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Amendment to ILSA is good news for condominium developers and lenders

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On September 26th, President Obama signed into law an amendment to the federal Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701 et seq. (“ILSA” or the “Act”) which, as of March 25, 2015, will exempt the sales of condominium units from the registration requirements of the Act. This is a significant change to ILSA, one that is greatly welcomed by the development community.

ILSA was enacted by Congress in 1968 to address the fraud arising from sales of vacant residential subdivision lots in deserts and swamps by unscrupulous developers to unsuspecting retirees and other consumers who were, in most cases, buying lots site unseen. Anyone who directly sells or leases, or offers to sell or lease, or advertises for sale of lease, via interstate commerce, any “lots” in a “subdivision” or aids or abets such activities, including officers and directors of corporate developers, may be liable, civilly or criminally, for violations of the Act. The Act did not originally contemplate condominium developments but the courts quickly ruled that

ILSA was to be liberally construed in favor of the public, and took the position that condominium units are covered as “lots” under ILSA.

Unless a specified exemption is available, the Act makes it unlawful for developers of lots in subdivisions to make or use any means or instruments of transportation or communication, or the mails, to sell or lease any lot unless the development is registered with the Bureau of Consumer Financial Protection and a printed property report is furnished to the purchaser in advance of the purchaser signing any contract. If any such registration statement or report contains an untrue statement of a material fact or omits to state a material fact, or if the developer disseminates advertising material inconsistent with such report, it can be liable. It is also unlawful to employ any scheme to defraud; to obtain any money or property by means of any untrue statement of a material fact or omission of a material fact; to engage in any practice which operates as a fraud or deceit upon purchaser; or to represent that certain infrastructure and/or amenities will be provided or completed by the developer without so stipulating in the sales contract.

The penalties for failure to register and provide accurate property reports are significant. In addition to the civil and criminal penalties mentioned above, purchasers who

do not receive the required property report may rescind the purchase within two years from the date of execution of the contract and obtain a refund of all monies paid — even if the closing has occurred.

ILSA provides certain exemptions from its provisions, the most noteworthy full exemptions being

1. The sale or lease of lots in a subdivision containing fewer than 25 lots; and

2. The sale or lease of any improved land on which there is a residential, commercial, condominium or industrial building, or sale or lease of land under a contract obligating the seller or lessor to erect such a building thereon within a period of two years.

The registration and disclosure provisions of ILSA do not apply to, inter alia, the sale or lease of lots in a subdivision containing fewer than 100 lots; however, the fraud protections still apply.

While the initial purpose of the Act was to prevent fraud in the sales of vacant subdivision lots, as noted, the Act was soon applied to the sales of yet to be constructed condominium units, with the courts considering “units” to be equivalent to “lots”. Many condominium developments failed to register, however, with the developers opting to rely — in many cases unjustifiably — on the exemptions for developments containing fewer than 100 units or the exemption for

units where the developer was obligated to construct the unit within two years. The development community had a rude awakening when markets plummeted and purchasers claimed that they were entitled to a rescission of their contracts and refunds of their purchase prices. Lawsuits claiming that the exemptions did not apply or challenging the sufficiency of the disclosure materials proliferated, requiring developers — or their lenders — to take back large numbers of condominium units. The fact that many court decisions favored the purchasers resulted in the development community viewing ILSA as a consumer insurance policy against falling prices and subjected ILSA to closer legislative scrutiny. The combined efforts of several Fellows of the American College of Real Estate Lawyers convinced Congress — in a rare bipartisan action — to unanimously adopt the amendment.

The new exemption for condominium unit sales is in addition to and not a replacement for the existing exemptions from the registration requirements. However, sales of condominium units are still subject to the anti-fraud provisions of the Act unless one of the full exemptions applies.

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