2nd Circ. Must Close Condo Deal Escape Hatch: Developer

By **Richard Vanderford**

November 02, 2011, 5:32 PM ET

A district court decision that let a cash-conscious couple use a 1960s-era law to escape a $3.4 million condominium purchase deal threatens to upend the condo construction industry, the property's developers told the Second Circuit on Wednesday.

There is “no question” that the condo construction business model will collapse if the Second Circuit upholds a district court's status quo-busting reading of a federal property disclosure law, said Mark Walfish of Katsky Korins LLP, an attorney for the developers of the 193-unit Brompton building in New York.

The tony 22-story building on the city's Upper East Side has landed at the epicenter of a high-profile fight — involving both the real estate lobby and the U.S. government — over the technicalities of the Interstate Land Sales Full Disclosure Act, a once-mostly overlooked real estate statute.

ILSA, as it is known, was passed in 1968 to force developers to provide buyers with details about newly developed land and condos for sale. But in recent years, condo buyers who bought during the boom have seen prices bust before their homes were even built, and have turned to some of ILSA's legal requirements to try to get out of their purchase agreements.

Those remorseful buyers got support in September 2010, when U.S. District Judge P. Kevin Castel ruled that Vasilis Bacolitsas and Sofia Nikolaidou could walk away from their $3.4 million deal to buy a place in the Brompton and keep their $510,000 deposit.

Judge Castel said the Brompton developer, an entity controlled by Related Cos., had not made its contract “recordable” under New York city law, triggering a provision in ILSA that lets buyers walk away from contracts within two years of their signing.

A recordable home purchase contract includes precise details about the property's location, like a deed, and can give a buyer certain rights, including a lien on the property.

The Real Estate Board of New York, an amicus curiae in this case, has warned that it will be impossible to secure construction financing for new condos if Judge Castel's ILSA reading stands.

Lenders will not provide money needed to build if buyers have a two year-opt out period, nor if

their collateral — the condos — is already encumbered by buyers' liens, REBNY said.

The Castel decision was an overreach, Walfish told the judges Wednesday.

He added that the interaction of the new ILSA with a patchwork of state and local laws on condos might lead to perverse results like people being unable to occupy their newly constructed homes for years.

“There's absolutely no indication that Congress intended to give purchasers the right to record,” Walfish said.

Instead, ILSA, a law modeled after securities laws meant to keep investors informed, simply requires that a property being purchased be described with enough detail so it could recordable later on, he said.

The U.S. Department of Housing and Urban Development, another amicus curiae, agreed.

“The government does view the statutory language as unambiguous in this case,” said Assistant U.S. Attorney Li Yu, who argued for HUD.

Jeffrey R. Metz of **Adam Leitman Bailey PC**, an attorney for the couple, said Congress, and not the courts, should fix the law if it is worried about "harsh” outcomes.

Both Metz and Walfish said after the hearing that they looked forward to a favorable outcome.

Judges Roger J. Miner, Robert D. Sack and Peter W. Hall sat on the panel for the Second Circuit.

The plaintiffs are represented by **Adam Leitman Bailey PC**.

The developer is represented by Katsky Korins LLP.

The case is Bacolitsas v. 86th & 3rd Owner LLC, case number 10-4229, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Elizabeth Bowen.