Chapter 13

PANEL DISCUSSIONS: THE EFFECTS OF THE ECONOMIC AND BUDGETARY CRISIS ON INTEREST ARBITRATION AND BANKRUPTCY and THE IMPLICATIONS OF *14 PENN PLAZA V. PYETT*

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Panelists: Thomas J. Bender,† Stuart Davidson,‡ John A. DiNome,§ Regina A. Herzig,** Bruce H. Simon,†† and Nancy Walker‡‡

I. The Effects of the Economic and Budgetary Crisis on Interest Arbitration

Davidson: This economy has created, in the minds of public-sector employers, an entitlement to slash workers' benefits in ways that, I believe, are extremely dangerous. Philadelphia County (in which the city of like name is situated) has the highest income level in the Commonwealth. It's got the third highest value of real estate. It has a 20 percent general fund balance, having reduced it from 40 percent by lowering real estate taxes. They floated $35 million in bonds for open spaces, and gave $3 million to the Audubon Society. In that sense, it is a very generous county. But Philadelphia County has also cut employee health care coverage while adding a 40 percent contribution to the employee's cost, and has eliminated earned retiree health care for people who don't get benefits after their jobs. And it has done these things in the middle of a contract term.

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Officials in the City of Philadelphia told me that they had to cut pensions for employees because, for the past 40 years, the City had underfunded its defined benefit plan. All new workers have to go into a defined contribution plan, with the risk of bad investment performance thereby shifting from the City to the worker. But the City has a Managing Director who just retired after less than one year of service. She's going to pay in some money to buy some credits and then, for the rest of her life, will receive $50,000 a year from the City's defined benefit plan.

This is the theme in negotiations: What can we shift from the employer—whose work we do, whose citizens we protect, whose burning buildings we go into—to the worker? The changes in health care coverage shift more of the costs from the employer to the worker. They do it through co-pays, in user fees, in contributions, and through reductions in catastrophic health care and retiree health care. In the City of Philadelphia, firefighters and police get only five years of retiree health care coverage; every other major American city gives its police and fire retiree health care for life, recognizing that the stress they endure and the crap they inhale shortens their lives.

So for me, the central issue is no longer wages but protecting health care from "redesigns"; I am fighting shifting co-pays and am protecting the coverage of people who leave this industry diminished. Now, fortunately, at least they can buy health care with all of their preexisting conditions. Thank you, Barack Obama.

As for the furloughing of employees on the basis of funding constraints, the staffing issues raised vary with each bargaining unit. For firefighters, they're closing stations without first performing a study of how those closings impact the safety of firefighters. In firefighter interest arbitrations, the hardest thing to do is to get an arbitrator to focus on staffing. When a firefighter goes into a burning building, is he going in alone? Does he have enough people? Will the people on whom he is depending to ventilate the building—so that he's not blown up in a back draft—get there in time?

When a public employer talks about furloughs, is it talking about station closing? In the City of Philadelphia they want to do roving furloughs. And the mayor will say, "I'm determined not to lay anyone off because I care about the people who work in the City of Philadelphia. We want to be able to lay everybody off for thirty days during a course of the year. We're not going to end their job, we're just going to cut their pay by 15, 20 percent. Okay?" In

terms of fire protection, what that really means is that we're going to brown-out stations. The people of the City of Philadelphia will believe that they have fire protection but, at any given time, the station that protects them—which, by the way, is the station that sends paramedics to them when they have a heart attack or when they fall and they can't get up—will be closed. But the public won't know it because, on every other day, they'll see that the station is open. What it means for firefighters is that the station that had been seconds to the fire isn't coming in at all. Instead, another station, from farther away, will respond. And during that delay, the fire will progress and fighting it will become more hazardous. Firefighters will be in that building when it's more dangerous. Citizens will die. Firefighters will die. And the City will say that they died because the resident didn't have a smoke detector, because that is the explanation given for every death by conflagration in the City of Philadelphia: "If only they had a smoke detector. . . ." Well, I suggest that firefighters responding in time is kind of important, too.

We're fighting over health coverage, over pensions, over workplace standards, and over staffing. We're not fighting over educational incentive because it is dwarfed by the issues that are enormously important—literally life and death—for public safety employees and for the people whom they serve.

Symonette: How does a public employer respond to taxpayers who think that they're paying too much for whatever they get, and to politicians who appeal to those taxpayers in order to gain office or stay in office? The Tea Party's coming around the corner.

DiNome: The Tea Party is not around the corner. It is here. I think Stuart Davidson's points are correct. But the City's management is still permitted to run its municipality. And if the municipality wants to keep a certain fund balance, if they want to maintain donations to causes they think worthwhile, they're free to do that. Those decisions should not be a factor in collective bargaining. And if the citizenry doesn't like those decisions, they get a choice. There's usually an election every two years or perhaps every four years, and the City management can be removed. If the taxpayers in that municipality don't like the fund balance or public purpose investments and prefer those funds go to the workers, they can speak with their ballots.

I appreciate Stuart's anger with the City of Philadelphia over the outlandish retirement benefit it has awarded the Managing Director it so briefly employed—stuff like that shouldn't happen.

But that one example does not warrant the forfeiture of all of management's rights to direct the workforce, to control expenses, and to try to deal with some very unwieldy situations. Municipal employers' ability to deliver services is seriously at risk in America. It's certainly seriously at risk here in Philadelphia. There's a contracting business base, people have been moving out of the city, and the tax base is shrinking. And yet the unions believe that the same level of services still need to be delivered and the same employment benefits furnished. I agree that the police, firefighters, and City workers deserve those benefits. However, there needs to be a real "gut check" on the dialog; it needs to reflect reality.

Symonette: Let's talk about the taxpayers that come to you, Stuart, and basically say, "Look, I work in the private sector. I have to pay 50 percent of my health care. I just lost my job. I can't pay my taxes. My kids are going to schools I don't like. I may have to leave the City. Nothing is guaranteed. Why don't you public employees take on some of this burden?" What do you tell those people?

Davidson: I could say that the public employees I represent pay all those taxes; their children go to those schools; and they can't leave the city because their jobs have a residency requirement. And that's why we have Act 1111. That's why we amended the Constitution: to ensure that the people who provide essential services to communities are protected from those vagaries.

I'm not saying that management shouldn't manage. I'm saying that I'd love to see management manage just a little bit better, and focus on the big issues that drive up costs. I've always maintained that, if the municipality doesn't want to have fire protection, let them get rid of the fire department. If the municipality doesn't want to have police protection, let them get rid of the police department. The mayor can shut down the libraries. Those are decisions that the City can make. What they can't do is jeopardize the lives of the people on whom they rely to furnish those services. That's where the rubber meets the road.

The issue of what is reasonable pay is something that arbitrators need to decide. But health care is essential, and I'm not talking about Workers' Comp. Firefighters experience two-dozen types of cancers at higher rates than the general public, because of where they work. And in Pennsylvania, they don't get Workers' Comp; in 30 other states, they do. They don't get Social Security, and so their pensions are important. These things have to be explained to the taxpayers. If the taxpayers then think that firefighters and

the police cost more than they want to spend, they can get rid of the services.

The issue of how the municipality spends its money is a political decision. When a municipality squanders resources and then comes to the bargaining table and cries poverty, that is just wrong.

The City can spend the money any way it wants to, but when it comes to the table and tells me I have to take lesser health care, that I have to look at roving furloughs, that I have to get rid of a defined benefit plan because the City won't make contributions to it, then I have an absolute right to say that if you hadn't squandered the money on the Audubon Society and the City Manager's pension, on giving every member of City Council the right to be in the Deferred Retirement Option Plan (and getting half a million dollars), don't tell me that there's equity there. And don't tell me that I can't challenge the reasonableness of the decisions you make.

DiNome: By way of explanation, the Deferred Retirement Option Plan (or DROP) was passed as a way of keeping particularly senior municipal employees—particularly police and firemen—employed beyond their normal retirement dates. Under DROP, while they remain employed, those persons have their wages paid into a special account and receive pension payments while they continue to work. When they eventually stop working, after three years, they receive the money in that account and their full pension. It's a wonderful program for police and firefighters, but was not intended for elected officials. That is where it's gone off the tracks: Elected officials periodically have to run for election. DROP was not intended as an inducement for them to remain employed, because that decision is up to the voters, not the officials.

Davidson: When DROP is used to pay an elected official who has served only two terms a half a million dollars in benefits, that is unjust. And the injustice is compounded when the City then tells its employees that its defined benefit trust is only 40 percent funded, that the future generation's pensions are going to have to be cut, and that they will be put into a defined contribution plan, thus making illusory the promise of retirement security.

San Diego is the greatest example of everything that you could do wrong in municipal administration. In San Diego, both the city and the county were understating their liabilities and overstating their assets. They had fund managers who were taking back-end deals, and concealing them—charging consulting fees to run the

investment funds, taking money from the money managers who purportedly furnished research or trading services to the funds. And contribution holidays were bargained in exchange for the promise of increased benefits (ignoring the contradiction of increasing the promised liabilities while decreasing the current contributions). Add into that the lovely market performances that occurred, and it was the perfect storm.

The politicians got voted out. A crusading attorney, who was the district attorney at the time, was voted in, and brought criminal charges against the trustees and the municipal managers. There were private suits against the City because their bond prospectuses had been inaccurate and the bond buyers had thus been furnished false and misleading information. Everybody sued everybody, which is, after all, the silver lining of the American dream for all of us. Most of the criminal prosecutions were tossed out. I think there is one left. There were big settlements on the suits based on the bond prospectuses, and against the money manager. And there's litigation still going on.

We in the City of Philadelphia are "proud" of our moniker: pay to play. But that insidious practice is not unique to Philadelphia. People make a lot of money in the investment world. And even when they tanked everything, even when the money manager screwed up and the bank screwed up, they still made a lot of money.

Jaffe: Have you been able to reach deals outside of the interest arbitration process, given the substance, type, and magnitude of the issues and, if you have not, have you been able to use the interest arbitration process to obtain *de facto* deals? Or has the recession and the emphasis on different bargaining subjects changed the process? In sum, how has the current economy affected "ability-to-pay" arguments?

DiNome: I've seen two types of deals reached. One type is to postpone the big issues raised by the economic downturn and do a slimmed-down deal, maybe a two-year contract. Maybe a modest wage increase; without touching health coverage, the sell-back, or other benefits. The second type uses the services of an arbitrator to craft a deal through the interest arbitration process. This can work because you have a lot of the information on the table. For example, both sides may have spent money to do a pension study, or a health care study, a standards study, or a fitness study. Having all that information in front of you makes it easier to reach an agreement (albeit that some aspects can become more difficult

because you have too much information). When you have an arbitrator who knows what they're doing, you can put a deal together.

Davidson: The issue of ability-to-pay has always been raised. People who have sometimes suggested it's a new element in this process, it isn't. I can make a deal, provided I understand the legitimacy of the financial constraints. If both parties are willing to look hard and be flexible about where savings are possible, deals can be made as long as there isn't a political overlay that complicates things.

So for instance, if I'm in a discussion about rolling furloughs for firefighters, I might be told that they are essential because, if the firefighters don't have them, the employer can't force them on other bargaining units.

Where I can't make deals is when it's gluttony. When I encounter an employer that has the ability to pay but "smells blood in the water," and that employer attempts to gut everything in a collective bargaining agreement on the pretext of the recession, that's when I find it difficult to make a deal.

Jaffe: John, could you explain a little bit about fitness?

DiNome: At the time of hire, police, fireman, and prison guards are subject to physical fitness standards. What should the incentives be for those persons to continue to meet the standard? Or in certain cases, what should the penalty be?

Davidson: I'm for fitness, but I negotiate it as wellness and not as a means for culling employees who cost more on the health plan, or who have heart disease or lung disease that may, in the future, cost the employer more. I want a fitness standard that's reasonable; that's age-related; that's not punitive; and that is part of a program to help people get better. Every time negotiations fail over the issue of fitness, they fail because the employer is not seeking to help people who have worked for it get better.

In many major cities, there's a wellness—meaning fitness—standard for firefighters that was designed by the fire chiefs and firefighters. But it doesn't operate in Philadelphia because the City says its wellness features are too expensive. So all that Philadelphia does is test firefighters and, if they don't meet the standard, put them out.

Symonette: Stuart, you represent a constituency comprising both new firefighters and older, more experienced firefighters. The issues of wellness and fitness affect them differently. How do you work those differences in demographics within a single bargaining unit?

Davidson: It's one thing to advise newly hired employees that, throughout their careers, they will be required to meet a mandatory fitness standard. It's a different story to impose a new standard on people who have been employed for 20 and 30 years. How do I explain to a firefighter, who's worked for the City of Philadelphia for 30 years and who, as a result of fighting fires and of operating fire equipment within the station, has seen his lung capacity reduced, that he is being let go because his lowered lung capacity means he cannot pass a fitness test?

It took a combination—of my efforts, an arbitrator, and ten years of fighting for the City of Philadelphia—to have carbon emissions vented to outside of the station house. Firefighters live, eat, and work in these houses. Yet the City wouldn't agree to placing hoses on the fire station vehicle exhaust pipes, and to divert their emissions outside. It took several arbitrators' orders to get the City to do so. Firefighters have been sucking in those emissions every day, and eating it in their food; I am not going to fitness with those kinds of perils in mind. For example, I still have to go to arbitration to get hearing plug protection from the sirens, or to get a second set of bunker gear. A municipality that consistently refuses to provide basic protections to its firefighters loses most of its credibility on this topic.

When employers want to talk to me about protecting firefighters or police officers or sewer workers on the job, then they should be prepared to talk seriously about being interested in the wellness of those workers. Programs need to be rehabilitative.

Jaffe: There's been a large debate about promotions of firefighters. Would you talk about what the promotion process might be in the Philadelphia Fire Department and the process by which you came to that procedure?

Davidson: That's a very good question and, oh so timely. The Philadelphia Fire Department is different from any other major department in America, on many different levels. The promotional exams for lieutenant and captain are based 45 percent on a written segment, 45 percent on a supposedly real-life oral examination, and 10 percent on seniority.

Promotion to the higher positions of battalion chief, deputy chief, and the like is based 90 percent on an oral examination, given by multiple oral boards. When it's your turn, you may get a "Nyet" from the Russian judge or "Kyllä" if you draw the Finnish judge. In Philadelphia, the evaluators are fire professionals from outside the City, who've never fought a fire in Philadelphia and

have no idea of the system or operation of the Philadelphia Fire Department.

Until recently, African American firefighters railed against this system. Now, in 2010, white firefighters are railing that the system is unfair and discriminatory and they can't get a fair chance. Those claims of discrimination were true, and remain true. The use of boards has been unfair because multiple boards are inherently unfair: There's grade inflation by one board or another, and boards are subject to undue influence. No other major department that I am aware of uses oral exams with multiple boards for 90 percent of the test, and for good reason. Multiple boards are conducive to manipulation, unfairness, and inequity. While oral examinations have their place, I think that a written examination should be an essential part of promotional evaluations, and that they can be devised to be objective.

Symonette: This debate has been confined to interest arbitration in the public sector. Now, let's expand it to consider what interest arbitration might be like in the private sector, if the Employee Free Choice Act (the EFTA) is enacted and arbitration becomes the final step in first contract negotiation.

DiNome: The biggest challenge for the advocates and the arbitrators will be the comparables. Where do you get them? In the public sector, the data is just flying around: Many different organizations provide books and online information about county and municipal comparables. In the private sector, things are different. Let's pick hospitals, as an example. There are a lot of hospitals here in Philadelphia, but there is no ready means by which their financial data can be gleaned for the purpose of developing comparables. That will be a challenge for advocates and arbitrators alike.

Davidson: I assert that first contract arbitration under EFTA will save America. And now, I'd like to explain why. Studies from institutions like Carnegie Mellon Business School, Harvard Business School, Columbia Business School—all these great AFL-CIO organizations—have recognized and quantified the fact that when the level of unionization is stronger, the standard of living in America is better: All Americans, nonunion and union alike, progress. When labor and labor's presence is weakened, the economy, for working folks, declines dramatically. In our lifetime, the gap between the people at the top of the food chain in a company and the bottom has expanded exponentially. It has gotten to the point that our European counterparts are embarrassed by what Americans pay their CEOs.

DiNome: I think that's wildly misplaced. Let's look at our European counterparts. They've lived for 55 plus years without increased defense costs; costs that the United States has assumed. The Europeans have been living under America's nuclear umbrella and have been able to shift a lot of their military budget to social spending for their citizens.

Davidson: Do you think that they have been able to undertake social spending because they didn't pay their CEOs 500 times what the average worker makes? Regarding first contract arbitration under the EFTA, currently in the United States less than 50 percent of organized workplaces get past the first year and get to the first contract. Canada has had first contract arbitration ever since my mother was there, and it hasn't brought the economy to a halt. Instead, first contract arbitration regulates what we're supposed to be doing: labor relations. It allows the parties to have a first opportunity to work together under the authority—and with the threat—of an arbitration.

As for the difficulty of finding comparables, comparability statistics on job structures are maintained by trade associations, by union associations, by universities, and by business schools. The example of a hospital is an easy one. Statistics of what LPNs, RNs, and custodial services earn is readily available. You can obtain them from the hospital association or from the union.

Hertzig: On EFTA, I would like a first contract containing at least a grievance procedure: a union security clause prescribing a basic framework for resolving disputes.

Jaffe: We're fortunate to have one of the nation's leading expert advocates dealing with bankruptcy issues here with us today: Bruce Simon from New York City. Bruce has been involved in a variety of high-profile and very significant bankruptcy cases representing unions.

Simon: "Alternative universe." In the context of the current economic times, no phrase applies better than that to the world of bankruptcy insofar as it applies to arbitration and labor relations.

First, what should arbitrators do when informed that the employer they are serving is now in Chapter 11? To what extent is the arbitration subject to the so-called automatic stay—the curtain that falls for all litigation involving the debtor from the moment the petition for the bankruptcy is filed? The clear precedent—the manner in which the bankruptcy courts have dealt with the issue consistently for years—is that, in the absence of a rejection of the contract under Section 1113 (which we will get to), the arbitra-

tion provision of the collective bargaining agreement remains in full force and effect, and both preexisting arbitrations and new arbitrations should be scheduled and held. They are not subject to the automatic stay.

There is an interesting and periodically vexing question as to whether a money award issued by an arbitrator relating to "prepetition grievance," that is to say a grievance that arose before the Chapter 11 petition was filed, is enforceable. Fortunately, that's an issue that the arbitrators don't have to worry about. The arbitrator's ability to make the award, and for the award to include monetary damages (including damages for prebankruptcy filing activities) remains unaffected. Thereafter, the union may or may not, in various locations around the country, have some difficulty getting full collection on the award but, as arbitrators, that does not affect either your jurisdiction or your power.

Jaffe: So you don't have to worry about contempt from the court for violating the stay.

Simon: That is correct.

Bankruptcy judges in various sections of the country have a greater or lesser degree of respect for labor agreements and for arbitrators who render arbitration decisions. That is why those of us who represent unions in bankruptcy context often have our work cut out for us. It's one thing to deal with a case in bankruptcy court in Detroit, where they're accustomed to dealing with the UAW; it's another to deal with a bankruptcy court in some areas of the South. One does not want to necessarily appear before the bankruptcy judge sitting in Biloxi, Mississippi. (I assure you, having been there.) But, again, that is not something that should have an impact on your performance as arbitrators.

Let's talk about the alternate universe of labor arbitration. As arbitrators you are creatures of contract. You are upholders of the collective bargaining agreement. An agreement, once entered into, should be performed: That principle is the foundation of our economic system. Without it, our economy doesn't work. But in Chapter 11, in bankruptcy, you are in a forum in which the contract is a "maybe" thing, very much at risk. And the Chapter 11 debtor—the employer—has pretty broad powers to get out from under contractual relations. For those of you who are the creatures of contract, that fact may seem rather remarkable.

Imagine that you are the leader of a labor union that has negotiated a collective bargaining agreement, and you find that the

agreement is subject to being "rejected"— in effect, ripped up— by the bankruptcy court.

Some of you—those who have enough gray hairs—remember that, in the 1990s, one of the great debates in our economic journals was about the difference between the U.S. economy, where laissez-faire was the rule of the game, and Japan, where government agencies selected those industries that would be governmentally supported and those that would suffer the equivalent of bankruptcy. I assure you that, whatever other qualifications U.S. bankruptcy judges may possess, the notion that they can decide what our national economic policy is going to look like is obscene. But it is what it is, and that notion is our reality. From a 40,000-foot perspective, Chapter 11 is now what passes for industrial policy in this nation.

Here is a three-minute description of the world of bankruptcy. First, one does not have to petition for bankruptcy. All a company has to do is file a single sheet of paper saying ,"We hereby declare we're in Chapter 11." At that instant—the moment that paper is filed—the company is converted into a debtor-in-possession. The automatic stay falls; it is a bar against all continuing litigation. For the company's vendors, for its employees, for its stockholders, and for its bondholders, the world is divided into two parts: the prepetition world and the postpetition world.

In any significant Chapter 11 case you're going to have a creditors committee appointed. That committee is generally comprised of the company's creditors, who "supervise" or monitor the functioning of the Chapter 11. The creditors committee appears in court, is heard by the judge, and is given a significant amount of credit and respect. The committee membership can include the union and the trustees of its pension and welfare funds.

In a Chapter 11 proceeding, the company's board of directors and its management usually stay in place and are termed the "debtor-in-possession." In other forms of bankruptcy, a trustee may be appointed to operate and/or liquidate the company.

Almost any transaction that is "outside of the ordinary course of business" must come before the bankruptcy court for its approval. When that happens, interested parties, like the creditors' committee and like the union, can be heard regarding those transactions. In significant cases, almost all material transactions are treated as being outside the ordinary course. (This is because lawyers, being conservative, tend to treat them that way.)

In a Chapter 11 proceeding, postpetition obligations are likely to be paid in full. These include so-called claims of administration of the bankrupt estate. Prepetition claims are not likely to be paid in full unless you are a secured lender (basically a bank that has a security interest and a lien on assets that has been perfected before the bankruptcy petition was filed). Anyone who is not a secured lender is classified as a general unsecured creditor. The function of the bankruptcy court and of the bankruptcy system within which it operates is to deal with the tension between two fundamental objectives. One is the notion of "fresh start," the idea that a troubled company should be allowed to compromise its debts, to reject onerous "contracts," and to emerge from bankruptcy a fully fixed company. Management negotiates with the creditors committee on what's called a Plan of Reorganization; this is, in effect, the charter for how the company is going to get out of bankruptcy. The price of that repair, however, is that all of those who had obligations running to it from the company—not just suppliers but employees who have collective bargaining agreements as well—are subject to having those obligations carved up.

The union contracts, until the early 1980s, were treated like any other commercial contracts, which is to say that, if the debtor thought that it liked the contract, it would keep it; if it didn't, it would literally rip it up. In 1984 Congress passed 11 U.S.C. Section 1113 (an amendment to the bankruptcy act, dealing with the rejection of collective bargaining agreements) and, in 1988, Section 1114 (dealing with the payment of insurance benefits to retired employees). These Sections imposed a framework of steps through which the debtor-in-possession had to proceed before it could reject or modify a collective bargaining agreement. The framework requires full financial disclosure, collective bargaining, and good faith. Its purpose is to produce only those modifications of the collective bargaining agreement that are "necessary for the emergence of a company from Chapter 11." In Philadelphia, the Third Circuit (alone among all circuits) the framework is applied so rigorously that no cases with any labor significance are filed here. Every employer knows to avoid the Section 1113 law as developed by the Third Circuit.

Elsewhere in the country, the standard has been so weakened that it is almost as easy to reject a collective bargaining agreement under Section 1113 as it was before Section 1113. Almost. It is still possible to win Section 1113 cases but, when you do, you break out the champagne. It is not an everyday event.

Jaffe: If you suspect, prepetition, that a company's future is becoming shaky, are there ways to gain a greater priority for the breach of the collective bargaining agreement?

Simon: In theory, yes; in the real world, no. Most companies that are shaky have already begun the process of negotiating with their lenders for what is called "Debtor-in-Possession Financing," which is the money necessary in the early weeks of a Chapter 11 to continue to operate. And the lenders become exceedingly watchful for any efforts by anyone else to carve into their secured position. Also, there are protective periods. There's a 90-day period before petition is filed, when contracts that are entered into, especially contracts that enhance the position of a creditor vis-á-vis other creditors, are treated as fraudulent conveyances and otherwise prohibited transactions. But that doesn't stop us from trying.

Symonette: I have a question about the Section 1113 hearing. I understand that, during that hearing, some unions propose an alternative collective bargaining agreement for the judge to consider. Has any bankruptcy judge taken a more activist role in order to resolve the negotiation, and created a new contract that all the parties can live with?

Simon: The answer is yes. There are bankruptcy judges who are activists in trying to either propel or help the parties reach alternative positions in collective bargaining. In those instances, the judges have become like mediators. I have had, in unreported cases, judges acting as mediators, with union representatives sitting in one room and employer representatives in another, shuffling back and forth, mediating and, on occasion, deciding issues, much in the same way that an interest arbitrator would.

In one such case, Delta Airlines had a Section 1113 hearing going for days, perhaps weeks. The hearing was extremely contentious, highly adversarial. For reasons I can't disclose, the Airline Pilots Association and Delta agreed to remove the 1113 hearing and establish a panel, comprising three arbitrators: Richard Bloch, Bob Harris, and Fred Horowitz: all members of the National Academy of Arbitrators. The skill of those arbitrators dulled some of the adversarial character of it and, on the last day of the session, when Richard, who had the panel's decision in front of him, raised his pen, the parties went out into the hallway and settled. And that was the foundation of the Delta Pilot Agreement, which led to the Delta Northwest Pilot Agreement, which led to the first really successful airline merger in recent memory. It was a wonderful process. I've tried it since, unsuccessfully.

Jaffe: Any interesting issues relative to conflicts between different unions in the bankruptcy process, since their interest may not overlap?

Simon: In the early days, we would often represent whatever unions were involved in a Chapter 11, without giving careful thought to conflicts. But now, unless both unions waive every conceivable conflict and do so in writing, in blood, we will represent usually just one union.

Unidentified Person: Is there any special status given by the bankruptcy court to an arbitrator's fee for an award that was issued prepetition?

Simon: If you heard a case in August and you submitted your bill in September and the petition is filed in October, you're going to have a tough time being treated as other than a general unsecured creditor. That's not always the case. On occasion, unions and management have been able to work out terms of what are called first day orders, such that the company will respect bills that were rendered with regard to arbitration proceedings that were prepetitioned. And on rare occasions, even the company itself, in its filing, will do that. In a significant case, within a day or two of the filing of the petition, the court will hold a hearing in which it will address so-called "first-day orders." Those are usually a couple of dozen orders, submitted with 24 or 48 hours public notice, one of which typically deals with wages, benefits, and labor contract administration. The court's objective is to create "a seamless process without disruption caused by the Chapter 11 filing." Those orders will sometimes authorize the payment of prefiling arbitration fees. Subsequent to the filing date, you hold a hearing. You render a bill. You get paid.

John Sands: Occasionally, where a company has filed for bankruptcy, the union has already agreed to joint and several liability for the arbitrator's fee or the arbitrator has included in their award the reimbursement of the union by the employer of the employer's share. In those instances, the union bears the burden of collecting the other share of the arbitrator's fee.

Bruce, what status does the bankruptcy court give a statutory proceeding, like the arbitrator's determination of liability for withdrawal from a multiemployer pension plan, as opposed to a contractual case?

Simon: Typically, the bankruptcy court and the bankruptcy system will accept the reality that there are other laws that apply to the company. And the automatic stay will not typically stay a

government procedure. Again, an award dealing with a prepetition obligation is subject to substantial diminution.

Sands: But conceptually, a withdrawal liability award is covered as the current value of the future obligation.

Simon: More often than not, the court will distinguish between the portion that was attributable to prepetition activity and that portion that was attributable to postpetition activity.

Davidson: In Pennsylvania, we passed a law that allows municipal employers to shed a collective bargaining agreement prior to filing for bankruptcy. What are your observations about public sector bankruptcy?

Simon: Chapter 9 of the bankruptcy code applies to municipalities. It is as weak as 11 U.S.C. 1113. I have never actually had a functioning Chapter 9; there haven't been many of them. When they occur, because of the obvious political implications, they are typically dealt with through bargaining on or off the table.

Unidentified Speaker: Do I understand you to say that under 11 U.S.C. 1113, a rights arbitration filed before a bankruptcy petition is filed would be allowed to go forward?

Simon: Yes, unless and until the court rejects the collective bargaining agreement. But even when it rejects the collective bargaining agreement, it almost never touches the arbitration clause. An arbitration under a labor contract will normally proceed to fruition, and the bankruptcy should not affect the arbitrator's authority.

Regarding 11 U.S.C. 1113, when a bankruptcy judge attempts to mediate the terms of a collective bargaining agreement, it is attempting to avoid issuing a decision under Section 1113; it is trying to get the case to go away. We've all seen activists and nonactivist judges and how they approach that. Some judges will absolutely refuse to get into a discussion with the parties about settlement because it believes that compromises his or her integrity as a decision maker. Others will see settlement as very much part of the judicial process and engage in it, fruitfully sometimes, not so fruitfully others.

Catherine Harris: I am dealing with an IBEW interest arbitration in the City of Vallejo, California Chapter 9 proceeding. Vallejo is a bedroom community of San Francisco. In that case, the IBEW challenged whether the City was truly insolvent. They took their case all the way to the Ninth Circuit Court of Appeals, and lost. Then they filed a motion to reject the collective bargaining agreement that was approved by the bankruptcy judge, which motion

was granted. And that particular phase of the case is currently on appeal to the Eastern District of Sacramento.

Walker: In that case, the city ordinance under which the arbitration was proceeding is on the ballot and will be voted on shortly, presenting some additional complexities.

Simon: Their next step will be to hold a Swiss Town Hall meeting to determine the terms and conditions of employment.

Harris: That's right. The IBEW represents every employee who is a bargaining unit member, except police officers and firefighters. The police and the firefighters have already made a deal. There may be some law on the rejected IBEW contract shortly; we're plowing new ground.

II. The Implications of *14 Penn Plaza v. Pyett*

Moderator: Ira Jaffe
Panelists: Thomas J. Bender, Stuart Davidson, Bruce H. Simon, John A. DiNome, Regina A. Hertzig, and Nancy Walker

Jaffe: We are now going shift from one hot button topic—bankruptcy—to another: the impact of the *Pyett* case[1] on bargaining positions and, for any advocates whose clients have agreed to the arbitration of external law disputes, the impact of *Pyett* on the application of their agreements.

Bender: *Pyett* was a case decided by the Supreme Court in April 2009. The Court held, in essence, that if your CBA requires employees to use the grievance–arbitration procedure to resolve disputes arising under external law—for example, Title 7, the Age Discrimination in Employment Act, and state statutes—that requirement is enforceable.

Our firm has about 760 lawyers, and all we do is management-side labor and employment advocacy. A survey of my firm disclosed that no attorney had yet had a "full–*Pyett*" case. What we are starting to see is what I would call mini–*Pyett* cases that deal with certain wage-hour issues, and particularly meal and rest breaks, driven by an epidemic of collective actions filed by the plaintiffs' bar. Plaintiff law firms are sending e-mails, particularly in the

[1] 14 Penn Plaza v. Pyett, 129 S. Ct. 1456 (2009).