

## Eleventh Circuit Hands a Victory to Developers and Their Construction Lenders: Pukka Ruling Reversed on 99 Lot HUD Exemption

December 10, 2008

On December 9, 2008, in a major victory for developers and their construction lenders across the nation, the U.S. Circuit Court of Appeals for the Eleventh District reversed the finding of the U.S. District Court for the Southern District of Florida (*Pugliese v. Pukka Development*, No.07-14040-COV-LYNCH, So. D. Fla., October 3, 2007).

In 1968, Congress enacted the Interstate Land Sales Full Disclosure Act, 15 U.S.C. 1701*et seq.* ("ILSA"). The purpose of ILSA was to assure that a purchaser of certain types of real estate received sufficient disclosure and information in order to make informed decisions about purchasing the property. ILSA requires that sellers or lessees of lots<sup>1</sup> using interstate commerce or the mail system register their projects with the U.S. Department of Housing and Urban Development ("HUD"), unless the sale or lease is exempt from registration under ILSA. ILSA also regulates sales practices. Violations of ILSA can result in claims for damages and rescission of contract by purchasers.

A registration exemption commonly relied upon by developers and sellers under 15 U.S.C. 1702(b)(1) provides an exemption for "the sale or lease of lots in a subdivision containing fewer than one hundred lots . . ." <sup>2</sup> (the "99 Lot Exemption"). Unfortunately, for developers and their construction lenders, courts in the *Pukka* case and two other cases<sup>3</sup> had construed 15 U.S.C. 1703(d) so as to make thousands of sales contracts relying upon the 99 Lot Exemption subject to rescission. Specifically, 15 U.S.C. 1703(d) requires contracts for the sale or lease of lots to meet certain requirements, including limiting the amount of the deposit that is nonrefundable to 15 percent of the purchase price, and providing purchasers with a 20-day right to cure defaults under a purchase contract. However, traditionally, developers and HUD had interpreted the requirements of 15 U.S.C. 1703(d) to apply only in those cases where the sale or lease of lots was registered under ILSA.

Nonetheless, in 2007 and 2008, the courts in the *Pukka*, *Meridian* and *Trotta* cases ruled that the requirements of 15 U.S.C. 1703(d) also applied to contracts relying upon the 99 Lot Exemption. These rulings subjected thousands, if not tens of thousands of contracts, across the country to rescission claims and heightened the concerns of developers and construction lenders already facing an increasingly difficult market. Now, by virtue of yesterday's decision, the rulings in *Pukka*, *Meridian* and *Trotta* have been reversed. For the moment, purchase contracts relying on the 99 Lot Exemption should not be subject to rescission based on claims arising under 15 U.S.C. 1703(d). The court's ruling, however, does not address other recent cases pertaining to other exemptions from registration.

### For Further Information

If you have any questions about this Alert or would like more information, please contact [Brian L. Belt](#), any other [member](#) of the [Real Estate Practice Group](#) or the attorney in the firm with whom you are regularly in contact.

### Footnotes

1. "Lots" include condominium units.
2. This Alert does not discuss the methodology for calculating the number of lots. Developers should take particular care that projects are not aggregated under the "common promotional plan" theory.
3. *Meridian Ventures, LLC v. One North Ocean, LLC*, 2007 WL 4414816 (S.D. Fla. Dec. 14, 2007); and *Trotta v. Lighthouse Point Land Company, LLC*, 2008 U.S. Dist. Lexis 10559 (S.D. Fla. Feb. 2008).