Year 15-Exit Disputes

- Historical understanding and practices
- Emergence of Aggregators
- Recent Litigation and Best Practice Suggestions

CED Capital Holdings 2000 EB, LLC v. CTCW Berkshire Club, L.L.C.

2020 WL 6537072 (Fla.Cir.Ct. Nov. 3, 2020)

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Florida Court recognizes several important industry concerns:

- *"**a trend in the LIHTC industry**" where entities are acquiring limited partner interests – known as "Aggregators" who then attempt to extract value that was not intended by the original parties.*

- *the "**Aggregator's playbook**" is designed to disrupt year-15 exits to drive a cash return that was never intended by the original tax credit investor or anyone originally involved in the Project.*

CED Capital Holdings 2000 EB, LLC v. CTCW Berkshire Club, L.L.C.

2020 WL 6537072 (Fla.Cir.Ct. Nov. 3, 2020)

- *"this type of activity has **become more common** in the LIHTC industry and the Court's decision here is in accord with decisions from other, similar cases in different jurisdictions where parties, like Hunt, have come into LIHTC partnership agreements and attempted to extract value or proceeds that is not otherwise permitted under the operative contracts like the Partnership Agreement here." (citing 9 cases and two sources)*

JER Hudson GP XXI LLC v. DLE Invs., LP,

275 A.3d 755 (Del. Ch. May 2, 2022)

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- *"Recently, a new type of buyer has emerged to buy the investors' discounted limited partnership interests. It purchases a limited partnership stake from the initial investor after the investor harvested the property's tax credits. As a new limited partner, the buyer engages in a* ***now-nationally-familiar pattern of tactics*** *to prevent the property from being transferred to the nonprofit."*

CED Capital Holdings X LTD v. CTCW Waterford East, L.L.C.

2023 WL 3436906 (Fla.Cir.Ct. May 8, 2023)

- *Recognizing that the Aggregator "**trend has intensified**" as various courts across the country continue to address Year-15 challenges.*

- *Citing a March 2023 Federal Court decision that released records from confidential court filings because the public's particular interest in Year-15 issues "**has been well-documented**."*

- *Noting a prior case discussing the "**Aggregator Playbook**".*

Year 15 Litigation

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- Section 42(i)(7) Right of First Refusal
- Purchase Options and Option Prices
- Fair Market Value / Appraisals / Broker's Opinion of Value
- Capital Accounts / Liquidation
- Refinancing
- Forced Sale Provisions
- Limited Partner Removal Initiatives

Various Tactics

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- Dispute Purchase Options and Option Prices
  - Option to purchase Property versus LP Interests in a Partnership.
  - Insist on a BOV in lieu of an appraisal, notwithstanding the requirements of a Partnership Agreement.
  - Demanding that positive capital accounts be returned as cash through an Option Purchase Price, arguing that Section 704(b) requires such treatment.
  - Demanding that valuations assume Partnership dissolution and asset liquidation.

Centerline/Fleet Hous. P'ship, L.P. v. Hopkins Ct. Apartments, L.L.C.,

151 N.Y.S.3d 272(2021)

- *"[S]ection 9.2 of the partnership agreement applies to the sale proceeds of the project* **regardless of whether they are the result of a direct purchase by HCA or a hypothetical sale price calculation** for redemption purchases.

- *"**[A]ny dissolution**, governed by section 12, **must occur after distribution of the sale proceeds** under section 9.2 (B)."*

- *"The fact that a sale of the project triggers a dissolution, and thereafter a liquidation, **does not mean** that the sale and its proceeds are automatically included in the subsequent liquidation."*

- *"The fact that section 9.2 (B) is made expressly "[s]ubject to the provisions of" section 12.4 simply means that **the project could be sold during the dissolution process** and provides in that event for the distribution of the proceeds pursuant to section 12.4 (A)."*

Saugatuck, LLC v. St. Mary's Commons Assocs., L.L.C.,

2022 WL 3699484 (E.D.N.Y. Aug. 26, 2022)

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- A Property sale and a Partnership dissolution are ***two separate and distinct events***.
- While a sale triggers a dissolution and ***thereafter*** a Partnership liquidation, this ***does not mean*** the sale and its proceeds are automatically included in the subsequent liquidation.
- Sale / Capital Transaction Waterfalls are ***first used*** to distribute proceeds ***before*** applying Liquidation Waterfalls to distribute any remaining funds based on capital accounts.
- ***Rejected arguments*** that a distribution of sale proceeds in a manner that does not follow capital account balances violates the tax code.

Berkshire and *Waterford*

- The Partnership Agreement requires the Option Purchase Price to be calculated pursuant to the Sale Proceeds Waterfall regardless of whether there is a hypothetical or real sale of the Property, rather than as if the Partnership were being dissolved or liquidated.

- The exercise of the Option and the transaction contemplated by it does not involve a liquidation or dissolution of the Partnership, thus there is no need to consider capital account balances to determine the Option Purchase Price.

Multi-Housing Tax Credit Partners XXX, v. Finlay Interests GP 40, LLC

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- Enforcing application of a Capital Transaction Waterfall to distribute 80% of sale proceeds to GP from Property sale and noting that this application has "***been uniformly confirmed by a growing body of case law***" across the country.

- Concluding that "***it is preposterous*** that the interpretation uniformly accepted by courts . . . 'somehow run[s] afoul of . . . the federal tax code'."

- Finding it would be "***absurd, unjust, and nonsensical***" to award the LP, by application of a Liquidation Waterfall and monetization of a positive capital account, virtually all Sales Proceeds and, in effect, nearly all benefits generated by the Partnership over 15 years.

Urban 2004 Holding Co. v. Nationwide Affordable Hous. Fund 27, LLC

2022 WL 767229 (N.D. Ill. Mar. 14, 2022)

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- GP granted "***the right to purchase the Interests of the Limited Partners*** during the nine (9) month period immediately following the Compliance Period, at a price equal to fair market value of the Interests as established by a mutually agreeable appraisal."

- The court found this allowed the GP to purchase ***the LP Interests in the Partnership***, rather than purchasing the Property from the Partnership, thus ***the value of the Property was not implicated*** in the FMV determination.

- The Option Price ***did not need to consider*** capital account balances or the amount the LP would receive from a Capital Transaction.

White Settlement Senior Living, LLC v. Multi-Housing Tax Credit Partners XXXI 2024 WL 301916 (Tex. App—Dallas Jan. 26, 2024)

- Right to purchase the Limited Partner Interests for Fair Market Value, assuming Partnership's continued ownership and operation of Property with restricted rents into the future

- Purchase price "*determined based on a going concern valuation . . . assuming continued use of the property owned by the Partnership (the "Property") for low-income housing*."

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