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# TIME SHARE REGULATION: THE WISCONSIN MODEL

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## I. INTRODUCTION

Time-share purchasing has become an increasingly popular method of vacation planning and real estate ownership.<sup>1</sup> Time-share interests generally are described and understood by lay purchasers as the purchase of a week or more stay in a recreational or resort property.<sup>2</sup> The owner of that interest then has the right to use, occupy, and possess the property during those weeks and for the corresponding weeks in subsequent years.

Notwithstanding this general understanding of time-share interests by lay purchasers, time-share ownership presents some unique and interesting problems. These legal and business problems arise because time sharing is a relatively new industry and focuses, in very real and dramatic ways, on the fourth dimension—time.<sup>3</sup> Time-share interests purport to convert time into a tangible marketable commodity—a commodity sold in fifty-two week slices.<sup>4</sup>

Despite concerns which may attend time-share interests, this form of ownership appeals both to developers and vacationers because of the

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1. Jacqueline L. Salmon, *Hotel Companies Polish Time Sharing's Image*, WASH. POST., July 11, 1992, at E1. A recent study demonstrates that since 1990 there has been an 18% rise in the number of households owning time shares in the United States. *Id.* Time-share ownership has gone by a variety of labels including: interval ownership, vacation licenses, vacation leases, club memberships, fractional fee, fractional ownership, right-to-use, and prepaid reservations. James R. Martin, *Time-Sharing in Colorado*, COLO. LAW., Nov. 1992, at 2804.

2. Yvette C. Mendez, *Timesharing and Realty Interests Under the Martin Act: Consumer or Investor Protection?* 17 FORDHAM URB. L.J. 505, 505 (1989). DAVID CHAPMAN & EDNA L. HEBARD, *CONDOMINIUMS AND COOPERATION* 156 (2d ed. 1984).

3. Ellen H. Pollack, *Time-Sharing, or Time Is Money But Will It Sell?* 10 REAL EST. L.J. 281, 283 (1982).

4. *Id.*

steady demand for vacation housing and the flexibility that time-share ownership permits.<sup>5</sup> Inflation and the prohibitive costs of owning a second home have forced middle-income families to seek more cost-effective forms of vacation property ownership.<sup>6</sup> Time sharing offers these owners the ability to share in the benefits of real estate ownership. This shared ownership gives owners the tax savings realized through the deductibility of real estate taxes, a voice in the management and administration of the project while avoiding the burden of sole management, and flexibility. Flexibility can be achieved because owners may exchange blocks of time with other time-share owners—not only within their own resort, but also with owners of interests in other areas and countries.<sup>7</sup>

As the time-share industry has grown, some particular problems have been identified. Deceptive sales practices, inept management, and a shortage of buyer protections have tarnished the industry's image and fostered a public outcry for increased regulation. The response to these problems has been government intervention and regulation at both the state and local level.<sup>8</sup> For instance, the Wisconsin legislature has responded to these concerns by enacting Chapter 707, the Time-Share

5. Ellen R. Pierce & Richard A. Mann, *Time-Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment*, 59 NOTRE DAME L. REV. 9, 10-11 (1983).

6. *Id.* The average time-share owner has a household income of \$49,700. Salmon, *supra* note 1, at E1.

7. *Vacationers Look to Exchange Companies for Added Flexibility*, PR NEWSWIRE, Oct. 2, 1992. Recent surveys show that 80% of time-share owners cite the exchange opportunity as a primary motivation for purchasing a time-share vacation. *Id.* Exchange opportunities may include:

[B]lue and bright green jungles . . . of Si Ho Playa, a beach-side resort near Campeche, Mexico. Built on an old Spanish hacienda, the resort features two Mayan archaeological sites and lies a short hop from Mexico's only Spanish fort. Anglophile vacationers might be keen on the Brant Ridge Park Estate. Built in 1750 the formal royal residence features 8 acres of formal gardens, clay-pigeon shooting, badminton, croquet, and other ultrarefined recreational activities.

Laguna Azul is a secluded spot on the shores of Peru's clear blue lake "El Sauce." Horseback riding, diving for pearls, and paying visits to nearby native villages top the list of highlights at this resort, where vacationers live in individual huts beneath thatched roofs.

For the person who demands the lively clamor of the city, there is The Courtyards in New Orleans. A restored 1840's carriage house, the resort stands a half block from the city's hot and saucy French quarter. . . . .

Anyone looking for a quicker road to heaven might want to look into the Purgatory-Eolus resort located near the Purgatory ski complex in the Colorado Rockies. Jack Hayes, *Something for Everyone—At \$3,000 to \$15,000*, *Chi. Trib.*, Aug. 15, 1986, at 20, 24.

8. William E. Mooz, Jr., *State and Local Regulation of Time-sharing in Colorado*, 56 U. COLO. L. REV. 289 (1985).

Ownership Statute (the "Act").<sup>9</sup> The extent and adequacy of the Act's protection of consumers and regulation of the time-share industry are the focus of this article.

This article will examine the problems affecting Wisconsin's time-share industry in light of the existing regulations governing time-share developers, sellers, and buyers. It also will propose additional legislative protections for the Wisconsin time-share industry. Part I will provide an overview of time shares, including their historical development and legal creation. Part II will consider the manners in which state and local governments have attempted to regulate the time-share industry. Part III will consider legislation affecting time-share developers and managers in Wisconsin. Part IV will review the regulation of the sale of time-share properties in Wisconsin. Part V will address the existing protections afforded time-share buyers. Finally, Part VI will analyze the regulation of time-share resales and exchange programs.

## II. OVERVIEW OF TIME SHARES

### A. *Historical Development of the Time-Share Industry*

#### 1. The European Experience

Time sharing, a relatively recent form of vacation ownership, originated in Europe during the middle part of the twentieth century.<sup>10</sup> Although the historical roots of time sharing are not well documented, the concept of the resort condominium is said to have originated in Europe in 1957 with the formation of the Eurotel.<sup>11</sup> The Eurotel, a chain of hotels throughout Europe, provided individuals with the opportunity to purchase the limited use of a Eurotel hotel room for vacation purposes.<sup>12</sup> In addition, purchasers received discounted rates at other Eurotel locations.<sup>13</sup> Essentially, an individual who purchased time at a Eurotel, bought the exclusive right to use the facility for a set period of time over a certain number of years.<sup>14</sup>

Although the Eurotel originated in 1957, it is believed that time sharing actually began in the French Alps in 1968 when owners of apartment

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9. See generally WIS. STAT. ch. 707 (1989-90). This chapter is substantially based on the Uniform Law Commissioners' Model Real Estate Time-Share Act. 7B U.L.A. 351 (1982).

10. Pollack, *supra* note 3, at 283.

11. *Id.*

12. *Id.*

13. *Id.*

14. Mendez, *supra* note 2, at 509 (citing MADISON & DWYER, THE LAW OF REAL ESTATE FINANCING § 10-2 (Supp. 1988)).

complexes began offering vacationers the opportunity to purchase weekly vacations.<sup>15</sup> Because of the growing popularity of the area, vacationers sought to ensure accommodations at their favorite facility.<sup>16</sup> This was accomplished by purchasing a week of vacation on a yearly basis.<sup>17</sup>

Time sharing continues to be a popular form of vacationing throughout the European Community. Although the United States remains the leader in the worldwide time-share market, the European market accounts for over twenty percent of the world's time-share resorts, and it continues to grow.<sup>18</sup> More than fourteen percent of the world's time-share owners reside in Europe, while ten percent of the world's time-share owners reside in the United Kingdom.<sup>19</sup>

## 2. The Movement to The United States

Soon after its development in Europe, time-share ownership began to be used by developers in the United States.<sup>20</sup> During the recessionary period of the 1970s, time-share ownership proved to be a viable alternative for resort condominium developers unable to sell their properties.<sup>21</sup> Although time-share ownership in the United States arose largely out of the need for developers to "bail" themselves out of a depressed economic situation, entire time-share projects have been constructed in the United States for the sole purpose of offering consumers the opportunity to purchase ownership rights in a time-share development.<sup>22</sup>

The growth of time shares in the United States has been astounding. In 1973, there were only eight time-share resorts in the United States.<sup>23</sup> However, by 1992, the United States was home to 1,329 time-share resorts.<sup>24</sup> Worldwide, the United States accounts for more than fifty per-

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15. Everett Potter, *Time-shares: An Expanding Travel Market*, HOUS. CHRON., May 24, 1992, at 9.

16. Martin, *supra* note 1, at 2804.

17. *Id.*

18. *Time-share Industry Booming In Worldwide Market*, BUS. WIRE, July 19, 1991. Europe contains 20.8% of the world's time-share resorts and 25,980 units. *Id.*

19. *Id.*

20. Mendez, *supra* note 2, at 509.

21. Pollack, *supra* note 3, at 283. The oil-crisis of mid 1970s "awakened" the time-share industry in the United States. Potter, *supra* note 15, at 9. Developers were unable to sell "second homes," and as a result, the concept of time shares caught on in the United States. *Id.*

22. George M. Straw, *Representing A Purchaser of a Time-Share*, 11 COLO. LAW. 1543, 1543 (1982).

23. Potter, *supra* note 15, at 9.

24. *Id.*

cent of the time-share market.<sup>25</sup> Further, more than sixty-six percent of time-share owners reside in the United States.<sup>26</sup> In April 1992, statistics indicated that there were 1.415 million time-share owners in the United States.<sup>27</sup> This figure represents an 18.2 percent increase in ownership from 1990.<sup>28</sup>

Despite its widespread popularity, the time-share industry has come under scrutiny. Coupled with the industry's promises of vacation paradises and romantic getaways are claims of fraud and deception. In an attempt to induce the unsophisticated consumer into purchasing a time-share property, time-share developers have been accused of engaging in unethical and high-pressured sales tactics.<sup>29</sup> Moreover, the industry has been plagued with claims of mismanagement.<sup>30</sup> As a result of these claims, the time-share industry was labeled the "black sheep" of vacation fads.<sup>31</sup>

Recently, however, the time-share industry's tainted reputation has been lessened by the entry of several high-profile and reputable hotel operators. Hotel companies such as Walt Disney Corporation, Hilton Hotels Corporation, and Marriot Corporation have entered the time-share business, making the time-share industry a more credible option for vacationers.<sup>32</sup> One commentator, in evaluating the impact of Disney's decision to enter the time-share industry, stated "[t]he magical name of Disney was like a wave of Tinkerbell's wand to the industry. It seemed to signify that, at long last, time shares had come of age."<sup>33</sup>

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25. See *Time-Share Industry Booming in World Wide Market*, *supra* note 18 and accompanying text.

26. *Id.*

27. Potter, *supra* note 15, at 9.

28. *Id.*

29. Timothy E. Dougherty, *Risky business: A Time-share is Good For Fun, Not Profit*, *NEWSDAY*, Oct. 3, 1992, at 28.

30. California's Glen Ivory Holdings, for example, which operates 23 time-share condominium projects, is currently under criminal investigation for alleged gross mismanagement and fraud. *Id.*

31. Terri Thompson, *A Yearly Slice of Paradise*, *U.S. NEWS & WORLD REP.*, May 23, 1988, at 70. Because of the industry's reputation for misleading sales tactics and failing to deliver on promises, as well as the difficulty of swapping time with other owners, time shares became a form of vacationing hardly considered. *Id.*

32. See Salmon, *supra* note 1, at E1. In 1984, the Marriot Corporation was the first major hotel company to enter into the time-share industry. *Id.* As of July of 1992, Marriot owned 18 time-share resorts and expects time-share sales to exceed \$100 million in 1992. *Id.* In December of 1992, the Walt Disney Corporation offered time shares for the first time at Disney World in Orlando, Florida. *Id.* Recently, Hilton Hotels Corporation has begun developing time shares internationally under its subsidiary, Hilton Grand Vacations Co. *Id.*

33. Potter, *supra* note 15, at 9.

### 3. Time Sharing in Wisconsin

The sun and surf of California, Florida, and Hawaii, and the snow-covered mountaintops of Colorado, have made these states popular time-share markets.<sup>34</sup> Although Wisconsin does not offer the sun and surf of Florida or the snow-covered mountains of Colorado, the state is home to several time-share properties.

Time-sharing first appeared in Wisconsin during the mid 1970s.<sup>35</sup> The Heidel House at Green Lake and the Playboy Resort at Lake Geneva were the first properties in Wisconsin to offer time-share ownership.<sup>36</sup>

In recent years, campground time-shares have become increasingly popular in the Midwest.<sup>37</sup> Christmas Mountain Village, a 450-acre development in the Wisconsin Dells, offers a variety of time-share plans, including the opportunity to purchase an interest in the Village's campgrounds. Those choosing to purchase an interest in a campground at Christmas Village buy a 1/5400 interest in the campground, and also the right to use the resort's clubhouse, pool, lake, and golf course.<sup>38</sup> Christmas Mountain Village offers time sharing for recreational vehicle owners, individuals interested in mobile homes, and even those who prefer villa living.<sup>39</sup>

#### *B. Legal Creation Of Time-Share Interests*

Time-share conveyances can transfer either a fee interest, creating ownership and a recordable title in a property, or a non-fee interest, which merely transfers the right to use a property for a specific time period.<sup>40</sup>

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34. Thompson, *supra* note 31, at 70.

35. 1 MARTIN J. GREENBERG, WISCONSIN REAL ESTATE § 7:48, at 379 (1992).

36. *Id.* Other Wisconsin properties that have ventured into the time-share industry include the Gateway Lodge (Land O Lakes), Lake Forest Resort & Club (Eagle River), Lauderdale Lakes Resorts (Elkhorn), Marina Place (Sister Bay), Northernaire (Three Lakes), Olympia Resort (Oconomowoc). *Id.*

37. Dan Sheridan, *Time-share Buyers Focus of Law Push*, CHI. TRIB., Apr. 12, 1985, § 8, at 8, 24. Campground time shares have become popular in Wisconsin, Michigan, and Minnesota. *Id.*

38. *Id.*

39. *Id.*

40. MARK E. HENZE, THE LAW AND BUSINESS OF TIME-SHARE RESORTS, § 301[1] (1987).

## 1. Fee Interests

In all fee interest time-share estates, a purchaser receives an ownership interest in the property. This enables the property to be mortgaged, devised, sold, occupied, and possessed. The only restrictions on the property are those that are contractual and run with the land. Advantages to ownership include the potential financial gain through an increase in equity and the ability to deduct real estate taxes.

The disadvantages of the fee interest form include its being subject to expenses, losses, depreciation, increasing property taxes, and liability risks. There also is the burden of disposing of the property after its usefulness is gone.<sup>41</sup> It is also possible, though unlikely, that the government could place a lien on the entire property if one of the time share owners owed unpaid taxes.<sup>42</sup>

A transfer of a fee interest in a time-share can be accomplished in three ways: (1) a tenancy in common or "time span" ownership, (2) a recurring estate for years, or (3) a fee simple.<sup>43</sup>

### *a. Tenancy In Common Or Time Span*

In a tenancy in common or time span ownership, a time-share developer sells each purchaser a fee simple estate consisting of a percentage of a condominium unit together with an undivided interest in the common areas. Each purchaser takes the property interest as a tenant in common with the other time-share purchasers. Covenants filed with the deed and running with the land, restrict the owner's right to possession and creates the time-share distribution. It also provides notice to future purchasers that it is a time-share property.<sup>44</sup> The covenants create the time-share distribution with the following two restrictions: First, it defines the rights and duties of each individual tenant and the period that each co-owner has the right to possess the unit.<sup>45</sup> Second, it contains an enforceable waiver of each co-tenant's right to seek judicial partition of the time-share property.<sup>46</sup>

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41. *Id.*

42. Pierce & Mann, *supra* note 5, at 16.

43. HENZE, *supra* note 40, § 3.03; *see also* David R. Duhord, *Time-Share Condominiums: Property's Fourth Dimension*, ME. L. REV. 181, 186-87 (1980).

44. Duhord, *supra* note 43, at 186-87.

45. *Id.* at 186.

46. *Id.* at 187.



*b. Recurring Estate For Years*

In a recurring estate for years, a developer conveys to the purchaser an annually recurring estate for a specified number of weeks and enduring for a set number of years. The developer also conveys a fee simple remainder, in which the purchaser takes a tenancy in common estate after the set number of years has elapsed. Each purchaser's title includes both an estate for years and a fee simple remainder. This recurring estate allows the purchaser "exclusive fee title" for the duration of the time of possession, unlike the "tenancy in common or time span approach," in which the purchaser's rights flow from the covenant.<sup>47</sup>

*c. Fee Simple*

In the fee simple form, a developer conveys sole title to the property in fee simple absolute, with time as a fourth conveyable dimension. Using this approach, the purchaser's possessory right exists only during the times conveyed and not during any other time.<sup>48</sup> During the conveyed time period, the purchaser does not own the property as a co-tenant, but rather as a sole owner.<sup>49</sup> Because this type of ownership does not follow traditional property law concepts, which are limited to physical dimensions, it is not used as frequently.<sup>50</sup> One disadvantage of this type of estate is that the right to partition the property does not exist. The absence of this right can make the property difficult to sell as a unit when it no longer serves a useful purpose as a time-share property.<sup>51</sup>

## 2. Non-Fee Interests

Non-fee interests permit property use without the problems of ownership. In non-fee ownership, the purchaser's interest is contractual. When the ownership contract expires, the purchaser's right to occupy the premises ends and the interest reverts to the owner (who retains the title in fee simple absolute). Vacation licenses are examples of this form of contractual interest. Vacation licenses are usually for a defined duration and can be used anytime during the year. Courts do not consider them interests in real property. On the other hand, vacation leases usually are

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47. *Id.* at 201-02.

48. Robert M. Kessler, *The North Carolina Time Share Act*, 62 N.C. L. REV. 1356, 1358 (1984).

49. Pierce & Mann, *supra* note 5, at 20.

50. Kessler, *supra* note 48, at 1358.

51. Diane M. Messer, Comment, *An Overview of Time-Sharing and the Tennessee Time Share Act: Are Purchasers Now Protected?*, 53 TENN. L. REV. 779, 780 (1986).

contracted for the same period of time each year. The vacation leases are considered interests in real property and can be recorded. The right to record the contract is frequently limited, however, because its recording can curtail the developer's right to secure loans on the property.<sup>52</sup>

In some states courts have held that non-fee interests are securities, subjecting them to regulation by the Securities and Exchange Commission.<sup>53</sup> In Wisconsin, the legislature has determined that time-share interests are fee interests<sup>54</sup> and not securities.<sup>55</sup>

Another form of non-fee ownership is club membership. In this type of time-sharing, a club or association usually is organized by a developer or a non-profit organization to provide time shares for its members, who pay membership and maintenance fees. An advantage to club membership is that they frequently permit use of several different resorts.<sup>56</sup>

Some states mandate that the interest received in time share must be a fee interest. Wisconsin prohibits time-sharing licenses<sup>57</sup> and mandates that the interest received be in fee simple absolute.<sup>58</sup> The Uniform Law Commissioners' Model Real Estate Time-Share Act (the "Model Act"), however, allows a time-share interest to be a license.<sup>59</sup>

### III. STATE AND LOCAL REGULATION OF THE TIME-SHARE INDUSTRY

In recent years, several states have enacted legislation directed at regulating various aspects of the time-share industry.<sup>60</sup> Because of rampant claims of deceptive and unethical sales practices in the time-share industry and community concerns over the development and establishment of time-share properties, state and local legislation has been enacted on nearly every aspect of the time-share industry.

Although several states have implemented laws aimed at regulating time sharing, there is little commonality among jurisdictions.<sup>61</sup> Several states have opted to regulate time sharing through time-share laws or

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52. HENZE, *supra* note 40, § 3.02[3][a].

53. Pierce & Mann, *supra* note 5, at 25.

54. WIS. STAT. § 707.03 (1989-90).

55. *Id.* § 707.11.

56. Pierce & Mann, *supra* note 5, at 26-27.

57. WIS. STAT. § 707.04.

58. *Id.* § 707.03.

59. MODEL REAL EST. TIME-SHARE ACT § 2-102(b), 7B U.L.A. 368 (1982).

60. Mendez, *supra* note 2, at 506-07.

61. HENZE, *supra* note 40, at § 9.03[1].

amendments.<sup>62</sup> Others, such as New York, have regulated time sharing through the state's securities laws.<sup>63</sup> Still others, have preferred to regulate time sharing through subdivision laws, condominium laws, and consumer protection laws.<sup>64</sup>

In addition to monitoring and controlling time sharing at the state level, many states actively regulate time sharing at the local level. Because time sharing often involves high-density developments operating in communities throughout the year, local governments have relied on their zoning powers to limit or restrict the location of time-share developments.<sup>65</sup> As a result, local governments have effectively restricted time sharing in their communities to certain high-density and transient areas.<sup>66</sup> Moreover, in several communities, local governments have been successful in implementing zoning ordinances that preclude time-share development.<sup>67</sup>

Although municipalities have successfully enacted zoning laws aimed at regulating the time-share industry, some states have placed limitations upon municipalities' zoning powers. For some states, a zoning ordinance must operate to regulate the use of the land, not the form of ownership.<sup>68</sup> Additionally, some states further demand that a zoning ordinance be substantially related to the public health, safety, morals, and welfare.<sup>69</sup>

Until recently, Wisconsin did not have state legislation specifically aimed at the regulation of time sharing. However, in 1986, the Wisconsin legislature enacted comprehensive time-share legislation with the adoption of Chapter 707, the Time-Share Ownership statute.<sup>70</sup> Chapter 707, nearly fifty sections in total, contains several sections directed at regulating the creation and the management of time-share properties, as well as sections that provide protections for the time-share purchaser.<sup>71</sup>

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62. Patrick J. Rohan & Daniel A. Furlong, *Time-sharing and Consumer Protection: A Precis for Attorneys*, 10 WM. MITCHELL L. REV. 13, 29 (1984).

63. Mendez, *supra* note 2, at 507. New York's belief that time sharing should be regulated through its securities laws is the minority position. *Id.* at 507 n.14.

64. Rohan & Furlong, *supra* note 62, at 29.

65. Mooz, *supra* note 8, at 291.

66. HENZE, *supra* note 40, § 4.03[1].

67. *Id.* Some communities which have, in the past, enacted prohibitory ordinances include: Carmel-By-The-Sea, California; Naples, Florida; Newport Beach, California; Pacific Grove, California; and West Hampton Beach, New York. Henze, *supra* note 42, § 4.30(3)(b)(4.0)-(12.2).

68. *Id.*

69. *Id.*

70. GREENBERG, *supra* note 35, at 380.

71. WIS. STAT. CH. 707 (1989-90).

The Wisconsin legislature greatly limited the ability of municipalities to enact ordinances or other land-use regulations affecting the development of time-share projects. Specifically, section 707.10 sets forth limitations on the zoning and local regulation of time-share projects.<sup>72</sup> Section 707.10(1) protects the time-share developer by forbidding the enactment of any zoning or land use ordinance or other regulation that discriminates against the construction or development of a time-share project.<sup>73</sup> Moreover, section 707.10(2) prohibits any county, city, or other jurisdiction from engaging in the practice of placing burdens or restrictions on a time-share project that are not imposed on similar non-time-share projects.<sup>74</sup> According to the statute, such powers are left solely to the State.<sup>75</sup>

In 1985, the Wisconsin Court of Appeals established Wisconsin's prohibition against discriminatory local regulation.<sup>76</sup> In *State ex rel. Harding v. Door County Board of Adjustment*<sup>77</sup>, the Door County Board of Adjustment revoked John Harding's building permit on the grounds that Harding intended to build a home for thirteen owners on property which was zoned for single-family residential use.<sup>78</sup> Under Harding's plan, the home would be sold to thirteen owners, with each owner having the right to possess the home for a four-week period each year.<sup>79</sup> In reversing the lower court's decision, the Court of Appeals held that, although thirteen different families would occupy the home each year, one family would occupy the home to the exclusion of the other twelve families.<sup>80</sup> Moreover, the ordinance at issue failed to require "occupancy over a period of time," and the court refused to prescribe such a requirement.<sup>81</sup>

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72. *Id.* § 707.10 (1989-90).

73. *Id.* § 707.10(1).

74. *Id.* § 707.10(2).

75. *Id.*

76. *State ex rel. Harding v. Door County Board of Adjustment*, 125 Wis. 2d 269, 270, 371 N.W.2d 403, 404 (Ct. App. 1985).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 271, 371 N.W.2d at 404.

81. *Id.* at 271-72, 371 N.W.2d at 404.

## IV. DEVELOPING AND MANAGING TIME SHARES IN WISCONSIN

A. *Time-Share Developments*

The time-share industry has become a billion-dollar business. In 1991, worldwide time-share sales surpassed three billion dollars.<sup>82</sup> This figure represents a 650% increase from time-share sales in 1980.<sup>83</sup> The amounts of money involved, the opportunity for profit (and embezzlement), and the increased regulation of the time-share industry have made time-share development increasingly more complex.

Not surprisingly, entry into the time-share industry as a developer requires extensive financing. The developer's ability to secure favorable financing has become the single most important consideration for the time-share developer.<sup>84</sup> For the typical time-share development, the developer must procure financing for land acquisition and construction costs, initial marketing and sales costs, and long-term receivables.<sup>85</sup>

Although development often requires high-level financing, if the development is successful, a time-share project may prove to be financially rewarding. The increased potential profit of selling a property as time-share units rather than as condominium units makes time-share development a more attractive alternative. Potential profits in a newly constructed twenty-unit development can be as much as three times greater if the property is sold as a time-share project rather than as individual condominiums.<sup>86</sup>

Successful time-share planning is a process that requires a great deal of strategic planning by the legitimate developer; planning that requires both a great deal of money and patience. The developer must not only make key business decisions regarding the financing, marketing, and selling of a time-share project, but also must ensure that development practices conform with state and local regulations that govern the processes and procedures of time-share development.

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82. See *Vacationers Look to Exchange Companies for Added Flexibility*, *supra* note 7 and accompanying text. In 1991, worldwide time-share sales totaled more than \$3.7 billion. *Id.*

83. *Id.*

84. Kenneth J. Cassutt & Patrick Brower, *Boom to Bust in Ruidoso: A Guide for the Time-Share Industry*, 2 *PROB. & PROP.* 45, 46 (July-Aug. 1988).

85. *Id.*

86. Paul Barron, *The Louisiana Time-sharing Act: An Analysis and Assessment*, 58 *TUL. L. REV.* 863, 869-70 (1984). The net profits for a newly constructed 20 unit development marketed and sold as individual condominium units would total \$600,000. *Id.* The net profits for a similar development marketed and sold as a time-share property would total \$2,089,500. *Id.* at 870.

*B. An Analysis of Wisconsin's Regulatory Scheme*

The Wisconsin legislature has imposed numerous legislative restrictions and limitations on the Wisconsin time-share developer. These regulations are aimed at protecting the time-share purchaser from a reoccurrence of the misfortunes that plagued the industry during the 1980s.

Specifically, the Wisconsin legislature has imposed comprehensive legislative requirements on the developer regarding the developer's organizational process. Several of the statutes in Chapter 707 were designed to ensure that the time-share developer has engaged in the requisite planning prior to undertaking the creation of a time-share project.

Section 707.21 sets forth the requirements for a time-share instrument.<sup>87</sup> In setting forth these requirements, the Wisconsin legislature targeted large-scale developers by excluding those properties with less than thirteen time shares.<sup>88</sup> For large-scale developers, section 707.21 imposes several exacting requirements for a valid time-share instrument. In addition to requiring the developer to record the time-share instrument with the register of deeds in the county in which the property is located, section 707.21 also mandates that the developer provide additional information regarding the property description and name, the property plat, the property location, identification of time periods, and the time-share liability and voting rights.<sup>89</sup> By placing such rigid requirements on the developer, the Wisconsin legislature is attempting to ensure that the developer has engaged in a sufficient level of preparation prior to engaging in the time-share project.

The exacting requirements found under section 707.21 are furthered under section 707.215. This section requires the recording of a survey and floor plans that describe the dimensions and location of each time-share unit.<sup>90</sup>

To further protect the time-share purchaser against the unscrupulous developer, section 707.22 requires that the developer set forth, in the time-share instrument, the manner in which time-share liability will be determined.<sup>91</sup> Moreover, if the time-share instrument contains a provi-

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87. WIS. STAT. § 707.21 (1989-90).

88. *Id.* § 707.21(1).

89. *Id.* § 707.21(1)(3).

90. *Id.* § 707.215 (1989-90).

91. *Id.* § 707.22(1)(1989-90).

sion for voting, section 707.22 places restrictions on the developer's allocation of such voting rights.<sup>92</sup>

Finally, section 707.26 affords the time-share purchaser additional protection by prohibiting the developer from entering into any agreement with a secured lender that contains a provision granting the lender control over the administration of the time-share project.<sup>93</sup> Control over the general administrative affairs of an association is to remain with the time-share owners or their elected representatives.<sup>94</sup> By restricting the rights of a secured lender, a lender is likely to be more cautious about granting financing to a time-share developer. A prudent lender would not want to foreclose on a property if control of the property is statutorily limited.

### C. *Proposals for Clarification*

The Wisconsin legislature has set forth extensive legislation regulating and controlling time-share development. In so doing, the legislature has ensured that the time-share developer initiates a time-share project with a thorough and operative plan. Further, the regulation protects the purchaser by demanding that the developer meet exacting requirements before the time-share project begins. If unable to comply with these early requirements, the developer would most likely fail to fulfill the duties and responsibilities that attach as the time-share project continues.

Although Wisconsin's legislation is comprehensive in this area, opportunities remain for improving the protections that it currently provides. For example, Florida recently enacted time-share legislation that placed supervisory duties on a developer.<sup>95</sup> These provisions require that the developer "supervise, manage and control all aspects of the offering of a time-share plan, including, but not limited to, promotion, advertising, contracting and closing."<sup>96</sup> The statute further provides that any violation that occurs in this area shall not only be deemed a violation by the person committing the violation, but also a violation by the developer.<sup>97</sup> By placing this level of responsibility on the developer, the Florida legislature has attempted to further protect against the unscrupulous developer by holding the developer personally accountable for the ac-

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92. *Id.* § 707.22(2)(3).

93. *Id.* § 707.26(1) (1989-90).

94. *Id.*

95. FLA. STAT. ANN. § 721.056 (West 1988).

96. *Id.*

97. *Id.*

tions of subordinates. A similar provision in Wisconsin could better protect the Wisconsin time-share purchaser.

Illinois has enacted legislation mandating that a developer, after registering a time-share program, provide a certified, audited financial statement that fully and fairly discloses the developer's financial condition for the most recent year.<sup>98</sup> Although Wisconsin does not specifically provide for the registration of developers, such financial information could be required at the recording of the time-share instrument. By requiring such a statement, the Wisconsin legislature could further ensure that a time-share developer is properly prepared to enter into the time-share project.

#### D. *The Management of Time-Shares in Wisconsin*

The average time-share owner purchases one or two weeks of time each year in a recreational or resort property. During that time, the owner enjoys the exclusive right to possess the time-share property. However, for the balance of the year the owner surrenders the right of possession to individuals who have also purchased a right to possess the property. Accordingly, by purchasing an interest in a time-share property, individuals have purchased a right in a property which, over the years, will be possessed and used by a number of unknown individuals.<sup>99</sup> Some individuals may use their allocated time each year in a manner that results in extraordinary wear and tear on the premises or may unilaterally decide to extend their right to use the property beyond their allotted time.<sup>100</sup>

In order to adequately protect a time-share owner from such occurrences, time-share properties must establish a system of time-share management;<sup>101</sup> that is, identify entities responsible for overseeing the daily operations of time-share projects. Generally, management of a time-share project requires dealing with holdover tenants, collecting fees from time-share owners, providing for the maintenance and cleaning of the time-share property, and paying taxes.<sup>102</sup>

The method by which such an entity is established depends on the manner in which the time-share project is marketed.<sup>103</sup> That is, control

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98. ILL. ANN. STAT. ch. 30, para. 731(a) (Smith-Hurd 1992).

99. HENZE, *supra* note 40, § 6.01.

100. *Id.*

101. Pollack, *supra* note 3, at 288.

102. Mooz, *supra* note 8, at 298.

103. HENZE, *supra* note 40, § 6.02[1].



over time-share management is directly related to whether the project is classified as non-ownership, quasi-ownership, or fee-ownership time-share interests.<sup>104</sup> In a non-ownership setting, control over management remains with the developer.<sup>105</sup> In a quasi-ownership setting, control over management may vary depending upon the circumstances of the arrangement.<sup>106</sup> Finally, in a fee-ownership setting, control over management rests with the time-share owners themselves.<sup>107</sup>

Similar to the claims of high-pressured sales tactics, claims of mismanagement have plagued the time-share industry. In 1992, industry observers estimated that as many as forty percent of all time-share resorts in the United States suffered from management problems.<sup>108</sup> Currently, mismanagement is the single most important problem facing the time-share industry.<sup>109</sup> Not only is the industry troubled with unqualified managers, but also, management problems are occurring as a result of embezzlement and other fraudulent schemes.<sup>110</sup>

### *E. Wisconsin's Regulation of Time-Share Management*

Not surprisingly, several states, including Wisconsin, have regulations that govern the management of time-share properties. Subchapter III of Chapter 707 of the Wisconsin Statutes on Time-Share Ownership is specifically directed at regulating and controlling time-share management.

Like the sections regulating the actions of the time-share developer, the Wisconsin legislature, in creating subchapter III, has attempted to protect Wisconsin's time-share purchasers. Specifically, subchapter III is

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104. *Id.*; See *infra* notes 156-160 and accompanying text.

105. HENZE, *supra* note 40, § 6.02(1). Since the developer retains the fee interest in the project, the developer also retains control over the management of the project. *Id.*

106. *Id.* § 6.02(3).

107. *Id.* § 6.02(4). The majority of time-share resorts in the United States are not controlled or managed by the developer. Dougherty, *supra* note 29, at 28. After all the units in a development have been sold, the developer will usually turn operations over to a board of directors consisting of owners of individual units. *Id.* Moreover, because unit owners in a specific development typically come from all over the country, owner associations often times decide to hire property managers. *Id.*

108. Dougherty, *supra* note 29, at 28. William E. Sanborn, chief of the Florida Bureau of Time Shares stated, "There are an awful lot of resorts doing fine and an awful lot of happy owners, but management problems are mounting fast for a lot more of these properties." *Id.*

109. *Id.*

110. *Id.* Phillip Fisher, chief of the North Carolina Real Estate Commission and president of the National Association of Real Estate License Law Officials, stated, "In most cases where there are problems, there are unqualified managers, but there are many, many instances of embezzlement." *Id.*

designed to better protect the time-share purchaser from the perils of mismanagement.

By enacting this subchapter, the Wisconsin legislature has granted the Wisconsin time-share owner broad management powers, including the ability to organize an association of unit owners; to adopt, amend, and repeal bylaws; and to implement initiatives, referendums, and recalls.

Section 707.30 sets forth the procedures for establishing a managing entity for a time-share property in Wisconsin.<sup>111</sup> Because section 707.03 states that a grant of a time-share estate creates a fee simple absolute interest,<sup>112</sup> section 707.30 mandates that the developer establish an association to govern the time-share property in instances where there are greater than twelve time shares in a time-share property.<sup>113</sup> For additional protection, 707.30(2) requires that the membership of this association shall consist exclusively of the time-share owners.<sup>114</sup>

The Wisconsin legislature further regulated the management powers by requiring that such powers be exercised by an elected board of directors.<sup>115</sup> While the statute permits the developer to appoint or remove members of the board of directors, this power is limited by the requirement that time-share owners elect a majority of the board members once certain sale criteria are met. Also, the developer may not remove a board member elected by the time-share owners.<sup>116</sup>

Section 707.30(5) provides a detailed listing of the managing powers of the association.<sup>117</sup> Included among these powers is the right to adopt, amend, and repeal bylaws; to employ and dismiss employees, agents, and independent contractors; to make contracts and incur liabilities; to regulate the use, maintenance, repair, replacement, and modification of the time-share property; and to make additional improvements to the time-share property.<sup>118</sup>

The Wisconsin legislature provided the time-share owner with additional protection by providing owners with the power to implement ini-

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111. WIS. STAT. § 707.30 (1989-90).

112. *Id.* § 707.03 (1989-90).

113. *Id.* § 707.30(2). In instances where there are 12 or fewer time shares, three or more time-share owners may form an association to manage the property. *Id.* § 707.30(2)(b).

114. *Id.* § 707.30 (emphasis added).

115. *Id.* § 707.30(4).

116. *Id.* § 707.30(4)(b)(c).

117. *Id.* § 707.30(5).

118. *Id.* § 707.30(5).

tatives, referendums, and recalls.<sup>119</sup> Under section 707.39, time-share owners are given broad powers to amend the project instrument.<sup>120</sup> Further, this statute gives the time-share owners the authority to discharge a manager through a recall procedure.<sup>121</sup>

Section 707.35 further protects the time-share owner by setting forth mandatory insurance requirements.<sup>122</sup> Specifically, the managing entity is charged with maintaining property and liability insurance.<sup>123</sup> The managing entity is also required to notify owners if such insurance is no longer reasonably available and to make copies of the insurance policies available for inspection.<sup>124</sup> Moreover, section 707.35 places a general duty on the managing entity to promptly replace or repair any time-share property that is damaged.<sup>125</sup>

Finally, the Wisconsin legislature set forth the parameters for tort and contract liability of the developer, the association, and time-share owner. Specifically, section 707.34 states that a contract and tort actions may be brought against the developer, the association, or the time-share owner.<sup>126</sup> Moreover, the statute prohibits the practice of precluding a time-share owner from bringing a tort or contract action simply because the individual is an owner, member, officer, or director of the association.<sup>127</sup>

#### *F. Additional Legislative Proposals*

Subchapter III reflects the Wisconsin legislature's concerns about the potential for mismanagement of time-share properties. Time-share management is an integral part of the industry, and the Wisconsin legislature has responded by enacting extensive legislation. Despite these provisions, many other significant issues remain.

First, because claims of embezzlement have continued to trouble the time-share industry, a statute that compels the managing entity of a time-share project to provide a detailed annual accounting of its income and expenditures may be warranted. Section 721.13 of Florida's Real Estate Time-Share Plans requires management to arrange for an annual

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119. *Id.* § 707.39 (1989-90).

120. *Id.* § 707.39(4m).

121. *Id.* § 707.39(7).

122. *Id.* § 707.35 (1989-90).

123. *Id.*

124. *Id.* § 707.35(2)(2m).

125. *Id.* § 707.35.

126. *Id.* § 707.34(1)-(2) (1989-90).

127. *Id.* § 707.34(1)(c).

independent audit of its books and financial records and further mandates that the results of the audit be made available to officers of the association and the time-share owners.<sup>128</sup>

Second, section 707.36 of the Wisconsin Statutes should be modified. This section, which governs the disposition of surplus funds, provides broad discretion for time-share associations.<sup>129</sup> Unless otherwise stated in the time-share instrument, section 707.36 gives the association the power to determine the manner in which surplus funds will be utilized.<sup>130</sup> Such power is inherently dangerous and could foster mismanagement. Although all the owners of a time-share property are given the right to actively participate in the decision-making process, in reality, such decisions are likely to rest with association board members who time-share developers or management companies have lobbied into power.

Finally, the Wisconsin legislature should adopt a provision similar to that of section 721.13(5) of Florida's Real Estate Time-Share Plans.<sup>131</sup> Under that section, any managing entity or employee or agent of a managing entity, who willfully misappropriates time-share funds or property, is guilty of a third-degree felony.<sup>132</sup> Punishment for such an offense includes imprisonment for up to five years<sup>133</sup> and fines of up to \$5,000.<sup>134</sup> By enacting a comparable provision, the Wisconsin legislature would advance an aggressive measure aimed at eliminating those members of the time-share industry who engage in improper and unlawful behavior.

## V. SELLING TIME SHARES IN WISCONSIN: FEDERAL AND STATE RESTRICTIONS

### A. *Problems Encountered in Selling and Marketing Time Shares*

Time-share developers are notorious for employing aggressive and deceptive sales tactics.<sup>135</sup> Marketers often bait consumers with phony gifts or worthless discounts on goods and services.<sup>136</sup> Once the consumer is on the premises, the seller utilizes a high-pressure sales pitch in an attempt to induce the prospect into purchasing based on emotion,

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128. FLA. STAT. ANN. § 721.13(3)(e) (West 1988).

129. WIS. STAT. 707.36 (1989-90).

130. *Id.*

131. FLA. STAT. ANN. § 721.13(5) (West 1988).

132. *Id.*

133. *Id.* § 775.082(3)(d).

134. *Id.* § 775.083(1)(c).

135. See Mooz, *supra* note 8, at 293.

136. *New Law Could Ease Time-Share Problems*, CHI. TRIB., Sept. 11, 1988, at 2B.

rather than on careful research concerning the developer of the project.<sup>137</sup>

These tactics are not reserved for the affluent California crowd or the unsuspecting retiree in Florida. The Wisconsin Attorney General has cited Wisconsin time-share resorts for deceiving consumers through the use of such tactics.<sup>138</sup> In recent years, consumers have filed over 1,500 complaints with the Wisconsin Office of Consumer Protection.<sup>139</sup>

### B. *Applicable Federal Regulations to Deceptive Time-Share Sales Tactics*

The current federal regulatory scheme of time-share estates is characterized by duplicative language and uncertainty in application. This has resulted from the government's attempt to conform time-share regulation to existing regulations rather than to address the unique problems posed by the growth of the time-share industry. Numerous federal statutes apply to time-share developers, including the Federal Trade Commission Act, the "holder in due course" rule, the Truth in Lending Act, the Equal Credit Opportunity Act, and the Federal Mail Fraud Act.<sup>140</sup>

The Federal Trade Commission (the "FTC") regulates the practices of individuals or corporations engaged in the sale of land in interstate commerce.<sup>141</sup> FTC investigations traditionally have focused on two aspects of the time-share sales process. First, the FTC investigates misrepresentations made in connection with the solicitation of customers.<sup>142</sup> Second, the FTC investigates material misrepresentations and failure to disclose material facts.<sup>143</sup> Although the FTC has investigated time-share

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137. Mooz, *supra* note 8, at 293-94.

138. Numerous lawsuits have been filed against Wisconsin based time-share developers. The suits have claimed that developers failed to disclose conditions, restrictions, and additional costs or premiums in its promotional mail solicitations; misrepresented the cost of memberships; created a false sense of urgency to purchase on the first visit; and used unconscionable high-pressure sales tactics. *Wisconsin Regional News*, UPI, May 12, 1986, available in LEXIS, Nexis Library, UPI File.

139. See *New Law Could Ease Time-Share Problems*, *supra* note 136 and accompanying text.

140. See generally Gunnar, *Resort Time-Sharing: Current Regulation . . . and the Alternatives*, CORNELL H.R.A., Nov. 1978, at 28 (discussing additional federal enactments that are potentially applicable to time shares).

141. Rohan & Furlong, *supra* note 62 at 25; see also 15 U.S.C. §§ 41-58 (1976).

142. Rohan & Furlong, *supra* note 62, at 26.

143. *Id.*

developers and marketers for alleged violations,<sup>144</sup> the FTC has not pursued enough violations to make them a serious threat to developers.

A second federal control on the sale of time shares is the "holder in due course" rule.<sup>145</sup> This rule applies to any time-share contract granting installment credit. The rule requires that the following notice appear on any installment contract:

ANY HOLDER OF THIS CONSUMER CREDIT CONTRACT IS SUBJECT TO ALL CLAIMS AND DEFENSES WHICH THE DEBTOR COULD ASSERT AGAINST THE SELLER OF GOODS OR SERVICES OBTAINED PURSUANT HERETO OR WITH THE PROCEEDS HEREOF. RECOVERY HEREUNDER BY THE DEBTOR SHALL NOT EXCEED AMOUNTS PAID BY THE DEBTOR HEREUNDER.<sup>146</sup>

Failure to include this notice constitutes an unfair trade practice.

Time-share sellers are also bound by the provisions of the Truth in Lending Act<sup>147</sup> and the Equal Credit Opportunity Act.<sup>148</sup> These acts mandate that certain disclosures be made to the prospective purchaser prior to the sale and that the extension of credit cannot be denied based on sex, race, age, or marital status.

Finally, the Federal Mail Fraud Statute restricts time-share sales tactics.<sup>149</sup> This statute regulates the mailing of any fraudulent or misleading material via the postal service.<sup>150</sup>

### C. Wisconsin's Regulation of Time-Share Sales

Wisconsin has enacted legislation designed to protect consumers from deceitful sales tactics.<sup>151</sup> These provisions comprehensively restrict the sales practices that time-share sellers may employ.

Section 707.55 prohibits certain advertising and sales practices.<sup>152</sup> Specifically, section 707.55 prohibits time-share developers, marketers, and salespersons from (1) making false, deceptive, or misleading state-

144. See generally *In re Market Development Corporation*, 95 F.T.C. 100 (1980); see also *In re Matter of Horizon Corp.*, 97 F.T.C. 464 (1982).

145. HENZE, *supra* note 40, at 5-25.

146. 16 C.F.R. § 433.2(a) (1991); HENZE, *supra* note 40, § 5.04[2][a], at 5-25.

147. 15 U.S.C. §§ 1601-1667e (1991).

148. *Id.* § 1691 (1991).

149. 18 U.S.C. § 1341 (1991).

150. *Id.*; see generally *GLM Corp. v. Klein*, 684 F. Supp. 1242 (S.D.N.Y. 1988).

151. See generally *Wis. STAT. §§ 707.54-.55* (1989-90).

152. *Id.* § 707.55 (1989-90).

ments;<sup>153</sup> (2) asserting that incentives are only available to a prospective purchaser for a specific time period—a common high-pressure sales tactic;<sup>154</sup> (3) misrepresenting the resale value of a time-share unit;<sup>155</sup> (4) representing a time-share purchase as a financial investment;<sup>156</sup> and (5) misrepresenting the estimated length of any sales presentation.<sup>157</sup> Further, section 707.55 mandates that developers include a disclosure on all advertising materials and that promotional gifts be accompanied with the approximate charges the consumer will incur in connection with the prizes.<sup>158</sup>

The Wisconsin legislature also has set forth certain minimum requirements that must appear on all sales contracts. Every contract must contain the date, the name of the developer, the name of any sales agent, the total financial obligations of the purchasers, the projected date of the development's completion, and a description of the purchaser's rights.<sup>159</sup>

Section 707.54 further regulates the labelling of promotional materials.<sup>160</sup> This section prohibits developers from promoting improvements on the property that are not yet built and that need not be built.<sup>161</sup>

In an attempt to counteract aggressive sales tactics, the Wisconsin Time-Share Act also provides for a five-day cooling-off period.<sup>162</sup> This provision allows purchasers to cancel a sales contract until midnight of the fifth business day following the contract date.<sup>163</sup> The purchaser can request this cancellation without penalty.<sup>164</sup>

In addition to regulating sales tactics, Wisconsin recently enacted legislation that regulates the qualifications of time-share salespersons.<sup>165</sup> These enactments are designed to ensure that time-share sellers possess the skills necessary to understand the complex issues involved in time-share sales. Section 452.025 requires that all time-share salespersons be licensed by the state.<sup>166</sup>

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153. *Id.* § 707.55(1).

154. *Id.* § 707.55(2).

155. *Id.* § 707.55(3).

156. *Id.* § 707.55(4).

157. *Id.* § 707.55(7).

158. *Id.* § 707.55(9)-(10).

159. *Id.* § 707.46 (1989-90).

160. *Id.* § 707.54 (1989-90).

161. *Id.*

162. *Id.* § 707.47(2) (1989-90).

163. *Id.*

164. *Id.* § 707.47(6). An additional protection for buyers is found in § 707.06. This section indicates the criteria that courts will employ to determine if a contract is unconscionable.

165. *Id.* § 452.025 (1989-90).

166. WIS. STAT. § 452.025 provides in pertinent part:

### D. *Proposals for Clarification and Improvement*

Chapter 707 and section 452.025 provide a comprehensive regulatory scheme of time-share sales. However, the Wisconsin legislature could take additional steps to protect against further abuses.

One such measure, which has been adopted by several jurisdictions, is the requirement that developers file all promotional materials with a regulatory body within ten days prior to their use.<sup>167</sup> Nevada further regulates this area by requiring that all advertisements be approved by the Real Estate Division prior to being displayed to the public.<sup>168</sup>

A second measure, which was advanced by the National Time Sharing Council Model Act<sup>169</sup> and subsequently adopted by a number of jurisdictions,<sup>170</sup> includes the formation of an administrative agency with authority to directly oversee time-share sales.<sup>171</sup> Such an agency would review all submitted documents and have the knowledge and ability to ensure full disclosure.<sup>172</sup>

Third, Wisconsin's licensing requirements do not adequately sanction developers who employ deceptive sales tactics. Although section 452.17 provides for the sanctioning of the individual salesperson, the sanction-

TIME-SHARE SALESPERSONS. (1)(a) A person desiring to act as a time-share salesperson shall submit to the department an application for a certificate of registration.

(b) The application for registration as a time-share salesperson shall be in the form prescribed by the department and shall include all of the following:

1. The name and address of the applicant.
2. The prior occupations of the applicant.
3. Certification from the licensed broker employing the applicant that the applicant is competent to act as a time-share salesperson.
4. Any other information which the department reasonably requires to enable it to determine the competency of the person to transact business as a time-share salesperson in a manner which safeguards the interests of the public. . . .

(2) A person shall not engage in the business or occupation of, or advertise or hold himself or herself out as, a time-share salesperson unless the person is registered under this section or licensed under s. 452.09.

*Id.*

167. Pierce & Mann, *supra* note 5, at 48.

168. NEV. REV. STAT. § 119A.370 (1993).

169. NATIONAL TIMESHARING COUNCIL MODEL ACT, art. II. This act was drafted by the National Timesharing Council for the American Land Development Association and the National Association of Real Estate License Law Officials. Copies can be obtained by writing the National Timesharing Council, 604 Solar Building, 1000 16th Street, N.W., Washington, D.C. 20036.

170. *E.g.*, VA. CODE ANN. §§ 55-390 (Michie 1993); *see also* FLA. STAT. ANN. § 721.07 (West Supp. 1988).

171. Barron, *supra* note 86, at 906.

172. *Id.*



ing of ill-motivated developers is noticeably absent.<sup>173</sup> This omission allows developers to continue to employ unethical sales tactics.

## VI. BUYING TIME SHARES IN WISCONSIN AND ELSEWHERE: APPLICABLE LAWS AND REGULATIONS

### A. *Buying Time Shares*

One of the first considerations for prospective time-share purchasers is to determine how the particular jurisdiction classifies time-share ownership rights. The manner in which a jurisdiction classifies time-share interests can have an effect on the rights and liabilities of the individual participants.<sup>174</sup>

As we discussed in Part II, B above, time-share interests fall broadly into two classifications: fee interests and non-fee interests.<sup>175</sup> Under fee interests, the developer conveys recordable legal title to the purchaser. Time-span ownership and interval ownership are two types of fee interests. In contrast, non-fee ownership does not convey legal title to the property; the owner possesses only those rights granted by the developer.<sup>176</sup> Vacation licenses, vacation leases, and club membership time shares are several of the available non-fee interests.

The advantages of possessing a fee interest in property include tax deductions and the potential for equity accumulation. Under these forms of ownership, the owner holds an interest in the real property, including all of the rights inherent in the ownership of real property<sup>177</sup>—the owner has the right to freely transfer the property by sale, devise, bequest, or gift.<sup>178</sup>

The advantages of possessing a non-fee interest in the time-share unit include the avoidance of upkeep costs, the avoidance of personal liability, the avoidance of disposing of the property at the end of its economic life, and the avoidance of property taxes.<sup>179</sup>

Although the various forms of ownership have certain advantages over the others, one particular drawback to non-fee ownership interests deserves to be addressed. The Security and Exchange Commission is

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173. WIS. STAT. § 452.17 (1989-90).

174. See *supra* note 106 and accompanying text for a discussion of how classifications can affect time-share management.

175. Pollack, *supra* note 3, at 284.

176. *Id.* at 285.

177. Pierce & Mann, *supra* note 5, at 12.

178. HENZE, *supra* note 40, § 3.04(3)[6].

179. Pierce & Mann, *supra* note 5, at 27.

much more likely to deem a non-fee interest a security, thus requiring registration<sup>180</sup> in compliance with the Federal Securities Act of 1933<sup>181</sup> and the Securities and Exchange Act of 1934.<sup>182</sup> Compliance with these acts can be costly<sup>183</sup> and failure to comply leads to harsh civil and criminal sanctions.<sup>184</sup>

A second concern that purchasers undoubtedly will have is whether the time-share development is legitimate—whether the developer will complete the project and provide adequate funding for maintenance and future development. This concern stems from the fact that many time-share units are marketed and sold before they are constructed.<sup>185</sup>

Because of the possibility of fraudulent inducements and embezzlement, a careful purchaser will want to make a thorough inspection of the development's premises.<sup>186</sup> A purchaser will want to ensure that the basic construction is sound, that appliances and furniture can withstand near constant use, and that recreational amenities are large enough to accommodate the project.<sup>187</sup>

Purchasers also will want to examine the project documentation. Purchasers should review documentation regarding sales of the time-share units, the enabling and structuring documentation (the time-share instrument), and documentation regarding management of the development.<sup>188</sup> Moreover, prospective purchasers will want to ensure that they are protected, to some extent, against oral representations that were not incorporated into the final written agreement.

A third consideration that prospective purchasers are likely to entertain is the extent of remedies available if the developer breaches the

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180. For a more detailed explanation of the applicable securities laws, see generally SEC v. W.J. Howey Co., 328 U.S. 293 (1946); United Housing Foundation, Inc. v. Forman, 421 U.S. 837 (1975); Joseph W. Byrne, *Securities Regulation of Time-Sharing Resort Condominiums*, 7 REAL EST. L.J. 3 (1978); Stewart M. Bloch, *Regulation of Time-sharing*, 60 U. DET. J. URB. L. 23 (1982).

181. Federal Securities Act of 1933, ch. 38, tit. I, § 1, 48 Stat. 881 (1934) (current version at 15 U.S.C. §§ 77a-77bbb (1990)).

182. Securities and Exchange Act of 1934, ch. 404, § 1, 48 Stat. 881 (1934) (current version at 15 U.S.C. § 77b(1) (1990)).

183. Compliance can cost more than \$20,000 to \$100,000 per development. HENZE, *supra* note 40, § 5.02[8].

184. *Id.* § 5.02[1].

185. *E.g.*, Federal Trade Commission v. Paradise Palms Vacation Club, No. C811160V (W.D. Wash. Sept. 30, 1981) (the promoters sold over 3,000 time-share interests before construction and built only enough for 20% of the buyers).

186. See generally Pierce & Mann, *supra* note 5, at 29.

187. HENZE, *supra* note 40, § 8.04[3].

188. *Id.* § 8.04[5]. These documents are also available from the register of deeds in the county where the development is located. See *supra* note 91 and accompanying text.

time-share contract. First, purchasers may want to ensure that they have the right to cancel agreements with the developer upon the developer's breach. Second, purchasers may want to ensure that they are not prohibited from seeking punitive damages for wilful violations. Finally, purchasers may want to consider to what extent they, or other purchasers, may exercise a right to partition.<sup>189</sup>

### B. State Restrictions of Time-Share Purchases

Wisconsin's enactment of Chapter 707 evidences a legislative intent to clarify existing complexities regarding classification of time-share interests and to provide full disclosure of applicable information.

Wisconsin limits time-share ownership to a fee ownership scheme. Section 707.03 defines a time-share ownership estate as a fee simple absolute interest in real property;<sup>190</sup> section 707.04 prohibits the sale of time-share licenses.<sup>191</sup> Moreover, section 707.11 states that any time share created in accordance with Chapter 707 is not a security and is not subject to securities act compliance.<sup>192</sup>

Wisconsin mandates that developers conform to substantial disclosure requirements. Developers must provide a general description of the time-share property and more specific information relating to the individual time-share units, including the types and quantities of units.<sup>193</sup> Developers must also identify the managing entity and provide a current balance sheet for the association.<sup>194</sup> Insurance coverage and the extent to which the developer has secured financial arrangements for the completion of the project are also required disclosures.<sup>195</sup>

Not only does Wisconsin mandate that certain disclosures be made to purchasers, but Wisconsin also protects purchasers from losing deposits if a project fails. Section 707.49 states that developers must place an amount equal to fifty percent of each purchaser's deposit in an escrow account.<sup>196</sup> Each deposit must remain in escrow until the project is complete or the purchaser cancels the sales contract.<sup>197</sup>

189. See generally Pierce & Mann, *supra* note 5, at 13, 52. The right to partition is an interesting issue in relation to time-share developments; HENZE, *supra* note 40, § 3.03(2)(b)[i].

190. WIS. STAT. § 707.03 (1989-90).

191. *Id.* § 707.04 (1989-90).

192. *Id.* § 707.11 (1989-90).

193. *Id.* § 707.41 (1989-90).

194. *Id.* § 707.41(4)(e)-(f).

195. *Id.* § 707.41(4)(p)-(r).

196. *Id.* § 707.49(3) (1989-90).

197. *Id.*

Wisconsin's statutory scheme contains provisions dealing with both express and implied warranties. Section 707.53 provides that any affirmation of fact or promise that relates to the time share, if relied on by the purchaser, creates an express warranty.<sup>198</sup> Section 707.53 (2) also creates certain implied warranties. For example, the developer has a duty to maintain the property, except for normal wear and tear, until the buyer takes possession of the unit.<sup>199</sup>

Developers also have an obligation to complete all improvements that are described in the time-share instrument.<sup>200</sup> This provision protects buyers from unfinished developments and places a burden on the developer to conform to initial projections.

The Wisconsin legislature permits a time-share interest owner to pursue any applicable private remedy; remedies are not limited.<sup>201</sup> Moreover, section 707.05 indicates that a buyer cannot waive or otherwise vary the rights conferred under the Act.<sup>202</sup>

Section 707.23 recognizes the need to address the problem created by the possibility of partition. This section prohibits any action for partition except in certain well-defined circumstances.<sup>203</sup>

### C. *An Analysis of Wisconsin's Regulatory Scheme*

Wisconsin's enactment of Chapter 707 resolves many of the inherent complexities and potential problem spots spurred by the time-share interest. The Chapter's scope is broad enough to avoid problems in classifications, yet specific enough to exclude hotels and other vacation options. Moreover, Wisconsin has exhibited a policy to protect purchasers and to legitimize the Wisconsin time-share industry.

As with any legislation, room for improvement exists in Wisconsin's scheme relating to purchasers of time shares. First, Wisconsin could provide for harsher damages for wilful violations of the time-share provisions. For example, a wilful violation could subject the violator to treble damages. Second, state auditors could be responsible for periodically checking the health of time-share projects. Alternatively, the legislature could enact a provision requiring the developer or managing entity to allocate association fees to an independent auditor for this purpose.

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198. *Id.* § 707.53(1)(a) (1989-90).

199. *Id.* § 707.53(2). For a complete listing of implied warranties see *id.*

200. *Id.* § 707.56 (1989-90).

201. *Id.* § 707.57 (1989-90).

202. *Id.* § 707.05 (1989-90).

203. *Id.* §§ 707.23-24 (1989-90).

Although Wisconsin does require such allocation for comprehensive disclosure, this disclosure may not necessarily be helpful without the assistance of an attorney or accountant. Moreover, because of the tremendous opportunity for misappropriation, an annual independent audit could protect purchasers from future problems.

## VII. REALES AND EXCHANGES OF TIME-SHARE UNITS

### A. *Problems Encountered in the Resale of Time Shares*

The time-share resale market is plagued by a variety of problems.<sup>204</sup> A weak resale market has resulted due to an influx of new developments, a glut of existing time-share units,<sup>205</sup> and difficulty in locating prospective purchasers.<sup>206</sup>

Although developers would like to claim that an initial time-share purchase is a wise financial investment, the figures simply do not support this claim.<sup>207</sup> The state of the market usually necessitates that resales require a substantial discount from the original purchase price.<sup>208</sup>

Another problem encountered by prospective resale purchasers is a lack of financing. Although a developer will usually have financing options available to the initial purchaser, subsequent buyers do not enjoy the same options.<sup>209</sup> Most conventional lenders refuse to finance time shares on a retail basis. These lenders will not accept a time share as security will offer only an unsecured personal loan with interest rates significantly higher than conventional mortgage rates.<sup>210</sup>

As a result, many sellers have resorted to secondary market brokers.<sup>211</sup> Secondary brokers, which claim to have a worldwide network of agents, often charge a substantial listing fee and their resale results are

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204. See generally Dougherty, *supra* note 29.

205. It is estimated that there are currently 870,000 unwanted time-share units choking the resale market. Andrée Brooks, *Talking Timeshares: When It's Time To Sell*, N.Y. TIMES, Sept. 13, 1992, § 10 (Real Estate), at 5.

206. HENZE, *supra* note 40, § 2.05[3]. According to Condolink, an Omaha firm that handles resales, time-share units will be on the market for at least 21 months and will only receive 30 to 60 percent of the original purchase price. Thompson, *supra* note 31, at 1.

207. This is also the reason why the Wisconsin legislature forbids developers and sellers from referring to time-share sales as a financial investment. See WIS. STAT. § 707.55(1)(1989-90).

208. *Id.* According to one survey, 58% of all time-share owners in the United States are attempting to sell their units. Dougherty, *supra* note 29, at 28. Many units that purchasers paid up to \$12,000 are now going for \$2,000. *Id.*

209. Brooks, *supra* note 205, at 5.

210. HENZE, *supra* note 40, § 2.05[6].

211. Brooks, *supra* note 205, at 5.

less than optimistic.<sup>212</sup> In fact, many commentators now characterize the resale industry as the latest scam—“[resale agents] use the thousands of dollars from listing fees to advertise for even more sellers.”<sup>213</sup> Several time-share resale brokerages have recently been cited for racketeering and deceptive sales tactics.<sup>214</sup>

### B. Wisconsin's Approach to Time-Share Resale Regulation

Wisconsin's Time-Share Ownership Act minimally regulates the resale of time-share units; only section 707.48 directly regulates time-share resales. This section was adopted from provisions of the Uniform Model Real Estate Time Share Act.<sup>215</sup> These restrictions are designed to ensure that prospective purchasers are given full disclosure of hidden costs and potential liability prior to a purchase.

Section 707.48 requires that the reselling owner and the managing entity of the time share furnish prescribed information to the new purchaser.<sup>216</sup> The reselling owner is required to provide a copy of the time-share instrument and a certificate disclosing the following information:

- (a) The effect on the proposed transfer of any right of first refusal or other restraint on transfer of all or any portion of the time share.
- (b) The amount of the periodic time-share liability and any unpaid time-share expense or special assessment or other sums currently due and payable from the seller.
- (c) Any other fees payable by time-share owners.
- (d) Any judgments or other matters that are or may become liens against the time share or the time-share unit and the status of any pending suits that may result in those liens.<sup>217</sup>

The managing entity is required to furnish a certificate indicating that the time-share owner is not liable for any time-share liability.<sup>218</sup> Purchasers also have a five day cancellation period for resale purchases.<sup>219</sup>

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212. An average fee is approximately \$400. *Id.* One consumer was contacted in March 1991 by an agency in Fort Lauderdale, Florida. After the agency claimed that it could resell her unit for \$15,000, she quickly paid a listing fee of \$400. Eventually, since no offers were forthcoming, she lowered her asking price to \$7,000. “And I still haven’t had one offer.” *Id.*

213. *Id.*

214. Dougherty, *supra* note 29, at 28.

215. MODEL REAL EST. TIME-SHARE ACT § 4-107, 7B U.L.A. 403 (1982).

216. WIS. STAT. § 707.48 (1989-90).

217. *Id.* §§ 707.48(1)(a)-(d) (1989-90).

218. *Id.* § 707.48(3).

219. *Id.* § 707.48(3)(c).

### C. *Analysis Of Wisconsin's Resale Regulation*

To maintain the legitimacy of the time-share industry, effort must be taken to improve the resale market. Currently, Wisconsin requires that sellers fully disclose information that purchasers need in order to understand their obligations and financial commitments. Although full disclosure is a necessary ingredient to a sound resale market, Wisconsin could take additional steps to prevent abuses.

One such step is increased regulation of resale brokers. Commentators are now classifying the resale market as the latest time-share scam. To avoid the escalation of these problems, it is important for regulators to protect consumers. Because most resale brokerage firms are based in traditional time-share communities such as Florida and California, they may not be licensed to operate in Wisconsin. Yet, these firms solicit Wisconsin owners for an up-front resale fee. State authorities, to the extent possible, must carefully monitor such mail-order companies to ensure proper licensure and fair dealing.

### D. *Time-Share Exchange Programs*

One aspect of time-share ownership that is appealing to potential buyers is the possibility of exchanges with other resorts.<sup>220</sup> Exchange programs allow owners to trade times and locations. Exchanges provide the flexibility that is characteristic of time-share ownership. Exchange networks generally are not connected with the developer of the specific time-share development. Rather, there are organizations specifically designed for this purpose.<sup>221</sup> However, the developer is responsible for negotiating with the networks to have the development accepted into the exchange network.<sup>222</sup>

An initial charge usually is levied against a development to become a member of an exchange program.<sup>223</sup> This charge is borne initially by the developer, who passes the cost on to the owner in the initial sales price. Once the development is included as a member resort, the time-share

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220. Pollack, *supra* note 3, at 289.

221. HENZE, *supra* note 42, § 8.04(b)(5)(d).

222. Barron, *supra* note 88, at 868 n.19. Resort Condominiums is the largest of the exchange networks, with approximately 700 developments and 320,000 subscribers. *Id.* Interval International is the second largest, with approximately 300 developments and 155,000 subscribers. *Id.* Vacation Homes is the third largest, with approximately 140 Horizons developments. *Id.*

223. Pollack, *supra* note 3, at 289. These fees can range from \$6,300 to \$8,700. Barron, *supra* note 68, at 868 n.20.

owners at that resort are eligible to become individual members.<sup>224</sup> Thereafter, members are required to pay an annual fee. An additional fee is charged if the owner requests an exchange.<sup>225</sup>

### *E. Wisconsin's Regulation of Exchange Programs*

Wisconsin's requirements regarding exchange networks is substantial. Section 707.42 requires a developer to make full disclosure of that developer's agreement with the exchange network and of all costs that must be borne by the owner of the unit to continue membership.<sup>226</sup> Other disclosure requirements include:

- a complete description of how to participate in the program;
- the name and address of each time-share development included in the exchange network;
- whether the time-share unit may be withdrawn from the program; and
- the percentage of time-share owners who received the right to use a time-share property, expressed as a percentage of the time-share owners who properly requested such use.<sup>227</sup>

These provisions adequately inform purchasers of their rights and obligations relating to exchange programs. With the proper information in hand, the decision is rightfully on the individual as to whether she wishes to continue membership in the exchange program.

## VIII. CONCLUSION

Wisconsin's enactment of Chapter 707 evidences a legislative movement to confront the problems that have troubled the time-share industry. The Wisconsin legislature has attempted to cure these problems through a series of substantial disclosure requirements, consumer protection laws, and managerial safeguards. Further, Wisconsin has addressed the complexities raised by the growing time-share industry by classifying the time-share ownership interest as a fee simple interest and by setting forth disclosure requirements for time-share resales.

Time-share ownership continues to grow at record levels. Despite the inherent problems in time-share ownership, the numerous benefits of ownership combined with the economic restrictions of owning a second home have made time-share purchases an attractive alternative. Be-

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224. Barron, *supra* note 86, at 868 n.20.

225. *Id.*

226. WIS. STAT. § 707.42 (1989-90).

227. For a full listing, see generally WIS. STAT. § 707.42.



cause this trend is likely to continue, the measures taken by the Wisconsin legislature will protect the viability of the state's time-share industry—protection that will inure to the benefit both of time-share owners and Wisconsin's tourism industry.