



OCTOBER 2005

# BUSINESS LEASING NEWS

*"Offering leasing and financing strategies for your success"*

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BLN's home page follows the theme and bold look of the firm's web site that aptly describes Patton Boggs LLP as a "[Power Base](#)."

As you can see, BLN's home page features a jet engine image that relates well to some of BLN's topics.

**Welcome to the October 2005 edition of Business Leasing News.**

**From:** [David G. Mayer](#), a business transactions partner of the law firm of [Patton Boggs LLP](#) and author of the book, [Business Leasing for Dummies](#)® (BLFD).

This e-newsletter offers timely, concise information and analysis backed by supporting research. Please contact [Business Leasing News \(BLN\)](#) to provide us with your ideas for topics and comments on BLN's articles. Our readers reside in more than 23 countries and do communicate with BLN or its author, David G. Mayer. Thanks for taking your valuable time to read BLN.

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## 1. After Teterboro Crash, FAA Increases Scrutiny of Aircraft Charter Arrangements

It is a common and widely accepted practice for an owner or lessee of an aircraft to place its aircraft on the operations specifications (op specs) of a Part 135 air carrier. This practice allows the owner/lessee to operate the aircraft as part of the air carrier's on demand air taxi operation. The owner/lessee can thereby generate revenue when the owner/lessee is not using the aircraft for its own purposes. Where the owner/lessee simply leases the aircraft to the Part 135 operator (a so-called dry lease), and takes no active role in generating air charter opportunities, the Federal Aviation Administration (FAA) is not likely to question this arrangement.

**\*Warning:** However, the FAA's suspicion may be aroused when the owner/lessee uses its own pilots to conduct the air charter operations and plays an active role in the charter business.

## FAA Initiates Enforcement Action Against Aircraft Lessee

A February 2, 2005 crash of a Challenger 600 aircraft on take off at Teterboro Airport in New Jersey triggered prompt FAA enforcement actions against the aircraft lessee and the Part 135 operator with which the lessee had entered into a charter management agreement. The Challenger 600 was leased by [Platinum Jet Management](#) (Platinum) and placed under the ops specs of Darby Aviation d/b/a AlphaJet International, Inc. (AlphaJet). A month after the accident, the FAA issued an Emergency Cease and Desist Order against Platinum, alleging that Platinum, not AlphaJet, exercised operational control of the flight in question as well as other flights, without holding an air carrier certificate. The FAA essentially [shut down Platinum's operation](#). See [Emergency Cease and Desist Order](#), FAA Docket No. 2005EA250027.

## FAA Turns Next To Charter Company

On March 23, the FAA [suspended AlphaJet's Part 135 certificate](#) on an emergency basis, until such time as AlphaJet demonstrates to the FAA that it will not surrender operational control of any of its flights operated under Part 135. AlphaJet appealed the emergency suspension order to the NTSB. On May 25, the NTSB upheld the emergency suspension, *Blakey v. Darby Aviation d/d/a AlphaJet International, Inc.*, [NTSB Order No EA-5159](#), 2005 WL 1254208. The Board noted that its decision was not intended to be a "broad indictment" of all aircraft charter management agreements and that it did not view the suspension of Darby's air carrier certificate as a de facto revocation: "We think that the FAA has a heightened obligation to cooperate with Darby in attempting to restructure its operations so as to satisfy the FAA that it can maintain operational control." Recently Darby was permitted to resume Part 135 operations.

## FAA Pursues Civil Penalty Actions Against Aircraft Lessee

On July 8, the FAA issued a civil penalty letter to Platinum and its Chief Executive Officer, seeking \$1,861,500 for violations of the Federal Aviation Regulations (FARs). BLN obtained a copy of this letter under the Freedom of Information Act. (It is not available on the Internet.) See FAA Docket 2005EA250040.

**\*Warning:** The amount of the civil penalty reflects the seriousness with which the FAA views unauthorized operations generally, as well as the specific maintenance failures and multiple flights being operated overweight or without making weight and balance calculations.

In its civil penalty action against Platinum, the FAA listed 11 factors establishing that Platinum, not AlphaJet, exercised operational control of flights. Platinum was responsible for: (1) providing the aircraft; (2) maintaining the aircraft; (3) providing and paying for its own maintenance personnel; (4) preparing and keeping maintenance records; (5) employing and dispatching the flight crew; (6) scheduling pilot and flight attendant training and maintaining these records; (7) conducting pre-employment and random drug testing; (8) preparing and submitting TSA criminal history record checks; (9) flight scheduling, including any charter; (10) paying AlphaJet a monthly "Part 135 certificate fee;" and (11) preparing and keeping records of trip itinerary and flight manifests using Platinum letterhead. The FAA also noted that Platinum was entitled to receive 90 percent of all charter revenues (10 percent was received by Darby d/b/a AlphaJet).

## FAA Pursues Civil Penalty Against Three Aircraft In Rem

In the same July 8<sup>th</sup> letter, the FAA resorted to a seldom-used provision of the Federal Aviation Act, in seeking civil penalties in rem against the three aircraft Platinum leased and allegedly operated for compensation or hire on a total of forty-nine flights over a two-year period. The FAA stated that the three aircraft are "jointly and severally liable" with Platinum and its CEO for the amounts of \$832,500, \$432,000, and \$36,500, respectively.

**\*Warning:** The civil penalty action "in rem" refers to an action against the aircraft itself (with no required service of legal process on an owner or lessee). This action is permitted when the aircraft is involved in a violation of the FARs and the violation is by the owner or person operating the aircraft. The violation makes the aircraft subject to a lien for the civil penalty, and thus the owner of the aircraft is ultimately held responsible under [49 U.S.C. § 46304](#). That section also authorizes the summary seizure of an aircraft. The FAA can seize an aircraft for an alleged violation of the FARs even before a civil penalty letter is sent. Section 46305 authorizes a civil penalty action to be filed in court against an aircraft "in rem" subject to a lien for a penalty. For lenders and lessors, it is likely that the FAA can ground the aircraft and place a valid lien on the aircraft due to violations that are not recorded at the FAA. The harder question is whether the FAA can use its lien power to take priority in right of payment over a lender or even force a lessor to pay the penalty before the FAA releases its lien. You should consider performing due diligence to determine whether there are any past or future enforcement issues with a borrower or lessee that

may give rise to these lien rights. Some [title insurance](#) policies may cover the risk of certain liens.

In the Platinum matter, the FAA has initially chosen to seek this civil penalty administratively. The civil penalty letter does not itself create a lien. If the parties do not settle this matter, the FAA can refer the civil penalty action to the U.S. Attorney for a filing of a civil suit, at which point presumably the FAA can enforce and file its lien.

**\*Prediction:** Because the practice of an aircraft owner/lessee to put its aircraft under the op specs of an air taxi operator is apparently widespread, the FAA is not expected to stop its enforcement activity after pursuing Platinum, Darby d/b/a AlphaJet, and the aircraft owners.

This spring, after the Teterboro accident, the FAA sent an e-mail to all of its Flight Standards District Offices (FSDOs) requesting information about arrangements between certificated Part 135 operators and non-certificated entities "in order to assess the number, impact, and appropriateness of such arrangements."

### **FAA Operational Control Concern in Business Aviation Leasing**

The Teterboro investigation also triggered formal guidance to FAA inspectors to look for potential problems. On June 14, the FAA issued [Notice 8400.83](#), "Responsibility for Operational Control During Part 135 Operations and the Use of a DBA (Doing-Business-As) Name," directed foremost to Principal Operations Inspectors (POIs) of Part 135 operators. The Notice:

- **reiterates** the requirement that each Part 135 operator must maintain control and authority over the initiation, continuation and termination of its Part 135 flights;
- **prohibits** Part 135 operators from delegating the responsibility to "maintain operational control over its air transportation and commercial services to any outside entity, including any aircraft owner and/or aircraft management company;"
- **directs** POIs "to ascertain whether each of their assigned part 135 operators has a system of controls in place that is adequate, in light of the complexity and scope of their operations, to ensure that they maintain operational control of each part 135 flight conducted under their certificate"; and
- **lists** several elements of flight operations required to ensure that the Part 135 operator maintains operational control, establishing crew qualifications and training, designating a Pilot in Command and ensuring the aircraft is airworthy.

The most notable element is that the air carrier must "ensure that only its crewmembers, who are trained and qualified in accordance with the applicable regulations and the certificate holder's approved training program, are assigned to conduct a flight." This guidance begs the question whether an aircraft owner/lessee may provide one or more of the pilots it uses for its own non-commercial flights to the Part 135 carrier and direct the Part 135 carrier to use such pilots. See [14 CFR 135.115](#), which provides that no pilot in command may allow any person to manipulate the controls of a Part 135 flight, nor may any person manipulate the flight controls of such a flight, unless that person is a pilot employed by the Part 135 air carrier.

Thereafter, the [National Business Aviation Association](#) asked the FAA whether it is FAA policy that "pilots in a part 135 charter operation must be employed by the part 135 operator in the sense that the operator must issue W-2 statements to the pilots." The FAA provided a one-sentence answer in a July 21 letter: "It is not current FAA policy that the relationship between a part 135 operator and its pilots be such that the operator must provide W-2 statements to each of its pilots." Thus, it currently remains permissible for an aircraft owner/lessee to have its crew used by the Part 135 charter carrier so long as the Part 135 operator has sufficient control over the pilots, but the word "current" may hint that such arrangements may be curtailed or limited in some way in the near future.

**\*Technical Point:** The Notice also suggests "other circumstances that may affect whether a part 135 operator properly maintains operational control of its flights conducted under its certificate for compensation or hire." Operational control includes: (a) who is in actual or legal possession of the aircraft; (b) the business relationship between the Part 135 operator and crewmembers; (c) insurance requirements; (d) fuel payments; and (e) payment flows.

While the Notice does not explain how these factors apply, the FAA notes that these factors are "important and will be the subject of guidance material that is being developed." No such guidance has been issued since. FAA appears to be concerned with anything that smacks of a "certificate fee" or "management fee" that does not bear a direct relationship to the hours flown.

**\*Tip:** Lessors and lenders should, therefore, take note of the factors relating to operational control and include appropriate covenants in the lease and loan documents. A company that owns or leases an aircraft for use by the company and its officers should use extreme care and perform due diligence before placing its aircraft on the op specs of a Part 135 air carrier to

generate revenue in charter service. Lenders and lessors should scrutinize these issues and conduct their own diligence.

It remains to be seen whether the FAA will attempt to prohibit certain arrangements categorically, as some FSDOs reportedly are inclined to do, or will instead examine each relationship on a case-by-case basis, evaluating its legality under the various operational control factors developed in the Notice and in subsequent guidance. Although the Notice makes no mention of it, the Department of Transportation (DOT) recently has taken a number of enforcement actions against aircraft owners/lessees, management companies and air charter brokers that market air charter flights without appropriate economic authority from the DOT as a direct or indirect air carrier.

The Platinum case may foretell the direction of FAA actions. The FAA could develop multiple factors, the violation of any of which leads to enforcement actions. Such action could affect lenders or lessor as the FAA could exercise the right to place liens on aircraft.

**\*Prediction:** Expect more guidance by the FAA and more enforcement actions against Part 135 operators and aircraft owners/lessees whose operational or business arrangement is inconsistent with the operational requirements in the FARs and implementing guidance.

### What's Next?

Many aircraft charter management agreements used by Part 135 operators or management companies may not weather the type of scrutiny the FAA focused on Platinum and Darby. Just as important, these arrangements may fall under the weight of the recent FAA guidance. In short, the enforcement story has just begun. The next chapters may alter practices that have long been accepted in the breach. The Teterboro accident has certainly galvanized the FAA's enforcement apparatus, and now the business aviation community's attention is focused on what guidance will emanate from the FAA.

Thanks to [Greg Walden](#), a member of the Patton Boggs Aviation Team and [Transportation and Infrastructure Practice Group](#), for contributing this article.

## 2. ELA Creates Principles for International Leasing Laws

It is widely recognized that leasing is an international business, but many nations do not have laws that facilitate or even contemplate leasing transactions. A subcommittee of the Equipment Leasing Association recently issued principles of leasing that may serve as the basis for leasing laws around the world in commercial leasing transactions. See [Principles of Equipment Leasing Law](#), THE EQUIPMENT LEASING ASSOCIATION (Sept. 2005) [site for ELA members only]. They also provide a useful resource to understand the fundamental principles for a lease transaction from inception to enforcement.

The subcommittee used its hundreds of years of collective experience to write the concepts on which the future of international leasing may be built. The subcommittee necessarily limited the principles to "finance leases" where the lessor does not select, manufacture or supply the goods, and usually does not provide any express warranties concerning the goods. Generally, the lessee arranges for the lessor to finance the lessee's use of the goods by having the lessor acquire them under circumstances where the lessee has the opportunity to exercise its rights directly against the manufacturer or supplier of the goods in the event of problems with such goods. See [Leasing 101: What is a "Finance Lease"?](#)

Despite lively debate in the subcommittee, the principles do not address the concept of leasing software. Instead, the project focuses primarily on principles for leasing transactions in which the lessor only acts as a source of financing to enable the lessee's use of goods. In other words, the subcommittee did not intend to apply the principles to lending transactions (leases intended as security) or to leases where the lessor has an active role, such as being the manufacturer and the lessor of goods. In addition, the principles do not resolve the difficult question under U.S. law whether a transaction creates a security interest or a lease. Rather, the subcommittee structured the principles to provide each nation the choice of how to treat that issue. See *True Leases Under Attack: Lessors Face Persistent Challenges to True Lease Transactions*, by David G. Mayer, EQUIPMENT LEASING & FINANCE FOUNDATION (Oct. 2005), a 17,000 word white paper to be published in October by the Equipment Leasing & Finance Foundation.

The leasing principles cover the full array of issues in leasing from formation of leasing contracts to enforcement after defaults. The subcommittee developed the issues and scope in part from other laws and international principles, including the following:

- [Article 2A of the Uniform Commercial Code](#) - covers leases of goods including embedded software.

- [Unidroit Convention on International Financial Leasing](#) (Ottawa 1988) - rules for lessees and lessors in different countries to lease equipment, including fixtures.
- [Unidroit Principles of International Commercial Contracts 2004](#) - rules to supplement or govern contracts when the parties elect to use these principles to interpret or supplement domestic or international laws.

Article 2A provided useful and persuasive authority to write the principles, but the subcommittee took care not to rely on, or too frequently refer to, Article 2A in the text or comments to principles in deference to other nations that might resist too much obvious legal content from U.S. law.

As leasing continues to extend its reach in more markets around the world, Unidroit plans to continue its work to develop international leasing laws, which, in part, will rely on the ELA's contribution. The expectation is that a uniform framework for leasing will increase in international acceptance and volume of leasing around world. Only time will tell.

[David G. Mayer](#), the Founder of BLN, is a member of the subcommittee and participated in writing the principles.

### 3. Basel II Delayed Again Amid Strong Debate and Controversy

After seven years of working on Basel II, banking regulators made clear on September 30, 2005, that Basel II is still a few years away from implementation. Federal Reserve Governor Susan Schmidt Bies stated on September 26, 2005, in a [speech](#) before the Institute of International Bankers in Washington, D.C.:

"Some might bemoan this long formative period, but we must all remember that an international undertaking of this magnitude takes substantial time to complete." . . . Broadly speaking, in developing Basel II we are striving to establish higher standards for internal risk management at complex banking organizations, including capital adequacy, and to improve both the supervisors' and the public's understanding of banks' risk taking and risk management. Indeed, one of the main reasons we started down the Basel II path was to better align regulatory capital with what banks are actually doing in practice to manage risks and the level of risk exposures . . . . A fundamental premise of Basel II is that, for these major banks, neither supervisory nor market discipline can be effective unless banks' own systems can be relied upon to measure and manage risk taking and capital adequacy.

*\*Term to Know:* [Basel II](#), formally known as the "International Convergence of Capital Measurement and Capital Standards: A Revised Framework," will, in theory, create a more flexible and comprehensive framework for bank capital requirements built on three mutually reinforcing "pillars": (1) minimum capital requirements, (2) supervisory review of capital adequacy, and (3) market discipline.

Basel II is an enormously complex international risk-capital banking accord designed to manage risk capital for the largest internationally active banks, including ten to twenty banks in the United States. Basel II has the potential through its capital and other requirements to change the competitive landscape among major international banks. As a result, the accord has been highly controversial.

#### Significant Delay or Putting Basel II Back on Track?

Understanding the divergent views of the banking industry, the federal bank and thrift [regulators announced in a press release](#) that they would:

- **Delay** implementation to at least January 1, 2009, depending on the decisions of the governing federal agencies: Federal Reserve Board, the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation and the Office of Thrift Supervision;
- **Delay** of the "parallel run" from January 1, 2007 to January 1, 2008 (i.e., the period when banks would simultaneously calculate capital based on the current banking standards and the proposed standards of Basel II); and
- **Slow** down the transition period of the parallel run from two years to three years. During this period, regulators have increased the risk capital floor from 90 percent to 95 percent in the first year of the transition (2009), from 80 percent to 90 percent in the second year (2010) and to 85 percent (the new extended transition year) in the third year (2011). The percentage refers to the amount of risk capital required below the standard minimum established by

## Discord Hits Basel II Accord

Not everyone agrees with the delay. By slowing down the process, the largest U.S. internationally active banks may suffer from competition by international banks that can develop their systems to compete under Basel II before the U.S. banks can make substantial progress. In addition, U.S. investment banks will be able to compete while U.S. banks stand down because investment banks remain on the same timetable as the international banks abroad. Finally, the American Bankers Association warned about the dire consequences of the delay in this [statement by Wayne Abernathy](#), Executive Director for Financial Institutions Policy:

“The ABA understands and appreciates the importance of getting something as important as capital rules right. However, the announced delay risks leaving U.S. institutions at a disadvantage while the rest of the world implements the internationally agreed upon framework.

This delay could be very costly for the major banking firms that have committed significant resources to improve their risk metrics in compliance with the new standard. We hope that the bank regulators will coordinate with their foreign counterparts to maintain a common set of international capital standards while the details are worked out.”

*\*Tip:* Smaller banks will not have to adhere to Basel II, but they do comply with the existing accord, Basel I, which is also under review. However, the options remain open how to regulate small banks and savings associations that could use certain standard approaches under Basel II or become subject to enhancements of Basel I, which some have dubbed “Basel 1A.”

## Leasing Industry Impact

From the standpoint of the leasing industry, the impact of Basel II remains as unclear as the timetable to implement it. See [As Basel II Advances, Impact on Leasing Remains Unclear](#), by David G. Mayer, BUSINESS LEASING NEWS (June 2004). What is clear to the leasing industry, and particularly to some of its largest bank members, is that leasing will feel the effects of Basel II on its product mix and related capital requirements.

The international banking community represents powerful and important voices in the financial services industry. It is now apparent that this complex regulation is not quite ready for prime time, but when it arrives, Basel II will almost certainly affect financial services organizations around the world.

### 4. Leasing 101: What is a "Split-TRAC Lease"?

A “TRAC lease” is a lease that contains a special provision called a “terminal rental adjustment clause” as contemplated in [Section 7701\(h\)](#) of the Internal Revenue Code of 1986, as amended. TRAC leases apply to motor vehicles (including trailers) used more than 50 percent of the time in the trade or business of the lessee. Sometimes called an “open-end lease,” a TRAC lease requires the lessee to make an unknown (open-ended) payment to the lessor at the end of the lease term. This “terminal rent” payment makes up any shortfall due to the lessor if the lessor does not receive proceeds of a sale or other disposition of the vehicle sufficient to recover its investment plus its return on the investment.

In contrast, a “split-TRAC lease” requires the lessor to share (or split) the residual value exposure with the lessee. In other words, in a typical TRAC lease, the lessee pays the sum necessary (the “open-ended” amount) to make the lessor whole. For example, assume a lessor needs a residual value of 30 percent of original equipment cost (OEC) to make its yield in a transaction. Assume the equipment sells for 10 percent, which establishes the shortfall of 20 percent (30% of OEC minus 10% of OEC in proceeds). The lessee must pay the lessor the 20 percent of OEC shortfall so the lessor receives its 30 percent of OEC.

In a split-TRAC, the parties limit the lessee’s payments to the lessor to a guaranteed residual amount. The lessor must absorb any shortfall in excess of the lessee’s guaranteed residual value amount. Assume the same transaction but this time in a split-TRAC structure in which the lessee limits its payment obligation to the lessor to 15 percent of OEC. Assume, again, that the equipment sells for 10 percent of OEC. In a split-TRAC, the lessee pays the lessor 15 percent (10% of OEC in sale proceeds + 15% of OEC in lessee guaranteed residual amount payment = equals 25% of OEC). The lessor absorbs 5 percent of the downside to equal the 30 percent.

## 5. Case & Comment: Norvergence Forum Selection Clause Upheld in *Preferred Capital v. Power Engineering Group, Inc.*

In another of the series of Norvergence cases, [Preferred Capital v. Power Engineering Group, Inc.](#) 2005-Ohio-5113 (Ct. App. 9th Dist., Sept. 28, 2005) (New Preferred Case), the appellate court reviewed whether the lower court correctly dismissed a lessor's rent collection case in Ohio against the lessee. The lower court held that the Ohio court should dismiss the case of Preferred Capital, Inc. (Preferred) case for lack of personal jurisdiction over the lessee arising out of an unenforceable forum selection clause in a lease with the lessee. That clause purported to confer jurisdiction on the Ohio courts in any dispute between Preferred and the lessee.

**BACKGROUND:** Norvergence assigned to Preferred rental payments under certain "Master Program Agreements" that Norvergence arranged under a series of rental agreements with lessees. Though Norvergence did not perform its service obligations to the lessee, Preferred, as assignee, nonetheless sued the lessee to perform and pay the rents to Preferred. The lessee refused to pay Preferred, and Preferred brought those suits in Ohio, the forum selected in the lease, to collect the rents. The lower court ruled that the choice of forum clause in its lease was unenforceable. It so decided because the lease used a "floating forum selection clause" which did not name the state (Ohio) and court (exact forum) in which disputes would be litigated with Norvergence or its assignee (Preferred). As a result, the lower court found that the clause was unreasonable and unjust because it "contained absolutely no guidance as to which forum would be appropriate to resolve disputes." *Preferred Capital v. Power Engineering Group, Inc.*, CV2004-Ohio-5737 (Summit C.P., Dec. 15, 2004), New Preferred Case at page 4. The clause read in part:

"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 . . . ."

See [BLN Case & Comment: Norvergence Strikes Again - Preferred Capital, Inc. v. Thomas E. Strellec](#), by David G. Mayer, *BUSINESS LEASING NEWS* (March 2005); See also BLN Case & Comment: [Preferred Capital Revisited: State Attorneys General Weigh In](#), by David G. Mayer, *BUSINESS LEASING NEWS* (April 2005) (Attorneys General argue that forum selection clause is invalid).

**\*Term to Know:** A "forum selection clause" is a contract provision in which the parties agree to a court in a particular location in which disputes between them will be litigated. The parties basically establish the place to sue and be sued. [Leasing 101: What Is a "Forum Selection Clause"?](#), by David G. Mayer, *BUSINESS LEASING NEWS* (March 2005).

**ISSUE:** Is the Norvergence forum selection clause valid?

**ANSWER:** Yes. The lower court erred in deciding that it did not have jurisdiction over the lessee under the floating forum selection clause.

**OUTCOME:** The court upheld the enforceability of the floating forum selection clause with respect to "for-profit businesses," even though the businesses (lessees) have not read the documents (leases) or were sophisticated. The court's decision relied, in part, on the objectives of the Uniform Commercial Code to promote "sound economic policy," to enhance the marketability, free transferability and negotiability of commercial paper and to stimulate "financial interdependence." New Preferred Case at page 12.

**\*Comment:** Preferred filed many cases in different trial courts. Because this appellate court rendered a split decision with one dissenting opinion, it would not be surprising to see more appeals on this issue. This court understood the vital importance of encouraging commerce and forcing the lessee to carry the burden of establishing that forum selection clause should be held unenforceable. It cited clear precedent that a lessee must demonstrate that the clause should fail based on fraud in the negotiation or because it would be unreasonable or unjust to enforce the clause. The arguments of the lessees do not hold water, but hopefully the finding of this court will as it may soon come before Ohio's Supreme Court.

## 6. About Patton Boggs LLP and Our Law Practice; Publications

[Patton Boggs LLP](#) is a law firm of more than 400 lawyers located in five offices in the United States and internationally in Doha, Qatar. The firm has extensive capabilities in four major practice areas: Business Transactions, Intellectual Property, Public Policy and Litigation. I am a member of the Business Transactions Group. This group includes over 100 lawyers with a

broad array of skills in equipment leasing and finance, corporate finance, secured transactions, syndications, wind power and other project finance, oil and gas transactions, mezzanine financing, hedge fund work and related creditors rights/bankruptcy, real estate and technology law. We regularly work in cost-effective teams to meet our clients' needs.

Our leasing and equipment finance work entails a full range of transactions. We help our clients buy, sell, finance and lease real and personal property, including business and commercial aircraft, energy assets, facilities, vehicles, production equipment, technology hardware and software and health care equipment. We have specific teams specifically for aviation, infrastructure/power, health care, federal leasing/finance/marketing, municipal leasing/finance and more.

We work with our clients from the "front-end" to the "back-end" of a variety of transactions. For example, we can assist in the development, construction and financing of infrastructure and power projects, structure and close securitizations, syndications and asset sales, and complete large asset-based company financings. We also restructure troubled credits, appear in court on complex bankruptcies, and act for our clients in such routine matters as repossessions, lift stay actions, true lease contests, workouts and forbearance arrangements. We provide extensive litigation resources with a record of proven success.

You are welcome to call me at 214.758.1545 or e-mail me at [dmayer@pattonboggs.com](mailto:dmayer@pattonboggs.com). We value your contact with us on any topic, including questions arising from BLN articles or about our law practice.

## Publications

- *True Leases Under Attack: Lessors Face Persistent Challenges to True Lease Transactions*, by David G. Mayer, EQUIPMENT LEASING & FINANCE FOUNDATION (Oct. 2005), by David G. Mayer, a 17,000 word white paper. Special thanks go to the many editors, including Patton Boggs bankruptcy partner, Jeff LeForce, Patton Boggs tax partner, George Schutzer, three members of the ELA's Legal Committee and two Foundation reviewers. Look for the paper on line and at the ELA's Annual Convention this month in Boca Raton, Florida.
- *The Cape Town Convention: New Complexities and Opportunities*, by David G. Mayer and Frank Polk, Aviation Partner at McAfee & Taft, LNJ'S EQUIPMENT LEASING NEWSLETTER (Oct. 2005).
- [Wind Power Financing In Canada and the U.S.](#), by Vern Kakoschke and David G. Mayer, *North American Wind Power* (July 2005).

## Aviation Briefing - October 21, 2005

On Friday, October 21, 2005, from 8:00 a.m. - 6:00 p.m., Patton Boggs LLP will present a briefing for *The New Era of Business Aviation II* at our Washington, D.C. Office. Our unique line up of speakers will provide an insightful, succinct and interactive discussions of the hottest issues in business aviation. This is a second in a series of briefings. Our Aviation Team speakers include:

[Rodney E. Slater](#), former Secretary of Transportation (DOT) in the Clinton Administration

[Gregory S. Walden](#), former Chief Counsel of the Federal Aviation Administration (FAA)

[Stephen McHale](#), former Deputy Administrator of the U.S. Transportation Security Administration (TSA)

[David G. Mayer](#), Author of [Business Leasing For Dummies](#), Founder of [Business Leasing News](#) and Aviation Briefing Chairman

Our additional speakers from the firm are:

[Cass Weiland](#), a senior securities litigation partner in the Dallas Office of Patton Boggs LLP.

[George Schutzer](#), a senior tax partner and Chairman of our Tax Practice Group.

We will also have a special guest speaker, [Barry Justice](#), a dean of the general aviation industry and Chairman and CEO of Leading Edge Aviation Solutions.

For more details, feel free to call me at (214) 758-1545 and if you would like to attend, please request registration/invitation by

e-mailing me at [rabrams@pattonboggs.com](mailto:rabrams@pattonboggs.com). The space is almost full; so if you are interested, please request registration promptly. Clients of the firm will be given preference to this invitation-only event.

## 7. A Message from the Founder, [David G. Mayer](#)

### Executive Risk

The horrific damage and human suffering from hurricanes Katrina and Rita put a new spin on risk management. Like it or not, we face risk, both natural and man-made, in everything we do in business. This point is so clear and important today that many corporations have created the position of Chief Risk Officer. When approving transactions, lessors consider credit, residual and liability risk. Lawyers give advice that largely turns on managing risk. Lenders consider the risks associated with relying on the management team running the companies to which they may lend.

In its October 3, 2005, issue, [Fortune Magazine](#) published an article entitled *An Executive Risk Handbook* (page 69). In the article, [Fortune](#) congratulates executives who “realize that risk is one of the most powerful factors driving your stock price. . . .” Continuing it says: “. . . and you were probably stunned when you confronted the total amount of risk your company faces.”

Managed correctly, risk can be used to create strategic and economic advantage. For example, Shell Oil planned for risks associated with Katrina and executed its plans, according to [Fortune](#), as did, I suspect, scores of other companies. Shell's work probably helped it weather nature's fiercest lashing of the Gulf Coast.

From my view, we should embrace and understand risk. We should plan for it and around it. We should play out scenarios in advance to practice ways to manage risk effectively. That process can range from planning for a negotiation up to implementing an evacuation. We should also figure out the probabilities in any risk situation, and adapt our thinking and planning accordingly.

[Fortune](#) presented five lessons on risk management. One lesson is: “Turbocharge your imagination.” Try to imagine the unimaginable and how to cope with it. Can you say honestly that in any given situation, you can describe how you would manage the associated risk? The next time the word “risk” pops into your head, whether it is the perfect storm or even your next deal structuring, will you correctly analyze the risks and execute a plan to cope with them? The outcome of your actions and decisions may be a risk you may have to take.

Enjoy the balance of October, and thanks for reading [Business Leasing News](#).

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*All the best,*

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