining only two meetings with unions); *In re Sierra Steel Corp.*, 88 B.R. 337, 338-39 (Bankr. D. Colo. 1988) (union neither responded to three letters from debtor nor filed opposition to application); *In re Sol-Sieff Produce Co.*, 82 B.R. 787, 794 (Bankr. W.D. Pa. 1988) (union official sent letter refusing to negotiate); *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847, 851 (Bankr. N.D. Ohio 1987) (union offered "no documentary or other evidence to refute" debtor's "necessary" argument); *New York Typographical Union No. 6 v. Royal Composing Room, Inc.*, 848 F.2d 345, 408-409 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (union "stonewalled," thereby causing parties to spend "almost ten times more time in court . . . than in post-petition prehearing negotiations"); *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 802 (Bankr. W.D. Ky. 1985) (union offered no evidence to rebut debtor's showing as to necessity of

the statute imposes a duty to bargain in good faith only on the employer and not on union parties, it is not hard to understand why a bankruptcy judge would incline toward finding in favor of the debtor when a union's intransigence effectively precludes bargaining.<sup>351</sup>

Finally, in at least three of the fifteen decisions *denying* rejection, the bankruptcy court ruled for the union even though it appeared to believe that rejection was the better course.<sup>352</sup> In these decisions, the debtor's failure to comply with Congress' statutory directives, rather than good business judgment, compelled such a result.

The one measure that, at first glance, seems to undermine the hypothesis is the rate at which interim relief from collective bargaining agreements was granted under section 1113(e).<sup>353</sup> The less frequently reported use of section

major reduction in labor costs); *In re Mile Hi Metal Sys., Inc.*, 51 B.R. 509 (Bankr. D. Colo. 1985), *as noted on appeal*, Sheet Metal Workers Int'l Ass'n, Local No. 9 v. Mile Hi Metal Sys., Inc., 899 F.2d 887, 892 n.6 (10th Cir. 1990) (union "stonewalled"); *In re Carey Transp., Inc.*, 50 B.R. 203, 211 (Bankr. S.D.N.Y. 1985) (union "stonewalled" at meetings), *aff'd*, Truck Drivers Local 807 v. Carey Transp., Inc., 816 F.2d 82 (2d Cir. 1987).

351. [This does] not decide the proper consequences of [the union's] refusal to confer in good faith, but clearly some adverse consequence should befall an intransigent party. At the very least, a union's lack of participation should be considered when the court decides whether the union had good cause to reject the proposal, and whether the balance of equities favors rejection of the agreement. Other responses may also be available to the bankruptcy court.

Sheet Metal Workers' Int'l Ass'n, Local No. 9 v. Mile Hi Metal Sys., Inc., 899 F.2d 887, 892 n.6 (10th Cir. 1990) (citations omitted).

352. See *In re GCI, Inc.*, 131 B.R. 685, 697 (Bankr. N.D. Ind. 1991) ("[T]he court's inability to find that the debtor conferred in good faith prevents it from authorizing rejection . . . [even though] the need for modification is real and undisputed."); *In re George Cindrich Gen'l Contracting, Inc.*, 130 B.R. 20, 21 (Bankr. W.D. Pa. 1991) ("Were we granted authority to 'Do Justice, Sir,' then clearly this contract would be temporarily modified."); *accord In re Express Freight Lines, Inc.*, 119 B.R. 1006, 1018 (Bankr. E.D. Wis. 1990) ("The court's finding that the debtor has not met its burden of proof for rejection . . . does not mean that this court is convinced that the debtor can succeed in its reorganization. On the contrary, we are satisfied that it cannot. Therefore, we will order that this case be converted to one under Chapter 7.") *Id.*

353. See *infra* app. C (listing § 1113(e) cases). The full text of § 1113(e) provides:

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 a collective bargaining agreement. Any hearing under this

1113(e) made it somewhat difficult to generalize about trends in applications for interim relief. Nevertheless, during the study period, section 1113(e) applications were granted at the rate of seventy percent and denied at the rate of twenty percent.<sup>354</sup> In absolute terms, three-and-one-half times more applications were granted as were denied: bankruptcy courts granted fourteen, denied four, and declined to rule on two.<sup>355</sup> Figure 6 describes the data in more detail.

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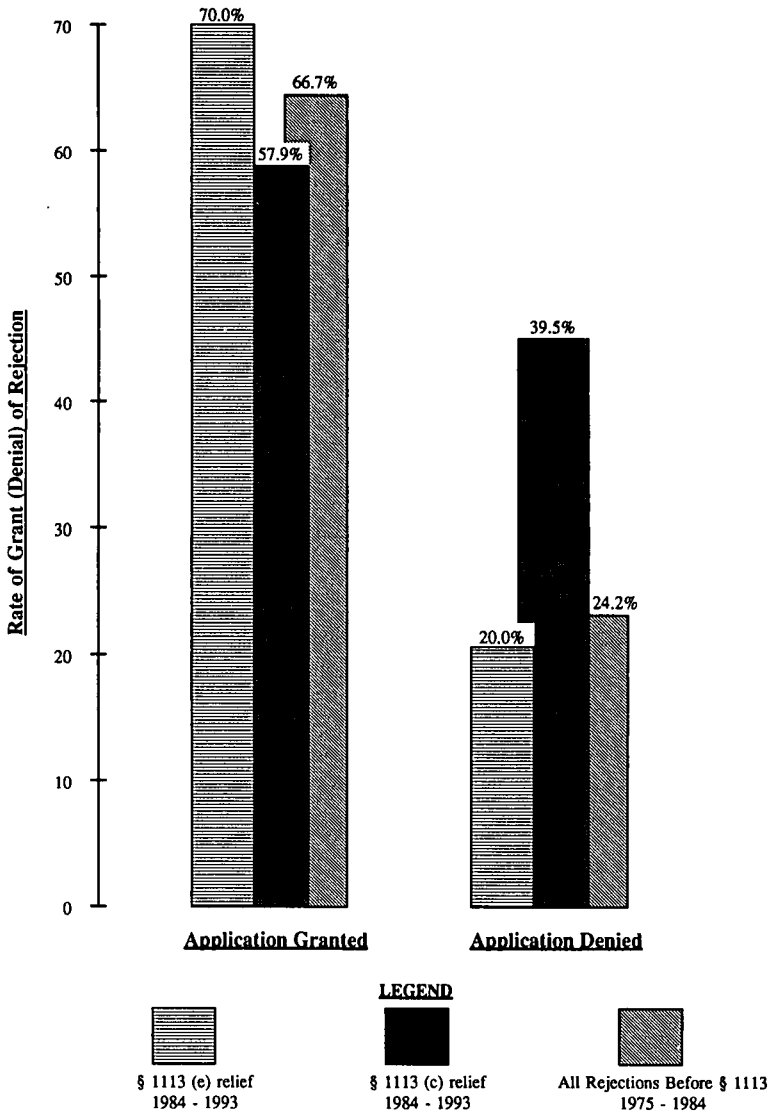
paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

11 U.S.C. § 1113(e) (1988).

354. *See* fig. 6.

355. *Id.*

FIGURE 6  
 OUTCOMES OF APPLICATIONS FOR INTERIM RELIEF FROM  
 COLLECTIVE BARGAINING AGREEMENTS UNDER § 1113(E)  
 1984-1993



The available data suggest that bankruptcy courts routinely grant interim relief. In fact, the rate at which interim relief was granted was slightly higher than the rate at which straight rejection was granted before the enactment of sec-

tion 1113.<sup>356</sup> But three key differences between the two provisions of section 1113 explain this variance.

First, in order to secure interim relief under section 1113(e), a debtor does not have to climb the nine steps of *American Provision* required to secure permanent relief under section 1113(c).<sup>357</sup> Section 1113(e) permits relief under either of two circumstances: "if *essential* to the continuation of the business, or in order to avoid *irreparable damage* to the estate."<sup>358</sup> The debtor is not required to submit a proposal to the union, provide pertinent information, or engage in collective bargaining of any type or duration. Nor is the debtor required to show how the union, all creditors, and the debtor are treated fairly and equitably, or that the balance of equities favors a grant of interim relief. Freed from having to undertake a longer—if not more arduous—journey,<sup>359</sup> a debtor seeking interim relief has an easier climb than one seeking permanent relief.

Second, by definition, relief under section 1113(e) is less drastic than relief under section 1113(c). The remedy under the former is limited to "interim changes" in the collective bargaining agreement, meaning a relatively short period of time.<sup>360</sup> But the remedy under the latter is "rejection" of the entire contract, meaning performance of *all* obligations—whether the debtor's proposal sought modification of them or not—is permanently excused and instead treated as a breach giving rise to an unsecured claim.<sup>361</sup> As the provision allowing the more flexible remedy, section 1113(e) would naturally be more readily embraced by a bankruptcy judge faced with a debtor's application for relief from his collectively bargained-for obligations. In four of the fourteen decisions granting interim relief, the bankruptcy court specifically

356. *Id.*

357. *See, e.g., In re Salt Creek Freightways, Inc. (Salt Creek I)*, 46 B.R. 347, 350 (Bankr. D. Wyo. 1985).

358. 11 U.S.C. § 1113(e) (1982) (emphasis added).

359. *But see In re Wright Airlines, Inc.*, 44 B.R. 744, 745 (Bankr. N.D. Ohio 1984) (alternative requirements of § 1113(e) impose "heavy burden" on employer).

360. *See, e.g., In re United Press Int'l, Inc.*, 134 B.R. 507, 514 (Bankr. S.D.N.Y. 1991) ("Any § 1113(e) relief must, by its nature, be temporary.").

361. *See, e.g., NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 532 (1984) ("[T]he filing of the petition in bankruptcy means that the collective bargaining agreement is no longer immediately enforceable, and may never be enforceable again.").

pointed to the limited nature and duration of relief under section 1113(e) as mitigating the debtor's victory.<sup>362</sup>

Finally, section 1113(e) seems designed to give immediate, although temporary, relief to debtors who are in the most desperate financial circumstances. The typical section 1113(e) application is filed concurrently with, or very soon after, the filing of the Chapter 11 petition, but before any application to reject outright is filed. By contrast, section 1113(c) seems designed to give permanent relief, but only after the debtor has expended the time and energy to engage the union in a form of collective bargaining. Accordingly, the typical section 1113(c) application is filed after the petition and well after any application for interim relief. It would hardly be surprising to learn that employers who claim to need interim relief due to financial emergencies do not do so lightly, and are more likely to persuade the bankruptcy courts of their need for help than employers who need relief but can afford to undertake the bargaining process that is a prelude to the granting of the more common section 1113(c) application. Indeed, four of the fourteen decisions in which interim relief was granted showed the debtor faced quick liquidation absent interim relief.<sup>363</sup>

A look at reported decisions in which the debtor filed applications for *both* interim relief under section 1113(e) and permanent rejection under section 1113(c) confirms this. If bankruptcy judges are truly more inclined to grant section 1113(e) rather than section 1113(c) applications due to the urgent nature of the former, then one would also expect a grant of interim relief to predict a grant of permanent relief.

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362. See *In re United Press Int'l, Inc.*, 134 B.R. 507, 514, 515 (Bankr. S.D.N.Y. 1991); *In re Evans Prods. Co.*, 55 B.R. 231, 234 (Bankr. S.D. Fla. 1985); *In re Russell Transfer, Inc.*, 48 B.R. 241, 243 (Bankr. W.D. Va. 1985); *In re Salt Creek Freightways, Inc. (Salt Creek I)*, 46 B.R. 347, 351 (Bankr. D. Wyo. 1985).

363. See, e.g., *In re United Press Int'l, Inc.*, 134 B.R. 507, 509, 512 (Bankr. S.D.N.Y. 1991) (Question: "[W]ill UPI's business collapse without the immediate relief requested?" Answer: "[W]e find that UPI has met the heavy burden required under § 1113(e) for most of the relief requested."); *In re Evans Prods. Co.*, 55 B.R. 231, 233 (Bankr. S.D. Fla. 1985) ("[T]he present negative cash flow cannot be accepted by a corporation in bankruptcy."); *In re Russell Transfer, Inc.*, 48 B.R. 241, (Bankr. W.D. Va. 1985) ("The Debtor's uncontradicted evidence shows that the Debtor cannot continue absent modification."); *In re Salt Creek Freightways, Inc. (Salt Creek I)*, 46 B.R. 347, 350 (Bankr. D. Wyo. 1985) ("[W]ithout the requested interim changes, the company will not be able to stay in business longer than one (1) week.").

One might also expect to find more decisions in which interim relief was granted and permanent rejection was later denied than decisions in which the opposite occurred. The data are in accord. Of the ten decisions for which data were available on both types of section 1113 application,<sup>364</sup> bankruptcy courts granted both interim and permanent relief in six,<sup>365</sup> and granted interim but denied permanent relief in three.<sup>366</sup> In only one reported decision did the bankruptcy court deny interim relief but later grant permanent rejection.<sup>367</sup>

The data for rates of rejection under section 1113(c) suggest that the statutes have improved the prospects for preserving union contracts in Chapter 11.<sup>368</sup> No longer are collective bargaining agreements routinely rejected.<sup>369</sup> Until a bankruptcy court has been satisfied that the debtor has at-

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364. There were 12 reported decisions in which applications for both temporary relief under § 1113(e) and permanent rejection under § 1113(c) were filed. See *supra* note 317. In 10 of the 12 decisions, the bankruptcy court ruled on both applications; in two, it did not. See *In re Maxwell Newspapers, Inc.*, 146 B.R. 920 (Bankr. S.D.N.Y. 1992) (declining to rule on interim relief but granting permanent rejection), *aff'd in part and rev'd in part*, New York Typographical Union No. 6 v. Maxwell Newspapers, Inc., 149 B.R. 334 (S.D.N.Y. 1993), *aff'd in part and rev'd in part*, 981 F.2d 85 (2d Cir. 1992); *In re Sullivan Motor Delivery*, 56 B.R. 28 (Bankr. E.D. Wis. 1985) (declining to rule on either application).

365. See *In re Blue Diamond Coal Co.*, (*Blue Diamond I*), 147 B.R. 720 (Bankr. E.D. Tenn. 1990), *later proceeding*, *In re Blue Diamond Coal Co., Inc.* (*Blue Diamond II*), 131 B.R. 633 (Bankr. E.D. Tenn. 1991), *aff'd mem.*, Civ. No. 3-91-0741 (E.D. Tenn. Apr. 20), *appeal docketed*, No. 92-5747 (6th Cir., June 10, 1992); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363 (Bankr. N.D. Ill. 1990); *In re Big Sky Transp. Co.*, 104 B.R. 333 (Bankr. D. Mont. 1989); *In re Royal Composing Room, Inc.*, 62 B.R. 403 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, New York Typographical Union No. 6 v. Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *In re Mile Hi Metal Sys., Inc.*, 51 B.R. 509 (Bankr. D. Colo. 1985), *related appeal*, Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys., Inc., 67 B.R. 114 (D. Colo. 1988), *vacated and remanded*, 899 F.2d 887 (10th Cir. 1990); *In re Salt Creek Freightways, Inc.* (*Salt Creek I*), 46 B.R. 347 (Bankr. D. Wyo.), *later proceeding*, *In re Salt Creek Freightways, Inc.* (*Salt Creek II*) 47 B.R. 835 (Bankr. D. Wyo. 1985).

366. See *In re Sun Glo Coal Co.*, 144 B.R. 58 (Bankr. E.D. Ky. 1992); *In re Chas. P. Young Co.*, 111 B.R. 454 (Bankr. W.D. Va. 1988); *In re Landmark Hotel & Casino, Inc.*, Case No. S-85-01113, slip op. (Bankr. D. Nev. Jan. 24, 1986) (Jones, J.), *related appeal*, Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. of Las Vegas, 78 B.R. 575 (Bankr. 9th Cir. 1987), *appeal dismissed*, 872 F.2d 857 (9th Cir. 1989).

367. See *In re Amherst Sparkle Mkt., Inc.*, 75 B.R. 847 (Bankr. N.D. Ohio 1987).

368. See fig. 5.

369. See *supra* text accompanying note 346.



tempted to meet the requirements of section 1113(c), an application to reject likely will be denied.

2. *Hypothesis #2: The Debtor's Conduct at the Bargaining Table, Not the Merit of His Arguments for Rejection, Determines the Fate of a Section 1113 Application*

Hypothesis #2 presented an opportunity to study the degree of influence the nine *American Provision* steps may have on the decision to grant or deny rejection.

In general, the data do *not* confirm the hypothesis.<sup>370</sup> Were the hypothesis true, the procedural steps that a debtor must climb to reach rejection under section 1113 (steps one, two, five, six, and seven) would be more important than the substantive ones (steps three, four, eight, and nine) in determining the fate of an application to reject. In fact, the opposite appears to be true. By virtually every measure, the substantive steps are relatively important to bankruptcy judges, while the procedural steps are relatively unimportant.

This finding should come as a surprise to serious students of the institution of collective bargaining, which in its quintessential American form eschews government supervision of bargaining outcomes in favor of bargaining process. If nothing else, however, the data do confirm the unique impact of section 1113, which alone among our labor laws appears to embrace government supervision of bargaining product as well as process.<sup>371</sup>

Based on researchers' ratings of the relative importance of each of the nine *American Provision* steps, the study calculated an average importance rating for each step. The substantive steps consistently received higher average importance ratings than the procedural ones.<sup>372</sup> In fact, only a single procedural step—the “meet-and-confer” requirement of step six—had a higher average importance rating than any single substantive step.<sup>373</sup> These findings were true whether viewed from the perspective of the parties (“contested factors”) or the overall perspective of the bankruptcy judge

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370. See figs. 7-8.

371. See *supra* text accompanying notes 253-264.

372. See fig. 8.

373. See *infra* text accompanying notes 387-390.

("overall factors").<sup>374</sup> Figures 7 and 8 report these results in more detail.

**FIGURE 7**  
**AVERAGE IMPORTANCE RATINGS OF**  
***AMERICAN PROVISION STEPS***

Step	Description	Contested Rating	Overall Rating
1	Proposal	1.3	2.1
2	Complete information	1.9	2.4
3	Necessary	4.6	4.5
4	Fair and equitable	3.8	4.0
5	Necessary information	2.1	2.8
6	Meet and confer	2.0	3.6
7	Good faith	2.6	3.1
8	Good cause refusal	3.4	3.4
9	Balance equities	3.4	3.5

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374. See fig. 7.

FIGURE 8  
AVERAGE IMPORTANCE RATINGS OF SUBSTANTIVE VS.  
PROCEDURAL STEPS

	<u>Contested</u>	<u>Overall</u>
<u>Step Category</u>		
Substantive 3, 4, 8, 9	3.8	3.8
Procedural 1, 2, 5, 6, 7	2.0	2.8

Among steps whose satisfaction was contested by the parties, the necessary requirement of step three was recorded as having an average importance rating of 4.6—by a comfortable margin the highest rating registered by any step.<sup>375</sup> When viewed from the overall viewpoint of the bankruptcy judge, step three still recorded an average importance rating of 4.5—once again, the highest rating for any step.<sup>376</sup>

The relative importance of step three in the decision-making process persisted despite the outcome, whether rejection was eventually granted or denied. In decisions granting rejection, step three registered average importance ratings of 4.6 (contested) and 4.4 (overall). In decisions denying rejection, step three once again registered 4.6 (contested) and now 4.6 (overall).

Therefore, it can safely be concluded that the idea shared by so many commentators is correct: the single most important step that a debtor must climb to secure rejection under section 1113(c) is establishing that his or her proposed modifications are “necessary” to permit reorganization. Or, stated another way, in the average bankruptcy court decision re-

375. As rated on a five-point scale, where 1 denotes unimportant, 2 somewhat unimportant, 3 maybe/maybe not important, 4 somewhat important, and 5 important. Accordingly, any rating above 3 is more important than not; conversely, any rating below 3 is less important than not. See *supra* text accompanying note 298.

376. See fig. 7.

garding a section 1113(c) application, step three is the most important of all the steps in the decision-making process.

The only other step appearing to exert a comparable degree of influence on decisions to grant or deny section 1113(c) applications is the fair-and-equitable requirement of step four.<sup>377</sup> From the parties' perspective, step four recorded an average importance rating of 3.8, or slightly below the level of "somewhat important."<sup>378</sup> But from the bankruptcy court's overall perspective, step four rose to an average importance rating of 4.0.<sup>379</sup> Thus, steps three and four were the only *American Provision* steps to rate at least "somewhat important" in the average decision to grant or deny a section 1113(c) application.

The good-cause refusal requirement of step eight and the balance-of-the-equities requirement of step nine exerted moderate influence on decision-making. They showed steady ratings from both the contested and overall perspectives.<sup>380</sup> Steps three and four each recorded a mean importance rating of 3.4 by both measures, making them remarkable at least for their consistency.<sup>381</sup>

So what became of the procedural steps that, according to the hypothesis, should figure most prominently in the bankruptcy judge's section 1113 calculus?

As Figure 8 shows, steps one, two, five, six, and seven registered collective importance ratings under 3.0<sup>382</sup>—meaning that, in the average section 1113 decision, the requirements that the debtor make a proposal, provide certain information, and meet and confer in good faith with the union were relatively *unimportant* in the decision to grant or deny rejection. This held true whether viewed from the contested or the overall perspective.<sup>383</sup>

The only countervailing support for the hypothesis was found in the performance of the meet-and-confer requirement of step six. From the parties' perspective, step six registered an average importance rating of just 2.0.<sup>384</sup> But from the

377. *Id.*

378. *Id.*

379. *Id.*

380. *Id.*

381. *Id.*

382. *See* fig. 8.

383. *Id.*

384. *See* fig. 7.

bankruptcy judge's perspective, step six jumped to an average importance rating of 3.6<sup>385</sup>—indicating that in the overall picture, step six was slightly more important than not. In fact, step six was the only procedural step to record an average importance rating greater than 3.0 by either measure, contested or overall.<sup>386</sup>

Two pieces of anecdotal evidence provide further support for the importance of step six, if not for the now-endangered hypothesis, in the decision-making process. First, in at least fourteen of the thirty-eight decisions studied, the bankruptcy judge specifically discussed the importance of negotiations and expressed her preference for a collectively bargained solution rather than a judicially imposed one.<sup>387</sup> In the decision involving the reorganization of the typographical firm discussed above, Judge Abram expressed it this way:

This court is powerless to impose contractual modifications on the parties, even if that were the equitable outcome. It can only permit rejection or not. After rejection, a debtor must still bargain with the union. If the changes this Debtor imposes after rejection are unacceptable, the employees are free to resign or strike.<sup>388</sup>

Second, in at least seven of the twenty-two decisions granting rejection, the bankruptcy court urged the parties to

385. *Id.*

386. *Id.*

387. See *In re Alabama Symphony Ass'n*, 155 B.R. 556, 572 (Bankr. N.D. Ala. 1993); *In re Maxwell Newspapers, Inc.*, 146 B.R. 920, 922, 930 (Bankr. S.D.N.Y. 1992); *In re Valley Steel Prods. Co.*, 142 B.R. 337, 342 (Bankr. E.D. Mo. 1992); *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639, 647 (Bankr. N.D. Ia. 1991); *In re GCI, Inc.*, 131 B.R. 685, 687, 697 (Bankr. N.D. Ind. 1991); *In re Express Freight Lines, Inc.*, 119 B.R. 1006, 1013 (Bankr. E.D. Wis. 1990); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 373-74 (Bankr. N.D. Ill. 1990); *In re Walway Co.*, 69 B.R. 967, 973, 975 (Bankr. M.D. Fla. 1987); *In re Royal Composing Room, Inc.*, 62 B.R. 403, 405 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, *New York Typographical Union No. 6 v. Royal Composing Room, Inc.*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *In re Landmark Hotel & Casino, Inc.*, Case No. S-85-01113, slip op. (Bankr. D. Nev. June 9, 1986) (Jones, J.), *as noted on appeal*, *Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. of Las Vegas*, 78 B.R. 575, 579 (Bankr. 9th Cir. 1987), *appeal dismissed*, 872 F.2d 857 (9th Cir. 1989); *In re Kentucky Truck Sales, Inc.*, 52 B.R. 797, 801-02, 806 (Bankr. W.D. Ky. 1985); *In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969, 984 (Bankr. W.D. Pa.), *aff'd*, 52 B.R. 997 (W.D. Pa. 1985), *vacated and remanded*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (1986); *In re Cook United, Inc.*, 50 B.R. 561, 564, 565 (Bankr. N.D. Ohio 1985); *In re Fiber Glass Industries, Inc.*, 49 B.R. 202, 207-08 (Bankr. N.D.N.Y. 1985).

388. *Royal Composing Room*, 62 B.R. at 405.

continue bargaining, even *after* the debtor had prevailed.<sup>389</sup> In a decision involving the reorganization of a firm specializing in the sales, service, and leasing of trucks, Judge Merritt Deitz of the United States Bankruptcy Court for the Western District of Kentucky explained:

[O]ur decision in this matter does not mark an end but rather a new phase in the negotiations between these parties. Although we have granted the debtor's motion to reject, our holding does not mean that the union and its members are stripped of their bargaining power . . . . The ultimate fate of the debtor's reorganization effort lies not in this forum, but at the bargaining table. We cannot compel, but we do encourage the union and the debtor to continue their negotiations, for without a settlement of this labor conflict the likelihood of the debtor being forced to liquidate is very real indeed.<sup>390</sup>

Although the data in the aggregate do not support the hypothesis,<sup>391</sup> they do show that the meet-and-confer requirement of step six exerts measurable influence on the decision to grant or deny rejection.<sup>392</sup> But procedural questions about whether the debtor made a proposal to the union, supplied it with complete and necessary information, or even conducted negotiations in good faith seem relatively unimportant in the section 1113(c) calculus of the bankruptcy judge in the typical decision.

### 3. *Hypothesis #3: The More Bargaining That Fails to Produce a Settlement, the More Likely That Rejection Will Be Granted*

Hypothesis #3 presented the opportunity to study whether the amount of time spent in negotiations influenced the decision to grant or deny rejection.

The data confirm the hypothesis, but some qualifications are in order. Under the best of circumstances it is difficult to measure the amount of "bargaining." Should each bargaining contact be counted? If so, should face-to-face meetings be dis-

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389. See *Garofalo's Finer Foods*, 117 B.R. at 373-74; *In re Texas Sheet Metals, Inc.*, 90 B.R. 260, 274 (Bankr. S.D. Tex. 1988); *In re Sol-Sieff Produce Co.*, 82 B.R. 787, 795 (Bankr. W.D. Pa. 1988); *Walway*, 69 B.R. at 975; *Kentucky Truck Sales*, 52 B.R. at 806; *Wheeling-Pittsburgh Steel*, 50 B.R. at 984; *Salt Creek II*, 47 B.R. at 842.

390. *Kentucky Truck Sales*, 52 B.R. at 806 (Deitz, J.).

391. See fig. 7.

392. *Id.*

tinguished from written communications or telephone calls? Should duration be measured, and if so, in weeks, days, or hours? And what about quality—should a bargaining session at which the parties carefully make and support their arguments be distinguished from one in which the debtor places a “take-it-or-leave-it” offer on the table, or the union counters with a “stonewall” response?

The study avoided these hard questions by default, because in most cases such data were not available. Few reported decisions described each and every proposal, counterproposal, bargaining session, telephone call, facsimile transmission, or other communication between employer and union. So the study improvised by using two measurement tools: the number of bargaining sessions and the number of days available for bargaining.<sup>393</sup>

(a) *Number of Bargaining Sessions*

Data about the number of actual bargaining sessions were recorded for all but eight of the decisions studied. For each decision, the number was calculated by counting the reported number of face-to-face meetings at which the parties expected to engage in substantive negotiations prior to the section 1113(c) hearing. Exchanges of correspondence, telephone calls, facsimile transmissions, and the like were not counted.

Overall, the mean number of actual bargaining sessions was 3.4.<sup>394</sup> Of the nineteen decisions in which rejection was granted and for which data were available, the mean number of bargaining sessions was 3.8.<sup>395</sup> But of the eleven decisions in which rejection was denied and for which data were available, the mean number of actual bargaining sessions dropped to 2.2.<sup>396</sup> Thus the data suggest that the fewer actual bargaining sessions, the more likely rejection will be denied.

This spread of only one-and-one-half bargaining sessions between the grant or denial of rejection seemed narrow, so the study explored other angles from which to analyze the

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393. See *infra* app. A (question 18).

394. A form of mean rather than a straight average was calculated to control for the extreme variations in some of the decisions. Each mean reported here represents data from which the highest and lowest recorded numbers have been excluded.

395. See fig. 9.

396. *Id.*

data. The study tried to determine whether any particular cutoff in the number of bargaining sessions could predict the grant or denial of rejection. An arbitrary line was drawn at three bargaining sessions, and the grant or denial of rejection following three or more sessions was plotted on a graph. Figure 9 describes the frequency of grant or denial of rejection following three or more bargaining sessions.

FIGURE 9  
 NUMBER OF REPORTED DECISIONS GRANTING (DENYING)  
 REJECTION AFTER (BEFORE) THREE ACTUAL  
 BARGAINING SESSIONS

Outcome of § 1113(c) Application

		<u>Granted</u> (19 Decisions)	<u>Denied</u> (11 Decisions)
<u>Number of Bargaining Sessions</u>	$\geq 3$ Sessions	13	3
	$< 3$ Sessions	6	8

The data suggest a strong relationship between unsuccessful bargaining and the likelihood of rejection after three or more bargaining sessions. Of the nineteen decisions in which rejection was granted and for which data were available, thirteen involved three or more unsuccessful bargaining



sessions.<sup>397</sup> By contrast, of the eleven decisions in which rejection was denied and for which data were available, just three involved three or more such sessions.<sup>398</sup> The conclusion: bankruptcy courts "reward" debtors who have engaged in actual bargaining sessions that do not produce contract settlements by granting their applications for rejection.

By NLRA standards, three seems to be a small number of bargaining sessions from which to base a decision about the propriety of the grant or denial of rejection of a collective bargaining agreement.<sup>399</sup> Nevertheless, the number seems to be significant in the context of section 1113.

(b) *Days Available for Bargaining*

Data about the number of days available for bargaining were recorded for thirty of the thirty-eight decisions studied. These data represented *opportunities* to bargain, rather than actual bargaining sessions. In each decision, the number was calculated by counting the number of days after the date of the debtor's first proposal to the union up to and including the date on which the first hearing on the section 1113(c) application was held by the bankruptcy court.

The study assumed that data about opportunities for bargaining meant something different than data about actual bargaining sessions. Under the statute, a debtor may exercise considerable control over the collective bargaining timetable by virtue of when he chooses to file the section 1113 application and then attempts to schedule negotiations with the union. A meet-and-confer session cannot take place unless both parties agree, but under the statute it is the debtor's duty to move things along by asking for bargaining sessions.<sup>400</sup> When time marches on without producing a settlement—irrespective of whether or not there is actual bargaining going on—it suggests that the debtor is falling down, at the minimum, on his or her obligation to climb the meet-and-confer requirement of step six. Perhaps he or she is preoccupied with other estate matters, or is simply lazy, but it is quite plausible that, the more days that go by without pro-

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397. *Id.*

398. *Id.*

399. *See, e.g.,* C. MORRIS, *supra* note 262, at 691-99.

400. *See* 11 U.S.C. §§ 1113(b)(1)-(2) (1988).

ducing a settlement, the less urgent the debtor's section 1113 application.

So the assumption of the study, at first glance counter-intuitive, makes sense: the more available bargaining days between the date of the debtor's first proposal and the date of the first hearing held on it by the bankruptcy court, the *less* likely that the section 1113 application will be granted.

In light of this assumption, the data regarding available bargaining days also support the hypothesis.<sup>401</sup> Overall, the mean number of available bargaining days from first proposal to first hearing was 72.8 days, or a little over ten weeks.<sup>402</sup> Of the twenty decisions in which rejection was granted and for which data were available, the mean number of available bargaining days was 66.6.<sup>403</sup> But of the ten decisions in which rejection was denied and for which data were available, the mean number of available bargaining days actually rose by almost three weeks, to 86.8 days.<sup>404</sup>

Just how useful is information about the number of available bargaining days? The study tried to determine whether any particular cutoff in the days available for bargaining could predict the grant or denial of rejection. Arbitrary lines were drawn at ten-day intervals up to and including one hundred days, and rejection rates were plotted along those intervals on a graph.<sup>405</sup> Figure 10 describes the results.

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401. Other than setting certain notice and hearing requirements for applications to reject, § 1113 does not require bargaining for any fixed period of time. See 28 U.S.C. §§ 1113(d)(1)-(2) (1988). Although as many as six months may elapse between the employer's first proposal and the first hearing date, the statute, if adhered to strictly by an employer-debtor, can produce a result in as few as 24 days. See *In re United Press Int'l, Inc.*, 134 B.R. 507, 513 (Bankr. S.D.N.Y. 1991). For a discussion of the time lines in the statute, see *supra* note 260.

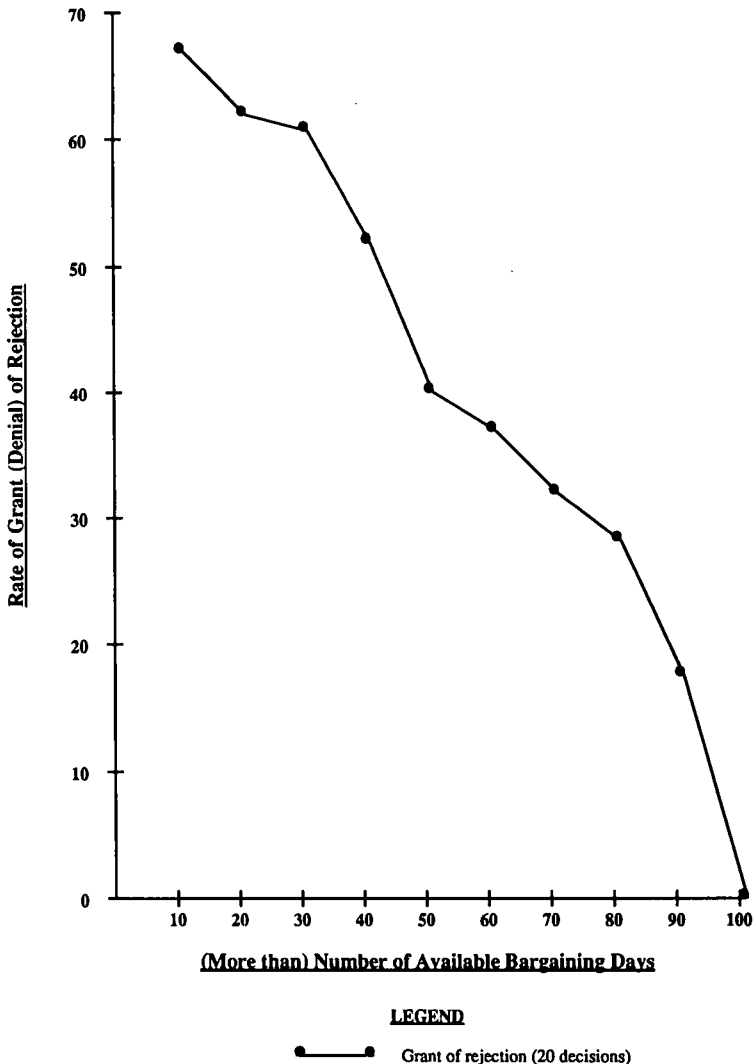
402. See fig. 10.

403. *Id.*

404. *Id.*

405. The rejection rates plotted here reflect the frequency at which rejection was granted when the number of available bargaining days equaled or exceeded the cutoff (which was defined as the last day of each interval).

FIGURE 10  
 LIKELIHOOD OF GRANT (DENIAL) OF REJECTION WHEN  
 NUMBER OF AVAILABLE BARGAINING DAYS PRODUCES  
 NO SETTLEMENT



The data suggest a very strong relationship between the number of days available for bargaining in which no settlement is produced and the likelihood of rejection. As the number of available bargaining days marches on, the rejection rate steadily and substantially declines. When at first fewer days are available for bargaining, the rejection rate re-

mains relatively high: ten or more days (sixty-seven percent),<sup>406</sup> twenty or more days (sixty-three percent),<sup>407</sup> and thirty or more days (sixty percent).<sup>408</sup> A shift seems to occur between forty and fifty days: from forty or more available bargaining days, when chances for rejection are still more likely than not (fifty-three percent),<sup>409</sup> to fifty or more available bargaining days, when chances for rejection drop to less likely than not (forty percent).<sup>410</sup> The logical explanation would seem to be the one offered by the assumption underlying the hypothesis given above: the more days that pass without settlement, the less urgent the debtor's application—and the weaker the debtor's case for rejection.

V. SOME CAVEATS, AN OBSERVATION, AND SOME CONCERNS  
ABOUT HOW "NECESSARY" BECAME THE MOTHER OF  
REJECTION

A. *Caveats*

Any interpretation of the results as supporting or undermining each of the three hypotheses offered in Part IV must be tempered by some concessions about the possible limitations of the data. Before offering observations about some of the larger issues raised here, the study notes three major caveats regarding these limitations.

1. *Representativeness of Sample*

It is fair to ask whether the thirty-eight reported bankruptcy court decisions under section 1113(c) studied here are a representative sample of the universe of all such decisions, reported or not. Is the number of decisions a sufficient basis for generalization? Is the sample a random slice of the whole pie, or a skewed piece of the crust? After all, not even the federal appellate courts report all of their decisions, irrespective of the subject matter. Indeed, as trial-level courts, the bankruptcy courts might be expected to report fewer, if any, decisions.

The response is based on anecdotal evidence, but that evidence is persuasive. Notwithstanding the impending tenth

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406. See fig. 10.

407. *Id.*

408. *Id.*

409. *Id.*

410. *Id.*

anniversary of the statute, applications to reject collective bargaining agreements appear to be so rare as compared to the regular law-and-motion business of the bankruptcy courts that decisions on section 1113(c) applications tend to get published.<sup>411</sup> Originally, the study proposed to track all such applications—not merely the decisions on those applications—filed in the United States Bankruptcy Court for the Central District of California, the nation's busiest bankruptcy court located in the nation's busiest federal circuit.<sup>412</sup> The idea was to follow each application from filing to disposition, whether ruled upon or settled, whether published or not.<sup>413</sup> But after spending three months during the summer of 1992 examining voluminous records of Chapter 11 proceedings maintained by the clerk of that court,<sup>414</sup> researchers turned up just one section 1113(c) application.<sup>415</sup> A conversation with the chief judge of the bankruptcy court confirmed the rarity of such applications.<sup>416</sup>

Moreover, the chief judge of the United States Bankruptcy Court for the Western District of Pennsylvania advised that, despite his considerable experience as both a settlement judge in the *Wheeling-Pittsburgh* reorganization<sup>417</sup>

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411. Gordon Bermant of the Federal Judicial Center, whose specialty is case management in the federal courts, disagrees with this premise. He agrees, however, that § 1113 decisions are more likely to be published than bankruptcy court decisions in other areas. Telephone Interview by Christopher D. Cameron with Gordon Bermant, Director of Planning and Technology, Federal Judicial Center (July 7, 1992).

412. See Tom Furlong, *Many Firms Don't Survive Filings for Bankruptcy*, L.A. Times, at A16 (Jan. 13, 1992).

413. See Memorandum from Chris Cameron to Interested Parties Regarding Faculty Research Grant Project—Summer 1992 (Apr. 16, 1992) (on file with author).

414. The author thanks Chief Judge Calvin Ashland, Clerk of the Court Frank E. Goodroe, and Records Supervisor Sharnette Bradley, all of the United States Bankruptcy Court for the Central District of California, for their cheerful assistance.

415. See *In re Good Stuff Food Co.*, Case No. LA 92-41584-WL (Bankr. C.D. Cal.) (filed Aug. 20, 1992). No decision regarding this application has been reported.

416. Interview with Calvin B. Ashland, Chief Judge, United States Bankruptcy Court for the Central District of California, in Los Angeles, Cal. (Oct. 14, 1992).

417. See 50 B.R. 969 (Bankr. W.D. Pa.), *aff'd*, 52 B.R. 997 (W.D. Pa. 1985), *vacated and remanded*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986).

and a scholar analyzing the statute,<sup>418</sup> he could recall no other section 1113(c) application being filed in his court.<sup>419</sup>

In fact, the number of reported decisions issued since the statute became law as analyzed here (a total of forty-six, including thirty-eight section 1113(c) decisions, over the nine-year period 1984 to 1993)<sup>420</sup> compares favorably with the number of reported decisions issued before the statute as analyzed by Professor White (a total of thirty-three over the previous nine-year period 1975 to 1984)<sup>421</sup> and the number of prior decisions independently analyzed here (a total of fifty-four during the nine-year period from 1975 to 1984).<sup>422</sup>

As a result, the study may indeed represent—if not constitute—the universe of section 1113(c) decision-making in the bankruptcy courts, reported or not. At the least, the present study seems no less representative than prior ones.<sup>423</sup>

## 2. *Subjectivity of Evaluations*

There is a measure of subjectivity in any behavioral study, and the present one is no exception. Although most of the recorded data admitted little room for interpretation (e.g., the bankruptcy court either granted or denied rejection), other data could be considered ambiguous. At least two elements of subjectivity require consideration: that of researchers' evaluations, and that of self-reports by bankruptcy judges.

### (a) *Researchers' Evaluations*

Among other things, the study's key analytical tool—the calculation of average importance ratings for each of the nine steps to rejection under *American Provision*—depended heavily upon the opinions of the researchers who recorded those ratings. Other persons given the same task today may well disagree with those ratings. Can we have any confidence that the ratings are reliable?

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418. See Cosetti & Kirshenbaum, *supra* note 241, at 208 n.233. Chief Judge Cosetti acted as settlement judge during the Wheeling-Pittsburgh case before its appeal to the Third Circuit.

419. Letter from Christopher D. Cameron to Chief Judge Cosetti (July 7, 1992) (on file with author).

420. See *supra* text accompanying notes 332-334. See also fig. 5.

421. See *supra* text accompanying notes 336-342.

422. See *supra* text accompanying notes 344-345.

423. See *supra* text accompanying notes 332-343 (citing analyses of combined bankruptcy and appellate decisions).

The response is that four elements of rigor attended the recording of average importance ratings. First, at least two researchers separately reviewed and recorded ratings for each step as to each of the thirty-eight reported decisions. In most cases, the first researcher was a student and the second was the author. Usually the second researcher agreed with the ratings recorded by the first; when the second researcher disagreed, he or she would so indicate on the inventory sheet and discuss the matter with the first researcher before recording a "final" rating.

Second, each researcher was instructed in accordance with, and performed rating tasks under, the same set of guidelines.<sup>424</sup> Even if the ratings were somehow inaccurate, at least every researcher made the same mistakes. Third, a simple five-point scale was used to record the ratings.<sup>425</sup> Rather than seeking to measure fine gradations of influence among the nine steps to rejection, the study sought broad generalizations: did the step lean toward unimportant or important, or did it sit somewhere in the middle? The five-point scale left less room for discretion than a finer measurement tool might have permitted. Thus, each researcher was required to consider carefully where, along a narrow range of possibilities, to record observations and conclusions.

Finally, there is a certain rigor that attends the simple exercise of closely reading one hundred separate bankruptcy court decisions (counting both pre- and post-section 1113 decisions). After analyzing such a sample, most reasonable people would have a good feel, at the minimum, for what is important and what is not in the decision-making process.

Of course, whether researchers' subjective evaluations are truly a problem is a question capable of resolution by resort to the ultimate scientific tool—more research. The study can be duplicated by anyone with the time and energy to sift through the reported decisions set forth in the appendices.

#### (b) *Self-Reports by Bankruptcy Judges*

By definition, depending on reported decisions for data meant depending on the accuracy of bankruptcy judges' written observations and conclusions about the facts, law, and parties' respective arguments regarding each. If bankruptcy

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424. See *supra* note 298.

425. See *supra* text accompanying note 298.

judges omitted, misunderstood, or embellished this information, that too would be reflected in the data recorded by the researchers.

The short response is that legal scholarship has depended on judges' representations about case information, as reported in published decisions, for centuries. For better or worse, judges' self-reports are the main vehicle for conveying the type of information sought by the study. If this information was somehow suspect—and there is no reason to think that reported bankruptcy decisions are any more inaccurate than any other type of reported decisions—then the work of most scholars also is suspect.<sup>426</sup>

### 3. *Strength of Conclusions*

The limitations of the study suggested by the above caveats counsel restraint in making sweeping conclusions. Accordingly, the study holds that fewer collective bargaining agreements are rejected now than before the enactment of section 1113; that the substantive steps to rejection under *American Provision*<sup>427</sup> are more important in the decision-making calculus of bankruptcy judges than the procedural ones; and that the more unsuccessful bargaining that occurs, the more likely rejection will be granted. These are moderate conclusions supported by empirical evidence. To overstate them would be to stretch the tools available for conducting the research beyond what we should reasonably expect.

#### B. *An Observation: What "Necessary" Means*

Mindful of the foregoing caveats, the study may now profitably offer an important observation about the major controversy that heretofore has attended the statute. The circuits and the commentators have debated at length the meaning of the term "necessary" in step three<sup>428</sup> as it relates

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426. Certainly the case can be made for collecting data about decision-making through other vehicles. Like everyone else, judges filter information through their own experiences and biases, and may omit or alter—intentionally or unintentionally—information before publication. In the alternative, researchers could review the unreported portions of bankruptcy filings; send detailed questionnaires to attorneys, judges, and parties; or, in appropriate circumstances, directly observe the proceedings. Although these methods also have their limits, not to mention additional costs, future research efforts might profit from the added rigor of using as many other sources as possible.

427. *In re American Provision Co.*, 44 B.R. 907 (Bankr. D. Minn. 1984).

428. *See supra* note 36 (citing commentary).



to the debtor's proposed modifications to the collective bargaining agreement. They agree that the problem has two dimensions. First, *how* necessary must the proposed modifications be—essential, or something less? And second, *for what* must the proposed modifications be necessary—complete rehabilitation of the debtor, or something less?<sup>429</sup>

But the debaters disagree about how to answer these questions. The arguments raised by each side in the debate have received plenty of attention elsewhere and need not be repeated here.<sup>430</sup> Suffice it to say that, as to each question, each position has significant merit, but that, given the lack of meaningful legislative history,<sup>431</sup> it is impossible to pick a winner using the traditional methods of legal scholarship.

The study, however, tells us that, whatever its true meaning, the necessary requirement of step three is the single most important factor in the bankruptcy judge's calculus.<sup>432</sup> So, in the average piece of litigation involving section 1113(c), any litigant who fails to deal with the necessary question will be remiss. We might well ask, then, whether the study offers any guidance in the inevitable search for meaning in the term "necessary."

Indeed, the study does offer some guidance. Recall that the fair-and-equitable requirement of step four<sup>433</sup> was the only step besides step three to record average importance ratings in the neighborhood of 4.0—meaning, at the least, "somewhat important." (Step three recorded ratings of 4.6 contested and 4.5 overall;<sup>434</sup> step four recorded ratings of 3.8 contested and 4.0 overall.<sup>435</sup>) Thus, the data suggest a new hypothesis: finding that the debtor's proposal would treat all creditors, the debtor, and all affected parties fairly and equitably under step four is the substantial equivalent of finding that such proposal is "necessary" to permit reorganization under step three.

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429. See *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 88 (2d Cir. 1987); *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074, 1088 (3d Cir. 1986).

430. See *supra* note 36.

431. See *supra* note 272.

432. See *supra* notes 375-376 and accompanying text.

433. See fig. 7.

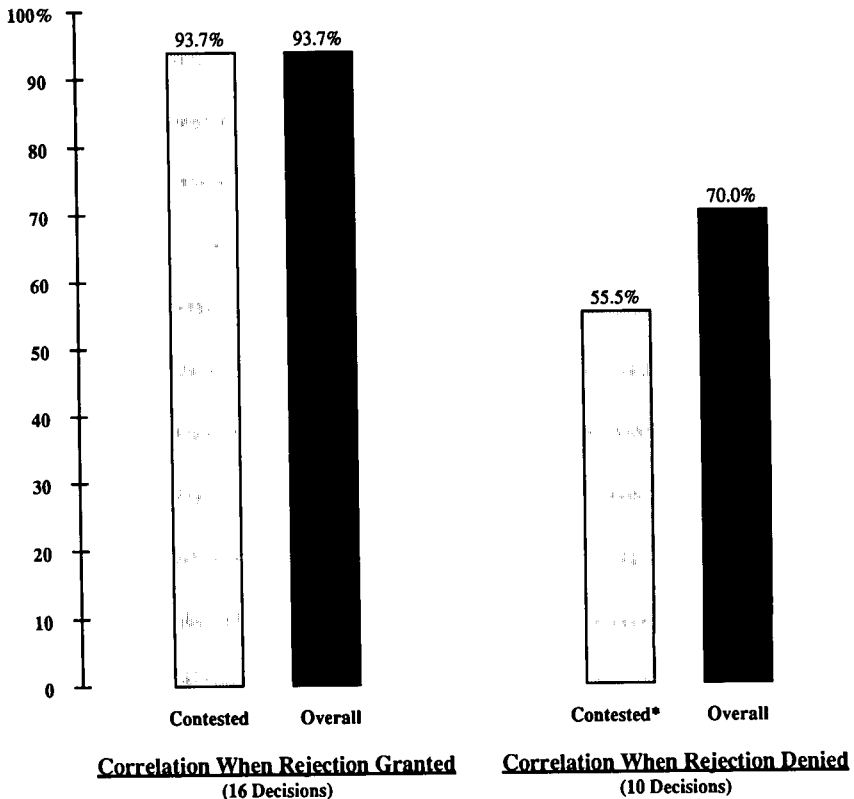
434. *Id.*

435. *Id.*

In other words, establishing an independent definition of “necessary” may be superfluous. If the new hypothesis is true, then “fair and equitable” means “necessary.”

To test the new hypothesis, the study analyzed data relating to two separate outcomes: the relative importance of steps three and four in decisions to grant rejection on the one hand, and their relative importance in decisions to deny rejection on the other hand. For each outcome, the study compared the number of decisions in which step three recorded an average importance rating of at least 4.0 to the number of decisions in which step four recorded an average importance rating of at least 4.0. Figure 11 describes the results.

FIGURE 11  
CORRELATION OF AVERAGE IMPORTANCE RATINGS BETWEEN  
STEPS 3 AND 4 BY GRANT (DENIAL) OF REJECTION



\* Denotes data available for only nine decisions

The data comparing importance ratings when the outcome was a *grant* of rejection demonstrate remarkably strong support for the new hypothesis. Of the sixteen decisions in which rejection was granted and for which data were available, fifteen recorded importance ratings of at least 4.0 for both steps three and four.<sup>436</sup> That is, in decisions in which both steps were at least somewhat important to the outcome, if the debtor had satisfactorily climbed step three, then nearly ninety-four percent of the time he had also climbed step four.<sup>437</sup> The results were identical whether viewed from the contested or overall perspective.<sup>438</sup>

The data comparing importance ratings when the outcome was a *denial* of rejection supported the new hypothesis, but not as strongly. Of the nine decisions in which rejection was denied and for which data were available, five recorded contested importance ratings of at least 4.0 for both steps three and four.<sup>439</sup> That is, in decisions in which steps three and four were at least somewhat important to the outcome, if the debtor had satisfactorily climbed step three, then just over half the time—55.5 percent—he or she had also climbed step four.<sup>440</sup> Support for the new hypothesis picked up, however, when overall importance ratings were analyzed. Of the ten decisions in which rejection was denied and for which data were available, seven recorded overall importance ratings of at least 4.0 for both steps three and four.<sup>441</sup> In other words, in decisions in which the debtor had satisfactorily scaled step three, seventy percent of the time he or she had also scaled step four.<sup>442</sup>

The conclusion: steps three and four are so closely correlated in the bankruptcy judge's section 1113(c) calculus that it makes sense to read "fair and equitable" as a fair substitute for, if not a complete definition of, "necessary."

Of course, for litigants in a section 1113(c) contest, it is reasonable to ask whether "fair and equitable" is any more susceptible of definition than the elusive independent meaning of "necessary." The answer is yes. "Fair and equitable"

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436. See fig. 11.

437. *Id.*

438. *Id.*

439. *Id.*

440. *Id.*

441. *Id.*

442. *Id.*

harkens back to the formulae of the *Kevin Steel* and *REA Express* panels, each of which held that the relative equities should be carefully weighed before the bankruptcy court grants rejection,<sup>443</sup> presumably out of a concern for fairness to all affected parties. Taking their cue from *Kevin Steel*<sup>444</sup> and *REA Express*,<sup>445</sup> bankruptcy courts became comfortable with discussing the merits of applications to reject in terms of fairness and equity for at least nine years before the "necessary" standard was inserted by section 1113.<sup>446</sup>

In *Bildisco*, the Supreme Court itself offered some guidelines about the meaning of fairness and equity in this context.<sup>447</sup> While cautioning that the Bankruptcy Code "does not authorize freewheeling consideration of every conceivable equity," the Court instructed:

Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, the creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors' claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.<sup>448</sup>

Since the enactment of section 1113(c), "fair and equitable" has become an accepted term of art meaning similar "burden-sharing." For example, in *In re Indiana Grocery Co.*,<sup>449</sup> the debtor, the operator of a chain of grocery stores in Indiana and Illinois, sought rejection of a collective bargaining agreement with Local 550R of the United Food and Commercial Workers International Union (UFCW).<sup>450</sup> Local 550R represented food clerks at four stores in the chain.<sup>451</sup> As part of a comprehensive plan of reorganization, the debtor

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443. See *supra* notes 142, 156-157 and accompanying text.

444. 519 F.2d 698 (2d Cir. 1975).

445. 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

446. 11 U.S.C. § 1113(b)(1)(A) (1988).

447. *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

448. *Id.* at 527.

449. 138 B.R. 40 (Bankr. S.D. Ind. 1990).

450. *Id.* at 42.

451. *Id.*

had already negotiated wage cuts for food clerks at other stores in the chain represented by Local 917 of the UFCW; now it wanted Local 550R to agree to a proposal calling for across-the-board wage cuts of 16.5 percent.<sup>452</sup> Local 550R resisted.<sup>453</sup>

In granting rejection, the bankruptcy court focused attention on step four. The heart of the matter, it held, was burden-sharing; the reorganization had created financial stress that major creditors, management, and other affected parties should share.<sup>454</sup> The bankruptcy court recalled that it had denied an earlier section 1113(c) application precisely because the debtor had failed to demonstrate that its proposal attempted to allocate the burdens of reorganization fairly among its constituent groups.<sup>455</sup> Instead, employees represented by Local 550R seemed to be hauling the heaviest load.<sup>456</sup> Now things were different. The debtor had negotiated a reduced collective bargaining agreement with Local 917, cut management positions, stopped paying executive bonuses, reduced the chief executive officer's salary while increasing his responsibilities, and obtained credit terms from vendors and forbearance from its bank on the right to demand immediate payment.<sup>457</sup> In light of these developments, the bankruptcy court concluded that the debtor, the creditors, and all affected parties were being treated fairly and equitably—and that Local 550R ought to have accepted the 16.5% cut.<sup>458</sup>

In sum, parties to and bankruptcy courts presented with section 1113(c) litigation may look to the fair-and-equitable requirement of step four for guidance on how to evaluate the necessary requirement of step three.

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452. *Id.* at 44.

453. *Id.*

454. *In re Indiana Grocery Co.*, 138 B.R. 40, 48 (Bankr. S.D. Ind. 1990).

[W]hile it would probably be an unreasonable burden for a debtor to have to get and prove burden sharing by every one of its creditors, a debtor should show that major creditors who stand to benefit greatly from successful reorganization and from concessions employees make are bearing in some manner their fair share of the burden of reorganization.

*Id.* at 48.

455. *Id.*

456. *Id.*

457. *Id.* at 48-49.

458. *Id.* at 50.

### C. Concerns

For two of the three major hypotheses tested by the study, the data discussed above suggest that section 1113 is a success. At the least, one might say that the statute has substantially achieved the twin goals that organized labor had sought: halting unilateral rejections, and reducing the perceived tendency of bankruptcy judges to approve rejections. Yet the study raises at least two causes for concern that lawmakers would be well advised to address, perhaps in the form of amendments to section 1113.

#### 1. *The Rejection Rate Is Still Too High*

The rate at which applications to reject collective bargaining agreements are granted has dropped from about sixty-seven percent before section 1113 was enacted to about fifty-eight percent today.<sup>459</sup> This is a substantial, but not dramatic, improvement. Is there any reason to believe that the rate should be lower?

One might expect that, after nearly a decade of experience with the statute, the rejection rate would be closer to fifty percent. After all, the substantive steps of the law are replete with the language of even-handedness: "fair," "equitable" or "equities," and "balance." And the procedural steps reflect the language of diplomatic negotiations: "proposal," "information," "meet and confer," "good faith," "good cause." In short, these are words of neutrality. The statute expresses a policy preference for neither grants over denials nor denials over grants. It favors neither debtors over unions nor unions over debtors. On its face, then, the statute would seem to predict something on the order of a fifty-fifty split, rather than a fifty-eight-forty split, in the rates of rejection versus denial.

If the foregoing is true, then why are significantly more section 1113(c) applications still being rejected than denied? Several possible reasons come to mind: bankruptcy judges have a persistent, though now tempered, bias in favor of debtors over union creditors; the necessary requirement in step three is a *non*-neutral element in the law that skews the results; or simply, debtors' cases as a group are more meritorious than unions' cases. Perhaps there are others. Whatever

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459. See fig. 5.

the cause, there is a need for further research to determine why and what might be done to balance, as the statute would seem to have it, the relative outcomes.

2. *The Government Should Monitor the Process, Not the Product, of Collective Bargaining in Bankruptcy*

As discussed above, section 1113 made one of the most sweeping changes in the law governing private-sector labor relations since the Taft-Hartley Act of 1947:<sup>460</sup> placing the federal government, in the guise of the bankruptcy courts, in the role of monitoring the product as well as the process of collective bargaining.<sup>461</sup> The substantive steps to rejection under *American Provision* (steps three, four, eight, and nine) effectively amended nearly fifty years of national labor policy, under which the government stayed out of the role of arbitrator as to the relative merits of either the debtor's bargaining proposals or the union's reasons for resisting them.

There are three disturbing things about this modification. First, in light of the absence of committee reports and sparse legislative history, Congress never made any finding to justify such a radical departure from national labor policy. It may very well be, as the pre-section 1113 bankruptcy courts reasoned, that the exigencies of reorganization required such a departure, but certainly Congress has never said so. Consequently, neither the departure itself nor its consequences for collective bargaining outside of bankruptcy has ever been fully debated in a national forum. A venerable and successful institution such as collective bargaining would seem to deserve better treatment.

Second, giving the job of monitoring collective bargaining to non-experts—federal bankruptcy judges—was not a particularly good idea. Many of them have all but said so themselves.<sup>462</sup> As a group, bankruptcy judges do show enthusiasm

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460. 29 U.S.C. §§ 141-187 (1988).

461. See *supra* text accompanying notes 254-257.

462. See, e.g., *In re Alabama Symphony Ass'n*, 155 B.R. 556, 572 (Bankr. N.D. Ala. 1993) ("This Court is not equipped to handle what would necessarily be a tedious process of rewriting the [contract]."); *In re Royal Composing Room, Inc.*, 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986) ("The necessity for the Debtor's proposal and the equitability of the sacrifice are matters which must be first tested in the crucible of prehearing negotiations."), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, *New York Typographical Union No. 6 v. Royal Composing Room, Inc.*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 498 U.S. 1078 (1989); *In re Ken-*

for examining the product of bargaining, such as the economic impact of the debtor's proposals and perceived reasonableness of the union's response to them. The comparatively high importance they attach to the four substantive steps to rejection under *American Provision* (steps three, four, eight, and nine) bears this out.<sup>463</sup> But bankruptcy judges seem neither able nor willing to involve themselves in the bargaining itself; they are unfamiliar with the fine points of the duty to bargain as established in the NLRA and do not wish to be.<sup>464</sup> The problem with this attitude is that product is less than half the picture. The remaining five procedural steps to rejection (steps one, two, five, six, and seven) require them to evaluate the scope and extent of the process<sup>465</sup>—a task that, under nonbankruptcy law, ordinarily belongs to the experts at the NLRB.<sup>466</sup>

Finally, the case against adherence to traditional labor policy, even during Chapter 11, has yet to be made. The *Bildisco* majority pointed to the debtor's need for flexibility without offering any empirical or anecdotal evidence as to how or why requiring bargaining under sections 8(a)(5) and 8(d) would interfere with this need.<sup>467</sup> But by nature, the process of collective bargaining is quite flexible.<sup>468</sup> In fact,

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tucky Truck Sales, Inc., 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985) ("The ultimate fate of the debtor's reorganization effort lies not in this forum, but at the bargaining table."); *In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969, 984 (Bankr. W.D. Pa.) ("[T]his court, as a place for resolving a collective bargaining dispute, is not the proper forum. The real decisions must be made at the bargaining table."), *aff'd*, 52 B.R. 997 (W.D. Pa. 1985), *vacated and remanded*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986). *See also* Cosetti & Kirshenbaum, *supra* note 241, at 226 ("Nor should the courts allow the judicial process to be used as a substitute for bargaining. The union and the debtor must focus on the economic realities of their situation, rather than the strength of their respective legal positions.").

463. *See* fig. 8.

464. *See, e.g., In re Blue Diamond Coal Co. (Blue Diamond II)*, 131 B.R. 633, 648-49 (Bankr. E.D. Tenn. 1991) (holding bankruptcy courts have no authority to adjudicate unfair labor practices, no matter how blatant), *aff'd mem.*, Civ. No. 3-91-0741 (E.D. Tenn. Apr. 20), *appeal docketed*, No. 92-5747 (6th Cir. June 10, 1992); Steven Kropp, *Collective Bargaining in Bankruptcy: Toward an Analytical Framework for Section 1113*, 66 TEMPLE L. REV. 697, 701 (1993) ("[B]ankruptcy judges' unfamiliarity with the principle of collective bargaining leads them to misapply § 1113.").

465. *See supra* text accompanying notes 253-257.

466. *See supra* text accompanying notes 263-264.

467. *See* *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 551-52 (1984) (Brennan, J., dissenting).

468. *See id.*



several respected commentators have argued that, the exigencies of bankruptcy notwithstanding, a union creditor has great incentive during reorganization proceedings to engage in bargaining with the debtor to produce a mutually acceptable outcome.<sup>469</sup> Section 1113, for all the good intentions behind it, may have tinkered too hastily with the very institution that ensures flexibility in relations between Chapter 11 debtors and their unionized employees.

## VI. CONCLUSION

With due deference to the caveats outlined above, the study makes some important findings about how section 1113, after ten years, is working. In substantial measure, organized labor's twin goals of halting unilateral rejection of collective bargaining agreements and reducing the perceived tendency of bankruptcy judges to grant rejection have been achieved. The study found that the rate of rejection has declined from about sixty-seven percent before section 1113 to about fifty-eight percent today.<sup>470</sup> Bankruptcy courts are more sensitive to labor's position during reorganization proceedings and require debtors to climb the nine steps of *American Provision* before granting rejection.<sup>471</sup>

But this success is a qualified one in two respects. First, the rate of rejection is still too high. Given the neutral language of the statute, the rate should be closer to fifty percent—about the same number of rejection applications should be denied as are granted.<sup>472</sup>

Second, the study found that bankruptcy courts seem conflicted about how closely they should examine the process, as opposed to the product, of collective bargaining. On the one hand, the study found that the more bargaining between debtor and union that fails to produce a voluntary settlement, the more likely that rejection will be granted.<sup>473</sup> It makes sense that the longer the parties engage in fruitless negotiations, the more likely the debtor will be "rewarded" with rejection for at least having made the effort to work things out.

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469. See, e.g., Douglas Bordewieck & Vern Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293, 319 (1983); George, *supra* note 16, at 335; Gibson, *supra* note 259, at 342.

470. See *supra* text accompanying note 346. See also fig. 5.

471. See *supra* text accompanying notes 347-349.

472. See *supra* text accompanying note 459.

473. See *supra* text accompanying notes 397-398. See also figs. 8-9.

On the other hand, the study found that the employer's conduct at the bargaining table is far less important in the bankruptcy judge's decision-making calculus than are the merits of his arguments for rejection.<sup>474</sup> Under the longstanding regime of the NLRA, the opposite has been true.<sup>475</sup> This finding, the consequences of which Congress has yet to carefully examine, is cause for great concern.

The study does offer some guidance to section 1113 litigants faced with the difficult task of defining "necessary," the requirement of step 3 that is the single most important factor in the decision-making process. For all intents and purposes, "necessary" under step three means the same thing as "fair and equitable" under step four.

In enacting section 1113, Congress made the most sweeping changes in national labor policy since 1947. It is less than certain whether these changes have been for the better. Future research efforts should investigate this important question.

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474. See *supra* text accompanying notes 382-383. See also fig. 8.

475. See *supra* text accompanying notes 254-257.

APPENDIX A  
CAMERON LABOR/BANKRUPTCY PROJECT  
FIRST REVISED CASE INVENTORY SHEET

A. General Information

1. Case name & citation:	2. Docket #:	4. Judge:	6. Chapter 11 date:
	3. Court:	5. Circuit area:	7. Has § 1113(c) application been filed?
8. § 1113(c) application.			
a. Filing date:	c. Decision date:	e. Opposition?	
b. Hearing date(s):	d. Rejection?	f. Comments:	
9. Prior § 1113(c) application.			
a. Filing date:	c. Decision date:	e. Opposition?	
b. Hearing date(s):	d. Rejection?	f. Comments:	
10. § 1113(e) interim application.			
a. Filing date:	c. Decision date:	e. Comments?	
b. Hearing date(s):	d. Granted?		
11. Appeal		12. Other relevant issues.	
a. Filed?	c. Outcome:	a. Priority?	c. Other
b. Court & citation:	d. Judge	b. § 1114?	(describe):

B. American Provision Factors (13. Specifically mention?     )

14. Contested factors:  <u>1 2 3 4 5 6 7 8 9</u>	<p style="text-align: center;"><u>Importance</u></p> <p>1 = unimportant 2 = somewhat unimportant 3 = maybe important 4 = somewhat important 5 = important</p>
15. Overall factors:  <u>1 2 3 4 5 6 7 8 9</u>	<p style="text-align: center;"><u>Factors</u></p> <p>1 = proposal            6 = meet &amp; confer 2 = complete info    7 = good faith 3 = necessary         8 = good cause 4 = fair &amp;                refusal    equitable     9 = balance equities 5 = necessary info</p>

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C. Court Proceedings

<p>16. ER Proposal(s).  a. Proposal made?      c. Written?  b. #?</p>	<p>17. U responses(s).  a. Counter made?      c. Written?  b. #?</p>
<p>18. Meet &amp; confer.  a. # of sessions:  b. Of these, # before Chapter 11:  c. # days, 1st proposal to hrg:  d. Good faith by ER?  e. U refusal to meet &amp; confer?</p>	<p>19. Information  a. Necessary info provided?  b. Most complete/reliable?</p>
	<p>20. Necessary.  a. Standard essential or nonessential?  b. Standard met?</p>
<p>21. Fair/equitable treatment?  Explain:</p>	<p>22. Good cause for U refusal?  Explain:</p>
<p>23. Equities favored rejection?  Describe changes sought:</p>	<p>D. Other Information</p>
	<p>24. Industry involved.  a. Type of industry:  b. Type of workers:</p>
<p>25. BK plan.  a. Filed?      Date:  b. Confirmed?      Date:</p>	<p>26. Settlement.  a. Order on application entered?  b. If not, settled?  Explain:</p>
<p>27. Counsel  a. ER:  b. U:  c. CR cte:  d. Other:</p>	<p>28. Researcher's data  a. Analyzed by:      Date:  b. Reviewed by:      Date:  Observations:</p>

APPENDIX B  
REPORTED BANKRUPTCY COURT DECISIONS UNDER  
SECTION 1113(C) 1984-1993

Decisions Granting Rejection

- In re* Alabama Symphony Ass'n,  
155 B.R. 556 (Bankr. N.D. Ala. 1993).
- In re* Allied Delivery Sys. Co.,  
49 B.R. 700 (Bankr. N.D. Ohio 1985).
- In re* Amherst Sparkle Mkt., Inc.,  
75 B.R. 847 (Bankr. N.D. Ohio 1987).
- In re* AppleTree Mkts., Inc.,  
155 B.R. 431 (S.D. Tex. 1993) (referring to unreported  
bankruptcy court decision; reported district court deci-  
sion provides significant data).
- In re* Big Sky Transp. Co.,  
104 B.R. 333 (Bankr. D. Mont. 1989) (granting applica-  
tion to "reject" contract for 180 days).
- In re* Blue Diamond Coal Co. (*Blue Diamond II*),  
131 B.R. 633 (Bankr. E.D. Tenn. 1991), *aff'd mem.*, Civ.  
No. 3-91-0741 (E.D. Tenn. Apr. 20), *appeal docketed*,  
No. 92-5747 (6th Cir. June 10, 1992).
- In re* Carey Transp., Inc.,  
50 B.R. 203 (Bankr. S.D.N.Y. 1985), *aff'd mem.* Case  
No. —, (S.D.N.Y. Aug. 19, 1986) (Owen, J.), *aff'd*,  
Truck Drivers Local 807 v. Carey Transp., Inc., 816  
F.2d 82 (2d Cir. 1987).
- In re* Century Brass Prods., Inc.,  
Case No. 2-85-00197, slip op. (Bankr. D. Conn. July 26,  
1985) (Krechevsky, J.), *aff'd*, 55 B.R. 712 (D. Conn.  
1985), *rev'd*, Century Brass Prods., Inc. v. UAW, 795  
F.2d 265 (2d Cir.), *cert. denied*, 479 U.S. 947 (1986)  
(referring to unreported bankruptcy court decision, but  
significant data therein available from reported appel-  
late decisions).
- In re* Garofalo's Finer Foods, Inc.,  
117 B.R. 363 (Bankr. N.D. Ill. 1990) (extending interim  
relief and granting permanent rejection as of date  
certain unless parties mutually agreed to "snap-back"  
provision).
- In re* Gatke Corp.,  
Case No. 87-30308-RKR, slip op. (Bankr. N.D. Ind.  
June 1988) (Rodibaugh, J.), *aff'd*, UAW v. Gatke Corp.,

151 B.R. 211 (Bankr. N.D. Ind. 1991) (referring to unreported bankruptcy court decision; reported district court decision provides significant data).

*In re* Indiana Grocery Co.,

138 B.R. 40 (Bankr. S.D. Ind. 1990).

*In re* Kentucky Truck Sales, Inc.,

52 B.R. 797 (Bankr. W.D. Ky. 1985).

*In re* Royal Composing Room, Inc.,

62 B.R. 403 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, New York Typographical Union No. 6 v. Royal Composing Room, Inc., 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

*In re* Salt Creek Freightways, Inc. (*Salt Creek II*),

47 B.R. 835 (Bankr. D. Wyo. 1985).

*In re* Sierra Steel Corp.,

Case No. 86-M-09653, slip op. (Bankr. D. Colo. Apr. 9) (McGrath, J.), *remanded*, Colorado Iron Workers Pension Fund v. Sierra Steel Corp., 88 B.R. 314 (D. Colo. 1987), *on remand*, 88 B.R. 337 (Bankr. D. Colo. 1988).

*In re* Sol-Sieff Produce Co.,

82 B.R. 787 (Bankr. W.D. Pa. 1988).

*In re* Texas Sheet Metals, Inc.,

90 B.R. 260 (Bankr. S.D. Tex. 1988).

*In re* Maxwell Newspapers, Inc.,

146 B.R. 920 (Bankr. S.D.N.Y.), *rev'd and remanded*, New York Typographical Union No. 6 v. Maxwell Newspapers, Inc., 149 B.R. 334 (S.D.N.Y.), *aff'd in part and rev'd in part*, 981 F.2d 85 (2d Cir. 1992).

*In re* Mile Hi Metal Sys., Inc.,

51 B.R. 509 (Bankr. D. Colo. 1985), *related appeal*, Sheet Metal Workers' International Association, Local No. 9 v. Mile Hi Metal Sys., Inc., 67 B.R. 114 (D. Colo. 1988), *vacated*, 899 F.2d 887 (10th Cir. 1990) (considering retroactivity of prior unreported decision granting rejection; reported appellate decisions provide significant data).

*In re* Valley Steel Prods. Co.,

142 B.R. 337 (Bankr. E.D. Mo. 1992).

*In re* Walway Co.,

69 B.R. 967 (Bankr. E.D. Mich. 1987).

*In re* Wheeling-Pittsburgh Steel Corp.,

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

(Bankr. W.D. Pa. 1985), *vacated and remanded*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986).

Decisions Denying Rejection

- In re American Provision Co.*,  
44 B.R. 907 (Bankr. D. Minn. 1984).
- In re Chas. P. Young Co.*,  
111 B.R. 410 (Bankr. S.D.N.Y. 1990) (granting rejection even though contract had already expired).
- In re Cook United, Inc.*,  
50 B.R. 561 (Bankr. N.D. Ohio 1985) (referring to § 1113(e), but treating application as one for rejection under § 1113(c)).
- In re Fiber Glass Industries*,  
49 B.R. 202 (Bankr. N.D.N.Y. 1985).
- In re Express Freight Lines, Inc.*,  
119 B.R. 1006 (Bankr. E.D. Wis. 1990).
- In re GCI, Inc.*,  
131 B.R. 685 (Bankr. N.D. Ind. 1991).
- In re George Cindrich Gen'l Contracting, Inc.*,  
130 B.R. 20 (Bankr. W.D. Pa. 1991).
- In re Landmark Hotel & Casino, Inc.*,  
Case No. S-85-01113, slip op. (Bankr. D. Nev. Jan. 24, 1986) (Jones, J.), *related appeal*, *Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. of Las Vegas*, 78 B.R. 575 (Bankr. 9th Cir. 1987), *appeal dismissed*, 872 F.2d 857 (9th Cir. 1989) (referring to unreported bankruptcy court decision on § 1113(c) application; reported appellate decisions on § 1113(e) application provide significant data. A later § 1113(c) application was granted).
- In re K & B Mounting, Inc.*,  
50 B.R. 460 (Bankr. N.D. Ind. 1985).
- In re Pierce Terminal Warehouse, Inc.*,  
133 B.R. 639 (Bankr. N.D. Iowa 1991).
- In re Schauer Mfg. Corp.*,  
145 B.R. 32 (Bankr. S.D. Ohio 1992).
- In re Sun Glo Coal Co.*,  
144 B.R. 58 (Bankr. E.D. Ky. 1992).
- In re Unimet Corp.*,  
Case No. 685-00240, slip op. (Bankr. N.D. Ohio Aug. 6, 1985) (Williams, J.), *related appeal*, *United Steelwork-*

ers v. Unimet Corp., 842 F.2d 879 (6th Cir.), *cert. denied*, 488 U.S. 828 (1988) (referring to unreported bankruptcy court decision; reported appellate decisions provide significant data).

*In re* Valley Kitchens, Inc.,  
52 B.R. 493 (Bankr. S.D. Ohio 1985).

*In re* William P. Brogna & Co.,  
64 B.R. 390 (Bankr. E.D. Pa. 1986).

Non-Decisions Regarding Rejection

*In re* Sullivan Motor Delivery,  
56 B.R. 28 (Bankr. E.D. Wis. 1985) (declining to rule on application because contracts had already expired).



APPENDIX C  
REPORTED BANKRUPTCY COURT DECISIONS UNDER  
SECTION 1113(E) 1984-1993

Decisions Granting Interim Relief

- In re* Big Sky Transp. Co.,  
104 B.R. 333 (Bankr. D. Mont. 1989) (granting application to "reject" contract for 180 days).
- In re* Blue Diamond Coal Co. (*Blue Diamond I*),  
131 B.R. 633 (Bankr. E.D. Tenn. 1991) (referring to unreported bankruptcy court decision; reported bankruptcy decision, disallowing unsecured claim for damages arising from grant of interim relief, provides significant data).
- In re* Chas. P. Young Co.,  
111 B.R. 410 (Bankr. S.D.N.Y. 1990).
- In re* D.O. & W. Coal Co.,  
93 B.R. 454 (Bankr. W.D. Va. 1988) (referring to unreported bankruptcy court decisions granting application for interim relief and later application to modify same, but denying separate application to modify again; reported later decision, proceeding on contempt motion for employer's non-compliance, provides significant data).
- In re* Evans Prods. Co.,  
55 B.R. 231 (Bankr. S.D. Fla. 1985).
- In re* Garofalo's Finer Foods, Inc.,  
117 B.R. 363 (Bankr. N.D. Ill. 1990).
- In re* Ionosphere Clubs, Inc.,  
Case No. 89-B-10448, slip op. (Bankr. S.D.N.Y. Aug. 14, 1990) (Lifland, J.), *vacated*, *Shugrue v. Air Line Pilots Ass'n*, 139 B.R. 772 (1992) (referring to unreported bankruptcy court decision; reported appellate decisions provide significant data).
- In re* Landmark Hotel & Casino, Inc.,  
Case No. S-85-01113, slip op. (Bankr. D. Nev. June 9, 1986) (Jones, J.), *aff'd*, *Landmark Hotel & Casino, Inc. v. Local Joint Executive Bd. of Las Vegas*, 78 B.R. 575 (Bankr. 9th Cir. 1987), *appeal dismissed*, 872 F.2d 857 (9th Cir. 1989) (referring to unreported bankruptcy court decision; reported appellate decisions provide significant data).

*In re* Mile Hi Metal Sys., Inc.,  
51 B.R. 509 (Bankr. D. Colo. 1985), *related appeal*,  
Sheet Metal Workers' International Association, Local  
9 v. Mile Hi Metal Sys., Inc., 67 B.R. 114 (D. Colo.  
1988), *vacated*, 899 F.2d 887 (10th Cir. 1990) (consider-  
ing retroactivity of prior unreported decision granting  
rejection; reported appellate decisions provide signifi-  
cant data).

*In re* Royal Composing Room, Inc.,  
62 B.R. 403 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671  
(S.D.N.Y. 1987), *aff'd*, New York Typographical Union  
No. 6 v. Royal Composing Room, Inc., 848 F.2d 345 (2d  
Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989) (referring  
in passing to earlier grant of interim relief).

*In re* Russell Transfer, Inc.,  
48 B.R. 241 (Bankr. W.D. Va. 1985).

*In re* Salt Creek Freightways (*Salt Creek I*),  
46 B.R. 347 (Bankr. D. Wyo. 1985).

*In re* Sun Glo Coal Co.,  
144 B.R. 58 (Bankr. E.D. Ky. 1992).

*In re* United Press Int'l, Inc.,  
134 B.R. 507 (Bankr. S.D.N.Y. 1991).

#### Decisions Denying Interim Relief

*In re* Amherst Sparkle Mkt., Inc.,  
75 B.R. 847 (Bankr. N.D. Ohio 1987).

*In re* Beckley Coal Mining Co.,  
81 B.R. 6 (Bankr. D. Del. 1987), *rev'd*, Beckley Coal  
Mining Co. v. United Mine Workers, 98 B.R. 690  
(Bankr. D. Del. 1988).

*In re* Cedar Rapids Meats, Inc.,  
117 B.R. 448 (Bankr. N.D. Iowa 1990).

*In re* Wright Air Lines, Inc.,  
44 B.R. 744 (Bankr. N.D. Ohio 1984).

#### Non-Decisions Regarding Interim Relief

*In re* Maxwell Newspapers, Inc.,  
146 B.R. 920 (Bankr. S.D.N.Y.), *aff'd in part and rev'd*  
*in part*, New York Typographical Union No. 6 v.  
Maxwell Newspapers, Inc., 149 B.R. 334 (Bankr.  
S.D.N.Y.), *aff'd in part and rev'd in part*, 981 F.2d 85  
(2d Cir. 1992).

*In re* Sullivan Motor Delivery, Inc.

56 B.R. 28 (Bankr. E.D. Wis. 1985) (declining to rule on application because contracts had already expired).

APPENDIX D

REPORTED BANKRUPTCY COURT DECISIONS ON APPLICATIONS  
TO REJECT UNDER BANKRUPTCY ACT SECTION 313(1) AND  
BANKRUPTCY CODE SECTION 365(A) 1975-1984 \*

Decisions Granting Rejection

- In re* Alan Wood Steel Co.,  
449 F. Supp. 165 (E.D. Pa. 1978), *appeal dismissed*,  
595 F.2d 1211 (3d Cir. 1979).
- In re* Allied Supermarkets, Inc.,  
B.R. No. 8-92871-H, oral op. (Bankr. E.D. Mich Mar.  
31, 1979), *appeal dismissed*, Borman's, Inc. v. Allied  
Supermarkets, Inc., 6 B.R. 968 (Bankr. E.D. Mich.  
1980), *aff'd per curiam*, 706 F.2d 187 (6th Cir. 1983)  
(referring to unreported bankruptcy court decision;  
reported appellate decisions provide significant data).
- In re* Allied Technology, Inc.  
8 B.R. 366 (Bankr. S.D. Ohio 1980).
- In re* Ateco Equip., Inc.,  
18 B.R. 915 (Bankr. W.D. Pa. 1982).
- In re* Bildisco,  
B.R. No. 80-01283, oral op. (Bankr. D.N.J. Jan. 15)  
(Stark, J.), *aff'd*, Civ. No. 81-942, bench op. (D.N.J.  
May 4, 1981) (Thompson, J.), *vacated and remanded*,  
NLRB v. Bildisco & Bildisco, 682 F.2d 72 (3d Cir.  
1982), *aff'd*, 465 U.S. 513 (1984).
- In re* Bloss Glass Co.,  
39 B.R. 694 (Bankr. M.D. Pa. 1984).
- In re* Blue Ribbon Transp. Co.,  
30 B.R. 783 (Bankr. D.R.I. 1983) (granting rejection  
conditioned on employer undertaking certain  
performance).
- In re* Bohack Corp.,  
Truck Drivers Local 807 v. Bohack Corp., 431 F. Supp.  
646 (E.D.N.Y. 1977), *related appeal*, Truck Drivers  
Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976)

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\* Including unreported decisions for which reported appeals or reported related decisions provide significant data about bankruptcy court proceedings. (Prior to 1979, most bankruptcy court decisions were unreported.) Also including decisions issued on or after July 10, 1984, but for which petitions for reorganization under chapter 11 or its predecessor, chapter XI, were filed before such date. The study includes bankruptcy court decisions collected by Professor James White, together with other decisions turned up by the study. See White, *supra* note 15, at 1184-85 n.49.

(referring to unreported bankruptcy court decision; reported district court decision provides significant data).

- In re Brada Miller Freight Sys. Inc.*,  
16 B.R. 1002 (N.D. Ala. 1981), *vacated*, 702 F.2d 890  
(11th Cir. 1983) (referring to unreported bankruptcy  
court decision; reported appellate decisions provide  
significant data).
- In re Braniff Airways, Inc.*,  
25 B.R. 216 (Bankr. N.D. Tex. 1982).
- In re Briggs Transp. Co.*,  
39 B.R. 343 (Bankr. D. Minn.), *aff'd*, Briggs Transp. Co.  
v. Local 710, Int'l Bhd. of Teamsters, 40 B.R. 972 (D.  
Minn.), *aff'd*, 739 F.2d 341 (8th Cir.), *cert. denied*, 469  
U.S. 917 (1984).
- In re Commercial Motor Freight, Inc.*,  
27 B.R. 293 (Bankr. S.D. Ind. 1980).
- In re Concrete Pipe Mach. Co.*,  
28 B.R. 837 (Bankr. N.D. Iowa 1983).
- In re Continental Airlines Corp.*,  
38 B.R. 67 (Bankr. S.D. Tex. 1984), *related proceeding*,  
57 B.R. 845 (Bankr. S.D. Tex. 1985) (referring to  
unreported bankruptcy court decisions; reported bank-  
ruptcy decisions provide significant data).
- In re Figure Flattery, Inc.*,  
88 Lab. Cas. (CCH) ¶ 11,850 (S.D.N.Y. 1980) (referring  
to unreported bankruptcy court decision; reported dis-  
trict court decision provides significant data).
- In re Flechtner Packing Co.*,  
63 B.R. 585 (Bankr. N.D. Ohio 1986) (granting rejection  
in context of employer's motion to dismiss union's  
complaint to compel arbitration of grievances under  
contract).
- In re Gray Truck Line Co.*,  
34 B.R. 174 (Bankr. M.D. Fla. 1983).
- In re Handy Andy, Inc.*,  
109 L.R.R.M. (BNA) 3298 (Bankr. W.D. Tex. 1982),  
*aff'd*, 112 L.R.R.M. (BNA) 2657 (W.D. Tex. 1983).
- In re Holabird Co.*,  
B.R. No. 83-00373, mem. order (Bankr. N.D. Ohio June  
29, 1983) (Krasneiewski, J.), *related proceeding*, 86 B.R.  
111 (Bankr. N.D. Ohio 1988) (referring to unreported

bankruptcy court decision; reported bankruptcy court decision in related proceeding provides significant data).

*In re Hotel Circle, Inc.*,

419 F. Supp. 778 (S.D. Cal. 1976), *aff'd*, 613 F.2d 210 (9th Cir. 1980) (referring to unreported bankruptcy court decision; reported appellate decisions provide significant data).

*In re Hoyt*,

27 B.R. 13 (Bankr. D. Or. 1982) (granting rejection as part of confirmation of Chapter 13 plan of reorganization).

*In re IML Freight, Inc.*,

37 B.R. 556 (Bankr. D. Utah 1984) *later proceeding*, International Brotherhood of Teamsters v. IML Freight, Inc., 789 F.2d 1460 (10th Cir. 1986) (denying motion to reject post-petition contracts; reported decisions provide significant data about unreported earlier decision granting motion to reject pre-petition contracts).

*In re J.R. Elkins, Inc.*,

27 B.R. 862 (Bankr. E.D.N.Y. 1983).

*In re Kevin Steel Prods., Inc.*,

Case No. 73-B-909, slip op. (Bankr. S.D.N.Y. Mar. 1, 1974) (Schwartzberg, J.), *rev'd*, Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc., 381 F. Supp. 336 (S.D.N.Y. 1974), *rev'd*, 519 F.2d 698 (2d Cir. 1975).

*In re Kirkpatrick*,

34 B.R. 767 (Bankr. 9th Cir. 1983), *related proceeding*, Kirkpatrick, 273 N.L.R.B. 1131 (1984) (referring to unreported bankruptcy court decision; reported appellate and NLRB decisions provide significant data).

*In re Midwest Emery Freight Sys., Inc.*,

48 B.R. 566 (Bankr. N.D. Ill. 1985) (referring to unreported bankruptcy court decision; reported bankruptcy court decision in related proceeding provides significant data).

*In re Parrot Packing Co.*,

42 B.R. 323 (Bankr. N.D. Ind. 1983).

*In re Price Chopper Supermarkets, Inc.*,

19 B.R. 462 (Bankr. S.D. Cal. 1982).

- In re* Rath Packing Co.,  
36 B.R. 979 (Bankr. N.D. Iowa 1984).
- In re* Robinson Truck Line, Inc.,  
47 B.R. 631 (Bankr. N.D. Miss. 1985) (approving application to reject only health and welfare provisions of contract).
- In re* Ryan Co.,  
4 B.R. Ct. Dec. (CRR) 64 (Bankr. D. Conn. 1978).
- In re* Reserve Roofing of Florida, Inc.,  
21 B.R. 96 (Bankr. M.D. Fla. 1982).
- In re* Southern Elec. Co.,  
23 B.R. 348 (Bankr. E.D. Tenn. 1982).
- In re* Tucson Yellow Cab Co.,  
21 B.R. 166 (Bankr. D. Ariz. 1982), *vacated*, Tucson Yellow Cab Co. v. NLRB, 27 B.R. 621 (Bankr. 9th Cir. 1983) (referring to prior unreported bankruptcy court decision; reported appellate decisions provide significant data).
- In re* U.S. Truck Co.,  
24 B.R. 853 (Bankr. E.D. Mich. 1982) (granting application to reject on motion to reconsider prior denial).
- In re* Yellow Limousine Serv., Inc.,  
22 B.R. 807 (Bankr. E.D. Pa. 1982).

#### Decisions Denying Rejection

- In re* C. & W. Mining Co.,  
3 B.R. L. Rep. (CCH) ¶ 69,792 (Bankr. N.D. Ohio 1984).
- In re* Connecticut Celery Co.,  
106 L.R.R.M. (BNA) 2847 (Bankr. D. Conn. 1980).
- In re* Crozier Bros., Inc.,  
52 B.R. 402 (Bankr. S.D.N.Y. 1985).
- In re* David A. Roscow, Inc.,  
9 B.R. 190 (Bankr. D. Conn. 1981).
- In re* DeLuca Distrib. Co.,  
38 B.R. 588 (Bankr. N.D. Ohio 1984) (finding, on debtor's motion for declaratory relief, that debtor was bound to terms of collective bargaining agreement entered into during pending of Chapter 11).
- In re* Fitzgerald,  
44 B.R. 628 (Bankr. W.D. Mo. 1984).
- In re* IML Freight, Inc.,  
37 B.R. 556 (Bankr. D. Utah 1984) (denying trustee's

motion to reject because collective bargaining agreement was entered into post-petition).

- In re* Louis F. Sammarco Elec. Co.,  
109 L.R.R.M. (BNA) 3288 (Bankr. W.D. Tenn. 1982).
- In re* Maverick Mining Corp.,  
36 B.R. 837 (Bankr. W.D. Va. 1984).
- In re* Miles Mach. Co.,  
113 L.R.R.M. 3114 (BNA) (Bankr. E.D. Mich. 1982)  
(denying debtor's motion to reconsider prior order denying rejection).
- In re* Schuld Mfg. Co.,  
43 B.R. 535 (Bankr. W.D. Wis. 1984).
- In re* S.A. Mechanical, Inc.,  
51 B.R. 130 (Bankr. D. Ariz. 1985), *aff'd*, 104 Lab. Cas. (CCH) ¶ 11,974 (Bankr. 9th Cir. 1986).
- In re* Studio Eight Lighting, Inc.,  
91 L.R.R.M. (BNA) 2429 (Bankr. E.D.N.Y. 1976).
- In re* Tinti Constr. Co.,  
29 B.R. 971 (Bankr. E.D. Wis. 1983).
- In re* Total Transp. Serv.,  
37 B.R. 904 (Bankr. S.D. Ohio 1984).

Non-Decisions Regarding Rejection

- In re* Gloria Mfg. Corp.,  
734 F.2d 1020 (4th Cir.), *later proceeding*, Goodman v. NLRB, 47 B.R. 370 (Bankr. E.D. Va. 1984) (referring to unreported bankruptcy and district court decisions; reported decisions provide significant data).
- In re* Hers Apparel Indus.,  
88 L.R.R.M. (BNA) 3254 (S.D.N.Y. 1975) (referring to unreported bankruptcy court decision granting rejection of individual employment contracts without reaching question whether collective bargaining agreement providing for such individual contracts should also be rejected; reported appellate decision provides significant data).
- In re* St. Croix Hotel Corp.,  
18 B.R. 375 (Bankr. D.V.I. 1982) (recharacterizing debtor's motion to reject collective bargaining *agreement* as motion to terminate collective bargaining *relationship*, and denying same).



