

IS THERE A CLAIM FOR DAMAGES FROM THE REJECTION OF A COLLECTIVE BARGAINING AGREEMENT UNDER SECTION 1113 OF THE BANKRUPTCY CODE?

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I. INTRODUCTION

In 1984, Congress enacted section 1113 of the Bankruptcy Code.¹ Its stated purpose was to overrule the recent decision of the Supreme Court in *NLRB v. Bildisco & Bildisco*,² which allowed a chapter 11 debtor to unilaterally reject a collective bargaining agreement.³ While section 1113 imposes certain procedural and substantive requirements for a debtor to reject a prepetition collective bargaining agreement, it leaves unaddressed the fundamental issue of whether there is a claim for damages from the court-approved rejection of a collective bargaining agreement.

In *In re Blue Diamond Coal Co.*,⁴ the only reported case to decide this issue, the court held that section 1113 completely removes collective bargaining agreements from treatment as executory contracts⁵ under section 365, with the consequence that, since section 1113 does not expressly provide a claim for damages after rejection, such a claim does not exist. The author contends that *Blue Diamond* was wrongly decided. The better view is that section 1113 provides a mechanism for rejection, and, once rejection occurs, a claim for rejection damages is allowable in the same manner as for other executory contracts under section 365.

Part II of this article examines the rejection of collective bargaining agreements prior to the enactment of section 1113. Part III discusses the circumstances of the enactment of section 1113. Part IV discusses whether, after the enactment of section 1113, a damage claim continues to exist for the court-approved rejection of a collective bargaining agreement.

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II. THE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS BEFORE THE ENACTMENT OF SECTION 1113

Prior to the enactment of section 1113, courts consistently treated collective bargaining agreements as executory contracts within the meaning of section 365,⁶ which allows a debtor to assume or reject such contracts.⁷ If an executory contract is assumed after the filing of a bankruptcy petition, and the debtor subsequently defaults on its obligations under the contract, claims arising from this default are treated as postpetition obligations.⁸ Consequently, these claims will be treated as administrative expenses,⁹ which are entitled to priority of payment.¹⁰

If an executory contract is rejected by a debtor, such a rejection is deemed to have occurred prior to the filing of the bankruptcy petition.¹¹ Accordingly, the aggrieved party's claim for damages from the rejection of the executory contract will be allowed,¹² but will not be granted administrative priority.¹³

Prior to the enactment of the Bankruptcy Amendments and Federal Judgeship Act of 1984,¹⁴ courts generally applied the business judgment rule to determine whether to approve a debtor's rejection of an executory contract under section 365.¹⁵ "It is enough, if, as a matter of business judgment, rejection of the burdensome contract may benefit the estate."¹⁶ Many courts recognized, however, that allowing debtors to reject collective bargaining agreements so easily was at odds with federal policies embodied in the National Labor Relations Act (NLRA), which seeks to protect employees from unfair labor practices.

¹⁷ The NLRA provides, in part, that no party can modify or terminate a collective bargaining agreement unless certain conditions are met. ¹⁸ If the employer, in the exercise of its business judgment, is able to unilaterally reject a collective bargaining agreement once it files for bankruptcy, the goals of the NLRA could easily be circumvented.

Recognizing this possibility, courts began to require a higher standard for the rejection of collective bargaining agreements, but they disagreed on the standard. The United States Court of Appeals for the Second Circuit in *Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc.* held that "a bankruptcy court should permit rejection of a collective bargaining agreement only after thorough scrutiny." ¹⁹ In *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*, a different panel of the same court held that rejection "should be authorized only where it clearly appears to be the lesser of two evils and that, unless the agreement is rejected, the [debtor] will collapse and the employees will no longer have their jobs." ²⁰

When confronted with the issue, the Supreme Court articulated a new standard for the rejection of collective bargaining agreements. In *NLRB v. Bildisco & Bildisco*, ²¹ a union appealed the debtor's unilateral rejection of a collective bargaining agreement. First, the Supreme Court reaffirmed the uncontroverted proposition that a collective bargaining agreement was an executory contract, which could be assumed or rejected under section 365 of the Bankruptcy Code. ²²

Then, the Supreme Court made two important holdings. First, it held unanimously that the rejection of a collective bargaining agreement by the bankrupt employer was only appropriate when the balance of the equities favored rejection. ²³ The Supreme Court declined to accept the higher standard for rejection articulated in *REA Express* that the debtor show that reorganization will fail unless rejection is permitted. But the Supreme Court imposed a higher standard for rejection than that of the business judgment rule. "[T]he Bankruptcy Court should permit rejection of a 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 favor of rejecting the labor contract." ²⁴ Second, the Supreme Court, in a five-to-four decision, held that it was not an unfair labor practice under the NLRA for the debtor to unilaterally reject or modify the collective bargaining agreement prior to the bankruptcy court's approval of formal rejection by the debtor. ²⁵

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III. THE ENACTMENT OF SECTION 1113

Congress enacted section 1113 of the Bankruptcy Code as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984 ²⁶ in response to the Supreme Court's decision in *Bildisco*. ²⁷ Section 1113 ²⁸ addresses both parts of the Supreme Court's holding.

First, it expands upon the standard for rejection of collective bargaining agreements articulated by the Supreme Court. According to section 1113, the bankruptcy court may only allow the debtor to reject a collective bargaining agreement if three requirements are met: (1) the debtor has made a proposal to the union which provides the modifications to the collective bargaining agreement that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor, and all of the affected parties are treated fairly and equitably; ²⁹ (2) the union has refused to accept the modifications without good cause; and (3) the balance of equities clearly favors rejection. ³⁰

Second, while substantially codifying the first part of the Supreme Court's holding in *Bildisco*, section 1113 overruled the Court's holding that a debtor may unilaterally reject or modify a collective bargaining agreement prior to court-approved rejection. Section 1113 prohibits the unilateral alteration or termination of a collective bargaining agreement by the debtor. It does, however, allow rejection with the approval of the bankruptcy court, and it allows the bankruptcy court to grant interim relief to the debtor to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collective bargaining agreement prior to rejection, if such relief is essential to the continuation of the debtor's business or to avoid irreparable damage to the estate. ³¹

Section 1113 is silent, however, as to the consequences of rejection, in particular, the issue of whether there is a claim for damages after the bankruptcy court has approved rejection of a collective bargaining agreement.

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IV. DID SECTION 1113 ELIMINATE DAMAGE CLAIMS FROM THE REJECTION OF COLLECTIVE BARGAINING AGREEMENTS?

Part A of this section discusses the cases that have addressed the issue of damages from court-approved rejection of collective bargaining agreements. Part B examines the statutory language of section 1113 in conjunction with other provisions of the Bankruptcy Code to determine whether damages are allowable from court-approved rejection. It demonstrates that *Blue Diamond* wrongly concluded both that section 1113 was unambiguous and that resort to its legislative history was improper. Part C examines the legislative history of section 1113 in order to determine congressional intent. In Part D, the author contends that *Blue Diamond* was wrongly decided, and that, after the enactment of section 1113, a damage claim continues to exist for the court-approved rejection of a collective bargaining agreement.

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A. The Case Law

The issue of whether a damage claim arises from the court-approved rejection of a collective bargaining agreement is largely a matter of first impression. Only one reported case, *In re Blue Diamond Coal Co.*, ³² has directly addressed this issue. Other cases have peripherally addressed this matter.

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1. The Blue Diamond Decision

In *Blue Diamond*, the debtor filed a chapter 11 petition and, at the same time, sought authority pursuant to section 1113(e) to implement certain interim changes to its collective bargaining agreement. The bankruptcy court granted the requested interim changes. The debtor later sought and obtained additional interim changes to the collective bargaining agreement. Finally, the debtor received bankruptcy court approval to reject the collective bargaining agreement. The debtor's union filed a proof of claim for damages arising from the debtor's rejection of the collective bargaining agreement and from the interim changes to the agreement that were implemented pursuant to section 1113(e), which effectively modified the agreement.

The debtor argued that, according to section 1113(a), a collective bargaining agreement

can be assumed or rejected "only in accordance with the provisions of this section," ³³ and, since there is no provision in section 1113 allowing claims for rejection, no such remedy exists. The union argued that section 365(g), ³⁴ which deals with executory contracts in general, and section 502(g) ³⁵ still applied to section 1113 because a collective bargaining agreement is an executory contract.

The bankruptcy court, noting that this was a case of first impression, held that the union was not entitled to damages from the modification and rejection of the collective bargaining agreement. The bankruptcy court reasoned that, by enacting section 1113, Congress eliminated collective bargaining agreements from the framework of section 365, which, in turn, removed collective bargaining agreements from the provisions of section 502(g). The bankruptcy court stated:

[W]hen sections 365(g) and 502(g) are removed from the equation, the rejection provides the entity injured thereby with a breach of the executory contract, but with no vehicle by which to assert the damages resulting from that breach as having arisen "before the date of the filing of the petition." Therefore, the entity sustaining the breach is not only incapable of meeting the section 502(a) requirement that the claim be "filed under section 501," it also does not hold a claim cognizable under section 502(b) because the claim is not capable of being determined "as of the date of the filing of the petition." ³⁶

As a result, the bankruptcy court held that a person injured by the rejection of a collective bargaining agreement does not have an allowable claim for damages flowing from the rejection. ³⁷

The bankruptcy court found that section 1113 was not ambiguous and that, therefore, there was no basis for reliance on its legislative history. ³⁸ Moreover, the bankruptcy court noted that, in any event, because no committee reports were issued regarding the enactment of section 1113, it was doubtful that the legislative history would offer any insight. ³⁹

Nonetheless, the bankruptcy court expressed some reservations about its holding. The court observed:

On one hand, it is difficult to believe that Congress provided for rejection of a collective bargaining agreement under section 1113, but neither defined the status of any claim which might result from that rejection nor provided a remedy for the breach cognizable under the Bankruptcy Code. On the other hand, the court is compelled to apply the Bankruptcy Code as written. ⁴⁰

The bankruptcy court concluded that Congress did not provide any alternative to section 365(g). Given this apparent omission and the fact that the debtor faces so many barriers to rejection under section 1113, the bankruptcy court stated that "it is arguable that Congress intended that no claim for damages for rejection of a collective bargaining agreement would be allowed." ⁴¹ Moreover, the bankruptcy court noted that allowing damages for rejection would undermine the whole purpose of court-approved rejection, which is to permit reorganization for the debtor so that its business will survive; "[i]f rejection is truly necessary, then allowing a claim for damages, especially if the amount of that claim represents lost future wages and benefits, would necessarily assure the failure

of the reorganization." ⁴²

On appeal from the bankruptcy court, the district court affirmed. ⁴³ The district court held that the appeal was moot because the plan of reorganization had been substantially consummated. However, the district court assumed, *arguendo*, that the appeal was not moot, and on that assumption, it agreed with the bankruptcy court that section 1113 removed collective bargaining agreements from the purview of sections 365 and 501 ⁴⁴ and that, as a result, damage claims from the rejection of collective bargaining agreements no longer existed. ⁴⁵ As did the bankruptcy court, the district court noted, in support of its conclusion, that to allow a rejection claim for damages would necessarily assure the failure of the reorganization. ⁴⁶ Finally, the district court concluded, as did the bankruptcy court, that "Congress' intent need not be gleaned apart from the unambiguous language in the controlling statute itself." ⁴⁷

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2. Cases that Factor Rejection-Damage Claims into Their Rejection Analysis

While no other reported case has dealt squarely with the issue of whether damages are allowable from the court-approved rejection of a collective bargaining agreement, the cases that have dealt generally with collective bargaining agreements under section 1113 have treated them as executory contracts that continue to be subject to the provisions of section 365. In the context of deciding whether to allow rejection of a collective bargaining agreement under section 1113, bankruptcy courts have used damage claims by unions as a factor to be considered when applying the balance-of-the-equities test mandated under section 1113. ⁴⁸

For example, the bankruptcy court in *In re Maxwell Newspapers, Inc.*, ⁴⁹ in allowing rejection of a collective bargaining agreement, noted that "[t]he possibility of large damage claims from the rejection certainly looms as a threat to the dividend which the unsecured creditors will receive." ⁵⁰ Thus, the court assumed that damage claims from rejection would be allowed under the Bankruptcy Code, and it considered these claims in its decision to allow rejection.

In addition, some of the courts that have considered the risk of damage claims by unions in their rejection analysis have been more willing to approve rejection because of the possibility of such claims. These courts have reasoned that the existence of damage claims will ensure that unions would not bear a disproportionate share of the burden of the debtor's reorganization efforts. For example, the bankruptcy court in *In re Salt Creek Freightways* ⁵¹ explained:

[I]f the contract is rejected, the union employees will be in a better position than the other non-contractual employees of the debtor because they may receive dividends based on unsecured claims for the damages resulting from the court-approved rejection of the collective bargaining agreement Accordingly, from an equitable standpoint, it appears that the union employees are not being made to bear a disproportionate share of the debtor's reorganization efforts. ⁵²

These courts, by factoring rejection-damage claims into their analyses, provide support for the proposition that such claims continue to exist after the enactment of section 1113.

3. Cases Where the Debtor Has Neither Assumed Nor Rejected the Collective Bargaining Agreement

There is a line of cases in which the debtor has not sought to reject the collective bargaining agreement under the procedures of section 1113, but instead has defaulted on its obligations under the agreement, thereby unilaterally rejecting the collective bargaining agreement. In such cases, all courts have allowed the recovery of damages from such rejection even though section 1113 does not specifically provide such a remedy.⁵³ Although not directly on point, these cases are instructive because their analysis suggests that damages should be allowed from court-approved rejection as well, even though section 1113 does not specifically provide such a remedy.

While these decisions agree that damages are allowable from the unilateral rejection of a collective bargaining agreement, they differ on the priority to accord such claims.⁵⁴ Some courts hold that section 1113(f)⁵⁵ creates superpriority status for these claims.⁵⁶ Other courts hold that such claims should be treated according to the priority scheme set forth in section 507.⁵⁷ The courts that adhere to the latter view provide support for the proposition that, if section 507 applies to collective bargaining agreements, other provisions, including section 365, may apply despite the apparently exclusive language in section 1113.

For example, in *In re Moline Corp.*, the union demanded immediate payment of obligations arising under a collective bargaining agreement, which the debtor had neither assumed nor rejected. The court held that immediate payment was not necessary, but if the debtor never "rejects the collective bargaining agreement and thus assumes the agreement by inaction, the plan of reorganization must provide for the payment of the unsecured prepetition and postpetition claims according to the priority scheme set out in section 507."⁵⁸

In support of its holding, the *Moline* court noted that section 1113 is silent on the issue of damages for claims arising from the assumption or rejection of collective bargaining agreements. The court stated therefore that "section 365 must apply to fill in the gap left by section 1113."⁵⁹ The court recognized that section 365(g) only provides for the treatment of executory contracts "under this section" but viewed this language as "a legislative gaffe, i.e., when Congress added section 1113 in 1984, it forgot to make conforming amendments to other provisions in the Bankruptcy Code, including section 365. Otherwise, the gaps in section 1113 would make it virtually impossible to determine the consequence of the assumption or rejection."⁶⁰

In reaching the similar conclusion that the unilateral breach of a collective bargaining agreement would be subject to the section 507 priority rules, the court in *In re Murray Industries, Inc.* compared the language of section 1114 to section 1113.⁶¹

In section 1114 of the Code, there is explicit language exempting payment of retirement benefits from other provisions of Title 11 which otherwise might prohibit such payments. ... The explicit language and the legislative history of section 1114 stand in stark contrast to the absence of any such language in section 1113.⁶²

The *Murray* court concluded that Congress did not intend to exempt section 1113 from the operation of other sections of the Bankruptcy Code, including section 507.

The *Murray* court held that the payment of claims arising under section 1113 from the unilateral rejection of a collective bargaining agreement can be administered according to the priorities set by section 507. Thus, if damage claims arising from the unilateral rejection of a collective bargaining agreement are to be subject to the operation of other provisions of the Bankruptcy Code, there is no good reason why damage claims arising from court-approved rejection should not also be subject to the operation of other provisions of the Bankruptcy Code, notably section 365(g).

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B. Statutory Construction

Blue Diamond was decided largely on the basis of the language of section 1113(a), which provides that the debtor "may assume or reject a collective bargaining agreement *only in accordance with the provisions of this section.*" ⁶³ Both the bankruptcy court and the district court concluded that section 1113 was unambiguous, and thus precluded resort to its legislative history.

Both the bankruptcy court and the district court in *Blue Diamond* wrongly concluded that section 1113 was unambiguous. Section 1113 does not clearly and specifically provide that there is no damage claim from the rejection of a collective bargaining agreement, although such a result would have been easy for Congress to accomplish in the drafting of the section. For example, section 1113 could have expressly stated that section 365 was not applicable to collective bargaining agreements. Alternatively, section 365 could have expressly stated that it did not apply to collective bargaining agreements. Instead, neither section 1113 nor section 365 by its express terms eliminates collective bargaining agreements from the purview of section 365. Indeed, section 1113 does not even specifically refer to section 365. On its face, section 1113 merely provides that the assumption or rejection of collective bargaining agreements may only occur in accordance with section 1113. The section is completely silent as to the effects of assumption and rejection. Unlike section 365, section 1113 provides no guidance on the consequences of assumption or rejection. It merely addresses the mechanism for the rejection and modification of collective bargaining agreements.

Section 365(g) of the Bankruptcy Code provides that the rejection of an executory contract is treated as a prepetition breach which, under section 502(g), is allowed as an unsecured claim. Section 365(g) provides that "the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease-if such contract or lease has not been assumed *under this section*" ⁶⁴ It may be argued that section 365(g), by its own terms, does not apply to collective bargaining agreements because section 365(g) only applies if the contract has been rejected under section 365 and not under section 1113. However, this is incorrect. Section 365(g) does not require that rejection occur under section 365. It requires only that the executory contract "has not been assumed under" section 365. ⁶⁵ A collective bargaining agreement that has been rejected under section 1113 qualifies as a contract that has not been assumed under section 365. ⁶⁶

It may be also argued that, if Congress had wanted to create a claim for damages from the rejection of collective bargaining agreements, this could have been accomplished in several different ways. For example, Congress could have included in section 1113 language similar to that in sections 365(g) and 502(g). Alternatively, Congress could have incorporated sections 365(g) and 502(g) into section 1113 by reference. Congress could also have simply added a new subsection to section 365 to deal with collective bargaining agreements. Instead, by adding a new section in another part of the Code, some may argue that Congress intended to completely remove collective bargaining agreements from

the purview of section 365. ⁶⁷

However, this argument is flawed. Its premise is that, for rejection damages to be allowable after the enactment of section 1113, there must be some express statutory connection between section 1113 and section 365(g). The premise is incorrect. The fact is that, prior to the enactment of section 1113, the rejection of a collective bargaining agreement would clearly result in an allowable damage claim under section 365(g). This was unanimously affirmed by the Supreme Court in *Bildisco*. ⁶⁸ If section 1113 was intended to eliminate such damage claims, such a dramatic reversal of the law would have been accomplished by clear and specific language to that effect. If Congress intends for legislation to change the existing law, such intent must be specific and not left to inference and implication. ⁶⁹ Moreover, there is a presumption that Congress adopts the prevailing judicial interpretation of a statute if it re-enacts the statute without change. ⁷⁰ Here, the prevailing judicial interpretation, as affirmed by the Supreme Court in *Bildisco*, is that the rejection of a collective bargaining agreement gives rise to a rejection-damage claim. To overrule this existing law, there must be clear and specific language in either the statute or the legislative history to that effect. ⁷¹ In other words, section 1113 cannot and should not be construed to reverse the law that damages are allowable from the court-approved rejection of a collective bargaining agreement in the absence of clearly expressed congressional intention to that effect.

As discussed above, section 1113 does not clearly and specifically remove collective bargaining agreements from section 365, and thus from the application of section 365(g). Resort to the legislative history of section 1113 is appropriate to determine if Congress intended to reverse the existing law on this issue.

Therefore, contrary to the conclusion of the *Blue Diamond* courts, the plain language of section 1113 begins, rather than ends, the analysis of whether there is a claim for damages from the rejection of a collective bargaining agreement. When a statute is ambiguous on its face, as is section 1113, it is appropriate to turn to its legislative history to determine congressional intent. ⁷²

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C. Legislative History of Section 1113

Section 1113 was enacted as part of the Bankruptcy Amendments and Federal Judgeship Act of 1984. ⁷³ No committee reports were issued in connection with section 1113. Moreover, in all of the congressional debates and reports issued in respect of the Bankruptcy Amendments and Federal Judgeship Act of 1984, there is no direct reference to the issue of whether or not there exists a claim for damages from the court-approved rejection of collective bargaining agreements. However, a review of the general legislative history of the bill, the remarks made by its sponsors, and the various drafts of the bill provide some insight into Congress' intent. ⁷⁴

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1. The Origin of Section 1113

If we could determine whether the collective bargaining provisions of the Bankruptcy Amendments and Federal Judgeship Act of 1984 were intended to benefit labor or management, it would be easier to determine in whose favor the effects of rejection should be interpreted. ⁷⁵

When first introduced by Congressman Rodino of New Jersey in the House of Representatives, the collective bargaining provisions were clearly intended to benefit labor by overturning the result in *Bildisco* in two ways. First, while *Bildisco* had held that bankruptcy courts could allow rejection of collective bargaining agreements if the balance of the equities favored rejection, the Rodino proposal sought to reinstate the stricter standard articulated by the Second Circuit in *REA Express*.⁷⁶

Rodino proposed language which provided that "[t]he collective bargaining agreement would not be subject to rejection in a chapter 11 case, unless the jobs covered by the collective bargaining agreement would otherwise be lost and any financial reorganization would fail."⁷⁷ Second, while *Bildisco* had held that the unilateral rejection of a collective bargaining agreement was not an unfair labor practice, Rodino's bill sought to prohibit unilateral rejection. After limited debate, the House of Representatives passed a bankruptcy bill that adopted the stricter *REA Express* standard for rejection as well as the provision prohibiting the unilateral rejection of collective bargaining agreements.

When the proposal was debated in the Senate, many senators voiced reservations about the reinstatement of the strict *REA Express* standard and expressed a preference for the *Bildisco* standard.⁷⁸ The most significant proposals on this subject in the Senate were offered by Senators Thurmond and Packwood. Both Senators proposed to adopt the *Bildisco* standard for rejection of collective bargaining agreements, but differed on the subject of the unilateral rejection of collective bargaining agreements. Ultimately, both Senators withdrew their proposals so that the process of enacting the Bankruptcy Amendments and Federal Judgeship Act of 1984 could be expedited. They agreed to try to work out the collective bargaining provisions in conference.⁷⁹

What started as a pro-labor bill in the House turned into a compromise bill among various interest groups when it emerged from the Conference Committee.⁸⁰ The Conference Committee adopted the *Bildisco* standard for rejection of collective bargaining agreements, which provided that collective bargaining agreements could only be rejected if the balance of the equities clearly favored rejection. In addition, the Committee bill prohibited unilateral rejection of a collective bargaining agreement by the debtor. This bill was approved by both houses of Congress and signed into law by President Reagan on July 10, 1984.

The bill that emerged was vastly different from the original Rodino proposal. Congressman Rodino noted that "it was only after much deliberation and much exchange that we finally came to what we believe to be a very balanced provision."⁸¹ Senator Thurmond made similar remarks in the Senate.⁸² Thus, the enactment of section 1113 cannot be considered an unqualified victory for either labor or management. Accordingly, it would be inappropriate to construe section 1113 with either a pro-labor or a pro-management bias.

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2. Remarks in Congress

Unfortunately, the remarks made in the House and Senate are of little assistance in the determination of the legislative intent of section 1113 because of the absence of debate on the subject of damages from court-approved rejection of collective bargaining agreements. The legislative history is completely devoid of any reference to rejection damages.

Congressional silence on this issue is surprising if Congress' intention was to eliminate the right to rejection damages, a right that was only recently affirmed by the Supreme Court in *Bildisco*. The bill that emerged from the Conference Committee was clearly intended to

overturn the portion of *Bildisco* that allowed the debtor to unilaterally reject a collective bargaining agreement.⁸³ Notably, however, no member of Congress criticized the portion of *Bildisco* that held collective bargaining agreements to be executory contracts within the purview of section 365. In fact, even the most vocal opponents in the House of the *Bildisco* decision acknowledged that "there is unanimity that collective-bargaining agreements are executory contracts for purposes of bankruptcy."⁸⁴ Since *Bildisco* clearly affirmed that the rejection of collective bargaining agreements is governed by section 365 and that, as a result, an allowable claim for damages arises therefrom, one would have expected that if Congress intended to reverse this prevailing law, surely there would have been some reference in the legislative history to that effect.⁸⁵ Yet, in the entire legislative history of this bill, there is not a single reference to overruling *Bildisco*'s unqualified affirmation of the law on this subject.

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3. Drafting History of Section 1113

Several of the previous versions of section 1113 contained express references to sections 365 and 503. The House version of the bill would have amended section 365(a) to specifically refer to section 1113. The proposal would have amended section 365(a) to read as follows: "Except as provided in sections 765, 766 and 1113 of this title and in subsections (b), (c) and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor."⁸⁶

Furthermore, the House bill would have amended section 503(b)(1)(A) to read that administrative expenses would be allowed, including:

the actual, necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case, except that such wages or salaries covered by a collective bargaining agreement to which section 1113 of this title applies shall only be measured at the rate prescribed for such services in such agreement.⁸⁷

The express reference to section 1113 in the House version of section 365 suggests that the provisions of section 365 would continue to apply to collective bargaining agreements to the extent that they were not inconsistent with the provisions of section 1113. Since section 1113 is silent on the subject of rejection damages, the provisions of section 365(g) would be applicable to fill the gaps.

However, by the time the final bill was enacted, the reference to section 1113 in sections 365 and 503 was dropped. What is the significance, if any, of this deletion? The fact that the reference to section 1113 was deleted from the final bill could support the view that section 1113 was intended to completely remove collective bargaining agreements from the purview of section 365. As previously discussed, however, more than mere inference and implication are necessary to attribute to Congress an intention to reverse the law of the land, as recently affirmed by the Supreme Court.⁸⁸

The Thurmond proposal in the Senate actually added the collective bargaining agreement provisions to section 365.⁸⁹ This proposal seems to have been based on the recommendation of the National Bankruptcy Conference, which sent Senator Thurmond a summary that incorporated a provision on collective bargaining agreements into section 365.⁹⁰ This version of the bill would have made it much clearer that collective bargaining agreements continued to be subject to the other provisions of section 365.

The Packwood amendment proposed to create a new section 1113 (rather than adding to section 365) and was silent as to section 1113's effect on section 365, 503, or 507.⁹¹ This amendment did not contain the apparently exclusive language found in the final bill, which provides for the assumption or rejection of collective bargaining agreements "only in accordance with" the provisions of section 1113.⁹² If Packwood's version had been enacted, it too would have made it clearer that courts could look to other sections of the Bankruptcy Code to determine the effects of the rejection of collective bargaining agreements.

The final bill was a compromise between the Packwood amendment and the Thurmond proposal.⁹³ The National Bankruptcy Conference, in a letter to Senator Thurmond explaining its recommendation to amend section 365 to include a provision dealing with collective bargaining agreements, had suggested that "[t]he Committee Report or floor statement accompanying the amendment should mention that the omission of any provision in the amendment means that section 365(g) applies if the court approves rejection."⁹⁴ In fact, the absence of such a clarifying provision was one of the problems that the National Bankruptcy Conference found with Packwood's proposal. The National Bankruptcy Conference later wrote to Senator Thurmond, commenting on the Packwood amendment that "[i]f the debtor is required to comply with the terms of the collective bargaining agreement pending the determination of the application to reject, it must be clear that damages arising by reason of rejection are to be treated as prepetition unsecured claims. This treatment is consistent with 11 U.S.C. § 365(g)."⁹⁵ What is the significance, if any, of the fact that the requested clarifying language was not added? While it could be used to support the argument that Congress did not intend for unions to have claims for damages from rejection, again, more than mere inference and implication are necessary to find congressional intent to reverse the law.⁹⁶ There must be clear and specific language in either the statute or the legislative history to that effect.

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D. The Failure of the Dog to Bark

Even after the most exhaustive examination of the legislative history of section 1113, it is still nearly impossible to divine congressional intent on the issue of whether there is a claim for damages arising from court-approved rejection of a collective bargaining agreement.⁹⁷ The legislative history is so sketchy that it is difficult to get a clear view of what Congress intended.

Blue Diamond held that section 1113 was not ambiguous and that the plain language of the section eliminated collective bargaining agreements from the framework of section 365. In the absence of any provision in section 1113 comparable to section 365(g) governing the effect of the rejection of collective bargaining agreements, the *Blue Diamond* courts concluded that the enactment of section 1113 abolished any rejection claim for damages.

For the reasons previously discussed, however, *Blue Diamond* was wrongly decided.⁹⁸ *Blue Diamond* erred in its conclusion that section 1113 was unambiguous and that the court was compelled to apply the statute as written.⁹⁹ Section 1113 does not clearly and specifically provide that there are no damage claims from the rejection of collective bargaining agreements. Nor does it specifically exclude application of the provisions of section 365 from collective bargaining agreements where those provisions would not be inconsistent with the application of section 1113. Rather, section 1113 is completely silent as to the effect of rejection. Thus, the language of the statute is ambiguous.

Resort to the legislative history of section 1113 is inconclusive. The legislative history of the section, the remarks on the floor of Congress and the drafting history of section 1113 offer no clear and specific evidence on whether rejection-damage claims were intended to survive the enactment of section 1113. However, the legislative history is more informative for what it does *not* say than for what it does say.

Even the bankruptcy court in *Blue Diamond* acknowledged that "it is difficult to believe that Congress provided for rejection of a collective bargaining agreement under section 1113, but neither defined the status of any claim which might result from that rejection nor provided a remedy for the breach cognizable under the Bankruptcy Code." ¹⁰⁰

If section 1113 was a trade-off where unions would be protected from the rejection of collective bargaining agreements with elaborate procedural and substantive requirements, and, in return, would relinquish their existing rights to assert damage claims, surely there would be some reference in the legislative history to that effect. Instead, and if we accept the decision in *Blue Diamond*, Congress in enacting section 1113 overruled the prevailing law without a single statement or reference to that effect in the entire legislative history of the section! Indeed, the section, as enacted, does not even specifically address the elimination of rejection-damage claims; that result can only be reached through inference or implication. Section 1113 cannot, nor should it be construed to, overrule the existing law without clear and specific language in the statute or the legislative history to that effect. As the Supreme Court has noted, if Congress intends for legislation to change judicial interpretation, it must make that intent specific. ¹⁰¹ To require otherwise would reverse or, in effect, repeal the existing law by implication; and as the Supreme Court has expressed many times, "repeals by implication are not favored." ¹⁰² "The intention of the legislature to repeal must be clear and manifest." ¹⁰³

In a similar situation, Judge Norris in *Montana Wilderness Association v. United States Forest Service* declined to follow the appellee's contention that the Alaska Lands Act applied to non-Alaska land. In that case, the judge noted:

What we find most significant in the legislative history in the Senate is the same thing that Sherlock Holmes found to be crucial in solving the case of the Hound of the Baskervilles—the failure of the dog to bark. The Alaska Lands bill was discussed endlessly on the Senate floor. There are numerous occasions when one would expect a change in current laws of access of the magnitude of the appellees' proposed interpretation of section 1323 to be discussed, mentioned or at least alluded to. Yet we have not found in the Senate debates, and appellees have not called to our attention, one single suggestion that anything in the Alaska Land Bill would affect access rights in the rest of the country. ¹⁰⁴

Similarly, here in the entire legislative history there is no discussion or mention of, or even allusion to, overruling the existing law, which was only recently affirmed unanimously by the Supreme Court, that collective bargaining agreements are executory contracts whose rejection would trigger damage claims. The legislative history tends to subvert rather than support the thesis that the enactment of section 1113 eliminated rejection-damage claims, since it contains not a hint that such a result was intended. "Such a major change in the existing rules would not likely have been made without specific provision in the text of the statute; it is most improbable that it would have been made without even any mention in the legislative history." ¹⁰⁵ Here, the "failure of the dog to bark" strongly suggests that Congress did not intend for section 1113 to remove collective bargaining agreements from the purview of section 365(g) for purposes of determining the effects of rejection. ¹⁰⁶

The court in *Moline*¹⁰⁷ was correct that section 365 should apply to fill the gaps in section 1113. Did Congress, as suggested by the *Moline* court, simply forget to make conforming amendments to section 1113 to make it clear that section 365(g) would continue to apply? The likely explanation is that section 1113 was not intended to entirely remove collective bargaining agreements from the purview of section 365. Instead, section 1113 overrules section 365 to the extent that the latter is inconsistent with the former. Put differently, section 365 generally and section 365(g) in particular continue to apply to collective bargaining agreements to the extent that such application would not be inconsistent with section 1113.¹⁰⁸ Sections 1113 and 365(g) are perfectly capable of co-existing. Section 365(g) is not limited to executory contracts that have been rejected under section 365. It requires only that the contract "has not been assumed under this section."¹⁰⁹ A collective bargaining agreement rejected under section 1113 satisfies this requirement because it has not been assumed under section 365. Therefore, the application of section 365(g) does not abrogate the provisions of section 1113. Moreover, there is no clearly expressed congressional intention that the provisions of section 365(g) are not to be applicable to court-approved rejection of collective bargaining agreements.

In fact, if *Blue Diamond* is correct that collective bargaining agreements are no longer within the purview of section 365, the result is that there is then no provision in the Bankruptcy Code that would enable a debtor to affirmatively assume a collective bargaining agreement. Section 1113 actually deals only with rejection, not assumption, of collective bargaining agreements.¹¹⁰ In the absence of section 365(a), by what power does a debtor assume a collective bargaining agreement? What are the procedural and substantive requirements for assumption? Is the debtor required to cure its defaults under the collective bargaining agreement in order to assume it? Section 1113 offers no answers to these questions. No one would seriously contend that, in enacting section 1113, Congress intended to strip from a debtor its pre-section 1113 ability to assume a collective bargaining agreement. Similarly, assuming *arguendo* that a debtor may assume a collective bargaining agreement under section 1113 (rather than under section 365), it cannot be seriously contended that Congress intended to allow assumption without the debtor curing any defaults or providing adequate assurance that it will promptly cure such defaults, as would be the case under section 365(b)(1). Section 365 must continue to apply to collective bargaining agreements to the extent that its application is not inconsistent with the provisions of section 1113. Otherwise, the results, as previously noted, could border on the absurd.

But what of the consequences to a reorganization of allowing a claim for damages from the rejection of a collective bargaining agreement? Both the bankruptcy court and the district court in *Blue Diamond* contended, in support of their conclusion that damage claims were not allowable, that "[i]f rejection is truly necessary, then allowing a claim for damages ... would necessarily assure the failure of the reorganization."¹¹¹

This contention, however, is erroneous. A claim for damages for breach of any executory contract could potentially lead to the failure of the reorganization.¹¹² Yet, the Bankruptcy Code expressly provides for such damages in section 365(g). It did not seem to bother Congress that, if rejection is necessary for other executory contracts, allowing a claim for damages may jeopardize reorganization.¹¹³ The fact is that a claim for damages from court-approved rejection under section 1113 would be treated as a prepetition, unsecured claim under section 502(g). These claims could be dealt with in the context of a plan of reorganization just like all other prepetition, unsecured claims.¹¹⁴ Moreover, interpreting section 1113 to allow damages for court-approved rejection of collective bargaining agreements strikes the appropriate balance between protecting the ability of the debtor to reorganize and protecting the interests of labor unions. Allowing a rejection-damage claim would not jeopardize a debtor's reorganization efforts because such a claim would be

treated like other prepetition, unsecured claims. Allowing such claims would also ensure that unions would not bear a disproportionate burden in the debtor's reorganization. If rejection damages were not allowed under collective bargaining agreement, non-union members holding rejected executory employment contracts would be better off than union members under a rejected collective bargaining agreement. Non-union members would have damage claims under their rejected employment contracts,¹¹⁵ while union members would have no damage claims under their rejected collective bargaining agreement. In fact, employees under rejected collective bargaining agreements would always fare worse in a chapter 11 bankruptcy than all other creditors under other rejected executory contracts because the latter would be entitled to rejection damages and the former would not.¹¹⁶ Thus, union members would bear a disproportionate burden of the debtor's reorganization efforts.¹¹⁷ This would be at odds with the Bankruptcy Code's overriding goal of treating creditors of the debtor fairly and equitably.

Not only does allowing damage claims from court-approved rejection further the goals of the Bankruptcy Code, but it also advances the policies behind the National Labor Relations Act. The NLRA provides in part as follows:

NLRA experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.¹¹⁸

The Supreme Court has further noted that:

The theory of the [National Labor Relations] Act is that free opportunity for negotiation with accredited representatives of employees is likely to promote industrial peace and may bring about the adjustments and agreements which the Act in itself does not attempt to compel.¹¹⁹

The NLRA does not seek to stifle commerce or marginalize business interests. Rather, it seeks to open the lines of communication between labor and management so that disputes can be resolved through negotiation and collective bargaining. The Bankruptcy Code provides a process by which employers and courts can impose unfavorable consequences on labor unions without their consent. While such steps may be necessary to ensure the reorganization of the debtor, it seems inconsistent with the policies of the NLRA to disallow the damage claim of unions in circumstances in which they have not consented to the rejection of their collective bargaining agreements.

While employers must apply for court approval under section 1113 to reject collective bargaining agreements, several courts have permitted rejection even when rejection is not essential to the successful reorganization efforts of the debtor.¹²⁰ Such a flexible standard for rejection provides little protection for unions, since they would "probably have to accept any modifications that would make unsecured creditors somewhat better off than they would be in a liquidation of the debtor."¹²¹ In the bankruptcy context, to give meaning to the NLRA's goal of consensual negotiation, rejection damages should be allowed.

Both Congress and the courts have struggled for many years to find ways to reconcile the

often conflicting goals of the NLRA and the Bankruptcy Code. ¹²² Not allowing claims for damages from the rejection of collective bargaining agreements goes too far afield of U.S. labor relations policy of encouraging collective bargaining. Allowing such claims would strike the appropriate balance by facilitating the successful reorganization efforts of the debtor while, at the same time, discouraging debtors from building their reorganization on the backs of unions.

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V. CONCLUSION

Section 1113 sets forth the procedural and substantive requirements for the rejection of collective bargaining agreements. If complied with and the bankruptcy court approves rejection of the collective bargaining agreement, a prepetition damage claim should result pursuant to section 365(g), which in turn would be treated as an allowable claim against the bankruptcy estate under section 502(g).

Blue Diamond, however, held that the plain language of section 1113 eliminated collective bargaining agreements from the framework of section 365. In the absence of any provision in section 1113 comparable to section 365(g) governing the effect of the rejection of collective bargaining agreements, *Blue Diamond* concluded that the enactment of section 1113 abolished any rejection claim for damages.

The *Blue Diamond* courts, however, mistakenly concluded that section 1113 was unambiguous and that they were compelled to apply the statute as written. Section 1113 does not clearly and specifically provide that there are no damage claims from the rejection of collective bargaining agreements. Nor does it expressly remove collective bargaining agreements from the purview of section 365. Rather, it excludes the application of section 365 to collective bargaining agreements only to the extent that it is inconsistent with the provisions of section 1113. Section 1113 is completely silent as to the effects of rejection. Thus, section 365 should apply to fill in the gaps in section 1113.

The legislative history of section 1113 is more informative for what it does not say than for what it does say. In the entire legislative history of the section, no mention was made of overturning the law that collective bargaining agreements are executory contracts whose rejection would trigger damage claims. The "failure of the dog to bark" strongly suggests that Congress did not intend for section 1113 to remove collective bargaining agreements from the purview of section 365(g) for purposes of determining the effects of rejection. Section 1113 should not be construed to overrule the existing law without clear and specific language in either the statute or the legislative history to that effect. In sum, there continues to be an allowable claim for damages from the rejection of a collective bargaining agreement under section 1113.

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* Partner, Covington & Burling, Washington, DC The author is grateful to Philip Stansbury, Oscar Garibaldi, and Daniel Keating, each of whom reviewed an earlier draft of this article. Special thanks to my associate Maneesha Mithal for her valuable assistance in the preparation of this article. The views expressed are solely those of the author.

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¹ Bankruptcy Reform Act of 1978, Pub. L. No. 95-598, 92 Stat. 2549 (codified at 11 U.S.C. §§ 101-1330), *as amended by* Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Bankruptcy Judges, United States Trustees and Family Farmer Bankruptcy Act of 1986, Pub. L. No. 99-554, 100 Stat. 3114 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Retiree Benefits Bankruptcy Protection Act of 1988, Pub. L. No. 100-334, 102 Stat. 610 (codified as amended in various sections of 11 U.S.C.); Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, 104 Stat. 1388 (codified as amended in various sections of 11 U.S.C.); Criminal Victims Protection Act of 1990, Pub. L. No. 101-581, 104 Stat. 2865 (codified as amended in various sections of 11 U.S.C.); Crime Control Act of 1990, Pub. L. No. 101-647, 104 Stat. 4789 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (codified as amended in various sections of 11 U.S.C. and 28 U.S.C.); Treasury, Postal Service and General Government Appropriations Act of 1990, Pub. L. No. 101-509, 104 Stat. 1389 (codified as amended in various sections of 28 U.S.C.); Department of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act of 1994, Pub. L. No. 103-121, 107 Stat. 1153 (codified as amended in various sections of 28 U.S.C.); Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320934, 108 Stat. 1976, 2135; and Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 3146 (codified in various sections of 11 U.S.C., 18 U.S.C., and 28 U.S.C.) [hereinafter Bankruptcy Code or Code].

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² 465 U.S. 513 (1984).

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³ See 130 Cong. Rec. S20,092 (1984) (statement of Sen. Packwood) ("The provision overrules the 5-to-4 portion of the Supreme Court's *Bildisco* decision.").

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⁴ 147 B.R. 720 (Bankr. E.D. Tenn. 1992), *aff'd*, 160 B.R. 574 (E.D. Tenn. 1993).

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⁵ The term "executory contract" is not defined by the Bankruptcy Code, but it is generally (although not universally) thought to mean "a contract under which the obligations of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing performance on the other side." Vern Countryman, *Executory Contracts in Bankruptcy: Part I*, 57 Minn. L. Rev. 439, 460 (1973). See also *In re Cardinal Indus., Inc.*, 146 B.R. 720, 725-30 (Bankr. S.D. Ohio 1992); Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection,"* 59 U. Colo. L. Rev. 845 (1988); Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1 (1991); Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227 (1989).

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⁶ Section 365(a) provides in relevant part that "the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." 11 U.S.C. § 365(a) (1994).

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⁷ *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984); see, e.g., *Borman's, Inc. v. Allied Supermarkets, Inc.*, 706 F.2d 187 (6th Cir.), cert. denied, 464 U.S. 908 (1983); *In re Brada Miller Freight Sys., Inc.*, 702 F.2d 890 (11th Cir. 1983); *Brotherhood of Railway, Airline & Steamship Clerks v. REA Express, Inc.*, 523 F.2d 164 (2d Cir. 1975), cert. denied, 423 U.S. 1017 (1975); *Shopmen's Local Union No. 455 v. Kevin Steel Prods., Inc.*, 519 F.2d 698 (2d Cir. 1975); *In re Overseas Nat'l Airways, Inc.*, 238 F. Supp. 359 (E.D.N.Y. 1965).

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⁸ 11 U.S.C. § 365(g)(2) (1994).

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⁹ 11 U.S.C. § 503(b)(1)(A) (1994) (providing that administrative expenses include "the actual and necessary costs and expenses of preserving the estate, including wages, salaries, or commissions for services rendered after the commencement of the case"). Courts have construed this provision to hold that claims arising from default on an assumed executory contract should be accorded administrative priority. See *In re MidRegion Petroleum, Inc.*, 1 F.3d 1130 (10th Cir. 1993). This is because "[t]he trustee's power to assume executory contracts or unexpired leases under § 365(a) promotes the viability and rehabilitation of a debtor in bankruptcy. ... Because the creditor's right to payment under an assumed contract arises postpetition and that contract benefits the estate, such claims are entitled to first priority treatment as an administrative expense." 2 William L. Norton, Jr., *Norton Bankruptcy Law and Practice* 2d § 42:24 (1994) (footnotes omitted).

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¹⁰ See *In re Coast Trading Co.*, 744 F.2d 686, 692-93 (9th Cir. 1984); *R & O Elevator Co. v. Harmon*, 93 B.R. 667 (D. Minn. 1988); *In re Sombrero Reef Club, Inc.*, 18 B.R. 612 (Bankr. S.D. Fla. 1982); see also *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 531-32

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¹¹ 11 U.S.C. § 365(g)(1) (1994).

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¹² 11 U.S.C. § 502(g) (1994).

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¹³ See 11 U.S.C. § 503(b)(1) (1994).

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¹⁴ Pub. L. No. 98-353, 98 Stat. 333.

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¹⁵ See *Orion Pictures Corp. v. Showtime Networks, Inc.*, 4 F.3d 1095 (2d Cir. 1993); *In re Minges*, 602 F.2d 38 (2d Cir. 1979). Some courts applied a different standard, holding for rejection to be lawful, a contract must in fact be burdensome, i.e., involves some loss

or detriment to the estate. 2 Collier on Bankruptcy 365.03 at 365-24 (Lawrence P. King ed., 15th ed. 1995); *In re Jackson Brewing Co.*, 567 F.2d 618 (5th Cir. 1978); *American Brake Shoe & Foundry Co. v. New York Rys.*, 278 F. 842 (S.D.N.Y. 1922).

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¹⁶ *Minges*, 602 F.2d at 43.

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¹⁷ 29 U.S.C. §§ 159-169 (1994).

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¹⁸ 29 U.S.C. § 158(d) (1994).

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¹⁹ 519 F.2d 698, 707 (2d Cir. 1975) (internal quotation omitted).

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²⁰ 523 F.2d 164, 172 (2d Cir.), *cert. denied*, 423 U.S. 1017 (1975).

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²¹ 465 U.S. 513 (1984).

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²² *Id.* at 521-22.

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²³ *Id.* at 524-27.

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²⁴ *Id.* at 526.

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²⁵ *Id.* at 527-34.

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²⁶ *Supra* note 14.

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²⁷ See generally 5 Collier, *supra* note 15, 1113.01. In a remarkable example of legislative resolve, § 1113 was enacted within 5 months of the *Bildisco* decision. At the time of the Supreme Court ruling in *Bildisco*, Congress was already working on legislation to address

the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), that the bankruptcy courts, as then constituted, were unconstitutional.

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²⁸ Section 1113 provides as follows:

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

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

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

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

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

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

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

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

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

(d) (1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the

date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

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

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

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

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113 (1994).

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²⁹ The "necessary" standard has been described as "the single most controversial question under section 1113." Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 Wm. & Mary L. Rev. 503, 526 (1994). The Third Circuit has held that "necessary" means "essential" and includes only those modifications directly related to the debtor's financial condition and reorganization. *Wheeling-Pittsburgh Steel v. United Steelworkers*, 791 F.2d 1074, 1088 (3d Cir. 1986). The Second Circuit has held that "necessary" does not mean "essential," but rather that which will enable the debtor to effect a successful reorganization. *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82, 90 (2d Cir. 1987). See generally Carlos J. Cuevas, *Necessary Modifications and Section 1113 of the Bankruptcy Code: A Search for the Substantive Standard for Modification of a*

Collective Bargaining Agreement in a Corporate Reorganization, 64 Am. Bank. L.J. 133, 166-98 (1990); Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 Wm. & Mary L. Rev. 503 (1994); Mitchell Rait, *Rejection of Collective Bargaining Agreements Under Section 1113 of the Bankruptcy Code: The Second Circuit Enters the Arena*, 63 Am. Bankr. L.J. 355, 364-69 (1989); Jeffrey W. Berkman, Note, *Nobody Likes Rejection Unless You're a Debtor in Chapter 11: Rejection of Collective Bargaining Agreements Under 11 U.S.C. § 1113*, 34 N.Y.L. Sch. L. Rev. 169 (1989); Anne J. McClain, Note, *Bankruptcy Code Section 1113 and the Simple Rejection of Collective Bargaining Agreements: Labor Loses Again*, 80 Geo. L.J. 191 (1991).

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³⁰ 11 U.S.C. § 1113(c) (1994).

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³¹ 11 U.S.C. § 1113(e) (1994).

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³² 147 B.R. 720 (Bankr. E.D. Tenn. 1992), *aff'd*, 160 B.R. 574 (E.D. Tenn. 1993).

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³³ See *supra* note 28 for the statutory text of section 1113(a).

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³⁴ Section 365(g) provides in relevant part as follows:

the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease - (1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition ...

11 U.S.C. § 365(g)(1) (1994).

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³⁵ Section 502(g) provides as follows:

A claim arising from the rejection, under section 365 of this title or under a plan under chapter 9, 11, 12, or 13 of this title, of an executory contract or unexpired lease of the debtor that has not been assumed shall be determined, and shall be allowed under subsection (a), (b), or (c) of this section or disallowed under subsection (d) or (e) of this section, the same as if such claim had arisen before the date of the filing of the petition.

11 U.S.C. § 502(g) (1994).

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³⁶ 147 B.R. at 734.

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³⁷ *Id.* at 729-730.

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³⁸ *Id.* at 731.

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³⁹ *Id.*

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⁴⁰ *Id.*

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⁴¹ *Id.* at 732.

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⁴² *Id.*

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⁴³ 160 B.R. 574 (E.D. Tenn. 1993).

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⁴⁴ Section 501 provides in relevant part as follows:

(d) A claim of a kind specified in section 502(e)(2), 502(f), 502(g), 502(h) or 502(i) of this title may be filed under subsection (a), (b), or (c) of this section the same as if such claim were a claim against the debtor and had arisen before the date of the filing of the petition.

11 U.S.C. § 501(d) (1994).

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⁴⁵ 160 B.R. at 576.

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⁴⁶ *Id.* at 577.

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⁴⁷ *Id.*

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⁴⁸ See, e.g., *In re Indiana Grocery Co., Inc.*, 138 B.R. 40, 50 (Bankr. S.D. Ind. 1990) ("Rejection of the CBA would entitle the Local 550R employees to file a claim for breach of contract"); *In re Garofalo's Finer Foods, Inc.*, 117 B.R. 363, 371 (Bankr. N.D. Ill. 1990) (noting that one factor to be considered in applying balance-of-the-equities test is amount of union's claims for damages); *In re Texas Sheet Metals, Inc.*, 90 B.R. 260, 293 (Bankr. S.D. Tex. 1988) ("[I]t is quite likely that the union workers will have claims for breach of contract if rejection is approved."); *In re Carey Transp., Inc.*, 50 B.R. 203, 212 (Bankr. S.D.N.Y. 1985) (same as *Garofalo's*); *In re Salt Creek Freightways*, 47 B.R. 835, 841 (Bankr. D. Wyo. 1985) (same).

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⁴⁹ 146 B.R. 920 (Bankr. S.D.N.Y.), *rev'd on other grounds*, 149 B.R. 334 (S.D.N.Y.), *aff'd in part and rev'd in part*, 981 F.2d 85 (2d Cir. 1992).

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⁵⁰ *Id.* at 934.

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⁵¹ 47 B.R. 835 (Bankr. D. Wyo. 1985).

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⁵² *Id.* at 841-42. See also *Texas Sheet Metals*, 90 B.R. at 273 n.2 (adopting the reasoning of *Salt Creek*).

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⁵³ See, e.g., *In re Moline Corp.*, 144 B.R. 75 (Bankr. N.D. Ill. 1992); *In re Murray Indus., Inc.*, 110 B.R. 585 (Bankr. M.D. Fla. 1990); *In re St. Louis Globe-Democrat, Inc.*, 86 B.R. 606 (Bankr. E.D. Mo. 1988).

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⁵⁴ This issue is outside the scope of this article. See Keating, *supra* note 29, at 539-48 and cases cited therein for a discussion of the priority status accorded to such claims.

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⁵⁵ See *supra* note 28 for the statutory text of section 1113(f).

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⁵⁶ Adherents of this view argue that unilateral rejection creates a superpriority because, under § 1113(f), a debtor must pay its obligations under the agreement as they become due. *In re Unimet Corp.*, 842 F.2d 879 (6th Cir. 1988), *cert. denied*, 488 U.S. 828 (1988); *In re Arlene's Sportswear, Inc.*, 140 B.R. 25 (Bankr. D. Mass. 1992); *In re Golden Distribs., Ltd.*, 152 B.R. 35 (S.D.N.Y. 1992).

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⁵⁷ See, e.g., *In re Roth American, Inc.*, 975 F.2d 949 (3d Cir. 1992); *In re Armstrong Store Fixtures Corp.*, 135 B.R. 18 (Bankr. W.D. Pa. 1992); *In re Ohio Corrugating Co.*, 115 B.R. 572 (Bankr. N.D. Ohio 1990) .

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⁵⁸ *In re Moline Corp.*, 144 B.R. 75 (Bankr. N.D. Ill. 1992) (declining to accord superpriority status to § 1113(f)).

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⁵⁹ *Id.* at 78.

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⁶⁰ *Id.* at 78-79.

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⁶¹ 110 B.R. 585 (Bankr. M.D. Fla. 1990).

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⁶² *Id.* at 587.

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⁶³ 11 U.S.C. § 1113(a) (1994) (emphasis added).

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⁶⁴ 11 U.S.C. § 365(g) (1994) (emphasis added).

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⁶⁵ *Id.*

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⁶⁶ Admittedly, § 502(g) may present a more difficult statutory construction problem since it appears to be limited to claims "arising from the rejection under section 365". 11 U.S.C. § 502(g) (1994). If anything, however, this demonstrates that, as comprehensive as the Bankruptcy Code may be, it is far from being seamless legislation; and after numerous amendments, the seams become more apparent. Indeed, it is unrealistic to impute to Congress the omniscient ability to enact seamless legislation that will be perfect in its application in all circumstances.

Omniscience is always an unrealistic assumption, and particularly so when one is dealing with the legislative process. The basic reason why statutes are so frequently ambiguous in application is not that they are poorly drafted - though many are - and not that the legislators failed to agree on just what they wanted to accomplish in the statute - though often they do fail - but that a statute necessarily is drafted in advance of, and with imperfect

appreciation for the problems that will be encountered in, its application.

Richard A. Posner, *Statutory Interpretation - in the Classroom and in the Courtroom*, 50 U. Chi. L. Rev. 800, 811 (1983).

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⁶⁷ Additionally, it may be argued that where Congress has intended for debtors to be subject to damage claims from the rejection of an executory contract, it has so provided. For example, under § 1114, a provision enacted in 1988 dealing with the payment of benefits to retired employees, Congress provided damage claims for retirees if the debtor modified or rejected an agreement to pay benefits. Section 1114(i) states that no benefits paid between the filing of a bankruptcy petition and the approval of a plan "shall be deducted or offset from the amounts allowed as claims for any benefits which remain unpaid ... whether such claims for unpaid benefits are based upon or arise from a right to future unpaid benefits or from any benefits not paid as a result of modifications allowed pursuant to this section." 11 U.S.C. § 1114(i) (1994). Similarly, § 1114(j) provides that "[n]o claim for retiree benefits shall be limited by section 502(b)(7) of this title." 11 U.S.C. § 1114(j) (1994). Implicit in these sections is the assumption that retirees whose benefits have been modified or rejected will have allowed damage claims.

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⁶⁸ 465 U.S. at 521-23.

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⁶⁹ See, e.g., *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986) ("If Congress wishes to grant the trustee an extraordinary exemption from nonbankruptcy law, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt.") (internal quotations and citation omitted).

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⁷⁰ *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when re-enacts a statute without change."). See also *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951); *National Lead Co. v. United States*, 252 U.S. 140, 147 (1920).

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⁷¹ Cf. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)) ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored."); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682 (1975) (same); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (same); *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (same); *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936) ("[T]he intention of the legislature to repeal must be clear and manifest."). While not actually a "repeal" of the existing law, a reversal of the kind found by *Blue Diamond* is sufficiently analogous to require the clear and manifest intention of Congress to that effect.

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⁷² *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249 (1992); *Rubin v. United States*, 449 U.S. 424, 430 (1981).

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⁷³ *Supra* note 14.

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⁷⁴ Caution should always be observed in attempting to divine congressional intent from sources other than the committee reports. See *Garcia v. United States*, 469 U.S. 70, 76 (1984) ("[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill, which represent the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.") (internal quotation and citation omitted). Here, however, in the absence of any committee reports, there is no alternative.

See Bruce H. Charnov, *The Uses and Misuses of the Legislative History of Section 1113 of the Bankruptcy Code*, 40 Syracuse L. Rev. 925, 946-69 (1989), for an in-depth review of the legislative history of § 1113.

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⁷⁵ *Cannon v. University of Chicago*, 441 U.S. 677 (1979); *Cort v. Ash*, 422 U.S. 66 (1975).

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⁷⁶ See *supra* note 20 and accompanying text.

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⁷⁷ 130 Cong. Rec. H2989 (1984) (statement of Rep. Rodino).

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⁷⁸ See 130 Cong. Rec. S13,059-13,078 (1984) (statements of Sens. Thurmond, Hatch, and Dole).

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⁷⁹ See 130 Cong. Rec. S17,157 (1984) (statement of Sen. Dole thanking Senators Packwood and Thurmond for withdrawing their amendments to facilitate passage of the entire bill).

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⁸⁰ The final provisions, in fact, were loosely based on a proposal submitted by the National Bankruptcy Conference, "an organization composed of representatives of different groups who are interested in the administration of bankruptcy law. Its membership is composed of bankruptcy judges, full-time professors of law, and practicing attorneys who specialize in bankruptcy law." 130 Cong. Rec. S13,061 (1984) (statement of Sen. Thurmond).

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⁸¹ 130 Cong. Rec. H20,225 (1984) (statement of Rep. Rodino).

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⁸² See 130 Cong. Rec. S20,081 (1994) (statement of Sen. Thurmond) ("This compromise is, in my opinion, the fairest and most equitable one that could have been reached under the circumstances.").

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⁸³ "The conference's compromise adheres to the spirit of this unanimous Supreme Court opinion." 130 Cong. Rec. S20,085 (1984) (statement of Sen. Hatch); "The provision overrules the 5-to-4 portion of the Supreme Court's *Bildisco* decision." 130 Cong. Rec. S20,092 (1984) (statement of Sen. Packwood).

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⁸⁴ 130 Cong. Rec. H6213 (1984) (statement of Rep. Bartlett).

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⁸⁵ See *infra* note 104 and accompanying text.

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⁸⁶ See 130 Cong. Rec. H6237 (1984).

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⁸⁷ *Id.*

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⁸⁸ See *supra* notes 69-71 and accompanying text.

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⁸⁹ 130 Cong. Rec. S13,105 (1984).

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⁹⁰ See 130 Cong. Rec. S13,199 (1984).

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⁹¹ See 130 Cong. Rec. S13,185 (1984) (text of Packwood amendment).

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⁹² See 11 U.S.C. § 1113 (1994).

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⁹³ 130 Cong. Rec. S20,081 (1984) (statement of Sen. Thurmond).

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⁹⁴ 130 Cong. Rec. S13,200 (1984).

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⁹⁵ 130 Cong. Rec. S13,202 (1984).

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⁹⁶ See *supra* notes 69-71 and accompanying text.

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⁹⁷ See Charnov, *supra* note 74 at 946-69.

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⁹⁸ See *supra* notes 63-72 and accompanying text.

Two years after the *Blue Diamond* decision, Congress enacted the Bankruptcy Reform Act of 1994. Pub. L. No. 103-394, 108 Stat. 4106. This Act, which amended certain provisions of the Bankruptcy Code, did not affect § 1113. It is possible to argue that Congress' failure to overrule *Blue Diamond* in this subsequent legislation is evidence that Congress agreed with the result in *Blue Diamond*. See *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

However, it cannot be seriously contended that Congress was actually aware of the relatively obscure decision in *Blue Diamond* (the only reported case to specifically address the issue of rejection damages), and intentionally failed to take action to address *Blue Diamond's* interpretation of § 1113. See *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414 n.8 (1975) (Several courts of appeals interpreted the law in question, and the legislative history referred clearly and approvingly to those cases.); *NLRB v. Gullett Gin Co.*, 340 U.S. 361, 366 (1951) (finding ample evidence that, in the course of adopting the amendment, Congress considered in great detail the administrative interpretation of the earlier legislation.); *National Lead Co. v. United States*, 252 U.S. 140, 146 (1920) (The interpretation in question had been widely applied prior to the re-enactment of the provision.).

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⁹⁹ *Blue Diamond*, 147 B.R. at 731.

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¹⁰⁰ *Id.*

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¹⁰¹ See *Midlantic Nat'l Bank v. New Jersey Dep't of Env'tl. Protection*, 474 U.S. 494, 501 (1986). See also *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563

(1990) ("We will not read the Bankruptcy Code to erode past bankruptcy practice absent a clear indication that Congress intended such a departure."); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 244 (1989) ("We also recognized that the outcome sought would be not only a departure from pre-Code practice, but also an extraordinary exemption from nonbankruptcy law, requiring some clearer expression of congressional intent.") (internal quotations and citations omitted).

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¹⁰² *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976) (quoting *United States v. United Continental Tuna Corp.*, 425 U.S. 164, 168 (1976)) ("It is, of course, a cardinal principle of statutory construction that repeals by implication are not favored."). See also *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682 (1975) (same); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974) (same); *Morton v. Mancari*, 417 U.S. 535, 549 (1974) (same).

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¹⁰³ *Posadas v. National City Bank*, 296 U.S. 497, 503 (1936).

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¹⁰⁴ *Montana Wilderness Ass'n v. United States Forest Service*, No. 80-3374 (9th Cir. May 14, 1981) (opinion withdrawn based on enactment of new statute), reprinted in Willaim N. Eskridge, Jr. & Philip P. Frickey, *Cases and Materials on Legislation Statutes and the Creation of Public Policy*, 743, 747 (1988). For the new opinion, see 655 F.2d 951 (9th Cir. 1981), cert. denied, 455 U.S. 989 (1982).

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¹⁰⁵ *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 380 (1988) (citation omitted). See also *Pennsylvania Dep't of Pub. Welfare v. Davenport*, 495 U.S. 552, 563 (1990) (The Bankruptcy Code should not be interpreted such that it results in an erosion of prior bankruptcy practice without clear indication that Congress intended such a result.).

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¹⁰⁶ See *In re Young*, 193 B.R. 620, 624 (Bankr. DC 1996) (declining to interpret the ambiguous amendment to § 362(a)(3) in a manner that would result in a "dramatic shift" in both pre-Code and pre-amendment practice without "one word of legislative history" to support such an interpretation).

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¹⁰⁷ *In re Moline Corp.*, 144 B.R. 75 (Bankr. N.D. Ill. 1992).

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¹⁰⁸ Cf. *Morton v. Mancari*, 417 U.S. 535, 551 (1974) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional to the contrary, to regard each as effective."). See also *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-34 (1974) (same).

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¹⁰⁹ 11 U.S.C. § 365(g) (1994).

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¹¹⁰ Although § 1113 provides that a debtor may "assume or reject a collective bargaining agreement only in accordance with the provisions of this section," the section contains no provisions dealing with the assumption of collective bargaining agreements. 11 U.S.C. § 1113(a) (1994).

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¹¹¹ *Blue Diamond*, 147 B.R. at 732 and 160 B.R. at 577.

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¹¹² Of course, not all executory contracts have the potential to lead to large rejection-damage claims. Given the nature of collective bargaining agreements, the potential for large damage claims is more likely under rejected collective bargaining agreements.

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¹¹³ Indeed, where Congress wanted to limit the damage claims from the rejection of certain executory contracts, it has clearly and specifically so provided. For example, rejection-damage claims under unexpired leases of real property and employment contracts are expressly limited under the Bankruptcy Code. See 11 U.S.C. § 502(b)(6), (b) (7) (1994).

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¹¹⁴ See Keating, *supra* note 29, at 537 ("[A]ny damage claim against the estate will not be paid in real dollars, but instead will be paid with the proverbial 'ten-cent bankruptcy dollars.'").

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¹¹⁵ Such claims, however, would be subject to the cap imposed by § 502(b)(7) of the Code.

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¹¹⁶ Admittedly, employees under collective bargaining agreements have the advantage of stricter rules for rejection than parties to other kinds of executory contracts. However, as previously discussed, if this was the trade-off for the elimination of rejection-damage claims, surely there would be some reference in the legislative history to that effect.

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¹¹⁷ See *In re Salt Creek Freightways*, 47 B.R. 835, 842 (Bankr. D. Wyo. 1985).

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¹¹⁸ 29 U.S.C. § 151 (1994).

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¹¹⁹ *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45 (1937).

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¹²⁰ See, e.g., *Sheet Metal Workers' Int'l Ass'n v. Mile Hi Metal Sys. (In re Mile Hi Metal Sys.)*, 899 F.2d 887, 892-93 (10th Cir. 1990); *New York Typographical Union No. 6 v. Royal Composing Room, Inc., (In re Royal Composing Room, Inc.)*, 848 F.2d 345, 348 (2d Cir. 1988), *cert. denied*, 489 U.S. 1078 (1989); *Truck Drivers Local 807 v. Carey Transp., Inc.*, 816 F.2d 82 (2d Cir. 1987); *contra Wheeling-Pittsburgh Steel v. United Steelworkers*, 791 F.2d 1074 (3d Cir. 1986).

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¹²¹ Keating, *supra* note 29, at 534.

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¹²² See, e.g., Cuevas, *supra* note 29; Collier, *supra* note 15 at 365-27 to 365-33.

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