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Real Estate Timesharing: Construction of Non-Fee Ownership

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REAL ESTATE TIMESHARING: CONSTRUCTION OF NON-FEE OWNERSHIP

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I. INTRODUCTION

Real estate timesharing,[1] although still in its embryonic stage, is developing rapidly in the courts[2] and as a subject of state and federal regulation.[3] The results have helped temper timesharing's potential inconsistencies and abuses.[4] At the same time, uneven regulation

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1. *See infra* note 5 for definitions of this amorphous concept. Timesharing is a term adopted from the computer industry. Pollack, *Time-Sharing, or Time is Money But Will It Sell?*, 10 REAL EST. L.J. 281, 282 (1982). Other labels for this concept include: time share ownership, interval ownership, fractional time period ownership, membership club, vacation lease, and vacation license. Comment, *Legal Challenges to Time Sharing Ownership*, 45 MO. L. REV. 423, 424 n.5 (1980) [hereinafter cited as Comment, *Legal Challenges*]; *see also* Block, *Regulation of Timesharing*, 60 U. DET. J. URB L. 23, 23 (1982).

One can attribute the variety of labels to the many ways of structuring timesharing programs. This Note, like the works of other commentators, refers to timesharing as a generic term that includes both fee and non-fee ownership. *See, e.g.*, Comment, *Regulating Vacation Timesharing: A More Effective Approach*, 29 UCLA L. REV. 907, 907 n 1 (1982) [hereinafter cited as Comment, *Regulating Vacation Timesharing*].

2. *See infra* notes 127-86, 212-37 and accompanying text.

3. *See infra* notes 61-112 and accompanying text.

4 *See, e.g.*, M. HENZE, THE LAW AND BUSINESS OF TIME-SHARE RESORTS (1982); K ROMNEY & B. ROMNEY, CONDOMINIUM DEVELOPMENT GUIDE (rev. ed. 1983) [hereinafter cited as ROMNEY & ROMNEY]; Block, *supra* note 1 (provides a thorough analysis of current regulation); Rugani, Simon & Silverman, *Time-Sharing of Real Property*, 2 REAL PROP. NEWS 1 (Fall 1980) [hereinafter cited as Rugani]; Comment,

and unforeseen timesharing difficulties necessitate legislative change.

Timesharing is not susceptible to a single definition[5] because it can take many forms.[6] Essentially, timesharing injects a temporal element into real estate ownership.[7] It grants a purchaser the right to

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Regulating Vacation Timesharing, supra note 1, at 907 (author suggests that the "desire to regulate has been the only consistent aspect of the legislative approaches to the timesharing industry"); Podgers, *Two Groups Propose Time-Share Legislation*, 66 A.B.A. J. 543 (May 1980) [hereinafter cited as *Time-Share Legislation*].

5. Timesharing is a generic term extending to both real and personal property. *See supra* note 1. "Virtually any piece of property—a house, a condominium, a hotel, even a yacht—can be timeshared." Comment, *Regulating Vacation Timesharing, supra* note 1, at 907. Despite conceptual difficulties in defining real estate timesharing, two proposed uniform acts offer their own definitions.

The Model Time-Share Act, previously titled the Uniform Real Estate Time-Share Act, drafted by the National Conference of Commissioners on Uniform State Laws, defines "time share" as "time-share estate or time-share license." UNIFORM LAW COMMISSIONERS' MODEL TIME-SHARE ACT § 1-102(13) (Proposed Official Draft 1980), 7A U.L.A. 269 (Supp. 1984) [hereinafter cited as MODEL TIMESHARE ACT]. These two terms are defined in § 1-102:

> (14) "Time-share estate" 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, coupled with a freehold estate or an estate for years in a time-share property or a specified portion thereof. . . .
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> (18) "Time-share license" 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, not coupled with a freehold estate or an estate for years.

Id. §§ 1-102(14), (18).

The Model Timeshare Act, drafted jointly by the National Timesharing Council of the American Land Development Association and the National Association of Real Estate License Law Officials, defines "timeshare" as "the right, however evidenced or documented, to use and occupy one or more timeshare units on a periodic basis according to an arrangement allocating such use and occupancy rights between other similar users." MODEL TIMESHARE ACT § 1-103 (1983), *reprinted in* M. HENZE, *supra* note 4, at app. 5-14. "'Timeshare plan' means the rights, obligations and program created by the timeshare documents for a timeshare property or, in the case of a multi-location plan, for timeshare properties." MODEL TIMESHARE ACT § 1-102(36) (1983), *reprinted in* M. HENZE, *supra* note 4, at app. 5-14. In addition, the Model Timeshare Act defines "timeshare property" as "one or more timeshare units subject to the same declaration, together with any common areas of any other real estate, or rights therein, appurtenant to those units." *Id.*

6. *See infra* notes 20-60 and accompanying text.

7. Comment, *Time-Share Condominium: Property's Fourth Dimension*, 32 ME. L. REV. 181, 181 (1980). The commentator asserts that in addition to real property's traditional three dimensions (breadth, depth, and height), timesharing offers a fourth dimension—time. *See id.* at 211-12; *see also* Eastman, *Time Share Ownership: A Primer*, 47 N.D.L. REV. 151, 152 (1981).

In addition to a "temporal division of property," one commentator remarked that

use and occupy real property for a fixed duration every year.

Several commentators and a few courts have examined the general concept of real estate timesharing.[8] Legislators in several states used these insights to implement timesharing regulations and statutes.[9] Several aspects of timesharing still, however, present theoretical and practical dilemmas.[10] In particular, this Note examines the classifications and regulatory frameworks of timesharing,[11] with special emphasis on the conceptual and regulatory problems inherent in non-fee timesharing.[12]

II. TIMESHARING CLASSIFICATION

The timesharing concept originated in Europe.[13] In America, people began to participate in timesharing programs in response to inflation, economic recession, and a downturn in the housing market during the 1970s.[14] In particular, developers rearranged their failing condominium projects[15] into timesharing units to prevent financial

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timesharing "lowers the threshold of real property ownership." Pollack, *supra* note 1, at 282.

8. *See infra* notes 20-60 and accompanying text.

9. *See infra* notes 61-112 and accompanying text.

10. The continuing development of new timesharing formats compounds the continuing struggle over how to classify timesharing.

11. Attempting to "pidgeon-hole" timesharing into a particular legal classification is counterproductive, because it strains prior common law principles and can defeat consumers' expectations. A realistic approach examines the substance of timesharing and why it was purchased rather than focusing upon the particular format.

12. Non-fee timesharing is also known as right-to-use timesharing and "quasi-ownership." Some non-fee formats create a chattel real. Others, however, form a more tenuous interest. *See infra* notes 40-60 and accompanying text.

13. Originally, timesharing developed in the resort areas of Europe in the 1960s. Straw, *Representing a Purchaser of a Time Share*, 11 COLO. LAW. 1543, 1543 (1982). One author traces timesharing's origins to the French Alps in 1967. ROMNEY & ROMNEY, *supra* note 4, ¶ 13-4.

14. *See* M. HENZE, *supra* note 4, § 1-4; Comment, *supra* note 7, at 181. One article noted that "[n]ew housing starts [were] at their lowest point since World War II, but during the past seven years the time-share business has exploded from $50 million to $1.3 billion in annual sales." *Holiday Condos*, 120 TIME, Aug. 16, 1982, at 54.

15. Timesharing extends beyond condominium conversions. Other facilities, such as motels, campgrounds, yachts, houseboats, cruise ships, and recreational vehicles, are subject to timesharing. *See Before You Buy Your Week at That Condo—*, 93 U.S. NEWS & WORLD REP., July 19, 1982, at 45 [hereinafter cited as *Before You Buy*]; *see also* Curtis, *Endless Vacation or Endless Headache?*, 128 FORBES, Sept. 14, 1981, at 114. In addition, some developers build timesharing projects from the ground up. *See id.*

loss.[16] Consumers quickly purchased the timesharing offerings[17] for two principal reasons: to decrease vacation costs[18] and to own a vacation unit only for the periods of use.[19]

Timesharing comes in a variety of formats.[20] Some distinctions merely offer a variation of nomenclature.[21] Others create diverse operational and legal consequences.[22] Generally, commentators broadly categorize timesharing as fee ownership or non-fee ownership,[23] but each class is further subdivided.[24] Therefore, to under-

16. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-4; *see also* Straw, *supra* note 13, at 1543 ("[t]he use of the time share was first adopted by developers who needed a highly leveraged 'bail-out' of their failing projects during the recession of 1976").

Normally, the developer will triple the wholesale price of a unit before it is divided into the designated number of time segments. *Before You Buy, supra* note 15, at 46. Although the developer realized a substantially greater profit on the sale of the unit in segments, the cost to sell a timeshare unit is approximately 40% to 50% greater than selling the undivided unit to one purchaser. Pollack, *supra* note 1, at 287. The author attributes part of the increase to the difficulty of selling time segments that are not as desirable. *Id.* at 288.

17. In general, the high cost of condominiums limits their marketability to the wealthy. Dividing the condominium unit into time segments increases the number of potential consumers. M. HENZE, *supra* note 4, § 1-3.

18. Initial reports suggested that timesharing could "result in vacation saving[s] as much as 60 per cent on hotel and restaurant bills. . . ." *"Time Sharing" of Resort Homes*, 82 U.S. NEWS & WORLD REP., Mar. 14, 1977, at 49; *see also Tips on Time Sharing*, 90 U.S. NEWS & WORLD REP., Mar. 16, 1981, at 78. Despite these early predictions, consumer advocates now caution potential purchasers that inherent risks may offset savings. Curtis, *supra* note 15, at 115, 123. *See infra* notes 182-237 and accompanying text.

Developers also have sold timesharing to consumers as an investment. Timesharing may provide a successful investment for the developer, but not for the purchaser, because it lacks an established resale market and those who do resell must compete against the developer. *Before You Buy, supra* note 15, at 46.

19. Developers have implemented "rental pools" to help condominium owners locate renters. The developers terminated this service when it became subject to securities regulations. M. HENZE, *supra* note 4, § 1-4; *see generally* Comment, *supra* note 7, at 182.

20. The basic timesharing structures are presented here, not as an analysis of the structures, but rather as an illustration of the basic devices that courts and legislatures will confront. For a comprehensive discussion of real estate timesharing formats, see ROMNEY & ROMNEY, *supra* note 4, ¶¶ 13-5 to 13-7.

21. For example, tenancy in common timesharing also is known as timesharing ownership and time span ownership. *Cf.* Pollack, *supra* note 1, at 283-84; Comment, *supra* note 7, at 184.

22. *See infra* notes 25-60 and accompanying text.

23. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-5.

24. *See id.* ¶¶ 13-5 to 13-7. *See infra* notes 25-60 and accompanying text.

stand timesharing, one must first know its basic classifications.

A. *Fee Ownership*

Some timesharing structures provide the purchaser with a fee interest in real property.[25] Despite the format, the timesharing fee owner acquires all the incidents of real property ownership.[26] Fee ownership of real estate timesharing takes one of three forms: tenancy in common, interval ownership, and term for years.

Tenancy in common developed as the first form of timesharing fee ownership.[27] Here, the purchaser obtains an undivided interest in fee as a tenant in common.[28] In a separate agreement, the purchasers designate the specific time during which each purchaser has the exclusive right to use the unit.[29] This agreement usually contains a waiver of the right to partition.[30]

In an effort to avoid some of the legal consequences of tenancy in common timesharing, interval ownership developed.[31] One instrument, the deed, conveys to the unit purchaser both the title and the periodic exclusive right-to-use.[32] Generally, commentators describe interval ownership as a recurring estate for years for a designated number of years[33] with a remainder over as tenants in common.[34] When the term of years expires, the owners are free to partition the

25. *See* Gunnar, *Regulation of Resort Time-Sharing*, 57 OR. L. REV. 31, 33 (1977); *see also* Pollack, *supra* note 1, at 286. The author notes these interests may be "sold, bequeathed, donated, and rented. They are subject to the same burdens: increasing taxes and operating costs, as well as refurbishing." Pollack, *supra* note 1, at 286.

26. *See, e.g.*, ROMNEY & ROMNEY, *supra* note 4, ¶ 13-5.

27. *See generally* Straw, *supra* note 13, at 1044.

28. ROMNEY & ROMNEY, *supra* note 4, ¶ 13-6.

29. *See, e.g.*, Pollack, *supra* note 1, at 284.

30. The right to partition tenancy in common property is premised on common law property rights. This right permits a "co-tenant to petition a court to direct . . . a co-owned parcel of land be either physically partitioned or divided between the individual interest holders into separate fee simple parcels being distributed among the owners according to their pro rata share." M. HENZE, *supra* note 4, § 3-15. Often developers incorporate an agreement not to partition in the master deed. *Id.* § 3-19. This waiver is not enforceable if courts find the restriction unreasonable. *Id.*

31. Because the individual purchasers do not own the units as tenants in common, the threat of partition does not exist.

32. *See* Davis, *The Second Home Market: Time-Sharing Ownership—Legal and Practical Problems*, 48 ST. JOHN'S L. REV. 1183 (1974).

33. This is frequently the useful life of the building.

34. This format also is known as a "revolving set of springing or shifting execu-

property or restructure the units in a timesharing program.[35] The owner thus receives a present possessory interest in each year for a specific time segment and a future interest in that designated time for the remaining years.

The third version of fee ownership is the interval estate, also known as term for years.[36] Essentially, the interval estate differs little from interval ownership.[37] This third format grants the purchaser a term for years with a remainder over in fee simple as a tenant in common.[38] Not until the purchasers become tenants in common do they have an interest in real property.[39]

B. *Non-Fee Ownership*

The consumer does not acquire a fee interest in the real estate with non-fee ownership.[40] Under a non-fee timesharing plan, the fee owner[41] is charged with management, upkeep, taxes, and the other responsibilities of fee simple ownership. The developer often prefers to retain the fee in order to accumulate the equity and avoid real estate regulations.[42] Essentially, non-fee ownership grants the purchaser the right of use and occupation.[43] These characteristics make non-fee timesharing susceptible to creativity, flexibility, and fraud.[44]

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tory uses." *See* M. HENZE, *supra* note 4, § 3-23; *see also* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-6.

35. The remainder over as tenants in common avoids violation of the rule against perpetuities. *See* M. HENZE, *supra* note 4, §§ 3-23 to 3-25.

36. *See id.* §§ 3-26 to 3-27. Several commentators do not recognize this format as a separate type of fee ownership. *Cf.* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-6.

37. Some commentators suggest that the term for years does not differ from the term interval ownership but is merely a refinement or a better description of that term. *See, e.g.*, M. HENZE, *supra* note 4, § 3-26.

38. *Id.* § 3-27.

39. *Id.* §§ 3-27 to 3-28.

40. *See, e.g.*, Pollack, *supra* note 1, at 285-86. One commentator suggests that non-fee ownership is divided into "right-to-use" and "quasi-ownership" categories. M. HENZE, *supra* note 4, §§ 2-1 to 2-2.

41. Frequently the developer retains fee ownership.

42. *See infra* notes 174-75 and accompanying text.

43. *See, e.g.*, Davis, *Real Estate Time Sharing in Florida—A Practitioner's View*, 55 FLA. B.J. 116, 116-17 (1981). The author explains that the "purchaser enters into a contractual right for the recurring use periods." *Id.*

44. *Cf. id.* at 118. Because right-to-use timesharing frequently does not fit neatly under existing regulatory devices, developers may fail "to disclose to potential purchasers the underlying encumbrances on the property and the financial condition of

The non-fee format offers a wider variety of options than is available with the fee format. The basic formats in use include timesharing leases, timesharing licenses, and membership clubs.

With a timesharing lease, the consumer acquires the right to use and to occupy a specific unit for a portion of each year for the agreed upon number of years.[45] The consumer pays an amount equivalent to prepaid rent.[46] At the end of the specified number of years, the interest reverts to the fee owner.[47] Although the purchaser receives an interest in real estate[48] that can be recorded,[49] she lacks a proprietary interest.[50] In a timesharing lease, unlike other non-fee ownerships, the purchaser can transfer or sublease the interest without the fee owner's consent unless the lease provides otherwise.[51]

The timesharing license is often indistinguishable from the timesharing lease.[52] The purchaser, with the permission of the fee owner, receives the right to use an undesignated unit during a portion of a year for a predetermined number of years.[53] Contract law applies to timesharing licenses[54] because no formal property interest

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the developer." *Land Investments and Time-Sharing Abuses: Hearings Before the Select Comm. on Aging of the House of Representatives*, 97th Cong., 2d Sess. 42 (1983) (testimony of Garth C. Lucero, Asst. Atty. Gen., Denver, Colo.) [hereinafter cited as *Hearings*].

45. *See* M. HENZE, *supra* note 4, §§ 3-4 to 3-5; *see also* ROMNEY & ROMNEY, *supra* note 4, ¶¶ 13-6 to 13-7.

46. *See, e.g.*, Straw, *supra* note 13, at 1544.

47. *See* M. HENZE, *supra* note 4, § 3-5.

48. At early common law leases were considered personal property. Leases, however, now are classified as chattel real and, as a term of years, are considered an interest in land. C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 64 (1962).

49. The developer may include in the agreement a covenant that bars recording the interest to preserve his ability to refinance the property. *See* M. HENZE, *supra* note 4, § 3-5.

50. *See, e.g., id.* § 3-5.

51. This distinguishes a timesharing lease from a license, under which these rights do not exist unless the fee owner grants permission. *Id.* §§ 3-5 to 3-8.

52. *Id.* § 3-7 n.2. A recent timesharing case developed a test to determine whether an agreement creates a license or lease. *See infra* note 165 and accompanying text.

53. *See, e.g.*, ROMNEY & ROMNEY, *supra* note 4, ¶ 13-7. Commentators classify generally the vacation license as a "contractual right to use." *Id.*

54. *See, e.g.*, ROMNEY & ROMNEY, *supra* note 4, ¶ 13-7. In addition, the Internal Revenue Service issued Letter Ruling 8252005 which stated that the "'vacation licenses' sold by the taxpayer amounted to contracts for future services, rather than a conveyance of real property or a lease, and thus all the income from the future serv-

arises.[55]

Unlike timesharing leases and licenses, an organization operates the timesharing membership club.[56] The association purchases, leases, or licenses units or entire complexes for its members.[57] The member pays annual or lifetime membership dues plus a maintenance fee for each period of use.[58] In return she receives the right to use and to occupy a unit for a specific amount of time each year.[59] Most membership clubs grant the purchaser an ownership interest but not a real estate interest.[60]

Understanding these basic formats provides a basis for determining the appropriate method of timesharing regulation. As the timesharing industry becomes more sophisticated, even more timesharing forms undoubtedly will appear. The manner of regulation adopted, therefore, should encompass all present timesharing structures and anticipate those that may develop in the future.

III. TIMESHARING REGULATION

A. *State and Local Regulation*

1. Specific Timesharing Regulation

Commentators have noted the confusion in the timesharing industry stemming from the assortment of regulations that directly or indirectly affect timesharing.[61] These perceptions helped induce the

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ices contract was reportable in the year of sale." *Time-Sharing Vacation License is Future Services Contract*, 58 J. TAX'N 350, 350 (Kaster ed. 1983).

55. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-7; *cf.* Division of Real Estate v. Carriage House Assocs., 94 Nev. 707, 585 P.2d 1337 (1978) (vacation license gives contractual rights but no property interest); Davis, *supra* note 32, at 1184.

56. *See, e.g.*, Pollack, *supra* note 1, at 285-86.

57. *Id.*

58. *Id.*

59. *See, e.g.*, M. HENZE, *supra* note 4, § 3-10. While a specific amount of time is guaranteed, particular times may issue on a "first come, first served" basis annually. *Id.* Nevertheless, the same author suggests that a timeshare membership club may be structured such that a purchaser obtains a proprietary interest. *Id.*

60. *But cf. id.*

61. *See infra* notes 64-112 and accompanying text; Bloch, *supra* note 1, at 24 (state-by-state analysis of timesharing regulations); *see also* M. HENZE, *supra* note 4; ROMNEY & ROMNEY, *supra* note 4; Pollack, *supra* note 1, at 294-95.

This section provides essential background information for the development of this Note. For a complete analysis of timesharing regulation, see articles cited within this section.

gradual movement towards uniform and comprehensive timesharing legislation.[62] In addition, two model timesharing acts now are available to assist state legislators in drafting timesharing statutes.[63]

These model acts, the Commissioners' Model Real Estate Time-Share Act (MRETSA)[64] and the Model Time-Share Ownership Act (MTSOA),[65] both provide for timesharing regulation, ownership guidelines, sales requirements, and consumer protection.[66] Despite these similarities, MRETSA is a more detailed and consumer-oriented statute.[67] At least one state has passed a timesharing statute incorporating provisions from both model acts.[68]

Because of the recent rapid development of the industry,[69] the unique concept,[70] and the inexperience of the growing number of

62. Generally, resort-oriented states have implemented timesharing legislation. For a discussion of states with timesharing statutes, see ROMNEY & ROMNEY, *supra* note 4, ¶ 13-37; Bloch, *supra* note 1, at 26-31.

63. *See Time-Share Legislation, supra* note 4, at 44.

64. *See supra* note 5. Although the Commissioner's Prefatory Note to this act recognizes that many reasons for uniform legislation exist, it expressly states:

> [U]niformity is important to the multi-state purchasers and national lenders who find it difficult to assess the appropriateness of varying real estate documents and financing arrangements in the several states. Uniformity is particularly important with regard to timeshare ownership because most real estate timesharing involves recreational or resort property, and consequently more multi-state relationships exist than with other types of real estate.

Id. at 259. For a discussion of this Act, see generally Burek, *Uniform Real Estate Time-Share Act*, 14 REAL PROP., PROB. & TR. J. 683 (1979).

65. *See supra* note 5. Both the Resort Time-Sharing Council (RTC) and the National Association of Real Estate License Law Officials (NARELLO) sponsored this Act. The express goal of the Act is "to prescribe reasonable state regulation of timesharing in order to avoid or minimize potential abusive or fraudulent sales practices." M. HENZE, *supra* note 4, at app. 5-1.

For a comparison of the Model Time-Sharing Ownership Act with the Model Real Estate Time-Share Act, see Pollack, *supra* note 1, at 294-301.

66. Pollack, *supra* note 1, at 294-301.

67. *Id.* One commentator noted that despite meager legislative and administrative experience with timesharing regulations, the Commissioners' Model Real Estate Time-Share Act provides legislators with an extensive "second generation act." Burek, *supra* note 64, at 690. Supporters of the Commissioners' Model Time-Share Ownership Act contend that the Model Real Estate Time-Share Act is too comprehensive for new development. *See, e.g., Time-Share Legislation, supra* note 4, at 543-44.

68. FLA. STAT. ANN. §§ 721.01-.30 (West Supp. 1984); *see also* Bloch, *supra* note 1, at 24-31.

69. *See supra* notes 13-14 and accompanying text.

70. *See supra* notes 20-60 and accompanying text.

consumers,[71] a state statute that specifically regulates timesharing can help protect the public and enhance timesharing development.[72] Absent a state timesharing statute or other applicable legislation, local legislative bodies may implement zoning laws[73] or other ordinances.[74] Although local ordinances may satisfy the need for specific timesharing legislation, they exacerbate the fragmentation of timesharing regulation.[75] In many instances, these ordinances effectively eliminate timesharing from a local area.[76]

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71. *See supra* notes 17-19 and accompanying text.

72. *See supra* notes 61-68 and accompanying text.

73. *See* Rugani, *supra* note 4, at 8. The local body can assert a legitimate interest in regulating residential and transient growth. Developers face two primary problems when the local body implements zoning ordinances that specifically regulate timesharing. First, the zoning scheme may bar timesharing altogether. Second, some localities will classify timesharing as a transient use while others classify it as a non-transient use. This too increases the fragmentation and regulatory confusion for both consumers and developers. *See id.*

74. ROMNEY & ROMNEY, *supra* note 4, ¶¶ 13-37 to 13-38; Rugani, *supra* note 4, at 8. Other than zoning, local legislators also are concerned about the loss of "bed tax" revenue, a per-bed tax on transient accommodations. Therefore, localities have sought to reassess the real estate taxes based on the market value of the individual timesharing estate. *Id.*

In Board of County Comm'rs v. Colorado Bd. of Assessment Appeals, 628 P.2d 156 (Colo. App. 1981), the "county assessor increased the value of the property 200% to 300%. . .[based on] an independent assessment of each time share unit." 628 P.2d at 157. The court rejected the 1978 reassessment stating that state statutory recognition in 1977 of real estate timesharing as a property interest did not increase the use of the property. The court supported its conclusion by pointing out that the 1977 assessments were based on the 1973 value. 628 P.2d at 158.

In some instances local bodies have imposed moratoria on timesharing development and sale. ROMNEY & ROMNEY, *supra* note 4, ¶ 13-37. A solution to this dilemma is proposed in the Commissioners' Model Real Estate Time Share Act. It bars local governments from implementing regulations that either discriminate against timesharing or prevent development of timesharing projects. One commentator suggests that this solution is unsatisfactory because "it may eliminate the ability of state agencies or local governments to zone timeshared buildings." Comment, *Regulating Vacation Timesharing*, *supra* note 1, at 938. For a discussion of local governments that instituted moratoria on timeshare projects, see ROMNEY & ROMNEY, *supra* note 4, ¶ 13-37; Rugani, *supra* note 4, at 8.

75. *See supra* notes 73-74 and accompanying text.

76. *See* Ocean's Edge Dev. Corp. v. Town of Juno Beach, 430 So. 2d 472 (Fla. Dist. Ct. App. 1983). Juno Beach passed an ordinance declaring a moratorium on a timesharing development one month after the developer filed a declaration of condominium for interval ownership or timesharing and after the developer made expenditures based on the existing ordinances. The court struck down the city's denial of a

2. Timesharing Regulation by Existing Mechanisms

The majority of states have not enacted comprehensive timesharing legislation.[77] Instead, these states have turned to existing regulatory mechanisms.[78] Problems arise when states attempt to deal with timesharing in this manner because legislators did not design these devices with timesharing in mind.[79] Consequently, a governing body may apply these overlapping regulatory schemes inconsistently with anomalous consequences.[80] Nevertheless, these regulatory structures can provide a framework for controlled timesharing development.[81]

Many states use existing condominium statutes,[82] subdivision control laws,[83] zoning laws,[84] and real estate departments[85] to regulate

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certificate of occupancy stating that the town could not enact such a moratorium in an "after-the-fact fashion." *Id.* at 474.

One author noted that implementation of the Hawaii timesharing statute averted the potential elimination of timesharing. ROMNEY & ROMNEY, *supra* note 4, ¶¶ 13-37 to 13-38.

77. *See, e.g.*, Bloch, *supra* note 1, at 25, 35-36 (noting the majority of states regulate timesharing under existing mechanisms; only Arizona, California, Florida, Hawaii, South Carolina, Tennessee, and Virginia have timesharing statutes); *accord* Burek, *supra* note 64, at 683.

78. For an extensive analysis of each state's regulatory formats, see Bloch, *supra* note 1, at 35-36. In addition to the common state regulatory devices noted in the text, some commentators also suggest regulation by usury laws, income taxes, ad valorem taxes, or direct mail solicitation controls. ROMNEY & ROMNEY, *supra* note 4, ¶ 13-37; Davis, *supra* note 43, at 118-19.

79. *See* Comment, *supra* note 7, at 217-20.

80. *See* Bloch, *supra* note 1, at 23-24. This problem becomes particularly acute with non-fee timesharing ownership. This Note focuses on the regulatory fragmentation problems of non-fee timesharing. *See infra* text accompanying notes 113-81.

81. *See* Comment, *supra* note 7, at 220-22 (commentator notes that application of existing regulations may create other legal perplexities but suggests that existing laws will enhance stability).

82. The timesharing concept developed, in part, from condominium theory. Consequently, states naturally turn to these statutes when confronted with the issue of timesharing. In a minority of states, the condominium statutes contain specific timesharing provisions. Because legislatures usually neglect to enact condominium statutes with timesharing in mind, regulatory inconsistencies arise among the states. Several commentators suggest that because of the inherent differences between the condominium and timesharing concepts, condominium statutes do not regulate timesharing adequately. *See* Pollack, *supra* note 1, at 295; Comment, *Regulating Vacation Timesharing*, *supra* note 1, at 934-35; *but cf.* Comment, *supra* note 7, at 220 (author points out that in a state that does not otherwise regulate timesharing, condominium laws provide some protection).

83. *See* Bloch, *supra* note 1, at 25 n.14 (nine states regulate timesharing with subdivision control laws). Commentators propose arguments similar to those made in

timesharing. Basically, these states recognize the similarities between timesharing and condominium sales or other real estate transfers.[86] Other states rely on their securities laws[87] or "little FTC Acts,"[88] both of which focus on consumer protection.[89] Furthermore, a few states have not adopted any timesharing regulations.[90] Finally, some states commonly apply several of these regulatory devices to real estate

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regard to regulating timesharing with condominium statutes, that is, that the statutes fail to provide substantive protection. Comment, *Regulating Vacation Timesharing, supra* note 1, at 935.

84. In addition to specific timeshare regulation at the local level, timesharing is also subject to regulation under existing zoning formats. Anomalous and inconsistent results may occur because these ordinances were not designed to accommodate timesharing arrangements. Rugani, *supra* note 4, at 8. *See also* County of Maui v. Puamana Management Corp., 631 P.2d 1215 (Hawaii Ct. App. 1981). In *Puamana Management Corp.*, the court held that a planned unit development of single-family dwelling units, timeshared in one week periods, did not violate the local zoning ordinance on its face. Although the development was located in a district zoned for residential use, its operation was similar to a hotel and it served transient guests. The court concluded that the local legislators, and not the courts, must clarify the zoning ordinances. *Id.* at 1219. For a discussion of *Puamana Management Corp.*, see *Residential Zoning Ordinance Held to Permit Time Share Rentals*, 4 ZONING & PLAN. L. REP. 175 (1981).

85. *See* Comment, *Regulating Vacation Timesharing, supra* note 1, at 934-35. The author suggests that an advantage of real estate regulation of timesharing is the understanding of land sales and property concepts. *Id.* The effectiveness of this form of regulation becomes suspect when a court construes narrowly a real estate department's authority over timesharing. *See infra* text accompanying notes 127-81.

86. *See* Bloch, *supra* note 1, at 23-24, 28-29; *see also* Comment, *Regulating Vacation Timesharing, supra* note 1, at 934-35.

87. *See* Bloch, *supra* note 1, at 25 n.16 (author examines those states that currently regulate timesharing under state securities laws). Generally, states apply two different tests in determining whether a timesharing development is a security: the investment contract test and the risk capital test. The majority of states use the federal SEC standard—the investment contract test. *See infra* note 95 and accompanying text. The risk capital test, the minority test, is triggered if the funds "are used to develop the project, repay an outstanding encumbrance on the property, or otherwise finance the project. . . ." Comment, *Regulating Vacation Timesharing, supra* note 1, at 928.

88. Bloch, *supra* note 1, at 25 n.17. The author explains that "little FTC Acts" are used often in conjunction with other state regulatory devices that regulate timesharing. The author notes that 29 states have adopted these acts. *Id.*

89. Gunnar, *supra* note 25, at 40-42.

90. Comment, *Regulating Vacation Timesharing, supra* note 1, at 907. Approximately 10 states do not regulate timesharing. Bloch, *supra* note 1, at 25 n.20. One author suggests that in a state that does not regulate timesharing, a court may find an implied warranty of habitability. This argument has been applied successfully to condominiums, but there is some doubt whether the implied warranty applies to timesharing absent some form of ownership. M. HENZE, *supra* note 4, § 10-20. In

timesharing, although these laws may not have been intended or structured to accommodate the timesharing concept.[91]

B. *Federal Regulation*

1. Security and Exchange Commission

The debate continues[92] over whether real estate timesharing[93] is a "security" as defined in the Securities Act of 1933.[94] The Securities and Exchange Commission (SEC) applies the investment contract test[95] to determine if a security exists. Basically, the SEC will find an

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that case, the purchaser can argue under contract law for an implied warranty of merchantability for a particular purpose.

91. In many instances, application of more than one existing regulatory device may create a complementary alternative if the state does not have a timeshare statute. Problems may develop, however, when the different state regulatory agencies have inconsistent policies. *See, e.g.*, Bloch, *supra* note 1, at 23.

92. *Compare* Comment, *Regulating Vacation Timesharing, supra* note 1, at 911-33 (arguing that timesharing interests fall in the gray area between securities and commercial interests and because securities laws protect the consumer they should apply) *with* Bloch, *supra* note 1, at 32-37 (stating that timesharing does not involve profit sharing, rental pools, or limited partnerships; but rather is a commodity for personal consumption that should not be treated as a security).

In United Hous. Found., Inc. v. Forman, 421 U.S. 837 (1975), the Supreme Court considered whether "shares of stock entitling a purchaser to lease an apartment in Co-op City, a state subsidized and supervised nonprofit housing cooperative, are 'securities' within the purview of the Securities Act of 1933 and the Securities Exchange Act of 1934." *Id.* at 840. The Court applied the test derived from S.E.C. v. W.J. Howey Co., 328 U.S. 293 (1946), to determine if the shares in the co-op constituted a security. *Id.* at 852. This test considers "whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." *Howey*, 328 U.S. at 301. Therefore, the *Forman* Court concluded that the shares in Co-op City did not constitute securities because purchasers sought personal living quarters rather than an investment. 421 U.S. at 858. The result may differ when the timesharing consumer purchases the unit as an investment. Timesharing units, however, generally are sold in timespans of one to two weeks per year. This short time-span suggests that timesharing purchasers only desire the unit for their personal consumption rather than as an investment for profit.

93. The fact that some forms of timesharing involve the sale of real estate should not bar the application of securities laws. Comment, *Regulating Vacation Timesharing, supra* note 1, at 930. *Contra* Gunnar, *supra* note 25, at 48.

94. 15 U.S.C. § 77(b)(1) (1982).

95. *See* Bloch, *supra* note 1, at 32-33. This standard uses a version of the *Howey* test, *supra* note 92, to determine whether a particular investment is a security. In addition to the standard in *Howey*, the SEC asks whether the investor in the common venture had a reasonable expectation of profits from efforts of others over which the investor has little or no control. *Id.* at 32; *cf.* Comment, *Regulating Vacation Timesharing, supra* note 1, at 911-27.

investment contract when there is a contract "to contribute money to a common venture based on a reasonable expectation of profits to come from the efforts of others, over which efforts the investor has little or no control."[96] If an investment contract exists, then the SEC considers the timesharing development a security.

The developer must comply with rigid registration requirements[97] if the timesharing unit is a security. The purpose of these requirements is to deter fraud[98] and to provide the public with information essential for determining the value of the property.[99] Although several timesharing developments are registered with the SEC,[100] the Commission has remained silent.[101]

2. Department of Housing and Urban Development

Although the Department of Housing and Urban Development (HUD) has not yet tried to regulate timesharing,[102] it may have au-

96. The risk capital test, however, presents the stronger view for regulating timesharing as securities. One commentator explains that the primary difference between this theory and the investment contract theory is that under the former scheme the investor "subjects his funds to the 'risks' of the enterprise." Bloch, *supra* note 1, at 33. In addition, interpretation of "profits" under this theory includes "valuable benefit." *Id.*

97. Comment, *Regulating Vacation Timesharing, supra* note 1, at 930-31.

98. *Id.*

99. *Id.*

100. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-36. A developer may register to avoid having to determine whether the development constitutes a security, or she may seek to market the development as a security. *See* Bloch, *supra* note 1, at 37.

101. Although the SEC initially issued no-action letters, it has discontinued this procedure. Commentators suggest that the SEC currently does not take a position on the issue. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-36.

If the timesharing format includes an investment-oriented program similar to a rental pool, it probably qualifies as a security. To avoid this result, possible solutions include inserting a "no resale at profit" clause, using a trust arrangement during the offering period, and not marketing the development as an investment. Bloch, *supra* note 1, at 37.

102. 15 U.S.C. §§ 1701-1720 (1982). Although commentators explain that the HUD agency may have the power to regulate developments in interstate sales, they note that timesharing developments may be exempted. The scope of authority of the Office of Interstate Land Sales Registration (OILSR) does not extend to residential housing contracted to be built and delivered within two years. 15 U.S.C. § 1702(a)(3) (1982). OILSR has interpreted this exemption to include resort housing. *See* Comment, *Regulating Vacation Timesharing, supra* note 1, at 933 n.123. The regulations also may not apply to those developments that do not grant the purchaser an interest in real property. *Id.*

thority to regulate timesharing developments through its Office of Interstate Land Sales Registration (OILSR).[103] The current HUD regulatory power, however, may not include timesharing because of statutory limitations.[104] One commentator suggests that OILSR will become active in regulating timesharing with the expansion of the practice of preselling timesharing units during the construction period.[105]

3. Federal Trade Commission

The Federal Trade Commission (FTC) has monitored timesharing since its introduction in the United States.[106] The Commission derives its authority from the Federal Truth in Lending Act.[107] The two primary trade regulation rules with which the FTC implements the Act are the Holder Rule and the Cooling-Off Rule. The holder-in-due-course rule protects consumers purchasing consumer goods or services through the terms of the consumer credit contract.[108] Under the cooling-off rule, a purchaser may rescind the sale within three days if the unit was not sold at the seller's permanent place of business. Up to this point the FTC has not applied the cooling-off rule to timesharing unit sales.[109] Nevertheless, the FTC strives to enjoin unfair and deceptive timesharing sales practices.[110] These areas represent predominant consumer concerns about timesharing,[111] and the

103. Comment, *Regulating Vacation Timesharing, supra* note 1, at 933.

104. *See* Bloch, *supra* note 1, at 46-48.

105. *Id.*

106. *Hearings, supra* note 44, at 77 (statement of Timothy J. Muris, Director, Bureau of Consumer Protection, FTC).

107. *See* Bloch, *supra* note 1, at 41-46; *see also* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-36.

108. FTC GUIDELINES, 41 Fed. Reg. 20,023 (1976). One commentator contends that the holder rule for consumer services should not apply to real property, but the FTC claims that substance should prevail over form. Bloch, *supra* note 1, at 45. Even fee timesharing "may have components of goods and services. . . ." *Id.* For a discussion of this issue, see FTC v. Paradise Palms Vacation Club, No. C81-116OV, (W.D. Wash. filed Sept. 28, 1981); Bloch, *supra* note 1, at 42-45.

109. 16 C.F.R. § 429 (1984); *see also* Bloch, *supra* note 1, at 45-46.

110. *See* ROMNEY v. ROMNEY, *supra* note 4, ¶ 13-36.

111. Concern for educating consumers reaches beyond the FTC; the mass media also has attempted to alert the public about the benefits and the problems surrounding real estate timesharing. *See generally Before You Buy, supra* note 15, at 45-46 (warning consumers about deceptive tactics, development bankruptcy, and inadequate management); Curtis, *supra* note 15, at 115-23 (suggesting danger signals poten-

FTC readily assists consumers with their complaints.[112]

IV. CONSTRUCTION OF NON-FEE TIMESHARING OWNERSHIP

A. *Examination of Non-Fee Timesharing as a Property Interest*

Real estate timesharing as an industry continues to expand both in scope[113] and in size.[114] The original form of timesharing fee ownership[115]—tenancy in common—has spawned other fee and non-fee formats to accomplish the goals of both the consumer and the developer.[116] Even though comprehensive timesharing legislation is available,[117] the majority of states rely on existing state regulations.[118] The sheer number of existing regulatory devices creates confusion within the timesharing industry,[119] and this confusion is compounded because none of these regulatory measures apply to all timesharing formats.[120] This situation exists because legislators did not pass statutes specifically designed to address the timesharing concept.[121]

States generally construe timesharing fee ownership as an interest

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tial purchasers should look out for); *Guaranteed Getaways*, NEWSWEEK, Dec. 17, 1979, at 104 (demonstrating skepticism that timesharing can save purchasers money); *Holiday Condos, supra* note 14, at 54 (warning consumers about high pressure sales).

Although Congress has passed no timesharing legislation, the House of Representatives has held hearings on real estate timesharing and the elderly. One speaker explained that within a three-year span "the reported complaints concerning time share businesses have numbered approximately 1,300, totaling over $3.2 million in losses in Colorado." *Hearings, supra* note 44, at 39 (statement of Garth C. Lucero, Asst. Atty. Gen., Denver, Colo.).

112. *See* Bloch, *supra* note 1, at 41-46.

113. *See supra* text accompanying notes 20-60.

114. *See supra* notes 13-17 and accompanying text.

115. *See supra* text accompanying notes 27-30.

116. *Cf.* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-85.

117. *See supra* text accompanying notes 63-72.

118. *See supra* text accompanying notes 63-72. A state may not implement a timesharing statute if timesharing developments are scarce in the state. The states with specific timesharing legislation generally are the states with popular resort areas. These include Hawaii, California, and Florida. *See* Bloch, *supra* note 1, at 35-36.

119. *See supra* notes 77-80 and accompanying text. *See also* Comment, *Regulating Vacation Timesharing, supra* note 1, at 910-11.

120. *Id.*

121. That a particular regulatory device was not designed to accommodate or foresee real estate timesharing does not mean that its particular goals are inapplicable. Goals such as consumer protection and full disclosure are equally vital when applied to the sale of timeshare units.

in real property[122] and, therefore, apply regulations that govern real estate. Non-fee timesharing and its variations do not fit neatly into any existing state regulatory framework.[123] Traditionally, these bodies did not construe such ownership as an interest in real property.[124] Ideally, states will implement statutes that regulate all forms of real estate timesharing. Absent such a statute, courts and legislatures must decide whether non-fee timesharing ownership is subject to regulatory power of existing state agencies.[125]

The traditional view holds that non-fee timesharing ownership, also called "right-to-use" ownership, does not create an interest in real property.[126] This view is illustrated by the decision in *Division of Real Estate v. Carriage House Associates*,[127] when the court held that the timeshare purchasers did not acquire a leasehold[128] interest in real property but only a vacation license.[129] In reaching its conclusion, the court first examined the circumstances of this particular offering.[130] The timesharing owner had the right to reserve occupancy in an undesignated unit every year for the useful life of the build-

122. *See supra* notes 25-39 and accompanying text.

123. Rugani, *supra* note 4, at 5; *see also* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-7 (author states that right-to-use timesharing creates a contractual right).

124. *See* Bloch, *supra* note 1, at 25, 35-36.

125. The authority granted to agencies regulating real estate is, in general, statutory. The determination of whether an agency may regulate the right-to-use timesharing is often a question of statutory construction and not merely common law real property principles. *See* Cal-Am Corp. v. Department of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (1980) (*see infra* notes 157, 159-71 and accompanying text); Division of Real Estate v. Carriage House Assocs., 94 Nev. 707, 585 P.2d 1337 (1978) (*see infra* notes 127-36 and accompanying text); Royal Aloha Partners v. Real Estate Div., 59 Or. App. 564, 651 P.2d 1350 (1982) (*see infra* notes 137-50 and accompanying text).

126. *See* ROMNEY & ROMNEY, *supra* note 4, ¶¶ 13-6 to 13-7.

127. 94 Nev. 707, 585 P.2d 1337 (1978).

128. The court stated that the interest created was not a leasehold "because it is not definite as to its duration or description. . . ." *Id.* at 709.

129. *Id.* at 708-09, 585 P.2d at 1338-39. The court defined a vacation license as a "form of time-sharing which divides the occupancy rights to resort units among multiple parties." *Id.* at 708, 585 P.2d at 1338. In addition, the court explained that the "vacation license" only provides the consumer with a "contractual right," not an interest in real property, nor even a true license because the timeshare is irrevocable and transferable. *Id.* at 709, 585 P.2d at 1339.

130. *Id.* The Carriage House Partners offering granted purchasers the "contractual right to reserve for occupancy . . . for an aggregate of seven days each year, a suite of a designated type and location during a designated season of the year." *Id.* at 708, 585 P.2d at 1338.

ing.[131] This timeshare was irrevocable, and purchasers could not rent or sublet their interests, but they could transfer their interests by gift, devise, or approval of the association.[132] In addition, purchasers received no deed or title to indicate an interest in real property.[133] Finally, the court noted that the fee owner provided services to the purchasers similar to those of a hotel.[134] In light of these factors, the court concluded that neither the real estate laws nor the land subdivision laws apply to vacation licenses, until the state legislature decides otherwise.[135]

The *Carriage House* court merely reiterates the traditional view that contract law applies because a vacation license grants no formal interest in real property.[136] Some courts have gone further in enforcing this view. In *Royal Aloha Partners v. Real Estate Division*,[137] a state court invalidated a state real estate division's "right-to-use" timesharing regulations.[138] Royal Aloha Partners (Partners) acquired timesharing units for Royal Aloha Vacation Club members' use.[139] Only the Partners, not the individual members,[140] held title to

131. The license agreement granted an irrevocable right-to-use for "not less than 40 years nor more than 60 years from January 1, 1976." *Id.* at 709.

132. *Id.*

133. *Id.*

134. *Id.* These services included maid service, towels, linens, kitchenware, management, and reservation services. *Id.* The court overlooks the fact that these services are inherent in timesharing developments, both for fee and non-fee ownership. Often this occurs because of a transitory nature of timesharing and the relatively short period of time during which each owner has use of the unit. These duties, therefore, generally are delegated to a management group.

135. *Id.* Because the Nevada Attorney General issued opinions that existing regulations sufficiently encompass right-to-use timesharing, the state now regulates both fee and non-fee forms under its land sale laws. *See* Bloch, *supra* note 1, at 29, 35.

136. The court struggled with determining how to classify right-to-use timesharing. Although the *Carriage House* court noted that this "vacation license" did not have the traditional characteristics of a license because it was irrevocable and transferable, the court also felt that the right-to-use plan conveyed no interest in real property. Thus, only contract law applies. *See Carriage House*, 94 Nev. at 708-09, 585 P.2d at 1338-39.

A license in real property is defined as "a privilege to go on premises for a certain purpose, but does not operate to confer, or vest in, licensee any title, interest, or estate in such property." BLACK'S LAW DICTIONARY 829 (5th ed. 1979).

137. 59 Or. App. 564, 651 P.2d 1350 (1982).

138. *Id.* at 570, 651 P.2d at 1353.

139. *Id.* at 564, 651 P.2d at 1350.

140. The court noted that the club member does not acquire a fee interest; there-

the vacation units.[141]

The state agency argued the state Condominium Act[142] gave it authority to regulate[143] all forms of timesharing. Although the Condominium Act expressly encompassed fee timesharing ownership,[144] it did not mention non-fee formats.[145] The division claimed that because the legislature mentioned timesharing in the Act, it intended to regulate all forms of timesharing.[146] In addition, the legislative history suggested an intent to govern even non-fee timesharing.[147] The

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fore the arrangement did not convey timesharing ownership interest. *Id.* at 564, 651 P.2d at 1350.

141. *Id.*

142. OR. REV. STAT. § 94.004(23) (1982) (superseded 1983). The pertinent portion of the Condominium Act provided:

> "Interest or estate" also includes a time-share estate. A "time-share estate" means a combination of an undivided interest in a present estate in fee simple in a unit, the magnitude of the interest having been established not later than the creation of the time-share estate either by the project instrument or by the deed conveying the time-share estate, and an exclusive right to possession and occupancy of the unit during an annually recurring period of time established by a recorded schedule set forth or referred to in the deed conveying the time-share estate.

Id. Subsequent to the court's decision in *Royal Aloha Partners*, the Oregon Legislature redefined timesharing statutory provisions to include specifically non-fee ownership. Now, the pertinent provision provides:

> "Timeshare plan" means an arrangement, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, right to use agreement or otherwise, in which an owner receives a timeshare estate or a timeshare license and the right to use accommodations and facilities that are part of the timeshare property. A timeshare plan does not include an exchange program.

OR. REV. STAT. § 94.803(24) (1984).

143. The Real Estate Division promulgated regulations to govern timesharing plans defined as:

> [A]ny arrangement, plan, scheme or devise, excluding exchange programs, whether by *membership*, agreement, share, tenancy in common, sale, lease, deed, rental agreement, license, *right to use agreement* or otherwise, whereby a purchaser in exchange for consideration, receives a right to use accommodations and facilities for a period of time less than a full year during any given year, but not necessarily for consecutive years and which extends for a period of more than 3 years.

Royal Aloha Partners, 59 Or. App. at 565, 651 P.2d at 1351 (emphasis in original) (construing OR. ADMIN. R. 863-30-050(15) (1982)).

144. *Id.* at 566, 651 P.2d at 1352.

145. *Id.*

146. *Id.*

147. The Real Estate Division referred to the testimony of the Oregon House Judiciary Committee to support its argument that the legislature intended the Act to

court applied the statutory rule of construction that "the expression of one thing is the exclusion of another,"[148] and rejected the agency's arguments.[149] In regard to the legislative history, the court found a "clear implication" in the Condominium Act that only those "interests or estates" expressly mentioned in the statute are within its purview.[150]

Not all courts feel constrained to classify right-to-use timesharing interests outside the area of real property.[151] Although statutory construction remains an important element in this determination,[152] policy factors also play a vital role in a court's conclusion that right-to-use timesharing transfers a real property interest. Arguably, this view strains common law real property concepts.[153] Although real estate timesharing is not a product of traditional common law concepts,[154] at least one commentator suggests right-to-use timesharing is a real estate product and should be regulated accordingly.[155]

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apply to both fee and non-fee timesharing. Testimony revealed that the legislators "'very carefully included within the dragnet *time shares*, where you're offered an interval, two weeks a year use of a condominium. That *even though it may not be a conveyance of a fee estate in a unit*, may or may not be, that has to be registered.'" *Royal Aloha Partners*, 59 Or. App. at 567, 651 P.2d at 1352 (emphasis added by court) (quoting NEVADA HOUSE JUDICIARY COMM., SUBCOMM. C, TAPE 30, SIDE 1, at 405-10 (testimony of Howard Feuerstein)). *But cf.* OR. REV. STAT. § 94.803(1984) (enacted after *Royal Aloha Partners*).

148. BLACK'S LAW DICTIONARY 521 (5th ed. 1979) (defined under its Latin form *expressio unius est exclusio alterius*).

149. In response to the Division's arguments the court replied that the "[i]nclusion of specific matter in a statute usually implies a legislative intent to exclude related matters not mentioned." *Royal Aloha Partners*, 59 Or. App. at 567, 651 P.2d at 1352.

150. *Id.* The court concluded nothing in the legislative history suggested that the Condominium Act included interests beyond those mentioned expressly. *Id. But see* OR. REV. STAT. § 94.803 (1984) (the Oregon Legislature enacted timesharing provisions to encompass non-fee ownership subsequent to *Royal Aloha Partners*).

At present, Oregon regulates both fee and non-fee timesharing developments under its real estate statutes. *See* Bloch, *supra* note 1, at 36.

151. *See, e.g.*, Cal-Am Corp. v. Department of Real Estate, 104 Cal. App. 3d 453, 456, 163 Cal. Rptr. 729, 732 (1980) (court concluded without discussion that timeshare membership interests constitute real property interests).

152. *See supra* notes 128-51 and accompanying text.

153. *See Carriage House*, 94 Nev. at 708-10, 585 P.2d at 1338-40.

154. For a discussion of the traditional real property concepts, see generally C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY (1962).

155. The president of California Resorts Company, a timesharing development and management firm, and Chairman of the National Timesharing Council asserted that timesharing is "a real estate product, even though [it is] not specifically a lease-

Through the legislative process some states have made right-to-use timesharing an interest in real property.[156] The majority of states have not taken this step, even though sixty percent of timesharing developments employ a right-to-use format.[157] The courts continue to disagree.

One California court held that a particular vacation membership club did constitute an interest in real property.[158] In *Cal-Am Corp. v. Department of Real Estate*,[159] the court rejected Cal-Am's statutory construction argument that the right-to-use timesharing offering fell outside the Department's authority because the membership interests did not constitute a sale or lease of lots or parcels in a subdivision to which the legislature directed the statute.[160] In finding an interest in real property,[161] the court explained that the interest at issue[162] was substantively a lease.[163] The court, nevertheless, expressly rejected the opportunity to classify the real property interest created.[164] In addition, the court instituted a test based on exclusive possession to determine if a right to use interest is a license or a lease.[165]

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hold interest." *Bankruptcy Reform: Hearings Before the Subcomm. on Courts of the Comm. on the Senate Judiciary*, 98th Cong., 1st Sess. 405 (1983) (testimony of Carl Berry, Chairman, National Timesharing Council of the American Land Development Association) [hereinafter cited as *Bankruptcy Reform Hearings*].

156. New Hampshire statutes provide that all timesharing interests are subject to regulation as real property. *See* N.H. REV. STAT. ANN. § 356-B:3XXVIII (Supp. 1981).

157. Burek, *supra* note 64, at 683.

158. *See infra* notes 159-70 and accompanying text.

159. 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (1980).

160. *Id.* at 455, 163 Cal. Rptr. at 731. The pertinent statutory provision defines subdivision as an "improved or unimproved land or lands divided or proposed to be divided for the purpose of sale or lease, whether immediate or future, into five or more lots of parcels." CAL. BUS. & PROF. CODE § 10249.1 (Deering 1976).

The *Cal-Am* court noted that other interests, such as "any accompanying memberships or other rights or privileges created," also are subject to the subdivision laws. *Id.* at 457, 163 Cal. Rptr. at 731-32.

161. *Id.* at 457, 163 Cal. Rptr. at 732.

162. Cal-Am Corporation sells memberships in the Royal Hawaiian Adventure Club. Members are "entitled" to the use of a one-bedroom condominium unit for one week each year *until December 31, 2041*. *Id.* at 456, 163 Cal. Rptr. at 731 (emphasis added).

163. *Id.* at 457, 163 Cal. Rptr. at 732.

164. *Id.*

165. The *Cal-Am* court stated:

> The test for determining whether an agreement for the use of real property is a license or a lease is whether the contract gives exclusive possession of the prem-

Despite many similarities,[166] the *Cal-Am* court did not find *Carriage House* persuasive.[167] The court distinguished *Carriage House* noting that here the right-to-use interest terminated on a set date, December 31, 2041, while the interest in *Carriage House* continued for the indeterminate useful life of the building.[168] This distinguishing factor weighed in favor of a determination of exclusive possession.[169] From this, the *Cal-Am* court concluded the Department had the power to issue an order to desist from selling, leasing, or offering membership interests in the Royal Hawaiian Adventure Club.[170]

The *Cal-Am* court chose substance over strict statutory construction in order to find an interest in real property.[171] Commentators suggest several reasons why courts should consider right to use timesharing as an interest in real property for regulatory purposes.[172] A regulatory loophole results when a right-to-use interest cannot be regulated as real property. The fee interest is then regulated while the non-fee interest goes unregulated.[173] For this reason, many de-

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ises against all the world, including the owner, in which case it is a lease, or whether it merely confers a privilege to occupy under the owner, in which case it is a license.

Id. *See* Von Goelitz v. Turner, 65 Cal. App. 2d 425, 150 P.2d 278 (1944).

166. These similarities include units only available after reservation on a first come, first serve basis. The members in both cases could transfer, devise, or lend their interest. The respective corporations provided maintenance and maid service. In addition, the agreements guaranteed the members occupancy if they complied with reservation requirements. *Id.* at 456-57, 163 Cal. Rptr. at 731-32.

167. *Id.* at 457, 163 Cal. Rptr. at 732. The *Cal-Am* court characterized *Carriage House* as holding "that a membership interest in a resort condominium constitutes neither a license nor a lease." *Id.*

168. The *Cal-Am* court stressed the difference between an interest terminating on a fixed date and one the termination date of which is based on an estimated number of years. This was an important factor in the *Cal-Am* court's exclusive use test. *Id.*

169. *Id.* In addition, the *Cal-Am* court emphasized that it did not matter whether the management association assigned members to a particular unit and a particular week on a yearly basis. The property right was defined and specific. *Id.*

170. *Id.* at 456-60, 163 Cal. Rptr. at 731-33. The Real Estate Department issued the order after an investigation of a compliant about the Royal Hawaiian Adventure Club. *Id.* at 455, 163 Cal. Rptr. at 731.

171. *Id.* at 457, 163 Cal. Rptr. at 732. *See supra* notes 162-65 and accompanying text.

172. *See, e.g., Hearings, supra* note 44, at 39-42 (statement of Garth C. Lucero, Asst. Atty. Gen., Denver, Colo.).

173. In a congressional hearing on timesharing abuses, one witness testified that the "potential for abuse in the sale of vacation license agreements is very much higher because the sellers are not required to be licensed with regulatory agencies and the

velopers purposely choose to structure their development in a right-to-use format to avoid regulation and licensing.[174] Consumers, however, purchase right-to-use and fee ownership timesharing for the same purpose.[175] Indeed, the type of timeshare arrangement does not significantly affect the purchase price of the units.[176] As a new and complex property concept, timesharing may compound the confusion of a potential purchaser.[177] Because a salesperson need not have a license to sell timesharing interests, a purchaser has no guarantee that the salesperson even will understand what is actually being sold. In light of these policy factors, commentators suggest broad construction of real estate regulatory provisions.[178]

Traditional common law real property principles weigh in favor of finding that right-to-use timesharing involves no property interest transfer.[179] Policy factors and broad statutory construction suggest right-to-use timesharing should be subject to real property regulations.[180] State legislatures can alleviate this regulatory tension if they institute specific timesharing regulations that encompass all timesharing forms.[181]

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legal protections typically associated with real estate ownership, such as recording, foreclosure, and other statutory procedures, do not apply." *Id.* at 39.

174. One author suggests that the primary reason that developers utilize a vacation license format is "to avoid state real estate regulations which require the use of licensed sales people and registration of the offering with the state's Real Estate Commission." M. HENZE, *supra* note 4, § 3-6.

175. Consumers purchase a timesharing unit so that they can affordably "own" their own vacation unit. *See supra* notes 17-19 and accompanying text.

Relatively few consumers understand the intricacies of real estate law. They must rely on the advice of a salesperson. Also, because the timesharing offering is relatively inexpensive, it is likely that an attorney's review of the offering agreement may increase substantially the cost to the consumer. *See generally* Straw, *supra* note 13, at 1543.

176. *See* Davis, *Time-Sharing Ownership: Possibilities and Pitfalls*, 5 REAL EST. REV. 49, 53 (1976).

177. In addition to conceptual complexities, developers frequently fail to disclose "underlying encumbrances on the property and the financial condition of the developer." *Hearings, supra* note 44, at 42 (testimony of Garth C. Lucero, Asst. Atty. Gen., Denver, Colo.).

178. *See supra* notes 61-112 and accompanying text.

179. *See supra* notes 127-50 and accompanying text.

180. *See supra* notes 171-78 and accompanying text.

181. Although this solves many problems, federal preemption can negate the protections that states provide timesharing purchasers. *See infra* notes 212-37 and accompanying text.

B. *Complications Common to Fee and Non-Fee Timesharing*

Despite non-fee timesharing's constructional perplexities, common characteristics and problems relate to both fee and non-fee timesharing. In many respects, either of these formats satisfies the individual consumer's desire to own a vacation residence.[182] This section briefly focuses on real estate timesharing complications that apply to both formats.

Commentators' and courts' initial examinations of timesharing focused on complications that may arise under the only format then available—fee ownership.[183] The primary concerns involve partition, potential tort liability, and tax lien consequences. Partition is a right to division or sale of the property inherent in tenancy in common.[184] As such, it does not apply to other fee formats nor does it usually concern non-fee arrangements.[185] The threat of partition has diminished because of the shift to other fee and non-fee timesharing formats, and because of contractual waivers of the right.[186]

Tort liability especially concerns fee owners of a timesharing development.[187] In light of condominium laws,[188] courts may apportion liability among the units and not apply joint and several

182. *See supra* notes 17-19 and accompanying text. Often, the particular timesharing format results as a matter of developer preference.

183. These complications induced the development of other timesharing structures, in particular, right-to-use formats.

184. *See supra* note 30 and accompanying text. For a comprehensive discussion, see M. HENZE, *supra* note 4, §§ 3-15 to 3-22. This common law right allows a cotenant to partition the land, either from proceeds of a forced sale or from physical division. A single timesharing owner may petition a court for partition and thus destroy the timesharing structure. *Id.*

185. While other timesharing formats can provide for tenancy in common, developers may avoid such an arrangement to circumvent the partition problem. *Id.* § 3-15 n.13.

186. Although the timeshare contract may contain a waiver of the right to partition, a clause disallowing partition generally is considered unreasonable and unenforceable. Comment, *Legal Challenges, supra* note 1, at 433. Nevertheless, a consumer may not wish to expend the time, effort, and expense to challenge the provision in court.

187. For a discussion of tort liability in a timesharing development, see Comment, *Legal Challenges, supra* note 1, at 436-39. The author examines tort liability arising from negligence in the common areas, injury to a third party on the property, and negligent acts by an individual timesharing owner. *Id.*

188. One commentator suggests that timesharing ownership and condominium ownership are analogous with respect to common area tort liability. He suggests that

liability.[189] How the developer structures the timesharing project may determine how courts apportion liability. Possibilities include holding all unit owners jointly and severally liable, apportioning liability among the units while holding the individual unit owners jointly and severally liable, or further subdividing liability to each timesharing owner.[190]

The consequences of a tax lien[191] present complications similar to those encountered with tort liability. Here again the question becomes whether the tax deficiency on a unit encumbers the whole project, that individual unit, or just the guilty owner's individual interest.[192] Because the fee owner usually can record her individual timesharing interest, timesharing owners can apportion the deficiency.[193] Under most non-fee structures, the fee owner pays the taxes[194] and the entire project may be subject to a tax lien and sale.

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courts apply the same reasons in rejecting joint and several liability and prorating contribution among the units. *Id.* at 437.

If courts will take this theory one step further, liability will be apportioned not merely by the unit, but by the particular timesharing period of ownership. This liability apportionment may become complicated because the value of the timesharing interest will depend on whether it falls within the prime season or not. *Cf.* Straw, *supra* note 13, at 1546-47 (author explains the "calculation of the 'general common element' share" may be based on the amount of time owned and if it is a peak or low season use).

189. *See id.*; *see also* Dutcher v. Owens, 647 S.W.2d 948, 951 (Tex. 1983) (holding that condominium tort liability is premised not on joint and several liability, but rather on each co-owner's "*pro rata* interest in the regime as a whole . . . where such liability arises from those areas held in tenancy-in-common").

190. *See generally* Comment, *Legal Challenges, supra* note 1, at 436-39 (analysis and presentation of solutions for timesharing tort liability).

191. Often, these consequences depend on the particular form of timesharing ownership involved. *See generally* M. HENZE, *supra* note 4, §§ 7-13 to 7-14 (discussion of real estate tax liens).

192. A recent Internal Revenue Service (IRS) ruling suggests that the Service will levy the tax lien only against the deficient owner and not on the entire unit or development. Rev. Rul. 79-55, 1979-I C.B. For a discussion of the implications of this ruling, see M. HENZE, *supra* note 4, §§ 7-13 to 7-14.

193. *Id. See also* Comment, *Legal Challenges, supra* note 1, at 428-31 (author notes that such suits are rare and that a pragmatic analysis suggests liability of the single owner and not joint liability).

194. There are other tax consequences of timesharing besides a tax lien for both the timesharing consumer and developer. Generally, the developer is concerned with income tax and property tax consequences of timesharing. The purchase price generally constitutes ordinary income rather than capital gains. It is possible, however, to structure the development differently. Non-fee timesharing is the sale of a service and not the sale of a capital asset and thus no gain from the sale of a property interest

When real estate timesharing developed, the focus on timesharing complications shifted to solicitation, project development, and conversion.[195] High pressure sales techniques in the timesharing industry has become a primary concern of consumers and consumer advocates.[196] These sales techniques persist partly because many states do not require licensing of non-fee timesharing salespeople.[197] Sophisticated marketing techniques also help lure consumers to the developments with prizes and gifts.[198] Once there, they become captive audiences for a high pressure sales pitch.

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results. With fee ownership the developer does not retain an interest and, therefore, cannot depreciate the unit. M. HENZE, *supra* note 4, §§ 7-2 to 7-4.

The developer also may structure the format to affect the timing of gain recognition. Under a fee timesharing scheme at least one commentator believes the IRS probably will recognize the gain as the purchase price is paid. *Id.* §§ 7-4 to 7-5. If a lump sum payment is required, there will be immediate recognition of the gain. On the other hand, if the purchaser pays in installments the gain should be recognized with each payment. The IRS probably will treat non-fee timesharing as prepaid rent. *Id.*

A timesharing consumer may deduct interest payments and real estate taxes from her taxable income. If the timesharing owner rents her interest she may qualify for further deductions. When the owner does not rent the timeshare interest, the IRS construes it as a second home. If, however, the owner does rent the interest, she may deduct depreciation, maintenance expenses, advertising, and losses from attempting to rent the unit. If the owner uses the interest and rents a portion of the interest, the IRS may construe it as "part rental." Usually, the IRS construes timesharing interests as a second home because the owner often owns seven to 10 days, a period insufficient to meet the minimum yearly rental requirements prescribed in I.R.C. § 280A. *Id.* §§ 7-16 to 7-14.

Timesharing consumers desiring to sell their non-fee interest must know how the transfer is taxed. In an IRS letter ruling, the Service stated that a "vacation license" in a condominium amounts to a contract for future services. Therefore, the seller must report the sale of this contract in the year of sale. In addition, the ruling stated that these contracts were neither a lease nor real property. Kaster, *supra* note 54, at 350.

195. These issues are raised in the pending case FTC v. Paradise Palms Vacation Club, No. C81-1160V (W.D. Wash. filed Sept. 28, 1981). For a discussion of this case, see Bloch, *supra* note 1, at 24-46.

196. These activities were examined recently in a congressional hearing concerning timesharing abuses. The hearing originally focused on the effect of high pressure sales tactics on senior citizens. The emphasis of the hearing shifted, however, to the abuses of timesharing sales in general. *Hearings, supra* note 44, at 1-4, 39-42, 77-96.

197. *Hearings, supra* note 44, at 39 (statement of Garth C. Lucero, Asst. Atty. Gen., Denver, Colo.). Mr. Lucero stated that "the potential for abuse in the sale of vacation license agreements is . . . much higher because the sellers are not required to be licensed with regulatory agencies. . . ." *Id.*

198. *See generally* Curtis, *supra* note 15, at 114-23; *Tips on Time Sharing, supra* note 18, at 78.

As previously noted, inconsistent application of zoning regulations may hamper the orderly development of timesharing in appropriate areas.[199] Whether a condominium or a house may be converted into a timesharing format depends on these same zoning requirements and perhaps on the condominium bylaws.[200]

Another primary concern in timesharing development is the possibility of encumbrances on the entire project.[201] Methods that provide consumers with some protection include disclosure and non-disturbance clauses in the timesharing contract.[202]

Future complications will develop as real estate timesharing progresses. A possible trouble spot is long-range management and operation of the project.[203] The transitory nature of timesharing ownership and increased usage of the units may cause maintenance complications and more expenses than purchasers anticipated.[204] A non-fee owner is more dependent on the fee owner's ability to assure proper project maintenance.[205] In addition, the timesharing owner relies on the management association to schedule timesharing uses

199. *See supra* notes 73-76 and accompanying text.

200. In Laguana Royale Owners Ass'n v. Darger, 119 Cal. App. 3d 673, 174 Cal. Rptr. 136 (1981), the court upheld a condominium unit owner's sale of the unit in timesharing periods. Although the dissent recognized this transfer as a timesharing device, the majority did not. *See id.* For a discussion of this case, see August, *Clockwork Condo: The Time-Sharing Condominium Stumbles into Court*, 37 PERS. FIN. L.Q. REP. 15, 37 (1983).

201. *See* Eastman, *supra* note 7, at 161 (generally the mortgage must be paid in full before partial releases are granted to the individual owner).

202. *But cf.* Sombrero Reef Club, Inc. v. Allman, 18 BANKR. L. REP. (CCH) 612 (Bankr. S.D. Fla. 1982) (federal bankruptcy court held that federal law preempts the "non-disturbance" clause).

203. Frequently, with fee timesharing the developer manages the complex until she sells a certain amount of units. At that point, maintenance responsibilities turn over to the new owners. Curtis, *supra* note 15, at 123. In many instances, the owners hire the developer's management subsidiary to continue managing the development. *Id.*

Commentators suggest several areas that may pose future problems for timesharing consumers, such as heavier use because of the greater number of purchasers, difficulty in making decisions because a majority of owners are never at the development at one time, increased likelihood of owner defaults or delinquencies in paying assessments, and the potential for significantly greater unit resale. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-34.

204. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-34; *see also* Pollack, *supra* note 1, at 288-89. One author suggests that the management group needs greater authority to operate effectively the timesharing project. *Id.*

205. *Id.*

fairly and accurately.[206] The fee owner possesses greater authority over the management and maintenance of the project.[207] This control is limited because most timesharing projects have many owners scattered over a wide geographic area, only a few of whom are present at the development at any given time.[208] This hinders management action unless the owners delegate this responsibility. Other problems directly concern both the fee and non-fee timesharing consumer. These include prior occupant overstay and damage to the unit by other owners. Association agreements or management controls often provide solutions to such owner problems.[209]

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206. Under a floating system, where the purchaser does not acquire a particular unit for a particular period each year, the purchaser acquires the option to reserve a unit for a requested period. Prior to use, the purchaser reserves a timesharing period and unit on a first-come, first-serve basis. Often, the agreement requires notice of more than 30 days and less than one year for unit reservations. *See generally* Rugani, *supra* note 4, at 5-6.

One commentator suggests the timesharing development declaration should "contain provisions bordering on the punitive . . . in the event a time share owner holds over into another owner's period of occupancy." Straw, *supra* note 13, at 1547.

In addition to vacation scheduling, some commentators suggest that the timesharing plan include maid service, an information booth, and weekly social gatherings. *See* ROMNEY & ROMNEY, *supra* note 4, ¶ 13-35.

207. In a fee timesharing structure, the owners are in charge of management. *See generally* Straw, *supra* note 13, at 1546-47.

208. Generally, there will never be a majority of the owners at the project because the units are subdivided. Although proxy voting provides one solution, it creates a fragmented owners association. It is likely, therefore, that there will be greater delays in resolving management questions.

Various voting patterns include allocating different weights to each owner's votes based on the amount of time purchased and the cost of the timesharing period or giving each owner only one vote. One commentator suggests, regardless of the particular voting method, the owners should elect representatives. The representatives would choose a board of managers to operate the timesharing project. *See* Straw, *supra* note 13, at 1546-47.

209. Many problems are avoidable if expressly addressed in the various timesharing documents. Generally, these documents include: The declaration of covenants, conditions, and restrictions; the articles of incorporation and the bylaws of the timesharing owners' association; the rules and regulations; the grant deed; the purchase agreement; and the escrow instructions. Rugani, *supra* note 4, at 5.

The declaration of covenants, conditions, and restrictions—or a similar document—should allocate individual expences directly to the particular owner. These expenses include intentional damage and long distance telephone calls. *See* Straw, *supra* note 13, at 1546. In addition, these documents also should prescribe timesharing owner changes in the structure, decoration, or furniture in the particular unit. *Id.* at 1547.

C. *Complications Unique to Non-Fee Timesharing Ownership*

As previously noted, a state's classification of non-fee timesharing can produce either harmonious application or anomalous inconsistencies.[210] In addition, the inability to classify neatly the non-fee timesharing concept creates unwelcome consequences beyond the question of regulatory inconsistencies.[211] A recent bankruptcy case confirms this premise.

In *Sombrero Reef Club v. Allman*,[212] a resort-marina in the process of converting to a timesharing program declared bankruptcy. At the time of bankruptcy, there were approximately two hundred timesharing agreements.[213] The timesharing agreements, ranging in price from $1,000 to $3,000, granted a purchaser the "privilege to use" a unit for one week per year.[214] In addition, the developer assessed the purchasers, whether they paid the contract price in full or under an installment plan, annual dues to maintain the premises.[215] A purchaser reserved a unit on a first-come, first-served basis at least sixty days in advance of when she wanted to come to the resort.[216]

Although the developer made unsuccessful attempts to sell the de-

210. *See supra* notes 113-81 and accompanying text.

211. Inconsistent regulation is only one problem stemming from the failure to classify timesharing concisely and precisely. Unwelcome consequences develop because timesharing formats fluctuate between fee and non-fee ownership. Primarily, two underlying difficulties surface in attempting to classify timesharing. First, courts treat differently the same or similar forms of timesharing. One court may hold that right-to-use is an interest in real property and another may conclude that it is not such an interest. *See supra* note 122-70 and accompanying text. Second, consumers generally purchase fee and non-fee timesharing for the same purpose (personal recreation rather than investment). Relying on common law real property concepts, however, some courts and commentators refuse to treat the two types of timesharing consistently, which frequently means the non-fee owners' rights remain unprotected while the fee owners' rights are protected. *See supra* notes 221-41 and accompanying text. This inspires developers to structure timesharing developments toward non-fee arrangements to escape any regulations or consumer protections. *See supra* notes 174-81 and accompanying text.

212. 18 BANKR. L. REP. (CCH) 612 (Bankr. S.D. Fla. 1982).

213. *Id.* at 612-13.

214. The agreement granted the purchaser a "privilege to use" an accomodation, not, however, a specific unit or a designated time, for a period of 30 years. The purchasers could not rent, sublease, or sublicense their interests. *Sombrero Reef Club*, 18 BANKR. L. REP. (CCH) at 614-15, 617-18.

215. *Id.* at 615-16.

216. *Id.* at 614.

velopment with the timesharing agreements,[217] the bankruptcy court held that the non-fee timesharing contracts between the bankrupt developer and his purchasers were executory and, therefore, the debtor in possession could reject the contracts in order to sell the property.[218] The court premised this conclusion on section 365,[219] the executory contract provision of the Federal Bankruptcy Code.[220] In addition, the court noted that these timesharing contracts neither fall within the exemptions for unexpired leases,[221] nor within the exemptions for the sale of real property.[222]

Neither the court nor the parties agreed on the type of timesharing interest created.[223] The court did note, however, that the drafters did

217. *Id.* at 615. Sombrero Reef first attempted to sell the units subject to the timesharing contracts, but attracted no purchasers. *Id.*

218. *Id.* at 615, 618. One commentator explains that this is an application of the "business judgment rule" in which the court allows rejection because a reasonable business person could conclude that the contracts are too burdensome. M. HENZE, *supra* note 4, §§ 5A-4 to 5A-5.

219. 11 U.S.C. § 365 (1982). This section provides in pertinent part: "(a) Except as provided . . . the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor." *Id.* § 365(a).

220. *Sombrero Reef Club*, 18 BANKR. L. REP. (CCH) at 615.

221. *Id.* at 618. The unexpired lease exception provides that:

> If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, the lessee under such lease may treat the lease as terminated by such rejection, or, in the alternative, may remain in possession for the balance of the term of such lease and any renewal or extension of such term that is enforceable by such lessee under applicable non-bankruptcy law.

11 U.S.C. § 365(h)(1) (1982).

222. *Sombrero Reef Club*, 18 BANKR. L. REP. (CCH) at 618. The sale of real property exception provides that: "If the trustee rejects an executory contract of the debtor for the sale of real property under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property." 11 U.S.C. § 365(i)(1) (1982).

Based on the membership agreement, the court stated that Sombrero Reef Club was not willing to sell a conventional real property interest. *Sombrero Reef Club*, 18 BANKR. L. REP. (CCH) at 617.

223. *Id.* at 615. The agreement granted the purchaser a privilege to use an accommodation for 30 years, but did not designate a specific time or unit. To use a unit, the purchaser made reservations with the Sombrero Reef Club. They could not rent, sublease, or sub-license their interests. In addition, Sombrero Reef Club assumed responsibilities for all management and upkeep. *Sombrero Reef Club*, 18 BANKR. L. REP. (CCH) at 614-15, 617-18.

Although these facts parallel those of other cases where courts have attempted to decide what type of interest a non-fee timesharing purchaser acquires, the court did not examine those cases. *See supra* notes 127-70 and accompanying text.

not choose a definite or conventional form of real property.[224] Although the purchasers had paid a portion of the price and some even paid in full, the court found determinative the fact that each party owed some performance.[225] It rejected the contention that the "non-disturbance" clause[226] protects these consumers, and concluded that the Federal Bankruptcy Code preempts this statutory protection.[227] Finally, the court concluded that the purchasers received no interest in real property, therefore, the contracts fell outside the statutory exemptions of the Bankruptcy Code.[228]

The implications of the *Sombrero Reef Club* holding threatened the timesharing industry,[229] the timesharing consumer,[230] and financial institutions.[231] This decision limited the viability of non-fee

224. *Id.* at 617. The court relied on the drafters intent and the statutory language. The court failed to consider the consumers' intent or policy factors.

225. *Id.* at 615-16. Even though some consumers had paid the full purchase price, the court held that substantial obligations remained outstanding. The purchasers must pay yearly maintenance fees and the Sombrero Reef Club must maintain the project and make units available for the purchasers' use. The court concluded that the yearly fee was "not a de minimus obligation." *Id.* at 616.

226. The recorded nondisturbance clause informed purchasers that the property was encumbered but that the purchasers' rights were protected in accordance with Florida statutory provisions. *Id.* at 619.

227. *Id.* at 619-20.

228. *Id.* at 618.

229. For a general discussion of the consequences of *Sombrero Reef Club*, see M. HENZE, *supra* note 4, §§ 5A-7 to 5A-12; Dungan, *Right-to-Use Timeshare Contracts Rejected in Bankruptcy Proceedings*, 12 PROB. & PROP. 3, 4 (1983).

230. The decision was especially detrimental to state timesharing consumer protection because they would become irrelevant when a timesharing developer declares bankruptcy. *See* M. HENZE, *supra* note 4, § 5A-7. This leaves non-fee timesharing owners in a precarious position. They purchased what they believed was a state-protected interest. Now, they realize that this protection is subject to federal preemption, and they are unable to sell their interest because it cannot be protected. The purchaser only can hope, therefore, that the development does not go bankrupt.

231. One commentator explains that no financial institution will finance a developer or accept the paper from installment sales as collateral under the *Sombrero Reef Club* rule. Dungan, *supra* note 229, at 4; *see also Bankruptcy Reform Hearings, supra* note 156, at 405 (testimony of Carl Berry, Chairman, National Timesharing Council of the American Land Development Ass'n) (stating that financiers are "hesitant" to grant loans or purchase receivables because the timesharing interest may be cut short).

Of course, financiers who made loans before *Sombrero Reef Club* may find themselves at risk absent protection within the loan agreement. If contractual protection does exist, banks are more likely to call in the loan because of the increased risk, emasculating the problems of timesharing developers and consumers.

timesharing,[232] and extended the non-fee timesharing constructional dilemma.[233] The court effectively eliminated the statutory consumer protections of state timesharing laws.[234] The consumers become unsecured creditors and lending institutions lose their investments.[235] *Sombrero Reef Club*, however, did not threaten fee timesharing growth,[236] and it encouraged creative structuring of new timesharing formats.[237]

In response to *Sombrero Reef Club*, Congress specifically exempted real estate timesharing from section 365 of the Bankruptcy Code of 1978.[238] It did so for the purpose of granting all timesharing purchasers equal treatment with regard to the exemptions from unexpired leases and the sale of real property.[239] Even though the

232. In addition to inconsistent regulatory practices, lenders and purchasers faced the complete loss of their interest. Commentators suggest this may deter the use of non-fee timesharing formats. *See, e.g.*, M. HENZE, *supra* note 4, §§ 5A-7 to 5A-8; Dungan, *supra* note 229, at 4.

233. *See supra* note 122-81 and accompanying text.

234. *Sombrero Reef Club*, 18 BANKR. L. REP. (CCH) at 619-20. The Florida Administrative Code provisions recognized the need to protect all timesharing purchasers, not merely those with a fee interest. FLA. ADMIN. CODE 2-23-09, *superseded by* FLA. STAT. ANN. § 721.08(3)(b) (West. Supp. 1984). The bankruptcy court could have extended this logic because the decision to reject executory contracts is discretionary with the bankruptcy trustee. 11 U.S.C. § 365(a) (1982). Sound policy dictates that the court should avoid the inequity of subjecting thousands of timesharing purchasers to financial loss and judicially hindering the development of a useful industry. The court should not have created a distinction between the regulation of non-fee and fee timesharing. Instead, it reasonably could have concluded that this interest falls within the unexpired lease or sale of real property exemptions. *See* 11 U.S.C. § 365(h), (i) (1982).

235. *See* Dungan, *supra* note 229, at 4.

236. Although courts may determine that fee timesharing under an installment purchase plan is executory, § 365 exemptions apply because fee timesharing confers a recognized interest in real property. *Cf.* M. HENZE, *supra* note 4, § 5A-8.

237. Timesharing is a flexible concept. Throughout its short development in the United States it has changed continually to meet legal and practical complications. The desire to avoid the threat of partition in tenancy in common timesharing inspired interval ownership. The developer's desire to avoid real estate licensing and to retain equity spurred the growth of right-to-use timesharing. The conflict of whether non-fee ownership is an interest in real property will serve as an impetus for further refinement and restructuring. Some plans suggest including the proprietary right-to-use and deeded right-to-use in timesharing contracts. *See* M. HENZE, *supra* note 4, § 5A-9.

238. Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-533, §§ 401-04, 98 Stat. 333, 366-67 (1984).

239. *See* SENATE JUDICIARY COMM. ON OMNIBUS BANKRUPTCY IMPROVEMENTS

trustee still has the option to reject the contracts, the timesharing purchaser can either treat the contract as terminated or may remain in possession.[240] The recent legislation recognizes the difficulties in construing non-fee timesharing and demonstrates the desire to protect the non-fee timesharing consumer consistently with the fee timesharing consumer.[241] Nevertheless, timesharing consumers, developers, financiers, and commentators must wait to see if courts will carry out consistently the spirit of the timesharing reforms.

IV. CONCLUSION

Real estate timesharing is quickly gaining popularity in the United States. Although timesharing is a new development, it has both avid supporters and fervent opponents. The success of timesharing attracts both consumers and developers. The rapid development and popularity of real estate timesharing increases the demand for regulation. State statutes, agency regulations, and local controls are devices to obtain this objective. Although regulatory implementation is slow, the real concern, as the Bankruptcy Amendments of 1984 demonstrate, is consistent regulation of all timesharing formats. Consistent regulation and construction of both fee and non-fee formats is necessary to protect the timesharing industry, the financial institutions, and the timesharing consumers.

ACT OF 1983, S. REP. NO. 65, 98th Cong., 1st Sess. 49 (1983) [hereinafter cited as S. REP. NO. 65, 98th Cong., 1st Sess.].

240. 11 U.S.C. § 365(h)(1), (2) (1982), *amended by* Pub. L. No. 98-353, §§ 401-04, 98 Stat. 333, 366-67 (1984). The amendment grants the timesharing consumer a lien on the property if the contracts are rejected in bankruptcy. The Senate Judiciary Committee reported that the purpose of the amendment is "to . . . [indicate clearly] that timeshare interests are to be treated in the same manner as leases and sales of real property." S. REP. NO. 65, 98th Cong., 1st Sess. 50.

241. S. REP. NO. 65, 98th Cong., 1st Sess. 50. The report explains that non-fee timesharing "interests are difficult to characterize within existing legal concepts [, therefore,] it is necessary to extend the coverage of the existing consumer protections to . . . include them [explicitly]." *Id.*; *cf. Bankruptcy Reform Hearings, supra* note 155, at 405 (testimony of Carl Berry, Chairman, National Timesharing Council of the American Land Development Ass'n).