TOSSING THE COIN UNDER SECTION 1113: HEADS OR TAILS, THE UNION WINS

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I. INTRODUCTION

The continuing confusion over the application and effect of § 1113[1] of the Bankruptcy Code,[2] which governs rejection of collective bargaining agreements in chapter 11 cases,[3] was recently highlighted in a trio of rapid-fire decisions by the Bankruptcy Court[4] and District Court for the Southern District of New York[5] and the United States Court of Appeals for the Second Circuit[6] in *In re Maxwell Newspapers, Inc.* (*MNI*), the chapter 11 proceeding involving the tabloid newspaper, the *New York Daily News* (*Daily News*).

The Second Circuit ultimately adopted a functional approach to defining the "good cause" requirement of § 1113[7] and required the debtor in possession (the Debtor) to hold its last offer of modification open as a condition to approving rejection of its collective bargaining agreement with one of its unions.[8] Although the immediate result of the litigation was to save one of New York City's most venerable institutions, the longer range

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[1] 11 U.S.C. § 1113 (1988). See *infra* note 20 for the text of the relevant portions of § 1113. Section 1113 was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (1984) (BAFJA). A full discussion of BAFJA, which included important jurisdictional provisions, is beyond the scope of this Article.

[2] 11 U.S.C. §§ 101-1330 (1988). The Bankruptcy Code was originally enacted as Title I of the Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (1978).

[3] *See* 11 U.S.C. §§ 1101-1146. Section 1113 does not apply, however, in railroad reorganization cases. *Id.* § 1113(a).

[4] *In re* Maxwell Newspapers, Inc., 146 B.R. 920 (Bankr. S.D.N.Y.), *rev'd in part and aff'd in part*, 149 B.R. 334 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992).

[5] *In re* Maxwell Newspapers, Inc., 149 B.R. 334 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992).

[6] *In re* Maxwell Newspapers, Inc., 981 F.2d 85 (2d Cir. 1992).

[7] 11 U.S.C. § 1113(c)(2). For the text of § 1113(c)(2), see *infra* note 20.

[8] *In re Maxwell Newspapers*, 981 F.2d at 90-92.

implications may well wreak havoc with the negotiating process under § 1113.[9]

This Article contains reflections of counsel to the Debtor about the practical difficulties that may result from the *MNI* decisions. With the era of failed leveraged buyouts now history, the next wave of restructurings — both in bankruptcy and through out-of-court workouts — is likely to focus in large part on the excessive labor costs saddling many businesses.[10] Even though the problems confronting each company are to a certain extent unique, the Debtor's experience provides a useful platform for exploring the continued tension inherent in § 1113 between labor law and bankruptcy law principles — tension that any debtor will necessarily confront if it attempts to restructure its labor costs in chapter 11.

Congress enacted § 1113 in response to the United States Supreme Court's decision in *NLRB v. Bildisco & Bildisco*,[11] which

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9 *See infra* notes 88-90 and accompanying text.

10 The 1990s have already been witness to dramatic layoffs at companies throughout the country, a downsizing trend which is likely to continue. *See, e.g.*, *Financial Executives Say Downsizing Will Continue*, WALL ST. J., Feb. 26, 1993, at A16. As technological improvements continue, still more jobs will be eliminated. *See, e.g.*, Amy Kaslow, *Special Report: Jobs in the 90s—Beyond Guarantees*, CHRISTIAN SCIENCE MONITOR, March 24, 1993, Special Regent Section at 1; J.F. CHRONICLE, Oct. 29, 1992 at C1.

11 465 U.S. 513 (1984). In *Bildisco*, the Supreme Court unanimously held that a collective bargaining agreement was an executory contract within the meaning of § 365 of the Bankruptcy Code. *Id.* at 521-22. At the same time, the Court concluded:

> [B]ecause of the special nature of a collective-bargaining contract, and the consequent 'law of the shop' which it creates . . . a somewhat stricter standard [than the business judgment standard normally applicable to the rejection of executory contracts] should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement.

Id. at 524 (citation omitted). Thus, according to the Court, a collective bargaining agreement could be rejected "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 526. Rejection must be preceded by "reasonable efforts to negotiate a voluntary modification . . . [but the] court need not determine that the parties have bargained to impasse or make any other determination outside the field of its expertise." *Id.* at 526-27. In addition, a narrow 5-4 majority held that a debtor in possession did not commit an unfair labor practice if it unilaterally rejected or modified a collective bargaining agreement before obtaining court approval. *Id.* at 527-34. While courts had generally permitted debtors to reject collective bargaining agreements prior to *Bildisco*, the Supreme Court's decision settled conflicts between lower courts regarding the appropriate standard and the effect of the debtor's implementation of unilateral changes before the court-approved rejection. *In re* Am. Provision Co., 44 B.R. 907, 908 (Bankr. D. Minn. 1984).

upheld the right of a debtor to reject a collective bargaining agreement and to implement changes in the terms and conditions of employment before court approval of rejection without running afoul of the National Labor Relations Act (NLRA).[12] It is the thesis of this Article that § 1113 is a poorly conceived and inartfully drafted statute that has failed to resolve this tension between the Bankruptcy Code and the NLRA.[13] The absence of a clearly defined standard for determining when the union has good cause to reject the debtor's final proposal (a necessary ele-

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[12] 29 U.S.C. §§ 151-169 (1973). *See generally* Douglas Bordewieck & Vern Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293, 317 (1983) (asserting that a court should carefully scrutinize the debtor's justifications for rejection because the debtor is, in essence, seeking to directly contravene the National Labor Relations Act (NLRA)).

[13] The Second Circuit has noted that *Bildisco* "sparked intense congressional debate" concerning the ability of a debtor in possession or trustee to reject a collective bargaining agreement in bankruptcy. *See* Century Brass Prods., Inc. v. Int'l Union, United Auto. Aerospace and Agric. Implement Workers (*In re* Century Brass Products, Inc.), 795 F.2d 265, 266 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). This debate represented an "institutional tension between labor and bankruptcy law" because a debtor could unilaterally reject a contract under bankruptcy law, but such rejection, if attempted on a collective bargaining agreement, would "flaunt[] national labor policy." *Id.* Congressional reaction was swift, and § 1113 was signed into law on July 10, 1984, less than five months after the *Bildisco* decision. *Id.* at 266-67. *See also* Bruce H. Charnov, *The Uses and Misuses of the Legislative History of Section 1113 of the Bankruptcy Code*, 40 SYRACUSE L. REV. 925, 946-54 (1989) (chronicling congressional reaction to *Bildisco*); Rosalind 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, 313 (1984) (noting organized labor's support for undoing the *Bildisco* decision). To put it charitably, "§ 1113 is not a masterpiece of draftsmanship," and courts and commentators have struggled with it ever since its enactment. *In re Am. Provision Co.*, 44 B.R. at 909. Indeed, § 1113 has inspired a virtual avalanche of scholarly publications attempting to divine its true meaning and Congress's intent. *See, e.g.*, Hon. Joseph L. Cosetti & Stanley A. Kirshenbaum, *Rejecting Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code — Judicial Precision or Economic Reality?*, 26 DUQ. L. REV. 181 (1987); Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a Collective Bargaining Agreement in a Corporate Reorganization*, 64 AM. BANKR. L.J. 133 (1990); B. Glenn George, *Collective Bargaining in Chapter 11 and Beyond*, 95 YALE L.J. 300 (1985); Richard H. Gibson, *The New Law on Rejection of Collective Bargaining Agreements in Chapter 11: An Analysis of 11 U.S.C. § 1113*, 58 AM. BANKR. L.J. 325 (1984); Anne J. McClain, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J. 191 (1991); Mitchell Rait, *Rejection of Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code: The Second Circuit Enters the Arena*, 63 AM. BANKR. L.J. 355 (1989); Martha S. West, *Life After* Bildisco*: Section 1113 and the Duty to Bargain in Good Faith*, 47 OHIO STATE L.J. 65 (1986); Jeffrey W. Berkman, Note, *Nobody Likes Rejection Unless You're a Debtor in Chapter 11: Rejection of Collective Bargaining Agreements Under 11 U.S.C. § 1113*, 34 N.Y.L. SCH. L. REV. 169 (1989); Peter B. Brandow, Note, *Rejection of Collective Bargaining Agreements in Bankruptcy: Finding a Balance in 11 U.S.C. § 1113*, 56 FORDHAM L. REV. 1233 (1988).

ment for rejection),[14] as well as the Second Circuit's requirement that the debtor hold open its last offer to the union following rejection, will foster continued litigation rather than the consensual resolutions that Congress intended.[15] Accordingly, this Article contains specific suggestions for changes to § 1113 and its interpretation that are intended to re-focus § 1113 towards the goal of rehabilitating distressed companies on a consensual basis.

II. SECTION 1113

Section 1113 provides strict procedural and substantive requirements that a debtor must meet to reject a collective bargaining agreement. Section 1113 is in sharp contrast to § 365 of the Bankruptcy Code,[16] which governs the assumption and rejection of all other executory contracts. Section 365 places little, if any, constraint on the ability of the trustee or debtor in possession[17] to reject burdensome executory contracts. Although § 365 requires court approval of a debtor's decision to reject,[18] courts will generally defer to the debtor's business judgment when considering a motion to authorize rejection.[19]

Section 1113,[20] on the other hand, departs from the business

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14 *See infra* notes 88-118 and accompanying text.

15 *See infra* notes 154-55 and accompanying text.

16 11 U.S.C. § 365. Section 365 provides in relevant part: "Except as provided in sections 765 and 766 of this title 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." *Id.* § 365(a). Upon rejection, a debtor in possession is freed of any ongoing post-petition obligation to the nondebtor party, which is simply left with a claim for rejection damages. Pursuant to § 502(g) of the Bankruptcy Code, this claim is deemed to have arisen prepetition, notwithstanding the fact that rejection by definition occurs post-petition. *Id.* § 502(g).

17 Section 1107(a) of the Bankruptcy Code gives a debtor in possession essentially the same rights and powers as a trustee. 11 U.S.C. § 1107(a).

18 *Id.* § 365(a).

19 *See, e.g.*, NLRB v. Bildisco & Bildisco, 465 U.S. 513, 523 (1984) (noting that ordinary rejection of executory contracts is governed by the "business judgment standard"); *In re* Structurlite Plastics Corp., 86 B.R. 922, 925 n.4 (Bankr. S.D. Ohio 1988) (same); *In re* FCX, Inc., 60 B.R. 405, 411 (Bankr. E.D.N.C. 1986) (same); *In re* Anglo Energy, Ltd., 41 B.R. 337, 340 (Bankr. S.D.N.Y. 1984) (same); Nat'l Sugar Ref. Co. v. Stroehmann Bros. Co. (*In re* Nat'l Sugar Ref. Co.), 26 B.R. 765, 767 (Bankr. S.D.N.Y. 1983) (same).

20 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 applica-

judgment standard and instead adopts "a compromise approach" between labor law and bankruptcy principles.[21] Section 1113 thus establishes procedural and substantive requirements that must be met prior to rejection.[22]

There are two procedural requirements for rejection: first, § 1113(b)(1) requires that the debtor's proposal to the union include the type of relevant and dependable information necessary to assess such a proposal; second, § 1113(b)(2) provides that bargaining between the debtor and the union must be in good faith.[23]

There are also three substantive requirements for rejection:

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tion 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 reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and (B) provide, 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 proposal without good cause; and (3) the balance of the equities clearly favors rejection of such agreement.

. . . .

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. §§ 1113(a), (b), (c), (f).

[21] Century Brass Prods., Inc. v. Int'l Union, Auto., Aerospace and Agric. Implement Workers, 795 F.2d 265, 266 (2d Cir.), *cert. denied*, 497 U.S. 949 (1986).

[22] *Id.* Section 1113 also provides that emergency, temporary modification of a collective bargaining agreement may be granted to the debtor without meeting the requirements for rejection set forth in subsections (b) and (c). 11 U.S.C. § 1113(e). Such emergency relief is, however, much more difficult to obtain; it is available only "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate." *Id.* Issues relating to the interpretation of subsection (e) are beyond the scope of this Article.

[23] *Century Brass*, 795 F.2d at 273.

first, the debtor's proposal must satisfy the requirements of § 1113(b)(1), under § 1113(c)(1); second, the union's rejection of the proposal must lack good cause, under § 1113(c)(2); and finally, under § 1113(c)(3), rejection of the proposal must be favored after a "balance of the equities" examination.[24]

For ease of analysis in assessing motions to reject, most bankruptcy courts have used a nine-part test that the bankruptcy court in *In re American Provision Co.*[25] adopted shortly after the enactment of § 1113.[26] The nine factors are:

> (1) The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement; (2) The proposal must be based on the most complete and reliable information available at the time of the proposal; (3) The proposed modifications must be necessary to permit the reorganization of the debtor; (4) The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably; (5) The debtor must provide to the union such relevant information as is necessary to evaluate the proposal; (6) Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union; (7) At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement; (8) The Union must have refused to accept the proposal without good cause; and (9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.[27]

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24 *Id.* (citing Gibson, *supra* note 13, at 335).

25 44 B.R. 907 (Bankr. D. Minn. 1984).

26 *Id.* at 909. *See also In re* Valley Steel Prods. Co., 142 B.R. 337, 340 (Bankr. E.D. Mo. 1992) (noting that the nine-part test is "now widely accepted"). For various courts' application of this nine-part test, see *In re* GCI, Inc., 131 B.R. 685, 690-91 (Bankr. N.D. Ind. 1991); *In re* Big Sky Transp. Co., 104 B.R. 333, 335 (Bankr. D. Mon. 1989); *In re* Texas Sheet Metals, Inc., 90 B.R. 260, 263 (Bankr. S.D. Tex. 1988); *In re* Amherst Sparkle Mkt., Inc., 75 B.R. 847, 849 (Bankr. N.D. Ohio 1987); *In re* Walway Co., 69 B.R. 967, 972 (Bankr. E.D. Mich. 1987); *In re* Kentucky Truck Sales, Inc., 52 B.R. 797, 800 (Bankr. W.D. Ky. 1985); *In re* Salt Creek Freightways, 47 B.R. 835, 837-38 (Bankr. D. Wyo. 1985).

27 *In re Am. Provision*, 44 B.R. at 909. While the interpretation of all of these requirements is beyond the scope of this Article, it is worth noting that there is a major and important split in the circuits concerning the interpretation of the "necessary to the reorganization" language. The Third Circuit has construed this language "strictly to signify only those modifications that the trustee is constrained to accept because they are directly related to the Company's financial condition and its reorganization." Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1088 (3d Cir. 1988). Moreover, the Third Circuit requires

The courts within the Second Circuit have not, however, formally adopted this test. In 1985 the Bankruptcy Court for the Southern District of New York noted in *In re Carey Transportation, Inc.*,[28] that the nine-part test provided a "convenient framework" for analysis.[29] But, the same court in 1986 stated in *In re Royal Composing Room, Inc.*[30] that "[t]his court eschews the talismanic nine-step analysis . . . . Instead, this court looks to the three interdependent findings required by Code § 1113(c)."[31]

The bankruptcy court in the *MNI* case seemed to follow this latter approach. Thus, after addressing a variety of objections to rejection that the New York Typographical Union No. 6 (Local 6) raised, the bankruptcy court sought to determine whether the debtor satisfied the three requisite showings needed to support rejection.[32] The United States Court of Appeals for the Second Circuit agreed, stating that "[r]ejection of a collective bargaining agreement is permitted only if the debtor fulfills the requirements of § 1113(b)(1), the union fails to reject the debtor's proposal with good cause, and the balance of the equities clearly favors rejection."[33]

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that the proposed modifications be necessary to the "short[] term goal of preventing the debtor's liquidation." *Id.* at 1089. The Second and Tenth Circuits have adopted a less stringent interpretation. In the view of these courts, "necessary" does not mean absolutely minimal or essential changes, although it does mean more than just helpful changes. *See* Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys., Inc. (*In re* Mile Hi Metal Sys., Inc.), 899 F.2d 887, 893 (10th Cir. 1990); Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey Transp., Inc., 816 F.2d 82, 88-90 (2d Cir. 1987). The focus is not on short term survival but on a successful reorganization. *Id. See generally* Charnov, *supra* note 13, at 984-1003.

28 50 B.R. 203 (Bankr. S.D.N.Y. 1985), *aff'd sub nom.* Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey Transp., 816 F.2d 82 (2d Cir. 1987).

29 *Id.* at 207.

30 *In re* Royal Composing Room, Inc., 62 B.R. 403 (Bankr. S.D.N.Y. 1986), *aff'd*, 78 B.R. 671 (S.D.N.Y. 1987), *aff'd*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

31 *Id.* at 406.

32 *In re* Maxwell Newspapers, Inc., 146 B.R. 920, 928 (Bankr. S.D.N.Y.), *rev'd in part and aff'd in part*, 149 B.R. 334 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992).

33 *In re Maxwell Newspapers*, 981 F.2d at 89 (citing 11 U.S.C. §§ 1113(c)(1)-(3)). The Second Circuit omitted any mention of § 1113(b)(2), which requires the debtor to meet with the union in an effort to reach a consensual resolution. The Second Circuit acknowledged that the statute required good faith negotiations between the parties, but reasoned that "[t]his obligation is properly analyzed under § 1113(c)(2), which permits rejection of a labor agreement only when the union has rejected the debtor's proposal without good cause." *Id.* (citing *In re Royal Composing Room*, 848 F.2d at 349). As discussed in detail below, the Second Circuit's conception of good cause incorporates the situation where the debtor failed to comply with § 1113(b)(2), or has only "gone through the motions" and offered proposals

III. THE *MNI* DECISIONS

A. The Bankruptcy Court Decision

1. The Onerous Lifetime Guarantees

From the inception of the Debtor's chapter 11 case, virtually all parties recognized that a sale of the *Daily News* was essential to the Debtor's successful reorganization.[34] While the Debtor had approximately $8 million in cash when it filed for relief under chapter 11, cumulative losses over the previous decade of more than $100 million, plus estimated net losses of approximately $7.2 million for 1992, left the Debtor in an extremely weakened position.[35]

A potentially fatal impediment to a sale, however, was the Debtor's onerous collective bargaining agreement with Local 6, which represented the Debtor's typographers.[36] Part of the collective bargaining agreement was a so-called "special agreement," originally entered into in 1974, that provided for lifetime job guarantees for members of Local 6 then employed by the Debtor. The consideration for this special agreement was Local 6's consent to permit automation of the functions performed by typographers.[37] A successors and assigns clause in the Local 6 collective bargaining agreement purported to provide that this lifetime job guarantee would bind any successor or assign of the Debtor.[38] By the end of 1992, the Debtor still employed 167 ty-

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in bad faith. *Id.* at 90; *see infra* notes 94-123 and accompanying text (suggesting that subsuming the good faith bargaining requirement within the good cause requirement is erroneous, and, instead, the good cause requirement needlessly diverts the court's focus from the reorganization process, and therefore should be eliminated).

[34] *In re Maxwell Newspapers, Inc.*, 146 B.R. at 923, 931. On December 5, 1991, the Debtor filed for relief under chapter 11 of the Bankruptcy Code. While the immediate cause of the Debtor's bankruptcy filing was the death of its owner, Robert Maxwell, and the loss of his continued financial support for the Debtor's operations, the Debtor's excessive labor costs and its weakened condition from a bitter 1990 strike made an eventual filing inevitable. *Id.* at 922-23.

[35] *Id.* at 923.

[36] *Id.* at 923-24.

[37] *In re* Maxwell Newspapers, Inc., 149 B.R. 334, 336 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992); *see also* NLRB v. New York Typographical Union, 632 F.2d 171, 174 n.3 (2d Cir. 1980) (summarizing history of the special agreement).

[38] The collective bargaining agreement's successors and assigns clause provided, in pertinent part:

> 2. The employment guarantees and discharge provision of this Special Agreement, including the survival of such employment guarantees and discharge provision beyond the expiration of this Special Agreement and the Contract, shall enure to the successors and/or as-

pographers,[39] at an annual cost of approximately $9.3 million,[40] even though technological developments had effectively rendered the typographers' craft largely obsolete.[41]

Not surprisingly, none of the potential purchasers of the newspaper was willing to assume the Local 6 collective bargaining agreement.[42] The Debtor, however, ultimately reached an agreement to sell the newspaper to an entity controlled by Mortimer Zuckerman.[43] He, too, was unwilling to assume the collective bargaining agreement with Local 6 and its lifetime job guarantees.[44]

Local 6 reacted to the Debtor's efforts to sell the newspaper by commencing an adversary proceeding[45] against the Debtor seeking, inter alia, to compel arbitration on its claim that the Debtor's sales efforts violated the successors and assigns clause of the collective bargaining agreement by failing to condition any sale on assumption of the lifetime job guarantees.[46] Local 6 also asserted that § 1113 was simply inapplicable in the sale context.[47]

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signs of any Publisher signatory to this Special Agreement as if such successor or assign had been an original signatory thereto.

3. Only in the event of a permanent suspension of the Publisher's newspaper will the employment guarantees of this Special Agreement cease.

New York Typographical Union—Publisher Productivity and Job Security Special Agreement, Article 1(F), *in* CONTRACT AND SCALE OF PRICES, NEWSPAPER BRANCH, NEW YORK, TYPOGRAPHICAL UNION No. 6, at 69 (amended Mar. 31, 1984) (on file with the SETON HALL LAW REVIEW).

39 *In re Maxwell Newspapers*, 146 B.R. at 923.

40 *Id.* at 924.

41 *Id.* at 923-24.

42 *Id.* at 924.

43 *Id.*

44 *Id.*

45 According to the Federal Rules of Bankruptcy Procedure, a proceeding for injunctive relief constitutes an adversarial proceeding. FED. R. BANKR. P. 7001. These proceedings are similar to normal civil actions and are commenced by service of a summons and complaint. *Id.* 7003. Contested matters, on the other hand, are commenced by notice of motion. *Id.* 9014. A motion to reject a collective bargaining agreement pursuant to § 1113 is a contested matter. *In re* Salt Creek Freightways, 47 B.R. 835, 837 n.1 (Bankr. D. Wyo. 1985).

46 Complaint, New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. d/b/a Daily News, Adv. Proc. No. 92-9552A (Bankr. S.D.N.Y. 1992).

47 Local 6 apparently assumed that if § 1113 was inapplicable in the context of a sale, the Debtor would have no mechanism to reject the collective bargaining agreement. This does not logically follow; it is equally plausible that if the rejection provisions of § 1113 were inapplicable, the prohibition against rejection of § 1113(a), other than in compliance with the procedures provided for in §§ 1113(b) and (c), would also be inapplicable. Presumably, under such a scenario, rejection would then be available under § 365 of the Bankruptcy Code, subject to the standard adopted by the Supreme Court in *Bildisco*.

Prior to the filing of the § 1113 motion, the bankruptcy court rejected Local 6's position, holding that § 1113 applied in the context of a debtor that attempted to reorganize by means of a sale of its business.[48]

2. The Bargaining Process

On October 1, 1992, the Debtor made an initial proposal to Local 6 to modify the collective bargaining agreement. This proposal essentially called for the elimination of the lifetime job guarantees contained in the collective bargaining agreement.[49] Local 6 rejected this proposal and ultimately made a counterproposal that provided for a gradual reduction in the number of "shifts" that the purchaser would be required to offer Local 6's members each week. In return, however, Local 6's members would receive an incentive in the form of a cash buyout offer and a contribution to its pension and welfare funds.[50] Although the buyout component of this proposal was unacceptable to the Debtor and Zuckerman, the concept of a reduction in shifts formed the basis for all subsequent proposals.[51]

The Debtor and Zuckerman responded with a counterproposal that accelerated the shift reductions.[52] While this proposal

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[48] *In re* Maxwell Newspapers, Inc., Adv. Proc. No. 92-9552A, Hearing Transcript at 56-57 (Bankr. S.D.N.Y. Oct. 8, 1992). The bankruptcy court reasoned that, given the strong policy in favor of rehabilitating debtors and Congress's determination that rejection of collective bargaining agreements could be utilized to further that goal, a chapter 11 debtor could utilize pertinent provisions of chapter 11, even when planning to sell most of its assets, provided it seeks to change and maintain operations, rather than cease and liquidate operations. *Id.* at 54. The Bankruptcy Judge stated:

> This is not a true liquidation in the sense that Local 6 seeks to convey.
>
> Under the terms of the proposed sale the newspaper will continue to operate rather than shut down, resulting in the preservation of the jobs of approximately 2,000 employees, a critical consideration in the face of our economy.
>
> Although substantially all of the newspapers's assets would be sold, the only true change will be the ownership of the paper, a change that will ideally preserve jobs and benefit the estate.

Id. at 56.

[49] *In re Maxwell Newspapers*, 146 B.R. at 925. This proposal also called for the elimination of the successors and assigns clause and any duty to arbitrate regarding the lifetime job guarantees. *Id.*

[50] *Id.* at 926.

[51] *Id.* at 926-27. Because Zuckerman, as the potential purchaser, would necessarily fund any settlement, he was deeply involved in the negotiations with Local 6. The bankruptcy court found that this participation was consistent with the purposes of the Bankruptcy Code. *Id.* at 929.

[52] *In re Maxwell Newspapers*, 146 B.R. at 926.

omitted any buyout or contributions to Local 6's welfare and pension funds, it provided an early retirement incentive by adding five years to an employee's age and length of service for calculating retirement eligibility and benefits (the "5 + 5" early retirement program).[53] Local 6's response increased the rate of shift reductions, but at the cost of a "6 + 6" early retirement program, plus a cash payment of $10,000 for each retiring employee.[54] Zuckerman subsequently concluded that the cost of either a "5 + 5" or "6 + 6" was impossible to quantify and dropped this element from his final proposal, which was delivered to Local 6 late in the evening preceding the § 1113 hearing.[55] The final proposal did provide, however, for an immediate cash payment of $1 million to Local 6's health and welfare fund to provide health insurance coverage for the Local 6 employees.[56] Local 6 rejected this final proposal, asserting that it did not meet Local 6's earlier proposals[57] and that it was made too late in the evening before the hearing on the rejection motion for it to make a meaningful response.[58]

3. The Bankruptcy Court Rulings

The bankruptcy court held a hearing on the Debtor's motion to reject the collective bargaining agreement on October 22 and 23, 1992. After rejecting Local 6's threshold arguments in opposition to the Debtor's motion to reject the collective bargaining agreement,[59] the bankruptcy court turned to whether the Debtor

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53 *Id.*

54 *Id.*

55 *Id.* at 926-27.

56 *Id.* at 927. The cost of this final proposal to Zuckerman was $30 million. *Id.* Fred Drasner, Zuckerman's chief negotiator, testified that he estimated that the jobs of all of Local 6's members could be eliminated for a capital investment of between $1.5 and $2.0 million. *Id.* at 930.

57 *Id.* at 927.

58 *In re* Maxwell Newspapers, Inc., 149 B.R. 334, 341 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992). Significantly, Local 6 did not raise the timing issue below in the bankruptcy court but only in the district court.

59 In the first threshold point, Local 6 argued that rejection was impermissible because the Daily News allegedly sought a " 'retroactive modification' of the [*Daily News's*] alleged breach in agreeing to a sale [of the newspaper] without honoring the lifetime job guarantees." *In re Maxwell Newspapers*, 146 B.R. at 928. The bankruptcy court dismissed this argument on the facts, holding that the *Daily News* did not breach the collective bargaining agreement by entering into an agreement to sell the newspaper because such an agreement was not binding on the *Daily News* absent bankruptcy court approval. *Id.* The bankruptcy court went on to note that "even if there had been a breach, nothing in the language of section 1113 suggests that a debtor cannot reject a collective bargaining agreement if it has breached that

had fulfilled the three substantive requirements imposed by § 1113. First, the bankruptcy court examined whether the Debtor had made a post-petition, pre-motion proposal that complied with § 1113(b)(1). Consistent with the majority of earlier cases addressing the issue, the bankruptcy court construed this requirement as meaning that "[t]he debtor must show that its pre-rejection proposal was made in good faith and contains necessary, *but not absolutely minimal*, changes that will enable the debtor to complete the reorganization process successfully."[60] The bankruptcy court had little difficulty concluding that the Debtor and Zuckerman had acted in good faith, given the extensive bargaining that occurred from the time of the initial propo-

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agreement so long as the debtor has negotiated in good faith." *Id.* (citing *In re* GCI, Inc., 131 B.R. 685, 694-97 (Bankr. N.D. Ind. 1991)). *See also In re* Alabama Symphony Assoc., 155 B.R. 556, 571 (Bankr. N.D. 1993) (debtor's breach of collective bargaining agreement does not preclude subsequent rejection).

Second, Local 6 argued that rejection should be denied on the theory that the *Daily News's* initial proposal improperly sought the termination of the collective bargaining agreement and that the *Daily News* had therefore failed to comply with § 1113(b)(1)(A)'s requirement that the debtor make a pre-application proposal containing necessary *modifications* to the collective bargaining agreement. *Id.* at 928-29. The bankruptcy court dismissed this argument, noting that the *Daily News's* proposal, while harsh, left many provisions of the collective bargaining agreement intact and therefore constituted a proposal to modify, not terminate, the collective bargaining agreement. *Id.* at 929. Moreover, the bankruptcy court held that, in any event, rejection may be granted even if the initial pre-application proposal is defective, so long as "the debtor has 'prior to the hearing' made a proposal that fulfills the requirements of subsection (b)(1). *Id.* The bankruptcy court further noted that it could consider pre-hearing proposals irrespective of whether the pre-application proposal was not a model proposal for section 1113 purposes." *Id.* (citing *In re* Royal Composing Room, Inc., 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986), *aff'd*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *In re* Allied Delivery Sys. Co., 49 B.R. 700, 703 (Bankr. N.D. Ohio 1985)).

Local 6's third threshold objection was that the explicit reference in § 1113 to the trustee or the debtor precluded the bankruptcy court from considering the prospective purchaser's proposal to Local 6. *Id.* at 929. The bankruptcy court rejected this argument, holding that it was a necessary corollary of its earlier holding that the purchaser's needs — and therefore the purchaser's proposals — be considered in evaluating a motion to reject a collective bargaining agreement under § 1113. *Id.* The bankruptcy court also rejected as "senseless" Local 6's related argument that the determination of whether the proposed modifications were "necessary" within the meaning of § 1113(b)(1)(A) should be determined by reference to the purchaser's wealth. *Id.* at 929-30. As the bankruptcy court correctly pointed out, "[t]hat there are wealthy suitors for an ailing debtor's business matters little if those suitors will not marry the debtor because of the economic handcuffs which the debtor wears." *Id.* at 930.

60 *Id.* (citing *In re Royal Composing Room*, 848 F.2d at 348). See *supra* note 27 for a discussion of the different standards regarding the meaning of "necessary" in this context.

sal through the date of the hearing.[61]

Second, the bankruptcy court considered whether Local 6 had rejected the final proposal to modify the collective bargaining agreement without good cause. The bankruptcy court dismissed Local 6's argument that the good cause requirement merely required the union to articulate a rational reason for rejecting the proposal.[62] After noting that courts have had difficulty in determining precisely what good cause means,[63] the bankruptcy court offered its own elucidation of this issue:

> Although some courts have suggested that good cause to reject the proposal cannot exist if the debtor shows that it bargained in good faith, that the proposed modifications are necessary, and that they are fair and equitable, the Second Circuit has rejected that standard except where the union has neither participated meaningfully in post-petition negotiations nor offered any reason for rejecting the proposal other than its view that the proposed modifications were excessive . . . . Manifestly, Local 6 bargained hard here. It would seem that a union may safely refuse the debtor's proposal if its members are being unfairly burdened relative to the other parties or the proposal is not necessary for the debtor's reorganization, but, otherwise, the union cannot safely turn down the proposal if it has not proffered an alternative which accomplishes the same economic end and fulfills the needs of the reorganization.[64]

Applying this somewhat diaphanous "reorganization" standard, the bankruptcy court concluded that Local 6 in fact lacked good cause to reject the debtor's final proposal to modify the collective bargaining agreement. The bankruptcy court acknowledged that Local 6 "was caught off guard by the final proposal."[65] The court nonetheless concluded that Local 6's failure to offer an alternative proposal that "would accomplish the same economic result"[66] as Zuckerman's final proposal, and its insistence "that the excess employees be given a sweetener to induce them to leave,"[67] did not constitute good cause. This conclusion was buttressed by the fact

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61 *In re Maxwell Newspapers*, 146 B.R. at 930. *See also In re* Sol-Sieff Produce Co., 82 B.R. 787, 795 (Bankr. W.D. Pa. 1988) (finding good faith where debtor "has at all times been ready, willing, and able to negotiate these issues").

62 *In re Maxwell Newspapers*, 146 B.R. at 933.

63 *Id.* at 932. *See infra* notes 91-118 and accompanying text (discussing various formulations of good cause standard).

64 *Id.* at 932 (citing Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey Transp., 816 F.2d 82, 92 (2d Cir. 1987)).

65 *Id.*

66 *Id.*

67 *Id.* at 933.

that Zuckerman offered a gradual phase-out of jobs likely to become obsolete in the very short term.[68]

Third, the bankruptcy court concluded that the Debtor had established the final substantive requirement: the balance of the equities clearly favored rejection, because "without the relief sought, the [Debtor] is doomed and chapter 7 looms large."[69] Having found that the Debtor had complied with § 1113, the bankruptcy court granted the Debtor's motion to reject the collective bargaining agreement.[70]

B. The District Court Decision

Local 6 immediately appealed to the United States District Court for the Southern District of New York and sought a stay of the closing of the sale pending appeal. The request for a stay was denied, but the appeal was expedited, briefed, argued and decided in a matter of a few weeks.[71] The district court affirmed the bankruptcy court's conclusion that § 1113 applied in the sale context as well as the order approving the sale of the newspaper.[72] The district court, however, reversed the decision to permit rejection on the narrow ground that Local 6 had good cause to reject the final proposal to modify the collective bargaining agreement.

Focusing exclusively on the second half of the bankruptcy court's articulation of the "good cause" standard, the district court concluded that the bankruptcy court had construed § 1113(c)(2) too narrowly and equated lack of good cause with the debtor's making a proposal containing necessary modifications.[73] The district court reasoned that under the bankruptcy court's interpretation of § 1113(c)(2), rejection of the collective bargaining agreement would be required "in all cases except two: where the union members are 'unfairly burdened relative to the

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[68] *Id.* The bankruptcy court also rejected Local 6's contentions that the original proposal was not made in good faith and that its rejection of that proposal was supported by good cause. *Id.* at 932. The court noted that Local 6's argument failed to account for the later proposals. *Id.*

[69] *Id.* at 934.

[70] *Id.* The bankruptcy court then approved the Debtor's motion to approve the sale of the newspaper to Zuckerman. *In re* Maxwell Newspapers, Inc., 149 B.R. 334, 335 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992).

[71] *Id.* at 336.

[72] *Id.* at 337-38. Local 6 had also appealed the bankruptcy court's denial of its motion for appointment of an examiner. This order was also affirmed by the district court. *Id.* at 341.

[73] *Id.* at 338-39.

other parties' and where 'the proposal is necessary for the debtor's reorganization.' "[74] The district court concluded that these two scenarios simply restated the requirements of §§ 1113(b)(1)(A) and 1113(c)(1), and thus effectively read the good cause requirement of § 1113(c)(2) out of the statute. In the district court's view, the United States Court of Appeals for the Second Circuit implicitly disavowed this construction of § 1112 in *Truck Drivers Local 807 v. Carey Transp.*[75]

According to the district court, § 1113(c)(2) emphasizes the bargaining process itself, and not solely the substance of the debtor's proposal.[76] Applying this "process" concept of good cause, the district court concluded that Local 6 had good cause to reject the final proposal, because it was made late in the evening preceding the bankruptcy court hearing, and because it changed certain aspects of the prior proposal.[77] The district court reasoned that the Debtor's proposal, which shifted directions at such a late hour, left Local 6 with insufficient time to respond with a meaningful counterproposal.[78]

C. *The Second Circuit Decision*

After expedited appeals, and less than three weeks after the district court ruling, the Second Circuit reversed the district court on the good cause issue, holding that Local 6 lacked good cause to reject the final proposal to modify the collective bargaining agreement.[79] Although not entirely clear from its opinion, the Second Circuit appeared to agree with the district court's finding that the bankruptcy court had read the good cause requirement too narrowly.[80] The Second Circuit, however, did not attempt to define good cause as used in § 1113(c)(2), noting that

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74 *Id.* at 339 (quoting *In re Maxwell Newspapers*, 146 B.R. at 932).

75 *Id.* (citing Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey Transp., 816 F.2d 82, 92 (2d Cir. 1987)).

76 *In re Maxwell Newspapers, Inc.*, 149 B.R. at 339. The district court acknowledged, but did not consider to be significant, the fact that *Carey Transp.* involved the very different factual situation of a union that simply refused to bargain with the debtor over proposed modifications to the collective bargaining agreement. *Id.* at 339 & n.3 (quoting *Carey Transp.*, 816 F.2d at 92).

77 *Id.* at 340-41.

78 *Id.* at 341.

79 All other aspects of the district court's decision were affirmed. *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 92 (2d Cir. 1992).

80 *Compare id.* at 89 (apparently agreeing with the district court that the bankruptcy court misread § 1113(c)(2)) *with id.* at 90 (stating that "the bankruptcy court perhaps took a too narrow view of § 1113(c)(2). . . . [w]hether or not the bankruptcy court may have misstated the good cause rule").

its meaning must be ascertained on a case-by-case basis.[81] Instead, the Second Circuit adopted a more functional approach to understanding what is meant by good cause:

> A more constructive and perhaps more answerable inquiry is why this term is in the statute. We think good cause serves as an incentive to the debtor trying to have its labor contract modified to propose in good faith only those changes necessary to its successful reorganization, while protecting it from the union's refusal to accept the changes without a good reason.
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> To that end, the entire thrust of § 1113 is to ensure that well-informed and good faith negotiations occur in the market place, not as part of the judicial process. . . . Knowing that it cannot turn down an employer's proposal without good cause gives the union an incentive to compromise on modifications of the collective bargaining agreement, so as to prevent its complete rejection . . . .
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> Thus, for example, a union will not have good cause to reject an employer's proposal that contains *only* those modifications essential for the debtor's reorganization, that is, the union's refusal to accept it will be held to be without good cause. On the other hand, as we have noted, where the union makes compromise proposals during the negotiating process that meet its needs while preserving the debtor's savings, its rejection of the debtor's proposal would be with good cause.[82]

While apparently disagreeing with the bankruptcy court's explanation of the good cause standard, the Second Circuit concurred with its factual findings that other employee groups had already suffered far greater reductions than Local 6, that creditors would receive only a small return on their prepetition claims, that Local 6 nonetheless insisted on incentives for its members to voluntarily surrender their guaranteed jobs and that neither the Debtor nor Zuckerman could accede to this request.[83] The Second Circuit also reversed the district court's assertion that the last-minute nature of the final proposal was somehow unfair, thereby justifying the union's rejection of the final proposal. In this regard, the circuit court noted that ten hours during labor negotiations provided parties with sufficient time to contemplate and respond to an adversary's proposal.[84]

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[81] *Id.* at 90.

[82] *Id.* (citations omitted).

[83] *Id.* at 90-91.

[84] *Id.* at 91. This is also consistent with the text of § 1113, which contemplates

Further, the Second Circuit considered the proposals and counterproposals that had been made after the commencement of the original rejection hearing in the bankruptcy court.[85] Indeed, the Second Circuit invited a complete report about the most current status of the offers and counteroffers. This aspect of the decision implicitly rejected conflicting authority in the Second Circuit, as well as a court of appeals decision outside the Second Circuit.[86]

Finally, and of special concern, the Second Circuit conditioned its approval of the rejection of the Local 6 collective bargaining agreement by requiring the debtor to hold open the last offer to Local 6, which was made immediately before the Second Circuit oral argument. Thus, the union was given one final chance to accept the Debtor's last proposal even after the Second Circuit rendered the decision.[87]

IV. PRACTICAL PROBLEMS RAISED BY THE *MNI* DECISIONS: FUTURE SOLUTIONS

The trio of *MNI* decisions raise two difficult theoretical and practical questions regarding § 1113. First, as all three courts in the *MNI* case correctly noted, cardinal principles of statutory construction mandate that § 1113(c)(2)'s current requirement that the union reject the final proposal without good cause be given some independent meaning, rather than simply be construed as a redundant restatement of the requirements of §§ 1113(c)(1) and (3).[88] The concept of good cause, however,

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that negotiations, after the filing of a motion to reject, will proceed on a fast track. Section 1113(d)(1) provides that the hearing on the debtor's motion to reject a collective bargaining agreement must be scheduled within fourteen days of the filing of the motion. 11 U.S.C. § 1113(d)(1).

85 *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 88 (2d Cir. 1992).

86 *See In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 893 (10th Cir. 1990) (refusing to consider proposal made during rejection hearing); *In re* Royal Composing Room, Inc., 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986) (same), *aff'd*, 78 B.R. 671 (Bankr. S.D.N.Y. 1987), *aff'd*, 848 F.2d 345 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989). *But see In re* Kentucky Truck Sales, Inc., 52 B.R. 797, 800 (Bankr. W.D. Ky. 1985) (considering negotiations made during recess of rejection hearing). It is difficult, if not impossible, to reconcile this part of the Second Circuit's decision with the plain language of § 1113. Section 1113(c)(1) expressly refers to a proposal made by the debtor "prior to the hearing." 11 U.S.C. § 1113(c)(1).

87 *In re Maxwell Newspapers*, 981 F.2d at 91-92. The Second Circuit also held that § 1113 applied in the sale context, confirming the viability of the sale device as a reorganization method. *Id.* at 91.

88 *See In re* Maxwell Newspapers, Inc., 149 B.R. 334, 338-39 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992); *In re Maxwell Newspapers*, 981 F.2d at 89. *See also* Pennsylvania Dep't of Pub. Welfare v. Davenport, 110 S. Ct. 2126, 2133 (1990) (maintaining that "[o]ur cases express a deep reluctance to interpret a statu-

remains elusive notwithstanding these three decisions. This Article suggests that the separate good cause requirement is inconsistent with the policy of fostering reorganizations and that § 1113 should be amended to eliminate this element.

Second, the result of the Second Circuit's condition that the Debtor hold open its last offer is that the debtor's ability to impose new terms after a collective bargaining agreement has been rejected is limited to the final proposal made to the union, even if that proposal is made after the § 1113 hearing (or even the initial decision).[89] This rule creates a disincentive for the union to reach consensual agreements with a debtor. There will now be a great risk that the union will attempt to manipulate the negotiation process to induce the debtor to make increasingly favorable proposals, and then litigate over the final proposal. At that stage, the union cannot lose: the union will either be able to defeat the debtor's rejection motion if it can convince the bankruptcy court that the debtor has failed to comply fully with § 1113; or, the union will be governed by the debtor's final proposal, plus it will have the benefit of a claim for damages arising from rejection of the collective bargaining agreement.[90] Requiring the Debtor to

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tory provision so as to render superfluous other provisions in the same enactment") (citation omitted).

89 In theory the union could turn down the debtor's final proposal after rejection is approved, but there would be no rational reason for doing so. If the union did reject the final proposal, it is unclear whether under the Second Circuit's decision the debtor would be at liberty to unilaterally implement any changes to the terms and conditions of employment of its union employees.

90 Prior to the enactment of § 1113, courts had either held or assumed that a union was entitled to rejection damages when a collective bargaining agreement was rejected pursuant to § 365 of the Bankruptcy Code. *See* NLRB v. Bildisco & Bildisco, 465 U.S. 513, 530-31 (1984) (assuming that rejection of collective bargaining agreement would give rise to rejection claims governed by 11 U.S.C. §§ 365(g)(1) and 502(g)); U.S. Truck Co. v. Teamsters Nat'l Freight Indust. Negotiating Comm. (*In re* U.S. Truck), 89 B.R. 618, 623-24 (E.D. Mich. 1988) (same). Following the enactment of § 1113, most courts have likewise assumed that rejection damages remain available. *See, e.g.*, *Carey Transp.*, 816 F.2d at 93 (observing that in determining whether equities favor rejection, bankruptcy court should consider, inter alia, "the possibility and likely effect of any employee claims for breach of contract if rejection is approved"); *In re* Garofalo's Finer Foods, Inc., 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990) (same); *In re* Salt Creek Freightways, 47 B.R. 835, 841 (Bankr. D. Wyo. 1985) (noting that damages resulting from rejection of a collective bargaining agreement will have to be estimated pursuant to 11 U.S.C. § 502(c)). The Bankruptcy Court for the Eastern District of Tennessee, however, recently held that a union is not entitled to damages arising from interim changes to a collective bargaining agreement pursuant to § 1113(e) or from rejection pursuant to §§ 1113(b) and (c). *In re* Blue Diamond Coal Co., 147 B.R. 720, 732, 734 (Bankr. E.D. Tenn. 1992). The bankruptcy court reasoned that the congressional enactment of § 1113 expressly removed collective bargaining agreements from

keep the last offer open is inimical to the goal of obtaining consensual modifications of collective bargaining agreements and should be eliminated.

A. The Elusive Good Cause Element under Section 1113(c)(2)

Section 1113 does not define good cause, nor does it provide any textual support for giving any particular meaning to this language.

1. The Legislative History

The legislative history sheds no light on the meaning of good cause under § 1113(c)(2). The *Bildisco* decision provoked wildly disparate reactions from members of Congress;[91] indeed, Congress was unable to agree upon a conference report for § 1113.[92] The legislative history thus "consists of little more than self-serving statements by opposing partisans"[93] and as such "is singularly unhelpful."[94] This is particularly true with respect to § 1113's good cause requirement. For example, Senator Thurmond commented:

> The requirement that the union refusal to accept the proposal be "without good cause" is obviously not intended to import traditional labor law concepts into a bankruptcy forum or turn the bankruptcy courts into a version of the National Labor Relations Board. Again, the intent is for these provisions to be interpreted in a workable manner.[95]

Simply stating that good cause is not a labor law concept[96] and that

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§ 365 analysis. *Id.* at 730. Accordingly, neither § 365(g) nor § 502(g), which govern rejection claims under § 365, is applicable. *Id.* While resolution of the issues raised by *Blue Diamond Coal* is beyond the scope of this Article, the unavailability of rejection damages would not change the authors' analysis.

91 *Compare* 130 CONG. REC. 20,081 (1984) (statement of Sen. Thurmond) ("I believe that the Bildisco decision was correctly decided and did not require legislative action by Congress") *with* 130 CONG. REC. 6200 (1984) (statement of Rep. Rodino) (offering proposed legislation requiring application of stricter standard adopted in Brotherhood of Ry., Airline and S.S. Clerks v. REA Express, Inc., 523 F.2d 164 (2d Cir.), *cert. denied*, 423 U.S. 1017 and 1073 (1975)).

92 Charnov, *supra* note 13, at 954.

93 *In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 890 (10th Cir. 1990).

94 Gibson, *supra* note 13, at 340. *See also* Judith D. Nichols, Note, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement Under Section 1113*, 21 GA. L. REV. 967, 1005 (1987) (suggesting that the wide range of comments by individual members of Congress regarding § 1113 demonstrated the lack of consensus on the subject and the difficulties of assessing congressional intent) (footnote omitted).

95 130 CONG. REC. 20,081-82 (1984).

96 *See* West, *supra* note 13, at 47 (suggesting that labor law precedent does not

it is "to be interpreted in a workable manner" (as presumably all statutes are to be interpreted) adds little to one's understanding of this provision. Senator Hatch's statement that "the union can only reject such a good faith offer for cause good enough to justify the risk of the business' collapse,"[97] without suggesting what this might be, is also unhelpful.[98] Finally, Senator Packwood suggested that the good cause requirement adds nothing to the statute:

> The "without good cause" language provides an incentive of pressure on the debtor to negotiate in good faith. *In practical terms, this language imposes no barrier to rejection if the debtor's proposal has contained only the specified "necessary" modifications.* Thus, the language serves to prohibit any bad faith conduct by an employer, while at the same time protecting the employer from a Union's rejection of the proposal without good cause.[99]

2. The Emerging Case Law

a. *The Cases that Ignore the Good Cause Element*

The case law construing the good cause requirement is no more helpful than the legislative history. For example, some courts have simply held that a union lacks good cause when the debtor has otherwise complied with §§ 1113(c)(1) and (3) by making a proposal that contains only necessary modifications and establishing that the balance of equities clearly favor rejection.[100]

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provide assistance in interpreting § 1113(c) because labor law has no counterpart to § 1113(c)'s requirement that, absent good cause to refuse, a union must accept proposed modifications). West noted that the term good cause "cannot import labor law concepts into the bankruptcy courts, at least not NLRA concepts, because this language is foreign to the NLRA." *Id.*

97 130 CONG. REC. 20,085 (1984).

98 Indeed, because all of the debtor's employees will inevitably lose their jobs if the business collapses and creditors will likely recover only a fraction of their claims, if anything, it is difficult to imagine what would constitute cause good enough to warrant such a drastic result.

99 130 CONG. REC. 20,092 (1984) (emphasis added). *See also* Gibson, *supra* note 13, at 341 (noting the unlikelihood that a bankruptcy court would find a good cause rejection of a proposal when the proposal requires shared sacrifice among the parties, satisfies § 1113(b)(1) requirements and only seeks modifications necessary for the continued existence of the firm).

100 *In re* Valley Steel Prods. Co., 142 B.R. 337, 342 (Bankr. E.D. Mo. 1992) (concluding that union lacked good cause where, absent changes, liquidation was likely and "[t]he proposed modifications treat the creditors, the debtors, the Teamsters and other affected parties fairly and equitably"); *In re* Walway Co., 69 B.R. 967, 975 (Bankr. E.D. Mich. 1987) (finding that "[b]ecause the proposal was necessary and equitable pursuant to § 1113, the Union's rejection of the modification was without good cause"); *In re* Carey Transp., 50 B.R. 203, 211-12 (Bankr. S.D.N.Y. 1985), *aff'd sub nom.*, Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey

These cases do not even attempt to examine responsive offers made by the union, and as all three courts correctly concluded in the *MNI* case, when the union has participated in the negotiating process, this approach effectively renders § 1113(c)(2) superfluous, as suggested by Senator Packwood.[101]

b. *The Focus on the Bargaining Process*

Other courts have held that a union lacks good cause when it has failed to participate meaningfully in negotiations with the debtor regarding the proposed modifications to the collective bargaining agreement.[102] These cases suggest that good cause — at least under some circumstances — is somehow linked to the negotiating process and agree that it somehow differs from labor law concepts.[103] The cases, however, fail to offer any guidance in

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Transp., 816 F.2d 82 (2d Cir. 1987) (stating that because debtor's "proposal contained necessary modifications and was fair and equitable . . . it must be found that the Union's refusal to accept [the] proposal was without good cause within the meaning of the statute"); *In re* Allied Delivery Sys. Co., 49 B.R. 700, 704 (Bankr. N.D. Ohio 1985) (maintaining that "[i]f the proposal is necessary and is fair and equitable, . . . then the union's refusal to accept it on the basis that the proposal is unjust . . . is not for good cause").

101 *In re* Maxwell Newspapers, Inc., 146 B.R. 920, 932 (Bankr. S.D.N.Y.), *rev'd in part and aff'd in part*, 149 B.R. 334, 339 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85, 89 (2d Cir. 1992). Other cases construing § 1113 are also consistent with the *MNI* decisions. *See, e.g.*, *Carey Transp.*, 816 F.2d at 91-92; *In re* Texas Sheet Metals, Inc., 90 B.R. 260, 271 (Bankr. S.D. Tex. 1988) (citations omitted). This Article, however, suggests that Senator Packwood was ultimately correct: much confusion and costly litigation and gamesmanship will be eliminated if the good cause requirement were deleted from § 1113 by legislative enactment.

102 *See, e.g.*, *Carey Transp.*, 816 F.2d at 92 (union stonewalled during negotiations); *In re* Alabama Symphony Assoc., 155 B.R. 556, 577 (Bankr. N.D. Ala. 1993) (union lacked good cause when it refused to negotiate meaningfully). *In re* GCI, Inc., 131 B.R. 685, 695 (Bankr. N.D. Ind. 1991) (union refused to negotiate regarding seniority issues); *In re Texas Sheet Metals*, 90 B.R. at 271 (unions failed to offer counterproposal); *In re* Sol-Sieff Produce Co., 82 B.R. 787, 795 (Bankr. W.D. Pa. 1988) (union refused to negotiate at all); *In re* Amherst Sparkle Mkt., Inc., 75 B.R. 847, 853 (Bankr. N.D. Ohio 1987) (unreasonable delay in responding to debtor's proposal); *In re* Kentucky Truck Sales, Inc., 52 B.R. 797, 805 (Bankr. W.D. Ky. 1985) (refusal to negotiate regarding medical benefits).

103 For example, the Second Circuit has stated that "bargaining in good faith is not intended to import labor law into the bankruptcy forum. Rather, the intent is for these provisions to be interpreted in a 'workable manner.'" Century Brass Prods., Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 273 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986) (citing 130 CONG. REC. S8888, *reprinted in* 1984 U.S.C.C.A.N. 583). Another court has stated that "bankruptcy courts are not meant to follow labor law decisions in determining what constitutes good cause." *In re* K & B Mounting, Inc., 50 B.R. 460, 465 (Bankr. N.D. Ind. 1985). While labor law principles are clearly not controlling, however, they can perhaps shed some light on what should be considered good faith bargaining in the context of § 1113. The basic labor law princi-

the more difficult case where the union participated in the negotiating process but ultimately failed to accept the debtor's final proposal for a clearly articulated reason.

The district court's decision in the *MNI* is perhaps an extreme example of the examination of the negotiating process. The district court focused exclusively on whether the Debtor and Zuckerman had somehow violated the district court's concept of appropriate bargaining. The district court concluded, as a factual matter, that the shift in proposals to Local 6 violated this normative concept and determined that this violation gave Local 6 good cause to reject the final proposal made to it, notwithstanding the potentially devastating impact on the Debtor's reorganization and the jobs of its almost 2000 employees.[104]

The district court also concluded that it was too late to make an offer changing the nature of the proposals on the eve of the hearing on the rejection motion. Not only was this conclusion wrong as a factual matter,[105] but even if it were true, denying rejection of a collective bargaining agreement under such circumstances is massive overkill. The more rational solution is to adjourn briefly the § 1113 hearing if the union asserts that it needs additional time to consider the final proposal and respond with a proposal of its own.[106] Indeed, § 1113(d)(1) expressly contemplates that the time for commencing the § 1113 hearing may be extended for up to seven days, and longer if the debtor and the union mutually agree to do so.[107]

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ples are as follows: The duty to bargain in good faith is a statutory requirement found in § 8(d) of the NLRA. 29 U.S.C. § 158(d). That requirement imposes on the parties an "obligation . . . to participate actively in the deliberations so as to indicate a present *intention* to find a basis for agreement . . . ." THE DEVELOPING LABOR LAW 608 (3d ed. 1992) (quotation omitted). Such obligation implies both "an open mind and a sincere desire to reach an agreement," as well as "a sincere effort . . . to reach a common ground." In assessing a party's good faith, the "totality of the conduct" is considered. *Id.* at 608-15. While easy to state, a leading labor law treatise concludes that these principles have been difficult and controversial to apply. *Id.* at 610.

104 *In re* Maxwell Newspapers, Inc., 149 B.R. 334, 341 (S.D.N.Y. 1992), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992) (asserting that "even the threat of closing the *Daily News* does not justify abandonment of the [c]ongressional design").

105 *See supra* text accompanying notes 77-78.

106 Significantly, Local 6 made no such request to the bankruptcy court.

107 Section 1113(d)(1) provides in pertinent part:

> 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. . . . The court may extend the time for the commencement of such hearing for a period not exceed-

The district court's construction of good cause suffers from both practical and analytic defects. Practically, it will inevitably preclude rejection in many situations where the debtor's dire economic straits mandate it, simply because the union negotiated in good faith or because of defective bargaining by the debtor. An approach this divorced from the reorganization process will doom the reorganization efforts of many companies that have excessive labor costs. The approach is also contrary to the policy underlying chapter 11 of fostering reorganization as the best method of saving jobs and maximizing the returns of creditors. Moreover, even assuming that the debtor has not bargained completely in good faith, it is not clear why less than perfect negotiations should have the effect of forcing the debtor into liquidation and causing the debtor's employees — both union and nonunion — to lose their jobs.

Analytically, the district court's approach — equating good cause to the debtor's failure to comply with § 1113(b)(2) — renders § 1113(c)(2) mere surplusage: good cause would be irrelevant in this circumstance, because the debtor has simply failed to establish another element of its prima facie case.

c. *The Focus on the Debtor's Needs*

A number of other courts and commentators have suggested that good cause is, instead, properly viewed as a function of whether the union, in responding to the debtor's proposal to modify the collective bargaining agreement, has addressed the debtor's economic needs in reorganizing. The bankruptcy court in *In re Salt Creek Freightways*[108] was an early proponent of this view.[109] The bankruptcy court there stated:

> [I]t is not necessary to find that a Union has rejected the debtor's proposal in 'bad faith' or for some contrary motive. In fact, the Union may often have a principled reason for deciding to reject the debtor's proposal and which may, when viewed subjectively and from the standpoint of self-interest, be a perfectly good reason. However, the court must review the Union's rejection utilizing an objective standard which narrowly construes the phrase 'without good cause' in light of the

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ing 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.

11 U.S.C. § 1113(d)(1).

[108] 47 B.R. 835 (Bankr. D. Wyo. 1985).

[109] *See id.* at 840-41.

> main purpose of Chapter 11, namely reorganization of financially distressed businesses.[110]

More recently, in *In re Royal Composing Room, Inc.*,[111] the Second Circuit stated that "[i]f the union seeks to negotiate compromises that meet its needs while preserving the debtor's required savings, it would be unlikely that its rejection of the proposal could be found to lack good cause."[112] Similarly, Richard H. Gibson, in an early and influential article interpreting § 1113, suggested that a union will have good cause to reject the debtor's proposal when the union itself makes a counterproposal that complies with § 1113(b)(2), even if such proposal is "offensive to management and favorable to the union."[113] Gibson reasoned:

> [O]ne of the primary purposes of all of the provisions of section 1113 is to place "the primary focus on the private collective-bargaining process and not in the courts." If the court has before it two proposals, either one of which is satisfactory from the perspective of section 1113 and of bankruptcy law generally, it would seem that a bankruptcy court would have neither the need nor the expertise to select between them. In such a case, as the union has demonstrated a willingness to agree to proper modifications of the agreement, it would be hard to justify court intervention in favor of the debtor.[114]

The problem with this standard is that the precise economic impact of many proposals will be difficult if not impossible to quantify. The standard puts the bankruptcy court in the position of attempting to evaluate competing proposals that are not readily comparable to determine whether the union's proposals also will permit the debtor to reorganize. Thus, while quantifying the effect of a wage or benefit reduction is a relatively simple matter, other modifications — which may be just as critical to the long term health and successful reorganization of the enterprise — may not be susceptible to being reduced to an immediate dollar amount. For example,

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110 *Id.* *See also In re* Valley Steel Prods. Co., 142 B.R. 337, 341-42 (Bankr. E.D. Mo. 1992) (declaring that the union failed to substantiate its claims that it negotiated in good faith when it agreed to substantial cost cuts); *In re* Indiana Grocery Co., 138 B.R. 40, 49-50 (Bankr. S.D. Ind. 1990) (finding the union's failure to negotiate wage adjustments, which was based on its belief that the debtor's business was doomed, lacked good cause).

111 848 F.2d 343 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989).

112 *Id.* at 349.

113 Gibson, *supra* note 13, at 341.

114 *Id.* at 342 (quoting 130 CONG. REC. 20,092 (1984) (statement of Sen. Packwood)). Gibson buttresses his conclusion with the labor law principal that "it is improper for a court to compel one or the other of the parties to accept particular terms of a contract." *Id.*

how is a bankruptcy court to compare the debtor's proposal to eliminate seniority rules and the union's counterproposal to lift certain work rules?

There is a more fundamental flaw with this notion — it is totally at odds with the policy of fostering the debtor's reorganization. If, in fact, the union proposes modifications to the collective bargaining agreement that equally meet the needs of the reorganization, it makes no sense to conclude that the appropriate result is to maintain the status quo and thereby ensure the debtor's ultimate demise.[115]

d. *The Second Circuit's Dual Concerns*

The Second Circuit's articulation of good cause in the *MNI* decision is an uneasy and unfinished amalgam of the "bargaining process" concept of good cause (as articulated by the district court) and the "needs of the reorganization" concept of good cause (as articulated by *Royal Composing*). On the one hand, the Second Circuit's statement that "the entire thrust of § 1113 is to ensure that well-informed and good faith negotiations occur in the market place,"[116] and its suggestion that this process protects a union from "an employer whose proposals may be offered in bad faith,"[117] evokes the notion that good cause is related to, if not synonymous with, good faith bargaining and that good cause may be based upon a defect in the bargaining process alone. On the other hand, the Second Circuit's suggestion that "where the union makes compromise proposals during the negotiating process that meet its needs while preserving the debtor's savings, its rejection of the debtor's proposal would be with good cause"[118] suggests that a union will not have good cause unless it substantively meets the debtor's proposal by formulating a counterproposal that is equally geared to the needs of the reorganization.

The Second Circuit's opinion is best read as imposing *both* a procedural and substantive requirement on the union. For a

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115 After the denial of the debtor's motion to reject, the debtor in theory could simply adopt the union's proposal as its own and commence a new § 1113 negotiation if the union was unwilling to immediately agree to such proposal. This step, however, would inevitably result in the needless expenditure of the resources of the parties and the bankruptcy court. Section 1113 is silent as to whether the debtor may make more than one motion to reject a particular collective bargaining agreement. One bankruptcy court has indicated that such successive motions are permitted. *See In re* GCI, Inc., 131 B.R. 685, 697 (Bankr. N.D. Ind. 1991).

116 *In re* Maxwell Newspaper, Inc., 981 F.2d 85, 90 (2d Cir. 1992).

117 *Id.*

118 *Id.* (citations omitted).

union to have good cause, (1) it must bargain in good faith with the debtor by making a proposal that (2) also meets the needs of the reorganization process. Either requirement, standing alone, will be insufficient. Thus, good faith bargaining that does not address the needs of the reorganization will not constitute good cause. Similarly, a proposal designed to deal with the needs of the reorganization that is framed in a manner that will be unacceptable to the debtor will also not constitute good cause. For example, a union counterproposal that results in economic savings comparable to the debtor's proposal, but that imposes restrictions on management's prerogatives in a previously unrestricted area as a quid pro quo for agreeing to this change, will not be deemed good cause under this construction of § 1113(c)(2). Likewise, as was the case with the Debtor's negotiations with Local 6, a union will not have rejected the debtor's proposal with good cause when the union's counterproposal insists that the union be given certain "sweeteners" as the price of the union's consent to the excision of the burdensome provision from the collective bargaining agreement.

This construction of good cause removes some, but by no means all, of the problems associated with the other interpretations of the provision. By focusing on the union's negotiations with the debtor, the problem of a redundant interpretation of the statute is eliminated. Similarly, the good faith requirement will eliminate certain union proposals as constituting good cause because of the presence of demands for "sweeteners" and other unacceptable provisions, thus eliminating the need for the bankruptcy court to weigh the relative economic merits of competing proposals in such instances. The latter problem will still remain, however, in those cases in which the union's counterproposal does not suffer from this defect.

3. Future Solutions to the Good Cause Problem

One possible partial solution to the good cause problem would be to shift the burden of proof to the union to show that it had good cause to reject the debtor's final proposal.[119] This

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[119] Section 1113(c) does not on its face impose the burden of proof on the debtor. Courts have uniformly held, however, that the debtor bears the ultimate burden of persuasion with respect to each of § 1113(c)'s substantive requirements. *See, e.g.*, Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey Transp., 816 F.2d 82, 88 (2d Cir. 1987); Century Brass Prods., Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 266 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986); *In re* Maxwell Newspa-

would require the union to articulate and prove not only the elements of its counterproposal, but also how those elements would mesh with the debtor's reorganization needs. By imposing this burden on the union, the bankruptcy court's task of evaluating competing proposals would at least be substantially, if not wholly, alleviated. In many instances the union would not be able to meet this burden. In those instances where it does, the debtor would likely face significant pressure to withdraw its application to reject the collective bargaining agreement and to accept the union's counterproposal.

This suggestion is, however, a stopgap measure at best. The preferable alternative would be to eliminate the good cause concept from § 1113 entirely. The true problem is that Congress had no clear reason to include the good cause requirement in § 1113 in the first instance, and courts and commentators alike have constantly struggled to give meaning to this legislative afterthought.

This radical legislative change is necessary to reconcile § 1113 with the reorganization policy of chapter 11. If, in fact, a debtor proposes modifications to a collective bargaining agreement, which are necessary to the reorganization process, such policy — as well as fairness to all of the parties, including the debtor's union and nonunion employees — compels the conclusion that there can be no cause good enough to tilt the scales in favor of liquidation.[120] Denying rejection under such circumstances elevates form over substance, giving the union a hollow victory. It simply makes no sense to hold that the effect of the union having submitted a proposal that meets the needs of the reorganization is that those needs should therefore go unmet.[121]

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pers, Inc., 149 B.R. 334, 337 (S.D.N.Y.), *rev'd in part and aff'd in part*, 981 F.2d 85 (2d Cir. 1992). The union has the duty of production on certain issues, including whether it had good cause to reject the final proposal. *See, e.g.*, *In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 892 (10th Cir. 1990); *In re* Am. Provision Co., 44 B.R. 907, 909-10 (Bankr. D. Minn. 1984).

120 *Cf. In re Mile Hi Metal Sys.*, 899 F.2d at 891 (positing that "[a] proposal containing modifications which, if implemented, would violate labor law, does not per se fail to satisfy subpart (b)(1)(A), and does not relieve the union of its duty to confer in good faith").

121 As one bankruptcy court remarked in granting the debtor's motion to reject its collective bargaining agreement:

> It is clear that § 1113 was intended to benefit the Union as well as the Debtor. It is based upon the simple but logical notion that in light of a failing business, employment that yields lesser benefits is preferable to no employment at all. If a company is saved by § 1113, then everyone is benefitted.

Merely eliminating the good cause requirement will not, however, fully correct § 1113's deficiencies. Even if the bankruptcy court approves rejection, undesirable consequences can result. If the union has significant bargaining strength, the debtor may find that rejection of the collective bargaining agreement leads to a strike by the employees represented by the union, with the potential for economic decimation of the debtor's business.[122] If the strong union does not strike, at the very least it may force the debtor into a bargain that is less desirable than what the court determined was necessary to reorganization, or that contains adverse long-term trade-offs for any economic relief the union reluctantly has conceded. Conversely, if the union has little or no bargaining strength, as was the case with Local 6 in the *MNI* case, the union faces the possibility that rejection of its contract may lead to a substantial diminution of the wages, benefits and working conditions attained through years of negotiation prior to the bankruptcy.

Therefore, we suggest that the chapter 11 situation is an appropriate one for use of a form of "final offer" arbitration as the procedural vehicle for restructuring a collective bargaining agreement that is an obstacle to a company's reorganizing. This approach might work as follows:

The debtor would make a written proposal to the union of the type required by § 1113(b)(1)(A) (one necessary to permit reorganization, treating all parties fairly and equitably) and provide relevant information. The parties would be required to bargain for a designated period, *e.g.*, fourteen days. If no agreement is reached, at the end of this bargaining period the parties would be required to exchange detailed written proposals for changes in the collective bargaining agreement, drafted in the form of explicit contract language changes desired by the party, leaving nothing further to negotiate if a proposal is accepted.

Simultaneously, the parties would submit their alternate proposals to the bankruptcy court with supporting papers, and a hearing would be set no later than an additional fourteen days after submission to the bankruptcy court. During the period of time between submission and the court hearing, the parties could bargain further if they desired. If no agreement is reached, at the

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In re Walway Co., 69 B.R. 967, 975 (Bankr. E.D. Mich. 1987).

[122] Upon rejection the union is free to exercise its right to strike. *See, e.g., Carey Transp.*, 816 F.2d at 93; *In re* Kentucky Truck Sales, Inc., 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985).

hearing both parties would present evidence as to their respective proposals and why their proposal better serves the requirements of § 1113(b)(1)(A).

After the hearing, the bankruptcy court would select one proposal or the other; the court could not pick and choose parts of each proposal. The court's order would provide that the existing contract would be modified in accord with the proposal selected and both parties would be required to comply with the contract as revised.

This approach encourages a bargained solution. Neither side can overreach without risking taking its position "out of the picture." If both sides present responsible proposals, there is a substantial chance the parties will bridge any gap to save litigation costs. There is no risk of a status quo standoff as at present, because the proposal that better carries out the purposes of § 1113(b)(1)(A) will be adopted. There should be a reduction in appeals from the bankruptcy court because there will be fewer potential statutory interpretation issues, and the bankruptcy judge's opinion will only be subject to reversal on a clearly erroneous basis. If both proposals equally advance the purposes of § 1113(b)(1)(A), the business judgment rule could be used to support selection of the debtor's proposal.

The economic results of this final offer arbitration will depend less on bargaining power and more on the needs of the reorganization and fairness to all parties. Although this approach is a departure from the historical antipathy of employers and unions to arbitrating the terms of a collective bargaining agreement, it is a small price to pay to foster the goals of reorganization. In any event, the changes made in the collective bargaining agreement would apply only until the contract expired, at which point the parties could exercise their economic power to the extent desired.[123]

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[123] The concept of "final offer" arbitration that we propose for § 1113 is akin to final offer salary arbitration in major league baseball. While baseball owners often bemoan the system because of an inability to control the skyrocketing baseball salaries, *see, e.g.*, Chass, *Thud! Economic Report Lands on Baseball's Desk*, N.Y. TIMES, Dec. 7, 1992, at C2, similar "skyrocketing" proposals should not occur in the § 1113 process because the benchmark for evaluation is the reorganization of the debtor. The theory that final offer arbitration greatly encourages negotiated resolutions has been borne out in the baseball field. For example, a study in 1986 noted that for most parties, the threat of final offer arbitration in baseball creates strong incentives for both good faith bargaining between the parties and the use of self-help in settling any differences that may exist. James B. Dworkin, *Salary Arbitration in Baseball: An Impartial Assessment After Ten Years*, ARB. J. 63, 69 (1986). Indeed, the threat

B. *What Does Rejection of a Collective Bargaining Agreement Mean?*

Section 1113 is silent as to what happens after a collective bargaining agreement is rejected. May the debtor unilaterally change any or all terms and conditions of employment contained in the now rejected collective bargaining agreement? May the debtor terminate any or all of the employees represented by the union? Or is the debtor required to maintain all the terms and conditions of employment and continue good faith bargaining until an impasse is reached?[124] Is the debtor permitted to make certain changes without further bargaining, but not others?

Most bankruptcy practitioners, familiar with the impact of rejection on other executory contracts and unexpired leases pursuant to § 365 of the Bankruptcy Code, would probably assume that the debtor is free to impose any terms on the union that the relative economic bargaining power of the parties will permit after rejection. Under § 365(g)(1) of the Bankruptcy Code, rejection of an executory contract that has not been previously assumed creates a breach of contract which is deemed to have arisen immediately prepetition.[125] Any claims against the debtor arising from such breach are treated as prepetition claims and allowed or disallowed like any other prepetition claim.[126] The debtor is free to deal with the nondebtor party as it chooses. It may propose any new terms to govern the parties' relationship going forward, or determine to sever its relationship.

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of final offer arbitration is apparently so great in baseball that, even after a player files for arbitration, the parties almost always reach agreement before the arbitration hearing. *See, e.g.*, Chass, *The Wheel of Fortune: 149 Seek Arbitration*, N.Y. TIMES, Jan. 15, 1992, at B12 (noting that, in 1991, 153 players filed for arbitration but only 16 finally went to arbitration); Chass, *3 Pirate Stars Top List of 159 in Arbitration*, N.Y. TIMES, Jan. 16, 1991, at D22 (noting that, in 1990, 164 players filed for arbitration but only 24 finally went to arbitration).

[124] Section 1113 does not impose a requirement that the parties bargain to impasse. *See, e.g.*, Century Brass Prods., Inc. v. Int'l Union, United Auto., Aerospace and Agric. Implement Workers (*In re* Century Brass Prods., Inc.), 795 F.2d 265, 272 (2d Cir.), *cert. denied*, 479 U.S. 949 (1986). Thus it is entirely possible for the § 1113 bargaining process to be completed without an actual impasse having been reached.

[125] Section 365(g)(1) provides in pertinent part:

> [T]he rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease —
>
> (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition . . . .

11 U.S.C. § 365(g)(1).

[126] *Id.* § 502(g).

1. NLRA Principles

Unlike the situation posed by rejection of a non-labor executory contract, however, the relationship between the debtor and a union representing the debtor's employees is governed not only by a collective bargaining agreement, but by the statutory framework of the NLRA. Briefly, the NLRA mandates that an employer and the union engage in good faith bargaining upon expiration of a collective bargaining agreement.[127] One corollary to this duty to bargain is that an expired collective bargaining agreement precludes an employer from disrupting the status quo until a new agreement is reached or the parties bargain to impasse.[128] Only once an impasse has been reached may an employer unilaterally implement new terms and conditions of employment: these new terms are limited to terms that were reasonably contemplated by its bargaining proposals[129] or substan-

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127 *See* NLRA §§ 8(a)(5), 8(b)(3) and 8(d), *codified at* 29 U.S.C. §§ 158(a)(5), 158(b)(3) and 158(d). *See also* NLRB v. Katz, 369 U.S. 736, 742-43 (1962); Inland Tugs v. NLRB, 918 F.2d 1299, 1307 (7th Cir. 1990), *reh'g denied en banc*, 1991 U.S. App. LEXIS 131 (7th Cir. 1991).

128 Teamsters Local Union No. 175 v. NLRB, 788 F.2d 27, 30 (D.C. Cir. 1986). The NLRB has not developed a single definition of when impasse occurs. *See* NLRB v. H&H Pretzel Co., 831 F.2d 650, 656 (6th Cir. 1987) (noting that there is no statutory definition of impasse); Blue Grass Provision Co. v. NLRB, 636 F.2d 1127, 1130 (6th Cir. 1980), *cert. denied*, 452 U.S. 915 (1981) (pointing out that "impasse" can not be defined precisely). An impasse will be found when "good-faith negotiations have exhausted the prospects of concluding an agreement." Taft Broadcasting Co., 163 N.L.R.B. 475, 478 (1967), *enf'd sub nom.* Am. Fed'n of Television and Radio Artists v. NLRB, 395 F.2d 622 (D.C. Cir. 1968). *Accord Teamsters Local Union No. 175*, 788 F.2d at 30; NLRB v. McClatchy Newspapers, Inc., 964 F.2d 1153, 1164 (D.C. Cir. 1992); River City Mechanical, 289 N.L.R.B. 1503, 1505 (1988). The absence of agreement on a tentative contract obviously is a key factor in finding impasse, because an impasse cannot arise simultaneously with a tentative agreement on a contract. LaPorte Transp. Co. v. NLRB, 888 F.2d 1182, 1187 n.2 (7th Cir. 1989). *See also Teamster Local Union No. 175*, 788 F.2d at 30-31 (adopting definition of impasse "as the deadlock reached by bargaining parties 'after good faith negotiations have exhausted the prospects of concluding an agreement' ") (footnote omitted); Francis J. Fischer, Inc., 289 N.L.R.B. 815, 820-21 (1988) (stating that "the number and extent of bargaining sessions," although not dispositive, should be considered in determining whether an impasses has been reached, as well as the magnitude of concessions sought). The parties can only negotiate to impasse over mandatory subjects of bargaining. *See, e.g.*, Louisiana Dock Co. v. NLRB, 909 F.2d 281, 288 (7th Cir. 1990).

In analyzing whether an impasse in bargaining exists, the NLRB will consider: "The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, [and] the contemporaneous understanding of the parties . . . ." *Taft Broadcasting Co.*, 163 N.L.R.B. at 478. The party asserting that an impasse has occurred bears the burden of persuasion. Baytown Sun, 255 N.L.R.B. 154, 157 (1981).

129 *See, e.g., Katz*, 396 U.S. at 743, n.11 (citation omitted); Huck Mfg. Co. v.

tially similar to such proposals.[130]

2. *Bildisco*'s Resolution

Neither § 1113 nor the NLRA, however, addresses the issue of how the two statutory paradigms of the Bankruptcy Code and the NLRA are to be reconciled, if at all, post-rejection. Before the adoption of § 1113, the Supreme Court in *Bildisco* stated that the NLRA is applicable post-rejection, noting that after rejection "a debtor-in-possession is an 'employer' within the terms of the NLRA, 29 U.S.C. §§ 152(1) and (2) and is obligated to bargain collectively with the employees' certified representative over the terms of a new contract . . . following formal approval of rejection by the bankruptcy court."[131] Consistent with *Bildisco*, several cases decided after the enactment of § 1113 have concluded that following rejection, the employer must continue to bargain with the union.[132]

3. Section 1113 Confusion

It is not at all clear, however, what this duty to bargain means in the § 1113 context. Is the debtor's duty to bargain satisfied by the pre-rejection bargaining mandated by § 1113, even though the parties may not have actually reached an impasse? If continued bargaining is required, then must the debtor use its last proposal as the starting point, or may the debtor suggest additional or deeper changes to the collective bargaining agreement than were raised during the previous bargaining?

Prior to the Second Circuit's decision in the *MNI* case, the few courts that had considered the issue in the context of a rejection under § 1113 had reached a variety of conclusions. For example, the bankruptcy court in *In re Mile Hi Metal Systems, Inc.*[133] stated that the debtor is limited to implementing its final propo-

NLRB, 693 F.2d 1176, 1186 (5th Cir. 1982) (stating that after negotiating to impasse, employer may unilaterally implement terms previously offered to union); *Taft Broadcasting*, 163 N.L.R.B. at 478. *But see* River City Mechanical, 289 N.L.R.B. 1503, 1503 (1988) (concluding that although employer bargained in good faith to impasse, it nonetheless committed an unfair labor practice when it subsequently unilaterally implemented terms not encompassed by its proposals).

130 Atlas Tack Corp., 226 N.L.R.B. 222 (1976), *enf'd*, 559 F.2d 1201 (1st Cir. 1976).

131 *Bildisco*, 465 U.S. at 534.

132 *See, e.g.*, *In re* Kentucky Truck Sales, Inc., 52 B.R. 797, 806 (Bankr. W.D. Ky. 1985); *In re* Salt Creek Freightways, 47 B.R. 835, 842 (Bankr. D. Wyo. 1985).

133 51 B.R. 509 (Bankr. D. Colo. 1985), *rev'd on other grounds*, 67 B.R. 114 (D. Colo. 1986), *vacated on other grounds*, 899 F.2d 887 (10th Cir. 1990).

sal after rejection.[134] In that case, the bankruptcy court stated that the debtor's proposal "defines the parameters of any relief the court may subsequently grant the debtor."[135] The bankruptcy court based this conclusion solely[136] upon a joint statement made by Representatives Hughes and Morrison that "the court in framing such relief may not go beyond the proposal made by the trustee pursuant to subsection (b)(1)(A)."[137]

Leaving aside the wisdom of basing a decision upon isolated statements made by members of Congress,[138] this remark is in any event inconsistent with the negotiating framework created by § 1113. Although § 1113(b)(1)(A) requires that the debtor make an initial proposal before seeking rejection, the court considers the final proposal in ruling on the debtor's rejection motion.[139] Moreover, the relief that a motion to reject requests from the court is rejection of the entire contract, not modification in accordance with a proposal.[140]

In *In re Allied Delivery System Co.*,[141] the bankruptcy court allowed rejection even though the collective bargaining agreement was due to expire shortly, apparently in the belief that rejection, as opposed to expiration, would permit the debtor to implement immediately changes in the terms and conditions of employment.[142] It is unclear from the bankruptcy court's decision, however, whether such changes were limited by the debtor's pre-rejection proposals. The bankruptcy court in *In re Salt Creek*

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134 By contrast, the Second Circuit in *MNI* conditioned relief on the debtor holding open its final offer. *In re* Maxwell Newspapers, Inc., 981 F.2d 85, 91-92 (2d Cir. 1992).

135 *In re Mile Hi Metal Sys.*, 51 B.R. at 510.

136 The bankruptcy court did not consider whether such a result was mandated by the NLRA.

137 *In re Mile Hi Metal Sys.*, 51 B.R. at 510 (quoting 130 CONG. REC. 20,093 (1984)).

138 *See supra* notes 91-99 and accompanying text.

139 *See supra* note 68.

140 Section 1113 does not authorize the court to impose on the parties a modified collective bargaining agreement to which they do not agree. *In re* Alabama Symphony Assoc., 1993 WL 217372, **13-14 (Bankr. N.D. Ala. May 17, 1993) (§ 1113(c) permits only rejection, not modification, of the collective bargaining agreement). *In re* Carey Transp., 50 B.R. 203, 210 n.4 (Bankr. S.D.N.Y. 1985), *aff'd sub nom.* Truck Drivers Local 807, Int'l Brotherhood of Teamsters v. Carey Transp., 816 F.2d 82 (2d Cir. 1987); *In re* Russell Transfer, Inc., 48 B.R. 241, 243-44 (Bankr. W.D. Va. 1985). *Cf. In re* Garofalo's Finer Foods, Inc., 117 B.R. 363 (Bankr. N.D. Ill. 1990) (noting that § 1113(b)(1)(A) expressly refers to "rejection," but that it is unclear whether other forms of relief are permitted or denied).

141 49 B.R. 700 (Bankr. N.D. Ohio 1985).

142 *Id.* at 704.

Freightways[143] reached the same result as *Allied Delivery* with essentially the same reasoning.[144]

Reaching a somewhat middle ground, the bankruptcy court in *In re Kentucky Truck Sales*[145] also stated, without citing any authority, that rejection "does not mark an end but rather a new phase in the negotiations between the parties."[146] The bankruptcy court further noted that it retained "jurisdiction over future proceedings in this case"[147] and that "[t]he debtor has a continuing duty to operate its business in a fair and commercially reasonable manner."[148] This language suggests that the debtor has some latitude in setting new terms — that the debtor is not limited to its final proposal — but a duty of "fairness and reasonableness" of unstated origin, which is ultimately subject to bankruptcy court review, limits that latitude. Similarly, the bankruptcy court in *In re Alabama Symphony Association*[149] suggested that any decision to reject would be "subject to further out-of-court negotiations" between the debtor and the union.[150]

A number of commentators have concluded that, following rejection, the debtor must maintain the status quo and continue to bargain with the union until an impasse is reached, at which point the debtor may implement its final proposal.[151] This conclusion is perhaps the logical result of *Bildisco*'s assumption that a debtor still has a duty to bargain under the NLRA about the terms and conditions of employment post-rejection, but it is impossible to reconcile with the chapter 11 reorganization process. In effect, this assumption would impose on the debtor — by definition already in a financially weakened condition — a burdensome and expensive[152] two-step negotiation process before it can implement the changes to the collective bargaining agreement the debtor had already demonstrated were necessary to the reor-

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143 47 B.R. 835 (Bankr. D. Wyo. 1985).
144 *Id.* at 842.
145 52 B.R. 797 (Bankr. W.D. Ky. 1985).
146 *Id.* at 806.
147 *Id.*
148 *Id.*
149 155 B.R. 556 (Bankr. N.D. Ala. 1993).
150 *Id.* at 13.
151 George, *supra* note 13, at 319-36; West, *supra* note 13, at 152-59; Berkman, *supra* note 13, at 193.
152 In the *Daily News's* case, the rejection motion was litigated through three levels of the court system in less than ninety days — an extraordinarily short period of time. This intensive litigation was extremely expensive. Moreover, in addition to the substantial legal expense involved, this legal battle consumed a significant portion of the time of senior management.

ganization.[153] The only relief granted to the debtor is to enable it to engage in negotiations with the union — which must then continue until impasse — earlier than it otherwise could (i.e., upon expiration of the collective bargaining agreement pursuant to its terms).

This result is also impossible to reconcile with a literal reading of § 1113. If the debtor cannot implement its final proposal to the union immediately upon the union's rejection, it is hard to understand § 1113's concern that the debtor make a proposal that is limited to necessary modifications. There is no reason for any restrictions if the real agreement is to be determined by a second round of negotiations. Indeed, if all that happens after rejection is continued bargaining, the elaborate procedure created by § 1113 would seem to be much ado about nothing.

Adoption of this position would also lead to other difficulties. For example, would the bankruptcy court or the National Labor Relations Board (NLRB) address alleged violations of this duty to bargain? The bankruptcy court clearly lacks the expertise to make such judgments. If the matter is placed in the hands of the NLRB, as some commentators[154] and courts[155] have suggested, how is the NLRB's assertion of jurisdiction over a matter integral to the reorganization process — as opposed to more mundane violations of the NLRA, such as the allegedly unlawful discharge of an individual employee — to be reconciled with the

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153 The availability of emergency relief under § 1113(e) of the Bankruptcy Code might arguably ameliorate any real harm to the debtor caused by imposing an obligation to bargain to impasse. *Cf.* West, *supra* note 13, at 158 (suggesting that restrictions against post-rejection unilateral change may pressure debtors into reaching interim changes under § 1113(e)). The problem with this argument, however, is that it ignores the more demanding standards for relief under § 1113(e) than under § 1113(c). Specifically, § 1113(e) requires the debtor to demonstrate that the relief sought is "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate." 11 U.S.C. § 1113(e).

154 George, *supra* note 13, at 334; West, *supra* note 13, at 159-61.

155 *In re* Mile Hi Metal Sys., Inc., 899 F.2d 887, 891 (10th Cir. 1990) (asserting that "the bankruptcy court has no authority to adjudicate unfair labor practice claims") (footnote omitted); NLRB v. Superior Forwarding, Inc., 762 F.2d 695, 700 (8th Cir. 1985) (positing that "if an unfair labor practice charge stems from a debtor's failure to bargain in good faith over the terms and conditions of a new contract, a bankruptcy court should deny a debtor's motion to enjoin Board proceedings on the charge"); NLRB v. Adams Delivery Serv. (*In re* Adams Delivery Serv.), 24 B.R. 589, 592 (B.A.P. 9th Cir. 1982) (finding that NLRB back pay proceeding not subject to removal to bankruptcy court). *But see* NLRB v. Goodman, 90 B.R. 56, 60 (W.D.N.Y. 1988) (concluding that bankruptcy court has jurisdiction to adjudicate alleged unfair labor practice where such issues are collateral to issues in bankruptcy proceeding).

bankruptcy concept that such matters are to be centralized in the bankruptcy court? As a practical matter, sending the matter to the NLRB could result in delays that would threaten the existence of the business.

4. The Second Circuit's Resolution

Fortunately, the Second Circuit appears to have implicitly rejected this extreme approach in the *MNI* case. The Second Circuit conditioned its approval of the Debtor's rejection motion on the Debtor and Zuckerman holding open their last proposal to Local 6. Thus, no further bargaining would be necessary. On the other hand, the debtor's ability to impose new terms after a collective bargaining agreement has been rejected was flatly limited to the terms and conditions in the final proposal to the union, even if that proposal was not only made after the § 1113 hearing, but while the bankruptcy court's decision was on appeal. Unlike rejection of an ordinary executory contract pursuant to § 365 of the Bankruptcy Code, the debtor is not free — at least in the Second Circuit — to impose any terms that it chooses after rejection.

Although this decision is by no means as detrimental to the reorganization process as would be the imposition of a duty to bargain to impasse, it nonetheless is at odds with the spirit, if not the letter, of § 1113. The entire thrust of § 1113 is to channel the parties' effort towards negotiation, in the hope that they will be able consensually to agree upon modifications to the collective bargaining agreement. By assuring the union that the debtor's final proposal will either be held open as a condition of rejection, or establish the ceiling on the changes which can be implemented post-rejection, the union's incentive to compromise is substantially diminished, if not eliminated.

A sophisticated union will adopt the strategy of negotiating with the debtor without actually agreeing to anything. At best, it will convince the bankruptcy court that rejection is unwarranted because the debtor has failed to establish one or more of the requirements under § 1113. At worst, it will be left with the debtor's last proposal, with no risk that such proposal will be withdrawn and less favorable terms imposed after rejection,[156] as

156 The debtor might frame its final proposal in terms of alternatives, depending on whether a consensual agreement is reached or court ordered rejection is required, to defeat such a stratagem by a union. It is not clear, however, whether

well as a potential claim for any damages[157] resulting from rejection of the collective bargaining agreement. The rational decision for a union under such circumstances will be to roll the dice rather than reach an agreement — it wins either way. Conversely, the rational debtor will be under substantial pressure to give in to the union's demands, because the debtor — unlike the union — faces the risk of getting nothing if it chooses to litigate.

5. Future Solutions to the Post-Rejection Problem

The Second Circuit decision in *MNI* gives the union a true bargaining advantage by requiring the Debtor to hold its last offer open as a condition to rejection. The last offer thus becomes the new collective bargaining agreement. The authors submit that this aspect of the ruling is not appropriate. Nothing in either the Bankruptcy Code or the NLRA mandates this result. Section 1113 can be fairly construed as reconciling the conflicting policies of these two statutes in an altogether different way: the appropriate resolution under § 1113 is for the prior collective bargaining agreement to be deemed terminated upon entry of a rejection order. Under this circumstance, the Debtor will be free to implement, without further bargaining, the proposal made to the union as part of the § 1113 bargaining process. The debtor could take this action without the worry of whether an "impasse" under traditional NLRA analysis had been reached — frequently a very difficult and imprecise determination. The bankruptcy court ruling would satisfy or supersede the impasse requirement. Instead of being locked into its last offer as mandated by *MNI*, however, the debtor could engage in bargaining over other changes from the terms and conditions of employment provided by the rejected contract, to the extent required by the NLRA. The former contract itself no longer would be an obstacle to change, but the employer's section 8(a)(5) duty to bargain would have to be satisfied.

The union's ability to strike, as well as the debtor's critical need to avoid any major disruption to its business operations, should in many cases serve as an effective disincentive to overreaching on the debtor's part post-rejection. At the same time, the possibility that the debtor may implement changes less

such a proposal would comply with § 1113(b)(1)'s limitation that the proposal be limited to necessary modifications.

157 See *supra* note 90 for a discussion of issues relating to potential damage claims after rejection of a collective bargaining agreement.

favorable to the union than the debtor's final proposal will truly give the union an incentive to negotiate in good faith and attempt to reach an agreement.

Finally, because a substantial body of law exists under the NLRA to deal with the expired contract situation, debtors and unions will be able to determine their respective rights by reference to that set of legal principles and decisions.[158] Such a result would not offend the policies underlying the NLRA. These polices have already been given their due weight in the procedural and substantive requirements for rejection contained in § 1113(b) and (c). By imposing a period of intense bargaining before rejection can be ordered, § 1113 gives credence to the spirit, if not the letter, of the NLRA. Under these circumstances it is reasonable to conclude that Congress's silence on what happens after rejection means that the parties are subject only to the rules that apply to the rejection of "normal" executory contracts, particularly because this construction will make consensual modifications to collective bargaining agreements more likely.

V. CONCLUSION

Section 1113 is a flawed statute. It has proved to be unworkable in practice and is the cause of much needless and expensive litigation. A pervasive congressional overhaul is sorely needed.

Congress's original goal of encouraging the consensual modification of burdensome collective bargaining agreements and fostering the reorganization — as opposed to liquidation — of financially troubled companies could be best met by eliminating the good cause element. In addition, we suggest strong consideration of the "final offer" arbitration model to deal with the good cause problem. Finally, making clear that upon rejection the debtor is free to implement any changes in the terms and conditions of employment that it believes are necessary for its reorganization, subject only to bargaining under the NLRA standards and to the relative economic bargaining power of the parties, will eliminate no-lose game playing by a union that would occur as a result of the Second Circuit decision in the *MNI* case.

158 *See, e.g.*, THE DEVELOPING LABOR LAW, *supra* note 103, at 587-746.