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Time Sharing: The North Carolina General Assembly's Response to Ownership of Time Share Contracts

I. INTRODUCTION

You just purchased a dream vacation home at Atlantic Beach, North Carolina. It is not really a house, but two glorious weeks a year at the Whaler Inn, a time share resort complex at one of North Carolina's finest vacation beaches. The decision to buy a time share unit was easy: two great weeks a year in a multi-million dollar resort; a professionally decorated unit of your choice; amenities you could never afford in a single family home; full room service, and access to a pool; no maintenance work because maintenance is included in a nominal monthly service fee; new people to meet in the forty-six other time share units; and, best of all, your time share cost tens of thousands of dollars less than a single family vacation home. Now you can work hard all year, waiting for those two joyous weeks at Atlantic Beach.

But wait! You receive a letter from a court-appointed receiver informing you that the Whaler Inn is insolvent. A bank you never heard of is proceeding to foreclose on your time share unit. When you purchased your time share the salesman assured you that the deed you would receive from the owner protected your investment. You write the North Carolina Attorney General seeking help. The Attorney General informs you that the time share developer borrowed nearly two million dollars to finance conversion of the Whaler Inn from a resort hotel to a time share project. The developer secured the loan with a first mortgage on all Whaler units. For unknown reasons, the time share developer defaulted on mortgage payments. The Attorney General offers some hope that your time share interest is protected from the lender's lien. If you received a release from the developer's mortgage-lender and a deed from the time share developer, then your time share is protected. You vaguely remember something about a release and deed, however, you did not receive either one.

Months pass and you receive more letters. The mortgage-lender, who has a lien on all the time share units, offers an "accommodation," promising to release the lien on your time share interest in the Whaler Inn for a payment equal to thirty-two and one-half percent of the original sales price. The "accommodation" is in addition to monies you have already paid or may have to pay in the future to the time share developer. The court-appointed receiver sends you a letter stating that, although you can accept the mortgage-lender's "accommodation," the receiver cannot is-

sue a deed to your unit because materialmen have filed liens against all the time share units. The receiver proposes another plan to save your investment. The existing time share interest owners must commit to raise sufficient funds among themselves to satisfy existing materialman liens. Your share would be approximately two thousand dollars. You agree to pay your share. After several weeks have passed, the court-appointed receiver advises you that an insufficient number of time share owners have responded to his plan. A North Carolina superior court approves the mortgage-lender's petition for foreclosure. The Whaler Inn is to be sold in less than three weeks. You receive a letter from the Attorney General's office stating that, in order to forestall foreclosure, the time share developer has filed for a Chapter 11 bankruptcy; a rehabilitation plan to save the Whaler Inn will be presented to the bankruptcy court. The mortgage-lender petitions the bankruptcy court to lift the stay on foreclosure; however, the motion is denied and the bankruptcy trustee is given time to devise a plan to rehabilitate the Whaler Inn.

Welcome to the world of time sharing.

Since the early 1970's in the United States,¹ time sharing has become a significant and growing method of owning an interest in, or occupying, vacation residential property² for extended periods. As demonstrated by the Whaler Inn experience,³ time sharing can be an attractive investment for both the time share developer and purchaser, or a pitfall for the unwary investor. Time sharing offers individuals without the desire to purchase a single family vacation home or without sufficient financial resources the opportunity of owning their own vacation home. Individuals can purchase a fractional property interest in the time share or the right to occupy a vacation home, normally in a development complex, for a predetermined number of days each year. Compared to the cost of full home ownership, time sharing is a viable financial alternative.⁴ Time sharing substantially expands marketing potential for real estate develop-

1. For a brief but informative history of the time sharing concept as developed in Europe and adapted in the United States, see generally Comment, *Time-Share Condominiums: Property's Fourth Dimension*, 32 ME. L. REV. 181, 181-82 (1980); Gunnar, *Regulation of Resort Time-Sharing*, 57 OR. L. REV. 31, 31-32 (1977); Pollack, *Time Sharing, or Time Is Money But Will It Sell?*, 10 REAL EST. L.J. 281, 283 (1982).

2. Time sharing is not limited in concept to vacation homes or real property. Pollack describes "more exotic types of housing, including houseboats." Pollack, *supra* note 1, at 283. Even more exotic applications have been identified. Some of these time share projects are recreational vehicle lots, yachts, and ocean cruisers. Comment, *Timesharing: A Unique Property Concept Creates The Need For Comprehensive Legislation*, 25 ST. LOUIS U.L.J. 629, 630 n.8 (1981).

3. *In re Time Sharing, Inc.*, No. M-84-01551-4 (Bankr. E.D.N.C. December 27, 1984).

4. Gunnar, *supra* note 1, at 32. While purchasing a fractional time share interest is less costly for the individual when compared to the cost of full home ownership, the total cost of purchasing all of the fractional time share interests is greater than if one individual purchased a comparable vacation home. Roodhouse, *Fractional Time Period Ownership of Recreational Condominiums*, 4 REAL EST. L.J. 35, 38 (1975). See generally M. HENZE, *THE LAW AND BUSINESS OF TIME-SHARE RESORTS* § 1.04 (1984) (comprehensive discussion of advantages and disadvantages of time sharing).

ers by reducing the cost of a vacation resort to a level which is affordable by most middle class families. Enhanced market potential is especially important in an industry recently plagued by historically high interest rates and conversely slumping market demand.⁵

The potential pitfalls in purchasing a time share are numerous. The term "time sharing"⁶ describes numerous contractual arrangements which are not readily defined by the common law classifications of real property estates.⁷ Pursuant to case law decisions and statutory law, the classification of property interests dictates numerous rights and obligations. Therefore, the sale of time shares raises serious questions for the time share purchaser and developer as to what, if any, legal interest is being conveyed. High pressure sales tactics associated with time sharing also present practical problems as well as legal considerations.

The North Carolina General Assembly enacted the North Carolina Time Share Act (NCTSA or Act) to protect the time share purchaser from the inherent problems in time sharing.⁸ The NCTSA prohibits the sale of time shares after July 1, 1984 unless the time share project is registered with, and salesmen are licensed by, the North Carolina Real Estate Commission.⁹ The Act requires detailed disclosures to potential purchasers prior to sale,¹⁰ a "cooling-off" period following the sale,¹¹ recordation of the instrument conveying the time share interest¹² and limited protection of time share owners in the management and operation of the time share development.¹³ The North Carolina General Assembly authorized the North Carolina Real Estate Commission to regulate time

5. Comment, *supra* note 1, at 181-82.

6. "Time sharing" is a term originating in the computer industry denoting a central data bank accessed by separate users on an established time agreement. D. PARKER, *CRIME BY COMPUTER* 107-11 (1976).

7. One author correctly concludes that "[t]here are almost as many methods of conveying time-shared titles as there are developers in the field. Many of them are unsound, amateurish attempts at accomplishing a complex legal result." Davis, *Time-Sharing Ownership - Legal and Practical Problems*, 48 ST. JOHN'S L. REV. 1183, 1183 (1974).

8. N.C. GEN. STAT. §§ 93A-39 to -57 (Cum. Supp. 1983) (effective July 1, 1984). Vacation exchange programs can be offered in conjunction with time share developments. Exchange programs permit time share owners to "trade [their] allocated time period for a similar period in any one of many similar projects in other resort areas around the world." Eastman, *Time Share Ownership: A Primer*, 57 N.D.L. REV. 151, 153 (1981). Vacation exchange programs are not within the scope of this comment.

Vacation exchange programs present a unique set of practical and legal problems. The NCTSA regulates exchange programs. N.C. GEN. STAT. §§ 93A-48 to -49 (Cum. Supp. 1983). One North Carolina attorney, reviewing a draft of the proposed time share legislation, observed that she could not "understand the preoccupation of the bill with the exchange programs." Letter from Sue V. McCown to Representative Charles D. Evans (June 10, 1983) (available from the North Carolina General Statutes Commission).

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

10. *Id.* § 93A-44.

11. *Id.* § 93A-45.

12. *Id.* § 93A-42(b).

13. *Id.* § 93A-47.

share developers and salesmen. The Real Estate Commission was granted the power to enforce the Act.¹⁴ Most importantly, the NCTSA declares that "[a] time share is deemed to be an *interest in real estate*, and shall be governed by the law of this State relating to real estate."¹⁵

Part II of this comment analyzes the potential effect of the NCTSA's expansive definition of time shares as an interest in real property in relation to the prevalent forms of time share agreements. While the Act makes time share an "interest" in real property, the state's courts will likely face obstacles in defining the exact nature of that "interest." Part III explores the statutory provisions designed for consumer protection in the sale of time shares. Part IV reviews the NCTSA's provisions for management of time share projects. This comment suggests additional protections which would afford more protection to the substantial investment of time share purchasers.

II. TIME SHARES AS A REAL PROPERTY INTEREST

Time sharing is deceptively simple in concept. The time share purchaser obtains a property interest in or a right to use a residential unit exclusively for a predetermined period each year for a recurring number of years.¹⁶ Because time sharing reduces "property ownership and occupancy to a temporal element . . .,"¹⁷ it radically departs from traditional property concepts, which measure ownership by the metes and bounds of the estate. The two basic forms of time sharing are those purporting to convey a property interest in real estate and those that merely sell a right to use a unit. Within the two basic forms, many hybrid property interests are being marketed. Classifying the numerous time sharing property interests within the traditional law of property is extremely difficult,¹⁸ yet, significant legal rights and duties flow from the classification

14. *Id.* § 93A-54.

15. *Id.* § 93A-42(a) (emphasis added).

16. Comment, *supra* note 2, at 629. A perplexing problem in any analysis of time sharing is the numerous terms that are applied to describe the same concept. One author notes that "[t]he variety of terminology used by the [time share] industry coupled with the novelty of the concept can leave the time share purchaser with an erroneous understanding of the interest he has purchased." *Id.* at 631. This problem is recognized by most authors who have written on the subject. See generally Comment, *supra* note 1, at 184; Johnakin, *Legislation For Time Share Ownership Projects*, 10 REAL PROP., PROB. & TR. J. 606, 606 n.3 (1975). One author mused that "[a] particularly pressing need . . . is to establish uniform terminology. Already there is considerable . . . confusion, which unnecessarily amplifies the possibility of litigation." Comment, *Legal Challenges To Time Sharing Ownership*, 45 MO. L. REV. 423, 441 (1980) [hereinafter cited as *Legal Challenges*]. This comment uses the definitions provided in the NCTSA whenever possible.

17. Comment, *supra* note 2, at 630-31. See generally Comment, *supra* note 1, at 181 (a comprehensive and thoughtful analysis of time sharing within the traditional property law); Pollack, *supra* note 1, at 282 (brief but incisive analysis of temporal ownership and possession).

18. As one authority cogently and descriptively notes:

The study of property law is somewhat like playing a pinball machine. The logic of the law places all property into categories and ascribes peculiar legal attributes to the location of the

of the property interest employed.¹⁹

The NCTSA mandates that all forms of time shares are interests in property and are subject to North Carolina real property law.²⁰ The Act expansively refers to freehold estates as time share estates, and to non-freehold²¹ estates, licenses and bonds as time share licenses.²² The prevalent forms of time share estates are the time share tenancy-in-common, interval ownership, and the estate for years. The most common form of time share license in the vacation license.²³

A. Time Share Tenancy-in-Common

The most frequently marketed form of time share estate is the tenancy-in-common. Units in the time share complex are divided into one-week

item in each classification. The answer to a problem consists of dropping the property into the proper slot.

1 G. THOMPSON, THOMPSON ON REAL PROPERTY § 6, at 33 (1980).

19. G. PINDAR, AMERICAN REAL ESTATE LAW § 1-1, at 2 (1976) ("Land ownership is often described as a bundle of rights, powers, and privileges The bundles also include a number of duties or liabilities").

20. N.C. GEN. STAT. § 93A-42 (Cum. Supp. 1983). This provision of the Act was in response to two judicial decisions. In *State v. Carriage House Assocs.*, 94 Nev. 709, 709, 585 P.2d 1337, 1339 (1978), the Nevada Supreme Court held that time shares which were sold as "vacation licenses" were neither licenses nor leases, because they were irrevocable and transferrable and because the description of the property and the duration of the contract were indefinite. The court found that the "vacation license" was only a contractual right and represented no interest in property. *Id.* A federal bankruptcy court held that "club memberships" were not a lease but "more akin to an option" *In re Sombrero Reef Club, Inc.*, 18 Bankr. 612, 619 (S.D. Fla. 1982). See *infra* notes 57-76 and accompanying text.

21. The distinction between freehold and non-freehold estates is that the freehold interest is one greater than a leasehold. 4 G. THOMPSON, *supra* note 18, § 1850, at 374.

22. N.C. GEN. STAT. § 93A-41(9) (Cum. Supp. 1983). The Act specifically limits a time share to contracts that provide for occupancy for five or more separated time periods lasting at least five years. *Id.*

The terms "time share estate" and "time share license" are definitions adopted by the National Conference of Commissioners of Uniform State Laws in its UNIFORM REAL ESTATE TIME SHARE ACT (URETSA). URETSA § 1-102(13), 7A U.L.A. 310 (Supp. 1985). The NCTSA adopted URETSA's definition of time share. No assumption should be made, however, that definitions in the industry or among the states are uniform. See *supra* note 15 and accompanying text. See generally Burek, *Uniform Real Estate Time-Share Act*, 14 REAL PROP., PROB. & TR. J. 683 (1979) (simple overview of URETSA excluding minor amendments subsequent to publication).

The National Time Sharing Council of the American Land Development Association and the National Association of Real Estate License Law Officials jointly promulgated a MODEL TIME SHARE ACT (NARELLO). The Model Act does not distinguish between time share estates and time share licenses as such. MODEL TIME SHARE ACT § 102(33) (1983). This makes NARELLO more flexible than URETSA, even though it does not adequately resolve the property interest problem. See generally Catalina, *Real Estate Time Sharing: Protecting the Buyer*, 9 REAL EST. L.J. 144, 146-49 (1980); Podgers, *Two Groups Propose Time-Share Legislation*, 66 A.B.A.J. 543 (1980) (detailed comparison of URETSA and NARELLO); Pollack, *supra* note 1, at 296-300.

23. M. HENZE, *supra* note 4, §§ 3.01-04. Other forms of time share licenses, stock cooperatives, resort or vacation clubs, and limited partnerships are not covered in this comment. For a description of these forms of time sharing licenses see *id.* §§ 3.02[5]-.02[7]. See generally Ellsworth, *Owning A Resort - The Timesharing Plan*, NAT'L L.J., April 20, 1981, at 17, col. 6 (overview of vacation clubs); Pollack, *supra* note 1, at 285-86 (excellent discussion of vacation clubs).

occupancy segments. The purchaser receives an undivided estate in the entire resort property proportionate to the length of occupancy. Covenants are executed among all purchasers, either in the contract of sale or deed, establishing uniform conditions of occupancy, management, and control of the development.²⁴

Although the tenancy-in-common time share estate closely conforms to common law property principles,²⁵ in North Carolina it requires modification of both the common law right of equal possession of the premises by all co-tenants and the statutory right of partition. The ability to legally covenant for fixed periods of exclusive possession is essential to the time share purchaser.²⁶ The right of tenants-in-common to contract *inter se* for periods of exclusive possession was specifically permitted in North Carolina²⁷ prior to the passage of the NCTSA. Furthermore, each co-tenant of property owned as tenants-in-common personally holds the statutory right of partition.²⁸

There are two types of statutory partition in North Carolina. "In kind" partition may result in a physical division of the real property by equitably subdividing the single tract into separate plots equal to the number of tenants-in-common requesting partition, with each owning a subdivided plot in fee simple. If "in kind" partition is not possible, partition "by sale" is authorized, whereby sale proceeds are divided equally among the co-tenants.²⁹

Obviously, an unfettered right of partition would utterly destroy the time share concept of exclusive possession in multi-party ownership because one disgruntled owner could force partition. Since by its very nature a time share unit could not be physically partitioned, partition necessarily would be "by sale." The NCTSA recognizes the threat of partition to time sharing and exempts time shares from the statutory

24. M. HENZE, *supra* note 4, § 3.03[2][a]. The tenancy-in-common approach is treated in every major work on the subject of time sharing. For the best treatments, see generally, Davis, *supra* note 7, at 1185-87; Eastman, *supra* note 8, at 153; Gray, *Pioneering The Concept of Time-Sharing Ownership*, 48 ST. JOHN'S L. REV. 1196 (1974); Pollack, *supra* note 1, at 284.

25. P. HETRICK, WEBSTER'S REAL ESTATE LAW IN NORTH CAROLINA § 110 (rev. ed. 1981).

26. In the tenancy-in-common time share estate, each purchaser owns an undivided, but not necessarily equal, interest in the property but has an equal right of possession. Of the four common law unities necessary to create the estate, only unity of possession is required. *Id.* See generally 4 G. THOMPSON, *supra* note 18, § 1795, at 145. Most time share projects either sell possession for a specific week recurring each year, or contract to provide a week during the year based on owner preference and availability of units. Eastman, *supra* note 8, at 153-56.

27. *E.g.*, Parslow v. Parslow, 47 N.C. App. 84, 266 S.E.2d 746 (1980); P. HETRICK, *supra* note 25, § 115; 4 G. THOMPSON, *supra* note 18, § 1795.

28. N.C. GEN. STAT. § 46-1 (1984); see, e.g., Stanley v. Cox, 253 N.C. 620, 117 S.E.2d 826 (1961) (the covenant is binding on heirs, personal representatives, and assigns who take with notice). If the time share instrument is recorded as permitted by the NCTSA, recordation would provide the required notice. N.C. GEN. STAT. § 93A-42 (Cum. Supp. 1983). See generally Comment, *supra* note 1, at 185-87 (excellent discussion of the necessity of covenants in time share projects).

29. N.C. GEN. STAT. § 46-22 (1984).

right of partition "in kind" or "by sale."³⁰ The statute, however, authorizes partition "by sale" of each individual's time share interest.³¹ In effect, this permits two or more owners of a single time share, as tenants-in-common, joint tenants, or tenants by the entirety, to partition their own interests without jeopardizing the rights of co-tenants.

As an illustration, partition of a single time share interest may be required in divorce proceedings. A district court could award title of the time share interest to one spouse, by deed, and thereby effectuate a sale of the other spouse's interest in the time share.³² While no North Carolina cases have been reported in which a divorce proceeding has involved disposition of a time share interest, recently reported cases in other jurisdictions have dealt with time share interests.³³

The NCTSA provides a solid legal basis on which a tenancy-in-common estate may be marketed because it expands common law concepts of the tenancy-in-common estate and exempts time shares, except the single time share interest, from the statutory right of partition. The Act should facilitate consumer acceptance of this form of time sharing and lender financing.³⁴

B. *Interval*³⁵ *Ownership Time Share Estates*

The interval ownership time share estate is the most unusual property concept being marketed by developers. Interval ownership can assume three distinct legal forms. The essential concept underlying each form is the creation of a separate fee estate in the time share unit for each purchaser, recurring annually, for the duration of the estate. The objective of interval ownership is to create an exclusive right to possession in each time share owner without the necessity of covenants as contemplated by the time share tenancy-in-common approach.³⁶

30. *Id.* § 93A-43 (Cum. Supp. 1983). The North Carolina General Statutes Commission generally adopted the URETSA approach to partition. Memorandum from Monica K. Kalo to the General Statutes Commission's Condominium Statutes Drafting Committee (undated) (available from the North Carolina General Statutes Commission). Co-tenants have the right to contractually waive partition for a "reasonable" period. P. HETRICK, *supra* note 25, § 123. See generally Comment, *supra* note 1, at 187-90; *Legal Challenges*, *supra* note 16, at 432-35.

31. N.C. GEN. STAT. § 93A-43 (Cum. Supp. 1983).

32. *Id.* § 50-20(c), (g) (1984).

33. *E.g.*, *Farkas v. Farkas*, 452 So. 2d 963 (Fla. Dist. Ct. App. 1984).

34. The financing of time share developments is beyond the scope of this comment. For a survey of the problems in this area, see generally, Davis, *supra* note 7, at 1187-90; Dunn, *Lending to the Resort Timesharing Industry*, 63 J. COM. BANK LENDING 24 (1981); Gray, *supra* note 24, at 1201-02; Johnson, *Timeshare Financing: A Lending Opportunity*, 42 MORTGAGE BANKING 6 (1982).

35. The term "interval" is not used to denote a property interest or any rights or duties arising from any estate in land. It is merely used to denote a time sharing sales concept. The term was coined by the developer initially using this form of time sharing. Note, *New Ideas in the Vacation Home Market*, 48 ST. JOHN'S L. REV. 1203, 1217 (1974).

36. Comment, *supra* note 1, at 202.

1. Fee Simple Absolute Estate

The first form of interval ownership time sharing is simply a conveyance of a fee simple absolute estate, limited to fixed dates each year for each time share purchaser.³⁷ While the fee simple absolute estate is recognized in every American jurisdiction, the limitation of this estate to a specific period, recurring annually, is a unique feature of real property law. The fee simple absolute is the greatest estate in land that may be conveyed. It is conceptualized as ownership of "the *entire property*, with unconditional power of disposition"³⁸ Interval ownership seeks to engraft temporality, a new characteristic of the fee simple absolute, in a single property.³⁹

The crucial question raised by this form of interval ownership estate is whether North Carolina courts will recognize multiple fee simple absolute estates in the same real property absent statutory authorization.⁴⁰ The greater weight of authority in the United States refuses judicial sanction of multiple fee simple absolutes in the same property.⁴¹ Historically, multiple fee simple absolutes in one property were simply not envisioned,⁴² and "[s]ince [the Statute of Uses in 1540] no new types [of estates] have been formed by the law, and it is recognized today that it is beyond the grantor, settlor or testator to create a new type of estate."⁴³ This reasoning is best reflected in *Moore v. McKinley*,⁴⁴ in which the Supreme Court of Iowa held that only one fee simple in a given tract of

37. M. HENZE, *supra* note 4, § 3.03[3]. The conveyance may be described as follows: Unit 2A in building 3 of Block 2 of Filing 117 in the Winterland Subdivision, County of Summit, State of Colorado, for the period of the 7th week of each year, beginning on the 7th Saturday of each year at noon, and ending on the 8th Saturday of each year at noon.

Id.

38. G. PINDAR, *supra* note 19, § 7-5, at 208 (emphasis added). See generally P. HETRICK, *supra* note 25, at 35; 4 G. THOMPSON, *supra* note 18, § 1856, at 412.

39. M. HENZE, *supra* note 4, § 3.03[3].

40. Many state statutes, including North Carolina's, define the term time share broadly enough to encompass interval ownership even though it is not specifically authorized. The difficulty is in classifying the term within the common law real property estates. Colorado, however, specifically authorizes several forms of interval ownership as new estates in property. COLO. REV. STAT. § 38-33-110(1) (1973). The Condominium Statutes Drafting Committee chose neither to permit nor to deny use of interval estates despite the fact that interval ownership is not a recognized property estate in North Carolina. Minutes of the Condominium Statutes Drafting Committee of the North Carolina General Statutes Commission (February 14, 1980) (available from the North Carolina General Statutes Commission).

41. G. PINDAR, *supra* note 19, § 7-5, at 208-09.

42. 1 G. THOMPSON, *supra* note 18, § 32, at 145-53.

43. 4 *id.* § 1848, at 366. URETSA would provide a contrary result. It provides that "notwithstanding any contrary rule of common law, a grant of an estate in a unit conferring the right to possession during a potentially infinite number of separated time periods creates an estate in fee simple having the character and incidents of such an estate at common law" URETSA § 1-103, 7A U.L.A. 313-14 (Supp. 1985).

44. 246 Iowa 734, 69 N.W.2d 73 (1955); see also *In re McBride's Estate*, 253 Mich. 305, 235 N.W. 166 (1931); *Humphrey's Mexia Co. v. Gammon*, 113 Tex. 247, 254 S.W. 296 (1923). But see *Ocean Shore R.R. v. Doelger*, 127 Cal. App. 2d 392, 274 P.2d 23 (1954).

land is possible. This issue was not addressed in the NCTSA, and interval fee simple absolute estates have not been judicially recognized in North Carolina. In the absence of specific statutory authorization, it is unlikely that North Carolina courts will recognize this form of interval ownership.

It has been suggested that the fee simple absolute interval estate can be recognized theoretically within common law classifications of estates if the multiple fee simple absolutes are connected by either shifting or springing executory interests.⁴⁵ In time sharing, the annual shifting executory interest would end the current owner's interval estate in favor of the next time share owner. A springing executory interest would remain in the time share developer-grantor until all time shares in a unit were sold.⁴⁶ Both the springing and shifting executory interests are subject to the Rule Against Perpetuities,⁴⁷ and should afford enthusiasts of the Rule hours of theoretical exercise in determining if the perpetually shifting or springing estates vest or fail in accordance with the Rule.

2. Estate for Years

The second form of interval ownership time sharing employs a conveyance of an estate for years⁴⁸ with a remainder in fee simple to all purchasers as tenants-in-common.⁴⁹ It is deceptively simple in design and may be classified readily within established common law property estates. Both the estate for years and the fee simple estate as tenants-in-common are fundamental to the real property law of this state. The North Carolina common law doctrine of merger, however, effectively prohibits the sale of interval estates which are based on an estate for years with a fee simple remainder to the tenants-in-common.

The doctrine of merger⁵⁰ is fully defined in *Trust Co. v. Watkins*.⁵¹ The North Carolina Supreme Court held that "when a life tenant or

45. M. HENZE, *supra* note 4, § 3.03[3]. See generally L. SIMES, *HANDBOOK OF THE LAW OF FUTURE INTERESTS* § 12, at 25-28 (2d ed. 1966) (definitions of both executory interests).

46. M. HENZE, *supra* note 4, § 3.03[3].

47. The Rule is "[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." L. SIMES, *supra* note 45, § 127, at 263. The application of the Rule Against Perpetuities to interval time share estates is beyond the scope of this comment. For a statement of the Rule and its judicial application, see *Peele v. Wilson County Bd. of Educ.*, 37 N.C. App. 168, 289 S.E.2d 890, *cert. denied*, 306 N.C. 386, 294 S.E.2d 210 (1982).

48. An estate for years is a lease granting exclusive possession for a definite period. 3 G. THOMPSON, *supra* note 18, § 1017, at 14-15. In the context of time sharing, the usual term of the leasehold is the anticipated life of the development. Johnakin, *supra* note 16, at 607.

49. Comment, *supra* note 1, at 201-02. Because each time share purchaser holds a leasehold estate, covenants are necessary to determine *inter se* rights. The requirement of covenants is thought to negate the benefits of this interval estate as compared with the time share estate based on a tenancy-in-common. *Id.* at 201 n.24.

50. The majority view of merger in the United States is that it is not favored in law or equity. Most courts will not apply the doctrine unless the parties intended to do so. 3A G. THOMPSON, *supra* note 18, § 1204, at 18-22.

lessee for years acquires the fee in remainder or reversion . . . the estates are merged."⁵² Under the *Watkins* rationale, the lesser estate (the estate for years) immediately merges into the greater estate (the fee simple as tenants-in-common) by operation of law.⁵³ While the *Watkins* court based its holding on facts in which a tenancy and remainder were held by one individual in the same property, multiple tenancies and fee simple remainders in the same share time unit logically lead to the same result. The unit owners collectively hold the entire tenancy and remainder in the same property. The probable result is that the estate for years with a remainder in the fee interval ownership form of time sharing will not be recognized in North Carolina without statutory modification of the doctrine of merger.⁵⁴

3. Variation of the Estate for Years

The third form of interval ownership time sharing employs a variation of the estate for years with a remainder in fee simple. The estate for years is replaced by a defeasible estate for years with a shifting executory interest. A remainder in fee to all purchasers, as tenants-in-common, follows the defeasible estate for years. The objective, similar to that of the fee simple absolute interval estate, is to create an estate and a right of exclusive possession in a purchaser only during the time periods purchased, without the necessity of covenants. Each time share owner would be defeased annually, at the conclusion of the period established by the tenancy, but would come into the tenancy and exclusive occupancy during the next year. Occupancy, therefore, arises from ownership and not by covenant.⁵⁵ At the end of the estate for years, usually calculated by the useful life of the time share units, all owners take possession as tenants-in-common. At this time, the owners may either sell the property or reinstitute a time sharing plan.

Like the interval estate based on the estate for years with remainder in fee simple, the defeasible estate for years probably will fail to gain judicial acceptance in North Carolina because of the doctrine of merger. Under the holding in *Watkins*, the defeasible estate for years (the lesser estate) will merge by operation of law with the remainder in fee simple as tenants-in-common (the greater estate). Further, the use of a shifting execu-

51. 215 N.C. 292, 1 S.E.2d 853 (1939). See generally P. HETRICK, *supra* note 25, § 85, at 91. URETSA would except time shares from the doctrine of merger. See *supra* note 43.

52. *Watkins*, 215 N.C. at 297, 1 S.E.2d at 857.

53. *Id.*

54. See *supra* note 40.

55. *Legal Challenges*, *supra* note 16, at 427. See generally 4 G. THOMPSON, *supra* note 18, § 1870, at 514-27. The term of years is defeasible in that the estate ends each year at the conclusion of the agreed period and is subject to a shifting executory limitation resulting in the next owner taking his estate from the defeased occupant. 4A *id.* at 535-42.

tory interest to connect the multiple tenancies for years raises the possibility that the Rule Against Perpetuities may apply.⁵⁶

The three forms of interval estates being marketed simply do not comport with common law principles of real property estate classification. If the conveyance of interval estates is attempted in North Carolina, courts should, because of the doctrine of merger, hold that the property interest owned is a tenancy-in-common among the interval purchasers.

C. Time Share Leases and Licenses

At early common law, a leasehold was not an interest in real property.⁵⁷ Modern common law uniformly provides that a lease is an interest in real property⁵⁸ even though it is still treated as personal property for some purposes.⁵⁹ A lease is classified as an interest in real property because the lessee has an exclusive right to possession of the demised premises against all individuals, including the lessor. Therefore, the NCTSA's mandate that all time share leases be deemed interests in property does not alter existing North Carolina common law concepts.

The vacation lease is prevalent among the non-freehold time share estates that are not coupled with a freehold remainder. The time share developer simply grants an estate for years to the purchaser and retains the right of reversion following the tenancy.⁶⁰ The relationship created is that of landlord and tenant.⁶¹

The time share license is similar to the vacation lease. Title to the property remains with the time share developer while the time share purchaser is granted the right to use a unit on contracted terms. The time share license was developed primarily to circumvent state real estate development and broker licensing laws⁶² in those jurisdictions that exempt the sale of licenses. That objective will not succeed in North Carolina, however, because the NCTSA requires the registration of time share developments and the licensing of brokers and salesmen by the Real Estate Commission.⁶³

56. See *supra* note 47. See generally P. HETRICK, *supra* note 25, § 41, at 52; 4A G. THOMPSON, *supra* note 18, § 2018, at 633-43. One author succinctly states that "[o]nly future litigation will decide conclusively whether this does . . . avoid the perpetuities problem." *Legal Challenges*, *supra* note 16, at 427 n.17.

57. H. TIFFANY, *THE LAW OF REAL PROPERTY* § 68, at 58 (abr. ed. 1940).

58. P. HETRICK, *supra* note 25, § 64, at 77.

59. Kavanau Real Estate Trust v. Debnam, 41 N.C. App. 256, 254 S.E.2d 638, *aff'd*, 299 N.C. 510, 263 S.E.2d 595 (1979). See generally 3 G. THOMPSON, *supra* note 18, § 1015, at 2-9.

60. See *Helicopter Corp. v. Cutter Realty Co.*, 263 N.C. 139, 139 S.E.2d 362 (1964) (statement of state law on leases); M. HENZE, *supra* note 4, § 3.02[3][a].

61. Because a landlord-tenant relationship is created, a number of rights and duties are mandated by the North Carolina Residential Rental Agreements Act, N.C. GEN. STAT. §§ 42-38 to -56 (Cum. Supp. 1983).

62. M. HENZE, *supra* note 4, § 3.02[4][a]; see *supra* note 19.

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

More importantly, the Act deems a time share license to be an "interest" in property.⁶⁴ This provision directly vitiates the decisional law expressed by the North Carolina Court of Appeals in *Hill v. Smith*.⁶⁵ The *Smith* court held that a license creates no interest in real property; the licensee simply obtains a right to use the property under the licensor.⁶⁶ The degree of possession that distinguishes leases from licenses is oblique, the most important factor being "whether the instrument gives exclusive possession of the premises 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."⁶⁷ By deeming a time share license to be an interest in real estate, the NCTSA apparently elevates the time share license into a leasehold interest. In North Carolina, the terms "interest" and "estate" are synonymous and the estate varies from "absolute ownership down to naked possession."⁶⁸ The time share license clearly becomes something more than the common law license defined in *Smith*⁶⁹ because, unlike the mere right to use, some degree of possession is mandated by the NCTSA.

In determining if a lease or license has been created by the parties, courts may consider other factors in addition to the exclusive right of possession. These additional factors include the intent of the parties as expressed in any written instrument, the degree of certainty in defining the physical area to be used, and the expectation of compensation by the owner for use of the premises.⁷⁰

The purpose of the time share license is to provide the exclusive possession of a unit for a stated period. If time share licensees were not promised exclusive possession for the contract term, the successful marketing of these licenses would be doubtful.

The time share licensee's entitlement to a specific physical area is more difficult to analyze. The time share licensee may obtain (1) the right to occupy a specified unit for a specified period, (2) an unspecified unit for a specified period, (3) a specified unit for an unspecified period chosen by the developer, or (4) an unspecified unit for an unspecified period both of which are selected by the developer.⁷¹ In the two options in which a unit

64. *Id.* § 93A-42.

65. 51 N.C. App. 670, 277 S.E.2d 542 (1981) (citing *Sanders v. Wilkerson*, 285 N.C. 215, 204 S.E.2d 17 (1974)).

66. *Id.* at 675, 277 S.E.2d at 545.

67. *Cal-Am Corp. v. Department of Real Estate*, 104 Cal. App. 3d 453, 457, 163 Cal. Rptr. 729, 731 (1980); see *supra* note 23. See generally G. PINDAR, *supra* note 19, § 8-45, at 365; 3 G. THOMPSON, *supra* note 18, § 1032, at 116.

68. *Shoemaker v. Coats*, 218 N.C. 251, 256, 10 S.E.2d 810, 814 (1940).

69. *Accord Williamston & Tarboro R.R. v. Battle*, 66 N.C. 540 (1872) (licensed coupled with an "interest" is irrevocable). See generally R. BOYER, *SURVEY OF THE LAW OF PROPERTY* 609-10 (3d ed. 1981).

70. 1A G. THOMPSON, *supra* note 18, § 223, at 219-21.

71. See *supra* note 7.

is specified, certainty of area is clearly established. In the two options in which a unit is not specified, it is arguable that certainty of area is not achieved. Even when a particular unit is not specified, however, the time share licensee is guaranteed some unit within the development and exclusive occupancy of that unit.

Unlike the common law "permissive use" license, the time share developer's expectation of compensation for the grant of a time share license is inherent in the time share concept. Although time share developers may not intend to provide purchasers with exclusive possession of a single unit for profit, the time share license "approach is risky as there is little to distinguish the license from the lease. The developer is gambling that it won't be deemed a property interest."⁷²

The issue of whether a time share license is actually a lease has been addressed in several states. In *Cal-Am Corp. v. Department of Real Estate*,⁷³ an intermediate California appellate court held that the interest created is a lease. Cal-Am Corporation marketed "membership licenses" in a Hawaii time share complex, which entitled the purchaser to an unspecified unit, to be selected by the project management, for an unspecified week each year. The time share purchaser was also required to make reservations at least sixty days in advance. The *Cal-Am* court based its decision on the time share purchaser's right to exclusive possession of the assigned unit. The court reasoned that "the fact that [management] retains the right to specify which unit will be occupied and to provide maintenance and maid service . . . does not derogate the exclusive possessory interests of the members during their annual periods of [occupancy]."⁷⁴

The Supreme Court of Nevada, in *State Dep't of Commerce, Div. of Real Estate v. Carriage House Assocs.*,⁷⁵ held that a time share "membership" was neither a lease nor a license. The time share plan in *Carriage House* was similar to the one in *Cal-Am* with one exception: each time share purchaser was entitled to annual occupancy for a number of years estimated to be between forty and sixty years. The *Carriage House* court held that the "membership" could not qualify as a lease because a leasehold interest requires specificity of term and certainty of area of the property involved.⁷⁶

The *Cal-Am* court reasoned that a license is a leasehold interest because a license requires exclusive occupancy. This reasoning alone, if applied by the North Carolina courts, would be compelling. However,

72. M. HENZE, *supra* note 4, § 3.02[4][a].

73. 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (1980).

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

75. 94 Nev. 678, 585 P.2d 1337 (1978).

76. *Id.* at 709, 585 P.2d at 1339.

the NCTSA's mandate, that some "interest" in real property be conveyed by a time share license, provides an even stronger argument for holding that the time share license is in fact a lease.

III. REGULATION OF TIME SHARE SALES

Although the NCTSA can be criticized for its simplistic treatment of time shares as an interest in real property, the Act is more comprehensive in its regulation of time share sales practices. The purpose of the North Carolina General Statutes Commission in drafting the proposed legislation was to protect the purchasing consumer.⁷⁷ The approach taken by the North Carolina General Assembly was direct regulation and the requirement of comprehensive disclosures of material information to the consumer.⁷⁸

A. Registration of Developers and Licensing of Salesmen

The NCTSA prohibits the sale of time shares in North Carolina after July 1, 1984, unless a certificate of registration is obtained by the developer from the North Carolina Real Estate Commission.⁷⁹ However, effective January 1, 1984, time share developers must apply for registration

77. Minutes, North Carolina General Statutes Commission (March 4, 1983) ("The draft is geared mainly toward consumer protection . . .") (available from the North Carolina General Statutes Commission).

This comment does not discuss the potential for additional consumer protections through the regulation of time shares as securities. The NCTSA clearly recognizes that in certain cases, time shares may be securities. N.C. GEN. STAT. § 93A-50 (Cum. Supp. 1983). This provision was included in the Act at the insistence of the North Carolina Secretary of State. Memorandum from F. Daniel Bell, III, Securities Deputy, to Representatives William E. Clark and H. Martin Lancaster (undated) (available from the North Carolina General Statutes Commission). See generally N.C. GEN. STAT. §§ 98A-1 to -65 (1981 & Cum. Supp. 1983). North Carolina's securities laws will probably be found to be inapplicable. John R. Corne, Securities Deputy for the Secretary of State, stated that while "time-shares purchased for investment . . . can be considered securities, . . . that without statutory language to that effect regulation will be difficult, since it is difficult to establish . . . that an investment contract is a security." Minutes of the Condominium Statutes Drafting Committee of the North Carolina General Statutes Commission (October 15, 1980) (available from the North Carolina General Statutes Commission).

The issue of state security regulation is only a precursor to the potential for federal regulation. At this writing, the Securities and Exchange Commission has taken a no-policy position on regulation which it established in 1974. *In re The Innesfree Corp.*, [1974-75 Transfer Binder] FED. SEC. L. REP. (CCH) § 79,935 (June 19, 1974). This no-policy position followed a brief period in which no-action rulings were issued. *Caribbean Beach Club, Inc.* [1972-73 Transfer Binder] FED. SEC. L. REP. (CCH) § 78,819 (May 25, 1972). See generally Byrne, *Securities Regulation of Time-Sharing Resort Condominiums*, 7 REAL EST. L.J. 3 (1978) (advising how to avoid federal security regulation); Comment, *Regulating Timesharing: A More Effective Approach*, 29 UCLA L. REV. 907 (1982) (an excellent work supporting federal security regulation); Gunnar, *supra* note 1, at 35-42 (asserting no position); Comment, *supra* note 2, at 636-39 (opposing federal security regulation).

78. The time share industry was generally supportive of the disclosure approach. Letter from Julian D. Bobbit, Jr. to Special Deputy Attorney General Charles J. Murray (April 1, 1983) (available from the North Carolina General Statutes Commission) (Bobbit is counsel for Fairfield Communities, Inc., one of the major developers of resort properties in North Carolina).

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

of the time share project.⁸⁰ The application for registration, which must be approved or disapproved by the Real Estate Commission within forty-five days, is simple in nature and inexpensive. It requires the time share developer to provide a description of the project, copies of time share instruments to be sold, a copy of the proposed public offering statement, copies of sales contracts, deed forms, information on the marketing and management entity, information on any exchange program offered and appointment of the Real Estate Commission as agent for service of process.⁸¹ After the initial approval, the certificates of registration must be renewed annually.⁸²

In its review of the application for registration, the Commission is limited to a determination of whether the application is complete and whether the time share sales and project management will be directed by individuals of "good moral character."⁸³ The question of what standard is imposed by "good moral character" was brought before the General Statutes Commission in its drafting process,⁸⁴ but the draft legislation was approved by the Commission without further clarification.⁸⁵ To date, the "good moral character" standard has not been judicially defined as applied to real estate brokers, salesmen or time share developers.

The "good moral character" standard used in the licensing of lawyers⁸⁶ has been judicially defined. However, the standard applied in licensing lawyers had never been considered to be applicable under the NCTSA to a group of individuals. The standard was applied and defined by Chief Justice Stacy in *In re Applicants for License*.⁸⁷ Good moral character "means that [the applicant] must have conducted himself as a man of upright character ordinarily would, should or does."⁸⁸ Although a rather general standard, the "good moral character" standard of *In re Applicants* may be judicially applied under the NCTSA. Certainly the Real Estate Commission must further define the "good moral character"

80. *Id.* § 93A-52(a).

81. *Id.* The time share developer must report promptly any changes in information submitted, as well as any change in the developer's interest in the property. *Id.* The North Carolina Real Estate Commission has promulgated administrative regulations generally reciting the statutory requirements. 58B N.C. ADMIN. CODE §§ .0101-.0104 (1984).

82. N.C. GEN. STAT. § 93A-52(d) (Cum. Supp. 1983) (certificates of registration expire June 30th of each year).

83. *Id.* § 93A-52(a).

84. Letter from John C. Kersten to Frank M. Bell (April 15, 1983) (available from the North Carolina General Statutes Commission) ("This language appears to be impermissibly vague. How and [by] what criteria is such a determination to be made?").

85. Minutes of the North Carolina General Statutes Commission (March 1, 1983) (available from the North Carolina General Statutes Commission).

86. N.C. GEN. STAT. § 84-24 (1981 & Cum. Supp. 1983).

87. 191 N.C. 235, 131 S.E. 661 (1926) (defining "upright character").

88. *Id.* at 238, 131 S.E. at 663. NARELLO contains a more detailed list of criteria, the thrust of which would evidence "good moral character." NARELLO, *supra* note 22, § 2-105(d)(3).

standard as applied collectively to time share developers and salesmen,⁸⁹ even though it has not chosen to do so to date.

The NCTSA requires that all time share salesmen be licensed as real estate brokers or salesmen.⁹⁰ The licensing provision appears to afford purchasers protection because licensed sales personnel would have met the stringent educational and experience requirements.⁹¹ The General Assembly's objective was to help ensure that the public would receive correct information from professionals when considering the purchase of time shares. The General Assembly's objective may be thwarted by exceptions in the real estate licensing laws.⁹² In three different situations, real estate licenses are not required. First, no license is required for individuals or associations who sell or lease their own property and the sale or lease is "performed in the regular course of or incident to the management of that property"⁹³ Second, even if the broker does not personally own the property, any of his unlicensed salaried employees may exhibit residential units to prospective tenants, provide information about the project, and help prepare and accept applications for leases.⁹⁴ Third, any owner who sells or leases his own property does not require a license.⁹⁵ If the time share developer is incorporated, the corporate officers or employees, acting on behalf of the corporation, need not be licensed. In the lease or sale of time share projects in which there is an independent contracting managing entity, only one licensed broker would be required. Non-licensed employees can handle most aspects of time share sales transactions through the licensed broker. Given the nature of time share sales,⁹⁶ it is difficult to imagine many situations in which licensed brokers or salesmen would be required as a matter of law.⁹⁷

89. N.C. GEN. STAT. § 93A-51 (Cum. Supp. 1983).

90. *Id.* § 93A-40. The statute provides that:

From and after July 1, 1984, it shall be unlawful for any person in this State to engage or assume to engage in the business of a time share salesman without first obtaining a real estate broker or salesman license issued by the North Carolina Real Estate Commission under the provisions of Article I of this Chapter

Id. (emphasis added).

91. *Id.* §§ 93A-4, -5 (Cum. Supp. 1983) (specifying the licensing requirements).

92. *Id.* § 93A-2(c).

93. *Id.* § 93A-2(c)(1).

94. *Id.* § 93A-2(c)(6).

95. *Id.* § 93A-2(c)(7).

96. See generally M. HENZE, *supra* note 4, § 2.02[4] (one person's humorous experience with time share salesmen). As the Whaler Inn situation illustrates, however, the experience can be devastating.

97. North Carolina courts have, at times, been generous in applying the exceptions. See *McArver v. Gerukos*, 265 N.C. 413, 144 S.E.2d 880 (1965); *Gower v. Stout Realty, Inc.*, 56 N.C. App. 603, 289 S.E.2d 880 (1982); *North Carolina Real Estate Licensing Bd. v. Aikens*, 31 N.C. App. 8, 228 S.E.2d 493 (1976). But see *Cox v. North Carolina Real Estate Licensing Bd.*, 47 N.C. App. 135, 266 S.E.2d 851, *cert. denied*, 301 N.C. 87, 273 S.E.2d 296 (1980).

B. Public Offering Statement

Every time share developer is required to deliver a public offering statement to the purchaser before the contract of sale is executed.⁹⁸ The public offering statement must conspicuously disclose seven specific items and any other information required by the Real Estate Commission's regulations. The specified items are: (1) the purchaser's financial obligation; (2) the persons who may assess a maintenance charge and the method of its calculation; (3) the terms and duration of any developer's contract with the managing entity; (4) if the time share project is not completed, when it and every amenity, will be completed; (5) the term of the time share; (6) the purchaser's right to cancel the contract; and (7) the method of recordation of the time share instrument.⁹⁹

The Real Estate Commission's regulations comport with the seven disclosures mandated by the NCTSA, but do little more than recite the statutory provisions. In addition to the statutory requirements, the Real Estate Commission's regulations require that the public offering statement completely disclose any information as to the existence of any vacation exchange program offered in conjunction with the time share development.¹⁰⁰ In order to meet the Act's requirement that the seven disclosures be conspicuous, the Real Estate Commission opted for a standardized one page summary to be attached to the cover of the offering statement. The summary presents a series of questions covering the topics required by statute and regulation. It also directs the purchaser to the specific page in the body of the public offering statement on which the particular question is answered. These questions are followed by a bold-face notice of the "cooling-off" period in which the time share purchaser may cancel the sales contract without liability.¹⁰¹ The notice also includes suggested mailing instructions.

Neither the NCTSA nor the administrative regulations specifically require the public offering statement to contain a description of the property interest conveyed in the developer's time share plan. In light of the Act's requirement that such information be disclosed to the Real Estate Commission in the project's registration statement as well as the general objective of the Act to protect the consumer through the disclosure of all material facts, this omission from the NCTSA is perplexing. Other states require the specific disclosure of the real property interest to be conveyed. For example, Hawaii requires the developer to disclose whether

98. N.C. GEN. STAT. § 93A-45(a) (Cum. Supp. 1983). If the public offering statement is not provided to the purchaser as required, the purchaser, in addition to any other remedies, may recover ten percent of the time share purchase price not exceeding three thousand dollars. *Id.*

99. *Id.* § 93A-44.

100. 58B N.C. ADMIN. CODE § .0201 (1984).

101. *Id.* § .0202.

the time share plan is an ownership or right to use interest "with a description of the rights and responsibilities under said plan."¹⁰² Given the complexities of time share property interests, the potential for consumers to misunderstand the facts, or for unscrupulous brokers or salesmen to manipulate the facts, the NCTSA's failure to require the disclosure of the property interest to be conveyed falls short of its consumer protection objectives.

Additionally, the NCTSA and administrative regulations do not require that a description of any covenants be included in the public offering statement. In most time share plans, especially in the tenancy-in-common time share estate, covenants are required to establish the periods of occupancy, liability for damage to the time share unit or its furnishings and the remedies for occupant holdover. The Uniform Real Estate Time Share Act (URETSA) provides comprehensive guidelines for disclosure of this type of information.¹⁰³ Even though the purchaser of a time share estate normally signs any covenants, in order to comply with common law requirements for fixing periods of exclusive possession among co-tenants, the disclosure of covenants prior to sale would more adequately alert buyers to the intricate relationship among time share owners. The North Carolina Real Estate Commission's failure to require disclosure of co-purchaser covenants is regrettable.

C. "Cooling-Off," Liens, and Foreclosure

1. Protection of Time Share Purchasers through "Cooling-Off" Periods

The NCTSA provides a five-day "cooling-off" period following execution of the sales contract for the time share purchaser.¹⁰⁴ During the five-day period, the purchaser may rescind the contract without any financial liability by hand-delivering or mailing notice of cancellation to the developer or salesman.¹⁰⁵ Numerous states follow this approach in

102. HAWAII REV. STAT. § 514-9(a)(6) (Supp. 1983). In non-ownership forms of time sharing the developer must state any restraint on alienability. *Id.* § 514-9(a)(5). *E.g.*, URETSA § 4-103(3), 7A U.L.A. (Supp. 1985).

103. URETSA § 4-103(a)(4), (12), (21), 7A U.L.A. 339-40 (Supp. 1985). URETSA's disclosure requirements are the most comprehensive in nature and provide an excellent model for legislation.

104. N.C. GEN. STAT. § 93A-45(a) (Cum. Supp. 1983). The developer must escrow funds for ten days or until cancellation, whichever occurs first, or in lieu of escrow, provide a surety, cash deposit, corporate bond or irrevocable letter of credit satisfactory to the Commission. *Id.* § 93A-45(c). The General Statutes Commission felt a ten-day "cooling-off" period was the most important protection for the consumer. Minutes of the North Carolina General Statutes Commission (March 1, 1983) (available from the North Carolina General Statutes Commission). The "cooling-off" period was reduced to five days in the House of Representatives Committee on Judiciary III. *Daily Bulletin* No. 117, Institute of Government, 1163 (June 23, 1983).

105. N.C. GEN. STAT. § 93A-45(b) (Cum. Supp. 1983).

time share sales.¹⁰⁶ In North Carolina, the five-day "cooling-off" period may in fact be greater than five days. Absent statutory definitions, legal periods of time are calculated under the North Carolina Rules of Civil Procedure.¹⁰⁷ The Rules of Civil Procedure provide that the day of execution of the contract is not counted and if the last day is a Saturday, Sunday, or legal holiday, the concluding day is the next business day. Intervening weekends and legal holidays are excluded from the calculation.¹⁰⁸ Due to the history of high pressure sales tactics in the time share industry, the five-day "cooling off" period seems adequate to permit mature reflection and introspection.

2. Protection of Time Share Purchasers from Liens and Bankruptcy Foreclosures

There were three major concerns addressed by the General Assembly in the NCTSA. These concerns were, first, protecting time share purchasers in a foreclosure against the developer in bankruptcy or general creditor foreclosure against the project; second, protecting time share purchasers if a developer "absconds" with the funds leaving liens against the time share development; and third, protecting co-owners of time share interests from potential liens against another co-owner. To protect the time share purchaser's interest in a bankruptcy proceeding from the financial irresponsibility of a time share developer, the NCTSA requires the developer to provide the time share purchaser with a release from all liens prior to recordation of the instrument transferring the time share interest sold. In the alternative, a developer may provide a surety bond or insurance in an amount satisfactory to the Real Estate Commission. In addition, any lienholder must agree to subordinate his rights to those of the time share purchaser who complies with the sales contract.¹⁰⁹ To protect a time share owner from liens of time share co-owners, the Act

106. *E.g.*, UTAH CODE ANN. § 57-11-5(2) (Supp. 1983) (five days); ME. REV. STAT. ANN. tit. 33, § 558(5) (Cum. Supp. 1982-83) (fifteen days).

107. N.C. GEN. STAT. § 1-593 (1969).

108. *Id.* § 1A-1, Rule 6(a) (1983); *see also* Jackson v. Stanwood Corp., 38 N.C. App. 479, 248 S.E.2d 576 (1978).

109. N.C. GEN. STAT. § 93A-57(a) (Cum. Supp. 1983). *See generally* Comment, *supra* note 2, at 650-52 (commentary on abuses in time share development financing).

A release can be provided by a "take out commitment." This "commitment" is an agreement with the mortgage-lender that upon sale of a time share, a percentage of the purchase price will be used to repay the mortgagor's debt for which a release of any lien is negotiated. Comment, *supra* note 2, at 651 n.129.

As to subordination of liens, the language of the Florida act is very similar to the NCTSA. However, the Florida statute provides that purchasers shall also be furnished with a copy of a recorded nondisturbance instrument from every lien holder who has a recorded lien against the property upon which the accommodations or facilities to be used by the purchaser are situated. The nondisturbance instrument must provide that upon foreclosure, the succeeding owner shall take title to the property subject to the possessory rights of the purchasers. FLA. STAT. ANN. § 721.08(3)(c) (Cum.

provides for a mandatory release procedure.¹¹⁰

a. Protection from bankruptcy foreclosure

Subsequent to the enactment of the NCTSA, Congress enacted the Bankruptcy Amendments and Federal Judgeship Act of 1984¹¹¹ (BAFJA) to help alleviate the unique problems associated with time shares in a bankruptcy proceeding. The Whaler Inn incident may provide insights into the effectiveness of the North Carolina and congressional enactments.

The status of time share owners in a developer bankruptcy was first addressed in *In re Sombrero Reef Club, Inc.*¹¹² In *Sombrero*, the time share developer sold time share interests for a thirty-year term, with no remainder. The time share developer retained the right to assign one-week occupancy periods and specific units on an availability basis.¹¹³ The bankruptcy court held that the time share contracts, even those fully paid for, were executory and, therefore, subject to rejection by the debtor-in-possession. The court reasoned that the contracts were executory because the debtor-developer maintained an obligation to provide maintenance and room service while the purchasers remained obligated for an annual maintenance fee.¹¹⁴

In finding that all of the time share contracts were executory, the *Sombrero* court faced the crucial issue of classifying the property interest. If classified as a leasehold interest, the time share purchasers would receive special statutory protections in bankruptcy accorded leases and executory contracts for the sale of real estate.¹¹⁵ If the contracts were deemed non-freehold interests in real estate, time share purchasers would be mere unsecured creditors, and a civil action against a bankrupt developer would be virtually meaningless as the developer would be judgment proof. The court held that the time share contracts were neither leases nor contracts for the sale of land because "[t]he drafters appear to have been unwilling to describe or limit the contract to a more definite or

Supp. 1984). See generally URETSA § 4-109, 7A U.L.A. 344-45 (Supp. 1985); NARELLO §§ 10-101, -108, 117, 118 (1983); P. HETRICK, *supra* note 25, §§ 409-55, at 476-537.

For an excellent discussion of federal and state tax liens in the time share context, see generally, *Legal Challenges*, *supra* note 16, at 428-31. Since publication of the *Legal Challenges* article, the Internal Revenue Service has stated that when a delinquent taxpayer lien must be foreclosed on a time share, "[t]he . . . lien may be enforced against the delinquent taxpayer's interest but not against the condominium itself." Rev. Rul. 79-55, 1979-1 C.B. 400, 401.

110. N.C. GEN. STAT. § 93A-57(b) (Cum. Supp. 1983).

111. Bankruptcy Amendments and Federal Judgeship Act, July 10, 1984, Pub. L. No. 98-353, title III, §§ 101, 410-04, 98 Stat. 367 (to be codified at 11 U.S.C. §§ 101, 402-404).

112. 18 Bankr. 612 (D. Fla. 1982).

113. *Id.* at 614.

114. *Id.* at 616-17 (ruling on 11 U.S.C. § 365(d)(2) (1982)).

115. 11 U.S.C. § 365(h), (i) (1982).

conventional category of real property interest.”¹¹⁶ The court also relied on the failure of Florida’s time share legislation to define the property interest conveyed by a time share contract. The Florida statute defining time shares recognized that an interest in property might not be conveyed in all cases.¹¹⁷ Because the time share contracts were non-freehold estates, the court correctly concluded that they were not executory contracts for the sale of real property.

Even in the face of the drafter’s inability to define the property interest and the lack of statutory clarity, the court recognized that the classification of the *Sombrero* contracts as a lease was a more difficult question.¹¹⁸ The court relied on three factors in holding the property interest was not a lease. First, the contracts defined the relationship as a “membership,” indicating the parties’ intent to convey a license rather than a lease. Second, the contracts did not conform to the state’s witnessing requirements for leases of greater than one year. Third, the court reasoned that the right to possess a unit was incidental to the recreational facilities actually bargained for.¹¹⁹

In *Sombrero*, the time share owners argued that their contracts could not be rejected by the debtor-developer because of Florida’s legislative mandate that their right of possession be honored by subsequent purchasers.¹²⁰ The time share contracts themselves contained the required statutory provisions.¹²¹ The court held that the debtor-in-possession could reject the time share contracts under federal law even though it would constitute a breach of contract for which damages could be awarded.¹²² The court refused to apply the Florida statute which required subsequent purchasers of the time share development to recognize the right of possession of prior time share purchasers, because it found that if the Florida statute had been designed to prevent a breach by the debtor-in-possession of the time share estate, it would “frustrate” federal bankruptcy law, and therefore, was invalid.¹²³

Recognizing that the *Sombrero* rationale could be applied by other bankruptcy courts, the North Carolina General Assembly mandated that all time share interests are “interests” in real property in order to avoid a similar result. Federal bankruptcy courts are to determine property interests in accordance with the applicable state law.¹²⁴ Inasmuch as the

116. *Sombrero*, 18 Bankr. at 617.

117. *Id.* at 618.

118. *Id.*

119. *Id.* at 619.

120. *Id.*

121. *Id.* at 620.

122. *Id.*

123. *Id.*

124. *E.g., In re Aienel Furniture, Inc.*, 13 Bankr. 264 (E.D. Wis. 1980); *In re Hospitality Assoc., Inc.*, 6 Bankr. 778 (D. Or. 1980).

NCTSA provides that all time shares are "interests" in property,¹²⁵ and assuming that the interest will probably be classified by the state's judiciary as fee simple estates and leases, federal law¹²⁶ would protect the purchaser's property interest in a bankruptcy sale. The logic employed by the General Assembly was simply to abolish the time share license in North Carolina.

Congressional enactment of BAFJA accomplished the same result as the North Carolina legislation, but in a more direct manner. BAFJA also affords some additional protections for the time share purchaser. Congress defined a time share estate to include all legal interests from a license to fee simple absolute ownership. The definition of time share includes not only an interest in projects designed for occupancy but also any time share facility, e.g., campgrounds, recreational sites, or tennis courts. The only limitation imposed on the definition of time share is that the interest must be conveyed for more than three years, with use either during consecutive or non-consecutive periods annually.¹²⁷ If the trustee rejects an unexpired time share interest¹²⁸ or executory contract¹²⁹ in bankruptcy proceedings, the holder of the time share interest may deem the time share interest terminated if it constitutes a breach under the terms of the contract with the debtor, state law, or covenants among time share co-owners. The owner of the time share interest may elect to remain in possession of the time share for the balance of any contract term. Also, the owner may elect to exercise any optional contract periods.¹³⁰ If the time share purchaser remains in possession, that individual may elect to offset damages occurring after rejection against rent reserved under a lease or monies due for the balance of the term. Any offset is limited to the amount which may be due the debtor, and any claims against the debtor which arise after rejection are limited to the offset only.¹³¹

The bankruptcy proceeding involving the Whaler Inn is the first North Carolina case in which BAFJA will be applicable.¹³² The Whaler Inn, owned by Time Sharing, Inc. (TSI), was converted from a resort hotel to a time share project in 1982. The conversion was financed by a 1.8 million dollar loan obtained from First Savings & Loan Association of Suffolk, Virginia (FSLA), and secured by a first mortgage on the Whaler Inn. TSI planned to sell time shares which were to be tenancies-in-com-

125. See *supra* text accompanying notes 2-16.

126. See 11 U.S.C. § 365 (1982).

127. *Id.* § 101(47).

128. *Id.* § 365(h)(1).

129. *Id.* § 365(i)(1).

130. *Id.* § 365(h)(1).

131. *Id.* § 365(h)(2).

132. BAFJA provisions applicable to Whaler Inn were effective on the date of enactment, July 10, 1984. Whaler Inn was not placed into Chapter 11 bankruptcy until several months later.

mon by dividing each of forty-seven rooms into fifty, one-week interests. TSI was to retain ownership of two, one-week interests for annual maintenance. If the time share purchaser paid the full sales price in cash, TSI was obligated to execute a deed to the purchaser and then forward to the mortgage-lender twenty-five percent of the gross sales price in exchange for the lender's release of his lien as to that purchaser. If the purchaser made a down payment and financed the balance of the purchase price with TSI, no deed was executed and TSI did not apply for a release.¹³³ TSI failed to issue deeds or apply for the release of the mortgage-lender's lien in a substantial number of instances. As a result, some purchasers who paid cash either did not receive a deed from TSI, a release from the lender, or both. An even greater number of purchasers financed the sale through TSI and were not entitled to a deed or lender's release.

TSI defaulted on its note with FSLA¹³⁴ and on June 1, 1984, a North Carolina superior court ordered the Whaler Inn into receivership. Five days later, the superior court ordered the receiver to cease sales of any time shares, but to maintain the property.¹³⁵ Citizens Savings and Loan, now administering TSI's mortgage, filed for foreclosure under the deed of trust and the court approved the foreclosure sale of Whaler Inn.¹³⁶ In order to forestall the scheduled foreclosure sale, TSI filed for a Chapter 11 bankruptcy invoking an automatic stay of the foreclosure sale.¹³⁷ The automatic stay of sale was sought in order to allow time to develop a plan to rehabilitate the Whaler Inn.¹³⁸

A Model Plan of Reorganization has been developed and is currently under review by all parties. Essentially, the Plan proposes that the existing time share owners form a stock cooperative corporation to receive all assets and liabilities of the debtor and resume sale of time shares at the Whaler Inn. Each time share owner would have the option to purchase up to five shares of stock in the corporation. This stock could not be sold unless the time share estate owned is sold with the shares of stock. Time share owners are not required to purchase stock in order to protect their interest in the development. However, in order for the rehabilitation plan to work, at least seven hundred shares of stock must be sold at two thousand dollars per share.

The *Whaler* court has not yet been required to define the applicability of BAFJA. It would appear that those owners who received deeds from TSI and the mortgage-lender will have a protectable interest. However,

133. *In re* Time Sharing, Inc., No. M-84-01551-4 (Bankr. E.D.N.C. December 27, 1984).

134. *Id.*

135. *Id.*

136. *Id.* Citizens Savings and Loan assumed administration of TSI's loan, having taken it by assignment, because FSLA was experiencing its own financial difficulties. *Id.*

137. *Id.*

138. *Id.*

the BAFJA protections may be meaningless. If Whaler Inn cannot be rehabilitated and is liquidated, there is no assurance that the Whaler Inn would be used as a time share resort after the sale. If not used as a time share development, the time share owners may have a legal interest in the property with no practical use of their interest. The only practical sale of their interests would be to the Whaler Inn's ultimate purchaser. However, the market value of their nominal interests in the real estate would likely be substantially less than the original market value. If the rehabilitation plan fails, the time share owners, at best, are in a precarious position.

Although the NCTSA was not in effect when time shares were sold at the Whaler Inn, the probable application of the NCTSA in bankruptcy proceedings similar to those involving the Whaler Inn can be envisioned. The Act's designation of the time share as a real property interest has been duplicated in BAFJA, with the unresolved issue being the practical remedies to be fashioned by a bankruptcy court to effectively protect that interest. The NCTSA's provision for the release of liens and the requirement of insurance coverage or bonding "prior to recordation of the instrument transferring a time share"¹³⁹ is ineffective in preventing developers from illegally diverting sale proceeds. To date, the Real Estate Commission has neither acted to more carefully define when release, insurance, or bonding must be effective, nor has set the amounts of insurance or bonding that will be required if used as an alternative to the lien release procedure.

An effective approach may be that utilized in Florida. The Florida procedure requires that when a leasehold estate is conveyed, one hundred percent of the contract payments must be held in escrow.¹⁴⁰ The escrow principle could be adapted to the sale of fee simple time share estates. The system would require that an adequate portion of any down payment made by the purchaser be placed in escrow or committed to the time share developer's mortgagee, as well as escrowing a percentage of the monthly payment made to the time share developer who finances the balance of the purchase price. The escrow system would be coupled with either monthly or quarterly reporting requirements by the developer to the Real Estate Commission. This proposal is a radical departure from the doctrine of *caveat emptor* applied in North Carolina real estate sales. However, given the unique qualities of time sharing, this system appears necessary to adequately protect the consuming public.

139. N.C. GEN. STAT. § 93A-57(a) (Cum. Supp. 1983).

140. FLA. STAT. ANN. § 721.08(2) (Cum. Supp. 1984). In lieu of an escrow the division director may provide a surety bond or an irrevocable letter of credit. *Id.* § 721.08(5).

b. Protection from liens

The NCTSA also provides for the release from a time share purchaser's lien which could be assessed against time share co-owners. Such liens, except for mortgages or deeds of trust, may be satisfied by individual co-owners' payment of a proportional amount of the lien based on a ratio of the shares of all time share owners. Upon receiving the proportional payment, the lienor must provide a release to the time share owner.¹⁴¹ Extinguishment of time share developer and co-owner liens was not a part of the draft legislation by the General Statutes Commission and, therefore, was not recommended to the General Assembly. These provisions were requested by Representative H. Martin Lancaster, co-sponsor of the NCTSA.¹⁴² Providing for the right of each time share purchaser to extinguish co-owner liens is a foresighted innovation and should prove effective in many situations.

D. *Civil and Criminal Actions in the Sale of Time Shares*

The NCTSA specifically grants the Real Estate Commission substantial investigatory and disciplinary powers in regulating time share sales, salesmen, and developers.¹⁴³ The Commission may suspend or revoke real estate licenses or certificates of project registration, reprimand or censure time share salesmen or developers, and fine developers up to five hundred dollars¹⁴⁴ for violating each of thirteen specified acts or omissions and any administrative regulations ultimately adopted. The thirteen categories of acts or omissions are almost totally dedicated to the protection of prospective purchasers of time share contracts from false, misleading or deceptive sales practices.¹⁴⁵ The grant of regulatory authority to the Real Estate Commission is unique in North Carolina real property law.

In addition to administrative remedies, the NCTSA makes a violation of its provisions an unclassified misdemeanor punishable by fine, imprisonment, or both.¹⁴⁶ All unclassified misdemeanors are punishable by a fine left in the discretion of the court and imprisonment for up to two

141. N.C. GEN. STAT. § 93A-57(b) (Cum. Supp. 1983).

142. Letter from Representative H. Martin Lancaster to Charles Murray, Special Deputy Attorney General (May 12, 1983) (available from the North Carolina General Statutes Commission). Representative Lancaster stated:

I feel it is very important that this legislation address in some fashion the protection of buyers from developers who go bankrupt or abscond with funds so that the original deed of trust on the development is foreclosed and they lose everything. I would like for the Committee Substitute to include something on that.

Id.

143. N.C. GEN. STAT. § 93A-54 (Cum. Supp. 1983).

144. *Id.* § 93A-54(a).

145. *Id.*

146. *Id.* § 93A-56.

years, or both.¹⁴⁷ However, if the offense is "infamous . . . with deceit and intent to defraud"¹⁴⁸ it is reclassified as a felony punishable by fine, imprisonment up to ten years, or both.¹⁴⁹ One North Carolina case has held that an attempt to *obtain* property by false pretenses would be an "infamous" crime within the meaning of the statute and punishable as a felony.¹⁵⁰ It is conceivable that the fraudulent sale of time shares may invoke the greater statutory penalties.

Beyond the regulatory powers of the Real Estate Commission, the NCTSA clearly provides that the time share purchaser, or any person injured by a sales practice, retains an unencumbered right of private action.¹⁵¹ Of the numerous possible civil actions, North Carolina General Statute, section 75-1.1 offers significant potential for redress for false, misleading or deceptive sales practices. The provisions for treble damages in the Unfair Trade Practice Act (UTPA)¹⁵² and for the award of attorney fees¹⁵³ ensure its active use in litigation. Equally important, the UTPA authorizes investigations and suits on behalf of the public by the North Carolina Attorney General.¹⁵⁴ In litigating under the UTPA, the Attorney General may seek the extraordinary remedy of rescission of contracts and restitution of monies.¹⁵⁵ This remedy may be uniquely valuable for time share purchasers beyond the five-day "cooling-off" period.

The Federal Trade Commission (FTC), under the Unfair Trade and Practices Act,¹⁵⁶ is entering the time share field primarily in the area of sales practices. In one case, the FTC has issued a cease and desist order to prohibit a market development firm from using unfair and deceptive trade practices. The firm was luring potential time share purchasers into high pressure time share seminars at a development owned by its parent corporation.¹⁵⁷ In a landmark case, the FTC filed for a preliminary and permanent injunction against one developer for misleading potential buyers by printing brochures depicting time share units which were more luxurious than those available, misstating the city in which some units were available, and for deception in describing the nature of the time

147. *Id.* § 14-3(a) (1981).

148. *Id.* § 14-3(b).

149. *Id.* § 14-1.1(a)(8).

150. *State v. Page*, 32 N.C. App. 478, 232 S.E.2d 460, *cert. denied*, 292 N.C. 463, 235 S.E.2d 64 (1977).

151. A discussion, even of all the major civil actions, is beyond the scope of this comment.

152. N.C. GEN. STAT. § 75-16 (1981).

153. *Id.* § 75-16.1.

154. *Id.* § 75-9.

155. *Id.* § 75-15.1.

156. *See also* 15 U.S.C. § 45 (1982) (N.C. GEN. STAT. § 75-1.1 (1981) is virtually identical to the FTCA on unfair trade practices).

157. *Market Development Corp.*, 3 TRADE REG. REP. (CCH) ¶ 21,651 (January 15, 1980).

share interest being sold.¹⁵⁸ It seems inevitable that greater FTC intervention will be forthcoming.

IV. MANAGEMENT OF TIME SHARE DEVELOPERS

While the consumer protection provisions of the NCTSA are comprehensive, the Act is virtually devoid of provisions regulating the management of time share projects. The Act contains only one provision relating to management practices. Yet, management of the time share complex is one of the crucial factors in the success of a project.¹⁵⁹ Management of a time share project may prove more cumbersome than management of condominium projects primarily because of the greater number of owners and their transient use of the facility. Time share developments that employ a lease program present special considerations because the leaseholders do not control management.

The paucity of NCTSA provisions regulating time share management entities can be explained by the legislative history of the Act. The NCTSA was conceptualized by the Condominium Statutes Drafting Committee of the General Statutes Commission in September, 1980.¹⁶⁰ By the end of that year, the Drafting Committee had rejected the idea of adopting model time share legislation,¹⁶¹ but agreed to incorporate time sharing into the Unit Ownership Act.¹⁶² The Drafting Committee established the policy that time shares "*would be treated identically to condominium units* and directed that the provisions regulating time shares specifically set out which particular sections treat time shares differently."¹⁶³

When the draft legislation was considered by the full General Statutes Commission, the Drafting Committee's approach was maintained.¹⁶⁴ The Commission reversed its position, however, and recodified the proposed legislation specifically placing time sharing under Chapter 93A of

158. Paradise Palms Vacation Club, TRADE REG. REP. (CCH) (1979-1983 Transfer Binder) ¶ 21,875 (W.D. Wash., September 30, 1981) (docketed as FTC v. Paradise Palms Vacation Club, No. C811160V). See generally Dickerson, *Litigating Resort Timeshare Abuses*, 4 NAT'L L.J., June 7, 1982, at 44, col. 1; Smith, *Timeshare Regulation*, 4 NAT'L L.J., May 24, 1982, at 43, col. 4.

159. See generally Pollack, *supra* note 1, at 288 ("Management is an essential factor in the value of a time-share project . . ."); Comment, *supra* note 2, at 648 ("Effective ongoing management plays a critical role in timeshare projects.").

160. Minutes of the Condominium Statutes Drafting Committee of the North Carolina General Statutes Commission (September, 1980) (available from the North Carolina General Statutes Commission).

161. *Id.* (October 15, 1980).

162. N.C. GEN. STAT. §§ 47A-1 to -37 (Cum. Supp. 1983).

163. Minutes of the Condominium Statutes Drafting Committee of the North Carolina General Statutes Commission (December 18, 1980) (emphasis added) (available from the North Carolina General Statutes Commission).

164. Minutes of the North Carolina General Statutes Commission (March 4, 1983) (available from the North Carolina General Statutes Commission).

the North Carolina General Statutes, which governs the North Carolina Real Estate Licensing Commission. The policy change was made at the insistence of the Real Estate Commission, which would be responsible for regulating time share developers, salesmen, and sales.¹⁶⁵ This seemingly simple recodification separated the time share provisions from all underlying management controls contained in the Unit Ownership Act.¹⁶⁶

The Unit Ownership Act is permissive.¹⁶⁷ Therefore, time share developers can avoid its provisions and establish management arrangements virtually unregulated. Developers can and may choose to qualify under both the Unit Ownership Act and the NCTSA. Because several forms of time sharing are based on a condominium principle, dual registration may be a desirable method of determining the rights and duties between the management entity and time share purchasers, and of defining relationships among purchasers.

The NCTSA's single requirement for management relates to proxy voting. The Act limits the duration of any proxy to one year if it is obtained from a purchaser and it relates to employment of a managing entity.¹⁶⁸ This provision prevents potential "sweet-heart" contracts¹⁶⁹ between the managing entity and the developer.

Two URETSA proposals which govern management of the time share project would provide the purchaser with a more adequate means of self-government. These provisions are the owner initiative and the referendum.¹⁷⁰ The owner initiative permits purchasers to amend unrecorded project documents and approve or disapprove any proposed expenditure by the managing entity. An owner must secure a petition, stating any proposal, signed by at least one co-owner in each unit; the number of units then must comprise one-third of the allocated votes. Next, a ballot is prepared by the managing entity and mailed to each owner.¹⁷¹ A simple majority normally determines the issue¹⁷² and any action adopted is binding for three years unless modified by a subsequent initiative.¹⁷³

A referendum would be required whenever the managing entity pro-

165. *Id.* (April 1, 1983).

166. The Unit Ownership Act provides numerous provisions relating to governance of condominium projects. The more significant provisions relate to the use of common areas and facilities, to maintenance, to compliance with bylaws, regulations and covenants, to *inter se* damages, and to civil actions on common interests. N.C. GEN. STAT. §§ 47A-8 to -10, -13, -16, -19, -21 to -26 (1984).

167. *Id.* §§ 47A-2, -4.

168. *Id.* § 93A-47 (Cum. Supp. 1983).

169. "Sweet heart" contracts are those in which the developer retains long term contracts with the managing entity established by that developer, even though the developer no longer owns any interest in the property.

170. URETSA § 3-117, 7A U.L.A. 336-37 (Supp. 1985); *id.* § 3-116, 7A U.L.A. 336.

171. *Id.* § 3-117(b), 7A U.L.A. 336-37.

172. *Id.* § 3-115(c), 7A U.L.A. at 336.

173. *Id.* § 3-115(d).

poses an amendment to the recorded project documents.¹⁷⁴ Within thirty to one hundred and eighty days prior to tabulation of any vote, ballots must be mailed to each time share owner¹⁷⁵ and a simple majority is sufficient on most issues.¹⁷⁶

Given the unique nature of time sharing, the owner initiative and the referendum are worthy of North Carolina legislative enactment. Each measure would certainly help time share purchasers negotiate more effectively with the managing entity.

V. CONCLUSION

The NCTSA is a beginning toward an effective regulation of the time share industry. By eliminating the use of time share licenses in North Carolina and mandating that a property interest be conveyed, the Act affords some protection to time share purchasers. However, the Act takes an overly simplistic approach to the seemingly endless contractual arrangements known as time sharing. Further legislative clarification is needed for the regulation of the exotic interval ownership estates, if they are to be permitted at all in this state.

Congress has supplanted the General Assembly's attempt to afford time share purchasers some protection in a developer bankruptcy. The remaining question is how, and to what extent, legally and practically, the bankruptcy court can protect the time share owners if the resort is sold. Fortunately, BAFJA places the owner in a better position than that accorded the *Sombrero* time share owners.¹⁷⁷

The NCTSA does not effectively protect time share purchasers from developer liens. Requiring lender releases, subordination of creditors and insurance or bonding "prior" to recordation simply can not deter a dishonest developer, broker, or salesman. The language employed in the Act is general enough to permit the Real Estate Commission to correct some obvious situations by administrative regulation. The Commission has yet to aggressively adopt regulations beyond the bare requirements of the NCTSA. The Whaler Inn should provide instructive lessons as well as incentive for the Commission to act. The historical attitude of *caveat emptor* in real estate sales obviously provides a psychological deterrent to overly regulating property sales. However, time sharing is a unique property concept—in reality an ingenuous marketing concept—which does not lend itself to traditional attitudes or regulations.

The primary purpose of the NCTSA, the protection of consumers in the sale of time shares, has been more adequately met. If the North Car-

174. *Id.* § 3-116(a).

175. *Id.* § 3-116(b).

176. *Id.* § 3-116(c).

177. *See In re Sombrero Reef Club, Inc.*, 18 Bankr. 612 (S.D. Fla. 1982).

olina Real Estate Commission aggressively regulates the industry, its powers, coupled with those of the Attorney General, could ensure adequate governmental supervision in the registration of developments and sales practices. However, the Real Estate Commission must be careful to provide more detailed regulation of the public offering statement and specific prohibited sales practices through administrative regulations.

The NCTSA fails in regulating the management of time share projects. This failure is unjustifiable. Adequately protecting the consumer prior to ownership is an incomplete accomplishment if time share owners cannot be assured of secure and quality management. The North Carolina General Assembly should require that time share developments comply with the Unit Ownership Act or, preferably, consider adopting URETSA management provisions. At least one member of the Condominium Statutes Drafting Committee argued that the adoption of URETSA in North Carolina is justified and necessary.¹⁷⁸ It is an argument that deserves a second chance.

STEPHEN T. GHEEN

178. Memorandum from Monica K. Kalo to the General Statutes Commission's Condominium Statutes Drafting Committee (undated) (available from the North Carolina General Statutes Commission).