

**Baker Donelson's
Financial Institution Advocacy Group Webinar Series:**

**Unique Issues and Strategies in
Effectively Dealing with Defaulted
Tenant in Common Borrowers**

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Overview

Unique Legal Rights of Tenant in Common Borrowers and Tenant in Common Property

Dealing with Tenant in Common Borrowers after Default

Foreclosure & Enforcement of Remedies in a Tenant in Common Borrower Loan

Bankruptcy Issues with Tenant in Common Borrowers

I. Introduction

What is a TIC and why do they exist?

Like kind exchange under section 1031 of Internal Revenue Code

Structure

II. Formation of a TIC Transaction

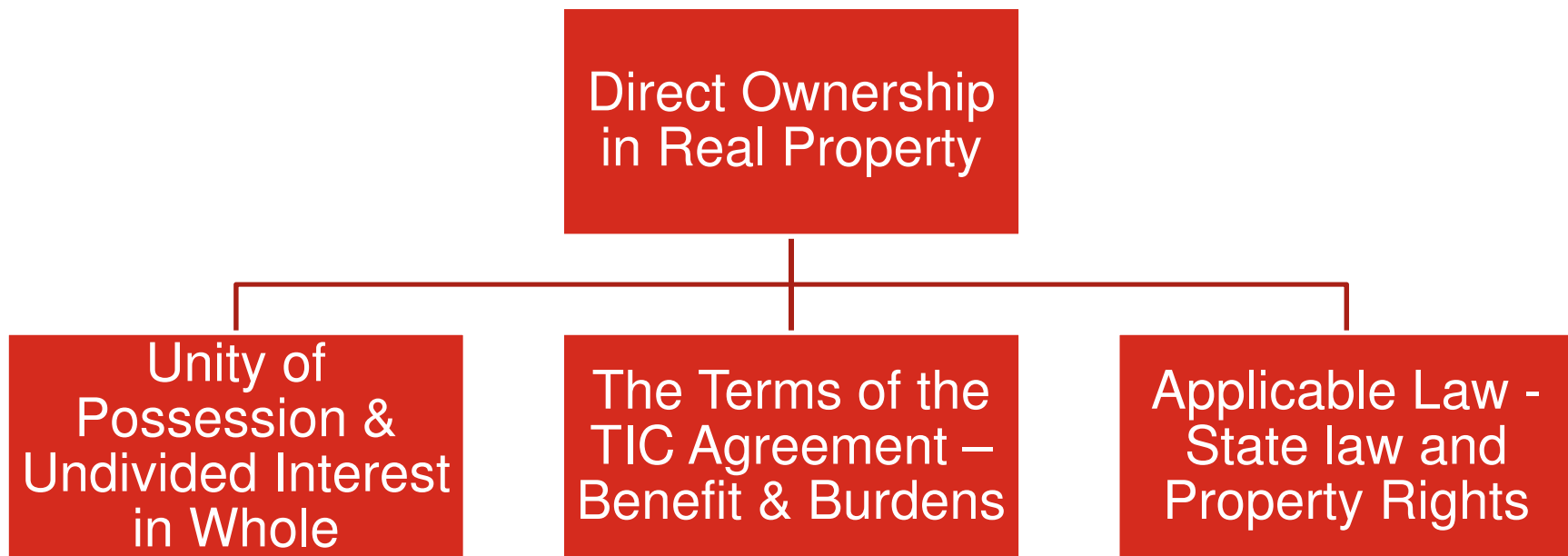
Offering Memorandum

- Sponsor offers TIC Interests to Accredited Investors
- Lender Not Part of Process
- Confirm
 - Is Lender is Identified?
 - Assurances & Representations of Loan

Loan Document Covenants –

- No Violation of Securities Law in Offering Memorandum
- Accurate & No Omission of any Material Information
- General Indemnity Provisions to Protect Lender

III. Unique Legal Rights of a TIC & TIC Member



IV. TIC Multiple Ownerships Issues & Liability

Each TIC Must be a Borrower under the Loan Documents

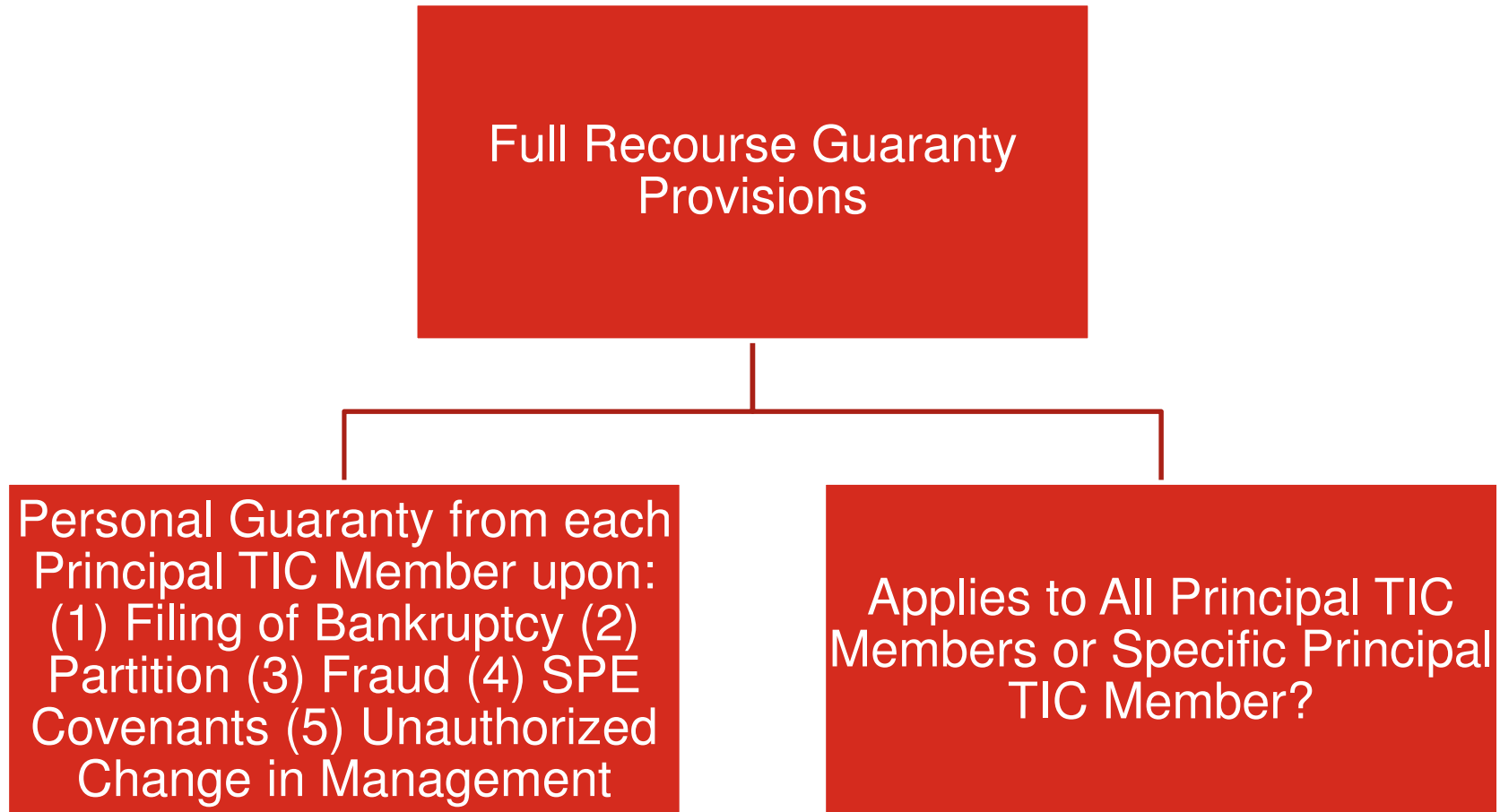
TIC Agreement - Proportional Liability based on % Ownership Interest

Loan Documents – Each TIC Jointly and Severally Liable for all of Borrowers' Obligations & Rights of TIC Owners Subordinate to Mortgage

Centralized Management of Day to Day Operations

Unanimous Consent for Major Decisions – (1) Amend Loan (2) Sale of Property (3) Major Improvements

IV. TIC Multiple Ownerships Issues & Liability (continued)



V. Partition – Rights of a TIC to Seek Partition

Inherent Right of Partition
& Difficulties as to
Commercial Real Estate

Waiver of Right to
Partition?

- Limit in Time (State Law) v. Restriction on Right of Alienation
- Tax Treatment – Partnership v. Tenant in Common?

TIC Agreement –Must
Offer TIC interest to other
TIC owners at fair market
value prior to seeking
Partition

VI. Lender Protections of TIC Partition Rights

Loan Documents can restrict Partition Rights and Transfer of Interests of a TIC Owner

Immediate Event of Default - Any Partition or Transfer by any TIC

TIC and TIC Principal Member Personally Liable for Entire Amount of Loan upon seeking Partition or Transfer or TIC Interest

Loan Covenant –

Other TICS or Borrower Sponsor TIC must purchase the TIC interest at Fair Market Value

Failure to Comply – Full Recourse to each TIC Principal Member

VII. Default & Enforcement of Rights and Remedies by Lender

Effective Notice and Service

- All TICS
- Centralized - Borrower Sponsor Only

PNA

- Signed by all TICS with notice address
- Signed by TIC representative/sponsor

Negotiating with various TIC constituencies

- Borrower Sponsor
- Attorneys for individual TICS or TIC Groups

VII. Default & Enforcement of Rights and Remedies by Lender (continued)

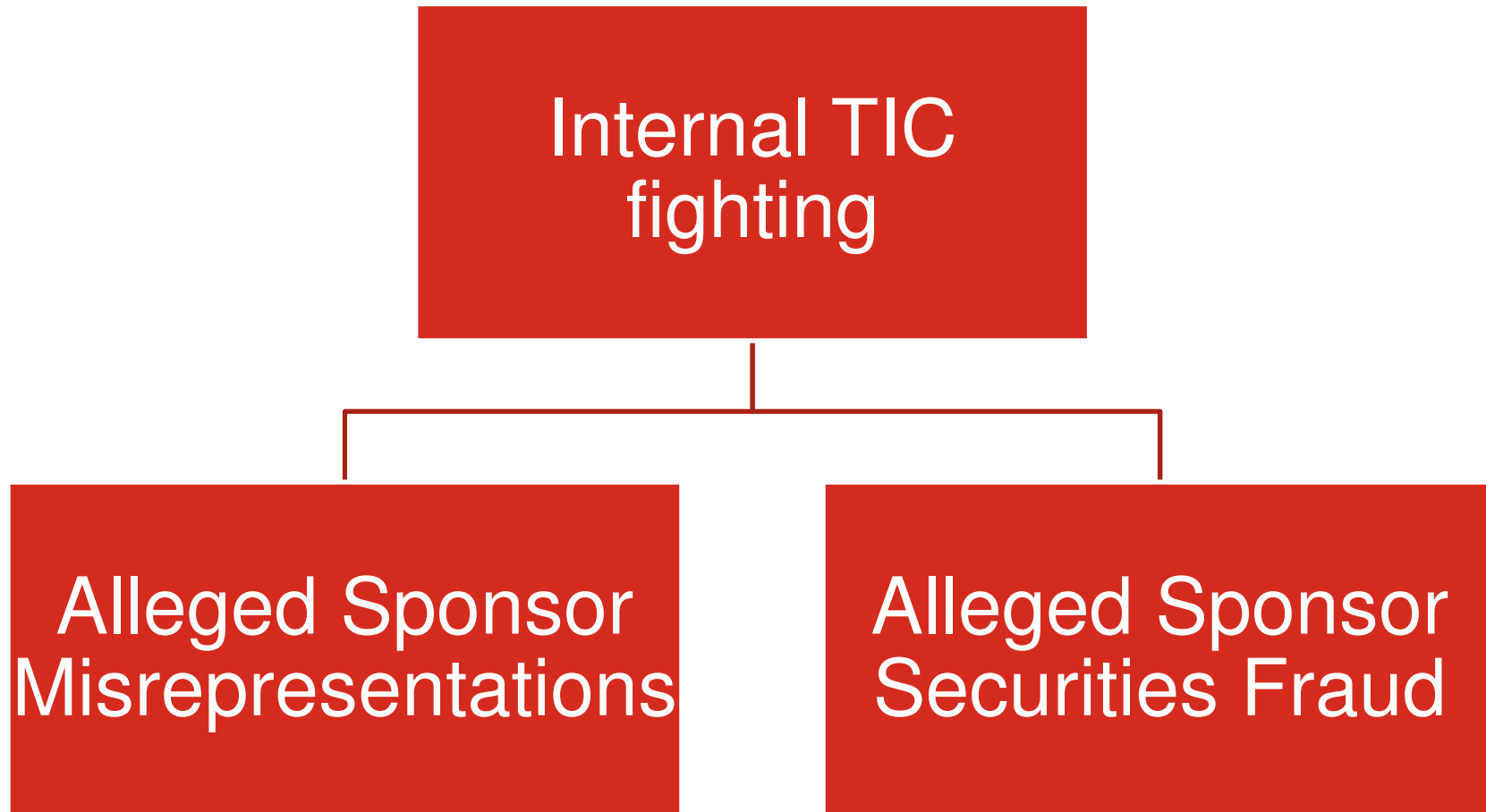
Restructure/Workout

- Agreement by all TICS
- Warm body guarantors (Borrower Sponsor vs TIC members)
- Address any bankruptcy protection deficiencies
- Enhance enforcement mechanisms

Alleged Lender/ Servicer Liability Claims – Origination & After

- Borrower Seeking Leverage
- Breach of Contract
- Tort Claims
- Breach of Fiduciary Duty
- Claims Against Servicer

VII. Default & Enforcement of Rights and Remedies by Lender *(continued)*



VIII. Bankruptcy Issues and Strategies in TIC Loans

Effect of automatic stay of one
TIC member bankruptcy



Can one TIC member file for
bankruptcy and stay an action
against property owned by all
the TICs?

- Can TIC debtor reject TIC Agreement under Section 365 as an Executory Contract?
- What is the property interest of the bankrupt TIC (Section 541)
- Risk of serial filing by multiple TICs in multiple jurisdictions
- Can other TICs exercise right to buy out the bankrupt TIC based on language in TIC Agreement or is it an ipso facto clause?

VIII. Bankruptcy Issues and Strategies in TIC Loans

(continued)

Action Plan Upon TIC Filing Bankruptcy

- Motion to Transfer Venue of Bankruptcy to location of the property
- Motion to Dismiss bankruptcy case as a bad faith filing; lack of valid reorganizational purpose (Section 1112(b))
- Motion for Relief from Automatic Stay & *In Rem* Relief
- File Involuntary Petitions as to the Other TIC entities?
- Motion for Retention of Pre-petition Receiver to run Property (Section 543(d))



Does individual TIC have rights in "Cash Collateral"?



How can a TIC provide adequate protection?

VIII. Bankruptcy Issues and Strategies in TIC Loans

(continued)

Can a TIC file and confirm a Plan of Reorganization?

- Reorganize What?
- Nothing to Reorganize
- No employees and no assets other than its de minimis, passive investment of a certain % tenant-in-common interest in a Property operated by a third party; no business operations, no equity in the Property, no employees, no current cash flow; no authority to facilitate a plan of reorganization.

Does filing by one TIC trigger carveout liability for all TICs?

- Language of Guaranties
- Requirement that other TICs "stay neutral"

VIII. Bankruptcy Issues and Strategies in TIC Loans

(continued)

Bankruptcy Sale under Section 363(h) & Partition Rights

- Do the TIC owners consent?
- A Trustee or TIC Debtor may sale its interest in property and that of a non-debtor co-owner if 4 conditions are satisfied:
 - Partition in kind of property & co-owners is impracticable
 - Sale of bankruptcy estate's undivided interest (the TIC % interest) in such property would realize significantly less than sale of property free and clear of other co-owners
 - Benefit to the estate of a sale of such property free of interests of the co-owners outweighs the detriment, if any, to such co-owners; and
 - Property is not used in the production of specific energy industries

VIII. Bankruptcy Issues and Strategies in TIC Loans

(continued)

TIC Owner Statutory Protections

- Section 363(i) right of First Refusal at a sale & Section 363(j) payment of the value of the TIC owners interest in the sales proceeds

Lender's Statutory Protections

- Lender's Right to Credit Bid Under Section 363(k)

Questions



Baker Donelson – Who We Are

We represent **over half of the FORTUNE 100** and **more than a quarter of the FORTUNE 1000** companies.

We represent **more than half** of the top 50 financial services companies in the country.

One of only five firms named to FORTUNE's "**100 Best Companies to Work For**" list for four consecutive years.

We bolster efficiency and collaboration with **BakerManage, BakerConnect**, extranet sites, AFAs and alternative staffing.

Ranked as a **top 20 firm nationally** by *U.S. News Best Lawyers* "Best Law Firms."

Team-based culture where client needs are always at the forefront.

Baker Donelson – What We Provide

Largest CMBS group in the Southeast: workout, foreclosure, restructure, litigation in 25+ states

Matters in 40+ states

National bankruptcy coverage in commercial and consumer workouts; trustee and creditor committee work

Sophisticated litigation in FDIC, regulatory, class actions, closings/failures/reorganizations

Broad experience in seeking the appointment of receivers for all types of distressed properties throughout our footprint and the country

National defense for lenders, servicers and investors in lender liability, contested matters, origination, default, REO

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