# Critical Labor Considerations in Bankruptcy and Business Restructuring

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Mr. Newman is a partner in the Labor & Employment Department in the firm's Atlanta office. His practice, which is national in scope, focuses on traditional labor relations matters, managing employment litigation, preventive counseling and management training in labor and employment law subjects.

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# Statutory Scheme For Modifying Or Rejecting Collective Bargaining Agreement Or Retiree Health Benefits

Bankruptcy does not automatically permit an employer to change employment terms in a collective bargaining agreement (CBA) or to modify/eliminate retiree health benefit obligations.

- NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984). Supreme Court held that a Bankruptcy Court should permit debtor-in-possession to unilaterally reject CBA under Section 365(a) of Bankruptcy Code upon showing that labor contract burdens the bankruptcy estate and equities support rejection.

- In response, Congress enacted 11 U.S.C. § 1113 (governing modification rejection of CBAs) and § 1114 (governing modification/elimination of retiree health benefit obligations) to establish modification/rejection standards and need for Bankruptcy Court approval.

- Although Sections 1113 and 1114 are sole means by which debtor can avoid obligations under CBA (or retiree health obligations), some courts have refused to order specific performance and find breaches to be administrative claims requiring plan of reorganization for satisfaction. However, potential NLRA Section 8(a)(5) violations/contractual grievances.

 

# Procedural Prerequisites To Modifying Or Rejecting Collective Bargaining Agreement

The majority of courts adhere to the analysis of Section 1113's prerequisites to CBA rejection set forth in *In re American Provision Co*., 44 B.R. 907 (Bankr. D. Minn. 1984):

- The debtor must make a proposal to the union to modify the CBA. See 11 U.S.C. § 1113(b)(1)(A).
- The proposal must be based on the most complete and reliable information available at the time of the proposal. See 11 U.S.C. § 1113(b)(1)(A).
- The proposed modifications must be necessary to the reorganization of the debtor. See 11 U.S.C. § 1113(b)(1)(A).
- The proposed modifications must treat stakeholders (e.g., creditors, union-represented employees, non-union employees) in a fair and equitable manner. See 11 U.S.C. § 1113(b)(1)(A).
- The debtor must provide the union with relevant information necessary for it to be able to intelligently evaluate the proposal. See 11 U.S.C. § 1113(b)(1)(B).
- The debtor must meet at reasonable times with the union prior to a hearing on a motion to reject the existing CBA. See 11 U.S.C. § 1113(b)(2).
- The debtor must confer (negotiate) in good faith with the union in an attempt to reach a mutually satisfactory modification of the CBA. See 11 U.S.C. § 1113(b)(2).
- The union must have refused to accept the proposal without good cause. See 11 U.S.C. § 1113(c)(2).
- The balance of the equities must clearly favor rejection of the CBA. See 11 U.S.C. § 1113(c)(2).

The debtor/employer generally has the burden of persuasion to show prerequisites met.

 

# What Does The American Provision Analysis Really Mean?

"Most complete and reliable information"/"provide relevant information"

- Opening the books.
- Be proactive in gathering information to avoid union delays.
- Try to obtain confidentiality agreement (but difficult to enforce in practice).

"Necessary to the reorganization"

- Sufficient nexus to financial condition and "good faith" (e.g., Truck Drivers Local 807 v. Carey Transp., Inc. 816 F.2d 82 (2d Cir. 1987)) vs. "but for" (e.g., Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of America, 791 F.2d 1074 (3d Cir. 1986)).
- Non-economic (i.e., work rule) changes must affect economics.

"Fair and equitable"

- Management and shareholder sacrifice.
- Equitable generally does not mean equal.
- Consideration of "snap back" in some jurisdictions.

"Meeting at reasonable times"/ "good faith bargaining"

- Be available to meet – show ready, willing, and able
- Do not have to agree but show process of exploration/compromise

"Without good cause"

- Force union to provide cogent reasons. Develop paper trail.
- If after good faith bargaining, employer proposal is reasonable and fair, good cause probably lacking
- If Union reaches agreement, must support it during ratification process.

"Balance of the equities"

- What are possibilities of liquidation absent rejection. Reduced value to creditors and impact on employees of liquidation.

 

# Other Considerations

*Bankruptcy Court approval of interim relief under Section 1113(e)*. Must be essential to continuation of business or to avoid irreparable damage to estate. Heavy burden on debtor to establish.

*Split of authority as to whether Bankruptcy Court can modify discrete contract provisions instead of rejection of CBA*. If so, could arguably retain CBA no-strike provisions.

*Even if CBA rejected, parties have ongoing duty under NLRA to bargain in good faith to agreement or impasse*.

*Union free to strike post-rejection under NLRA*. Bankruptcy Court likely cannot enjoin strikes under NLRA even though could be detrimental to debtor. Automatic stay provisions of Bankruptcy Code likely do not supersede Norris-LaGuardia Act prohibition on federal court injunctions of activity growing out of a labor dispute. *See, e.g., Crowe & Associates v. Bricklayers Local 2*, 713 F.2d 211 (6th Cir. 1993)).

*Union probably cannot immediately strike post-rejection under RLA*. Bankruptcy Court may be able to enjoin strikes under RLA (specifically distinguishing NLRA). *See, e.g. In re Northwest Airlines*, 349 B.R. 338 (S.D.N.Y. 2006), *affd*, 483 F.3d 160 (2nd Cir. 2007)(NLRA contains right to strike; RLA has no express provision and to the contrary, Section 2 (First) provides parties must "exert every reasonable effort to make and maintain agreements … in order to avoid any interruption to commerce or to operation of carrier.").

*Bankruptcy stay probably does not stay arbitrations arising under CBA*. Viewed as modification of CBA outside of Section 1113 process. *In re Ionosphere*, 922 F.2d 984 (2nd Cir. 1990). But enforcement action under LMRA Section 301 might be capable of being blocked.

*Bankruptcy Court not required to defer to pending NLRB action*. But NLRB action not stayed by Bankruptcy Code Section 362(a)-(b) automatic stay provisions (which exclude "actions by a government unit to enforce such governmental unit's policy or regulatory power.") Jurisdictional collision as to remedy. *See, e.g., In re Bel Air Chateau Hospital*, 611 F.2d 1248 (9th Cir. 1979) (Bankruptcy Court cannot enjoin unfair labor practice proceedings but possibly remedy – not defense costs – if threat to estate). NLRB Section 10(j) proceedings.

*Open question whether CBA entered into post petition requires Bankruptcy Court approval under Section 363(c)* (*i.e.*, argument that not contract in routine and ordinary course).

 

# Modification/Elimination Of Post-Retirement Health Benefits

"Retiree benefits" are payments to provide/reimburse retired employees, spouses and dependents for medical, surgical or hospital care, or sickness, accident, disability or death benefits under any plan, fund or program maintained or established in whole or in part by the debtor prior to filing a Chapter 11 petition. See 11 U.S.C. § 1114(a).

Non-vested post-retirement health benefits may be unilaterally modified by employer outside of bankruptcy.

Unless vested retiree health benefits modified in accordance with 11 U.S.C. § 1114 procedures, debtor must continue such benefits.

Determination of whether retiree health benefits are vested may rest on language and provisions in plan documents, summary plan descriptions, collective bargaining agreements, and other documents. Courts generally try to ascertain whether employer intended to provide benefits throughout retirement, e.g., statements such as benefits "will be continued for the rest of your life," benefits "will be equal to the active group," retirees "will be insured." Generally, reservation by an employer of the right to modify or terminate retiree health benefits defeats vesting. See, e.g., In re Unisys Corp. Retiree Med. Benefit Litig., 58 F.3d 896, 904 (3d Cir. 1996).

Bargaining process similar to Section 1113. See, e.g., In re SAI Holdings, Ltd., 200 Bankr. LEXIS 1051 (Bankr. N.D. Ohio. 2007) (extended application of nine- part American Provision analysis to Section 1114). Debtor makes a proposal to the retirees' representative that, based upon the most complete and reliable information then available, such modifications to the pre-bankruptcy necessary to permit reorganization and all of the affected parties are treated fairly and equitably.

Negotiations with court-approved representative of retirees – either union or special committee (since retirees are not statutory employees under NLRA). Representative is ordinarily union if there is one, but union can decline or can be conflict of interest between active employees and retirees. If negotiated settlement not reached and benefits modified/eliminated, retiree representative can petition Bankruptcy Court for restoration/relief.

Modification of retiree health benefits under Section 1114 may be OK after plan of reorganization already confirmed because necessary to permit reorganization. In re Oremet Corp., 355 B.R. 37 (Bnkr. S.D. Ohio 2006).

In re Towers Automotive, Inc., 241 FRD 162 (S.D.N.Y. 2006)(waiving retiree medical benefits and other retirement benefits in exchange for guaranteed sum equal to 20% of unsecured claims not sub rosa plan of reorganization; Section 1114 is protection for retirees in reorganization).

Section (l): Bankruptcy Court, upon motion, may reinstate benefits modified within 180 days before Chapter 11 filing while debtor insolvent unless the balance of the equities clearly favors the modification.

 

# Sales In Bankruptcy And Successor Labor Liability

Stock purchaser “stands in shoes” of seller for labor liability purposes and bound to seller’s CBA.

Ordinary asset purchaser may have joint and several liability to remedy seller’s unfair labor practices (ULPs) if acquisition undertaken with knowledge of ULPs and reasonable opportunity to account for liability in transaction (e.g., through indemnification, purchase price adjustment). Golden State Bottling.

Ordinary asset purchaser not bound to assume seller’s CBA, but must recognize and bargain with seller’s union over new labor contract if a majority of purchaser’s employees in “bargaining unit” positions were seller’s employees. May be able to establish new and different initial employment terms as starting point for negotiations if purchaser is not a “perfectly clear” successor. Burns.

“Successors and assigns” clauses in seller’s CBA cannot bind asset purchaser, but could give rise to breach of contract action against seller if purchaser fails to adhere. Could be basis for enjoining transaction.

Asset purchaser in Section 363 bankruptcy sale can purport to extinguish labor successor liability and acquire assets “free and clear” of such liability.

Jurisdictional collision with NLRB. In past, NLRB has deferred to Bankruptcy Court’s extinguishing of successor ULP liability. (Could change with Obama NLRB). NLRB will not defer to Bankruptcy Court attempt to eliminate successor union recognition/bargaining obligation.

 