SELLING OUT

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When bankruptcy policy competes with other federal and state regulatory policies, which should take priority? Bankruptcy law, provided it is used to save a struggling business from having to close its doors. Bankruptcy's supremacy, then, can preserve the debtor's going concern value, save jobs, and limit the collateral damage from a business failure. But should this bankruptcy supremacy apply only when the debtor is pursuing a traditional reorganization under chapter 11, or should it also apply when bankruptcy is used to bring about a quick sale of substantially all of the debtor's assets?

This Article addresses this question in the specific context of federal bankruptcy law's conflict with federal labor laws, and it does so in the context of recent coal mining bankruptcies. Coal mining companies have filed bankruptcy with the goal of shedding their labor obligations to current and retired miners, and they have been successful at doing so whether they have structured their bankruptcies as traditional reorganizations or as asset sales. While the end result may look similar—in both instances, the business line is continued in some shape—the process is quite different, especially as to the balancing of federal bankruptcy and labor policies. The Bankruptcy Code's balancing of these interests, properly interpreted, requires the debtor to allocate some of its bankruptcy-created value to its collective bargaining units—a requirement that debtors have managed to sidestep when they structure their bankruptcy as asset sales.

This finding has implications for bankruptcy asset sales broadly and for the role of bankruptcy judges in chapter 11. While judges should not try to draw a sharp distinction between traditional reorganizations and asset sales, they should enforce the creditor protections and distributional norms embodied in the Bankruptcy Code.

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INTRODUCTION

When should bankruptcy law provide a means to reduce or avoid a company's regulatory obligations in times of financial distress? The coal industry provides a fascinating case study to consider this question. Over the past four years, coal mining companies have been steadily heading to bankruptcy court.[1] Even with President Trump's pro-coal stance, eleven coal companies have filed for bankruptcy during his term.[2]

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1 *See* Clifford Kraus, *Murray Energy Is 8th Coal Company in a Year to Seek Bankruptcy*, N.Y. TIMES (Oct. 29, 2019), https://www.nytimes.com/2019/10/29/business/energy-environment/murray-energy-bankruptcy.html [https://perma.cc/75WF-4Q9Z]; Becky Yerak, *Bets on Coal End Where They Started: In Bankruptcy*, WALL ST. J. (Nov. 24, 2019, 9:00 AM), https://www.wsj.com/articles/bets-on-coal-end-where-they-started-in-bankruptcy-11574604000 [https://perma.cc/GT6J-TXNB] (reporting that roughly sixty percent of the nation's coal is mined by companies that have been through bankruptcy in recent years).

2 Daniel Moritz-Rabson, *Eleven Coal Companies Have Filed for Bankruptcy Since Trump Took Office*, NEWSWEEK (Oct. 30, 2019, 2:36 PM) https://www.newsweek.com/eight-coal-companies-

The coal industry has struggled to service their heavy debt loads as demand for coal has plummeted at the same time as labor and regulatory costs have increased. Faced with these struggles, coal mining companies have turned to bankruptcy courts for a solution. And in turning to bankruptcy for relief, they have all followed a similar playbook.

The coal mining industry's bankruptcy playbook has been to file bankruptcy to facilitate a foreclosure sale for the secured lenders: the debtor files bankruptcy with the aim to sell the company's assets to a new entity owned by the senior secured lenders, and that sale is contingent on court orders declaring that the new entity will not be liable for the debtor's financial or regulatory obligations.[3]

The basic model of this playbook is familiar. It is the same model that was used in the restructuring of the automobile industry during the Great Recession, as General Motors and Chrysler pursued similar "quick sale" bankruptcy cases. Scholars have analyzed the efficiency of these quick asset sale cases and have proposed models to guide courts and legislators on how these sales could be improved.[4]

There is an aspect to these coal mining quick sales, though, that has been under-appreciated: To what extent does this quick sale playbook affect the way that the Bankruptcy Code directs courts to balance bankruptcy's pro-reorganization policy against competing federal regulatory schemes, such as labor law?[5]

The Bankruptcy Code provides a balancing test to determine to what extent a financially struggling business should be able to reduce its labor and pension liabilities vis-à-vis other claims against the debtor. That is, to what extent should labor, pensioners, and other creditors "share the pain" of the debtor's reorganization? Those specific Bankruptcy Code

have-filed-bankruptcy-since-trump-took-office-1468734 [https://perma.cc/WD34-XJQX] (listing Armstrong Energy Inc., Mississippi Minerals, Mission Coal, Piney Woods Resources Inc., Westmoreland Coal, Trinity Coal, Cloud Peak Energy, Cambrian Holding, Blackjewel, Blackhawk Mining, and Murray Energy).

3 *See infra* Part I (describing the path many of these coal mining bankruptcies have pursued).

4 *See infra* Section II.A.

5 Joshua Macey & Jackson Salovaara, *Bankruptcy as Bailout: Coal Company Insolvency and the Erosion of Federal Law*, 71 STAN. L. REV. 879 (2019), as discussed further *infra* Section IV.A, likewise use the coal mining companies as a way to examine the interaction of federal bankruptcy law with pension and environmental obligations. While I agree with much of their argument, this Article highlights the role of the asset sale procedure as a key mechanism that leads to the "erosion" of other federal laws.

tests, found in sections 1113 and 1114 of Chapter 11 of the Bankruptcy Code, require the bankruptcy court to find that any proposal to cut labor and pension obligations is "necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably."[6]

When a coal mining company seeks to reject its collective bargaining and pension obligations as part of a quick sale playbook, it has had to argue that these cuts were necessary to permit the reorganization of the debtor. Even if the court accepts the argument that the cuts are necessary for the asset sale, it must also determine that a bankruptcy foreclosure sale is a "reorganization" for purposes of sections 1113 and 1114.

This Article examines how courts have addressed the question of whether a foreclosure sale is a "reorganization" and examines the way this interpretation strikes a new balance between bankruptcy and labor laws. While the question of whether an asset sale is a "reorganization" is a challenging one—empirical studies of bankruptcy "success," for example, have struggled with how to characterize asset sales under Chapter 11 of the Bankruptcy Code—it is not a useful or practical interpretation exercise.[7] Virtually any asset sale could be reconfigured as a reorganization, albeit with different processes.

This Article thus argues that courts should instead focus on whether the sale process distorts the distributional priorities embedded in those balancing tests. This argument is consistent with the approaches advocated by Mark Roe and David Skeel, Ralph Brubaker and Charles Tabb, and the American Bankruptcy Institute's Commission to Study the Reform of Chapter 11.[8] This Article contributes to this argument by highlighting the distributional priorities inherent in the processes for rejecting labor and retirement benefits.

Understanding sections 1113 and 1114's distributional priorities, the coal mining bankruptcy playbook should not work to permit these companies to quickly shed their labor and retirement benefits in bankruptcy.

While this argument focuses on labor and pension balancing, it has implications for the way courts balance bankruptcy and non-bankruptcy policies more broadly. To what extent should environmental creditors

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6 11 U.S.C. §§ 1113(b)(1)(A), 1114(f)(1)(A) (2018).

7 *See infra* note 125.

8 *See infra* Section II.A.

bear the burden of financial restructuring? To what extent should bankruptcy policy honor corporate separateness when all or part of an enterprise group files bankruptcy? And to what extent should bankruptcy law provide a safe harbor from federal securities disclosure requirements? This Article does not address these questions, but its argument implicates each of them by focusing on the way that the quick sale model of bankruptcy impacts the way bankruptcy law strikes these balances.

I. The Coal Bankruptcy Playbook

The setting for this bankruptcy dispute is the wake of the coal industry crisis, with coal mining companies across the industry struggling to compete with cheaper natural gas prices all the while continuing to service their existing debt.[9] A major portion of that existing debt comes in the form of retiree health care benefits, provided pursuant to collective bargaining agreements (CBAs) with labor unions.[10]

Labor costs are high because the companies' CBAs were negotiated when coal prices were high.[11] They are also high because coal companies have statutory obligations to fund retiree pensions.[12] And President Trump's coal-friendly policies encouraged investors to pump large sums of money into the coal mining industry through the leveraged loan market, in anticipation of the coal rebound that has not materialized.[13]

When they filed for bankruptcy relief, one of the principal questions is how the restructuring burden should be borne by different creditor

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9 Micah Maidenberg, *Miners Cut Back in Largest U.S. Coal Region*, WALL ST. J. (Dec. 31, 2018, 9:22 AM), https://www.wsj.com/articles/miners-cut-back-in-largest-u-s-coal-region-11546264800 [https://perma.cc/V33E-MEDS].

10 *Id.*

11 Kelly Poe, *Walter Energy's Bankruptcy Is Biggest in Coal Industry Since 2012*, AL.COM (July 18, 2015), https://www.al.com/business/2015/07/walter_energys_bankruptcy_is_b.html [https://perma.cc/6VRN-6GWL] (Walter Energy's attorney states that "[o]ur collective bargaining agreement was negotiated when coal prices were much, much higher").

12 DAVID M. HILLMAN, SCHULTE ROTH & ZABEL LLP, LABOR LIABILITIES IN COAL BANKRUPTCIES (2016), https://www.law.columbia.edu/sites/default/files/microsites/climate-change/hillman_-_labor_liabilities_in_coal_bankruptcy.pdf [https://perma.cc/XCU7-ZGZB].

13 Jonathan Schwarzberg, *Coal Companies Return to U.S. Leveraged Loan Market*, REUTERS (Mar. 3, 2017, 12:40 PM), https://www.reuters.com/article/us-coal-loans-idUSKBN16A24I [https://perma.cc/473G-JD66].

groups. Restructuring requires reducing or wiping out existing claims against the debtor—that is, bankruptcy reorganization requires imposing costs on the creditors. One of the core bankruptcy functions is to determine how those costs get distributed among creditors, what we refer to as the relative priority of creditors' claims. When the coal companies file bankruptcy in order to reorganize, one of the principal questions is how their restructuring costs should be spread among various creditor interests.

In this way, these coal mining bankruptcy cases raise important questions about the interaction of federal bankruptcy law with state corporate law, federal and state environmental laws, and federal laws protecting retirees.[14] While some of these problems are unique to the coal mining industry, the problem of dealing with large (and growing) legacy labor costs is neither new nor limited to the coal mining industry.[15] Bankruptcy law as a potential tool to modify or terminate retiree benefits has deep roots. LTV Corp. made national news headlines back in 1986 for doing precisely this.[16] And while the pressures of the coal mining industries are unique in some ways—this is a heavily regulated business in which worker and retiree benefits have long been a central concern—the legal issues presented here are common. Similar issues arise in retail bankruptcy (SEARS and its pension plan plans), manufacturing (Hostess Bakeries), and transportation (American Airlines, Delta, United Airlines).[17]

Walter Energy Industries provides a useful case study of this dynamic. Walter Energy, like other bankruptcy coal miners, filed for bankruptcy at a time when coal prices were at their lowest. At the same

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14 *See* Macey & Salovaara, *supra* note 5.

15 Daniel Keating, *The Continuing Puzzle of Collective Bargaining Agreements in Bankruptcy*, 35 WM. & MARY L. REV. 503 (1994).

16 Nancy L. Ross, *LTV Unloads Pension Plans on U.S. Unit*, WASH. POST (Sept. 27, 1986), https://www.washingtonpost.com/archive/business/1986/09/27/ltv-unloads-pension-plans-on-us-unit/3f64f896-6aa8-4ce2-89a3-5eaa7798c0f7 [https://perma.cc/CV8W-3Q5S]; Thomas C. Hayes, *LTV Corp. Files for Bankruptcy; Debt Is $4 Billion*, N.Y. TIMES (July 18, 1986), https://www.nytimes.com/1986/07/18/business/ltv-corp-files-for-bankruptcy-debt-is-4-billion.html [https://perma.cc/N6B9-EL5H].

17 Andrew B. Dawson, *Collective Bargaining Agreements in Corporate Reorganizations*, 84 AM. BANKR. L.J. 103 (2010); Andrew B. Dawson. *Labor Activism in Bankruptcy*, 89 AM. BANKR. L.J. 97 (2015); Keating, *supra* note 15.

time, they were parties to CBAs that were negotiated when coal demand was on the rise. Walter Energy's CBAs had been negotiated back in 2011, when coal prices were at their highest, only to find itself struggling to meet its financial obligations as coal prices sank.[18] In addition to their obligations under existing CBAs, coal companies have obligations to fund retiree funds for coal mining companies that have failed, pursuant to the Coal Act.[19] Walter Energy stated that its obligations to employees and retirees, including pensions and postretirement healthcare, were nearly $600 million as of the end of 2014, with additional annual obligations under the Coal Act.[20]

Not only did Walter Energy find itself with high labor costs, but by the time it filed bankruptcy it was mortgaged to the hilt.[21] Walter Energy, as the coal mining companies that filed bankruptcy before it, entered bankruptcy with substantially all of its assets pledged to its first and second lien lenders.[22]

Before it filed bankruptcy, Walter Energy's secured creditors negotiated with the debtor to buy the company's assets through a bankruptcy sale. Walter Energy, thus, filed for bankruptcy relief and then filed a motion to sell its assets to the lender, free and clear of any claims

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18 Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(g) for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief at 2, *In re* Walter Energy, Inc., 542 B.R. 859 (Bankr. N.D. Ala. 2015) *aff'd sub nom.* United Mine Workers of Am. 1974 Pension Plan & Tr. v. Walter Energy, Inc., 579 B.R. 603 (N.D. Ala. 2016), *aff'd sub nom. In re* Walter Energy, Inc., 911 F.3d 1121 (11th Cir. 2018) (No. 2:15-bk-02741) [hereinafter Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(g)].

19 Coal Industry Retiree Health Benefit Act (Coal Act), 26 U.S.C. §§ 9701–9722 (2018).

20 Debtors' Motion Pursuant to 11 U.S.C. §§ 105(a), 1113(c) and 1114(g), *supra* note 18, at 5.

21 *Id.* at 7.

22 Declaration of William G. Harvey in Support of First Day Motions, *Walter Energy*, 542 B.R. 859 (No. 2:15-bk-02741); Debtors' Motion for (A) An Order (I) Establishing Bidding Procedures for the Sale(s) of All, or Substantially All, of the Debtors' Assets; (II) Approving Bid Protections; (III) Establishing Procedures Relating to the Assumption and Assignment of Executory Contracts and Unexpired Leases; (IV) Approving Form and Manner of the Sale, Cure and Other Notices; and (V) Scheduling an Auction and a Hearing to Consider the Approval of the Sale(s); (B) Order(s) (I) Approving the Sale(s) of the Debtors' Assets Free and Clear of Claims, Liens and Encumbrances; and (II) Approving the Assumption and Assignment of Executory Contracts and Unexpired Leases; and (C) Certain Related Relief, *Walter Energy*, 542 B.R. 859 (No. 2:15-bk-02741) [hereinafter Debtors' Sale Motion].

against the estate.[23] That sale agreement was contingent on Walter Energy obtaining a court order that the sale would be "free and clear" of Walter Energy's debts and that the purchaser would not be bound by Walter Energy's labor and pension obligations.[24]

Both of these moves—a "free and clear" sale of corporate assets and a motion to reject the collective bargaining agreement as a precondition to the sale—were standard practice in the coal mining bankruptcies examined here. Alpha Natural Resources,[25] Patriot Coal,[26] Westmoreland Coal,[27] and Murray Energy[28] have all used this same approach: prepetition first lien lenders proposed to buy the debtor's business as a going concern out of bankruptcy but only if the debtor first rejected its CBAs. And the debtors have succeeded in rejecting their collective bargaining obligations in every case in which the debtor has sought to do so.[29]

The general asset sale model pursued here was not only common in the coal mining cases, but it has been common practice (minus the labor transformation part) in bankruptcy practice broadly over at least the past

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23 Debtors' Sale Motion, *supra* note 22.

24 Declaration of William G. Harvey in Support of First Day Motions at 42, *Walter Energy*, 542 B.R. 859 (No. 2:15-bk-02741) (setting forth the milestones the debtor must obtain as the parties pursued either a debt-for-equity swap or a sale of assets). By November 5, 2015, the debtors had abandoned the debt-for-equity swap and pursued the free and clear sale. *See* Debtors' Sale Motion, *supra* note 22.

25 *In re* Alpha Nat. Res., Inc., No. 15-33896-KRH, 2016 BL 423241 (Bankr. E.D. Va. Dec. 20, 2016).

26 Parsley v. Blackhawk Mining, LLC (*In re* Patriot Coal Corp.), No. 15-32450, 2018 BL 321899 (Bankr. E.D. Va. Sept. 6, 2018).

27 Trs. of the United Mine Workers of Am. v. Westmoreland Coal Co. (*In re* Westmoreland Coal Co.), No. 18-35672, 2018 BL 483160 (Bankr. S.D. Tex. Dec. 28, 2019).

28 *In re* Murray Energy Holdings Co., No. 19-56885, 2020 BL 195925 (Bankr. S.D. Ohio May 13, 2020).

29 As of the writing of this Article, Murray Energy has signaled that it might seek to reject its collective bargaining agreements but has not yet done so. Murray Energy's Restructuring Support Agreement, *Murray Energy*, 2020 BL 195925 (No. 19-56885), provides that the debtors

> shall have (x) reached an agreement with the applicable authorized representatives of the employees or retirees . . . or (y) absent such agreement, filed a motion in form and substance acceptable to the Required Consenting Superpriority Lenders in their reasonable discretion under section 1113 of the Bankruptcy Code for rejection of the Debtors' collective bargaining agreements and under section 1114 of the Bankruptcy Code for modification of the Debtors' retiree benefits (the "1113/1114 Motion").

two decades.[30] Scholars have examined this trend and its implications for a long time now, reaching a crescendo perhaps when General Motors and Chrysler both pursued the quick asset sale model in bankruptcy during the Great Recession.[31]

What makes the coal mining cases a bit different is the labor transformation element to the sale. And what makes *In re Walter Energy, Inc.* interesting for this analysis is that litigation on this matter was litigated and appealed to the Circuit Court of Appeals. Otherwise, though, the issues raised in that case underlay all of these coal mining bankruptcies. Indeed, as this Article argues later, even though the labor transformation is special, the way the *Walter Energy* court addressed this issue has implications for the way courts balance bankruptcy and non-bankruptcy interests in all asset sale cases.

The *Walter Energy* court, in an opinion affirmed by the Eleventh Circuit, held that the power to reject CBAs is not limited to traditional reorganizations but extends also to going concern sales.

The Eleventh Circuit considered this question and ultimately held that, yes, asset sales are "reorganization" for purposes of rejecting labor and retiree obligations.[32] "Reorganization," the court held, "refer[s] to all types of debt adjustment under Chapter 11, including a sale of assets on a going-concern basis."[33] As a result, a debtor has the power to reject CBAs and slash retiree benefits not only when it is attempting to use bankruptcy as part of a traditional reorganization but also when selling substantially all of its assets pursuant to a section 363 sale.

The court reached this conclusion based on dictionary definitions of the term "reorganization." The Random House Dictionary of the English Language defines "reorganization" as "[a] reconstruction of a business corporation, including a marked change in capital structure, often

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30 *See infra* Section II.A.

31 *See infra* Section II.A.

32 *In re* Walter Energy, Inc., 911 F.3d 1121 (11th Cir. 2018). The court considered three issues, only the last of which is discussed here. First, the court considered whether the Anti-Injunction Act prohibited the bankruptcy court from terminating Walter Energy's obligation to pay retirement premiums; second, whether the court erred in holding that the retiree benefits were "retiree benefits" because they were not voluntary but rather statutory obligations; and third, whether the court could enter a rejection order under section 1113 when the debtor was liquidating and not reorganizing.

33 *Id.* at 1151.

following a failure and receivership or bankruptcy trusteeship."[34] Merriam-Webster Dictionary Online defines the term as "financial reconstruction of a business concern."[35] And Webster's Third New International Dictionary defines it as "[t]he rehabilitation of the finances of a business concern under procedures prescribed by federal bankruptcy legislation."[36] Drawing from these definitions, the court stated that a reorganization requires that "the business concern must continue to operate."[37] Accordingly, an asset sale is a reorganization, the court concluded, so long as "the debtor's business continues operating as a going concern, albeit under new ownership."[38]

This approach, the court reasoned, fits within the overall structure of the Bankruptcy Code and of chapter 11. Even though the Bankruptcy Code titles chapter 7 "Liquidation" and chapter 11 "Reorganization," chapter 11 itself permits debtors to reorganize or liquidate under a debt restructuring plan. Thus, concluded the court, "[b]ecause Chapter 11 permits both classic reorganization as well as liquidations, this title suggests that Congress understood that the term 'reorganization' also referred to some liquidations."[39] In those reorganization-like liquidations, debtors should therefore be able to exercise the powers of section 1113.

Further, the court acknowledged that traditional reorganizations and going concern sales are similar: "In these cases, the end result of a Chapter 11 liquidation bears a close resemblance to the end result of a classic reorganization in which creditors trade their debt for equity."[40] Indeed, the similarity in result means that asset sales serve the same job-preserving policy as does a traditional reorganization.[41]

The court did acknowledge one functional concern with this approach. Namely, section 1114 contemplates a bargaining process. What was there to bargain over where the debtor was not trying to reduce

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34 *Id.* at 1153.

35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 1154.

39 *Id.*

40 *Id.* at 1153; *see also* Andrew B. Dawson, *Better than Bankruptcy*, 69 RUTGERS U. L. REV. 137 (2016) (arguing that state law asset sale procedures are effectively a reorganization process).

41 *See Walter Energy*, 911 F.3d at 1153.

pension obligations (as it might do in a traditional reorganization) but instead to eliminate them entirely in order to facilitate a sale? The retiree health funds argued that there is no room for good faith bargaining when the debtor's position is that the CBA and the retiree benefits must go, or else the sale would fall through. The court rejected this argument as

> prov[ing] too much. A bankruptcy court may terminate retiree benefits under a Chapter 11 classic reorganization or liquidation only when the termination is "necessary to permit the reorganization of the debtor." *See* 11 U.S.C. § 1114(g)(3). Because the termination will be, by definition, necessary for the company to continue to operate, the authorized representative will always be "hard pressed" to decline.[42]

The end result was that Walter Energy was then able to terminate its pension obligations and sell its assets as a going concern to the purchaser, with a court order declaring that no retiree liabilities would travel with those assets.

II. ASSET SALE MODEL "PLUS"

The example of Walter Energy's bankruptcy case and appeal highlights the way quick asset sales in bankruptcy implicate the way Congress balanced bankruptcy and non-bankruptcy policies in chapter 11 of the Bankruptcy Code. In a traditional reorganization, the debtor would have to propose modifications to its CBAs or retirement plants and prove that those proposed modifications were necessary to permit the debtor to reorganize. In the sale context, the debtor can accomplish much more: it can eliminate its labor obligations, and it can do so not by showing that it would be necessary for its reorganization but only that potential purchasers would not buy the assets absent this elimination.

To assess the impact of asset sales on the way the Bankruptcy Code balances its pro-reorganization policy against labor policies, it is important to first examine the basic framework of Walter Energy's plan, the quick asset sale. The quick asset sale is typical of many large corporate bankruptcies. As scholars have long argued, these quick asset sales raise

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42 *Id.* at 1156.

serious concerns about whether the asset sales themselves are efficient.[43] That is, do they maximize returns for creditors, or do they tend to shift value from the estate to the secured creditors?

More recent scholarship has asked whether these asset sales are consistent with creditors' state law entitlements under article 9 of the Uniform Commercial Code. If a core tenet of the dominant theoretical model of Chapter 11 of the Bankruptcy Code is that bankruptcy law should respect state law entitlements, are these asset sales consistent with that theory?[44]

After reviewing the literature on these two fundamental questions, this Article will then turn to the labor and retiree aspects of Walter Energy's case. The Bankruptcy Code has two specific sections dealing with CBAs and retiree benefits, in sections 1113 and 1114, respectively. Those sections provide the statutory test for balancing bankruptcy pro-reorganization policy against both labor and pension protections. They do this, in part, by requiring courts to allow a debtor to modify its labor obligations only if necessary to permit reorganization—a principal which the Supreme Court first articulated in 1984. The principal behind that policy is fairly clear and easy to understand: while the debtor should not be able to easily cut its labor costs in bankruptcy, some labor cost cutting may be necessary to prevent the debtor from shutting down. While this principal is easy to understand, it is difficult to apply fairly and equitably. Further, the interpretation of "necessary" has ultimately eroded the redistributional entitlements embedded in this test.

A. *Quick Sale Model*

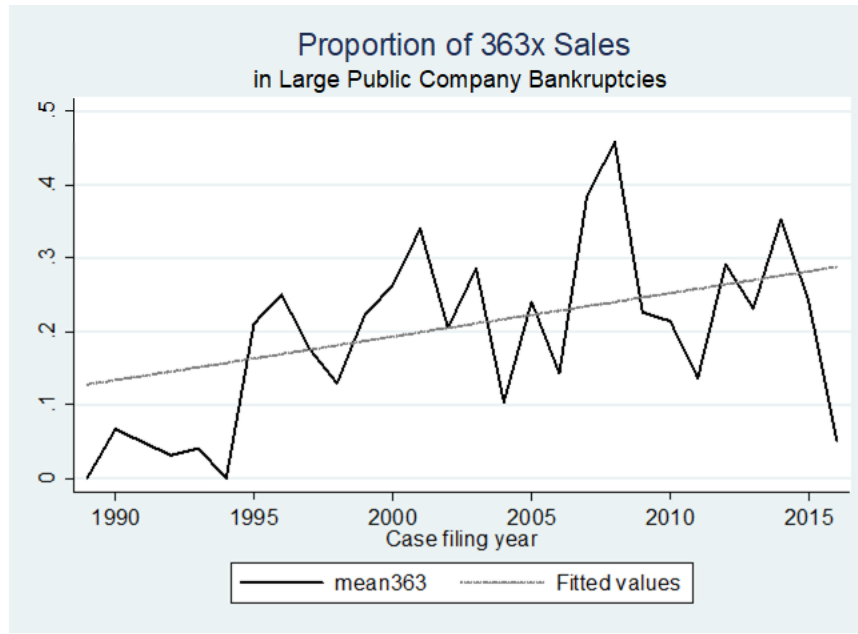
The first aspect of the *Walter Energy* case that needs explanation is the free-and-clear power in bankruptcy asset sales. The trend for decades now has been away from traditional reorganizations and instead towards a going concern sale of the business in bankruptcy. (See Figure 1).[45] Because free and clear sales are often contrasted with a traditional reorganization in bankruptcy, it may be helpful to start with that notion.

43 *Infra* Section II.A.

44 *Infra* Section II.B.

45 Data gathered from the UCLA-LoPucki Bankruptcy Research Database. UCLA-LOPUCKI BANKR. RES. DATABASE, http://lopucki.law.ucla.edu [https://perma.cc/7KJD-XGVB].

Figure 1



The idea of a traditional corporate reorganization is that the managers of a company can place the company into bankruptcy, operate it through the bankruptcy, restructure the company's operations and finances, and then emerge from bankruptcy as the same company. Thus, ABC Corp. can seek bankruptcy protection, allowing ABC Corp. management to continue operating the company but under the protection of the Bankruptcy Code. With that protection, management would have the necessary breathing room to negotiate a debt settlement with its creditors. As long as that "plan of reorganization" receives sufficient support from the classes of creditors and confirmation by the court, the debtor can impose that plan even on dissenting creditors. Once the court confirms the reorganization plan, ABC Corp. could then emerge from bankruptcy with a restructured balanced sheet. The line of business continues, preserving jobs and relationships with suppliers.

A going concern sale of the business can reach a nearly identical result, albeit with a change in ownership. The managers of ABC Corp. could place the company into bankruptcy and sell all, or substantially all, of its assets to a purchaser. The purchaser would then continue the business, thereby preserving jobs and relationships with suppliers. The

proceeds of that sale would then be distributed in satisfaction of the seller's debts.

Each of these procedures reaches a similar endpoint: the debtor's going concern value is preserved, jobs are saved, and the disruptions of business closure are avoided. They both, thus, advance the federal bankruptcy policy of avoiding the "attendant loss of jobs and possible misuse of economic resources" in a piecemeal liquidation.[46] But these goals are reached through different procedures, procedures which balance the debtor's right to continue operating its business against creditors' rights to receive a fair value in exchange for their claims.

The sale process, though, raises a couple of important questions. First, courts may not be willing to approve a sale process that effectively accomplishes a traditional reorganization's results but without its protections. For example, a traditional reorganization process requires disclosure to creditors, creditor approval, and then a court confirmation. This process provides several means by which a creditor can object to the proposed plan of reorganization, either individually or as a class.

Second, while asset purchasers do not generally assume the seller's liabilities, there are state law exceptions to that rule, particularly when the purchaser continues the seller's line of business.[47] In such case, courts may treat the purchaser as the seller's successor entity. Many successor liability problems can be resolved by asking the court to approve the sale "free and clear of any interest in such property."[48]

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46 NLRB v. Bildisco & Bildisco, 465 U.S. 513, 528 (1984).

47 George W. Kuney, *A Taxonomy and Evaluation of Successor Liability*, 6 FLA. ST. U. BUS. L. REV. 9 (2007).

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> (f) The trustee may sell property under subsection (b) or (c) of this section free and clear of any interest in such property of an entity other than the estate, only if—
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> (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
>
> (2) such entity consents;
>
> (3) such interest is a lien and the price at which such property is to be sold is greater than the aggregate value of all liens on such property;
>
> (4) such interest is in bona fide dispute; or
>
> (5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

While at one point in time there was some doubt as to whether this provision applied to going concern sales, that is no longer really in doubt. Courts frequently grant such requests even for sales of the business—the asset sales of Chrysler and General Motors being perhaps the best-known examples of this practice.[49] But these bankruptcy asset sales were quite common even before then.[50] Scholars have analyzed the impact of this trend in bankruptcy practice for a long time. Douglas Baird and Robert Rasmussen wrote *The End of Bankruptcy* in 2002, arguing that traditional reorganizations were obsolete.[51] Bankruptcy law's chief function is to create a central forum to coordinate a resolution of how to dispose of the bankruptcy estate. With a robust market for selling small and large firms, there are buyers with sufficient capital to purchase the business as a going concern, thus eliminating the need for bankruptcy law's collective forum.

Lynn LoPucki and Joseph Doherty wrote *Bankruptcy Fire Sales* in 2007, presenting evidence that these asset sales are inefficient and suggesting that the trend towards asset sales was likely waning.[52] Their empirical analysis of quick asset sale cases compared with traditional reorganizations found that asset sales yielded less than half the value of traditional reorganizations, leading them to conclude that asset sales are value destructive and that the asset sale trend was curtailing. Ayotte and Morrison further examined the efficiency of asset sales in 2009, finding that asset sale cases were directed by the senior secured lenders, whose incentives were often not aligned with those of bankruptcy's goal to maximize the value of the bankruptcy estate.[53]

11 U.S.C. § 363(f) (2018).

49 *See* Ralph Brubaker & Charles Jordan Tabb, *Bankruptcy Reorganizations and the Troubling Legacy of* Chrysler *and* GM, 2010 U. ILL. L. REV. 1375 (2010); Stephen J. Lubben, *No Big Deal: The* GM *and* Chrysler *Cases in Context*, 83 AM. BANKR. L.J. 531 (2009); Mark J. Roe & David Skeel, *Assessing the Chrysler Bankruptcy*, 108 MICH. L. REV. 727 (2010).

50 Lubben, *supra* note 49.

51 Douglas G. Baird & Robert K. Rasmussen, *The End of Bankruptcy*, 55 STAN. L. REV. 751 (2002).

52 Lynn M. LoPucki & Joseph W. Doherty, *Bankruptcy Fire Sales*, 106 MICH. L. REV. 1 (2007).

53 Kenneth M. Ayotte & Edward R. Morrison, *Creditor Control and Conflict in Chapter 11*, 1 J. LEGAL ANALYSIS 511 (2009).

1. Sub Rosa Doctrine

The major check on this approach, in theory, is the sub rosa doctrine, which courts have (rarely) invoked to prevent a debtor from using a sale process to replace chapter 11's distributional requirements.[54] As the *Braniff Airways* court stated, "[t]he debtor and the Bankruptcy Court should not be able to short circuit the requirements of Chapter 11 for confirmation of a reorganization plan by establishing the terms of the plan *sub rosa* in connection with the sale of assets."[55]

There, the court cited three examples where the sale agreement encroached upon chapter 11's creditor protections: part of the sale proceeds would go only to former Braniff employees, shareholders, and (some) unsecured creditors; the secured creditors would be required to vote in favor of the post-sale reorganization plan; and the sale transaction included a release of claims against the debtor, its officers and directors, and its secured creditors.[56] This doctrine, though, has done little work in pushing back against asset sales.

Professors Brubaker and Tabb argue that any attempt to distinguish between "true sales" and "traditional reorganization" is not particularly helpful because any reorganization could be recast as an asset sale.[57] Instead of the lender purchasing the assets, the deal could be restructured with the debtor proposing a plan to issue equity in the newly reorganized entity to satisfy the claims of the secured creditors. The reorganization plan could discharge many of the company's old debts, allowing the new owners to take control of a company with a rehabilitated balance sheet. In both instances, the secured lender owns the business.

Because any attempt to distinguish a "sale" from a "reorganization" is a waste of time, courts should instead focus solely on the distributional consequences of the sale.[58] That line drawing process is fact-intensive and therefore expensive; but the real cost, they assert, is that courts will lose

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[54] Pension Benefit Guar. Corp. v. Braniff Airways, Inc. (*In re* Braniff Airways, Inc.), 700 F.2d 935, 940 (5th Cir. 1983).

[55] *Id.*

[56] *Id.*

[57] Brubaker & Tabb , *supra* note 49.

[58] *Id.*

sight of the distributional norms and entitlements of stakeholders.[59] Thus, they urge that courts should reject the debtor's chosen reorganizational vehicle only if "the mechanism used impairs or obstructs the court's ability to fulfill [its] central protective role."[60]

Professors Roe and Skeel have likewise criticized these sales as violating bankruptcy norms.[61] Focusing on Chrysler, they argued that the asset sale procedure shifted money from secured creditors to pensioners. However defensible that redistribution might be from a policy standpoint, it fails to comport with the creditors' pre-established rights. They therefore suggested three "makeshift safeguards" that can permit going concern sales under section 363 without losing essential creditor protections found in the section 1129 plan confirmation requirements.[62] These safeguards are judicial valuation of the assets, creditor consent, and a sale process that leads to a contested auction.[63] If we have these, then our concerns about creditor protections and priority skipping should be allayed.

The American Bankruptcy Institute's legislative reform project has proposed legislative reforms that would adopt some of these safeguards. The Commission to Study the Reform of Chapter 11, a collaborative legislative reform project that brought together practitioners and academics to make proposals for amending chapter 11 of the Bankruptcy Code, considered the sale versus reorganization issue and has proposed a form of the Roe/Skeel approach: debtors should be able to sell substantially all assets outside of the plan; however, the sale process must incorporate the fundamental creditor protections embedded in the plan confirmation requirements.[64]

The takeaway from all three approaches is: (a) going concern sales can result in a quasi-reorganization outcome and that (b) this is not a cause for concern except to the extent it skirts creditor priorities and protections. That is, chapter 11's creditor protections and priorities are a fundamental part of chapter 11's governance structure. The debtor gets

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59 *Id.*

60 *Id.* at 1379.

61 Roe & Skeel, *supra* note 49.

62 *Id.* at 739.

63 *Id.*

64 COMM'N TO STUDY THE REFORM OF CHAPTER 11, AM. BANKR. INST., 2012–2014 FINAL REPORT AND RECOMMENDATIONS 201–06 (2014).

to stay in control of the business in exchange for the Code's creditor protections. If the debtor were to instead file under chapter 7 and cede control of the business to a trustee, these protections would be only those lesser protections available to creditors under chapter 7.

Absent legislative reform, there is some possibility of reform in asset sale cases as the Supreme Court has emphasized the importance of procedural protections in some asset sale cases. Although *Czyzewski v. Jevic Holding Corp.*[65] perhaps does not merit much discussion in this Article because of its unique procedural posture, it does provide a basis for arguments about procedurally-based distributional entitlements. The case involved an asset sale to be followed immediately by a "structured dismissal," in which the debtor would settle its claims with creditors and immediately move to dismiss the case. In ruling that such structured dismissals are not permitted under the Bankruptcy Code, the Court focused on the Code's statutory priorities, holding that debtors cannot sidestep those priorities through an end of case distribution. As Jonathan Lipson points out, this ruling is facially about statutory priorities, but it rests upon the logic of procedure. "Priority lives a dual life," he argues, explaining that priority "is a substantive doctrine about the distribution of property, but it also has strong procedural effects."[66] Priority is about substantive rights to distribution from the bankruptcy estate, and these substantive distributional rights grant the priority creditor control over the estate.[67] In making this argument, Professor Lipson draws heavily from the earlier seminal work of Jay Westbrook, in which Westbrook memorably wrote "[c]ontrol is the function of bankruptcy; priority is the end for which it is employed."[68]

Chapters 7 and 11 strike balances of creditor governance and creditor protection: when creditors gain control over the debtor in chapter 7, we see fewer creditor protections; when governance is left in the debtor's control in Chapter 11, creditor protections are more pervasive. The debtor cannot simultaneously evade the Chapter 7

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65 Czyzewski v. Jevic Holding Corp., 137 S. Ct. 973, 979 (2017); Jonathan C. Lipson, *The Secret Life of Priority: Corporate Reorganization After* Jevic, 93 WASH. L. REV. 631 (2018).

66 Lipson, *supra* note 65, at 685.

67 *Id.*

68 Jay Lawrence Westbrook, *The Control of Wealth in Bankruptcy*, 82 TEX. L. REV. 795, 797 (2004).

governance and the chapter 11 priority system. This can be read, as Professor Pamela Foohey argues, as preventing those in control from "circumvent[ing] the Code's procedural protections" even in areas outside of structured dismissals.[69] And while Foohey may be right that courts can (should) look to these procedural protections as reflecting something more than statutory priorities, it is unclear if *Jevic* will do much more than just that.

2. State Law Entitlements

Professors Melissa Jacoby and Ted Janger have approached these asset sale cases from another tack. Their concerns are both procedural and substantive. Procedurally, they take up the LoPucki and Doherty Fire Sales argument. Asset sales might at times need to be speedy (when the bankruptcy estate is like a melting ice cube, dripping away value with each passing day), but other times the speed might actually depress the value of the assets. They have proposed a procedural "fix" that could slow down asset sales, helping to prevent these sales from yielding only fire sale prices.[70] They propose the use of "Ice Cube Bonds:" if a sale proponent wants to rush an asset sale because of concerns that estate value is melting away, the sale proponent could be required to post a bond to insure against this risk.

Their second concern is that these asset sales shift more value to the secured creditors than they are entitled to receive under state law. They draw on Westbrook's work on article 9 security interests and bankruptcy control.[71] Secured creditors exercise control over asset sales in bankruptcy because they claim an interest in all, or substantially all, of the debtor's assets. Jacoby and Janger question whether this "blanket lien" on the debtor's assets includes the going concern value associated with those assets. Jacoby and Janger examine this assumption, arguing that the blanket lien does not cover the entirety of the going concern sale value; rather, the sale proceeds should be divided into "value traceable to

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[69] Pamela Foohey, Jevic*'s Promise: Procedural Justice in Chapter 11*, 93 WASH. L. REV. ONLINE 128, 136 (2018).

[70] Melissa B. Jacoby & Edward J. Janger, *Ice Cube Bonds: Allocating the Price of Process in Chapter 11 Bankruptcy*, 123 YALE L.J. 862, 869–72 (2014).

[71] *Id.* at 926 n.231.

encumbered assets and other value."[72] The secured parties' lien attaches only to the value traceable to their encumbered assets. The other value—which is the bankruptcy-created value—belongs to the estate.

All of these approaches trend away from distinguishing between reorganization and asset sales and towards focusing on honoring the Bankruptcy Code's priority scheme for distributing losses among creditors. These issues were all at play in Walter Energy's case, as the secured creditors pushed for a quick sale of the assets instead of a plan of reorganization (together with the creditor protections inherent in the plan proposal and confirmation process).

Walter Energy was importantly different in that there is already a statutory mechanism for sharing restructuring costs among organized labor and pensioners. These provisions are found, respectively, in sections 1113 and 1114 of the Bankruptcy Code. As discussed below, these are often treated as simply creating the standard for rejecting labor and pension obligations. However, these sections are better understood as creating distributional entitlements. Courts have under-appreciated these distributional entitlements and instead fallen into a line-drawing exercise between "reorganization" and "sales."

B. *Asset Sale Plus Labor Transformation*

While a section 363 sale potentially can scrub away most claims for successor liability, section 363 cannot eliminate a debtor's obligations under its CBAs or its retiree benefits.[73] Sections 1113 and 1114 are the exclusive means by which a debtor under Chapter 11 can reject CBAs and pension obligations, respectively.[74] And those provisions provide both

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[72] Melissa B. Jacoby & Edward J. Janger, *Tracing Equity: Realizing and Allocating Value in Chapter 11*, 96 TEX. L. REV. 673, 674 (2018).

[73] Whether or not section 363(f) should in fact be interpreted to allow a trustee to preclude successor liability claims is up for debate. *See* George W. Kuney, *Misinterpreting Bankruptcy Code Section 363(f) and Undermining the Chapter 11 Process*, 76 AM. BANKR. L.J. 235 (2002); Michael H. Reed, *Successor Liability and Bankruptcy Sales Revisited—A New Paradigm*, 61 BUS. LAW. 179 (2005). As a descriptive matter, though, trustees (including debtors-in-possession) do use section 363(f) for this purpose.

[74] 11 U.S.C. § 1113(a) (2018) ("The debtor in possession . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section."); *Id.* § 1114(e)(1) ("Notwithstanding any other provision of this title, the debtor in possession . . . shall timely pay and shall not modify any retiree benefits, except that . . . .").

procedural and substantive requirements that a debtor must meet to adjust these liabilities.

Sections 1113 and 1114 reflect an attempt to balance the policy goal of Chapter 11 of the Bankruptcy Code with the policies underlying the federal labor and employment laws. These come in conflict when a debtor's labor and pension obligations render it unable to continue as a going concern. In that case, the practical solution would be to allow the debtor to escape those obligations to the extent necessary to continue operations. This result would be better for everyone: the debtor remains in operations and continues to generate revenue that allows it to pay workers and retirees. As stated by the bankruptcy court in *Walter Energy*:

> This Court recognizes that the miners are the backbone and crucial workforce in these mining operations. Essentially, the dilemma facing the Court is whether to shut down the mines or allow the possibility that the mining operations continue in the hopes that coal prices will rebound in time and the miners keep valuable jobs, and are able to benefit when better times and better coal prices occur.[75]

At the same time, the power to escape these obligations creates an incentive for debtors to file bankruptcy even if doing so were not absolutely essential for the debtor's survival—an incentive that is all the greater for companies under the control of private equity and other institutional investors looking to extract value from the debtor.[76] This extraordinary bankruptcy power, coupled with the fact that U.S. bankruptcy law does not have an insolvency requirement, may make it more likely that employers would use bankruptcy with the primary purpose of escaping labor and pension obligations.[77]

The language "necessary to permit the reorganization of the debtor" is found in both sections 1113 (CBAs) and 1114 (retiree benefits). The legislative history for each of these is virtually nonexistent; however,

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[75] *In re* Walter Energy, Inc., 542 B.R. 859, 866 (Bankr. N.D. Ala. 2015), *aff'd sub nom.* United Mine Workers of Am. 1974 Pension Plan & Tr. v. Walter Energy, Inc., 579 B.R. 603 (N.D. Ala. 2016), *aff'd sub nom. In re* Walter Energy, Inc., 911 F.3d 1121 (11th Cir. 2018).

[76] Babette A. Ceccotti, *Lost in Transformation: The Disappearance of Labor Policies in Applying Section 1113 of the Bankruptcy Code*, 15 AM. BANKR. INST. L. REV. 415 (2007).

[77] *Id.*

understanding the context of each does provide some insights into what Congress intended in creating this necessary-to-reorganize standard.

C. *Sections 1113 & 1114*

Congress enacted section 1113 immediately in the wake of the Supreme Court ruling in *NLRB v. Bildisco & Bildisco*, which permitted debtors to reject CBAs immediately upon filing bankruptcy.[78] In *Bildisco*, a building supplies distributorship filed for bankruptcy relief, unilaterally modified its collective bargaining obligations, and then sought to reject its CBAs under section 365—the same section that a debtor would use to reject any "executory contract" (such as an ongoing distributorship agreement) or unexpired lease. The questions before the Supreme Court were whether CBAs are "executory contracts" subject to rejection and whether it is an unfair labor practice to unilaterally modify labor agreements in bankruptcy.

The Supreme Court answered the first question in the affirmative: CBAs are executory contracts subject to rejection under section 365. Again, this means that CBAs are subject to rejection under the same statutory provision that would apply to lease agreements and distribution agreements. At the same time, though, the Court recognized that CBAs are special, due to their central role under federal labor laws. Thus, the Court imposed a higher standard that debtors must satisfy before rejecting CBAs: "If the parties are unable to agree, a decision on the rejection of the collective-bargaining agreement may become necessary to the reorganization process."[79] And hence, we find the origins of the necessary-to-reorganize standard.

The Court explained the policy rationale behind this standard as follows. "Since the policy of Chapter 11 is to permit successful rehabilitation of debtors, rejection should not be permitted without a finding that that policy would be served by such action."[80] The Court went on then to explain further that even though a bankruptcy court is a court of equity, in ruling on a motion to reject a collective bargaining

78 NLRB v. Bildisco & Bildisco, 465 U.S. 513 (1984).

79 *Id.* at 526.

80 *Id.* at 527.

agreement, the bankruptcy court's focus should be "only how the equities relate to the success of the reorganization."[81]

In considering the unfair labor practices question, the Court held that it was not an unfair labor practice and that debtors can immediately and unilaterally modify or reject their CBAs. Although this part is less relevant for the purposes of this Article, the following passage is helpful in elucidating further the policy goals driving the decision: "The fundamental purpose of reorganization is to prevent a debtor from going into liquidation, with an attendant loss of jobs and possible misuse of economic resources."[82]

Congress immediately added section 1113 of the Bankruptcy Code.[83] Section 1113 definitely and completely overrules the unfair labor practices part of *Bildisco*.[84] It also overrules *Bildisco* as to whether a debtor under chapter 11 of the Code can use section 365 to reject a collective bargaining agreement.[85] Section 1113 says that a debtor "under the provisions of this chapter . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section."[86] But in setting out the standards for rejection under section 1113, Congress largely codified the standard created in *Bildisco*. Most importantly for our purposes, Congress adopted the necessary-to-reorganize standard.

Section 1113 requires, inter alia, that the debtor propose changes to the collective bargaining agreement that includes "those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably."[87]

The main question following section 1113 was the meaning of "necessary to permit the reorganization:" Did the debtor have to show that proposed modifications would be the bare minimum amount to

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81 *Id.*

82 *Id.* at 528.

83 11 U.S.C. § 1113 (2018).

84 *See id.* § 1113(f) ("No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.").

85 *See id.* § 1113(a).

86 *See id.*

87 *See id.* § 1113(b)(1)(A).

avoid liquidation or did the debtor have to show only that the proposed modifications would be necessary for a long-term economic recovery?[88]

Although there is still a split of authority on this question that divides the two most important corporate bankruptcy courts in the country, the majority of courts apply the long-term-economic-recovery standard.[89] And even Delaware, which finds itself alone on the other side of this divide, has never denied a debtor's motion to reject a collective bargaining agreement in any large corporate reorganization case.[90] Practically, then, the definition of "necessary" may be irrelevant; however, a closer look at the split in the case law highlights an aspect to this standard that gets overlooked. Namely, "necessary to reorganize" is not just a standard of proof but it is also a distributional entitlement. However robustly "necessary to reorganize" is interpreted, it provides a loss distribution scheme as between labor/pensioners and other creditors.

Section 1114, enacted four years after section 1113, is structurally similar to section 1113 and includes the same "necessary" standard. Congress enacted this provision in response to the bankruptcy of LTV Steel, which filed bankruptcy with an estimated two trillion dollars in unfunded retiree medical benefits.[91]

When a company goes into bankruptcy with retiree benefit obligations, there are two issues. The first is how to handle the debtor's failure to fund the retirement funds and the second is whether the debtor should be able to modify those obligations going forward—that is, there is an issue as to retirement benefits plans that have not been funded and there is the issue of whether the debtor should be relieved of funding those obligations prospectively.

As to the first issue, Keating argues this is not really a bankruptcy problem—that is, looking at LTV Steel, the problem with its massive unfunded retiree benefit plan was not something bankruptcy law could address.[92] There was simply no way the company could pay that amount,

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[88] *See* Christopher D. Cameron, *How "Necessary" Became the Mother of Rejection: An Empirical Look at the Fate of Collective Bargaining Agreements on the Tenth Anniversary of Bankruptcy Code Section 1113*, 34 SANTA CLARA L. REV. 841, 868–69 (1994).

[89] 11 U.S.C. § 1113(b)(1)(A).

[90] *See* Dawson, *supra* note 17, at 116–17.

[91] *See* Daniel Keating, *Transforming a Non-Claim into a Claim: § 1114 and the Curious Case of* In re Visteon, 85 AM. BANKR. L.J. 1, 4–5 (2011).

[92] *Id.*

and if the firm were forced to liquidate, those retirees would receive nothing. A true solution to this problem would be to require pre-funding plans.[93]

The second issue is more similar to the issue of modifying collective bargaining agreement obligations, and the structure is similar (although the dynamics may be different, as this provision deals with retired workers and section 1113 deals with active workers).[94]

Even though that issue is more similar to modifying CBAs, it is importantly different in that bankruptcy law here is interacting with the Employee Retirement Income Security Act and, in the coal mining cases, with the Coal Act. These raise fascinating and important issues, but for the purposes of this Article, it is enough to note that the gateway requirement that any court relief as to a retirement plan (just as with a collective bargaining agreement) requires a finding that the debtor proposed "necessary modifications . . . that are necessary to permit the reorganization of the debtor."[95] This narrower focus on this aspect of section 1114 does not do justice to the complexity of dealing with retirement funds in corporate reorganization; however, even this narrow aspect of section 1114 highlights how this provision aimed to balance the interests of retirees against other claims.[96]

1. "Necessary to Reorganize"

As discussed above, debtors may reject their CBAs under chapter 11 only by invoking section 1113, and they may modify their retiree benefit obligations only under section 1114. Both of these sections have a "necessary to permit the reorganization of the debtor" standard. Because

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93 *Id.*

94 *Id.* at 9.

95 11 U.S.C. § 1114(f)(1)(A) (2018).

96 For a more complete review of § 1114 and its complexity, see Paul M. Secunda, *An Analysis of the Treatment of Employee Pension and Wage Claims in Insolvency and Under Guarantee Schemes in OECD Countries: Comparative Law Lessons for Detroit and the United States*, 41 FORDHAM URB. L.J. 867, 876 (2014). *See also* Israel Goldowitz, *Response to Professor Paul Secunda's Comparative Analysis of the Treatment of Employment Claims in Insolvency Proceedings and Guarantee Schemes in OECD Countries*, 41 FORDHAM URB. L.J. 1027 (2014).

section 1114's test is modelled on that of section 1113, this section will focus on section 1113.

While section 1113 is often cited for having a list of procedural and substantive requirements, its most important (and analyzed) part is its double-necessary language: the debtor must propose "necessary modifications . . . that are necessary to permit the reorganization of the debtor and assures that that all creditors, the debtor and all of the affected parties are treated fairly and equitably."[97]

This double-necessary language has been interpreted as creating two separate inquiries: "(1) the standard to be applied, *i.e.,* '*how* "necessary"' must the proposed modifications be, and (2) the object of the 'necessary' inquiry, *i.e.*, '"necessary" to *what*.'"[98] The first of these is distributive, the second one is substantive. The "how necessary" part is distributive because it determines how much of the debtor's reorganization value should be allocated to satisfying the debtor's collective bargaining obligations. The debtor must pay these in full unless it can show that it needs to reduce those obligations. The substantive part is the standard the debtor must satisfy in order to prove that need: Must the debtor show that the proposed cuts are needed in order to stay in business (i.e., to avoid a straight liquidation)? Or must the debtor show that the proposed cuts are needed in order to permit the debtor to compete with its rivals on labor costs?

The two separate inquiries in the double-necessary test are often conflated, both in case law and in commentary. Perhaps the most-cited section 1113 case is *In re American Provision Co.*, cited because it lays out a nine-part test for section 1113.[99] Step three is that

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97 11 U.S.C. § 1113(b)(1)(A).

98 Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., 791 F.2d 1074, 1088 (3d Cir. 1986).

99 *In re* Am. Provision Co., 44 B.R. 907, 909 (Bankr. D. Minn. 1984), listing the nine-step test:

> 1. The debtor in possession must make a proposal to the Union to modify the collective bargaining agreement.
>
> 2. The proposal must be based on the most complete and reliable information available at the time of the proposal.
>
> 3. The proposed modifications must be necessary to permit the reorganization of the debtor.

"[t]he proposed modifications must be necessary to permit the reorganization of the debtor."[100] There is no step discussing the "how necessary" test.

The commentary has at times lost track of this distributive "how necessary test," focusing instead on the substantive test as well. But the first court of appeals decision to interpret section 1113 dealt precisely with this issue.[101] In *Wheeling-Pittsburgh*, the issue was whether the debtor's proposal should have contained a "snap back" provision in order to prove the modifications were only what was necessary to reorganize. In that case, the debtor proposed modifications that would reduce labor costs over a five-year term, based on a pessimistic model of future earnings. The union argued that these proposed cuts were more than what was necessary given the possibility that these projected future earnings were unduly pessimistic. According to the union, the proposal should have provided that the workers' pay and benefits would "snap back" to their pre-rejection levels should the company outperform its pessimistic projections.[102]

The Third Circuit held the "necessary" standard must take the absence of a snap back into account. This is not just a question of whether the proposal was fair and equitable as to the other creditors; rather, the "how necessary" test reflected congressional intent that cuts to labor

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4. The proposed modifications must assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably.

5. The debtor must provide to the Union such relevant information as is necessary to evaluate the proposal.

6. Between the time of the making of the proposal and the time of the hearing on approval of the rejection of the existing collective bargaining agreement, the debtor must meet at reasonable times with the Union.

7. At the meetings the debtor must confer in good faith in attempting to reach mutually satisfactory modifications of the collective bargaining agreement.

8. The Union must have refused to accept the proposal without good cause.

9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

[100] *Id.*

[101] *Wheeling-Pittsburgh*, 791 F.2d 1074.

[102] *Id.* at 1089.

union obligations be as minimal as possible. In other words, that section 1113 created a sort of priority for collective bargaining obligations.[103]

The Second Circuit Court of Appeals was the next to address this issue, and it was perhaps here where the duality of the necessary standard got lost: the labor union raised the same argument as in *Wheeling-Pittsburgh*, but it raised that argument for the first time on appeal.[104] The *Carey* court said that the union could not raise the point for the first time on appeal unless it could show that the result would result in a "manifest injustice."[105] The union, according to the court, failed to make this showing because it had "wholly failed to demonstrate that Carey's proposed three-year term was unnecessary or exceeded either the prevailing industry practices or the parties' past experience."[106]

The *Carey* case split from *Wheeling-Pittsburgh* not on the "how necessary" question but on the "necessary for what" question. Whereas the *Wheeling-Pittsburgh* court required the debtor to show that the proposed modifications were necessary to avoid liquidating, *Carey* held that the proposed changes must be necessary "but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."[107]

Carey has carried the day on this "necessary for what" point. Every other court of appeals that has addressed the question has found that debtors need not show that the proposed cuts are the bare minimum to avoid liquidation. In the process, the distributive entitlement has been subsumed under the substantive requirement. Questions about the necessity of snap backs have subsided.

Even in this snap back-less world, the substantive requirement still does some distributive work: Are the proposed cuts too steep? Empirically, we know that the "cuts are too steep" argument is a weak check against debtors' efforts to reject CBAs. Every debtor that has sought to do so has ultimately succeeded. Yet, even in *Carey* jurisdictions, the substantive requirements of section 1113 have done some work. For

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[103] *Id.* at 1094.

[104] Truck Drivers Local 807, Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen & Helpers of Am. v. Carey Transp. Inc., 816 F.2d 82, 90 (2d Cir. 1987).

[105] *Id.*

[106] *Id.*

[107] *Id.*

example, American Airlines attempted to reject its CBAs with its pilots, flight attendants, and transit workers. The court denied the motion even though the court otherwise found that changes to the existing CBAs were necessary to permit the debtor's reorganization.[108] Specifically, the court found that two of American Airlines' proposed changes were "inconsistent with Section 1113's concept of necessity."[109] American Airlines had proposed changes to the pilot furlough rules and to codesharing, but it had failed to establish that either was "necessary either in American's business plan or by the practices of American's competitors."[110]

2. Consequences of Rejection

However one interprets "necessary to reorganize," another important aspect that is poorly understood is what happens post rejection. The Bankruptcy Code itself is silent in this regard. Prior to sections 1113 and 1114, rejection motions were handled under section 365, the same section that debtors can use to reject unfavorable leases or other executory contracts.[111] Section 365(g) provides that rejection of a lease would give rise to a breach of contract claim against the estate.[112] When Congress enacted sections 1113 and 1114, there was no similar provision as to the consequences of rejection. Does the union have a breach of contract claim against the estate? More importantly, does the debtor then get to unilaterally impose its proposed modifications on the existing collective bargaining agreement? Do the parties instead treat the collective bargaining agreement as if it were expired, requiring the parties to go back to the bargaining table to work on a new agreement?

Courts have split on this. There are very few reported cases on this, but court orders granting motions to reject reach different conclusions. Courts at times specifically allow the debtor to impose its proposed modifications. At other times, the court simply notes that the old collective bargaining agreement was rejected (without any discussion of

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108 *In re* AMR Corp., 477 B.R. 384, 394 (Bankr. S.D.N.Y. 2012).

109 *Id.*

110 *Id.*

111 11 U.S.C. § 365 (2018); *see also* John A.E. Pottow, *A New Approach to Executory Contracts*, 96 TEX. L. REV. 1437 (2018).

112 11 U.S.C. § 365(g).

what "rejection" entails). And at still other times, the court has noted that the order simply sends the parties back to the table to negotiate a new deal.

In the coal cases, all of which were sale cases, the court every time outright rejected the collective bargaining agreement. There were no new terms to impose, as the debtor was not seeking to adjust its labor costs but protect the purchaser from any potential labor/pension successor liability. For example, in *Patriot Coal*, the court order stated:

> For the avoidance of doubt, upon the rejection of the Debtors' CBAs, the Debtors, over the objection of the UMWA, shall have no further obligations under the CBAs whatsoever, and any obligations shall be completely and permanently eliminated, including the Debtors' obligations to contribute to or participate in the United Mine Workers of America 1974 Pension Plan.[113]

Likewise, in *Walter Energy*, the rejection order stated that "the Collective Bargaining Agreement is REJECTED, and any Sale of Assets shall be free and clear of encumbrances and liabilities under either the CBA or with respect to any UMWA Funds."[114]

In contrast, in reorganization cases such as that of *In re Frontier Airlines Holdings, Inc.*, the court ordered that the debtor was "authorized to implement, and perform under, the terms of the Final Proposal."[115] In those cases, the court contemplated that rejection would not simply "vaporize" the agreement but would require an ongoing relationship and negotiation between the reorganized debtor and the union. Thus, even if the union had no claim for damages for rejection, the debtor's obligations to perform under the collective bargaining agreement were not simply terminated altogether.

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113 Order Authorizing, but Not Directing, the Debtors to Reject Collective Bargaining Agreements at 2–3, Parsley v. Blackhawk Mining, LLC (*In re* Patriot Coal Corp.), 2018 BL 321899 (Bankr. E.D. Va. Sept. 6, 2018) (No. 3:15-bk-32450).

114 Memorandum Opinion and Order Granting Debtors' Motion for an Order (I) Authorizing the Debtors to (A) Reject Collective Bargaining Agreements, (B) Implement Final Labor Proposals, and (C) Terminate Retiree Benefits; and (II) Granting Related Relief at 57, *In re* Walter Energy, Inc., 542 B.R. 859 (Bankr. N.D. Ala. 2015) *aff'd sub nom.* United Mine Workers of Am. 1974 Pension Plan & Tr. v. Walter Energy, Inc., 579 B.R. 603 (N.D. Ala. 2016), *aff'd sub nom. In re* Walter Energy, Inc., 911 F.3d 1121 (11th Cir. 2018) (No. 2:15-bk-02741).

115 *In re* Frontier Airlines Holdings, Inc., No. 08-11298 (RDD), 2008 WL 5110927, at *1 (Bankr. S.D.N.Y. Nov. 14, 2008).

The ongoing relationship with the union has distributional consequences. The union may be forced to take on the cost of the reorganization, but it receives the benefit of an ongoing relationship with the reorganized debtor. That is, like other unsecured creditors who maintain contractual relationships with the debtor, their old debts may not be paid in full, but they are able to reap at least some benefit from ongoing contractual relationships.

In sale cases, the courts have instead treated the old agreement as simply terminated, ending the debtor's liability under the agreements completely. This has important distributional consequences to the union. Should the court require that, before approving a labor rejection motion in a sale case that the purchaser and union negotiate for a new deal? Should it require the debtor, as part of its good faith negotiations, to broker such a deal with the purchaser? There is no such statutory requirement, but such an approach is more consistent with the overall aim of section 1113. In fact, in Patriot Coal's case, the Asset Purchase Agreement required that the debtor either reject its collective bargaining agreement or that the union enter into a new collective bargaining agreement with the purchaser.[116] The debtor, in its motion to reject, averred that it was working to broker a deal between its union and the purchaser.[117] When the court granted the debtor's rejection motion, it noted that a proposal had been sent out to the union membership for approval.

III. RE-EXAMINATION OF COAL BANKRUPTCY PLAYBOOK

This Section will re-examine the *Walter Energy* case not as a line-drawing exercise between reorganization and liquidation but instead focusing on procedural and distributional entitlements. To begin, we can imagine what Walter Energy's case would have looked like if it had pursued a reorganization instead of a sale.

Under a traditional reorganization model, Walter Energy would have needed to file motions under sections 1113 and 1114 to reject its CBAs and modify its retiree benefits. There might be some dispute as to whether those cuts were too steep, whether the debtor provided sufficient

116 Asset Purchase Agreement, *In re Patriot Coal Corp.*, 2018 BL 321899 (No. 3:15-bk-32450).

117 *Id.*

information to enable the union to analyze the proposal, etc. This would require looking at each layer of cuts: Did the debtor really need to cut wages and benefits, to modify work rules, or to make changes to vacation and sick day policies? And this might involve hiring experts to analyze the debtor's projected revenues and its labor costs relative to peer institutions.

Contrast that with what Walter Energy did when it filed its motion to reject in the context of a sale. All it had to target was the successor clause. The debtor could show necessity by showing that no one would purchase the business unless the collective bargaining agreement were rejected. This argument does not lend itself to much objection. The issue of necessity does not turn on a factual basis as to projected earnings and costs. It is simply whether the debtor can prove that the purchaser will not purchase the business without terminating the CBAs.

Process-wise, then, the quick sale model permits the debtor and its lenders to sidestep the fact-intensive analysis of the necessity standard by engineering the reorganization as an asset sale. In the asset sale scenario, there is no room for the question of whether the cuts were too deep—that is, the distributive entitlement. There is no standard to permit the court to protect the labor obligations in the way the court could under a traditional reorganization framework.

Consequence-wise, we can also see that the choice of reorganization structure has important consequences. Under a traditional reorganization, the debtor would propose necessary modifications to the CBAs. If the motion were granted, the debtor would then be able to impose those modifications on its existing CBAs.

Contrast that consequence with what happens in the asset sale scenario. In the asset sale context, the debtor is asking the court to take out the successorship clause. Once removed, the assets are transferred. The business then continues under a new management, and the old collective bargaining agreement is not just modified—it is terminated. The management will have an obligation under the labor laws to negotiate with the employees' collective bargaining agent. But the old collective bargaining agreement is effectively vaporized. This is a

surprising result given that it is an old bankruptcy adage that the power to reject contracts is not the power to vaporize them.[118]

Once we appreciate these differences in processes and consequences, we can see that the real focus of the issue in *Walter Energy* should not be on whether an asset sale is a "liquidation" or a "reorganization" but on whether the process respects (or sidesteps) section 1113's distributive requirements.

Such an approach would not attempt to draw lines between liquidation and reorganization; rather, it would look at the distributional consequences. For example, the "necessary" test might examine whether the purchaser has negotiated new CBAs with the existing labor union, treating that new agreement through the same analysis as it would apply in a traditional reorganization. Or the court might consider whether the treatment of the collective bargaining agreement post-rejection will be greater than what they would have received under a straight liquidation—that is, did the asset sale generate value in excess of the debtor's liquidation value and will some of that surplus be distributed to the labor union?

Only by focusing on these procedural and substantive distributions can a court determine if the quick sale comports with the bankruptcy-labor balance that Congress struck in sections 1113 and 1114.

IV. IMPLICATIONS FOR BANKRUPTCY POLICY AND PRACTICE

This Article has focused primarily on sections 1113 and 1114, dealing with the way Congress has balanced bankruptcy policy against labor and retirement benefits policies. But these are not the only non-bankruptcy policies that courts have to balance against chapter 11's pro-reorganization goals. Even within the coal industry, there are competing concerns as courts have to balance the interests of creditors with the interests of environmental regulators—every dollar spent for

[118] Pottow, *supra* note 111, at 1456 (citing Sunbeam Prods. v. Chi. Am. Mfg., LLC, 686 F.3d 372, 377 (7th Cir. 2012); Thompkins v. Lil' Joe Records, Inc., 476 F.3d 1294, 1306 (11th Cir. 2007) ("[R]ejection does not embody the contract-vaporizing properties commonly ascribed to it . . . . Rejection merely frees the estate from the obligation to perform; it does not make the contract disappear." (internal quotation marks omitted)).

environmental remediation is a dollar less for the other claimants.[119] Bankruptcy courts likewise have to consider other countervailing policies, from constitutional due process of law, corporate governance, and federal securities regulations, to name a few.[120]

Even though labor and retirement benefits are governed by special sections of the Bankruptcy Code, the examination of how the quick asset sale model affects the balance between bankruptcy and non-bankruptcy law has implications for the way courts have to strike this balance generally. Furthermore, the fact that quick asset sales affect how courts balance bankruptcy and non-bankruptcy policies, even in fields with a codified balancing test, provides some helpful insights into the ways bankruptcy judges make decisions.

A. *Sales Restrike the Balance*

The coal bankruptcy cases provide a specific illustration of the larger problem in corporate bankruptcy practice: Distributional norms are flattened when a secured creditor is in control of the case and, in particular, when it exercises that control to bring about a quick asset sale. While Ayotte and Morrison highlight how this creditor-in-control model can lead to inefficient sales, this Article highlights how these sales can also work to rebalance bankruptcy and non-bankruptcy policies.

Macey and Salovaara examine this same phenomenon and conclude that the problem is one of "continuation bias."[121] Courts, they argue, accept overly optimistic asset valuations, in part, because that supports plans that will keep the debtor in business—even if the debtor's reorganization plan is not actually feasible. This allows companies to externalize the external costs of their business, notably the regulatory costs of their labor, retiree healthcare, and environmental obligations.

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119 Macey & Salovaara, *supra* note 5 (analyzing coal mining companies as a way to examine the interaction of federal bankruptcy law with pension and environmental obligations).

120 David A. Skeel, Jr., *Rethinking the Line Between Corporate Law and Corporate Bankruptcy*, 72 TEX. L. REV. 471 (1994); Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 U. PA. L. REV. 669 (1993); Daniel J. Bussel, *Corporate Governance, Bankruptcy Waivers and Consolidation in Bankruptcy*, 36 EMORY BANKR. DEV. J. (forthcoming 2020–2021).

121 Macey & Salovaara, *supra* note 5, at 942.

They are correct that there are many areas in which bankruptcy law threatens to undermine competing regulatory goals. For instance, bankruptcy law's respect for corporate separateness can at times facilitate fraudulent transfer schemes, and a more robust substantive consolidation remedy might counteract that.[122] This is an important point, and one that could possibly be well-informed by comparative studies with jurisdictions, such as Brazil, that have a much more robust substantive consolidation remedy.[123]

They are further almost certainly right that continuation bias plays a role in elevating bankruptcy policy over non-bankruptcy policies—that is, in promoting a company's rehabilitation even at the expense of competing regulatory goals. Indeed, that continuation bias is one way of explaining why courts have interpreted "reorganization" to include going concern sales.

The difficulty, of course, comes from determining when a case should be permitted to "reorganize" and when it should be forced to "liquidate," a question that is further complicated by the blurriness between these two outcomes. As illustrated in the academic debates in the 1990s about the "success" rate of chapter 11, the question of whether bankruptcy courts are good gatekeepers for determining whether debtors should remain in business is a complicated one,[124] and so is the question of whether a liquidating chapter 11 plan should be coded as a "success."[125] The UCLA-LoPucki Bankruptcy Research Database's Success-modeling Project, for instance, does not define "success" itself, recognizing that "success" for some scholars focuses on whether the debtor emerged from

122 *Id.* at 952.

123 *See, e.g.*, STEFAN SAX, MING DONG, CHRISTIAAN ZJDERVELD & THIAGO JUNQUEIRA, INT'L INSOLVENCY INST., SUBSTANTIVE CONSOLIDATION AND OTHER ASPECTS OF CROSS-BORDER INSOLVENCIES OF GROUPS OF COMPANIES (2018), https://www.iiiglobal.org/sites/default/files/Group%20consolidation%20in%20cross%20%20border%20cases%20%28Dr.%20Stefan%20Sax%29%20FINAL%20PAPER.pdf [https://perma.cc/ER9J-KC2J] (citing a 2016 study by Professor Sheila Cerezetti).

124 Elizabeth Warren & Jay Lawrence Westbrook, *The Success of Chapter 11: A Challenge to the Critics*, 107 MICH. L. REV. 603, 611 (2009) (noting "[a]n even more complex question is the meaning of the 'success' represented by a liquidating plan").

125 *See, e.g.*, UCLA-LOPUCKI BANKR. RES. DATABASE, http://lopucki.law.ucla.edu/index.htm [https://perma.cc/7KJD-XGVB].

bankruptcy as a standalone entity while others might look at the continuation of the business line.[126]

Thus, while this Article recognizes that these are important questions, it focuses instead on a specific aspect of these coal reorganization cases that tends to elevate bankruptcy policy over other regulatory goals—and that is the quick sale model. The process exacerbates this norm-flattening because it forces the normative dialogue into the mold of an asset sale motion: Was the sale process reasonably designed to maximize the value of the estate? There is no room in that mold to ask questions about feasibility, best interests of the creditors, or discriminatory treatment among creditors.

In the labor rejection context, we see this clearly. When section 1113's requirements are forced into the mold of an asset sale, the dialogue changes. Instead of asking when the proposed changes are necessary to the debtor's reorganization, the union is forced to question only the sale process. Questions about sale process focus not on bankruptcy's distributional entitlements but on whether the sale is likely to maximize the value of the estate. And if the question is whether the sale would yield more value if stripped of the collective bargaining obligation (and, consequently, also potentially stripped of the collectively-bargained retiree benefits), then the answer is always going to be yes.

In short, when bankruptcy's balancing tests are forced through the procedures of asset sales, the balance of bankruptcy and non-bankruptcy interests inevitably (and drastically) tilts toward bankruptcy.

B. *Norm-Power Paradox*

These coal bankruptcy cases do more than merely illustrate this rebalancing aspect of asset sale cases. They also help us think about the role of bankruptcy courts in corporate reorganization cases. In particular, they can help us think about Janger's proposed Norm/Power Paradox of bankruptcy judging.[127]

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126 *Id.*; Lynn M. LoPucki, *The Bankruptcy Success Modeling Project: A Participant's Guide*, AM. BANKR. INST. JOURNAL, Aug. 2012, https://lopucki.law.ucla.edu/brd-articles/abi-aug2012-lopucki.pdf [https://perma.cc/NFA5-KTD3].

127 Edward J. Janger, *Towards a Jurisprudence of Public Law Bankruptcy Judging*, 12 BROOK. J. CORP., FIN. & COM. L. 12 (2017).

Examining how bankruptcy judges make decisions, Janger draws on the public law litigation model and concludes that, "[w]here a relatively 'inarticulate' legal norm regulates a public institution, the need for a detailed judicial remedy may be greatest precisely where the link to a specific legal command is at its most tenuous."[128] That is, unarticulated legal norms require a more active judicial role; when legal norms are more clearly articulated, the judge's role can be much more passive.

To illustrate this, he considers constitutional issues such as school desegregation in which it is difficult for a judge "to map a broad constitutional norm onto granular institutional practices."[129] Any such order, then, "may appear to be a naked exercise of judicial power unless tempered by the techniques of public law judging," for example, "information gathering, participatory consultation, facilitation and ultimately consent."[130]

Janger extends this to the municipal bankruptcy context, he posits there exists a similar problem in that context because the broad norms of debt repayment and sustainable debt load do not map neatly onto a granular remedy. This puts judges into a public law function, as "determining the sources of debt repayment and of a sustainable debt load requires social choices."[131] Just as in the school desegregation cases, then, the political consequences of any judicial ruling in the municipal debt restructuring context creates a legitimacy gap: Any ruling, say, permitting pensioners to recover before bondholders might appear to lack legitimacy. As David Skeel reports, that was a common reaction by many experts.[132]

In the corporate reorganization context, the political consequences of favoring secured versus unsecured creditors might be inconsequential;

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128 *Id.* at 49.

129 *Id.*

130 *Id.*

131 *Id.*

132 David A. Skeel, Jr., *From Chrysler and General Motors to Detroit*, 24 WIDENER L.J. 121, 145–46 ("The bond settlement is a classic illustration of the dangers of gifting. If the bondholders were clearly entitled to full payment and opted to give a portion of their recovery to a lower priority class such as the pensions, the gift might be defensible. But the bondholders' secured status was in doubt, which would imply something less than a 100% recovery. This raises serious questions about the legitimacy of the gift—questions that are in a sense subsumed into the unfair discrimination analysis, since the effect is to increase the payout to pension recipients.").

however, the consequences of favoring bankruptcy policy over labor policy are important and serious.

If we try to apply the Norm/Power Paradox in this context, we would ask whether there was a broad or narrowly defined legal norm the court must apply. If broad, then the judge should exercise the public litigation model. If narrow, then less judicial involvement is required. When applying a broad norm, such as feasibility, we might expect the judge to engage in more public litigation-style case management: The court should gather more information and promote and facilitate consent. When applying more specific norms, that judicial involvement is less necessary.

Whether the bankruptcy-labor context is one that calls for more active judicial management depends on whether section 1113 is thought of as reflecting a broad or narrow norm. If the "necessary to permit the debtor's reorganization" is viewed simply as asking the question "does the debtor need to reject the collective bargaining agreement in order to reorganize?," then this appears to be a fairly narrow norm. Active judicial management is not necessary, and this dispute looks much more like a private litigation model. But if the standard is read as asking "are these proposed modifications necessary?," the norm is much broader, and it is difficult to map that onto a granular remedy. The section 1113 rejection process, then, looks to involve more of a public law judging model, with fact-gathering, consultation, and consensual resolution.

CONCLUSION

This Article examined an important issue raised in a recent Eleventh Circuit decision in *Walter Energy*, in an effort to address a much broader question about bankruptcy law's supremacy. *Walter Energy* addressed the controversial question of when and whether a debtor should be able to use bankruptcy to reject its CBAs and modify its pension obligations. This is a difficult, policy-laden question that requires balancing the interests of bankruptcy law (preserving going concern value, preserving jobs, minimizing the impact of business failure) with those of labor and employment laws (enforcing collectively bargaining for agreements, protecting retiree benefits).

I have argued that the court's analysis of this issue focused on this wrong question. Instead of focusing on the question of whether a going

concern sale is a "reorganization" for purposes of section 1113, the court should have focused on whether the proposed modifications to the collective bargaining agreement would allocate some of the reorganization surplus to the labor union. That is, would the structure of the reorganization honor and respect the distributional entitlements Congress created when enacting section 1113?

The failure to honor these entitlements raises policy questions of particular concern in the field of labor and employment law. Further, it illustrates the way that current chapter 11 practice permits debtors and their powerful creditors to engineer a reorganization and sidestep the distributional entitlements Congress baked into chapter 11.