Two Cases to Note When Faced with Contract Rescission Claims

By Christopher J. Thanner, Chair of the Real Property Section

The current real estate market has left many developers and buyers at odds over pending sales contracts. Below are two court decisions to note when dealing with contract rescission claims.

The first decision, Cloud v Schenck, 869 So. 2d 709 (Fla. 1st DCA 2004), declared a common liquidated damages provision void as a penalty. The default clause in Cloud granted the Seller a choice between retaining the buyer's contract deposit as liquidated damages or "enforc[ing] Seller's rights under this contract." The court held that this and other similar language that permitted the Seller to choose between receiving liquidated damages or enforcing its rights "at law" allowed the Seller to sue for actual damages, rendering the liquidated damages remedy void as a penalty.

The second case, Pugliese v. Pukka Development, Inc., 524 F. Supp. 2d 1370 (S.D. Fla. 2007), impacts the availability to developers of the commonly used One Hundred Lot Exemption found in §1702(b) of the Interstate Land Sales Act ("ILSA"). The Pugliese decision runs contrary to guidelines published by the U.S. Department of Housing & Urban Development and an opinion letter issued by the Director of the RESPA and Interstate Land Sales Office. Pugliese requires single family residential and condominium developers relying on the One Hundred Lot Exemption to comply with ILSA's §1703(d) requirements. §1703(d) requires the purchase agreement grant the buyer certain rights, such as the right to notice of default and an opportunity to cure. Contracts previously considered enforceable under ILSA may now be subject to revocation by the Buyer for two years following execution. Several other recent cases have reached similar conclusions.

Owners of existing developments should review their purchase agreements. Current contract drafters should take care to comply with the requirements of ILSA and Cloud to avoid potential rescission claims.

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Will My Anti-Assignment Clause Protect My Client's Interest?

By Robert Riva, Member of the Corporate Banking & Business Law Section

You may seek to protect your client's interest in dealing with a business entity ("Company A") by including an anti-assignment clause in an agreement ("Agreement") that reads something similar to: "This Agreement is not assignable without the prior written consent of the other party." Your objective might be that if Company A is sold, your client will have the right to consent and thereby control with whom it has a business relationship. While the anti-assignment clause above might protect your client where Company A sells its assets, including the Agreement, such clause may be of no protection where the shareholder of Company A sells his stock or Company A merges into another company ("Company B").

In a stock sale, the owner of Company A would sell his stock to a third party. While this would constitute a change in control of Company A, no assets of Company A have been assigned to any third party. In a merger, if Company A is merged into Company B, whereby Company B survives and Company A does not, a change of control occurs but no assignment is deemed to have occurred. All of Company A's assets and liabilities would pass to Company B "by operation of law." Accordingly, in the case of a change in control of Company A by merger or otherwise, your client would have no right to consent.

Be sure to expand your anti-assignment clause to address a change in control of Company A by merger or stock sale, if you desire to provide your client with more comprehensive protection.

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