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THE BILDISCO CASE AND THE CONGRESSIONAL RESPONSE

JAMES J. WHITE†

Section 365 of the Bankruptcy Reform Act authorizes one in bankruptcy to “assume or reject any executory contract . . . of the debtor.” The most frequent use of the section arises when a lessee goes into Chapter 11 and decides either to reject its real estate lease with its lessor or, if the lease is at a favorable rental rate, to assume it and assign it to another. A less frequent but more controversial use of section 365 is to reject one’s collective bargaining agreement with his employees.

One can justify the rights granted by section 365 alternatively on a

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1. 11 U.S.C. § 365(a) (1982) provides: “Except as provided in sections 765 and 766 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.”

2. A lease at a favorable rental is an asset with a marketable value. If the debtor is able to sublease the leasehold at a higher rate to a third party, he may be able to use the difference between the original contract and the market value of the lease to meet some of the obligations owed to his creditors. See, e.g., In re Brentano’s, Inc., 29 Bankr. 139 (Bankr. S.D.N.Y. 1983); In re City Stores Co., 21 Bankr. 809 (Bankr. S.D.N.Y. 1982); In re National Sugar Ref. Co., 21 Bankr. 196 (Bankr. S.D.N.Y. 1982); In re Bronx-Westchester Mack Corp., 20 Bankr. 139 (Bankr. S.D.N.Y. 1982); In re U.L. Radio Corp. 19 Bankr. 537 (Bankr. S.D.N.Y. 1982); In re Lafayette Radio Elec. Corp., 7 Bankr. 189 (Bankr. E.D.N.Y. 1980). In Brentano’s the district court stated: “Code section 365 governs assumption and assignment, providing broad authority to a debtor to assume and assign an unexpired lease and expressing a clear Congressional policy that potentially valuable assets inure to the benefit of a reorganizing debtor.” 29 Bankr. at 882. See also Fogel, Executory Contracts and Unexpired Leases in the Bankruptcy Code, 64 MINN. L. REV. 341 (1980).

pragmatic basis or on equitable grounds. Practically, it would be impossible for many corporations to undergo a successful reorganization if made to carry every onerous executory contract. Consider, for example, a thinly capitalized coal company with a contract to mine and sell coal at a price $30 million below its own cost. If such a debtor hoped to succeed in reorganization, it could not


In some of the cases that uphold rejection, the appellate court has nevertheless remanded for further findings. See, e.g., NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984); *In re* Brada Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983); Brotherhood of Ry., Airline & S.S. Clerks, 525 F.2d 164 (2d Cir.), cert. denied, 423 U.S. 1017 (1975).

4. Following the enactment of the Bankruptcy Reform Act, a few commentators discussed the purpose of section 365 in general terms, but none addressed the basic purpose in great detail. See, e.g., Donahue, *Executory Contracts Under the New Bankruptcy Law*, 24 RES GESTAE 6121, 6121-217 (1980); Fogel, *supra* note 2; Hughes, "Wavering Between the Profit and the Loss": Operating a Business During Reorganization Under Chapter 11 of the New Bankruptcy Code, 54 AM. BANKR. L.J. 45, 84-86 (1980). The Hughes article probably gave the best treatment of the policy behind section 365. He stated:

For the debtor in possession, the major dilemma in the labor area will be whether to assume or reject the existing labor contract. In the Code, Congress did not choose to treat collective bargaining differently from other executory contracts, which are governed by section 365. Section 365 gives the debtor in possession the power to assume or reject executory contracts. This section does not specify what a [sic] executory contract is, but the legislative history indicates that a section 365 executory contract is one in which "performance remains due to some extent on both sides," that is, when neither side has fully performed. Under a collective bargaining agreement, labor has
feasibly perform such a contract. In such cases the very idea of a reorganization and the hope of continuing the existence of a reorganized company is fundamentally inconsistent with the satisfaction of all of its executory obligations.

Even in circumstances where the debtor might be able to carry out its obligations, other creditors may argue that it would be inequitable to allow the debtor to pay only a share of the obligations due them while at the same time continuing to satisfy every obligation owed on executory contracts signed before bankruptcy. Partly, therefore, section 365 springs from the idea that existing and prospective creditors, both those with obligations due and unpaid and those with obligations about to be due, should bear a comparable part of the burden of bankruptcy.

Although it was well known that section 365 would apply not just to leases and other executory contracts but also to collective bargaining agreements, the section seems to have caused little controversy in the past. Yet the use of the section to reject collective bargaining agreements in a series of cases since 1979 has provoked an outburst of wounded rage from the labor movement and has caused the unions to seek the amendment of section 365.

In the spring of 1984, that anger focused on the decision of the Supreme Court handed down February 22, 1984, *NLRB v. Bildisco*

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5. See Control Data Corp. v. Zelman, 602 F.2d 38 (2d Cir. 1979); *In re Hurricane Elkhorn Coal Corp. II*, 15 Bankr. 987 (Bankr. W.D. Ky. 1981). See also *In re Fashion Two Twenty, Inc.*, 16 Bankr. 784 (Bankr. N.D. Ohio 1982) where the debtor sought to reject contracts to manufacture and sell cosmetics at an average discount of 72% below retail price, a discount significantly larger than others granted.


> The power of rejection is a valuable weapon . . . in the armory of the trustee in protecting the rights of creditors. As such it complements his power to undo other kinds of transactions and obligations . . . .

> Inevitably these two attitudes are at war with one another. The contract or property interest demands enforcement of the original transaction whereas the bankruptcy interest demands cancellation of the bankrupt's obligations, thus freeing his estate to pay a larger dividend to general creditors.

*Id.* at 468.


8. The statutory history of the 1976 statute pertaining to municipal bankruptcy indicates that Congress has long considered collective bargaining
In that case, a New Jersey general partnership in the business of distributing building supplies had filed a petition for reorganization under Chapter 11 of the bankruptcy laws on April 14, 1980. Prior to the filing, Bildisco had failed to meet some of its obligations under the collective bargaining agreement and in May of 1980 it refused to pay wage increases that were specifically provided for in that agreement. In December of 1980 Bildisco requested bankruptcy court authority to reject its collective bargaining agreement. The bankruptcy court granted Bildisco’s request. Meanwhile, the union filed an unfair labor practice charge with the NLRB, and the counsel of the Board issued a complaint alleging that Bildisco had violated the National Labor Relations Act by unilaterally changing the terms of the collective bargaining agreement and by failing to negotiate with the union. Ultimately the Board found Bildisco to have violated the National Labor Relations Act.

The Court of Appeals for the Third Circuit consolidated the union’s appeal from the adverse bankruptcy court finding under section 365 and the agreements to be executory contracts. See H. REP. NO. 686, 94th Cong., 1st Sess. 8 (1975) which states:

For example, if a collective bargaining agreement had been rejected, applicable law may provide a process or procedure for the renegotiation and formation of a new collective bargaining agreement. A rejection would also be sufficiently similar to a termination of such a contract so that again, applicable law, if any, would apply to the rights of the other contracting party between rejection and conclusion of the bargaining process. See also S. REP. NO. 458, 94th Cong., 1st Sess. 15 (1975) which states:

Subsection 801(b) is based upon § 116(1) and (2) and upon §§ 313(1) and 344 of the Present Act. The powers designated here are considered necessary to the continued functioning and subsequent rehabilitation of the petitioner. The Committee contemplates that all continuing obligations of the petitioner will be considered executory contracts, including collective bargaining agreements.

The Kevin Steel case was specifically mentioned in the discussion reprinted in the Congressional Record:

Section 82(b)(1) of proposed Chapter IX provides that the court may permit the petitioner to reject executory contracts, after a hearing on notice to the parties to such contracts. The House Report says that this Section is intended to grant power to reject executory contracts similar to the authority which now exists under the other chapters of the Act. House Report No. 94-686, p. 17. This authority includes the rejection of collective bargaining agreements. Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2d Cir. 1975).

122 CONG. REC. 7972 (1976).


10. The NLRB found that Bildisco had engaged in unfair labor practices: By unilaterally failing and refusing, since on or about January 3, 1980, and at all times thereafter, to make required pension, health, and welfare contributions, to remit to the Union the dues withheld from its employees’ pay, and to pay vacation benefits, and by unilaterally failing and refusing since on or about May 1, 1980, and at all times thereafter, to pay wage increases to
Board's petition for the enforcement of its order. The court found that the debtor in possession's rejection of the collective bargaining agreement was permitted under section 365 of the Bankruptcy Act and that the NLRB was precluded from finding a violation of the National Labor Relations Act based upon a permissible rejection under section 365. The Supreme Court affirmed.

The Supreme Court dealt explicitly with two questions. First, what standard should be used under section 365 of the Bankruptcy Reform Act to determine whether a collective bargaining agreement can be rejected? Second, does a debtor in possession commit an unfair labor practice by unilaterally rejecting a collective bargaining agreement before court approval of that rejection?

On the first issue the Court concluded that the test espoused by the Eleventh Circuit in *Brada Miller Freight Systems, Inc.* and by the Third Circuit in *Bildisco* should be adopted. According to the Supreme Court, the debtor in possession had a right to reject a collective bargaining agreement

if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract. 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 of the Court of Appeals for the Second Circuit.

As the quoted passage suggests there are at least three separate articulations of the standard to be used for rejection of an executory contract under section 365. The standard applied to the usual contract (such as a lease) is that the debtor in possession may reject if, in its business judgment, it would be prudent to do so. In other words, if the service is not needed or if the goods can be procured more

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11. NLRB v. Bildisco & Bildisco, 682 F.2d 72, 72-74 (3rd Cir. 1982).
12. *In re* Brada Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983).
cheaply on the open market, the debtor in possession is free to reject and purchase the goods or services elsewhere. The *REA* test,\textsuperscript{15} at the other end of the spectrum, was read by the Supreme Court in *Bildisco* to mean that a collective bargaining agreement could not be rejected unless the debtor “can demonstrate that its reorganization will fail unless rejection is permitted.”\textsuperscript{16} Between these is the test used in *Bildisco, Brada Miller*\textsuperscript{17} and *Kevin Steel*;\textsuperscript{18} it calls for a “balancing of the equities”\textsuperscript{19} after a determination that the agreement “burdens the estate.” All members of the Court joined in this part of the decision, and since the management did not argue for the application of the business judgment test, its adoption is an unequivocal victory for management, the debtor in possession.\textsuperscript{20}

The second part of the case is an amalgam of procedural and jurisdictional issues. Recall that the debtor in possession had apparently breached its collective bargaining agreement even before the petition in bankruptcy had been filed. Subsequently it explicitly declined to grant pay increases provided in the contract. Only months later did it petition the bankruptcy court for authority to reject the contract. Thus one might have argued that the debtor in possession had violated the National Labor Relations Act by unilaterally altering a collective bargaining agreement without having followed the National Labor Relations Act procedures or alternatively that it had violated section 365 itself by unilaterally rejecting without having first received court approval. Finally, there is the question whether the determination about compliance with the National Labor Relations Act should have been made by the NLRB or by the bankruptcy court. The Court did not discuss the question whether a rejection can be made without court approval under section 365. The section states that the trustee may reject a contract “subject to the court’s approval”; it does not state whether the court approval must come before the rejection, but that is certainly a tenable interpretation.\textsuperscript{21} By ruling that

\begin{itemize}
  \item \textsuperscript{16} *Bildisco*, 104 S. Ct. at 1195.
  \item \textsuperscript{17} *In re Brada Miller Freight Sys.*, 702 F.2d 890 (11th Cir. 1983).
  \item \textsuperscript{18} Shopmen’s Local Union 455 v. Kevin Steel Prod., Inc., 519 F.2d 698 (2d Cir. 1975).
  \item \textsuperscript{19} *Bildisco*, 104 S. Ct. at 1196.
  \item \textsuperscript{20} *Bildisco* did not challenge the holding of the court of appeals, and in its brief *Bildisco* argued for the “balancing the equities” standard applied by the lower court, and did not urge the business judgment test. “As the Court of Appeals determined, the question of whether a debtor in possession should be permitted to reject a particular executory contract must be decided on a case by case basis utilizing the ‘thorough scrutiny’ and ‘balancing the equities’ test.” Brief for respondent at 11, NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188 (1984).
  \item \textsuperscript{21} A few of the cases prior to *Bildisco* held that bankruptcy court approval was necessary for the rejection of executory contracts. See, e.g., *In re Unishops*, 553
\end{itemize}
the unilateral rejection of the contract was permissible under the National Labor Relations Act, however, the Court also implicitly found that the rejection was permitted without prior court approval under section 365. Nowhere does the opinion state that, and it is not clear from the case whether the union argued section 365 as an independent basis for denying the debtor in possession the right to reject unilaterally.

All members of the Court apparently concluded that it is for the bankruptcy court to determine whether the contract has been properly rejected under section 365, and thus, all agreed that there is nothing in that context for the NLRB to determine. Ultimately, the majority found that a unilateral change in the collective bargaining agreement when authorized under the standard set out in Bildisco did not violate section 8(a)(5) or 8(d) of the National Labor Relations Act. The dissent, on the other hand, concluded that section 8(d) of the National Labor Relations Act still imposed a duty on the debtor in possession. That section states a procedure for the modification of existing collective bargaining agreements. The procedure contains both a notice and cooling-off period and an obligation to engage in certain kinds of bargaining.\textsuperscript{22} In footnote 9 the dissent stated it would not require full compliance with section 8(d) in the case of a bankrupt company. According to the dissent:

\begin{itemize}
\item F.2d 305, 308 (2d Cir. 1977) ("A debtor in possession under Chapter 11 may disaffirm or reject an executory agreement only in accordance with the statutory procedures.");
\item In re R. Hoe & Co., 508 F.2d 1126, 1130 (2d Cir. 1974) (Court's acquiescence fulfills the requirement "that the court 'permit' the rejection of an executory contract.");
\item In re Shoppers Paradise, Inc., 8 Bankr. 271, 279 (Bankr. S.D.N.Y. 1980) ("Thus, although Code § 365(a) expressly requires court approval before a debtor-in-possession may assume or reject a contract or unexpired lease, (and it is not disputed that Shoppers never obtained court approval to assume the lease), it does not follow that Masters is relieved of its obligation to pay rent.");
\item In re Tilco, Inc., 408 F. Supp. 389, 392 (D. Kan. 1976) ("rejection of executory contracts in Chapter X proceedings requires judicial action and not merely administrative action or decision by the trustee in bankruptcy.").
\end{itemize}

\textsuperscript{22} 11 U.S.C. § 158(d) (1982) provides:

For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or in the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: \textit{Provided}, that where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

\begin{itemize}
\item (1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration
\end{itemize}
I agree with the Court that the debtor in possession need not comply with the notice requirements and waiting periods imposed by § 8(d) before seeking rejection. That is, in order to obtain rejection the debtor in possession need not, for example, demonstrate that it has given notice to the union of its desire to seek rejection and has maintained the contract . . . . I also agree that the debtor in possession need not bargain to impasse before he may seek the court's permission to reject the agreement. . . . Nor, as the Court notes, should the bankruptcy court be required to make determinations that are wholly outside its area of expertise such as whether the parties have bargained to impasse. . . . Rather, I believe that the test for determining whether rejection should be permitted enunciated in Part II of the Court's opinion strikes the proper balance between the NLRA and the Bankruptcy Code. 23

date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;
(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;
(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and
(4) continues in full force and effect, without resorting to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:
The duties imposed upon employers, employees, and labor organizations by paragraph (2) to (4) of this subsection shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 159(a) of this title, and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section, shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 158, 159, and 160 of this title, but such loss of status for such employee shall terminate if and when he is reemployed by such employer.
23. Bildisco, 104 S. Ct. at 1204 n.9.

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By its invocation of section 8(d) the minority is saying only two things. First, the debtor in possession must show that it has offered to meet and confer with the other party for the purpose of negotiating a contract that contains the proposed modifications. Second, the debtor in possession must comply with the collective bargaining agreement until the court authorizes departure from it.

As we will see below, the differences between the majority and the minority opinion may be insignificant. The two positions would produce different outcomes only if a prompt hearing on rejection is not possible and if there is an effective sanction available to the union for the debtor in possession's violation of its obligation under the National Labor Relations Act.

THE TEST

In establishing its test, the Supreme Court explicitly rejected REA Express and specifically approved the standards established by the Third Circuit in Bildisco and the Eleventh Circuit in Brada Miller. One should note that in all of those cases and in Kevin Steel, the seminal case, the circuit courts approved rejection of collective bargaining agreements. Brada Miller spells out four noninclusive factors to assist a court in balancing the equities.

The first Brada Miller factor is the consideration of the “possibility of liquidation, both with and without rejection, and the impact of liquidation on each of the parties involved.” In applying this test the court of appeals in Brada Miller directs courts to weigh the impact on employees, creditors and shareholders “in the aggregate” and to bear in mind that after rejection there will have to be new collective bargaining. The courts must also consider the possibility of a strike. Producing an equation that will balance the relative impact of any action on the interested parties with the possible effects of a new settlement or of a strike is no small metaphysical task.

In some cases, however, it will be possible to cut through the verbiage to a conclusion under the first Brada Miller factor that will end the inquiry. If the court finds that a continuation of the collective bargaining agreement will cause liquidation of the corporation, surely the collective bargaining agreement can be abandoned and the court need look no further. For me the superficially elaborate first factor comes down to a simple question: if the collective bargaining agreement is maintained, is liquidation likely?

24. Id. at 1196.
26. Id. at 706; REA, 523 F.2d at 169; Bildisco, 682 F.2d at 78; Brada Miller, 702 F.2d at 894.
27. Brada Miller, 702 F.2d at 899.
In a footnote relating to its first factor the *Brada Miller* court indicates that it might be appropriate for a judge to make a “comparison of wage and benefit levels of similarly situated employees in other companies . . . .” Of course, competitors’ labor costs are clearly relevant to the capacity of a company to stay in business in the long run, but it is not clear how they immediately affect the possibility of liquidation. Nevertheless, that reference to competitors’ wage scales and benefits package is an interesting point, for invariably a union organized shop will have higher wages, more stringent (and therefore more costly) work rules and more expensive fringe benefits than a nonunion shop. If one is to infer a higher “possibility of liquidation” from such wage and cost differentials, then every collective bargaining agreement would meet this test if the debtor in possession has non-union competition.

The second *Brada Miller* factor involves determining what claims will result from the rejection of the bargaining agreement and how those claims will be dealt with. It was sometimes argued under the bankruptcy law prior to 1978 that collective bargaining agreements should not be rejected because the employees would have no claim against the estate. Sections 502(c) and 365(g) of the Bankruptcy

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28. *Id.* at 899 n.28.
29. Under section 57(d) of the Bankruptcy Act no claims for indefinite sums such as those due for abrogation of pensions, seniority or welfare rights could be allowed if the court determined that “it is not capable of liquidation or of reasonable estimation or that such liquidation would unduly delay the administration of the estate or any proceeding under this Act.” 11 U.S.C. § 57 (1974). Such claims were not normally “allowable on the grounds that [they were] too speculative to be capable of estimation.” 2 *COLLIER ON BANKRUPTCY*, 365-17 (15th ed. 1984), *quoted in In re Ateco Equip., Inc.*, 18 Bankr. 915, 917 (Bankr. W.D. Pa. 1982). The district court, in *In re Overseas Nat’l Airways*, was reluctant to allow the rejection of a collective bargaining agreement without carefully balancing the interests between the debtor and the employees as the employees would be left without a provable claim. “It seems to me [that a collective bargaining agreement] may be depriving the employees affected of their seniority, welfare and pension rights, as well as other valuable benefits which are incapable of forming the basis of a provable claim for money damages.” 238 F. Supp. 359, 361-62 (E.D.N.Y. 1965).

For other cases where the court found that unadjudicated damages were speculative and therefore not provable, see *Kevin Steel*, 519 F.2d at 707 and *REA*, 523 F.2d at 172.

30. 11 U.S.C. § 502(c) (1982) states:
   
   There shall be estimated for purpose of allowance under this section—
   
   (1) any contingent or unliquidated claim, fixing or liquidation of which, as the case may be, would unduly delay the closing of the case, or
   
   (2) any right to any equitable remedy for breach of performance if such breach gives rise to a right to payment.

31. 11 U.S.C. § 365(g) (1982) states:

Except as provided in subsections (h) (2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a
Reform Act of 1978 direct the court to evaluate the claims that arise out of rejection of a contract and to treat them as though they were claims existing before the date the petition was filed. Thus such breach of contract claims are given a weight equal to the claims of other general creditors of the bankruptcy estate. Presumably to the extent that a dollar amount can be placed on the rights given up by the employees, the factor points to allowance of the rejection. Beyond that, questions remain since it is difficult, if not impossible, to determine the monetary value of certain things such as seniority rights and favorable work rules.\textsuperscript{32}

The third factor requires the court to make a determination of the "cost-spreading abilities of the parties."\textsuperscript{33} In \textit{Brada Miller} the court suggested that the loss of $50,000 to "a group of employees averaging $20,000 a year in salary may have a far more devastating impact than a $100,000 loss suffered by a group of large banks and other major creditors . . . ."\textsuperscript{34} How will courts apply this test? Does a court divide the total loss that would be suffered by the union members by the number of members and then attribute a certain dollar amount to each member? Is the court then to look ahead and see how—if there is no rejection of the contract—this loss will be transmitted to the shareholders or creditors? If, for example, these creditors are composed mostly of widows holding bonds or of retirees, does one make a different determination than if the bonds are held by institutional


\textsuperscript{33} \textit{Brada Miller}, 702 F.2d at 900.

\textsuperscript{34} Id.
lenders?

It is conceivable that this factor will have bite, but it will be difficult to apply. First, the court must guess at the injury that will be caused by rejection of the contract. Second, the court must look into its crystal ball to determine the probable shape and form of the Chapter 11 plan if it is not right. Thus it must ask who will bear the cost of continuing the labor agreement and then examine that hypothetical class to determine if it is composed of large banks whose shareholders have deep pockets or of retirees and widows.

The final test suggested in Brada Miller is to measure the "good (or bad) faith of the unions and the debtor in seeking to resolve their mutual dilemma . . . "35 Presumably if the union has been a bad boy, its contract will be rejected. Conversely, if management has been recalcitrant, it will be punished by being made to suffer an onerous labor contract.

This factor is the most questionable of all. If one assumes that the continuation of the collective bargaining agreement will increase the probability of liquidation, its retention may injure not only the shareholders and general creditors, but also the employees. Yet if its retention injures the corporation but does not cause its liquidation, the creditors, and not the management, suffer. What is the sense of this standard? On the one hand, it punishes the employees themselves by causing a liquidation in its efforts to punish management for acting in bad faith. On the other hand, if no liquidation occurs, but additional sums are paid out to the employees, those sums will come out of the pocket of bondholders, debenture holders, or other creditors, while management, who behaved in bad faith, may not suffer at all.36

When one examines the four standards together and adds to them those suggested in the variety of law student notes that urge other and even more impossible tests,37 he is left with a sense of skepticism about

35. Id.
36. While it is up to management (the debtor in possession) to determine the fate of collective bargaining agreements and other executory contracts, it is the stockholders, other creditors, and especially the employees, who feel the effects of any such decision. Essentially the balancing of interests is among the claims of the creditors. If management must pay out sums of money to the employees in wages or other benefits, this reduces the pool of money available to pay other creditors. In this sense, management does not suffer from the redistribution. It is the other creditors who are affected, and they were not even party to the collective bargaining agreement. If the union does not bargain in good faith, the union and all other creditors lose out. If the management does not bargain in good faith, the union and other creditors but not management will suffer.
37. See, e.g., Comment, Collective Bargaining and Bankruptcy, 42 S. Cal. L. Rev. 477, 490-91 (1969) ("In those circumstances where the collective bargaining is so unfavorable to the employer that it will interfere with . . . the trustee's operation of the business during bankruptcy . . . adjustments could be made within the bounds of the
the ability of a court to make meaningful use of these standards. The court can take testimony about the probability of the continued success of the Chapter 11 corporation with and without a particular collective bargaining agreement; and having listened to such testimony, the court can make a guess as to the probability of liquidation and can decide to continue the collective bargaining agreement or to cancel it. Beyond that I suggest that the Brada Miller factors are at best foolish, if not positively harmful. It is possible that they are merely a cynical facade used to obscure the true standard, namely, that the business judgment test prevails.

**THE PROBABLE CONSEQUENCES OF BILDISCO**

In the days following the Supreme Court decision in *Bildisco*, the papers were full of stories by union leaders and lawyers predicting dire agreement without resorting to rejection.

(Comment, *Rejection of Collective Bargaining Agreements by Trustees in Bankruptcy*, 81 Dick. L. Rev. 64, 80-81 (1976) ("Courts should look first to executory contracts other than the collective bargaining agreement. . . . Only when rejection of such other contracts has failed reasonably to assure the continued existence of the debtor should rejection of the labor agreement be considered."); Comment, *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) ("Although the *Bildisco* test appears to have struck the proper balance between the interests of labor and business, there remains a conflict in the tests used by the Second and Third Circuits. A congressionally-legislated standard is needed to remedy this conflict [between the labor and bankruptcy laws]."); Note, *The Bankruptcy Law’s Effect on Collective Bargaining Agreements*, 81 Colum. L. Rev. 391, 399-400 (1981) ("[K]evin Steel and [REA Express] can, however, be synthesized into a consistent test. . . . The threshold question is whether the collective bargaining agreement will definitely cause the reorganization to fail. If so, the court should authorize rejection. . . . If, however, it is unclear whether preserving the agreement will cause total bankruptcy, the court should decide whether the contract is onerous and burdensome, so that retaining it will make reorganization more difficult. If it is, the court should then decide whether the balance of the equities favors rejection."); Note, *The Labor-Bankruptcy Conflict: Rejection of a Debtor’s Collective Bargaining Agreement*, 80 Mich. L. Rev. 134, 148 (1981) ("[C]ourts should recognize the conflict between the bankruptcy and labor laws, and exercise their discretion to approve or disapprove rejection requests in a way that will strike a sound balance between the competing policies. In most cases, courts can strike this balance by requiring the parties to bargain concerning possible private modifications of the agreement before considering a debtor’s request for rejection."); Note, *Bankruptcy and the Rejection of Collective Bargaining Agreements*, 51 Notre Dame Law. 819, 832 (1976) ("[T]he [REA Express] standard takes into account the unique nature of the collective bargaining agreement as an embodiment of tangible and untangible [sic] human rights. Although the test does not require deterrence to the modification provisions of the RLA or NLRA, it requires a positive showing on the part of the bankrupt that rejection is the only alternative to complete liquidation . . . "); Note, *The Automatic Stay of the 1978 Bankruptcy Code versus the Norris-LaGuardia Act: A Bankruptcy Court’s Dilemma*, 61 Tex. L. Rev. 321, 335 (1982) ("[C]ourts should weigh the contrasting bankruptcy and labor policies involved . . . and attempt to reconcile the ef-
These people suggested that companies who had formerly not considered the use of Chapter 11 would now be motivated to go into reorganization in order to avoid burdensome labor contracts. They suggested implicitly, if not explicitly, that courts formerly resistant to the rejection of a contract in reorganization would now routinely permit the rejection of such contracts.

First consider the test adopted in Bildisco: the balancing of the equities test. I agree with Mr. Bordewieck and Prof. Countryman\textsuperscript{39} that ultimately this test will be no different than the business judgment test. But I go further. I maintain few if any cases would have been changed even if the \textit{REA Express} test had been adopted by the Court.\textsuperscript{40} As long as the Code grants debtors and the courts the power to abrogate collective bargaining agreements, such agreements

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\item \textsuperscript{39} Bordewieck & Countryman, The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors, 57 AM. BANKR. L.J. 293, 316 (1983) (“In actual practice, this precatory approach will probably reduce to little more than the business judgment test applicable to other executory contracts.”).
\item \textsuperscript{40} The \textit{REA} test is as follows:
\begin{quote}
Faced with this apparent conflict in the language and purposes of the RLA [Railway Labor Act] and the Bankruptcy Act we must give effect to both statutes to the extent that they are not mutually repugnant. In the present case we are persuaded, as we were in \textit{Kevin Steel}, that this can be accomplished by holding that where, after careful weighing of all the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement.
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will be rejected and the courts will approve such rejection almost without regard to the test proposed.

To examine my hypothesis, consider the recent case *In Re Rath Packing Company*.\(^{41}\) In that case an old-line meat packing company, Rath, asked court approval of its rejection of its collective bargaining agreement. The request was particularly poignant since Rath was in the process of being purchased by its employees through an employee stock option plan. At the time of the case approximately 60% of the Rath stock was held by employees. The president of the company was the former president of the union. On November 1, 1983 the company filed a petition in Chapter 11; on the same day, it filed an application for court approval of its rejection of its collective bargaining agreement. The court held hearings late in December and authorized the rejection of the contract in an opinion issued on December 30, 1983.

At the hearing the company presented written and oral evidence to show that it had lost approximately $31 million from 1978 through 1983; that its current wage rates of $7.24 were to become $10.24 as of January 1, 1984; that it had attempted unsuccessfully to negotiate a satisfactory modification of the contract with the union; and that its existing contract contained both more generous payment and more restrictive work rules than the contracts of its competitors. As part of its case, Rath put into evidence a Price Waterhouse study that had been procured at the insistence of its principal lender early in 1983. In that report the consultant concluded that "Rath . . . as it is currently operated, and experiencing substantial losses, is not a viable long term competitor in the meat packing industry," that its health care plan was substantially more generous than those of the competitors and that a variety of its work rules were grossly inefficient.\(^{42}\)

The union showed that it had negotiated in an attempt to modify the contract. Specifically it showed that it had offered to forego the increase to $10.24 and instead had agreed to an $8 hourly wage. Yet, as the court pointed out, it made such concessions only as a part of a package that included a variety of items that added substantial cost to the package. That package apparently excluded all or most of the work rule changes that would be enjoyed if the contract were rejected. The union also argued that repeated references in the negotiations by management to let "the judge decide" and the fact that management had given only one formal offer constituted bad faith or perhaps an unfair labor practice.\(^{43}\)

In a careful opinion, Judge Thinnes determined first that the

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42. *Id.* at 982-84.
43. *Id.* at 986.
business judgment test was the proper test under 365 and that the
debtor had based its case on that standard. Realizing Bildisco was
before the Supreme Court, the court applied each of the other tests
and concluded that each was satisfied. Whatever the test from the
most restrictive to the most generous, Rath had made out its case for
rejection of the contract. If Rath is the norm and a well-counseled
management and a careful judge can always make a case even for the
REA test, then quarreling over the appropriate standard may be
much ado about nothing. In Rath the judge was able to point to
specific statements from management's expert that the company could
not continue in operation with its current contract. Management was
able to show that contracts of competitors were not only at lower wage
rates but also contained work rules that made them much more effi-
cient than Rath. If that kind of testimony is readily available from a
credible expert, and if the critical decisions can be buried in factual
determinations made by the trial judge, under a standard so amor-
phous that it will be difficult to challenge on an appeal, then one will
get nearly the same outcome in cases such as Continental Airlines,
Wilson Foods, and Brada Miller, irrespective of the test. Clearly
that was so in Rath.

A second way of examining my hypothesis is to look at the reported
decisions since the seminal case, Kevin Steel. By my count, courts
have ruled on thirty-three proposals to reject collective bargaining
agreements since January 1, 1975. Management has won an outright
victory in twenty-two of those cases, and a victory tempered by a
remand in three. In only eight has the union been successful in

44. Id. at 990-97.
45. Continental Airlines filed in Chapter 11 bankruptcy on September 23,
1983. A decision is pending. See Bankruptcy and the Unions, N.Y. Times, Sept. 29,
1983, at D1, col. 3.
is pending. Id.
47. See supra notes 33-35 and accompanying text.
48. Shopmen's Local Union v. Kevin Steel Prod., Inc., 519 F.2d 698 (2d Cir.
1975).
49. For cases upholding rejection of the collective bargaining agreement see
Local Joint Executive Bd. v. Hotel Circle, Inc., 613 F.2d 210 (9th Cir. 1980); Truck
Drivers Local 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976), remanded, 431 F.
Supp. 646 (E.D.N.Y. 1977); Shopmen's Local Union 455 v. Kevin Steel Prod., Inc.,
519 F.2d 698 (2d Cir. 1975); In re Braniff Airways, Inc., 25 Bankr. 216 (Bankr. N.D.
Tex. 1982); In re Southern Elec. Co., 23 Bankr. 348 (Bankr. E.D. Tenn. 1982); In re
(Bankr. D. Or. 1982); In re Yellow Limousine Serv., 22 Bankr. 807 (Bankr. E.D. Pa.
1982); In re Reserve Roofing of Florida, Inc., 21 Bankr. 96 (Bankr. M.D. Fla. 1982); In
re Price Chopper Supermarkets, Inc., 19 Bankr. 462 (Bankr. S.D. Cal. 1982); In re
Ateco Equip., Inc., 18 Bankr. 915 (Bankr. W.D. Pa. 1982); In re Allied Technology,
arguing that its contract could not be rejected. Thus if one looks only
at the outcome—the holding—and reads those cases as a legal realist,
he gets the following message: companies in reorganization which seek
to reject their collective bargaining agreements may normally do so.
Of course, it is possible that there are hundreds of other cases in which
management, having read the Kevin Steel or the REA Express cases
concluded that it could not legally reject its collective bargaining
agreement. However, looking at the decided cases, one would think it
quite inappropriate for a management attorney to advise its client in
Chapter 11 that a court would refuse his attempt to reject a collective
bargaining agreement. It is conceivable that there is a large number of
cases where there was no attempt to reject, but the decided cases and
the inferences that one would draw from them suggest the contrary.\[50\]

Particularly in industries that have been recently deregulated,
such as the airlines, or those that have experienced decentralization
and accompanying competition from unorganized or weakly organized
competitors, such as the meat packing industry,\[51\] the courts are not
sympathetic to the union's position. The repeated inability to stop
management from abrogating such contracts and the courts' frequent
decisions in management's favor suggests a fundamental position.
When that view can be articulated on a basis as empty and amorphous
as that set down in Brada Miller and Bildisco, the union has little hope

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In some of the cases that uphold rejection, the appellate court has nevertheless
remanded for further findings. See, e.g., NLRB v. Bildisco & Bildisco, 104 S. Ct. 1188
(1984); In re Brada Miller Freignt Sys., 702 F.2d 890 (11th Cir. 1983); Brotherhood of Ry., Airline & S.S. Clerks, 523 F.2d 164 (2d Cir.), cert. denied, 425 U.S. 1017 (1975).

50. See supra note 3 and accompanying text.

51. For a discussion of recent changes in the meat packing industry see Adkins, Meat-Packers Cut Out the Fat, 118 Dun's Rev. 80 (1981).
of sustaining its position. An examination of the testimony in Rath shows how readily well-counseled management can present testimony that will facilitate a judge's decision.

Despite the hyperbole found in the newspapers and in the scholarly arguments about the importance of the test to be applied, I would suggest that Rath and the other cases show that the test is not critical; it may not even be important.

PROBABILITY OF INCREASED FILINGS

After Bildisco, union representatives complained bitterly that the decision would stimulate healthy companies with unsatisfactory labor contracts to file petitions in Chapter 11 for the sole purpose of escaping those agreements. The argument is not persuasive; no objective observer of the bankruptcy system would make such an argument.

Although it is true that a company need not be insolvent in order to file under Chapter 11, there are many powerful reasons why healthy companies will not choose to exercise Chapter 11 rights. In the first place any management who files in Chapter 11 ipso facto loses a measurable portion of its freedom. To take but on example, consider the rule in section 363(c). A company in reorganization may use, sell or lease property not in the ordinary course of business only

52. See supra note 38 and accompanying text.
54. 11 U.S.C. § 363(c) (1982) states:

(1) If the business of the debtor is authorized to be operated under section 721, 1108, or 1304 of this title and unless the court orders otherwise, the trustee may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing, and may use property of the estate in the ordinary course of business without notice or a hearing.

(2) The trustee may not use, sell, or lease cash collateral under paragraph (1) of this section unless—

(A) each entity that has an interest in such cash collateral consents; or

(B) the court, after notice and a hearing, authorizes such use, sale, or lease in accordance with the provisions of this section.

(3) Any hearing under paragraph (2)(B) of this subsection may be a preliminary hearing or may be consolidated with a hearing under subsection (e) of this section, but shall be scheduled in accordance with the needs of the debtor. If the hearing under paragraph (2)(B) of this subsection is a preliminary hearing, the court may authorize such use, sale, or lease only if there is a reasonable likelihood that the trustee will prevail at the final hearing under subsection (e) of this section. The court shall act promptly on any request for authorization under paragraph (2)(B) of this subsection.

(4) Except as provided in paragraph (2) of this subsection, the trustee shall segregate and account for any cash collateral in the trustee's possession, custody, or control.
"after notice and a hearing." Should the company choose, for example, to execute a long term contract for the sale of goods that are not part of its inventory or to make a variety of other business arrangements, it could do so only after notice, a hearing and a favorable ruling by the bankruptcy court.

More remote, but more threatening, is the prospect that the court will appoint an examiner or a trustee. Under section 1104 of the Bankruptcy Reform Act

the court shall order the appointment of a trustee—

(1) for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, either before or after the commencement of the case . . .; or

(2) if such appointment is in the interests of creditors, any equity security holders, and other interests of the estate, without regard to the number of holders of securities of the debtor or the amount of assets or liabilities of the debtor.  

Among the creditors, of course, are the employees. One can easily imagine angered employees moving the court to appoint a trustee on the ground that such appointment is in their interest or that the current managers are guilty of "gross mismanagement." Although the Bankruptcy Reform Act nowhere says so in as many words, it is clear from the history and the practice under the Act that the trustee runs the company; he supplants not just the chief executive officer but the board of directors and the other executives as well. Although the appointment of a trustee is relatively uncommon in Chapter 11 proceedings, it is not unheard of.

An examiner may be appointed by the court at the request of any interested party. The examiner's responsibility is to investigate and report to the court, in the words of the statute: "to conduct such an investigation of the debtor as is appropriate . . . ." The scope of the

56. Congress intended that "in a reorganization case, operation of the business will be the rule . . . ." H.R. REP. No. 595, 95th Cong., 2d Sess. 5, reprinted in 1978 U.S. CODE CONG. & AD. NEWS 5963, 6560. To ensure this result 11 U.S.C. § 1108 provides: "Unless the court orders otherwise, the trustee may operate the debtor's business." Exactly how that business will be operated is left to the good faith judgment of the trustee. See, e.g., In re Curlew Valley Assoc., 14 Bankr. 506 (Bankr. D. Utah 1981).
57. For Chapter 11 cases in which trustees were appointed see, e.g., In re Caroline Desert Disco, Inc., 5 Bankr. 536 (Bankr. C.D. Cal. 1980); In re McCordi Corp., 6 Bankr. 172 (Bankr. S.D.N.Y. 1980).
power granted to the examiner will be much less than the power enjoyed by a trustee and in some sense contrary to management's interests. His function is limited, and he may be expected to investigate the management's operations for possible fraud or mismanagement.

That management will do anything—even to the extent of sacrificing the shareholders' interest on occasion—to save its own position is now a commonplace occurrence. Yet filing a petition in Chapter 11 puts management's very position at risk. That alone seems enough reason in most cases to keep a healthy company from using Chapter 11 to escape a collective bargaining agreement. Moreover, even if some of management retains its position, it will still be subject to explicit limits of the kind spelled out in section 363 dealing with the property of the estate and section 364 on obtaining credit.

Equally strong reasons to avoid Chapter 11 are the consequences that Chapter 11 may have on the firm's shareholders and creditors. Except in unusual cases, a debtor in Chapter 11 may not pay any debt that arose prior to the filing of the petition. Interest for the period after the petition is filed and prior to the confirmation of the plan does not normally accrue at the contract rate. A fortiori the company will not be permitted discretionary payments such as dividends. Because interest payments stop with the date of the petition and because the probability of collection of principal is rendered uncertain by the filing of the petition, management can be certain to undermine its relationship, not only with all of its trade creditors who must now await payment for an indefinite period, but also with its institutional lenders, such as banks and brokerage firms, and with any individual or institutional holders of its debt instruments, bonds, notes and debentures. By the mere act of filing a petition in Chapter 11 management successfully antagonizes every member of the class that has the most intense interest in the corporation's success.

The filing presents problems to the shareholders entirely apart from the question of dividends. Because of the rule of absolute

59. The trustee can usually avoid any postpetition transfer of property of the estate. See 11 U.S.C. § 549 (a)(1) (1982). Since property of the estate encompasses all tangible and intangible property interests of the debtor, § 549 effectively precludes the payment of prepetition debts. Cf. 4 COLLIER ON BANKRUPTCY 541-28 (15th ed. 1984). An exception to this general rule is demonstrated by In re James A. Phillips, Inc., 29 Bankr. 391 (Bankr. S.D.N.Y. 1983). There the court allowed the debtor to pay off certain prepetition debts so that several suppliers' right to assert mechanic's liens could be avoided. Id. at 396-97.

60. 11 U.S.C. §§ 502(b)(2) & 507(b) (1982). These sections make a recovery of postpetition interest the exception rather than the rule. See Blum, Treatment of Interest on Debtor Obligations Under the Bankruptcy Code, 50 U. Chi. L. Rev. 430 (1983). See also In re Langley, 30 Bankr. 595 (Bankr. N.D. Ind. 1983) (exception arises when value of collateral exceeds amount of secured claim). In the unusual situation in which all unsecured debts could be paid on liquidation, creditors would get interest at the "legal rate" under 11 U.S.C. § 726 (a)(5) (1982).
priority that is incorporated in section 1129 of the Act, the debtor has presented each shareholder with the prospect, if not the probability, of dilution of his shareholder interest, and potentially, its complete destruction. The absolute priority rule says that no member in the hierarchy of interests in a corporation may receive even one cent if members of an unconsenting superior class receive less than full payment. Thus, for example, if the debenture holders refused to vote for the plan, they must be paid the full principal amount due them or the shareholders will receive nothing. Even assuming that management views itself as having interests different from those of the shareholders, it will have alienated a second important group by filing in Chapter 11. The shareholders also have the right to ask for a trustee under section 1104 and entirely apart from bankruptcy, they may have the capacity to oust the management.

For all of these reasons, filing in Chapter 11 is a desperate measure. It subjects the management of the company to the whim of the court. It angers friends and galvanizes enemies to action. Moreover, it arms all of these with a variety of weapons under Chapter 11 and Chapter 3 with which to challenge and impede the free operation of the corporation.

The employees have their own weapons. If management abrogates its labor contract with or without court approval, the union retains its right to strike. The bankruptcy court has no authority to enjoin such a strike and presumably the strike will have the same economic consequences in as out of Chapter 11. Thus, if the company is truly healthy, and if a strike is a plausible threat, that threat will not be removed by the filing in Chapter 11. In the traditional Chapter 11 cases, a strike is not a plausible threat because management can point out that a strike may cause the company to go into dissolution, or in cases such as Continental Airlines, the strike was never a viable threat because of the status of the labor market and the availability of ready substitutes who were willing to cross picket lines.

If, in the face of all the arguments stated above, a healthy corporation nevertheless chose to file a petition in Chapter 11, it is still within the court’s power to dismiss the petition. For example, the court has the power under section 1112 to dismiss any plan of

63. See supra note 45.
reorganization that is not proposed in good faith.\textsuperscript{64} Under section 305 the court has authority to “abstain” from (i.e. to dismiss) the case if it concludes, for example, that “the interest of creditors and the debtor would be better served by such dismissal or suspension.”\textsuperscript{65} Thus should the case in fact be presented in which a healthy company was attempting to escape from a foolish or unprofitable contract, the court is free to throw them out of court under section 305 or 1112.

CONGRESSIONAL RESPONSE

The Supreme Court issued its decision in \textit{Bildisco} less than two months before the jurisdiction of the bankruptcy courts would expire under the interim legislation.\textsuperscript{66} During the two years since the

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\item[64.] 11 U.\textsuperscript{S}.C. § 1112(b)(6) (1982) permits the court to “convert a case under this chapter” to a Chapter 7 liquidation case or to dismiss a case under this chapter, whichever is in the best interest of creditors and the estate, for cause, including—
  \begin{enumerate}
  \item (1) continuing loss to or diminution of the estate and absence of a reasonable likelihood of rehabilitation;
  \item (2) inability to effectuate a plan;
  \item (3) unreasonable delay by the debtor that is prejudicial to creditors;
  \item (4) failure to propose a plan under section 1121 of this title within any time fixed by the court;
  \item (5) denial of confirmation of every proposed plan and denial of additional time for filing another plan or a modification of a plan;
  \item (6) revocation of an order of confirmation under section 1144 of this title, and denial of confirmation of another plan or a modified plan under section 1129 of this title;
  \item (7) inability to effectuate substantial consummation of a confirmed plan;
  \item (8) material default by the debtor with respect to a confirmed plan; and
  \item (9) termination of a plan by reason of the occurrence of a condition specified in the plan.
  \end{enumerate}
\item[65.] 11 U.S.C. § 1129(a)(3) provides:
  \begin{itemize}
  \item[(a)] The court shall confirm a plan only if all of the following requirements are met:
  \begin{itemize}
  \item[(9)] The plan has been proposed in good faith and not by any means forbidden by law.
  \end{itemize}
\item[66.] Id. § 305(a)(1) provides: “The court, after notice and a hearing, may dismiss a case under this title, or may suspend all proceedings in a case under this title, at any time if— (1) the interests of the creditors and the debtor would be better served by such dismissal or suspension. . . .”
\item The Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, §§ 404-405, 92 Stat. 2683-2685 (1978) conferred bankruptcy powers on district courts as courts of bankruptcy up until March 13, 1984. Section 404(a) stated:
  \begin{itemize}
  \item[(a)] The courts of bankruptcy, as defined under section 1(10) of the Bankruptcy Act, created under section 2a of the Bankruptcy Act, and exist-
\end{itemize}
\end{enumerate}
\end{footnotesize}
Marathon Pipeline Co. v. Northern Pipeline Co. decision, Congress has tried unsuccessfully to agree upon a permanent solution to the jurisdictional conundrum caused by the Supreme Court's holding that an important part of the jurisdiction of the bankruptcy court was unconstitutional. Incapable of arriving at a consensus on the fundamental political issues, Congress extended the bankruptcy court's jurisdiction for a limited time on four occasions. At the end of each extension various parties seized the opportunity to get their particular bankruptcy project enacted into law in return for a vote for the continuance of the bankruptcy court.

Union representatives sought to use the March 31, 1984 deadline as a device to get Congress to reverse Bildisco. In effect the unions made the reversal of that decision the price of their vote, and they were successful in the House. House Bill 5174, continuing the bankruptcy court beyond March 31, would have reversed Bildisco. Desiring to appear resolute, the Senate refused to adopt such a rule, and the parties resolved the immediate impasse on four occasions by merely extending the bankruptcy court's jurisdiction to May 1, then to May 26, June 20 and finally, to June 26, 1984.

Approaching the May 26th deadline, the Bildisco issue was again presented; this time it took the form of a Senate proposal. Senator Packwood introduced a bill that borrowed the balancing of the equities test from Bildisco, some procedural requirements from the House bill, and inserted some additional tests.

On June 29th, after a two-day hiatus in which there was no bankruptcy court, Congress passed the new section 1113. That section on September 30, 1979, shall continue through March 31, 1984, to be the courts of bankruptcy for the purposes of this Act and the Amendments made by this Act.

69. H.R. 5174, 98th Cong., 2d Sess., § 1113, 130 CONG. REC. H 1842-42 (1984). In contrast to the balancing of the equities factor actually enacted, proposed § 1118(g)(2) stated that rejection would only be appropriate if the “jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail . . .” absent rejection of the collective bargaining agreement. Id. at 1842.
70. See supra note 68 and accompanying text.
tion traces its lineage first to House Bill 5174, which passed the House of Representatives on March 21, 1984. Its immediate predecessor is the Packwood Amendment, which was introduced in the Senate on May 22, 1984. Section 1113 contains many of the features of each of its predecessors, but is measurably more favorable to management interests than either of the original proposals.

75. H.R. 5174, 98th Cong., 2d Sess., § 1113, 130 CONG. REC. H 7488 (June 29, 1984) provides:

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by Title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

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

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

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

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

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

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

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

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

(d) (1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.
The House bill\textsuperscript{76} was a square attempt to overturn nearly every aspect of \textit{Bildisco} and to adopt the union position. Like section 1113 and all other proposed amendments, it barred unilateral rejection. It contained a form of the REA test—to approve a rejection of a collective bargaining agreement, a court would have had to find that "the jobs covered by such agreement will be lost and any financial

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional periods as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employees to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title 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.

(b) The table of sections for Chapter 11 of Title 11, United States Code, is amended by inserting after the item relating to section 1112 the following new item: "1113. Rejection of collective bargaining agreements."

(c) The amendments made by this section shall become effective upon the date of enactment of this Act; provided that this section shall not apply to cases filed under Title 11 of the United States Code which were commenced prior to the date of enactment of this section.

\textsuperscript{76} H. R. 5174, 98th Cong., 2d Sess., § 1113, 130 CONG. REC. H 1842-43 (Mar. 21, 1984), the predecessor to the newly enacted bill provides:

(a) For purposes of this section "collective bargaining agreement" means a collective bargaining agreement which is covered by Title II of the Railway Labor Act or the National Labor Relations Act.

(b) The trustee may reject or assume a collective bargaining agreement under the title only if and after the court approves the rejection of assumption of such agreement.

(c) The court, only on the motion of the trustee, may approve the rejection of a collective bargaining agreement under this title only after notice to all parties in interest and a hearing.

(d) (1) The trustee shall—
prior to any rejection, it would also have required the trustee in bankruptcy to propose a modification of the collective bargaining agreement that was "deemed necessary by the trustee for such successful financial reorganization of the debtor and preservation of the jobs . . . ." Because the proposal authorized the court to put off a hearing on a request for rejection for

(A) meet and confer in good faith with the authorized representative of the employees who are subject to a collective bargaining agreement; and
(B) provide such authorized representative with the relevant financial and other information.

(2) The trustee may file a motion for the rejection of a collective bargaining agreement under this title if—
(A) the trustee has proposed modifications in such agreement to such authorized representative deemed necessary by the trustee for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement;
(B) the trustee has considered but rejected as inadequate for successful financial reorganization of the debtor and preservation of the jobs covered by such agreement alternative proposals for modifying such agreement made by such authorized representatives; and
(C) a prompt hearing on rejection is necessary to successful financial reorganization of the debtor.

e) The court, upon motion of the trustee to reject a collective bargaining agreement, shall hold an expedited hearing to determine whether such agreement may be rejected under this title, not less than 7 days and not more than 14 days after the filing of such motion, or within such additional time as the court, for cause, within such 14-day period fixes. Such hearing shall be completed no later than 14 days after the commencement of such hearing, or within such additional time as the court, for cause, within such 14-day period fixes.

(f) The financial information relevant to determining whether a collective bargaining agreement may be rejected under this title shall be made available, under such conditions and within such time as the court may specify, to the authorized representative of the employees who are subject to such agreement.

(g) The court may not approve the rejection of a collective bargaining agreement under this title unless—
(1) the trustee has complied with subsection (d) of this section; and
(2) absent rejection of such agreement, the jobs covered by such agreement will be lost and any financial reorganization of the debtor will fail.

(h) No provision of this title shall be construed to permit the trustee unilaterally to terminate or alter any of the wages, hours, terms and conditions established by a collective bargaining agreement.

(b) The table of sections of Chapter 11 of Title 11, United States Code, is amended by inserting after the item relating to section 1112 the following new item: "1113. Rejection of collective bargaining agreements."
an indefinite period for "cause," it offered substantially greater opportunity for delay than the bill which ultimately passed.

The Packwood Amendment substituted the balance of the

79. See id. 1113(e), 130 CONG. REC. at H 1842.
80. See H.R. 5174, 98th Cong., 2d Sess., § 1113, 130 CONG. REC. S 6181-82 (May 22, 1984) which provides:
(a) The debtor in possession, or the trustee (hereinafter in this section "trustee" shall include a debtor in possession), if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by Title I of the Railway Labor Act, may reject or assume a collective bargaining agreement under this title only after the court approves such rejection or assumption of such agreement.
(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the trustee shall—
(A) make a proposal, based on the most complete and reliable information available, to the authorized representative of the employees covered by such agreement, providing for the minimum modifications in such employees benefits and protections that would permit the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties to the reorganization; and
(B) provide, subject to subsection (d) (3), the representatives with the information necessary to evaluate such proposal.
(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.
(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—
(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);
(2) the authorized representative has refused to accept such proposal and under the circumstances such refusal was unjustified; and
(3) the balance of the equities clearly favors rejection of such agreement.
(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than twenty-one days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.
(2) The court shall rule upon such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice the court may extend such time for a period not exceeding fifteen days, or for additional periods of time to which the trustee and representative agree.
(3) The court may enter protective orders on terms consistent with
equities test, for the REA test;\textsuperscript{81} it tightened up the time-lines somewhat;\textsuperscript{82} and it modified the proposal that had to be made by the trustee from one merely “deemed necessary by the trustee for successful financial reorganization” to one that would permit “the reorganization, taking into account the best estimate of the sacrifices expected to be made by all classes of creditors and other affected parties . . . .”\textsuperscript{83}

Section 1113 carries forward the balancing of the equities test, but, like Packwood, requires that the equities “clearly” favor rejection.\textsuperscript{84} It modifies the management proposal to require not simply that the management consider the union’s needs or the sacrifices of all classes, as in Packwood, but that “all of the affected parties are treated fairly and equitably.”\textsuperscript{85} It contains a fairly rigid timetable that should normally produce a decision on rejection no later than fifty-one days after the filing of an application for rejection.\textsuperscript{86}

Finally, section 1113 contains two provisions not found in either of the other versions, which may be of significance. First, it authorizes unilateral rejection of the collective bargaining agreement if the court does not rule on the application for rejection within thirty days after the commencement of the hearing.\textsuperscript{87} Second, it authorizes the court to permit rejection or modification of a collective bargaining agreement on behalf of a management that has not complied with the other conditions of section 1113 if it is “essential to the continuation of the

\begin{quote}
the need of the authorized representative to evaluate the trustee’s proposal and the application for rejection, and as may be necessary to prevent the unauthorized disclosure of information in the possession of the debtor or trustee, if such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.
\end{quote}

\textsuperscript{81} See S. 3112, 98th Cong., 2d Sess., § 1113(c)(3), 130 CONG. REc. S 6182 (May 22, 1984).
\textsuperscript{82} Id. § 1113(d)(1)(2).
\textsuperscript{83} Id. § 1113(d)(1)(A).
\textsuperscript{84} See H.R. 5174, 98th Cong., 2d Sess., § 1113(c)(3), 130 CONG. REc. H 7488 (June 29, 1984).
\textsuperscript{85} Id. § 1113(d)(1)(A).
\textsuperscript{86} Id. § 1113(d)(1)(2).
\textsuperscript{87} Id. § 1113(d)(2).
debtor's business or necessary to avoid irreparable damage to the estate."^{88}

What will be the consequence of the enactment of section 1113? Because the language is purposefully ambiguous and because it plays upon a vast and varied landscape, one cannot be sure. Surely it makes the law measurably less certain; it will make the trial judge's decision more discretionary and speculative;^{89} it will introduce greater guesswork into the lives of those who must advise management and unions about their rights.

Consider some of the important but undefined terms in section 1113. The court may approve a rejection only if it finds that the union representative has refused to accept management's proposal for modification of the contract "without good cause."^{90}

88. Id. § 1113(e).
89. Especially problematic in this regard is section 1113(b)(1)(A) of H.R. 5174, 98th Cong., 2d Sess., 130 Cong. Rec. H 7488 (June 29, 1984), where the trustee is required to make a proposal to the union "based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably." In Braniff, for example, long negotiations were required to produce a reorganization plan. See 25 Bankr. at 220, Braniff Urges Creditors to Approve Hyatt Plan, N.Y. Times, May 16, 1983, at D4 col. 5; Braniff Deal Called in Jeopardy, id., Nov. 1982, at D4, col. 5. In Manville, even longer negotiations have not yet produced a plan. See, Manville’s Chapter 11 Bid Upheld: Major Step on Future Claims, N.Y. Times, Jan. 24, 1984, at D1, col. 5; Manville Plan Sets Claim Guidelines, id., Nov. 22, 1983, at D15, col. 1; Manville Corp. Faces Increasing Opposition to Bankruptcy Filing: Loss of Creditor Support Could Bring Liquidation Instead of Reorganization, Wall St. J., Jan. 31, 1981, at 1, col. 6. At the outset of a complex reorganization, before such negotiations have begun in earnest, how is the debtor, and ultimately the bankruptcy judge, to predict what are "necessary" means to assure "fair and equitable" treatment of all concerned parties?
90. H. R. 5174, 98th Cong., 2d Sess., § 1113(c)(2), 130 Cong. Rec. H 7488 (June 29, 1984). The members of the House and Senate Conference Committee on the Bankruptcy Reform Bill engaged in a lengthy debate over the requirement in thePackwood Amendment that the union's rejection of the debtor's proposed plan must be "unjustified" before a bankruptcy court can approve repudiation of the contract, which Senator Thurmond's proposal removed. House Judiciary Committee Chairman Peter Rodino called the Thurmond version a "hollow proposal" which would allow the employer to put 'any proposal' on the table and remove key procedural protections for employees before rejection of a collective bargaining agreement." 126 Daily Lab. Rep. A-9 (1984). “House conferees, particularly Rep. Bruce Morrison and Rep. William Hughes pressed for changes in the wording of the section regarding the debtor's proposal as necessary to assure that employees are not asked to make a greater financial sacrifice than other creditors of an employer which files for bankruptcy.” Id. The Committee eventually agreed to add the "without good cause" qualification, but compromised by allowing the debtor the option to modify the union contract on its own if the court does not act within the thirty-day limit. Labor may have lost an essential victory in the substitution of "without good cause" for "unjustified." Business and labor both are unhappy over the ambiguity of the phrase "without good cause," seeing
Good cause is not defined in this section. Presumably this requires that the court not only make its own determination whether the management proposal was fair and equitable, but also whether the union decision was itself justified on factors that may be unrelated to the merits of the modification proposal. By what standard is the court to measure these things? Is the union's refusal "with good cause" if nonunionized workers of competing businesses are accepting terms similar to those offered? Are all refusals "for a good cause" if the management proposal was too niggardly? The legislation provides no answer to these questions.

Thus the most certain consequence of the new enactment is that the already loose jointed law will be made even more so. We have turned the bankruptcy judges loose in the garden to do what they please. Only after many cases have made their way through the federal court system will we know what modifications are "fair and equitable," which refusals are "with good cause," and how one tests the equities to find which "clearly" favor rejection.

Yet as I have argued above, the standards for rejection are not the important matter. Unless the very act of Congressional enactment signals that labor unions are to be treated more generously than they have been previously, I believe that the courts will continue routinely to reject collective bargaining agreements. The standards, however uncertain, will not make a critical difference.

The majority in *Bildisco* held explicitly that the National Labor Relations Act, and implicitly that section 365, did not prohibit a unilateral rejection of a collective bargaining agreement. Section 1113 of the new bankruptcy amendment specifically reverses that rule; it bars unilateral rejection except in very limited circumstances. Inability to reject unilaterally will be significant only if prompt and final judicial determination cannot be had. At least superficially it appears that section 1113 has dealt with the problem of judicial delay. It provides specifically that a hearing on a proposed rejection must be commenced not later than twenty-one days after the application for rejection and by requiring the court to rule within thirty days after the commencement of the hearing. The section puts teeth in this requirement by authorizing unilateral rejection if the court fails to rule within thirty days.

There are at least two potential difficulties with the superficial reading suggested above. First, the application for rejection appears as prolonging litigation when "time and cash are running short." *House-Senate Conference Resolve Disputes on Bankruptcy Bill; Approval is Expected*, Wall St. J., June 29, 1984, at 2, col. 3.


parently cannot be made until the trustee has made a proposal for modification of the contract, and possibly, until the union has had an opportunity to pass on that proposed modification. Moreover it is possible that the union will be able to procure a stay pending an appeal of an unfavorable ruling by the bankruptcy judge. One can appeal an order as of right "if it is a final order" and, as a matter of discretion, under section 1334(b) if it is not final. The rules grant considerable discretion to the courts to stay an order, to require a bond, or to make other appropriate disposition. If the rejection is

93. Id. § 1113(b)(1)(A)(B), states:
   (b) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee . . . shall—
      (A) make a proposal to the authorized representative of the employees covered by such agreement . . .
      (B) provide . . . the representative of the employees with such relevant information as is necessary to evaluate the proposal (emphasis added).
   (c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that—
      (1) the trustee has made a proposal that fulfills the requirements of subsection (b)(1);
      (2) the authorized representative of the employees has refused to accept such proposal without good cause; (emphasis added).

Read together, these two subsections imply that the union must have an opportunity to at least evaluate the proposal if not to reject it, before the application seeking rejection is filed.


95. 28 U.S.C. § 1334(b) gives the district courts the jurisdiction to hear appeals from orders that are not final (i.e., interlocutory) "only by leave of the district court to which the appeal is taken." This is left unchanged by the passage of the new bankruptcy bill. See H.R. 5174, 98th Cong., 2d Sess., § 158(a), 130 CONG. REC. H 7474 (June 29, 1984). For cases that have considered hearing discretionary appeals pursuant to 28 U.S. § 1334(b), see, e.g., In re Leonetti, 28 Bankr. 1005 (Bankr. E.D. Pa. 1983); Wilson Freight Co. v. Citibank, 21 Bankr. 398 (Bankr. S.D.N.Y. 1982); Bank of Am. N.T. & S.A. v. Communication & Studies Int'l, 23 Bankr. 1015 (Bankr. N.D. Ga. 1982); In re Stiles, 29 Bankr. 389 (M.D. Tenn. 1982). For more discussion on interlocutory appeals see Levin, supra note 94, at 987-90.

96. Rule 8005—Stay Pending Appeal—granted the courts considerable discretion:

A motion for a stay of the judgment, order, or decree of a bankruptcy court, for approval of a supersede as bond, or for other relief pending appeal must ordinarily be made in the first instance in the bankruptcy court. Not-
stayed pending appeal, and particularly if the union is not made to put up a large bond, the apparently short timelines in section 1113 go for naught.

By authorizing a right unilaterally to reject a collective bargaining agreement, the Supreme Court gave management something that many management lawyers never expected to receive. It freed them not just from the clutches of the NLRB, but also from the requirements of getting a bankruptcy judge's approval. Section 1113 will now require the bankruptcy court's approval, but it displays a Congressional intent that this approval be granted or withheld promptly.

When legislation springs from Congress' brow at the end of the session and under the heat of intense lobbying, it is difficult to predict the ultimate consequences. If my analysis is correct, namely that the bankruptcy courts are skeptical of union claims and, deep down, believe that unionized employees should not be treated better than others, the new law will have no significant impact. If I am incorrect in that judgment or if a new and different group of judges have different views, there is more than enough leeway in the legislation to favor the union position by a favorable finding on any of number of determinations that must be made in the legislation.

**BILDISCO'S GRAND MEANING**

Because Congress has already overturned that part of *Bildisco* permitting unilateral rejection of collective bargaining agreements, because the test for rejection may not be significant in any event, and because *Bildisco* will not stimulate additional filings, then must the case be unimportant? Not so. First, the decision has already had an impact on the new bankruptcy legislation in matters unrelated to collective bargaining agreements. Second, the combination of the *Bildisco* case and the new section 1113 that it spawned may yet alter

withstanding Rule 7062 but subject to the power of the district court and the bankruptcy appellate panel reserved hereinafter, the bankruptcy court may suspend or order the continuation of other proceedings in the case under the Code or make any other appropriate order during the pendency of an appeal on such terms as will protect the rights of all parties in interest. A motion for such relief, or for the modification or termination of relief granted by the bankruptcy court, may be made to the district court or the bankruptcy appellate panel, but the motion shall show why the relief, modification, or termination was not obtained from the bankruptcy court. The district court or the bankruptcy appellate panel may condemn the relief if grants under this rule on the filing of a bond or other appropriate security with the bankruptcy court. Where an appeal is taken by a trustee, a bond or other appropriate security may be required, but when an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the government of the U.S. a bond or other security shall not be required.

97. H. R. 5174, 98th Cong. 2d Sess., § 1113, 130 CONG. REC. H 7488 (June 29,
the bargaining power between union and management in the shadow of bankruptcy. Third, like many Supreme Court cases, *Bildisco* may be perceived as a symbolic message. As a symbol, it may lead the courts and others in ways that are hard to predict, but that are ultimately detrimental to labor unions' interests.

Turning first to the newly enacted bankruptcy amendments, how did *Bildisco* affect matters other than collective bargaining agreements? If one assumes that any advocate before Congress has a finite amount of influence at any particular moment, and that influence spent one place may not be expended in others, the presence of *Bildisco* caused labor unions to expend a significant share of their power in a modification of the right to unilateral rejection that *Bildisco* had apparently conferred upon management. I hypothesize that the unions' need to modify *Bildisco* weakened their influence in a variety of matters that were also subjects of the new bankruptcy legislation. For example, certain of the unions have traditionally supported the consumer side in the bankruptcy debate against the consumer credit industry. *Bildisco* surely gave the consumer credit industry coin that they could trade for matters of interest to them in the bankruptcy legislation. The presence of *Bildisco* may have shaped the bankruptcy legislation in ways that may be significant, but not measurable.

How the decision, and the Congressional response, will alter the bargaining power between management and labor is not clear. After the Congressional response described above, management no longer has the right to unilaterally reject collective bargaining agreements. On the other hand, courts must act promptly on proposals for rejections, the balancing of the equities test is now embodied in the statute, and there is explicit provision for emergency relief from collective bargaining agreements.

When one adds all of these factors together, it is likely that a union representative would perceive himself to be in a stronger position today than immediately after *Bildisco* but in a still weaker position than one year ago. In negotiation, belief is reality. Therefore, if union spokesmen truly believe the assertions made after *Bildisco* concerning the balancing of the equities standard, *Bildisco* will have an

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98. The unions, traditionally allied with consumers, have aligned themselves with the consumer credit industry on the passage of a bankruptcy bill to protect their special interest regarding collective bargaining. See, King, *Bankruptcy Courts on the Brink: The Plague of Special Interest Groups*, N.Y. Times, Mar. 4, 1984 at III 2, col. 3.

99. See supra note 75.

100. See H.R. 5174, 98th Cong., 2d Sess., § 1115(c)(3), 130 CONG. REC. H 7488 (June 29, 1984).

101. See id § 1113(e).
It will mean that unions who had not formerly agreed to concessions may now do so, and that those who might have litigated will accept changes and modifications rather than risk more substantial modifications of their agreement at the hands of a court.

It seems likely that much of the talk after *Bildisco* by union representatives was made for public and Congressional consumption and that the true union analysis is closer to the one I have suggested above than to the one they articulated in the press. Even so, the fact that the Court so readily accepted the management position by a 9-0 decision may cause union negotiators to predict a ready acceptance of that position in the future and may thus weaken their bargaining position. Therefore, even if one takes an objective view of the consequences of *Bildisco* and the subsequent legislation, I would expect it to have some impact upon the way unions and management accommodate their contracts to hard times.

The dramatic impact of *Bildisco*, however, and the one I suspect that truly called for the outraged response from union spokesmen, is the symbolic one. Here all nine members of the Court rejected the union position on the standard to be applied. How remarkable that the union could not get a single vote, not even from such certified members of the Warren Court as Justices Brennan and Marshall. It is little solace that a minority of four believed that some truncated form of section 8(d) ought to be followed before rejection.103

102. The decision and the responsive legislation remove all doubt about the application of the National Labor Relations Act and the jurisdiction of the NLRB in such circumstances. It is now clear that management need not comply with the modification rules in 8(d) of the National Labor Relations Act, nor apply for approval with the NLRB. By eliminating that bargaining point, the *Bildisco* decision and the new legislation may have weakened the union position in negotiations.

103. In two law review articles published in the year prior to the *Bildisco* decision, two commentators analyzed the *Bildisco* question in tightly reasoned, heavily footnoted and carefully elaborated arguments. See Pulliam, *supra* note 32; Bordewieck & Countryman, *supra* note 39. After careful legal and logical analysis, each arrived at a diametrically opposed conclusion. Professor Countryman and Mr. Bordewieck concluded that Congress must have intended that the REA test apply under section 365. Bordewieck & Countryman, *supra* note 39, at 293, 296. To Mr. Pulliam it was beyond question that Congress intended to apply the business judgment test to rejection of collective bargaining agreement in section 365. Pulliam, *supra* note 32, at 29, 42-43. The very fact that well-intended and intelligent people can draw diametrically opposed conclusions from careful analysis of the same data suggests that the legal analysis is not the important thing.

In my view, the conclusions the commentators arrived at were not reached primarily by legal analysis but from *a priori* judgments. Unions can be characterized in quite different ways. Some regard them as the faithful alter egos of employees who, but for the union protection, would be subject to management exploitation or worse. Unions may be regarded as altruistic, as working not just for the good of their members, but for the good of society as a whole. Some of these sentiments form the
CONCLUSION

It is unfortunate and ironic that the Bildisco decision became a pawn in the bankruptcy jurisdiction game. That Congress, which wasted two years in fruitless efforts to resolve the jurisdiction question, should find it appropriate to reverse the Supreme Court before the ink had dried on the decision is ironic. That it should act in hasty response to union pressure and to the need for continuing the bankruptcy court is unfortunate.

The need for a hasty repair of the bankruptcy court and the intensity of the union feelings about Bildisco—whether for symbolic or other reasons—foreclosed dispassionate consideration of the fundamental question here: whether collective bargaining agreements should be treated differently from other executory contracts, and whether unionized employees should have greater rights than other creditors. All creditors suffer in bankruptcy. Without exception non-unionized employees find their terms of employment changed upon the filing of a petition in bankruptcy. Indeed, if it could be proven that the very inefficiencies that brought the business to its knees had been imposed by the union demands in collective bargaining, one basis for the Wagner Act and for the status that unions have enjoyed in the courts and legislatures for the last 45 years.

Others consider unions as mature, powerful American institutions. They view unions as possessing the same qualities as other powerful (and therefore suspect) American institutions, such as corporations and governmental agencies. These persons would characterize modern unions as intensely self interested, single minded in their pursuit of power and influence, with interests often different from and conflicting with the employees' individual interests. If one were to adopt either one of these polar views of unions and unionized employees, all kinds of consequences might result.

Does a 9-0 vote of the Supreme Court proceed from such an a priori view of modern American unions? It is that possibility that should frighten union representatives. That an occasional union might have its collective bargaining agreement rejected in bankruptcy is a small matter. That the 9-0 vote in Bildisco shows the Court to have adopted the negative polar view of unions is a matter of great importance. I believe that the union fears are well-founded. The Court does no better a job of legal analysis than do Countryman and Pulliam. Its arguments for siding with management are no more compelling than are Mr. Pulliam's, and in my view it is as likely that the Court is proceeding from an a priori judgment, as are the commentators.

If that is the basis for the Bildisco case, it has a meaning for every case involving union rights that comes before the Supreme Court in the foreseeable future. It means that their arguments will be met with a skepticism formerly reserved for the rich and selfish, not with the traditional sympathy accorded the working man. It means that the assertion that the union speaks for and correctly represents the individual's interest will now be open to question. Worse, it may mean that lower courts, taking their lead from the Supreme Court, will be more hostile to the union's interests in a whole host of ways.

It is ironic therefore, that Bildisco, touted as a critical bankruptcy case, may have only a modest impact on the bankruptcy law, and yet, may have a far-reaching impact on labor law.
could argue that the union contract should receive worse, not better treatment in bankruptcy. Why should union employees receive more favorable treatment? That is a question to which neither the Congress nor the courts have given a satisfactory answer.

104. Some might argue that the collective bargaining agreement is entitled to less consideration than other contracts. For example, the Rath opinion discloses a union clinging stubbornly to inefficient work rules, and to wages that were significantly above those at competing plants. Rath, 36 Bankr. at 983-85. The pilots for Continental Airlines were receiving wages that may have been as much as 100% above the free market level. See Continental Air Unions Lose Attack on Pay Cut, N.Y. Times, Jan. 18, 1984, at 1, col. 4; see also As Continental Airlines Takes Bankruptcy Step, Rivals Plan to Move In—Although Line Plans to Fly Again With Cut Fares, Its Viability is Doubted—Will Labor Accept Half Pay? Wall St. J., Sept. 26, 1983, at 1, col. 6.