ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

Chapter 11 Liquidations and the Termination of Collective Bargaining Agreements

2015 Volume VII No. 8

Chapter 11 Liquidations and the Termination of Collective Bargaining Agreements

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Cite as: *Chapter 11 Liquidations and the Termination of Collective Bargaining Agreements,* 7 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 8 (2015).

Introduction

Section 1113 of the Bankruptcy Code[1] governs the modification or rejection of a collective bargaining agreement ("CBA") by a chapter 11 trustee or debtor-in-possession.[2] To modify or reject a CBA, a trustee or debtor-in-possession must (1) make a proposal to the union which provides the "necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor"; (2) provide the union with relevant information as is necessary to evaluate the proposal; and (3) meet with the union and confer in good faith.[3] For the modification or rejection to take place, the union must refuse to accept the trustee's or debtor-in-possession's proposal without good cause and the balance of the equities must clearly favor the modification or rejection of the agreement.[4]

While it is clear that section 1113 applies in chapter 11 cases in which the debtor's reorganizing, it is unsettled as to whether section 1113 applies in chapter 11 cases in which the

[1] Unless otherwise indicated, all sections referenced in this article refer to Chapter 11 of the United States Code.
[2] *See* 11 U.S.C. § 1113.
[3] UFCW, Local 211 v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 891 (8th Cir. Mo. 2001).
[4] *Id.*

debtor is liquidating. Moreover, in chapter 11 liquidations it is also unclear as to how a court should apply section 1113.[5]

Section 1113 was enacted in 1984 in response to the Supreme Court's decision in *NLRB v. Bildisco & Bildisco*.[6] In *Bildisco*, the Supreme Court held that a chapter 11 debtor-in-possession could unilaterally reject a CBA under section 365 based on the debtor's reasonable business judgment.[7] By enacting section 1113(f), Congress overruled *Bildisco*.[8] This section provides special treatment and protections to a CBA in bankruptcy,[9] ensuring "that lawyers…[cannot] use [c]hapter 11 solely to rid themselves of unions, but only [to] propose modifications that are truly necessary for the company's survival."[10]

While the enactment of section 1113 provided special treatment and protections to a CBA in bankruptcy, its plain language does not instruct the courts as to how it should be applied.[11] Nor did Congress provide any meaningful legislative history providing courts with such instruction.[12] Rather, this burden has fallen upon the courts, which have uniformly held that section 1113 applies to both reorganizations and liquidations.[13] Bankruptcy courts, however, have held that section 1113 applies only to chapter 11 liquidations,[14] not chapter 7 liquidations.[15] Accordingly,

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[5] *Id*. at 892.
[6] *Id*. at 891.
[7] *See NLRB v. Bildisco,* 465 U.S. 513 (1984).
[8] *See* Carpenters Health & Welfare Trust Funds v. Robertson (In re Rufener Constr.), 53 F.3d 1064, 1066 (9th Cir. 1995); *In re* Moline Corp., 144 B.R. 75, 78 (Bankr. N.D. Ill. 1992).
[9] *See In re Rufener Constr*., 53 F.3d at 1066; *In re Moline Corp*., 144 B.R. at 78.
[10] *In re* Fulton Bellows & Components, 307 B.R. 896, 900 (Bankr. E.D. Tenn. 2004); *See also In re Family Snacks, Inc*., 257 B.R. at 890; New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (*In re* Maxwell Newspapers, Inc.), 981 F.2d 85, 89 (2d Cir. 1992); Jones Truck Lines, Inc. v. Central States, Southeast & Southwest Areas Pension Fund (*In re* Jones Truck Lines, Inc.), 130 F.3d 323, 330 (8th Cir. 1997).
[11] *In re Family Snacks, Inc*., 257 B.R. at 892.
[12] *Id*.
[13] *Id*.
[14] *In re Rufener Constr*., 53 F.3d at 1068.
[15] Every court that has addressed whether section 1113 applies in a chapter 7 case has determined that it does not. *In re Rufener Constr., Inc*., 53 F.3d at 1067; *In re Moline Corp*., 144 B.R. at 79; *In re Liberty Fibers Corp*., 2007 Bankr. LEXIS 2950, at *4 (Bankr. E.D. Tenn. 2007); *In re U.S. Truck Co. Holding*, 2000 Bankr. LEXIS 1376, at *9 (Bankr. E.D. Mich. 2000). Some courts have arrived at this conclusion through their examination of subchapter

the courts were then tasked with determining how to apply section 1113 in chapter 11 cases involving two different types of liquidation: going concern sales and piecemeal liquidations.

This Article explores the recent decisions illustrating that the standard nine-factor test used traditionally for reorganizations applies to going concern sales, while a modified eight-factor test is used for piecemeal liquidations. Part I of this Article discusses section 1113's procedural and substantive requirements generally. Part II discusses how section 1113 applies to the different chapter 11 liquidations. Finally, Part III considers how the different section 1113 substantive tests relating to the two different chapter 11 liquidations will impact future cases.

I. Section 1113 Generally

Section 1113 (b) and (c) has both procedural and substantive requirements.[16] Section 1113 (b) requires (1) the trustee to make a proposal to the employee representative before filing a motion for rejection and (2) that the proposal be (a) "based on the most complete and reliable

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1 of chapter 11, which includes section 1113 and only applies in chapter 11. *In re Rufener Constr., Inc*., 53 F.3d at 1067; *In re Moline Corp*., 144 B.R. at 79; *In re Liberty Fibers Corp*., 2007 Bankr. LEXIS 2950, at *4 (Bankr. E.D. Tenn. Aug. 27, 2007); *In re U.S. Truck Co. Holding*, 2000 Bankr. LEXIS 1376, at *9 (Bankr. E.D. Mich. Sept. 29, 2000). Based on this examination, these courts have concluded that section 103(g) of the Bankruptcy Code makes section 1113(f) irrelevant, and therefore inapplicable, in a chapter 7 case. *In re Rufener Constr., Inc*., 53 F.3d at 1067; *In re Moline Corp*., 144 B.R. at 79; *In re Liberty Fibers Corp*., 2007 Bankr. LEXIS 2950, at *4; *In re U.S. Truck Co. Holding*, 2000 Bankr. LEXIS 1376, at *9.

Other courts have arrived at the same conclusion by looking at the language of section 1113 as a whole, without simply focusing on 1113(f). First, while section 1113(f) is broadly written in that it states "no provision of this title shall be construed to permit a trustee to unilaterally terminate[,]" the language of section 1113 as a whole embraces concepts incompatible with chapter 7 proceedings. *In re Rufener Constr.,* 53 F.3d at 1067; *In re Liberty Fibers Corp*., 2007 Bankr. LEXIS 2950, at *8. Subsection (a) describes a "trustee" as used in section 1113 as one that "has been appointed under the provisions of this chapter," meaning a chapter 11 trustee. *In re Rufener Constr*., 53 F.3d at 1067; *In re Liberty Fibers Corp*., 2007 Bankr. LEXIS 2950, at *8. Moreover, subsections (a) through (e) explicitly reference the "debtor-in-possession," which only exists under the provisions of chapter 11. *Liberty Fibers Corp*., 2007 Bankr. LEXIS 2950, at *4; *In re Rufener Constr. Inc*, 53 F.3d at 1068. Second, the procedural requirements imposed by section 1113 are premised on the notion that the company is still doing business, regulating the manner in which CBAs may be implemented, modified, or terminated during the period of reorganization. Thus, the procedural requirements imposed by section 1113 appear more suited toward chapter 11 proceedings. *In re Rufener Constr*., 53 F.3d at 1067. This is because chapter 11 proceedings ordinarily involve companies who plan on continuing operations, while chapter 7 proceedings usually involve liquidating the business completely. *Id*.

Regardless of the rationale used, courts have uniformly found that section 1113 does not apply in chapter 7 liquidations. *In re Moline Corp*., 144 B.R. at 79. Thus, under chapter 7 proceedings, CBAs are treated as any other executor contract and afforded no extra protections. *Id*.

[16] *See* 11 U.S.C. § 1113.

information available" and (b) contain proposed modifications that are "necessary to permit reorganization of the debtor."[17] Similarly, section 113 (c) provides in order to reject a CBA, the debtor must (1) prior to the hearing, make "a proposal that fulfills the requirements of subsection (b)(1)"; (2) demonstrate that "the authorized representative of the employees has refused to accept such proposal without good cause"; and (3) show that "the balance of the equities clearly favors the rejection of the CBA."[18]

These procedural and substantive elements have been formulated into a consolidated nine-factor test for determining whether a debtor may reject a CBA, first articulated in *In re American Provision Co*.[19] In particular, under the *American Provision* test, courts will consider the following factors:

1. "The debtor in possession must make a proposal to the union to modify the collective bargaining agreement.
2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
3. The proposed modifications must be necessary to permit the reorganization of the debtor.
4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
5. The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.
6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the union.
7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
8. The union must have refused to accept the proposal without good cause.
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement."[20]

[17] 7-1113 Collier on Bankruptcy P 1113.04.
[18] 11 U.S.C. § 1113 (c).
[19] *In re Chi. Constr. Specialties, Inc.*, 510 B.R. 205, 215 (Bankr. N.D. Ill. 2014) (citing *In re American Provision Co.*, 44 B.R. 907, 909 (Bankr. D. Minn. 1984)).
[20] *Id.*

The first, second, fifth and sixth factors are procedural requirements, while the third, fourth, seventh, eighth and ninth factors are substantive requirements.[21] Both the procedural and substantive requirements under section 1113 must be met for the court to accept the rejection of a CBA.[22] Furthermore, it is the debtor who bears the burden of persuasion by the preponderance of the evidence on all nine factors.[23]

II. Section 1113 and Chapter 11 Liquidations

Section 1113 is conventionally applied reorganization cases where the debtor seeks to modify a CBA in order to cut costs or otherwise enhance the prospects of a successful reorganization.[24] While the law is well settled that section 1113 applies to chapter 11 reorganizations, it is unclear whether and how section 1113 applies to debtors who seek to liquidate in chapter 11.[25] This uncertainty exists because the plain language of section 1113 uses the phrase "reorganization of the debtor."[26] Such language implies that section 1113 only applies to chapter 11 reorganizations.[27] In spite of this language, however, several courts have still applied section 1113 to chapter 11 liquidations[28] because section 1113 does not contain any limiting or exclusionary words that distinguish between chapter 11 reorganizations and liquidations.[29] Accordingly, many courts have concluded that the "necessary to permit reorganization" requirement of section 1113 should be read to include liquidations.[30]

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[21] 7-1113 Collier on Bankruptcy P 1113.04.
[22] *In re Lady H Coal Co*., 193 B.R. 233, 240 (Bankr. S.D. W. Va. 1996).
[23] *In re Family Snacks, Inc*., 257 B.R. at 893.
[24] 7-1113 Collier on Bankruptcy P 1113.04.
[25] *Id,*
[26] 11 U.S.C. 1113 (b)(1)(A)
[27] *In re Chi. Constr. Specialties, Inc*., 510 B.R. at 213-15.
[28] *Id*.
[29] *Id*.
[30] *Id*.

Despite this conclusion, section 1113 does not easily apply in the liquidation context.[31] For example, the procedural requirements imposed by section 1113 "are premised on the notion that the company is still conducting business."[32] Thus, when applied to liquidation cases, section 1113 must be construed to reflect the debtor's lack of incentive "to make concessions to motivate workers needed to operate its business … [and the union's lack of incentive] to grant reasonable concessions to preserve jobs."[33]

Furthermore, there are two distinct types of liquidations: going concern sale and piecemeal liquidations. When a debtor elects to sell its assets going-concern basis, the debtor's objective is to sell all or substantially all of its assets to a third-party purchaser that will continue the debtor's operations.[34] When a debtor elects to sell all of its assets through piecemeal liquidation, the debtor's objective is to cease its business operations completely. Due to these different objectives, courts have concluded that section 1113 must apply differently to going concern sales verses piecemeal liquidations under chapter 11.

A) Section 1113 and Going Concern Sales Under Chapter 11

As stated above, going concern sales are chapter 11 liquidations that result in the sale of all or substantially all company assets to a third-party purchaser.[35] Since the business will continue to operate in this type of liquidation, courts have held that the nine-factor test, traditionally used for reorganizations, applies.[36]

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[31] *Id*.
[32] *Id*.
[33] *In re United States Truck Co. Holdings*, 2000 Bankr. LEXIS 1376, at *44.
[34] *In re Lady H Coal Co*., 193 B.R. at 243.
[35] 7-1113 Collier on Bankruptcy P 1113.04.
[36] *In re Family Snacks, Inc*., 257 B.R. at 891.

(1) The Procedural Requirements of Section 1113 As Applied to Going Concern Sales

a. Timing – When Does a Debtor Need to Proposal Modification or Rejection of a CBA When Filing as A Going Concern Sale

To meet the procedural requirements of the nine-factor test, the debtor must make proposals and meetings with the union in order to reach agreement to modify the CBA prior to seeking the CBA's rejection.[37] However, section 1113 does not indicate when the debtor must take such action to reject the CBA.[38] In fact, when the debtor liquidates in a going concern sale, the timing of such action is governed, not by section 1113, but by section 365(d)(2).[39] Section 365(d)(2) allows the debtor to defer making the proposal to the union to reject the CBA until confirmation of a plan.[40]

This conclusion is supported the circumstances surrounding section 363.[41] Purchasers are often only willing to purchase if the sale can be closed with "lightning speed."[42] For this reason, section 363 asset sales often occur on an expedited basis.[43] As such, mandating that the debtor modify or reject the CBA before the sale would make it impossible for the debtor to accept the highest and best offer for its assets.[44] This would result in the loss of potential purchasers to the detriment of other creditors.[45] As a result, mandating that a debtor modify or reject a CBA prior to the sale would effectively give the union veto power over a going concern sale,[46] which would enable the union to reap the greatest benefit from the sale at the expense of the other creditors.[47]

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[37] *In re Lady H Coal Co*., 193 B.R. at 240.
[38] *In re Family Snacks, Inc*., 257 B.R. at 891.
[39] *Id*. at 895-96.
[40] *Id*.
[41] *Id*. at 897.
[42] *Id*.
[43] *Id*.
[44] *Id*.
[45] *Id*.
[46] *Id*. at 896-97.
[47] *Id*.

Since section 1113 was never intended to give unions such power, a going concern sale debtor can file for the modification or rejection of a CBA post-sale.[48]

b. The Procedural Requirements of the Nine-Factor Test As Applied to A Chapter 11 Going Concern Sale

Moving onto the nine-factor test itself, in most cases, the first factor (that the debtor must make a proposal to the union to modify the CBA) is a routine formality.[49] As a result, the bar for satisfying this factor is low.[50] A proposal must simply be communicated to and received by the parties to the CBA for this factor to be satisfied.[51] However, for the notice of the proposal to be deemed sufficient, the notice must (1) state that it is a proposal and (2) make it clear that the notice is meant to inform the union that the debtor proposes to modify or reject the CBA.[52]

The second factor requires that the proposal must be based on "the most complete information at the time and … base its proposal on the information it considers reliable," excluding "hopeful wishes, mere possibilities and speculation."[53] To determine whether such information is sufficient, courts consider the debtor's individual circumstances, taking into account (1) the size and complexity of the debtor's business and work force; (2) the complexity of the wage and benefit structure under the CBA; and (3) the extent and severity of the debtor's proposed modifications.[54] Nonetheless, the debtor is only required to provide information that is within its power to provide.[55]

To meet the fifth factor (that the debtor provide the union with such relevant information as is necessary to evaluate the proposal) a debtor should provide the union with the proposed

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[48] *Id*.
[49] *In re Chi. Constr. Specialties, Inc*., 510 B.R. at 218
[50] *Id*.
[51] *Id*.
[52] *Id*. at 219.
[53] *Id*. (quoting *In re AMR Corp*., 477 B.R. 384, 409 (Bankr. S.D.N.Y. 2012)).
[54] *Id*.
[55] *Id*.

disclosure statement and chapter 11 plan that provides for the sale or the sale motion, and information regarding all parties who expressed interest in purchasing the debtor's assets.[56] Furthermore, the debtor is responsible for responding to all information requests by the union.[57] Having the debtor's financial advisor detail the liquidation process to the union will be considered sufficient to satisfy the fifth factor.[58]

Finally, to meet the sixth factor, that the debtor meet at reasonable times with the union, the debtor should meet with the union (1) immediately following the proposal notice to have its financial advisor detail the anticipated process with the union and
(2) meet with the union every one to two weeks following the initial meeting in order to solicit further input from the union.[59] Importantly, the union also has a responsibility to try to meet with the debtor.[60] If the debtor does not meet with the union and the lack of meetings is the fault of the union, the court will deem that the debtor has satisfied the sixth factor.[61]

(2) The Substantive Requirements of Section 1113 As Applied to Going Concern Sales

The first substantive requirement in the nine-factor test lies in the third factor (mandating that the proposed modification or rejection be necessary to permit the reorganization of the debtor). To satisfy the third factor, the debtor must demonstrate to the court that the proposed modification or rejection is necessary,[62] that the only way for the debtor to accomplish the reorganization of the debtor is through the sale of its assets.[63]

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[56] Nat'l Forge Co. v. Indep. Union of Nat'l Forge Emples (*In re* Nat'l Forge Co.), 289 B.R. 803, 812 (Bankr. W.D. Pa. 2003).
[57] *Id*.
[58] *Id*.
[59] *Id*.
[60] *In re Chi. Constr. Specialties, Inc*., 510 B.R. at 223.
[61] *Id*.
[62] *In re Nat'l Forge Co*., 289 B.R at 810.
[63] *Id*.

Next, to satisfy factor four (that the proposed modifications treat all creditors and all affected parties fairly and equitably[64]), the debtor must not place a disproportionate share of the financial burden of liquidating on one creditor over another.[65] Instead, this burden must be spread fairly and equitably among all affected parties.[66] The debtor can meet this burden by simply treating the union no differently than they would in a chapter 7 case and no differently than the union's similarly situated creditors in the debtor's case.[67] If there is evidence of the debtor shortcutting its duties or taking unfair advantage of a particular group, the court will find insufficient evidence under the fourth factor to enable rejection of the CBA.[68]

Moving on to the seventh factor (that the debtor must confer with the union in good faith, to negotiate in good faith) the debtor's conduct must indicate an honest intention to arrive at an agreement with the union as to the modification or rejection of the CBA through the bargaining process.[69] A debtor will fail to satisfy this factor if the debtor is locked into an agreement with the purchaser prior to conducting negotiations with the union.[70] The stubbornness or steadfast nature of the debtor during those negotiations, however, is considered irrelevant as to whether the debtor is negotiating in good faith.[71]

Furthermore, when viewing the seventh factor with the eighth factor (that the union can only refuse to accept the proposal with good cause), it becomes apparent that the union has an obligation to confer in good faith as well.[72] The union is required to have "good cause" for rejecting the debtor's proposal and must participate meaningfully in the negotiations to explain

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[64] *In re Lady H Coal Co*., 193 B.R. at 242.
[65] *In re Nat'l Forge Co*., 289 B.R at 811 (citing Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1075, 1091).
[66] *Id*.
[67] *Id*.
[68] *In re Lady H Coal Co*., 193 B.R. at 242.
[69] *Id*.
[70] *Id*.
[71] *In re Chi. Constr. Specialties, Inc*., 510 B.R. at 223.
[72] *Id*. (quoting Mile Hi Metal Systems, Inc., 899 F.2d 887, 892 (10th Cir. 1990)).

its reasons for opposing the proposal.[73] Even if part of the proposal is unacceptable, the union must confer in good faith on the remainder and explain to the debtor why it deems certain sections of the proposal unacceptable to facilitate the negotiations of changes or alternatives to those sections.[74] If the union refuses to accept the proposal without good cause,[75] the court will find that the debtor has satisfied the eighth factor.[76]

Finally, under the ninth factor (which requires the balance of the equities to favor rejection), "[t]he balance of equities favors rejection when debtor is in need of substantial relief from a collective bargaining agreement and the bargaining process has failed to produce any results and is unlikely to produce any in the foreseeable future."[77] Thus, the balance will favor rejection when: (1) the debtor is under the mandate of its major secured lenders to complete an expedited sale process, in default of which the debtor faces liquidation; (2) the sacrifices the union will make upon rejection of the CBA are not disproportionate to the scarifies of similarly situated creditors; and, or, or both (3) a sale at the highest price is clearly best for all concerned parties.[78]

B) Section 1113 and Piecemeal Liquidations Under Chapter 11

While the nine-factor test applies to going concern sales, the same cannot be said for chapter 11 piecemeal liquidations.[79] Piecemeal liquidations involve the debtor selling off portions of its business at a time, preventing the business from continuing its operations in the

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[73] *Id*.
[74] *Id*.
[75] The union will be found to have rejected without good cause if it steadfastly demands that any buyer assume the CBA or negotiate a new contract before it considers termination of the CBA. This is because such demands are beyond the debtor's control, making them impossible for the debtor to satisfy. *Id*.
[76] *In re Nat'l Forge Co*., 289 B.R at 812.
[77] *Id*. (quoting *In re* Bowen Enters., 196 B.R. 734, 747 (Bankr. WD PA 1996) (citing *In re* Royal Composing Room, 62 B.R. 403, 408 (Bankr. S.D.N.Y. 1986), *aff'd*., 78 B.R. 671(S.D.N.Y. 1987), *aff'd*. 848 F.2d 345 (2d Cir. 1988) *cert. denied*, 489 U.S. 1078 (1989)).
[78] *Id*.
[79] *In re Chi. Constr. Specialties, Inc*., 510 B.R. at 219.

future.[80] As a result, some of the prongs of the nine-factor test, which are premised on the notion that the business will continue operations, are irrelevant in this instance.[81] As a result, courts have used a modified nine-factor test to make section 1113 applicable to chapter 11 piecemeal liquidations.[82]

(1) The Procedural Requirements of Section 1113 as Applied to Piecemeal Liquidations

a. Timing – When Does a Debtor Need to Proposal Modification or Rejection of a CBA When Filing as A Piecemeal Liquidation

In piecemeal liquidations, the debtor should seek modification or rejection of a CBA in advance of presenting a plan for liquidation.[83] Even though the debtor is required to seek modification or rejection of the CBA in advance of a plan, such action by the debtor does not in and of itself terminate the CBA.[84] Such a timing requirement is in the best interest of the debtor's estate as a whole.[85] In particular, in a piecemeal liquidation, to mandate that the debtor wait to reject the CBA as part of a confirmed plan could result in accrual of administrative claims against the estate.[86] Such administrative claims would not only dilute the recoveries of other creditors, but have an even greater potential detriment to the debtor's restructuring.[87] Administrative claims must be paid upon confirmation of the plan.[88] Moreover, the net result of an accrual of administrative claims beyond the debtor's ability to pay would be that the debtor would be prevented from confirming its plan of liquidation at all.[89] Finally, the failure to reject a CBA enables the contract to "ride through" bankruptcy and remain enforceable against the

[80] *Id*.
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *Id*.
[85] *Id*.
[86] *Id*. at 217.
[87] *Id*.
[88] *Id*.
[89] *Id*.

debtor.[90] For these reasons, debtors are encouraged to seek rejection in advance of a plan in piecemeal liquidations.[91]

When a debtor seeks rejection in advance of a plan, however, the debtor has a higher burden to demonstrate that it is in fact liquidating.[92] The debtor can do this by liquidating its assets prior to bankruptcy and ceasing its business operations, leaving the debtor with no choice but to liquidate since there is nothing left to reorganize.[93]

b. The Procedural Requirements of the Nine-Factor Test As Applied to A Chapter 11 Piecemeal Liquidation

Looking to the first factor of the modified nine-factor test for piecemeal liquidations, the debtor's requirements under a piecemeal liquidation are the same as under a going concern sale.[94] However, when considering the second factor, certain conclusions become tautological.[95] For example, in piecemeal liquidations, the debtor unquestionably has no ability to continue to operate as a going concern because it has already sold or will soon sell all or substantially all its assets.[96] If the notice states such and that the debtor has closed its doors and ceased normal business operations with no current business or prospects for doing business with no intent of selling the business as a going concern or to resurrect the business in any form, it is likely that the court will find that the debtor has met its burden for the second requirement.[97]

Moving to the fifth factor, under a piecemeal liquidation, the information provided in the notice does not have to be voluminous.[98] In fact, section 1113 does not even require the debtor to

[90] *Id*.
[91] *Id*.
[92] *Id*. at 218.
[93] *Id*.
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] *Id*.

make his best offer at the outset of the negotiations.[99] However, if the union requests additional information, the debtor will have to provide it if such information exists and is within the debtor's ability to provide.[100] If either party fails to engage with the other, the court will find that such party failed to satisfy this factor.[101]

Finally, the sixth factor is handled in the same manner as stated above for going concern sales.[102]

(2) The Substantive Requirements of Section 1113 as Applied to Piecemeal Liquidations

As noted above, due to the different circumstances surrounding piecemeal liquidations, several factors of the nine-factor test are rendered inapplicable.[103] Of the substantive factors in the nine-factor test, the third and the ninth factors had to be modified due to their inapplicability in their original form.[104]

The third factor specifically uses the phrase: "reorganization."[105] For this reason, the third factor has to be modified when dealing with piecemeal liquidations.[106] Courts have found that "[w]hile 'reorganization' is not a statutorily defined term, it is generally understood to include all types of debt adjustment, including a sale of assets, piecemeal or on a going concern basis, under section 363 followed by a plan of reorganization which distributes the proceeds of the sale to creditors in accordance with the Bankruptcy Code's priority scheme."[107] Thus, in connection with piecemeal liquidations, courts have modified the third factor to mean "necessary to the

[99] *Id*. at 220 (citing Pierce Terminal Warehouse, Inc., 133 B.R. 639, 647 (Bankr. N.D. Iowa 1991).
[100] *Id*.
[101] *Id*.
[102] *Id*.
[103] *Id*.
[104] *Id*.
[105] *Id*.
[106] *Id*. at 221.
[107] *Id*. (quoting *In re Family Snacks, Inc*., 257 B.R. at 895).

[d]ebtor's liquidation."[108] This third factor will likely be satisfied in a piecemeal liquidation because the debtor will cease operating.[109] If the court allowed the CBA to remain in place, the union would be afforded the opportunity for an augmented administrative claim rather than a general unsecured claim,[110] which would elevate the union's position over that of other creditors.[111] Courts have noted that such a result would be contrary to the purpose of section 1113 and the Bankruptcy Code as a whole.[112]

Finally, the ninth factor was modified to consider the "possibility of liquidation, the impact of the losses suffered by the individual employees in proportion to the losses suffered by the other creditors, and the good faith of the parties."[113] This modification is meant to ensure that the bankruptcy court, being a court of equity, would focus on the ultimate goal of chapter 11 when dealing with this factor and a piecemeal liquidation.[114]

III. Implications

Based on the discussion above, it is clear that a debtor must comply with section 1113 in a chapter 11 liquidation case regardless of the type of liquidation used. If the debtor chooses to liquidate through a going concern sale, the debtor will be subject to the nine-factor test

[108] *Id.*
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Id.*
[114] In conclusion, under piecemeal liquidations, the nine-factor test becomes the following eight-factor test:

1. The debtor in possession must make a proposal to the union to modify the collective bargaining agreement.
2. The proposed modifications must be necessary to the debtor's liquidation.
3. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.
4. The debtor must provide to the union such relevant information as is necessary to evaluate the proposal.
5. 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.
6. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.
7. The union must have refused to accept the proposal without good cause.
8. The balance of the equities must clearly favor rejection of the collective bargaining agreement, considering the possibility of liquidation, the impact of the losses suffered by the individual employees in proportion to the losses suffered by other creditors, and the good faith of the parties.

traditionally used for reorganizations because the debtor's business will continue to operate. If the debtor chooses to liquidate piecemeal, the debtor will be subject to the modified eight-factor test because the debtor's business will be sold off piece by piece, resulting in the termination of business operations.

Thus, it is clear that the burden section 1113 will impose on a debtor will likely depend on how the trustee or debtor-in-possession seeks to sell the property. On one hand, if the debtor's assets are going in a going concern sale, the court will probably be less likely to permit the debtor to reject the CBA because the company will continue to operate. On the other hand, if the debtor's assets are going to be sold piecemeal, the court will probably be more likely to allow the modification or rejection of the CBA because there will be no company going forward for the debtor's unionized employees to work at and rejecting the agreements prevents the union's claims from being elevated over those of the debtor's other creditors.

However, it is clear that timing is an issue as well. If a debtor is liquidating as a going concern sale and proposes the modification pre-sale, it is likely that the court will mandate the debtor satisfy the traditional nine-factor test. Yet, if the going concern debtor proposes the CBA modifications post-sale, it is likely that the court will only hold the debtor responsible for satisfying the eight-factor, modified test since the debtor has already sold substantially all its assets. Thus, for chapter 11 liquidations, the test the debtor will have to satisfy will not only depend on the type of liquidation, but also on the timing of the modification proposal.

Whether the debtor liquidates through a going concern sale or piecemeal liquidation will also affect the union. If a debtor chooses to liquidate through a going concern sale, it is unlikely that the court will allow the CBA to be modified or rejected. This is because the debtor's business will continue to operate. As such, the CBA will remain intact after liquidation.

Conversely, if the debtor liquidates through piecemeal liquidation, the court will likely allow the debtor to reject or modify the CBA since the debtor is ceasing business operations. If the court allowed the CBA to remain in place, the union would be afforded the opportunity for an augmented administrative claim rather than a general unsecured claim, which would elevate the union's position over that of other creditors. This will not be permissible since courts have held that such a result would be contrary to the purpose of section 1113 and the Bankruptcy Code as a whole. Accordingly, when a debtor liquidates through piecemeal liquidation, the debtor will likely be allowed to modify or reject the CBA.

Regardless of how the debtor liquidates, however, the union must confer in good faith with the debtor when reviewing the debtor's liquidation proposal. The union cannot steadfastly demand that any buyer assume the CBA or negotiate a new contract before it considers termination of the CBA. Rather, the union must participate meaningfully in the negotiations to explain its reasons for opposing the proposal. Even if part of the proposal is unacceptable, the union must confer in good faith on the remainder and explain to the debtor why it deems certain sections of the proposal unacceptable to facilitate the negotiations of changes or alternations to those sections. If the union refuses to accept the proposal without good cause, the court will find the union conferred in bad faith and hold in favor of the debtor. Thus, while section 1113's application to chapter 11 liquidation cases has implications for the debtor, it places responsibilities and consequences on the union as well.

Conclusion

Courts have uniformly held that section 1113 applies to chapter 11 liquidations. However, the law is unclear concerning how to apply section 1113 to the two different types of chapter 11 liquidations. Based on current case law, it is likely that going concern debtors will

have to satisfy all nine factors of the nine-factor test traditionally used for reorganizations. Since the debtor will continue conducting business in a going concern sale, it is unlikely that the court will allow the debtor to modify or reject the CBA. However, if the going concern debtor proposes the modification or rejection post-sale, it is likely that the court will only hold the debtor to the modified, eight-factor test used for piecemeal liquidations since the debtor has already sold substantially all its assets.