

Is an Aircraft Lessor Entitled to Adequate Protection under §363(e) During the §1110 60-day Period?

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This article addresses the issue of whether an aircraft lessor is entitled to “adequate protection” pursuant to 11 U.S.C. §363(e) during the 60-day period after a bankruptcy filing contemplated by §1110 of the Bankruptcy Code. Ruling from the bench on July 15, 2008, Hon. **A. Jay Cristol**, chief judge emeritus for the U.S. Bankruptcy Court for the Southern District of Florida, on what the authors believe is a first-impression issue in the country, held as a matter of law that no such right existed. In so holding, Judge Cristol denied a motion seeking adequate protection filed by aircraft lessor GE Commercial Aviation Services LLC, for itself and as lease manager for affiliate AFS Investments 50 LLC (collectively, GECAS), in the chapter 11 cases of *Gemini Cargo Logistics Inc.* and its affiliated debtors (collectively, Gemini).



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Gemini filed for chapter 11 protection on June 18, 2008.¹ Gemini leased two MD-11s from GECAS in connection with its air cargo business. In the context of a §363 sale case,² GECAS moved for adequate protection pursuant to 11 U.S.C. §§361³ and 363(e),⁴ primarily arguing that continued use of its aircraft worked a depreciation of the value thereof while Gemini’s senior secured creditor was

¹ *In re Gemini Cargo Logistics Inc., et al.*, Case No. 08-18173-BKC-AJC (Bankr. S.D. Fla.) (Jointly Administered).

² On the first day of its chapter 11 cases, Gemini filed a motion seeking approval of bid procedures for a contemplated sale of its air cargo business or constituent parts thereof. Judge Cristol granted the motion and set a hearing to confirm a sale on Aug. 12, 2008, within the §1110 60-day period. See 11 U.S.C. §1110(a)(2).

³ Section 361 of the Bankruptcy Code provides the methods by which adequate protection, if required by Code §§362, 363 or 364, may be provided. See 11 U.S.C. §361.

⁴ Section 363(e) of the Code provides, in relevant part, that upon the “request of an entity that has an interest in property used...or leased... by the [debtor-in-possession], the court...shall prohibit or condition such use...or lease as is necessary to provide adequate protection of such interest.” 11 U.S.C. §363(e). As noted by the Eleventh Circuit, the term “adequate protection” is not defined in the Code. *Chrysler Credit Corp. v. Ruggiere* (in re *George Ruggiere Chrysler-Plymouth Inc.*), 727 F.2d 1017, 1019 (11th Cir. 1984). The prevailing case law, however, holds that the contract rate of the lease constitutes adequate protection of a lessor’s interest in leased property. See *In re Raymond Cossette Trucking Inc.*, 231 B.R. 80, 85 (Bankr. D. N.D. 1999). This is the form of adequate protection that GECAS sought.

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the recipient of the value of that use, and that GECAS shouldn’t be forced to finance Gemini’s chapter 11 case. Specifically, GECAS argued that there was nothing in §§363 or 1110 that precluded the grant of adequate protection during the §1110 60-day period. Gemini, however, argued that it was entitled to a “free ride” during this period, and Judge Cristol agreed.

At bottom, Judge Cristol found that §1110 reflects a congressional compromise whereby a chapter 11 debtor does not have to make payments to an aircraft lessor during the first 60 days of the case but, if a §1110(a)(2)(A) election⁵ or §1110(b) stipulation⁶ is not made or entered into within that timeframe, respectively, the automatic-stay provisions of §362(a) do not apply and the lessor, unlike other creditors, is free to retrieve

debtor’s bankruptcy petition. In the alternative, the debtor and lessor may enter into a court-approved stipulation [within this 60-day period] which allows the debtor to retain possession of the leased aircraft equipment by curing defaults and making the required lease payments.”⁹



Jordi Guso

Similarly, in *GATX Leasing Corp. v. Airlift Int’l Inc.* (in re *Airlift Int’l Inc.*),¹⁰ the Eleventh Circuit noted that §1110 gives the debtor-in-possession or trustee 60 days “to contemplate the wisdom of meeting the terms of §1110.

This 60-day period gives the debtor or trustee the opportunity to reassess his situation in light of bankruptcy and to choose whether to enter into a §1110 agreement as if he were entering into a new contract.”¹¹

Lastly, in *Western Pacific Airlines Inc. v. GATX Capital* (in re *Western Pacific Airlines Inc.*),¹² the district court explained that “[w]hile its purpose was to extend special protections afforded aircraft

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its leased aircraft. The authors submit that the rule of law announced by Judge Cristol—that an aircraft lessor is not entitled to adequate protection during the §1110 60-day period—was correct and supported by applicable case law that relies on the legislative history to §1110.⁷

In *The Port Authority of New York and New Jersey v. Sabre Decision Technologies Inc.* (in re *Kiwi Airlines Inc.*),⁸ the Third Circuit noted that §1110 “allows aircraft lessors to repossess their collateral 60 days after the filing of the

equipment vendors and lessors under Chapter X of the Code to all reorganizations under the new [c]hapter 11, it also intended to balance these protections with the debtor’s right to a ‘breathing spell’ and a meaningful opportunity to reorganize. Thus, the new §1110 was intended to continue protections allowing aircraft financiers to retake possession of their collateral under a lease...unencumbered by the automatic stay or any other power of the bankruptcy court, but also to afford debtors a 60-day window of time in which to avoid a retaking by agreeing to perform their future obligations under the lease or agreement [i.e., a §1110(b) stipulation] as they come due...and by curing defaults.”¹³

⁵ “The right to take possession and to enforce the other rights and remedies described in paragraph (1) shall be subject to §362—(A) before the date that is 60 days after the date of the order for relief under this chapter, the [debtor-in-possession] subject to the approval of the court, agrees to perform all obligations of the debtor under such security agreement, lease, or conditional sale contract....” 11 U.S.C. §1110(a)(2)(A).

⁶ “The trustee [or debtor-in-possession] and the secured party, lessor, or conditional vendor whose right to take possession is protected under subsection (a) may agree, subject to the approval of the court, to extend the 60-day period specified in subsection (a)(1).” 11 U.S.C. §1110(b).

⁷ GECAS and Gemini agreed to the submission of an agreed form of order denying GECAS’ motion for adequate protection that merely incorporated into the order the rulings Judge Cristol made from the bench. (Docket Entry 200). Gemini agreed to submission of this form of order based on GECAS’ agreement not to seek rehearing or appeal to the district court.

⁸ 344 F.3d 311 (3d Cir. 2003).

⁹ *Kiwi Airlines*, 344 F.3d at 320 (citing H.R. Rep. No. 95-595 at 404 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6361) (italics added).

¹⁰ 761 F.2d 1503 (11th Cir. 1985).

¹¹ *Airlift Int’l*, 761 F.2d at 1509 (italics added).

¹² 221 B.R. 1 (D. Colo. 1998). This decision was overruled (on other grounds) by amendments to §1110 of the Code. See *In re UAL Corp.*, 299 B.R. 509, 516-17 (Bankr. N.D. Ill. 2003).

¹³ 221 B.R. at 8 (citing H.R. Rep. at 239, 1978 U.S.C.C.A.N. at 6198) (italics added).

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The lead and only aircraft case relied upon by GECAS as supporting a right to adequate protection during the §1110 60-day period, *In re UAL Corp.*,¹⁴ was factually distinguishable. In the *UAL* case, a §1110(b) stipulation that contemplated adequate protection payments was entered into by the debtor and the aircraft lessor on the 59th day after the debtor filed bankruptcy.¹⁵ This fact, notwithstanding any other language in the opinion suggesting the availability of adequate protection during the §1110 60-day period, which the authors submit is necessarily *dictum*, supported Judge Cristol's conclusion that during the 60-day period immediately after the bankruptcy filing, there is no right to adequate protection. See also *GATX Leasing Corp.*, 761 F.2d at 1506-07 and n.1 (chapter 11 debtor and aircraft lessor entered into §1110(b) bankruptcy court-approved stipulation on Aug. 11, 1981, 67 days after the June 4, 1981, bankruptcy filing with the first lease payment due on Aug. 26, 1981). Judge Cristol found further support for his holding in §365(d)(5) of the Code, which provides, in pertinent part, that "[t]he trustee [or debtor-in-possession] shall timely perform all of the obligations of the debtor... first arising from or after 60 days after the order for relief¹⁶ under a case under chapter 11 of [the Code] under an unexpired lease of personal property."¹⁷

The authors submit that to afford an aircraft lessor adequate protection during the

§1110 60-day period would have the practical effect of rewriting §1110, which gives chapter 11 debtors 60 days to decide whether to make an §1110(a)(2)(A) election or enter into a §1110(b) stipulation. We further submit that this simply cannot be the result

intended by Congress. See 2A J. Sutherland, *Statutes and Statutory Construction*, §46.06 (4th ed. C. Sands 1973) (statute should not be read in such way so that one section renders another section inoperative, superfluous, void or insignificant). ■

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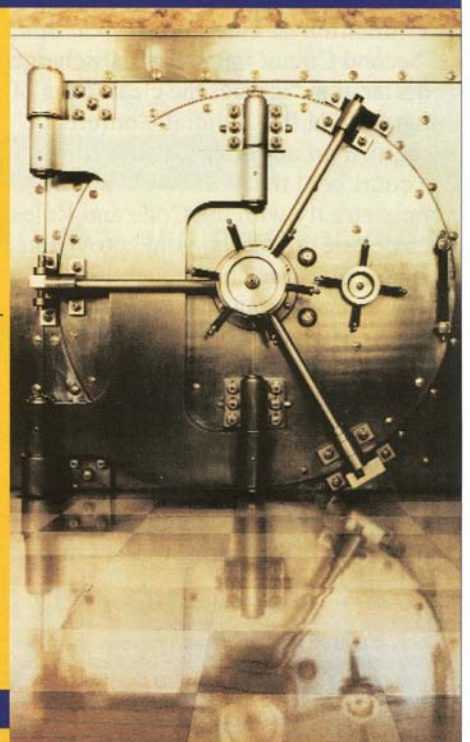
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¹⁴ 2005 WL 3117411 (Bankr. N.D. Ill. Nov. 21, 2005).

¹⁵ *UAL Corp.*, 2005 WL 3118411, *1 ("On Feb. 6, 2003, 59 days after the bankruptcy filing, [the debtor] and the [administrator of the aircraft lease] entered into a 'Stipulation and Order Approving §1110(b) Extension'").

¹⁶ "The commencement of a voluntary case under a chapter of [the Bankruptcy Code] constitutes an order for relief under such chapter." 11 U.S.C. §301(b).

¹⁷ 11 U.S.C. §365(d)(5) (italics added).