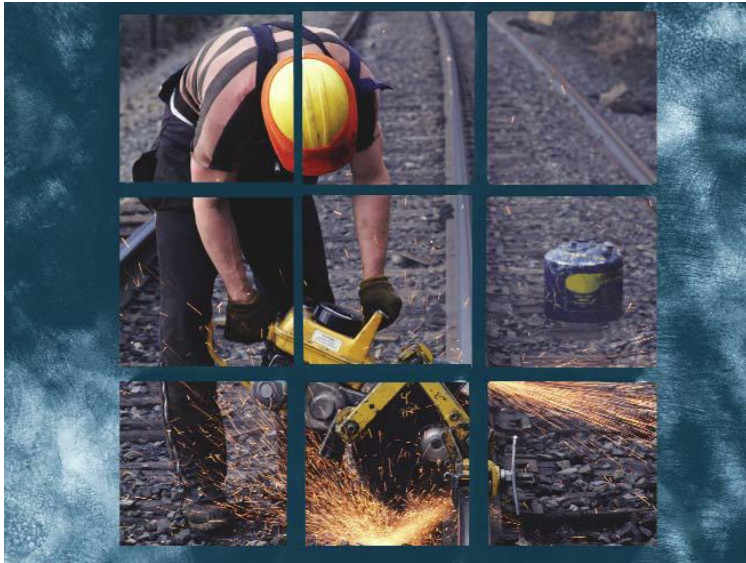


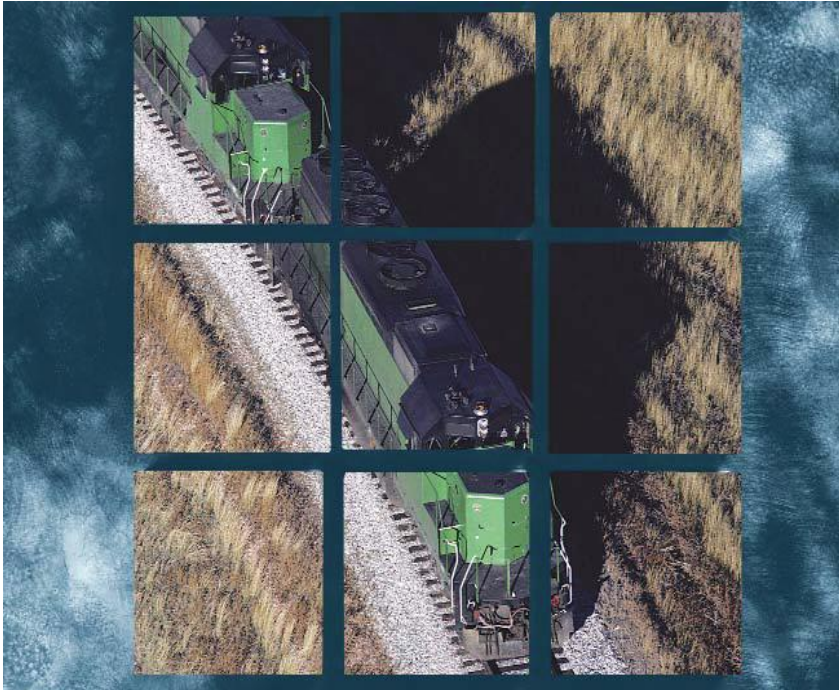
# Lechner Law Office, P.C.

The Lechner Group, Ltd.

## A Framework for Contract Review



***“A Checklist Approach”***



- Focus on Goals
- Develop a Strategy
- Leverage Self Interest
- Get the Right team
- Use the Playbook
  - *“Your Contract Should Answer these 10 Basic Questions”*

- You go to lunch with a friend and decide to have a pizza
  - Would you hire a lawyer to negotiate a division of the pizza if one of the slices is his fee?
  
- You go to a business/equipment acquisition closing
  - Would you rely on Seller's documents for your deal, your Loan Broker to explain types of financing available, your Lender's Attorney to draft your note and security agreement?
  
- Focus on Goals and.... Develop a strategy...
  - Economics, tax and book consequences
  - Manage the business side of the negotiations
  - Make the deal less expensive by understanding negotiation mechanics
  - Develop workable alternate solutions
  - And Remember .....

***“Business transactions are like Marriage without Love”***



***Should I do this myself?***

**B**usiness control, risks, term

**E**conomics

**D**eal Structure – Tax, Book

keep (**P**rocedures)

**S**tructure, **S**ecurity

**C**onditions to Agreement/Enforcement

**O**bligations

**R**ights, **R**isk Allocation, **R**emedies

**E**nforcement

- We all want MORE
  - Sales Volume
  - Margin
  - Service Quality
  - Price
  - Term flexibility
  - Obligations
  - Technology
  - CONTROL of operations, equipment
  - Yield, Earning asset growth
  - Economics
  - Cash Burn
  - Upside potential
  - Limit Downside risk
  - Minimum breakeven levels



- When **Vince Lombardi** became head coach of the Green Bay Packers he was asked what he was going to change? He replied:
  - “We’re not going to change anything, “We’ll just be Brilliant on the basics”
    - Put together the right team
    - Develop your people
    - Understand your partner
    - Use the Playbook, and
    - Keep Score!

## Good People = Good Results

### The Playbook *(Develop a Strategy)*

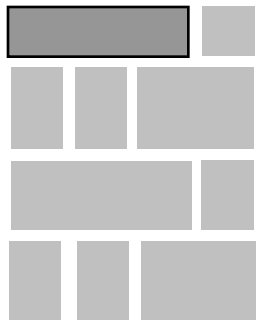
The Business Deal *(getting in BED)*

The Legal Deal *(Keeping Score!), or*

*Your Contract should answer these ten basic questions*

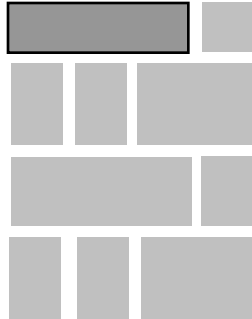
- Express terms of contract control unless against public policy...
- Understand how you can expand or contract each term ...
- Understand that legal default rules control if your are silent...
- In some cases it might be better to say nothing!





## Who has Rights under a Contract?

- Only the following parties
  - Signatories
  - Permitted Assignees
  - Successors in interest by operation of law (merger)
- A contract is permitted to be assigned and the permitted assignee becomes the beneficiary under the contract if:
  - The assignment will not materially change the non-assigning parties rights or obligations
  - The assignment is not against public policy

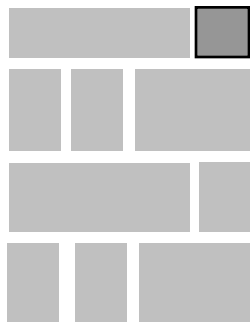


## 1. Expanding Rights

- a. To Third Party Beneficiaries
- b. By Assignment, sublease, personal services contracts
- c. To Successors in interest, heirs, acquiror, survivorship
- d. Increasing capacity of signatory

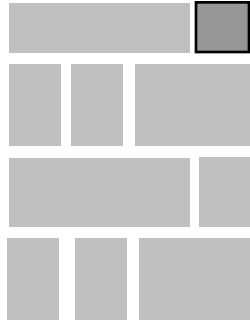
## 2. Contracting Rights by

- a. Limiting rights of Beneficiary to specific provisions
- b. Limiting scope of Assignable contract
  - i. No assignment, sublease, limit assignee
  - ii. Subject to approval, consent
  - iii. Terminate on assignment
- c. Provide for right of first refusal
- d. Restrict Transfer
- e. Decrease capacity of signatory



## Who has obligations under the Contract?

- Only the following parties:
  - Signatories
  - Assignees (in most cases)
  - Successors in interest by operation of law (merger)
- A Contract is permitted to be assumed (and assigned( if):
  - The assumption and assignment will not materially change the non-assigning party's rights or obligations
  - The assignment (and assumption) is not against public policy

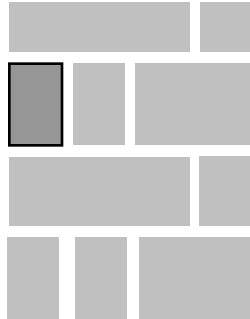


## 1. Expanding Obligations

- a. Get a guaranty, co-signer
- b. Other third party: title insurance, letter of credit, bonding company, Law or Accounting firm
- c. Affidavit, Certificate
- d. Joint and several liability for signatories
- e. No release of assignor if assigned

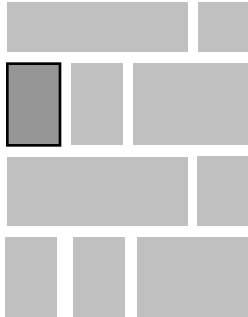
## 2. Contracting Obligations

- a. Limit rights of Obligor to specific provisions
- b. Limit recourse to specific assets only
- c. Pro rata allocation of liabilities
- d. Release on assignment/delegation
- e. Decrease capacity of signatory



## Against what assets may recourse be sought in the enforcement of a contract?

- Generally a contracting party may NOT seek recourse against a specific asset in enforcement of a contract
- In certain limited circumstances the law will impose liens on specific assets which allow a contracting party to seek recourse or recovery of or against a specific asset

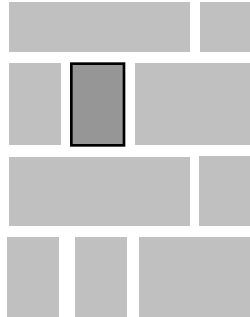


1. **Expanding Security**

- a. Security interest in personal or real property
- b. Mortgage, pledge, collateral assignment of insurance or intellectual property
- c. Possession of collateral
- d. A security deposit

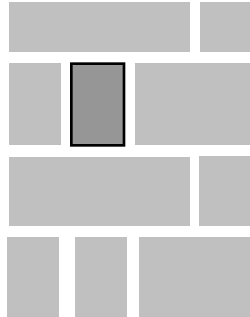
2. **Contracting Security**

- a. Limit recourse
- b. Waive, release, disclaim liens provided or imposed by law



## What are the procedural and substantive rules by which a contract may be enforced?

- Burden of Proof
- Choice of Law
- Enforcement Body
- Forum
- Jurisdiction
- Intent
- Parole Evidence
- Severability
- Trier of Fact



## Alternative or Modifications

Shift or change burden of proof

Identify jurisdiction, forum, choice of law

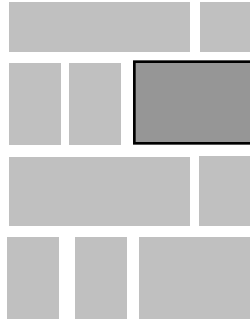
Provide for Arbitrator, mediator, or require jury trial

If one provision unenforceable, remainder is enforceable

Identify Intent

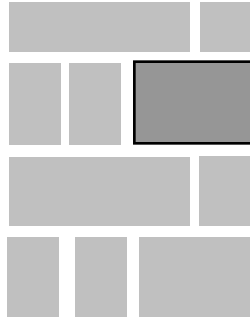
- a. Merger/integration on signing
- b. Final expression, no parol evidence
- c. No prejudice against drafter
- d. Consulted an attorney
- e. Prioritize provisions
- f. Standards of interpretation





## What are the factual or legal statements upon which the parties to a contract may rely?

- Except for certain representations and warranties provided by law, a contract does NOT contain any upon which a party may rely
- The following are implied in or provided by law:
  - Implied warranty of merchantability
  - Implied warranty of fitness for a particular purpose
  - 10B-5 Rep if Security
  - Residential Real Estate
  - Truth in Lending
  - Magnuson-Moss Warranty Act
- Deemed made as of contract date and do not continue
- Claim for breach survives until relevant SOL

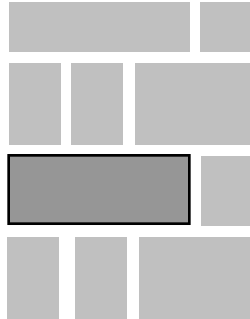


1. **Expand**

- a. Express reps and warranties
  - i. **Business:** Financial, EPA, Customers, No Adverse Changes, Employees, Encumbrances
  - ii. **Legal:** Corporate existence, authority; enforceability, no default or conflict, title and ownership, infringement, no litigation

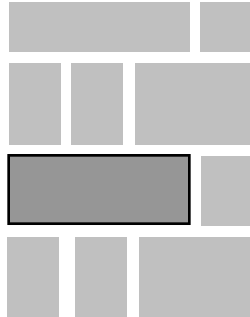
2. **Contract**

- a. Disclaimers, Waivers, “As-is”
- b. Decrease length of survivability
- c. Merger clause
- d. Acknowledgement of no other reps and warranties
- e. Disclosure schedules
- f. No oral or other reps or warranties
- g. Acknowledgement of reliance on own due diligence
- h. Officers are unauthorized to make reps or warranties



## What has to happen (or not) in order to be obligated to perform?

- You are obligated to perform unless the other party has materially failed to perform its obligations
- The law may impute additional conditions in certain situations
  - Failure of the other party to satisfy certain notice or disclosure requirements (securities, real estate)
  - An event o/s control of the parties which makes performance “legally impossible”
  - An event o/s control of the parties which makes performance “impracticable” or “commercially frustrated”

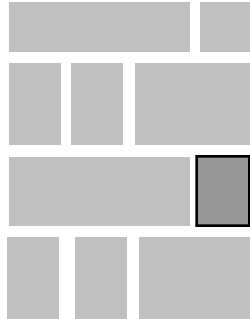


## 1. Expanding Conditions which Must be Satisfied

- a. Add express conditions
  - i. Board or shareholder approval
  - ii. Satisfactory inspection, due diligence
  - iii. Performance of covenants, accuracy of reps and warranties, no default, bankruptcy
  - iv. Government approval, consents, legal opinion, financing
  - v. No force majeure, act of God
- b. Any failure or breach (not material)
- c. Define material breach
- d. "Time is of the essence"

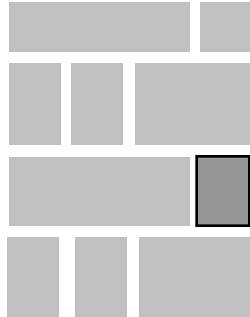
## 2. Contraction of Conditions

- a. Disclaim, waive, release conditions imposed by law
- b. Only material failure or breach
- c. Acknowledge that obligations are unconditional



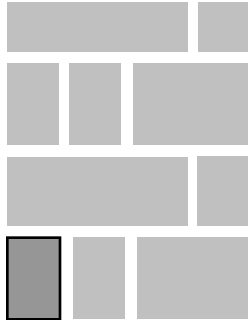
## What is the allocation of control and risk among the parties to a contract?

- Custom, industry practice, parties past history
- Parties are free to agree on allocation except for certain limitations imposed by law
  - Unconscionability
  - Usury
  - Violation of public policy
- Each party has a duty of good faith and fair dealing



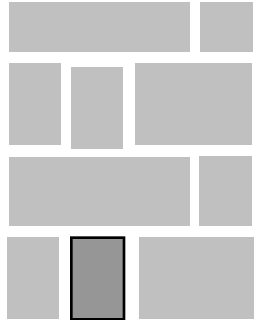
## Business Deal Components

1. **Control**
  - a. Active Management
  - b. Passive Management: veto, consent, approval, review, consultation
  - c. Voting
2. **Economics**
  1. Price, profit allocation, tax, timing, assets
  2. Scope of performance: shall do, endeavor, attempt, assist, cooperate
  3. Standard of performance: absolute, best efforts, commercially reasonable
3. **Risks**
  1. Known, unknown, cap exposure, threshold for exposure, fault
4. **Term**
  1. Start, end, early termination, extension rights, events, Post termination responsibilities



## What are your Tax Consequences?

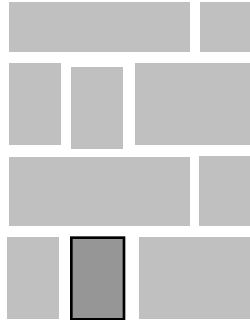
- Tax consequences generally reduce the economic benefit of the deal
  - Avoid double tax
  - Structure as non-taxable
  - Covert ordinary gain to capital
  - Convert capital loss to ordinary deduction
  - Accelerate depreciation
  - Delay gain recognition
  - Accelerate loss recognition
  - Increase tax basis
  - Allocate tax attribute to best party
  - Determine best tax transaction location
  - Convert non-deductible to deductible
  - Bifurcate rights to maximize value
  - Avoid ancillary tax
  - Make payments to party who can use deduction
  - Convert sales tax event to non-event



## What has to happen for a party to enforce its remedies under the contract?

- In general you can enforce remedies upon a breach by the other party to the contract
- Prior to enforcement law may require other conditions be satisfied
  - Notice
  - Expiration of cure period
  - Civil Practice procedure
  - SOL
  - Non-expiration of Statute of Repose



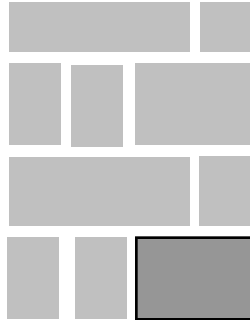


## 1. Make Enforcement Easier

- a. Disclaim or waive conditions provided by law
- b. Add events that constitute default
  - i. Cross defaults
  - ii. BK, insolvency, assignment for benefit of creditors
  - iii. Guarantor default
  - iv. Loss of license

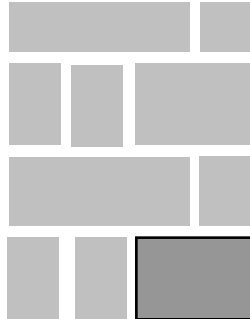
## 2. Make Enforcement more Difficult

- a. Expand cure, notice periods
- b. Limit SOL and Statute of Repose
- c. No prior knowledge of breach wrt reps and warranties
- d. Comply with “remedial” procedures
  - a. Consent for settlement
  - b. Standard of performance (commercially reasonable)
  - c. Prompt notice
  - d. Choice of counsel
  - e. Post bond, prove damages
- e. Financial hurdle (deductible) for damages



## What remedies are available?

- In general only (i) recovery of actual monetary damages and (ii) right to terminate in event of material breach
- Non breaching party may be entitled to
  - Attorneys' fees
  - Default interest
  - Equitable remedies
  - Foreclosure
  - Specific performance
- Parties have a duty to mitigate damages and act reasonably



## 1. Expanding Remedies

- a. Expand damages; actual, consequential, incidental, punitive, calculation methods, liquidated
- b. Other types
  - a. Specific performance, set off
  - b. Termination, attorney fees
  - c. Default interest, Rescission
  - d. Remediation, cure rights
  - e. Foreclosure, repossession
- c. Define mitigation
- d. Different remedies for different defaults

## 2. Contracting Remedies

- a. Limit damages: only actual, no consequential, punitive or incidental
- b. Waive/Disclaim types of Remedies: no specific performance, set-off rescission, etc
- c. Election of sole remedies
- d. Financial limitations, cap, hurdle, deductible, net

If you are getting in BED...



***Keep SCORE !***

- A Checklist approach will make you more efficient
  - Understanding alternatives will result in lower legal fees
  - If you are getting in BED keep SCORE
  
- Express Contract Provisions control unless against public policy
  - But, legal default rules control if contract is silent
  
- When should you use this approach ?
  - When you don't want to let negotiations drag on...
  - When you don't think you will be able to get a better deal...
  - You want to control costs
  - Always !

## ■ Can I back out of a deal?

### □ Arnold Palmer Golf Co. v. Fuqua Industries

Memorandum agreements may create binding contracts; entire document and the relevant circumstances surrounding the adoption of the agreement must be considered...

## ■ Emails?

### □ Cloud Corp. v. Hasbro, Inc

The statute of frauds does not require that a contract itself be in writing, only that there is adequate documentary evidence of its existence and essential terms...

## ■ Admissible evidence?

### □ Interform Co. v. Mitchell

Without an “integration clause” outside evidence (extrinsic to contract writing) will be admitted to show true intent of the parties...

## ■ When can I Sue ?

### □ Jungmann & Co., Inc. V. Atterbury Brothers, Inc.

All contractual conditions must be performed before bringing an action for a breach...  
i.e. watch your conditions precedent, subsequent.

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  - **Transactional and General Counsel Services**
  - **Deal Diligence, Consulting**
  - **Business Succession, Tax, Estate Planning**
  - **Asset Protection Strategies**



## Experience

Paul is Principal Attorney of the **Lechner Law Office, P.C.** The Law Office provides legal services for business transactions, tax structuring, estate planning and asset protection for entrepreneurial and middle market companies and professionals.

**The Lechner Group**, Ltd., is a registered Public Accounting and financial services organization, active in transactional financial diligence, and tax structuring, solutions.

Paul is an Attorney CPA, and holds a Masters in Business Finance (MBA), a Juris Doctorate (JD) and Master of Laws in Tax (LLM) from DePaul University in Chicago and is admitted in the State of Illinois, the Federal Court, Northern District of Illinois, and the United States Tax Court. He graduated from St. Joseph's College in Indiana with a BS in Accounting. He is an Adjunct Professor at Saint Xavier University's Graduate School of Management.

Paul's experience has included:

**Managing Director, KPMG LLP, Global Lease Finance Advisory Services**  
**General Manager, Trinity Industries Financial Services**  
**President, Chicago Freight Car Capital**  
**Vice President: GE Capital Railcar Services, CIT Rail, Newcourt Capital, Railroad Financial**

## Personal:

Paul is a private pilot and served in the USAF as a Missile Launch Officer. He is a past Chairman of the Equipment Leasing Association's Equipment Management Committee. He maintains an extensive network in the Equipment Finance Industry and has spoken at numerous Industry Functions. He is published in industry journals and contributed chapters to [A Leasing Company's Guide to Equipment Management](#).  
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## Sector expertise

Legal, tax, and financial expertise. Estate Planning and Asset Protection for Business Owners and Professionals.

## Education

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Illinois CPA. Attorney at Law, Admitted Illinois, Federal Court – Northern District of Illinois. US Tax Court REALTOR®, Adjunct Professor, St. Xavier University Graduate School of Management. – Financial Fraud, Accounting, CFP Certificate Program