

# Overview of Disputes, Litigation and Legislation

## Lawsuits Becoming More Common

- Range of subjects – often involving price and valuation, but also other matters
- “Traditional” syndicators and investors and “aggregators.”

See David Davenport, “Year 15: Facing Off with the Aggregator”

[https://www.winthrop.com/wp-content/uploads/2019/05/Davenport\\_Year-15-Facing-Off-with-the-Aggregator-Tax-Credit-Advisor-May-2019.pdf](https://www.winthrop.com/wp-content/uploads/2019/05/Davenport_Year-15-Facing-Off-with-the-Aggregator-Tax-Credit-Advisor-May-2019.pdf)

## Right of First Refusal “Trigger” Disputes

- *Homeowner’s Rehab, Inc. vs. Related Corporate V SLP, L.P.* (2018 – Massachusetts Supreme Judicial Court)
  - ROFR can be exercised once a third party makes an enforceable offer to purchase
  - “Bona fide” offer not required
  - Approval of partnership and consent of investor not required
  - Considers statutory purpose of 42(i)(7) as part of interpreting disputed contracts and common law standards
  - Requiring bona fide offer would mean that ROFR would almost never be triggered
    - “We decline to interpret the agreements in a way that would so obviously contravene the purpose of Sec. 42(i)(7).”

## Right of First Refusal “Trigger” Disputes

- *Senior Housing Assistance Group v. AMTAX Holdings 260, LLC* (2019 – U.S. District Court, Washington)
  - ROFR requires “a bona fide offer from a third party, acceptable to the property owner” (among other standards)
  - Standard not met by “sham offers”
  - SHAG also had “unclean hands”

# Lessons and next steps from HRI and SHAG Cases

- Contracts and facts matter
- Does 42(i)(7) statutory purpose matter?
  - *HRI*: yes
  - *SHAG*: not taken into account
  - *Riseboro Community P'ship Inc. v. SunAmerica Housing Fund No. 682, et al.* (2019 – U.S. District Court, NY)
    - Investor removed case from state court to federal court based on federal questions involving interpretation of federal tax law
  - Disputes continue
    - See - Nonprofit Transfer Disputes in the Low Income Housing Tax Credit Program: An Emerging Threat to Affordable Housing; Washington State Housing Finance Commission – <http://www.wshfc.org/admin/Reporton15YearTransferDisputes.pdf>

# Affordable Housing Credit Improvement Act of 2019

- a. Replaces 42(i)(7) ROFR with Option
  - i. Price remains “debt and taxes”
  - ii. Effective for agreements entered into after date of enactment
- b. Clarifies ROFR and Option Terms
  - i. Clarifications
    - 1. ROFR applies to property or partnership interests
    - 2. Property includes assets relating to the building (e.g., reserves)
    - 3. May be exercised with or without approval of the taxpayer
    - 4. May be exercised in response to any offer to purchase – including an offer by a related party
  - ii. Effective Date
    - 1. applies to future agreements *and* existing agreements – but does not supersede existing agreements as to the manner of execution or terms
    - 2. Related controversy
      - a. <https://www.novoco.com/notes-from-novogradac/congress-considering-retroactive-changes-affecting-low-income-housing-tax-credit-property-owners>
      - b. <https://www.novoco.com/readers-respond-novogradac-blog-posts-about-right-first-refusal-and-qualified-contracts>