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The Inconsistent Application of Section 1113 to Expired Collective Bargaining Agreements

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I. Introduction

The United States Bankruptcy Code (the "Bankruptcy Code") allows a trustee a debtor-in-possession ("DIP") to assume or reject a collective bargaining agreement ("CBA").[1] Courts are split on whether a trustee or DIP may reject an expired collective bargaining agreement under section 1113 of the Bankruptcy Code. In general, a collective bargaining agreement may be rejected notwithstanding the labor standards afforded to employees by the National Labor Relations Act ("NLRA"). In particular, under the NLRA, an employer that is party to a CBA is obligated to bargain with its employees until the employer either enters into a new contract or bargains to impasse– even after the CBA has expired.[2] Consequently, a debtor may reject an expired CBA to avoid its ongoing bargaining obligations under the NLRA.

Section 1113 also fails to restrict its prescription to "executory" or "unexpired" collective bargaining agreements.[3] Some courts have held that a debtor may reject an expired CBA in bankruptcy. Other courts have disagreed and concluded that a bankruptcy court does not have

[1] 11 U.S.C. § 1113.
[2] Litton Fin. Printing Div., Inc. v. N.L.R.B., 501 U.S. 190, 199 (1991); *see also* 29 U.S.C. 158.
[3] *In re Trump Entm't Resorts*, 810 F.3d 161, 168 (3d Cir.) *cf.* 11 U.S.C. 365 (permitting the rejection of an executory contract or unexpired lease that is burdensome to the estate).

the jurisdiction over an expired CBA has expired. Last year, the Supreme Court denied a petition for writ of *certiorari* to the Third Circuit in *In re Trump Entertainment Resorts*, where the court held that a debtor may reject an expired collective bargaining agreement.[4] Consequently, courts remain divided on a debtor's ability to reject an expired CBA.

II. *Bildisco* Held That a CBA is an Executory Contract

Prior to the enactment of Section 1113, section 365 of the Bankruptcy Code governed the acceptance or rejection of a CBA. In *NLRB v. Bildisco & Bildisco*, the Supreme Court confirmed that a CBA was an executory contract as contemplated by Section 365 of the Bankruptcy Code.[5] According to the Court, section 365 applies to all unexpired executory contracts.[6] The Court found that any inference that a CBA is not included in section 365(a) is rebutted by the actual text of section 365 indicated that Congress was concerned with the scope of the DIP's power regarding certain types of executory contracts and, accordingly, drafted the provision to limit the DIP's power to reject or assume a contract in those circumstances.[7] The Court continued, "[y]et none of the express limitations on the debtor-in-possession's general power under § 365(a) apply to collective-bargaining agreements."[8] The failure of Congress to draft an exception regarding a debtor's ability to reject a CBA reflects Congress' intention for Section 365 to apply to CBAs.[9]

Accordingly, the Court held that: (1) a collective bargaining agreement could be rejected under section 365 of the Bankruptcy Code as an "executory contract", and (2) a debtor-employer

[4] United Here Local 54 v. Trump Entm't Resorts, Inc., 136 S.Ct. 2396 (2016).
[5] 465 U.S. 513 (1984).
[6] *Id.* at 521.
[7] *Id.*
[8] *Id.*
[9] *Id.*

did not violate its labor law duties by unilaterally modifying collectively bargained terms and conditions of employment before seeking or obtaining court authorization to reject the agreement.[10] The Court reasoned that a collective bargaining agreement was "no longer immediately enforceable," meaning that a CBA was non-binding and may never be binding, when an employer files for reorganization.[11]

III. Section 1113 Provides Procedural Safeguards for Employees

The *Bildisco* decision was met with instant opposition by organized labor.[12] The decision reinforced existing fears that companies used the "bankruptcy law as an offensive weapon in labor relations."[13] Congress enacted Section 1113, which "replace[d] the Bildisco standard with one that was more sensitive to the national policy favoring collective bargaining agreements."[14]

Section 1113 provides heightened procedural and substantive requirements for allowing a debtor to reject a CBA. Courts have adopted the nine-factor test articulated in *In re American Provision Co*., to determine if a debtor has adequately complied with section 1113 requirements, thus allowing the Trustee to reject the CBA.[15] The nine factors are: (1) the debtor must make a proposal to the union to modify the CBA; (2) the proposal must be based on complete and reliable information; (3) the proposed modifications must be necessary to permit the reorganization; (4) the proposed modifications must assure that all affected parties are treated fairly and equitably; (5) the debtor must provide necessary information to the union; (6) the debtor must meet at reasonable times with the union; (7) the debtor must confer in good faith in

[10] *Id.* at 514.
[11] *Id.* at 532.
[12] *See* Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074, 1082–84 (3d Cir. 1986).
[13] Adventure Resources, Inc. v. Holland, 137 F.3d 786, 797–98 (4th Cir. 1998).
[14] *Wheeling-Pittsburg Steel Corp.*, 791 F.2d at 1089.
[15] 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

attempting to modify the CBA; (8) the union must have refused to accept the proposal without good-cause; and (9) the balance of the equities must clearly favor rejection of the CBA.[16]

Further, section 1113(f) provides that the Bankruptcy Code "shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section."[17] This safeguard supersedes provisions, including the automatic stay under section 362, when the requirements of the section are not met.[18]

IV. Inconsistent Application of Section 1113 to Expired CBA's Among Bankruptcy Courts

Section 1113 applies to CBAs in lieu of section 365. Though Congress intended for section 1113 to act as a safeguard for employees, courts have interpreted it to favor business interests. Accordingly, the question of section 1113's application to expired CBAs remains open because the plain language of the statute does not limit its application to unexpired CBAs. Courts have grappled with competing interests in determining the application of section 1113 to expired collective bargaining agreements.

A. Rejection Not Permitted by the Court

In *In re Sullivan Motor Delivery, Inc.,* the Bankruptcy Court in the Eastern District of Wisconsin refused to apply section 1113 to an expired agreement.[19] The debtor filed for relief under chapter 11 on September 23, 1985.[20] On October 8, 1985, the debtor moved to reject the

[16] *Id.*
[17] 11 U.S.C 1113(f).
[18] *See In re Pearl Cos*., 2010 Bankr. LEXIS 2896 *, 22 Fla. L. Weekly Fed. B 540 (Bankr. S.D. Fla. Sept. 2, 2010) (prohibiting the application of the automatic stay when such application would permit a debtor to achieve a unilateral termination or modification of a collective bargaining agreement without meeting the requirements of section 1113).
[19] 56 B.R. 28, 29 (Bankr. E.D. Wis. 1985).
[20] *Id.*

CBA with the union pursuant to section 1113.[21] Notwithstanding that the CBA at issue had expired several months prior to the petition date, the court considered the explicit guidance set forth in *Bildisco,* which specifically held that an unexpired CBA is an executory contract.[22] The bankruptcy court reasoned that it "does not believe that § 1113 intended a bankruptcy court to intrude into an area of labor law reserved exclusively for the expertise of the National Labor Relations Board under circumstances where a collective bargaining agreement by its own terms expired before the Chapter 11 case was filed."[23] The bankruptcy court concluded its decision by reiterating that under these circumstances the parties still had certain rights and obligations to one another – including the obligation to bargain to impasse before the employer could make unilateral changes to the CBA.[24] The court concluded that the National Labor Relations Act, not Section 1113, governs situations where stability in bargaining relations is required.[25]

In *In Re Chas P. Young Company,* the Bankruptcy Court in the Southern District of New York held that a debtor may not reject a CBA pursuant to § 1113 if the agreement has expired by its own terms.[26] In this case, the contract between the employer and the union expired on October 3, 1989.[27] On April 26, 1989, union representatives formally met with management to negotiate a new CBA to no avail.[28] Interim relief was granted on September 26th of the same year and was extended until after the CBA expired.[29]

In this case, the bankruptcy court reasoned that because section 1113(f) incorporated the underlying assumption that there was an existing collective contract to reject or modify, and

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[21] *Id.* at 28.
[22] *Id.* at 29.
[23] *Id.* at 30.
[24] *Id.*
[25] *Id.*
[26] *In re Charles P. Young Co.,* 111 B.R. 410, 413 (Bankr. S.D.N.Y. 1990).
[27] *Id.* at 411.
[28] *Id.*
[29] *Id.*

because the contract expired by its own terms there was nothing left to reject or assume. The court concluded that a CBA may be executory on the date the debtor's bankruptcy petition is filed, but once the agreement expires of its own terms, the debtor's application to reject it becomes moot.[30]

The court in *In Re San Rafael Baking Company Co.,* held that no authority vests in the bankruptcy court to award benefit payments under an expired collective bargaining agreement.[31] Here, the union argued the holding in *In Re Hoffman Brothers* supported the bankruptcy court's authority to order the continuation of benefit payments in order to maintain the *status quo ante*. However, the court rejected the argument in *In Re Hoffman Brothers* as dicta.[32] Instead, the court held that only the National Labor Relations Board has subject matter jurisdiction to make such an award for violations of an unfair labor practice under the Labor Management Relations Act and section 1113 does not apply to an expired CBA.[33]

In *In re Hostess Brands, Inc.,* the Bankruptcy Court for the Southern District of New York held that section 1113 did not apply to collective bargaining agreements that expired pre-petition, despite the fact that certain terms of the CBA continued in effect pursuant to the NLRA provisions.[34] The court applied a plain meaning reading of the language of the statute without reference to the underlying policy concerns that may have been anticipated by Congress.[35] The court said:

> I believe if I were to extend the language of "collective bargaining agreement" to "collective bargaining agreement in effect" or "collective bargaining agreement as it covers the relations between the parties," I would be basing that conclusion on, first, a policy

[30] *Id.*
[31] 219 B.R. 860, 866 (B.A.P. 9th Cir. 1998).
[32] *Id.* at 865; *see also In re Hoffman Bros. Packing Co., Inc.,* 173 B.R. 177, 184 (B.A.P. 9th Cir. 1994).
[33] *Id*. at 867.
[34] 477 B.R. 378, 382 (Bankr. S.D.N.Y. 2012).
[35] *Id*. at 383–84.

> that is not well-articulated or found in the statute itself. Secondly, I'm of a view that as a factual matter I do not believe it has been established that the post-expiration regime would so interfere with whatever the congressional policy is behind Section 1113 as to the negate, Congress's policy.[36]

Rejecting any policy concerns, the court found that the language of the statute required a determination that section 1113 does not apply to an expired CBA.[37] Upon the expiration of the agreement, the court suggested that section 1113 leaves parties subject to the fallback provisions of otherwise applicable law, including the NLRA.[38]

B. Rejection Permitted by the Court

In *In re Hoffman Bros. Packing Co., Inc.,* the court determined that the clear Congressional intent behind section 1113 was to grant jurisdiction to the bankruptcy court to modify or otherwise alter the status *quo ante* rights and obligations between a debtor employer and its employees whether they exist under a current or expired CBA.[39] In this case, there was a CBA between parties that commenced on February 1, 1992 and remained effective until March 31, 1993.[40] The CBA contained provisions relative to termination including an "evergreen clause" which would renew the CBA automatically from year to year unless one party took action to terminate it.[41] The union took the position that when a CBA has expired, the parties must adhere to *status quo ante* while bargaining to impasse.[42] The union reasoned that maintaining *status quo ante* after a collective agreement has expired promotes industrial peace by fostering a non-coercive atmosphere that is conducive to serious negotiations on a new contract.[43] Ultimately, the court rejected the union's argument and held that rejection was permissible because section

[36] *Id.* at 382–83 (internal citations omitted).
[37] *Id.* at 383.
[38] *Id.*
[39] 173 B.R. at 184.
[40] *Id.* at 180.
[41] *Id.*
[42] *Id.* at 183.
[43] *Id.*

1113 clearly granted jurisdiction to the bankruptcy court to modify or alter the *status quo ante* rights and obligations between a debtor employer and its employees under the terms of the expired CBA.[44]

In *In re Karykeion, Inc.,* the Bankruptcy Court for the Central District of California memorialized a comprehensive analysis of section 1113 jurisprudence.[45] The court concluded that section 1113's language and purpose indicated that it permits a debtor to terminate or modify its ongoing obligations to the employees covered by a union, whether or not those obligations arise as a result of a current or expired CBA.[46]

Section 1113(e) allows for a debtor to modify a CBA during "the period that it continues in effect" when the debtor determines that such a modification is necessary for continuation of the debtor's business, or to avoid irreparable harm to the estate.[47] "[C]ontinues in effect" is a term of art used in labor law and it refers to the time between the expiration of a CBA and the NLRB deciding that there is an impasse.[48] At the time of impasse, the two parties were no longer bound by continuing effects of the agreement.[49]

The court noted that the intersection of the Bankruptcy Code and the NLRA was under heated discussion at the time this language was drafted, and this phrase was not arbitrary in its usage.[50] The court continued, "[s]uch language is intended to give the debtors the authority to reject the continuing effects of expired collective bargaining agreements through compliance with § 1113 instead of the NLRA."[51]

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[44] *Id*. at 184, 186.
[45] 435 B.R. 663, 673–75 (Bankr. C.D. Cal. 2010).
[46] *Id*. at 674.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.* at 674–75.

In affirming that this interpretation was consistent with other powers that the Bankruptcy Code gives to debtors-in-possession, the court held that disallowing a debtor to reject the residual effects of an expired contract would greatly impair the overriding goal of bankruptcy because the process would be too lengthy.[52] Finally, the court emphasized the power of bankruptcy courts to determine if the debtor had satisfied the procedural requirements of section 1113 and if the debtor was entitled to terminate or modify its ongoing obligations to its workers.[53]

C. Emergence of a Pattern: In re 710 Long Ridge Road Operating Company

710 Long Ridge Rd. Operating Company filed a voluntary petition under Chapter 11 of the Bankruptcy Code in 2014 with the United States Bankruptcy Court for the District of New Jersey.[54] In considering the debtor's motion for an order rejecting a CBA the court noted that as a threshold matter, it was necessary to determine if the language of section 1113 gives the debtors the authority to reject an expired CBA.[55] If the threshold inquiry was answered in the affirmative, the court is free to enter an order approving the debtor's application for rejection of the CBA so long as the court found that the debtor's adhered to the procedural requisites in section 1113.[56] The court noted that there was a split of authority with respect to whether section 1113 applied to expired CBAs.[57]

The Union and the NLRB (collectively, the "Objecting Parties") argued that because section 1113 only gives the debtors the authority to assume or reject a CBA, the statute does not

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[52] *Id.* at 675.
[53] *Id.* at 676.
[54] *In re 710 Long Ridge Road Operating Company,* 518 B.R. 810 (Bankr. D.N.J. 2014).
[55] *Id.* at 825.
[56] *Id.*
[57] *Compare In re Karykeion, Inc.,* 435 B.R. 663, 675 (Bankr.C.D.Cal.2010); *In re Ormet Corp.,* 2005 WL 2000704, at *2 (S.D.Ohio 2005); *In re Hoffman Bros. Packing Co. Inc.,* 173 B.R. 177 (9th Cir. BAP 1994)(all holding that section 1113(c) applies to expired collective bargaining agreements); *with In re Hostess Brands, Inc.,* 477 B.R. 378, 379(Bankr.S.D.N.Y.2012); *In re Sullivan Motor Delivery, Inc.,* 56 B.R. 28, 29, 31 (Bankr.E.D.Wis.1985); *In re San Rafael Baking Co.,* 219 B.R. 860, 866 (9th Cir. BAP 1998) (all holding that section 1113 is only applicable where a collective bargaining agreement exists at the time the Chapter 11 case is filed).

grant the authority to reject the continuing terms of an expired CBA.[58] The debtors argued that the bankruptcy court had the authority to reject the continuation of the economic terms of a post-expiration CBA and view the language of Section 1113 that refers to "collective bargaining agreements" as inclusive of those collective bargaining agreements that continue as an effect by virtue of the NLRA.[59]

The court found the rationale relied on by the debtors and supported by the decision in *In re Karykeion* to be persuasive.[60] The court concluded that the collective bargaining agreement's status as either expired or unexpired has no effect on a Debtor's need to modify or reject the continuing economic terms in order to ensure the debtor's survival in bankruptcy.[61] The court reasoned that adaptation of the Union's rationale would result in the Debtor's closure, liquidation, and lost loss of employment for hundreds of workers.[62] Further, the court noted that the clear legislative purpose of section 1113 was to allow debtors to lower labor costs and reorganize successfully.[63]

D. In Re Trump Entertainment Resorts Litigation and Denial of Certiorari

In a high-profile decision, the Third Circuit affirmed a bankruptcy court determination allowing for reorganization of the Trump Taj Mahal. Here, the Debtors filed a Chapter 11 Reorganization Plan with the court contingent upon the rejection of the CBA, which expired on September 14, 2014.[64] The CBA expired after the Debtors petitioned for bankruptcy, but before

[58] *Id.* at 225–26.
[59] *Id.* at 826.
[60] *Id.* at 828.
[61] *Id*. at 30.
[62] *Id*.
[63] This statement is seemingly contrary to the contention that section 1113 was a direct result of the *Bildisco* decision and served as a procedural safeguard to help organized labor when a company was engaged in Chapter 11 reorganization.
[64] *In re Trump Entm't Resorts*, Inc., 519 B.R. 76, 83 (Bankr. D. Del. 2014).

the claim was filed with the court.[65] The court addressed whether it had authority to grant the motion to reject an expired CBA if the Debtors satisfied the necessary requirements under Section 1113, and whether the court could authorize the implementation of the debtors' new proposal.[66] The court asserted that the Bankruptcy Code gives debtors broad powers to preserve value of a company.[67] Ultimately, the court determined that it had the jurisdiction under section 1113 to approve the application for the rejection of the expired CBA.[68]

Furthermore, the court determined that the Debtors met the stringent procedural requirements for rejecting a CBA. *Id.* at 86. Under section 1113, the court must find three elements: (i) the debtor made a proposal; (ii) the union refused to accept the debtor's proposal without good cause; and (iii) the balance of the equities clearly favors rejection of the CBA.[69] The court found that the Debtors met each requirement and that balance of equities favored rejection of the CBA because the Debtors would be forced to close the casino if relief was not granted.[70] Therefore, the court approved the rejection of the expired CBA and authorized the Debtors to implement a new proposal.[71]

On appeal to the Third Circuit, the court, once again, aimed to reconcile the outcomes of rejecting the expired CBA under the NRLA and section 1113 by interpreting the statutes as a whole.[72] Because the laws conflicted, the court read the two statutory frameworks *seriatim*, and assumed that Congress passed each subsequent law, the NLRA and section 1113, with full knowledge of the existing legal landscape.[73] This reliance on statutory construction, which

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[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 92.
[71] *Id.*
[72] *In re* Trump Entm't Resorts, 810 F.3d at 167.
[73] *Id.* at 163.

sought to reconcile the conflicting laws, differed from the bankruptcy court's reliance on section 1113 procedural requirements.[74] Though bankruptcy courts have been divided on how to interpret section 1113, the circuit court determined that the provision allowed for judicial evaluation of a petition to reject an expired CBA after unsuccessful negotiation.[75]

The Union argued that the Debtors are required to bargain to impasse before making any changes to the terms and conditions of the CBA based on the NLRA requirement that "once a collective bargaining relationship has been established, an employer may not make a change affecting the mandatory bargaining subjects without affording the Union the opportunity to bargain over the change."[76] Further, the Union contended that section 1113, though it allows for the rejection of a CBA, does not mention continuing obligations imposed by the NLRA, and thus the provision does not apply.[77]

The circuit court evaluated the purpose of section 1113 and reinforced that Congress intended the provision to allow companies latitude to restructure their labor obligations if it means saving jobs that would otherwise be lost during liquidation.[78] It has been consistently held that a chapter 11 reorganization provides debtors with an opportunity to reduce or extend their debts so its business can achieve economically efficient long-term viability.[79] The court noted that a contrary holding, such as affirming that section 1113 does not allow a debtor to reject expired CBA's, would impede the overriding goal contemplated by Congress.[80] Denying the Debtors the ability to reorganize based on an expired CBA would negate the rehabilitative

[74] *Id*. at 167.
[75] *Id*.
[76] *Id*. at 168.
[77] *Id.*
[78] *Id.* at 173.
[79] *Id.*
[80] *Id.* at 174.

function of Chapter 11.[81] Thus, the United States Court of Appeals for the Third Circuit affirmed the holding of the bankruptcy court.[82]

V. Conclusion

The Supreme Court denied the petition for writ of *certiorari* to the Third Circuit in *In re Trump Entertainment Resorts*.[83] However, the question of the application of section 1113 to collective bargaining agreements has been puzzling bankruptcy courts, and more recently the Third Circuit, for three decades. The two most recent decisions, *In Re Trump Entertainment Resorts* and *710 Long Ridge Operating*, have evoked similar language and exhibited similar values. For example, both cases concluded that in balancing different interests, section 1113 applied to expired CBA's and the bankruptcy court had the jurisdiction to reject the agreements to preserve jobs.

The bargaining power of organized labor has been undermined in light of recent decisions, which calls into question the relative fairness of the reorganization process. The fair treatment of creditors is a major underlying theme in bankruptcy, which as a process, seeks to ensure that creditors, debtors, and other affected parties are treated fairly and equitably. Courts will favor contract rejection when all employee groups bear their share of wage reductions.[84] Courts will also consider whether concessions were made by suppliers, secured creditors, state and local taxing agencies, and management and nonunion employees.[85]

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[81] *Id.*
[82] *Id.* at 175.
[83] *Unite Here Local 54*, 136 S. Ct. at 2396.
[84] Truck Drivers Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Carey Transp. Inc., 816 F.2d 82, 90–91 (2d Cir. 1987).
[85] *See e.g., In re K&B Mounting*, 50 B.R. 460, 464–68 (noting that all parties were treated equally where nonunion workers made equivalent concessions, there was a huge backlog of accounts payable owed to creditors, and principals offered to retire, resulting in large savings); *see also In re Bowen Enterprises, Inc.*, 196 B.R. 734, 744 (Bankr. W.D. Pa. 1996) (holding for rejection because the burdens spread equitably over all affected parties; fairness did not require that unions be treated identically with other parties).

The interpretation of section 1113 is muddied by relative values of competing interests and mixed Congressional intent. On one hand, courts have argued that the section applies to expired agreements and the bankruptcy court has jurisdiction to accept or reject an agreement in the name of expediency in the bankruptcy process. Conversely, other courts have attempted to decipher the Congressional intent behind enacting section 1113 following the *Bildisco* decision and have held that the provision does not apply to expired collective bargaining agreements because it was not included in the plain meaning of the statute. The problem for organized labor is not the Bankruptcy Code itself, but how courts apply such provisions to cases dealing with corporate restructuring. Courts are faced with weighing the importance of seamless restructuring and job preservation with procedural safeguards meant to protect organized labor.