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United States District Court, D. New Jersey.
In re: NEW VALLEY CORPORATION, Involuntary Debtor.
RETIRED WESTERN UNION EMPLOYEES ASSOCIATION, Appellant,
v.
NEW VALLEY CORPORATION, and Communication Workers of America, Appellees.
Civ. A. No. 92-4884.

Jan. 28, 1993.

Zazzali, Zazzali, Fagella & Nowak by Robert A. Fagella, Newark, New Jersey, and Bredhoff & Kaiser by Douglas L. Greenfield, Washington, D.C., for Appellant Retired Western Union Employees Association.

Crummy, Del Deo, Dolan, Griffinger & Vecchione by Jonathan M. Jacobson, Newark, New Jersey, and Coudert Brothers by Ellen R. Werther, Carolyn S. Schwartz, Scott E. Ratner, New York City, for Appellee New Valley Corporation.

Reitman, Parsonnet & Dugan by Joseph S. Fine, Newark, New Jersey, for Appellee Communication Workers of America.

OPINION

BISSELL, District Judge.

***1** This action arises out of an appeal taken by the Retired Western Union Employees Association (the "Association") from the order entered by Bankruptcy Judge Novalyn L. Winfield on October 21, 1992 (the "Order"). That Order determined that modification procedures under section 1114 of the Bankruptcy Code, 11 U.S.C. § 1114, do not apply to cutbacks in the medical insurance premium subsidy that the New Valley Corporation ("New Valley") has announced as part of its proposed reorganization. The Association filed a notice of appeal from the Order on October 30, 1992 and the case was docketed in this court on November 19, 1992. On November 20, 1992, New Valley filed a motion for an order dismissing the appeal on various grounds, including claims that the Association was not an "aggrieved person" with standing to appeal, that Judge Winfield's Order was not final, and that an interlocutory appeal was inappropriate. This Court conducted a hearing on December 18, 1992 and decided that the Association had standing, and that although the bankruptcy court's order was not final, it would nonetheless exercise its discretion pursuant to 28 U.S.C. § 158(a) in granting the Association leave to appeal the bankruptcy court's interlocutory order so that the issue raised on appeal could be resolved before confirmation of the reorganization plan. (Order of Jan. 5, 1993). Briefs were submitted and the oral argument followed on January 25, 1993.

FACTS

On November 15, 1991, a group of creditors filed an involuntary petition under Chapter 11 of the United States Bankruptcy Code against New Valley, formerly known as the Western Union Corporation. In recent years, New Valley has suffered serious financial difficulties that have required it to reduce its workforce from 14,000 employees in 1984 to 2,200 today. (Boyle Aff., ¶ 14). Of these, approximately 8,000 are eligible to participate in the retiree welfare plans offered by New Valley. (*Id.*) Over the last several decades, New Valley has offered its employees a variety of medical plan benefits. For the last 18 years, however, the company has included in all Summary Plan Descriptions ("SPDs") and annual Summaries of Material Modifications ("SMMs") an explicit reservation of the right to modify or terminate the plan. (*Id.*, ¶ 25). The 1991 SPD, for example, provided that "the

Company reserves the right, within its sole discretion, to amend or terminate all or any part of the Program at any time and from time to time." (*Id.*, Exh. A at 81). New Valley reports that it has repeatedly exercised its rights and adjusted premiums payable by participants in the company's medical plans. For example, the subsidy payable by New Valley has been reduced from 1989 levels of 90 percent for retirees and 80 percent for their dependents to the 1992 levels of 50 percent for retirees with no subsidy for dependents. (*Id.*, ¶¶ 17-26). New Valley claims that it can no longer afford to subsidize the medical insurance premiums at 1992 levels. According to its calculations, a subsidy at the 1992 level would cost New Valley $6,820,000. (*Id.*, ¶ 16).

***2** The Retired Western Union Employees Association is a non-profit New Jersey corporation that represents the interests of over 10,000 New Valley retirees. On August 11, 1992, the Association requested that New Valley agree to the formation of an official retiree committee in accordance with provisions of the Retiree Benefits Bankruptcy Protection Act of 1988 ("RBBPA"), Pub. L. No. 100-224, 102 Stat. 610 (1988). Section 2 of the RBBPA added sections 1114 and 1129(a)(1) to the Code, applicable to cases commenced after the statute's enactment. Section 3 added a stopgap provision to apply to cases pending during the statute's enactment but contains substantially the same structure as section 2. Accordingly, 11 U.S.C. § 1114 is the operative provision. It provides, in pertinent part, that

> (d) The court, upon a motion by any party in interest, and after notice and a hearing, shall appoint a committee of retired employees if the debtor seeks to modify or not pay the retiree benefits or if the court otherwise determines that it is appropriate, to serve as the authorized representative, under this section, of those persons receiving any retiree benefits not covered by a collective bargaining agreement.
>
> (e)(1) Notwithstanding any other provisions of this title, the debtor in possession, or the trustee if one has been appointed under the provisions of this chapter (hereinafter in this section "trustee" shall include a debtor in possession), shall timely pay and shall not modify any retiree benefits, except that --
>
> A) the court, on motion of the trustee or authorized representative, and after such notice and a hearing, may order modification of such payments, pursuant to the provisions of subsection (g) and (h) of this section; or
>
> B) the trustee and the authorized representative of the recipients of those benefits may agree to modification of such payments;
>
> after which such benefits as modified shall continue to be paid by such trustee.

11 U.S.C. § 1114(d), (e).

New Valley declined the Association's request to form an official committee under section 1114 and instead, filed a motion with the bankruptcy court seeking a declaration that the modification procedures outlined in section 1114 do not apply to it because the medical benefit plans reserve New Valley's right to modify or terminate the benefits at any time. The bankruptcy court heard the parties on October 13, 1992 and Judge Novalyn L. Winfield issued a decision from the bench. In the order entered on week later, Judge Winfield found that New Valley had reserved the right in its sole discretion to modify or terminate the retiree benefits, that section 1114 did not apply to such changes, and that the appointment of an official committee was not necessary or appropriate at the present time. (Bankr. Ct. Order of Oct. 21, 1992). The transcript of Judge Winfield's oral opinion on October 13 reveals that she was particularly concerned with harmonizing the Bankruptcy Code with the ERISA statute, and in particular, those provisions from ERISA which exclude medical and other welfare benefit plans from the vesting requirements that apply to pension benefits. (Tr. of Oct. 13, 1992 at 62-63). To apply

section 1114 to New Valley and thereby extend certain terms of the benefit plan beyond that which had been agreed to by the parties would, in Judge Winfield's view, ignore the parties' contractual bargain and impose a vesting requirement that had been rejected by Congress in the ERISA statute.

***3** The Association disagrees and insists that New Valley is obligated under section 1114 to pay unmodified retiree benefits during the pendency of bankruptcy and, further, to negotiate with an authorized representative of its retirees with respect to the continuation or modification of such benefits. A timely appeal was filed and the Association advances three arguments in support of its appeal: first, that neither ERISA nor any other federal statute is implicated by the issue presented in this case; second, that the plain language and underlying purposes of section 1114 support the view that all retirees, including those whose benefits could otherwise be terminated outside of the bankruptcy context, should be afforded the protections of section 1114; and third, that the weight of case law on this subject supports application of section 1114 to retirees covered by plans which contain "reservations of rights" clauses for the employer. This Court's review of the matter is plenary. *Brown v. Pennsylvania State Employees Credit Union,* 851 F.2d 81, 84 (3d Cir. 1988); *In re Allegheny Int'l, Inc.,* 107 B.R. 518, 523 (Bankr. W.D. Pa. 1989).

ANALYSIS

ERISA Implications

Appellants argue that the bankruptcy court should not look to ERISA, and the distinctions made in that statute between pension rights and medical benefits, for guidance in interpreting section 1114 of the Bankruptcy Code. They have reminded this Court that it is improper "to eliminate inconsistent policy results between two enactments in the face of unambiguous statutory language." (Appellant's Br. at 14).[FN1] The principle is unassailable. Clearly, a later statutory enactment that takes a position at odds with a previous one, or which revises rights set forth previously, takes precedence over the earlier legislation. Accordingly, section 1114 must be read on its own terms. However, when those terms are unclear, it is well settled that judges are advised to construe them in harmony with earlier enactments. *See United States v. Borden Co.,* 308 U.S. 188, 198 (1939); *In re University Medical Center,* 973 F.2d 1065, 1082-83 (3d Cir. 1992).

As explained more fully below, the scope of section 1114 is ambiguous. The statutory scheme is not clear. While the language and underlying purposes of section 1114 are the primary concerns of the Court, efforts to harmonize any statutory construction with other congressional enactments is appropriate here. Accordingly, while this Court does place primary emphasis on ERISA, it does agree with appellees and the bankruptcy court below that an interpretation of section 1114 that sets aside the modification rights written into benefit agreements would run contrary to those provisions of ERISA that require the written terms of SPDs to govern the distribution of benefits. *See* 29 U.S.C. §§ 1022(a), 1102.

Statutory Language and Underlying Purposes

Sections 1114 and 1129(a)((13) govern the payment of retiree benefits in a Chapter 11 reorganization. The critical phrase of section 1114 is the requirement that the trustee "shall timely pay and shall not modify any retiree benefits...." 11 U.S.C. § 1114(e)(1). Section 1114(a) defines "retiree benefits" as "payments to any entity or person for the purpose of providing or reimbursing payments for retired employees ... for medical, surgical, or hospital care benefits ... under any plan, fund or program (through the purchase of insurance or otherwise) maintained or established in whole or in part by the debtor prior to filing a petition commencing a case under this title." Section 1129(a)(13) authorizes confirmation of a reorganization plan where:

***4** [t]he plan provides for the continuation after its effective date of payment of all retiree benefits, as that term is defined in section 1114 of this title, at the level established pursuant to subsection (e)(1)(B) or (g) of section 1114 of this title, at any time prior to confirmation of the plan, for the duration of the period the debtor has obligated itself to provide such benefits.

11 U.S.C. § 1129(a)(13).

Whereas the language of section 1114, particularly the phrase "any retiree benefits" appears to embrace all retiree benefit plans in its modification procedures, section 1129(a)(13), which governs overall plan confirmation, would appear to limit the application of section 1114 to retiree benefits which the debtor has "obligated itself" to pay, presumably pursuant to prior contractual agreement. Neither provision, of course, explicitly addresses the scope of application and the problem of modification terms in the plans themselves. And both statutes, particularly section 1129(a)(13), are somewhat abstruse. Hence there is a fair degree of confusion as to their application.

The legislative history sheds some light on the matter. Both sections 1114 and 1129(a)(13) were enacted as part of the Retiree Benefits Bankruptcy Protection Act of 1988, referred to earlier as "RBBPA." Prior to its enactment, there was no procedure for modifying preexisting labor agreements once the debtor was in a bankruptcy reorganization. All that existed, up until that time, was a provision allowing debtors to assume or reject executory contracts. 11 U.S.C. § 656(a). In 1984, the Supreme Court held that section 365 applied to collective bargaining agreements, and that a bankruptcy debtor could reject its collective bargaining agreement under section 365(c). *NLRB v. Bildisco & Bildisco,* 465 U.S. 513, 521-27 (1984). Congress responded to the *Bildisco* decision by adding section 1113 to the Code. That provision established a procedure for the orderly modification of a debtor's prepetition collective bargaining obligations. Two years later, in 1986, LTV filed for a Chapter 11 reorganization and took the position that it could not pay its pre-existing retirement benefit obligations because to do so, would favor one set of creditors over another. *See* S. Rep. No. 119, 100th Cong. 2d Sess. 2 (1988) *reprinted in* 1988 U.S.C.C.A.N. 683. Congress responded with interim legislation designed to maintain the status quo in LTV, Pub. L. No. 99-591 § 608, 100 Stat. 3341-73 to 74 (1986) followed by the RBBPA of 1986. Section 2 added sections 1114 and 1129(a)(13) to the Code, Section 3, as noted earlier, was a stopgap measure that essentially mirrored section 2 and was designed explicitly to apply to the pending LTV case. *See* 134 Cong. Rec. S 6825 (daily ed. May 26, 1988) (remarks of Senator Metzenbaum).

Thus, while appellant has offered a laundry list of floor statements suggesting that the RBBPA was enacted to prevent all Chapter 11 debtors from modifying retirement plans, regardless of the terms of the plan agreements, the unique context and specific problem confronting Congress at the time the statute was enacted suggests a much narrower focus.

Case Law

***5** The most persuasive decisions addressing the issues raised on this appeal favor New Valley's position. *In re Chateaugay Corp.,* 111 B.R. 399 (Bankr. S.D.N.Y. 1990), *aff'd,* 945 F.2d 1205 (2d Cir. 1991) , *cert. denied,* --- U.S. ---, 112 S. Ct. 1167 (1992), was the first case to be decided on this subject, and appropriately, it deals with application of the statute to LTV. The case involved two LTV mining subsidiaries that had entered into a benefit plan for retirees represented by the United Mine Workers of America ("UMWA"). LTV and the UMWA had entered into a series of wage agreements governing the benefits, including a 1984 amendment which provided that a UMWA trust (not the employer) would pay the benefits if the employer was "no longer in business." 111 B.R. at 402. The court held that LTV was not obligated to make continued payments since section 1114 was aimed at preventing

the unilateral cancellation of bargained-for benefits, not the operation of contract provisions mutually agreed upon. (*Id,* at 404-405).

Similarly, in *In re Doskocil Companies,* 130 B.R. 870 (Bankr. D. Kan. 1991), the court accepted the reasoning offered in *Chateaugay* and permitted a debtor food corporation to amend its retirement benefits without resort to appointing an official committee under section 1114. In *Doskocil,* the debtor had reserved the right to modify its plan unilaterally, and the court held that this bargained-for power carried over into Chapter 11 proceedings and was not lost by virtue of section 1114. Finally, in *In re Federated Dept. Stores, Inc.,* 123 B.R. 572 (Bankr. S.D. Ohio 1991), the court reaffirmed the holdings of both *Chateaugay* and *Doskocil* as standing for the proposition that "old contract rights involving retiree benefits may operate to short-circuit the modification process outlined above [in section 1114]." 123 B.R. at 574. All three of these decisions were recently cited with approval in *In re Drexel Burnham Lambert Group,* 138 B.R. 723 (Bankr. S.D.N.Y. 1992).

The contrary opinions expressed in the unpublished decisions in *In re Hanlin Group, Inc.,* Case No. 91-33872 (Bankr. D.N.J. May 26, 1992), and *Ames Department Stores, Inc. v. Employees' Committee,* 1992 WL 373492 (S.D.N.Y. Nov. 30, 1992), are unpersuasive, and this Court chooses not to follow them.

The decision of Bankruptcy Judge Winfield is in all respects affirmed.

> FN1. In support of this principle, appellant cites *West Virginia Univ. Hosps., Inc. v. Casey,* 499 U.S. 83, 111 S. Ct. 1138 (1991) , in which Justice Thomas writes:
>
> > Where what is at issue is not a contradictory disposition within the same enactment, but merely a difference between the more parsimonious policy of an earlier enactment and the more generous policy of a later one, there is no more basis for saying that the earlier Congress forgot than for saying that the earlier Congress felt differently. In such circumstances, the attribution of forgetfulness rests in reality upon the judge's assessment that the later statute contains the *better* disposition. But that is not for judges to prescribe.
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> 111 S. Ct. at 1148.

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