

AIRCRAFT FINANCINGS - § 1110 PROTECTION

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In order to support private sector financings of the airline industry, Congress has provided, for half a century, special initiatives to financiers of aircraft in the case of bankruptcy. Bankruptcy Code § 1110 provides that the right of a qualifying financier (such as a true lessor) to take possession of the aircraft is not affected by the provisions of the automatic stay, the debtor's right to use property post-petition, a reorganization plan that "crams down" creditors, or any other power of the court to enjoin the taking of possession unless:

(a) within 60 days after bankruptcy, the airline agrees, with court approval, to perform all obligations under the financing that becomes due after bankruptcy; *and*

(b) any default (other than *ipso facto* defaults and penalty rates) (i) that occurs before bankruptcy is cured within 60 days of bankruptcy and (ii) that occurs after bankruptcy is cured within the later of 60 days of bankruptcy or 30 days after the default.¹

Thus, in practical effect, if the airline wishes to exercise its option under § 1110 to keep the aircraft, (i) a default that occurs pre-petition or within 30 days post-petition, must be cured within 60 days after bankruptcy and (ii) a default that occurs after 30 days post-petition must be cured within 30 days after the date of the default. If the cure is not timely, within the structure set forth in § 1110, the financier may repossess the aircraft. The certainty provided by § 1110 is relied upon by financiers in the private credit markets and by the rating agencies in both the public and private markets.

A District Court in Colorado, in reversing a highly respected Bankruptcy Judge, has interpreted § 1110's repossession rules to apply only to defaults occurring within the first 60 days after bankruptcy. *Western Pacific Airlines, Inc. and South Management, Inc. v. GATX Capital et al. (In re Western Pacific Airlines, Inc.)*, Civ. Action No. 98-K-358, Bankr. Case No. 97-24701 SBB (D. Colo. Mar. 10, 1998). We believe the Colorado District Court decision is wrong for a number of reasons.

First, the *Westpac* District Court decision takes unqualified statutory language and adds an unexpressed qualifier to limit § 1110 to defaults that occur within 60 days of bankruptcy. In the *Pan Am* § 1110 litigation, which was litigated by this Firm on behalf of aircraft lessors, the

¹ Nothing in § 1110 precludes the financier from seeking earlier relief from the automatic stay in an appropriate case.

United States Court of Appeals for the Second Circuit held that it was improper to add limitations to the language of § 1110. *In re Pan American Corp.*, 929 F.2d 109 (2d Cir.), cert. denied 111 S.Ct. 2248 (1991).

Second, the *Westpac* District Court decision ignores, without ever citing, existing case law. For example, the Court of Appeals for the Eleventh Circuit has held that a § 1110 performance agreement “amounts to a post-petition agreement under which the trustee agrees to meet the obligations coming due under the existing executory contract or unexpired lease”; “the installments due under the § 1110 agreement constituted administrative expenses of the estate”; and financiers “are guaranteed payment by the terms of the agreement during the time the aircraft remains in the possession of the debtor.” *GATX Leasing Corp. v. Airlift Int'l, Inc. (In re Airlift Int'l, Inc.)*, 761 F.2d 1503, 1509-10 (11th Cir. 1985). These rulings are premised on the continuing applicability of § 1110 after the initial 60-day period post-bankruptcy. So is the decision of the District Court of Delaware holding that, even though an aircraft lease had been rejected by the airline, “a § 1110 agreement expires [only] when the leased goods are returned to the lessor.” *Interface Group-Nevada v. Trans World Airlines, Inc. (In re Trans World Airlines, Inc.)*, Civ. Action 94-593-LON, Slip Op. at 18 (D. Del. Feb. 12, 1997).

Third, the *Westpac* District Court decision defies Congressional intent. The purpose of § 1110 is to permit airlines to raise capital at attractive rates. House of Representatives Report No. 944, 85th Cong., 1st Sess., reprinted in 1957 U.S. Code Cong. & Admin. News 1926. This purpose would obviously be frustrated if § 1110 protection was available only for 60 days, as opposed to the life of the bankruptcy case.

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The *Westpac* District Court decision is currently subject to a motion for rehearing. We will keep our clients advised of developments. We are aware that the *Westpac* District Court decision has caused alarm and apprehension in pending financings. We have concluded that we can continue to render § 1110 opinions. We have further concluded that, based on the rationale discussed above, we are prepared to render a reasoned opinion that the *Westpac* District Court decision does not represent a correct statement of the law. If any questions arise, please feel free to contact either Martin Jacobson (455-7023), Steve Feder (455-7405), or Mike Sigal (455-7140).

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