

**JUST HOW NECESSARY IS “NECESSARY”?:  
THE QUESTION OF INTERPRETATION IN 11 U.S.C.  
§ 1113(B)(1)(A)**

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I. INTRODUCTION

The word “necessary” . . . has not a fixed character peculiar to itself. It admits of all degrees of comparison, and is often connected with other words which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed by these several phrases.<sup>1</sup>

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In 1984, the Supreme Court handed down its decision in *National Labor Relations Board v. Bildisco & Bildisco*,<sup>2</sup> which gave bankruptcy courts the power to permit a debtor to reject a collective bargaining agreement merely by showing (1) that the agreement burdens the estate and (2) that rejection is the equitable thing to do.<sup>3</sup> Organized labor responded with predictable outrage and pressured Congress to take action. That same year, Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984,<sup>4</sup> which included 11 U.S.C. § 1113.<sup>5</sup> That section governs the standards by which a debtor can

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1. *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, at 414 (1819).

2. 465 U.S. 513 (1984).

3. *Id.* at 526.

4. Pub. L. No. 98-353, 98 Stat. 333 (1984).

5. 11 U.S.C. §1113 (2006) provides in pertinent part (emphasis supplied):

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

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

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

reject a collective bargaining unit without running afoul of the National Labor Relations Act ("NLRA").<sup>6</sup> Section 1113 was an attempt to reconcile the competing interests of a debtor in Chapter 11 with those of its representative union.<sup>7</sup> Due to the hastiness in which it was enacted, Section 1113 left many questions unanswered and provided little in the way of legislative history.<sup>8</sup> The vagueness of the statute coupled with the absence of any directional indicators from Congress resulted in a split between the Second and Third Circuits over the meaning of "necessary" in §1113(b)(1)(A).<sup>9</sup>

(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.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen (14) days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten (10) days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven (7) days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty (30) days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

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

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

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

6. 29 U.S.C. §151 (2006).

7. Donald B. Smith & Richard A. Bales, *Reconciling Labor and Bankruptcy Law: The Application of 11 U.S.C. §1113*, 2001 L. REV. M.S.U.-D.C.L. 1145, 1153 (2001).

8. §1113 was passed without a customary conference committee report, thus the only evidence of Congressional intent comes in the form of statements made on the House and Senate floors.

9. *Compare* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074

Part II of this paper will discuss the line of cases leading up to *Bildisco* and the passage of §1113. Part III will analyze the conflicting Circuit Court decisions of *Wheeling-Pittsburg Steel* and *Carey Transportation*, as well as the subsequent treatment of these decisions by the courts. Part IV will evaluate the merits of these decisions and attempt to establish a definition of “necessary” that comports with the policy justifications of Chapter 11 and the NLRA. Finally, Part V will examine legislation currently pending in Congress that is intended to resolve any debate on the subject.

## II. HISTORY OF § 1113

Under Section 8(a)(5) of the NLRA, an employer and its employee representative must bargain until the point of impasse before the employer is permitted to make unilateral changes to a collective bargaining agreement.<sup>10</sup> Employers are further prohibited from terminating or modifying the agreement without the consent of the union.<sup>11</sup> One commentator has held that “[t]ogether, these provisions impose a duty to bargain that prohibits self-help by employers. . . . The duty to bargain has often been cited as the cornerstone of our national labor policy.”<sup>12</sup>

While in most circumstances, employer-union relations are governed by the NLRA, labor’s relationship with an employer in Chapter 11 is governed by the Bankruptcy Code. Prior to *Bildisco*, collective bargaining agreements entered into by a debtor and a representative union were treated as executory contracts, subject to assumption or rejection under Section 365(a) of the code.<sup>13</sup> Accordingly, employers’ decisions to reject collective bargaining agreements were evaluated using the “business judgment test,” which permitted rejection of an executory contract when a debtor established that rejection would benefit the estate.<sup>14</sup> This gave debtors the power to reject unfavorable labor contracts while treating the ensuing liability for breach as an unsecured claim, which must then compete with all of the debtor’s other unsecured claims.<sup>15</sup>

The Second Circuit disagreed with this looser standard, and in *REA Express* held that the business judgment test represented too low a bar for employers

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(3d Cir. 1986) (holding that “necessary” means the minimum modifications that would permit reorganization) with *Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82 (2d Cir. 1987) (holding that §1113 does not restrict the debtor to modifications that are absolutely minimal).

10. See *National Labor Relations Board v. Katz*, 369 U.S. 736 (1992)

11. Section 8(d) of the NLRA provides in pertinent part:

[W]here there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless [certain procedural requirements are met].

NLRA § 8(d), 29 U.S.C. § 158(d) (2006).

12. Christopher D. Cameron, *How “Necessary” Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 849 (1993-1994).

13. See 11 U.S.C. §365(a) (2006) (providing that a trustee “may assume or reject any executory contract” with court approval).

14. Cameron, *supra* note 12, at 850.

15. Smith and Bales, *supra* note 7, at 1148.

seeking to reject their collective bargaining agreements.<sup>16</sup> There, the court attempted to reconcile an apparent conflict between Chapter 11 and the Railroad Labor Act (an act similar in language and purpose to the NLRA), holding that a court could permit the rejection of a collective bargaining agreement only where "after careful weighing of all the factors and equities involved, including the interest sought to be protected by [federal labor law], . . . an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing [employer] in bankruptcy from collapse, the court may . . . authorize rejection . . . of the agreement."<sup>17</sup> This test essentially required a debtor to meet the extraordinary burden of demonstrating that, unless the court permitted the rejection of the collective bargaining agreement, the reorganization would fail.<sup>18</sup>

In the coming years, numerous circuit courts refused to follow the Second Circuit's decision in *REA Express*, instead opting to apply a less onerous test; permitting rejection if the estate was burdened and the balance of equities favored rejection.<sup>19</sup> In 1982, the Third Circuit decided in *In re Bildisco*,<sup>20</sup> which expressly rejected the stringent, pro-labor standard of the Second Circuit, imposing instead far less rigorous requirements on debtors. There the Court held that "the debtor [] must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; [and] once this threshold determination has been made the debtor [] must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities."<sup>21</sup> This conflict between the Second and Third Circuits prompted the Supreme Court to grant certiorari.<sup>22</sup>

In *Bildisco*, the debtor entered into a collective bargaining agreement with its union which was explicitly binding even in the event of bankruptcy.<sup>23</sup> Subsequent to filing its Chapter 11 petition, the debtor failed to meet its obligations under the agreement by refusing to pay health and pension benefits and failing to provide scheduled wage increases.<sup>24</sup> These violations led the National Labor Relations Board ("NLRB") to issue a complaint against the debtor, alleging violations of §§8(a)(1),(5) of the NLRA for unilateral modification of the terms of the collective bargaining agreement.<sup>25</sup> After filing the complaint, the debtor sought permission, under § 365(a) of the Bankruptcy Code, to reject its collective bargaining agreement.<sup>26</sup> At the hearing on the

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

17. *Id.* at 169.

18. Judith DeMeester Nichols, Note, *Rejection of Collective Bargaining Agreements by Chapter 11 Debtors: The Necessity Requirement Under Section 1113*, 21 GA. L. REV. 967, 980 (1987).

19. *Id.* at 981 n. 48.

20. 682 F.2d 72 (3d. Cir. 1982), *aff'd*, 465 U.S. 513 (1984).

21. *Id.* at 81.

22. *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513 (1984).

23. *Id.* at 518.

24. *Id.*

25. *Id.* at 519.

26. 11 U.S.C. §365(a) (2006) (setting forth procedures for rejection or assumption of executory contracts in Chapter 11).

application, a general partner of the debtor testified that rejecting the agreement would save the debtor approximately \$100,000. The bankruptcy court then granted the debtor's application to reject its collective bargaining agreement.<sup>27</sup>

In reaching its decision, the Supreme Court held that although collective bargaining agreements were executory contracts subject to rejection under § 365(a), they required a stricter standard for rejection than the business judgment test.<sup>28</sup> But rather than applying the strict requirements of *REA Express*, the Court, affirmed the decision below and held that rejection of a collective bargaining agreement should be permitted by a Bankruptcy Court "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."<sup>29</sup> With the fundamental purposes of Chapter 11 in mind, namely the prevention of liquidation of the debtor,<sup>30</sup> the Court reasoned that the "authority to reject an executory contract is vital to the basic purpose of a Chapter 11 reorganization, because rejection can release the debtor's estate from burdensome obligations that can impede a successful reorganization."<sup>31</sup>

Prior to *Bildisco*, employers were utilizing Chapter 11, or the threat thereof, as a means of either voiding labor agreements or extracting painful concessions from their representative unions. *Bildisco* removed a significant impediment for employers seeking to do just that.<sup>32</sup> After *Bildisco*, an employer seeking to free itself from the obligations of an inconvenient collective bargaining agreement would simply have to demonstrate that its contractually mandated high labor costs hinder its competitiveness.<sup>33</sup>

The *Bildisco* decision "provoked a general outcry (from management in support of the decision, from organized labor in opposition)."<sup>34</sup> Labor leaders immediately began lobbying Congress, which was already in the process of drafting new amendments to the Bankruptcy Code in the wake of *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*<sup>35</sup> Less than a month after the Court rendered its *Bildisco* decision, the House of Representatives began debating a set of bankruptcy amendments, proposed by Congressman Peter

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27. *Bildisco*, 465 U.S. at 519.

28. *Id.* at 524.

29. *Id.* at 526.

30. Smith and Bales, *supra* note 7, at 1153.

31. *Bildisco*, 465 U.S. at 529.

32. 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, 304 (Fall 1984).

33. *Id.*

34. *Id.* at 293. See also *Id.* at 313-14 n. 125-129 (presenting various negative and positive responses to *Bildisco* from labor and management, respectively).

35. 458 U.S. 50, 87 (1982) (holding that Bankruptcy Courts created by the Bankruptcy Act of 1978, Pub. L. 95-598, §§404-05, 92 Stat. 2549, 2683-85, were unconstitutional, as they "impermissibly removed most, if not all, of 'the essential attributes of the judicial power' from the Article III district court . . . . Such a grant of jurisdiction cannot be sustained as an exercise of Congress' power to create adjuncts to Article III courts.") The Court stayed implementation of this decision in order to give Congress ample time "to reconstitute the bankruptcy courts or to adopt other valid means of adjudication." *Id.* at 88. The stay expired before Congress was able to enact new legislation, forcing bankruptcy courts to operate under an emergency interim rule for two years before Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984. *Supra*, note 5.

Rodino, intended to codify the recently overturned *REA Express* standard in the Bankruptcy Code.<sup>36</sup> The new standard proposed in this bill permitted a bankruptcy court to approve the rejection of a collective bargaining agreement only if "absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail."<sup>37</sup> If adopted, this bill would have "allowed rejection only if necessary to prevent liquidation of the debtor and to preserve jobs."<sup>38</sup>

The House bill and its strict standard for rejection met stiff resistance in the Senate. Senator Strom Thurmond proposed an alternative amendment drafted by the National Bankruptcy Conference,<sup>39</sup> which rejected Congressman Rodino's proposed *REA Express* standard, and instead essentially codified the standard set forth in *Bildisco*.<sup>40</sup> In response to Senator Thurmond's unabashedly anti-labor amendment, Senator Robert Packwood proposed an alternative amendment, favored by organized labor,<sup>41</sup> which prohibited unilateral rejection while removing the House bill's requirement that the modifications be necessary to preserve jobs.<sup>42</sup> In the end, the Senate decided not to adopt either amendment, and sent the bill to a conference committee to find a middle ground between the Thurmond and Packwood proposals.<sup>43</sup>

At 3:00am on June 28, 1984, after two days of deliberation, the conference committee reached a compromise on the bill, which President Reagan signed into law.<sup>44</sup> The committee seemingly combined elements from the Thurmond and Packwood amendments,<sup>45</sup> but failed to include any reports or hearing

36. See 130 CONG. REC. H1723 (daily ed. Mar. 19, 1984) (statement of Rep. Rodino) ("[t]he bill would require the bankruptcy judge to apply the standard used in the second circuit *REA Express* opinion in determining whether to approve a request for the rejection of a collective-bargaining agreement under the bankruptcy laws: Under this standard, the collective-bargaining agreement would not be subject to rejection in a chapter 11 case, unless the jobs covered by the collective-bargaining agreement would otherwise be lost and any financial reorganization of the debtor would fail. . . . This bill clarifies the Congress intent [*sic*] to incorporate the second circuit standard for the rejection of a union agreement in a Chapter 11 reorganization case and presents a proper balance between bankruptcy and labor policies.").

37. H.R. 5174, 98th Cong., 2d Sess. (1984), 130 CONG. REC. H1842 (daily ed. Mar. 21, 1984).

38. Peter B. Brandow, *Rejection of Collective Bargaining Agreements in Bankruptcy: Finding a Balance in 11 U.S.C. § 1113*, 56 FORDHAM L. REV. 1233, 1243 (1987-1988).

39. *Id.*

40. Amendment No. 3083 to H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. S6126 (daily ed. May 22, 1984) (authorizing a debtor to reject a collective bargaining agreement when "the agreement is burdensome to the estate, and that in considering the needs of the debtor, the employees covered by the agreement, and other parties in interest, the equities balance in favor of the rejection of the agreement.").

41. Nichols, *supra* note 18, at 985.

42. Amendment No. 3112 to H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. S6181-82 (daily ed. May 22, 1984) (A Bankruptcy Court could permit the rejection of a collective bargaining agreement if "[the debtor made] a proposal . . . providing for the minimum modifications in such employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization; and . . . the balance of the equities clearly favors rejection of such agreement.").

43. Brandow, *supra* note 38, at 1244-1245.

44. See *In re Century Brass, Inc.*, 795 F.2d 265, at 266-67 (1986) ("A House-Senate Conference Report adopted a compromise approach to the conflict by overruling the unilateral power to reject given the debtor in *Bildisco*, and by setting forth certain requirements to be met before rejection of a collective bargaining agreement. The Report was passed overwhelmingly in both Houses . . .").

45. 130 CONG. REC. 130 S8890 (daily ed. June 29, 1984) (statement of Sen. Dole) ("The conference

records that normally accompany the enactment of a bill, leaving little more than the transcripts of floor debates as tools for divining legislative intent.<sup>46</sup>

Section 1113 of the act governs the rejection of collective bargaining agreements. It mandates that after filing for rejection with the court, a debtor must:

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.<sup>47</sup>

The court must then find (1) that the debtor fulfilled the above requirements,<sup>48</sup> (2) that the union refused to accept the debtor's proposals without good cause,<sup>49</sup> and (3) that rejection would be the equitable outcome.<sup>50</sup> Within fourteen days of receiving the debtor's application, the court must hold a hearing,<sup>51</sup> and issue a ruling in the following thirty days.<sup>52</sup> In certain situations, a debtor may need to make modifications which are absolutely vital to the continuation of its business, in which case a court may permit the debtor to unilaterally modify the "terms, conditions, wages, benefits, or work rules" provided for in a collective bargaining agreement.<sup>53</sup>

One of the first decisions to elaborate on § 1113 was *American Provision*,<sup>54</sup> which unpacked the requirements of § 1113 into nine requirements that must be met before the rejection of a collective bargaining agreement can be approved.<sup>55</sup>

compromise evenly splits the difference between *Bildisco* and *Packwood*. It overturns the court ruling with regard to unilateral rejection, and requires now a prior court hearing and ruling upon an application for rejection of a collective bargaining agreement. In addition, it inserts into the law a requirement upon the debtor that the debtor make a proposal, for necessary modifications in the collective bargaining agreement that are necessary to permit reorganization.").

46. Nichols, *supra* note 18, at 986 n. 65 ("Normally, the enactment of a bill leaves in its wake an extensive record, including public hearings, a committee report, records of committee hearings, briefs for and against the bill, and explanatory memoranda.").

47. 11 U.S.C. § 1113(b)(1) (emphasis supplied).

48. See 11 U.S.C. § 1113(c)(1).

49. See 11 U.S.C. § 1113(c)(2).

50. See 11 U.S.C. § 1113(c)(3).

51. See 11 U.S.C. § 1113(d)(1).

52. See 11 U.S.C. § 1113(d)(2).

53. See 11 U.S.C. § 1113(e).

54. 44 B.R. 907 (Bankr. D. Minn. 1984).

55. These nine requirements are as follows:

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.

While these requirements have been widely adopted by bankruptcy courts,<sup>56</sup> the application of these criteria does little to resolve the question of how "necessary" should be interpreted in § 1113(b)(1). In the twenty years since § 1113 became law, the Supreme Court has not provided guidance on how certain provisions are to be interpreted.

### III. JUDICIAL INTERPRETATIONS OF § 1113(b)(1)(A)

Since the enactment of § 1113, courts have grappled with a statute that not only contains vague language, but also lacks any meaningful legislative history that could be used to resolve these vagaries. A glaring example of this deficiency comes in § 1113(b)(1)(A), which requires debtor seeking rejection of a collective bargaining agreement to "provide [] for those *necessary* modifications in the employees [*sic*] benefits and protections that are *necessary* to permit the reorganization of the debtor."<sup>57</sup> The Second and Third Circuits each addressed this issue in the late 1980s; however each court came to a very different conclusion.

The Third Circuit was the first court to address the "necessary" issue in *Wheeling-Pittsburgh Steel*.<sup>58</sup> There, the debtor-employer entered into negotiations with the plaintiff-union over a new collective bargaining agreement, seeking to lower its average labor costs from over twenty one dollars to nineteen dollars an hour.<sup>59</sup> Concurrently, the debtor sought major concessions from its lenders and stockholders, which it did not receive. The union and the lenders each rejected the other's proposals, and eventually negotiations between the parties broke down. Soon after this, the debtor filed for Chapter 11 protection.<sup>60</sup> Following its bankruptcy petition, the debtor proposed new modifications to the union, this time asking for labor costs of fifteen dollars an hour and for cuts in benefits. After giving the union three weeks to deliberate, and refusing to provide them with more information, the debtor filed an application to reject its collective bargaining agreement with the bankruptcy court.<sup>61</sup> The court approved the debtor's application and the union immediately appealed and commenced a strike to protest the debtor's unilateral changes to the terms of employment.<sup>62</sup> The district court affirmed the decision

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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.

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

*Id.* at 909 (emphasis added).

56. See Smith & Bales, *supra* note 7, at 1157.

57. See 11 U.S.C. § 1113(b)(1)(A) (emphasis added).

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

59. *Id.* at 1077.

60. *Id.*

61. *Id.* at 1078.

62. *Id.*



of the bankruptcy court and the union appealed to the Third Circuit.<sup>63</sup>

The Third Circuit analyzed the events leading up to the enactment of § 1113 and the sparse legislative history that came with it in an attempt to find the correct definition of "necessary." After looking at statements made by various Senators regarding the product of the conference committee, the court determined that the general consensus in Congress was that *Bildisco* had been overturned and a standard similar to *REA Express* had been instated.<sup>64</sup> In light of this congressional intent, the court construed "necessary" to mean "essential," holding:

The "necessary" standard cannot be satisfied by a mere showing that it would be *desirable* for the trustee to reject a prevailing labor contract so that the debtor can lower its costs. . . . The congressional consensus . . . requires that "necessity" be construed strictly to signify only *modifications that the trustee is constrained to accept because they are directly related to the Company's financial condition and its reorganization*. We reject the hypertechnical argument that "necessary" and "essential" have different meanings because they are in different subsections. The words are synonymous.<sup>65</sup>

The court essentially held that a debtor's proposed modifications must be absolutely necessary (rather than simply desirable) for achieving the short-term goal of preventing liquidation (rather than for achieving the long-term goal of a successful reorganization).<sup>66</sup> In applying this standard to the facts of the case, the court determined that the bankruptcy court erred because the debtor's proposed modifications were not absolutely necessary to prevent liquidation, and that it incorrectly focused its analysis on the long-term viability of the debtor.<sup>67</sup>

A year later, the Second Circuit became the next circuit court to attempt to define "necessary" in § 1113. In *Truck Drivers Local 807 v. Carey Transportation Inc.*,<sup>68</sup> the debtor, facing a rapidly declining business, asked for and received numerous concessions from its representative union, enabling it to reduce operating costs.<sup>69</sup> These concessions proved inadequate, and the debtor sought further concessions from the union which the union denied, resulting in the debtor's filing of a Chapter 11 petition.<sup>70</sup> The next day, the debtor applied

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63. See *In re Wheeling-Pittsburgh Steel Corp.*, 52 B.R. 997, 1003 (Bankr. W. D. Pa. 1985) (holding that "'necessary' . . . does not mean 'absolutely essential.' A more practical long range test of a less stringent nature is more compatible with congressional intent. . . . The prevention of the debtor going into liquidation, ensuring the loss of jobs, is a goal and policy decision of the Bankruptcy Code which indicates an intent of Congress to impose a 'necessary' standard to be satisfied by considerations of feasibility for reorganization.").

64. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088 ("the tide of members of Congress who expressed an otherwise pervasive understanding that the substantive standard of *Bildisco* had been overturned and that the *REA Express* standard, or something close to it, had been reinstated.").

65. *Id.* (emphasis supplied).

66. 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 Corporate Reorganization*, 64 AM. BANKR. L.J. 133, 182 (1990).

67. *Wheeling-Pittsburgh Steel*, 791 F.2d at 1093.

68. 816 F.2d 82 (2d Cir. 1987).

69. *Id.* at 85.

70. *Id.* at 86.

for permission to modify its collective bargaining agreement, proposing freezes or cuts in wages, reductions in overtime and vacation time, and the elimination of various employee benefits, in an effort to save approximately \$1.8 million per year for three years.<sup>71</sup> The union refused to negotiate on these proposals and the debtor filed an application to reject its bargaining agreement. During hearings on the application, the union put forth proposals that would have saved the debtor approximately three quarters of a million dollars per year, but the debtor rejected this proposal. The bankruptcy court, applying the nine step test from *American Provision*, granted the debtor's request to reject its collective bargaining agreement, finding that the debtor had complied with both the substantive and procedural requirements of § 1113.<sup>72</sup>

Affirming the decision of the Bankruptcy Court, the Second Circuit declined to adopt the strict definition of necessary from *Wheeling-Pittsburgh Steel* advocated by the union, finding this line of reasoning flawed for three reasons: First, while statute was generally viewed as a victory for organized labor, Congress explicitly rejected the language in Senator Packwood's proposal which would have required a debtor to propose only bare minimum modifications. Second, limiting a debtor to proposing only bare-minimum modifications would make it impossible for that debtor to fulfill the rest of its statutory obligations, namely its duty to negotiate in good faith.<sup>73</sup> Third, *Wheeling-Pittsburgh Steel* incorrectly focused its decision on the need for the debtor's short term survival rather than its eventual reorganization. The court held that it would be "impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimating what the debtor needs to attain financial health. . . . A debtor can live on water alone for a short time but over the long haul it needs food to sustain itself."<sup>74</sup> Therefore, the court concluded Section 1113 requires a debtor's proposed modifications to its collective bargaining agreement to contain "necessary, but not absolutely minimal, changes that will enable [it] to complete the reorganization process successfully."<sup>75</sup>

In 1990, the Tenth Circuit also weighed in on the "necessary" debate, adopting the Second Circuit's more debtor-friendly definition from *Carey Transportation*. In *Mile Hi Metal*<sup>76</sup> the debtor filed a petition for Chapter 11 relief and then sought approval to reject its collective bargaining agreement under § 1113. The debtor held negotiation sessions with its union, but the union did not accept any of the debtor's proposals.<sup>77</sup> The Bankruptcy Court granted the

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71. *Id.*

72. *Id.*

73. *Carey Transportation*, 816 F.2d at 89 ("Because the statute requires the debtor to negotiate in good faith over the proposed modifications, an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposals were minimal.")

74. *Id.* at 89-90 (quoting *In re Royal Composing Room, Inc.*, 62 B.R. 403, 418 (Bankr. S.D.N.Y. 1986) (quotation marks omitted).

75. *Id.* at 90.

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

77. *Id.* at 888 (the debtor proposed (1) prohibiting the presence of a union steward on a job

debtor's application to reject its collective bargaining agreement and the union appealed. The District Court, in reversing the decision of the bankruptcy judge, held that § 1113 did not permit a debtor to make non-essential modifications, such as those that affected competitiveness, but not wages.<sup>78</sup>

Vacating the decision of the District Court, the Tenth Circuit held that while "in ordinary usage, 'necessary' means 'cannot be done without' or 'absolutely required,'"<sup>79</sup> in bankruptcy proceedings, necessary modifications must enable the debtor to reorganize successfully, without being absolutely minimal. The court tempered this loose definition with one caveat, holding that "the debtor may not overreach under the guise of proposing necessary modifications. The proposals must be more than potentially helpful; they *must be directly related* to the debtor's financial condition."<sup>80</sup>

Since *Mile Hi Metal*, no other circuit courts have addressed the issue of necessity of proposed modifications, and Bankruptcy Courts have been split between the two approaches advocated by the Third and Second Circuits.<sup>81</sup> While the Supreme Court has yet to weigh in on the matter, various authors have attempted to reconcile these competing approaches.

#### IV. ANALYSIS AND RECOMMENDATIONS

This section will evaluate the merits of the two competing Circuit Court approaches to "necessity," and attempt to come to a correct interpretation. Analyzing these two approaches, it becomes clear that they represent the two extreme ends of a spectrum, with an entirely too restrictive definition on one side and a far too permissive interpretation on the other. A proper definition of necessity should fall somewhere in the middle, striking a balance between the respective needs of debtors and organized labor.

##### A. *The Wheeling-Pittsburgh Steel Standard*

The Third Circuit's *Wheeling-Pittsburgh Steel* definition of necessity stands at the most restrictive end of the spectrum. The flaws in this analysis are readily

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unless three or more union employees were present, (2) hiring temporary employees to replace striking employees without requiring them to become union members, and (3) paying replacement employees less than union wages).

78. 67 B.R. 114 (Bankr. D. Colo. 1986).

79. *Mile Hi Metal*, 899 F.2d at 892.

80. *Id.* at 893 (emphasis supplied).

81. For bankruptcy court decisions advancing the Third Circuit's strict standard of necessity, see generally *In re William P. Brogna and Company, Inc.*, 64 B.R. 390 (Bankr. E. D. Pa. 1986) (holding that "necessary" is synonymous with "essential"); *In re Valley Kitchens, Inc.*, 52 B.R. 493 (Bankr. S. D. Ohio 1985) (holding that because Congress intended a narrow reading of the statute, modifications must be absolutely necessary to the debtor's reorganization.). For decisions advancing the Second Circuit's flexible definition of necessary, see generally *In re Allied Delivery System, Co.*, 49 B.R. 700, 702 (Bankr. N.D. Ohio 1985) (holding that "in the context of [§ 1113], 'necessary' must be read as a term of lesser degree than 'essential.'"); *In re Walway Company*, 69 B.R. 967, 973 (Bankr. E. D. Mich. 1987) (holding that "'necessary' means a modification that will result in a greater probability of a successful reorganization than if the contract were allowed to continue in force."); *In re Amherst Sparkle Market, Inc.*, 75 B.R. 847, 851 (Bankr. N.D. Ohio 1987) (holding that "the legislative history is strongly suggestive that 'necessary' should not be equated with 'essential' or bare minimum.").

apparent. Section 1113(b)(2) requires a debtor to "confer in good faith [with a union] in attempting to reach mutually satisfactory modifications of [a collective bargaining] agreement."<sup>82</sup> Bankruptcy courts have interpreted this requirement to include serious attempts at negotiation of reasonable modifications to collective bargaining agreements.<sup>83</sup> As the court in *Allied Delivery* articulated, application of the *Wheeling-Pittsburg Steel* standard, equating "necessary" with "essential," would render the requirements of § 1113(b)(2) meaningless.<sup>84</sup> In short, adopting the *Wheeling-Pittsburgh Steel* definition would place an impossible burden on the debtor to negotiate in good faith. If it is only permitted to propose those modifications that are absolutely essential to reorganization, the debtor would logically be unable to give up any ground while negotiating those modifications, as doing so would place the absolute necessity of those proposals somewhere above the level of "bare minimum." On the other hand, a debtor's strict adherence to its absolutely essential proposals would render it incapable of negotiating in good faith, for if the debtor granted any concessions, liquidation would theoretically result. Therefore, the *Wheeling-Pittsburgh Steel* standard places the debtor in a Catch-22: either it violates § 1113(b)(2) by failing to bargain in good faith, or it violates § 1113(b)(1)(A) by proposing modifications that are not absolutely essential for modification. This approach severely impairs the ability of the debtor to bargain in good faith with the union, thus frustrating one of the core purposes of the NLRA.<sup>85</sup> Additionally, this approach encourages the union to avoid the bargaining table. The deck is stacked heavily in the union's favor, a union would have very little incentive to accept a debtor's proposed modifications because that debtor would carry the difficult burden of demonstrating their absolute necessity.<sup>86</sup>

Furthermore, the *Wheeling-Pittsburgh Steel* court's insistence that all proposals be directly related to economic issues<sup>87</sup> frustrates the purposes of the NLRA by constraining the parties to negotiation over only those issues relating directly to the terms and conditions of employment that would have a direct financial impact on the debtor. This limitation prevents the parties from entering into negotiations regarding ancillary issues that, while not economic, would still have an impact on the debtor's short and long term survival, including issues relating to working conditions, employee benefits, hours, and

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82. 11 U.S.C. § 1113(b)(2).

83. See generally *In re Kentucky Truck Sales*, 52 B.R. 797, 801-02 (Bankr. W. D. Ky. 1985).

84. *Allied Delivery System*, 49 B.R. at 702 (holding that the strict interpretation of necessity "would . . . render the subsequent requirement of good faith negotiation, which the statute requires must take place after the making of the original proposal and prior to the date of the hearing, meaningless, since the debtor would thereby be subject to a finding that any substantial lessening of the demands made in the original proposal proves that the original proposal's modifications were not 'necessary.'").

85. See 29 U.S.C. § 151 (stating that "[i]t is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining . . . for the purpose of negotiating the terms and conditions of their employment . . .").

86. See Cuevas, *supra* note 67, at 197 n. 457.

87. See *Wheeling-Pittsburgh Steel*, 791 F.2d at 1089 (holding that the debtor is limited to proposals that "are directly related to the Company's financial condition and its reorganization.").

seniority.<sup>88</sup>

Turning away from application of the statute and to Congress's intent during its drafting, it becomes apparent that the Third Circuit's hasty dismissal of the language of § 1113(e) was premature.<sup>89</sup> Presumably, Congress acted intentionally when it opted to use "necessary" in § 1113(b)(1)(A) and "essential" in § 1113(e), and for good reason. Section 1113(e) sets out the procedural requirements that a debtor must follow to make unilateral interim changes to the collective bargaining agreement when they are "essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."<sup>90</sup> Modifications under § 1113(e) are meant to be temporary, and made contemporaneously with the ongoing negotiation over permanent changes mandated by § 1113(b). Section 1113(e) essentially represents a codification of the "onerous and burdensome" standard from *REA Express*, and is meant to be applied only in the most dire of circumstances. Section 1113(b)(1)(A), on the other hand, sets a lower standard for modification and is intended to apply under circumstances where the parties have already engaged in negotiation.<sup>91</sup>

The *Wheeling-Pittsburgh Steel* standard also insufficiently answers the question of "necessary to what," holding that modifications must be necessary to prevent the short term liquidation of the debtor. In light of the structure of § 1113, however, this requirement simply does not make sense. Read as a whole, the statute clearly provides the procedures a debtor must follow when seeking short term relief. The language of § 1113(e), authorizing interim changes to a collective bargaining agreement, suggests the purpose of that section is to permit the debtor to take steps necessary to keep the debtor's business going. If § 1113(b)(1)(A) were meant to serve this same purpose, § 1113(e) would be superfluous. In light of these flaws, it is apparent that the Third Circuit's definition of necessary is incorrect.

#### B. *The Carey Transportation/Mile Hi Metal Standard*

The *Carey Transportation* standard provides a much better starting point for determining a workable definition of necessary than the *Wheeling-Pittsburgh Steel* standard. This standard's focus on the long term reorganization of the debtor is more in line with the overall goals of bankruptcy, as well as

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88. See Smith & Bales, *supra* note 8, at 1169 (citing Richard L. Merrick, *The Bankruptcy Dynamics of Collective Bargaining Agreements*, 91 COM. L.J. 169, 198 n. 121 (1986)).

89. The court devoted a mere two sentences to this argument, stating "We reject the hypertechnical argument that 'necessary' and 'essential' have different meanings because they are in different subsections. The words are synonymous." *Wheeling-Pittsburgh Steel*, 791 F.2d at 1088.

90. 11 U.S.C. § 1113(e) (2006).

91. See Cuevas, *supra* note 66, at 189 n. 413 ("The standard for obtaining interim relief is in essence the onerous and burdensome test because the trustee must demonstrate that absent the modifications to the collective bargaining agreement the debtor would be compelled to cease operating. . . . The standard for permanent relief is less strenuous because the modifications must be necessary to permit reorganization. . . . The word essential was not used to define necessary modification in section 1113(b)(1)(A). Hence, the term necessary modification does not mean essential modification.") (citations omitted).

Congress's intent. Despite its superiority, the Second Circuit's looser standard of necessity still fails to provide a proper definition of necessity that complies with labor and bankruptcy policies. Without a more concrete definition of "necessary," *Carey Transportation* does not provide parties with a clear enough rubric for proposing modifications.<sup>92</sup> While more likely to bring the parties to the bargaining table,<sup>93</sup> this lack of a precise standard seriously inhibits the parties' ability to bargain effectively as neither party can be entirely sure that a proposed modification does not violate § 1113(b).<sup>94</sup> This standard also impermissibly tilts in the favor of debtors. If a debtor is able to prove that rejecting its collective bargaining agreement will result in economic gains likely to improve its chances of a successful reorganization, a Bankruptcy Court following this standard would probably grant its application.<sup>95</sup>

### C. Proposed Standard

In order to fully effectuate the dual goals of labor and bankruptcy policies, an interpretation of § 1113(b)(1)(A) that falls somewhere between *Wheeling-Pittsburgh Steel's* strict standard and *Carey Transportation's* loose standard is required. If interpreted too strictly, proposals that have a high probability of aiding a successful reorganization will be rejected;<sup>96</sup> if interpreted too loosely, debtors may be able to rid themselves of inconvenient collective bargaining agreements by simply demonstrating that doing so would be economically beneficial, essentially representing a return to the *Bildisco* standard that Congress originally sought to eliminate.

The legislative history of § 1113 and the context in which it was enacted make it clear that Congress intended to hold debtors to at least a slightly higher standard than *Carey Transportation's* "necessary, but not essential" standard.<sup>97</sup> In order to better comply with the language and goals of the statute, courts should apply the following two criterion when evaluating a debtor's proposals under § 1113(b)(1)(A).

First, courts should ask whether certain proposed modifications are

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92. See *Carey Transportation*, 816 F.2d at 90 (holding simply that proposed modifications must "contain[] necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully.").

93. See Daniel S. Ehrenberg, *Rejecting Collective Bargaining Agreements Under Section 1113 of Chapter 11 of the 1984 Bankruptcy Code: Resolving the Tension Between Labor Law and Bankruptcy Law*, 2 J. L. & POL'Y 55, 85 (1994).

94. See Brian J. Beck et al., Note, *Bankruptcy Law – The Standard for Rejecting Collective Bargaining Agreements in Bankruptcy: Labor Discovers it Ain't "Necessarily" So*, 63 NOTRE DAME L. REV. 79, 96 (1988).

95. See Cameron, *supra* note 12, at 875, for a statistical analysis of how Bankruptcy Courts have dealt with the substantive provisions of § 1113, specifically the "necessary" and "balance of equities" standards.

96. See *Wheeling-Pittsburgh Steel*, 791 F.2d at 1090 (denying the debtor's application to reject its collective bargaining agreement because its proposed modifications did not contain a "snap back" provision).

97. See 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood) ("the word 'necessary' inserted twice into [section 1113] clearly emphasizes this required aspect of the proposal which the debtor must offer.").

reasonably necessary for a successful reorganization.<sup>98</sup> Employing this "reasonable necessity" standard would set a higher bar than *Carey Transportation* without being too onerous and burdensome. In his concurring opinion in *Mile Hi Metal*, Judge Seymour stated that reasonably necessary modifications "need not be essential to prevent financial collapse"<sup>99</sup> (an implicit rejection of the *Wheeling-Pittsburgh Steel* standard), but without those modifications, "the debtor must prove that reorganization will probably fail in short order."<sup>100</sup>

This standard of reasonable necessity imposes a stricter standard than *Carey Transportation*, but still gives a bankruptcy judge some discretion to determine whether or not proposed modifications are necessary. Although a debtor would be given less leeway in crafting its proposals than under *Carey Transportation*, to comport with Congressional intent, the application of this new standard of reasonable necessity should be applied only to modifications which are substantially related to the debtor's bottom line.

The second prong of the proposed standard involves modifications which are not economic in nature. Because nothing in § 1113 mandates that a debtor make *only* "necessary modifications . . . to permit the reorganization,"<sup>101</sup> debtors should be permitted (and encouraged) to propose additional modifications, beyond those directly related to economic issues in collective bargaining agreements. Coupled with the requirement that economic modifications be reasonably necessary, allowing non-necessary proposals would give the fullest effect to the dual goals of Chapter 11 and the NLRA.

As long as the debtor meets those baseline requirements of proposing modifications that are economic in nature and likely to facilitate a successful reorganization, it should be permitted to propose additional modifications that fall below this necessary standard. This would serve various practical purposes: It would significantly curtail a union's incentive to challenge a debtor's proposed modifications for lack of necessity, as a well drafted proposal would contain at least some modifications related to elements of the collective bargaining agreement (such as wages or benefits) that have a direct economic impact on the debtor.<sup>102</sup> Additionally, permitting the debtor to propose non-

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98. As discussed below, the standard of reasonable necessity should only apply to proposed modifications directly related to the debtor's economic situation.

99. *Mile Hi Metal*, 899 F.2d at 897 (Seymour, J., concurring).

100. *Id.* Imposing Justice Seymour's "in short order" element, would shift the balance of power between labor and debtors back towards the center as it seems to represent a middle ground between *Wheeling-Pittsburgh Steel's* myopic approach, looking only to prevent immediate liquidation, and *Carey Transportation's* far-sighted approach, focusing only on the state of the debtor post-reorganization. The "in short order" standard takes away the ability of a debtor to simply state that a modification would help its eventual reorganization by requiring it to demonstrate at least a somewhat pressing need.

101. 11 U.S.C. § 1113(b)(1)(A). A plain reading of the language of the statute suggests that a debtor is required, *but not limited*, to make propose modifications that are necessary to permit a successful reorganization. If Congress's intent was to restrict the nature of a debtor's proposed modifications to *only* those directly affecting the debtor's bottom line, it would have included limiting language in the statute. For an example of a Bankruptcy Court applying a limiting standard, see *In re Valley Kitchens, Inc.*, 52 B.R. 493, 495 (Bankr. S. D. Ohio 1985).

102. See *In re Royal Composing Room*, 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986) ("It is impossible

necessary modifications would further effectuate the goals of the statute by making it easier for the debtor to comply with § 1113(b)(2).<sup>103</sup> As stated earlier, mandating that a debtor propose only those modifications that are absolutely essential to prevent liquidation would make compliance with § 1113(b)(2) logically impossible.<sup>104</sup> Even under the looser *Carey Transportation* standard, a debtor is required to make proposals that are necessary, although not essential, to the reorganization, essentially limiting the debtor to economic proposals.

If a debtor is freed from the confines of making solely economic modifications, it will be able to raise issues at the bargaining table that are of importance to the union, such as work schedules, non-economic benefits, seniority, and promotions, which are not economic in nature. This would place the debtor in the best position to bargain in good faith, giving the fullest effect to the requirements of § 1113(b)(2), and increasing the possibility that the parties reach a mutually favorable outcome.<sup>105</sup>

Encouraging the parties to engage in robust negotiation over a variety of proposals, not limited to those that the debtor deems essential for its survival, would significantly reduce the chances of the union going on strike, which is often an inevitable consequence when a bargaining agreement is rejected.<sup>106</sup> Lowering the probability of a strike is highly desirable for debtors as strikes following the rejection of a collective bargaining agreement often have serious negative repercussions: cash flows from the manufacture and sale of its products or services cease, leaving an already cash strapped debtor in even worse financial straits, while allowing a union with moderate financial resources to assert great leverage over a weakened debtor.<sup>107</sup>

A debtor able to propose modifications to a collective bargaining agreement that are neither economic in nature nor absolutely necessary to its reorganization may be able to prevent such a strike from occurring. Painful

to conceive of a case in which some aspect of the debtor's projections as to its future financial needs, the allocation of burden among the various parties, or some item in the menu of modifications in the union contract proposed by the debtor *could not be viewed as unnecessary*, inessential or inequitable. Projections are necessarily speculations about the future and are an art, rather than a science. The factors that might influence the equities of the allocation of burden or the necessity for a proposal are numerous.") (emphasis supplied).

103. 11 U.S.C. § 1113(b)(2) (Requiring the debtor to "meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.") (emphasis supplied).

104. See *Allied Delivery*, *supra* note 85.

105. *But see* 130 CONG. REC. S8898 (daily ed. June 29, 1984) (statement of Sen. Packwood) ("only modifications which are necessary to a successful reorganization may be proposed"); *id.* at H7489 (statement of Rep. Rodino) ("[this section] requires the trustee to propose only those modifications that are necessary") These statements imply a tension between the intentions of Congressmen as articulated on the House and Senate floors and the language of the final statute and national labor and bankruptcy policies placing an emphasis on negotiation.

106. Joshua L. Sheinkman, *Rejection of Collective Bargaining Agreements in Chapter 11 and the Probability of Strikes: Tipping the Balance of Equities*, 15 N.Y.U. REV. L. & SOC. CHANGE 513, 532 (1987) ("whether the debtor formally rejects its labor contract or simply fails to perform its contractual obligations while enjoying the protection of the bankruptcy court, the union is likely to respond by striking.").

107. *Id.* at 540 ("[T]wo objective factors . . . should be considered by courts presiding over bankruptcy rejections: 1) the financial resources that the union can commit to maintaining a strike; and 2) the ability of an employer to recruit and retain qualified strike replacements.").



concessions at the bargaining table from both the debtor and labor are an inevitability of the negotiation process, but if the debtor is able to mitigate the economic effects of reorganization felt by the union, rejection of the bargaining agreement and a subsequent strike are more likely to be avoided. While this standard of reasonable necessity coupled with a debtor's ability to make additional, non-necessary proposals strikes a middle ground between *Wheeling-Pittsburgh Steel* and *Carey Transportation*, currently pending legislation may finally solve this question once and for all.

## V. FUTURE DEVELOPMENTS

The Protecting Employees and Retirees in Bankruptcy Act of 2007 ("the 2007 Act"), which was not passed by the 110th Congress but may be reintroduced in the 111th Congress, might render the above analysis moot.<sup>108</sup> Cosponsored at the time by both the President and Vice President Elects,<sup>109</sup> and with widespread Democratic support in both the House and Senate, the 2007 Act faces a strong likelihood of passage in the upcoming Obama administration.<sup>110</sup>

The 2007 Act would substantially modify the requirements of § 1113, tilting the balance of power in organized labor's favor by placing a higher burden on a debtor seeking to reject a collective bargaining agreement. Looking at the language of the bill, it is clear that Congress further intended to strip employers of their ability to use Chapter 11 as a tool to reject collective bargaining

108. Protecting Employees and Retirees in Business Bankruptcies Act of 2007, H.R. 3652, 110th Cong. (1st Sess. 2007). Under these proposed amendments, section 1113 would read:

(a) The debtor in possession, or the trustee if one has been appointed under 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 reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Where a debtor in possession or trustee (hereinafter in this section referred to collectively as a 'trustee') seeks rejection of a collective bargaining agreement, a motion seeking rejection shall not be filed unless the trustee has first met with the authorized representative (at reasonable times and for a reasonable period in light of the complexity of the case) to confer in good faith in attempting to reach mutually acceptable modifications of such agreement. Proposals by the trustee to modify the agreement shall be limited to modifications to the agreement that

(A) are designed to achieve a total aggregate financial contribution for the affected labor group for a period not to exceed 2 years after the effective date of the plan;

(B) shall be no more than the minimal savings necessary to permit the debtor to exit bankruptcy, such that confirmation of such plan is not likely to be followed by the liquidation of the debtor or any successor to the debtor; and

(C) shall not overly burden the affected labor group, either in the amount of the savings sought from such group or the nature of the modifications, when compared to other constituent groups expected to maintain ongoing relationships with the debtor, including management personnel.

(emphasis added).

109. See Cosponsors of S. 2092, available at <http://www.govtrack.us/congress/bill.xpd?bill=s110-2092> (last accessed April 1, 2009).

110. But see Kris Maher, *Democrats Push Bill to Protect Workers*, WALL ST. J., Sept. 25, 2007, at A2 ("the bill, which would make the bankruptcy process more burdensome to corporate managers, has little chance of passing in the Senate because of opposition from business groups.").

agreements.<sup>111</sup> Despite its unabashedly pro-labor slant, the proposed bill places a greater emphasis on negotiation than the current act. The new § 1113(b)(1) mandates that the parties meet in good faith "at reasonable times and for a reasonable period in light of the complexity of the case."<sup>112</sup>

Section 1113(b)(1)(A) of the new legislation places a two year time limit on the proposed modifications which serves the dual purpose of preventing employers from using Chapter 11 as a tool for permanently getting out of the requirements of an unfavorable collective bargaining agreement, and also codifies a "snap back" provision, intended to prevent an employer from operating under an unfairly favorable collective bargaining agreement after its position has substantially improved.<sup>113</sup>

The proposed version of § 1113(b)(1)(B) does away with the vague "necessary" standard and instead imposes a strict requirement upon the debtor to propose only "the minimal savings necessary to permit [it] to exit bankruptcy."<sup>114</sup> This bill essentially adopt the strict standard set forth by the Third Circuit in *Wheeling-Pittsburgh Steel*, and answers the twofold inquiry of "how necessary" and "necessary to what" by requiring the debtor to propose modifications that are absolutely necessary to prevent liquidation.

Section 1113(b)(1)(C) of the 2007 Act provides further protection for unions above those currently in effect. Instead of approving the rejection only where the balance of equities favors doing so,<sup>115</sup> the new amendments mandate that courts place special emphasis on ensuring that the union is not burdened by the modifications more than any other group. This modification clearly tilts the balance of equities in favor of labor at the expense of other constituent groups, such as customers, vendors and shareholders.

The effects of the 2007 Act are not difficult to predict. While courts in the Third Circuit will not have to drastically alter their standards, those bankruptcy courts that followed the *Carey Transportation* interpretation of § 1113 will now be required to impose a far stricter test on debtors seeking to reject their collective bargaining agreements. In a time of economic turmoil with historically high numbers of corporations declaring bankruptcy, the enactment of these amendments will likely have negative ramifications on companies

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111. See Office of Congresswoman Linda Sanchez, Chairwoman's Opening Statement at Hearing on Protecting Employees and Retirees in Business Bankruptcies, <http://lindasanchez.house.gov/news.cfm/article/433/print/1> (last visited Dec. 2, 2008) ("Chapter 11 is being used by some businesses to bust unions. . . . In case after case, bankruptcy courts have applied Congressional intent favoring long-term rehabilitation to sweep aside wage and benefits concessions won at the bargaining table. Chapter 11 . . . was originally enacted to give all participants an equal say in how a business—struggling to overcome financial difficulties—should reorganize. Unfortunately, this laudable goal does not reflect reality, especially for American workers.") (quotations omitted). See also Maher, *supra* note 111, at A2 ("labor officials have argued the bankruptcy process has become an all-too-common strategy for employers who want to void labor contracts.").

112. The current act merely requires that the debtor meet with the union "at reasonable times . . . to confer in good faith." 11 U.S.C. § 1113(b)(2).

113. For a more in depth analysis of "snap back" provisions, see *Wheeling-Pittsburgh Steel*, 791 F.2d at 1091.

114. 2007 Cong. U.S. H.R. 3652.

115. See 11 U.S.C. § 1113(c).

already struggling to stay afloat. Critics of the bill have argued that its provisions would seriously hinder a debtor's ability to successfully reorganize by raising, rather than lowering, labor costs which may have helped push the company into bankruptcy to begin with.<sup>116</sup> Corporations already forced to take drastic measures to cut costs and remain in business, will likely find that complying with the strict requirements in this bill places a significant impediment on the road to successful reorganization.

## VI. CONCLUSION

In its haste to amend Chapter 11 of the Bankruptcy Code in the aftermath of *Bildisco*, Congress failed to precisely define one of § 1113's most important substantive provisions. While the goals of the statute are clear—Congress wanted to restrict a debtor's ability to unilaterally reject a collective bargaining agreement by imposing stringent procedural requirements of negotiations over proposed modifications—the lack of an exact standard for bankruptcy courts to apply when evaluating the necessity of those modifications places those very goals in jeopardy. As demonstrated by the inconsistent definitions of "necessary" adopted by the Second and Third Circuits in *Carey Transportation* and *Wheeling-Pittsburgh Steel*, respectively, Congress failed to provide a means for courts to properly balance the competing goals of national labor (encouragement of good faith negotiations over collective bargaining agreements) and bankruptcy policies (promoting the successful reorganizations of debtors). While the standard of necessity used in *Carey Transportation* comes close to balancing these aims, it falls short by imposing too vague a standard on debtors, which in turn, tilts the balance too far in the debtor's favor.

A better interpretation of § 1113(b)(1)(A) would first require that economic proposals be "reasonably necessary" for the successful reorganization of the debtor, and second, permit the debtor to propose non-economic modifications that are not required for reorganization. This standard would impose clearer obligations on the debtor, requiring it to propose modifications that are necessary, within reason, to the debtor's eventual reorganization, while also permitting the debtor to propose other, non-essential modifications to the bargaining agreement. Permitting the debtor to make these proposals would encourage the parties to engage in more robust negotiations, giving full effect to both national labor policy and § 1113 while reducing the chances that the debtor will end up rejecting the collective bargaining agreement, causing the union to go on strike.

These proposed changes may be rendered meaningless, however, with the enactment of the *Protecting Employees and Retirees in Bankruptcy Act of 2007*. If passed, the 2007 Act would place a substantial hurdle in front of debtors looking to reject collective bargaining agreements. The act, while codifying the strict standard of necessity from *Wheeling-Pittsburgh Steel*, places a greater emphasis on negotiation than does the current code. With a Democratically

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116. See Maher, *supra* note 111, at A2.

controlled Congress and White House, passage of the 2007 Act appears likely, although it remains to be determined whether it will emerge from conference containing the same pro-labor biases with which it entered.

