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Sections 1113 and 1114: An Overview and Current Issues of Importance

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The author first provides an overview of the process and procedures for seeking relief under Sections 1113 and 1114 of the Bankruptcy Code and a discussion of the changes made by BAPCPA to Section 1114. She then explores current issues of significance.

With two minor exceptions, Congress did not tinker with Sections 1113 and 1114 of the Code when it enacted the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (“BAPCPA”). Nonetheless, with the recent wave of Chapter 11 filings in heavily-unionized industries — first the steel companies, then the airlines and now the automotive industry — the intersection of labor laws and the

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Bankruptcy Code have taken on renewed significance and received much attention in the popular press.¹ The current focus on the impact that collectively bargained retirement and health and welfare benefits can have upon a company's balance sheet will only increase when the new accounting rules for the treatment of defined benefit pension plans and other post-retirement plans come into effect later this year.² As more companies experience a significant erosion of their net worth as a result of these new rules, more troubled companies can be expected to file for Chapter 11 protection with an eye towards eliminating or reducing these liabilities from their balance sheets and also reducing their on-going labor costs.

This article first provides an overview of the process and procedures for seeking relief under Sections 1113 and 1114 of the Code and a discussion of the changes made by BAPCPA to Section 1114. It then explores current issues of significance.

REQUIREMENTS FOR SECTION 1113 AND 1114 RELIEF

Negotiating Participants

Section 1113 of the Code allows a debtor to reject a collective bargaining agreement ("CBA"). Section 1113 only applies to CBAs and does not alter the rights of a debtor to reject or modify contractual terms of employment contracts under Section 365 of the Code or at-will terms of employment with non-represented employees. Thus, Section 1113(b)(1)(a) requires a debtor that is seeking Section 1113 relief to negotiate with the collective-bargaining representative for the affected employees.

Section 1114 allows a debtor to "modify" "retiree benefits." Retiree benefits are defined in Section 1114(a) to mean "payments to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability or death under any plan, fund or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title." The definition of affected benefits is not inclusive and thus, Section 1114 only applies to those types of retiree benefits specifically addressed in

subsection (a).³ The phrase “plan, fund or program” is not defined in the Code, however, courts look to the Employee Retirement Income Security Act (“ERISA”) where these terms are defined to supply meaning.⁴ “The distinguishing feature of most of the benefits paid under an ERISA ‘plan, fund, or program’ is that ‘most of these benefits...accumulate over a period of time and are payable only upon the occurrence of a contingency outside of the control of the employee.’”⁵ Further it is not necessary under ERISA that the benefits be “funded” in advance to qualify as benefits paid under a plan, fund or program and thus, “retiree benefits” that are paid out of cash flow qualify under Section 1114.⁶

Section 1114 also has been held to apply to retiree benefits created by statute, such as those arising under the Coal Act,⁷ even if that statute bars modification of the benefits arising under it. One court has held that Section 1114 allows modification of Coal Act retiree benefits, notwithstanding a provision of the Coal Act which requires employers to maintain those benefits for so long as they are in business.⁸ The court reasoned that Section 1114 allowed such modification because: (1) Congress did not exclude Coal Act benefits from subsequently-enacted Section 1114 and (2) declining to apply Section 1114 would not be in the best interests of the estate as it would reduce the value of the debtor.⁹

Further, Section 1114 is not limited in application to retirees who retired under a CBA. It applies to all of a company’s retirees, both union and non-union¹⁰, including senior officers of a debtor.¹¹ The statute also applies to multi-employer plans.¹² The only exception to the reach of Section 1114 is that it does not apply to any retiree whose gross income for the twelve months preceding the bankruptcy filing is \$250,000 or more, unless the retiree can demonstrate that he or she cannot obtain comparable benefits on his or her own.¹³

Despite the fact that Section 1114 appears to apply to any attempt to modify or terminate “retiree benefits,” there is a split in authority on whether a debtor is required to comply with Section 1114 if the debtor would have the right outside of bankruptcy to modify the retiree benefits without the consent of the retiree.¹⁴ This issue is discussed *infra*, but often the question of whether Section 1114 applies at all to a debtor’s actions with respect to retiree benefits arises in the context of a motion by retirees

to obtain the appointment of a Section 1114 committee.

Retirees who retired under a CBA are represented in the Section 1114 negotiations by the collective bargaining representative that currently represents their active counterparts unless the collective bargaining representative elects not to represent the retirees or a motion is made by a party in interest for the appointment of a different representative.¹⁵ Challenges to a union's decision to represent its retirees in the Section 1114 proceedings are rare although conflicts between the interests of retirees and active employees can arise if the debtor is simultaneously seeking both Section 1113 and 1114 relief. These conflicts arise because bankruptcy is often a zero-sum game and concessions made by one group may relieve another group of having to make greater concessions.¹⁶ In fact, in other contexts, the United States Supreme Court has even acknowledged that unions have internal conflicts when they seek to represent both active employees and retirees in labor negotiations.¹⁷ Union retirees have filed suit against their unions as a result of their dissatisfaction with Section 1114 agreements negotiated by the union.¹⁸ The Seventh Circuit has concluded that unlike challenges to union's bargaining positions outside of bankruptcy, where federal law preempts state claims, the same is not true of claims based upon Section 1114 negotiations and such claims can proceed in state court.¹⁹ Thus, although Section 1114 contemplates that the norm for union retirees will be representation through the union, some unions typically opt out of representing their retirees in Section 1114 negotiations to avoid such conflicts.

As discussed below, opting out of the representation has the added benefit of forcing the debtor to pay for the cost of the retirees' representation. That is because there is no provision in Section 1114 that compels the debtor to pay for the cost of the Section 1114 process borne by the union, while there is a provision that allows for the Section 1114 committee to recover its professionals' costs.²⁰ While unions frequently negotiate reimbursement for these expenses as part of the Section 1114 negotiations with the debtor, a union is not assured of reimbursement absent a negotiated agreement.

For retirees who did not retire under a CBA or, in circumstances where the union opts out of representing its retirees, Section 1114(c)(2)

and (d) provides for the appointment of a committee of retired employees. The Third Circuit has held in *In re Erie Forge & Steel, Inc.*,²¹ that appointment of a committee is not automatic even if a union opts out of representing its retirees and a party in interest still must move for the appointment of a committee. Because no motion for a committee was filed in *Erie Forge*, the Third Circuit held that the appellants — a group of retirees — were bound by a stipulation their former union signed that modified retiree benefits notwithstanding a letter the union sent to these retirees stating it was not representing their interests.²²

Any party in interest may seek the appointment of a committee of retired employees if: (1) the debtor seeks to modify or not pay retiree benefits; or (2) if the court otherwise determines it is appropriate to appoint such a committee.²³ In the Delphi Chapter 11 case, for example, a group of non-union retirees initially moved to obtain an order directing the appointment of a retiree committee, but withdrew the motion when the debtor promised to comply with Section 1114 in the event it sought to modify or terminate retiree benefits for non-union retirees.²⁴ In the Delta Chapter 11 case, retirees were successful when they moved for the appointment of a committee.²⁵ Typically, however, it is the debtor that seeks appointment of the committee as a precursor to beginning the process of modifying retiree benefits.

The procedure for appointment of a committee is one of the two changes made by BAPCPA to Section 1114. For cases filed under BAPCPA, the United State Trustee, rather than the court, appoints the members of the retiree committee.²⁶ As a practical matter, this is not a significant amendment. In many districts, the United States Trustee often assisted the courts in pre-BAPCPA cases with the process of finding eligible retirees to serve on Section 1114 committees. Typically, a list of retirees is obtained from the company and/or the unions that have elected not to represent their retirees. These retirees are sent questionnaires about their willingness to serve and then, like the appointment process with respect to any committee, members are selected to ensure a cross-section of retirees are appointed.

If a committee is appointed under Section 1114, it has the same rights, powers and duties of a committee appointed under Sections 1102 and 1103 “for the purpose of carrying out the purposes of sections 1114 and

1129(a)(13)...”²⁷ This means that a Section 1114 committee may retain professionals that are compensated by the estate, consult with the debtor, investigate matters, participate in the formulation of a plan, request the appointment of a trustee or examiner, and “perform such other services as are in the interests of those represented.”²⁸ In addition, Section 1114(b)(2) also allows the court to grant permission to a Section 1114 committee to enforce the rights of retirees as individuals under the Code. Thus, a Section 1114 committee may, for example, with court permission, file claims on behalf of retirees arising from the modification of retiree benefits or seek to compel payment of retiree benefits to individual retirees if the debtor fails to pay such benefits without first obtaining appropriate relief under Section 1114.

In some cases, there may be both union representation of retirees and a Section 1114 committee. In *United Airlines*, for example, all of the unions except the union representing the pilots chose to represent their retirees and the court appointed two committees, one for non-union retirees and one for pilot retirees because of conflicts that potentially existed between the pilots and all other retirees. Because a typical negotiating tactic may be to reach an agreement with one group that sets the amount of concessions that are asked of other retiree groups, counsel that find themselves in a situation where there are multiple negotiating groups may be wise to co-ordinate their efforts. In *United Airlines*, for example, all but one of the six unions and the two committees, negotiated as a group with the debtor about the Section 1114 modifications.

The Elements of Section 1113 and 1114 Relief

The requirements for obtaining relief under Sections 1113 or 1114 are virtually identical. To obtain relief under Sections 1113 or 1114 of the Code, a debtor must prove by a preponderance of the evidence that it has satisfied nine requirements.²⁹ The nine requirements are:

1. The debtor in possession must make a proposal to the [retirees or the union] to modify the [retiree benefits plan or CBA].
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 [retirees or 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 [CBA or retiree benefits plan], the debtor must meet at reasonable times with the [union or retirees].
7. At the negotiating meetings, the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the [CBA or retiree benefits plan].
8. The [union or retirees] must have refused to accept the proposal without good cause.
9. The balance of the equities must clearly favor rejection of the [CBA or retiree benefits plan].³⁰

The failure to meet its burden of proof as to any one of these requirements is sufficient to defeat a debtor's motion under Sections 1113 or 1114.³¹ Furthermore, as the ninth element specifies, the "balance of the equities" must "*clearly*" favor rejection.³²

The Procedural Process for Obtaining Relief

The process for obtaining relief under Sections 1113 and 1114 is quite expedited given the complex valuation issues that often arise in these negotiations. As a result, these procedures favor debtors because debtors can control the timing of the process. This is particularly true under Section 1114 when a committee is formed. While a debtor's unions may have a long history with a company and may have a great deal of institutional knowledge about a debtor and its financial circumstances, typically individual retirees will not have that same level of knowledge and what they may know based upon their prior employment may be out-dated.

Thus, a retiree committee often must start from scratch to learn the company's finances in order to perform its job of negotiating modifications or proceeding to a hearing if agreement cannot be reached.

Both Sections 1113(b)(1)(A) and 1114(f)(1)(A) require the debtor to begin the process by making a proposal to the authorized negotiating representative that: (1) is based upon the most complete and reliable information that is available; (2) provides only for those modifications that are necessary to permit the reorganization of the debtor; and (3) assures that all creditors, the debtor and all affected parties are treated fairly and equitably. This proposal must be made before the debtor moves the court for relief. A proposal is based upon the most complete and reliable information that is available if it is "firmly grounded in the historical reality of operational economics, an unvarnished evaluation of [the debtor's] current straits, and a thorough analysis of all of the incidents of income and expenses that would bear on [the debtor's] ability to maintain a going concern in the future."³³

Typically, when the debtor makes a proposal it will also inform the negotiating representative about what it believes to be the "value" of its proposal in terms of annual cash savings to the debtor. Indeed it would seem that to prove the proposal is "necessary to permit reorganization," the debtor would be required to show the savings or value of its proposal. This "value" is typically referred to as the "ask" which is being requested from the labor or retiree group.³⁴

After making a proposal, Sections 1113(b)(1)(B) and 1114(f)(1)(B) require the debtor to provide the negotiating representative with "such relevant information as is necessary to evaluate the proposal." The failure to do so can result in denial of the motion.³⁵ While there is scant case law on what constitutes "relevant information" "necessary to evaluate the proposal," this information must be sufficient to justify the proposal and be the most meaningful information available.³⁶ In a recent case, a court denied an application because a debtor refused to turn over its financial modeling software to the unions.³⁷ Moreover, both Sections 1113 and 1114 contain a provision which allows the court to enter protective orders to treat as confidential any information which "could compromise the position of the debtor with respect to its competitors in the industry in

which it is engaged.”³⁸ Thus, it seems clear that Congress contemplated that a debtor seeking relief under Sections 1113 or 1114 would share highly confidential financial data and business plans with the negotiating representatives as part of the 1113 or 1114 bargaining process.

Further to evaluate whether proposed modifications or rejection “are necessary to permit reorganization” or “will treat all creditors, the debtor and all of the affected parties fairly and equitably,” the negotiating representatives, at a minimum, need to be in a position to value the debtor and evaluate its business plan. Thus, to comply with the statute, it would seem that a debtor should provide the negotiating representatives, at a minimum, with:

- (1) the company’s business plan;
- (2) an analysis of company’s performance against the plan;
- (3) data regarding cost-savings and other financial initiatives being undertaken by the company to reduce its costs in other non-labor areas;
- (4) the actuarial assumptions and analysis being used by the company to value the proposal it has given to the negotiating representative;
- (5) information about negotiations with other creditor groups; and
- (6) information about compensation and benefits currently being paid to senior management and any proposed modifications along with information about unique retirement packages for senior personnel and any proposed modifications.

Only after a debtor makes a proposal and provides the “relevant information” may the debtor file a motion seeking relief.³⁹ The purpose behind forcing a debtor to negotiate first before seeking court relief is to foster negotiated agreements.⁴⁰

While Section 1114 motions are typically made before confirmation of a plan, a district court has upheld on appeal an order allowing modifications where the motion was filed after confirmation of the plan, holding that there are no temporal limitations on the use of Section 1114.⁴¹ In that case, the effectiveness of the plan was conditioned upon Section 1114

relief. Absent such a condition (which arguably in and of itself should not determine the outcome of the motion),⁴² however, it is difficult to see how a debtor can prove relief is “necessary to permit reorganization” if it already has its confirmation order in hand.

Once a debtor files a motion, the court is required “to schedule a hearing to be held not later than fourteen days after the filing” of the motion and to give at least ten days notice of the hearing date.⁴³ Absent an agreement between the debtor and the negotiating representative to a continuance, the court only has the discretion, on the request of a party in interest, to continue the start of the hearing for up to seven days after the originally scheduled date and may only do so “if the interests of justice require” the continuance.⁴⁴

The court also has a deadline by which it must rule. A ruling must be made within 30 days after the start date for the hearing.⁴⁵ The court may only extend this deadline and rule by a later date if the debtor and the negotiating representative agree to a later date.⁴⁶ If the court fails to meet the deadline, the debtor may unilaterally impose the relief it sought pending the court’s ruling.⁴⁷

Both Sections 1113 and 1114 also provide for more expedited, emergency relief. Sections 1113(e) and 1114(h) provide that a debtor may seek to implement interim changes “if essential to the continuation of the debtor’s business, or to avoid irreparable damage to the estate.” Emergency interim relief is appropriate if the debtor will go out of business without such relief.⁴⁸ An order granting interim relief is interlocutory and as such is not subject to review at the circuit court level.⁴⁹ A request for interim relief under Sections 1113(e) or 1114(h) does not moot a debtor’s application for permanent relief and a debtor must still satisfy each of the elements necessary to obtain permanent relief at a final hearing.⁵⁰ Agreements regarding the imposition of emergency relief are often used as means to allow the parties more time to negotiate.

Prior to the filing of a motion, the only formal discovery rights a negotiating representative may have are those found in Rule 2004 of the Federal Rules of Bankruptcy Procedure. The need to resort to discovery may depend on the negotiating representatives’ trust in the debtor and the completeness of the information which is being provided. Further, noth-

ing in Sections 1113 or 1114 compel a debtor to honor every request for information that a negotiating representative makes and indeed, the debtor may refuse a request, albeit and risk denial of its motion.⁵¹ Thus, under Sections 1113 and 1114, the debtor controls the amount and type of information it will provide with the only penalty being denial of the motion if the debtor has not provided sufficient information to evaluate the proposal. Once the motion is filed, however, Rule 9014 of the Federal Rules of Bankruptcy Procedure operates to provide the negotiating parties with access to discovery under the Federal Rules of Civil Procedure.

Trial Issues

Between the date of the filing of the motion and the hearing on the motion, the debtor and the negotiating representatives must meet and negotiate at reasonable times as the failure to do so will doom a debtor's request for relief.⁵² To satisfy this element of the statute, a debtor need only show it met to negotiate; whether those meetings satisfied the spirit of the statute is left to analysis under the good faith/good cause standards.⁵³

If an agreement is not reached by the time of the hearing, however, the parties must proceed to trial. Typically, a debtor will present four categories of evidence at the hearing. First, it will typically present the testimony of its lead negotiator to explain the last offer made to the union or the retirees and all earlier offers and to explain the negotiating history between the parties. This evidence will be presented to satisfy the good cause/good faith elements of the statute. These two elements are intertwined.⁵⁴ Both of these requirements exist to foster the goals of good faith negotiations and voluntary modifications.⁵⁵

The requirement that a debtor bargain in good faith requires the court to objectively view how the debtor has conducted itself in its talks with its union or retiree committee.⁵⁶ The good faith test is objective; thus, it does not depend upon proof of the debtor's mindset.⁵⁷ Good faith is defined in the bankruptcy context as: (1) honesty of purpose; and (2) full and complete disclosure of the financial acts of the debtor.⁵⁸ To show good faith, a debtor will typically present evidence about why it needs the relief requested and the subsequent offers made to the union or the retiree committee in an attempt to reach an agreement.

While it is acceptable for a company to insist upon certain relief, a complete refusal to negotiate after making the initial proposal will likely lead to denial of the motion on the grounds that the debtor has not acted in good faith.⁵⁹ In *Mesaba Aviation Inc.*, for example, a district court recently reversed an order authorizing rejection of the debtors' CBAs because the debtor refused to negotiate snap-back provisions to allow employees to recover lost wages in the future.⁶⁰ While the district court made clear that it was not requiring the debtor to provide "snap-backs," it held that because there was no evidence in the record that the inclusion of "snap-backs" would hinder the reorganization, it was improper for the debtor to refuse to consider them. Further, a debtor cannot deflect its own bad faith by claiming bad faith on the part of the other side. While a union's or committee's bad faith may go to the good cause standard, a debtor must still independently show it acted in good faith.⁶¹

In addition to proving its own good faith at the bargaining table through objective proof that it has attempted to reach a consensual resolution and has not simply gone through the motions of meeting with its union or retiree committee, a debtor also must prove that the union or retiree committee did not have good cause to reject the company's last offer. If the union or retiree committee submit a significant counterproposal, it may be difficult for the court to find that the good cause requirement has been satisfied⁶² and thus, the debtor's negotiator will have to explain why the union or retiree offer does not allow the debtor to achieve its necessary objectives. Likewise if a debtor's offer fails to comply with the other provisions of Sections 1113 or 1114, a union or retiree committee will have good cause to reject it.⁶³ Thus, contrary to the typical rule that evidence of settlement offers or negotiating history is not admissible at trial, in Section 1113 and 1114 hearings such evidence is required for the debtor to meet its burden of proof.

The second category of evidence the debtor will likely present is the testimony of its chief financial officer or other senior executive and/or that of a financial expert to explain why the debtor needs the relief it seeks to permit its reorganization. This testimony will likely include evidence about the debtor's long-term business plan, how the projected savings from the requested modifications fit into the success of that business plan

and evidence about why the savings cannot be achieved in other areas. Such testimony also may include evidence about how the debtor's labor or retiree benefit costs compare to those of its competitors.

A debtor may likely present two types of evidence to support its contention that what it proposes treats the parties fairly and equitably. First, the debtor will likely present evidence that what it proposes is consistent with industry trends for wages and benefits and thus, argue that the offer is fair and equitable. To show that its proposal is fair and equitable, a debtor must prove it has not "place[d] a disproportionate share of the financial burden of avoiding liquidation upon" the union or retirees.⁶⁴ While courts consider such evidence, its relevance might be questioned given that employees or retirees of other non-debtor entities are not typically "creditors" or "affected parties" so it is unclear why it would matter if the proposal is fair as compared to an unrelated company's work force.

In addition, the debtor may likely present evidence about the expected treatment of other creditor groups, particularly other labor groups, to show that the relative percentage of the concession being requested is not greater for the group at issue. A debtor most likely will not be required, however, to show how every other creditor group in the case will fare early in a case, but if relief is sought later in the Chapter 11 proceeding more detail may be required.⁶⁵ Early in a case, a debtor may be able to satisfy its burden by showing that major creditors who stand to benefit if the debtor reorganizes successfully are sharing fairly in the burden with employees or retirees.⁶⁶

Finally, a debtor will present evidence to show that the balance of equities favors rejection. Bankruptcy courts typically examine six factors when determining whether the balance of the equities clearly favor rejection of the CBA or modification of retiree benefits:

- (1) the likelihood and consequences of liquidation if rejection is not permitted;
- (2) the likely reduction in the value of creditors' claims if the bargaining agreement remains in force;
- (3) the likelihood and consequences of a strike if the bargaining agreement is voided;
- (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved;
- (5) the cost-spreading abilities of the various par-

ties, taking into account the number of employees covered by the bargaining agreement and how various employees' wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtor's financial dilemma.⁶⁷

The fact that a strike may be devastating to the debtor may be outweighed if the effect of not rejecting the CBA is liquidation of the debtor.⁶⁸

The defense will, of course, offer evidence to refute each of these points and often focuses its evidence on explaining why its last counterproposal is sufficient to satisfy the debtor's needs. In addition, union or retiree committees often offer the testimony of employees or retirees to explain the real hardships the debtor's proposal will impose upon these individuals.

THE CLAIMS OF EMPLOYEES AND RETIREES ARISING FROM SECTIONS 1113 OR 1114 RELIEF

Section 101(5) defines a "claim" against the debtor to mean "any right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured."⁶⁹ Given this broad definition of what constitutes a claim, both active employees impacted by Section 1113 and retirees impacted by Section 1114 may hold claims against the estate. These claims arise if: (1) a debtor rejects a CBA or modifies its terms or modifies or terminates retiree benefits; or (2) a debtor fails to pay amounts due post-petition under a CBA or a retiree benefits plan without obtaining relief from those payment requirements through the Section 1113 or 1114 process.

One of the few areas in which the text of Sections 1113 and 1114 differ, however, is with respect to the claims against the estate that arise as a result of relief under these provisions. Section 1113 is silent on the issue of claims. Section 1114 is not. Section 1114 contains two provisions that deal with the claims of affected retirees: subsections (e)(2) and (j). In addition, Section 1129(a)(13) protects the rights of retirees post-confirmation by requiring a debtor to continue to offer retiree benefits post-effective date.⁷⁰

Administrative Expenses Under Section 1113 and 1114

Section 1114(e)(2) provides that “any payments for retiree benefits required to be made” before a plan for the debtor becomes effective are entitled to priority as an administrative expense without regard to the requirements of Section 503(b). Thus, retirees are not required to prove their right to administrative expense priority under the standards developed under Section 503(b)(1).⁷¹ Under this broadly-worded provision, retirees may be able to assert administrative priority for payments that are due to be paid post-petition, but might be classified as prepetition obligations under Section 503(b)(1)(A).⁷²

The key here, however, is that the “payment” must be one which is required. There is a split of authority with respect to the rights of an employer to modify retiree benefits without the consent of the retiree. Unlike pension benefits, ERISA does not require employees to provide for the contractual vesting of health and welfare benefits. “A medical insurance plan comes within the statutory definition of a “welfare plan,” 29 U.S.C. § 1002(1)(A), and does not come within the statutory definition of a “pension plan.” 29 U.S.C. § 1002(2)(A). ERISA establishes minimum vesting standards for *pension* benefits, making some of such benefits non-terminable, 29 U.S.C. § 1053, but Congress declined to make *welfare* benefits non-terminable.... “[Thus,] [t]he difference between retiree pension plan benefits and retiree welfare plan benefits is thus a “crucial” one.”⁷³

Because of this difference in the ERISA vesting rules, federal common law, which consists of standard principles of contract construction, determines whether retiree benefits are vested and not subject to termination. The issue, therefore, becomes one of contract construction and whether the contract that creates the right to benefits unambiguously provides that the benefits are vested, in which case, the analysis stops, or whether there is ambiguity, in which case parole evidence of the parties’ intent may be considered.⁷⁴ While union retirees may be able to look to the CBA under which they retired for support for the argument that their rights are contractual and cannot be modified post-retirement, there may be no corresponding contract for a non-union retiree to rely upon.⁷⁵ Thus, employers may be able to argue that because the retiree benefits may be terminated or modified at will, the “payments” were not “required to be

made” and do not give rise to an automatic entitlement to a priority claim under Section 1114(e)(2).

This is in stark contrast to the rights of active employees to obtain priority status for wages or benefits that are not paid post-petition. Section 1113 does not contain a provision that is comparable to Section 1114(e)(2). One circuit, the Sixth, however, has held that because Section 1113(f) prohibits the unilateral termination or modification of CBAs without compliance with Section 1113, that the failure to pay amounts due under a CBA gives rise to an administrative expense.⁷⁶ The majority of courts, however, including the Tenth,⁷⁷ Second,⁷⁸ Third,⁷⁹ and Fourth⁸⁰ Circuits hold that an employee that has not been paid amounts due under a CBA still must prove that the claim arising from the non-payment satisfies the requirements of Section 503(b) before the claim will be treated as an administrative expense.

To qualify for administrative expense treatment, a claimant typically must show that the services for which administrative expense status is sought were rendered post-petition and the services were beneficial to the debtor in the operation of its business.⁸¹ In a very recent Tenth Circuit decision, the court determined that musicians that were ready, willing, and able to rehearse or perform under their CBA even though they did not actually attend any rehearsals or perform any concerts were entitled to administrative expense priority for their unsatisfied post-petition wages and benefits.⁸²

Prepetition Claims Under Sections 1113 and 1114

In the event that retiree benefits are modified or terminated, Section 1114(j) provides that Section 502(b)(7) does not apply. Section 502(b)(7) caps the claim of an employee arising out of the termination of an employment agreement to one year.⁸³ Thus, retirees impacted by the modification or termination of their retiree benefits are entitled to file a damage claim for the full amount of their lost benefits. Nonetheless, the same vesting considerations that apply to post-petition claims might apply to prepetition unsecured claims as well.

Section 1113 does not contain any provisions which are comparable to Section 1114(j) and this would seem to imply that Section 502(b)(7)

may apply to the claims of employees arising out of rejected CBAs. However, Section 1113 addresses “collective bargaining agreements” while Section 502(b)(7) addresses “employment agreements.” Because of this difference in terminology, the better view would be that Section 502(b)(7) is not intended to apply to CBAs.

COMPARISON OF SECTIONS 1113 AND 1114 AND KEY DIFFERENCES

In conceptual, analytical, and legal terms, Sections 1113 and 1114 of the Code are in most respects the same. Both are products of Congressional reaction to specific Chapter 11 proceedings: first, the United States Supreme Court’s holding in *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), that Section 365 of the Code conferred on a debtor broad power to reject CBAs, which prompted Congress to enact Section 1113; and then the debtor’s attempted rejection of retiree benefit contracts in the first LTV Steel reorganization, which precipitated Congress’s passage of Section 1114.⁸⁴ Both establish significant limitations on a debtor’s power to reject collective bargaining agreements and health and welfare plans by imposing a heightened standard for approval of a debtor’s decision to shed itself of these agreements.⁸⁵ Both reflect a policy that the interests of labor should receive additional protection in the Chapter 11 process.⁸⁶ Both contain nearly identical language, reflecting a Congressional intent that the same standards apply to both statutes.⁸⁷

As a practical matter, however, the applications of Sections 1113 and 1114 in Chapter 11 cases differ significantly in a number of very important respects. First, rarely are a company’s annual cash outlays for the types of retirement benefits covered by Section 1114(a), which notably excludes pension benefits, significant enough to make meaningful difference to a company’s liquidity or any of the key operating ratios that financial institutions use to measure a company’s performance. Often the impact of the requested Section 1114 retiree benefit modifications may make significantly less than a one per cent difference to all of the company’s key operating ratios and, some of the ratios may not be varied at all by the projected savings. Further the “cushion” in some long-range

financial models may be larger than the expected cash savings from Section 1114 relief over the life of those models. The same is typically not true of labor savings. A company with a significant unionized labor force will, in many circumstances, be able to show how the expected savings from the reduction of current labor costs will improve its chances for a successful reorganization. Thus, the granting of relief under Section 1113 should not necessarily mean that relief under Section 1114 is required.⁸⁸ Moreover, the importance of which of the conflicting circuit views⁸⁹ of the “necessary to permit the reorganization of the debtor” standard is employed will often be more critical in Section 1114 proceedings.

Second, retirees do not have the bargaining leverage that a unionized work force has because retirees cannot go on strike. As Senator Heinz put it during the hearings on Section 1114, retirees are completely at the mercy of the company because “[u]nlike active workers...there is nothing the retirees have that the company needs.”⁹⁰ Thus, the involvement of the court in the negotiation process, through careful scrutiny of the good cause and good faith standards may be more important in Section 1114 proceedings because retirees do not have the leverage active employees have to compel a negotiated agreement.

Third, retirees will not have another opportunity to regain the benefits they may lose if Section 1114 relief is granted. Active employees may be able to negotiate wage and benefit improvements in the future if a company survives the Chapter 11 process and ultimately succeeds. Likewise general unsecured creditors may be able to negotiate improved contract terms in the future. There is no similar mechanism for retirees to renegotiate with a debtor post-confirmation. Thus, it is arguable that the modifications which are imposed upon retirees will only satisfy the “fair and equitable” requirement if the modifications only last for as long as the expected length of the debtor’s financial distress.

Fourth, Section 1113 speaks in terms of “rejection” of the CBA, while Section 1114 speaks of “modification” of “retiree benefits.” Traditionally, rejection of an executory contract is an “all or nothing” proposition leaving the court with the alternative of rejecting the CBA in its entirety or allowing the CBA to remain in place.⁹¹ The negotiation of new terms of employment is left to the debtor and the authorized CBA representatives.

The use of the term modification, however, implies that the court has some discretion to impose new “retiree benefits” upon retirees when ruling upon a Section 1114 application.

Finally, while an employee’s rights under a CBA are enforceable contractual rights, not all “retiree benefits” enjoy the same contractual status. A debtor’s health and welfare benefit plans may allow the company to make unilateral changes to a retiree’s benefits after an employee’s retirement, including terminating the benefits, without the retiree’s consent. While union retirees may be able to look to the CBA under which they retired for support for the argument that the rights are contractual and cannot be modified post-retirement, there may be no corresponding contract for a non-union retiree to rely upon.⁹² The same is not true with respect to an active employee’s rights under a CBA. Yet, Section 1114 appears to impose a requirement that the company treat these benefits as if they are vested contractual rights. This has led to conflicting authority on whether a debtor must seek approval under Section 1114 before terminating or modifying “retiree benefits” which are not vested.⁹³ As discussed herein, the recent BAPCPA amendment adding Section 1114(l), however, would appear to suggest that Congress intended Section 1114 to protect retiree benefits

THE EXTENDED REACH OF SECTION 1114 UNDER BAPCPA

The second change made by BAPCPA was to expand the scope of Section 1114. Section 1114 now applies to modifications of retiree benefits that are made within 180 days of a bankruptcy filing while the debtor is insolvent. Under new Code Section 1114(l), if there has been a pre-filing modification of retiree benefits, a party in interest may ask the court to reinstate the benefits in effect immediately before the change unless “the balance of equities clearly favors such modification.” One court has held that the filing of a motion under Section 1114(l) does not require the court to appoint a committee because Section 1114(l) contemplates that the motion may be brought by a party in interest. The court there chose not to exercise its discretion to appoint a committee anyway because the appointment of a committee would delay the debtor from emerging from Chapter 11.⁹⁴ There

are no reported decisions on the substance of the relief provided under new subsection (l) as of the date of this article, but it would seem that the balancing of the equities test would be met by modifications that are made as part of a pre-filing collective bargaining process with a debtor's unions. Absent the presence of equitable considerations, however, the import of this amendment is to prevent debtors from avoiding the Section 1114 process by modifying retiree benefits on the eve of bankruptcy. Once the benefits are reinstated, the debtor can seek to modify the benefits again by complying with the requirements of Section 1114.

THE APPROPRIATE STANDARD FOR DETERMINING WHEN REJECTION OR MODIFICATION ARE NECESSARY TO PERMIT REORGANIZATION

Sections 1113(b)(1)(a) and 1114(f)(1)(a) forbid rejection of a CBA or modifications to or termination of retiree benefits absent a finding that “such modification is necessary to permit the reorganization of the debtor.” There is a split in authority among the circuits about what the phrase “necessary to permit the reorganization” means.

The Third Circuit in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*⁹⁵ has construed “necessary” as “essential,” thereby reading “necessary to permit the reorganization of the debtor” as permitting only those modifications essential to preventing a debtor's liquidation. This interpretation has support in the legislative history as the statements of Section 1113's sponsors (and subsequently Section 1114's sponsors) suggest that this may be what Congress intended.⁹⁶

Other courts led by the Second Circuit in *Truck Drivers Local 807 v. Carey Transportation*⁹⁷ have construed “necessary to permit the reorganization of the debtor” as those changes that are necessary to “enable the debtor to complete the reorganization process successfully.”⁹⁸ Under this slightly more permissive approach, modifications are sufficiently “necessary” if “adoption of the modifications would result in significantly greater probability of the debtor's successfully reorganizing, than would result if the debtor was required to continue under the [retiree benefits plan] sought to be rejected.”⁹⁹

Construing the “necessary” standard, however, to mean something less strict than “essential” disregards the plain meaning of the Code. The United States Supreme Court has repeatedly held that the Bankruptcy Code should be interpreted according to its plain meaning.¹⁰⁰ The Tenth Circuit has observed that “[i]n ordinary usage, ‘necessary’ means ‘cannot be done without’ or ‘absolutely required.’”¹⁰¹ Thus, the unambiguous and therefore “plain” meaning of the “necessary” requirement is that a proposed reduction in retiree benefits must be “essential” or “absolutely required” to permit the debtor’s reorganization.

Support for the view that necessary means essential also can be found in the Supreme Court decision, *United Savings Ass’n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*,¹⁰² which was decided after *Carey Transportation*. There, the Court interpreted Section 362(d) of the Code, which concerns relief from the automatic stay. Specifically, the Court explained that the phrase “necessary for an effective reorganization” requires of the debtor “not merely a showing that if there is conceivably to be an effective reorganization, this property will be needed for it; but that the property is essential for an effective reorganization that is in prospect.”¹⁰³ It is a basic principle of statutory construction “that language used in one portion of a statute...should be deemed to have the same meaning as the same language used elsewhere in the statute.”¹⁰⁴ Thus, because “necessary” in Section 362 of the Code means “essential,” then “necessary” in Sections 1113 and 1114 also should mean “essential.”

This result is even clearer in the Section 1114 context, as Section 1114’s Congressional sponsors expressed unequivocally their intent to codify the strict interpretation of the “necessary” standard enunciated in *Wheeling-Pittsburgh Steel*:

It is intended that the words “necessary for the reorganization of the debtor”...should be interpreted as the Third Circuit interpreted them in [*Wheeling-Pittsburgh Steel*]...[where] the court held that a proposal to modify a labor contract is “necessary to permit reorganization” when essential to the “goal of preventing the debtor’s liquidation.”¹⁰⁵

At the same time, Senator Metzenbaum issued an admonition that the

Second Circuit's interpretation of Section 1113's "necessary" standard, in *Carey Transportation*, was not applicable under Section 1114. In *Carey Transportation*, the Second Circuit rejected the Third Circuit's "reading [of] 'necessary' [in Section 1113] as the equivalent of 'essential' or bare minimum," holding that Section 1113 required that the debtor's proposal "contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."¹⁰⁶ The *Carey Transportation* interpretation of the "necessary" standard, however, "would not afford retirees the full protections intended by [Section 1114]."¹⁰⁷

THE ABILITY OF THE BANKRUPTCY COURT TO RE-WRITE THE CBA AND ORDER THE IMPOSITION OF SPECIFIC CONTRACT TERMS POST-REJECTION

On June 29, 2006, the bankruptcy court presiding over the Northwest Airlines Chapter 11 case issued its opinion allowing for the rejection of the debtor's CBA with the Professional Flight Attendants Association ("PFAA").¹⁰⁸ Although the court sided with the debtor and allowed for the rejection of the CBA, labor groups viewed the decision as a victory for labor because it required the debtor to impose the terms of its last and best offer following rejection.¹⁰⁹

The procedural history leading up to this ruling was quite lengthy. On October 12, 2005, Northwest filed its Section 1113 motion.¹¹⁰ By agreement, the hearing was not held until January 17, 2006 and concluded after eight days of testimony on February 3, 2005.¹¹¹ The parties negotiated before, during and after the hearing and reached a tentative agreement on March 1, 2006, subject to ratification by the PFAA's membership.¹¹² The flight attendants, however, rejected the tentative agreement by a vote of four to one and the PFAA faced an election, which it ultimately lost, to change the designated CBA representative.¹¹³

Northwest and the PFAA continued to negotiate, but on June 6, 2006, Northwest asked the court to rule.¹¹⁴ On June 29, 2006, the court ruled in Northwest's favor, however, the court also found that Northwest obtained its relief by showing that the union had rejected the last proposal — the

March 1, 2006, tentative agreement — for good cause. Moreover, the parties had also advised the court that they would not seek to “undo” their negotiation progress by retreating to earlier, less favorable proposals in the event agreement could not be reached.¹¹⁵ Thus, the court ordered that the terms of employment to be imposed upon flight attendants should be those set forth in the March 1, 2006, tentative agreement and not an earlier offer which Northwest wanted to impose. The court acknowledged that its ruling might cause the union to be lax in obtaining approval of tentative agreements since the court’s ruling could not be worse than the company’s last offer.¹¹⁶ Nonetheless, the court held that absent bad faith, which was not present, this was not a good enough reason not to order the imposition of Northwest’s last offer.¹¹⁷

Labor views this ruling as a victory for precisely the same reasons the debtor argued this ruling might chill negotiations — it sets a floor on the union’s downside and alters the usual dynamic in negotiations where a party settles because the risk of a ruling on the merits may be worse than the last settlement offer.

At first blush, squaring this ruling with the decision of other courts on the issue is difficult. Most courts have held that the only available options are rejection of the CBA in its entirety or denial of motion, shying away from re-writing the terms of the CBA on the grounds that the courts are ill-equipped to rewrite the parties contracts.¹¹⁸ Indeed, courts uniformly refuse to rewrite contracts rejected under Section 365 and there does not appear to be a principled basis for the effect of rejection under Section 365 to be different from the effect under Section 1113. One court, however, attempted to find such a basis, albeit in dicta, by noting that Section 1113(c)(1) uses the phrase “necessary modifications” thereby suggesting that rejection is not the only form of relief allowed under Section 1113.¹¹⁹

But upon careful review the holding in *Northwest Airlines* is legally justifiable. As the court noted, its good cause finding was based on the last offer made to the flight attendants. Allowing a debtor to reject a CBA and then to impose an earlier offer which the court might have found was rejected by the union with good cause would be inconsistent with the goal of the statute to impose heightened scrutiny on the rejection decision. In other words, the debtor ought to be bound by the offer it presents to the

court as the offer rejected by the negotiating representative without good cause. Imposing that requirement upon the debtor that prevails under Section 1113 prevents debtors from obtaining relief and then imposing terms and conditions of employment that the court might not have found sufficient to allow rejection of the CBA.

Since it ruled on June 29, 2006, the new representative of Northwest's flight attendants, the Association of Flight Attendants — CWA ("AFA") also reached a tentative agreement with Northwest, which its membership also rejected, this time by a ten percent margin.¹²⁰ The AFA moved the court to order Northwest to impose the terms of this latest rejected tentative agreement, but the court denied the motion. The court concluded its earlier order was final and the AFA had not shown good cause to modify it.¹²¹ Moreover, the court agreed with Northwest that imposing this rejected post-ruling offer might lead union members to believe there is no risk in rejecting a proposal.¹²² This subsequent result makes sense if the basis for the court's June 29, 2006 ruling was simply to compel Northwest to honor what it represented to the court was the basis for obtaining Section 1113 relief in the first place.

The lesson to be learned from the Northwest decisions is that the debtor may be required to impose only the offer that forms the basis of the request for relief. This should not lead the debtor to refuse to formally vary from the initial proposal it makes. Courts have held that a debtor's refusal to negotiate after submitting its initial proposal constitutes bad faith and justifies denial of an application under Section 1113 or 1114.¹²³ One method for dealing with these issues, which is often used in these negotiations, is an agreement between the negotiating participants that after negotiations reach a certain point, proposals between the parties are treated on an informal basis and not presented to the court should an agreement not be reached.

THE ABILITY OF DEBTORS TO RESORT TO SELF-HELP RATHER THAN COMPLY WITH SECTION 1114

As explained above, the Federal Circuits are split on the issue of whether health and welfare benefits are vested or whether an employer may

unilaterally change such benefits without the consent of the affected retirees.¹²⁴ This fact has led to a split in lower court case law about whether an employer that has the right to unilaterally modify or terminate retiree benefits may do so post-filing without complying with Section 1114.

The *Farmland Industries* decision is the leading decision holding that even employers with a unilateral right to modify retiree benefits outside of bankruptcy must comply with Section 1114's requirements. The *Farmland Industries* court addressed this issue in the context of a motion by the debtor to terminate certain retiree benefits and the objection of certain retirees to that motion because the procedures set forth in Section 1114 had not been satisfied, including the appointment of a committee.¹²⁵ The *Farmland Industries* court concluded that compliance with Section 1114 was required based upon the plain language of the statute,¹²⁶ which provides that: "[n]otwithstanding any other provision of this title, the debtor in possession, or the trustee, ... shall timely pay and shall not modify any retiree benefits" unless the court orders the modification or the parties agree to modifications.¹²⁷ Because there was nothing in the statute that suggested that compliance with Section 1114 would not be mandatory and the legislative history also supported this conclusion,¹²⁸ the *Farmland Industries* court concluded that the debtor was required to follow Section 1114's procedures and denied the debtor's motion for its failure to do so.¹²⁹

The court also found support in the other protections added into the Code for retirees at the time of enactment of Section 1114, such as the addition of Section 1129(a)(13) and concluded that Congress knowingly intended to protect retirees.¹³⁰ This decision, however, does not provide much comfort for retirees as the court noted that once a plan is confirmed and the debtor emerges from bankruptcy, it would be freed from the constraints of Section 1114 and entitled to take any action that federal law would allow it to take with respect to retiree benefits.¹³¹ The court also refused to appoint a committee finding that doing so would delay the case. The court left open whether it would appoint a committee in the future should the debtor elect to proceed further with a motion to modify retiree benefits.¹³²

The two leading decisions reaching the opposite result are *In re Dorskocil Co.*,¹³³ and *Chateaugay Corp. v. LTV Steel Co.*¹³⁴ In *Chateaugay*,

the agreement under which the benefits were due, a national agreement involving the United Mine Workers that also provided for the UMW Benefit Fund to assume responsibility for these liabilities upon expiration of the agreement, had expired. Thus, the court concluded that Section 1114 did not require the debtor to continue to provide the retiree benefits as nothing in Section 1114 required the continuation of benefits that were no longer contractually in existence.¹³⁵ Accordingly the Second Circuit upheld the bankruptcy court's determination that the benefit fund was responsible for the benefits and not the debtor.¹³⁶

The *Doskocil* court relied upon *Chateaugay* to expand the holding to cover situations where the retiree benefits were in place as of the petition date but subject to unilateral termination or modification by the employer.¹³⁷ The court focused upon the statements of Senator Byrd, a co-sponsor of Section 1114 where he stated that the bill would protect against actions by companies that "have a legal and contractual obligation to their retirees."¹³⁸ Thus, the *Doskocil* court concluded that compliance with Section 1114 was not required.¹³⁹ Further the court reasoned that since Section 1114 was modeled after Section 1113 and Section 1113 only applies to contracts, Congress would not have intended Section 1114 to be applied in circumstances where the debtor had no contractual obligation to continue to provide retiree benefits.¹⁴⁰

The addition of new subsection (1) to Section 1114 would seem to suggest that Congress intends Section 1114 to apply to all modifications of retiree benefits regardless of whether the benefits are vested or not. New subsection (1), which allows the courts to reach back and undo modifications made within the 180 days prior to the filing, is not limited to modifications made where the benefits are vested. While a court might conclude that the balance of the equities test is not met if the debtor had the right to make the modifications in the first place, nothing within the language of this new subsection suggests that Congress intended to limit Section 1114 to vested "retiree" benefits.

A recent Third Circuit decision also supports the view that compliance with Section 1114 is required. In *In re General Datacomm Industries, Inc.*,¹⁴¹ the debtor maintained a long term senior executive benefit plan for four senior executives which provided, among other things,

for continuation of health benefits upon retirement. After the debtor filed for bankruptcy, it told the covered executives, all of whom were older than age 65, that they would be terminated without cause. Before terminating the executives, however, the debtor moved to reject the long term benefit plan under Section 365, asserting that Section 1114 did not apply because none of the covered executives were retired.¹⁴² The bankruptcy court denied the motion, holding that Section 1114 applied.¹⁴³ The Third Circuit affirmed, finding that the debtor's construction of when Section 1114 would apply would elevate form over substance. The court held that the deliberate and involuntary termination of an employee on the verge of retirement and where the employee has met all conditions of retirement cannot deprive the retiree of the protections of Section 1114.¹⁴⁴ Given the obvious gamesmanship surrounding this debtor's motion, the ruling is not surprising. It does suggest, however, that the Third Circuit views enforcement of the procedural protections of Section 1114 as required, lending credence to the view that while in bankruptcy, debtors must comply with Section 1114.

NOTES

¹ See, e.g., Michael Schroeder, *Congress Seeks to Rein In Special Executive Pensions — Proposal Would Push Firms to Ensure Workers' Plans Get Adequate Funding First*, The Wall Street Journal, Jan. 25, 2006, at A1.; Michael Schroeder, *Big Stakes in Ailing Airlines Raise Questions for U.S. Pension Agency*, The Wall Street Journal, Nov. 3, 2005, at A1; Susan Carey, *Pilots Won't Fight UAL on Pensions — Unions To Get \$550 Million In Convertible Notes in '05, Setting Precedent for Others*, The Wall Street Journal, Dec. 17, 2004, at A3; Ellen Schultz and Theo Francis, *Most Workers in Dark on Health of their Pensions — US Airways Killed a Plan That Pilots Had No Inkling Was in Financial Danger*, The Wall Street Journal, July 1, 2003, at A1.

² In July 2006, the Financial Accounting Standards Board affirmed its "Employers Accounting for Defined Benefit Pension and Other Post-Retirement Plans," which requires companies to recognize the funding status of pension and other post-retirement ("OPEB") plans on their balance sheets. See also Mary Williams Walsh, *Pension Rule Could Lower Net Worth's*, The

New York Times, April 14, 2006, at 1C.

³ *In re Farmland Indus., Inc.*, 294 B.R. 903, 919 (Bankr. W.D. Mo. 2003) (court declined to apply Section 1114 to deferred compensation benefits or benefits based upon retirement).

⁴ *In re New York Trap Rock Corporation*, 126 B.R. 19, 22 (Bankr. S.D.N.Y. 1991).

⁵ *Id.*

⁶ *Id.*

⁷ *In re Horizon Natural Resources Co.*, 316 B.R. 268, 275-279 (Bankr. E.D. Ky. 2004); *but see In re Westmoreland Coal Co.*, 213 B.R. 1, 19-20 (Bankr. D. Colo. 1997) (Section 1114(a) only applies to voluntary plans and not to statutorily-imposed obligations or amounts due following prepetition termination of a plan).

⁸ *Horizon Natural Resources, supra* at 275-79.

⁹ *Id.*

¹⁰ *Id.* at 275.

¹¹ *New York Trap Rock, supra*, 126 B.R. at 22.

¹² *In re A.C.E. Elevator Co.*, 347 B.R. 473, 486 (Bankr. S.D.N.Y. 2006); *In re Certified Air Techs. Inc.*, 300 B.R. 355, 370-71 (Bankr. C.D. Calif. 2003).

¹³ 11 U.S.C. §§ 1114(b), (m).

¹⁴ Compare, *Farmland Indus., supra*, 294 B.R. at 903; with *Chateaugay Corp. v. LTV Steel Co.*, 943 F.2d 1203 (2d Cir. 1991) and *In re Doskocil Companies, Inc.*, 130 B.R. 870 (Bankr. D. Kan. 1991).

¹⁵ 11 U.S.C. § 1114(c)(1).

¹⁶ *Nelson v. Stewart*, 422 F.3d 463, 471 (7th Cir. 2005).

¹⁷ *Allied Chem. & Alkali Workers v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 173 (1971).

¹⁸ *Nelson, supra*, 422 F.3d at 463.

¹⁹ *Id.* at 474-75.

²⁰ 11 U.S.C. § 1114(b)(2).

²¹ 418 F.3d 270, 276 (3rd Cir. 2005).

²² *Id.* at 276-77.

²³ 11 U.S.C. § 1114(d); *In re Anchor Glass Container Corp.*, 342 B.R. 878 (Bankr. M.D. Fla. 2005).

²⁴ *In re Delphi Corp.*, 05-44481, Docket Nos. 1284, 1285 (Bankr. S.D.N.Y. Nov. 28, 2005).

²⁵ *In re Delta Airlines, Inc.*, 05-17923, Docket No. 1125 (Bankr. S.D.N.Y.

Nov. 10, 2005).

²⁶ 11 U.S.C. § 1114(d).

²⁷ 11 U.S.C. § 1114(b)(2).

²⁸ 11 U.S.C. § 1103(c).

²⁹ See *In re Indiana Grocery Co., Inc.*, 176 B.R. 182, 191 (Bankr. S.D. Ind. 1990).

³⁰ 11 U.S.C. §§ 1113(b), (c); 1114(b),(c); see *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984); see also *Horizon Natural Resources, supra*, 316 B.R. at 281 (noting that the nine elements are the same under Sections 1113 and 1114).

³¹ *In re Garofolo's Finer Foods, Inc.*, 117 B.R. 363, 370 (Bankr. N.D. Ill. 1990); see also *In re National Forge Co.*, 279 B.R. 493, 500 (Bankr. D. Del. 2002).

³² See *In re Indiana Grocery Co., supra*, 176 B.R. at 196 (court denied Section 1113(c) motion where equities "militated in favor" of rejection but did not "clearly favor rejection" of collective bargaining agreement (court's emphasis)).

³³ *In re Mesaba Aviation, Inc.*, 341 B.R. 693, 712 (Bankr. D. Minn 2006).

³⁴ See, e.g., *In re Northwest Airlines Corp.*, 346 B.R. 307, 322-24 (Bankr. S.D.N.Y. 2006) (discussion of the "ask").

³⁵ *Mesaba, supra*, 341 B.R. at 713-17.

³⁶ *Id.* at 714.

³⁷ *Id.* at 713-17.

³⁸ 11 U.S.C. §§ 1113(d)(3), 1114(k)(3).

³⁹ 11 U.S.C. §§ 1113(b)(1); 1114(f)(1).

⁴⁰ *In re Royal Composing Room, Inc.*, 62 B.R. 403, 411 (Bankr. S.D.N.Y. 1986).

⁴¹ *In re Ormet Corp.*, 2006 U.S. Dist. LEXIS 14947 at ** 12-15 (S.D. Ohio March 31, 2006).

⁴² See, e.g., *In re Lady H Coal Co., Inc.*, 193 B.R. 233, 242 (Bankr. S.D. W.Va. 1996); *In re GCI, Inc.*, 131 B.R. 685, 693 (Bankr. N.D. Ind. 1991); *In re Walway Co.*, 69 B.R. 967, 973 (Bankr. E.D. Mich. 1987).

⁴³ 11 U.S.C. §§ 1113(d)(1); 1114(k)(1).

⁴⁴ *Id.*

⁴⁵ 11 U.S.C. §§ 1113(d)(2); 1114(k)(2).

⁴⁶ *Id.*

⁴⁷ *Id.*

- ⁴⁸ *In re Russell Transfer, Inc.*, 48 B.R. 241 (Bankr. W.D. Va. 1985).
- ⁴⁹ 28 U.S.C. § 158(d); *In re Landmark Hotel & Casino, Inc.*, 872 F.2d 857 (9th Cir. 1989) (court dismissed appeal from 1113(e) order for lack of jurisdiction).
- ⁵⁰ 11 U.S.C. §§ 1113(e), 1114(h)(3).
- ⁵¹ *Mesaba Aviation, supra*, 341 B.R. at 713-17.
- ⁵² See 11 U.S.C. §§ 1113 (b)(2), 1114(f)(2).
- ⁵³ *Mesaba Aviation, supra*, 341 B.R. at 719.
- ⁵⁴ *Horsehead Indus., supra*, 300 B.R. at 584.
- ⁵⁵ *Id.* at 485.
- ⁵⁶ *GCI, supra*, 131 B.R. at 693.
- ⁵⁷ *Id.*
- ⁵⁸ *In re Harper*, 11 B.R. 395, 396 (Bankr. N.D. Ga. 1981); accord *GCI, supra*, 131 B.R. at 693.
- ⁵⁹ *Association of Flight Attendants — CWA, AFL-CIO v. Mesaba Aviation, Inc.*, 2006 U.S. Dist. LEXIS 65450 at ** 45-46 (D. Minn. Sept. 13, 2006); *Delta Airlines, supra*, 342 B.R. at 694-95; *Horsehead Indus., supra*, 300 B.R. at 587-88; *American Provisions, supra*, 44 B.R. at 911.
- ⁶⁰ *Mesaba Aviation, supra*, 2006 U.S. Dist. LEXIS at * 46-49.
- ⁶¹ *GCI, supra*, 131 B.R. at 697.
- ⁶² *Sun Glo, supra*, 144 B.R. at 63-64.
- ⁶³ *In re Speco Corp.*, 195 B.R. 674, 677 (Bankr. S.D. Ohio 1996); *In re Express Freight Lines, Inc.*, 119 B.R. 1006, 1017 (Bankr. E.D. Wisc. 1990); *In re K&B Mounting, Inc.*, 50 B.R. 460, 468 (Bankr. N.D. Ind. 1985).
- ⁶⁴ *In re National Forge, Co.*, 279 B.R. 493, 501 (Bankr. W. D. Pa. 2002).
- ⁶⁵ *Mesaba Aviation, supra*, 2006 U.S. Dist. LEXIS at * 51-56.
- ⁶⁶ *Id.* at 54-55.
- ⁶⁷ *Carey Truck Drivers' Local 807 v. Carey Transportation*, 816 F.2d 82, 93 (2d Cir. 1986); *Mesaba, supra*, 341 B.R. at 757.
- ⁶⁸ *Mesaba, supra*, 2006 U.S. Dist. LEXIS at * 61-62.
- ⁶⁹ 11 U.S.C. § 101(5).
- ⁷⁰ 11 U.S.C. 1129(a)(13).
- ⁷¹ See *A.C.E. Elevator, supra*, 347 B.R. at 484-85; but see *Adventure Resources Inc. v. Holland*, 193 B.R. 787 (S.D. W. Va. 1996), *rev'd in part on other grounds, aff'd in part*, 137 F.3d 786 (4th Cir. 1998), *cert. denied*, 525 U.S. 962 (1998) (court construes Section 1114(e) narrowly to exclude obligations to fund that are prepetition in nature).

⁷² *A.C.E. Elevator, supra*, 347 B.R. 486.

⁷³ *See Musto v. American Gen. Corp.*, 861 F.2d 897, 901 n.2 (6th Cir. 1988), cert. denied, 490 1020 (1989) quoting *In re White Farm Equipment Co.*, 788 F.2d 1186, 1191, 1193 (6th Cir. 1986).

⁷⁴ *See, e.g., UFCW Local 150-A v. Dubuque Packing Co.*, 756 F.2d 66, 70 (8th Cir. 1985).

⁷⁵ *Compare Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) and *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1478 (6th Cir. 1983) with *UAW v. Skinner Engine Co.*, 188 F.3d 976, 980 (3d Cir. 1999) and *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1515 (8th Cir. 1988).

⁷⁶ *See In re Unimet*, 842 F.2d 879 (6th Cir. 1988).

⁷⁷ *Peters v. Pikes Peak Musicians Association*, 462 F.3d 1265 (10th Cir. 2006).

⁷⁸ *In re Ionosphere Clubs, Inc.*, 22 F.3d 403, 407 (2d Cir. 1994).

⁷⁹ *In re Roth American, Inc.*, 975 F.2d 949, 956 (3d Cir. 1992).

⁸⁰ *Adventure Res., Inc. v. Holland*, 137 F.3d 786, 796 (4th Cir. 1998).

⁸¹ *Peters, supra*, 462 F.3d at 1265.

⁸² *Id.*

⁸³ 11 U.S.C. § 502(b)(7).

⁸⁴ For a discussion of the respective legislative histories of Sections 1113 and 1114 see Leslie T. Gladstone, *Retiree Benefits Bankruptcy Protection Act of 1988: Welfare Benefits In Need Of Reform*, 65 Am. Bankr. L.J. 427 (1991); Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a Collective Bargaining Agreement in a Corporate Reorganization*, 64 Am. Bankr. L.J. 133 (1990).

⁸⁵ *Compare NLRB v. Bildisco, supra*, 465 U.S. at 523 (the “traditional” standard for rejection of an executory contract under Section 365 is the “business judgment” standard) with 11 U.S.C. §§ 1113 (b), (c), 1114 (b), (c).

⁸⁶ *Farmland Indus., supra*, 294 B.R. at 918 (Bankr. W.D. Mo. 2003) (it is “abundantly clear that Congress knowingly acted to provide special protections for retiree benefits when it enacted § 1114”).

⁸⁷ *In re Ionosphere Clubs, Inc.*, 134 B.R. 515, 519-20 (Bankr. S.D.N.Y. 1991).

⁸⁸ *See, e.g., In re Horsehead Indus. Inc.*, 300 B.R. 573, 583 (Bankr. S.D.N.Y. 2003) (court allowed relief under Section 1113 while denying relief under Section 1114).

⁸⁹ Compare *Carey Transportation*, *supra*, 816 F.2d at 90 with *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1089 (3d Cir. 1986).

⁹⁰ S. Rep. 100-119, Hearings at 16 (1987).

⁹¹ See e.g., *In re Alabama Symphony Assoc.*, 155 B.R. 556, 571-73 (Bankr. N.D. Ala. 1993); *In re Sun Glo Coal Co.*, 144 B.R. 58, 61 (Bankr. E.D. Ky. 1992); *In re Sierra Steel Corp.*, 88 B.R. 314, 317 (D. Colo. 1987); *Russell Transfer*, *supra*, 48 B.R. at 243-44; but see *Northwest Airlines*, *supra*, 346 B.R. at 331-32 and discussion *infra*.

⁹² Compare *Keffer v. H.K. Porter Co.*, 872 F.2d 60, 64 (4th Cir. 1989) and *UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1478 (6th Cir. 1983) with *UAW v. Skinner Engine Co.*, 188 F.3d 976, 980 (3d Cir. 1999) and *Anderson v. Alpha Portland Indus., Inc.*, 836 F.2d 1512, 1515 (8th Cir. 1988).

⁹³ Compare *Farmland Indus.*, *supra*, 294 B.R. at 914-19 with *Chateaugay*, *supra*, 945 F.2d at 1205 and *Doskocil*, *supra*, 130 B.R. at 870.

⁹⁴ *Anchor Glass*, *supra*, 342 B.R. at 882.

⁹⁵ 791 F.2d 1074, 1089 (3d Cir. 1986).

⁹⁶ Compare *Wheeling-Pittsburgh Steel*, *supra*, 791 F.2d at 1081-89 (discussion of Section 1113's legislative history) with S. Rep. 100-199.

⁹⁷ 816 F.2d 82 (2d Cir. 1987).

⁹⁸ *Id.* at 90.

⁹⁹ *In re Cook United*, 50 B.R. 561, 563 (Bankr. N.D. Ohio 1985), quoting *In re Wright Airlines, Inc.*, No. 84-02493, slip op. at 4 (Bankr. N.D. Ohio January 17, 1985).

¹⁰⁰ See *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989).

¹⁰¹ *In re Mile Hi Systems Metal Systems, Inc.*, 899 F.2d 887, 892 (10th Cir. 1990); see also *In re Pierce Terminal Warehouse, Inc.*, 133 B.R. 639, 647 (Bankr. N.D. Iowa 1991) (“‘Necessary’ and ‘essential’ are synonymous”).

¹⁰² 484 U.S. 365, 375-76 (1988).

¹⁰³ *Id.* (second emphasis in original).

¹⁰⁴ *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993).

¹⁰⁵ 134 Cong. Rec. S. 6823-27 (daily ed. May 26, 1988) (Statement of Sen. Metzenbaum). See also 134 Cong. Rec. S 6823-02, 13v (1988) (Statement of Sen. Heinz) (“The bill will protect retirees...[ensuring that] benefits would be continued throughout the proceedings unless it was necessary to discontinue

them to keep the company alive”).

¹⁰⁶ 816 F.2d at 89.

¹⁰⁷ 134 Cong. Rec. S 6823-02, 8 (1988) (Statement of Sen. Metzenbaum).

¹⁰⁸ *Northwest Airlines, supra*, 346 B.R. at 307.

¹⁰⁹ *Id.* at 331-32.

¹¹⁰ *Id.* at 313.

¹¹¹ *Id.* at 316-17.

¹¹² *Id.* at 317-18.

¹¹³ *Id.* at 318.

¹¹⁴ *Id.* at 319.

¹¹⁵ *Id.* at 331-32.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ See e.g., *Alabama Symphony Assoc., supra*, 155 B.R. at 571-73; *Sun Glo Coal, supra*, 144 B.R. at 61; *Sierra Steel, supra*, 88 B.R. at 317; *Russell Transfer, supra*, 48 B.R. at 243-44.

¹¹⁹ *Garofolo's Finer Foods, supra*, 117 B.R. at 369-370.

¹²⁰ *In re Northwest Airlines Corp.*, 346 B.R. 333, 337 (Bankr. S.D.N.Y. 2006).

¹²¹ *Id.* at 345.

¹²² *Id.*

¹²³ *In re Delta Airlines, Inc.*, 342 B.R. 665, 694-95 (Bankr. S.D.N.Y. 2006) (“implicit if not explicit in the mandate in subsection (b)(2) to ‘confer in good faith’ or to ‘negotiate in good faith over proposed modifications’ . . . is the willingness to moderate debtor’s initial proposal referred to in subsection (b)(1)(A) and to reach a compromise.”).

¹²⁴ *Compare Keffer, supra*, 872 F.2d at 64 and *Yard-Man, supra*, 716 F.2d at 1478 with *Skinner Engine, supra*, 188 at 980 and *Anderson, supra*, 836 F.2d at 1515.

¹²⁵ 294 B.R. at 905.

¹²⁶ *Id.* at 916.

¹²⁷ 11 U.S.C. § 1114(e)(1).

¹²⁸ The *Farmland Industries* court relied upon the following passage from the legislative history:

[The bill]...requires a company to continue paying for these [retiree health] benefits even after the termination of a collective bargaining agreement. Only if a company can prove a modification is absolutely necessary and that it treats everyone fairly can a court, after a hearing, order any mod-

ifications.

Retiree Benefits Security Act of 1987: Hearings on S. 548 Before the Subcomm. on Courts and Administrative Practice of the Senate Comm. on the Judiciary, 100th Cong., 1st Sess. 14 (1987) (statement of Sen. Metzenbaum).

¹²⁹ 294 B.R. at 917-18.

¹³⁰ *Id.*

¹³¹ *Id.* at 920 n.19.

¹³² *Id.* at 919-20.

¹³³ 130 B.R. 870 (Bankr. D. Kan. 1991).

¹³⁴ 945 F.2d 1205 (2d Cir. 1991); *see also Retired Western Union Employees Ass'n v. New Valley Corp.*, 1993 U.S. Dist. LEXIS 21420 (D.N.J. Jan 28, 1993) (court affirmed bankruptcy court decision finding that Section 1114 does not apply if retiree plan may be terminated or modified at the sole discretion of the employer); *accord In re North American Royalties, Inc.*, 276 B.R. 860 (Bankr. S.D. Tenn. 2002) (contractual right to terminate plan is different from modification of the plan which Section 1114 governs, therefore, debtor may terminate plan without complying with Section 1114).

¹³⁵ *Id.* at 1209-11.

¹³⁶ *Id.*

¹³⁷ 130 B.R. at 876-77.

¹³⁸ *Id.* at 875.

¹³⁹ *Id.* at 875-77.

¹⁴⁰ *Id.*

¹⁴¹ 407 F.3d 616 (3d Cir. 2005)

¹⁴² *Id.* at 617-19.

¹⁴³ *Id.* at 619.

¹⁴⁴ *Id.* at 624.

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