
CLIENT ADVISORY

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GANFER & SHORE, LLP WELCOMES MARTIN E. SCHLOSS

Ganfer & Shore, LLP is pleased to announce that Martin E. Schloss has become Of Counsel to the firm and will be substantially expanding our corporate practice.

Mr. Schloss has four decades of experience as a corporate attorney in Manhattan. Prior to joining Ganfer & Shore, LLP, he spent 13 years as Vice President, General Counsel and Secretary of Scientific Games Corporation, a multinational corporation in the business of supplying wagering products and services and operating gaming venues. As General Counsel, Mr. Schloss led all of the company's corporate acquisitions, both domestic and international; handled public offerings of the company's common stock as well as numerous debt financings; supervised legal and regulatory compliance; drafted and reviewed contracts; and supervised investor relations, government relations, and the company's stock option programs. Mr. Schloss also served for several years as a senior officer and in-house counsel for General Instrument Corporation. He also has years of experience as a corporate attorney in law firm practice. We welcome him and his clients to Ganfer & Shore.

INTERSTATE LAND SALES ACT GOVERNS DEVELOPERS AND PURCHASERS IN LARGE NEW-CONSTRUCTION CONDOMINIUMS

With the economic downturn driving down prices in the real estate market in New York and elsewhere, many purchasers who signed pre-construction contracts to acquire real estate when times were good are now looking for ways to terminate those contracts as their buildings are reaching completion. A federal statute known as the **Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1701-1720**, referred to as "ILSA", although originally intended to prevent fraud in connection with the sale of undeveloped homesites in subdivisions of vacant land, also applies to contracts for the purchase of condominium units and is being raised increasingly often by purchasers in the New York metropolitan area.

ILSA makes it unlawful to sell or lease any lot of real property covered by the statute unless the developer/seller complies with statutory registration and disclosure requirements. Among these is the requirement that the purchaser be provided with a document known as the Property Report, which must disclose specific types of information to the purchaser, before signing the purchase contract. Significantly, the Property Report must be a self-contained document containing all the necessary disclosures. A document prepared for another purpose, such as an Offering Plan, will not satisfy the requirement. Real property covered by the statute includes condominiums and, according to U.S. Department of Housing and Urban Development regulations, it also includes cooperatives (even though cooperatives are often considered personal property rather than real property for other purposes), in addition to traditional property lots.

If the registration and disclosure provisions of ILSA are not complied with, then a purchaser may rescind the purchase contract for up to two years after he or she signs it. This relieves the purchaser of any obligation to close on the purchase and permits the purchaser to recover his or her downpayment. This right of rescission is absolute and does not depend on a showing that the

developer had any intent to defraud or that the purchaser was actually misled. Thus, developers or sponsors in projects that are or even might be subject to ILSA must ensure that they comply with all of ILSA's requirements, including providing a qualifying Property Report to every purchaser as well as complying with substantive ILSA provisions concerning what may be included in a contract.

ILSA applies to all purchases of real property unless an exemption to the statute is applicable. The two most important exemptions are known as the "100 lot" exemption and the "improved lot" or "two year" exemption. The 100-lot exemption provides that ILSA does not apply to a transaction involving a subdivision or property containing less than 100 "lots" of real property under a common promotional plan. The improved-lot/two-year exemption provides that ILSA does not apply where construction on a property has already been completed before the contract is signed or where the developer is contractually obliged to complete construction within two years.

The combined effect of these two exemptions is that ILSA will generally apply only to new-construction developments (as opposed to resales of individual homes or conversions of rental properties) involving 100 or more lots or units. However, there has been a great deal of litigation surrounding the interpretation of each of these exemptions, including disputes concerning how the number of lots or units is to be counted (for example, is a parking spot or a separately purchased storage unit considered a separate lot?). Therefore, all developers and sponsors should be sure to obtain guidance from counsel regarding whether ILSA compliance is required, as should contract purchasers seeking relief from their purchase obligation.

Two recent cases decided by the federal courts in New York have addressed the scope of the exemptions. In **Bodansky v. Fifth on the Park Condo, LLC**, 2010 WL 334985 (S.D.N.Y. Jan. 29, 2010), the developer escaped application of ILSA under the 100-lot exemption by showing that although the condominium building under construction comprised 157 units, only 90 units were already sold or under contract of sale at the time the case was brought and that no more sales would take place until the building was completed and received its temporary certificate of occupancy. In **Romero v. Borden East River Realty LLC**, N.Y.L.J. Mar. 16, 2010, p. 25, col. 3 (E.D.N.Y. Mar. 11, 2010), the court similarly allowed a developer to "piggyback" the 100-lot and two-year exemptions to defeat a rescission claim under ILSA. Both courts held that "the Hundred Lot Exemption applies where a developer contracts to sell up to ninety-nine non-exempt lots in a 200-lot subdivision, but will sell the remaining 101 lots either as improved lots or pursuant to contracts obligating the developer to improve the lots within two years." Finally, the court in Romero held that under the terms of the offering plan and purchase contracts in that case, parking spaces and roof terraces included in the sale of each unit did not constitute separate units for purposes of determining whether the statutory threshold of 100 units had been reached.

The plaintiffs in both of these cases argued that the developers were "purposefully evading" the ILSA requirements by structuring their sales in this manner. The courts disagreed based on the developers' representations that they had never heard of the ILSA statute until they received demands for rescission from the plaintiffs. This is evidence that until recently, many real estate professionals were unaware of ILSA and its important ramifications for developers and purchasers in projects subject to its terms. It should be noted that Bodansky and Romero are lower-court decisions and are subject to appeal. In addition, some decisions from other parts of the country disagree with the interpretation of the ILSA exemptions adopted in these decisions. Ganfer & Shore, LLP has successfully represented parties in several disputes under ILSA, but was not involved in either of the cases discussed above.