

113TH CONGRESS
2D SESSION

S. 2589

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 10, 2014

Mr. DURBIN (for himself, Mr. HARKIN, Mr. WHITEHOUSE, Mr. BROWN, and Mr. FRANKEN) 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 2014”.

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

1 and broader use of bankruptcy by businesses in all
2 sectors of the economy. However, while protections
3 for employees and retirees in bankruptcy cases have
4 eroded, management compensation plans devised for
5 those in charge of troubled businesses have become
6 more prevalent and are escaping adequate scrutiny.

7 (3) Changes in the law regarding these matters
8 are urgently needed as bankruptcy is used to ad-
9 dress increasingly more complex and diverse condi-
10 tions affecting troubled businesses and industries.

11 **TITLE I—IMPROVING RECOV-**
12 **ERIES FOR EMPLOYEES AND**
13 **RETIREEES**

14 **SEC. 101. INCREASED WAGE PRIORITY.**

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

17 (1) in paragraph (4)—

18 (A) by striking “\$10,000” and inserting
19 “\$20,000”;

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

21 (C) by striking “or the date of the ces-
22 sation of the debtor’s business, whichever oc-
23 curs first,”;

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

25 (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 striking the period
15 at the end and inserting “; or”; 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

1 owed pursuant to a collective bargaining agreement,
2 for layoff or termination on or after the date of the
3 filing of the petition, which pay shall be deemed
4 earned in full upon such layoff or termination of em-
5 ployment; and”.

6 **SEC. 104. FINANCIAL RETURNS FOR EMPLOYEES AND RE-**
7 **TIREES.**

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

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

11 “(17) The plan provides for recovery of dam-
12 ages payable for the rejection of a collective bar-
13 gaining agreement, or for other financial returns as
14 negotiated by the debtor and the authorized rep-
15 resentative under section 1113 (to the extent that
16 such returns are paid under, rather than outside of,
17 a plan).”; and

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

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

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

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

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

15 **SEC. 105. PRIORITY FOR WARN ACT DAMAGES.**

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

18 “(ii) wages and benefits awarded pursuant
19 to a judicial proceeding or a proceeding of the
20 National Labor Relations Board as back pay or
21 damages attributable to any period of time oc-
22 ccurring after the date of commencement of the
23 case under this title, as a result of a violation
24 of Federal or State law by the debtor, without
25 regard to the time of the occurrence of unlawful

1 conduct on which the award is based or to
 2 whether any services were rendered on or after
 3 the commencement of the case, including an
 4 award by a court under section 2901 of title 29,
 5 United States Code, of up to 60 days' pay and
 6 benefits following a layoff that occurred or com-
 7 menced at a time when such award period in-
 8 cludes a period on or after the commencement
 9 of the case, if the court determines that pay-
 10 ment of wages and benefits by reason of the op-
 11 eration of this clause will not substantially in-
 12 crease the probability of layoff or termination of
 13 current employees or of nonpayment of domes-
 14 tic support obligations during the case under
 15 this title;”.

16 **TITLE II—REDUCING EMPLOY-**
 17 **EES' AND RETIREES' LOSSES**

18 **SEC. 201. REJECTION OF COLLECTIVE BARGAINING AGREE-**
 19 **MENTS.**

20 Section 1113 of title 11, United States Code, is
 21 amended by striking subsections (a) through (f) and in-
 22 serting the following:

23 “(a) The debtor in possession, or the trustee if one
 24 has been appointed under this chapter, other than a trust-
 25 ee in a case covered by subchapter IV of this chapter and

1 by title I of the Railway Labor Act, may reject a collective
2 bargaining agreement only in accordance with this section.
3 In this section, a reference to the trustee includes the
4 debtor in possession.

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

14 “(c)(1) If the trustee seeks modification of a collec-
15 tive bargaining agreement, the trustee shall provide notice
16 to the labor organization representing the employees cov-
17 ered by the agreement that modifications are being pro-
18 posed under this section, and shall promptly provide an
19 initial proposal for modifications to the agreement. There-
20 after, the trustee shall confer in good faith with the labor
21 organization, at reasonable times and for a reasonable pe-
22 riod in light of the complexity of the case, in attempting
23 to reach mutually acceptable modifications of such agree-
24 ment.

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

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

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

23 “(B) shall be limited to modifications designed
24 to achieve a specified aggregate financial contribu-
25 tion for the employees covered by the agreement

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

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

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

1 hearing. An application for rejection shall seek rejection
2 effective upon the entry of an order granting the relief.

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

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

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

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

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

21 “(i) cause a material diminution in the
22 purchasing power of the employees covered by
23 the agreement;

1 “(ii) adversely affect the ability of the
2 debtor to retain an experienced and qualified
3 workforce; or

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

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

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

24 “(4) In no case shall the court enter an order reject-
25 ing a collective bargaining agreement that would result in

1 modifications to a level lower than the level proposed by
2 the trustee in the proposal found by the court to have com-
3 plied with the requirements of this section.

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

15 “(e) During a period in which a collective bargaining
16 agreement at issue under this section continues in effect,
17 and if essential to the continuation of the debtor’s busi-
18 ness or in order to avoid irreparable damage to the estate,
19 the court, after notice and a hearing, may authorize the
20 trustee to implement interim changes in the terms, condi-
21 tions, wages, benefits, or work rules provided by the collec-
22 tive bargaining agreement. Any hearing under this sub-
23 section shall be scheduled in accordance with the needs
24 of the trustee. The implementation of such interim

1 changes shall not render the application for rejection
2 moot.

3 “(f)(1) Rejection of a collective bargaining agreement
4 constitutes a breach of the agreement, and shall be effec-
5 tive no earlier than the entry of an order granting such
6 relief.

7 “(2) Notwithstanding paragraph (1), solely for pur-
8 poses of determining and allowing a claim arising from
9 the rejection of a collective bargaining agreement, rejec-
10 tion shall be treated as rejection of an executory contract
11 under section 365(g) and shall be allowed or disallowed
12 in accordance with section 502(g)(1). No claim for rejec-
13 tion damages shall be limited by section 502(b)(7). Eco-
14 nomic self-help by a labor organization shall be permitted
15 upon a court order granting a motion to reject a collective
16 bargaining agreement under subsection (d) or pursuant to
17 subsection (e), and no provision of this title or of any other
18 provision of Federal or State law may be construed to the
19 contrary.

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

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

1 **SEC. 202. PAYMENT OF INSURANCE BENEFITS TO RETIRED**
2 **EMPLOYEES.**

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

5 (1) in subsection (a), by inserting “, without re-
6 gard to whether the debtor asserts a right to unilat-
7 erally modify such payments under such plan, fund,
8 or program” before the period at the end;

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

13 (3) by striking subsection (f) and inserting the
14 following:

15 “(f)(1) If a trustee seeks modification of retiree bene-
16 fits, the trustee shall provide a notice to the authorized
17 representative that modifications are being proposed pur-
18 suant to this section, and shall promptly provide an initial
19 proposal. Thereafter, the trustee shall confer in good faith
20 with the authorized representative at reasonable times and
21 for a reasonable period in light of the complexity of the
22 case in attempting to reach mutually satisfactory modi-
23 fications.

24 “(2) The initial proposal and subsequent proposals
25 by the trustee shall be based upon a business plan for the
26 reorganization of the debtor and shall reflect the most

1 complete and reliable information available. The trustee
2 shall provide to the authorized representative all informa-
3 tion that is relevant for the negotiations. The court may
4 enter a protective order to prevent the disclosure of infor-
5 mation if disclosure could compromise the debtor's posi-
6 tion with respect to its competitors in the industry, subject
7 to the needs of the authorized representative to evaluate
8 the trustee's proposals and an application pursuant to
9 subsection (g) or (h).

10 “(3) Modifications proposed by the trustee—

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

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

1 reorganization, of the debtor (or any successor to
2 the debtor) in the short term; and

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

7 (4) in subsection (g)—

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

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

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

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

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

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

11 “(D) the court finds that implementation of the
12 proposal shall not cause irreparable harm to the af-
13 fected retirees; and

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

22 “(3) If a trustee has implemented a program of in-
23 centive pay, bonuses, or other financial returns for insid-
24 ers, senior executive officers, or the 20 next most highly
25 compensated employees or consultants providing services

1 to the debtor during the bankruptcy, or such a program
2 was implemented within 180 days before the date of the
3 filing of the petition, the court shall presume that the
4 trustee has failed to satisfy the requirements of subpara-
5 graph (f)(3)(C).”; and

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

8 “(4) In no case”; and

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

12 **SEC. 203. PROTECTION OF EMPLOYEE BENEFITS IN A SALE**
13 **OF ASSETS.**

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

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

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

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

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

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

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

23 Section 506(e) of title 11, United States Code, is
24 amended by adding at the end the following: “If employees
25 have not received wages, accrued vacation, severance, or

1 other benefits owed under the policies and practices of the
2 debtor, or pursuant to the terms of a collective bargaining
3 agreement, for services rendered on and after the date of
4 the commencement of the case, such unpaid obligations
5 shall be deemed necessary costs and expenses of pre-
6 serving, or disposing of, property securing an allowed se-
7 cured claim and shall be recovered even if the trustee has
8 otherwise waived the provisions of this subsection under
9 an agreement with the holder of the allowed secured claim
10 or a successor or predecessor in interest.”.

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

12 Chapter 11 of title 11, United States Code, is amend-
13 ed—

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

16 **“§ 1100. Statement of purpose**

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

23 (2) in section 1129(a), as amended by section
24 104, by adding at the end the following:

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

6 (3) in section 1129(c)—

7 (A) by inserting “(1)” after “(c)”; and

8 (B) by striking the last sentence and in-
9 serting the following:

10 “(2) If the requirements of subsections (a) and (b)
11 are met with respect to more than 1 plan, the court shall,
12 in determining which plan to confirm—

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

18 “(B) confirm the plan that better serves such
19 interests.

20 “(3) A plan that incorporates the terms of a settle-
21 ment with a labor organization representing employees of
22 the debtor shall presumptively constitute the plan that sat-
23 isfies this subsection.”; and

24 (4) in the table of sections, by inserting before
25 the item relating to section 1101 the following:

“1100. Statement of purpose.”.

1 **SEC. 207. TERMINATION OF EXCLUSIVITY.**

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

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

7 “(A) The filing of a motion pursuant to section
8 1113 seeking rejection of a collective bargaining
9 agreement if a plan based upon an alternative pro-
10 posal by the labor organization is reasonably likely
11 to be confirmed within a reasonable time.

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

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

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

21 “(11) with respect to withdrawal liability owed
22 to a multiemployer pension plan for a complete or
23 partial withdrawal pursuant to section 4201 of the
24 Employee Retirement Income Security Act of 1974
25 (29 U.S.C. 1381) where such withdrawal occurs on
26 or after the commencement of the case, an amount

1 equal to the amount of vested benefits payable from
2 such pension plan that accrued as a result of em-
3 ployees' services rendered to the debtor during the
4 period beginning on the date of commencement of
5 the case and ending on the date of the withdrawal
6 from the plan.”.

7 **TITLE III—RESTRICTING EXECU-**
8 **TIVE COMPENSATION PRO-**
9 **GRAMS**

10 **SEC. 301. EXECUTIVE COMPENSATION UPON EXIT FROM**
11 **BANKRUPTCY.**

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

14 (1) in paragraph (4), by adding at the end the
15 following: “Except for compensation subject to re-
16 view under paragraph (5), payments or other dis-
17 tributions under the plan to or for the benefit of in-
18 siders, senior executive officers, and any of the 20
19 next most highly compensated employees or consult-
20 ants providing services to the debtor, shall not be
21 approved except as part of a program of payments
22 or distributions generally applicable to employees of
23 the debtor, and only to the extent that the court de-
24 termines that such payments are not excessive or

1 disproportionate compared to distributions to the
2 debtor’s nonmanagement workforce.”; and

3 (2) in paragraph (5)—

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

6 (B) in subparagraph (B), by striking the
7 period at the end and inserting “; and”; and

8 (C) by adding at the end the following:

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

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

19 Section 503(e) of title 11, United States Code, is
20 amended—

21 (1) in paragraph (1), in the matter preceding
22 subparagraph (A)—

23 (A) by inserting “, a senior executive offi-
24 cer, or any of the 20 next most highly com-

1 compensated employees or consultants” after “an
2 insider”;

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

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

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

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

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

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

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

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

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

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

23 “(r) No plan, fund, program, or contract to provide
24 retiree benefits for insiders, senior executive officers, or
25 any of the 20 next most highly compensated employees

1 of the debtor shall be assumed if the debtor has obtained
2 relief under subsection (g) or (h) of section 1114 to impose
3 reductions in retiree benefits or under subsection (d) or
4 (e) of section 1113 to impose reductions in the health ben-
5 efits of active employees of the debtor, or reduced or elimi-
6 nated health benefits for active or retired employees within
7 180 days before the date of the commencement of the
8 case.”.

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

10 (a) IN GENERAL.—Subchapter III of chapter 5 of
11 title 11, United States Code, is amended by inserting after
12 section 562 the following:

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

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

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

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

24 “(c) Upon the determination of the percentage dimi-
25 nution in value under subsection (a) or (b), the estate shall

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

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

22 “(e) The court shall not award postpetition com-
23 pensation under section 503(c) or otherwise to any person
24 subject to subsection (c) if there is a reasonable likelihood
25 that such compensation is intended to reimburse or re-

1 place compensation recovered by the estate under this sec-
2 tion.”.

3 (b) TECHNICAL AND CONFORMING AMENDMENT.—

4 The table of sections for chapter 5 of title 11, United
5 States Code, is amended by inserting after the item relat-
6 ing to section 562 the following:

“563. Recovery of executive compensation.”.

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

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

10 “(j)(1) The trustee may avoid a transfer—

11 “(A) made—

12 “(i) to or for the benefit of an insider (in-
13 cluding an obligation incurred for the benefit of
14 an insider under an employment contract) made
15 in anticipation of bankruptcy; or

16 “(ii) in anticipation of bankruptcy to a
17 consultant who is formerly an insider and who
18 is retained to provide services to an entity that
19 becomes a debtor (including an obligation under
20 a contract to provide services to such entity or
21 to a debtor); and

22 “(B) made or incurred on or within 1 year be-
23 fore the filing of the petition.

1 “(2) No provision of subsection (c) shall constitute
2 a defense against the recovery of a transfer described in
3 paragraph (1).

4 “(3) The trustee or a committee appointed pursuant
5 to section 1102 may commence an action to recover such
6 transfer, except that, if neither the trustee nor such com-
7 mittee commences an action to recover such transfer by
8 the time of the commencement of a hearing on the con-
9 firmation of a plan under section 1129, any party in inter-
10 est may apply to the court for authority to recover the
11 claims for the benefit of the estate. The costs of recovery
12 shall be borne by the estate.”.

13 **TITLE IV—OTHER PROVISIONS**

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

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

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

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

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

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

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

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

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