

112TH CONGRESS
2D SESSION

S. 3381

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.

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; TABLE OF CONTENTS.**

4 (a) SHORT TITLE.—This Act may be cited as the
5 “Protecting Employees and Retirees in Business Bank-
6 ruptcies Act of 2012”.

7 (b) TABLE OF CONTENTS.—The table of contents of
8 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.

1 SEC. 2. FINDINGS.

2 The Congress finds the following:

3 (1) Business bankruptcies have increased
4 sharply in recent years and remain at high levels.
5 These bankruptcies include several of the largest
6 business bankruptcy filings in history. As the use of
7 bankruptcy has expanded, job preservation and re-
8 tirement security are placed at greater risk.

9 (2) Laws enacted to improve recoveries for em-
10 ployees and retirees and limit their losses in bank-
11 ruptcy 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

1 (B) “or the date of the cessation of the
2 debtor’s business, whichever occurs first”; and

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

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

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

10 Section 101(5) of title 11, United States Code, is
11 amended—

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

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

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

17 “(C) right or interest in equity securities
18 of the debtor, or an affiliate of the debtor, held
19 in a defined contribution plan (within the mean-
20 ing of section 3(34) of the Employee Retire-
21 ment Income Security Act of 1974 (29 U.S.C.
22 1002(34))) for the benefit of an individual who
23 is not an insider, a senior executive officer, or
24 any of the 20 next most highly compensated
25 employees of the debtor (if 1 or more are not

1 insiders), if such securities were attributable to
 2 either employer contributions by the debtor or
 3 an affiliate of the debtor, or elective deferrals
 4 (within the meaning of section 402(g) of the In-
 5 ternal Revenue Code of 1986), and any earn-
 6 ings thereon, if an employer or plan sponsor
 7 who has commenced a case under this title has
 8 committed fraud with respect to such plan or
 9 has otherwise breached a duty to the partici-
 10 pant that has proximately caused the loss of
 11 value.”.

12 **SEC. 103. PRIORITY FOR SEVERANCE PAY.**

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

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

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

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

20 “(10) severance pay owed to employees of the
 21 debtor (other than to an insider, other senior man-
 22 agement, or a consultant retained to provide services
 23 to the debtor), under a plan, program, or policy gen-
 24 erally applicable to employees of the debtor (but not
 25 under an individual contract of employment), or

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

“(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

20 “(13) With respect to retiree benefits, as that
21 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 confirmation of the plan, the continuation of all such retiree 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 pursuant to a judicial proceeding or a proceeding 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 Federal or State law by the debtor, without re-

gard to the time of the occurrence of unlawful conduct on which the award is based or to whether any services were rendered 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 commenced at a time when such award period includes a period on or after the commencement of the case, if the court determines that payment of wages and benefits by reason of the operation of this clause will not substantially increase the probability of layoff or termination of current employees or of nonpayment of domestic support obligations during the case under this title.'".

TITLE II—REDUCING EMPLOYEES' AND RETIREES' LOSSES

SEC. 201. REJECTION OF COLLECTIVE BARGAINING AGREEMENTS.

Section 1113 of title 11, United States Code, is amended by striking subsections (a) through (f) and inserting the following:

1 “(a) The debtor in possession, or the trustee if one
2 has been appointed under this chapter, other than a trust-
3 ee in a case covered by subchapter IV of this chapter and
4 by title I of the Railway Labor Act, may reject a collective
5 bargaining agreement only in accordance with this section.
6 Hereinafter in this section, a reference to the trustee in-
7 cludes a reference to the debtor in possession.

8 “(b) No provision of this title shall be construed to
9 permit the trustee to unilaterally terminate or alter any
10 provision of a collective bargaining agreement before com-
11 plying with this section. The trustee shall timely pay all
12 monetary obligations arising under the terms of the collec-
13 tive bargaining agreement. Any such payment required to
14 be made before a plan confirmed under section 1129 is
15 effective has the status of an allowed administrative ex-
16 pense under section 503.

17 “(c)(1) If the trustee seeks modification of a collec-
18 tive bargaining agreement, then the trustee shall provide
19 notice to the labor organization representing the employ-
20 ees covered by the agreement that modifications are being
21 proposed under this section, and shall promptly provide
22 an initial proposal for modifications to the agreement.
23 Thereafter, the trustee shall confer in good faith with the
24 labor organization, at reasonable times and for a reason-
25 able period in light of the complexity of the case, in at-

1 tempting to reach mutually acceptable modifications of
2 such agreement.

3 “(2) The initial proposal and subsequent proposals
4 by the trustee for modification of a collective bargaining
5 agreement shall be based upon a business plan for the re-
6 organization of the debtor, and shall reflect the most com-
7 plete and reliable information available. The trustee shall
8 provide to the labor organization all information that is
9 relevant for negotiations. The court may enter a protective
10 order to prevent the disclosure of information if disclosure
11 could compromise the debtor’s position with respect to its
12 competitors in the industry, subject to the needs of the
13 labor organization to evaluate the trustee’s proposals and
14 any application for rejection of the agreement or for in-
15 terim relief pursuant to this section.

16 “(3) In consideration of Federal policy encouraging
17 the practice and process of collective bargaining and in
18 recognition of the bargained-for expectations of the em-
19 ployees covered by the agreement, modifications proposed
20 by the trustee—

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

1 “(B) shall be limited to modifications designed
2 to achieve a specified aggregate financial contribu-
3 tion for the employees covered by the agreement
4 (taking into consideration any labor cost savings ne-
5 gotiated within the 12-month period before the filing
6 of the petition), and shall be not more than the min-
7 imum savings essential to permit the debtor to exit
8 bankruptcy, such that confirmation of a plan of re-
9 organization is not likely to be followed by the liq-
10 uidation, or the need for further financial reorga-
11 nization, of the debtor (or any successor to the debt-
12 or) in the short term; and

13 “(C) shall not be disproportionate or overly bur-
14 den the employees covered by the agreement, either
15 in the amount of the cost savings sought from such
16 employees or the nature of the modifications.

17 “(d)(1) If, after a period of negotiations, the trustee
18 and the labor organization have not reached an agreement
19 over mutually satisfactory modifications, and further ne-
20 gotiations are not likely to produce mutually satisfactory
21 modifications, the trustee may file a motion seeking rejec-
22 tion of the collective bargaining agreement after notice
23 and a hearing. Absent agreement of the parties, no such
24 hearing shall be held before the expiration of the 21-day
25 period beginning on the date on which notice of the hear-

1 ing is provided to the labor organization representing the
2 employees covered by the agreement. Only the debtor and
3 the labor organization may appear and be heard at such
4 hearing. An application for rejection shall seek rejection
5 effective upon the entry of an order granting the relief.

6 “(2) In consideration of Federal policy encouraging
7 the practice and process of collective bargaining and in
8 recognition of the bargained-for expectations of the em-
9 ployees covered by the agreement, the court may grant a
10 motion seeking rejection of a collective bargaining agree-
11 ment only if, based on clear and convincing evidence—

12 “(A) the court finds that the trustee has com-
13 plied with the requirements of subsection (c);

14 “(B) the court has considered alternative pro-
15 posals by the labor organization and has concluded
16 that such proposals do not meet the requirements of
17 paragraph (3)(B) of subsection (c);

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

22 “(D) the court finds that implementation of the
23 trustee’s proposal shall not—

1 “(i) cause a material diminution in the
2 purchasing power of the employees covered by
3 the agreement;

4 “(ii) adversely affect the ability of the
5 debtor to retain an experienced and qualified
6 workforce; or

7 “(iii) impair the debtor’s labor relations
8 such that the ability to achieve a feasible reor-
9 ganization would be compromised; and

10 “(E) the court concludes that rejection of the
11 agreement and immediate implementation of the
12 trustee’s proposal is essential to permit the debtor to
13 exit bankruptcy, such that confirmation of a plan of
14 reorganization is not likely to be followed by liquida-
15 tion, or the need for further financial reorganization,
16 of the debtor (or any successor to the debtor) in the
17 short term.

18 “(3) If the trustee has implemented a program of in-
19 centive pay, bonuses, or other financial returns for insid-
20 ers, senior executive officers, or the 20 next most highly
21 compensated employees or consultants providing services
22 to the debtor during the bankruptcy, or such a program
23 was implemented within 180 days before the date of the
24 filing of the petition, the court shall presume that the

1 trustee has failed to satisfy the requirements of subsection
2 (c)(3)(C).

3 “(4) In no case shall the court enter an order reject-
4 ing a collective bargaining agreement that would result in
5 modifications to a level lower than the level proposed by
6 the trustee in the proposal found by the court to have com-
7 plied with the requirements of this section.

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

19 “(e) During a period in which a collective bargaining
20 agreement at issue under this section continues in effect,
21 and if essential to the continuation of the debtor’s busi-
22 ness or in order to avoid irreparable damage to the estate,
23 the court, after notice and a hearing, may authorize the
24 trustee to implement interim changes in the terms, condi-
25 tions, wages, benefits, or work rules provided by the collec-

1 tive bargaining agreement. Any hearing under this sub-
2 section shall be scheduled in accordance with the needs
3 of the trustee. The implementation of such interim
4 changes shall not render the application for rejection
5 moot.

6 “(f) Rejection of a collective bargaining agreement
7 constitutes a breach of the agreement, and shall be effec-
8 tive no earlier than the entry of an order granting such
9 relief. Notwithstanding the foregoing, solely for purposes
10 of determining and allowing a claim arising from the rejec-
11 tion of a collective bargaining agreement, rejection shall
12 be treated as rejection of an executory contract under sec-
13 tion 365(g) and shall be allowed or disallowed in accord-
14 ance with section 502(g)(1). No claim for rejection dam-
15 ages shall be limited by section 502(b)(7). Economic self-
16 help by a labor organization shall be permitted upon a
17 court order granting a motion to reject a collective bar-
18 gaining agreement under subsection (d) or pursuant to
19 subsection (e), and no provision of this title or of any other
20 provision of Federal or State law may be construed to the
21 contrary.

22 “(g) The trustee shall provide for the reasonable fees
23 and costs incurred by a labor organization under this sec-
24 tion, upon request and after notice and a hearing.

1 “(h) A collective bargaining agreement that is as-
 2 sumed shall be assumed in accordance with section 365.”.

3 **SEC. 202. PAYMENT OF INSURANCE BENEFITS TO RETIRED**
 4 **EMPLOYEES.**

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

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

11 (2) in subsection (b)(2), by inserting after “sec-
 12 tion” the following: “, and a labor organization serv-
 13 ing as the authorized representative under sub-
 14 section (c)(1),”;

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

18 “(f)(1) If a trustee seeks modification of retiree bene-
 19 fits, then the trustee shall provide a notice to the author-
 20 ized representative that modifications are being proposed
 21 pursuant to this section, and shall promptly provide an
 22 initial proposal. Thereafter, the trustee shall confer in
 23 good faith with the authorized representative at reason-
 24 able times and for a reasonable period in light of the com-

1 plexity of the case in attempting to reach mutually satis-
2 factory modifications.

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

15 “(3) Modifications proposed by the trustee—

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

20 “(B) shall be limited to modifications that are
21 designed to achieve a specified aggregate financial
22 contribution for the retiree group represented by the
23 authorized representative (taking into consideration
24 any cost savings implemented within the 12-month
25 period before the date of filing of the petition with

1 respect to the retiree group), and shall be no more
2 than the minimum savings essential to permit the
3 debtor to exit bankruptcy, such that confirmation of
4 a plan of reorganization is not likely to be followed
5 by the liquidation, or the need for further financial
6 reorganization, of the debtor (or any successor to
7 the debtor) in the short term; and

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

12 (4) in subsection (g)—

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

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

1 Only the debtor and the authorized representative may ap-
2 pear and be heard at such hearing.

3 “(2) The court may grant a motion to modify the
4 payment of retiree benefits only if, based on clear and con-
5 vincing evidence—

6 “(A) the court finds that the trustee has com-
7 plied with the requirements of subsection (f);

8 “(B) the court has considered alternative pro-
9 posals by the authorized representative and has de-
10 termined that such proposals do not meet the re-
11 quirements of subsection (f)(3)(B);

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

16 “(D) the court finds that implementation of the
17 proposal shall not cause irreparable harm to the af-
18 fected retirees; and

19 “(E) the court concludes that an order granting
20 the motion and immediate implementation of the
21 trustee’s proposal is essential to permit the debtor to
22 exit bankruptcy, such that confirmation of a plan of
23 reorganization is not likely to be followed by liquida-
24 tion, or the need for further financial reorganization,

1 of the debtor (or a successor to the debtor) in the
2 short term.

3 “(3) If a trustee has implemented a program of in-
4 centive pay, bonuses, or other financial returns for insid-
5 ers, senior executive officers, or the 20 next most highly
6 compensated employees or consultants providing services
7 to the debtor during the bankruptcy, or such a program
8 was implemented within 180 days before the date of the
9 filing of the petition, the court shall presume that the
10 trustee has failed to satisfy the requirements of subpara-
11 graph (f)(3)(C).”; and

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

14 “(4) In no case”; and

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

18 **SEC. 203. PROTECTION OF EMPLOYEE BENEFITS IN A SALE**
19 **OF ASSETS.**

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

22 “(3) In approving a sale under this subsection, the
23 court shall consider the extent to which a bidder has of-
24 fered to maintain existing jobs, preserve terms and condi-
25 tions of employment, and assume or match pension and

1 retiree health benefit obligations in determining whether
2 an offer constitutes the highest or best offer for such prop-
3 erty.”.

4 **SEC. 204. CLAIM FOR PENSION LOSSES.**

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

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

19 “(m) The court shall allow a claim of a kind described
20 in section 101(5)(C) by an active or retired participant
21 in a defined contribution plan (within the meaning of sec-
22 tion 3(34) of the Employee Retirement Income Security
23 Act of 1974 (29 U.S.C. 1002(34))), or by a labor organi-
24 zation representing such participants. The amount of such
25 claim shall be measured by the market value of the stock

1 at the time of contribution to, or purchase by, the plan
2 and the value as of the commencement of the case.”.

3 **SEC. 205. PAYMENTS BY SECURED LENDER.**

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

17 **SEC. 206. PRESERVATION OF JOBS AND BENEFITS.**

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

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

22 “A debtor commencing a case under this chapter
23 shall have as its principal purpose the reorganization of
24 its business to preserve going concern value to the max-
25 imum extent possible through the productive use of its as-

1 sets and the preservation of jobs that will sustain produc-
 2 tive economic activity.”;

3 (2) in section 1129(a), as amended by section
 4 104, by adding at the end the following:

5 “(18) The debtor has demonstrated that the re-
 6 organization preserves going concern value to the
 7 maximum extent possible through the productive use
 8 of the debtor’s assets and preserves jobs that sustain
 9 productive economic activity.”;

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

15 “(1) consider the extent to which each plan
 16 would preserve going concern value through the pro-
 17 ductive use of the debtor’s assets and the preserva-
 18 tion of jobs that sustain productive economic activ-
 19 ity; and

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

22 A plan that incorporates the terms of a settlement with
 23 a labor organization representing employees of the debtor
 24 shall presumptively constitute the plan that satisfies this
 25 subsection.”; and

1 (4) in the table of sections for chapter 11, by
 2 inserting the following before the item relating to
 3 section 1101:

“1100. Statement of purpose.”.

4 **SEC. 207. TERMINATION OF EXCLUSIVITY.**

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

7 “(3) For purposes of this subsection, cause for reduc-
 8 ing the 120-day period or the 180-day period includes the
 9 following:

10 “(A) The filing of a motion pursuant to section
 11 1113 seeking rejection of a collective bargaining
 12 agreement if a plan based upon an alternative pro-
 13 posal by the labor organization is reasonably likely
 14 to be confirmed within a reasonable time.

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

20 **SEC. 208. CLAIM FOR WITHDRAWAL LIABILITY.**

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

24 “(11) with respect to withdrawal liability owed
 25 to a multiemployer pension plan for a complete or

1 partial withdrawal pursuant to section 4201 of the
 2 Employee Retirement Income Security Act of 1974
 3 (29 U.S.C. 1381) where such withdrawal occurs on
 4 or after the commencement of the case, an amount
 5 equal to the amount of vested benefits payable from
 6 such pension plan that accrued as a result of em-
 7 ployees' services rendered to the debtor during the
 8 period beginning on the date of commencement of
 9 the case and ending on the date of the withdrawal
 10 from the plan.”.

11 **TITLE III—RESTRICTING EXECU-**
 12 **TIVE COMPENSATION PRO-**
 13 **GRAMS**

14 **SEC. 301. EXECUTIVE COMPENSATION UPON EXIT FROM**
 15 **BANKRUPTCY.**

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

18 (1) in paragraph (4), by adding at the end the
 19 following: “Except for compensation subject to re-
 20 view under paragraph (5), payments or other dis-
 21 tributions under the plan to or for the benefit of in-
 22 siders, senior executive officers, and any of the 20
 23 next most highly compensated employees or consult-
 24 ants providing services to the debtor, shall not be
 25 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 determines 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 reasonable 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 ENHANCEMENTS.

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

(1) in paragraph (1)—

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

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

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

14 (2) by amending paragraph (3) to read as fol-
15 lows:

16 “(3) other transfers or obligations, to or for the
17 benefit of insiders, senior executive officers, man-
18 agers, or consultants providing services to the debt-
19 or, in the absence of a finding by the court, based
20 upon clear and convincing evidence, and without def-
21 erence to the debtor’s request for such payments,
22 that such transfers or obligations are essential to the
23 survival of the debtor’s business or (in the case of
24 a liquidation of some or all of the debtor’s assets)
25 essential to the orderly liquidation and maximization

1 of value of the assets of the debtor, in either case,
 2 because of the essential nature of the services pro-
 3 vided, and then only to the extent that the court
 4 finds such transfers or obligations are reasonable
 5 compared to individuals holding comparable posi-
 6 tions at comparable companies in the same industry
 7 and not disproportionate in light of economic conces-
 8 sions by the debtor’s nonmanagement workforce dur-
 9 ing the case.”.

10 **SEC. 303. ASSUMPTION OF EXECUTIVE BENEFIT PLANS.**

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

13 (1) in subsection (a), by striking “and (d)” and
 14 inserting “(d), (q), and (r)”; and

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

16 “(q) No deferred compensation arrangement for the
 17 benefit of insiders, senior executive officers, or any of the
 18 20 next most highly compensated employees of the debtor
 19 shall be assumed if a defined benefit plan for employees
 20 of the debtor has been terminated pursuant to section
 21 4041 or 4042 of the Employee Retirement Income Secu-
 22 rity Act of 1974, on or after the date of the commence-
 23 ment of the case or within 180 days before the date of
 24 the commencement of the case.

1 “(r) No plan, fund, program, or contract to provide
 2 retiree benefits for insiders, senior executive officers, or
 3 any of the 20 next most highly compensated employees
 4 of the debtor shall be assumed if the debtor has obtained
 5 relief under subsection (g) or (h) of section 1114 to impose
 6 reductions in retiree benefits or under subsection (d) or
 7 (e) of section 1113 to impose reductions in the health ben-
 8 efits of active employees of the debtor, or reduced or elimi-
 9 nated health benefits for active or retired employees within
 10 180 days before the date of the commencement of the
 11 case.”.

12 **SEC. 304. RECOVERY OF EXECUTIVE COMPENSATION.**

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

15 **“SEC. 563. RECOVERY OF EXECUTIVE COMPENSATION.**

16 “(a) If a debtor has obtained relief under subsection
 17 (d) of section 1113, or subsection (g) of section 1114, by
 18 which the debtor reduces the cost of its obligations under
 19 a collective bargaining agreement or a plan, fund, or pro-
 20 gram for retiree benefits as defined in section 1114(a),
 21 the court, in granting relief, shall determine the percent-
 22 age diminution in the value of the obligations when com-
 23 pared to the debtor’s obligations under the collective bar-
 24 gaining agreement, or with respect to retiree benefits, as
 25 of the date of the commencement of the case under this

1 title before granting such relief. In making its determina-
2 tion, the court shall include reductions in benefits, if any,
3 as a result of the termination pursuant to section 4041
4 or 4042 of the Employee Retirement Income Security Act
5 of 1974, of a defined benefit plan administered by the
6 debtor, or for which the debtor is a contributing employer,
7 effective at any time on or after 180 days before the date
8 of the commencement of a case under this title. The court
9 shall not take into account pension benefits paid or pay-
10 able under such Act as a result of any such termination.

11 “(b) If a defined benefit pension plan administered
12 by the debtor, or for which the debtor is a contributing
13 employer, has been terminated pursuant to section 4041
14 or 4042 of the Employee Retirement Income Security Act
15 of 1974, effective at any time on or after 180 days before
16 the date of the commencement of a case under this title,
17 but a debtor has not obtained relief under subsection (d)
18 of section 1113, or subsection (g) of section 1114, then
19 the court, upon motion of a party in interest, shall deter-
20 mine the percentage diminution in the value of benefit ob-
21 ligations when compared to the total benefit liabilities be-
22 fore such termination. The court shall not take into ac-
23 count pension benefits paid or payable under title IV of
24 the Employee Retirement Income Security Act of 1974 as
25 a result of any such termination.

1 “(c) Upon the determination of the percentage dimi-
2 nution in value under subsection (a) or (b), the estate shall
3 have a claim for the return of the same percentage of the
4 compensation paid, directly or indirectly (including any
5 transfer to a self-settled trust or similar device, or to a
6 nonqualified deferred compensation plan under section
7 409A(d)(1) of the Internal Revenue Code of 1986) to any
8 officer of the debtor serving as member of the board of
9 directors of the debtor within the year before the date of
10 the commencement of the case, and any individual serving
11 as chairman or lead director of the board of directors at
12 the time of the granting of relief under section 1113 or
13 1114 or, if no such relief has been granted, the termi-
14 nation of the defined benefit plan.

15 “(d) The trustee or a committee appointed pursuant
16 to section 1102 may commence an action to recover such
17 claims, except that if neither the trustee nor such com-
18 mittee commences an action to recover such claim by the
19 first date set for the hearing on the confirmation of plan
20 under section 1129, any party in interest may apply to
21 the court for authority to recover such claim for the ben-
22 efit of the estate. The costs of recovery shall be borne by
23 the estate.

24 “(e) The court shall not award postpetition com-
25 pensation under section 503(c) or otherwise to any person

1 subject to subsection (c) if there is a reasonable likelihood
2 that such compensation is intended to reimburse or re-
3 place compensation recovered by the estate under this sec-
4 tion.”.

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

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

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

4 **SEC. 401. UNION PROOF OF CLAIM.**

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

8 **SEC. 402. EXCEPTION FROM AUTOMATIC STAY.**

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

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

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

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

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

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