

HEALTHCARE MORTGAGEE ADVISORY COUNCIL

Financing Seniors Housing for America

Legal Hot Topics

“Not” Breaking the Law – Judas Priest



MEET THE PANEL





Blair L. Schiff Troutman Pepper

- **Blair Schiff**, is a partner in the Washington Office of Troutman Pepper, where he concentrates in the areas of real estate, housing and policy development. Blair's practice involves closings of multifamily and healthcare projects throughout the US, and he specializes in the Section 232 transactions, coordinating complex portfolio transactions involving account receivable financing and master lease structures. As well as working with Lenders, Mr. Schiff also represents a number of developers and public housing authorities navigating through the restrictions that go with the federal programs.



John Vihstadt Krooth & Altman

- **John Vihstadt, Esq.** - John Vihstadt is a multifamily housing and healthcare financing partner at Krooth & Altman LLP in Washington, D.C., and represents lenders exclusively. Prior to joining the firm in 1989, he served as Executive Assistant to the President of Ginnie Mae and as counsel to the Select Committee on Aging, U.S. House of Representatives. An active member of the Mortgage Bankers Association (MBA) and the National Housing Conference (NHC), he was just named the incoming Co-Vice Chair of the MBA's Insured Projects Closing Committee. His pre-pandemic career goal was to dine at least once in every HUD cafeteria in the country. He came close!



Jason P. Roth ORCF

- **Jason Roth**, is currently a Workload Manager and leads ORCF's Closing Team. He has worked at HUD for over 30 years and has a wealth of experience in both Underwriting and Closing FHA insured loans. Jason's current tenure at HUD dates back to 2000, when he worked in the Baltimore Field Office before joining ORCF in 2011.
- Jason received an MBA from Johns Hopkins University (1983) and a B.A. from University of Maryland (1979) in Urban Planning and Architecture.
- Jason has been married to his wife, Barbara, for 43 years and together they have two grown children. He enjoys playing on a volleyball league with his son, is a member of the LMG road bike club in Baltimore, MD, and is an avid Pickleball player..

Raymond Keyser

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- **Ray Keyser**, has served as the Chief Counsel in HUD's Cleveland Field Office since 2007 where his practice focuses on FHA-insured multifamily and healthcare transactions. He began his career as a legal honors attorney in the Hartford Field Office and then spent three years at Squire, Sanders, and Dempsey as an associate in the firm's Affordable Housing Practice Group. He holds a B.A. in history from Mount Vernon Nazarene College and earned his J.D. from the Ohio State University Moritz College of Law. In 2019 he completed the Kennedy Senior Executive Fellows Program at the Harvard Kennedy School.



Lesley Meyer

Lesley Meyer is the Associate Regional Counsel for Programs in HUD Region VIII. Lesley began her career at HUD in 2005. Lesley has closed hundreds of complex FHA insured multifamily and healthcare loans, including projects with diverse funding sources such as bond financing, public housing funds, CPD grants and loans, tax credit allocations, state and local financing, private investments, and accounts receivable financing. She served as Region VIII's Lean Coordinator and as a mentor to numerous new HUD attorneys. Lesley is also a leader in professional legal instruction, having developed and delivered trainings on a variety of topics including title and survey, accounts receivable financing, entity formation, and change of ownership.

Prior to her time at HUD, Lesley was a Language Arts and Reading teacher in Louisville, Colorado. She received her Bachelor of Arts in English from the University of Kansas, a Master of Arts in Curriculum and Instruction from the University of Colorado, and Juris Doctorate from the University of Colorado School of Law.



Heather Johns

- Heather Aislynn Johns began her career at HUD in 2009 as a Community Planning and Development Specialist in the Indianapolis Field Office, specifically supporting grantees and program leadership in the implementation of the American Recovery and Reinvestment Act, Neighborhood Stabilization Program (ARRA, NSP). In 2011, she transitioned to HUD Indianapolis Office of Counsel as an Attorney-Advisor where she continues to serve. Prior to her service at HUD, Heather worked for 19 years in the title insurance industry, starting in a policy typing pool and moving to title examiner, escrow and underwriter roles. After law school, she served as a Regional Claims Counsel for Stewart Title Guaranty Company and Fidelity National Financial, as well as a Supervisory Commercial Underwriting Attorney for Chicago Title Insurance Company. Heather holds a B.A. in English Writing from Saint Mary's College-Notre Dame and earned her J.D. from Indiana University Robert H. McKinney School of Law. Currently, in addition to supporting HUD program areas in Region V, she serves as a subject matter expert in title insurance and survey matters for HUD counsel and programs staff.



Legal Hot Topics

Common Legal Issues

Legal Issues

- **Owner & Borrower Structure**

- Item to look for in Organizational Docs
 - Section 38 – Key Principal/Carve Out section
 - Sometimes individual is named at closing but not listed in the organizational structure
 - Sometimes the appropriate entity is not mentioned in the organizational structure
 - Double check your Ownership structure
 - Be sure Org charts are correct
 - A lot of times the Org Charts are incomplete
 - Make sure Section 38 party or parties are identified
 - Also include who prepared the org chart in case there are questions.

- **Preferred Equity**

- What is Preferred Equity?
- How does HUD address Preferred Equity?
- What Preferred Equity options fit within HUD's framework?

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Legal Issues

- Operator Structure

- Operator Single Purpose

- Per LEAN Handbook Section the Operator must be single asset entity(SAE) and may also be referred to as a single purpose entity. The Operator is not required to be a SAE when certain circumstances as noted in the LEAN Handbook Section 2.5.C.1-3 of apply.

- However, what do if the deal was approved and closed with Operator as a SAE and later wants to add more facilities?

- Make the Operator part of ownership structure or not?

- Identity of Interest
 - Non-Identity of Interest
 - Deal by deal decision

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Legal Issues continued

- Licensing Issues

- Licensed number of beds vs. beds in use
 - Make sure licenses are consistent with loan documents license vs. actual beds available for all types of care.
 - Are there any special licenses that need to be noted?
 - Special license for different levels of care
 - Make sure you know who the holder of the license is, borrower, operator some other entity
 - Occupancy declines
 - Make sure license is current and accurate in all respects

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Legal Issues continued

• Licensing Issues

- State Specific Licensing Issues
 - Lots of states behind on issuing licenses
 - Some states list management agent as operator and operator as owner – how do we address?
- Expiring Licenses
 - Be Proactive – Get explanation of process from licensing counsel
 - Make sure Operator has game plan for securing renewal if Closing is within a month or weeks of expiration
 - Process varies by state – need to be aware of process
- License Transfers
 - Make sure to plan ahead and submit applications in a timely manner
 - HUD requires new license to be in place for Closing – can it be post-closing if state back dates license?

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More Legal Issues

- **DACA & DAISA Issues**

- Problems with private banking
- Common negotiated legal issues embedded in the DACA & DAISA with triggers for control
 - Various forms exist
- What do you do when there is a difference?
 - Do you promulgate the forms? Which is successful?
 - Riders?
 - Addendums?
- What are Lender's issues?
 - Legal Punchlist Items of focus vary per HUD Office
- HUD requirements are in the Handbook/Legal Punchlist and you should try to get them

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DACA & DAISA other issues

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- What accounts actually need DACAs & DAISAs?
 - Keep eyes open on when new Handbook comes out.

Legal Issues continued

- QUIPP Issues (Upper Payment Limits)
 - What are challenges?
 - Mostly in Texas, other states: Utah & Indiana
 - Structure
 - DACA issues with QUIPP
 - Get the right security interest

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Legal Questions

- DocuSign
 - When will HUD accept it and on what documents?
 - Generally accepted
 - Documents ancillary or collateral to the HUD Loan Documents
 - Historical organizational documents
 - Management Agreements and amendments
 - Commercial Leases and other third-party documents (e.g. zoning letters)
 - Not generally accepted
 - HUD Loan Documents
 - Need original signatures for documents to be recorded

More Legal Questions

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- Title Policy Issues
 - ALTA 2021 Policy Update for ORCF (2006 currently approved).

More Legal Questions

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HUD LEAN Checklists and Punchlists Hygiene:

HUD has an array of checklists and punchlists for lenders, attorneys and HUD closers for various loan products (e.g., new construction, 223(f), (a)7, 241(a)) and at various stages (loan application, loan closing, change of ownership, change of operator).

- These checklists and punchlists range in publication date from as far back as 2014 up to 2023, resulting in sometimes inconsistent and confusing direction. Moreover, the HUD Lean website is not always current with operative checklists and punchlists, current checklists may not all be found in one consolidated location, transition directions may be awkward, and the LEAN Blasts may give no or delayed notice of new checklists versions.
- HUD should consider a holistic and contemporaneous updating of all checklists and punchlists to (a) update them for consistency, (b) remove unnecessary documents that do not ripen until a later stage of the transaction, (c) host them in one central location for easy access and comparison, and (d) ensure synchronicity with ORCF guidance and LEAN Blasts.



Litigation

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Litigation Issues

- What is a problem?
- What is an immediate problem?
 - Licensing fraud
 - Example: Couple days before closing: Operator sued 3 more times in last 3 months what do we do?
 - Suggested Litigation form with all information
 - What are the workarounds?
 - Guaranty?
 - Litigation escrow?
 - Substitute party?
 - What's covered by insurance?
 - Obtain a letter and additional information from the Insurance Carrier or their counsel
 - Coverage Limits vs. Maximum Potential Exposure
 - What if it's a CHOW or CHOP?
 - Is that review different and why?

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Litigation examples

- Fraud or contractual dispute among Partners, what do you do?
 - Can they be removed from the Borrower Structure?
 - Look at OFAC, LDP, Excluded Parties List
- One tip:
 - Even if you don't know the answers get together and come up with some solutions and/or plan then come to HUD.
 - Answer 4 questions in old e-mail blast from February 27,2014.
 - Also included on the Closing Checklist
 - Do you have insurance to cover it, where are you in the litigation process?



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OGC Thoughts?

- Know your deal
- Be Proactive
- Help solve problems
- Reach out if you see a mistake or don't understand something.
- Let OGC know ahead of time of any deadlines you need to meet.
- Deadline of deliverables

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Questions?



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Thank you!

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