

NOTE

INTERSTATE LAND SALES REGULATIONS

I. INTRODUCTION

Since the late 1940's, sales of undeveloped, subdivided property have increased rapidly.¹ The majority of the developers-salesmen are legitimate businessmen who have fashioned communities from previously barren land.² Unfortunately, however, a significant minority of developers have been either so poorly financed that they could not execute their plans, or so unscrupulous that they have made misrepresentations and used high-pressure selling techniques to foist worthless property on unsuspecting purchasers.³

In the early 1960's, complaints from defrauded purchasers, legitimate developers, and the general public motivated state and federal governments to act. Some states passed legislation regulating the sale of undeveloped, subdivided land.⁴ The federal government in-

1. In 1962 the industry sales volume was estimated at \$500 million. *Hearings Before the Senate Special Comm. on Aging*, 88th Cong., 1st Sess. 291 (1963) [hereinafter cited as *1963 Hearings*]. By 1967 the industry's sales volume had grown to an estimated \$1 billion. *Hearings on S. 275 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 90th Cong., 1st Sess. 2 (1967) [hereinafter cited as *1967 Hearings*]. In 1973 the Department of Housing and Urban Development estimated that the interstate land development industry had sales of \$6 billion. 4 *HUD Newsletter*, No. 50, Dec. 10, 1973, at 2. See Comment, *A Handbook to the Interstate Land Sales Full Disclosure Act*, 27 *ARK. L. REV.* 65 (1973).

2. *1967 Hearings 2; Hearings on S. 2672 Before the Subcomm. on Securities of the Senate Comm. on Banking and Currency*, 89th Cong., 2d Sess. 3 (1966) [hereinafter cited as *1966 Hearings*]; *Hearings Before the Subcomm. on Frauds and Misrepresentations Affecting the Elderly of the Senate Special Comm. on Aging*, 88th Cong., 2d Sess. 2 (1964) [hereinafter cited as *1964 Hearings*].

3. See generally *1967 Hearings; 1966 Hearings; 1964 Hearings; 1963 Hearings; Jones, A Nice Piece of Desert*, 213 *NATION* 616 (1971); *In Pursuit of the Second Home*, *NEWSWEEK*, Apr. 17, 1972, at 84; *Land Frauds*, *SAT. EVE. POST*, Apr. 27, 1963, at 17; Carberry, *Investors Speculating in Land Often Find Profits Are Elusive*, *Wall Street J.*, Apr. 2, 1974, at 1.

4. State authorities intensified their actions against land promoters beginning in 1962. *1963 Hearings* 230. New York, California, and Florida were the early leaders in the field, but today more than one-half the states have some form of land development legislation. These state statutes vary widely in scope and effectiveness. Some states regulate only sales of subdivided land located within the state, while others attempt to include in-state sales of land located outside the state. Two basic types of

creased enforcement of the antifraud weapons at its disposal,⁵ and congressional hearings⁶ resulted in passage of the Interstate Land Sales Full Disclosure Act.⁷ The Act, modeled after the Securities Act of 1933,⁸ has provided some protection for the prospective land purchaser by requiring full disclosure of all facts material to the property, but it has not been as effective as first anticipated.⁹ One important reason for the ineffectiveness of the scheme has been the narrow view taken by the Office of Interstate Land Sales Registration (OILSR) with respect to the Act's purposes and its own enforcement powers.¹⁰

statute prevail: (1) "full disclosure," which requires the developer to register with the state by providing specified information concerning the development, and in some cases, the developer must furnish a prospectus to purchasers; and (2) "fair, just, and equitable," which requires the developer to register and furnish specified information, and also permits the state agency to prohibit offerings which are not deemed fair, just, and equitable. See Coffey & Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth*, 21 CASE W. RES. L. REV. 5, 14 (1969) [hereinafter cited as Coffey & Welch]; Note, *Regulation of Interstate Land Sales*, 25 STAN. L. REV. 605 (1973). For a listing of the types of statute by state, see 1967 Hearings, app. 3, at 218.

5. Prior to the enactment of the Interstate Land Sales Full Disclosure Act, fraudulent practices in the interstate land sales industry were subject to control at the federal level by one of three agencies. First, the Post Office could prosecute developers, or deny them access to the mails, for fraudulent practices defined under the mail fraud statutes, 18 U.S.C. § 1341 (1970) and 39 U.S.C. § 3005 (1970). Secondly, the Federal Trade Commission could take administrative action against fraudulent and deceptive advertising pursuant to 15 U.S.C. § 45 (1970). Thirdly, the Securities and Exchange Commission could proceed against fraudulent practices in any land scheme which qualified as a "security." 15 U.S.C. § 77b (1970).

Regulation by the Post Office and the Federal Trade Commission was time-consuming, after-the-fact, and provided no means for the purchaser to recoup his losses. The SEC provided better remedies for the purchaser, but very few land offerings qualified as securities. See Coffey & Welch 12-14; Morris, *The Interstate Land Sales Full Disclosure Act: Analysis and Evaluation*, 24 S.C.L. REV. 331, 334-36 (1972) [hereinafter cited as Morris]; Note, *supra* note 4, at 606.

These remedies are still available to purchasers who are defrauded by developers-salesmen, in addition to remedies under the Act. It is interesting to note that the Federal Trade Commission recently obtained a consent order against the GAC Corporation for deceptive sales practices, and this order included provisions for refunds and land exchanges for defrauded customers. See Carberry, *supra* note 3.

6. Hearings before various Senate committees began in 1963 and continued intermittently through 1967. See notes 1 & 2 *supra*.

7. 15 U.S.C. §§ 1701-20 (1970).

8. 15 U.S.C. § 77a *et seq.* (1970).

9. See generally Carberry, *supra* note 3; *In Pursuit of the Second Home*, NEWSWEEK, Apr. 17, 1972, at 84; *Land Sales Boom—Let the Buyer Beware*, 37 CONSUMER REP. 607 (1972); *Land Development Sales Gimmicks*, CONSUMER BULL., Apr. 1971, at 21; *New American Land Rush*, TIME, Feb. 28, 1972, at 72; N.Y. Times, Feb. 13, 1972, § 8, at 4, col. 1; Washington Post, June 1, 1972, § A, at 1, col. 6.

10. See notes 28-29 *infra* and accompanying text.

A change of attitude within the OILSR occurred in 1972,¹¹ however, and is reflected in newly promulgated regulations.¹² The purpose of this Note is to analyze these regulations in the context of the Act and the new OILSR attitude, and to determine the impact the regulations may have upon the interstate land sales industry.

II. INTERSTATE LAND SALES FULL DISCLOSURE ACT

Congress had several purposes in mind when it passed the Act in late 1968: (1) to aid states in their attempts to regulate fraudulent practices in an industry national in scope; (2) to protect the public by prohibiting the use of interstate commerce or the mails to effect fraudulent sales of undeveloped land; (3) to alleviate the pressures on land-use planning caused by the uncontrolled marketing of undeveloped, subdivided land; and (4) to protect the land development industry from internal destruction.¹³ Any offering of undeveloped, subdivided land made by use of interstate commerce or the mails falls within the jurisdiction of the Act¹⁴ unless certain exemptions apply.¹⁵ Any de-

11. See notes 30-33 *infra* and accompanying text.

12. 38 Fed. Reg. 23,866 (1973).

13. Coffey & Welch 7-10. See generally 1967 Hearings; 1966 Hearings; Note, *Interstate Land Sales Regulation: The Case for an Expanded Federal Role*, 6 U. MICH. J.L. REF. 511, 512 (1973) [hereinafter cited as *Expanded Federal Role*]; Note, *supra* note 4, at 606.

14. 15 U.S.C. § 1703(a) (1970):

It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails

The scope of the Act's jurisdiction has not been interpreted by the courts, but the language is identical to that of the Securities Act of 1933. See 15 U.S.C. § 77q (1970). This argues strongly for the courts to interpret the two acts as having the same jurisdictional scope. Under such an interpretation, any use by the developer of the mails, telephone, and so forth, including intrastate telephone contacts or mailings, to promote his offering would bring the development within the scope of the Act. See 3 L. Loss, *SECURITIES REGULATION* 1522 (2d ed. 1961); 4 *id.* at 2316; 6 *id.* at 3747-48.

15. Certain methods of interstate disposition of such property are exempt from the requirements of the Act unless these methods are adopted by developers as a means of evading the Act. 15 U.S.C. §§ 1702(a)(1)-(10) (1970). Some of the more important exemptions are: (a) a subdivision or promotional plan of fewer than 50 lots; (b) any subdivision in which all lots are 5 acres or larger; and (c) sales of lots which are free and clear of encumbrances if the purchaser and spouse have made an on-the-lot inspection. Pursuant to 15 U.S.C. § 1702(b) (1970), the Secretary of HUD has formulated regulatory exemptions for (1) lots where the complete cost is less than \$100 and the purchaser is not required to buy more than one lot, 24 C.F.R. § 1710.13(a) (1974), and (2) a subdivision of fewer than 300 lots which are sold entirely or almost entirely within the state where the subdivision is located, 24 C.F.R. § 1710.14 (1974).

veloper whose subdivision offering comes within the jurisdiction of the Act and does not qualify for one of the exemptions must file a statement of record¹⁶ with the OILSR, and provide an approved property report¹⁷ to prospective purchasers. In addition, the Act contains broad antifraud provisions¹⁸ similar to section 17 of the Securities

See generally Coffey & Welch 36-48; Morris 341-47; Walsh, *The Role of the Federal Government in Land Development Sales*, 47 NOTRE DAME LAW. 267, 268-72 (1971).

16. 15 U.S.C. §§ 1704, 1705 (1970). The format and instructions for completing the statement of record are set out at 24 C.F.R. § 1710.105 (1974). The statement of record is a detailed listing, with supporting documents, of all the facts deemed by the OILSR to be material to the offering. It includes extensive information concerning: (1) the legal and financial position of the developer and others owning significant interests in the property; (2) the condition of the title to the property, including the existence of any blanket encumbrance on the property and any steps taken by the developer to protect the purchaser's interests in the property should the developer fail to fulfill his obligations; (3) the topography of the land and availability of utilities, municipal services, and roads; and (4) the present status of advertised recreational, educational, and common facilities. Included with the statement of record must be copies of the property report, the developer's articles of incorporation or partnership, the deed or instruments establishing title to the land, the forms of conveyance to be used, and financial statements of the developers. The material in the statement of record is verified by the OILSR and then used as a guide to judge the truthfulness of the property report. The statement of record generally becomes effective thirty days after it is filed unless discrepancies are found, and sales in the development may not begin until the statement is effective. Amendments to the statement are required when any material change in the offering occurs. *See generally* 24 C.F.R. §§ 1710.20-23 (1974).

17. The property report must be filed as an attachment to the statement of record and approved by the OILSR before being distributed. 24 C.F.R. § 1710.20 (1974). The information in the report is basically the same as that disclosed in the statement of record, but less detailed. Questions in the property report require disclosure of (1) the rights of purchasers under the sales contract and the existence of any prior liens or encumbrances on the property, (2) any restrictions on the use of the property and any additional fees or assessments which purchasers will be required to pay, (3) the available recreation facilities and their costs, as well as provisions to ensure completion of proposed or partly completed facilities, and (4) information relating to the topography of the land and climate. The instructions for preparing the property report are found at 24 C.F.R. § 1710.110 (1974). Some of the changes and additions to the new property report are discussed at notes 39-42 *infra* and accompanying text.

18. 15 U.S.C. § 1703(a)(2) (1970) provides:

(a) It shall be unlawful for any developer or agent, directly or indirectly, to make use of any means or instruments of transportation or communication in interstate commerce, or of the mails—

.....
(2) in selling or leasing, or offering to sell or lease, any lot in a subdivision—

(A) to employ any device, scheme, or artifice to defraud, or

(B) to obtain money or property by means of a material misrepresentation with respect to any information included in the statement of record or the property report or with respect to any other information pertinent

Act of 1933.¹⁹ Failure by the developer to comply with the registration or disclosure requirements, or the developer's use of fraudulent sales practices, can result in criminal penalties,²⁰ administrative or civil action by the OILSR,²¹ or civil suits by the purchasers.²²

Numerous shortcomings of the Act have become evident. First, Congress failed to prescribe any statutory controls on pre-effective advertising.²³ Secondly, there is no definition of a "device, scheme, or

to the lot or the subdivision and upon which the purchaser relies, or (C) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon a purchaser.

19. 15 U.S.C. § 77q(a) (1970) states:

(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

(1) to employ any device, scheme, or artifice to defraud, or

(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(3) to engage in any transaction, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser.

20. Upon conviction for willfully violating provisions of the Act, a developer can be fined not more than \$5000 and/or imprisoned for not more than five years. 15 U.S.C. § 1717 (1970).

21. The Secretary of HUD, through the OILSR, may suspend the effectiveness of a developer's statement of record if the statement appears to be incomplete or inaccurate. 15 U.S.C. § 1706 (1970). If the OILSR believes that any developer is violating or about to violate the provisions of the Act, it may seek an injunction against the practices. 15 U.S.C. § 1714(a) (1970).

22. A purchaser may sue a developer for damages resulting from a sale in violation of the Act or he may rescind the contract if he does not receive a property report before signing the contract. 15 U.S.C. §§ 1703(b), 1709 (1970). These remedies are in addition to any rights or remedies available to the purchaser at law or in equity. 15 U.S.C. § 1713 (1970).

23. By prohibiting only *sales* or *leases* prior to the effective date of the statement of record, Congress permits the developer to advertise his offering prior to filing with the OILSR. 15 U.S.C. § 1703(a)(2) (1970). In effect, this allows the developer to condition his market—flood the market with highly favorable advertising to stimulate interest in his development—before he registers with the OILSR. Some control of this practice can be exercised by the OILSR through strict enforcement of the general anti-fraud provision, but this has not been done. The only other counterweight to such an advertising campaign is the property report, which contains objective facts about the offering. See Coffey & Welch 31-34, 62-68; Morris 353-54. During hearings on a predecessor to the Act, a suggestion was made to prohibit or control pre-effective advertising, but Congress failed to include such a provision. See 1967 Hearings 52-53. Compare §§ 2(3) and 5 of the Securities Act of 1933, 15 U.S.C. §§ 77b(3), 77e (1970), which prohibit all advertising prior to filing a registration statement, and allow only prospectus-type promotional materials during the waiting period.

artifice to defraud"²⁴ in the Act which would proscribe or limit such selling practices as high-pressure sales techniques or puffing.²⁵ Thirdly, the antifraud provisions arguably do no more than restate the common law of deceit, which generally has proved inadequate to protect the private rights of purchasers.²⁶ Finally, some commentators

24. The definition of a "device, scheme, or artifice to defraud" may have been purposefully omitted. SEC rule 10b-5, 17 C.F.R. § 240.10b-5 (1974), which like § 17 of the Securities Act of 1933 is almost identical to § 1703(a)(2) of the Interstate Land Sales Full Disclosure Act, has proven to be extremely effective against securities fraud in part because of the flexibility of the definition of a "device, scheme, or artifice to defraud." See 1 A. BROMBERG, SECURITIES LAW: FRAUD—SEC RULE 10b-5 § 2.6(1) (Supp. 1973). The lack of a rigid set of criteria to determine fraudulent activity has allowed the courts to adopt a rather broad interpretation of the phrase in question. See *SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968), *cert. denied*, 394 U.S. 976 (1969). In deciding that certain press releases were fraudulent misrepresentations, the Second Circuit focused its attention on the average investor who was the recipient of the questioned information. The test established by the court was "whether the release was misleading to the reasonable investor." *Id.* at 864. This type of approach allows the courts to expand the phrase to cover any scheme that an unscrupulous seller may develop. If such an approach is taken by the courts in interpreting § 1703(a)(2) of the Act, much of the fraudulent activity within the interstate land sales industry will be eliminated. See note 25 *infra*.

25. "Puffing" is the practice in which the salesman gives his opinion concerning the offering as a means of inducing the buyer to purchase a lot. It is an age-old practice of salesmen which is fully protected by the common law. See Coffey & Welch 64-68; Morris 354. The SEC and the courts have restricted the types of opinion that may be given in the sale of securities. See 2 L. LOSS, *supra* note 14, at 1436-38. The problem as applied to the interstate land sales industry has not been presented to the courts. Manuel Cohen, then Chairman of the SEC, suggested at the 1967 Hearings that the SEC (it was anticipated that the SEC would administer the scheme at that time) be given the authority to proscribe such fraudulent practices by regulation, but this suggestion was ignored. 1967 Hearings 52-53; see Coffey & Welch 64-65.

26. See note 18 *supra* and accompanying text. The following are the elements of common law deceit:

- (1) a false representation of fact made by the defendant;
- (2) knowledge or belief by the defendant that the representation is false;
- (3) intent of the defendant to induce the plaintiff to act in reliance on the misrepresentation;
- (4) justifiable reliance by the plaintiff upon the representation;
- (5) damages to the plaintiff as a result of his reliance.

See W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 105, at 685-86 (4th ed. 1971).

Section 1703(a)(2) of the Act mentions specifically only two of the elements of deceit—misrepresentation and reliance. However, Coffey and Welch have pointed out that courts have required purchasers of securities suing under rule 10b-5 to show some, but not all, of the elements of deceit. Particularly, the courts have required some showing of mental state other than negligence. Since § 1703(a)(2) of the Act is almost identical to rule 10b-5, it is quite possible that the courts will construe the Act

have argued that the entire full disclosure concept is inadequate and should be replaced with a "paternalistic" approach to consumer protection.²⁷

A. *The Office of Interstate Land Sales Registration*

In addition to the statutory weaknesses, the OILSR took a very limited view of its own purposes and enforcement powers for the first three years of its existence. The staff was extremely small and its activities were limited almost exclusively to registering subdivisions, with little emphasis on investigating complaints or policing developers.²⁸ Early OILSR administrators viewed their authority as confined to ensuring that all material facts concerning the offering were disclosed in the statement of record.²⁹

In 1972, dissatisfaction with the performance of the OILSR and increased consumer complaints of fraudulent practices brought a shake-up in the Office.³⁰ The operative principle of the OILSR be-

as requiring some showing of the elements of deceit.

Coffey and Welch argue, however, that the two sections should not be treated alike in this respect. The Act specifically provides for private rights of action under § 1703 (a)(2), while the courts have had to imply such rights under rule 10b-5. Thus, the courts should avoid the problems they have encountered with the securities cases by construing the Act as not requiring the elements of common law deceit. The one problem with discarding the common law elements of deceit—a problem which is readily admitted by Coffey and Welch—is the resulting lack of any standards for the courts to use to define punishable acts in the sale of interstate land. See Coffey & Welch 62-68. Morris simply disregards the possibility that the courts could interpret the Act as they have rule 10b-5. He would read § 1703(a)(2) as providing for strict liability. Morris 355. For a good discussion of the requirements for recovery under rule 10b-5, see Note, *SEC Rule 10b-5: A Recent Profile*, 13 WM. & MARY L. REV. 860 (1972).

27. See *Expanded Federal Role* 511.

28. Throughout 1971, the OILSR had only forty employees, two of whom traveled the country in search of unregistered developments. Jones, *supra* note 3, at 624. As of May 1972, the OILSR had obtained four indictments and one conviction under the Act, and had suspended only eighteen sales operations. *Land Sales Boom*, *supra* note 9, at 608. See generally *Expanded Federal Role* 514-15; *New American Land Rush*, *supra* note 9, at 72.

29. See Walsh, *Consumer Protection in Land Development Sales*, 42 PA. B. ASS'N Q. 38 (1970). Ray Walsh, then a staff member of the Administrative Proceedings Division of the OILSR, stated:

The Act confers merely the authority to require a *disclosure* of any and all material facts concerning land which is being offered for sale or lease. Once an adequate disclosure has been accomplished, the Act's intent has been satisfied and compliance with the law is assured.

Id. (emphasis original). See also *Expanded Federal Role* 514-15.

30. On March 1, 1972, the OILSR became directly responsible to the Secretary of

came "developer beware,"³¹ a marked increase in the enforcement of existing restrictions occurred;³² and a series of hearings was held concerning ways to strengthen the Act.³³ The result of the hearings and this general change in policy was the promulgation of new regulations,³⁴ which became effective on December 1, 1973.

B. *The Regulations*

Two parts of the regulations make significant additions to the prior regulations and indicate expanded interest in protecting the purchaser. These changes, set out in parts 1710 and 1715 of the regulations, are a two-pronged attempt by the OILSR to correct the basic weaknesses of the Act:³⁵ (1) to strengthen the effectiveness of the property report; and (2) to eliminate certain types of misleading sales techniques.

Section 1710.110 makes several substantive changes concerning both the information required in and the format of the property report. The report must now include a cover sheet containing (1) a notice to the purchaser that any representation made by the developer contrary to the information contained in the property report is unlawful and should be reported to the OILSR, (2) a suggestion to the purchaser that he seek professional advice regarding the proposed transaction, and (3) a red overprint which warns the purchaser to read the property report before signing anything.³⁶ Within the report, five "special risk factors" must be listed verbatim from the regulations. These factors attempt to make the purchaser aware that the rosy future described by the developer in his sales pitch may not come to pass. They specifically point out that future land values are un-

HUD, and a new Director was appointed. 3 *HUD Newsletter*, No. 12, Mar. 20, 1972, at 3. See *Expanded Federal Role* 517.

31. Statement by the new OILSR Administrator, George K. Bernstein, in Washington Post, June 1, 1972, § A, at 1, col. 6.

32. By the end of 1972, the OILSR had obtained three criminal convictions and two additional indictments, and had increased the number of administrative actions—sales suspensions—to 207. 1972 DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT ANNUAL REPORT 59. Through the first three months of 1973, the OILSR had suspended 107 sales operations for violations of the Act. 4 *HUD Newsletter*, No. 14, Apr. 2, 1973, at 3. See generally *Expanded Federal Role* 517-20.

33. See *Expanded Federal Role* 517-20.

34. 24 C.F.R. § 1700 *et seq.* (1974).

35. See notes 23-27 *supra* and accompanying text. See also 4 *HUD Newsletter*, No. 38, Sept. 17, 1973, at 1 (statement by George K. Bernstein).

36. 24 C.F.R. § 1710.110, pt. B, ¶¶ 3 & 4 (1974). For an example of the cover sheet, see 38 Fed. Reg. 23,892 (1973).

certain, and that resale of the lot may be subject to restrictions or impossible due to competition from others who are also anxious to sell their lots.³⁷ One critical point is made for purchasers who plan to buy on an installment contract: the contract may be sold by the developer to a holder in due course, in which case the buyer may be required to continue his payments even though the developer fails to carry out the promised plans.³⁸ Also, in an effort to apprise the purchaser of the developer's ability to complete promised developments, the regulations require the developer to attach a copy of his company's most recent financial report.³⁹ Finally, the new property report requires expanded disclosure of facts relating to the availability of roads, utilities, and municipal services within the development, including estimated costs, any known limitations, and suppliers.⁴⁰

By requiring more information in the property report and warning prospective buyers of the risks involved in interstate land purchases, the regulations extend the property report to the limits of its effectiveness. The OILSR cannot require the purchaser to read and understand the property report, nor can it require him to seek professional advice. Additionally, the required information cannot always be expressed in layman's language, and the longer the report the less likely the prospective purchaser is to read it carefully. Thus, the OILSR has attempted to balance the type and amount of facts disclosed in the

37. 24 C.F.R. § 1710.110, pt. C (1974). Investment potential is one of the most important reasons given by purchasers for buying such undeveloped property. This is especially true for people with modest incomes who feel land development is a "sure thing." See 1964 Hearings 2-8; 1963 Hearings 184-235; Carberry, *supra* note 3, at 1.

38. See 38 Fed. Reg. 23,871 (1973).

39. 24 C.F.R. § 1710.110, pt. C (1974). Many disgruntled purchasers have complained of developments left uncompleted because the developers were inadequately financed. See 1963 Hearings 184-235; cf. Washington Post, June 1, 1972, § A, at 7, col. 1. The OILSR feels that providing the purchaser with an insight into the developer's financial position will allow him to make a more intelligent assessment of the offering. See 38 Fed. Reg. 23,870-71 (1973); Carberry, *supra* note 3.

40. 24 C.F.R. § 1710.110, pt. A, ¶ 10 (1974). Some disclosure concerning availability of services and utilities was previously required. See note 16 *supra*. The new regulations, however, make significant additions to these requirements. These added disclosure requirements when read in conjunction with some of the advertising guidelines, set out in note 46 *infra*, attempt to correct one of the major abuses perpetrated by developers. The proximity of commercial and medical facilities and availability of utilities are two important factors bearing on the purchaser's decision to buy. It is common for developers to refer to such facilities as "only minutes away" or "available" without further explanation. In many instances "minutes away" may mean 20 or 30 miles. See 1964 Hearings 17-38; 1963 Hearings 184-235; N.Y. Times, Feb. 13, 1972, § 8, at 4, col. 1.

report with the need for a reasonably short, concise document which the purchaser will be more likely to read and understand. Although the property report will be longer as a result of the new disclosure requirements, the OILSR anticipates that any ill effects of this added length will be offset by the benefits of a potential buyer's more careful scrutiny of the report.⁴¹

The second and more important step taken by the OILSR is the addition, in part 1715 of the regulations, of guidelines for developers' advertising and sales practices. Subpart A, including sections 1715.5 to 1715.15, pertains to advertising (printed matter and radio and television broadcasts) circulated by developers in attempts to sell their lots.⁴² The guidelines specifically make unlawful the circulation of advertisements (1) which contain information materially different from that contained in the statement of record and property report,⁴³ (2) which contain false or misleading statements,⁴⁴ or (3) which omit statements necessary to render the representations not misleading.⁴⁵ The regulations also set out an extensive listing of the types of representations which the OILSR deems false and misleading, or which will require an accompanying explanation so as not to be misleading.⁴⁶ This listing further specifies inferences or presumptions that will arise from certain representations made by the developer. For example, when "homesites" are advertised, the inference arises that an adequate, potable water supply is readily available to the purchaser.⁴⁷ These inferences will be regarded by the OILSR as positive

41. See 38 Fed. Reg. 23,870 (1973) (comments by OILSR Administrator).

42. 24 C.F.R. § 1715.5(a) (1974).

43. *Id.* § 1715.5(a)(3).

44. *Id.* § 1715.5(a)(1). Misleading advertising in the post-effective period was illegal prior to the new regulations based on the general antifraud provisions. See note 23 *supra* and accompanying text.

45. 24 C.F.R. § 1715.5(a)(2) (1974). This is an attempt by the OILSR to adopt the "half-truth" concept incorporated in the securities regulatory scheme by 15 U.S.C. § 77q (1970) and SEC rule 10b-5. See 1 A. BROMBERG, *supra* note 24, at § 26(2); 3 L. LOSS, *supra* note 14, at 1438-39.

46. 24 C.F.R. § 1715.15 (1974). Advertisements which represent that towns, shopping centers, and other facilities are "near" or "only minutes away" are misleading unless actual distances are given. *Id.* § 1715.15(j). References to the availability of "roads" and streets are misleading unless the nature of the roads, *i.e.*, all-weather, gravel, etc., is disclosed. *Id.* § 1715.15(q). Advertisements which refer to uncompleted improvements to the subdivision must clearly state the date of promised completion or that the facilities are only planned. *Id.* §§ 1715.15(n), (ee). See generally 38 Fed. Reg. 23,873 (1973).

47. 24 C.F.R. § 1715.15(jj)(1) (1974). Other examples of the inferences which

statements unless they are clearly negated by the developer in the advertisements.⁴⁸

Subpart B of part 1715 applies the advertising guidelines to sales practices of the developers.⁴⁹ Sales practices are defined to include "any act by the developer or his agents [intended] to induce a purchaser to buy or lease a lot."⁵⁰ Thus, any oral representations made by developers are subject to the same standards applicable to printed matter. Subpart B also classifies as violations of the Act certain practices of the developers which tend (1) to conceal or misrepresent the purpose of the property report,⁵¹ or (2) to misrepresent the volume of sales in the development.⁵²

Specific parts of these guidelines, when applied both to advertising and sales practices, go to the very heart of the fraudulent practices in the interstate land sales industry. Three methods of "puffing"⁵³ are expressly branded as misleading: (1) representations that quick profits may be made if the land is purchased;⁵⁴ (2) the use of vague or inaccurate pictures or sketches purporting to show "before" and "after" conditions;⁵⁵ and (3) vague or inaccurate opinions or comparisons relating to land values in the area.⁵⁶ Labeled as equally offensive are developers' attempts to pressure the buyer into making a quick decision to purchase by creating an atmosphere of urgency through

will be drawn from certain advertisements are as follows: (1) advertisements of title insurance or abstract of title in connection with the sale of regulated property will raise the inference that the seller can and will convey fee simple title, *id.* § 1715.15(jj)(2); (2) advertisements of improvements, recreational facilities, or other accommodations raise the inference that these facilities are presently on the property and available to the purchaser without restriction, *id.* § 1715.15(jj)(4); (3) to advertise lots as "usable" for a specific purpose other than as homesites or building lots, implies that they are immediately accessible and usable for such purposes, *id.* § 1715.15(jj)(3).

48. *Id.* § 1715.15(jj).

49. *Id.* § 1715.25.

50. *Id.*

51. *Id.* §§ 1715.25(b)-(d).

52. *Id.* § 1715.25(a). A favorite practice of some developers is to repeatedly announce to prospective buyers the sale of one or more lots in the subdivision. The announcements may be completely false, or simply repetitious announcements of the same sale. The effect of this practice is to create anxiety on the part of prospective purchasers who may feel they are "missing a golden opportunity." See 1964 Hearings 17-38; 1963 Hearings 184-235. See also note 58 *infra*.

53. See note 25 *supra*.

54. 24 C.F.R. § 1715.15(f) (1974).

55. *Id.* § 1715.15(t).

56. *Id.* § 1715.15(v).

vague representations of imminent sales price increases⁵⁷ or repetitive false announcements of lots being sold.⁵⁸ Also, the regulations prohibit several forms of advertisements which are notoriously connected with "bait and switch" sales techniques.⁵⁹

1. OILSR Authority to Regulate Advertising

Various portions of the new regulations were vigorously challenged by developers prior to final publication. The most widely voiced complaint related to the lack of authority in the OILSR to promulgate advertising and sales practice guidelines.⁶⁰ In his prefatory remarks to the regulations, the Administrator of the OILSR specifically disclaimed any intent to propose substantive regulation of advertising.⁶¹ Rather, he spoke of these guidelines as definitions of "what [OILSR] believes to be misrepresentations in advertising which would be violative of the Act."⁶² The sole reason for this less-than-authoritative position would seem to be Congress' failure to provide statutory authority for the Secretary of HUD, through the OILSR, to regulate advertising.

The OILSR rests its claim of authority to issue these guidelines on its general rule-making power under section 1718 of the Act. The Secretary of HUD, through the OILSR, is empowered to "make such rules and regulations as are necessary and appropriate"⁶³ to the exer-

57. *Id.* § 1715.15(g).

58. *Id.* § 1715.25(a). Russell Burroughs, a recreational land developer critical of his own industry, characterized the creation of an atmosphere of urgency as one of the most widespread deceptive practices in the industry. *See* Washington Post, June 2, 1972, § C, at 2, col. 3. *See also* 1964 Hearings 17-38; 1963 Hearings 184-235.

59. Some land developers use bait and switch tactics very profitably. They obtain legally binding, or at least psychologically binding, commitments from purchasers by offering "free" or "cheap" lots which are unsuitable for use. They then induce the purchaser to buy additional lots to make his own lot usable, or to "swap" his bargain lot for a more suitable, but higher priced, lot. *See* 1964 Hearings 17-38; 1963 Hearings 184-235. The new regulations take several steps to eliminate these practices. Developers may not advertise lots as "free" when the purchaser will in fact be required to pay some consideration or when additional lots must be purchased at a higher price to make the "free" lot usable. 24 C.F.R. § 1715.15(o) (1974). It is also unlawful for developers to advertise "pre-development" sales at lower prices unless substantial steps have been taken to assure that the land will be developed in the reasonably near future. *Id.* § 1715.15(p).

60. 38 Fed. Reg. 23,873 (1973).

61. *Id.*

62. *Id.*

63. *Id.* 15 U.S.C. § 1718 (1970) provides:

cise of his *powers* under the Act. One of these powers, pursuant to section 1703(a) of the Act, is to prevent practices which constitute a "device, scheme, or artifice to defraud"⁶⁴ or a "material misrepresentation . . . with respect to any information pertinent to the lot"⁶⁵

Several factors appear to lend some support to the OILSR position. First, the Act is a remedial statute intended to eliminate fraudulent practices in the interstate sale of land.⁶⁶ Since one of the prime areas of fraudulent practices is advertising, one can argue for a broad interpretation of the regulatory powers of the OILSR to include advertising. There is scant legislative history specifically relating to the Act from which one can glean any congressional intent opposing such an argument.⁶⁷ Secondly, the Act defines an offer as "any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision."⁶⁸ This is a much broader definition of "offer" than the common law contract definition.⁶⁹ An offer under the terms of the Act would include most advertisements as they are commonly conceived.⁷⁰ It remains to be seen, however, what approach the courts will take.

The Secretary shall have authority from time to time to make, issue, amend, and rescind such rules and regulations and such orders as are necessary or appropriate to the exercise of the functions and powers conferred upon him elsewhere in this chapter.

Coffey and Welch would support the Secretary's position. See Coffey & Welch 33.

64. 15 U.S.C. § 1703(a)(2)(A) (1970).

65. *Id.* § 1703(a)(2)(B).

66. See note 13 *supra* and accompanying text.

67. See generally S. REP. NO. 1123, 90th Cong., 2d Sess. (1968); CONF. REP. NO. 1785, 90th Cong., 2d Sess. (1968). All of the legislative hearings on abuses in the interstate land sales industry related to various forerunners of the Act. See notes 1-2 *supra*. Neither of the congressional reports relating to the Act as finally passed discusses the possibility of controlling advertising.

68. 15 U.S.C. § 1701(10) (1970).

69. An offer "is an expression by the offeror of his agreement that something over which he at least assumes to have control shall be done or happen or shall not be done or happen if the conditions stated in the offer are complied with." 1 S. WILLISTON, A TREATISE ON THE LAW OF CONTRACTS 56 (3d ed. W. Jaeger 1957).

70. The definition of "offer" for purposes of the Act should be given at least as broad an interpretation as the same term has received in the securities field. Compare § 2(3) of the Securities Act of 1933, 15 U.S.C. § 77b(3) (1970) (emphasis added), which states in part:

The term "offer to sell", "offer for sale", or "offer" shall include every *attempt* or offer to dispose of, or *solicitation* of an offer to buy, a security or interest in a security, for value.

This definition has been read to include advertisements of a company's products, speeches by its officers, and press releases which are attempts to arouse interest in the

2. *Effects of the Regulations*

The new guidelines represent a substantial step in the growth of the OILSR and a positive commitment to providing more protection for the prospective buyer. The simple fact that the guidelines have been issued should inhibit the fraudulent activities of many developers. If these guidelines have the effect only of OILSR policy statements, as the Administrator suggested,⁷¹ a violation by a developer surely will bring about closer scrutiny and investigation by the OILSR,⁷² an occurrence which most developers would not welcome. And should the courts uphold the authority of the Secretary, through the OILSR, to issue substantive regulations, a violation of these regulations will result in criminal or administrative sanctions against the developer.⁷³

Furthermore, the guidelines can apply to pre-effective as well as post-effective advertising and sales practices, thus limiting a developer's ability to condition the market.⁷⁴ The OILSR defines advertising as "a reasonably widespread dissemination of any inducement, solicitation, or attempt to encourage a person to acquire a lot in a subdivision,"⁷⁵ and the regulations refer to *any* such advertising.⁷⁶ Therefore, any advertisements pertaining to a subdivision within the jurisdictional limits of the Act would be subject to the guidelines.

The new regulations also should significantly strengthen the effectiveness of the general antifraud provision of the Act—section 1703(a)(2). This section provides the basis for private actions by purchasers against developers for misrepresentations other than those in the statement of record or property report.⁷⁷ Critics of the Act have argued that this section does no more than apply the elements of common law deceit to interstate land sales.⁷⁸ Other commentators, however, believe that the courts should not require the purchasers to prove all the elements of deceit, especially intent, when suing pur-

company's securities. See 1 L. Loss, *supra* note 14, at 216. See also *Chris-Craft Indus., Inc. v. Bangor Punta Corp.*, 426 F.2d 569 (2d Cir. 1970); *SEC v. Arvida Corp.*, 169 F. Supp. 211 (S.D.N.Y. 1958).

71. See note 61 *supra* and accompanying text.

72. See 38 Fed. Reg. 23,873 (1973).

73. See 15 U.S.C. §§ 1714, 1717 (1970). See also notes 20-21 *supra* and accompanying text.

74. See note 23 *supra* and accompanying text.

75. 38 Fed. Reg. 23,873 (1973).

76. See 24 C.F.R. § 1715.5(a) (1974).

77. 15 U.S.C. § 1709(b) (1970). See Coffey & Welch 62-63.

78. See note 26 *supra* and accompanying text.

suant to section 1703(a)(2).⁷⁹ Inasmuch as no reported cases have interpreted the section, no definitive answer to this question is available. Nevertheless, in the case of the developer who violates the guidelines it will be easier for a plaintiff to argue the existence of intent, should the courts require it. Since the guidelines specifically describe representations that the OILSR interprets as misleading, and since developers are presumed to know the regulations, a developer who makes such representations knowing they are deemed to be misleading arguably intends to mislead the purchaser.

Additionally, the guidelines should help plaintiffs establish the other elements of deceit—material misrepresentation, knowledge, and reliance. Based on the OILSR's argument in support of the authority to issue the regulations, the guidelines are definitions of material misrepresentations with respect to the subdivision.⁸⁰ The developer is presumed to know the content of the guidelines and the types of information that are deemed to be misleading. Thus, he should be on notice to investigate the truth of certain representations before he allows them to be made. Also, the regulations create an inference that reliance by the purchaser on such statements by the developer is justified unless the facts prove otherwise.⁸¹

III. CONCLUSION

The changes in the OILSR and the new regulations indicate a new phase in the development of the scheme to regulate interstate land sales—a coming of age. Prior to passage of the Act, some observers believed that the creation of a federal scheme of regulation, similar to the full disclosure scheme in the securities field, would bring an immediate end to the problems in the interstate land sales industry.⁸²

79. See Coffey & Welch 62-68; Morris 355. See also note 26 *supra* and accompanying text.

80. See text accompanying notes 63-65 *supra*.

81. 24 C.F.R. § 1715.15 (1974). Reliance by the purchaser on the seller's misrepresentation is a requirement of any action for common law deceit, and is specifically required for any action pursuant to § 1703(a)(2)(B) of the Act. A plaintiff-purchaser normally has the burden of showing that he placed reasonable reliance on the developer's misrepresentations when deciding to buy the property. The regulations appear to ease this burden by creating an inference that a purchaser has relied on any of the types of advertising set out therein, should the advertisements prove to be false or misleading. This would shift the burden of proof to the developer to show that the purchaser had prior knowledge of the true facts or that his reliance was unreasonable.

82. See generally 1967 Hearings; 1966 Hearings; 1964 Hearings; 1963 Hearings.

This, unfortunately, did not occur.⁸³ The OILSR has had to grow and develop in its field just as the Securities and Exchange Commission (SEC) had to grow and develop over the years. Nevertheless, the OILSR can profit immeasurably from the SEC example and, hopefully, become as effective as the SEC, if not more so.

The OILSR has switched from a passive to an active role in the regulatory scheme; instead of simply receiving and filing statements of record, it has begun to exercise its authority to regulate all phases of the interstate sale of land. If the courts uphold the issuance of the advertising guidelines, more and broader guidelines can be expected to appear. Should the courts in any way limit the power of the Secretary, through the OILSR, to issue such guidelines, the OILSR most likely would approach Congress for an amendment to the Act which would provide specific authority to regulate advertising and fraudulent sales practices. In either case, developers can expect a more concerted effort by the OILSR to discover and eliminate fraudulent operations.

83. See note 27 *supra* and accompanying text.