

The New Condo Exemption to the Interstate Land Sales Full Disclosure Act

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As of March 25, 2015, the registration requirements of the Interstate Land Sales Full Disclosure Act, 15 USC §§ 1701 et seq. (the “ILSFDA”), will no longer apply to condominium unit sales. In a rare showing of bipartisan cooperation, both the United States House and the United States Senate unanimously approved H.R. 2600 to add a catch-all exemption for condominium unit sales not otherwise exempt from the registration requirements of the ILSFDA. The measure was signed into law by President Obama on September 26, 2014.

As background, the ILSFDA was originally enacted in 1968 as an attempt to curb sales of “swampland” and other undesirable property to unsuspecting consumers who did not receive adequate information or disclosures regarding the nature and condition of the lots being purchased. Unless a specified exemption is available, the ILSFDA requires the developer of a subdivision to register the real estate development with the Consumer Financial Protection Bureau (the “CFPB”) (and before that agency, with HUD). As part of that registration, developers are required to prepare a “property report” that must be delivered to a prospective purchaser prior to the purchaser signing his or real contract to purchase the property. The consequence of failing to register are steep – in addition to the CFPB’s enforcement powers that include criminal and civil remedies, purchasers who were required to receive a property report but did not are given the option to rescind their purchase for a period of two years from the date of signing the purchase contract (even if the closing has already occurred).

While the ILSFDA applies to “lots” and not specifically to condominium units, numerous decisions over the years and HUD regulations imposed the provisions of the ILSFDA on condominium unit sales. Many condominium projects nevertheless went unregistered as most developers chose to rely on any one (or more) of the recognized exceptions to registration, most commonly either the “99-lot” exemption and/or the “improved lot” exemption. When the Great Recession helped burst the condominium market (or when the collapse of the condominium market helped create the Great Recession, depending on your perspective), recalcitrant condominium unit purchasers desperate for relief found a remedy under the ILSFDA. Lawsuits from coast to coast were brought challenging condominium developers’ reliance on these exemptions and, in other instances, challenging the sufficiency of condominium developers’ ILSFDA registrations and property reports.ⁱⁱ Many of these cases were ultimately decided against the developers, in some cases requiring the developers to take back massive stocks of condominium units and/or declare bankruptcy. As a result of these decisions, many condominium developers no longer viewed the ILSFDA compliance as a mere regulatory and disclosure consumer “shield”, but instead as a consumer insurance policy against falling real estate prices. As a result, and because most states provide

their own regulation of condominium unit sales, application of the ILSFDA to condominium unit sales came under closer legislative scrutiny.

The new exemption for condominium unit sales is in addition to, and not replacement for, the existing recognized exceptions to registration. This catch-all exemption is intended to capture condominium unit sales not otherwise exempt and is not a complete exemption from the ILSFDA. Indeed, unless another full exemption applies, the sale of condominium units will remain subject to the law's antifraud provisions. Moreover, the exemption does not trump any state condominium registration requirements and, in point of fact, may result in more comprehensive state level condominium registrations as some states previously deferred to ILSFDA condominium registrations in lieu of their own state requirements.

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ⁱⁱ The Hospitality, Timesharing and Common Interest Development Group has previously compiled a list of some of the more notable recent ILSFDA decisions (see http://meetings.abanet.org/webupload/commupload/RP270000/sitesofinterest_files/List-of-ILSFDA-Cases.doc). The February 2012 edition of the eReport also contains a more thorough discussion of the ILSFDA and cases decided in 2012 (see http://www.americanbar.org/content/dam/aba/publishing/rpte_ereport/2012/1_february/rp_lubinski.authcheckdam.pdf)