

Senior Living Industry: Review of Owner's Loan Documents Through Management Company Lens

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Although a senior living property manager is not the party on the hook for the loan, it is important that they review and negotiate certain provisions in the owner's loan documents that affect their rights and obligations in connection with the loan.

Outlined below are a few major provisions for a manager in the senior living industry to keep in mind.

1. Requirement of Lender to Fund During Borrower Default

A loan agreement must include a requirement that a lender fund facility expenses even in the event of a borrower default. Unlike a typical loan, where a default by borrower would suspend the lender's obligations to fund, with respect to a loan in connection with a senior living facility, the lender must be obligated to continue to fund because the lights must remain on and the residents must remain fed, no matter the circumstance.

2. Ability of Lender to Terminate a Manager

A lender should not have the right to terminate a manager due to a default by borrower under the loan agreement or any other loan document. Instead, a lender should have the right to terminate a manager upon the happening of any of the following events: (A) a default (beyond applicable notice and cure periods) under the management agreement on the part of manager, (B) if a manager is the subject of a bankruptcy proceeding, or (C) if a manager commits gross negligence, fraud, illegal acts, or willful misconduct (unless, in each case, the individuals responsible for such action are promptly terminated). Any termination must be done in accordance with all applicable laws because a state may require notice or approval of a new manager whether or not the manager holds the primary

healthcare license. Further, the appointment of a receiver and any assignments of permits to operate the facility by a manager should occur only if either there is an event of default under the management agreement or if lender takes affirmative action as a result of an event of default under the loan (e.g., acceleration, filings in pursuit of foreclosure).

3. Symmetry Between Loan Agreement and Management Agreement

The loan agreement cannot obligate a manager to do more than what they are required to do under the management agreement. These documents must jive or a borrower must acknowledge they are responsible for any obligations under the loan that are not expressly required to be performed by a manager under the management agreement. These types of obligations include, but are not limited to, insurance and reporting requirements. In addition, the definition of revenues must be consistent, as well as the procedures associated with events of casualty and condemnation.

4. Primary Healthcare License v. Ancillary Licenses

The primary healthcare license (i.e., the license to operate the facility) should be treated separately than all other ancillary licenses used in connection with the facility. The representations, covenants, and events of default in the loan agreement should be reviewed carefully to incorporate the concept that only an adverse event relating to a primary license will trigger an issue under the loan agreement. In addition, an adverse event relating to the primary license should not trigger a loan default until the borrower or manager has exhausted all appeal rights or are otherwise prevented from operating the facility.

5. Subordination of Management Fees

Ideally, a manager should push back on the requirement that the management agreement, including the management fees, be subject and subordinate to the lender's rights and remedies under the loan documents, including the lender's right to receive principal, interest and any other sums due thereunder. However, many lenders will require this subordination, especially in the instance where the manager is an affiliate of the borrower. If subordination is required, the manager should expressly include that borrower is permitted to pay the manager (and the manager is permitted to accept) such amounts and fees payable to the manager under the management agreement, provided no default under the loan shall have occurred and be continuing. The manager should also include in the subordination agreement that it shall have no obligation to continue to perform under the management agreement if it is not paid the fees and other payments payable to it in accordance with the management agreement.