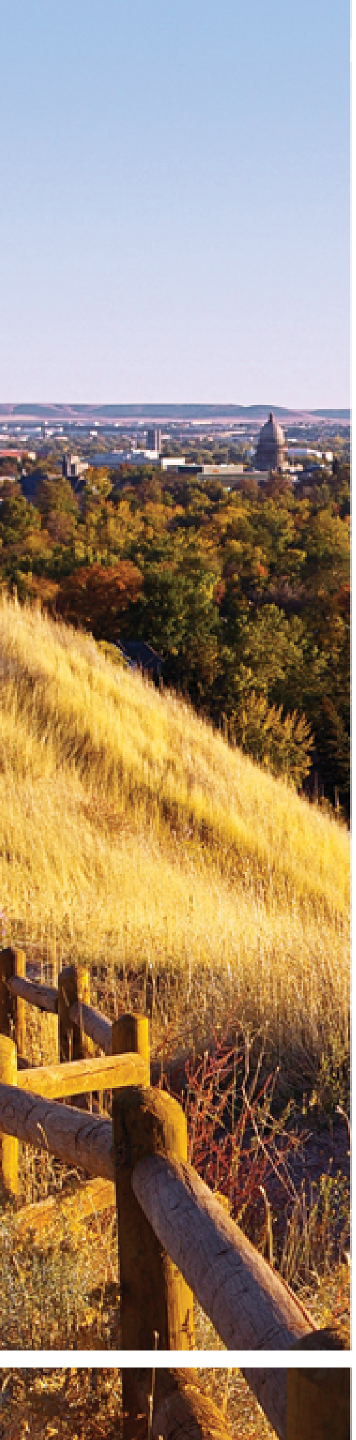

GIVENS PURSLEY LLP

DISTRESSED LOANS: BASIC ISSUES IN STRUCTURING A WORKOUT

Checklist for Post-Default Agreements

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Scope of Presentation

A post-default agreement can take many different forms. It can be characterized as a forbearance agreement, a loan modification agreement, or a workout agreement. Regardless of what the agreement is called, because the terms and conditions will be determined by the facts and circumstances of the loan (including, but not limited to, the credit quality and financial strength of the borrower and the guarantors, the scope and extent of the collateral, the value of the collateral, the market for the collateral, the reason for the default, the financial condition and regulatory concerns of the lender, the existence of loan documentation or lien problems that the lender desires to correct, the objectives of the lender, etc.), it is not possible to draft a one-size-fits all template agreement. Therefore, the purpose of this presentation is to provide a checklist of possible terms, conditions, issues, and concepts that a lender may wish to consider when structuring a post-default agreement.

The Lender's Exit Strategy/Objectives Will Impact Most Terms of the Agreement. What are the Lender's Objectives?

- To give the borrower time to attempt to solve the problem or pay the loan. Is time needed to attempt to: (i) complete construction, (ii) stabilize cash flows, (iii) sell the collateral, (iv) refinance the loan, (v) fix management problems, (vi) allow the market/property values to recover, (vii) allow guarantors to sell assets to raise cash to pay the loan, or (viii) other circumstances?

- To expedite possession and disposition of collateral (deed in lieu)?

The Lender's Exit Strategy/Objectives Will Impact Most Terms of the Agreement. What are the Lender's Objectives?

- To fix loan documentation or collateral deficiencies (such as incorrect signing capacity, incorrect parties, wrong form of document, incorrect cross-collateralization or cross-default language, unperfected liens, missing collateral, etc.)?

- To ensure the construction of the project is completed to increase the value and/or likelihood of selling the collateral?

The Lender's Exit Strategy/Objectives Will Impact Most Terms of the Agreement. What are the Lender's Objectives?

- To improve the lender's position in preparation of enforcement actions or borrower's bankruptcy (more collateral, additional guaranties, principal paydown, etc.)?

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Forbearance period
  - If the lender improves its position or corrects loan document or collateral deficiencies, to mitigate bankruptcy preference risk, the period should be greater than 90 days.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Management of the project – by current management or require third party management?
  - Consider: if mismanagement contributed to the loan default, confidence in current management, veracity of current management, etc.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Reserve Account.
  - Purpose – preserve/increase the value of the collateral (taxes, insurance, capital repairs, tenant improvements to increase rent income, etc.).
  - Potential Source of Funds – project revenue, capital contributions by owners of borrower or guarantors, lender.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Requiring a principal paydown to reinstate the lender's desired equity cushion (re-establish lender's desired loan to value ratio).

- Obtain additional collateral (from borrower, affiliates, guarantors?).

  - Conduct diligence to identify other collateral – Accurint reports, private investigator, etc.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Obtain additional guaranties from owners of borrower or affiliates.

- Require lockbox of rents to ensure payment of property expenses.

- Include a provision that upon a bankruptcy filing, any non-recourse or limited recourse provisions in the loan documents (or guaranties) are revoked.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Require a subordination agreement from the owners or affiliates of borrower that subordinates any debt from such owners or affiliates to the lender's loan.
  - May correct lien priority deficiencies.
  - May give lender additional votes to influence/control bankruptcy plan confirmation.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Require borrower/owners to attempt to sell the collateral during the forbearance period.
  - To incentivize borrower to sell, consider a disposition (broker) fee if the property is sold.
- Require borrower/owners to attempt to re-finance the loan during the forbearance period.
  - To incentivize borrower to re-finance, consider success fee if loan is re-financed.

Terms that Will Depend on the Lender’s Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Require deed in lieu.
  - Timing: (i) now to expedite possession of collateral, (ii) if/when borrower breaches the terms of the agreement (when the lender’s objectives are not met), or (iii) other triggers?
  - Analyze lien issues.
- Require the owners of the borrower to grant a lien on their ownership interests in the borrower.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Modify loan terms to give the borrower the time to attempt to solve the problem or pay the loan (interest only, reamortize loan, payment holiday, extend maturity, etc.).

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Lend more to:
  - Complete construction.
  - Maintain or improve collateral (fund capital improvements, tenant improvements to increase leasing revenue, etc.).
  - While also creating "new value" from lender to eliminate/mitigate bankruptcy preference risk for any terms in the agreement (or related documents) that improved the lender's position.

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

- Improve the lender's economic upside to compensate for continued/added risk.
  - Increase the interest rate (but defer)
    - Consider waiving if the borrower honors the key terms of the agreement (such as selling the property, refinancing loan, making a capital contribution for partial principal paydown, making capital a contribution for tenant improvements, stabilizing cash flow, etc.).

Terms that Will Depend on the Lender's Exit Strategy/Objectives and the Facts and Circumstances of the Loan

– Forbearance fee/loan reinstatement fee (added to note balance).

  - Consider waiving if the borrower honors the key terms of the agreement (such as selling the property, refinancing the loan, making a capital contribution for partial principal paydown, making a capital contribution for tenant improvements, stabilizing cash flow, etc.).

Standard Terms for Most Post-Default Agreements

- Borrower *and* all guarantors as parties to the agreement.
- Identification and acknowledgement of loan documents.
- Identification and acknowledgement of defaults.
- Acknowledgement of outstanding loan amount.
- Acknowledgement that all required lender notices have been given or waived.

Standard Terms for Most Post-Default Agreements

- Representations and warranties (signing authority, no liens, no litigation, no environmental problems, no prior loan document modifications or waivers, accuracy of financial info provided to lender, no claims against lender, etc.).

Standard Terms for Most Post-Default Agreements

- Periodic reporting obligations from borrower and guarantors to allow lender to monitor the financial heath of the obligors (financial statements, tax returns, rent rolls, bank statements to verify tenant security deposits, management narrative summaries that include a description of major expenses (leasing commissions, management fees, salary, expense reimbursement, etc), capital improvement report, budget, prospects and activity concerning sale or refinancing of the project, etc.).

- Lender has the right to inspect the property.

Standard Terms for Most Post-Default Agreements

- Stop all owner distributions.
- Release lender from any liability.
- Lender’s legal fees are added to note.
- Upon termination or breach of the agreement, the lender has all rights and remedies granted under the loan documents (as modified by the post-default agreement).
- Standard (but important) boilerplate provisions (choice of law, jurisdiction, venue, attorney fees, etc.).