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Legal Challenges to Time Sharing Ownership

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COMMENTS

LEGAL CHALLENGES TO TIME SHARING OWNERSHIP

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I. INTRODUCTION

"FOR SALE: Luxurious, roomy, 2 bedroom Condominium, tennis courts, swimming pool, fronts on ocean. Under $10,000." Under ten thousand dollars? The concept of time sharing ownership turns that price into reality. Time sharing ownership is an outgrowth of the continuing desire of persons to own a vacation home, spawned by the popularity of resort condominiums.

With the rapid growth and development of residential and resort condominiums during the last twenty years, the concept of ownership of "airspace"[1] has become an accepted part of real property law.[2] A condominium is a system of separate ownership of individual units in a multiple

1. Under traditional real property law, the maxim *cujus est solum, ejus est usque ad coelum et ad inferos* controlled. "To whomsoever the soil belongs, he owns also to the sky and to the depths." Thus an owner of a piece of land owned everything above and below to an indefinite extent. *See* United States v. Causby, 328 U.S. 256 (1946). *See also* 2 BLACKSTONE COMMENTARIES 18 (Lewis ed. 1902); 1 COKE INSTITUTES ch. 1, § 1(4a) (19th ed. 1832); Merrill, Cooper & Papell, *An Overview of California Condominium Law*, 6 SW. U.L. REV. 487, 493 (1974).

2. Some economists predict that 50% of the population in the United States will live in condominiums by the year 2000. U.S. DEPT. OF HOUSING AND URBAN DEVELOPMENT, QUESTIONS ABOUT CONDOMINIUMS, 3 CHUD-365-F (June 1974). All 50

unit building in which each purchaser receives by deed a fee simple interest in an apartment and an undivided interest as tenant in common in the facilities and areas of the building which are used by all residents or members of the condominium.[3] The concept thus contemplates two distinct tenures, one in severalty and one in common, both inseparably joined in a condominium.

A substantial portion of condominium growth has been in the resort condominium area, although development in this sphere has been severely restricted by the dramatic escalation in costs of land, labor and materials, and the attendant decline in profitability to the developer.[4] Resort developers sought to devise a vehicle by which the cost of ownership of a vacation condominium could be significantly reduced. The optimal goal was to provide a prospective purchaser the opportunity to acquire and pay for a real property ownership interest only for the time period during which the owner of the unit and his family or guests would actually occupy the condominium. The idea of purchasing an ownership interest in the unit only for the desired vacation period caused the concept of the condominium regime to be expanded one step further, resulting in the emergence of a new property concept: the time-share estate[5] vacation condominium.

This Comment will focus upon the major impediments to widespread acceptance of time sharing involving fee ownership.[6] After an initial

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states have passed condominium enabling legislation. For a listing of citations to condominium legislation, see 1A P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE, App. B-1 (1979) [hereinafter cited as P. ROHAN & M. RESKIN]. For a history of condominium growth in the United States, see Note, 29 CASE W. RES. L. REV. 228, 232 (1978).

3. The Missouri Condominium Property Act, RSMo §§ 448.010-.220 (1978), does not define the term condominium. An extensive definition of the term may be found, however, in Annot., 45 A.L.R.3d 1171 (1972). A condominium is to be distinguished from a cooperative apartment, which is a multi-unit dwelling in which each resident has an interest in the entity owning the building and a lease entitling him to occupy a particular apartment within the building. *See* Susskind v. 1136 Tenants Corp., 43 Misc. 2d 588, 251 N.Y.2d 321 (Civ. Ct. 1964). *See generally* Annot., 77 A.L.R.3d 1290, 1290 n.4 (1977).

4. *See* Mylod, *The Mortgage Scene,* 45 HOUSE & HOME 60 (April 1974). One factor in increased costs was the imposition of environmental safeguards by many states in reaction to the spoliation of their landscapes. *See generally* S. COMM. ON INTERIOR & INSULAR AFFAIRS LAND USE POLICY & PLANNING ASSISTANCE ACT, S. REP. No. 197, 93d Cong., 1st Sess. 3 (1973).

5. The "time share estate" rubric was adopted by the UNIFORM CONDOMINIUM ACT § 4-103, *reprinted in* 1A P. ROHAN & M. RESKIN, *supra* note 2, App. B-6. The concept is known under many different names, including interval ownership, fractional time period ownership (FTOP), and time sharing ownership (TSO). *See* Gray, *Pioneering the Concept of Time-Sharing Ownership,* 48 ST. JOHN'S L. REV. 1196 (1974); Roodhouse, *Fractional Time Period Ownership of Recreational Condominiums,* 4 REAL EST. L.J. 35 (1975). The term fractional time period ownership was coined by the Conference of Commissioners on Uniform State Laws, in UNIFORM LAND TRANSACTIONS ACT, TENTATIVE DRAFT No. 4.

6. This Comment will only examine time share techniques which involve fee simple ownership of vacation homes on a time sharing basis. Other time sharing arrangements not involving fee simple ownership of a real property interest, such as "vacation licenses" and "club memberships," where ownership and title remain in

description of the time-sharing estate concept, this Comment will examine the three foremost problem areas in this fast developing field: dangers of foreclosure of a time sharing interest because of a federal tax lien; the effectiveness and legal validity of agreements not to partition; and the extent and basis for potential tort liability of unit owners. In each of these areas, problems arise when traditional real property solutions are applied to problems for which real property principles were not designed. The Comment will then pinpoint the need for legislation in these areas.

II. The Concept of the Time Share Estate

The concept of time sharing entails division of the fee simple ownership of a condominium unit into several separate time periods.[7] Such a division results in what one writer has described as "condominiumizing the condominium."[8] Each unit is owned by the vacationer only for the period he desires to be in possession. A time period may range in duration from one week to several months, and gives different owners (those having an interest in the fee) the right to exclusive occupancy for that period only. The right to occupy the condominium during that time period typically recurs annually for an unlimited number of years. Additionally, management ordinarily purchases a two-week time period out of every six months for necessary in-unit maintenance work.[9]

The vacation condominium time share development essentially operates as does the ordinary condominium complex.[10] Each unit, however, rather than having only one owner, may have virtually an unlimited number of owners. The unit owners collectively constitute the owners' association. This body operates and manages the common areas[11] of the

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the developer, are beyond the scope of this Comment. For discussion of these two arrangements, see J. Bush, *Planning to Meet Problems of Non-business Property: Co-ops; Condominiums; Nonexotic Realty; Exotic Types of Real Property, Time shared Property; Domicile and Conflicts of Laws,* 35 Part 2 New York University Institute on Federal Taxation 1403, 1421-23 (1977); Outen, *Latter Day Time Sharing,* Law. Title News 5 (July-Aug. 1974).

7. For additional general discussions of the time-share estate concept, see 1 Part 2 P. Rohan & M. Reskin, *supra* note 2, §§ 17C.01-.03; Davis, *Time-Sharing Ownership: Possibilities & Pitfalls,* 5 Real Est. Rev. 49 (1975); Liebman, *Can Condominium Time-Sharing Work?,* 3 Real Est. Rev. 40 (1973).

8. Note, *New Ideas in the Vacation Home Market,* 48 St. John's L. Rev. 1203, 1216 (1974).

9. *See* 1 Part 2 P. Rohan & M. Reskin, *supra* note 2, § 17C.01.

10. Theoretically, time sharing ownership need not be confined to the condominium format. *See* Johnakin, *Legislation for Time Share Ownership Projects,* 10 Real Prop., Prob. & Tr. J. 606, 610 (1975) (stating that time share ownership could be made applicable to planned unit developments and traditional subdivisions as well as to condominiums).

11. The areas of a condominium complex available for use by all unit owners are called common areas or common elements, and include the land upon which the building is situated, lobbies, foundations and the like. A list of typical common areas and facilities may be found in 1 P. Rohan & M. Reskin, *supra* note 2, § 6.01[2]. Most states define the term common element within their condominium statutes. *See, e.g.,* RSMo § 448.010 (1978) which defines "common elements" as

complex through an annually-elected board of managers who are given authority to conduct the affairs of the association. An annual charge is assessed each unit owner to cover operational and managerial expenses.

The generic term "time sharing ownership" is used to describe the two distinct techniques which have been developed to permit fee simple ownership of vacation homes on a time share basis. Each technique involves a separate and distinct real property concept and thus is identified by a different name. An *interval estate* is defined by the Uniform Condominium Act as:

> A combination of (i) an estate for years in a unit, during the term of which title to a unit rotates among the time-share owners thereof, vesting in each of them in turn for periods established by a fixed recorded schedule, with the series thus established recurring regularly until the term expires, coupled with (ii) a vested undivided fee simple interest in the remainder in that unit, the magnitude of that interest having been established by the declaration or by the deed creating the interval estate.[12]

The second technique for conveying a time sharing estate, the *time span estate,* is defined as:

> A combination of (i) an undivided interest in a present estate in fee simple in a unit, the magnitude of that interest having been established by the declaration or by the deed conveying the time span estate, coupled with (ii) the exclusive right to possession and occupancy of that unit during a regularly recurring period designated by that deed or by a recorded document referred to therein.[13]

In both the interval estate and the time span estate a purchaser is also a tenant in common with all other purchasers of the common areas of the complex.

In essence the time span estate makes all unit owners tenants in common in fee simple absolute, with each tenant in common having title to the undivided interest specified in his deed. The undivided right to possession and use of the whole property in its entirety is the one unity among tenants in common. Therefore, to maintain the viability of time sharing ownership, the time span method necessitates that a separate agreement delineating each unit owner's specific period of occupancy be entered into by all co-tenant-purchasers.[14] Each co-tenant also waives his

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"all portions of the property except the unit." The statute goes on to define "unit" as "a part of the property including one or more rooms, occupying one or more floors or a part or parts thereof, designed and intended for any type of independent use, and having lawful access to a public way."

12. UNIFORM CONDOMINIUM ACT § 4-103, *reprinted in* 1A P. ROHAN & M. RESKIN, *supra* note 2, App. B-6.

13. *Id.*

14. *See* R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 633.2 (abr. ed. 1968) [hereinafter cited as R. POWELL].

right to seek partition.[15] The time span estate is freely alienable, either inter vivos by deed or by testamentary transfer.

The interval estate technique is conceptually more difficult than the time span method. Purchasers do not take title to each condominium unit as tenants in common; rather, the purchaser receives two separate and distinct vested interests in the unit. First, the interval estate owner acquires a defeasible fee in the form of an estate for years for the time period in each year during which he is entitled to occupancy. This defeasible fee will continue to vest in the owner for a period of years equal to the expected useful life of the building as a resort complex. For example, an interval estate owner may purchase a defeasible fee for the first two weeks in July for the next forty years. The owner's fee, being defeasible, is subject to a shifting executory interest[16] which passes the fee to the next owner upon commencement of a subsequent time period, such as the third week of July in the above example.

The second interest acquired by the owner of an interval estate is a vested remainder as a tenant in common with the other interval estate owners of the unit, upon the termination of the defeasible fee interest. This collective remainder interest was added to the defeasible fee arrangement in an attempt to eliminate any possible violation of the Rule Against Perpetuities.[17] At the remote date when the interval estate owners become tenants in common, they may, if they choose, repeat the cycle for another period of years. The interval estate differs from the time span estate in that the right of occupancy and title of ownership coincide; the interval owner is the sole owner of the unit during his period of occupancy. Also, the right of occupancy arises by reason of the ownership interest, and not by reason of some contract or lease as under the time span estate.[18]

The primary advantage of time sharing ownership is the low cost of the property interest purchased. A time-share estate owner also experiences the intangible satisfaction of owning a place of his own. He need not be concerned with making vacation reservations months ahead of time, nor is he subject to escalating motel costs. Additional advantages of owning a vacation time-share estate include interest and real estate tax deductions,

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15. *See* notes 41-66 and accompanying text *infra*.

16. A shifting executory interest is a real property interest which shifts title from one transferee to another. A fee simple subject to a shifting executory interest is an estate where, upon the happening of an event specified in the grant, the fee simple is automatically transferred to a third person, and not to the original grantor or his heirs. *See* 5 R. POWELL, *supra* note 14, ¶ 779[3], at 639.

17. Only future litigation will decide conclusively whether this does indeed avoid the perpetuities problem. The Rule Against Perpetuities provides that no interest in property subject to a condition precedent (*i.e.*, a condition which must be fulfilled prior to the interest passing to the grantee) is good unless the condition *must* be satisfied, if at all, within 21 years after a designated life in being at the creation of the property interest. When the Rule is violated, the conveyance is void. *See* Davis, *supra* note 7, at 51.

18. *See* Outen, *Interval Ownership—A Truly Unique Concept*, LAW. TITLE NEWS 2 (May-June 1973).

equity buildup, and the possibility of leveraged appreciation leading to a profit upon resale.[19]

For the developer, the advantage of time share estates results from the higher sales price he receives from each unit. In fact, the price markup of a unit sold as time share estates may be from 15 to 100% higher than the selling price of a comparable non-time sharing unit.[20]

All is not bliss, however, for time share owners and developers. Before time sharing ownership's full potential can be achieved, several significant legal uncertainties need to be resolved. These questions are presented below.

III. Legal Hurdles to Time Sharing Ownership

A. *Impact of Federal Tax Lien*

A problem unique to time-span estate ownership[21] is the possibility that a federal tax lien might force the sale of *all* co-ownership interests in the condominium unit to satisfy *one* co-tenant's tax liability. Such a tax foreclosure sale would cause the ousting of all co-tenants from their vacation home.[22] Interval ownership, in contrast, would permit the taxing authority to sell the delinquent taxpayer's interest but not the interests of all other time share owners in the unit.

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19. A potential disadvantage of the time share estate is that upon attempted resale real estate agents may be unwilling to list the time share. This is because of the huge number of time sharing periods offered in connection with a single complex and the relatively low selling price against which sales commissions would be taken. Another potential disadvantage exists for owners of off-season time shares. Generally, time share owners pay a pro rata share of the yearly utility bill for their unit. As a result, those owners with summer periods effectively subsidize winter users' heating bills. Moreover, off-season owners save little by not using the condominium during their period. They are liable for their pro rata share of utilities for the active in-season period, irrespective of their actual use.

20. *See* Ingleby, *Time Sharing: New Hope for the Second Home Industry?*, 5 Real Est. Rev. 96, 97 (1975). This profit is significantly offset, however, by the higher marketing and sales costs resulting from the need for many more sales. *See generally* Gray, *supra* note 5, at 1201 (total value of time-share ownership unit is 125 to 150% of market price for same unit if it were sold as a condominium).

21. This problem does not affect interval estate owners, because each is an owner in severalty only for his particular period of ownership and retains no ownership interest during any other part of the year. He therefore remains immune from a tax deficiency action brought against another co-owner.

22. There also arises the specter of a state tax lien attaching to the time share unit which may trigger a forfeiture sale for the non-payment of taxes by one or more of the time-share estate owners. A brief discussion of the problem of state tax liens is presented herein. Due to the individuality and uniqueness of each state's real property law, however, counsel is urged to examine the law of the particular state in interest to ascertain any statutory variations affecting the general discussion below. *See, e.g.*, RSMo §§ 137.075-.285 (1978) (assessment of real property and tax liens thereon). The problem is that state assessors are not required to separately assess each time share owner's interval, absent a legislative mandate to do so. Instead, a single assessment is made for the unit as a whole, with the owners then being jointly and severally liable as a group for payment of the tax assessment. Assessing the unit as a whole eliminates the need for an assessor to have to place a monetary valuation on each of the different time periods owned. Such valuation differences could be substantial. For example, a week in December

Section 6321 of the Internal Revenue Code imposes a general tax lien in favor of the United States for unpaid federal taxes.[23] The right of the government to enforce its lien on the property against all co-owners, by either joint or several liability, is an incident of co-tenancy ownership.[24] Once activated,[25] the lien attaches to "all property and rights to property, whether real or personal, belonging to . . . [the person] liable to pay any tax."[26]

Section 7403 of the Code authorizes the court enforcing the lien to sell any property in which the taxpayer has an interest.[27] There currently is some dispute whether this section authorizes the sale of the entire property held jointly with others or only the tax-delinquent tenant's interest.[28] The ramifications of the question are clear: if the government can sell the entire unit to satisfy a lien on one co-tenant's property, the potential for harming innocent co-owners is great. Furthermore, each co-tenant would be a necessary party to any action brought by the government.[29]

The Fifth Circuit's 1962 decision in *Folsum v. United States*[30] was the first to address the scope of section 7403 *vis-à-vis* jointly held property. In

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at a popular ski area may cost many times more than a week in May. Recent Colorado legislation, passed as a result of lobbying by the state's assessors, codifies the assessor's right to assess the unit as a whole. *See* COLO. REV. STAT. § 38-33-111(3) (Supp. 1978). This legislation portends serious trouble for time share owners seeking separate assessment of their individual time periods to avoid responsibility for another time share owner's taxes. Until such separate assessment is adopted, the possibility of a state tax lien affecting all time share owners in a given unit will remain.

23. I.R.C. § 6321 states: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person."

24. State condominium enabling acts frequently include provisions for tax liens on units and each co-owner's liability thereon. *See, e.g.,* FLA. STAT. ANN. § 718.120 (West Supp. 1979); MASS. ANN. LAWS ch. 183A, § 14 (Michie/Law. Co-op 1969); N.Y. REAL PROP. LAW §§ 339-y to -z (McKinney 1968); OR. REV. STAT. §§ 91.575-.580 (1969); VA. CODE § 55-79.42 (1977).

25. *See* W. PLUMB, FEDERAL TAX LIENS 10 (3d ed. 1972) (discussion of formalities which trigger a lien).

26. I.R.C. § 6321. Property held in the name of a straw party is not subject to a lien for taxes of the straw party, but is for taxes of the true owner. *Compare* United States v. Johnson, 200 F. Supp. 589 (D. Ariz. 1961) *with* United States v. Pittman, 449 F.2d 623 (7th Cir. 1971); United States v. Lewis, 272 F. Supp. 993 (N.D. Ill. 1967).

27. I.R.C. § 7403(a) authorizes the government to bring an action in federal district court "to enforce the [§ 6321] lien . . . or to subject any property, of whatever nature, of the delinquent, or in which he has any right, title, or interest, to the payment of such tax or liability."

28. *See* W. PLUMB, *supra* note 25, at 35; Davis, *Time-Sharing Ownership—Legal & Practical Problems,* 48 ST. JOHN'S L. REV. 1183, 1186 (1974); Roodhouse, *supra* note 5, at 46.

29. I.R.C. § 7403(b) states: "All persons having . . . or claiming any interest in the property involved in such action [to enforce the government's lien] shall be made parties thereto."

30. 306 F.2d 361 (5th Cir. 1962).

resolving the issue of whether the government could force a sale of property held jointly with the delinquent taxpayer, the court declared that while the United States could "obtain the last vestige of title and every right which such taxpayer owns . . . , [t]he law does not authorize . . . [it] to force a sale of the property of other joint owners, deny them the right to seek a partition in kind, and to tax them with the costs incurred by the Government in pursuing the delinquent taxpayer."[31] Unfortunately, this viewpoint was not to prevail for long.

Just two years later, the Seventh Circuit in *United States v. Trilling*[32] examined this same issue. In *Trilling*, the government sought to sell land owned jointly by husband and wife to satisfy a federal tax lien against the husband. The court, after considering the congressional intent behind section 7403, stated that "the express language of the statute negates any design or intent on the part of Congress to limit the reach of the statute to the 'interest' of the taxpayer as distinguished from the 'property' in which he has such 'interest.' "[33] The *Trilling* court, while recognizing that its holding would be contrary to the *Folsum* decision, nonetheless held that section 7403 does empower a court to order a sale of the entire property, including any co-ownership interest, and to charge such co-ownership interest with any of the fees, costs, or expenses incident to the sale.[34]

Subsequent to *Trilling*, a majority of circuits confronted with the issue have adhered to that court's analysis.[35] These courts hold that section 7403 authorizes the government to sell in its entirety any property in which the taxpayer has an interest in order to enforce its lien upon a delinquent taxpayer's property. Additionally, the *Folsum* minority position was undermined significantly by the Fifth Circuit case of *Broday v. United States*.[36] *Broday* held that despite a Texas statute exempting community property from antenuptial debts, a lien would attach to the wife's interest in a community checking account for a tax deficiency assessed against her prior to marriage.

The view adopted by a majority of the circuits allowing the sale of property in its entirety rather than just the delinquent taxpayer's interest may be influenced by the more moderate stance taken by the Tenth Circuit

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31. *Id.* at 367.
32. 328 F.2d 699 (7th Cir. 1964).
33. *Id.* at 703.
34. *Id.* at 702.
35. *See* United States v. Kocher, 468 F.2d 503 (2d Cir. 1972) (tenants in common); Washington v. United States, 402 F.2d 3 (4th Cir. 1968) (wife's inchoate dower interest); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970) (community property). *Contra*, Folsom v. United States, 306 F.2d 361 (5th Cir. 1962). *See also* United States v. Hershberger, 475 F.2d 677 (10th Cir. 1973) (relying on equitable considerations in holding that a wife's interest in a homestead should not be sold in its entirety).
36. 455 F.2d 1097 (5th Cir. 1972).

in *United States v. Eaves*.[37] The *Eaves* court held that while section 7403 authorizes the court to order a sale of jointly held property to satisfy an outstanding federal tax lien against one co-tenant, the statute does not compel the court to exercise this full measure of authority. Rather, the *Eaves* court declared, section 7403 confers broad discretion upon the courts in fashioning a remedy: "[W]e do not believe that section 7403 makes foreclosure an 'all or nothing' proposition."[38]

The allowance of equitable considerations as a factor in the application of section 7403 softens the potentially harsh impact of *Trilling* and its progeny upon time share owners. Furthermore, it may be possible to distinguish the time sharing situation because all cases involving sale of co-owned property to enforce a federal tax lien have involved a husband and wife rather than unrelated co-tenants who would typically be the owners of a condominium unit in a time sharing arrangement. Whether the presence of unrelated parties would influence the court is uncertain; if combined with the innocence of the co-tenants and hardships which would be imposed upon them by a sale of the property, a court sitting in equity might be persuaded to exercise discretion and authorize sale of only the delinquent taxpayer's interest in the unit rather than the entire unit. Indeed, as the market for time sharing units expands, the government probably will be able to realize more money by selling the delinquent owner's time-span property interest rather than the unit as a whole. Selling the entire unit rather than just the time span estate would obligate the government to divide sale proceeds proportionately with nonindebted co-owners.[39] After such division, the government's share could be less than the sale price of the time span estate sold separately.

The pragmatic answer to the federal tax lien problem is that while the potential effect of foreclosure resulting from a federal tax lien would be devastating, the likelihood of such a sale is small. Suits to foreclose pursuant to a federal tax lien are extremely rare.[40] Additionally, other assets of the delinquent taxpayer could be sold first to satisfy the lien, leaving the time span estate intact. Moreover, co-owners would be likely to purchase a deficient taxpayer's interest once trouble arose to prevent any possibility of foreclosure. The cost to each co-owner would be slight, and certainly less than the cost of hiring an attorney to represent the co-tenants in a foreclosure suit.

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37. 499 F.2d 869 (10th Cir. 1974).

38. *Id.* at 871. *See also* United States v. Boyd, 246 F.2d 477 (5th Cir. 1957) (court not compelled to use tax lien foreclosure remedy); United States v. Overman, 424 F.2d 1142 (9th Cir. 1970) (noting that Congress intended court to function with the full traditional flexibility of the chancellor); United States v. Hershberger, 475 F.2d 677 (10th Cir. 1973) (applying equitable considerations).

39. If a sale is decreed, the distribution of the proceeds are made "according to the findings of the court in respect to the interests of the parties and of the United States." I.R.C. § 7403(c).

40. *See* W. PLUMB, *supra* note 25, at 3.

B. *Threat of Partition*

An action for judicial partition[41] is perhaps the most apparent danger associated with the time sharing arrangement. A right to seek partition ostensibly arises whenever there is co-ownership with other unit owners of various parts of the development.[42] Under time span estate ownership, the threat of partition exists toward both the common elements and the individual condominium units. Partition of an individual unit is possible because all co-owners are tenants in common.

Under the interval estate arrangement the threat of an action for partition exists only as to the common elements of the vacation complex. This is because each owner obtains a defeasible fee for the period during which he is entitled to possession and does not hold the unit itself as a tenant in common. Prohibiting partition of the common elements is necessary because time sharing ownership of a unit would be untenable without free use of the common elements by the occupants.

The right of a co-tenant to bring an action for judicial partition is one of the fundamental common law rights attaching to any co-tenancy property interest.[43] Partition is favored by the courts on the ground that it not only promotes peace and enjoyment of property, but also facilitates transmission of titles and eliminates the inconvenience of joint holding.[44]

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41. Partition is defined as the division between two or more persons of lands, tenements, or hereditaments belonging to them as co-owners. BALLENTINE'S LAW DICTIONARY 918 (3d ed. 1979). In Missouri, partition is allowed by statute. *See* RSMo § 528.030 (1978). *See also* State *ex rel.* State Park Bd. v. Tate, 365 Mo. 1213, 295 S.W.2d 167 (En Banc 1956) (defining partition). Partition proceedings enable co-tenants of a real property interest to terminate the tenancy so as to vest in each former co-tenant a separate individual estate in specific property or an allotment of the lands. Partition achieves an absolute severance of the individual interests of each joint owner and, after partition, each has the right to use and enjoy his estate free of interference from former co-tenants. Whenever a joint estate cannot be physically divided—as would be the case with one condominium unit owned by many individuals—the decree will order the property sold and the proceeds divided among the co-tenants. *See* Comment, *Partition in Missouri,* 6 Mo. L. REV. 87 (1941).

42. RSMo § 528.030 (1978). The general rule in Missouri is that joint owners have an absolute right to partition absent an express or implied agreement not to partition. Stout v. Stout, 564 S.W.2d 89 (Mo. App., St. L. 1978) (declaring an agreement waiving the right to partition invalid as an unreasonable restraint on alienation if it contains no limitation upon time or express contingency which can terminate the agreement).

43. *See* R. POWELL, *supra* note 14, ¶¶ 609-14. Land must be held in co-tenancy before division by judicial partition will be granted. Without a co-tenancy relationship there can be no compulsory partition since the primary purpose of the partition statute was to remove the difficulties resulting from common possession. Several persons together may own an entire parcel of property without being co-tenants thereof and in such case they are not entitled to partition any more than if they were owners of separate pieces of property (for example, where an owner in fee simple absolute conveys the coal rights to one person, and sand and gravel rights to another). All parties to a partition action must have an undivided interest in the whole. *See* Comment, *supra* note 41, at 88.

44. *See* Flournoy v. Kirkman, 270 Mo. 1, 192 S.W. 462 (1917); Stout v. Stout, 564 S.W.2d 89 (Mo. App., St. L. 1978). *See also* Rubens, *Right of First Refusal &*

Legislation has been enacted in Missouri, for example, to permit compulsory partition when co-ownership becomes too burdensome.[45]

The key question in the time share context is whether the partition right may be effectively waived by contractual agreement. The general rule is that a valid waiver of partition rights can be effected.[46] The courts have cited estoppel[47] and waiver[48] as the two major grounds for upholding the enforceability of such agreements.

The important qualification to the general rule is that an agreement *never* to partition is not enforceable as an unreasonable restraint on alienation.[49] Similarly, an agreement which restricts the right to partition for an unreasonable length of time has been held unenforceable.[50] Where the agreement not to partition extends for a reasonable length of time, the courts, in accordance with the *Restatement of Property* position, have enforced it.[51]

In all time sharing documents currently in use, the grantee-purchaser

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Waiver of the Right of Judicial Partition, 14 HASTINGS L.J. 255, 261 (1963); Comment, *Partition in the Modern Context,* 1967 WIS. L. REV. 988.

45. *See* RSMo ch. 528 (1978). Section 528.010 provides in part:

> [A]ny person . . . may sue in equity . . . upon the ground that the life or other estate of immediate enjoyment is burdensome and unprofitable or that the cost of paying the taxes and assessments thereon and holding, maintaining, caring for and preserving the lands from waste, or injury, and deterioration, exceeds the reasonable value of the rents and profits thereof, and that a greater income can probably be had from proceeds of a sale thereof invested in bonds of the United States or of Missouri or some municipality or school district thereof or first lien mortagage loans upon lands situate in this state . . . .

46. *See* Petty v. Griffith, 352 Mo. 540, 165 S.W.2d 412 (1942); Mastin v. Ireland, 320 Mo. 617, 8 S.W.2d 900 (1928); Springer v. Bradley, 188 S.W. 175 (Mo. 1916); Mack v. Mack, 286 S.W.2d 385 (Mo. App., St. L. 1956); Annot., 37 A.L.R.3d 962, 968 (1971).

47. *See* Twin Lakes Reservior & Canal Co. v. Bond, 156 Colo. 433, 401 P.2d 586 (1965); Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957); Ortmann v. Kraemer, 190 Kan. 76, 378 P.2d 26 (1963); Odstroil v. McGlaun, 230 S.W.2d 353 (Tex. Civ. App. 1950). *See also* Annot., 37 A.L.R.3d 962, 971 (1971).

48. *See* Ortmann v. Kraemer, 190 Kan. 76, 378 P.2d 26 (1963); Carter v. Weowna Beach Community Corp., 71 Wash. 2d 498, 429 P.2d 201 (1967). *See also* Annot., 37 A.L.R.3d 962, 971 (1971).

49. *See* Vollmer v. Wheeler, 42 Cal. App. 1, 183 P. 264 (1919); Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957); Haeussler v. Missouri Iron Co., 110 Mo. 188, 19 S.W. 75 (1892); Stout v. Stout, 564 S.W.2d 89 (Mo. App., St. L. 1978) (expressly upholding this rule). *See generally* Annot., 37 A.L.R.3d 962, 979 (1971). Although traditionally an agreement not to partition has been viewed as a restraint on alienation, this logic breaks down in the context of time sharing estates. Under a time sharing plan an agreement not to partition actually enhances the saleability or "alienability" of each owner's interest. This is so because it removes the threat of impairment of one's interest through partition, which otherwise would limit the marketability of the time shares.

50. Stout v. Stout, 564 S.W.2d 89 (Mo. App., St. L. 1978); Mack v. Mack, 286 S.W.2d 385 (Mo. App., St. L. 1956).

51. *See* RESTATEMENT OF PROPERTY § 412 (1944). This section states, "A restraint on the power of a co-tenant to compel partition, created to last for a reasonable time only, is valid." *See* Annot., 37 A.L.R.3d 962, 978 (1971) and cases cited therein.

expressly covenants against partition.[52] Most of these documents limit the life of the partition agreement to fifty-five or sixty years, the anticipated life of the building.[53] The legality of this limitation remains uncertain.[54]

A statutory prohibition of judicial partition, similar to that drafted for condominium legislation, would be the optimal solution to the partition problem.[55] A statute making partition proscribable by express intention of the creator of the interests would be another viable alternative.[56] Without legislation of some kind there is simply no certain answer to the partition question.

To be effective, a partition agreement should be binding on all future co-owners. Privity of contract may not be relied upon because of the possibility of passage of title by noncontractual methods such as probate, an execution sale, or refusal by a subsequent grantee to so contract with

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52. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, § 17C.02[1], for illustrative time and interval ownership forms. Some courts also have held that an agreement not to partition will be implied where the purpose of the contract entered into would be defeated by partition. *See* Annot., 37 A.L.R.3d 962, 976 (1971).

53. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, § 17C.02[1].

54. Most courts have taken a liberal attitude toward the reasonableness of the duration of partition agreements in contexts other than time sharing. *See* Smith v. Brasseale, 213 Ala. 441, 105 So. 199 (1925) (reasonable time determined by purpose for which agreement made); Condrey v. Condrey, 92 So. 2d 423 (Fla. 1957) (lives in being, reasonable); Mastin v. Ireland, 320 Mo. 617, 8 S.W.2d 900 (1928) (upholding agreement not to partition until death of widow); Springer v. Bradley, 188 S.W. 175 (Mo. 1916) (upholding agreement not to partition while mortgage indebtedness remained on property); Mack v. Mack, 286 S.W.2d 385 (Mo. App., St. L. 1956) (until youngest child of parties is 18 years old or wife remarries, reasonable); Michalski v. Michalski, 50 N.J. Super. 454, 142 A.2d 645 (App. Div. 1958) (lives of parties, reasonable; parties were advanced in years); Buschmann v. McDermott, 154 A.D. 515, 139 N.Y.S. 314 (1913) (until first of three persons dies, reasonable); Ogilby v. Hickok, 144 A.D. 61, 128 N.Y.S. 860 (1911) (until last of heirs dies, reasonable). None of these cases, however, involved an agreement extending even half the duration of the standard time sharing partition agreement's 60-year provision.

The RESTATEMENT OF PROPERTY defines reasonableness according to the parameters of the Rule Against Perpetuities. Any agreement of longer than 21 years plus lives in being is *per se* unreasonable. *See* RESTATEMENT OF PROPERTY § 173, Comment c (1944). This rigid rule would make the 60-year restraint on the right to partition void *ab initio* because the Rule Against Perpetuities is violated if any conceivable set of circumstances could stretch the length of the agreement beyond the period allowed by the Rule.

55. *See, e.g.*, RSMo § 448.070 (1978) which provides:

> As long as the property is subject to the provisions of this chapter the common elements shall, except as provided in section 448.140, remain undivided, and no unit owner shall bring any action for partition or division of the common elements. Any covenant or agreement to the contrary shall be null and void. Nothing contained herein, however, shall prevent partition of a unit as between co-owners thereof, if such right of partition shall otherwise be available, but such partition shall not be in kind.

See generally Comment, *Missouri Condominium Property Act of 1963*, 29 Mo. L. REV. 238, 243 (1964) (examining the Rule Against Perpetuities and Missouri's 1963 Condominium Property Act).

56. A few states have chosen this option in their conventional condominium statutes. *See* R. POWELL, *supra* note 14, ¶ 290 n.98.

the other owners.[57] The method presently used to bind successors in title is recordation of the terms of the declaration of rights and duties prior to the first sale of a unit and reliance on the doctrine of equitable servitudes.[58] Because an agreement not to partition restricts the right of the unit owner to deal with his land, it is similar to an equitable servitude which usually prohibits certain physical uses of the land.[59] Both an equitable servitude and an agreement not to partition are essentially negative promises which are enforced to promote compatible and homogeneous land development.[60]

In order for a covenant not to partition to bind subsequent purchasers under the doctrine of equitable servitudes, the parties must intend that the covenant run[61] and there must be actual or constructive notice to all purchasers for value against whom the agreement is to be enforced.[62] There is little question that parties to a time sharing agreement intend the agreement to bind successors in interest. Constructive notice may be given future owners by the recording of the express promises[63] as contained in the declaration of conditions, covenants, and restrictions.[64] The deed must contain a provision making the recorded declaration applicable.

The threat of judicial partition in Missouri can be minimized with proper drafting of the documents establishing the time sharing arrangement. Missouri courts have upheld the validity of reasonable agreements not to partition, and have endorsed the general principle of binding successors of title to the partition agreement.[65] Therefore, it would seem that judicial partition can be effectively avoided by a written agreement of reasonable duration[66] which states the purpose for which the restraint is imposed, and is made binding on all subsequent successors in interest regardless of how title is acquired.

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57. *See* Roodhouse, *supra* note 5, at 40.

58. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, § 17C.01. An equitable servitude is a covenant running with the land which is enforceable only in equity. *See* 20 AM. JUR. 2d *Covenants* §§ 169, 173 (1977).

59. *See generally* Williams, *Restrictions on the Use of Land: Equitable Servitudes,* 28 TEX. L. REV. 194 (1949); Comment, *Equitable and Contractual Defenses to Partition,* 18 STAN. L. REV. 1428, 1436 (1966).

60. When all parties are bound to an agreement not to partition, both dominant and servient tenements arise between the overlapping estates of the joint owners in the entire property. Thus, each person's interest is both dominant and servient because its owner has promised not to partition and has received a like promise. *See* Comment, *supra* note 59, at 1436.

61. *See* Williams, *supra* note 59, at 227.

62. *Id.* at 198.

63. *See, e.g.,* RSMo §§ 59.010-.660 (1978) (pertaining to the recording of real property interests).

64. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, § 17C.02, for various examples of the documentation currently in use by time share developers.

65. *See* Mastin v. Ireland, 320 Mo. 617, 8 S.W.2d 900 (1928); Springer v. Bradley, 188 S.W. 175 (Mo. 1916). *But see* Flournoy v. Kirkman, 270 Mo. 1, 192 S.W. 462 (1917) (holding that absent clear expression of intent an agreement not to partition does not bind heirs).

66. *See* notes 49-54 and accompanying text *supra.*

C. *Tort Liability*

Shielding the time-share estate owner from tort liability is increasingly important in these days of escalating jury verdicts.[67] The three distinct areas of potential tort liability to be discussed are: (1) liability of time share owners for injury or damage from negligent upkeep or design of common areas; (2) with respect to the time span estate, liability of co-owners as tenants in common for injury or damage to a third party who is on the premises of the unit while another co-owner has the right to possession; and (3) liability of a time-share estate owner to his co-owners for damage he negligently causes to the unit while he is in possession.

1. Liability for Common Area Injury

All time-share estate resort condominiums are composed of basically two types of property:[68] individual units owned in fee simple absolute by the time-share estate owners; and common areas of the complex used and enjoyed by all residents and their guests.[69] The hallways and recreational facilities are typical common areas. Because the common areas are maintained by a condominium association in which all owners are members, association through the membership creates potential liability for a time-share estate owner for injuries and accidents occurring in the common area. The associational aspect of the time-share estate owner's liability is identical to that of the full unit owner in a conventional condominium.

Much has been written by legal scholars in the past decade addressing the question of common-area tort liability for the condominium owner,[70] ways to minimize the risk,[71] and prevention of imposition of liability on

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67. An extensive list of possible sources of tort liability in the condominium complex may be found in 1 P. ROHAN & M. RESKIN, *supra* note 2, § 10A.03[1].

68. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, §§ 17C.01-.03.

69. A time sharing regime also may have limited common areas such as a balcony or patio shared with more than one unit owner but not available for use by all residents.

70. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, §§ 10A.01-.06; Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987, 995 (1963); Kerr, *Condominium—Statutory Implementation*, 38 ST. JOHN'S L. REV. 1, 17 (1963); Lawrence, *Tort Liability of a Condominium Unit Owner*, 2 REAL EST. L.J. 789 (1974); Rohan & Reskin, *God, Man & the Condominium: Casualty Loss & Tort Liability*, 33 J. PROP. MAN. 32 and 75 (1968); Note, White v. Cox: *Tort Actions Against the Condominium Association—Implications for the Individual Owner*, 8 CAL. W.L. REV. 536 (1972); Note, *Condominium Unit Owner Has Standing to Sue Unincorporated Unit Owners' Association for Injuries Inflicted Because of the Association's Negligence*, 25 VAND. L. REV. 271 (1972); Annot., 45 A.L.R.3d 1171 (1972). *See also* Jackson, *Joint Torts and Several Liability*, 17 TEX. L. REV. 399 (1939); Prosser, *Joint Torts & Several Liability*, 25 CALIF. L. REV. 413 (1937).

71. *See* Jackson, *Why You Should Incorporate a Homeowner's Association*, 3 REAL EST. L.J. 311 (1975); Knight, *Incorporation of Condominium Common Areas? An Alternative*, 50 N.C.L. REV. 1 (1971); Note, *Condominium Casualty and Liability Insurance*, 48 ST. JOHN'S L. REV. 1112 (1974); Note, *Condominiums: Incorporation of the Common Element—A Proposal*, 23 VAND. L. REV. 321 (1970).

all owners of the condominium complex.[72] Although there are significant distinctions between the rights and liabilities of the time-share estate owner and the condominium owner in other contexts, the principles and authorities dealing with the subject of common-area tort liability of the conventional condominium owner are fully applicable to the time-share estate owner. In addition to being cognizant of this aspect of liability, the attorney also should know that such risks can be reduced by incorporation of the owner's association[73] and through comprehensive insurance coverage.[74] Still unanswered questions in this area include: standing of a unit owner to sue another owner in tort for an injury occurring in the common area; viability of actions by a unit owner against the condominium association; standing of household members and guests to commence a tort action; enforceability of declaration and bylaw provisions barring a unit owner's cause of action in negligence or exonerating management for all but willful wrongs; ability of a unit owner to satisfy a judgment obtained by him against the association of which he is a member; and applicability of the assumption of risk defense against an owner in the project.[75]

2. Liability of Co-Owners for Injury to Third Parties

Where a time span estate exists, a question could arise concerning the liability of all unit owners as tenants in common for an injury within a particular unit, not in the common area, as a result of the negligence of a co-owner in possession of that unit. This is not an issue in the interval estate framework because each interval estate owner has a defeasible fee in the unit during his period of possession, exclusive of all rights and liabilities of persons in whom title may vest later in the cycle. Thus, under the interval estate concept the negligence of one owner cannot be imputed to a subsequent owner.

A different question is presented by time-span estate ownership. Whether co-owners here can be liable for the negligent acts of another co-owner depends on whether, for liability purposes, a court would construe the time span estate to be a true tenancy in common or a new form of property interest which subjects all co-owners to joint liability. It is well

72. *See* R. POWELL, *supra* note 14, ¶ 633.25; Hyatt & Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owner Associations,* 12 WAKE FOREST L. REV. 915 (1976); Rohan, *Perfecting the Condominium as a Housing Tool: Innovations in Tort Liability and Insurance,* 32 LAW & CONTEMP. PROB. 305, 308-09 (1967); Comment, *Community Apartments: Condominium or Stock Cooperative?,* 50 CALIF. L. REV. 299, 312-14 (1962); Annot., 72 A.L.R.3d 314 (1976).

73. *See* articles cited note 70 *supra.*

74. Subsequent to the passage of condominium enabling legislation in all 50 states, insurance companies were quick to modify coverage to fit the condominium format. Such has not been the case with time sharing ownership. Because of the lack of specific statutory authorization in the time sharing area, there has been much uncertainty as to the potential risks of insuring such interests. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, §§ 10A.05[2], 11.01-.10.

75. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, §§ 10.01-.04.

established that tenants in common in possession of real property are jointly and severally liable for injuries arising by reason of a dangerous condition on the premises.[76] Where the injury is attributable solely to the independent act of a single co-tenant, the general rule is that he alone is liable.[77] While this view would protect time-share estate owners from negligent acts of other co-owners, a real threat exists that a court might find that the time span estate does not make purchasers tenants in common, but rather creates a different ownership interest altogether. Classification as a tenancy in common results in a concurrent interest in which there is a unity of possession by separate and distinct titles.[78] In other words, although each co-owner has separate title to some fraction of the property, all share in "one single right to possession"[79] which encompasses the entire property. Under the time span estate, however, there is a written agreement restricting this right to possession. The agreement is continuous and binding on successors in interest for the life of the time-sharing ownership interest. It is therefore arguable that because the right to unqualified possession is *never* present in a time span estate, the ownership interest involved is not one of tenancy in common at all, but an entirely new form of property ownership. This argument is strengthened by the fact that the time-span estate owner waives his right to partition during the life of the time share estate. This is in marked contrast to the usual tenancy in common in which judicial partition is an ultimate solution to an intolerable tenancy.

An indication of a court's willingness to treat the time span estate as a unique form of ownership can be gleaned from the landmark case of *White v. Cox.*[80] In *White,* the plaintiff (a condominium unit owner) sued the condominium association for personal injuries caused by a negligently placed water sprinkler in a common area. In an unprecedented decision, the California Court of Appeals recognized an unincorporated condominium association as a jural entity capable of being sued.[81] The holding in *White* illustrates that in dealing with condominiums and other new forms

76. *See* Bryant v. Welles, 65 Fla. 355, 61 So. 748 (1913); Low v. Mumford, 14 Johns. 426 (N.Y. 1817); 20 AM. JUR. 2d *Cotenancy and Joint Ownership* § 90 (1965).

77. Baker v. Fritts, 143 Ill. App. 465 (1908); Simpon v. Seavey, 8 Me. 138 (1831); Marsh v. Hand, 120 N.Y. 315, 24 N.E. 463 (1890). *See also* 20 AM. JUR. 2d *Covenants* § 90 (1965).

78. *See* Goforth v. Ellis, 300 S.W.2d 379, 383 (Mo. 1957); G. THOMPSON, MODERN LAW OF REAL PROPERTY § 1793 (1967).

79. *See* R. POWELL, *supra* note 14, ¶ 617.

80. 17 Cal. App. 3d 824, 95 Cal. Rptr. 259 (1971). For a discussion of the ramifications of *White,* see Note, *Condominiums—Member of Unincorporated Association of Condominium Owners Permitted to Bring Personal Injury Action Against Association for Negligent Maintenance of Common Areas,* 40 FORDHAM L. REV. 627 (1972); Note, *Condominium Unit Owner Has Standing to Sue Unincorporated Unit Owners' Association for Injuries Inflicted Because of the Association's Negligence,* 25 VAND. L. REV. 271 (1972).

81. 17 Cal. App. 3d at 831, 95 Cal. Rptr. at 263.

of real property ownership interests, courts need not be bound by outdated concepts developed in cases pertaining to other types of concurrent ownership.

3. Liability of Owner to His Co-Owners for Damage to Unit

An area of tort liability unique to time sharing ownership is the liability of a time share owner to his co-owners for unit damage caused by his negligent conduct. In the ordinary situation, expenses for the repair of a damaged unit would be assessed by the condominium association against the owner or owners of that unit. With multiple owners in the time sharing context, however, repairs necessitated by the negligent conduct of one time share owner should be paid for solely by that one owner and not assessed to all co-owners of the unit. The problem in determining whether "negligent" conduct has caused the damage arises when occupancy changes every two to six weeks.[82] An efficient, reliable, and rapid means of determining negligence is needed.

Contemporary judicial machinery is certainly too slow for resolving questions of negligent conduct within the time-sharing ownership framework. Moreover, resort to judicial processes would tend to blow the issue out of proportion to the harm done. Most time-sharing resort properties today authorize the managing agent to determine negligence.[83] This would appear to be the most efficient solution to the problem.

The system of abbreviated, administrative determination of negligence is not, however, without problems. In essence, an owner's consent to a determination of this type constitutes a waiver of the common law right to a jury trial on the issue. Such a system would be acceptable only in cases exclusively involving property damage and not personal injury. In addition, it is essential that the managing agent's cursory determination not possess evidentiary value in an ancillary tort action by one claiming injury as a result of the owner's conduct. Finally, the scope of determination of negligence should be limited to the sole issue of who is to pay for repair of the damaged unit. This is, after all, the only issue which is of importance to *all* co-owners.

IV. The Need for Legislation

A. *Examining the Problem*

While the problems previously discussed are the most commonly recognized legal impediments to full acceptance of the time sharing estate, a myriad of other problems combine to present a formidable challenge to time-share estate development. Included therein are questions concerning

82. It is not difficult to imagine a potential dispute over whether a rock was thrown through a window by vandals or the window was negligently broken from within by over-enthusiastic party-goers.

83. *See, e.g.*, 1 Part 2 P. Rohan & M. Reskin, *supra* note 2, § 17C.02[1].

title insurance of each owner's possessory share,[84] acquisition of financing to build units and finance each sale,[85] applicability of securities law to sales of time share interests,[86] and marketing strategy to obtain public acceptance of this new ownership concept. These questions point to the need for thorough time sharing legislation. Just as condominium development languished until the enactment of enabling legislation by the states in the early sixties,[87] it is doubtful that time sharing estates will achieve full stature until a statutory framework for resolving these uncertainties is enacted.

Legislation also is needed which would finally remove any question of whether a unit owner's covenant not to partition is an unreasonable restraint on alienation. Ideally, time sharing statutes, like their condominium statute counterparts, should provide that the Rule Against Perpetuities and the rule against restricting rights of alienation shall not be applied to defeat any provision of the time sharing act.[88]

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84. *See* Eagen, *Title Insurance for Condominiums,* 14 HASTINGS L.J. 210 (1963); Johnson, *Condominium Practice: A Second Look,* 51 N.D.L. REV. 761, 764 (1975).

85. The availability of capital for building time sharing developments and financing each unit is dependent upon many factors including the developer's contacts, the money market, and lender confidence in the time share concept. *See* Roodhouse, *supra* note 5, at 40.

86. An offering of interests in realty can constitute an offering of securities under federal law. The primary factor is whether there is a substantial expectation by an investor, relying on a vendor or third party, of an economic return on his investment. *See* SEC v. W.J. Howey Co., 328 U.S. 293 (1946). In 1973 the Innisfree Corporation requested an opinion from the SEC as to whether the proposed sale of time share estates would constitute security offerings. The SEC ruled that it would recommend no action against Innisfree for failure to register the sales under the Securities Act of 1933. Subsequently, however, the SEC has refused other developers' requests for no action letters and is refusing to issue an opinion on the question pending further study. [1974] FED. SEC. L. REP. DEC. (CCH) ¶ 79,935. Thus, the sale of time share estates may yet be classified as the sale of securities. *See* Byrne, *Securities Regulation of Time-Sharing Resort Condominiums,* 7 REAL EST. L.J. 3 (1978). *See generally* Clurman, *Condominiums as Securities: A Current Look,* 19 N.Y.L.F. 457 (1974); Note, *Federal Securities Regulation of Condominiums: A Purchaser's Perspective,* 62 GEO. L.J. 1403 (1974); Comment, *Looking Through Form to Substance: Are Montana Resort Condominiums "Securities"?,* 35 MONT. L. REV. 265 (1974); Note, *Securities: Another Way to Regulate the Resort Development Boom,* 27 OKLA. L. REV. 104 (1974); Note, *Shares of a State-Subsidized Non-Profit Cooperative Housing Corporation Are Securities Under Federal Securities Law,* 53 TEX. L. REV. 623 (1975).

87. For a complete listing of all condominium legislation passed by the 50 states, see 1A P. ROHAN & M. RESKIN, *supra* note 2, App. B-1.

88. *See, e.g.,* RSMo § 448.210 (1978) which provides: "It is expressly provided that the rule of property known as the rule against perpetuities and the rule of property known as the rule restricting unreasonable restraints on alienation shall not be applied to defeat any of the provisions of this chapter." *See also* Moller, *The Condominium Confronts the Rule Against Perpetuities,* 10 N.Y.L.F. 377 (1964); Comment, *Missouri Condominium Property Act of 1963,* 29 Mo. L. REV. 238, 243 (1964); Note, *The Ohio Condominium Act,* 33 U. CIN. L. REV. 463 (1964). If the threat of violating the Rule Against Perpetuities is removed, the interval estate would no longer need to include a vested remainder interest as a tenant in common after a certain number of years. At least one commentator would continue

There are other areas where legislation would be helpful. First, the extent of the individual unit owner's liability in the time sharing context is in need of greater clarification. Legislation would benefit not only owners, but others as well. For example, the prospective plaintiff now has a difficult time determining who is responsible for his injury, especially if it occurs in a common area. In addition, statutory guidance is needed to clarify the problem of judgment satisfaction, such as the liability of the developer and non-culpable time share owners for all or part of a tort judgment.[89]

The question of real estate tax allocation also must be a part of any effective time sharing legislation. Condominium statutes throughout the United States provide that each condominium unit constitutes a separate parcel of real estate for tax purposes.[90] Without such legislation directed at the time share situation, tax assessors are unlikely to submit fractionalized bills. Interval estate owners for tax purposes would be treated as individuals who own different estates or interests in the same property; tax authorities might be tempted to take the more convenient route of assessing each unit as a single entity, levying one tax on the unit rather than assessing each time share owner.[91] Similarly, time span owners, who as tenants in common generally are not entitled to separate assessment, should be so assessed.[92]

A particularly pressing need for legislation regarding time share ownership is to establish uniform terminology. Already there is considerable terminological confusion, which unneccessarily amplifies the possibility of litigation. Clear and succinct standardized definitions need to be developed for such terms as interval owner, time span owner, unit, time share estate, and time share owner. Standardization of terms could reduce confusion for the potential purchaser of a time share estate, who is already at a disadvantage in understanding the property concept underlying his ownership interest.[93]

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to insist on this remainder over as tenants in common to provide a convenient escape mechanism via judicial partition at the end of the property's economic life as a vacation facility. *See* Davis, *supra* note 7, at 54.

89. *See* Note, *Condominiums: Incorporation of the Common Element—A Proposal,* 23 VAND. L. REV. 321, 341 (1970).

90. *See, e.g.,* RSMo § 448.100 (1978) (all condominium units are to be separately assessed and individually taxed).

91. This would cause a situation similar to the federal tax lien problem discussed in notes 21-40 and accompanying text *supra, i.e.,* individual unit owners who paid their pro rata share would then be subjected to the risk of tax lien foreclosure, either federal or state, if any of their neighbors defaulted on the joint obligation.

92. This follows from the fundamental real property principle which defines a tenant in common as an owner in severalty of the whole who only shares possession of the property jointly with other co-tenants. *See* R. POWELL, *supra* note 14, ¶¶ 602-05.

93. *See* Johnakin, *supra* note 10, at 612 (nearly half of proposed legislation is definitional).

B. *Uniform Act Legislation*

A uniform time-sharing ownership act has yet to be drafted.[94] This step and eventual adoption by at least the more popular resort states is an obvious goal of nationwide developers who must now deal with the complexities of individual state laws. Realistically, widespread adoption of a uniform act is unlikely in the near future, given each state's unique interests and concerns, especially in light of the fact that no state has yet adopted the Uniform Condominium Act.[95] A more practical hope is that the states will enact locally-drafted legislation dealing with the problems of time sharing, although only federal legislation can cure the problem involving federal tax liens.

C. *Proposed Legislative Action*

State legislative action in the time sharing area has been negligible. Only the states of Colorado, Florida, and Utah have adopted legislation dealing with time sharing ownership.[96] Several states are, however, studying the problem,[97] although legislative enthusiasm appears to have subsided from the fervor of the early seventies.

As a temporary alternative to legislation, California has enacted pertinent state administrative regulations. These regulations require time share developers to submit plans and other information to state regulatory bodies. The emphasis is upon public disclosure so as to prevent consumer fraud in the sale of time share interests.[98] These regulations are a step in

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94. Tentative Draft No. 4 of the UNIFORM LAND TRANSACTIONS ACT (ULTA) mentioned time sharing only in Article 4-103 pertaining to public offering statements. The UNIFORM CONDOMINIUM ACT (UCA) and the sections from Article 4 pertaining to time sharing were removed from the ULTA for further consideration at the 1975 annual meeting of the National Conference of Commissioners on Uniform State Laws. The UCA, approved by the Conference in 1977, mentions time sharing ownership only with regard to disclosure requirements pursuant to a public offering. UCA, Commissioners' Prefatory Notes, 7 U.L.A. 97, 98 (1978).

A few commentators have drafted proposed legislation to stimulate thinking and legislative action in this area. None, however, has received widespread recognition or attention. *See* Johnakin, note 10 *supra;* Roodhouse, *supra* note 5, at 59.

95. It must be noted, however, that the Act was only proposed in 1977.

96. *See* COLO. REV. STAT. § 38-33-111 (Cum. Supp. 1978); FLA. STAT. ANN. §§ 718.103-.116 (West Supp. 1979); UTAH CODE ANN. §§ 57-8-3 to -8-36 (1977).

97. *See* 1 Part 2 P. ROHAN & M. RESKIN, *supra* note 2, § 17C.01. Hawaii, Maryland, and South Carolina currently have such proposals under consideration. In the 1974 legislative session, Hawaii passed a measure that would have recognized time sharing interests or intervals as real property interests. *See* S. 2197-74, Hawaii Leg. Sess. (1974) (enacted April 5, 1974, to amend § 513-2 (23) of the Horizontal Property Act). This proposal was incorporated into a larger condominium bill that ultimately was vetoed by the governor. A new time sharing bill was introduced in Hawaii by Jt. Res. 734 in 1975, authorizing the Real Estate Commission to review the proposed bill and report its findings and recommendations to the legislature. The Commission responded in February of 1979 via S.C.R. No. 78 with two tentative proposals yet to be adopted.

98. *See* 1 P. ROHAN & M. RESKIN, *supra* note 2, § 3.05(2); 1A P. ROHAN & M. RESKIN, *supra* note 2, App. B-2.

the right direction, but lack the comprehensiveness necessary to deal with the many problems associated with the time sharing concept.

V. Conclusion

This Comment has attempted to identify and analyze the major legal questions surrounding the time-share estate form of ownership and the need for legislative action in this area. It is unquestionable that the demand for second home ownership will continue to expand; time sharing ownership provides a practical, viable means of satisfying that demand. The novel time-share approach to resort property development can solve many of the difficult challenges faced by resort developers as land and construction costs spiral upward. Although many uncertainties still remain, it appears inevitable that time share estates will become a predominant vehicle for marketing resort and second home facilities within the next several decades.

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