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# 'Material changes' to condo give new material to buyers wanting out

South Florida Business Journal - by [Julia Neyman](#)

Nine buyers have filed lawsuits against the Opera Tower condominium in downtown Miami, alleging the developers misrepresented the size of an "Olympic-style" pool, downgraded designer kitchen tiles and didn't deliver promised views of Biscayne Bay.

Because the same attorney has filed all nine suits, Opera Tower developer Tibor Hollo says they're just a tactic to get speculative buyers out of contracts.

The legal face-off sounds familiar as projects finish in a depressed real estate market. First, attorneys relied on the Interstate Land Sales Disclosure Act to get buyers off the hook if projects didn't deliver in time. The act says a developer must file property reports with the U.S. Department of Housing and Urban Development, or agree to deliver units within two years of executing the purchase agreement. Buyer attorneys argue that since many South Florida developers did not file with HUD and have taken longer than two years to deliver units, buyers can rescind their contracts.

Recently, as with Opera Tower, attorneys have begun comparing what was promised to buyers to what is actually delivered.

The clincher to see if buyers can rescind their contracts is if the changes are "material and adverse," lawyers say. Herein lies the point of contention, especially if buyers relied on oral representations instead of what was in the actual condo documents when they decided to buy units prior to construction.

In the case of Opera Tower, attorney Kent Harrison Robbins alleges the luxury condo project misled buyers by offering an "oversized, Olympic-style pool," and instead delivered a pool that is about 2,500 square feet. The International Swimming Federation defines an Olympic pool as being 50 meters long and 25 meters wide, which translates to about 13,500 square feet.

But Hollo, president of Florida East Coast Realty, which is building the project, points to the original condo documents: The pool is slated to be 2,530 square feet.



Mark Freerks

Attorneys Kent Harrison Robbins and David Phillips say buyers were misled about the size of the condo's pool

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"The pool sizes are exactly documented in recorded condo docs," he said. "We built what we promised people."

So far, there isn't much case law to determine who wins in these types of disputes. When the market was good, buyers weren't looking to get out of contracts for any reason. Now that the market is falling, buyers are "trying every possible way to bite into something to get out of the contract," Hollo said.

Attorneys for Opera Tower buyers disagree, saying buyers are simply becoming more discerning, now that making money on a condo isn't a foregone conclusion, like it was two years ago.

"Buyers now want what was promised to them, and they're scrutinizing the developers more," said David Philips, an attorney who drafts condo documents, but has recently started representing buyers on contract disputes, including Opera Tower. "Buyers are educating themselves."

### **Ruling: oral representation cannot be relied upon**

Buyers may be educating themselves now, but failure to do so in the past has resulted in at least one judgment in favor of developers. South Florida District Court Judge Lawrence King recently dismissed a case against Santa Maria Resort in Key West because buyers' complaints were based on what their brokers had told them, not what was written in the actual condo documents.

Santa Maria buyers were told they could access a private beach and the nearby Wyndham Resort spa, and that the upscale Queens Table restaurant would move into the condo building. None of those promises came true, but none were written into the condo's documents.

"Oral representations cannot be relied upon as correctly stating the representations of the developer," is written on each purchase contract.

Developers won a round with the Key West ruling, which is now being appealed, but some attorneys are watching a case involving the Ocean Marine Yacht Club in Hallandale Beach to see if it scores a legal victory for buyers.

Suits against the condo tower allege that buyers were promised a 48-slip marina, which was scrapped after developers failed to get approval. The marina was a key selling point since many of the buyers own boats, attorney Matthew Miltzok said.

"A marina is a scarcity, and a lot of purchase prices were based on views of the marina," he said. "To call a building an Ocean Marine Yacht Club, and then take the marina away ... that is a material change."

Ronald Rosengarten, who represents the project's developer, **Fifield Realty Corp.**, said he wouldn't comment on the suit because it is in litigation. But he said he has seen an upswing in "material and adverse" cases, and added that it will be interesting to watch as court decisions pave new case law involving buyer-developer disputes.

"The volume of cases will result in a certain amount of opinions being issued on this subject," he said. "It will be interesting to see how it develops."

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