Hearing on H.R. 3652, the "Protecting Employees and Retirees in Business Bankruptcies Act of 2007"

Before the Subcommittee on Commercial and Administrative Law

Statement of:

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Madam Chairman Sánchez, Ranking Member Cannon, and members of the Subcommittee, thank you for inviting me to testify at your hearing on H.R. 3652, the "*Protecting Employees and Retirees in Business Bankruptcies Act of 2007*." My name is Michael Bernstein. I am a partner in the law firm of Arnold & Porter LLP and the chair of the firm's national bankruptcy and corporate restructuring practice.[1] We represent debtors, creditors, committees, investors and other parties in a wide variety of bankruptcy and corporate restructuring matters. I have advised and represented debtors and other parties in connection with matters at the intersection of bankruptcy and labor law, and I have lectured on this subject, as well as on numerous other bankruptcy-related subjects. I have also written various books and articles. For example, I am co-author of *Bankruptcy in Practice*, a comprehensive treatise on bankruptcy law and practice published by the American Bankruptcy Institute.

Chapter 11 of the Bankruptcy Code is intended to enable a financially troubled business to restructure its operations and obligations so that it is able to remain a going concern, and to emerge from bankruptcy as a viable and competitive enterprise. A debtor that achieves this objective benefits its creditors, suppliers, customers, employees, local communities, and other constituencies. A successful reorganization ordinarily requires a debtor to achieve a competitive cost structure. This includes paying market-competitive wages and benefits to all employee groups, from hourly workers to administrative and clerical employees, to mid-level management and senior executives.

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[1] The views expressed herein are solely those of the author, and do not necessarily represent the views of my firm or any of its clients.

H.R. 3652, the "*Protecting Employees and Retires in Business Bankruptcies Act of 2007*," would modify many provisions of the Bankruptcy Code. Some of these modifications are difficult to reconcile with the fundamental goals of chapter 11, and would be likely to impair the ability of chapter 11 debtors to reorganize.

First, some of these proposed modifications would increase the already substantial cost of chapter 11, making reorganization more difficult to achieve.

Second, certain of the proposed modifications would create substantial additional hurdles for a business that needs to modify its labor and retiree cost structure in order to remain viable. If a chapter 11 debtor that needs to reduce above-market labor costs is precluded from doing so, it will likely be unable to attract new capital and unable to reorganize. This is detrimental to all constituencies, including the employees who lose their jobs in a liquidation.

Third, several of the proposed modifications would make it materially more difficult for chapter 11 debtors to attract and retain management employees. Because of the substantial risks, burdens and uncertainties that typically come with managing a company in chapter 11, it has historically been a challenge for debtors to retain and attract management talent. Numerous debtors have suffered from management defections, as their competitors cherry-pick the best management talent. The 2005 modifications to the Bankruptcy Code, as part of the *Bankruptcy Abuse and Prevention and Consumer Protection Act of 2005* (BAPCPA), compounded this problem by effectively precluding debtors from paying "stay bonuses" to management employees. These bonuses had previously been an important means to compensate management employees for the risk and uncertainty of working for a debtor, and incentivizing such employees to remain with the debtor even though they may have more attractive, and more stable, opportunities elsewhere. The additional proposed modifications in H.R. 3652 would make it materially more difficult for a chapter 11 debtor to attract and retain managerial employees.

Several provisions in the bill would link, in a direct way, the wages and benefits paid to managerial employees to the wages and benefits of hourly employees. While there may be a superficial appeal to this linkage, it fails to take into account the different labor markets that exist for different types of employees. Simply put, a debtor must pay its hourly employees the going rate in the community in which it operates for employees with comparable skills and expertise. The same is true for all other employees, up to and including the most senior executives. Thus, while it may sound good to say "if labor suffers a ten percent pay cut, management employees must suffer the same pay cut," a more rational approach would be to say that: (i) each employee should be paid as close as possible to market-competitive wages and benefits, and (ii) the overall labor cost structure should not exceed what the company can afford to pay, in light of its financial circumstances.

Fourth, certain of the proposed provisions would substitute inflexible, one-size-fits-all rules for the judicial discretion that exists under current law. Because each company, each industry and each chapter 11 case is different, the reorganization goal of chapter 11 is better served by allowing judges to make decisions in each case, based on the evidence before them, rather than trying to create identical rules for every case, without regard to the facts.

Finally, some of the proposed provisions would create potentially substantial new priority claims. Viewed in isolation, this may not seem particularly problematic. However, in evaluating the extent to which such priorities should be created, it is worthwhile to consider two factors. First, priority claims must be paid in full in order for a debtor to reorganize under a chapter 11 plan. Thus, the creation of new priority claims will make it more difficult, or perhaps impossible, for some companies to reorganize. Second, priorities create "creditor versus creditor" issues more than "debtor versus creditor" issues. In other words, whenever you give priority to one type of claim, you are leaving less money for the holders of other types of claims.

Thus, while it may be appealing to say "we are giving a greater priority to employee benefits claims," it is important to keep in mind that, by doing so, you are likely to be diminishing the recovery of other types of creditors, such as taxing authorities, trade vendors, customers, or tort victims.

I will now address some specific provisions of the proposed legislation, and point out some of the consequences that I believe would be likely to result if these provisions were enacted.

Sections 3-5: *Priorities*

These provisions would increase the existing wage priority and create new types of priority claims, including a priority for diminution in the value of equity securities in a defined contribution plan,[2] and an administrative expense priority for severance pay. Some of these new priority claims could be substantial, and would have to be paid in full in order for a debtor to confirm a plan of reorganization and emerge from bankruptcy. If these new priorities are established, there are likely to be some cases in which the debtor will not be able to confirm a reorganization plan because it will not be able to pay its priority claims in full. Instead, these debtors would be forced to liquidate.

In addition, as I noted above, claim priorities pit one creditor group against another. The new proposed employee priorities will, except in those relatively rare cases in which there is enough money to pay all claims in full (in which case the priorities are largely irrelevant), diminish or eliminate entirely the recovery of other creditors. This creates fairness issues -- for example, whether it is fair to increase the recovery of employees at the expense of tort victims injured by a debtor's products, customers who paid the debtor for goods or services but did not

[2] This would turn what is now an equity interest into a claim, and then give that claim priority over general unsecured claims as well as certain other priority claims.

receive what they paid for, taxing authorities, or small businesses that sold goods to a debtor.

Sections 6 and 7: *Limitations on Executive Compensation*

These sections of the bill would make it substantially more difficult for a debtor to pay bonus or other incentive-based compensation to management employees. By doing so, it will make it more difficult for chapter 11 debtors to attract and retain management talent. The job of managing a debtor through the chapter 11 process is quite challenging and requires substantial skill. The people who can do this job well tend to be in great demand, and have many opportunities. In order to retain and attract management talent, a debtor must be able to pay market-competitive wages and benefits to its management employees. In many cases, this will include bonus or other incentive-based compensation.[3] If debtors are precluded from paying market-competitive compensation, including incentive and bonus compensation, their best managers are likely to find alternative employment, thereby imperiling the debtor's reorganization efforts.

The requirement in section 6 of the bill (relating to compensation upon emergence) and section 7 of the bill (relating to compensation during the chapter 11 case) that management compensation be "not disproportionate in light of economic concessions by the debtor's nonmanagement workforce during the case" could be problematic, depending on how it is interpreted. If it is interpreted to mean that hourly workers should not be paid materially below market while management is paid materially above market, that would be reasonable and should not unduly interfere with the reorganization process. However, if this provision were interpreted to preclude a debtor that has obtained labor cost reductions through the §1113 or §1114 process,

[3] This is true not only because bonus and incentive compensation is a typical component of executive pay, but also because, unlike their competitors, debtors ordinarily cannot offer their management employees compensation in the form of equity (stock or options), since equity is most often out-of-the-money.

or through negotiations, from paying market-competitive wages and benefits (including incentive compensation) to management employees, that would be problematic because it would essentially punish management for undertaking difficult but necessary cost-cutting measures, and would interfere with the debtor's ability to retain management employees.

Section 8: *Rejection of Collective Bargaining Agreements*

Section 1113 of the Bankruptcy Code deals with the modification and rejection of collective bargaining agreements. Unlike other contracts that can be rejected by a debtor if doing so is found to be a reasonable exercise of the debtor's business judgment, the rejection of a collective bargaining agreement is evaluated using a far more stringent standard.[4] In order to reject a collective bargaining agreement under present law:

(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;

(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;

4 *See Comair, Inc. v. Air Line Pilots Ass'n, Int'l* (*In re Delta Air Lines, Inc.*), 359 B.R. 491, 498 (Bankr. S.D.N.Y. 2007) ("Congress enacted Section 1113 not to eliminate but to govern a debtor's power to reject executory collective bargaining agreements, and to substitute the elaborate set of subjective requirements in Section 1113(b) and (c) in place of the business judgment rule as the standard for adjudicating an objection to a debtor's motion to reject a collective bargaining agreement.").

(8) The union must have refused to accept the proposal without good cause; and

(9) The balance of the equities must clearly favor rejection of the collective bargaining agreement.[5]

The debtor must satisfy *all nine* of these standards in order to obtain relief. There are many cases in which a debtor's request for relief under §1113 has been denied.[6]

The additional requirements in the proposed bill would make it more difficult to modify or reject a collective bargaining agreement. For example, under existing law any proposed modifications must be "necessary to permit the reorganization of the debtor." In *Truck Drivers Local 807 v. Carey Transp. Inc*., 816 F.2d 82, 89–90 (2d Cir. 1987), the court concluded that "'necessary' should not be equated with 'essential' or bare minimum….[rather] the necessity requirement places on the debtor the burden of proving that its proposal is made in good faith, and that it contains necessary, but not absolutely minimal, changes that will enable the debtor to complete the reorganization process successfully."[7] The proposed bill, among other things,

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5 The test was initially articulated by the court in *In re Am. Provision Co*., 44 B.R. 907, 908 (Bankr. D. Minn. 1984), and has subsequently been adopted by many other courts. *See, e.g., In re Family Snacks, Inc*., 257 B.R. 884 (B.A.P. 8th Cir. 2001).

6 *See, e.g., In re Delta Air Lines* (*Comair*), 342 B.R. 685 (Bankr. S.D.N.Y. 2006) (debtor failed to confer in good faith); *In re Nat'l Forge Co*., 279 B.R. 493 (Bankr. W.D. Pa. 2002) (debtor did not meet its burden of proving that the proposed modifications were fair and equitable); *In re U.S. Truck Co*., 165 L.R.R.M. (BNA) 2521 (Bankr. E.D. Mich. 2000) (debtor failed to meet its burdens of proving the proposal to be necessary, fair and equitable); *In re Jefley, Inc.*, 219 B.R. 88 (Bankr. E.D. Pa. 1998) (court concluded "that the proposal, as presented, is not 'necessary' to the Debtor's reorganization; [and] does not treat the union workers 'fairly and equitably'"); *In re Liberty Cab & Limousine Co*., 194 B.R. 770 (Bankr. E.D. Pa. 1996) (debtor's proposal was not fair and equitable); *In re Lady H Coal Co*., 193 B.R. 233 (Bankr. S.D. W. Va. 1996) (debtor failed to treat all parties fairly and equitably and did not bargain in good faith); *In re Schauer Mfg. Corp*., 145 B.R. 32 (Bankr. S.D. Ohio 1992) (debtor "has failed to show that the Proposal which it made to the Union makes 'necessary modifications . . . that are necessary to permit the reorganization of the debtor . . . ."); *In re Sun Glo Coal Co*., 144 B.R. 58 (Bankr. E.D. Ky. 1992) ("the debtors have failed to sufficiently quantify the results of such proposed changes to allow this Court to find that they are 'necessary' to the reorganization of the debtors.").

7 *But see Wheeling-Pittsburgh Steel Corp. v. United Steelworkers of Am., AFL-CIO-CLC*, 791 F.2d 1074, 1088 (3d Cir. 1986) (holding that "[t]he 'necessary' standard cannot be satisfied by a mere showing that it would be desirable for the trustee to reject a prevailing labor contract so that the debtor

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would replace "necessary to permit the reorganization" with "no more than the minimal savings necessary to permit the debtor to exit bankruptcy, such that confirmation of such plan is not likely to be followed by the liquidation of the debtor or any successor to the debtor." Depending on how it is interpreted, this standard might be nearly impossible to satisfy. It may require a debtor to leave itself, in creating a post-emergence cost structure, so little leeway that even a minor unforeseen "bump in the road" after emergence could cause another bankruptcy filing. The "necessary" standard under present law is sufficient to assure that modifications are achieved only where they are needed in order for the debtor to reorganize and emerge as a viable enterprise. A more stringent standard would be likely to impede successful reorganizations. The more stringent standard would also be likely to reduce the number of negotiated resolutions because, if the rejection standard is nearly impossible to satisfy, the unions will have great leverage and therefore less incentive to negotiate. Such a change in the standard could upset the delicate balance that exists under present law, which in the vast majority of cases has resulted in negotiated rather than litigated resolutions.

The bill would also amend §1113(d) to slow down the §1113 process. This provision is not in any constituency's interest. Resolution of §1113 issues is often a prerequisite to obtaining commitments for new investments or exit financing and negotiating and implementing a plan of reorganization. As a general matter, the faster this can be achieved, the lower the costs of chapter 11 and the greater the debtor's prospects for success. Thus, slowing down the §1113 process would be counterproductive. The bill would also prohibit creditors and other interested

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can lower its costs" and suggesting that the use of the word "necessary" equates to "essential" and that rejection under §1113 should be used only when necessary to prevent liquidation).

parties from participating in a §1113 hearing, even though their recoveries could be substantially affected by the outcome.

The proposed legislation would also add a requirement that the debtor's proposal "not overly burden the affected labor group, either in the amount of savings sought from such group or the nature of the modifications, when compared to other constituent groups expected to maintain ongoing relationships with the debtor, including management personnel," and would create a presumption that a debtor who implemented any incentive compensation or similar plan for management employees during the case or within 180 days before the filing fails to satisfy this requirement. Existing law already requires that a §1113 proposal assure that all creditors, the debtor and all of the affected parties are treated fairly and equitably. Seeking to create some sort of more precise equivalence between the treatment of hourly employees and other constituencies, without regard to market factors, would be counterproductive. The guiding principal should not be that every group must take the exact same pay cut or reduction in benefits, but instead that each employee or group of employees should be paid and receive benefits at, or as close as possible to, a market-competitive level, and the resulting overall cost structure should be manageable for the debtor.

In addition to the foregoing modifications, the proposed bill would add six new provisions to §1113. Some of these provisions would likely undermine the purpose of chapter 11 or make reorganization significantly more costly. For example, proposed §1113(g) would authorize "self help" (presumably a strike or other job action) by labor representatives if the court grants a motion to reject a collective bargaining agreement or a motion for interim modifications to such an agreement.[8] If a labor union, after the court finds that it unjustifiably

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[8] Similarly, proposed §1113(c)(1)(D)(iii) would require the court to consider the threat of a strike by a union in evaluating whether to grant relief to the debtor in the first place. In my opinion, this provision

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refused to accept a fair and equitable modification proposal that is necessary for the debtor's reorganization, and therefore grants §1113 relief, is able to torpedo the reorganization by engaging in a retaliatory strike or other job action, the purpose of §1113 (and of chapter 11 more generally) will be undermined, and the company and its stakeholders will suffer. The union will also have less incentive to negotiate because it can always turn to the "nuclear option" of a strike if the debtor does not accede to its demands, or as retaliation for the debtor's implementing §1113 relief. A more balanced provision would be to authorize the bankruptcy court to enjoin a strike or similar job action after granting §1113 relief, but only where such an injunction is necessary in order to enable the debtor to reorganize and remain in business as a going concern. [9]

Another newly proposed section, §1113(j), would require a debtor to pay the union's fees and expenses. Chapter 11 is already quite expensive, and this would create an additional administrative burden, to the detriment of creditors and other constituencies.

Finally, the bill would preclude a debtor from making a §1113 proposal that would achieve cost savings for more than a two-year period. This is a particularly short-sighted provision. A chapter 11 debtor should restructure its costs and obligations in a manner calculated to make it economically viable for the foreseeable future, not only for two years. If a

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would be a mistake. A union should not, by threatening to strike, be able to compel a court to deny relief that is necessary for a successful reorganization. This would give the union too much leverage, to the detriment not only of the debtor, but also all of its creditors and other stakeholders who would benefit from a reorganization.

[9] Under existing law, courts have suggested that in cases governed by the National Labor Relations Act a union has the right to strike upon entry of a § 1113 order. *See Briggs Transp. Co. v. Int'l Bhd. Of Teamsters*, 739 F.2d 341 (8th Cir. 1984) (rejecting request for injunctive relief in an NLRA case based on the NLGA's protection of right to strike); *see also Northwest Airlines Corp. v. Assn. of Flight Attendants--CWA, AFL--CIO* (*In re Northwest Airlines Corp.*), 349 B.R. 338 (S.D.N.Y. 2006), *aff'd*, 483 F.3d 160 (2d Cir. 2007). By contrast, under the Railway Labor Act (which governs, *inter alia*, the airline industry), the Second Circuit has held that the right to strike does not exist. *See In re Northwest Airlines Corp.*, 483 F.3d at 167-68.

debtor were to look only two years in the future, the probable result would be repeat bankruptcy filings.[10] As noted in the *CRS Report for Congress*, "limiting the duration of modifications to a CBA may limit the debtor's ability to successfully reorganize."[11]

Section 9: *Payment of Insurance Benefits to Retired Employees*

Most of the proposed modifications to §1114 track the modifications to §1113. As a result, the proposed modifications to this section would create many of the same impediments to reorganization discussed previously with regard to §1113. Current law is sufficient to guard against any modification in retiree benefits other than in those cases where such modification is essential for the company to be able to reorganize and emerge from bankruptcy.

Section 10: *Protection of Employee Benefits in a Sale of Assets*

This section would impose a flat $20,000 per retiree charge upon all §363 sales that result in a cessation of retiree benefits. This flat charge apparently does not take into consideration the value of the transaction, the number of retirees, or the magnitude of lost benefits. Indeed, in some cases $20,000 per retiree could be greater than the entire value of the asset sale transaction, rendering the sale impossible to consummate even if it were the best transaction available to the

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[10] This would be inconsistent with §1129(a)(11), which requires that, in order to confirm a chapter 11 plan, a debtor must show that it is not likely to be followed by the subsequent need for further restructuring or liquidation.

[11] The Report further provides that: "Modifications that can, in just two years, provide significant economic relief for the company's survival may necessarily require economic concessions that are too burdensome to be acceptable because of the effect on paychecks is too great. Conversely, modifications that last no more than two years but also have a smaller effect on paychecks may not provide sufficient economic relief to allow the debtor company to survive, effectively forcing the company into liquidation." *See* C. Pettit, *CRS Report for Congress*, Rejection of Collective Bargaining Agreements in Chapter 11 Bankruptcies: Legal Analysis of Changes to 11 U.S.C. Section 1113 Proposed in H.R. 3652 -- The Protecting Employees and Retirees in Business Bankruptcies Act of 2007, at CRS-5 (May 9, 2008).

bankruptcy estate and its creditors. This is an example of an attempt to create a one-size-fits-all rule without regard to the facts of a particular case.[12]

Section 13: *Payments by Secured Lender*

Bankruptcy Code §506(c) currently provides that the trustee may surcharge a secured creditor's collateral to pay the reasonable and necessary costs and expenses of preserving or disposing of the collateral to the extent the secured creditor benefits from the expenditures. This surcharge right is sometimes waived by a debtor in exchange for the prepetition secured lender's consent to the use of cash collateral or providing postpetition financing.

The proposed modifications to §506 would treat postpetition wages and other benefits as necessary costs and expenses, for surcharge purposes, regardless of any waiver of the surcharge right. The proposed modifications to §506 are likely to decrease the availability, and increase the cost, of secured credit, including postpetition financing. Particularly in a tight credit environment, such as we are currently facing, this surcharge provision could be problematic for companies seeking secured financing.

Section 14: *Preservation of Jobs and Benefits*

This provision would mandate that in a situation where competing chapter 11 plans were proposed, the court must confirm the plan that better serves the interests of retirees and employees. It seems reasonable for a court to consider the interests of retirees and employees in evaluating which competing plan to confirm. However, to consider only the interests of employees and retirees, while ignoring the interests of creditors and other constituencies, would

[12] This provision also does not address the situation in which the assets sold are subject to a lien securing a debt that is greater than the sale proceeds, meaning that there are no unencumbered proceeds. The intent may be, in this situation, that the $20,000 per retiree would be a forced "carve-out" from the secured lender's lien. This would likely have implications for the availability and pricing of secured credit to companies that have retiree medical obligations.

be inconsistent with the approach historically taken in chapter 11 cases, which is to take into account and balance the interests of all stakeholders.[13]

<u>Section 15: *Assumption of Executive Retirement Plans*</u>

Section 15 would preclude a debtor from assuming a management deferred compensation plan if the debtor has terminated its defined benefit plans during or within 180 days prior to bankruptcy. There are many cases in which it is necessary to terminate a defined benefit plan in order for a company to be able to remain a viable going concern. Under these circumstances, termination of the plan is consistent with the fiduciary duty of officers and directors. This provision would punish management for the proper exercise of their fiduciary duty by eliminating what is often an important element of management compensation. It would thereby make the job of attracting and retaining management talent to a company in or on the verge of bankruptcy materially more difficult. This section also seeks to create an equivalence between two unrelated plans -- a management deferred compensation plan and an employee defined benefit plan. Instead of this artificial linkage, a company (and a court) should look at each plan in terms of whether it serves a legitimate business purpose, whether it provides benefits that are competitive in the marketplace, whether the debtor's obligations under the plan are affordable in light of the debtor's financial circumstances, and what would be the likely consequences of a proposed assumption, rejection or termination.

<u>Section 16: *Recovery of Executive Compensation*</u>

This provision would create a cause of action against certain officers and directors for the return of their personal compensation in an amount equal to the percentage reduction of

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[13] As a hypothetical, if two plans were proposed, one of which would not require any job cuts while the second would require cutting five percent of the workforce, but the second plan would result in an 80% recovery to creditors rather than a 10% recovery under the first plan, it would be more equitable to consider the interests of creditors as well as employees, rather than to consider only the interests of employees and ignore the interests of creditors.

collective bargaining obligations or retiree benefits implemented by a debtor pursuant to §§1113 and 1114. This provision apparently seeks to create a disincentive for a company to seek to modify collective bargaining agreements or retiree benefits by threatening the personal compensation of some of the individuals involved in making the decision to seek such relief.

As discussed above, §§1113 and 1114 relief is available only when a clear case has been made that such relief is necessary for the debtor to reorganize. Where such circumstances exist, and yet the negotiation process has failed to generate an agreement, it is appropriate for a debtor to seek relief. Indeed, in such a situation, the debtor's failure to seek relief may well result in liquidation, and the resulting loss of jobs and creditor recoveries. The debtor's officers and directors should not be forced to operate under a threat that, if they do what is in their company's best interest, they will be sued and required to disgorge their own compensation. This would create an inappropriate disincentive for officers and directors. It would put such individuals in a "Catch 22" position -- they either decline to implement labor cost reductions that are necessary for their company to reorganize, or they implement such reductions but thereby expose themselves to a lawsuit to disgorge their own compensation. As with several other provisions in the bill, this provision would make it more difficult for a troubled company (particularly one with labor cost issues) to retain and attract officers and directors.

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In enacting chapter 11, Congress observed that , "[i]t is more economically efficient to reorganize than liquidate, because it preserves jobs and assets." H. Rep. 95-595, 95th Cong.,1st Sess. 220 (1977). Thirty years of chapter 11 history proves that this is true. Where a company is able to reorganize, creditors tend to recover more, customers and suppliers enjoy continued relationships, taxing authorities continue to receive revenues, employees retain their jobs, and local communities benefit. Unfortunately, chapter 11 reorganization is not easy. First, it is expensive. Second, it requires a talented management team to lead the effort. Third, it requires hard decisions, including sometimes painful cost cutting, to bring costs in line with revenues, and with the competitive marketplace. Fourth, it typically requires financing, which is increasingly hard to obtain. Fifth, it requires a balancing among competing interests which are often difficult to reconcile.

In an effort to protect the interests of, and maximize value for union employees, H.R. 3652 is likely to impede chapter 11 reorganizations. It will increase costs. It will make attracting and retaining talented management much more difficult. It will impair a debtor's ability to bring labor costs into line with the competitive marketplace, even when doing so is necessary in order for the company to remain viable. It will make financing less available and, where available, more expensive. And it will, by moving labor to the front of the line, diminish the recoveries of other constituencies, and thereby make the balancing of interests that is at the heart of the chapter 11 process more difficult to achieve.