

CAPITAL CALL PROVISIONS IN LLC AND PARTNERSHIP AGREEMENTS

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The University of Texas School of Law
32nd Annual LLCs, LPs and Partnerships
July 13-14, 2023
Austin, Texas

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Introduction and Agenda

- “Show me the money”
- Agenda
 - Debt Versus Equity
 - Types of Capital Contributions
 - Drafting Capital Contribution Provisions
 - Remedy Provisions
 - Case Law
 - New Investors Added After Formation



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Debt Versus Equity

- Advantages of Debt
 - Simplicity of Drafting
 - Simplicity of management and accounting
 - Consider whether additional burden of partnership capital accounting is warranted
 - Priority
 - TBOC § 11.053 provides “a domestic entity in the process of winding up shall apply and distribute its property to discharge .. [its] liabilities and obligations” prior to distributions to owners

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Debt Versus Equity (cont'd.)

- Disadvantages of Debt
 - Balance Sheet Considerations
 - Debt on the balance sheet may chill other funding sources
 - Other Loans
 - Institutional lenders may insist on a “clean” balance sheet
 - Control Issues
 - Non-management members or owners typically have some approval rights related to business decisions
 - TBOC § Sec. 153.103 contains a long list of items that limited partners can vote on that will not subject them to liability for participating in control of the business
 - Control by lenders raises lender liability issues

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Debt Versus Equity (cont'd.)

- Usury
 - A preferred return on equity is not subject to usury laws
- Multiple Lenders
 - Consider necessity of an intercreditor agreement to address potential intercreditor issues

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Types of Capital Contributions

- Cash
- Real Estate or Non-Cash Personal Property
 - Drafting
 - Consider what provisions the agreement should include as a result of the transaction
 - Are other provisions warranted, such as real estate “earnest money contract” type provisions (title opinion, survey, environmental study, etc.) or representations and warranties regarding personal property?



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First appeared as part of the conference materials for the

32nd Annual LLCs, LPs and Partnerships session

"Capital Call Provisions in LLC and Partnership Agreements"