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THOU CANST NOT FLY HIGH WITH BORROWED WINGS:¹
AIRLINE FINANCE AND BANKRUPTCY CODE
SECTION 1110

Jason J. Kilborn*

INTRODUCTION

Over the past twenty years, this country has witnessed an explosion of growth in the air transportation industry. In 1996, U.S. certificated air carriers logged nearly 435 billion passenger miles, a 113% increase over the 1980 level.² During this same period, usage of motorcycles, passenger cars and other two-axle, four-tire vehicles grew only 55%, while travel on various forms of public transit, such as buses and passenger railways, increased a mere 3.5%.³ The total number of aircraft operated by U.S. certificated air carriers burgeoned to 5961 in 1996—a 112% expansion of the 1980 fleet—while the number of registered motorcycles, passenger cars and other two-axle, four-tire vehicles increased only 30% over the same period.⁴ Yearly expenditures on aircraft acquisitions increased 61.5% between 1980 and 1996 to over four-and-a-half billion dollars.⁵

The sophisticated widebody jet airliners that spurred this air transportation revolution cost tens of millions of dollars, and the capital-intensive nature of the business obliges air carriers to finance their aircraft acquisitions through a variety of means, including secured borrowing and

¹ Thomas Fuller, *Gnomologia* (1732), reprinted in THE QUOTABLE LAWYER § 39.2 at 79 (David Shrager & Elizabeth Frost eds., 1986).

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² See Bureau of Transp. Statistics, U.S. DEPARTMENT OF TRANSPORTATION, NATIONAL TRANSPORTATION STATISTICS 1998, tbl.1-10, available only on the Internet at <<http://www.bts.gov/btsprod/nts/chp1/tbl1x10.html>>, visited Aug. 25, 1999. By comparison, total U.S. population grew only 17% between 1980 and 1996. See *id.* at tbl.2-10, <<http://www.bts.gov/btsprod/nts/chp2/tbl2x10.html>>, visited Aug. 25, 1999.

³ See *id.* at tbl.1-10. Between 1990 and 1996 alone, the percentage of for-hire transportation attributable to air carriers rose 21%, while the percentage attributable to all other forms of for-hire transportation either declined or remained relatively stable. See *id.* at tbl.2-5, <<http://www.bts.gov/btsprod/nts/chp2/tbl2x5.html>>, visited Aug. 25, 1999.

⁴ See *id.* at tbl.1-25, <<http://www.bts.gov/btsprod/nts/chp1/tbl1x25.html>>, visited Aug. 25, 1999.

⁵ See *id.* at app. A, *General Aviation Profile*, <<http://www.bts.gov/btsprod/nts/apxa/ga98.html>>, visited Aug. 25, 1999. One of the returns on this investment was a 249% increase in the air transportation industry's contribution to the U.S. Gross Domestic Product between 1980 and 1996. See *id.* at tbl.2-1, <<http://www.bts.gov/btsprod/nts/chp2/tbl2x1.html>>, visited Aug. 25, 1999.

leasing.⁶ Given the magnitude of these transactions, the financiers of aircraft acquisitions seek—indeed, sometimes demand—maximum protection for their investment, particularly protection from the worst-case scenario of an air carrier bankruptcy.⁷

Since 1957, aircraft financiers have sought refuge in a special protective provision Congress grafted onto the rules governing business bankruptcy reorganizations.⁸ As originally enacted, the law effectively suspended the rules of bankruptcy that inhibited the rights of aircraft financiers to remove aircraft from an airline's bankruptcy estate if the airline defaulted on the related financing agreement.⁹ In the late 1970s, Congress revised the bankruptcy law and revisited this extraordinary provision. It revised and combined it with another similar provision to form a new section 1110 of the Bankruptcy Code.¹⁰

Not long after the enactment of section 1110, heated controversy erupted regarding the scope of its protection. During the next two decades, aircraft financiers fought to maintain their privileged status, and airline debtors desperately clutched the core assets of their businesses.¹¹ One par-

⁶ See Air Transport Association of America, AIRLINE HANDBOOK ch.4 (1998), available at <<http://www.air-transport.org/public/Handbook/ch4.htm>>, visited Aug. 25, 1999, (explaining that “[m]ost [airline] equipment is financed through loans or the issuance of stock, rather than purchased outright” and that “[i]ncreasingly, airlines are leasing equipment, including equipment they owned previously but sold to someone else and leased back”). Nearly half of the major airlines' aircraft are subject to various leasing arrangements. Telephone Interview with Edmund Greenslet, founder, Airline Capital Associates Inc. (May 17, 1999). Sophisticated structured financing techniques have allowed airlines to use their aircraft as collateral to secure billions of dollars of debt offerings. See *infra* notes 96-108 and accompanying text.

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 [extraordinary protection from bankruptcy] as the *sine qua non* of the financing; creditors of more financially stable carriers reportedly in some instances will do without [such special] protection, but only on less favorable terms to the borrower.”).

⁸ The Bankruptcy Code of 1978, which appears in the United States Code at 11 U.S.C. §§ 101-1330 (1994), governs the vast majority of business reorganization proceedings. All references hereinafter to “sections” or “the Code” refer to the Bankruptcy Code of 1978, as amended, unless otherwise indicated. The original 1957 provision relating to aircraft financiers arose under the old Bankruptcy Act of 1898, see *infra* note 48 and accompanying text.

⁹ See H.R. REP. NO. 95-595, at 238-39 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6198.

¹⁰ The other provision, enacted in 1968, protected financiers of certain water transportation equipment. See *infra* note 49; H.R. REP. NO. 95-595, at 238-39, reprinted in 1978 U.S.C.C.A.N. at 6198. Along with section 1110, Congress included a new section 1168, which accorded analogous protections to financiers of rolling stock equipment and accessories. The predecessor to this section was enacted in 1935. See H.R. REP. NO. 95-595, at 238, reprinted in 1978 U.S.C.C.A.N. at 6198. While this Article focuses on section 1110, the same principles apply equally to both sections 1110 and 1168.

¹¹ Section 1110 has figured most prominently in a number of airline bankruptcy proceedings, see, e.g., *In re Pan Am Corp.*, 929 F.2d 109 (2d Cir. 1991); *In re Continental Airlines, Inc.*, 932 F.2d 282 (3d Cir. 1991); *In re Air Vermont, Inc.*, 761 F.2d 130 (2d Cir. 1985); *Seidle v. GATX Leasing Corp.*, 778 F.2d 659 (11th Cir. 1985); *In re Airlift Int'l, Inc.*, 761 F.2d 1503 (11th Cir. 1985); *In re Braniff, Inc.*, 110 B.R. 980 (Bankr. M.D. Fla. 1990), and its application has the greatest effect on the availability of financing in the airline industry. Telephone Interview with Martine Nowicki, Vice President and Senior Credit Officer, Moody's Investors Service, Inc. (May 5, 1999) [hereinafter

ticularly active struggle over the give-and-take of section 1110 occurred recently in the District of Colorado in the reorganization of Western Pacific Airlines, Inc. ("WestPac").¹² In that case, Senior District Judge Kane rebuffed an attempt by a group of aircraft financiers to retrieve the aircraft they leased to WestPac. Judge Kane construed section 1110 to afford only a narrow advantage to transportation equipment financiers, and, in so doing, he soundly rejected the broader construction of section 1110 upon which the aircraft finance industry had relied for decades.

This Article reexamines the language and history of section 1110 and concludes that Judge Kane correctly interpreted Congress's will to limit the special privilege that section 1110 bestows upon transportation financiers. It observes, however, that the wider advantages made available to airlines as a result of the industry's understanding of section 1110 suggest that it might be preferable to reintroduce stronger and more reliable protection for financiers. Part I describes the battle over section 1110 in WestPac's bankruptcy proceedings, providing a context for the discussion to follow. Part II begins, as must any attempt at construing a statute, with the "plain language" of section 1110. It concludes that the ambiguous statutory language is consistent with a number of reasonable constructions and offers little guidance on the issue addressed by Judge Kane. Part III turns to the legislative history of section 1110 and argues that Judge Kane's narrow construction of section 1110 is most consistent with Congress's remarks on the application of the new section 1110. This Part reveals that Congress sought to retract the right of transportation financiers to destroy single-handedly a transportation debtors' reorganization, so long as the debtor fulfilled certain minimal requirements. If these requirements were met, Congress intended to relegate transportation financiers to the protections provided by other sections of the Bankruptcy Code, which more carefully balance the rights of creditors vis-à-vis each other and the debtor. Part IV reexamines Congress's policy choice in light of the substantial, broad-based advantages that airlines have enjoyed because financiers and investors assumed that section 1110 shielded their investments. In light of recent experience, the balance of burdens appears to favor encouraging financing of the entire airline industry rather than avoiding the disruption of individual bankruptcy proceedings. The current legislative initiative to revise and strengthen section 1110 accordingly should restore the proper balance between airline debtors, their creditors and the airline industry as a whole.

Nowicki, Telephone Interview]; see also Sandor E. Schick, *When Airlines Crash: Section 1110 Revisited*, 48 BUS. LAW. 277, 277 (1992). Accordingly, this Article focuses on section 1110 as it applies to aircraft financing, with the understanding that the discussion applies in like manner to disputes between water and rail carriers and their financiers under sections 1110 and 1168.

¹² See *In re Western Pac. Airlines, Inc.*, 219 B.R. 298 (Bankr. D. Colo.), *rev'd*, 219 B.R. 305 (D. Colo.), *reh'g denied*, 221 B.R. 1 (D. Colo. 1998), *appeal dismissed*, 181 F.3d 1191(10th Cir. 1999).

I. THE WESTPAC DISPUTE

WestPac filed a petition for relief under Chapter 11 of the Bankruptcy Code on October 6, 1997.¹³ At that time, it leased eighteen Boeing 737 aircraft from various lessors.¹⁴ On December 3, 1997, the U.S. Bankruptcy Court for the District of Colorado approved WestPac's arrangement to receive up to \$30 million in debtor-in-possession¹⁵ ("DIP") financing. On that same day, WestPac verbally expressed its intention to cure existing defaults on its aircraft leases and to continue to make payments on the leases on a current basis in accordance with section 1110.¹⁶ WestPac subsequently used a large part of the \$23 million ultimately disbursed to cure defaults under virtually all of its aircraft leases.¹⁷ In addition, on January 5, 1998, the court approved a written Section 1110 Stipulation between WestPac and General Electric Capital Corporation ("GECC"), one of the lessors. The stipulation provided that GECC could retake possession of its aircraft immediately if WestPac failed to comply with the terms of the stipulation.¹⁸

WestPac was compelled to cure its lease defaults, promise to make continuing payments on the leases, and enter into the stipulation with GECC because of the special rights provided to aircraft lessors by section 1110. Generally, when a debtor files a bankruptcy petition, the debtor is entitled to broad-ranging protections automatically. One of the most important protections is an "automatic stay" of virtually any action that might have any direct or indirect effect on property within the debtor's estate. Under section 362, creditors are enjoined from, among other things, taking any action to exercise control over property of the debtor's estate, including repossessing property in which the debtor holds a leasehold interest.¹⁹

¹³ See *In re Western Pac. Airlines, Inc.*, 219 B.R. 298, 300 (Bankr. D. Colo. 1998).

¹⁴ See *id.* at 299 n.1 for a list of the lessors.

¹⁵ Unlike liquidation proceedings under Chapter 7 of the Bankruptcy Code, in which the court always appoints a trustee to administer the bankrupt debtor's estate, see 11 U.S.C. §§ 701-704 (1994), in most Chapter 11 reorganization proceedings, the bankrupt entity retains control of its operations throughout the life of the case. The "debtor in possession," as the entity is then known, exercises the powers of the trustee. See 11 U.S.C. § 1107 (1994); but see 11 U.S.C. § 1104 (1994) (providing for the appointment of a Chapter 11 trustee under certain extreme circumstances). For this reason, this Article discusses actions taken by "the debtor" in administering the Chapter 11 estate as a shorthand reference to any action taken by either the appointed trustee or the debtor in possession, as the case may be.

¹⁶ See *Western Pac.*, 219 B.R. at 300.

¹⁷ In return for this high-risk financing, WestPac was forced to grant the DIP lenders a first priority senior security interest in and lien upon any proceeds from any disposition of WestPac's leasehold interest in the aircraft, including from any assumption and assignment of the aircraft leases. See *id.*; *In re Western Pac. Airlines, Inc.*, 223 B.R. 567, 569-70 (Bankr. D. Colo. 1997).

¹⁸ See *Western Pac.*, 219 B.R. at 300 n.3.

¹⁹ See 11 U.S.C. § 362(a) (1994). See also 11 U.S.C. § 541(a) (1994) (defining "property of the estate").

Notwithstanding the statutory injunction in section 362²⁰ or the power of the court to enjoin repossession, section 1110 expressly empowers financiers of certain transportation equipment²¹ to remove the equipment from the debtor's estate in accordance with the lease, security agreement or conditional sale contract governing the equipment, unless the debtor undertakes certain obligations going forward. Section 1110(a) provides as follows:

- (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.

Thus, to avoid foreclosure on its aircraft, the debtor has only sixty days to enter into a "section 1110 agreement" in which it agrees to continue to perform its obligations under the related financing agreement. Furthermore, the debtor has only a sixty-to-ninety-day grace period²² after

²⁰ Section 1110 also suspends the operation of section 363, which allows the debtor to use, sell or lease property of the estate under certain conditions, *see infra* Part III.A, and section 1129, which sets out the conditions for confirmation of a plan of reorganization and, under certain circumstances, allows a debtor to "cram down" a plan on nonconsenting creditors despite their opposition, *see infra* note 77.

²¹ Section 1110 applies to aircraft, aircraft engines and propellers, and certain other aircraft parts held by specific certified U.S. air carriers, as well as to "documented vessels" held by specific certified water carriers. *See* 11 U.S.C. § 1110(a)(2) (1994).

²² The financier may agree to extend the 60-day period in section 1110(a)(1)(A). *See* 11 U.S.C. § 1110(b) (1994). However, under all but the most sluggish economic conditions, it seems unlikely that a financier would forego voluntarily its right to retake the equipment and preserve the full benefit of leasing or selling it under similar or superior terms to another party. Although the debtor must agree to make current payments under section 1110(a)(1)(A) before the 60th day, the time limit for curing post-petition defaults under section 1110(a)(1)(B) is subject to substantial dispute. That uncertainty is ir-

the entry of an order for relief at the outset of its bankruptcy case²³ to cure its pre- and post-petition defaults²⁴ under the financing agreement. Given the significant value of transportation equipment to a carrier's estate—either in operating the carrier's business or in producing proceeds from assignment of the carrier's rights under an unexpired lease—debtors have a powerful incentive to fulfill these conditions.

On December 4, 1997, the 59th day after WestPac filed its bankruptcy petition, WestPac responded to this powerful incentive by curing its post-petition defaults, and it continued to use the leased aircraft in the operation of its business.²⁵ WestPac maintained current lease payments until its sudden and unexpected collapse at the end of January 1998.²⁶ Left without a ready source of funding, WestPac was unable to meet several lease payments that came due in the week preceding February 4, 1998, and the lessors sought to enforce their right to immediate repossession of the aircraft pursuant to the aircraft leases and section 1110(a).²⁷

WestPac was prepared to surrender six of the aircraft and reject the underlying leases, but it fought to retain the right to assume and assign the leases on the remaining twelve.²⁸ It argued that section 1110(a)(1)(B)(ii)(I) allowed it to forestall repossession by curing any lease default within thirty days, regardless of how long after the date of the order for relief the default occurred. The lessors rejoined that section 1110(a) gave them an unconditional and immediate right to retrieve the aircraft if WestPac failed to fulfill its verbal and written promises to remain current on its lease obliga-

relevant to the analysis advanced by this Article. For the sake of brevity, this Article will refer periodically to the initial cure period as a 60-to-90-day period.

²³ The filing of a voluntary petition under section 301 or 302 constitutes an "order for relief" and starts the section 1110(a)(1) clock. In an involuntary case under section 303, some time after the filing of the petition, the court might—depending upon the circumstances of the case—enter an order for relief, and the section 1110 timeline is measured from the date of entry of that order. *See* 11 U.S.C. § 303(h) (1994).

²⁴ Other than defaults relating to "(A) the insolvency or financial condition of the debtor at any time before the closing of the case; (B) the commencement of a case under [the Bankruptcy Code]; (C) the appointment of or taking possession by a trustee in a case under [the Bankruptcy Code] or a custodian before such commencement; or (D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease." 11 U.S.C. § 365(b)(2) (1994).

²⁵ *See In re Western Pac. Airlines, Inc.*, 219 B.R. 298, 300 (Bankr. D. Colo. 1998).

²⁶ WestPac's DIP lenders announced during the last week in January that they would continue to fund the airline only pursuant to specific lender approval of each expense item. WestPac ceased flight operations on February 4, 1998. *See id.* at 301.

²⁷ *See id.*

²⁸ *See id.* at 301 n.4. The proceeds derived from WestPac's assignment of its leasehold interests in the aircraft to other entities would become part of its bankruptcy estate, increasing the amount potentially distributable to all of WestPac's creditors. *See* 11 U.S.C. § 541(a)(6) (1994). Although any proceeds WestPac received for assigning its leases would most likely be enveloped by the DIP lenders' first priority senior security interest or the lessors' cross-collateralization provisions in the leases, a significant infusion of funds might increase the residual remaining for distribution to all of the other claimants to WestPac's estate.

tions at any point outside the initial sixty-to-ninety-day cure period in section 1110(a)(1)(B).

On February 9, 1998, the U.S. Bankruptcy Court for the District of Colorado held in favor of the aircraft lessors. Relying primarily on its view of the legislative intent underpinning section 1110,²⁹ the court held that debtors can rely on section 1110 to stave off their financiers' advances only within the sixty-to-ninety-day grace period.³⁰ During this period debtors must choose either to cure their defaults and agree to remain current on their obligations or to relinquish their equipment to their financiers. Beyond this period, the court explained, section 1110 continues to insulate financiers from the operation of sections 362, 363 and 1129 in the enforcement of their contractual right to foreclose, and debtors are bound by—and may seek refuge only in—the terms of each individual financing agreement.³¹

WestPac and its DIP lenders took an expedited appeal, urging that the plain language of section 1110(a)(1)(B)(ii)(I) and (II) offers the debtor a rolling thirty-day reprieve from the enforcement of a financier's remedies following any default under the financing agreement, in which time the debtor may cure the default in order to retain the equipment. This construction, WestPac argued, acknowledges the special protection afforded to transportation equipment financiers, but it balances the financier's interests with the competing interests of the debtor and others involved in the Chapter 11 case.³²

The U.S. District Court for the District of Colorado reversed the Bankruptcy Court's decision and, in doing so, dramatically shifted the balance of burdens and benefits under section 1110. The District Court, per Senior Judge Kane, held that section 1110 ceases to permit foreclosure once the debtor either turns over the equipment to the financier or fulfills the promise and cure requirements of section 1110(a) within the first sixty to ninety days of the Chapter 11 case.³³ By taking the latter path, the court explained, the debtor forever avoids repossession of its aircraft under sec-

²⁹ At the outset of its discussion, the court remarked that “[t]he purpose of Section 1110 is clearly to protect the financiers of extremely expensive, highly-maintenance intensive, mobile equipment.” *Western Pac.*, 219 B.R. at 301.

³⁰ *See id.* at 303.

³¹ *See id.* Because “[t]his decision [was] the very first legal guidance these parties [had] had on the question,” the bankruptcy court allowed WestPac to avoid the “unfair and financially catastrophic” impact of the decision by extending WestPac another 72 hours in which to cure all lease defaults before the lessors could retake possession of the aircraft “immediately and unilaterally.” *Id.* at 304. WestPac cured some, but not all, of its defaults within the allotted time. Accordingly, the bankruptcy court allowed the lessors to terminate their leases with WestPac on February 12, 1998. *See In re Western Pac. Airlines, Inc.*, 219 B.R. 305, 306 (D. Colo. 1998).

³² *See id.* at 308. The DIP lenders also objected that the Bankruptcy Court's decision ignored their contribution to the estate and their special right consequently arising under section 364(c) and (e) to a first priority senior security interest in a potential recovery from assumption and assignment of WestPac's leasehold interest in the aircraft. *See id.*

³³ *See id.* at 310.

tion 1110(a), it “return[s] the bankruptcy proceedings to orthodox administration. . . . and any subsequent defaults under the [reaffirmed financing document are] governed by the more general provisions of the Code, including §§ 362, 364 and 365.”³⁴

The court surveyed portions of the legislative history of sections 362 and 1110 and concluded that section 1110 represents a “limited exception to the automatic stay,” designed to provide only for the “exigent circumstances” shortly after a transportation company’s bankruptcy filing.³⁵ Disregarding WestPac’s appraisal of the “plain language” of section 1110, the court explained that “[b]oth sides misconstrue the purpose and effect of § 1110 by failing to consider it in the context of the Bankruptcy Code as a whole and by seeking to extend its effect beyond its terms.”³⁶ The court emphasized the “limited function” of section 1110 to protect a “specific and narrowly defined class of financiers.”³⁷ Accordingly, the court construed section 1110 narrowly: Once the debtor has reaffirmed the financing document and cured all defaults occurring before the sixtieth day after the entry of the order for relief, “the section has served its purpose.”³⁸ Thereafter, the financier is relegated to “other, generally applicable provisions of the Code” for protection of its rights under the reaffirmed financing document.³⁹ The debtor might, for example, assume and assign (or reject) an aircraft lease in accordance with the requirements of section 365, even if the debtor has defaulted on the reaffirmed lease in the interim.⁴⁰

This constraining approach to section 1110, in the court’s view, promoted the fundamental policies of allowing the debtor a “breathing spell” from its creditors and narrowly construing special interest legislation.⁴¹ It also provided much-needed certainty and finality to the effect of section 1110 on both the financier and the debtor.⁴² “Most importantly,” though, the District Court’s approach was designed to orient section 1110 solidly within the context of the Bankruptcy Code as a whole by “constru[ing] § 1110 *in pari materia* with other provisions of the Code” that regulate the relationship among the debtor, the financiers and the estate’s other credi-

³⁴ *Id.* at 308.

³⁵ *Id.*

³⁶ *Id.* at 309-10.

³⁷ *Id.* at 310.

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* Transportation equipment financiers are better situated than their counterparts in financing arrangements not involving transportation equipment. The court pointed out that because section 1110—unlike section 365 and other provisions—allows transportation equipment financiers to receive cure payments and perhaps other continuing payments without petitioning the bankruptcy court for adequate protection or seeking relief from the automatic stay. *See id.*

⁴¹ *Id.*

⁴² *Id.*

tors, particularly the DIP lenders who infused millions of dollars into the estate to facilitate the reorganization.⁴³

II. INTERPRETING SECTION 1110: “PLAIN LANGUAGE”

Both WestPac and the District Court insisted that their reading of the “plain language” of section 1110(a)(1)(B) admitted only one outcome.⁴⁴ The course of the proceedings amply demonstrates, however, that the meaning of the statutory language is anything but plain.⁴⁵ Section 1110 requires the debtor to make certain promises to avoid foreclosure but is silent on what happens if the debtor breaks those promises. The solutions offered by both the Bankruptcy Court and the District Court are reasonably compatible with the law as it is written. Reference to the language of section 1110 alone simply cannot provide a complete picture of the Congressional intent underlying the statute. None of the interpretations advanced by WestPac, the Bankruptcy Court or the District Court is conclusive without reference to external sources.

WestPac’s myopic view fails to take into account the whole of section 1110. WestPac understandably honed in on the language of section 1110(a)(1)(B)(ii), which read in isolation plainly appears to allow for cure of “any default . . . that occurs after the date of the order . . . [within] 30

⁴³ *Id.* at 310-11. The court reaffirmed its decision as it denied rehearing. *See In re Western Pac. Airlines, Inc.*, 221 B.R. 1 (D. Colo. 1998). Upon consideration of supplemental briefing, the court noted that other courts had not addressed this particular issue; it therefore revisited the legislative history of section 1110, identifying a number of passages that buttressed its approach. *See id.* at 6-10. Because this Article addresses the legislative history in greater detail below in Part III, I will not dwell on the District Court’s second opinion here. The Tenth Circuit dismissed as moot an appeal by one of the financiers because the financier had already retrieved its planes from WestPac. *See In re Western Pac. Airlines, Inc.*, 181 F.3d 1191 (10th Cir. 1999). The court let stand the decision of the District Court, however, despite a general policy of vacating the judgment of the lower court and remanding with instructions to dismiss when an appeal becomes moot. *See id.* at 1197-98. The court did not vacate the judgment below because it found that the financier voluntarily mooted the appeal by repossessing the airplanes at issue in the action. *See id.*

⁴⁴ *See Western Pac.*, 219 B.R. at 302; *Western Pac.*, 221 B.R. at 4.

⁴⁵ If the “contrasting positions” of the parties on the proper construction of the bankruptcy statute in *Dewsnup v. Timm*, 502 U.S. 410 (1992), led the Court to conclude that the law “embrace[d] some ambiguities,” *see id.* at 414-16, surely the sharp distinctions between the interpretations of section 1110 advanced by the parties and the courts in the WestPac case also testify to the ambiguity inherent in the language of section 1110. *See also* Giddens & Schick, *supra* note 7, at 111 (“[S]ection 1110, like many statutes, is not without its ambiguities. . . . [I]ts complexity sometimes fosters confusion and obscures the purpose that Congress intended the section to serve.”). Surely, courts generally should avoid reading ambiguity into statutes to avoid a “miasma of potential litigation.” *In re Continental Airlines, Inc.*, 932 F.2d 282, 293 (3d Cir. 1991). In particular, courts should interpret important provisions that affect long-term and costly commercial transactions—where and to the extent possible—according to the “plain language” of the statute to promote certainty and predictability for the parties, who negotiate and structure these transactions in reliance on a particular understanding of the law. Nonetheless, courts cannot ignore ambiguity for the sake of artificial clarity and certainty. If Congress fails to make its intent clear on the face of the statute, courts must acknowledge this and seek to determine Congress’s will through other means.

days after the date of the default.” If the debtor defaulted six months after the commencement of the case, it could, consistent with a literal reading of section 1110(a)(1)(B)(ii), cure that default within thirty days—which is clearly the later of thirty days after the default and the expiration of sixty days after entry of the order for relief—and remain safely within the exception to the financier’s right to foreclose. The open-ended language of section 1110(a)(1)(B)(ii) may be read quite logically to extend the cure period for “any default” as far as the bankruptcy court’s patience and the life of the case will allow.

Nonetheless, one subsection does not a statute make. If one seeks to divine Congress’s will from the words of a statute, one must at least consult *all* of the words as a cohesive whole. Congress constructed section 1110(a)(1) around the framework of the sixty-day period following the entry of the order for relief. The statute refers to this sixty-day period three times in the operative subsection. The first two references require the debtor to reaffirm the financing agreement and cure all pre-petition defaults within that period. The deadline for curing post-petition defaults is also tied somewhat ambiguously to the expiration of the sixty-day period. WestPac’s fixation on one limb of one tree neglects the remainder of that tree, as well as the surrounding forest. Its overly focused approach, while technically and grammatically plausible, diverts attention from Congress’s broader intent.

The Bankruptcy Court adopted a more holistic view of section 1110, and the District Court expanded its field of inquiry even further to include other sections of the Code. Nonetheless, neither court was able to determine conclusively the proper construction of section 1110 by drawing only upon the language of the Code. Although section 1110 requires the debtor to promise to remain current on obligations under its financing agreement, it fails to account for the possibility that the debtor will not live up to that promise. One can argue for a remedy by analogy to other sections of the Code, such as section 365, governing unexpired leases, or 363, governing use of property of the estate.⁴⁶ But under the *sui generis* section 1110, the burden of the debtor’s inability to meet its obligations might rest quite logically either on the debtor—as the Bankruptcy Court concluded—on the financier—as the District Court held. Choosing one of these alternatives is a matter of policy and must be made based upon the intent of Congress. Both conclusions are reasonably supported by the language of section 1110, but neither is compelled or foreclosed by the “plain language” of any section of the Code. Both the Bankruptcy Court and the District Court

⁴⁶ See *infra* Parts III.A and III.B.

were forced to resort to sources outside the Code to clarify the choice that Congress made.⁴⁷

III. CONGRESSIONAL INTENT: THE LEGISLATIVE HISTORY OF SECTION 1110

Although the legislative history of section 1110 contains ambiguities, a compelling picture of Congress's design emerges from a survey of House and Senate statements on the purpose and effect of the new section. Under the Bankruptcy Act of 1898⁴⁸ (the "Bankruptcy Act"), the predecessor of the modern Bankruptcy Code, transportation equipment financiers were permitted to retake possession of certain transportation equipment from bankrupt carriers unilaterally and immediately upon default under the relevant financing agreements, despite the commencement of the carrier's reorganization case.⁴⁹ Congress enacted these provisions to protect certain historical financing practices⁵⁰ and to encourage new financing in key industries.⁵¹ Their effect was "to encourage financing of . . . equipment in transactions that are 'bankruptcy-proof.'"⁵² When Congress revised the bankruptcy law in the late 1970s, it noted that such extraordinary insulation from the disruptive effects of bankruptcy had become "largely addicting" to the transportation equipment financing industry.⁵³ Indeed, financiers had threatened that they "would simply cease financing of the relevant equipment if the protections were removed."⁵⁴

Undaunted, Congress substantially scaled back transportation financier protections in the new Code. It "provide[d] an alternative to [the Bankruptcy Act's transportation finance] sections," which it considered "harsh

⁴⁷ In fact, the Bankruptcy Court never seemed to dwell for any period on the language of section 1110. It began its analysis with the caveat that "the Court must be mindful of the legislative intent behind the statute." *Western Pac.*, 219 B.R. at 301. The Bankruptcy Court, however, appears to have based its conclusion on an assertion regarding "[t]he purpose of Section 1110." *Id.* The District Court also moved quickly past the statutory language to "the context of the Bankruptcy Code as a whole," section 1110's place within it, and Congress's "specific and narrowly defined" purpose in enacting the provision. 219 B.R. at 309-10.

⁴⁸ Act of July 1, 1898, ch. 541, 30 Stat. 544 (repealed 1978).

⁴⁹ Bankruptcy Act §§ 77(j) (railroad rolling stock), 116(5) (aircraft), 116(6) (ships), 11 U.S.C. §§ 205(j), 516(5)-(6) (1970) (repealed 1978).

⁵⁰ See H.R. REP. NO. 74-1283, at 4 (1935); H.R. REP. NO. 95-595, at 239 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6198.

⁵¹ See H.R. REP. NO. 85-944 (1957); H.R. REP. NO. 95-595, at 239, *reprinted in* 1978 U.S.C.C.A.N. at 6198.

⁵² See H.R. REP. NO. 95-595, at 239, *reprinted in* 1978 U.S.C.C.A.N. at 6198.

⁵³ See *id.*

⁵⁴ See *id.*

in their application,” as it recast them in the new sections 1110 and 1166.⁵⁵ The House⁵⁶ introduced the new law as follows:

The proposed sections do not give a financier an absolute right to retake possession of the equipment involved, as under current law. Instead, they provide that the trustee may agree to perform the obligations of the debtor under a security agreement, conditional sale contract, or lease of equipment, within 60 days after the date of the order for relief. In addition, all prior defaults must be cured, and any defaults that occur after the agreement to perform is made must be cured within 30 days after they occur. If these conditions are met, the financier may not retake possession of the equipment. Otherwise, his right to retake is unaffected.

The sections protect the interests of the financier by entitling him to payments according to the financing agreement terms or to his equipment. They protect the estate and the reorganization process by leaving the choice of which the financier will get to the trustee. Thus, equipment that the trustee needs to keep operating the business is beyond reach by the financier if the trustee is willing to continue to pay for it according to pre-bankruptcy terms. If the trustee does not need the equipment, he may simply surrender it to the financier.⁵⁷

These passages, however, simply reiterate the ambiguity with which the courts struggled in the WestPac cases: Congress here seems to support WestPac’s interpretation by saying that the debtor can avoid foreclosure by agreeing to perform under the financing agreement, curing outstanding defaults and curing any default arising “after the agreement to perform is made” within thirty days after the default occurs. Congress seems to imply that this cure can take place even well after the initial sixty-day period and far beyond the entry of the order for relief. But in the same breath, Congress seems to describe the Bankruptcy Court’s approach as it reassures financiers that the new section preserves “unaffected” their “right to retake” if the debtor fails to make any payment “according to pre-bankruptcy terms” after the expiration of the initial sixty-to-ninety-day period. These passages are just as susceptible to selective emphasis as is section 1110 itself.

The following passages, however, reflect much more clearly Congress’s intent to limit substantially the advantages afforded to financiers by section 1110. In its section-by-section description of the new legislation, Congress straightforwardly expressed its intention with respect to section 1110 to “remove[] the absolute veto power over a reorganization that lessors and conditional vendors have under present law, while entitling them

⁵⁵ *Id.* The originally proposed section 1166 was later renumbered 1168 in a House amendment. See 124 CONG. REC. H11,106 (daily ed. Sept. 28, 1978).

⁵⁶ The Senate adopted the portion of the House bill including section 1110 without modification. See 124 CONG. REC. S17,406 (daily ed. Oct. 6, 1978). Therefore, this Article will refer primarily to House Reports and commentary on section 1110.

⁵⁷ H.R. REP. NO. 95-595, at 239 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6198-99 (footnotes omitted).

to protection of their investment.”⁵⁸ More specifically, the House elaborated on its introduction as follows:

The protection afforded the financier is similar to that contained in other sections of the bill governing use of collateral by the estate and the treatment of executory contracts and unexpired leases. Under those sections, a secured creditor is entitled to adequate protection if the trustee elects to keep and use his collateral. A lessor is entitled to lease payments under the terms of the lease, and to the curing of past defaults, if the trustee elects to assume a lease. The major differences [sic] for transportation equipment security interests is that the proposed section defines more precisely what constitutes adequate protection. It is the payments and duties of the debtor called for under the security agreement. In the case of a lease, the protection is the same afforded other lessors, but the trustee is required to make a decision within 60 days of the order for relief. . . . The quick decision requirement applies equally to security agreements and conditional sale contracts, thus providing some additional measure of protection for equipment financier[s].⁵⁹

The “protection afforded the financier . . . in other sections of the bill” to which Congress referred appear in sections 361 through 365 of the new Code, of which sections 361, 363 and 365 are the most salient. Section 363 sets out the requirements for the debtor to use, sell or lease property of the bankruptcy estate.⁶⁰ These requirements include, in some circumstances, providing “adequate protection,” as defined in section 361, to a lender with an interest in that property. Section 365 describes the requirements for the debtor to assume or reject the burdens and benefits of unexpired leases and other “executory contracts.” An examination of the operation of these sections and other Congressional remarks elsewhere in the legislative history strongly suggests that Congress was concerned primarily with curtailing, rather than preserving, financiers’ rights to evade bankruptcy restrictions on repossession of transportation equipment.

A. *Section 363: Use, Sale or Lease of Property of the Estate*

Section 363 allows the debtor to use, sell or lease property of the estate, but it also protects the rights of creditors with an interest in that property. If at any point an entity with an interest in the property to be used, sold or leased becomes concerned about the preservation of its interest, the court must honor a request by that entity to “prohibit or condition such use, sale or lease as is necessary to provide adequate protection of such interest.”⁶¹ Section 361 enumerates several possible forms of “adequate protection”:

⁵⁸ H.R. REP. NO. 95-595, at 405, *reprinted in* 1978 U.S.C.C.A.N. at 6361.

⁵⁹ H.R. REP. NO. 95-595, at 239-40, *reprinted in* 1978 U.S.C.C.A.N. at 6199 (footnote omitted).

⁶⁰ 11 U.S.C. § 363(e) (1994).

⁶⁰ 11 U.S.C. § 361 (1994). The definition of “property of the estate” appears in section 541(a).
¹¹ U.S.C. § 541(a) (1994).

⁶¹ *Id.* at § 363(e).

[A]dequate protection may be provided by —

- (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that the stay under section 362 of this title, [or] use, sale, or lease under section 363 of this title . . . results in a decrease in the value of such entity's interest in such property;
- (2) providing to such entity an additional or replacement lien to the extent that such stay, use, sale, [or] lease . . . results in a decrease in the value of such entity's interest in such property; or
- (3) granting such other relief, other than entitling such entity to compensation allowable under section 503(b)(1) of this title as an administrative expense, as will result in the realization by such entity of the indubitable equivalent of such entity's interest in such property.⁶²

According to the legislative history of section 1110, secured transportation equipment lenders receive a compulsory choice of subsection (1)—periodic cash payments, along with the fulfillment of any other duties, “called for under the security agreement”—as “adequate protection” for the debtor’s continued use of encumbered transportation equipment.⁶³

But what if the debtor fails to make its required payments and to fulfill its duties, depriving the financier of its adequate protection? The remedy for failure of adequate protection should be the same under sections 363 and 1110.⁶⁴ Congress specified that the “major difference[]” between the treatment of holders of security interests in transportation equipment under section 1110 and holders of security interests in other property under section 363 is that section 1110 “defines more precisely what constitutes adequate protection.”⁶⁵ Had Congress intended to provide for a different or more extensive remedy for failure of adequate protection for secured lenders under section 1110—i.e., failure of the debtor to make its payments and fulfill its duties under the security agreement—this surely would have

⁶² *Id.* at § 361.

⁶³ H.R. REP. NO. 95-595, at 240, *reprinted in* 1978 U.S.C.C.A.N. at 6199.

⁶⁴ The primary remedies for secured lenders are (1) to seek supplemental adequate protection under section 363(e) and one of the other subsections of section 361, or (2) to move for relief from the automatic stay under section 362(d)(1). Section 362(d)(1) directs that “the court shall grant relief from the [automatic] stay . . . such as by terminating, annulling, modifying, or conditioning such stay” if the party in interest identifies “cause” for such relief. 11 U.S.C. § 362(d)(1) (1994). The statute provides only one example of “cause”: “the lack of adequate protection of an interest in property of such party in interest.” 11 U.S.C. § 362(d)(1) (1994). These provisions arm secured financiers with powerful arguments for obtaining relief from the stay if their interests in the property subject to the security interest are truly inadequately protected, although the court retains a good measure of discretion to fashion appropriate relief. *See* Giddens & Schick, *supra* note 7, at 112-14 (describing the potential protections of section 362(d)(1) and (2) and opining that they “may be on balance just as effective in protecting the aircraft equipment financier”).

⁶⁵ H.R. REP. NO. 95-595, at 240, *reprinted in* 1978 U.S.C.C.A.N. at 6199.

been a “major difference” worthy of special note in the legislative history. Consequently, after the debtor cures defaults and promises to uphold its obligations under the security agreement, Congress apparently intended that the secured lender be treated like all other secured lenders who petition for and receive adequate protection under section 363(e). The “major difference” between sections 1110 and 363 is that transportation lenders are entitled immediately to a particularly desirable form of adequate protection—a constant stream of payments⁶⁶—without request. In contrast, other secured lenders are relegated to formally requesting adequate protection and arguing for a particular form of protection from among the choices in section 361. Lenders under both sections 363 and 1110 are left to the protections of sections 362 and 363 if their “adequate protection” proves inadequate.⁶⁷ This result appears to be the extent of the advantage that Congress granted secured lenders under section 1110.

B. Section 365: Unexpired Leases

Section 365 regulates the debtor’s choice between assuming or rejecting its unexpired leases. The debtor must either reaffirm and continue

⁶⁶ Given Congress’s careless use of words in the passages relating to leases, however, it apparently did not intend for section 1110 to guarantee financiers the “adequate protection” of full and timely fulfillment of “the payments and duties of the debtor called for under the security agreement.” *Id.* Rather, it intended to entitle them only to the right to *receive* timely payments if the debtor made them, and to guarantee them a right to *compel* only administrative expense priority payments from the ultimate distribution of estate assets. See *infra* notes 86-88 and accompanying text (revealing that, although Congress stated that section 365 entitles lessors to “lease payments under the terms of the lease,” H.R. REP. NO. 95-595, at 240, *reprinted in* 1978 U.S.C.C.A.N. at 6199, the law only guarantees administrative expense priority for the payments from the ultimate distribution of the debtor’s estate).

⁶⁷ If adequate protection proves inadequate for a transportation lender, any outstanding payments due under the security agreement at the conclusion of the case should be viewed as an administrative expense of the estate entitled to superpriority payment over any other administrative claim. The court must approve the debtor’s promise to pay under section 1110(a)(1)(A) and one should view the approval as tacit acknowledgment that the debtor’s continued use of the equipment qualifies as an “actual, necessary cost[] and expense[] of preserving the estate.” 11 U.S.C. § 503(b)(1)(A); see also *In re Trans World Airlines, Inc.*, 145 F.3d 124, 136 (3d Cir. 1998) (holding that the secured lender was entitled to an administrative expense claim for the full amount due under the financing agreement, and that “having received court approval [of the section 1110(a)(1)(A) agreement] *ex ante*, there is no need to subject the agreement to the court’s review for a second time upon the submission of a creditor’s claim” for administrative expense priority); *In re Airlift Int’l, Inc.*, 761 F.2d 1503, 1510 (11th Cir. 1985) (“[I]t is obvious to this court that . . . the [debtor]’s breach of a section 1110 stipulation [must be treated] as a post-petition breach giving rise to a section 503(b) claim for administrative expenses.”); *In re Multech Corp.*, 47 B.R. 747, 750-52 (Bankr. N.D. Iowa 1985). Moreover, if the debtor “provides adequate protection,” but it then fails to make one or more payments, the transportation lender, at the conclusion of the case, will still hold a claim “allowable under subsection (a)(1) of [section 507] arising from . . . the use, sale, or lease of . . . property under section 363,” and that claim “shall have priority over every other claim,” 11 U.S.C. § 507(b), for “administrative expenses allowed under section 503(b) . . . and any fees and charges assessed against the estate under chapter 123 of title 28.” 11 U.S.C. § 507(a)(1). While the transportation lender risks nonpayment along with all other administrative expense claimants, the superpriority status conferred by section 507(b) is yet another slight advantage of the transportation lender over other general secured lenders.

to fulfill its obligations under the leases to retain possession of the leased property, or reject each lease in its entirety and surrender possession of the leased property to the lessor. The debtor may not selectively assume the benefits while rejecting the burdens of its leases,⁶⁸ and the lessor is entitled to certain protections. Like section 1110, section 365 requires the debtor to fulfill certain requirements before assuming a lease. The debtor may not assume a lease if it has defaulted under that lease unless it:

- (A) cures, or provides adequate assurance that the trustee will promptly cure, such default;
- (B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and
- (C) provides adequate assurance of future performance under such contract or lease.⁶⁹

If the debtor fails to assume or reject a lease of personal property within sixty days of the entry of the order for relief, it must resume compliance with the lease and “timely perform all of the obligations of the debtor.”⁷⁰ For leases of personal property, the Code allows the debtor to delay decision on assumption or rejection until confirmation of a reorganization plan, which may be several months or even years after the commencement of the case. An anxious lessor may request that the court order the debtor to make a decision within a “specified time period,”⁷¹ but the court is not required to honor such a request.

Under section 1110, by comparison, “the [debtor] is required to make a decision within 60 days of the order for relief.”⁷² This time constraint is the one and only contrast Congress identified between the treatment of unexpired leases under sections 365 and 1110. “This [constraint] should not impose an undue burden on the trustee,” Congress assured, “because transportation equipment in any major transportation company reorganization is one of the most important assets. A decision must be made quickly

⁶⁸ See, e.g., 3 WILLIAM MILLER COLLIER, COLLIER ON BANKRUPTCY ¶365.03[1] (Lawrence P. King ed., 1998) (citing cases) (“An executory contract may not be assumed in part and rejected in part. The trustee must either assume the entire contract, *cum onere*, or reject the entire contract, shedding obligations as well as benefits.”) (footnote omitted).

⁶⁹ 11 U.S.C. § 365(b)(1). Both sections 365 and 1110 exempt the debtor from compliance with lease provisions relating to the commencement of bankruptcy proceedings, insolvency or financial condition of the debtor. See 11 U.S.C. §§ 365(b)(2), 1110(a)(1)(B).

⁷⁰ 11 U.S.C. § 365(d)(10). The debtor is not required to fulfill those obligations identified in section 365(b)(2), relating to the debtor’s financial condition. *Id.* Moreover, the court may free the debtor from the burdens of this section “based on the equities of the case.” *Id.*

⁷¹ 11 U.S.C. § 365(d)(2).

⁷² H.R. REP. NO. 95-595, at 240 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6199.

if the business is to be kept operating and be rehabilitated.”⁷³ According to Congress, in all other respects, “the protection [of transportation lessors under section 1110] is the same afforded other lessors.”⁷⁴ Congress carefully noted, however, that the debtor “is not required to assume the . . . unexpired lease under section 1110; rather, if the . . . debtor in possession complies with the requirements of section 1110(a), the . . . debtor in possession is entitled to retain the aircraft or vessels subject to the normal requirements of section 365.”⁷⁵

Congress’s focus on the “quick decision requirement” as constituting the only difference between lessor protections under sections 365 and 1110⁷⁶ (and essentially the only remaining benefit to lessors under section 1110) strongly suggests that the “requirements of section 1110” have a very limited duration.⁷⁷ If a quick decision is the only benefit to lenders

⁷³ H.R. REP. NO. 95-595, at 240, *reprinted in* 1978 U.S.C.C.A.N. at 6199.

⁷⁴ *Id.* This statement is no longer entirely accurate—section 1110 offers greater protection in at least two additional ways. First, “adequate assurance” of prompt cure of outstanding defaults has never been sufficient under section 1110(a)(1)(B); the debtor must *cure* all outstanding defaults—assurances of future cure are not enough. Second, personal property lessors received a mixed blessing with the addition of section 365(d)(10) by the Bankruptcy Reform Act of 1994, Pub. L. No. 103-394, 108 Stat. 4106. Lessees of personal property now must timely perform all lease obligations first arising from or after 60 days after the commencement of the case, but, “based on the equities of the case,” the court may suspend or alter this new requirement. *See* 11 U.S.C. § 365(d)(10). On the other hand, because the debtor under section 1110(a)(1)(A), enters into a court-approved agreement to fulfill its lease obligations, the court should not be able to relieve the debtor of its liability under this agreement until the debtor formally rejects the lease. *See* Kathryn Hoff-Patrinis, *Aviation Finance Revisited: The 1994 Amendments to Section 1110 of the Bankruptcy Code*, 69 AM. BANKR. L.J. 167, 185 (1995) (“In situations where the new § 365(d)(10) conflicts with § 1110, § 1110 should prevail, as it is the more specific provision. . . . Under § 365(d)(10), a court may excuse the timely performance of obligations based on the ‘equities of the case,’ while a court expressly has no such power in respect of aircraft lease obligations under § 1110.”) (footnotes omitted).

⁷⁵ 124 CONG. REC. H11,102-03 (daily ed. Sept. 28, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6436, 6471; *see also* 124 CONG. REC. S17,419 (daily ed. Oct. 6, 1978), *reprinted in* 1978 U.S.C.C.A.N. 6505, 6540 (quoting same language).

⁷⁶ Congress emphasized that “[t]he quick decision requirement applies equally to security agreements and conditional sales contracts, thus providing some additional measure of protection for equipment financier[s].” H.R. REP. NO. 95-595, at 240, *reprinted in* 1978 U.S.C.C.A.N. at 6199.

⁷⁷ The appellants in *WestPac* argued, quite logically, that the reference to section 1129 among the sections that cannot interfere with the financier’s rights under section 1110(a) demonstrates that section 1110 *must* continue to apply beyond the initial 60-to-90-day cure period, because “[n]o reported airline reorganization has engaged in plan confirmation within the first 60 days of the case.” Appellants’ Opening Brief at 14, *In re Western Pac. Airlines, Inc.*, 181 F.3d 1191 (10th Cir. 1999). However, the legislative history reveals Congress’s limited intention. Congress added this reference in 1994 to clarify that “the rights of a section 1110 or section 1168 creditor would not be affected by section 1129 ‘cram-down.’” H.R. REP. NO. 103-834, at 44 (1994), *reprinted in* 1994 U.S.C.C.A.N. 3340, 3353. This vague statement tells us little without reference to the circumstances of the amendment. A fear that section 1129 might allow the debtor to “cram down” a reorganization plan on its creditors that modified the terms of pre-petition security agreements that the debtor had reaffirmed under section 1110, thus effectively circumnavigating the protections of section 1110 for secured lenders provided impetus for this provision. *See* Hoff-Patrinis, *supra* note 74, at 167, 171, 179-82; Joseph H. Levie & Shepard W. Meltzer, *Secured Lenders Enforcing Agreements in Bankruptcy*, N.Y.L.J., Feb. 2, 1995, at 5 col.1 (describing Continental Airlines’ bankruptcy proceedings, in which

under section 1110, that benefit must accrue, if at all, within the first sixty days of the case.⁷⁸ Moreover, Congress's hasty retreat to "the normal requirements of section 365" after the debtor makes its "quick decision" further suggests that Congress understood section 1110 to limit dramatically the extraordinary advantages given to transportation financiers under the Bankruptcy Act. Congress's evaluation that lessor protections under section 1110 are otherwise "the same" as under section 365 amplifies this point.⁷⁹ Congress plainly expressed its intent to disarm transportation equipment lessors of their "harsh"⁸⁰ right to immediate and unconditional repossession of vital equipment and to "remove[] the absolute veto power over a reorganization that lessors and conditional vendors ha[d]" under the Bankruptcy Act.⁸¹ The legislative history presents a powerful case for leaving section 1110 largely behind and reverting to section 365 for the rules to govern the ongoing relationship between lessor and lessee once the debtor decides to keep its transportation equipment and impose on the estate the burdens of the lease.

Lessors may avail themselves of the same remedies for breach of a lease either assumed under section 365 or reaffirmed under section 1110.⁸² After the debtor formally assumes a lease with court approval under section 365, all of the obligations under the lease become necessary and actual expenses of preserving the estate. These expenses qualify for priority payment from the ultimate distribution of the bankruptcy estate as administrative expenses if the debtor defaults.⁸³ Likewise, all claims for pay-

this issue arose and the result of the 1994 amendments). It is not clear that Congress achieved its goal of thwarting such backdoor evasion of section 1110, *see* Hoff-Patrinis, *supra* note 74, at 182, Levie & Meltzer, *supra* this note, at 5, but the new reference to section 1129 is not inconsistent with the substance of Judge Kane's construction of section 1110. After the debtor reaffirms a secured financing agreement and enters into a binding agreement under section 1110(a)(1), other sections of the Code, i.e., sections 361 and 363 govern the debtor's reaffirmed obligations. *See supra* Part III.A. Section 1110 continues to operate in a limited way beyond the initial 60-to-90-day period, however, guiding the application of those other sections, and the new reference to section 1129 reminds the debtor at plan confirmation that the plan cannot undo the debtor's section 1110(a)(1) agreement. Congress clarified in 1994 only that, while other agreements relating to secured debt may be involuntarily "renegotiated" by way of a section 1129 cram down, section 1110 agreements cannot. This is not inconsistent with the construction of section 1110 advanced by Judge Kane and this Article.

⁷⁸ Unless, of course, the lender agrees to extend the sixty-day period under section 1110(b).

⁷⁹ *See also* Giddens & Schick, *supra* note 7, at 115 (describing the similarity between the effect of sections 365 and 1110 and observing that "[t]he only significant difference between a debtor in possession's duties under section 365 and section 1110 is that, under the latter provision, the debtor in possession is statutorily required to reach a decision to assume or reject a lease within 60 days").

⁸⁰ H.R. REP. NO. 95-595, at 239, *reprinted in* 1978 U.S.C.C.A.N. at 6198.

⁸¹ H.R. REP. NO. 95-595, at 405, *reprinted in* 1978 U.S.C.C.A.N. at 6361.

⁸² *See In re Airlift Int'l, Inc.*, 761 F.2d 1503, 1509 (11th Cir. 1985) ("[T]he factors considered by a debtor or trustee in deciding whether to continue a contract are essentially the same under sections 365 and 1110.").

⁸³ 11 U.S.C. §§ 503(b) and 507(a)(1) (1994); *see also* COLLIER, *supra* note 68, at 365-77 ("The better approach, however, is to recognize that the estate receives the benefit of the assumed contract, which presumably was viewed as beneficial at the time it was assumed, and takes that contract *cum*

ments and duties under a transportation equipment lease reaffirmed with court approval under section 1110 should qualify for administrative expense priority upon distribution of the estate if the debtor fails to carry out its obligations under the section 1110 agreement.⁸⁴ Moreover, if the lessor fears that its reversionary interest in the property subject to the lease is in danger, it may either seek adequate protection under section 363(e) or move for relief from the stay under section 362(d)(1).⁸⁵

onere. Therefore, any damages flowing from the breach of a previously assumed contract should be considered first priority administrative expenses.”); *In re Trans World Airlines, Inc.*, 145 F.3d 124, 136 (3d Cir. 1998) (“If the lease is assumed . . . [s]hould the debtor breach thereafter, all future payments due under the remainder of the lease become administrative expenses with administrative priority.”); *In re Klein Sleep Prods., Inc.*, 78 F.3d 18, 22-28 (2d Cir. 1996) (citing cases); *Airlift*, 761 F.2d at 1509 n. 5 (“[T]he breach of an executory contract or unexpired lease assumed under section 365 clearly results in an administrative expense claim”); *In re Washington Capital Aviation & Leasing*, 156 B.R. 167, 172 (Bankr. E.D. Va. 1993); *In re Florida Airlines, Inc.*, 73 B.R. 64, 66 (Bankr. M.D. Fla. 1987); *In re Multech Corp.*, 47 B.R. 747, 750-52 (Bankr. N.D. Ia. 1985). *Cf. In re Merry-Go-Round Enters., Inc.*, 180 F.3d 149, 156 (4th Cir. 1999) (equating post-petition leases with pre-petition assumed leases and holding that claims for future rent following rejection of the former are entitled to administrative expense priority).

⁸⁴ See *Trans World Airlines*, 145 F.3d at 136-40, 142 (“If the lease obligations are not met, such failure constitutes a breach of the § 1110 agreement giving rise to an administrative claim.”); *Airlift*, 761 F.2d at 1510 (“Having reviewed section 365 it is obvious to this court that one of the normal requirements under that section, for purposes of section 1110, is to treat the trustee’s breach of a section 1110 stipulation as a post-petition breach giving rise to a section 503(b) claim for administrative expenses.”); Hoff-Patrinis, *supra* note 74, at 200. The magnitude of the claim is not the same as with formally assumed leases, however. Congress clearly stated that the debtor “is not required to assume the . . . unexpired lease under section 1110.” 124 CONG. REC. H11,102-03 (daily ed. Sept. 28, 1978), reprinted in 1978 U.S.C.C.A.N. at 6471. Under section 365, the debtor has a choice between formal assumption or rejection of the entire lease with all remaining obligations. Therefore, even after the debtor reaffirms a lease under section 1110, it may thereafter decide that the lease no longer advances the best interests of the estate. The debtor may then formally reject the lease, return the equipment to the lessor, and remain liable only for those payments and duties that arose while the equipment was in the debtor’s possession. See *Airlift*, 761 F.2d at 1512 (“If the debtor wishes to stop the payment meter, [it] must return the [equipment].”).

⁸⁵ Pursuant to a 1994 amendment to section 363(e), if the lessor chooses to seek adequate protection, it may not thereafter move for relief from the automatic stay. See 11 U.S.C. § 363(e). Consequently, lessors seeking relief from the stay might be able to rely on the one clear example of “cause” for relief in section 362(d)(1)—lack of adequate protection—only if they move immediately to avoid the stay on the basis that their reversionary interest in the leased property is in jeopardy. See, e.g., *In re Peters Millworks, Inc.*, 151 B.R. 440, 444 (Bankr. N.D. Ohio 1993). Given the exclusionary language of the 1994 amendment to section 363(e), it is not entirely clear that lessors may still seek relief from the stay for lack of adequate protection of their reversionary interest. See Robert D. Drain, et al., Practising Law Institute, *The Bankruptcy Code & Equipment Leasing*, in EQUIPMENT LEASING 271, 346 (1995) (“[U]nder the 1994 amendment to section 363(e), personal property lessors may not be able to seek relief from the automatic stay for lack of adequate protection”); but see *In re Elder-Beerman Stores Corp.*, 201 B.R. 759, 763 (Bankr. S.D. Ohio 1996) (“Thus after the 1994 revisions, lessors of personal property who lack adequate protection may elect to seek relief from the automatic stay under § 362 or to seek equitable remedies under § 363(e).”). Other grounds constituting “cause” for lifting the stay most likely remain available to lessors, however. See, e.g., *In re Stagedoor, Inc.*, 32 B.R. 13, 14 (Bankr. W.D. Pa. 1983) (history of payment defaults, bad checks, and failure to maintain insurance); *In re Heinzeroth*, 40 B.R. 518, 520 (Bankr. E.D. Pa. 1984) (“A debtor who fails to provide insurance coverage is not entitled to the protection of the automatic stay under § 362(d)(1).”) (citing cases). Moreover, if lessors receive adequate protection that ultimately proves to be inadequate, their

Comparing the actual operation of section 365 with Congress's description of that section sheds more light on the limited degree of protection afforded financiers under section 1110. In describing the "protection afforded the financier . . . in other sections of the bill governing . . . the treatment of executory contracts and unexpired leases,"⁸⁶ i.e., section 365, Congress observed that lessors generally "are entitled to lease payments under the terms of the lease . . . if the trustee elects to assume a lease."⁸⁷ In fact, as described above, section 365 does not unequivocally entitle lessors to timely lease payments, even if the debtor has formally assumed the lease. If the debtor fails to make a payment under an assumed lease, lessors are not entitled to compel payment. Rather, they may only file a claim for the unpaid amounts, which will qualify for first priority administrative expense payment from any eventual distribution of the estate. A lessor can point to no section of the Code that guarantees that she will receive timely lease payments "under the terms of the lease." At best, the lessor can move for relief from the stay under section 362(d)(1) or for adequate protection and a court order under section 363 to compel the debtor to make timely lease payments. The Code, however, does not automatically guarantee either of these. The lessor is only assured of administrative expense priority payment from the estate on claims for any outstanding amounts due under the lease.⁸⁸ Congress's imprecise description of the operation of section 365 further reflects the limited extent of guaranteed payment protection that Congress intended to bestow on lessors under section 1110.

C. *Preservation of Bankruptcy Act Protections?*

One statement in the legislative history appears to be inconsistent with the analysis outlined above. A single vague remark, however, cannot undermine the overriding spirit of the legislative history generally. In its section-by-section analysis of the new Code, Congress assured financiers that section 1110 "to a large degree, preserves the protection given lessors and conditional vendors of aircraft to a certificated air carrier or of vessels to a certificated water carrier under section[s] 116(5) and 116(6) of present

deficiency claims are not apparently entitled to superpriority administrative expense status under section 507(b), because a lessor's interest is not "secured by a lien on property of the debtor." 11 U.S.C. § 507(b) (1994). This appears to have been an oversight when Congress added protection for lessors in section 363(e) in 1994. This oversight should be corrected by a corresponding amendment of section 507(b) to encompass not only secured lenders, but also lessors whose claims arise from failed "adequate protection" under section 363(e).

⁸⁶ H.R. REP. NO. 95-595, at 239 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6199.

⁸⁷ H.R. REP. NO. 95-595, at 240, *reprinted in* 1978 U.S.C.C.A.N. at 6199.

⁸⁸ If the DIP lenders' first priority senior security interest siphons off all of the estate property, for example, the lessor may have to wait even longer for payment of amounts due under the lease.

chapter X.”⁸⁹ It cannot be gainsaid, however, that if the protections of section 1110 are only slightly different from those offered by sections 363 and 365, as Congress explained elsewhere, this represents a significant setback for the extraordinarily protective regime that existed under section 116 of the Bankruptcy Act. In addition, a few phrases after its initial comment about “preservation,” Congress quickly backpedaled, remarking that the new law “removes the absolute veto power over a reorganization that lessors and conditional vendors have under present law, while entitling them to protection of their investment.”⁹⁰

The great weight of Congressional commentary on section 1110, as demonstrated above, suggests that Congress intended to divert financiers to sections other than 1110 for “protection of their investment” after the initial sixty-to-ninety-day cure period. Rather than “preserving” the previous scheme of preference for financiers, Congress appears to have been concerned far more with limiting the destructive right of financiers to “veto” reorganizations. Congress’s loose language in both the statute and the historical record makes for a difficult case, but several strong statements and the general tenor of the legislative history lean acutely in the direction of confining, rather than preserving, special benefits for transportation equipment financiers.⁹¹

IV. BANKRUPTCY POLICY VERSUS AVAILABILITY OF CAPITAL: THE RIGHT CHOICE?

While Congress’s decision to curtail the special protections in section 1110 may have advanced the principles by which our bankruptcy law is structured, modern airline financing practice under the Code has shown

⁸⁹ H.R. REP. NO. 95-595, at 405 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6361; S. REP. NO. 95-989, at 116 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5902.

⁹⁰ H.R. REP. NO. 95-595, at 405, *reprinted in* 1978 U.S.C.C.A.N. at 6361; S. REP. NO. 95-989, at 116, *reprinted in* 1978 U.S.C.C.A.N. at 5902.

⁹¹ The sparse scholarly commentary on section 1110 is arguably inconsistent with this interpretation of section 1110. *See, e.g.*, 4 NORTON BANKRUPTCY LAW & PRACTICE 2D §81:3, at 81-7 (1998) (“If the transportation debtor does not . . . live up to its conditions (such as by failing to comply with the prebankruptcy agreements), the equipment financier may take possession of the covered equipment.”); Robin C. Lamer, *Bankruptcy: Effect of Stipulations Under 11 USCS § 1110*, 92 A.L.R. FED. 170, 173 (1997); Levie & Meltzer, *supra* note 77, at 5 (explaining that, to avoid repossession by the financier, “the debtor must from the 61st day forward, perform all future obligations under the terms of its pre-petition contracts with the financiers”); Hoff-Patrinis, *supra* note 74, at 197-98 (“Section 1110 also provides that the automatic stay ceases to apply if a default occurs under the financing agreement after making a § 1110 agreement.”). None of these sources, however, has undertaken a careful analysis of the legislative history underlying the difficult policy choice that Congress made in enacting section 1110. All apparently base their interpretations on the text of section 1110 alone, without regard either to the ambiguity inherent in the statute or to the compelling congressional commentary accompanying the enactment of section 1110. While all of these sources offer reasonable constructions of the “plain language,” each of their conclusions is limited by a failure to go beyond the inconclusive statutory language to consider the historical record behind section 1110.

that the industry at large benefits greatly from stronger section 1110 protections. Congress has apparently recognized this, and the current bankruptcy reform bills contain provisions to clarify that the burden of complying with the terms of the financing agreement remain with the debtor even beyond the initial sixty-to-ninety-day period in section 1110(a). Holding the debtor to its "reaffirmed" financing agreement obligations appears to be the better choice for apportioning benefits and burdens among debtor and non-debtor airlines, their financiers, and their other creditors.

Congress's scale-back of special transportation financing protections advanced "the two recognized policies underlying Chapter 11 [of the Code], of preserving going concerns and maximizing property available to satisfy creditors."⁹² A debtor able to cure outstanding defaults within the first few months of the case, convince a bankruptcy court that taking on the ongoing burdens of the financing agreement is in the best interests of the estate, and navigate the obstacles of sections 361 through 365 clearly deserves a chance at self-preservation as a going concern. Allowing one large creditor to sweep away the debtor's core assets at the first sign of trouble allows that creditor to sound the death knell for the reorganization. The debtor will have no chance to generate any income stream from the use of its equipment, and all of its creditors will stand a reduced chance of recovering any significant portion of their claims. The provisions in sections 361 through 365 were designed to balance the interests of the debtor and all of its creditors. By referring the case back to these sections once the debtor clears the hurdle of section 1110(a), Congress maximized the potential upside of the reorganization for both the debtor and the aggregate interests of all of its creditors. Judge Kane correctly observed that section 1110, as applied in accordance with the legislative history outlined above, "allow[s] for the most seamless reading of §§ [361-365], and 1110 of the Code and best effect[s] the balancing of interests of reorganizing airlines, the lessors of their aircraft, and those who assume the risk of financing reorganization efforts."⁹³

The influence of bankruptcy law extends far beyond those involved in the formal bankruptcy system, however. By weakening section 1110, Congress shifted a substantial portion of the risks of aircraft equipment financing from airlines to financiers. The airline finance industry, however, did not recognize that this substantial shift had occurred. Assuming that aircraft equipment collateral was insulated from debtor-protective bank-

⁹² See *Bank of America Nat'l Trust & Sav. Assoc. v. 203 N. LaSalle St. Partnership*, 119 S. Ct. 1411, 1421 (1999) (citing *Toibb v. Radloff*, 501 U.S. 157, 163 (1991)); see also H.R. REP. NO. 95-595, at 220 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6179.

⁹³ *In re Western Pac. Airlines, Inc.*, 221 B.R. 1, 5 (D. Colo. 1998).

ruptcy laws, airline financiers continued to extend secured financing⁹⁴ as they had done in the past.⁹⁵ If the airline finance industry were disabused of this misperception, it would undoubtedly proceed with greater caution and less willingness to extend crucial credit on favorable terms to airlines.

Specifically, airlines would most likely encounter greater cost in obtaining financing through complex financing vehicles (an increasingly important source of funding for less developed airlines). For the past several years, airlines have raised large amounts of capital by issuing "equipment trust certificates" or "ETCs," which are essentially bonds secured by pools of leasehold or security interests in section 1110(a)(2)-qualified equipment.⁹⁶ Since 1994, airlines have drawn financing through even more sophisticated "enhanced ETCs" ("EETCs"), which reallocate the risks and benefits of these pools of interests among various groups, or "tranches," of investors.⁹⁷ Investors in these enormously expensive and sophisticated debt

⁹⁴ Although section 1110 applies to both secured financing and equipment leases, this Part addresses only the former. Leases in this context often take the form of "sale-leaseback" transactions, which are functionally equivalent to secured loans designed to infuse capital into the airline. *See generally* 4 ASSET-BACKED FINANCING: A TRANSACTIONAL GUIDE §§ 34.01-34.02 (Howard Ruda ed., 1999); Schick, *supra* note 11, at 283 ("First and foremost, sale-leasebacks enable airlines to raise capital from existing assets."); *see also* Levie & Meltzer, *supra* note 77, at 5; *In re Pan Am Corp.*, 124 B.R. 960, 966 (Bankr. S.D.N.Y. 1991). Both types of financiers rely on their ability under section 1110 to move quickly against valuable and marketable collateral. Section 1110 presumably has a similar effect on both those offering secured financing and those offering sale-leaseback arrangements. *See infra* notes 92-94 and accompanying text.

⁹⁵ *See* Marvin E. Jacob & Michele J. Meises, *WestPac Decision Reaffirmed: Aircraft Financiers' Rights Enter "Never Never Land,"* BCD NEWS & COMMENT, June 2, 1998 (remarking that Judge Kane's decision reversed "the heretofore generally accepted meaning of Section 1110"); Marvin E. Jacob & Michele J. Meises, *Flying Without A Net: Recent District Court Decision Strips Aircraft Lessors of Section 1110 Protections,* BCD NEWS & COMMENT, Apr. 7, 1998 ("[T]he district court has dislocated the protections of Section 1110 upon which lessors have relied for decades."); *Judge's Ruling May Affect Future Leasing & Financing of Aircraft,* AIRLINE FIN. NEWS, Apr. 6, 1998 ("Judge Kane's decision is contrary to the understanding of most lawyers, creditors and the airlines themselves on how financings were treated in previous bankruptcy cases.") (quoting Philip Baggaley, managing director for corporate ratings in aerospace, defense and transportation at Standard & Poor's Ratings Service); *U.S. Aircraft Finance Ruling Will Not Affect Current Ratings,* STANDARD & POOR'S CREDITWEEK, Apr. 1, 1998, at 28 ("Aircraft lessors and other providers of aircraft finance are willing to extend credit to weak or startup airlines, such as Western Pacific largely because they believe that they can repossess their planes if an agreement to perform by a bankrupt airline is not reached fairly quickly."); Giddens & Schick, *supra* note 7, at 109 ("It is axiomatic among the aircraft equipment financing fraternity that section 1110 of the Bankruptcy Code provides essential protection to those who lease or finance the purchase of aircraft."). Moody's Investors Service, Inc., which rates the debt instruments of airlines, has also "generally assumed that Section 1110 would be available to a lessor or creditor with a security interest in equipment, regardless of when in the bankruptcy proceeding a default occurred." Martine Nowicki, Special Comment, *Ruling in Western Pacific Airlines Bankruptcy Case Raises Uncertainty In Application of Sections 1110 and 1168 In Transportation Finance* 3 (Mar. 1998) (on file with author) [hereinafter Nowicki, Special Comment].

⁹⁶ Nowicki, Telephone Interview, *supra* note 11.

⁹⁷ *Id.* For example, an EETC may be divided into three tranches A, B, and C. The A tranche has the first right to receive some combination of principal and interest payments on the security agreements or leases and to foreclose on the underlying collateral if the airline defaults on the bonds. The B and C tranches' rights to payment and foreclosure are subordinate to those of the A tranche, and the C

instruments have assumed that section 1110 allows them the extraordinary right to foreclose immediately upon the airline's default. For this reason, ETCs and EETCs have received more favorable investment ratings than the airlines' general senior unsecured debt and their senior debt secured by non-section 1110(a)(2) collateral.⁹⁸ Moody's, for example, generally assigns a rating to ETCs one notch above the rating for an airline's non-section 1110 senior secured debt and two notches above the airline's senior unsecured debt.⁹⁹ The senior tranches of EETCs receive an even greater boost—as many as eight notches above the senior non-section 1110 secured debt rating.¹⁰⁰ Thus, if a developing or troubled airline's general senior secured debt were rated Ba1—one notch below investment grade—the airline's ETCs would be rated Baa3, the beginning of the hallowed investment-grade range,¹⁰¹ and the A tranche of its EETCs would soar as high as Aa1—an extremely attractive instrument marketable to a wide range of investors. Breaking the barrier into investment grade allows airlines to seek financing much more broadly. By marketing ETCs and EETCs, airlines gain access to a substantial number of entities willing or able to invest only in investment-grade debt securities.

This rating enhancement not only opens up an entire crucial segment of the debt investor market, it translates into a substantial savings in interest payments. Investors are willing to accept lower interest payments for higher rated—and consequently less risky—bonds. If, for example, investors demanded an interest payment on the lowest investment-grade airline debt instruments of 400 basis points—or 4%—over the interest rate on thirty-year U.S. treasury bonds, they might accept 200 basis points for senior tranches of airline EETCs rated Aa3, and even less interest on

tranche's rights are subordinate to both the A and the B tranches. This structure enhances the desirability of the senior tranches and allows the airline to market various tranches of EETCs to investors with very specific needs. *See generally* Committee on Bankruptcy & Corporate Reorganization of the Ass'n of the Bar of the City of New York, *Structured Financing Techniques*, 50 BUS. LAW. 527, 529-32, 534-35 (1995) [hereinafter, *Structured Financing Techniques*].

⁹⁸ Nowicki, Telephone Interview, *supra* note 11; *see also* Kathryn Hoff-Patrinis & Elliot Gewirtz, *US Court Casts Doubt on Section 1110 Aircraft Cases*, AIRFINANCE J., Apr. 1998, at 42 ("The structuring of recent innovative financings of pools of US aircraft leases, including through . . . enhanced equipment trust mechanisms, has relied heavily on protection afforded by Section 1110 . . . [This protection] is an important feature affecting ratings given by Standard & Poor's, Moody's and other rating agencies to the financial instruments issued by the financing."). The ability to move quickly against the aircraft under section 1110 enhances the predictability of the liquidation value of the collateral underlying the ETC, and this "predictability is at the heart of the evaluation by the rating agencies," allowing the agencies to increase their rating on the ETCs. *Structured Financing Techniques*, *supra* note 97, at 532.

⁹⁹ Nowicki, Telephone Interview, *supra* note 11; Nowicki, Special Comment, *supra* note 95 at 5.

¹⁰⁰ Nowicki, Telephone Interview, *supra* note 11.

¹⁰¹ The top Moody's long-term debt rating is Aaa, followed, in descending order, by Aa1, Aa2, Aa3, A1, A2, A3, Baa1, Baa2, and Baa3, the floor for investment grade ratings. The scale of non-investment grade ratings descends further from Ba1 to Ba2, Ba3, B1, B2, B3, Caa1, Caa2, etc.

higher rated bonds.¹⁰² Without the enhancement in rating based on strong section 1110 protections, investors most likely would demand between 150 and 200 basis points—1 ½% to 2%—more interest on all of the airline's debt instruments—assuming the airline's ETCs and EETCs still elevated the airline's debt rating into investment-grade range.¹⁰³ The airplanes at issue in the *WestPac* case cost approximately \$30 million each.¹⁰⁴ A strong section 1110 allows an airline like *WestPac* to access the investment-grade debt securities market through EETCs to finance a \$600 million fleet of twenty airplanes and save \$12 million in annual interest payments. Several airlines have taken advantage of these enormous benefits, and more can be expected to do so in the future assuming the pre-*WestPac* construction of section 1110 controls.¹⁰⁵

Moody's has threatened to downgrade the ratings on \$14 billion of ETCs and \$8 billion of EETCs if Judge Kane's construction of section 1110 is widely adopted.¹⁰⁶ Standard & Poor's already has altered its approach to rating the debt of Colorado-based airlines, including Atlas Air, which has issued approximately \$539 million of EETCs. Standard & Poor's now requires that counsel for non-Colorado-based airlines issue legal opinions denouncing the *WestPac* case as "wrongly decided."¹⁰⁷ Standard & Poor's has also ominously promised to monitor the appeal of the *WestPac* case and "address any potential wider impact of the ruling [on appeal]."¹⁰⁸

A reduction in section 1110 protections may advance general bankruptcy principles, but the gain to a relatively limited number of transportation debtors pales in comparison to the cost of sacrificing the substantial

¹⁰² Nowicki, Telephone Interview, *supra* note 11.

¹⁰³ *Id.* Indeed, an erosion of the predictability of foreclosure rights under section 1110 might destroy an ETC transaction altogether. See *Structured Financing Techniques*, *supra* note 97, at 532.

¹⁰³ *Id.* Indeed, an erosion of the predictability of foreclosure rights under section 1110 might destroy an ETC transaction altogether. See *Structured Financing Techniques*, *supra* note 97, at 532.

¹⁰⁴ See *Judge's Ruling May Affect Future Leasing & Financing of Aircraft*, AIRLINE FIN. NEWS, Apr. 6, 1998 ("The planes, all 737-300s, cost in the \$30 million range . . .") (quoting Christian Onsager, attorney for Western Pacific Airlines, Inc.); Roger Fillion, *Ruling favors WestPac Judge: Bankrupt airline can keep control of planes*, DEN. POST, Mar. 11, 1998, at C-01.

¹⁰⁵ United Airlines, US Airways, Continental Airlines, Atlantic Coast, Midway, American Trans Air, America West Airlines, and Atlas Air are among the airlines benefitting from ETC and EETC financing. Nowicki, Telephone Interview, *supra* note 11.

¹⁰⁶ Nowicki, Special Comment, *supra* note 95.

¹⁰⁷ *U.S. Aircraft Finance Ruling Will Not Affect Current Ratings*, STANDARD & POOR'S CREDITWEEK, Apr. 1, 1998, at 27-28 ("For airlines whose principal place of business is within Colorado, Standard & Poor's will place greater emphasis on the airline's creditworthiness and such financings will be judged on a case-by-case basis.").

¹⁰⁸ *Id.* at 28. Philip Baggaley, managing director for corporate ratings in aerospace, defense and transportation at Standard & Poor's, has threatened that "S&P might have to downgrade a lot of debt—nearly \$18.6 billion of airline equipment trust certificates and enhanced equipment trust certificates rated by the firm." *Judge's Ruling May Affect Future Leasing & Financing of Aircraft*, AIRLINE FIN. NEWS, Apr. 6, 1998.

advantages of strong section 1110 protections for developing airlines. Congress laudably reacted to an imbalance under the overly protective provisions of the Bankruptcy Act, but its overreaction might have taken a toll on the development of the airline industry as a whole. The past two decades have witnessed development in the airline industry that undoubtedly would not have been possible without the extraordinary protection that investors, lenders and lessors assumed section 1110 provided to them. Notwithstanding Congress's challenge that there might never have been a need for such extraordinary protection,¹⁰⁹ the special protection clearly facilitated access to financing for airlines, increased development of the industry, and consequently enhanced convenience and safety for the traveling public.

Congress apparently has recognized that a strong and clear section 1110 benefits the entire airline industry. All three of the primary bankruptcy reform bills now pending clarify that the financier's right to repossess transportation equipment in accordance with the financing agreement or lease under section 1110 is not "limited or otherwise affected by any other provision of [the Bankruptcy Code] or by any power of the court."¹¹⁰ They specify that any default "that occurs on or after the expiration of [the] 60 day period [must be] 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."¹¹¹ The lessors in WestPac's proceedings urged this interpretation, and the airline finance industry has relied upon it since section 1110 came into existence twenty years ago. It continues the spirit of the former law by allowing the debtor to avoid foreclosure, but it reaffirms the right of the financier to react decisively in response to defaults in accordance with the financing agreement. Section 1110, as amended by the pending legislation, preserves the benefit of both sides of the bargain and ensures that others in need of financing will be able to strike similar bargains in the future.

¹⁰⁹ See H.R. REP. NO. 95-595, at 239 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6198 ("Whether or not there was an initial need for these provisions, their existence has become largely addicting for the financing industry . . .").

¹¹⁰ Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. § 126(b); S. 625, 106th Cong. § 401(b); S. 945, 106th Cong. § 728(b). The House bill passed by a veto-proof supermajority of 313 to 108 on May 5, 1999. See 145 CONG. REC. H2771 (daily ed. May 5, 1999). Bankruptcy reform faces an uncertain future, however, after the failure of Sen. Lott's cloture motion on S. 625 on September 21. The Senate bill may return to the floor in the near future, but non-germane amendments will likely postpone passage of the bill even further.

¹¹¹ Bankruptcy Reform Act of 1999, H.R. 833, 106th Cong. § 126(b); S. 625, 106th Cong. § 401(b); S. 945, 106th Cong. § 728(b).

CONCLUSION

Judge Kane has been unfairly harangued by various commentators for his reading of section 1110. A careful look at the statute and its legislative history, however, bears out Judge Kane's interpretation, regardless of its potential effect on modern airline finance. WestPac's lessors have paid the price for the airline finance industry's mistaken reliance on section 1110, but Congress has returned to the drafting table to fill the void in which WestPac managed to hide its aircraft. Fortunately, the airline industry largely avoided the ill effects that might have flowed from Congress's contraction of special bankruptcy treatment of airline financiers. The proposed revisions to section 1110 will ensure that airlines will continue to be able to take advantage of advances in aircraft technology, and an ever increasing number of air travelers in this country will ultimately reap the benefits.

