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Legal Developments Since NLRB v. Bildisco: Partial Resolution of Problems Surrounding Labor Contract Rejection in Bankruptcy

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LEGAL DEVELOPMENTS SINCE *NLRB V. BILDISCO*: PARTIAL RESOLUTION OF PROBLEMS SURROUNDING LABOR CONTRACT REJECTION IN BANKRUPTCY

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INTRODUCTION

This article will analyze the critically important Bankruptcy Amendments of 1984[1] which partially overruled the Supreme Court's controversial decision in *NLRB v. Bildisco*.[2] The decision was issued on February 22, 1984 and the legislation was enacted July 10, 1984. Among the most significant elements of the *Bildisco* opinion were the Court's affirmation of the power of the debtor-in-possession[3] in bankruptcy proceedings[4] to unilaterally abrogate a collective bargaining

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1. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333-392 (codified in scattered sections of 11 and 28 U.S.C.).

2. 104 S. Ct. 1188 (1984); *see generally* Gregory, *Labor Contract Rejection in Bankruptcy: The Supreme Court's Attack on Labor in* NLRB v. Bildisco, 25 B.C.L. REV. 539 (1984) [hereinafter cited as Gregory, *The Supreme Court's Attack on Labor*].

3. "Debtor-in-possession" normally refers to an employer who has filed for reorganization pursuant to the Chapter 11 of the Bankruptcy Code of 1978. 11 U.S.C. § 1101(1) (1982). Although there are some technical distinctions, the debtor-in-possession generally has the powers of a trustee. 11 U.S.C. § 1107(a).

Section 1104 provides for appointment of a trustee, but this provision is not ordinarily invoked.

> The norm, under section 1104, is to leave the debtor in possession unless a party in interest requests appointment of a trustee or examiner. Upon such request, after notice and hearing the court shall appoint a trustee if one of two conditions is found to exist: (1) fraud, dishonesty, incompetence or gross mismanagement, or (2) a trustee would be in the best interest of creditors, and equity security holders, and other interests, regardless of number of holders of securities or the amount of assets or liabilities.

Herzog & King, COLLIER ON BANKRUPTCY (pamphlet ed. 1983), 463 (comments on § 1104). Unless otherwise noted, this article will use the terms debtor-in-possession, trustee, and employer interchangeably.

4. Labor contract rejection is normally sought in Chapter 11 reorganizations, rather than in Chapter 7 liquidations. In the latter, the business will not resurface. Therefore, it is largely academic whether the labor contract is rejected. Congress has expressly emphasized this distinction between the nature and purpose of Chapter 11 reorganization and Chapter 7 liquidation proceedings:

> The purpose of a business reorganization case, unlike a liquidation case, is to restructure a business's [sic] finances so that it may continue to operate, provide its employees with jobs, pay its creditors, and produce a return for its stockholders. The premise of a business reorganization is that assets that are used for production in the industry for which they were designed are more valuable than those same assets sold for scrap. Often, the return on assets that a business can produce is inadequate to compensate those who have invested in the business. Cash flow problems may develop, and require creditors of the business, both trade creditors and long-term lenders, to wait for payment of their claims. If the

agreement without first engaging in good faith bargaining with the union[5] and without committing an unfair labor practice under sections 8(d) and 8(a)(5) of the National Labor Relations Act (NLRA or Act) when rejection occurs prior to bankruptcy court approval.[6] After four months of intensive congressional lobbying by organized labor, these crucial elements of *Bildisco* were legislatively overruled in the broader context of the Bankruptcy Amendments of 1984.[7] After closely analyzing this legislation, the pertinent cases decided subsequent to *Bildisco* will also be briefly reviewed, since the new statutes have only prospective application. Finally, some of the most important policy implications of both *Bildisco* and the new legislation will be discussed.

I. THE SUPREME COURT'S DECISION IN *NLRB V. BILDISCO*

Affirming the decision of the Third Circuit,[8] the Court unanimously held that collective bargaining agreements could be abrogated by the debtor-in-possession without prior bargaining with the union.[9] The

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business can extend or reduce its debts, it often can be returned to a viable state. It is more economically efficient to reorganize than to liquidate, because it preserves jobs and assets.

H.R. REP. No. 595, 95th Cong., 1st Sess. 220, *reprinted in* 1978 U.S. CODE CONG. & AD. NEWS 5787, 5963, 6179. For further discussion of the distinctions between reorganization and liquidation, *see*, Note, *Collective Bargaining Agreements and the Bankruptcy Reform Act: What Test Should the Bankruptcy Court Use in Deciding Whether to Allow a Debtor to Reject a Collective Bargaining Agreement?*, 51 U. CIN. L. REV. 862, 868 (1982) [hereinafter cited as Note, *What Test Should the Bankruptcy Court Use*]; Note, *The Bankruptcy Law's Effect on Collective Bargaining Agreements*, 81 COLUM. L. REV. 391, 392 (1981).

5. 104 S. Ct. at 1197.

6. *Id.* at 1201; 28 U.S.C. §§ 158(a)(d).

7. The 1984 legislation was the product of a much broader two year struggle by Congress to rectify the unconstitutionality of the bankruptcy courts, since the Supreme Court's decision in Northern Pipeline Const. v. Marathon Pipeline Co., 458 U.S. 50 (1982). In *Marathon*, the Court held that the 1978 Bankruptcy Code violated article III of the Constitution. The judicial power of the United States must be vested only in courts whose judges enjoy Article III life tenure and protection against salary diminution during their term of office. As the Court ruled in *Marathon*:

> Article III bars Congress from establishing legislative courts to exercise jurisdiction over all matters related to those arising under the bankruptcy laws. The establishment of such courts does not fall within any of the historically recognized situations in which the general principle of independent adjudication commanded by Art. III does not apply.

Id. at 76. This article will not discuss the broad constitutional considerations surrounding the bankruptcy courts. For further commentary regarding the broader constitutional contours of the *Marathon* decision, see articles cited in Gregory, *The Supreme Court's Attack on Labor*, 25 B.C.L. Rev. 539, 548 n.48 (1984).

8. *In re Bildisco*, 682 F.2d 72 (3d Cir. 1982). For earlier commentary on the Third Circuit's decision, see Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 AM. BANKR. L.J. 293 (1983); Pulliam, *The Rejection of Collective Bargaining Agreements Under Section 365 of the Bankruptcy Code*, 58 AM. BANK. L.J. 1 (1984); Note, *What Test Should The Bankruptcy Court Use?*, *supra* note 4.

9. 104 S. Ct. at 1197, 1200. The Court expressly relieved the debtor-in-possession from any prior duty to bargain to impasse, and explicitly stated that complex labor determinations were beyond the province of the bankruptcy court's expertise.

> Whether impasse has been reached generally is a judgment call for the Board to make; imposing such a requirement as a condition precedent to rejection of the labor contract will simply divert the Bankruptcy Court from its customary area of expertise into a field in which it presumably has little or none.

Id. at 1200.

Court did, however, recommend that the employer undergoing reorganization and the union representatives first engage in reasonable efforts to negotiate contract concessions and modifications.[10] Before intervening, the bankruptcy court must be satisfied that these negotiations "are not likely to produce a prompt and satisfactory solution."[11] Since prior good faith bargaining was not mandated, there was no requirement that the parties bargain to impasse before the debtor-in-possession unilaterally abrogate the labor contract. Over a vitriolic dissent to the third part of an otherwise unanimous decision,[12] a bare majority further held that the debtor-in-possession would not commit an unfair labor practice[13] by "unilaterally rejecting or modifying a collective bargaining agreement before [obtaining authorization for] formal rejection by the Bankruptcy Court."[14]

After unilateral rejection by the debtor-in-possession, the bankruptcy court would determine whether rejection was appropriate by assessing the equities.[15] Deferring to the special nature of the collective bargaining agreement,[16] the Court deemed that the standard for labor contract rejection should be "stricter than the traditional 'business judgment' standard applied by the courts to authorize rejection of the ordinary executory contract."[17] The Court rejected the stricter test for labor contract rejection adopted by the Second Circuit, which required the debtor-in-possession to show that liquidation would occur absent contract rejection.[18] After assessing the legislative intent behind section

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10. *Id.* at 1196.

11. *Id.*

12. Justice Brennan filed a dissent to Part III of the opinion, joined by Justices White, Marshall, and Blackmun.

13. Section 8(a) of the National Labor Relations Act, 28 U.S.C. § 158(a) (1982), states, in part:

(a) it shall be an unfair labor practice for an employer—

. . .(5) to refuse to bargain collectively with the representatives of his employees.

14. 104 S. Ct. at 1197.

15. *Id.*

16. The Court stated: "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." (citations omitted) *Id.* at 1195.

17. *Id.*

18. The Second Circuit's stricter test for whether labor contract rejection was warranted is illustrated in Brotherhood of Ry. Clerks v. REA Express, Inc., 523 F.2d 164 (2nd Cir.), *cert. denied*, 423 U.S. 1017 (1975). *REA Express* substantially tightened the standards enunciated one month earlier by the Second Circuit in Shopman's Local Union 455 v. Kevin Steel Prod., Inc., 519 F.2d 698 (2nd Cir. 1975). Essentially, the *REA Express* test was that labor contract rejection "should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the carrier [employer] will collapse and the employees will no longer have their jobs." 523 F.2d at 172.

Rejecting the *REA Express* strict test as the "illegitimate progeny" of *Kevin Steel*, the Third Circuit in *Bildisco* explained:

> We reject this more stringent test for two discrete but related reasons: first, for the pragmatic reason that it may be impossible to predict the success vel non of a reorganization until very late in the arrangement proceedings; and second, for the prudential consideration of whether the employees will continue to have jobs at all. . . .
>
> We also reject the more stringent test because it could work to the detriment of the workers it seeks to protect. By erecting an excessive evidentiary barrier to rejection of labor contracts, the *REA Express – Alan Wood Steel* formulation would

365(a) of the Bankruptcy Code[19] the Court concluded that the Second Circuit's stricter test for labor contract rejection was inimical to the fundamental policies of bankruptcy law and to the practical likelihood of successful business reorganization.[20] The Court adopted the less strict Third Circuit test as the appropriate standard to determine whether labor contract rejection was warranted.[21] The standard required bankruptcy courts to determine whether the labor contract burdened the estate and whether the concerned parties as a whole would ultimately benefit from the rejection.[22]

The Court vested a private employer with the unilateral power to rewrite its labor contract governing the hours, wages, and terms and conditions of employment. This unilateral action was subject only to an after-the-fact review by the bankruptcy court based on a supposed careful scrutiny of all the equities. Because the Court had already relieved the employer of its duty to comply with any of the bargaining requirements, the union was deprived of any viable role. If the bankruptcy court determined the prior unilateral rejection was not warranted, it could vitiate the prior rejection. However, the likelihood of such court action would be remote. The bankruptcy courts have traditionally manifested indifference and often hostility to the interests of labor. The bankruptcy courts view their primary responsibility as the revitalization of imperiled enterprises. Labor interests, perceived as potentially contrary to business interests, are often viewed with disfavor by the courts.[23]

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make it likely that numerous businesses attempting to reorganize will in fact be forced over the line into liquidation. Adherence to a collective bargaining agreement together with a successful reorganization is surely the best of possible worlds; but given the inevitable potential for conflict between these goals we think it preferable that jobs be preserved through rejection of a labor contract than that they be lost because of its acceptance.

682 F.2d at 80.

19. 104 S. Ct. at 1196.

20. *Id.* "The standard which we think Congress intended is a higher one than that of the 'business judgment' rule, but a lesser one than that embodied in the *REA Express* opinion."

21. The Third Circuit summarized the test as follows:

We believe that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; that once this threshold determination has been made the debtor-in-possession must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities; that the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible 'sacrifices which other creditors are making' in the effort to bring about a successful reorganization and that the court must make a reasoned determination that the rejection of the labor contract will assist the debtor-in-possession or the trustees to achieve a satisfactory reorganization. (citation omitted)

In re Bildisco, 682 F.2d at 81. Between the Third Circuit's decision and the affirmance by the Supreme Court, the Eleventh Circuit reiterated the *Bildisco* test in In re Brada Miller Freight System, Inc., 702 F.2d 890 (11th Cir. 1983). *Brada Miller* is fully consonant with the Third Circuit test in *Bildisco*.

22. *Id.* 104 S. Ct. 1196-97.

23. For further discussion of the pro-business institutional bias of the bankruptcy courts, see Gregory, *The Supreme Court's Attack On Labor*, *supra* note 4.

The *Bildisco* decision would have furthered this predicament. The Court's endorsement of a "careful scrutiny" formula was compromised because the Court failed to provide any coherent structure to guide this allegedly "careful" review. The employer was relieved of its duties to bargain in good faith with the union and to secure court approval before rejecting the labor contract. The *Bildisco* opinion merely enumerated the general equities for bankruptcy courts to consider in determining whether the prior unilateral contract rejection was warranted.[24] Furthermore, the bankruptcy court was accorded wide discretion in assessing these equities and was strongly influenced by its overriding objective of expediting successful business reorganization.[25] Absent egregious bad faith by the employer, the court's pro-business bias virtually guaranteed that the interests of labor would be subordinated to those of the debtor-in-possession and the creditors. The courts' decisions favored the philosophy that a job at reduced wages was better than the alternative of loss of employment. By preventing unemployment, troublesome employee and labor equities would be deemed sufficiently considered, and the primary task of business reorganization could proceed.[26] The loose equities test administered by bankruptcy courts subsequent to contract rejection was devastating to employee and labor interests.

If the *Bildisco* decision had not been partially remedied by legislation, it would have had an irreparable impact on effective collective bargaining and on realistic prospects for achieving coherent labor law jurisprudence. The article will now examine the key statutory provisions of the 1984 Bankruptcy Amendments which corrected the *Bildisco* decision.

II. LEGISLATIVE RECTIFICATION OF *BILDISCO*

The Bankruptcy Amendments and Federal Judgeship Act of 1984 added section 1113 to the comprehensive Bankruptcy Code of 1978 and substantially remedied *Bildisco*.[27] These new provisions afford some meaningful protections for unionized employees and establish workable guidelines and chronologies for labor contract rejection, but the primary goal of the Bankruptcy Code, to successfully reorganize business, is still preserved at the heart of the Code. Hopefully, the effect of section 1113 will be that when collective bargaining agreement rejection is

24. 104 S. Ct. at 1197.

25. [T]he Bankruptcy Court must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize free-wheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization. The Bankruptcy court's inquiry is of necessity speculative and it must have great latitude to consider any type of evidence relevant to this issue.

Id. at 1197.

26. For examples of courts applying this analysis, see Bordewieck & Countryman, *The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors*, 57 Am. Bankr. L.J. 293 (1983).

27. Pub. L. No. 98-353, § 1113, 98 Stat. 390-91 (1984) (to be codified at 11 U.S.C. § 1113).

authorized by the bankruptcy court, all parties will better understand why rejection was approved and why alternatives to rejection were not viable.

Under section 1113, after filing a petition for reorganization and prior to filing an application for rejection of the collective bargaining agreement, the trustee[28] must comply with several provisions. The trustee must propose modifications to the union of contractual terms and conditions of employment which "are necessary to permit the reorganization of the debtor and [assure] that all creditors, the debtor and all of affected parties are treated fairly and equitably."[29] Further, the trustee must provide the union with "such relevant information as is necessary to evaluate the proposal."[30] Until the bankruptcy court conducts a hearing on the contract modification proposal, "the trustee shall meet, at reasonable times, with the authorized representative [of the union] to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement."[31] This prior good faith bargaining requirement imposed on the debtor-in-possession thus overrules one of the two most devastating aspects of *Bildisco*. The second major element of *Bildisco* was likewise vitiated by requiring formal court approval prior to labor contract rejection.[32] The bankruptcy court is no longer accorded broad discretion in assessing the general equities of each case. In addition to insuring that "the balance of the equities clearly favors rejection,"[33] the bankruptcy court must be satisfied that the debtor-in-possession first complied with the good faith bargaining requirements prior to the hearing[34] and the union "refused to accept such proposal without good cause."[35] Unlike *Bildisco*, the new prior bargaining requirement makes subsequent judicial assessment of all the equities structured and meaningful.

While creating substantial safeguards for the contractual rights of unionized employees, the new legislation failed to incorporate the strong labor protections proposed in H.R. 5174,[36] passed by the House of Representatives on March 22, 1984. The original House bill would have also provided express judicial consideration not only for the "successful . . . reorganization of the debtor" but also for "preservation of the jobs covered by such agreement."[37] Under the House bill, the bankruptcy court could have approved rejection of the labor contract only if the parties had engaged in prior unsuccessful good faith bargaining and

28. The amendments refer to "trustee" to include debtor-in-possession; *see supra* note 3.

29. 11 U.S.C. § 1113(b)(1)(A); *see supra* note 27.

30. 11 U.S.C. § 1113(b)(1)(B). However, protective orders are also available to prevent union disclosure of the debtor's information to industry competitors. 11 U.S.C. § 1113(d)(3); *see supra* note 27.

31. 11 U.S.C. § 1113(b)(2); *see supra* note 27.

32. 11 U.S.C. § 1113(c); *see supra* note 27.

33. 11 U.S.C. § 1113(c)(3); *see supra* note 27.

34. 11 U.S.C. § 1113(c)(1); *see supra* note 27.

35. 11 U.S.C. § 1113(c)(2); *see supra* note 27.

36. H.R. 5174, 98th Cong., 2d Sess., 130 CONG. REC. H1806 (daily ed. Mar. 21, 1984).

37. *Id.*

"absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail."[38] Unfortunately, the final legislation fails to recognize these interests and to provide express protections for preserving jobs. Instead, concern for jobs is subsumed into the balance of the equities[39] the court will consider.

The new legislation also permits the court, after notice and hearing, to authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or workrules provided by the collective bargaining agreement "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate."[40] This provision is designed to afford interim relief, but does not affect the application for rejection nor the final hearing on the application.[41]

The hearing on the rejection application is also expedited. All interested parties must be notified at least ten days prior to the hearing and may testify at the hearing.[42] Normally, the hearing will be held within fourteen days after the trustee files the application for rejection of the collective bargaining agreement.[43] The court will normally issue its decision on the rejection application within thirty days of the commencement of the hearing.[44] If the decision is not rendered within the time limits, "the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application."[45] Although the power of the debtor-in-possession to impose interim modifications with court approval[46] and to terminate or alter the contract if a court decision is not timely rendered[47] is potentially significant, no unilateral alteration or termination of a labor contract can be effected without compliance with the new statutory provisions.[48]

III. POST-*BILDISCO* CASE LAW

Since the bankruptcy amendment is prospectively effective and does not apply to litigation commenced prior to its enactment, no significant case law has yet developed under the new legislation.[49] However, the

38. *Id.*

39. 11 U.S.C. § 1113(c)(3); *see supra* note 27.

40. 11 U.S.C. § 1113(e); *see supra* note 27. In its original form, H.R. 5174 contained no analagous provision.

41. 11 U.S.C. § 1113(f); *see supra* note 27.

42. 11 U.S.C. § 1113(d)(1); *see supra* note 27.

43. *Id.*

44. 11 U.S.C. § 1113(d)(2); *see supra* note 27. In its original form, H.R. 5174 provided for completion of the hearing within fourteen days of its commencement, but contained no time limit provision for rendering a decision.

45. 11 U.S.C. § 1113(d)(2); *see supra* note 27. In its original form, H.R. 5174 contained no analagous provision.

46. 11 U.S.C. § 1113(e); *see supra* note 27.

47. 11 U.S.C. § 1113(d)(2); *see supra* note 27.

48. 11 U.S.C. § 1113(f); *see supra* note 27.

49. Virtually all of the post-*Bildisco* case law involves judicial scrutiny of the facts of each case to insure the labor contract rejection process comports with either the judicial,

new statutory provisions do substantially overrule much of the *Bildisco* decision. A brief survey of the post-*Bildisco* pre-statutory case law will emphasize the drastic ramifications of the *Bildisco* decision and highlight improvements resulting from subsequent legislation.

It quickly became obvious from the few pertinent post-*Bildisco* decisions, that *Bildisco* did not serve as carte blanche for employer prerogatives. Contract rejection was not allowed if the solvent employer acted in bad faith by engaging in only a pretext of reorganization to break the union.[50] Although *Bildisco* did not expressly mention the parties' motives, one bankruptcy court found them to be a "proper factor to be considered when balancing the equities."[51] Because the record was replete with direct evidence of the employer's overt anti-union animus as the motive for seeking labor contract rejection, the motion to reject the contract was denied.[52]

Termination of operations will not necessarily permit contract rejection.[53] When business operations have ceased, the business interests of successful reorganization are no longer the court's paramount concern and labor interests become an equal concern. It would be more advantageous for the employer to maintain operations to benefit from the statutory and judicial concern for effecting viable reorganization. Financial savings resulting from cessation of operations will not automatically make labor contract rejection appropriate.

Cessation of business operations is distinguishable from the normal expiration of the labor contract. In the latter situation, the contract's effective term has lapsed and it is no longer an executory contract.[54] The Fourth Circuit Court of Appeals recently held an employer's petition to reject mooted by the contract's expiration.[55] The employer unsuccessfully argued that the court should have applied the relation-back doctrine to render the contract executory and permit its rejection despite its expiration.[56]

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or now statutory, provisions and insures careful assessment of all the equities. The post-*Bildisco* decisions show significantly heightened judicial sensitivity to union and employee interests. *See In re* Pesce Baking Co. Inc., 43 Bankr. 949 (Bankr., N.D. Ohio 1984); *In re* Schuld Mfg. Co. Inc., 43 Bankr. 535 (Bankr. W.D. Wisc. 1984); Wally Elec. Supply Co., 270 N.L.R.B. No. 165, 1984-85 NLRB Dec. (CCH) ¶ 16,563 (1984); Earle Equip. Co., 270 N.L.R.B. No. 121, 1984-85 NLRB Dec. (CCH) ¶ 16,375 (1984).

50. *In re* C & W Mining Co., 38 Bankr. 496, (Bankr., N.D. Ohio 1984).

51. *Id.* at 502.

52. Neither C. & W. nor William Catlett have been honest with the Union. Catlett threatened the Union, missed scheduled meetings, and delayed in giving requested financial information. For the most part, Catlett's testimony before this court was self-serving and less than credible. His surprising candor in admitting his anti-union bias upon cross examination only serves to underscore his bad faith.

Id. at 503-4.

53. *In re* Total Transp. Serv. Inc., 37 Bankr. 904 (Bankr. S.D. Ohio 1984).

54. Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 450-62 (1973).

55. Gloria Mfg. Corp. v. ILGWU, 730 F.2d 1020 (4th Cir. 1984).

56. *Id.* at 1022. The Fourth Circuit distinguished *Gloria Mfg.* from *Bildisco*. "*Bildisco* is not applicable to this case because the collective bargaining agreement . . . had expired and was therefore no longer executory." *Id.* at 1021 n.1. Since the expired contract was

Other than these examples of bad faith and business liquidation, *Bildisco* was designed to promote expeditious labor contract rejection to effect the ultimate objective of successful business reorganization. This purpose remained the central policy focus of the subsequent legislation. Approval of labor contract rejection is equally likely under *Bildisco* or under the new section 1113 when the employer is not solvent, despite union concessions, employer good faith and austerity measures.[57]

IV. PROGNOSIS—CAUTIOUS OPTIMISM

An unremedied *Bildisco* decision could have wreaked havoc on labor relations. Of course, solvent corporations did not rush en masse into the rigors of reorganization merely to abrogate their labor contracts. The strictures of reorganization are unpalatable enough, and even *Bildisco* would not have condoned bad faith pretextual manipulation of the bankruptcy law by solvent employers solely to destroy the union. Large solvent multinational corporations would be least likely to use *Bildisco* for such an illegitimate purpose. For the most part, these corporations have mature, established labor relations histories with large unions. The real dangers posed by *Bildisco* were at the smaller end of the corporate spectrum, which is still the bedrock of American enterprise. Smaller marginal businesses operating in unstable, highly competitive markets[58] without the resources or the inclination to retain informed labor counsel were more likely to enter into reorganization proceedings seeking labor contract rejection. This could have resulted in the hasty abrogation of a collective bargaining agreement which, upon reflection, the employer may have wished to preserve with some modifications. After reorganization, the union is likely to remain as the employee's exclusive bargaining representative. Even if labor contract rejection is approved, the reorganized employer will still have to bargain with the union. The first item on the agenda will usually be the negotiation of a new collective bargaining agreement. The prior bargaining requirement may prevent potential hostility in negotiations otherwise likely to have been engendered by spontaneous unilateral labor contract abrogation. Without prior bargaining, labor misunderstanding and hostility could have thoroughly poisoned post-reorganization labor relations.

Recent labor relations developments have repeatedly demonstrated the wisdom of pursuing good faith concession bargaining. For the most part, unions have responsibly demonstrated willingness to make often significant contract concessions to assist truly financially imperiled

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not executory, the rejection of the contract could not relate back to the day preceding the filing of the employer's petition to reject the contract.

57. *In re* Briggs Transp. Co., 39 Bankr. 343, (Bankr. D. Minn. 1984).

58. Bildisco & Bildisco, a general partnership, can be characterized in this way. When Bildisco filed for bankruptcy, eighteen of its employees, representing 40-45% of its work force, were covered by the labor contract in question. 104 S. Ct. at 102. By the date of the rejection hearing, only three employees remained who were covered by the agreement. 682 F.2d at 75.

employers.[59]

The new legislation is not failsafe. It remains doubtful whether bankruptcy courts possess sufficient labor law expertise to determine whether the prior bargaining was good faith but ultimately unsuccessful hard bargaining or whether it was bad faith, *pro forma* surface bargaining. Even for the labor law expert, determining the nature of bargaining is often a frustrating task of evaluating action according to intangible standards. Bankruptcy courts have previously demonstrated only sporadic appreciation of labor law considerations. Leaving these bargaining determinations to the bankruptcy courts alone may prove unwise. The better course would be to vest the bankruptcy courts and the National Labor Relations Board with joint supervision of these cases, leaving all labor law determinations, such as those regarding the nature of the prior bargaining, to the expertise of the NLRB.

Requiring prior court approval to reject the labor contract should prior bargaining be unsuccessful was the other major correction of *Bildisco* effected via the new legislation. The judicial hearing under an expedited time frame, with a decision normally rendered within thirty days of the commencement of the hearing, will be palatable to all parties. If the court is unable to render a timely decision, the employer may effect interim unilateral modifications. While this power is potentially ominous, it is only an interim relief measure. Any unilateral contract changes implemented without union consent are subject to later vitiation by the court if deemed unwarranted. While no significant case law has yet developed, this scenario may be rendered academic. It is contingent upon the bankruptcy courts issuing decisions in a timely fashion, as provided by the statute. Judicial administrative diligence should preclude employers from resorting to contingent, interim relief through unilateral contract termination which the statute was designed to prevent. If the courts are not punctilious, this unilateral interim relief provision could become a troublesome, unwise loophole in an otherwise sound statute.

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59. For recent examples of significant union concessions, see, *Lone Star Steelworkers Wage Concession Contract*, 114 LAB. REL. REP. (BNA) 41 (Sept. 19, 1983) (members of the United Steelworkers Union accept "one of the steepest pay cuts negotiated in the current round of contract concessions – an across-the-board reduction of $2.80 per hour"); *Concessions for Meatpackers*, 113 LAB. REL. REP. 188 (BNA) (July 4, 1983) (members of United Food and Commerical Workers vote to accept concessions significantly reducing wages and benefits after employer filed for bankruptcy); *Contract Approvals in Airline Industry*, 112 LAB. REL. REP. 202 (BNA) (Mar. 14, 1983) (concessions agreed to by transport workers union include elimination of paid meal periods, "increased deductibles under a comprehensive medical insurance plan and slower procession schedules to top rates for new hires"); *Wage, Benefit Cuts For Steel Employees* 112 LAB. REL. REP. 22 (BNA) (Jan. 10, 1983) (Steelworkers approve new contract cutting wages, benefits, vacations and holidays); Williams, *Wilson Food Fights Back*, N.Y. Times, Dec. 3, 1983, at L31, Col.2 (The corporation originally sought wage reductions from $10.69 to $6.50 an hour, in its bankruptcy petitions filed in April, 1983 which precipitated strikes by 5,000 employees at seven plants. However, the last of the striking unions has agreed to a wage reduction to $8 per hour, plus similar reductions in fringe benefits); Serrin, *How Deregulation Allowed Greyhound to Win Concessions From Strikers*, N.Y. Times, Dec. 7, 1983, at A22, col.2 ; Holusha, *Unions May Wait to Make Up for Lost Time*, N.Y. Times, Dec. 11, 1983, at E5, col.2 .

V. CONCLUSION

The new legislation provides significant rectification of the radical *Bildisco* decision. While labor interests remain subordinated to those of ownership in the new legislation, they are now an express part of the general equation. By requiring concession bargaining and court approval prior to rejection of a collective bargaining agreement, both employers and bankruptcy courts are forced to recognize labor interests. If history is a reliable guide,[60] most concession bargaining will be successful and no judicial intervention will be required. If prior bargaining is unsuccessful, the statute provides safeguards for labor through an expedited participatory hearing. Unfortunately, the judicial balancing of all the equities to determine whether labor contract rejection is warranted remains a largely unstructured exercise, with serious potential abuse by bankruptcy courts reflecting pro-enterprise institutional bias. By avoiding overt displays of anti-union tactics and prejudices, the clever employer may still severely handicap the union while simultaneously effecting business reorganization.

This analysis assumes a "worst possible case" scenario of ulterior employer objectives. In most instances, financially imperiled employers will responsibly seek reorganization without anti-union animus. Business has every right to pursue this legitimate avenue in highly competitive world markets. Abuses of the bankruptcy laws, whether pre-or post-*Bildisco*, are relatively rare and the new legislation makes it less likely that abuses will succeed.

The legislation prevented a return to the often overtly hostile labor relations climate that existed prior to the passage of the National Labor Relations Act in 1935. In addition to increased strike activity and labor violence, an unremedied *Bildisco* decision would have compelled a labor strategy of agreeing only to one year collective bargaining agreements. Three year labor contracts could have been suicidal, except with the most solvent large corporations. Labor would have had every tactical, preventive reason to avoid longer contracts that could have been summarily and unilaterally abrogated by employers unexpectedly entering into reorganization. In addition to increasing employer labor relations costs, one year contracts would have seriously destabilized and debilitated labor-management relations.

In the short term, the remedial legislation saved federal labor policy from possible disintegration. However, the prospects for achieving full labor management equilibrium are still not assured because labor cannot match the power of multinational corporations. While a great deal of work remains, the Bankruptcy Amendments of 1984 represent a small, incremental step toward achieving a responsible labor law jurisprudence. Perhaps Congress will yet reconsider the merits of comprehensive labor law reform.[61]

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60. See examples cited *supra* note 59.

61. Prospects for comprehensive labor law reform legislation in the foreseeable future

are remote. The Democratic Senate was unable to pass reform legislation during the Carter presidency despite the strong support of the administration and organized labor. It is unlikely that any meaningful reform legislation will be entertained during the Reagan administration with a Republican Senate. Nevertheless, proposals for future labor law legislative reforms have been resurrected and forcefully advanced in recent prominent studies. *See* RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? (1984); WILLIAM B. GOULD, JAPAN'S RESHAPING OF AMERICAN LABOR LAW (1984).