ILSA CRITICAL ISSUES AND CASE ANALYSIS

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> *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 … . All bubbles burst, as this one eventually 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 … . 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.[1]*

This appears to be an ideal time to revise the Interstate Land Sales Full Disclosure Act.[2] A little under one-half of all cases under ILSA since its adoption forty-two years ago have been reported in only the last four years. The statute, originally adopted to protect consumers against fraudulent land sales practices, now is litigated mostly over issues of coverage rather than allegations of fraud or misinformation. The driving force behind the extent of this litigation is that ILSA provides an automatic right of rescission if an exemption from ILSA is not established and the developer did not deliver a Property Report to the buyer.

As the Stein quote above suggests, ILSA is mostly invoked as a tactic to try to let speculators and persons with buyer's remorse out of their unsuccessful condominium investments.[3] Courts in the same federal circuit,[4] even in the same federal district,[5] do not agree on what is ironically asserted to be the "plaining meaning" of the statute in several key provisions that determine coverage. ILSA fails to guide developers in what they must do to stay within the law. The adverse effect of the ILSA litigation is also felt by consumers who buy a unit in a project that becomes distressed when other buyers are allowed to walk from their contracts and leave an association unable to function financially as the loss of closings add to the forces on developers causing default on their constrution loans.

Finally, the federal office charged with regulation and oversight under ILSA is changing from the

Office of RESPA and Interstate Land Sales of the US Department of Housing and Urban Development to the more independent new Consumer Financial Protection Bureau.[6] Some of the officials working with ILSA have recently looked to make possible legislative and regulatory changes and corrections.

The legal cases involving certain of topics likely to be discussed in any revision of ILSA are discussed below.

Units in a CIC Building[7] compared to lots.

ILSA regulates the sales of "lots" in a "subdivision." Condominium units were not a typical form of dwelling ownership in 1968 when ILSA was adopted. It is clear from the vocabulary used in the statute and a review of its original legislative history[8] that Congress then equated residences with the typical 1-4 family homes, and lots with plots of land on which a home was to be built. ILSA was aimed at the perceived abuses involved in land sales, not houses. With unimproved lots, access and utilities might not be available ever or for years to come, or other property conditions could make it impossible or cost-prohibitive to built a dwelling. In fact, completed buildings with certificates of occupancy, no matter how deceptive the sales practices, are totally exempt from ILSA.

Case law evolved to the now well-established precedent[9] as well as the official HUD position[10] that a condominium unit is a "lot" for ILSA purposes.[11] But ILSA has not been adapted to the different realities between house-by-house construction and phased development of infrastructure on the one hand and complex buildings with integrated systems serving dozens and even hundreds of interdependent dwellings on the other. A consumer can take a deed to a land lot in a subdivision and subsequently find out that local subdivision laws, if they exist at all, do not adequately assure the provision of utilities and access by passable roads to provide a habitable residence. Subdivisions where local laws provide that protection are more likely to be at least partly exempt from ILSA.[12] This is not true for a dwelling unit in a CIC Building,[13] where it is possible that a unit will never get built but then, too, the purchase will not be closed.

Although it is true that not getting to close on a unit can be a hardship for the buyer, ILSA does not concern itself with closings but rather with the construction of improvements. If a habitable dwelling exists at the time of contract, the lot is completely exempt from ILSA, whether or not a closing occurs. Even if constructed improvements do not exist at the time of contract, the lot is also totally exempt from ILSA if the developer obligates itself to construct the improvements (not to close the sale).[14] Since it is possible to define a large class of dwellings that, by their nature, cannot exist without completed improvements, then it is arguably within the spirit of ILSA to exclude those properties from coverage.

As a less preferred alternative to complete exemption, there are provisions in the statute and regulations where it makes sense to revise ILSA to distinguish multi-family structures from lots where the construction of the dwelling is not assured. For example, perhaps the developer of a multi-dwelling structure needs to have more time than two years to allow for construction under an obligation to build the improvements just as the consumer needs to have more than three years to bring a claim under ILSA.

Another area where it makes sense to distinguish CIC Buildings from other properties is in the contents of the Property Report. Among other things, the Property Report is now required to cover the following and other topics that have little or no relevance to the consumers of units in a CIC Building:

- The source, timing and assurances of water, sewer, gas and electricity
- Engineering of drainage facilities
- Disclosure of the risks of buying land
- The reservation of oil, gas and mineral rights
- The construction and capacity of internal roads
- The topography and natural hazards

The obligation to build exemption.

A lot is completely exempt from ILSA if the developer obligates itself to complete construction of the improvements within two years. This may sound simple and direct but there are an extraordinary number of cases over the meaning of this obligation. Many of those issues continue to be unresolved.

These are the issues with this exemption that seem to need the greatest clarification or reconsideration.

(1) What is the beginning of the two-year period? It begins on the date that the consumer enters into a binding obligation to purchase.[15] If the obligation is tied to the execution of the contract by the developer, it has been held not to qualify for the exemption.[16] Although the policy reason is that the time of significance under ILSA is when the purchaser makes the decision to legally obligate itself, the issue for this exemption is really the obligation of the developer. As a matter of contract, the developer is not obligated until both buyer and seller sign the contract.

(2) What is the end of the two-year period? Although the Guidelines require the structure to be "ready for occupancy and have all necessary and customary utilities extended to it,"[17] cases require the issuance of a certificate of occupancy.[18]

(3) The statute ties the exemption to the developer's making a contractual commitment on the date

the contract is executed, not to the actual completion of construction within two years from the date of contract.[19] Therefore, there ought to be no retroactive loss of the exemption if the developer, without purpose of evasion, makes the commitment to complete building on time but fails to perform.[20] As the court said in Pellegrino v. Koeckritz Dev. of Boca Raton, LLC,[21] "There is no indication in the statute that the seller's failure to fulfill its obligation eliminates the exemption." The author's experience is that HUD enforcement officials are reluctant to concede that the developer does not lose the exemption if the improvements are not constructed within two years.

(4) The obligation to complete construction within two years must be an absolute obligation of the developer, not the buyer. In Atteberry v. Maumelle Co.,[22] the court allowed the developer to contractually place the responsibility for completing construction on the buyer. The buyer was purchasing the lot from the land developer in order to have another builder construct the dwelling, and the land developer wanted the advantage of the ILSA exemption. Subsequently, HUD revised the Guidelines and said it would not follow the Atteberry decision in this regard.[23]

(5) There is much confusion about the standards to be applied to determine if the developer is "obligated" to construct the improvements within two years. Substantively, the questions have concerned a contract's provisions for remedies for breach and excuses to non-performance, both discussed below. There is a threshold issue, however, concerning the application of individual state laws versus a uniform federal standard. The Guidelines say that state law applies to determine what is and is not an obligation,[24] although HUD also reserved the right to override the state if state law principles were not satisfactory.[25] Based on an expansive approach to the role of state law, the Florida Supreme Court in Samara Development Corp. v. Marlow[26] limited the role of federal law to mandating that the developer be "obligated," and used state law to determine if the developer was obligated. The court concluded that a purchaser must have all of the remedies available at law or in equity. Otherwise, there is only an "illusory obligation to complete construction within two years." In so doing, Florida set a standard for the existence of an enforceable contract unique to ILSA, as contracts with limited remedies mutually agreed by the parties are typically not "illusory" in Florida.

The Samara approach to validity was rejected in Stein v. Paradigm Mirasol, LLC.[27] The Eleventh Circuit used Florida law to analyze the duties of the developer and the remedies available to a consumer for a breach, but not to determine if the duties and available remedies amounted to an "obligation." Stein concluded that a buyer who finds himself unable to get effective specific performance has remedies under Florida law for recovery of profits and other damages based, not on contract, but as civil and criminal contempt penalties. The Eleventh Circuit then applied federal law to determine that the duties and remedies promised by the developer constituted an "obligation."

(6) HUD's position about the availability of remedies for breach of the promise to construct by the developer "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."[28] Of all the cases dealing with the issue of remedies, only Stein concluded that a remedy of specific performance alone is sufficient. But the cases have not even been consistent in their requirements concerning the availability of a damages remedy.

Samara said that all remedies at law and in equity needed to be available to the buyer. But even Florida cases failed to follow Samara's hard line. Hardwick Prop. Inc. v. Newbern[29] held that remedies were sufficient even if they did not include the right to consequential or special damages. In Rosenstein v. The Edge Investors, L.P.[30], 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. In Rondini v. Evernia Properties, LLLP,[31] 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.

(7) The question whether a developer's obligation to complete construction is adequate has often turned on what defenses to non-performance are available to the developer besides the buyer's own breach of contract. HUD's position in the Guidelines[32] allows contract provisions permitting nonperformance or delays "if such provisions are legally recognized as defenses to contract actions in the jurisdiction where the building is being erected." Unfortunately, the Guidelines invited confusion by going a step further and saying "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." (emphasis added) Developers, perhaps more foolishly worried about not completing construction on time than on failing to qualify for the ILSA exemption, have tried to give the excuses to performance further definition. As a result, it is difficult to know whether any particular court will decide that the standard for an acceptable excuse will be impossibility, events beyond the developer's control, or any promise where "the developer has actually committed itself to do anything specific."[33]

In Fortunato v. Windjammer Homebuilders, Inc.,[34] 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 constitute an obligation. The lower court in Stein v. Paradigm Mirsol, LLC,[35] reversed on appeal, 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") contained exclusions "broad enough to seriously undermine the obligation to complete the condominium within two years." Disimone v. LDG South II, LLC,[36] 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'" so expanded the available bases for delay that the promise to build within two years was illusory. The court reached a similar conclusion in Harvey v. Lake Buena Vista Resort.[37] Plaza court, L.P. v. Baker-Chaput[38] also did not like references to adverse weather but went beyond the "outside seller's control" standard when it said "the question is whether Plaza's contractual provisions are recognized within Florida's doctrine of impossibility."

On the other hand, the court in Bloom v. Home Devco/Tivoli Isles, LLC[39] held that the failure to include the word "impossible" in a *force majeure* clause did not render the promise illusory. In the Rondini case, the court approved somewhat similar language to that rejected in the lower court ruling 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"). And in Tedder v. Harbour Phase I Owners, LLC,[40] 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.[41] The "beyond seller's control" standard was applied, but not satisfied, in Princeton Homes, Inc. v. Virone,[42] the court holding that a contingency for seller to obtain a building permit "is not beyond Princeton's control or an unforeseeable obstacle that would prevent Princeton from completing construction within [the time specified in the contract]."

Non-residential properties and uses.

ILSA applies to non-residential property, which surprises many real estate lawyers. There is an exemption for commercial and industrial property,[43] but it is actually quite narrow[44] and was not even in the original legislation.[45] The author is aware of no cases of reported fraud or misleading information brought under ILSA with respect to non-residential property in all forty-two years of ILSA's history. This fact alone suggests that the policy decision for ILSA to cover some non-residential property ought to be reconsidered.

There are numerous requirements to satisfy the commercial and industrial property exemption. In an Advisory Opinion,[46] HUD denied an exemption for sales of a "commercial condominium or shopping center" based on insufficient information about various requirements.

The property must be zoned commercial or industrial or there must be recorded covenants limiting the property to these uses. This presents a potential problem for flexible or mixed-use properties. It ought to be sufficient that a property is marketed and then in fact used for a non-residential purpose. Another requirement is that the buyer must be a legal entity and have been set up, in fact, as a business entity. The Guidelines[47] (and the Advisory Opinion mentioned above) require the entity to have an operational structure with checking accounts, licenses, and accounting records. It is not

clear why a sole proprietorship would not qualify as a commercial property purchaser, or whether a single member limited liability company is an entity for ILSA purposes. The buyer must actually be engaged in commercial or industrial business. These established business requirements raise an issue for a start-up just in the process of being formed.

The buyer must affirm in writing to the seller that it meets the requirements mentioned above, a provision one would not find in a typical commercial contract. Finally, 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 document separate from the purchase contract or lease. Few commercial sales transactions will be conducted without title insurance but the same cannot be said of leases. ILSA covers leases longer than five years.[48] Residential leases with terms more than five years are rare, but in a commercial context, particularly for warehouse space and offices, such terms are common. Finally, the exceptions to title must be approved by the buyer in writing affirmatively, not by failing to object. This requirement, too, is outside the commercial norm and could trap an unaware seller.

An automatic right of rescission versus relying on statutory remedies.

The reason that ILSA was such a popular plaintiff's claim in the last recession was the lack of a necessary connection between an ILSA violation and the remedy provided under 15 U.S.C. §1703. If a developer delivered a property early, it is still not exempt if the developer did not obligate itself to deliver it on time. If the developer never invoked a delay contingency, it is not exempt if the contract included an inappropriate contingency. If the developer did not provide a legal description suitable for recording, it did not matter that the recording of the contract was never an issue in the transaction. Each of these lapses in technicality results in a buyer's automatic right to revoke the contract and receive a full refund.[49]

ILSA already contains an alternative route to rescission meted out on the basis of equity. 15 U.S.C. §1709 creates private causes of action for alleged violations of ILSA, authorizing the court to "order damages, specific performance, or such other relief as the court deems fair, just, and equitable."[50] Some of the former substance of this section was moved in 1979 to §1703 so that now §1709 simply states that a purchaser or lessee may bring an action at law or in equity for a violation of §1703.[51]

In cases where the developer's failure is related to the harm suffered by the plaintiff, the court has the power to award damages proven and to use its equitable powers, including granting a right of rescission, under a §1709 action.[52] Although one court thought that any grant of equitable relief under §1709 is precluded by §1703,[53] revocation under §1709 was allowed in Plant v. Merrifield Town Center L.P.[54] when "supported by proper proof." The court in Murray v. Holiday

Isle[55] reached a similar result by allowing the purchaser to assert a claim for damages against the developer under §1709 when the buyer failed to timely exercise his rescission right under §1703.

Bacolitsas and Nikolaidou v. 86th & 3rd Owner, LLC[56] is a good example of the absurdity of the automatic right of rescission. In that case, involving the sale of a $3.4 million condominium, all parties were represented by counsel. The time from contract to substantial completion of the unit was less than 12 months. The developer registered the property with HUD. But the court determined that the buyer could rescind the contract because the contract did not contain a description of the unit "in a form acceptable for recording" required for registered properties by §1703(d)(1). Plaintiff did not argue that the unit was not identifiable or that it was damaged or inconvenienced in any way by this alleged failure. In deciding whether the description of the unit was in proper form, the court noted that under New York law a legal description was not recordable by itself. It needed to be part of a document, in this case the purchase contract. Therefore, the court decided that the proper analysis was whether the purchase contract was recordable. Since under New York law only an acknowledged document could be recorded, and since the purchase contract was not notarized, the court concluded that the legal description was not in recordable form because it was not attached to a document in recordable form. Since the right to rescission is automatic if §1703(d)(1) is not complied with, the court concluded that the purchaser had a rescission right.

Application of §§1703(a)(2) through (e) to properties qualifying for a partial exemption.

Subsections of §1703 require certain provisions to appear in an applicable purchase contract,[57] failing which there is an automatic right of rescission for the buyer. For forty years, these requirements were not applied to projects exempt from ILSA, whether the exemption was complete or partial. HUD did not consider them applicable.[58] But in 2008, a trilogy of cases from the Southern District of Florida held that partially exempt lots or subdivisions are not exempt from the §1703 requirements. Pugliese v. Pukka Devel., Inc.,[59] Meridian Ventures, LLC v. One North Ocean, LLC.,[60] and Trotta v. Lighthouse Pt. Land Co., LLC,[61] applying the principle that exemptions should be construed narrowly and disagreeing with the result reached in the earlier Florida state court case of Mayersdorf v. Paramount Boynton, LLC,[62] concluded that a partial exemption only applies to registration[63] and that all other provisions of ILSA, in particular §§1703(a)(2) through (e), continue to apply. Developers across the country had signed contracts under the 100-Lot Exemption, in most cases ignoring the §1703 provisions.

In reaching this conclusion, the courts applied the language that is in the exemption provision itself, §1702(b): "the provisions requiring registration and disclosure (as specified in §1703(a)(1) and §§1704 through 1707) shall not apply." There is, however, broader exemption language in the substantive provisions of §1703 itself: "Any contract or agreement for the sale or lease of a lot not

exempt under section 1702 ... ." Deferring to HUD's interpretation (and pre-1996 regulations), the Eleventh Circuit overruled the District Court in Pugliese, putting an end to countless state and federal court claims seeking to rescind contracts during the real estate recession based on projects falling under the 100-Lot Exemption not including the §1703 provisions in their contracts.

One can hardly fault the trial courts for applying the specific scope provisions set forth in the very section of ILSA, §1702, that defines the exemption tests. The Eleventh Circuit's decision rests on deference to HUD on ILSA interpretation rather than on the dubious assertion that the language in §§1702 and 1703 are clearly harmonious. If deference standards for the non-regulatory positions of HUD on ILSA were uniformly recognized, one might expect other federal district and circuit courts will follow the final Pugliese result. But the deference due to HUD has had limited power of persuasion,[64] and transactional lawyers outside the Eleventh Circuit cannot dismiss the possibility that the Pugliese issue about the scope of the §1702(b) exemption may be raised in their jurisdiction. After all, the District Court for the Southern District of Florida was not the only federal court to conclude that projects exempt under §1702(b) must comply with all of §1703 except for registration under §1703(a)(1).[65]

The evasion standard.

§1702 provides for full exemption from ILSA, partial statutory exemption and partial regulatory exemption. The two statutory exemption subsections are available "[u]nless the method of disposition is adopted for the purpose of evasion of this title." It is not clear whether structuring the details of a purchase contract in order to avoid coverage by ILSA is an impermissible evasion absent an independent business purpose. 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 interpretation of their contract necessary to accomplish an exemption.

In Gentry v. Harborage Cottages-Stuart, LLLP,[66] the court held that a seller's use of the two-year exemption coupled with the 100-lot exemption was improper because the seller did not have a "legitimate business purpose" for using both exemptions,[67] its sole purpose in so structuring its sales being to qualify for the ILSA piggyback exemption, i.e., to avoid ILSA. In this case, the seller used one purchase agreement for the first thirty-six lots that fulfilled the requirements for the two year exemption and used a different purchase agreement for the remaining ninety lots which fulfilled the 100-lot exemption requirement.[68]

On the other hand, the court in Pilato v. Edge Investors, L.P.[69] held that a severability clause indicated an intent that the contract be exempt from ILSA but "does [not] reveal an intent solely to evade ILSA's disclosure requirements."[70] Double AA Int'l Inv. Grp., Inc. v. Swire Pacific Holdings, Inc.[71] took a different approach, stating that the required business purpose for ILSA had a "low

threshold." The developer's plan was to sell all but ninety-nine units under the two-year obligation to construct exemption and the remaining ninety-nine units then under the 100-Lot Exemption. The court stated that saving time and money by taking advantage of the exemptions to avoid registration with HUD is consistent with the primary purpose of a for-profit business, "to make the greatest possible profit."

The non-evasion requirement is not specific to the §1702(b)(1) exemption; it qualifies all of the full and partial exemptions. It is hard to see how there can be a legitimate business purpose other than taking advantage of the exemption when the only way to comply with some exemptions is to depart from normal commercial practices, such as where the developer must promise to construct the improvements within two years from the date of contract and subject himself to a specific performance remedy.

At least one case suggests perhaps a better approach to the anti-evasion analysis, namely whether or not there is an element of fraud or bad faith. Atteberry v. Maumelle Co.[72] 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."[73] 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 Devel., LLC,[74] the court pointing out that the two-year promise to complete construction exemption does not apply if the method of disposition is evasion of the statute. In Sea Shelter IV v. TRG Sunny Isles V,[75] the court allowed the case to proceed on the basis of fraudulent inducement rather than exemption failure because of evasion where the purchaser alleged that the seller fraudulently induced purchaser to enter a contract by stating that the unit would be completed in two years, although seller knew at the time of signing that it would not be completed within that time frame.

Piggyback exemptions.

ILSA provides a partial exemption for subdivisions with fewer than 100 non-exempt lots (the "100-Lot Exemption").[76] The statute[77] is clear that lots exempt from ILSA do not count towards the maximum ninety-nine lots allowed by this exemption, permitting a piggyback of exemptions. For example, a 110 lot subdivision may have only ninety-nine or fewer non-exempt lots if eleven lots are sold to builders under 15 U.S.C. §1702(a)(7)). Further, the legislative history is clear that lots planned for exemption, not only those for which the exemption is already established, count as exempt lots.[78] The Guidelines point out that the developer bears the risk of being certain that all lots in excess of ninety-nine remain exempt from ILSA because if they do not the registration

exemption is nullified "for prior and future sales." The Guidelines allow for a fluid marketing plan saying that which ninety-nine lots will be sold under the exemption does not need to be specified in advance in a piggyback arrangement. The "plain language" of ILSA that requires the lots to be exempt, and the legislative history that says the exemption can be planned, have led to inconsistent decisions about whether or not the developer can plan to exempt lots not already under contract.[79]

HUD has issued private Advisory Opinions confirming that piggyback arrangements can be structured properly based on an intent to exempt future sales, and developers have acted in reliance on those opinions. The typical situation that HUD approves is where "the developer plans to sell the first 99 lots under the One Hundred Lot Exemption and [x] units under the Improved Lot Exemption that obligates the completion of construction within two years from the date the purchaser signs the Condominium Purchase Contract."[80] This structure makes business sense for projects where it is not possible to assure construction within a two-year period. The developer first places under contract ninety-nine units under the 100-Lot Exemption, which buys time for development to progress to the point where the obligation to complete construction within two years can be made in good faith.[81]

Obtaining an Advisory Opinion under 24 CFR §1710.17 is not as safe a way to proceed as it should be.[82] Although Grove Towers, Inc. v. Lopez[83]and N & C Properties v. Windham[84] required a prior conforming marketing plan to allow the future sales of lots to be provisionally counted as exempt sale, 200 East Partners, LLC v. Gold[85] required the developer to have the 100-Lot Exemption and the improved lot exemption contracts "in effect and completely valid" when the 100-Lot E0xemption units were being sold.[86] The 200 East Partners case held that the plan to sell ninety-nine units under the 100-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. In so holding, the court disagreed with an Advisory Opinion the developer had obtained from HUD for that very subdivision.

In Nahigian v. Juno-Loudon,[87] the court concluded that, under the plain meaning of ILSA, future plans to satisfy an exemption are irrelevant, saying "[t]he statute is drafted in the present tense." Since "hoped for future sales to builders" that would be exempt "have yet to occur," those lots are not exempt and therefore they could not reduce the number of lots so that the rest satisfied the 100-Lot Exemption. The court did not address the anomaly that while under ILSA the lots do not need to exist to be counted,[88] since ILSA focuses on what is intended in the marketing, the intent to market them in a manner that would qualify for an exemption was not sufficient.[89] Nahigian was followed by the Southern District of Florida in First Global Corp. v. Mansiana Ocean Residences, LLC,[90] saying that "[u]nder the ILSA, a unit cannot qualify for the two-year exemption until the unit is actually sold with a commitment to construct a building on the property within two years."

By contrast, the court in Bair v. Atlantis LLC[91] held that the developer failed in establishing a piggyback exemption because "Defendant would have to show that 141 of these [unsold] units will qualify for exemptions under the Act … [and it] has provided no evidence."[92] Bodansky v. Fifth on the Park Condo, LLC[93] held that a developer was exempt based on the actual number of units under contract or closed at any particular time, although the developer may have been marketing more than the number of units allowed for the 100-Lot Exemption. Since the number of units in the project sold or under contract for sale was below 100 when construction was completed (and therefore the sales of remaining units would necessarily be exempt), the 100-Lot Exemption was satisfied.

Bodansky directly rejected the analysis in the 200 East Partners Case. Another judge in the same district agreed with Bodansky in Romero v. Borden East River Realty, LLC,[94] stating that "[a] plain reading of the statute does not support plaintiff's position that compliance with the Fewer Than 100-Lot Exemption is measured at the time the purchase agreement is signed." The court distinguished this exemption from the Improved Lot Exemption since the time when the obligation is incurred is when the purchase contract is signed.[95] Yet a third judge in the same district disagreed with the analysis in Bodansky and Romero. In Griffith v. Steiner Williamsburg, LLC,[96] the court concluded "Given that ILSA's registration and disclosure provisions focus on the time the sale occurs-that is, when the purchaser signs the purchase agreement-the exemptions also should depend on this point in time. … Allowing a developer to rely on the 100-Lot Exemption until it sells more than 99 non-exempt lots would significantly weaken ILSA's disclosure and revocation protections. ILSA gives a purchaser only two years from signing the Purchase Agreement to revoke the sale based on the developer's failure to provide timely disclosure of the property report."[97]

Deference to the regulatory agency.

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 to be repetitive or otherwise unnecessary.[98] Previously, the Guidelines were published in the Code of Federal Regulations as Appendix A to Part 1710 of the ILSA regulations.

The Guidelines as well as other consistent public pronouncements[99] are entitled to "substantial deference" under Skidmore v. Swift & Co.,[100] but as noted below some ILSA cases have reduced this to "some deference." By contrast, regulations that have gone through the formal process of publication, hearings and adoption are entitled to "controlling weight" under Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.[101] "[N]o *Chevron* deference is to be given to agency interpretations made outside the delegation of authority to 'promulgate rules or regulations'."[102]

In rejecting an interpretation provided by HUD in the Guidelines about counting future sales as exempt in piggyback exemption arrangements, the court in Nahigian stated that while HUD's regulations are entitled to Chevron deference, an authoritative interpretation, the Guidelines are interpretive rules entitled only to "some deference." This has been described as being "entitled to respect … but only to the extent that those interpretation (sic) have the power to persuade."[103] Cases discussed in this Paper that reached conclusions contrary to HUD non-regulatory pronouncements[104] all basically said the same thing, that HUD's interpretations of ILSA in the Guidelines and Advisory Opinions should be considered only if its reasoning is sound.

The problem is that the current HUD regulations say very little about ILSA statutory exemptions that are not already said in the statute.[105] The Guidelines, on the other hand, are highly explanatory. If the ILSA litigation during the past four years demonstrates anything, it is that the Guidelines are not "repetitive or otherwise unnecessary" to developers who try to understand what is required of them and their contracts. Adopting the Guidelines as regulations would not make the government's positions definitive to all courts in all cases, but it would require a more rigorous analysis by the courts of the question at issue to find that the agency's position "is not one that Congress would have sanctioned."[106]

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[1] Stein v. Paradigm Mirasol, LLC, 586 F.3d 849 (11th Cir. 2009), cert. den., 130 S.Ct. 1903 (2010).

[2] 15 U.S.C. §§1701 et seq., "ILSA" but sometimes also referred to as the "ILSFDA."

[3] "Under the plain terms of the ILSFDA, 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." Pigott v. Sanibel Devel., LLC, 576 F.Supp.2d 1258, 1265 (S.D. Ala. 2008).

[4] Compare Stein v. Paradigm Mirasol, LLC, 551 F.Supp.2d 1323 (M.D.Fla. 2008), rev'd, 586 F.3d 849 (11th Cir. 2009), cert. den., 130 S.Ct. 1903 (2010) with Rondini v. Evernia Properties, LLLP, Case No. No. 07-81077-CIV, 2008 WL 793512 (S.D. Fla. Feb. 13, 2008).

[5] Compare Bodansky v. Fifth on the Park Condo, LLC, Case No. 1:09-CV-04651-DLC, 2010 WL 334985 (S.D.N.Y. Jan. 29, 2010) with Griffith v. Steiner Williamsburg, LLC, Case No. 09 Civ.

9747(AJP), 2010 WL 4970595 (S.D.N.Y. December 3, 2010).

[6] Created by the Consumer Financial Protection Agency Act of 2009, Pub.L. 111-203, Title X, § 1001 et seq., July 21, 2010, 124 Stat. 1955

[7] Under the laws of many states, a common interest community or a condominium can include land lots and a multiple-dwelling unit building may actually include other forms of ownership such as a planned development. See, for example, the Uniform Common Interest Ownership Act. The term "CIC Building" used in this Paper refers only to the situation in which state law requires the issuance of a certificate of occupancy as a pre-requisite to the creation of the unit or to closing the transfer of title. A building containing air space units created and whose title can be transferred based on the mere filing of a map indicating the planned location of space boundaries is arguably no different than a lots subdivision where the legal boundaries are established by a plat, and so it is not included in the term "CIC Building."

[8] "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 suitable only for grazing purposes) was a good investment, suitable for homesites and easily resaleable." House Report No. 69-154 and House Conference Report No. 96-706, 1979 U.S. Code Cong. & Adm. News 2317 at 2346.

[9] Winter v. Hollingsworth Properties, Inc., 777 F.2d 1444 (11th Cir. 1985); Schatz v. Jockey Club Phase III, Ltd., 604 F.Supp. 537 (S.D.Fla. 1985); Nargiz v. Henlopen Devel., 380 A.2d 1361 (Del. 1977).

[10] "This [definition of a "lot"] applies to the sale of a condominium … as well as a traditional lot." 38 Fed.Reg. 23,866 (Sept. 4, 1973).

[11] Any attempt to argue that ILSA does not apply to condominium units is likely to be met with the response given by the court in Nu-Chan v. 20 Pine Street, LLC, Case No. 09-CIV-00477 (PAC), 2010 WL 3825734 at *3 (S.D.N.Y. Sept. 30, 2010): "The court sees no need to disturb this trend and holds that condominium units are covered by the provisions of ILSFDA."

[12] 15 U.S.C. §1702(b)(5).

[13] Units in a building containing more than four dwellings do not qualify for the exemption in 15 U.S.C. §1702(b)(5), pursuant to 24 C.F.R. 1710.10(c)(2) (2009).

[14] 15 U.S.C. §1702(a)(2).

[15] Orpheus Investments, S.A. v. Ryegon Investments, Inc., 447 So.2d 257 (3rd DCA Fla. 1983). "Sale occurs … upon contract formation." Aldrich v. McCulloch Properties, Inc., 627 F.2d 1036 (10th Cir. 1980).

[16] A promise to complete construction from the seller's signature is not legally sufficient. Long v. Merrifield Town Center L.P., 611 F.3d 240 (4th Cir. 2010).

[17] Part IV (b)

[18] See Harvey v. Lake Buena Vista Resort, 568 F.Supp 1354 (M.D.Fla. 2008), where the certificate of occupancy was only five days late and where it appears that the physical improvements were actually constructed within the two-year period. The argument is that a structure is not legally "ready for occupancy" unless it is issued a certificate of occupancy by the local government.

[19] Lopez v. TRG-Brickell Pt. West Ltd., 2009 WL 1456340 (S.D. Fla. 2009).

[20] See Pellegrino v. Koeckritz Development of Boca Raton , Case No. 08-80164-CIV, 2008 WL 612 8748 (S.D. Fla. July 10, 2008); Nargiz v. Henlopen Developers, 380 A.2d 1361 (Del.Supr.1977); Lopez v. TRG-Brickell Point West, Case No. 09-20653-CIV, 2009 WL 1456340 (S.D. Fla. May 22, 2009)).

[21] 2008 WL 6128748 at *4, fn. 3 (S.D. Fla. July 10, 2008).

[22] 60 F.3d 415 (8th Cir. 1995).

[23] 61 Fed. Reg. 60, 13599 (1996).

[24] "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." Guidelines, Part IV(b).

[25] "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." Guidelines, Part IV(b). HUD actually did weigh in to override what might be conflicting principles of state law when it mandated that "contracts that directly or indirectly waive the buyer's right to specific performance are treated as lacking a realistic obligation to construct."

Guidelines, Part IV(b).

[26] 556 So.2d 1097 (Fla. 1990).

[27] 586 F.3d 849 (11th Cir. 2009), cert. den., 130 S.Ct. 1903 (2010).

[28] Guidelines, Part IV(b).

[29] 711 So.2d 35 (1st DCA Fla. 1998).

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

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

[32] Part IV(b).

[33] Law-Yue v. Miami River, L.L.C., Case No. 3D09-2243, 2010 WL 4103349 (3rd DCA Fla. Oct. 20, 2010).

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

[35] Case No. 2:07-cv-71-FtM-29DNF, 2008 WL 344492 (M.D. Fla. Feb. 7, 2008), rev'd, 586 F.3d 849 (11th Cir. 2009).

[36] Case No. 2:08-cv-544-FtM-29SPC, 2009 WL 210711 (M.D. Fla. Jan. 28, 2009).

[37] 568 F.Supp 1354 (M.D.Fla. 2008).

[38] 17 So. 3d 720 (5th DCA Fla. 2009).

[39] Case No. 07-80616-CIV2009, WL 36594 (S.D. Fla. Jan. 6, 2009).

[40] Case No. 8:08-cv-1674-T-30TGW, 2009 WL 1043911 (M.D. Fla. April 17, 2009).

[41] See also Rosenstein v. The Edge Investors, L.P., Case No. 07-80903-CIV-MIDDLEBR, 2009 WL 903806 (S.D.Fla. March 30, 2009); Stefan v. Singer Isl. Condominiums, LTD, 08-80039-CIV, 2009 WL 426291 (S.D. Fla. Feb. 20, 2009).

[42] 612 F.3d 1324 (11th Cir. 2010).

[43] 15 U.S.C. §1702(a)(8).

[44] 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." A commercial or industrial property is more likely to be exempt under the Twenty-Five Lot Exemption (§1702(a)(1)) or the 100-Lot Exemption (§1702(b)(1)).

[45] PL 93-383, Housing and Community Development Act of 1974.

[46] Advisory Opinion dated September 7, 2007 issued with reference to ILS Number 32091 for AMC Delaney Hudson Capital Properties and Antigua at St. Augustine.

[47] Part IV(h).

[48] ILSA covers leases, 15 U.S.C. §1703, and has no short term exemption. Pursuant to its authority granted by 15 U.S.C. §1702(c), HUD has adopted certain regulatory partial exemptions in 24 C.F.R. §1710.14, including leases for a term (including mandatory renewals) not exceeding five years.

[49] 15 U.S.C. §1703(c) and (d)(1).

[50] "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." 15 U.S.C. §1709(a).

[51] 15 U.S.C. §1709(b).

[52] 15 U.S.C. §1709.

[53] Werdmuller von Elgg v. Carlisle Devel., Case No. 6:09-cv-132-Orl-31KRS, 2009 WL 961144 (M.D. Fla. April 7, 2009).

[54] Case Nos. 1:08cv374, 1:08cv566, 2009 WL 2225415 (E.D.Va. July 21, 2009).

[55] Case No. 07-0771-WS-M, 2009 WL 857406 (S.D.Ala. March 25, 2009).

[56] Case No. 1:09-CV-07158-PKC (S.D.N.Y. Sept. 21, 2010)

[57] The purchaser's right to a seven-day rescission period (§1703(b)), the requirement that a contract for a non-exempt project state that the buyer has a two-year right of rescission if a Property Report is not delivered (§1702(c)), 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 fifteen percent of the purchase price or actual damages (§1703(d)).

[58] See the history of HUD's position recited in Pugliese v. Pukka Devel., Inc., 550 F.3d 1299, 1304-1305 (11th Cir. 2008).

[59] Case No. 07-14040-CIV-LYNCH, 2007 WL 4165395 (S.D. Fla. Oct. 4, 2007), rev'd 550 F.3d 1299, 1304-1305 (11th Cir. 2008).

[60] Case No. 07-80061-CIV, 2007 WL 4414816 (S.D. Fla. Dec. 14, 2007).

[61] Case No. 07-80269-CIV, 2008 WL 413962 (S.D. Fla. Feb. 13, 2008).

[62] 910 So.2d 887 (4th DCA Fla. 2005).

[63] §1703(a)(1) and §§1704 through 1707.

[64] See TAN 99-104 infra.

[65] See Stockton v. Mustique, LLC, Case No. 07-0310-WS-B, 2007 WL 2480244 (S.D. Ala. Aug. 28, 2007). But see Bartley v. Merrifield Town Center, 580 F.Supp.2d 495 (E.D. Va. 2008), which anticipated the contrary decision by the Eleventh Circuit in the Pugliese case.

[66] 602 F. Supp. 2d 1239 (S.D. Fla. 2009).

[67] Id. at 1249.

[68] This is exactly the structure that would have satisfied the courts in the Nahigian, 200 East

Partners and First Global Corp. cases, discussed at TAN 87-92 infra.

[69] 609 F.Supp.2d 1301 (S.D. Fla. 2009).

[70] 609 F.Supp.2d at 1309.

[71] 674 F. Supp.2d 1344 (S.D.Fla. 2009).

[72] 60 F.3d 415 (8th Cir. 1995).

[73] Id. at 421.

[74] 576 F.2d 1258 (S.D. Ala. 2008).

[75] Case No. 08-21767-CIV, 2009 WL 692469 (S.D. Fla. March 17, 2009).

[76] 15 U.S.C. §1702(b)(1), counting only " lots which are not exempt under subsection (a) of this section."

[77] HUD points out in the Guidelines, Part V(a), that this does not apply to lots exempt under §1702(a)(1) because those lots must be in a subdivision that contains fewer than a total of twenty-five lots.

[78] House Report No. 69-154 and House Conference Report No. 96-706, 1979 U.S. Code Cong. & Adm. News 2317 at 2347 states 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.

[79] Compare Nahigian v. Juno-Loudon, Case No. 1:09-CV-725 (JCC), 2010 WL 1381637 (E.D. Va. March 30, 2010), discussed at TAN 76 infra, with Bodansky v. Fifth on the Park Condo, LLC, Case No. 1:09-CV-04651-DLC, 2010 WL 334985 (S.D.N.Y. Jan. 29, 2010), discussed at TAN 81 infra.

[80] See, for example, Advisory Opinion letter dated September 2, 2005 issued with reference to ILS Number 31422 for 200 East Partners, LLC and 200 East Palmetto Park Condominium and Advisory Opinion dated May 3, 2005 issued with reference to ILS Number 31260 for LB Main, L.P. and 1200 Main, a Condominium.

[81] But see Double AA, where the developer obligated itself to complete construction of the first units to bring the remaining number below 100, and then claimed the 100-Lot Exemption for the rest, something that is only possible if construction can safely be completed within two years. Even in that case, the developer was challenged for not having a legitimate business purpose. See TAN 73, infra.

[82] See 200 East Partners , LLC v. Gold, 997 So.2d 466 (4th DCA Fla. 2008), where the developer obtained an Advisory Opinion from HUD (fn. 55 supra) but lost when the court disagreed with HUD about the ability to count as exempt units planned to be sold in the future under an exemption.

[83] 467 So.2d 358 (3rd DCA Fla. 1985), rev. den. 480 So.2d 1294.

[84] 582 So.2d 1044 (Ala. 1991).

[85] 997 So.2d 466 (4th DCA Fla. 2008).

[86] Even when the developer followed that requirement in Gentry v. Harborage Cottages-Stuart, LLLP, 602 F. Supp. 2d 1239 (S.D. Fla. 2009), the court held that a seller's use of the two-year exemption coupled with the 100-lot exemption was improper because the seller did not have a legitimate business purpose for using both exemptions and therefore the sole purpose for using the piggyback program was to evade ILSA requirements. See TAN 68-70 supra.

[87] Case No. 1:09-CV-725 (JCC), 2010 WL 1381637 (E.D. Va. March 30, 2010).

[88] In First Global, the developer argued that it might not develop more than 100 units, but lost to the overwhelming evidence of public pronouncements of a project of more than 100 units. In N & C Properties v. Windham, 582 So.2d 1044 (Ala. 1991), the developer's reserving the right to build and market a second phase of development took the unit count over 100 for ILSA purposes although he was only building and offering the first phase for sale. In Grove Towers, Inc. v. Lopez, 467 So.2d 358 (3rd DCA Fla. 1985), rev. den. 480 So.2d 1294, the developer was held to have failed to comply with ILSA although he only built a ninety-eight unit condominium because when he entered into sales contracts, he contemplated there would be 108 units and marketed on that basis.

[89] The Guidelines provide that a "lot" includes land proposed to be divided. ""Proposed to be divided"includes the developer's intention to subdivide land, as well as the developer's intention to add additional land or units."

[90] Case No. 09-21092-Civ, 2010 WL 2163756 (S.D. Fla. May 27, 2010)

[91] Case No. 07-4243-CV-C-NKL, 2008 WL 5051393 (W.D. Mo. Nov. 20, 2008).

[92] 2008 WL 5051393 at *4.

[93] Case No. 1:09-CV-04651-DLC, 2010 WL 334985 (S.D.N.Y. Jan. 29, 2010). This case is currently on appeal to the Second Circuit.

[94] Case No. 1:09-CV-00845-ARR-JMA (S.D.N.Y. March 11, 2010). This case is currently on appeal to the Second Circuit.

[95] See Ahn v. Merrifield Town Center Ltd., 584 F. Supp.2d 848 (E.D. Va. 2008). The Nahigian Case cited the same case for the opposite conclusion ("These provisions reflect "Congress's recognition that the need for buyer protection is critical prior to the time the buyer makes the decision to sign and incur obligations" *Ahn*, 584 F. Supp.2d at 854-855" (holding that the timing of a specific exemption begins to run at the time the purchaser signs the purchase agreement, rather than at some later time when the developer ratifies the agreement)") at *7.

[96] Case No. 09 Civ. 9747(AJP), 2010 WL 4970595 (S.D.N.Y. December 3, 2010).

[97] 2010 WL 4970595 at **11-15 (S.D.N.Y. December 3, 2010).

[98] 61 Fed. Reg. 60, 13596 (1996).

[99] Such as HUD's position interpreting the scope of the §1702(b) partial exemptions set forth in Brief of the United States as Amicus Curiae Supporting Reversal, Pugliese v. Pukka Development, Inc., appeal to the United States court of Appeals for the Eleventh Circuit, Case No. 07-15198-FF (11th Cir. 2009).

[100] 323 US 134 (1944).

[101] 467 U.S. 837 (1984). See the discussion the authority for the Guidelines in Pugliese v. Pukka Development, Inc., 550 F.3rd 1299 (11th Cir. 2008).

[102] Trotta v. Lighthouse Pt. Land Co., LLC, 2008 WL 413962 at *4.

[103] Nahigian quoting Christensen v. Harris County, 529 U.S. 576, 587 (2000). As to the substance of this exemption issue, the deference standard would not have made a difference since, according to the court, "it would reach the same determination using Chevron deference… ."

[104] See, for example, The District Court opinion in the Pugliese case which, in response to the developer's arguing that its interpretation was consist with a HUD Advisory Opinion, stated "because the instant opinion letter is not a formally promulgated interpretation or regulation, there is less reason to be bound by it." 2007 WL 4165395 at *4.

[105] See 24 C.F.R. §§1710.4 - 1710.14. In commenting on 24 C.F.R. §1710.6, the 100-Lot Exemption, the lower court said in Pugliese "this information … essentially restates in general terms what the statute already requires [and] provides no real guidance to resolving the specific issue before this Court." 2007 WL 4165395 at *4.

[106] Ahn v. Merrifield Village L.P., 584 F.Supp.2d 848, 855 fn. 15 (E.D.Va. 2008).