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In Transition Litigation, Is An Association Entitled To Enhanced Damages Under NJ PREDFDA? Unfortunately, It Depends On Which Judge You Ask.

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For residential developers operating in New Jersey, transition litigation can be a bane of the developer's operation. A cottage industry of attorneys, engineers and architects seeks out condominium and homeowner associations in transition and lures them to invest in finding design or construction deviations with the prospect of a big pay day. They file canned complaints asserting a laundry list of claims that often include a claim for double damages and attorney's fees under the New Jersey Planned Real Estate Development Full Disclosure Act ("PREDFDA"). There is, however, a question whether PREDFDA even applies to transition litigation brought by an Association.

Under PREDFDA, a developer that makes a false representation or omits a material fact from its registration or public offering statement "shall be liable **to the purchaser** for double damages suffered, and court costs expended, including reasonable attorney's fees …." A "purchaser" is "any person or persons who acquires a legal or equitable interest in a unit, lot, or parcel …." Thus, a plain reading of PREDFDA suggests that a condominium or homeowner association that does not acquire a legal or equitable interest in a unit, lot or parcel is not a "purchaser" with standing to assert a claim for double damages and attorney's fees under PREDFDA.

While we have been largely successful on behalf of our developer clients in obtaining dismissals of PREDFDA claims for double damages, a few courts have declined to follow the plain language of the legislature.

Three different Judges in Hudson County, and a Judge in Somerset County, have followed the plain language of the statute and held that only a "purchaser," not an Association, has standing to assert a claim under PREDFDA's enhanced damage provision. Conversely, the Appellate Division, in an unpublished, non-precedential decision, and one Essex County Judge have held that because an Association "stands in the shoes" of purchasers with respect to the common elements, it has standing to assert a PREDFDA claim relating to those common elements.

Until an appellate court issues a published decision addressing the issue, Developers should be diligent in challenging what appears to be a misuse of a statute intended to protect unwitting consumers, not Associations looking for a cash grab.

If you have questions about New Jersey PREDFDA? Contact Don Taylor at 732.855.6434 or Dan Kluska at 732.855.6033.

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