

ARE REAL ESTATE SPECULATORS ENTITLED TO AFFIRMATIVE RELIEF UNDER THE FEDERAL INTERSTATE LAND SALES FULL DISCLOSURE ACT AS INTERPRETED BY FLORIDA COURTS?

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I. INTRODUCTION

“Surprise, surprise, surprise!”¹ The Florida real estate market fluctuates.² Ignoring the obvious and allowing their pecuniary interests to overcome them, numerous speculators jumped into the Florida real estate market following the booming years of 2004 and 2005 when Florida property values were in a seemingly never-ending rise.³ These speculators soon found that what goes up, inevitably will come down.⁴ Significant market correction in the succeeding years—beginning in mid-2006 and continuing through 2008—left many of those real estate speculators upside down with what seemed to be legally binding real

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¹ Letter to the Editor, “*In the Immortal Words of Gomer Pyle: Surprise, Surprise, Surprise!*,” SEATTLE TIMES, Jan. 27, 2008, http://seattletimes.nwsources.com/html/opinion/2004145673_sunlets27.html.

² See *Hot Developers, Inc. v. Willow Lake Estates, Inc.*, 950 So. 2d 537, 540, 542 (Fla. Dist. Ct. App. 2007) (citing *Hutchison v. Tompkins*, 259 So. 2d 129, 132 (Fla. 1972)); see also *Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, at *1 (11th Cir. Sept. 30, 2009) (“In a market-based economy the price of housing, like other goods, is subject to swings.”); *Santidrian v. Landmark Custom Ranches, Inc.*, No. 08-60791-CIV, 2009 WL 1955757, at *1 (S.D. Fla. July 6, 2009) (noting the fluctuation in the real estate market negatively affected Plaintiff’s ability to obtain financing for the purchase of a house).

³ See Michael Corkery & James R. Hagerty, *Speculators Helped Fuel Florida’s Housing Boom*, WALL ST. J. ONLINE, Jan. 9, 2007, <http://www.realestatejournal.com/buysell/markettrends/20070109-corkery.html>.

⁴ See *Stein*, 2009 WL 3110819, at *1 (“All bubbles eventually burst, as this one did.”); Blood, Sweat & Tears Lyrics – Spinning Wheel, http://www.oldielyrics.com/lyrics/blood_sweat_tears/spinning_wheel.html (last visited Dec. 23, 2009).

estate contracts for properties they could no longer flip for a large profit.⁵ Instead, many of those contracts stood at purchase prices that, due to market forces, now exceed the market value of the properties.⁶ Thus, the prevailing issue for many real estate speculators since mid-2006 became whether there was a lawful way out of the intend-to-for-sake, noose-around-my-neck-of-a-contract and whether speculators can find a safe haven by invoking the Interstate Land Sales Full Disclosure Act (ILSA).⁷

The United States Congress enacted the ILSA in 1968⁸ to protect the public, particularly land purchasers,⁹ from fraudulent, unscrupulous land sales schemes “by real estate developers through interstate commerce and the use of the mails in the promotion and sale of properties offered as a part of a common promotional plan.”¹⁰ Consequently, if the ILSA applies, it requires developers to “furnish prospective subdivision-lot purchasers with a property report” that discloses all material information to protect buyers.¹¹ Thus, disclosure is the ILSA’s “pri-

⁵ See Maya Bell, *Boom of Condo Crash Loudest in Miami: The Pain is Acute Here but Unbearable in S. Florida*, ORLANDO SENTINEL, Aug. 27, 2007, at A1, available at 2007 WLNR 16700826.

⁶ *Id.*

⁷ See *Rosenstein v. Edge Investors, L.P.*, No. 07-80903CIV-MIDDLEBR, 2009 WL 903806, at *1 & n.1 (S.D. Fla. Mar. 30, 2009) (providing, in relevant part, “[t]he Court is aware that in recent years, suits such as this [alleging ILSA violations] have become increasingly common”).

⁸ 15 U.S.C. §§ 1701-1720 (2009); see *Paquin v. Four Seasons of Tenn., Inc.*, 519 F.2d 1105, 1108 (5th Cir. 1975); *Fortunato v. Windjammer Homebuilders, Inc.*, No. 8:04-CV-165-T-26MSS, 2006 WL 208777, at *2 (M.D. Fla. Jan. 25, 2006).

⁹ See *Samara Dev. Corp. v. Marlow (Samara II)*, 556 So. 2d 1097, 1100 (Fla. 1990); *200 E. Partners, LLC. v. Gold*, 997 So. 2d 466, 469 (Fla. Dist. Ct. App. 2008); *Dorchester Dev., Inc. v. Burk*, 439 So. 2d 1032, 1035 (Fla. Dist. Ct. App. 1983).

¹⁰ *Appalachian, Inc. v. Olson*, 468 So. 2d 266, 267-68 (Fla. Dist. Ct. App. 1985); see *Flint Ridge Dev. Co. v. Scenic Rivers Ass’n of Okla.*, 426 U.S. 776, 778-79 (1976); *Grove Towers, Inc. v. Lopez*, 467 So. 2d 358, 361 (Fla. Dist. Ct. App. 1985); *Fortunato*, 2006 WL 208777, at *2 (citing *Winter v. Hollingsworth Props., Inc.*, 777 F.2d 1444, 1447 (11th Cir. 1985)).

¹¹ *Rice v. Branigar Org., Inc.*, 922 F.2d 788, 791 n.4 (11th Cir. 1991) (citing *Flint Ridge Ridge*, 426 U.S. at 778-80); see *Law v. Royal Palm Beach Colony, Inc.*, 578 F.2d 98, 99-100 (5th Cir. 1978); cf. *Cook v. Deltona Corp.*, 753 F.2d 1552, 1560 (11th Cir. 1985) (rejecting buyer’s fraud claim where buyer admitted that “he knew, at the time of purchase, that the lot for which he was contracting was underwater”).

mary tool to protect purchasers from unscrupulous sales of undeveloped home sites.”¹²

With the congressional intent behind the ILSA in mind, it is appropriate to examine Florida appellate court opinions and other relevant decisions that may provide a lawful means of escape from burdensome, onerous real estate contracts that consumers once expected to return a handsome profit. Notably, the Florida Fourth District Court of Appeal certified a contract issue arising under the ILSA as a question of great public importance to the Florida Supreme Court in *Samara Development Corp. v. Marlow*.¹³

II. THE FLORIDA SUPREME COURT’S MATERIALLY FLAWED SAMARA DECISION

Addressing the certified question from the Fourth District,¹⁴ the Florida Supreme Court considered whether:

a contract for the sale of a condominium in Florida [is] exempt from the provisions of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. § 1710, where it provides for completion within two years but restricts the buyer’s remedies for breach of the contract by the sellers to a return of the deposit or specific performance, or must the contract also afford the buyer the alternative remedy of a suit for damages[.]¹⁵

In what appears to be the Florida Supreme Court’s only opportunity to date to address any issue concerning the ILSA, the court held *Samara Development Corporation’s* (*Samara*) reliance on the United

¹² *Maguire v. S. Homes of Palm Beach, L.L.C.*, 591 F. Supp. 2d 1263, 1267 (S.D. Fla. 2008); *Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, at *2 (11th Cir. Sept. 30, 2009) (both quoting *Winter*, 777 F.2d at 1446-47).

¹³ *Samara II*, 556 So. 2d at 1098.

¹⁴ *Marlow v. Samara Dev. Corp. (Samara I)*, 528 So. 2d 420, 422 (Fla. Dist. Ct. App. 1988).

¹⁵ *Samara II*, 556 So. 2d at 1098. *But see Stein*, 2009 WL 3110819, at *1 (involving a condominium unit that was completed within the two-year period and purchasers who relied on the ILSA to get out of their contract after suffering from buyer’s remorse).

States Department of Housing and Urban Development's (HUD)¹⁶ interpretation of the ILSA to be ineffective.¹⁷

In *Samara*, the Florida Supreme Court initially recognized that Samara, the developer of the condominium project claiming to be exempt from the ILSA, "promised to complete the condominium . . . less than two years from the date of the agreement."¹⁸ The agreement also provided that the purchaser, Marlow, would be able to recover his deposit or sue for specific performance in the event that Samara defaulted.¹⁹ In essence, the contract restricted the buyer's remedies for breach, but also contained the requisite two-year construction completion commitment and did not preclude a cause of action for specific performance. The four to three majority in *Samara* recognized that the administrative interpretations of a statute by HUD are entitled to great weight.²⁰ Nevertheless, the majority proceeded to find "that limitation of the remedy of specific performance is one example of where the seller would be permitted 'to breach [the contract] virtually at will.'"²¹ In view of the fact that the *Samara* contract did not preclude or otherwise restrict the remedy of specific performance, but merely limited the remedies available, the majority's finding seems to present the pejorative question of why the finding was even necessary.

On the other hand, the dissenting opinion recognized that HUD's advisory opinions concerning the ILSA stated "that exemptions [under the ILSA] will be granted when the seller is obligated to complete the building within two years and the purchaser is not restricted from seeking specific performance."²² Like the majority, the dissent recognized that great deference should be afforded to federal agencies charged with interpretation and enforcement of laws.²³ However, in direct contrast to the majority, the dissent properly gave great deference to

¹⁶ HUD is the agency charged with enforcement and construction of the ILSA.

¹⁷ *Samara II*, 556 So. 2d at 1099-100.

¹⁸ *Id.* at 1098. This fact left *Samara* materially distinguishable from *Dorchester Development, Inc. v. Burk*, 439 So. 2d 1032 (Fla. Dist. Ct. App. 1983) (discussed *infra* Part III). *Id.* at 1100.

¹⁹ *Id.* at 1098.

²⁰ *Id.* at 1099.

²¹ *Id.*

²² *Id.* at 1102 (Overton, J., dissenting) (citing five HUD advisory opinions).

²³ *Id.*

HUD's advisory opinions, citing three United States Supreme Court opinions for support.²⁴ Further, the majority's finding that HUD's interpretation and advisory opinions were unpersuasive²⁵ was incorrect because the majority failed to apply the correct standard, that an agency's construction of a statute should stand "unless clearly erroneous."²⁶

For over two hundred years, it has "emphatically [been] the province and duty of the [federal] judicial department to say what the law is" when it comes to federal law arising from the enumerated powers granted to Congress under the United States Constitution.²⁷ Simply put, because the highest court in the land spoke conclusively on the underlying deference issue in *Samara*,²⁸ the Florida Supreme Court was not at liberty to reach a conclusion contrary to HUD's interpretation of the ILSA, unless HUD's interpretation was first determined by the court to be clearly erroneous. In fact, the United States Supreme Court, under Chief Justice John Marshall, "declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution."²⁹ Therefore, because the ILSA is a federal law arising from the enumerated powers granted to Congress under the United States Constitution, the Supreme Court's rulings regarding the deference afforded should be given maximum precedential value. The *Samara* majority did not conclude that HUD's interpretation of the ILSA was clearly erroneous,³⁰ which remains the long-standing prerequisite to a contrary determination of a federal agency's own interpretation.³¹ The Florida

²⁴ *Id.* (citing *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980); *Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Am. Paper Inst., Inc. v. Am. Elec. Power Serv. Corp.*, 461 U.S. 402, 422-23 (1983)).

²⁵ *Id.* at 1099 n.2.

²⁶ *Id.* at 1102 (Overton, J., dissenting).

²⁷ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

²⁸ *Id.*; U.S. CONST. art. III, § 1.

²⁹ *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (citing *Marbury*, 5 U.S. at 177).

³⁰ *See Samara II*, 556 So. 2d at 1099-100.

³¹ *See, e.g., Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("[I]f [a] statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."); *Pugliese v. Pukka Dev., Inc.*, 550 F.3d 1299, 1304 (11th Cir. 2008) ("*Chevron* deference applies to agency rules promulgated in the exercise of the authority to make rules carrying the force of law granted to the agency by Congress. HUD is the agency responsible for administration of the ILSA and has been granted authority to promulgate rules and regulations relating to the ILSA.")

Supreme Court established, “if an agency’s interpretation of its own regulation is merely one of several reasonable alternatives, it must stand even though it may not appear as reasonable as some other alternative.”³²

Nevertheless, the Florida Supreme Court reached a holding in *Samara* that was not only contrary to HUD’s interpretation of the ILSA, but also incredibly divergent from the Florida Supreme Court’s own precedent.³³ Despite this, *Samara* has stood as precedent in Florida for twenty years.³⁴ The Florida Supreme Court should recede from or overrule *Samara* because its holding is materially flawed.³⁵ With due respect to the Florida Supreme Court, a close examination of the Florida appellate opinions upon which the court based its reasoning in *Samara* seems to make this conclusion plainly evident.

III. SAMARA’S TENUOUS, UNSUPPORTIVE UNDERPINNINGS

In *Samara*, the Florida Supreme Court gave tacit approval to many similar cases from the Florida district courts of appeal³⁶—at least to the extent they decided the same or substantially similar issues as

(citations omitted); *Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm’n*, 427 So. 2d 716, 719 (1983) (“We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute’s administration is entitled to great weight and should not be overturned unless clearly erroneous.” (citing *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation of Dep’t of Bus. Regulation*, 276 So. 2d 823, 828 (Fla. 1973))).

³² *Pan Am.*, 427 So. 2d at 719-20; see *Chevron*, 467 U.S. at 845.

³³ See, e.g., *Dep’t of Env’tl. Regulation v. Goldring*, 477 So. 2d 532, 534 (Fla. 1985) (citing *Pan Am.*, 427 So. 2d at 719). The *Samara* majority never considered the time-honored judicial constraint doctrine of *stare decisis*. See *IRS v. Osborne (In re Osborne)*, 76 F.3d 306, 309 (9th Cir. 1996).

³⁴ See *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 39 (Fla. Dist. Ct. App. 1998).

³⁵ *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) (“The District Courts of Appeal are required to follow Supreme Court decisions.” (quoting *State v. Hayes*, 333 So. 2d 51, 53 (Fla. Dist. Ct. App. 1976))); cf. *Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, at *3-5 (11th Cir. Sept. 30, 2009).

³⁶ *Samara II*, 556 So. 2d 1097, 1100 (Fla. 1990) (citing *Berzon v. Oriole Homes Corp.*, 497 So. 2d 670, 671 (Fla. Dist. Ct. App. 1986); *Arvida Corp. v. Barnett*, 502 So. 2d 11, 12-13 (Fla. Dist. Ct. App. 1986); *Dorchester Dev., Inc. v. Burk*, 439 So. 2d 1032, 1034 (Fla. Dist. Ct. App. 1983)).

Samara—and gave express approval to *Samara*'s originating case, *Marlow v. Samara Development Corp.*³⁷ Accordingly, it is also appropriate to examine *Marlow*'s case law underpinnings.

In *Marlow*, the Fourth District appropriately recognized that other Florida district courts' interpretations of the ILSA conflicted with HUD's, so the Fourth District certified the question to the Florida Supreme Court.³⁸ In other words, the Florida Supreme Court's decision in *Samara* perpetuated twenty years and counting of Florida jurisprudence that conflicted with HUD, even though the federal agency's reasonable interpretation of the ILSA was not found to be clearly erroneous by either the Florida Supreme Court or any Florida district court of appeal at the time of the *Samara* decision or since then.³⁹ In a 2008 Fourth District case, wherein a developer sought and received an advisory opinion letter from HUD approving its plan for development and sale of condominium lots, the court found that the order from HUD was unpersuasive and insufficient to warrant a holding in favor of the developer.⁴⁰

Interestingly, HUD apparently gave its imprimatur to *Dorchester Development, Inc. v. Burk*,⁴¹ which the *Samara* dissent directly addressed:

[HUD] construed *Dorchester* consistently with its own position, noting that “[a]lthough the [*Dorchester*] language was broad, it is HUD’s position that the court’s concern regarding limitations on remedies was confined to the right to specific performance.” . . . HUD has effectively said that a developer is exempt from the act if it binds itself to finish the project within two years and allows the purchaser to seek specific performance or a return of the deposit.⁴²

³⁷ *Id.* at 1098 (approving the district court's decision in *Marlow*).

³⁸ *Samara I*, 528 So. 2d 420, 421-22 (Fla. Dist. Ct. App. 1988). *But see* Mailloux v. Briella Townhomes, LLC, 3 So. 3d 394, 395-96 (Fla. Dist. Ct. App. 2009) (relying on HUD Guidelines' interpretation of the ILSA).

³⁹ *See, e.g.*, 200 E. Partners, LLC v. Gold, 997 So. 2d 466, 468-69 (Fla. Dist. Ct. App. 2008).

⁴⁰ *Id.* at 467-69.

⁴¹ *Dorchester*, 439 So. 2d at 1032.

⁴² *Samara II*, 556 So. 2d at 1102 (citations omitted).

The *Samara* majority's holding directly contradicts HUD's interpretation of the ILSA without the necessary finding that it was clearly erroneous.⁴³

The contract issue in *Dorchester*, however, was materially distinguishable from *Samara*. The *Dorchester* contract did not contain a commitment to complete the condominium unit within two years, but provided the purchasers "an option to cancel the contracts and receive back their deposits in the event the condominium units were not erected by November 30, 1981," which happened to be two years later.⁴⁴ In other words, the contract in *Dorchester* limited the purchaser's remedies but did not contain an unconditional commitment to complete the condominium unit within two years.⁴⁵ The Florida First District Court of Appeal subsequently acknowledged this conclusion in *Hardwick Properties, Inc. v. Newbern*.⁴⁶ The court held the lack of an unconditional commitment to complete the condominium unit within two years, alone, was enough to violate the ILSA,⁴⁷ which supports the *Dorchester* court's ruling that there was no exemption.⁴⁸

Samara also relied upon the Florida Third District Court of Appeal's decision in *Arvida Corp. v. Barnett*, which focused on the language contained in the contract by which the developer sought to significantly curtail the purchaser's rights to specific performance.⁴⁹ The *Arvida* court properly concluded that "the remedy of specific performance [wa]s made available to the Barnetts solely in order for Arvida to evade the ILSA's disclosure requirements."⁵⁰ This finding was

⁴³ *Pan Am. World Airways, Inc. v. Fla. Pub. Serv. Comm'n*, 427 So. 2d 716, 719 (Fla. 1983) ("We have long recognized that the administrative construction of a statute by an agency or body responsible for the statute's administration . . . should not be overturned unless clearly erroneous." (citing *State ex rel. Biscayne Kennel Club v. Bd. of Bus. Regulation of Dep't of Bus. Regulation*, 276 So. 2d 823, 828 (Fla. 1973))).

⁴⁴ *Dorchester*, 439 So. 2d at 1034.

⁴⁵ *Id.* at 1035.

⁴⁶ *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 38 (Fla. Dist. Ct. App. 1998).

⁴⁷ *Id.*

⁴⁸ *Dorchester*, 439 So. 2d at 1035.

⁴⁹ *Samara II*, 556 So. 2d 1097, 1100 (Fla. 1990) (citing *Arvida Corp. v. Barnett*, 502 So. 2d 11, 12 (Fla. Dist. Ct. App. 1986)).

⁵⁰ *Arvida*, 502 So. 2d at 13.

also consistent with the plain language of the ILSA,⁵¹ as well as HUD's interpretation of the ILSA.⁵²

Samara further relied upon the Fourth District's decision in *Berzon v. Oriole Homes Corp.*,⁵³ which itself relied upon *Appalachian, Inc. v. Olson* and *Dorchester*.⁵⁴ Having already addressed *Dorchester*, the *Samara* court observed that the Fourth District's opinion in *Marlow* was "consistent with its prior decision in *Berzon*."⁵⁵ Accordingly, we must now consider *Appalachian*.

We are navigating in charted waters because, like *Dorchester*, the *Appalachian* court faced "contracts [that] contained no provision requiring the developers to complete construction by any definite date."⁵⁶ The developers, in addition to failing to include a commitment to complete the condominium units within two years, also never asserted any entitlement to the applicable exemption under the ILSA.⁵⁷ Just as in *Dorchester*, the mere lack of an unconditional commitment to complete the condominium unit within two years was inconsistent with the ILSA's exemption requirements and thus sufficient to support a decision in favor of the condominium purchasers.⁵⁸

Samara also relied upon the Florida Second District Court of Appeal's opinion in *Marco Bay Associates v. Vandewalle*.⁵⁹ The *Vandewalle* court began its decision by stating, "[w]e reverse [the granting of summary judgment for the purchasers], having found that appellants contracted to guarantee completion of appellee's condominium unit within two years, thereby exempting themselves from the

⁵¹ 15 U.S.C. § 1702(a) (1979).

⁵² See generally Guidelines for Exemptions Under the Interstate Land Sales Full Disclosure Act, 49 Fed. Reg. 31375, 31376 (Aug. 6, 1984).

⁵³ *Samara II*, 556 So. 2d at 1100 (citing *Berzon v. Oriole Homes Corp.*, 497 So. 2d 670, 671 (Fla. Dist. Ct. App. 1986) (per curiam)).

⁵⁴ *Berzon*, 497 So. 2d at 671 (citing *Appalachian, Inc. v. Olson*, 468 So. 2d 266, 268-69 (Fla. Dist. Ct. App. 1985); *Dorchester Dev., Inc. v. Burk*, 439 So. 2d 1032, 1034-35 (Fla. Dist. Ct. App. 1983)).

⁵⁵ *Samara II*, 556 So. 2d at 1100-01.

⁵⁶ *Appalachian*, 468 So. 2d at 268.

⁵⁷ *Id.* at 269.

⁵⁸ *Id.*

⁵⁹ *Samara II*, 556 So. 2d at 1100 (citing *Marco Bay Assocs. v. Vandewalle*, 472 So. 2d 472 (Fla. Dist. Ct. App. 1985)).

Act.”⁶⁰ The *Vandewalle* court substantially relied upon the logic and reasoning of *Dorchester*.⁶¹ However, the *Vandewalle* court approvingly distinguished *Dorchester*, as “there was no express contractual guarantee to complete the building within two years,” and because of the limited options given the buyer in lieu thereof.⁶²

Additionally, the Florida Supreme Court’s decision in *Samara* reasoned that “without the availability of at least both specific performance and damages the obligation to complete the construction within two years is illusory. Specific performance alone is not sufficient because the developer could sell the property to a third party in the interim, thereby nullifying the availability of specific performance.”⁶³

However, the eighty-four-year-old United States Supreme Court decision, *Halsell v. Renfrow*, relied upon by the *Samara* majority—in part for its conclusion as to the remedy of specific performance—merely dealt with an oral contract for the sale of real property,⁶⁴ which, as expressly recognized by the Supreme Court, is not sustainable under the statute of frauds.⁶⁵ Thus, the Supreme Court’s *Halsell* decision was inapposite to *Samara*. Furthermore, the Fourth District’s decision in *Krantz v. Donner*, another decision relied upon by the *Samara* majority, provided:

where a third-party purchaser, at the time of the subsequent conveyance of the property to him by the vendor,

⁶⁰ *Marco Bay*, 472 So. 2d at 473.

⁶¹ *Id.* at 474.

⁶² *Id.* at 475. The *Newbern* court also approvingly acknowledged the *Vandewalle* court’s conclusion. See *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 38-39 (Fla. Dist. Ct. App. 1998).

⁶³ *Samara II*, 556 So. 2d at 1101 (citing *Halsell v. Renfrow*, 202 U.S. 287, 292-94 (1906); *Krantz v. Donner*, 285 So. 2d 699, 700 (Fla. Dist. Ct. App. 1973)) (citations omitted); compare *Hardwick*, 711 So. 2d at 39, with *Kaufman v. City Place S. Tower, LLC*, No. 08-80226-CIV, 2008 WL 4722106, at *4 (S.D. Fla. Oct. 21, 2008) (“The Act does not stand for the proposition that purchasers’ remedies can never be limited. Rather, the ILSA and relevant case law state that purchasers’ remedies cannot be limited if developers claim an exemption under . . . the Act.”).

⁶⁴ *Halsell*, 202 U.S. at 292-94.

⁶⁵ *Id.* at 292 (citing OKLA. STAT. tit. 8, § 4 (2009)); see FLA. STAT. § 689.01 (2009); *Bergman v. DeJulio*, 826 So. 2d 500, 503 (Fla. Dist. Ct. App. 2002); *Con-Dev of Vero Beach, Inc. v. Casano*, 272 So. 2d 203, 206 (Fla. Dist. Ct. App. 1973).

is fully aware that the vendor had previously sold the property to another and that the prior contract of sale has not been rescinded by the parties, the subsequent contract purportedly entered into between the vendor and the third party will be deemed to be fraudulent and the product of conspiracy. Consequently, equity in such a case will order the cancellation of the latter agreement and enter a decree of specific performance of the original contract in favor of the purchaser⁶⁶

The Florida Supreme Court, however, did not address or consider this portion of the Fourth District's holding in *Krantz*, which provided a lawful remedy in direct contrast to the *Samara* majority's illusory conclusion.⁶⁷ In *Con-Dev of Vero Beach, Inc. v. Casano*, the Fourth District reviewed an appeal of an interlocutory order which struck down a builder's affirmative defenses against an action for specific performance or in the alternative, money damages.⁶⁸ The trial court's order struck, among others, the defense of impossibility where the condominium unit under the contract for purchase and sale was alleged not to have been built.⁶⁹ As such, like the Supreme Court's *Renfrow* decision, *Casano* was also inapposite to *Samara*, and the court's reliance on it was misplaced.⁷⁰

Additionally, the Florida First District Court of Appeal drew a notable distinction in *Newbern* concerning the Supreme Court's decision in *Samara*, saying

We do not read *Samara* as creating a bright-line rule that the developer's contractual obligation is rendered illusory by any restriction of the purchaser's right to recover all possible damages. The court in *Samara* makes clear

⁶⁶ *Krantz v. Donner*, 285 So. 2d 699, 700 (Fla. Dist. Ct. App. 1973) (citations omitted).

⁶⁷ *Samara II*, 556 So. 2d at 1098-2001.

⁶⁸ *Con-Dev*, 272 So. 2d at 205.

⁶⁹ *Id.*

⁷⁰ See *Redington Grand, LLP v. Level 10 Props., LLC*, No. 2D08-4738, 2009 WL 2408334, at *4-5 (Fla. Dist. Ct. App. Aug. 7, 2009) (discussing *Samara*, *Hardwick*, and a recent federal district court decision upon which the trial court improperly relied).

that specific performance alone is not a sufficient remedy and that a purchaser must have the availability of both specific performance and some damages for the developer's obligation to complete construction to be real, rather than illusory. In determining whether the developer's obligation is "real" or "illusory," the focus of the *Samara* court was on whether the contract could, in effect, be breached virtually at will, or whether the developer would be exposed to sufficient damages for breach that a realistic obligation to construct would exist. This analysis may be particularly complicated where, for example, a favorable real estate market would allow the developer after breach to sell the constructed property at a price materially greater than the preconstruction sales price. We conclude that, if the developer remains exposed to damages for breach which are sufficient to constitute a substantial economic risk under the circumstances, the developer's obligation is real rather than illusory.⁷¹

Thus, the Florida Supreme Court's conclusion concerning the sole remedy of specific performance, while a reasonable possibility, was not mandated under all facts and circumstances. "Under Florida law, notwithstanding any contractual limitation of remedies, when the seller frustrates the buyer's specific performance right by selling the property to someone else, the buyer may recover the seller's entire profit from the sale."⁷² Contract buyer or purchasers could protect themselves by recording the contract or a memorandum of contract in the public records; thereby, giving the world notice of their contractual rights, which would either affirmatively or constructively inform a subsequent contract purchaser, even without the first contract buyer's knowledge of sale.⁷³

⁷¹ *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 39 (Fla. Dist. Ct. App. 1998) (citing *Samara II*, 556 So. 2d at 1101).

⁷² *Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, at *5 (11th Cir. Sept. 30, 2009) (citing *Seaside Cmty. Dev. Corp. v. Edwards*, 573 So. 2d 142, 146-47 (Fla. Dist. Ct. App. 1991)).

⁷³ See *Feemster v. Schurkman*, 291 So. 2d 622, 626 (Fla. Dist. Ct. App. 1974) ("It is fundamental that a purchaser of an interest in land is chargeable with notice of liens,

It should be evident, after an exhaustive examination of the tenuous, unsupportive foundations of the Florida Supreme Court's decision in *Samara*, that the majority's judgment was improvidently reached and the Fourth District's *Marlow* decision should have been reversed, just as the *Samara* dissent concluded.⁷⁴ Accordingly, the Florida Supreme Court should recede from or overrule *Samara* at its earliest opportunity, along with the Fourth District's *Marlow* and *Berzon* decisions. Indeed, even the Florida Supreme Court has expressly recognized the "quintessential professional act" of conceding error.⁷⁵

Now, in the ubiquitous shadow of the Florida Supreme Court's *Samara* decision, we turn to examine what may be the primary requisites necessary to invoke and sustain a claim under the ILSA, which may or may not provide protections for the real estate speculator.

IV. THE ILSA MAY NOT AFFORD FLORIDA REAL ESTATE SPECULATORS ANY RELIEF

The "ILSA makes it unlawful to sell any lot not exempt under 15 U.S.C. § 1702 unless the seller provides a written property report to the purchaser prior to the purchaser signing a contract for sale."⁷⁶ However, the ILSA expressly provides for numerous alternative means by which a developer may exempt itself or be exempt from the registration and precontract disclosure requirements of the Act.⁷⁷ By the same to-

conveyances, contracts or judicial proceedings affecting the ownership or title thereto as disclosed by official records and such purchaser takes title subject to the above encumbrances which are reflected in the public records." (citing *Latin-American Bank v. Rogers*, 99 So. 546, 548 (Fla. 1924))) (citations omitted).

⁷⁴ *Samara II*, 556 So. 2d at 1102 (Overton, J., dissenting). *Dorchester, Arvida, Vandewalle, Berzon*, and *Krantz* seem properly grounded in law, but were not sufficient to support the *Samara* majority's logic and reasoning. See *Stein v. Paradigm Mirsol, LLC*, 551 F. Supp. 2d 1323, 1329 (M.D. Fla. 2008) (agreeing, in part, and disagreeing, in part, with the *Samara* majority's reasoning), *rev'd on other grounds*, No. 08-10983, 2009 WL 3110819, at *5 (11th Cir. Sept. 30, 2009) (recognizing "Florida law provides for more than specific performance, regardless of what the contract says about remedies").

⁷⁵ See *Boca Burger, Inc. v. Forum*, 912 So. 2d 561, 571-72 (Fla. 2005) (recognizing that parties, or their attorneys, should promptly admit or concede error).

⁷⁶ 200 E. Partners, LLC. v. Gold, 997 So. 2d 466, 467 (Fla. Dist. Ct. App. 2008).

⁷⁷ 15 U.S.C. § 1702 (2009); see *Grove Towers, Inc. v. Lopez*, 467 So. 2d 358, 360 (Fla. Dist. Ct. App. 1985).

ken, a developer must be conscientious and careful not to utilize purchase and sale agreements that courts may interpret as purposefully avoiding the ILSA's requirements.⁷⁸ In other words, the availability of an exemption must be driven by a method of disposition that reflects a legitimate business purpose, as opposed to one that lacks such a purpose and exists primarily to evade the ILSA's requirements.⁷⁹

One such exemption, and perhaps the most commonly utilized exemption, that parties include in contracts for purchase and sale applies to sales under a contract that obligates the seller or developer to erect a condominium unit or residence within a period of two years.⁸⁰ The critical aspect of this exemption is that the purchase and sale contract must unconditionally require completion of the structure within two years.⁸¹ That commitment must be real and not rendered illusory by the particular conditions set forth in the contract.⁸² Whether that two-year commitment is unconditional is a matter of contract interpretation, and within the province of the court.⁸³ Notably, courts must narrowly construe any ambiguity regarding the scope of an exemption under the ILSA to further the statute's purpose of consumer protec-

⁷⁸ See *Gentry v. Harborage Cottages-Stuart, LLLP*, 602 F. Supp. 2d 1239, 1248 (S.D. Fla. 2009) (“[A] seller’s ability to avail himself of the statute’s exemptions must be tempered to ensure that the exemptions are not used in an abusive manner.”).

⁷⁹ See *id.*

⁸⁰ 15 U.S.C. § 1702(a)(2); see, e.g., *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 36-37 (Fla. Dist. Ct. App. 1998); *Marco Bay Assocs. v. Vandewalle*, 472 So. 2d 472, 474 (Fla. Dist. Ct. App. 1985); *Tedder v. Harbour Phase I Owners, LLC*, No. 8:08-cv-1674-T-30TGW, 2009 WL 1043911, at *3 (M.D. Fla. Apr. 17, 2009).

⁸¹ See *Winterrowd v. Taylor Morrison Servs., Inc.*, No. 8:09-cv-1011-T-26EAJ, 2009 WL 2149239, at *2 (M.D. Fla. July 16, 2009).

⁸² See *Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, at *6 (11th Cir. Sept. 30, 2009) (“Allowing for reasonable delays caused by events beyond the seller’s control does not promote or permit fraud. It does not transform the seller’s obligation into an option.” (citing *Atteberry v. Maumelle Co.*, 60 F.3d 415, 420 (8th Cir. 1995))); *Disimone v. LDG S. II, LLC*, No. 2:08-cv-544-FtM-29SPC, 2009 WL 210711, at *3 (M.D. Fla. Jan. 28, 2009); *Bloom v. Home Devco/Tivoli Isles, LLC*, No. 07-80616-CIV, 2009 WL 36594, at *6 (S.D. Fla. Jan. 6, 2009).

⁸³ See *DEC Elec., Inc. v. Raphael Constr. Corp.*, 558 So. 2d 427, 428 (Fla. 1990) (stating that generally contract interpretation is a question of law to be determined by the court, not a jury).

tion.⁸⁴ It naturally follows that the terms of the ILSA must “be applied liberally in favor of broad coverage.”⁸⁵

In a recent opinion, Florida’s Fifth District Court of Appeal whittled away at qualifying language in a contract concerning the two-year unconditional commitment requirement and determined that the extensive conditions agreed to in the contract were broader than Florida’s impossibility defense.⁸⁶ In other words, if the developer’s contractual attempt to be excused from the two-year completion requirement exceeds “grounds cognizable in Florida contract law as impossibility or frustration of performance,” such language renders the developer’s two-year completion obligation illusory.⁸⁷ Notably, the appellate court’s conclusion was not inconsistent with HUD’s rules and regulations, which the court quoted in the opinion.⁸⁸

Moreover, under the ILSA, whether construction is actually completed in two years is immaterial.⁸⁹ If the two-year construction completion commitment was not met by the developer, the buyer or contract purchaser may have a cause of action for breach of contract, but not for violation of the ILSA where the contract unconditionally provided a two-year completion commitment.⁹⁰

Under subsection 1702(b), the ILSA exempts residential subdivisions that contain fewer than one hundred lots from the ILSA’s pre-

⁸⁴ See *Pigott v. Sanibel Dev., LLC*, 576 F. Supp. 2d 1258, 1268 (S.D. Ala. 2008); *Harvey v. Lake Buena Vista Resort, LLC*, 568 F. Supp. 2d 1354, 1362 (M.D. Fla. 2008).

⁸⁵ *Pigott*, 576 F. Supp. 2d at 1268 (quoting *N & C Props. v. Windham*, 582 So. 2d 1044, 1048 (Ala. 1991)).

⁸⁶ *Plaza Court, L.P. v. Baker-Chaput*, Nos. 5D08-899, 5D08-1188, 2009 WL 1809921, at *7 (Fla. Dist. Ct. App. June 26, 2009). *But see Stein*, 2009 WL 3110819, at *7 n.6 (“It appears to us that force majeure [or greater force] clauses broader than the scope of impossibility are enforceable under Florida law.”) (citations omitted).

⁸⁷ *Stein*, 2009 WL 3110819, at *7 n.6.

⁸⁸ *Id.* at *5.

⁸⁹ See *Dorchester Dev., Inc. v. Burk*, 439 So. 2d 1032, 1034 n.1 (Fla. Dist. Ct. App. 1983); see also *Santidrian v. Landmark Custom Ranches, Inc.*, No. 08-60791-CIV, 2009 WL 1955757, at *4 n.2 (S.D. Fla. July 6, 2009) (citing *Dorchester*, 439 So. 2d at 1034 n.1).

⁹⁰ See *Harvey v. Lake Buena Vista Resort, LLC*, 306 F. App’x 471, 471-72 (11th Cir. 2009).

contract registration and disclosure requirements.⁹¹ Therefore, a real estate speculator who enters into a preconstruction purchase and sale agreement in a subdivision with fewer than one hundred lots would not find safe haven by invoking the ILSA.⁹² The applicability of the exception is determined by calculating the number of lots called for by the development plan at the time the parties entered into the contract for sale.⁹³ In other words, under the ILSA, it is of no legal consequence that the developer initially stated the subdivision would contain one hundred or more lots, yet, in the end, built less than one hundred lots.⁹⁴ If there are one hundred lots or more, the ILSA disclosures must be made before the purchaser signs the contract.⁹⁵ This conclusion is clear because, for purposes of the ILSA, the sale takes place when the contract is executed by the purchaser, which establishes an obligation.⁹⁶

Contracts entered into for the purpose of resale to third parties engaged in such business are another exemption important to real estate speculators.⁹⁷ That is, if Florida real estate speculators entered into contracts for the purpose of resale to persons engaged in the sale or resale of real property—a factual determination—the speculators themselves would provide the developer an ILSA exemption.⁹⁸ Notably, a finding of exemption for the developer means the contract purchaser or real estate speculator cannot find relief under the Act.⁹⁹

⁹¹ 15 U.S.C. § 1702(b) (2009); *see* *Mayersdorf v. Paramount Boynton, L.L.C.*, 910 So. 2d 887, 888 (Fla. Dist. Ct. App. 2005).

⁹² *See Mayersdorf*, 910 So. 2d at 888.

⁹³ *See* 200 E. Partners, LLC. v. Gold, 997 So. 2d 466, 468-69 (Fla. Dist. Ct. App. 2009); *Grove Towers, Inc. v. Lopez*, 467 So. 2d 358, 360-61 (Fla. Dist. Ct. App. 1985) (“[Alleged violations of the ILSA] are of such a nature that they can only occur, they in fact spring into being, at the moment the contract of sale is entered into.”).

⁹⁴ *See Grove Towers*, 467 So. 2d at 361.

⁹⁵ *Id.*

⁹⁶ *See Winter v. Hollingsworth Props., Inc.*, 777 F.2d 1444, 1449 (11th Cir. 1985).

⁹⁷ 15 U.S.C. § 1702(a)(7) (2009); *see Hamptons Dev. Corp. of Dade v. Sackler*, 522 So. 2d 1035, 1035 (Fla. Dist. Ct. App. 1988).

⁹⁸ *See Hamptons Dev. Corp.*, 522 So. 2d at 1035; *cf. Jankus v. Edge Investors, L.P.*, 619 F. Supp. 2d 1328, 1343-44 (S.D. Fla. 2009) (concluding purchaser’s evidence that, in addition to the disputed transaction, he had only contracted to purchase real property twice in the previous nine years negated the notion that he was in the land sales business).

⁹⁹ *See generally* 15 U.S.C. § 1702.

Additionally, the involvement of interstate commerce is a material prerequisite to sustain an ILSA violation claim.¹⁰⁰ Section 1701, subsection 8 expressly provides “‘interstate commerce’ means trade or commerce among the several States or between any foreign country and any State.”¹⁰¹ Additionally, section 1702, concerning exemptions, further provides that the provisions requiring registration and disclosure shall not apply to

the sale or lease of real estate by a developer who is engaged in a sales operation which is intrastate in nature. . . . For the purpose of this paragraph, a sales operation is “intrastate in nature” if the developer is subject to the laws of the State in which the land is located, and each lot in the subdivision . . . is sold . . . to residents of the State in which the land is located.¹⁰²

Furthermore, section 1703 provides in relevant part:

It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—(1) with respect to the sale or lease of any lot not exempt under section 1702 of this title¹⁰³

Also noteworthy, the ILSA provides for intrastate activity exemptions.

Chapter 42 of the United States Code regulates interstate land sales. The purpose of the [ILSA] is “to prohibit and

¹⁰⁰ It is no coincidence that the federal act, the ILSA, is entitled *Interstate Land Sales Full Disclosure Act*. See *Paramo v. Imico Brickell, LLC*, No. 08-20458-CIV, 2008 WL 4360609, at *4 (S.D. Fla. Sept. 24, 2008) (“Crucial to maintaining an action under the [ILSA] is the requirement that a ‘developer or agent, directly or indirectly, [makes] use of any means or instruments of transportation or communication in interstate commerce, or of the mails’ when violating the provisions of section 1703.” (citing 15 U.S.C. § 1703(a) (2008))).

¹⁰¹ 15 U.S.C. § 1701(8) (2009).

¹⁰² 15 U.S.C. § 1702(b)(7)(A), (C). This statute could apply to a Florida resident even though that resident may be a temporary resident, as long as all the requisite elements described herein are met.

¹⁰³ 15 U.S.C. § 1703(a)(1) (2009).

punish fraud in . . . land development enterprises”¹⁰⁴
 The act provides for exemptions, among which is an exemption for “a developer who is engaged in a sales operation which is intrastate in nature.”¹⁰⁵

In fact, in 1969 the Secretary of HUD issued regulations that exempted “the sale or lease of lots where the offering was entirely or almost entirely intrastate” from the scope of the ILSA.¹⁰⁶ Further, in 1995 the Supreme Court acknowledged that Congress “could *not* regulate commerce ‘which is completely internal, which is carried on between man and man in a State, or between different parts of the same State, and which does not extend to or affect other States.’”¹⁰⁷

Thus, unless otherwise exempted, the ILSA will apply under such facts and circumstances as the sale of real estate by a developer engaged in an interstate sales operation.¹⁰⁸ On the other hand, the ILSA would not apply where a developer engages in a sales operation that is substantially intrastate in nature.¹⁰⁹

In *Happy Investment Group v. Lakeworld Properties, Inc.*, the court observed that it was difficult to determine whether the defendants’ subdivision sales literature was “almost entirely intrastate.”¹¹⁰ The court further observed that the House of Representatives’ Report on the ILSA “indicate[d] that the conferees agreed that an example of the ‘almost entirely intrastate’ exemption ‘would be where a few out-of-state

¹⁰⁴ State *ex rel.* Webster v. Eisenbeis, 775 S.W.2d 276, 278 n.3 (Mo. Ct. App. 1989) (quoting McCown v. Heidler, 527 F.2d 204, 207 (10th Cir. 1975)).

¹⁰⁵ *Id.* (quoting 15 U.S.C. § 1702(b)(7)(A)); see Schenker v. United States, 529 F.2d 96, 98 (9th Cir. 1976) (“[T]he government only needed to establish that an instrument in interstate communication of the mails had been used in furtherance of a scheme to defraud [under section 1703].”).

¹⁰⁶ Wiggins v. Lynn, 406 F. Supp. 338, 343 (E.D. Tex. 1975).

¹⁰⁷ United States v. Lopez, 514 U.S. 549, 594 (1995) (Thomas, J., concurring) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194 (1824)); see also U.S. CONST. art. I, § 8, cl. 3.

¹⁰⁸ See Hardwick Props., Inc. v. Newbern, 711 So. 2d 35, 37 (Fla. Dist. Ct. App. 1998); see also Adams-Lipa v. TDS Town Homes (Phase 1) LLC, No. 8:08-cv-1783-T-30MAP, 2009 WL 1850267, at *2-3 (M.D. Fla. Jun. 25, 2009).

¹⁰⁹ See Happy Inv. Group v. Lakeworld Props., Inc., 396 F. Supp. 175, 181-82 (N.D. Cal. 1975).

¹¹⁰ *Id.* at 181.

purchasers buy lots only being offered for sale within the State of the land's location or nearby communities.”¹¹¹

In a Georgia case, *Cooper v. Mason*, the plaintiff purchasers amended their complaint to allege a cause of action under the ILSA, but the trial court dismissed the claim.¹¹² On appeal, the appellate court reversed because the plaintiffs' amended complaint alleged that,

Defendants are developers of a subdivision which they offered for sale by means of interstate commerce and the mails. . . . At the time of that sale defendants had not filed a statement of record and property report with the Secretary of Housing and Urban Development as required by the Act, thereby injuring and damaging plaintiffs because certain material facts which were required to be disclosed in said documents were not made known to plaintiffs.¹¹³

In reaching the conclusion that the plaintiffs' complaint was sufficient to state a cause of action under the ILSA, the *Cooper* court observed:

[The Act] provides that it shall be unlawful for any developer to make use of interstate commerce or the mails to sell any lot in any subdivision of fifty or more lots unless a statement of record is in effect as required by [the Act], and a printed property report meeting the requirements of [the Act] is furnished to the purchaser in advance of the signing of any contract for sale.¹¹⁴

Even the oft-cited *Dorchester* opinion provided,

[t]he Act, in pertinent part, prohibits a developer from making use of any means or instruments of transporta-

¹¹¹ *Id.* at 182.

¹¹² *Cooper v. Mason*, 261 S.E.2d 738, 739 (Ga. Ct. App. 1979).

¹¹³ *Id.*

¹¹⁴ *Id.* at 739-40; *see also* *Winter v. Hollingsworth Props., Inc.*, 777 F.2d 1444, 1448 (11th Cir. 1985); *Dorchester Dev., Inc. v. Burk*, 439 So. 2d 1032, 1033 (Fla. Dist. Ct. App. 1983).

tion or communications in interstate commerce, or of the mails, in connection with the sale of any real property such as that here involved, unless, *inter alia*, a printed property report meeting the requirements of Section 1707 of the Act is furnished to a purchaser in advance of the signing of any contract or agreement for sale by the purchaser.¹¹⁵

In another federal case, *Paniaguas v. Aldon Cos.*, the plaintiffs alleged in their complaint that the defendants, as subdivision developers in interstate commerce, violated the ILSA by not registering with HUD, as required, and for failing to comply with various other obligations under the ILSA.¹¹⁶ Likewise, the court cited title 15, section 1703 of the United States Code and found the plaintiffs alleged sufficient facts to support a reasonable inference that the defendants participated in interstate commerce, despite the fact that the plaintiffs did not specify how the defendants made use of interstate commerce.¹¹⁷

If a federal statute provides a remedy for a plaintiff, but the plaintiff's pleading does not entitle him to claim such a remedy, it is a result of insufficient pleading rather than a jurisdictional deficiency.¹¹⁸ “[I]t is well settled that the failure to state a proper cause of action calls for a judgment on the merits”¹¹⁹ Thus, in order for a plaintiff to maintain a cause of action under the ILSA, it is essential that the plaintiff plead some form of interstate commerce activity or use of the instrumentalities of interstate commerce by a developer.

Florida courts recognize failure to sufficiently state a legally cognizable cause of action under the ILSA as fatal to a claim.¹²⁰ How-

¹¹⁵ *Dorchester*, 439 So. 2d at 1033 (citing 15 U.S.C. § 1703(a)(1)(B) (1983)).

¹¹⁶ *Paniaguas v. Aldon Cos. Inc.*, No. 2:04-CV-468-PRC, 2005 WL 1983859, at *10 (N.D. Ind. Aug. 17, 2005).

¹¹⁷ *Id.* at *9-10.

¹¹⁸ *See Bell v. Hood*, 327 U.S. 678, 685 (1946) (Stone, C.J., Burton, J., dissenting) (citing *Binderup v. Pathe Exch., Inc.*, 263 U.S. 291, 306-08 (1923); *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25-26 (1913)); *see also Screven County v. Brier Creek Hunting & Fishing Club, Inc.*, 202 F.2d 369, 371 (5th Cir. 1953).

¹¹⁹ *Bell*, 327 U.S. at 682.

¹²⁰ *Paramo v. Imico Brickell, LLC*, No. 08-20458-CIV, 2008 WL 4360609, at *4 (S.D. Fla. Sept. 24, 2008) (providing it is crucial to maintaining an action under the

ever, no Florida appellate court decision concerning the ILSA has generally addressed what allegations are sufficient to allege a cause of action under the Act.¹²¹ Due to this omission, it is necessary to rely upon the guidance of other courts' decisions addressing this issue.¹²² All of Florida's appellate courts have gone well beyond the threshold pleading stage and have addressed numerous other issues concerning the ILSA; while other courts, including the Florida Supreme Court for the first and only time in *Samara*, have directly addressed the actual contracts for purchase and sale.¹²³

Furthermore, the ILSA expressly provides, “[n]othing in this chapter may be construed to prevent or limit the authority of any State or local government to enact and enforce with regard to the sale of land any law, ordinance, or code not in conflict with this chapter.”¹²⁴ Therefore, Congress has made clear that Florida statutes enacted to regulate the business of land development and land or condominium sales do not

ILSA to plead, and later prove, interstate commerce or use of the mails, which is necessary for the court to exercise jurisdiction under the statute); *see also* *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 733-34 (11th Cir. 1982) (“Jurisdiction is . . . inextricably intertwined with the merits of the plaintiff’s case.”).

¹²¹ *See Samara II*, 556 So. 2d 1097 (Fla. 1990); *Mailloux v. Briella Townhomes, LLC*, 3 So. 3d 394 (Fla. Dist. Ct. App. 2009); *200 E. Partners, LLC v. Gold*, 997 So. 2d 466 (Fla. Dist. Ct. App. 2008); *Mayersdorf v. Paramount Boynton, L.L.C.*, 910 So. 2d 887 (Fla. Dist. Ct. App. 2005); *Engle Homes, Inc. v. Krasna*, 766 So. 2d 311 (Fla. Dist. Ct. App. 2000); *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35 (Fla. Dist. Ct. App. 1998); *Ni v. Deltona Corp.*, 701 So. 2d 888 (Fla. Dist. Ct. App. 1997); *Marexcelso Compania Naviera, S.A. v. Fla. Nat’l Bank*, 533 So. 2d 805 (Fla. Dist. Ct. App. 1988); *Samara I*, 528 So. 2d 420 (Fla. Dist. Ct. App. 1988); *Hamptons Dev. Corp. of Dade v. Sackler*, 522 So. 2d 1035 (Fla. Dist. Ct. App. 1988); *Appalachian, Inc. v. Ackmann*, 507 So. 2d 150 (Fla. Dist. Ct. App. 1987); *Arvida Corp. v. Barnett*, 502 So. 2d 11 (Fla. Dist. Ct. App. 1986); *Appalachian, Inc. v. Olson*, 468 So. 2d 266 (Fla. Dist. Ct. App. 1985); *Grove Towers, Inc. v. Lopez*, 467 So. 2d 358 (Fla. Dist. Ct. App. 1985); *Marco Bay Assocs. v. Vandewalle*, 472 So. 2d 472 (Fla. Dist. Ct. App. 1985); *Star Island Assocs. v. Lichter*, 473 So. 2d 791 (Fla. Dist. Ct. App. 1985); *Dorchester Dev., Inc. v. Burk*, 439 So. 2d 1032 (Fla. Dist. Ct. App. 1983); *Orpheus Invs., S.A. v. Ryegon Invs., Inc.*, 447 So. 2d 257 (Fla. Dist. Ct. App. 1983).

¹²² *See Eaton*, 692 F.2d at 732 n.10; *Happy Inv. Group v. Lakeworld Props., Inc.*, 396 F. Supp. 175, 187 (N.D. Cal. 1975); *Cooper v. Mason*, 261 S.E.2d 738, 739-40 (Ga. Ct. App. 1979); *Paramo*, 2008 WL 4360609, at *4; *Paniaguas v. Aldon Cos., No. 2:04-CV-468-PRC*, 2005 WL 1983859, at *10 (N.D. Ind. Aug. 17, 2005).

¹²³ *Samara II*, 556 So. 2d at 1098-1101.

¹²⁴ 15 U.S.C. § 1708(e) (2009).

yield to the ILSA. Florida, like any other state, is at liberty to enact and enforce regulations regarding the sale of land, condominiums, or dwellings as long as the regulation does not conflict with the ILSA.¹²⁵ In fact, the Florida legislature has already enacted such laws.¹²⁶ Therefore, it should be evident that the ILSA is not a universal, generally applicable federal statute that applies to every real estate contract, regardless of the particular alleged facts and circumstances.¹²⁷

V. CONCLUSION

Although Congress may not have intended the ILSA to protect the real estate speculator, it appears that even a Florida real estate speculator comes within the ambit of the Act, unless the speculator entered into the purchase and contract with the intent to resell to persons engaged in the business of “constructing residential, commercial, or industrial buildings.”¹²⁸ Further, if the purchase and sale contract for the dwelling contained an unconditional obligation to complete the unit within two years from the time of contracting, then the seller-developer would be exempt from the ILSA.¹²⁹ This issue will often be the critical or prevailing issue for a court, given the myriad of real estate purchase and sale contracts drafted by attorneys on behalf of developers, which may not reach their intended result.¹³⁰

In addition, the ILSA does not apply unless interstate commerce is involved.¹³¹ This issue, which turns on the particular facts alleged and proven, also requires that the litigants properly invoke the ILSA at

¹²⁵ *Id.*

¹²⁶ Condominium Act, FLA. STAT. §§ 718.101-718.622 (2009).

¹²⁷ See *Bell v. Hood*, 327 U.S. 678, 685 (1946) (Stone, C.J., Burton, J., dissenting) (citing *Binderup v. Pathe Exch.*, 263 U.S. 291, 306-08 (1923); *Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 25 (1913)); see also *Screven County v. Brier Creek Hunting & Fishing Club*, 202 F.2d 369, 371 (5th Cir. 1953).

¹²⁸ *Tippens v. Round Island Plantation L.L.C.*, No. 09-CV-14036, 2009 WL 2365347, at *6 (S.D. Fla. July 31, 2009) (quoting 15 U.S.C. § 1702(a)(7) (2009)).

¹²⁹ 15 U.S.C. § 1702(a)(2).

¹³⁰ See *Hardwick Props., Inc. v. Newbern*, 711 So. 2d 35, 36-37 (Fla. Dist. Ct. App. 1998); *Marco Bay Assocs. v. Vandewalle*, 472 So. 2d 472, 474 (Fla. Dist. Ct. App. 1985); *Tedder v. Harbour Phase I Owners, LLC*, No. 8:08-cv-1674-T-30TGW, 2009 WL 1043911, at *3 (M.D. Fla. Apr. 17, 2009).

¹³¹ 15 U.S.C. § 1703(a) (2009).

the pleading stage to ensure relief may be afforded, because the ILSA is not a universal, generally applicable federal statute.¹³² Thus, it may be concluded that the ILSA is not a panacea or absolute remedy for every wayward or overly zealous real estate speculator who jumped into the Florida real estate market hoping to score a large profit only to find themselves upside down on the deal and compelled to walk away from their deposit.¹³³ The zealous, money-driven litigant would be wise to proceed with the advice of competent ILSA counsel prior to filing suit based on a purchase and sale contract containing a prevailing party's attorney fee provision. This provision may mean a loss of their earnest money deposit, and the losing party may be forced to pay the opposing party's attorney fees.¹³⁴

Moreover, while the Florida Supreme Court's *Samara* decision currently remains controlling precedent in Florida, having exposed its unsupportive foundations and tenuous underpinnings, the informed litigant would be wise not to rely on the *Samara* decision, particularly in federal court.¹³⁵ While "the views of the state's highest court with re-

¹³² See *Paniaguas v. Aldon Cos., Inc.*, No. 2:04-CV-468-PRC, 2005 WL 1983859, at *10 (N.D. Ind. Aug. 17, 2005).

¹³³ See *Bell*, *supra* note 5; see also Polyana da Costa, *As Condos Fail, Buyers Looking for Their Deposits*, PALM BEACH DAILY BUS. REV., Sept. 9, 2009, available at 9/9/2009 PALMBCHDBR 7; Polyana da Costa, *Condo Buyers Try to Stop CityPlace Foreclosure*, PALM BEACH DAILY BUS. REV., Aug. 31, 2009, available at 8/31/2009 PALMBCHDBR 7 ("Since South Florida's condo market started to collapse in 2007, a wave of buyers has been trying to cancel pre-construction purchase contracts and recover their deposits."); John Pacenti, *Real Estate Meltdown: ILSA Written to Protect Consumers in Land Deals: Developers Win in Fight to Enforce Contracts*, PALM BEACH DAILY BUS. REV., Oct. 14, 2009, available at 10/14/2009 PALMBCHDBR 3.

¹³⁴ See *Overman v. Imico Brickell, LLC*, No. 08-21091-CIV, 2009 WL 68826, at *1 (S.D. Fla. Jan. 6, 2009); *Herbst v. N. Ocean Condos, L.P.*, No. 08-60869-CIV, 2009 WL 2257827, at *2-4 (S.D. Fla. July 29, 2009); *Marbolo, LLC v. Swire Pac. Holdings, Inc.*, No. 09-20404-CIV, 2009 WL 2258335, at *1 (S.D. Fla. July 29, 2009); *Pellegrino v. Koeckritz Dev. of Boca Raton, LLC*, No. 08-80164-CIV, 2008 WL 4753726, at *1 (S.D. Fla. Oct. 27, 2008).

¹³⁵ See *Kamel v. Kenco/Oaks at Boca Raton LP*, 321 F. App'x 807, 809 (11th Cir. 2008) ("Because the ILSA is a federal statute, federal law governs its interpretation." (citing *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942))); see also *Van Hook v. Residences at Coconut Point, LLC*, No. 2:07-cv-796-FtM-29SPC, 2008 WL 2740331, at *2 (M.D. Fla. July 10, 2008) (providing the interpretation of the ILSA is

spect to state law are binding on the federal courts,”¹³⁶ a state court’s decision “which interferes with or is contrary to federal law, must yield.”¹³⁷

It should be fairly clear that the ILSA is one of those federal statutes that involves the intricacies and inter-play of both federal and state law which, from time to time, confounds even the most articulate and informed legal practitioners and judges alike. Speculating on one’s success upon filing a claim under the ILSA could turn out to be no different than speculating on that real estate investment; you may win or you may lose it all.

not controlled by state law) (citing *Markowitz v. Ne. Land Co.*, 906 F.2d 100, 105 (3d Cir. 1990)).

¹³⁶ *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) (per curiam).

¹³⁷ *Free v. Bland*, 369 U.S. 663, 666 (1962); see *Stein v. Paradigm Mirasol, LLC*, No. 08-10983, 2009 WL 3110819, at *7 n.5 (11th Cir. Sept. 30, 2009) (“The Florida Supreme Court has interpreted the Disclosure Act differently than we do. Although we respect its views, we are not bound by *Samara’s* interpretation even in cases arising in Florida because it is a federal statute we are interpreting.”) (citation omitted).