
NOTE

A BANKRUPT BARGAIN

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This Note discusses the conflict between labor law and the Bankruptcy Code, specifically focusing on whether bankrupt debtor firms can reject expired labor contracts within bankruptcy. The National Labor Relations Act prohibits employers from unilaterally changing key terms of an expired collective bargaining agreement after the agreement has expired. This rule serves to promote labor peace and prevent coercive actions by employers during the post-expiration negotiation period. Increasingly, Bankruptcy courts interpret the statutory provision that governs the rejection of labor contracts, § 1113 of the Bankruptcy Code, to allow for rejection of expired agreements. This trend poses a threat to labor unions' bargaining power and conflicts with the National Labor Relations Act's statutory goals. This Note argues that a textualist interpretation of § 1113 illuminates legislative intent to prohibit debtors' rejection of expired collective bargaining agreements in bankruptcy. It argues that § 1113 allows for temporary changes to the terms of an expired agreement, simultaneously providing for relief for the debtor while preserving the intended negotiation process between unions and employers.

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I. INTRODUCTION

A wave of bankruptcies brought on by the COVID-19 pandemic and the accompanying quarantine coincided with an unemployment crisis and renewed focus on labor protections.¹ Unions have rallied around the issues of job

¹ See, e.g., Hank Tucker, *Coronavirus Bankruptcy Tracker: These Major Companies Are Failing amid the Shutdown*, FORBES (May 3, 2020, 10:00 AM), <https://www.forbes.com/sites/hanktucker/2020/05/03/coronavirus-bankruptcy-tracker-these-major-companies-are-failing-amid-the-shutdown> (on file with the Columbia Business Law Review) (discussing the economic consequences of COVID-induced lockdowns); Steven Greenhouse, *Opinion, Covid-19 Puts Workers in Danger. It's Another Reason We Need Unions*, GUARDIAN (July 24, 2020, 8:12 AM), <https://www.theguardian.com/commentisfree/2020/jul/24/covid-19-workers-dangers-unions> [<https://perma.cc/2J8U-4XJ2>] (arguing that more organized labor is needed to address workers' COVID-related safety concerns); see also Jimmy O'Donnell, *Essential Workers During COVID-19: At Risk and Lacking Union Representation*, BROOKINGS (Sept. 3, 2020), <https://www.brookings.edu/blog/up-front/2020/09/03/essential-workers-during-covid-19-at-risk-and-lacking-union-representation/>

protection, workplace safety, and employee voice in the workplace.² However, unions have historically struggled to protect their members' bargained-for and statutory rights within bankruptcy.³ The need to protect workers' rights in bankruptcy took on an increased urgency during the COVID-19 crisis because financial crises can have a long-lasting impact on wages and union membership.⁴ Despite this historical trend, organized labor has experienced a significant increase in interest in the wake of the COVID-19 pandemic.⁵ Established unions are participating in twice as many strikes

[<https://perma.cc/NMV9-U2BZ>] (discussing workplace safety concerns for essential workers and the role of unions in raising workplace safety concerns).

² See e.g., Allen Smith, *Unions Organize in Response to COVID-19 Safety Concerns*, SOC'Y HUM. RES. MGMT. (June 26, 2020), <https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/coronavirus-unions-organize-in-response-to-safety-concerns.aspx> [<https://perma.cc/3TBD-Q4AF>]; Greenhouse *supra* note 1; Laura Benshoff, *This Labor Day, Unions Face New Pressures and Possibilities Due to COVID-19*, WHYY (Sept. 7, 2020), <https://whyy.org/articles/this-labor-day-unions-face-new-pressures-and-possibilities-due-to-covid-19/> [<https://perma.cc/JEF2-AMQ3>].

³ See Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 AM. BANKR. L.J. 103, 117, 119 (2010) (noting an empirical study which found that between 2001–2007 all corporate debtors were able to reject collective bargaining agreements even when unions litigated against rejection).

⁴ See generally Charles B. Craver, *The Impact of Financial Crises upon Collective Bargaining Relationships*, 56 GEO. WASH. L. REV. 465 (1988).

⁵ Office of Public Affairs, Nat'l Lab. Rels. Bd., *Union Election Petitions Increase 57% in First Half of Fiscal Year 2022*, NAT'L LAB. RELS. BD. (Apr. 6, 2022), <https://www.nlr.gov/news-outreach/news-story/union-election-petitions-increase-57-in-first-half-of-fiscal-year-2022> [<https://perma.cc/6G2P-E4K7>]. Public approval of labor unions is up to sixty-eight percent, the highest it has been since 1965. Megan Brennan, *Approval of Labor Unions at Highest Point Since 1965*, GALLUP (Sept. 2, 2021), <https://news.gallup.com/poll/354455/approval-labor-unions-highest-point-1965.aspx> [<https://perma.cc/M2BS-V5XV>]. However, the total percentage of unionized workers has declined. News Release, Bureau of Lab. Stat., *Union Members—2021* (Jan. 20, 2022, 10:00 AM), <https://www.bls.gov/news.release/pdf/union2.pdf> [<https://perma.cc/XRR8-WNJM>].

as before the health crisis, and there is a boom in new unionizations across industries.⁶ While workers may have more leverage outside of bankruptcy at this moment, it is unclear if this power translates to the bankruptcy process. And while businesses are now bouncing back after the economic contraction caused by the pandemic, the high amount of debt that many firms took on leaves a large sector of the economy exposed in the event of another economic downturn. Unions may again face vulnerability if the forecasted recession spurs a throng of bankruptcy filings.⁷

This Note examines the conflict between the bankruptcy process and labor law. Specifically, it probes § 1113 of the Bankruptcy Code (“the Code”), which governs the rejection of collective bargaining agreements (CBAs) by bankrupt firms.⁸ Though Congress passed § 1113 to protect unionized workers from unilateral rejection of their CBAs, § 1113 is often used as a union-busting device by firms looking to cut labor costs.⁹ Labor protections are being further eroded as certain courts, particularly those in the Third Circuit, are interpreting § 1113 to allow for the rejection of *expired* CBAs.¹⁰

This Note argues that the Third Circuit’s broad interpretation of § 1113 allows for an abuse of bankruptcy procedure by creating a loophole that permits corporations to default on their statutorily imposed labor obligations. Part II

⁶ Ian Kulgren, Brian Eckhouse & Deena Shanker, *U.S. Labor Unions Are Having a Moment*, TIME (Oct. 17, 2021, 11:55 AM) <https://time.com/6107676/labor-unions/> [https://perma.cc/5GVF-W8GT]; Kate Rogers, *Covid Upended the Labor Market, and Now These Workers Are Using Their Leverage To Push for Unions*, CNBC (Mar. 29, 2022, 12:46 PM), <https://www.cnbc.com/2022/03/29/amazon-starbucks-workers-push-for-unions-after-covid-upended-labor-market.html> [https://perma.cc/45KC-S2FQ].

⁷ Scott Horsley, *Why There Are Growing Fears the U.S. Is Headed to a Recession*, NPR (Apr. 13, 2022, 5:00 AM) <https://www.npr.org/2022/04/13/1092291748/economy-recession-inflation-federal-reserve-interest-rates> [https://perma.cc/G8ZF-LHFU].

⁸ 11 U.S.C. § 1113 (2018).

⁹ See Dawson, *supra* note 3, at 103.

¹⁰ See *In re Trump Ent. Resorts Unite Here Loc. 54 (Trump II)*, 810 F.3d 161, 174 (3d Cir. 2016).

explores bankruptcy law, labor law, and the tension between these areas of law that culminate in § 1113. Part III examines the troubling trend in the lower courts' rejection of expired CBAs and probes the courts' differing interpretations. Part IV suggests that judges should focus on a close reading of the statute to ascertain congressional intent, instead of relying on their policy intuitions and their own weighing of the goals of the National Labor Relations Act (NLRA) and Bankruptcy Code. Part IV further argues that a close reading of the statute reveals that § 1113(e) allows for temporary modifications of expired CBAs, but that this power to alter unexpired agreements does not extend to approving a debtor's application for rejection of an expired CBA through § 1113(c). Further, this Note suggests that effectuating congressional intent will protect union workers—a constituency that should not be forced to bear all of the costs of economic downturn or poor managerial decisions. Part V concludes.

II. BACKGROUND

Part II lays out the basics of bankruptcy law and policy, labor law and policy, and the conflict between these two areas of federal law. It details the genesis of the conflict, the Supreme Court case which addressed the issue, and the subsequent congressional action which intended to smooth the conflict and blend the goals and processes of the two laws. This attempt, codified in 11 U.S.C. § 1113, was successful in many ways; yet it did not fully resolve the differing goals of bankruptcy and labor law. This Part details how the conflict persists through § 1113, and how in bankruptcy court the goals of bankruptcy often trump those of labor, to disastrous effect.

A. Bankruptcy Law

The Bankruptcy Code, enacted by Congress in 1978, governs the distribution of a distressed firm's assets to its

creditors in a Chapter 11 restructuring proceeding.¹¹ Restructuring is intended to relieve a profitable but financially distressed company of their burdensome debt obligations so that they may survive as a “going concern.”¹² Such relief is accomplished through converting debt to equity, allowing rejection of unprofitable contracts, and discharging claims against the firm.¹³ A major creditor or group of creditors often becomes the owner of the debtor firm after the conclusion of a bankruptcy proceeding.¹⁴

The Code also serves to solve a collective action problem.¹⁵ Insolvency could create a rush by creditors to foreclose on assets and trigger loan acceleration, making survival of the firm unlikely.¹⁶ By imposing an automatic stay on all proceedings against the debtor, the bankruptcy process prevents certain creditors who are quicker to notice the firm’s

¹¹ 11 U.S.C. § 109. Section 109 specifies which entities can file under each Chapter. Business entities can file under Chapter 11 (reorganization) or under Chapter 7 (liquidation). *See id.* §§ 109(b), (d). In cases where the liquidation value is higher than the going concern value, distressed companies must liquidate through Chapter 7 of the Code. *Id.* § 1129(a)(7).

¹² *Chapter 11—Bankruptcy Basics*, U.S. CTS., <https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics> [<https://perma.cc/LD7M-3C6N>] (last visited June 7, 2022). Ballentine’s Law Dictionary defines a “going concern” as “[a] business in operation for the purpose for which it is organized, unhampered by insolvency or legal prohibitions.” *Going concern*, BALLENTINE’S LAW DICTIONARY (3d ed. 1969).

¹³ 11 U.S.C. §§ 365, 1141(d)(1)(A).

¹⁴ These creditors are referred to as the “fulcrum creditors” because they own the “fulcrum security”—the security most likely to be converted from debt to equity in the reorganized company. *Fulcrum Security (Financial Restructuring & Bankruptcy Glossary)*, LEXISNEXIS (Apr. 20, 2022), <https://advance.lexis.com/open/document/openwebdocview/Fulcrum-Security-Financial-Restructuring-Bankruptcy-Glossary-/?pdmfid=1000522&pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5NNS-TFY1-F60C-X3W7-00000-00&pdcomponentid=149080> (on file with the Columbia Business Law Review).

¹⁵ Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879, 901 (2019).

¹⁶ *Id.*

insolvency from receiving unfair priority over other creditors.¹⁷ Thus, the automatic stay not only prevents a mad rush to foreclose upon the debtor's assets, but also preserves value both by allowing the firm to continue using those assets and by preventing the breakup of assets that are worth more preserved together.¹⁸ Without a bankruptcy procedure to stay state foreclosure actions and divide the assets pro rata, one watchful unsecured creditor could receive a windfall to the detriment of both secured creditors and other unsecured creditors.¹⁹ Within bankruptcy, however, creditors whose loans are secured by collateral are paid in full, while unsecured creditors receive a portion of the remaining assets.²⁰ Unsecured creditors can include lenders, employees, suppliers, and tort victims.²¹ General unsecured creditors have the highest risk of recovering less than the full value of their claim.²²

The bankruptcy process also allows companies to decide which contractual obligations it wants to survive bankruptcy. Firms are able to “assume” beneficial executory contracts and

¹⁷ 11 U.S.C. § 362. Bankruptcy courts also have discretion to enjoin National Labor Relations Board (NLRB) actions against a debtor if the unfair labor practice proceeding “threatens the assets of the debtor’s estate.” 9 EMP. COORDINATOR LAB. RELS., *Bankruptcy Court’s Discretionary Right To Enjoin NLRB Actions* § 11:24, Westlaw (database updated June 2022).

¹⁸ Macey & Salovaara, *supra* note 15, at 901.

¹⁹ See Elizabeth Warren, *Bankruptcy Policy*, 54 U. CHI. L. REV. 775, 782 (1987). Foreclosure is generally a state process, as opposed to bankruptcy, which, though it can be impacted by state law, is a federal process. *See id.* at 782–83 (discussing the focus of state debt collection law on making a single creditor whole and the state laws of liens creating a system of priority for creditors outside of bankruptcy).

²⁰ 11 U.S.C. § 1129(b)(2). This provision is known as the “absolute priority rule.” 7 COLLIER ON BANKRUPTCY ¶ 1129.03, LexisNexis (Henry J. Sommer & Richard Levin eds., database updated June 2022). It requires that the plan of reorganization respect the priority of claims, so secured creditors must be paid in full before unsecured creditors receive any payout. *Id.*

²¹ 11 U.S.C. § 101(5) (defining “claim” broadly and thus identifying anyone who has a claim against the debtor as a claimant and thus creditor).

²² John D. Ayer et al., *What Every Unsecured Creditor Should Know About Chapter 11*, AM. BANKR. INST. J., June, 2004, at 16.

“reject” unprofitable executory contracts.²³ Courts have generally interpreted an “executory contract” to mean a contract where substantial performance is required by both parties to the agreement.²⁴ When a debtor company assumes an executory contract in bankruptcy, it incurs all obligations and receives all benefits under the contract.²⁵ Rejection, by contrast, terminates each party’s future obligations and benefits.²⁶ Thus, when the debtor rejects a contracting party’s agreement, the contracting party has a claim for contract breach.²⁷ This claim is evaluated by the bankruptcy judge and is discharged post-bankruptcy.²⁸ Crucially, the remedy for rejection of a contract within bankruptcy is invariably a smaller monetary award than it would be outside of bankruptcy, as the contracting party’s claim is considered along with the claims of all the other general unsecured creditors.

As discussed below, CBAs were originally treated as executory contracts that could be assumed or rejected under § 365 of the Bankruptcy Code.²⁹ However, in 1984 Congress enacted § 1113 to separately govern the assumption, rejection,

²³ 11 U.S.C. § 365.

²⁴ NLRB v. Bildisco & Bildisco, 465 U.S. 513, 522 n. 6 (1984); see Martha S. West, *Life After Bildisco: Section 1113 and the Duty To Bargain in Good Faith*, 47 OHIO ST. L. REV. 65, 78 (1986); Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 MINN. L. REV. 439, 460 (1973).

²⁵ Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding “Rejection”*, 59 U. COLO. L. REV. 845, 846–47 (1988). The debtor also has to “cure” any default when it assumes a contract. 11 U.S.C. § 365(b)(1)(A).

²⁶ Victoria Vron, *Rejection of an Executory Contract Does Not Relieve a Debtor of Assumed Liabilities*, WEIL (Dec. 22, 2010), <https://restructuring.weil.com/executory-contracts/rejection-of-an-executory-contract-does-not-relieve-a-debtor-of-assumed-liabilities/> [https://perma.cc/3F84-G6YR].

²⁷ 11 U.S.C. § 365(g).

²⁸ Vron, *supra* note 26.

²⁹ Bildisco & Bildisco, 465 U.S. at 513; Michael St. Patrick Baxter, *Is There a Claim for Damages from the Rejection of a Collective Bargaining Agreement Under Section 1113 of the Bankruptcy Code?*, 12 BANKR. DEVS. J. 703, 704 (1996).

and modification of CBAs in bankruptcy proceedings.³⁰ Courts and academics continue to debate whether workers have a claim for damages after rejection or modification of their CBA under § 1113.³¹

B. Labor Law

The Clayton Antitrust Act of 1914 codified the labor exception to antitrust legislation.³² Congress approved the National Labor Relations Act (NLRA or “the Act,”) in 1935³³ as part of President Franklin D. Roosevelt’s New Deal.³⁴ The Act allows workers to form labor organizations and bargain as a group for better wages and working conditions without the threat of employer retaliation.³⁵ The NLRA also created an administrative body, the National Labor Relations Board (NLRB), to oversee and enforce the NLRA, and to adjudicate any disputes between unions and management.³⁶ The NLRA is intended to correct a perceived imbalance of bargaining power between the workers and the management by giving workers a (qualified) right to strike without fear of retaliation

³⁰ Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, § 541(a), 98 Stat. 333, 390–91 (1984) (codified at 11 U.S.C. § 1113).

³¹ Compare Baxter, *supra* note 29, at 703–04 (arguing that the better view is that a rejection of a CBA provides workers with a claim for damages) with Christopher Updike & Ingrid Bagby, *Collective Bargaining Agreements and the Bankruptcy Code: Are Damage Claims for Rejection of Collective Bargaining Agreements Available Under Section 1113?*, 4 PRATT’S J. BANKR. L. 20 (2008) (arguing that recent court decisions make it clear that unions do not have a claim for damages after rejection).

³² Pub. L. 63-212, 38 Stat. 730, 731 (codified at 15 U.S.C. § 17). See generally Sandeep Vaheesan, *Accommodating Capital and Policing Labor: Antitrust in the Two Gilded Ages*, 78 MD. L. REV. 766 (2019) (discussing congressional intent to except labor from antitrust laws).

³³ Pub. 74-198, 49 Stat. 449 (codified as amended at 29 U.S.C. §§ 151–69).

³⁴ *FDR and the Wagner Act*, FRANKLIN D. ROOSEVELT PRESIDENTIAL MUSEUM & LIBR., <https://www.fdrlibrary.org/wagner-act> [<https://perma.cc/2LX5-U3KK>] (last visited June 7, 2022).

³⁵ 29 U.S.C. § 157 (2018).

³⁶ *Id.* § 153.

by the employer.³⁷ It is also intended to ensure peace between labor and management,³⁸ and it is structured to encourage labor agreements to be determined on the market, rather than by the government.³⁹ The NLRA details processes for employees to vote to join a union, certify their bargaining unit, and negotiate with the employer to form a CBA.⁴⁰

The NLRA defines certain employer actions to be “unfair labor practices,”⁴¹ and the NLRB has the authority to adjudicate alleged unfair labor practices and issue make-whole remedies like employee reinstatement or injunctions.⁴² Employers that retaliate against workers for supporting or joining a union violate § 7 of the NLRA and are liable under § 8 for committing an “unfair labor practice.”⁴³ Additional prohibited behaviors include coercion, anti-union animus, and unilateral changes in employment.⁴⁴ It is also an unfair labor practice for an employer or union to refuse to bargain collectively.⁴⁵ Though these prohibitions appear broad, they have been eroded by numerous specific exceptions. For example, while an employer may not prevent its workers from discussing unionization, it may restrict them from speaking and distributing information about unions while they are on the clock in certain areas of the workplace.⁴⁶

³⁷ *Id.* §§ 151, 158, 163.

³⁸ *Id.* § 151.

³⁹ *See* Dawson, *supra* note 3, at 120.

⁴⁰ *See* 29 U.S.C. §§ 158(d), 159.

⁴¹ 29 U.S.C. § 158.

⁴² *Decide Cases*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/decide-cases> [<https://perma.cc/5LMQ-LVZR>] (last visited June 7, 2022); *Investigate Charges*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/about-nlr/what-we-do/investigate-charges> [<https://perma.cc/V79W-YCYK>] (last visited June 7, 2022).

⁴³ National Labor Relations Act of 1935 §§ 7–8; 29 U.S.C. §§ 157–58.

⁴⁴ Kenneth Pasquale, Joshua Siegal & Odelia Lee, *The Rejection and Modification of Collective Bargaining Agreements Pursuant to Bankruptcy Code Section 1113*, 2015 ANN. SURV. BANKR. LAW 113, 115.

⁴⁵ 29 U.S.C. §§ 158(a)(5), (b)(3).

⁴⁶ *See* St. John's Hosp. & Sch. of Nursing, Inc., 222 N.L.R.B. 1150, 1150 (1976), *enforcement granted in part, denied in part*, 557 F.2d 1368 (10th Cir. 1977) (“In order to provide this [tranquil] atmosphere, hospitals may be

The NLRA sets out detailed procedural and substantive requirements for negotiating a CBA.⁴⁷ Section 8(d) of the Act mandates that the employer and the employee representative meet “at reasonable times” to negotiate “wages, hours, and other terms and conditions of employment.”⁴⁸ The Act imposes a requirement to “confer in good faith” but specifies that neither party is required to make concessions.⁴⁹ Good-faith bargaining for the purposes of the NLRA entails meeting at regular intervals, putting forth reasonable demands and counterproposals, “demonstrat[ing] a willingness to consider issues further,” and “refrain[ing] from adding new proposals at an advanced stage in the negotiations or withdraw[ing] already agreed-upon proposals.”⁵⁰ If the parties are unable to come to an agreement after good-faith bargaining, the employer may declare an impasse and implement its last best offer—that is, the last proposal it made to the employee representative.⁵¹ At this point, the union is legally permitted to strike if it chooses to do so and the employer can institute a lockout.⁵² If the union contests that negotiations are at an

justified in imposing somewhat more stringent prohibitions on solicitation than are generally permitted.”); *see also* Republic Aviation Corp. v. NLRB, 324 U.S. 793, 805 (1945) (holding that employers can restrict union speech during working hours but cannot restrict union speech during an “employee’s own time” even while the employee is on employer premises); Beth Israel Hosp. v. NLRB, 437 U.S. 483, 493, 507 (1978) (ruling that restrictions on union speech during non-working time and in non-working areas constitutes an unfair labor practice, but leaving open the option for employers to restrict speech in working areas even during non-working times).

⁴⁷ 29 U.S.C. § 158(d).

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Pasquale et al., *supra* note 44, at 115.

⁵¹ *Id.* at 115–16.

⁵² *Id.* at 116. A “strike” is a work stoppage by the employees, whereas a “lockout” is the employer’s withholding of work from its employees. Strikes and lockouts are powerful bargaining tools only permitted by the NLRA when negotiations on labor agreements have reached an impasse. 1 LAB. & EMP. L. § 20.01, LexisNexis (database updated 2022).

impasse, it can file an unfair labor practice claim with the NLRB, which would then make a factual determination.⁵³

If, at any time during the term of a CBA, an “employer modifies the terms of the CBA before its expiration without following the guidelines set forth in the act, it commits an ‘unfair labor practice.’”⁵⁴ Even after the CBA’s expiration, an employer is held to certain continuing obligations until a new CBA is negotiated.⁵⁵ Violating these “status quo obligations” is similarly prohibited by the NLRA.⁵⁶ The status quo obligations that survive expiration preserve certain core terms of the CBA, such as wages.⁵⁷ Post-expiration obligations are statutory, rather than contractual, even though their terms are based on the expired contract.⁵⁸ A unilateral change

⁵³ Pasquale et al., *supra* note 44, at 116. To determine

whether [an] impasse has occurred, the NLRB and courts . . . consider several factors, including: (i) the parties’ bargaining history; (ii) the good faith of the parties in negotiations; (iii) the fluidity of the parties’ positions; (iv) the demonstrated willingness to consider the issue further; (v) the continuation of bargaining; (vi) statements or understandings of the parties concerning the existence of impasse; [and] (vii) the importance of the issue(s) and the extent of the differences[.]

among others. *Id.* at 117–18 (internal footnotes and citations omitted).

⁵⁴ Dawson, *supra* note 3, at 105.

⁵⁵ Pasquale et al., *supra* note 44, at 153–54; see *Finley Hosp. & Serv. Emps. Int’l Union, Loc. 199*, 362 N.L.R.B. 915, 917 (2015), *overruled on other grounds sub nom.*, *Finley Hosp. v. NLRB*, 827 F.3d 720 (2016).

⁵⁶ *In re Trump Ent. Resorts, Inc. (Trump I)*, 519 B.R. 76, 86 (Bankr. D. Del. 2014) (emphasis omitted), *aff’d sub nom. In re Trump Ent. Resorts Unite Here Loc. 54*, 810 F.3d 161 (3d Cir. 2016).

⁵⁷ See *Finley Hosp. v. NLRB*, 827 F.3d 720 (2016) (citing *NLRB v. Katz*, 369 U.S. 736, 743, 746 (1962)).

⁵⁸ See *Finley Hosp. & Serv. Emps. Int’l Union, Loc. 199*, 362 N.L.R.B. at 917 (stating that while the contractual obligations of an employer cease after expiration, the employer has a statutory obligation to maintain the status quo and may not make unilateral changes to the terms and conditions of employment); see also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 206 (1991) (referring to the difference between the statutorily-imposed terms of an expired agreement and the contractual terms of an unexpired agreement as “elemental”). Maintaining the “status quo” refers to

in employment conditions after expiration is *statutorily* prohibited because it amounts to a refusal to bargain and constitutes an unfair labor practice.⁵⁹ This requirement serves to maintain labor peace even after a CBA's expiration, and to prohibit the employer from allowing the CBA to lapse in an effort to avoid negotiation. Hence, to implement a new CBA, the parties must re-negotiate under the same process described above.

C. Conflict Between Labor and Bankruptcy Law

The Bankruptcy Code often disrupts other laws.⁶⁰ Indeed, it is designed in part to override certain contractual obligations of the debtor in order to relieve them of credit agreements they can no longer honor.⁶¹ At the same time, a guiding principle adopted by bankruptcy judges is to upset state law as little as possible.⁶² Professor Ronald Mann has

the requirement that both unions and employers to adhere to certain longstanding practices while negotiating a new agreement. 1 LAB. & EMP. L. *supra* note 52, at § 12.02. This requirement not only benefits employees by ensuring continuation of core working conditions and wages, but also allows the employer to make routine changes that are consistent with longstanding practice. *Id.*

⁵⁹ See *Finley Hosp. & Serv. Emps. Int'l Union, Loc. 199*, 362 N.L.R.B. at 916.

⁶⁰ Macey & Salovaara, *supra* note 15 (describing how bankruptcy law conflicts with and disrupts federal environmental regulations).

⁶¹ For example, discharge of claims in bankruptcy court allows the contractual rights created by the reorganization plan to supersede pre-bankruptcy contracts. *Chapter 11—Bankruptcy Basics*, U.S. CTS., *supra* note 12; see also Andrew, *supra* note 25, at 853–54 (“Discharge operates for the benefit of the debtor.”); *supra* Section II.A (discussing contract rejection).

⁶² *Butner v. United States*, 440 U.S. 48, 55 (1979) (“Unless some federal interest requires a different result, there is no reason why [state law] interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding.”); *In re Int'l Mgmt. Assocs., LLC*, 495 B.R. 96, 102 (Bankr. N.D. Ga. 2013) (“To the extent that a bankruptcy court has discretion to choose whether to apply the forum state’s or the federal choice of law rules in a bankruptcy proceedings in which state law determines the rights of the parties, this Court concludes that it can exercise

argued that the interests of the bankruptcy process are consistently subordinated to “competing state and federal interests.”⁶³ However, tensions still arise in bankruptcy proceedings with both state and federal law when the goals of competing statutes are at odds.⁶⁴

The Proceduralists and the Traditionalists, two groups of legal scholars, disagree as to the proper purpose of bankruptcy law in the face of such conflicts. Proceduralists advocate for identical asset distribution rules within the state law forum and the bankruptcy forum.⁶⁵ This position leads to favoring secured creditors within bankruptcy because of their state law foreclosure rights.⁶⁶ Indeed, Proceduralists are characterized as arguing that “bankruptcy should aim exclusively to maximize asset values” for the benefit of secured creditors.⁶⁷ Traditionalists, in contrast, see bankruptcy as a way to further social values and federal policy goals.⁶⁸ This camp is

its discretion to apply the federal rule only if it identifies an appropriate federal interest that justifies the use of the federal rule.”).

⁶³ RONALD J. MANN, *BANKRUPTCY AND THE U.S. SUPREME COURT* 99 (2017).

⁶⁴ See, e.g., Notes, *Switching Priorities: Elevating the Status of Tort Claims in Bankruptcy in Pursuit of Optimal Deterrence*, 116 HARV. L. REV. 2541, 2542 (2003) (arguing that the bankruptcy system undermines the functioning of the incentives and deterrence mechanisms of tort law); William H. Lake, *Conflict: The Bankruptcy Act v. State Statutes*, 10 LOY. L.A. L. REV. 753, 755 (1977) (noting the conflicts between bankruptcy law and certain provisions of the Uniform Commercial Code and between bankruptcy and state statutes); Macey & Salovaara, *supra* note 15 (arguing that the bankruptcy system undermines federal environmental law).

⁶⁵ See Douglas G. Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren*, 54 U. CHI. L. REV. 815, 822–23 (1987).

⁶⁶ See *id.*

⁶⁷ Macey & Salovaara, *supra* note 15, at 890–91; see also Zachary Liscow, *Counter-Cyclical Bankruptcy Law: An Efficiency Argument for Employment-Preserving Bankruptcy Rules*, 116 COLUM. L. REV. 1461, 1467–68 (2016). Proceduralists are so named because they focus on procedural parity of asset distribution priority inside and outside of bankruptcy, rather than substantive rights. Baird, *supra* note 64, at 825 (“It is possible to criticize worlds with multiple avenues of enforcement without taking a position on the wisdom of the substantive rights of any of the players.”).

⁶⁸ Macey & Salovaara, *supra* note 15, at 892; Liscow, *supra* note 67, at 1467.

prone to “continuation bias,” which favors reorganizing the firm instead of liquidating in order to preserve employment.⁶⁹ Elizabeth Warren and Douglas Baird published a pair of influential articles in 1987, which advocated for a Traditionalist approach and a Proceduralist approach to bankruptcy policy, respectively.⁷⁰ Warren points to congressional comments on the Bankruptcy Code to argue that, as opposed to state law debt collection, bankruptcy is intended to serve the interests of parties other than the creditors.⁷¹ She notes that Congress has acknowledged that the community, employees, suppliers, and customers are all affected when a business dissolves.⁷² In particular, Warren points out that employees are specially provided for in bankruptcy, likely because they are rarely able to diversify employment risk and therefore the insolvency of their employer is likely to affect them most viscerally.⁷³ In contrast to Warren’s distributive approach, Baird argues that the “legal rule to distribute losses in bankruptcy” and the “legal rule that distributes the same loss outside of bankruptcy” should be the same.⁷⁴ He argues that secured creditors should receive the “same deal” as they are entitled to outside of bankruptcy, and that this value should be based on liquidation value.⁷⁵ Baird’s view ultimately favors secured creditors over other stakeholders.⁷⁶

This Note embraces neither the Proceduralist nor the Traditionalist view in their entirety. Rather, it proposes that congressional intent and laws outside bankruptcy law collide

⁶⁹ Macey & Salovaara, *supra* note 15, at 892.

⁷⁰ Warren, *supra* note 19; Baird, *supra* note 65.

⁷¹ Warren, *supra* note 19, at 788.

⁷² *Id.*

⁷³ *Id.* at 790.

⁷⁴ Baird, *supra* note 65, at 822–23.

⁷⁵ *Id.* at 832

⁷⁶ *Id.* at 822. An emphasis on increasing value for secured creditors encourages practices like asset sales, which allows debtors to sell assets free and clear of all claims and interests. Ultimately these “fire sales” can destroy value by breaking up assets which are worth more together. Andrew B. Dawson, *Labor Activism in Bankruptcy*, 89 AM. BANKR. L.J. 97, 100 (2015).

in ways that do not directly fit into the paradigm created by these two approaches. In the case of a unionized workforce, enforcing rights owed to the creditor-employees outside of bankruptcy would not necessarily be considered efficient or benefit secured creditors. Baird's Proceduralist emphasis on parity of rights within and without of bankruptcy does not consider the situation in which the creditor is a unionized workforce.⁷⁷ This Note posits that creditors in bankruptcy should have their out-of-bankruptcy rights protected as much as possible, regardless of perceived value maximization, unless Congress has given express authority to the bankruptcy judge to eliminate an out-of-bankruptcy right.

Apart from the Proceduralist and Traditionalist schools, other commentators have argued "that it is often impossible to isolate bankruptcy's goals from other competing statutory mandates" and that reorganization of the firm should not be the aim if reorganizing would "undercut [other] congressional goals."⁷⁸ Still others argue that "traditionalist" goals, such as preserving employment, can actually be macroeconomically efficient if considered when unemployment is high.⁷⁹ These differing views of the underlying purpose of bankruptcy law are likely to implicate whether the goals of other statutes should be honored or overshadowed in bankruptcy.⁸⁰

In the case of labor law within bankruptcy, it is unclear which of the NLRA or the Bankruptcy Code should supersede the other, and which should be subjugated. Given that "[t]here is no supremacy clause to tell the courts which law should prevail," courts have resorted to statutory interpretation,

⁷⁷ See Baird, *supra* note 65, at 817–18. However, though he did not address the specific case of a unionized debtor workforce, Baird's argument in favor of a single system of loss distribution both within and outside of bankruptcy could be read to support preserving the on-the-market negotiation process between unions and employers that occurs outside of bankruptcy. *See id.* at 822.

⁷⁸ Macey & Salovaara, *supra* note 15, at 891–92.

⁷⁹ See Liscow, *supra* note 67, at 1467.

⁸⁰ See Warren, *supra* note 19, at 796 (pointing out that determining the policy rationale underlying the Bankruptcy Code has real impact on how the code is administered).

legislative history, and intuition to square these two laws.⁸¹ Though the NLRA contains a conflict of laws provision that stipulates its supremacy over the 1898 Bankruptcy Act,⁸² this provision was rendered moot with the passage of the 1978 Bankruptcy Code.⁸³ Indeed, because the Code contains no provision suggesting that labor law would supersede it, some courts have interpreted this to suggest that the Code, since it was enacted more recently, trumps the NLRA.⁸⁴

Conflict between the goals of labor law and bankruptcy law emerges in several key areas during a reorganization. For example, while CBA bargaining and other NLRB processes take time, bankruptcy proceedings are under significant time constraints. While the NLRA allows workers to bargain for higher wages, bankruptcy is intended to help debtors cut costs and take other measures to preserve the vitality of struggling companies. Moreover, bankruptcy's power to eliminate burdensome contractual obligations contrasts with the statutory duties placed on companies by the NLRA, which invariably protect expensive labor contracts.

These tensions came to a head in 1984 in the Supreme Court case *NLRB v. Bildisco & Bildisco*.⁸⁵ In 1980, Bildisco, a small, New Jersey-based building material distributor, filed

⁸¹ West, *supra* note 24, at 68–69.

⁸² 29 U.S.C. § 165 (2018).

⁸³ Adam E. Ekbom, *Unbalanced Bargaining: Trump Entertainment Resorts United Here Local 54 and Expired Collective Bargaining Agreements Under § 1113*, 35 EMORY BANKR. DEV. J. 547, 582–83 (2019).

⁸⁴ *Trump II*, 810 F.3d at 167 (“We read these two statutory frameworks *seriatim*, and assume that Congress passed each subsequent law with full knowledge of the existing legal landscape.” (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990))). While this is an accepted way of determining the authority of conflicting statutes, see Quintin Johnstone, *An Evaluation of the Rules of Statutory Interpretation*, 3 U. KAN. L. REV. 1, 3 (1954), this Note argues that it is unnecessary when the text of § 1113 is clear.

⁸⁵ 465 U.S. 513 (1984), *superseded by statute*, Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub L. 98-353, § 541(a), 98 Stat. 333, 390 (codified at 11 U.S.C. § 1113), *as recognized in* *Mason v. Off. Comm. of Unsecured Creditors (In re FBI Distribution Corp.)*, 330 F.3d 36 (1st Cir. 2003).

for bankruptcy and sought to reject their CBA.⁸⁶ At issue was whether the debtor could, through § 365 of the Bankruptcy Code, reject its employees' CBA, and whether unilateral changes to working conditions made by the employer after the filing constituted an unfair labor practice.⁸⁷ The Court ruled that the requirements of the NLRA were to be "subordinated to the exigencies of bankruptcy."⁸⁸ More specifically, the Court ruled that a debtor could unilaterally reject a CBA in bankruptcy because rejection was governed under § 365, which applies to the rejection of executory contracts.⁸⁹ While the Court mandated that the application for rejection be evaluated with a standard slightly more stringent than the business judgement rule,⁹⁰ critics responded that this dictum was meaningless when combined with the grant of unilateral rejection.⁹¹

Bildisco was a puzzling decision considering the unique nature of CBAs. In contrast to agreements that emerge from a completely voluntary, mutually desired contractual relationship, CBAs are born out of a statutorily-imposed relationship that mandates good faith bargaining.⁹² Moreover, while CBAs may be "executory" in the sense that there are continuing obligations on both sides, it can be argued that they are not "executory" because there is no way to breach a CBA that would excuse performance by the other party.⁹³ The relationship and obligations mandated by CBAs continue despite breach, and any unilateral change would be considered an unfair labor practice and be adjudicated by the NLRB.

⁸⁶ *Id.* at 518.; see also James J. White, *The Bildisco Case and the Congressional Response*, 30 WAYNE L. REV. 1169, 1172 (1984).

⁸⁷ *Bildisco*, 456 U.S. at 518–19.

⁸⁸ *Id.* at 533.

⁸⁹ *Id.* at 531–32.

⁹⁰ *Id.* at 523–25.

⁹¹ See Pasquale et al., *supra* note 44, at 120–21.

⁹² West, *supra* note 24, at 69.

⁹³ See *id.* at 78.

D. Section 1113

The same day the Supreme Court handed down the *Bildisco* decision, Congressman Peter Rodino introduced a bill in the House of Representatives to overturn the ruling.⁹⁴ At one point, there were three separate bills on the floor all intending to “clarify” *Bildisco*.⁹⁵ A compromise was eventually reached, leading to § 1113 of the Code.⁹⁶ While the provision was in some ways a “pro-labor” reaction to *Bildisco*,⁹⁷ the compromise resulted in an addition to the Code which was not a “clear victory” for either labor or business interests.⁹⁸ Section 1113 eliminated a firm’s ability to unilaterally reject a CBA upon filing for bankruptcy, but it also codified *Bildisco*’s holding that a debtor could reject a CBA—albeit after negotiation and judicial approval.⁹⁹ Despite its ambiguous legislative history, § 1113 is thought to have been “enacted to prevent companies from using bankruptcy as a strategic tool in its dealings with labor.”¹⁰⁰

To that end, § 1113 implements an expedited negotiation process for insolvent firms seeking to modify or reject their CBAs. First, the debtor is required to make a proposal to the union or employee representative and provide the union with all relevant information so that the union can adequately

⁹⁴ 130 CONG. REC. 2989 (1984) (“The collective bargaining agreement would not be subject to rejection in a chapter 11 case, unless the jobs covered by the collective bargaining agreement would otherwise be lost and any financial reorganization would fail.”); see Dawson, *supra* note 3, at 106 (citing *In re Century Brass Prods., Inc.*, 795 F.2d 265, 272 (2d Cir. 1986)).

⁹⁵ Pasquale et al., *supra* note 44, at 122; Babette A. Ceccotti, *Lost in Transformation: The Disappearance of Labor Policies in Applying Section 1113 of the Bankruptcy Code*, 15 AM. BANKR. INST. L. REV. 415, 422 (2007).

⁹⁶ Ceccotti, *supra* note 95; see Bankruptcy Amendments and Federal Judgeship Act of 1984 § 541(a), 11 U.S.C. § 1113(a) (2018).

⁹⁷ See *id.* at 424 (discussing how contemporaneous participants in the drafting process considered the substance to be backed by the labor movement).

⁹⁸ Dawson, *supra* note 3, at 106.

⁹⁹ 11 U.S.C. § 1113(a); see also *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); Dawson, *supra* note 3, at 106.

¹⁰⁰ Ceccotti, *supra* note 95, at 418.

assess the proposal.¹⁰¹ This proposal must also treat all affected parties “fairly and equitably.”¹⁰² The bankruptcy trustee or debtor in possession must then meet the union representative to “confer in good faith in attempting to reach mutually satisfactory modifications of such agreement.”¹⁰³ After this process, the debtor may submit to the court an application for rejection or modification of the CBA, which the judge may grant if the union refuses to accept the proposal without “good cause” and if the “balance of the equities clearly favors rejection of such agreement.”¹⁰⁴ After a judge has authorized rejection, debtors can implement new labor terms in one of two ways. Some courts hold that the employer can implement its “last, best offer” that it proposed in negotiations.¹⁰⁵ Other courts find that the employer can implement terms found in any proposals made to the union before the application for rejection was filed.¹⁰⁶ To complement this process, § 1113(e) allows the court to

¹⁰¹ 11 U.S.C. §§ 1113(b)(1)(A), (B).

¹⁰² *Id.* § 1113(b)(1)(A).

¹⁰³ *Id.* § 1113(b)(2).

¹⁰⁴ *Id.* §§ 1113(c)(2), (3).

¹⁰⁵ Jacob L. Kaplan, *Considering Which Labor Terms a Debtor May Impose on Its Union After Rejecting a Collective Bargaining Agreement Under § 1113*, 30 EMORY BANKR. DEVS. J. 207, 220 (2013) (citing *N.Y. Typographical Union No. 6 v. Maxwell Newspapers, Inc.* 981 F.2d 85, 92 (2d Cir. 1992)); *In re Condere Corp.*, 228 B.R. 615 (Bankr. S.D. Miss. 1998).

¹⁰⁶ *Id.* at 223 (citing Advice Memorandum from the NLRB Office of the Gen. Counsel to Michael Dunn, Reg'l Dir. of Region 16, AppleTree Mkts., Inc., No. 16-CA-15724, 1994 WL 694254 (Nov. 30, 1992) [hereinafter AppleTree Mkts., Inc. Memo]; Advice Memorandum from the NLRB Office of the Gen. Counsel to Frederick Calatrello, Regional Director of Region 8, Amherst Sparkle Mkt., No. 8-CA-20323, 1988 WL 489921 (Feb. 25, 1988); Advice Memorandum from the NLRB Office of the Gen. Counsel to W. Bruce Gillis, Jr., Reg'l Director of Region 27, Mile-Hi Metal Sys., Inc., No. 27-CA-9241 et al., 1997 WL 731480 (July 30, 1986)). For the short period between rejection of a CBA and implementation of the new terms of employment, the status quo as defined by the rejected CBA must be preserved. In this way, rejection through § 1113 is equivalent to expiration of a CBA on its own terms. AppleTree Mkts., Inc. Memo, *supra*, at *5, 8 (noting that rejection is equivalent to expiration and that status quo obligations survive rejection until the new, court-approved terms are implemented.).

authorize interim changes to a CBA that “continues in effect”¹⁰⁷ when it is essential to the debtor’s continued business or “in order to avoid irreparable damage to the estate.”¹⁰⁸

While § 1113 may seem straightforward, it has fomented numerous and varied interpretations.¹⁰⁹ Indeed, critics have decried it as “not a masterpiece of draftsmanship,”¹¹⁰ “unworkable,” “flawed,” and in need of a “congressional overhaul.”¹¹¹ Both labor and business advocates suggest a re-

¹⁰⁷ 11 U.S.C. §1113(e) (2018). The meaning of this phrase is discussed Part III, *supra*.

¹⁰⁸ 11 U.S.C. §1113(e).

¹⁰⁹ For example, there is ample scholarly debate on what constitutes “necessary” for the purposes of CBA alteration or rejection. See Christopher D. Cameron, *How “Necessary” Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 845–46, 846 n.36 (1993).

¹¹⁰ *In re Am. Provision Co.*, 44 BR 907, 909 (Bankr. D. Minn. 1984).

¹¹¹ Marc S. Kirschner et al., *Tossing the Coin Under Section 1113: Heads or Tails, the Union Wins*, 23 SETON HALL L. REV. 1516, 1519 n.13, 1554 (1993). *American Provision Co.* also established the nine-factor test that courts use to evaluate a debtor’s application for rejection of a CBA. The factors require that

1. [t]he debtor in possession must make a proposal to the Union to modify the collective bargaining agreement[;]
2. [t]he proposal must be based on the most complete and reliable information available at the time of the proposal[;]
3. [t]he proposed modifications must be necessary to permit the reorganization of the debtor[;]
4. [t]he proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably[;]
5. [t]he debtor must provide to the Union such relevant information as is necessary to evaluate the proposal[;]
6. [b]etween the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union[;]
7. [a]t the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement[;]

write.¹¹² While pro-business voices argue that under the current statute unions always win,¹¹³ labor advocates have noted that rejection applications almost always result in pro-debtor outcomes.¹¹⁴ Commentators worried about the strength of the NLRA's protections perceive a resurgence of bankruptcy-led union busting reminiscent of the time before § 1113 when CBAs could be unilaterally rejected through § 365.¹¹⁵ Most visibly, the airline industry's bankruptcies have allegedly been used to "ravage" CBAs.¹¹⁶ "Notwithstanding [the] congressional intent" of § 1113, airlines have serially filed for bankruptcy in order to reject CBAs and lower the cost of labor.¹¹⁷ While wages for pilots and flight attendants drop precipitously after bankruptcies, executive compensation remains high.¹¹⁸ That airlines maintain outsized executive

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8. [t]he Union must have refused to accept the proposal without good cause; and]
 9. [t]he balance of the equities must clearly favor rejection of the collective bargaining agreement."

In re Am. Provision Co. at 909.

¹¹² See Ekbon, *supra* note 83, at 583; Kirschner et al., *supra* note 111, at 1554.

¹¹³ Kirschner et al., *supra* note 111, at 1534 (arguing that unions come out on top in bankruptcy because debtors must implement their last best offer in negotiations, meaning that unions have little to lose when pushing for more concessions).

¹¹⁴ Dawson, *supra* note 3, at 118 ("Nonetheless, the outcome of the litigated motions—resulting in ultimate victory for the debtor in every case—suggests that the legal standards are actually irrelevant.").

¹¹⁵ See Ceccotti, *supra* note 95, at 435 (arguing that airline debtors use §§ 1113 and 1114 to cut labor and employee costs). The period leading up to *Bildisco* was devastating for labor. Bankrupt companies were generally able to unilaterally terminate CBAs, and labor was further injured by the "developing perception that many of the bankruptcies terminating labor agreements had been successful." MANN, *supra* note 63, at 101–02.

¹¹⁶ *Protecting Employees in Airline Bankruptcies: Hearing Before the Subcomm. on Com. and Admin. L. of the H. Comm. on the Judiciary*, 111th Cong. 5 (2009) (statement of Chelsey B. Sullenberger, III, Captain, U.S. Airways Flight 1549).

¹¹⁷ *Id.* at 1–2 (statement of Rep. Steve Cohen).

¹¹⁸ *Id.* at 13 (statement of Arnold D. Gentile, Gov't Affs. Chairman, U.S. Airline Pilot Assoc.); Charles B. Craver, *The Impact of Financial Crises*

compensation undermines the argument that airlines need these labor concessions in order to continue operating.¹¹⁹

Section 1113 is also employed in other industries to dispose of CBAs. A recent decision by a federal district judge in Alabama approving the rejection of a mineworkers' CBA without requiring the employer to bargain with the union shows the flimsy protections provided under § 1113.¹²⁰ An older, though telling, case allowed a meat-packing plant's rejection of a CBA even though the debtor's net worth was \$67 million.¹²¹ Indeed, despite the different standards applied in the various courts, applications for rejection are invariably approved.¹²² Clearly, there is no parity between labor law and bankruptcy law when the two meet in § 1113: Bankruptcy's goals of reorganization trump the NLRA's mission to provide statutory protections to organized workers.¹²³ Moreover, this interpretation of § 1113 is expanding. Courts are increasingly reading the statute to allow for rejection of expired collective bargaining agreements within bankruptcy proceedings and thus increasing the scope of § 1113's potential for abuse.

upon Collective Bargaining Relationships, 56 GEO. WASH. L. REV. 465, 471 (1988).

¹¹⁹ See generally Terry G. Sanders, *The Runway to Settlement: Rejection of Collective Bargaining Agreements in Airline Bankruptcies*, 72 BROOK. L. REV. 1401 (2007) (arguing that airlines require labor-related concessions in bankruptcy).

¹²⁰ *In re Mission Coal Co., LLC*, No. 18-04177-TOM11, 2019 WL 1024933, at *28 (Bankr. N.D. Ala., Mar. 1, 2019); see Peter D. DeChiara, *Alabama Bankruptcy Court Allows Rejection of Mineworkers' Contract*, COHEN WEISS & SIMON (Mar. 2019), <https://www.cwsny.com/blog/alabama-bankruptcy-court-allows-rejection-of-mineworkers-contract> [<https://perma.cc/6FGA-6X58>] ("The judge dutifully undertook the multi-factor analysis often used in Section 1113 cases, but applied it in such a way that the outcome was never in doubt. Arguments the U[nited] M[in]e W[orkers] raised fell like pins before a bowling ball.").

¹²¹ Craver, *supra* note 4, at 470–71.

¹²² Dawson, *supra* note 3, at 103.

¹²³ See *In re Wheeling-Pittsburgh Steel Corp.*, 50 B.R. 969, 978 (Bankr. W.D. Pa. 1985) ("The paramount goal in a Chapter 11 proceeding is reorganization of the company, not preservation of the collective bargaining agreement."), *vacated on other grounds sub nom.*, *Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am.*, 791 F.2d 1074 (3rd Cir. 1986).

III. COURTS' INTERPRETATIONS OF SECTION 1113

This Part examines how courts have interpreted § 1113(e) in several key decisions. It explains the genesis and development of the judicial interpretation of § 1113(e) that allows debtors to reject expired CBAs. First, this Part lays out the text of § 1113(e). Next, it touches on how various courts have interpreted it. Finally, this Part explores in depth the recent line of cases which culminated in the Third Circuit's 2016 decision in *Trump Entertainment*.

In determining whether § 1113 authorizes a debtor to reject an expired CBA, courts have been surprisingly inconsistent in their holdings and reasoning. Courts generally look to § 1113(e) when deciding whether the Bankruptcy Code grants them the authority to allow the debtor to modify, reject, or assume expired CBAs. Section 1113(e) reads:

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.¹²⁴

Some courts have held that 1113(e) allows only for temporary changes to expired CBAs,¹²⁵ while others have decided that the language in § 1113(e) allows for rejection and

¹²⁴ 11 U.S.C. § 1113(e) (2018). When making a § 1113(e) motion for interim relief, debtors "bear the burden of proving the extraordinary circumstances warranting emergency relief." *In re 710 Long Ridge Rd. Operating Co., II*, No. 13-13653(DHS), 2013 WL 796721, at *12 (Bankr. D. N.J. Mar. 4, 2013) (quoting *In re United Press Int'l, Inc.*, 134 B.R. 507 (Bankr. S.D.N.Y. 1991)).

¹²⁵ See, e.g., *In re Hostess Brands, Inc.*, 477 B.R. 378, 382 (Bankr. S.D.N.Y. 2012); *In re Chas. P. Young Co.*, 111 B.R. 410, 415 (Bankr. S.D.N.Y. 1990).

assumption of expired CBAs through §§ 1113(b) and 1113(c) provisions.¹²⁶ Still another court has held that § 1113(e) in no way implicates expired CBAs, and thus disallows rejection, assumption, and temporary modification of expired agreements.¹²⁷ One court overrode the language of the statute entirely, relying solely on policy to justify allowing rejection of a debtor's expired CBA.¹²⁸

While there is a split among the lower courts of several circuits, the Third Circuit is the only circuit court of appeals to have decided the issue.¹²⁹ Nevertheless, the wide range in methods of interpretation throughout the lower courts means that an eventual circuit conflict is likely. An examination of these varying lower court opinions is useful in assessing the reasoning behind—and the solution to—this conflict. On the whole, courts are increasingly split on their interpretation of § 1113(e) to allow for rejection of expired CBAs.¹³⁰ In light of this variation, it is especially important to highlight and critique the courts' varying interpretations of § 1113's text and resulting consequences, as these decisions expand debtors' ability to nullify the goals of labor law.

The cases that analyze § 1113(e) often do not clearly or accurately define terms that are essential to divining its

¹²⁶ See, e.g., *Trump II*, 810 F.3d at 161; *In re Karykeion, Inc.*, 435 B.R. 663, 675–76 (Bankr. C.D. Cal. 2010).

¹²⁷ *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28, 29 (Bankr. E.D. Wis. 1985).

¹²⁸ *In re Ormet Corp.*, 316 B.R. 665 (Bankr. S.D. Ohio 2004).

¹²⁹ *Trump II*, 810 F.3d at 164. The Ninth Circuit Bankruptcy Appeals Panel has seen two cases on this issue, but those can still be appealed to the Ninth Circuit, so they do not have the same weight as circuit cases. See 28 U.S.C. § 158(b); cf. *Off. Comm. of Unsecured Creditors v. Hancock Park Cap. II, L.P.*, 714 F.3d 1141 (9th Cir. 2013) (overruling a decision by the Ninth circuit Bankruptcy Appeals Panel).

¹³⁰ Compare *In re San Rafael Baking, Co.*, 219 B.R. 860 (B.A.P. 9th Cir. 1998) (holding that § 1113 does not allow for rejection of expired CBAs), *In re Hostess Brands, Inc.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (same), *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 29 (Bankr. E.D. Wis. 1985) (same), and *In re Chas. P. Young Co.*, 111 B.R. 410 (Bankr. S.D.N.Y. 1990) (same); with *Trump II* (holding that § 1113(e) allows rejection of expired CBAs); *In re 710 Long Ridge Rd. Operating Co., II, LLC (Long Ridge II)*, 518 B.R. 810 (Bankr. D.N.J. 2014) (same); *In re Karykeion*, 435 B.R. at 663 (same).

meaning. Few of the cases that deal with § 1113(e) examine the statutory language or construction closely.¹³¹ Instead, these courts rely on policy, intuition, or loosely gesture to the minimal harm done to labor law to support their conclusion.¹³² Courts have implicitly or explicitly asserted definitions of terms and phrases in § 1113(e) that are broad or inconsistent with other courts' interpretations. First, courts have ignored or misinterpreted the requirement for changes to a CBA ordered under § 1113(e) to be *interim* modifications.¹³³ Second, some courts have read the phrase "continues in effect" into the rest of § 1113, despite its presence only in subsection (e), to argue that a CBA and a CBA that "continues in effect" are identical in meaning.¹³⁴ The trend toward an atextual interpretation of § 1113 is not only inappropriate because it departs from the statute's plain meaning; it also has negative policy implications. It allows for inequitable application of § 1113 to extinguish terms of employment that survive expiration of CBAs—eliminating statutory protections established by the NLRA.

One line of cases that favors a policy analysis to the exclusion of rigorous statutory interpretation includes *In re Karykeion, Inc.*,¹³⁵ *In re 710 Long Ridge Road Operating Co.*,

¹³¹ See, e.g., *Trump II*, 810 F.3d at 168–69 ("Following the lead of the Supreme Court to take a broad, contextual view of the Bankruptcy Code, we will not embark, as the parties do, on a hyper-technical parsing of the words and phrases that comprise § 1113, or focus on a meaning that may seem plain when considered in isolation." (internal footnote omitted)). An exception to this lack of attention to the text is *In re Hostess Brands*, which comes to the same conclusion as this Note by interpreting the statute's text and construction. *In re Hostess Brands, Inc.*, 477 B.R. at 382..

¹³² See, e.g., *Trump I*, 519 B.R. at 86–87 (holding that requiring the debtor to comply with the NLRA-imposed bargaining process would "thwart" the Bankruptcy Code's "overriding policy" and that the practical implications of allowing rejection of expires CBAs is "slight"); *In re N.W. Holding Co.*, 533 B.R. 753, 758 (Bankr. E.D. Mo. 2015) (holding that an intuition that the NLRA bargaining process would take longer than the § 1113 bargaining process justifies allowing the debtor to submit an application for rejection for an expired CBA under § 1113).

¹³³ See *infra* Part III.B.

¹³⁴ See *infra* Part IV.B.ii.

¹³⁵ 435 B.R. 663, 675 (Bankr. C.D. Cal. 2010).

LLC,¹³⁶ *In re Trump Entertainment Resorts Unite Here Local 54*,¹³⁷ and *In re N.W. Holding Co.*¹³⁸ Together, these cases represent a shift in the enforcement of § 1113 toward debtor-friendly outcomes. *In re Karykeion, Inc.* was the first of these cases, and set the stage and interpretive framework for the other three. In *Karykeion*, the court allowed a bankrupt hospital to reject its expired collective bargaining agreement.¹³⁹ In doing so, it relied primarily on policy concerns, misinterpreted § 1113(e), and wrongly relied upon wording in the *Bildisco* majority opinion. These misinterpretations survived and mutated in the subsequent cases.

A. *In re Karykeion*

In *Karykeion*, the Central District of California acknowledged that “[t]he rejection of a CBA is a rejection of one of the most binding of contracts in our legal system and not a matter to be treated lightly.”¹⁴⁰ With that being noted, the case before the court was a situation which mandated increased attention to the needs of the debtor. The debtor was a hospital in a poor community in California, which was operating at a monthly loss of \$500,000.¹⁴¹ In addition to jeopardizing the jobs of many employees of the hospital during a recession, the bankruptcy threatened an indigent community’s access to healthcare.¹⁴² Judge Tighe was straightforward about her desire to keep the debtor in operation for these reasons.¹⁴³

With these considerations in mind, the court reasoned that holding the debtor to the terms of the expired CBA—in other words, *not* allowing a debtor to reject an expired CBA—would

¹³⁶ 518 B.R. 810, 833–39 (Bankr. D.N.J. 2014).

¹³⁷ 810 F.3d 161, 168–69 (3d Cir. 2016).

¹³⁸ 533 B.R. 753, 758 (Bankr. E.D. Mo. 2015).

¹³⁹ *In re Karykeion, Inc.*, 435 B.R. 663, 684–85 (Bankr. C.D. Cal. 2010).

¹⁴⁰ *Id.* at 666.

¹⁴¹ *Id.* at 668.

¹⁴² *Id.* at 680.

¹⁴³ *Id.*

cause “residual effects” that would “greatly impede” the overriding goal of the Bankruptcy Code.¹⁴⁴ The court stated that the NLRA-imposed negotiation process would be lengthier and more costly than the process laid out by § 1113.¹⁴⁵ It asserted that the debtor would be “locked into” the labor rates dictated by the expired CBA until the NLRB declared an impasse.¹⁴⁶ Thus, in order to release the hospital from this funds-draining process, the court held that the expired CBA should be rejected through the “procedures” imposed by § 1113(e).¹⁴⁷

The court looked to both the “language and purpose” of § 1113 to hold that it allows for the rejection of expired CBAs.¹⁴⁸ First, the court examined the language of the statute. It held that the phrase “continues in effect” is a term of art used in labor law that refers to the period of time between expiration of a CBA and when the NLRB rules that there is an impasse in negotiations and that the parties are no longer subject to the CBA’s continuing terms.¹⁴⁹ The court asserted that the phrase “continues in effect,” which is present only in § 1113(e), must be read “in conjunction” with the last sentence of the statute, § 1113(f).¹⁵⁰ Section 1113(f), provides that “[n]o 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.”¹⁵¹ Reading these two subsections in conjunction, the court held that “[s]uch language is intended to give the debtors the authority to reject the continuing

¹⁴⁴ *Id.* at 675.

¹⁴⁵ *Id.* at 675–76.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 675.

¹⁴⁸ *Id.* at 674.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* (first quoting 11 U.S.C. § 1113(e) (2018)).

¹⁵¹ 11 U.S.C. § 1113(f).

effects of expired collective bargaining agreements through compliance with § 1113 instead of the NLRA.”¹⁵²

However, the court did not explain why these two subsections provide the basis for allowing rejection of expired CBAs. One possible explanation is that the court found that § 1113(f) requires all terminations or alterations to occur through the § 1113(c) process, including any alterations to expired agreements. The problem with this interpretation is that § 1113(e) provides its own shortened process for interim changes to CBAs that continue in effect,¹⁵³ so § 1113(f) can be satisfied without requiring all modifications to go through the § 1113(c) process.

Second, the court divined the purpose of § 1113 by looking to *Bildisco*. The *Karykeion* court stated that § 1113 was passed in order to “codify and modify” *Bildisco*, and thus *Bildisco*’s reasoning is relevant to interpreting the statute.¹⁵⁴ The court reasoned that, because *Bildisco* appeared to give debtors the ability to modify or reject the “residual obligations” of a CBA, § 1113 must give debtors the same authority.¹⁵⁵ Finally, the court invoked the overarching purpose of bankruptcy: allowing a debtor to modify its existing obligations to prevent liquidation.¹⁵⁶

While the policy justifications in *Karykeion* are understandable considering the circumstances, the decision is wholly atextual.¹⁵⁷ The court read the word “interim” of out

¹⁵² *In re Karykeion*, 435 B.R. at 674–75. The court also acknowledged that the period when a collective bargaining agreement “continues in effect” encompasses unexpired agreements. *Id.* at 674.

¹⁵³ See 11 U.S.C. § 1113(e).

¹⁵⁴ *In re Karykeion*, 435 B.R. at 675.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 676.

¹⁵⁷ Indeed, when a § 363 sale is involved, as it was in *Karykeion*, Judge Robert Gerber argues that judges correctly rely on the “Common Law of Bankruptcy” to tailor decisions to account for the public good. Robert E. Gerber, *GM 10 Years Later: Some Musing on Who the Bankruptcy System’s Supposed to Help—And What Bankruptcy Judges Can Properly Do To Help Them* 6 (2019) (unpublished manuscript), <https://ncbjmeeting.org/2019/materials/When%20the%20Weak%20Link%20Breaks.pdf> [<https://perma.cc/32UB-CPR3>]. With little guidance in the text

§1113(e), and simultaneously read the phrase “continues in effect” into areas of the statute in which it does not appear. While the decision references the rejection “procedures” imposed by § 1113(e),¹⁵⁸ there is in fact no particular *rejection* process imposed by this subsection alone. Section 1113(e) requires notice, a hearing, and court approval, but this process is only applicable to “interim” modifications, not permanent rejections.¹⁵⁹ The court effectively read out the word “interim” from subsection (e) in its analysis, never addressing how this word may affect application of § 1113 to expired CBAs. In addition, by reading the phrase “continues in effect,” present only in subsection (e), in “conjunction” with subsection (f), the court imported this phrase into areas of the statute where it does not appear.¹⁶⁰ Indeed, the court stretched the language of the statute so much that it nearly re-writes it.

Next, the court relied on a misreading of *Bildisco* to support applying the § 1113(c) procedure to expired CBAs. While the court asserts that *Bildisco* suggested that debtors were able to modify the “residual obligations” resulting from an expired CBA,¹⁶¹ *Bildisco* in fact never refers to “residual obligations” either explicitly or implicitly. *Bildisco* includes references to “obligations under [a] collective bargaining agreement” and “contractual obligations”; yet residual obligations are never addressed.¹⁶² Moreover, *Bildisco* explicitly applies to *unexpired* CBAs—the court specifies that no party disputed that unexpired CBAs were executory contracts, and thus held that as an executory contract, an

of § 363, Judge Gerber suggests that judge-made law fills in the Code’s gaps. *Id.* at 6–7. He goes on to state, however, that “[n]obody would suggest, I think, that judge-made law could trump anything as to which the Code is specific.”

¹⁵⁸ *In re Karykeion*, 435 B.R. at 675. Instead, the process for negotiating and ultimately rejecting a CBA is laid out in subsections 1113(b), (c), and (d). *See* 11 U.S.C. § 1113.

¹⁵⁹ 11 U.S.C. § 1113(e).

¹⁶⁰ Subsection 1113(f) refers only to “collective bargaining agreement[s],” unlike § 1113(e) which refers to a period when a “collective bargaining agreement continues in effect.” 11 U.S.C. §§ 1113(e)–(f).

¹⁶¹ *In re Karykeion*, 435 B.R. at 675.

¹⁶² *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 518, 532 (1984)

unexpired CBA could be rejected through the § 365 process.¹⁶³ In addition, the *Karykeion* court's reliance on the reasoning of a controversial case that was quickly overturned by Congress is questionable.¹⁶⁴

Finally, the *Karykeion* decision oversimplifies labor law by distilling it only to the adjudication process overseen by the NLRB.¹⁶⁵ The court asserted that a debtor who is unable to reject an expired CBA would be "locked into" the established labor rates until the NLRB declared an impasse.¹⁶⁶ This assertion rejects the possibility of a negotiated agreement between the union and the employer. In fact, the NLRA intends for negotiations and agreements to happen on the market, ideally without any need for NLRB involvement.¹⁶⁷ The court assumed that the unions would not make concessions in negotiations, despite evidence that unions are typically understanding of their employers when they are in financial distress.¹⁶⁸

¹⁶³ *Id.* at 521–22.

¹⁶⁴ See *supra* Section II.D on Congress' push to enact § 1113 following *Bildisco*.

¹⁶⁵ The definition the court uses for the term "continues in effect" rules out the possibility of an independent agreement between the union and the debtor. See *Karykeion*, 435 B.R. at 674 ("The phrase refers to the time between the expiration of a CBA and the NLRB deciding that there is an impasse and the two parties are no longer bound by continuing effects of the agreement.")

¹⁶⁶ *Id.* at 675.

¹⁶⁷ *National Labor Relations Act*, NAT'L LAB. RELS. BD., <https://www.nlr.gov/guidance/key-reference-materials/national-labor-relations-act> [<https://perma.cc/6EKE-WPHG>] (last visited June 8, 2022) (The purpose of the NLRA is to "encourage collective bargaining by protecting workers' full freedom of association.")

¹⁶⁸ See, e.g., Richard B. Freeman & Morris M. Kleiner, *Do Unions Make Enterprises Insolvent?*, 52 INDUS. & LAB. REL. REV. 510, 526 (1999) (Arguing, based on empirical data, that unions do not push firms to insolvency and instead are "rational optimizer[s]" which prefer to maintain employment rather than drive a firm out of business). In fact, the unions involved in the *Karykeion* dispute seemed particularly willing to make concessions. When the bankruptcy court denied the debtor's motion for interim changes pursuant to 1113(e), the union agreed to delay wage increases that were due under their CBA because of the debtor's financial troubles. *In re Karykeion*, 435 B.R. at 667. Similarly, the nurses' union agreed to waive severance

It seems that the decision in *In re Karykeion* was one based on policy: without rejection of the CBA, the potential buyer would have walked away, and the hospital would have closed.¹⁶⁹ More generally, the court holds that the NLRA's "procedural hurdles" could impede reorganization, or "leav[e] the debtor less competitive when it emerges from bankruptcy."¹⁷⁰ The court here made a policy choice to favor bankruptcy's restructuring goal over labor law. In the process, it stretched the wording of the relevant statute and relegated the goals and procedures of labor law. Ultimately, the *Karykeion* court propagated dubious textual analysis that later decisions rely upon to allow for the rejection of expired CBAs through § 1113 in cases which do not have the same compelling facts or policy rationale.¹⁷¹

B. *In re Long Ridge Road*

*In re 710 Long Ridge Road Operating Co., II, LLC*¹⁷² serves as an example of a subsequent case which relied on *Karykeion*'s reasoning, even when faced with facts less deserving of debtor deference. In this case, decided by the Bankruptcy Court of the District of New Jersey in 2014, the debtor nursing home facility had an ostensibly compelling policy reason to advocate for rejecting their expired CBA and preserving the business as a going concern. Upon closer inspection, the court was deferential to the debtor at the expense of the plain meaning of the Code and labor policy. The court's decision leaned heavily on bankruptcy policy, the *Karykeion* analysis of § 1113 and *Bildisco*, and on an NLRB case, *Accurate Die Casting*.

The court found the textual analysis in *Karykeion* more persuasive than the analysis in opposing case law and it based

requirements for all employees hired by the hospital's buyer if the buyer agreed to simply meet with the union. *Id.* at 671–72.

¹⁶⁹ *In re Karykeion*, 435 B.R. at 680.

¹⁷⁰ *Id.* at 675–76.

¹⁷¹ See *Trump II*, 810 F.3d at 161; see also *In re N.W. Holding Co.*, 533 B.R. 753 (Bankr. E.D. Mo. 2015).

¹⁷² *Long Ridge II*, 518 B.R. at 810.

its decision largely on *Karykeion*'s reading of § 1113.¹⁷³ Ultimately, the *Long Ridge* court held that “§ 1113(c) provides authority to reject and modify the terms of an expired collective bargaining agreement while those terms continue in effect during the Chapter 11 proceeding.”¹⁷⁴ The *Long Ridge* court similarly followed the *Karykeion* court's analysis of *Bildisco* and held that *Bildisco* allowed for the rejection of expired labor contracts' residual obligations and that Congress intended for § 1113 to codify this holding.¹⁷⁵

The *Long Ridge* court also cited to a 1989 NLRB decision that commented on §1113's applicability to expired agreements to support its decision.¹⁷⁶ The court asserted that in *Accurate Die Casting Co.*, the NLRB “held that a debtor may avail itself of § 1113(c) to reject an expired collective bargaining agreement.”¹⁷⁷

Finally, the court decided this case based on its policy intuitions. It found that there was “no logic to support Congressional intent allowing interim modifications to an expired CBA . . . but not allowing the rejection of the expired CBA if necessary to further the purpose of reorganization provided §1113(c) conditions are met.”¹⁷⁸ Moreover, relying on legislative history, the court asserts that § 1113 “was enacted to provide bankruptcy courts with the ultimate authority to modify or terminate a debtor's collective bargaining obligations.”¹⁷⁹ The court based its determination on the

¹⁷³ *Id.* 518 B.R. at 828. In a previous decision in the same bankruptcy case, the court allowed an interim modification through § 1113(e), specifying that § 1113(e) applied to expired agreements and only permitting interim modifications. *In re 710 Long Ridge Rd. Operating Co., II, LLC (Long Ridge I)*, No. 13-13653(DHS), 2013 WL 796721, at *5–7 (Bankr. D.N.J. Mar. 4, 2013); see e.g. *Long Ridge II*, 518 B.R. at 828 (first quoting *In re Karykeion*, 435 B.R. at 673 and then citing *In re Karykeion*, 435 B.R. at 674–75).

¹⁷⁴ *Long Ridge II*, 518 B.R. at 831.

¹⁷⁵ *Id.* at 828–29; *Id.* at 829 (quoting *In re Karykeion, Inc.*, 435 B.R. at 675).

¹⁷⁶ *Id.* (citing *Accurate Die Casting Co.*, 292 N.L.R.B. 982 (1989)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 830 (citing 130 CONG. REC. 20094 (1984) (statement of Sen. Daniel Moynihan) (“The conference report in my view, is a sound and

statements of Senator Daniel Moynihan, who commented that § 1113 was a “sound and entirely reasonable compromise” between the goals of the NLRA and the goals of the bankruptcy proceedings under Chapter 11.¹⁸⁰ The court interpreted Moynihan’s statement as indicating that the Bankruptcy Code’s policy interest in avoiding liquidation retains its primacy.¹⁸¹

In this particular case, the continued care of elderly residents in the debtor’s facility was at risk, and it is reasonable to argue that public policy favored the survival of the facility.¹⁸² The court also decided the case in a way that would avoid “loss of employment for hundreds of workers.”¹⁸³ However, this policy rationale is less convincing when taking into account the union’s allegations that (1) the debtor’s management company, which is owned by the debtor’s parent company, reported a 17% profit margin in 2010 and (2) the principal shareholders had extracted \$23 million from the business in the preceding three years.¹⁸⁴ Indeed, there is ample evidence to disprove the debtor’s testimony that the burdensome CBAs caused the debtor’s financial troubles between 2010 to 2012.¹⁸⁵ The debtor stopped complying with its CBAs starting in 2010. This noncompliance was the subject of an NLRB enforcement action that eventually went to the

entirely reasonable compromise between the goals Congress articulated in the National Labor Relations Act, and the bankruptcy proceedings under chapter 11, which allow companies to lower costs, when necessary, in order to reorganize.”).

¹⁸⁰ *Id.* (citing 130 CONG. REC. 20094 (1984)).

¹⁸¹ *Id.*

¹⁸² *Id.* at 824. The court also considered patients’ well-being when the NLRB asked the district court to stay the bankruptcy court’s ruling, noting that “[a]ppellees are operators of long-term nursing care facilities, and a disruption in service will force the closure of debtors’ facilities, and the loss of over 1,000 jobs, threatening the health and well-being of their frail and elderly patients.” *NLRB v. 710 Long Ridge Rd. Operating Co., II, LLC (Long Ridge III)*, Civil Action No. 14-832(CCC), 2014 WL 906128, at *2 (D.N.J. Mar. 6, 2014).

¹⁸³ *Long Ridge II*, 518 B.R. at 830.

¹⁸⁴ *Long Ridge I*, 2013 WL 796721, at *2.

¹⁸⁵ *See Long Ridge II*, 518 B.R. at 824.

Second Circuit.¹⁸⁶ The Second Circuit found that the debtor nursing home began laying off union employees in 2010, in contravention of their CBA.¹⁸⁷ Then, from 2011 to 2012 the debtor instituted a lockout and replaced all unionized employees with non-union employees.¹⁸⁸ Clearly, this group of nursing homes experienced a fair share of labor strife, but any economic strife they experienced between 2010 to 2012 was not due to burdensome CBAs. Indeed, the Second Circuit found that during this period, the debtor was wantonly violating its CBAs.¹⁸⁹ Despite the debtor's unfair labor practices, and the potential for further labor strife resulting from rejecting the CBA, the *Long Ridge* court prioritizes the debtor's cost-cutting goals over the statutory rights of the workers. Indeed, the *Long Ridge* court found "no logic to support Congressional intent" prohibiting rejection of an expired CBA;¹⁹⁰ but it is incumbent on Congress, not the bankruptcy court, to decide which federal statute prevails when their goals are conflicting.

Though the *Long Ridge* court correctly identified § 1113(c) as the portion of the statute which provides a procedure for rejection of CBAs, it also imported § 1113(e)'s language into subsection (c) without a textual basis for doing so. While reasonable parties may (and do) disagree about whether "continues in effect" refers to an unexpired CBA, an expired CBA, or both, the court violated rules of statutory construction in applying this specific and confined language to the statute generally.¹⁹¹ The court, however, chose to follow the debtor's

¹⁸⁶ See *Kreisberg v. HealthBridge Mgmt., LLC*, 732 F.3d 131 (2d Cir. 2013).

¹⁸⁷ *Id.* at 134. Further, the NLRB ruled that this lockout violated labor laws because negotiations between the company and the union had not reached an impasse. See *id.* at 135.

¹⁸⁸ *Id.* at 135.

¹⁸⁹ *Id.* at 134–36, 142.

¹⁹⁰ *Long Ridge II*, 510 B.R. at 829.

¹⁹¹ The opposing parties, the union and the NLRB, argued that the language used in 1113(e) was taken directly from § 8(d) of the NLRA, which refers to the "period when there is in effect a collective bargaining contract." *Id.* at 826 (quoting 15 U.S.C. 1113(e) (2018)). Thus, they argued that

“common sense” argument and the *Karykeion* court’s assertion that the language in § 1113(e) is “intended to give the debtors the authority to reject the continuing effects of expired collective bargaining agreements though compliance with § 1113 instead of the NLRA.”¹⁹² *Long Ridge* also adopted *Karykeion*’s problematic analysis of *Bildisco*.¹⁹³ As noted above, the *Bildisco* decision never referred to “residual obligations” and can thus not be used to support a finding that Congress intended to codify a debtor’s power to reject expired agreements.¹⁹⁴

Finally, *Long Ridge* is based on a misreading of *Accurate Die Casting*. In *Accurate Die Casting*, the debtor company argued that, because it was engaged in a Chapter 11 proceeding, it did not have to comply with the continuing obligations of the expired CBA.¹⁹⁵ The Board held that whether or not the CBA was expired, the debtor company would not be able to unilaterally terminate the terms and conditions of the CBA.¹⁹⁶ It highlighted that “[t]he obligations which survive the expiration of a collective bargaining agreement are among the most important that are contained in the agreement.”¹⁹⁷ *Accurate Die Casting* held that § “1113 does not ignore” the continuing burdens of an expired CBA and indeed makes “explicit provision” for them in §§ 1113(e) and 1113(f).¹⁹⁸ *Accurate Die Casting* did not hold, as the *Long Ridge* court asserts, that a debtor can “avail itself of § 1113(c) in order to reject an expired collective bargaining agreement.”¹⁹⁹ Rather, the Board in *Accurate Die Casting* held that the debtor is required under § 1113 to present its

because after expiration no CBA is “in effect,” the debtors had nothing to reject. *Id.* (quoting 15 U.S.C. 1113(e)).

¹⁹² *Id.* at 826, 828 (citing *In re Karykeion, Inc.*, 435 B.R. 663, 674–75 (Bankr. C.D. Cal. 2010)).

¹⁹³ *Id.* at 829 (citing *In re Karykeion*, 435 B.R. at 675).

¹⁹⁴ *See supra* notes 158–161 and accompanying text.

¹⁹⁵ *Accurate Die Casting, Co.*, 292 N.L.R.B. 982, 985–88 (1989).

¹⁹⁶ *Id.* at 987.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *In re Long Ridge II*, 518 B.R. at 829.

proposed changes to the union, and if the union fails to agree to the changes, the debtor should “make application to the bankruptcy court.”²⁰⁰ This holding is in line with the text of § 1113(e), which allows for “interim changes” to CBAs that continue in effect after approval of the court.²⁰¹ The only mention of rejection occurs earlier in the decision, where the Board explained the general purpose of § 1113 and the modifications it made to *Bildisco*.²⁰²

C. *In re Trump Entertainment Resorts*

Karykeion’s legacy of poor textual interpretation lives on in the sole circuit case to evaluate this issue, *In re Trump Entertainment Resorts Unite Here Local 54*.²⁰³ The Third Circuit found that “§ 1113 does not distinguish between the terms of an unexpired CBA and the terms and conditions that continue to govern after the CBA expires,” and the court allowed the debtor to reject its expired CBAs.²⁰⁴ With each case subsequent to *Karykeion*, the underlying policy rationale degrades further. In this case, the court threw out the CBAs of service workers for a serially-filing casino in Atlantic City.²⁰⁵ The workers paid the price when the casino’s CEO and controlling shareholder, Donald Trump, consistently overleveraged the business while still making a fortune through “salary, bonuses, and other payments.”²⁰⁶ His poor

²⁰⁰ *Accurate Die Casting*, 292 N.L.R.B. at 988.

²⁰¹ 11 U.S.C. § 1113(e) (2018). The Board held that the period when a CBA “continues in effect” includes the contract term and extends to the period when a CBA has expired and a new agreement is being negotiated. See *Accurate Die Casting*, 292 N.L.R.B. at 988.

²⁰² *Accurate Die Casting*, 292 N.L.R.B. at 987.

²⁰³ *Trump II*, 810 F.3d at 161.

²⁰⁴ *Id.* at 164.

²⁰⁵ See *id.*

²⁰⁶ Russ Buettner & Charles V. Bagli, *How Donald Trump Bankrupted His Atlantic City Casinos, but Still Earned Millions*, N.Y. TIMES (June 11, 2016),

<https://www.nytimes.com/2016/06/12/nyregion/donald-trump-atlantic-city.html> [<https://perma.cc/QZ8R-LHV7>].

managerial tactics pushed the business into bankruptcy four times.²⁰⁷

Perhaps unaware of this history, or simply more hopeful for the future, the Third Circuit based its decision on the policy goal of eliminating debts and costly contracts so the company could achieve “longterm viability.”²⁰⁸ Judge Jane Roth focused on bankruptcy’s overarching policy goals, admitting that she would not decide the case based on “a hyper-technical parsing of the words and phrases that comprise § 1113.”²⁰⁹ Yet, while this opinion did not delve into the statute’s language, it affirmed part of the bankruptcy court’s analysis, which addressed the language of the statute in more depth.²¹⁰

The bankruptcy court held that while the legislative history of § 1113 is not dispositive, “the words of the statute and the context in which Congress enacted it are instructive as to its purpose.”²¹¹ First, the court relied on *Karykeion*’s definition of “continues in effect,” holding that it refers to the “employer’s post-expiration *status quo* obligations.”²¹² The court noted that the use of “continues in effect” in the provision rather than “executory” is significant—and that by choosing this phrasing and not mirroring the § 365 terminology, Congress intended to allow for rejection of expired CBAs.²¹³

The bankruptcy court argued that the phrase “continues in effect,” which appears only in § 1113(e), is “implicit” in § 1113(c) and thus Congress intended to allow rejection of

²⁰⁷ *See id.*

²⁰⁸ *Trump II*, 810 F.3d at 174.

²⁰⁹ *Id.* at 169.

²¹⁰ *Id.* at 165, 174 (“[T]he [bankruptcy] court concluded that § 1113 permits rejection of expired CBAs, reasoning that § 1113 is not limited to “unexpired” or “executory” CBAs. . . . [W]e find the intent of Congress here also to be clear [and] that intent was to incorporate expired CBAs in the language of § 1113.”).

²¹¹ *Trump I*, 519 B.R. 76, 85.

²¹² *Id.* at 84 (emphasis added).

²¹³ *Id.* at 84–85.

expired CBAs through the process detailed in § 1113(c).²¹⁴ This reading is based on the argument that the statute would otherwise produce an “absurd” result where only interim modifications were available to a debtor subject to terms of an expired CBA.²¹⁵ The court relied on the statutory interpretation device that “interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.”²¹⁶

The bankruptcy court then dove into the purpose behind § 1113, asserting the supremacy of bankruptcy policy over labor policy in the context of § 1113.²¹⁷ The court noted that § 1113 codified certain parts of *Bildisco* and rejected others, striking a balance between flexibility for debtors and court oversight.²¹⁸ It looked to the schedule of hearings, within fourteen days of filing, of § 1113(d) to assert that the process is meant to be expedited.²¹⁹ The court also argued that allowing the NLRB to oversee the negotiation between the debtor and the union would “thwart” the overriding policy of bankruptcy: maintaining the debtor corporation as a going concern.²²⁰ It criticized the union’s argument as “illogical” because it would allow the court to reject an unexpired CBA, but would not allow the court to permanently cast-off the continuing effects of an expired CBA.²²¹

The bankruptcy court’s textual analysis of the statute, as in the cases that preceded it, ignored the distinction between a CBA and a CBA that “continues in effect.” But in asserting that “continues in effect” is implicit in § 1113(c), the court disregarded the language and structure of § 1113. Moreover,

²¹⁴ *Id.* at 85.

²¹⁵ *Id.*

²¹⁶ *Id.* (citing *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982)).

²¹⁷ *Id.* at 86–87.

²¹⁸ *Id.* at 85–86.

²¹⁹ *Id.* at 86.

²²⁰ *Id.*

²²¹ *Id.* at 86–87.

the court's focus on the exclusion of the word "executory"²²² results in conjecture about congressional intent that ignores alternative reasons why Congress could choose to omit the term "executory" from the statute. For example, Congress could have thought that the term "collective bargaining agreement" on its own implied that an agreement had to be unexpired or executory, especially contrasted with a "collective bargaining agreement that continues in effect." More likely, the statute's congressional drafters chose not to include the term because it is confusing when applied to CBAs. As previously mentioned, the term "executory" does not apply neatly to a CBA since there is no extent of performance which can excuse another party's obligations.²²³ Though these possibilities are mere speculation, they show that the court's analysis requires jumping to a conclusion about why Congress omitted a word.

Ultimately, this decision is based on a policy rationale rather than a textual one—the court reads the statute to avoid what it deems an "illogical" result, rather than interpreting the statute as it is written.²²⁴ While the court relied on the canon that statutes should be read to avoid absurd results, the outcome in this case would not be so absurd as to justify re-writing the statute. The Code provides relief for the debtor by allowing interim modifications to expired agreements while preserving the delicate negotiation process. Indeed, the policies behind labor law favor negotiations on the market in order to promote industrial peace. The justification for slowing down the bankruptcy process with negotiations between the union and the employer parallels this labor law policy. In this case, the court was concerned with executing a deal quickly in order to avoid liquidation and save 3,000 jobs.²²⁵ Yet after approving rejection of the expired CBA, the union employees were legally permitted to strike. In fact, after the decision, the casino employees began striking and

²²² *Id.* at 84.

²²³ *See supra* Section II.C.

²²⁴ *Trump I*, 519 B.R. at 86.

²²⁵ *Id.* at 87.

continued to no avail until the casino closed.²²⁶ While focusing on bankruptcy policy to the exclusion of labor law's goals, the bankruptcy court's decision fomented the very outcome it had attempted to prevent.²²⁷

Thus, the legacy of the *Karykeion* opinion, a decision based on a valid social policy concern but an atextual reading of the Bankruptcy Code, survives despite the flawed analysis. The distorted textual analysis passed first to *Long Ridge*, where the debtor nursing home appeared on its face to be dependent on cost-cutting for its survival, but in fact was in bankruptcy because of oversized payouts to shareholders.²²⁸ The next debtor company, Trump Entertainment Resorts, was a serial filer whose profits were regularly pilfered by management.²²⁹ While the decisions in *Long Ridge* and its progeny, *Trump I*, leaned heavily on the mission to further bankruptcy policy, the decisions in fact worked against bankruptcy goals by promoting strategic filing. These bankruptcies appear to be tactical maneuvers by the debtors to shed labor contracts and avoid the statutory duty to bargain with their unions. The policy justification for relying on poor textual analysis weakened with each iteration. Not only do these decisions subvert the text of the Bankruptcy Code and ignore labor policy, they also promote strategic filing and therefore work counter even to bankruptcy policy.²³⁰ This slippery slope can only be corrected by courts following § 1113 to the letter.

²²⁶ See Patrick McGeehan, *Last Atlantic City Casino Linked to Trump Is Closing Amid a Strike*, N.Y. TIMES (Aug. 3, 2016), <https://www.nytimes.com/2016/08/04/nyregion/last-atlantic-city-casino-linked-to-trump-is-closing-amid-a-strike.html> [https://perma.cc/E8BR-M4ZD].

²²⁷ *In re N.W. Holding Co.*, decided after *Trump Entertainment Resorts*, also relies on *Karykeion* to argue that bankruptcy policy would be hindered if the expired CBA was not subject to §1113(c). The court alleged that disallowing rejection would be a “victory for form over substance.” *In re N.W. Holding Co.*, 533 B.R. 753, 758–59 (Bankr. E.D. Mo. 2015).

²²⁸ See *supra* Section II.B.

²²⁹ Buettner & Bagli, *supra*, note 214.

²³⁰ Strategic bankruptcy refers to companies filing under Chapter 11 as a corporate management tool rather than a response to insolvency or true financial distress. Michael Bradley & Michael Rosenzweig, *The Untenable*

IV. INTERPRETING SECTION 1113

Canons of statutory interpretation have gone through periods of popularity and periods of derision among legal academics.²³¹ Despite these academic trends, courts continue to use these norms in their reasoning.²³² Notwithstanding the debate over the usefulness of the canons, courts, including bankruptcy courts, are required to follow the letter of the law rather than substitute their own policy choices for those of Congress.²³³ This necessarily requires engaging with the text of a statute. Especially in the case of § 1113, where judicial analysis of a statutory provision has been so divorced from the provision's language and structure, a re-rooting in the text of the Code is required.²³⁴ This Part advocates for an analysis of § 1113 consistent with several basic rules of statutory construction.

A. The Argument for a Detailed Textual Interpretation

Courts have declined to use non-textual approaches, such as legislative history, to interpret § 1113 in a favorable way for labor organizations. For example, courts have rejected the

Case for Chapter 11, 101 YALE L. J. 1043, 1047 n. 20 (1992). Some commentators view strategic filing as counter to bankruptcy's apparent policy goals, because it can empower management to make poor managerial decisions and then shirk their creditors. *Id.* 1045–46.

²³¹ See Richard A. Posner, *Statutory Interpretation—in the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800, 805 (1983); see also David L. Shapiro, *Continuity and Change in Statutory Interpretation*, 67 N.Y.U. L. REV. 921, 921 (1992).

²³² See Posner, *supra* note 231, at 805; see also Shapiro, *supra* note 231, at 921–22; *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214 (2008); *Bostock v. Clayton Cty.*, 140 S. Ct. 1731 (2020).

²³³ Gerber, *supra* note 157, at 7. Even those who note the existence of a “common law of bankruptcy” acknowledge that the text of the statute must be followed when sufficient guidance is given. *Id.*

²³⁴ See *supra* Part III; see also Robert K. Rasmussen, *A Study of the Costs and Benefits of Textualism: The Supreme Court's Bankruptcy Cases*, 71 WASH. U. L. Q. 535, 538 (1993) (arguing that, in contrast to the lower courts, the Supreme Court is more likely to decide Bankruptcy Code decisions on the text of the statute rather than policy concerns).

logic-based argument that after a CBA expires there is no contract to reject or assume, and that as a result § 1113 cannot apply to expired CBAs.²³⁵ While this argument may seem overly formalistic, it in fact reflects that the terms that survive expiration of a CBA remain in place by order of the NLRA.²³⁶ The post-expiration labor obligations imposed on employers are statutory, not contractual.²³⁷ Yet, bankruptcy courts have denied that this distinction is important in determining whether they can approve rejection of an expired CBA.²³⁸ For example, the *Hoffman* court asserted that the basic purpose of § 1113 is “to grant ultimate jurisdiction to the bankruptcy court to accept, modify or otherwise alter or terminate the status quo ante rights and obligations between a debtor employer and its employees.”²³⁹ This assertion gets to the heart of the issue: congressional intent.

The legislative history of § 1113 does not shed light on whether Congress intended to allow rejection of status quo obligations. Indeed, the “legislative history of Section 1113 has been described to consist of ‘little more than self-serving statements by opposing partisans.’”²⁴⁰ In addition, scholars have noted that the legislative materials concerning § 1113 are “limited,” “not especially helpful,”²⁴¹ and not

²³⁵ See, e.g., *Long Ridge II*, 518 B.R. at 828; cf. *In re Sullivan Motor Delivery, Inc.*, 56 B.R. 28, 29 (Bankr. E.D. Wis. 1985) (accepting the argument that post-expiration a debtor’s motion to reject a CBA is moot).

²³⁶ See *NLRB v. Katz*, 369 U.S. 736, 743 (1962) (holding that after a CBA expires an employer may not unilaterally alter certain conditions of employment, such as wages, without first bargaining with the union).

²³⁷ Though, there may sometimes also be contractual agreements that extend to the post-expiration period. See *In re Chas. P. Young Co.*, 111 B.R. 410, 418 (Bankr. S.D.N.Y. 1990) (holding that a debtor could reject those contractual obligations which were not kept in place because of the NLRA, and instead were merely contractually mandated to survive expiration, unlike the statutory obligations imposed by the NLRA).

²³⁸ See, e.g., *In re Hoffman Bros. Packing Co., Inc.*, 173 B.R. 177, 184 (Bankr. App. 9th Cir. 1994).

²³⁹ *Id.* (emphasis omitted).

²⁴⁰ *Trump I*, 519 B.R. at 85 (quoting *In re Mile Hi Metal Sys., Inc.*, 899 F.2d 887, 890 (10th Cir. 1990)).

²⁴¹ 7 COLLIER ON BANKRUPTCY, *supra* note 20, at ¶ 1113.01.

“definitive.”²⁴² Courts continue to rely on the limited history available, however, and have come to differing conclusions based on it.²⁴³ There is even a dispute over whether § 1113 was enacted to “overturn the *Bildisco* decision,”²⁴⁴ or whether it “codif[ie]d and modif[ie]d” the Supreme Court ruling.²⁴⁵ In contrast, a popular treatise on bankruptcy has noted that the “history of section 1113 make[s] clear that the preferred outcome under § 1113 is a negotiated solution rather than contract rejection.”²⁴⁶

Criticisms over § 1113’s “ambiguous”²⁴⁷ wording and lack of guiding legislative history have led scholars to suggest that the statute be re-written.²⁴⁸ The issue with this suggestion is that a re-written version of § 1113 has been proposed consistently since 2007 and has never been passed.²⁴⁹ In fact, 2020’s version of the proposed bill, H.R. 7370,²⁵⁰ was the first to make it out of the House Committee on the Judiciary.²⁵¹ It

²⁴² Dawson, *supra* note 3, at 120. *See also* UFCW, Local 211 v. Family Snacks, Inc. (*In re* Family Snacks, Inc.), 257 B.R. 884, 892 (B.A.P. 8th Cir. 2001) (“Congress provided courts with no meaningful legislative history to decipher and clarify Congressional intent or to interpret and apply the statute’s substantive, often ambiguous, terms.”).

²⁴³ 7 COLLIER ON BANKRUPTCY, *supra* note 20, at ¶ 1113.01.

²⁴⁴ *In re* Sullivan Motor Delivery, Inc., 56 B.R. 28, 31 (Bankr. E.D. Wis. 1985) (quoting 30 CONG. REC. 20092 (1984) (statement of Sen. Ted Kennedy)).

²⁴⁵ *In re* Karykeion, Inc., 435 B.R. 663, 675 (Bankr. C.D. Cal. 2010).

²⁴⁶ 7 COLLIER ON BANKRUPTCY, *supra* note 20, at ¶ 1113.01.

²⁴⁷ Dawson, *supra* note 3, at 120.

²⁴⁸ *See* Ekbohm, *supra* note 83, at 588 (recommending a redrafting of § 1113 to explicitly remove expired CBAs from § 1113’s reach); Kirschner et al., *supra* note 111, at 1554 (writing that a “pervasive congressional overhaul is sorely needed.”).

²⁴⁹ *See, e.g.*, H.R. 3652, 110th Cong. (2007); H.R. 4677, 111th Cong. (2010); H.R. 6117, 112th Cong. (2012); H.R. 100, 113th Cong. (2013); H.R. 97, 114th Cong. (2015); H.R. 138, 115th Cong. (2017).

²⁵⁰ Protecting Employees and Retirees in Business Bankruptcies Act, H.R. 7370, 116th Cong. § 201 (2020).

²⁵¹ *See* Bill History—Congressional Record References, H.R. 7370 – Protecting Employees and Retirees in Business Bankruptcies Act of 2020, CONGRESS.GOV, <https://www.congress.gov/bill/116th-congress/house-bill/7370/all-actions> (on file with the Columbia Business Law Review); Bill

is unlikely that Congress will have the political make-up to pass a pro-labor amendment in the near future.

Political viability aside, the proposed amendments to § 1113 barely alter the wording of § 1113(e). While the 2020 bill re-writes the rest of the provision, the interim changes subsection is left largely untouched. The sole substantive change specifies that interim changes can be “authorized for not more than 14 days in total.”²⁵² The bill additionally proposes changing the reference to “a period when the collective bargaining agreement continues in effect”²⁵³ to “a period during which a collective bargaining agreement at issue under this section continues in effect.”²⁵⁴ It also requires that an application for rejection be submitted before the judge

History—Congressional Record References, H.R. 3652—Protecting Employees and Retirees in Business Bankruptcies Act of 2007, CONGRESS.GOV, <https://www.congress.gov/bill/110th-congress/house-bill/3652/actions> (on file with the Columbia Business Law Review); Bill History—Congressional Record References, H.R. 4677—Protecting Employees and Retirees in Business Bankruptcies Act of 2010, CONGRESS.GOV, <https://www.congress.gov/bill/111th-congress/house-bill/4677/all-actions> (on file with the Columbia Business Law Review); Bill History—Congressional Record References, H.R. 6117—Protecting Employees and Retirees in Business Bankruptcies Act of 2012, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/6117/all-actions> (on file with the Columbia Business Law Review); H.R. 100—Protecting Employees and Retirees in Business Bankruptcies Act of 2013, CONGRESS.GOV, <https://www.congress.gov/bill/113th-congress/house-bill/100/all-actions> (on file with the Columbia Business Law Review); Bill History—Congressional Record References, H.R. 97—Protecting Employees and Retirees in Business Bankruptcies Act of 2015, CONGRESS.GOV, <https://www.congress.gov/bill/114th-congress/house-bill/97/all-actions> (on file with the Columbia Business Law Review); Bill History—Congressional Record References, H.R. 138—Protecting Employees and Retirees in Business Bankruptcies Act of 2017, CONGRESS.GOV, <https://www.congress.gov/bill/115th-congress/house-bill/138/all-actions> (on file with the Columbia Business Law Review).

²⁵² Protecting Employees and Retirees in Business Bankruptcies Act, H.R. 7370, 116th Cong. § 201 (2020).

²⁵³ 11 U.S.C. § 1113(e) (2018).

²⁵⁴ Protecting Employees and Retirees in Business Bankruptcies Act, H.R. 7370, 116th Cong. § 201 (2020).

rules on allowing interim modifications.²⁵⁵ While full analysis of these changes lies outside the scope of this Note, the alterations of § 1113(e) notably do not reference expired CBAs.²⁵⁶ However, this omission does not necessarily indicate the drafters' approval of the Third Circuit's interpretation. Instead, the proposed amendments focus on fixing other apparent issues, such as disallowing rejection of CBAs where major executive bonuses preceded the debtor's bankruptcy filing.²⁵⁷ Thus the proposed amendments to § 1113 provide no guidance either way on how to address this burgeoning circuit split.

Yet, the fact that the 116th Congress did not explicitly address expired CBAs does not mean that there are no such provisions already in § 1113. For the moment, what scholars and judges alike have to analyze is the statute as it was passed in 1984. Indeed, a close reading of the statute dispenses with any ambiguity in § 1113(e) and makes it clear that Congress intended to provide a method for modifying expired CBAs on an interim basis.

B. Recommendations for Judicial Interpretation

Whether § 1113 allows for rejection or modification of expired CBAs “remains a question of interpretation.”²⁵⁸ Because legislative history is unenlightening and proposed amendments to the statute are silent on this issue, the interpretive framework must be centered on the language in the statute. This analysis reveals that § 1113 does not provide for the rejection or modification of expired CBAs—it allows solely for interim modifications of such expired agreements. Textual interpretation and the canons of statutory construction suggest congressional intent to protect certain

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.* § 201; *see also* Press Release, Jerrold Nadler, Chairman Nadler Statement for the Markup of H.R. 7370 (Sept. 29, 2020), <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=3375> [<https://perma.cc/B4WZ-GQ74>] (stating that the bill will “put much-needed limits on excessive executive compensation”).

²⁵⁸ Ekbohm, *supra* note 83, at 592.

aspects of labor law from the ravages of the bankruptcy process. Consequently, judicial adoption of an interpretive framework based on the text of the statute is necessary to prevent an expansion of the abuses of § 1113 by debtors looking to shed CBAs.

1. The Significance of the Word “Interim” in Section 1113(e)

The first contested term in § 1113(e) is the word “interim.”²⁵⁹ Indeed, this word was ignored in the *Karykeion* court’s analysis of the provision.²⁶⁰ Black’s Law Dictionary defines “interim” as “[d]one, made, or occurring for an intervening time” or as “temporary or provisional.”²⁶¹ Ballentine’s Law Dictionary defines “interim” as “[m]eanwhile; in the meantime. Hence, temporary.”²⁶² In accordance with this definition, Ballentine’s defines “interim allowance” as a “temporary allowance,” and an “interim curator” as a “temporary guardian or custodian.”²⁶³ The Wolters Kluwer Bouvier Law Dictionary similarly defines “interim” as a “temporary gap between periods.”²⁶⁴ Courts have used the term both to mean “temporary” and “during an intervening period” when interpreting § 1113(e). In *Accurate Die Casting*, for example, the NLRB seemed to use “interim” to mean the period between the expiration of a CBA and the adoption of a new agreement.²⁶⁵ The Board held that “[l]abor peace is preserved by the maintenance of established practices

²⁵⁹ 11 U.S.C. § 1113(e) (2018).

²⁶⁰ See *supra* Part III; see *In re Karykeion, Inc.*, 435 B.R. 663, 674 (Bankr. C.D. Cal. 2010) (“Specifically, § 1113(e) allows a debtor to modify a collective bargaining agreement during ‘the period that it continues in effect’ when it finds that such modification is necessary for continuation of the debtor’s business or to avoid irreparable harm to the estate.”).

²⁶¹ *Interim*, BLACK’S LAW DICTIONARY (11th ed. 2019).

²⁶² *Interim*, BALLENTINE’S LAW DICTIONARY (3rd ed. 1969).

²⁶³ *Interim allowance*, BALLENTINE’S LAW DICTIONARY (emphasis added); *Interim curator*, BALLENTINE’S LAW DICTIONARY (emphasis added).

²⁶⁴ *Interim*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012 ed.).

²⁶⁵ See *Accurate Die Casting Co.*, 292 N.L.R.B. 982, 987 (1989).

during the *interim period*.”²⁶⁶ However, it is not clear whether the Board intended to define “interim” as it appears in § 1113(e). This sentence appears before the Board applies the Bankruptcy Code provision to the facts of the case,²⁶⁷ so it could be using the phrase “interim period” as part of a general statement about the importance of maintaining the status quo ante.

Justice Brennan’s *Bildisco* concurrence is also illuminating. While the concurrence references the “interim period,” the majority opinion does not.²⁶⁸ It is possible that in drafting § 1113, Congress used the word “interim” as it was used in the concurrence. Justice Brennan writes that “enforcement of the contract is suspended during the interim period,” and later refers to “the interim between filing and rejection or assumption.”²⁶⁹ Both of these uses suggest that “interim” is being used to describe the period during which the debtor is in bankruptcy and before the debtor has either assumed or rejected the contract in question.

Lately, however, the term has been interpreted to refer to the second of Black’s definitions: temporary or provisional. For example, the bankruptcy court in *Trump Entertainment Resorts* held that § 1113(e) allows for modifications of a CBA “on an interim basis.”²⁷⁰ In this context, “interim” most plainly means “temporary.” The proposed changes to § 1113 also suggest that reading “interim” to mean “temporary or provisional” is the more appropriate interpretation. The congressional drafters specified that interim changes could last no longer than fourteen days²⁷¹—much shorter than the length of most bankruptcy proceedings, and potentially shorter than the period between a CBA’s expiration and the adoption of a new agreement.

²⁶⁶ *Id.* (emphasis added)

²⁶⁷ *See id.*

²⁶⁸ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 545 (1984) (Brennan, J., concurring).

²⁶⁹ *Id.* at 545–46 (Brennan, J., concurring).

²⁷⁰ *Trump I*, 519 B.R. at 84.

²⁷¹ Protecting Employees and Retirees in Business Bankruptcies Act, H.R. 7370, 116th Cong. § 201 (2020).

All of these interpretations are plausible, and in fact, none are antithetical to the “interim changes” allowed by § 1113(e). Changes for any of the periods explained above would of course be temporary, and that is the key distinction between §§ 1113(e) and 1113(c). Subsection (e) allows for a judge to approve changes without requiring the debtor to bargain with the Union, and subsection (c) imposes a bargaining structure.²⁷² Thus it is imperative that “interim” not be read out of the statute. Moreover, reading “interim” out of the statute would violate the statutory interpretation rule against surplusage.²⁷³ Each word in a statute is presumed to have meaning. Whether “interim” means a specific, temporary period or whether it suggests provisional changes, it cannot be left out of an application of the statute. It follows that § 1113(e) should not be used to make permanent modifications to CBAs, whether expired or unexpired. While some bankruptcy courts allow interim modifications for lengthy periods, the changes will evaporate once the debtor is out of bankruptcy, or when the court decides the changes are no longer necessary to the debtor’s survival.²⁷⁴

2. The Significance of the Phrase “Continues in Effect” in Section 1113(e)

The second term that has sparked debate is “continues in effect,” which appears in § 1113(e).²⁷⁵ Invoking again the rule against surplusage and the presumption of meaningful variation, it is clear that a collective bargaining agreement that “continues in effect” must have a different scope than a “collective bargaining agreement.”²⁷⁶ As purposeful drafters, Congress would not have added a qualifier unless it intended

²⁷² See 11 U.S.C. §§ 1113(c), (e) (2018).

²⁷³ See LARRY M. EIG, CONG. RSCH. SERV., STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 14 (2014) (“[S]tatutes should be construed ‘so as to avoid rendering superfluous’ any statutory language[.]” (quoting *Astoria Federal Savings & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991))).

²⁷⁴ 7 COLLIER ON BANKRUPTCY, *supra* note 20, at ¶ 1113.07.

²⁷⁵ 11 U.S.C. § 1113(e).

²⁷⁶ See *id.* § 1113(b), (c).

to alter the meaning of the term. Further, if Congress had wanted the scopes of §§ 1113(c) and 1113(e) to be identical, Congress could have explicitly specified that § 1113(c) applied to CBAs that “continue[] in effect.” An argument that this qualifier is implicit in § 1113(c) obfuscates congressional intent by ignoring the plain meaning of the statute.²⁷⁷

A CBA that “continues in effect” must have a scope that is either broader or narrower than a CBA without the qualifier. In defining the term, most courts cite *Litton Financial Printing Division v. NLRB*, which held that “continues in effect” refers to post-expiration obligations.²⁷⁸ The courts in the *Karykeion* line of cases ruled that this qualifier is “implicit” in §§ 1113(c) and 1113(b).²⁷⁹ Thus, by extension they have adopted a broad definition of CBAs which “continue in effect”—it must include both expired and unexpired agreements.²⁸⁰ This definition comports with the NLRB’s holding in *Accurate Die Casting*, where the Board ruled that “[t]he period when a collective bargaining agreement ‘continues in effect’ includes a period when its replacement is

²⁷⁷ Courts that have disallowed the rejection of expired agreements have likewise disregarded the presumption of meaningful variation. For example, in *San Rafael Baking Co.* the court held that “continues in effect” refers only to unexpired agreements. *San Rafael Baking Co. v. N. Cal Bakery Drivers*, 219 B.R. 860, 866 (B.A.P. 9th Cir. 1998). This definition requires conflating CBAs that “continue[] in effect” with CBA as it appears in 1113(c), without the qualifier.

²⁷⁸ *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 203 (1991); see, e.g., *Trump I*, 519 B.R. at 84 (citing *Litton Fin. Printing Div.*, 501 U.S. at 203); *In re Karykeion, Inc.*, 435 B.R. 663, 674 (Bankr. C.D. Cal. 2010) (citing *Litton Fin. Printing Div.*, 501 U.S. at 203); *Long Ridge II*, 518 B.R. at 828 (citing *Litton Fin. Printing Div.*, 501 U.S. at 203).

²⁷⁹ E.g., *Trump I*, 519 B.R. at 85.

²⁸⁰ All of the courts that argue that “continues in effect” is “implicit” in § 1113(e) must by extension adopt the broad definition of the term, otherwise § 1113(c) would apply only to expired CBAs. Cf. *San Rafael Baking Co.*, 219 B.R. at 866 (holding that “continues in effect” refers only to unexpired CBAs and citing lack of jurisdiction to enforce the statutory obligations of an expired agreement).

being negotiated and in which no impasse has been reached.”²⁸¹

The consensus around the scope of what is included in a CBA that “continues in effect” makes sense upon close inspection.²⁸² Labor law principles support the expansive reading of the term.²⁸³ The inclusion of unexpired CBAs in the term helps to make sense of the final line of § 1113(e), which states, “The implementation of such interim changes shall not render the application for rejection moot.”²⁸⁴ Where an application for rejection has been made in relation to an unexpired CBA, a debtor can still move for interim changes without nullifying the application. This line, however, does not refer to expired CBAs, which are, as this Note argues, not eligible for the rejection process detailed in § 1113(c).

Thus, courts’ misapplication of § 1113(c) to expired collective bargaining agreements does not stem from their misunderstanding of “continues in effect.” Rather, it stems from “stretch[ing] the statute’s language too far.”²⁸⁵ These courts import the phrase into provisions where it does not exist in order to hold that the statute allows for rejection of expired CBAs. In doing so, they violate not only the rule against surplusage and the presumption of meaningful variation, but also the rule against allowing a specific statutory rule to be abrogated by a general rule in the same

²⁸¹ *Accurate Die Casting Co.*, 292 N.L.R.B. 982, 988 (1989) (emphasis added).

²⁸² However, one union has argued that the language in § 1113(e) is taken from § 8(d) of the NLRA, which refers to a period when “there is in effect a collective bargaining agreement.” *Long Ridge II*, 518 B.R. at 826. The union contended that because this language in § 8(d) applies only to unexpired CBAs, that 1113(e) cannot be used to make changes to expired CBAs. *Id.*

²⁸³ *See, e.g., Accurate Die Casting Co.*, 292 N.L.R.B. at 987–88 (using labor law principles to determine when a contract is effective, and concluding that “[t]he period when a collective bargaining agreement ‘continues in effect’ includes a period when its replacement is being negotiated and in which no impasse has been reached.”).

²⁸⁴ 11 U.S.C. § 1113(e) (2018).

²⁸⁵ *In re Hostess Brands, Inc.*, 477 B.R. 378, 383 (Bankr. S.D.N.Y. 2012).

statute.²⁸⁶ The CBA that is the subject of § 1113(c) and the CBA that “continues in effect” in § 1113(e) must have distinct meanings. But the line of cases explored in this Note hold that these terms are synonymous.²⁸⁷ In order to reject expired CBAs, bankruptcy courts are ignoring the basic norm of statutory interpretation that all words in a statute are presumed to have meaning and thus contravening congressional intent.

Further, the courts are improperly allowing a general statutory provision to nullify a specific provision. Because the words “continues in effect” are only present in § 1113(e), it follows that this provision applies to a specific situation. Specifically, this subsection allows for interim modifications to both expired and unexpired CBAs, while the rest of the provision applies only to unexpired CBAs. At least one court has noted § 1113(e) as an “exception” to the general terms detailed before it.²⁸⁸ In applying §§ 1113(b), (c), and (d) to expired CBAs, the courts are essentially nullifying the specificity of the subsection and applying the general rule to a situation that is specifically provided for in § 1113(e).

Courts have implicitly relied on the “whole act rule” as justification for their over-inclusive reading of § 1113(c).²⁸⁹ The “whole act rule” is an interpretive canon that favors coherence and consistency within the statute itself based on its perceived purpose.²⁹⁰ While scholars debate the intended

²⁸⁶ See *EIG*, *supra* note 273, at 11, 14, 16; *D. Ginsberg & Sons, Inc. v. Popkin*, 285 U.S. 204, 208 (1932) (holding that when there is a statute or statutory provision specific to one situation, the general statute does not apply to that situation); see also *In re Demoff*, 109 B.R. 902, 909 (Bankr. N.D. Ind. 1989).

²⁸⁷ *Trump I*, 519 B.R. at 84; *Trump II*, 810 F.3d at 168–69; *Long Ridge II*, 518 B.R. at 828.

²⁸⁸ See *In re Hostess Brands, Inc.*, 477 B.R. 378, 382 (Bankr. S.D.N.Y. 2012).

²⁸⁹ See, e.g., *In re Karykeion, Inc.*, 435 B.R. 663, 675–76 (Bankr. C.D. Cal. 2010) (stating that not allowing a debtor to reject an expired CBA would “greatly impede [the] overriding goal” of the Bankruptcy Code and be inconsistent with the other powers afforded a debtor in bankruptcy).

²⁹⁰ See *King v. Burwell*, 576 U.S. 473, 486 (2015) (holding that “established by the State” should be read in the context of the whole

purpose behind the Bankruptcy Code,²⁹¹ courts often refer to Bankruptcy's goal to maintain debtors as a going concern.²⁹² They reason that, because reorganization is the ultimate goal, provisions in the code should be read to promote continuance of the debtor firm.²⁹³ Indeed, in the instant scenario, courts have characterized a plain meaning interpretation of § 1113 as inconsistent with the purpose of the Bankruptcy Code.²⁹⁴ The *Karykeion* court held that prohibiting the debtor from rejecting residual obligations would make the debtor "less competitive" upon emergence from bankruptcy and for that reason would be incompatible with the statute's purpose.²⁹⁵ However, when read closely, § 1113(e) is not ambiguous and therefore amorphous concepts—such as the purpose of the

statutory scheme of the Affordable Care Act); *Yates v. United States*, 574 U.S. 528, 537 (2015) (relying on the "whole act rule" in holding that a fish is not a "tangible object" for the purposes of a statute intended to prevent financial fraud).

²⁹¹ See *supra* Section II.C. (discussing the debate on whether bankruptcy policy should focus on achieving social policy goals or increasing payouts to secured creditors).

²⁹² See, e.g., *Trump I*, 519 B.R. 76, 86; *NMSBPCSLDHB, L.P. v. Integrated Telecom Express, Inc.* (*In re Integrated Telecom Express, Inc.*), 384 F.3d 108, 120 (3d Cir. 2004) (ruling on whether the debtor has a valid bankruptcy purpose for its position, such as preserving the business as a going concern.); *In re W.R. Grace & Co.*, 475 B.R. 34, 147 (D. Del. 2012) (stating that the purpose of Chapter 11 is to allow insolvent corporations to shed their debts in order to continue operating as a going concern.); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434, 453 (1999) (same).

²⁹³ See, e.g., *In re Karykeion, Inc.*, 435 B.R. at 675–76 (stating that not allowing a debtor to reject an expired CBA would "greatly impede [the] overriding goal" of the Bankruptcy Code and be inconsistent with the other powers afforded a debtor in bankruptcy). *Trump I*, 519 B.R. at 86 (holding that the court would not interpret the Bankruptcy Code in a way that would "thwart" the underlying policy goal of preserving the debtor as a going concern.).

²⁹⁴ See *In re Karykeion*, 435 B.R. at 675; *Trump I*, 519 B.R. at 85 ("Interpreting Section 1113(c) to allow for the rejection of a post-expiration collective bargaining agreement also comports with the legislative policies underlying . . . the Bankruptcy Code[.]").

²⁹⁵ *In re Karykeion*, 435 B.R. at 676.

whole act—need not be invoked to understand its meaning.²⁹⁶ Moreover, there are numerous exceptions in the bankruptcy process which restrict debtors' prerogatives or are otherwise incompatible with the broader trend toward debtor deference.²⁹⁷

3. The Rule Favoring Continuity

Finally, the analysis supporting rejection of expired CBAs violates the rule favoring continuity. The rule favoring continuity states that when there is doubt, the courts should interpret statutes to minimize interference with other legal rights.²⁹⁸ Before Congress passed § 1113, rejection of expired CBAs was a moot issue—because the contracts were expired, they were no longer considered executory and there was nothing to reject.²⁹⁹ A reading of § 1113 that allows debtors to do something they could not do under § 365 would require explicit inclusion of the new right. In the case of § 1113(e), the

²⁹⁶ Preserving the bargaining process may also prevent post-emergence labor strife, which would ultimately be more disruptive to the firm than the NLRA bargaining process. *See infra*, Part IV.B.iv.

²⁹⁷ For example, there are special terms in § 1110 of the Bankruptcy Code which provide aircraft creditors privileges while limiting protections that are available to debtors in other circumstances. Aircraft creditors can breach the automatic stay, for example, and repossess the aircraft collateral. 11 U.S.C. § 1110 (2018). NLRB actions are similarly exempt from the automatic stay, an indication that Congress and courts have acknowledged that labor issues warrant unique treatment. *See, e.g.*, *NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2d Cir. 1992); 11 U.S.C. § 362(b)(4).

²⁹⁸ Russell E. Carparelli, *The Rehnquist Court's Canons of Statutory Construction*, NAT'L CONF. STATE LEGISLATORS (2005), https://www.ncsl.org/documents/lsss/2013pds/rehnquist_court_canons_citations.pdf [<https://perma.cc/KH45-DBQ7>].

²⁹⁹ *See, e.g.*, *In re Pesce Baking Co.*, 43 B.R. 949, 957 (Bankr. N.D. Ohio 1984); *Gloria Mfg. Corp. v. Intern'l Ladies Garment Workers' Union*, 734 F.2d 1020, 1022 (4th Cir. 1984). *Pesce Baking* and *Gloria Mfg.* are both pre-section 1113 cases where the court ruled that § 365 did not permit the bankruptcy court to reject expired CBAs. *See In re Pesce Baking Co.*, 43 B.R. at 957; *Gloria Mfg. Corp.*, 734 F.2d at 1022; *see also In re Hostess Brands, Inc.*, 477 B.R. 378, 382 (Bankr. S.D.N.Y. 2012) (citing *In re Chas. P. Young Company*, 111 B.R. 410 (Bankr. S.D.N.Y. 1990)).

statute does exactly that—it specifically allows for interim modifications to expired CBAs, explicitly granting bankruptcy courts a power that they previously did not possess.³⁰⁰ Without an express signal from Congress providing for rejection of CBAs, the rule favoring continuity suggests that courts should not interpret § 1113 to create a new right to reject expired CBAs as this would not be consistent with previously established common law.

4. The Policy Justification for Allowing Only Interim Modifications to Expired CBAs

There are important policy reasons why Congress would not want to allow for the rejection of expired CBAs. While the courts that have allowed debtors to reject expired CBAs have made numerous policy arguments in favor of their decision, they have also emphatically expressed doubt that there is any policy justification for a decision the other way. The *In re Trump Entertainment* court, for example, could not fathom why Congress would pass legislation allowing for such an “absurd result.”³⁰¹

There are a variety of policy benefits that can flow from a closer adherence to the text—namely, preservation of an already-commenced bargaining process between the employer and the union. Especially when a negotiating process has already started, it is important to uphold the integrity of that process in order to maintain trust and cooperation between the parties. Moreover, preserving the bargaining obligation encourages information sharing. Instead of simply cutting off communication with unions and filing for rejection, employers with expired CBAs would need to maintain a dialogue with their workers’ representative in order to gain voluntary concessions outside of bankruptcy through the traditional NLRA-imposed bargaining procedure.³⁰² Interim

³⁰⁰ See 11 U.S.C. § 1113(e).

³⁰¹ *Trump I*, 519 B.R. at 85.

³⁰² Cf. MANN, *supra* note 63, at 122–23. Ronald Mann has argued that § 1113 could encourage employers to make prepetition agreements with unions instead of risking a strike during bankruptcy. *Id.* If this is the case,

modifications would provide immediate, though temporary, relief to employers and the impetus to continue sharing information and cultivate a good relationship with the union would remain. The on-the-market negotiation procedure that Congress intended when drafting the NLRA, and which is the ideal outcome under § 1113, is thus preserved.³⁰³

Maintaining labor peace is another major reason Congress may have chosen to except expired agreements from rejection. In *Accurate Die Casting*, the NLRB held that “[t]he obligations which survive the expiration of a collective-bargaining agreement are among the most important that are contained in the agreement,” and that “[l]abor peace is preserved by the maintenance of established practices.”³⁰⁴ Indeed, after their expired CBA was rejected *In re Trump Entertainment*, the unionized workers at Trump’s casino went on a prolonged strike that ended in the business’s closure.³⁰⁵ This exemplifies the labor strife that debtor corporations may experience after they reject their unexpired CBAs.³⁰⁶ Because labor law preserves only the most important aspects of a CBA’s terms after expiration, such as wages, hours, benefits, and work rules, it makes sense that Congress would provide for the maintenance of the these status quo obligations, while providing flexibility to the debtor through the interim relief provision.³⁰⁷

and § 1113 encourages employers to use the NLRA-imposed bargaining process, then § 1113 and its interpretation has little impact on expired CBAs.

³⁰³ See 7 COLLIER ON BANKRUPTCY, *supra* note 20, at ¶ 1113.01 (“The language and history of section 1113 make clear that the preferred outcome under section 1113 is a negotiated solution rather than contract rejection.”); Dawson, *supra* note 3, at 120.

³⁰⁴ *Accurate Die Casting Co.*, 292 N.L.R.B. 982, 987 (1989).

³⁰⁵ Nick Rummell, *Icahn Blames Union for Closing Trump Taj Mahal*, COURTHOUSE NEWS SERV. (Aug. 4, 2016), <https://www.courthousenews.com/icahn-blames-union-for-closing-trump-taj-mahal/> [<https://perma.cc/4FD8-6B5T>].

³⁰⁶ See MANN, *supra* note 63, at, 118–119 (describing union strikes after Continental Airlines filed for bankruptcy).

³⁰⁷ *Accurate Die Casting Co.*, 292 N.L.R.B. at 987; *In re Salt Creek Freightways*, 46 B.R. 347, 351 (Bankr. D. Wyo. 1985) (“The inclusion of the

The fears expressed by bankruptcy court judges that involving the NLRB in the debtor's reorganization would result in overcomplication, while valid, are already realized. The Bankruptcy Code's automatic stay provision does not apply to enforcement actions brought by the NLRB.³⁰⁸ Often, debtors with unionized workforces are already in litigation with the NLRB during their bankruptcy proceedings. Thus, labor concerns can sometimes trump bankruptcy's goal of maintaining the business as a going concern.

Furthermore, preventing debtors from rejecting expired CBAs may result in a more accurate valuation of the firm as a going concern. Valuation is a major issue in bankruptcy and determines not only how much is paid out to different classes of creditors, but also who ends up owning the firm after debt is converted to equity. If the firm's projected costs and revenues are inaccurate, the "fulcrum security" class of creditors³⁰⁹ could end up getting less than they were ordered to receive in bankruptcy. In the scenario where an expired CBA is rejected, the firm may project lower labor costs than when they entered bankruptcy. However, these labor costs are not likely to remain at the post-rejection level. While rejection can set a union back, hurt morale, and have many negative consequences for the individual workers, the employer still has a duty to bargain with the union outside of bankruptcy. It is possible that the union will compel the employer to improve working conditions or raise wages a short time after bankruptcy, negating the firm's cost projections upon which their valuation was based.³¹⁰ Bankruptcy judges may attempt

interim changes provision was a compromise by which Congress intended that a court would have the flexibility to effectuate the overriding objective of Chapter 11, the preservation of a failing business for the benefit of all, including the employees who would otherwise lose their jobs.") (citations omitted).

³⁰⁸ *Accurate Die Casting Co.*, 292 N.L.R.B. at 987.

³⁰⁹ The class of creditors, usually unsecured, who end up owning the firm after a bankruptcy proceeding. See *Fulcrum Security (Financial Restructuring & Bankruptcy Glossary)*, *supra* note 14.

³¹⁰ Generally, around one-third of certified unions are not able to produce a first CBA. Richard B. Freeman & Kelsey Hilbrich, *Do Labor Unions Have a Future in the United States?*, in 1 *THE ECON. OF INEQUALITY*,

to ignore labor law within a bankruptcy proceeding, but they cannot trump it outside of bankruptcy.

It is true that more firms may liquidate if they are not able to negotiate a compromise with their union workers and comply with higher wages imposed by an expired CBA. This consequence is unfortunate and could potentially hurt the broader local economy surrounding the closed firm.³¹¹ However, contrary to the suggestion in *Long Ridge*,³¹² unions likely do not favor the firm liquidating over rejection of their CBA.³¹³ Moreover, scholars have argued that “a company should not be able to use bankruptcy to dispose of obligations whose purpose is to force corporations, shareholders, and creditors to bear the social costs of corporate activities.”³¹⁴ Indeed, “unless Congress has explicitly permitted it” firms should not be able to shed regulatory obligations in bankruptcy.³¹⁵ In the instant case, Congress has not explicitly allowed for the shedding of the statutorily-imposed status quo obligations that survive a CBA’s expiration through the bankruptcy process. In fact, it has expressly provided for bankruptcy court action in this area in only one provision: section 1113(e).

The most important effect of not allowing rejection of expired CBAs through § 1113(e) is that it would prevent further abuse of § 1113. As noted above, § 1113 has become a weapon used by companies against an already struggling union labor force.³¹⁶ Abuse of § 1113(e) is similarly creating a situation where workers bear the cost of poor management and outsized executive compensation. Requiring companies to maintain status quo obligations and bargain to impasse

POVERTY, AND DISCRIMINATION IN THE 21ST CENTURY 484, 489 (Robert S. Rycroft ed., 2018). It is unclear whether this statistic applies when a union previously had a CBA that was rejected in a bankruptcy proceeding.

³¹¹ See Liscow, *supra* note 67, at 1487.

³¹² *Long Ridge II*, 518 B.R. at 837.

³¹³ Freeman & Kleiner, *supra* note 310, at 526.

³¹⁴ Macey & Salovaara, *supra* note 15, at 888.

³¹⁵ *Id.* at 889.

³¹⁶ Ceccotti, *supra* note 95, at 420.

maintains the union's influence, encourages information sharing, and gives employees a voice.

V. CONCLUSION

Bankruptcy courts may be courts of equity,³¹⁷ but they are still required to follow the letter of the law.³¹⁸ While canons of statutory construction may not be in their usual wheelhouse, they are important tools to ensure that a statute is not misread. When there is ambiguity in a statute, a bankruptcy court can and should look to canons of statutory construction to parse congressional intent.³¹⁹ When read closely and with these canons in mind, § 1113 does not allow for rejection of expired CBAs—it instead provides for interim changes to be made to those obligations that “continue in effect” after expiration. Courts interpreting § 1113 should be sure to give each word in the statute meaning; “interim” cannot be glossed over or read out of law. Likewise, variations in terms should be assumed to have significance; a “collective bargaining agreement” must have a different scope than a CBA that “continues in effect.” Lastly, courts should be careful to not let the general § 1113 provision to nullify the specific rule in §1113(e). Congress made an exception for expired agreements, and this exception should not be overridden or substituted for judge-made rules based on desired outcomes. This reading not only comports with the text of the statute; it also allows for relief for the debtor without compromising the delicate bargaining process between unions and employers during the post-expiration period.

³¹⁷ Marcia S. Krieger, “*The Bankruptcy Court Is a Court of Equity*”: *What Does That Mean?*, 50 S. C. L. REV. 275, 275 (1999).

³¹⁸ See, e.g., Yona A. Kornsgold, Note, *Beginner's Luck That Hertz: Bankruptcy Companies and the Trap for Retail Investors*, 2021 COLUM. BUS. L. REV. 914, 951–53 (discussing how the Bankruptcy Court's injunctive power must be consistent with the rest of the Bankruptcy Code).

³¹⁹ See, e.g., *In re Walter Energy, Inc.*, 911 F.3d 1121, 1137 (11th Cir. 2018) (using statutory interpretation to interpret the Bankruptcy Code); *In re Westmoreland Coal Co.*, 221 B.R. 512, 514 (D. Colo. 1998) (using the same).