

**NEGOTIATING A WORKOUT –
BORROWER/DEBTOR PROFESSIONAL'S
PERSPECTIVE¹**

BE PREPARED

I. Prenegotiation "Do's "

A. Know Your Client -- Company, subsidiaries, guarantors, principals

(a) Is there potential conflict among clients, need for special counsel?

(b) Any fraud or misrepresentation?

B. Understand the business and the deal:

(a) What is the value of the business? (going concern, orderly liquidation, forced sale)

(b) Is your function to be a workout facilitator or a damage control officer to limit personal liability?

(c) Make sure you have an accurate history of the company's relationship with lenders and vendors.

(i) Any previous workouts?

(ii) If so, why are you back at the table?

(d) Where is market headed/future prospects/projections

1. Is there a viable market for the company's product at a price that is profitable?

2. How did business get to the point that it needs a workout?

3. Is management trustworthy?

4. Who are the principals -- Do they really run the business? If not, who does?

5. What are the strengths and weaknesses of:

(a) Management

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- (b) Production
 - (c) Product
 - (d) Sales
 - (e) Margins
 - (f) Profitability
6. Is new management needed? Turnaround professionals?
- (a) Is management credible with trade creditors, lenders, key vendors, customers?
7. Can the existing management change and adjust?
8. What are ownership/management's goals (e.g., continue the business or minimizing personal exposure)?
9. Evaluation:
- (a) Loan documents/covenants
 - (b) Secured creditor relationship
 - (c) Vendor relationship
 - (d) Customer relationship
 - (e) Employee or union (if applicable) relationship
10. What is status of financial records?
- (a) Does the accountant have credibility/loyalty?

NOTE: The old accountant if credible or a new accountant with new credentials must be part of the negotiating team if the client is an operating business.
 - (b) Even if not an operating business, you may need the accountant relative to an evaluation and verification of the company's and guarantor's assets and cash flow.
11. Are there up-to-date financial reports?
12. Are there credible financial projections?
13. Are there non-business operations issues that have to be addressed?

- (a) Environmental
 - (b) Accounting irregularities
 - (c) Illness
 - (d) Potential criminal matters
 - (e) Family issues
 - (f) Off balance sheet items
14. Who are the key vendors and can they help in the negotiations with the bank, other vendors and other constituencies such as secured creditors, debentureholders, government agencies?
- (a) Should Company assist in organizing ad hoc trade group?
15. Explore maximizing value through possible sale of business.
- (a) Outright sale
 - (b) Merger
 - (c) Strategic alliance
16. Who is the institutional lender(s)? Has the original lender sold the loan?
- (a) Who are the officers representing the institution?
 - (b) Who are the attorneys representing the institution?
 - (c) What is the institution's cultural approach to workouts?
 - (d) What is the credibility factor of the company with the institution?
 - (i) Previous negotiations
 - (ii) Previous workouts
 - (iii) Status of current workout negotiations
 - (e) Can you present the proposal so that it is advantageous to the lender as compared to other alternatives?
 - (f) Consider transferring bank accounts to non-lender bank to avoid set-offs and levies.

Alternatives to Examine:

17. Are there any "chips" you can call in on a psychological, business or political basis to encourage continuation of business?
 - (a) Necessity of operations in the geographic or business area in which it operations.
 - (b) Effect of termination of business on local or regional economy.
18. Look for any immediate sources of funds, other than existing lenders
 - (a) Additional equity or collateral.
 - (b) Public agencies - EDA, County Improvement Authority, UDAG, S.B.A.
 - (c) Minority Lender if applicable
19. Are there any 800 pound gorillas in the case - competitor who controls a constituency or creditor who has guarantees with collateral?
20. Risk of operating while insolvent - "D&O" liability to creditors and stockholders.
 - (a) Who advises D's and O's?
21. Valuation of assets and business on liquidation versus "going concern" basis.
22. Tax problems in a workout versus Chapter 11, forgiveness of debt, use of NOL, tax attributes, tax basis of depreciable property, debt for equity.
23. Are there labor problems?
24. Does anybody have any money to invest? (Will you be throwing good money after bad?)
25. Is Chapter 11 a threat or viable alternative?
26. Are there investors or predators out there looking for all or part of the business?
27. Tax considerations of out of court resolution.

II. Meeting With The Adversaries.

- A. Credibility of the negotiators is paramount.

1. Be realistic. Don't promise what you can't deliver.
2. If you are not ready to negotiate, don't.
3. If you need time to present a plan, get it.
4. At the initial meeting with the vendors and/or lenders, present the new team or the old team with new religion and why.
5. If an interim plan is needed, prepare it and present it.
6. Consider use of moratorium to buy time to stabilize or for presentation of plan.
7. Try to anticipate every objection and be able to deflect every possible criticism for past sins.
8. Set a time schedule for a second meeting with agenda and production schedule of information.
9. The "three meetings" syndrome with creditors - especially trade:
Meeting # 1: Everyone is mad;
Meeting #2: Start talking about offer; and
Meeting #3: Start negotiating deal
 - (a) The noninvasive taking of temperature and pulse of adversaries
 - (i) check with others
 - (ii) try to see what are the other side's real objectives
 - (b) Perception is everything. The other side must believe that you want to help the situation and are capable of doing it.
 - (c) The illusion of reality. Everyone wants to recoup - they want to believe.
 - (d) Avoid knee jerk responses to real or imagined slights.
 - (e) Present an initial plan to bridge the period from the initial meeting to the second meeting.
 - (f) Keep creditor constituencies apart.
 - (g) Plan a second meeting(s) - Don't try to rush the process. Standstill agreement, if possible - Don't give up causes of action.

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- (h) Make sure you have enough money or credit or both to do the job right.
 - (i) Save something to give at subsequent meetings.
11. Third meeting or more.
- (a) Normally if you get to this point, the chances are that you have a deal to put to bed.

DON'TS

1. Don't get caught bluffing. Consider having a Chapter 11 petition prepared and present for inspection or emphasis.
2. Don't be unprepared.
3. If you can't sell the deal, get someone who can.
4. Don't try to make your own deal if you are old management. In almost every case, the debtor/obligor is better off having someone else negotiate for it rather than existing management or equity.