Chapter 7

THE INCREDIBLE SHRINKING WORKPLACE: LEGAL AND ARBITRATION ISSUES GENERATED BY REORGANIZATIONS AND DOWNSIZING

I. Introduction

Marc D. Greenbaum*

We all know that today's economic challenges have generated more work, more responsibility, and more headaches for labor relations professionals. Our task this morning, with the help of a very distinguished panel, is to look at the issues that we as labor relations professionals will confront in an economic downturn, with specific emphasis on the issues arising under the bankruptcy statute and the Employee Retirement Income Security Act (ERISA), or, as one of our panelists describes it, "every ridiculous idea since Adam." I've asked the first two speakers to give you an overview of the issues that arise from the bankruptcy side, and the final two presenters will discuss ERISA. Then we will spend the balance of the time looking at questions, hypotheticals, and particularly vexing issues that we as labor relations professionals are likely to confront.

II. Bankruptcy: A Management Perspective

Michael R. Brown**

I want to talk about the conflict between the bankruptcy laws and the National Labor Relations Act (NLRA). First, I am not, have not

*Member, National Academy of Arbitrators, Newton, Massachusetts.
**Seyfarth Shaw, Boston, Massachusetts.

been, and have no desire to be a bankruptcy lawyer. That's why I'm a member of a firm that has a bankruptcy department. When I have bankruptcy law questions, I call my colleagues in that department. What I am, what I have been, and what I hope to stay is a labor lawyer representing management, dealing with issues that arise with the employees' unions. Of course, those issues have been exacerbated lately by the sliding economy.

The essence of the NLRA is to ensure industrial stability and protect the employees' right to organize. Employers are required to respect that right and to respect the sanctity of the collective bargaining agreement. However, coming from a wholly different angle is the purpose of Chapter 11, which is to permit the debtor to rehabilitate and reorganize a business under court supervision, by allowing the debtor to relieve itself of the burdens of oppressive debt and begin with a fresh start. Some of this debt, of course, arises from the collective bargaining agreement. I think it's helpful to begin prior to 1984.

Prior to 1984, under section 365 of Chapter 11, a debtor in possession was allowed to reject executory contracts such as a collective bargaining agreement.

In a 1984 landmark case, *NLRB v. Bildisco & Bildisco*,[1] the Supreme Court held essentially that a building supply distributor, who was the debtor in possession, did have the power under section 365 to reject the collective bargaining agreement if the debtor could show that it would burden the estate. The Court agreed that the equities favored rejecting the contract. Needless to say, that decision was not accepted easily by labor and by Congress, and, in 1984, the Bankruptcy Act[2] was amended to add provisions that basically overruled *Bildisco* and set down a written procedure to be followed by a debtor in possession. A court must ensure that the debtor did comply with this procedure before it even considers rejecting or modifying a collective bargaining agreement.

There are two basic requirements. First, after filing for bankruptcy the debtor has to approach the union and make a complete proposal. Not only must the proposal be complete, but it must contain reliable information. Unlike the normal collective bargaining situation, where I rarely have to disclose the information

---

[1]465 U.S. 513, 115 LRRM 2805 (1984).
[2]Pub. L. No. 98-353, §541, 98 Stat. 333 (1984).

behind any of my proposals, here I have the obligation to disclose why it is necessary for us to, for example, reduce the wages by 20 percent.

Second, not only are we required to make the proposal and provide the relevant information, but we also have an obligation, as a carryover from the NLRA, to bargain in good faith. We cannot stop at telling the union to "take it or leave it and if you leave it, we are both going under," because the debtor has to manifest this intent to bargain in good faith. If the parties cannot reach agreement, the debtor must try to convince the court later on that it did everything it could to reach agreement but the union was intransigent, that its representatives would not say why they rejected the proposal, and thereby shift any questions about good faith to the union.

Unlike the NLRA, where there is some room for a cat-and-mouse game, the post-Bildisco legislation imposes a much heavier burden on the debtor when bargaining. Here are some of the tests of good-faith bargaining in bankruptcy cases created by the post-*Bildisco* legislation.

- The debtor has to make a proposal to modify.
- That proposal must be based on the most complete and reliable information. If modifications are necessary to permit reorganization, the modifications should ensure that all creditors, debtors, and affected parties are treated fairly and equally.
- Employees have to be treated fairly and equitably. That is a key issue for the court.
- The debtor must provide to the union such relevant information as is necessary for the union and its advisors to evaluate the proposal.
- The debtor must meet at reasonable times with the union.
- The debtor must negotiate in good faith at those meetings.
- The union must have good cause if it refuses to accept the debtor's proposal. Here is one of the main themes that has come out of the case law. Assume that I am a debtor in possession with an industrywide contract and I am asking the union to modify the contract for the company to survive. Assume that this union has nine other employers with that same contract and it contends that it could not allow this exception, notwithstanding the fact that the employer is a Chapter 11 debtor in possession. That is not a rationale that is accepted by the courts.

- If the debtor asks for rejection of the contract, the balance of equity must favor the rejection.

One of the big concerns that is present in many of these negotiations is the accuracy and the relevance of the information. Our clients often are reluctant to share with the unions the basic information as to why they had to go into Chapter 11. Consider what recently happened with American Airlines. All of the unions accepted reductions and then found out that the president of the company and his cabinet were receiving tremendous bonuses. A union, if it is well advised, will most often try to get on the creditors' committee, which does receive accurate information.

Those are the essential obligations of an employer who has declared bankruptcy. Section 1113 obviously gives more rights to the representative of the employees than it had under the result of *Bildisco.* The essence of section 1113 is that when a debtor goes into possession, the debtor must maintain the collective bargaining agreement intact. All provisions that were in the contract before filing continue after filing unless and until they are rejected in total or modified in part by the court. This means that if a court were to modify only the wage provision and not modify the rest of the agreement, the remaining provisions continue without change. For example, a no-strike clause would survive and the union could not strike even if other provisions of the contract were modified by the court.

Two approaches to the application of the automatic stay to labor arbitrations are apparent in the case law. Though there is disagreement about the applicability of the automatic stay to labor arbitrations, the practical consequence of this doctrinal disagreement is relatively minor. Both approaches favor arbitration of labor disputes, despite the employer's bankruptcy filing. One approach would require the union to seek leave of the bankruptcy court before pursuing a grievance to arbitration, in effect seeking relief from the automatic stay. The other approach would allow labor arbitrations involving bankrupt employers to proceed by default, perhaps leaving the employer the option of petitioning the bankruptcy court for relief from its duty to arbitrate labor disputes in unusual cases.

Under the most recently articulated approach, the automatic stay provision of the Bankruptcy Code does not apply to arbitration

of grievances under a collective bargaining agreement.[3] The reasoning underlying this approach is somewhat subtle. Section 1113(f) precludes an employer's unilateral modification of the terms of a contract, except by compliance with the rigorous procedural requirements set forth by section 1113.[4] The provisions of a contract thus remain in full force and effect after an employer's Chapter 11 filing, until an employer successfully petitions for modification of the agreement under section 1113.[5] In *In re Ionosphere Clubs*,[6] the U.S. Court of Appeals for the Second Circuit reasoned that application of the automatic stay to labor arbitrations would work a de facto modification of the contract on behalf of the employer, outside the auspices of section 1113.[7] The court also noted that, even though, in its opinion, the automatic stay does not apply to labor arbitrations, an employer may be able to seek a stay of labor arbitrations under provisions of the Bankruptcy Code extending equitable powers to bankruptcy judges.[8] No discussion of the sort of circumstances in which a stay of labor arbitrations would be appropriate was undertaken by the *Ionosphere* court.

Other courts have suggested that the automatic stay invoked by an employer's filing under Chapter 11 is applicable to labor arbitrations, and that a union must petition the bankruptcy court for relief from the stay in order to pursue a grievance to arbitration.[9] These courts have opined that courts ordinarily should allow labor disputes to go to arbitration, so that the arbitrator may determine the rights of the parties.[10] Any monetary award made by the arbitrator against the bankrupt employer will then be subject to a priority determination by the bankruptcy court, along with the other debts of the company.[11]

---

[3] *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 990–91 (2d Cir. 1990).
[4] *Id.* at 989–90.
[5] *Id.* at 992.
[6] *Id.*
[7] *Id.*
[8] *Id.* at 995; 11 U.S.C. §105(a).
[9] *In re Penn Fruit Co.*, 1 B.R. 714, 716 (Bankr. E.D. Pa. 1979); *Garland Coal & Mining Co. v. Mine Workers*, 778 F.2d 1297, 1304 (8th Cir. 1985).
[10] *Penn Fruit*, 1 B.R. at 716 n.4; *Garland Coal*, 778 F.2d at 1304.
[11] *Penn Fruit*, 1 B.R. at 716–17; *Garland Coal*, 778 F.2d at 1304.

III. Bankruptcy: A Union Perspective

Warren H. Pyle*

This is an area that we union attorneys like to call graveyard law, where you have a sick, dying, or dead company. Speaking to a group of arbitrators about graveyard law brings to mind a situation that happened in Massachusetts a while ago. A firefighters union was in a very high-profile, public, and highly contentious dispute with the city and it was politically damaging to the city officials. They were looking for a way out of the situation and they came up with the idea of arbitrating the dispute. The union was not anxious to arbitrate because they were doing well without some third party telling them what their contract was going to contain. At some point the union agreed to arbitrate the dispute with the city and an arbitrator was named. The city was happy, and the papers and television carried the story "City and union agree to arbitrate." The union had asked the city to make the necessary arrangements for the arbitration. In making these arrangements, the city discovered that the arbitrator was dead. The employer had been snookered into agreeing to a dead arbitrator. Needless to say, the arbitration idea was quickly abandoned.

The objective of the congressional enactment in reorganization of a debtor is not to accept or reject an agreement but to permit the modification of an agreement, if necessary, in order to allow the debtor in possession to continue in business and be rehabilitated. The objective of a Chapter 11 proceeding is to rehabilitate the company so it can go forward on a profitable basis or, in some situations, so that it can be sold to a third party who can better continue the business. It is essential to a successful rehabilitation to have a collective bargaining agreement. In some cases it's essential to have a modified agreement. But to have no agreement is not good because there's no stability. It's even possible that no one will buy the company unless there is a contract.

Courts are reluctant to set aside contracts. The whole structure of the statute is to encourage the parties to negotiate in order to reach a new agreement that (1) would be completely enforceable, (2) the employer in the Chapter 11 proceeding would be required

*Pyle, Rome, Lichten & Ehrenberg, P.C., Boston, Massachusetts.

to comply with in full, and (3) would not be subject to challenge in the bankruptcy proceeding.

I want to make a few comments on some of the court standards in bankruptcy proceedings. If the agreement in question is typical for the industry, the bankruptcy court will not modify the agreement to give the employer a leg up on its competitors. Sometimes unions will propose what is called a "snap-back provision," and some agreements reached in bankruptcy have that provision. A snap-back agreement means that there is a temporary reduction in wages and benefits but the wages and benefits come back, either in whole or in part, if the employer is rehabilitated. Another aspect of the statute provides for temporary emergency relief. The bankruptcy court has the authority to make temporary modifications of the agreement if these modifications are essential to keep the bankrupt estate going. Several years ago, I was bargaining with an employer in Chapter 11. The employer was trying to find a buyer and asked the court to cut wages. It was a retail store situation and no one makes a lot of money there. Over our objection, the court did reduce wages by 5 percent among the higher paid groups. After a while we moved the court to lift some of the modification and the court moved it back to a 2 percent reduction. The court has a lot of flexibility in this area.

What is the situation if a new agreement isn't reached and the contract is rejected? The union is free to strike as long as there is no no-strike clause. The union can even strike to get the same contract back that the court has rejected. That is why rejecting a contract is not something that is attractive to a court or to a debtor in possession. If a contract is rejected or modified, the law is not completely clear as to whether the union and the employees have a claim, sustainable in full, for lost wages. They may have a claim, but in bankruptcy everyone is expected to take a haircut, including secured creditors. The union members may have a claim for the lost wages, but it is generally an unsecured claim and may have low priority. One factor that encourages the union to negotiate a new agreement is the preservation of its right to represent the members during the bankruptcy proceeding.

As noted above, arbitration continues during the pendency of a bankruptcy proceeding unless and until the contract is rejected. I submit that the arbitrator's award, as long as it doesn't involve back pay, is binding. If it involves back pay and if it involves back pay going into the period before the bankruptcy, it may only have a partial priority and may not be payable in full.

IV. ERISA: A Management Perspective

Susan Katz Hoffman*

When the work force is shrinking, there are two aspects of benefits that become crucial. The first is the extent to which you have fixed benefit costs for retirees or, in the case of defined benefit plans, where you want to reduce those costs because your sales and revenues have fallen. The second problem is the tension caused if you cut benefits to your active employees in order to keep more of them working.

Retiree medical and life insurance benefits are very hot issues when you've got a shrinking work force or a closing plant. We will discuss the details of those issues later, particularly with respect to the NLRA implications, but I want to focus on section 1114 of the Bankruptcy Code, which obviously follows section 1113 just discussed. Just as section 1113 was triggered by the *Bildisco*[1] case, section 1114 was triggered by a few very high-profile bankruptcies where employers terminated medical benefits for thousands of retirees. The resultant congressional crisis led to section 1114. This section is similar to 1113 in that the employer cannot terminate retiree benefits that are contractually mandated without first bargaining with a representative of the retirees.

The presumptive representative of the retirees is the union that represented them when they were active employees. The union can back out of that role and if it does, the court will appoint a representative for the retirees. The parties have to negotiate and if agreement is not reached, the employer has to show good cause to terminate or cut back the benefits. The courts have decided that if the employer had the right to cut back or eliminate the retiree benefits outside of the bankruptcy, section 1114 does not apply. Section 1114 applies only when there is a contractual commitment that requires continued retiree benefits. There are cases where the employer starts into bankruptcy intending to liquidate. The courts also have decided that in these cases, section 1114 still requires bargaining but the employer does not have as great a burden to

---

*Pepper Hamilton LLP, Philadelphia, Pennsylvania.

[1] *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 115 LRRM 2805 (1984).

show why it is necessary to cut back the benefits. We saw this with the recent Bethlehem steel case where Bethlehem's retirees were about to lose their retiree benefits once their benefits under the Consolidated Omnibus Budget Reconciliation Act of 1985[2] expired. Things became abuzz in Congress because it becomes a congressional crisis when that many people are losing benefits.

The other impact on retiree benefit negotiations comes from the Age Discrimination in Employment Act[3] (ADEA). Two recent court cases have restricted the rights of employers and unions in this area. In one case, the court held that a company could not reduce its benefits once the retirees became eligible for Medicare.[4] The employer wanted to put them on a Medicare supplement that had more limited access to doctors than their under-65 retiree benefit plan provided. The Equal Employment Opportunity Commission has said that it is going to issue regulations with the effect of reversing that court case and those regulations are expected any day now.

The other case out of the Sixth Circuit dealt with an employer/union agreement to eliminate retiree benefits for employees who were presently under the age of 50 but retain those retirement benefits for employees who were over the age of 50.[5] The Sixth Circuit said that that design violated the ADEA because it discriminated against employees between the ages of 40 and 50. It is quite possible that the Supreme Court will reverse that decision, but, if this case holds, there will be no grandfathering protection for active employees if the downsizing requires elimination of retiree benefits. That's a case where the plaintiffs won, but I do not think that the result is good for employees.

The major problem with defined benefit plans is funding. Three years ago, when the markets were booming, we were fighting over surplus. Today those surpluses are largely gone, but the funding obligations continue even though the work force is downsizing. We saw the impact of this on the recent US Airways bankruptcy, where the company sought congressional action to allow it to reduce its

---

[2]Pub. L. No. 99-272, 100 stat. 82 (1985).

[3]Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified as amended at 29 U.S.C. §621 et seq.).

[4]*Erie County Retirees' Ass'n v. County of Erie*, 220 F.3d 193, 83 FEP Cases 941 (3d Cir. 2000).

[5]*Cline v. General Dynamics Land Sys., Inc.*, 296 F.3d 466, 89 FEP Cases 609 (6th Cir. 2002), *cert. granted*, 123 S. Ct. 1786 (2003).

ongoing funding obligation substantially. The Pension Benefit Guaranty Corporation (PBGC) objected to those changes and they were not enacted. As a result, the pilots' plan in the US Airways bankruptcy was terminated under the idea that such an action was the only way that the company could emerge successfully from bankruptcy.

The other defined benefit plan issue is the timing of the shutdown benefit. There are quite a few union-negotiated defined benefit plans that have special unreduced benefits for people who are terminated as the result of a layoff or plant shutdown. These benefits are guaranteed by the federal government if they are triggered *before* a plan termination. If the plant shuts down *after* a plan termination date, they are not guaranteed and, in an underfunded plan, they are not going to be paid. So the union might find itself fighting the PBGC in terms of the timing of a plan termination.

In defined contribution plans, particularly 401K plans, there are two big issues in a downsizing situation. One is if the plan is holding employer stock. All I have to say is Enron. The other problem is that the plan is an attractive place for the employer, particularly a small company, to get money. Frequently we see that employer/employee contributions withheld from paychecks don't get deposited or the employer borrows money from the plan without repaying it. The easy thing for a management lawyer is to ask clients how a few months in jail strike them. That usually gets the money in the plan.

Finally, I want to talk about severance. In any downsizing situation, the union and the employer are going to talk about severance. There may be severance provisions in the collective bargaining agreement or there may be a separate agreement. The key issue for benefit-type lawyers concerns whether the plan is subject to ERISA. Severance plans might or might not be subject to ERISA depending on whether there is enough structure around the severance payment to turn it into something more than that.

Severance plans are covered by ERISA, but if severance is given simply as a lump sum, the courts will say that it is not a plan. But if there is enough of an administrative structure around the program, manifested by such things as whether there is a "for cause" determination or continuing monitoring to see whether the employee has gotten another job, then you have an ERISA severance plan. That has a number of implications, not the least of which is that employees who are unhappy over their treatment have a choice of using the grievance procedure or going directly to court

under ERISA. ERISA claims are not subject to deferral to the grievance procedure.

V. ERISA: A UNION PERSPECTIVE

DONALD J. SIEGEL*

Up to now the discussion has been fairly theoretical. I'm going to try to make it a little more practical. In particular, I'm going to tell you how ERISA has increased your own liability and your own exposure, and I'm going to tell you a few things that I think you can do to diminish that liability and that exposure.

Most of my work is in the building trades, and most of my employee benefit work is in the multiemployer context. That context was enshrined in the Taft-Hartley Act, [1] which provides for final and binding arbitration when joint trustees on employee benefit plans deadlock over issues that involve plan administration. Arbitrators are either agreed to by the trustees or appointed by the federal district court. Your role as arbitrators is of significant interest because it is extremely important to the statutory scheme in the multiemployer field and because it is one that is fraught with some danger for all of you.

The background of my comments is not a happy one. In the health care hemisphere we seem to be facing what actuaries call the perfect storm. We're experiencing exploding health care costs, diminishing resources to pay for those costs, and a growing number of consumers who need health care benefits. On the pension side it's more of the same. We see an explosive growth in the retiree population and diminishing assets. Pension funds today are coming in with statements that show that their assets are not just failing to grow but are below their actuarial assumptions and are diminishing. They are losing money year after year. Until that bleeding stops, we're in for some tense times in the multiemployer field.

---

*Segal, Roitman & Coleman, Boston, Massachusetts.

[1]Labor-Management Relations Act, ch. 120, stat. 136 (1947) (codified as amended at 29 U.S.C. §141 et seq.).

Section 302 of the Taft-Hartley Act, which governs the multiemployer field, provides that employers may set up jointly trusteed funds through collective bargaining with unions. However, those funds must meet certain structural requirements that are set out in the statute. If the structural requirements are not met, the statute is violated and criminal, not just civil, consequences can flow from the violation. Among those structural requirements is a requirement that when employee and employer trustees deadlock on an issue of plan administration, the deadlock is submitted to a neutral for resolution. Some plans have permanent neutrals, but most funds rely on arbitrators to resolve trustee deadlocks. The statutes provide that the deadlocked trustees sit down and agree upon the identity of an arbitrator to resolve the dispute or file a petition in the federal district court for appointment of an arbitrator. If the court finds that the deadlock is over an issue of administration of the fund, it appoints the arbitrator and the arbitrator issues the ruling after a hearing under the auspices of the federal district court.

Arbitrators under section 302 are only authorized to decide deadlocked issues of plan administration. The issue of whether or not a deadlock involves plan administration comes up time and again. It's like an issue of substantive arbitrability that's put before a court on a petition to compel arbitration. Just as courts often resolve the issue of substantive arbitrability when they appoint an arbitrator, courts may similarly resolve an arbitrability issue by determining whether the issue involves plan administration and, thus, is arbitrable. The definition of plan administration, as you might suspect, is nowhere in the statute. We have some circuit court law, but it is not uniform. We have a very broad definition of plan administration in the Second Circuit and a much narrower definition in the Tenth Circuit, and most circuits come down in between. Arbitrators have to use their best judgment and hopefully reach a voluntary resolution. Most of these deadlocks are resolved voluntarily.

The trust agreement, which creates these multiemployer funds, is usually the point of reference in determining whether an issue involves plan administration. In particular, the sections that deal with the powers of trustees are critical in determining whether something is a plan administration issue. Issues such as increasing or decreasing benefits, the design of the plan, and even the issue of amending the trust, have all been determined by various courts and various arbitrators to be either questions of plan administra-

tion or not. In every context, the terms of the trust instrument and the powers that that trust instrument gives to the trustees are the key point of reference for making the determination. Arbitrators have been resolving these disputes since 1950 and they continue to do so today.

I predict that these disputes under section 302 are going to grow in number and intensity and that the tension of the hearings will increase. Arbitrators—and this is ironic—face unique pressures when they resolve these disputes. Ever since the passage of ERISA in 1974, arbitrators have grappled with their status under the statute. Are they fiduciaries, and, if so, what exactly does that mean? ERISA was passed 25 years after the Taft-Hartley Act was passed. Although it has many implications for arbitrators, ERISA was not really aimed at them. According to the Department of Labor, which is the agency charged with the administration of many parts of ERISA, arbitrators who resolve trustee deadlocks under section 302 may be fiduciaries under the statute and, as fiduciaries, they may be personally liable for breach of fiduciary duties.

The Department of Labor (DOL) has issued advisory opinions that indicate that at least in one specific area the government considers arbitrators to be fiduciaries under the statute. This occurs when the arbitrator determines whether a certain group of people is eligible for a certain type of benefit. When an arbitrator is called upon in the context of a section 302 dispute to resolve a dispute about whether a particular group of people is eligible for a certain benefit, he or she is a fiduciary under the statute and carries fiduciary liability. This is to be distinguished from what I call a plan design case, which is an issue about whether a plan should have a benefit of A or B. The DOL has been clear about this distinction and has indicated so in writing. Arbitrators who resolve issues of benefit eligibility are fiduciaries while their colleagues who break deadlock on plan design issues are not fiduciaries.

Another area where I think arbitrators are exposed to fiduciary liability is when they deal with unresolved questions of investment policy or investment choices. I cannot find a DOL advisory or court case on this point, but, in 1980, the head of the DOL department that administers employee benefit funds spoke to this group and indicated that he saw this as a prime example of the situation where an arbitrator could and would be a fiduciary under ERISA. I have found no court case that holds that an arbitrator breached his or her fiduciary duty under ERISA. Nor have I found any court case that overrules the DOL's advisory opinions on circumstances

under which an arbitrator could be a fiduciary under ERISA. Advocates are in an area of uncertainty and arbitrators are in an area of exposure.

In order to diminish your liability and decrease your exposure when you resolve section 302 deadlocks, I suggest that you secure fiduciary liability insurance either by insisting that the parties provide it for you or by getting it through a group, perhaps through the Academy or the American Arbitration Association. You also should have the parties or the benefit fund indemnify you from any liability that you might actually acquire in the process of resolving their section 302 dispute. You also might consider asking the parties to request a DOL advisory opinion on whether or not in the context in which you will be deciding the dispute and breaking the deadlock you are a fiduciary or you are exercising fiduciary responsibilities under ERISA.

VI. The Question and Answer Session

Marc Greenbaum: In our remaining time we want to address some issues that were encompassed within the specific presentations and some that were not. In a downsizing era, certainly one of the ways that many companies have chosen to reduce their head count to satisfy the demands of Wall Street is by early retirement incentive plans. Suppose you've got a company that is union and nonunion. The union contracts are all in their midcontract term and the company wants to do an early-out incentive program. My instincts tell me that the company's request should be a mandatory subject of bargaining.

Susan Hoffman: Yes and no. Let me tweak your example. Let's say we have a union contract with a tight zipper clause and a minimal severance provision. The contract says that union employees will be in the company Y defined benefit plan and the union waives its right to bargain over any changes in the plan except for the amount of the multiplier.

Management says that we are going to have an early retirement program for our nonunion employees. We'll treat you as if you have 5 more years of service and 5 more years of age if you retire during the next 6 months and sign a release. The union says you have to bargain with us because we want you to offer that to our employees. The question then is this: Is the zipper clause enough

of a zipper to permit you to say that the union has lost the right to bargain over that new early retirement program you're giving to the nonunion employees?

In most situations I think the National Labor Relations Board (NLRB) would say it's a mandatory subject, but the Board has not been very successful in court on these waiver cases involving benefit plans. The court's rationale in reversing the NLRB has not been directly on the waiver issue. They've been finding other ways to disagree with the NLRB. My answer is that maybe it's a mandatory subject, but if the company is willing to take it past the NLRB, there's probably a reasonable chance of finding it's not.

Warren Pyle: Probably a more fruitful way for the union to approach a situation like that is to bring an arbitration or a court action to ask the arbitrator or the court to interpret the agreement in such a way as to extend the proposed benefits to the employees. That's going to scare the employer a lot more than an NLRB charge that takes forever to resolve. If the employer is forced to bargain about it, it is going to say, "OK, we're bargaining and the answer is no." I think the union should get aggressive about it and either arbitrate or take it to court.

Susan Hoffman: You've now given me the second part of my hypothetical, which is that the company gives the package to everybody, including the union group. But the union would really like to bargain over it in order to either tweak it or get something else in exchange. The company says that you've agreed to be in our plan, that this is now a change in our plan, and you're stuck.

Warren Pyle: Again, bargaining is a matter of give-and-take and the employer doesn't have to give if he doesn't want to.

Donald Siegel: I would like to jump in to point out the difference in the single employer benefit world and the multiemployer benefit world. A lot of this stuff can't happen in the multiemployer benefit world. The structure of multiemployer benefit plans is one where changes in benefits have to be approved by a majority of trustees who come with equal voting power from management and union. Most of the changes that do take place, take place because they're agreed upon after careful reflection and thoughtful deliberation and with a lot of good and professional advice about the implications of those changes.

Susan Hoffman: That's the ideal.

Donald Siegel: That's the ideal. But, based on an awful lot of experience, I think the ideal is more often the rule than not. Is that your experience too?

Susan Hoffman: Mostly, except in certain industries that I would call dysfunctional. The other aspect of doing a downsizing bargaining is when the management wants to put its severance program into the pension plan. The Internal Revenue Service will tell you that you cannot pay severance benefits out of a defined benefit pension plan and that's true. What you can do is offer a window benefit that is payable in the form of a lump sum as well as an annuity. The advantage for the employer is if, by some miracle, the plan has a surplus, they get to pay the severance out of the surplus in the defined benefit plan. The other advantage is that even if the plan does not have a surplus, they get to fund this severance benefit over a period of between 10 and 20 years rather than all at once. So there's a real cash flow advantage. The impact on the balance sheet is identical whether severance is paid in the pension plan or outside.

What is the impact on the employees? If they want to get a lump-sum benefit they need to get spousal consent. For most employees that's not a problem, but there are some who may have problems getting their spouses to sign off on a lump-sum benefit. The second problem is if the employee is under age 55 and he or she takes the benefit in cash but does not roll it into an Individual Retirement Account. In that case, the benefit is going to be subject to a 10 percent early distribution tax. That's offset to some extent by the fact that the lump sum is not subject to Federal Income Contributions Act (FICA). The employee is going to save about 7.5 percent in FICA but pay 10 percent in an early distribution tax. Most employers will negotiate a gross-up in the benefit to cover that extra tax burden. But you can't pay the gross-up only to people under 55 or you run into an ADEA problem. We end up balancing labor law, ERISA, and ADEA in downsizings.

The other thing to keep in mind is that if you want to get a release in exchange for any type of severance, whether it's in a defined benefit plan or any kind of early retirement program, you've got to put it into the plan amendment and you've got to include it in every description of the plan that you send out. Until you draft the plan amendment—which is usually done 2 weeks after people are laid off—what has been sent out is the plan document.

Marc Greenbaum: I want to go back to Warren's variation where he asked what happens if the union wants to enter the retirement incentive plan offered to the nonunion employees and the company says no! What are the issues? Who has the burden in this

situation on what issue, and what kind of evidence will you need to satisfy the burden or to rebut it?

Susan Hoffman: I think the issue is going to be whether the provision that I described (where the union gave up the right to bargain over every aspect of the benefit plan except the multiplier) opens up other parts of the contract for bargaining. I think the multiplier automatically gives the union any improvements in the plan's benefits, even if it's not a multiplier change.

Warren Pyle: What about the zipper clause?

Susan Hoffman: I don't think it's relevant.

Marc Greenbaum: I don't think it is either.

Donald Siegel: Union lawyers have always had a hard time with zipper clauses. We never understood them anyway.

Marc Greenbaum: The second area for our attention is retiree health care benefits. What legal issues are likely to be generated, particularly those that could conceivably wind up on some poor arbitrator's plate?

Warren Pyle: Let me give you some general background. Retiree health insurance, unlike retiree pension benefits, is not vested as a matter of law. The Supreme Court has held that pension benefits are vested and the Pension Benefit Guarantee Corporation guarantees it. Retiree health insurance benefits are not vested and if there's no collective bargaining agreement or other contractual obligation, the employer is generally free to reduce or eliminate them. There are a couple of ways in which retirees can fight back. The first is on the theory that there has been a contractual promise to pay retiree health benefits. Many union contracts provide that upon retirement an employee will be entitled to a certain level of health insurance benefits, perhaps for life, and either a court or an arbitrator will have to decide whether that promise was only for the term of the contract or for life. The other approach, which is not based on a union contract, is a retirement incentive program. Let's say the employer offers a retirement incentive, part of which is a continuation of health insurance. Often it's not clear whether the employer intended to guarantee it for life or whether the right of the employer to make changes is protected but buried in some document that is referenced in the incentive plan. Often the retiree or the prospective retiree is induced to retire based, in part, on a promise of lifetime health insurance or so the employee perceives it. In that case, whether it arises under a collective bargaining agreement or not, if the employee can show what we

call promissory estoppel—that is, that he or she chose to retire because of the promise of lifetime health insurance—the court will enforce that.

Marc Greenbaum: What if the employer goes into bankruptcy and as a debtor is able to convince the court that it is "necessary" to either modify that health insurance promise or eliminate it altogether to avoid liquidation or to allow the enterprise to continue to emerge from bankruptcy?

Warren Pyle: In bankruptcy under section 1114, the court could modify the plan if it is determined to be essential to the survival of the company. If it's just going to save the company a couple of dollars and it's dead anyhow, the court isn't going to do that.

Susan Hoffman: I would like to get back into retirement benefits. The Supreme Court has held that retirement benefits for those who have already retired are not a mandatory subject for bargaining. The NLRB has held that they are a mandatory subject of bargaining for current employees but that unilateral changes to current retiree benefits are a mandatory subject if those changes affect the benefits received by those who have not already retired. Although I find it hard to imagine how to implement that particular decision, the question has arisen for a number of my clients.

We have a contract with the union that in its original form predated the Supreme Court case described above, and now the union won't sit down and bargain about changes. How do we get the union to the table? I had one interesting case where we actually sued the union for breach of contract under section 301 of Taft-Hartley for refusing to bargain. We argued that even though it's not a mandatory subject, it's a permissive subject, and by putting certain language in the contract, the union has agreed to bargain over potential changes. The union responded with a countersuit as a class action, bringing in all the retirees and arguing an anticipatory breach of ERISA.

I told the client that I thought what the union was trying to do was get the protection of the class action settlement approval over the bargaining to protect against a duty of fair representation suit. So we consolidated the cases before the same judge and negotiated a settlement, which was what I expected and thought the union had in mind all along. That's an interesting problem when you've got a contract that leaves it open for the union to bargain but the union doesn't feel safe in bargaining, and I think you need a class action to resolve those.

Warren Pyle: The Supreme Court has held that the union does not represent people who have retired. The union cannot compel a company to talk about increasing health or retirement benefits for people who are already retired. What the union can do is argue that under the contract in effect at the time of their retirement, the retiring employees had certain entitlements. Can a company compel the union to bargain such benefits down? I don't think so.

We had an interesting retiree health insurance case once where a large conglomerate sold a losing operation to another who put up about $100,000 and ran the company into the ground. We argued that failure was a virtual certainty when the conglomerate sold the operation. We were able to hold the conglomerate liable for the retirees' health insurance that was promised under the contract.

Donald Siegel: This plays out a little differently in the multiemployer context. First, we don't have to grapple with the issue of whether a retiree who is receiving health care benefits is actually somebody whom we have to deal with because issues of mandatory subjects and employee status are irrelevant. If the individual is getting a benefit from a health and welfare fund, he or she is a participant and has all the rights of the participant under ERISA. This dispute in all likelihood in a multiemployer context is going to be resolved by arbitration if it's not resolved by agreement of the parties.

Susan Hoffman: And it will rarely be resolved by agreement of the parties. It is very difficult to convince union trustees that they have to cut back or eliminate benefits for their retirees, and they will deadlock the proceedings.

Donald Siegel: I want to go back to what Susan said before about the relationship between severance benefits and retirement funds, and, in particular, where severance benefits were loaded onto retirement funds. Notwithstanding the legal issues, this practice raises some dangerous policy issues. I have seen cases where trustees try to switch retiree health care benefits to pension funds. I think it's not permitted under the law, but it is a tempting thing to do because health and welfare funds often find themselves in more intense negative conditions than retirement funds.

Susan Hoffman: What I have seen is to put in a retiree co-pay. A company may require that retirees have to pay $100 a month for the benefits and then give them an increase of $100 a month on the pension side. That's perfectly legal.

Marc Greenbaum: I would like to spend some time on section 1113 and rejections. There are a number of issues or conflicts that were implicit or explicit in your presentations. My first question was stimulated by an article in the *New York Times* that was written in connection with the then potentially imminent bankruptcy filing by American Airlines. The article said that section 1113, particularly in the pre-petition period, gave the employer an incredibly powerful weapon with which to shove changes down the union's throat. Is that right? How does the union feel pre-petition? How does the union feel post-petition?

Michael Brown: Just look at what's happened with US Airways, United, and American in their dealings with unions that are rarely amenable to opening up contracts. What the press doesn't understand is that this is now a post-*Bildisco* era and that an employer just can't go into bankruptcy by filing papers and the next morning declaring that its contracts are null and void.

As we discussed earlier, there is a very specific statutory procedure that has to be followed. It is not an open-and-shut matter but the threat is clearly there. I think the proof is in the pudding, and all three carriers, without going before the bankruptcy court, were able to get all of their employees to give up substantial benefits.

Warren Pyle: Of course, bankruptcy reorganization proceeding liquidation is a very threatening thing for everybody involved. There's tremendous pressure to get on a level footing with everybody else who's gone through bankruptcy. Unions have to be very careful and they have to be very creative. If they handle things well at that point, they can do a good thing for their members.

Marc Greenbaum: One of the things we read about in connection with the US Airways bankruptcy was that the union had a seat on the creditors' committee. Is that a good idea?

Warren Pyle: I've never served on a creditors' committee. It involves a lot of time and expertise. In very high-profile and big reorganizations, unions do use bankruptcy counsel or counsel experienced in bankruptcy matters. Being on the creditors' committee involves oversight of the bankruptcy operation and requires the ability to know about the employer's operations, what it is doing, and its plans. The creditors' committee has had a considerable role in the negotiation of a plan to emerge from bankruptcy. Being involved with the creditors' committee is particularly valuable when a union is facing a threat of diminished rights or a potentially rejected contract. The committee can help assure that the union isn't the only party taking a haircut.

Susan Hoffman: It is generally the largest creditors who get representatives on the committee. It's unusual for a union to be a large creditor. It's more common for a multiemployer pension fund to be on the committee because the fund will have both delinquent contribution and withdrawal liability claims. We have seen the Central States Pension Funds sit on a creditors' committee in quite a few cases.

Marc Greenbaum: Large or small, in a case where an employer was likely to seek rejection under section 1113, would being on a creditors' committee give the union more clout?

Warren Pyle: Possibly more clout. Probably greater knowledge in which to exercise whatever clout it has would be a better way to put it.

Susan Hoffman: Each member of the creditors' committee only gets one vote. Knowledge is key here because the members of the creditors' committee sit there as fiduciaries of all creditors. They aren't supposed to be fighting their individual battles.

Marc Greenbaum: I also wanted to highlight a difference I heard between Warren and Mike. Mike took the view that if the bankruptcy court rejects the collective bargaining agreement or portions of it, the union might get *Boys Markets*[1] injunctive relief, and I think Warren had a different view. Would you both speak to that?

Michael Brown: Basically what *Boys Markets* tested is whether a dispute is arbitrable. If the employer agrees to arbitrate and the contract contains either an explicit or implicit no-strike clause, and the union strikes rather than arbitrates, is a strike in violation of the agreement and is an injunction warranted? Under general principles of equity, a district court and, implicitly, a bankruptcy court operating under the bankruptcy law can enjoin the strike. I think what Warren was referring to, which I do agree with, is that if the court does reject the contract, there is no way to satisfy the *Boys Markets* test. If the union wants to take what I think is a kamikaze course and strike and watch the plant close in front of them, I suppose that a *Boys Markets* injunction is available. I do think that you can satisfy the test of *Boys Markets* if the contract has been modified but the no-strike clause and the arbitration clause remain intact. I also think that a bankruptcy court, with circuit court approval, does have the right to issue a *Boys Markets* injunction.

[1]*Boys Mkts. Inc. v. Retail Clerks Local 770*, 398 U.S. 235, 74 LRRM 2257 (1970).

Warren Pyle: Certainly the court has that power while the contract is in full force and effect and the union is striking over something that it can arbitrate. But if the court has rejected or modified the agreement, there is nothing to arbitrate and the union can strike.

From the Floor: I have a question for Mr. Siegel. I've always assumed that if I could get the parties to get the court to appoint me, I would have immunity. Am I right?

Donald Siegel: I don't think you are.

Susan Hoffman: I don't think so either.

From the Floor: Have there been any court decisions on that point?

Donald Siegel: No. There have been no court decisions on any issue involving the fiduciary responsibility and the fiduciary liability of an arbitrator in a section 302 context. All of you as arbitrators are used to assuming that you have judicial immunity for your work as arbitrators and for your work in resolving disputes. There's every reason for you to assume that, except that the DOL has been telling you since 1974 that you can no longer make that assumption when you resolve certain kinds of employee benefit issues. I think that you as a group of arbitrators need to take seriously the fact that the DOL has opined that you are fiduciaries in certain contexts and that the former head of the DOL office that administers certain parts of ERISA spoke to you 20 years ago and told you then that you had fiduciary liability in certain contexts, that an important governmental agency has taken the position that you've got it. I think that you need to take certain actions to protect yourselves. I have suggested a few. By no means are those an exhaustive list and there may be better ideas, but I do not think that judicial appointment immunizes you.

From the Floor: I had a court appointment as a special master once. Would that make a difference?

Warren Pyle: It might very well.

Susan Hoffman: DOL advisory opinions get limited deference. It's not like a regulation that gets very substantial deference by a court. I have a vague recollection that there's an old Greyhound case where the court said in dicta that arbitrators were not fiduciaries.

Donald Siegel: You are absolutely right.

Susan Hoffman: You wouldn't have that kind of exposure. Then you get this question if you have one of those issues. Can the plan pay for the arbitration under the recent DOL guidance that came

out a month ago that said multiemployer plans cannot pay for matters that are "settlor" (design) functions unless the plan makes it a fiduciary function?

Donald Siegel: Susan makes an interesting point. The DOL did come out recently with this advisory about the difference between what we call settlor functions and trustee functions. They made the point that that if it's a settlor function, the settlors in the multiemployer context (i.e., the management and union parties that create the trust) pay for those costs. If it's a fiduciary administrative type of issue, the plan can pay for those costs. It's all very new, all very controversial. Again, it is a DOL advisory opinion.