AMERICAN
BANKRUPTCY
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# 2018 Northeast Bankruptcy Conference and Consumer Forum

## Transactions: Closely Held Businesses

CONCURRENT SESSION


**Amy A. Zuccarello, Moderator**
*Sullivan & Worcester; Boston*

**Charles A. Goodrich**
*Goodrich & Associates LLC; Lexington, Mass.*

**Hon. Robert E. Grossman**
*U.S. Bankruptcy Court (E.D.N.Y.); Central Islip*

**Scott A. Vickery**
*Webster Bank, N.A.; Boston*


2018

# Resolving Bankruptcy Authority Challenges in Family Businesses and Closely-Held Entities

**Amy A. Zuccarello**[1]
**Sullivan & Worcester LLP**

*Introduction*

In a closely-held business, a small group of shareholders control the operating and managerial policies of the firm. More than 90 percent of all businesses in the United States are closely held.[2] Similarly, about 90 percent of all U.S. businesses are family-owned or controlled by a single family.[3] Unfortunately, less than one-third of family businesses survive the transition from first to second generation ownership, and another 50 percent do not survive the transition from second generation to third generation ownership.[4] Of course, some of these businesses with opt to sell, cease operations or liquidate while profitable as the result of retirement or a change in interest of the founding generation. However, in light of these statistics, it stands to reason that some of these businesses will contemplate the need for insolvency proceedings during their lifespans.

Once a family or closely-held business begins to experience distress, even ordinary management activities may become contentious. For this reason, it is not uncommon for disputes to arise among shareholders or ownership groups, and these disputes may also extend to boards of directors and managers. There may also be disputes across generations of families,

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[1] Ms. Zuccarello would like to acknowledge the contribution of her associates, Nathaniel R.B. Koslof and Ryan Rosenblatt, who assisted in the preparation of these materials.

[2] *Closely Held Corporations*, REFERENCE FOR BUSINESS, http://www.referenceforbusiness.com/encyclopedia/Clo-Con/Closely-Held-Corporations.html#ixzz5FVyN759l (last visited May 15, 2018).

[3] Aileron, *The Facts of Family Business*, FORBES (Jul. 31, 2013, 1:15 PM), https://www.forbes.com/sites/aileron/2013/07/31/the-facts-of-family-business/#46fbd3f09884.

[4] Id.

each fueled by different ideas and objectives. These materials focus on situations where a family business or closely-held business has commenced a bankruptcy case, which is subsequently challenged by another stakeholder on the basis of improper authorization to commence the case.

*Discussion*

**A. Source of Authorization to File Bankruptcy**

A bankruptcy petition for an entity may be filed only by those with the authority to take such action on behalf of the entity. The law of the state where the entity is incorporated, registered or formed determines who has such authority, and if a bankruptcy court determines that a petition was filed without the requisite authority, it must dismiss the case.[5]

In the case of a business entity, such as a corporation, limited liability company or partnership, the state statute provides the controlling source of law on the topic. For corporations, the general rule is that it is the corporation's board of directors (and not its shareholders) which has the authority to commence a bankruptcy case on behalf of the corporation. However, state law permits entities to adopt their own authorization rules which will govern the parties' conduct when incorporated into the entity's organizational documents, leaving state law to apply as a default in the event that the agreements are silent.

One source of trouble arises with the agreements themselves. Organizational documents are often put in place in the infancy of the entity – when thoughts of strife between members and partners are far from consideration and the prospect of bankruptcy is even more remote. At the time of the conflict, organizational documents may be outdated and may not reflect the manner in which a family business has actually been run. In entities which are closely held – particularly those which are family businesses or involve related parties – levels of trust when the initial

[5] *Price v. Gurney*, 324 U.S. 100 (1945).

organization documents are being put in place may have been very high – and issues of control and competing interests may not always be as thoroughly addressed in organizational documents as they could be. Contributing to the problem can be a lack of sophistication of the decision makers and the reliance upon a single counsel who may be advising the entity – and not the individual stakeholders from the outset.

The cases below detail some examples where courts have needed to interpret authorization provisions in organizational documents to address the propriety of a bankruptcy filing by a closely-held company.

***In re* Desperado Dairy, LLC**[6]
Motion to dismiss **granted**. The member-manager filing the bankruptcy petition only held a 33.3% membership interest in the LLC, and was aware that the other members opposed the bankruptcy filing. After rejecting the member-manager's arguments concerning the validity of the amended and restated operating agreement and determining that the agreement was in fact valid, the Court found very clearly that the filer did not have the authority to file as required under the operating agreement and so the case was dismissed.

***In re* Pasta Bar by Scotto II, LLC**[7]
Motion to dismiss **granted**. The Debtor was a two member LLC in which each member held a 50% membership interest. One member had been designated as the manager, but the operating agreement still required a 75% supermajority of the member interests for any "major decisions," defined further to include commencing any proceeding on behalf of the company relating to bankruptcy, insolvency, reorganization, or relief of debtors. The Court found that as it was undisputed that the manager did not have a 75% supermajority for the decision of filing for bankruptcy, so the operating agreement did not grant him authority to file the petition.

***In re* Springfield Homes, LLC**[8]
Motion to dismiss **granted**. The Debtor was a two member LLC where each of two member-managers held a 50% interest. Where the operating agreement provided that the business of the company shall be governed by the affirmative vote of a majority of its managers, one manager could not authorize filing for bankruptcy without the consent of the other. Therefore, the filing member-manager lacked the requisite authority.

[6] No. 12-50354, 2012 Bankr. LEXIS 5189 (Bankr. N.D. Tex. Nov. 6, 2012).

[7] No. 15-12766, 2015 Bankr. LEXIS 3941 (Bankr. S.D.N.Y. Nov. 19, 2015).

[8] No. 13-04550, 2013 Bankr. LEXIS 4039 (Bankr. E.D.N.C. Sept. 27, 2013).

The above cases are examples of relatively straightforward contract interpretation. In some instances, the language in the organizational documents or the conduct of the parties may require a more complex analysis. The cases below address situations where the filing of bankruptcy was not directly addressed in the operating agreement itself, and courts were left to determine whether the operating agreement granted authority to management on an implicit basis.

***In re* East End Developments, LLC**[9]
Motion to dismiss **denied**. The Debtor was a two member LLC in which each member held a 50% interest. Pursuant to the LLC's operating agreement, the managing member had broad powers to decide how to handle operations. Certain specified acts required the consent of both members; however the power to file for bankruptcy was not one of those enumerated acts. As a result, the Court looked to the New York Limited Liability Company statute for guidance. The statute, while touching on bankruptcy in several places, is silent as to who within the LLC has authority to file a bankruptcy petition. As such, the Court, for the purposes of filing a petition, refused to consider bankruptcy akin to liquidation or dissolution – both specified acts in the operating agreement as requiring consent of both members – and found that in the face of silence from the operating agreement and the statute, the managing member had implicit authority to file a bankruptcy petition for the LLC under its general broad operating powers.

***In re* Mid-South Business Associates, LLC** [10]
Motion to dismiss **granted**. The operating agreement vested the LLC managers with the sole right to manage the LLC's operations as necessary in the ordinary course of business, while listing certain situations which would require a two-thirds majority vote of the membership interests. Although filing a bankruptcy petition was not specifically enumerated on that list, the Court recognized that it is well-settled that the decision to file for bankruptcy comes outside the ordinary course of business, even for an entity in dissolution. Accordingly, when the managers filed for bankruptcy without a membership vote, they exceeded their authority under the terms of the operating agreement, and did not have authority to file the petition.

***In re* Oregon Homes, LLC**[11]
Motion to dismiss **denied**. Debtor was an LLC in which members holding 80% of the membership units filed for bankruptcy. The minority members filed a motion to dismiss based on the language of the operating agreement which required unanimous consent for "any act which would make it impossible to carry on the business of the company." In contrast, the operating agreement provided that only a majority of the members were

[9] 491 B.R. 633 (Bankr. E.D.N.Y. 2013).

[10] 555 B.R. 565 (Bankr. N.D. Miss. 2016).

[11] No. 13-33349, 2014 Bankr. LEXIS 4093 (Bankr. N.D. Ohio Sept. 25, 2014).

needed to authorize a sale of all or substantially all of the company's property. Although bankruptcy was not mentioned in the operating agreement, the Court found that because the majority members had the authority to sell all or substantially all of the debtor's property, the majority members also had the authority under the operating agreement to seek the orderly and expeditious sale of the debtor's assets through the filing of the debtor's chapter 7 bankruptcy petition.

***In re* N2N Commerce, Inc.**[12]
Motion to dismiss **granted**. After experiencing certain financial difficulties, the corporation's board of directors voted to enter into an assignment for the benefit of creditors, pursuant to which the board transferred the corporation's assets to an assignee. One year later, the assignee filed a bankruptcy petition on the corporation's behalf. In response, the board filed a motion to dismiss, asserting that the assignee lacked authority to file for bankruptcy on the corporation's behalf. After reviewing the corporation's by-laws, Delaware law and the language of the assignment, the bankruptcy court determined that the decision to file bankruptcy belonged to the corporation's board and did not transfer to the assignee. The bankruptcy court reasoned that language of the assignment did not "clearly manifest the intention on the part of the Board . . . to authorize the filing of a bankruptcy petition by the Assignee" and that, as a matter of contract interpretation, the assignment did not transfer this right. The Court concluded that if the board intended to transfer this right to the assignee, it would have expressly stated so in the assignment. Because it did not, the general language empowering the assignee to liquidate assets and serve as attorney in fact did not grant the assignee the "extraordinary authority to commence a bankruptcy case, authority that is almost always reserved for the board."

These cases present more challenging examples. For example, the Court in *E. End Dev.*[13] considered the question of whether to dismiss a case filed by a managing member of an LLC where the operating agreement did not specifically list "filing for bankruptcy" as a power granted to its managing member. Instead, the operating agreement granted broad authority to the managing member to "manage the business and affairs" of the debtor including, the "power to bring or defend, settle, pay, collect, compromise, arbitrate, resort to legal action, or otherwise adjust claims or demands of or against the [Debtor]" and the power to "perform any and all acts it deems necessary or appropriate for the protection and preservation of the [Debtor's assets and property]," but expressly prohibited the managing member from making a decision to "wind-up,

[12] 405 B.R. 34 (Bankr. D. Mass. 2009).

[13] 491 B.R. at 639-640 (Bankr. E.D.N.Y. 2013).

liquidate or dissolve" the debtor without the consent of both members.[14] The Court was faced with the question of whether the limitation on decisions to wind-up, liquidate or dissolve should be extended by implication to include filing for bankruptcy.[15] Ultimately, the Court declined to read additional terms into the text of the operating agreement, and reasoned further that liquidation was not synonymous with bankruptcy – but actually more equivalent to an act to "bring or defend, settle, pay, collect, compromise, arbitrate, resort to legal action, or otherwise adjust claims or demands of or against the [Debtor]" which was expressly permitted by the operating agreement in the absence of the consent of both members.[16]

This example illustrates a common problem in the closely-held entity. The operating agreements at issue, while perhaps not ambiguous from a technical legal standpoint, are not the model of clarity. If the parties had discussed the roles of member and manager, the control of majority interest and the problems of requiring unanimity for company decisions at the outset of their relationship, it is very possible that the operating agreement would be a more comprehensive document and the parties would be better prepared to address conflict in a distress situation.

**B. Challenges to Contractual Restrictions on Bankruptcy Filings**

Several courts have addressed challenges to constraints on an entity's ability to seek bankruptcy protection contained within the charter documents or operating agreement, typically on policy grounds. As the below cases illustrate, courts are generally inclined to enforce the contractual agreements of the entity's stakeholders and resist interfering in the contractual relationship between parties.

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[14] Id. at 637.

[15] Id. at 640.

[16] Id.

**DB Capital Holdings, LLC v. Aspen HH Ventures, LLC**[17]
Dismissal of case **affirmed**. Operating documents forbade the LLC from seeking or consenting to any insolvency or bankruptcy protections or proceedings. Despite the manager's assertion that this provision was the result of coercion by the main secured creditor of the LLC, the Court found no precedent supporting "the proposition that members of an LLC cannot agree among themselves not to file bankruptcy, and that if they do, such agreement is void as against public policy…." The Court further found that even if such clause were unenforceable, the operating documents precluded the manager from filing for bankruptcy.

***In re* Lexington Hospitality Group, LLC**[18]
Motion to dismiss **denied**. In providing financing to an LLC, a lender required that the LLC revise its operating agreement to effectively restrict the LLC's ability to file bankruptcy without the lender's approval, by among other things, appointing an "independent" manager who was under lender's control, and permitting the LLC to declare bankruptcy only with the authorization of the independent manager. Further, the operating agreement required a vote of 75% of members of the LLC in order to declare bankruptcy, notwithstanding the fact that the lender required that its subsidiary be granted 30% of the membership interests as a prerequisite for its lending.

When the LLC's company manager filed a bankruptcy petition, the lender filed a motion to dismiss, challenging the manager's authority to file because the manager did not comply with the operating agreement. Notwithstanding the explicit terms of the operating agreement, the bankruptcy court found that the restrictions were unenforceable as against public policy. Because the restrictions effectively prohibited the LLC from filing for bankruptcy without the lender's consent, the provisions were void. The bankruptcy court then struck the provisions and determined that, in the absence of such provisions, the manager had authority to file under the operating agreement's remaining terms and under Kentucky state law.

***In re* Lake County Grapevine Nursery Operations**[19]
Motion to dismiss **denied**. Members of two LLCs pledged their interests in the LLCs to secure a payment obligation under a settlement agreement, and agreed contractually that, upon the occurrence of any default under the settlement agreement, the pledgors' voting and distribution rights in the LLCs would be automatically cut off. The LLCs sought bankruptcy protection which was authorized by one of the pledgers, as the controlling member of each of the entities. The issue was whether the agreement to immediately forfeit voting rights upon the occurrence of a default was enforceable, or whether state law governing the strict formal transfer of voting rights must be followed. California law provides that the mere pledge or grant of a security interest in one's membership interest (in the absence of enforcement) will not cause the member to cease being a member or

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[17] *(In re DB Capital Holdings, LLC)*, No. 10-046, 2010 Bankr. LEXIS 4176 (10th Cir. B.A.P. Dec. 6, 2010).

[18] 577 B.R. 676 (Bankr. E.D. Ky. 2017).

[19] 441 B.R. 653 (Bankr. N.D. Cal. 2010).

grant anyone else the power to exercise the rights of that member. The Court found that although the LLC's members had pledged their interests to a third party as collateral on a settlement agreement, the pledging member retained the voting rights until the secured creditor has enforced the security agreement and become the member, and neither the act of pledging the membership rights as security nor the declaration of a breach by the secured party is sufficient to divest the pledging member of the right to vote to authorize the filing of the bankruptcy petition.

**Citizens & N. Bank v. Monroe Heights Development Corp.**[20]
Motion to dismiss **granted**. The debtor was a closely-held corporation with a single shareholder, who filed a petition on behalf of the debtor. Prior to the filing, a receiver had been appointed for the corporation, and had been given the powers equal to those of the board of directors. The Court concluded that Pennsylvania law conferred authority to commence bankruptcy proceedings on the board of directors of a corporation, and this power had been transferred to the receiver upon its appointment. As such, the filing by the sole shareholder was unauthorized. The Court rejected the shareholder's contention that the Supremacy Clause of the United States Constitution prohibited the effective blocking of the debtor's access to the bankruptcy court by the appointment of a receiver and enjoining the parties who had previously enjoyed the power to authorize a bankruptcy filing. The Court reasoned that deferral to a court-appointed receiver is appropriate in the absence of a showing of dereliction of duties or bias, and as a matter of policy, the creditor's determination to seek appointment of a receiver to sell estate property through a state court receivership does not constitute interference with the debtor's ability to access the bankruptcy system.

The common thread most apparent in these cases is that – while the courts appear willing to defer to contractual agreement, there are obviously limitations to what the courts will permit, whether as a matter of policy or as a matter of state law, when an entity's ability to access the bankruptcy system is implicated. A result which denies the company access to bankruptcy or a reasonable state law alternative, especially if brought upon by a third party, seems to be the most likely to raise concern. In comparison, agreements which have been made entirely among the holders of the interests in the entity themselves appear to be the most likely be permissible under current decisional authority.

[20] *(In re Monroe Heights Dev. Corp.)*, No. 17-10176, 2017 Bankr. LEXIS 2355 (Bankr. W.D. Pa. Aug. 22, 2017).

**C. Failure to Observe Corporate Formalities as a Basis for Dismissal**

Another interesting question is whether the failure to adhere to corporate formalities is a basis for dismissal of a bankruptcy case. This issue is particularly relevant to smaller closely-held and family businesses which may disregard corporate formalities with some regularity.

> **Adorn Glass & Venetian Blind Corp. v. Herbst**[21]
> Motion to dismiss **denied**. For a number of years, the founder of the debtor corporation held 100% of the stock. At some point, he entered into a stock purchase agreement with a longtime employee, selling 40% of the shares to that employee and making that person a corporate officer. The agreement stated that for decisions requiring the involvement of both individuals, in the face of disagreement, the founder's 60% stake would prevail. The founder authorized a bankruptcy filing on behalf of the debtor, but neither the founder nor the board provided formal written authorization to enter into bankruptcy. The minority shareholder challenged authorization on this basis. The Court excused strict compliance with corporate formalities on the basis that the debtor was a closely-held corporation. The clarity of the agreement in giving the founder a controlling 60% stake was sufficient to overcome any potential missteps in formality.
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> ***In re* Orchard at Hansen Park, LLC**[22]
> Motion to dismiss **granted**. Applying Washington state law, the Court found no issue with an operating agreement requirement that a unanimous vote of all members and all managers of the LLC be taken before filing for bankruptcy. While the filing manager did not dispute that no such vote had been taken, it tried to argue that such corporate formalities need not be taken in every instance. The Court agreed, but pointed to the exhibits submitted in this case as showing that corporate formalities had generally been followed in regular LLC operations, so there would be no good reason to cease following them for something as important as filing for bankruptcy. Without unanimous consent, the manager did not have the authority to file the petition.

Although these cases yield different results, the courts in question didn't necessarily view the importance of corporate formalities differently. Although strict compliance with corporate formalities may not be required for a closely-held corporation, there does need to be sufficient evidence that the authorization has occurred in order for the court to determine that the appropriate party has authorized the filing. Further, although formality standards for closely-

[21] *(In re Adorn Glass & Venetian Blind Corp.)*, No. 03-14423, 2004 Bankr. LEXIS 2411 (Bankr. S.D.N.Y. Dec. 14, 2004)

[22] 347 B.R. 822 (Bankr. N.D. Tex. 2006).

held entities will differ from those of large, sophisticated organizations, courts may be wary of approving filings in the face of authorization challenges where the process used to authorize the bankruptcy filing differs from the entity's past practices.

**D. Procedural Issues**

**(i) § 1112(b) and Dismissal "For Cause" on the basis of Lack of Authority**

Numerous courts have recognized that 11 U.S.C. § 1112(b) provides a statutory basis for bankruptcy courts to dismiss Chapter 11 cases "for cause" based on lack of authority.[23] However, relying on the Supreme Court's mandate in *Price v. Gurney*[24] several courts have concluded that reliance on § 1112(b) for authority to dismiss a case is not necessary, in one case noting that, a court would be "required to dismiss an unauthorized filing even if § 1112(b) were not in the Bankruptcy Code."[25]

**(ii) The Burden of Proof on Motions to Dismiss**

There is conflicting case law regarding the burden of proof on a motion to dismiss a Chapter 11 petition for lack of authority to file. The cases alternatively hold that: (1) the burden is on the movant; (2) the burden is initially on the movant to make a prima facie showing, after which the burden shifts to the debtor; or (3) the burden is on the debtor.

The majority position appears to be that the burden of proof lies with the movant.[26] As described in the case law, it would be undesirable to place the burden on the debtor because to do

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[23] *See Citizens & N. Bank*, 2017 Bankr. LEXIS 2355, at *18-19 (noting that, even though lack of authority does not appear in the list of specific circumstances set forth in Section 1112(b)(4), such list is preceded by the word "includes," and is therefore not to be construed as limiting); *In re ComScape Telecomms., Inc.*, 423 B.R. at 829-30 ("It is well established that lack of authority to commence a bankruptcy case constitutes cause for dismissal.").

[24] 324 U.S. 100 (1945).

[25] Id. at 830 (emphasis added); *see also In re Southern Elegant Homes, Inc.*, No. 09-02756, 2009 Bankr. LEXIS 1478 at *1 (Bankr. E.D.N.C. Jun. 9, 2009) (dismissing unauthorized petition without relying on § 1112 (b)).

[26] *See, e.g.*, *In re Quad-C Funding LLC*, 496 B.R. 135, 142 (Bankr. S.D.N.Y. 2013) (placing burden on the movant); *see also In re NNN 123 N. Wacker, LLC*, 510 B.R. 854, 859 (Bankr. N.D. Ill. 2014) ("The movant . . . bears the burden to demonstrate by a preponderance of evidence that the bankruptcy filing was unauthorized."); *In*

so "would invariably allow any party in interest to force a debtor to expend its diminished resources litigating over the issue whether it could seek to rehabilitate or liquidate itself in an orderly fashion under the auspices of the Bankruptcy Code."[27]

For the reasons mentioned above and detailed in the cases cited, only a slim minority of courts have placed the burden of proof on the debtor.[28] Even here, however, the Court ultimately found that the debtor met its burden and denied the motion challenging the debtor's authority to file.[29]

Increasingly, courts seem to be applying a burden-shifting approach to resolving authority challenges. Under this approach, the burden is initially on the movant to make a prima facie showing, after which the burden shifts to the debtor.[30] This approach recognizes that movants should bear at least the initial burden so to prevent improper obstructionist behavior by minority interest holders; yet this approach also appreciates the inequities that would result from requiring movants to effectively disprove the affirmative defenses of debtors. As recently summarized by the United States Bankruptcy Court for the Western District of Pennsylvania:

> If the Court were to place the burden solely on the Debtor to show the existence of authority to file the petition, that would allow any aggrieved party to indiscriminately force a debtor to expend its limited resources litigating over the issue of whether it could access the bankruptcy system. If the Court were to place the burden solely on [the movant] to show a lack of authority, it would ignore the fact that doing so would effectively require [the movant] to overcome what

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*re Or. Homes, LLC*, 2014 Bankr. LEXIS 4093 at *6 (2013) ("The court agrees with those courts that place the burden of demonstrating cause for dismissal and, specifically, that the filing of the case was not authorized, on the movant."); *In re Player Wire Wheels, Ltd.*, 421 B.R. 864, 868-69 (Bankr. N.D. Ohio 2009) (finding the burden is on the movant in addressing motion to dismiss under § 1112(b) based upon unauthorized filing); *In re Comscape Telecomm., Inc.*, 423 B.R. 816, 830 (Bankr. S.D. Ohio 2010) (same).

[27] *In re Quad-C Funding LLC*, 496 B.R. at 142.

[28] *See, e.g.*, *In re Peterson's Motor Express, Inc.*, 84 F. Supp. 230, 232 (D.N.H. 1949) (placing the burden of proof on the debtor).

[29] Id.

[30] *See, e.g.*, *In re Real Homes, LLC*, 352 B.R. 221, 227-28 (Bankr. D. Idaho 2005) (stating that once movant makes a prima facie showing, the burden shifts to the debtor).

> amounts to affirmative defenses by the Debtor in contravention of the principle that the burden is normally on the proponent of such a defense. The burden-shifting approach is a middle solution that avoids either of those two undesirable outcomes.[31]

As this approach appears to be gaining traction, petitioners need to be increasingly prepared to respond to authority challenges with affirmative evidence of their authority to file.

[31] *Citizens & N. Bank*, 2017 Bankr. LEXIS 2355, at *16 (internal citations omitted).

**A Bankers Perspective:**
**Key Partners, Business Succession Plan and Assignment of Life Insurance**
**Scott Vickery, SVP Business Banking**

Having the right partners is the key for any business. A business should have an Attorney, CPA, Insurance Agent and a Banker that have background working with businesses and its owners. Not all are created equal and it would benefit the business owner to look for consultants with the appropriate business industry experience when available. Different industries have different risks relative to them and may require specific conversations and coverage around taxes, insurance, etc. All businesses encounter various challenges throughout the businesses life cycle and being prepared with correct support channels help businesses avoid pitfalls. When I started in Banking 25 years ago, the common question for a banker to ask was who is your Attorney, CPA and Insurance agent but that seems to be less common today. I'm always having conversations with business owners and their key financial consultants to develop a working relationship, to discuss various business challenges and to provide food for thought to the business owner.

As the banking industry has been deregulated and banks have grown in size, banks have tried to standardize Business Banking to compete and deliver small business loans in a more profitable way. For some banks, this has led to a less skilled commercial lender working with the smaller businesses. Middle market, business banking and small business bankers are now segmented lines of business. Small business bankers are generally retail employees that report through the branch management structure. Business Banking is generally reported up through the retail channel but has separate management from the branch structure while middle market is the old school commercial lender. The deal size each segment works with depends on the bank but is usually broken out by revenue and lending size. Loans typically less than $250m have a credit scoring model that creates auto responses. The models used by banks vary significantly and the bands in which loans are approved, denied or given a second look vary as well. I mention this because it goes to the level of attention a business client receives from a key partner. While this reduces the hands on experience it has made access to capital a little but more available.

Finding the right bank can be just as important to finding the right banker. Again not all banks handle relationships the same or provide a value added approach. They also handle difficult situations in significantly different ways. It is important to work with a bank that has a reputation for working with clients in hard times not just in the good. Banks rely on the borrower and its other partners to work with the bank to address issues early and to be transparent in all matters. Having books up to date, insurance reviewed from time to time, not just amounts but types of insurance as well as legal structure and succession plans that incorporate potential pitfalls and changes in ownership.

Succession Planning used to be a very common question for a banker; however, again depending on the size of the business and sophistication of the banker this is less and less common. Also, if the banker asks the questions it stops there. They rarely help the client understand if there are adequate plans in place. Depending on the level of experience, they may be asking the questions but may not know what to do with the information. Often times, the banker is just trying to get enough information to satisfy its credit manager that there will be someone in charge avoid having to collateralize life insurance which I will discuss a little further on. SBA is sometimes a driver of this conversation; however, this should be a common question for all businesses of a certain size. That size depends on the individual business and industry. Again more competition, as well as the need to make quicker more streamlined decisions in small business banking has an impact. The banker is by no means an expert in this area but they should add value by asking the right questions and understanding if the business has breadth and depth of management and ownership to avoid potential pitfalls.

Keyman life insurance seems to have become less common as it's a costly and often a misunderstood need. Due to HIPPA laws the time to get a policy approved can be longer as well. Banks will ask about keyman life but really are more interested in life insurance and if there is a lack of succession plan or a strong reliance on one individual they will collateralize a personal life policy in an amount and term sufficient to generally cover the loan. Businesses should consider keyman life to protect the business from loss of a key employee or owner. This is not used to pay off bank loans but can assist to help financially during a management transition. Business interruption and disability insurance are also important to consider. Having sufficient insurance in place should something befall the owner will take some of the financial liability off the business, the partners and potentially the family.

As mentioned earlier, the key partners are most important to a business and follow up with them to gain insight and advice on a regular basis should be routine for a business owner. The more the partners get a chance to be involved with the owner and each other the better the partnerships. Having people with the right experience is obvious, but we see time and time again the brother or sister in law involved in a role they don't have the skill set or experience with to properly advise the business.

**Closely Held Businesses: Why They're Different; How to Work With Them**

*By Charlie Goodrich*

**Often, my clients are closely held businesses with just a handful of key players.** That is to say, there are effectively several owners and/or operators involved, along with their respective personalities, life histories and interests. Taken together, all of this leads to potential conflicts and, often, obstructive behavior.

Typically, these are family run businesses. But they can also be businesses owned by a small group of involved owners. **The common thread is that there are a handful of active players with different interests, concerns, motivations and personalities.**

In a family owned business in crisis or strain, Dad, for example, may be concerned about his legacy, while his children (who have never worked anywhere else) are concerned about being thrown on the street with limited funds and job prospects. Or maybe there is a CEO who has all his wealth in a business in which he controls just a small piece, and he is worried about losing everything.

Whatever the specifics, **closely held businesses with a handful of key players are different than those with a single, dominant owner or most other public or private companies.** As a result, working with them, particularly in times of financial distress, also requires a modified approach.

What follows are my tips for outsiders in the position of helping one of these companies when time is of the essence:

- **Don't try to "fix" or resolve conflicts among the ownership parties.** It's too late. Yes, there may be partial or complete solutions to make things run more smoothly, but they take too long to contemplate and a new, outside party is rarely in a position to propose such a solution. As an outside advisor, assume that you must work around existing difficulties.

- **Stress the facts behind your analysis.** While it is always important to be objective and fact-based, this is especially true in these situations. Doing so shows impartiality among the players.

  This can become tricky, however, when the data is not readily or quickly available. Often, and because there is limited time for validation, a CEO's or other executive's views on how markets work and so forth are used as a starting point. **Be careful here: Push for validating facts from the operator or wherever you can find them.** Otherwise, the other parties will consider your views to be "his" views.

- **Don't become a proxy for the bogeyman.** Whomever the bogeyman happens to be in a given situation - the lender, one of the owners, etc. - you don't want to be aligned with him. Once that happens, the owners' frustration with that party gets transferred to you and operating becomes that much more difficult.

On one assignment, for example, I was brought in by a Federal Receiver to run a business that was being sold. The founder/owner lost big time litigation with a mega-company. While the owner had many shortcomings, including all sorts of deception, troublemaking and so forth, **the Receiver had become one and the same as mega-corp in the owner's eyes.** So, the owner aggressively obstructed the Receiver.

My success was due in large part to my coming across as objective, respectful, and willing to listen to the owner's "henchman" on site. That didn't stop me from executing the Judge's orders to close a sale of the company, but it made things go a lot more smoothly.

- **Try and get the owners/family to have their own set of advisors, particularly legal advisors.** In many situations the legal interests of owners and the company can diverge. Moreover, a good advisor can address other concerns of family members, etc.

  For example, I was involved with the bankruptcy of a scrap metal company in the Midwest with operations in several states. Dad stayed at home while his daughter priced most scrap purchases. Until we arrived, the owner personally counted bags of money delivered by an armored service (the loan agreement wouldn't let the owner use his own truck drivers anymore!). Several other children were employed in the business too. One ran one of the larger scrap yards, another was in sales.

  **The family brought in its own counsel (in addition to the company's) and that helped immensely.** The new family counsel did a good job of protecting family assets and, importantly, got Dad to lay out the family finances in sufficient detail so that the children were no longer concerned about their own financial futures. (Note that, as mentioned earlier, the advisor did not attempt to resolve long standing family conflicts and other issues during the bankruptcy process.)

- **Identify the proxies for the owners and various parties; use them to get the job done.** Often, the owner, former CEO, one side of the family, etc., has "their" person on site. They act as the owner's eyes and ears and sometimes as an advisor. If you want to know what is on their backer's mind, listen to them. If you want to sway the owner or similar parties' thinking or interests, work through their proxy.

  In the Federal Receivership case mentioned earlier, there were two guys who were the primary eyes and ears for the owner. One was a technical expert (and martial arts master on the side). The other was "muscle" to move heavy equipment and so forth, as well as an amateur boxer, convicted car thief, and technical expert on obsolete equipment. Both would come to me with "issues." I took the time to listen and address their concerns. As I earned their trust, the level of owner problem-making subsided.

- **Set forth the objective to those involved.** In my experience, that is usually to sell or liquidate the business to maximize recovery for creditors. Most people expect (and appreciate) being led. So if that is what you are there for, share your objectives and lead them. Done properly, this new goal can focus the organization and divert (or at least reduce) attention paid to outside, interfering parties.

Closely held businesses are unique. **When jumping in, don't try to lead as the conductor. Success comes from having the Quartet play as well as possible together, and by themselves.**

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**Lead When You Can't Get the Job Done Alone**

*By Charlie Goodrich*

When it is time to act, often it is time to lead.

Why? Because **if you need to get something done in your organization that requires the help of others, you must lead.**

But don't worry - I'm not going to rehash the books, articles and so forth that have been written about leadership. You've already read them and besides, most of these focus on becoming a better or more effective leader.

What they rarely touch on, however, is just what leadership is.

**Two simple things**

Simply stated, leadership is getting an organization to move in a particular direction. And, since organizations are collections of people, **leadership is getting *people* to move in a particular direction.**

So step one requires setting a clear vision of what that direction is.

Step two comes from the word itself - leading, being in front of the movement so that everyone else can follow. There is no such thing as leading from behind - that's either pushing or manipulating.

**That's leadership.**

1. Communicate a clear vision and make sure people know what they need to do to get there.
2. Get out in front, visibly.

Why then is leading so scary, particularly for those who haven't led before? I think it has to do with evolution. If the human race were full of those who lead and refuse to follow, the human species would have killed itself off a long time ago. Most people are born to follow (even good leaders). It is human nature.

**During a crisis, people are eager to follow**

First time leaders are often worried that people won't follow. It's a reasonable concern, quite frankly, particularly among organizations in crisis. Refusal to change and set upon a new direction may explain why the organization faces its set of troubles in the first place.

**In a crisis, however, just about everyone knows they can't sit still.** The problem, usually, is that they don't know what to do or where to go. It's a perfect time to lead, because there are no alternatives but to take action.

For example, **I was called on to lead at the request of a private equity firm.** They were 10 days from the scheduled close of a public to private sale and it looked like the private equity firm would have to write a bigger equity check in order to meet the closing day loan covenants.

A bigger check meant an embarrassing conversation with the limited partners who were the ultimate investors and the private equity firm would rather scrub the deal than proceed. Senior Management, meanwhile, was absent from the Company, gambling away their expected winnings from the sale in Atlantic City.

By stepping forward and meeting with middle management, I laid out a path to get the deal closed. In this case, that meant bulking up working capital upon which the loan funding was based, by invoicing all shipments daily, receiving all goods daily (instead of during the end close) and cleaning up old receivables. (Yes, this company had so much cash, they did not worry about cash flow!)

Everybody followed. They all had stock options, so they wanted to get the deal done. The deal closed with cash in the bank and only 50% utilization of the working capital based loan facility.

**It's rarely about job titles**

Notice, by the way, that I have not talked about leadership roles, titles, or position in an organization. **While organizational leadership often makes leadership easier and more effective, it is not necessary.** In the above example, I was a consultant who wasn't even working for the company!

Staff and even consultants can communicate a clear direction and start taking visible actions along the path, so others may follow. As a crisis consultant, I lead all the time, even though I lack organizational and even legal authority to do so. In times of crisis, people follow because they know they have to move.

In another example, **I was brought in as the Chief Operating Officer of a technology company.** For various reasons, a Federal Judge prevented the owner from showing up on the premises and from running the business - the company had a flat organization structure and nearly everybody reported to him. One business was being sold to the winning bidder at an auction; another business was to be shut down.

The supporting technical infrastructure of the business being sold was intertwined with the business being shut down. There was no documentation, just the owner's knowledge (and he couldn't help). There were all sorts of external Internet-based attacks on the business being sold and customer service was a shambles. Meanwhile the owner was thought to be encouraging employees to obstruct the sale. The situation was untenable and all the employees knew it.

I laid out a path of the steps needed to close the sale of the business, appointed a new head of customer service who reported to me and elevated the key technical customer needs with engineering.

Yes, there was skepticism at first, but soon they all followed. With the strong leader physically gone, the employees chose my path to close the sale over the owner's desire to block it. The sale was closed and the other business shut down.

**Leadership, while perhaps not a natural inclination for most humans, is something that many people are capable of.** By laying out a clear path and providing a visible model for others to follow, leaders - particularly during times of crisis - can emerge from any number of locations and situations.

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**When Insolvency Strikes, Don't Lose More Than Your Investment**

*By Charlie Goodrich*

**Bankruptcy and insolvency - either one is almost always bad for equity holders in a business.** Often, everything is lost.

But it can be worse ... you can lose more than just your investment. Whether you are an officer, an owner, an investor or some combination, you can individually be tagged for certain types of liabilities.

Let's first take a look at how, then we'll consider what to do to mitigate your losses...

**If you are an officer** of the company or otherwise a responsible party:

- **Unpaid wages.** Most states make officers personally liable for unpaid wages. Which officers? Usually owner/operators, CFOs, Controllers, even OFOs (Only Finance Officer). So, potentially, even the bookkeeper.

  **The harder question is defining what is a wage.** Salaries are easy, but bonuses, sales commissions, even severance payments can get tricky. The answer is always fact and state law dependent, so make sure employees are paid and get legal help versed in your fact and State specifics.

  If your company is laying off many people, beware of the WARN act. **This Federal law requires a 60-day advance notification of layoffs in certain instances.** Here as well, the exact timing of and the need for the notification requirement is fact dependent. The risk to you as an officer is if unpaid WARN Act claims are considered valid and are treated as unpaid wages by the relevant State and Bankruptcy Courts.

  Note as well that **sometimes, state law treats vendors as employees,** particularly in Massachusetts. This relatively new area of overdone regulation sweeps up independent contractors and treats them as employees for salary and benefit purposes. So, an unpaid vendor who normally is just burned when a company runs out of money, may be able to call himself an employee and therefore be due wages instead of an unpaid invoice. This newer area of the law has many unknowns, particularly when insolvency is involved.

- **Unpaid fiduciary payments.** Federal and State laws make officers personally liable for these. This refers to money that theoretically belongs to someone else for payment to a third party, usually the government.

Withholdings from employee salaries for taxes and benefits, for example, is such a fiduciary fund, as is sales tax collected from customers. Remember that employee contributions for medical plans and retirement plans are "employee money" and not the business's.

- **Bank fraud.** Surprisingly, this happens often enough by people with good intentions, that it's worth mentioning. Besides jail and fines, lenders can sometimes seek personal recovery from those who commit the fraud.

  **Don't be tempted to doctor borrowing base reports, "refresh" invoices, or worse,** so that your company can borrow more money and live for another day. Senior management of the big and now defunct law firm, **Dewy & Leboeuf**, is learning that lesson now. Earlier this month, **New York State Prosecutors filed a 106-count indictment** against the CEO, his right hand man, the CFO and a poor chump who sent damaging e-mails, accusing these individuals of issuing deliberately misleading financial information so that lenders would lend more money.

**But what if you're simply an owner/operator and/or an investor?** Well, if you are an operator you are likely an officer and so all of the above applies. Unfortunately, there is more...

- **Guarantees.** If your company can't pay, and you personally guaranteed the debt, you pay. Look for guarantees from other entities you own, such as a real estate holding company. Personal Guarantees to banks and lenders are obvious.

  Others are less so. **Look out for personal guarantees buried in leases or credit applications from ordinary vendors** that you may have signed or an employee may have signed. Years ago, when I was the CFO of the S. S. Pierce Company, we imbedded a personal guarantee in our credit application for restaurants. It was very effective.

  For example, **the former Mayor of Providence, Rhode Island, Buddy Cianci,** came upon the ownership of a franchised restaurant for a local chain. (Presumably, but never proven, as compensation for granting liquor licenses.) The local sales representative had Buddy sign the credit application - "just a formality." And so Buddy personally guaranteed all the back and new debts to the S. S. Pierce Company. The restaurant tanked and **we moved to enforce our personal guarantee by placing a For Sale sign on his front lawn.** Buddy joked about it often on the radio talk show he hosted between Mayoral gigs. But the day before Buddy announced he was running for Mayor again (and won), we received a check for all past due amounts - and the check cleared!

- **Underfunded pension plans.** The beast known as **PBGC (Pension Benefit Guaranty Corporation)** is an arm of the US Department of Labor that has made life miserable for many a business owner, including other pension funds that own businesses!

  The PGBC was established by Congress as a backstop to all of the non-government, old fashioned (a/k/a defined benefit) pension plans. If the pension fund tanks, the PBGC picks up the tab. But, **Congress gave it powers to go after any entity with money to make whole.** The laws were designed to prevent companies from putting the pension plans in subsidiaries and then walking away. The consequence is that if an owner was actively involved in the business, he/she can be tagged for the shortfall.

  In one bankruptcy I was involved in, **the absentee owner lost his $60MM investment.** Worse, the union pension fund was underfunded and today the PBGC is chasing after his remaining assets to make up the shortfall.

  **Not just individual owners can be tagged.** This past Summer, the First Circuit held Sun Capital's (a prominent private equity investor) fund liable for the pension funding shortfall in one of their failed investments, as Sun Capital had been actively involved in that business. The irony is, the limited partners in the fund that are picking up the shortfall are mostly other pension plans.

- **"Piercing the corporate veil."** This describes techniques used by creditors to gain access to personal assets. My own experience is that this risk is overblown by attorneys that form corporations and LLCs, but it can happen. Get good legal advice on what to do and follow it. Make sure adequate books and records are maintained.

- **Fraudulent conveyance and avoidance actions.** This is a complicated area of the law. In short, it means that both inside and outside of bankruptcy, creditors can "claw back" payments to business owners and others. This topic is beyond the scope of this newsletter, but when businesses face insolvency, this is one more reason for business owners to get good legal and financial help.

Whew, lots of potentially nasty surprises to be concerned with. **So, what should business owners and officers do to protect against losing more than just their investment?**

1. **Avoid surprises with a good 13-week rolling cash flow forecast** (see our May 2013 newsletter on the topic). Not paying wages or fiduciary withholding is often the result of predictable - but unpredicted - cash flow shortages. Bank fraud, in turn, is

often a foolish reaction to cash shortfalls that should have been anticipated.

2. **Review your insurance policies.** Such policies are often a front line defense in that they pay legal costs to defend against such claims.

3. **Get help.** From a financial advisor who can guide you through the many traps and from legal counsel that is well versed in the relevant fact situation and legal jurisdiction issues in question.

Remember, when in trouble, don't lose more than is already lost.

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**When Cash Is Tight, Build Trust Through Centralized Processes**

*By Charlie Goodrich*

**I help companies when they run out of money.** More technically, I help them when they lack the liquidity needed to pay their bills as they come due.

Often, when I arrive, the company has already lost the trust of its trade creditors. But it's not so much because the creditors are owed a lot of money ... it's usually because trade creditors have been told time and again that they would be paid and they weren't. **The creditors were misled, even though senior management knew they didn't have the funds to pay them** and weren't likely to, anytime soon.

Why the deception? Most often, it's not that senior management is lying (although they sometimes do). It's that middle managers and below (buyers and so forth) are making promises they can't keep. They don't know the details of the company's liquidity position; they don't have the heart to tell a trusted vendor that they won't get paid; and they simply don't know what else to do.

**The need for centralized approval of payments and trade communications.**

One of the first things I do in these situations is to centralize the approval for making payments. And while most companies have a centralized disbursement function, I am talking about more than that.

The enhanced control I add is to **establish one, central point with authorization to make a commitment on when a check will be cut.** After all, there's no faster way to irritate a creditor than to say you will pay when you can't. So I make sure that everyone in the company understands that they *cannot* make payment commitments. This is really important.

More specifically, here's what we do...

**Phase I: Centralize control over who can make commitments to *pay.***

Understanding what you can pay requires a 13-week cash flow. I have talked about this before, but as a reminder, schedule payments coming in and payments going out by week and track the cash balance. From this, a list of expected disbursements for the week is generated.

On a daily basis, disbursements should be reviewed and compared against available cash, given the day's cash receipts. From there, decisions can be made on what to pay and what not to pay. **It is critical that those making these decisions be kept informed as to the consequences of not paying particular vendors.** For example, is a given vendor needed to repair broken equipment? Depending on the nature of the business, strong communications with manufacturing, purchasing, etc., are needed.

This process gets harder with geographically disparate operations. Most disbursement systems were not designed for detailed review of the item to be paid, beyond invoice number and due date. Sometimes a special report from IT will be needed. But IT or no IT, a process must be put in place so the payment needs of the operating groups or locations are communicated upward, in a way that whomever is deciding what will be paid and not paid understands the consequences of non-payment.

**Have a consistent message to all creditors.** The organization needs to know what that message is, so communicate it. As to what the message should be, read this.

Note as well that buyers have to be monitored. They often have long-standing relationships with their vendors and will make payment commitments to keep vendors happy (particularly if a buyer hopes to use a vendor for job references, should things head further south). Sometimes a buyer thinks he can force the company's hand to pay a vendor by making the commitment. Naturally, all of this destroys credibility with the vendor and adds to frustration and anger.

**Interestingly, many of my clients have already begun doing much of this before I arrive.** But, because senior management often wants to keep its problems a secret, the rest of the organization is unaware of the new process and continues on as before. Of course, most employees know something is wrong, so you might as well be more forthcoming with them.

**Phase II: Centralize control over who can make commitments to *buy.***

When things get tight, it is equally important to not make purchase commitments that you can't honor or, with hindsight, rather not make. Once the goods are ordered - and certainly, once they are received - the business owes the money. A process similar to phase I is needed, but for purchase orders.

**When should Phase II be put in place?** As soon as the forecast shows nothing but negative cash flow. At that point, and unless new funding can be had, you will never be able to pay for these goods. Also, if there are liquidity issues in a manufacturing or distribution business where lots of purchases are made, businesses have to selectively cut inventory levels. It is better for the company to decide what items to not order than have a vendor decide, by saying they won't ship until they are paid.

Controlling purchase orders (or any commitment that leads to the company paying money) is surprisingly hard to do, particularly in manufacturing companies. Why? Because most IT systems were built for a Materials Requirement Planning (MRP) environment; orders pop out based on minimum stock levels and so forth.

**One client of mine really struggled with this.** They were an old line manufacturer, literally Bridgeport Machine, Inc., that made the old school vertical milling machines that are in shops around the world. Their parent company was in dire straits for the usual reasons and cash was very tight. Bridgeport had a standard MRP system. That is, it used orders to forecast the parts needed, looked at stocks and generated purchase orders. At the time, Bridgeport was nine months into lean manufacturing. That worked short-term wonders for cash flow by dramatically reducing raw materials, work in process and finished goods inventory, along with labor. **The problem was that the buyers struggled to know what parts to order for the lean system.** Worse, it became clear that many of the buyers really didn't know anything about the manufacturing process. They were, for the most part, reorder clerks who placed automated orders from the MRP systems and followed up on late shipments. What was the solution? We started looking at special IT reports around week two of my engagement. Unfortunately, it was not long before the lenders filed an involuntary bankruptcy petition and that was that.

**If you are a distributor, controlling POs is much easier.** When you are out of stock, either you have the money or you don't. There is no bill of materials to struggle with. The danger here, however, is the temptation to try and "keep the customer" by making sure you don't run out of the "core" items. Unfortunately, **profitability for most core items is slim to none** (the profit is on the non-core items). For example, when I was in the food service distribution business for Kraft Foods, we gave away the "center of the plate," the meat and potatoes, at cost. We made our money selling cleaning supplies, tabletop items, spices and so forth. So look carefully. In these situations you may need to shrink the customer base to fund the items that carry the margin. Don't let your buyers force this decision on an ad hoc basis.

Centralizing payments and purchases at this level of detail and with this level of control is cumbersome, no question. But it's absolutely necessary to preserve trust with creditors, lenders and others. **And when times are tight, trust is as important as liquidity for survival.**

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**Better Leadership Begins with Defining - and Communicating - the End Goal**
*By Charlie Goodrich*

**A few years ago, I was called into a crisis situation at a VOIP ("Voice Over IP") Company.** An unknown bidder had just won an auction to buy the company; employees had been expecting the CEO to win. A Federal Judge barred the CEO from the premises and four critical employees had just walked out the door. I was brought in as interim COO to run the company and close the sale.

For a variety of reasons, the employees had been told little. One of the first things I did, therefore, was tell the employees that the company had indeed been sold and that we needed to continue to run the company and maintain service levels until we closed the sale.

Why did I say this so early on? **Because the fastest way to reach a goal is to have the entire team row there, together.** "There" doesn't have to be precisely defined, just sufficiently clear to know the general direction; the exact endpoint can be fine-tuned along the way.

If, on the other hand, you know you need to change course but haven't communicated it, the organization will waste time, with resources going in the wrong direction (if not outright circles). Furthermore, if employees don't understand where the company is headed, they can't alert you to obstacles or help divine the path. As I said in my newsletter on leadership, **you can't lead nor can an organization follow, without a vision of where you are going: The end goal.**

Defining the end goal has an additional benefit. By providing clarity regarding where you hope to end up and understanding what it takes to get there, you can evaluate new opportunities along the way and decide if pursuing them will take resources from achieving your ultimate objective. The end goal provides a benchmark to measure the opportunity cost of new alternatives. For more on that, see my opportunity cost newsletter, here.

**Four Recommendations for Defining and Communicating Your End Goal:**

1. **Do a situation analysis, as needed.** Setting the wrong end goal is usually bad, sometimes very bad. Often, for example, I am brought in when an entrepreneur with strong leadership skills has been charging after sales growth, but without regard to profitability. The end goal was clearly defined but, unfortunately, achieving that goal required going over a cliff. In my crisis management engagements, therefore, the first thing I assess is cash flow and the ability to make payroll. Closing the sale of a company in 90 days is not an option if you can't make payroll next Friday.

   Often, however, the direction or objective is set at the outset, as it was in the VOIP Company. In these cases, no analysis is needed to determine that - you just need to determine how. In larger companies in particular, it's often the case that the overall situation has been analyzed, the objective set and strategies and plans put in place to achieve that objective. So if the end goal has already been defined, run with it.

2. **Analyze and adjust along the way.** In the VOIP example, I pointed us in the direction of closing the sale. But the asset purchase agreement hadn't yet been finalized, so what we ultimately would have to deliver wasn't known. But we did know we had to deliver customers and that the purchase price would be adjusted by the final count. Additionally, we knew there had been a trend the last several years of declining customer count. So we focused on customer service and quality of service, both of which had been ignored in recent years. Once we had a signed APA, we knew in detail what had to be done to close the sale. The end goal sharpened from "sell the company" to delivering the specifics of what was in the APA. What we didn't do was conduct a lengthy analysis or prepare a detailed action plan before moving forward at the outset.

3. **Make sure key stakeholders, such as investors and the Board of Directors, are on board with the end goal.** Absent this agreement, there will be powerful forces in your way. For example, pursuing a diversified customer base or product mix may conflict with an investor's goal of increasing cash flow or EBITDA and selling soon. In my insolvency cases, sometimes the secured lender does not want to sell the company because he can get paid simply by liquidating it.

4. **Spend time listening.** Crisis situations in particular, require an ability to hear what's going on outside the four walls of your office. I have talked about this before. Listening can minimize the "unknown unknowns" among other things. **I view listening as part of the ongoing situation analysis.** People will highlight obstacles and other things in the way, allowing you to make mid-course corrections as necessary. In the VOIP Company, the top engineer told me that the VOIP network we were selling was tangled together with a different network we were shutting down. We had to develop a plan to untangle the two networks and then get it done, requiring a push back of the close date.

In short, when driving change or working towards an objective, it's essential to figure out the end goal - and communicate it with others - as early and as frequently as possible.

**You can't anticipate all that will occur in the future, but success can happen faster by keeping everyone's eye on the prize from the start.**

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