

Florida Appeals Court Orders Immediate Release of ILSA Refund to Buyers

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Florida new construction buyers fighting with their developer over who gets to keep the deposit may get some well-needed relief in Court these days, thanks to a recent decision from the Third District Court of Appeals. On October 21, 2009, the Third DCA (with appellate jurisdiction that includes Miami-Dade County) held in *Terra-Adi International Bayshore, LLC. v. Kostandinos Georgariou, et. al.* that the purchasers were entitled to the immediate release of the amount deposited over 15% of the purchase price of their units, pursuant to the terms of the purchase agreement, even before the cases go to trial.

The purchase agreements at issue in Terra-Adi contained language which entitled the purchasers to a refund of any amount deposited over 15% of the unit's purchase price upon a purchaser-default. After the trial Court ordered that the developer return this amount immediately to purchasers, the developer appealed. Even though purchasers were claiming rescission and breach of the purchase agreements (among other claims), they took the position that the language of the purchase agreements provided that, regardless of the outcome of the litigation, they were entitled to the immediate return of any amount they deposited over 15% of the purchase price. In part, the default provision of the purchase agreements state as follows:

If Buyer defaults after fifteen percent (15%) of the Purchase Price, exclusive of interest, has been paid, Seller will refund to the Buyer any amount which remains from the payments Buyer made after subtracting fifteen percent (15%) of the Purchase Price, exclusive of interest.

This language is one of the acceptable "default provisions" provided by the Federal Interstate Land Sales Full Disclosure Act, commonly known as ILSA. By including this language, the developer essentially obligated itself to return at least that amount to the purchasers, even if they defaulted and the developer prevailed in the litigation. Failure to immediately release those funds, the purchasers successfully argued, amounted to an improper restraint on the use of their own assets.

This is a clear win for new construction buyers involved in litigation with their developers, at least in the Third District. Litigants previously inclined to settle for only a release of their ILSA refund amount (the amount deposited over 15% of the unit's purchase price) may now find themselves willing to go the distance with developers, since the Court's ruling in Terra-Adi should mean that they no longer have to wait for

the case to end (which could take years) in order to get that amount returned to them. Although the war continues, this battle win goes to the purchasers.

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