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The North Carolina Time Share Act

Whether motivated by the desire for a less expensive vacation, a second home, a hedge on inflation, or a calculated investment, over a quarter-million Americans last year each paid between four thousand and twenty-five thousand dollars for a week of vacation time during each of the next five, ten, thirty, or more years.¹ Developers in over 900 resort spots sold each unit to as many as fifty purchasers, at profits far greater than those on traditional condominium sales.² Consequently, resort timesharing has become the fastest growing sector of the vacation and resort industries. With sales increasing from fifty million dollars in 1975 to an estimated one and one-half billion dollars in 1983,³ timesharing has grown from a clever innovation to a self-contained industry, with numerous variations,⁴ questionable sales practices, and a maze of regulatory controls.⁵

With the North Carolina Time Share Act of 1983,⁶ North Carolina became the fourteenth state to pass an act directly regulating the timeshare industry.⁷ Although such legislation varies considerably from state to state, North Carolina's differs from the majority in one most significant feature: it has declared all forms of timeshares, "whether or not coupled with a freehold estate or an estate for years,"⁸ to be interests in real property.⁹ After briefly describing the development of timesharing and its various forms, this note focuses on the methods employed in controlling timeshare sales and operation, and discusses the ramifications of North Carolina's Act.

A classic example of the ingenuity of the entrepreneur, timeshares developed in response to the needs of both vacation home suppliers and consumers. The inflationary costs of land and construction in the early 1970s and the increasing administrative expenses of complying with condominium regulations¹⁰ had led to declining profit margins for condominium developers.¹¹ By employing the "basic principle of subdivision economics" through timeshar-

1. Daniels, *When a Week is Realty*, N.Y. Times, Oct. 9, 1983, § 12, at 51, col. 3. In addition to the purchase price of \$4,000 to \$25,000, the timeshare owner must pay yearly maintenance and facility fees, maid service fees, and taxes. *Id.* at 51, col. 2.

2. *Id.* at 52, col. 4. This is true despite the additional costs incurred in selling the same unit 50 times.

3. *Id.*

4. See *infra* notes 19-37 and accompanying text.

5. See generally Gunnar, *Regulation of Resort Time Sharing*, 57 OR. L. REV. 31 (1977).

6. 1983 N.C. Adv. Legis. Serv. 401 (codified at N.C. GEN. STAT. §§ 93A-39 to -57 (Cum. Supp. 1983)).

7. Alabama, Arizona, Connecticut, Florida, Georgia, Hawaii, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Tennessee, and Virginia also have timeshare acts. For statutory cites, see *infra* note 85.

8. N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983).

9. *Id.* § 93A-42.

10. See *infra* note 77. Condominium sales also are often considered sales of securities, and subjected to additional regulatory requirements. See Note, *New Ideas in the Vacation Home Market*, 48 ST. JOHN'S L. REV. 1203, 1205-10 (1974).

11. Roodhouse, *Fractional Time Period Ownership of Recreational Condominiums*, 4 REAL ESTATE L.J. 35, 38 (1975).

ing, these developers expected to offset their lost profits by selling "parts" of the condominiums for an aggregate amount greater than the whole.¹²

At the same time timeshares met an increasing consumer demand. Because of increased leisure and mobility¹³ and the need to escape urban nuisances,¹⁴ more middle-class Americans were seeking vacation retreats formerly reserved for the wealthy. The timeshare offered an affordable and flexible form of second-home ownership. With multiple ownership of a unit, purchasers could resolve the affordability problems of condominium ownership while getting exactly what they needed, a "place of their own" for a limited period each year.¹⁵ The practical problems encountered with group purchases of vacation homes could be avoided by employing professional managers to handle scheduling and maintenance.¹⁶ Finally, timeshare plans often enabled purchasers to trade timeshares with owners in other places, further increasing the popularity of timesharing.

A timeshare is the prepurchase of a week's exclusive use¹⁷ of a resort apartment or suite¹⁸ each year for a period ranging from five years to the useful life of the dwelling, or for perpetuity. For descriptive and sometimes regulatory purposes timeshares can be divided into two categories—"fee" and "right-to-use" timeshares.¹⁹ The fee timeshare includes the right to use a unit coupled with an ownership interest in that unit; a right-to-use timeshare involves simply the right to use a unit either by lease or contract, with no ownership interest.²⁰

Four types of fee timeshares correspond to four alternatives for conveying the interest.²¹ A "timespan" estate is held by all the weekly owners of a given

12. *Id.* at 38. Even though the costs of marketing a timeshare project are up to 50% higher than for conventional condominiums, the most expensive part, construction, costs no more. *Id.* at 39. It is estimated that revenues from a timeshare project may be from two and one-half to three times higher than from condominiums. Pollack, *Time-Sharing, or Time Is Money But Will It Sell?*, 10 REAL ESTATE L.J. 281, 287 (1982).

13. Roodhouse, *supra* note 11, at 36. See also Note, *supra* note 10, at 1203-04.

14. Note, *supra* note 10, at 1203.

15. *Id.* at 1210.

16. Gray, *Pioneering the Concept of Time-Sharing Ownership*, 48 ST. JOHN'S L. REV. 1196, 1197-98 (1974).

17. How the period or conditions of the exclusive use is defined varies greatly. North Carolina, for example, defines a timeshare as "a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options." N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983).

18. Timeshares are found not only in resort condominiums, but have expanded to "marinas, recreational vehicle parks, and even to campgrounds, and cities." Daniels, *supra* note 1, at 52, col. 4.

19. Labels for classifications of timeshares vary; "fee" and "right-to-use," as well as other labels used in this note are the most commonly used designations. This multiplicity of nomenclature is one of the primary sources of confusion in the timeshare industry.

20. The proportion of fee and right-to-use timeshare sales is close to 50-50. AM. LAND DEV. ASS'N, RESORT TIME-SHARING FACT SHEET (Oct. 1981).

21. For a complete analysis of the benefits and detriments of each form of fee timeshare, see generally Comment, *Time-Share Condominiums: Property's Fourth Dimension*, 32 ME. L. REV. 181 (1980); E. Peirce & R. Mann, *Time Share Interests in Real Estate: A Critical Evaluation of the Regulatory Environment* 4-29 (1983) (unpublished article from the University of North Carolina at Chapel Hill, School of Business Administration); Pollack, *supra* note 12, at 284-85.

unit as tenants in common, each having a present undivided interest in a fee simple estate.²² As a supplement to the deed, a timeshare declaration is recorded, with restrictive covenants giving each owner the exclusive right to possession for an established period each year.²³ With the second form, the "interval" estate, an estate for years is deeded to each purchaser, with title rotating among the owners; the possessory rights are determined by the rotating title rather than by a separate document.²⁴ The deed also vests a remainder in the purchasers as fee simple tenants in common.²⁵ The third form, the "fee simple" timeshare, grants each purchaser fee simple ownership for a given period each year.²⁶ Although this form avoids the complications of tenancy in common²⁷ and interval ownership,²⁸ it adds the unfamiliar dimension of time to fee simple ownership, which traditionally has been limited to dimensions of breadth, depth, and height.²⁹ Because of its novelty, fee simple timesharing may cause confusion in drafting conveyances and infringe the right to waste, an incident of fee simple ownership.³⁰ Because it defies these conventional property law concepts, fee simple timesharing has been used cautiously and infrequently.³¹ The fourth and newest form of fee timeshare ownership is the timeshare "cooperative," under which the purchasers own stock in a corporation that grants individual use periods through proprietary leases.³² Although this form is not yet widely used, it "appears to have advantages in the areas of financing, taxation, and regulation."³³

The "vacation license" is the oldest of three widely-used types of right-to-use timeshares.³⁴ "Developed primarily as a mechanism to avoid real estate

22. See Comment, *supra* note 21, at 184-85.

23. *Id.* at 186-91.

24. *Id.* at 201-02.

25. *Id.* "At the end of the recurring estates for years, the owners can either reinstate the interval arrangement or seek partition of their interests." *Id.* at 201 n.35.

26. *Id.* at 211. The fee simple timeshare originally was noted in Roodhouse, *supra* note 11, at 41 & nn.19-20.

27. Common problems with tenancy in common include partitioning, allocating the tax burden, enforcing the payment of taxes, and obtaining title insurance. For a complete treatment of these problems, see generally sources listed in *supra* note 21.

28. Problems of interval ownership stem from its similarity to a landlord-tenant arrangement and from the possibility of merger of title. As an estate for years, interval ownership might be treated under the special laws of landlords and tenants, implying developer liability for tort, warranty of habitability, and a nonequity interest for the purchaser. Comment, *supra* note 21, at 202, 204. Although a fee simple remainder might lessen the possibility of landlord-tenant treatment, it raises the possibility for merger of the lesser estate into the greater estate, eliminating the timeshare portion of the grant altogether. *Id.* at 207-10. For a more complete treatment of these issues, see generally sources listed in *supra* note 21.

29. Roodhouse, *supra* note 11, at 48-50.

30. *Id.* at 50-51.

31. E. Peirce & R. Mann, *supra* note 21, at 16.

32. PRACTICING LAW INST., THE LEGAL ASPECTS OF REAL ESTATE TIMESHARING 14 (1982).

33. *Id.* While the Institute does not describe these advantages, this form of ownership would avoid the problems of joint liability for financing and taxes.

34. The North Carolina Act mentions several other forms of right-to-use timeshares—prepaid hotel reservations, limited partnerships, and vacation bonds—which are not described in the literature on timeshares. N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983). The constant development of variations on the timesharing concept is evidenced by the fact that these forms of timeshares were not common when the literature was written.

regulatory agencies and the necessity of using licensed real estate salesmen," this form gives the purchaser the right to use a given unit for a specified portion of each year, for either a number of years or for the useful life of the unit.³⁵ The second form, the "vacation lease," gives the purchaser a leasehold interest in the unit for a specified period each year; unlike the license form, the vacation lease may be assigned, transferred, or subleased.³⁶ The final form of right-to-use timeshares is the "club membership," in which the purchaser pays a membership fee to a club or association that owns and operates the premises and leases timeshares to the members.³⁷

The numerous existing schemes for timesharing, and the likelihood that even more variations will evolve, illustrate the need for legislation governing the sale and operation of timeshares. Commentators have suggested legislation to protect consumers and establish guidelines for timeshare developers and managers since early in the development of the timeshare industry.³⁸ Consumer protection legislation was necessary to combat the questionable sales techniques employed,³⁹ such as "bait and switch,"⁴⁰ deceptive prize offers, and nondisclosure of fine print contract provisions, as well as the confusion caused by the multiple forms of timesharing.⁴¹ In addition, guidance was needed for the special management requirements of timeshares—scheduling and overseeing use and possession of, ensuring the maintenance of, and coordinating the insurance and tax payments on each unit.⁴² Other legal problems of timesharing, including tort and tax liability among owners, partition of units, property rights of timeshare purchasers in registration and transfer of interests, and the status of timeshares under securities regulation, also require legislative resolution. Finally, it was believed that "widespread market acceptance and legal soundness [of timeshares] might be greatly enhanced" by amending existing legislation to account for timesharing,⁴³ or passing specific legislation to govern timesharing.⁴⁴

Both the federal government and various state governments have recognized the need to protect consumers and guide timeshare operations through regulation of the timeshare industry.⁴⁵ Unfortunately, the regulations vary

35. E. Peirce & R. Mann, *supra* note 21, at 22.

36. Pollack, *supra* note 12, at 285. The vacation lease commonly has been accepted as a leasehold interest in real estate and thus may be unaffected by North Carolina's declaration that all timeshares are real property interests. See N.C. GEN. STAT. § 93A-42 (Cum. Supp. 1983).

37. E. Peirce & R. Mann, *supra* note 21, at 26.

38. Altro, *Resort Time-Sharing: Why Real Estate's New Brainchild Needs its Own Legislation*, 41 LA REVUE DU BARREAU DU QUEBEC 1054, 1086 (1981). See generally Roodhouse, *supra* note 11.

39. See *infra* notes 60-68 and accompanying text.

40. See *infra* note 63.

41. See *supra* notes 17-37 and accompanying text.

42. Roodhouse, *supra* note 11, at 52-54.

43. *Id.* at 52.

44. See generally Altro, *supra* note 38.

45. Although the most relevant federal legislation is discussed elsewhere in this note, see *infra* notes 47-50, 60-65, 69-73 and accompanying text, several other federal acts might also affect timeshares. These include: Federal Truth in Lending Act, 15 U.S.C. §§ 1601-1691(f) (1976) (requires those who "regularly extend credit" to make certain disclosures regarding the cost of in-

widely among the states both in extent of coverage and regulatory methods, causing unnecessary confusion for both developers and purchasers. Even within a state, the inability to classify timeshares in an existing regulatory category, such as securities, consumer sales practices, or real estate, has led to an environment of "potential and actual regulation [that] often results in conflicting and irreconcilable requirements."⁴⁶ An examination of this regulatory environment illustrates this confusion.

One form of regulation that might apply to timeshares at both the state and federal level is securities regulation. Although the Securities and Exchange Commission (SEC) has not required registration of timeshare projects, nor planned any "definitive action" such as guidelines or no-action letters, it has not specifically exempted timeshares from its authority.⁴⁷ The SEC has issued guidelines for condominiums and other real estate securities that also might be used for timeshares.⁴⁸ Condominiums, when coupled with renting services for the purchaser, are included in the SEC definition of a "security," which emphasizes the purchaser's economic gains derived from a third party's efforts.⁴⁹ Timeshares might be distinguished, however, since the services provided are not so much for the purchasers' economic benefits as for their own use and enjoyment. Federal cases imply that most timeshares fall outside SEC control since purchases of commodities "for personal consumption or living quarters for personal use" are excluded from its "investment contract" definition of securities.⁵⁰

The majority of states, including North Carolina, apply the investment contract definition to their own "blue sky" laws.⁵¹ This theory, however, is

stallment credit); Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691(f) (1976) (prohibits discrimination in extension of credit based on race, color, religion, sex, national origin, age, marital status, or source of income); Civil Rights Act of 1964, title II, 42 U.S.C. §§ 2000a to 2000a-(6) (1976) (prohibits discrimination in public accommodations on basis of race, color, religion, sex, or national origins); Federal Flood Insurance Act, 42 U.S.C. § 2414 (1976) (availability of insurance dependent on compliance with certain construction standards in flood prone areas; as of October, 1983, federal flood insurance was not available for structures on "undeveloped" coastal barriers); Civil Rights Act of 1968, title VIII, 42 U.S.C. §§ 3601-3619, 3631 (1976) (prohibiting discrimination in housing on the basis of race, color, religion, gender, or national origin). For a more detailed discussion of these laws as they apply to timeshares, see Bloch, *Regulation of Timesharing*, 60 U. DET. J. URB. L. 23 (1982).

46. Gunnar, *supra* note 5, at 32-33. For example, a potential conflict between real estate laws and securities laws may require dual licensing of timeshare salespersons or multiple public offering statements. For a complete treatment of regulatory mechanisms and examples of possible confusion, see *id.* at 40-43. See also E. Peirce & R. Mann, *supra* note 21, at 48-65.

47. Bloch, *supra* note 45, at 37-38.

48. *Id.* at 38.

49. *Id.* at 38 & n.105.

50. In *United Hous. Found., Inc. v. Forman*, 421 U.S. 837 (1975), the Supreme Court held that the purchasers of "shares" in a cooperative housing project were not buying stock in the ordinary sense, to make a profit, but rather to acquire low-cost housing. This motive precluded the cooperative stock from being considered an investment contract under the test set forth in *S.E.C. v. W.J. Howey Co.*, 328 U.S. 293 (1946). Under this test, a purchaser must invest in a common enterprise with the expectation of profits solely from the efforts of the promoter or some third party. *Id.* at 298-99. For a more complete treatment of the securities issue in timesharing, see Comment, *Regulating Vacation Timesharing: A More Effective Approach*, 29 UCLA L. REV. 907, 911-33 (1981-82).

51. Bloch, *supra* note 45, at 34 & n.91. As of 1982, 35 states had adopted the Uniform Secur-

applied only if the legislation does not specify its own applicability or inapplicability. Several states expressly include⁵² or exclude⁵³ timeshares from blue sky coverage or limit the coverage to real estate⁵⁴ or nonreal estate⁵⁵ interests. North Carolina has chosen to apply its securities laws to the extent that timeshares are deemed investment contracts;⁵⁶ thus, while leaving open the possibility of securities regulation for timeshares, it has not expressly included or excluded them. Although some favor applying blue sky legislation to timeshares because of its broad concept of fraud, wider range of civil remedies, and greater authority for substantive regulation,⁵⁷ "[t]he consensus among commentators is that securities laws should not apply to most time share offerings."⁵⁸ Although treating timeshares as securities might be desirable when no other laws apply, such regulation may create an unnecessary overlap of authority when specific legislation could perform the same function more efficiently.⁵⁹

A second area of regulation involves the prohibition of unfair and fraudulent sales practices. This type of state and federal legislation addresses the sales and promotion techniques of timeshare developers, a major complaint of prospective timeshare purchasers. Alleged "misrepresentation of gifts and prizes offered, misrepresentation of the purpose of the solicitation, failure to disclose material facts about the offering, 'high pressure' sales, and even 'verbal abuse' of consumers," have resulted in lawsuits, adverse publicity, and legislative and administrative attention.⁶⁰ The Federal Trade Commission (FTC) has informally assisted potential purchasers of timeshares by preparing a consumer checklist for timeshare offerings.⁶¹ It also investigates timeshare promoters and sellers for "unfair methods of competition or unfair or deceptive acts or practices;"⁶² these investigations have led to at least one court action.⁶³ A further regulatory provision applicable to timeshares⁶⁴ is the holder-

ities Act, which applies the "investment contract" definition of security. *Id.* In North Carolina both the Securities Act and the Time Share Act refer to investment contracts. *See* N.C. GEN. STAT. § 78A-2(11) (1981) (definition of "security" includes "investment contract"); *Id.* § 93A-50 (Cum. Supp. 1983) ("time shares deemed to be investment contracts" are subject to securities laws in addition to real estate laws).

52. These states include Alaska, Maine, Minnesota, and New York. Smith, *Timesharing Regulation by States*, NAT'L L.J., May 10, 1982, at 34.

53. *E.g.*, OR. REV. STAT. § 94.813 (1983).

54. *E.g.*, OHIO REV. CODE ANN. § 1707.33(B) (Page 1978 & Supp. 1982) (securities regulations applicable to out-of-state real property).

55. Maryland, for example, might classify some timeshares as "limited use resort securities" subject to its blue sky laws. Bloch, *supra* note 45, at 28 n.48.

56. N.C. GEN. STAT. § 93A-50 (Cum. Supp. 1983).

57. Gunnar, *supra* note 5, at 45; *see also* Comment, *supra* note 50, at 930-31.

58. E. Peirce & R. Mann, *supra* note 21, at 36. *See also* MODEL TIME-SHARE SALES ACT § 1-106 (Fourth Draft, October 1982) (National Time Sharing Council of the Am. Land Dev. Ass'n) (timeshare not a security unless the income of the project goes directly to timeshare owners) [hereinafter cited as MTSA].

59. *See infra* notes 85-113 and accompanying text.

60. Bloch, *supra* note 45, at 30-31.

61. *Id.* at 41.

62. *Id.* The authority for these investigations is section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1982).

63. *F.T.C. v. Paradise Palms Vacation Club*, 2 TIMESHARING L. REP. (LDD) II-7 (No. C81160

in-due-course rule, which requires "that consumer credit contracts used in financing the retail purchase of consumer goods or services specifically preserve the consumer's rights against the seller."⁶⁵

Most states have similar regulations governing fraud, monopolies, and consumer protection that permit actions for misrepresentation, nondisclosure, and "high pressure" sales tactics.⁶⁶ For example, section 75-1.1 of the North Carolina General Statutes parallels the FTC Act,⁶⁷ and the North Carolina Time Share Act expressly requires developers to comply with chapter 75 when their timeshare promotions include offers of prizes.⁶⁸

Another type of timeshare regulation involves controls on the subdivision and sale of land. The Federal Interstate Land Sales Full Disclosure Act of 1968,⁶⁹ which requires registration of land marketed or sold in interstate commerce and provides remedies for victims of fraud and misrepresentation, may apply to timeshares. Although a federal court has upheld application of this Act to right-to-use "camping clubs,"⁷⁰ the Act exempts land that already has been improved or on which a building is scheduled to be built within two years,⁷¹ as well as land subject to certain other statutory registration and disclosure requirements.⁷² Although these provisions would exempt many timeshares from the Act's coverage, others that include the "right to exclusive use of a specific portion of land" would be covered.⁷³

At the state level, inclusion of timeshares under similar land sales and subdivision acts often depends on whether they are considered an interest in real estate; thus, some states include fee timeshares under these laws, but ex-

V, W.D. Wash., filed Sept. 28, 1981) (involves alleged "bait and switch" tactics by timeshare developers, sales organization, and owners association in misrepresenting the availability of Hawaiian timeshares to purchasers and then offering only units in Tahoe, Nevada and Ocean Shores, Washington). Discussed in Dickerson, *Litigating Resort Timeshare Abuses*, NAT'L L.J., June 7, 1982, at 44.

64. Bloch, *supra* note 45, at 44-45.

65. FTC Guidelines, 41 C.F.R. § 433.2 (1982). The holder-in-due-course rule requires a boldface statement of the consumer's rights on the contract. *Id.*

66. Bloch, *supra* note 45, at 30-31.

67. N.C. GEN. STAT. § 75-1.1 (1981). See *supra* note 62. See *Hardy v. Toler*, 288 N.C. 303, 218 S.E.2d 342 (1975) ("close parallel" to FTC Act); *Pedwell v. First Union Nat'l Bank*, 51 N.C. App. 236, 275 S.E.2d 565 (1981) (§ 75-1.1 applied to an agreement to prevent performance of contracts to purchase condominium); *Kent v. Humphries*, 50 N.C. App. 580, 275 S.E.2d 176 (rental of spaces in mobile home park is "trade and commerce"), *aff'd as modified*, 303 N.C. 675, 281 S.E.2d 43 (1981); *Kleinfelter v. Northwest Bldrs. & Developers*, 44 N.C. App. 561, 261 S.E.2d 498 (1980) ("close parallel to FTC Act"); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1977) (rental of housing is "trade or commerce"), *disc. rev. denied*, 294 N.C. 441, 241 S.E.2d 843, 844 (1978).

68. N.C. GEN. STAT. § 93A-46 (Cum. Supp. 1983).

69. 15 U.S.C. §§ 1701-1720 (1982).

70. See Bloch, *supra* note 45, at 46.

71. 15 U.S.C. § 1702(a)(2) (1982).

72. *Id.* § 1702(b). Subdivisions involving purely intrastate activity or those meeting local minimum standards for subdivisions, zoning, and utility provision, and assuring marketable title, personal inspection of the property, and involving no prize offers are excluded. *Id.*

73. Bloch, *supra* note 45, at 48.

empt right-to-use units.⁷⁴ Also, some state acts apply only to vacant land⁷⁵ or to land on which there is no contractual obligation to build within two years.⁷⁶ Other state laws, such as those requiring timeshare salespersons to have real estate licenses or including timeshares under condominium statutes, also often distinguish between fee and nonfee timeshares.⁷⁷

Among states that have not expressly excluded right-to-use timeshares from land subdivision or real estate licensing acts, the courts are split over whether they are real property interests. In *State v. Carriage House Associates*,⁷⁸ the Nevada Supreme Court determined that the state land sales act did not apply to a right-to-use timeshare. In so finding, the court cited with approval the lower court's opinion that although the right-to-use timeshare is "really an anomaly . . . [that] doesn't fit neatly into any nice legal terminology, . . . an individual entering into the contract [does not acquire] an interest in real estate."⁷⁹ Similarly, the Oregon Court of Appeals found that vacation club timeshares were not subject to the state's subdivision control laws, nor to the condominium regulations promulgated under the authority to regulate the sale of "an interest or estate" in a condominium unit.⁸⁰ The Oregon court classified right-to-use memberships as "mere contract rights to use unspecified property."⁸¹ Conversely, California's Court of Appeal found the state's land subdivision sales act applicable to right-to-use timeshares.⁸² Although the timeshare purchaser had not been entitled to a particular unit, the entitlement to exclusive occupancy for a specific period of time brought the timeshare under California's real property law.⁸³ Although the specific provisions of the particular timeshare arrangement in question may be determinative in these close cases, the divergence of judicial opinion on this issue is clear.⁸⁴

74. The states are: Arizona, Colorado, Idaho, Illinois, Iowa, Michigan, Nevada, New Hampshire, New Jersey, and New Mexico. *Id.* at 25.

75. *E.g.*, N.Y. REAL PROP. LAW §§ 337 to 339-c (McKinney 1916 & Supp. 1984).

76. *E.g.*, ILL. REV. STAT. § 30-372a-2A(3) (Supp. 1982); UTAH CODE ANN. § 57-11-4(1)(b) (1953 & Supp. 1983).

77. *E.g.*, COLO. REV. STAT. §§ 38-33-110 to -111 (1982) (condominium statutes with separate sections for timeshares apply only to interval and timespan timeshares); ME. REV. STAT. ANN. tit. 33, §§ 591-94 (West Cum. Supp. 1983) (provisions for timeshares within condominium act distinguish between timeshare estates and timeshare licenses).

78. 94 Nev. 707, 585 P.2d 1337 (1978).

79. *Id.* at 710, 585 P.2d at 1339 (citation omitted). In 1982, however, the Nevada Attorney General declared that a right-to-use timeshare is an interest in property and as such is subject to the Nevada Land Sales Act. PRACTICING LAW INSTITUTE, *supra* note 32, at 15. In the same year an opinion by the Texas Attorney General declared that a right-to-use timeshare is not an interest in real property. *Id.*

80. Royal Aloha Partners v. Real Estate Div., 59 Or. App. 564, 651 P.2d 1350 (1982).

81. 651 P.2d at 1353 (Or. App.).

82. Cal-Am Corp. v. Department of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (1980) (state act requiring registration of, and public disclosure statements for, subdivisions of real property).

83. *Id.* at 458, 163 Cal. Rptr. at 732. The purchaser was given "exclusive occupancy" during a specific portion of each year "until precisely December 31, 2041." *Id.*

84. Another case, arising in a bankruptcy context, held that a right-to-use timeshare that did not promise a specific unit was neither an unexpired lease nor an executory contract for the sale of real property, and gave the purchaser no right in the underlying property. *In re Sombrero Reef Club, Inc.*, 18 Bankr. 612, 617-19 (Bankr. S.D. Fla. 1982).

Instead of depending on these more general regulatory frameworks, the final form of timeshare regulation specifically regulates timeshares as a distinct form of sale, subdivision, or security.⁸⁵ This per se legislation generally entails a combination of other regulatory methods and covers some combination of the following: sales practices;⁸⁶ salesperson and project registration;⁸⁷ public offering statements;⁸⁸ liens;⁸⁹ partitioning;⁹⁰ advertising and promotions;⁹¹ and project organization and management.⁹² Like the other forms of legislation, per se timeshare laws often distinguish between fee and right-to-use timeshares; although some portions of most state acts apply to both forms, other provisions may apply only to one type.⁹³

Although some commentators contend that amendment of existing state condominium acts might protect timeshare purchasers and owners, or that fee timeshares are best regulated as condominiums and right-to-use timeshares under general consumer protection laws,⁹⁴ the trend is toward comprehensive legislation specifically covering timeshare sales and operation.⁹⁵ Nevertheless, specific regulation of timeshares varies considerably in comprehensiveness. In addition to provisions based on the fee and right-to-use distinction, some acts exclude timeshares from the other means of regulation discussed above,⁹⁶ while others continue to subject them to multiple regulatory mechanisms.⁹⁷

Some states have adopted portions of the three model timesharing acts that have been drafted, but none of the model acts has been widely accepted. The Model Time-Sharing Ownership Act,⁹⁸ known as RTC/NARELLO, is a "disclosure-type" statute "designed to assure consumer protection while pre-

85. Fourteen states have passed legislation specifically regulating timeshares. They are: ALA. CODE §§ 34-27-50 to -69 (Cum. Supp. 1983); ARIZ. REV. STAT. ANN. §§ 32-2197 to -2197.17 (West. Cum. Supp. 1983); CONN. GEN. STAT. ANN. §§ 42-103w to -103bb (West. Cum. Supp. 1984); FLA. STAT. ANN. §§ 721.01 to -.28 (Cum. Supp. 1981); GA. CODE ANN. §§ 44-3-160 to -205 (Supp. 1983); HAWAII REV. STAT. §§ 514E-1 to -15 (Supp. 1982); NEB. REV. STAT. §§ 76-1701 to -1741 (1981); NEV. REV. STAT. §§ 119A.010 to -.700 (1983); N.C. GEN. STAT. §§ 93A-39 to -57 (Cum. Supp. 1983); OR. REV. STAT. §§ 94.803 to -.991 (1983); S.C. CODE ANN. §§ 27-32-10 to -230 (Supp. 1983); S.D. CODIFIED LAWS ANN. § 43-15B (1983); TENN. CODE ANN. §§ 66-32-101 to -130 (1982); VA. CODE §§ 55-360 to -400 (1981 & Supp. 1983). In most states, the timeshare acts are administered by the same entity that administers land subdivision controls.

86. *E.g.*, CONN. GEN. STAT. ANN. § 42-103 (West Cum. Supp. 1984).

87. *E.g.*, N.C. GEN. STAT. § 93A-52 (Cum. Supp. 1983).

88. *E.g.*, VA. CODE § 55-374 (1981 & Supp. 1983).

89. *E.g.*, FLA. STAT. ANN. § 721.16 (Cum. Supp. 1981).

90. *E.g.*, *Id.* § 721.22.

91. *E.g.*, ARIZ. REV. STAT. ANN. § 32-2197.11 (West Cum. Supp. 1983).

92. *E.g.*, OR. REV. STAT. §§ 94.846 to .869 (1983).

93. *See, e.g.*, VA. CODE § 55-363 (only transfer of timeshare "estates" may be recorded); *id.* §§ 55-368, 371 (separate management guidelines for timeshare "estates" and "uses" respectively).

94. Comment, *supra* note 21, at 223; E. Peirce & R. Mann, *supra* note 21, at 70.

95. Until 1982, only seven states—Arizona, Florida, Hawaii, Nebraska, South Carolina, Tennessee, and Virginia—had per se legislation. Since 1982, however, Alabama, Connecticut, Georgia, Nevada, North Carolina, South Dakota, and Oregon have enacted timeshare legislation. *See supra* note 85 (statutory cites).

96. *E.g.*, FLA. STAT. ANN. § 721.23 (Supp. 1981) (timeshare not a security); OR. REV. STAT. § 94.813 (1983) (timeshare not a security).

97. *E.g.*, N.C. GEN. STAT. § 93A-50 (Cum. Supp. 1983) ("investment contract" timeshare is a security); *id.* § 93A-46 (advertising and promotions subject to separate consumer protection laws).

98. MODEL TIME-SHARING OWNERSHIP ACT (1974) (Resort TimeSharing Council of the Am.

erving a reasonable commercial atmosphere."⁹⁹ This Act, adopted without change by Nebraska¹⁰⁰ and with some variation by at least five other states,¹⁰¹ includes provisions for a public offering statement, a three-day rescission period, and a nondisturbance clause, under which the lender, developer, and buyer agree to protect the purchaser from loss due to default by the developer and subsequent foreclosure by the lender.¹⁰² RTC/NARELLO distinguishes between a "time-share estate" (timeshare coupled with an interest in property) and "timeshare use" (no attached property interest). Despite this distinction, however, RTC/NARELLO does not state explicitly whether a right-to-use timeshare is to be treated as an interest in real estate.¹⁰³

In 1982 the American Land Development Association drafted a second model statute, the Model Time-Share Sales Act (MTSA). More comprehensive than RTC/NARELLO, MTSA includes structural guidelines for timeshare projects,¹⁰⁴ provisions controlling advertising and timeshare exchange programs,¹⁰⁵ and an exemption of most timeshares from securities laws.¹⁰⁶ MTSA also changed the definition of timeshare so that "no distinction is made between a so-called time-share use and a so-called time-share estate."¹⁰⁷ Like RTC/NARELLO, MTSA brings all regulatory power over timesharing under a single state agency, preferably an agency governing real estate matters. While MTSA has not been adopted by any states, some of its concepts have been included in state acts.¹⁰⁸

The third model act, also more comprehensive than RTC/NARELLO, is the Uniform Real Estate Time Share Act (URETSA).¹⁰⁹ URETSA distinguishes between the "time-share estate" and "time-share license" forms of ownership.¹¹⁰ It characterizes the "time-share license," however, as an estate

Land Dev. Ass'n & Nat'l Ass'n of Real Estate License Law Officials) [hereinafter cited as RTC/NARELLO].

99. Smith, *supra* note 52, at 34.

100. Bloch, *supra* note 45, at 24.

101. *Id.* These states are Arizona, Florida, Hawaii, Tennessee, and Virginia. *Id.*

102. Smith, *supra* note 52, at 35.

103. Pollack, *supra* note 12, at 296-97.

104. MTSA, *supra* note 58, art. III. Article III requires a recorded declaration establishing the basic scheme of ownership, occupancy, and management in accordance with rules and regulations to be promulgated regarding the creation of an owners' association, the powers of the association, the powers of hired management, methods of assessing and collecting fees for maintenance and operating expenses, and requirements for insurance. *Id.*

105. *Id.* art. VI. Article VI prohibits misleading advertising, requires that all advertisements be reviewed by the regulatory agency, and restricts certain advertising techniques, especially those that offer gifts or prizes. *Id.*

106. *Id.* § 1-106. See *supra* note 58 and accompanying text.

107. *Id.* § 1-102.

108. See, e.g., GA. CODE ANN. §§ 44-3-185 to -188 (Supp. 1983) (based on MTSA, art. VI - Advertising); N.C. GEN. STAT. § 93A-48 (Cum. Supp. 1983) (based on MTSA, Art. V - Exchange Programs); NEV. REV. STAT. §§ 119A.590 to .620 (1983) (loosely based on MTSA, art. V - Exchange Programs).

109. UNIFORM REAL ESTATE TIME SHARE ACT (1979) (Nat'l Conference of Commissioners on Unif. State Law) [hereinafter cited as URETSA]. See also Pollack, *supra* note 12, at 296.

110. E. Peirce & R. Mann, *supra* note 21, at 46. For comparison of MTSA and URETSA, see *id.*, at 44-48; Pollack, *supra* note 12, at 295-301.

for years with all the incidents that attach to it at common law.¹¹¹ Thus, it appears that URETSA classifies all timeshares as interests in real property. Of the states with timeshare legislation, only Oregon has adopted this bifurcated definition with both types of timeshares classified as real property.¹¹² URETSA is also broader than the other model acts in that it recognizes both implied and express warranties of quality, has a seven-day period for rescission, and establishes a plan for timeshare project management.¹¹³

The North Carolina Time Share Act¹¹⁴ includes several features of MTSA. Most importantly, it defines "time share" without distinguishing between fee and right-to-use timeshares.¹¹⁵ Also, like MTSA, it provides for detailed disclosures regarding vacation exchange programs available to purchasers,¹¹⁶ and a five-day rescission period during which any money paid is to be escrowed.¹¹⁷ In addition, the North Carolina Act establishes requirements, procedures, and disciplinary measures for registration of timeshare projects and salespersons with the North Carolina Real Estate Commission,¹¹⁸ and requires a public disclosure statement for all timeshare offerings.¹¹⁹

The Act, however, does not cover many subjects that are included in a more comprehensive act, such as MTSA and URETSA.¹²⁰ For example, the North Carolina Act does not address the resale of timeshares, out-of-state sales,¹²¹ the structure and management of the timeshare project,¹²² local regu-

111. Pollack, *supra* note 12, at 297, 299.

112. OR. REV. STAT. § 94.813 (1983). North Carolina, among other states, has defined "timeshare" as a single concept and classified it as real property. *See infra* notes 115, 125, 171.

113. Pollack, *supra* note 12, at 295-301. Unlike RTC/NARELLO, which requires merely that management provisions be included in timeshare agreements, URETSA specifically describes management duties and purchaser involvement in management decisionmaking. *Id.* at 298.

114. N.C. GEN. STAT. § 93A-39 to -57 (Cum. Supp. 1983).

115. "Time share" means a right to occupy a unit or any of several units during five or more separated time periods over a period of at least five years, including renewal options, whether or not coupled with a freehold estate or an estate for years in a time share project or a specified portion thereof, including, but not limited to, a vacation license, prepaid hotel reservation, club membership, limited partnership, or vacation bond
Id. § 93A-41(9).

Under the MTSA:

"Time-share" means the right, however evidenced or documented, to use and occupy a living unit (either a specifically identified living unit or a living unit of a specific type or any living unit) which use and occupancy rights are divided among all persons holding similar interests within that living unit according to a fixed or variable time schedule on a periodic basis that has been or will be allotted from the use or occupancy into which the time-share project has been divided. No distinction is made in this Act between a so-called time-share use and a so-called time-share estate.

MTSA, *supra* note 58, § 1-102.

116. *Compare* N.C. GEN. STAT. § 93A-48, -49 (Cum. 1983), with MTSA, *supra* note 58, art. V.

117. *Compare* N.C. GEN. STAT. § 93A-45 (Cum. Supp. 1983) with MTSA, *supra* note 58, §§ 4-101 to 102.

118. N.C. GEN. STAT. §§ 93A-40, -52, -53 (Cum. Supp. 1983).

119. *Id.* § 93A-44.

120. *See supra* notes 104-13 and accompanying text. Though not modeled exactly on either of the model acts, several state acts, such as those in Georgia, Florida, Oregon, and Tennessee are fairly complete. For statutory references, see *supra* note 85.

121. *E.g.*, S.D. CODIFIED LAWS ANN. § 43-15B-7 (1983) (applies to all timeshares located in South Dakota or sold in South Dakota). The North Carolina registration requirements apply only to timeshares located in North Carolina. N.C. GEN. STAT. § 93A-40 (Supp. 1983).

lation of timesharing development, or tort liability of timeshare owners. Rather than being self-contained, the North Carolina Act delegates some of the regulatory authority over time shares to administrators other than the Real Estate Commission; securities violations fall under the jurisdiction of the Secretary of State,¹²³ and violations of advertising and promotions laws are investigated and prosecuted by the Attorney General.¹²⁴ Nowhere does the act expressly exempt timeshares from the coverage of other laws.

The most significant portion of the North Carolina Act is section 93A-42, which characterizes all timeshares as interests in real estate.¹²⁵ By defining timeshare to include a periodic right to use "whether or not coupled with a freehold estate or an estate for years,"¹²⁶ this provision turns all timeshares, whether of the fee or right-to-use type, into interests in real estate "governed by the law of [North Carolina] relating to real estate."¹²⁷ Although insignificant for those timeshares that always have been considered realty interests,¹²⁸ this provision subjects arrangements formerly contractual, such as timeshare licenses and club memberships, to the laws of real property and the rights and duties incident to ownership of real property. This change, which overrides the common-law notions that a license to use land is not an interest in land,¹²⁹ but rather a mere contract right,¹³⁰ has several implications.

First, by statutorily designating right-to-use timeshares as real property interests, the Act avoids the potential flood of litigation that would result from a less certain statutory provision. The Act conclusively determines that real estate laws apply to right-to-use timeshares; if this issue had been litigated, a North Carolina court probably would have found real estate laws inapplicable after considering the North Carolina common law¹³¹ and the decisions of other states.¹³²

Second, the Act will promote uniformity of timeshare practices by providing the same benefits and protections to all timeshare purchasers, regardless

122. *MTSA, supra* note 58, art. III.

123. N.C. GEN. STAT. § 78A-45(a) (1981 & Cum. Supp. 1983). The North Carolina Time Share Act provides that the North Carolina Securities Act, applies "to time shares deemed to be investment contracts or to other securities offered with or incident to a time share." *Id.* § 93A-50.

124. *Id.* § 75-15. The Time Share Act requires full compliance with chapter 75 of the North Carolina General Statutes for advertisements that include the offer of a prize or other inducement. *Id.* § 93A-46.

125. *Id.* § 93A-42 (Cum. Supp. 1983).

126. *Id.* § 93A-41(9). For the full text of this definition, see *supra* note 115.

127. *Id.* § 93A-42(a).

128. See *supra* notes 19-37 and accompanying text.

129. *Hill v. Smith*, 51 N.C. App. 670, 277 S.E.2d 542, *disc. rev. denied*, 303 N.C. 543, 281 S.E.2d 392 (1981) (permission given by licensor without deed of property for wife of decedent to use house located on land purchased by licensor from decedent's estate was not a life estate but a mere license, revocable at will of licensor).

130. See *supra* notes 78-84 and accompanying text.

131. Even a leasehold in real estate is treated by North Carolina courts as a "chattel real," or personal property, except as modified by statute. *Moche v. Leno*, 227 N.C. 159, 41 S.E.2d 369 (1947); *Waddell v. United Cigar Stores*, 195 N.C. 434, 142 S.E. 585 (1928). See also *supra* note 129 and accompanying text.

132. See *supra* notes 71-84 and accompanying text.

of the type purchased. The legislature apparently recognized that the vacation license was developed primarily as a mechanism to avoid existing land sales regulation¹³³ and subjected all timeshare salesmen and projects to registration requirements.¹³⁴ Consequently, developers and salespersons will be more accountable for their actions; this will shield the prospective purchaser from fraud or misrepresentation. Also, because there will be no legal incongruities to consider in forming and purchasing timeshares, a purer economic market putting consumers on more equal footing with developers will result.

All timeshare purchasers also will now receive the additional protections of real property ownership, such as registered and insured title¹³⁵ and the equitable remedy of specific performance. With a contractual timeshare, however, the licensee would have had little right to keep the timeshare if the developer defaulted or the title were encumbered.¹³⁶ In these situations, the licensee could sue the developer for monetary contractual damages, but this action would be "only as good as the solvency of the licensor and [would have] no reference to the land itself."¹³⁷ Since the defaulting developer probably would be judgment proof, the licensee might collect nothing.

With a real property interest, the purchaser can purchase title insurance to protect that interest against failure or defect of title. For example, if the developer conveys the same timeshare to two purchasers, or possesses an encumbered title to the property, the purchaser might not be able to keep the timeshare. He would, however, recover his loss in insurance regardless of the developer's financial status. If, however, the developer has good title, but fails to deliver it as promised, the purchaser may demand specific performance of the agreement, a remedy granted only in actions involving real property and unique goods.¹³⁸ Thus, if a developer fails to cede exclusive occupancy of the unit for the time period purchased, the purchaser can compel performance.¹³⁹

In addition, an interest in real property generally may be sold, mortgaged, leased, or willed, while contractual rights might be more strictly limited.¹⁴⁰ Under ordinary contract theory, for example, the purchaser's right to his timeshare unit probably would terminate upon his death, but a property interest timeshare may be willed to whomever the timeshare owner chooses. Similarly, a contract might restrict the resale of a timeshare. By designating the timeshare as a property interest, however, this kind of restriction probably would constitute an unlawful restraint on alienation. The inability to sublease

133. Davis, *Time Sharing Ownership—Legal and Practical Problems*, 48 ST. JOHN'S L. REV. 1183, 1184 (1974).

134. N.C. GEN. STAT. § 93A-40 (Cum. Supp. 1983).

135. Vogel, *The Tax Consequences of Time-Sharing*, 10 J. REAL EST. TAX. 323, 328 (1983). Vogel's article is a good general source on the tax implications of timesharing and the differences between fee and right-to-use timeshares.

136. Davis, *supra* note 133, at 1185.

137. Note, *supra* note 10, at 1210.

138. D. DOBBS, HANDBOOK ON THE LAW OF REMEDIES 795-96 (1973).

139. In the timeshare context, however, this remedy is not as valuable as in other situations, since the purchaser's possessory period is likely to have passed by the time an action is brought.

140. Note, *supra* note 10, at 1210.

or assign often distinguishes vacation licenses from vacation leases,¹⁴¹ but such a restriction on real property would violate state policy declaring realty "a basic resource of the people [that] should be made freely alienable and marketable so far as is practicable."¹⁴² Given that the constitutional right to property is also subject to "reasonable regulation for the general welfare,"¹⁴³ however, a less restrictive constraint, such as requiring developer approval of a proposed sublease or assignment, might be permitted in North Carolina as it has been elsewhere.¹⁴⁴

Designation of timeshares as real property interests confers several other advantages. Although the contractual purchaser receives nothing more than the use of the unit, the property purchaser acquires an equitable interest in the property, and may realize a gain upon resale from appreciation in the property's value.¹⁴⁵ In addition, the timeshare owner will pay real rather than personal property taxes, and may deduct these and his mortgage interest payments from his taxable income.¹⁴⁶ Finally, property ownership has an inherent status and psychological advantage over a mere rental or contract right.¹⁴⁷

Although the Timeshare Act is intended to protect the consumer, the classification of all timeshares as real property may have adverse consequences. The price of timeshares probably will increase. Because all timeshares are now considered real property, the developer must employ licensed real estate salespersons for all timeshares,¹⁴⁸ not just for fee timeshares; these costs, along

141. Pollack, *supra* note 12, at 285.

142. N.C. GEN. STAT. § 47B-1 (1976 & Cum. Supp. 1983). A restraint prohibiting the transfer, sublease, or assignment of real property "is contrary to public policy and void." Williams v. McPherson, 216 N.C. 565, 566, 5 S.E.2d 830, 831 (1939) (realty conveyed with clause "never to be sold, bought, or transferred" was void).

143. Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

144. See Laguna Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 670, 683, 174 Cal. Rptr. 136, 144 (1981) (condominium's requirement that management approve assignments and transfers is valid, if exercised reasonably).

145. A substantial gain is unlikely, however, since the developer's marketing expenses will have inflated the original purchase price. Pollack, *supra* note 12, at 287-88. Many agree that claiming a timeshare to be a good capital investment is difficult to sustain. "Even using swash-buckling projections for future inflation and interest rates, timeownership is still likely to take approximately 20 years to pay for itself against renting equivalent hotel or motel accommodations." *Business Brief: Doing Time on Holiday*, ECONOMIST, Apr. 10, 1982, at 81.

146. Vogel, *supra* note 135, at 336. A tax matter of interest to all timeshare purchasers is the passage, in 1983, by the North Carolina General Assembly of two statutes declaring that when real or personal property is owned under a timesharing arrangement but managed by a homeowner's association or some other managing entity it is to be listed for taxes under the name of the entity rather than the actual owner. N.C. GEN. STAT. § 105-302(c)(13) (Cum. Supp. 1983) (real property), and *id.* § 105-306(c)(9) (personal property). Although these statutes will simplify the paperwork for tax personnel, they might reduce tax revenues to the local government, since the aggregate value of separately assessed timeshares is usually much higher than the property's independent value. Timeshare managers may face problems in allocating the tax burden among timeshare owners and in deciding whether to include tax expenses in annual maintenance fees, to assess each timeshare owner, or to absorb the expense. For timeshare owners there is the additional problem of whether property taxes may be deducted for income tax purposes when they are not assessed directly.

147. Note, *supra* note 10, at 1211.

148. N.C. GEN. STAT. § 93A-40 (Cum. Supp. 1983) (timeshare salesmen must be licensed real estate agents). Even if salespersons are paid on a commission-only basis, a licensed agent proba-

with the expenses of complying with disclosure and registration requirements,¹⁴⁹ likely will be passed on to the purchaser. In addition, the purchaser will incur the added expenses of purchasing and owning real estate—title search fees, attorney's fees, and property taxes. The purchaser also will absorb the risk of damage or destruction to the property, or at least the expense of insurance. With a contractual relationship, the developer might have retained these costs.

A final concern is whether the right-to-use arrangements are compatible with other laws that now govern them. According to the Act, timeshares "shall be governed by the law of this State relating to real estate,"¹⁵⁰ which includes conveyancing laws,¹⁵¹ mortgaging and foreclosure statutes,¹⁵² recordation requirements,¹⁵³ eminent domain powers,¹⁵⁴ the Uniform Marketability of Title Act,¹⁵⁵ and the Unit Ownership Act,¹⁵⁶ as well as the common law regarding real property. Although most of these laws present no direct conflict with the right-to-use form of ownership, and the Act has addressed some of the conflicts that might arise from applying traditional real estate law to timeshares,¹⁵⁷ a few potential problem areas remain.

One possible problem not addressed by the Act is presented by the rule against perpetuities,¹⁵⁸ which invalidates from its creation a future interest in property if it does not vest "within a life or lives in being and twenty-one years and ten lunar months thereafter."¹⁵⁹ In North Carolina this rule applies to

bly will demand a larger commission, causing the developer to raise the purchase price accordingly.

149. *Id.* §§ 93A-40, -52 (application fee for registering timeshare project of up to \$1500).

150. *Id.* § 93A-42(a).

151. *Id.* §§ 39-1 to -29 (1976).

152. *Id.* §§ 45-1 to -74 (1976 & Cum. Supp. 1983).

153. *Id.* §§ 47-1 to -120. Timeshare conveyances, contracts to convey, or leases must be registered for the buyer to prevail against lien creditors or bona fide purchasers for value. *Id.* § 47-18. In addition to placing registration and title search duties on timeshare purchasers, and according them the protection of title registration, this will create a tremendous increase in business in Registrar of Deeds' offices, especially in resort counties.

154. *Id.* §§ 40A-1 to -69 (Cum. Supp. 1983).

155. *Id.* §§ 47B-1 to -9 (1976 & Cum. Supp. 1983).

156. *Id.* §§ 47A-1 to -37 (controlling the creation, structure, and management of condominiums and the relations among unit owners and with the management).

157. Although difficulties might occur in a tenancy in common situation with partitioning of a timeshare, the Act expressly prohibits partitioning of the timeshare unit itself. It allows the partition, by sale, of a single timeshare interest. *Id.* § 93A-43 (Cum. Supp. 1983). For discussion of the partitioning problems, see generally *supra* note 21. Also, the Act requires the developer to release timeshare owners from any liens affecting that timeshare and provides, unless otherwise agreed, for the severability of liability for liens against more than one timeshare in the project. *Id.* § 93A-57. This provision entitles the timeshare owner to a release from such a lien "upon payment of the amount of the lien attributable to his time share." *Id.* Thus, debts of other timeshare owners will not affect his interest.

158. The rule against perpetuities is still significant in North Carolina law. See generally Link, *The Rule Against Perpetuities in North Carolina*, 57 N.C.L. REV. 727 (1979).

159. *American Trust Co. v. Williamson*, 228 N.C. 458, 463, 46 S.E.2d 104, 108 (1948). North Carolina has a long history of cases holding that restraints on the sale of conveyed property are void. See, e.g., *Pilley v. Sullivan*, 182 N.C. 493, 109 S.E. 359 (1921); *Stokes v. Dixon*, 182 N.C. 323, 108 S.E. 913 (1921); *Brooks v. Griffin*, 177 N.C. 7, 97 S.E. 730 (1919); *Lee v. Oates*, 171 N.C. 717, 88 S.E. 889 (1916); *Christmas v. Winston*, 152 N.C. 48, 67 S.E. 58 (1910); *Wool v. Fleetwood*,

remainders as well as executory interests,¹⁶⁰ to personal as well as real property,¹⁶¹ to sales as well as gratuitous conveyances,¹⁶² and possibly even to commercial contractual arrangements.¹⁶³

In the timesharing context, the rule might cover units conveyed for the useful life of the building with a remainder in the grantor or in the purchasers as tenants in common. Like a life estate, this conveyance is for an indefinite term; however, it is attached only to the life of a building, which is not considered "a life or lives in being."¹⁶⁴ Although the life of the building might be estimable, it is not certain. Since it may last longer than twenty-one years and ten months plus some life in being, the rule would invalidate the remainder.¹⁶⁵ Although the rule against perpetuities may have been of concern to purchasers of conventional condominiums¹⁶⁶ and interval timeshares, and possibly to timeshare licensees depending on the rule's applicability to mere contractual rights prior to passage of the Act,¹⁶⁷ it is of certain concern now that timeshares are considered real property.

The rule will necessitate change in either the timeshare documents or in the Act. If the interest is to revert, the useful life of the building will have to be estimated and a contingency added to the agreement for the possibility of early destruction of the building. In this case the agreement would be subject to two contingencies, one stating a definite time period complying with the rule, the other exceeding the rule (saying, *e.g.*, "so long as the building shall stand"). With this arrangement, however, the courts may disregard an "or" between the two contingencies and "hold that such an interest, if void in part, is void in *toto*."¹⁶⁸ If the possibility of destruction were ignored in the conveyance for a term of years, it surely would conform to the rule; with this

136 N.C. 460, 485 S.E. 785 (1904); *see also* Parker v. Parker, 252 N.C. 399, 113 S.E.2d 899 (1960); Wing v. Wachovia Bank & Trust Co., 35 N.C. App. 346, 241 S.E.2d 397 (1978).

160. Link, *supra* note 158, at 753.

161. *Id.* *See* Stellings v. Austry, 257 N.C. 303, 126 S.E.2d 140 (1962) (rule against perpetuities applied to stock).

162. Link, *supra* note 158, at 806. *See* Hardy Bros. v. Galloway, 111 N.C. 519, 15 S.E. 890 (1892) (grantor's right of first refusal to repurchase land if grantee should "ever" sell held void as contrary to rule against perpetuities).

163. Link, *supra* note 158, at 754, 804-17. Professor Link discusses the propriety of applying the rule against perpetuities to commercial interests, saying that although the rule is a "fairly appropriate yardstick for family settlements . . . [it is] not an appropriate unit of measure for most commercial interests. Often no lives in being can be related to the commercial interest." *Id.* at 807. *See* Gay Mfg. Co. v. Hobbs, 128 N.C. 46, 38 S.E. 26 (1901) (right to all timber cut by grantee on grantor's land for five years "from the time [grantee] begins to manufacture said timber into wood or lumber" invalidated; rule against perpetuities rationale used, though rule not specifically cited).

164. The lives by which the interest can be measured must be human. Link, *supra* note 158, at 768.

165. *See* Farnan v. First Union Nat'l Bank, 263 N.C. 106, 110, 139 S.E.2d 14, 17 (1964); Parker v. Parker, 252 N.C. 399, 402-03, 113 S.E.2d 899, 902 (1960) (if controlling event might not occur within period of the rule, or if any uncertainty or doubt exists, limitation is void, whether or not event actually occurs).

166. *See generally* Seeber, *Condominiums in North Carolina: Improving the Statutory Base*, 7 WAKE FOREST L. REV. 355, 359-64 (1971).

167. *Id.*

168. *Id.* at 361.

possibility, however, the protection to the developer from the claims of purchasers in the event of destruction is limited. The remaining possibility, and probably the best, is to amend the Timeshare Act to provide that the rule against perpetuities will not invalidate any instruments thereunder.¹⁶⁹ Until the Act is so amended, however, those involved in timeshare transactions should check every instrument for possible violations, and correct these violations by making the term more definite or stating that it not exceed the rule.¹⁷⁰

Although sellers and purchasers of right-to-use timeshares probably have intended them not to be real property interests,¹⁷¹ this intent has been based on expectations nurtured by the prevailing laws. With a change in the law, expectations eventually will change as well. Some commentators, however, believe that designating a new interest in real estate will paralyze the timeshare industry; they argue that people will avoid timeshares because they do not know what this new interest means. The fee timeshare, however, has already fit into existing property interests without destroying the state's property law or the timeshare industry. Defining all timeshares as real property merely affords the protections of property ownership to all timeshare owners, regardless of the particular timeshare arrangement involved.

The other arguments against North Carolina's decision are similarly surmountable. Although the change will lead to a higher price for timeshares, this increase should be nominal since the developer's increased expenses may be spread among the purchasers. The problem with the rule against perpetuities is not necessarily new. North Carolina has applied it to nonrealty conveyances in the past. In any case, the problem usually can be avoided by careful drafting, without substantially changing the relationship of the parties under the conveyance.

In conclusion, the benefits of North Carolina's Act outweigh its detriments. With timeshares considered real property, timeshare owners will be given the protection of title insurance and registration, the right of specific performance, and greater freedom of alienability, as well as the other incidents of real property ownership. The uniform applicability of real property law to all timeshare interests will foster a greater uniformity of timeshare projects, once developers and consumers learn how best to comply with the law's re-

169. *Id.* at 362.

170. For a summary of drafting prescriptions that help avoid the rule, see Link, *supra* note 158, at 817-18.

171. Case law, though sparse, usually has declared that right-to-use timeshares do not constitute real property interests. See *supra* notes 78-84 and accompanying text. Similarly, most state statutes distinguish between fee and right-to-use timeshares, defining only the fee form as including real property interests. *E.g.*, Alabama, Arizona, Georgia, Nebraska (except for tax purposes), Tennessee, and Virginia (except for tax purposes). In addition to MTSA, only five other states have expressed the same view as North Carolina: California, Hawaii, New Hampshire, Oregon, and Utah. See *supra* note 85. Further, commentators express the notion that neither purchasers nor developers think of timeshares as real estate. "All of the putative advantages of the vacation license time-share arrangement are founded upon the premise that the interest purchased is not an interest in real property." E. Peirce & R. Mann, *supra* note 21, at 22. "But under no circumstances do the purchaser and seller of these right-to-use programs intend that this approach will give rise to what is commonly considered the ownership of land." Vogel, *supra* note 135, at 327.

quirements. This uniform applicability will prevent developers from circumventing the law merely by structuring the timeshare development as a right-to-use project.

In addition to declaring timeshares a real property interest, North Carolina has taken another step toward protecting the timeshare purchaser by recognizing the necessity of enacting *per se* timeshare legislation. Because timeshares face problems beyond those of conventional condominiums, condominium laws are insufficient to cover timesharing. Similarly, subdivision laws, blue sky laws, and general consumer protection laws, while covering some aspects of timesharing, do not comprehensively regulate the area. Even if they did, regulation under several different laws and agencies would complicate unnecessarily compliance by a timeshare project.

The substance of North Carolina's Act, however, does not protect consumers completely. The absence of guidelines for the management of timeshares denies the timeshare owners' right to be represented by management. The possibility of applying securities laws to timesharing leaves open an avenue for litigation that could have been closed by exempting timeshares from securities laws or by intensifying timeshare registration and disclosure provisions. In addition, the Act fails to address other problems that are certain to arise, such as the rule against perpetuities, resale, and out-of-state sales. Finally, the lack of uniformity in timeshare legislation from state to state, while not a problem specific to the North Carolina Act, is likely to unnecessarily complicate timeshare sales and operation for interstate developers and purchasers.

Although the North Carolina Time Share Act is not comprehensive, the efforts of the North Carolina legislature in enacting it are laudable. The Act addresses the needs of a growing sector of the population and will eliminate much of the confusion caused by the multiplicity of timeshare forms and the questionable promotional techniques of timeshare developers. It should improve relations between timeshare developers and purchasers and provide incentive and guidance for the industry to develop in a positive direction.

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