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

IN THE SENATE OF THE UNITED STATES

JULY 12, 2012

Mr. DURBIN (for himself, Mr. FRANKEN, Mr. HARKIN, Mr. WHITEHOUSE, and Mr. BROWN of Ohio) 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.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) Short Title.—This Act may be cited as the “Protecting Employees and Retirees in Business Bank-
ruptcies Act of 2012”.

(b) Table of Contents.—The table of contents of

this Act is as follows:

Sec. 1. Short title; table of contents.
Sec. 2. Findings.
TITLE I—IMPROVING RECOVERIES FOR EMPLOYEES AND RETIREES

Sec. 101. Increased wage priority.
Sec. 102. Claim for stock value losses in defined contribution plans.
Sec. 103. Priority for severance pay.
Sec. 104. Financial returns for employees and retirees.
Sec. 105. Priority for WARN Act damages.

TITLE II—REDUCING EMPLOYEES’ AND RETIREES’ LOSSES

Sec. 201. Rejection of collective bargaining agreements.
Sec. 202. Payment of insurance benefits to retired employees.
Sec. 203. Protection of employee benefits in a sale of assets.
Sec. 204. Claim for pension losses.
Sec. 205. Payments by secured lender.
Sec. 206. Preservation of jobs and benefits.
Sec. 207. Termination of exclusivity.
Sec. 208. Claim for withdrawal liability.

TITLE III—RESTRICTING EXECUTIVE COMPENSATION PROGRAMS

Sec. 301. Executive compensation upon exit from bankruptcy.
Sec. 302. Limitations on executive compensation enhancements.
Sec. 303. Assumption of executive benefit plans.
Sec. 304. Recovery of executive compensation.
Sec. 305. Preferential compensation transfer.

TITLE IV—OTHER PROVISIONS

Sec. 401. Union proof of claim.
Sec. 402. Exception from automatic stay.

SEC. 2. FINDINGS.

The Congress finds the following:

(1) Business bankruptcies have increased sharply in recent years and remain at high levels. These bankruptcies include several of the largest business bankruptcy filings in history. As the use of bankruptcy has expanded, job preservation and retirement security are placed at greater risk.

(2) Laws enacted to improve recoveries for employees and retirees and limit their losses in bankruptcy cases have not kept pace with the increasing
and broader use of bankruptcy by businesses in all sectors of the economy. However, while protections for employees and retirees in bankruptcy cases have eroded, management compensation plans devised for those in charge of troubled businesses have become more prevalent and are escaping adequate scrutiny.

(3) Changes in the law regarding these matters are urgently needed as bankruptcy is used to address increasingly more complex and diverse conditions affecting troubled businesses and industries.

TITLE I—IMPROVING RECOVERIES FOR EMPLOYEES AND RETIREES

SEC. 101. INCREASED WAGE PRIORITY.

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

(1) in paragraph (4)—

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

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

(C) by striking “or the date of the cessation of the debtor’s business, whichever occurs first,”;

(2) in paragraph (5)(A), by striking—

(A) “within 180 days”; and
(B) “or the date of the cessation of the
debtor’s business, whichever occurs first”; and
(3) in paragraph (5), by striking subparagraph
(B) and inserting the following:
“(B) for each such plan, to the extent of
the number of employees covered by each such
plan, multiplied by $20,000.”.

SEC. 102. CLAIM FOR STOCK VALUE LOSSES IN DEFINED
CONTRIBUTION PLANS.

Section 101(5) of title 11, United States Code, is
amended—
(1) in subparagraph (A), by striking “or” at
the end;
(2) in subparagraph (B), by inserting “or”
after the semicolon; and
(3) by adding at the end the following:
“(C) right or interest in equity securities
of the debtor, or an affiliate of the debtor, held
in a defined contribution plan (within the mean-
ing of section 3(34) of the Employee Retire-
1002(34))) for the benefit of an individual who
is not an insider, a senior executive officer, or
any of the 20 next most highly compensated
employees of the debtor (if 1 or more are not
insiders), if such securities were attributable to either employer contributions by the debtor or an affiliate of the debtor, or elective deferrals (within the meaning of section 402(g) of the Internal Revenue Code of 1986), and any earnings thereon, if an employer or plan sponsor who has commenced a case under this title has committed fraud with respect to such plan or has otherwise breached a duty to the participant that has proximately caused the loss of value.”.

SEC. 103. PRIORITY FOR SEVERANCE PAY.

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

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

(2) in paragraph (9), by striking the period and inserting a semicolon; and

(3) by adding at the end the following:

“(10) severance pay owed to employees of the debtor (other than to an insider, other senior management, or a consultant retained to provide services to the debtor), under a plan, program, or policy generally applicable to employees of the debtor (but not under an individual contract of employment), or
owed pursuant to a collective bargaining agreement, for layoff or termination on or after the date of the filing of the petition, which pay shall be deemed earned in full upon such layoff or termination of employment; and”.

SEC. 104. FINANCIAL RETURNS FOR EMPLOYEES AND RETIREES.

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

(1) by adding at the end the following:

“(17) The plan provides for recovery of damages payable for the rejection of a collective bargaining agreement, or for other financial returns as negotiated by the debtor and the authorized representative under section 1113 (to the extent that such returns are paid under, rather than outside of, a plan).”; and

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

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

“(A) provides for the continuation after its effective date of payment of all retiree benefits at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 at any time be-
fore the date of confirmation of the plan, for
the duration of the period for which the debtor
has obligated itself to provide such benefits, or
if no modifications are made before confirma-
tion of the plan, the continuation of all such re-
tiree benefits maintained or established in whole
or in part by the debtor before the date of the
filing of the petition; and

“(B) provides for recovery of claims arising
from the modification of retiree benefits or for
other financial returns, as negotiated by the
debtor and the authorized representative (to the
extent that such returns are paid under, rather
than outside of, a plan).”.

SEC. 105. PRIORITY FOR WARN ACT DAMAGES.

Section 503(b)(1)(A)(ii) of title 11, United States
Code is amended to read as follows:

“(ii) wages and benefits awarded pur-
suant to a judicial proceeding or a pro-
ceeding of the National Labor Relations
Board as back pay or damages attributable
to any period of time occurring after the
date of commencement of the case under
this title, as a result of a violation of Fed-
eral or State law by the debtor, without re-
gard to the time of the occurrence of un-
lawful conduct on which the award is
based or to whether any services were ren-
dered on or after the commencement of the
case, including an award by a court under
section 2901 of title 29, United States
Code, of up to 60 days’ pay and benefits
following a layoff that occurred or com-
menced at a time when such award period
includes a period on or after the com-
mencement of the case, if the court deter-
mines that payment of wages and benefits
by reason of the operation of this clause
will not substantially increase the prob-
ability of layoff or termination of current
employees or of nonpayment of domestic
support obligations during the case under
this title.”.

TITLE II—REDUCING EMPLOY-
EES’ AND RETIREES’ LOSSES

SEC. 201. REJECTION OF COLLECTIVE BARGAINING AGRE-
MENTS.

Section 1113 of title 11, United States Code, is
amended by striking subsections (a) through (f) and in-
serting the following:
“(a) The debtor in possession, or the trustee if one has been appointed under this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may reject a collective bargaining agreement only in accordance with this section. Hereinafter in this section, a reference to the trustee includes a reference to the debtor in possession.

“(b) No provision of this title shall be construed to permit the trustee to unilaterally terminate or alter any provision of a collective bargaining agreement before complying with this section. The trustee shall timely pay all monetary obligations arising under the terms of the collective bargaining agreement. Any such payment required to be made before a plan confirmed under section 1129 is effective has the status of an allowed administrative expense under section 503.

“(c)(1) If the trustee seeks modification of a collective bargaining agreement, then the trustee shall provide notice to the labor organization representing the employees covered by the agreement that modifications are being proposed under this section, and shall promptly provide an initial proposal for modifications to the agreement. Thereafter, the trustee shall confer in good faith with the labor organization, at reasonable times and for a reasonable period in light of the complexity of the case, in at-
tempting to reach mutually acceptable modifications of such agreement.

“(2) The initial proposal and subsequent proposals by the trustee for modification of a collective bargaining agreement shall be based upon a business plan for the reorganization of the debtor, and shall reflect the most complete and reliable information available. The trustee shall provide to the labor organization all information that is relevant for negotiations. The court may enter a protective order to prevent the disclosure of information if disclosure could compromise the debtor’s position with respect to its competitors in the industry, subject to the needs of the labor organization to evaluate the trustee’s proposals and any application for rejection of the agreement or for interim relief pursuant to this section.

“(3) In consideration of Federal policy encouraging the practice and process of collective bargaining and in recognition of the bargained-for expectations of the employees covered by the agreement, modifications proposed by the trustee—

“(A) shall be proposed only as part of a program of workforce and nonworkforce cost savings devised for the reorganization of the debtor, including savings in management personnel costs;
“(B) shall be limited to modifications designed to achieve a specified aggregate financial contribution for the employees covered by the agreement (taking into consideration any labor cost savings negotiated within the 12-month period before the filing of the petition), and shall be not more than the minimum savings essential to permit the debtor to exit bankruptcy, such that confirmation of a plan of reorganization is not likely to be followed by the liquidation, or the need for further financial reorganization, of the debtor (or any successor to the debtor) in the short term; and

“(C) shall not be disproportionate or overly burden the employees covered by the agreement, either in the amount of the cost savings sought from such employees or the nature of the modifications.

“(d)(1) If, after a period of negotiations, the trustee and the labor organization have not reached an agreement over mutually satisfactory modifications, and further negotiations are not likely to produce mutually satisfactory modifications, the trustee may file a motion seeking rejection of the collective bargaining agreement after notice and a hearing. Absent agreement of the parties, no such hearing shall be held before the expiration of the 21-day period beginning on the date on which notice of the hear-
ing is provided to the labor organization representing the employees covered by the agreement. Only the debtor and the labor organization may appear and be heard at such hearing. An application for rejection shall seek rejection effective upon the entry of an order granting the relief.

“(2) In consideration of Federal policy encouraging the practice and process of collective bargaining and in recognition of the bargained-for expectations of the employees covered by the agreement, the court may grant a motion seeking rejection of a collective bargaining agreement only if, based on clear and convincing evidence—

“(A) the court finds that the trustee has complied with the requirements of subsection (c);

“(B) the court has considered alternative proposals by the labor organization and has concluded that such proposals do not meet the requirements of paragraph (3)(B) of subsection (c);

“(C) the court finds that further negotiations regarding the trustee’s proposal or an alternative proposal by the labor organization are not likely to produce an agreement;

“(D) the court finds that implementation of the trustee’s proposal shall not—
“(i) cause a material diminution in the
purchasing power of the employees covered by
the agreement;
“(ii) adversely affect the ability of the
debtor to retain an experienced and qualified
workforce; or
“(iii) impair the debtor’s labor relations
such that the ability to achieve a feasible reor-
organization would be compromised; and
“(E) the court concludes that rejection of the
agreement and immediate implementation of the
trustee’s proposal is essential to permit the debtor to
exit bankruptcy, such that confirmation of a plan of
reorganization is not likely to be followed by liquida-
tion, or the need for further financial reorganization,
of the debtor (or any successor to the debtor) in the
short term.
“(3) If the trustee has implemented a program of in-
centive pay, bonuses, or other financial returns for insid-
ers, senior executive officers, or the 20 next most highly
compensated employees or consultants providing services
to the debtor during the bankruptcy, or such a program
was implemented within 180 days before the date of the
filing of the petition, the court shall presume that the
trustee has failed to satisfy the requirements of subsection (e)(3)(C).

“(4) In no case shall the court enter an order rejecting a collective bargaining agreement that would result in modifications to a level lower than the level proposed by the trustee in the proposal found by the court to have complied with the requirements of this section.

“(5) At any time after the date on which an order rejecting a collective bargaining agreement is entered, or in the case of an agreement entered into between the trustee and the labor organization providing mutually satisfactory modifications, at any time after such agreement has been entered into, the labor organization may apply to the court for an order seeking an increase in the level of wages or benefits, or relief from working conditions, based upon changed circumstances. The court shall grant the request only if the increase or other relief is not inconsistent with the standard set forth in paragraph (2)(E).

“(e) During a period in which a collective bargaining agreement at issue under this section continues in effect, and if essential to the continuation of the debtor’s business or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by the collec-
tive bargaining agreement. Any hearing under this subsection shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

“(f) Rejection of a collective bargaining agreement constitutes a breach of the agreement, and shall be effective no earlier than the entry of an order granting such relief. Notwithstanding the foregoing, solely for purposes of determining and allowing a claim arising from the rejection of a collective bargaining agreement, rejection shall be treated as rejection of an executory contract under section 365(g) and shall be allowed or disallowed in accordance with section 502(g)(1). No claim for rejection damages shall be limited by section 502(b)(7). Economic self-help by a labor organization shall be permitted upon a court order granting a motion to reject a collective bargaining agreement under subsection (d) or pursuant to subsection (e), and no provision of this title or of any other provision of Federal or State law may be construed to the contrary.

“(g) The trustee shall provide for the reasonable fees and costs incurred by a labor organization under this section, upon request and after notice and a hearing.
“(h) A collective bargaining agreement that is assumed shall be assumed in accordance with section 365.”.

SEC. 202. PAYMENT OF INSURANCE BENEFITS TO RETIRED EMPLOYEES.

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

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

(2) in subsection (b)(2), by inserting after “section” the following: “, and a labor organization serving as the authorized representative under subsection (c)(1),”;

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

“(f)(1) If a trustee seeks modification of retiree benefits, then the trustee shall provide a notice to the authorized representative that modifications are being proposed pursuant to this section, and shall promptly provide an initial proposal. Thereafter, the trustee shall confer in good faith with the authorized representative at reasonable times and for a reasonable period in light of the com-
plexity of the case in attempting to reach mutually satis-
factory modifications.

“(2) The initial proposal and subsequent proposals
by the trustee shall be based upon a business plan for the
reorganization of the debtor and shall reflect the most
complete and reliable information available. The trustee
shall provide to the authorized representative all informa-
tion that is relevant for the negotiations. The court may
enter a protective order to prevent the disclosure of infor-
mation if disclosure could compromise the debtor’s posi-
tion with respect to its competitors in the industry, subject
to the needs of the authorized representative to evaluate
the trustee’s proposals and an application pursuant to
subsection (g) or (h).

“(3) Modifications proposed by the trustee—

“(A) shall be proposed only as part of a pro-
gram of workforce and nonworkforce cost savings
devised for the reorganization of the debtor, includ-
ing savings in management personnel costs;

“(B) shall be limited to modifications that are
designed to achieve a specified aggregate financial
contribution for the retiree group represented by the
authorized representative (taking into consideration
any cost savings implemented within the 12-month
period before the date of filing of the petition with
respect to the retiree group), and shall be no more
than the minimum savings essential to permit the
debtor to exit bankruptcy, such that confirmation of
a plan of reorganization is not likely to be followed
by the liquidation, or the need for further financial
reorganization, of the debtor (or any successor to
the debtor) in the short term; and

“(C) shall not be disproportionate or overly bur-
den the retiree group, either in the amount of the
cost savings sought from such group or the nature
of the modifications.”;

(4) in subsection (g)—

(A) by striking “(g)” and all that follows
through the semicolon at the end of paragraph
(3) and inserting the following:

“(g)(1) If, after a period of negotiations, the trustee
and the authorized representative have not reached agree-
ment over mutually satisfactory modifications and further
negotiations are not likely to produce mutually satisfac-
tory modifications, then the trustee may file a motion
seeking modifications in the payment of retiree benefits
after notice and a hearing. Absent agreement of the par-
ties, no such hearing shall be held before the expiration
of the 21-day period beginning on the date on which notice
of the hearing is provided to the authorized representative.
Only the debtor and the authorized representative may appear and be heard at such hearing.

“(2) The court may grant a motion to modify the payment of retiree benefits only if, based on clear and convincing evidence—

“(A) the court finds that the trustee has complied with the requirements of subsection (f);

“(B) the court has considered alternative proposals by the authorized representative and has determined that such proposals do not meet the requirements of subsection (f)(3)(B);

“(C) the court finds that further negotiations regarding the trustee’s proposal or an alternative proposal by the authorized representative are not likely to produce a mutually satisfactory agreement;

“(D) the court finds that implementation of the proposal shall not cause irreparable harm to the affected retirees; and

“(E) the court concludes that an order granting the motion and immediate implementation of the trustee’s proposal is essential to permit the debtor to exit bankruptcy, such that confirmation of a plan of reorganization is not likely to be followed by liquidation, or the need for further financial reorganization,
of the debtor (or a successor to the debtor) in the short term.

“(3) If a trustee has implemented a program of incentive pay, bonuses, or other financial returns for insiders, senior executive officers, or the 20 next most highly compensated employees or consultants providing services to the debtor during the bankruptcy, or such a program was implemented within 180 days before the date of the filing of the petition, the court shall presume that the trustee has failed to satisfy the requirements of subparagraph (f)(3)(C).”; and

(B) by striking “except that in no case” and inserting the following:

“(4) In no case”; and

(5) by striking subsection (k) and redesignating subsections (l) and (m) as subsections (k) and (l), respectively.

SEC. 203. PROTECTION OF EMPLOYEE BENEFITS IN A SALE OF ASSETS.

Section 363(b) of title 11, United States Code, is amended by adding at the end the following:

“(3) In approving a sale under this subsection, the court shall consider the extent to which a bidder has offered to maintain existing jobs, preserve terms and conditions of employment, and assume or match pension and
retiree health benefit obligations in determining whether
an offer constitutes the highest or best offer for such prop-
erty.”.

SEC. 204. CLAIM FOR PENSION LOSSES.

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

“(l) The court shall allow a claim asserted by an ac-
tive or retired participant, or by a labor organization rep-
resenting such participants, in a defined benefit plan ter-
minated under section 4041 or 4042 of the Employee Re-
tirement Income Security Act of 1974, for any shortfall
in pension benefits accrued as of the effective date of the
termination of such pension plan as a result of the termi-
nation of the plan and limitations upon the payment of
benefits imposed pursuant to section 4022 of such Act,
notwithstanding any claim asserted and collected by the
Pension Benefit Guaranty Corporation with respect to
such termination.

“(m) The court shall allow a claim of a kind described
in section 101(5)(C) by an active or retired participant
in a defined contribution plan (within the meaning of sec-
tion 3(34) of the Employee Retirement Income Security
Act of 1974 (29 U.S.C. 1002(34))), or by a labor organi-
zation representing such participants. The amount of such
claim shall be measured by the market value of the stock
at the time of contribution to, or purchase by, the plan
and the value as of the commencement of the case.”).

SEC. 205. PAYMENTS BY SECURED LENDER.

Section 506(c) of title 11, United States Code, is
amended by adding at the end the following: “If employees
have not received wages, accrued vacation, severance, or
other benefits owed under the policies and practices of the
debtor, or pursuant to the terms of a collective bargaining
agreement, for services rendered on and after the date of
the commencement of the case, then such unpaid obliga-
tions shall be deemed necessary costs and expenses of pre-
serving, or disposing of, property securing an allowed sec-
cured claim and shall be recovered even if the trustee has
otherwise waived the provisions of this subsection under
an agreement with the holder of the allowed secured claim
or a successor or predecessor in interest.”.

SEC. 206. PRESERVATION OF JOBS AND BENEFITS.

Title 11, United States Code, is amended—
(1) by inserting before section 1101 the fol-
lowing:

“SEC. 1100. STATEMENT OF PURPOSE.

“A debtor commencing a case under this chapter
shall have as its principal purpose the reorganization of
its business to preserve going concern value to the max-
imum extent possible through the productive use of its as-
sets and the preservation of jobs that will sustain productive economic activity.”;

(2) in section 1129(a), as amended by section 104, by adding at the end the following:

“(18) The debtor has demonstrated that the reorganization preserves going concern value to the maximum extent possible through the productive use of the debtor’s assets and preserves jobs that sustain productive economic activity.”;

(3) in section 1129(c), by striking the last sentence and inserting the following: “If the requirements of subsections (a) and (b) are met with respect to more than 1 plan, the court shall, in determining which plan to confirm—

“(1) consider the extent to which each plan would preserve going concern value through the productive use of the debtor’s assets and the preservation of jobs that sustain productive economic activity; and

“(2) confirm the plan that better serves such interests.

A plan that incorporates the terms of a settlement with a labor organization representing employees of the debtor shall presumptively constitute the plan that satisfies this subsection.”; and
(4) in the table of sections for chapter 11, by inserting the following before the item relating to section 1101:

“1100. Statement of purpose.”.

SEC. 207. TERMINATION OF EXCLUSIVITY.

Section 1121(d) of title 11, United States Code, is amended by adding at the end the following:

“(3) For purposes of this subsection, cause for reducing the 120-day period or the 180-day period includes the following:

“(A) The filing of a motion pursuant to section 1113 seeking rejection of a collective bargaining agreement if a plan based upon an alternative proposal by the labor organization is reasonably likely to be confirmed within a reasonable time.

“(B) The proposed filing of a plan by a proponent other than the debtor, which incorporates the terms of a settlement with a labor organization if such plan is reasonably likely to be confirmed within a reasonable time.”.

SEC. 208. CLAIM FOR WITHDRAWAL LIABILITY.

Section 503(b) of title 11, United States Code, as amended by section 103 of this Act, is amended by adding at the end the following:

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

TITLE III—RESTRICTING EXECU-
TIVE COMPENSATION PRO-
GRAMS

SEC. 301. EXECUTIVE COMPENSATION UPON EXIT FROM
BANKRUPTCY.

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

(1) in paragraph (4), by adding at the end the
following: “Except for compensation subject to re-
view under paragraph (5), payments or other dis-
tributions under the plan to or for the benefit of in-
siders, senior executive officers, and any of the 20
next most highly compensated employees or consult-
ants providing services to the debtor, shall not be
approved except as part of a program of payments
or distributions generally applicable to employees of
the debtor, and only to the extent that the court de-
termines that such payments are not excessive or
disproportionate compared to distributions to the
debtor’s nonmanagement workforce.”; and

(2) in paragraph (5)—

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

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

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

**SEC. 302. LIMITATIONS ON EXECUTIVE COMPENSATION EN-
HANCEMENTS.**

Section 503(c) of title 11, United States Code, is
amended—

(1) in paragraph (1)—
(A) by inserting “, a senior executive offi-
cer, or any of the 20 next most highly com-
pensated employees or consultants” after “an
insider”;  

(B) by inserting “or for the payment of
performance or incentive compensation, or a
bonus of any kind, or other financial returns
designed to replace or enhance incentive, stock,
or other compensation in effect before the date
of the commencement of the case,” after “re-
main with the debtor’s business,”; and

(C) by inserting “clear and convincing” be-
fore “evidence in the record”; and

(2) by amending paragraph (3) to read as fol-
loows:

“(3) other transfers or obligations, to or for the
benefit of insiders, senior executive officers, man-
agers, or consultants providing services to the debt-
or, in the absence of a finding by the court, based
upon clear and convincing evidence, and without def-
ference to the debtor’s request for such payments,
that such transfers or obligations are essential to the
survival of the debtor’s business or (in the case of
a liquidation of some or all of the debtor’s assets)
esential to the orderly liquidation and maximization
of value of the assets of the debtor, in either case,  
because of the essential nature of the services pro-  
vided, and then only to the extent that the court  
finds such transfers or obligations are reasonable  
compared to individuals holding comparable posi-  
tions at comparable companies in the same industry  
and not disproportionate in light of economic conces-  
sions by the debtor’s nonmanagement workforce dur-  
ing the case.”.

SEC. 303. ASSUMPTION OF EXECUTIVE BENEFIT PLANS.

Section 365 of title 11, United States Code, is  
amended—  
(1) in subsection (a), by striking “and (d)” and  
inserting “(d), (q), and (r)”; and  
(2) by adding at the end the following:  
“(q) No deferred compensation arrangement for the  
benefit of insiders, senior executive officers, or any of the  
20 next most highly compensated employees of the debtor  
shall be assumed if a defined benefit plan for employees  
of the debtor has been terminated pursuant to section  
4041 or 4042 of the Employee Retirement Income Secu-

rity Act of 1974, on or after the date of the commence-
ment of the case or within 180 days before the date of  
the commencement of the case.
“(r) No plan, fund, program, or contract to provide retiree benefits for insiders, senior executive officers, or any of the 20 next most highly compensated employees of the debtor shall be assumed if the debtor has obtained relief under subsection (g) or (h) of section 1114 to impose reductions in retiree benefits or under subsection (d) or (e) of section 1113 to impose reductions in the health benefits of active employees of the debtor, or reduced or eliminated health benefits for active or retired employees within 180 days before the date of the commencement of the case.”.

SEC. 304. RECOVERY OF EXECUTIVE COMPENSATION.

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

“SEC. 563. RECOVERY OF EXECUTIVE COMPENSATION.

“(a) If a debtor has obtained relief under subsection (d) of section 1113, or subsection (g) of section 1114, by which the debtor reduces the cost of its obligations under a collective bargaining agreement or a plan, fund, or program for retiree benefits as defined in section 1114(a), the court, in granting relief, shall determine the percentage diminution in the value of the obligations when compared to the debtor’s obligations under the collective bargaining agreement, or with respect to retiree benefits, as of the date of the commencement of the case under this
title before granting such relief. In making its determina-
tion, the court shall include reductions in benefits, if any,
as a result of the termination pursuant to section 4041
or 4042 of the Employee Retirement Income Security Act
of 1974, of a defined benefit plan administered by the
debtor, or for which the debtor is a contributing employer,
effective at any time on or after 180 days before the date
of the commencement of a case under this title. The court
shall not take into account pension benefits paid or pay-
able under such Act as a result of any such termination.

“(b) If a defined benefit pension plan administered
by the debtor, or for which the debtor is a contributing
employer, has been terminated pursuant to section 4041
or 4042 of the Employee Retirement Income Security Act
of 1974, effective at any time on or after 180 days before
the date of the commencement of a case under this title,
but a debtor has not obtained relief under subsection (d)
of section 1113, or subsection (g) of section 1114, then
the court, upon motion of a party in interest, shall deter-
mine the percentage diminution in the value of benefit ob-
ligations when compared to the total benefit liabilities be-
fore such termination. The court shall not take into ac-
count pension benefits paid or payable under title IV of
the Employee Retirement Income Security Act of 1974 as
a result of any such termination.
“(c) Upon the determination of the percentage diminution in value under subsection (a) or (b), the estate shall have a claim for the return of the same percentage of the compensation paid, directly or indirectly (including any transfer to a self-settled trust or similar device, or to a nonqualified deferred compensation plan under section 409A(d)(1) of the Internal Revenue Code of 1986) to any officer of the debtor serving as member of the board of directors of the debtor within the year before the date of the commencement of the case, and any individual serving as chairman or lead director of the board of directors at the time of the granting of relief under section 1113 or 1114 or, if no such relief has been granted, the termination of the defined benefit plan.

“(d) The trustee or a committee appointed pursuant to section 1102 may commence an action to recover such claims, except that if neither the trustee nor such committee commences an action to recover such claim by the first date set for the hearing on the confirmation of plan under section 1129, any party in interest may apply to the court for authority to recover such claim for the benefit of the estate. The costs of recovery shall be borne by the estate.

“(e) The court shall not award postpetition compensation under section 503(e) or otherwise to any person
subject to subsection (c) if there is a reasonable likelihood
that such compensation is intended to reimburse or re-
place compensation recovered by the estate under this sec-
tion.”.

**SEC. 305. PREFERENTIAL COMPENSATION TRANSFER.**

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

“(j) The trustee may avoid a transfer to or for the
benefit of an insider (including an obligation incurred for
the benefit of an insider under an employment contract)
made in anticipation of bankruptcy, or a transfer made
in anticipation of bankruptcy to a consultant who is for-
merly an insider and who is retained to provide services
to an entity that becomes a debtor (including an obligation
under a contract to provide services to such entity or to
a debtor) made or incurred on or within 1 year before the
filing of the petition. No provision of subsection (c) shall
constitute a defense against the recovery of such transfer.
The trustee or a committee appointed pursuant to section
1102 may commence an action to recover such transfer,
except that, if neither the trustee nor such committee com-
mences an action to recover such transfer by the time of
the commencement of a hearing on the confirmation of
a plan under section 1129, any party in interest may apply
to the court for authority to recover the claims for the
benefit of the estate. The costs of recovery shall be borne by the estate.”.

TITLE IV—OTHER PROVISIONS

SEC. 401. UNION PROOF OF CLAIM.

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

SEC. 402. EXCEPTION FROM AUTOMATIC STAY.

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

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

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

(3) by adding at the end the following:

“(29) of the commencement or continuation of a grievance, arbitration, or similar dispute resolution proceeding established by a collective bargaining agreement that was or could have been commenced against the debtor before the filing of a case under this title, or the payment or enforcement of an award or settlement under such proceeding.”.

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