FEDERAL APPEALS COURT: REMORSEFUL BUYERS CAN'T GET THEIR MONEY BACK

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By Luis F. Perez

Allen Levine, an attorney at Becker & Poliakoff, who represented the Coconut Point developers in Van Hook v. the Residences at Coconut Point

A federal appellate court decision last month has strengthened the hand of developers as they fight thousands of lawsuits across the country from condominium unit buyers trying to get out of contracts signed during the boom.

A December analysis by *The Real Deal* showed that hundreds of buyers in New York were trying to use a federal disclosure law called the Interstate Land Sales Full Disclosure Act, or ILSA, to renege on their contracts. New York saw its first ILSA ruling in decades when a federal judge ruled in January that the developers of the Harlem condo Fifth on the Park were exempt from the ILSA statute, thereby rejecting two buyers' efforts to break their contracts and get their deposits back. The buyers said they planned to appeal that decision.

Just days after the New York ruling, the Atlanta-based U.S. Court of Appeals for the 11th Circuit sided with the developer in another ILSA case in Bonita Springs, Florida. That Feb. 3 ruling doesn't bind other federal jurisdictions, but it sets a precedent other federal courts are likely to follow, experts said. It's the second ILSA ruling the same appellate court has made in the last six months siding with the developers .

"The vast majority of ILSA cases are in the 11th Circuit," said Martin Schwartz, a partner in the real estate practice group at Miami-based law firm Bilzin Sumberg Baena Price & Axelrod.

The 11th Circuit has a lot more experience in this area of the law since it covers Florida, which has been at the forefront of the real estate bust, he said. So the other circuits and lower courts are likely to look at its decisions for guidance, said Schwartz, who represents developers but hasn't been involved in any of the lawsuits decided by the federal appeals court.

The disclosure law requires developers dividing land into 100 or more parcels to provide the U.S. Department of Housing and Urban Development with a property report. The law also requires them to provide buyers with the report before signing contracts.

The 1968 law was intended to protect out-of-state consumers from being duped into buying worthless swamps in Florida or tracts of desert land in Arizona. In the 1970s, the law was formally extended to apply to condo developers. In the Feb. 3 Bonita Springs decision, Van Hook v. the Residences at Coconut Point, the 11th Circuit reversed a lower court's decision siding with the buyer, who accused the developer of not complying with an ILSA provision requiring the project be built within two years. So Pamela Van Hook wanted to rescind her contract and get back her $110,000 deposit on a $493,000 unit she agreed to buy in December 2005.

However, the three-judge appeals panel sided with the condo developer and ordered the lower court to rehear the case.

The appellate court ruled that "that the clause which excused delays for failure to complete the construction in two years because of 'acts of God, weather conditions, restrictions imposed by any governmental agency, labor strikes, material shortages or other delays beyond the control of the seller,' did not render the contract [void]."

Lawyers have misconstrued the consumer protection law to try and get their buyers out of valid contracts, said Allen Levine, a lawyer who represented the Coconut Point developers, Kosene & Kosene and the Simon Property Group. He said the decision could put an end to this "creative lawyering that has backfired."

He added: "This is probably it on this because the trial courts will follow the law now." A lawyer for the buyer could not be immediately reached for comment.

The earlier ILSA decision from the 11th Circuit -- handed down Sept. 30, 2009 -- involved a Lee County, Florida dispute in which the buyer wanted to back out, Schwartz said. The appeals court ruled against the buyer in that case. With the more recent Van Hook case in Bonita Springs, the court made it much clearer, he said.

Levine said he has defended his clients in hundreds of Florida ILSA cases and that there are thousands of them winding their way through the court system.

"This act was never designed for the purpose they're using it for," Schwartz said, referring to the buyers' lawyers. "It's not the investor protection act."