

Borrower Entity Structure – How Form Can Dictate Substance

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Overview of Entity Types

- Type of Entity – Balancing Management Issues with Recourse Issues
- Common Borrower Entity Structures
 - Individuals or Trusts – Revocable vs. Irrevocable
 - Corporations – S Corp. vs. C Corp.
 - Partnerships – Limited & General and Joint Ventures
 - Limited Liability Companies
 - 501 Entities and 1031 Exchanges
- TIC and Other Co-Owner Structures

Reasons for Entity Structures

- Recourse Concerns – Who is taking on Liabilities for the Entity
- Tax Concerns – Investments in Real Property vs. Personal Property
- Estate Planning Concerns – Family Matters
 - Trusts
 - Family Partnerships
- Relationships Between Co-Investors
 - Management
 - Other Controls

Effect of Entity Structure on Loan Structure

- Role and Extent of Management
 - Owner Managed or Third Party Managed
 - Change in Management Issues – Lender Controls
- Entity as Liability Shield
 - Partnerships vs. LLCs/Corporations vs. Trusts
 - Entity Determines Who is Primarily Liable and Who Is the Guarantor
- Sources of Capital Funding
 - Investments vs. Loans
- Operative Agreements
 - Partnerships, LLPs, LLCs – Formed by filing Articles, and Operating Agreement sets business terms
 - Corporations – Formed by filing Articles, and By-Laws set business terms
 - Need both for Corporation formation, but only Articles for Partnership formation

Individuals, Trusts, Community Property

- Individual Borrowers
 - Single vs. Married – Who signs What
 - Community Property and Separate Property
- Trust Borrowers
 - Revocable vs. Irrevocable
 - Key Review Issues for Trust Agreement – Management and Authority
 - Land Trusts – Unique to Illinois
 - Delaware “Series LLC” vs. Delaware Trusts – Designed to Use a Parent Entity that can easily spin off sub-entities for SPE purposes
 - Unitrusts – Special Form of Irrevocable Trust
 - Non-Charity Lifetime Beneficiary
 - At Death, Estate Goes to Charitable Purpose
 - Need Express Powers to Own Property and Enter Mortgages

Corporate and LLC Entities

- Corporate Issues
 - C Corp. vs. S Corp. – Primarily Tax Driven
 - Third Party Management
 - Liability of Subsidiary or Affiliated Corporate Entities
 - S Corp. Has Limited List of Possible Owners
- LLC (or LLP) is A Hybrid Between Corporation and Partnership
 - Guaranties from Members
 - Third Party Management
 - Replacement of Manager
 - Special/Limited Use for LLP
 - Consequence of Alternative Business Purposes for LLP

Partnerships – General, Limited and Joint Ventures

- General Partnerships/Joint Ventures
 - General and Joint Venture Partners – Management, Control and Liability
 - Why Not Used Anymore
- Limited Partnerships
 - General Partners vs. Limited Partners – Management, Control and Liability
 - Use of Shell General Partner

Piercing the Veil for Corporations and LLCs

- Owners Must return Distributions if:
 - If Entity Insolvent due to Distributions to Owners
 - Dissolution is Improper under Organizational Documents
 - Dissolution is Prior to Payment to All Creditors
- Alter Ego Theory – How It Applies
- Bankruptcy Concepts
 - Preferential Transfer Rules
 - Substantive Consolidation
 - Prohibited Transfers

Non-Traditional Entities For Tax Purposes (Part 2)

- Foreign Investors
 - When permitted; Authority and Liability Issues
 - Jurisdiction, Venue, Governing Law, Forum Non Conveniens
 - Guarantor Issues
 - Role of Legal Opinions
- Foreign Investor Protections
 - Negative Pledge
 - Cash Management
 - Guarantor Financial Covenants
 - Foreign and Local Legal Opinions

Tenants in Common and Similar Co-Ownership

- Aspects of TIC Structures
 - Role of TIC Agreements
 - Role of Master Leases
 - Management vs. Decision Making
 - Buy/Sell Requirements
 - Syndications
- Splitting Legal and Equitable Ownership
 - Tax Concerns
 - Third Party Accommodator

Summary; Final Thoughts

- Plenty of Room For Creativity Within Each Variation of Entity Type
- Lender's Role is Not to Dictate Borrower Structure, but Recognizing the Limitations and Opportunities with Each Entity Type



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