

Intercreditor Agreements

Avoiding Lender-on-Lender Violence In the Closing Process

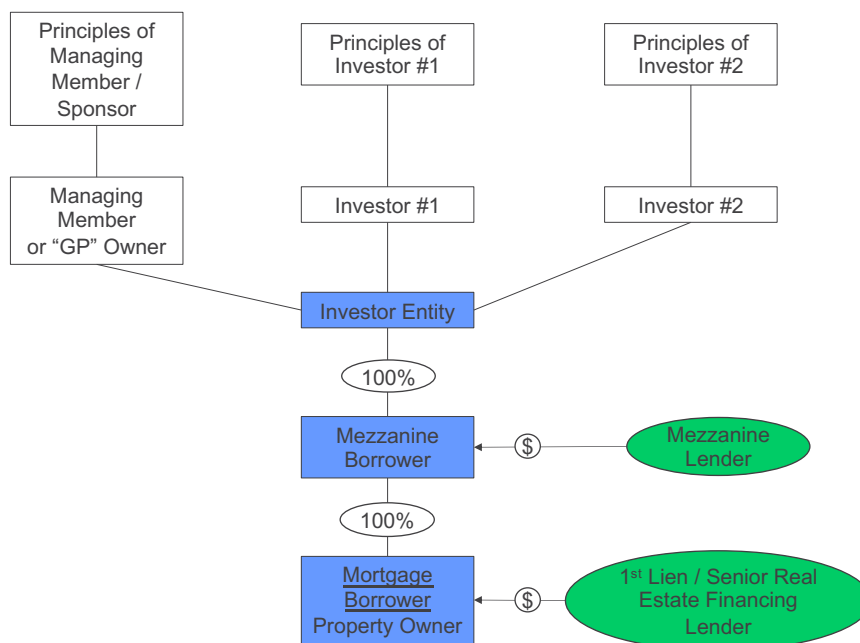
2024 Mortgage Lending Institute
University of Texas
September 12, 2024

Kevin A. Sullivan
Winstead PC

WINSTEAD

4856-3617-0699

1



2

WINSTEAD

2

1

Features of Typical Senior-Mezzanine Intercreditor Agreement

1. Nature of mezzanine debt
2. "Sequential" vs. "Pari Passu" funding
3. Notice and cure rights
4. Right to foreclose equity
5. Right to buy Senior Loan
6. Limitations on transfer rights
7. Limitations on modification rights
8. Amendment to Senior Loan terms after Mezzanine Foreclosure

3

WINSTEAD

3

Borrower/Owner Perspective

1. Typically Intercreditor Agreement not visible to Borrower/Owner
2. Degree of Difficulty
3. Dual obligation to the lenders
4. Expectation: Timing and Legal Fees
5. Consideration applicable if Mezz Lender takes over

4

WINSTEAD

4

ISSUE #1 SUPPLEMENTAL GUARANTIES

1. Identity of Supplemental Guarantor
 - Control over Borrower
 - Minimum economic stake
 - Creditworthiness requirements
 - "Excluded Parties"
 - Pre-Approval Issue
2. Nature of Supplemental Guaranties
 - Any sponsor guaranties being omitted?
 - The "going forward only" argument

5

WINSTEAD

5

ISSUE #2 OTHER CONDITIONS TO MEZZANINE FORECLOSURE

1. Identity of "Qualified Transferee"
2. Construction Transition Issues
3. Reserve Replenishment
4. Cure of Defaults
5. KYC/OFAC Approval
6. Procedural Matters

6

WINSTEAD

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: Intercreditor Agreements - Avoiding Lender-on-Lender Violence in the Closing Process

Also available as part of the eCourse

[Answer Bar: The Ins and Outs of Commercial Real Estate Loans and Title Insurance](#)

First appeared as part of the conference materials for the
58th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Intercreditor Agreements - Avoiding Lender-on-Lender Violence in the Closing Process"