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AMPLIFYING THE VOICES OF RETIREES: THE THIRD CIRCUIT'S
BROAD INTERPRETATION OF BANKRUPTCY CODE SECTION 1114 IN
IN RE VISTEON CORP.

ASHLEIGH K. REIBACH*

“We . . . reject Visteon’s characterization of [Section] 1114 as a ‘hammer.’ It is much more accurately characterized as a ‘microphone,’ intended to elevate the voices of those who would otherwise not be heard above the din of more powerful creditors carving up the pie of the bankruptcy estate.”¹

I. INTRODUCTION

In 1986, LTV Steel, a Dallas steel manufacturing corporation, filed for Chapter 11 bankruptcy and subsequently terminated the retiree benefits of 78,000 former LTV employees.² The termination of retiree benefits resulted in a strike by the union workers and evoked a strong reaction from Congress, which characterized the termination of retiree benefits as “irresponsible, unfair and unwelcome.”³ In response, Congress extended temporary retiree benefits to the former LTV employees and enacted the Retiree Benefits Bankruptcy Protection Act (RBBPA), later codified as Section 1114 of the Bankruptcy Code, in an effort to provide additional protection to retiree benefits during

* J.D. Candidate, 2014, Villanova University School of Law. I would like to thank Bob and Raab Reibach for their unwavering support through my academic endeavors, all the editors of the *Villanova Law Review* for their guidance and editorial assistance throughout the writing process, and my friends and family for their constant encouragement. This article is dedicated to the memory of Jacqueline Reibach who has served as a source of inspiration during my legal studies.

1. *In re Visteon Corp.*, 612 F.3d 210, 236 (3d Cir. 2010).

2. See Douglas S. Mintz & Jonathan D. Canfield, *Third Circuit Prohibits Visteon from Terminating Benefits Plan in Bankruptcy*, CADWALADER, http://www.cadwalader.com/list_newsletters.php?newsletter_type_id=7&newsletter_id=47 (last visited Jan. 30, 2013) (describing events that led to Congress providing additional protection for retirees in Bankruptcy Code); see also Thomas C. Hayes, *LTV Corp. Files for Bankruptcy; Debt Is \$4 Billion*, N.Y. TIMES (July 18, 1986), <http://www.nytimes.com/1986/07/18/business/ltv-corp-files-for-bankruptcy-debt-is-4-billion.html> (“LTV said in its court filing that it could return to profitability by restructuring its debt, cutting employment costs and ‘dealing effectively’ with the cost of pension and other retiree benefits [They] added that the company would terminate the fund The plan covers 4,000 salaried employees and 11,000 retirees in its steel operations. The company said it would also stop medical and life insurance payments for all of its 78,000 retirees.”).

3. See James Warren & Jerry Crimmins, *Retirees’ Aid Restored, LTV Says Strike Over*, CHI. TRIB. (July 31, 1986), http://articles.chicagotribune.com/1986-07-31/news/8602250098_1_ltv-management-ltv-corp-united-steelworkers-union (describing strike of around 3,000 workers resulting from LTV’s termination of retiree benefits during Chapter 11 bankruptcy proceeding); see also *66,000 LTV Retirees’ Benefits Revived by Bankruptcy Judge*, N.Y. TIMES (Aug. 1, 1986), <http://www.nytimes.com/1986/08/01/us/66000-ltv-retirees-benefits-revived-by-bankruptcy-judge.html> (reporting restoration of retiree benefits terminated by LTV during Chapter 11 bankruptcy).

Chapter 11 bankruptcy.⁴ While employers do not presently provide retiree benefits as often as they have in the past, these benefits remain a contentious issue during bankruptcy proceedings.⁵

Retirees are a particularly vulnerable class of creditors during Chapter 11 bankruptcy because a debtor may decide to modify or terminate retiree benefits based on economic pressures present in the bankruptcy context, whereas outside of bankruptcy, the debtor is more likely to consider the long term consequences of modifying or terminating the retiree benefits.⁶ Moreover, in an effort to emerge as a viable business entity “the debtor faces intense pressure both internally and externally to relieve itself of all perceived liabilities.”⁷ It is with these realities in mind that some courts have broadly interpreted sections of the Bankruptcy Code to provide increased protection to retiree benefits during Chapter 11 bankruptcy.⁸ However, some broad judicial interpretations of the Bankruptcy Code have produced curious consequences, as retirees whose benefits could otherwise be subject to unilateral termination are “afforded better treatment” during a Chapter 11 bankruptcy proceeding than outside the bankruptcy context.⁹

This Brief examines the Third Circuit’s analysis of Chapter 11, Section 1114 of the Bankruptcy Code as it applies to motions to modify or terminate retiree benefits and serves as a guide to practitioners bringing or contesting such motions during Chapter 11 bankruptcy proceedings in the Third Circuit.¹⁰ Part

4. See Judy A. O’Neill & Jennifer Hayes, *Case Study: In Re Visteon Corp.*, FOLEY & LARDNER, LLP (Aug. 12, 2010, 12:36 AM), <http://www.foley.com/case-study-in-re-visteon-corp-08-12-2010/> (providing analysis of Third Circuit’s decision in *In re Visteon Corp.*).

5. See generally Daniel Keating, *Transforming a Non-Claim into a Claim: § 1114 and the Curious Case of In Re Visteon*, 85 AM. BANKR. L.J. 1 (2011) (explaining recent trend for employers not to create retiree benefits, and practice of employers who have extended retiree benefits to phase them out); see also Mintz & Canfield, *supra* note 2 (asserting retiree benefits remain significant issue in bankruptcy, especially when debtor is industrial company with union presence).

6. See *In re Visteon Corp.*, 612 F.3d at 235 (“[L]egal and economic pressures converge to encourage a debtor to terminate benefits based on short-term considerations with insufficient regard for long-term consequences to retirees or to the debtor itself.”).

7. See *id.* (describing economic pressures in bankruptcy that justifies providing additional protection to retirees during bankruptcy); see also Susan J. Stabile, *Protecting Retiree Medical Benefits in Bankruptcy: The Scope of Section 1114 of the Bankruptcy Code*, 14 CARDOZO L. REV. 1911, 1953–54 (1993) (asserting that debtors outside bankruptcy typically “evaluate changes in employee benefit plans in terms of their impact on overall human resource objectives as well as financial objectives” while decisions concerning retiree benefits during bankruptcy are made in consideration of “the competing interests of retirees, debtors and creditors”).

8. See *In re Visteon Corp.*, 612 F.3d at 237 (interpreting Bankruptcy Code Section 1114 to provide retirees with greater protection from debtor’s ability to terminate retiree benefits in Chapter 11 bankruptcy).

9. See *id.* at 231 (providing union’s argument “that interpreting [Section] 1114 to give retirees more rights under Chapter 11 than they would have outside bankruptcy is so absurd . . . that Congress simply could not have intended the result”); see also O’Neill & Hayes, *supra* note 4 (asserting Third Circuit’s holding in *In re Visteon Corp.* results in circumstance where retirees are provided more protection in Chapter 11 bankruptcy than outside bankruptcy).

10. For a discussion of the Third Circuit’s methodology in *In re Visteon Corp.*, see

II provides a brief overview of Chapter 11 bankruptcy and Section 1114 of the Bankruptcy Code.¹¹ Part III reviews judicial precedent interpreting Section 1114 and illustrates the two main interpretations of Section 1114 as applied to retiree benefits that can be terminated or modified unilaterally outside bankruptcy.¹² Part IV analyzes the Third Circuit's reasoning in *In re Visteon Corp.*¹³ and the Third Circuit's conclusion that debtors are unable to terminate or modify the retiree benefits without complying with procedures set forth in Section 1114.¹⁴ Part V provides guidance to practitioners bringing or opposing a motion to modify or terminate retiree benefits in jurisdictions bound by the Third Circuit's decision in *In re Visteon Corp.*¹⁵ Part VI concludes by exploring the legal and policy ramifications of the Third Circuit's decision in *In re Visteon Corp.*¹⁶

II. SOUND CHECK: A BRIEF OVERVIEW OF CHAPTER 11 BANKRUPTCY AND SECTION 1114

In providing for Chapter 11 bankruptcy, the Bankruptcy Code recognizes an inherent tension between two interests: the reorganization of the business so as to allow the debtor to emerge from bankruptcy as “an economically viable entity,” and the protection of creditors through the maximization of the bankruptcy estate.¹⁷ An application for bankruptcy under Chapter 11 provides an opportunity for a business (debtor) to reorganize and emerge from bankruptcy.¹⁸ After a debtor files for Chapter 11 bankruptcy, the management

infra notes 60–75 and accompanying text. For a discussion of how the Third Circuit's conclusions in *In re Visteon Corp.* should inform decisions in filing or contesting a motion to modify or terminate retiree benefits during Chapter 11 bankruptcy, see *infra* notes 76–98 and accompanying text.

11. For a discussion of the Chapter 11 bankruptcy process and Section 1114 of the Bankruptcy Code, see *infra* notes 17–29 and accompanying text.

12. For a discussion of judicial precedent detailing interpretation of Bankruptcy Code Section 1114, see *infra* notes 30–48 and accompanying text.

13. 612 F.3d 210 (3d Cir. 2010).

14. For a discussion of the Third Circuit's decision in *In re Visteon Corp.*, see *infra* notes 60–75 and accompanying text.

15. For a discussion of the ramifications of the holding in *In re Visteon Corp.*, as well as guidance for practitioners contesting or filing a motion to modify or terminate retiree benefits in the Third Circuit, see *infra* notes 76–98 and accompanying text.

16. For a discussion of the legal and policy implications associated with the Third Circuit's decision in *In re Visteon Corp.*, see *infra* notes 99–113 and accompanying text.

17. See *In re Phila. Newspapers, LLC*, 599 F.3d 298, 303 (3d Cir. 2010) (articulating two principal interests considered in Chapter 11 bankruptcy); see also *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004) (explaining fundamental bankruptcy principles).

18. See Richard I. Aaron, *An Overview of Bankruptcy Choices Under Chapter 7, Chapter 11, Chapter 12, and Chapter 13*, 1 BANKR. L. FUNDAMENTALS § 1:9 (2012) (providing overview of Chapter 11 bankruptcy). Chapter 11 bankruptcy has a different purpose than Chapter 7 bankruptcy. See *id.* (distinguishing Chapter 11 bankruptcy and Chapter 7 bankruptcy). A debtor wishing to reorganize and emerge from bankruptcy as a viable business entity should file Chapter 11 bankruptcy, while a debtor wishing to liquidate a business should file for Chapter 7 bankruptcy. See *id.* (same). The term “debtor” refers to a “person or municipality concerning which a case under this title has been commenced.” See

continues to operate the business as a going concern, acting as debtor in possession.¹⁹ Once the bankruptcy court confirms a debtor's plan to reorganize, the debtor emerges from bankruptcy "as a more viable business entity" and is discharged of its debts.²⁰

Following the termination of 78,000 retirees' benefits by LTV Corporation during their Chapter 11 bankruptcy, Congress passed the RBBPA, which was codified as Section 1114 of the Bankruptcy Code.²¹ Section 1114 addresses the payment of retiree benefits to former employees during Chapter 11 bankruptcy.²² The statute limits debtors' ability to modify or terminate retiree benefits once a petition for Chapter 11 bankruptcy is filed.²³ Specifically Section 1114(e)(1) provides: "The debtor in possession, or the trustee . . . shall timely pay and shall not modify any retiree benefits" notwithstanding two exceptions found in the statute.²⁴ Sections 1114(e)(1)(A) and (B) provide that retiree benefits may be modified if the court permits, or if the debtor and an individual authorized to represent the recipients of the benefits agree to modification of the benefits.²⁵ Section 1114 provides a procedure for debtors

11 U.S.C. § 101(13) (2012) (providing definition of debtor in context of bankruptcy).

19. See 11 U.S.C. § 1101(1) ("[D]ebtor in possession' means debtor except when a person that has qualified under section 322 of this title is serving as trustee in the case . . ."); see also Aaron, *supra* note 18 (describing parties involved in Chapter 11 petition).

20. See Aaron, *supra* note 18 (detailing effect of Chapter 11 bankruptcy); see also 11 U.S.C. § 1141 (describing result of confirmation of Chapter 11 bankruptcy plan).

21. See Stabile, *supra* note 7, at 1927 (describing events leading up to Congress drafting RBBPA). Congress enacted Section 1114 in response to the termination of health and life insurance benefits of 78,000 retirees by LTV when it filed for Chapter 11 bankruptcy in 1986. See S. REP. NO. 100-119, at 683-84 (1987), reprinted in 1988 U.S.C.C.A.N. 683, 683 (characterizing enactment of Section 1114 and Section 1129(a)(13) as direct response to actions taken by LTV, who terminated benefits of thousands of retirees). For a discussion of the events that led to LTV terminating 78,000 retirees' employment benefits, see *supra* notes 2-4 and accompanying text.

22. See 11 U.S.C. § 1114(a) (defining retiree benefit to mean payments made "to any entity or person for the purpose of providing or reimbursing payments for retired employees and their spouses and dependents, for medical, surgical, or hospital care benefits, or benefits in the event of sickness, accident, disability, or death" through fund established at least in part by debtor prior to filing for Chapter 11 bankruptcy).

23. See *id.* § 1114(e)(1) (limiting modification of retiree benefits); see also W. HOMER DRAKE, JR. & KAREN VISSER, BANKRUPTCY PRACTICE FOR THE GENERAL PRACTITIONER § 12:34 (3d ed. 2012) (providing details concerning Section 1114 and modification of retiree benefits). Additionally, Section 1114 limits an insolvent debtor's ability to modify or terminate retiree benefits 180 days prior to filing a Chapter 11 bankruptcy petition. See 11 U.S.C. § 1114(l)(1)-(2) (providing insolvent debtor may not modify retiree benefits 180 days prior to filing bankruptcy petition). If an insolvent debtor undertakes such modification, the court, after notice and a hearing, may reinstate the retiree benefits. See *id.* (providing bankruptcy court may reinstate retiree benefits terminated by insolvent debtor).

24. See 11 U.S.C. § 1114(e)(1) (emphasis added) (prohibiting modification of retiree benefits payments by debtor in Chapter 11 bankruptcy).

25. See *id.* § 1114(e)(1)(A)-(B) (providing exceptions to general rule that retiree benefits may not be modified by debtor during Chapter 11 bankruptcy). First, retiree benefits may be modified upon motion by the debtor in possession or other authorized individual if modification is ordered by the court after notice and a hearing. See *id.* § 1114(e)(1)(A) (providing exceptions to compliance with Section 1114). Further, retiree benefits may be modified if the recipients of the benefits, or individuals authorized to represent the recipients

to follow should a debtor wish to modify retiree benefits.²⁶ To comply with the procedures set forth in Section 1114, a debtor must make a proposal to the representative of the retirees that details the desired modifications of the retiree benefits “that are necessary to permit the reorganization of the debtor.”²⁷ Subsequently, the court will grant modification of the retiree benefits if the representative of the retirees refuses to accept the modifications “without good cause” and if the modification of retiree benefits “is necessary to permit the reorganization of the debtor.”²⁸ While some courts have held that Section 1114 does not apply to retiree benefits that can be terminated or modified unilaterally outside bankruptcy, other courts have held Section 1114 applies to all debtors in Chapter 11 bankruptcy proceedings.²⁹

III. A HAMMER VERSUS A MICROPHONE: JUDICIAL TREATMENT OF BANKRUPTCY CODE SECTION 1114

In *In re Chateaugay Corp.*,³⁰ the Second Circuit considered whether the RBBPA required LTV to continue payment of retiree benefits following the expiration of a wage agreement.³¹ In holding that the RBBPA did not require LTV to continue payment of the retiree benefits, the Second Circuit emphasized the legislative history of the RBBPA, which reveals the legislature’s concern that a debtor in bankruptcy may break a promise that was made to a retiree when the retiree was employed by the debtor.³² In a series of cases following *In re Chateaugay Corp.* and Congress’s passage of Section 1114, various lower

agree to the modification of the benefits. *See id.* § 1114(e)(1)(B) (same).

26. *See Stabile, supra* note 7, at 1928 (giving overview of procedures debtor must follow to modify retiree benefits during Chapter 11 bankruptcy); *see also* 11 U.S.C. § 1114(f)(1) (providing procedure for debtor to modify retiree benefits). Courts typically grant orders to modify retiree benefits if the debtor follows the procedure set forth in the statute, the beneficiaries of the benefits or their authorized representatives lack good cause for refusing to accept the modifications, and the modification of retiree benefits is necessary to achieve a successful reorganization. *See* 11 U.S.C. § 1114(g)(1)–(3) (detailing circumstances under which court should grant order to modify retiree benefits during Chapter 11 bankruptcy).

27. *See* 11 U.S.C. § 1114(f)(1)(A)–(B) (explaining that debtor must provide representative of retiree with sufficient information concerning modification of retiree benefits in order to allow evaluation of proposal).

28. *See id.* § 1114(g)(1)–(3) (providing guidance to court as to when motion to modify retiree benefits should be granted).

29. *Compare In re Delphi Corp.*, No. 05-44481 (RDD), 2009 WL 637315, at *6 (Bankr. S.D.N.Y. Mar. 10, 2009) (finding debtors have right to modify retiree benefits if benefits can be unilaterally modified outside bankruptcy), *with In re Visteon Corp.*, 612 F.3d 210, 218 (3d Cir. 2010) (finding Section 1114 applies to retiree benefits that can be unilaterally modified outside bankruptcy).

30. 945 F.2d 1205 (2d Cir. 1991).

31. *See id.* at 1206 (providing facts and procedural background). The issue in *In re Chateaugay* arose under Section 3 of the RBBPA, which Congress passed in an effort to protect retiree benefits prior to the implementation of Section 1114. *See id.* at 1206–07 (same).

32. *See id.* at 1210 (detailing legislative history of RBBPA). Specifically, the Second Circuit in *In re Chateaugay* recognized Congress’s intent to provide additional protection to retired workers’ expectations regarding retiree benefits granted to them during their years of employment. *See id.* (same).

courts concluded that Section 1114 did not apply to retiree benefits that could otherwise be terminated outside of bankruptcy.³³

The United States Bankruptcy Court first addressed the issue of whether Section 1114 applies to modifications of retiree benefits that can be unilaterally modified outside bankruptcy in *In re Doskocil Co.*,³⁴ and held that the procedure set forth in Section 1114 is not applicable when a debtor can unilaterally terminate the retiree benefits outside bankruptcy.³⁵ In arriving at this conclusion the court explained that the legislative history of the RBBPA illustrates that Congress did not intend for Bankruptcy Code Section 1114 to apply to retiree benefits that could be unilaterally terminated outside of bankruptcy.³⁶ The United States Bankruptcy Court for the Eastern District of Tennessee, in *In re North American Royalties, Inc.*,³⁷ entertained a motion by a debtor to terminate retiree benefits.³⁸ In concluding that Section 1114 did not prevent the debtors from terminating retiree benefits, the court reasoned that if the debtors were required to follow the procedures set forth in Section 1114 to modify the retiree benefits, Bankruptcy Code Section 1129(a)(13) would then “vest the benefits after reorganization.”³⁹

In 2009, the Southern District of New York in *In re Delphi Corp.*⁴⁰ entertained a motion by debtors to terminate retiree benefits without complying with the procedures set forth in Section 1114.⁴¹ In concluding that the debtor need not comply with the procedures set forth in Section 1114 to modify or terminate retiree benefits that could be terminated unilaterally outside bankruptcy, the court relied on “two fundamental principles underlying the Bankruptcy Code.”⁴² First, the bankruptcy court explained that contract or

33. *See Retired W. Union Emp. Ass'n v. New Valley Corp.*, Civ. A. No. 92-4884, 1993 WL 818245, at *2, *5 (D.N.J. Jan. 28, 1993) (concluding debtor need not comply with Section 1114 if benefit plan reserves the “right to modify or terminate the benefits at any time”); *see also In re Doskocil Co.*, 130 B.R. 870, 877 (Bankr. D. Kan. 1991) (finding debtor not required to follow procedure set forth in Section 1114 if debtor reserved ability to adjust retiree benefits).

34. 130 B.R. 870, 877 (Bankr. D. Kan. 1991).

35. *See id.* (sustaining debtors’ motion to modify retiree benefits without compliance with procedures set forth in Section 1114). The issue came before the bankruptcy court when Wilson Food Corporation filed a motion to modify retiree benefits during the Chapter 11 bankruptcy proceeding. *See id.* at 871 (providing procedural history).

36. *See id.* at 875 (explaining legislative history that led bankruptcy court to conclude that Bankruptcy Code Section 1114 did not apply to retiree benefits that could be unilaterally terminated outside bankruptcy).

37. 276 B.R. 860, 866 (Bankr. E.D. Tenn. 2002).

38. *See id.* (contemplating whether Section 1114 of Bankruptcy Code applies to benefits that can be unilaterally modified or terminated outside bankruptcy).

39. *See id.* at 867 (concluding compliance with Section 1114 could cause retiree benefits, which were not previously vested, to vest in bankruptcy); *see also* 11 U.S.C. § 1129(a)(13) (2012) (requiring continuation of payment of retiree benefits as established under Section 1114 “for the duration of the period the debtor has obligated itself to provide such benefits”).

40. No. 05-44481 (RDD), 2009 WL 637315 (Bankr. S.D.N.Y. Mar. 10, 2009).

41. *See id.* at *1 (providing procedural background of case).

42. *See id.* at *2 (applying fundamental principles of bankruptcy law in interpreting language of Section 1114).

property rights in existence prior to a bankruptcy petition should not be “analyzed differently or enhanced” due to a bankruptcy petition.⁴³ Next, the court recognized the limited amount of resources possessed by a debtor and concluded “statutory priorities must be narrowly construed.”⁴⁴

In contrast, other judicial decisions have held that Section 1114 of the Bankruptcy Code applies to the modification or termination of retiree benefits, regardless of whether the benefits can be modified or terminated unilaterally outside bankruptcy.⁴⁵ In *In re Ames Department Stores, Inc.*,⁴⁶ the Southern District of New York declared the importance of protecting retirees and concluded the unilateral termination of retiree benefits would result in a “drastic and most undeserving result” under Section 1114.⁴⁷ In 2003, the Bankruptcy Court in the Western District of Missouri recognized the myriad of interpretations attributable to Section 1114, but ultimately held in *In re Farmland Industries, Inc.*⁴⁸ that Section 1114 is applicable to the termination or modification of retiree benefits that can be terminated or modified unilaterally outside bankruptcy.⁴⁹

IV. RETIREES TAKE THE MIC: THIRD CIRCUIT CONCLUDES DEBTORS MUST COMPLY WITH PROCEDURES SET FORTH IN SECTION 1114 TO MODIFY RETIREE BENEFITS

Following Congress’s passage of Bankruptcy Code Section 1114, various courts concluded the procedures set forth in Section 1114, for the modification or termination of retiree benefits, did not apply to debtors who reserved the

43. *See id.* (citing *Butner v. United States*, 440 U.S. 48, 99 (1979)) (concluding property and contract rights should not be treated differently due to existence of bankruptcy petition).

44. *See id.* at *3 (citing *In re Bethlehem Steel Corp.*, 479 F.3d 167, 172 (2d Cir. 2007)) (emphasizing importance of narrow construction in order to assure resources are distributed equally among proper parties). Bankruptcy is often described as a “zero sum game.” *See Howard Delivery Serv., Inc. v. Zurich Am. Ins. Co.*, 547 U.S. 651, 667 (2006) (explaining phenomenon in bankruptcy often described as “zero sum game”). Bankruptcy is characterized as a zero sum game because providing funds to some claimants limits the amount of funds available to other claimants due to the debtor’s limited funds. *See id.* (same).

45. *See generally In re Farmland Indus., Inc.*, 294 B.R. 903 (W.D. Mo. 2003) (denying debtors’ motion to terminate retiree benefits because debtors did not comply with procedures set forth in Section 1114); *see also In re Ames Dep’t Stores, Inc. v. Emp. Comm. of Ames Dep’t Stores, Inc.*, No. 92 Civ. 6145 (KTD), 1992 WL 373492, at *1 (S.D.N.Y. Nov. 30, 1992) (affirming bankruptcy court’s order denying debtor’s motion to terminate retiree benefits absent compliance with Section 1114).

46. No. 92 Civ. 6145 (KTD), 1992 WL 373492, at *1 (S.D.N.Y. Nov. 30, 1992).

47. *See id.* (concluding plain language of Section 1114 requires compliance with procedures in order to terminate or modify retiree benefits that can be unilaterally modified or terminated outside bankruptcy).

48. 294 B.R. 903, 914, 919 (W.D. Mo. 2003) (concluding debtors are obligated to follow procedure set forth in Section 1114 despite fact that benefits may be unilaterally modified or terminated outside bankruptcy).

49. *See id.* at 914 (recognizing split in authority in applicability of Section 1114 to termination and modification of retiree benefits that can be modified or terminated unilaterally outside bankruptcy).

right to unilaterally terminate or modify retiree benefits outside bankruptcy, while other courts held that Section 1114 applied to all debtors in Chapter 11 bankruptcy.⁵⁰ Part A details the facts and procedural history of *In re Visteon Corp.*, which raised the issue of whether a debtor in Chapter 11 bankruptcy may modify or terminate retiree benefits without complying with the procedures set forth in Bankruptcy Code Section 1114.⁵¹ Subsequently, Part B discusses the Third Circuit's holding in *In re Visteon Corp.*, which is the first circuit court opinion to conclude that Section 1114 applies to debtors even if the debtor previously reserved the right to unilaterally terminate or modify retiree benefits outside bankruptcy.⁵²

A. *Amping Up: Facts and Procedural History of In re Visteon Corp.*

For many years Visteon Corporation (Visteon), a large supplier of automotive components, provided health and life insurance benefits (collectively retiree benefits) to retired employees.⁵³ The collective bargaining agreements that memorialized Visteon's commitment to provide retiree benefits dictated that Visteon maintained the power to "suspend, amend or terminate" such benefits.⁵⁴ On May 28, 2009, Visteon filed for Chapter 11 bankruptcy and subsequently filed a motion to terminate the retiree benefits.⁵⁵ In response to

50. For a discussion concerning Congress's passage of Bankruptcy Code Section 1114, and subsequent judicial decisions interpreting the application of that section, see *supra* notes 2–5, 30–48, and accompanying text.

51. For a discussion of the facts and procedural history in *In re Visteon Corp.*, see *infra* notes 52–59 and accompanying text.

52. For a summary of the Third Circuit's decision in *In re Visteon Corp.* concerning compliance with Bankruptcy Code Section 1114, see *infra* notes 60–75 and accompanying text.

53. See *In re Visteon Corp.*, 612 F.3d 210, 212 (3d Cir. 2010) (describing collective bargaining agreement that provided retiree benefits to retired Visteon employees).

54. See *id.* at 213 (“[T]he Company reserves the right to suspend, amend or terminate the Plan—or any of the coverages or features provided under the Plan—at any time and in any manner to the extent permitted by law . . .”) (internal quotations omitted). Visteon had five benefit plans that provided coverage to approximately 6,650 retired employees. See Brad Scheler et al., *In re Visteon: Third Circuit Expands the Protection of Retiree Benefits in Chapter 11 Cases*, FRIED, FRANK, HARRIS, SHRIVER & JACOBSON LLP (Aug. 12, 2010), <http://www.friedfrank.com/siteFiles/Publications/F3D2F943D9A10F6DFCD2DA8D27C444A0.pdf> (providing background concerning benefits provided to retired employees of Visteon). Upon the closure of two of Visteon's plants, in Bedford, Indiana and Connersville, Indiana, closing agreements were negotiated between the union and Visteon. See *In re Visteon Corp.*, 612 F.3d at 213 (providing factual background relevant to litigation). The closing agreements provided: “Visteon may in the future amend its benefit plans and make available different retirement, placement or separation benefits for which I may not be eligible. The Plant Closure Agreement does not limit or in any way modify the provisions of any benefit plan.” See *id.* (providing relevant text in Plant Closure Agreement) (internal quotations omitted).

55. See *In re Visteon Corp.*, 612 F.3d at 213 (providing background of bankruptcy proceeding). Visteon filed a motion to terminate the retiree benefits under Section 363(b)(1). See 11 U.S.C. § 363(b)(1) (2012) (“The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . .”) (emphasis added). Eight thousand former employees and present employees, as well as their spouses and dependents, would be affected as a result of Visteon terminating the benefits. See *In re*

the motion, retirees asserted that Visteon should not be allowed to terminate the benefits without complying with the procedure set forth in Bankruptcy Code Section 1114.⁵⁶

The bankruptcy court granted Visteon's motion to terminate the benefits, noting that they were not vested and could be terminated at will outside bankruptcy.⁵⁷ The retirees appealed to the district court, which denied the appeal and refused to issue a stay because "the bankruptcy court's finding that the benefits were not vested was not clearly erroneous."⁵⁸ The retirees appealed the case to the Third Circuit, which reviewed the conclusions of the bankruptcy court de novo.⁵⁹ The Third Circuit concluded that limiting a debtor's ability to terminate benefits, which it could normally terminate unilaterally outside bankruptcy, is consistent with the plain language of the statute and the drafters' legislative intent.⁶⁰

B. *Testing 1 . . . 2 . . . 3: The Third Circuit's Broad Interpretation of Section 1114 in In re Visteon Corp.*

On appeal, the Third Circuit held that Section 1114 effectively limits the ability of a debtor to terminate or modify retiree benefits that it otherwise could terminate or modify outside of Chapter 11 bankruptcy.⁶¹ In arriving at this conclusion, the court first examined the plain language of Section 1114 and determined it was unambiguous.⁶² The court concluded that the language of

Visteon Corp., 612 F.3d at 213 (providing factual background concerning retiree benefit plans in place at Visteon prior to bankruptcy).

56. *See In re Visteon Corp.*, 612 F.3d at 213 (describing retirees' argument that Visteon should not be allowed to terminate benefits after initiation of Chapter 11 bankruptcy). For a discussion of the procedure set forth in Section 1114, see *supra* notes 25–28 and accompanying text.

57. *See In re Visteon Corp.*, 612 F.3d at 214 (noting plain language of Section 1114 "would lead to an absurd result in that it would expand retiree rights beyond the scope of state law for no legitimate bankruptcy purpose") (internal quotations omitted). In coming to its conclusion the bankruptcy court relied heavily on the bankruptcy court's analysis in *In re Delphi Corp.* *See id.* (incorporating Judge Drain's analysis of Section 1114 in *In re Delphi Corp.*). The retirees moved for a stay pending an appeal to the district court, but the bankruptcy court denied the request. *See id.* (detailing procedural history).

58. *Id.* at 215 (providing procedural history of bankruptcy proceeding).

59. *See id.* at 216 (noting de novo standard of review); *see also In re Engel*, 124 F.3d 567, 571 (3d Cir. 1997) (noting conclusions of bankruptcy courts "are subject to plenary review").

60. For a discussion of the Third Circuit's justification for a broad interpretation of Bankruptcy Code Section 1114, see *infra* notes 61–75 and accompanying text.

61. *See In re Visteon Corp.*, 612 F.3d at 218 (providing conclusion as to interpretation of Bankruptcy Code Section 1114). Although a debtor may have the right to terminate benefits outside bankruptcy, a debtor still must comply with "plan documents, collective bargaining obligations, and the prescriptions of the Employee Retirement Income Security Act of 1974 (ERISA)." *Id.* (noting additional constraints on employers who wish to terminate retiree benefits outside bankruptcy).

62. *See id.* at 219 (concluding language of Section 1114 is unambiguous and applies to retiree benefits). In analyzing issues of statutory construction, it is necessary for courts to defer to unambiguous language of a statute to ensure laws are carried out in a manner that is consistent with Congress's intention in drafting the legislation. *See Lamie v. United States*

Section 1114(e) plainly states that debtors “shall timely pay and shall not modify any retiree benefits” absent an exclusion specifically enumerated in the statute.⁶³ Further, the Third Circuit rejected the argument that when read in conjunction with Section 1129(a)(13), the language of Section 1114 is ambiguous.⁶⁴ The debtors argued that Congress intended Section 1129(a)(13) and Section 1114 to be “identical in scope” and thus Section 1114 is ambiguous.⁶⁵ In rejecting this argument, the court applied a canon of statutory construction that states where one section of a statute does not include a term used elsewhere in the same statute, “the drafters did not wish such a requirement to apply.”⁶⁶

Next, the Third Circuit explored the legislative history of the RBBPA and found it to be consistent with the plain language of Section 1114.⁶⁷ The legislative history emphasized the drafters’ concerns with the possibility that the burden of reorganizing a corporation could fall on a vulnerable group of

Tr., 540 U.S. 526, 538 (2004) (concluding deference should be given to words chosen by Congress because often representatives vote on language of law).

63. 11 U.S.C. § 1114(e)(1) (2012) (listing circumstances under which debtors may modify retiree benefits in bankruptcy). For a thorough discussion of Section 1114, see *supra* notes 21–29 and accompanying text. The Third Circuit emphasized that Congress specifically limited the scope of Section 1114 under certain circumstances, and therefore one can infer Section 1114 should apply broadly. See *In re Visteon Corp.*, 612 F.3d at 220–21 (interpreting Section 1114 to apply broadly to all debtors in Chapter 11 bankruptcy). Further, the court noted that Congress’s use of the word “any,” which appears multiple times in the statute serves the purpose of ensuring Section 1114 applies to all but the few exceptions enumerated in the statute. See *id.* (concluding apart from enumerated exclusions Section 1114 should apply broadly); see also 11 U.S.C. § 1114(e)(1)(A)–(B) (providing exclusions to rule that debtors should not modify retiree benefits without compliance with Section 1114).

64. See *In re Visteon Corp.*, 612 F.3d at 223–24 (rejecting argument by debtors that language of Section 1114 is ambiguous). Section 1129(a)(13) details requirements to be included in a debtor’s plan to emerge from bankruptcy, one of which is the payment of retiree benefits “for the duration of the period the debtor has obligated itself to provide such benefits.” See 11 U.S.C. § 1129(a)(13) (providing guidance to debtors intending to emerge from bankruptcy). Section 1114 of the Bankruptcy Code provides protection to retirees during the bankruptcy process, while Section 1129(a)(13) ensures protection to retirees after bankruptcy proceedings end. See *In re Visteon Corp.*, 612 F.3d at 216–17 (describing protections provided by Sections 1114 and 1129(a)(13)).

65. See *In re Visteon Corp.*, 612 F.3d at 223 (noting some courts assume provisions to be “identical in scope” and thus found ambiguity when construing provisions in tandem); see also *In re New Valley Corp.*, Civ. A. No. 92-4884, 1993 WL 818245, at *3 (D.N.J. Jan. 28, 1993) (finding ambiguity in construing Section 1129(a)(13) and Section 1114(e)(1)).

66. See *In re Visteon Corp.*, 612 F.3d at 224 (citing *United States v. Mobley*, 956 F.2d 450, 452–53 (3d Cir. 1992) (explaining canon of statutory construction)); see also *BFP v. Resolution Tr. Corp.*, 511 U.S. 531, 537 (2006) (explaining that Congress acts intentionally when including language in one section of statute and omitting that language from other parts of statute).

67. See *In re Visteon Corp.*, 612 F.3d at 226–31 (exploring legislative history of Section 1114). The legislative history of a statute only justifies a departure from the plain language of that statute if there is the “‘most extraordinary showing of contrary intentions’ in the legislative history” See *United States v. Albertini*, 472 U.S. 675, 680 (1985) (quoting *Garcia v. United States*, 469 U.S. 70, 75 (1984)) (describing circumstances under which legislative history justifies departure from plain language of statute).

individuals—former workers and retirees.⁶⁸ The Third Circuit pointed to a Senate Report that clearly states that the only way a debtor can modify or terminate retiree benefits while in Chapter 11 bankruptcy is through the procedure established in Section 1114.⁶⁹ Further, the court contended that Congress's actions in drafting Section 1114 served as a direct response to LTV Corporation's termination of the retiree benefits of 78,000 former employees.⁷⁰

Lastly, the Third Circuit addressed the debtor's argument that providing retirees more rights during Chapter 11 bankruptcy than they would otherwise have outside of bankruptcy is "so absurd . . . that Congress simply could not have intended the result."⁷¹ The retiree benefits at issue would not be protectable outside bankruptcy because the Employee Retirement Income Security Act (ERISA) does not require the vesting of such benefits.⁷² The Third Circuit noted that Chapter 11 bankruptcy is unique because while debtors are in the position to reorganize and emerge as a more economically viable business, it is possible that retirees face a heightened vulnerability as the debtor

68. See *In re Visteon Corp.*, 612 F.3d at 227–29 (describing Congress's intention to protect retired workers in drafting Bankruptcy Code). One example of the drafters' intent can be gleaned from a statement by Congressman Edwards who considered it "imperative that [the statute] protect the retirees from the sudden and unilateral termination of their health, life, and disability benefits . . ." 134 CONG. REC. H3486-02 (daily ed. May 23, 1988) (statement of Rep. Don Edwards).

69. See *In re Visteon Corp.*, 612 F.3d at 229 (discussing intent of legislature in drafting Section 1114); see also S. REP. NO. 100-119, at 687 (1988) ("Section 1114 makes it clear that when a Chapter 11 petition is filed retiree benefit payments must be continued without change until and unless a modification is agreed to by the parties or ordered by the court. Section 1114(e)(1) rejects any other basis for trustees to cease or modify retiree benefit payments.").

70. See *In re Visteon Corp.*, 612 F.3d at 229 (characterizing Congress's drafting of Section 1114 as direct response to LTV Corporation terminating retiree benefits during 1986 bankruptcy). For further discussion on the termination of retiree benefits by LTV, see *supra* notes 2–3 and accompanying text.

71. See *In re Visteon Corp.*, 612 F.3d at 231 (addressing debtor's absurdity argument). Courts must adhere to the plain language of a statute that is unambiguous, unless doing so would yield a result "at odds with the intentions of its drafters." See *Mitchell v. Horn*, 318 F.3d 523, 535 (2003) (citing *BFP*, 511 U.S. at 563) (explaining canon of statutory interpretation). In advancing their absurdity argument, the debtors pointed to a bankruptcy principle that states that contract and property rights should not be enhanced because a party is involved in a bankruptcy proceeding. See *In re Visteon Corp.*, 612 F.3d at 231 (detailing debtor's absurdity argument).

72. See *In re Visteon Corp.*, 612 F.3d at 232 (describing manner in which retiree benefits are treated under ERISA). ERISA does not require vesting of retiree benefit plans, such as the ones at issue in *In re Visteon Corp.* See *In re Unisys Corp. Retiree Med. Benefit ERISA Litig. (Unisys II)*, 58 F.3d 896, 901 (3d Cir. 1995) ("Although ERISA contains elaborate vesting requirements for pension plans, ERISA does not require automatic vesting of welfare benefit plans."); see also *Alexander v. Primerica Holdings, Inc.*, 967 F.3d 90, 95 (3d Cir. 1992) (describing vesting requirements imposed by ERISA). Under ERISA, Congress does not mandate the vesting of such retiree benefits because Congress recognized "the need for flexibility with regard to an employer's right to change medical plans." See *In re Visteon Corp.*, 612 F.3d at 232 (citing *Unisys II*, 58 F.3d at 901) (internal citations and quotations omitted) (describing Congress's intent when drafting ERISA).

chooses to relieve “itself of all perceived liabilities.”⁷³ Yet, the court characterized the RBBPA as an “imperfect compromise” between members of the legislature that could serve to protect retiree benefits while not requiring a vesting of those benefits.⁷⁴ Last, the Third Circuit emphasized that their interpretation of Section 1114 may appear to give the retirees a right that does not exist outside bankruptcy; however, this is not always the case because debtors retain the opportunity to utilize the procedure set forth in Section 1114 to terminate the retiree benefits.⁷⁵ In rejecting the debtor’s absurdity argument, the Third Circuit deferred to the plain language of the statutory text as well as the legislative history and reversed the decisions of the district court and bankruptcy court.⁷⁶

V. TURNING UP THE VOLUME: IMPLICATIONS OF *IN RE VISTEON CORP.* FOR PRACTITIONERS IN THE THIRD CIRCUIT

The Third Circuit’s decision in *In re Visteon Corp.* is significant because the Third Circuit is the first circuit court to directly address the issue of whether Section 1114 applies to cases where a debtor reserves the right to unilaterally modify or terminate retiree benefits.⁷⁷ The Third Circuit’s broad interpretation of Section 1114, and its conclusion that a debtor may not modify or terminate retiree benefits in Chapter 11 bankruptcy without first complying with procedures set forth in Section 1114, affords greater protection to retirees who

73. See *In re Visteon Corp.*, 612 F.3d at 235–36 (providing possible explanation as to why Congress chose to provide heightened protection to retiree benefits in context of Chapter 11 bankruptcy).

74. See *id.* at 234 (characterizing the RBBPA as an “imperfect compromise”). The Third Circuit recognized that Congress’s concern shifted after enacting ERISA due to the events that occurred in conjunction with LTV’s bankruptcy in 1986. See *id.* at 233 (detailing Congress’s concern after LTV terminated retiree benefits of over 78,000 individuals while in bankruptcy).

75. See *id.* at 235 (describing opportunity for debtors to terminate retiree benefits by utilizing procedures set forth in Section 1114).

76. See *id.* at 237 (articulating holding in *In re Visteon Corp.*). Following the Third Circuit appeal of *In re Visteon Corp.*, the bankruptcy court approved Visteon’s plan for reorganization. See Mintz & Canfield, *supra* note 2 (providing information concerning Visteon’s settlement with former Visteon employees). Ultimately, Visteon entered into a deal with the union representing former Visteon employees, in which Visteon agreed to pay 11 million dollars to over 6,000 retired Visteon employees in exchange for the right to terminate retiree benefits. See *id.* (describing details of settlement).

77. See Keating, *supra* note 5, at 2 (discussing significance of Third Circuit’s decision in *In re Visteon Corp.*). Keating notes the Second Circuit decided the similar and related issue of whether a debtor is required to continue payment of retiree benefits upon expiration of a collective bargaining agreement. See *id.* (addressing Second Circuit ruling on this issue); see also *In re Chateaugay Corp. v. United Mine Workers of Am.*, 945 F.2d 1205, 1206 (2d Cir. 1991) (finding debtors not obligated to continue payment of retiree benefits after expiration of collective bargaining agreement). The Third Circuit is comprised of New Jersey, Pennsylvania, Delaware, and the Virgin Islands; therefore, the Third Circuit’s holding in *In re Visteon Corp.* is binding on all of the aforementioned jurisdictions for the purpose of compliance with procedures set forth in Bankruptcy Code Section 1114. See UNITED STATES COURTS, *Court Locator*, http://www.uscourts.gov/Court_Locator.aspx (last visited Nov. 6, 2013) (providing court locator function).

are potentially vulnerable in the context of Chapter 11 bankruptcy.⁷⁸ Additionally, the Third Circuit's decision provides retirees with leverage in potential settlement negotiations with debtors because debtors may wish to avoid the time commitment and expense associated with complying with Section 1114.⁷⁹ Commentary and analysis of the Third Circuit's decision has characterized *In re Visteon Corp.* as problematic for debtors who may now think twice before initiating bankruptcy proceedings in Delaware.⁸⁰

However, it is necessary to closely examine the implications of *In re Visteon Corp.* and the decision's effect on Section 1114 in order to fully comprehend the ramifications of the decision for practitioners in the Third Circuit.⁸¹ First, it is important for practitioners—particularly those representing debtors—to note that retiree benefits may not be terminated six months prior to filing a petition for Chapter 11 bankruptcy.⁸² In 2005, Congress amended Section 1114(l) to prohibit insolvent debtors from modifying retiree benefits 180 days prior to filing a petition for Chapter 11 bankruptcy.⁸³ In *In re Visteon Corp.*, the Third Circuit noted that Section 1114(l) applies to those benefits that could otherwise be terminated unilaterally outside bankruptcy.⁸⁴

78. See *In re Visteon Corp.*, 612 F.3d at 237 (describing retirees as particularly vulnerable group during bankruptcy due to “their ages, their reduced incomes, and their inability to replace the benefits . . .”). The Third Circuit furthers the argument that Congress intended to protect retirees and retiree benefits when it enacted Section 1114 of the Bankruptcy Code as a direct response to LTV terminating retiree benefits of more than 78,000 individuals. See *id.* at 226–31 (discussing legislative history of Section 1114). Compare *id.* at 219 (finding Section 1114 protects retirees during Chapter 11 bankruptcy by limiting debtor's ability to terminate or modify retiree rights absent compliance with Section 1114), with *In re Delphi Corp.*, No. 0544481, 2009 WL 637315, at *6 (Bankr. S.D.N.Y. Mar. 10, 2009) (providing less protection to retirees by holding debtors have right to modify or terminate retiree benefits that can be unilaterally terminated outside bankruptcy).

79. See Marshall S. Huebner & Brian M. Resnick, *Contractually Amendable Retiree Health and Welfare Benefits*, 27 BANKR. STRATEGIST 1 (2010) (concluding Third Circuit's conclusion in *In re Visteon Corp.* provided retirees with leverage in negotiating settlement with debtors); see also *In re Visteon Corp.*, 612 F.3d at 235 (explaining that Section 1114 process to modify or terminate retiree benefits can lead to agreement between parties). The Third Circuit's holding in *In re Visteon Corp.* could possibly “lead to shorter bankruptcy cases, or more prepackaged or pre-negotiated bankruptcies . . . and likely increase union leverage in negotiating any changes to benefit plans.” See Mintz & Canfield, *supra* note 2 (describing possible ramifications of Third Circuit's holding in *In re Visteon Corp.*).

80. See Scheler et al., *supra* note 54 (describing possibility debtors will be dissuaded from filing bankruptcy in Delaware as result of Third Circuit's holding in *In re Visteon Corp.*); see also Stephen J. Lubben, *The Chapter 11 Challenge to Delaware*, N.Y. TIMES (Oct. 5, 2010, 1:18 PM), <http://dealbook.nytimes.com/2010/10/05/the-chapter-11-challenge-to-delaware/> (predicting recent Third Circuit decisions, including *In re Visteon Corp.*, could lead to debtors filing for bankruptcy in New York as opposed to Delaware).

81. For a discussion concerning a debtor's rights to terminate or modify retiree benefits under Section 1114 after the Third Circuit's decision, see *infra* notes 82–99 and accompanying text.

82. See 11 U.S.C. § 1114(l) (2012) (providing debtor may not terminate retiree benefits during 180 days prior to filing Chapter 11 bankruptcy petition).

83. See *id.* (noting prohibition on modification of benefits).

84. See *In re Visteon Corp.*, 612 F.3d at 225 (concluding Section 1114(l) applies to those retiree benefits that could be unilaterally terminated outside bankruptcy). The Third Circuit explains:

Following *In re Visteon Corp.*, debtors who wish to terminate retiree benefits may do so by following the procedures set forth in Section 1114 of the Bankruptcy Code.⁸⁵ Section 1114 provides the debtor an “equitable procedure” to make a case for the termination or modification of retiree benefits during Chapter 11 bankruptcy, and provides the retirees notice and a hearing.⁸⁶ Often the debtor and the retirees reach an agreement concerning the modification of employment benefits.⁸⁷ However, if an agreement is not reached between the parties, the court weighs the equities at stake and determines whether modification of retiree benefits is in the interest of all parties involved in the Chapter 11 bankruptcy proceeding and rules on the motion.⁸⁸ Although the procedure set forth in Section 1114 provides debtors with the opportunity to modify or terminate retiree benefits, the process is often criticized because it is expensive and time consuming, and decisions often benefit the retirees as opposed to the debtors.⁸⁹

Another option available to debtors wishing to terminate retiree benefits is to wait until after the Chapter 11 bankruptcy proceeding, as Section 1114 of the Bankruptcy Code only applies during bankruptcy.⁹⁰ In *In re North American Royalties Inc.*, the Eastern District of Tennessee Bankruptcy Court concluded that an interpretation of Section 1114 that prevented the debtor from terminating

“[Section] 1114(l) would be virtually meaningless if it did not apply to those benefits the debtor could unilaterally terminate [because] Outside of the bankruptcy context, an employer is already prohibited by various laws . . . and basic principles of contract law, from those benefits it is obligated to provide.”

See id. (articulating argument that Section 1114 applies to debtors who reserve right to unilaterally terminate retiree benefits outside bankruptcy).

85. *See* 11 U.S.C. § 1114(e)(1)(A) (stating court may rule on motion to modify retiree benefits after notice and hearing). Upon a motion by the debtor to modify retiree benefits the court will grant such a motion if: (1) a proposal, that complies with subsection (f) is made before the hearing; (2) the representative of the retirees rejects the proposal without “good cause”; and (3) the modification proposed by the trustee “is necessary to permit the reorganization of the debtor” and necessary to treat all parties fairly. *See id.* § 1114(g)(1)–(3) (providing circumstances under which court will grant motion to modify retiree benefits).

86. *See id.* § 1114(g)(1)–(3) (providing procedure that allows modification or termination of retiree benefits by debtor upon notice and a hearing). For a discussion of Bankruptcy Code Section 1114, see *supra* notes 22–29 and accompanying text.

87. *See In re Visteon Corp.*, 612 F.3d at 235 (“[T]his process may, by itself, foster an agreement about continuing or modifying retiree benefits that would otherwise be impossible to reach.”).

88. *See* 11 U.S.C. § 1114(g)(1)–(3) (providing guidance to court ruling on motion to modify retiree benefits); *see also In re Visteon Corp.*, 612 F.3d at 235 (asserting if no agreement concerning modification of retiree benefits is reached court must determine whether modification of retiree benefits is equitable). While the court may enter an order for the modification of retiree benefits pursuant to Section 1114(g), the court cannot provide “for a modification to a lower level than that proposed by the trustee.” *See* 11 U.S.C. § 1114(g)(1)–(3) (providing court’s ability to modify retiree benefits after motion by debtor and subsequent notice and hearing for benefit of retirees).

89. *See* Mintz & Canfield, *supra* note 2 (describing impact of Third Circuit’s holding in *In re Visteon Corp.* on debtors in Chapter 11 bankruptcy).

90. *See In re Visteon Corp.*, 612 F.3d at 236 (“[Section] 1114’s protections terminate upon plan confirmation, when the distorting pressures . . . recede.”).

retiree benefits was problematic because Bankruptcy Code Section 1129(a)(13) would then require the vesting of those benefits.⁹¹ In *In re Visteon Corp.*, the Third Circuit explicitly rejected the bankruptcy court's reasoning and further explained Section 1129(a)(13) does not vest retiree benefits upon conclusion of the Chapter 11 bankruptcy proceeding.⁹² Rather, if a debtor reserved the right to unilaterally terminate retiree benefits prior to filing for Chapter 11 bankruptcy, the Third Circuit's holding in *In re Visteon Corp.* does not impose an obligation to continue to provide retiree benefits after confirmation of the bankruptcy plan.⁹³ The fact that debtors may still modify or terminate retiree benefits following emergence from bankruptcy could lead debtors to seek an accelerated bankruptcy process in order to avoid costs associated with sustaining payments of retiree benefits.⁹⁴

The Third Circuit's decision in *In re Visteon Corp.* may have ramifications beyond the interpretation of Bankruptcy Code Section 1114, and a debtor's ability to modify or terminate retiree benefits.⁹⁵ Traditionally, Delaware has been considered a "favored jurisdiction" by debtors filing Chapter 11 bankruptcy petitions.⁹⁶ However, following *In re Visteon Corp.*, and other Third Circuit decisions considered unfavorable by debtors, Delaware may no

91. See generally *In re N. Am. Royalties, Inc.*, 276 B.R. 860 (Bankr. E.D. Tenn. 2002) (concluding interpretation of Section 1114 that vests previously unvested retiree benefits is problematic and inconsistent with ERISA). Bankruptcy Code Section 1129(a)(13) mandates that in order for a bankruptcy plan to be confirmed it must provide for the continuation of retiree benefits "for the duration of the period the debtor has obligated itself to provide such benefits." See 11 U.S.C. § 1129(a)(13) (detailing requirements for confirmation of bankruptcy plan).

92. See *In re Visteon Corp.*, 612 F.3d at 236 ("[Section] 1129(a)(13) does not vest benefits."). The Third Circuit explains that contrary to the bankruptcy court's interpretation of Section 1129(a)(13) in *In re North American Royalties, Inc.*, Section 1129(a)(13) actually "ensures that a debtor who reserved the right to terminate retiree benefits has no ongoing obligation, other than one that may have been voluntarily undertaken during the § 1114 process, to continue to provide benefits." Compare *id.* (finding Section 1129(a)(13) does not vest retiree benefits upon reorganization), with *In re N. Am. Royalties, Inc.*, 276 B.R. at 860 (characterizing Sections 1114 and 1129(a)(13) as vesting retiree benefits after conclusion of Chapter 11 bankruptcy).

93. See O'Neill & Hayes, *supra* note 4 (providing analysis concerning implications of Third Circuit's decision in *In re Visteon Corp.*). It is important to note that after emerging from bankruptcy the debtor still needs to consider its "underlying contractual rights" to terminate or modify retiree benefits. See *id.* (explaining debtors' ability to terminate or modify retiree benefits may still be limited outside bankruptcy).

94. See Mintz & Canfield, *supra* note 2 (noting debtors may attempt to expedite bankruptcy process in order to avoid payment of retiree benefits). Debtors may attempt to accelerate the Chapter 11 bankruptcy proceeding by seeking "a prepackaged or prearranged bankruptcy, or through a large-scale asset sale followed by a liquidation." See *id.* (explaining how to expedite bankruptcy proceeding).

95. For a discussion of ramifications of Third Circuit's holding in *In re Visteon Corp.* beyond the interpretation of Bankruptcy Code Section 1114, see *infra* notes 96–98 and accompanying text.

96. See Lubben, *supra* note 80 (describing Delaware as favored jurisdiction by debtors in Chapter 11 bankruptcy cases).

longer be as alluring to debtors filing Chapter 11 bankruptcy cases.⁹⁷ Debtors wishing to relieve themselves of burdensome expenses associated with the payment of retiree benefits can no longer file for Chapter 11 bankruptcy in Delaware and expect “immediate relief” from payment of retiree benefits.⁹⁸ As a result, debtors may be more likely to file for Chapter 11 bankruptcy in jurisdictions, such as the Southern District of New York, where unfavorable precedent does not govern.⁹⁹

VI. CONCLUSION

In 1988 Congress amended the Bankruptcy Code to include Section 1114, which specifically provides that debtors “shall timely pay and shall not modify any retiree benefits.”¹⁰⁰ Following the enactment of Bankruptcy Code Section 1114, judicial interpretation varied as to whether debtors who had the ability to unilaterally modify or terminate retiree benefits outside bankruptcy should have to comply with the procedure for modification and termination under Section 1114.¹⁰¹ In reliance on the plain language of the Bankruptcy Code and legislative history, the Third Circuit in *In re Visteon Corp.* adopted the minority approach and interpreted Section 1114 as providing additional protection to retirees during Chapter 11 bankruptcy.¹⁰² The debtors characterized the Third Circuit’s broad interpretation of Bankruptcy Code Section 1114 as a “hammer.”¹⁰³ In response the Third Circuit explained: “[Section 1114] is much more accurately characterized as a ‘microphone,’ intended to elevate the

97. See *id.* (noting Third Circuit’s decision in *In re Visteon Corp.* as well as other decisions by Third Circuit are unfavorable from debtors’ perspective); see also *In re Phila. Newspapers, LLC*, 599 F.3d 298, 338 (3d Cir. 2010) (providing protection to creditors “at a plan of sale of collateral free of liens by providing them a means to control undervaluations of secured assets.”).

98. See Mintz & Canfield, *supra* note 2 (noting Third Circuit’s holding in *In re Visteon Corp.* has potential to change process followed by debtors in bankruptcy cases involving substantial amount of retiree benefits). Visteon estimated it could “save \$31 million in 2009 and \$310 million long term” by terminating retiree benefits. See Tom Hals, *Court Orders Visteon Retiree Benefits Reinstated*, REUTERS (July 13, 2010, 2:13 PM), <http://www.reuters.com/article/2010/07/13/us-visteon-retiree-benefits-idUSTRE66C57W20100713> (reporting Third Circuit’s decision in *In re Visteon Corp.* to mandate debtor compliance with procedures in Section 1114 when terminating or modifying retiree benefits during bankruptcy).

99. See Lubben, *supra* note 80 (stating belief that if decisions unfavorable to debtor continue to be issued by Third Circuit, Delaware will lose its status as favored jurisdiction for filing Chapter 11 bankruptcy cases, resulting in more cases being filed in New York).

100. See 11 U.S.C. § 1114(e)(1)(A)–(B) (2012) (providing debtor may not modify retiree benefits absent exemptions enumerated within Bankruptcy Code) (emphasis added); see also Mintz & Canfield, *supra* note 2 (explaining Congress amended Bankruptcy Code to provide additional protection to retiree benefits in 1988).

101. For a discussion concerning judicial interpretations of Section 1114 prior to the Third Circuit’s decision in *In re Visteon Corp.*, see *supra* notes 30–49 and accompanying text.

102. For a discussion of the Third Circuit’s analysis of Section 1114 in *In re Visteon Corp.*, see *supra* notes 61–76 and accompanying text.

103. See *In re Visteon Corp.*, 612 F.3d 210, 236 (3d Cir. 2010) (“We therefore reject Visteon’s characterization of [Section] 1114 as a ‘hammer.’”).

voices of those who would otherwise not be heard above the din of more powerful creditors carving up the pie of the bankruptcy estate.”¹⁰⁴

Response to the Third Circuit’s holding in *In re Visteon Corp.* is varied due to the fact that retiree benefits are now afforded additional protection during Chapter 11 bankruptcy at the expense of the debtors, who are now required to comply with the procedures set forth in Section 1114 in order to modify or terminate retiree benefits.¹⁰⁵ Critics fear that the decision in *In re Visteon Corp.*, as well as other recent unfavorable decisions, will result in debtors filing bankruptcy petitions in other jurisdictions, causing Delaware to lose its status as a favored jurisdiction for bankruptcy.¹⁰⁶ However, options still exist that allow debtors to relieve themselves of the burden associated with sustaining expensive retiree benefit plans.¹⁰⁷

Following the Third Circuit’s broad interpretation of Bankruptcy Code Section 1114, it is necessary for both debtors and individuals representing retirees to be cognizant of the law governing the modification or termination of retiree benefits.¹⁰⁸ First, it is important for debtors who wish to terminate or modify retiree benefits to note that retiree benefits may not be modified or terminated six months prior to filing a bankruptcy petition.¹⁰⁹ Next, debtors wishing to modify or terminate retiree benefits during a Chapter 11 bankruptcy proceeding may still do so by complying with the procedures set forth in Bankruptcy Code Section 1114.¹¹⁰ Lastly, debtors may still be able to modify or terminate retiree benefits upon emerging from bankruptcy, if such modification or termination is consistent with their contractual rights.¹¹¹

Chapter 11 bankruptcy attempts to balance the interests of the debtors in reorganizing the business and emerging from bankruptcy as an “economically viable entity,” and the interests of the creditors, including retirees.¹¹²

104. *Id.* (characterizing Section 1114 as procedural device that allows retirees to be heard in Chapter 11 bankruptcy process that often leaves them vulnerable).

105. For a discussion of the practical implications of the Third Circuit’s holding in *In re Visteon Corp.*, see *supra* notes 77–99 and accompanying text.

106. For a discussion concerning the implications of the Third Circuit’s holding in *In re Visteon Corp.* on Delaware’s status as a favored jurisdiction for bankruptcy petitions, see *supra* notes 95–99 and accompanying text.

107. For a discussion examining debtors’ option to modify or terminate retiree benefits following the Third Circuit’s decision in *In re Visteon Corp.*, see *supra* notes 77–99 and accompanying text.

108. For a discussion of the law governing modification and termination of retiree benefits during Chapter 11 bankruptcy in the Third Circuit following the court’s decision in *In re Visteon Corp.*, see *supra* notes 77–99 and accompanying text.

109. For a discussion of rules regarding termination or modification of retiree benefits prior to filing for Chapter 11 bankruptcy, see *supra* notes 82–84 and accompanying text.

110. For a discussion concerning how debtors can comply with procedures set forth in Section 1114 to modify or terminate retiree benefits, see *supra* notes 77–99 and accompanying text.

111. For a discussion concerning modification or termination of retiree benefits upon emergence from Chapter 11 bankruptcy, see *supra* notes 90–94 and accompanying text.

112. See *In re Phila. Newspapers, LLC*, 599 F.3d 298, 303 (3d Cir. 2010) (citing *In re Integrated Telecom Express, Inc.*, 384 F.3d 108, 119 (3d Cir. 2004)) (“The Supreme Court has identified two of the basic purposes of Chapter 11 as (1) ‘preserving going concerns’ and (2) ‘maximizing property available to satisfy creditors.’”).

Following LTV's termination of retiree benefits during their bankruptcy proceeding in 1986, Congress expressed concern and an intention to provide additional protection to retiree benefits during Chapter 11 bankruptcy.¹¹³ The Third Circuit's interpretation of Bankruptcy Code Section 1114 echoes Congress's belief that retirees, who are vulnerable during the bankruptcy process, should be adequately protected from debtors who may wish to relieve themselves of the economic burden associated with payment of retiree benefits.¹¹⁴

113. For a discussion of Congress's actions following LTV's termination of retiree benefits in connection with their Chapter 11 bankruptcy petition, see *supra* notes 2–4 and accompanying text.

114. For a discussion concerning the legislative history of Bankruptcy Code Section 1114, see *supra* notes 2–4 and accompanying text.