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Response to Professor Paul Secunda's Comparative Analysis of the Treatment of Employment Claims in Insolvency Proceedings and Guarantee Schemes in OECD Countries

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**RESPONSE TO PROFESSOR PAUL
SECUNDA’S COMPARATIVE ANALYSIS OF
THE TREATMENT OF EMPLOYMENT
CLAIMS IN INSOLVENCY PROCEEDINGS
AND GUARANTEE SCHEMES IN OECD
COUNTRIES**

*Israel Goldowitz**

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INTRODUCTION

Professor Secunda ably documents the approaches of OECD nations to protecting wage and pension claims in insolvency, particularly priorities and guarantee schemes. His Article will therefore be an important resource to employment, bankruptcy, and international law. The Article should be useful not only to academics, practitioners, government agencies, NGOs, and labor organizations, but also to law reformers. Professor Secunda correctly notes that the United States has longstanding guarantee schemes for unemployment and retirement income, but its bankruptcy priorities for employment-based claims are not particularly strong. His thesis is that the United States—with a “Limited Model Two” system of guarantees and

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priorities¹—can learn from Canada’s recently enacted Wage Earner Protection Program Act (WEPPA).² WEPPA provides a government guarantee of unpaid wages and related amounts, and a super-priority “charge” on debtor assets for wages, vacation pay, and pension contributions in Bankruptcy and Insolvency Act (BIA) proceedings (liquidations and smaller company reorganizations).³

For the past twenty-five years, I have represented the Pension Benefit Guaranty Corporation (PBGC), the nation’s pension insurer, practicing both employee benefits and bankruptcy law. At Georgetown University Law Center (GULC), where I have been an adjunct professor for more than twenty years, I have taught both pension insurance law and comparative bankruptcy law. For the past year, I have served on the Labor and Benefits Advisory Committee to the American Bankruptcy Institute’s Commission to Study the Reform of Chapter 11 (Commission).

My experience is therefore with collective and institutional solutions to insolvency problems. The PBGC itself administers an insolvency system for terminated pension plans,⁴ in addition to participating in major corporate bankruptcies. Based on that experience, I believe that keeping businesses and pension plans going despite bankruptcy is where we should focus our efforts.⁵

As documented by Professor James Wooten in his study, *Political History*,⁶ ERISA is the result of compromise, between workforce

1. His taxonomy, Model One (Bankruptcy Priority, Little or No Guarantee), Model Two (Robust) (Bankruptcy Priority and Guarantee for Both Pensions and Wages), Model Two (Limited) (Bankruptcy Priority and Guarantee for either Pensions or Wages), and Model Three (No or Limited Bankruptcy Priority, But Some Form of Guarantee) derives from GORDON JOHNSON, ORG. FOR ECON. CO-OPERATION & DEV., INSOLVENCY AND SOCIAL PROTECTION: EMPLOYEE ENTITLEMENTS IN THE EVENT OF EMPLOYER BANKRUPTCY (2006), available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/38184691.pdf>

2. Paul M. Secunda, *An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States*, 41 FORDHAM URB. L.J. 867, 876 (2014).

3. See generally Wage Earner Protection Program Act, S.C. 2005, c. 47, s. 1 (Can.); see also Secunda *supra* note 2 at 876–77.

4. See Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1301–1461 (2012).

5. Fiona Stewart argues that there is great leverage in strong funding rules, curbs against moral hazard and adverse selection, and proper enforcement tools. See generally Fiona Stewart, *Benefit Security Pension Fund Guarantee Schemes* (Org. for Econ. Co-operation & Dev., Working Paper No. 5, 2007), available at www.oecd.org/dataoecd/25/52/34770674.pdf.

6. JAMES A. WOOTEN, THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974: A POLITICAL HISTORY (2004).

management and worker protection objectives, and between labor and tax policy, among other things. ERISA is also the product of what we now call Rahm's Rule, "You never want a serious crisis to go to waste."⁷ National pension reform was inspired by the Studebaker shutdown in 1963.⁸ And Congress rushed to enact ERISA in the summer of 1974, believing that it would spend the rest of the session on the Nixon impeachment proceedings.⁹

In the bankruptcy area, I recommend an equally important book, Professor David Skeel's *Debt's Dominion*,¹⁰ tracing the history of bankruptcy laws in the United States and the political forces behind them. For those familiar with modern credit-bid proceedings, Skeel's account of SEC Chairman William O. Douglas's attempt to curb similar practices in the 1938 Chandler Act¹¹ evokes déjà vu.¹²

At times, it seems that Congress no sooner acts than the seams begin to open, leading to demand for fresh reforms, sometimes in the opposite direction. For example, at least in retrospect, some said that the Pension Protection Act of 2006's (the PPA's)¹³ funding reforms were inadequate.¹⁴ But just as PPA took effect, the Great Recession began. In short order, Congress enacted temporary relief provisions, and followed with additional relief provisions in the next several years.¹⁵ The debate continues on what funding regime is necessary to adequately protect pensions without driving employers out of the system.¹⁶

7. *In Crisis, Opportunity for Obama*, WALL ST. J., Nov. 21, 2008, <http://online.wsj.com/news/articles/SB122721278056345271> (quoting Rahm Emanuel, White House Chief of Staff).

8. See James A. Wooten, "The Most Glorious Story of Failure in the Business": *The Studebaker-Packard Corporation and the Origins of ERISA*, 49 BUFF. L. REV. 683, 683 (2001) [hereinafter Wooten, *Most Glorious Story*]; see also WOOTEN, *supra* note 6, at 260–62. This illustrates John Kingdon's "policy streams" model, that when the problem stream, the policy stream, and the politics stream flow together, a window opens for policy entrepreneurs. See JOHN W. KINGDON, *AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES* (1995); see also Wooten, *Most Glorious Story*, *supra* at 725–26.

9. See WOOTEN, *supra* note 6, at 260–62.

10. DAVID A. SKEEL, JR., *DEBT'S DOMINION: A HISTORY OF BANKRUPTCY LAW IN AMERICA* (2001).

11. *Id.* at 90–127.

12. See *infra* note 36 and accompanying text.

13. Pension Protection Act, Pub. L. 109–280, 120 Stat. 780 (2006).

14. See e.g., David D. Hanss, *Too Little, Too Late: Why the Pension Protection Act of 2006 Will Not Live Up to Its Name*, 45 HOUS. L. REV. 509, 540 (2008).

15. See e.g., Worker, Retiree, and Employer Recovery Act, Pub. L. No. 110–458, 122 Stat. 5092 (2008).

16. See Hanss, *supra* note 14, at 549–51; see also Mark Miller, *Do No Harm: Protecting Retirees in Shaky Pension Plans*, REUTERS, June 26, 2013, available at

Similarly, the Bankruptcy Abuse, Prevention, and Consumer Protection Act of 2005 (BAPCPA)¹⁷ was seen as favoring creditors and hindering reorganization due to such measures as shorter exclusive periods for the debtor to propose a reorganization plan and solicit votes. Like PPA, BAPCPA was enacted shortly before the Great Recession. As demand slackened, bankruptcies increased, though in some cases distressed companies could not obtain DIP financing, suggesting that economic conditions were more influential than BAPCPA's lender-driven reforms.¹⁸

Last year, the American Bankruptcy Institute (ABI)¹⁹ formed its Commission, based on the concern that "the use of secured credit, the growth of distressed-debt markets and other externalities have affected the effectiveness of the current Bankruptcy Code."²⁰ The Commission's Labor and Benefits Advisory Committee includes

<http://www.reuters.com/article/2013/06/26/us-column-miller-seniordebt-idUSBRE95P15T20130626>; Stephen Miller, *President Signs Pension Funding Relief Measure*, SOC'Y FOR HUM. RESOURCE MGMT. (July 6, 2012), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/reliefmeasure.aspx>.

17. Pub. L. No. 109-8, 119 Stat. 23 (2005).

18. See John J. Rapisardi, *TalkingPoint: US Bankruptcy*, FINANCIERWORLDWIDE (Oct. 2009), http://www.financierworldwide.com/article_printable.php?id=6835. ("Driven by the global credit crisis and low consumer demand, the US bankruptcy market has become increasingly active over the past 18 months, with commercial bankruptcies having jumped 42 percent in July 2009 over the same period last year. It is unlikely that the 'worst' is over. The fortunes of many industries—particularly retail, hospitality, aviation and automotive—are tied to US consumer spending, which basically went 'on strike' after the financial markets crashed in late 2008. Yet many businesses elected against filing for Chapter 11 because DIP financing was not available or they had no exit strategy." (quoting Aaron L. Hammer, Partner, Freeborn & Peters LLP)). Despite a wave of bankruptcy filings during the Recession, a considerable number of pension plan sponsors successfully reorganized and kept their pensions between 2009 and 2011. Putting aside the special cases of General Motors and Chrysler, they included major auto parts, chemical, financial services, food, media, retail, and packaging companies. See, e.g., JOSH GOTBAUM, PENSION BENEFIT GUAR. CORP., 2010 PBGC ANNUAL REPORT (2010), available at https://www.pbgc.gov/docs/2010_annual_report.pdf ("If a company enters bankruptcy, PBGC becomes an active advocate, urging reorganizing sponsors to keep their plans if possible. In FY 2010, PBGC's efforts ensured that plans sponsored by LyondellBasell Industries, Smurfit-Stone, Lear Corp., and more than 30 other companies survived Chapter 11 bankruptcies. Their 250,000 employees and retirees continue to enjoy their full benefits, and are still protected by PBGC insurance coverage.").

19. The ABI's mission includes providing Congress and the public with unbiased analysis of bankruptcy issues. See *About ABI*, AM. BANKR. INST., http://www.abiworld.org/AM/Template.cfm?Section=About_ABI (last visited Mar. 15, 2014).

20. *Purpose of the Commission*, AM. BANKR. INST., <http://commission.abi.org/purpose-commission> (last visited Mar. 15, 2014).

management and union practitioners, academics, and a sitting bankruptcy judge.²¹

Though Chapter 11's treatment of employment and pension claims are fairly well known,²² and law reform efforts have begun, treatment of "legacy" costs in Chapter 9 is still relatively untested. The Detroit bankruptcy might become an example of treating a pension program as a restructuring project in its own right. The Emergency Manager froze pension plans for certain city workers (though the decision has been stayed), intending to establish a defined contribution plan for future service.²³ If ERISA applied to governmental plans, that would in all likelihood be considered a settlor function (reserved to the employer's business judgment and unreviewable),²⁴ and not a violation of the anti-cutback rule.²⁵ But in a municipal bankruptcy, the issue is fraught with constitutional and federalism concerns.²⁶

In one well-known case, a governmental plan sought to reorganize under Chapter 11. The effort failed, as a pension plan is not an entity entitled to be a debtor under Chapter 11.²⁷ But reformers have already focused on the issue.²⁸

Professor Secunda's Article is mainly devoted to private-sector plans. I had suggested that Professor Secunda give more attention to

21. See *Labor and Benefits Issues*, AM. BANKR. INST., <http://commission.abi.org/node/15> (last visited Mar. 15, 2014).

22. See, e.g., DANIEL L. KEATING, *BANKRUPTCY AND EMPLOYMENT LAW: BANKRUPTCY'S IMPACT ON EMPLOYERS, EMPLOYEES, UNIONS, AND RETIREES* (1995).

23. See Matt Helms, *Orr Issues Stay on Freezing Pensions for Detroit Workers as Mediation Continues*, DETROIT FREE PRESS, Jan. 6, 2014, <http://www.freep.com/article/20140106/NEWS/301060055/Detroit-pension-freeze-Orr>; Mary Williams Walsh, *A Proposal to Freeze Pensions in Detroit*, N.Y. TIMES, Sept. 26, 2013, <http://dealbook.nytimes.com/2013/09/26/detroit-manager-seeks-to-freeze-pension-plan>.

24. See *Beck v. PACE Int'l Union*, 551 U.S. 96, 101 (2007).

25. 29 U.S.C. § 1054(g) (2012).

26. See Claire Groden, *The Wages of Bankruptcy: Stockton's Cautionary Tale for Detroit*, TIME (July 25, 2013), <http://nation.time.com/2013/07/25/the-wages-of-bankruptcy-stocktons-cautionary-tale-for-detroit>.

27. See Hazel Bradford, *Northern Mariana Islands Pension Bankruptcy Bid Dismissed*, PENSIONS & INVESTMENTS (June 18, 2012), <http://www.pionline.com/article/20120618/DAILYREG/120619892>; see also *In re N. Mariana Islands Ret. Fund*, No. 12-00003, 2012 WL 8654317, at *1 (D.N. Mar. I. June 13, 2012) (citing 11 U.S.C. § 109(d) (2012)). Nor does it appear that a pension plan could be a debtor under Chapter 9. See § 109(c)(1).

28. See Andrew Dawson, *Minutes of ABI Commission*, LAB. & BENEFITS ADVISORY COMMITTEE (May 24, 2013), available at <http://commission.abi.org/sites/default/files/May%2024%202013%20meeting%20minutes.docx>, ("Public Employee Plans: discussed whether governmental pension plans should be eligible to be debtors under either chapter 9 or 11 of the Code.").

some of the factors I have introduced here: protections for ongoing pension plans and the insurance system, such as appropriate funding rules; the vagaries of legislation, including congressional committee jurisdictional issues, compromises made in “must-pass” legislation, and Rahm’s Rule; and bankruptcy reform efforts already underway on the labor side, such as H.R. 100, and the proceedings of the Commission. Professor Secunda has adopted some of these suggestions. With this response, I add some pragmatic points that could be further developed.

I have no suggestions for Chapter 9 reform. But despite the different reorganization and employment law regimes, it seems inevitable that parallels will be drawn between corporate and municipal bankruptcies.

I. PROTECTIONS FOR ONGOING PLANS AND THE INSURANCE SYSTEM

Professor Secunda treats bankruptcy priority and government guarantees as alternatives for protecting worker and retiree claims in the event of employer insolvency. They are not necessarily exclusive, he notes, as claims for benefits above the guarantee should not simply disappear.²⁹

Given his focus on “Employment Claims,” with guarantee schemes as a potential means for protecting them, Professor Secunda appropriately recognizes the need to protect the guarantee scheme itself.³⁰ On that issue, Stewart argues that not only is sound funding of pensions the primary bulwark, but where funding requirements are extremely conservative (as in the Netherlands), there is probably no

29. In the seminal case on pension insurance under ERISA, the Supreme Court said that the employer could disclaim direct liability to its employees beyond amounts funded. *See Nachman Corp. v. PBGC*, 446 U.S. 359, 378–84 (1980). But some courts recognized a claim for benefits beyond the PBGC guarantee under Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a)(2014) (providing for enforcement of labor agreements). *E.g.*, *Murphy v. Heppenstall Co.*, 635 F.2d 233 (3d Cir. 1980).

In 1986 and 1987, Congress increased PBGC’s claim beyond unfunded guaranteed benefits to all unfunded benefit liabilities, and imposed a recovery-sharing formula on PBGC with respect to non-guaranteed benefits. 29 U.S.C. § 1322(c) (2012). The courts have held that these enactments displaced the federal common law under *Heppenstall* and *United Steelworkers v. United Engineering, Inc.*, 52 F.3d 1386 (6th Cir. 1995), and that in bankruptcy, any such claim duplicates PBGC claims and should be disallowed, *e.g.*, *In re Adams Hard Facing Co.*, 129 B.R. 662 (W.D. Okla. 1991). Like workers’ compensation laws, this regime substitutes a formulaic administrative recovery for a greater but uncertain recovery in litigation. *See Secunda, supra* note 2, at 894–98.

30. Secunda, *supra* note 2, at 913–15.

need for a guarantee scheme. For those guarantee schemes that do exist (in the United States, the United Kingdom, Germany, Switzerland, Sweden, Finland, Japan, and Ontario), she argues, it is important to guard against the moral hazard of employers' increasing benefits during the spiral toward insolvency; to impose limits on benefits guaranteed; to give the regulator or the insurer the necessary tools to manage risk (including both investment risk and business risk, which are often correlated); to require appropriate premiums without forcing good risks to unduly subsidize bad risks; and, to be sure, to require sound funding and provide appropriate priority in bankruptcy.³¹

Professor Secunda also acknowledges the importance of recoveries for the guarantee scheme.³² In my experience, however, there is more leverage in shoring up pension funding (assuming it does not drive good risks out of the system) and deterring unwarranted terminations in the first place.³³

Among the ideas that have been proposed are:

- Requiring a debtor in possession to make minimum funding contributions as they fall due, much as Congress has required debtors in possession to adhere to collective bargaining agreements and to pay retiree medical benefits until modified.
- Giving unpaid minimum funding contributions falling due post-petition an administrative priority.

31. Stewart, *supra* note 5, at 3–8. The UAW, which developed the idea of public “pension reinsurance” in the 1960s, shared such concerns. See Wooten, *Most Glorious Story*, *supra* note 8, at 725–26.

32. Secunda, *supra* note 2, at 879–80, 886–90.

33. See generally, e.g., *In re Philip Servs. Corp.*, 310 B.R. 802 (Bankr. S.D. Tex. 2004) (debtor asserted that it could not reorganize if it had to continue its pension plans, but did just that while the adjudication was pending). In 2005, Congress enacted a “termination premium,” \$1250 per participant for three years, payable to PBGC. Congress specified that where the plan terminates during bankruptcy, the claim does not arise until after the debtor is discharged. 29 U.S.C. § 1306(a)(7)(B) (2012). As a result, the claim escapes discharge, and is payable one hundred-cents on the dollar by the reorganized debtor. See generally *PBGC v. Oneida Ltd.*, 562 F.3d 154 (2d Cir. 2009). Congress intended the termination premium to be a factor in deterring plan termination, despite bankruptcy. See H.R. REP. NO. 109-276, at 62, 348–49 (accompanying H.R. 4241) (“termination premiums would be paid for three consecutive years once a company emerges from bankruptcy”); see also H.R. REP. NO. 109-745, at 33 (discussing H.R. 4); 151 CONG. REC. H11666 (daily ed. Dec. 15, 2005) (statement of Rep. Souter) (arguing that H.R. 2830 will require “employers that terminate their pensions in bankruptcy to pay an annual premium of \$1,250 per participant to the PBGC for the 3 years after they emerge from bankruptcy”).

- Exempting the attachment and perfection of minimum funding liens from the automatic stay.³⁴

Of course, as Professor Secunda notes, there are countervailing arguments, such as disruption of the capital markets.³⁵ Indeed, lenders and investors are increasingly insisting that companies be cleansed of legacy liabilities, often through a “free and clear” asset sale under Bankruptcy Code Section 363.³⁶ I expect that other scholars will develop the opposing arguments.

II. CONGRESSIONAL CONSIDERATIONS

Stewart notes that pension guarantee funds in the United States, Ontario, and the United Kingdom were established to deal with political and economic crises attendant to the decline of the industrial sector. Indeed, she argues, pension insurance under ERISA intentionally subsidizes failing firms, at the risk of serious market distortions.³⁷

Pensions are the province of four committees of jurisdiction: the labor committees (Senate HELP and House Education & Workforce), and the “tax writing” committees (Senate Finance and House Ways & Means). Bankruptcy is the province of the Judiciary committees. In arguing for greater priority in bankruptcy, Professor

34. 11 U.S.C. §§ 362(b), 503(b), 507(a)(2), 1113, 1114 (2012); *see* ABI COMM’N TO STUDY REFORM OF CHAPTER 11, STATEMENT OF HON. JOSHUA GOTBAUM (2013), available at <http://www.pbgc.gov/documents/Gotbaum-ABI-Statement.pdf>.

35. Secunda, *supra* note 2, at 891–92.

36. ABI COMM’N TO STUDY REFORM OF CHAPTER 11, *supra* note 34, at 3–4. Private equity firms have recently used section 363 sales to retain control of defaulted portfolio companies by “credit-bidding” their secured claims, thereby deterring potential competitive bids. *Id.* *See generally* RadLAX Gateway Hotel, LLC v. Amalgamated Bank, 132 S. Ct. 2065 (2012) (upholding right to credit bid even under a debtor-propounded plan of reorganization). So far, no solution has emerged to credit bids by controlling parties, though some unsecured creditors have been able to get a portion of the sale proceeds set aside for their claims. *See* Randall Chase, *Attorneys Say Coda Bankruptcy Issues Resolved*, ASSOCIATED PRESS, May 29, 2013, available at <http://bigstory.ap.org/article/coda-bonuses-pulled-more-bankruptcy-issues-remain>; ABI COMM’N TO STUDY REFORM OF CHAPTER 11, *supra* note 34, at 4 (suggesting that the Commission consider requiring cash bids, that security be marked to market, a fifty-percent set-aside, or assumption of pension obligations). *See generally* *In re Daufuskie Island Props.*, 441 B.R. 60, 66 (Bankr. D.S.C. 2010);

37. Stewart, *supra* note 5, at 5–6; *see also* Brief Amicus Curiae in Support of the Pension Benefit Guaranty Corporation and Brief Amicus Curiae of Armco, et al., *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633 (1990) (No. 89-390), 1989 WL 1127271, at *6 (asserting that if LTV is permitted to terminate its pensions plans and establish follow-on plans largely replacing uninsured benefits, LTV would have an unfair advantage, and other integrated steelmakers would have to pursue the same course).

Secunda inevitably raises the question whether this can be accomplished under ERISA or the Tax Code, or whether, given the jurisdictional concerns, it must be done as part of bankruptcy reform.³⁸

As Professor Secunda notes, ERISA provides for a lien and for tax treatment for unpaid minimum funding contributions where the unpaid balance exceeds \$1 million.³⁹ ERISA provides similar treatment for the plan's unfunded benefit liabilities (the difference between benefit liabilities and assets), subject to "net worth" limits.⁴⁰ By and large, however, the courts have rejected the argument that these provisions are effective to establish priority claims in bankruptcy. For example, the Tenth Circuit has held that without an "explicit connector" in the Bankruptcy Code itself (rather than in ERISA or the Tax Code), those provisions are ineffective in attempting to establish a priority tax claim in bankruptcy.⁴¹ Thus, one might suggest Congress cannot effectively do so without amending the Bankruptcy Code.⁴²

The employer made a similar argument in the *Oneida* case.⁴³ The issue was whether the termination premium is a "claim," to be treated in a plan of reorganization and discharged, or, as ERISA provides, an obligation that does not arise until after discharge. Relying on recent Supreme Court decisions on choice of law in bankruptcy, however, the Second Circuit held that "we look to the substantive non-bankruptcy law that gives rise to the debtor's obligation," in that case the ERISA provisions on when the obligation arises.⁴⁴

Oneida represents the emerging mainstream view on choice of law in bankruptcy.⁴⁵ But Professor Secunda is operating in the political realm. The thorny jurisdictional issues in Congress must still be reckoned with.

38. See generally David C. King, *The Nature of Congressional Committee Jurisdictions*, 88 AM. POL. SCI. REV. 48 (1994), available at http://www.unc.edu/~fbaum/teaching/PLSC541_Fall08/king_1994.pdf (arguing that jurisdictional change in Congress takes place through bill referral precedents).

39. 26 U.S.C. § 430(k) (2012).

40. 29 U.S.C. §§ 1362(d), 1368(c)-(e) (2012).

41. *In re CF&I Fabricators of Utah, Inc.*, 150 F.3d 1293, 1297 (10th Cir. 1998).

42. See King, *supra* note 38, at 48-62.

43. Brief of Appellee at 39-40, *Pension Ben. Guar. Corporation v. Oneida, Ltd.*, 562 F.3d 154 (2d Cir. 2009) (No. 08-2964-bk).

44. *Oneida*, 562 F.3d at 157 (citations omitted).

45. See *In re U.S. Airways Grp.*, 296 B.R. 734 (Bankr. E.D. Va. 2003) (upholding PBGC's "valuation regulation" for the same reason, that bankruptcy accepts non-bankruptcy law as the rule of decision unless the Bankruptcy Code specifically overrides it).

Moreover, the legislative process can take some unexpected turns, especially in the case of “must-pass” legislation. For example, even in the “Golden Age of Bi-Partisanship,” 1978–87, at least “25 non-germane amendments were attached to debt-limit bills . . . including allowing voluntary school prayer, banning busing to achieve integration and proposing a nuclear freeze.”⁴⁶ Given that dynamic, a legislative advocate would be well advised to have draft provisions ready to offer when the opportunity arises. Professor Secunda may therefore want to turn next to preparing legislative text that embodies his proposals.

Finally, Professor Daniel Keating provided some sobering thoughts in this area in his testimony before the ABI Commission. At times an advocate of greater priority for employment and pension claims,⁴⁷ Keating urges non-bankruptcy solutions, such as advance funding for retiree medical benefits. He cautions that employers can plan around “springing priorities,” by using 363 sales to avoid retiree claims; that priorities can make reorganization more difficult; that liquidation can make priorities irrelevant; and that priorities can deter lending.⁴⁸ Though Professor Secunda acknowledges these concerns,⁴⁹ he has not suggested ways to overcome or mitigate them.

III. BANKRUPTCY REFORM EFFORTS IN PROCESS

Though the United States has no guarantee of unpaid wages, both the Fair Labor Standards Act (FLSA) and state wage laws provide significant penalties for missing a payroll, including double damages and personal liability for corporate officers under certain circumstances.⁵⁰ In Chapter 11 cases, courts routinely approve payment of wages in “first-day orders,” even for the pay period that

46. Rich Lowry, *The Intransigents*, POLITICO (Oct. 3, 2013), <http://www.politico.com/story/2013/10/the-intransigents-rich-lowry-97759.html>.

47. See generally Daniel Keating, *Chapter 11's New Ten-Ton Monster: The PBGC and Bankruptcy*, 77 MINN. L. REV. 803 (1993).

48. Daniel Keating, *Some Lessons for Congress to Ponder About the Labor-Bankruptcy Intersection: Hearing Before the ABI Commission* (June 7, 2013) (unpublished manuscript), available at http://commission.abi.org/sites/default/files/statements/07jun2013/ABI_Testimony_Oral_Remarks.pdf; see also *The Fruits of Labor: Worker Priorities in Bankruptcy*, 35 ARIZ. L. REV. 905, 917–18 (1993) (arguing for unionized employees to use their natural leverage, rather than seek legislative reform on bankruptcy priorities).

49. Secunda, *supra* note 2, at 891–92.

50. 29 U.S.C. § 216 (2012); see e.g., N.Y. LAB. LAW §§ 191, 197, 198 (McKinney 2009).

spans the petition date.⁵¹ And post-petition wages have an express administrative priority.⁵²

In a reorganization, therefore, employees are likely most concerned not with being paid for work performed but with keeping their jobs, as Professor Secunda seems to acknowledge.⁵³ In a sale to a strategic buyer, redundancies may result in headcount reductions. Even in an internal reorganization, rationalization of the business may result in downsizing. In any case, the debtor may seek to reduce wages and benefits, and modify manning requirements and other work rules.⁵⁴ I therefore wonder whether a wage guarantee fund, as under Canada's WEPPA, is as important as Professor Secunda suggests.⁵⁵ In the area of pay, Professor Secunda might better focus on severance pay, which is generally not considered a priority.⁵⁶

More broadly, as Professor Secunda notes, employers and employees do not have equal bargaining power. That is the premise of the National Labor Relations Act.⁵⁷ Moreover, union membership

51. JOHN D. AYER & MICHAEL L. BERNSTEIN, *BANKRUPTCY IN PRACTICE* 304 (4th ed. 2007).

52. 11 U.S.C. § 503(b)(1) (2012).

53. Secunda, *supra* note 2, at 871–72, 891. This may be an important concern in Chapter 7 and non-bankruptcy liquidations. Some fact-based research on this point would be useful.

54. *See* 11 U.S.C. § 1113 (2012) (modification of collective bargaining agreements). Of course, for non-unionized employees, the debtor may do so unilaterally.

55. *See* Secunda, *supra* note 2, at 873–74.

56. *See generally* 3 WILLIAM L. NORTON, JR., *BANKRUPTCY LAW AND PRACTICE* § 49:21 (3d ed. 2013). The main exception is in the Second Circuit, where severance pay may be deemed to accrue upon termination of employment, rather than ratably across an employee's career. *See e.g.*, *Straus-Duparquet, Inc. v. Local Union No. 3 Int'l Bhd. of Elec. Workers*, 386 F.2d 649 (2d Cir. 1967). The Fourth Circuit has recently reached a similar conclusion with respect to severance during the pre-petition priority period. *See Matson v. Alarcon*, 651 F.3d 404 (4th Cir. 2011). The ABI Commission is considering severance pay issues. *See* Andrew Dawson, *Minutes of ABI Commission to Study the Reform of Chapter 11*, LAB. & BENEFITS ADVISORY COMMITTEE (Apr. 19, 2013), available at <http://commission.abi.org/sites/default/files/April%2019%20meeting%20minutes.docx>, (“Discussion focused on the working paper regarding severance issues under section 503.”).

57. In enacting the NLRA, Congress found that “[t]he inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce” 29 U.S.C. § 151 (2012). Similarly, in enacting Section 1113 of the Bankruptcy Code, Senator Kennedy stated that the law's intent was to prevent the trustee from having unlimited discretionary power to repudiate labor contracts. 130 CONG. REC. S8898 (daily ed. Jun. 29, 1984). And, in enacting Section 1114, Congress sought to protect the rights of retirees to continue to receive benefits irrespective of their employer's bankruptcy. *See In re Arclin U.S. Holding, Inc.*, 416 B.R. 117, 119

has been steadily declining, at least in the private sector.⁵⁸ And union membership has historically been low in the South, for example.⁵⁹

That said, unions remain powerful advocates in the legislative arena. Though he mentions one pending bill (Senator Hatch's proposal for a new type of pension platform),⁶⁰ Professor Secunda has not discussed the reforms organized labor has identified as important to their constituents.

For example, much attention has been focused on The Protecting Employees and Retirees in Business Bankruptcies Act of 2013 (H.R. 100), introduced by Representative John Conyers Jr. (D-MI) on January 3, 2013. The bill's stated purpose is to improve protections for employees and retirees in business bankruptcies.⁶¹ House Bill 100 has been referred to the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law.⁶²

Some view House Bill 100 as a "wish list," and consider it unlikely to pass in its current form because it is heavily tilted toward employee interests.⁶³ Among other things, the bill would amend the Bankruptcy Code to:

- increase the priority claim for wages, salaries, or commissions, including vacation and severance pay;

(Bankr. D. Del. 2009). Professor Secunda only briefly discusses Sections 1113 and 1114, but the literature on these provisions is extensive. *See generally* JOHN D. PENN ET AL., LABOR ISSUES IN CHAPTER 11: AN OVERVIEW (2010), available at <http://www.abiworld.org/committees/newsletters/busreorg/vol9num5/labor.pdf>.

58. *See* Steven Greenhouse, *Share of the Work Force in a Union Falls to a 97-Year Low, 11.3%*, N.Y. TIMES, Jan. 23, 2013, http://www.nytimes.com/2013/01/24/business/union-membership-drops-despite-job-growth.html?_r=0.

59. *See* GERALD MAYER, CONG. RESEARCH SERV., UNION MEMBERSHIP TRENDS IN THE UNITED STATES (2004), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1176&context=key_workplace; *see also* *Union Affiliation of Employed Wage and Salary Workers by State*, BUREAU LAB. STATISTICS, <http://www.bls.gov/news.release/union2.t05.htm> (last updated Jan. 24, 2014).

60. *See* Secunda, *supra* note 2 at 883.

61. *See* Protecting Employees and Retirees in Business Bankruptcies Act, H.R. 100, 113th Cong. (2013), available at <http://beta.congress.gov/bill/113th/house-bill/100>; *see also* *John Conyers, Jr.: A Legislative Record of Jobs, Justice and Peace*, JOHN CONYERS, JR.: U.S. CONGRESSMAN, 1, 10, http://conyers.house.gov/_cache/files/93cecf79-b4bb-4a41-939c-00302e5a53ca/Executive_Summary_Jobs_Justice_and_Peace.pdf (stating that Rep. Conyers has introduced or cosponsored legislation since 1987 that has sought to level the playing field for employees and retirees in business bankruptcies by requiring heightened standards to reject collective bargaining agreements and reduce employee benefits).

62. *See* H.R. 100.

63. *See e.g.*, Michael L. Bernstein, *Testimony Before the ABI Commission to Study the Reform of Chapter 11*, AM. BANKR. INST. (March 14, 2013), http://commission.abi.org/sites/default/files/statements/14mar2013/Michael_L_Bernstein.pdf.

- increase the priority claim for contributions to an employee benefit plan;
- include severance pay (other than for insiders, senior management, and highly compensated employees) as an administrative expense;
- include damages for WARN Act violations as an administrative expense;
- provide a claim for damages for rejection of a collective bargaining agreement under Section 1113.⁶⁴

In addition to these “claims” issues, and major reforms to Sections 1113 and 1114, House Bill 100 would require that in evaluating purchase offers, the court consider the extent to which a bidder offers to maintain existing jobs, preserve the terms and conditions of employment, and assume or match pension and retiree health benefit obligation.⁶⁵ Assuming that solution is realistic,⁶⁶ it would dramatically change the landscape with respect to unionized employees and retirees, as well as the pension insurance system and providers of health care coverage.

The Commission was established to “study and propose reforms to Chapter 11 and related statutory provisions that will better balance the goals of effectuating the effective reorganization of business debtors with the attendant preservation and expansion of jobs”⁶⁷ Its members include lawyers, workout professionals, and academics.⁶⁸ At a field hearing in March 2013, the Commission heard testimony from management- and union-side witnesses, a retired bankruptcy judge and Joshua Gotbaum, the PBGC’s Director. Gotbaum emphasized that the Commission’s charge is to “revisit and rebalance

64. Protecting Employees and Retirees in Business Bankruptcies Act of 2013, H.R. 100, 113th Cong. §§ 101, 103, 105, 201 (2013).

65. *Id.* § 203. See also Judith Greenstone Miller & My Chi To, Legislative Update, American Bar Association Business Bankruptcy Committee, Spring Meeting of the Business Law Section 1, 5 (Apr. 4, 2013), available at <http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=5&ved=0CEgQFjAE&url=http%3A%2F%2Fmeetings.abanet.org%2Fwebupload%2Fcommupload%2FCL160000%2Frelatedresources%2Flegislativeupdate20130404.doc&ei=Yc7aUsTVAsrlsASF0oHgCA&usg=AFQjCNHm3jVnX4Ss0CENIWMGlqYR6KX4pg&sig2=XtDd5b43Nw6md7Wp6HJ86A>.

66. See Bernstein, *supra* note 63, at 12 (“The reality is that in many cases there is no buyer who is willing to preserve all of the debtor’s employees’ jobs and assume all of its pension and retiree liabilities.”).

67. *Purpose of the Commission*, AM. BANKR. INST., <http://commission.abi.org/purpose-commission> (last visited Mar. 15, 2014).

68. See *id.*

Chapter 11, in pursuit of the twin goals of reorganization and just treatment of creditors.”⁶⁹

Given the ABI’s key role in providing bankruptcy information, the Commission’s report could significantly affect the debate. Professor Secunda should find an opportunity to collaborate or to offer his services.

CONCLUSION

As a resource on comparative employment and bankruptcy law, Professor Secunda’s Article will be a valuable addition to the literature. While his proposals to increase priority treatment for wages and pension contributions have support among interest groups, it is not clear that his proposal for a wage guarantee fund is necessary.

With this response, I have suggested a need for greater focus on protections for ongoing pension plans and the pension insurance system (and any wage guarantee fund), the vagaries of legislation, and bankruptcy reform efforts already underway. Scholars and law reformers may want to take them into account in their respective endeavors.

69. ABI COMM’N TO STUDY REFORM OF CHAPTER 11, *supra* note 34, at 1.