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CFPB Observer

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CFPB's First ILSA Enforcement Action

The Consumer Financial Protection Bureau (CFPB) recently announced an enforcement action against a property developer in Tennessee for violation of the Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§1701 et seq. (ILSA). According to the administrative consent order, the developer violated ILSA by making misrepresentations to consumers regarding maintenance of the roads in a subdivision. This action by the CFPB is likely just the beginning of its efforts to enforce ILSA, a long-neglected consumer protection statute.

The Interstate Land Sales Full Disclosure Act

ILSA, and its implementing Regulations, 12 C.F.R. Part 1010 (Reg. J), K, 12 C.F.R. Part 1011 (Reg. K), and L, 12 C.F.R. Part 1012 (Reg. L), regulates the sale of subdivided land in interstate commerce. Unless otherwise exempt, ILSA requires that subdivision lots being offered for sale be registered with the CFPB and that the developer provide a property report to consumers who purchase lots. ILSA exempts a number of different types of transactions, such as sale or lease of lots in a subdivision containing less than 25 lots. Aside from administrative enforcement of ILSA and in addition to other remedies, ILSA also generally provides a two-year statutory right of rescission for transactions that fail to comply with ILSA and Reg. J's requirements.

The Department of Housing and Urban Development (HUD) previously administered ILSA; however, the Dodd-Frank Act transferred this authority to the CFPB as of July 21, 2011. The CFPB issued an interim final rule on Dec. 21, 2011, that largely adopted HUD's regulations as they were written. ILSA was also amended in 2014 to exempt condominium developments from the registration and property report requirements, rescission rights and other contractual provisions previously required under ILSA. The new exemption became effective March 29, 2015.

We note that it is possible that the CFPB will further modify the regulations currently in place. In addition, it remains unclear as to the extent that developers may rely on HUD's old guidance related to ILSA in light of the CFPB's failure to explicitly address the applicability of such guidance.

CFPB Enforcement Action

The CFPB announced its enforcement action against the Tennessee property developer on May 1, 2015. The CFPB also named several individuals in the action that were also involved in the development and sale of the property in Tennessee.

The developer sold developed lots from the subdivided property during the period 2004 through 2008. According to the consent order, the developer and individuals made misrepresentations to purchasers of the lots regarding the maintenance of the roads in the subdivision. They made statements in both the property reports submitted to HUD and marketing materials provided to prospective purchasers that the development's roads would be maintained by the developer until they were accepted by the county. However, the developer did not maintain the roads and the roads were not accepted by the county.

Specifically, the consent order states that the ILSA property reports "contained false statements regarding the ongoing maintenance of the roads in the Development." This violated ILSA section 1703(a)(1)(C), which makes it unlawful to "sell or lease any lot where any part of the statement of record or the property report contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein pursuant to sections 1704 through 1707 of this title or any regulations thereunder." Further, the consent order states that the developer "falsely represented to purchasers and prospective purchasers that the roads in the Development would be maintained by the seller until they were accepted by [the county]." This violated ILSA section 1703(a)(2)(B), which makes it unlawful to "obtain money or property by means of any untrue statement of a material fact, or any omission to state a material fact necessary in order to make the statements made (in light of the circumstances in which they were made and within the context of the overall offer and sale or lease) not misleading, with respect to any information pertinent to the lot or subdivision."

Both the developer and the individuals admitted liability for the alleged conduct. Under the terms of the consent order, the developer must repair the development's roads so that they satisfy the requirements established in an engineering report to be prepared by an independent consultant. Although civil money penalties of $1,000 for each violation up to a maximum of $1 million are permitted under ILSA, none were assessed in this enforcement action.

A copy of the administrative consent order is available here.

Takeaway

The CFPB's first action under ILSA is a likely presage of future enforcement actions to come. Property developers subject to ILSA should closely examine the representations that they make in their property reports as well as their marketing materials to ensure that they do not contain misstatements or misrepresentations that could open the door to potential rescission claims, CFPB enforcement actions, or consumer rescission or class action claims.

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