

110TH CONGRESS
1ST SESSION

S. 2092

To amend title 11, United States Code, to improve protections for employees and retirees in business bankruptcies.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 25, 2007

Mr. DURBIN (for himself, Mr. KENNEDY, Mr. FEINGOLD, and Mr. OBAMA) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend title 11, United States Code, to improve protections for employees and retirees in business bankruptcies.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protecting Employees
5 and Retirees in Business Bankruptcies Act of 2007”.

6 **SEC. 2. FINDINGS.**

7 The Congress finds the following:

8 (1) Recent corporate restructurings have ex-
9 acted a devastating toll on workers through deep
10 cuts in wages and benefits, termination of defined

1 benefit pension plans, and the transfer of productive
2 assets to lower wage economies outside the United
3 States. Retirees have suffered deep cutbacks in ben-
4 efits when companies in bankruptcy renege on their
5 retiree health obligations and terminate pension
6 plans.

7 (2) Congress enacted chapter 11 of title 11,
8 United States Code, to protect jobs and enhance en-
9 terprise value for all stakeholders and not to be used
10 as a strategic weapon to eliminate good paying jobs,
11 strip employees and their families of a lifetime's
12 worth of earned benefits and hinder their ability to
13 participate in a prosperous and sustainable economy.
14 Specific laws designed to treat workers and retirees
15 fairly and keep companies operating are instead
16 causing the burdens of bankruptcy to fall dispro-
17 tionately and overwhelmingly on employees and re-
18 tirees, those least able to absorb the losses.

19 (3) At the same time that working families and
20 retirees are forced to make substantial economic sac-
21 rifices, executive pay enhancements continue to
22 flourish in business bankruptcies, despite recent con-
23 gressional enactments designed to curb lavish pay
24 packages for those in charge of failing enterprises.

1 Bankruptcy should not be a haven for the excesses
2 of executive pay.

3 (4) Employees and retirees, unlike other credi-
4 tors, have no way to diversify the risk of their em-
5 ployer's bankruptcy.

6 (5) Comprehensive reform is essential in order
7 to remedy these fundamental inequities in the bank-
8 ruptcy process and to recognize the unique firm-spe-
9 cific investment by employees and retirees in their
10 employers' business through their labor.

11 **SEC. 3. INCREASED WAGE PRIORITY.**

12 Section 507(a) of title 11, United States Code, is
13 amended—

14 (1) in paragraph (4)—

15 (A) by striking “\$10,000” and inserting
16 “\$20,000”;

17 (B) by striking “within 180 days”; and

18 (C) by striking “or the date of the ces-
19 sation of the debtor's business, whichever oc-
20 curs first,”;

21 (2) in paragraph (5)(A), by striking—

22 (A) “within 180 days”; and

23 (B) “or the date of the cessation of the
24 debtor's business, whichever occurs first”; and

1 (3) in paragraph (5), by striking subparagraph
2 (B) and inserting the following:

3 “(B) for each such plan, to the extent of
4 the number of employees covered by each such
5 plan, multiplied by \$20,000.”.

6 **SEC. 4. PRIORITY FOR STOCK VALUE LOSSES IN DEFINED**
7 **CONTRIBUTION PLANS.**

8 (a) Section 101(5) of title 11, United States Code,
9 is amended—

10 (1) in subparagraph (A), by striking “or” at
11 the end;

12 (2) in subparagraph (B), by inserting “or”
13 after the semicolon; and

14 (3) by adding at the end the following:

15 “(C) right or interest in equity securities
16 of the debtor, or an affiliate of the debtor, held
17 in a defined contribution plan (within the mean-
18 ing of section 3(34) of the Employee Retirement
19 Income Security Act of 1974 (29 U.S.C.
20 1002(34)) for the benefit of an individual who
21 is not an insider or 1 of the 10 most highly
22 compensated employees of the debtor (if 1 or
23 more are not insiders), if such securities were
24 attributable to—

1 “(i) employer contributions by the
2 debtor or an affiliate of the debtor, other
3 than elective deferrals (within the meaning
4 of section 402(g) of the Internal Revenue
5 Code of 1986), and any earnings thereon;
6 or

7 “(ii) elective deferrals and any earn-
8 ings thereon.”.

9 (b) Section 507(a) of title 11, United States Code,
10 is amended—

11 (1) by redesignating paragraphs (6) through
12 (10) as paragraphs (7) through (11), respectively;

13 (2) by inserting after paragraph (5) the fol-
14 lowing:

15 “(6) Sixth, loss of the value of equity securities
16 of the debtor or affiliate of the debtor that are held
17 in a defined contribution plan (within the meaning
18 of section 3(34) of the Employee Retirement Income
19 Security Act of 1974 (29 U.S.C. 1002(34)), without
20 regard to when services resulting in the contribution
21 of stock to the plan were rendered, measured by the
22 market value of the stock at the time of contribution
23 to, or purchase by, the plan and the value as of the
24 commencement of the case where an employer or
25 plan sponsor that has commenced a case under this

1 title has committed fraud with respect to such plan
2 or has otherwise breached a duty to the participant
3 that has proximately caused the loss of value.”;

4 (3) in paragraph (7), as redesignated, by strik-
5 ing “Sixth” and inserting “Seventh”;

6 (4) in paragraph (8), as redesignated, by strik-
7 ing “Seventh” and inserting “Eighth”;

8 (5) in paragraph (9), as redesignated, by strik-
9 ing “Eighth” and inserting “Ninth”;

10 (6) in paragraph (10), as redesignated, by
11 striking “Ninth” and inserting “Tenth”; and

12 (7) in paragraph (11), as redesignated, by
13 striking “Tenth” and inserting “Eleventh”.

14 **SEC. 5. PRIORITY FOR SEVERANCE PAY.**

15 Section 503(b) of title 11, United States Code, is
16 amended—

17 (1) in paragraph (8) by striking “and” at the
18 end;

19 (2) in paragraph (9) by striking the period and
20 inserting “; and”; and

21 (3) by adding at the end the following:

22 “(10) severance pay owed to employees of the
23 debtor (other than to an insider, other senior man-
24 agement, or a consultant retained to provide services
25 to the debtor), under a plan, program, or policy gen-

1 erally applicable to employees of the debtor, or owed
2 pursuant to a collective bargaining agreement, but
3 not under an individual contract of employment, for
4 termination or layoff on or after the date of the fil-
5 ing of the petition, which pay shall be deemed
6 earned in full upon such layoff or termination of em-
7 ployment.”.

8 **SEC. 6. EXECUTIVE COMPENSATION UPON EXIT FROM**
9 **BANKRUPTCY.**

10 Section 1129(a)(5) of title 11, United States Code,
11 is amended—

12 (1) in subparagraph (A)(ii), by striking “and”
13 at the end; and

14 (2) in subparagraph (B), by striking the period
15 at the end and inserting the following: “; and

16 “(C) the compensation disclosed pursuant
17 to subparagraph (B) has been approved by, or
18 is subject to the approval of, the court, as rea-
19 sonable when compared to persons holding com-
20 parable positions at comparable companies in
21 the same industry and not disproportionate in
22 light of economic concessions by the debtor’s
23 nonmanagement workforce during the case.”.

1 **SEC. 7. LIMITATIONS ON EXECUTIVE COMPENSATION EN-**
2 **HANCEMENTS.**

3 Section 503(e) of title 11, United States Code, is
4 amended—

5 (1) in paragraph (1), by inserting “or for the
6 payment of performance or incentive compensation,
7 or a bonus of any kind, or other financial returns
8 designed to replace or enhance incentive, stock, or
9 other compensation in effect prior to the date of the
10 commencement of the case,” after “remain with the
11 debtor’s business,”; and

12 (2) by amending paragraph (3) to read as fol-
13 lows:

14 “(3) other transfers or obligations, to or for the
15 benefit of officers, of managers, or of consultants re-
16 tained to provide services to the debtor, before or
17 after the date of filing of the petition, in the absence
18 of a finding by the court based upon evidence in the
19 record, and without deference to the debtor’s request
20 for such payments, that such transfers or obligations
21 are essential to the survival of the debtor’s business
22 or (in the case of a liquidation of some or all of the
23 debtor’s assets) essential to the orderly liquidation
24 and maximization of value of the assets of the debt-
25 or, in either case, because of the essential nature of
26 the services provided, and then only to the extent

1 that the court finds such transfers or obligations are
2 reasonable compared to individuals holding com-
3 parable positions at comparable companies in the
4 same industry and not disproportionate in light of
5 economic concessions by the debtor’s nonmanage-
6 ment workforce during the case.”.

7 **SEC. 8. REJECTION OF COLLECTIVE BARGAINING AGREE-**
8 **MENTS.**

9 Section 1113 of title 11, United States Code, is
10 amended—

11 (1) by striking subsections (a) through (c) and
12 inserting the following:

13 “(a) The debtor in possession, or the trustee if one
14 has been appointed under this chapter, other than a trust-
15 ee in a case covered by subchapter IV of this chapter and
16 by title I of the Railway Labor Act, may reject a collective
17 bargaining agreement only in accordance with the provi-
18 sions of this section.

19 “(b)(1) Where a debtor in possession or trustee (here-
20 inafter in this section referred to collectively as a ‘trustee’)
21 seeks rejection of a collective bargaining agreement, a mo-
22 tion seeking rejection shall not be filed unless the trustee
23 has first met with the authorized representative (at rea-
24 sonable times and for a reasonable period in light of the
25 complexity of the case) to confer in good faith in attempt-

1 ing to reach mutually acceptable modifications of such
2 agreement. Proposals by the trustee to modify the agree-
3 ment shall be limited to modifications to the agreement
4 that—

5 “(A) are designed to achieve a total aggregate
6 financial contribution for the affected labor group
7 for a period not to exceed 2 years after the effective
8 date of the plan;

9 “(B) shall be no more than the minimal savings
10 necessary to permit the debtor to exit bankruptcy,
11 such that confirmation of such plan is not likely to
12 be followed by the liquidation of the debtor or any
13 successor to the debtor; and

14 “(C) shall not overly burden the affected labor
15 group, either in the amount of the savings sought
16 from such group or the nature of the modifications,
17 when compared to other constituent groups expected
18 to maintain ongoing relationships with the debtor,
19 including management personnel.

20 “(2) Proposals by the trustee under paragraph (1)
21 shall be based upon the most complete and reliable infor-
22 mation available. Information that is relevant for the ne-
23 gotiations shall be provided to the authorized representa-
24 tive.

1 “(c)(1) If, after a period of negotiations, the debtor
2 and the authorized representative have not reached agree-
3 ment over mutually satisfactory modifications and the par-
4 ties are at an impasse, the debtor may file a motion seek-
5 ing rejection of the collective bargaining agreement after
6 notice and a hearing held pursuant to subsection (d). The
7 court may grant a motion to reject a collective bargaining
8 agreement only if the court finds that—

9 “(A) the debtor has, prior to such hearing,
10 complied with the requirements of subsection (b)
11 and has conferred in good faith with the authorized
12 representative regarding such proposed modifica-
13 tions, and the parties were at an impasse;

14 “(B) the court has considered alternative pro-
15 posals by the authorized representative and has de-
16 termined that such proposals do not meet the re-
17 quirements of subparagraphs (A) and (B) of sub-
18 section (b)(1);

19 “(C) further negotiations are not likely to
20 produce a mutually satisfactory agreement; and

21 “(D) the court has considered—

22 “(i) the effect of the proposed financial re-
23 lief on the affected labor group;

24 “(ii) the ability of the debtor to retain an
25 experienced and qualified workforce; and

1 “(iii) the effect of a strike in the event of
2 rejection of the collective bargaining agreement.

3 “(2) In reaching a decision under this subsection re-
4 garding whether modifications proposed by the debtor and
5 the total aggregate savings meet the requirements of sub-
6 section (b), the court shall take into account—

7 “(A) the ongoing impact on the debtor of the
8 debtor’s relationship with all subsidiaries and affili-
9 ates, regardless of whether any such subsidiary or
10 affiliate is domestic or nondomestic, or whether any
11 such subsidiary or affiliate is a debtor entity; and

12 “(B) whether the authorized representative
13 agreed to provide financial relief to the debtor within
14 the 24-month period prior to the date of the com-
15 mencement of the case, and if so, shall consider the
16 total value of such relief in evaluating the debtor’s
17 proposed modifications.

18 “(3) In reaching a decision under this subsection,
19 where a debtor has implemented a program of incentive
20 pay, bonuses, or other financial returns for insiders or sen-
21 ior management personnel during the bankruptcy, or has
22 implemented such a program within 180 days before the
23 date of the commencement of the case, the court shall pre-
24 sume that the debtor has failed to satisfy the requirements
25 of subsection (b)(1)(C).”;

1 (2) in subsection (d)—

2 (A) by striking “(d)” and all that follows
3 through paragraph (2) and inserting the fol-
4 lowing:

5 “(d)(1) Upon the filing of a motion for rejection of
6 a collective bargaining agreement, the court shall schedule
7 a hearing to be held on not less than 21 days notice (un-
8 less the debtor and the authorized representative agree to
9 a shorter time). Only the debtor and the authorized rep-
10 resentative may appear and be heard at such hearing.”;
11 and

12 (B) by redesignating paragraph (3) as
13 paragraph (2);

14 (3) in subsection (f), by adding at the end the
15 following: “Any payment required to be made under
16 this section before the date on which a plan con-
17 firmed under section 1129 is effective has the status
18 of an allowed administrative expense, as provided in
19 section 503.”; and

20 (4) by adding at the end the following:

21 “(g) The rejection of a collective bargaining agree-
22 ment constitutes a breach of such contract with the same
23 effect as rejection of an executory contract pursuant to
24 section 365(g). No claim for rejection damages shall be
25 limited by section 502(b)(7). Economic self-help by an au-

1 thORIZED representative shall be permitted upon a court
2 order granting a motion to reject a collective bargaining
3 agreement under subsection (c) or court-authorized in-
4 terim changes under subsection (e), and no provision of
5 this title or of any other Federal or State law shall be
6 construed to the contrary.

7 “(h) At any time after the date on which an order
8 is entered authorizing rejection, or where an agreement
9 providing mutually satisfactory modifications has been en-
10 tered into between the debtor and the authorized rep-
11 resentative, at any time after such agreement has been
12 entered into, the authorized representative may apply to
13 the court for an order seeking an increase in the level of
14 wages or benefits, or relief from working conditions, based
15 upon changed circumstances. The court shall grant the re-
16 quest so long as the increase or other relief is consistent
17 with the standard set forth in subsection (b)(1)(B).

18 “(i) Upon request by the authorized representative,
19 and where the court finds that the prospects for reaching
20 a mutually satisfactory agreement would be aided by
21 granting the request, the court may direct that a dispute
22 under subsection (c) be heard and determined by a neutral
23 panel of experienced labor arbitrators in lieu of a court
24 proceeding under subsection (d). The decision of such
25 panel shall have the same effect as a decision by the court.

1 The court’s decision directing the appointment of a neu-
2 tral panel is not subject to appeal.

3 “(j) Upon request by the authorized representative,
4 the debtor shall provide for the reasonable fees and costs
5 incurred by the authorized representative under this sec-
6 tion, after notice and a hearing.

7 “(k) If a plan to be confirmed under section 1129
8 provides for the liquidation of the debtor, whether by sale
9 or cessation of all or part of the business, the trustee and
10 the authorized representative shall confer regarding the ef-
11 fects of such liquidation on the affected labor group, in
12 accordance with applicable nonbankruptcy law, and shall
13 provide for the payment of all accrued obligations not as-
14 sumed as part of a sale transaction, and for such other
15 terms as may be agreed upon, in order to ensure an or-
16 derly transfer of assets or cessation of the business. Any
17 such payments shall have the status of allowed administra-
18 tive expenses under section 503.

19 “(l) A collective bargaining agreement that is as-
20 sumed shall be assumed in accordance with section 365.”.

21 **SEC. 9. PAYMENT OF INSURANCE BENEFITS TO RETIRED**
22 **EMPLOYEES.**

23 Section 1114 of title 11, United States Code, is
24 amended—

1 (1) in subsection (a), by inserting “, whether or
2 not the debtor asserts a right to unilaterally modify
3 such payments under such plan, fund, or program”
4 before the period at the end;

5 (2) in subsection (c)(1), by adding at the end
6 the following: “Where a labor organization elects to
7 serve as the authorized representative, the debtor
8 shall provide for the reasonable fees and costs in-
9 curred by the authorized representative under this
10 section after notice and a hearing.”;

11 (3) in subsection (f), by striking “(f)” and all
12 that follows through paragraph (2) and inserting the
13 following:

14 “(f)(1) Where a trustee seeks modification of retiree
15 benefits, a motion seeking modification of such benefits
16 shall not be filed, unless the trustee has first met with
17 the authorized representative (at reasonable times and for
18 a reasonable period in light of the complexity of the case)
19 to confer in good faith in attempting to reach mutually
20 satisfactory modifications. Proposals by the trustee to
21 modify retiree benefits shall be limited to modifications in
22 retiree benefits that—

23 “(A) are designed to achieve a total aggregate
24 financial contribution for the affected retiree group

1 for a period not to exceed 2 years after the effective
2 date of the plan;

3 “(B) shall be no more than the minimal savings
4 necessary to permit the debtor to exit bankruptcy,
5 such that confirmation of such plan is not likely to
6 be followed by the liquidation of the debtor or any
7 successor to the debtor; and

8 “(C) shall not overly burden the affected retir-
9 ees, either in the amount of the savings sought or
10 the nature of the modifications, when compared to
11 other constituent groups expected to maintain ongo-
12 ing relationships with the debtor, including manage-
13 ment personnel.

14 “(2) Proposals by the trustee under paragraph (1)
15 shall be based upon the most complete and reliable infor-
16 mation available. Information that is relevant for the ne-
17 gotiations shall be provided to the authorized representa-
18 tive.”;

19 (4) in subsection (g), by striking “(g)” and all
20 that follows through the semicolon at the end of
21 paragraph (3) and inserting the following:

22 “(g) If, after a period of negotiations, the debtor and
23 the authorized representative have not reached agreement
24 over mutually satisfactory modifications and the parties
25 are at an impasse, the debtor may apply to the court for

1 modifications in the payment of retiree benefits after no-
2 tice and a hearing held pursuant to subsection (k). The
3 court may grant a motion to modify the payment of retiree
4 benefits only if the court finds that—

5 “(1) the debtor has, prior to the hearing, com-
6 plied with the requirements of subsection (f) and has
7 conferred in good faith with the authorized rep-
8 resentative regarding such proposed modifications
9 and the parties were at an impasse;

10 “(2) the court has considered alternative pro-
11 posals by the authorized representative and has de-
12 termined that such proposals do not meet the re-
13 quirements of subparagraphs (A) and (B) of sub-
14 section (f)(1);

15 “(3) further negotiations are not likely to
16 produce a mutually satisfactory agreement; and

17 “(4) the court has considered—

18 “(A) the effect of the proposed modifica-
19 tions on the affected retirees; and

20 “(B) where the authorized representative is
21 a labor organization, the effect of a strike in
22 the event of modification of retiree health bene-
23 fits;”;

24 “(5) in subsection (k)—

25 (A) in paragraph (1)—

1 (i) in the first sentence, by striking
2 “fourteen” and inserting “21”; and

3 (ii) by striking the second and third
4 sentences, and inserting the following:
5 “Only the debtor and the authorized rep-
6 resentative may appear and be heard at
7 such hearing.”;

8 (B) by striking paragraph (2); and

9 (C) by redesignating paragraph (3) as
10 paragraph (2); and

11 (6) by redesignating subsections (l) and (m) as
12 subsections (n) and (o), respectively, and inserting
13 the following:

14 “(l) In determining whether the proposed modifica-
15 tions comply with subsection (f)(1)(A), the court shall take
16 into account the ongoing impact on the debtor of the debt-
17 or’s relationship with all subsidiaries and affiliates, re-
18 gardless of whether any such subsidiary or affiliate is do-
19 mestic or nondomestic, or whether any such subsidiary or
20 affiliate is a debtor entity.

21 “(m) No plan, fund, program, or contract to provide
22 retiree benefits for insiders or senior management shall
23 be assumed by the debtor if the debtor has obtained relief
24 under subsection (g) or (h) for reductions in retiree bene-
25 fits or under subsection (c) or (e) of section 1113 for re-

1 ductions in the health benefits of active employees of the
2 debtor on or after the commencement of the case or re-
3 duced or eliminated active or retiree benefits within 180
4 days prior to the date of the commencement of the case.”.

5 **SEC. 10. PROTECTION OF EMPLOYEE BENEFITS IN A SALE**
6 **OF ASSETS.**

7 Section 363 of title 11, United States Code, is
8 amended—

9 (1) in subsection (b), by adding at the end the
10 following:

11 “(3) In approving a sale under this subsection, the
12 court shall consider the extent to which a bidder has of-
13 fered to maintain existing jobs, has preserved retiree
14 health benefits, and has assumed the obligations of any
15 defined benefit plan, in determining whether an offer con-
16 stitutes the highest or best offer for such property.”; and

17 (2) by adding at the end the following:

18 “(q) If, as a result of a sale approved under this sec-
19 tion, retiree benefits, as defined under section 1114(a), are
20 modified or eliminated pursuant to the provisions of sub-
21 section (e)(1) or (h) of section 1114 or otherwise, then,
22 except as otherwise provided in an agreement with the au-
23 thorized representative of such retirees, a charge of
24 \$20,000 per retiree shall be made against the proceeds

1 of such sale (or paid by the buyer as part of the sale)
2 for the purpose of—

3 “(1) funding 12 months of health coverage fol-
4 lowing the termination or modification of such cov-
5 erage through a plan, fund, or program made avail-
6 able by the buyer, by the debtor, or by a third party;
7 or

8 “(2) providing the means by which affected re-
9 tirees may obtain replacement coverage on their
10 own,

11 except that the selection of either paragraph (1) or (2)
12 shall be upon the consent of the authorized representative,
13 within the meaning of section 1114(b), if any. Any claim
14 for modification or elimination of retiree benefits pursuant
15 to section 1114(i) shall be offset by the amounts paid
16 under this subsection.”.

17 **SEC. 11. UNION PROOF OF CLAIM.**

18 Section 501(a) of title 11, United States Code, is
19 amended by inserting “, including a labor organization,”
20 after “A creditor”.

21 **SEC. 12. CLAIM FOR LOSS OF PENSION BENEFITS.**

22 Section 502 of title 11, United States Code, is
23 amended by adding at the end the following:

24 “(l) The court shall allow a claim asserted by an ac-
25 tive or retired participant in a defined benefit plan termi-

1 nated under section 4041 or 4042 of the Employee Retirement
2 ment Income Security Act of 1974, for any shortfall in
3 pension benefits accrued as of the effective date of the ter-
4 mination of such pension plan as a result of the termi-
5 nation of the plan and limitations upon the payment of
6 benefits imposed pursuant to section 4022 of such Act,
7 notwithstanding any claim asserted and collected by the
8 Pension Benefit Guaranty Corporation with respect to
9 such termination.”.

10 **SEC. 13. PAYMENTS BY SECURED LENDER.**

11 Section 506(e) of title 11, United States Code, is
12 amended by adding at the end the following: “Where em-
13 ployees have not received wages, accrued vacation, sever-
14 ance, or other benefits owed pursuant to the terms of a
15 collective bargaining agreement for services rendered on
16 and after the date of the commencement of the case, such
17 unpaid obligations shall be deemed necessary costs and ex-
18 penses of preserving, or disposing of, property securing an
19 allowed secured claim and shall be recovered even if the
20 trustee has otherwise waived the provisions of this sub-
21 section under an agreement with the holder of the allowed
22 secured claim or successor or predecessor in interest.”.

23 **SEC. 14. PRESERVATION OF JOBS AND BENEFITS.**

24 Title 11, United States Code, is amended—

1 (1) by inserting before section 1101 the fol-
2 lowing:

3 **“SEC. 1100. STATEMENT OF PURPOSE.**

4 “A debtor commencing a case under this chapter
5 shall have as its purpose the reorganization of its business
6 and, to the greatest extent possible, maintaining or en-
7 hancing the productive use of its assets, so as to preserve
8 jobs.”;

9 (2) in section 1129(a), by adding at the end the
10 following:

11 “(17) The debtor has demonstrated that every
12 reasonable effort has been made to maintain existing
13 jobs and mitigate losses to employees and retirees.”;

14 (3) in section 1129(c), by striking the last sen-
15 tence and inserting the following: “If the require-
16 ments of subsections (a) and (b) are met with re-
17 spect to more than 1 plan, the court shall, in deter-
18 mining which plan to confirm, consider—

19 “(1) the extent to which each plan would main-
20 tain existing jobs, has preserved retiree health bene-
21 fits, and has maintained any existing defined benefit
22 plans; and

23 “(2) the preferences of creditors and equity se-
24 curity holders, and shall confirm the plan that better
25 serves the interests of employees and retirees.”; and

1 (4) in the table of sections in chapter 11, by in-
2 sserting the following before the item relating to sec-
3 tion 1101:

“1100. Statement of purpose.”.

4 **SEC. 15. ASSUMPTION OF EXECUTIVE RETIREMENT PLANS.**

5 Section 365 of title 11, United States Code, is
6 amended—

7 (1) in subsection (a), by striking “and (d)” and
8 inserting “(d), and (q)”; and

9 (2) by adding at the end the following:

10 “(q) No deferred compensation arrangement for the
11 benefit of insiders or senior management of the debtor
12 shall be assumed if a defined benefit plan for employees
13 of the debtor has been terminated pursuant to section
14 4041 or 4042 of the Employee Retirement Income Secu-
15 rity Act of 1974, on or after the date of the commence-
16 ment of the case or within 180 days prior to the date of
17 the commencement of the case.”.

18 **SEC. 16. RECOVERY OF EXECUTIVE COMPENSATION.**

19 Title 11, United States Code, is amended by inserting
20 after section 562 the following:

21 **“§ 563. Recovery of executive compensation**

22 “(a) If a debtor has obtained relief under subsection
23 (c) or (e) of section 1113, or subsection (g) or (h) of sec-
24 tion 1114, by which the debtor reduces its contractual ob-
25 ligations under a collective bargaining agreement or re-

1 three benefits plan, the court, as part of the entry of such
2 order granting relief, shall determine the percentage dimi-
3 nution, as a result of the relief granted under section 1113
4 or 1114, in the value of the obligations when compared
5 to the debtor's obligations under the collective bargaining
6 agreement or with respect to retiree benefits, as of the
7 date of the commencement of the case under this title.
8 In making its determination, the court shall include reduc-
9 tions in benefits, if any, as a result of the termination pur-
10 suant to section 4041 or 4042 of the Employee Retirement
11 Income Security Act of 1974, of a defined benefit plan
12 administered by the debtor, or for which the debtor is a
13 contributing employer, effective at any time on or after
14 180 days before the date of the commencement of a case
15 under this title. The court shall not take into account pen-
16 sion benefits paid or payable under the provisions of title
17 IV of such Act as a result of any such termination.

18 “(b) Where a defined benefit plan administered by
19 the debtor, or for which the debtor is a contributing em-
20 ployer, has been terminated pursuant to section 4041 or
21 4042 of the Employee Retirement Income Security Act of
22 1974, effective at any time on or after 180 days before
23 the date of the commencement of a case under this title,
24 but a debtor has not obtained relief under subsection (c)
25 or (e) of section 1113, or subsection (g) or (h) of section

1 1114 of this title, the court, upon motion of a party in
2 interest, shall determine the percentage diminution in the
3 value of benefit obligations when compared to the total
4 benefit liabilities prior to such termination. The court shall
5 not take into account pension benefits paid or payable
6 under the provisions of title IV of the Employee Retirement
7 Income Security Act of 1974 as a result of any such
8 termination.

9 “(c) Upon the determination of the percentage dimi-
10 nution in value under subsection (a) or (b), the estate shall
11 have a claim for the return of the same percentage of the
12 compensation paid, directly or indirectly (including any
13 transfer to a self-settled trust or similar device, or to a
14 nonqualified deferred compensation plan under section
15 409A(d)(1) of the Internal Revenue Code of 1986) to any
16 officer of the debtor serving as member of the board of
17 directors of the debtor within the year before the date of
18 the commencement of the case, and any individual serving
19 as chairman and any individual serving as lead director
20 of the board of directors at the time of the granting of
21 relief under section 1113 or 1114 of this title or, if no
22 such relief has been granted, the termination of the de-
23 fined benefit plan.

24 “(d) The trustee or a committee appointed pursuant
25 to section 1102 may commence an action to recover such

1 claims, except that if neither the trustee nor such com-
2 mittee commences an action to recover such claim by the
3 first date set for the hearing on the confirmation of plan
4 under section 1129, any party in interest may apply to
5 the court for authority to recover such claim for the ben-
6 efit of the estate. The costs of recovery shall be borne by
7 the estate.

8 “(e) The court shall not award postpetition com-
9 pensation under section 503(c) or otherwise to any person
10 subject to the provisions of subsection (c) if there is a rea-
11 sonable likelihood that such compensation is intended to
12 reimburse or replace compensation recovered by the estate
13 under this section.”.

14 **SEC. 17. EXCEPTION FROM AUTOMATIC STAY.**

15 Section 362(b) of title 11, United States Code, is
16 amended—

17 (1) in paragraph (27), by striking “and” at the
18 end;

19 (2) in paragraph (28), by striking the period at
20 the end and inserting “; and” and

21 (3) by adding at the end the following:

22 “(29) of the commencement or continuation of
23 a grievance, arbitration, or similar dispute resolution
24 proceeding established by a collective bargaining
25 agreement that was or could have been commenced

1 against the debtor before the filing of a case under
2 this title, or the payment or enforcement of an
3 award or settlement under such proceeding.”.

4 **SEC. 18. PREFERENTIAL COMPENSATION TRANSFER.**

5 Section 547 of title 11, United States Code, is
6 amended by adding at the end the following:

7 “(j) The trustee may avoid a transfer to or for the
8 benefit of an insider (including an obligation incurred for
9 the benefit of an insider under an employment contract)
10 made in anticipation of bankruptcy, or a transfer made
11 in anticipation of bankruptcy to a consultant who is for-
12 merly an insider and who is retained to provide services
13 to an entity that becomes a debtor (including an obligation
14 under a contract to provide services to such entity or to
15 a debtor) made or incurred on or within 1 year before the
16 filing of the petition. No provision of subsection (c) shall
17 constitute a defense against the recovery of such transfer.
18 The trustee or a committee appointed pursuant to section
19 1102 may commence an action to recover such transfer,
20 except that, if neither the trustee nor such committee com-
21 mences an action to recover such transfer by the time of
22 the commencement of a hearing on the confirmation of
23 a plan under section 1129, any party in interest may apply
24 to the court for authority to recover the claims for the

1 benefit of the estate. The costs of recovery shall be borne
2 by the estate.”.

3 **SEC. 19. FINANCIAL RETURNS FOR EMPLOYEES AND RETIR-**
4 **EES.**

5 Section 1129(a) of title 11, United States Code, is
6 amended—

7 (1) by adding at the end the following:

8 “(18) In a case in which the debtor initiated
9 proceedings under section 1113, the plan provides
10 for recovery of rejection damages (where the debtor
11 obtained relief under subsection (c) or (e) of section
12 1113 prior to confirmation of the plan) or for other
13 financial returns, as negotiated by the debtor and
14 the authorized representative (to the extent that
15 such returns are paid under, rather than outside of,
16 a plan).”; and

17 (2) by striking paragraph (13) and inserting
18 the following:

19 “(13) With respect to retiree benefits, as that
20 term is defined in section 1114, the plan—

21 “(A) provides for the continuation after its
22 effective date of payment of all retiree benefits
23 at the level established pursuant to subsection
24 (e)(1)(B) or (g) of section 1114 at any time
25 prior to the date of confirmation of the plan,

1 for the duration of the period for which the
2 debtor has obligated itself to provide such bene-
3 fits, or, if no modifications are made prior to
4 confirmation of the plan, the continuation of all
5 such retiree benefits maintained or established
6 in whole or in part by the debtor prior to the
7 date of the filing of the petition; and

8 “(B) provides for allowed claims for modi-
9 fication of retiree benefits or for other financial
10 returns, as negotiated by the debtor and the au-
11 thorized representative, to the extent that such
12 returns are paid under, rather than outside of,
13 a plan).”.

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