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## **Bankruptcy Law - Rejection of Collective Bargaining Agreements - Section 1113 of 1984 Bankruptcy Amendments Permits Rejection of Collective Bargaining Agreements Only If Debtor's Proposed Modifications to Agreement Are Necessary to Prevent Liquidation and Treat All Affected Parties Fairly and Equitably**

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1987]

BANKRUPTCY LAW—REJECTION OF COLLECTIVE BARGAINING  
AGREEMENTS—SECTION 1113 OF 1984 BANKRUPTCY AMENDMENTS  
PERMITS REJECTION OF COLLECTIVE BARGAINING  
AGREEMENTS ONLY IF DEBTOR'S PROPOSED  
MODIFICATIONS TO AGREEMENT ARE NECESSARY  
TO PREVENT LIQUIDATION AND TREAT ALL  
AFFECTED PARTIES FAIRLY AND  
EQUITABLY

*Wheeling-Pittsburgh Steel v. United Steelworkers* (1986)

The Bankruptcy Amendments and Federal Judgeship Act of 1984 (Bankruptcy Amendments)<sup>1</sup> contain a new provision, section 1113,<sup>2</sup>

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1. Pub. L. No. 98-353, 98 Stat. 333 (codified as amended at 11 U.S.C. §§ 101-1113 (1984)). Title I of the new law abrogates the provisions of the Bankruptcy Reform Act of 1978 (the "Code") "governing the composition and jurisdiction of the bankruptcy courts and establishes a new court system that is similar in structure but different in concept and operation." Taggart, *The New Bankruptcy Court System*, 59 AM. BANKR. L.J. 231 (1985) (concluding that district court-bankruptcy court dichotomy is complex and imperfect).

Under the Bankruptcy Act of 1898, the jurisdictional grant to the courts of bankruptcy was bifurcated into categories of summary and plenary jurisdiction. See 2 COLLIER ON BANKRUPTCY, ¶ 23.03-04 (14th ed. 1976). Although the district courts included the courts of bankruptcy, referees in bankruptcy, appointed by the district court for six-year terms, handled most chapter proceedings and all liquidations. See Kennedy, *The Bankruptcy Court Under the New Bankruptcy Law: Its Structure and Jurisdiction*, 55 AM. BANKR. L.J. 63-66 (1981). With the promulgation of the Bankruptcy Rules in 1973, referees were renamed bankruptcy judges. *Id.*

During deliberations on the Bankruptcy Reform Act of 1978, Congress decided to abolish the distinction between summary and plenary jurisdiction by granting to the bankruptcy courts, a "pervasive or comprehensive grant of jurisdiction to be exercised by the bankruptcy judges." Taggart, *supra* at 233. Following passage of the Reform Act, the bankruptcy court structure reflected the express intent of Congress to expand the jurisdiction of the courts; to enhance the status of bankruptcy judges; and to permit those judges to function independently of the district courts. *Id.* at 232. Amendments to the 1978 Act specifically created the United States Bankruptcy Court, a new court of record intended to function as an adjunct to the district court. *Id.* at 233-34. Judges were to be appointed by the President, with the advice and consent of the senate, for fourteen-year terms. *Id.* Jurisdiction was conferred pursuant to former 28 U.S.C. § 1471, under which the district courts had exclusive jurisdiction over cases under the Code, and non-exclusive jurisdiction over civil proceedings arising under the Code or related to cases under the Code. 28 U.S.C. § 1471(a), (b). In addition, section 1471(c) also transferred the district court's bankruptcy jurisdiction to non-Article III courts. Taggart, *supra* at 234. This comprehensive jurisdictional grant called into question the constitutionality of non-Article III courts. *Id.* Ultimately, the Title 28 provisions of the Reform Act were repealed by sections 113 and 112(c) of the 1984 Bankruptcy Amendments. *Id.* at n. 12.

Impetus for the Bankruptcy Amendments was the United States Supreme Court's decision in *Northern Pipeline Constr. Co. v. Marathon Pipeline Co.*, wherein the Court held that state created common-law rights involving a bankrupt could

which governs the rejection of collective bargaining agreements by

not be constitutionally adjudicated by non-Article III bankruptcy courts. 458 U.S. 50, 84-85 (1982). Focusing on section 241(a) of the Reform Act, a plurality of the Court held that the broad grant of jurisdiction to bankruptcy judges was unconstitutional because it "impermissibly removed most, if not all, of the essential attributes of the judicial powers from the Art[icle] III district court, and vested those powers in a non-Article III bankruptcy court, instead." *Id.* at 87; see Note, *The Constitutionality of the Federal Magistrate System After the Northern Pipeline Decision*, 29 VILL. L. REV. 745, 754-57 (1984) (noting Supreme Court's decision not to recognize Bankruptcy Court as an "adjunct" to district court under saving provision absent Reform Act's retention of traits subscribed to Article III courts); see also Fullerton, *No Light at the End of the Pipeline: Confusion Surrounds Legislative Courts*, 49 BROOKLYN L. REV. 207, 219-27 (1983) (suggesting *Marathon* shed little light on constitutionality of legislative bankruptcy courts); King, *Symposium on Bankruptcy: Jurisdiction and Procedure Under the Bankruptcy Amendments of 1984*, 38 VAND. L. REV. 675, 684-86 (1985) (positing that establishment of Article III bankruptcy court would have guaranteed constitutionality of 1984 Amendments without question); Reddish, *Legislative Courts, Administrative Agencies and the Northern Pipeline Decision*, 1983 DUKE L.J. 197, 202-04 (criticizing Court's method for allocating judicial power between Article III and non-Article III courts and suggesting "preferable" standards).

The 1984 Bankruptcy Amendments enacted largely in response to *Marathon*, restrict and complicate the jurisdiction of the bankruptcy courts. See Taggart, *supra* at 264. Under the Amendments, bankruptcy judges appointed by the courts of appeal serve fourteen-year terms in a unit of the district court designated as the bankruptcy court for that district. *Id.* at 231. The district courts have pervasive jurisdiction over cases under Title III and related proceedings, and the authority to refer bankruptcy matters within the jurisdiction of the district court to bankruptcy court judges. *Id.* In matters referred to the bankruptcy court, the bankruptcy judge may enter dispositive orders and judgments in core proceedings only. *Id.* With respect to non-core proceedings, the bankruptcy judge submits proposed findings of fact and law to the district court. *Id.* In addition, the "new bankruptcy system" is subject to specific guidelines regarding appeals from dispositive orders, personal injury and wrongful death claims, and abstention. *Id.* at 231-32. For a critical look at the new bankruptcy system, see King, *supra* (suggesting bankruptcy court system created by 1984 Amendments is "complex and convoluted"); Comment, *The 1984 Bankruptcy Amendments—Another Flawed Compromise*, 46 OHIO ST. L.J. 1035 (1985) (characterizing restrictive jurisdiction created by Amendments as "a step backward toward the troubled pre-Reform Act system").

2. 11 U.S.C. § 1113 (1982 & Supp. III 1985). Section 1113 provides in pertinent part:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall—

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorgani-

zation of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposals without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing.

In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to

trustees in bankruptcy<sup>3</sup>, and debtors-in-possession<sup>4</sup>, appointed in a chapter 11 reorganization under the Bankruptcy Reform Act of 1978 (the Bankruptcy Code).<sup>5</sup> The legislative enactment of section 1113 was prompted by the United States Supreme Court's decision in *NLRB v. Bildisco and Bildisco*.<sup>6</sup> In *Bildisco*, the Court held that collective bargaining agreements were subject to rejection under the Bankruptcy Code pursuant to section 365(a) which provides for the rejection of executory con-

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unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

*Id.*

The main purpose of section 1113 is to discourage unilateral action by the debtor in rejecting collective bargaining agreements and seeking refuge in the bankruptcy court. See Gibson, *The New Law on the Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. 1113*, 58 AM. BANKR. L.J. 325, 327 (1984).

3. See 11 U.S.C. §§ 1104(a), 1108 (1982 & Supp. III 1985). In a chapter 11 reorganization, the Bankruptcy Code provides for the continuation of the debtor's business by a trustee who may be appointed at any time after the filing of the chapter 11 petition if certain requirements are met. See COHEN, BANKRUPTCY, SECURED TRANSACTIONS AND OTHER DEBTOR-CREDITOR MATTERS, ¶ 14-503.2, at 272 (1981). First, the appointment of a trustee must be requested by a "party in interest," including, but not limited to a creditor's committee, an equity security holder's committee, and an indenture trustee. *Id.* (citing 11 U.S.C. § 1102(a)). Second, an appointment can be made only "for cause," including fraud, dishonesty, incompetence or gross mismanagement of the affairs of the debtor by current management, or if such appointment is in the interests of all parties who have an interest in the debtor or the estate. *Id.* (citing 11 U.S.C. § 1104(a)(1)).

4. See 11 U.S.C. §§ 1107(a), 1108 (1982 & Supp. III 1985). Unlike a chapter 7 liquidation, reorganization under chapter 11 does not usually require the appointment of a trustee to deal with property of the estate. See COHEN, *supra* note 3, at 271. In a chapter 11 reorganization, the debtor, as "debtor-in-possession," retains control of the property of the estate and is accorded the rights and powers generally entrusted to the trustee. *Id.* at 272-74 (discussing trustee's duties in chapter 11 reorganization).

5. See Bankruptcy Code, 11 U.S.C. §§ 1101-1174 (1982 & Supp. III 1985). The principle purpose of a chapter 11 reorganization, as contrasted with a chapter 7 liquidation, is the rehabilitation and continued operation of the debtor business according to a plan which allows the debtor to provide its employees with jobs, pay its creditors and produce a return for its stockholders. See COHEN, *supra* note 3, at 265. Chapter 11 provides for continued operation of the business under bankruptcy court supervision. 11 U.S.C. § 1108. The debtor-in-possession is given a period of time during which debt collection efforts are stayed and a repayment plan can be proposed. *Id.* §§ 1121-29. Under chapter 11, a reorganization plan may be filed by any "party in interest," defined by the Code as an individual, partnership or corporation. *Id.* § 109(d), 101(30); see also COWANS, BANKRUPTCY LAW AND PRACTICE (West 1986) (discussing reorganization process under chapter 11 of Bankruptcy Code).

6. 465 U.S. 513 (1984); see also 130 CONG. REC. H809 (daily ed. February 22, 1984) (statement of Rep. Rodino); 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Kennedy). For a discussion of the facts of *Bildisco*, see *infra* note 39. For a discussion of the legislative history of section 1113, see *infra* notes 40, 47-50, 81-86, & 94-96 and accompanying text.

tracts.<sup>7</sup> *Bildisco* further adopted the lenient standard for rejection first enunciated by the United States Court of Appeals for the Second Circuit in *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.*<sup>8</sup> which permits

7. 465 U.S. at 526. Section 365(a) provides in pertinent part: "Except as provided in sections 765 and 766 of this title [11 U.S.C. §§ 765, 777] and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (1982 & Supp. III 1985). Under section 365, rehabilitation of a chapter 11 debtor is facilitated by providing the debtor with the option of terminating those executory contracts certain to impede the debtor's recovery, while providing for affirmance of those contracts that would assist in a company's efforts to revitalize. *Id.*; see Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements By Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983) (discussing rejection of executory contracts under section 365(a)); see also Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANKR. L.J. 1 (1984) (same).

Although section 365 empowers a bankruptcy court with authority to permit a debtor's rejection of executory contracts, the Code does not define that term. 11 U.S.C. § 365(a). The legislative history of section 365 defines such contracts as generally including "contracts on which performance remains due to some extent on both sides." H.R. REP. NO. 595, 95th Cong., 1st Sess. 347.

Professor Countryman has articulated a specific test for determining whether a contract is executory as requiring the "obligations of both the bankrupt and the other party to be so far unperformed that the failure of either to complete the performance would constitute a material breach excusing the performance of the other." Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN L. REV. 439, 460 (1973); see also *Lubrizol Enter. v. Richmond Metal Finishers*, 756 F.2d 1043, 1045 (4th Cir. 1985) (adopting Professor Countryman's formulation of executory contract).

Rejection of an executory contract or unexpired lease by the debtor constitutes a breach of the contract or lease. 11 U.S.C. § 356(g) (1982). In the event of rejection, the innocent party can file a claim for damages. *Id.* at 501(d) (1982 & Supp. III 1985).

Section 1113 removes the rejection of executory collective bargaining agreements from operation under section 365 of the Code. See Ehrenwerth & Lally-Green, *The New Bankruptcy Procedures for Rejection of Collective Bargaining Agreements: Is the Pendulum Swinging Back?* 23 DUQ. L. REV. 939, 941 (1985). For a further discussion of the effect of section 1113 on the rejection of executory collective bargaining agreements, see *infra* notes 41 & 75 and accompanying text.

8. 519 F.2d 698 (2d Cir. 1975). In *Kevin Steel*, the debtor steel company had filed a plan of reorganization under chapter 11. *Id.* at 700. Subsequently, the bankruptcy court for the district of New York granted the debtor's petition for permission to reject its collective bargaining agreement with the union as an "onerous executory contract" under section 365 of the Bankruptcy Code. *Id.* The union appealed and the district court reversed the decision of the bankruptcy court. *Id.* On appeal to the Second Circuit, the debtor argued that Congress' inclusion of collective bargaining agreements under section 313, permitting rejection of executory contracts by the debtor, reflected a clear intention to characterize such agreements as executory contracts subject to rejection if proven by the debtor to be "onerous." *Id.* at 702. In deciding to permit the debtor to reject the agreement, the Second Circuit stated that "[t]he decision to allow rejection should not be based solely on whether it will improve the financial status of the debtor . . . A bankruptcy court should permit rejection of a collective bargaining agreement 'only after careful scrutiny and a careful balancing of the equities on both sides.'" *Id.* at 707 (quoting *In re Overseas Nat'l Airways*,

the unilateral modification or termination of a labor agreement<sup>9</sup> if the debtor can show that “the collective bargaining agreement burden[s] the estate, and that after careful scrutiny, the equities balance in favor of

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238 F. Supp. 359 (E.D.N.Y. 1965). For a further discussion of the *Kevin Steel* decision, see *infra* note 9.

9. 519 F.2d at 706. Section 8(d) of the National Labor Relations Act (NLRA), which covers termination of collective bargaining agreements, provides in pertinent part:

(d) For the purposes of this section, to 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 respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: Provided, That where 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—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a) [29 USCS § 159(a)], and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended [29 USCS §§ 158, 159, 160], but loss of status for such

rejecting the labor contract.”<sup>10</sup>

employee shall terminate if and when he is reemployed by such employer.

29 U.S.C. § 158(d)(1982).

The statutory objective of section 8 is to “resolve disputes through peaceful bargaining, and not by resort to economic warfare.” R. GORMAN, *LABOR LAW* 399 (1976).

In *Kevin Steel*, the union argued that permitting rejection of its collective bargaining agreement created a direct conflict with the NLRA’s prohibition against unilateral termination of a labor agreement during its term. 519 F.2d at 704. Recognizing the “importance of the policies behind the Labor Act,” the United States Court of Appeals for the Second Circuit held that “a bankruptcy court must scrutinize with particular care, petitions to reject collective bargaining agreements.” *Id.* The court then concluded that it did not see any irreconcilable conflict between the Bankruptcy Act and the NLRA. *Id.* Specifically, the court stated:

We recognize, of course, that the policies animating the two statutes are different. The bankruptcy law is meant to preserve the funds of the debtor for distribution to creditors and to give the debtor a new start, while the basic policy of labor law is always to encourage creation and enforcement of collective bargaining agreements. Should Congress prefer to alter the present balance between these policies, it can do so.

*Id.* at 706 (quoting Comment, *Collective Bargaining and Bankruptcy*, 42 S. CAL. L. REV. 477 (1969)). Concluding that the district court had the power to permit the debtor to reject the labor contract, the Court of Appeals for the Second Circuit reversed and remanded the case to the bankruptcy court. *Id.* at 707. In so doing, the court cautioned the bankruptcy court to “move cautiously” in allowing rejection of a collective bargaining agreement “by permitting rejection ‘only after thorough scrutiny and a careful balancing of the equities on both sides. . . .’” *Id.* (quoting *In re Overseas Nat’l Airways*, 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965)).

The Second Circuit, in *Kevin Steel*, further reasoned that the debtor-in-possession, as a “new entity,” is not a party to the collective bargaining agreement, and thus, is not subject to the provisions of section 8(d) of the NLRA which prohibits termination of such agreements. *Id.* at 704. Subsequently, this “new entity” theory was rejected by the Second Circuit in *Truck Driver’s Local Union No. 807 v. Bohack Corp.*, 541 F.2d 312, 318 (2d Cir. 1976), *aff’d per curiam after remand*, 567 F.2d 237 (2d Cir. 1977), *cert. denied*, 439 U.S. 825 (1978). See also *In re Brada Miller Freight Sys.*, 702 F.2d 890 (11th Cir. 1983) (rejecting “new entity” theory).

*Kevin Steel* has been criticized for failing to reconcile the conflict between a debtor employer’s decision to unilaterally reject an “onerous” contract under the Code and the NLRA’s policy of encouraging the collective bargaining process as the primary means of dispute resolution. See Bordewick & Countryman, *supra* note 7 at 300-01 (*Kevin Steel* tried to reconcile conflict by way of “an ingenious, if unconvincing feat of verbal prestigation.”). For a further discussion of the need to reconcile these two competing interests, see *infra* notes 77-85 & 97-100 and accompanying text.

10. 465 U.S. at 521 (citing *Shopmen’s Local Union No. 455 v. Kevin Steel*, 519 F.2d 698, 707 (2d Cir. 1975)). The Court stated: “We agree . . . that the bankruptcy court should permit rejection of a collective bargaining agreement under §65(a) . . . if the debtor can show that the collective bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.” *Id.* at 525-26. For a discussion of the “balancing of the equities” test adopted in *Bildisco*, see *infra* note 41 and accompanying text.



In response to *Bildisco*, labor supporters lobbied for legislative codification of a stricter standard for rejection later adopted by the Second Circuit in *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*<sup>11</sup> and expressly rejected by the Supreme Court in *Bildisco*.<sup>12</sup> The

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11. 523 F.2d 164 (2d Cir. 1975), *cert. denied*, 423 U.S. 1017 (1976). In *REA Express*, the issue before the Second Circuit was whether a collective bargaining agreement, subject to the Railway Labor Act, could be rejected by a debtor-in-possession on the basis of those principles enunciated earlier by the court in *Kevin Steel*. 523 F.2d at 164. In rendering its decision in favor of the debtor, the Second Circuit held that to preclude rejection would defeat the Railway Labor Act's primary purpose of avoiding the disruption of commerce. *Id.* at 169. Accepting the *Kevin Steel* "balancing of the equities" test, the *REA Express* court qualified the *Kevin Steel* standard by adding that rejection is permissible "to save a failing carrier in bankruptcy from collapse;" "to save a carrier from complete collapse and liquidation;" and to prevent a debtor's collapse and save employee jobs. *See id.* at 169, 170 & 172. It was this seemingly "stricter" standard for rejection that labor urged upon Congress in the aftermath of the *Bildisco* decision. *See Ehrenwerth & Lally-Green, supra* note 7.

For cases adopting the *REA Express* standard, see *In re Brada Miller Freight Sys.*, 702 F.2d 890 (11th Cir. 1983) (careful balancing of the equities essential to bankruptcy court's approval of rejection by trustee); *In re Alan Wood Steel Co.*, 449 F. Supp. 165 (E.D. Pa. 1978), *appeal dismissed*, 595 F.2d 1211 (3d Cir. 1979) (application to reject collective bargaining agreement must be carefully scrutinized).

12. 465 U.S. at 425. One court has stated that under the *REA Express* test, the decision to authorize rejection is based on a purely economic analysis. *See Bohack Corp. v. Truck Drivers' Local Union*, 431 F. Supp. 646 (E.D.N.Y. 1977), *aff'd*, 576 F.2d 237 (2d Cir. 1977) ("If the debtor's debts greatly exceeded its assets, if it obviously was about to collapse, and if the costs of labor were the clear cause of its financial troubles, the rejection would be authorized."), *cert. denied*, 439 U.S. 825 (1978).

Similarly, one commentator has termed the standard for rejection derived from *REA Express* as a "but for" test. *See Lunnie, Chapter 11 and Collective Bargaining*, 35 LAB. L.J. 516, 518-19 (1984) ("But for rejection, the reorganization would fail and liquidation would result."); *see also Bildisco*, 465 U.S. at 524. In *Bildisco*, the Supreme Court refused to apply the *REA Express* standard to prevent *Bildisco* from rejecting a collective bargaining agreement unless it could demonstrate that its reorganization would fail if rejection were not permitted. *Id.* In *Bildisco*, both union and board argued that the legislative history of section 365(a) evinced a congressional intent to incorporate the *REA Express* standard for rejecting labor contracts. *Id.* However, the Court found that argument "unconvincing," noting that since the congressional debates revealed some mention of the conflicting *Kevin Steel* and *REA Express* tests, "Congress cannot be presumed to have adopted one standard over the other without some affirmative indication of which it preferred." *Id.* at 525. At most, the Court stated: "[T]he House Report supports only an inference that Congress approved the use of a somewhat higher standard than the business judgment rule . . ." *Id.* Rejecting the rigidity of the *REA Express* standard, the *Bildisco* Court stated:

The standard adopted by the Court of Appeals for the Second Circuit in *REA Express* is fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code. The rights of workers under collective bargaining agreements are important, but the *REA Express* standard subordinates the multiple, competing considerations underlying a Chapter 11 reorganization to one issue: whether rejection of the collective bargaining agreement is necessary to prevent the debtor from going into liquidation. The evidentiary burden neces-

subsequent enactment of section 1113 was hailed as a victory for labor which safeguarded its interests by encouraging the collective bargaining process as the primary means of dispute resolution.<sup>13</sup> In *Wheeling-Pittsburgh Steel v. United Steelworkers*,<sup>14</sup> confronted with the potential demise of the nation's seventh largest steel producer, and the precarious balance between the competing interests of the creditors and labor, the United States Court of Appeals for the Third Circuit became the first court of appeals to interpret section 1113 of the Bankruptcy Amendments in the context of a chapter 11 reorganization.<sup>15</sup>

The controversy in *Wheeling-Pittsburgh Steel* arose out of the efforts of Wheeling-Pittsburgh (the "Company") to combat the economic recession plaguing the steel industry, through corporate reorganization under chapter 11<sup>16</sup> and negotiation with the United States Steelworkers of America, AFL-CIO-CLC (the "Union" or "Steelworkers").

By 1984, Wheeling-Pittsburgh's status as a leading steel manufac-

sary to meet this stringent standard may not be insurmountable, but it will present difficulties to the debtor-in-possession that will interfere with the reorganization process.

*Id.* The Court characterized the *Kevin Steel* standard as stricter than the "business judgment test," but more lenient than the standard for rejection adopted by the Second Circuit in *REA Express*. *Id.* at 526. For a discussion of the *Kevin Steel* standard, see *supra* note 8.

13. For a discussion of the relationship between the new law and the collective bargaining process, see *infra* notes 77-85 & 97-100 and accompanying text.

14. 791 F.2d 1074 (3d Cir. 1986). Several bankruptcy courts had interpreted section 1113 prior to the Third Circuit's decision in *Wheeling-Pittsburgh Steel*. For a discussion of those cases, see *infra* note 87.

15. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969 (Bankr. W.D. Pa. 1985). In 1982, an economic recession threatened the vitality of this country's steel industry. *Id.* The price of steel had declined over the past three to five years, and the industry was plagued by plant shutdowns and employee lay-offs. *Id.* The precise status of Wheeling-Pittsburgh's economic health was an important issue throughout the legal proceedings. *Id.* The Steelworkers contended that Wheeling-Pittsburgh's concern over its position as a leading steel producer was "unreasonably pessimistic." *Id.* However, the bankruptcy court did "not find credible the Union expert's optimism regarding the steel industry and Wheeling-Pittsburgh's future participation therein." *Id.*

16. *In re Wheeling-Pittsburgh Steel Corp.*, 52 Bankr. 997 (W.D. Pa. 1985). The concern that the controversy in *Wheeling-Pittsburgh Steel* might have serious extra-judicial ramifications, as well as important legal consequences, was expressed by the district court:

In actuality, this is not a typical adversary proceeding, but rather a tense and imperative struggle for the survival of a company and the preservation of jobs generated by that company's normal operations. The Company and the Union are both in the same boat faced with a serious and common problem that may well sink all aboard . . . . The response to the problem cannot be unfairly shifted to one group while the others sit by with a nonchalant claim of a preferred interest. The response needed is for all to bail water, pull together, throw over that portion of the heavy cargo that can be sacrificed, head for safe ground and try to weather the storm with the hope that all will not be lost.

52 Bankr. at 1004.

turer was tenuous at best.<sup>17</sup> In 1981, the gravity of the Company's condition became apparent when serious financial pressures prompted it to seek concessions from certain employees for the first time during the pendency of a collective bargaining agreement.<sup>18</sup> One year later, in 1982, the Company sought further concessions from the Union and was granted a reduction in labor costs not provided for in the original collective bargaining agreement.<sup>19</sup> The terms and conditions of the negotiated reduction, including the eventual restoration of union wages, were embodied in a new agreement which was to expire in July, 1986.<sup>20</sup> However, in November, 1984, at the Company's request, and in light of

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17. See *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 979 (Bankr. W.D. Pa. 1985). The bankruptcy court noted that Wheeling-Pittsburgh had sustained significant losses between 1982 and 1985 resulting in "deep financial difficulty." *Id.* Long-term debts and operating losses had combined to weaken the Company's financial position and cast a shadow over its prospects for resurgence and growth. *Id.* Specifically, the bankruptcy court found that the Company was producing steel at only 50-60% of capacity; that the majority of the Company's cash necessarily went towards utilities and labor costs (with labor costs comprising 35-40% of the Company's total costs); \$50-\$65 million was owed in 1985 in pension fund liabilities for the previous year; approximately \$125 million was owed to unsecured creditors; \$547 million was owed to secured creditors; and between \$121 million and \$363 million was owed to pension benefit plans. *Id.* Upon consideration of these factors, together with the generally impoverished condition of the United States steel industry, the bankruptcy court expressed its opinion that the Company's "continued existence is in question." *Id.*

18. See *id.* at 973. During the late 1970's, Wheeling-Pittsburgh began a major capital investment program for modernization. *Id.* Between 1980 and 1985, the Company spent \$540 million in an effort to improve its quality and service. *Id.* The cost of such modernization was steep, necessitating heavy borrowing. *Id.* Between 1980 and 1981, Wheeling-Pittsburgh was forced to seek concessions from employees of the Company's Allenport plant. *Id.* It was the first time Wheeling-Pittsburgh had asked for concessions during the pendency of a labor agreement, and the parties successfully reached an accord. *Id.*

19. *Id.* Negotiators for Wheeling-Pittsburgh obtained two separate sets of concessions from the Union membership: the first in April, 1982 and the second in December, 1982. *Id.* The April concessions contained a \$1.65 an hour reduction in labor costs in return for entitlement to preferred stock which each employee could redeem upon resignation, death or retirement from the company. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1077. The December, 1982 concessions were embodied in a new three and one half year collective bargaining agreement. *Id.* Under the terms of the original 1980-1983 agreement, Wheeling-Pittsburgh's labor costs averaged \$25.00 per hour. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 973 n.3 (Bankr. W.D. Pa. 1985). In addition to wages, this figure represented all fringe benefits and government required payroll costs, the then current cost of pensions, and other retirement benefits not part of employee earnings. *Id.* The December, 1982 agreement reduced labor costs to \$18.60 per hour at its lowest point. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1077. In return, Wheeling-Pittsburgh agreed to a profit-sharing plan. *Id.* A schedule of restorations provided for a gradual return to a wage level of \$25.00 per hour before expiration of the agreement in July, 1986. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 973 (Bankr. W.D. Pa. 1985). By the end of 1984, restorations had raised the labor cost to \$21.40. *Id.*

20. See *Wheeling-Pittsburgh Steel*, 791 F.2d at 1077. It was this particular con-

additional financial difficulties, the Union voluntarily agreed to cancel all previously scheduled restorations.<sup>21</sup>

Subsequently, in January, 1985, Wheeling-Pittsburgh requested a reduction in labor costs for the fourth time.<sup>22</sup> The Steelworkers refused to comply, absent some effort by the Company to secure concessions from its lenders.<sup>23</sup> In response to the Union's counter-demand, Wheeling-Pittsburgh introduced a three-prong "restructuring proposal" which outlined the necessity for concessions from its lenders, the Steelworkers, and the Company's shareholders.<sup>24</sup> Both the Union and the Company's lenders submitted counter-offers which suggested alternative terms of reorganization.<sup>25</sup> In April, 1985, when the opposing demands of the lenders and the Steelworkers proved to be irreconcilable, Wheeling-Pittsburgh Steel petitioned for reorganization under chapter 11 of the Bankruptcy Code.<sup>26</sup>

On May 9, 1985, Wheeling-Pittsburgh, now in the posture of debtor-in-possession, again submitted to the Union, proposed modifica-

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tract which Wheeling-Pittsburgh attempted to reject when it filed for bankruptcy under chapter 11. *Id.*

21. *Id.* At the end of 1984, Wheeling-Pittsburgh asked the Union to cancel all expected restorations above \$21.40. *Id.* The Union agreed only after its financial experts again confirmed the necessity for that concession. *Id.* Specifically, the Union agreed to defer restorations indefinitely. *Id.*

22. *Id.*

23. *Id.* Prior to mid-January, 1985, no concessions had been secured from the Company's principal bank creditors. *Id.*

24. *Id.* In response to the Union's refusal to make further concessions unless the Company obtained concessions from its lenders, Wheeling-Pittsburgh submitted a restructuring proposal. *Id.* The proposal asked the Union for a labor cost of approximately \$19 for three years and cancellation of the restorations, in return for which the employees were to receive preferred or common stock in the Company. *Id.* Second, Wheeling-Pittsburgh asked all of its lenders for a 100% moratorium on the payment of principal for 1984-85 and certain of its lenders for an additional 50% moratorium in interest payments. *Id.* Third, the Company proposed a continued suspension of dividends to its preferred stockholders. *Id.*

25. *Id.* The lenders submitted a counter-proposal calling for the deferment of nearly \$210 million in outstanding debts and \$40 million in additional credit between 1985 and 1989. *Id.* In addition, the lenders asked Wheeling-Pittsburgh to pledge its current assets (including accounts receivable and inventory valued at approximately \$300 million) to secure the Company's entire debt. *Id.* The Union's counter-offer called for a two-year contract with labor costs of \$19.50 per hour for the first year and \$20.00 for the second year; cancellation of all scheduled restorations; compensation in common stock; power to appoint a member of the Company's Board of Directors; and the Company's promise not to pledge its assets to the banks to secure the old debt. *Id.*

26. *Id.* When the Union rejected the lenders' proposal regarding the Company's pledge of its current assets, the restructuring proposal collapsed. *Id.* Wheeling-Pittsburgh filed its chapter 11 petition on April 16, 1985. *Id.* Seven subsidiary companies filed for relief simultaneously under chapter 11. *Id.* at 972. For a discussion of the underlying principles of reorganization under chapter 11 of the Bankruptcy Code, see *supra* notes 3-5.

tions to its current collective bargaining agreement.<sup>27</sup> The Union hired a professional accounting firm to evaluate the Company's proposal and to prepare a response.<sup>28</sup> Wheeling-Pittsburgh provided certain information to the Union's financial advisors but not all that was requested by the Union.<sup>29</sup> Notwithstanding the Union's position that additional information was necessary to its evaluation of the proposal, Wheeling-Pittsburgh demanded the Steelworkers' response by May 30 and threatened to petition the bankruptcy court for authority to reject the collective bargaining agreement.<sup>30</sup> On May 31, 1985, after the Union had advised the Company of its inability to formulate a response, Wheeling-Pittsburgh followed through with its threat.<sup>31</sup>

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27. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1077-78. The proposal advocated a five-year contract which included the following terms: (1) an average labor cost not to exceed \$15.20 an hour; (2) a reduction in medical and insurance benefits; (3) elimination of supplemental unemployment benefits; and (4) elimination of various other employee payments and benefits. *Id.* at 1078.

Whether Wheeling-Pittsburgh submitted this proposal with the imminent purpose of seeking to reject the collective bargaining agreement is not apparent from the facts of this case. Nevertheless, section 1113(b)(A)(1) requires the debtor-in-possession to submit a proposal based on reliable and complete information revealing the necessary changes vis-a-vis current collective bargaining agreements to permit reorganization. 11 U.S.C. 1113(b)(A)(1) (1982 & Supp. III 1985). Such a proposal is a condition precedent to a court's determination of whether to permit rejection of the collective bargaining agreement. *Id.*; see 5 K. KLEE, R. LEVIN, C. CYRE, W. MINKEL, H. SOMMERS, W. TAGGART, COLLIER ON BANKRUPTCY 1113-15 (15th ed. 1986).

28. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1078.

29. *Id.*

30. *Id.* Section 1113 imposes on the debtor an obligation to provide the representative of its employees with "such relevant information as is necessary to evaluate the proposal." 11 U.S.C. § 1113(b)(1)(3). The Union had contended that the Company exhibited bad faith by denying the Union's request for a plant tour, and for a review and explanation of the Company's standard wage cost system. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 977-78 (Bankr. W.D. Pa. 1985). However, the bankruptcy court interpreted the good faith requirement of 1113(b)(2) as capable of being satisfied "by showing that the debtor made reasonable efforts to negotiate a voluntary modification, and that those efforts were not likely to produce a prompt and satisfactory solution." *Id.* at 976. Applying that standard to the facts of the case before it, the bankruptcy court found that the Company's response to the Union's requests had not been unreasonable, since the Company had merely delayed the plant tour and the standard cost system used by the Company had already undergone close scrutiny by the Union's financial advisors. *Id.* The district court affirmed the bankruptcy court's finding that the financial information provided to the Union was sufficient to evaluate the Company's proposal. *In re Wheeling-Pittsburgh Steel Corp.*, 52 Bankr. 997, 1006 (W.D. Pa. 1985). The Third Circuit disagreed, and directed the bankruptcy court to reconsider its findings on remand. *Wheeling-Pittsburgh Steel*, 791 F.2d 1094. For a discussion of the good faith requirement of section 1113, see generally Gibson, *supra* note 2, at 325.

31. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 974 (Bankr. W.D. Pa. 1985). On appeal from the decision of the bankruptcy court, the Union maintained that the 22-day period between the Company's submission of its proposal on May 9, and the filing of its application for rejection of the collective bargaining agreement on May 28, violated the good faith requirement of section

Following a four-day hearing, the bankruptcy court authorized rejection of the contract.<sup>32</sup> In response, the Steelworkers commenced a strike on July 21, 1985<sup>33</sup> and appealed the decision of the bankruptcy

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1113. *In re Wheeling-Pittsburgh Steel Corp.*, 52 Bankr. 997 (W.D. Pa. 1985). However, the district court disagreed, reasoning that the 22-day period utilized by the Company was "not inherently unreasonable," since section 1113 contains no time constraints. *Id.* at 1003. The United States Court of Appeals for the Third Circuit disagreed, noting that Wheeling-Pittsburgh had not "met its negotiating obligation." *Wheeling-Pittsburgh Steel*, 791 F.2d at 1094.

32. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1078. The bankruptcy court held a hearing on Wheeling-Pittsburgh's motion from July 17 until July 21, 1985. *Id.* The bankruptcy court analyzed the Company's application for rejection by using a nine-step test first enunciated in *In re American Provision Co.*, 44 Bankr. 907, 909 (Bankr. D. Minn. 1984). *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969 (Bankr. W.D. Pa. 1985). Applying each of the nine factors to the Company's application for rejection of the contract, the bankruptcy court concluded that rejection was warranted. *Id.* at 984. First, the court concluded that Wheeling-Pittsburgh had complied with the pre-hearing procedural requirements implicit in sections 1113(b)(1)(A) & 1113(b)(2) by 1) submitting a proposal for modification; 2) meeting with Union representatives on several subsequent occasions; and 3) negotiating with the Union in "good faith" as evidenced by its reasonable attempts to reach a mutual agreement on contract modifications, and its efforts to provide the Union with the information necessary to evaluate its proposal. *Id.* at 975-77. Thereafter, applying the substantive provisions of the test to Wheeling-Pittsburgh's request, the court authorized the Company's rejection of the labor contract based on its finding that 4) the proposal was based on the most reliable and comprehensive information available; 5) the proposed modifications were "necessary" to permit reorganization in light of the economic recession plaguing the steel industry and the Company at that time; 6) the proposed modifications treated all parties "fairly and equitably" since it required sacrifices from both creditors and employees; 7) Wheeling-Pittsburgh had provided the Union with sufficient time and information to evaluate the proposal; 8) the Union's failure to accept the proposal was without good cause; and 9) the balance of the equities favored rejection of the agreement because "rejection will have a significant and positive effect on Wheeling-Pittsburgh's prospects for reorganization." *Id.* at 975-83. In deciding to grant the Company's application for rejection, the bankruptcy court cautioned against the adverse effects of liquidation, noting:

The financial direction of the Company must be reversed. The next step downward after Chapter 11 is liquidation. The effect of liquidation would be disastrous for all parties . . . The court is not unmindful that rejection will entail short term sacrifices on the part of employees, but in the long run, they will benefit by a successful reorganization, and a stable wage rate. That is far better than liquidation.

*Id.* at 984.

33. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1078. On October 15, 1985, Wheeling-Pittsburgh reached an agreement with the Steelworkers which ended the strike. *Id.* The settlement included, in part, a new collective bargaining agreement providing for a labor cost of \$18.00 per hour; a price escalation clause under which a labor cost bonus would be paid in relationship to increases in Wheeling-Pittsburgh's production prices; a pension relief program; and an employee buy-out protection plan for employees whose jobs had been permanently terminated as a result of reorganization. *Id.* In addition, the settlement agreement provided that if the Union was successful in reversing the court's authorization of the rejection, it would assert claims for the lost pay of plant guards who had continued to work during the strike. *Id.* On appeal to the United States Court of Appeals for the Third Circuit, the Company's principal

court to the United States District Court for the Western District of Pennsylvania, which affirmed the decision of the bankruptcy court to permit rejection of the contract.<sup>34</sup>

On appeal, the United States Court of Appeals for the Third Circuit, with Judge Sloviter writing for a unanimous court,<sup>35</sup> vacated the order of the district court and directed that court to remand the case to the bankruptcy court.<sup>36</sup> In so doing, the Third Circuit focused on two principal issues:<sup>37</sup> (1) whether Wheeling-Pittsburgh's proposed modifi-

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bank creditors urged that the issue of lost pay for the plant guards rendered the Union's appeal moot. *Id.* For a discussion of the Third Circuit's treatment of that issue, see *infra* note 37.

34. *In re* Wheeling-Pittsburgh Steel Corp., 52 Bankr. 997 (W.D. Pa. 1985). Espousing the view of the bankruptcy court, the district court stated:

If a way out of this financial and legal mire, which has produced anger, distrust, accusation and finger pointing, and a major labor strike is to be found, it will have to be a joint effort based on cooperation by the parties and not judicial fiat. . . .

A word to the wise has not yet been efficient and so it is hoped that its rejection here will prompt the parties to negotiate without ceasing until a fair accord is reached. The inability or unwillingness to do so will not produce a winner and a loser, but the premature fall of a proud warrior whose last struggle will be overshadowed by a failure to sense their need for each other.

*Id.* at 1007.

35. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1076. Judge Sloviter was joined in her opinion by Judges Adams and Mansmann.

36. *Id.* at 1094.

37. *Id.* Before it disposed of the merits, the Third Circuit addressed the alleged mootness of the Union's appeal previously raised by the Company's principal bank creditors. *Id.* at 1078. Although the lenders eventually withdrew their contention, they had urged that the issue of wages for the plant guards during the strike was a "mere contrivance," rather than an actual controversy. *Id.* at 1079. The Third Circuit disagreed, noting that Wheeling-Pittsburgh and the Union had a live agreement about their claim to the disputed wages. *Id.* at 1080.

Additionally, the court considered the Union's argument that Wheeling-Pittsburgh had failed to make the "threshold showing needed under section 1113 entitling it to reject the collective bargaining agreement." *Id.* at 1085. The Union argued that because Wheeling-Pittsburgh had enough cash to operate during the remaining 123 months of the 1983 contract, no modification to the agreement was "necessary" and that the bankruptcy court had erred in considering the Company's proposal. *Id.* Upon consideration of section 1113, the Third Circuit rejected the Union's suggestion that the statute provides either implicitly or explicitly for premitting evaluation of the debtor's proposal. *Id.* at 1085. The court disagreed with the Union's analysis of the procedure described in section 1113, noting that the statute does not require the bankruptcy court to make a preliminary finding of "necessity" before the debtor's proposal is submitted or evaluated. *Id.* Instead, the Third Circuit stated that a four-step procedure must be followed after a chapter 11 petition has been filed by the debtor: 1) proposed modifications to the labor contract must be submitted prior to filing an application for rejection; 2) the bankruptcy court must schedule a hearing to consider the merits of the debtor's application within a specified time; 3) the trustee and the Union must negotiate in good faith before the court hearing is held; and 4) the court must decide whether to reject the debtor's application

cations to the collective bargaining agreement contained only those modifications which were "necessary to permit reorganization of the debtor" and (2) whether the proposed modifications treated the Company, its creditors and the Steelworkers "fairly and equitably."<sup>38</sup>

Before turning to a consideration of the parties' contentions, the Third Circuit reviewed the United States Supreme Court's decision in *Bildisco*<sup>39</sup> and the congressional response to that case which culminated

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within thirty days after the application has been filed, subject to any stipulated extensions. *Id.* at 1085. Further, the court noted that the only provision for any preliminary determination appears in section 1113(e) wherein Congress recognized that the bankruptcy court may authorize interim changes in an agreement if such change is "'essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate.'" *Id.* (quoting 11 U.S.C. § 1113(e)). One bankruptcy commentator suggests that subsection (e) represents a "middle ground between the *Bildisco* majority and those who argued that forcing the debtor to comply with the terms and conditions of a collective bargaining agreement, prior to the entry of any order authorizing rejection could threaten the debtor's vitality." See 5 K. KLEE, C. CYR, W. MINKEL, H. SOMMER, W. TAGGART, COLLIER ON BANKRUPTCY ¶ 1113-12 (15th ed. 1986). For the full text of section 1113(e), see *supra* note 2.

38. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1086. The bankruptcy court and the district court rejected the Union's contention that Wheeling-Pittsburgh's proposal was neither "necessary" to the Company's reorganization, nor treated all the parties "fairly and equitably" as required under section 1113. *Id.* For a discussion of the Third Circuit's treatment of these issues, see *infra* notes 44-67 and accompanying text.

39. 465 U.S. 513 (1983). In *Bildisco*, a New Jersey partnership filed a voluntary petition in bankruptcy for reorganization under chapter 11 of the Bankruptcy Code. *Id.* When the petition was filed, relations between the partnership and the Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America were governed by a three-year collective bargaining agreement, effective through April 30, 1982. *Id.* at 518. Between January 1980 and December 1980, *Bildisco* failed to meet several of its financial obligations under the agreement. *Id.* Simultaneously, during the summer of 1980, the Union filed unfair labor practice charges with the National Labor Relations Board, alleging that *Bildisco* had violated sections 8(a)(5) and 8(a)(1) of the National Labor Relations Act. *Id.* at 518-19; see 29 U.S.C. § 158(a)(1), (a)(5) (1982). In January 1981, the bankruptcy court granted the partnership's request for authority to reject its collective bargaining agreement. *Bildisco*, 465 U.S. at 518. Rejection was premised solely on the basis of testimony offered by one of the Company's partners that rejection would save the partnership \$100,000. *Id.* at 519. The Union appealed, and the United States District Court for the District of New Jersey affirmed. *Id.* at 520-21. The United States Court of Appeals for the Third Circuit consolidated the Union's appeal with the Board's petition for enforcement of its order. *Id.* at 519. The Third Circuit accepted the standard applied by the United States Court of Appeals for the Second Circuit in *Shopmen's Local Union No. 455 v. Kevin Steel Products Inc.* and remanded the case to the bankruptcy court for reconsideration of the issues in light of that standard. *Id.* at 521.

The Supreme Court granted the Union's petition for certiorari to review the decision of the Court of Appeals in an effort to reconcile the *Kevin Steel* standard with the test for rejection later enunciated by the Second Circuit in *REA Express*. *Id.* The Supreme Court framed the questions presented as follows: (1) Under what conditions can a bankruptcy court permit a debtor-in-possession to reject a collective bargaining agreement; and (2) may the NLRB find a debtor-in-possession guilty of unfair labor practices for unilaterally terminating or modifying a



in the passage of section 1113 of the Bankruptcy Amendments.<sup>40</sup> The Third Circuit began its discussion by setting forth the standard for rejection of collective bargaining agreements under *Bildisco*.<sup>41</sup> The court

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collective bargaining agreement before rejection of that agreement has been approved by the bankruptcy court. *Id.* at 516.

40. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1086. Even before the Supreme Court's decision in *Bildisco*, some members of Congress had voiced their concern that seemingly solvent companies were using the bankruptcy laws as a "new collective bargaining weapon." See Rosenberg, *Bankruptcy and the Collective Bargaining Agreement—A Brief Lesson in the Use of the Constitutional System of Checks and Balances*, 58 AM. BANKR. L.J. 293, 312 (1984) (quoting Daily Labor Report (BNA) No. 194 at A-6 (October 5, 1983)). In the years following the adoption of the Bankruptcy Reform Act of 1978, more companies appeared to be using bankruptcy to void labor contracts prior to insolvency, reflecting the Act's emphasis on providing opportunities for individuals and companies to reorganize. See Rosenberg, *supra* at 304; see also Browning, *Using Bankruptcy to Reject Labor Contracts*, 70 A.B.A.J. 60 (1984). In his article, written shortly after the Supreme Court's decision in *Bildisco*, Browning notes that *Bildisco*'s lawyer, Jack Zelkin, recalled that at oral argument, the Court focused its attention on "whether or not a company can use chapter 11 merely to escape a labor contract." *Id.* As Browning points out, the use of section 1113 to reject onerous labor agreements while a company was still solvent was exemplified by the bankruptcy filing of Wilson Foods in April 1983, followed by the company's rejection of its collective bargaining agreement immediately thereafter, and Continental Airlines' similar move in September 1983 which resulted in a 50% wage reduction for 4,200 of its 12,000 employees immediately following the Airlines' rejection of its labor contracts with several unions. *Id.*; see also *In re Braniff Airways, Inc.*, 25 Bankr. 216 (Bankr. N.D. Tex. 1982) (rejection of collective bargaining agreement authorized after bankruptcy court determined that reorganization without rejection was impossible).

The day the *Bildisco* decision was announced, Representative Peter Rodino, chairman of the House Judiciary Committee with jurisdiction over bankruptcy legislation, introduced a bill to "amend title 11 of the United States Code to clarify the circumstances under which collective bargaining agreements may be rejected in cases under Chapter 11." 130 CONG. REC. H809 (daily ed. February 22, 1984). Thereafter, organized labor launched an immediate effort to overturn the *Bildisco* decision which labor interpreted as giving the trustee 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); see generally Ehrenwerth & Lally-Green, *supra* note 7, at 939 (describing legislative reaction to Supreme Court's decision in *Bildisco*); Pulliam, *The Collision of Labor and Bankruptcy Law: Bildisco and the Legislative Response*, 36 LAB. L.J. 390, 395-97 (1985) (discussing congressional response to *Bildisco*); White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1190-1200 (1984) (tracing legislative enactment of section 1113).

41. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1086. In *Bildisco*, the Supreme Court adopted the "balancing of the equities" test espoused by the United States Court of Appeals for the Eleventh Circuit in *In re Brada Miller Freight System*, 702 F.2d 890 (11th Cir. 1983). 465 U.S. 513 (1984). In *Brada Miller*, the Eleventh Circuit vacated the Alabama district court's holding that the bankruptcy court had properly determined that a collective bargaining agreement is an executory contract subject to rejection with court approval under section 365 of the Bankruptcy Code. 702 F.2d at 901. In so doing, the Eleventh Circuit noted that a "balancing of the equities test provides a more satisfactory accommodation of the conflicting interests at stake in a rejection proceeding." *Id.* at

then contrasted the *Bildisco* standard with the "very strict standard" adopted by the United States Court of Appeals for the Second Circuit in *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*<sup>42</sup>

After reviewing the standards for rejection of collective bargaining

899. According to the Eleventh Circuit, "although no hard and fast test may be applied in every case," a balancing of the equities involves a consideration of the following factors:

The possibility of liquidation both with and without rejection, and the impact of liquidation on each of the parties involved . . . claims that will result from the rejection of a collective bargaining agreement, both in terms of the adequacy of relief for the employees and other claimants, and the impact of these claims on the debtor . . . the cost-spreading abilities of the parties . . . and the good (or bad) faith of the Union and the debtor in seeking to resolve their mutual dilemma. . . .

*Id.* at 899-900.

In addition, the Eleventh Circuit concluded that "regardless of the outcome of the balancing of the equities, a bankruptcy court must make an explicit showing that the debtor was not improperly motivated by a desire to rid itself of the Union prior to allowing the rejection of a collective bargaining agreement." *Id.* at 901 (quoting *In re Figure Flattery, Inc.*, 88 Lab. Cas. (C.C.H.) ¶ 11,850, at 23,502 (S.D.N.Y. 1980)).

In adopting the Eleventh Circuit's formulation, the Supreme Court noted that the standard for rejection of collective bargaining agreements intended by Congress under Bankruptcy Code section 365(a) is a "higher one than that of the business judgment rule, but a lesser one than that enunciated by the United States Court of Appeals for the Second Circuit in *REA Express* which prohibits rejection unless the debtor can demonstrate "that its reorganization will fail unless rejection is permitted." *Id.* (citing *REA Express*, 523 F.2d 164 (2d Cir. 1975)). For a discussion of *REA Express* and cases adopting its "strict" standard for rejection under section 365(a) of the Bankruptcy Code, see *supra* note 11 and accompanying text.

The business judgment standard governs the rejection of ordinary executory contracts under section 365(a) of the Bankruptcy Code. See *Group of Investors v. Milwaukee R. R.*, 318 U.S. 523, 550 (1943). Collective bargaining agreements, as the cornerstones of labor law, have traditionally been accorded a higher status, requiring a more stringent standard for rejection. See *Bildisco*, 465 U.S. at 523. Using the "business judgment" test, a debtor need only show that the rejection of an executory contract will "benefit the estate." See Pulliam, *supra* note 7, at 8. Under this test, the assumption or rejection of executory contracts rests on the sound business judgment of the trustee. See, e.g., *Group of Investors v. Milwaukee R.R.*, 318 U.S. 523, 550 (1943) (debtor's rejection of lease as executory contract is subject to business judgment test); see also *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187 (6th Cir. 1983) (debtor's application to reject labor contracts not subject to balancing test); *In re Minges*, 602 F.2d 38 (2d Cir. 1979) (trustee has power to reject lease as executory contract with court's permission); *In re Tilco*, 558 F.2d 1369 (10th Cir. 1977) (business judgment rule applied in determining justification for rejection of executory contract); *In re Equities, Inc.*, 18 Collier Bankr. Cas. 289 (Bankr. S.D.N.Y. 1978) (unexpired lease is executory contract subject to rejection).

One commentator has noted: "A disinterested court would apply the business judgment test employed for any other executory contract . . . . A court more sensitive to the policies which underly the National Labor Relations Act would conclude that a test more stringent than the business judgment test must prevail." See, Pulliam, *supra* note 7, at 29.

42. *REA Express*, 523 F.2d at 164. In *REA Express*, the Second Circuit held that rejection should be permitted "only where it clearly appears to be the lesser

agreements enunciated in each of these cases, the Third Circuit concluded that section 1113 imposes on the debtor in a chapter 11 reorganization an entirely new standard for rejection of such labor contracts.<sup>43</sup> Relying principally on the legislative history of section 1113, the Third Circuit held that a debtor can reject its union contracts by establishing that its proposal contains only those modifications necessary to prevent the debtor's liquidation *and* that the proposal treats all of the affected parties fairly and equitably.<sup>44</sup> Thus, the Third Circuit's decision requires a debtor seeking to void a labor contract in bankruptcy to meet both prongs of a two-part test.<sup>45</sup>

Having concluded that the enactment of section 1113 modifies the lenient standard for rejection enunciated in *Bildisco*, the Third Circuit next considered whether the bankruptcy court and district court had properly interpreted and applied section 1113 in deciding to authorize Wheeling-Pittsburgh's rejection of the collective bargaining agreement.<sup>46</sup>

To ascertain the meaning of section 1113, the Third Circuit contrasted the language of the proposed legislation<sup>47</sup> with the actual lan-

of two evils and that unless the agreement is rejected, the carrier will collapse and the employees will no longer have their jobs." *Id.* at 172.

43. For a discussion of the Third Circuit's interpretation of the standard for rejection under section 1113, see *supra* notes 44-51 and accompanying text.

44. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089. For a discussion of the Third Circuit's conclusion that the proposal must provide only for those modifications to the proposal that are necessary to prevent liquidation *and* treat all parties fairly and equitably, see *infra* note 61 and accompanying text.

45. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089.

46. *Id.* at 1086. In so doing, the Third Circuit became the first court of appeals to interpret the new law. Subsequently, the Second Circuit issued its interpretation of section 1113 in *In re Century Brass Products, Inc.*, 795 F.2d 265 (2d Cir. 1986). More recently, in *Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82 (2d Cir. 1987), the Second Circuit departed dramatically from the Third Circuit's articulation of section 1113's requirement that the debtor's proposal contain only those modifications which are "necessary" to prevent liquidation. For a discussion of *Truck Drivers Local 807*, see *infra* note 50.

47. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1086. Senator Thurmond's proposed amendment adopted the *Bildisco* standard for rejection and would have permitted rejection upon the bankruptcy court's finding that "the inability to reach an agreement threatens to impede the success of the [debtor's] reorganization." *Id.* at 1087 (quoting 130 CONG. REC. S6884 (daily ed. May 21, 1984)). The Third Circuit interpreted the Thurmond proposal as "stemming from the language of *Bildisco* where the Court said, 'Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that the policy would be served by such action.'" *Id.*

Congressman Rodino introduced an alternative to the Thurmond resolution which appeared to borrow from the language of the United States Court of Appeals for the Second Circuit in *REA Express*. *Id.* The Rodino proposal conditioned rejection of a collective bargaining agreement on a "showing that absent such rejection, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail." *Id.* (quoting 130 CONG. REC. H1942 (daily ed. March 26, 1984)).

guage of section 1113 adopted by the House and Senate conferees.<sup>48</sup> With respect to the first prong of the substantive standard for rejection, the statutory requirement of "necessity," the court noted that the legislative history of section 1113 illuminates how "necessary" a proposed modification must be,<sup>49</sup> as well as the purpose behind any inquiry into the necessity of making any modification.<sup>50</sup> The court concluded that under section 1113, "necessity" must be strictly construed to permit

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48. *Id.* at 1087. The Third Circuit noted that section 1113 was based in substantial part on the language of Senator Packwood's proposal. *Id.* The Packwood Amendment provided that the debtor's proposal should contain "the minimum modifications in such employees' benefits and protections that would permit the reorganization." *Id.* (quoting 130 CONG. REC. S6181-82 (daily ed. May 22, 1986)). In fact, the statutory language of section 1113 does require a debtor's proposal to provide for those necessary modifications in the employees' benefits and protections as are necessary to permit the reorganization of the debtor. See 11 U.S.C. § 1113(b)(1)(A) (1982 & Supp. III 1985). For the full text of § 1113(b)(1)(A), see *supra* note 2.

49. 11 U.S.C. § 1113(b)(1)(A) (1982 & Supp. III 1985). For the full text of the pertinent statutory language, see *supra* note 2. In interpreting the "necessity" requirement, the Third Circuit scrutinized the legislators' comments with respect to that provision. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088. For example, Congressman Rodino stated: "The provision requires the trustee to propose only those modifications that are necessary. The proposed modifications must be necessary to the reorganization of the debtor." *Id.* at 1087. (quoting 130 CONG. REC. H7489 (daily ed. June 29, 1984)). Congressman Fish noted that "the debtor must make a proposal to the union which makes the modifications necessary for reorganization of the debtor." *Id.* Similarly, the Third Circuit noted that Congressmen Morrison and Hughes emphasized that the "necessary" requirement makes clear that the trustee must limit his proposal to "only those modifications that *must be accomplished* if the reorganization is to succeed." *Id.* (quoting 130 CONG. REC. H7496 (daily ed. June 29, 1984) (emphasis supplied by the court)). Since its decision in *Wheeling-Pittsburgh Steel*, several bankruptcy courts have espoused the Third Circuit's interpretation of the "necessary" requirement under section 1113(b)(1)(A). See, e.g., *Matter of Walway, Co.*, 69 Bankr. 967, 973 (Bankr. E.D. Mich. 1987) ("[T]he Third Circuit's view of 'necessity' . . . concerns giving the debtor a better opportunity to reorganize and become profitable again."); *In re William P. Brogna and Co., Inc.*, 64 Bankr. 390, 392 (Bankr. E.D. Pa. 1986) (word "necessary" in section 1113(b)(1)(A) relates to short term goal of avoiding liquidation).

50. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088. The court took note of the underlying purpose of the "necessary" requirement as articulated by Senator Packwood:

Only those modifications which are necessary to a successful reorganization may be proposed. Therefore, the debtor will not be able to exploit the bankruptcy procedure to rid itself of unwarranted features of the labor agreement that have no relation to its financial condition and its reorganization and which earlier were agreed to by the debtor. The word "necessary" inserted twice into this provision clearly emphasizes this required aspect of the proposal which the debtor must offer and guarantees the sincerity of the debtor's good faith in seeking contract changes.

*Id.* (quoting 130 CONG. REC. S8898 (daily ed. June 29, 1984)); see also Ehrenwerth & Lally-Green, *supra* note 7, at 953-54 (critical issue is not whether proposed modifications will result in reduction of labor costs, but whether they are necessary to permit debtor's reorganization); Gibson, *supra* note 5, at 337-38

“only those modifications that the trustee is constrained to accept, because such modifications are directly related to the company’s financial condition and reorganization.”<sup>51</sup>

(“[I]t is clear that the debtor must be prepared to justify each of its proposed modifications in terms of a rational plan of reorganization.”).

The Third Circuit, in reviewing the requirement of “necessity,” commented that the “question of ‘necessary to what’ is not easily answered by reference to the statutory language.” *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088. Therefore, the court took particular note of the resolution proposed by Senator Strom Thurmond which was rejected by the conference committee. *Id.* In so doing, the court noted that the Thurmond proposal and the *Bildisco* decision focused on the “long-term economic health” of the debtor, as opposed to the somewhat “shorter term goal of preventing the debtor’s liquidation.” *Id.* The court then inferred that the legislative intent was embodied in the statutory language calling for only those modifications “necessary to permit the reorganization of the debtor.” *Id.* The court noted that “this construction finds additional support in the conferees’ choice of the words, ‘permit the reorganization,’ which places emphasis on the reorganization, rather than the longer term issue of the debtor’s ultimate future.” *Id.*

Compare the Second Circuit’s very different interpretation of section 1113’s requirement that the debtor’s proposal contain only those modifications which are “necessary” to permit reorganization. In *Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82 (2d Cir. 1987), the Second Circuit affirmed the district court’s decision upholding the bankruptcy court’s decision to grant the company’s request for permission to reject two collective bargaining agreements. *Id.* at 84. Addressing the union’s contention that the company’s proposal was doomed for failure because it contained modifications which were more than necessary to permit reorganization, the Second Circuit expressly rejected the Third Circuit’s interpretation of section 1113 in *Wheeling-Pittsburgh Steel*. *Id.* at 89. Specifically, the Second Circuit disagreed with its sister circuit’s characterization of “necessary” as synonymous with “essential,” and as requiring the bankruptcy court to focus its attention on the short-term goal of avoiding liquidation, rather than on the larger issue of the debtor’s “ultimate future.” *Id.* (quoting *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089). Moreover, the Second Circuit criticized the Third Circuit for failing to consider “the significant differences between interim relief requests and post-petition modification proposals.” *Id.* Focusing on the language of sections 1113(d) and 1113(e), the Second Circuit conceded that in the context of a debtor seeking interim relief, the bankruptcy court must focus on “short-term survival.” *Id.* However, the court reasoned, “a final reorganizational plan . . . can be confirmed only if the court determines that neither liquidation nor a need for further reorganization is likely to follow.” *Id.* (quoting Bankr. Code § 1129(a)(11)). Therefore, the court concluded, “in virtually every case, it becomes impossible to weigh necessity as to reorganization without looking into the debtor’s ultimate future and estimating what the debtor needs to attain financial health.” *Id.* The “necessity” requirement, the Second Circuit concluded, requires the debtor to prove that its proposal contains “necessary, but not absolutely minimal changes that will enable the debtor to complete the reorganization process successfully.” *Id.*

51. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088. The court further stated:

The “necessary” standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing debtor contract so that the debtor can lower its costs. Such an indulgent standard would inadequately differentiate between labor contracts, which Congress sought to protect, and other commercial contracts, which the trustee can disavow at will.

*Id.*

The Third Circuit then proceeded to evaluate the Union's argument that the Company's proposal had failed to satisfy the statutory requirement of "necessity."<sup>52</sup> Preliminarily, the court rejected the Union's contention that Wheeling-Pittsburgh's cash position was adequate to preclude any modification to the collective bargaining agreement.<sup>53</sup> The Third Circuit stated that a company's cash position, although relevant, is not the only factor to be weighed in considering the validity of a debtor's proposed modifications.<sup>54</sup> Wheeling-Pittsburgh's cash position had in fact been developed and maintained by virtue of the reorganization process itself.<sup>55</sup> The court noted, "Congress cannot have intended the bankruptcy court to hold all other parties at bay, while pointing to the resulting cash as the reason why no modifications to the labor contract are needed."<sup>56</sup> However, the Union's second contention, viewed more favorably by the Third Circuit, was that Wheeling-Pittsburgh's proposal was defective in that it was not restricted to only "those necessary modifications . . . necessary to permit the reorganization of the debtor."<sup>57</sup> Specifically, the Third Circuit found it "difficult . . . to accept the bankruptcy court's finding that it was 'necessary' to modify an existing labor contract by providing an unusually long five-year term<sup>58</sup> at markedly reduced labor costs based on a pessimistic five

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52. *Id.* at 1093.

53. *Id.*

54. *Id.* The Third Circuit stated that "the bankruptcy court correctly recognized that the question is *not* simply whether Wheeling-Pittsburgh can continue to pay the \$21.40 rate required by the collective bargaining agreement and still emerge with enough cash in hand at the expiration of the contract term to meet current operational expenses." *Id.* (quoting *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 978 (Bankr. W.D. Pa. 1985))(emphasis supplied by court). Instead, the Third Circuit stated, the proper question is "whether it is necessary for Wheeling-Pittsburgh to pay the \$15.20 rate found in its *proposal* in order to successfully reorganize." *Id.*

55. *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 977 (Bankr. W.D. Pa. 1985).

56. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089.

57. *Id.* The Union's second contention was based on the following facts: (1) the proposal called for a five-year agreement which drastically reduced labor costs; (2) the proposal was based on conservative projections under which labor cost reductions in the amount proposed would be permitted only if Wheeling-Pittsburgh's actual experience conformed to the "worst case" scenario; and (3) the proposal failed to contain a "snap-back" provision for additional compensation to the employees if Wheeling-Pittsburgh's performance turned out to be better than predicted. *Id.* The court stated that "the Union is on firmer ground with this argument." *Id.*

58. *Id.* The bankruptcy court had found that the five-year contract was necessary to the Company's reorganization, because "Wheeling-Pittsburgh's period of reorganization will likely last at least five years;" labor stability is a required element of reorganization; and there is no evidence as to how labor stability can be achieved with a contract of less than five years' duration." *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 979 (Bankr. W.D. Pa. 1985). In rejecting the bankruptcy court's finding of necessity, the Third Circuit noted that Wheeling-Pittsburgh Steel had conceded that a five-year contract was neither its own

year projection,<sup>59</sup> without also providing for some 'snap-back' provision to compensate for the workers' concessions."<sup>60</sup>

In remanding the case to the bankruptcy court to determine whether the Company's proposed modifications to the labor contract were "necessary" to permit its reorganization, the Third Circuit criticized the substantive standard for rejection utilized by the lower courts.<sup>61</sup> Specifically, the court disapproved of the bankruptcy court's decision to apply the *Bildisco* standard<sup>62</sup> to the Company's request and the district court's "failure to appreciate Congress' substantial modification" of the standard for rejection.<sup>63</sup>

practice nor the practice of the industry. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089.

59. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089-90. The court noted that the bankruptcy court had accepted the Company's "pessimistic" projection of its performance over the next five years." *Id.* The generally sluggish condition of the steel industry, together with the significant losses sustained by Wheeling-Pittsburgh between 1982 and 1985 led the lower court to reject the "optimistic assessment" of the Steelworkers' experts. *Id.* The Third Circuit, however, did not characterize such findings as "clearly erroneous." *Id.*

60. *Id.* at 1090. The Union criticized the absence of a "snap-back" provision from the proposal which would have increased the employees' wages or benefits in the event the Company performed more successfully than was expected. *Id.* In deciding to remand the case to the bankruptcy court for further consideration, the Third Circuit criticized the lower court's failure to focus on the lack of such a provision when considering whether the proposed modifications were "necessary." *Id.*

61. *Id.* More specifically, the Third Circuit noted that the bankruptcy court had erroneously treated the two prongs of section 1113 disjunctively by confining its discussion to the second prong of the standard: whether the proposal treated all affected parties "fairly and equitably." *Id.* The court stated:

It is also important to note that the requirement that the proposal provide only for "necessary" modifications in the labor contract is conjunctive with the requirement that the proposal treat "all of the affected parties . . . fairly and equitably." The language, as well as the legislative history makes plain that a bankruptcy court may not authorize rejection of a labor contract merely because it deems such a course to be equitable to other affected parties, particularly the creditors. Such a construction would nullify the insistent congressional effort to replace the *Bildisco* standard with one that was more sensitive to the national policy favoring collective bargaining agreements, which was accomplished by inserting the "necessary" clause as one of the two prongs of the standard that the trustee's proposal for modification must meet.

*Id.* at 1089.

62. *Id.* The Third Circuit noted that the bankruptcy court had erroneously framed the issue in terms of "successful reorganization" . . . in a manner which implied it was looking to the long-term economic health of the company rather than the feasibility of reorganization as such." *Id.* at 1090 (citations omitted) (emphasis in original). Similarly, the Third Circuit criticized the district court's confusing analysis with respect to which standard should be applied in considering the Company's request for permission to reject the contract. *Id.* Although at times it viewed the underlying purpose of the "necessary" requirement as the "prevention of the debtor from going into liquidation," the district court also seemed to approve of the bankruptcy court's use of the *Bildisco* standard. *Id.*

63. *Id.* Further, the Third Circuit criticized the district court's interpreta-

Further, applying the second prong of the substantive standard to the facts of *Wheeling-Pittsburgh Steel*, the Third Circuit held that the bankruptcy court had also erred in determining that the Company's proposed modifications assured "that all creditors, the debtor, and all of the affected parties are treated fairly and equitably."<sup>64</sup> The Third Circuit conceded that the bankruptcy court had properly identified the focus of its inquiry—whether the Company's proposal would impose a disproportionate burden on the employees.<sup>65</sup> However, looking to the legislative history of section 1113 for guidance in interpreting the language of that provision, the Third Circuit determined that the lower courts' analysis of the relative equities of labor and the creditors was erroneous.<sup>66</sup> Accordingly, the Third Circuit vacated the district court's order authorizing rejection of the collective bargaining agreement.<sup>67</sup>

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tion of section 1113 as limited to "prevention of the trustee's unilateral rejection of the contract before formal rejection by the bankruptcy court." *Id.* For a discussion of the procedural requirements of section 1113, see *supra* notes 80-84 and accompanying text. See generally COHEN, *supra* note 3, at ¶ 14.503.4 (outlining four-step procedure to be followed by debtor seeking rejection under section 1113); Ehrenwerth & Lally-Green, *supra* note 7, at 952-71 (same).

64. 791 F.2d at 1091 (quoting 11 U.S.C. § 1113(b)(1)(A)). The Union argued that the absence of a snap-back provision from the Company's proposed modifications evinced the Company's failure to comply with the "fair and equitable" prong of the substantive standard embodied in section 1113. *Id.*

65. *Id.* at 1091 (citing *In re Wheeling-Pittsburgh Steel Corp.*, 50 Bankr. 969, 980 (Bankr. W.D. Pa. 1985)).

66. *Id.* at 1090. The Third Circuit interpreted the congressional record to require that the proposed modifications treat all affected parties "fairly and equitably." *Id.* The congressional debate reveals the following:

[The] language that requires assurance that "all creditors, the debtor and other affected parties are treated fairly and equitably" would ensure that where the trustee seeks to repudiate a collective bargaining agreement, the covered employees do not bear either the entire financial burden of making the reorganization work, or a disproportionate share of that burden, but only their fair and equitable share of the necessary sacrifices.

*Id.* at 1091 (quoting 130 CONG. REC. H7496 (daily ed. June 29, 1984) (remarks of Congressman Morrison)). Similarly, Senator Packwood noted that the "focus for cost-cutting must not be directed exclusively at unionized workers. Rather, the burden of sacrifices in the reorganization process will be spread among all affected parties." *Id.* (quoting 130 CONG. REC. S8898 (daily ed. June 29, 1984)).

67. *Id.* at 1091. However, in so doing, the Third Circuit recognized the difficult task faced by the bankruptcy court in balancing the equities among all affected parties. *Id.* Preliminarily, the court discussed in detail the best method of measuring the "burden of [such] sacrifices" when inquiring into the proposal's capacity to treat all affected parties fairly and equitably. *Id.* The court noted that some commentators suggest that the equities be balanced by "compar[ing] the concessions asked of the Union, on a dollar or percentage basis, with those sought from the affected parties." *Id.* at 1092 (quoting Ehrenwerth & Lally-Green, *supra* note 7, at 955). However, the Third Circuit was unable to accept "ipso facto" the commentators' suggestion. *Id.* Therefore, the court did not criticize the lower courts' failure to make a direct comparison between creditors and labor on a dollar or percentage basis, without the benefit of "considerably more expertise." *Id.*



In *Wheeling-Pittsburgh Steel*,<sup>68</sup> the United States Court of Appeals for the Third Circuit interpreted for the first time, the standard by which a debtor in a chapter 11 reorganization may reject a collective bargaining agreement under section 1113 of the Bankruptcy Amendments.<sup>69</sup> In so doing, the Third Circuit departed from the United States Supreme Court's controversial decision in *Bildisco*, which held that a debtor-in-possession could unilaterally terminate or modify a collective bargaining agreement under section 365(a) of the Bankruptcy Code without committing an unfair labor practice under the National Labor Relations Act.<sup>70</sup> The Third Circuit's decision in *Wheeling-Pittsburgh Steel* substantially restricts the debtor's power to cancel executory labor contracts under chapter 11 of the Bankruptcy Code.<sup>71</sup>

Following passage of the Bankruptcy Reform Act of 1978,<sup>72</sup> corporations in various stages of financial decline, finding themselves armed with "a new collective bargaining weapon," successfully forced dramatic concessions from their unions or eliminated their union contracts altogether upon a showing that rejection was merely "in the best interests of the debtor."<sup>73</sup> In *Bildisco*, the Supreme Court approved that practice by sanctioning a debtor's power to unilaterally reject a collective bargaining agreement.<sup>74</sup>

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Notably, however, the court did criticize the bankruptcy court's failure to consider comparisons of a different nature, namely, the fact that in the absence of a "snap-back" provision, the workers would suffer disproportionately to the creditors if the Company fared better than was forecast. *Id.* at 1093. More specifically, the Third Circuit held that the absence of a "snap-back" provision was particularly significant because the Company's proposed modifications required the workers to agree to a substantial reduction in wages under an inordinately lengthy five-year contract. *Id.* In addition, the Third Circuit criticized the bankruptcy court's finding that the "wage stability" created by the proposal was sufficiently "fair and equitable" to satisfy the second prong of the standard for rejection under section 1113, since the Company's proposal was predicated on a "worst-case" scenario. *Id.*

68. For a discussion of the facts of *Wheeling-Pittsburgh Steel*, see *supra* notes 15-34 and accompanying text.

69. For a discussion of the Third Circuit's interpretation of section 1113, see *supra* notes 44-51 and accompanying text.

70. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1074. For a discussion of *Bildisco*, see *supra* notes 12, 39 & 40.

71. For a discussion of the rejection of executory contracts under section 365(a) of the Bankruptcy Code, see *supra* note 41.

72. Pub. L. No. 95-598, 92 Stat. 2672 (1978). Title I of the Bankruptcy Reform Act of 1978 contained the amendments and additions to title 28 necessary to establish the United States Bankruptcy Courts. *Id.* For a discussion of the court structure and jurisdiction under the Bankruptcy Reform Act, see *supra* note 1.

73. See Rosenberg, *supra* note 40, at 312 (quoting Daily Labor Report (BNA) No. 194 at A-6 (Oct. 5, 1983)).

74. 465 U.S. at 516. For a discussion of *Bildisco*, see *supra* notes 12, 39-40 and accompanying text. Some commentators have criticized the Supreme Court's decision in *Bildisco* for having "blessed the firm's actions and allowed the Company to do almost anything, provided it cried wolf and filed for bank-

It is submitted that in *Wheeling-Pittsburgh Steel*, the Third Circuit correctly interpreted section 1113 as prohibiting such unilateral action.<sup>75</sup> In so doing, the court properly focused its attention on the requirements of section 1113(b)<sup>76</sup> as embodying the most significant modifications of the *Bildisco* decision. Implicit in the court's decision to prohibit rejection absent the Company's compliance with subsection (b)<sup>77</sup> is a recognition of labor's desire for protection from the unilateral actions of faltering debtors in the context of chapter 11 reorganizations.<sup>78</sup> Reasoning from the legislative history of the new provision, the Third Circuit's interpretation of section 1113 places labor's concerns on an equal footing with those of management by both encouraging participation in

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ruptcy." See Oswald, *The Effect of Chapter 11 on Collective Bargaining*, 35 LAB. L.J. 522, 523 (1984). One Miami newspaper columnist wrote a scathing critique of the *Bildisco* decision, stating: "This being 1984, the year in which Ignorance is Strength, War is Peace, and Freedom is Slavery, it should come as no surprise that the Supreme Court ruled that Bankruptcy is the Way to Prosperity and a Labor Contract is Not Worth the Paper it is Printed On." See Oswald, *supra* at 522 (quoting Lars-Erik Nelson, "Unions Get You Down? Try a Little Bankruptcy," *Miami Herald* (March 2, 1984)).

75. See Gibson, *Chapter 11 Is A Two-Edged Sword: Union Options in Corporate Chapter 11 Proceedings*, 35 LAB. L.J. 624 (1985). Prior to the enactment of section 1113, a debtor-in-possession was empowered to reject a collective bargaining agreement under section 365(a) of the Bankruptcy Code upon a showing that rejection was in the best interests of the debtor. See *Bildisco*, 465 U.S. at 516. However, rejection under section 365 was frequently criticized by labor supporters for adopting a lenient standard for rejection which failed to distinguish collective bargaining agreements from ordinary executory contracts. See Oswald, *supra* note 74, at 526; see also 130 CONG. REC. S8900 (daily ed. June 29, 1984) (statement of Sen. Moynihan) ("The Congress must distinguish between labor contracts and other financial arrangements . . . I ask my colleagues to consider . . . the human costs of the rejection of an existing labor contract.").

Professor Gorman makes the following observation:

While the typical commercial contract is the creation of parties who have been joined in a voluntary arrangement sparked by mutual self-interest, the labor contract is the product of a bilateral relationship which is in large measure compelled by law, frequently against the wishes of the two parties.

R. GORMAN, *supra* note 9, at 540.

Subsection (b)(1)(A) requires the employer to submit to the union, proposed modifications to an agreement *prior* to filing an application for rejection with the bankruptcy court. 11 U.S.C. § 1113(b)(1)(A) (1982 & Supp. III 1985). In addition, subsection (f) provides: "No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provision of a collective bargaining agreement prior to compliance with the provisions of this section." *Id.* § 1113(f).

76. For the full text of section 1113 subsection (b), see *supra* note 2.

77. See, e.g., *In re Mile Hi Metal Sys., Inc.*, 51 Bankr. 509, 510 (Bankr. Colo. 1985) (section 1113 enacted to emphasize private collective bargaining to avoid recourse to bankruptcy court).

78. For a discussion of the Third Circuit's holding that the Company's proposals contained modifications to the labor contract which were, in effect, more than "necessary to permit reorganization," and which failed to treat all affected parties "fairly and equitably," see *supra* notes 53-67 and accompanying text.

the collective bargaining process and curbing a debtor's use of the bankruptcy laws to eschew its obligations under a labor contract.<sup>79</sup>

Furthermore, the court's analysis of section 1113 accurately reflects the congressional emphasis on negotiation and good faith bargaining between the parties as a prerequisite to the debtor's submission of its application for rejection.<sup>80</sup> The new law permits rejection, but compels a debtor to *first* bargain with the union in good faith over proposed modifications to the agreement.<sup>81</sup> Thereafter, a bankruptcy court can authorize rejection *only* if it decides that the union refused to accept the debtor's proposal without good cause,<sup>82</sup> and if the balance of the equi-

79. See, e.g., *In re Century Brass Prod., Inc.*, 795 F.2d 265, 273 (2d Cir. 1986) ("The new law encourages the collective bargaining process as a means of solving a debtor's financial problems insofar as they affect its union employees.").

80. *Id.* ("Section 1113 . . . created an expedited form of collective bargaining with several safeguards designed to ensure that employers do not use Chapter 11 to rid themselves of corporate indigestion.").

Judge Stanley B. Bernstein has characterized the new law as both a "process" by which labor contracts may be rejected, and as a "barrier to the rejection of Union contracts . . . [that] must be scaled before the bankruptcy court may consider an application to reject the contract." See *In re K & B Mounting, Inc.*, 50 Bankr. 460, 464 (Bankr. N.D. Ind. 1985) (quoting S. BERNSTEIN, *BANKRUPTCY PRACTICE AFTER THE AMENDMENT ACT OF 1984* (1984)). Similarly, Professor Gibson has described section 1113 as a "three-step procedure which encourages the collective bargaining process." See Gibson, *supra* note 2, at 328.

81. See, e.g., 130 CONG. REC. S8891 (daily ed. June 29, 1984) (remarks of Sen. Hatch). Regarding the necessity for negotiation and communication between the employer and the Union during a chapter 11 reorganization, Senator Hatch commented:

This provision will require negotiations to attempt to save both the labor contract and the business prior to court adjudication to reject the contract. These negotiations will be characterized by an offer from the business making such modifications in the labor contract as are necessary to permit the reorganization to be successful . . . . Only if these good faith negotiations fail does the court get involved in granting an application to reject the contract.

*Id.*

In addition, the new law requires the bankruptcy court to rule on the debtor's application for rejection within thirty days after the date of a hearing, to be commenced not more than fourteen days after the filing of the application. 11 U.S.C. § 1113(d)(2). Only if the court fails to rule on the application within thirty days after commencement of the hearing, or within such additional time as may be mutually agreed upon by the parties, may the debtor "terminate or alter" any provision of the collective bargaining agreement. *Id.* Subsection (e) recognizes the potential need for some unilateral action by the business and authorizes such action if essential to its continuation, or if irreparable damage might occur. *Id.* § 1113(e). For a discussion of the protective nature of section 1113(e), see 130 CONG. REC. S8892 (daily ed. June 29, 1984) (comments of Sen. Hatch).

82. See, e.g., 130 CONG. REC. S8892 (daily ed. June 29, 1984) (comments of Sen. Hatch) ("Rejection of a proposal should only happen if the cause for rejection is good enough to risk the damage to the business as well as its creditors and employees that delay or protracted negotiations could produce."); see also *id.* S8898 (daily ed. June 29, 1984) (comments of Sen. Packwood) ("[T]he 'without

ties clearly favors rejection.<sup>83</sup> If rejection is approved, the union cannot file unfair labor charges, but it does have an unsecured claim for breach of contract.<sup>84</sup> Moreover, rejection of the contract does not release the debtor from its other obligations to the union, since the debtor will still be obligated to bargain with its union employees in the future.<sup>85</sup>

The Third Circuit, in *Wheeling-Pittsburgh Steel*, has offered an interpretation of section 1113 based solely on the legislative history of the new law.<sup>86</sup> Although several bankruptcy courts had interpreted section 1113 prior to the Third Circuit's decision,<sup>87</sup> the court confined its analy-

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good cause' language provides an incentive or pressure on the debtor to negotiate in good faith.").

83. See 11 U.S.C. § 1113(c)(3) (1982 & Supp. III 1985). The "balancing of the equities" test was first articulated in *In re Overseas National Airways, Inc.*, 238 F. Supp. 359 (E.D.N.Y. 1965). In discussing the test, one commentator has suggested that "this is still an area that calls for creativity both from the bar and the bench." Gibson, *supra* note 5, at 343. Another commentator has enumerated certain criteria for consideration by a court in determining whether rejection of a collective bargaining agreement would benefit or burden a party, and whether the equities balance in favor of rejection. Ehrenwerth & Lally-Green, *supra* note 7, at 966-67. A partial list of those factors included the following: (1) the possibility of liquidation versus a successful reorganization with and without rejection and its impact on all affected parties; (2) the possibility of a strike after rejection and the impact of such a strike on the reorganization process; (3) the parties' good faith negotiations; (4) whether pension and health care plans impose an inordinate burden on the debtor; and (5) whether payments of benefits would prejudice the position of unsecured creditors. *Id.*

It should be noted that in *Wheeling-Pittsburgh Steel*, the Third Circuit did not find it necessary to "balance the equities" since it determined, preliminarily, that the Company's proposed modifications did not satisfy the first step in the rejection process. See 791 F.2d at 1094.

84. See Gibson, *supra* note 75, at 627.

85. *Id.*

86. 791 F.2d at 1086. Preliminarily, the Third Circuit commented:

Because the statute contains no definition [of "necessary"], we must turn to the legislative history for enlightenment. We are aware, of course, that the most authoritative source of legislative intent lies in the committee reports. In this instance, however, there was no committee report, and we must seek guidance from the sequence of events leading to adoption of the final bill, and the statements on the House and Senate floor of the legislators most involved in its drafting . . . . [C]oncentration on the substantive provisions of the various bills and amendments offers significant guidance to construction of the statutory language.

*Id.* (citation omitted).

87. See, e.g., *In re K & B Mounting, Inc.*, 50 Bankr. 460 (Bankr. N.D. Ind. 1985) (fair and equitable treatment of all parties); *In re Kentucky Truck Sales, Inc.*, 52 Bankr. 797 (Bankr. W.D. Ky. 1985) (proportionate concessions by all parties for sake of reorganization); *In re American Provision Co.*, 44 Bankr. 907 (Bankr. D. Minn. 1984) (nine requirements under section 1113: (1) proposal to union; (2) based on complete information; (3) modifications necessary to reorganization; (4) fair treatment; (5) reasonable time for consideration of proposals; (6) good faith; (7) union must have refused proposal without good cause; (8) balance of equities; (9) meetings of debtor and union between time proposal offered and hearing); *In re Carey Transp.*, 50 Bankr. 203 (Bankr. S.D.N.Y. 1985)

sis to the congressional response to *Bildisco*.<sup>88</sup> While some authorities might question the propriety of the court's reliance on extrinsic aids<sup>89</sup> such as congressional debates,<sup>90</sup> it is submitted that in interpreting the new law,<sup>91</sup> the Third Circuit properly looked to the sequence of events which preceded the enactment of the final bill.<sup>92</sup> Moreover, the Third Circuit's analysis of the legislative history was exhaustive, focusing not only on the "self-congratulatory speeches" of the Congressmen,<sup>93</sup> but on the language of the rejected proposals,<sup>94</sup> as well. Consequently, the

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(equitable treatment; no disproportionate burden); *In re Allied Delivery Sys.*, 49 Bankr. 700 (Bankr. W.D. Ohio 1985) (proposal offered, reliable information, balancing of equities); *In re Cook United, Inc.*, 50 Bankr. 561 (Bankr. N.D. Ohio 1985) (debtor must demonstrate that adverse effects of denying debtor's motion to reject contract must outweigh adverse effects of rejection on debtor's employees); *In re Valley Kitchens, Inc.*, 52 Bankr. 493 (Bankr. S.D. Ohio 1985) (strong emphasis on necessity of modifications to collective bargaining agreement); *In re Salt Creek Freightways*, 47 Bankr. 835 (Bankr. D. Wyo. 1985) (proposal necessary to reorganization, debtor has affirmative duty to furnish union reliable information).

88. For a discussion of the Third Circuit's review of the legislature's efforts to modify *Bildisco*, see *supra* notes 47-51 and accompanying text.

89. See N. SINGER, STATUTES AND STATUTORY CONSTRUCTION ¶ 48.01 (4th ed. 1984). In the context of statutory interpretation, extrinsic aids consist of background information about circumstances which led to the enactment of a statute, events surrounding enactment, and developments pertinent to its subsequent operation. *Id.* "The use of extrinsic aids to statutory interpretation . . . has real and not illusory significance." See Landis, *A Note on Statutory Interpretation*, 43 HARV. L. REV. 886, 893 (1930).

90. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1086-88. Traditionally, consideration of legislative debates under any circumstances was forbidden in the context of statutory interpretation. See N. SINGER, *supra* note 89, at 330. The current trend permits a court to consider statements made by individual legislators during floor debates, "along with information about contemporary conditions and events, when they establish what problems or evils the legislature was trying to remedy." *Id.* In addition, federal courts permit resort to statements made by individual legislators "where they show a common agreement . . . about the meaning of an ambiguous term." *Id.*

91. For an excellent discussion of the art of statutory construction in interpreting legislative intent, see Dickerson, *Statutory Interpretation: A Peek Into the Mind and Will of a Legislature*, 50 IND. L.J. 206 (1975). See also Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 262 (Spring 1982).

92. See N. SINGER, *supra* note 89, at 300. "Events occurring immediately prior to the time when an act becomes law comprise an instructive source, indicative of what the legislature intended." *Id.* Similarly, Justice Frankfurter stated: Statutes come out of the past and aim at the future. . . . Legislation has an aim—it seeks to obviate some mischief, to supply an inadequacy, to effect a change of policy, to formulate a plan of government. That aim, that policy is not drawn, like nitrogen, out of air, it is evinced in the language of the statute, as read in the light of other external manifestations of purpose . . . .

Frankfurter, *Some Reflections on Statutes*, 47 COLUM. L. REV. 527, 539 (1947).

93. See *In re Carey Transp.*, 50 Bankr. 203, 206 (Bankr. S.D.N.Y. 1985).

94. For a discussion of the Third Circuit's analysis of the proposed bills, see *supra* notes 47-48 and accompanying text.

court's decision reflects the legislative intent, rather than its own judgment on the issue.<sup>95</sup>

Although the court correctly viewed section 1113 as the culmination of pro-labor efforts to overrule that portion of *Bildisco* which permitted a debtor to unilaterally reject a collective bargaining agreement, the Third Circuit accurately interpreted the new law as compromise legislation.<sup>96</sup> Section 1113 upholds the underlying principles of reorganization by preserving the debtor's power to reject an executory contract when it is "necessary to permit the reorganization of the debtor."<sup>97</sup> At the same time, the interests of labor<sup>98</sup> are accorded equal protection,

95. See, e.g., 130 CONG. REC. S8898 (daily ed. June 29, 1984) (comments of Sen. Packwood) ("This amendment, which was developed with the cooperation of labor leaders was designed to reverse the Supreme Court's *Bildisco* decision . . . [by] preventing companies from unilaterally rejecting union contracts . . . This amendment was vigorously opposed by those who did not want to give labor contracts adequate protection in bankruptcy."). *Id.*

96. See, e.g., *id.* (statement of Sen. Dole) ("The conference compromise evenly splits the difference between *Bildisco* and Packwood."); see also *id.* S8900 (daily ed. June 29, 1984) (statement of Sen. Moynihan) ("The conference report, in my view, is a sound and entirely reasonable compromise between the goals Congress articulated in the National Labor Relations Act and the bankruptcy proceedings under Chapter 11, which allows companies to lower costs, when necessary, in order to reorganize.").

97. For a discussion of the Third Circuit's interpretation of the requirement that the debtor's proposed modification be "necessary" to permit reorganization, see *supra* notes 47-63 and accompanying text. Even before the court's decision in *Wheeling-Pittsburgh Steel*, several bankruptcy courts had rendered their interpretations of section 1113. Compare *In re K & B Mounting, Inc.*, 50 Bankr. 460, 468 (Bankr. N.D. Ill. 1985) (test, in justifying each of proposed modifications, is necessity, not convenience or desirability); *In re Kentucky Truck Sales, Inc.*, 52 Bankr. 797, 802 (Bankr. W.D. Ky. 1985) (proposed concessions were "critical if the company wished to survive . . . \$100,000 per year in labor costs was necessary for debtor to show enough profit to meet its current expenses and begin to reduce its sizeable trade accounts payable"); and *In re American Provision Co.*, 44 Bankr. 907, 910 (Bankr. D. Minn. 1984) (proposed savings amounting to 2% of debtor's monthly operating expenses was not "necessary to permit the reorganization of the debtor") with *In re Allied Delivery Sys.*, 49 Bankr. 700, 702 (Bankr. N.D. Ohio 1985) ("necessary must be read as a term of lesser degree than essential"); and *In re Carey Transp.*, 50 Bankr. 203, 209 (Bankr. S.D.N.Y. 1985) ("There can be no pat formula . . . any analysis must be undertaken on a case by case basis . . ."); and *In re Cook United, Inc.*, 50 Bankr. 561, 563 (Bankr. N.D. Ohio 1985) ("The adoption of the modifications [must] result in a significantly greater probability of the debtor's successfully reorganizing than would result if the debtor were required to continue under the collective bargaining agreement sought to be rejected.").

98. See, e.g., *In re K & B Mounting, Inc.*, 50 Bankr. 460, 468 (Bankr. Ind. 1985) (requiring management, non-union employees, suppliers and unionized workers to "sacrifice to a similar degree"); *In re Kentucky Truck Sales, Inc.*, 52 Bankr. 797, 807 (Bankr. W.D. Ky. 1985) ("[A]ll parties affected by the bankruptcy must have made or be willing to make contributions to the debtor's reorganization which are proportionate to the concessions contained in the bargaining proposal."); *In re Carey Transp.*, 50 Bankr. 203, 211 (Bankr. S.D.N.Y. 1985) (the proposal must not place a "disproportionate burden on the members of the union"); *In re Cook United, Inc.*, 50 Bankr. 561, 564 (Bankr. N.D. Ohio

because any proposed modification to a collective bargaining agreement must treat all affected parties "fairly and equitably."<sup>99</sup> The new law, as applied by the Third Circuit, encourages management to meet its employees at the bargaining table, rather than at the courthouse, to the benefit of all concerned.<sup>100</sup>

In conclusion, it is submitted that as long as businesses are plagued by financial instability, bankruptcy law will remain of major concern to organized labor.<sup>101</sup> It is suggested that the Third Circuit's interpretation of the new law will not deter failing businesses from filing for reorganization under chapter 11.<sup>102</sup> In *Wheeling-Pittsburgh Steel*, the Third Circuit has devised not simply a stricter standard for rejection,<sup>103</sup> but, rather, an equitable process which furthers the purpose of reorganization without ignoring the interests of any creditor, employee or debtor.<sup>104</sup> Therefore, it is suggested that the Third Circuit's interpretation of section 1113 is consistent both with the legislative purpose of the new law and the competing interests of labor and management.

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1985) (rejection not authorized where impact of rejection upon employees is out of proportion to hardship imposed upon debtors, creditors and union); *In re Salt Creek Freightways, Inc.*, 47 Bankr. 835 (Bankr. D. Wyo. 1985) (defining "fairly and equitably" in words of Rep. Morrison as "intended to insure . . . that covered employees do not bear either the entire financial burden of making the reorganization work, or a disproportionate share of that burden, but only their fair and equitable share of the necessary sacrifices"). One court has cautioned that "fair and equitable treatment does not mean identical or equal treatment." See *In re Allied Delivery Sys.*, 49 Bankr. 700, 703 (Bankr. N.D. Ohio 1985).

99. For a discussion of the Third Circuit's interpretation of the "fairly and equitably" language of section 1113, see *supra* notes 64-67 and accompanying text.

100. See 130 CONG. REC. S8893 (daily ed. June 29, 1984) (statement of Sen. Hatch) (noting that under section 1113, the reorganization process should be characterized by a sense of fairness and "reasonable spirit of cooperation toward saving the business").

101. See Gibson, *supra* note 75.

102. *Id.*

103. For a discussion of the standard for rejection enunciated by the United States Court of Appeals for the Third Circuit in *Wheeling-Pittsburgh Steel*, see *supra* notes 47-51 and accompanying text.

104. See, e.g., Pulliam, *supra* note 40, at 347. Upon passage of the Bankruptcy Amendments and Federal Judgeship Act of 1984, President Reagan remarked that section 1113, "meets the interests of both labor and business by providing debtors with the flexibility they need to reorganize successfully and preserve jobs for workers" while "prohibiting unilateral rejection of labor agreements without court review of whether rejection is necessary." *Id.* (quoting BNA Daily Labor Report at A-9 (July 12, 1984)).