

**National Retiree Legislative Network**  
**Washington D.C. Fly – In Legislative Agenda Priorities**  
**September 15–17, 2009**

**BANKRUPTCY REFORM**

Retirees enter bankruptcy with no clear cut rules that assure equal treatment with that afforded to “secured creditors”. They lose their health care and pension benefits and unlike secured creditors, rarely have the ability to recover losses.

Bankruptcy courts stymie retirees from organizing to defend themselves. The law does not require companies to provide groups of retirees the access to the lists of other retirees covered by the same health care and pension plans at risk.

Bankruptcy courts stymie retirees from making health care claims by ruling for companies because they can establish the existence of a Reservation Of Rights (ROR) clause. Judges rule that ROR’s are prima fascia evidence that companies are right in terminating benefits and therefore, retirees may not be entitled to establishment of or participation in Section 1114 committees.

Retirees become eligible for Health Coverage Tax Credits (HCTC) as a result of pension plan terminations only. These credits are paid to offset 65% of the retiree’s health care premium costs. However, during the two year economic stimulus funding period, these limits are temporarily set at 80%.

Bankruptcy protection shields companies from the liability to fund pension plans and thus enables a depletion of fund assets that has led to plan terminations.

**The NRLN proposes that the following changes to bankruptcy law be made:**

- Require that companies must **provide retirees with an updated list of all retirees** and that it must be updated throughout Chapter 11 proceedings.
- **Disallow company Reservation Of Rights (ROR) clauses** as reason for denying retiree’s rights to a Section 1114 Committee.
- Mandate **Section 1114 Committees within 60 days of Chapter 11 filing date.**
- Permanently **increase the Health Coverage Tax Credit (HCTC) payment from 65% to 80%** (post stimulus).
- Require pension plan sponsors to **fund underfunded plans after passage of 365 days from date of filing for Chapter 11 protection.**

Go to [www.nrln.org](http://www.nrln.org) and click on the link to read the NRLN's complete Legislative Agenda.



## **Proposal for Bankruptcy Law Reform Protecting Retiree Benefits in Bankruptcy**

### **Executive Summary**

Tens of millions of U.S. retirees—especially those forced into early retirement by down-sizing—are dependent on their former employers for critical pension, healthcare, prescription drug, disability, survivorship, and life insurance benefits. Unfortunately, these benefits are at great risk when an employer files for bankruptcy: Even though these benefits are earned and critical for basic health and well-being, the retirees are seen as already having made their contribution. Unlike the other creditor constituencies of suppliers, lenders and active employees, retirees are not seen as necessary for the business going forward.

And unlike suppliers, lenders, and active employees, who can diversify their risk or make an adjustment as a company descends into bankruptcy, or who can recoup a portion of their losses out of future dealings with the restructured company, retirees who lose benefits in a bankruptcy typically lose those benefits forever, and they have no option to take back their four-decade investment in their employers' fortunes.

In view of that, Congress has already legislated special procedural and substantive protections for retirees' benefits in bankruptcy, because of the need to protect critical health and welfare benefits in a bankruptcy process that would otherwise result in retirees bearing an unfair share of the burden of cuts (losing everything before others give up anything). Unfortunately, recent large bankruptcy cases have highlighted (or even created) tragic shortcomings or loopholes in those protections in Bankruptcy Code Section 1114, thus pointing out the urgent need for legislative reform.

The National Retiree Legislative Network (NRLN) urges Congress to pass the most critical of these reforms as soon as possible:

- Congress should clarify Section 1114 of the Bankruptcy Code to reiterate that the protections of the statutorily-defined health and welfare retiree benefits extend to “any plan, fund, or program” providing those benefits (as the statutory language provides, but some courts have ignored), not just those benefits a debtor failed to reserve the right to modify outside bankruptcy. At the same time, the statute should require prompt appointment of a Section 1114 retiree committee in large bankruptcy cases and give bankruptcy judges additional flexibility to expand the power of a retiree committee (1) to represent retirees on modification of their collectively-bargained benefits when their union has chosen not to represent them on those issues and (2) to negotiate over claims for termination of non-qualified pension benefits in appropriate cases.
- Congress should provide that more broadly available pensions for workers and retirees may not be terminated in bankruptcy unless the debtor's executives also give up their richer (non-qualified) pensions and deferred compensation plans.
- Congress should generally require the continued minimum funding of defined benefit pension plans during a bankruptcy and provide an administrative claim for the pension fund if those minimum contributions are not made.
- Similar to the protections Congress has already added in Bankruptcy Code Section 1102(a)(4) for small business creditors, to ensure a representative creditors committee, Congress should add flexibility to allow a retiree representative on the creditors committee, particularly where unions have specifically declined to represent the interests of their retirees in negotiating over benefits.