

# LAW WEEK

## COLORADO

## ILSA Reqs For Condos Facing Change

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IN SEPTEMBER, the U.S. Senate unanimously approved an amendment to exempt condominium developments from certain provisions of the Interstate Land Sales Full Disclosure Act, or ILSA. The bill, which also passed unanimously through the House of Representatives last year, is now being sent to the President for his signature and will take effect 180 days thereafter.

Congress enacted the original act in 1968 in response to the growing number of land sellers taking advantage of unsuspecting purchasers. Before then, prospective buyers would enter into purchase agreements for land, sight unseen, that was supposedly perfectly suited for development. Upon inspecting the land, however, buyers found their new properties to be under water, on steep slopes, or suitable only for grazing.

The phrase, "If you believe that, I've got swampland in Florida to sell you," popularized during that period, reflects the prevalence of land swindles and the gullibility of buyers. By the time purchasers of these properties realized they had been conned, their binding purchase agreements generally left them with inadequate remedies.

Under ILSA, however, sellers of nonexempt land must file a statement of record with the government and also furnish a property report to the prospective buyer. Additionally, sellers of nonexempt land may not make any misrepresentations or omissions in either document, nor may they advertise or promote the property in a way that is inconsistent with the property report.

Moreover, should the seller fail to provide the property report, the



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buyer may revoke the purchase agreement up to two years after signing. Even if the seller complies with all of the act's requirements, the law automatically grants a seven-day period during which buyers may revoke the purchase agreement for any reason. The act contains a second prong that, in effect, makes unlawful any sale, lease or offer that constitutes fraud, or intent to defraud, on the purchaser.

Although perhaps unclear from the text of the act itself, which refers to "land sales" and "lots," administrative guidance and case law have consistently applied its requirements to condominium developments.

The Bureau of Consumer Financial Protection, currently charged with enforcing the act, defines "lot" as "any portion, piece, division, unit or undivided interest in land ... if the interest includes the right to the exclusive use of a specific portion of the land." The Department of Housing and Urban Development, which enforced the act until 2010, had adopted a nearly identical definition in order to include condominium developments under the act's purview. Similarly, courts, often relying heavily on



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these agency interpretations, have consistently applied ILSA to condominium developments since the U.S. 11th Circuit Court of Appeals, the first federal circuit court to address the issue, did so in 1985.

Under the current law, it is difficult for condominium developers to qualify for an exemption from ILSA's requirements. For example, condominium developers may seek an exemption if the condominium development as a whole has fewer than 25 units. However, separate properties or contemplated expansions of the development may be required to be counted together if developed under a common plan.

Another exemption applies to sales of units within a finished building or for which a contract requires the seller to complete a building within two years. As applied to condominium developments, this exemption requires the condominium development as a whole, including common elements, to be complete within two years, which is often not feasible for developers who may be developing in phases that may not be scheduled for completion within the two-year time limit. Due to these and other complexities of

navigating the exemptions, developers often choose to comply, at great cost, with the act's registration requirements to avoid the consequences of non-compliance.

During the recent economic downturn, condominium buyers took advantage of the act's complicated requirements to revoke their purchase agreements, sometimes even after closing, when developers either failed to comply with ILSA's onerous registration requirements or mistakenly believed the development fell under one of complicated exemptions. The act became a tool for savvy consumers to use in playing the market, giving them the right to revoke purchase agreements that became economically disadvantageous.

The proposed amendment to the act will clarify and expand the exemptions available to condominium developers by exempting all condominium developments, regardless of size, from the registration and disclosure provisions.

Although condominium developers will still need to comply with the anti-fraud provisions (unless they meet some other exemption requirements), they will be exempt from both the seven-day revocation period for all buyers and the two-year revocation period that arises from the seller's failure to provide a property report.

The exemption does require that the condominium unit purchased be an improved lot under the act, that is, physically habitable with necessary utilities connected, but does not require the entire development to be completed. •

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