ASPECTS OF THE INTERSTATE LAND SALES FULL DISCLOSURE ACT

Richard Linquanti*

Editors' Synopsis: In 1968, Congress passed the Interstate Land Sales Full Disclosure Act in order to protect the buyers and lessees of real property by requiring disclosure, registration, and honesty in fact with regard to interstate sales of land. In this Article, the Author examines in detail the Act and the case law that interprets it, concluding that over time the Act has become less effective at its primary purpose and more obtrusive to interstate commerce.

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* Carlton Fields, P.A., St. Petersburg, Florida. The author gratefully acknowledges the education about the Land Sales Full Disclosure Act that he has received by working through issues with his partner, Leslie K. Schultz-Kin; William Sklar of Edwards Angell Palmer & Dodge LLP, West Palm Beach, Florida; Rebecca Anderson Fischer of Sherman & Howard L.L.C., Denver, Colorado; and Sandra E. Krumbein of Ruden McClosky, Fort Lauderdale, Florida. He is also grateful to Ryan E. Eastmoore, student at the University of Florida Law School and summer associate at Carlton Fields, for her assistance with legislative history research.

I. INTRODUCTION

> The grand jury charged that. . . . "the principal object of this scheme to defraud . . . to acquire more than 91,000 acres of semi-arid desert grazing land . . . for approximately $180 per acre, to subdivide this desert land into approximately 86,000 lots of approximately one-half acre in size . . . and to describe and sell these lots as 'homesites' . . . in a 'masterplanned community' to persons throughout the United States at prices . . . which . . . presently range from approximately $6,200 to $11,800 per acre . . .
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> It was further part of this scheme . . . that the defendants . . . did deliberately conceal and fail to convey to the persons to be defrauded information . . . to show that the purchase . . . was not a sound risk-free investment, but was an exceptionally poor, risky and dangerous investment . . . that the overwhelming majority of the lots could not be resold at a profit or even at cost . . . that there had been virtually no resale market for these lots . . . that the defendants . . . had not and were not improving the lots sold with water, utilities and other customary amenities . . . that the defendants . . . had no expectation that Rio Rancho Estates could be or would be completely developed in less than 200 years, if ever . . . ."[1]

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[1] Husted v. Amrep Cor., 429 F. Supp. 298, 302–03 n.2 (S.D.N.Y. 1977) (some alterations in original).

> In a market-based economy the price of housing, like other goods, is subject to swings. There was a sharp upward swing in housing prices between late 2000 and the end of 2005, and the resulting bubble was bigger in Florida than it was in most other states. . . . All bubbles burst, as this one did. The bigger the bubble, the bigger the pop. The bigger the pop, the bigger the losses. And the bigger the losses, the more likely litigation will ensue. Hence this case. . . .
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> After the housing bubble burst, the Steins had second thoughts about their decision to purchase the condominium unit. Wanting out of their contract, they seized on the Interstate Land Sales Full Disclosure Act, . . . a federal statute that has become an increasingly popular means of channeling buyer's remorse into a legal defense to a breach of contract claim.[2]

Both of these comments accurately reflects the environment of the case being decided and the dichotomy of a statute, the Interstate Land Sales Full Disclosure Act (ILSA or the Act),[3] which seeks to correct a problem but runs the risk of overreacting to it. The mission of ILSA is to protect the public from the ageless, almost clichéd, land swindle but it raises the question whether it has evolved by degrees to protect that same public from its own greed while interfering with the legitimate workings of a free market economy. Because greed is the fuel for many a swindle, perhaps that interference is inevitable. The regulations, policies and cases that have accumulated over the forty years of ILSA's existence demonstrate the delicacy of the balances between promoting marketplace decency and paternalism, between punishing the swindler and enabling the greedy.

In the late 1960's, Congress conducted hearings to address concerns about widespread real estate fraud.

> Purchasers living in the same state where the land was located or living out of state were persuaded to buy land they had never seen by sophisticated sales forces promising that land (which might be under water or

[2] Stein v. Paradigm Mirasol, LLC, No. 08-10983, 2009 WL 3110819, *1 (11th Cir. Sept. 30, 2009).

[3] *See* 15 U.S.C. §§ 1701–1720 (2006) (sometimes also referred to as the ILSFDA).

> suitable only for grazing purposes) was a good investment, suitable for homesites and easily resaleable."[4]

In response, in 1968 Congress passed the ILSA.[5]

The Act does three basic things to protect buyers and lessees of real property in interstate commerce: first, it prohibits certain practices, especially fraud and misrepresentation; second, it requires certain consumer protection provisions in nonexempt purchase and lease agreements; third, it requires registration of nonexempt property with the U.S. Department of Housing and Urban Development (HUD)—the enforcement agency for ILSA—and delivering a detailed property report to a purchaser before contract.[6] ILSA is patterned after the Securities Law of 1933.[7] This Article examines the basic structure of ILSA and civil case issues arising under it, but does not address HUD civil-enforcement procedures or the criminal law issues of ILSA.

Substantially rewritten in 1979, ILSA does not apply to every real estate sales and lease transaction,[8] but few statutes have such a broad scope or effect on the real estate market as ILSA. The statute applies if any means of interstate commerce—which may include radio, television, print media, telephone, mail, the Internet, or other media with interstate circulation—is used to make or solicit offers to buy or lease real property lots.[9] ILSA applies to commercial as well as residential property, leases longer than five years, sales of property to be improved, and vacant land not scheduled for improvement by the developer.[10] Although ILSA is a federal statute, state contract law governs the analysis of one critical exemption.[11] The statute is relatively short but is by no means straightforward or obvious. ILSA has existed for forty years, but each economic downturn reveals new uncertain-

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[4] H.R. REP. NO. 96-154, at 30 (1979); H.R. Rep. No. 96-706, at 30 (1979), *reprinted in* 1979 U.S.C.C.A.N. 2317, 2346.

[5] *See* 15 U.S.C. §§ 1701–1720 (2006).

[6] *See id.* § 1703(a), 1707. The Office of RESPA and Interstate Land Sales, formerly known as the Office of Interstate Land Sales Registration, of the US Department of Housing and Urban Development is the enforcement agency, pursuant to sections 1715(a) and 1718.

[7] Courts occasionally apply Securities Act analysis to issues relating to alleged fraud claims under ILSA. *See, e.g.*, McCown v. Heidler, 527 F.2d 204, 208 (10th Cir. 1975).

[8] *See* 15 U.S.C. § 1702 (2006).

[9] *See id.* § 1703(a).

[10] *See* Section IV *infra*.

[11] *See infra* note 124 and accompanying text.

ties and understandings about compliance.[12] ILSA contains two limitations periods, and courts have described both as being statutes of limitations,[13] but only one truly is.[14] Compliance with ILSA cannot be waived by contract.[15]

Severe consequences exist for failing to comply with ILSA. Violating ILSA can be a criminal act carrying up to five years of imprisonment.[16] HUD can obtain injunctions against the wrongful behavior and shut down sales.[17] It can impose civil penalties of up to $1,000 per violation.[18] The buyer or lessee can invoke rescission rights within two years from the date of contract[19] and can bring a private cause of action within three years.[20] The purchaser's rights under ILSA do not merge into the delivery of the deed.[21] ILSA is not preemptive of other statutes and remedies;[22] in fact, civil suits commonly state both ILSA and state law claims.[23]

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[12] Since the first case in 1972, each burst in the number of ILSA reported cases—from 9 in 1974 to 21 in 1976; from 10 in 1979; to 15 in each of 1985 and 1986; from 4 in 1990 to 14 in 1991; and from 6 in 2006 to 67 in 2008—coincides approximately within a couple of years after peaks in land value—1973, 1979, 1989, and 2006—and construction—1972, 1978, 1986, and 2006. Dr. Fred Foldvary, an economist at Santa Clara University, provides a table of peaks in land values and construction in the U.S. and notes "real-estate values and construction have peaked one to two years before a depression." FRED FOLDVARY, REAL ESTATE CYCLES, www.foldvary.net/works/cycle.html. Allowing time for a case to be filed before an order or decision is reported, the correlation between periods of real estate bust and the number of ILSA cases is even more evident. In the 37 years that ILSA has had reported cases in Westlaw, 31% of the cases are in the period beginning 2007. From 2007 through July 2009, the number of reported ILSA cases averages about 51.5 annually, whereas in the ten years from 1997 through 2006 the annual average was only 4.4.

[13] *See, e.g.*, Orsi v. Kirkwood, 999 F.2d 86, 89 (4th Cir. 1993) (analyzing sections 1703 and 1711).

[14] *See* 15 U.S.C. § 1711 (2006).

[15] *See id.* § 1712.

[16] *See id.* § 1717.

[17] *See id.* § 1714.

[18] *See id.* § 1717(a). HUD's administrative procedures for hearings involving alleged violations of ILSA are set forth in 24 C.F.R. Section 1720. 15 U.S.C. Section 1710 provides an appeals process from a decision by HUD.

[19] *See* 15 U.S.C. § 1703(c)–(d) (2006).

[20] Buyers or lessees can bring private causes of action under section 1709. The statute of limitations is contained in section 1711.

[21] *See id.* § 1711(b); *see also* Bettis v. Lakeland, Inc., 402 F. Supp. 1300 (E.D. Tenn. 1975).

[22] *See* 15 U.S.C. § 1713 (2006).

[23] A plaintiff may include both ILSA claims and state law claims in the federal courts. However, if the ILSA claims and other federal law claims are dismissed, the court loses

A specific exclusion or exemption must exist for ILSA not to apply to a particular transaction. Exclusions exist by virtue of limitations contained in certain critical definitions in ILSA, such as requiring a subdivision to involve a "common promotional plan."[24] Exemptions exist where ILSA does not apply, in whole or in part, because the transaction meets the requirements of a full statutory exemption,[25] partial statutory exemption,[26] or regulatory exemption.[27] Full and partial statutory exemptions, and defined regulatory exemptions, are self-determining and automatic, so the burden is on the developer to ensure that each sale qualifies for an exemption, to determine the scope of the exemption, and to maintain records demonstrating that the requirements of the exemption have been met.[28] HUD provides regulatory exemptions under its regulatory authority in 24 C.F.R. section 1710.14. In addition, HUD has the authority to determine that ILSA should not apply to specific facts and circumstances pursuant to a specific application for regulatory exemption[29] or to interpret ILSA in a private opinion.[30]

II. SOURCE MATERIALS

Primary source materials, which can be accessed on the Internet through HUD's website, include a list of the registered developers and subdivisions (the actual filings are not online), HUD publications, the statute, and the regulations.[31]

The HUD website uses the shortened label "Exemptions" for the document titled "Guidelines for Exemptions Available Under the Interstate Land

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jurisdiction over the state law claims. *Cf.* Bush v. Bahia Sun Assocs., Ltd. No. 8:07-CV-1314-T-17-EAJ, 2009 WL 963133 (M.D. Fla. Apr. 8, 2009).

[24] *See* Part IV *infra*.

[25] *See* 15 U.S.C. § 1702(a) (2006).

[26] *See id.* § 1702(b).

[27] *See id.* § 1702(c).

[28] One can seek an advisory opinion from HUD. *See* 24 C.F.R. § 1710.17 (2009). The opinion does not guaranty protection from an adverse court decision.

[29] *See* 24 C.F.R. § 1710.15–.16 (2009).

[30] *See id.* § 1710.18.

[31] *See* HUD, http://www.hud.gov/offices/hsg/sfh/ils/ilshome.cfm (last visited Sept. 25, 2009). The HUD Publications available include Most Common Questions from Purchasers, Do's and Don'ts for Consumers, FAQs for Developers, Buying Lots from Developers, and Exemptions (also known as the Guidelines). The statutory text on the HUD website is the Public Law version, not the U.S. Code version. Therefore, it's numbering starts with section 1401 rather than section 1701, and section 1401, which is the common name of the law, has no U.S. Code counterpart. Thus, 15 U.S.C. section 1701 is section 1402 of the Public Law, 15 U.S.C. section 1702 is section 1403 of the Public Law, etc.

Sales Full Disclosure Act" (Guidelines) and is an interpretive rule described as "Supplemental Information to Part 1710" of the ILSA regulations.[32] The Guidelines were published by HUD in 1996, when HUD, in response to the Clinton Administration's memorandum to all federal agencies to streamline their regulations, adopted a rule that amended the ILSA regulations to eliminate language it considered repetitive or otherwise unnecessary.[33] Previously, the Guidelines were published in the Code of Federal Regulations as Appendix A to Part 1710 of the ILSA regulations. The Guidelines and other consistent public pronouncements[34] are entitled to substantial deference under *Skidmore v. Swift & Co.*,[35] if not "controlling weight" under *Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*[36]

III. THE STRUCTURE OF ILSA

Section 1703, as supplemented by 24 C.F.R. sections 1710.3 and 1715, contains the basic provisions for what ILSA prohibits and requires.[37] Section 1701[38] and section 1710.1[39] define the terms necessary to interpret section 1703. The definitions also effectively exclude particular persons, projects, or practices from ILSA.[40]

Section 1702 provides exemptions from ILSA (subsection (a) for full exemptions and subsection (b) for partial exemptions,[41] as supplemented by sections 1710.4 through 1710.13[42] and the Guidelines). Section 1702(c) authorizes HUD to adopt regulatory exemptions,[43] which it does in section

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[32] Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,598 (Mar. 27, 1996).

[33] *See id.*

[34] Such as HUD's position interpreting the scope of the section 1702(b) partial exemptions set forth in Brief of the United States as Amicus Curiae Supporting Reversal, *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299 (11th Cir. 2008) (No. 07-15198-FF), 2008 WL 2442110.

[35] 323 U.S. 134 (1944).

[36] 467 U.S. 837 (1984). See the discussion of the authority for the Guidelines in *Pugliese v. Pukka Development, Inc.*, 550 F.3d 1299 (11th Cir. 2008).

[37] *See* 15 U.S.C. § 1703 (2006).

[38] *See id.* § 1701.

[39] *See* 24 C.F.R. § 1710 (2009).

[40] *See* 15 U.S.C. § 1701 (2006).

[41] *See id.* § 1702.

[42] *See* 24 C.F.R. § 1710.4–.13 (2009).

[43] *See* 15 U.S.C. § 1702(c) (2006).

1710.14[44] (supplemented by the Guidelines, Part VI) for self-implementing exemptions and in sections 1710.15–1710.16 for individual exemptions that require a HUD determination.[45]

If the project is not excluded or exempt from ILSA, the developer must file a statement of record with HUD[46] and give each prospective purchaser a property report, which is part of the statement of record.[47]

IV. BASIC ILSA COVERAGE AND SECTION 1701 DEFINITIONS

Section 1703 makes it unlawful for any developer or agent, directly or indirectly, to use interstate commerce or the mails to sell or lease any lot not exempt under section 1702 without filing a statement of record with HUD and delivering a property report to the buyer or lessee, or to commit fraud or be misleading in making the sale or lease.[48] If the activity does not involve a "developer" or "agent" in the "sale" or "lease" of a "lot," it is excluded from coverage by ILSA by definition.[49]

Developer or Agent

A developer is "any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision."[50] In *Santidrian v. Landmark Custom Ranches, Inc.*,[51] the court held that the president of the defendant company was a developer because he participated in the negotiations and final signing of the contract with the buyer. The opinion included no discussion about piercing the corporate veil or whether it was significant that the individual was a corporate officer. Rather, participants in an ILSA violation may be held individually liable and are not shielded by the corporate structure of the seller.[52]

When elements of fraud and misrepresentation are present, controlling persons seem to be more at risk for personal liability. Acknowledging that Congress rejected a proposed amendment to ILSA that would have added a

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[44] *See* 24 C.F.R. § 1710.14 (2009).

[45] *See* 24 C.F.R. § 1710.15–.16 (2009).

[46] *See* 15 U.S.C. §§ 1704–1706 (2006); 24 C.F.R. § 1710.20–.23, 1710.100 et seq. (2009).

[47] *See* 15 U.S.C. § 1707 (2006); 24 C.F.R. § 1710.100–.118 (2009).

[48] *See* 15 U.S.C. § 1703 (2006).

[49] *See* 15 U.S.C. § 1701(5)–(6) (2006) and 24 C.F.R. 1710.1(b) (2009).

[50] *See id.* § 1701(5).

[51] No. 08-60791-CIV, 2009 WL 210668 (S.D. Fla. Jan. 28, 2009).

[52] *See id.* at *2.

controlling-persons clause[53] similar to that which is found in securities law, the court in *McCown v. Heidler*[54] nonetheless reasoned that "[t]he basic protection of the Act, to be meaningful, must be leveled against the fraudulent planners and profit makers for otherwise the Act would be pragmatically barren."[55] The Fourth Circuit adopted this reasoning in a case also involving fraud, misleading sales practices, and high-pressure tactics, in *Kemp v. Peterson*.[56] So too did the federal court in the Northern District of Indiana in *Paniaguas v. Aldon Cos.*[57] The court in *Gibbes v. Rose Hill Plantation Development Co.*[58] recognized that "ILSA applies only to developers and their agents, unlike the Federal Securities Acts which apply to 'any person'" and that "ILSA causes of action are still limited to defendants who are involved in the sales process."[59] Nonetheless, the court concluded that "a controlling person in an organization that participated in sales" is personally liable, and the court allowed the case to proceed against persons who were "corporate insiders of the agent of the developer."[60]

An agent is "any person who represents, or acts for or on behalf of, a developer in selling or leasing, or offering to sell or lease, any lot or lots in a subdivision; but shall not include an attorney at law whose representation of another person consists solely of rendering legal services."[61] A "person" is "an individual, or an unincorporated organization, partnership, association, corporation, trust, or estate."[62] An "indirect sale" is not defined in ILSA or the regulations, but case law has construed an indirect seller as one "who

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[53] *See* Securities Act of 1933 § 15, 15 U.S.C. § 77 (2006).

[54] 527 F.2d 204 (10th Cir. 1975), *abrogated on other grounds*, Anixtes v. Home-Stake Production Co., 77 F.3d. 1215 (10th Cir. 1996).

[55] *Id.* at 207. The court also found the individual defendants liable for aiding and abetting, adopting the concept from the securities antifraud provisions, but the Supreme Court read aiding and abetting out of the securities laws in *Central Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1993).

[56] 940 F.2d 110 (4th Cir. 1991).

[57] No. 2:04-CV-468-PRC, 2005 WL 1983859 (N.D. Ind. Aug. 12, 2005).

[58] 794 F. Supp. 1327 (D.S.C. 1992).

[59] *Id.* at 1333 (citing Bartholomew v. Northhampton Nat'l Bank of Easton, Pa., 584 F.2d 1288 (3d Cir. 1978)).

[60] *Id.*

[61] 15 U.S.C. § 1701(6) (2006).

[62] *Id.* § 1701(2).

conduct[s] . . . selling efforts through means other than direct, face-to-face contact with buyers."[63]

Interpreting the requirement that the seller be a developer or agent, cases have held that ILSA did not apply to protect a buyer:

- who was the assignee of the purchaser with whom the developer entered into the contract;[64]
- against a defendant that was not the actual seller involved in the sale of the property, or its agent where "[t]here was no corporate affiliation and no continuity of interests or control;"[65]
- against a defendant that was the developer of the lots but did not sell to buyer and did not act as the agent of the seller in the sale.[66]

Sale or Lease

ILSA applies only to transactions where there is a "sale" or "lease." The regulations define a sale as "any obligation or arrangement for consideration to purchase or lease . . . ."[67] According to the Guidelines, a non-binding reservation is not a sale.[68] In order to qualify for this exclusion, HUD states that the reservation arrangement must place any money received "in escrow with an independent institution having trust powers" and must be fully refundable at any time at the potential purchaser's option.[69] An agreement that is voluntary until a certain point in time and then becomes binding unless the consumer opts out is not excluded—in order to go from reservation to contract, the consumer must take "some . . . affirmative action."[70]

A sale under ILSA occurs at the point in the marketing process where the buyer or lessee makes the purchase decision, which is generally when

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[63] Bartholomew v. Northampton Nat'l Bank of Easton, Pa., 584 F.2d 1288, 1293 (3rd Cir. 1978).

[64] *See Gibbes*, 794 F. Supp. at 1333–34.

[65] Paniaguas v. Aldon Cos., No. 2:04-CV-468-PRC, 2005 WL 1983859, at *5 (N.D. Ind. Aug. 17, 2005) (citing Zachary v. Treasure Lake of Ga., Inc. 374 F. Supp. 251, 255 (N.D. Ga. 1974)).

[66] *See* Tomlinson v. Vill. Oaks Dev. Co., No. IP-02-0599-C-M/S, 2003 WL 21180644, *2–*3 (S.D. Ind. Apr. 17, 2003); Akers v. Classic Props. Inc., No. CA2003-03-035, 2003 WL 22326605, *6 (Oh. Ct. App. Oct. 13, 2003).

[67] 24 C.F.R. § 1710.1(b) (2009).

[68] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,602–03 (Mar. 27, 1996).

[69] *Id.*

[70] *Id.* at 13,603.

the buyer signs a contract to purchase.[71] This position makes it clear that the execution of an enforceable obligation by the buyer may not be the only indication that the decision to buy has been reached. In other words, placing a substantial reservation deposit or moving from reservation to contract if the buyer fails to terminate the reservation may indicate that a purchase decision has been made in a way that makes the buyer beholden to the developer.

The fact that for ILSA the sale occurs at contract and not at closing has interesting implications. Most especially, one determines if the transaction is exempt at the time of sale. A failed exemption cannot be cured by subsequent facts, even if the closing has not yet occurred.[72] But it cuts both ways. A buyer may run through the two-year right of rescission under section 1703 even before the closing occurs, just as another buyer's two-year rescission right may extend past the closing date.

The Lot

ILSA requires that the sale be of a "lot," a term that ILSA does not define. HUD defines a lot in its regulations as "any portion, piece, division, unit, or undivided interest in land located in any State or foreign country, if the interest includes the right to the exclusive use of a specific portion of the land."[73] The Guidelines exclude from ILSA coverage a sale of undivided interests that does not provide the exclusive right to use the lot, such as a camping tenant-in-common arrangement where the campsites are available on a first-come, first-served basis.[74]

The case law that a condominium unit is a lot is now well-established.[75] However, *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*[76] held that interests in a condominium hotel were not lots within the meaning of ILSA where owners had occupancy rights only fourteen days per year and interests were encumbered with a number of use restrictions on owner occupancy.[77] In *Giralt v. Vail Village Inn Associates*,[78] a Colorado state court

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[71] *Id.* at 13,602–03.

[72] *See, e.g.*, Law v. Royal Palm Beach Colony, Inc., 578 F.2d 98, 101 (5th Cir. 1978).

[73] 24 C.F.R. § 1710.1(b) (2009).

[74] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,603 (Mar. 27, 1996).

[75] *See, e.g.*, Winter v. Hollingsworth Props. Inc., 777 F.2d 1444, 1446–48 (11th Cir. 1985); Schatz v. Jockey Club Phase III, Ltd., 604 F. Supp. 537, 540–41 (S.D. Fla. 1985); Nargiz v. Henlopen Dev., 380 A.2d 1361, 1363–64 (Del. 1977).

[76] 127 F.3d 478 (6th Cir. 1997).

[77] *See id.* at 480–81.

held that "parking units" are individual lots under ILSA. The court dismissed the developer's argument that parking units were not condominium units under Colorado's former condominium statute, saying that the argument was irrelevant to the correct question, which is "whether they are lots within the meaning of [ILSA]."[79]

However, in *Trotta v. Lighthouse Point Land Co.*,[80] a federal court held that transferable, limited common elements are not lots for ILSA purposes.[81] The court reached this conclusion based on the logic of the intent of the legislation, explaining that "a development does not become meaningfully larger, in the sense that consumers are more likely to need regulatory protection from sophisticated sellers, merely because interests in storage spaces (or parking spaces) are sold along with the residential units."[82] That rationale may underestimate developers, but there are at least two other possible reasons to reach this conclusion—because the limited common elements are appurtenances to other interests that are lots, rather than stand-alone interests, or because a limited common element is only a right to use—a license—which is not an interest in real property.

Subdivision or Common Promotional Plan

If a developer or agent sells a lot, ILSA will still not apply unless the lot is in a "subdivision."[83] The concept of subdivision is important not only for general ILSA coverage—it also forms the basis of several full and partial exemptions. For example, the full exemption exists for the sale of fewer than twenty-five lots,[84] and the partial exemption exists for the sale of fewer than 100 lots in a subdivision.[85]

ILSA does not use the term *subdivision* in the sense that the real estate industry does of a platted area. Section 1701(3) defines subdivision as land that is located in any state or foreign country and is divided or proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a "common promotional plan."[86] A subdivision does not

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[78] 759 P.2d 801 (Colo. App. 1988).

[79] *Id.* at 807.

[80] 551 F. Supp. 2d 1359 (S.D. Fla. 2008).

[81] *See id.* at 1363.

[82] *Id.*

[83] *See* 15 U.S.C. §§ 1701(5), 1703 (2006).

[84] *See id.* § 1702(a)(1).

[85] *See id.*

[86] *Id.* § 1701(3).

have an implied geographic radius. Even such a thing as the "historic unity" of the areas may be considered relevant in determining if there is a common promotional plan.[87]

Common promotional plan is defined in section 1701(4) to mean any plan undertaken by a single person or group of persons acting in concert to offer lots for sale or lease.[88] The definition includes a rebuttable presumption that a common promotional plan exists if the land offered by a developer or a group of developers acting in concert is contiguous or is known, designated, or advertised as a common development or by a common name. The number of lots covered by each individual offering has no bearing on whether or not there is a common promotional plan. The Guidelines list several characteristics to evaluate whether or not a common promotional plan exists, including but not limited to: 10% or greater common ownership; same or similar name or identity; common sales agents acting in a coordinated effort; common sales facilities; common advertising; and common inventory.[89] These characteristics are not conclusive; rather, they are indications of the presence of a common promotional plan.

Common ownership should be determined easily in most cases. Using common agents is a bit trickier. Independent brokers selling lots for different individuals who are merely receiving the usual real estate commission for the sales is, according to the Guidelines, not sufficient by itself.[90] To establish common ownership, some coordinated effort is required. Several plaintiffs have argued that regional or national homebuilders that advertised multiple projects under a common name or on a common website utilized a common promotional plan. The plaintiffs made such an argument against Toll Brothers in the *Trotta* case.[91] The court concluded that there was not a common promotional plan where the projects were on separate sites, maintained separate sales offices, conducted separate advertising campaigns, and filed separate registrations with the state regulatory authorities.[92]

When a developer subdivides and sells some lots in bulk to a homebuilder, it raises questions about whether the lots in the subdivision are all of the lots or only the lots sold by the homebuilder. In *Tomlinson v. Village*

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[87] *See* State v. Heck, 817 P.2d 247, 251 (N.M. Ct. App. 1991).

[88] *See* 15 U.S.C. § 1701(4) (2006).

[89] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,602 (Mar. 27, 1996).

[90] *See id.*

[91] *See* 551 F. Supp. 1359.

[92] *See id.* at 1364.

Oaks Development Co.,[93] plaintiffs brought suit against the subdivision developer although they bought their lot from a homebuilder to which the subdivision developer had sold several lots for resale. The court concluded that the subdivision developer did not act as the agent of the homebuilder, although both the subdivision developer and the homebuilder were identified in the same marketing brochure.[94] The court concluded that their separate roles in the development were clearly identified and that they were not acting "in concert."[95]

The Fourth Circuit reached a similar conclusion in *Orsi v. Kirkwood*.[96] In that case, the buyers purchased their home from a builder who had bought certain lots from the subdivision developer.[97] The court concluded that the subdivision developer and the builder did not act in concert.[98] The court considered that the lot sales from the subdivision developer to the homebuilder were at arms-length, that neither party had a financial interest in the other, that there were no common officers or directors, and that the sales brochure that listed the lots of both the subdivision developer and the homebuilder was prepared by the broker at its own expense and without approval by the subdivision developer or the homebuilder.[99] The court explained that "[t]o stretch the Act to such an extent would drown the small developer in a sea of federal regulation."[100]

On the other hand, in the *Paniaguas* cases,[101] plaintiffs argued that all of the units in two subdivisions that were under common ownership with the common name of "Fieldstone" should be aggregated as a single subdivision for ILSA purposes. Further, plaintiffs alleged that the lots in the Fieldstone subdivision should be combined with lots in "Northwoods" because the same model home was used to promote both subdivisions and copies of the Northwoods covenants were supplied as examples of what the Fieldstone

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[93] No. IP-02-0599-C-M/S, 2003 WL 21180644 (S.D. Ind. 2003).

[94] *See id.* at *2–*3.

[95] *See id.* at *3.

[96] 999 F.2d 86 (4th Cir. 1993).

[97] *See id.* at 88.

[98] *See id.* at 89.

[99] *See id.* at 90.

[100] *Id.*

[101] Paniaguas v. Aldon Cos., No. 2:04-CV-468-PRC, 2005 WL 1983859 (N.D. Ind. Aug. 17, 2005); Paniaguas v. Aldon Cos., No. 2:04-CV-468-PRC, 2006 WL 2568210 (N.D. Ind. Sept. 5, 2006), *reconsideration denied*, No. 2:04-CV-468-PRC, 2007 WL 2228597 (N.D. Ind. July 31, 2007).

covenants would look like.[102] The court found there was a material issue of fact, denying the developer's motions to dismiss and for summary judgment.[103]

V. SECTION 1702(a) FULL STATUTORY EXEMPTIONS

The Guidelines in Part IV provide a useful discussion of each of the section 1702(a) full exemptions from ILSA, which are: (1) Twenty-Five Lots; (2) Improved Lots; (3) Evidences of Indebtedness; (4) Securities; (5) Government Sales; (6) Cemetery Lots; (7) Sales to Builders; and (8) Industrial or Commercial Developments.[104] If a property fits into one of these categories, ILSA will not apply in any respect unless there is a purpose to evade ILSA.[105]

Twenty-Five Lots (15 U.S.C. § 1702(a)(1))

This exempts a subdivision or common promotional plan that contains fewer than twenty-five lots.[106] If the subdivision has lots that will never be marketed, such as a lot containing a clubhouse, those lots are not counted. This exemption is the only one in section 1702(a) that cannot be combined with the One Hundred Lot Exemption in section 1702(b)(1).

Improved Lots and the Two-Year Construction Exemption (15 U.S.C. § 1702(a)(2))

This section exempts lots on which there is a completed building or on which the developer is obligated to construct a completed building within two years from the date of the contract. This exemption is very popular and often litigated.

There are two ways to satisfy this exemption. The first is to have a completed building at the time the buyer signs the purchase contract. The Guidelines interpret this to require a habitable structure, not, for example, a mobile-home pad with utilities but no dwelling, evidenced by the issuance of a certificate of occupancy.[107]

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[102] *See Paniaguas*, 2005 WL 1983859, at *7; *Paniaguas*, 2007 WL 2228597, at *7.

[103] *See Paniaguas*, 2005 WL 1983859, at *19; *Paniaguas*, 2007 WL 2228597, at *19.

[104] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,603 (Mar. 27, 1996).

[105] *See* 15 U.S.C. § 1702(a) (2006).

[106] Prior to the 1979 amendments to ILSA, developments of less than fifty lots were not covered by ILSA as the term "subdivision" was defined then. *See* 15 U.S.C. § 1701 (1976).

[107] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,603 (Mar. 27, 1996).

The second way to satisfy the exemption is for the developer to obligate itself to complete construction of the improvements within two years.[108] The two-year obligation to construct is measured from the date that the consumer enters into a binding obligation to purchase.[109] According to the Guidelines, the obligation ends when the improvements are "physically habitable" and ready for occupancy with all utilities connected,[110] but cases have required that a certificate of occupancy actually be issued.[111]

The statute ties the exemption to the developer's contractual commitment on the date the contract is executed, not to the actual completion of construction within two years from the date of contract.[112] Therefore, there ought to be no retroactive loss of the exemption if the developer, without purpose of evasion, makes a commitment to complete building on time but fails to perform.[113] As the court said in *Pellegrino*, "[t]here is no indication in the statute that the seller's failure to fulfill its obligation eliminates the exemption."[114] The author's experience is that HUD enforcement officials are reluctant to concede that a developer retains the exemption if improvements are not constructed within two years. Of course, in that event, the buyer will have a breach of contract claim for specific performance and damages. What is at stake is whether the buyer will have a right of rescission absent a contractual remedy to that effect.

The obligation to complete construction within two years must be an absolute obligation of the developer, not the buyer. In the *Atteberry* case, the Eighth Circuit allowed the developer to shift the responsibility for completing construction to the buyer by contract.[115] Subsequently, HUD revised

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[108] *See id.*

[109] *See* Aldrich v. McCulloch Props., Inc., 627 F.2d 1036 (10th Cir. 1980) (noting a sale occurs upon "contract formation"); Orpheus Invs., S.A. v. Ryegon Invs., Inc., 447 So. 2d 257 (Fla. Dist. Ct. App. 1983).

[110] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,603 (Mar. 27, 1996).

[111] *See* Harvey v. Lake Buena Vista Resort, 568 F. Supp. 2d 1354 (M.D. Fla. 2008) (holding the two-year obligation was not met where the certificate of occupancy was only five days late and it is possible that the physical improvements were actually constructed within the two-year period).

[112] *See* Lopez v. TRG-Brickell Point W. Ltd., No. 09-20653-CIV, 2009 WL 1456340 (S.D. Fla. May 22, 2009).

[113] *See id.*; Pellegrino v. Koeckritz Dev. of Boca Raton, LLC, No. 08-80164-CIV, 2008 WL 6128748 (M.D. Fla. July 10, 2008); Nargiz v. Henlopen Devs., 380 A.2d 1361 (Del. 1977).

[114] *Pellegrino*, 2008 WL 6128748, at *4 n.3.

[115] *See* Atteberry v. Maumelle Co. 60 F.3d 415, 420 (8th Cir. 1995).

the Guidelines and said it would not follow the *Atteberry* decision in this regard.[116] Nonetheless, there are other exceptions to how absolute the obligation must be in relation to presales contingencies, remedies for nonperformance, and defenses to performance.

The regulations permit the developer to terminate all contracts under limited presales conditions if a presales number is not met within 180 days and the contingency period does not extend beyond the two-year completion period.[117] In *Pilato v. Edge Investors, L.P.*,[118] the court held that a seller's two-year completion obligation was not illusory where the contract allowed the seller to unilaterally cancel the contract and refund the purchaser's deposits in the event that the seller did not enter into binding contracts to sell at least 80% of the units in the condominium.

The next two questions are related in that they both address whether or not the developer is "obligated" to construct the improvements within two years. These questions are whether the remedies for default are adequate and whether the excuses to performance are too broad. In order to answer these questions, the preliminary issue is whether state or federal law applies. Until very recently, it seemed that the court assumed that whether an obligation existed was a question of state law. The Guidelines seemed to agree,[119] although a carefully reading of the Guidelines indicates that HUD reserved the right to weigh in if state law principles were not satisfactory.[120] In *Samara Development Corp. v. Marlow*,[121] the Florida Supreme Court took an expansive approach to the role of state law. It limited the role of federal law to mandating that the developer be "obligated," and used state law to determine if that standard was met.[122] The Eleventh Circuit, in *Stein v. Paradigm*

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[116] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,599 (Mar. 27, 1996).

[117] *See* 24 C.F.R. §1710.5 (2009) (mistakenly referring to section 1703 when intending to refer to section 1702).

[118] 609 F. Supp. 2d 1301 (S.D. Fla. 2009).

[119] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. at 13,603 (Mar. 27, 1996) ("Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected.")

[120] *See id.* ("Because of the variations in applicable contract law among the states and the many different provisions that are used by sellers in construction contracts, HUD may condition its advisory opinions regarding this exemption on representations by local counsel as to the current status of state law on the relevant issues.").

[121] 556 So. 2d 1097 (Fla. 1990).

[122] *See Samara Dev. Corp. v. Marlow*, 556 So. 2d 1097, 1099–1100 (Fla. 1990).

Mirasol, LLC[123] seems to disagree with *Samara*. It used state law to analyze the duties of the developer and the remedies available to a consumer, but not to determine if these amounted to an "obligation."[124]

Remedies

In *Samara*,[125] the Florida Supreme Court held that a purchaser must have all of the remedies available at law or in equity. Otherwise, "the obligation to complete construction within two years is illusory."[126] In applying this case, Florida courts subsequently did not apply its mandate literally.

Hardwick Properties Inc. v. Newbern[127] held that a contract that granted the buyer the right to the remedies available at law or in equity but specifically prohibited consequential or special damages did not, as a matter of law, fail to satisfy ILSA's exemption. The court explained that if actual damages were substantial, the promise to complete construction would not be illusory.[128] In *Rosenstein v. The Edge Investors, L.P.*,[129] a federal court held that a seller's promise to complete construction within two years was not illusory even though the contract waived the purchaser's right to record a lis pendens. The court reasoned that the availability of specific performance is not dependent on the availability of a lis pendens, and thus, the promise is not illusory.[130]

In *Rondini v. Evernia Properties, LLLP*[131] the court held that a provision giving the purchaser a right to seek specific performance, "or if specific performance is not available, the right to seek actual damages" was enough of an obligation to satisfy the exemption.[132] In so concluding, *Rondini* anticipated the reasoning of the Eleventh Circuit in *Stein v. Paradigm Mirasol, LLC*,[133] discussed below.

In the area of remedies, HUD actually did weigh in to override what might be conflicting principles of state law when it mandated that "contracts

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[123] No. 08-10983, 2009 WL 3110819, *1 (11th Cir. Sept. 30, 2009).

[124] *See Stein*, 2009 WL 3110819, at *3, *5.

[125] 556 So. 2d 1097 (Fla. 1990).

[126] *Id.* at 1101.

[127] 711 So. 2d 35 (Fla. Dist. Ct. App. 1998).

[128] *See id.* at 36.

[129] No. 07-80903CIV-MIDDLEBR, 2009 WL 903806 (S.D. Fla. Mar. 30, 2009).

[130] *See id.* at *9.

[131] No. 07-81077-CIV, 2008 WL 793512 (S.D. Fla. Feb. 13, 2008).

[132] *Id.* at *2.

[133] No. 08-10983, 2009 WL 3110819 (11th Cir. Sept. 30, 2009).

that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to construct."[134] HUD and some courts have been clear that the contract does not need to affirmatively provide for, so much as to retain, the right to specific performance. "HUD's position is not that a right to specific performance of construction must be expressed in the contract, but that any such right that purchasers have must not be negated."[135]

In *Ndeh v. Midtown Alexandria*,[136] the court held that remedies provided to the purchaser are exclusive to other remedies allowed by law only when the language of the contract clearly indicates an intent that the remedy is to be exclusive. In other words, a contract may provide that in the event of default by the seller, the purchaser shall have the right to a refund of his deposit so long as that is not stated to be the exclusive remedy. The court held that the contract does not need to alert the buyer that he has other remedies.[137]

One can argue that these cases reach conflicting conclusions because they fail to address the fundamental question of what it means to say that ILSA follows state law in determining if a developer has obligated itself to construct the dwelling within two years. The *Samara* court concluded that the standard of an obligation was that the duty not be "illusory."[138] It then applied a subjective analysis of whether certain contractual safeguards drafted by developers provided sufficient disincentives to compliance to decide if the obligation was too weak.[139] But did *Samara* really mean that as a general principle of Florida contract law, a contract that does not provide all legal and equitable remedies is illusory and unenforceable? Or did *Samara* create principles of contract law specifically to apply to ILSA? If the latter, the Eleventh Circuit in *Stein v. Paradigm Mirasol, LLC*[140] concluded that the Florida Supreme Court overreached its authority.[141] *Stein* looked to general Florida law to determine that, with specific performance, a buyer who finds himself unable to get effective specific performance has remedies

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[134] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. at 13,603 (Mar. 27, 1996).

[135] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13603 (Mar. 27, 1996).

[136] 300 F. App'x 203 (4th Cir. 2008).

[137] *See id.* at 207.

[138] *See Samara Dev. Corp. v. Marlow*, 556 So.2d 1097, 1099 (Fla. 1990).

[139] *See id.* at 1099-1100.

[140] No. 08-10983, 2009 WL 3110819 (11th Cir. Sept. 30, 2009).

[141] *See id.* at *7 n.5.

for recovery of profits and other damages based, not as contract remedies, but as civil and criminal contempt penalties.[142] It concluded that, as a matter of federal law, this was sufficient to amount to an "obligation."[143]

Excuses to Performance

The question of whether a developer's absolute obligation to complete construction is adequate has often turned on what defenses to nonperformance are available to the developer besides the buyer's own breach of contract. As in the remedies discussion above, the issue of excuses to performance hinges on how ILSA is impacted by state law principles. HUD's position in the Guidelines starts fairly clearly: "Contract provisions which allow for nonperformance or for delays of construction completion beyond the two-year period are acceptable if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected."[144] Not content to rely on general principles of contract law, developers have tried to define in their contracts what those legally-recognized defenses might be, taking a hint from the Guidelines provision that says, "as a general rule delay or nonperformance must be based on grounds cognizable in contract law such as impossibility or frustration and on events which are beyond the seller's reasonable control."[145] Unfortunately, courts are having a hard time with HUD's formulation and the sometimes conflicting state contract law principles.

Florida has wrestled with the problem in the context of the *Samara* language that the obligation must not be illusory.[146] In *Fortunato v. Windjammer Homebuilders, Inc.*,[147] the court held a provision that the developer would complete construction "as soon as practicable, subject to the availability of labor and supplies" did not satisfy the obligation.[148] In the lower court ruling in *Stein v. Paradigm Mirasol, LLC*,[149] the district court held a typical "force majeure" clause, "for any delay caused by acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of Seller,"

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[142] *See id.* at *4.

[143] *See id.* at *3.

[144] Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,603 (Mar. 27, 1996).

[145] *Id.*

[146] *See* Samara Dev. Corp. v. Marlow, 556 So. 2d 1097 (Fla. 1990).

[147] No. 8:04-CV-165-T-26MSS, 2006 WL 208777 (M.D. Fla. Jan. 25, 2006).

[148] *Id.* at *3.

[149] 551 F. Supp. 2d 1323 (M.D. Fla. 2008).

contained exclusions "broad enough to seriously undermine the obligation to complete the condominium within two years."[150] The court denied the developer's claim to an exemption.[151] *Disimone v. LDG South II, LLC*[152] held that a force majeure clause that listed "acts of God or any other grounds cognizable in Florida contract law . . . including without limitation, delays occasioned by rain, wind, and lightning storms" expanded the available bases for delay and thus rendered the promise to build within two years illusory.[153] The court reached a similar conclusion in *Harvey v. Lake Buena Vista Resort, LLC*.[154]

But in *Bloom v. Home Devco/Tivoli Isles, LLC*,[155] a federal court held that the failure to include the word "impossible" in a force majeure clause did not render the promise illusory because the conditions described in the clause supported an impossibility defense in Florida.[156] In the *Rondini* case, the court approved somewhat similar language to the language rejected by the district court in *Stein*—"subject to extensions for delays caused by Acts of God, the unavailability of materials, strikes, other labor problems, governmental orders or other events which would support a defense based upon impossibility of performance for reasons beyond [seller's] control."[157] And in *Tedder v. Harbour Phase I Owners, LLC*,[158] the court held that a provision that obligated the seller to complete the construction within two years "subject to delays caused by acts of God or other events that would be a legal defense to Seller's obligation to perform under Florida law" was sufficiently narrow not to render the promise to build within two years illusory.[159]

One was forced to conclude that, in Florida at least, writing a defenses provision that goes beyond impossibility or impracticability of perfor-

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[150] *Id.* at 1329–30.

[151] *See id.* at 1330.

[152] No. 208-CV-544-FTM-29SPC, 2009 WL 210711 (M.D. Fla. Jan. 28, 2009).

[153] *Id.* at *3.

[154] 568 F. Supp. 2d 1354 (M.D. Fla. 2008), *aff'd*, Harvey v. Lake Buena Vista Resort, LLC, 306 F. App'x 471 (11th Cir. 2009).

[155] No. 07-80616-CIV, 2009 WL 36594 (S.D. Fla. Jan. 6, 2009).

[156] *See id.* at *6.

[157] Rondini v. Evernia Props., No. 07-81077-CIV, 2008 WL793512, at *2 (S.D. Fla. Feb. 13, 2008).

[158] No. 8:08-CV-1674-T-30TGW, 2009 WL 1043911 (M.D. Fla. Apr. 17, 2009).

[159] *Id.* at *3; Stefan v. Singer Island Condos, Ltd., No. 08-80039-CIV 2009 WL426291 (S.D. Fla. Feb. 20, 2009); *see also* Rosenstein v. The Edge Investors, L.P., No. 07-80903-CIV-MIDDLEBR, 2009 WL 903806 (S.D. Fla. Mar. 30, 2009).

mance[160] and itemizing examples of when those defenses are available is risky.[161]

All that may have changed with the Eleventh Circuit's decision in *Stein*, which concluded that whether or not an obligation exists is a matter of applying federal law to state law principles.[162] Since Florida contract law permits excuses to performance applying a lesser standard than impossibility, the court concluded that Florida could not limit ILSA's defenses to those cases satisfying an impossibility standard by defining lesser standards (such as "beyond the seller's control") as creating an illusory obligation.[163]

Evidences of Indebtedness (15 U.S.C. § 1702(a)(3))

No hidden issues have surfaced with this exemption so far. The statute's purpose is to exempt those transactions in which mortgages are transferred. However, in *Ackmann v. Merchants Mortgage & Trust Corp.*,[164] where a developer carried back a mortgage and assigned it to a note purchaser who had knowledge of the developer's violations of ILSA, the court held that the

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[160] *See* Plaza Court, L.P. v. Baker-Chaput, Nos. 5D08-899, 5D08-1188, 2009 WL 1809921 (Fla. Dist. Ct. App. 2009) ("[T]he question is whether Plaza's contractual provisions are recognized within Florida's doctrine of impossibility.").

[161] The *Plaza Court* judge found unsuccessful the attempt to limit defenses to those constituting impossibility because "the modifying clause here contains the subsequent language 'including, without limitation, delays occasioned by rain, wind lighting (sic) and storms.'" *Id.* at *7.

[162] *See Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, *3 (11th Cir. Sept. 30, 2009).

[163] *See id.* at *7 n.6. One example the court used was inclement weather, *see id.*, and in so doing the court may have gone too far in characterizing Florida law, or even common law in general. Although weather is outside a person's control, certain weather patterns are foreseeable. Someone is going to bear the cost of a delay caused by inclement weather; the question is which party to the contract should it be. The parties are free to determine that for themselves. The balancing of the sometimes conflicting interests of certainty and fairness is well-articulated in *Cook v. Deltona Corp.*, 753 F. 2d, 1552, 1557–58 (11th Cir. 1985). Florida cases hold that new fees and taxes are foreseeable and therefore are not excuses for nonperformance, *City of Key West v. R.L.J.S. Corp.*, 537 So. 2d 641 (Fla. Dist. Ct. App. 1989), that whether a dispute was foreseeable or not is a triable question of fact, *Walter T. Embry, Inc. v. LaSalle Nat'l Bank*, 792 So. 2d 567 (Fla. Dist. Ct. App. 2001), and that the foreseeability of the difficulty of obtaining insurance in Florida made the defense of frustration of purpose unavailable, *Home Design Center JV v. County Appliances of Naples, Inc.*, 563 So. 2d 767 (Fla. Dist. Ct. App. 1990).

[164] 645 P.2d 7 (Colo. 1982).

assignee acquired the mortgage subject to the lot purchaser's defenses against payment.[165]

REIT Securities (15 U.S.C. § 1702(a)(4))

This provision is also what it appears to be—an exemption for "the sale of securities of a real estate investment trust."[166]

Government Sales (15 U.S.C. § 1702(a)(5))

The only comment on this exemption is in the Guidelines, which states that while sales by governments and governmental agencies (even foreign governments) are exempt, sales by federally- or state-chartered companies, like banks, are not.[167] Note that this full exemption only applies to sales *by*, not sales *to*, government agencies. HUD has issued a regulatory partial exemption for sales to a government or government agency.[168] With respect to special taxing districts and utility districts, the question of exemption is open to an analysis of whether the district is considered a government agency under local law.[169]

Cemetery Lots (15 U.S.C. § 1702(a)(6))

This exemption speaks for itself, at least for the present.

Sales to Builders (15 U.S.C. § 1702(a)(7))

This exempts a sale to a person who engages in the business of constructing a residential, commercial, or industrial building. The Guidelines are clear that there must be a business function, not an isolated transaction.[170] By contrast, the sale of a lot to a person who then intends to build his own house does not qualify for this exemption.[171] Finally, HUD takes the position in the Guidelines that a sale to a person who is not licensed as a broker is not exempt, even if he is buying the property as an investment and

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[165] *See id.* at 19.

[166] 15 U.S.C. § 1702(a)(4) (2006).

[167] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,604 (Mar. 27, 1996).

[168] *See* 24 C.F.R. § 1710.14(a)(5) (2009).

[169] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,604 (Mar. 27, 1996).

[170] *See id.*

[171] *See id.*

loosely plans to sell it in the future.[172] *Tippens v. Round Island Plantation LLC*[173] concurs that buying a property solely as an investment opportunity does not mean that the buyer is engaged in the business required for the sale to qualify for an exemption.[174]

Industrial or Commercial Developments (15 U.S.C. § 1702(a)(8))

That ILSA's application is not limited to residential property is shocking. The exemption for commercial and industrial property, which was not in the original legislation but was only added later,[175] is actually quite narrow.[176]

Two requirements are easy and obvious: the property must be restricted to commercial or industrial uses either by zoning or recorded covenant, and there must be legal access from the property boundary to the public street.[177] The other requirements can be problematic. The buyer must be a legal entity and have been set up, in fact, as a business entity.[178] The Guidelines require the entity to have an operational structure with checking accounts, licenses, and accounting records.[179] The buyer must actually be engaged in commercial or industrial business and be represented in the transaction by its own

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[172] *See id.*

[173] No. 09-CV-14036, 2009 WL 2365347 (S.D. Fla. July 31, 2009).

[174] *See id.* at *6.

[175] *See* Housing and Community Development Act of 1974, Pub. L. No. 93-383, 88 Stat. 633 (codified as amended in 15 U.S.C. 1702(a)(8)).

[176] The legislative history makes it clear that a narrow exemption was intentional. Senate Report No. 93-693 stated:

> The bill adds a new paragraph to Section 1403(a) of the Act which would exempt from its requirements the sale or lease of lots in bona fide industrial or commercial developments. The word bona fide is not used loosely in this context. Stringent requirements have been incorporated into the exemption which would preclude qualification of those land developers who are selling almost exclusively to private non-business individuals and would attempt to escape the requirements of the Act solely by putting in its development a shopping center or a factory.

S. REP. NO. 93-693 (1974), *reprinted in* 1974 U.S.C.C.A.N. 4273, 4357. A commercial or industrial property is more likely to be exempt under the Twenty-Five Lots Exemption or the One Hundred Lot Exemption.

[177] *See* 15 U.S.C. § 1702(a)(8) (2006).

[178] *See id.*

[179] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,604 (Mar. 27, 1996).

representative.[180] Because neither a transaction broker nor a listing broker is an agent of the buyer, they will not satisfy this requirement.

The buyer must affirm to the seller in writing that it meets the requirements mentioned above. If the affirmation is in a form contract, the provision must be initialed by the buyer. The exceptions to title must be approved in writing by the purchaser and there must either be a title insurance policy, a title opinion, or a signed waiver in a separate document. Few commercial sales transactions will be conducted without title insurance, but the same cannot be said of leases. Finally, the exceptions to title must be approved by the buyer in writing affirmatively, not by failing to object.[181]

VI. SECTION 1702(B) PARTIAL STATUTORY EXEMPTIONS

In Part V the Guidelines provide an extended discussion of each of the section 1702(b) partial exemptions from ILSA,[182] some of which are also covered by regulations.[183] The partial exemptions are: (1) One Hundred Lot Exemption; (2) Twelve Lot Exemption; (3) Scattered Site Exemption; (4) Twenty Acre Lots Exemption; (5) Single-Family Residence Exemption; (6) Mobile Home Exemption; (7) Intrastate Exemption; and (8) Metropolitan Statistical Area Exemption.[184]

A. What Are "Partially Exempt" Projects Exempt From?

ILSA specialists spent much of 2008 analyzing and critiquing a trilogy of federal cases from the Southern District of Florida that addressed what it is that partially exempt projects are exempt from. *Pugliese v. Pukka Development, Inc.*,[185] *Meridian Ventures, LLC v. One North Ocean, LLC*,[186] and *Trotta*[187] all concluded, applying the principle that exemptions should be construed narrowly and, disagreeing with the Florida Fourth District Court of Appeals,[188] that the exemption is only from registration[189] and that all

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[180] *See id.*

[181] *See id.*

[182] *See id.* at 13,604–08.

[183] *See* 24 C.F.R. § 1710.6–.13 (2009).

[184] *See* 15 U.S.C. § 1702(b) (2006).

[185] No. 07-14040-CIV-LYNCH, 2007 WL 4165395 (S.D. Fla. Oct. 4, 2007).

[186] 538 F. Supp. 2d 1359 (S.D. Fla. 2007).

[187] Trotta v. Lighthouse Point Land Co., 551 F. Supp. 2d 1359 (S.D. Fla. 2008).

[188] *See* Mayersdorf v. Paramount Boynton, LLC, 910 So. 2d 887 (Fla. Dist. Ct. App. 2005).

[189] *See* 15 U.S.C. §§ 1703(a)(1), 1704–1707.

other provisions of ILSA, in particular section 1703(a)(2) through (e), continue to apply.[190]

In reaching this conclusion, the federal courts applied the language that is in the exemption provision itself: "the provisions requiring registration and disclosure (as specified in section 1703(a)(1) . . . and sections 1704 through 1707 . . .) shall not apply."[191] However, the courts needed to get around the broader exemption language that appeared in the substantive provisions of section 1703: "Any contract or agreement for the sale or lease of a lot not exempt under section 1702 . . . ."[192]

The consequence of the holdings in these cases was that all of the substantive requirements in section 1703 other than the section 1703(a)(1) registration requirement became relevant to partially exempt projects, including the purchaser's right to a seven-day rescission period;[193] the requirement that the contract state that the buyer has a two-year right of rescission if a property report is not delivered;[194] and the requirements that the contract provide a legal description appropriate for recording, a twenty-day period of notice and right of the purchaser to cure a default, and a limitation of damages for the developer to the greater of 15% of the purchase price or actual damages.[195] This consequence was an urgent concern because a failure of the contract to contain those provisions, whether or not relevant to the transaction, is fatal to the enforceability of the contract, and there is no way to remedy it. Since these cases were decided as Florida's real estate wheels were falling off, the *Pugliese* line of cases may have actually contributed to the speed and intensity of the crisis.[196]

One can hardly fault the courts for applying the specific scope provisions set forth in the section 1702 that define the exemption tests. The problem with the *Pugliese* line of cases was that developers and their counsel followed HUD's pronouncements and relied on them, and no one in the preceding thirty years had applied the substantive provisions of section 1703 to partially exempt properties. Now they were being told that they could not rely on HUD's position and their contracts were unenforceable.

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[190] *See id.* § 1703(a)–(e).

[191] *See id.* § 1702(b).

[192] *See id.* § 1703(b).

[193] *See id.*

[194] *See id.* § 1703(c).

[195] *See id.* § 1703(d).

[196] Of the 136 ILSA cases reported in Westlaw from 2007 through July 2009, 92 were in a Florida state or federal court.

As a consequence, the buyer had an absolute right to rescission in a declining market regardless of the irrelevancy of the missing contractual language, and there was nothing that the developers could do to fix the prob-problem.

The Eleventh Circuit resolved the issue when it reversed the district court in *Pugliese v. Pukka Development, Inc.* concluding that if the project is exempt from registration, lot buyers do not have the right of revocation provided in section 1703(d).[197] Because the Eleventh Circuit's decision rests, at least in part, on the deference to HUD on ILSA interpretation, rather than on the dubious assertion that the language in sections 1702 and 1703 is clearly harmonious, it is likely that other federal district and circuit courts will follow the final *Pugliese* result. But transactional lawyers outside the Eleventh Circuit cannot dismiss the possibility that the *Pugliese* issue about the scope of the section 1702(b) exemption may arise in their jurisdictions. After all, the District Court for the Southern District of Florida was not the only federal court to conclude that projects exempt under section 1702(b) must comply with all of section 1703 except for the registration requirement of section 1703(a)(1).[198]

If they did nothing else, the *Pugliese* cases demonstrated the hard effects of ILSA's remedy of rescission for a violation of section 1703. When speculation is driving real estate, the peak of the bubble is just a year or two before the crash. The very purchase contracts that fueled the speculation in its greatest frenzy—those entered into during the last couple of years before the bubble bursts—are protected by the right of rescission whether the contracts have closed or are pending closing, even when the violation is wholly irrelevant or a lesser remedy might have sufficed.[199]

For the developer, a contract issue is not an isolated problem. The project contract form is going to be the same for all sales in the project, so there is a domino effect—if one contract is invalid, probably all of the contracts for that property are invalid. In *Atteberry*, for example, there were 178 listed plaintiffs seeking to represent a class of 2,000 purchasers.[200] In a down market, when the developer loses the contracts that formed the basis for the development budget and the financing, those contracts cannot be

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[197] 550 F.3d 1299 (11th Cir. 2008).

[198] *See* Stockton v. Mustique, LLC, No. 07-0310-WS-B, 2007 WL 2480244, *1 (S.D. Ala. Aug. 28, 2007). *But see* Bartley v. Merrifield Town Ctr., 580 F. Supp. 2d 495, 498–500 (E.D. Va. 2008) (anticipating the contrary decision by the Eleventh Circuit in the *Pugliese* case).

[199] *See supra* note 12.

[200] *See* Atteberry v. Maumelle Co., 60 F.3d. 415, 418 (8th Cir. 1995).

replaced. The result is a troubled asset and a bankrupt developer, not to mention some very lucky speculators. ILSA seems to assume that the developer can absorb the loss, whereas in truth those holding the bag seem to be the lenders, the buyers who cannot rescind their purchases because they contracted to buy their units more than two years earlier, and the condominium associations in the failed projects.

B. One Hundred Lot Exemption (15 U.S.C. § 1702(b)(1))

Notwithstanding the title in the Guidelines, the One Hundred Lot Exemption is for subdivisions with fewer than 100 nonexempt lots.[201] The statute[202] and its legislative history[203] are both clear that the lots exempt from ILSA do not count towards the number of lots for purposes of this exemption. If the project has 100 lots or more, but some of those are exempt from the statute (for example, as sales to builders), a 110-lot subdivision may have only ninety-nine or fewer nonexempt lots. The Guidelines point out that the developer bears the risk of being certain that all lots in excess of ninety-nine are exempt from ILSA because if they are not, the registration exemption is nullified "for prior and future sales."[204]

The ninety-nine lots do not need to be specifically identified in advance. Beyond that, the law is not clear. In *Grove Towers, Inc. v. Lopez*,[205] the court held that the developer failed to comply with ILSA, although he only built a ninety-eight-unit condominium, because he contemplated there would be 108 units when he entered into sales contracts and he marketed on that basis.[206] One cannot market ninety-nine units at a time and be exempt

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[201] *See* 15 U.S.C. § 1702(b)(1) (2006).

[202] *See id.* (referring to "lots which are not exempt under subsection (a) of this section"). HUD points out in the Guidelines that this does not apply to lots exempt under section 1702(a)(1) because those lots must be in a subdivision that contains fewer than twenty-five lots. *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,603 (Mar. 27, 1996).

[203] *See* H.R. REP. NO. 69-154 (1979); H.R. REP. NO. 96-706 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. 2317, 2347 (stating that the 1979 amendments "clarify that only non-exempt lots would be counted to reach the 100-lot threshold" in order to reserve a situation where HUD would have required a property report for an eighty-lot subdivision where fifty lots were exempt because they had homes on them and twenty lots were planned for commercial development).

[204] Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. at 13,604 (Mar. 27, 1996).

[205] 467 So. 2d 358 (Fla. Dist. Ct. App. 1985).

[206] *See id.*

serially. In *N & C Properties v. Windham*,[207] by reserving the right to build and market a second phase of development, the developer took the unit count over 100 for ILSA purposes even though he was only building and offering the first phase for sale.[208]

HUD has issued private advisory opinions confirming that piggyback exemptions can be structured properly. Obtaining an advisory opinion under 24 C.F.R. section 1710.17 is the only nearly-safe way to proceed. Curing a failure to satisfy the Improved Lots Exemption in advance by stopping the marketing at ninety-nine lots until construction has advanced to the stage that the developer can fix future contracts to comply with the Improved Lots Exemption may be impossible. The *Grove Towers* and *N & C Properties* cases required a prior conforming marketing plan.[209]

The *200 East Partners, LLC* court required the developer to have the One Hundred Lot Exemption and the Improved Lots Exemption contracts "in effect and completely valid" when the One Hundred Lot Exemption units were being sold.[210] Even when the developer followed that requirement, in *Gentry*, a federal court held that the seller's use of the Two-Year Exemption coupled with the One Hundred Lot Exemption was improper because the seller did not have a "legitimate business purpose" for using both exemptions,[211] and, therefore, the sole purpose for using the piggyback program was to evade ILSA requirements.[212]

C. Twelve Lot Exemption (15 U.S.C. § 1702(b)(2))

This section provides for an annual rolling exemption. Starting with the date of the first contract, there is an exemption if there are not more than twelve lot sales (i.e., contracts) in the subsequent twelve-month period.[213] Not only are those sales exempt, but the first twelve lot sales in the next twelve-month period are also exempt. The process repeats every year if there are twelve sales or fewer in the preceding twelve-month period. Once the exemption is lost, it is gone forever, even if sales in future years again

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[207] 582 So. 2d 1044 (Ala. 1991).

[208] *See id.*

[209] *See Grove Towers*, 467 So. 2d 358; *N & C Props.*, 582 So. 2d 1044.

[210] 200 East Partners, LLC v. Gold, 997 So. 2d 466, 468 (Fla. Dist. Ct. App. 2008).

[211] *See* Gentry v. Harborage Cottages-Stuart, LLLP, 602 F. Supp. 2d 1239, 1249 (S.D. Fla. 2009).

[212] *See id.*

[213] *See* 15 U.S.C. § 1702(b)(2) (2006).

fall below twelve.[214] The Guidelines provide that the developer may apply to HUD for a different twelve-month period than a calendar year, for example one that matches his fiscal year.[215]

D. Scattered Site Exemption (15 U.S.C. § 1702(b)(3))

The purpose of this exemption is to account for subdivisions that have noncontiguous parts with lots scattered here and there or for brokers who have a few lots in various parts of the subdivision.[216] Protection is afforded by requiring that the purchasers have an on-site visit prior to signing any contract.[217] There are several technicalities to this exemption. First, the subdivision—the area covered by a common promotional plan—must have noncontiguous sites.[218] The Guidelines define a site as an area having contiguous lots.[219] Contiguity of the sites or "parts"[220] of a subdivision is not broken by roads, parks, small bodies of water, or recreational facilities.[221] Once it is determined that there are noncontiguous sites, the next part of the test is that each of the sites has twenty lots or fewer.[222] If the common promotional plan or subdivision involves multiple sites that are not contiguous and each of the sites has no more than twenty lots, then sales to people who do an on-site visit before signing a contract are exempt from registration.[223]

E. Twenty Acre Lots Exemption (15 U.S.C. § 1702(b)(4))

The statutory language is straightforward, and no regulation exists for this exemption. However, HUD has added a couple of twists.[224] Since at least April 28, 1969, or such later time as the subdivision came into existence, the lots must have been at least twenty acres.[225] According to the Guidelines, one cannot consolidate two ten-acre lots into one twenty-acre

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[214] *See id.*

[215] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,605 (Mar. 27, 1996).

[216] *See* 15 U.S.C. § 1702(b)(3) (2006).

[217] *See id.*

[218] *See id.*; *see also* 24 C.F.R. § 1710.8(c) (2009).

[219] *See* 24 C.F.R. § 1710.1(b).

[220] *See id.* § 1710.8(a).

[221] *See id.* § 1710.8(b).

[222] *See id.* § 1710.8(a)(1).

[223] *See id.* § 1710.8(a)(2).

[224] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,605 (Mar. 27, 1996).

[225] *See* 24 C.F.R. § 1710.9 (2009).

lot or require purchasers to buy two contiguous ten-acre lots.[226] The exemption "applies to the entire subdivision," so every lot must meet the twenty-acre–size test.[227]

F. Single-Family Residence Exemption (15 U.S.C. § 1702(b)(5))

This registration exemption applies to lots in a subdivision where there is local government oversight of use and infrastructure, and the purchaser is protected by certain devices, such as an on-the-lot inspection before entering into any contract.[228] Note that although a condominium unit is a lot for purposes of ILSA, condominium units in a building containing more than four dwellings cannot qualify for this exemption.[229]

The statute,[230] the regulations,[231] and the Guidelines[232] provide an extensive number of provisions covering the exemption. These provisions must be read carefully. There are both subdivision and lot requirements.[233]

Subdivision Requirements

The subdivision must meet all local codes and standards.[234] There may be no offers of gifts, trips, dinners, or other promotional techniques to induce a visit to the subdivision by prospective purchasers.[235] According to the Guidelines—but not the statute or the regulations—the subdivision re-

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[226] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. at 13,605 (Mar. 27, 1996).

[227] *Id.*; *see also* De Luz Ranchos Inv., Ltd. v. Coldwell Banker & Co., 608 F.2d 1297 (9th Cir. 1979) (holding under a former five-acre lot exemption from ILSA that a transaction involving only sale of lots that were five acres or more was not exempt when there were other lots within subdivision less than five acres in size).

[228] *See* 15 U.S.C. § 1702(b)(5) (2006). ILSA originally exempted sales of lots where the purchasers made an on-site inspection before entering into a contract. Congress deleted this exemption after finding that an inspection alone did not adequately inform purchasers about the potential problems in buying the land, such as the availability of utilities. At least one-third of the complaints filed with HUD involved properties where the buyers made an on-site inspection. *See* H.R. REP. NO. 69-154; H.R. REP. NO. 96-706 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. 2317, 2346.

[229] *See* 24 C.F.R. § 1710.10(c)(2) (2009).

[230] *See* 15 U.S.C. § 1702 (b)(5) (2006).

[231] *See* 24 C.F.R. § 1710.10 (2009).

[232] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,605 (Mar. 27, 1996).

[233] *See* C.F.R. § 1710.10(b)–(c) (2009).

[234] *See* 15 U.S.C. § 1702(b)(5)(A)(i) (2006); 24 C.F.R. § 1710.10(b)(1) (2009).

[235] *See* 15 U.S.C. § 1702(b)(5)(G) (2006); 24 C.F.R. § 1710.10(b)(2) (2009).

quirements must be met from the beginning; once again, one cannot cure a problem.[236]

Lot Requirements

There are eight lot requirements, each of which must be met.[237] The lot must be in an area where the local government provides specific minimum legal standards for the development of subdivision lots and the lot must comply with those standards.[238] The regulations list the standards that local government must regulate: dimensions, plat approval and recordation, roads and access, drainage, flooding, water supply, and sewage disposal.[239] The lot must be zoned or covenanted for only single-family residences.[240] Although the statute is not completely clear,[241] the regulations only require the lots for which an exemption is claimed to meet this standard.[242]

The lot must be on a "paved" street that meets local government standards.[243] The regulations define paved as impervious hard surfaces, excluding hard-packed dirt and gravel. If the roads are not complete, their completion must be bonded or secured to the satisfaction of the local government. The roads must be maintained by either a unit of government or a homeowners association. In the latter case, the purchaser must receive a written disclosure, before signing a contract, of the estimated maintenance cost for the first ten years.[244] Potable water, sanitary sewage disposal, and electricity must be available on or with lines to the lot. If they are not, the local government must be obligated to supply them within 180 days after closing.[245] The utilities must be installed by the local government,[246] and the Guidelines make it clear that an obligation for the developer to complete installa-

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[236] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. at 13,605 (Mar. 27, 1996).

[237] *See* 24 C.F.R. § 1710.10(c) (2009).

[238] *See* 15 U.S.C. 1702(b)(5) (2006).

[239] *See* 24 C.F.R. § 1710.10(c)(3) (2009).

[240] *See id.* § 1710.10(c)(1).

[241] *See* 15 U.S.C. § 1702(b)(5)(A) (2006) (providing: "(i) the subdivision meets all local codes and standards, and (ii) each lot is either zoned for single family residences or, in the absence of a zoning ordinance, is limited exclusively to single family residences").

[242] *See* 24 C.F.R. § 1710.10(c)(2) (2009).

[243] *See* 24 C.F.R. § 1710.10(c)(3) (2009).

[244] *See id.* § 1710.10(c)(4).

[245] *See id.* § 1710.10(c)(5).

[246] *See id.*

tion is not adequate.[247] Developer's counsel ought to be aware of this requirement at the land-use-process stage because many jurisdictions impose the installation requirement on the developer in a subdivision improvements agreement. The regulations give the developer some leeway to supply septic tank approval before the closing if all earnest money deposits are escrowed.[248]

Closing with a transfer by deed must occur within 180 days of signing the purchase contract.[249] There must be a title policy or title opinion at closing, with any exceptions approved in writing by the purchaser before closing.[250] Finally, the purchaser or spouse must make a personal, on-the-lot inspection before any contract is signed, and the developer must make no offers of gifts, trips, dinners, or other promotional techniques to induce a visit to the lot.[251]

G. Mobile Home Exemption (15 U.S.C. § 1702(b)(6))

This exemption was added to ILSA in the 1979 amendments[252] and imposes a two-year obligation to complete, with the lot being sold by a different party than the one selling the mobile home.[253] Both the lot and home sellers are regulated—all deposits to either of them must be placed in escrow, to be released to the buyer unconditionally if the transactions are not completed within two years.[254] The homesite must provide all utilities and access by road, and the seller of the lot must deliver marketable title.[255] The Guidelines add the requirement that nothing restricts the purchaser's right to specific performance.[256]

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[247] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,606 (Mar. 27, 1996).

[248] *See* 24 C.F.R. § 1710.10(c)(5) (2009).

[249] *See id.* § 1710.10(c)(6).

[250] *See id.* § 1710.10(c)(7).

[251] *See id.* § 1710.10(c)(8).

[252] *See* Housing and Community Development Amendments of 1979, Pub. L. No. 96-408, 93 Stat. 1101 (1979) (codified as amended at 42 U.S.C. § 5301 (2006)).

[253] *See* 24 C.F.R. § 1710.11(a)(1) (2009).

[254] *See id.* § 1710.11(a)(1)(iii).

[255] *See id.* § 1710.11(a)(3).

[256] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,606 (Mar. 27, 1996).

H. Intrastate Exemption (15 U.S.C. § 1702(b)(7))

This exemption is intentionally narrow. Proposals in 1978 to extend the exemption to all land sales that were primarily intrastate in nature were defeated. The exemption was added to ILSA in 1979 to address the problems of in-state purchasers.[257] Both the statute and the regulations[258] contain extensive details of the requirements that must be met, including among them:

- The sale of lots must be intrastate in nature;
- The purchaser must make an on-the-lot personal inspection;
- The lot must be sold free and clear of liens and encumbrances;
- The developer must make certain written disclosures prior to the contract concerning utilities and infrastructure;
- There must be a seven-day rescission period after contract signing;
- The purchaser must have a written receipt of the developer's written disclosures of the cost to provide utilities to the lot before signing the contract; and
- The developer must make certain title disclosures, again before any contract is signed, about taxing districts and associations with lien rights.[259]

To be "intrastate in nature," all sales must be to residents of the state in which the land is located, unless the lots are exempt from the statute, the sales are exempt from registration as mobile homes, or the subdivision is exempt under the regulation because it has fewer than 300 lots within a standard metropolitan statistical area.[260]

The regulations repeat, and to some extent, expand upon these requirements.[261] For example, a lot is not sold free and clear of liens and encumbrances if it is subject to servitudes that do not apply uniformly to all lot owners.[262] An assessment that does not apply to the developer the same way

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[257] *See* H.R. REP. NO. 96-154 (1979); H.R. REP. NO. 96-706 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. 2317, 2346.

[258] *See* 15 U.S.C. § 1702(b) (2006); 24 C.F.R. § 1710.12 (2009).

[259] *See* 15 U.S.C. § 1702(b)(7)(A)–(B) (2006); 24 C.F.R. § 1710.13(a)–(b) (2009).

[260] *See* 15 U.S.C. § 1702(b)(8) (2006).

[261] *See* 24 C.F.R. § 1710.12 (2009).

[262] *See id.* § 1710.12(a)(4)(v).

it does to any other owner violates this requirement, even if the distinction is one that the state law permits. For example, in Florida condominium law, the developer may be freed from actually paying full assessments in a condominium by capping the assessment liability of purchasers and agreeing to be bound to fund any accrued operating deficit.[263] Another elaboration of the regulations is that the developer must release control of the association no later than when a majority of the planned lots are sold.[264] Under some state condominium or subdivision laws, the developer might have the right to control the association for a longer period of time.[265]

Finally, the Guidelines require all sales to be to intrastate buyers—a registered lot sold to a non-resident of the state "would make the entire subdivision ineligible for the intrastate exemption."[266] The Guidelines provide a sample form of an acceptable intrastate exemption statement.[267]

I. MSA Exemption (15 U.S.C. § 1702(b)(8))

This exemption applies where the entire subdivision contains fewer than 300 lots, if the purchasers are within the same standard metropolitan statistical area.[268] The purpose is to extend the intrastate-type exemption from registration to include coherent areas divided by a state line. Some of the requirements are common to the intrastate exemption, such as a transfer of title free and clear of certain liens and encumbrances, a personal on-the-lot inspection, disclosures about utilities and other infrastructure, and good-faith cost estimates for utilities.[269] The developer must also agree, in a writing delivered to the purchaser, to designate a person in the purchaser's state as agent for service of process, and the developer must consent to the jurisdiction of that state and otherwise affirm compliance with the provisions of the exemption.[270]

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[263] *See* FLA. STAT. ANN. § 718.116(9)(a) (West 2005 & Supp. 2009).

[264] *See* 24 C.F.R. § 1710.12(a)(4)(v) (2009).

[265] In Florida, for example, a condominium developer may control the association for up to three years after 50% of the units have been sold. *See* FLA. STAT. ANN. § 718.301(1)(a) (West 2005 & Supp. 2009).

[266] *See* Guidelines to the Interstate Land Sales Regulation Program, 61 Fed. Reg. 13,596, 13,606 (Mar. 27, 1996).

[267] *See id.* at 13,607–08.

[268] *See* 15 U.S.C. § 1702(b)(8) (2006).

[269] *See id.* § 1702(b)(8)(B)–(D).

[270] *See id.* § 1702(b)(8)(E)–(F).

J. Regulatory Exemptions (15 U.S.C. § 1702(c))

ILSA permits HUD to adopt other exemptions from registration by regulation if enforcement is not necessary for the public interest because of the small amount involved or the limited character of the offering.[271] Pursuant to this authority, HUD regulations allow the following partial exemptions,[272] subject to certain limitations to prevent abuse:

(1) The sale of lots, each of which will be sold for less than $100, including closing costs, if the purchaser will not be required to purchase more than one lot;

(2) The lease of lots for a term not to exceed five years if the terms of the lease do not obligate the lessee to renew;

(3) The sale of lots to a person who is engaged in a bona fide land sales business;[273]

(4) The sale of a lot to a person who owns the contiguous lot which has a residential, commercial, or industrial building on it;

(5) The sale of real estate to a government or government agency;[274] and

(6) The sale of a lot to a person who has leased and resided primarily on the lot for at least the year preceding the sale.

VII. EVASION LIMITATION ON FULL AND PARTIAL EXEMPTIONS

As previously mentioned, section 1702 provides for full exemption from ILSA, partial statutory exemption (from registration and possibly more), and partial regulatory exemption.[275] The two statutory exemption subsections are available "[u]nless the method of disposition is adopted for the purpose of evasion of this chapter."[276] It is not clear how much of a limitation this anti-evasion provision places on a developer's ability to plan to avoid coverage by ILSA. Judging from the common use of savings and severability clauses in form purchase contracts, it is clear that developers freely admit their intent to be exempt from ILSA and to allow virtually any

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[271] *See* 15 U.S.C. § 1702(1) (2006).

[272] *See* 24 C.F.R. § 1710.14 (2009).

[273] Compare to the full exemption for sales to builders at 15 U.S.C. section 1702(a)(7) (2006), discussed above.

[274] Compare to the full exemption for sales by governments and government agencies at 15 U.S.C. section 1702(a)(5) (2006), discussed above.

[275] *See* 15 U.S.C. § 1702 (2006).

[276] *Id.*

interpretation of their contract necessary to accomplish an exemption. The court in *Pilato v. Edge Investors, L.P.*[277] held that a severability clause indicating an intent that the contract be exempt from ILSA "does [not] reveal an intent solely to evade ILSA's disclosure requirements."[278]

In *Gentry v. Harborage Cottages-Stuart, LLLP*,[279] a federal court held that a seller's use of the Two-Year Construction Exemption coupled with the One Hundred Lot Exemption was improper because the seller did not have a "legitimate business purpose" for using both exemptions.[280] In this case, the seller used one purchase agreement for the first thirty-six lots that fulfilled the requirements for the Two-Year Construction Exemption and used a different purchase agreement for the remaining ninety lots that fulfilled the One Hundred Lot Exemption requirement.[281] The *Gentry* court held that the seller was not entitled to either exemption because the evidence indicated that the sole purpose for using two different purchase agreements was to evade ILSA requirements.[282]

The court reached the same conclusion in *200 East Partners, LLC v. Gold*,[283] stating that a plan to sell ninety-nine units under the One Hundred Lot Exemption and then sell the remaining units under the Two-Year Construction Exemption was a failure to perfect the exemption at the time of the plaintiff's contract.[284] In so concluding, the court disagreed with an advisory opinion from HUD that the planned disposition satisfied exemption requirements.[285]

Although these two cases reached a similar conclusion on a similar set of facts where the developer tried to piggyback the same two exemptions, their analysis is completely different. *Gentry* would allow the exemption if the developer had an independent business reason for proceeding as it did.[286] What if, for example, the developer did not push the partial exemption to the full ninety-nine lots, but instead only for so many as were necessary to get the project to a time frame where the developer could, in good

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[277] 609 F. Supp. 2d 1301 (S.D. Fla. 2009).

[278] *Id.*

[279] 602 F. Supp. 2d 1239 (S.D. Fla. 2009).

[280] *Id.* at 1249.

[281] *See id.*

[282] *See id.* at 1239.

[283] 997 So. 2d 466 (Fla. Dist. Ct. App. 2008).

[284] *See id.* at 469.

[285] *See id.*

[286] *See Gentry*, 602 F. Supp. 2d 1239.

faith, promise to complete construction within two years? On the other hand, the *200 East Partners* case, requiring that the exemption be fully implemented at the point of each contract, would only permit exemption if the first units, rather than the last units, were made exempt under the two-year promise to complete construction until fewer than 100 units remained.[287] This is actually what the developer did in *Gentry*.[288]

The non-evasion requirement is not specific to the One Hundred Lot or the Two-Year Construction Exemption—it qualifies all of the full and partial exemptions.[289] It is hard to see how there can be a "legitimate business purpose" other than taking advantage of the exemption when one looks at such exemptions as that provided in section 1702(a)(2) for developers that promise to construct the improvements within two years from the date of contract, where the promise is compelled by market purpose other than securing the exemption.

At least one case suggests that what is perhaps a better approach to the anti-evasion analysis is whether or not an element of fraud or bad faith exists. *Atteberry v. Maumelle Co.*[290] required that the plaintiffs prove fraudulent intent, such as a lack of intent by the developer to fulfill its contractual obligations:

> Even a good-faith use of the enumerated exceptions arguably could be viewed as an evasion of the Act, but we think the phrase "adopted for the purpose of the evasion of this chapter" must be read more narrowly and confined to use of the enumerated exceptions with fraudulent intent.[291]

Reading between the lines, an insincere promise to complete construction seems to have been behind the voluntary decision by the developer to drop a claim for exemption in *Pigott v. Sanibel Development, LLC*.[292] The court pointed out that the Two-Year Construction Exemption does not apply if the purpose of disposition is evasion of the statute.[293] In *Sea Shelter IV, LLC v. TRG Sunny Isles V, Ltd.*,[294] the court allowed the case to proceed on

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[287] *See 200 East Partners*, 997 So. 2d 466.

[288] *See Gentry*, 602 F. Supp. 2d 1239.

[289] *See* 15 U.S.C. § 1702 (2006).

[290] 60 F.3d 415 (8th Cir. 1995).

[291] *Id.* at 421 (quoting 15 U.S.C. § 1702(a) (2006)).

[292] 576 F. Supp. 2d 1258 (S.D. Ala. 2008).

[293] *See id.* at 1269 (quoting 15 U.S.C. § 1702(a)(2006)).

[294] No. 08-21767-CIV, 2009 WL 692469 (S.D. Fla. Mar. 17, 2009).

the basis that the seller evaded ILSA by fraudulently inducing purchaser to enter a contract by stating that the unit would be completed in two years, although the seller knew at the time of signing that it would not be completed within that time frame.[295]

VIII. SECTION 1703 - PURCHASERS' STATUTORY REMEDIES

Section 1703 is the heart of ILSA. There are five subsections in section 1703, (a) through (e), with subsection (a) divided into two substantive subsubsections. Subsection (a)(1) is the registration and disclosure provision; subsection (a)(2) is the anti-fraud part of ILSA. Before the substantive provisions of section 1703 apply, however, an initial determination of jurisdiction must be made. The prohibited activities of section 1703(a) involve the use, directly or indirectly, "of any means or instruments of transportation or communication in interstate commerce, or of the mails."[296] Section 1703(a) is jurisdictional. In *Paniaguas*, the court held that billboard signs along a federal highway satisfied this requirement; the use of telephone and facsimile transmissions across state lines presented a genuine issue of material fact; and stories printed about the subdivision in a newspaper in an adjacent state, not being paid advertisements, did not constitute using transportation, communications, or the mail in interstate commerce.[297]

A. The Statement of Record and Property Report Requirements

The specific details of a statement of record and property report are discussed in detail in the next Section. Section 1703(a)(1)(A) requires the statement of record to be filed with HUD,[298] and section 1703(a)(1)(B) requires the consumer to be furnished with a property report "in advance of the signing of any contract or agreement."[299] Although the author is not aware of any cases where the meaning of "delivery in advance of the signing of any contract" has been interpreted, developers should separate the delivery of the property report from the contract signing by at least a sufficient amount of time for the purchaser to have the opportunity to read the property report.[300]

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[295] *See id.* at *6 n.7.

[296] *See* 15 U.S.C. § 1703(a) (2006).

[297] Paniaguas v. Aldon Cos., Inc., No. 2:04-CV-468-PRC, 2006 WL 2568210 (N.D. Ind. Aug. 12, 2006).

[298] *See* 15 U.S.C. § 1703(a)(1)(A) (2006).

[299] *See id.* § 1703(a)(1)(B).

[300] Legislative history is clear that Congress did not mean "in advance" to be "at the time of" signing the contract.

Subsections 1703(a)(1)(C) and (D) are the provisions that can catch a developer off guard. Their requirements are simple. Subparagraph (C) requires that the statement of record and property report must not contain an untrue statement of a material fact or omit to state a material fact. Subparagraph (D) does not permit any other material of the developer to be inconsistent with the information required in the property report. The details about a project may change from time to time, especially during the preconstruction and construction phases. The developers should track carefully all changes in all documents, advertisements, and promotional materials to assure that timely amendments are made to the statement of record and the property report. Subparagraph (C) is clearly unforgiving if the fact is material, whether or not the buyer knew about the fact or relied on the wrong statement, and without regard to any intent to deceive on the part of the developer. Applying the same analysis to subparagraph (D) should produce the same result.

In *Burns v. Duplin Land Development, Inc.*,[301] the failure of the property report to state that the lot was in a flood plain—a required and material fact—resulted in summary judgment for the purchaser, even though the developer disclosed the flood plain in numerous other documents and verbally, and the purchasers admitted they knew the lot was in a flood plain. The developer's counsel raised every possible defense, and the federal district court shot every defense down, concluding that the plain language of section 1703(a)(1)(C) does not require reliance.[302] Nor does it require scienter.[303] And materiality only relates to the nature of the fact, not the misrepresentation or omission, because the standard for materiality is the hypothet-

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> If the report were provided, a few seconds before or virtually simultaneously with the contract documents to be executed, this would not meet the requirements of the Act. Developers and their agents should be clearly aware of the role the Committee intends the report to play and the importance and value which the Committee places on the property report in designing their sales practices and procedures.

H.R. REP. NO. 69-154, at 36 (1979); H.R. REP. NO. 96-706, at 36 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. 2317, 2352.

[301] 621 F. Supp. 2d 292 (E.D. N.C. 2009).

[302] *See id.* The court not only looked to other ILSA cases for its analysis, but also to claims under section 12(a)(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(a) (2006), such as Dunn v. Borta, 369 F.3d 421 (4th Cir. 2004).

[303] *See* Gibbes v. Rose Hill Plantation Dev. Co., 794 F. Supp. 1327, 1334 ("In order to prevail on an ILSA claim [under section 1703(a)(1)(C)], a plaintiff does not need to prove that a defendant intended to defraud or deceive or that the plaintiff relied on the property report.").

ical purchaser, not the actual one.[304] The only potential good news for the developer is that a violation of section 1703(a)(1) does not result in an automatic right to rescind the contract, but it rather falls under the court's general remedial powers in section 1709(a), discussed below.[305] Reliance was also not a required element under the predecessor to section 1703(a)(1).[306]

B. Anti-Fraud

Section 1703(a)(2) says that the developer cannot commit fraud or deceit in the sale of lots; obtain money by making false or misleading statements; or represent that utilities, roads, and amenities will be provided without contractually committing to their construction.[307] One important fact about section 1703(a)(2) is that lots that are partially exempt under section 1702(b) are subject to section 1703(a)(2) even though they are not subject to section 1703(a)(1) (requiring a statement of record, property report, both of which must be true, and prohibiting inconsistent advertisements).[308] Another important fact is that if a lot is sold pursuant to a fraudulent statement of record or property report,[309] the three-year statute of limitations runs from the date the sales contract is signed. In contrast, the period for section 1703(a)(2)(B), which broadly prohibits an offer, sale, or lease by means of *any* untrue statement or omission of a material fact, regardless where found, runs from the time that the violation is discovered or should have been discovered with "the exercise of reasonable diligence."[310] Section 1703(a)(2)(B) prohibits with respect to "any information" the same basic conduct that section 1703(a)(1)(C) prohibits with respect to the statement of record or the property report.

Sections 1703(a)(2)(A) and (C) specifically prohibit fraud. Section 1703(a)(2)(B) is an interesting provision because it merely prohibits the use of untrue statements of material facts and omissions. It is not clear if, reasonable reliance is required by section 1703(a)(2)(B) because it is part of

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[304] *See id.* (citing Prebil v. Pinehurst, Inc., 638 F. Supp. 1314, 1317 (D. Mont. 1986)).

[305] *See* 15 U.S.C. § 1703(a)(1) (2006).

[306] *See* Hester v. Hidden Valley Lakes, Inc. 495 F. Supp. 48, 53 (N.D. Miss. 1980). The case was brought under then 15 U.S.C. section 1709(b)(2), which provided a cause of action for an untrue material statement or omission in a property report akin to present section 1703(a)(1)(C).

[307] *See* 15 U.S.C. § 1703(a)(2) (2006).

[308] *See id.*

[309] *See id.* § 1703(a)(1)(C).

[310] *See* 15 U.S.C. § 1711(a) (2006).

anti-fraud regulation.[311] Fraud claims typically require reasonable reliance,[312] although at least one court held that reliance was not necessary for the direct fraud prohibitions of sections 1703(a)(2)(A) and (C), may not be necessary for an omission claim under section 1703(a)(2)(B), but is necessary to show a violation of section 1703(a)(2)(B) as a claim of misrepresentation.[313] The courts in *Weaver v. Opera Tower, LLC*[314] and *Dongelewicz*[315] both required reliance for a section 1703(a)(2)(B) claim, but the court in *Prebil v. Pinehurst, Inc.* did not.[316] The House Conference Report for the 1979 amendments, which drafted the anti-fraud provisions in their current form, makes it clear that the drafters considered section 1703(a)(2)(B) to be under the fraud umbrella, but "the purchaser's actual reliance would no longer have to be an element of proof."[317]

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[311] *See* Dongelewicz v. First E. Bank, 80 F. Supp. 2d 339, 348 (M.D. Pa. 1999).("In other words, subparagraphs [1703(a)(2)] (A), (B), and (C) prohibit fraud.").

[312] FED. R. CIV. P. 9(b) requires a precise pleading of time, place, and content of statements made, persons making them, the manner in which plaintiff was misled, and the benefit obtained by the defendant. There is a detailed discussion of the reliance issue in *Garcia v. Santa Maria Resort, Inc.*, 528 F. Supp. 2d 1283, 1294 (S.D. Fla. 2007). Because claims under section 1703(a)(2)(B) involve documents and circumstances not involving the statement of record or property report, there are contractual issues to consider in many cases. 15 U.S.C. § 1703(a)(2)(B). The Florida Condominium Act, FLA. STAT. ANN. § 718.504 (West 2005 & Supp. 2009), for example, provides for public disclosures in a prospectus with mandatory conspicuous language that the buyer cannot rely on oral representations and that the buyer can only rely on the contract and documents delivered pursuant to the prospectus. The court in *Garcia* concluded that this disclosure, together with a standard integration clause in the purchase contract, made it unreasonable for the plaintiff to rely on alleged oral statements by the defendant as a matter of law. *See Garcia*, 528 F. Supp. 2d at 1289–97.

[313] *See* Gibbes v. Rose Hill Plantation Dev. Co., 794 F. Supp. 1327, 1336 (D.S.C. 1992).

[314] No. 07-23332-CIV, 2008 WL 4145520 (S.D. Fla. Aug. 1, 2008).

[315] *See Dongelewicz*, 80 F. Supp. 2d at 348. The court reached the conclusion that "subparagraphs (A), (B), and (C) prohibit fraud" by correctly characterizing subparagraphs (A) and (C) as the "employment of fraudulent means" and put "making a false statement or material omission" in the same pot. *Id.* But one can make a false statement or material omission by negligence, so it is unclear why the court would conclude that subparagraph (B) necessarily involves fraud.

[316] 638 F. Supp. 1314 (D. Mont. 1986).

[317] H.R. REP. NO., at 35 (1979) 96-154; H.R. REP. No. 96-706, at 35 (1979) (Conf. Rep.), *reprinted in* U.S.C.C.A.N. 2317, 2351.

C. Sales Contracts

Subsections (b) through (e) deal with sales contract requirements.[318] The fact that they are in section 1703 along with the foundation rules of subsection (a) (registration and anti-fraud) leads to the confusion at the heart of the *Pugliese* line of cases discussed above.[319] Subsection (b) gives the buyer seven days to revoke the contract; subsection (c) says that if a required property report is not delivered before the contract is signed by the buyer, then the buyer has two years to revoke the contract.[320]

Subsection (d) requires a contract to include certain provisions that provide a legal description of the lot "in a form acceptable for recording," that give the buyer a twenty-day notice and right to cure a default, and that limit the amount of damages against the buyer to the greater of 15% of the purchase price or actual damages suffered by the seller.[321] If the contract does not contain those provisions, the buyer must receive a warranty deed within 180 days from signing the contract or she has two years to revoke the contract.

Subsection (d)(1), which requires that the contract provide a legal description in a form capable of recording, can be a problem if the condominium declaration has not yet been recorded and the contract description refers to the unit by reference to the declaration. The buyer would argue that the condominium was not yet created, and therefore the legal description was not in a form acceptable for recording.[322] This argument is a stretch if the description in the contract matches the description requirements of the statute or the declaration, since there is no other way to describe a legal parcel that is strictly a creature of statute. However, there is an underlying belief at HUD that recording a contract will protect the rights of a buyer in many states against intervening claims. In a registered project, the developer must state if the sales contract may be recorded, and if not, why not.[323] The sales contract must also contain this warning in capital letters enclosed in a box: "Unless your contract or deed is recorded you may lose your lot through the

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[318] *See* 15 U.S.C. § 1703(b)–(e) (2006).

[319] *See supra* text accompanying notes 198–202.

[320] *See* 15 U.S.C. § 1703(b)–(c) (2006).

[321] *See id.* § 1703(d).

[322] For allegations that the developer violated section 1703(d)(1), see, for example, *Leaton v. Paramount Lake Eola, L.P.*, No. 6:09-CV-94-Orl-28KRS, 2009 WL 1396293, at *2, n.3 (M.D. Fla. May 18, 2009); *Jankus v. Edge Investors, L.P.*, 619 F. Supp. 2d 1328, 1332 (S.D. Fla. 2009); and *Palmer v. Ocean Club at Biloxi, Ltd.*, No. 1:08CV236H50-JMR, 2008 WL 4934045, at *1 n.2 (S.D. Miss. Oct. 21, 2008).

[323] *See* 24 C.F.R. § 1710.19(d)(1)(ii)–(iii) (2009).

claims of subsequent purchasers or subsequent creditors of anyone having an interest in the land."[324]

An interesting issue has arisen under subsection (d)(3) (which limits the seller's recovery against a defaulting buyer): Can the developer contract for a right to specifically enforce the contract against the purchaser without violating ILSA? In *Degirmenci v. Sapphire-Fort Lauderdale, LLLP*,[325] the purchase contract contained the required damages limitation, but also provided the developer with the remedy of specific performance against the purchaser. The plaintiff's attempt to have the court declare that remedy invalid was rebuffed on two related grounds—ILSA does not state that the 15%-purchase-price retention is the only right given to the developer, and the language of section 1703(d) is a limitation on damages, and "[s]pecific performance is a remedy, not damages."[326]

The reported case only involves orders on motions to dismiss.[327] It will be interesting to see if the developer counterclaims for specific performance, and if the court grants that remedy if it finds the purchaser to have been in default of her contract. Specific performance for a buyer of real property requires the payment of the purchase price at closing and little more. This same issue has been reserved for trial in *Stefan v. Singer Island Condominiums Ltd.*,[328] a case where the developer claimed that the purchaser only has a right to a refund of the excess deposits if the developer elected to cancel the contract rather than to seek specific performance.

Subsection (e) says that if the seller violates any of the sales contract requirements in (b) through (d), the buyer is entitled to a return of all of his money if, within the applicable period, the buyer tenders back a deed to the seller and returns the property in substantially the same legal and physical condition as he received it.[329] There is no regulatory explanation for what constitutes all of the money paid by the buyer, and developers would argue that all of the money cannot mean payments made for custom orders. However, there is no such carve-out in ILSA or its regulations. In *Engle Homes,*

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[324] *See id.* § 1710.109(d)(1)(iv).

[325] No. 09-60089, 2009 WL 2475457 (S.D. Fla. July 1, 2009).

[326] *See id.* at *5.

[327] The court dismissed plaintiff's claims seeking to enforce the refund promise made under ILSA, saying that once the promise was made, the requirements of ILSA for an exemption were satisfied and thereafter the buyer did not have a claim under ILSA, but only a state law claim for breach of contract. *See id.* at *4.

[328] No. 08-80039-CIV, 2009 WL 1515529 (S.D. Fla. May 28, 2009).

[329] *See* 15 U.S.C. § 1703(e) (2006).

Inc. v. Krasna,[330] a developer failed in its attempt to offset against the refund the benefit to the consumer of living in the house for two years. However, if the buyer is unable to convey the lot back in its original condition, the developer may not refuse to accept it but may deduct the diminished value.[331]

D. Two-Year Limitations Period

The subsections of section 1703 contain limitations periods during which the consumer must assert applicable rights: seven days in the case of section 1703(b), and two years from contract in the case of sections 1703(c) and (d).[332] The seven-day and two-year limitations periods have loosely been referred to as a "statute of limitations,"[333] although technically they are not because they do not "prescribe the date *by which suit must be filed.*"[334] ILSA's statute of limitations is set forth in section 1711.[335] However, the periods in section 1703 require action by the buyer and cases have addressed these questions: How do these time periods relate to the statute of limitations in section 1711? How stringent are these time periods? What if the developer never stated the revocation right in the contract as required by sections 1703(b) and (c)?

Generally, section 1703 states periods during which the buyer must assert his revocation right in some effective form of notice to the seller, while section 1711 states the time by which the buyer must file an action to enforce those rights.[336] Courts have generally been strict about applying the limitations periods—not allowing "equitable tolling"—and some have not made available the revocation remedy to one who brings an action for relief under section 1709 after the section 1703 period has expired, but before the section 1711 statute of limitations period has run.[337]

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[330] 766 So. 2d 311 (Fla. Dist. Ct. App. 2000).

[331] *See* 24 C.F.R. § 1715.5 (2009).

[332] *See* 15 U.S.C. § 1703 (2006).

[333] *See, e.g.*, Orsi v. Kirkwood, 999 F.2d 86, 89 (4th Cir. 1993).

[334] Jankus v. The Edge Investors, 619 F. Supp. 2d 1328, 1336 (S.D. Fla. 2009) (emphasis in original).

[335] *See* 15 U.S.C. § 1711 (2006).

[336] *See id.* § 1711; *see also* Taylor v. Holiday Isle, LLC, 561 F. Supp. 2d 1269, 1273 (S.D. Ala. 2008); Tait v. 430 Hibiscus, L.P., No. 08-80806-CIV, 2009 WL455439, at *2 (S.D. Fla. Feb. 23, 2009); Bush v. Bahia Sun Associates, No. 8:07-CV-1314-T-17-EAJ, 2009 WL 963133, at *12 (M.D. Fla. Apr. 8, 2009).

[337] *See* Werdmuller von Elgg v. Carlisle Devs., Inc., No. 6:09-CV-132-ORL-31KRS, 2009 WL 961144, at *2 (M.D. Fla. Apr. 7, 2009).

The issue of whether or not the limitations period applies has proved more problematic if the court focuses on the fact that the developer did not provide in the contract that the buyer has two years in which to exercise its rescission rights, as required by sections 1702(b) and (c). The court in *Taylor* analyzed the section-1703-limitations-period issues extensively and concluded that the failure to include the disclosure does not extend the limitations period because "[n]othing in the statute says that the two-year period prescribed by [section] 1703(c) runs from the date that purchasers discovered or should have discovered they had a right to rescind."[338]

The court in *Plaza Court, L.P. v. Baker*,[339] disagreed with *Taylor*. Following a decision in *Jankus v. Edge Investors, L.P.*,[340] which the court later withdrew, *Plaza Court* equated the developer's failure to make the disclosure to the developer's waiver of the condition precedent to revocation that the buyer act within two years from the date of contract. However, the court in *Venezia v. 12th Division Properties, LLC*[341] reviewed the conflicting cases of *Taylor* and *Jankus* (subsequently withdrawn) in detail and came down on the side of *Taylor*.

No developer that believes that it is exempt from ILSA will make an unqualified disclosure in the contract of the right to rescind, which applies only if the developer is not exempt. The *Plaza Court* decision would limit the two-year limitations period to those situations where the developer discloses that it is intentionally violating ILSA by not providing a property report and the consumer has a rescission right. Or perhaps the courts would allow a developer's contract to say that it believes it is exempt from ILSA, but if the developer is wrong, the consumer has a two-year right of rescission because the developer did not deliver a property report. Viewed either way, the *Taylor* court seems to have the better argument based on statutory construction rules because ILSA easily could have said that the two-year limitations period runs from the time of disclosure rather than from the time of contract.[342] Section 1703 does not require that the plaintiff show that the developer's failure to make a disclosure or include a contract provision

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[338] *Taylor*, 561 F. Supp. at 1274–75.

[339] *See* Plaza Court, L.P. v. Baker-Chaput, Nos. 5D08-899, 5D08-1188, 2009 WL 1809921 (Fla. Dist. Ct. App. 2009).

[340] *See id.* at 1337–38.

[341] No. 3:09-CV-430, 2009 WL 2366417 (M.D. Tenn. July 30, 2009).

[342] *See* Taylor, 561 F. Supp. at 1269. Congress has made those distinctions in ILSA. Compare, for example, section 1711(a), where the statute of limitations runs from the discovery of the fraud, to section 1711(b), where it runs from the date of contract.

actually adversely affected the buyer.[343] As the court correctly observed in *Pigott*, "[u]nder the plain terms of [ILSA], if the Project is not exempt, then [developer's] failure to furnish a property report conferred upon plaintiffs an absolute right to back out of the transactions (for good reasons, bad reasons or no reasons) at any time within a two-year period."[344]

In cases where the developer's failure to disclose the rescission right is relevant to the plaintiff's situation, a court could use equity under a section-1709 action brought within the section 1711 statute of limitations period to extend the revocation right. In *Plant v. Merrifield Town Center L.P.*,[345] the court used this procedure, softening the hard line taken in *Werdmuller von Elgg v. Carlyle Developers*[346] that seems to preclude any equitable grant of rescission outside of section 1703. The *Plant* court justified its conclusion that it was not undermining the two-year limitations period in section 1703 by pointing out that it is an "*automatic, unconditional* right," whereas equitable relief under section 1709 "must be supported by proper proof."[347] The court in *Murray v. Holiday Isle, LLC*[348] reached a similar result by allowing the purchaser to assert a claim for damages against the developer on the theory that the contract's failure to advise the buyer of his rescission right caused him not to exercise that right in a timely manner.[349]

IX. SECTIONS 1704–1708 - THE DISCLOSURE DOCUMENTS

Although almost all of the litigation concerning ILSA has focused on the exemptions, ILSA is fundamentally a registration and disclosure statute. The registration document, the statement of record,[350] consists of several parts—a property report, which is the document that the developer must deliver to the consumer before the purchase contract is signed,[351] and addi-

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[343] *See* 15 U.S.C. § 1703 (2006).

[344] Pigott v. Sanibel Dev., LLC, 576 F. Supp. 2d. 1258, 1264 (S.D. Ala. 2008).

[345] Nos. 1:08CV374, 1:08CV566, 2009 WL 2225415 (E.D. Va. July 21, 2009).

[346] No. 6:09-cv-132-Orl-31KRS, 2009 WL 961144 (M.D. Fla. Apr. 7, 2009).

[347] *Id.* at *3 (emphasis in original).

[348] 620 F. Supp. 2d 1302 (S.D. Ala. 2009).

[349] *See id.* at 1309.

[350] 15 U.S.C. section 1705 (2006) itemizes the information required in the statement of record. HUD elaborates considerably on this list in the regulations in 24 C.F.R. sections 1710.105 through 1710.310.

[351] 15 U.S.C. section 1707 (2006) gives HUD the authority to determine which information in the statement of record should be included in a property report, which it does in 24 C.F.R. sections 1710.102 through 1710.118.

tional information that is not handed out automatically but is nonetheless available to the public.[352]

A recent article mentions some reasons why a developer might prefer to register with HUD and some reasons why a developer might pursue an exemption to avoid registration.[353] Two common reasons to rely on an exemption are the cost involved in putting together the registration and the delay to market caused by the review process.[354]

A typical developer will not view these as adding value to the product. These are issues inherent in every registration process. In states such as Florida that have their own extensive registration and disclosure processes not certified by HUD, the process may be substantially equivalent so that one disclosure satisfies both jurisdictions,[355] the developer may be especially resistant. Developers also complain about adding another bulky document that they must give to a consumer, which salespeople tend to resist. However, a typical property report may be only twenty-five to thirty-five pages and contain practical information in short, readable paragraphs. Much of this information ought to be of interest to a buyer, such as: a description of the closing documents; limitations on the buyer's right to use the lot; ownership and maintenance of the roads; utility service providers; recreational amenities; and local public services, such as police and fire protection, schools, medical facilities, and shopping. It is ironic, therefore, that at least one commentary, given credibility by citation in *George v. Lochen-*

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[352] *See* 15 U.S.C. § 1704(d) (2006).

[353] *See* Adam K. Feldman, *The Interstate Land Sales Full Disclosure Act: An Overview*, COLO. LAW. Aug. 2009, at 97–99.

[354] The period for review is thirty days or less, but there is often a period of comment and response that can easily take the filing process out to sixty days or more; the time for counsel to collect the necessary information and documents and put the Statement of Record together can add considerably to that time. *See id.* at 98–99.

[355] 15 U.S.C. section 1708 (2006) permits a state to request HUD to certify that its registration and disclosure laws are substantially equivalent to the ILSA requirements, so that those documents can be filed with HUD and will constitute the statement of record. Certification procedures are found at 24 C.F.R. section 1710.500 (2009). HUD lists four states as having effective certification in the Questions and Answers document on its website: Arizona, California, Florida, and Minnesota. See Full Disclosure Act Questions and Answers, http://www.hud.gov/offices/hsg/ramh/ils/ilsdevga.cfm (last visited Sept. 25, 2009). However, the inclusion of Florida is an error, and at this time Florida subdivisions that do not have an exemption must file a separate registration with HUD and cannot use the Florida registration and prospectus for condominiums as a substitute. *See* FLA. STAT. ANN. § 718.501–.509 (West 2005 & Supp. 2009) (showing that there is no registration and disclosure for subdivisions).

Heath Properties,[356] states that the reason ILSA contains so many exemptions is "[b]ecause of the complexity of the act's disclosure ments."[357]

The regulations concerning the form and content of the statement of record and property report are very specific,[358] and this Article will not review the individual requirements in detail. Prior to the 1979 amendments, when section 1709(b)(2) created a cause of action for untrue statements or omissions of material facts "required to be stated in [a property report],"[359] the court in *Hester v. Hidden Valley Lakes, Inc.*[360] held that the developer would not be liable under ILSA for misstatements or omissions "not required by specific HUD regulations."[361] The regulations, then as now, required the developer to "disclose all pertinent facts," with potential consequences made clear "even though not specifically asked for in the format and the instructions."[362] However, the court interpreted this to be a gloss on the quality of specifically required disclosures rather than an open door to expand the scope of the disclosures.[363] The standard used by the court to test the significance of the misstatements and omissions was whether "a reasonable investor might have considered these omitted facts to be important ones in making his decision to invest."[364]

One significant element of the property report is that the developer is not permitted to publish any advertising or promotional material that contradicts the information in the property report.[365] The intended scope of this

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[356] No. 1:07-CV-426, 2008 WL 4377797 (W.D. Mich. Sept. 23, 2008).

[357] *See* 1 PAUL BARRON & MICHAEL A. BERENSON, FEDERAL REGULATION OF REAL ESTATE AND MORTGAGE LENDING § 3.3 (4th ed. 2007).

[358] *See* 24 C.F.R. § 1710.100-.219 (2009).

[359] *See* 15 U.S.C. § 1709(b)(2) (1976).

[360] 495 F. Supp. 48 (N.D. Miss. 1980).

[361] *Id.* at 53.

[362] 24 C.F.R. § 1710.102(f). Although this subsection addresses "language," subsection (j)(1) says the following with respect to the "additional information" that is required:

> In addition to the information expressly required to be stated in the Statement of Record, there shall be added, and the Secretary may require, such further material information, documentation and certification as may be necessary in the public interest and for the protection of purchasers or necessary in order to make the statements not misleading in the light of circumstances under which they are made.

Id. at § 1710.102(j)(1).

[363] *See* Hester, 495 F. Supp. at 53.

[364] *Id.* at 52.

[365] *See* 15 U.S.C. § 1703(a)(1)(D) (2006).

prohibition, as described in the 1979 amendments House Conference Report, is instructive: "For example, it would be contradictory to advertise wooded lots or to picture wooded hillsides when information in the property report reveals that timber rights to the land are under option or have been sold, and that the exercise of such rights would denude the property."[366]

The property report must be written in "plain, concise, everyday language which can be readily understood by purchasers who are unfamiliar with real estate transactions."[367] HUD requires clarity, not length. With respect to basic infrastructure, including roads, water, sewer, electricity, telephone service and energy sources, the disclosure will state who is the responsible provider, who is responsible to pay for their installation, and, in cases where there is not a public provider obligated to service the project, clear statements of the potential consequences to the buyer.[368] The developer cannot say that it will be responsible to provide the infrastructure unless it is so contractually obligated.[369]

The property report will include a series of "warnings," which must conform substantially to the language in the regulations, "be printed in capital letters[,] and enclosed in a box."[370] For example, if the recorded acquisition, development, or construction mortgage does not include partial release rights, the warning will include specific language: "If we should default on the mortgage prior to obtaining a release of your lot, you may lose your lot and all monies paid."[371] If the earnest money deposits are not held in an independent escrow account, the warning includes the statement: "You may lose your deposit on your lot if we fail to deliver legal title to you as called for in the contract, because it is not held in an escrow account which fully protects you."[372] If certain infrastructure improvements have not been completed and there are no financial assurances for their completion, the warning will state: "No funds have been set aside in an escrow or trust account, nor have other financial arrangements been made to assure the completion of the . . . system."[373]

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[366] H.R. REP. NO. 96-154, at 35 (1979); H.R. REP. NO. 96-706, at 35 (1979) (Conf. Rep.), *reprinted in* 1979 U.S.C.C.A.N. 2317, 2352.

[367] 24 C.F.R. § 1710.102(f) (2009).

[368] *See id.* §§ 1710.10, 1710.11(a)–(e).

[369] *See id.* § 1710.103(a).

[370] *Id.* § 1710.102(e).

[371] *Id.* § 1710.109(c)(2)(i)(A).

[372] *Id.* § 1710.109(e)(1).

[373] *See id.*, § 1710.111(a)(1)(ii)(E). *See, e.g.*, § 1710.110(b)(2) (with respect to roads); § 1710.111(a)(1)(ii)(E) (with respect to a central water system).

The disclosure with respect to recreational facilities focuses on the primary weak points in the early stages of most developments—what they are, where they will be, who will construct them, whether the developers are financially assured, if providing recreational facilities is under the developer's control (rather than, for example, part of the program of a master developer), the estimated start and completion dates of construction; the cost to buyers for access, responsibility for maintenance, who may use them, and plans for their transfer or lease.[374]

The property report will include other information pertinent to a buyer's informed decision to purchase, including such things as whether the topography presents risks (such as steep or unstable slopes), water coverage, lot drainage, flood plains, and nuisances, as well as details about the property owners' association, taxes, resales or exchange programs, time sharing, and other unusual situations.[375] The developer must disclose the existence of legal violations or lawsuits for itself, its principals, officers, directors, parent companies, subsidiaries, or other entity under 10% or more common ownership or financial interest.[376] The developer must also make financial disclosures and provide a copy of its financial statements upon request.[377]

If the facts set forth in a statement of record or property report change, the developer must amend the filing and disclosure documents.[378] If the construction of the recreational facilities is delayed, the new disclosure must identify that the estimated completion date is new and that the original estimated completion date has been delayed.[379] However, the developer is not required to deliver the amended property report to purchasers who have not yet closed their purchases.[380]

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[374] *See id.* § 1710.114.

[375] *See id.* § 1710.115–.116.

[376] *See id.* § 1710.116(c).

[377] *See id.* § 1710.112. Many developers will use a single-purpose entity for each project to insulate its other assets from liability. ILSA does not prohibit this scheme, but the absence of a long financial history and the required statement (if true) that the entity has experienced operating losses in the last year or since its inception, ought to alert buyers of an incomplete project that there is some risk to the developer's ability to complete the project if the project loses sales momentum. *Id.* § 1710.112(b).

[378] *See* 15 U.S.C. § 1706(c) (2006).

[379] *See* 24 C.F.R. § 1710.114(b)(4) (2009).

[380] *See* Campbell v. Glacier Park Co., 381 F. Supp. 1243 (D. Idaho 1974).

X. SECTION 1709 - PRIVATE CAUSES OF ACTION

Section 1709 creates a private cause of action for alleged violations of ILSA.[381] As mentioned previously, some of the former substance of this section was moved in 1979 to section 1703, so that now section 1709 simply states that a purchaser or lessee may bring an action at law or in equity for a violation of section 1703. In the case of section 1703(b), (c), (d), or (e), the right is to enforce the rights granted by those subsections, which are basically rescission rights. In the case of section 1703(a), whether it is with respect to the statement of record and property report or the anti-fraud provisions, section 1709(a) is more specific, authorizing the court to "order damages, specific performance, or such other relief as the court deems fair, just, and equitable."[382]

XI. SECTION 1711 - THREE YEAR STATUTE OF LIMITATIONS

Section 1711 provides a three-year statute of limitations in private causes of action.[383] The relationship between the statute of limitations in section 1711 and the right of rescission limitation periods in section 1703 has been discussed. The nature of the allegation determines when the limitation periods begin to run. For the following, the limitation periods begin to run on the date the purchase contract or lease is signed:

- Signing a purchase contract or lease without registering the project with HUD by a statement of record. This is a "sale" under ILSA. Although at least one court has held that a sale also occurs when the deed is delivered,[384] this interpretation is the minority view.[385]
- Signing a purchase contract or lease without delivering a property report to the buyer in violation of section 1703(c).[386] Note that in addition to claims for legal and equitable relief brought under sec-

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[381] *See* 15 U.S.C. § 1709 (2006).

[382] *Id.* § 1709(a).

In determining such relief the court may take into account, but not be limited to, the following factors: the contract price of the lot or leasehold; the amount the purchaser or lessee actually paid; the cost of any improvements to the lot; the fair market value of the lot or leasehold at the time relief is determined; and the fair market value of the lot or leasehold at the time such lot was purchased or leased.

Id.

[383] *See id.* § 1711.

[384] Hadad v. Deltona Corp., 535 F. Supp. 1364 (D.N.J. 1982).

[385] *See* Rodriguez v. Banco Cent., 727 F. Supp. 759 (D.P.R. 1989).

[386] *See* 15 U.S.C. § 1703(c) (2006).

tion 1709 and the three-year statute of limitations in section 1711, the buyer has an absolute right to revoke the contract under section 1703(c) if the right is claimed within two years from the date of contract.

- Where the statement of record or property report is false, misleading (by commission or omission), or incomplete. In this situation, because a property report has been supplied, the two-year limitations condition in section 1703(c) is not applicable. A claim for the equitable relief of rescission may proceed in a suit filed after two years from contract but before the expiration of three years.[387] In *Ali v. Royal Palm Miami Holdings, LLC*,[388] the court reasoned that it is fairly easy for a buyer to determine within two years if she received a property report, but it may take more time to determine if it was accurate or complete.
- Where advertising or promotional material is not consistent with information required to be in the statement of record or property report.
- For the seven-day right of revocation under section 1703(b).
- For the two-year right of revocation when the contract does not contain certain required provisions in section 1703(d).
- For the buyer's right to a refund of all money paid in connection with the exercise of the right of revocation under section 1703(e).

When the claim is basically one for fraud or deceit under sections 1703(a)(2)(A), (B), or (C),[389] the limitations period is three years but begins to run when the violation is known or should have been known through the exercise of reasonable diligence. The purchaser's rights under ILSA do not merge into the delivery of the deed.[390]

XII. CONCLUSION

Plaintiffs' counsel are examining ILSA as a tool to avoid contracts more closely than ever before. Sometimes ILSA seems to provide the kind of protection to consumers that its creators envisioned, but sometimes it seems

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[387] *See id.*

[388] No. 08-23449 CIV., 2009 WL 959913 (S.D. Fla. Apr. 8, 2009).

[389] *See* 15 U.S.C. § 1703(a)(2)(A)–(C) (2006).

[390] *See id.* § 1711(b); *see also* Bettis v. Lakeland, Inc., 403 F. Supp. 1300 (E.D. Tenn. 1975).

to be more of a minefield than a service to the overall public interest. This is the fault of both the statute and the cases that interpret it.

The courts and HUD contribute to ILSA's overreaching when they treat every case with more scrutiny—strict rather than good faith compliance—than they would apply to actual fraud, where scienter and causation are relevant factors.[391] By rigorously applying the rules of statutory construction, the Eleventh Circuit has demonstrated in the *Pugliese* and *Stein* cases that it is possible to reach practical conclusions that do justice to the parties and provide predictability to guide future behavior.

The statute allows rescission as an automatic remedy for certain deficiencies that bear no relationship to the harm done or even the underlying cause of the consumer's problem, thus contributing to the problem of providing protection for consumers from themselves rather than from developers. One may question, for example, what public good is served when a buyer has the right to cancel a contract that fails to incorporate a right to cure a default, when the buyer actually was given such a right, or when a developer provides the local government with a secured obligation to complete utilities and completes them in fact. Too much hinges on the developer's technical, and often factually irrelevant, compliance with an exemption. Certainly situations exist where rescission is an appropriate remedy, but why is that equitable determination taken out of the hands of the courts applying the facts and circumstances to the actual case before it? Perhaps the current real estate collapse provides sufficient data to provide a good basis upon which Congress may re-examine where consumers need protection and the appropriately measured remedies to provide it.

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[391] Fed. R. Civ. P. 9.