Bankruptcy Litigation/Labor & Employment

Distress & Labor in the Courtroom: Pensions and CBA Rejections

Frank A. Anderson
Pension Benefit Guaranty Corporation; Washington, D.C.

John C. Goodchild
Morgan Lewis & Bockius LLP; Philadelphia

Jordan A. Kroop
Perkins Coie LLP; Phoenix

Kenneth Pasquale
Stroock & Stroock & Lavan LLP; New York

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Frank A. Anderson Pension Benefit Guaranty Corporation Washington D.C.	**Jordan A. Kroop** Perkins Coie LLP Phoenix, AZ
John C. Goodchild III Morgan Lewis & Bockius LLP Philadelphia, PA	**Ken Pasquale** Stroock & Stroock & Lavan LLP New York, NY

I. BANKRUPTCY CODE SECTION 1113

A. Background and History

A collective bargaining agreement ("CBA") between a debtor and an employee union can only be rejected or modified in a chapter 11 case pursuant to the stringent requirements set forth in Section 1113 of the Bankruptcy Code.

The National Labor Relations Act ("NLRA") governs the collective bargaining process between most private-sector employers and their employees.[1] Congress enacted the NLRA in 1935 in order to protect the rights of employees and employers, to encourage collective bargaining and to curtail certain private sector labor and management practices.[2] Among other things, the NLRA guarantees the right of employees to organize with their coworkers, bargain collectively with employers and engage in certain concerted activity, while protecting these employees from employer and union misconduct.[3] The National Labor Relations Board ("NLRB") is the federal agency charged with adjudicating complaints under the NLRA with

[1] See 29 USC § 152(2), 164(c)(1).

[2] See 29 USC § 151.

[3] See 29 U.S.C. §§ 151-169 (2014).

respect to the enforcement of an employer's labor law obligations and, particularly, collective bargaining between a union and employer. Bankruptcy courts generally defer to the primary jurisdiction of the NLRB. However, tension between the authority of the NLRB and that of the courts often arises in the context of bankruptcy because the exigent timelines faced by debtors seeking to reorganize may conflict with the NLRB's more lengthy proceedings.[4]

In NLRB v. Bildisco & Bildisco, the United States Supreme Court held that a debtor may reject a CBA under the relatively flexible standards of section 365 of the Bankruptcy Code.[5] In that case, the debtor moved to reject, pursuant to section 365(a) of the Bankruptcy Code, its three-year CBA with the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 408 ("Local 408"), a union that represented approximately forty to forty-five percent of the debtor's labor force. The bankruptcy court granted the debtor's motion and, upon appeal, the district court affirmed the bankruptcy court's order. In tandem with appealing to the U.S. Court of Appeals for the Third Circuit, Local 408 filed unfair labor practice ("ULP") charges against the debtor with the NLRB, alleging that the debtor had violated section 8(a) of the NLRA by unilaterally changing the terms of its CBA and by failing to pay, during the prepetition period, certain wage increases and benefits as set forth in its CBA. The NLRB concluded that the debtor had violated the NLRA by unilaterally modifying the CBA and by refusing to negotiate with Local 408. Accordingly, the NLRB ordered the debtor to remit to Local 408 the payments previously required under the CBA and petitioned the Third Circuit to enforce the NLRB order. The Third Circuit consolidated the bankruptcy and ULP actions and

[4] See 7 Collier on Bankruptcy ¶ 1113.09[1] (16th ed. 2007).

[5] See N.L.R.B. v. Bildisco, 465 U.S. 513, 526-28 (1984) (hereinafter, "Bildisco") ("[T]he Bankruptcy Court should permit rejection of a collective-bargaining agreement under § 365(a) of the Bankruptcy Code if the debtor can show that the collective-bargaining agreement burdens the estate, and that after careful scrutiny, the equities balance in favor of rejecting the labor contract.").

held that a CBA is ultimately an executory contract that may be rejected pursuant to section 365(a) of the Bankruptcy Code, albeit according to a more stringent test: " [T]he debtor-in-possession [is required] to show not only that the collective-bargaining agreement is burdensome to the estate, but also that the equities balance in favor of rejection."[6] The Third Circuit declined to enforce the NLRB's order because it reasoned that a debtor-in-possession is not the alter ego of the pre-petition employer, but rather is "a 'new entity' not bound by the debtor's prior collective-bargaining agreement."[7]

In affirming the Third Circuit's decision, the Supreme Court held that a court may allow a debtor to reject a CBA as an executory contract pursuant to section 365(a) of the Bankruptcy Code, but that the court must scrutinize the requested rejection under a higher standard than the business judgment rule.[8] Specifically, the Supreme Court found that the debtor must demonstrate that a CBA burdens the estate and that the equities balance in favor of rejecting it. In addition, the court held that a debtor must show that it has made "reasonable efforts to negotiate a voluntary modification," as is required under the NLRA.[9] When "the parties' inability to reach an agreement threatens to impede the success of the debtor's reorganization," however, the Supreme Court held that a court is permitted to step into the process and allow rejection of a CBA to the extent such rejection would further the ultimate goal of chapter 11, to permit the successful rehabilitation of the debtor.[10]

The Supreme Court concluded that a debtor does not commit a ULP under section 8(d) of the NLRA by unilaterally rejecting or modifying a CBA before obtaining approval for such

[6] Bildisco, 465 U.S. at 520-21.

[7] Id. at 521.

[8] Id. at 526.

[9] Id.

[10] Id.

rejection or modification from the court. The Supreme Court explained that although the debtor is the same entity that had existed prior to entering bankruptcy, the Bankruptcy Code empowers the debtor to reject or modify executory contracts in order to "release the debtor's estate from burdensome obligations that can impede a successful reorganization."[11] The Supreme Court concluded that to find otherwise would be to undermine the protections a debtor receives under the Bankruptcy Code. The Court found that the NLRB was precluded from enforcing the NLRB order and, therefore, the terms of the CBA, because any claims for damages arising from the rejection of an executory contract must be administered through the bankruptcy process. As a result, the Supreme Court refused to enforce the NLRB order.[12]

B. Scope of Section 1113

In response to organized labor's strongly negative reaction to Bildisco, and in order to address the unique policy concerns related to CBAs, Congress enacted section 1113 of the Bankruptcy Code. Section 1113 requires a debtor to satisfy rigorous substantive and procedural requirements before a bankruptcy court will approve a debtor's motion to reject a CBA. Section 1113 provides that a debtor must satisfy all of the following criteria in order to reject a CBA:[13]

- **Subsequent to the bankruptcy filing, but prior to the filing of any motion under section 1113 motion, the debtor must make a proposal to the union describing proposed modifications to employee benefits and protections under the CBA (11 U.S.C. § 1113(b)(1)(A)).**

  A debtor must deliver this proposal to the union only after it has filed its chapter 11 petition but before it has filed its motion to reject the CBA.[14] Courts have

[11] Id. at 528.

[12] Id. at 531-33.

[13] Section 1113 uses the term "authorized representative of the employees," which is typically a labor union. For ease of reference, we refer here to the employees' representative as the "union."

[14] See 11 U.S.C. § 1113(b)(1)(A) and (c)(1); see also Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC (In re Wheeling-Pittsburgh Steel Corp.), 791 F.2d 1074, 1085 (3d Cir. 1986); In re 710 Long

required that any such proposal reflect modifications to the existing CBA rather than incorporate the terms of an entirely new CBA.[15] Also, when the parties exchange multiple proposals before the hearing, bankruptcy courts vary as to which proposal they analyze to determine if the debtor has satisfied the other relevant factors.[16] In general, however, the majority of courts consider the last proposal made by the debtor prior to the hearing when analyzing the section 1113 factors.[17]

- **The proposal must be based on the most complete and reliable information available to the debtor at the time it makes its proposal (11 U.S.C. § 1113(b)(1)(A)).**

  In determining whether such information satisfies this factor, courts will analyze the "breadth, depth, and objective credibility" of such information.[18] The debtor is required to only gather such information that is available at the time the proposal is made and to base its proposal on information it deems reliable.[19] Courts do not require that the information be error-free or audited, though the debtor must make "an honest effort to compile all data relevant to making its proposal."[20] Such information may include a reasonably detailed business plan, short and long-term financial projections and other financial data supporting the proposed modifications.[21]

Ridge Rd. Operating Co. II, LLC, 518 B.R. 810, 817-20 (Bankr. D.N.J. 2014) (hereinafter, "710 Long Ridge") (filed chapter 11 on February 24, 2013, submitted initial proposal on June 13, 2013 and a modified proposal on or around September 13, 2013); In re Delta Airlines, Inc., 342 B.R. 685, 691 (Bankr. S.D.N.Y. 2006) (filed chapter 11 on September 14, 2005 and submitted proposal on November 3, 2005).

[15] Bankruptcy courts have rejected a debtor's section 1113 motion when the CBA was set to expire, and the debtor proposed an entirely new CBA rather than proposing modifications to the CBA at issue. See, e.g., In re Valley Kitchens, Inc., 52 B.R. 493, 497 (Bankr. S.D. Ohio 1985) ("A further ground for our decision not to authorize rejection and a very significant factor in it, is the fact that the proposal here made by the debtor was made in connection with the negotiation of a new or successor collective bargaining agreement.").

[16] Compare Mile Hi, 899 F.2d at 893 (refusing to consider oral proposals made at the hearing), with In re Northwest Airlines Corp., 346 B.R. 307, 331-32 (Bankr. S.D.N.Y. 2006) (considering oral proposals at the hearing).

[17] See, e.g., Bowen Enters., Inc. v. United Food & Commercial Workers Int'l Union, Local 23, AFL-CIO-CLC (In re Bowen Enters., Inc.), 196 B.R. 734, 743 (Bankr. W.D. Pa. 1996) (same).

[18] 710 Long Ridge, 518 B.R. at 833 (citations omitted).

[19] Id.; see, e.g., Ass'n of Flight Attendants-CWA, AFL-CIO v. Mesaba Aviation, Inc. (In re Mesaba Aviation, Inc.), 350 B.R. 435, 454 (D. Minn. 2006) (finding that financial projections offered by debtor satisfied the most complete and reliable information requirement even though debtor provided the union with updated projections on the day of the section 1113 hearing).

[20] In re Mesaba Aviation, Inc., 350 B.R. at 454 (citations omitted); see also In re Amherst Sparkle Mkt, Inc., 75 B.R. 847, 850 (Bankr. N.D. Ohio 1987) (finding that the business plan that debtor used to prepare its section 1113 proposal need not be audited).

[21] See In re Trump Entertainment Resorts, Inc., 519 B.R. 76, 89 (Bankr. D. Del. 2014) (employer's proposal was based upon the most complete and reliable information by "provid[ing] comprehensive information and mak[ing] an honest effort to compile all relevant data,") (hereinafter "Trump Entertainment"); 710 Long Ridge, 518 B.R. at 833 (finding that debtor had satisfied this factor by providing the union with: (i) a one-year (and, upon the union's request, a six-year) forecast of financial projections that compared the proposed modifications with the terms of the CBA staying in place; (ii) details of cost savings as to each affected facility; (iii) a benefits summary guide;

- **The modifications to employee benefits and protections must be necessary to permit the reorganization of the debtor (11 U.S.C. § 1113(b)(1)(A)).**

  Note that a circuit split exists as to what constitutes "necessary" modifications. In the Third Circuit, necessary modifications are those that are essential to prevent liquidation. See Wheeling, 791 F.2d at 1082-83 (defining "necessary modifications" as the bare minimum modifications that are essential to the debtor's short-term survival or absolutely necessary to prevent the debtor from being forced to liquidate).

  In the Second Circuit, and in various circuits following its lead, modifications that simply increase the likelihood of a successful reorganization have been held to satisfy the requirement that the modification is necessary for the reorganization.[22] The Second Circuit approves of both economic and non-economic modifications that enhance the debtor's business if those modifications as a whole "increase the likelihood of a successful reorganization."[23]

  Courts will often consider whether the proposal includes a "snap-back" provision (*i.e.*, a provision that calls for the reinstatement of the original wages and benefits if the company returns to profitability). A snap-back provision may be relevant in determining the necessity of the modifications because such provisions "ensure that once a company is profitable enough for successful reorganization, further profits not necessary for reorganization are returned to the employees who made the concessions."[24] The Third Circuit in Wheeling found that a proposal that lacked a snap-back provision failed this requirement.[25] However, at least one

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(iv) significant data productions; and (v) relevant testimony from the debtor and its chief financial officer); see also In re AMR Corp., Case No. 11-15463 (SHL), at *83-86 (Bankr. S.D.N.Y. March 27, 2012) [Docket No. 2041] (finding that the debtor satisfied this factor after: (i) providing "sensitive financial information," "including the data on which it relied, the models it used in performing its own analyses, and the assumptions that underlie its projections into the future," to the union; (ii) making their "subject matter experts" available for information requests; and (iii) using similar data sets and methodologies as the union); see also In re Fiber Glass Indus., Inc., 49 B.R. 202, 206 (Bankr. N.D.N.Y. 1985) (denying debtor's motion because it did not provide the union with the supporting evidence to justify debtor's proposed modifications); see 11 U.S.C. § 1113(d)(3).

[22] Compare Wheeling, 791 F.2d at 1088-89; Trump Entertainment, 519 B.R. at 89 (modifications were necessary to permit the reorganization of the Debtors and were "essential to the Debtors' short-term survival."); 710 Long Ridge, 518 B.R. at 836 (citing Wheeling); with Truck Drivers Local 807, et al. v. Carey Transp., Inc. (In re Carey Transp., Inc.), 816 F.2d 82, 89 (2d Cir. 1987) (hereinafter, "Carey"); United Food & Commercial Workers Union v. Family Snacks, Inc. (In re Family Snacks, Inc.), 257 B.R. 884, 896-97 (B.A.P. 8th Cir. 2001); Mile Hi, 899 F.2d at 892-93; United Food & Commercial Workers Union, Local 770 v. Official Unsecured Creditors Comm. (In re Hoffman Bros. Packing Co., Inc.), 173 B.R. 177, 187-88 (B.A.P. 9th Cir. 1994) (hereinafter, "Hoffman").

[23] Carey, 816 F.2d at 89 ("[I]t becomes impossible to weigh necessity as to reorganization without looking into the debtor's ultimate future and estimating what the debtor needs to attain financial health."); In re Northwest Airlines Corp., 346 B.R. at 321 (holding that a debtor's proposed modifications are considered necessary if they have a significant impact on the debtor's operations and are required for the debtor to compete in the marketplace upon emergence); In re Family Snacks, Inc., 257 B.R. at 896-97; Mile Hi, 899 F.2d at 892-93; Hoffman, 173 B.R. at 187-88.

[24] See 710 Long Ridge, 518 B.R. at 836 (internal quotations and citation omitted).

[25] Compare Wheeling, 791 F.2d at 1090 ("We find it difficult, on the basis of this record, to accept . . . that it was 'necessary' to modify an existing labor contract by providing an unusually long five-year term at markedly reduced labor costs based on a pessimistic five-year projection without at least also providing for some 'snap back' to

other bankruptcy court has found that as a matter of law there is no requirement that a debtor include a snap-back provision to satisfy this requirement.[26]

- **The proposal assures that all creditors, the debtor and all affected parties are treated fairly and equitably (11 U.S.C. § 1113(b)(1)(A)).**

  "[T]he focus of inquiry as to 'fair and equitable' treatment should be whether the [debtor's] proposal would impose a disproportionate burden on the employees."[27] Courts have found that the phrase "fair and equitable" does not require that the proposal treat every constituency the same.[28] Although courts have recognized that it may be possible to compare the amount or percentage of the cost reduction from various sources, courts have focused on "whether the proposed sacrifices will be borne exclusively by members of the bargaining unit or will be spread among all affected parties[,]" while noting that the "concessions sought from various parties must be examined from a realistic standpoint."[29] Specifically, a debtor may demonstrate that it has not unfairly burdened the unionized employees by reducing their wages and diminishing their benefits to the advantage of management, non-unionized employees or creditors.[30] However, the debtor will likely be required to justify to the bankruptcy court any disparities in the treatment of the various parties if it does not treat all parties in interest identically.[31]

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compensate for workers' concessions."), with In re Mesaba Aviation, Inc., 350 B.R. 105, 107 (Bankr. D. Minn. 2006) ("[I]t is possible that the absence of snapbacks might be justified."), and United Food & Commercial Workers Local Union v. Appletree Mkts., Inc. (In re Appletree Mkts., Inc.), 155 B.R. 431, 440 (S.D. Tex. 1993) (granting the debtor's motion where its proposal did not contain a snap-back provision).

[26] See In re Bowen Enters., Inc., 196 B.R. at 742 (stating that the court is "aware of no binding precedent which holds that, as a matter of law, such a proposed modification [(*i.e.*, a snap-back provision)] is not 'necessary'"); see also Trump Entertainment, 519 B.R. at 90 (absence of a "snap-back" provision was not categorically fatal to rejection under section 1113(c); although the inclusion of a snap-back provision is useful in determining whether proposed CBA modifications treat all parties fairly and equitably, neither section 1113 nor applicable case law requires that a proposal contain such a provision).

[27] See Wheeling, 791 F.2d at 1091-92; 710 Long Ridge, 518 B.R. at 835 (citing Wheeling); see also In re Kaiser Aluminum Corp., 456 F.3d 328, 341 (3d Cir. 2006). Similarly, the Second Circuit has held that the purpose of this requirement is "to spread the burdens of saving the company to every constituency while ensuring that all sacrifice to a similar degree." In re Century Brass Prods., Inc., 795 F.2d at 273.

[28] See Carey, 816 F.2d at 90-91 (noting that a debtor need not prove that managers and non-union employees will suffer salary and benefit reductions to the same degree as union workers); In re Blue Diamond Coal Co., 131 B.R. 633, 645-646 (Bankr. E.D. Tenn. 1991) (allowing a proposal to treat parties in interest differently); In re Walway Co., 69 B.R. at 974 (same).

[29] In re Bowen Enters., Inc., 196 B.R. at 743; see also 710 Long Ridge, 518 B.R. at 835.

[30] See Carey, 816 F.2d at 90-91; see also Trump Entertainment, 519 B.R. at 90 (finding that debtors satisfied the requirement to treat all parties fairly and equitably based upon the evidence in the record that all key parties, including the Debtors' secured lender, trade creditors, state and local taxing authorities, non-union employees, tenants and management, would suffer significant losses as a result of the restructuring).

[31] See, e.g., 710 Long Ridge, 518 B.R. at 835-36 (finding 15% cut in union employees' payroll compared to 2% cut in non-union employees' payroll was nonetheless fair and equitable because: (a) union wages and benefits were significantly higher than those of non-union employees and such cost reduction measures closed the gap between those parties; (b) the modified proposal contained a snap-back provision; and (c) the debtors also obtained

When analyzing this factor, a court will likely consider the wages and benefits of all unionized and non-unionized employees and the expected returns of creditors.[32] The types of benefits that most courts analyze include wage reductions, decreases in vacation days or health insurance coverage, wage freezes, staff reductions, an increase in job responsibilities without commensurate salary increases and the elimination of overtime pay.[33] In Wheeling, the Third Circuit considered, among other things, whether non-unionized employees were leaving the company for better paying jobs and whether the proposal included a snap-back, profit sharing or equity rights provision.[34] However, other bankruptcy courts have found that under this factor, a debtor need not include a snap-back provision to demonstrate that the proposal treats all parties fairly and equitably.[35]

- **The debtor must provide the union such relevant information as is necessary to evaluate the proposal (11 U.S.C. § 1113(b)(1)(B)).**

  Courts have interpreted "necessary" to mean information that is "the most meaningful financial and statistical information available[.]"[36] The nature and scope of the proposed modifications will dictate the breadth and scope of information to be provided.[37] In general, a court will look more favorably upon a debtor who openly shares with the union all of the information it has available

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concessions from other related parties, including substantial claims waivers and/or reductions from their landlords, non-debtor affiliate and other creditors); Int'l Brotherhood of Teamsters v. IML Freight, Inc., 789 F.2d 1460, 1462-63 (10th Cir. 1986) (reversing lower court's approval of debtor's motion and denying the motion because debtor did not justify the disproportional cutbacks in unionized workers' payroll); In re Delta Air Lines, 342 B.R. at 698-99 (denying debtor's motion because union, which comprised 10.5% of the payroll, was asked to provide 21% of the total labor cost reductions); In re Texas Sheet Metals, Inc., 90 B.R. 260, 269 (Bankr. S.D. Tex. 1988) (concluding that debtor's proposal was fair and equitable despite union wage cuts of 18.9% because "[t]he union have [*sic*] not been singled out" as the rental payment on debtor's property was lowered by 20%, office staff workers took a 5% wage cut and supervisors took a 5% wage cut and eliminated overtime payments).

[32] See In re Amherst, 75 B.R. at 851-52 (comparing the wages and benefits of union and non-union employees when considering the fair and equitable factor); 710 Long Ridge, 518 B.R. at 835-36 (comparing union and non-union wages and analyzing the expected returns of the debtor's creditors); see, e.g., In re Texas Sheet Metals, Inc., 90 B.R. at 269.

[33] 710 Long Ridge, 518 B.R. at 823 (weighing wage reductions, reductions in vacation days and paid holidays, as well as contributions to employee health benefits); In re Carey Transp., Inc., 50 B.R. 203, 209-10 (Bankr. S.D.N.Y. 1985), aff'd, 816 F.2d 82 (2d Cir. 1987) (considering the debtor's staff reductions); In re Bowen Enters., Inc., 196 B.R. at 743 (weighing the debtor's proposed wage freeze).

[34] See Wheeling, 791 F.2d at 1089-93 ("[T]he proposal's failure to provide workers a share in a possible recovery, is particular significant in this case since the proposal asked workers to take substantial reductions over a five-year period based on extremely pessimistic forecasts.").

[35] See, e.g., In re Appletree Mkts., Inc., 155 B.R. at 440 (granting the debtor's motion where its proposal did not contain a snap-back provision, as the proposal still treated all affected parties fairly and equitably); see also In re Sierra Steel Corp., 88 B.R. 337, 342 (Bankr. D. Colo. 1988) (granting section 1113 relief where "the absence of a snap-back provision is not an indication of inequitable treatment or an inequitable result[]" and, thus, the debtor satisfied the fair and equitable and balance of the equities factors) (internal citation omitted).

[36] See In re Liberty Cab & Limousine Co. Inc., 194 B.R. 770, 776-77 (Bankr. E.D. Pa. 1996).

[37] See Wheeling, 791 F.2d at 1094 (noting that a bankruptcy court must not give "undue weight to . . . the need for haste" in considering this factor); 710 Long Ridge, 518 B.R. at 834.

relating to the formation of a proposal.[38] In assessing the information that the debtor gives to the union, the courts may consider data exchanged both pre- and post-petition.[39] For example, in 710 Long Ridge, the debtor satisfied this requirement by providing access to thousands of documents in a data room, giving high priority to the union and responding to every relevant document request.[40] In In re AMR Corp., the debtor presented the unions with the same monthly financial information that it provided to its board of directors and held monthly meetings with the unions that included financial presentations by the debtor's senior management and opportunities for the unions to ask the debtor's senior financial officers questions.[41]

- **From and after the date that the debtor makes its proposal and ending on the date of the section 1113 hearing before the bankruptcy court, the debtor must meet at reasonable times with the union (11 U.S.C. § 1113(b)(2)).**

  Bankruptcy courts determine whether a debtor has met this requirement based on a "facts and circumstances" test, as the Bankruptcy Code does not require a minimum number of meetings or a minimum number of hours. For example, one court denied a debtor's motion where it only met once with a union that had requested additional meetings, whereas another court found that the debtor satisfied this factor after meeting just twice with the union. As a general rule, if the CBA and the debtor's proposals are complex, a court will require multiple meetings for longer durations.[42]

- **The debtor must confer with the union in good faith in an attempt to reach mutually satisfactory modifications of the CBA (11 U.S.C. § 1113(b)(2)).**

  Bankruptcy courts define "good faith" bargaining as "conduct indicating an honest purpose to arrive at an agreement as the result of the bargaining process."[43]

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[38] See In re AMR Corp., Case No. 11-15463 (SHL), at *83-86 (D.I. 2041) (approving the section1113 motion where the debtor readily provided the union with extensive financial information, analyses, and access to the debtor's own "subject matter experts."); 710 Long Ridge, 518 B.R. at 833 (allowing the debtor to reject the CBA and finding that the debtor provided the union with significant information, including a one and six-year forecast of financial projections, details of cost savings and relevant testimony from the debtor and its chief financial officer).

[39] In re Wheeling-Pittsburgh Steel Corp., 50 B.R. 969, 976-77 (Bankr. W.D. Pa. 1985) (analyzing documentation that debtor gave to union both pre- and post-petition). See In re Sol-Sieff Produce Co., 82 B.R. 787, 794 (Bankr. W.D. Pa. 1988) (looking favorably upon the debtor for instructing its accountant to hold nothing back in providing information).

[40] See In re AMR Corp., Case No. 11-15463 (SHL), at *18.

[41] See id. at *84.

[42] See, e.g., Trump Entertainment, 519 B.R. at 91 (finding that debtors went to "great lengths" and were "relentless in their efforts" in their attempts to negotiate with union); In re American Provision Co., 44 B.R. 907, 911 (Bankr. D. Minn. 1984) (denying debtor's motion because it only had one meeting with the union, which expressed interest to discuss and negotiate the proposal further); In re Amherst Sparkle Market, Inc., 75 B.R. at 852 (concluding that debtor had met at reasonable times with union where the parties only met twice); see also In re Allied Delivery Sys. Co., 49 B.R. 700, 701-03 (Bankr. N.D. Ohio 1985) (concluding that two meetings were sufficient); In re Kentucky Truck Sales, 52 B.R. 797, 801 (Bankr. W.D. Ky. 1985) (holding that four meetings was satisfactory).

[43] In re Walway Co., 69 B.R. at 973.

A bankruptcy court's determination as to whether or not the debtor met and conferred in good faith will depend on the facts and circumstances.[44] The debtor can satisfy this factor by demonstrating that it has met or corresponded with the union multiple times or has responded to the union's counterproposal(s) with substantial critiques and suggestions.[45] To refute this factor, the union must then produce evidence that the debtor did not confer in good faith.[46] Furthermore, a bankruptcy court is likely to *per se* deny the debtor's motion for lack of good faith when the debtor can prove only the union's bad faith or when the debtor meets with but refuses to negotiate with the union.[47]

- **The union must refuse to accept such proposal without "good cause" (11 U.S.C. § 1113(c)(2)).**

  Though not defined in section 1113 or elsewhere in the Bankruptcy Code, courts have found that this term does not mean "bad faith," but rather means that the union lacks a willingness to work with the debtor in its attempts to successfully reorganize.[48] The Second Circuit in New York Typographical Union No. 6 v. Maxwell Newspapers, Inc. (In re Maxwell Newspapers, Inc.) explained that the good cause requirement protects the debtor "from the union's refusal to accept the changes without a good reason."[49] Thus, if the union rejects the debtor's proposal, it must provide sufficient justification for such rejection.[50] Although the debtor must carry the burden of persuasion, the union must provide evidence

[44] See Wheeling, 791 F.2d at 1093-94.

[45] See, e.g., In re Texas Sheet Metals, Inc., 90 B.R. at 270 (noting that debtor sent numerous letters to union to negotiate); In re Salt Creek Freightways, 47 B.R. 835, 839 (Bankr. D. Wyo. 1985) (noting that debtor met four times with union and analyzed and responded to union's counter-proposal in detail); In re AMR Corp., Case No. 11-15463 (SHL), at *80, 87 (approving 1113 motion where the debtors bargained with the unions for years before filing for chapter 11, made their negotiators available to commence around-the-clock negotiations during the post-petition period, and made several concessions in response to union counterproposals, such as freezing, rather than terminating, their defined benefit plans).

[46] See 710 Long Ridge, 518 B.R. at 839; In re Kentucky Truck Sales, 52 B.R. at 801-02 ("The 'good faith' requirements of section 1113 can be satisfied by the debtor showing that it has seriously attempted to negotiate reasonable modifications in the existing collective bargaining agreement with the union prior to the rejection hearing.").

[47] See, e.g., In re Horsehead Indus., 300 B.R. 573, 588 (Bankr. S.D.N.Y. 2003) (rejecting 1113 motion because debtor refused to meet with union); In re GCI, Inc., 131 B.R. at 697 (finding that debtor cannot satisfy good faith requirement merely by showing union's bad faith).

[48] See, e.g., Trump Entertainment, 519 B.R. at 81, 90-91 (court held that the debtors demonstrated that they "were literally begging the Union to meet while the Union was stiff-arming the Debtors" and that the union was "intransigent in its position" and that instead of coming to the bargaining table, the union took a "'fight rather than switch' stance" in the face of the debtors' liquidation); In re Alabama Symphony Ass'n, 155 B.R. 556, 577 (Bankr. N.D. Ala. 1993), aff'd in part, rev'd in part on other grounds, 211 B.R. 65 (N.D. Ala. 1996); see also In re Bruno's Supermarkets, LLC, No. 09-00634-BGC-1, 2009 WL 1148369, at *15 (Bankr. N.D. Ala. Apr. 27, 2009).

[49] In re Maxwell Newspapers, Inc., 981 F.2d 85, 90 (2d Cir. 1992) (hereinafter, "Maxwell").

[50] See In re Horsehead Indus., 300 B.R. at 585 ("Where the union rejects a proposal that is necessary, fair and equitable, it must explain the reasons for its opposition.") (internal citations omitted); In re Am. Provision Co., 44 B.R. 907, 910 (Bankr. D. Minn. 1984) ("[O]nce the debtor has shown that the [u]nion has refused to accept its proposal the [u]nion must produce evidence that it was not without good cause").

that its rejection was for good cause.[51] Various bankruptcy courts have *per se* concluded that a union cannot provide sufficient justification when the debtor's modifications are necessary, fair and equitable and the union fails to provide within a reasonable time prior to the hearing on the section 1113 motion any reason for its rejection.[52] Furthermore, a union's "refusal to negotiate and delayed response to the [p]roposal has been found to be sufficient lack of good cause for rejection."[53] For example, in 710 Long Ridge, the bankruptcy court determined that the union's refusal to confer with the debtors or present a counterproposal constituted a rejection of the proposal without good cause.[54]

However, to the extent that a union submits a counterproposal to the debtor that maintains the savings put forth by the debtor, such counterproposal may be deemed by a court to be a rejection for good cause.[55] For example, the court in In re Bruno's Supermarkets, LLC denied the debtor's motion to reject its CBAs because the union's counterproposal maintained the savings that the debtor put forth in its initial proposal.[56] In that case, the debtor sought to sell its assets to a third-party buyer. The debtor's proposal sought to eliminate successorship clauses within its CBAs (requiring any successor or assign of the debtor to assume the CBAs) so that the buyer would not be obligated to assume the CBAs, whereas the union's counterproposal required the buyer to agree to negotiate with the union to reach a new agreement. The court concluded that the counterproposal did not affect the debtor's savings because potential buyers offered to negotiate new CBAs.[57]

- **The balance of the equities must clearly favor rejection of the CBA (11 U.S.C. § 1113(c)(3)).**

  The debtor must demonstrate that the balance of the equities *clearly* favors rejection.[58] Bankruptcy courts consider some combination of or all of the following six factors, which were first set out by the Second Circuit in Carey, in order to determine whether the debtors satisfied this element:

  > (1) the likelihood and consequences of liquidation if rejection is not permitted; (2) the likely reduction in the value of creditors'

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[51] See, e.g., In re Carey Transp., Inc., 816 F.2d at 90.

[52] See, e.g., Maxwell, 981 F.2d at 90 (finding that union's lack of response constituted lack of good cause); In re Royal Composing Room, Inc., 62 B.R. 403, 407 (Bankr. S.D.N.Y. 1986), aff'd, 848 F.2d 345 (2d Cir. 1988) (same).

[53] See 710 Long Ridge, 518 B.R. at 837.

[54] See id.

[55] See, e.g., In re Horsehead Indus., 300 B.R. at 585 ("[I]f the union makes counter-proposals that meet its needs while preserving the savings required by the debtor, its rejection of the debtor's proposal will be with 'good cause.'").

[56] See In re Bruno's Supermarkets, LLC, 2009 WL 1148369 at *17-19.

[57] See id.

[58] See 11 U.S.C. § 1113(c)(3). This factor codified the Bildisco ruling by incorporating the balancing of the equities test into section 1113.

> claims if the [CBA] remains in force; (3) the likelihood and consequences of a strike if the [CBA] is voided; (4) the possibility and likely effect of any employee claims for breach of contract if rejection is approved; (5) the cost-spreading abilities of the various parties, taking into account the number of employees covered by the [CBA] and how various employees' wages and benefits compare to those of others in the industry; and (6) the good or bad faith of the parties in dealing with the debtor's financial dilemma.[59]

Some courts require the debtor to prove this factor by a burden of proof greater than a preponderance of the evidence because of the use of the word "clearly" in the language of section 1113. For example, the court in In re Ind. Grocery Co., Inc. denied the debtor's motion because the equities only "militated in favor" of rejection and did not "clearly" favor it.[60]

The debtor must prove each of these elements by a preponderance of the evidence.[61] After a debtor has established its compliance with these factors, the burden of proof then shifts to the union to demonstrate that the debtor has failed to comply with any or all of such factors.[62] Procedurally, only after the debtor makes a proposal and provides information to the union regarding the proposal can it file its motion to reject the CBA.[63] The bankruptcy court must then: (i) schedule a hearing no later than fourteen days after the debtor files its motion; (ii) give at least ten days' notice of such hearing to all interested parties; and (iii) reach a decision within

[59] See 710 Long Ridge, 518 B.R. at 838 (citing Carey); see also Trump Entertainment, 519 B.R. at 91 (court determined that all six Carey factors weighed in favor of rejection, emphasizing that the debtors would be forced to liquidate in the event the proposed modifications were not implemented, and noting that the union demonstrated bad faith based on its "campaign of misinformation, refusal to negotiate in earnest and effort to drive business away.").

[60] 136 B.R. 182, 196 (Bankr. S.D. Ind. 1990) (finding debtor must prove this factor beyond a preponderance of the evidence because of the existence of the word "clearly" in section 1113).

[61] See In re Century Brass Prods., Inc., 795 F.2d at 273 (requiring debtor to prove section 1113 elements by a preponderance of the evidence). However, some courts hold that the balancing of the equities factor requires the debtor to satisfy requirement has a higher burden of proof than preponderance of the evidence. See, e.g., In re Walway Co., 69 B.R. 967, 975, n. 18 (Bankr. E.D. Mich. 1987); In re American Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984).

[62] See, e.g., Sheet Metal Workers' Int'l Ass'n, Local 9 v. Mile Hi Metal Sys., Inc. (In re Mile Hi Metal Sys., Inc.), 899 F.2d 887, 891-92 (10th Cir. 1990) (hereinafter, "Mile Hi").

[63] See 11 U.S.C. § 1113(b)(1).

thirty days of the hearing as to the merits of the debtor's motion.[64] Furthermore, the court may continue the hearing for a maximum of seven days in the "interests of justice," or for a longer period as may be agreed upon by the debtor and the union. A bankruptcy court may rule more than thirty days after the hearing date only if the debtor and union agree.[65] If the bankruptcy court fails to rule by the specified deadline, the debtor may unilaterally alter or terminate the CBA pending the bankruptcy court's final ruling.[66]

In contrast to the permanent relief available to a debtor pursuant to section 1113(c) of the Bankruptcy Code, a debtor may seek interim relief to modify a CBA under section 1113(e).[67] In order to be granted interim relief, a debtor must demonstrate that any modification it is seeking to impose is essential to its business or is required to avoid irreparable damage to its estate.[68] Various courts have found that section 1113(e) unequivocally cannot be used to permanently alter a CBA.[69] As such, most bankruptcy courts require a debtor to limit its emergency motion to "the bare minimum, short-term requirements for the debtor's immediate survival."[70] However, courts do not require a debtor to comply with the requirements provided in section

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[64] See 11 U.S.C. § 1113(d)(1); see also Wheeling, 791 F.2d at 1085.

[65] See 11 U.S.C. § 1113(d)(2).

[66] Id.

[67] See 11 U.S.C. § 1113(e).

[68] See Wheeling, 791 F.2d at 1085-86; Beckley Coal Mining Co. v. United Mine Workers of Am., 98 B.R. 690, 697 (D. Del. 1988) (hereinafter "Beckley") ("[T]he Bankruptcy Court, in deciding whether to grant relief under section 1113(e), should determine after a hearing whether the relief is 'essential to the continuation of the debtor's business or in order to avoid irreparable damage to the estate.'"); see, e.g., In re Landmark Hotel & Casino, Inc., 872 F.2d 857, 859 (9th Cir. 1989); In re Garofalo's Finer Foods, Inc., 117 B.R. 363, 369 (Bankr. N.D. Ill. 1990); In re Salt Creek Freightways, 46 B.R. 347, 351 (D. Wyo. 1985).

[69] See In re Russell Transfer, Inc., 48 B.R. at 243-44 ("Section 1113(e) was enacted as an emergency stopgap measure pending proceedings in the rejection process. It specifically provides that implementing this sub-section in no wise moots the requirement for the rejection process. . . . Congress did not intend that this Court undertake the rewriting on a permanent basis of collective bargaining agreements."); see, e.g., In re Allied Holdings, Inc., 376 B.R. 351, 357 (N.D. Ga. 2007).

[70] In re 710 Long Ridge Rd. Operating Co., II, LLC, No. 13-13653 (DHS), 2013 WL 796721, at *11 (Bankr. D.N.J. Mar. 4, 2013) (internal citations omitted).

1113(b) and 1113(c) for permanent rejection or modification of a CBA. For example, a debtor need not negotiate with, or provide information to, the union prior to filing this motion. Nor is the debtor required to file an 1113(c) motion to permanently reject the CBA prior to seeking interim relief under 1113(e).[71] Any hearing for such interim relief is likely to be scheduled in accordance with the debtor's needs, and courts often approve of very short notice periods.[72]

C. Applicability of Section 1113(c) to Expired CBAs

It is well-settled that the terms of an expired CBA remain in effect until a new agreement is negotiated or impasse is established between the parties.[73] However, there exists a division among courts as to whether bankruptcy courts have authority to grant a debtor's motion to reject a CBA pursuant to section 1113(c) when that CBA has already expired under its terms.[74] In addition, a number of courts have opined *in dicta* concerning whether an expired CBA can be rejected in bankruptcy pursuant to section 1113(c).[75] In order to determine if a CBA is expired,

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[71] See Beckley, 98 B.R. at 695-97 (reversing and remanding bankruptcy court decision that held that, prior to filing for interim relief, the debtor must first file a section 1113(c) motion and present its proposal to and engage in negotiations with the union).

[72] See In re United Press Int'l, Inc., 134 B.R. 507, 514 (Bankr. S.D.N.Y. 1991) (approving a one-day notice period for the debtor's emergency relief motion under section 1113(e)).

[73] Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991) (citing 29 USC §§ 158(a)(5) and (d)).

[74] Compare Gloria Mfg. Corp. v. Int'l Ladies' Garment Workers' Union, 734 F.2d 1020 (4th Cir. 1984) (hereinafter, "Gloria Mfg.") (disallowing motion to reject expired CBA); In re Hostess Brands, Inc., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (hereinafter, "Hostess") (same); In re Pesce Baking Co., Inc., 43 B.R. 949 (Bankr. N.D. Ohio 1984) (same); In re Sullivan Motor Delivery, Inc., 56 B.R. 28 (Bankr. E.D. Wis. 1985) (same), with 710 Long Ridge, 518 B.R. at 830 (permitting motion to reject expired CBA); In re Karykeion, Inc., 435 B.R. 663 (Bankr. C.D. Cal. 2010) (hereinafter, "Karykeion") (finding it "odd" if section 1113, which was "enacted specifically to codify and modify Bildisco, did not allow a debtor to modify its residual obligations if it followed section 1113[c]'s procedures" and extending to expired CBAs the rational of Bildisco that "requiring the debtors and labor unions to go through the formal bargaining process [under the NLRA] in the middle of a bankruptcy proceeding would doom many a reorganization"); In re Ormet Corp., 316 B.R. 662 (Bankr. S.D. Ohio 2004) (stating that the debtors "should not have to risk being charged with an unfair labor practice by declaring an impasse and unilaterally making changes to the terms and conditions of the parties' agreements without this Court's approval") (hereinafter, "Ormet").

[75] See, e.g., In re San Rafael Baking Company, 219 B.R. 860 (9th Cir. B.A.P. 1998) (citing to rationale of Gloria Mfg. Corp. in determining that NRLA, and not the bankruptcy court, had jurisdiction to require debtor to make payments under pension plan relating to expired CBA and to determine whether such payments were an

courts have considered the date that the debtor's motion will be heard before the court rather than the petition date.[76]

In Hostess, the court denied the debtor's motion to reject certain expired CBAs.[77] In doing so, the court relied upon what it found to be the plain language of the statute, drawing a distinction between the use of "collective bargaining agreement" in section 1113(a) through (d) and (f), which permits a debtor to reject a CBA after satisfying the requirements set forth therein, and the language in section 1113(e) permitting a debtor to seek temporary unilateral modifications "when the collective bargaining agreement continues in effect" (*i.e.*, potentially after it expires).[78] The court also relied upon the fact that the debtor presented insufficient evidence demonstrating that the NLRA bargaining process or the continuation of the CBA provisions in effect would burden the debtor so much that the debtor's reorganization efforts would be inhibited.[79] Thus, having been thwarted in the bankruptcy court, the debtor was left pursuing relief under the NLRA.

Decisions predating Hostess reached the same conclusion but relied on differing rationale. These decisions rely upon a pre-section 1113 case, Gloria Mfg., 734 F.2d at 1020, in which the Fourth Circuit determined that a debtor could not reject a CBA after it expired,

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administrative claim); In re Chas P. Young Co., 111 B.R. 410 (Bankr. S.D.N.Y. 1990) (citing to rationale of Gloria Mfg. Corp. in finding that debtor was not obligated to comply with 1113(c) in seeking permanent relief under 1113(e) to eliminate debtor's arbitration obligation arising under expired CBA); Hoffman, 173 B.R. at 184 (determining that union's request to alter or amend the CBA did not constitute a termination under an evergreen clause and stating that the debtor could engage in the section 1113)(c) process when a CBA had expired); Accurate Die Casting Co., 292 NLRB 982, 987 (1989) (ruling that the company must restore the terms and conditions of employment to the status quo pursuant to it undertaking unilateral changes to the CBA and, in doing so, finding that the argument that bankruptcy courts do not have jurisdiction to hear section 1113(c) motions relating to expired CBAs is untenable.).

[76] See, e.g., Gloria Mfg., 734 F.2d at 1022; In re Chas P. Young Co., 111 B.R. at 413.

[77] Hostess, 477 B.R. at 378.

[78] Id. at 380.

[79] Id. at 381.

applying an executory contract analysis pursuant to section 365 of the Bankruptcy Code. Not surprisingly, the Gloria Mfg. court held that because the CBA had expired, there was nothing left for the debtor to assume or reject.[80]

Most recently, in In re Trump Entertainment Resorts, Inc., the Bankruptcy Court for the District of Delaware (Bankruptcy Judge Gross) held that Section 1113 applied to an expired collective bargaining agreement.[81] There, the union, UNITE HERE Local 54 ("Local 54"), contended that the bankruptcy court lacked jurisdiction under section 1113(c) to authorize rejection of an expired CBA and the authority to relieve a debtor from its post-expiration, statutorily-imposed "status quo" obligations under the NLRA.[82] Relying upon NLRA authority,[83] Local 54 argued that a legal distinction must be made between unexpired CBAs and the post-expiration obligations of the parties to the CBA that are imposed by the NLRA, such that the continuing economic terms of an expired CBA are no longer contractual terms, but rather are governed solely by the NLRA.[84] According to Local 54, section 1113(c) itself does not authorize a bankruptcy court to approve a debtor's motion to reject an expired CBA and, as a result, the debtor's post-expiration, status quo obligations.[85] Thus, Local 54 argued that section 1113(c) expressly applies to the rejection of a "collective bargaining agreement" in that such term refers only to a contract that is still in existence, as distinct from the independent

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[80] See, e.g., In re Sullivan Motor Delivery, Inc., 56 B.R. at 30 (relying on rationale of Gloria Mfg. Corp. in denying the debtor's motion to reject an expired CBA); In re Pesce Baking Co., 43 B.R. at 957 (same).

[81] Local 54 timely filed a notice of appeal from the bankruptcy court's order, solely on the legal issue of whether section 1113 can be applied to an expired CBA. The Debtors and Local 54 then successfully jointly moved to certify the appeal directly to the Third Circuit Court of Appeals. The appeal is *sub judice* before the Third Circuit Court of Appeals as of the date of this submission.

[82] Trump Entertainment, 519 B.R. at 83.

[83] Id. (citing Litton Fin. Printing Div, 501 U.S. at 198 (citing 29 U.S.C. §§ 158(a)(5), (d)).

[84] Id.

[85] Id.

obligations imposed after such contract expires.[86] In addition, Local 54 asserted that a distinction should be drawn between the plain language in section 1113(c) and that of 1113(e), which applies "during a period when the collective bargaining agreement continues in effect[]"[87] and thus contemplates relief from an expired CBA, whereas 1113(c) does not. Local 54 contended that the NLRB has exclusive jurisdiction to enforce such obligations because section 1113(c) does not expressly provide the debtor the means to alter its post-expiration status quo obligations under the NLRA.[88]

In granting the Debtors' motion, the court disagreed with Local 54 and rejected the holding in Hostess. The court determined that the more reasoned view was found in the contrary authority.[89] Specifically, the court addressed the distinction in the plain language of subsections (c) and (e), concluding that:

> Congress selected the phrase "continues in effect" in Section 1113(e) with the intention of giving debtors the authority to modify the continuing effects of an expired collective bargaining agreement. It follows that the concept that a post-expiration collective bargaining agreement which "continues in effect" may be rejected is implicit in Section 1113(c) since there is "no logic to support Congressional intent allowing interim modifications to an expired CBA if essential to a Debtor's business or to avoid irreparable harm to the estate as permitted by [Section] 1113(e) but not allowing the rejection of the expired CBA terms if necessary to further the purpose of reorganization provided the conditions of Section 1113(c) are satisfied."[90]

The court further provided that section 1113(c)'s application to an expired CBA avoids the "absurd result" that an expired agreement could be modified pursuant to sections 1113(e) but not

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[86] Id.

[87] 11 U.S.C. § 1113(e).

[88] Trump Entertainment at 84.

[89] Id.

[90] Id. at 85 (internal citations omitted).

1113(c).[91] The court found that in enacting section 1113, "Congress struck a balance between affording debtors the flexibility to restructure their labor costs on a comparatively expedited basis […], while interposing a certain level of court oversight and requirements for good faith bargaining[.]"[92] Given that "[i]n many cases, time is the enemy of a successful restructuring," section 1113 was designed to provide a debtor the potential for relief under a much shorter timeline as compared to the traditional collective bargaining process provided for under the NLRA.[93]

The court noted the overriding policy of the Bankruptcy Code to facilitate and promote reorganization while providing a debtor great latitude in their restructuring efforts, and found that such efforts should not be hampered by a "complex and time consuming process overseen by another administrative body" wholly separate from the court.[94] Accordingly, the time constraints that a debtor typically faces in chapter 11 "applies with equal force in a situation where a debtor is bound by the terms of a recently expired collective bargaining agreement" and "with special force here, where the uncontroverted evidence demonstrates that…[absent the relief sought] the Debtors would be forced to close the [Taj Mahal] and liquidate, resulting in the loss of approximately 3,000 jobs [which includes union and non-union labor]."[95] By adopting this view, the court believed that a contrary decision would have done "violence . . . to the legislative purpose of section 1113 and the Bankruptcy Code."[96] The court took care to explain that a determination that section 1113(c) applies with equal force to an expired CBA still preserves the

[91] Id. (internal citations omitted).

[92] Id.

[93] Id. at 86.

[94] Id.

[95] Id. at 87.

[96] Id. (internal citations omitted).

NLRB's exclusive jurisdiction to interpret and enforce the NLRA.[97] Accordingly, the scope of the court's jurisdiction would be the same as if it were applying section 1113 to a CBA that had not yet expired.[98]

II. A WINDOW INTO PBGC'S PRACTICE: CURRENT ISSUES AND TRENDS

Frank A. Anderson
Israel Goldowitz (Chief Counsel)
Erika E. Barnes
Kimberly E. Neureiter (Attorneys)
Pension Benefit Guaranty Corporation

The Pension Benefit Guaranty Corporation ("PBGC") is a wholly owned U.S. Government corporation established by Title IV of ERISA. Modeled after the FDIC, the PBGC pays benefits under terminated defined benefit pension plans, subject to statutory limits. We act as a safety net when companies don't honor their pension commitments. As of November 2014, we protected the retirement benefits of over 41 million workers and retirees in almost 24,000 ongoing pension plans.

PBGC acts to preserve pensions when possible, and seeks to maximize recoveries for plans when companies fail. We actively work with companies to keep their pension plans ongoing, negotiating with companies both in bankruptcy and outside bankruptcy.

PBGC also pursues protections for plans. Our risk mitigation efforts include early warning cases, funding and termination liens, and funding waivers. Even as the economy continues to improve, plans and participants remain at risk from low plan funding, freezes, de-risking, and sales of sponsors to weaker controlled groups.

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[97] Id.

[98] Id.

Plan terminations don't immediately follow bankruptcy filings. Nor do they inevitably follow. Plans continued when sponsors emerged from bankruptcy in many of the large cases of the past few years. Although bankruptcy forces tough choices, that doesn't mean that pensions must be sacrificed for companies to succeed.

The Bankruptcy Code is designed to promote compromises, so the debtor can be rehabilitated. Bankruptcy provides the debtor with relief from demands of creditors, in the form of an automatic stay of all collection efforts. Allowance of claims and payment on allowed claims is subject to the bankruptcy process.

The debtor has certain powers to force concessions – e.g., to reject or revise labor contracts following negotiation – and to force unsecured lenders and other creditors to take reduced recoveries on their claims.

Bankruptcy also allows asset sales free and clear of debts and liens, allowing a buyer to cleanse the balance sheets of so-called legacy costs.

Among our current bankruptcies are **BH1**, **Budd Co.**, **Energy Future Holdings**, **Exide Technologies**, **Furniture Brands**, **Nortel Networks**, **Revstone/Metavation**, and **Standard Register**. The last several years saw the bankruptcies of **American Airlines**, **Chrysler**, **Chemtura**, **Delphi**, **Friendly's**, **GM**, **Hawker Beechcraft**, **Hostess**, **Philadelphia Symphony Orchestra**, **The Tribune Company**, **Tronox**, and **Visteon**, just to name a few. We are on the Creditors' Committee in many of these cases.

We monitor industries as well as individual sponsors. Among industries that bear close watching are coal, healthcare, manufacturing, airlines, newspapers, and retail.

A. Negotiated Protections For Ongoing Plans

Through our **Early Warning Program**, we monitor business transactions that may jeopardize pension plans, and negotiate for financial protection. We have flexibility to structure settlements that mitigate risk to pensions without weakening employers' business plans. We actively engage companies, and encourage plan sponsors and their advisors to discuss potential transactions with us well in advance.

Protections can come in various forms, such as accelerated contributions, letters of credit, escrow accounts, surety bonds, or guarantees by a departing controlled group member. For instance:

> Protections negotiated through this program were highlighted in 2009 when **Chrysler** considered reorganization and ultimately filed for bankruptcy protection.
>
> We first sought protection for Chrysler's plans when **DaimlerChrysler** sought to sell its North American Chrysler operations to an affiliate of **Cerberus** in 2007. PBGC initiated discussions with all parties on protections for the Chrysler pension plans. As a result, Daimler provided a $1 billion guaranty for up to five years, in the event of plan termination. In addition, PBGC negotiated $200 million in contributions beyond the legal minimum from Chrysler, under the new ownership capitalized by Cerberus.
>
> Less than two years later, through multi-party talks on the eve of Chrysler's bankruptcy, PBGC used that prior agreement as a springboard to negotiate further cash infusions into the pension plans. In lieu of the $1 billion guaranty contingent on termination, Daimler agreed to make $600 million in contributions into the pension plans over two years and provide a $200 million guaranty in the event the plans terminated by August 2012. Better funded, the plans were able to continue when Chrysler emerged from bankruptcy protection with new owners.
>
> The importance of such agreements was similarly highlighted when **Ampex** emerged from bankruptcy. PBGC had negotiated an agreement over a decade earlier when Ampex's parent was reorganizing in bankruptcy. That agreement secured the minimum funding for two plans, which enabled the company to continue sponsoring the plans. And both the plans and the agreement survived the bankruptcy.
>
> More recently, through the Early Warning Program, PBGC negotiated an agreement for **Safeway, Inc.**, an affiliate of Cerberus Capital Management L.P., to make $212 million in additional contributions to Safeway's largest pension plan. PBGC initiated discussions when Cerberus and Albertsons announced the acquisition of Safeway, in a transaction

that resulted in the pension plan being subordinate to approximately $11 billion of secured debt, which placed additional risk on the pension plan.

PBGC negotiated a settlement under which **Saint-Gobain Containers, Inc.** contributed $207.5 million in additional contributions to its plan. PBGC sought protection for the plan in connection with the $1.7 billion sale of the plan's sponsor to a company with fewer financial resources, a unit of Luxembourg-based **Ardagh Group, S.A.** The settlement raised the plan's funding level to about 80% and resolved litigation brought by PBGC to terminate the plan after the company turned down numerous requests to improve funding levels.

PBGC also negotiated an agreement for **Roundy's Supermarket** to make $17.5 million in additional contributions to its pension plan, and to increase a $10 million letter of credit, obtained by PBGC during a 2005 settlement, to $12.5 million. PBGC began negotiations with Roundy's upon learning that the company sought to take on $150 million in new secured debt to pay a dividend.

In another example, PBGC negotiated an agreement with the London-based **Tomkins Corp.**, whose U.S. affiliates sponsor ten pension plans. In connection with the leveraged buyout of Tomkins, and the closure of a Texas facility, Tomkins agreed to contribute an additional $5 million to its largest pension plan and $3.7 million to a second pension plan, and to forgo pension funding relief, valued at approximately $35 million, for all plans.

ERISA § 4062(e) gives us a tool to protect pensions and the insurance system in certain downsizing cases. In December 2014, the Consolidated and Further Continuing Appropriations Act of 2015 (H.R. 83) significantly amended ERISA § 4062(e). Amended 4062(e) imposes liability where, due to cessation of operations at a facility, there has been workforce reduction of over 15% of the total number of employees who are eligible to participate in an employee pension benefit plan. Sponsors are encouraged to review the amended statute.

A 20% reduction in a plan's active participants is a reportable event under ERISA § 4043 and the regulations. But the reportable event isn't necessarily a § 4062(e) event, and vice versa. The reportable event is a 20% reduction, regardless of cause, from the beginning of the plan year, or a 25% reduction from the beginning of the preceding year. In addition to looking at a

15% workforce reduction of eligible employees, Section 4062(e) aggregates separations for up to 3 years prior to the cessation and includes a causation requirement.

Section 4062(e) cross-references § 4063, the provision that covers withdrawals from multiple-employer plans, and § 4063(a) has its own reporting requirement.

Section 4063 has some presumptive remedies, and the recent amendment to § 4062(e) has added an additional remedy option under which sponsors may make certain annual additional contributions to their plans over seven years.

Pension continuation or assumption in bankruptcy: When companies enter bankruptcy, PBGC first seeks to preserve their plans if possible. We take an active role in bankruptcies to prevent unnecessary plan terminations and to pursue claims on behalf of the plan participants and the pension insurance program. Pension plans often continue in a bankruptcy reorganization, even when a debtor sells its assets in a 363 sale. And sponsors often continue to make full contributions in bankruptcy, anticipating that outcome. In addition to the obvious workforce benefits, plan continuation also prevents sizeable claims in bankruptcy, as well as post-bankruptcy termination premiums. Some noteworthy cases of plan continuation include:

Chemtura's POR incorporated a settlement with PBGC in which the company not only continued its pension plans but made a $50 million contribution to the largest plan and waived any pre-funding balance. The confirmation ruling specifically noted that "[s]ettling with the PBGC was entirely sensible," and indicated that the company had responsibly dealt with pension funding and avoiding possible plan termination claims.

PBGC worked proactively to preserve the pension plans of **American Airlines**. When American entered bankruptcy in November 2011, it immediately announced plans to terminate its four pension plans. We worked actively to revisit that decision. Our financial analysts found that American's plans were less costly than some of its competitors. We then worked with American's creditors, to show them the consequences of termination on their interests. We worked closely with stakeholders, the press, Congress, and other government agencies, and were actively involved in court proceedings. Eventually, American agreed to freeze rather than terminate its plans.

PBGC's efforts on behalf of 130,000 people in American's four pension plans helped them keep the benefits they had been promised. When American emerged from bankruptcy in December 2013, it did so with all four of its pension plans.

A few months earlier, **Eastman Kodak Co.** ended its bankruptcy proceeding with its two pension plans intact, keeping its promise from when it entered bankruptcy that it wished to continue protection for the nearly 63,000 people covered by those plans. Similarly, the **Tribune Company** emerged from bankruptcy with all four of its defined benefit pension plans.

Chrysler and **GM**'s pension plans continued despite the auto companies' 2009 bankruptcy filings. PBGC was actively involved in the bankruptcy proceedings and was a member of the unsecured creditors' committees.

Other companies that have continued their pension plans when they emerged from bankruptcy, or where plans have been assumed by other parties in connection with a bankruptcy, include: **AbitibiBowater**, **Basha's**, **CIT**, **Constar International, Cooper-Standard**, **FairPoint Communications**, **Freedom Communications**, **Great Atlantic & Pacific Tea Company (A&P)**, **Houghton Mifflin Harcourt Publishing**, **Lear**, **Lee Enterprises**, **LyondellBasell Industries**, **MediaNews Group**, **Metro-Goldwyn-Mayer**, **Momentive Performance Materials, Pilgrim's Pride**, **R. H. Donnelly**, **Reader's Digest**, **Six Flags**, **Smurfit-Stone Container**, **SP Newsprint**, **Tronox**, **Visteon, and W.R. Grace**.

PBGC also works with debtors to have some pension plans continue if the company is unable to keep all of its plans when it emerges from bankruptcy. For example, in **Hawker Beechcraft**, one plan continued, while two plans terminated. In **Oneida**, the sponsor agreed to continue two plans, while one plan terminated. But plans cannot always be saved. GM assumed a portion of Delphi's hourly plan in an IRC § 414(l) spinoff, but the **Delphi** plans terminated when the company effectively liquidated in Chapter 11. Other plans that terminated as part of the Chapter 11 process include those of **Crucible**, the **Chicago Sun-Times**, **Colonial Bank**, **Dewey & Leboeuf**, **Harry & David**, **Nortel**, **Penn Traffic**, **RG Steel**, and **St. Vincent Catholic Medical Centers**.

B. Funding Liens And Waivers

An **IRC § 430(k) lien** arises when the plan sponsor fails to make required minimum contributions to the pension plan, and the total unpaid contributions plus interest exceed $1 million. Activity in this area increased after the "perfect storm" of 2001-02, and it also increased in the 2008-09 economic downturn. The value of plan assets plummeted in 2008.

All controlled group members (80% commonly owned businesses, such as subsidiaries at any tier) are jointly and severally liable for minimum funding, and the funding lien applies to all of them. The funding lien arises by operation of law, and is perfected and enforced by PBGC for the benefit of the plan. Perfection is accomplished by filing notice in the appropriate state or local recording office. In the case of foreign controlled group members, such liens are perfected by filing notice with the D.C. Recorder of Deeds.

The funding lien has the status of a tax lien. Future borrowings, even future advances on a revolving credit arrangement, are primed by a tax lien after notice or expiration of 45 days. By law, the lien persists until the end of the plan year in which the unpaid balance is reduced to less than $1 million. But as part of a settlement or forbearance agreement, PBGC may withdraw the notice or subordinate the lien.

PBGC may sue to enforce a funding lien. PBGC can also sue for unpaid contributions where the conditions for a lien are met. ERISA § 4003(e).

A statutory lien perfected before bankruptcy is generally unavoidable. When a funding lien is perfected pre-petition, it represents a secured claim. A secured creditor generally cannot foreclose, due to the automatic stay in bankruptcy. But it is entitled to adequate protection when a senior lien is granted, when the value of the collateral declines, or when the collateral is sold.

A debtor may sell its assets free and clear of liens, but such liens attach to the sale proceeds. And when assets of a non-debtor subsidiary are sold, the lien must be satisfied before the debtor can take a liquidating dividend. And a sale of stock does not extinguish the lien.

In bankruptcy, the automatic stay prevents creation, perfection, or enforcement of liens. But it does not protect non-debtor controlled group members. In such cases, PBGC often has considerable leverage.

And the effect of a funding lien (or unsecured ERISA claim) on a foreign controlled group member has become more settled. Questions including the extraterritorial reach of ERISA, and practical questions of establishing personal jurisdiction in the U.S. or suing abroad were recently addressed in **PBGC v. Asahi Tec**, 839 F. Supp. 2d 118 (D.D.C. 2012); 979 F. Supp. 2d 46 (D.D.C.2013). In a case of first impression, the district court agreed with PBGC that the court has jurisdiction over a foreign member of a plan sponsor's controlled group for purposes of enforcing termination liability. A foreign auto-parts manufacturer had bought a U.S. manufacturer. When the U.S. company sold its assets under Chapter 11, its pension plan was terminated and PBGC sued the foreign company for termination liability. The Court held that because ERISA bases liability on the fact of ownership alone, the foreign manufacturer's deliberate and knowing decision to acquire a U.S. company and subject itself to ERISA is a sufficient minimum contact for specific jurisdiction. In a subsequent opinion, the Court held that the foreign manufacturer was a member of the U.S. company's controlled group as of the plan's termination date, and was therefore jointly and severally liable for the plan's underfunding and termination premiums, giving deference to PBGC's regulations.

Whether domestic or foreign controlled group members are involved, these liens and unsecured claims provide significant leverage due to the need to pass clear title. The liens can also provide leverage when companies seek to refinance their outstanding debt or obtain a line of credit. As a practical matter, a funding lien or even a joint and several claim must be satisfied before a subsidiary remits sales proceeds, pays an ordinary or liquidating dividend, or otherwise upstreams funds to its parent. So in our experience, the parties usually conclude that it is good business to settle these claims to facilitate a

transaction, and PBGC is able to reach consensual resolutions in the vast majority of cases.

Claims against foreign controlled group members can occur in a variety of contexts, judicial or non-judicial. For example, in **Ingersoll**, PBGC obtained a $16 million settlement towards unfunded benefit liabilities in exchange for withdrawing lien filings against a German subsidiary and releasing joint and several claims. The settlement was funded by sale proceeds that were upstreamed to the U.S. parent's bankruptcy estate.

If a sponsor cannot meet the minimum funding requirement for a plan year because of "temporary business hardship" and application of the funding standard would be "adverse to the interests of plan participants in the aggregate," the IRS may grant a **funding waiver** for that year. **26 U.S.C. § 412(c)(1).** Such a waiver involves a deferral of payments otherwise due, and is usually accompanied by security or other protections. No more than three waivers may be granted during any fifteen consecutive plan years. Id.

The IRS often involves PBGC in negotiations on what collateral would be adequate to secure the deferred payments. Any resulting liens are defined by the terms of the agreement and do not have the priming power of statutory liens.

In one example, **WHX**, a metals and mining company, faced a temporary liquidity crunch and applied for a waiver of $16 million in required contributions. PBGC recommended approval of the waiver conditioned on subordination of a second lien held by the owner of WHX to a security interest in favor of the pension plan, as well as resolution of a significant 4062(e) event. The IRS granted the waiver and WHX paid the waived contributions in full in late 2007.

C. Distress And PBGC-Initiated Terminations

A plan sponsor can seek to terminate a plan by demonstrating that the plan is unaffordable, in a distress termination. ERISA § 4041(c). PBGC may also terminate a plan to limit its losses. ERISA § 4042(a), (c).

In practice, the **distress test** means that projected cash flow is inadequate to support projected minimum funding contributions. It is generally considered a "but for" test, in that after all constituencies have made meaningful sacrifices and the debtor has explored all reasonable alternatives, the debtor would be able to reorganize but for pension funding requirements. Relevant factors include whether the debtor has considered funding waivers, benefit freezes and other measures to reduce pension costs; trimmed other fixed costs; and properly identified discretionary spending. **E.g.**, **In re US Airways Group**, 296 B.R. 734 (Bankr. E.D. Va. 2003).

A distress termination cannot proceed if it would violate a collective bargaining agreement. ERISA § 4041(a)(3). In bankruptcy, a termination motion may be preceded by a motion to modify or reject the agreement (11 U.S.C. § 1113).

> In some cases, the debtor argues that no plan is feasible because the exit lender or equity investor will not fund unless the pension plan is terminated. In that event, the debtor must show that the transaction has been market-tested. **E.g.**, **In re Philip Services**, 310 B.R. 802 (Bankr. S.D. Tex. 2004). In other cases, the debtor argues that all pension plans must terminate even though some are affordable, based on "equality of sacrifice" among workers, particularly when the distress termination motion follows rejection of one or more collective bargaining agreements. **See In re Kaiser Aluminum**, 456 F.3d 328 (3d Cir. 2006).

> As controlled group members are liable for minimum funding, all controlled group members must demonstrate distress.

PBGC may initiate termination when a plan has failed the minimum funding standard, the plan will be unable to pay benefits when due, or PBGC's long-run loss may be expected to increase unreasonably. Under the latter standard, PBGC has successfully terminated plans to prevent additional losses from springing shutdown benefits (**PBGC v. Republic Technologies Intern. ("RTI")**, 386 F.3d 659 (6th Cir. 2004)), or even from further accruals under an inherently unsustainable plan (**In re UAL (Pilots Pension Plan Termination)**, 468 F.3d 444 (7th Cir. 2006)). PBGC has also successfully terminated plans in advance of a controlled group breakup (**PBGC v. FEL**, 798 F. Supp. 239 (D.N.J. 1992)). In **PBGC v. Rouge Steel Co.**, the court reaffirmed the standard enunciated by the Sixth Circuit in **RTI**, holding that termination was appropriate when participants' expectation interest was cut off by notice, and that the termination date met PBGC's interests. No. 03-CV-75092-GCS (E.D. Mich. Aug. 23, 2010) (also recognizing PBGC's authority to set the termination date by agreement with the plan administrator). And more recently, a court held that a plan sponsor may not seek declaratory judgment to prevent a PBGC termination suit. See **FBOP Corp. v. PBGC**, No. 11-C-2782 (N.D. Ill. Oct. 5, 2011) (granting PBGC's motion to dismiss the sponsor's suit for declaratory judgment on ground that it was duplicative of PBGC's termination suit).

The Pension Protection Act of 2006 ("PPA 2006") reduced PBGC's exposure for unfunded guaranteed benefits in two significant ways: setting the deemed termination date at the bankruptcy petition date, and phasing in the guaranty of shutdown benefits. ERISA §§ 4022(b)(7), (8), 4048(a). Presumably, this should blunt the concerns that were present in cases like **Republic** and **UAL**.

D. Claims Resulting From Plan Termination

When an underfunded plan terminates, PBGC has a claim for the unfunded benefit liabilities, missed contributions, and unpaid premiums, and there is a post-petition termination premium obligation.

The controlled group is liable to PBGC for the **unfunded benefit liabilities (or UBL)**, the shortfall between plan liabilities and assets, valued under PBGC assumptions. ERISA §§ 4001(a)(18), 4062. Under a longstanding regulation, 29 CFR pt. 4044, the value of liabilities is based on closeout annuity prices, using periodic annuity price surveys. See 73 Fed. Reg. 79362 (Dec. 29, 2008).

> In several cases, debtors successfully argued that the present value of future liabilities should be based on returns that a so-called prudent investor might expect on a diversified portfolio. **In re CF&I Fabricators of Utah,** 150 F.3d 1293 (10th Cir. 1998); **In re CSC Industries**, 232 F.3d 505 (6th Cir. 2000).
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> But more recent decisions have rejected the prudent investor theory, as a matter of law, and as a matter of economics:
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> > In **In re US Airways Group**, 303 B.R. 784 (Bankr. E.D.Va. 2003), the court held that a plan's benefit liabilities must be valued according to ERISA and the regulations, based on the Supreme Court's teaching in **Raleigh v. Illinois Dep't of Revenue**, 530 U.S. 15 (2000), that the "applicable nonbankruptcy law" generally provides the rule of decision in bankruptcy. The court also held that a liability should not be valued based on projected cash flows from risky investments, but based on its own characteristics – in this case, a promise of a fixed benefit. **See also In re UAL** (Bankr. N.D. Ill. 2005); **In re High Voltage Engineering** (Bankr. D.Mass. 2006).
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> > **Dugan v. PBGC (In re Rhodes)**, 382 B.R. 550 (Bankr. N.D. Ga. 2008), explains why Bankruptcy Code provisions on claim allowance and pro rata payment on allowed claims do not displace the nonbankruptcy law in this context.
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> > In the latest decision, **In re Wolverine Proctor & Schwartz**, 436 B.R. 253 (D. Mass. 2010), aff'd, No. 10-1334 (1st Cir. Apr. 20, 2011), the Court stated it had "no difficulty concluding that Judge Feeney's opinion in **High Voltage** properly

states the law," and upheld the bankruptcy court's opinion applying **Raleigh** and the "emerging line of cases" that endorse calculation of a UBL claim based on the regulatory method. **See also Official Unsecured Creditors' Comm. v. PBGC (In re Harriet & Henderson Yarn Co.),** 164 Fed. Appx. 454 (4th Cir. 2006) (upholding valuation regulation in settlement under bankruptcy standards); **Law Debenture Trust Co. v. Kaiser Aluminum Corp. (In re Kaiser Aluminum Corp.),** 339 B.R. 91, 38 Employee Benefits Cas. (BNA) 1316 (D. Del. 2006) (same).

A UBL claim has the status of a tax lien, up to 30% of the controlled group's net worth. ERISA § 4068. Therefore, much of what is said about funding liens also applies to the UBL lien. And in some respects, ERISA liens can be enforced even when a tax lien could not. **See PBGC v. Boury**, 2008 WL 2803798 (N.D. W. Va. Jul. 18, 2008); 2009 WL 3334924 (N.D. W. Va. Oct. 14, 2009) (UBL lien survived a tax sale of real property, though other tax liens would have been discharged).

Congress enacted a **termination premium** in the Deficit Reduction Act of 2005 and made it permanent in PPA. PBGC issued final rules in December 2007 that provide additional guidance (29 CFR § 4007.13).

The premium is $1,250 per participant (as of the day before plan termination), for each of three years. This can be a sizeable amount in the aggregate.

The premium applies to distress terminations under the reorganization and business continuation tests, and to PBGC-initiated terminations.

Under a **special rule** for bankruptcy reorganizations, the premium doesn't arise until after discharge or dismissal. In a reorganization, PBGC therefore asserts that it is not a dischargeable bankruptcy "claim," to be paid in fractional dollars by the estate, but an obligation payable in full by the reorganized company. The legislative history emphasizes that Congress intended that the termination premium survive the bankruptcy discharge, as a post-emergence cost.

The test case was **In re Oneida**. There, the bankruptcy court held that the termination premium is a bankruptcy claim, which can be satisfied by pro rata payment and discharged. PBGC asserted that the rule of decision in bankruptcy is provided by applicable nonbankruptcy law and that Congress provided that the termination premium does not arise until after discharge. On direct appeal, the Second Circuit agreed, overturning the bankruptcy court's decision. The Supreme Court denied Oneida's petition for certiorari, letting the Second Circuit ruling stand. **PBGC v. Oneida**, 562 F.3d 154 (2d Cir. 2009), cert denied, 558 U.S. 1100 (2009). (Note: PBGC v. Oneida may

have been the first case where direct review was granted under BAPCPA's direct review procedures.)

PBGC can also seek recovery under **ERISA § 4069(a)** against former sponsors who enter into transactions to evade or avoid pension liability within five years before a pension plan terminates. And PBGC may bring actions under state common law for fraud and misrepresentation. **See PBGC v. The Renco Group**, No. 13 Civ. 621 (RJS) (S.D.N.Y. Mar. 14, 2014) (holding ERISA § 4002(b)(1) authorizes PBGC to bring suit in any appropriate court, including on state law claims in either state or federal court, and that ERISA did not preempt the state law claims).

PBGC vigorously pursues recovery in bankruptcy proceedings. In addition to filing claims for pension plan liability, PBGC pursues motions practice.

The Eleventh Circuit agreed with PBGC that a state insolvency statute prohibited the distribution of corporate assets to a shareholder if it would render the corporation insolvent. **Cox Enterprises v. PBGC**, 666 F.3d 697 (11th Cir. 2012), vacating and remanding Cox Enterprises, Inc. v. News-Journal Corp., 2010 WL 3220198 (M.D.Fla. Aug 13, 2010); on remand, 2014 WL 3962694 (M.D. Fla. Aug. 13, 2014).

When PBGC was omitted from the list of creditors and not given official notice of the case in time to file a timely claim, PBGC moved to have its proofs of claim treated as if timely filed. The Court awarded PBGC summary judgment, holding that because PBGC had neither sufficient notice nor actual knowledge of the bankruptcy case in time to file a timely claim, its late-filed claims could not be subordinated. **In re Colonial Brokerage, Inc.**, 2013 WL 3049232 (Bankr. M.D. Ala. June 17, 2013).

Only PBGC may receive a monetary recovery under ERISA § 4062, as the Eleventh Circuit recognized in **Durango-Georgia Paper Co. v. H.G. Estate**, 739 F.3d 1263 (11th Cir. 2014) (PBGC amicus). The Court gave deference to PBGC's view, holding that the trustee of a bankrupt plan sponsor, who did not purport to seek recovery solely for PBGC's benefit, could not obtain a money judgment against predecessor controlled group members for § 4062 liability owed to PBGC.

Although it can be argued that bankruptcy law trumps ERISA in case of conflict, many conflicts between ERISA and bankruptcy law are false conflicts, as **US Airways** and **Oneida** suggest. **See, e.g., I. Goldowitz, ERISA and Bankruptcy: A Comfortable Co-Existence**, ABI Journal, Nov/Dec 2004.

E. Regulations And Other Guidance

PBGC's Office of General Counsel/Regulatory Affairs Group is continuing its work to reduce regulatory burden, enhance retirement security, and complete regulatory implementation of the PPA 2006.

PBGC's **Plan for Regulatory Review** highlights PBGC's plan to work with its stakeholders and reduce burden in various areas, including reportable events, premiums, and ERISA section 4010. PBGC developed the plan in response to Executive Order 13563 on Improving Regulation and Regulatory Review. PBGC's regulatory review reports are posted on PBGC.gov. **The public is encouraged to submit comments on PBGC's review plan on an on-going basis as PBGC engages in its regulatory review or nominates rules to review.**

PBGC's regulatory work from 2013 through the present includes the following:

In February 2015, PBGC published a **Request for Information** on changes to the rules for partitions of eligible multiemployer plans and facilitated mergers under the **Multiemployer Pension Reform Act of 2014**. The request seeks input from the public to help PBGC develop future guidance on the statutory changes.

In April 2014 and January 2015, OMB approved revisions to **standard and distress termination forms and instructions**. The current forms and instructions can be found on PBGC.gov under the Plan Terminations page.

In November 2014, PBGC published a **final rule** on **401(k) rollovers to traditional pensions**. The rule makes it easier for participants in 401(k) plans with rollover options to get lifetime income by moving their funds into traditional pensions. Under the final rule, benefits earned from a rollover generally would not be affected by PBGC's maximum guarantee limit or its five-year phase-in limit.

In September and October 2014, PBGC issued **Technical Update 14-1**, which provides guidance on the effect of the Highway and Transportation Funding Act of 2014 (**HATFA**) on PBGC premiums, and **Technical Update 14-2**, which provides guidance on the effect of HATFA on annual financial and actuarial information reporting under ERISA § 4010 and part 4010 of PBGC's regulations.

In May 2014, PBGC published a **final rule** amending PBGC's **multiemployer regulations**. The changes were developed as a result of PBGC's regulatory review. The amendments reduce the number of actuarial valuations required for certain small terminated but not insolvent plans, shorten the advance notice filing requirements for mergers in situations that do not involve a compliance determination, and remove certain insolvency notice and update requirements.

Also in May 2014, PBGC published a **final rule** amending its benefit payment regulation to implement the PPA 2006 provision that the phase-in period for PBGC's guarantee of benefits contingent upon the occurrence of an "**unpredictable contingent event**," such as a plant shutdown, starts no earlier than the date of the event. Under the statute, the change applies to benefits that become payable as a result of an event that occurs after July 26, 2005. The regulation includes examples that show how the phase-in rules apply to PBGC benefits in various situations.

In January and March 2014, PBGC published two **final rules regarding premiums**. The first final rule moved the flat-rate premium due date for large plans to the variable-rate premium due date for single-employer plans, starting in 2014. The second final rule changed the due date for small plans, generally requires small plans to base the variable-rate premium on prior year data, coordinates the due date for terminating plans with the termination process, and expands premium penalty relief. The two rules finalize a July 2013 proposal to make PBGC's premium rules more effective and less burdensome.

In July 2013, PBGC published a **Request for Information** soliciting information from the public to assist it in developing a proposed rule that would implement an **expansion of the missing participants program** authorized by PPA 2006 to cover with benefits of missing participants in terminated individual account plans, multiemployer plans, and non-covered defined benefit plans. PBGC expects to publish the proposed rule in 2015.

In April 2013, PBGC published a **proposed rule** that would amend its **reportable events regulation** to expand small plan waivers, introduce a waiver based on sponsor financial soundness, and make other changes to reduce regulatory burden. The proposal would exempt more than 90% of plans from most reporting requirements and permit PBGC to focus on companies and plans that are really at risk. Pending a final rule, **Technical Update 13-1** provides guidance on how to comply with reportable events requirements under the current regulation for plan years beginning on or after January 1, 2012. PBGC expects to publish the final rule in 2015.

PBGC also expects to publish a **final rule** on **statutory hybrid plans** (such as cash balance plans) in 2015. This will finalize PBGC's 2011 proposed rule and reflect Treasury final regulations issued September 2014.

F. Current Trends In PBGC Litigation

PBGC's litigation practice includes administrative law, enforcement, and defense. PBGC also regularly appears as amicus curiae. (For a comprehensive summary, **see I. Goldowitz and M. Pfeuffer, *Pension Benefit Guaranty Corporation: Litigation Outline***, December 2014, available online as a pdf at http://www.pbgc.gov/Documents/PBGCLitigationOutline2014.pdf.)

As a federal agency, PBGC's determinations and interpretations are entitled to significant **deference**. **See**, **e.g.**, **Beck v. PACE Int'l Union**, 551 U.S. 96 (2007) (accepting PBGC's view that a plan merger is not a proper form of benefit distribution when a fully funded plan is terminated, noting "We have traditionally deferred to the PBGC when interpreting ERISA, for 'to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to embar[k] upon a voyage without a compass.'" (quoting Mead Corp. v. Tilley, 490 U.S. 714, 722, 725-26 (1989)). In **USW v. PBGC**, 707 F.3d 319 (D.C. Cir. 2013), the circuit court affirmed the district court's grant of PBGC's motion for summary judgment, holding that PBGC's benefit determinations are entitled to the Administrative Procedure Act's deferential "arbitrary and capricious" standard of review, and noting that when an agency's decision is supported by its record, weighing evidence is not the court's function. The court upheld the agency's determination that participants in the Thunderbird Mining Company Pension Plan were not entitled to shutdown benefits under their terminated plan. Similarly, in **Sara Lee Corp. v. American Bakers Ass'n**, No. 06-819 (D.D.C. Dec. 1, 2009), the district court granted PBGC's motion for summary judgment. Applying the APA's "arbitrary and capricious" standard, the court upheld PBGC's administrative determination classifying a plan as a multiple-

employer plan, rather than an aggregate of single-employer plans, though PBGC had reversed an earlier determination. **See also Burmeister v. PBGC**, 943 F. Supp.2d 83 (D.D.C. 2013) (upholding PBGC's benefit determination under the arbitrary and capricious standard of review); **Crane v. PBGC (formerly Adey v. PBGC)**, 2010 WL 892229 (N.D. W. Va. Mar. 9, 2010) (on summary judgment, upholding PBGC's benefit determination under the arbitrary and capricious standard); **PBGC v. Rouge Steel Co.**, No. 03-CV-75092-GCS (E.D. Mich. Aug. 23, 2010) (PBGC's choice of termination date entitled to deference under **Heppenstall** test).

Under the APA, it is well established that the focus for judicial review is the existing **administrative record**. **Camp v. Pitts**, 411 U.S. 138 (1973). PBGC is entitled to a **strong presumption of regularity** that it properly designated the administrative record. Recently, in two cases involving PBGC Appeals Board decisions, courts have refused to grant additional discovery against PBGC or to supplement PBGC's administrative record.

> In an action by PBGC to enforce a final agency decision by the PBGC Appeals Board in a section 4062(e) matter, the court concluded that discovery sought by the plan sponsor was unwarranted under the APA. First, the plan sponsor failed to produce clear evidence that PBGC had excluded documents from the administrative record. Second, the plan sponsor's defenses involved legal determinations for which discovery was unnecessary. **PBGC v. Bendix Commercial Vehicle Sys.**, 2012 WL 629928, No. 11CV1961 (N.D. Ohio Feb. 24, 2012).
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> In a matter involving an appeal of PBGC's denial of shutdown benefits, the court denied plaintiffs' request to supplement the administrative record. The court noted that plaintiffs failed to demonstrate that the documents in question had been before the decision makers and did not justify making an exception to the rule against supplementing administrative records. **Deppenbrook v. PBGC**, 2011 WL 1045765 (W.D. Pa. Mar. 17, 2011); No. 11600 (D.D.C. Mar. 12, 2012); 950 F. Supp. 2d. 68 (D.D.C. 2013); __ F.3d __, No. 13-5254, 2015 WL 728062 (D.C. Cir. Feb. 20, 2015) (affirming grant of summary judgment to PBGC, applying deferential standard of review under the APA, and finding that "PBGC properly applied ERISA").
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> **See also Lewis v. PBGC**, 2014 WL 1816069, 58 Employee Benefits Cas. (BNA) 2479 (D.D.C. May 8, 2014) (applying arbitrary and capricious standard of review and granting PBGC motion to dismiss based on evidence in the administrative record); **DeLeon v. US Airways, Inc.**, 2014 WL 341570, 57 Employee Benefits Cas. (BNA) 2381 (D.D.C. Jan.

31, 2014) (applying arbitrary of capricious standard of review and limiting review to record available to PBGC at the time of the benefit determination); **Powell Valley Nat. Bank v. PBGC**, No. 12-00018 (W.D. Va. Jan. 28, 2013) (rejecting supplementation of administrative record); **USW v. PBGC**, No. 1:09-cv-00517-BAH (D.D.C. Mar. 20, 2012) (finding sufficient evidence in the administrative record to support PBGC's determination).

In the last several years, we have seen a marked increase in suits challenging **benefit determinations** and other decisions that indirectly affect benefits. Thus far, plaintiffs have not been successful.

In **Davis v. PBGC**, a group of retired airline pilots sued PBGC, contending in part that PBGC erred in numerous aspects of its benefit determinations. The D.C. Circuit affirmed the district court's grant of summary judgment, holding that on each issue PBGC had the better view of the statute, PBGC's regulations, and the pension plan. It also held that PBGC's Appeals Board properly refused to consider evidence that the pilots failed to submit to the Board in their initial appeal and that judicial review is limited to the administrative record made before the Board. 734 F.3d 1161 (D.C. Cir. 2013), aff'g 864 F. Supp. 2d 148 (D.D.C. 2012); 815 F. Supp. 2d 283 (D.D.C. 2011).

In a participant suit challenging an Appeals Board decision over a qualified joint and survivor annuity (QJSA), the district court held that both the Appeals Board's decision and PBGC's interpretation of ERISA were entitled to ***Chevron* deference**. The court upheld the Appeals Board's decision that a participant's spouse has a vested interest in the survivor's benefit under a QJSA, notwithstanding a domestic relations order that purported to transfer the benefit to the participant's subsequent spouse. **VanderKam v. PBGC**, 943 F. Supp. 2d 130 (D.D.C. 2013), aff'd VanderKam v. VanderKam, 776 F.3d 883 (D.C. Cir. 2015).

The Ninth Circuit held that PBGC's **discretionary decision** not to pursue claims for fiduciary breach is not subject to **judicial review**. **Paulsen v. CNF**, 559 F.3d 1061 (9th Cir. 2009) (affirming dismissal of a complaint against PBGC and focusing on PBGC's unique role and varied statutory duties), cert. denied, 558 U.S. 1111 (2010). The court of appeals also agreed with PBGC that any proceeds of a participant suit for fiduciary breach relating to a terminated plan would go to PBGC under the statutory allocation scheme, and not directly to participants. On that basis, the Court held that the participants lacked standing to sue.

In **US Airline Pilots Assoc. v. PBGC**, No. 09-1674 (JR), 2010 WL 3168048 (D.D.C. Apr. 16, 2010); 274 F.R.D. 28 (2011); 2014 WL 3537827 (D.D.C. June 20, 2014), aff'd, No. 14-5181, 2015 WL _____ (D.C. Cir. Apr. 28, 2015), the court held that PBGC fulfilled its fiduciary duties with respect to a terminated plan. In rejecting the plaintiff's claims that PBGC failed to investigate and rectify possible wrongdoings by former plan fiduciaries, the court cited PBGC's investigations and audits with approval, and

concluded that PBGC had "met the prudent person standard required of Title IV trustees." In its 2011 denial of a preliminary injunction in which plaintiff sought appointment of a special trustee, the court held that USAPA had so far not distinguished or attacked the reasoning of **Paulsen v. CNF, Inc**, 559 F.3d 1061 (9th Cir. 2009), which held that the agency's decision not to pursue former fiduciaries was presumptively unreviewable by the courts. The court also rejected USAPA's assertion that deprivation of a statutory entitlement constituted irreparable harm, noting that the first $510 million of any litigation recovery would accrue to PBGC rather than the plan. Finally, the court held that appointing a special trustee would unduly disrupt the agency's operations and not be in the public interest.

PBGC has an aggressive motions practice in such cases. For example, PBGC regularly moves to **transfer** cases to the District of Columbia, as appropriate. Under ERISA § 4003(f), the appropriate court for an action against PBGC is where termination proceedings are taking place, where the plan has its principal office, or the District of Columbia. Courts have agreed with PBGC that D.C. is the appropriate venue for actions concerning terminated plans. **See Deppenbrook v. PBGC**, 2011 WL 1045765 (W.D. Pa. Mar. 17, 2011) (court ordered transfer to D.D.C.); **United Steelworkers v. PBGC**, 602 F. Supp. 2d 1115 (D. Minn. 2009) (in challenge to PBGC's shutdown benefit determination, court emphasized duty to follow ERISA's plain language, and agreed with PBGC that the District of Columbia was the only court in which the action could have been brought, and transferred the case there); **Carstens v. Michigan Dep't of Treasury**, 2009 WL 2581504 (W.D. Mich. Aug. 18, 2009) (PBGC first removed to federal district court, then successfully moved for transfer to D.D.C.); **Stephens v. US Airways Group, Inc.**, No. 00-00144 (N.D. Ohio June 28, 2007) (court ordered transfer to D.D.C.).

Courts have denied **attorneys' fees** in benefit suits against PBGC, and have stricken **jury demands**. **Stephens v. US Airways Group**, 555 F. Supp. 2d 112 (D.D.C. 2008); 644 F.3d 437 (D.C. Cir. 2011), aff'g in part and rev'g in part 696 F. Supp. 2d 84 (D.D.C. 2010) (plaintiffs not entitled to attorneys' fees); **Davis v. PBGC**, 571 F.3d 1288 (D.C. Cir. 2009), aff'g 596 F. Supp. 2d 1 (D.D.C. 2008) (granting PBGC motion to strike demand for attorneys' fees); **Deppenbrook v. PBGC**, No. 11-cv-600 (D.D.C. Sept. 2, 2011) (granting PBGC motion to strike jury demand).

A sponsor may voluntarily terminate a plan in a **standard termination** if the plan has sufficient assets to pay all promised benefits. ERISA § 4041(b). PBGC steps in the event that problems arise in connection with such terminations. In standard termination cases, courts have agreed with PBGC interpretations in a variety of contexts, including audit enforcement matters, PBGC's role in noncompliant standard terminations, and the appropriate statute of limitations.

PBGC takes an active role in enforcing audit determinations and dealing with failed standard terminations.

> Courts have upheld PBGC's audit determinations prohibiting post- termination amendments that reduce lump sum benefits. Specifically, courts have agreed with PBGC that post-termination amendments to replace a plan's actuarial assumptions with the minimums required under PPA when valuing lump sums must be disregarded upon a standard termination when they reduce benefits. **See Royal Oak Enterprises, LLC v. PBGC**, No. CV 13-01040 (GK), 2015 WL 364336 (D.D.C Jan. 28, 2015); **PBGC v. Kentucky Bancshares, Inc.**, No. 14-5573, 2015 WL 221621 (6th Cir. Jan. 15, 2015), upholding 7 F. Supp. 3d 689 (E.D. Ky. 2014); **PBGC v. Wilson N. Jones Mem. Hospital, 374 F.3d 362 (5th Cir. 2004); Powell Valley Nat. Bank v. PBGC**, 2013 WL 4759242 (W.D.Va. Sept. 4, 2013); **PBGC v.Town & Country Bank and Trust Co.**, 2012 WL 4753352 (W.D.Ky. Oct. 4, 2012). These cases also deferred to PBGC on interpretation of its organic statute and regulations, including instances where Internal Revenue Code provisions were considered in the analysis.
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> PBGC has also prevailed on procedural issues in other standard termination audit enforcement cases. For example, in **PBGC v. Endodontic Specialists of Colo.**, No. 14-CV-01163-RPM, 2014 WL 5465307 (D. Colo. Oct. 28, 2014), the court agreed with PBGC, dismissing the plan sponsor's third-party complaint against the plan administrator. The court held that there was no diversity of citizenship and that exercising supplemental jurisdiction over their dispute would interfere with the disposition of the case, which is determined on PBGC's administrative record. And in **PBGC v.Ferfolia Funeral Homes, Inc.**, 835 F. Supp. 2d 416 (N.D. Ohio 2011), the court agreed that the statute of limitations ran from the non-compliant act, in this case a deficient distribution to participants. The court noted that "PBGC's interpretation is unassailable under Supreme Court and Sixth Circuit law."
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> Courts have also agreed with PBGC regarding standard termination issues other than audits. In **H & R Convention & Catering Corp. v. PBGC**, 2013 WL 1911335 (E.D.N.Y. May 8, 2013), where PBGC terminated and trusteed a plan after a failed standard termination, the purchaser of the pension plan sponsor sought recovery against the former sponsor for fiduciary breach for failing to complete the plan's standard termination, and a declaration that it was not liable for plan contributions or termination liability. The court dismissed the case, holding, in part, that PBGC's trusteeship cut off the former sponsor's right to maintain fiduciary breach claims.
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> In addition, an appeals court agreed with PBGC's view as amicus that Title IV provides the exclusive means of termination and that a sponsor can withdraw a standard termination in accordance with the ERISA 4041 regulations. **Carter v. Pension Plan of A. Finkl & Sons Co. For Eligible Office Emps.**, 654 F.3d 719 (7th Cir. 2011), aff'g 2010 WL 1930133 (N.D. Ill. May 12, 2010).

G. Multiemployer Plans

The PBGC insurance program for multiemployer plans involves a smaller guarantee than the single-employer program and a less frequent insurable event – inability to pay benefits currently due rather than termination.

Multiemployer plans provide economies of scale for employers who might not be able to afford their own plans or who operate in industries where traditional pension plans are impractical. For employees, they not only provide a benefit but a portable benefit if they change jobs. They also spread the risk of employer insolvency, charging withdrawal liability to those who go non-union, downsize, or go out of business. PBGC steps in only if the plan becomes insolvent, providing financial assistance to pay benefits up to the legal guarantee limit.

The system has worked well for almost three decades, but some plans and the insurance system itself are now under strain. The demographics of participant populations complicate the situation for many multiemployer plans. By 2010, only 39% of all participants in multiemployer plans were active employees while 61% were retired or separated vested participants. Those percentages were reversed in 1990. And there are fewer employers and thus more "orphan" participants to be supported by those who remain. Like many investors, plans suffered significant investment losses in the past few years. Because contributions are usually based on hours worked, plans also lost revenue due to the economic decline.

The PPA 2006 amended multiemployer funding rules to require trustees to earlier identify and monitor funding issues. PPA shortened amortization schedules from 30 to 15 years. Under PPA's rules, plans are considered critical, endangered, or neither, depending on their funding status. (Plans in critical status are commonly referred to as "red zone" plans, endangered as "yellow zone," and those that are neither critical nor endangered as "green zone.")

Critical and endangered plans must adopt rehabilitation or funding improvement plans that may entail more aggressive funding and certain benefit cuts (to future accruals and to adjustable benefits).

Some relief was available to plan sponsors in connection with PPA. Congress allowed a one-year delay of PPA rules in 2008 under the Worker, Retiree, and Employer Recovery Act. PPA itself allowed an automatic five-year amortization extension if needed to avoid a funding deficiency. In 2010, Congress allowed 29-year amortization and 10-year asset averaging to smooth the effect of investment losses. Many plans took advantage of this relief. Many are recovering and many are no longer in critical or endangered status.

Early in 2013, the ERISA agencies provided reports to Congress with thorough analysis on the health of multiemployer plans and PBGC's multiemployer insurance program. The Multiemployer Report to Congress, submitted by PBGC, IRS, and the Department of Labor, provided a comprehensive study of the effect of funding amendments and related changes on the operation and funding status of multiemployer plans under PPA. PBGC also offered vital information in its quinquennial report to Congress on PBGC's premiums and guaranteed benefit level.

Plans, unions, employers, and their professionals had also been discussing changes to the multiemployer system and presented proposals to the Administration and to Congress. The Retirement Security Review Commission, which was convened by the National Coordinating Committee for Multiemployer Plans (NCCMP) and which included large multiemployer plans and members of the American Academy of Actuaries Multiemployer Pension Plans Subcommittee, suggested approaches for strengthening plans.

In December 2014, the Multiemployer Pension Reform Act of 2014 ("MPRA") established new options for trustees of multiemployer plans that are expected to become insolvent in less than 20 years (or 15 years in certain situations). Trustees of such plans may apply for a temporary or permanent reduction of pension benefits under the plan if such reductions are necessary to keep the plan from becoming insolvent. Participants will be notified of any proposal to reduce benefits and will have the opportunity to comment on the proposal. If the trustees' proposal to reduce benefits is approved by the U.S. Department of the Treasury, in consultation with PBGC and the DOL, participants and beneficiaries have the right to vote on the proposed benefit changes before they occur. However, regardless of that vote, in the case of particularly large and financially troubled multiemployer plans (referred to as "systemically important") that will require PBGC assistance valued at more than $1 billion, Treasury must permit the implementation of such benefit reductions or a modified version of such reductions developed by Treasury in consultation with PBGC and the DOL.

MPRA also provides other options that, in combination with benefit reductions, could help certain plans. The new law allows PBGC to provide financial assistance to eligible plans to pay for certain benefits and to help financially weak plans merge with stronger plans. Fortunately, many plans that are in endangered or critical status have a path to work their way back to health over time, without reducing benefits.

MPRA also increased the 2015 flat-rate premium for multiemployer plans from $13 to $26 per participant.

Under pre-MPRA law, PBGC has certain avenues to help protect multiemployer plans. PBGC gets notice when multiemployer plans propose to merge, to assure that participants and

the insurance system are protected. Mergers can increase economies of scale and improve dependency ratios. We often provide technical assistance in these cases.

Plans can adopt alternative withdrawal liability allocation methods with our approval. Some have used this flexibility to attract new employers by protecting them from legacy costs. Some have also let existing employers pay off their withdrawal liability and start fresh as new employers to ensure that those employers remain in the plan.

While PBGC does not have the same opportunities as under the single-employer program, it has facilitated transactions that mitigate risk. We have conferred with employers, unions, and plans, and our sister agencies on plan-specific solutions, such as accepting agreements for lower benefits and contributions.

In rare cases, we partitioned a plan, funding orphans' benefits at guaranteed levels and leaving a downsized and more sustainable plan. Even more rarely, we facilitated a merger by pre-funding financial assistance. MPRA has revised the standard for partition, and codified facilitated mergers, under new legal standards.

Examples of PBGC's recent work with multiemployer plans include:

In FY 2014, PBGC used partition authority for only the third time in its history, separating **Hostess** participants from the Bakery and Sales Drivers Local 33 Industry Pension Fund in connection with the Hostess liquidation. PBGC acted to help the plan avoid insolvency and to preserve pension benefits for most of the plan's participants.

As noted above, in FY 2014, PBGC proposed regulations that streamline certain reporting requirements and ease the administrative burden on plans.

In FY 2013, PBGC approved a large East Coast multiemployer plan's use of special withdrawal liability rules for contributing employers whose employees work under a contract or subcontract with federal or D.C. government agencies governed by the Service Contract Act and whose work shares characteristics with the construction industry.

In FY 2011, PBGC approved the merger of four red zone multiemployer plans that included a $600 million contribution from a substantial employer that resulted in a single green zone plan.

A major East Coast multiemployer plan agreed to transfer approximately $200 million in net liabilities to a new multiemployer plan as part of a package of employer financial commitments and guarantees. The agreement prevented a mass withdrawal, reduced PBGC's probable losses for nonrecoverable financial assistance, and prevented benefit cutbacks. We assisted the parties in crafting the agreement and approved the transfer under ERISA § 4231.

In FY 2010, PBGC issued an order partitioning a Midwestern multiemployer plan, **Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund**, following the plan's request. As a result, participants with benefits attributable to service with a bankrupt employer will be moved to the terminated portion of the plan, which will immediately be insolvent and require PBGC financial assistance. Partitions of multiemployer plans are discretionary.

In FY 2010, PBGC helped seven small insolvent multiemployer plans close out through the purchase of annuities or lump sum payments of guaranteed benefits. Closing out small insolvent plans reduces PBGC's future financial assistance payments for plan administrative costs and helps PBGC manage increases in its ongoing financial assistance workload.

PBGC continues to work with multiemployer plan sponsors and practitioners in situations such as restructurings in order to protect plans.

PBGC has also filed briefs as amicus curiae to clarify multiemployer provisions at issue in litigation. The First Circuit found PBGC's analysis persuasive in defining "trades or businesses" in **Sun Capital Partners III, LP v. New England Teamsters & Trucking Indus. Pension Fund**, 724 F.3d 129, 134 (1st Cir. 2013) cert. denied, 134 S. Ct. 1492 (2014). In that case, an operating company owned by two private equity funds withdrew from a multiemployer plan, and the plan assessed withdrawal liability against the two private equity funds. The district court held that the private equity funds were not liable because they were passive investors, not "trades or businesses." On appeal, the First Circuit reversed, finding that at least one of the

funds was a "trade or business" because it operated, managed, and was advantaged by its relationship with the operating company. The appellate court also noted the lack of a Treasury regulation or other agency guidance defining "trade or business" in this context, but found PBGC's analysis, in an unrelated PBGC Appeals Board decision and its amicus curiae brief, persuasive.

PBGC played a major role in clarifying the withdrawal liability provisions of the 1980 Multiemployer Act, particularly the "arbitrate first" rule. At the invitation of the Seventh Circuit, PBGC filed an amicus brief expressing its views on applying the Act's rules for the payment of withdrawal liability. The Seventh Circuit agreed with PBGC that a plan may accelerate the liability in the event of an "insolvency default" even while arbitration is pending. **Central States, SE & SW Areas Pension Fund v. O'Neill Bros. Transfer**, 620 F.3d 766 (7th Cir. 2010). At the request of the Seventh Circuit, PBGC also filed an amicus brief in another multiemployer matter, expressing the agency's views on procedural and substantive aspects of the Multiemployer Act. The Seventh Circuit once again agreed with PBGC and reinforced the Multiemployer Act principle that an employer must arbitrate any dispute it has about a plan's assessment of withdrawal liability before the employer may challenge the assessment in court. The court held that this principle applies even where the disputed withdrawal liability assessment was a revision of a previously undisputed assessment. **National Shopmen Pension Fund v. DISA Indus., Inc.**, 653 F.3d 573 (7th Cir. 2011).

At the invitation of the Second Circuit, PBGC filed an amicus brief clarifying the application of the sale-of-assets exemption to withdrawal liability under MPPAA. The Second Circuit agreed with PBGC's position that the exemption did not apply because, at the time of the sale, the buyer was not required to contribute to the plan for substantially the same number of

contribution base units as the seller. **HOP Energy, LLC v. Local 553 Pension Fund**, 678 F.3d 158 (2nd Cir. 2012).

PBGC has also been involved in litigation in other venues. **In re Hostess Brands, Inc.**, No. 12-22052 (Bankr. S.D.N.Y.), PBGC filed two statements providing critical guidance to the court and the parties. PBGC's first statement clarified that neither Title IV nor PBGC's regulations authorize a multiemployer plan's trustees to compel the involuntary withdrawal of a contributing employer. And the second statement was pivotal in explaining the permissibility and operation of alternative withdrawal liability and reallocation rules under Title IV and PBGC's regulations. **See also Quality Auto. Serv., LLC v. PBGC**, 960 F. Supp. 2d 211 (D.D.C. 2013) (court found reasonable PBGC's consideration of the plan's overall financial condition and the cumulative effect on the plan of all employer withdrawals, in determining that the withdrawn employer in a trucking-industry plan caused substantial damage to the plan's contribution base and thus owed withdrawal liability).