

# Pratt's Journal of Bankruptcy Law

LEXISNEXIS® A.S. PRATT®

JUNE 2023

**EDITOR'S NOTE: WHEN BANKRUPTCY HAPPENS**

Victoria Prussen Spears

**BANKRUPTCY CODE SECTION 546(e)'S NOT-SO-SAFE HARBOR: SECOND INFLUENTIAL  
BANKRUPTCY JUDGE ECHOES CONCERNS THAT BROAD EXEMPTION SHELTERS PIRATES**

Jason G. Cohen and Robert P. Grattan

**BANKRUPTCY COURTS INFLICT PAIN ON MARY JANE**

Michael J. Lichtenstein

**BANKRUPTCY COURT AUTHORIZES SERVICE OF SUBPOENA ON U.S. NATIONALS  
THROUGH SOCIAL MEDIA WHILE PROHIBITING THE ISSUANCE OF SUBPOENA ON  
FOREIGN NATIONALS ABROAD**

Michael B. Schaedle and Evan Jason Zucker

**BANKRUPTCY COURT ORDERS DEBTOR TO COMPLY WITH POST-PETITION LEASE  
OBLIGATIONS PAYABLE TO NON-LESSORS**

Brian Smith and Barbra R. Parlin

**PROTECTING PARTIES' RIGHTS UNDER QUALIFIED FINANCIAL CONTRACTS AND NETTING  
AGREEMENTS WHEN AN INSURER GOES INTO RECEIVERSHIP**

Paige D. Waters and Stephanie M. O'Neill Macro

**PRIVATE EQUITY'S NEW SWEET SPOT: MANUFACTURING SECTOR OPPORTUNITIES AND  
HOW TO MAKE THE BEST OF THEM IN A DOWN MARKET**

Brooke M. Ringel and Wendy A. Clarke

**LESSONS FROM *BURNFORD*: INVESTORS, CREDITORS AND RECOVERING REFLECTIVE  
LOSSES**

Oliver Williams, Alex Potten and Prav Reddy



LexisNexis

# Pratt's Journal of Bankruptcy Law

---

VOLUME 19

NUMBER 4

June 2023

---

<b>Editor's Note: When Bankruptcy Happens</b> Victoria Prussen Spears	145
<b>Bankruptcy Code Section 546(e)'s Not-So-Safe Harbor: Second Influential Bankruptcy Judge Echoes Concerns That Broad Exemption Shelters Pirates</b> Jason G. Cohen and Robert P. Grattan	148
<b>Bankruptcy Courts Inflict Pain on Mary Jane</b> Michael J. Lichtenstein	152
<b>Bankruptcy Court Authorizes Service of Subpoena on U.S. Nationals Through Social Media While Prohibiting the Issuance of Subpoena on Foreign Nationals Abroad</b> Michael B. Schaedle and Evan Jason Zucker	162
<b>Bankruptcy Court Orders Debtor to Comply with Post-Petition Lease Obligations Payable to Non-Lessors</b> Brian Smith and Barbra R. Parlin	168
<b>Protecting Parties' Rights Under Qualified Financial Contracts and Netting Agreements When an Insurer Goes Into Receivership</b> Paige D. Waters and Stephanie M. O'Neill Macro	173
<b>Private Equity's New Sweet Spot: Manufacturing Sector Opportunities and How to Make the Best of Them in a Down Market</b> Brooke M. Ringel and Wendy A. Clarke	178
<b>Lessons from <i>Burnford</i>: Investors, Creditors and Recovering Reflective Losses</b> Oliver Williams, Alex Potten and Prav Reddy	190

## QUESTIONS ABOUT THIS PUBLICATION?

---

For questions about the **Editorial Content** appearing in these volumes or reprint permission, please call or email:

Ryan D. Kearns, J.D., at ..... 513.257.9021  
Email: ..... ryan.kearns@lexisnexis.com

For assistance with replacement pages, shipments, billing or other customer service matters, please call:

Customer Services Department at ..... (800) 833-9844  
Outside the United States and Canada, please call ..... (518) 487-3385  
Fax Number ..... (800) 828-8341  
Customer Service Website ..... <http://www.lexisnexis.com/custserv/>  
For information on other Matthew Bender publications, please call

Your account manager or ..... (800) 223-1940  
Outside the United States and Canada, please call ..... (937) 247-0293

---

Library of Congress Card Number: 80-68780

ISBN: 978-0-7698-7846-1 (print)

ISBN: 978-0-7698-7988-8 (eBook)

ISSN: 1931-6992

Cite this publication as:

[author name], [*article title*], [vol. no.] PRATT'S JOURNAL OF BANKRUPTCY LAW [page number] ([year])

**Example:** Patrick E. Mears, *The Winds of Change Intensify over Europe: Recent European Union Actions Firmly Embrace the "Rescue and Recovery" Culture for Business Recovery*, 10 PRATT'S JOURNAL OF BANKRUPTCY LAW 349 (2023)

This publication is designed to provide authoritative information in regard to the subject matter covered. It is sold with the understanding that the publisher is not engaged in rendering legal, accounting, or other professional services. If legal advice or other expert assistance is required, the services of a competent professional should be sought.

LexisNexis and the Knowledge Burst logo are registered trademarks of RELX Inc. Matthew Bender, the Matthew Bender Flame Design, and A.S. Pratt are registered trademarks of Matthew Bender Properties Inc.

Copyright © 2023 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved.

No copyright is claimed by LexisNexis or Matthew Bender & Company, Inc., in the text of statutes, regulations, and excerpts from court opinions quoted within this work. Permission to copy material may be licensed for a fee from the Copyright Clearance Center, 222 Rosewood Drive, Danvers, Mass. 01923, telephone (978) 750-8400.

Editorial Office  
230 Park Ave., 7th Floor, New York, NY 10169 (800) 543-6862  
[www.lexisnexis.com](http://www.lexisnexis.com)

MATTHEW  BENDER

# *Editor-in-Chief, Editor & Board of Editors*

---

## **EDITOR-IN-CHIEF**

**STEVEN A. MEYEROWITZ**

*President, Meyerowitz Communications Inc.*

## **EDITOR**

**VICTORIA PRUSSEN SPEARS**

*Senior Vice President, Meyerowitz Communications Inc.*

## **BOARD OF EDITORS**

**SCOTT L. BAENA**

*Bilzin Sumberg Baena Price & Axelrod LLP*

**ANDREW P. BROZMAN**

*Clifford Chance US LLP*

**MICHAEL L. COOK**

*Schulte Roth & Zabel LLP*

**MARK G. DOUGLAS**

*Jones Day*

**MARK J. FRIEDMAN**

*DLA Piper*

**STUART I. GORDON**

*Rivkin Radler LLP*

**PATRICK E. MEARS**

*Barnes & Thornburg LLP*

*Pratt's Journal of Bankruptcy Law* is published eight times a year by Matthew Bender & Company, Inc. Copyright © 2023 Matthew Bender & Company, Inc., a member of LexisNexis. All Rights Reserved. No part of this journal may be reproduced in any form—by microfilm, xerography, or otherwise—or incorporated into any information retrieval system without the written permission of the copyright owner. For customer support, please contact LexisNexis Matthew Bender, 9443 Springboro Pike, Miamisburg, OH 45342 or call Customer Support at 1-800-833-9844. Direct any editorial inquiries and send any material for publication to Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc., 26910 Grand Central Parkway Suite 18R, Floral Park, New York 11005, [smeyerowitz@meyerowitzcommunications.com](mailto:smeyerowitz@meyerowitzcommunications.com), 631.291.5541. Material for publication is welcomed—articles, decisions, or other items of interest to lawyers and law firms, in-house counsel, government lawyers, senior business executives, and anyone interested in privacy and cybersecurity related issues and legal developments. This publication is designed to be accurate and authoritative, but neither the publisher nor the authors are rendering legal, accounting, or other professional services in this publication. If legal or other expert advice is desired, retain the services of an appropriate professional. The articles and columns reflect only the present considerations and views of the authors and do not necessarily reflect those of the firms or organizations with which they are affiliated, any of the former or present clients of the authors or their firms or organizations, or the editors or publisher.

POSTMASTER: Send address changes to *Pratt's Journal of Bankruptcy Law*, LexisNexis Matthew Bender, 230 Park Ave. 7th Floor, New York NY 10169.

# Bankruptcy Court Orders Debtor to Comply with Post-Petition Lease Obligations Payable to Non-Lessors

*By Brian Smith and Barbra R. Parlin\**

*In this article, the authors discuss how a decision by the U.S. Bankruptcy Court for the Southern District of New York may affect drafting and structuring decisions in future airline bankruptcies. In that case, the court held that the requirement in Bankruptcy Code Section 365(d)(5) that a debtor “perform all obligations” under a lease can even include payment of certain fees related to pre-bankruptcy services owed to non-lessors, which fees are expressly scheduled in, and payable under, the lease.*

Bankruptcy Code Section 365(d)(5) provides personal property lessors with important rights concerning lease payments that come due after a lessee commences a U.S. bankruptcy proceeding. Generally, that section requires that the lessee “perform all of the obligations of the debtor” under an unexpired personal property lease (including the obligation to pay rent) that arise on and after the 60th day following a bankruptcy filing, until the debtor makes a decision to assume or reject the lease.

## BACKGROUND

In the *Avianca Holdings* bankruptcy case,<sup>1</sup> the U.S. Bankruptcy Court for the Southern District of New York recently affirmed that Bankruptcy Code Section 365(d)(5)’s requirement that a debtor “perform all obligations” under a lease means exactly what the text of that provision says. To that end, the bankruptcy court ordered the debtor (*Avianca*) to comply with lease terms that required payment of certain prepetition leasing fees characterized as “additional rent” under the terms of the lease that were due after the bankruptcy filing and before the leases were later rejected. Notably, the court required the payments to be made even though:

- The fees were payable to a third party, not the lessor;
- The fees related to services performed and completed well before the

---

\* Brian Smith, a partner in the Dallas office of Holland & Knight LLP, focuses his practice on bankruptcy, corporate finance and general corporate matters. Barbra R. Parlin, a partner in the firm’s office in New York, focuses her practice on advising parties involved in complex commercial insolvency and restructuring proceedings, as well as related litigation and transactional matters. The authors may be contacted at [brian.smith@hklaw.com](mailto:brian.smith@hklaw.com) and [barbra.parlin@hklaw.com](mailto:barbra.parlin@hklaw.com), respectively.

<sup>1</sup> In re *Avianca Holdings S.A.*, et al., No. 20-11133 (MG) (Bankr S.D.N.Y. Jan. 26, 2023).

bankruptcy filing date; and

- The payments potentially were at odds with the policy reasons surrounding the enactment of Section 365(d)(5).

This ruling resolved a dispute between the debtors (Avianca) and two entities (Initiators) that assisted Avianca with initiating and locating commercial aircraft leases prepetition. The Initiators had assisted Avianca with entering into approximately 20 separate commercial aircraft leases that remained in effect as of the petition date. Instead of paying fees owed to the Initiators for their services at the time the leases became effective, the relevant aircraft leases each required Avianca to pay the Initiators' fees over time in monthly installments. Each monthly fee was listed in the applicable aircraft lease as "additional rent" and was payable to the Initiator in accordance with a well-defined payment schedule (such that the amount of fees due for each month following the bankruptcy filing was readily and easily ascertainable).

Avianca sought bankruptcy protection in May 2020 in the wake of COVID-19 outbreaks earlier that year. Shortly after the commencement of Avianca's bankruptcy proceeding, Avianca entered into substantially identical "usage stipulations" with nearly all of its aircraft lessors. The "usage stipulations" modified certain of Avianca's obligations under the lease, including providing that Avianca would have to pay only "power by the hour" rent during the bankruptcy case, rather than the rent specified in the lease, pending a final decision by Avianca as to whether the underlying lease would be assumed or rejected. The usage stipulations each stated that all rights regarding future assumption or rejection of the relevant lease were reserved. Other than suspending the obligation to pay rent in favor of power by the hour rentals, the usage stipulation did not explicitly address payment of the "additional rental" amounts due to the Initiators, nor were the Initiators parties to any of the aircraft usage stipulations (which were executed between the applicable lessor and Avianca).

The 60th day following the commencement of Avianca's bankruptcy cases occurred on July 9, 2020. During the period after that date, Avianca and the underlying lessors continued to negotiate regarding assumption or rejection. Ultimately, Avianca reached agreements to continue the use of substantially all of the aircraft for which the original leases included payment of "Initiator" fees. In most cases, Avianca and the lessor agreed that the existing lease would be rejected, with the parties to execute a new, replacement lease for the aircraft. Such agreements provided that the effective rejection date for each aircraft would be the effective date of the new lease. However, the effective date for most new leases did not occur until early 2022.

## DISPUTE AND RULING REGARDING INITIATOR CLAIMS

The Initiators filed administrative claims seeking allowance and payment of the Initiator fees that were payable as “additional rent” under the original leases through the rejection date. Avianca disputed its obligation to pay such claims, so the Initiators filed a motion seeking alternatively (a) allowance of administrative claims for the post-bankruptcy (but pre-rejection) fees that accrued after July 9, 2020, through the relevant rejection effective date, or (b) an order compelling payment of such amounts under Bankruptcy Code Section 365(d)(5).

In response, Avianca claimed that it was not obligated to pay the Initiator fees post-petition because (a) such amounts did not constitute obligations under the leases arising after July 9, 2020, and instead represented deferred obligations that accrued prior to Avianca’s bankruptcy filing, or (b) the obligation to pay such amounts was superseded by the terms of the “usage stipulations” executed between Avianca and the aircraft lessors.

Ultimately, the court rejected both arguments and held that the Initiators were entitled to the amounts due to them under the underlying lease agreements for the period from July 9, 2020, through the applicable rejection date.

In so holding, the court focused principally on the text of 365(d)(5). The payments due to the Initiators were set forth in the aircraft lease (and constituted one of multiple payment obligations under that lease) and, importantly, were payable according to a fixed schedule (raising no questions as to which obligations were payable from and after July 9, 2020).

The court noted that payment of such amounts could be at odds with the policies set forth in the legislative history underlying Section 365(d)(5), which provision was intended to protect lessors themselves (not necessarily other third parties for whom amounts are owed under lease documents) from suffering financial harm while the lessor awaits a final decision from the debtor concerning whether the lessor’s lease will be assumed or rejected. Nevertheless, the court held that such policy complications could not override the explicit text of Section 365(d)(5).

Further, the court did not identify any provision of the usage stipulation that explicitly addressed payment of the Initiator fees. Although the usage stipulations stated that the reduced power-by-the-hour (PBH) rentals and other amounts payable per the usage stipulation would “satisfy any and all rights of the [stipulation signatories] to administrative expense status or priority in payment . . . for any claims arising out of or related to the [usage stipulation



term],” the court held that the language did not expressly address amounts due to the Initiators (who were not parties to the usage stipulation). Because the usage stipulations did not address amounts due to the Initiators, and otherwise preserved all other lease rights pending the decision to assume or reject the leases, the court held that the usage stipulations did not override the leases’ requirement to pay Initiator fees.

Notably, the court did not hold that the Initiators were entitled to an administrative claim, because payment of the Initiator fees did not provide a post-petition benefit to the estate (such a benefit is a prerequisite to allowance of an administrative claim). However, because Section 365(d)(5) does not require a showing of any benefit to the estate in order to compel payment, the court nevertheless ordered payment of the Initiator fees over Avianca’s objection.

## DRAFTING AND STRUCTURING CONSIDERATIONS

Certain facets of the *Avianca Holdings* opinion may impact drafting and structuring decisions made in connection with future airline bankruptcies. Because the court was very focused on the explicit schedule for amounts payable to the Initiators (which left no disagreement as to amounts that were due after day 60), any parties that want payments to third parties included in a lease to remain payable during a bankruptcy (absent overriding language in a usage stipulation) will need to ensure there is no ambiguity regarding when such payments are due. Any potential flexibility regarding the ability to make any such payments before day 60 could be fatal to a post-bankruptcy claim for such payments.

Furthermore, the timing and mechanics of assumption or rejection of a lease may impact how long any third-party fees (similar to the ones payable to the Initiators) will continue to accrue. In *Avianca Holdings*, the airline reached an agreement in principle regarding retention of most of the aircraft in question months before the effective rejection date of the old leases (that included payment of Initiator fees). Accelerating the effective date of rejection of the leases in question could have reduced the amount of fees payable to the Initiators, as the effective date of assumption or rejection (not the date of a deal regarding potential terms of assumption or rejection) dictates when the Section 365(d)(5) payment clock stops.

## CONCLUSION

In summary,

- In a recent opinion from the *Avianca Holdings* bankruptcy case, the

U.S. Bankruptcy Court for the Southern District of New York held that the requirement in Bankruptcy Code Section 365(d)(5) that a debtor “perform all obligations” under a lease can even include payment of certain fees related to pre-bankruptcy services owed to non-lessors, which fees are expressly scheduled in, and payable under, the lease.

- The ruling resolved a dispute between the debtors and two entities that assisted Avianca in initiating and locating commercial aircraft leases (whose fees for such services were payable under terms set forth in the lease).