

# Senza Sordino

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## Chapter 11 Bankruptcy

It is clear from the debacle this year with the Oakland Symphony that symphony, opera and ballet musicians now face the same accelerating threat which has plagued other fields for years—that their employers may use the U.S. Bankruptcy Code to destroy gains won in collective bargaining. While this development deserves careful study and concern, there is certainly no basis for panic. In order to inform ICSOM musicians how bankruptcy works, this article will discuss some aspects of Chapter 11 of the Bankruptcy Code, 11 U.S.C. 1101 *et seq.*

The stated statutory purpose of a Chapter 11 (“reorganization”) petition is to allow the employer (called “debtor” or “debtor in possession” once a petition is filed) “breathing room” to restructure its financial obligations so that it may continue to operate. **An employer need not be insolvent to avail itself of Chapter 11 protection.** Once a petition is filed, the U.S. Bankruptcy Court has the right and responsibility to oversee the debtor’s business. Before filing under Chapter 11, a debtor will often have laid extensive groundwork, including having reached a new financing agreement with its secured creditors (usually banks) providing for continued financing during reorganization. Early in the course of reorganization proceedings (which can take anywhere from months to years), a financing agreement can be submitted to the court without notice to the union or employees, except in the unlikely event that they are among the twenty largest unsecured creditors. Because a court order could have considerable financial impact on how the orchestra is managed, if a Chapter 11 petition has been filed or is under discussion, you and your counsel should immediately investigate whether an order has been sought or granted and be prepared to argue for a balanced plan protective of employees. It is crucial to have legal counsel which has experience representing unions in bankruptcy cases and which will be especially vigilant in protecting your interests.

The filing of a Chapter 11 petition invokes an “automatic stay” which prevents the commencement or continuation of legal proceedings, including arbitrations, against the debtor. A creditor may ask the court to lift the stay as to a particular matter, and the court may do so if it finds adequate cause. The stay is usually not applicable to matters such as unfair labor practice proceedings under the National Labor Relations Act. This is because the stay does not apply to other governmental units’ enforcement power unless the Bankruptcy Court determines that the government’s action presents a threat to the property (“estate”) of the debtor.

In every Chapter 11 proceeding, the first major event is to form a committee of unsecured creditors. The creditors’ committee has great power to influence the course of events in the case, including real participation in the formulation of a long-term reorganization plan, much broader power to inquire into the financial affairs of the employer than the labor laws grant us in collective bargaining, and the ability to

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## Oakland Symphony Update

The musicians of the Oakland Symphony have been hard at work forming a new organization since the Oakland Symphony Orchestra Association (OSOA) declared bankruptcy on September 12. The players gave a benefit concert on October 16, conducted by George Cleve, music director of the San Jose Symphony. Critical response was very enthusiastic, and the event served to solidify the players’ resolve to stay together in spite of the OSOA’s abdication. Proceeds from the benefit are being used to establish new management and to help provide a concert series for the public during this period of transition.

It is the musicians’ intention that the new Oakland Symphony should more responsibly serve the East Bay, not only by producing concerts of the highest quality, but also by reaching out to previously neglected groups in the community. In the past, Oakland players have advocated park concerts, educational programs, maintenance and expansion of the Music Assistance Fund Orchestral Fellowship Program, and other courses of action that were not considered seriously by management. Now, after the OSOA has folded, many players have criticized the organization for having failed to take those courses of action. Because the standard volunteer board structure may not adequately be able to cope with the evermore difficult demands of fund-raising and audience-building, a hybrid structure combining patronage and cooperative systems is being considered. The eventual format of the organization will insure greater musician control in the fundamental direction of the Symphony, including safeguards against repetition of the OSOA’s irresponsible actions.

During this period of transition, the Oakland Symphony Musicians’ Association, a non-profit corporation created during the 1985 strike and made up of players, is being revamped to act as the coordinating entity for all interim activities, in conjunction with the players’ committee, which continues to represent the orchestra. Negotiations are underway to engage a management consultant to handle the technical aspects of running the orchestra and to facilitate implementation of a new parent organization.

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## Chapter 11 Bankruptcy

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retain counsel, accountants, and other professionals (with court approval) at the debtor's expense. Employee/union representation on that committee is desirable and important, but not automatic, and must usually be fought for in a variety of ways for which you will need experienced legal assistance. Representation on the committee can sometimes be obtained on the basis of monies owed to a benefit fund.

One of the major reasons for which companies today seek the protection of Chapter 11 is to relieve themselves of the burden of union contracts and other financial obligations. Even highly profitable companies have filed under Chapter 11 to avoid prospective liabilities; for example, the Johns-Manville Corporation and A.H. Robins filed bankruptcy petitions in response to the personal injury claims, respectively, of asbestosis victims and wearers of the infamous Dalkon Shield. A number of airlines and auto part manufacturers have sought bankruptcy protection to rid themselves of union contracts.

Chapter 11 petitions are far less prevalent among not-for-profit corporations such as symphony orchestras and opera and ballet companies, yet can be used to accomplish the same destructive goals as in the profit sector. And while the wisdom of seeking solutions to financial woes through bankruptcy is obviously questionable for not-for-profit organizations dependent upon public and government fundraising, this point did not stop the Oakland Symphony management and may not stop others. Using bankruptcy as a "solution" to financial problems is a greater threat as corporate members of orchestra boards of directors increasingly import popular employer legal tactics to the orchestras which they support "philanthropically."

Once a Chapter 11 petition is filed, the debtor may seek emergency interim changes in collective bargaining agreements and/or outright rejection of them. Interim relief for the debtor can be sought on extremely short notice with a summary hearing at which affected unions must be prepared to contradict the debtor's evidence. Abrogation of a contract is generally only obtainable upon a showing that the debtor will collapse and the employees become unemployed altogether unless "relief" is granted, and, when granted, provides only temporary relief, such as until a new contract can be negotiated.

Rejection of collective bargaining agreements--literally, the throwing out of a contract by the Bankruptcy Court--can be accomplished once the debtor has satisfied nine requirements. The requirements were established by an amendment to the Bankruptcy Code in response to a 1984 U.S. Supreme Court case, *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984). That case held, in brief, that an employer could unilaterally modify or terminate a contract, after filing under Chapter 11 but before a court-approved rejection of the agreement, upon a showing that the contract "burdened" the estate. In such a case, the court would have to find that the equities balanced in favor of rejection of the contract and that "reasonable efforts" to negotiate a voluntary modification of the agreement had been made, but were not likely to produce a prompt and satisfactory solution. There is no requirement to bargain to impasse before unilateral action can be taken by an employer under *Bildisco*.

The post-*Bildisco* amendments established the following nine requirements for rejection of a collective bargaining agreement:

1. The debtor must make a proposal to modify the agreement;
2. The proposal must be based on the most complete and reliable information available at that time;

3. The modification must assure that all creditors and affected parties, as well as the debtor, are treated equitably;
5. The debtor must provide the union whatever relevant information is necessary to evaluate the debtor's proposal;
6. Before the hearing on the petition to reject the contract, the debtor must meet at reasonable times to negotiate;
7. At these negotiating meetings, the debtor must confer "in good faith" in attempting to reach satisfactory modifications of the contract;
8. If the union refuses to accept the proposal, the court must find there was "good cause;" and
9. The balance of the equities must clearly favor rejection of the collective bargaining agreement.

Case law interpreting these amendments has produced predictable, sometimes helpful principles. Among them are that a debtor may not change the contract regarding matters that are economically insignificant (e.g., musician tenure) or otherwise unnecessary to its reorganization in the opinion of the court.

To read between the lines of this article is to understand that, unfortunately, the filing of a Chapter 11 petition means that the parties are usually going to be back at the negotiating table regardless of how outrageous and unfair it will feel (and your colleagues in Oakland will assure you, the prospect is a bitter one). The road to preventing rejection of a collective bargaining agreement is paved with negotiation. You must "meet and confer" with the debtor, including reviewing, studying and commenting on all its proposals rather than rejecting them out of hand; you must make alternative proposals, and the debtor can be held not to have bargained in good faith if it simply rejects your proposals peremptorily; and in rejecting the debtor's proposal, you must be ready to justify your action according to the nine requirements of the Bankruptcy Code outlined above.

Sadly, it is not overwhelmingly difficult for a debtor to reject a union contract. However, in the not-for-profit field, there are both encouraging and discouraging signs. Many bankruptcy judges and trustees might be horrified by the financial picture of many orchestras, making rejection of the contract easier. For this reason, it is essential to educate the court and the public about the common economic realities of all symphony orchestras, which differ from the profit-making sector. Using detailed comparisons with other orchestras not facing Chapter 11 but with similar economic circumstances, an effective case may be made against rejecting the contract. The Oakland experience, in which management was forced (by its lack of proper preparation, among other reasons) to withdraw its petition to reject the contract, demonstrates that rejecting a contract is not always as automatic as many employers would hope. Contract rejection may be less attractive because symphony associations could not simply hire a non-union group of replacements (as can and does happen in industry), and because the right to strike is immediately restored once a union contract is rejected in bankruptcy court.

The information provided in this article is basic to our understanding of the situation in Oakland. In a future article, Chapter 7 and other bankruptcy issues will be addressed as the Oakland situation develops further.

Liza Hirsch DuBrul  
Leibowitz & DuBrul  
LCSOM Legal Counsel

## Oakland Symphony Update

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A major problem in garnering support and positive media coverage for our new organization has been the taint left by the bankruptcy of the OSOA. People may be wary of supporting a group that is perceived as having "failed." This is exacerbated by the image of Oakland as a second-class neighbor to San Francisco. The previous management did more than anyone to promulgate the idea that Oakland cannot support a symphony, having stated as much in the press in efforts to extract a 54% pay cut from the musicians.

The musicians' greatest ally in the community has been the Oakland Symphony League (OSL), originally the fund-raising arm of the OSOA. Before the bankruptcy, the OSL incorporated separately to protect its assets and insure its existence regardless of the OSOA's future. The OSL has worked tirelessly to produce the benefit concert and otherwise provide the city with a symphony. The mayor appointed a task force, which includes a musician representative and the chairperson of the OSL, in order to "...assess the orchestral needs of the community and to formulate a plan that will enlist the support of the community as a whole...." In addition, the city has reportedly made an offer to purchase the assets of the OSOA, which are held in trusteeship by the bankruptcy court. These assets include the Symphony's music library, music stands, lights, and other music-making accoutrements, all of which are under lock and key and unavailable for use or sale pending the disposition of the bankruptcy case. Members of other area ICSOM orchestras have volunteered their services and have been outspoken supporters of having a symphony in Oakland. The Alameda County Central Labor Council has been very helpful, and Lynn Johnson of the AFM Symphony Department has been in constant consultation with the musicians.

Scott Anderson  
Oakland Symphony ICSOM Delegate

## Boston: The Inside Story

The recent Boston Symphony negotiations were characterized by our legal counsel, I. Philip Sipser, as the longest, most arduous in his experience. The process began in May, and the corporation presented us with their proposals on June 25. None of their numerous proposals, which our committee likened to a "laundry list," dealt directly with our economic proposals. Most of the summer was spent on non-economic items. By the time we became openly aware of the vast economic gap between us, we were quickly exhausting our remaining time, with no apparent movement from the corporation. It was obvious that more time was needed to reach agreement, so the contract was extended until October 31. They would not even discuss the proposal of \$0.00 raise in the third year until we were already into the period of contract extension. Phil was surprised by the style of these negotiations, which he defined as our having to negotiate against "policies," one of which was an attempt to cap orchestra salaries in the third year. We were also faced with lengthy stalling tactics, which we hope never to see again.

This was the first negotiation in BSO history in which there was so little movement, for so long a time, from management and the board that we felt compelled to make the process more public. The management stance did more to unify this orchestra than anything else ever has.

Our internal unity (until the final management proposal on 10/27) was the strongest and most complete ever, culminating in the largest "no" vote on a contract in our history. The letters, telegrams, and mailgrams from 39 ICSOM orchestras strengthened the spirit of the orchestra and bolstered the negotiating committee, and we thank those orchestras again. Our opening night demonstration had almost unanimous participation of players, with support

from pensioners, families, union officers and board, and Lew Waldeck representing the AFM. Our strike committees were formed with widespread player participation. We organized chamber concerts and one big strike concert (which fortunately wasn't needed) involving the entire orchestra, scheduled for the evening following the expiration of the contract extension. We had programs and tickets already printed and nearby Jordan Hall reserved. We spoke to university and conservatory faculties and students to encourage their support, and wrote to pensioners, who responded with letters to our board and local newspapers. It is also noteworthy that we voted 82 to 14 (with 2 abstentions and 3 on sabbatical) to join the AFM Strike Fund, and are currently discussing starting our own internal strike fund in preparation for the next negotiations.

The relationship with our local union officers and union board is the best ever and was encouraged by visits from President Fuentealba and Lew Waldeck during negotiations.

We had an incredibly difficult struggle just to maintain status quo in most areas of our contract. The additional relief week in the second and third years is probably entirely due to Seiji Ozawa's speaking out on our behalf. The relationships within the BSO, Inc. need extensive and timely re-thinking and repair. We came closer to a strike than at any time since becoming a union orchestra, and morale remains very low. There is still a great deal of unhappiness with conditions here, as indicated by the ratification vote of 63-38.

Jay Wadenpfehl, Boston Symphony Orchestra ICSOM Delegate; with assistance from Ronald Barron, Negotiating Chairman, and the BSO Players' Committee.



Michael Nutt (right), ICSOM member-at-large and delegate from the Los Angeles Philharmonic, Damian Bursill-Hall (left) of the San Diego Symphony, and other musicians from both orchestras in a November 8 picket at San Diego's Symphony Hall. L.A. Philharmonic musicians read a statement supporting their San Diego colleagues, and donated over \$1,000 to the San Diego musicians. A statement supporting the San Diego musicians was included in the programs of the L.A. Philharmonic concert at San Diego's Civic Theater that night, and the Philharmonic musicians stood by their chairs for an electrifying minute of silence following tuning. Guest conductor Daniel Lewis made an impassioned plea from the podium. The San Diego Symphony season was canceled on November 11. Photo by D. Steinmeyer.

## San Diego Philharmonic Formed

The San Diego Symphony musicians intend to play as much as possible despite the fact that management has canceled the season. On November 25, the musicians gave their first full-orchestra benefit concert, playing to an enthusiastic audience and raising \$15,000 at the box office. Eight full-orchestra concerts are scheduled at the East

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# San Diego Philharmonic

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County Performing Arts Center starting in mid-January, with repeats at other locations also being planned. The concerts will be produced by a non-profit corporation called the San Diego Philharmonic, which was formed on November 19, 1986 for the sole purpose of filling the temporary musical gap created by management's lock-out of the SDSO.

This corporate base for symphony concerts in San Diego during the canceled symphony season lists among its motivations the desire to preserve continuity of audiences and to maintain a core of professional musicians in San Diego. The chairman of the orchestra committee is a member of the board of directors of the San Diego Philharmonic. Upon resumption of the San Diego Symphony season, the San Diego Philharmonic will cease its principal activity.

## Settlement Summaries

**Denver** just barely ratified a one-year contract which called for a 20 per cent aggregate cut in wages and pension. The board of directors had voted to file Chapter 11 unless the musicians accepted the board's proposal calling for pay cuts. The musicians took a 10% cut in salary and have no pension contribution, although a special plan may produce contributions toward pension this season. Before the present agreement, wages were at \$681 plus \$15 EMG for 41 weeks; the pension contribution had been at 10 per cent of individual wages.

**Indianapolis** ratified a 3-year agreement. Annual wages (were \$28,125) increase during the life of the contract to \$30,250; \$32,425; and \$36,270. Seniority pay increases to \$1/week/year of service payable in 5-year increments up to 20 years. Pension increases from \$25/month/year of service to \$40 in the third year of the contract. New provisions include 3 days personal leave; short-term disability, which covers the period between 90 days and 1 year at 1/2 salary; 8 relief services with pay to all strings and second winds; and instrument insurance, with management contributing toward premiums. Life insurance increased from \$25,000 to \$40,000.

**New Jersey** ratified a 3-year agreement. Length of season (was 18 weeks) increases to 24, 27, and 29 weeks. Thus, by the third year, the orchestra recovers the full-time status which it had lost in 1980. In the past, the orchestra has excused musicians from some services so that the players could take other work in order to make up economic losses caused by orchestra cutbacks. Therefore, a premium pay rate is given to those musicians who play all services in each subscription series. Wages (were \$590/week) go to \$610/week plus \$15/service premium; \$630/week plus premium; \$690/week (no premium). By the third year, musicians will be required to attend all services. Pension increases from 7 to 8 per cent of scale over the term of the contract. Vacation will now be

reinstated at one week in the second year of the contract, and two weeks in the third year. The medical plan was greatly improved, with management paying 100% of premium costs and family coverage included. Life insurance (was \$4,000) increases to \$15,000. Instrument insurance will be paid in full by management for those players who play all services and at the rate of 50% for others.

**Boston** voted to join the AFM Strike Fund, and then ratified a 3-year agreement. Wages (were \$880) will be \$930; \$1,000; (six months) \$1,020; (2nd six months) \$1,040. Pension (was \$17,750) goes to \$19,000; 19,500; 20,000. A floating vacation week in the second and third years will be jointly administered by music director, musicians, and management. Instrument insurance provides for \$15,000 to be contributed per year to be administered by the players. Limits were specified as to how many quota concerts or evening services may be performed during any non-tour, non-pops, or non-youth concert week. Other gains in working conditions include a maximum of 12 evening rehearsals per year; 5-day weeks were increased from 20 to 22; overtime will now be paid in 5-minute increments. The players gave up their 5 consecutive free days at Tanglewood; will be doing some Friday night concerts; and will be doing one quota service during the Tanglewood/European tour season.

An update to the **Oregon Symphony** agreement provides for repeating the first year of their current three-year contract, thereby implementing a one-year wage freeze and extending the term of the contract to four years.

## Change in Governing Board

Jay Wadenpfuhl of the Boston Symphony joins ICSOM's Governing Board as member-at-large, replacing Gary Smith, who has accepted the position of personnel manager with the St. Louis Symphony. Jay has been appointed on an interim basis by the Governing Board until August, 1987 when elections are scheduled for all member-at-large positions.

*Happy  
New Year*

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