

# CAPITAL CALL PROVISIONS IN LLC AND PARTNERSHIP AGREEMENTS

**Cliff Ernst**

McGinnis Lochridge LLP  
Austin

**K. “Andy” Tiwari**

CJMA  
San Antonio

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

1

## 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



2

# 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

3

## 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

4

## 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

5

## 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?



6

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](http://utcle.org/elibrary)

## Title search: Capital Call Provisions in LLC and Partnership Agreements

Also available as part of the eCourse

[Drafting LLC and Partnership Agreements: Capital Call Provisions and Net Profit Agreements](#)

First appeared as part of the conference materials for the  
32<sup>nd</sup> Annual LLCs, LPs and Partnerships session  
"Capital Call Provisions in LLC and Partnership Agreements"