Representing Real Estate Joint Ventures in Mortgage Financing Transactions

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Understanding the client's business objectives, effectively managing the due diligence process and negotiating flexibility for the client in key loan document provisions are critical elements in successfully representing real estate joint ventures in mortgage financing transactions.

An increasingly common occurrence in today's real estate industry is the formation of joint ventures between two or more unrelated entities (the "constituent joint venture partner(s)"). A joint venture may take the form of a general or limited partnership, limited liability company, corporation, REIT, limited liability limited partnership or other recognized legal entity.

Negotiating loan documents as counsel on behalf of a joint venture can be professionally rewarding. Joint venture organizational structures often are complex in order to accomplish certain tax and/or other business objectives; understanding these complex structures and their effect on the loan transaction can be intellectually stimulating in ways that more routine mortgage loan transactions are not. Knowledge of the joint venture's (and a particular constituent joint venture partner's) organizational structure, operational philosophy and business objectives will enable the attorney to better represent the joint venture, both in the current transaction and in possible future transactions.

Further, representing joint ventures offers the potential for the attorney to expand his or her client base. Many attorneys initially represent a joint venture by virtue of representing one of the constituent joint venture partners; that attorney's (hopefully) positive interaction with other constituent joint venture partners may lead to the attorney developing new client relationships with the other constituent joint venture partners on matters unrelated to the particular joint venture mortgage financing transaction.

Serving as counsel to a real estate joint venture in a mortgage financing transaction poses some unique challenges. In a typical mortgage financing transaction, the attorney's client has a stated, non-conflicting set of objectives that it desires the loan documents to reflect. A joint venture similarly may have collective objectives, but each constituent joint venture partner individually also may have critical issues that it wants addressed in the loan documents. Often, these constituent joint venture partner issues concern the ability of one partner to exit or assume control over the joint venture. Furthermore, constituent joint venture partners sometimes have very different views on the role of the attorney for the joint venture in the loan due diligence and documentation process.

Identifying the Client: The Importance of a Proper Engagement Letter

Prior to undertaking representation of a joint venture entity, the attorney should have each of the constituent

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joint venture partners execute an engagement letter that, at a minimum, (i) states that the attorney is representing the joint venture (and, if applicable, also permitting the same attorney to represent a constituent joint venture partner in joint venture-related matters) as counsel in negotiating and documenting the mortgage loan and (ii) specifies the rights and obligations of the attorney representing the joint venture in the event that disputes arise between the constituent joint venture partners.[1]

Where each constituent joint venture partner is represented individually by separate counsel, the engagement letter should, if possible, specify the tasks to be performed by the attorney for the joint venture in the mortgage loan transaction, which may include the following:

- being the principal contact with lender's counsel on all matters pertaining to drafting and negotiating the loan documents and closing the loan (which function may include, if applicable, assembling comments on the loan documents from the various counsel representing individual joint venture partners and formulating those comments into a single, comprehensive set of comments to lender's counsel);
- coordinating or performing certain due diligence functions, including responding to and resolving the lender's title and survey issues;
- drafting various ancillary closing documents and any required legal opinion letters;
- preparing the closing books; and
- handling any other matters of a legal nature that may be pertinent to a given loan transaction.

Finally, in preparing the engagement letter the attorney should consult the rules of professional conduct for his or her state to ascertain whether he needs to incorporate any particular jurisdictional ethical requirements into the engagement letter.

Understanding The Client's Business Objectives

Purpose of the Joint Venture

Entities may have one or more reasons for forming a joint venture:

- An entity with extensive property development (or rehabilitation) and property management expertise in a particular product type (e.g., office, multifamily or industrial), but limited financial resources, may desire to form a joint venture with an entity that can provide funding (or access to funding) for the construction of a new product. Sometimes in this scenario, the potential equity partner owns and operates other assets in the particular product class and is looking to expand his or her holdings. In other instances, the potential equity partner may be an investor seeking to invest in real estate assets.
- A major tenant in an office building may look to purchase part ownership in the building in order to assure itself the ability to control its current and future space needs.
- Investors (e.g., exchange funds, entities seeking to invest Internal Revenue Code Section 1031 exchange proceeds) may want to acquire ownership interests in real estate in order to realize certain federal income tax benefits. Forming a joint venture with an owner/operator of real estate to own property may permit the investor to realize the sought-after federal income tax benefits while also allowing the owner/operator to "cash out" of a portion of its ownership interest and use the proceeds to invest in other properties or lines of business.

Having an understanding of each constituent joint venture partner's business objectives will help the attorney better understand both the joint venture's business goals and the role mortgage financing will play in helping the joint venture attain those goals.

Even if a real estate joint venture has clearly articulated business objectives, it is possible that the constituent joint venture partners will not share the same operational philosophy. For example, in a case in which a joint venture is composed of a developer and an owner/investor, the developer's goal following completion of construction may be to maximize short-term asset value, sell the asset and receive payment of its share of any appreciation in asset value. By contrast, an owner/investor may want to hold the property as a long-term investment, particularly in situations in which the owner/investor desires to improve the age of its existing real estate portfolio or when the property is located in one of the owner/operator's core geographic markets. Given the foregoing situation, for the constituent joint venture partners to have the ability to attain their respective business goals the loan documents must contain provisions that allow the owner/operator to purchase the developer's interest in the joint venture or the property itself, as appropriate.

Reviewing the Joint Venture's Organizational Documents

The attorney representing the joint venture in the real estate loan transaction may or may not have been involved in drafting and negotiating the joint venture organizational documents. Nevertheless, counsel for the joint venture should read carefully and understand all of the provisions of the joint venture documents. Of particular importance are any transfer, buy-sell, joint venture management and control provisions (e.g., requirements for future development, asset transfers, expansion of joint venture operations into different

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business lines and product types) and compensation structure provisions contained in the organizational documents. The attorney should make sure that all joint venture approvals obtained for the loan transaction are consistent with the requirements of the joint venture organizational documents.

The joint venture organizational documents also may contain provisions setting forth parameters for any mortgage loan transactions (e.g., maximum interest rate, minimum loan proceeds, term, limitations on liability and other key provisions), as well as allocating responsibility between the joint venture parties for furnishing any credit enhancement (e.g., letters of credit, guaranties) or interest rate protection products that the lender may require. The attorney must verify that the applicable provisions of the loan documents are consistent with the requirements of the joint venture organizational documents.[2]

The Joint Venture's Organizational Structure

The joint venture's organizational structure initially may not satisfy the lender's loan underwriting requirements. The constituent joint venture partners will focus on control, operational or tax issues when selecting the joint venture's organizational structure rather than lender's requirements, especially when the joint venture is formed and becomes operational prior to the selection of a lender to provide financing. As a result, the joint venture may not be a single asset entity or satisfy other lender underwriting criteria.

Virtually all lenders currently require that borrowers hold title to the real estate collateral in a single-asset entity; additionally, some lenders require the borrowing entity to incorporate various other bankruptcy-remoteness protections into the entity structure. In particular, Fannie Mae and certain conduit loan lenders currently require that borrowers have an "independent director," the consent of whom is needed in order for the borrowing entity to file for bankruptcy. Invariably, the joint venture borrowing entity does not provide for an independent director in its governance structure. Borrower's counsel may have to modify the borrower's organizational documents accordingly. For example, where the borrowing entity is a limited liability company, borrower's counsel can amend the operating agreement to provide for an additional member that does not have an economic interest in the borrower. The sole purpose of this additional member would be to act as an independent member to approve a bankruptcy filing by the borrower.[3] Prior to making any lender-required modifications to the joint venture's organizational structure, counsel for the joint venture should have the tax attorneys for the constituent joint venture partners verify that the proposed changes will not have any adverse tax impact on the joint venture or its constituent partners.

If the joint venture owns multiple properties in a single entity, counsel for the joint venture may have to form a single-asset, bankruptcy-remote entity to serve as the borrower for purposes of the loan transaction. In such a situation, the joint venture attorney must confirm that the organizational structure of the new borrower satisfies the lender's requirements and does not have adverse tax consequences for the joint venture or its constituent partners and, if possible, accomplish the transfer of title to the property from the joint venture to the borrowing entity without imposition of any real estate transfer taxes on the transfer.

Managing the Due Diligence Process

The joint venture's attorney should have primary responsibility for managing the borrower's compliance with the due diligence requests of the lender and the lender's counsel, the title company and the surveyor. Facilitating the flow of information during the due diligence phase of the loan transaction allows the borrower's attorney to constantly monitor the status of the transaction and timely satisfy requests for information. The extent of such attorney's success in overseeing the due diligence process will in no small measure determine whether the parties close the financing transaction in an efficient and timely manner.

Counsel for the joint venture must perform multiple tasks to manage properly the due diligence process:

- Providing information. The attorney should obtain and distribute copies of the joint venture's organizational documents, title documents, surveys, Uniform Commercial Code searches and other due diligence compliance items to the appropriate parties.
- Coordinating the due diligence process. In addition to reviewing and commenting on the loan document drafts, the attorney should collect loan document comments from borrower (and, if applicable, those attorneys representing individual joint venture partners) and prepare a single set of comments for the lender's consideration. Counsel should perform a similar function with respect to all title and survey comments, particularly in situations in which separate counsel represent a prospective joint venture partner and are performing property due diligence concurrently with the lender's due diligence review (as will be the case when the joint venture is being formed simultaneously with the closing of the loan financing). The joint venture's attorney must maintain an up-to-date closing checklist and should arrange for regularly scheduled status calls between the joint venture team members, as well as between the joint venture team and the lender. If the borrower is required to retain special counsel for the transaction (e.g., local counsel for multi-state loan transactions, or special counsel to render non-consolidation or other specialized opinions in certain conduit loan transactions), then the joint

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venture's attorney must coordinate the activities of such counsel and the delivery of the final work product at closing.

- Resolving due diligence issues. The joint venture's attorney should take a proactive role in resolving any open due diligence issues and finalizing the survey and title insurance policy (including endorsements) for the transaction.
- Obtaining information from third parties. As a condition to the loan closing, the lender may require that the borrower obtain estoppel letters, subordination, non-disturbance and attornment agreements, zoning letters and other information from tenants and other third parties. Counsel to the joint venture should assist borrower in borrower's efforts to obtain such information.

Negotiating the Loan Documents: Key Considerations

It is possible, even likely, that the lender to the joint venture will have a pre-existing relationship with one or more of the constituent joint venture partners. The longevity and track record of such relationships, and the lender's assessment of the financial strength, operational experience and the relative importance to the ongoing success of the joint venture of each of the constituent joint venture partners, all will influence the lender's willingness to negotiate various important document provisions. If possible, the parties should draft and negotiate all key loan document provisions as part of the loan application and commitment process.

Where the joint venture (or one of its constituent joint venture partners) has a pre-existing relationship with the lender, the parties may elect to use as a starting point loan documents from a prior transaction. Although this strategy can expedite the loan negotiation process, the borrower's attorney must review and negotiate the template documents carefully so that the final documents for the deal are consistent both with the terms of the specific transaction, as well as the terms of the joint venture's organizational documents.

Recourse Liability

Probably the most important loan document provisions to the borrower and its constituent joint venture partners are those provisions that limit or expand personal liability. Limitations on personal liability are most important in situations in which the constituent joint venture partners do not provide the lender with a full and unconditional guaranty of borrower's performance under the loan documents. The ability of borrower's counsel to negotiate non-recourse provisions that are acceptable to the borrower and its constituent joint venture partners depends on several factors:

- whether the lender will require that one or more of the constituent joint venture partners have recourse liability;
- the extent to which the constituent joint venture partners can successfully negotiate limitations on recourse liability; and
- the types of loan document defaults that will trigger recourse liability to the borrower and/or one or more of the constituent joint venture partners.

In transactions in which the lender is willing to limit the borrower's liability in all instances to the assets of the borrowing entity, the liability of the constituent joint venture partners will be limited to the value of their respective ownership interests in the property. However, it is still useful for the joint venture's counsel to negotiate the types of non-recourse carve outs that will exist in the loan documents. There is a possibility (however unlikely) that following a loan default (where none of the non-recourse carve-outs come into effect) and subsequent property foreclosure sale, there may exist sale proceeds in excess of the amount due to the lender; these excess proceeds would be paid to the borrower. Also, negotiating the non-recourse provisions may serve as useful precedent in future transactions where the lender's underwriting standards may have changed in a manner adverse to the borrower's interest.

Should the lender require that one or more of the constituent joint venture partners have personal liability for breaches of the non-recourse provisions in the loan documents, then borrower's counsel should focus on the following issues in negotiating the non-recourse carve-outs: (i) bifurcating the non-recourse carve-outs into two categories, those carve-outs for which the lender's recovery against the constituent joint venture partners will be limited to lender's actual losses ("Type A carve-outs"), and those breaches where the loan will become fully recourse to the constituent joint venture partners ("Type B carve-outs"); and (ii) negotiating an overall cap on recourse liability for Type A carve-outs.

Examples of Type A carve-outs are:

- Fraud or material misrepresentations in the loan documents by the borrower or its partners;
- Misapplication or misappropriation of insurance or condemnation proceeds;
- Failure to pay rents to lender following a default;
- Waste and abandonment;
- Failure to remove unpermitted liens; and
- Costs of environmental compliance.

Examples of Type B carve-outs include violations of restrictions on transfers; violation of any ERISA representations; and breach of any single-asset entity and bankruptcy-remoteness covenants.

If borrower's counsel is successful in getting the lender to distinguish between Type A carve-outs and Type B carve-outs, then counsel should ask the lender to agree to limit borrower's (and its constituent joint venture partners') personal liability for breaches of any

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Type A carve-outs to any actual loss, cost or damage (excluding any consequential, punitive or exemplary damage) incurred by the lender as a result of the breach. Additionally, borrower's counsel should attempt to have the lender cap the aggregate recourse liability for all Type A carve-outs, understanding, however, that the lender probably will not agree to have the cap apply to environmental issues.

Credit Enhancement Requirements

The single asset joint venture borrower usually does not have any assets other than the real property and the income from the operation thereof. Therefore, one or more of the constituent joint venture partners will have to provide any letters of credit or guaranties required to support the loan. If credit enhancement instruments are required under the loan terms, counsel for the joint venture should negotiate the right for the requisite constituent joint venture partners to provide separate letters of credit or guaranties, as the case may be, to the lender. Having this right can facilitate the ease with which (i) the joint venture, through its constituent partners, can obtain and deliver to the lender any required letters of credit and (ii) constituent joint venture partners may be able to transfer ownership interests in the future. Further, the loan documents should state that in the event the lender draws (or demands collection of) less than the maximum amount of any credit enhancement instruments furnished to the lender by the constituent joint venture partners, the amount drawn by (or payable to) the lender under a given constituent joint venture partner's credit enhancement instrument will not exceed the product of (x) the aggregate amount paid to lender under all such credit enhancement instruments, and (y) the constituent venture partner's ownership interest in the joint venture (expressed as a percentage).

Finally, all guarantees should provide that the maker of the guarantee shall not have any personal liability for the fraud or intentional misrepresentation to the lender of any other constituent joint venture partner.

Representations and Warranties

If one constituent joint venture partner (e.g., the developer partner) had primary responsibility for the construction and delivery of the completed property (or where an existing property owner is forming a joint venture with another party), all loan document (and title policy clearance) representations and warranties relating to the physical condition of the property, the existence of possible building code violations and other property-specific matters should be qualified by (i) the knowledge of those individuals employed by the developer (or prior owner) joint venture partner, as the case may be, and (ii) if applicable, the existence of any written information provided to lender in connection with the relevant representation and warranty. Any limitations on the scope of the representations and warranties in the loan documents will reduce the likelihood of any inaccuracies in those representations and warranties.

Covenants

Covenants in loan documents either require the borrower and its constituent entities to perform certain actions (i.e., affirmative covenants) or prohibit the borrower and its constituent entities from taking certain actions (i.e., negative covenants). Although numerous and often complex, affirmative and negative covenants relating to the operation of the real estate collateral and the operation and financial condition of the borrowing entity are common in real estate mortgage loan transactions. In circumstances in which the borrower (or the borrower's key principal, as described below) is a joint venture, the loan documents also will contain a variety of covenants pertaining to the operation and financial condition of the borrower's constituent joint venture partners.

Depending on the organizational structure of the borrower and its constituent joint venture partners, the loan documents may contain the following covenants that can frustrate the joint venture's ability to operate pursuant to its organizational documents:

- Covenants that restrict the borrower's ability to make distributions to its constituent partners. The inclusion of these covenants is crucial in situations where the borrower or one of its constituent partners is a REIT and is required to make certain distributions in order to maintain its real estate investment trust status. Borrower's counsel must negotiate the right for the relevant entities to make any income distributions that are required for the distributing entity to retain its organizational status.
- Prohibitions on changes in the property manager. In transactions where one of the constituent joint venture partners also serves as the property manager, a prohibition on a change in management can effectively prevent that partner from exiting the joint venture. Counsel for the borrower should propose that the loan documents contain either a pre-approved list of possible substitute property managers or a set of objective criteria (e.g., national reputation, square footage or units under management) for lender approving a replacement property manager.
- Restrictions on the borrower's lines of business operations. The lender may want to restrict the borrower's ability to operate lines of businesses other than the business of owning a particular type of property. Such a restriction can prevent the borrower from expanding into new types of businesses in order to take advantage of changes in economic conditions. If possible, and to the

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extent not inconsistent with limitations in the borrower's organizational documents, counsel should have any such covenants removed from the loan documents.

- Financial covenants applicable to the constituent joint venture partners. Although covenants requiring the constituent joint venture partners to furnish financial information to the lender may be acceptable to the borrower, borrower's counsel should request that lender remove from the loan documents any covenants that require the constituent joint venture partners to satisfy net worth requirements, certain debt-to-equity coverages or similar requirements.[4]

Permitted Transfers and Changes in Control

Other than the recourse provisions of the loan documents, provisions regarding transfers of the property and/or interests in the borrower are the most important loan document provisions to the borrower and its constituent partners. Having broad transfer rights can provide a valuable exit mechanism for the constituent joint venture partners. If one constituent joint venture partner (the "key principal") has management and/or operational control of the borrower, and the lender believes that the constant presence of the key principal is critical to the continued successful operation of the property and the borrowing entity, then the lender will want to prevent the key principal from exiting the joint venture. This is true particularly in situations in which the key principal is the entity that has the primary relationship with the lender.

Borrower's counsel should strive to negotiate transfer provisions that are broad enough to permit the following types of transfers:

- Transfers of any interests (or issuance of new ownership interests) in any constituent joint venture partner, by merger, acquisition or otherwise.
- Transfers of limited partnership interests where the borrowing entity is a limited partnership.
- Transfers that occur by devise, descent or operation of law upon the death or a natural person who is the owner of a direct (if the natural person is not the key principal) or indirect ownership interest in the borrower.
- Transfers of ownership interests in the borrower by joint venture partners other than any key principal. These transfers may include distributions of ownership interests in borrower in order to facilitate a subsequent purchase of such interests by another party (including other constituent joint venture partners) in a manner to maximize tax planning benefits (e.g., using Internal Revenue Code Section 1031 exchange proceeds).
- Transfers by the key principal of ownership interests in the borrower, provided that the key principal maintains management and operational control.

Exhibit 1 is an example of a permitted transfer provision that is broad enough to allow the borrower and its constituent joint venture partners sufficient flexibility to transfer various ownership interests.

Notice and Cure Provisions

The loan document notice provisions should provide that copies of all notices will be given to all of the constituent joint venture partners. In addition, a joint venture may need additional time to coordinate its proposed cure following a loan default; counsel to the joint venture must be sensitive to this issue of internal joint venture coordination when negotiating cure provisions in the loan documents.

Collateral Substitutions

In the event that the joint venture owns or will own other property similar to the collateral for the mortgage loan, having the right to substitute collateral for the loan gives the joint venture great flexibility to (i) sell property without the necessity of assigning or prepaying the loan, and (ii) manage the restoration process following the occurrence of a casualty or condemnation. Not only do substitution rights give the joint venture operational flexibility, in the case of property sales the joint venture may save money if the transaction costs payable in connection with the substitution are less than the applicable assignment fee or prepayment fee.

Opinion Letters

Counsel for the borrower may be required to opine to matters concerning the borrower and some or all of the constituent joint venture partners. As part of the due diligence process, borrower's counsel should obtain all of the organizational documents, good standing certificates, searches and other information necessary to render the requested opinions. This information may include the certificates of borrower and the constituent joint venture partners as to certain factual matters. Such factual certificates are particularly important where borrower's counsel is required to give a non-consolidation opinion.

Summary

In representing a joint venture as borrower in a mortgage loan transaction, counsel for the borrower will use all of his or her skill and experience gained from representing other borrowers and lenders in other transactions. If the borrower's counsel understands the specific objectives of his or her joint venture client, he can identify and resolve those loan document issues that are of particular importance to his or her client in a

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manner that will allow the borrower (and the constituent joint venture partners) the flexibility to execute the business plan of the joint venture as contemplated by its organizational documents. Having this flexibility may give the joint venture both a timing and cost edge in subsequent transactions with other parties, especially those transactions that involve the sale of the real estate collateral or ownership interests in the joint venture. The ultimate goal (and the expected result) of the attorney's efforts is a satisfied client.

EXHIBIT 1

SAMPLE PERMITTED TRANSFER PROVISION*

The occurrence of any of the following events shall not constitute an Event of Default under this Instrument, notwithstanding any provision of this Instrument to the contrary:

The Transfer (as defined below) of shares of common stock, limited partnership interests or other beneficial or ownership interests or other forms of Securities (as defined below) in any Constituent Venture Partner (as defined below), and the issuance of all varieties of convertible debt, equity and other similar securities of any Constituent Venture Partner, and the subsequent Transfer of such securities;

The issuance by any Constituent Venture Partner of additional shares, limited partnership interests or other beneficial or ownership interests, convertible debt, preferred equity, equity and other similar Securities, and the subsequent Transfer of such convertible debt, preferred equity or Securities;

A merger or consolidation of a Constituent Venture Partner into another entity or of another entity into such Person, or the reconstitution of such Person from one type of entity to another type of entity;

The Transfer of fee simple title to the Mortgaged Property by Borrower to (i) an entity at least ____% owned, directly or indirectly, by (a "VPA Affiliate") and (ii) an entity at least ____% owned, directly or indirectly, by (a "VPB Affiliate"), provided that the VPA Affiliate and the VPB Affiliate hold the Mortgaged Property as tenants-in-common pursuant to written agreements reasonably satisfactory to Lender;

The Transfer by the VPB Affiliate referred to in (4) above of its entire tenant-in-common interest in the Mortgaged Property to the VPA Affiliate referred to in (4) above; or

The Transfer at any time of fee simple title to the Mortgaged Property to any VPA Affiliate.

"Constituent Venture Partners" shall mean [Venture Partner A] and [Venture Partner B], such entities being the sole members of Borrower.

"Person" shall mean an individual, an estate, a trust, a corporation, a partnership, a limited liability company or any other organization or entity (whether governmental or private).

"Security" shall have the same meaning as in Section 2(1) of the Securities Act of 1933, as amended.

"Transfer" means (A) a sale, assignment, transfer or other disposition (whether voluntary, involuntary or by operation of law); (B) the granting, creating or attachment of a lien, encumbrance or security interest (whether voluntary, involuntary or by operation of law); (C) the issuance or other creation of an ownership interest in a legal entity, including a partnership interest, interest in a limited liability company or corporate stock; (D) the withdrawal, retirement, removal or involuntary resignation of a partner in a partnership or a member or manager in a limited liability company; or (E) the merger, dissolution, liquidation, or consolidation of a legal entity or the reconstitution of one type of legal entity into another type of legal entity. The term "Transfer" does not include (i) a conveyance of the Mortgaged Property at a judicial or non-judicial foreclosure sale under this Instrument or (ii) the Mortgaged Property becoming part of a bankruptcy estate by operation of law under the United States Bankruptcy Code. For purposes of defining the term "Transfer", the term "partnership" shall mean a general partnership, a limited partnership, a joint venture and a limited liability partnership, and the term "partner" shall mean a general partner, a limited partner and a joint venturer.

NOTE:

This provision assumes that Constituent Venture Partner A is the "key principal" in terms of the lender's underwriting.

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[1] The attorney may choose to include the following provision in the engagement letter; the provision allows the attorney to continue to represent one constituent joint venture partner in the event a dispute arises between the joint venture partners: "Please note, however, that our representation is limited to the Borrower and Venture Partner A and in the event of any dispute between Venture Partner A and Venture Partner B regarding the transaction, our representation will be limited to that of the Venture Partner A. We will inform Venture Partner B in writing should any such dispute arise so that Venture Partner B may engage independent counsel."

[2] In circumstances in which the borrower is required to furnish a letter of credit to the lender or enter into an interest rate swap agreement (compared to an interest rate cap), the letter of credit issuer or swap counterparty, as the case may be, will likely want an entity other than the (most likely) single-asset joint venture to assume liability for any letter of credit reimbursement obligations or swap payments. This is not an issue where the borrower is required to purchase an interest rate cap, because the purchase of the cap usually requires only a single up-front payment from the borrower to the cap provider.

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[3] The independent member can be either an individual that is "independent" from the joint venture or a corporation that has a board of directors containing an independent director.

[4] One possible situation in which the lender may resist removing such financial covenants is when the lender agrees to accept a guaranty from one or more constituent joint venture partners in lieu of a letter of credit in satisfaction of a credit enhancement requirement.

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