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NOTE

SPECIAL PROTECTION IN THE AIR[LINE INDUSTRY]: THE HISTORICAL DEVELOPMENT OF SECTION 1110 OF THE BANKRUPTCY CODE

*Gregory P. Ripple**

INTRODUCTION

The airline industry is not for the faint of heart. The deregulation of the airline industry in 1978[1] coincided with the adoption of the Federal Bankruptcy Code.[2] In the six years following deregulation, over 130 new commercial air carriers took off into the newly opened American skies.[3] While there were success stories, there were many failures, and American airlines have not been strangers to the American bankruptcy courts.

The great capital expense required of airlines to build and maintain their fleet makes them particularly susceptible to economic downturns. Today's modern jetliners cost at a very minimum tens of millions of dollars apiece.[4] Airlines, even well-established ones, simply

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1 Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705 (codified as amended in scattered sections of 49 U.S.C.).

2 Pub. L. No. 95-598, Nov. 6, 1978, 92 Stat. 2629 (codified as amended at 11 U.S.C. §§ 101–1330 (2000)).

3 Michael A. Katz, *The American Experience Under the Deregulation Act of 1978—An Airline Perspective*, 6 HOFSTRA LAB. & EMP. L.J. 87, 93 (1988); Mark C. Mathiesen, *Bankruptcy of Airlines: Causes, Complaints, and Changes*, 61 J. AIR L. & COM. 1017, 1022 (1996).

4 The cost of a brand new Boeing jetliner, for instance, ranges from approximately $35 million for the Boeing 717-200 to in excess of $230 million for the Boeing 777-300ER. *See* Boeing Commercial Airplane Prices, *at* http://www.boeing.com/commercial/prices (last visited Oct. 14, 2002).

cannot afford to own all their aircraft outright.[5] In order to secure the needed aircraft to fly, airlines engage in rather complicated financing arrangements not only with financial institutions, but also with the aircraft manufacturers themselves.[6]

Given the large amount of money involved and airline susceptibility to bankruptcy, financiers have long demanded special protection for their investment. Without this protection, financial institutions or aircraft manufacturers would be unwilling to provide financing for aircraft to new or troubled airlines, or would do so only under terms far less favorable to the borrower.[7] As a result of this pressure, Congress included provisions under the old Bankruptcy Act that "effectively suspended the rules of bankruptcy that inhibited the rights of aircraft financers to remove aircraft from an airline's bankruptcy estate."[8]

The Bankruptcy Code, enacted in 1978, contains a similar provision.[9] The automatic stay of the Bankruptcy Code typically prevents a

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The difficulty these costs impose on start-up airlines is evidenced in the circumstances surrounding the beginnings of JetBlue Airways. In 1999 the airline launched with $130 million in capital investment, the largest capital buildup in the history of the American airline industry. This amount would have been sufficient to buy outright only one of the airline's twenty-three Airbus A320s. *See* Fact Sheet–Jet Blue, *at* www.jetblue.com/learnmore/factsheet.html (last visited Sept. 22, 2002).

5 *See* Jason J. Kilborn, *Thou Canst Not Fly with Borrowed Wings: Airline Finance and Bankruptcy Code Section 1110*, 8 GEO. MASON L. REV. 41, 41–42 (1999).

6 American Trans Air (ATA), for instance, recently began to take possession of new Boeing 737s to replace its aging fleet of Boeing 727s. As part of the purchase agreement, Boeing agreed not only to accept the older 727s as "trade-ins," but also agreed to purchase a large number of shares in the airline. *See* David C. Forward, *ATA: Whither Goest Thou?*, AIRWAYS, Dec. 2001, at 39, 44.

In addition to the purchase of new aircraft, airlines often use their ownership of aircraft as a source of new capital. Before the 1960s, it was common for an airline to borrow money against the security of the aircraft, similar to a homeowner taking out a "home improvement" loan. This type of financing is no longer common, because of negative tax implications. A more common practice is the "sale-leaseback" arrangement, whereby an airline sells its equipment and then leases the same equipment back from the purchaser. Sale-leasebacks are advantageous to both sides by allowing the airline to raise capital from its existing assets while also allowing the purchaser-lessor to take advantage of the tax benefits of ownership. Sandor E. Schick, *When Airlines Crash: Section 1110 Revisited*, 48 BUS. LAW. 277, 283–84 (1992).

7 *See* James W. Giddens & Sandor E. Schick, *Section 1110 of the Bankruptcy Code: Time for Refueling?*, 64 AM. BANKR. L.J. 109, 109 (1990) ("Aircraft equipment financiers who deal with the smaller or less financially resilient airlines regard [special protection for their investments] as the *sine qua non* of the financing; creditors of more financially stable carriers reportedly in some instances will do without protection, but only on less favorable terms to the borrower."); *see also* Kilborn, *supra* note 5, at 42.

8 Kilborn, *supra* note 5, at 42.

9 11 U.S.C. § 1110 (2000).

secured party or lessor from asserting their rights to repossess collateral.[10] Title 11, Section 1110 of the U.S. Code, however, provides an exception to the automatic stay, and allows the financiers of aircraft and aircraft parts to repossess their collateral if the airline is unable to cure any defaults within thirty days.[11] Section 1110 has played a prominent role in many airline bankruptcies over the last now almost twenty-five years,[12] and has been revised several times in response to questions raised in its application. This note addresses the historical development of § 1110. Part I briefly explains the separate waves of airline bankruptcies that the industry has experienced in the era of deregulation. Part II discusses the 19th century origins of this special protection and the enactment of § 1110 in the Bankruptcy Code. Part III introduces the first major amendments to § 1110, contained in the Bankruptcy Reform Act of 1994. Part IV considers the case of Western Pacific Airlines and its aftermath, which resulted in the 2000 amendments to § 1110.

I. Airline Bankruptcy in the Era of Deregulation

A. *The Early Years: Wave One*

In the first six years of the deregulated era, beginning in 1978, over 130 new airlines took to the skies.[13] Inevitably, many of these endeavors crashed just as quickly as they had taken off. The economic recession of the early 1980s coupled with high fuel costs made it difficult for new airlines to compete with their larger, more established competitors.[14] By 1988, over 100 of these new carriers had disappeared.[15] In addition, some established pre-regulation carriers found it difficult to adapt to the new deregulated market conditions. Large regional carriers such as Air Florida and Frontier Airlines who could not expand their routes to compete with national airlines filed Chapter 11 petitions in the early 1980s.[16] Continental Airlines and Braniff

10 *Id.* § 362.

11 *Id.* § 1110.

12 *See, e.g.*, *In re* Cont'l Airlines, Inc., 932 F.2d 282 (3d Cir. 1991); *In re* Pan Am Corp., 929 F.2d 109 (2d Cir. 1991); *In re* Air Vermont, Inc., 761 F.2d 130 (2d Cir. 1985); *In re* Braniff, Inc., 110 B.R. 980 (Bankr. M.D. Fla. 1990).

13 Katz, *supra* note 3, at 93.

14 Athanassios Papaioannou, *The Duty To Bargain and Rejection of Collective Agreements Under Section 1113 by a Bankrupt Airline: Trying To Reconcile R.L.A. with Bankruptcy Code*, 18 TRANSP. L.J. 219, 220 (1990).

15 Katz, *supra* note 3, at 94.

16 Papaioannou, *supra* note 14, at 220.

represented major American international carriers in the bankruptcy courts during this same period.[17]

B. The Early 1990s: Wave Two

The economic downturn of the early 1990s saw a second wave of post-deregulation airline bankruptcies.[18] The economic recession combined with rising oil prices during and after the Gulf War resulted in an almost universal decline in profit margin for American carriers.[19] Indeed, operating profit margin for the industry fell to negative three percent in 1992, down from its high in excess of five percent in the late 1980s.[20] Furthermore, many airlines had expanded during the boom years of the late 1980s through mergers and acquisitions financed by a great deal of highly leveraged debt.[21] Debt loads which could barely be managed in good economic times became overwhelming in the economic climate of the early 1990s.[22] Finally, the bombing of Pan Am Flight 103 over Lockerbie, Scotland, had a further impact on the demand for air travel.[23] Estimates of the total extent of the airline industries' losses in those years range from $10.6 to $12.8 billion.[24]

The airlines that filed for Chapter 11 protection in this period were not new upstart airlines or established, but regionalized, carriers, as in the prior wave. This second wave saw well-established airlines succumb to mounting losses.[25] Eastern and Pan Am, both among the

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17 *Id.* Continental's 1983 bankruptcy was unique in the industry in that the Chapter 11 filing was not motivated by poor profit performance, but by management's desire to lower labor costs. Continental's 12,000 employees were heavily unionized. *Id.* Although otherwise healthy, Continental's reorganization was designed to void and renegotiate the collective bargaining agreements between the airline and the unions that represented Continental's employees. *See* STEVEN A. MORRISON & CLIFFORD WINSTON, THE EVOLUTION OF THE AIRLINE INDUSTRY 108 (1995).

18 Mathiesen, *supra* note 3, at 1023.

19 *Id.* at 1023–24; *see also* MORRISON & WINSTON, *supra* note 17, at 30.

20 MORRISON & WINSTON, *supra* note 17, at 31. Operating profit margin is the percentage by which revenue exceeds costs. Operating profit margin does not take into account interest on long-term debt and income taxes. *Id.*

21 Mathiesen, *supra* note 3, at 1023.

22 *Id.* at 1024.

23 *Id.* at 1023–24.

24 MORRISON & WINSTON, *supra* note 17, at 30 n.24.

25 Several upstart airlines joined the well-established carriers in Chapter 11. Both Midway Airlines and America West filed for Chapter 11. *Id.* America West successfully reorganized, while Midway was liquidated. *Id.* *See also* Mathiesen, *supra* note 3, at 1018 n.6.

nation's oldest airlines, were liquidated.[26] Colorful Braniff Airlines ceased operations after a second bankruptcy.[27] Likewise, Continental Airlines filed its second Chapter 11 petition in a four-year span.[28] Trans World Airlines (TWA) as well turned to the bankruptcy courts when it became unable to handle the weight of the debt acquired in its acquisition by Carl Icahn.[29]

C. *The Twenty-First Century: Phase 3?*

The economic downturn of the early twenty-first century appears to have sparked a third wave of airline bankruptcies. Even before the September 11, 2001 terrorist attacks on the Pentagon and New York City, National and Midway Airlines were operating under the protection of the bankruptcy court.[30] As business and leisure travel plummeted after September 11, American airlines began to encounter severe financial losses.[31] Sun Country Airlines became the first victim of the economic turmoil when it filed for bankruptcy in January, 2002.[32] In late summer 2002, upstart Vanguard Airlines and major player US Airways filed for Chapter 11 within weeks of each other.[33] By the end of the summer of 2002, United Airlines was seeking major concessions from its unions and had retained bankruptcy counsel.[34] Although United's leadership claims that bankruptcy is not inevitable,

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26 Mathiesen, *supra* note 3, at 1024; *see also* MORRISON & WINSTON, *supra* note 17, at 30.

27 Mathiesen, *supra* note 3, at 1018 n.7.

28 *Id.*; *see also infra* notes 96–104 and accompanying text.

29 Mathiesen, *supra* note 3, at 1023.

30 *See Midway Files for Bankruptcy, Lays Off 700, Cuts Fleet,* AVIATION DAILY, Aug. 15, 2001, at 1, *available at* 2001 WL 8898692; *National's Debts Nears $120 Million As It Files Chapter 11 Bankruptcy,* AVIATION DAILY, Dec. 8, 2000, at 3, *available at* 2000 WL 9307591.

31 *See U.S. Major Carriers Financial Results, Third Quarter 2001,* AVIATION DAILY, Mar. 11, 2001, at 7, *available at* 2002 WL 7637019.

32 *See Sun Country Lessors Move Bankruptcy Petition,* AVIATION DAILY, Jan. 28, 2002, at 4, *available at* 2002 WL 7636191. Sun Country was the first American casualty after the September 11 attacks. In Europe, the sudden disruption of air travel struck more swiftly. By the end of 2001, Belgian flag carrier Sabena and Swissair had ceased flying. *See Swissair, Flightlease Get Creditor Protection,* AVIATION DAILY, Dec. 5, 2001, at 2, *available at* 2001 WL 8900826; *Sabena Files for Bankruptcy,* AVIATION DAILY, Nov. 7, 2001, at 1, *available at* 2001 WL 8900288.

33 *See Vanguard Ceases Operations After ATSB Rejects Second Application,* AVIATION DAILY, July 31, 2002, at 1, *available at* 2002 WL 7639891.

34 *UAL Warns of Bankruptcy, Sets 30-Day Countdown for Concession,* AVIATION DAILY, Aug. 25, 2002, at 1, *available at* 2002 WL 7640185.

many media pundits believe the airline too will seek to reorganize under the protection of the bankruptcy courts.[35]

Section 1110 may potentially play a major role in the current, and in any future, Chapter 11 proceedings of major American carriers. As discussed above, even major carriers cannot afford to own their entire fleet outright.[36] At the time of its bankruptcy petition, US Airways leased 203 of the 306 aircraft in its fleet.[37] Section 1110 forces an airline in Chapter 11 to make final, binding decisions concerning billions of dollars worth of equipment very early in the bankruptcy proceedings. An understanding of the pre-Bankruptcy Code origins of § 1110 and its subsequent evolution is essential to understanding the interests behind this accelerated decision requirement.

III. PRE-CODE AIRCRAFT FINANCIER PROTECTION & THE ENACTMENT OF § 1110

The historical origins of § 1110 date back to the nineteenth century railroad industry. Railroads share two important characteristics with airlines. First, the equipment needed to operate is very expensive, and usually must be financed.[38] Second, railroads were no stranger to bankruptcy.[39] Nineteenth century railroads developed a unique two-tiered style of financing.[40] Rolling stock was financed separately from the railroad's other assets, primarily real property and structures, through a mortgage agreement. Financiers of the rolling stock, therefore, enjoyed a priority on their separate liens on the equipment.[41]

35 *See Bankruptcy Not a Given, United Says*, SAN JOSE MERCURY NEWS, Sept. 5, 2002, at 2, *available at* 2002 WL 24313499; Susan Carey & Joann S. Lublin, *New UAL Chief Faces Struggle To Cut Costs, Keep Airline Aloft*, WALL ST. J., Sept. 3, 2002, at A1; Dave Carpenter, *United's Chief Executive Says Bankruptcy Filing Not Certain*, FT. WORTH STAR TELEGRAM, Sept. 5, 2002, at 2, *available at* 2002 WL 24696558.

36 *See supra* note 4 and accompanying text.

37 *Chapter 11 Forces US Airways To Evaluate Leasing Options*, AVIATION DAILY, Aug. 13, 2002, at 3, *available at* 2002 WL 7640139. US Airways leases covered almost every type of aircraft in their fleet. At the time of filing, the airline leased 3 Boeing 727s, 109 Boeing 737s, 11 Boeing 757s, 4 Boeing 767s, 44 Airbus A319s, 13 Airbus A320s, 8 Airbus A321s, 4 Fokker 100s, 1 McDonald-Douglas MD-81, and 6 McDonald-Douglas MD-82s. *Id.*

38 Glenn S. Gerstell & Kathryn Hoff-Patrinos, *Aviation Financing Problems Under Section 1110 of the Bankruptcy Code*, 61 AM. BANKR. L.J. 1, 5–6 (1987).

39 1 GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 430 (1965) ("Historically the railroads have made insolvency a way of life, with brief periods of prosperity punctuating the successive reorganizations.").

40 *See* 2 *id.* at 753.

41 Gerstell & Hoff-Patrinos, *supra* note 38, at 5.

This system served the railroad industry well for over half a century. In 1935, however, the Supreme Court interfered. On July 7, 1933, the Chicago, Rock Island, & Pacific Railway filed a reorganization petition under the Bankruptcy Act.[42] On September 26, the railroad filed papers in the district court indicating that the railroad could no longer meet interest payments owed on certain mortgage bonds secured by liens on its rolling stock.[43] Each of the notes contained a provision that the note would become due on the nonpayment of interest or if the railway became insolvent or entered receivership.[44] The notes further provided that the holders of the bonds could have the collateral sold to satisfy the debt in the case of default.[45] The railway petitioned the court to enjoin the holders of the notes from selling any of the collateral, arguing that the debt was oversecured and the property was necessary for reorganization.[46] The district court granted the injunction over the creditors' objections, and the Seventh Circuit affirmed.[47]

The Supreme Court held that the bankruptcy court had the authority to enjoin the sale of the collateral if the sale would hinder, delay, or obstruct a plan of reorganization.[48] The Court reasoned that bankruptcy proceedings are proceedings in equity, and equity courts have a broad array of tools at their disposal: "[t]he power to issue an injunction when necessary to prevent the defeat or impairment of its jurisdiction is, therefore, inherent in a court of bankruptcy, as it is in a duly established court of equity."[49] The district court, therefore, acted within its discretion and power to issue an injunction preventing actions that would undermine the purpose of the bankruptcy statute.[50] The power of the district court—recognized by the Supreme Court in

42 Cont'l Ill. Nat'l Bank v. Chicago, Rock Island, & Pac. Ry., 294 U.S. 648, 656–57 (1935). Nine of the railroad's subsidiaries subsequently filed bankruptcy petitions. *See id.*

43 *Id.* at 657.

44 *Id.* at 659–60.

45 *Id.* at 660.

46 *Id.* at 657.

47 *See In re* Chicago, Rock Island, & Pac. Ry., 72 F.2d 443 (7th Cir. 1934). The district court reasoned that a sale of the collateral would be inconsistent with the purposes of the Bankruptcy Code, "and would hinder, impede, obstruct, delay, and . . . prevent the orderly preparation and consummation of a plan of reorganization." *Cont'l Ill. Nat'l Bank*, 294 U.S. at 666.

48 *Cont'l Ill. Nat'l Bank*, 294 U.S. at 675–78.

49 *Id.* at 675.

50 *Id.* at 676.

Continental Illinois National Bank[51]—to suspend effectively the rights of secured creditors frightened equipment financiers. A successful railroad reorganization could take years to effectuate. During that time, although the railroad could still be in default, lenders would be effectively stripped of the power to foreclose and sell the collateral. Financiers, therefore, turned to Congress to reinstate their rights. Congress responded by adding section 77(j) to the Bankruptcy Act of 1898.[52] Section 77(j) allowed the owner of conditionally sold or leased rolling stock equipment to take possession of the collateral despite the commencement of a reorganization case.[53] This was neither an insignificant nor minor piece of legislation. When section 77(j) was added to the Bankruptcy Act, fifty-five railroads were engaged in bankruptcy or receivership proceedings.[54] In 1957, the same protections were added to the Bankruptcy Act for owners of aircraft equipment in section 116(5),[55] and for those of watercraft in 1968.[56]

In 1975, the U.S. District Court for the Eastern District of Pennsylvania managed to frustrate the right of a secured creditor to repossess the rolling stock of a railroad in default in spite of section 77(j).[57] The Penn Central Railroad had borrowed from Citibank to purchase rolling stock.[58] In 1975, Penn Central no longer had the financial resources to make the principal and interest payments on these loans.[59] The federal government, through a special agency created by Congress, the United States Railway Association (USRA), proposed a

51 The Supreme Court made it clear that the power of the district court to issue the injunction does not modify or eliminate the rights of the creditors: "it does no more than suspend the enforcement of the lien . . . ." *Id.*

52 *See* Act of Aug. 27, 1935, Pub. L. No. 74-381, ch. 774, 49 Stat. 922 (repealed 1978). The new section 77(j) provided:

> The title of any owner, whether as trustee or otherwise, to rolling-stock equipment leased or conditionally sold to the debtor, and any right of such owner to take possession of such property in compliance with the provisions of any such lease or conditional sale contract, shall not be affected by the provisions of this section.

Id.

53 *Id.*

54 Gerstell & Hoff-Patrinos, *supra* note 38, at 6.

55 Act of Sept. 4, 1957, Pub. L. No. 85-295, 71 Stat. 617 (repealed 1978). Congress apparently was concerned that many smaller airlines could not generate sufficient capital to replace aging aircraft. *See* H.R. REP. No. 85-944, at 1 (1957), *reprinted in* 1957 U.S.C.C.A.N. 1926, 1926. The hope was the amendment "would result in an increased availability of capital . . . at a lower interest rate." *Id.*

56 Act of Oct. 17, 1968, Pub. L. No. 90-586, 82 Stat. 1149 (repealed 1978).

57 *In re* Penn Cent. Transp. Co., 402 F. Supp. 127 (E.D. Penn. 1975).

58 Giddens & Schick, *supra* note 7, at 117.

59 *See id.*

plan designed to keep Penn Central's rolling stock riding the rails. The USRA would make the railroad's installment payments as they became due.[60] This payment would not extinguish the debt, but Citibank would assign to the USRA its rights to recover that installment from Penn Central.[61] In approving the plan, the district court reasoned, "[section] 77(j) of the Bankruptcy Act does not preclude a reorganization court from decreeing that, so long as the holders of equipment obligations receive in cash a particular installment when due, they may not declare a default and attempt to accelerate the balance or repossess the equipment."[62] In addition to approving the plan the court also enjoined the creditor from declaring the loan in default so long as they received the cash the conditional sales agreement laid out, whether the payee be the railroad or the USRA.[63]

The district court's decision in Penn Central can be easily defended on equitable grounds. No party was injured. The railroad continued to operate and its debt obligations remained the same. Citibank received the payment it was due. The USRA made Penn Central's payments and in return received a subordinate interest in the collateral. Perhaps the only real losers in the equation were the American taxpayers who effectively subsidized the failing railroad, but, of course, they received the benefits of an operating rail system. From its inception, however, section 77(j) was added to the Bankruptcy Act to limit the power of a bankruptcy court to exercise its equitable powers. After all, the language of the statute states that the rights of the secured creditor of rolling stock "shall not be affected" by proceedings in bankruptcy.[64] If this legislative history and purpose did not bother the *Penn Central* court, what would prevent other courts from again exercising their equitable powers to interfere with the rights of secured equipment financiers?

In 1978, Congress adopted the new federal Bankruptcy Code. Worried by the *Penn Central* decision, transportation financiers lobbied Congress heavily to include even stronger protection for their interests in both railroad rolling stock and aircraft.[65] Although some members of Congress questioned the necessity of special protection for transportation financiers,[66] Congress obliged by including § 1110

60 *Penn Cent.*, 402 F. Supp. at 133–34.

61 *Id.*

62 *Id.* at 138.

63 *Id.* at 138–39.

64 *See supra* note 52 and accompanying text.

65 Gerstell & Hoff-Patrinos, *supra* note 38, at 7 n.26.

66 The report of the House of Representatives concerning the proposed § 1110 stated, "Whether or not there was an initial need for these provisions, their existence

in the Bankruptcy Code, which generally preserved aircraft financiers' rights to repossess under the Bankruptcy Act.[67]

Section 1110 requires an airline that has filed a Chapter 11 petition and has defaulted on its debt obligations on its aircraft to make an important early decision. Within sixty days of the filing of the petition, the airline must decide whether it wishes to assume the obligations of the lease or purchase agreement and retain possession of the aircraft.[68] If the airline chooses to retain the aircraft, it must not only cure all defaults within the sixty-day period, but the airline must also agree to perform all its future obligations according to the terms of the lease or sales agreement.[69] If the airline chooses not to retain the aircraft, the automatic stay of § 362 does not apply and the financier can immediately assert its rights under the lease or purchase agreement to take possession of the collateral.[70]

The legislative history of § 1110 is sparse.[71] The House and Senate reports on this section of the new Bankruptcy Code are very brief.[72] Apparently, Congress designed § 1110 to preserve the existing protections of section 166(5) of the Bankruptcy Act.[73] Most commentators agree that Congress hoped to strengthen the borrowing power of airlines engaged in fleet modernization by offering equipment financiers more security on their investment by limiting the equitable powers of the bankruptcy court to modify their rights to take possession of collateral after a default.[74]

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has become largely addicting to the financing industry, and now the industry claims it would simply cease financing of the relevant equipment if the protections were removed." H.R. REP. No. 95-595, at 239 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6198–200. For a brief discussion of the congressional debate, see Gerstell & Hoff-Patrinos, *supra* note 38, at 7–8.

67 See Appendix A of this Note for the full text of the original version of § 1110. Congress also included an almost identical section protecting the financiers of railroad rolling stock. *See* 11 U.S.C. § 1168 (2000).

68 *Id.* § 1110(a)(2)(B).

69 *Id.* Pre-petition defaults must be cured by the end of the sixty-day period. Post-petition defaults must be cured within thirty days or within in the sixty-day grace period, whichever is later. *Id.*

70 *Id.*

71 Giddens & Schick, *supra* note 7, at 126.

72 *Id.* at 127.

73 *Id.*

74 *Id.* at 126–27; Anthony Michael Sabino, *Flying the Unfriendly Skies: A Year of Reorganizing Airlines, Aircraft Lessors and the Bankruptcy Code*, 57 J. AIR L. & COM. 841, 851 (1991).

II. THE 1994 AMENDMENTS TO § 1110

By 1994, the American airline industry experienced the first two waves of post-deregulation bankruptcies.[75] These cases exposed ambiguities in § 1110, and bankruptcy courts were forced to decide the issues with little guidance from either the statute or congressional intent and no applicable case law. This uncertainty threatened to defeat § 1110's legislative purpose of providing assurances to secured creditors that they would absolutely retain their right to repossess the collateral in case of default or bankruptcy. Congress amended the section in 1994 in response to the issues raised in this litigation.[76] The 1994 amendments to the Bankruptcy Code affected § 1110 in three ways. First, the 1994 amendments expanded the definition of covered carriers.[77] Second, the changes clarified whether all leases and security interests in equipment were covered by § 1110.[78] Finally, Congress dealt with the interplay between § 1110 and the "cramdown" provisions of § 1129.[79]

A. *Expansion of Covered Carriers*

The original § 1110 required the debtor to be "an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board [(CAB)]."[80] During Pan Am's reorganization, this limitation denied certain creditors the protection of § 1110. Pan Am Express, a wholly owned subsidiary of Pan Am, operated thirty-two commuter aircraft.[81] Pan Am Express had followed the parent airline into Chapter 11. Pan Am Express operated prior to 1988 without a certificate of convenience and necessity under an exception to the Federal Aviation Administration's certification process.[82] Al-

75 *See supra* notes 13–29 and accompanying text.

76 11 U.S.C. § 1110 (2000), *amended by* Act of July 5, 1994, Pub. L. No. 103-272, § 5(c), 108 Stat. 1373; Act of Oct. 22, 1994, Pub. L. No. 103-394, tit. II, § 201(a), 108 Stat. 4119. See Appendix B of this Note for the post-1994 amendment version of § 1110.

77 *See infra* notes 80–93 and accompanying text.

78 *See infra* notes 94–112 and accompanying text.

79 *See infra* notes 113–19 and accompanying text.

80 11 U.S.C. § 1110(a) (1988). In 1984, as a part of the deregulation of the airline industry, the CAB was dissolved. *See* Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 98-443, 98 Stat. 1703. Subsequently, the Secretary of Transportation became authorized to issue these certificates. *See* Kathryn Hoff-Patrinos, *Aviation Finance Revisited: The 1994 Amendments to Section 1110 of the Bankruptcy Code*, 69 AM. BANKR. L.J. 167, 178 n.46 (1995).

81 *In re* Pan Am Corp., 124 B.R. 960, 964 (Bankr. S.D.N.Y. 1991).

82 Hoff-Patrinos, *supra* note 80, at 178.

though Pan Am Express did eventually receive the certificate and held it when it filed its bankruptcy petition,[83] many of its aircraft were acquired while it was operating under the FAA exception.[84]

The bankruptcy court held that lease and sales agreements between Pan Am Express and its creditors entered into before the airline obtained the certificate were not protected by § 1110.[85] While conceding that the language of § 1110 did not require the airline to have held the certificate at the time of acquisition, the court believed "to rule otherwise would lead to incongruous results."[86] The court feared that creditors who had knowingly entered into agreements with non-certified carriers would receive an undeserved benefit if the airline later obtained a certificate.[87] The creditors could have protected themselves by conditioning the agreement on Pan Am obtaining the certificate, but they did not.[88] The court stated, "They assumed a calculated risk and have lost."[89]

The 1994 amendments to § 1110 redefined covered air carriers. The reference to "a certificate of convenience and necessity" was removed. The amended § 1110 now applies if three criteria are met. First, the debtor must be a citizen of the United States.[90] Second, the carrier must hold an operating certificate issued by the Secretary of Transportation.[91] Finally, only aircraft capable of carrying ten or more passengers or 6000 pounds or greater of cargo are eligible for § 1110 protection.[92] This amendment effectively extended § 1110 protection to financiers of all commuter airlines.[93]

B. *Scope of Leases and Security Interests*

During their reorganization proceedings, some airline debtors argued that § 1110 only applied to aircraft acquisition transactions.[94] This was important because of the frequent use of sale-leaseback trans-

83 *Pan Am*, 124 B.R. at 964.

84 Hoff-Patrinos, *supra* note 80, at 178.

85 *Pan Am*, 124 B.R. at 968–69.

86 *Id.*

87 *Id.*

88 *Id.* Apparently this type of conditioned financing had been routinely employed in the aviation financing business. *See* Hoff-Patrinos, *supra* note 80, at 178.

89 *Pan Am*, 124 B.R. at 968–69.

90 11 U.S.C. § 1110(a)(2)(A) (2000).

91 *Id.*

92 *Id.*

93 *See* Hoff-Patrinos, *supra* note 80, at 178.

94 For a general discussion the issues confronting bankruptcy courts in their application of § 1110, see generally Giddens & Schick, *supra* note 7 (providing a pre-amendment view); and Marvin E. Jacob & Michele J. Meises, *The 1994 Amendments to*

actions in the airline industry.[95] Braniff, Pan Am, and Continental Airlines all used sale-leaseback agreements to generate capital before filing Chapter 11 petitions in the late 1980s and early 1990s.[96] All three airlines brought actions in the bankruptcy court seeking a declaratory judgment that the sale-leaseback agreements were not subject to § 1110.[97] The airlines argued that § 1110 only applied to acquisition agreements whereby the airline took possession of new aircraft.[98] The airlines based their argument on what they perceived as the underlying legislative purpose of § 1110, to strengthen the credit power of airlines so they could engage in fleet modernization.[99] Fleet modernization necessarily entails the acquisition of new aircraft. Furthermore, § 1110 specifically protected holders "of a secured party with a purchase-money equipment security."[100] The use of the word "purchase," the airlines argued, implied that Congress only intended § 1110 to apply to acquisition transactions.

Although Continental experienced a fleeting success with this argument in the bankruptcy court,[101] courts generally rejected these arguments. The *Continental* court agreed that one goal of § 1110 was to facilitate the purchase of new aircraft, but stated that "we do not believe the legislative history clearly demonstrates that this was Congress' sole aim."[102] The bankruptcy court in *Braniff* again found no support for the theory that new acquisitions were "a necessary prerequisite for, the protections [of § 1110]."[103] According to the *Braniff* court, Congress had not designed § 1110 for the protection of the airlines, but

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Section 1110 of the Bankruptcy Code: The Issues Left Up in the Air, 5 J. BANKR. L. & PRAC. 349 (1996) (providing post-amendment opinion).

95 *See supra* note 6.

96 Braniff had filed a second Chapter 11 petition on September 28, 1989. *See In re* Braniff, 110 B.R. 980 (Bankr. M.D. Fla. 1990). Continental filed its second petition in ten years on December 3, 1990. *See In re* Cont'l Airlines, Inc., 932 F.2d 282 (3d Cir. 1991). Pan Am filed its petition on January 8, 1991. *See In re* Pan Am Corp., 125 B.R. 372 (Bankr. S.D.N.Y. 1991).

97 *See Cont'l Airlines*, 932 F.2d at 283–84; *Pan Am*, 125 B.R. at 372–73; *Braniff*, 110 B.R. at 981.

98 *See Cont'l Airlines*, 932 F.2d at 285; *Pan Am*, 125 B.R. at 376; *Braniff*, 110 B.R. at 981.

99 *See Cont'l Airlines*, 932 F.2d at 285; *Pan Am*, 125 B.R. at 376; *Braniff*, 110 B.R. at 982.

100 11 U.S.C. § 1110(d)(2) (1994) (current version at 11 U.S.C. § 1110 (2000)).

101 *In re* Cont'l Airlines, 123 B.R. 713 (Bankr. D. Del. 1991). The bankruptcy court accepted Continental's argument but was reversed by the district court. *See In re* Cont'l Airlines, 125 B.R. 399 (D. Del. 1991). The Third Circuit subsequently affirmed the district court's decision. *Cont'l Airlines*, 932 F.2d at 282.

102 *Cont'l Airlines*, 932 F.2d at 291.

103 *Braniff*, 110 B.R. at 983.

rather to protect the rights and interests of the equipment financiers.[104]

Airlines also argued that § 1110 only applied to true leases, and did not apply to disguised security interests.[105] The district court in *Pan Am* adopted this theory.[106] Congress, the court reasoned, was well aware of the distinction made in the Uniform Commercial Code between true leases and disguised security agreements, and still used language that protected only leases.[107] According to the district court, § 1110 only protected true leases.[108] This statement, however, appears to be mere dicta, because, as the court concedes, the issue was not properly before the court and had no impact on the resolution of the matter.[109]

Congress addressed both these issues in the 1994 amendments to § 1110.[110] The phrase "purchase-money equipment security interest" was abandoned. The revised § 1110 now protected "the right[s] of a secured party with a security interest in equipment . . . or of a lessor."[111] Any lease or security interest in aircraft now falls under the umbrella of § 1110. Characterization of an agreement as a true lease or a disguised sale no longer matters, because both transactions are covered by the revised statute. The question of whether aircraft were acquired by the airline in the agreement giving rise to the security interest is likewise irrelevant.[112]

C. *Section 1129 "Cramdown" and § 1110*

In the reorganization plan, a debtor may attempt to modify the terms of pre-petition debt over the objection of a creditor.[113] This is

104 *Id.* at 984.

105 Jacob & Meises, *supra* note 94, at 357 (discussing the contention and its implications).

106 *See In re* Pan Am Corp., 125 B.R. 372, 380 (Bankr. S.D.N.Y. 1991).

107 *Id.*

108 *Id.* The Third Circuit in *Continental* came to a similar conclusion. *See In re Cont'l Airlines*, 932 F.2d 282, 285 (3d Cir. 1991) ("We hold that § 1110 covers only true leases . . . .").

109 *Pan Am*, 125 B.R. at 380.

110 Act of Oct. 22, 1994, Pub. L. No. 103-394, 108 Stat. 4106 (codified as amended at 11 U.S.C. § 1110 (2000)).

111 *Id.*

112 Hoff-Patrinos, *supra* note 80, at 171 ("The major effect of the 1994 Amendments is to remove any controversy over whether a particular agreement . . . is a lease, a conditional sale or a sale subject to a security interest. Because all three types of agreements are now covered by § 1110 . . . there should be little reason to raise the issue.").

113 11 U.S.C. § 1129(b)(2).

known as the "cramdown" provision. In their second Chapter 11 reorganization, Continental Airlines entered into § 1110 agreements with several of its creditors in order to retain possession of its aircraft. Subsequently, Continental submitted a reorganization plan that proposed to modify the terms of the pre-petition agreements.[114] The creditors objected, arguing that the § 1110 agreements should be considered post-petition agreements and, therefore, not subject to the cramdown provisions of § 1129.[115] The bankruptcy court never resolved the issue because the creditors eventually accepted the proposed plan.[116]

The 1994 amendments attempt to resolve this issue by providing that the financier's right to take possession of the collateral is not affected by § 1129.[117] The legislative history of the amendments states that the new language intended to make clear "that the rights of a § 1110 or § 1168 creditor would not be affected by § 1129 'cramdown'."[118] Although at least one commentator found this language ambiguous and predicted extensive litigation over its meaning,[119] the intent of Congress to protect financiers seems apparent, and this change has sparked little controversy in the courts.

III. Western Pacific Airlines and the 2000 Amendments to § 1110

On October 6, 1997, Western Pacific Airlines (WestPac) filed a voluntary Chapter 11 petition.[120] At the time of filing, WestPac operated eighteen leased Boeing 737s, under agreements with various lessors. On December 3, 1997, the fifty-eighth day after the filing of the petition, the bankruptcy court approved WestPac's financing plan, which allowed the airline to access $23 million in Debtor-in-Possession (DIP) loans.[121] On December 4, 1997, the fifty-ninth day after the filing, WestPac used most of the DIP loan proceeds to cure its post-petition defaults on the aircraft leases, and continued to retain possession of the aircraft.[122] In late January, 1998, however, WestPac suffered more financial setbacks, and was unable to meet several

114 *See* Hoff-Patrinos, *supra* note 80, at 180.

115 *Id.*

116 *Id.* at 179–80.

117 11 U.S.C. § 1110.

118 H.R. Rep. No. 103-835, at 44 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3353.

119 *See* Hoff-Patrinos, *supra* note 80, at 180.

120 *See In re* W. Pac. Airlines, Inc., 219 B.R. 298, 300 (Bankr. D. Colo. 1998).

121 *Id.*

122 *Id.*

scheduled lease payments in early February, 1998.[123] Subsequently, the lessors sought immediate repossession of the aircraft pursuant to § 1110.[124]

WestPac agreed to surrender six of the 737s, but sought to cure their defaults and retain the remaining twelve aircraft.[125] WestPac argued that the language of § 1110 granted the airline a thirty-day period to cure each default of the lease, even after the sixty-day grace period had expired.[126] The aircraft lessors, on the other hand, argued "that upon expiration of the initial 60-day period they have—at the instant the Debtor airline failed to make a post-petition lease or maintenance reserve payment—an unqualified, immediate and complete right to retake possession and control."[127]

The bankruptcy court agreed with the lessors' interpretation of § 1110.[128] The court recognized that the purpose of the section was to protect "the financiers of extremely expensive, highly-maintenance intensive, mobile equipment."[129] The court recognized that § 1110 granted a thirty-day time limit to cure default, but this "only applies to lease payments that come due during the first 60 days of the case."[130] Lease payments due after the sixty-day grace period must be made in accordance with the original pre-petition lease.[131] To adopt the airline's approach and grant a thirty-day period to cure after each and every default, the court concluded, would undermine the purpose of § 1110.[132]

The district court, however, reversed the bankruptcy court's decision.[133] In its opinion, the bankruptcy court misread the purpose of the protections granted in § 1110. Section 1110 was designed to serve a very limited function and protect a specific and narrow class of cred-

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123 *Id.* at 301. For reasons not clear from the opinion, in the last week of January WestPac's DIP creditors informed the airline that further financing would only be available if the DIP lenders approved each expenditure on an "item-by-item, day-by-day basis." *Id.*

124 *Id.*

125 *W. Pac Airlines*, 219 B.R. at 301 n.4; *see also* Kilborn, *supra* note 5, at 46–47.

126 *W. Pac.* Airlines, 219 B.R. at 302.

127 *Id.* at 300.

128 *Id.* at 301.

129 *Id.* (relying on *In re* Air Vermont, Inc., 761 F.2d 130, 132–33 (2d Cir. 1985); Seidle v. GATX Leasing Corp., 778 F.2d 659, 664 (11th Cir. 1985)).

130 *Id.* at 303.

131 *Id.*

132 *Id.*

133 *Id.* at 305.

itors.[134] According to the district court, § 1110 gave aircraft lessors the power to take possession of aircraft if, and only if, the airline fails to cure within the initial sixty-day grace period.[135] Once the airline cured its defaults in this initial time-period and agreed to perform all its future obligations under the pre-petition lease, § 1110 no longer applies, and "the lessor's potential automatic right to a lifting of the automatic stay terminates and it assumes the status of any other lessor/creditor."[136] Furthermore, the district court relied on principles of equity, citing the potential harm to DIP creditors if § 1110 allowed the aircraft lessors to take possession of the airplanes.[137]

The district court in *Western Pacific* seems to have misread the purpose of § 1110. Section 1110 clearly intended for an airline in Chapter 11 to decide early in the proceedings either to surrender the aircraft or accept the terms of the pre-petition agreement. There is a strong implication, therefore, that the terms of the pre-petition agreement will govern the relationship between creditor and airline for the remainder of the Chapter 11 proceedings. In the district court's interpretation of § 1110, an airline could cure its defaults, accept the terms of the pre-petition lease fifty-nine days after filing the petition, and then default two days later, and thereby avoid any § 1110 ramifications, and the lessor would simply be another secured creditor in bankruptcy. It seems to make little, if any, sense for the Code to require the acceptance of the pre-petition agreement if the airline can later breach the agreement without penalty.

Congress, as well it seems, thought that Judge Kane of the Colorado District Court missed the point. In 2000, Congress amended § 1110 to clarify this issue, and adopted the interpretation first employed by the bankruptcy court.[138] Under the new, and current, § 1110, pre-petition defaults must be cured by the end of the initial sixty-day period.[139] Defaults that occur between the filing of the petition and the end of the sixty-day period must be cured by the later of thirty days from the date of default or the expiration of the sixty-day

134 *Id.* at 310. Furthermore, the court relied on the sparse legislative history of § 1110 to conclude that the section must be narrowly construed. *Id.*

135 *Id.*

136 *Id.*

137 *Id.* at 308. The lessors' appeal to the Tenth Circuit was dismissed as moot, because the creditors failed to obtain a stay of the district court's order. *See In re* W. Pac. Airlines, Inc., 181 F.3d 1191 (10th Cir. 1999).

138 Act of Apr. 5, 2000, Pub. L. No. 106-181, tit. VII, § 744(b), 114 Stat. 177. See Appendix C of this Note for the current version of § 1110.

139 11 U.S.C. § 1110(a)(B)(i).

grace period.[140] Finally, defaults that occur after the expiration of the sixty-day grace period must be cured in accordance with the pre-petition lease or security arrangement, if such agreements allow for cure.[141] If the current version of § 1110 had been in effect during *Western Pacific*, the aircraft lessors would certainly have had the right to take possession of WestPac's aircraft.

CONCLUSION

Section 1110 of the federal Bankruptcy Code forces debtor airlines to make decisions very early in their reorganization efforts regarding their most important asset—their aircraft. Congress believed that the great expense of transportation equipment combined with the relative financial instability of the transportation industry justified greater protection for secured creditors and lessors of aircraft. Section 1110 is only the latest chapter in a long history of protecting the investments of transportation equipment financiers. Originally, this protection was found in section 77(g) of the old Bankruptcy Act and is now codified in both § 1110 and § 1168 of the current Bankruptcy Code. If the current wave of airline bankruptcies continues, whether or not to enter into § 1110 agreements will be a time-consuming decision that must be made in the face of a relatively short deadline.[142]

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140 *Id.* § 1110(a)(B)(ii).

141 *Id.* § 1110(a)(B)(iii). To default after sixty days means, of course, that the debtor had agreed to adhere to the original terms of the agreement during the sixty-day period.

142 The recent experiences of National Airlines and US Airways in Chapter 11 bear this out. In the first year of its reorganization, National Airlines and its aircraft creditors filed dozens of stipulations, on an almost monthly basis, requesting the extension of § 1110's sixty-day period. *See* Docket Sheet, *In re* Nat'l Airlines, Inc., No. 00-19258 (Bankr. D. Nev. filed Feb. 2, 2001). Typically, these stipulations agreed that the airline would continue to make the payments due under the original lease agreement, and the creditor would not seek to exercise its § 1110 rights although National had not cured its pre-petition arrearages. The creditor did not waive its § 1110 rights, it merely granted the debtor an extended time to fulfill its responsibilities under § 1110. By entering into these stipulations over and over again, National was able to continue to operate its aircraft without curing its pre-petition default for nearly a year until the proposed plan of reorganization was submitted. For an example of this type of stipulation, see Agreed Order Granting Stipulation by National Airlines, Inc. and Ansett Worldwide Aviation USA Regarding Extension of the 11 U.S.C. 1110 Period, *In re Nat'l Airlines*, Case No. 00-19258.

As of this writing, US Airways has yet to enter into any § 1110 agreements with the lessors of its aircraft. The airline has filed a motion, however, seeking the bankruptcy court's permission to enter into § 1110 agreements or stipulations extending the timeframe of § 1110 with its creditors without prior court approval. *See* Motion for Order Authorizing Entry Into 1110 Agreements and Stipulations Extending Time

In the twenty-five year history of the Bankruptcy Code, Congress has amended § 1110 twice, in 1994 and 2000. Both times have been in response to court decisions attempting to interpret the section without the aid of precedent or legislative history. That courts have occasionally misinterpreted or misapplied Congress's intentions may be an unavoidable result when a seldom-used provision of the Bankruptcy Code is relied upon by parties.

Although some members of Congress expressed reservations as to the necessity of §§ 1110 and 1168 when the new Bankruptcy Code was introduced in 1977,[143] transportation creditors clearly regard these sections to be an almost unqualified success. The international aviation community has taken note of the success of § 1110 in making capital available to airlines. For instance, the proposed International Institute for the Unification of Private Law Convention on International Interests in Mobile Equipment contains a provision inspired by § 1110.[144] Industry analysts expect § 1110 and its international counterparts to continue to play a major role in aircraft financing as the increased demand for air travel requires airlines to engage in massive fleet overhauls over the next several decades.[145]

To Comply with Section 1110 of the Bankruptcy Code and To File Aircraft Agreement Modifications Under Seal, *In re* US Airways Group, Inc., No. 02-83984 (Bankr. E.D. Va., filed Sept. 6, 2002). In its motion, US Airways indicated that the sheer size of its leased fleet made the decisions as to what leases to assume or reject very difficult. *Id.* ¶16. The airline was, according to its motion, engaged in extensive renegotiations of its leases with the aircraft owners, and the success of those renegotiations would have a serious impact on the airline's decision of what aircraft to fly. *See id.* The US Airways motion provides a small glimpse into the extensive negotiations that § 1110 requires happen early in an airline's Chapter 11 proceeding.

143 *See supra* note 66 and accompanying text.

144 *See* Anthony Saunders et al., *The Economic Implications of International Secured Transactions Law Reform: A Case Study*, 20 U. PA. J. INT'L ECON. L. 309, 327 (1999); Jeffery Wool, *The Case for a Commercial Orientation to the Proposed UNIDROIT Convention as Applied to Aircraft Equipment*, 31 LAW & POL'Y INT'L BUS. 79, 92 (1999) (noting that international credit rating agencies grant a rating enhancement of two notches to secured debt protected by § 1110).

145 Saunders et al., *supra* note 144, at 328 (noting that industry analysts expect that airlines outside of North America will require an estimated $1 trillion in aircraft financing over the next twenty years).

APPENDICES

APPENDIX A

Original Version of 11 U.S.C. § 1110 (1978)

(a) The right of a secured party with a purchase-money equipment security interest in, or of a lessor or conditional vendor of, whether as trustee or otherwise, aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in § 101 of the Federal Aviation Act of 1958 (49 U.S.C. 1301), or vessels of the United States, as defined in subsection B(4) of the Ship Mortgage Act, 1920 (46 U.S.C. 911(4)), that are subject to a purchase-money equipment security interest granted by, leased to, or conditionally sold to, a debtor that is an air carrier operating under a certificate of convenience and necessity issued by the Civil Aeronautics Board, or a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission, as the case may be, to take possession of such equipment in compliance with the provisions of a purchase-money equipment security agreement, lease, or conditional sale contract, as the case may be, is not affected by section 362 or 363 of this title or by any power of the court to enjoin such taking of possession, unless—
  (1) before 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after such date under such security agreement, lease, or conditional sale contract, as the case may be; and
  (2) any default, other than a default of a kind specified in section 365(b)(2) of this title, under such security agreement, lease, or conditional sale contract, as the case may be—
    (A) that occurred before such date is cured before the expiration of such 60-day period; and
    (B) that occurs after such date is cured before the later of—
      (i) 30 days after the date of such default; and
      (ii) the expiration of such 60-day period.

(b) The trustee and the secured party, lessor, or conditional vendor, as the case may be, whose right to take possession is protected under subsection (a) of this section may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1) of this section.[146]

146 Bankruptcy Code, ch. 11, § 1110, 92 Stat. 2629 (1978) (current version at 11 U.S.C. § 1110 (2000)).

Appendix B

Post-1994 Amendments Version of 11 U.S.C. § 1110

(a)(1) The right of a secured party with a security interest in equipment described in paragraph (2) or of a lessor or conditional vendor of such equipment to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract is not affected by section 362, 363, or 1129 or by any power of the court to enjoin the taking of possession unless—

(A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the court's approval, agrees to perform all obligations of the debtor that become due on or after the date of the order under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of the order is cured before the expiration of such 60-day period; and

(ii) that occurs after the date of the order is cured before the later of—

(I) the date that is 30 days after the date of the default; or

(II) the expiration of such 60-day period.

(2) Equipment is described in this paragraph if it is—

(A) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a citizen of the United States (as defined in section 40102 of title 49) holding an air carrier operating certificate issued by the Secretary of Transportation pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pounds or more of cargo; or

(B) a documented vessel (as defined in section 30101(1) of title 46) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that holds a certificate of public convenience and necessity or permit issued by the Interstate Commerce Commission.

(3) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the court's approval, to extend the 60-day period specified in subsection (a)(1).

(c) With respect to equipment first placed in service on or prior to the date of enactment of this subsection, for purposes of this section—

(1) the term "lease" includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term "security interest" means a purchase-money equipment security interest.[147]

147 Bankruptcy Code, ch. 11, § 1110, 92 Stat. 2629 (1978) (as amended by Pub. L. No. 103-294, tit. II, § 201(a), 108 Stat. 4119; and Pub. L. No. 103-272, § 5(c), 108 Stat. 1373).

APPENDIX C

Current Version of 11 U.S.C. § 1110

(a)(1) Except as provided in paragraph (2) and subject to subsection (b), the right of a secured party with a security interest in equipment described in paragraph (3), or of a lessor or conditional vendor of such equipment, to take possession of such equipment in compliance with a security agreement, lease, or conditional sale contract, and to enforce any of its other rights or remedies, under such security agreement, lease, or conditional sale contract, to sell, lease, or otherwise retain or dispose of such equipment, is not limited or otherwise affected by any other provision of this title or by any power of the court.

(2) The right to take possession and to enforce the other rights and remedies described in paragraph (1) shall be subject to section 362 if—

(A) before the date that is 60 days after the date of the order for relief under this chapter, the trustee, subject to the approval of the court, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract; and

(B) any default, other than a default of a kind specified in section 365(b)(2), under such security agreement, lease, or conditional sale contract—

(i) that occurs before the date of the order is cured before the expiration of such 60-day period;

(ii) that occurs after the date of the order and before the expiration of such 60-day period is cured before the later of—

(I) the date that is 30 days after the date of the default; or

(II) the expiration of such 60-day period; and

(iii) that occurs on or after the expiration of such 60-day period is cured in compliance with the terms of such security agreement, lease, or conditional sale contract, if a cure is permitted under that agreement, lease, or contract.

(3) The equipment described in this paragraph—

(A) is—

(i) an aircraft, aircraft engine, propeller, appliance, or spare part (as defined in section 40102 of title 49) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that, at the time such transaction is entered into, holds an air carrier operating certificate issued pursuant to chapter 447 of title 49 for aircraft capable of carrying 10 or more individuals or 6,000 pound or more of cargo; of

(ii) a documented vessel (as defined in section 30101(1) of title 46) that is subject to a security interest granted by, leased to, or conditionally sold to a debtor that is a water carrier that, at the time such transaction is entered into, holds a certificate of public convenience and necessity or permit issued by the Department of Transportation; and

(B) includes all records and documents relating to such equipment that are required, under the terms of the security agreement, lease, or conditional sale contract, to be surrendered or returned by the debtor in connection with the surrender or return of such equipment.

(4) Paragraph (1) applies to a secured party, lessor, or conditional vendor acting in its own behalf or acting as trustee or otherwise in behalf of another party.

(b) The trustee and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the approval of the court, to extend the 60-day period specified in subsection (a)(1).

(c)(1) In any case under this chapter, the trustee shall immediately surrender and return to a secured party, lessor, or conditional vendor, described in subsection (a)(1), equipment described in subsection (a)(3), if at any time after the date of the order for relief under this chapter such secured party, lessor, or conditional vendor is entitled pursuant to subsection (a)(1) to take possession of such equipment and makes a written demand for such possession to the trustee.

(2) At such time as the trustee is required under paragraph (1) to surrender and return equipment described in subsection (a)(3), any lease of such equipment, and any security agreement or conditional sale contract relating to such equipment, if such security agreement or conditional sale contract is an executory contract, shall be deemed rejected.

(d) With respect to equipment first placed in service on or before October 22, 1994, for purposes of this section—

(1) the term "lease" includes any written agreement with respect to which the lessor and the debtor, as lessee, have expressed in the agreement or in a substantially contemporaneous writing

that the agreement is to be treated as a lease for Federal income tax purposes; and

(2) the term "security interest" means a purchase-money equipment security interest.[148]

148 11 U.S.C. § 1110 (2000).