

# CAPITAL CALL PROVISIONS IN LLC AND PARTNERSHIP AGREEMENTS

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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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