

2010

Collective Bargaining Agreements in Corporate Reorganizations

Andrew B. Dawson

University of Miami School of Law, adawson@law.miami.edu

Follow this and additional works at: https://repository.law.miami.edu/fac_articles



Part of the [Bankruptcy Law Commons](#), and the [Business Organizations Law Commons](#)

Recommended Citation

Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 *Am. Bankr. L.J.* 103 (2010).

This Article is brought to you for free and open access by the Faculty and Deans at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

Collective Bargaining Agreements in Corporate Reorganizations

by

Andrew B. Dawson*

Congress enacted § 1113 to the Bankruptcy Code in 1984 in order to establish a standard for the rejection of Collective Bargaining Agreements. But the statute's ambiguous language has caused a split between the Second and Third Circuits, and has precipitated a lengthy academic debate largely centered on the interpretation of one word: "necessary." This debate has focused on proper statutory interpretation as well as deeper concerns regarding the policy goals behind the Bankruptcy Code. The present study reports data that indicate that the different interpretations are irrelevant in practice. No matter how "necessary" is defined, the result is always the same: debtors are able to reject their collective bargaining agreements. This article concludes that § 1113's ambiguities need to be clarified such that courts have a clearer standard as to what "necessary" means and how that necessity is to be measured.

INTRODUCTION

Bankruptcy scholars have long debated the proper treatment of collective bargaining agreements in corporate reorganizations. Collective bargaining agreements (CBAs) are typically short-term contracts between employers and their labor unions, setting forth basic terms of employment such as wages and benefits. While employers are not required to enter into CBAs with their unions, once a CBA is adopted it is an unfair labor practice for the employer to unilaterally change any of these core employment terms. In bankruptcy, however, debtors may reject these CBAs under terms specified in 11 U.S.C. § 1113.

The interpretation of § 1113 has spurred a debate concerning the treatment of CBAs in corporate reorganizations. Some commentators have feared that an overly pro-debtor interpretation of this statute would allow debtors to use bankruptcy as a "union-busting" tool. In contrast, an overly labor-friendly interpretation might prevent debtors from successfully emerging from bankruptcy. This debate has taken concrete form thanks to a split be-

*J.D. 2008, Harvard Law School; Kauffman Legal Fellow. The author wishes to thank the Kauffman Foundation for its generous support and to thank the following people for their comments: Lynn LoPucki, Phil Tedesco, and Elizabeth Warren.

tween the Third and Second Circuits. Thus, scholarship has largely divided as to which court has the better interpretation. Underlying this debate is an assumption that the difference in legal standards actually makes a difference in application.

This article presents data from an empirical study to test the above assumption. Based on data from every large publicly traded company bankruptcy between 2001 and 2007,¹ the present study reveals that the outcome of § 1113 motions was the same regardless of the legal standard applied: the court granted the debtor's motion to reject its CBA. This article argues that this result is the inevitable outcome of having an ambiguous pro-labor union standard in a pro-reorganization Bankruptcy Code. While the statute attempts to ensure that debtors can only reject their CBAs when rejection is truly necessary, Congress failed to define what "necessary" means or how courts are to make this determination. Consequently, Bankruptcy Courts implementing a Bankruptcy Code designed to facilitate the rehabilitation of debtors have little choice but to find rejection to be necessary.

This paper begins by presenting the language and background of § 1113. Part II then discusses the different interpretations of § 1113 in both the Third and Second Circuits, and reviews commentary regarding the merits of each interpretation. Part III describes the data collection methodology for the study reported in this article. Part IV lays out the findings of this study and presents analysis arguing that the difference in legal standards has no real impact on legal outcomes. And finally, Part V concludes.

I. BACKGROUND OF § 1113 OF THE BANKRUPTCY CODE

Collective bargaining agreements are short term contracts² between employers and labor unions specifying such core employment issues as "wages, hours, and other terms and conditions of employment."³ Since the enactment of the National Labor Relations Act in 1935, federal labor laws have sought to promote industrial peace by encouraging collective bargaining between

¹Database of these cases was provided by Lynn LoPucki's Bankruptcy Research Database, available at http://lopucki.law.ucla.edu/bankruptcy_research.asp.

²See Kevin J. Murphy, *The Determinants of Contract Duration in Collective Bargaining Agreements*, 45 *INDUS. & LAB. REL. REV.* 352, 357 (1992) (reporting results from an empirical study of collective bargaining agreements that "[t]he mean length of contracts signed during the sample period is 32.8 months. The standard deviation and the range of the data are 7.96 months and 4 years, respectively.")

³29 U.S.C. § 158(d). This section further describes the duty to bargain collectively:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party

employers and employee representatives.⁴ The role of the government in this legal scheme is to allow workers the freedom to organize and bargain through representatives.⁵ If the parties reach agreement on these terms, the law then serves to provide enforcement of the CBA.⁶ If the employer modifies the terms of the CBA before its expiration without following the guidelines set forth in the act, it commits an “unfair labor practice” that will result in a claim before the National Labor Relations Board.⁷

This policy favoring collective bargaining in labor relations runs into direct conflict with bankruptcy policy when a unionized debtor files for bankruptcy under Chapter 11. Chapter 11 promotes the reorganization of businesses in order to preserve their going concern value.⁸ And one of the primary tools for reorganization is the ability to reject burdensome contracts.⁹ The Bankruptcy Code, as enacted in 1978, did not contain any special provision for CBAs, and most courts treated these agreements as executory contracts, such as sales contracts and leases.¹⁰ Nonetheless, as the Supreme Court explained in *NLRB v. Bildisco & Bildisco*, courts treated CBAs differently due to their “special nature”:

⁴See 29 U.S.C. § 151 (“It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.”)

⁵*NLRB v. American Nat. Ins. Co.*, 343 U.S. 395, 401-2 (1952) (“The National Labor Relations Act is designed to promote industrial peace by encouraging the making of voluntary agreements governing relations between unions and employers. The Act does not compel any agreement whatsoever between employees and employers. Nor does the Act regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement. The theory of the Act is that the making of voluntary labor agreements is encouraged by protecting employees’ rights to organize for collective bargaining and by imposing on labor and management the mutual obligation to bargain collectively.”)

⁶29 U.S.C. § 158(a) and (d) (making it an unfair labor practice to unilaterally change the terms in a CBA) and 29 U.S.C. § 185(a) (providing jurisdiction in federal district courts for suits for violations of CBAs); see *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 451 (1957) (29 U.S.C. § 185(a) “is more than jurisdiction . . . it authorizes federal courts to fashion a body of federal law for the enforcement of these collective bargaining agreements.”)

⁷*NLRB v. Katz*, 369 U.S. 736, 747-48 (1962) (“Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5), without also finding the employer guilty of over-all subjective bad faith.”)

⁸*NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (“The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources.”)

⁹11 U.S.C. § 365.

¹⁰Douglas Bordewick and Verne Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L. J. 293, 294 (1983) (“courts now routinely hold that a collective bargaining agreement is an executory contract which may be rejected in a bankruptcy proceeding.”)

Although there is no indication in § 365 of the Bankruptcy Code that rejection of collective-bargaining agreements should be governed by a standard different from that governing other executory contracts, all of the Courts of Appeals which have considered the matter have concluded that the standard should be a stricter one We agree with these Courts of Appeals that because of the special nature of a collective-bargaining contract, and the consequent "law of the shop" which it creates, a somewhat stricter standard should govern the decision of the Bankruptcy Court to allow rejection of a collective-bargaining agreement.¹¹

Despite this agreement that CBAs merited special treatment in corporate reorganizations, courts disagreed regarding what this special treatment should be.¹² *Bildisco* clarified this question by stating that Bankruptcy Courts would allow debtors to reject their CBAs only "if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract."¹³

On the same day as the Supreme Court issued its decision in *Bildisco*, a bill was introduced in the House of Representatives to overrule it.¹⁴ This legislative initiative eventually resulted in the adoption of § 1113 of the Bankruptcy Code. While the impetus for the bill was a pro-labor reaction to *Bildisco*, the final law that emerged was a compromise between labor and business interests and did not represent a clear victory for either side.¹⁵ While § 1113 overruled *Bildisco*'s most controversial holding—that a debtor could unilaterally reject a CBA upon filing for bankruptcy—it codified the general structure laid out in that decision: a debtor must first negotiate with its unions before seeking court-ordered rejection of a CBA.¹⁶

¹¹*NLRB v. Bildisco & Bildisco*, 465 U.S. at 523-524 (internal citations omitted).

¹²See Bruce H. Charnov, *The Uses and Misuses of the Legislative History of Section 1113 of the Bankruptcy Code*, 40 SYRACUSE L. REV. 925, 934 (1989) (describing the pre-*Bildisco* caselaw: "The circuit courts employed at least three distinctly different standards before allowing rejection of a collective agreement in a Chapter 11 proceeding.")

¹³465 U.S. at 526.

¹⁴See *In re Century Brass Products, Inc.*, 795 F.2d 265, 272 (2d Cir. 1986) ("In fact, on the same day *Bildisco* was decided, Congressman Rodino introduced H.R. 4908 to 'clarify the circumstances under which collective bargaining agreements may be rejected.' H.R. 4908, 98th Cong., 2d Sess., 130 Cong.Rec. H 809 (daily ed. February 22, 1984).")

¹⁵Michael St. Patrick Baxter, *Is There a Claim for Damages from the Rejection of a Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code?*, 12 BANK. DEV. J. 703, at 721-22 (1993) ("What started as a pro-labor bill in the House turned into a compromise bill among various interest groups when it emerged from the Conference Committee. . . . Thus, the enactment of section 1113 cannot be considered an unqualified victory for either labor or management. Accordingly, it would be inappropriate to construe section 1113 with either a pro-labor or a pro-management bias.")

¹⁶*NLRB v. Bildisco & Bildisco*, 465 U.S. at 526 ("Before acting on a petition to modify or reject a

Section 1113 imposes both procedural and substantive restrictions on the bargaining process.¹⁷ The procedural requirements are relatively straightforward—the debtor must meet with the union representative, make a proposal, and provide the information necessary to evaluate the proposal. The substantive provisions, on the other hand, are rather ambiguous and have sparked controversy among commentators and the split among Circuit Courts. For example, some scholars have considered what it means for the union to refuse the debtor's proposed modifications “without good cause.”¹⁸ Meanwhile, others have examined whether a labor union receives a claim for damages from a rejected CBA.¹⁹ But the bulk of this commentary has focused on the meaning of “necessary.”²⁰

collective bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution. The NLRA requires no less. Not only is the debtor-in-possession under a duty to bargain with the union under § 8(a)(5) of the NLRA, 29 U. S. C. § 158(a)(5) . . . but the national labor policies of avoiding labor strife and encouraging collective bargaining, § 1, NLRA, 29 U. S. C. § 151, generally require that employers and unions reach their own agreements on terms and conditions of employment free from governmental interference.”)

¹⁷11 U.S.C. § 1113, which states in relevant part:

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

(A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and

(B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

¹⁸For a discussion of the “good cause” element, see Marc. S. Kirschner, Willis J. Goldsmith, Lawrence P. Gottesman, Deena B. Jenab, and Jay G. Swardenski, *Tossing the Coin Under Section 1113: Heads or Tails, the Union Wins*, 23 SETON HALL L. REV. 1516 (1993).

¹⁹Baxter, *supra* note 15, at 721-2.

²⁰Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503, 526 (1994) (“Without question the single most controversial question under section 1113 has been how to define what modifications are necessary to permit the debtor's reorganiza-

Section 1113 requires that, prior to seeking rejection, the debtor must propose to its union "those *necessary* modifications in the employees benefits and protections that are *necessary* to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably."²¹ Congress did not define what makes a modification "necessary" nor what it means for the modifications to be "necessary to permit" reorganization, and commentators immediately focused on this ambiguity.²² They noted that not only is the statute ambiguous, but that the legislative history provides little to no guidance. With no House or Senate Report concerning § 1113, attempts at discerning the legislative intent have depended on a series of inconsistent statements from Congressional representatives.²³

As predicted, this statutory ambiguity caused divergent outcomes among Bankruptcy Courts and then among Courts of Appeals. Notably, the two most prominent corporate Bankruptcy Courts in the country soon found themselves on opposing sides of this debate, as discussed below.

II. THIRD CIRCUIT VS. SECOND CIRCUIT

Congress used the word "necessary" twice in drafting § 1113: "the debtor-in-possession . . . shall make a proposal . . . which provides for those *necessary* modifications in the employees benefits and protections that are *necessary* to permit the reorganization of the debtor."²⁴ The interpretation of "necessary" has thus posed two interpretative questions. First, "how necessary?" And second, "necessary for what?"²⁵ That is, must the modifications be "essential" or something more akin to "helpful"? And must the modifica-

tion."); Christopher D. Cameron, *How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 869 (1994) ("Exactly what 'necessary' means has been the subject of vigorous judicial and academic debate.")

²¹11 USC 1113(b)(1)(A) (emphasis added).

²²See e.g. James J. White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, at 1197 (1984) ("What will be the consequence of the enactment of section 1113? Because the language is purposefully ambiguous and because it plays upon a vast and varied landscape, one cannot be sure. Surely it makes the law measurably less certain; it will make the trial judge's decision more discretionary and speculative; it will introduce greater guesswork into the lives of those who must advise management and unions about their rights.")

²³Bruce H. Charnov, *The Uses and Misuses of the Legislative History of Section 1113 of the Bankruptcy Code*, 40 SYRACUSE L. REV. 925, 1002 (1989) (concluding that "other than this general desire to achieve a better policy reconciliation [between bankruptcy and labor law], little is dispositive in the legislative history."); see also Daniel S. Ehrenburg, *Rejecting Collective Bargaining Agreements under Section 1113 of the 1984 Bankruptcy Code: Resolving the Tension between Labor and Bankruptcy Law*, 2 J. L. & POL'Y 55, at 71 (1994) ("As a result, no definitive legislative history exists and legislative intent can only be inferred from inconsistent statements by various Congress-people contained in the Congressional Record.")

²⁴11 U.S.C. § 1113(b)(1)(A) (emphasis added).

²⁵See Cameron, *supra* note 20, at 869.

tions prevent the debtor from entering liquidation, or is it enough that they facilitate the reorganization?

The Third Circuit answered these questions in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America* by finding that the modifications must be essential in order to prevent the debtor's liquidation.²⁶

The Second Circuit, in *Truck Drivers Local 807 v. Carey Transportation, Inc.*, found that the modifications need not be essential and that they must facilitate the reorganization: "the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."²⁷

Even though the Second Circuit's interpretation has been more widely accepted among the other circuits,²⁸ commentators continue to debate which court has the better interpretation, as discussed below. Each side advances both policy and statutory arguments in favor of its position. And each side argues that its interpretation of "necessary" will have a drastic impact on corporate reorganizations.

Those in favor of the Third Circuit's interpretation argue that it better balances bankruptcy's pro-reorganization policy with the labor policy of resolving disputes through collective bargaining.²⁹ They argue that by re-

²⁶*Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America*, 791 F.2d 1074, 1088 (3d Cir. 1986) ("The 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor can lower its costs. Such an indulgent standard would inadequately differentiate between labor contracts, which Congress sought to protect, and other commercial contracts, which the trustee can disavow at will We reject the hypertechnical argument that 'necessary' and 'essential' have different meanings because they are in different subsections. The words are synonymous."); and at 1089 ("While we do not suggest that the general long-term viability of the Company is not a goal of the debtor's reorganization, it appears from the legislators' remarks that they placed the emphasis in determining whether and what modifications should be made to a negotiated collective bargaining agreement on the somewhat shorter term goal of preventing the debtor's liquidation, the mirror image of what is 'necessary to permit the reorganization of the debtor.'")

²⁷*Truck Drivers Local 807 v. Carey Transportation, Inc.*, 816 F.2d 82, 90 (2d Cir. 1987).

²⁸Anne J. McClain, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 GEO. L.J. 191, 206 (1991) ("The majority of courts, however, have rejected the Wheeling-Pittsburgh interpretation of the necessity element and have imposed a more liberal interpretation."); Hon. William T. Bodo and Beth A. Buchanan, *Ignored Consequences—The Conflicting Policies of Labor Law and Business Reorganization and its Impact on Organized Labor*, 15 AM. BANKR. INST. L. REV. 395, 409 (2007) ("the Second Circuit approach . . . is the approach most widely adopted by courts.")

²⁹See e.g. Gary M. Roberts, *Bankruptcy and the Union's Bargain: Equitable Treatment of Collective Bargaining Agreements*, 39 STAN. L. REV. 1015, 1047 (1987) ("Courts should strictly construe the necessity requirement, allowing only those contract modifications that must be made to avoid liquidation. Only through such strict construction can the courts establish in bankruptcy the balance of power in labor-management negotiations that approximates the relative strengths established by Congress in the NLRA."); Babette A. Ceccotti, *Lost in Transformation: The Disappearance of Labor Policies in Applying Section 1113 of the Bankruptcy Code*, 15 AM. BANKR. INST. L. REV. 415, 431 (2007) ("Viewed under *Carey*, the rejection standard tilts decidedly towards a bankruptcy-centered consideration about the pros-

quiring debtors to propose only those bare minimal modifications to avoid liquidation, the decision in *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America* respects the balance of power between labor and management created by the NLRA.³⁰ At the same time, the Third Circuit still permits debtors to reject burdensome CBAs when doing so is necessary to prevent liquidation—and to avoid the job losses that would result. Proponents of the Third Circuit approach argue that to define “necessary” as less than “essential” would allow debtors to use the Chapter 11 process as a “collective bargaining weapon,” as any company in bankruptcy can easily establish that the cutting of labor costs would help to increase profits.³¹

Supporters of the Second Circuit’s interpretation argue that Congress actually used the word “essential” in another part of § 1113, and that it is therefore internally consistent to interpret “necessary” as something less than essential.³² Additionally, they argue that to interpret “necessary” as “essential” would frustrate the duty to bargain in good faith. In this spirit, *Truck Drivers Local 807 v. Carey Transportation, Inc.*, held as follows:

Because the statute requires the debtor to negotiate in good faith over the proposed modifications, an employer who initially proposed truly minimal changes would have no room for good faith negotiating, while one who agreed to any substantive changes would be unable to prove that its initial proposals were minimal.³³

Policy-wise, commentators have argued that the Second Circuit interpretation is more likely to permit successful reorganizations—thus avoiding liquidations and consequent job losses. They contend that because the debtor needs some breathing room to survive unforeseen events, a successful reorganization requires that the debtor be allowed to make more than minimal

pects for a long-term reorganization and away from a labor policy frame of reference (for example, the degree to which proposed cuts invade the expectations reflected in the collective bargaining agreement or are modulated by snap-backs or other compensatory features of interest to the union.”).

³⁰Roberts, *supra* note 29, at 1047.

³¹McClain, *supra* note 28, at 207 (“[The *Carey*] rationale is self-fulfilling. Since a Chapter 11 debtor is in severe financial straits, any proposed cost reduction would likely help its reorganization and would, therefore, be ‘necessary.’ The court’s analysis in *Carey Transportation* supports this conclusion.”).

³²Charnov, *supra* note 23, at 1003 (“Even if the legislative history is discounted, the textual and pragmatic good faith arguments raised in *Allied Delivery* point to the interpretation offered by the *Carey Transportation* court as being more accurate. Interpreting section 1113(b)(1)(A)’s necessity requirement as less than the essential standard employed for interim modifications under section 1113(e) avoids the rigidity ascribed to the REA Express standard of labor contract rejection.”); Steven Kropp, *Collective Bargaining in Bankruptcy: Toward an Analytical Framework for Section 1113*, 66 TEMP. L. REV. 697, 710-11 (1993) (“Finally, as commentators have noted, Congress used the term ‘essential’ in subsection (e), which authorizes emergency relief (interim) changes, but used ‘necessary’ in subsection (b)(1)(A). Congress must therefore have intended a distinct and lower threshold where it used the word necessary.”)

³³*Carey*, 816 F.2d at 89.

modifications.³⁴ In addition, by allowing more than minimal changes to the CBA, the debtor can cut more costs, thus resulting in a greater payout to the other general unsecured creditors whose vote may be critical to confirmation of a plan.³⁵ Finally, proponents of the Second Circuit's approach argue that it enhances the debtor's long term financial health and is more consistent with the Bankruptcy Code's goal of approving plans that will ensure the emerging company's survival.³⁶

These arguments about whether the Third or Second Circuit has properly interpreted the word "necessary" each assume that the difference in legal standards actually matters. That is, they assume that debtors will have greater success rejecting their CBAs in the Second Circuit than in the Third. A secondary assumption is that the difference in legal standards would impact a unionized debtor's decision of where to file for bankruptcy. Large corporations can effectively forum shop their bankruptcy filings, due in part to the Bankruptcy Code's venue provisions and to the nature of corporate groups.³⁷ Presumably, therefore, the difference in legal standards would make it more likely that a unionized debtor would file for bankruptcy in the Second Circuit than in the Third.³⁸

To assess whether the difference in legal standards actually impacts cor-

³⁴See 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, 191 (1990).

³⁵Keating, *supra* note 20, at 533 ("The *Carey* standard of 'necessary,' which allows greater cuts in union wages than merely those absolutely necessary to avoid liquidation, is more likely to lead to a confirmed plan of reorganization. The reason that the *Carey* standard will have this effect is that the *Carey* definition of 'necessary' is more likely to allocate at least some of the gains of the debtor's going-concern surplus to the unsecured creditors who must vote on the debtor's plan of reorganization.")

³⁶This is known as the "feasibility" requirement for the confirmation of a plan of reorganization, found in 11 USCA § 1129 (a)(11) ("Confirmation of the plan is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor or any successor to the debtor under the plan, unless such liquidation or reorganization is proposed in the plan."); Cuevas, *supra* note 34, at 192 ("The feasibility requirement of section 1129 must be borne in mind in determining whether the proposed modifications to the collective bargaining agreement are necessary to permit reorganization. It is vital to examine the proposed modifications to a collective bargaining agreement in terms of the long-term financial stability of the debtor.")

³⁷The Bankruptcy Code's venue requirements, 28 U.S.C. § 1408, allow a debtor to file for bankruptcy at the (1) location of the debtor's residence, (2) location of principal place of business, (3) location of the principal assets, or (4) the location of a chapter 11 case involving an "affiliate, general partner, or partnership." As noted by Professor LoPucki, a large corporate debtor can use this last option as a "venue hook" to file for bankruptcy almost anywhere. LYNN LOPUCKI, *COURTING FAILURE: HOW THE COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY SYSTEM* 37 (2005) ("A venue hook enables a corporate group to pull itself into any court in which any of its constituent corporations can set the hook. For large corporate groups, that can include almost any bankruptcy court in the United States.")

³⁸This assumption led many to predict that Chrysler and General Motors would choose to file their bankruptcies in the Southern District of New York, within the Second Circuit, instead of in Delaware, within the Third Circuit. Cf. Barbara Kiviat, "GM's Potential Bankruptcy: Shopping for a Venue," April 9, 2009, <http://www.time.com/time/business/article/0,8599,1890171,00.html>.

porate reorganizations, it is necessary to look not only at the outcomes in bankruptcies in each circuit but also at the practice of forum shopping. Prior to the present study, data has been insufficient to answer these questions. Although this is not the first empirical study on § 1113 motions, it is the first to gather a large enough sample to analyze the impact of the different legal standards.

The first study of § 1113 was conducted in 1994 by Professor Christopher Cameron.³⁹ He focused on thirty-eight Bankruptcy Court decisions⁴⁰ between the years 1984 and 1993.⁴¹ Although he gathered data on the location of the bankruptcy filings,⁴² he did not analyze the impact of the different legal standards on outcomes. Instead, he tested three different hypotheses: (i) § 1113 has led to fewer rejected CBAs since its passage in 1984;⁴³ (ii) § 1113's procedural steps are more important than the substantive ones;⁴⁴ and (iii) courts are more willing to reject a CBA if the debtor bargains but fails to reach a negotiated agreement.⁴⁵ By comparing the percentage of decisions in his study that resulted in a rejected CBA with a similar "rejection rate" reported by Professor James White in a pre-§ 1113 study, Cameron concluded that § 1113 had a pro-labor impact.⁴⁶ He found that after the

³⁹Cameron, *supra* note 20.

⁴⁰*Id.* at 886-87 ("The study examined forty-six reported bankruptcy court decisions in which a debtor filed at least one section 1113 application: thirty-eight decisions in which complete contract rejection was sought under section 1113(c), and twenty in which interim modification of the contract was sought under section 1113(e). Applications for rejection rather than modification of collective bargaining agreements draw more critical fire, so the study focused on the thirty-eight decisions under section 1113(c).")

⁴¹*Id.* at 878 ("The study examined every bankruptcy court decision reported between July 10, 1984 and July 10, 1993 in which the debtor-employer filed an application for relief from the obligations of a collective bargaining agreement under section 1113."); and at 879 ("For purposes of the study, the term 'reported,' when used in referring to reported bankruptcy court decisions, has two dimensions. First, it includes all section 1113 bankruptcy court decisions published or otherwise made available through the facilities of the Bureau of National Affairs, Commerce Clearing House, Matthew Bender Company, Mead Data Corporation, and West Publishing Company. It was assumed that West's *Bankruptcy Reporter* was the most widely relied-upon reporting service. Consequently, the study examined the version of every decision reported there and used the other services to examine additional decisions not reported by West. Second, 'reported' includes all un-reported bankruptcy court decisions for which there were related reported appellate decisions (by district courts, bankruptcy appellate panels, and circuit courts of appeal, where applicable) providing significant data about what happened below when the bankruptcy court was presented with a section 1113 application.")

⁴²*Id.* at 890 ("Close to two-thirds of the decisions were reported by bankruptcy courts in the Second, Sixth, and Seventh Circuits, which may reflect the financial distress suffered by residents of the industrial Midwest and Northeast during the 1980's. By contrast, no section 1113(c) decisions at all were reported by bankruptcy courts in the First, Fourth, or District of Columbia Circuits during the study period.")

⁴³*Id.* at 892.

⁴⁴*Id.* at 904.

⁴⁵*Id.* at 909.

⁴⁶*Id.* at 895-96 ("In sum, the study shows that the rate of rejection has declined about nine percentage points since the enactment of the statute—from about sixty-seven percent during the period 1975-1984 to about fifty-eight percent during the period 1984-1993. This is a substantial, if not radical, improvement in

enactment of §1113, debtors were able to reject their CBAs in 58% of all cases, compared to 67% of the cases prior to 1984.⁴⁷ Examining the relative importance that courts seemed to place on each of § 1113's requirements, he concluded that courts put the most emphasis on the "necessary" standard.⁴⁸ Finally he found that courts were more likely to grant rejection when debtors participated in a greater number of bargaining sessions.⁴⁹

The United States Government Accountability Office (GAO) later performed a study on Chapter 11 bankruptcies to measure the impact of the 2005 Bankruptcy Abuse Prevention and Consumer Protection Act and the Pension Protection Act of 2006 on corporate reorganizations.⁵⁰ This study examined all 115 publicly traded companies identified by the SEC as having filed for bankruptcy between 2004 and 2006.⁵¹ It found that eight of the twenty-eight, or 29%, of the debtors with CBAs sought to reject the labor agreements in bankruptcy, and that these § 1113 motions generally resulted in negotiated modifications.⁵² While this GAO report presents a census of Chapter 11 cases with § 1113 motions, as opposed to Professor Cameron's study, it did not examine where these cases were filed. Additionally, this study involved a small sample of only eight cases with § 1113 motions.

the prospects for the survival of collective bargaining agreements in Chapter 11.")(comparing his results with those of Professor James White in *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169 (1984).

⁴⁷Cameron, *supra* note 20, at 895-96.

⁴⁸*Id.* at 906-7 ("Therefore, it can safely be concluded that the idea shared by so many commentators is correct: the single most important step that a debtor must climb to secure rejection under section 1113(c) is establishing that his or her proposed modifications are 'necessary' to permit reorganization. Or, stated another way, in the average bankruptcy court decision regarding a section 1113(c) application, step three is the most important of all the steps in the decision-making process.")

⁴⁹*Id.* at 911-12 ("The data suggest a strong relationship between unsuccessful bargaining and the likelihood of rejection after three or more bargaining sessions. Of the nineteen decisions in which rejection was granted and for which data were available, thirteen involved three or more unsuccessful bargaining sessions. By contrast, of the eleven decisions in which rejection was denied and for which data were available, just three involved three or more such sessions. The conclusion: bankruptcy courts 'reward' debtors who have engaged in actual bargaining sessions that do not produce contract settlements by granting their applications for rejection.")

⁵⁰U.S. GEN. ACCOUNTING OFFICE, MANY FACTORS AFFECT THE TREATMENT OF PENSION AND HEALTH BENEFITS IN CHAPTER 11 BANKRUPTCY (2007), available at <http://www.gao.gov/new.items/d071101.pdf>.

⁵¹*Id.* at 11 ("Reviewed publicly available court documents of the 115 public companies identified by the Securities and Exchange Commission (SEC) as having filed for chapter 11 bankruptcy in the years before and after BAPCPA's general enactment date—October 17, 2005, (76 companies before, 39 after), including motions to change benefits, such as defined benefit (DB) plans, retiree health benefits, and those protected by collective bargaining agreements (CBA). We also reviewed whether employers sought approval to continue benefit programs. The scope of analysis was limited to public companies due to data limitations and is not generalizable to all companies in bankruptcy.")

⁵²*Id.* at 34 ("Eight of the 28 employers that reported union representation sought to modify or reject their CBAs. Generally, employers and unions negotiate the changes to the CBA. Negotiations often include wage and benefit cuts.")

These two previous studies present important insights into the use of § 1113 in corporate reorganizations, but they do not provide sufficient data to analyze the importance of the differing legal standards in the two most important corporate reorganization courts. The study reported in this article, as described below, seeks to contribute the necessary data to address this issue.

III. DATA

The study reported in this article is based on data from every Chapter 11 filing of large publicly traded companies between 2001 and 2007, as identified through Professor Lynn LoPucki's Bankruptcy Research Database.⁵³ This database provided certain basic facts about each case, including the date of filing, the district in which it was filed, and whether the case was "forum shopped"—meaning that it was filed in a district other than where the debtor had its headquarters.

Building on Professor LoPucki's data, this study coded each filing for the presence of a unionized labor force. This information was gathered in three ways: (1) by examining the debtors' last pre-bankruptcy SEC Form 10-K for statements indicating that its employees were represented by labor unions;⁵⁴ (2) by examining the bankruptcy docket report for debtors' motions to reject a collective bargaining agreement;⁵⁵ and (3) by examining news reports after the bankruptcy filing.⁵⁶ Finally, each case was coded for the presence of motions to reject a CBA. This was done principally by searching the bankruptcy case docket for such motions, either as motions pursuant to § 1113 or simply motions to reject a CBA.⁵⁷ The search was supplemented with news searches for collective bargaining agreements in bankruptcy.⁵⁸

⁵³Database of these cases was provided by Lynn LoPucki's Bankruptcy Research Database, available at http://lopucki.law.ucla.edu/bankruptcy_research.asp.

⁵⁴An examination of the latest 10-K for the year prior to filing bankruptcy was performed, and included a review of the subsection "Employees." The company was coded as having no collective bargaining agreements if the 10-K made no mention of labor unions or CBAs, or if the company specifically said that it was not subject to any collective bargaining agreements, that its employees were not unionized, or that only a very small minority of the employees was unionized. The company was coded as having a collective bargaining agreement if it said that its employees were unionized (unless it said this group was a small minority).

⁵⁵Dockets were accessed from PACER, either through Bloomberg's docket search or directly from the PACER website itself.

⁵⁶A search of news source was performed in two databases on Bloomberg, both the labor union news and bankruptcy news databases. A search was performed in the bankruptcy news database for "collective bargaining". A search in the labor database was performed for "bankrupt*" and "collective bargain*."

⁵⁷If the docket, as accessed on PACER, had a motion to reject the collective bargaining agreement, this was coded as a yes. Motions for interim relief from collective bargaining agreements were not counted. To search for motions, a word search was performed for the words "1113" (for a § 1113 motion), "collective" (for collective bargaining), and "union" (for any mention of labor unions.)

⁵⁸*Supra* note 56.

Data were collected as to how many CBAs were affected by motions in each of the subject cases. In some instances, the debtor tried to reject as many as ten or more of its CBAs. In others, the debtor only attempted to reject one. For each of the affected CBAs, the name of the union involved and the outcome of the motion were recorded.

This study contributes to the previous studies by providing a complete census of large Chapter 11 filings over seven years in a recent time span. The census provides a broader picture of the CBAs in bankruptcy—not only the rejection rate, but also how often these motions are filed and how often they settle. In addition, this study contributes data about each individual CBA affected by these motions.

The data in this study do pose a limitation, however. They represent only a thin sliver of all Chapter 11 filings during this time period, as large corporate bankruptcies are the exceptions more than the norm.⁵⁹ The outcomes in these big cases may not be representative of the treatment of labor contracts in all Chapter 11 cases. It is possible that smaller companies are better able to negotiate with their unions—perhaps because they have fewer unions with whom to negotiate. It is also possible that courts may treat larger cases differently due to the added pressure of trying to keep large companies afloat through the bankruptcy process. Something akin to the “too big to fail” mentality may impact outcomes, as courts may feel additional pressure to keep these large companies out of Chapter 7 liquidation.

Despite the above limitations, the data present the complete picture of large Chapter 11 filings during the covered period. And partially *because* of this limitation, the data carry even greater weight. If courts do indeed feel an additional pressure when handling these larger cases, this present analysis will provide a stress test of § 1113’s ability to balance the bankruptcy and labor policies inherent when a debtor seeks to reject a CBA.

IV. FINDINGS

Even though the debate concerning the appropriate interpretation of the necessity requirement has assumed that the different legal standards in the Third and Second Circuits would produce different outcomes, this study finds that courts granted every motion under § 1113 without regard to the applicable legal standard.⁶⁰ This finding suggests that the difference in legal standards made no difference in practice. The outcome was “debtor-friendly”

⁵⁹Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 609 (2009) (“In the 2002 sample [of Chapter 11 filings], 15% are tiny cases, with less than \$100,000 in assets, while at the other end of the spectrum 6% involve over \$100 million in assets.”)

⁶⁰Only once, in the Southern District of New York, did a court deny a debtor’s motion—but the court then granted the debtor’s renewed motion. *In re Delta Air Lines*, 342 B.R. 685 (Bankr. S.D.N.Y. 2006)

whether the Bankruptcy Court applied the “pro-labor” or “pro-debtor” interpretation of “necessary.”

This section first presents an overview of the use of § 1113 motions and finds that about 20% of unionized debtors filed a § 1113 motion. Presenting data concerning Chapter 11 filings in Delaware and the Southern District of New York, this study finds no significant difference except with respect to the settlement rate of motions. Not only did the difference in legal standards fail to make a difference in litigated motions, but it also did not appear to impact debtors’ venue selection. An almost equal number of debtors filed § 1113 motions in New York as in Delaware. This section then concludes that the two legal standards have converged in practice, and that they have done so in a way that makes the necessity requirement effectively meaningless.

A. OVERVIEW: SECTION 1113 MOTIONS TO REJECT CBAs

In this study of large Chapter 11 bankruptcies, 136 of 316 companies had unionized workforces. The debtor filed at least one motion to reject a CBA in thirty of these cases (representing 22% of the unionized debtors), a percentage not far from the 29% reported in the GAO study.⁶¹ In the vast majority of cases, the debtor did not need to avail itself of § 1113. It may not have needed to modify its CBAs—perhaps because it could restructure without modifications, because the Chapter 11 filing may have resulted in a liquidation of the business, or because the debtor may have been able to negotiate modifications out of court.

These thirty debtors that sought to reject a CBA involved a total of 103 different § 1113 motions. The majority of these motions were settled. The debtor and the labor unions reached settled agreements for 62 of these 103 CBAs. For nine other CBAs, the § 1113 motions were never ruled on because the debtor failed to reorganize. All of the remaining thirty-two CBAs were rejected. Only once did a court deny a debtor’s § 1113 motion, and even then the debtor was able to reject the CBA upon filing a second motion.⁶²

B. SECOND CIRCUIT VS. THIRD CIRCUIT

Although conventional wisdom holds that the Second Circuit case law is more pro-management while the Third Circuit is more pro-union, every litigated motion allowed the debtor to reject its CBA, regardless of whether the case was filed in the Southern District of New York or Delaware. As men-

(denying the debtor’s § 1113 motion) and 351 B.R. 67 (approving the debtor’s renewed motion three months later.)

⁶¹U.S. GEN. ACCOUNTING OFFICE, *supra* note 50, at 34.

⁶²This involved *In re Delta Airlines*, as stated *supra* note 60.

tioned above, only once did a court deny even an initial § 1113 motion, and that was in the Delta Airlines restructuring in the “pro-debtor” Southern District of New York.⁶³ While these results do not indicate that the difference in legal standards was entirely irrelevant, they do indicate that the difference in legal standards did not affect the ultimate outcome: every litigated motion resulted in a rejected CBA.

Not only were debtors successful in rejecting their CBAs regardless of legal standard, but the difference in legal standards does not appear to have driven more unionized debtors to file in the Southern District of New York. In fact, more unionized debtors shopped into Delaware than into New York. Of the sixty-two unionized debtors that shopped into either New York or Delaware, thirty-seven filed in Delaware and twenty-five in New York. And among these unionized debtors that shopped into Delaware and New York, five New York debtors filed § 1113 motions compared to six in Delaware.⁶⁴

If one accepts the assumption that large publicly traded companies have virtually limitless options on where to file—and all the debtors in this study are of this sort—then it does not appear that the difference in legal standards promoted forum shopping. Thus, the difference in legal standards does not appear to have affected either the outcome of litigated motions or debtors’ forum selection decision.

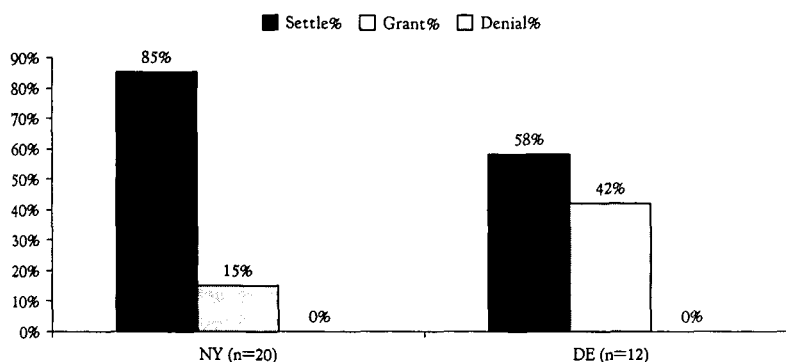
The one significant difference between the cases filed in the Southern District of New York and those filed in Delaware concerns the settlement rate of § 1113 motions. In the five New York cases, the debtors filed a total of twenty § 1113 motions. In the six Delaware cases, the debtors filed a total of twelve such motions. Nearly 85% of the New York motions were settled, compared to only 58% of the motions in Delaware.⁶⁵ (see Figure 1).

⁶³See *supra* note 60 and text at note 62.

⁶⁴The following debtors filed in the Southern District of New York: Dana Corporation (Docket No. 06-10354), DPH Holding Corp., at al. (Docket No. 05-44481), Delta Air Lines, Inc. (Docket No. 05-17923), Northwest Airlines Corporation (Docket No. 05-17930), and Tower Automotive Inc. (Docket No. 05-10578). The following filed in Delaware: Muma Services, Inc. (Docket No. 01-0926), Advanced Glassfiber Yarns, LLC (Docket No. 02-13615), Rouge Industries, Inc. (Docket No. 03-13272), American Class Voyages Co. (Docket No. 01-10954), Kaiser Aluminum Corporation (Docket No. 02-10429), and Trans World Airlines, Inc. (Docket No. 01-0056).

⁶⁵Seventeen of the twenty § 1113 motions in New York were settled, compared to seven of the thirteen motions in Delaware. This difference is statistically significant with $\chi^2 = 3.86$, $p = .05$

Figure 1: Outcomes of § 1113 Motions on CBAs, in New York and Delaware Cases



C. ANALYSIS

The different legal standards regarding the rejection of CBAs in the Second and Third Circuits has made little difference in application, despite the difference in settlement rates. Even though the Second and Third Circuits continue to apply different standards, the results of § 1113 motions indicate that these standards have effectively converged.

The higher settlement rate in motions filed in New York may indicate that the different legal standards have impacted the parties' perception of their bargaining leverage. Labor unions may be more inclined to settle when negotiating in the shadow of the Second Circuit's standard.⁶⁶ In addition, although not verifiable by the data here, it is possible that the different legal standards affected not only the rate of settlements but also the terms of those settlements.

The impact upon settlement rates suggests that labor unions and their debtor-employers perceive the applicable legal standard as relevant. Nonetheless, the outcome of the litigated motions—resulting in ultimate victory for the debtor in every case—suggests that the legal standards are actually irrelevant. As between the Second and Third Circuits, different interpretations of § 1113 produce the same results. In effect, their different legal standards have converged.

Convergence in legal standards might generally represent a positive development, especially in a field like bankruptcy that involves a uniform code. In

⁶⁶See Linda Babcock, Henry S. Farber, Cynthia Fobian, and Eldar Shafir, *Forming Beliefs about Adjudicated Outcomes: Perceptions of Risk and Reservation Values*, 15 INT'L REV. L. & ECON. 289, 290 (1995) ("In negotiations where impasses are resolved via a dispute resolution mechanism in which a third party makes a binding decision (e.g., the court system, arbitration), beliefs about a potential adjudicated outcome are central in determining the negotiating environment."); cf. Mnookin and Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 978 (1979).

this case, however, the convergence of legal standards regarding § 1113 has resulted in one-sided, pro-debtor outcomes that are inconsistent with the statutory intent. This bankruptcy code provision was intended to provide some extra protection for CBAs. As discussed above, the precise level of protection is unclear. But the fact that every large corporate debtor during a seven year period was able to reject its CBAs suggests that the statute has provided very little protection at all. Section 1113 may have imposed additional costs on debtors seeking to reject their CBAs, but it has not kept any debtor from rejecting a CBA. In essence, § 1113's requirements were to serve as a gatekeeper for motions to reject CBAs, but the data reported here indicate that the gatekeeper has let everyone through.

This convergence in legal standards with decidedly pro-debtor results should also cause concern because it is alarmingly consistent with the fears of forum shopping scholars.⁶⁷ Because large corporate groups can forum shop their reorganizations, these scholars fear that in order to attract these cases, Bankruptcy Courts will adopt pro-debtor procedures and interpretations that will gradually result in a "race to the bottom."⁶⁸ While the data in this paper cover too short a time span to indicate any trends indicating a race to the bottom, the data are consistent with these theories, especially when compared with the results of Professor Cameron's 1994 study reporting that some motions were denied.

Even though the data in this study are consistent with the court competition theory, this article suggests that a better explanation for the collapsing of the legal standards is § 1113's ambiguous language. By failing to define "necessary" or to provide any guidance for measuring necessity, courts are left with little choice but to ultimately find that all proposed modifications are necessary and to grant these motions.⁶⁹ Granting these motions is not only consistent with the bankruptcy policy of promoting reorganizations, but it also represents the less risky choice for courts. If a court grants the debtor's motion, wages will be cut and some jobs will be lost, but the debtor will more likely survive. In contrast, if a court denies a motion for rejection, the debtor may be forced into liquidation and *everyone* will lose employment. Absent more direct language in the statute telling courts what is required to

⁶⁷See LYNN LOPUCKI, *COURTING FAILURE: HOW THE COMPETITION FOR BIG CASES IS CORRUPTING THE BANKRUPTCY SYSTEM* (2005).

⁶⁸*Id.* at 123-35; see also Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 1002-3 (1999).

⁶⁹Judge Hardin, in his opinion denying Comair's motion to reject its CBA, described § 1113 as "surely [] one of the most unusual provisions in the Bankruptcy Code or any other statute because of the remarkable degree of subjective discretion which a bankruptcy court must exercise in order to carry out its mandate." *In re Delta Air Lines*, 342 B.R. 685, 691 (Bankr. S.D.N.Y. 2006)

prove “necessity,” rational decision making compels courts to allow debtors to reject their CBAs.

Clarification to § 1113 should not only define “necessary,” but should also provide objective means for measuring necessity. The data reported here suggest that merely defining “necessary” to mean “essential” or “important” would not effect any change in outcome. Instead, this provision needs to include some sort of objective requirements for measuring necessity. One such provision, as has been proposed to Congress, would be to require that proposed modifications be of a limited duration.⁷⁰ Such duration limits would provide some assurance that the proposed changes would apply only during the debtor’s financial difficulty.

Alternatively, Congress could amend § 1113 to ensure that labor unions have a claim for damages resulting from a rejected CBA, in the same way that a landlord would have a claim for damages under § 365 for rejection of its lease. Currently, the Code is silent on the union’s right to receive such damages.⁷¹ If § 1113 clarified this—and provided a means for measuring these damages—the statute could provide another way to balance bankruptcy and labor policies.

By clarifying not only the standard for rejecting CBAs but also both how to determine if that standard is met and what the consequences of rejection should be, Congress could not only provide courts with more guidance, but it could also alter the bargaining process between employers and their unions.

V. CONCLUSION

Even though § 1113 contains ambiguous language and has no definitive legislative history, its text clearly indicates that Congress preferred the outcome of negotiated settlements to labor disputes. This preference may reflect a belief that settlements are more consistent with federal labor policy, which seeks to promote collective bargaining and, more generally, to remove government presence from labor relations. Nonetheless, § 1113 does more than encourage negotiation. It also creates the substantive law that provides the parameters for that negotiation. And that substantive law is defectively ambiguous.

Legal scholars have argued about what has been perceived as the major point of ambiguity: what does § 1113 mean when it requires debtors to propose only necessary modifications? These scholars were rightly concerned about the impact of the substantive law on outcomes, and indirectly, on nego-

⁷⁰See e.g. *Hearings before the H. Comm. on the Judiciary, Subcomm. on Commercial and Administrative Law*, 111th Cong. (Dec. 16, 2009)(statement of Marshall Huebner, co-chair of Insolvency and Restructuring Department at Davis, Polk & Wardwell LLP), 2009 WL 4829091.

⁷¹See Baxter, *supra* note 15.

tiations. However, the study reported in this paper suggests they overestimated the significance of the competing interpretations of “necessary.” Not only did the different interpretations produce the same outcomes, but the necessity requirement had no impact on the outcomes.

While the necessity requirement of § 1113 needs clarification, the statute must also provide a means for determining if a debtor’s proposals meet that standard. In addition, § 1113 needs clarification concerning the consequences of a rejected CBA. By providing these clarifications, Congress would create greater uniformity in the Bankruptcy Code. In turn, such uniformity would promote more effective labor negotiations. Until Congress enacts such clarifications, courts will have little choice but to continue to err on the side of encouraging corporate reorganization, and employers and unions must continue to negotiate in the shadow of a pro-debtor law.