

1-1-1980

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1 Miss. C. L. Rev. 439 (1978-1980)

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## TIMESHARING: AN INNOVATIVE CONCEPT

Probably the most dramatic departure from the traditional use of real estate in this century is the timesharing concept of property ownership. Timesharing<sup>1</sup> is ownership of a piece of real property that is broken down among several owners with each having an exclusive right to occupy the property for a specified period of time each year.<sup>2</sup> The average time period of ownership is one to four weeks.<sup>3</sup> This departure offers valuable vacation options and opportunities for the majority of the population who cannot afford a second home. Instead, the purchaser only buys the amount of vacation time that he can use, thereby taking the burden of paying for and maintaining a second home off of one purchaser's shoulders and distributing these costs among several purchasers.<sup>4</sup>

Americans have had a marked response to the ownership option. Reports predicted that in 1979 sales in the area reached as high as \$700 million, with approximately 250,000 Americans owning timeshare units at about 400 resorts.<sup>5</sup> Studies show that most timesharing purchasers have families, are well educated, and are in the upper-middle-income bracket.<sup>6</sup> In a 1978 survey of 1,500 timeshare buyers, most indicated that they were satisfied with their purchases and nearly half said they intended to make another timeshare purchase.<sup>7</sup>

Europe is responsible for this unique concept. Resort developers in the 1960's found they could market the right to use a time period to persons who would not purchase the standard condominium unit because of its exorbitant cost.<sup>8</sup> By 1972 timesharing had made its way to the United States and has been gaining acceptance ever since.<sup>9</sup> This is apparent in that several states have given timesharing statutory recognition.<sup>10</sup>

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"Timesharing," when used to refer to ownership of real property, has yet to obtain an accepted literary style which is included in any legal dictionary. The Resort Timesharing Council (RTC) of the American Land Development Association, the leading trade and research association of the timesharing industry, has adopted the use of "timesharing," as opposed to "time-sharing" or "time sharing." Throughout this article the RTC usage will be followed except when quoting specifically designated statutes or acts.

<sup>1</sup>Davis, *Time-Sharing Ownership: Possibilities and Pitfalls*, 5 REAL ESTATE REV. 49 (1976).

<sup>2</sup>1 P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 17C.01[1] (1979).

<sup>3</sup>Pohoryles, *Time-Sharing: How To Do It*, 6 REAL ESTATE REV. 23, 23 (1976).

<sup>4</sup>NEWSWEEK, Dec. 17, 1979, at 104.

<sup>5</sup>*Time-Sharing: Taping the Vacation Industry*, REALTORS REVIEW (Sept. 1978).

<sup>6</sup>*Id.* See also NEWSWEEK, Dec. 17, 1979, at 104.

<sup>7</sup>Gunnar, *Regulation of Resort Time-Sharing*, 57 OR. L. REV. 31, 36 (1977).

<sup>8</sup>Davis, *Time-Sharing Exchange Networks*, 8 REAL ESTATE REV. 42, 43 (1978).

<sup>9</sup>Burek, *Timesharing: The Pie in the Sky*, July, Aug. 1979 LAWYER'S SUPPLEMENT TO THE GUARANTOR 1, 1. To date Colorado, New Hampshire, Utah, Florida, South Carolina, Hawaii and California have given timesharing statutory recognition.

Timesharing has been marketed in many different forms depending upon what the developer wishes to achieve. These different forms can be broken down into ownership and non-ownership categories.<sup>11</sup>

The ownership forms can be divided into two classes: interval ownership and timesharing ownership (T.S.O.).<sup>12</sup>

## OWNERSHIP

### *Interval Ownership*

Interval ownership is a revolving set of tenancies for years with a vested remainder over to all timeshared owners as tenants in common.<sup>13</sup> A major departure from the common law means of conveyance results with interval ownership as the deed creates both title and a right to occupy in one instrument.<sup>14</sup> The purchaser, during the time he has possession, has fee title to the unit.<sup>15</sup> The tenancy in common comes into play at a designated period which is normally the end of the useful life of the building.<sup>16</sup> At this time the unit owners can either renew the interval arrangement of partition.<sup>17</sup> The reason for coupling the tenancy in common with the tenancies for years is twofold: to avoid breaching the Rule against Perpetuities and to show that the intent is not to convey a leasehold interest.<sup>18</sup>

Interval ownership appears to be the most advantageous form of the timesharing concept for the purchaser as well as for the developer. Most important to the purchaser is the fact that he acquires an interest in real property. The title can be insured, recorded and under the rules of many financial institutions it may become a security interest. Since the time periods are exclusive of each other, unlike a tenancy in common timesharing arrangement, there are no problems with partition or with the possibility of a tax lien being imposed upon a diligent tax-paying co-owner because of a less diligent co-owner.<sup>19</sup>

One of the disadvantages of this type of ownership is that the remainder in tenancy in common is subject to partition and tax lien complications. Since this remainder is set up to occur generally at the end of the useful life of the unit these complications do not pose a major problem.<sup>20</sup>

<sup>11</sup>Davis, *supra* note 2, at 50.

<sup>12</sup>*Id.*

<sup>13</sup>Davis, *Time-Sharing Ownership—Legal and Practical Problems*, 48 ST. JOHN'S L. REV. 1183, 1187 (1974).

<sup>14</sup>*Id.*

<sup>15</sup>P. ROHAN & M. RESKIN, *supra* note 3.

<sup>16</sup>3 THE TIME SHARING ENCYCLOPEDIA *Legal Documentation* A-1, A-2 (1979) (Interval International, Technical Communications Division, South Miami, Fla.) [hereinafter cited as 3 TIME SHARING ENCYCLOPEDIA].

<sup>17</sup>1 P. ROHAN & M. RESKIN, *supra* note 3.

<sup>18</sup>3 TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-2.

<sup>19</sup>*Id.* at A-3.

<sup>20</sup>Pohoryles, *supra* note 4, at 23.

The price of a unit depends upon the location and time of year, but all units are relatively inexpensive. The average price is estimated to be \$4,000 for an efficiency apartment during a peak-season week.<sup>21</sup> In addition the units are completely furnished by the developer.<sup>22</sup>

### *Timesharing Ownership*

Timesharing Ownership (T.S.O.) is the sale of an undivided fee simple percentage in a single timesharing unit to purchasers as tenants in common.<sup>23</sup> The T.S.O. interest is acquired by a deed that gives each purchaser an undivided interest plus a right to exclusive use of the unit for the purchaser's particular time period each year.<sup>24</sup> The purchaser must agree to use the unit for a specific time period or the system fails.<sup>25</sup> To insure the purchaser of an exclusive right to occupy the unit during his "use period" title insurance is issued.<sup>26</sup>

The advantages of T.S.O. include, among other things, the ownership aspect of a direct interest in real property, the fact that the title, as in interval ownership, may be recorded and the fact that a single mortgage may be secured thus allowing the individual owners to contribute to paying the mortgage off.<sup>27</sup>

This type of ownership has its disadvantages. In the common law tenancy in common each tenant owns the whole and does not have exclusive right of possession or control of any particular portion.<sup>28</sup> Accordingly a covenant against partition must accompany the deed to make this type of ownership workable.<sup>29</sup> The covenant would have to be binding upon the successors in interest as well as the original purchaser.<sup>30</sup> T.S.O. will not be workable in states that do not allow such covenants.<sup>31</sup>

Under section 7403 of the Internal Revenue Code the government was arguably given authority to sell the entire unit to satisfy the delin-

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<sup>21</sup>NEWSWEEK, Dec. 17, 1979, at 104.

<sup>22</sup>1 P. ROHAN & M. RESKIN, *supra* note 3.

<sup>23</sup>Liebman, *Can Condominium Time-Sharing Work?*, 3 REAL ESTATE REV. 40, 41 (1973).

<sup>24</sup>Gray, *Pioneering The Concept of Time-Sharing Ownership*, 48 ST. JOHN'S L. REV. 1196, 1197 (1974).

<sup>25</sup>Liebman, *supra* note 23, at 41.

<sup>26</sup>Gray, *supra* note 24, at 1198.

<sup>27</sup>3 TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-4, A-5.

<sup>28</sup>C. MOYNIHAN, INTRODUCTION TO THE LAW OF REAL PROPERTY 224 (1968). See Allison, *The Mississippi Condominium Act: An Analysis of Potential Problems*, 44 MISS. L. J. 261 (1973).

<sup>29</sup>3 TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-4.

<sup>30</sup>*Id.*

<sup>31</sup>Pohoryles, *supra* note 4, at 23. See generally *Wiener v. Pierce*, 203 So. 2d 598 (Miss. 1967). In this case the court held that it was a well-settled general rule that the right of partition may be limited by the provisions of the deed under which the parties claim and that joint owners may contract that their property will not be partitioned for a reasonable length of time.

quent income tax of any one of the timesharing owners.<sup>32</sup> However, in 1978 the IRS issued Letter Ruling 7831029<sup>33</sup> which stated that a forced disposition of the entire unit would not result because a federal tax had been imposed against any one of the owners.<sup>34</sup>

If an individual owner fails to make a mortgage payment the other tenants of the unit are forced to pay to protect their individual interest. This is because their interests are joint and several.<sup>35</sup>

### NON-OWNERSHIP

Three classes of non-ownership timesharing are the vacation license, the vacation lease, and the vacation club memberships. A developer may choose to use non-ownership timesharing because he can sell a right to use the property while retaining the underlying fee in himself. The documents for creating these arrangements are not as complex as for the ownership form. In addition, the requirements of using licensed real estate personnel and following real estate regulations may possibly be avoided.<sup>36</sup>

#### *Vacation License*

The vacation license was the first form of timesharing utilized in the United States.<sup>37</sup> As mentioned earlier, the developer retains the underlying fee while the purchaser has a right to occupy the property for a recurring time period each year for a specified number of years.<sup>38</sup> Since the license is not an interest in the property in most states, the buyer is vulnerable to any encumbrances that are created by the fee owner or his creditors.<sup>39</sup> Other disadvantages are that the license may be defined as a security, financing could be more difficult, and the license holder does not have the protection of recording.<sup>40</sup> Since the licensee does not generally obtain a designated room, he must secure by reservation his occupancy in advance.<sup>41</sup> This form normally forbids the licensee from renting, sublicensing, selling, or assigning his interest.<sup>42</sup>

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<sup>32</sup>See generally 3 TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-4.

<sup>33</sup>See generally, *id.* at A-5.

<sup>34</sup>M. RESKIN & SAKAIN, MODERN REAL ESTATE AND MORTGAGE FORMS, Modern Condominium Form § 11.15 (Supp. 1979).

<sup>35</sup>3 TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-4.

<sup>36</sup>Davis, *supra* note 3, at 52.

<sup>37</sup>*Id.*

<sup>38</sup>Pohoryles, *supra* note 4, at 23.

<sup>39</sup>Malleris, *Five Legal Hurdles in Time-Share Ownership*, 8 REAL ESTATE REV. 97, 98 (1978).

<sup>40</sup>3 TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-6.

<sup>41</sup>Burek, *supra* note 10, at 2.

<sup>42</sup>*Id.*

### *Vacation Lease*

The vacation lease promotes the effect of a license with the exception that it conveys an interest in real estate.<sup>43</sup> The lease seems to be more advantageous than a license because title insurance may be issued making it more marketable, the lease may be recorded thereby protecting the lessee, and the lessee acquires an interest in real property.<sup>44</sup>

### *Vacation Club Membership*

Club membership, the less frequently used form of timesharing, is probably the only non-ownership technique that cannot be considered an interest in real estate.<sup>45</sup> These memberships usually give the purchaser a right to use a unit for a predetermined period of time which will be either fixed or floating.<sup>46</sup> Unique to the vacation club membership is the fact that the right to use the resort facilities can either be limited to the purchaser's period of occupancy or may be for the entire year.<sup>47</sup>

Timesharing is applicable to many different forms of property but is normally utilized in the condominium type unit.<sup>48</sup>

### EXCHANGE SERVICE

The exchange service offered by most, if not all, timesharing programs contributes to the attractiveness of owning a timeshare unit. The exchange provides an owner with a choice of alternative vacation resorts thus allowing him to exchange his time period with other timeshare owners in different parts of the country or the world. To utilize this exchange the timesharing developer must become a member of the service. Then his resort is listed in the exchange service's directory. Timesharing unit owners of member developments may then become individual members by paying annual dues. When a member wishes to swap his time period he submits a list of locations and time periods that he would like in exchange for his particular location and time period. The service then attempts to satisfy the member's alternative vacation desires. Thus far, the service has been relatively successful.<sup>49</sup> Resort Condominiums International, the largest exchange service, has over 250 member resorts in America and abroad from which a member may choose.<sup>50</sup> Interval International, a Miami-based exchange service, offers over 160 resorts throughout the United States, Mexico,

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<sup>42</sup>Davis, *supra* note 2, at 52.

<sup>43</sup> TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-7.

<sup>44</sup>Davis, *supra* note 2, at 52.

<sup>45</sup> TIME SHARING ENCYCLOPEDIA, *supra* note 16, at A-8.

<sup>46</sup>*Id.*

<sup>47</sup>Burek, *supra* note 10, at 1.

<sup>48</sup>Davis, *supra* note 9, at 44.

<sup>50</sup>1 INTERVAL NEWS No. 6, at 11 (1979) (Published by Captran, Inc. Sanibel Island, Fla.).

Europe, the Middle East, the Caribbean, Canada and Latin America for its members.<sup>51</sup>

#### TIMESHARING AND THE SEC

To date there is no clear-cut answer to whether a timeshare offering is to be considered a security. In determining this question it seems clear that substance will control over form.

In past years the protection of condominium buyers led to a broad interpretation of securities law.<sup>52</sup> In an official release on January 4, 1973, the Securities and Exchange Commission set out guidelines for determining whether an offering of a condominium was a security.<sup>53</sup> The release indicated that the offering would be considered a security if any of the following arrangements occurred in conjunction with the offering: participation in a rental pool arrangement where the proceeds of rent are divided among all the owners and developers; if the sale emphasizes economic benefits to the purchaser through the managerial acumen of the party handling the sale; or if the rental arrangement requires that for a certain portion of the year the unit be kept open for rental purposes which would be handled by an exclusive rental agent, thereby materially restricting the purchaser's use of the unit.<sup>54</sup> The Supreme Court has held that "if a person invests money in a common enterprise with profits to come solely from the efforts of others" the transaction involves a security.<sup>55</sup> From these rulings it seems to be settled that the offering of an interest in real estate with the utilization of rental pools or other methods, whereby the purchaser receives prospective profits solely from the efforts of third persons, is a security. However, straight condominium offerings which contain no pooling arrangement or restrictive management agreements have not been brought within the control of the SEC.<sup>56</sup>

The SEC has followed the rules set out for straight condominium offerings in determining whether a timeshare condominium offering is a security, that is, offerings without pooling or restrictive management agreements have not been considered a security.<sup>57</sup> But there are reports that the SEC may be changing its position in the near future.<sup>58</sup>

The vacation license comes closest to the SEC definition of a securi-

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<sup>51</sup>*Id.*

<sup>52</sup>Gunnar, *supra* note 8, at 35-37.

<sup>53</sup>SEC Securities Act Release No. 5347, [1972-73 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 79, 163 (Jan. 4, 1973).

<sup>54</sup>Johnson, *Condominium Practice: A Second Look*, 51 N.D. L. REV. 761, 767 (1974).

<sup>55</sup>SEC v. Howey Co., 328 U.S. 293, 301 (1946).

<sup>56</sup>4 THE TIME SHARING ENCYCLOPEDIA *Regulation*, A-102 (1979) (Interval International, Technical Communications Division, South Miami, Fla.) [hereinafter cited as 4 TIME SHARING ENCYCLOPEDIA].

<sup>57</sup>*Id.* at A-103.

<sup>58</sup>*Id.*

ty. If the license is deemed a security it would have to comply with federal disclosure laws.<sup>59</sup>

In a no-action letter the SEC has stated that the mere "possibility of rental arrangements" in condominium sales did not amount to a security.<sup>60</sup> So an offering which allows for renting at "some future time" rather than presently is not a security since such an arrangement is not giving the buyer an interest in land with a present rental opportunity or management contract.<sup>61</sup>

#### UNIFORM REAL ESTATE TIME-SHARE ACT

Due to the growth of timesharing projects many states have enacted statutes dealing with different aspects of this unique idea.<sup>62</sup> These statutes vary from state to state causing much confusion among developers as well as purchasers. To try and clarify the timesharing concept the Uniform Real Estate Time-Share Act (URETSA) is presently being drafted by the National Conference of Commissioners on Uniform State Laws.<sup>63</sup> Section 1-104 of this proposed act gives statutory recognition to all forms of timeshare interests including timeshare estates (time-span, interval, and chrometric) and timeshare licenses.<sup>64</sup> The section assures that the new statutory estate will be recognized as a fee simple.<sup>65</sup>

In section 4-102(b) the new act requires detailed disclosures about the exchange network. These disclosures include such items as the number and location of units in the particular program and the percentage of persons applying for exchanges that actually were fulfilled during the previous year.<sup>66</sup>

The act, by setting up guidelines, will be useful to the attorney because it will clarify the timesharing concept and aid him in providing sound procedures for advising clients in timesharing ventures.

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<sup>59</sup>Pohoryles, *supra* note 4, at 23.

<sup>60</sup>Donovan, *When Is Registration Required In Resort Condominiums*, Real Estate & Practice 80-81 (D. Augustine & J. Donovan eds. 1973).

<sup>61</sup>*Id.* In order to avoid litigation with the SEC, a developer of a timeshare offering should familiarize himself with the prescriptions of state securities statutes in the state where the project will be located as well as the states in which the timeshare will be offered. Federal securities statutes should also be reviewed since the offering may be considered interstate commerce.

<sup>62</sup>See note 10 *supra*, for a list of states that have enacted timesharing statutes.

<sup>63</sup>Burek, *supra* note 10, at 1, 3.

<sup>64</sup>Uniform Real Estate Time-Share Act, April 5, 1979 draft. A chrometric fee is defined as a "fee simple estate in a time-share parcel conferring the exclusive right to occupancy and possession of the parcel during a potentially infinite number of separated time periods of a fixed duration." Burek, *supra* note 10, at 4. This definition was given in an earlier draft of the URETSA known as the Uniform Time-Share Ownership Act (January 23, 1978 draft).

<sup>65</sup>Uniform Real Estate Time-Share Act § 1-104, April 5, 1979 draft.

<sup>66</sup>*Id.* at § 4-102(b). See generally Burek, *supra* note 10, at 5.



## MISSISSIPPI AND TIMESHARING

It is the opinion of this author that the Mississippi Condominium Law<sup>67</sup> enacted in 1964 should be amended in order to give timesharing statutory recognition. Many problems that prospective developers and purchasers in Mississippi would encounter with existing law could thus be avoided. An amendment could also serve to protect consumers by establishing procedures for taxing and assessing as well as regulating marketing. By careful draftsmanship this amendment could specify the particular types of timesharing interest that would be recognized. Colorado, Florida, New Hampshire, South Carolina, and Utah have all recognized timesharing by amending their condominium ownership laws.<sup>68</sup> Colorado recognizes the two ownership forms of timesharing, the interval estate and the time-span estate.<sup>69</sup> Colorado adds a new twist to interval ownership, however, by specifying that the remainder in fee may be retained by the developer or purchaser.<sup>70</sup> New Hampshire recognizes all forms of ownership and non-ownership timesharing.<sup>71</sup> Florida and South Carolina recognize all forms of ownership and non-ownership, however they exclude from the definition of timeshare estate the non-ownership classes like licenses and memberships that are not based on a fixed time schedule.<sup>72</sup> Utah seems to follow Colorado in limiting their timesharing concept to a fee interest.<sup>73</sup>

Mississippi can promote economic growth and profit within the state by enacting timesharing statutes. The state has vast existing vacation opportunities as well as potential development possibilities. With inflation affecting every aspect of economic growth it seems well advised to put to use ideas and opportunities like timeshare ownership which other states have used to promote their economic growth. With a legal framework backing their efforts developers can turn unprofitable condominium units into timesharing programs. In turn, new development would be encouraged in the state by showing investors that a market exists for their investment and that there is a workable framework to carry out their investment project. The statutes should provide the necessary safeguard for the investor, developer, salespersons and purchasers. By implementing legislation, the state could benefit from the increased tax revenues spurred by the new developments

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<sup>67</sup>MISS. CODE ANN., §§ 89-9-1 to 37 (1972).

<sup>68</sup>COLO. REV. STAT. §§ 38-33-110 to 111 (Supp. 1978); FLA. STAT. ANN. §§ 718.101 to 508 (Supp. 1979); N.H. REV. STAT. ANN. RSA 356-B (Supp. 1979); S.C. CODE §§ 27-32-10 to 170 (Supp. 1979); UTAH CODE ANN. § 57-8-6 (Supp. 1979).

<sup>69</sup>COLO. REV. STAT. §§ 38-33-110 to 111 (Supp. 1978).

<sup>70</sup>*Id.* See generally Burek, *supra* note 10, at 2.

<sup>71</sup>N.H. REV. STAT. ANN. RSA 356-B(3) (XXVIII) (Supp. 1979).

<sup>72</sup>FLA. STAT. ANN. § 718.103(19) (Supp. 1978); S.C. CODE § 27-32-10(8) (Supp. 1979). See generally Burek, *supra* note 10, at 3.

<sup>73</sup>UTAH CODE ANN. § 57-8-6 (Supp. 1979). See generally Burek, *supra* note 10, at 3.

and by the accompanying economic growth in its cities and towns. Without statutory regulations to solve the problems that states faced that put together piecemeal programs, Mississippi cannot expect to effectively participate in the growing activity in this new area of real estate use.

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