STATE SECURITIES REGULATION OF INTERSTATE LAND SALES

Promoters frequently finance land development by selling subdivision lots on installment purchase agreements.[1] When such development schemes are poorly financed, they constitute high-risk investments for buyers who may lose their investment if the promoter encounters a cash flow problem or the buyer fails to make an installment payment.[2] While many promoters actually build planned communities, others sell subdivision lots on undeveloped land of questionable value as "investments."[3] To guard against abuses in the sale of subdivision lots, land offerings are now regulated in many states.[4]

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1. *See* M. PAULSON, THE GREAT LAND HUSTLE 70 (1972) [hereinafter cited as PAULSON].

2. *Id.* at 10, 70-71, 103. *See also Hearings on S. 275 Before the Subcomm. on Securities of the Senate Comm. on Banking & Currency*, 90th Cong., 1st Sess. (1967); *Hearings on S. 2672 Before the Subcomm. on Securities of the Senate Comm. on Banking & Currency*, 89th Cong., 2d Sess. (1966); *Hearings Before the Subcomm. on Frauds & Misrepresentations Affecting the Elderly of the Senate Special Comm. on Aging*, 88th Cong., 2d Sess. (1964); Carberry, *Home on the Range: Investors Speculating in Land Often Find Profits Are Elusive*, Wall Street J., Apr. 2, 1974, at 1, col. 6.

3. *See* PAULSON, *supra* note 1, at 11-12. *See generally* TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO URBAN GROWTH 263-93 (1973).

4. Thirty-four states now have statutes or administrative rules affecting the sales of subdivision lots. California, Maine, Missouri, Ohio, Tennessee, Vermont and Washington regulate certain subdivision lot sales under their securities laws. CAL. BUS. & PROF. CODE §§ 10238.4-49.5 (Deering Cum. Supp. 1973); *id.* §§ 11000-21 (Deering 1960), *as amended*, (Deering Supp. 1975); ME. REV. STAT. ANN. tit. 32, § 751 (1965), *as amended*, (Supp. 1975); MO. REV. STAT. § 409.401(*l*) (Supp. 1975); OHIO REV. CODE ANN. §§ 1707.01(B), 1707.33 (Page Supp. 1975); TENN. CODE ANN. § 48-1602(J) (1964), *as amended*, (Supp. 1974); VT. STAT. ANN. tit. 9, § 4202(9) (1971); WASH. REV. CODE § 21.20.005(12) (Supp. 1973). Alaska, Florida, Hawaii, Kansas, Montana, New Hampshire, Rhode Island, South Carolina, and Utah have statutes modeled after the Uniform Land Sales Practices Act. ALASKA STAT. §§ 34.55.004-.046 (1971); FLA. STAT. ANN. §§ 478.011-.33 (Supp. 1975); HAWAII REV. STAT. §§ 484-1 to -22 (Supp. 1974); KAN. STAT. ANN. §§ 58-3301 to -3323 (Supp. 1974); MONT. REV. CODES ANN. §§ 67-2101 to -2136 (1970), *as amended*, (Supp. 1974); N.H. REV. STAT. ANN. §§ 356-A:1 to :22 (Supp. 1973); R.I. GEN. LAWS ANN. §§ 34-38-1 to -10 (Supp. 1974); S.C. CODE ANN. §§ 57-551 to -571 (Supp. 1974); UTAH CODE ANN. §§ 57-11-1 to -21 (1974). For the text of the uniform

One aspect of this regulation is illustrated in the case of *Florida Realty, Inc. v. Kirkpatrick*[5] in which plaintiff-appellant, Florida Realty, offered to sell subdivision lots located in Florida to Missouri residents. A prospective buyer was required to sign an installment purchase agreement[6] which the Missouri Commissioner of Securities considered to be within the definition of a "security" in the Missouri Uniform Securities Act.[7] Accordingly, Florida Realty's transactions were subjected to the requirements of the Act.[8] Florida Realty sought

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act see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 339-61 (1966) [hereinafter cited as HANDBOOK]. The other eighteen states with some control over sales of subdivision lots or foreign real estate have various approaches involving registration, inspection or permit systems. *See* ARIZ. REV. STAT. ANN. §§ 32-2181 to -2185.04 (Supp. 1974); COLO. REV. STAT. ANN. §§ 12-61-401 to -407 (1974); CONN. GEN. STAT. ANN. §§ 20-329a to -329b (1975); GA. CODE ANN. §§ 84-5801 to -5814 (Supp. 1974); ILL. ANN. STAT. ch. 30, §§ 371-89 (Smith-Hurd Supp. 1975); MD. REAL PROP. CODE ANN. §§ 10-101 to -402 (1974); MASS. ANN. LAWS ch. 41, §§ 81K-GG (1974); MICH. STAT. ANN. §§ 26.1286(1)-(3) (Supp. 1975); MINN. STAT. ANN. §§ 83.20-.42 (Supp. 1975); NEB. REV. STAT. §§ 81-886.01 to .07 (1971); N.J. STAT. ANN. § 45:15-16.1 (Supp. 1975); N.M. STAT. ANN. §§ 70-3-1 to -9 (Supp. 1973); N.Y. REAL PROP. LAW §§ 337-39(c) (McKinney 1968), *as amended,* (Supp. 1974); N.D. CENT. CODE §§ 43-23.1-01 to -23 (Supp. 1973), *as amended,* (Interim Supp. 1975); ORE. REV. STAT. §§ 92-.205-.245 (1973); S.D. COMPILED LAWS ANN. §§ 36-21-45 to -53 (Supp. 1974); W. VA. CODE ANN. § 32-2-1 (1972); WIS. ADM. CODE, ch. REB 5.01 (1972). Wisconsin's regulation is a rule of the Wisconsin Real Estate Board.

5. 509 S.W.2d 114 (Mo. 1974). For additional commentary on this case see 6 URBAN LAW., No. 2, at ix (1974).

6. 509 S.W.2d at 116.

7. The Act reads, in part: " 'Security' means any note; . . . bond; debenture; . . . investment contract; . . . *or any contract or bond for the sale of any interest in real estate on deferred payments or on installment plans when such real estate is not situated in this state or in any state adjoining this state*; . . . ." (emphasis added). Mo. REV. STAT. § 409.401(*l*) (1969). For commentary on the Act see Bateman, *Missouri Uniform Securities Act,* 34 Mo. L. REV. 463 (1969); Logan, *Blue Skyways and Byways of Missouri—Amendments to Uniform Securities Act and Regulations,* 29 Mo. B.J. (pts. 1-2) 446, 542 (1973); *id.,* 30 Mo. B.J. (pts. 3-7) 37, 112, 159, 231, 305 (1974); Logan, *Blue Skyways and Byways of Missouri,* 25 Mo. B.J. (pts. 1-4) 460, 511, 584, 609 (1969); *id.,* 26 Mo. B.J. (pts. 5-10) 30, 86, 148, 198, 240, 292 (1970); Logan, *Missouri's Evolving Securities Law and Regulations—Update,* 42 U.M.K.C.L. REV. 341 (1974); Logan, *Missouri's New Uniform Securities Act and Securities Regulation,* 37 U.M.K.C.L. REV. 1 (1969).

8. Missouri Uniform Securities Act, Mo. REV. STAT. §§ 409.101-.418 (1969). The Act requires that all transactions defined as a "security" by § 409.401(*l*) be registered with the Commissioner of Securities before that security can be sold or offered for sale in the state. Even after registration the Commissioner can exclude an offering if he finds any aspect of it to be "substantially

to enjoin enforcement of the Act, asserting that the purchase agreement was not a "security." Upon adverse judgment, Florida Realty appealed to the Supreme Court of Missouri, contending that the lower court had misconstrued the Securities Act's definition of a "security."

Appellant argued that its sales transactions did not involve any of the instruments listed in the definitional section,[9] particularly the "foreign real estate security" provision,[10] nor possess the attributes of an "investment contract."[11] Appellant asserted that it was selling

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unfair, unjust, unequitable or oppressive." *Id.* § 409.306(*a*)(2)(E)(ii). It is this power to exclude the offering based on the Commissioner's subjective evaluation of the "substantive fairness" of the offering that distinguishes a state securities, or Blue Sky, law from the disclosure philosophy inherent in the federal securities laws.

9. *Id.* § 409.401(*l*); *see* note 7 *supra.*

10. " 'Security' means . . . any contract or bond for the sale of any interest in real estate on deferred payments or on installment plans when such real estate is not situated in this state or in any state adjoining this state . . . ." Missouri Uniform Securities Act, MO. REV. STAT. § 409.401(*l*) (1969). This provision will hereinafter be referred to as the Missouri "foreign real estate security."

11. *See* note 7 *supra.* "Investment contracts" are not usually defined in securities statutes despite their importance in bringing many transactions within the securities laws. The United States Supreme Court's interpretation, in the context of federal law, is that "an investment contract for purposes of the Securities Act means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946); *cf.* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344 (1943). The *Howey* test has been criticized because (1) it ignores the risk of loss of the original value furnished by the purchaser, (2) the words "common enterprise" are ambiguous and tend to fog the central issues involved in identifying a "security," and (3) too much emphasis is placed on the inducement of future "profits." *See* Coffey, *The Economic Realities of a "Security": Is There a More Meaningful Formula?*, 18 W. RES. L. REV 367, 374-75 (1967). Professor Coffey contends that risk to investment, though not determinative, is the single most important economic characteristic which distinguishes a security from other transactions. *Id.* at 375. *See* SEC v. C.M. Joiner Leasing Corp., *supra*, at 349; SEC v. Glenn W. Turner Enterprises, Inc., 348 F. Supp. 766 (D. Ore. 1972), *aff'd*, 474 F.2d 476 (9th Cir. 1973); Silver Hills Country Club v. Sobieski, 55 Cal. 2d 811, 361 P.2d 906, 13 Cal. Rptr. 186 (1961); State v. Hawaii Mkt. Center, Inc., 52 Hawaii 642, 485 P.2d 105 (1971).

Most courts have held that contracts providing for the mere sale of an interest in real property are not "investment contracts." *See, e.g.*, People v. Davenport, 13 Cal. 2d 681, 91 P.2d 892 (1939); *In re* McCormick's Estate, 284 Ill. App. 543, 1 N.E.2d 769 (1936); McCormick v. Shively, 267 Ill. App. 99 (1932). *But see* State v. Lorentz, 221 Minn. 366, 22 N.W.2d 313 (1946) (contract for deed in connection with sale of cemetery lots). *See generally* 1 L. LOSS, SECURITIES REGULATION 483-511, 2500-56 (2d ed. 1961, Supp. 1969); Annot., 47 A.L.R.3d 1375 (1973); Annot., 3 A.L.R. Fed. 592 (1970).

land, not *securities,* arguing that the purchase agreement arose from the transaction and that even if the purchase agreement was a "security," it was neither transferred, sold, nor discounted in the course of the transaction. Therefore, appellant concluded, the Securities Act was inapplicable to its sales transactions.[12] The court rejected this argument and held that Florida Realty's sale of, or its offer to sell, land pursuant to an installment purchase agreement came directly within the statutory language defining a security,[13] *i.e.* the "foreign real estate security." Having determined that appellant's installment purchase agreements were "securities," the court held that Florida Realty was subject to the requirements of the Securities Act, including the rules, regulations and orders of the Securities Commissioner.[14] The court noted that when the Act is taken as a whole, it encompasses not only sales and purchases of securities to third parties after execution, issuance and delivery, but also offers by sellers' agents to prospective purchasers to sell a contract such as appellant's installment purchase agreement.[15]

Legislative scrutiny of interstate land sales has resulted in several regulatory approaches.[16] The two principal approaches are "substantive fairness" and "full disclosure."[17] "Substantive fairness" statutes

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12. Brief for Appellant at 35, Florida Realty, Inc. v. Kirkpatrick, 509 S.W.2d 114 (Mo. 1974).

13. 509 S.W.2d at 117-18.

14. *Id.* at 117.

15. *Id.* at 118. *See* Missouri Uniform Securities Act, Mo. Rev. Stat. §§ 409.101, 409.301 (1969). The court also found that the statutory discrimination in § 409.401(*l*) against sales of land in non-adjoining states was "arbitrary, artificial, and unreasonable," and, therefore, a denial of equal protection. The language in the "foreign real estate security" provision of the Act, note 10 *supra,* which excluded from the definition of a security any deferred payment sale of land situated "in any state adjoining this state" was struck from the statute. 509 S.W.2d at 118-19. The court upheld the statutory distinction between sales of land within Missouri and of land without Missouri. It concluded that a resident might reasonably be expected to personally inspect in-state land, while it might be difficult or impossible to travel long distances to inspect out-of-state land. *Id.* at 118. Also found to be reasonable was the legislature's distinction between cash sales and deferred payment sales. Thus cash sales of out-of-state subdivision lots remain unregulated in Missouri. *Id.* at 119.

16. *See* statutes cited note 4 *supra.*

17. *See* Coffey & Welch, *Federal Regulation of Land Sales: Full Disclosure Comes Down to Earth,* 21 Case W. Res. L. Rev. 5, 14 (1969); Note, *Regulation of Interstate Land Sales,* 25 Stan. L. Rev. 605, 608-09 (1973); Note, *Interstate Land Sales Regulations,* 1974 Wash. U.L.Q. 123, 123-24 n.4.

require promoters to register with the appropriate authority by providing specified information about the offering. This information is usually required to be disclosed to prospective purchasers.[18] More importantly, the appropriate official may exclude the offering from distribution in the jurisdiction if he finds that it is "unfair, unjust, and unequitable."[19] "Full disclosure" statutes, as the name implies, simply require the promoter to make information relevant to the property available to the appropriate official. This information is intended to permit a purchaser to make a rational decision.[20]

Many state securities laws fall in the "substantive fairness" category.[21] These laws usually provide two types of protection for investors. First, unless a security, as defined in the particular statute, is subject to an exemptive provision,[22] registration or state approval

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18. *See, e.g.*, Interstate Land Sales Full Disclosure Act, 15 U.S.C. §§ 1704, 1705, 1707 (1970) (requirement of filing a Statement of Record and a Property Report); 24 C.F.R. §§ 1710.105, 1710.110 (1975).

19. *See, e.g.*, Missouri Uniform Securities Act, Mo. REV. STAT. § 409.306(*a*)(2)(E)(ii) (1969); *cf. Prefatory Note to the Uniform Land Sales Practices Act*, HANDBOOK, *supra* note 4, at 339-40, which states:

> [T]he Act is designed to place individual purchases of large scale promotional land offerings on an equal bargaining basis with the promoter-seller. It achieves this purpose by providing for the examination of the promotional offering to determine (1) that it affords full and fair disclosure to prospective buyers, (2) that the seller can convey unencumbered legal title to the purchaser, and (3) that there are sufficient safeguards to assure that the seller will complete the promised offsite improvements on the land.

20. Professors Coffey and Welch raise the argument that full disclosure to prospective land buyers through prospectus-like selling documents might not function as well as it does in the securities context. Many securities offerings filter through a "superstructure of financial sophisticates" who are presumed to understand the prospectus information. Some securities offerings, however, do not involve a large selling group of brokers or dealers. Also, a subdivision lot property report may not be as complex as a securities prospectus. They conclude that a prospectus has a "purifying effect" on the one disclosing, notwithstanding its effect on a prospective purchaser. Coffey & Welch, *supra* note 17, at 18-19. For an analysis of the effects of disclosure in the federal securities scheme see SEC, REPORT ON DISCLOSURE TO INVESTORS—A REAPPRAISAL OF FEDERAL ADMINISTRATIVE POLICIES UNDER THE '33 AND '34 ACTS (CCH ed. 1969) [commonly called the WHEAT REPORT].

21. *See, e.g.*, Mo. REV. STAT. § 409.306 (*a*)(2)(E)(ii) (1969); N.H. REV. STAT. ANN. §§ 421:27, 421:29 (1968); OHIO REV. CODE ANN. § 1707.13 (Page 1964).

22. *See, e.g.*, Uniform Securities Act § 402, 1 BLUE SKY L. REP. ¶ 4932 (1971). For example, securities issued by federal, state or municipal governments, or by federal or state banks are exempted. *Id.*

is required before the security may be distributed.[23] Second, even if the exemptive provisions apply, distribution and trading of the security will usually fall within the residual protection of several anti-fraud provisions, whether or not registration is required.[24] *Florida Realty* illustrates the application of a state securities law (commonly called Blue Sky Laws) to protect consumers against possible exploitation by land promoters with unsubstantial schemes.[25] The Missouri Act employs the "substantive fairness" requirement.[26]

Even in the absence of a "foreign real estate security" provision like that in the Missouri Act,[27] most Blue Sky Laws will still become operative with respect to sales of subdivision lots, whether located in the jurisdiction or not, if the sales transaction possesses the attributes of an "investment contract."[28] Furthermore, if a sales transaction

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23. *See, e.g.*, Securities Act of 1933 § 5, 15 U.S.C. § 77*e* (1970) (registration required prior to distribution); Uniform Securities Act § 304(c), 1 BLUE SKY L. REP. ¶ 4924 (1971) (approval registration statement).

24. *See, e.g.*, Uniform Securities Act §§ 101, 410(a)(2), 1 BLUE SKY L. REP. ¶¶ 4902, 4940 (1971).

25. Blue Sky Laws are often considered paternalistic, which means that the appropriate administrative agency, usually by the State Commissioner of Securities, may comment upon, or even prohibit, an offering because of its unfairness. This paternalistic purpose has been recognized by the United States Supreme Court: "The purpose of Blue Sky Laws is to protect the public against the imposition upon the public of unsubstantial schemes and the securities based upon them." 509 S.W.2d at 117, *citing* Hall v. Geiger-Jones Co., 242 U.S. 539 (1917).

The definitional section of the Missouri Act is identical to § 401(*l*) of the Uniform Securities Act (USA), 1 BLUE SKY L. REP. ¶ 4931 (1971), except that the USA does not contain a provision similar to Missouri's "foreign real estate security," note 10 *supra*. Several Blue Sky Laws are modeled after the USA. They frequently deviate in many respects from the USA and predate it. The USA was modeled after the Securities Act of 1933, 15 U.S.C. §§ 77*a-aa* (1970), to promote uniformity of application among jurisdictions. The first comprehensive licensing system applicable to securities and persons engaging in the securities business was enacted in Kansas in 1911. Law of Mar. 10, 1911, ch. 133 [1911] Kan. Laws 210 (repealed 1915). *See* 1 BLUE SKY L. REP. ¶ 501 (1973). By enacting the Securities Act of 1933, Congress sought to complement the state acts by regulating securities *concurrently* with the states; it did not preempt the field. L. LOSS & E. COWETT, BLUE SKY LAW 1, 237 n.1 (1958).

26. *See* Missouri Uniform Securities Act, Mo. REV. STAT. § 409.306(*a*)(2)(E)(ii) (1969).

27. *See, e.g., id.* § 409.401.

28. *See* note 11, *supra*. For example, if a subdivision lot is sold in connection with an "investment pool" or a "leaseback" arrangement, or if the purchaser agrees to purchase the lot with an expectation of appreciation in value due to the promoter's efforts at improving the area of which the lot is a part, the transaction may be considered an "investment contract" in many jurisdictions. *See, e.g.*, SEC

possesses the attributes of an "investment contract" and is sold through the mails or with the use of instrumentalities of interstate commerce, it may also be subject to the federal securities laws.[29]

If interstate sales of subdivision lots do not constitute "securities" under either state or federal securities law, they may still come within the ambit of legislation regulating land sales. The federal initiative is represented by the Interstate Land Sales Full Disclosure Act of 1967 (ILSFDA).[30] While not a securities law, the ILSFDA follows certain regulatory approaches found in securities law. As its name suggests, the ILSFDA is a "full disclosure" regulatory statute, rather than a paternalistic "substantive fairness" law. The Act requires promoters to file a Statement of Record,[31] which is analogous to a securities registration statement, with the Office of Interstate Land Sales Registration (OILSR)[32] before offering for sale or lease fifty or

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v. W.J. Howey Co., 328 U.S. 293 (1946) (sale of units in citrus grove development with contract under which seller will manage the unit); State v. Hofacre, 206 Minn. 167, 288 N.W. 13 (1939) (investment pool); State v. Evans, 154 Minn. 95, 191 N.W. 425 (1922) (contract for sale of land subject to purchaser's option to surrender or convert). *See also* Real Estate Syndications, SEC Securities Act Release No. 4877 (Aug. 8, 1967), 1 CCH FED. SEC. L. REP. ¶ 1046 (1973).

29. Securities Act of 1933, 15 U.S.C. §§ 77*a-aa* (1970); Securities Exchange Act of 1934, 15 U.S.C. §§ 78*a* to *hh*-1 (1970).

30. 15 U.S.C. §§ 1701-20 (1970), *as amended*, 15 U.S.C. §§ 1701-03 (Supp. IV, 1974). For commentary on the ILSFDA see Coffey & Welch, *supra* note 17; Ellis, *Land Sales Full Disclosure Laws: Federal and Illinois*, 60 ILL. B.J. 16 (1971); Morris, *The Interstate Land Sales Full Disclosure Act: Analysis and Evaluation*, 24 S.C.L. REV. 331 (1972); Comment, *A Handbook to the Interstate Land Sales Full Disclosure Act*, 27 ARK. L. REV. 65 (1973); Note, *S. 275—The Interstate Land Sales Full Disclosure Act*, 21 RUTGERS L. REV. 714 (1967); Note, *Interstate Land Sales Regulation: The Case for an Expanded Federal Role*, 6 U. MICH. J.L. REF. 511 (1973).

31. Interstate Land Sales Full Disclosure Act §§ 1405, 1406, 15 U.S.C. §§ 1704, 1705 (1970). The format and instructions for completing the Statement of Record are found at 24 C.F.R. § 1710.105 (1975).

32. OILSR was placed in the Department of Housing and Urban Development (HUD) by the Act. The 1966 bill which resulted in this Act originally envisaged administration by the SEC, rather than by HUD. Manuel F. Cohen, the Chairman of the SEC, testified before Congress that the SEC was well-equipped to administer interstate land sales regulation (in many states today subdivision lot sales are regulated by Securities Commissioners), since the proposed disclosure act followed the basic pattern of the Securities Act of 1933. *See Hearings on S. 275 Before the Subcomm. on Securities of the Senate Comm. on Banking & Currency*, 90th Cong., 1st Sess. 50-53 (1967). *See also* PAULSON, *supra* note 1, at 170-71. The early performance of OILSR has been considered less than vigorous by some writers. *Id.* at 171-87; *see* Note, *Interstate Land Sales Regulations*, *supra* note 17, at 129. OILSR has become more active since 1972 under

more[33] subdivision lots by means of the mails or instrumentalities of interstate commerce,[34] unless the offered property falls within an exemptive provision.[35] Promoters must also provide prospective purchasers with an approved Property Report,[36] which is analogous to a securities prospectus, that contains a detailed listing of facts deemed relevant to the offering by the OILSR. Failure by promoters to comply with the registration or disclosure requirements, or the use by promoters of fraudulent sales practices, can lead to criminal penalties[37] or to civil actions instituted by either purchasers[38] or OILSR.[39]

A "full disclosure" statute at the state level is the Uniform Land Sales Practices Act (ULSPA).[40] The ULSPA was approved in final

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the administration of George K. Bernstein. It recently promulgated stricter regulations for disclosure and advertising by land promoters. 24 C.F.R. §§ 1700-1720.530 (1975). These changes are discussed in Ellsworth, *AILSR Tightens the Regulatory Screws*, 4 REAL ESTATE REV. No. 1, at 106, 111 (1974); Note, *Interstate Land Sales Regulations*, *supra* note 17.

33. Interstate Land Sales Full Disclosure Act § 1403(a)(1), 15 U.S.C. § 1702(a)(1) (1970).

34. *Id.* § 1404, 15 U.S.C. § 1703, (1970), *as amended*, (Supp. IV, 1974).

35. *Id.* § 1403, 15 U.S.C. § 1702, (1970), *as amended*, (Supp. IV, 1974).

36. The Property Report must be filed with the Statement of Record and approved by the OILSR before distribution. 24 C.F.R. § 1710.20 (1975). The instructions for preparing the Property Report are found at *id.* § 1710.110.

37. Upon conviction for willfully violating provisions of the Act, a developer can be fined not more than $5000 and/or be imprisoned for not more than five years. Interstate Land Sales Full Disclosure Act § 1418, 15 U.S.C. § 1717 (1970).

38. An injured buyer can sue 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. *Id.* §§ 1404(b), 1410, 15 U.S.C. §§ 1703(b), 1709 (1970), *as amended*, 15. U.S.C. § 1703(b) (Supp. IV, 1974). These remedies are in addition to any rights or remedies available at law or in equity. *Id.* § 1414, 15 U.S.C. § 1713 (1970).

39. The Secretary of HUD may suspend the effectiveness of a developer's Statement of Record if it appears to be incomplete or inaccurate. *Id.* § 1407, 15 U.S.C. § 1706 (1970). If the OILSR believes that any developer is violating or is about to violate the provisions of the Act, it may seek an injunction against the practices. *Id.* § 1415(a), 15 U.S.C. § 1714(a) (1970).

40. HANDBOOK, *supra* note 4, at 339-61. *See, e.g.*, FLA. STAT. ANN. §§ 478.011-.33 (Supp. 1974); KAN. STAT. ANN. §§ 58-3301 to -3323 (Supp. 1974). Other states that have followed this model are set out in note 4 *supra*. For a state statute similar in operation to the ULSPA see California Out-of-State Land Promotions Act, CAL. BUS. & PROF. CODE §§ 10249-49.5 (Deering Cum. Supp. 1973), which makes applicable to out-of-state subdivision offerings the "substantive fairness" requirement of the California Real Property Securities Dealers Law, CAL. BUS. & PROF. CODE § 10238.4 (Deering Cum. Supp. 1973). The California approach, which is discussed in 39 L.A.B. BULL. 332 (1964), seems to be an effective regulatory approach for that state.

form by its drafters in 1966,[41] two years prior to the enactment of the ILSFDA. Promoters satisfying the jurisdictional requirements must apply for registration if they offer for sale land situated outside the state, as well as when in-state land is the subject of the offering.[42] A public offering statement is required to afford full and fair disclosure to purchasers.[43] The agency administering the Act is given

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41. HANDBOOK, *supra* note 4, at 127. With the advent of ILSFDA, the ULSPA drafters apparently abandoned their efforts toward further revision of the ULSPA. The Executive Committee of the National Conference of Commissioners on Uniform State Laws voted on August 6, 1970, to accept a recommendation that the Special Committee on Model Land Sales Practices Act, which had begun its work in 1965, be discharged. HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 105 (1970).

42. Dispositions of subdivided lands are subject to this Act and the [courts] of this State have jurisdiction in claims or causes of action arising under this Act, if:

(1) the subdivided lands offered for disposition are located in this State; or

(2) the subdivider's principal office is located in this State; or

(3) any offer or disposition of subdivided lands is made in this State, whether or not the offeror or offeree is then present in this State, if the offer originates within this State or is directed by the offeror to a person or place in this State and received by the person or at the place to which it is directed.

Uniform Land Sales Practices Act § 17, HANDBOOK, *supra* note 4, at 359-60. A "disposition" is defined as follows: "When used in this Act, *unless the context otherwise requires*: (1) 'disposition' includes sale, lease, assignment, award by lottery, or any other transaction concerning a subdivision, if undertaken for gain or profit." *Id.* § 1, HANDBOOK, *supra* note 4, at 341. (emphasis added). Thus, if a particular transaction does not constitute a "disposition" under the Act, the jurisdictional requirement is not met. The question of defining a disposition bears similarity to the question of defining a security. *See* note 53 *infra*. Finally, the ULSPA exempts specified dispositions. For example, a disposition of fewer than 25 separate lots offered by a person in a 12-month period or a subdivision in which the plan of disposition is to dispose to ten or fewer persons will be exempted. Uniform Land Sales Practices Act § 3(a)(2), HANDBOOK, *supra* note 4, at 343.

43. Uniform Land Sales Practices Act § 6, HANDBOOK, *supra* note 4, at 348-49. This disclosure requirement is copied from N.Y. REAL PROP. LAW. art. 9A, § 338.1 and Rules and Regulations of the Florida Installment Land Sales Board, ch. 188-6. Uniform Land Sales Practices Act § 6, Drafters' Comment, HANDBOOK, *supra* note 4, at 348. The Public Offering Statement is analogous to a securities prospectus and the Property Report required in the ILSFDA. It requires full and accurate disclosure of the physical characteristics of the subdivided lands offered and further requires them to be made known to prospective purchasers all unusual and material circumstances or features affecting the subdivided lands.

power to issue cease and desist orders[44] and to revoke registration.[45] The Act provides criminal penalties[46] against violators and civil remedies[47] for injured purchasers in addition to common law remedies.[48]

Florida Realty is a proper interpretation of Missouri Law. It will probably be of limited precedential value elsewhere, however, because it interprets a Blue Sky provision common to few jurisdictions.[49] *Florida Realty* indicates certain shortcomings of the Missouri approach to regulation of out-of-state subdivision offerings. It is significant that cash sales of foreign subdivision lots remain unregulated by the Act.[50] The case does, however, demonstrate the versatility of securities laws in regulating transactions not commonly associated with "securities." At the same time it highlights the fact that regulation of certain out-of-state subdivision offerings as "securities" may be a trap for the unwary land promoter who may overlook the possibility that land sold pursuant to an installment agreement may be a "security." As noted earlier, many securities statutes define "security" to include an "investment contract"[51] which has been interpreted to include certain transactions involving offers of subdivision lots when the transaction possesses the economic realities of a security, regardless of the form of the contract. But where the "investment contract" fails to bring certain subdivision offerings under the securities law, either the definition must be amended to include such

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44. Uniform Land Sales Practices Act § 12, HANDBOOK, *supra* note 4, at 354-55.
45. *Id.* § 13, HANDBOOK, *supra* note 4, at 355-56.
46. *Id.* § 15, HANDBOOK, *supra* note 4, at 357-58.
47. *Id.* § 16, HANDBOOK, *supra* note 4, at 358-59. Portions of § 16 are modeled after § 410 of the Uniform Securities Act, 1 BLUE SKY L. REP. ¶ 4940. Uniform Land Sales Practices Act § 16, Drafters' Comments, HANDBOOK, *supra* note 4, at 358-59.
48. Uniform Land Sales Practices Act § 16(b), HANDBOOK, *supra* note 4, at 358.
49. Maine, Ohio, Tennessee, Vermont and Washington are the only states with a provision similar to Missouri's "foreign real estate security." *See* notes 4, 10 *supra.* These states do not distinguish between cash and deferred payment land sales as Missouri does. Nor do they discriminate against sales of land located in non-contiguous states, except that Ohio and Tennessee exempt from the out-of-state classification sales of land located not more than 25 miles beyond their borders. OHIO REV. CODE ANN. § 1707.33(H)(4) (Page Supp. 1973); TENN. CODE ANN. § 48-1602(J) (1964), *as amended,* (Supp. 1974). Kansas repealed a land *qua* security provision in 1969. KAN. STAT. ANN. § 17-1252(j) (Supp. 1972), *amending* KAN. STAT. ANN. § 17-1252(j) (1964).
50. 509 S.W.2d at 119.
51. *See* discussion of "investment contracts" at note 11 *supra.*

offerings, as Missouri chose to do, or alternative regulatory legislation, such as the ULSPA, should be adopted. The latter approach appears to be preferred by most states.[52] If "security" were defined to include sales of or offers to sell subdivision lots, the requirements of registration, disclosure and substantive fairness may be unnecessarily applied to sales transactions that do not possess the characteristics of a security and that the securities laws were not intended to regulate.[53]

Many jurisdictions have enacted land sales or subdivision laws, while some have altered existing securities laws. The result has been a lack of uniformity in regulation that has probably contributed to higher land prices and erratic regulation among the several states.[54]

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52. *See* note 4 *supra.*

53. Many securities statutes begin their definitional sections with the phrase "unless the context otherwise requires." *See, e.g.*, Securities Act of 1933 § 2, 15 U.S.C. § 77*b* (1970); Missouri Uniform Securities Act, Mo. REV. STAT. § 409.401(*l*) (1969). Professor Coffey argues that this introductory phrase, which is present in many definitional sections, seems to sanction the use of an overriding test for identifying a security, rather than the use of the literal or formal aspects of the statute. He suggests that definitional sections might be amended to state the general and controlling test for a security in terms of the "economic realities" formula. *See* Coffey, *supra* note 11, at 407 & n.183. Presumably, the Commissioner of Securities should bear the burden of proving that a given transaction possesses the attributes of a security under an "economic realities" test in accordance with the paternalistic role he plays in administering the Blue Sky Law.

Analogously, in Tcherepnin v. Knight, 389 U.S. 332 (1967), the Supreme Court adhered to its previous expansive concept of "security" and held that a withdrawable capital share in a savings and loan association came within the definitional section of the Securities Exchange Act of 1934. In *Tcherepnin* the Court declared that " 'the reach of the Act does not stop with the obvious and commonplace.' " 389 U.S. at 338, *quoting* SEC v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351. The Court also reiterated the oft-quoted words from *Howey*: " 'As used in both the 1933 and 1934 Acts, security embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits.' " 389 U.S. at 338, *quoting* SEC v. W.J. Howey Co., 328 U.S. 293, 299. *Cf.* SEC v. Variable Annuity Life Ins. Co., 359 U.S. 65 (1959).

54. Promoters' costs are likely to be increased when operating in several states due to three factors: attorneys' fees in connection with multi-state compliance, registration fees in each state, and expenses associated with flying various state officials to the site for inspection and appraisal of the offered property. These costs are likely to be shifted to consumers. *See* Note, *Regulation of Interstate Land Sales, supra* note 17, at 607 n.24. Consider Missouri Securities Rule IV-J(a)(11), which requires an application for registration of foreign real estate securities to include, *inter alia*, the "[a]ssurance of an authorized officer that the fees and expenses of any on-site inspection of the

The further adoption of a model statute, such as the Uniform Land Sales Practices Act, or federal preemption of interstate land sales might close many existing gaps in coverage.[55]

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real estate, required by the Commissioner, will be borne by the applicant, and advanced upon request." 2 BLUE SKY L. REP. ¶ 28604 (1974). This rule illustrates the type of financial burden in addition to customary costs that may be placed on a promoter by the Commissioner in effectuating the Act.

55. For an argument for federal preemption of interstate land sales regulation see Note, *Interstate Land Sales Regulation: The Case for an Expanded Federal Role*, *supra* note 30.