

## NorVergence Bankruptcy: Related Litigation Places Standard Lease Enforcement Terms in Jeopardy

By Byron L. Saintsing and Thomas A. Gray

The bankruptcy and subsequent collapse of NorVergence, Inc., a New Jersey-based reseller of telecommunications services and equipment, has placed standard lease enforcement terms, including "hell or high water" clauses and forum selection clauses, under scrutiny. The purpose of this article is to provide a basic understanding of the NorVergence bankruptcy, its related litigation, the issues raised and relief sought so as to assist those within the leasing industry who are faced with similar issues. The below facts and procedural history are drawn from allegations contained within pleadings on file with various courts and are available to the public. Until the matters are fully adjudicated, the facts and legal assertions included below are mere allegations and are not conclusive.

### History and Collapse

NorVergence held itself out as a provider of "low-cost" telecommunications services to small and medium sized businesses throughout the United States. As part of its business plan, NorVergence entered into agreements with various telecommunications providers including Quest Communications Corporation, Sprint Communications, L.P. and T-Mobile USA, Inc. for the purpose of routing telephone and data traffic and providing cellular telephone services. It has been alleged that NorVergence represented to its customers that it could provide dramatic telecommunications services savings by installing a piece of equipment called the "Matrix". Customers of NorVergence entered into not only telecommunications agreements with NorVergence but customers were also



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required to enter into "Equipment Rental Agreements" ("ERA") for the "Matrix". The ERAs which contained typical provisions such as "hell or high water" clauses and forum selection clauses. Once the customers entered into the ERAs, the ERAs were assigned to and/or purchased by financing sources, which provided an influx of cash for NorVergence. It has been alleged that the prices charged for the "Matrix" were grossly inflated and further that the "Matrix" did not work as represented and some have alleged that the "Matrix" was non-functional and a hoax. The assignments generated a large amount of cash for NorVergence however; over time, NorVergence was unable to continue to sell enough ERAs to keep up with the cost of the telecommunications services provided. NorVergence collapsed when it was unable to provide the services or pay its suppliers.

### Bankruptcy

On June 30, 2004, an involuntary petition under Chapter 11 of the Bankruptcy Code was filed against NorVergence and thereafter the case was converted to a Chapter 7.<sup>1</sup> At the same time, the Court entered orders allowing the various telecommunication providers including Quest, Sprint and T-Mobile, to terminate their internet, long-distance and cellular telephone services. This termination effectively shut down NorVergence and thereafter numerous Adversary Complaints were filed by NorVergence customers against various funding sources who acquired the ERAs. The Adversary Complaints seek among other things declaratory judgments that the ERAs are void from the inception, should be rescinded, and that damages should be

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## Welcome to Lease Enforcement Analysis & News

LEAN, the only national network of law firms dedicated to providing collection, enforcement and recovery services for leasing companies, welcomes you to the inaugural issue of Lease Enforcement Analysis & News. This quarterly newsletter is provided free of charge to leasing professionals engaged in the legal, credit, collections and operations aspects of leasing firms. LEAN consists of experienced attorneys who assist leasing companies and lease funding entities. What sets LEAN law firms apart is that in addition to being experts in the enforcement of lease obligations including collections, asset recovery, and bankruptcy representation, LEAN members know leasing.

Each issue of the newsletter will feature an article that gives you practical tactics and tips about collection, bankruptcy or other lease enforcement issues. In addition, we will provide a calendar of events of interest to the leasing community. Updates about LEAN members and a useful directory of LEAN law firms are included.

We are anxious to receive your feedback. Visit the LEAN website at [www.leasecollect.org](http://www.leasecollect.org) or complete the response form on the back of this newsletter to receive your complimentary unique LEAN coffee mug.

You can refer to the enclosed directory to find a LEAN attorney to assist you anywhere in the United States or use our searchable database on the LEAN web site at [www.leasecollect.org](http://www.leasecollect.org). Contact LEAN directly by email at [info@leasecollect.org](mailto:info@leasecollect.org) or by calling its toll free number at 877-LEASELAW or 877-532-7352.

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awarded. The Adversary Complaints also claim conversion and allege that the assignees knew or should have known about, participated in and were the means and instrumentality for the commission of the alleged NorVergence scheme.

### **New Jersey Class Action**

In New Jersey, a class-action lawsuit was filed on behalf of all persons who leased equipment from NorVergence by way of ERAs, which were thereafter assigned to various lease-assignees.<sup>2</sup> This case is of particular interest to the leasing industry because the class alleges, among other things, that the assignees of the ERAs were fully aware of NorVergence's alleged misrepresentations yet still bought and enforced the ERAs. The class also asserts that the language contained in the ERA is unconscionable, with such unconscionable aspects including the "hell or high water" clause, the "floating jurisdiction" clause, and that the assignees knew or should have known of the unconscionability of the agreements. The class further questions the validity of the ERAs, disputes any finance lease characterizations, and claims that Article 2A of the Uniform Commercial Code does not apply. The relief sought by the class includes an injunction preventing enforcement of the ERAs, a declaratory judgment that the ERAs are not enforceable and punitive damages.

The various briefs and replies filed provide the parties' positions on such issues as the applicability of Article 2A, whether the forum selection clause is unconscionable, and whether the assignees are holders in due course of the ERA. The Amicus Curiae Memorandum submitted on behalf of the Attorney General of New Jersey and the Director of the New Jersey Division of

Consumer Affairs provides their position on several issues including the "floating jurisdiction" clause, whether the practices of NorVergence violated the New Jersey Consumer Fraud Act, and whether the violation can be used as a defense against any assignee, even if the assignee took the ERA in good faith, for value and without notice of any defenses against NorVergence.

### **"Floating" Forum Selection Clause in Dispute**

In Ohio, the validity of forum selection clauses contained in various NorVergence ERAs are front and center. Preferred Capital, Inc. ("Preferred") filed twelve cases against various businesses ("Appellees") that defaulted on ERAs entered into with NorVergence and thereafter assigned to Preferred.<sup>3</sup> The Appellees filed Motions to Dismiss claiming that the forum selection clauses contained in the ERAs were invalid and that each Appellee did not have the

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necessary minimum contacts with the State of Ohio. The twelve cases were dismissed for lack of personal jurisdiction and Preferred appealed.

The issues raised on appeal, namely the validity of the forum selection clause, are of particular interest to the leasing industry.

The forum selection clause in dispute is as follows:

"This Agreement shall be governed by, construed and enforced in accordance with the laws of the State in which Rentor's principal offices are located or, if this Lease is assigned by Rentor, the State in which the assignee's principal offices are located, without regard to State's choice of law considerations and all legal actions relating to this Lease shall be venued exclusively in the State or Federal court located within that State, which court to be chosen at Rentor or Rentor's Assignee's sole option."

Preferred claims that the ERA forum selection clauses are valid because the transactions were commercial in nature, fraud defenses do not apply and enforcement of the clause is not unreasonable or unjust. Preferred also emphasizes that the identical forum selection clause has been upheld by judges in Ohio and that public policy considerations favor enforcement of the forum selection clause. Preferred addresses minimum contacts and claims that a valid forum selection clause precludes a minimum contacts analysis and even if the forum selection clause was unenforceable, the Appellees have the requisite contacts to establish jurisdiction.

Appellees claim that the trial courts were correct in dismissing Preferred's claims for lack of jurisdiction. Appellees rely upon a variety of reasons including that the forum selection clause is vague, unclear and does not specify the state in which suit may be brought. Appellees also emphasize that they are not domiciled or incorporated in Ohio, had no expectation of litigation in Ohio, and that based upon the size and nature of their

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## **LEAN Members In The News**

### **Smith Debnam Narron Wyche Saintsing & Myers, L.L.P.**

announces the opening of their Charlotte office located at The Rotunda; 4201 Congress Street; Suite 460; Charlotte, NC 28209. The phone and fax for the Charlotte office are 704.643.3220 and 704.643.3898 respectively. The firm also announces the newest members of the firm. John B. Honeycutt, Jr., Partner – Charlotte Office and Heather N. Johnson, Associate – Charlotte office. The firm's Raleigh office is located at Landmark Center; 4601 Six Forks

Road; Suite 400; Raleigh, NC 27609. The Raleigh phone and fax are 949.250.200 and 919.250.2211. The firm's Web site is [www.smithdebnamlaw.com](http://www.smithdebnamlaw.com).

**Hiscock & Barclay**, headquartered in Syracuse, New York is celebrating its 150th anniversary this year. Formed in 1855, the firm has 160 attorneys in five strategic offices throughout Upstate New York. **Rob Liddell** is the primary contact at the firm for leasing business. He can be reached at 315.422.2131 or [rliddell@hiscockbarclay.com](mailto:rliddell@hiscockbarclay.com). The firm's Web site is [www.hiscockbarclay.com](http://www.hiscockbarclay.com).

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business and location of witnesses, Ohio is so inconvenient as to deny them their day in Court.

The Equipment Leasing Association (ELA) and various Attorneys General have weighed in on the issues raised. The ELA's Amicus Curiae brief provides the ELA's position on the forum selection clauses at issue and their importance to the leasing industry and commerce in general. The Attorneys General of various States filed their Brief on Appeal of Amici Curiae urging the Court to affirm the lower court's dismissals for lack of jurisdiction and bar enforcement of the floating forum selection clauses.

### Federal Trade Commission Files Suit

The Federal Trade Commission ("FTC") filed a complaint against NorVergence in the United States District Court District of New Jersey.<sup>4</sup> One of the FTC's functions is to enforce of the FTC Act prohibiting unfair and deceptive acts or practices in or affecting commerce. Of interest to the leasing industry, the FTC complaint attacks the validity of the ERAs by claiming, among other things, that the value of the ERAs had no relationship to the cost of the "Matrix". The complaint also questions the validity of the ERAs' "hell or high water" clause and a non-defined or distant forum selection clause. Finally, in relation to the finance company assignees, the FTC claims that they knew or should have known of NorVergence's fraudulent actions and that the ERAs might have been a part of the scheme to defraud the customers. Of particular interest to lease enforcement professionals, the relief requested by the FTC includes restitution, reformation or rescission of the contracts, cessation of

## LEAN Industry Calendar of Events

September 2005 through December 2005

For more information about individual events, visit the LEAN website at [www.leasecollect.org](http://www.leasecollect.org)

### September 12-14 (ELA)

Principles of Leasing Workshop (Advanced)  
Westin City Center  
Dallas, TX

### September 13-14 (ELA)

Healthcare Finance Summit  
Ritz Carlton -Pentagon City  
Arlington, VA  
September 19, 2005 (EAEL)  
Annual EAEL Expo  
Teaneck, New Jersey

### September 19-21 (ELA)

Lease Accountants Conference  
Marriott JW Hotel New Orleans  
New Orleans, LA

### September 22-25, 2005 (UAEL)

2005 ACE Fall Conference  
Caesars Tahoe  
Lake Tahoe, Nevada

### September 26-28 (ELA)

Municipal Leasing Forum  
Trump International Sonesta Beach  
Resort  
Sunny Isles Beach (Miami), FL

### October 11 (EAEL)

Regional Business Luncheon  
Hartford, CT

### October 17-19 (ELA)

Principles of Leasing Workshop  
Hyatt Regency Chicago  
Chicago, IL

### October 21 - 22 (NAELB)

NAELB Western Regional Meeting  
Hilton Irvine  
Irvine, CA

### October 23-25 (ELA)

44th Annual Convention  
Boca Raton Resort & Club  
Boca Raton, FL

### November 4 - 6 (NAELB)

NAELB Eastern Regional Meeting  
Sheraton Gateway  
Atlanta, GA

### November 15 (EAEL)

TBA  
Westchester/Long Island Regional  
Business Luncheon

### December 5-7 (ELA)

Principles of Leasing Workshop  
Courtyard Marriott  
Philadelphia, PA

### December 8 (EAEL)

New York City  
Holiday Reception and Dinner

### December 12-14 (ELA)

Principles of Leasing Workshop (Advanced)  
Hyatt Fisherman's Wharf  
San Francisco, CA

EAEL = Eastern Association of Equipment Leasing

ELA = Equipment Leasing Association

NAELB = National Association of Equipment Leasing Brokers

UAEL = United Association of Equipment Leasing

collections and the cancellation of purported debts.

### Attorneys General Involvement

The Attorneys General of several states have investigated the business practices of NorVergence, including its relationships to the assignees of the ERAs, and have filed suit in various jurisdictions against NorVergence based upon violations of certain consumer protection acts. The Attorneys General have investigated various assignees of the ERA's relating to NorVergence, have made formal requests for information, issued subpoenas, and have requested that certain assignees of the ERAs suspend monthly payment requirements and stay any collection

activities during the investigation. The Attorneys General have filed suit directly against NorVergence in several states, including Illinois, New York, North Carolina, Massachusetts, Pennsylvania and Florida, seeking, among other relief, damages, injunctions, restitution, and rescission of contracts. Some leasing companies have defended against the Attorney General's actions while others have elected to settle with various Attorneys General. As a part of their settlements, the Attorneys General have sought to cap the amounts that each assignee/leasing company can recover from NorVergence customers as part of the settlement.

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**Robert S. Bernstein** of the Pittsburgh, Penn. based **Bernstein Law Firm** recently traveled to Beijing, China to speak on the subjects of creditors' rights and bankruptcy. He presented to members of China Export and Credit Insurance Corporation, China's only official export credit insurance company, and to Jincheng & Tongda Law Firm, one of China's largest law firms. Bob can be contacted at 412.456.8101 or by e-mail at [rbernstein@bernsteinlaw.com](mailto:rbernstein@bernsteinlaw.com). The firm's Web site is [www.bernsteinlaw.com](http://www.bernsteinlaw.com).

**Steven L. Higgs** of **Steven L. Higgs, P.C.** located in Roanoke, Va. has been named President-elect of the Roanoke (Virginia) Bar Association. He also announces the relocation of his office to 9

Franklin Road, S.W.; Roanoke, Virginia 24011-2403. His phone and fax are 540.400.7991 and 540.400.7999 respectively. His e-mail is [higgs@higgslawfirm.com](mailto:higgs@higgslawfirm.com) and his Web site is [www.higgslawfirm.com](http://www.higgslawfirm.com). He also is co-author of the 2005 update of the Virginia Law Foundation Handbook, "Debt Collection for Virginia Lawyers - A Systematic Approach."

**Robert S. Bernstein** of the Pittsburgh, Penn. based **Bernstein Law Firm** was named Pennsylvania Super Lawyer for the second year in a row. The designation is awarded to the top five percent of Pennsylvania lawyers. He can be reached at 412.456.8101 or [rbernstein@bernsteinlaw.com](mailto:rbernstein@bernsteinlaw.com).

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## Analogous Cases

Generally, NorVergence and its related cases pertain to a lease of equipment between the vendor and lessee/customer, a separate service agreement, and thereafter an assignment of the lease to a leasing company. There are at least two series of cases with a similar, general fact pattern as to that of NorVergence that may provide guidance and are worth mentioning. The first involves cases that have arisen from the bankruptcy of Credit Card Center in 2001.<sup>5</sup> Credit Card Center ("CCC") was a vendor of automated teller machines that stopped servicing the ATM's after it filed for bankruptcy, which led to the lessees ceasing their lease payments. Some decisions that flowed from the CCC bankruptcy upheld the "hell or high water" provisions of an Article 2A lease and found that the lessees remained liable for payments under leases.

The second series of cases with a similar, general fact pattern to that of NorVergence and CCC, are those that have arisen from a Chapter 11 bankruptcy filed by Recomm International Display, Ltd. ("Recomm") and several Recomm affiliates in the United States Bankruptcy Court for the Middle District of Florida in 1996.<sup>6</sup> Recomm operated a nationwide network of electronic message boards and kiosks that it marketed and distributed primarily to pharmacists and veterinarians. More than 30 leasing companies provided lease financing to Recomm's customers for the leasing of the boards and kiosks pursuant to the lease agreements. At the time of Recomm's bankruptcy filing there were reported over 12,000 leases in place of Recomm equipment between various lessees and leasing companies. At the same time the lessees entered into the leases with the finance companies ("lessors"), the lessees entered into advertising agreements and rebate agreements with Recomm whereby Recomm agreed to pay license fees to the lessees for the right to place advertisements on the leased equipment. The lessors were not parties to the advertising agreements between Recomm and its customers. Recomm failed to pay the lessees the license fees and rebates and many lessees in turn ceased making payments on their leases to the leasing companies.

In Recomm's bankruptcy, the lessees of the Recomm equipment were considered unsecured creditors. Recomm, the

Unsecured Creditors Committee, and certain leasing companies filed a plan of reorganization and the Court entered an Order confirming the plan. Among other things, the Bankruptcy Court's Confirmation Order modified the terms of the leases ("modified leases"), declared that the modified leases are valid and binding on the lessees, and released lessors and lessees from various potential claims and defenses against each other from the up through the date of confirmation of the plan. In the aftermath of the confirmed plan, numerous leasing companies have had to resort to filing state court civil actions to enforce the terms of the plan and collect the lease payments provided for under the terms of the confirmed plan.

## Conclusion

The NorVergence bankruptcy and its related litigation has placed standard lease enforcement terms, including "hell or high water" clauses and forum selection clauses, under scrutiny and in jeopardy. The litigation is voluminous, fluid and on-going and hopefully the above summaries provide quick reference for those within the leasing industry faced with similar issues.

In a recent development, a suit filed by the Florida Attorney General against various leasing companies has been dismissed.<sup>7</sup> The Judge dismissing the Florida proceeding stated, among other things, that the "hell or high water" clause and the waiver of defense and warranties clause are permitted under Florida law and that the forum selection clause is valid and enforceable under Florida law. As it stands, the Florida dismissal may prove itself useful in other pending litigation related to NorVergence.

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**Byron Saintsing** has been a partner with **Smith Debnam Narron Wyche Saintsing & Myers, LLP** since 1993 where he leads a practice group whose attorneys concentrate in matters of construction law, commercial and business litigation, representation of equipment lessors and creditor bankruptcy. His practice emphasizes effective and frequent client communication, as well as efficient, aggressive and results-oriented representation. Mr. Saintsing has written and lectured on many topics pertaining to construction and equipment leasing, including editing materials on North Carolina's recent adoption of Article 2A of the Uniform Commercial Code.

**Thomas A. Gray** concentrates his practice in construction law, equipment leasing and finance, commercial creditor bankruptcy, commercial litigation, and creditors' rights. He represents national and local equipment leasing companies and their financing sources seeking to enforce their rights pursuant to the lease, including the recovery of amounts due, recovery of equipment, and representation of the creditors in bankruptcy court should the debtors file Chapter 7, Chapter 11, or Chapter 13 bankruptcy petitions. Mr. Gray has maintained his practice concentration in commercial litigation and creditors' rights since 1998. Prior to transferring to North Carolina and joining Smith Debnam, he worked with a Boston commercial litigation firm for over five years, regularly appearing in District and Superior Courts throughout Massachusetts.

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Thomas can be reached at 919.250.2121 or tgray@smithdebnamlaw.com.

<sup>1</sup> In re: NorVergence, Inc., United States Bankruptcy Court District of New Jersey, Case No. 04-32079

<sup>2</sup> Exquisite Caterers, LLC, et al. v. Popular Leasing USA, Inc., et al., United States District Court For the District of New Jersey (Trenton), Civil Action No. 04-04467 (Remanded); Superior Court of New Jersey, Monmouth County, Civil Action No. MON-L-3686-04

<sup>3</sup> Preferred Capital, Inc. vs. Thomas E. Strellec, Jr., et al., Court of Appeals of Ohio, Eighth District, COA Nos. 85706, 85707, 85723, 85731, 85732, 85733, 85743, 85744, 85745, 85775, 85776 and 85777

<sup>4</sup> Federal Trade Commission v. NorVergence, Inc., United States District Court District of New Jersey, Civil Action No. 04-5414

<sup>5</sup> In re JRA 222, Inc., d/b/a Credit Card Center, United States Bankruptcy Court for the Eastern District of Pennsylvania, Case No. 01-18495

<sup>6</sup> In Re Optical Technologies, Inc., United States Bankruptcy Court for the Middle District of Florida-Tampa Division, Case Nos. 96-00805, 96-01200, 96-01201, 96-01202, 96-01203, 98-020134, 98-020135, 98-020136

<sup>7</sup> State of Florida, Office of the Attorney General, Department of Legal Affairs vs. Commerce Commercial Leasing, LLC, et al. In the Circuit Court of the Second Judicial Circuit in and for Leon County, Florida, Case No. 2004 CA 2515.

## New Law Impacts Leasing

On April 20, 2005, the President signed Public Law 109-8, the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005.

This legislation includes an Equipment Leasing Association endorsed provision which clarifies that the debtor-lessee is obligated to perform all non-monetary, as well as monetary obligations, 60 days after the order for relief pending assumption or rejection of the lease. This change is consistent with legislative intent and is designed to ensure that bankruptcy courts throughout the country are consistent in their interpretation of the bankruptcy code. The Ninth Circuit Court of Appeals had ruled in 1997 that the bankruptcy code requires a bankrupt lessee to cure both monetary and non-monetary defaults in order to assume a lease while the First Circuit Court of Appeals in 2004 ruled that a bankrupt debtor did not have to cure non-monetary defaults as a condition to assumption of an unexpired lease. This legislation will resolve this conflict between the circuits.

The new law creates the concept of a small business bankruptcy, where the debtor is defined as a person engaged in commercial or business activities (other than owning or operating real estate), with no more than \$2 million in non-insider/affiliate debt.) The appointment of a creditors' committee, as long as the committee is sufficiently active to be effective, will remove the case from the definition of small business debtor.

The goal of the small business debtor provisions is to move the case through the bankruptcy process faster and cheaper. The two primary means of accomplishing this are by setting new deadlines for small business debtors and by allowing for the combination of the disclosure statement and plan into one step.

There are a number of changes that may benefit smaller creditors in all business bankruptcies. For example, certain actions against creditors, including preference actions, must be brought in the creditors' home district if seeking to collect a non-insider business debt of less than \$10,000 (\$15,000 for consumer debts). The dollar amount will be adjusted for inflation beginning April 1, 2007.

Trustees will not be able to pursue preferences that are less than \$5,000 in nonconsumer cases. The floor of \$600 remains unchanged in consumer cases.

Another change in the defense of preferences is that the "ordinary course" defense specifically allows for a showing that the payment was made in the ordinary course of business terms OR the ordinary course of dealing between the specific debtor and creditor.

Most provisions of the new law are effective for cases filed on or after October 17, 2005.

### LEAN Members Speak

**Stephen Jenkins of Hemar, Rouso & Heald, LLP** located in Encino, Calif. was a Discussion Leader on "Electronic Waste" at the 2005 ELA Legal Forum. Stephen can be reached at 818.501.3800 or [sjenkins@hemar-rouso.com](mailto:sjenkins@hemar-rouso.com).

**Steven L. Higgs of Steven L. Higgs, P.C.** in Roanoke, Va. was a seminar panel member for Virginia CLE speaking on "18 Issues in Virginia Foreclosure Actions." He can be reached at 540.400.7991 or [higgs@higgslawfirm.com](mailto:higgs@higgslawfirm.com).

**Byron L. Saintsing of Smith Debnam Narron Wyche Saintsing & Myers, L.L.P.** was a panelist at the ELA Legal Forum on the topic "NorVergence: Isolated Incident or Growing Trend?" He can be reached at 919.250.2118 or [bsaintsing@smithdebnamlaw.com](mailto:bsaintsing@smithdebnamlaw.com).

**Lewis Cohn of Cohn & Dussi, LLC** of Boston, Mass. spoke on "Managing a Collection Department" at the 2005 ELA Credit & Collections Conference. He can be reached at 781.494.0200 or [lcohn@cohnanddussi.com](mailto:lcohn@cohnanddussi.com).

**Robert S. Bernstein of Bernstein Law Firm** in Pittsburgh, Penn. spoke on "Representing Equipment Lessors" at the Global Debt Collection Summit in Atlanta in May. He can be reached at 412.456.8101 or [rbernstein@bernsteinlaw.com](mailto:rbernstein@bernsteinlaw.com).



LEAN hosted cocktail parties at ELA's Legal Forum in May and Credit and Collections Conference in June. Held on the Saturday night before each meeting officially began, these gave those attending the meetings a fun and low key way to relax and ease into the business of each meeting.

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