Road Map for Plaintiff Attorneys

40 Ways to Take a Syndicator Down

(And Fund Managers Too)

Volume 1

Prepared by Joel G. Block, CPA

Hedge Fund Manager, Syndicator and
Expert Witness

Bullseye Capital

Note from the Author

I am a venture capitalist, real estate Syndicator, and Hedge Fund manager and I have been in these businesses for the past 25 years. Since I left my tax accounting position at Price Waterhouse in 1986, I have been raising money to do deals - not as an intermediary, but as a principal. I risk my own money and I shoulder a lot of responsibility as a fiduciary and custodian for the Investors that rely on me.

More recently, I began hosting a semi-annual national conference which demonstrates best practices for running syndication and Hedge Fund operations called the Deal Making Symposium and Syndication Seminar. The program is designed to teach a sophisticated audience of real estate brokers, CPAs, attorneys, bankers, lenders and active Investors how to organize and fund syndications as well as how to build Hedge Funds and other complex deal making structures.

Attorneys frequently ask, if I teach others how to put deals together, why on earth would I show prospective Investors and plaintiff attorneys where "the bones are buried"?

It's for a similar reason the masked magician on Fox revealed the secrets that had been held sacred for hundreds of years: by showing the world how the trick is done, the trick loses its impact. For me, by making sure that the Syndicators that I train know that I am also educating Investors and attorneys about the games Syndicators play, they know that the games stop working. When the playing field is level, and when the players play fair, everybody wins. I love this business and feel strongly that it is a great business for both Syndicators and Investors. But it would be a better business if the bad guys are washed out before they can tarnish the reputations of the many legitimate operators in the marketplace who provide outstanding investment options and alternatives to their clients.

To that end, I want to help attorneys deal with problems that are brought about when circumstances go awry or by incompetent or mal-intentioned Syndicators.

I hope you are able to make good use of this material. Please note that it is neither comprehensive nor authoritative. I am not conveying any opinion about any situation you may encounter, however with a complete understanding of the facts and circumstances of the situation, I may be able to offer suggestions, advice or alternatives that might just be the help that you need.

This material is largely geared toward real estate syndication, but all forms of pooled investments where the manager controls the Investors' money deal with the same problems. That includes hedge funds, venture capital, film funds and more.

If you have clients that are dealing with these types of problems, I am available to speak with attorneys about matters that are either already in litigation or that might be contemplated for future litigation. To schedule a complimentary consultation, click here: **http://tinyurl.com/consult-with-joel.**

Warmest Regards,

Joel Block

Joel G. Block

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Contents

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Introduction: Syndication is Hazardous for Investors and Syndicators.

While this list of problems and issues is not meant to be exhaustive, we hope that plaintiff attorneys (and defense attorneys as well) will find it representative of some of the complications that arise in the syndication process. If your clients, Investors or promoters are involved in any of these situations, you should reach out for expert assistance immediately.

This material makes many Syndicators nervous – because they recognize it as true – especially in the hands of an experienced attorney defending a client who has been treated improperly or unfairly. Do not look at this list as comprehensive but rather suggestive of big issues that come up in the relationships between Syndicators and Investors.

What follows is not a list of additional disclosures that belong in the Private Placement Memorandum. Rather, most of this material is what happens in spite of the disclosures that are made to Investors. The target readers of this material are not Investors – though they will benefit dramatically if they keep their eyes open and their guards up. But in case those Investors let their guards down, the attorneys – who are the real targets for this material – will find this road map very valuable.

Like in most businesses, when managing money, character is the most important element of the transaction. Most all of the issues that we discuss below are mitigated when dealing with people whose character you trust. Remember, that one bad apple does not have to spoil the whole bunch and 99% of people are probably decent, so don't be too distraught by what you read below.

The 40 Games that Syndicators Play

1. A Private Placement is Like the Game "Where's Waldo"

Per Wikipedia, Where's Waldo is a series of detailed double-page spread illustrations depicting dozens or more people doing a variety of amusing things at a given location. Readers are challenged to find a character named Wally hidden in the group. Wally's distinctive red-and-white striped shirt, bobble hat, and glasses make him slightly easier to recognize, but many illustrations contain "red herrings" involving deceptive use of red-and-white striped objects. That means that the fees and the different pieces of the puzzle are spread across 100 pages or more, which makes it extremely difficult for Investors to thoroughly understand the deal because they're not in the business of reading these documents on a day-to-day basis.

2. Syndicators Call All The "Shots" With Little Or No Power In The Hands Of Investors.

The nature of the syndication business is for the Syndicator (sometimes referred to as the Promoter) to be in charge of the transaction. In situations where institutional or professional Investors are involved, they will frequently put a heavy hand on the deal and write their own place into the Operating Agreement. But retail Investors, or those who are less sophisticated, will frequently go along with the Operating Agreement that is proposed by the Syndicator. Those Operating Agreements are in many cases one-sided, or at the very least, imbalanced. The Investors tend to be okay with this, because they might know the Syndicator, or they might have been referred to the Syndicator by someone who has experience with the Syndicator.

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3. Another Word on Imbalance

Because the power is very lopsided, it is the biggest and most obvious problem for Investors. Though many Private Placement transactions go very well and lots of people make lots of money, one bad apple can make a terrible mess. Most of the issues described below are somehow a derivative of the promoter's unbalanced power in this relationship.

4. Inadvertent Ponzi Scheme

Believe it or not, most Ponzi Schemes are not calculated and pre-meditated. Most start out innocently with the promoter trying to stay afloat so that he or she looks good in the eyes of the Investors. Early stage projects will often borrow short-term capital but because projects always take longer than you think, cost more than you think and are more difficult than you think, the balloon payment on the borrowings frequently sneaks up on the Syndicator. Quick on his feet, the Syndicator will go get some new money to replace the old money that is due anticipating that the business will "take off" providing the needed capital to correct the situation. Unfortunately, when it goes slowly, the Syndicator has to continually recycle the cash until they hit a wall and lose control of the situation.

5. Unrealistic Borrowing Can Lead to a Ponzi Scheme

The unrealistic goals of some promoters, whether because they are cocky, inexperienced or over-optimistic, sometimes leads to accepting capital on terms that are not realistic. When money comes in on a short-term basis, and when the terms needed to repay those funds haven't materialized, sometimes a cycle of borrowing can ensue which can create an unintended Ponzi scheme. Investors must be aware of the timeframes for money that is coming in and when it is due back out. When those timeframes are too short, trouble can brew on the horizon.

6. Making Preferred Payments from the Investor's Own Capital

It is very clear from an accounting point of view, that the investment should generate enough profit, either on an accounting basis or on the cash basis, to make the minimum preferred payments to the Investors. That means that the expenses of the project must be met and that there is enough profit left over to pay the returns due to the investor as described in the Operating Agreement. Unfortunately, because most Investors are not paying attention, the promoter is able to send out what he calls preferred payments even though the project did not generate enough cash or profit to justify such a payment. If the project does not generate enough profits or cash and funds are sent under the guise of being distributions of profits or preferred payments, then the Investors are just getting their own money back. This means they are getting a return OF their capital – not a return ON their capital.

7. Who Cares About Returns OF vs. ON Capital?

Why would a promoter call returns OF capital a return ON capital? Investors love getting returns on their capital and happy Investors leave promoters alone to run their businesses. Happy Investors also invest more money and refer their friends to invest more money. For these reasons, promoters and Syndicators are motivated to mischaracterize the payments.

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8. Sometimes, The Promoter Just Isn't Competent For The Job

Deals sometimes go sideways and in a typical corporate structure, the board of directors would replace management to solve the problem. But in a syndication environment, the promoter, who probably wrote the rules of the game via the Operating Agreement, has a disproportionate financial interest compared to his or her investment with little or no provision for taking him or her out if necessary.

9. When the Syndicator Syndicates His Own Deal

It's hard to estimate how many times prospective Syndicators have told me that they have a property in their portfolio that is just a "dog" and they want to get rid of it. The next question is always "how can they syndicate it to others"? Of all the bad ideas, this one is about the worst. If it's bad in the Syndicator's hands, then why would passing the "hot potato" make it any better? Of course the Syndicator would have gotten his cash out but he leaves investors with a sub-standard opportunity. It is always a bad idea to make a purchase in one transaction and then syndicate it in another. The investor never really knows how much the Promoter paid for the property, what mark ups might have been added, or what the specific relationship the Promoter has with the investor. All of this is in spite of representations about the opportunity made by the Promoter. Even if the Promoter is perfectly honest, the appearance of impropriety from syndicating your own product is high and the impact on credibility is heavy.

10. Reliance on Competence Of The Syndicator

Investors who are passive put the life of their investment into the hands of the Syndicator. There is little or no oversight of the Syndicator and there is no licensing or certification requirement to put a deal together, although some services rendered by the Syndicators may require licensure.

11. Changing Economic Tides Can Bring Out The Worst In People

The last several years have been tough in real estate – and especially tough on buyers of properties who made their acquisitions before 2008. Sometimes, in an effort to keep investor profits looking good, promoters make decisions that are either not in the best interest of the entity, not in the best interest of the Investors or both. These decisions, on matters of borrowing, refinance, sale, or trade can have negative impact on Investors who likely have a different financial exposure than the promoter.

12. Bank Activity Can Be Hard to Track – and Hard to Audit

It is easy for some Syndicators and promoters to pull money out of a bank account using transactions that seem normal to the uninitiated eye. That money evaporates into thin air and can leave the syndication damaged and short on funds. It is not always cost effective to have accountants and other experts searching for buried treasure. Sometimes having someone who knows a lot about where to look could bring great advantage and save a fortune.

13. Some Syndicators Mislabel Passive Investors to Avoid Security Registration

Passive Investors want the protection that limited liability organizations provide them. Promoters want rich Investors to be quiet and let them run the show. But sometimes the classifications are switched so the Syndicators can refer to the entity as one containing many active partners to (hopefully) avoid registration and related matters. Sometimes, real estate promoters set up Joint Ventures to attempt to escape Securities regulations but it doesn't work. The broad definition of Securities and investment contracts tend to catch most all activities involving passive Investors.

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14. Calling a Securities Arrangement by Another Name

If the Investor is passive, or unsecured, or in a deal that meets the criteria of an investment contact it's probably a Securities transaction. Some Syndicators, in an effort to save costly up front legal fees, will masquerade under the guise of a non-securities arrangement which ends up costing the Syndicator much more than had it been done right from the start.

15. Private Equity Companies Are a Haven For Money Laundering

The concept of Money Laundering is not usually in the purview of litigators who advocate for their Investors, but sometimes the safety, security and longevity of the entity can be compromised by illegal or criminal behaviors on the part of the promoter. It is rather easy for the promoter to circumvent the banking rules requiring those institutions to "know their customers". The bank relies upon the character of the Syndicator to keep an eye on the money to protect every citizen's interests. Without disclosing the techniques used for laundering money, just know that it's not hard to do and the entire investment can be put at risk by an unscrupulous operator.

16. Syndicators Have a Disproportionate Profit Motive Because of Fees

Because they take commissions and other fees off the top of the deal, Syndicators could be improperly incentivized to engage in transactions that are not favorable to the Investors or to the deal.

17. Syndication Is A Conflict of Interest Business

There are significant opportunities where the Syndicator has to make a choice between protecting his own interests, the interests of the Investors, or the interests of the deal, and those three interests are usually never in complete alignment.

18. Syndication Is a Business Where There's Little Oversight of The Management Team

Investors are typically passive and in the dark, relying on the Syndicator to supply information that is timely, accurate, and fully forthcoming. Unfortunately, frequently, the Investors do not find out important information until it's too late.

19. Syndication Is a Complex and Sophisticated Investment

Many Investors are not really suited for syndicated investments even though they sign subscriber suitability questionnaires. They may be sophisticated business people but they frequently do not understand what they've gotten themselves into and how the inside of the deal works in spite of the fact that they have the money to hire a counsel, they may or may not have done a good job in their diligence.

20. Attorneys Who Don't Specialize In Private Placements May Not Understand Them

Attorneys who write Operating Agreements, which are typically for active Investors, are not necessarily experts in the nuance of Operating Agreements that apply to passive Investors. These passive investor Operating Agreements are extremely complex, and they are materially different from what most attorneys are used to. That opens the door to errors being made by attorneys who read these documents but don't really have the expertise to comment on them – even though they do. It also can be a problem for an attorney who prepared documents for use with passive Investors if that attorney is not specially trained in this area.

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21. Operating Agreements for Passive Investments are Very Complex

An Operating Agreement between active partners can be very simple and they can be put together quickly. But when passive partners are involved, such as in syndication, where there is disproportionate power, knowledge, access to information, and where the capital at-risk is disproportionate, the Operating Agreement has to contain situation specific language and it has to be drawn with great specificity. These documents, which cover issues such as tax, corporate governance, Securities matters and traditional business items, are complex for attorneys who are well versed in such matters. But many times Investors do not call on their attorneys or the attorneys who make such reviews don't have the requisite skills to thoroughly understand the elements. It is only when the small provisions kick in that the investor begins to understand the deal

22. Syndication Requires Tremendous Due Diligence

Investors should make significant effort to evaluate every aspect of the deal. Not only should they look into the real estate, but also the background and character of the Syndicator. They should also look into the type of deal being made and the way the payouts will occur, as well as the many exceptions that may be written into the deal. Many exceptions are hard to understand and difficult to find in the labyrinth of legal materials that make up the deal's documentation

23. Real Estate Syndication Has Complex Tax Treatments

It is very common for Investors to misunderstand how they will be treated from a tax perspective when reviewing these transactions. Even the attorneys who represent these clients have a hard time with the tax issues unless they are specially trained to deal with them. There are income tax issues from the state and local perspective, not to mention partnership issues, allocations, property issues, basis problems and economic realities that all make for a complex web of incomprehensible material.

24. Staff Must Be Carefully Supervised

Unfortunately, in circumstances where custodial activities take place, excellent internal controls must be put in place to prevent misappropriation and theft. When such controls are lax or missing, investor funds can go missing too.

25. Compliance with Securities Laws

The national and state-level Securities laws are complex and ever-changing. Frequently, the rules as communicated by the Securities attorney to the Syndicator are not always followed to the letter of the law as the attorney suggests, leaving gaping holes in compliance and providing fodder for injured parties.

26. Dealing With Multiple Third Parties

There may be dozens of separate parties involved in any single real estate syndication. Besides the Syndicator, there are vendors such as brokers, property managers, maintenance personnel and on-site supervisors. Professionals are also part of the formula. In addition to the attorneys and CPAs, there are insurance providers, bankers, lenders and appraisers. With this many cooks in the kitchen, unfortunately, mistakes are often made and sometimes overlooked.

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27. Prospectus Materials Are Complex and Costly to Assemble

Many Syndicators cut corners when assembling their prospectus materials in an effort to save on legal costs. Sometimes, promoters will find documents on the internet and use a "copy & paste" approach to producing their materials. This is bad for the Syndicator but potentially worse for the investor because a promoter, who cuts corners up front, may cut more corners in other places and who knows how bad the rest of the documentation will be.

28. Reg D Investments Do Not Require Any Form of Custodial Oversight

Without regulatory oversight, some Syndicators feel like they can get away with "borrowing", comingling, pinching, or otherwise inappropriately handing investor funds, because they know that no one is really watching.

29. Investor Relations May Be Weak

Frequently, real estate Syndicators are better at the real estate part of their business than the syndication part. They may not do a good job of communicating regularly with Investors. That can lead to issues related to miscommunication or lack of communication. At the very least, it can delay the time from when the Syndicator discovers a problem to when it becomes known to the Investors.

30. What Expense Goes Where?

The Operating Agreement gives Syndicators great latitude in allocating expenses whether direct or indirect to a variety of projects. It is usually reasonable to allocate direct expenses and even some overhead – but it's not always easy to know which project should bear what cost. The better Syndicators will develop systems or conventions for making such decisions but the less scrupulous ones will overcharge some projects and undercharge others – usually correlated to their profit sharing or ownership interest.

31. What Project is Our Project Funding?

One of the most egregious ways that Syndicators (and other money managers too) outright steal from their clients is to deliberately expand the scope of a given project. For example, when a project is having construction work done, a bad boy will have the same contractor do some work on a personal residence or vacation home at the same time and pass the bill to the syndicated project. This is hard to catch because the contractor and Syndicator are working together and it is well known that collusion is hard to uncover. Be aware when such projects are in motion because these are the times that the worst guys put their nose in the honey pot.

32. Internal Controls May Be Weak

The Syndicator is a generic term that actually refers to the entire team of people who manage the investment activities and though there is always a point person, there usually are critical staff too. Sometimes there are great internal controls in place to provide some assurance that these staffers aren't dipping their hands into the proverbial cookie jar, but not always. Investors should ask about these controls such as whether people who have access to the bank accounts are being reviewed for creditworthiness. Remember that bad credit can affect job performance because desperate people do desperate things. Further, people who pay bills might slip a personal bill in once in a while – or sometimes more often. The worst part is that when caught, the Syndicator doesn't have much incentive to share this information with Investors – even if the improperly used funds are not put back. Breakdowns and employee failures are usually swept under the rug.

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33. Many Moving Parts Make It Difficult To Compare Syndications

Every Syndicator will define his or her deal in the way the he or she sees fit. There are no rules and there is no uniformity between deals. This makes it difficult and time consuming for attorneys, CPAs and Investors to analyze each deal which can lead to shortcuts by the professionals who are asked to review these opportunities for clients and less than thorough due diligence in an effort to save time and money.

34. Syndications and Private Equity Structures Open the Door to Potential Improprieties

These improprieties can range from bad behavior to criminal actions. From petty theft to money laundering, there are many potential negative outcomes if the wrong people are tempted by the controls that are handed to the promoter of a syndication.

35. The Syndicator is Usually Indemnified By the Investors He Harms

Most Syndicators are protected by the Operating Agreements which they write. Most of those agreements provide for legal defense of the Syndicator with the project's capital. If the investor sues the promoter, the promoter will use the plaintiff's money (i.e. the investor's money) to defend himself. This is usually a pretty strong incentive for Investors to retreat.

36. When Something Goes Wrong, It Is Very Hard to Get Rid of The Syndicator

Since the Syndicator built the deal, they usually build in provisions that make it very difficult to remove them such as "only for cause". And even if they are removed, most Syndicators retain their equity or profit sharing position so the dilutive effect on the Investors is dramatic.

37. When Things Go Wrong, The Impact Is Less For The Syndicator

When things go awry, the Syndicator typically looks to the cash balances in the company accounts, because in many cases, the Syndicator does not have the financial resources to adequately solve the problem that has befallen him or her. When this happens, the Investors necessarily assume risk, which is disproportionately allocated to those Investors. Of course, if there is a capital call, the Syndicator, who typically will have a back-end interest, may lose his back-end interest, and the majority of the effort in the transaction from the previous period of time, will have been lost.

38. Sometimes a Finder is Really an Unlicensed Broker-Dealer

It is very common for people to make referrals to Syndicators of colleagues they know who might like to invest in the type of project the Syndicator is promoting. Sometimes, these referrals are compensated by the Syndicator who pays a fee to the person who made the referral. Naturally, the person making the investment rarely knows money is moving because of the investment. Nevertheless, it is a common arrangement. However an innocent finder relationship can morph if the finder begins acting like an investment advisor. This can happen in several ways. For example, in dealing with the investor, if the finder makes representations about the investment, negotiates the investment, asks questions about the investor's assets or suitability, or if the frequency of referrals is high, the finder can be classified by the SEC as a person acting as an Unlicensed Broker-Dealer.

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39. **Sometimes a Principal is Really an Unlicensed Broker-Dealer**

It is well known that owners and officers of LLCs and corporations can generally sell stock in their own company to raise capital without being licensed to do so. But the line between selling your own company stock and acting like a broker of Securities can get fuzzy pretty quickly. If the officer or owner does not have general management responsibilities then a red flag that may point to a person who is acting as an Unlicensed Broker-Dealer. If the officer's only job is raising capital, it may be pretty easy to remove the disguise. There are lots of Unlicensed money finders who are installed as company officers so they can "legally" raise capital. This is a serious offense both in the eyes of the SEC as well as litigators.

40. **Taking Compensation Other than What is Specified in the Operating Agreement.**

A lot of Syndicators who are new in the business are timid about asking for fees from Investors and they certainly don't want the disclosure documents including the Operating Agreement to make a "big deal" out of their compensation. But as they get into the deal, they sometimes become more bold and take matters into their own hands if they feel under-compensated. After all, they are doing "all of the work". Suddenly, after they get the money to do the deals with, they put less value on the money that was so critical to the deal's launch. This can lead to a situation where the Syndicator begins taking compensation that was not contemplated in the deal that was agreed to by the Investors. This situation is very problematic and can be tricky to uncover because of the subtleties involved.

Getting Ready for the Next Wave – Thanks to the JOBS Act

In July 2013, the SEC adopted the new rules to lift the ban on advertising which has governed the private placement business for 80 years. It's hard to say how this will affect the legitimate private equity business except to say that the marketers and fraudsters are already out in force starting to work their magic. People who have never been exposed to the world of private investing are about to learn about new and exciting opportunities – and some of them will learn the hard way about losing their money. Like the private equity promoters who are very excited about this new frontier, so too should the plaintiff attorneys be excited because a whole new wave of business opportunity will be coming your way.

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Property & Casualty - California Department of Insurance; License issued in April 2002 (retired).

California Notary License issued in 1986 (retired).

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In Joel's Words

Joel is a real world, 25+ year veteran of the private equity and Hedge Fund business. He is a professional investor who has been a principal in over 30 syndicated real estate, venture capital, and Hedge Fund transactions in addition to advising on dozens more. Joel is presently CEO of the Bullseye Capital Real Property Opportunity Fund, LLC and founder of the National Association of Syndicators. Joel has taught thousands of real estate brokers, CPAs, attorneys and Investors about raising capital and best-practices for structuring group investments. Joel is a nationally recognized expert in Private Placements, Reg D Offerings, Operating Agreements, deal structure, valuations, fairness opinions, tax issues and capital raising approaches with both accredited and non-accredited Investors.

Joel is a persuasive and engaging communicator. He naturally demystifies complex issues and forensics for laymen. As a leader, Joel is humble, likable, friendly and easy to relate to and was recently the foreman of a successful jury. Represented by over 20 of the nation's speaker bureaus, Joel has made hundreds of paid presentations to live audiences in person, by phone or by webinar on topics such as real estate, syndication, successful capitalization, entrepreneurship and how to work with Investors. Further, Joel has penned over 300 published articles on similar topics. His work has appeared in publications such as the Los Angeles Times, the Wall Street Journal, Forbes Small Business, Entrepreneur Magazine, Investor's Business Daily, and the Los Angeles Business Journal.

Additional Reference Materials

Expert Witness
http://tinyurl.com/help-attorneys

Wikipedia
http://en.wikipedia.org/wiki/Joel_G._Block

LinkedIn
http://www.linkedin.com/in/joelblock

Hedge Fund
http://www.bullseyecapfund.com/

For a Complimentary Consultation with Joel, click here: **http://tinyurl.com/consult-with-joel**

References Available Upon Request

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