Bankruptcy and Labor Law Conflict from NLRB v. Bildisco and Bildisco to the Bankruptcy Amendments of 1984

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NOTE

BANKRUPTCY AND LABOR LAW CONFLICT FROM NLRB V. BILDISCO & BILDISCO TO THE BANKRUPTCY AMENDMENTS OF 1984

The issue of collective bargaining agreements received attention from both the judiciary and Congress in 1984. Yet nearly two years later, the rights of labor and management are still unclear. Both branches of the federal government have attempted to articulate a workable standard permitting rejection of collective bargaining agreements by chapter eleven debtors-in-possession. Rejection of collective bargaining agreements may be subject to either the 1984 Supreme Court decision in Bildisco or section 1113 of the Bankruptcy Code. Those cases filed before July 10, 1984 are governed by Bildisco, and those after that date are governed by the Bankruptcy Code.

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"Statutory interpretation requires more than concentration upon isolated words; rather, consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions."1 For several decades,2 the judiciary attempted to reconcile provisions of the National Labor Relations Act (NLRA)3 and the Bankruptcy Code.4 The conflict arose when a fi-

2. See infra note 25.
financially troubled business filed for reorganization under chapter eleven of the Bankruptcy Code and sought permission to reject its collective bargaining agreement as part of its plan to continue operations. This dilemma appeared with such frequency in the last decade, that Congress finally addressed the issue.

Section 365 of the Bankruptcy Code allows a trustee, with the

5. See 11 U.S.C. §§ 1101-74. Chapter 11 gives a financially troubled business a bankruptcy option. The debtor does not have to completely terminate his business. Instead he may file a plan of reorganization, setting forth proposals for the rehabilitation of the business. A debtor may commence a voluntary case in bankruptcy by filing a petition under section 301 of the Bankruptcy Code. Id. § 301. Section 109 of the Code sets out the eligibility requirements for filing a chapter 11 petition. “Only a person that may be a debtor under chapter 7 of this title, except a stockholder or a commodity broker, and a railroad may be a debtor under chapter 11 of this title.” Id. § 109(d). The only “persons” not allowed to be debtors in chapter 7 are railroads, insurance companies, banks, or similar financial institutions. Id. § 109(b). Section 101(33) defines person as an “individual, partnership, and corporation, but does not include a governmental unit.” Id. § 101(33).

6. See id. § 365(a). Under the Code, an executory contract such as a collective bargaining agreement is subject to certain exceptions. That section states that “...the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” Id.

7. The presumption in chapter 11 is that the business will be continued. See 11 U.S.C. § 1108.


10. In a chapter 11 case, the court has the choice of either allowing the debtor to remain in control or appointing a trustee. See 11 U.S.C. § 1104. The court will appoint a trustee if: (1) there is cause, such as fraud or mismanagement by the debtor; or (2) appointment is in the interests of the creditors or any other interested party.
court's permission, to reject executory contracts. Section 8(d) of the NLRA, however, prohibits unilateral modification or termination of a collective bargaining agreement. The question became whether the bankruptcy procedure allowed rejection of an executory labor contract or whether the NLRA prohibited such termination. In February of 1984, the United States Supreme Court apparently settled the issue in *NLRB v. Bildisco & Bildisco*, by holding that the contract could be rejected.

A month later, however, Congress offered its own solution to the conflict by introducing an amendment to the Bankruptcy Code. The original amendment directly reversed the Supreme Court's decision. After three months, Congress adopted section 1113 of the Bankruptcy Code. The amendment established the procedures for rejection of a collective bargaining agreement by a trustee or debtor-in-possession.

This Note is an analysis of the accommodation of federal labor and bankruptcy laws by the Bankruptcy Amendment and Federal Judgeship Act of 1984. To provide the background for the congressional action, the *Bildisco* decision will be reviewed. The requirements and standards of section 1113 are then examined. This Note continues by analyzing the practical application of section 1113. Finally, this Note suggests appropriate application of section 1113 by the bankruptcy courts.

I. Judicial Solution to the Conflict: Bildisco

The *Bildisco* decision was intended to answer the questions regarding rejection of a collective bargaining agreement by a debtor in possession. The Court addressed three issues. First, the Court held that

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*Id.*; see also H.R. REP. No. 595, 95th Cong., 2d Sess. 220, 221, reprinted in 1978 U.S. Code Cong. & Ad. News 5963, 6180. The presumption is that the debtor will remain in possession and manage the business unless the court finds the parties in interest would be better served by a trustee. *Id.*


14. *Id.* at 1196. The Court stated that the Bankruptcy Code permits rejection of all executory contracts with some exceptions. *Id.* at 1196. The Court also found that it was not disputed that the parties’ unexpired collective bargaining agreement was an executory contract. *Id.* at 1194.


16. *See id.* The amendment as originally proposed required that a debtor show that it would be forced into liquidation if not permitted to reject the labor contract. *See also infra* notes 50-51 and accompanying text.


18. *See infra* notes 77-103 and accompanying text.
a debtor-in-possession has the power to reject a collective bargaining agreement. Second, the Court articulated a standard for bankruptcy courts to follow in determining whether rejection is warranted. Third, the Court addressed the issue of when the debtor-in-possession is allowed to reject the contract.

A. Power to Reject Executory Labor Contracts

The rationale for granting a debtor-in-possession the power to reject a collective bargaining agreement evolved from a literal reading of the Bankruptcy Code, to a more modern view that a debtor-in-possession is a new entity. Earlier cases treated labor contracts as any other executory contract.\(^{19}\) It was not until the early 1960’s that courts began to view rejection of collective bargaining agreements in light of labor laws.\(^{20}\)

Section 365 of the Bankruptcy Code gives a trustee the power, with the bankruptcy court’s permission, to reject executory contracts.\(^{21}\) The debtor-in-possession is given these same rights in a chapter eleven reorganization.\(^{22}\) The Code does not define executory,\(^{23}\) but the term commonly refers to contracts in “which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other.”\(^{24}\) Courts have had little or no problem finding collective bargaining agreements to be executory.\(^{25}\) It follows, therefore, that

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21. 11 U.S.C. § 365(a); see supra note 6.

22. 11 U.S.C. § 1107. The only right denied the debtor-in-possession is the right to compensation. Id.

23. See S. REP. No. 989, 95th Cong., 2d Sess. 58, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5787, 5844. “Though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides.” Id.


25. The courts began considering labor contracts as executory in the late 1950’s. See In re Klaber Bros., 173 F. Supp. 83 (S.D.N.Y. 1959). The Klaber court perceived no difference between commercial contracts and those entered into under the NLRA.
a collective bargaining agreement could likewise be rejected.

Over the years, however, courts realized that the rejection of collective bargaining agreements may be contrary to labor laws. Section 8(d) of the NLRA prohibits the unilateral termination of labor contracts. To avoid the restriction of section 8(d), the "new entity" theory was created. Under this theory, courts have held that a debtor could reject its labor contract because it was not the same entity that existed before bankruptcy. The Supreme Court, how-

Id. at 85. The court also stated that the NLRB had no jurisdiction over executory contracts in bankruptcy cases. Id.

In the mid-1960's, a federal district court, although disallowing rejection, suggested in dicta that executory contracts encompass collective bargaining agreements as commercial contracts. In re Overseas Nat'l Airways, Inc., 238 F. Supp. 359, 361 (E.D.N.Y. 1965).

By the late 1960's, another district court affirmatively stated, "[n]either the labor legislation of the Congress nor the Bankruptcy Act contains any language which would generally exclude collective bargaining agreements" from the scope of executory contracts. Carpenters Local Union No. 2746 v. Turney Wood Prods., Inc., 289 F. Supp. 143, 149 (W.D. Ark. 1968).

26. 29 U.S.C. § 158(d). The section, however, provides for termination when certain conditions are met.

27. See, e.g., Kevin Steel, 519 F.2d at 704.

28. The new entity theory classified the debtor as a new company "with its own rights and duties." Id. at 704; see REA Express, 523 F.2d at 170. A debtor-in-possession is not considered to be the same entity as the "pre-bankruptcy company." This new entity must comply with labor laws, however, it is generally not bound by the labor agreements of the pre-bankruptcy company. Kevin Steel, 519 F.2d at 704.

As a corollary to the issue of permission to reject, there is also a requirement that the debtor-in-possession have permission to assume an executory contract. The Bankruptcy Code provides that a "trustee [or debtor-in-possession], subject to the court's approval, may assume or reject any executory contract...." 11 U.S.C. § 365(a). If the debtor is a new entity, it is difficult to imagine why it needs permission to assume a contract to which it was not a party. Also, it would appear unnecessary to reject a contract to which it was never a party.

If the debtor is a new entity, it is more like a successor employer which takes over after the sale of the business. See REA Express, 523 F.2d at 170; Kevin Steel, 519 F.2d at 704. Successor employers have infrequently been held to their predecessor's collective bargaining agreements. See, e.g., NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972). In Burns, the successor employer was not bound to an existing collective bargaining agreement because it was not a party to the agreement. Id. at 281-82. The policy argument is that to maintain the flow of capital, successor employers must be allowed to enter into their own contracts. The court implied that few businesses would buy an existing business if they were forced to assume its contracts. Id. at 287-88; see also Howard Johnson Co. v. Detroit Local Joint Executive Bd., 417 U.S. 249 (1974) (franchisor not held to contract of franchisee). But see John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543 (1964) (successor employer held to arbitration clause). Since a labor contract often fails to bind a successor employer, it would be unjust to bind the debtor-in-possession. See Bordewieck & Countryman, supra note 8, at 304-14.

Three cases have established the standard for determining whether successor employers could be held to pre-existing labor contracts. The standard the Court uses to allow rejection by a successor appears to rely on the continuity of the busi-
ever, rejected this theory.

In *Bildisco*, the Supreme Court held that a collective bargaining agreement is an executory contract that may be rejected under section 365 of the Bankruptcy Code. The Court dismissed the new entity theory as legal fiction. Relying heavily on congressional intent, the Court determined that the power to reject a collective bargaining agreement was derived directly from the Bankruptcy Code. When Congress enacted the Bankruptcy Code, it knew that there was a perceived conflict between bankruptcy and labor laws. Congress, however, provided no special treatment for collective bargaining agreements. Therefore, according to the *Bildisco* Court, collective

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29. *Bildisco*, 104 S. Ct. at 1194-97. "Any inference that collective bargaining agreements are not included within the general scope of § 365(a) because they differ for some purposes from ordinary contracts . . . is rebutted by the statutory design of § 365(a) and by the language of § 1167 of the Bankruptcy Code." *Id.* at 1194 (citation omitted).

Section 365 limits the power of the debtor-in-possession by disallowing rejection or assumption of certain types of executory contracts. In essence, the limitations are: (1) no assumption is allowed if there has been a default; (2) no assumption or assignment is allowed if the creditor is excused by law from accepting assumption or does not consent to assumption; (3) the trustee must assume or reject within 60 days after filing, but in chapter 11 cases the assumption or rejection may take place any time prior to confirmation of the plan; and (4) the contract cannot be rejected or modified solely because of a contract provision regarding bankruptcy proceedings. 11 U.S.C. § 365(a)-(e).

Section 1167 of the Bankruptcy Code provides that the collective bargaining agreement of employees subject to the Railway Labor Act (RLA) may not be rejected or modified by the trustee or the court without following the procedures outlined in section 45 of the RLA. *See* 11 U.S.C. § 1167. The Supreme Court has concluded that because Congress "knew how to draft an exclusion for collective bargaining agreements when it wanted to," it would have done so for labor contracts if that were its intention. *Bildisco*, 104 S. Ct. at 1195.

In a concurring and dissenting opinion, Justice Brennan agreed that the test set out "properly accommodates" the Bankruptcy Code and NLRA, but argued that more emphasis should have been given to labor policies. *Id.* at 1201 (Brennan, J., concurring in part and dissenting in part).

30. *See Bildisco*, 104 S. Ct. at 1197.

31. *See id.* at 1194.


33. 104 S. Ct. at 1195. The Code is not completely silent on the subject of collective bargaining agreements. Section 1167 of the Code provides an exemption for
bargaining agreements must be capable of rejection.34

Lack of statutory exemption was only one factor in the power to reject collective bargaining agreements. In Bildisco, the Court reasoned that rejection furthers the purpose of reorganization under the Code.35 Reorganization allows a debtor to continue in opera-
labor agreements governed by the Railway Labor Act (RLA). 11 U.S.C. § 1167. Section 1167 provides:

Notwithstanding section 365 of this title, neither the court nor the trustee may change the wages or working conditions of employees of the debtor established by a collective bargaining agreement that is subject to the Railway Labor Act (45 U.S.C. 151 et seq.) except in accordance with section 6 of such Act (45 U.S.C. 156).

Id.

The RLA provides that changes in labor contracts may not be made without prior notice and agreement by both parties. See 45 U.S.C. § 156. The recognized importance of carrier labor laws is "too delicate and has too long a history for this code to upset established relationships." H.R. REP. No. 595, 95th Cong., 2d Sess. 423 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6379.

34. 104 S. Ct. at 1196. The Third Circuit found that Congress was well aware of the fact that debtors had been rejecting collective bargaining agreements. See Bildisco, 682 F.2d at 78.

When addressing the issue of a standard of rejection, the Supreme Court mentioned the "canon of statutory construction that Congress is presumed to be aware of judicial interpretations of a statute . . . ." Bildisco, 104 S. Ct. at 1195. The same analysis can be applied to collective bargaining agreements. Since Congress made no mention of a ban on rejection of collective bargaining agreements, Congress must have intended them to be included in executory contracts. See also In re Ateco Equip., Inc., 18 Bankr. 915 (Bankr. W.D. Pa. 1982) (concluding that Congress did not intend special treatment for collective bargaining under the Bankruptcy Code).

The Supreme Court stated that since Congress knew how to give deference to RLA contracts, it would have done so for NLRA contracts if that were the intent. Bildisco, 104 S. Ct. at 1194-95; cf. Kevin Steel, 519 F.2d at 702.


The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap.

Id.

The basic aim in allowing rejection of executory contracts is: (1) to relieve the debtor from burdensome contracts; and (2) to sustain for the debtor the benefits of worthwhile contracts while assuring the other party against continued or future default of the debtor. See P. MURPHY, CREDITORS RIGHTS IN BANKRUPTCY § 9.01 (1980); see also Levy & Blum, Limitations on Rejection of Union Contracts Under the Bankruptcy Act, 83 COM. L.J. 259, 261 (1978).

In REA Express, the court took judicial notice of the fact that "[i]t is a rare case when the financial distress of an enterprise in bankruptcy does not work a hardship on its creditors, including those who render services to the debtor." 523 F.2d at 169. In such circumstances, the employees and the union should not "be permitted to insist upon strict compliance with their executory agreements with [the enterprise]." Id. at 169-70.
tion, keep employees employed, and give creditors a better chance for repayment than they would have if the debtor was forced into liquidation. The rejection of certain executory contracts furthers this purpose by releasing a debtor’s estate from burdensome obligations that can impede a successful reorganization. The task for the bankruptcy court is to determine when a collective bargaining agreement could pose such a threat to the estate.

B. Standards of Rejection

The Supreme Court held that a collective bargaining agreement could be rejected if the agreement is burdensome and the equities balance in favor of rejection. The Court placed the burden on the debtor to show that the contract should be rejected. The development of the Supreme Court standard is based on three circuit court decisions: Shopmen’s Local Union No. 455 v. Kevin Steel Products, Inc.; Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.; and NLRB v. Bildisco & Bildisco. These decisions also serve as the


37. In Bildisco, the Third Circuit stated that statistics show that a successful reorganization are as beneficial to creditors as for debtors. According to tabulations taken from a sample of bankruptcy cases, priority creditors usually received full payment in a successful reorganization but realized less than one-third of the amount of their claims in a straight bankruptcy. Unsecured creditors realized only a median nineteen percent under one-payment plans and ten percent under deferred payment plans when the debtor went through reorganization, but in straight bankruptcies the median was only eight percent.

Bildisco, 682 F.2d at 77 n.6 (citing D. STANLEY & M. GIRTH, BANKRUPTCY: PROBLEM, PROCESS, REFORM 129-30, 142-43 (1971)).

38. Bildisco, 104 S. Ct. at 1196. The Court stated that a bankruptcy court should not allow rejection of a collective bargaining agreement unless it would further the purpose of bankruptcy. Id.

39. See id. at 1196-97.

40. 519 F.2d 698 (2d Cir. 1975). The Second Circuit held that a court could permit a debtor-in-possession to reject an executory labor contract only after thorough scrutiny and a careful balancing of the equities on both sides. Id. at 706.

41. 523 F.2d 164 (2d Cir. 1975). One month later, the Second Circuit held that: [W]here, after careful weighing of all the factors and equities involved, including interests sought to be protected by the [Railway Labor Act], a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement.

Id. at 169.

42. 682 F.2d 72 (3d Cir. 1982). The Bildisco court adopted the balancing test of Kevin Steel but rejected the cases subsequently interpreting Kevin Steel. Id. at 79-80. The court set out two reasons for its rejection of the REA Express standard:
basis for the subsequent bankruptcy amendments.43

In Kevin Steel, the Second Circuit found that a court could permit a debtor-in-possession to reject an executory labor contract only after thorough scrutiny and after carefully balancing the equities on both sides.44 The Second Circuit subsequently set forth a stricter standard in REA Express.45 The REA Express court held that collective bargaining agreements must be "onerous and burdensome," and the court will not reject a collective bargaining agreement unless it will prevent successful reorganization.46 Finally, the Third Circuit, in Bildisco, adopted the balancing test of Kevin Steel and rejected the REA Express standard.47 On appeal, the Supreme Court adopted the

43. See infra notes 102-11 and accompanying text.
44. 519 F.2d at 706. The court's decision is based on the policies of the Bankruptcy Act and the NLRA. The bankruptcy law is meant "to preserve the funds of the debtor for distribution to creditors and to give the debtor a new start, while the basic policy of the labor law is always to encourage creation and enforcement of collective bargaining agreements." Id. at 706 (quoting Comment, Collective Bargaining and Bankruptcy, 42 S. Cal. L. Rev. 477, 477 (1969).
45. 523 F.2d at 169. The court applied two contradictory statutes. First, the case involved a contract of airline employees. While airline employees were not contemplated when the RLA was promulgated, and therefore not specifically included, they have been drawn under its protection. The purpose of the RLA is to "avoid disruption of commerce by insuring that the carrier will continue operations pending resolution of labor disputes." Id. Second, § 77 of the old Bankruptcy Act prohibited unilateral rejection of contracts subject to the RLA. 11 U.S.C. § 205(n) (1976) (repealed in 1978). The REA Express court found that prohibiting rejection would hinder the purpose of the RLA because the end result could well be to preclude financial reorganization of the carrier and thus lead to its demise. REA Express, 523 F.2d at 169.
46. REA Express, 523 F.2d at 169.
47. Kevin Steel, 682 F.2d at 79-80. The court specifically stated that it was rejecting the REA Express standard. Id. The court found that it is unrealistic to expect that a bankruptcy court will know at the time of petition whether reorganization will fail absent rejection of the contract. Id. at 80.

Bildisco filed for bankruptcy in April of 1980. Id. at 75. Two years later it was still uncertain whether the plan would be successful. Id. at 80. The court also stated
Third Circuit standard.\textsuperscript{48} The Court held that if the contract is burdensome and the equities balance in favor of rejection, the debtor should be allowed to reject the agreement.\textsuperscript{49} The Court refused to require the debtor to demonstrate it would be forced into liquidation if not permitted to reject the collective bargaining agreement.\textsuperscript{50} The Supreme Court reasoned that the evidentiary burden would be difficult, if not impossible, for a debtor to meet.\textsuperscript{51} Requiring the debtor to meet such a burden would frustrate the equitable nature of the bankruptcy proceeding.\textsuperscript{52}

In an attempt to protect the policies of the NLRA,\textsuperscript{53} the Court that the stricter test could harm the workers. \textit{Id.} If the debtor is unable to meet the requirements of the \textit{REA Express} standard and is forced into liquidation, the employees lose their jobs completely.

Bankruptcy courts should consider the impact of a strike on the debtor. \textit{Id.} A strike could very easily push the debtor over the line into liquidation. \textit{Id.} The bankruptcy court should also consider the possibility of a breach of a contract claim by the employees, the impact such a claim would have on the company, and the adequacy of relief the employees may receive through the claim. \textit{Id.}

The standard is somewhat ambiguous. The court could be implying that a large union contract would be so burdensome on the debtor that rejection should be allowed. On the other hand, a greater number of employees would be affected, which is an argument against rejection.

\textsuperscript{48} Bildisco, 104 S. Ct. at 1196.

\textsuperscript{49} See \textit{id.}

\textsuperscript{50} \textit{Id.} The Court considered the Board's argument that the \textit{REA Express} standard was adopted by Congress when it reformed the Bankruptcy Act. The \textit{REA Express} decision was in 1975. The Bankruptcy Act was reformed in 1977 to the present Code. See \textit{id.} at 1194. Therefore, the Board argued, Congress approved the standard. \textit{Id.} at 1195-96.

Additionally, the Board argued there is evidence in the legislative history indicating that the \textit{REA Express} standard was adopted. The legislative history of the Code mentions both \textit{REA Express} and \textit{Kevin Steel} in its discussion of a stricter standard for collective bargaining agreements in municipal bankruptcy. See \textit{id.} at 1196.

The Supreme Court correctly points out that the history refers to both cases. Those standards are markedly different. The Court was unwilling to infer a preference for one standard over the other. \textit{Id.} at 1196.

The Court refused to affirm a requirement that the debtor must prove that it would be forced into liquidation if it was not permitted to reject the collective bargaining agreement. \textit{Id.} at 1196. Bankruptcy proceedings are equitable and should be flexible, according to the Court. \textit{Id.}

\textsuperscript{51} \textit{Id.} The Court reiterated the Third Circuit argument that the evidentiary burden may be too difficult for the debtor. See supra note 47.

\textsuperscript{52} See Bildisco, 104 S. Ct. at 1197. “The Bankruptcy Court is a court of equity . . . moreover it must have great latitude to consider any type of evidence . . . .” \textit{Id.}

\textsuperscript{53} The purpose of labor-management relations under the NLRA is to:

\begin{itemize}
\item [P]romote the full flow of commerce, to proscribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other, to protect the rights of individual employees in their relations with labor organizations whose activities af-
required the debtor to negotiate with the union representative.\textsuperscript{54} The Court did not hold that permission to reject the contract was dependent on negotiation.\textsuperscript{55} The Court stated that good faith bargaining was a factor for the bankruptcy court to consider.\textsuperscript{56} If negotiation did not solve the problem, the bankruptcy court could step in on behalf of the debtor.\textsuperscript{57}

\textbf{C. Rejection is Not an Unfair Labor Practice}

The most controversial part of the \textit{Bildisco} decision is the Court's holding that a debtor does not commit an unfair labor practice by terminating the contract before permission is granted by the bankruptcy court.\textsuperscript{58} The rejection of the agreement before court approval is contrary to both the NLRA and the Bankruptcy Code.\textsuperscript{59} The Supreme Court held, however, that the purposes of bankruptcy would be better served by allowing the debtor to abrogate the contract when the debtor found it necessary to save its business.\textsuperscript{60}

The policy reason allowing rejection of a collective bargaining agreement is to assist the debtor-in-possession in its attempt to revi-

\begin{itemize}
  \item 29 U.S.C. § 141.
  \item \textsuperscript{54} \textit{Bildisco}, 104 S. Ct. at 1196. Section 8(a)(5) of the Act imposes on the parties to a collective bargaining agreement a duty to bargain in good faith. 29 U.S.C. § 158(a)(5). Compliance with this duty demonstrates that attempts have been made to protect the rights of employees. \textit{See Bildisco}, 104 S. Ct. at 1196-97. If negotiation fails to solve the problem, the bankruptcy court may step in on behalf of the debtor. \textit{See id.} at 1197.
  \item \textsuperscript{55} \textit{Bildisco}, 104 S. Ct. at 1197.
  \item \textsuperscript{56} \textit{Id.} at 1200.
  \item \textsuperscript{57} \textit{Id.} In order for a bankruptcy court to intervene, however, the bargaining process need not have reached an impasse. Impasse is a term of art in labor law and there are no tests to determine when it occurs. Impasse has been equated with reaching a "stalemate." \textit{See NLRB v. Almeida Bus Lines, Inc.}, 333 F.2d 729, 731 (1st Cir. 1964). To ask that a bankruptcy court wait until an impasse occurs means that the court would have to make a determination in an area which bankruptcy courts have little or no expertise. \textit{See Bildisco}, 104 S. Ct. at 1200.
  \item Whether impasse has been reached generally is a judgment call for the Board to make; imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none. \textit{Id.}
  \item \textsuperscript{58} \textit{See Bildisco}, 104 S. Ct. at 1197. The unfair labor practice alleged was a violation of § 8(d) of the NLRA. 29 U.S.C.A. § 158(d).
  \item \textsuperscript{59} \textit{See 11 U.S.C.} § 365; 29 U.S.C. § 158(d).
  \item \textsuperscript{60} \textit{See Bildisco}, 104 S. Ct. at 1197-98. The Court reasons that enforcing the collective bargaining agreement may discourage creditors from "infusing the ailing form with additional capital." \textit{Id.}
talize its business.\textsuperscript{61} Permitting the debtor to reject its collective bargaining agreement before it receives permission from the bankruptcy court furthers this policy.\textsuperscript{62} It shields the debtor from action by the National Labor Relations Board (NLRB).

Section 8(d) of the NLRA provides that neither party to a collective bargaining agreement may unilaterally modify or terminate the agreement without following specified procedures.\textsuperscript{63} The parties must comply with procedures mandating notification and mediation.\textsuperscript{64} If these procedures are not followed, the NLRB may issue a cease-and-desist order directing the debtor to assume the contract.\textsuperscript{65} The \textit{Bildisco} holding, however, prohibits such an order in bankruptcy cases.\textsuperscript{66}

The Court's dismissal of an unfair labor practice is based on the application of bankruptcy procedure.\textsuperscript{67} Section 365(g) of the Bankruptcy Code provides that a rejection of an executory contract con-

\textsuperscript{61} The policy is well-recognized by the courts and legislature. See \textit{Bildisco}, 682 F.2d at 81; \textit{REA Express}, 523 F.2d at 170-71; \textit{Kevin Steel}, 519 F.2d at 706; H.R. Rep. No. 599, 95th Cong., 2d Sess. 220, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6179. See generally Comment, supra note 33, at 470 ("[T]he debtor needs fast and efficient way to reduce operating expenses which require large outlays of cash.").

\textsuperscript{62} See \textit{Bildisco}, 104 S. Ct. at 1197-98.

\textsuperscript{63} Section 8(d) provides that parties seeking termination or modification of a collective bargaining agreement must:

1. serve[ ] a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or . . . sixty days prior to proposed termination or modification;
2. offer[ ] to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modification;
3. notify[ ] the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notify[ ] any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
4. continue in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later.

\textsuperscript{64} See 29 U.S.C. § 158(d). Justice Brennan's dissent in \textit{Bildisco} points out that the notice and "cooling off" requirements serve to prevent the economic warfare that can result from unilateral changes in collective bargaining agreements. 104 S. Ct. at 1208. There is nothing in the statute which provides exemption from these procedural requirements. See 29 U.S.C. § 158(d).

\textsuperscript{65} 29 U.S.C. § 160(c).

\textsuperscript{66} See 104 S. Ct. at 1199 (enforcement of the cease and desist order runs counter to the express provisions of the Bankruptcy Code).

\textsuperscript{67} See id. at 1197-99. The Court began its analysis by dismissing the argument that the debtor is not held to § 8(d) because it is a "new entity." The argument is that if the debtor is a new entity it is not a party to the collective bargaining agree-
ststitutes a breach of the contract. A breach relates back to the day prior to filing of the petition. Claims for a breach of a contract against a debtor’s estate are settled through bankruptcy administrative procedures. If the NLRB were to order the debtor to cease and desist, the Board would be circumventing bankruptcy procedure.

In Bildisco, the Court also held that an unfair labor practice would be contrary to the purpose of bankruptcy reorganization. If a debtor had to wait for permission to reject the contract, then the debtor might be forced into liquidation. A debtor has until acceptance of a reorganization plan to reject or assume any of its executory contracts. If a debtor, through a NLRB order, were forced to assume the contract, the debtor’s business will fail. Thus, due to the flexible nature of the reorganization process, a debtor should be allowed to reject when necessary without interference from labor laws.

ment. If the debtor were not a party to the agreement, it would not be bound by the rules set out in § 8(d). See id. at 1197.

68. 11 U.S.C. § 365(g).

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


70. These administrative procedures are set forth in 11 U.S.C. § 502(g).

71. 104 S. Ct. at 1199.

72. In reorganization, the debtor-in-possession has until a plan is filed to accept or reject its executory contracts. 11 U.S.C. § 365(d)(2). The plan of reorganization may take months or years. The debtor has a lengthy procedure to follow before a plan is adopted. First, there is a period of disclosure required. Id. § 1125. Second, any party in interest may accept or reject the plan. Id. § 1126. This is predictably time-consuming. Third, there must be a confirmation hearing at which any party in interest may still object to the plan before it can be adopted. Id. § 1128. See generally Comment, supra note 32, at 470-71 (labor procedures are so lengthy that an existing contract would be a drain on the cash reserves).


74. See 104 S. Ct. at 1199.

75. A number of issues have arisen in the context of unfair labor practices by a debtor-in-possession or the trustee of the debtor’s estate. See Nathanson v. NLRB, 344 U.S. 25 (1952) (NLRB order to pay back wages); Yorke v. NLRB, 709 F.2d 1138, 1144 (7th Cir. 1983), cert. denied, 104 S. Ct. 1276 (1984) (failure to bargain in good faith); Mansfield Tire & Rubber Co. v. Ohio, 660 F.2d 1108 (6th Cir. 1981) (violation of workers’ compensation laws); NLRB v. Evans Plumbing Co., 639 F.2d 291, 292 (5th Cir. 1981) (reinstatement and backpay for wrongful discharge); In re Shippers Interstate Serv., Inc., 618 F.2d 9, 13 (7th Cir. 1980) (filing of chapter 11 petition does not operate as automatic stay of NLRB unfair labor practice proceedings); Local Joint
II. LEGISLATIVE SOLUTION TO THE CONFLICT: SECTION 1113

Five months after the Bildisco decision, Congress provided for rejection of collective bargaining agreements in the Bankruptcy Code. Section 1113 was added to the Code by the Bankruptcy Amendments and Federal Judgeship Act of 1984. The amendment established the procedures to be followed and the standard to be used in rejecting a collective bargaining agreement.

A. Procedure for Rejecting a Collective Bargaining Agreement

The only method for a debtor-in-possession to reject a collective bargaining agreement is the one provided in section 1113. The procedures are triggered after filing a petition in bankruptcy. In addition, the debtor must show the court that these procedures were complied with before it sought permission to reject the contract.

The essence of the statute is that the debtor must negotiate with the union’s representative. The debtor must make a proposal to the union outlining modifications in the collective bargaining agreement. Only those changes that are “necessary” to successful reor-
ganization may be proposed. The statute does not state what changes are necessary, and the legislative history provides little insight. In addition, the modified contract must ensure that all interested parties are treated fairly.

The proposal should be based on reliable information available to the debtor. There are no criteria as to what type of information the debtor may consider. It is assumed that most of the information would pertain to the financial status of the debtor. In order to promote fair, well-reasoned negotiations, the debtor must provide the union representative with this information. The debtor, however, is protected from disclosing information that would injure its status with competitors. The statute provides that a court order may be issued governing the disclosure of the information.

Once the proposal is made to the union representative, negotiations must continue until impasse is reached. The statute provides that the two sides must meet at "reasonable times" and bargain in

81. Id.
82. See generally 130 Cong. Rec. S6181-201 (daily ed. May 22, 1984). Senator Packwood, in presenting his amendment, stresses that only those changes that are necessary to successful reorganization should be made. Senator Packwood's original proposal also contained the word "minimum" in referring to the modifications. Id. The requirement of minimum changes was dropped from the adopted amendment. Compare 130 Cong. Rec. § 6181 with 130 Cong. Rec. H4788 (daily ed. June 29, 1984).
83. 11 U.S.C.A. § 1113(b)(1)(A); see supra note 80.
84. Id.
85. Section 1113, however, requires both parties to bargain in good faith. Id. §§ 1131(b)(2), (c)(2).
86. 11 U.S.C.A. § 1113(b)(1)(B). The debtor-in-possession must "provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal." Id.
87. Id. § 1113(d)(3). To protect information that might cause the debtor's competitors to have an unfair advantage, the statute provides:

(3) The court may enter such protective order, 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.

Id.
88. Id.
89. See id. § 1113(c)(2). The statute does not specifically require negotiation until impasse. The statute states that rejection will not be permitted unless the unions refused the proposal of the debtor. Id.; see supra note 57.
90. 11 U.S.C.A. § 1113(b)(2). The statute specifically provides:

(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.

Id.
good faith. The court may only approve rejection if the following conditions are met:

(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 had refused to accept such proposal without good cause; and (3) the balance of the equities clearly favors rejection of such agreement.

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

The decision must be rapidly made. The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.
terminate or alter the provisions of the contract pending the court’s decision.\textsuperscript{101} The presumption is that the contract will remain in force until the rejection is approved or the thirty day period expires.

In emergency situations, the statute provides for modification without negotiation. If the court determines that the reorganization will fail before negotiations can be completed or that the estate will suffer “irreparable damage,” the court may approve unilateral changes.\textsuperscript{102} Court approval may be granted, however, only after notice and hearing.\textsuperscript{103} This ostensibly prevents the contract from being terminated without union participation in the process.

\section*{B. Standard for Rejection}

Section 1113, in addition to procedural requirements, sets forth standards for the bankruptcy court to follow. The statute requires three findings before the court is allowed to approve the application for rejection. The standard is similar to the one articulated by the Supreme Court.\textsuperscript{104} It does, however, provide more protection for the employees than did \textit{Bildisco}.

First, the debtor must show the bankruptcy court that its proposal meets the requirements of section (b)(1) of the statute.\textsuperscript{105} The debtor must show that the proposal made only necessary modifications in employee benefits and protections.\textsuperscript{106} The debtor must also show that these modifications were necessary to successful reorganization.\textsuperscript{107} Finally, the debtor must show that the information used in designing the modifications was provided to the union representative.\textsuperscript{108}

Second, the court must find that the union representative refused the proposal without good cause.\textsuperscript{109} The statute does not define

\begin{flushleft}
101. \textit{Id.} \\
102. \textit{Id.} \textsuperscript{\textsection} 1113(e). The statute also incorporates the test set forth in \textit{REA Express}, 523 F.2d 164, 169, when the debtor is in danger of facing liquidation. \textit{See supra} note 41.

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.

11 U.S.C.A. \textsuperscript{\textsection} 1113(c)(2).
103. 11 U.S.C.A. \textsuperscript{\textsection} 1113(c)(1); \textit{see supra} note 93.
104. 11 U.S.C.A. \textsuperscript{\textsection} 1113(b)(1); \textit{see supra} note 84.
108. \textit{Id.} \textsuperscript{\textsection} 1113(b)(1)(B); \textit{see supra} note 87.
109. 11 U.S.C.A. \textsuperscript{\textsection} 1113(c)(2); \textit{see supra} note 90.
\end{flushleft}
good cause. The legislative history, however, indicated that this section should be narrowly interpreted. The union representative should base its decision largely on the information presented by the debtor in negotiations.

Finally, section 1113 adopts the standard articulated by the Supreme Court in *Bildisco*. The bankruptcy court must find that "the balance of the equities clearly favors rejection of such agreement." The only change from the *Bildisco* standard is the addition of the word "clearly." In all probability, this will not change the burden of proof.

III. SECTION 1113: A LABOR-MANAGEMENT COMPROMISE

An initial reading of section 1113 leads to the conclusion that Congress significantly changed the law set out in *Bildisco*. A more careful analysis reveals that the statute incorporates the holding of *Bildisco* into NLRA procedures. Congress provided the protections offered by labor laws while recognizing the importance of a successful reorganization.

A. Negotiation of the Contract Modifications

Both the NLRA and *Bildisco* recognize the importance of negotiations.
tion of a labor contract. Section 8(d) of the NLRA outlines a lengthy negotiation process before either party may terminate or modify a collective bargaining agreement. Similarly, the Supreme Court stated that a debtor must show that it negotiated the issue of rejection with its employees. Section 1113 compromises between the detail of the NLRA and the vague requirement of Bildisco.

The statute also incorporates the good faith bargaining requirements of the NLRA and Bildisco. The NLRA imposes a duty to bargain in good faith whenever there is a labor dispute. A change in the employment contract is a labor dispute, and therefore, must be bargained. The Bildisco decision also imposes a duty to bargain in

116. 29 U.S.C. § 158(d); see supra note 63.
117. 104 S. Ct. at 1201. The Court stated that a debtor is "obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court." Id.

See Yorke, 709 F.2d at 1143 (trustee held to same duty as employer to bargain in good faith); Kevin Steel, 519 F.2d at 706 (debtor cannot ignore its obligations under NLRA); Bachelder, 120 F.2d at 576 (refusal to bargain is within jurisdiction of NLRB).

While Yorke involved the duty of a trustee to bargain in good faith, it applies equally to a debtor-in-possession. The court "believe[d] that recognizing a duty to bargain would not unduly impede the Trustee's discharge of his responsibilities." Yorke, 709 F.2d at 1143. Section 503(b)(1)(A) of the Bankruptcy Code provides that the trustee takes responsibility for "the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case." Id. The court further reasoned that because the duty to bargain arose from a decision to close operations for the creditors' benefit, all costs could be administrative costs to "preserve the estate" for the benefit of creditors. Id.

118. 29 U.S.C. § 158(d). Subsection (a) of § 158(d) defines a "labor dispute" as the following:

(c) The term 'labor dispute' includes any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee.

119. There has been no comprehensive definition of "terms or conditions of employment" offered by the courts. The findings regarding this issue have been made on an ad hoc basis. See, e.g., Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964) (subcontracting of work is a term or condition of employment); Order of R.R. Tel. v. Chicago & N.W. Ry. Co., 362 U.S. 330 (1960) (merger of smaller railway lines is a term or condition of employment); Sinclair Refining Co. v. Atkinson, 370 U.S. 195 (1962) (work assignments are terms or conditions of employment).

State legislatures have attempted to define the term. One example is the definition found in section 179.03 of Minnesota Statutes. "Terms and conditions of employment means the hours of employment, the compensation therefor including fringe benefits except retirement contributions or benefits, and the employers' personnel policies affecting the working conditions of the employees." Minn. Stat. § 179.03, subd. 19 (1984).
good faith.\textsuperscript{120} Section 1113 explicit enforces this duty on the debtor-in-possession.\textsuperscript{121}

The good faith requirement is indirectly applied to the union representative. If the union representative does not bargain in good faith, it would be incumbent on the court to find that the contract proposal was refused "without good cause."\textsuperscript{122} Once the court makes this finding, the contract will most likely be rejected.\textsuperscript{123} Therefore, while the statute does not explicitly impose a duty to bargain in good faith, it is in the best interests of the employees to do so.

\textbf{B. Time Restrictions on Effective Termination}

Section 1113 allows for modification of the contract in a relatively rapid manner. Under the NLRA, the contract could be terminated no earlier than sixty days after the proposal is made.\textsuperscript{124} Bankruptcy procedures accelerate the process.\textsuperscript{125} If the debtor and the union representative can agree to modifications, the new contract takes effect as soon as court approval is received.\textsuperscript{126} The hearing must be within fourteen days of application.\textsuperscript{127} Court approval must follow within thirty days after the hearing.\textsuperscript{128} If the debtor and union representative cannot agree, the debtor applies to the court to reject the contract.\textsuperscript{129} The same time limitations apply whether the debtor is seeking to assume or reject the contract. Therefore, the changes would be in effect, no more than forty-four days from the date of

\textsuperscript{120} A finding of good faith in the debtor's rejection is of paramount importance. Almost any business can show that it would be better off without a union contract. See 104 S. Ct. at 1199. Justice Rehnquist's \textit{Bildisco} mandate of reasonable efforts to negotiate does not explicitly require a showing of good faith. The lower courts have consistently held that a good faith showing is essential in a decision to permit rejection. \textit{See}, e.g., \textit{Brada Miller}, 702 F.2d at 899 (good or bad faith of both parties examined); \textit{Kevin Steel}, 519 F.2d at 707 (improper motivation may preclude rejection). Perhaps, a reasonable effort is one that is made in good faith.

The balancing of the equities must be determined from the facts and circumstances of each case. A comprehensive list of factors would be impossible, but the Supreme Court's relative silence on the subject has made the task of the bankruptcy court unduly burdensome.

\textsuperscript{121} 11 U.S.C.A. § 1113(b)(2).
\textsuperscript{122} \textit{Id.} § 1113(c)(2). \textit{See} White, \textit{supra} note 111, at 1197.
\textsuperscript{123} See 11 U.S.C.A. § 1113.
\textsuperscript{124} 29 U.S.C.A. § 158(d).
\textsuperscript{125} See \textit{11} U.S.C.A. § 1113(b).
\textsuperscript{126} \textit{See id.}
\textsuperscript{127} \textit{See id.} § 1113(d)(2). The court has the discretion to extend the time period if the trustee and representative agree. For statutory language, see \textit{supra} note 99.
\textsuperscript{128} \textit{See} 11 U.S.C.A. § 1113(d)(1); \textit{see supra} note 94.
\textsuperscript{129} \textit{See} 11 U.S.C.A. § 1113(c)(2). The court may approve the rejection only if the debtor can show that "the authorized representative of the employees has refused to accept such proposal . . . ." \textit{Id.}
application to the court.\textsuperscript{130}

The Bildisco Court placed no time restrictions on the debtor. In fact, the Court's holding implies that the contract could be rejected whenever the debtor decided.\textsuperscript{131} Section 1113 specifically reversed this part of the holding.\textsuperscript{132} Congress was aware, however, that even the abbreviated statutory procedures may be detrimental to a struggling debtor.\textsuperscript{133}

In order to protect the interests of the debtor, section 1113 provides emergency procedures. The bankruptcy court may approve unilateral termination if it is “essential to the continuation of the debtor’s business,” or if the estate will suffer irreparable damage.\textsuperscript{134} To protect the unions, the statute requires notice and hearing before approval of unilateral changes.\textsuperscript{135} Congress has, through these various standards, incorporated most of the case law on rejection of col-

\textsuperscript{130} See id. § 1113(d)(1)-(2).

\textsuperscript{131} See 104 S. Ct. at 1199-1200. This is the most objectionable aspect of the Bildisco decision. The holding not only goes against the NLRA but also the Bankruptcy Code.

Section 8(d) of the NLRA requires that a party who wishes to modify or terminate a collective bargaining agreement must give notice to the other party of its proposed changes. 29 U.S.C. § 158(d)(1); see, e.g., First Nat’l Maintenance Corp. v. NLRB, 452 U.S. 666 (1981); Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203 (1964); Mastro Plastics Corp. v. NLRB, 350 U.S. 270 (1956). \textit{But see} Pulliam, \textit{supra} note 37, at 3-5 (section 8(d) should be narrowly construed).

Both sides must meet to discuss the changes proposed. \textit{See} 29 U.S.C.A. § 158(a)(5). This requirement is consistent with the general requirement to agree to bargain collectively with the employees’ representative. \textit{Id}. The Federal Mediation and Conciliation Service must be notified. \textit{Id} § 158(d)(3). Finally, the existing contract remains in force for 60 days or until the current contract expires. \textit{Id} § 158(d)(4).

The Supreme Court required that the debtor negotiate before seeking rejection. Bildisco, 104 S. Ct. at 1196. The only additional burden on the debtor would be notification of the federal agency and maintenance of the contract. In some cases, the 60 day waiting period required by 29 U.S.C. § 158(d)(4) would be long enough to impair the reorganization process. If the contract were that unduly burdensome, however, the debtor should not have a problem convincing a bankruptcy court that the contract should be rejected.

Furthermore, the holding in Bildisco is contrary to generally accepted bankruptcy procedures. Section 365(a) provides that the debtor may not reject or assume an executory contract without the court’s express approval. 11 U.S.C. § 365(a). No authority states that an exception should be made for executory labor contracts.

\textsuperscript{132} 11 U.S.C.A. § 1113(f). This subsection is a preemption section. “No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collectible bargaining agreement prior to compliance with the provisions of this section.” \textit{Id}.

\textsuperscript{133} See 130 CONG. REC. S8893 (daily ed. June 29, 1984).

\textsuperscript{134} 104 S. Ct. at 1197. Virtually any debtor could demonstrate that a union contract may cause irreparable damage. \textit{See} id. at 1199.

\textsuperscript{135} 11 U.S.C.A. § 1113(e).
C. The Modification Proposal: Factors to be Considered

The statutory presumption is that the debtor will attempt to modify before attempting to reject the collective bargaining agreement. The only modifications that can be made are those that are "necessary." To protect all creditors, commercial and service, the modifications must treat all affected parties fairly and equitably. The difficulty in determining whether all parties are treated equitably and fairly is deciding what type of information the debtor is permitted to examine when proposing modifications. Congress failed to address this issue directly. The legislative history indicates that Congress considered financial reports to be most important. This ignores, however, the unique aspects of the employee's contract. The cost saved by rejection is only part of the consideration. Had Congress addressed this issue more fully, the task of the bankruptcy court would be clearer.

Absent specific Congressional direction, the courts must turn to case law for guidance. Bildisco, while offering little protection to the employees, stated that "the Bankruptcy Court must not only consider the degree of hardship faced by each party, but it must also consider any qualitative differences between the types of hardship each may face." Some courts have considered the ability of the debtor to reduce costs elsewhere, or the costs of competitors' labor contracts. At the very least, bankruptcy courts should keep in mind the unique nature of the labor contract in determining if modifications are necessary.

D. The Standard of Rejection: Judicial Interpretation

One of the major problems in instituting the Bildisco standard is

136. See supra notes 40-42 and accompanying text.
138. Id. § 1113(b)(1)(A).
139. Id.
141. See Bildisco, 104 S. Ct. at 1195. The Court discusses the standard of rejection for collective bargaining agreements. The Court concludes that because of the "special nature" of collective bargaining agreements the standard of rejection of such contracts is different from other executory contracts.
142. See id. at 1197.
143. See White, supra note 109, at 1198. Professor White states that "[o]nly after many cases have made their way through the federal court system will we know what modifications are 'fair and equitable' . . . ." Id.
144. Bildisco, 104 S. Ct. at 1197.
145. See, e.g., In re Reserve Roofing, 21 Bankr. 96 (Bankr. M.D. Fla. 1982).
146. Id.
the vagueness of the standard. The Court merely stated that if the equities balanced in favor of rejection, the court should approve.\textsuperscript{147} Little guidance was provided as to what factors a bankruptcy court should examine in balancing the equities.\textsuperscript{148} Section 1113 provides no further guidance.

Since Congress adopted the vague standard set forth in \textit{Bildisco}, interpretation of section 1113 is left to the courts. The leading case interpreting section 1113 is \textit{In re American Provision Co.}.\textsuperscript{149} In \textit{American Provision}, the Minnesota Bankruptcy Court identified nine requirements in the statute that must be met before an application to reject may be approved.\textsuperscript{150}

\begin{itemize}
\item The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.
\item The proposal must be based on the most complete and reliable information available at the time of the proposal.
\item The proposed modifications must be necessary to permit the reorganization of the debtor.
\item The proposed modification must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
\end{itemize}

\textsuperscript{147} \textit{Bildisco}, 104 S. Ct. at 1196-97. In \textit{Bildisco}, the Supreme Court did little better than the lower courts in articulating a standard for the rejection of collective bargaining agreements. The Court offered no measurable facts to be weighed in balancing the equities. \textit{See id.} at 1197.

\textsuperscript{148} \textit{Id.} at 1197. The balancing of equities test is too vague a standard to develop any precise tests. The Court, however, outlined certain factors for the bankruptcy courts to consider. First, the likelihood of liquidation absent rejection should be examined. \textit{Id.} This is a change from the \textit{REA Express} standard that liquidation must be certain if the debtor is not allowed to reject. Second, other creditors must be considered. \textit{See id.} at 1195 (citing \textit{REA Express}, 523 F.2d at 167-69). If assumption of the contract would reduce the estate so that other claims are jeopardized, rejection would be justifiable. Finally, the impact on the employees themselves must be examined. \textit{Id.} In summary, the Court stated that the “Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.” \textit{Id.} at 1197.

Although the Supreme Court did not address the factors to be considered in balancing the equities, other courts have. \textit{See, e.g., Bildisco}, 682 F.2d at 79-80 n.12. The court could compare the amount of labor costs to the gross revenues of the debtor. \textit{See In re Briggs Transp. Co.}, 39 Bankr. 343, 351 (D. Minn. 1984). In \textit{Briggs}, the debtor's labor costs were 70\% of gross revenues. \textit{Id.} The court found that a 70\% figure was high enough to impede reorganization. In making this determination, the court looked to the industry standard of 56\% to 60\%. \textit{Id.}

The debtor may be able to reduce costs in other areas before it becomes necessary to tamper with the labor contract. \textit{See id.} at 345; \textit{see also Reserve Roofing.} 21 Bankr. 96. In \textit{Reserve Roofing}, the debtor’s collective bargaining agreement was rejected because it put the debtor at a disadvantage with its competitors. In contrast to the non-union companies, Reserve Roofing was required under the collective bargaining agreement to make pension payments. The additional payments placed the debtor in an inferior position with respect to his competitors. \textit{Id.} at 97-99.

\textsuperscript{149} 44 Bankr. 907 (Bankr. D. Minn. 1984).

\textsuperscript{150} \textit{Id.} at 909. The statute does not list the requirements separately as did the court:
In addition to discussing these requirements, the American Provision court addressed the burden of proof issue. The court stated that Congress failed to allocate the burden of proof to either the debtor or the union representative.\textsuperscript{151} Since the statute imposes duties on the debtor, the court reasoned that the debtor has the burden of proving that the requirements were met.\textsuperscript{152} The court found, however, that the burden of production of evidence shifts to the union on three of the requirements.\textsuperscript{153} Once the debtor has made a prima facie case, the union must demonstrate that it was not provided with adequate information, that the debtor did not bargain in good faith, and that its refusal to accept the modification was with good cause.\textsuperscript{154}

The American Provision court then addressed the factors used by the debtor in making its proposal. The debtor compared the cost and benefits of non union wages to the cost of the union contract.\textsuperscript{155} The debtor also compared the cost of wages to total operation costs.\textsuperscript{156} In examining the financial data, the court held that the

\begin{enumerate}
\item The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.
\item 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.
\item At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
\item The Union must have refused to accept the proposal without good cause.
\item The balance of the equities must clearly favor rejection of the collective bargaining agreement.
\end{enumerate}

Id.\textsuperscript{151} \textit{Id.} at 909.

Id. \textit{Id.} The court stated that “since these nine requirements form the bases of the debtor’s motion, the debtor bears the burden of persuasion by the preponderance of the evidence.” \textit{Id.}; see also \textit{In re Salt Creek Freightways}, 47 Bankr. 835, 838 (Bankr. D. Wyom. 1985) (citing American Provision, 44 Bankr. 907).

Id. \textit{American Provision}, 44 Bankr. at 909. The court found that the “burden of going forward with the evidence” should not always be on the debtor. \textit{Id.}\textsuperscript{153} \textit{Id.} at 909-10. The court stated:

In particular, as to elements 5, 7 and 8, I think that to a certain extent the burden of production of evidence should lie with the Union. As to element 5, I think that it is incumbent upon the debtor in the first instance to show what information it has provided to the Union. It is then incumbent upon the Union to produce evidence that the information provided was not the relevant information which was necessary for it to evaluate the proposal. Likewise as to element 7, once the debtor has shown that it has met with the Union representatives, it is incumbent upon the Union to produce evidence that the debtor did not confer in good faith. And lastly as to element 8, once the debtor has shown that the Union has refused to accept its proposal the Union must produce evidence that it was not without good cause.

Id.\textsuperscript{154} \textit{Id.} at 910.

Id. \textit{Id.} The debtor showed that salaries were approximately $24,000.00 a month.
changes proposed did not meet the statutory standard. The debtor did not show that the changes were necessary for successful reorganization.

There have been relatively few reported decisions interpreting section 1113. American Provision is the first to address the issue and has set the tone for other bankruptcy courts. In focusing on the financial data, the court reached an appropriate accommodation of the employee's and employer's interest.

CONCLUSION

The intention of the 1984 amendment was to establish procedures and standards for rejection of collective bargaining agreements. Also, the amendment is intended to prevent debtors from rejecting those contracts before the bankruptcy court has given permission. Congress has succeeded in outlining detailed procedures. The procedures provide full and fair negotiation before a debtor can alter an existing collective bargaining agreement. Congress, however, has fallen short in its attempt to provide a meaningful standard for rejection of these agreements. The "balancing of the equities" standard adopted in the amendment is the same nebulous standard articulated in Bildisco. Congress should have articulated factors for the bankruptcy court to use in evaluating rejection of a collective bargaining agreement. Congress, however, seemed more intent in overruling Bildisco than in providing guidance to bankruptcy courts. Therefore, until judicially created factors have been established, both the debtor and the union will be negotiating without knowledge of which factors balance the equities in whose favor.

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Total operating expenses were $58,000.00 a month. Therefore, the cut in wages would save two per cent of the monthly expenses. Id.

157. See id. at 910-11.

158. Id. The court stated that since the new contract negotiations were due in less than six months, 22% savings on salaries was not necessary to successful reorganization. Since the debtor could wait until the current contract expired, it was not necessary to tamper with the existing agreement. Id.


160. See Salt Creek Freightways, 47 Bankr. at 837.