Bildisco: Are Some Creditors More Equal Than Others

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NOTES

BILDISCO: ARE SOME CREDITORS MORE EQUAL THAN OTHERS?

I. INTRODUCTION

In NLRB v. Bildisco and Bildisco,¹ the United States Supreme Court unanimously agreed that under certain circumstances a bankruptcy court could permit a Chapter 11 debtor-in-possession to reject its collective bargaining agreement. The Court split five to four, however, in ruling that a debtor-in-possession would not commit an unfair labor practice if it unilaterally modified or terminated provisions of its labor contract during the interim period between the filing of a Chapter 11 bankruptcy petition and bankruptcy court approval of rejection of the collective bargaining agreement.

II. STATUTORY POLICIES AND PROVISIONS

A. Bankruptcy Reform Act of 1978

The policy behind a Chapter 11² reorganization is to provide a quick and efficient rehabilitation for a financially distressed business without sacrificing protection of the interests of its creditors or the public.³ Congress intended to prevent the liquidation of the debtor's business and, thus, to avert a consequent loss of jobs or misapplication of economic resources.⁴ An associated goal is to free the debtor from creditor collection attempts

while it completes a reorganization plan. 5

Several provisions of the Bankruptcy Reform Act of 1978 (Bankruptcy Code) facilitate implementation of these policies. Initially the business may file a voluntary petition in bankruptcy for a Chapter 11 reorganization. 6 In general, that filing triggers the automatic stay which suspends actions that have or could have been brought against the estate. 7 Another provision allows the bankruptcy court to authorize the debtor business to operate as the debtor-in-possession. 8 The debtor-in-possession, using section 365(a) of the Bankruptcy Code, 9 may reject “any executory contract,” subject to bankruptcy court approval. 10 Under section 365(g), such a rejection constitutes a breach of contract. The breach is deemed to relate back to the date immediately preceding the filing of the bankruptcy petition 11 and, therefore, is subject to the automatic stay.

B. National Labor Relations Act

The overall policy of the National Labor Relations Act 12 is to maintain industrial peace 13 and thereby eliminate “obstructions to the free flow of commerce.” 14 The promotion of collective bargaining, which channels the labor-management conflict, is central to this theme. 15 The National Labor Relations Act maps the procedural route for collective bargaining while avoiding trespass into the area of the contract’s substantive terms and conditions. The government may not interfere with the parties’ substantive determination of provisions. 16 The contract between the parties is known as a collective bargaining agreement and is

7. 11 U.S.C. § 362(a) (1982); see also 104 S. Ct. at 1198.
10. Id.
Specific provisions of the National Labor Relations Act safeguard the implementation of the foregoing policy. First, section 8(a)(5) provides that it is "an unfair labor practice for an employer to refuse . . . to bargain collectively with the representatives of his employees." Section 8(d) defines the section 8(a)(5) duty to bargain collectively as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment." The duty to bargain collectively includes a specific section 8(d) provision for mid-term modification or termination of the collective bargaining agreement:

\[\text{[N]o party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification —} \]

(1) serves a \textit{written notice} upon the other party to the contract . . . ;
(2) offers to \textit{meet and confer} with the other party . . . ;
(3) notifies the Federal Mediation and Conciliation Service . . . ; and
(4) continues in full force and effect, without resort to strike or lock-out, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later. . . .

[But] the duties so imposed shall not be construed as \textit{requiring} either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract.23

21. \textit{Id.} \textit{See also} 104 S. Ct. at 1201 (Brennan, J., concurring in part and dissenting in part).
23. \textit{Id.} (emphasis added).
Sections 8(a)(5) and 8(d) combine to provide the basis of an unfair labor practice charge for midterm rejection of a collective bargaining agreement.24

C. Accommodation as a Theme

The Court resolved two issues in Bildisco.25 Each issue involved a mixture of bankruptcy law, as regulated by the Bankruptcy Code, and labor law, as regulated by the National Labor Relations Act.26 These two federal statutory schemes presented important, but apparently conflicting congressional mandates. The Court had a choice: it could either accommodate the two and reconcile any apparent conflict or declare one to be superior to the other. The decision on the first issue was unanimous27 and rested on a theory of accommodation.28 On the second issue, however, the Court split five to four,29 with the dissent vigorously protesting that the majority had "completely ignored important policies . . . [of] the NLRA as well as" the accommodation theme that formed the foundation of the Court's decision on the first issue.30

III. FACTS AND PROCEDURAL HISTORY OF Bildisco

Bildisco, a building supply distributor, was a New Jersey general partnership.31 Teamsters Local 408 represented forty to forty-five percent of Bildisco's labor force.32 Bildisco and the union entered into a three year collective bargaining agreement in April 1979.33 This labor contract "expressly provided that it was binding on the parties and their successors even though

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25. See infra notes 72-257 and accompanying text.
26. See generally supra notes 12-24 and accompanying text.
27. 104 S. Ct. at 1191, 1201.
28. See id. at 1195, 1201.
29. Id. at 1201 (Brennan, J., concurring in part and dissenting in part)(joined by White, Marshall, & Blackmun, JJ.).
30. Id.
31. Id. at 1192.
32. Id.
33. Id.
bankruptcy should supervene."

In January 1980, Bildisco failed to pay health and pension benefits and to remit collected dues to the union as it was obligated to do under the collective bargaining agreement. Between May and October of 1980, Bildisco further refused to comply with certain wage increase and vacation benefit provisions of the labor contract.

Meanwhile, Bildisco filed a voluntary petition for a Chapter 11 reorganization on April 14, 1980, under the Bankruptcy Code. The bankruptcy court subsequently named Bildisco as the debtor-in-possession and authorized it to maintain the business during the bankruptcy proceedings. In December 1980, Bildisco requested permission from the bankruptcy court to reject its collective bargaining agreement with Local 408. The bankruptcy court granted this request on January 15, 1981, after hearing testimony that the company could save approximately $100,000 in 1981 if rejection were permitted. Rejection was ordered retroactive to the date immediately preceding the date on which the bankruptcy petition was filed. The bankruptcy judge gave the union 30 days to file a claim against the debtor-in-possession for damages arising from the rejection of the contract. The district court affirmed.

On July 31, 1980, the General Counsel of the National Labor Relations Board issued a complaint alleging that Bildisco's unilateral changes of the collective bargaining agreement consti-

34. Id. (emphasis added). Enforcement of this clause would violate the express provision of the Bankruptcy Code that calls for an automatic stay. 11 U.S.C. § 362(a)(6)(1979 & Supp. 1984) (filing a petition in bankruptcy operates as an automatic stay of "any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title").
35. 104 S. Ct. at 1192.
36. Id.
37. See In re Bildisco, 682 F.2d 72, 76 (3d Cir. 1982) (General Counsel amended complaint in October 1980 to add allegation of failure to pay vacation benefits).
38. 104 S. Ct. at 1192.
39. Id.
40. Id.; but see 682 F.2d at 75 (permission to reject sought January 5, 1981).
41. 104 S. Ct. at 1192.
42. Id.
43. 682 F.2d at 75.
44. 104 S. Ct. at 1192.
45. Id.
46. Id.
tuted unfair labor practices. Bildisco failed to answer both the original complaint and the amended complaint. The National Labor Relations Board entered summary judgment on April 23, 1981, notwithstanding Bildisco's multiple protests. Bildisco claimed that its answer was delayed because of disruptions associated with filing for reorganization, that the bankruptcy court had not yet approved retention of special labor counsel, and that no contract existed to be breached since the bankruptcy court had granted it permission to reject the collective bargaining agreement retroactive to the date immediately prior to the time it filed the petition for reorganization. The Board ordered Bildisco to make pension and health and welfare contributions and to remit dues as specified in the labor contract.

The Third Circuit consolidated the two actions and found that a bankruptcy court could grant the request of a debtor-in-possession to reject a collective bargaining agreement since it was an executory contract within the meaning of section 365(a) of the Bankruptcy Code. The court remanded the case to the district court, stating that the standard used in the bankruptcy court for rejection was not expressly articulated. The standard to be used, the court noted, would "require the bankruptcy courts to undertake a 'thorough scrutiny, and a careful balancing of the equities on both sides' as set forth in Kevin Steel." The court believed that this standard would accommodate the interests of each federal statutory scheme as long as certain safe-

47. Id. at 1192-93. The unilateral changes alleged included failure to pay contractually mandated fringe benefits and wage increases and failure to remit dues to the union. Id.
48. 682 F.2d 72, 76 (3d Cir. 1982). The amended complaint was filed in October 1980.
49. Id.
50. Id.
51. Id.
52. Id.
53. 104 S. Ct. at 1193.
54. Id.
55. Id.
57. 104 S. Ct. at 1194.
58. 682 F.2d at 82.
59. Id. at 80 (quoting in part Shopmen's Local 455 v. Kevin Steel Prods., 519 F.2d 698 (2d Cir. 1975)).
60. Id. at 81.
guards were implemented:

We believe that the debtor-in-possession must first demonstrate that the continuation of the collective bargaining agreement would be burdensome to the estate; that once this threshold determination has been made the debtor-in-possession must make a factual presentation sufficient to permit the bankruptcy court to weigh the competing equities; that the polestar is to do equity between claims which arise under the labor contract and other claims against the debtor; that, in this, the court must consider the rights of covered employees as supported by the national labor policy as well as the possible “sacrifices which other creditors are making” in the effort to bring about a successful reorganization, . . . and that the court must make a reasoned determination that rejection of the labor contract will assist the debtor-in-possession or the trustee to achieve a satisfactory reorganization. 61

The Board’s petition for enforcement was denied without prejudice.62 The Third Circuit first noted that it was presented with “an application for enforcement of summary judgment” and that “denial of enforcement does not preclude the Board from processing the charges through a full hearing, guided and governed by the . . . determination on remand concerning the rejection of the collective bargaining agreement”63 and by the Third Circuit’s views presented in Bildisco.64

The court divided the unfair labor practices that had been alleged against Bildisco into pre-petition and post-petition occurrences.65 It determined that when an unfair labor practice charge arises before the filing of a Chapter 11 petition, rejection of the collective bargaining agreement would not affect the employer’s section 8(d) obligations.66 In such a case, a Board ordered monetary claim would be filed as an ordinary creditor’s claim with the bankruptcy court.67 In contrast, the Board would be bound by the bankruptcy court’s decision to permit rejection if the unfair labor practices arose in the post-petition time pe-

61. Id. (emphasis added)(citation omitted).
62. Id. at 85.
63. Id. at 82 (emphasis added).
64. Id.
65. Id. at 84.
66. Id.
67. Id.
period; the court, however, did not discuss what action could be taken if the alleged unfair labor practice charge arose post-petition, but the bankruptcy court refused to allow rejection of the collective bargaining agreement.

IV. ANALYSIS

The United States Supreme Court granted certiorari "because of the apparent conflict between [the Bildisco] decision and the decision of the Court of Appeals for the Second Circuit in Brotherhood of Railway Employees v. REA Express." The court, however, did not discuss what action could be taken if the alleged unfair labor practice charge arose post-petition, but the bankruptcy court refused to allow rejection of the collective bargaining agreement.70

A. Power and Standard for Rejection

The standard, and not the power was now up for grabs. In this and many other legal contexts, the standard defines the power and thereby legally controls its application. Distinguishing the two is illusory.72

1. Power: Executory Contract

The members of the Court agreed unanimously that a bankruptcy court has the power to grant permission to a debtor-in-possession to reject its collective bargaining agreement. The

68. Id.
69. Id.
70. The court intimated that if the bankruptcy court refused to permit rejection, the Board would be free to determine any interim unfair labor practice allegations: "It would seem, however, that the Board must await the determination of the bankruptcy court on remand before it may proceed to consider the post-petition charges." Id. The inference is that the collective bargaining agreement retains enough vitality to be "in effect" for purposes of § 8(d) after the filing of a petition in bankruptcy. See generally infra notes 237-44 and accompanying text.
71. 104 S. Ct. at 1194.
73. For purposes of the issues involved in Bildisco, the terms debtor-in-possession and trustee in bankruptcy are the same. 104 S. Ct. at 1192 n.2.
74. Id. at 1191. The Court did not address the issue of partial versus total rejection of a collective bargaining agreement. Case law, however, limits the debtor-in-possession to total rejection of executory contracts. In re Italian Cook Oil Co., 190 F.2d 994, 997 (3d
Court, in an opinion written by Justice Rehnquist, reasoned that a collective bargaining agreement is an executory contract since "at any point during the life of the contract" performance is due on both sides.\textsuperscript{76} The Court's analysis of the power to reject an executory contract relied heavily upon the statutory language of the Bankruptcy Code that explicitly allowed rejection "except as provided . . . [of] any executory contract."\textsuperscript{76} Since the Bankruptcy Code did not provide a general exemption for collective bargaining agreements, a debtor-in-possession had the power to reject such executory contracts.\textsuperscript{77}

The Court's analysis to this point is unblemished. The case law prior to Bildisco demonstrated a "uniform judicial conclusion" that collective bargaining agreements fell within the category of executory contracts and could be rejected.\textsuperscript{76} This line of judicial authority, however, could have been used as the basis of a statutory construction argument that also would have supported Justice Rehnquist's conclusion.

Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when that statute is re-enacted without change. . . . So too, where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law at least insofar as it affects the new statute.\textsuperscript{76}

The judicial interpretation of a collective bargaining agreement as an executory contract had been enunciated prior to the pas-

\textsuperscript{76} Bordewieck and Countryman, The Rejection of Collective Bargaining Agreements by Chapter 11 Debtors, 57 AM. BANKR. L.J. 293, 296-97 (1983); See In re Brada Miller Freight Sys., 702 F.2d 890, 894 (11th Cir. 1983); Local Joint Executive Bd. v. Hotel Circle, 613 F.2d 210, 214 (9th Cir. 1980); Shopmen's Local 455 v. Kevin Steel Prods., 519 F.2d 698, 706 (2d Cir. 1975); see also In re Italian Cook Oil Corp., 190 F.2d 994, 996-97 (3d Cir. 1951) (treating a collective bargaining agreement under provision for rejection of executory contracts); In re Klaber Bros., 173 F. Supp. 83, 84-85 (S.D.N.Y. 1959)(treating a collective bargaining agreement under provision for rejection of executory contracts). The Court rejected the bare contention of amicus to the contrary. 104 S. Ct. at 1194 n.6.

\textsuperscript{77} Bordewieck and Countryman, supra note 78, at 296 (quoting Lorillard v. Pons, 434 U.S. 575, 580-81 (1978))(citations omitted).
sage of section 365(a) under its predecessor, section 313(1). Congress' enactment of section 365(a) without change from section 313(1) could be read as legislative approval of the earlier, uniform judicial interpretation.

Against this backdrop of express statutory language, judicial interpretation, and statutory construction, it was not surprising that the Court rejected the protest that collective bargaining agreements are more than ordinary contracts and, therefore, should not be considered executory contracts for the purposes of section 365(a) of the Bankruptcy Code. What was surprising was the Court's failure to conclude its opinion with this finding: a collective bargaining agreement is an executory contract and is, therefore, subject to the same rejection analysis as any other executory contract. Instead, the Court implied a congressional intent to shackle a debtor-in-possession to its collective bargaining agreement absent a showing of special circumstances. While the reasons for holding the debtor-in-possession to an apparently stricter standard for rejection were meritorious, there was little reason for the Court to footnote as folly the argument of amicus that a collective bargaining agreement was not an executory contract for purposes of section 365(a). In effect, the Court later wholeheartedly embraced the idea by creating a special rejection standard for executory contracts that also happen to be labor agreements.

One pointed example strengthened the Court's finding that Congress intended to subject collective bargaining agreements under the National Labor Relations Act to section 365(a) rejection. The Bankruptcy Code, in section 1167, explicitly exempted from rejection or modification those "collective bargaining agreement[s] . . . subject to the Railway Labor Act." Instead, these agreements could be modified only in conformity with the specific procedures set forth in the Railway Labor Act. Section 1167 demonstrated that Congress knew how to exclude collective bargaining agreements from section 365(a)'s rejection power. By negative inference, failure to exempt collective bargaining agreements covered by the National Labor Relations Act evidenced a

80. 104 S. Ct. at 1194.
81. See infra notes 98-118 and accompanying text.
82. 104 S. Ct. at 1194-95.
83. Id. at 1195 n.8.
congressional intent to subject them to the power of section 365(a).^{84}

The Court's explicit reference to the section 1167 exemption for collective bargaining agreements under the Railway Labor Act^{85} foreshadowed the denunciation of the rejection standard^{86} of *Brotherhood of Railway, Airline and Steamship Clerks v. REA Express, Inc.*^{87} The Second Circuit in *REA Express* held "that executory collective bargaining agreements subject to the provisions of the Railway Labor Act . . . [could] be rejected" under section 313(1),^{88} the predecessor provision of section 365(a).^{89} The Second Circuit noted that section 77(n),^{90} the predecessor of section 1167, excepted the collective bargaining agreements under the Railway Labor Act from the rejection provision of section 313(1).^91 Instead of finding that Congress had promulgated a clear exemption for collective bargaining agreements governed by the Railway Labor Act, the court found that the debtor-in-possession was a new judicial entity and, thus, was not a party held to the procedures of the Railway Labor Act.^92 This allowed the court to ignore the clear, congressionally formulated standard for rejection of Railway Labor Act agreements.^93 Instead the court prescribed a special, judicially formulated rejection standard to be used by the court below on remand.^94 This analysis failed to explain why Congress would bother to pass section 1167 since, using the *REA Express* interpretation, the section failed to apply to any entity. Section 1167 was to be asserted only in bankruptcy and only against an employer with a collective bargaining agreement governed by the

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84. *Id.* at 1195.
86. The Court, however, failed to denounce *REA Express* for its decision to ignore the § 1167 exemption.
87. 523 F.2d 164 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975); see *infra* notes 107-10 and accompanying text.
89. 523 F.2d at 169.
91. 523 F.2d at 169.
92. *Id.* at 170.
94. 523 F.2d at 172, cert. denied, 423 U.S. 1017 (1975); see also *infra* notes 107-10 and accompanying text.
Railway Labor Act. Yet, an employer in such a situation would always be considered a new judicial entity under REA Express, thus pre-empting the use of section 1167 in the only situation in which it could possibly apply.

Notwithstanding an express congressional exemption to the contrary, after REA Express, employee unions that had collective bargaining agreements under the Railway Labor Act with employers who later filed Chapter 11 petitions faced the threat of a court finding the power to reject the contract under section 313(1), or later, section 365(a). One commentator noted that “[t]he REA court's preoccupation with the result it wanted to achieve, even at the expense of rewriting (or ignoring) the controlling statute” was apparently the impetus for allowing rejection of an unusually burdensome collective bargaining agreement even though section 313(1) did not provide the court with the power to reject. Unfortunately, the Court in Bildisco failed to comment on REA Express' clearly erroneous side-stepping of the section 1167 exemption. The Court's unequivocal recognition of the section 1167 exception to the general power of section 365(a) coupled with the Court's unanimous rejection of the new entity theory should reassure groups with agreements under the Railway Labor Act that modification or rejection of their labor contracts must follow the more painstaking procedures set out in section 6 of the Railway Labor Act. Such a finding by a court

95. Pulliam, supra note 72, at 23; see generally id. at 21-25.
Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 15 of this title, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.
would, of course, have impact beyond the railroad industry; while the railroad industry was involved in REA Express, the airline industry is also regulated by the Railway Labor Act.97

2. Standard: Burden Plus Balancing

a. Burden to the Estate Plus Balancing the Interests

While the Court acknowledged that section 365(a) gives a bankruptcy court the power to reject a collective bargaining agreement, Justice Rehnquist rejected adherence to section 8(d) and instead issued a different list of conditions that must be met before that power may be exercised:

Before acting on a petition to modify or reject a collective-bargaining agreement, however, the Bankruptcy Court should be persuaded that reasonable efforts to negotiate a voluntary modification have been made and are not likely to produce a prompt and satisfactory solution . . . . The Bankruptcy Court need step into this process only if the parties’ inability to reach an agreement threatens to impede the success of the debtor’s reorganization. If the parties are unable to agree, a decision on the rejection of the collective-bargaining agreement may become necessary to the reorganization process . . . [but the] court need not determine that the parties have bargained to impasse or make any other determination outside the field of its expertise.98

Once this preliminary point is reached, the bankruptcy court may allow rejection of the collective bargaining agreement “under Section 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

All of the provisions of sections 151 to 152 and 154 to 163 of this title are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

98. 104 S. Ct. at 1196-97 (emphasis added).

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favor of rejecting the labor contract.”

This balancing is qualified. The Court “must focus on the ultimate goal of Chapter 11 when considering these equities. The Bankruptcy Code does not authorize freewheeling consideration of every conceivable equity, but rather only how the equities relate to the success of the reorganization.” With this in mind, Justice Rehnquist gave the bankruptcy courts a checklist to follow when balancing:

Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action. The Bankruptcy Court must make a reasoned finding on the record why it has determined that rejection should be permitted. Determining what would constitute a successful rehabilitation involves balancing the interests of the affected parties—the debtor, creditors, and employees. The Bankruptcy Court must consider the likelihood and consequences of liquidation for the debtor absent rejection, the reduced value of the creditors’ claims that would follow from affirmance and the hardship that would impose on them, and the impact of rejection on the employees. In striking the balance, the Bankruptcy Court must consider not only the degree of hardship faced by each party, but also any qualitative differences between the types of hardship each may face.

99. Id. at 1196 (agreeing with the Third Circuit Court of Appeals below and the Eleventh Circuit decision of In re Brada Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983)). A number of courts adopted the Third Circuit’s Bildisco approach. In re Handy Andy, Inc., ___ B.R. ___, 112 L.R.R.M. (BNA) 2557 (Bankr. W.D. Tex. 1983); In re Southern Elecs. Co., 23 B.R. 348, 359 (Bankr. E.D. Tenn. 1982) (Bildisco is persuasive because it does not exalt either bankruptcy reorganization or labor law policies over the other, but instead, strikes a balance between the two); see also In re Brada Miller Freight Sys., 702 F.2d 890, 899, 901 (11th Cir. 1983)(court says that it agrees with Bildisco, but actually adds another requirement for rejection, that the bankruptcy court make an explicit showing in the record that the debtors were not improperly motivated by a desire to rid themselves of the union); In re Blue Ribbon Transp. Co., 30 B.R. 783, 785 (Bankr. D.R.I. 1983); In re Alan Wood Steel Co., 449 F. Supp. 165, 168 (E.D. Pa. 1978).

100. 104 S. Ct. at 1197.

101. Id. (emphasis added). Many of the equities that courts have considered in the past will continue to be important. For example, the possibility that a company may be forced to liquidate has been considered a “paramount factor” favoring rejection. In re Southern Elecs. Co., 23 B.R. 348, 361 (Bankr. E.D. Tenn. 1982). The good faith of the employer has also been considered an equity favoring rejection. See In re Brada Miller Freight Sys., 702 F.2d 890, 900 (11th Cir. 1983); In re Miles Mach. Co., ___ B.R. ___, ___, 113 L.R.R.M. (BNA) 3114, 3119-20 (Bankr. E.D. Mich. 1982); In re Alan Wood Steel Co.,
The Court acknowledged that the ordinary standard used to reject an executory contract under section 365(a) is the business judgment test. Justice Rehnquist also noted that section 365(a) gave "no indication . . . that rejection of collective bargaining agreements should be governed by a standard different from that governing other executory contracts." The special nature of labor contracts and section 365(a)'s legislative history, however, persuaded the Court to demand a "somewhat stricter standard" than the business judgment test. The legislative history of section 365(a) included reference to two judicial opinions which had used standards other than the business judgment test when collective bargaining agreements were involved. Since the tests in the two opinions differed, the legislative history was inconclusive as to the exact test intended. An inference


102. 104 S. Ct. at 1195. The general rule is that a bankruptcy court presented with an application to reject an executory contract need only determine "whether it is indeed executory and whether disaffirmance would be advantageous to the debtor." Borman's, Inc. v. Allied Supermarkets, 706 F.2d 187, 189 (6th Cir. 1983), cert. denied, 104 S. Ct. 263 (1983)(citations omitted); see also In re Brada Miller Freight Sys., 702 F.2d 890, 897 (11th Cir. 1983); In re Bildisco, 682 F.2d 72, 79 (3d Cir. 1982), aff'd, 104 S. Ct. 1188 (1984).

103. 104 S. Ct. at 1195 (emphasis added).

104. Id. One court recently ruled that collective bargaining agreements should not be afforded any special protection from rejection; a debtor-in-possession need only show benefit to the estate to reject a collective bargaining agreement. In re Concrete Pipe Mach. Co., 28 B.R. 837, 839 (Bankr. N.D. Iowa 1983). The court added that rejection should be approved if it would "substantially improve the chances for reorganization." Id. at 840 (citations omitted). Another court used the benefit to the estate rule for rejection of a collective bargaining agreement, In re Klaber Bros., 173 F. Supp. 83, 85 (S.D.N.Y. 1959), but that decision was implicitly overruled. See In re Figure Flattery, Inc., 88 Lab. Cas. (CCH) ¶ 11,650 (S.D.N.Y. 1980)(must show that without rejection successful reorganization would be impossible).

105. 104 S. Ct. at 1195-96.
could be gleaned, however, that Congress intended a specific, more exacting test than that of business judgment when a debtor-in-possession tried to reject a collective bargaining agreement.106

At the other end of the spectrum, the Court denounced the REA Express test.107 REA Express 108 allowed rejection of a collective bargaining agreement only if the debtor-in-possession could demonstrate that its reorganization would fail unless rejection were permitted.109 The Court felt that such a standard exalted labor law policies to an extent "fundamentally at odds with the policies of flexibility and equity built into Chapter 11 of the Bankruptcy Code."110 The Court failed to note that the Railway Labor Act regulated the collective bargaining agreement in REA Express, while the National Labor Relations Act was applicable in Bildisco. Justice Rehnquist's failure to make this distinction is puzzling in light of his careful consideration of the section 1167 exemption. Using his earlier analysis, he could have distinguished the Railway Labor Act agreement of REA Express as clearly exempt from section 365(a) rejection.111

Justice Rehnquist led a unanimous Court in avoiding those

106. Id.
107. Id.
108. 523 F.2d 164.
109. 104 S. Ct. at 1196; see also 523 F.2d at 169:
In the present case we are persuaded . . . that where, after careful weighing of all of the factors and equities involved, including the interests sought to be protected by the RLA, a district court concludes that an onerous and burdensome executory collective bargaining agreement will thwart efforts to save a failing carrier in bankruptcy from collapse, the court may under § 313(1) authorize rejection or disaffirmance of the agreement.

The cases following REA Express failed to explain how close a company must be to liquidation before the test would be met. One company, unfortunately, was able to meet this burden. In re Alan Wood Steel Co., 449 F. Supp. 165, 169 (E.D. Pa. 1978) ("It is vital to note that Alan Wood has ceased all steelmaking operations. . . . Therefore, it is clear that, in absence of rejection of these agreements an arrangement will be impossible to effectuate.").

110. 104 S. Ct. at 1196.
111. Other courts have gone further and have not only failed to recognize this distinction, but have gone on to adopt the REA Express test when National Labor Relations Act agreements were involved. See In re Miles Mach. Co., ___ B.R. ___, 113 L.R.R.M. (BNA) 3114, 3115 (Bankr. E.D. Mich. 1982) (contract with UAW); In re David A. Rosow, Inc., 9 B.R. 190 (Bankr. D. Conn. 1981)(contract with Teamsters); In re Connecticut Celery Co., ___ B.R. ___, 106 L.R.R.M. (BNA) 2847 (Bankr. D. Conn. 1980) (contract with Teamsters); In re Figure Flattery, Inc., 88 Lab. Cas. (CCH) ¶ 11,850 (S.D.N.Y. 1980)(contract with I.L.G.W.U.).
outer boundaries. The standard that "Congress intended [was] a higher one than that of the 'business judgment' rule, but a lesser one than that embodied in the REA Express opinion."112 Making a selection within this range, the Court believed that the Bildisco formula of blending burden to the estate with, "in a very real sense, [a] balancing [of] the equities"113 accommodated the policies of both the Bankruptcy Code and the National Labor Relations Act. Indeed, upon close examination, the conditions precedent and mandatory checklist balancing converge to form a general, totality of the equities approach for the second prong of the rejection standard, notwithstanding the Court's earlier painstaking attempt to limit the scope of inquiry in which a bankruptcy court may engage.

The Court's warning that a bankruptcy court should demand reasonable efforts to negotiate a voluntary modification before a motion to reject may be entertained, is tempered with the allowance that this condition may be discarded upon the thin showing that such negotiations, for whatever reason, "threaten" to block successful reorganization. Since it is unlikely that a union would voluntarily agree to management's initial suggestions for modification, the debtor-in-possession may assert that such union reluctance is causing delay, which in turn could easily be parlayed into a "threat" to successful reorganization. With that condition met, the Court's approach is very similar to the business judgment standard. Justice Rehnquist recognized that under the business judgment test the question is whether an executory contract is burdensome to the estate. The Court, however, failed to note that that is, actually, the second prong of the business judgment test. First, the bankruptcy court must determine whether the debtor-in-possession is acting in good faith.114 During this initial inquiry the bankruptcy court, which is a court of equity, will focus upon the equities involved in the case as they relate to the goal of a successful reorganization of the debtor-in-possession. If the debtor-in-possession fails to act in good faith, rejection will not be granted. Thus, the Court's

112. 104 S. Ct. at 1196.
113. Id. at 1197.
114. See infra notes 155-56 and accompanying text; see generally Donato, Good Faith Reorganization Petitions: The Back Door Let's the Stranger In, 16 CONN. L. REV. 1 (1983).
two-tier approach merely reverses the steps used under the business judgment standard; the supposed condition precedent is little more than window dressing.

The Bildisco standard is not objectionable. The Court lacks justification for insisting that the Bildisco test is, in practice, distinguishable from the ordinary business judgment test. Nevertheless, the standard that the Court imposes is justified because it offers the same substantive protections and restrictions that the business judgment test offers when a debtor-in-possession moves to reject any executory contract. Notwithstanding this critical examination of the Court's decision, the analyses made in two articles on the eve of the Bildisco decision deserve a comparative examination. Each crystallizes a cogent argument, one for adoption of a test akin to REA Express and the other for a return to a purely stated business judgment approach.

b. Burden to the Estate Plus Probable Liquidation

Douglas Bordewieck and Vern Countryman concluded in a recent article that the Third Circuit's standard, which the Supreme Court affirmed in Bildisco, would "[i]n actual practice

115. For a discussion of the superiority of the business judgment test, see generally supra notes 138-63 and accompanying text.


117. See infra notes 119-137 and accompanying text.

118. See infra notes 138-162 and accompanying text.

119. "J.D., Harvard Law School, June 1983. Mr. Bordewieck is currently pursuing a Ph.D. in the field of Government at Cornell University." Bordewieck and Countryman, supra note 78, at 293.

120. "Professor of Law, Harvard Law School." Bordewieck and Countryman, supra note 78, at 293.

121. Bordewieck and Countryman, supra note 78.
... probably reduce to little more than the business judgment test applicable to other executory contracts."\textsuperscript{122} While they agreed that balancing was necessary, the authors disagreed with the Bildisco style of accommodation because it "effectively performs the delicate balancing of conflicting statutory objectives by placing a cinder block on the Bankruptcy Code side of the scale."\textsuperscript{123}

Bordewieck and Countryman found a direct conflict between (1) the necessary bankruptcy court approval of the debtor-in-possession's rejection of its collective bargaining agreement and (2) the labor law policy that the parties, never a court, must determine the substantive provisions of the collective bargaining agreement.\textsuperscript{124} This conflict, they argued, justified court authorized rejection only in an "extraordinary case."\textsuperscript{125} The Court in Bildisco also acknowledged this conflict, but felt that a bankruptcy court could intervene upon a lesser showing than Bordewieck and Countryman suggested. This "substantive" characterization, however, is a suspicious rationale for restricting rejection. To the extent that rejection affects the "substantive" provisions of a collective bargaining agreement, so too does the section 8(a)(5) duty to bargain and sign the completed agreement. Both the Board and the courts, however, have required signing.\textsuperscript{126} Under this precedent, mixed with Bordewieck and Countryman's analogy to "substantive" provisions, court authorized rejection should certainly be allowed. Neither signing nor rejection would affect the inner, "substantive" provisions of the collective bargaining agreement.

Bordewieck and Countryman proposed several minimum requirements for rejection. A few of these compare to those accepted in Bildisco. For example, the debtor must establish that it bargained in good faith\textsuperscript{127} and that the union refused to agree

\textsuperscript{122} Id. at 316-17.
\textsuperscript{123} Id. at 315.
\textsuperscript{124} Id. at 300.
\textsuperscript{125} Id.
\textsuperscript{126} NLRB v. Strong, 393 U.S. 357 (1969); see also H.J. Heinz Co. v. NLRB, 311 U.S. 514 (1941)(the Supreme Court held that the freedom of an employer to refuse to make an agreement relates to its substantive terms and not to its expression in a signed contract, the absence of which tends to impede the goal sought in requiring collective bargaining).
\textsuperscript{127} Bordewieck and Countryman, supra note 78, at 317. Many courts have examined the good faith of the debtor-in-possession in seeking rejection of a collective bar-
to the modifications.\textsuperscript{128} Unlike \textit{Bildisco}, however, and more akin to \textit{RE A Express}, the authors suggested that a court should not approve rejection if it appears that the debtor might successfully reorganize without rejection.\textsuperscript{129} The authors did not suggest how this possibility of reorganization could be determined. They also stated that a court should not allow a debtor-in-possession to reject the collective bargaining agreement if it is "primarily motivated by a desire to eliminate the union."\textsuperscript{130}

Moreover, the court should insure that the union is given a full opportunity to analyze the arguments and financial data submitted by the debtor or relevant to the issue, so that the union will be in a position to argue cogently that the modifications sought . . . are not in fact necessary to a successful reorganization, if such an argument can be made.\textsuperscript{131}

Unfortunately, this analysis, like that of the Court in \textit{Bildisco}, fails to credit the business judgment test with its initial examination of the good faith of the debtor-in-possession. Each of the proposed minimums, except one, would be taken into account in the usual bankruptcy court inquiry into good faith prior to a ruling on rejection. It should be noted that the last mentioned minimum does not concern good faith, but is aimed at the bankruptcy court itself: the court should allow a union to discover the debtor-in-possession's financial data. This, however, has seldom been a roadblock for any creditor involved in a debtor-in-possession's reorganization plan.\textsuperscript{132}

Bordewieck and Countryman also cite another reason for burdening a debtor-in-possession with a stringent test for rejection. Relying on \textit{Shopmen's Local 455 v. Kevin Steel Products},\textsuperscript{133} the authors noted that rejection is considered breach of

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\textsuperscript{128} Bordewieck and Countryman, supra note 78, at 317.

\textsuperscript{129} Id. (emphasis added); cf. \textit{In re Miles Mach. Co.}, --- B.R. ---, 113 L.R.R.M. (BNA) 3114, 3120 (Bankr. E.D. Mich. 1982) (company compliance with union request for financial information is an example of the good faith of the debtor-in-possession).

\textsuperscript{130} See \textit{In re Blue Ribbon Transp. Co.}, 30 B.R. 783, 785 (Bankr. D.R.I. 1983) (union argues that company's financial troubles are due to excessive management costs).
contract and subject to a damage claim. The breach gives rise to the loss of intangible employee rights, including those of welfare, pension and seniority, which cannot be reduced to monetary terms. Thus the employee, as a creditor, suffers a greater loss than the debtor-in-possession's other contract creditors. Normally a contract creditor's losses may be reduced to a quantifiable damage claim against the estate, but employee contract creditors would be unable to quantify, and, thus, unable to recover, their intangible losses. This analysis, however, overlooks the fact that Congress resolved the damages inequity issue after the decision in Kevin Steel.

c. Burden to the Estate

Mark Pulliam's recent article argued that balancing of any kind is an inappropriate addition to the analysis of a straight forward question of rejection:

[T]he dichotomy between power to reject and the standard for rejection is false. If, indeed, the NLRA conflicts with the Code, rejection of labor contracts is forbidden. In the absence of conflict, however, debtors should logically be able to reject labor agreements on the same basis as any other contract, if they can reject labor contracts at all.

Pulliam believed that the Court should reverse Bildisco and allow bankruptcy court approval of rejection on the same business judgment showing that is used with other executory contracts.

134. Bordewieck and Countryman, supra note 78, at 312.
135. Id.
136. But see infra notes 157-69 and accompanying text.
137. 519 F.2d 698. Case law interpreting § 313(1) has been upheld as authoritative precedent on the issue of the right of a debtor-in-possession to reject a collective bargaining agreement under the newer § 365(a). In re David A. Rosow, Inc., 9 B.R. 190, 192 (Bankr. D. Conn. 1981). While these two sections are mirror images of each other, other sections of the Bankruptcy Code that were used to aid in interpreting them did change. See infra notes 157-62 and accompanying text. For this reason, interpretations of § 313(1) should not be used as authority for § 365(a) issues. Justice Rehnquist, however, failed to make this distinction in Bildisco, 104 S. Ct. at 1188.
139. Id.
140. Id. at 29.
141. Id. at 42. See also In re Concrete Pipe Mach. Co., 28 B.R. 837, 839 (Bankr. N.D. Iowa 1983) (debtor-in-possession need only show benefit to the estate to reject a
Pulliam noted that the power to reject and the standard for rejection are "identical issues." The "plain language of Section 365(a) leaves little room for [balancing] conflicting [labor law] policies and implied restrictions. . . ." Congress balanced any conflicting labor policies before it passed the Bankruptcy Reform Act of 1978. Pulliam suggested that the express section 1167 exemption for collective bargaining agreements under the Railway Labor Act compared with the absence of a similar provision for such contracts governed by the National Labor Relations Act demonstrated that Congress had accommodated any conflict between bankruptcy and labor policies. The failure to make provision for the ordinary collective bargaining agreement "evince[d] Congress' intent to permit discretionary rejection. . . ." Pulliam's later examination of the issue of good faith, however, conservatively negates the idea that the only relevant issue is whether the contract is burdensome. The initial examination of good faith makes the business judgment test more complex.

The most cogent and novel reason that Pulliam gave for adoption of a business judgment standard was a comparison of a decision to file a Chapter 11 petition with a decision to go out of business. Each decision, Pulliam maintained, is at the "core of entrepreneurial control," a "fundamental" business decision, involving the "commitment or reorganization of large amounts of capital." Using this analogy, Pulliam argued that reorganization and attendant rejection, like going out of business

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142. Pulliam, supra note 72, at 37.
143. Id.
144. Id. at 38. But see Rodino Introduces Legislation Requiring Bankruptcy Court Permission to Void Pacts, DAILY LABOR REPORT (BNA) No. 37 at A13 (Feb. 24, 1984) (Rodino asserts that Congress passed § 365(a) with the intent that the REA Express standard would be used for rejection of collective bargaining agreements).
145. Pulliam, supra note 72, at 38.
146. Id. at 38.
147. Id. at 40-44.
148. Id. at 40.
149. Id.
150. Id.
in *Textile Workers Union v. Darlington Manufacturing*,151 should be an employer's decision that is left unrestricted by the policies and provisions of the National Labor Relations Act.152 This analogy is quite persuasive as long as the bankruptcy requirement of good faith is met.

Pulliam addressed two points that the Bordewieck and Countryman article raised in objecting to the use of a standard that would allow a debtor-in-possession a light burden when seeking rejection. First, the author noted that the fear that a debtor-in-possession would use Chapter 11 reorganization as a mere ruse to reject a collective bargaining agreement is unfounded.153 Pulliam argued that if such a scenario occurred it would constitute a lack of good faith on the debtor's part.154 Such a lack of good faith is already accounted for under the business judgment test.155

Likewise, just as with ordinary commercial contracts, a debtor's lack of good faith could disqualify its attempt to reject a collective bargaining agreement; . . . when the employer's motivation is simply to avoid an improvident contract rather than to consummate a plan of reorganization, the bankruptcy court will deny its attempt to reject executory contracts.156

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152. *Pulliam*, *supra* note 72, at 41.

153. *See id.* at 12. Recently one court seemed to feel that a debtor-in-possession was involved in somewhat of a ruse, although the court refused to rule that the Chapter 11 filing was in bad faith. *See In re Blue Ribbon Transp. Co.*, 30 B.R. 783, 113 L.R.R.M. (BNA) 3505 (Bankr. D.R.I. 1983). The court felt that it was "appropriate, although admittedly unorthodox, to impose" certain conditions on the debtor-in-possession before the court would entertain a motion to reject the collective bargaining agreement. Those conditions included cutting management salaries, reducing the number of company cars, and eliminating company gasoline credit cards as well as leveling the pro rata contribution by the company to health, welfare, and pension plans for management personnel to an amount not to exceed that which the company chose to contribute to the employees' plans. If these conditions were met, the court would grant the motion to reject the collective bargaining agreement. *Id.* at 788, 113 L.R.R.M. (BNA) at 3509. Section 365(a), of course, does not mandate such preconditions, but a bankruptcy court is a court of equity that has the power to at least make such suggestions, especially when faced with the type of circumstances with which that court was faced. *See id.* at 786, 113 L.R.R.M. (BNA) at 3507-08. The case stands as a warning to those businesses that might consider Chapter 11 in order to alleviate labor costs without parallel belt tightening on the management level.


155. *Id.*

156. *Id.* (citations omitted).
This argument dispels the notion that the business judgment test is inadequate as a standard for rejection of a labor contract in a Chapter 11 reorganization. A bankruptcy court, under the business judgment test, may consider the same type of evidence which the Court in Bildisco suggested be balanced.

The second objection that Pulliam addressed concerned the issue of damages. Some of the injuries that courts considered to be too speculative to form a damage claim under section 57(d) of the former Bankruptcy Act included welfare, pension, and seniority rights. Pulliam noted that the Bankruptcy Reform Act of 1978 corrected the problem that union employees faced when courts threw out portions of their damage claims as speculative. After Kevin Steel cited the inequitable subordination of employee claims as one basis for grafting a balancing element onto the business judgment test, the Bankruptcy Reform Act of 1978 was promulgated. Section 502(c) of that enactment mandated that a bankruptcy court estimate such claims and, thus, eliminated this inequity as a reason to avoid using the business judgment test.

The Supreme Court also recognized that a modification of the Bankruptcy Code had taken place. Justice Rehnquist failed to note, however, that such a change dramatically reduced the previous need to give labor special treatment in the context of rejection of a collective bargaining agreement. The impact of section 502(c) should have enabled the Court to endorse a purely stated, business judgment test.

B. Avoidance of Unfair Labor Practice Charges

1. Schism

A closely divided Court found that:

157. Id. at 6-7.
159. Pulliam, supra note 72, at 7.
162. Pulliam, supra note 72, at 6-7.
163. 104 S. Ct. at 1199 n.12.
[F]rom the filing of a petition in bankruptcy until formal acceptance, the collective-bargaining agreement is not an enforceable contract within the meaning of NLRA [section] 8(d).

... [I]t follows that the debtor-in-possession need not comply with the provisions of [section] 8(d) prior to seeking the Bankruptcy Court's permission to reject the agreement.

... Our rejection of the need for full compliance with [section] 8(d) procedures of necessity means that any corresponding duty to bargain to impasse under [section] 8(a)(5) and [section] 8(d) before seeking rejection must also be subordinated to the exigencies of bankruptcy.

... [However a] debtor-in-possession is an "employer" within the terms of the NLRA... and is obligated to bargain collectively with the employees' certified representative over the terms of a new contract pending rejection of the existing contract or following formal approval of rejection by the Bankruptcy Court... But... a debtor-in-possession... is not guilty of an unfair labor practice by unilaterally breaching... before formal Bankruptcy Court action.264

The majority's decision on this issue legitimized the course of conduct that labor had characterized as the most egregious. An employer's voluntary filing of a petition in bankruptcy under Bildisco allowed the employer to immediately disregard its collective bargaining agreement in whole or in part. The only condition was the filing of a petition in bankruptcy; no special showing of good faith or even insolvency was required. The Court's warning that the debtor-in-possession is obligated to bargain collectively lacked force since the usual remedy for a failure to bargain was a mere admonition to do so.265 This deci-

164. Id. at 1199, 1200, 1201. (emphasis added). Courts have recognized that the debtor-in-possession is obligated to continue bargaining with the employees' certified representative. In re Bildisco, 682 F.2d 72, 80 (3d Cir. 1982); Brotherhood of Railroad, Airline and S.S. Clerks v. REA Express, 523 F.2d 164, 170 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975); Carpenters Local 2746 v. Turney Wood Prods., 289 F. Supp. 143, 149 (W.D. Ark. 1968). As the previous cornerstone case in this area stated: "[I]t must be remembered that... the Bankruptcy Act even in its present form does not authorize a debtor-in-possession to ignore its obligations under the Labor Act any more than it can ignore those imposed by the Internal Revenue Code." Shopmen's Local 455 v. Kevin Steel Prods., 519 F.2d 698, 706 (2d Cir. 1975)(citations omitted).

165. See NLRB v. Brand Printing Corp., 594 F.2d 926 (2d Cir. 1979); Brockway Motor Trucks, Div. of Mack Trucks v. NLRB, 582 F.2d 720 (3d Cir. 1978); M.S.P. Industries v. NLRB, 568 F.2d 166 (10th Cir. 1977). But see Seeburg Corp. v. NLRB, 709 F.2d
sion subordinated labor law policies to bankruptcy policies prior to a motion for rejection of the collective bargaining agreement.

The dissent countered that "a debtor in possession commits an unfair labor practice when he unilaterally alters the terms of an existing collective-bargaining agreement after a bankruptcy petition has been filed but prior to rejection of that agreement." Justices White, Marshall, and Blackmun joined Justice Brennan's dissent on this issue and agreed in a footnote that:

Despite this conclusion, I agree with the Court that the debtor in possession need not comply with the notice requirements and waiting periods imposed by [section] 8(d) before seeking rejection. That is, in order to obtain rejection, the debtor in possession need not for example demonstrate that it has given notice to the union of its desire to seek rejection and has maintained the contract in "full force and effect" without resorting to a lockout for the period required by [section] 8(d). I also agree that the debtor in possession need not bargain to impasse before he may seek the court's permission to reject the agreement.

The dissent, as well as the majority, examined three issues in reaching a decision on the unfair labor practice charges: the degree of accommodation, the type of entity, and the status of the contract involved. The dissent's overall analysis and specific conclusion on the unfair labor practice issue was, for reasons to be stated herein, much more compelling than the majority's approach and result.

2. Issues

a. New Entity Fiction—Successor Entity Analogy

One issue that the Court discussed was the new entity the-
ory. This legal fiction was apparently a child of the Second Circuit's Kevin Steel opinion.\(^{173}\) In Kevin Steel, the court explained that, when applicable, section 8(d) required the parties to a collective bargaining agreement to adhere to its modification and termination procedures.\(^{174}\) While the pre-petition debtor employer may have been a party to the collective bargaining agreement, the debtor-in-possession was "not the same entity as the pre-bankruptcy company."\(^{175}\) A debtor-in-possession, by virtue of being a new entity, was not a party to the contract; thus, it did not need to comply with section 8(d) procedures unless and until it assumed the contract or entered into a new one.\(^{176}\) Kevin Steel analogized the debtor-in-possession to a successor employer,\(^{177}\) noting that an existing labor agreement generally does not bind a successor employer.\(^{178}\)

In Bildisco, the Court rejected this analogy with passing interest:

> For our purposes, it is sensible to view the debtor-in-possession as the same "entity" which existed before the filing of the bankruptcy petition, but empowered by virtue of the Bankruptcy Code to deal with its contracts and property in a manner it could not have done absent the bankruptcy filing.\(^{179}\)

The Court correctly recognized the inherent weaknesses of the theory.\(^{180}\) If the debtor-in-possession were a totally new entity, the power to reject under section 365(a) would have been unnecessary since the debtor-in-possession would not have been a party to the agreement in the beginning.\(^{181}\) The problems with the theory were so clear that the dissent fully agreed with the majority that the new entity fiction was untenable.\(^{182}\)

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173. See Shopmen's Local 455 v. Kevin Steel Prods., 519 F.2d 698, 704 (2d Cir. 1975).
174. Id. at 704.
175. Id. (emphasis in original).
176. Id.
177. Id.
178. Id. For a discussion concerning the court's reference to a successor employer "as generally not bound by the existing labor contract," id., see Bordewieck and Countryman, supra note 78, at 304-11.
179. 104 S. Ct. at 1197.
180. Id. at 1197.
181. Id. at 1197.
182. Id. at 1206 (Brennan, J., concurring in part and dissenting in part). See also id. at 1205-06 n.11.
Bildisco marks the culmination of a trend to discontinue the use of the short-lived new entity fiction. The theory was first espoused by the Second Circuit in Kevin Steel.\textsuperscript{183} That court used the idea again in REA Express.\textsuperscript{184} Within the year, however, the Second Circuit began a justifiable retreat from the concept which had gained popularity with other courts.\textsuperscript{185} In Truck Drivers Local 807 v. Bohack Corp.,\textsuperscript{186} the court noted that the concept was not to be taken "literally, since neither affirmation nor rejection of the collective-bargaining agreement would be possible by one not a party to it."\textsuperscript{187} After the Third Circuit's opinion in Bildisco, the Eleventh Circuit in \textit{In re Brada Miller Freight System},\textsuperscript{188} making reference to Bohack, continued the trend when it flatly rejected the theory.\textsuperscript{189}

The Third Circuit's Bildisco decision, however, ignored this trend and instead quoted the language of Kevin Steel when it adopted the new entity-successor view.\textsuperscript{190} The court felt so strongly on this issue that it chastised the Board for failing to recognize what the court felt was an established principle: "We suggest to the NLRB that, at least in matters within this judicial circuit, it cease operating under such a fundamental misconception of the law."\textsuperscript{191} The Supreme Court's united front put an end to this ill-conceived theory.

\textit{b. Unenforceable Contract or One "in Effect"}

The major point of disagreement between the majority and the dissent on the unfair labor practice issue was the status of the contract. The majority felt that an unfair labor practice complaint based on section 8(d) could not arise from noncompli-

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\textsuperscript{183} See Shopmen's Local 455 v. Kevin Steel Prods., 519 F.2d 698, 704 (2d Cir. 1975).
\textsuperscript{184} Brotherhood of Ry. Airline and S.S. Clerks v. REA Express, 523 F.2d 164, 167 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975).
\textsuperscript{185} Truck Drivers Local Union No. 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976), aff'd per curiam after remand, 557 F.2d 237 (2d Cir. 1977), cert. denied, 439 U.S. 825 (1978).
\textsuperscript{186} Id.
\textsuperscript{187} Id. at 320.
\textsuperscript{188} In re Brada Miller Freight Sys., 702 F.2d 890 (11th Cir. 1983).
\textsuperscript{189} Id. at 896.
\textsuperscript{190} In re Bildisco, 682 F.2d 72, 78-79, 82-83 (3d Cir. 1982).
\textsuperscript{191} Id. at 83.
\end{flushleft}
ance with the terms of a collective bargaining agreement during the time period between the filing of the petition in bankruptcy and rejection of the contract. The majority held that, during this time, the collective bargaining agreement was "not an enforceable contract" within the meaning of section 8(d). The dissent effectively countered this interpretation, reasoning that the collective bargaining agreement remained "in effect" for purposes of section 8(d), although enforcement was suspended during the interim period.

Justice Rehnquist's opinion for the majority relied upon an analysis of the Bankruptcy Code provisions for automatic stay and relation back. Section 362(a) provides that all actions that have or could have been brought against the pre-petition debtor are automatically stayed. Under section 365(g)(1), the rejection of an executory contract, such as a collective bargaining agreement, constitutes breach of contract. A cause of action based upon such a breach relates back to the date immediately preceding the bankruptcy petition filing. Since the breach relates back to that date, the automatic stay mandates that no action may be brought against the debtor-in-possession. Instead, a claim must be presented to the bankruptcy court for "the normal administration process by which claims are estimated and classified." This bankruptcy oriented analysis allowed the majority to label the collective bargaining agreement as an unenforceable contract. The majority seized on the erroneous assumption that continuous enforceability was a prerequisite to triggering adherence to the procedures of section 8(d), thus allowing Justice Rehnquist to conclude that accommodation of labor law and bankruptcy law was simply unnecessary; no conflict existed between the two federal statutory schemes. This single statute emphasis permitted the Court to reject the idea that an action could be brought on the contract because such an action

192. 104 S. Ct. at 1199.
193. Id. at 1206 (Brennan, J., concurring in part and dissenting in part).
194. Id. at 1198.
195. Id.
197. See supra notes 73-80 and accompanying text.
199. 104 S. Ct. at 1198-99.
200. Id. at 1198.
would constitute a violation of the Bankruptcy Code’s automatic stay provision. The dissent dissected this analysis to reveal one glaring fallacy; a collective bargaining agreement need only be “in effect,” not enforceable, for the procedures of section 8(d) to apply.

In addition to the unenforceable contract analysis, the majority noted that section 8(d) did not apply for yet another reason: section 8(d) applies only if a party to the contract has made a unilateral change. In a Chapter 11 case, the contract’s unenforceability and subsequent no-fault modification during the interim period arise “by operation of law” (through the automatic stay and relation back provisions), not by unilateral action of a party to the contract. Since this analysis rendered section 8(d) inapplicable, the Court felt that its decision did not undermine any policy of the National Labor Relations Act. The provisions of that statute, according to the majority, simply did not come into play.

The Court was technically correct. However, since this analysis allowed the Court again to avoid finding a conflict between the two statutory schemes, it merits close examination. Similar to the new entity fiction, the “by operation of law” approach overlooks one reality: by definition, the employer’s unilateral act of voluntary filing for reorganization is the cause of the change in the status of the contract. Thus, a party to the contract is arguably, through knowledge of the operation of bankruptcy law, unilaterally responsible for the change in the contract. The dissent failed, however, to make this or any other specific counter argument to the majority’s contention that any change was by operation of law, not by the unilateral action of a party to the contract. Thus, the majority’s argument, while based on a technicality, was left intact. Since a precondition to the applicability of section 8(d) had not been shown, the labor law provision failed to come into play, and no conflict between labor and bankruptcy law existed to be accommodated.

Justice Brennan, for the dissent, did make several vigorous and persuasive arguments that “Congress did not intend the

201. Id. at 1199.
202. Id. at 1200.
203. Id.
204. Id.
filing of a bankruptcy petition to affect the applicability of [section] 8(d)."\(^{205}\) Relying on past judicial pronouncements, the dissent reminded the Court that section 8(d) was to be flexibly construed to serve the goals of the labor act;\(^{206}\) any other construction was to "be avoided unless the words chosen by Congress clearly compel[led]" such a result.\(^{207}\) Justice Brennan did not believe that the words of Congress compelled the majority's conclusion that section 8(d) was inapplicable.\(^{208}\)

The words of Congress indicated that the procedures of section 8(d) applied whenever a collective bargaining agreement was "in effect."\(^{209}\) The majority apparently believed that these words meant that a collective bargaining agreement was not "in effect" for purposes of section 8(d) if it was temporarily unenforceable.\(^{210}\) The dissent relied on the earlier stated rule of construction and contended that the words of Congress did not clearly compel a finding that unenforceability and "in effect" were synonymous concepts.\(^{211}\) Justice Brennan correctly maintained that, absent such a clearly worded mandate from Congress, a collective bargaining agreement retained "sufficient vitality" to remain "in effect" once a petition in bankruptcy was filed.\(^{212}\) Thus, there was a head-on conflict between labor and bankruptcy law that required resolution.

The dissent listed some of the factors which it felt sustained a finding that a collective bargaining agreement, although not an enforceable contract because of the automatic stay, remained "in effect" during the interim period. First, assumption of the contract by the debtor-in-possession would relate back to the filing date, making compensation for the post-filing period a first pri-

\(^{205}\) Id. at 1204 (Brennan, J., concurring in part and dissenting in part).

\(^{206}\) Id. at 1205.

\(^{207}\) Id. (quoting NLRB v. Lion Oil Co., 352 U.S. 282, 290 (1956) (emphasis added)). While the majority did not address this rule of construction, it did take issue with the dissent's further contention that the Court should give "deference to the Board's construction of the NLRA." Id. Justice Rehnquist felt that in this case the Board's position that § 8(d) applied notwithstanding the filing of a petition in bankruptcy, id., was an interpretation of the Bankruptcy Code, not the labor act. Id. at 1198 n.9. Since such an interpretation was outside of the Board's expertise, deference was unnecessary. Id.

\(^{208}\) Id. at 1205 (Brennan, J., concurring in part and dissenting in part).

\(^{209}\) Id. at 1205.

\(^{210}\) Id. at 1206.

\(^{211}\) Id.

\(^{212}\) Id.
riority administrative expense.\textsuperscript{213} Conversely, if the contract were rejected, the damages claimed would flow from the "employer's obligations under the contract in the post-filing period."\textsuperscript{214} Moreover, the contract rate would frequently be the measure used to determine the reasonable value of any services that the estate received from employees.\textsuperscript{215} The concept of relation back, whether used in connection with the assumption or rejection of a collective bargaining agreement, is merely a priority provision. As one commentator succinctly stated, "[I]t does not affect the existence of the collective-bargaining agreement in the post-petition period, nor does it eliminate any unfair labor practices committed during that period."\textsuperscript{216}

Based on this reasoning, the dissent found a clash between labor and bankruptcy law; section 8(d) of the National Labor Relations Act and section 365(a) of the Bankruptcy Code came into play during the interim period. Using the concept of accommodation, the dissent resolved the problem, giving weight to labor law concepts and concluding that a debtor-in-possession committed an unfair labor practice when it unilaterally modified its collective bargaining agreement between the filing of a petition in bankruptcy and court approved rejection.

c. Accommodation Revisited

The majority found bankruptcy policies critical in its decision. First, Justice Rehnquist enunciated the baseline goal of reorganization as a tool in the prevention of liquidation for the debtor, job loss for the debtor's employees, and possible misapplication of the debtor's economic resources.\textsuperscript{217} Second, the Court recognized Congress' desire to give "a debtor-in-possession some flexibility and breathing space"\textsuperscript{218} in order to devise a successful reorganization plan.\textsuperscript{219}

\begin{itemize}
\item \textsuperscript{213} Id.
\item \textsuperscript{214} Id.
\item \textsuperscript{215} Id. at 1207.
\item \textsuperscript{216} Bordewieck and Countryman, supra note 78, at 331 (emphasis added); see generally id. at 330-35.
\item \textsuperscript{217} 104 S. Ct. at 1197.
\item \textsuperscript{218} Id. at 1199.
\item \textsuperscript{219} See also Pulliam, supra note 72, at 9 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977)).
\end{itemize}
The majority felt that forcing a debtor-in-possession to defend against unfair labor practice allegations would impermissibly frustrate both of the bankruptcy policies. Therefore, the majority refused to find it necessary to accommodate labor law policies; the procedures of the National Labor Relations Act failed to come into effect because, from the moment of filing a petition in bankruptcy, the debtor-in-possession’s collective bargaining agreement ceased to be an enforceable contract.\textsuperscript{220}

The dissent did not question the fundamental purposes of the Bankruptcy Code. Instead, Justice Brennan objected that the Court had failed to consider the significant underlying principles of the National Labor Relations Act in its analysis,\textsuperscript{221} principles which, ironically, the Court had unanimously found equally as persuasive as bankruptcy policies in deciding the rejection issue.\textsuperscript{222} The dissent found an “unavoidable conflict” between the Bankruptcy Code and the labor act\textsuperscript{223} which it felt the majority had avoided.\textsuperscript{224} While focusing on the Bankruptcy Code alone would have been easier, according to Justice Brennan, the Court was nevertheless faced with a “duty to decide the issue . . . in a way that accommodates the policies of both federal statutes.”\textsuperscript{225}

Two policies of the National Labor Relations Act needed to be examined, according to Justice Brennan. First was the goal of sustained industrial peace, the effect of which is preservation of the free flow of interstate commerce.\textsuperscript{226} The dissent noted that collective bargaining was the fulcrum balancing the conflicts between labor and management.\textsuperscript{227} The inference was that if management were allowed to disregard its collective bargaining duties, even under circumstances of bankruptcy reorganization, industrial peace would crumble. This argument seemed to presume that a union would be allowed to strike, free from injunction, during the debtor employer’s reorganization. If a union can strike without being enjoined during the reorganization of its

\textsuperscript{220} See supra notes 192-216 and accompanying text.
\textsuperscript{221} 104 S. Ct. at 1201 (Brennan, J., concurring in part and dissenting in part).
\textsuperscript{222} Id. at 1201, 1204.
\textsuperscript{223} Id. at 1204.
\textsuperscript{224} Id.
\textsuperscript{225} Id. (emphasis in original).
\textsuperscript{226} Id. at 1207.
\textsuperscript{227} Id. at 1207-08.
employer, then, as the dissent pointed out, the majority's analysis was certainly remiss in its failure to examine and accommodate the labor policy of maintaining industrial peace. "[P]lainly, the need to prevent 'economic warfare' resulting from unilateral changes in terms and conditions of employment is as great after a bankruptcy petition has been filed as it is prior to that time."\textsuperscript{228}

In 1976 the Second Circuit in \textit{Bohack}\textsuperscript{229} held that a union was entitled to a writ of mandamus directing the district court to vacate an order restraining a union's strike and picket against its employer who was also a debtor-in-possession.\textsuperscript{230} In \textit{Bildisco},\textsuperscript{231} the Third Circuit, without reference to the Second Circuit's decision, implied that a union could strike while the employer was undergoing reorganization.\textsuperscript{232} The Third Circuit noted that "[t]he consequences of a strike on a precarious business" was one factor to be balanced in determining the rejection issue.\textsuperscript{233} The Eleventh Circuit in \textit{Brada Miller}\textsuperscript{234} accepted the Third Circuit's statement without discussion or further authority.\textsuperscript{235} As the dissent in \textit{Bildisco} suggested, an employer's failure to fulfill its collective bargaining duties may be the impetus for such a strike even though bankruptcy proceedings are at the bottom of such nonfulfillment.\textsuperscript{236} The inescapable conclusion is that the judiciary believes that a union may strike against its employer even when that employer is undergoing a Chapter 11 reorganization. The rationale for this line of authority is that, except in extremely narrow and well-defined circumstances, federal courts are without jurisdiction to issue an injunction in any case "'involving or growing out of a labor dispute.'"\textsuperscript{237}

\begin{itemize}
\item \textsuperscript{228} \textit{Id.} at 1208.
\item \textsuperscript{229} Truck Drivers Local Union No. 807 v. Bohack Corp., 541 F.2d 312 (2d Cir. 1976), \textit{aff'd per curiam after remand}, 567 F.2d 237 (2d Cir. 1977), \textit{cert. denied}, 439 U.S. 825 (1978).
\item \textsuperscript{230} \textit{Id.} at 314.
\item \textsuperscript{231} \textit{In re} \textit{Bildisco}, 682 F.2d 72 (3d Cir. 1982).
\item \textsuperscript{232} \textit{See id.} at 80.
\item \textsuperscript{233} \textit{Id.}
\item \textsuperscript{234} \textit{In re} \textit{Brada Miller} Freight Sys., 702 F.2d 890 (11th Cir. 1983).
\item \textsuperscript{235} \textit{Id.} at 899.
\item \textsuperscript{236} 104 S. Ct. at 1208 (Brennan, J., concurring in part and dissenting in part).
\end{itemize}
The courts that have used this analysis, however, have overlooked any consideration of section 362(a)(6) of the Bankruptcy Code. It is a violation of the automatic stay to attempt to enforce a pre-petition debt, and the pressure of a strike could easily be characterized as such an attempt. Based on that finding, there would be a conflict between the Bankruptcy Code and the National Labor Relations Act. A bankruptcy court could conceivably and justifiably resolve that conflict by finding that the strike should be enjoined.

The second labor policy that the dissent wished to accommodate was the treatment of collective bargaining agreements as a special form of contract.\textsuperscript{238} The majority’s analysis of the unfair labor practice issue did not find this reasoning compelling.\textsuperscript{239} The dissent, however, found the policy of according special protection to labor contracts persuasive, but explicitly distinguished the need for section 8(d) protection of such contracts in a rejection situation as opposed to a pre-rejection, unfair labor practice situation.\textsuperscript{240}

The dissent, along with the majority, refused to follow the cumbersome procedures of section 8(d) when determining whether \textit{rejection} should be granted.\textsuperscript{241} Justice Brennan, in a footnote to the dissent, noted his reasons for agreeing with the majority on the rejection issue:

As the Board notes, debtors in possession may need expeditious determinations about whether they may reject a collective-bargaining agreement. The notice and waiting periods contained in [section] 8(d) would make a rapid determination impossible. Nor, as the Court notes, should the bankruptcy court be required to make determinations that are wholly outside its area of expertise, such as whether the parties have bargained to impasse. Rather, I believe that the test for determining whether rejection should be permitted enunciated in Part II of the Court’s opinion strikes the proper balance between the NLRA and the Bankruptcy Code.\textsuperscript{242}

\begin{itemize}
  \item \textsuperscript{238} 104 S. Ct. at 1204 (Brennan, J., concurring in part and dissenting in part).
  \item \textsuperscript{239} The majority failed to include the policy in its analysis of the unfair labor practice issue. \textit{See id.} at 1197-1201.
  \item \textsuperscript{240} \textit{Id.} at 1204 n.9 (Brennan, J., concurring in part and dissenting in part).
  \item \textsuperscript{241} \textit{Id.}
  \item \textsuperscript{242} \textit{Id.}
\end{itemize}
But Justice Brennan correctly noted that in the interim period, between the filing of a petition in bankruptcy and rejection, the need for an expeditious determination is absent.\textsuperscript{243} Therefore, unless another bankruptcy policy could be suggested, there was no reason to limit the protections of section 8(d) during the interim period. In short, the dissent demanded a specific justification for abandonment of section 8(d) protection during the postfiling pre-rejection period.\textsuperscript{244}

Justice Brennan analyzed each of the two policies upon which the majority founded its decision to deny the right to bring an unfair labor practice complaint during the interim period. First, when the majority cited the need for the power to reject executory contracts in order for the debtor-in-possession to avoid liquidation,\textsuperscript{245} the dissent heartily agreed, but then chastised the Court for failing to make a crucial distinction: "[U]nquestionably the option to reject an executory contract is essential to this goal. But the option to violate a collective-bargaining agreement before it is rejected is scarcely vital to insuring successful reorganization."\textsuperscript{246} Justice Brennan felt that if temporary adherence to an agreement would imperil reorganization, then, instead of violating the contract, a debtor-in-possession should move for bankruptcy court approval of rejection.\textsuperscript{247}

The problem with this analysis is that an immediate move by a debtor-in-possession to reject its collective bargaining agreement would be likely to cause a bankruptcy court to suspect the motives involved.\textsuperscript{248} The court could infer that the debtor-in-possession was not attempting to reorganize, but, instead, was trying to avoid a poor bargain. Such an inference would be detrimental to the debtor-in-possession's motion to reject.

\textsuperscript{243} Id.
\textsuperscript{244} Id. at 1209.
\textsuperscript{245} Id.
\textsuperscript{246} Id. (emphasis added).
\textsuperscript{247} Id. Justice Brennan explained that the fear was unfounded that a debtor-in-possession would prematurely reject an advantageous collective bargaining agreement and never regain the benefit: Because the union members would lose their jobs if the reorganization failed, it would be highly likely that a debtor-in-possession would be able to negotiate a contract as favorable as the contract that had been rejected. Id.
Finally, the dissent felt that the majority had given too broad a reading to the second bankruptcy policy of allowing a debtor-in-possession certain flexibility and breathing space. Justice Brennan initially noted that the majority failed to articulate how enforcement of section 8(d) would interfere with this policy. Moreover, the dissent contended that Congress "clearly" did not intend for flexibility and breathing space to be unlimited. This observation was supported by the right of the nondebtor party to an executory contract to request a bankruptcy court to order the debtor-in-possession to accept or reject the contract within a specified period of time. This careful analysis of both bankruptcy and labor law allowed the dissent to find that a debtor-in-possession would commit an unfair labor practice if it unilaterally modified its collective bargaining agreement.

V. IMPACT

A. Congressional Response

Congressional reaction to the Bildisco decision was swift. In July 1984 Congress passed the Bankruptcy Amendments and Federal Judgeship Act of 1984. The Act, while primarily a solution to the jurisdictional dilemma which Northern Pipeline Construction Co. v. Marathon Pipeline Co. created, contained a rider which added section 1113 to the Bankruptcy Code. Under that section, a debtor in Chapter 11 can reject a collective bargaining agreement with court approval after complying with specific procedures.

249. 104 S. Ct. at 1209-10 (Brennan, J., concurring in part and dissenting in part).
250. Id. at 1209.
251. Id. at 1210.
252. Id.
253. Id.
Initially it is worthy of note that the provisions of section 1113 apply only prospectively. Thus, a debtor who filed his petition prior to the enactment of the Bankruptcy Amendments on June 29, 1984, is unaffected by section 1113. Thus, the standard for rejection in Bildisco should remain wholly applicable in pre-Amendment cases.

Section 1113 provides that, prior to filing an application seeking rejection, the debtor-in-possession or Chapter 11 trustee must make a proposal to the authorized representative of its employees, providing for those modifications necessary to enable reorganization and to assure all parties of fair treatment. That proposal must contain "the most complete and reliable information available at the time of such proposal." The debtor must also provide the representative with "such relevant material as is necessary to evaluate the proposal." The debtor or trustee must also negotiate in good faith with the representative.

Section 1113 further provides that the court may approve rejection if a proposal meeting these specified requirements has been made, the authorized representative has refused to accept that proposal without good cause, and the "equities clearly [favor] rejection." Once an application for approval of rejection has been filed, a hearing on that application must be held within fourteen days. Further, the court must rule on that application within thirty days. Although the court may authorize changes in the collective bargaining agreement in the interim between the filing of the petition and the application for rejection, the debtor may not "unilaterally terminate or alter any provisions of a collective bargaining agreement."

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258. Id. § 541(c).
260. Id. § 541(d)(2). This seems to conflict with or be an exception to subsection (f) which disallows unilateral termination or alteration of a collective bargaining agreement by the trustee. Id. § 541(f).
262. Id. § 541(b)(1)(A).
263. Id. § 541(e).
264. Id. § 541(d)(1). Extensions of time may be granted under certain circumstances. Id.
265. Id. § 541(e), 98 Stat. at 391. These changes must be made in order to avoid irreparable damage or they must be essential to the continuation of the business. Id.
266. Id. § 541(f). Section 541(d)(2) conflicts with or is an exception to § 541(f).
While section 1113 imposes a set of specific procedures, the new provision leaves several unanswered questions concerning its effects on the nonprocedural aspects of Bildisco. For example, the precise extent to which Congress has overruled Bildisco is uncertain. Clearly the procedure for rejection of a collective bargaining agreement has changed.267 The decision in Bildisco, however, that compliance with section 8 of the NLRA was unnecessary in a Chapter 11 proceeding was based not on procedure, but on the lack of an "enforceable contract."268 Section 1113 now prohibits unilateral rejection by a debtor-in-possession. It seems unlikely that this enactment means that an enforceable contract exists for purposes of section 8 of the NLRA. Congress obviously intended to overrule Bildisco's rejection standard, but it gave no indication that it wished to modify the present interpretation of the NLRA. A further problem arises from the authentically procedural requirements which Congress enacted to replace those Bildisco imposed.269 Application of the requirements of both section 1113 of the Bankruptcy Code and section 8 of the NLRA would be ludicrous. The result of the concurrent jurisdiction of the bankruptcy court and the NLRB could only be chaotic, and would certainly imperil, if not prevent, effective reorganization.

It is also unclear what effect the new legislation will have on the bankruptcy court's power to enjoin strikes. Prior to Bildisco, the consensus was that the bankruptcy court had no authority to enjoin strikes.270 However, since more stringent requirements are now demanded from labor, courts may be more willing to test that assumption in proper circumstances.

Further, the construction which will be given to key phrases, such as bargaining in good faith, complete and reliable information, and irreparable damage to the estate, will be of major importance. The Bildisco interpretation of these concepts may foreshadow future judicial construction. Congress seems to have viewed this legislation as a compromise between the extremes of unilateral, unchecked rejection and the applicability of

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267. See supra notes 256-57, 260-66.
268. See supra notes 192-201.
the NLRA. The judicial gloss put upon the new legislation will determine whether section 1113 is a moderate provision, balancing the equities among the debtor, its employees, and its creditors, or whether a Chapter 11 proceeding will become a tool of management or an abyss for employers who must contend with collective bargaining agreements.

B. Impact on Public Sector Employment

Chapter 9 of the Bankruptcy Code concerns the adjustment of the debts of a municipality that has filed a petition in bankruptcy. The legislative history of this chapter indicates that once a public sector employer files a Chapter 9 petition in bankruptcy, it will be allowed to reject an executory contract, including a collective bargaining agreement. The effect of Bildisco, by analogy, and the effect of the new section 1113 on Chapter 9 debtors has yet to be determined.

C. Airlines

Bildisco dealt exclusively with a collective bargaining agreement governed by the NLRA. By contrast, airlines, as well as railroads, conduct their collective bargaining and subsequent agreements through the provisions of the Railway Labor Act. This difference, upon examination, leads to the conclusion that the Court's findings of a specific standard for rejection and avoidance of unfair labor practices in Bildisco and the standards imposed by section 1113 are not to be engrafted upon Chapter 11 reorganization filings in the airline or railroad industries.

As discussed, section 1167 of the Bankruptcy Code exempts from rejection Railway Labor Act collective bargaining agreements. Notwithstanding the outcome in REA Express, it has been held that because of section 1167, a debtor-in-possession with a collective bargaining agreement governed by the Railway Labor Act may modify or reject its obligations only upon strict

274. See supra note 97 and accompanying text.
275. See supra notes 82-97 and accompanying text.
compliance with the procedures set out in section 6 of the Railway Labor Act. In In re Overseas National Airways, the eastern district court in New York came to that conclusion in a case involving two collective bargaining agreements of a debtor-in-possession airline, one with its pilots, who were represented by the Air Line Pilots Association (ALPA), and one with its flight attendants. The court found that the Railway Labor Act governed the contracts. As a result, "the terms of the Bankruptcy Act itself . . . [under the predecessor provision to the current section 1167] prescribe the only method by which collective bargaining agreements of the kind . . . involved may be disaffirmed." It seems to follow that in cases falling under section 1167, that section would apply rather than section 1113 especially considering the latter section’s explicit exemption of Railway Labor Act debtors-in-possession from the newly enacted procedures. Congress’ passage of section 1167 seems to manifest its conviction that the railroads and airlines should be treated differently from other industries. Discerning the dramatic impact that a disruption in either of those industries would have on the public, Congress determined that this special formula for rejection of a Railway Labor Act collective bargaining agreement was necessary.

VI. Conclusion

The decision in Bildisco precipitated legislative change and that change appears to be dramatically pro-labor. The manner in which the courts will interpret the new statutes remains to be seen.

On the issue of changing the standard for rejecting collective bargaining agreements, the changes made by the 1984 Act were unnecessary. The Bildisco decision, for all its window dressing, is the same business judgment test used in bankruptcy to reject any collective bargaining agreement. As such, it is in step with Congress’ express command that all creditors are to be

276. Id.
278. Id. at 359.
279. Id. at 360.
280. Id. at 360-61 (emphasis by court).
treated equally. Congress has, in Orwellian fashion, amended its initial commandment: all creditors are to be treated equally, but some creditors are to be treated more equally than others. Such a change is contradictory and unjustified. In contrast, if Congress had changed the Bankruptcy Code to provide unequivocally that a debtor-in-possession’s unilateral modification of its collective bargaining agreement during the interim period would be an unfair labor practice, then, for the reasons the dissent stated, that move would have been equitable and justified.

The Court's decision that a bankruptcy court may approve rejection of a collective bargaining agreement as long as the debtor-in-possession can demonstrate that the agreement burdens the estate and the equities balance in favor of rejection did not represent a major change from the business judgment test’s comprehensive inquiry into good faith. This standard furthers the Bankruptcy Code goal of treating executory contract creditors equally, while simultaneously emphasizing a policy of respect for labor contracts. Once the interests of all of the parties are examined, the employer must demonstrate a good faith need to reject the contract. A legislative change in this area was unnecessary. Moreover, such partisan legislation as has been passed will have a doubly negative impact. It will displace established congressional goals of equalizing the treatment of a debtor-in-possession’s creditors and will needlessly exalt collective bargaining agreements to a level of immutability.

The holding in Bildisco that a debtor-in-possession does not commit an unfair labor practice when it unilaterally alters the terms of an existing collective bargaining agreement upon the filing of bankruptcy petition is untenable. The ruling gave a debtor-in-possession a powerful right, bereft of any immediate judicial check, to ignore its labor contract obligations upon the

281. G. ORWELL, ANIMAL FARM 123 (1946): “My sight is failing,” she said finally. “Even when I was young I could not have read what was written there. But it appears to me that that wall looks different. Are the Seven Commandments the same as they used to be, Benjamin?”

For once Benjamin consented to break his rule, and he read out to her what was written on the wall. There was nothing there now except a single Commandment. It ran: ALL ANIMALS ARE EQUAL BUT SOME ANIMALS ARE MORE EQUAL THAN OTHERS. After that it did not seem strange when next day the pigs who were supervising the work of the farm all carried whips in their trotters.
filing of a voluntary petition in bankruptcy. The dissent’s analysis and conclusion pertaining to this issue, however, would have accommodated both labor and bankruptcy policies by holding that a debtor’s unilateral action during the interim period would constitute an unfair labor practice.

D’Anne Haydel