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Use Versus Abuse: A Comprehensive Analysis of Nonbinding Reservation Agreements and Real Estate Developers' Ability to Freely Rescind

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INTRODUCTION

Consider the following hypothetical: Bob learns of Danny's plan to build Seaclusion on a beach-front lot in Bob's favorite vacation destination. Bob is excited and researches Danny's proposed complex on the Seaclusion website. There, Bob is able to view artists' renderings of the proposed condominiums and detailed descriptions concerning the options and amenities available for individual units. Danny boasts a current seventy-five percent preconstruction "sold out" status and encourages website viewers to reserve their unit before Seaclusion "sells out completely." Bob contacts Danny's agent, eager to get in on the development. Danny's agent issues Bob a reservation agreement, informing him it is nonbinding and requires a five-thousand dollar deposit. During the discussion, Bob is assured that the deposit will be fully refunded if he later elects to forgo the purchase of the unit; likewise, should Bob choose to proceed, the deposit will be credited towards his purchase price. Bob selects a unit based on proposed plans and artistic renderings and subsequently executes the reservation agreement for such unit, reserving it at a below-market, preconstruction price. Danny's agent further informs him that construction is expected to start within the next four months, at which time a purchase agreement will be issued and Bob will be expected to put down fifteen percent of the purchase price.

The situation described above is not unlike many residential real estate sales occurring recently, especially with respect to condominium sales. In general, preconstruction real estate transactions are advantageous to both the consumer and developer, and the practice of executing nonbinding reservation agreements has become increasingly popular. But what is the exact nature of the parties' relationship in the above hypothetical? Are they contractually bound to do anything? The answer, of course, is "no", in that the execution of the reservation agreement in the above situation clearly fails to create a binding legal contract. In the majority of situations though, this relationship is exactly what the parties desire—a loose arrangement enabling either party to cancel the reservation agreement at any time. Therefore, in most occurrences, the use of reservation agreements during the preconstruction phase serves a convenience function to the parties.
However, there are situations in which the "Bobs" out there expect more, primarily as a result to their misunderstandings as to the effect of an executed reservation agreement. This reality becomes evident in situations where the developer—not the buyer—cancels the reservation agreement, citing an inability to honor the document according to its terms. This situation is not as inherently evil as it sounds, as the reservation agreement is freely terminable by either party, and there are often very legitimate reasons for a developer's decision to rescind the agreement. The real problems, rather, occur when a developer's decision to cancel the agreement stems from less-than-legitimate motives, or when the developer's cumulative actions have misled the prospective purchasers.

This Comment addresses this increasingly common scenario where the developer reneges on reservation agreements and asserts that if certain developer practices remain unchanged, unwary developers will continue to face lawsuits brought by disappointed parties. Although the courts have generally been unsympathetic to contract claims, clearly struggling to find a remedy for plaintiffs in light of the express, nonbinding nature of the agreements, the potential for developer liability nevertheless exists under a theory of unfair and deceptive trade practices. Thus, this Comment asserts that since reservation agreements do not rise to the legal classification of option contracts, developers are justified in terminating reservation agreements with prospective purchasers so long as their cumulative actions do not amount to unfair or deceptive trade practices.

This Comment, therefore, begins by discussing preliminary background information regarding the general preconstruction real estate process. Further background information focuses on the correct legal classification of reservation agreements and distinguishes the typical agreements from other property rights. Next, this Comment addresses the developer cancellation issue by examining existing case law. Through this analysis of the various actions brought by disappointed parties against developers, including actions for specific performance, breach of contract, and unfair and deceptive trade practices, this Comment explains how there are certain situations in which developers could be held accountable for canceling the agreements. This Comment concludes by proposing various solutions to assist developers in their efforts to minimize their litigation risks. Specifically suggested are the ideas that reservation agreements need to clearly define the parties' respective rights, developers need to avoid the temptation to refer to reserved units as "sold", and those seeking to raise prices on
units should give various appeasement offers to disappointed purchasers.

The Conceptual Framework: Preconstruction Sales and Developer Use of Reservation Agreements

I. The Preconstruction Concept

The preconstruction concept of real estate transactions is one that has swept the country in recent years. Purchasing property during the preconstruction phase through the use of reservation agreements provides significant benefits to both the buyer and seller and, notwithstanding temporary market deficiencies, will prove to be a vital concept with regard to real estate transactions in the future. Faced


2. Most real estate experts have recently concluded the national real estate “bubble” has burst. The purported effect of this is hesitant buyers and investors. See M. Anthony Carr, Builders Adjust Deals for Softening Market, WASH. TIMES, Dec. 1, 2006, at F03 [hereinafter Builders Adjust]; M. Anthony Carr, Now is the Time to Invest in a House, WASH. TIMES, Dec. 8, 2006, at F03 [hereinafter Now is the Time] (noting reports indicate the “bottom’s fallen out” and the “balloon [has] burst”); Robyn A. Friedman, The Bust Stops Here: The Housing Boom is Over, But Creative Investors are Finding Ways to Make a Profit, SOUTH FLA. SUN-SENTINEL, Sep. 11, 2006, at 16; Amy Hoak, As Market Cools, Flippers Exit—and Buyers Have Leverage: It’s Still a Good Time to Purchase a Home— If You Plan to Live in it for 5-6 Years, ORLANDO SENTINEL, Aug. 13, 2006, at H45; McMullen, supra note 1 (indicating the sale of condominium and cooperatives fell sixteen percent in September of 2006 from a similar period a year earlier and that sales of condominiums in Miami, San Diego, and Las Vegas are all down at least forty percent based on year-on-year comparisons); Judy Stark, In Today’s Slow Sales Market It’s Time to Strategize, ST. PETERSBURG TIMES, Aug. 12, 2006, at 1F ("[A] year ago you had to enter a lottery just to get the chance to buy a house, and . . . now rows of ‘For Sale’ signs line up in front of new homes. . . .”); ‘Pop!’ goes the U.S. Real Estate Bubble, TORONTO STAR, Sep. 6, 2006, at C01.

3. It is the author’s contention that the slowing of the residential real estate market does not defeat the significance of the preconstruction real estate investment concept. Rather, the concept retains its vitality because of the inherent supply and demand needs of the national real estate market. Although the market may have significantly softened, there nonetheless will exist a need for housing. Developers and builders will continue to build homes and condominiums as a result, and many of them will continue to use preconstruction real estate sales as a tool. Some commentators also recognize that although the national real estate market as a whole may be down, there are many local markets across America that are still climbing and
with increased costs and lessened demands, developers across the country are backing out of land deals and delaying developments in an attempt to avoid a financial loss on real estate projects. Even in the future, when real estate markets will undoubtedly begin to improve, developers will nevertheless find themselves in situations where they are forced to scrap projects and cancel reservation agreements.

When a purchaser seeks to acquire real estate during the preconstruction phase, the first step typically involves the execution of a reservation agreement. The typical reservation agreement is a

the use of preconstruction sales and reservation agreements there is prevalent. See Hoak, supra note 2; see, e.g., Beth Greenfield, Preserving a Honky-Tonk Culture While Attracting New Buyers, N.Y. TIMES, Dec. 10, 2006, at 12 (“While much of the rest of the nation is facing a weakened market, East Austin is in the midst of a boom so explosive that median home prices have jumped 48 percent in the last year. New condo projects... routinely sell out during the preconstruction phase.”).

Also, the softening of the market increases the importance of the specific problem emphasized in this Comment. Since developers are currently faced with a large supply of unsold inventory and many markets are saturated with unsold homes, developers may choose to back out of land purchase agreements and may stall or cancel plans to develop properties. This may result in the canceling of reservation agreements in any developments open to preconstruction sales. See Marilyn Bowden, There's No Place Like Home, Especially Online: More Buyers Turning to Internet to Shop for Houses That Don't Yet Exist, SEATTLE POST-INTELLIGENCER, Jul. 29, 2006, at E2 (“[A]s the market softens and some projects inevitably fall by the wayside, [some real estate projects] might never be anything more than a computer-generated fantasy.”); Carr, Builders Adjust, supra note 2 (“[S]ome builders aren't just cutting housing starts, they're getting out of land deals and postponing developments altogether.”); McMullen, supra note 1 (stating “[a]s the number of scrapped projects increases, so too do the complaints” and “[i]n Las Vegas, an estimated 6,900 condo units have been suspended in the sales process, while another 1,900 have been cancelled officially. . .”).

Finally, trends in national real estate sales indicate market deficiencies are extremely temporary. In a general sense, real estate is still regarded as a wise investment vehicle and history has shown that the national real estate market is quite resilient and frequently recovers quickly from temporary deficiencies. As such, buyers and developers will once again resume the process of preconstruction sales and the use of reservation agreements. See Carr, Now Is the Time, supra note 2; Friedman, supra note 2; Hoak, supra note 2; Stark, supra note 2.


5. See generally Hoak, supra note 2; ANDREW J. MCLEAN & GARY W. ELDRED, INVESTING IN REAL ESTATE 3, 9 (John Wiley & Sons, Inc., 5th ed. 2006) (rejecting the “faulty reasoning that concludes property prices have reached a long-term peak . . . and can only enter a precipitous decline” and predicting the future will see “an emerging wave of echo boomers [creating] profits for income property investors”).

6. Lending Tree Smart Borrower Center, Buying a Condo Preconstruction, http://www.lendingtree.com/smartborrower/New-homes/Buying-a-condo-pre-construction.aspx (last visited February 25, 2007); Leo Miller, Investment Gains in Preconstruction,
nonbinding agreement which allows the prospective purchaser to designate a particular unit and establish a price for the unit by giving a deposit (typically between five and ten thousand dollars) to the developer to hold in escrow. The purchaser is free to cancel the agreement at any time for any reason and, upon such action, is entitled to receive a full refund of the initial reserving deposit.

After the execution of a reservation agreement, assuming events go according to plan, the parties enter into an agreement of a more binding nature. At this stage, the real estate documents are given to the purchaser for review, in which case the purchaser has a period of time to decide whether to enter into a binding purchase agreement. At such time, if the purchaser elects to enter into a purchase agreement for the property, a deposit of earnest money is due, which typically constitutes fifteen to twenty percent of the purchase price. If the purchaser executed a reservation agreement and gave a reservation deposit, such deposit will be credited towards the purchase price at this time. Once this purchase agreement, or "hard contract," is executed, the parties are bound under contract principles, and the purchaser is no longer permitted to back out of the agreement without typically incurring a penalty. Finally, when construction is finished,

7. The author recognizes that, although rare, some developers do in fact issue binding "reservation agreements", resulting in purchaser rights akin to those under option contracts or preemptive rights. The developer's ability to structure a preconstruction sale in this manner, however, is limited in most cases significantly limited, or even prohibited, by the Interstate Land Sales Full Disclosure Act, 15 U.S.C.A. §§ 1701 - 1720 (2000). See infra notes 22 - 32 and accompanying text. However, for the purposes of this Comment, "reservation agreement" will refer to those preconstruction agreements between vendor and prospective purchaser where the latter reserves a particular unit at a particular price and where neither party is bound to respectively sell or buy the property. These agreements contemplate a form contract issued by vendor denominated "Nonbinding Reservation Agreement," or an agreement similarly worded.


9. See Lending Tree Smart Borrower Center, supra note 6; Miller, supra note 6.

10. See Lending Tree Smart Borrower Center, supra note 6; Miller, supra note 6.

11. Lending Tree Smart Borrower Center, supra note 6.

12. See id.; Miller, supra note 6.

the parties will close the transaction and the remainder of the purchase price will become due.\textsuperscript{14}

\section{Developers' Incentives}

Most real estate developers operate pursuant to a common plan—build, profit, and get out. Thus, the typical developer loathes the idea of retaining control over property once it is developed because it means the development has not yet been sold and, of course, the developer has not made a return on his investment.\textsuperscript{15} Of course, a developer's ability to build successfully and get out of the development quickly is directly related to the then-existing demand in the area's local market. Often, therefore, a developer will offer preconstruction sales to ensure his project makes financial sense.\textsuperscript{16} The preconstruction "sale" has thus emerged as a vital tool for developers because it allows a developer, oftentimes without even breaking ground on the project, to obtain tangible, financially-backed evidence of purchaser demand in any given market.\textsuperscript{17} This demand provides assurance to lenders, an important consideration since it is not uncommon for a developer to be required to "pre-sell" fifty to ninety percent of the development's units in order to obtain the appropriate construction lending.\textsuperscript{18} As the costs of preconstruction advertising are mainly associated with compensation for graphical artists and website designers, the developer can pre-sell without expending large amounts of

\textsuperscript{14} See Anderson, \textit{supra} note 13; Lending Tree Smart Borrower Center, \textit{supra} note 6; Miller, \textit{supra} note 6.

\textsuperscript{15} DAVID CROOK, THE WALL STREET JOURNAL COMPLETE REAL-ESTATE INVESTING GUIDEBOOK, 144 (1st ed. 2006).


\textsuperscript{17} See Anderson, \textit{supra} note 13.

\textsuperscript{18} See Lending Tree Smart Borrower Center, \textit{supra} note 6; See, \textit{e.g.}, Troy Giles Realty, Tips For Buying Preconstruction, \url{http://www.tgreo.com/preconstruction.htm} (last visited Oct. 22, 2007) (60-80%); Press Release, PR Web Press Release Newswire, \textit{supra} note 1 (70-80%); see also MiamiCondoLifestyle.com, Miami Preconstruction Condos, \url{http://www.miamicondolifestyle.com/english/miami_preconstruction_condos.php} (last visited Feb. 25, 2007) ("Most developers are required by their lenders to pre-sell a certain percentage of their projects before the bank or lender will lend them the funds for construction.").
In today's world, most developers seeking preconstruction interest would have a detailed website where potential purchasers could visit and learn about the development. These expenses, although perhaps significant, are no greater than those which any modern property developer would need to spend since the internet has emerged as an essential, if not primary, tool for real estate purchases.

In addition to ensuring a demand exists for the project, many developers may engage in the practice of issuing reservation agreements to delay their compliance with the Interstate Land Sales Full Disclosure Act. The Act sets forth two substantial prerequisites to a developer's ability to use any "means or instruments of transportation or communication in interstate commerce, or . . . the mails" in an effort to sell or lease nonexempt lots in a subdivision: (1) a


20. See Bowden, supra note 3.

21. See id. (noting importance of internet in selling residential real estate in today's markets).


23. A "developer" is defined as "any person who, directly or indirectly, sells or leases, or offers to sell or lease, or advertises for sale or lease any lots in a subdivision." 15 U.S.C.A. § 1701(5).


25. The Act grants exemptions to certain developments: (1) subdivisions containing less than twenty-five lots; (2) lots in which a building has been constructed or an enforceable contract actually obligates the developer to construct such a building within 2 years of the contract's execution date; (3) property restricted to commercial or
developer must register the subdivision with the U.S. Department of Housing and Urban Development ("HUD") by filing a registration statement; and (2) a property report, containing all necessary information, must be furnished to the purchaser or prospective purchaser prior to the execution of a purchase agreement.\(^{27}\) Developers failing to comply with the Act face the possibility of civil law suits by disappointed purchasers,\(^{28}\) civil fines, and even imprisonment.\(^{29}\) Although certain developments are exempted, most large developments would typically fall under the Act’s purview, making the registration and disclosure requirements a tedious and time-consuming process for the developer wishing to drum up interest in his development.\(^{30}\)

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26. The Act defines "subdivision" as "any land which is located in any State or in a foreign country and is divided or is proposed to be divided into lots, whether contiguous or not, for the purpose of sale or lease as part of a common promotional plan." 15 U.S.C.A. § 1701(3). A "common promotional plan" is defined as "a plan, undertaken by a single developer or a group of developers acting in concert, to offer lots for sale or lease; where such land is offered for sale by such a developer or group of developers acting in concert, and such land is contiguous or is known, designated, or advertised as a common unit or by a common name, such land shall be presumed, without regard to the number of lots covered by each individual offering, as being offered for sale or lease as part of a common promotional plan." 15 U.S.C.A. § 1701(4).

27. 15 U.S.C.A. § 1703(a)(1); 24 C.F.R. § 1710.3. The Act also prevents a developer from using interstate commerce for the sale or lease of lots where any part of the statement of record contains an "untrue statement of a material fact or omitted to state a material fact required to be stated," 15 U.S.C.A. § 1703(a)(1)(C), or to display or deliver advertising or promotional material inconsistent with the property report, 15 U.S.C.A. § 1703(a)(1)(D). The Act prevents the same use of interstate commerce for the sale or lease or offer to sell or lease where developers use any device to defraud, obtain money by means of any untrue or misleading statement of a material fact or omission of a material fact, engage in a transaction or course of business which would operate as fraud or deceit on the purchaser, or to represent that roads, sewers, electricity, etc. will be completed by developer without stipulating in the contract that such services will be provided. 15 U.S.C.A. § 1703(a)(2).

28. A right of civil action is specifically provided for by the Act for "damages, specific performance, or such other relief as the court deems fair, just, and equitable." See 15 U.S.C.A. § 1709(a).


Fortunately, reservation agreements provide a means by which developers can initiate marketing efforts for their project before the registration statement and property report are completed. HUD's Guidelines for Exemptions available under the Interstate Land Sales Full Disclosure Act ("Guidelines"), promulgated to "clarify agency policies and positions with regard to the exemption provisions" of the Act, provide that reservation agreements are "excluded from the coverage of the Act." To be excluded, the reservation agreement must: (1) be nonbinding; (2) not become binding unless the potential purchaser takes a subsequent affirmative action to create a binding obligation, i.e., signing a purchase agreement; and (3) require any deposit to be placed in escrow and to be refundable at any time at the prospective purchaser's request. As a result, many developers may initiate marketing strategies and secure a demand for their project by issuing reservation agreements well before they begin to comply with the Act's rigorous and time-consuming requirements.

III. BUYERS' RATIONALES

For a buyer, purchasing preconstruction in an active market is typically a profitable investment. As one online investment resource aptly states, preconstruction real estate is "[t]he easiest and most cost-effective technique for investment that has come to the forefront of real estate investment in the past few years." The process by its very nature creates a natural discount because the property is being offered for sale before the developer has even broken ground or, in some cases, before construction is complete. Preconstruction real estate transactions, therefore, create a multitude of advantages for anyone seeking to purchase residential property—both long-and-short-term real property purchasers. In either case, the preconstruction process allows the

\footnotesize{available at www.hklaw.com/publications/newsletters.asp?IssueID=764&Article=3981 ("preparing the Property Report and its accompanying Statement of Record requires detailed and time consuming work by the developer and its counsel.").}

32. See id.
33. YAERD.org, The Benefits of Preconstruction, supra note 19.
34. See id.
35. This "Buyers' Rationales" section generally applies to both types of purchasers—the long-term, home-buying type as contemplated in the introductory example of this Comment and the short-term, investor or "flipper." The long-term category contemplates any purchaser interested in making a wise investment in real estate, either for use as a primary residence, vacation home and/or rental property, whose primary interest is a financially stable investment that will last the course of
buyer to get in, literally, on the ground level, and generally results in significant advantages to the consumer.

First, by purchasing a unit during preconstruction, the buyer gets property at a significantly lower price than he would with a finished unit. The below-market price is, in part, to compensate for the purchaser's inability to touch, feel or see the property being purchased. As a result of the lack of a tangible investment, developers routinely grant early purchasers substantially lower prices than those of com-

time. The short-term investor, or the real estate "flipper," has varying goals. Although this type of purchaser is of course interested in making a prudent investment, the flipper does not wish to hold on to the property as it appreciates over years, but rather wants to buy at a low price and turn around and sell it on the open market for a quick profit. During the past few years, real estate markets were flooded with short-term real estate investors seeking to turn a quick profit. The idea behind the real estate speculator, or flipper, is to buy property during the preconstruction phase, and then turn around and quickly resell the property, sometimes before the construction on the property is even complete. Often, market prices for developed property were increasing so quickly that these short-term investors were able to resell the property or assign their purchase contracts in weeks or months after initially acquiring them. See Carr, *Now is the Time*, supra note 2. The same interests and perks that make preconstruction purchases attractive to the long-term homebuyer (as emphasized in the text) appeal to the flippers. Short-term investors are interested in buying low and selling high, and purchase during preconstruction to lock in their lower purchase prices. They then turn around and subsequently sell the property when the construction process has substantially increased their equity in the project and when the purchase prices have increased.

Short-term investors are particularly interested in two additional factors, however, that are essential in determining whether a preconstruction purchase makes financial sense to them. First, the investor is extremely concerned with the assignability of his or her contracts. For a real estate investment to be profitable, a short-term investor would typically want the ability to assign the contract. Normally, real estate investors will execute a purchase agreement and put forth the required deposit to be held by the developer in escrow. Thereafter, a flipper will wait until the property value has increased and seek to assign his or her contract rights to a third party for a profit. Since the overwhelming majority of preconstruction flipping occurs with respect to the purchase agreement, the real estate flipper is not often concerned with his ability to assign his reservation agreement, but will rather wait until he enters the hard contract phase.

Second, the short-term real estate investor is invariably concerned with the current real estate market trends. Short-term investors rely heavily on the market's vitality for their investments to prove prosperous. There must be an active and steady demand for the property for the flipper to make a profit. If the investor cannot turn around and resell his property or contract rights at a higher price than he bought it for, the investor has absolutely no interest in entering the contract in the first place. Thus, considering the current market imbalances, these short-term investors have all but evaporated from major real estate markets across America. See Hoak, *supra* note 2.

completed units. Another contributing factor to the lower purchase prices is that the land is generally less valuable prior to the commencement of construction. In an active market, once a developer breaks ground, the value of the property increases and continues to increase substantially until it reaches completion. Thus, a purchaser who locks in an early reservation price on lower-valued property based on anticipated increases allows the developer to build his or her equity for them. As the developer moves on with the project, demand increases, driving the land value and purchase price up and increasing the value of the purchaser's property. Therefore, rising property values in an active market will inevitably result in an early purchaser's greater return on investment.

Also, since developers have tremendous incentives to pre-sell their development before construction is completed, they will routinely offer substantial benefits and upgrade packages to buyers, making a pre-construction purchase an even wiser investment. For example, in addition to price incentives, developers will often offer free upgrade packages, along with desirable unit selection and design options. The early purchaser, for example, may be afforded the opportunity to choose his kitchen countertops from various options offered by the developer. These early incentives and perks are often not available to the typical real estate purchaser buying a home after construction is complete.

Furthermore, the practice of reserving property during the preconstruction phase is generally a low-risk investment for the consumer. The deposit amount is typically held in escrow and reservation

37. See Press Release, PR Web Press Release Newswire, supra note 1; Lending Tree Smart Borrower Center, supra note 6; The Real Estate Foundation, supra note 16; Troy Giles Realty, supra note 18.
38. YAERD.org, The Benefits of Preconstruction, supra note 19.
39. Id.
40. See Miller, supra note 6.
42. YAERD.org, The Benefits of Preconstruction, supra note 19.
43. See Press Release, PR Web Press Release Newswire, supra note 1; Lending Tree Smart Borrower Center, supra note 6; The Real Estate Foundation, supra note 16; Troy Giles Realty, supra note 18.
agreements are freely terminable by the reserving party. Upon a reserving party's decision to terminate the agreement, the deposit is returned, with or without interest. If, on the other hand, the purchaser should seek to cancel the sale subsequent to the execution of a purchase agreement, the purchaser would potentially be subject to the forfeiture of the escrow deposit, since a purchase agreement creates binding contractual rights and obligations.

IV. CLASSIFYING THE RESERVATION AGREEMENT

Some justifiable confusion exists about the exact classification of reservation agreements. Plaintiffs in lawsuits against developers often contend the agreements constitute binding purchase agreements or, in the alternative, option contracts to sell a particular parcel of

45. YAERD.org, The Benefits of Preconstruction, supra note 19.
46. The agreements vary significantly with respect to whether the interest accrued on such deposits is returned in conjunction with the deposits or whether it is retained by the developer in the case of reserving party cancellation. See, e.g., Crescent Resources, LLC, Waterscape Condominiums Reservation Agreement, http://www.crescent-resources.com/condos/waterscape/reservationagreement.pdf (interest accruing to buyer during reservation period); Cutter Creek Plantation, Legacy Reservation Agreement (on file with author) (interest retained by developer upon cancellation). Furthermore, the developer's decision to retain or remit interest accrued on reserving deposits may have some effect on legal proceedings initiated against the developer in the case of developer cancellation. First, if the developer retains the interest earned on a plaintiff's deposit, the plaintiff may allege such loss of interest constitutes sufficient consideration for the existence of an option contract. See cases cited infra note 99. Second, the developer's decision to return interest accrued on a reserving party's deposit may act as an appeasement measure taken by the developer which would have the effect of persuading a disappointed party to refrain from filing suit under a "No Harm-No Foul" thought. See infra text accompanying notes 157-65.
47. See Lending Tree Smart Borrower Center, supra note 6.
Others claim reservation agreements constitute nothing more than preemptive rights or, in other words, rights of first refusal.\textsuperscript{50} It is rather difficult to pigeonhole the general concept into one neat category of contractual or property rights; rather, it appears reservation agreements are truly unique species of their own.

A. Reservation Agreements Defined

Although no two agreements are alike, the term “reservation agreement” generally encompasses a written agreement where a party purportedly reserves the right to purchase a particular residential unit at a specified price by giving a reservation deposit to the developer to be held in the latter’s escrow account. The deposit is held until the happening of one of the following occurrences: (1) the parties elect to enter into a purchase agreement for the property, in which case the deposit is applied to the purchase price; or (2) one of the parties cancels the agreement, in which case the deposit is refunded to the prospective purchaser. The agreements are nonbinding and freely terminable by either party at any time for any reason.

B. Purchase Agreements Distinguished

A purchase agreement is a contract under which the vendor and purchaser of real property agree respectively to sell and buy a specific parcel of property for a fixed price.\textsuperscript{51} A standard purchase agreement, or contract for sale, is typically nothing more than a form document evidencing an offer and acceptance with respect to the sale of a piece of property. These agreements are sometimes referred to as “hard contracts” in the context of preconstruction real estate purchases.\textsuperscript{52}

By their very nature, reservation agreements are not purchase agreements. In a typical reservation agreement, the developer only promises to allow a potential purchaser the ability to enter into a purchase agreement in the future, should the parties agree to the subsequent purchase. The purchaser’s rights under the agreement are, at best, subject to numerous conditions precedent, most notably the developer’s decision to offer the property for sale through the issuance

\textsuperscript{49} See discussion infra under heading, “An Increasing Problem: Developer Cancellation of Reservation Agreements.”

\textsuperscript{50} See infra notes 64-69 and accompanying text.

\textsuperscript{51} See 77 Am. Jur. 2d Vendor and Purchaser § 1 (2007).

\textsuperscript{52} See Lending Tree Smart Borrower Center, supra note 6. See also Destin Florida Real Estate, Basic Overview of Pre-Construction Condominium Purchases, http://www.teamdestin.com/reports-pre.htm (last visited Mar. 13, 2007); MiamiCondo Lifestyle.com, Miami Preconstruction Condos, supra note 18.
of a purchase agreement to the vendee and the developer's decision to avoid canceling the reservation agreement. In other words, the developer is not bound to offer the property for sale to the purchaser under the reservation agreement.

Similarly, a purchaser is not actually obligated to purchase the property under a reservation agreement. Rather, the potential purchaser merely promises to put forth a deposit in order to reserve his or her ability to purchase a particular piece of property, should the developer decide to sell the property to him. As a result, the reservation is truly a nonbinding agreement creating no obligations and serving merely a convenience function for the parties—either party may excuse their performance and be placed at the position they were in prior to the agreement.

C. Option Contracts Distinguished

Although reservation agreements fall drastically short of constituting purchase agreements for the sale of real property, the agreements are considerably closer to option contracts for the conveyance of land. In fact, many reserving parties across the country have zealously argued that reservation agreements constitute binding option contracts in an attempt to force canceling developers to perform under the agreements.\(^\text{53}\) The courts, however, have rightfully determined reservation agreements do not constitute binding option contracts for a number of reasons.\(^\text{54}\)

An option contract for the purchase of real property is one in which the vendor agrees to give another party the right to buy a piece of property at a specified price within a specified time.\(^\text{55}\) Under an option contract, the property vendor makes an irrevocable offer to sell the property subject to the terms of the contract.\(^\text{56}\) The potential purchaser, by furnishing consideration for the vendor's irrevocable offer, receives nothing more than a right to purchase the property at the specified price within the specified time period.\(^\text{57}\) A potential purchaser, however, is under no obligation to purchase the property.\(^\text{58}\)


\(^{54}\) See discussion infra under heading, "Binding Option Contracts."


\(^{56}\) Id.

\(^{57}\) Id.

\(^{58}\) Id.
The option contract, therefore, consists of a sale of an irrevocable offer and results in the potential purchaser's right to purchase the property at the specified price within the specified time. 59

Reservation agreements, as the oft-made argument contends, are similar to option contracts because they grant the reserving party the ability to purchase a piece of property at a particular price. However, as the courts considering the issue have held, 60 reservation agreements clearly fail to rise to the level of option contracts. Specifically, the courts have held reservation agreements do not constitute binding option contracts for the sale of property because: (1) their clear language does not create a specific period of time in which the seller is bound by an irrevocable offer to sell the particular parcel of land; 61 (2) a purchaser possesses no power of acceptance prior to the happening of a condition precedent, here the vendor's issuance of purchase agreement; 62 and, even if an offer to sell existed, (3) no consideration exists to create a binding option contract. 63 As a result, potential purchasers will be unsuccessful in contending nonbinding reservation agreements constitute irrevocable offers by vendors to sell a particular piece of property at a specified price within a specified period of time.

D. Preemptive Rights Distinguished

If reservation agreements were to be pigeonholed into an existing category of property rights, they would perhaps be considered subspecies of the known category of preemptive rights, or rights of first refusal. Reservation agreements closely resemble preemptive rights in that both concepts seemingly give the prospective purchaser the "right of first refusal" when a property owner decides to sell. 64 However, a

59. Id.
61. See Fendrich, 842 So. 2d at 1078, discussed infra notes 74-81 and accompanying text; McLamb, 619 S.E.2d at 579, discussed infra notes 82-104 and accompanying text; Rubin, 1985 WL 663135 at *3,*4 discussed infra notes 105-17 and accompanying text.
63. See id.; McLamb, 619 S.E.2d at 582.
64. In fact, many reservation agreements so closely resemble rights of first refusal that some marketers have expressly stated that prospective purchasers executing reservation agreements are vested with the right of first refusal. See e.g., Mazor Realty,
A closer look at both concepts reveals a distinct difference between true preemptive rights and reservation agreements.

Preemptive rights are contractual rights permitting a holder to purchase property upon specific terms, but only if the vendor decides to sell. Preemptive rights may be primarily distinguished from those rights accompanying an option contract in that, unlike the holder of an option, a holder of a preemptive right may not compel an unwilling vendor to sell. However, upon a vendor's decision to sell, a holder of a preemptive right has an undeniable right to purchase the property at the prior-specified price and terms. Thus, for all practical purposes, a preemptive right ripens into an option contract upon the happening of a condition precedent—the owner's decision to sell.

To the contrary, reservation agreements never ripen into option contracts. That is, at no point in time will a reserving party having executed a nonbinding reservation agreement be able to compel the owner into selling the particular piece of property to him at their agreed-upon price and terms. Unlike the preemptive right, when a vendor decides to sell a particular piece of property, a reserving party under a reservation agreement gains no greater rights than those which he has already enjoyed. Rather, he must still await a developer's issuance of a purchase agreement to him before he can contract for the sale of property. Therefore, it is clear that since a reserving party's rights under a reservation agreement never ripen into an undeniable right to buy property at a specified price, reservation agreements and preemptive rights are distinguishable.

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66. Id.
67. Id.
68. Id.
69. A reserving party's ability to buy is subject to the developer's decision to actually issue an option to purchase or a purchase agreement to the prospective purchaser. There is typically nothing on the face of the agreement granting the prospective purchaser the right to purchase the property upon a developer's decision to sell the property, and thus, there lies the problem. A developer can decide to sell the property to another willing consumer at a higher price by merely canceling the agreement.
AN INCREASING PROBLEM: DEVELOPER CANCELLATION OF RESERVATION AGREEMENTS

Remember the introductory hypothetical between Bob, the reserving party, and Danny, the developer? Consider the following sequence of events occurring after Bob executed the reservation agreement. Danny's marketing agents send Bob pamphlets and informational newsletters about Seclusion on a frequent basis, and this process continues until the groundbreaking event was supposed to occur. After another month, Bob receives a form apology letter in an effort to downplay the construction delay and to ensure Bob remains interested. Bob is annoyed but is still extremely excited about Seclusion and decides not to cancel his reservation agreement. Bob thereafter continues to receive promotional materials during the following months until Bob receives his next letter, dated more than ten months after Bob executed the agreement. This letter briefly apologizes for the “unanticipated construction delays” before informing Bob that Danny is canceling all of the reservation agreements for Seclusion and returning reservation deposits to all prospective purchasers. The letter cites rising construction costs as necessitating Danny's decision. The next day, Bob receives yet another letter offering him the “first chance” to enter into another reservation agreement for the same unit at a price increase of sixty-thousand dollars. 70

This hypothetical illustrates a pressing issue with regard to the current use of reservation agreements. Since the agreements clearly indicate on their face that they are nonbinding with respect to the proposed purchaser, disputes concerning a reserving party’s cancellation and deposit refund request rarely arise.71 However, the fact that the agreements are also freely rescindable by the developer is often over-


looked by the reserving party.\textsuperscript{72} When a developer cancels reservation agreements, disappointed purchasers may be left confused and angry as a result of their subjective expectations regarding their contractual relationship with the developer. But the developer is not necessarily at fault. After all, the very nature of a reservation agreement is that it is freely terminable by either party and sometimes, a developer faced with countless preconstruction hurdles, is left with no other financially reasonable alternative other than that of canceling the agreements.

There are, of course, instances when developers should be held accountable for their actions though. In making such rescissions, developers often cite reasons such as increased construction or material costs, permitting delays, or conveyance of the property. If such reasons are legitimate, there should be no penalty for a developer's decision to exercise his properly-reserved right to cancel the reservation agreements. However, if the reasons given are less than genuine and developers exercise their cancellation rights by taking advantage of innocent reserving parties, developers should face liability for their actions under applicable unfair and deceptive acts laws. Developers that claim financial impracticability may actually rescind reservation agreements for hidden, financial reasons such as: (1) an inability to make a profit on the development at the prices given; (2) the ability to make a greater profit by offering the land or units at higher prices; or (3) selling the land altogether for an increased profit to a third party for the same or different use. It is because of these hidden reasons that many disappointed purchasers feel they deserve a judgment in their favor.

reservation deposit and down payment in escrow where prospective purchasers executed multiple documents with differing language).

\textsuperscript{72} In certain situations, parties may become so wrapped up in their emotions and desire to purchase property that they may fail to realize the duality of the nonbinding characteristic of these agreements. See, e.g., Gergis, supra note 70 (Reserving party, a real estate attorney, brought suit against reneging developer on an unfair and deceptive trade practice theory. The attorney claimed that the developers “marketed the lots, accepted deposits, waited while the parcels appreciated and then terminated [his] reservation.” A spokesperson for the developer responded publicly to the suit by stating, “I find it ironic that a sophisticated real estate lawyer finds it difficult to assimilate details of a simple reservation agreement that clearly stipulates that the document is nonbinding and can be canceled any time by either party.”). Although a lawsuit filed with respect to a reservation agreement facially indicating the developer may back out of the agreement will likely be dismissed or disposed of through summary judgment, a developer should nevertheless strive to make this fact clear to the reserving party to prevent unnecessary litigation.
Whatever the reason for the developer's decision to cancel the reservation agreements, some purchasers are not content to only receive their deposit back. In some cases, the reserving parties want the development to be built as promised, and sue the developer for specific performance and breach of contract damages, alleging the existence of an option contract. Some also sue the developers on a theory that the developer's practices of using the reservation agreements, delaying the issuance of hard contracts and subsequent termination of reservation agreements amount to unfair and deceptive trade practices. Whatever the situation, some disappointed consumers have and will continue to sue developers when their reservation agreements are terminated and their deposits returned if developers' current preconstruction practices are continued.

I. BINDING OPTION CONTRACTS

Most commonly, disappointed parties will bring suits alleging the existence of a binding option contract and seeking either specific performance or breach of contract damages following a developer's decision to rescind reservation agreements. The following cases, however, are illustrative of the fact that reservation agreements cannot constitute binding option contracts entitling plaintiffs to force a vendor's performance or to recover breach of contract damages.

A. Eagle Tree Subdivision (Part 1)

A Florida district court confronted with the issue definitively ruled that the reservation agreement at issue could not constitute a binding option contract under which the plaintiffs could compel performance or recover damages. In *Fendrich v. RBF, LLC*, a dispute involved a reservation agreement for a lot in Eagle Tree, a single-family home subdivision located within the Ritz-Carlton Golf Club & Spa in Florida. There, the plaintiff executed a reservation agreement purporting to reserve his right to purchase "Lot 10A" for a price of

73. For example, one plaintiff in a class action suit filed against a developer noted that the developer sent him a monthly newsletter about the development for 18 months while holding his money in escrow. He claimed he was also sent other notes by the developer in an effort to drum up excitement about the complex and even received a "silly Lucite shovel" when they broke ground. See Hubble Smith, *Buyers Sue Vegas Grand Developer*, LAS VEGAS REVIEW-JOURNAL, May 20, 2005, available at http://www.westlaw.com (enter "5/20/05 LVRJ" into "Find by Citation" field) [hereinafter *Buyers Sue*].

$1,200,000. The plaintiff deposited $25,000 "as a good faith deposit" to secure his right to purchase Lot 10A. The dispute arose after the defendant-developer subsequently issued the plaintiff a purchase contract for Lot 2C, for a purchase price of $1,495,000, instead of the reserved lot at the lower price. The plaintiff thereafter filed suit seeking specific performance of the reservation agreement and, alternatively, breach of contract damages, alleging the existence of a binding option contract.

The court quickly dismissed the plaintiff's claims. It stated, "an option to purchase land...is irrevocable by the seller until expiration of a time limit." The court held that since Paragraph 4 of the agreement, entitled "No obligation," expressly stated "[t]his agreement can be terminated by either party at any time," the reservation agreement did not bind defendant to sell for any period of time and therefore could not constitute an option contract.

B. Surf City Condominiums (Part 1)

Another dispute arose from a lot reservation agreement cancellation in a Surf City, North Carolina subdivision. In McLamb v. T.P., Inc., prospective purchasers of a lot brought an action against the developer for specific performance and breach of contract. Each plaintiff executed reservation agreements for particular lots in the subdivision and paid five-hundred dollars "as consideration." The controversy arose when the developer cancelled the plaintiffs' reservation agreements and returned the deposits, claiming he was unable to obtain the necessary permits to continue the development. The plaintiffs were of a contrary belief. Their complaint alleged the developer could, in fact, obtain the permits, but he wished to make a greater profit by selling the entire tract of land to a third party. The plaintiffs

75. Id.
76. Id.
77. Id.
78. Id. Plaintiff also brought a claim for damages under Florida's unfair and deceptive trade practices act, discussed infra.
79. Id.
80. Id.
81. Id.
83. Id.
84. Id.
85. Id.
specifically alleged the agreements constituted binding option contracts and asked for specific performance of the agreements. 86

In addressing their claim, the court stated, “For there to be a valid option, there must be an express ‘promise or agreement that [an offer will] remain open for a specified period of time’” and, “an option contract does not exist where ‘there is no language indicating that seller in any way agreed to sell or convey her real property to [prospective buyers] at their request within a specified period of time.’” 87 The court noted all of the reservation agreements at issue contained the clauses, “[seller] is desirous of selling lots in Oceanaire Estates,” and “[buyer] reserves the right to purchase a lot.” 88 Thus, the court looked to the clear language of the reservation agreement to conclude that nothing in the document created an obligation for the developer to actually develop the property where the plaintiffs’ lots were to be located and nothing required the developer to actually convey the lots to the plaintiffs. 89 As such, the court concluded the reservation agreements could not constitute offers to sell land, and therefore, could not have created binding option contracts. 90

In perhaps the most interesting part of the case, the court assumed arguendo that the reservation agreements constituted offers to sell the land at a fixed price within a specified time, in order to conclude that the agreements nevertheless were not binding option contracts because they lacked consideration. 91 Consideration sufficient to support an option contract consists of “‘any benefit, right, or interest bestowed upon the promisor, or any forbearance, detriment, or loss undertaken by the promisee.’” 92

The parties to the action argued the consideration issue extensively. The plaintiffs argued that the courts should not inquire into the adequacy of consideration, since the face of the document evidenced the existence of such. 93 It is well established that consideration exists where the promisor receives a benefit or the promisee incurs a detriment. 94 The benefit received by the promisor must constitute a legal

86. Id.
87. Id. at 580 (quoting Normile v. Miller, 326 S.E.2d 11, 16 (N.C. 1985)).
88. McLamb, 619 S.E.2d at 580.
89. Id.
90. Id.
91. Id. at 581.
93. Id.
benefit, or "the receiving as the exchange for a promise some perform-
ance or forbearance which the promisor was not previously entitled to
receive." 95 In the same sense, the detriment incurred by the promisee
must be a legal detriment, or, in other words occurs when, "he
promises or performs any act, regardless of how slight or inconvenient,
which he is not obligated to promise or perform so long as he does so
at the request of the promisor and in exchange for the promise." 96
In accordance with this well-established principle of contract law, the
plaintiffs argued consideration existed because they "lost the benefit of
the use of that money during the interim time period before they
decided whether to exercise their options to purchase the subject
lots." 97 Alternatively, the plaintiffs contended the defendant received a
"benefit of the use of this money to enable it to, inter alia, both receive
and/or qualify for financing and to earn interest on the same should
the defendant so desire." 98 In support of this view, the plaintiffs urged
the court to adopt a view espoused by Florida courts by holding
deposits which are refundable at the request of the depositing party
nevertheless constitute sufficient consideration. 99 Despite this seem-
ingly compelling argument, the court was not persuaded.

Rather, the court adopted the developer's consideration argument
entirely. It stated, "our courts have held that consideration which may
be withdrawn on a whim is illusory consideration which is insufficient
to support a contract." 100 It went on to conclude that a number of
authorities agreed with its determination. 101 These authorities, given
in a lengthy string cite by the court, stand for the proposition that
where money is paid as a refundable deposit and where such money

95. Id.
96. Id.
97. McLamb, 619 S.E.2d at 581.
98. Id.
99. Id.; see, e.g., Benson v. Chalfonte Dev. Corp., 348 So. 2d 557, 559-560 (Fla.
detriment and inconvenience in that they were deprived of the free and unrestricted
use of their money during the period it was on deposit."); King v. Hall, 306 So. 2d 171,
173 (Fla. Dist. Ct. App. 1975) ("While buyer's three thousand dollar deposit could
have been drawn down . . . , it did constitute sufficient consideration . . . as it was a
detriment or inconvenience to buyer to post it.").
100. McLamb, 619 S.E.2d at 581 (citing Kadis v. Britt, 29 S.E.2d 543, 548 (N.C.
1944) ("A consideration cannot be constituted out of something that is given and
taken in the same breath—of an employment which need not last longer than the ink is
dry upon the signature of the employee . . . ."); and Wilmar, Inc. v. Liles, 185 S.E.2d
278, 283 (N.C. 1971) (profit sharing plan illusory consideration in return for a
covenant not to compete)).
101. McLamb, 619 S.E.2d at 581-582.
may, if the sale consummates, be used as part of the purchase price, the money paid will not constitute consideration to make an option binding. As such, the court expressly held that an option contract cannot be supported by consideration if “it is purported to be held open only by a deposit which is (1) refundable at the behest of the depositing party, and (2) to be applied as payment towards the object for which the option is offered if a sale occurs.” Since the plaintiffs’ situation mirrored the one described in the court’s holding, the court concluded that even assuming an offer existed, no consideration was present to create a binding option contract for the sale of land.

C. Rhode Island Condominiums

A similar conflict arose in Rhode Island where a developer cancelled reservation agreements after selling undeveloped property to a third party. In Rubin v. Finley, the court was confronted with the issue of whether the reservation agreement constituted a binding option contract. In an unpublished opinion, it thoroughly explained why the plaintiffs’ contentions that the reservation agreement constituted a binding option contract for the sale of land were flawed.

In Rubin, the plaintiffs contended their actions of depositing five-hundred dollars with the vendor and the execution of a document entitled “Reservation of Condominium Unit Selection for Purchase and Receipt of Refundable Deposit” resulted in the existence of a binding option contract for the sale of a particular unit in a proposed condominium development. Ten months after the execution of the agreement, the plaintiffs received a letter stating that the condominium project had been sold to a third party and were returned their initial

102. See id. at 582 (citing Ford v. McGregor, 234 S.W.2d 493, 495 (Ky. 1950) (“We think it is clear that there is no monetary consideration to support the option contract involved. There was no money paid for the option itself. [A] $650 check was simply an advance on the purchase price if the deal went through but, if not, to be refunded.”); First Dev. Corp. v. Martin Marietta Corp., 959 F.2d 617, 622 (6th Cir. 1992) (“[A]n option without consideration can be withdrawn at any time before acceptance and . . . a refundable deposit which is simply an advance payment on the purchase price, if the sale of the real estate is ultimately consummated, does not constitute consideration for an irrevocable option.”); Country Club Oil Co. v. Lee, 58 N.W.2d 247, 250 (Minn. 1953) (“consideration for the option must be separate and distinct from the obligation of the optionee to pay the stipulated purchase price in case he elects to purchase the property.”)).

103. McLamb, 619 S.E.2d at 582.

104. Id.


106. Id. at *1.
reservation fee along with the interest accrued thereon.\textsuperscript{107} The plaintiffs thereafter brought an action for specific performance of the alleged option contract and, alternatively, for breach of contract damages.\textsuperscript{108}

In rejecting the plaintiffs' claims, the court first took issue with the lack of certain essential terms in the agreement. The court noted the agreement completely lacked both condominium unit specifications and terms of the proposed sale.\textsuperscript{109} As such, the court concluded that the agreement could not comply with the statute of frauds and to be enforceable, it would require the court to "supply several essential terms which are missing from the document."\textsuperscript{110} Thus, the court used the agreement's terms—and lack thereof—to determine that the parties did not intend to create an option contract for the sale of a particular condominium unit.

The court also stressed the importance that the reservation agreement failed to reference any "fixed period" in which a proposed purchaser retained the power to accept the irrevocable offer from vendor.\textsuperscript{111} Indeed, a central requirement of an option contract is the existence of a fixed period of time in which the vendor's offer to sell is irrevocable and the vendee's power to accept is unbridled. The typical reservation agreement does not contemplate this type of arrangement. The court further noted that any purported right to purchase a particular piece of property was necessarily subject to the happening of a condition precedent.\textsuperscript{112} The court stated, "no power of acceptance could be exercised until the purchase and sale agreements drawn by the defendants were presented for execution."\textsuperscript{113} By the very terms of the agreement, neither the vendor nor the plaintiffs were bound to anything until the purchase agreement was executed.\textsuperscript{114} Therefore, since this event did not occur, the plaintiffs' claims failed.

Finally, the court disposed of plaintiffs' claims that sufficient consideration was given to create a binding option contract. The plaintiffs relied heavily on \textit{Country Club Oil Company v. Lee} to advance the proposition that consideration for an option is nevertheless valid to support the option contract if the parties agree that such consideration

\begin{thebibliography}{11}
\bibitem{107} Id.
\bibitem{108} Id.
\bibitem{109} Id. at *2.
\bibitem{110} Id.
\bibitem{111} Id. at *3.
\bibitem{112} Id.
\bibitem{113} Id.
\bibitem{114} Id. at *4.
\end{thebibliography}
will be applied to the purchase price if the purchaser subsequently elects to exercise the option.\textsuperscript{115} The court dismissed this claim by noting that the \textit{Country Club} decision seems to "presuppose that the down payment was expressly exchanged for 'an option.'" The court distinguished this case by noting the reservation agreement failed to reference the deposit as being given as consideration for an option to \textit{purchase} a unit in the condominium complex; rather the deposit was given merely to \textit{reserve} a unit.\textsuperscript{116} As such, the court concluded that even if the reservation agreement constituted an offer to sell a unit, there was no consideration to make the option binding.\textsuperscript{117}

\section*{II. Unfair and Deceptive Trade Practices}

In addition to alleging the existence of an option contract, many disappointed property purchasers have filed suit in tort, alleging that a vendor's use of reservation agreements and subsequent termination of such agreements amounted to unfair and deceptive trade practices under applicable state law. Unlike the option contract theory, this tort presents an alarming threat to many developers who mislead their consumers about the true nature of the reservation agreements or who terminate the agreements for improper purposes.

\subsection*{A. Eagle Tree Subdivision (Part 2)}

A return to \textit{Fendrich}\textsuperscript{118} is particularly relevant. After quickly disposing of the plaintiff's claim that the reservation agreement constituted a binding option contract, the court addressed the plaintiff's unfair and deceptive trade practice allegation in considerably more detail. The plaintiff alleged the developer's action of allowing him to reserve a particular unit at a particular price and subsequent issuance of a purchase agreement for an inferior lot at a higher price amounted to a violation of Florida's Deceptive and Unfair Trade Practices Act ("FDUTPA").\textsuperscript{119} The act, which is not unlike most states' unfair and deceptive trade practices acts, provides, "[U]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful."\textsuperscript{120} The plaintiff's claim under the Act relied on the theory

\begin{itemize}
\item \textsuperscript{115} \textit{Id.} at *3; see \textit{Country Club Oil Company v. Lee}, 58 N.W.2d 247 (Minn. 1953).
\item \textsuperscript{116} \textit{Rubin}, 1985 WL 663135 at *3.
\item \textsuperscript{117} \textit{Id.} at *4.
\item \textsuperscript{118} See supra text accompanying notes 74-81 for introductory facts.
\item \textsuperscript{119} \textit{Fendrich v. RBF, LLC}, 842 So.2d 1076, 1078 (Fla. Dist. Ct. App. 2003).
\item \textsuperscript{120} \textit{Id.} at 1079 (quoting FLA. STAT. § 501.204 (2007)).
\end{itemize}
that the defendant's actions amounted to a "classic bait and switch,"\textsuperscript{121} which, as the court noted, contemplates those situations where an offer is made not in order to sell the advertised product at the advertised price, but rather to draw the consumer to the store to sell him a different product that would be more profitable to the seller.\textsuperscript{122}

In analyzing this claim, the court noted the particular reservation form used by the defendant "could have deceived the consumer into thinking that he was reserving the right to enter into a contract for a home on Lot 10A for $1,200,000."\textsuperscript{123} Thus, it found that if the defendant had in fact used Lot 10A to attract the purchaser, and then knowing he was not bound, subsequently offered a less attractive lot for a greater price, its action would amount to a bait and switch and would give rise to a claim under FDUTPA.\textsuperscript{124} Therefore, the court held plaintiff's claim under FDUTPA was sufficient to survive a summary judgment motion and stated, "when the reservation form . . . unequivocally represents that the consumer will be given the opportunity to purchase a particular lot or unit at a firm price, it can be likely to mislead."\textsuperscript{125}

B. Boynton Beach Condominiums

A United States district court was faced with a claim after Fendrich's decision in Zlotnick v. Premier Sales Group, Inc.\textsuperscript{126} The facts of Zlotnick are not dissimilar to those in Fendrich or this Comment's hypothetical involving Bob and Danny—the plaintiff entered a non-binding reservation agreement purporting to give him the right to

\begin{itemize}
\item \textsuperscript{121} Fendrich, 842 So. 2d at 1079.
\item \textsuperscript{122} Id. at 1079, n.1 (deriving bait and switch definition from Tashof v. Fed. Trade Comm'n, 437 F.2d 707 n.3 (D.C. Cir. 1970)).
\item \textsuperscript{123} Fendrich, 842 So. 2d at 1079.
\item \textsuperscript{124} Id.
\item \textsuperscript{125} Id. at 1080. This holding in Fendrich is undoubtedly the correct ruling under the particular facts of that case. There, the agreement expressly stated, "Purchaser hereby reserves the right to purchase the aforesaid [lot]." Id. at 1078. It further indicates that the purchase price of $1,200,000 "is to be set forth in the [c]ontract." Id. The combination of the agreement's poorly chosen language and the substantial deposit of $25,000 given by the plaintiff in Fendrich could reasonably be seen as deceiving. Id. The holding, however, is dangerously sweeping and breathes air into the sails of aggrieved would-be-purchasers seeking to bring claims against developers canceling their reservation agreements. As the Florida courts would soon learn, plaintiffs, as a result of Fendrich's empowering decision, could now bring claims under FDUTPA alleging the reservation form was "likely to mislead" them into thinking they were entering an agreement granting them an undeniable privilege to enter into a purchase contract for the identified lot or condominium unit.
\item \textsuperscript{126} Zlotnick v. Premier Sales Group, Inc., 431 F.Supp.2d 1290 (S.D. Fla. 2006), aff'd, 480 F.3d 1281 (11th Cir. 2007).
\end{itemize}
purchase a specific unit for a specific price. The plaintiff gave a fifteen-thousand dollar deposit to defendant. Ten months after the execution of the reservation agreement, the developer sent the plaintiff a letter canceling the agreement claiming “meteoric increases in construction costs [ ] in tandem with worsening labor and material shortages resulting from Hurricanes Katrina, Rita and Wilma.” Two weeks later, the plaintiff received another letter from the developer offering to enable him to purchase the same unit he had reserved, but at a price increase of sixty-thousand dollars. After having his unfair and deceptive claim dismissed by the trial court, the plaintiff appealed, arguing that Fendrich should control, and that the developer's practices would deceive a reasonable purchaser into believing he had the right to purchase the proposed condominium at the reservation price.

The plaintiff's claim under FDUTPA was grounded on the contention that the developer entered into the agreements to obtain the requisite financing for construction and then unilaterally cancelled them to enable him to ‘reap the benefits of an increase in prices’ occurring in an active real estate market. The developer conversely contended that the agreement was an agreement to agree and therefore did not give the plaintiff the exclusive right to purchase the unit. Furthermore, the developer argued that since the plaintiff could have terminated the agreement at any time, he could have avoided any injury he allegedly suffered.

The Eleventh Circuit adopted the appellee's position, primarily relying on the express language in the reservation agreement to affirm

127. Id. at 1292.
128. Id.
129. Id at 1293.
130. Id.
131. It is worth noting that before dismissing the plaintiff’s claim, the trial court agreed with the Fendrich court and found that real estate transactions sufficiently triggered the “any trade or commerce” language of FDUTPA, relying on the broad language of the statute. See Zlotnick v. Premier Sales Group, Inc., 431 F.Supp.2d 1290, 1294, aff'd, 480 F.3d 1281 (11th Cir. 2007); Fendrich v. RBF, LLC, 842 So.2d 1076, 1079-1080 n.2 (Fla. Dist. Ct. App. 2003). Of course, the applicability of other states' unfair and deceptive trade practices statutes to real estate transactions may vary, depending on the specific language of the statute.
133. Zlotnick, 431 F.Supp.2d at 1293 (S.D. Fla. 2006); Zlotnick, 480 F.3d at 1283-84 (11th Cir. 2007).
134. Zlotnick, 431 F.Supp.2d at 1293 (S.D. Fla. 2006); Zlotnick, 480 F.3d at 1283-84 (11th Cir. 2007).
the invalidity of the plaintiff's claims. The court noted that, in actuality, the reservation agreement at issue created nothing more than an agreement to agree, and that the broad cancellation provisions in the agreement, when coupled with the clear indication that the agreement conferred no interest in the proposed condominium, could not mislead a reasonable person.\textsuperscript{136} Furthermore, the court had no trouble distinguishing \textit{Fendrich}; it emphasized that Zlotnick's reservation agreement contained "additional language" which served to clarify the nature of the agreement\textsuperscript{137} and that, unlike the "bait and switch" situation of \textit{Fendrich}, the developer in the instant case "released the 'bait'" by unequivocally canceling the agreement before offering the property for a higher price.\textsuperscript{138}

\textbf{C. Surf City Condominiums (Part 2)}

As indicated above, the plaintiffs in \textit{McLamb v. T.P., Inc.}\textsuperscript{139} were of the belief that the developer was perfectly able to carry out the subdivision development as planned, but that he chose not to and cancelled their reservation agreements in order to obtain a greater profit margin on the sale of the land to a third party.\textsuperscript{140} After the court dismissed the plaintiffs' option contract claim by holding the developer did not make an offer and even if he had, there was insufficient consideration, the court addressed the plaintiffs' final claim. Specifically, the plaintiffs alleged the developer's marketing of the land and failure to honor the reservation agreements amounted to a violation of North Carolina's unfair and deceptive act.\textsuperscript{141} The act, similar to other states, prohibits unfair or deceptive acts or practices "in or affecting commerce" which proximately cause "actual injury" to the plaintiff or to his business.\textsuperscript{142}

\textsuperscript{136} Zlotnick, 480 F.3d at 1285 (11th Cir. 2007).
\textsuperscript{137} The reservation agreement contained the language, "... expresses Purchaser's interest in purchasing [the unit]," and "this Reservation Agreement is not an agreement to sell the Unit, nor does it confer any lien upon or interest in the Unit or on the proposed Condominium property." Furthermore, the reservation agreement contained language indicating the rights of the parties upon cancellation—"thereafter Purchaser shall have no claim of any kind against the Seller." See Zlotnick, 480 F.3d at 1286 (11th Cir. 2007).
\textsuperscript{138} Id. at 1286.
\textsuperscript{139} See supra text accompanying notes 82-86 for introductory facts.
\textsuperscript{141} See id. at 583.
\textsuperscript{142} See id. at 582 (citing Spartan Leasing v. Pollard, 400 S.E.2d 476, 482 (N.C. 1991)). See generally N.C. GEN. STAT. § 75-1.1 (2005).
The plaintiffs specifically argued the developer intentionally failed to honor the agreements because the property had become much more valuable. They contended that after the developer learned of the increased value of the land, he cancelled the plaintiffs' reservation agreements and claimed an inability to obtain necessary land permits as an excuse. The plaintiffs' alleged injuries included the loss of the "benefit of their bargains, the free and unrestricted use of their deposit money, and the opportunity to use their money elsewhere." 

In response, the court engaged in strict logical analysis to invalidate the plaintiffs' claims. The court specifically noted the absence of any allegations relating to unfair or deceptive acts inducing them to enter into the reservation agreements. Rather, the court noted the unfair and deceptive claim hinged on the allegation that the developer's action of canceling the agreement was prohibited. Therefore, the only damages the plaintiffs could have possibly incurred were the loss of their contract rights under the agreement. The court concluded by stating that since the plaintiffs did not have any contract rights under the agreement, they suffered no injury and their claim should be dismissed.

Therefore, although it seems Fendrich opened the door for aggrieved reservation holders by validating claims for unfair and deceptive trade practices against reneging developers in certain situations, Zlotnick and McLamb narrow Fendrich's effect a bit. A quick reconciliation of the cases shows that developers need to use clear and precise language in their reservation agreements to avoid potential liability under unfair and deceptive trade practices legislation. As long as the language of the agreement clearly states that the parties merely express an interest in a sale of the proposed unit, that the agreement does not constitute an agreement to sell, and provides for each parties' respective rights upon cancellation of the agreement, developers will surely be less likely to be held liable under an unfair and deceptive trade practice theory.

143. Id. at 582.
144. Id.
145. Id.
146. Id.
147. Id.
148. Id.
The relatively sparse aggregate of decisional law on the subject of this Comment should not suggest the problem rarely occurs. Rather, many of the disputes arising over developer cancellations are resolved either at the trial court level or through out-of-court settlement negotiations. With this problem becoming increasingly common, developers in the future will only find themselves more susceptible to civil suits brought by disappointed parties if certain current practices are continued. Thus, developers utilizing reservation agreements should reevaluate their practices in an effort to limit their exposure to litigation.

I. REFUSING TO HIDE THE BALL: WELL-DRAFTED AGREEMENTS

The best and easiest way to avoid litigation involves a well-drafted reservation agreement. Developers should issue reservation agreements which expressly and unequivocally lay out the rights of both parties under the agreement. The most common problem occurs when developers cancel the agreements pursuant to their reserved rights and the disappointed purchasers sue, alleging the existence of something greater than a nonbinding reservation agreement. Thus, despite the fact that most agreements indicate on their face their mutually rescindable nature, developers utilizing such procedures are well-advised to include language in the agreement unequivocally defining the true nature of the agreements and each party’s respective rights therein. Although failure to read is seldom a permissible excuse, agreements

149. See McMullen, supra note 1 (“Angry condo buyers from Boca Raton, Fla., to San Diego are taking [developers] to court, alleging everything from breach of contract to fraud.”). See, e.g., Condon, supra note 70; Gergis, supra note 70; Rademacher, supra note 70; Wren, supra note 70.
150. See discussion supra under heading “An Increasing Problem: Developer Cancellation of Reservation Agreements.”
spelling out these essential terms in set-off, bold, or all capital letters will be far more successful in barring plaintiffs' "I didn't know" claims than those in which the language is artfully hidden amongst small text. Thus, a prudent developer will issue clear and coherent reservation agreements that indicate the rights of both parties under the agreement to greatly reduce the chances of purchasers "lawyering up" upon a developer's subsequent decision to terminate the agreement.

II. STOP BRAGGING: TONE DOWN THE WEB-MARKETING

There is no question that chief among a developer's priorities is to develop interest in his project and to cultivate a demand for the property. The majority of preconstruction interest is generated these days through the use of highly stylistic, interactive websites displaying artistic renderings and text concerning the proposed development. Through this process, the developer is able to generate "hype" for his project and may explain in detail the various amenities his project will include, a process ultimately vital for the success of his development. However, developers wishing to limit their susceptibility to suit for terminated reservation agreements will draw the line between marketing that is necessary to generate sales and that in which affirmatively misrepresents or implies falsities about the project.

Signs an instrument manifests assent to it and may not later complain about not reading or not understanding.

153. Compare Fendrich, 842 So. 2d at 1078 (restating terms of reservation agreement at issue and indicating a sentence found within a paragraph that stated "This agreement can be terminated by either party at any time. . . ") and McLamb, 619 S.E.2d at 579 (restating language of reservation agreement at issue and not indicating any language concerning the developer's right to cancel) with Klahowya Development, Reservation Document, supra note 151 (stating in double-block indented, bold, capital letters, "This reservation agreement does not create a binding contractual obligation to buy or sell on the part of either the seller or [purchaser]. Either party may cancel this reservation without incurring liability to the other at any time until [purchaser] has . . . executed an agreement to purchase a unit."). and Jo Anne Stubblefield, Cobblestone Midway Unit Reservation Agreement, SL072 ALI-ABA 157, 159-162 (2006) (clearly indicating "The [r]eserving [p]arty has expressed interest in purchasing [a unit]." "[d]eveloper may terminate this [r]eservation [a]greement upon . . . notice to [r]eserving [p]arty of [d]eveloper's decision to postpone or cancel its plans to develop the condominium; [d]eveloper will not terminate this [a]greement solely for the purposes of re-offering the [u]nit at a higher price to another buyer," and "this [r]eservation [a]greement is not an agreement to purchase or sell the [u]nit and does not confer any lien upon or interest in the [u]nit or the [c]ondominium. . ..").

154. See Bowden, supra note 3.

155. Id.
One of the biggest problems, as indicated supra, is that purchasers executing reservation agreements typically confuse the concept with an option to purchase real property. Developers often play no small role in creating this confusion, albeit oftentimes they do so inadvertently. Developers who use their websites to boast about preconstruction "sales" rates[156] are actively perpetuating the already pervasive misunderstanding concerning the preconstruction process. The solution, of course, is simple: Developers seeking to generate a sales momentum by indicating the rate by which their units are being reserved, should avoid using terms "sold" and simply replace it with "reserved". Developers shouldn't be able to "have their cake and eat it too" by boasting preconstruction "sales" rates and subsequently canceling reservation agreements on a theory they do not constitute contracts to sell. A simple change in word choice will go a long way towards defeating the current misconceptions about reservation agreements and ultimately aid a developer seeking to limit his susceptibility to lawsuits.

III. A LITTLE SOMETHING FOR YOUR TROUBLES: APPEASEMENT OFFERS

Another potential solution for the problem is appeasement offers. Where developers are faced with no other financially reasonable alternative to canceling the reservation agreements and raising prices, some developers have wisely chosen to make peace offerings to disappointed purchasers upon the developer's decision to terminate agreements and increase prices.[157] Developers employing this strategy provide a "cancellation bonus" for those opting for a cancellation and return of their deposit, or, in the alternative, a price reduction on the same property. Furthermore, developers could return any and all interest accrued on their reservation deposit during the interim period.[158]

156. See id. (quoting real estate developer as acknowledging "No matter how quickly a project 'sells out' a sale isn't really a sale until the unit is delivered and the contract closed."); Smith, Buyers Sue, supra note 73 ("In April 2004, Del American announced on its Web site that it had 'sold' 740 residences within 150 days of the initial offering . . .").

157. See, e.g., Rademacher, supra note 70.

158. See, e.g., Crescent Resources, LLC, Waterscape Condominiums Reservation Agreement, http://www.crescent-resources.com/condos/waterscape/reservation agreement.pdf (interest accruing to buyer during reservation period). This return of interest accrued operates as an appeasement measure but has an added effect of persuading the disappointed consumer there is no real injury, pursuant to a "no harm-no foul" mentality. The return of interest also limits the complainants' ability to claim a binding contract existed under a theory that the forgone interest constitutes consideration for the agreement. See, e.g., McLamb v. T.P., Inc., 619 S.E.2d 577, 581
These appeasement offers may go a long way to prove to the purchaser the developer's good intentions.

This strategy was employed with respect to a large condominium complex in Las Vegas after the developer unilaterally terminated “about 800” reservation agreements, citing higher costs for raw materials and labor as necessitating the decision.\(^\text{159}\) There, the developer offered various incentives in “an effort to appease the initial reservation holders,”\(^\text{160}\) some of whom held reservation agreements for over eighteen months.\(^\text{161}\) The letter offered two incentives to the disappointed parties: (1) those wishing to execute a new reservation agreement for a higher price (in some cases an over 60% price increase)\(^\text{162}\) would receive a 10-15% discount on the new prices; or (2) those wishing to cancel their agreements would receive a full refund of their deposit, coupled with a “cancellation bonus” of 5% of their initial deposit (average reserving deposit was $25,000).\(^\text{163}\)

Although this strategy was ineffective for this particular developer (a class action suit was filed against him to which the parties eventually reached an out-of-court settlement agreement),\(^\text{164}\) the method utilized could be effective at deterring litigation in cases not involving such gross increases in prices. For a developer rescinding agreements and re-issuing opportunities to purchase or reserve the property at higher prices,\(^\text{165}\) a significant price reduction or cancellation bonus for

\(^{\text{159}}\) Rademacher, supra note 70.

\(^{\text{160}}\) Id.

\(^{\text{161}}\) Smith, Buyers Sue, supra note 73.

\(^{\text{162}}\) See id.

\(^{\text{163}}\) Rademacher, supra note 70.

\(^{\text{164}}\) Smith, Federal Judge Gives OK, supra note 8.

\(^{\text{165}}\) There is a distinction between the two cases. On one hand, a developer could cancel the agreements and then re-issue reservation agreements for the same units at increased prices. This arrangement seems to be, in effect, just more of the same from the consumer’s perspective. It seems a disappointed consumer would struggle to find assurance that the developer would actually proceed to the purchase agreement stage this time around. What is to prevent the consumer from finding herself in the identical situation one year down the road? It seems the better solution would be for developers to issue purchase agreements for the units instead. Purchase agreements are binding obligations on the parties and would send a clear message to the disappointed parties of, “we are really going to give you the chance to get your property this time around.” This latter strategy might be especially effective if the market demand is high in the particular area. A disappointed party faced with this situation in a high-demand market would probably jump at the opportunity to secure his real estate under a binding agreement with the developer.

\(\text{N.C. Ct. App. 2005}, \) review denied, 627 S.E.2d 621 (N.C. 2006) (rejecting the plaintiffs’ claims that the lost of the interest accrued on their deposit constitutes consideration to create a binding option contract).
disappointed parties may go a long way towards indicating a developer's pure-hearted intentions. Especially if the notice of cancellation letter explains in detail the specific reasons the developer feels termination of the agreements is essential, appeasement offers similar to these may pacify the reserving party enough to prevent a lawsuit.

CONCLUSION

As seen above, the reservation agreement is truly a unique creature of property and contract law. For all practical purposes, it is an extremely weak contractual arrangement. In fact, it is difficult to say for sure that reservation agreements are anything greater than illusory promises reduced to writing, since typically either party is free to terminate the arrangement at any time for any reason. Nevertheless, the agreements are used and, in most cases, perform a convenience function for both parties. A developer can assure himself there is adequate demand and obtain the necessary financing for the project and delay compliance with the federal disclosure requirements, while the purchaser can choose his unit and reserve it for a price substantially lower than market value.

This reservation, however, is subject to conditions precedent, the most important of which is a party's decision to not cancel the agreement and terminate the relationship. It is the happening of this condition that brings forth the issue addressed in this Comment: whether and to what extent current practices with respect to developer cancellation will spark litigation initiated by disappointed parties and result in ultimate developer liability. Although the decisional law on this inquiry is sparse, a few conclusions are warranted at this point. First, it is abundantly clear that a disappointed purchaser will not be able to convince a court a reservation agreement grants him an option to purchase; the proper definition of reservation agreements and option contracts and the courts' holdings clearly provide support. Second, it seems developers may not be completely immune from liability when they cancel reservations pursuant to rights under the agreement. Rather, Fendrich makes clear that in certain instances a cumulative evaluation of a developer's actions could convince a court to hold him liable under applicable unfair and deceptive trade practices law. 166

As such, there are some advisable practices to limit lawsuits against developers and ultimately ensure they remain free from liability over cancelled reservation agreements. First, a developer should

166. See discussion of Fendrich v. RBF, LLC, 842 So.2d 1076 (Fla. Dist. Ct. App. 2003), supra notes 118-25 and accompanying text.
ensure his reservation agreement expressly and unequivocally lays out the terms of the agreement and the respective rights of both parties. A clearly-worded agreement will go a long way to reducing the merits of plaintiffs' after-the-fact contentions that they were unaware the developer possessed the right to unilaterally terminate the agreement. Second, current practices of web-marketing need to be toned down significantly to avoid perpetuating the current misconception with regard to the nature of reservation agreements. Developers and their marketing agents specifically should stop using the word “sold” when referring to preconstruction reservations. Finally, appeasement offers may offer developers a reprieve from litigation, where the disappointed party is offered a reasonable explanation for the cancellation and a gift from the developer. Appeasement offers may prove to be a wise solution for the developer faced with the decision to terminate agreements at lower prices by appealing to the disappointed parties' interests. If a real estate developer keeps these observations in mind when he decides to utilize the preconstruction process through the issuance of reservation agreements, he should be able limit the amount of lawsuits brought against him and his liability when and if he deems it necessary to cancel the nonbinding agreements.

Douglas J. Short