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Court Dismisses "Buyer's Remorse" Claim and Awards Developer \$577,000 in Attorneys' Fees

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Back in Autumn, 2010, we wrote that purchasers of condominium units in the New York metropolitan area were invoking the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701-20 (ILSA), to cancel their agreements to purchase condominium units in newly constructed projects. ILSA immediately became a hit for purchasers suffering from "buyer's remorse" following the precipitous downturn in the real estate market. ILSA allowed buyers to bring an action or a counterclaim to get out of their contracts even though the legislative intent of ILSA was to protect buyers against unscrupulous developers.

Despite the lack of any allegations of breach of contract, fraud or misrepresentation or other commonly raised grounds for rescission, ILSA made it possible for purchasers to revoke arms-length negotiated contracts on the grounds that a developer failed to either register a non-exempt project with HUD or, even if the project was registered, failed to strictly comply with the terms of the statute even in the absence of harm to the purchaser.

More recently, however, the courts have recognized the duplicitous nature of these ILSA claims. In *Bacolitsas v. 86th & 3rd Owner, LLC*, 702 F.3d 673, the United States Court of Appeals, Second Circuit, rejected the purchasers' claim that a developer's violation of the technicalities of ILSA afforded the purchaser the right to revoke their contract. In *Bacolitsas*, the purchasers claimed that their contract was revocable because it did not contain a description of the lot in a form acceptable for recording. This claim by the purchasers runs counter to the fact that the developer had filed a condominium offering plan in accordance with the requirements of General Business Law §352-eeee and that the offering plan contained a draft condominium declaration, unit deed and floor

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plans and narrative which, collectively, provided a detailed description of the unit and building. Specifically, the Court reversed the judgment of the District Court for the Southern District of New York (SDNY) and ruled that ILSA only requires that the description of the unit and not the entire contract of sale be in a form acceptable for recording. As the Court put it, if "...the description of the lot must be in a form acceptable for recording the deed, then a purchase agreement for a unit could be executed only after construction was finished." The Court recognized that such a determination would only serve to thwart the long-standing practice of entering into contracts for condominium units prior to the completion of construction. Further, and more to the point that developer's attorneys have been championing for several years, the Court's decision can be construed as a long-awaited recognition that ILSA's function is as a consumer protection regulation and not to afford purchasers who have been unharmed by a developer a means to rescind an otherwise valid contract.

More recently, on remand, the Court for the SDNY ruled that the developer in Bacolitsas was entitled to an award of \$577,000 for reimbursement of legal fees pursuant to the "prevailing party" provision in the contract even though the contract deposit at the core of the dispute was only \$510,000. This ruling is clearly a significant victory for developers and may serve to deter a purchaser contemplating bringing an action to rescind a contract under ILSA.

Although the recent ruling in Bacolitsas can be viewed as a victory for developers, it is important for purchasers and developers alike to understand the applicability of ILSA and the implications of ILSA for the real estate practitioner. If nothing else, the last several years of litigation seem to have provided some clarity on ILSA and its use and place in the real estate market.

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