Bankruptcy Trumps Collective Bargaining Agreement

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A federal court recently ruled that the Bankruptcy Code (the "Code") permits an employer to escape their expired collective bargaining agreement obligations under certain circumstances. In the matter of *In re Trump Entertainment Resorts, Unite Here Local 54*, the Third Circuit Court of Appeals (which controls in Pennsylvania and nearby states) affirmed a lower court's ruling that a Chapter 11 debtor/employer may reject the terms and conditions of a collective bargaining agreement ("CBA") under Section 1113 of the Bankruptcy Code after expiration of the CBA.

The basic facts of the case involved the Trump Entertainment Resorts debtors (the "Debtors") and their CBA with their union-Unite Here Local 54 (the "Union"). The most recent CBA between the parties was set to expire effective September 14, 2014. In the spring of 2014, the Debtors provided the Union with notice of their intention to terminate, modify or amend the CBA and requested that negotiations commence for a new agreement. The Debtors made several attempts to negotiate, but the Union failed to respond initially and subsequently informed the Debtors that they were not yet ready to negotiate.

In August 2014, the parties met to discuss revisions to a potential new CBA. No agreement was reached; and, on September 9, the Debtors filed for Chapter 11 protection. Absent a new agreement, the CBA expired on September 14, 2014. The Debtors subsequently attempted to modify the CBA post-petition to no avail. Shortly thereafter, the Debtors filed a motion under Section 1113 of the Code asserting that the Debtors required relief from any potential obligations under the CBA in order to effectuate their reorganization plan.

The federal bankruptcy court granted the Debtors' motion to reject the expired CBA finding that a Chapter 11 debtor is able to reject the ongoing terms and conditions of an expired CBA under Section 1113 of the Code. The Union then appealed the decision which was ultimately affirmed by the court of appeals.

The Third Circuit's decision in this case highlighted the clash between a debtor's rights to reject a CBA under the Code and federal law as it relates to union contracts. Under the National Labor Relations Act (NLRA), employers-both viable and bankrupt-are generally required to honor the terms of an expired CBA (i.e., maintain the status quo) until the parties reach a new agreement or an "impasse." For purposes of labor law, an "impasse" is defined generally as "irreconcilable differences in the parties' positions after full good faith negotiations."

Although the Court did not declare officially an impasse, it did find that the Debtors made good faith attempts to negotiate, whereas the Union chose to focus its attention on other issues (e.g., picketing) rather than negotiating a new CBA.

Section 1113 of the Code provides that a debtor-in-possession or trustee may assume or reject a CBA only in accordance with the provisions of Section 1113. Section 1113 was enacted by Congress to counter a U.S. Supreme

Court ruling in *National Labor Relations Board v. Bildisco & Bildisco*, 465 U.S. 513, 104 S.Ct. 1188, 79 L.Ed. 2d 482 (1984), which was perceived as affording a debtor an unlimited right to repudiate labor contracts, in much the same fashion as the power to reject executory contracts under Section 365 of the Code. Section 1113 establishes procedural hurdles to the modification or rejection of a CBA, but does permit modification or rejection of the CBA, "if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate". Section 1113 also requires that the court determine that the balance of the equities clearly favors rejection of a CBA. In resolving the Debtors' motion in this case, the bankruptcy court addressed three issues: (a) whether the Debtors had the authority to reject the CBA, in light of the fact that the CBA had expired after the filing of the bankruptcy but before the filing of the rejection motion, (b) whether the Debtors had complied with the requirements set forth in Section 1113 and (c) whether the court could authorize the Debtors to modify the CBA and implement their plan of reorganization. These questions were answered in the affirmative.

In concluding that the Debtors could reject the continuing terms and conditions of the CBA that had already expired by its terms, the Third Circuit apparently decided a matter of first impression among the federal Courts of Appeal.

Ultimately, the Third Circuit's opinion in this matter is a clear victory for employers. As long as a company is able to show that the terms and conditions of an expired CBA jeopardize the entity's ability to reorganize, that all parties are being treated fairly, that the equities favor the debtor, and that the debtor has complied with the Section 1113 procedural protections, a bankruptcy court (in the Third Circuit) will permit a debtor to avoid the high labor costs associated with an expiring CBA. For employers experiencing financial difficulties, the holding in *Trump* may be a new source of strategies and leverage to reduce costs and improve cash flow, both when negotiating a CBA and when attempting to effectuate a successful restructuring or bankruptcy reorganization.

In re: Trump Entertainment Resorts (Unite Here Local 54, Appellant), _____F.3d. _____, 2016 WL 191926 (3d.Cir. January 15, 2016).

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