

EB-5 Attorney Workshop

Loan Documentation

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EB-5 Conference



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Agenda

- Attorney's Role in EB-5 Loan Transactions
- Loan Documentation in EB-5 – Process and Timing
- Initial Steps in EB-5 Loan Process – Due Diligence and Special EB-5 Considerations
- Loan Agreement and Other Ancillary Loan Documents
- Liens – Perfection & Priority
- Loan Closing
- Loan Monitoring and Draw Conditions

Attorney's Role in EB-5 Loan Transactions

- What is the Attorney's Role?
 - Corporate/Securities Lawyer
 - Finance Lawyer
 - Real Estate Lawyer
 - Immigration Lawyer
 - Need for Local Counsel
 - Conflicts
- Loan Documents in EB-5: When does it come up in the process?

Early Loan Discussions

- Early Discussions – principal to principal (no lawyers typically)
- Other players in the deal (senior lender(s), preferred equity, developers, others)?
- Special considerations for senior lenders and intercreditor agreements
- Detailed Term Sheet/Memorandum of Understanding: Important to capture core economic deal terms (e.g., interest rate, maturity, reporting and financial covenants, funding conditions, and description of collateral)
 - Secured v. Unsecured
 - Guaranty v. No Guaranty
 - Personal Property Collateral v. Real Property Collateral (could offer potential 40 Act exemption/solution for larger projects)

Due Diligence Process

Kicking the Tires!



Due Diligence Process

- Entity Due Diligence – Organizational Chart, Borrower, Guarantor(s), Developer(s), Equity Partner(s), Other Lenders and General Contractor/Architect
- Real Estate Due Diligence – Title Review, Survey, Environmental, Appraisal, Insurance Review, Zoning Review and Property Condition Report (improved real property only)

Due Diligence Process

- Construction / Development Due Diligence – Construction Contracts, Construction Bonding, Insurance, Permitting, Development Budget, Additional Reports (Soils Report / Demolition) and Management/Development Agreements
- Credit Underwriting – Financial Statements, Prior Projects and Operating Budgets (projections)

Due Diligence Process

- Additional Considerations
 - Anti-Money Laundering Concerns: Know Your Customer (KYC) Requirements of Financial Institutions and FINRA member firms
 - Full UCC/Lien Searches (including UCC, federal and state tax liens, judgment, bankruptcy, and pending state and local litigation searches)
- NO TWO DEALS ARE EVER THE SAME – Consider the facts and circumstances and players of each transaction, **PULL THE THREAD**: condominium documents, third-party or affiliate loans, ground lease, etc.

Special EB-5 Considerations

- EB-5 Loan Restrictions:
 - Sinking funds
 - Interest reserves
 - Use of EB-5 proceeds
 - Prepayment
 - Mandatory prepayments based on I-526 denials
 - Allowable guaranties

Loan Documents

Where the Rubber Hits the Road



Loan Agreement

- Simplify, Efficient Comments (Minimize Changes), Get the Economics Right, Deal Particulars, Key Terms for Your Client (Management Fees, etc.), Create Cure Opportunities
- Loan Agreement – definitions, loan terms, conditions to funding, representations and warranties, covenants (affirmative and negative), financial covenants, financial reporting, defaults, remedies, indemnity/costs and expenses, and miscellaneous/boilerplate.

Ancillary Agreements

- Security Agreements – (a) mortgage/deed of trust and (b) pledge agreement (ownership interests and personal property collateral).
- Guaranty Agreements – (a) completion guaranty, (b) repayment or recourse guaranty and (c) non-recourse or carveout guaranty.
- Environmental Indemnity Agreement – discuss Phase I / II environmental site assessments.
- Promissory Notes – usury savings clause.
- Assignment of Construction Documents
- Subordination of Management Agreements

Intercreditor Agreement

The Long and Winding Road



Intercreditor Agreement

- Form Control and Timing of Perfection Documents
- Lien Subordination v. Payment Subordination
 - Clear Subordination of Junior Liens (absolute v. relative to valid perfected lien)
 - Payment Subordination – Debt Service and Principal Repayment, Payment in Full prior to Junior Lienholder
- Enforcement Blockage or Standstill Period
 - Duration: commonly range from 90 to 180 days
 - Against Debtor v. Common Collateral
 - Ability to Foreclose (if necessary): non-interference with enforcement by senior lien creditor v. standstill on junior lien enforcement

Intercreditor Agreement

- Restrictions Against Material Changes
 - Cap on amount of lien obligations
 - No material changes to loan documents and loan terms (principal, interest, payments, maturity, etc.)
- Special Junior Lien Creditor Considerations (retain as many of unsecured creditor's rights):
 - Right to accelerate loan on default, right to commence litigation against borrower or any guarantor, and right to commence an involuntary bankruptcy proceeding against borrower or any guarantor
- Bankruptcy Considerations

Real Property Liens

- First in Time, First in Right
- Super-priority Liens – real property liens, condominium association fees, homeowners' association fees, mechanic's liens and IRS liens
- Additional Liens / Encumbrances - CC&Rs, purchase options, rofrs, rofos, etc.
- Title Insurance – what it covers and what it doesn't

Personal Property Liens

- Creation, perfection and priority of security interests in personal property collateral are governed by Article 9 of Uniform Commercial Code (UCC)
 - Attachment: value, debtor's rights in collateral, security agreement, and description of collateral
 - Perfection: 4 basic methods of perfecting attached security interest
 - Filing UCC financing statements (e.g., accounts, inventory, equipment)
 - Possession (e.g., certificated securities)
 - Control (e.g., deposit accounts and investment property) – partnership and LLC interests are tricky and require due diligence
 - Automatic

Personal Property Liens

- General Rule:
 - Secured Creditor v. Unsecured Creditors and Judgment Creditors
 - Secured Creditor v. Secured Creditor: “First-to-File-or-Perfect”
 - Super Priority of Purchase Money Security Interest (PMSI)
 - Priority by Subordination Agreement

Closing

- Signatures and Signature Pages – counterparts
- Closing Instruction Letter
- Settlement Statement
- Issuance of Title Policy
- Flow of Funds – wire confirmations

Loan Monitoring Draw Conditions

- Insurance Review
- Financial Reporting
- Coupling loan monitoring with the I-829 Process
- Operating Expenses – taxes, utilities
- AIA Construction Contracts and Draw Forms

Disclaimer

- This presentation outline and the presentation itself are for *general* educational purposes only and are not intended to provide *specific* guidance or legal advice about what to do or not to do in any particular case. You should not rely on this general information to make decisions about specific immigration, securities, corporate or real estate matters.

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