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Colleen Ray

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## FUELING THE DEATH SPIRAL FOR WORKERS' PENSIONS: THE BANKRUPTCY PROCESS AND MULTIEMPLOYER PENSION PLANS

COLLEEN RAY\*

### I. INTRODUCTION

At this moment, in both the private and public sectors, there is ongoing fierce debate about the future of employee pension plans.<sup>1</sup> At the core of this debate is the financial sustainability of traditional defined benefit pension plans: plans that promise to pay retirement income to pensioners and surviving spouses for the rest of their lives.<sup>2</sup> Fueling this controversy is the underfunding of pension plans caused in large measure by the unexpected underperformance of the investment markets since 2000, punctuated by the investment crash of 2008, and the effects of the lingering Great Recession on employers and workers.<sup>3</sup> One of the “last bastions” of traditional defined benefit retirement

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\* Villanova University School of Law, J.D. Candidate 2013. The author would like to dedicate this Comment to the American workers who will suffer as a result of the unfairness of the current bankruptcy system. The author would like to thank her family without whose support this Comment would not have been possible.

1. See Hazel Bradford, *Public Pension Plans Brace for Legal Challenges to Cuts*, PENSIONS & INVESTMENTS, Sept. 3, 2012, <http://www.pionline.com/article/20120903/PRINTSUB/309039973> (discussing legal challenges to dramatic pension reforms such as greater employee contributions, higher retirement ages, or lower pension multipliers in New Jersey, Rhode Island, Louisiana, Michigan, New Hampshire, and California); see also Michael Corkery, *Pension Crisis Looms Despite Cuts*, WALL ST. J., Sept. 21, 2012, at A1, available at <http://online.wsj.com/article/SB10000872396390443890304578010752828935688.html> (discussing how nearly every state has trimmed pension benefits for public employees).

2. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 229–30 (1986) (describing difference between “defined benefit plan” and “defined contribution plan” in multiemployer plan context).

3. See *Private Pensions: Long-standing Challenges Remain for Multiemployer Pension Benefits: Hearing before the Comm. On Health, Educ., Labor & Pensions*, 111th Cong. 1–2 (2010) (statement of Charles A. Jeszeck, Acting Dir., Educ., Workforce, & Income Sec. Issues) [hereinafter Jeszeck Statement].

Since 2000, many multiemployer plans have experienced significant reductions in their funded status. Several factors contributed to this underfunding, including stock market losses, which reduced the value of plans’ holdings, and historically low interest rates, which increased plan liabilities. The economic downturn also affected employers’ ability to contribute to these plans. Many companies experienced slowdowns or closed their doors. While recent reports point to a recovering economy, some industries in which multiemployer plans are common have experienced high unemployment, limiting the stream of contributions coming into the plans.

*Id.*; see also Frances Denmark, *Multiemployer Pension Plans Face Uncertain Future*, INST. INVESTOR (Mar. 10, 2010), <http://www.institutionalinvestor.com/Article/2442319/Asset-Management-Pensions/Multiemployer-Pension-Plans-Face-Uncertain-Future.html>.

A devastating confluence of events—economic, sociological, and regulatory—is threatening the retirement security of millions of union workers while creating financial hardship for tens of thousands of employers. Market losses, growing unemployment, diminished union membership, pension regulation that backfired

programs are multiemployer pension plans: plans that are established and maintained through collective bargaining by labor unions and the employers of their members in accordance with the Labor Management Relations (Taft-Hartley) Act.<sup>4</sup>

Recognizing the importance of multiemployer pension plans to the retirement income security of millions of American workers, Congress developed a comprehensive federal regulatory regime to protect and nurture these plans.<sup>5</sup> This legislative scheme is reflected in the Employee Retirement Income Security Act of 1974 (ERISA) and in the Multiemployer Pension Plan Amendments Act of 1980 (MPPAA), which amended ERISA.<sup>6</sup> A key element

and rich benefits negotiated in halcyon times are creating a potent mix that is choking the viability of hundreds of multiemployer plans.

*Id.*

4. *Building a Secure Future for Multiemployer Pension Plans: Hearing Before the Comm. on Health, Educ., Labor, and Pensions*, 111th Cong. 1 (2010) (statement of Phyllis C. Borzi, Assistant Sec'y of Labor, U.S. Dep't of Labor, Emp. Benefits Sec. Admin.) [hereinafter Borzi Statement] ("Multiemployer defined benefit pension plans play a vital role in providing retirement security to millions of American workers and retirees."); Don McIntosh, *What Ever Happened to Retirement?*, NW. LABOR PRESS (June 5, 2009), <http://www.nwlabornpress.org/2009/0605/6-5-09GRetire.html> ("Unionized employers are becoming the last bastion of the traditional pension."); see also *Connolly*, 475 U.S. at 232 (discussing how multiemployer pension plans are commonly called "Taft-Hartley plans" because they are products of labor-management collective bargaining).

5. See 29 U.S.C. § 1001a(a)–(c) (2006). In pertinent part, ERISA states:

(a) Effects of multiemployer pension plans. The Congress finds that—(1) multiemployer pension plans have a substantial impact on interstate commerce and are affected with a national public interest; (2) multiemployer pension plans have accounted for a substantial portion of the increase in private pension plan coverage over the past three decades; (3) the continued well-being and security of millions of employees, retirees, and their dependents are directly affected by multiemployer pension plans; and (4)(A) withdrawals of contributing employers from a multiemployer pension plan frequently result in substantially increased funding obligations for employers who continue to contribute to the plan, adversely affecting the plan, its participants and beneficiaries, and labor-management relations, and (B) in a declining industry, the incidence of employer withdrawals is higher and the adverse effects described in subparagraph (A) are exacerbated.

(b) Modification of multiemployer plan termination insurance provisions and replacement of program. The Congress further finds that—(1) it is desirable to modify the current multiemployer plan termination insurance provisions in order to increase the likelihood of protecting plan participants against benefit losses; and (2) it is desirable to replace the termination insurance program for multiemployer pension plans with an insolvency-based benefit protection program that will enhance the financial soundness of such plans, place primary emphasis on plan continuation, and contain program costs within reasonable limits.

(c) Policy. It is hereby declared to be the policy of this Act—(1) to foster and facilitate interstate commerce, (2) to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans, (3) to provide reasonable protection for the interests of participants and beneficiaries of financially distressed multiemployer pension plans, and (4) to provide a financially self-sufficient program for the guarantee of employee benefits under multiemployer plans.

*Id.*

6. See 29 U.S.C. §§ 1001–461 (2006) (regulating pension plans); see also John C. Kilgannon, *Navigating Inchoate Withdrawal Liability Pension Fund Claims Through Bankruptcy*, 19 BENEFITS L.J. 50, 51 (2006), available at

of MPPAA's design to preserve multiemployer defined benefit pension plans is employer withdrawal liability (EWL).<sup>7</sup> EWL is a share of the unfunded vested benefit liabilities that accrued while an employer was obligated to contribute to the pension plan.<sup>8</sup>

ERISA, as amended by MPPAA, requires a multiemployer plan to impose EWL on an employer that ceases to be obligated to contribute to the plan and withdraws.<sup>9</sup> EWL was intended to prevent employers from abandoning plans with unfunded vested benefit liabilities and dumping their share of those liabilities on remaining employers.<sup>10</sup> Congress envisioned that EWL would save multiemployer pension plans from being undermined by a "vicious downward spiral" of cascading withdrawals as employers raced for the exit to avoid the plan's liabilities.<sup>11</sup>

For the twenty years following the enactment of MPPAA, most multiemployer pension plans enjoyed a relatively stable situation due to good investment markets.<sup>12</sup> Recently a "perfect storm" of economic and regulatory

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[http://www.stevenslee.com/news/Kilgannon\\_BLI%20indd.pdf](http://www.stevenslee.com/news/Kilgannon_BLI%20indd.pdf) (explaining that MPPAA amended ERISA to fill void in existing legislation that did not adequately protect multiemployer pension plans from adverse consequences that arose when employer terminated its participation in plan).

7. See Jeszeck Statement, *supra* note 3, at 1–2 (discussing how MPPAA strengthened funding requirements and made employers liable for their share of unfunded plan benefits upon withdrawal from multiemployer plan). The MPPAA's changes were also meant to discourage withdrawals, which shifts liabilities to PBGC's insurance program. See *id.*

8. See *id.* at 7–8 (explaining how MPPAA made employers liable for their share of unfunded plan benefits when they withdrew from multiemployer plan and how amount is based upon proportional share of plan's unfunded vested benefits).

9. See 29 U.S.C. § 1381 (2006) ("If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.").

10. See Jeszeck Statement, *supra* note 3, at 3–4 ("Liabilities that cannot be collected from a withdrawing employer, for example, one in bankruptcy, were to be rolled over and eventually had to be funded by the plan's remaining employers. The changes were to discourage withdrawals, which shift liabilities to PBGC's insurance program.") (internal quotation marks omitted).

11. See *Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 722 n.2 (1984). Congressional testimony by the Executive Director of the PBGC further explained the problems caused by employers withdrawing from multiemployer plans: A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.

*Id.* (quoting *Pension Plan Termination Insurance Issues: Hearings Before the S. Comm. on Oversight of the H. Comm. on Ways & Means*, 95th Cong. 22 (1978) (statement of Matthew M. Lind)). For a discussion of pre-MPPAA congressional concerns, see *infra* notes 51–63 and accompanying text.

12. See *Assessing the Challenges Facing Multiemployer Pension Plans: Hearing before the S. Comm. on Health, Educ., Labor & Pensions of the Comm. on Educ. & the Workforce*, 112th Cong. 2 (2012) (testimony of Josh Shapiro, Deputy Dir. for Research &

development has endangered multiemployer pension plans, including: underperforming investment markets beginning in 2000 which reduced the value of pension plan assets, the declining number of workers represented by labor unions, new accounting standards for public companies requiring more financial statement disclosure of multiemployer plan participation, and tougher funding standards imposed on plans by the Pension Protection Act of 2006 (PPA).<sup>13</sup>

However, a more ominous threat to the MPPAA regulatory scheme and the survival of multiemployer pension plans is the Bankruptcy Code.<sup>14</sup> The Bankruptcy Code is wreaking havoc on multiemployer pension plans by providing an escape hatch from employer withdrawal liability, as recently highlighted by *In re Hostess Brands, Inc.*<sup>15</sup> By taking advantage of bankruptcy courts, employers are able to discharge their EWL as a debt and as a result avoid paying millions or even billions of dollars in EWL to pension plans.<sup>16</sup> Because of the structure of multiemployer pension plans, the diminished pool of contributing employers remaining in the multiemployer pension plans gets stuck

Educ. Nat'l Coordinating Comm. for Multiemployer Plans) [hereinafter *Assessing the Challenges Facing Multiemployer Pension Plans*] ("Since the establishment of ERISA's pre-funding requirements, multiemployer plans have typically been very well funded. This was especially true in the late 1990's [sic] when exceptionally strong stock market returns resulted in many plans having assets that were significantly larger than their liabilities.").

13. See Jeszeck Statement, *supra* note 3, at 1–2 (enumerating factors contributing to multiemployer plans' funding reduction); see also Denmark, *supra* note 3 (discussing various factors leading to deterioration of multiemployer pension plans); U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-11-79, PRIVATE PENSIONS: CHANGES NEEDED TO BETTER PROTECT MULTIEMPLOYER PENSION BENEFITS 6 (2010).

The funding requirements of PPA took effect just as the nation entered a severe economic recession in December 2007. As a result, Congress enacted the Worker, Retiree, and Employer Recovery Act of 2008 (WRERA) to provide multiemployer plans with temporary relief from some PPA requirements by allowing multiemployer plans to temporarily freeze their funded status at the previous year's level. The freeze allows plans to delay creation of, or updates to, an existing funding improvement plan or rehabilitation plan, or postpone other steps required under PPA.

*Id.* (footnotes omitted).

14. See Kilgannon, *supra* note 6, at 51.

The divergent case law is the product of an apparent conflict between the provisions of MPPAA and the Bankruptcy Code. Indeed, the Bankruptcy Code contemplates the discharge of contingent and unmatured claims; MPPAA provides that a withdrawal liability claim does not ripen unless and until the employer withdraws from the fund.

*Id.*; see also Brief & Memorandum of Law for Nat'l Coordinating Comm. for Multiemployer Plans as Amicus Curiae Supporting Multiemployer Pension Plans' Objections to the Debtor's Section 1113 Mot. at 2, *In re Hostess Brands, Inc., et al.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) [hereinafter NCCMP Brief] ("The evasion by some employers through the bankruptcy process of their withdrawal liability constitutes a persistent and serious problem for multiemployer plans.").

15. 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (filing for Chapter 11 bankruptcy protection); see also NCCMP Brief, *supra* note 14, at 3 (stating that use of bankruptcy process allows employers to evade paying withdrawal liability).

16. For a discussion of corporate use of bankruptcy courts to avoid EWL, see *infra* notes 95–134 and accompanying text.

with the burden of picking up the costs associated with the withdrawal.<sup>17</sup> These increased costs can force other participating employers into insolvency and cause them to discharge their EWL in bankruptcy, sparking a cascade of bankruptcies.<sup>18</sup>

The loss of contributions and EWL from withdrawn bankrupt employers can eventually undermine the solvency of the multiemployer pension plan itself.<sup>19</sup> Once insolvent, a pension plan must cut benefits to the level guaranteed by the Pension Benefit Guaranty Corporation (PBGC), a federal agency funded only by premiums from pension plans.<sup>20</sup> The PBGC provides funding needed to maintain pensions at the guaranteed level.<sup>21</sup> However, the PBGC itself may be driven into insolvency if even one large multiemployer pension plan becomes insolvent and needs PBGC funding.<sup>22</sup>

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17. See *Building a Secure Future for Multiemployer Pension Plans: Hearing Before the Comm. on Health, Educ., Labor & Pensions*, 111th Cong. 1 (2010) (statement of Thomas C. Nyhan, Exec. Dir. and Gen. Counsel of the Teamsters Cent. States Se. and Sw. Areas Pension Fund) [hereinafter Nyhan Statement] (“When a company in a multiemployer plan goes out of business without paying its share of the liabilities, it is the surviving employers in the multiemployer plan that assume the liabilities.”).

18. See *id.* (asserting that surviving employers in multiemployer pension plans cannot continue assuming liabilities of companies that go out of business because “increased contributions are forcing more and more of these employers out of business”).

19. See NCCMP Brief, *supra* note 14, at 4. The NCCMP Brief stated:

In the event that the downward spiral . . . is permitted to continue, there is a real and present risk that the multiemployer plans will fail. In that event, the burden of providing the promised benefits, albeit at a substantial reduction to the detriment of the plan participants and their beneficiaries, will fall to the Pension Benefit Guaranty Corporation (“PBGC”), whose role is statutorily circumscribed and which itself is not sufficiently funded to carry that burden. Ultimately, then, it is the plan participants and their beneficiaries who will suffer the loss of anticipated and necessary retirement income.

*Id.*

20. See 29 U.S.C. § 1426 (2006) (setting maximum guaranteed level for which PGBC will insure retiree benefits when multiemployer pension plan is insolvent and explaining how insolvency status for plan year is determined).

21. See 29 U.S.C. § 1431 (2006) (explaining that if multiemployer pension plan applies for financial assistance, and PGBC verifies that plan is or will be insolvent, PGBC will provide financial assistance in amount sufficient to enable plan to pay basic benefits).

22. See PENSION BENEFIT GUAR. CORP., 2011 PBGC ANNUAL REPORT iv (2011), available at <http://www.pbgc.gov/documents/2011-annual-report.pdf>. The PBGC Annual Report stated:

More than 10 million of America’s workers and retirees participate in and rely on multiemployer plans. For decades, multiemployer plans were in relatively good health, even in the face of industry decline. Unfortunately, for many multiemployer plans, that is no longer true. Many are substantially underfunded; for some, the traditional remedies of increasing funding or reducing future benefit accruals won’t be enough. PBGC’s multiemployer pension insurance works very differently from our single-employer program. PBGC has fewer tools to work with multiemployer plans, and we cannot step in until plans are already insolvent, by which time other remedies are no longer possible. In the past year, as a result of additional failures, the financial deficit of our multiemployer program increased sharply, from \$1.4 billion last year to \$2.8 billion as of September 30, 2011. The greater challenge, however, comes from those plans that have not yet failed: our estimate of our reasonably possible obligations (obligations to participants), described in our financial statements, increased to \$23 billion.

This comment examines how the Bankruptcy Code undermines the retirement security goals of ERISA and MPPAA. First, Part II traces the development of multiemployer pension plans and the regulatory scheme.<sup>23</sup> Next, Part III discusses how withdrawal liability functions and how employer withdrawals affect the other employers contributing to a multiemployer pension plan.<sup>24</sup> Part IV addresses the Bankruptcy Code's treatment of withdrawal liability.<sup>25</sup> Finally, Part V analyzes the impact of discharging withdrawal liability by discussing *In re Hostess Brands, Inc.*<sup>26</sup>

## II. THE NATURE AND REGULATION OF MULTIEMPLOYER PENSION PLANS

### A. *The Nature of Multiemployer Plans*

A multiemployer pension plan is a pooled trust into which multiple employers, usually within a single type of industry, are required to contribute in order to fund their employees' pensions upon retirement.<sup>27</sup> The amount that employers are required to contribute generally depends on the collective bargaining agreement they negotiated with the labor union or unions representing their employees.<sup>28</sup> The employers' contributions are typically dollars—or cents—per unit of time that an employee works.<sup>29</sup> The contributions are paid periodically by the employers to the pension plan trust and then are pooled.<sup>30</sup> After working for a certain length of time, an employee

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*Id.*; see also NCCMP Brief, *supra* note 14, at 4 (describing negative impact of requiring other employers in MEPP to assume withdrawal liability of insolvent employer).

23. For a discussion of the development of ERISA and MPPAA, see *infra* notes 27–62 and accompanying text.

24. For a discussion of employment withdrawal liability, see *infra* notes 63–91 and accompanying text.

25. For a discussion of withdrawal liability in bankruptcy proceedings, see *infra* notes 92–132 and accompanying text.

26. For an analysis of *Hostess* and discussion of the ramifications of discharging employer withdrawal liability, see *infra* notes 133–80 and accompanying text.

27. See 29 U.S.C. § 1002(37)(A) (2006) (stating that multiemployer plans are plans “to which more than one employer is required to contribute . . . which is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer”); see also *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 605 (1993) (explaining that multiemployer pension plans involve more than one employer contributing, and contributions made by participating employers are pooled into general funds available to pay any benefit obligation of plan); Nyhan Statement, *supra* note 17, at 2 (“Multiemployer pension plans are collectively bargained, jointly administered pension plans funded by a number of contributing employers that are often in the same industry.”).

28. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 217 (1986).

The Trust receives contributions from several thousand employers under written collective-bargaining agreements covering employees . . . [u]nder these collective-bargaining agreements, the employers agree to contribute a certain amount to the Pension Plan, with the actual amount contributed by each employer determined by multiplying their employees' hours of service by a rate specified in the current agreement.

*Id.*

29. See *id.*

30. See *Concrete Pipe & Prods.*, 508 U.S. at 605 (explaining how contributions made

obtains a vested right to secure benefits upon retirement.<sup>31</sup>

Approximately ten million workers are covered by 1,400 multiemployer plans.<sup>32</sup> Industries where workers are typically covered by multiemployer pension plans include: construction, retail, food, garment manufacturing, mining, and trucking.<sup>33</sup> An important aspect of multiemployer pension plans is the portability of benefits, which enables employees to move easily between employers contributing to the same plan while continuing to accrue pension benefits.<sup>34</sup>

Multiemployer pension plans are important because they provide a private source of economic security to the nation's workers.<sup>35</sup> They are also beneficial because they provide retirement benefits in industries where it is unlikely that individual employers would establish single employer pension plans.<sup>36</sup> Multiemployer pension plans also help to ensure that the employers participating in the plans have access to a trained labor force.<sup>37</sup> As Congress

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by participating employers are pooled in general fund available to pay any benefit obligation of plan).

31. *See id.* at 606 (explaining how employees obtain vested rights to secure benefits upon retirement).

32. *See* Jeszeck Statement, *supra* note 3, at 1 (noting that in 2009 there were about 1,500 multiemployer plans that covered more than 10.4 million workers and retirees).

33. *See id.* (noting multiemployer plans cover workers in trucking, retail, food, construction, mining, and garment industries).

34. *See Concrete Pipe & Prods.*, 508 U.S. at 605–06 (“To receive benefits, an employee participating in such a plan need not work for one employer for any particular continuous period. Because service credit is portable, employees of an employer participating in the plan may receive such credit for any work done for any participating employer.”); *see also* Jeszeck Statement, *supra* note 3, at 1 (explaining that multiemployer pension plans provide portability of benefits because “[w]orkers can continue accruing pension benefits when they change jobs if their new employer is contributing employer in same plan”). This is particularly important to workers in industries like construction, where job changes are frequent throughout employees’ careers. *See id.*

35. *See* NCCMP Brief, *supra* note 14, at 4–5 (explaining public interest served by multiemployer pension plans). For a discussion of congressional findings regarding the importance of multiemployer pension plans, *see supra* note 5 and accompanying text.

36. *See Concrete Pipe & Prods.*, 508 U.S. at 606.

Multiemployer plans like the one before us have features that are beneficial in industries where ‘there [is] little if any likelihood that individual employers would or could establish single-employer plans for their employees . . . [.] where there are hundreds and perhaps thousands of small employers, with countless numbers of employers going in and out of business each year, [and where] the nexus of employment has focused on the relationship of the workers to the union to which they belong, and/or the industry in which they are employed, rather than to any particular employer.’

*Id.* (quoting *Multiemployer Pension Plan Termination Insurance Program: Hearings Before the S. Comm. on Oversight of the H. Comm. on Ways & Means*, 96th Cong. 50 (1979) (statement of Robert A. Georgine, Chairman, Nat’l Coordinating Comm. for Multiemployer Plans)).

37. *See Concrete Pipe & Prods.*, 508 U.S. at 606–07.

Multiemployer plans provide the participating employers with such labor market benefits as the opportunity to offer a pension program (a significant part of the covered employees’ compensation package) with cost and risk-sharing mechanisms advantageous to the employer. The plans, in consequence, help ensure that each participating employer will have access to a trained labor force whose members are able to move from one employer and one job to another without losing service



has stated, multiemployer pension plans are of national public interest and are vital to the security of millions of employees, retirees, and their dependents.<sup>38</sup>

### B. *The Federal Regulation of Multiemployer Pension Plans*

Multiemployer pension plans have been in use since the 1940s.<sup>39</sup> At first, they were established and controlled solely by the unions.<sup>40</sup> However, spurred by the realization of the importance of these plans and concerned with the improper administration of the plans, Congress began regulating them in 1947.<sup>41</sup>

#### 1. *Taft-Hartley Act*

Congress's first attempt at regulating multiemployer pension plans was through the Taft-Hartley Act.<sup>42</sup> The Taft-Hartley Act dictates the structure of multiemployer pension plans.<sup>43</sup> It requires that plans be maintained as trusts with an equal number of labor and management trustees administering the plans, and it also requires that the plans be maintained for the exclusive benefit of the employees of contributing employers.<sup>44</sup>

#### 2. *ERISA*

In 1974, Congress enacted ERISA, a "comprehensive and reticulated statute."<sup>45</sup> The purpose of ERISA was to provide a uniform federal regulatory system over employee benefit plans in order to secure workers' pension benefits.<sup>46</sup> Congress recognized the societal importance of employer-sponsored

credit toward pension benefits.

*Id.*

38. For a discussion of congressional findings regarding the importance of multiemployer pension plans, see *supra* note 5 and accompanying text.

39. See Daniel A. Etna, *MPPAA Withdrawal Liability Assessment: Letting the Fox Guard the Henhouse*, 14 *FORDHAM URB. L.J.* 211, 216–17 (discussing history of multiemployer pension plans in United States and how Taft-Hartley Act furnished flexible framework for participants in labor relations field to administer pension plans).

40. See *id.* at 216 (explaining beginning of multiemployer pension plans).

41. See *id.* at 217 (discussing Taft-Hartley Act and how there was concern over abuse and improper administration of pension plans).

42. See 29 U.S.C. §§ 141–87 (2006) (regulating multiemployer pension plans).

43. See Etna, *supra* note 39, at 217 (discussing history of multiemployer pension plans in United States and its interaction with Taft-Hartley Act).

44. See 29 U.S.C. § 186(c)(5)(B) (2006) (stating that board of trustees is comprised of one-half employer appointees and one-half union appointees); see also *Nat'l Labor Relations Bd. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("Congress directed that union welfare funds be established as written formal trusts, and that the assets of the funds be 'held in trust,' and be administered 'for the sole and exclusive benefit of the employees . . . and their families and dependents . . . .").

45. *Nachman Corp. v. Pension Benefit Guar. Corp.*, 446 U.S. 359, 361 (1980) (discussing development of ERISA).

46. See *AETNA Health Inc. v. Juan Davila*, 542 U.S. 200, 208 (2004) ("Congress enacted ERISA to 'protect . . . the interests of participants in employee benefit plans and their beneficiaries' by setting out substantive regulatory requirements for employee benefit plans and to 'provid[e] for appropriate remedies, sanctions, and ready access to the Federal

retirement plans and wanted to guarantee that “if a worker has been promised a defined pension benefit upon retirement—and if he has fulfilled whatever conditions are required to obtain a vested benefit—he actually will receive it.”<sup>47</sup> Multiemployer pension plans are among the retirement plans subjected to ERISA’s comprehensive regulatory scheme, including: reporting and disclosure requirements; minimum standards for participation, vesting, benefit accrual, and funding; standards of fiduciary conduct; and enforcement provisions.<sup>48</sup>

ERISA also established the PBGC, a federal government agency which insures against pension plan terminations, and directed it to create a pension benefit guaranty program for multiemployer pension plans that would be separate from the guaranty program for single employer pension plans.<sup>49</sup> The payment of guaranteed benefits by the PBGC for multiemployer pension plans was to become mandatory on January 1, 1978.<sup>50</sup> During the intervening period, Congress became concerned with the number of plans that were experiencing extreme financial hardship.<sup>51</sup> Congress directed the PGBC to analyze the problems faced by multiemployer pension plans and recommend legislation to help correct the problems.<sup>52</sup>

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courts.”) (quoting 29 U.S.C. § 1001(b)); *see also* Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 720 (1984) (“Among the principal purposes of this ‘comprehensive and reticulated statute’ was to ensure that employees and their beneficiaries would not be deprived of anticipated retirement benefits by the termination of pension plans before sufficient funds have been accumulated in the plans.”).

47. *Nachman Corp.*, 446 U.S. at 375 (explaining why Congress enacted ERISA).

48. *See* 29 U.S.C. §§ 1001–461 (2006) (establishing regulations for pension plans); *see also* *Trs. of Amalgamated Ins. Fund v. McFarlin’s Inc.*, 789 F.2d 98, 102 (2d Cir. 1986) (“ERISA regulated the funding, management, operation and benefit provisions of private pension plans and established a program to insure employee benefits in the event of plan termination.”).

49. *See* 29 U.S.C. § 1302 (2006) (creating Pension Benefit Guaranty Corporation); *see also* *R.A. Gray & Co.*, 467 U.S. at 720.

Title IV of ERISA, 29 U.S.C. § 1301 et seq., created a plan termination insurance program, administered by the Pension Benefit Guaranty Corporation (“PBGC”), a wholly owned Government corporation within the Department of Labor, § 1302. The PBGC collects insurance premiums from covered pension plans and provides benefits to participants in those plans if their plan terminates with insufficient assets to support its guaranteed benefits. For pension plans maintained by single employers, the PBGC’s obligation to pay benefits took effect immediately upon enactment of ERISA in 1974. For multiemployer pension plans, however, the payment of guaranteed benefits by the PBGC was not to become mandatory until January 1, 1978.

*Id.*; Jeszeck Statement, *supra* note 3, at 3 (noting that Title IV of ERISA created PBGC, which operates two distinct pension insurance programs, one for multiemployer plans and one for single employer plans).

50. *See* *R.A. Gray & Co.*, 467 U.S. at 720 (explaining development of ERISA and role of PGBC).

51. *See id.* at 721 (“As the date for mandatory coverage of multiemployer pension plans approached, Congress became concerned that a significant number of plans were experiencing extreme financial hardship. This, in turn, could have resulted in the termination of numerous plans, forcing the PBGC to assume obligations in excess of its capacity.”).

52. *See* S. Rep. No. 95-570, at 1–4 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4128, 4128–131 (directing PBGC to analyze problems faced by multiemployer plans and recommend legislative action); *see also* *R.A. Gray & Co.*, 467 U.S. at 730 (“One of the primary problems Congress identified under ERISA was that the statute encouraged employer

The PBGC's key finding was that multiemployer pension plans were not sufficiently protected by ERISA due to employer withdrawals from plans.<sup>53</sup> ERISA allowed employers to withdraw from pension plans without paying for the benefits earned by their employees.<sup>54</sup> The PBGC found that employer withdrawals reduced the amount of contributions to the pension plans and forced other participating employers to pay higher contributions to cover the costs of the plans, including debts owed by employers who no longer participated in the plans.<sup>55</sup> Calling it a "vicious downward spiral," the PBGC explained that as a result of the rising costs, other employers would be encouraged to withdraw until eventually the plan would no longer be sustainable.<sup>56</sup>

To counteract this problem, the PBGC suggested that the withdrawing employer be required to pay part of the plan's unfunded vested liabilities that accumulated during the employer's participation in the plan.<sup>57</sup> The PBGC thought the penalty of withdrawal liability would discourage withdrawals and

withdrawals from multiemployer plans.").

53. See *R.A. Gray & Co.*, 467 U.S. at 722.

The basic problem with the withdrawal rules is that they are designed primarily to protect PBGC. They do not provide an efficient mechanism for reducing the burden of withdrawal on the plan and remaining employers. They may even encourage withdrawals in some instances (e.g., where termination may be imminent). Changes in the withdrawal rules should be considered: (1) to provide relief to plans without increasing the burden on the insurance system, (2) to provide a disincentive to voluntary employer withdrawals, (3) to reduce or remove disincentives to plan entry, and (4) to work with, instead of against, the termination liability provisions.

*Id.* (quoting Pub. L. No. 95-214, 91 Stat. 1501 (1977)) (internal citations omitted).

54. See *Trs. of Amalgamated Ins. Fund v. McFarlin's, Inc.*, 789 F.2d 98, 102 (2d Cir. 1986) (explaining how ERISA's original structure allowed employers to withdraw from multiemployer pension plans without incurring withdrawal liability). This original structure left the plan's remaining contributing employers to pay for benefits promised to, and earned by, withdrawing employers' employees. See *id.*

55. See *R.A. Gray & Co.*, 467 U.S. at 722 n.2.

Congressional testimony by the Executive Director of the PBGC further explained the problems caused by employers withdrawing from multiemployer plans: 'A key problem of ongoing multiemployer plans, especially in declining industries, is the problem of employer withdrawal. Employer withdrawals reduce a plan's contribution base. This pushes the contribution rate for remaining employers to higher and higher levels in order to fund past service liabilities, including liabilities generated by employers no longer participating in the plan, so-called inherited liabilities. The rising costs may encourage—or force—further withdrawals, thereby increasing the inherited liabilities to be funded by an ever-decreasing contribution base. This vicious downward spiral may continue until it is no longer reasonable or possible for the pension plan to continue.'

*Id.* (quoting *Pension Plan Termination Insurance Issues: Hearings before the S. Comm. on Oversight of the H. Comm. on Ways & Means*, 95th Cong. 22 (1978) (statement of Matthew M. Lind)).

56. See *id.* (describing domino effect of employer withdrawals).

57. See *Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 216 (1986) ("To alleviate the problem of employer withdrawals, the PBGC suggested new rules under which a withdrawing employer would be required to pay whatever share of the plan's unfunded liabilities was attributable to that employer's participation.") (citation omitted) (internal quotation marks omitted).

lessen the financial impact on the plan in the event the employer did withdraw.<sup>58</sup>

### 3. MPPAA

To prevent the “vicious downward spiral,” Congress followed the PBGC’s recommendation and enacted the MPPAA in 1980.<sup>59</sup> The MPPAA’s purpose was to provide a special regulatory scheme under ERISA that further protected and encouraged these plans.<sup>60</sup> The MPPAA overhauled the original ERISA provisions regarding the multiemployer plan guaranty program to provide some benefit protections in the event of plan insolvency.<sup>61</sup> Importantly, among MPPAA’s provisions was EWL, which regulates employer withdrawals from multiemployer pension plans.<sup>62</sup>

## III. EMPLOYEE WITHDRAWAL LIABILITY

Perhaps the most notable feature of the MPPAA is EWL, which “requires a

58. See *R.A. Gray & Co.*, 467 U.S. at 723 n.3 (1984).

Again, the PBGC’s Executive Director provided a more elaborate explanation: ‘To deal with this problem, our report considers an approach under which an employer withdrawing from a multiemployer plan would be required to complete funding its fair share of the plan’s unfunded liabilities. In other words, the plan would have a claim against the employer for the inherited liabilities which would otherwise fall upon the remaining employers as a result of the withdrawal . . . . We think that such withdrawal liability would, first of all, discourage voluntary withdrawals and curtail the current incentives to flee the plan. Where such withdrawals nonetheless occur, we think that withdrawal liability would cushion the financial impact on the plan.’

*Id.* (quoting *Pension Plan Termination Insurance Issues: Hearings Before the S. Comm. on Oversight of the H. Comm. on Ways & Means*, 95th Cong. 22 (1978) (statement of Matthew M. Lind).

59. See *id.* at 722 n.2 (discussing “vicious downward spiral” resulting from employer withdrawals); see also *id.* at 723–25 (tracing PBGC’s withdrawal liability proposal from time it was included in policy recommendations submitted to Congress on February 27, 1979 through September 26, 1980 creation of MPPAA).

60. See Jeszeck Statement, *supra* note 3, at 3.

In 1980, Congress sought to protect worker pensions in multiemployer plans by enacting the Multiemployer Pension Plan Amendments Act (“MPPAA”). Among other things, MPPAA (1) strengthened funding requirements to help ensure that plans accumulate enough assets to pay for promised benefits, and (2) made employers, unless relieved by special provisions, liable for their share of unfunded plan benefits when they withdrew from a multiemployer plan.

*Id.* (footnotes omitted); see also NCCMP Brief, *supra* note 14, at 4–5 (“Congress enacted the MPPAA to protect multiemployer pension plans because those plans serve important functions in the national economy and as a private source of economic security to the nation’s workers.”). For a discussion of the importance of multiemployer pension plans to society, see *supra* note 5 and accompanying text.

61. See 29 U.S.C. § 1001a(b) (2006). For the full text of 29 U.S.C. § 1001a(b), see *supra* note 5.

62. See *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 609 (1993) (explaining that under MPPAA provisions, employers who withdraw from multiemployer pension plans incur withdrawal liability, which is fixed and certain debt to pension plan).

withdrawing employer to compensate a pension plan for benefits that have already vested with the employees at the time of the employer's withdrawal."<sup>63</sup> EWL was meant to correct the problem of employers terminating participation in multiemployer pension plans and leaving behind unfunded pension liabilities for their employees.<sup>64</sup> The unfunded pension liabilities left behind by employers withdrawing from the plan is borne by employers remaining in the plan.<sup>65</sup> Until the EWL scheme was put in place, there was an incentive for an employer to "rush to the exit" to avoid being the last man standing to pay the unfunded liabilities.<sup>66</sup>

A complete withdrawal from a multiemployer pension plan occurs when there is either a permanent termination of an employer's obligation to contribute to the pension plan, or the employer permanently ceases all covered operations under the plan.<sup>67</sup> An employer's partial withdrawal can also trigger EWL.<sup>68</sup> A partial withdrawal occurs in one of three circumstances: (1) when an employer is no longer obligated to contribute, (2) when there has been a severe shrinkage amounting to a seventy percent contribution decline, or (3) when there has been a cessation of an obligation to contribute to a facility.<sup>69</sup> There are special withdrawal liability rules that apply for certain industries, such as construction.<sup>70</sup>

Under the MPPAA, employers withdrawing from multiemployer pension plans owe a fixed amount of debt to the pension plan.<sup>71</sup> A withdrawing employer from an underfunded multiemployer pension plan is liable for a

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63. Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 734 (1984); see also Judith F. Mazo & Susan Lee, *Multiemployer Pension Plan Withdrawal Liability*, 23 BENEFITS L.J. 36, 36 (2010), available at <http://www.ifebp.org/inforequest/0159257.pdf> (noting that employer withdrawal liability "was the most visible and controversial feature of Multiemployer Pension Plan Amendments Act of 1980").

64. See Jeszeck Statement, *supra* note 3, at 3-4 ("Liabilities that cannot be collected from a withdrawing employer, for example, one in bankruptcy, were to be 'rolled over' and eventually had to be funded by the plan's remaining employers. The changes were to discourage withdrawals, which shift liabilities to PBGC's insurance program.") (footnote omitted).

65. See *id.* ("Liabilities that cannot be collected from a withdrawing employer, for example, one in bankruptcy, were to be 'rolled over' and eventually had to be funded by the plan's remaining employers.") (footnote omitted).

66. For a discussion of the pre-MPPAA concerns regarding the vicious downward spiral that led to the creation of EWL, see *supra* notes 51-62 and accompanying text.

67. See 29 U.S.C. § 1383 (2006) (defining what constitutes complete employer withdrawal); see also Kilgannon, *supra* note 6, at 51 (explaining what constitutes complete withdrawal); Mazo & Lee, *supra* note 63, at 40 (explaining that withdrawal is not triggered by employer's change in identity due to merger or change in structure of business so long as obligation to contribute continues).

68. See 29 U.S.C. § 1385 (2006) (defining partial withdrawals from pension plans); see also Mazo & Lee, *supra* note 63, at 44 (explaining that employers can be liable for EWL because of partial withdrawal and discussing what can trigger partial withdrawal).

69. See Mazo & Lee, *supra* note 63, at 44 (discussing what triggers partial withdrawal).

70. See *id.* at 37 (describing special withdrawal liability rules that apply to construction, entertainment, trucking, moving, and warehousing industries).

71. See Pension Benefit Guar. Corp. v. R.A. Gray & Co., 467 U.S. 717, 725 (1984) (explaining that MPPAA "requires that an employer withdrawing from a multiemployer pension plans pay a fixed and certain debt to the pension plan.").

proportionate share of the plan's unfunded vested benefits.<sup>72</sup> The unfunded vested benefits are "the difference between the present value of vested benefits (benefits that are currently being paid to retirees and that will be paid in the future to covered employees who have already completed some specified period of service) and the current value of the plan's assets."<sup>73</sup>

The EWL represents a withdrawing employer's accelerated contribution of the funds needed to pay their employees' pension benefits which have vested before the employer withdraws from the multiemployer pension plan, but which have not been funded at that date.<sup>74</sup> Every year, the multiemployer pension plan's unfunded vested liabilities are divided among the employers that were participating in the plan and required to contribute that year.<sup>75</sup> This allocation is based upon what the employer was obligated to pay over the preceding five years.<sup>76</sup> Additionally, any unpaid liability from withdrawn employers that is deemed uncollectible in a year is allocated among the participating employers that year.<sup>77</sup> When an employer withdraws from a plan, in addition to the employer being liable for the EWL, all other "trades and businesses" under common control with the withdrawn employer are also liable even if they did not contribute to the plan.<sup>78</sup>

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72. *See id.* ("This withdrawal liability is the employer's proportionate share of the plan's 'unfunded vested benefits,' calculated as the difference between the present value of vested benefits and the current value of the plan's assets.") (citations omitted).

73. *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 609 (1993) (citations omitted) (internal quotation marks omitted).

74. *See Trs. of Amalgamated Ins. Fund v. McFarlin's Inc.*, 789 F.2d 98, 103 (2d Cir. 1986) (explaining how withdrawal liability is calculated under MPPAA).

75. *See Mazo & Lee, supra* note 63, at 41 (explaining that change in plan's unfunded vested liabilities, whether up or down, is allocated each year to employers that were required to contribute that year).

76. *See id.* (noting that amount allocated to each employer is based on what they were obligated to pay into plan over preceding five years).

77. *See id.* (explaining that every year, multiemployer pension plan trustees determine amount of liability assessed to previously withdrawn employers that is uncollectible and that amount is also allocated among the contributing employers). When the employer withdraws, the amount of its liability is sum of what remains of annual allocations determined by trustees. *See id.*

78. *See* 29 U.S.C. § 1301(b)(1) (2006) ("For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer."); *see also* *Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC*, 668 F.3d 873, 876 (7th Cir. 2011), *cert. denied*, 132 S. Ct. 2688 (2012) ("Under the MPPAA, all trades or businesses under common control are treated as constituting a single employer for purposes of determining withdrawal liability. Each trade or business under common control is jointly and severally liable for any withdrawal liability of any other.") (citations omitted) (internal quotation marks omitted); David R. Levin, *Bankruptcy and Employee Benefit Plans—ERISA and the Bankruptcy Code*, 14 (1998), available at Westlaw N98EBAB ABA-LGLED N-1.

Even though a debtor's withdrawal liability may be limited by bankruptcy proceedings, the debtor's bankruptcy does not impair the multiemployer plan's right to hold members of the debtor's controlled group jointly and severally liable for the full amount of the employer's withdrawal liability. Once it has been determined that the debtor is part of a controlled group, a copy of the notice and demand for withdrawal liability should be sent by certified mail, return receipt requested, to the members of the controlled group that have not sought relief under

Termination of a multiemployer pension plan can occur either by amending the plan to “freeze” it or by mass withdrawal of contributing employers.<sup>79</sup> When a plan is frozen, it causes a cessation of the accrual of benefits and any further vesting.<sup>80</sup> However, the employers remain obligated to contribute to the plan at a rate sufficient to meet the funding requirements for the plan and the plan continues to pay out frozen benefits.<sup>81</sup> In the event of a mass employer withdrawal, each employer is required to pay a withdrawal liability.<sup>82</sup> Special provisions ensure that the amount of each employer’s liability adds up to the plan’s total unfunded liability for vested benefits.<sup>83</sup>

There are also special rules for insolvent and bankrupt employers.<sup>84</sup> When Congress created the MPPAA, it tried to strike a balance among the interests of debtors, creditors, and pension plans.<sup>85</sup> As a result, there is a limitation on the EWL assessed to insolvent employers undergoing liquidation or dissolution.<sup>86</sup> When an employer is insolvent or dissolving, half of the EWL is contingent on whether the employer has enough money left to pay the plan after they have liquidated their assets and paid their other debts.<sup>87</sup> When this happens, there is an increase in the unfunded pension liabilities in those pension funds to which the employer was obligated to contribute.<sup>88</sup>

Congress anticipated that insolvent employers would cause an increase in the unfunded pension liabilities; therefore it instructed the PBGC to establish a voluntary program to reimburse multiemployer plans for EWL that becomes

the Bankruptcy Code.

*Id.*

79. *See Mazo & Lee, supra* note 63, at 46 (discussing how multiemployer pension plans are terminated and how MPPAA redefined concept of “termination” for multiemployer pension plans).

80. *See id.* (explaining that termination of multiemployer pension plans is accomplished by freezing plans, which ceases accrual of benefits and any further vesting, as opposed to PBGC taking control of plan).

81. *See id.* (discussing what happens to terminated multiemployer pension plans once frozen).

82. *See id.* at 47 (explaining that mass withdrawal, which is presumed to occur when all employers withdraw within three years, triggers withdrawal liability).

83. *See id.* (describing how special provisions ensure that amount of liability each withdrawing employer is required to pay equals plan’s total unfunded liability for vested benefits).

84. *See id.* at 40 (explaining how insolvency liquidations impact withdrawal liability).

85. *See* 29 U.S.C. § 1405(a) (2006) (setting limitation on withdrawal liability for insolvent employers that are liquidating); *see also* *Trs. of Amalgamated Insurance Fund v. McFarlin’s Inc.*, 789 F.2d 98, 105 (2d Cir. 1986) (“Congress simply recognized that in certain limited circumstances the interests of the withdrawing employer outweighed those of the employees whose benefits were at stake and of other employers in the Plan who would be required partially to fund the shortfall resulting from the withdrawal.”).

86. *See* 29 U.S.C. § 1405(b) (2006) (setting unfunded vested benefits allocable to insolvent employer undergoing liquidation or dissolution); *see also McFarlin’s*, 789 F.2d at 105 (explaining 29 U.S.C. § 1405).

87. *See Mazo & Lee, supra* note 63, at 40 (noting how employers that are insolvent or going through dissolution have their EWL assessed).

88. *See id.* at 46 (explaining how multiemployer pension plan trustees determine amount of liability assessed to previously withdrawn employers that is uncollectible and how amount allocates among contributing employers). When an employer withdraws, its liability is the sum of what remains of the annual allocations determined by trustees. *See id.*

uncollectible due to proceedings under the Bankruptcy Code or similar proceedings.<sup>89</sup> However, the PBGC never established the program.<sup>90</sup> As a result, when previously assessed EWL is deemed uncollectible, instead of the PBGC reimbursing the plan, the unaccounted-for liability is divided among the remaining diminished pool of contributing employers to the plan.<sup>91</sup>

#### IV. THE BANKRUPTCY CODE'S TREATMENT OF EMPLOYER WITHDRAWAL LIABILITY

Independent of MPPAA developments, during the 1980s, employers were exploring whether reorganization under the Bankruptcy Code could be used to escape collective bargaining agreements with their employees' unions and the employee benefit obligations imposed by those agreements.<sup>92</sup> The U.S. Supreme Court in *National Labor Relations Board v. Bildisco & Bildisco*<sup>93</sup> addressed this intersection between the Bankruptcy Code and the National

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89. See 29 U.S.C. § 1402 (2006).

Required supplemental program to reimburse for payments due from employers uncollectible as a result of employer involvement in bankruptcy case or proceedings; program participation, premiums, etc. By May 1, 1982, the corporation shall establish by regulation a supplemental program to reimburse multiemployer plans for withdrawal liability payments which are due from employers and which are determined to be uncollectible for reasons arising out of cases or proceedings involving the employers under Title 11, or similar cases or proceedings. Participation in the supplemental program shall be on a voluntary basis, and a plan that elects coverage under the program shall pay premiums to the corporation in accordance with a premium schedule, which shall be prescribed from time to time by the corporation. The premium schedule shall contain such rates and bases for the application of such rates as the corporation considers to be appropriate.

*Id.*

90. See DANA M. MUIR, *EMPLOYEE BENEFITS LAW* 1483 (2d ed. 2010) ("Section 4222 provides for the establishment of a supplemental insurance program, funded from voluntary premium payments by multiemployer plans, designed to reimburse participating plans for withdrawal liability assessments that become uncollectible as a result of an employer's filing for bankruptcy. The PBGC never established the program.") (footnote omitted); see also *McFarlin's*, 789 F.2d at 105.

As a further step toward assisting the funds in such circumstances, 29 U.S.C. § 1402(a), (b), requires the government to establish a program under which Multiemployer Pension and Employee Benefit Plans will be reimbursed for withdrawal liability payments that are uncollectible because the withdrawing employer has undergone Chapter 11 or similar proceedings.

*Id.*

91. See *Mazo & Lee*, *supra* note 63, at 41 (explaining that every year multiemployer pension plan trustees determine amount of liability assessed to previously withdrawn employers that is uncollectible, and that amount is also allocated among contributing employers).

92. See Babette A. Ceccotti, *Lost in Transformation: The Disappearance of Labor Policies in Applying Section 1113 of the Bankruptcy Code*, 15 AM. BANKR. INST. L. REV. 415, 415 (2007) (discussing how recently there has been "resurgence in corporate bankruptcies targeting labor costs, pension funding and retiree health benefits obligations[, which] recalls an earlier time when companies saw bankruptcy as a potent instrument in labor-management relations. In the early 1980's, the strategic use of bankruptcy in several high-profile labor disputes . . .").

93. 465 U.S. 513 (1984).



Labor Relations Act, governing labor-management collective bargaining.<sup>94</sup> The Court held that a debtor company undergoing reorganization under the Bankruptcy Code could unilaterally reject a collective bargaining agreement, like any other executory contract, if the debtor could show that “the collective bargaining agreement is burdensome to the estate,” and that “the equities balance in favor of rejection.”<sup>95</sup> The *Bildisco* decision paved the way for even solvent companies to manipulate the Bankruptcy Code and unilaterally abrogate their labor contracts for any reason.<sup>96</sup>

Distressed by the imbalance struck by *Bildisco* against collective bargaining, Congress amended the Bankruptcy Code in 1984 to add Section 1113, which imposes restrictions on the rejection of labor contracts.<sup>97</sup> Section 1113 sets forth a process through which employers must negotiate with labor unions to reach a resolution before a bankruptcy court can approve rejecting the labor contracts.<sup>98</sup> The addition of Section 1113 reflects the congressional view that labor agreements should receive special protections in bankruptcy proceedings that are not extended to other types of executory contracts.<sup>99</sup>

94. See *id.* at 521 (examining Bankruptcy Code and considering whether employers can unilaterally reject collective bargaining agreements).

95. *Id.* (holding that debtor companies can unilaterally reject collective bargaining agreements).

96. See Nicholas J. Brannick, *At the Crossroads of Three Codes: How Employers Are Using ERISA, the Tax Code, and Bankruptcy to Evade Their Pension Obligations*, 65 OHIO ST. L.J. 1577, 1582–83 (2004) (“The *Bildisco* decision opened the doors to employers seeking to reject their labor contracts when those contracts became too burdensome, or simply inconvenient, by obtaining relief in bankruptcy, even when the employer was not insolvent.”); see also Ceccotti, *supra* note 92, at 415–16 (“In the early 1980’s the strategic use of bankruptcy in several high profile labor disputes, fueled by the Supreme Court’s 1984 decision in *NLRB v. Bildisco & Bildisco*, unleashed a storm of protests that companies were abusing the bankruptcy process to target collective bargaining agreements.”) (footnotes omitted).

97. See 11 U.S.C. § 1113 (2006) (restricting when a debtor in possession may reject collective bargaining agreements); see also Ceccotti, *supra* note 92, at 420 (“Enacted in 1984 as part of the Bankruptcy Amendments and Federal Judgeships Act, section 1113 was intended to overturn the Supreme Court’s decision in *NLRB v. Bildisco* with respect to the treatment of collective bargaining agreements in bankruptcy.”) (footnote omitted); Ceccotti, *supra* note 92, at 415–16 (“Soon after the *Bildisco* decision, Congress enacted section 1113 of the Bankruptcy Code to impose restrictions on the ability of a company in bankruptcy to reject a labor agreement.”) (footnote omitted); Ceccotti, *supra* note 92, at 416 (discussing how Congress passed Section 1114 of Bankruptcy Code shortly after passing Section 1113, which restricts elimination of retiree health, life insurance, and disability benefits when company files for bankruptcy).

98. See Brannick, *supra* note 96, at 1583–84 (discussing purpose and impact of Section 1113 of Bankruptcy Code).

99. See Ceccotti, *supra* note 92, at 416.

Sections 1113 and 1114 represent deliberate policy choices by Congress to restrain a debtor’s discretion under federal bankruptcy policy by prescribing special treatment for collective bargaining agreements and retiree insurance obligations not applicable to executory contracts generally or to other types of monetary obligations. Balancing these non-bankruptcy interests against federal bankruptcy policy, Congress determined that labor agreements and retiree health insurance should be afforded special protections notwithstanding the prerogatives otherwise available to a debtor in a chapter 11 bankruptcy.

*Id.* (footnotes omitted).

Section 1113 was added to prevent the strategic use of the Bankruptcy Code by employers seeking to reject labor contracts, and to save employees from bearing the burden of the employer's bankruptcy.<sup>100</sup>

Despite the best of congressional intentions in enacting Section 1113, employers have continued to strategically use the bankruptcy courts to avoid obligations to their employees, including the termination of pension plans sponsored by the companies.<sup>101</sup> The use of Section 1113 proceedings to avoid pension obligations gained notoriety in the single employer plan context.<sup>102</sup> More recently, multiemployer pension plan contributors are resorting to the bankruptcy device to annul their collective bargaining agreements, avoid the cost of future collectively bargained contributions to the multiemployer plan, withdraw from the multiemployer plan, and evade EWL.<sup>103</sup> Moreover, employers gain the advantage of transferring their share of the unfunded pension liabilities to their business competitors remaining in the plan.<sup>104</sup>

When an employer declares bankruptcy, a conflict arises between the Bankruptcy Code and the MPPAA.<sup>105</sup> Certain provisions in the Bankruptcy

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100. *See id.* at 418 (discussing congressional intention for creating Section 1113); *see also* *Adventure Res., Inc. v. Holland*, 137 F.3d 786, 797–98 (4th Cir. 1998) (explaining that Congress created Section 1113 to stop use of bankruptcy law as offensive weapon in labor relations).

101. *See* Ceccotti, *supra* note 92, at 417 (explaining that despite addition of Sections 1113 and 1114 of Bankruptcy Code, there has been wave of bankruptcy cases where employers have used bankruptcy courts strategically as cost-cutting tool). This permits employers to reject collective bargaining agreements, reduce or eliminate retiree health obligations, and terminate defined benefit pension plans. *See id.*; *see also id.* at 419.

The heavy focus on labor and benefit cost cuts in the 'transformation' bankruptcies offers strong proof that the substantive labor policies incorporated into the Bankruptcy Code through section 1113 are not operating as Congress intended. Despite the legislative choice made by Congress to restrain bankruptcy prerogatives where labor agreements are concerned, debtors have been free to use section 1113 and section 1114 to take broad aim at collective bargaining agreements, pension plans and retiree benefits.

*Id.*

102. *See* Brannick, *supra* note 96, at 1583–85 (discussing employers' use of bankruptcy courts and Section 1113 to avoid pension obligations to single employer pension plans).

103. *See* Brannick, *supra* note 96, at 1585 ("The recent use of Chapter 11 by employers with large unfunded pension obligations mimics the use of *Bildisco* and Chapter 11 by employers with unwanted labor contracts. As it did after *Bildisco*, Congress must intervene to prevent the abuse of Chapter 11 by employers seeking to reorganize."). For a further discussion of employer contributors using the Bankruptcy Code to avoid obligations, see *supra* notes 101–02 and accompanying text.

104. *See* Mazo & Lee, *supra* note 63, at 41 (explaining that every year multiemployer pension plan trustees determine amount of liability assessed to previously withdrawn employers that is uncollectible and that amount is allocated among contributing employers).

105. *See* Kilgannon, *supra* note 6, at 51 (discussing conflict between MPPAA and Bankruptcy Code).

The divergent case law is the product of an apparent conflict between the provisions of MPPAA and the Bankruptcy Code. Indeed, the Bankruptcy Code contemplates the discharge of contingent and claims; MPPAA provides that a withdrawal liability claim does not ripen unless and until the employer withdraws from the fund.

*Id.*

Code allow for the discharge of contingent and unmatured claims.<sup>106</sup> Under the MPPAA, a “withdrawal liability claim does not ripen unless and until the employer withdraws from the fund.”<sup>107</sup> In the bankruptcy context, an employer’s withdrawal from a multiemployer pension plan can happen either before they petition for bankruptcy protection (pre-petition) or after they file for protection (post-petition).<sup>108</sup>

When an employer withdraws from the multiemployer pension plan before the bankruptcy court confirms their plan of reorganization, the EWL assessed to the employer ripens and may be asserted as a claim against the bankruptcy estate.<sup>109</sup> The Bankruptcy Code sets forth an order of priority for the payment of claims against the estate of a debtor.<sup>110</sup> However, neither the Bankruptcy Code nor ERISA classify EWL.<sup>111</sup> As a result, courts have found that EWL does not have priority status.<sup>112</sup> The EWL is treated as a general unsecured claim and the pension fund receives a portion of their claim along with other unsecured claimants from the bankruptcy estate.<sup>113</sup> The money unsecured claimants receive is usually a fraction of their claim against the bankruptcy estate.<sup>114</sup> In exchange for the money, the EWL, and consequently the employer’s obligation to contribute to the fund, is discharged when the bankruptcy court confirms the employer’s reorganization plan.<sup>115</sup>

Conversely, when an employer has not withdrawn from a multiemployer pension plan prior to the bankruptcy court’s confirmation of the employer’s reorganization, they have not yet accrued EWL and it cannot be asserted as a claim against the bankruptcy estate.<sup>116</sup> Under those circumstances, a debtor-employer may petition the court to allow it to reject any and all collective

106. *See id.* (explaining that Bankruptcy Code allows for discharge of certain debts).

107. *Id.*

108. *See id.* at 52–53 (explaining that timing of employer’s withdrawal from plan is very important in bankruptcy context, and discussing difference between withdrawal that occurs before employer files for bankruptcy protection and one that occurs following bankruptcy plan confirmation).

109. *See id.* (discussing when EWL ripens as claim and can be asserted against bankruptcy estate).

110. *See Levin, supra* note 78, at 13 (describing how claims are prioritized in bankruptcy proceedings and discussing how withdrawal liability claims are treated in bankruptcy proceedings).

111. *See id.* (explaining that EWL is not given priority status by either ERISA or Bankruptcy Code).

112. *See id.* (“The status of withdrawal liability claims against an employer which has filed for bankruptcy protection is not expressly dealt with in either the Bankruptcy Code or ERISA. However, courts have generally held that a claim for withdrawal liability is not entitled to priority status as an administrative claim.”).

113. *See id.* (noting that courts have generally held that claims for withdrawal liability are not entitled to priority status as administrative claim).

114. *See NCCMP Brief, supra* note 14, at 12 (“[W]ithdrawal liability treated as a general unsecured claim on which the plans will be entitled to pennies on the dollar if anything.”).

115. *See* 11 U.S.C. § 1141(d) (2006) (stating that bankruptcy court’s confirmation of reorganization plan discharges all debts arising before confirmation).

116. *See Kilgannon, supra* note 6, at 51–53 (discussing when claim for EWL can be brought against bankruptcy estate). For a discussion of when an employer is deemed to have withdrawn from a multiemployer pension plan, see *supra* notes 69–72 and accompanying text.

bargaining agreements with its employees' unions and terminate its obligation to contribute to all multiemployer pension plans.<sup>117</sup> The debtor-employer must comply with the procedural and substantive requirements of Bankruptcy Code Section 1113.<sup>118</sup> Bankruptcy courts consider nine elements when considering a Section 1113 motion.<sup>119</sup> Assuming the employer can make the showings required by Section 1113, the court can terminate the debtor-employer's obligation to contribute to the multiemployer pension plan.<sup>120</sup> The termination of the debtor-employer's obligation to contribute to the pension plan constitutes a withdrawal and may trigger EWL to the plan.<sup>121</sup> The EWL is considered a general unsecured claim and is dischargeable by the court.<sup>122</sup>

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117. See Kilgannon, *supra* note 6, at 51–53 (explaining how EWL is treated in bankruptcy proceedings).

118. See 11 U.S.C. § 1113 (2006) (limiting when employers may reject collective bargaining agreements); see also Ceccotti, *supra* note 92, at 424–26 (explaining how statute requires submission of proposal based on reliable information that provides modifications necessary in order for debtor to reorganize and requires good faith bargaining with unions following submission of proposal); WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY ¶ 1113.01 (2009) (explaining that Section 1113 incorporates both procedural and substantive requirements); Jeffrey H. Taub, Audrey Aden Doline & Douglas Mintz, *The Devil (Dog)® is in the Details: Bankruptcy Court Denies Hostess's Motion to Reject Collective Bargaining Agreements on Narrow Factual Grounds*, JDSUPRA LAW NEWS (June 6, 2012), <http://www.jdsupra.com/legalnews/the-devil-dog-is-in-the-details-ban-15523/> (explaining that “[c]ourts are split on the meaning of term ‘necessary to permit the reorganization of the debtor’” and that courts in Second Circuit, where *Hostess* case is being litigated, “use a more flexible approach and analyze the effects that an unmodified CBA would have on the debtors ability to attain financial health”) (citations omitted).

119. See Sharon Levine, S. Jason Teele & Andrew D. Behlmann, *An Overview of Collective Bargaining Agreements, Retiree Medical Benefits, and Pension Issues in Chapter 11*, CORNELL UNIV., INDUS. & LABOR RELATIONS SCHOOL (June 21, 2012), [http://www.ilr.cornell.edu/law/events/upload/20780364\\_2\\_Seminar-Materials-1113-1114-1.pdf](http://www.ilr.cornell.edu/law/events/upload/20780364_2_Seminar-Materials-1113-1114-1.pdf) (explaining that courts' address uniform set of nine elements when deciding Section 1113 motions, and that these factors incorporate procedural and substantive elements of statute); see also COLLIER ON BANKRUPTCY, *supra* note 118, at ¶ 1113.01.

Subsections 1113(b) and (c) set forth the statutory requirements for judicial approval or rejection of a collective bargaining agreement. These subsections overlap and commingle the following procedural and substantive requirements: the debtor in possession or trustee must have made a proposal to the union for changes to the collective bargaining agreement based on the most complete and reliable information available at the time of the proposal; the proposed modifications must be necessary to permit reorganization of the debtor; the proposed modifications must assure that all affected parties are treated fairly and equitably; the debtor in possession or trustee must have provided the union with such relevant information as is necessary to evaluate the proposal, must have met with the collective bargaining representative at reasonable times subsequent to making the proposal and must have negotiated in good faith with the union concerning the proposal; the union must have refused to accept the proposal without good cause; and the balance of the equities must clearly favor rejection of the agreement.

*Id.*

120. See Levine et al., *supra* note 119 (explaining how court may approve rejection if debtors prove all nine elements).

121. For a discussion of when EWL is triggered, see *supra* notes 67–70 and accompanying text.

122. See Levin, *supra* note 78, at 13 (explaining how courts have generally held that claim for withdrawal liability is not entitled to priority status as administrative claim and how courts have held that withdrawal liability is general unsecured claim); see also Kilgannon,

However, the liability for discharged EWL does not stop with the employer-debtor.<sup>123</sup> If the employer-debtor is a member of a controlled group of trades and businesses, any other member of that group that is not part of the bankruptcy filing may be liable for the EWL of the bankrupt employer-debtor.<sup>124</sup> A discharge of EWL applies only to the bankrupt entity and not to any other controlled group member.<sup>125</sup>

This loophole to withdrawal liability has led to the underfunding of many multiemployer pension plans.<sup>126</sup> As a result, the other contributing employers who have continued their obligation to the plans are forced to fill the gaping hole of unfunded liabilities left behind by withdrawing employers who escape EWL through bankruptcy.<sup>127</sup> In addition, paying for the unfunded liabilities of withdrawn employers increases the financial strain on the remaining contributors to the plan and incentivizes others to withdraw using the bankruptcy escape hatch.<sup>128</sup> Ultimately, this loophole perpetuates the downward spiral that Congress meant to prevent with the MPPAA and

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*supra* note 6, at 52–53.

[T]he fund’s withdrawal liability claim would most likely be treated as a general unsecured claim and the fund would receive a pro rata distribution from a fund that is created to pay all of the employer’s unsecured creditors. Typically, the payout to unsecured creditors is a small percentage of the total claim. In consideration for the distribution, the employer’s obligation to the fund would be eliminated or ‘discharged’ upon confirmation of the employer’s plan of reorganization.

*Id.*

123. For a discussion of liability beyond the employer debtor, *see infra* notes 124–25 and accompanying text.

124. *See* Cent. States, Se. & Sw. Areas Pension Fund v. SCOFBP, LLC, 668 F.3d 873, 876 (7th Cir. 2011) *cert. denied*, 132 S. Ct. 2688 (2012) (“Under the MPPAA, all trades or businesses under common control are treated as constituting a single employer for purposes of determining withdrawal liability. Each trade or business under common control is jointly and severally liable for any withdrawal liability of any other.”) (citations omitted) (internal quotation marks omitted). In *Central States*, the court held that two affiliates of a withdrawing employer who went into bankruptcy were trades or businesses under common control with insolvent company under MPPAA and, therefore, were liable to the pension plan for the bankrupt employer’s withdrawal liability. *See id.* at 882.

125. *See* Levin, *supra* note 78, at 14 (discussing scope of EWL).

126. *See* Nyhan Statement, *supra* note 17, at 1–3.

If no action is taken, the Fund is projected to be insolvent in the next 10–15 years . . . . While many factors have contributed to the Fund’s problems, the single largest factor relates to the pension benefits that are paid to retirees of employers no longer in business (and thus not contributing to the Fund) . . . . When a company in a multiemployer plan goes out of business without paying its share of the liabilities, it is the surviving employers in the multiemployer plan that assume the liabilities. . . . More than 600 trucking companies that contributed to the Fund have gone bankrupt since 1980 and many thousands of others have gone out of business without filing formal bankruptcy . . . .

*Id.*

127. *See* NCCMP Brief, *supra* note 14, at 10 (“As an increasing number of contributing employers seek to shed contribution and withdrawal liability obligations to multiemployer plans under Section 1113 of the Bankruptcy Code, fewer employers remain to contribute to those plans and to fund the plans’ payment of accrued benefits.”).

128. *See id.* at 9 (explaining that employer withdrawal increases financial pressure on remaining contributors, which in turn increases incentive on other employers to withdraw from plan, essentially accelerating vicious downward spiral).

circumvents the purpose of Section 1113.<sup>129</sup>

Section 1113 was meant to protect American workers from bearing a disproportionate burden of their employer's bankruptcy.<sup>130</sup> However, the current situation seems in direct conflict with the purpose of the statute.<sup>131</sup> As several commentators note, despite the creation of Section 1113, employers continue to file for bankruptcy at an alarming rate solely for the purpose of shedding obligations to their employees.<sup>132</sup>

#### V. REVIVING THE DEATH SPIRAL: THE *HOSTESS* CASE

In January 2012, Hostess Brands, Inc. sought bankruptcy protection and reorganization.<sup>133</sup> On January 25, 2012, Hostess filed a motion with the bankruptcy court seeking to reject or modify 296 collective bargaining agreements with labor unions representing their employees, and to modify certain retiree obligations pursuant to Sections 1113 and 1114 of the Bankruptcy Code.<sup>134</sup> A core purpose of the motion was to terminate the company's obligation to contribute to all multiemployer pension plans covering its employees.<sup>135</sup>

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129. For a discussion of the downward spiral, see *supra* notes 49–62 and accompanying text. For a discussion of the purpose of Section 1113, see *supra* notes 97–100 and accompanying text.

130. See Ceccotti, *supra* note 92, at 418 (explaining that principal purpose of Sections 1113 and 1114 is to “protect employees and retirees from bearing a disproportionate burden of their employer’s bankruptcy”).

131. See *id.* at 417 (noting that despite creation of Sections 1113 and 1114, there has been wave of bankruptcy cases specifically targeting labor costs). As a result, labor groups have had to absorb losses including elimination of jobs, cuts in wages and benefits, termination or freezing of pension plans, and reductions in health benefits. See *id.*

132. See *id.* at 415 (discussing how recently there has been resurgence in corporate bankruptcies targeting labor costs, pension funding, and retiree health benefits obligations).

133. See *In Re Hostess Brands, Inc., et al.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (filing for Chapter 11 bankruptcy protection); see also David A. Kaplan, *Hostess is Bankrupt . . . Again*, CNN MONEY (July 26, 2012, 5:00 AM), <http://management.fortune.cnn.com/2012/07/26/hostess-twinkies-bankrupt/> (stating that this is second time in decade that Hostess has filed for bankruptcy).

134. See Memorandum of Law Supporting Mot. of Debtors & Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code at 1, *In re Hostess Brands, Inc., et al.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) [hereinafter *Debtor’s Brief in Support of Motion*] (requesting to modify or reject 296 collective bargaining agreements). See generally Jeffrey H. Taub et al., *supra* note 119 (explaining Hostess’s January 25th motion to bankruptcy court and their argument about why Hostess should be allowed to reject collective bargaining agreements).

135. See Mot. of Debtors and Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code at ¶ 4, *In re Hostess Brands, Inc., et al.*, 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) (stating that debtors sought order to “reject 296 collective bargaining agreements with Unions and to modify any obligation . . . that may provide non-pension benefits to retirees formerly represented by the IBT or BCT”) (footnote omitted); see also *id.* at ¶ 18 (stating that, if Debtor were to withdraw, they would be assessed \$2 billion in withdrawal liability); Rachel Feintzeig, *ConAgra, Pension Funds Oppose Hostess Withdrawals*, WALL ST. J. (Feb. 22, 2012), <http://online.wsj.com/article/SB10001424052970204909104577237643524650590.html>

The motion by Hostess Brands caused outrage among industry members, pension funds involved in the case, and the National Coordinating Committee for Multiemployer Plans (NCCMP).<sup>136</sup> The Teamsters Union objected to the motion, as did a number of the Teamsters' multiemployer pension plans to which Hostess was obligated to contribute.<sup>137</sup> The NCCMP, an advocacy group for multiemployer plans, filed an *amicus curiae* brief in opposition to the motion.<sup>138</sup> The unions and pension plans asserted that the protective procedural and substantive conditions for rejection of the bargaining agreements under Sections 1113 had not been satisfied by Hostess, and that the court lacked authority to release the company from its obligations under the agreements.<sup>139</sup>

The pension plans also focused on the harm to the plans and their participants that would be caused by Hostess withdrawing from the plans, especially if Hostess's EWL was discharged.<sup>140</sup> They argued that excusing the company from EWL would "fl[y] in the face of the long standing policy

("The company has said it can't survive with its current labor costs and launched a bid to shed its union deals.").

136. See Feintzeig, *supra* note 135 (explaining that Hostess's motion angered industry members, pension funds associated with two major unions involved in case, and National Coordinating Committee for Multiemployer Plans, all of which urged judge to strike down Hostess's request).

137. See *Objection of Interstate Brands Corp.—Int'l Bhd. of Teamsters Nat'l Negotiating Comm. to the Debtors' Motion to Reject Collective Bargaining Agreements Pursuant to Sections 1113 & 1114 of the Bankruptcy Code*, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) [hereinafter IBC Objection] (objecting to Hostess's motion to reject or modify collective bargaining agreements); see also IUOE Stationary Engineers Local 39, Local 101, Local 286, Local 309, Local 627, & Local 926's (IUOE) *Objection to & Opposition to Second Mot. of Debtors and Debtors in Possession to Reject Certain Collective Bargaining Agreements Pursuant to Section 1113(c) of the Bankruptcy Code at 5–6*, In re Hostess Brands, Inc., et al. 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) (emphasizing devastating financial impact on workers of bankrupt companies that escape payment of wages and pensions, noting that "unlike sophisticated commercial creditors, most employees do not meaningfully 'assume the risk' of their debtor's default . . . and have little ability to protect themselves in advance of an employer's possible default.") (quoting Donald R. Korobkin, *Employee Interests in Bankruptcy*, 4 AM. BANKR. INST. L. REV. 5, 6 (Spring 1996)); see also *Joint Objection to Mot. of Debtor & Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code at 2–3*, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) [hereinafter Joint Objection] (objecting on behalf of nine multiemployer pension plans sponsored by affiliates of International Brotherhood of Teamsters).

138. See NCCMP Brief, *supra* note 14, at 1 (opposing Hostess's motion to reject or modify collective bargaining agreements); see also *About the NCCMP*, NAT'L COORDINATING COMM. FOR MULTIEMPLOYER PLANS, <http://www.nccmp.org/about/index.html> (last visited Oct. 25, 2012) (explaining that NCCMP is non-profit membership organization dedicated exclusively to advocacy and protection of multiemployer plans, their participants, and their families).

139. See IBC Objection, *supra* note 137, at 27–51 (asserting that conditions required by Section 1113 for rejection of collective bargaining agreement had not been met).

140. See Joint Objection, *supra* note 137, at 17.

Consequently, allowing Hostess Brands to implement the modifications set forth in the Motion places an unfair economic drain on the MEPPs that will disturb the actuarial soundness of the Plans and likely lead to the insolvency of some, if not all of the MEPPs that have filed this Joint Objection.

*Id.*

adopted by Congress to promote and foster the maintenance of multiemployer plans[.]” citing the MPPAA’s findings and policy provision.<sup>141</sup> Calling it a “matter of national concern,” the NCCMP reinforced the plans’ position by broadening its perspective and presenting the *Hostess* case as a serious threat to the entire multiemployer pension plan system.<sup>142</sup>

Significantly, similar objections to the rejection motion were submitted by many of Hostess’s competitors in the food and snack industries who participate in many of the affected multiemployer pension plans.<sup>143</sup> These competitors vociferously argued that allowing Hostess to withdraw from the plans and escape EWL would give the company unfair competitive advantages relative to companies that continue to participate in the plans because: Hostess would be relieved of the cost of regular contributions to the plans; Hostess’s share of the plans’ unfunded benefit liabilities would be shifted to the remaining employers and increase their contribution costs; and, these expanded liabilities would hinder the ability of competing companies to raise investment capital to operate and expand their businesses.<sup>144</sup> The plans’ unfunded benefit liabilities do not

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141. *Id.* at 20 (quoting 29 U.S.C. § 1001(a) (2006)).

142. *See* NCCMP Brief, *supra* note 14, at 4–10.

This is a matter of national concern because it reflects the very concerns that motivated Congress in adopting ERISA in 1974 and MPPAA in 1980, namely the need to ensure that employees will receive promised pension benefits by protecting multiemployer plans from the negative impact of employer withdrawals . . . . Congress adopted MPPAA to address the ‘vicious downward spiral’ of employers withdrawing from multiemployer plans and increasing the financial pressure on remaining contributors which in turn increases the incentive on other employers to withdraw from the plan and so on . . . . [T]he solution to this downward spiral is not to permit more employers to exit plans without paying their withdrawal liability, which is precisely what Debtors seek with their motion. Indeed, the ‘vicious downward spiral’ would be accelerated by the Court’s granting of Debtors’ motion, both because Debtors are themselves a significant employer in the industry and because of the precedent it sets or the ‘road-map’ it would provide to permit other employers to ‘shed’ . . . their pension obligations in this manner.

*Id.*

143. *See* Objection of BBU, Inc. to Mot. of Debtor & Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) (objecting to Hostess’s motion to reject or modify collective bargaining agreements and asking judge to reject motion); *see also* Objection by Lewis Bros. Bakeries Inc. & Chicago Baking Co. to Debtors Mot. to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) [hereinafter Lewis Brothers Objection] (objecting to Hostess’s motion in its capacity as employer-sponsor of many of multiemployer pension plans from which Hostess sought to withdraw); Perfection Bakeries, Inc.’s Limited Objection to Mot. of Debtors & Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) [hereinafter Perfection Bakeries Objection] (objecting to Hostess’s motion and requesting judge to strike down Hostess’s motion).

144. *See* Lewis Brothers Objection, *supra* note 143, at 4 (claiming that increased withdrawal liability would harm ability of Lewis Brothers to obtain financing); *see also* Perfection Bakeries Objection, *supra* note 143, at 8 (“Moreover, Debtors’ Proposals do not



“vanish into thin air,” rather they are redistributed to the remaining employers.<sup>145</sup> The competitors warned, like the pension plans, that Hostess’s avoidance of plan liability would trigger a “domino effect” driving even more bakeries into bankruptcy.<sup>146</sup>

On May 14, 2012, U.S. Bankruptcy Judge Robert D. Drain conducted a hearing on Hostess’s rejection motion and announced his ruling.<sup>147</sup> After surveying the law of Section 1113 and the various factors to be considered in deciding whether to allow rejection of collective bargaining agreements, he focused on the pension issues.<sup>148</sup> He concluded that Hostess’s participation in multiemployer pension plans, particularly the plans sponsored by the Teamsters Union, was a “potentially insurmountable obstacle” to the company emerging from bankruptcy and that the company’s withdrawal was necessary.<sup>149</sup> He noted that Hostess had modified its original pension proposal in view of the Teamsters’ strong opposition to rejoin two financially sound plans for current employees, but that the Teamsters counter-proposed an arrangement under which the company would rejoin the same pension plans after discharge of its EWL by the court.<sup>150</sup> Judge Drain considered the Teamsters’ idea to be creative but risky, and sided with Hostess.<sup>151</sup> Nevertheless, the Judge

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address the Debtors’ windfall gain if Debtors are permitted to evade their MEPP obligations; not only would Debtors’ cost of doing business decrease substantially, but the cost of doing business for each of Debtors’ competitors that participate in the MEPPs would increase dramatically.”); Perfection Bakeries Objection, *supra* note 143, at 10–12 (explaining how Hostess would obtain unfair competitive advantage).

145. See ConAgra Foods, Inc.’s Objection to Mot. of Debtors & Debtors in Possession to (A) Reject Certain Collective Bargaining Agreements & (B) Modify Certain Retiree Benefit Obligations, Pursuant to Sections 1113(c) & 1114(g) of the Bankruptcy Code at 3, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) (explaining that if Debtor’s withdrawal liability is treated as general unsecured claim and not paid in full, debtor’s financial burden will be redistributed to debtor’s direct competitors who continue to contribute to multiemployer pension plans).

146. See Perfection Bakeries Objection, *supra* note 143, at 11–12.

Debtors’ withdrawal from the MEPPS [sic] may further weaken the economic condition of the MEPPs, thus increasing the unfunded liability and the funding obligations of the remaining contributing employers . . . . As a result, the contingent withdrawal liability of each remaining contributing employer to the MEPPs will increase significantly. The significant ‘aggregate’ adverse impact may result in the domino effect of more bakeries seeking relief under the Bankruptcy Code in order to continue to compete on a level playing field in the marketplace. This outcome would leave MEPPs wholly unfunded, which would have an adverse impact on thousands of employee beneficiaries of such MEPPs.

*Id.*

147. See Transcript for May 14, 2012, In re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) (ruling on Hostess’s motion to reject or modify collective bargaining agreements). For a discussion of Judge Drain’s findings, see *infra* notes 148–55 and accompanying text.

148. See *id.* at 114–18 (discussing pension issues involved in Hostess’s bankruptcy case).

149. See *id.* at 115–17 (discussing Hostess’s withdrawal from multiemployer pension plans and concluding that it was necessary).

150. See *id.* at 116–20 (explaining proposals from both Hostess and Union).

151. See *id.* (finding Union’s proposals creative and finding that Union negotiated in good faith).

expressed concern about the exclusion of new hires under the company's proposal, thus denying the motion without prejudice and sending the parties back to the bargaining table to fine tune the company's offer before re-submission to the court.<sup>152</sup>

Despite all of the objections invoking national pension policy concerns and the inequitable distribution of pension liabilities, Judge Drain's decision was based on a conventional bankruptcy law analysis.<sup>153</sup> He showed little concern for the national pension policy implications or for the impact on Hostess's competitors.<sup>154</sup> He acknowledged that "although . . . it would be painful for the specific MEPPs that the Debtors must withdraw from, it is in my view necessary for the Debtors to withdraw from those MEPPs . . ." <sup>155</sup>

A hearing on Hostess's second rejection motion regarding other unions' agreements was held on October 3, 2012.<sup>156</sup> Rejecting arguments that the other unions' pension plans should be seen in a different light than the Teamsters' plans, Judge Drain ruled that there would be "across the board treatment" for all of the multiemployer pension plans; thus, Hostess would be permitted to withdraw from all of the pension plans without EWL.<sup>157</sup>

In the meantime, Hostess reached a settlement with the Teamsters Union regarding the impact of the company's restructuring on its members.<sup>158</sup> The agreement provided that the company would work with Teamsters to provide for re-entry to the same multiemployer pension plans in the future under certain detailed conditions.<sup>159</sup> Hostess filed a reorganization plan with the court on October 10, 2012 which provided with regard to the multiemployer pension

152. *See id.* at 124 ("The one area that I have a grave concern about with regard to that proposal is the notion in that proposal that it would include only existing employees and not future hires."); *see also id.* at 130 ("I will deny the motion for the reasons that I have stated. I would, however, be receptive to a motion that makes a proposal along the lines that I've outlined.").

153. For a discussion of the policy concerns regarding Hostess's motion, see *supra* notes 137–46 and accompanying text.

154. *See* Transcript for May 14, 2012, *supra* note 147, at 117 (dismissing concerns about Hostess withdrawing from multiemployer pension plans).

155. *Id.* at 131.

156. *See* Transcript for Oct. 3, 2012, In Re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052) (discussing second motion of debtors to reject certain collective bargaining agreements pursuant to Section 1123(c)).

157. *See id.* at 266 (finding that differences between IUOE and other unions involved in Hostess's bankruptcy did not outweigh need to show all of Hostess's employees that they were being treated similarly); *see also id.* at 267–68 (deciding that risks inherent in IUOE multiemployer pension plan were same types of risks that led to conclusion during hearing for original motion to reject IBT's agreements where it was decided that debtors acted appropriately in seeking to severely modify agreements as they applied to all MEPPs). Notably, the judge rejected the argument that bankruptcy proceedings could not absolve Hostess of its EWL because 29 U.S.C. §1392(c) requires that any transaction whose principal purpose is to evade or avoid EWL be disregarded in determining EWL. *See id.* at 263–64.

158. *See Letter of Understanding for the Restructuring of Hostess Brands, THE INT'L BHD. OF TEAMSTERS* 1 (2012), <http://www.teamster.org/sites/teamster.org/files/82712HostessFinalOffer2012.pdf> (explaining settlement agreement with Hostess).

159. *See id.* at 3–4 (explaining part of settlement agreement between Hostess and Union which requires Hostess to re-enter same multiemployer pension plans).

plans: “To the extent that the Debtors have not previously withdrawn from a MEPP, the Debtors shall be deemed to have withdrawn from all MEPPs no later than December 31, 2012.”<sup>160</sup>

However, another union that represented many Hostess employees, the Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (Bakery Workers) refused to accept the imposed terms of employment and, after court-ordered mediation failed to produce an agreement, called a strike in November 2012.<sup>161</sup> Faced with the strike, Hostess’s management sought and obtained leave from the court to liquidate the company.<sup>162</sup>

Hostess is not the only company who sought to rescind their pension obligations by declaring bankruptcy.<sup>163</sup> In April 2011, the Philadelphia Orchestra also declared bankruptcy.<sup>164</sup> At the time of the orchestra’s filing, they were not insolvent.<sup>165</sup> One commentator noted that in fiscal year 2009 the orchestra’s endowment was over \$129,000,000, which was triple the amount of liabilities as of their bankruptcy filing date.<sup>166</sup> The orchestra’s main reason for filing was, admittedly, to eliminate their pension obligations.<sup>167</sup> Similar to the

160. Joint Plan of Reorganization of Debtor & Debtors in Possession at 25, In Re Hostess Brands, Inc., et al., 477 B.R. 378 (Bankr. S.D.N.Y. 2012) (No. 12-22052).

161. See Dawn McCarty & Phil Milford, *Hostess Judge Approves Wind-Down of Twinkie Maker*, BLOOMBERG (Nov. 21, 2012, 8:33 PM), <http://www.bloomberg.com/news/2012-11-21/hostess-bankruptcy-judge-approves-motion-for-wind-down.html> (explaining that after last-minute mediation with Bakery workers failed to resolve contract dispute, Hostess Brands was forced to liquidate); see also Chris Isidore, *Hostess Jobs: ‘Great’ to ‘Not Worth Saving’*, CNN MONEY (Nov. 16, 2012, 3:38 PM), <http://money.cnn.com/2012/11/16/news/companies/hostess-workers/index.html> (describing extreme pay cuts Bakers union workers would have been forced to endure if they had agreed to contract demands from Hostess Brands).

162. See Dawn McCarty, David McLaughlin & Phil Milford, *Hostess Asks Court to Approve Demise While U.S. Objects*, BLOOMBERG (Nov. 19, 2012, 12:49 PM), <http://www.bloomberg.com/news/2012-11-19/hostess-to-seek-court-approval-to-liquidate.html> (explaining that after mediated negotiations failed to resolve Bakery workers strike, Judge Drain approved Hostess’s liquidation plan).

163. For a discussion of the Philadelphia Orchestra’s bankruptcy case, see *infra* notes 164–71 and accompanying text.

164. See Peter Dobrin, *Philadelphia Orchestra Association Exits Bankruptcy*, PHILLY.COM (July 31, 2012, 10:06 AM), [http://www.philly.com/philly/blogs/entertainment/fine\\_arts/Philadelphia-Orchestra-Association-exits-bankruptcy.html](http://www.philly.com/philly/blogs/entertainment/fine_arts/Philadelphia-Orchestra-Association-exits-bankruptcy.html) (stating that Philadelphia Orchestra filed Chapter 11 petition in April 2011).

165. See Ivan Katz, *The Philadelphia Orchestra’s Unfortunate Bankruptcy Filing*, HUFF. POST BLOG, (May 1, 2011, 10:21 AM), [http://www.huffingtonpost.com/ivan-katz-/the-philadelphia-orchestr\\_b\\_854539.html](http://www.huffingtonpost.com/ivan-katz-/the-philadelphia-orchestr_b_854539.html) (explaining that Philadelphia Orchestra was not insolvent at time they filed for bankruptcy protection).

166. See *id.* (explaining that Philadelphia Orchestra was nowhere near insolvent when they applied for bankruptcy protection).

167. See Daniel J. Wakin & Mary Williams Walsh, *Other Orchestras Fear Paying Price for Philadelphia Pension Crisis*, N.Y. TIMES, Dec. 1, 2011, available at [http://www.nytimes.com/2011/12/01/arts/music/philadelphia-orchestra-tries-to-avoid-pension-payments.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2011/12/01/arts/music/philadelphia-orchestra-tries-to-avoid-pension-payments.html?pagewanted=all&_r=0) (stating that Philadelphia Orchestra, burdened by tens of millions of dollars in pension obligations it says it cannot afford, is using bankruptcy court to avoid paying); see also Daniel J. Wakin, *Philadelphia Orchestra Offers Plan to Cut Debt*, N.Y. TIMES, May 25, 2012, at C2, available at <http://www.nytimes.com/2012/05/25/arts/music/philadelphia-orchestra-submits-plan-to->

*Hostess* case, the move elicited the ire of other orchestras around the country who feared picking up the cost for the orchestra's strategic use of bankruptcy to avoid their responsibilities.<sup>168</sup> With some calling it an "abrogation of responsibility," what the orchestra effectively did was transfer its burden to other orchestras and individual musicians.<sup>169</sup> After the judge approved the orchestra's request to withdraw from their multiemployer pension plans, their withdrawal liability was estimated at \$35,000,000.<sup>170</sup> That money will now be redistributed to other employers in a pension fund that is already struggling.<sup>171</sup>

The musicians' fund that the orchestra withdrew from was recently required by law to take emergency measures after they lost a substantial amount of money in the financial turmoil of 2008.<sup>172</sup> Similarly, the largest multiemployer pension plan from which *Hostess* is withdrawing is the Teamsters Central States, Southeast and Southwest Areas Pension Fund.<sup>173</sup> That fund, upon which hundreds of thousands of workers depend for retirement income now and in the future, is already headed for insolvency.<sup>174</sup> The addition of *Hostess*'s unfunded liabilities could end up crippling the fund in its entirety.<sup>175</sup> If either fund becomes insolvent, the PBGC will lack sufficient resources to guarantee the pensions, even at the low PBGC guarantee level set by ERISA.<sup>176</sup>

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bankruptcy-court.html (explaining that Philadelphia Orchestra has admitted that shedding their pension obligations was main reason they filed for bankruptcy).

168. See Wakin & Walsh, *supra* note 167 (explaining that Philadelphia Orchestra's filing for bankruptcy in effort to rid themselves of pension obligations elicited concern from other orchestras).

169. See *id.* (quoting Deborah Borda, President of Los Angeles Philharmonic).

170. See *id.* (stating that withdrawal liability in Philadelphia Orchestra case was \$35 million dollars).

171. See *id.* (explaining that if Philadelphia Orchestra does not pay its estimated withdrawal liability, then \$35 million must be covered by other contributing employers, and further stating that musician's fund was already in precarious state before Philadelphia Orchestra's withdrawal).

172. See *id.* (discussing how musicians' fund had to take emergency measures as result of financial turmoil of 2008, including reducing accrual of benefits and requiring larger contributions from participating employers).

173. See Jacqueline Palank, *Union Pension, Health Funds Top Hostess Creditor List*, WALL ST. J. (Jan. 11, 2012, 10:27 AM), [http://blogs.wsj.com/bankruptcy/2012/01/11/union-pension-health-funds-top-hostess-creditor-list/?mod=WSJBlog&utm\\_source=twitterfeed&utm\\_medium=twitter](http://blogs.wsj.com/bankruptcy/2012/01/11/union-pension-health-funds-top-hostess-creditor-list/?mod=WSJBlog&utm_source=twitterfeed&utm_medium=twitter) (explaining that union benefit funds, including health and pensions, account for sixteen of forty top unsecured claims in *Hostess* bankruptcy case.) One of those pension funds, Central States, Southeast and Southwest Areas Pension Plan, owed \$11.82 million. See *id.*

174. See Nyhan Statement, *supra* note 17, at 1 (warning Congress that Teamsters Union's Central States pension fund faces insolvency within ten to fifteen years unless Congress acts to stabilize fund).

175. See *id.* (noting that failure to pay withdrawal liabilities leads other employers to assume such liability, thus increasing contributions from other employers and forcing some of these employers out of business).

176. See *PBGC Reports Record \$26 Billion Deficit for 2011*, PENSION BENEFIT GUAR. CORP. (Nov. 15, 2011), <http://www.pbgc.gov/news/press/releases/pr12-06.html> (explaining that agency's deficit rose to \$26 billion in 2011, which is largest deficit in PBGC's thirty-seven year history); see also George M. Kraw, *Four Reforms to Save Multiemployer Plans*, BNA PENSION & BENEFITS DAILY 2 (2010) <http://www.kraw.com/pdf/kraw-pension->

The bankruptcies of Hostess and the Philadelphia Orchestra are not isolated incidents, but rather recent examples of a trend that is emerging.<sup>177</sup> Many commentators have noted the wave of strategic bankruptcy cases aimed at relieving even solvent employers of their pension obligations.<sup>178</sup> One employer filing for bankruptcy creates an incentive for other contributing employers to follow the same path.<sup>179</sup> What this trend amounts to is the reemergence of the death spiral that Congress meant to prevent by passing the MPPAA and the potential end of multiemployer pension plans.<sup>180</sup>

## VI. CONCLUSION

As demonstrated by the *Hostess* case, the 1980 congressional design to prevent multiemployer pension plans from falling into a death spiral is being overpowered by the Bankruptcy Code.<sup>181</sup> One of the nation's largest multiemployer plans, the Teamsters Central States Southeast and Southwest Areas Pension Fund, "faces an unprecedented financial crisis" because many of its contributing employers have withdrawn through bankruptcy or otherwise gone out of business without paying their EWL.<sup>182</sup> This fund's experience is not unique, as is evident from the motions submitted to Judge Drain.<sup>183</sup>

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benefits.pdf

[T]he Pension Benefit Guaranty Corporation's insurance program for multiemployer plans has insufficient funds to cover insured benefits, even though the PBGC-guaranteed maximum monthly benefit of \$1,320 per participant and median monthly benefit of \$820 are relatively low. PBGC's multiemployer plan program has reported a deficit every year since 2003. At the end of fiscal year 2009, the program had assets of \$1.46 billion and total liabilities of \$2.33 billion. A reported \$2.30 billion of those liabilities represented nonrecoverable future financial assistance to distressed plans.

*Id.*; NCCMP Brief, *supra* note 14, at 4 (describing consequences of permitting other employers to carry burden of insolvent employer's withdrawal liability).

177. For a discussion of the strategic trend in bankruptcies, see *infra* notes 178–80 and accompanying text.

178. See Ceccotti, *supra* note 92, at 416–17 (explaining that despite addition of Sections 1113 and 1114 of Bankruptcy Code, there has been wave of bankruptcy cases where employers have used bankruptcy courts strategically as cost-cutting tool, allowing them to reject collective bargaining agreements, reduce or eliminate retiree health obligations, and terminate defined benefit pension plans); see also Brannick, *supra* note 96, at 1585 ("The recent use of Chapter 11 by employers with large unfunded pension obligations mimics the use of *Bildisco* and Chapter 11 by employers with unwanted labor contracts. As it did after *Bildisco*, Congress must intervene to prevent the abuse of Chapter 11 by employers seeking to reorganize.").

179. See NCCMP Brief, *supra* note 14, at 9 (stating congressional intent in passing MPPAA).

180. For a discussion of the creation of MPPAA, see *supra* notes 53–62 and accompanying text.

181. For a discussion of the *Hostess* bankruptcy case, see *supra* notes 133–62, and accompanying text.

182. See Nyhan Statement, *supra* note 17, at 1–4 (emphasizing that looming insolvency of fund was caused by assumption of withdrawal liabilities of insolvent employers formerly in MEPP).

183. See Christopher E. Condeluci, *Multiemployer Pension Plans: Unions and Their Retirees, Management, and Policymakers Must Share the Burden*, BNA PENSION & BENEFITS DAILY 2, (2011), <http://www.venable.com/files/Publication/cc010cf4-5bf8-46de-a770->

However, his decisions in the *Hostess* case reveal that the national pension policy of ERISA and MPPAA do not dilute the objectives of the Bankruptcy Code.<sup>184</sup>

Congress included in the MPPAA some tools for mitigating the impact of withdrawals by bankrupt employers.<sup>185</sup> The PBGC was directed by Congress to establish a program for reimbursement of uncollectible EWL.<sup>186</sup> However, no such program was ever created.<sup>187</sup> The MPPAA also authorized the PBGC to “partition” “orphaned participants” from a multiemployer plan and assume liability for the benefits of these participants under certain conditions.<sup>188</sup> The PBGC could require a partition of a plan if the plan experiences a substantial loss of employer contributions due to bankruptcy and the plan is likely to become insolvent unless action is taken.<sup>189</sup> The PBGC has used this partition power on very few occasions and only with small plans involving a small cost to the agency.<sup>190</sup>

Legislation has been proposed in Congress to enhance the PBGC’s partition authority and nudge the agency into exercising it.<sup>191</sup> Despite the strong support of the Central States Southeast and Southwest Areas Pension Fund, the NCCMP, and others, the bill was not passed after a hearing by a Senate committee.<sup>192</sup> More recently, Congress has stressed its distaste for the PBGC’s assumption of pension plan liabilities by repealing the agency’s longstanding borrowing authority.<sup>193</sup>

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0123b9eb6c01/Presentation/PublicationAttachment/6a3d8d47-5017-41b3-af5d-09c4f8714da3/Condeluci\_article\_in\_BNA\_72911.pdf (“Over the past two decades, thousands of companies otherwise participating in and contributing to a multiemployer plan have gone out of business . . . . In many cases, these companies declared bankruptcy, while others have simply slipped away into the night, never to be heard from again.”). For a discussion of multiemployer pension plan objections in the *Hostess* bankruptcy case, see *supra* notes 139–44 and accompanying text.

184. For a discussion of Judge Drain’s decisions in the *Hostess* bankruptcy case, see *supra* notes 149–57 and accompanying text.

185. For a discussion of the tools included by Congress, see *supra* notes 90, 149–57 and accompanying text.

186. For a discussion of the reimbursement program the PBGC was supposed to create, see *supra* note 90 and accompanying text.

187. For a discussion of the reimbursement program the PBGC was supposed to create, see *supra* note 90 and accompanying text.

188. See 29 U.S.C. § 1413 (2006) (giving partition power to PBGC and outlining how PBGC may use partitioning).

189. See PRIVATE PENSIONS: CHANGES NEEDED TO BETTER PROTECT MULTIEMPLOYER PENSION BENEFITS, *supra* note 13, at 26–27 (2010) (defining partitioning and listing circumstances under which PBGC may order partition).

190. See *id.* at 27 (explaining that since MPPAA was implemented in 1980, PBGC has partitioned only two plans).

191. See Create Jobs and Save Benefits Act of 2010, S. 3157, 111th Cong. (2010), available at <http://thomas.loc.gov/cgi-bin/query/z?c111:S.3157>: (proposing amendment to ERISA, expanding PBGC’s partitioning power and requiring agency to act when plan indicated they were in critical status).

192. See Nyhan Statement, *supra* note 17, at 1 (supporting Create Jobs and Save Benefits Act and explaining how it would provide essential relief to Fund, “thereby protecting the pensions of hundreds of thousands of participants in the Fund, as well as the tens of thousands of jobs of those Americans employed by businesses that contribute to the Fund”).

193. See Moving Ahead for Progress in the 21st Century Act, Pub. L. No. 112-141,

Bills have been introduced in the current and past two Congresses to adjust the process and standards under Section 1114 for rejecting collective bargaining agreements with the intent of better protecting employees and retirees.<sup>194</sup> The 2012 Senate version of the legislation included a provision granting administrative expense status in bankruptcy proceedings to a limited amount of EWL.<sup>195</sup> Debts that fall under the administrative expense category are given high priority under the Bankruptcy Code.<sup>196</sup> None of the bills progressed beyond referrals to committees.<sup>197</sup>

It is imperative for the future of multiemployer pension plans for Congress to find a way to prevent the reemergence of the death spiral.<sup>198</sup> Although some

126 Stat. 405 (2012) (repealing 29 U.S.C. § 1305(c), which authorized PBGC to borrow up to \$100 million by issuing notes and other obligations); *see also* 29 U.S.C. § 1302(g)(2) (2006) (“The receipts and disbursements of the corporation in the discharge of its functions shall be included in the totals of the budget of the United States Government. The United States is not liable for any obligation or liability incurred by the corporation.”).

194. *See* Protecting Employees and Retirees in Business Bankruptcies Act of 2013, H.R. 100, 113th Cong. (2013), *available at* <http://www.gpo.gov/fdsys/pkg/BILLS-113hr100ih/pdf/BILLS-113hr100ih.pdf>; *see also* Protecting Employees and Retirees in Business Bankruptcies Act of 2012, H.R. 6117, 112th Cong. (2012); Protecting Employees and Retirees in Business Bankruptcies Act of 2012, S. 3381, 112th Cong. (2012).

195. *See* S. 3381 at § 208 (amending 11 U.S.C. § 503(b)). This amendment would add a provision which states:

[W]ith respect to withdrawal liability owed to a multiemployer pension plan for a complete or partial withdrawal pursuant to section 4201 of the Employee Retirement Income Security Act of 1974 (29 U.S.C. [§] 1381) [sic] where such withdrawal occurs on or after the commencement of the case, an amount equal to the amount of vested benefits payable from such pension plan that accrued as a result of employees’ services rendered to the debtor during the period beginning on the date of commencement of the case and ending on the date of the withdrawal from the plan.

*Id.*; *see also* 11 U.S.C. § 503(b) (2006) (listing allowed administrative expenses under Bankruptcy Code).

196. *See* 11 U.S.C. § 507(a)(2) (2006) (giving administrative expenses allowed under 11 U.S.C. § 503(b) second priority in bankruptcy proceedings).

197. *See* S. 3381 (112th): Protecting Employees and Retirees in Business Bankruptcies Act of 2012, GOVTRACK, <http://www.govtrack.us/congress/bills/112/s3381> (last visited Mar. 15, 2013) (explaining that Bill No. S. 3381 was referred to committee but died); *see also* H.R. 6117 (112th): Protecting Employees and Retirees in Business Bankruptcies Act of 2012, GOVTRACK, <http://www.govtrack.us/congress/bills/112/hr6117> (last visited Mar. 15, 2013) (explaining that Bill No. H.R. 6117 was referred to committee but died and was reintroduced as H.R. 100 on January 3, 2013).

198. *See* NCCMP Brief, *supra* note 14, at 4 (“In the event that the downward spiral . . . is permitted to continue, there is a real and present risk that the multiemployer plans will fail.”); *see also* Kraw, *supra* note 176, at 1.

[T]he future of [multiemployer pension] plans is bleak unless reforms are made now to change the governance rules and financial obligations of multiemployer plans. The Pension Protection Act of 2006 (Pub. L. No. 109-280) and more recent legislative efforts have been insufficient to repair the plans’ deteriorating financial conditions. Some large multiemployer plans are teetering on the brink of collapse . . . . Moody’s Investors Service estimated the total unfunded liability of 126 of the nation’s largest multiemployer pension plans exceeded \$165 billion in 2008. A 2009 survey by the National Coordinating Committee for Multiemployer Plans found that 80 percent of the plans reviewed were ‘endangered’ or ‘critical’ underfunded status, which put those plans under increased regulatory constraints. Meanwhile, the Pension Benefit Guaranty Corporation’s insurance program for

commentators have proposed solutions, implementing these solutions requires congressional action.<sup>199</sup> Congress will have an opportunity to reconsider the regulatory regime for multiemployer pension plans before December 31, 2014, when key provisions of the Pension Protection Act of 2006 are scheduled to “sunset.”<sup>200</sup> In that process, Congress should give serious attention to harmonizing the competing policies of MPPAA and the Bankruptcy Code with regard to EWL.<sup>201</sup> If a solution is not found, the death spiral that Congress intended to prevent through the MPPAA may well engulf the multiemployer pension system, bankrupt the PBGC, and leave millions of workers without the pensions they earned over a lifetime of labor.<sup>202</sup>

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multiemployer plans has insufficient funds to cover insured benefits, even though the PBGC-guaranteed maximum monthly benefit of \$1,320 per participant and median monthly benefit of \$820 are relatively low. PBGC’s multiemployer plan program has reported a deficit every year since 2003. At the end of fiscal year 2009, the program had assets of \$1.46 billion and total liabilities of \$2.33 billion. A reported \$2.30 billion of those liabilities represented nonrecoverable future financial assistance to distressed plans.

*Id.*

199. See Kraw, *supra* note 176, at 2–3 (suggesting reforms that could help save distressed multiemployer pension plans by giving plans, participating employers, and unions greater flexibility to address their specific needs). Some commentators have suggested that EWL itself is the problem and should be replaced by a regulatory scheme under which plan trustees would be empowered to eliminate or cap EWL, reduce vested benefits to adjust to financial setbacks, undertake a reorganization process similar to a Chapter 11 proceeding if plan becomes severely distressed, and take other measures to preserve the plan. See *id.*; see also Paul M. Secunda, *The Forgotten Employee Benefit Crisis: Multiemployer Benefit Plans on the Brink*, 21 CORNELL J.L. & PUB. POL’Y 77, 89–95 (2011) (discussing feasibility of four proposals advanced by Kraw and whether they would alleviate problems that multiemployer pension plans face). A labor-management retirement commission was convened by the NCCMP in 2012 to study the current problems of the multiemployer plan system and develop proposed solutions for Congress’ consideration. See *Assessing the Challenges Facing Multiemployer Pension Plans*, *supra* note 12, at 5–6 (explaining that NCCMP has convened “Retirement Security Review Commission” which is “comprised of representatives from over 40 labor and management groups from the industries which rely on multiemployer plans to provide retirement security to their workers.”). The commission has developed a series of legislative proposals that would remove statutory obstacles to plans taking self-help actions to avoid insolvency and restore long-term soundness. These actions include transitioning to new types of plan design that minimizes or eliminates EWL and adjusts benefits as necessary. See *Conclusions of the NCCMP Retirement Security Review Commission*, NAT’L COORDINATING COMM. FOR MULTIEMPLOYER PLANS I (2012), <http://www.nccmp.org/conference/pdfs/Retirement%20Security%20Review%20Commission.pdf> (explaining potential solutions for troubled multiemployer pension plans)

200. See Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006) (setting sunset of additional funding rules for plans in endangered and critical status); see also *Assessing the Challenges Facing Multiemployer Pension Plans*, *supra* note 12, at 5 (“The multiemployer funding provisions of the Pension Protection Act of 2006 (PPA) will sunset at the end of 2014.”)

201. For a discussion of the conflicting policies of MPPAA and the Bankruptcy Code, see *supra* notes 92–132 and accompanying text.

202. See NCCMP Brief, *supra* note 14, at 4 (articulating negative impact of requiring other employers in MEPP to assume withdrawal liability of insolvent employer).