St. John's Law Review

Volume 48
Number 4 *Volume 48, May 1974, Number 4*

Article 30

August 2012

New Ideas in the Vacation Home Market

Frank L. Amoroso

NEW IDEAS IN THE VACATION HOME MARKET

Until recently, the luxury of owning a vacation home was limited to the wealthy.[1] However, fundamental forces operating in society throughout the 1960's changed this situation dramatically. "[R]ising disposable income, the continuing deterioration of urban centers, and changing life-styles . . ."[2] caused a wider segment of the populace to seek the benefits of resort home living. Moreover, the popularity of the second automobile to be used for pleasure driving and the growth of such recreational activities as surfing, sailing and skiing led to the occasional long weekend and concerted efforts to implement the four-day work week. Accordingly, the vacation home market became an important segment of the real estate industry.

The ideal recreation zone to accommodate this changing life-style tends to be approximately one hundred and fifty miles from large urban centers. This distance enables harried urbanites to jump into their cars on Friday afternoon and arrive at the beach or ski slopes within four hours.

Throughout the 1960's, the vacation home industry was able to satisfy this demand by utilizing available tracts of raw land which were susceptible to resort development and within driving range of the city.[3] However, as prime resort land became more difficult to find and the costs of construction increased sharply,[4] many people were priced out of the vacation home market. This situation was compounded by the imposition of environmental safeguards by many states in reaction to the helter-skelter spoliation of their landscape.[5]

Notwithstanding these factors, the demand for resort accommodations increased.[6] One contributing factor was increased mobility en-

1 Prior to the phenomenon characterized by John Kenneth Galbraith as the "Affluent Society," ownership of recreational homes was concentrated in the hands of the wealthy. Robbins, *The Recreation Condominium*, 1 REAL ESTATE REV., Fall 1971, at 5 [hereinafter cited as *The Recreation Condominium*].

2 Braun, *Marketing Recreation Property: A Strategy for Survival and Profit*, 3 REAL ESTATE REV., Summer 1972, at 83.

3 Liebman, *Can Condominium Time-Sharing Work?* 3 REAL ESTATE REV., Fall 1973, at 40 [hereinafter cited as Liebman].

4 A recent survey indicated that construction costs are rising at a rate of well over 10% per year. This rate is attributable to inflation and shortages of materials. *See* 1 U.S. REAL ESTATE WEEK, May 13, 1974, at 24.

5 *See, e.g.*, VT. STAT. ANN. tit. 10, § 6042 *et seq.* (Supp 1971). *See generally* S. COMM. ON INTERIOR AND INSULAR AFFAIRS, LAND USE POLICY AND PLANNING ASSISTANCE ACT, S. REP. NO. 93-197, 93d Cong., 1st Sess. (1973); Brownwell, *State Land Use Regulation — Where Are We Going?* 9 REAL PROP. PROBATE AND TRUST J. 29 (1974); 1 U.S. REAL ESTATE WEEK, April 8, 1974, at 5.

6 A survey conducted prior to October, 1973 indicated that the second home market

couraged by the availability of moderately priced air fares which enabled many people to jet away to their vacation paradises. Unfortunately, this demand was not satisfied by the hotel and motel industry because their rates had become prohibitively high.[7] In order to market an affordable alternative, the developers had to reconcile the high costs of construction with seasonal use. Multiple ownership of resort property was considered to provide maximum utilization of facilities while apportioning the costs among several owners. Because multiple ownership was designed to reach the broadest possible market, many developers seized upon it as a way to offset the contraction of the second home market caused by high prices.

THE CONDOMINIUM AS AN INVESTMENT

Using the condominium as a vehicle for providing affordable resort homes, the realty industry borrowed the approach utilized in European resorts.[8] By incorporating rental pools and promoting the condominium as an investment, the developers offered a hedge against inflation while satisfying the buyer's desire to own a vacation home in a resort area. The typical condominium as an investment required the unit owner to submit his unit to an arrangement whereby all units would be combined into a rental pool[9] and rented to vacationers, with the net income derived to be divided equally among all the unit owners regardless of whether their particular unit had been so used.[10] Another feature generally included in these ventures was a limitation on the personal use and occupancy of the unit by the owner.[11] The primary

comprised some 5 million homes. The amounts expended on vacation homes by 45% of this market was found to be $5,000 for the land and $15,000 for the vacation dwelling. A profile representing over half the second home buyers revealed an average income of over $15,000. Moreover, the survey showed that these buyers were between 31 to 50 years of age and planned to use the unit as a residence when they retired. 1 CONDOMINIUM REP. Oct. 1973, at 2.

[7] Among the factors contributing to the public's disillusionment with resort hotels were the rising prices and crowding on the one hand, and the lack of tax benefits and pride of ownership on the other. *See The Recreation Condominium*, *supra* note 1, at 5.

[8] *See* Ellsworth, *Condominiums Are Securities?*, 2 REAL ESTATE L.J. 694 (1974) [hereinafter cited as Ellsworth].

[9] These rental pool arrangements are generally collateral agreements executed by the management association and the purchaser. If they are in the form of an unincorporated organization it will be classified as a partnership. *Cf.* Treas. Reg. § 301.7701-2, T.D. 6797, 30 Fed. Reg. 1116 (1965). As a partnership all members are personally liable for the debts or claims against the rental pool.

[10] For an illustrative discussion of alternative systems for allocating the expenses and income of a resort condominium, see Preszler, *Profit Sharing in the Resort Condominium*, 2 REAL ESTATE REV., Summer 1972, at 31.

[11] Usually such limitations were incorporated into the condominium bylaws and imposed upon the owner strict notification requirements of intended use. Such a provision might read as follows:

aim of these restrictions was to allow the management to promote maximum utilization of the property, thereby generating income for the owners. Prospective buyers were further attracted to the tax-saving aspects of such ownership. Where a unit is held solely for personal use certain expenses, such as interest on any indebtedness incurred to purchase the unit,[12] real property taxes assessed against the unit,[13] and unreimbursed casualty losses with respect to the unit,[14] are deductible for federal income tax purposes.[15]

SECURITY VS. NONSECURITY

Despite the fact that promotional efforts for this type of resort condominium emphasized the economic benefits, the real estate industry had traditionally been distinguished from the investment industry. As such, condominium offerings were exempt from federal regulation: "A major factor in this accepted distinction between home ownership and securities ownership seems to be the absence of a third party promoter on whom the purchaser relies for the handling of his funds."[16]

Although the Securities and Exchange Commission (SEC) recog-

Section 1. *Owners' Occupancy and Use*
In order to maintain an efficient and financially sound operation of the commercial enterprise for the benefit of all owners, the following provisions shall apply:
Each owner has the right to reserve his own unit for his own occupancy and use subject to:
(1) Prior reservation or occupancy. If the unit has already been reserved or rented, then a similar unit, if available, shall be provided at the same rate that the owner would pay if he occupied his own unit.
(2) House rules and regulations.
(3) Payment of basic occupancy charge of:
. . .
(4) In the event that a unit is reserved by an owner but not used, the owner shall pay the owner's rate as though he had used the unit.
Id. at 33.

12 INT. REV. CODE OF 1954, § 163.

13 *Id.* § 164(a)(1).

14 *Id.* § 165(c)(3).

15 Where the unit is used solely for the production of income, *id.* § 212, certain operating expenses will be deductible. Moreover, the IRS permits deductions for depreciation of business property, *id.* § 167(a)(1)(2). *But see* N.Y. Times, May 1, 1974, at 12, col. 3, where it was reported that the House Ways and Means Committee may eliminate deductions for depreciation on "resort homes."

A problem arises when the property is used for both personal and nonpersonal purposes. Such property may be characterized as "not engaged in for profit" thereby bringing the hobby-farm proviso, *id.* § 183, into operation. Under this section the taxpayer may not claim a loss in a given year unless he shows a gain in two out of five consecutive years or can convince the IRS of his expectation of profit in the future; for example, when he resells the unit. *See* Rev. Rul. 73-58, 1973-1 CUM. BULL. 219, wherein the Internal Revenue Service ruled that interest taken on a loan no matter how the loan is obtained (*e.g.*, insurance policies, with stock as collateral) must be included in the property's income when calculating deductible expenses in "not-for-profit" ventures.

16 Clurman, *Are Condominium Units Securities?*, 2 REAL ESTATE REV., Spring 1972, at 18, 21.

nized this traditional distinction, it became concerned with the similarity between certain condominium offerings and the investment contract. In *SEC v. W. J. Howey Co.*,[17] the Supreme Court postulated a definition of "investment contract." According to Mr. Justice Murphy an investment contract is

> a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party. . . .[18]

As the real estate industry continued to promote resort condominiums by emphasizing the economic benefits, the SEC in 1967 embarked on a campaign to regulate certain investment opportunities in realty.[19] However, Commission action was sporadic during the next five years.[20]

Promulgating Guidelines

Since the offerings of resort condominiums were so diverse in terms of composition and promotional techniques, guidelines were needed to determine when they constituted securities. Accordingly, the Commission appointed the Real Estate Advisory Committee[21] to study the offering of real estate security interests.

On October 15, 1972, the Advisory Committee issued its report, which contained some 34 recommendations. Among them were several dealing with those cases in which security status attaches to condominiums and cooperatives. The Committee concluded that three different circumstances should trigger registration with the SEC. An investment contract was said to exist where a rental pool was offered;[22] the unit owner was "*required* to hold his unit available for rental;"[23] or the offering required the owner to utilize, as an exclusive rental agent, anyone connected with the developer or promoter.[24]

So as not to discourage beneficial management provisions, the Committee noted that the mere presence of management services by the promoter or developer would not activate the registration requirement.[25] Nor would the existence of commercial facilities within a residential

---

17 328 U.S. 293 (1946).

18 *Id.* at 298. The Court further noted that the substance of the transaction would be the gravamen of any inquiry and not its form. *Id.*

19 *See* SEC Securities Act Release No. 4877 (Aug. 8, 1967).

20 *See* Ellsworth, *supra* note 8.

21 The Committee was established on May 3, 1972 and was chaired by Raymond R. Dickey, Esq.

22 SEC, REPORT OF THE REAL ESTATE ADVISORY COMMITTEE, Recommendation 25, at 20 (1972), [hereinafter cited as ADVISORY COMMITTEE REPORT]. *See also* Dickey, *What Lies Ahead for Real Estate Regulation*, 3 REAL ESTATE REV., Spring 1973, at 13.

23 ADVISORY COMMITTEE REPORT, *supra* note 22, Recommendation 26, at 20.

24 *Id.*

25 *Id.*, Recommendation 27, at 21.

project mandate registration, provided the income derived was applied to common expenses and such facilities were incidental to the condominium project itself.[26] In addition, the Committee suggested that a short form registration designed specifically for condominium offerings be utilized.[27]

Shortly after the report of the Advisory Committee was submitted, the SEC set forth its response entitled "Guidelines as to the Applicability of the Federal Securities Laws to Offers and Sales of Condominiums or Units in a Real Estate Development."[28] The Commission noted that certain ancillary provisions in the sale of a condominium would result in an investment contract.[29] In announcing its guidelines, the Commission adopted the Advisory Committee's recommendations relating to rental pools, restrictions on occupancy, and designation of exclusive rental agent. Moreover, the Commission added that a condominium, offered with any rental or collateral services, would be considered an investment if the seller emphasized the economic benefits to be derived by the activities of third parties.[30] The Commission felt that these guidelines would alleviate much of the uncertainty and invited written inquiries related to particular situations.[31]

---

26 *Id.*, Recommendation 28, at 21. *But see* Forman v. Community Services, Inc., 500 F.2d 1246 (2d Cir. 1974) *rev'g* 366 F. Supp. 117 (S.D.N.Y. 1973), wherein the Appeals Court held that a cooperative offering constituted an investment contract, because, *inter alia* "[the tenants] share in the income from the leasing of retail establishments, office space, parking . . . ." 500 F.2d at 1254.

27 ADVISORY COMMITTEE REPORT, *supra* note 22, Recommendation 29, at 21. The short form would contain descriptive details relating to the condominium, specifically including a financial statement of the developer or promoter. *Id.*, Recommendation 20, at 21. ADVISORY COMMITTEE REPORT, at 99, contains guidelines, providing a detailed look at the short form suggested by the Committee.

The Committee also suggested that for the sake of uniformity, a permanent advisory committee in the field of real estate securities regulation be established. *Id.*, Recommendation 1, at 15. It should be noted that Chairman Dickey no longer believes that a permanent committee is advisable for two reasons. First, the recent enactment of the Federal Advisory Committe Act, Pub. L. No. 92-463, (Oct. 6, 1972), requires full public participation which Chairman Dickey feels "would not be conducive to accomplishing the free interchange of thinking among committee members necessary to accomplish meaningful goals." 184 BNA SEC. REG. & L. REP., Jan. 10, 1973, at A-18. Secondly, "uniformity" may be impossible to achieve. Therefore, he feels that frequent informal meetings among the Commission, state regulatory agencies, associations of state commissions, the NASD and groups from the private sector might produce the needed "consistency in fundamental purpose of regulation" more successfully than a permanent committee. *Id.*

28 SEC Securities Act Release No. 5347 (Jan. 4, 1973) [hereinafter cited as SEC No. 5347]. *See also* HOUSE AND HOME, February 1973, at 34.

29 SEC No. 5347, *supra* note 28. The Commission concluded that even though the owner was not wholly inactive an investment contract could arise. *Id.*, *citing* SEC v. Glenn W. Turner Enterprises, Inc., 348 F. Supp. 766 (D. Ore. 1972), *aff'd*, 474 F.2d 476 (9th Cir. 1973); State v. Hawaii Market Center, Inc., 485 P.2d 105 (1971).

30 SEC No. 5347, *supra* note 28.

31 *Id. See* HOUSE AND HOME, July 1972, at 9, where it was reported that SEC staff

However, after these guidelines were released, numerous questions remained concerning advertising and sales practices.[32] The Commission subsequently declared that prior to filing a registration statement, it would be unlawful for a promoter to disseminate any sales literature or publicity concerning condominiums subject to registration.[33] In addition, no downpayments, deposits or purchase commitments would be permitted prior to filing.[34]

The variety and complexity of offerings in this field make it necessary to examine the facts and circumstances in each case in order to distinguish investments from second homes. On the investment side of the spectrum is the plan implemented by Marriott at the Camelback Inn in Arizona.[35] Purchase of a suite entitles the buyer to occupy his unit four weeks yearly. During the remainder of the year, the unit is available for public rental with income from the operation of the hotel being shared among the owners. A major selling point in marketing this plan to potential buyers is Marriott's reputation as a professional resort manager. The program, which emphasizes tax and income advantages, is admittedly aimed at potential investors[36] and is clearly within the ambit of the securities laws.

The nonsecurity end of the spectrum is illustrated by a no-action letter issued to Surfside Condominiums, Inc.[37] Under this offering, resort condominium units were to be sold as second homes with no arrangements for managing or renting the units. Moreover, sales per-

members were attending condominium promotional dinners and, if the investment aspects were touted, suggesting registration of the project.

32 Of particular interest was whether sales persons were required to register as broker-dealers. Although licensed real estate brokers selling cooperative apartments are considered exempt from registration, *see* SEC Securities Exchange Act Release No. 3963 (June 10, 1947), the Commission refused to extend a similar exemption to licensed real estate brokers selling resort condominium units coupled with a management agency agreement. San Diego-Maui Group, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,444, at 80,970 (SEC 1971).

Notwithstanding this ruling, the Advisory Committee took the position that licensed real estate brokers should be exempt from broker-dealer registration when selling resort condominiums. *See* ADVISORY COMMITTEE REPORT, *supra* note 22, Recommendation 31(a). However, the Commission did not accept this recommendation and asserted that persons engaged in the distribution of investment condominiums may be required to register as brokers under the Securities Exchange Act. SEC No. 5347, *supra* note 28.

33 SEC Securities Act Release No. 5382 (April 9, 1973).

34 *Id.* Prior to filing, the only step a promoter would be permitted to take is the publishing of notices. SEC Rule 135, 17 C.F.R. § 230.135 (1973). For those activities permissible between the filing of a registration date and its effective date, see SEC Rule 433, 17 C.F.R. § 230.433 (1973); SEC Rule 134, 17 C.F.R. § 230.134 (1973).

35 *See* HOUSE AND HOME, February 1973, at 16. Purchasers of these suites must pay between $40,000 and $275,000.

36 *Id.*

37 *Surfside Condominiums*, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,686, at 81,447 (SEC 1972).

sonnel were instructed to respond to unsolicited inquiries as to the rental market by noting that rentals were the sole responsibility of the unit owners.[38]

Enforcement by the SEC

The cases at either end of the spectrum are usually easy. The problems arise when the offering contains both investment and second home features.[39] Apparently, the developers have chosen to avoid registration whenever their offering falls in the twilight zone.[40] This attitude is motivated, in part, by the expense and complexity inherent in filing a securities registration.

In response to this lack of compliance, the SEC has embarked upon an enforcement program and has begun prosecuting promoters for violations of the securities laws. In order to validate its guidelines and lay the foundation for judicial action, the Commission filed suit against Marasol Properties.[41] According to the SEC, the project marketed by Marasol stressed investment appreciation of the unit as a way to beat inflation and guaranteed a return of 9 to 12 percent as income from an exclusive management contract.[42] This annual return was guaranteed whether or not the owner's particular unit was rented. Moreover, there were occupancy time limitations on the use of the unit.[43] This case culminated in the issuance of a permanent injunction against the developers.[44]

In December 1973, the SEC instituted an action against the developers of the Pajaro Dunes project in California.[45] The Commission claimed that the developer emphasized the economic returns of owner-

38 *Id.* at 81,448.

39 *See* Tahoe Donner Bowl Condominiums, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 79,440, at 83,250 (SEC 1973), wherein the SEC refused to issue a no-action letter because of the retention of discretion in rental services by the offeror's subsidiary. *See also* 1 CONDOMINIUM REP. Jan. 1974, at 1-2.

40 One authority has reported that as of August, 1973, only 59 investment condominiums had been registered while another five to seven hundred unregistered condominiums subject to securities laws were currently being marketed. Ellsworth, *supra* note 8, at 698.

41 SEC v. Marasol Properties, Civil No. 73-1608 (D.D.C., Sept. 28, 1973).

42 This exclusive management contract is really a leaseback "whereby the investor contemporaneously with his purchase of a fully-furnished condominium unit executes a lease back contract which leases his unit for ten years to a company set up by [the developer]." 216 BNA SEC. REG. & L. REP., Aug. 22, 1973, at A-6.

43 *See* HOUSE AND HOME, Oct. 1973, at 12.

44 SEC v. Marasol Properties, Civil No. 73-1608 (D.D.C. Sept. 28, 1973). Although District Judge Gesell made a finding of fact that the defendants had not registered as brokers with the Commission, he did not elaborate as to when this would be a violation of section 15(b) of the Exchange Act. *Id. Findings of Fact and Conclusions of Law No. 16*, at 5. *See* note 32 *supra*.

45 SEC v. Hare, Brewer and Kelley, Civil No. 73-2175 (N.D. Cal., filed Dec. 6, 1973).

ship and conducted a rental pool by his practice of rotating unit rentals in order to distribute rental income among the owners. The complaint alleges that both of these factors contravene the guidelines promulgated by the Commission.[46] These SEC actions should warn developers that they would be well-advised to seek no-action letters or register their projects to avoid administrative roadblocks or face costly litigation.

A Solution: Multiple Participation

In the face of mounting pressure by the SEC and the negative trends in the vacation home market discussed previously, new approaches were needed. To circumvent these barriers it became apparent that potential buyers should be offered only what they need — a place of their own for an annual specified period. Therefore, the industry set out to design a system of rights in resort accommodations consecutively accruing to multiple parties. Such a system would combine maximum utilization of resources with proportionately lower prices, thereby enabling high quality accommodations to be offered to a broader market. In the last few years, innovative programs have appeared in various guises, ranging from licenses to use, to fee title for a particular time period.

Although each of these programs has the same objective, *viz.*, to provide affordable resort accommodations, the legal rights accruing to the buyer vary considerably depending on the legal structure utilized. Moreover, these disparate rights are evidenced by vastly different legal documents.

When the buyer executes a sales agreement with the developer entitling him to a license to use a particular unit, he acquires no legal interest in the property. A license is merely a legal privilege which permits the licensee to perform certain acts on the licensor's land.[47] Generally, such a license agreement will qualify as a retail installment contract. As such, the buyer may receive statutory protection against fraudulent practices. Nevertheless, the recourse of the licensee is only as good as the solvency of the licensor and has no reference to the land itself. For example, in the event the license is not honored because the property has been destroyed, the licensee will have a cause of action in damages for breach of contract. He will not be entitled to share in any insurance proceeds, nor will he retain any interests beyond the agreement.

---

[46] *See* notes 22-30 and accompanying text *supra*.

[47] *See generally* 2 R. Powell, The Law of Real Property ¶ 222, at 189 [hereinafter cited as Powell]; Walsh, *Licenses and Tenancies for Years*, 19 N.Y.U.L. Rev. 333 (1942).

If a lease (an estate for years) had been entered into, however, the lessee would have the additional protection of his jurisdiction's real property and landlord-tenant statutory and decisional law. Moreover, the lessee's rights are recognizable as against the world, not just the offeror. Also, subject to the express terms of the lease agreements, the rights of alienation are generally far more extensive than those accruing to the licensee. Nonetheless, the lease is not an ownership interest and does not generate the economic advantages of property value appreciation and tax benefits as does fee ownership.

As an owner, the buyer's interest in his unit is protected by his recorded deed. The promoter selling vacation units has the valuable psychological plus of offering outright ownership to the buyer. At the same time, the builder's obligation to the lender is reduced as his units are sold on mortgage commitments. In addition to establishing fee title, the deed gives notice to all third parties of any covenants, restrictions or easements on the property. The nature, scope and effect of covenants running with the land provide the developer with the flexibility and stability which are needed to effectuate a sophisticated plan of multiple ownership.

The license, the lease, and the deed merely represent the vehicles for establishing a system of enforceable rights. Unfortunately, however, the lines of demarcation between these categories become blurred when a developer attempts to market a program that complies with local laws yet meets the demands of his market studies. Frequently, the documents supporting a given transaction are a polyglot of legal concepts. For example, one condominium developer offers an estate for years which is conveyed by a warranty deed incorporating a license to use the common areas.[48] Whether this is a license, lease, or deed is problematical, and vividly illustrates the interpretative problems confronting the practitioner whose client presents him with these documents and complains that his vacation retreat is not paradise. Since each offering must be evaluated individually, the remainder of this article will consider the varieties of multiple participation resort programs which are presently being offered.

THE LICENSE TO USE RESORT PROPERTY

The license as a vehicle for transferring rights in vacation property is presently being considered by at least one developer and pres-

[48] This plan is being offered at Bird Rock Falls, North Carolina by Interval, Inc. *See* notes 77-78, 92-97 and accompanying text *infra* for a detailed treatment of interval ownership.

ently being marketed by another. The plan under consideration is characterized as a resort condominium club[49] and entails the purchase of condominium units in various existing resort projects and the subsequent sale of use privileges to members of the club. The members would acquire no interest in the property, while the developer would avoid the problems inherent in constructing its own development. It must be noted that this program has not yet been marketed and should not be confused with the "Vacation License," discussed below.

"The Vacation License"

The Caribbean-International Corporation is presently offering a plan, denominated the "Vacation License," which transfers to the buyer "the right to occupy specific accommodations at a Caribbean-International resort for a certain period every year during the useful life of that resort. . . ."[50] As a condition precedent to exercising this right, the licensee must notify Caribbean-International of his intention to utilize his suite at least 60 days prior to his scheduled period.[51] When the accommodations are utilized by the licensee he is required only to pay a per diem charge,[52] otherwise the suite may be rented to other licensees or the public.[53] Since the "Vacation License" is being marketed as a total program, a major selling point is the availability of accommodations under the "Vacation License" in resorts other than the owner's home resort.[54]

---

49 *See* 5 RECREATION LAND AND LEISURE HOUSING REPORT, Mar. 20, 1974, at 3 [hereinafter cited as LEISURE HOUSING REPORT].

50 The description of the "Vacation License" was taken from a promotional booklet printed by Caribbean-International Corp. *See The Vacation License Resort Program and the Caribbean International Club* 5 (1973) (on file in the St. John's Law Review office) [hereinafter cited as *The Vacation License*]. The useful life of a resort is calculated to be at least forty years and up to sixty years. *See Caribbean-International Vacation License Resort Program Agreement* (on file in the St. John's Law Review office).

51 *The Vacation License, supra* note 50, at 9. The cost of a "Vacation License" ranges from $2,000 to $6,000.

52 *Id.* at 17. The per diem charge is a nominal service charge, *e.g.*, $5 to $7, which is limited to a 6% annual increase to be applied if the resort is required to pay higher costs. This limitation is applicable until the "Per Diem Division Date" after which the per diem charge will directly reflect the actual costs of operation. The "Per Diem Division Date" varies for each resort, but falls approximately 13 years after the program has been instituted. *Id.*

53 In the event a suite is not reserved by the vacation licensee entitled to occupancy for that period, other licensees desiring to utilize the suite may reserve it. This right lasts for 15 days, at which time the suite becomes available for rental to regular hotel guests. *Id.* at 11.

54 Caribbean-International Corp. has currently implemented the "Vacation License" program in four different resorts: the Lauderdale Beach Club, Florida; the Caribbean Harbour Club, St. Thomas; Caribbean Reef Club, St. Croix; Caribbean Beach Club, San Juan. The company has also indicated it is studying future expansion to Europe or Hawaii. *Id.* at 37.

In consideration for the purchase price, the resort is obligated to maintain the facilities in good operating condition.[55] In addition, the resort must acquire insurance and establish an escrow fund of sales revenue to guarantee the operation of the resort.[56] The advantage of instituting such a program lies in the accumulation of capital via sales which enables the developer to retire its mortgage within a short time period.[57] Additionally, the developer is able to achieve maximum utilization of the property because when the licensee does not use his accommodations they will be rented to the general public as resort suites.

In order to avoid any similarity to a security, several limitations have been placed on the alienability of the "Vacation License." While a licensee may transfer his interest by gift or bequest, any other transfer may only be effected by prior written approval of the sponsor.[58] Additionally, the license owner may not sell his license at a profit, nor may he rent his accommodations or enter into sublicensee agreements.[59] Of greater significance to the securities registration question is the fact that the vacation licensee does not participate in the profits earned by Caribbean-International. Since the program offers no investment benefits to the purchaser, the SEC has not required the plan to be registered.[60]

Whether this program creates in the buyer the status of licensee, lessee, or perhaps lodger[61] is a close question. Although the above restrictions successfully evade registration with the SEC, they bear striking resemblance to the multiform covenants found in many leases. Yet

---

An approach similar to the "Vacation License" is being offered by University Resort Investors of California. *See* MORTGAGE AND REAL ESTATE EXECUTIVES REP., Feb. 7, 1974, at 4, wherein a syndicate-vacation package, known as the "chip" system is described. Under this program, purchasers become limited partners in several resorts and receive a number of "chips" which entitle them to utilize the facilities for a specified amount of time.

55 *The Vacation License*, *supra* note 50, at 27.

56 *Id.* at 25.

57 *Id.* at 3. Since the burden of paying interest is eliminated from the resorts' overhead, the promoters feel they can offer substantial long-time savings to vacation licensees.

58 *Id.* at 23.

59 *Id.*

60 *See* notes 21-46 and accompanying text *supra*. It appears, however, that the SEC is undertaking a serious reevaluation of their position on the vacation license concept. *See* Letter from Chief Counsel Neil S. McCoy to Tropics International, April 5, 1974, wherein the SEC declined to issue a no-action letter to such a program. The Commission maintained that the issuance of no-action letters in this rapidly evolving area might lead to erroneous inferences as to the Commission's position. Moreover, the Commission stressed the narrow scope of prior no-action letters, cautioning that they should not be relied upon beyond the particular issues involved. Hopefully, the SEC will publish guidelines in the near future.

61 *See* POWELL, *supra* note 47, ¶ 222.4, at 204.

the internal exchange program, whereby the owner may exercise his rights in several other resorts belies an interest in land. The guiding principle in close questions is considered to be the "ascertainment of the intent of the parties." On balance, therefore, the offeror's characterization of the plan as a license would probably be sufficient to avoid creating an interest in land.

THE LEASE OR SALE — LEASEBACK APPROACH

Several developers have utilized the lease to provide for the exclusive possession of a particular unit. One approach has been to transfer to the purchaser an undivided leasehold interest in a specific unit for a designated two week period to last in perpetuity.[62] Each lessee is obligated to pay a pro rata share of expenses and an annual percentage fee to an agent designated to manage the project. The SEC issued a no-action letter in one such case because the promoter made no mention of income-producing aspects.[63]

Another approach which has been used in several resort condominium projects is the sale of a particular unit to multiple buyers, each receiving fee title for a designated time period.[64] Upon execution of the deed each purchaser is required to execute a leaseback agreement whereby the management company agrees to pay a fixed yearly sum in addition to supervising the operation of the resort. The buyer's part of the agreement entitles him to use and occupancy of his unit for a specific period and obligates him to pay his pro rata share of the common expenses, *e.g.*, maintenance and repair costs, insurance, taxes and utility costs. In addition, each owner must pay a percentage fee to the management company.

The SEC issued a no-action letter to such a venture proposed by a Spanish developer,[65] noting that rental services were not included in the plan and there were no representations as to the economic benefits that may devolve upon the owner by re-renting. However, a similar inquiry was deemed a security by the Commission because the proposal included a rental brokerage service to cover maintenance costs and to reduce the principal of mortgage debt.[66] This provision moved the

---

62 Although this arrangement purports to create a leasehold interest, it is doubtful that this characterization is valid because of the lack of certainty as to duration. *See id.* ¶ 222.3, at 87.

63 *See* Kona Billfisher, P-H 1974 SEC. REG. ¶ 1100.150, at 1098.31.

64 *See, e.g.*, Edward S. Jaffry, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,395, at 80,881 (1971).

65 *See* 211 BNA SEC. REG. L. REP., July 18, 1973, at C-3.

66 Edward S. Jaffry, [1971-1972 Transfer Binder] CCH FED. SEC. L. REP. ¶ 78,395 at 80,881 (1971).

offering from the vacation home to the investment end of the spectrum and thus within the purview of the securities laws.

While the lease and sale-leaseback provide greater predictability than the license, they are attempting what can be done more directly in the deed.

FEE OWNERSHIP

Joint Ownership — The Quadrominium

A purchase made jointly by a number of people is the simplest form of multiple ownership.[67] While such arrangements may be common among family members, a prime example of this approach among strangers is the quadrominium.[68] Under this system, a condominium unit is owned in fee by four owners as tenants in common, each with a one-quarter undivided interest. "Quads" are best suited for multi-seasonal resort areas so that the interests of skiiers, nature lovers, boaters and foliage aficionados may all be accommodated. Such an approach has two major pitfalls. The first involves the owners' relationship *inter se* and is essentially administrative; the second pertains to liability for legal obligations.

Whether relations among co-owners are amicable or not depends on how effectively the right to possession is distributed. Generally, the right of occupancy is determined either informally, or by a written contract among the parties. Regardless of which method is employed, the task of allocating periods of occupancy is formidable and represents a substantial obstacle to the success of such a venture. The best and most equitable approach is to devise a formula to determine exclusive use. Preferably the formula should incorporate a cycle whereby occupancy would be rotated. However, human nature being what it is, it will be nearly impossible to satisfy all of the people all of the time. Moreover, serious practical problems may arise when enforcement is sought against an intransigent co-owner.

When parties decide to combine their resources in such a venture the legal relationship arising among the co-owners will be in the nature of a partnership.[69] As such, each co-owner will be jointly and severally

[67] While co-ownership of real property is not new, this idea has been incorporated into the bylaws of numerous recreational condominium projects. The bylaws of the Seven Lakes development in Florida requires each group of co-owners to select among themselves a chairman annually to set up a schedule governing the right of occupancy and file it with the condominium association. *See* HOUSE AND HOME, October 1972, at 36.

[68] The quadrominium is presently being offered at the Sandy Lanes development in Ocean City, Maryland. *See* 1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 7.06 (1973) [hereinafter cited as ROHAN & RESKIN].

[69] *Cf.* note 9 *supra.*

liable on the mortgage, for unit assessments, and for torts occurring on the property, regardless of his own culpability. This type of liability represents a great risk to the co-owners. Thus, representation by counsel is a must in order to provide limitations on individual liability in the documents.

If such problems are not anticipated and resolved at the outset, they may later emerge to disrupt the carefree enjoyment of the recreational paradise envisioned by co-owners.

Time-Sharing and Interval Ownership

One method of achieving stability and the absence of financial interdependence has been to solidify the rights and obligations of co-owners in a declaration of covenants running with the land.[70] When such a declaration is executed by the grantor (developer) and grantee (purchaser) and filed with the deed, privity of contract and privity of estate will arise, thereby binding all parties, heirs, assigns, and successors. The provisions of such a declaration are enforceable, either as covenants running with the land, or equitable servitudes, and are clearly preferable to a mere written agreement. Yet, for such a declaration to be successful, it must be combined with a form of ownership which is amenable to resort development.

The condominium, because of its potential for providing a wide range of amenities and maintenance-free living, is ideally suited for the vacation home. Moreover, as a creature of statute, the condominium is more flexible than the common law forms of ownership.[71] Thus, a system of multiple ownership may be implemented by dividing the unit temporally, *i.e.*, condominiumizing the condominium. By providing the buyer only with what he needs and can afford, this type of program has great appeal to the vacation home market. At the same time, these programs are attractive to the developer because he is able to increase his development profits. By fractionalizing the units, *e.g.*, into monthly increments, the developer is able to mark up each unit above the whole-unit cost.[72] An additional advantage, from the developer's position, is that this type of project apparently is not a security,[73] and does not necessitate the expense of registration with the SEC.[74] There-

70 *See generally* R. POWELL, *supra* note 47, ¶ 633.36, at 671.

71 *See generally* ROHAN & RESKIN, § 7.06, at 7-43.

72 *See* LEISURE HOUSING REPORT, *supra* note 49, at 2, where the higher markup is attributed to increased marketing costs. *See also* Outen, *Interval Ownership — A Truly Unique Concept*, LAWYERS TITLE NEWS, May-June 1973, at 1 [hereinafter cited as Outen]; HOUSE AND HOME, December 1972, at 20.

73 *See, e.g.*, The Innisfree Corp., CCH FED. SEC. L. REP., ¶ 79,398, at 83,154 (1973).

74 *See* notes 28-40 and accompanying text *supra*.

fore, it is understandable that this approach has been recently attempted by innovative developers in various parts of the country.[75]

The genesis of multiple ownership of resort condominiums occurred in Europe in the late 1950's. The Eurotel system was devised in order to promote hotel construction and entailed the ownership of individual units subject to occupancy restrictions. These units were then rented to the general public as luxury suites.[76] Time-sharing ownership, which is being offered by the Innisfree Corporation of California, and the interval ownership plan, marketed by Interval Incorporated, a Florida corporation, are the two leading multiple ownership programs. Time-sharing and interval ownership are two schemes of condominium ownership wherein the purchaser takes title, as a tenant in common, to a particular unit and an undivided percentage interest in the common areas during a specified use period. While both approaches rely on a declaration of covenants to establish the interaction among owners, management, and condominium association, each has adopted a different manner of providing for the sequential right of possession.

In its development at Bird Rock Falls, Interval utilizes a warranty deed to incorporate the interval ownership program. The deed purports to convey an estate for years, which "is to be succeeded forthwith by a succession of other estates in consecutive and chronological order, revolving among the owners. . . ."[77] The specifics of the interval owner-

---

[75] *See generally* LEISURE HOUSING REPORT, *supra* note 49.

The Innisfree Corporation of California is presently offering time-sharing at Brockway Springs at Lake Tahoe, California and is planning to implement time-sharing at the Hanalei Beach and Racquet Club in Kauai, Hawaii, and Smuggler's Mountain in Aspen, Colorado and possibly Acapulco. Innisfree's time-sharing program incorporates a broad range of amenities and includes a wide assortment of accommodations. The price of a two-week period ranges from $2,500 to $9,000. A similar program, known as interval ownership, is presently being offered by Interval, Inc., a Florida corporation, at the Bird Rock Falls development in Balsam Grove, North Carolina. The cost of a two-week share in a condominium unit ranges from $1,700 to $3,800 depending on the dates and the model chosen.

The technique of time-segmented ownership is suitable to any climate, as the Tidewatch Village project at Cape Cod, Massachusetts illustrates. There, the New Seabury Corporation is selling time-shared units on oceanfront property for $22,000 to $72,000 for three months. Specifically, the purchaser will acquire ownership for the summer season while the developer will retain title for the remainder of the year and conduct executive seminars during the winter months. This year-round use has a number of positive aspects: upkeep of the units year round is assured; because the development will rarely be vacant, the danger of vandalism is minimized; and the businessmen attending the executive workshops may comprise a ready-made supply of potential purchasers. *See* APARTMENT CONSTRUCTION NEWS, Dec. 1973, at 1.

[76] *See* Ellsworth, *supra* note 8, at 694. Another factor contributing to the development of this concept was the "time-sharing" operations of the computer industry.

[77] *See* Warranty Deed prepared by Interval Incorporated on file in the St. John's Law Review office [hereinafter cited as Interval Deed].

ship plan are contained in a "Declaration of Restrictive Covenants"[78] which is executed by the buyer and the developer and filed with the deed.

The Innisfree Corporation, in its Brockway Springs project, has elected to use a conventional condominium deed which establishes a tenancy in common, and incorporates the time-sharing program by reference.[79] The deed conveys a "time interest," the terms of which are contained in the "Supplemental Declaration of Covenants, Conditions and Restrictions."[80] This declaration, which is executed by Innisfree and the individual purchaser, is recorded with the deed, thereby assuring the buyer that the time-sharing program will be binding upon all parties and successors.[81]

In addition to the increased stability and enforceability of multiple ownership rights provided by the declaration, both interval and time-sharing ownership provide the advantage of eliminating the financial interdependence among owners which has plagued other multiple-ownership programs. By utilizing a system which conveys a distinct interest, both Innisfree and Interval are able to mortgage each unit share separately. Individual deeding and financing act to insulate the buyer from the defaults[82] of concurrent owners in a given

78 This document is prepared by Interval Incorporated and is on file in the St. John's Law Review office [hereinafter cited as Interval Declaration]. It should be noted that there is a disparity between the deed and the declaration as to the life of the program. According to the deed, the consecutive succession of estates is terminable on the first Saturday in 2075. *See* Interval Deed, *supra* note 77. "At that remote date the estate granted shall terminate, but a remainder over in fee simple is vested in the Interval owner as tenant in common with all the other owners of Intervals in the resort home." Outen, *supra* note 72, at 2. In contradistinction, the declaration is binding upon all parties until January 1, 1998, after which it shall be extended for successive ten-year periods. *See* Interval Declaration, *supra* note 78, at 9. Notwithstanding this peculiarity, the opportunity to extend the declaration for successive ten-year periods will assure the concurrent application of the scheme in the deed and declaration.

79 *See* Grant Deed utilized by Innisfree Corporation [hereinafter cited as Innisfree Deed] (on file in the St. John's Law Review office). As to the details of the project at Brockway Springs, see CALIFORNIA DEP'T OF REAL ESTATE FINAL SUBDIVISION PUBLIC REPORT, No. 8772 [hereinafter cited as CAL. PUBLIC REPORT].

80 This document is prepared by Innisfree and is on file in the St. John's Law Review office [hereinafter cited as Innisfree Declaration].

Under the Innisfree plan the declaration by its terms ends sixty years from the date of execution or upon the termination of the condominium itself. *Id.* at 9. Although the documents are silent as to what will happen at that time, the obvious alternatives are: the reinstatement of the declaration, possibly with additions or deletions; or partition among the owners.

81 *Id.* at 4; Innisfree Deed, *supra* note 79, at 2. *See* note 70 and accompanying text *supra*.

To prevent the possibility of irreconcilable situations in the future, the declarations of both Innisfree and Interval contain severability clauses and may be amended by an aggregate of 75% of the owners. Innisfree Declaration, *supra* note 80, at 10, 11; Interval Declaration, *supra* note 78, at 9.

82 Each individual owner is responsible for the expenses and damages attributable

unit.[83] Moreover, by removing the potential for internal disputes, these programs promote the free alienability of the unit shares. Nonetheless, time-sharing and interval ownership can only insure that the buyer's interest is protected and possession will be transferred smoothly; whether or not a particular project will measure up as a top-flight resort depends upon the structure and operation of the management entity.

The purchaser of a specific time period in a resort condominium wants to enjoy the maximum use of recreational facilities with a minimum of responsibility for upkeep. Thus, Innisfree and Interval offer their units fully furnished and ready for occupancy.[84] Furthermore, to

---

to his unit for the period of his right to possession. In addition to a pro rata share for the real estate taxes and insurance, this includes long distance phone calls, property destruction and anything directly related to his time period.

While Innisfree recognizes a lien for each owner and/or the management entity, Innisfree Declaration, *supra* note 80, at 9, the Interval Declaration creates a lien for unpaid assessments in favor of the management corporation only, Interval Declaration, *supra* note 78, at 5-6. In both cases such a lien is enforceable at a foreclosure sale like a mortgage. Additionally, all remedies against owners for failure to pay assessments are cumulative. *Id.* at 6; Innisfree Declaration, *supra* note 80, at 9. It should also be noted that under both plans such a lien will be ineffective against a bona fide purchaser for value, unless notice of default has previously been filed with the county.

[83] However, this insulation is not perfect because of the possibility of a forced sale of the unit to satisfy a federal tax lien against one time-share owner. *See* INT. REV. CODE OF 1954, § 7403. In such a case, the entire unit would be sold at a foreclosure sale and the nondefaulting owners would lose their interest in the unit and receive only their pro rata share of the proceeds after the lien was satisfied. *See* INT. REV. CODE OF 1954, § 7403. This eventuality is noted in the CAL. PUBLIC REPORT, *supra* note 79, at 3:

> The federal tax lien law may authorize the federal tax authorities to enforce the lien for unpaid federal taxes due from any one owner of a time-sharing interest by selling the entire condominium and distributing the sale proceeds to the owners in accordance with their interests. The supplemental declaration under which time-sharing interests are established provides special lien rights upon each owner's interest in favor of each other owner of an interest in the same condominium.
>
> One or more owners, or the owners' agent may be required to discharge a delinquent owner's obligations in order to prevent a sale of the entire condominium and to seek reimbursement by foreclosure of the special lien on the delinquent owner's interest or by other means.

See also Liebman, *supra* note 3, at 43, wherein it is suggested that "automatic options to repurchase with payment in escrow" may be the best means to avoid partition.

[84] Innisfree and Interval both provide for a service-period between consecutive time intervals to allow the management entity to inventory, clean and, if necessary, repair each unit. Under the time-sharing program, the right to possession begins as noon on the Friday beginning the period and terminates on noon of the second Thursday. In addition, two service weeks are set aside each year — one in the spring and one in the fall — for major cleaning and refurbishing of the unit. Innisfree Declaration, *supra* note 80, at 1-4. This system guarantees the owner two full weekends and allows twenty-four hours for the management to service the unit.

Pursuant to the "Rules and Regulations for Vacation Homes at Bird Rock Falls" (on file in the St. John's Law Review office) a four-hour period is set aside for servicing the unit. Each interval owner must vacate his unit by 10:00 a.m. on the final day of his time period, and the succeeding owner may not take possession until 2:00 p.m. on the day his interval begins.

insure the proper functioning of their plans, both Innisfree and Interval remain intimately involved in the managements of their respective projects. As with providing the right of possession, however, each has taken a different approach[85] in supplying management services.

Since the Innisfree complex at Brockway Springs is not comprised entirely of time-sharing units,[86] the time-sharing declaration is superimposed over the "Condominium Restrictions"[87] applicable to the entire project. Under the program the exterior and common elements of the condominium are controlled by the condominium association in the same manner as a conventional condominium. As to the interior of each time-sharing unit and the implementation of the time-sharing program, the "Supplemental Declaration" controls. By virtue of this declaration a "majority in interest of owners" appoint an agent to direct and control the maintenance and administration of the unit.[88] The Declaration requires the agent to maintain and refurbish the unit as it deems necessary,[89] and to pay all operating expenses and assess the owners for their pro rata share. For its efforts the agent receives five percent of the charges payable by each owner, plus reimbursement for reasonable and necessary administrative expenses.[90]

The management of the Interval project at Bird Rock Falls is governed by a series of inter-connected documents. Although the Declaration provides that the "sole responsibility and duty for maintenance"[91] rests with the Bird Rock Falls Club, Inc.,[92] a management

---

85 Liebman, *supra* note 3, at 42-43 suggests three alternatives for appointing the managing entity: 1) the pure agency form; 2) a trust indenture; and 3) a lease arrangement.

86 On the basis of marketing experience, Innisfree has withdrawn the time-sharing program from the four-bedroom units and limited the plan to two and three-bedroom units. 6 MORTGAGE AND REAL ESTATE EXECUTIVES REP., February 7, 1974, at 2. Innisfree is offering 110 time-sharing units at Brockway Springs and has sold 75. LEISURE HOUSING REPORT, *supra* note 49, at 2.

87 On file in the St. John's Law Review office.

88 Innisfree Declaration, *supra* note 80, at 5. A majority in interest of owners is defined as "an owner or owners owning in the aggregate more than 50% of the undivided interest in the condominium." *Id.* It should be noted that the term owner includes the developer with respect to any time interest not conveyed. *Id.* The declaration stipulates that the agent shall serve for a period of ten years at which time the majority in interest of owners shall reappoint or select a successor agent. *Id.* Said selection must be evidenced by a written agreement which binds the agent and owners to the declaration. *Id.* Moreover, the agent may retire this position upon giving ninety days notice to each of the owners. *Id.* In the absence of an agent the majority in interest shall have the rights of the agent. *Id.*

89 *Id.* The agent is authorized to make discretionary capital expenditures which do not exceed available reserves by more than one thousand dollars. Any larger expenditures require the prior approval of the majority in interest of owners. This wide latitude as to expenditures is designed to insure proper professional maintenance of the project.

90 *Id.* at 7.

91 Interval Declaration, *supra* note 78, at 4.

92 Bird Rock Falls Club, Inc. is a North Carolina nonprofit corporation which has a

agreement executed by the club and the developer provides that the club is to be managed by the developer, Interval.[93]

Each owner is designated a member of the Club,[94] which means that he and his family have a license to use the common areas.[95] In consideration for performing the duties of a managing agent the developer is entitled to receive an initial payment of $200 for each one-week time period sold plus 10 percent of all expenses of maintenance and operation of the Club.[96]

The goals of stability and enforceability, financial independence, and good management are indeed difficult to attain; however, they appear to have been met in these programs. The comprehensiveness of the time-sharing and interval ownership programs reflects a total commitment by both companies — an absolute necessity if such programs are to succeed.

CONCLUSION

Formerly, resort property ownership was based solely on conventional legal relationships; however, this is no longer the case. In order to satisfy the demands of a rapidly-changing society for "mass-produced, disposable" vacation homes, the recreational property industry is undergoing revolutionary change. Today, the industry is attempting to furnish vacationers only with what they can use and afford. Developers now use time-sharing and other programs to divide ownership and occupancy right among multiple parties. Whether such programs of multiple participation will be successful depends on how accurately the developer has analyzed the target market, whether the program is legally sound, and how well it has been implemented.

Each of the plans treated in this article varies in its market focus,

primary purpose to promote the civil and recreational interests of the Bird Rock Falls project. *See* Articles of Incorporation of Bird Rock Falls Club, Inc. [hereinafter cited as Bird Rock Articles] (on file in the St. John's Law Review office). *See also* By-laws of Bird Rock Falls Club, Inc. [hereinafter cited as Bird Rock By-laws] (on file in St. John's Law Review office), wherein the management corporation is empowered to borrow money and encumber club property upon a resolution of the board.

93 Agreement Between Interval, Inc. and Bird Rock Falls Club, Inc. [hereinafter cited as Management Agreement] (on file in St. John's Law Review office). This agreement is designed to last for ten years at which time it will be renewed automatically unless three-fourths of the interval owners vote for nonrenewal. *Id.* at 4.

94 Interval Declaration, *supra* note 78, at 5.

95 Bird Rock By-Laws, *supra* note 92, at 2.

96 Management Agreement, *supra* note 93, at 4. It should be noted that the declaration, Interval Declaration, *supra* note 78, at 7, allows the declarant to "retain ownership of certain parcels within the Development for use for commercial purposes." Furthermore, the developer reserves the right to conduct "all commercial enterprises of any type or kind whatsoever" on the common areas. *Id.* The declaration provides further that these rights are assignable at the sole election of the developer. *Id.*

legal basis and implementation. Nevertheless, a common thread discernable throughout is that innovators within the recreational property field have had to formulate hybrid interests in land in order to acquire the flexibility needed to satisfy market demands. Because the purchaser is receiving a unique system of rights in each case, the onus on the practitioner to unravel his client's rights will be great. This task will be compounded by the possible superimposition of condominium bylaws and statutory provisions on the multiple participation program. As breaches, defaults and a myriad of potential controversies wend their way toward the judicial process, the need for statutory[97] and administrative regulation will become apparent. Such control is necessary to protect the consumer and the lender, and to insure uniformity by providing guidelines for the courts which will ultimately have to grapple with these hybrids.

These approaches indicate the level of sophistication attained by the legal and marketing[98] facets of the real estate industry, and may revolutionize the nature of real property ownership.

Frank L. Amoroso

---

97 One possible limitation on these programs would be to put a ceiling on the duration of the program to the expected life of the resort property — *i.e.*, forty to fifty years. At that time ownership would revert to a tenancy in common. Such a limitation has the advantage of being realistic and preventing consumer "horror stories" in the future.

In the first legislation aimed directly at the concept of time-sharing, the state of Hawaii created a unique interest in real property, denominated the "time period unit," which "is not a tenancy in common or other common law concurrent undivided interest . . . ." Horizontal Property Act, § 514-4, Hawaii S.B. 2197-74 (April 5, 1973).

Although the measure was vetoed by the Governor, the legislative recognition of the problems created by a common law time-sharing scheme, as well as the recommended solutions, should serve as guidelines which other states may follow.

Under the Hawaii bill, a "time sharing period" was defined as "an annually recurring part of a year specified as a period for which a unit as defined herein may be separately owned." *Id.* § 514-2(23).

In addition to codifying, thereby protecting, the purchasers' interests, a statutory definition of time-sharing would facilitate the implementation of such programs by providing a statutory basis for the documentation of such a development.

98 Although buyers may be receptive to the economic advantages of time-segmented ownership, they may not like the idea of being locked into the same time period every year. Thus, the logical extension of the multiple participation concept is to increase the exchangability of these interests. To accomplish this some developers have devised systems which may be called "space banks." By incorporating a multiple participation program into a network of resorts, the developer is able to allow the buyer to transfer or exchange his rights to another place or time. *See* note 54 *supra*; Outen, *supra* note 72, at 3; HOUSE AND HOME, DECEMBER 1972, at 20. When this option is offered in diverse locales, a buyer may utilize one time-segmented unit in a ski resort one year and another in a tropical climate the next, thereby combining the lure of travel with multiple participation. However, as exchangeability increases, the real property nature of that interest decreases. Where the interest involves fee ownership, the developers suggest that the buyer can purchase ownership in several resorts for less than he would have to pay for one outright. *See* notes 72 & 75 and accompanying text *supra*.