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A Primer on Common Interest Communities and Interval Ownership: A Panacea or an Inevitable Trap?

Richard J. Hunter, Jr.

Professor of Legal Studies, Seton Hall University, South Orange, New Jersey.

hunterri@shu.edu

Abstract: This article is a primer on various forms of property ownership; specifically, condominiums, cooperatives, and time shares. The article will consider legal and financial aspects dealing with creation, financing, and project development. Issues relating to alienation of rights, ownership rights, duties of the board of directors, covenants and other restrictions, and potential tort liability will be discussed in a comparative manner. Special consideration will be given to the "interval ownership" form and difficulties inherent in this ownership form when the underlying property owner runs into financial difficulty—possibly even filing bankruptcy—and questions relating to cancellation of time share contracts.

Keywords: Condominiums; Cooperatives; Interval Ownership; Alienation; Time Shares; Fee Simple; Covenants

Introduction

Consider this scenario. Gert, Helen, and Irene are sisters. Gert and Irene have never been married and live independently, but in their deceased parents' home in Bayonne, New Jersey. Helen lives in a small one-bedroom apartment in Harrison, New Jersey, very near to her Parish Church in a neighborhood that has greatly changed over the past twenty or so years. Gert and Irene are contemplating moving out of their family home which has appreciated considerably in value and are looking for alternative opportunities. Gert is interested in purchasing a two bedroom condominium in the St. Petersburg, Florida area. Helen has heard about a co-op building on Long Island where she could be near her daughter and her family. Irene will probably move in with one of her sisters, but insists that the three also purchase together a timeshare somewhere in the Caribbean where "all three can get together once a year at the New Year for at least two weeks." She has heard that Aruba is nice and, as a plus, they have gambling there.

Your job, as a professional real estate broker and attorney, is to explain the basic elements—and the plusses and minuses—of each of these forms of property ownership so that your clients can make an informed—and right—decision. One more complication: you had better do a very good job as these three ladies are all your Aunts on your mother's side!

Literature Review

The article surveys the substantial contributions of Dukeminier (1992) relating to property law in the United States, Van Der Merwe (2015) on European Community law for comparative purposes, various state and international statutes and regulations relating to condominiums, cooperatives, and time shares, and important seminal court cases dealing with legal issues in these ownership forms in the United States. The article sources professional publications compiled by the Community Associations Institute (2018) and the Timeshare Consumer Association (2014) in order to draw contrasts between these forms of ownership as well.

The Condominium Form

The condominium form of ownership has been widely used in many parts of the world. It is often referred to as a "common interest community" (Odinet & Roussel, 2016). As described by Boyack (2014), "A Common Interest

Community is defined by the Restatement (Third) of Property (2007) as a development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal (1) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or (2) to pay dues or assessments to an association that enforces other servitudes burdening the property in the development of the neighborhood."

Odinet and Roussel (2016) continue: "The common interest community framework is seen in almost all legal forms of real estate-related projects and ranges from condominium complexes, housing developments, vacation timeshares, and numerous mixed-use projects" (Odinet & Roussel, 2016). The common interest community also includes planned unit developments or PUDs (Horn, 2014; David, 2015). Surprisingly, the condominium form was not widely known in the United States until the early 1960s (Dukminier, 1992; Moriarty, 2012; Van Der Merwe, 2015). In legal form, a condominium involves individual ownership of individual units organized with a variety of "common areas" for which unit owners enjoy mutual, non-exclusive rights and obligations. Condominium associations are organized under the statutory authority of individual states and all condominium developments are required to conform to the state statute. The most common condominium usually consists of individual apartments or residential units, but may also include commercial units, office suites, stores, separate houses, cabanas, or townhouses.

There are a number of Uniform Community Association Acts that have been adopted by the states (Community Associations Institute, 2018; Nerney, 2017):

- The *Uniform Common Interest Ownership Act* (UCIOA), a basic statute enacted in 1982, for "creating, managing, and terminating condominium, planned community, and real estate cooperatives, has been adopted by six states: Alaska, Colorado, Connecticut, Minnesota, Nevada, and West Virginia. Connecticut and Vermont enacted the 1994 version of the UCIOA. Later, Connecticut, Delaware, and Vermont enacted the 2008 version (see also Rosenberry and Sproul, 1998).
- In 1977, Congress enacted the *Uniform Condominium Act* (UCA) to serve as a guide for individual states in creating their own statutory framework. A condominium may consist in the creation of a new condominium project or in a "condominium conversion" of an existing property (often of prior rental units). Fourteen states have enacted the UCA, which contains "comprehensive provisions for creation, management, and termination of condominium associations, including point-of-sale consumer protections": Alabama, Kentucky, Minnesota, Nebraska, Pennsylvania, Texas, Washington, Arizona, Maine, Missouri, New Mexico, Rhode Island, Virginia, and West Virginia.
- Pennsylvania is the only state to have enacted the *Uniform Planned Community Act* (UPCA) (as amended, April 20, 2016 (see also DiAmico, 2016).
- The *Uniform Real Estate Cooperative Act* is a "companion act to the Uniform Condominium Act and the Uniform Planned Community Act…. The Model Act provides comprehensive legislation governing the critical phases of cooperative development: creation, financing, management, and termination" (Community Association Institute, 2018).

A condominium consists of individual units, common areas, and areas termed as "limited common areas" (Cohen, 2012). The *Uniform Common Interest Ownership Act* (CIOA) (effective January 1, 1984), enacted in Connecticut, defines a limited common interest as "a portion of the common elements allocated … for the exclusive use of one or more but fewer than all of the units." As such, limited common areas are elements of condominium living units that are assigned to specific tenants, but are still considered to be property of the condominium association. Limited common elements typically include front doors, balconies, decks, sky lights, or windows. Limited common areas frequently extend to parking places and boat slips. A limited common element is normally defined in the condominium documentation and/or in the deed of an individual condominium.

An important feature of a limited common element is that it is normally maintained by the owners association and paid for from the dues or condominium fees paid by each member (Investopedia, 2018). However, "the declaration can also require that the maintenance expense for a limited common element be allocated solely to the unit owner or units to which it is assigned. In such case, although the association would arrange for the repairs in the first instance, the benefitted owners would then have to reimburse the association for that expense through special assessments" (Cohen, 2012; see also Kass, 2005).

Essential Features (Generally, Kass, 2005)

There are three aspects condominium ownership: individual ownership of a unit; common areas; and financing.

- Unit Ownership

Each individual condominium unit is normally owned in fee simple or fee simple absolute. A fee simple absolute is absolute ownership of potentially indefinite duration (in Anglo-American law, termed a "fee") and where no limitations on its inheritability exist (termed "simple") (see Wyman, 2017). A fee simple cannot be divested and will not end upon the happening of any event or condition (termed "absolute"). Under the common law, words to the effect "*To A and his heirs*" created a fee simple. In traditional terms, a fee simple was characterized by the following rights: *inheritability, alienability, and divisibility*. With the exception of divisibility, condominium ownership involves inheritability and alienability.

The boundaries, sometimes known as the "extent of ownership," are defined as the interior surfaces of the perimeter walls, floors, and ceilings. In many cases, an individual unit may include a space restricted to the use of the unit owner such as a parking space, a storage room, a balcony, deck, or patio. In waterfront or beachfront areas, the space may take the form of a cabana or changing room.

In some cases, a condominium will be held under a leasehold or under the terms of a possessory estate. A possessory interest less than a fee simple absolute may include a leasehold of a determinable period (a common term is 99 years), or a life estate, at the end of which the title will revert to the original landowner.

- Common Areas

The entire condominium, with the exception of the individual units, is termed "the common areas." Common areas include walls, staircases, elevators, swimming pools, recreation areas, gyms, etc. The common areas are owned by the owners of the individual units as tenants in common.

A tenancy in common is a form of *concurrent ownership* wherein each co-tenant (owner of the condominium unit) is the owner of a separate and distinct share of the property, which has not been divided among the co-tenants. Each condominium owner has a separate undivided interest in the whole. Each co-tenant has the right to possess and enjoy the entire property so long as the tenant complies with requirements of membership in the association (i.e., pays the monthly assessment or condominium fee). Unlike an ordinary tenancy in common, a condominium tenant has no right to partition the common areas as long as the project remains in tact. In addition, in a condominium each individual unit owner possesses a nonexclusive easement for entrance and exit (ingress and egress) and for support through the common areas that is appurtenant to each unit.

- Financing

Each condominium unit owner normally finances the purchase of the unit independently of the other owners in the project either through a cash purchase or by procuring a separate mortgage on the unit (generally, Fegan, 1974; Holliday, 2005). The failure of a unit order to make the required payments on the mortgage will permit the mortgagee to foreclose on that unit. However, there is also an interdependency of the unit owners with each other in relation to the monthly charges for the upkeep of the common areas. Failure to make these required payments may result in a "loss of privileges" for the delinquent unit owner and the imposition of a lien against the property in some cases. In this context, several states had enacted statutes that provided mortgagees with *lien priority* over the collection of management assessments. Sterk (2016) argues that these statutes "threatened association ability to provide services, and imposed a disproportionate burden on non-defaulting unit owners." Sterk (2016) further argues that even "super priority" liens (generally encompassing six months of unpaid assessments) still left great uncertainty in light of foreclosure delays. Thus, associations' liens should enjoy complete priority over mortgage so that banks would be prohibited from 'free riding' on maintenance expenditures made by non-defaulting unit owners" (Sterk, 2016).

The Legal Process: Creation of the Condominium

A condominium (project) is normally created by a declaration or a master deed stating that the owner is creating a condominium to be governed by the provisions of the respective state condominium act. Condominium developers owe a fiduciary duty to prospective buyers when they develop a condominium for residential use (Levin, 2011). As noted by Odinet and Roussel (2016), the foundational document of the common interest community is the "declaration of covenants, conditions, and restrictions"—a document that "sets forth the basic framework of the community, imposes a number of deed restrictions, easements, and servitudes, and establishes a governing association of owners geared toward handling the day-to-day operations of the community." In most states, the declaration will be recorded in the office of the county recorder. The declaration may contain details of the organization of the condominium. In other cases, the details of the organization of the condominium will be found in separate bylaws provided to the individual unit owners at the time of purchase (closing) of the individual unit. There are three major issues which are addressed in the condominium bylaws or which may be found in the master deed:

- Membership Association: All unit owners become members of the condominium association, which is governed by an elected board of directors.

As Sherman (2018) has stated:

"A condo association's board of directors is a government in miniature. The board members are elected by the condo owners to run the association and manage condominium property, which the board may do directly or by hiring a manager. Condo owners rely on the board to resolve community problems ranging from building damage to unruly residents."

"The first priority for a condo board of directors is to carry out its duties in accordance with state law and the governing documents of the condo association, the Condo Lawyers website states. The directors are also responsible for enforcing the covenants—the rules for residents—and doing so uniformly and fairly, including obeying the same rules themselves. That responsibility requires the directors to review complaints, decide if the covenants have been violated, and impose fines on owners who have broken the rules. If it becomes necessary to change or revise the rules, that's also the board's responsibility. Beyond the requirements specifically written into the law and the governing documents, directors are obligated to act in their official capacity in the best interests of the association."

Weiss (2016) points out that under Tennessee law, which is fairly representative, "volunteer board members of a homeowner or condominium association must discharge their duties in good faith, with the care an ordinary prudent person in a like situation would exercise under similar circumstances, and in a manner that the director reasonably believes to be in the best interest of the association."

- However, until all units are sold, a number of cases have held that that the condominium developer may keep control of the association and management of the condominium (*Barclay v. DeVeau*, 1981).

The elected board can itself manage the condominium or, as is the normal case, the association will secure the services of a professional manager or a professional management company to perform the management function. Issues relating to the contract of the management company or manager are often vexing, most especially in the case where a disagreement arises or the board is seeking to hire a new manager (see *Point East Management Corp. v. Point One East Condominium Corp.*, 1973).

- Fractional Ownership: Each unit owner owns a fractional share of the whole project (sometimes determined by the size of the individual units, e.g. one bedroom, two bedrooms, size of the office suite, etc.). The *owner's fraction* will determine each unit's share of the common expenses and the unit owner's interest in the whole project. The owner's fraction will also be used by local authorities to assess the unit owner's property tax. Property taxes may be billed separately or may be included in the unit owner's monthly fee.

Governing documents include the Condominium Declaration, By-Laws, and Condominium Rules as a "part of the hierarchy of internal governing documents" (Duquette, 2015). Specifically, the membership association is empowered to enact rules to govern the operation and the use of the common areas and the conduct of individual unit owners in order to prevent unreasonable interference with the rights of other unit owners. These rules may appear as the condominium bylaws or as the rules of the association. According to Legal Beagle (2018), areas to be covered in the Condominium Bylaws may include:

- "Animals: Are pets allowed? If so, all pets? Only cats? Dogs under 30 pounds? Snakes?
- Antennas and satellite dishes—are they allowed? Where can they be placed? Is approval needed before buying and installing them?
- Dues—How much are they? What do they cover? When are they due? Is there a late fee?
- Noise—Are there hours for quiet time? What are they? How can homeowners complain?
- Renters—Can homeowners rent out their unit?
- Trash—What are the rules for trash and recycling?
- Windows—What colors of window frames are acceptable on replacement windows? Is permission needed to buy new windows?"

Glassman and Vanitzian (2012) state that if an association has adopted new bylaws without the vote of the owners, "the board would be liable for unlawful acts and the attorneys may be subject to discipline for counseling illegal actions by the board."

Duquette (2015) makes several important points concerning amending the condominium declaration in Canada which may be relevant to carrying out a similar task in the United States. "The first way to amend a declaration is with the support of the owners—normally with a positive vote of at least 80% to 90%"—depending on "what is being changed in the declaration" (Section 107 of the Canadian Condominium Act, 1998). The second way to amend a declaration is through a court order. This vehicle would only be available if a judge determines that an error or an inconsistency exists in the declaration (Section 109 of the Canadian Condominium Act, 1998; see also Kass, 2005).

Conflicts often arise concerning rules relating to conduct of unit owners (or of their guests or lessees). Courts will normally apply the standard of "reasonableness" in determining the validity of any such rules (*Chateau Village North Condominium v. Jordan*, 1982). Examples of such rules include those relating to use by children, pets, use of alcohol in common areas, noise, landscaping, or other matters "deemed to be in the interest of unit owners."

Each purchaser of an individual unite will be given a deed which will transfer ownership to the unit purchaser. The deed will be recorded according to the law of the state where the project is found under the statute applicable to the recoding of deeds. To be entitled to protection by recording, the purchaser must satisfy three requirements:

(1) the person must be the purchaser; (2) who takes without notice of any prior instrument or deed; and (3) who gives valuable consideration.

Issues Relating to the Administration of the Common Areas

The statute under which a condominium was set up or the condominium declaration itself provides that individual unit owners are liable for their pro rata shares of the common expenses. These provisions are generally known as *covenants,* In order to be enforceable (applicable) against any subsequent purchaser, the covenant must "run with the land" in law or equity (Pearson, 2017). Since the issue is determining whether an expense (considered as a "burden") will be enforced against a subsequent purchaser, certain requirements must be met:

(1) Intent: The parties must intend that successors to the original promisor be bound by the covenant. This intention is usually found in language such as the promisor's "heirs and assigns" or explicit language such as "These covenants shall run with the land."

(2) Privity of estate: Most courts require *privity of estate or a legal relationship* between the original promisor and promisee (termed horizontal privity) and between the promisor and his or her assignee (termed vertical privity).

(3) Touch or Concern: The covenant must "touch and concern" or specifically relate to the burdened land—the condominium itself—in the physical use or enjoyment of the condominium whether the covenant enhances the value of the property.

(4) Notice: A subsequent purchaser of the promisor's land is not bound by a burden unless that purchaser has received notice of the covenant before purchase.

On the other side of the equation, in order for a benefit (i.e., a feature of the condominium such as a pool, docking area, etc.) to apply to or inure to the benefit a subsequent purchaser, the requirements are:

(1) Intent;

(2) Privity of estate; and

(3) The benefit the land must "touch or concern" the condominium (Pearson, 2017).

In normal terms, few disputes arise in connection with the benefit; most disputes deal with the legal significance of a burden. The failure to pay any required assessment for common expenses may result in the imposition of a lien on the individual unit to enforce collection. As such, this lien may be foreclosed on by the management of the condominium in the same manner as a mortgage on real property.

Because improvements and renovations to the condominium may be required, these eventualities should be addressed in the condominium declaration or bylaws. Included in any determination should be the nature of any required vote (majority, two-thirds) that would be required in order to authorize any improvements or renovations to the condominium project.

Tort Liability

An individual unit owner would bear potential responsibility (liability) for any tort or civil wrong committed within his or her unit. In addition, in many states, unit owners may be subject to joint liability for any injuries occurring in the common areas which are owned as joint tenants. [The state of New York state provided a contrary perspective in *Pekelnaya v. Allyn* (2005), where a New York Appellate Court determined that unit owners are *not* personally liable for injuries caused by a defective condition in a building's common elements, absent proof that unit owners exercised control over the allegedly defective common element (Siegler and Talel, 2006)]. Issues relating to tort liability might include failure to maintain common areas such as hallways, elevators, and boilers; failure to adequately supervise pools, playgrounds, or recreations areas (especially where children may be in close proximity); and violation of any applicable housing codes (see *Dutcher v. Owens*, 1983). The liability of the unit owner for torts committed in common areas in a case of the imposition of liability on individual unit owners would be limited to the *pro rata* share of ownership and not on the basis of several liability. The owners' association may *also* bear liability for such injuries because it has assumed "management and control" over the common areas. It is incumbent on each unit owner to assure that the association is adequately insured against potential liability in order cover the personal liability of the individual unit owners.

Restrictions on Transfer and Alienation

In some condominiums, the by-laws or declaration may attempt to prohibit the transfer of an individual unit without the consent of the association or may require a fee to do so. However, any such restrictions may be in conflict with the principle of fee simple ownership. Romano (2005) writes: "The rule against unreasonable restraints invalidates unduly restrictive controls on transfers of property." As previously discussed, the unit owner owns a fee simple. Ordinarily, direct restraints on transfer of a fee simple would be void. Would a similar result obtain in the case of a condominium? In fact, courts have been mores supportive in upholding certain restriction in the case of a condominium, or even in extreme cases, expulsion from the condominium for anti-social behavior (Harris, 2017), provided that the restraint has been agreed to by the parties and is found to be reasonable.

Whenever condominiums are subject to state regulation, the regulatory agent may determine what is a reasonable restriction on transfer. A California statute provides that the Real Estate Commission will approve only "uniform and objective standards and qualifications for the sale or lease." Should the unit owner be unable to find a purchaser who meets these standards, he or she can be required to give the association an option to purchase which must be exercised within 15 days or the sale will be approved (Cal. Admin. Code Tit. 10, Chapter 6, Article 12, Section 2792.10). The same regulation applied to cooperatives as well.

Federal law may also be relevant. The *Fair Housing Act* (42 U.S.C. Section 3604, 1968) prohibits discrimination in the sale or rental of housing on grounds of race, color, religion, sex, or national origin (Massey, 2015; Casey, 2017). The *Civil Rights Act of 1866* (42 U.S.C. Section 1982) bars all racial discrimination in the sale or rental of property. "In *Jones v. Alfred Mayer Co.* (2008), the United States Supreme Court held for the first time that Congress can use its enforcement power under the Thirteenth Amendment, which abolished slavery, to prohibit private racial discrimination in the sale of property" (Miller, 2008; generally, Greene, 2012). If it can be shown that the condominium association is using restrictions on transfer with an illegal intent, the association can be enjoined from doing so, and can also be liable for damages (*Robinson v. 12 Lofts Realty, Inc.*, 1979).

If the association refuses to approve a transfer for reasons that might interfere with a constitutional right such as the right to marry or the right of freedom of association, it may be argued that the action is unconstitutional state action for a court to enforce the restriction. *Shelley v. Kraemer* (1948) applies to judicial enforcement of racially restrictive covenants found in deeds (Rose, 2013).

Finally, to maintain the stock of affordable rental housing (Kuruvila, 2004), many cities have enacted ordinances prohibiting or regulating the conversion of rental apartments to condominium (Michigan Law Review (Note), 1979; Hsu, 1985). In some cases, ordinances have prohibited the eviction of any tenant who chooses not to buy a condominium in that convened property. These ordinances have been upheld as a valid exercise of the police power of the state (see *Grace v. Town of Brookline*, 1979).

Cooperatives

Cooperatives are generally apartments (e.g., Autry & Hall, 2009). As noted by Sazama (2000), "the affordable cooperative movement has evolved from ethnic and union groups which developed self-help cooperatives in the 1920s, through the federal funding of low income cooperatives in the 1960s and 1970s" (see also Carter, 2015). In a cooperative (co-op), a corporation holds title to the apartment building. Shares of stock are sold to the individuals who will physically occupy the apartment (Smith, 2017). The amount of stock required to live in the building will depend on the value of the apartment based on such factors as size or location of the individual. In order to purchase shares in the co-op, each buyer takes out a "share loan" instead of a conventional mortgage. "The share pays the cost of buying into the partnership. It has nothing to do with the underlying mortgage on the property itself" (Smith, 2017). In addition to owning stock in the corporation, an occupant will receive a lease from the corporation for their individual apartment. The lease may be for a long term (such as 99 years) or for a short, renewable term. As a result, the residents in a cooperative are both tenants (under leases wit the cooperative corporation) and owners of the cooperative corporation (by virtue of their stock ownership interest).

Cooperatives enjoy several advantages over a more traditional landlord-tenant relationship. These include:

- Tenant control: Tenants who own the cooperative control the physical building. They set their own standards of maintenance and establish rules of conduct for residents. As Smith (2017) notes: "New buyers may be required to have a specific net worth or a certain debt-to-income ratio in addition to demonstrating the ability to meet the financial obligations of the co-op purchase."
- Should the value of the land and building appreciate, any capita gains will go to the owner-tenants in the form of a rise in value of the stock. When the owner-tenant sells his or her stock and moves out, the owner-tenant realizes this gain. However, the risk of loss is also placed on the owner-tenant in the event that the cooperative should decline in value.
- Property taxes and mortgage interest assessed against the unit owners are deductible on federal (and perhaps state) income tax returns, subject to the recent limitations of the 2017 Tax Reform. In ordinary leases, costs of operation are paid by the landlord and are ordinary covered by the tenant's rent—not normally deductible by the residential tenant. [In New Jersey, for example, a tenant may claim 18% of the rent paid as a residential credit on his or her New Jersey state income.]

What are the Basic Characteristics of a Cooperative?

The tenant-shareholders elect a board of directors which operate the building. Rents may be increased or decreased depending on the operational costs of the cooperative. The cooperative project consists of both the land and buildings. It will be subject to a *blanket mortgage*. An individual tenant is not personally liable on the blanket mortgage. However, there is a real and substantial risk to the members of the cooperative if there are rent defaults. This mortgage has priority over the leases of the individual occupancy leases. In the event of a foreclosure, the lender (mortgagee) will have the power to wipe-out each tenant's interest. In a cooperative, each lease will find a paragraph that will contain a provision "subordinating" the tenant's individual interest to the blanket mortgage. In this case, the individual tenants would be required to provide funds necessary to correct the deficiency if other tenants fail to pay the rent.

The board of directors, elected under the terms of Articles of Incorporation or by-laws of the corporation, is empowered to raise money for any needed capital improvements by raising the mortgage on the cooperative property. The lease will usually provide that repairs within each apartment are the responsibility of the individual tenants. Taxes and repairs to the exterior of the building and common areas are the responsibility of the cooperative association. If rent payments are insufficient, the corporation will raise the rent so that each tenant will pay their proportionate share based on the percentage of their ownership.

Tort Liability

In a cooperative association, the association owns the entire building and, as a result, an injured party will sue the cooperative corporation for any injuries in the common areas. The liability of the owner-tenant is limited to the value of his or her stock in the corporation. In a condominium, on the other hand, the association does not own the building itself, and individual owners are subject to liability for injuries in the common areas.

Restrictions on Transfer and Alienation

As Smith (2017) notes, in both the United States and Canada, the most popular types of co-op transfer option include:

- Market Rate Co-Ops, which allow partners to buy and sell shares at whatever rate the market will bear;
- Limited Equity Co-Ops, which set restrictions on the price at which shares may be bought and sold; and
- Leasing Co-Ops, where the co-op corporation leases the building rather than owning it and builds no equity.

Both the lease and the stock (ownership) interest of each tenant are subject to restrictions on transfer so that any new tenant will be "compatible" and financially responsible because the cooperative members are in a joint financial venture.

In general, restraints on the sale of a cooperative apartment are valid (*Penthouse Properties, Inv. v. 1158 Fifth Ave*, 1939). However, there is a decided split among courts whether the cooperative can arbitrarily withhold consent to transfer. New York courts have held that it may (see *Weisner v. 791 Park Ave. Corp*., 1959). However, most courts would apply a *reasonableness* test to restrictions on transfer of a cooperative apartment, holding that any restrictions must relate to the issues of financial responsibility and social compatibility. In these cases, the application of the restriction to a particular buyer is reviewable by a court (*Mowatt v. 1540 Lake Shore Drive*, 1967). Tekle (2010) argues that unlike other restrictive covenants, where "courts use common law property rules to strike down "who" covenants, such as those based on race, age, disability…," the use of restrictive covenants may be in the "next wave" of sex offender legislation.

Instead of possessing a right to effectively veto any transfer (either under an absolute of modified standard), the cooperative corporation may retain a preemptive option, termed a *right of first refusal, if any member wish to sell his or her stock and lease* (see *Gale v. York Center Community Corporation*, 1961; *Anderson v. 50 East 72nd Condominium*, 1986; Allen et al., 2017). In recent years, cooperative and condominium boards have begun to assess what is called a "flip tax"—either a flat fee or a percentage of the seller's profit or sales price, or a combination of these approaches—in order to provide a "convenient alternative to imposing assessments or borrowing for necessary repairs and improvements" (Romano, 2005; Coppolo, 2008). Interestingly, responding to a case that had invalidated these assessments (*Micheve, LLC v. Wyndham Place*, 2006), the state of New Jersey amended its condominium law in 2007 (N.J. Stat. Section 46:8B-15). Under this amendment, if a master deed or bylaws authorize it, the association may levy and collect a capital contribution, membership fee, or other charge upon the *initial sale or subsequent resale* of a unit (Coppolo, 2008). In New Jersey, the collection of these fees must be earmarked for maintenance or improvement of common elements to defray common expenses. The New Jersey statute provides that the charge "may not exceed nine times the amount of the most recent monthly common expense assessment for that unit" (Coppola, 2008).

Restrictions relating to restrictions on statutory and constitutional rights raised earlier in the discussion of condominiums are equally applicable to cooperatives.

As is the case in any common leasing arrangement, the lease of the cooperative tenant may be terminated if the tenant fails to pay his or her assessed share of the common expenses or violates the rules of conduct that have been established by the cooperative (*Green v. Greenbelt Homes, Inc.*, 1963). However, the rules of conduct may be unenforceable if they are deemed arbitrary or unreasonable (*Justice Court Mutual Housing Cooperative v. Sandow*, 1966). In this case, the termination of a lease of a pianist on the basis of rules prohibiting the playing of musical instruments after 8 PM and by any person more than an hour and one half per day were held to be unreasonable and unenforceable. As a result, the termination of the lease of the pianist was not upheld.

Timeshares or "Interval Ownership"

An interesting hybrid which illustrates elements of both condominium and cooperative ownership is the "time share." The term "timeshare," while generally associated with vacation ownership in the United States, Mexico, or in the Caribbean, was actually coined in the United Kingdom in the early 1960s. Timeshares are also known as "interval ownership."

The first timeshare in the United States was started in 1974 by Caribbean International Corporation (CIC), based in Fort Lauderdale, Florida. CIC would offer a 25-year *vacation license* rather than an ownership option. The company owned two other resorts. The *vacation license holder* could alternate their vacation weeks with one property in St. Croix and one in St. Thomas, both in the U.S. Virgin Islands. The Virgin Islands properties began their timeshare sales in 1973.

CIC promised to maintain the locations and provide the specified accommodation type for use by the "license owner" for a period of 25 years in the specified season and for the number of weeks agreed upon, with two additional charges: a fixed $15.00 *per diem* charge, which CIC promised would remain frozen at that amount for the life of the contract—at least that was the initial premise. The contract provided for a $25.00 "switching" or transfer fee," should the licensee decide to use their time at one of the other resorts. The license owner was allowed to rent, or give their week away as a gift in any particular year. The only requirement was that the per diem had to be paid every year whether the unit was occupied or not. This requirement was the basis of what is known today as "maintenance fees." The per diem had to be paid before the unit owner was able to use the property—"no maintenance fee, no key!"

In the period 1974-1976, the average purchase price of one week averaged $3,500.00 per week. Shortly thereafter, the Florida Real Estate Commission enacted regulations relating to timeshare sales in the state of Florida, creating a fee simple ownership. In addition to the initial price of the owner's week, the delineation of a maintenance fee and the creation of a homeowners association were initiated. The move to fee simple ownership created several timeshare location *exchange companies*, the most prominent being Interval International and RCI, permitting interval owners to "exchange" their week with owners in other areas—today, even worldwide locations.

Worldwide Legislative Actions

The time share industry is now regulated to a certain extent in all countries where timeshare resorts are located. In Europe, the sales of timeshares are regulated by both European and by national legislation (Romanowska, 2017). In 1994, the European Communities adopted "The European Directive 94/47/EC of the European Parliament and Council on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis." Revisions of the original directive resulted in the adoption in the January 2009 European Directive 2008/122/EC.

Closer to the United States, in 2010, Mexico's Ministry of Economy established official regulations and requirements for developers of timeshare services, called the NOM or an "Official Mexican Norm" (Ballard Spahr, 2010). The NOM established the following standards:

- Timeshare marketing companies are prohibited from offering gifts and soliciting prospective timeshare owners without clearly specifying the real purpose of the offer.

- The requirements for cancellation of a timeshare contract must be communicated to prospective purchasers.
- Timeshare providers are prohibited from providing the consumer's personal information without written consent.
- All verbal promises must be reduced to a writing found in the timeshare contract.
- All charges must be plainly and clearing defined and stated on the timeshare application forms, including the cost of membership, maintenance fees, exchange fees, and club fees.

If the timeshare provider does not follow the rules outlined in the NOM, the timeshare provider may be subject to financial penalties $50.00 to $200,000.

Time Share Exchanges

One of the perceived advantages of the time share model is the "exchange" of their interest. There are two main exchange agencies in the time share industry: RCI and Interval International, which combined, have listings at over 7,000 affiliated resorts worldwide. Both RCI and Interval International charge a yearly "membership fee" and additional fees for when the agency finds an exchange for a requesting member. In certain circumstances, owners can exchange weeks or points through independent exchange companies, provided that the resort of ownership has agreed to such arrangements in the original time share contract.

Deeded Versus Right-to-use Contracts

A major distinction in types of vacation ownership lies in the differences between deeded and right-to-use contracts. In a *deeded contract,* the use of the property is divided into week-long increments which are sold on the basis of fractional ownership—similar to a cooperative. As such, the owner may use the week, rent it, give it away, leave it to heirs through a will, or sell the week to another prospective buyer. The owner is liable for an equal portion of the real estate taxes, which are normally collected as a part of the maintenance fees. .

A type of deed is a *leasehold deed.* Leasehold deeds offer "ownership" for a fixed period of time after which the ownership reverts to the freeholder or property owner. Leasehold deeds do not generally convey ownership of the land, but merely the apartment or unit of accommodation.

A second type of vacation ownership is a *right-to-use contract*. Under a right-to-use contract, the purchaser has the right to use the property in accordance with the contract. At the end of the contracting period, the contract ends and all rights revert to the property owner. Thus, a right-to-use contract simply grants the "right to use" the property for a specific number of years without any ownership implications. The right to use model may take the form of a *club membership* or the right to use a reservation system, owned and operated by a third party not in the control of the owners (see Bakic et al., 2010).

Herein lies the greatest negative and danger of right to use contracts: *the right to use may be lost with the demise of the controlling company*, because a right to use contract is usually only valid with the current property owner. If that owner sells the property, or if the property owner becomes insolvent, the lease holder could lose their interest depending on the structure of the contract, and/or *current* laws in a foreign venue.

A unique form of real estate-based timeshare that combines features of *deeded timeshare with right-to-use* offerings was developed by Disney Vacation Club (DVC) in 1991. Purchasers of DVC timeshare interests, whom DVC calls *members,* receive a deed conveying an undivided real property interest in a timeshare unit. Each DVC member's property interest is accompanied by an annual allotment of *vacation points* in proportion to the size of the property interest. DVC is characterized by a highly flexible *vacation points system* which may be used in different increments for vacation stays at DVC resorts in a variety of accommodations. DVC's vacation points can be exchanged for vacations worldwide in many non-Disney resorts, or may be *banked* into or *borrowed* from future years, depending on the contract.

This point structure has been adopted by other timeshare developers including the Hilton Grand Vacations Company, the Marriott Vacation Club, the Hyatt Residence Club and Accor in France.

Cancellation of a Timeshare Contract

One of the most vexing issues is how to extricate the timeshare holder from the contract. The U.S. Federal Trade Commission (FTC) mandates a "cool (cooling) off period" that allows buyers to cancel some types of purchases without penalty within a three day period (Holmes, 2014). However, this rule generally does *not* apply to a real estate transaction. Even in the absence of an FTC mandate, the FTC reported that its law enforcement actions in the period July 1, 2016 to June 30, 2017 relating to various timeshare "scams" returned $6.4 billion in refunds to consumers—often on the basis of fraud (generally, Foxworth, 2012; Hicken, 2013; Corrigan, 2017)—"including $391 million the FTC sent directly to 6.28 million consumers" (FTC, 2017).

In order to fill this void, many U.S. states have enacted statutes that govern cancellation of timeshare contracts. The law might refer to the cancellation of a contract as "rescission" or "revocation."

In Florida, for example, a new timeshare owner can cancel the purchase within ten days (Drake, 2015). Laws differ by jurisdiction, as well as internationally (Timeshare Consumer Association (Great Britain), 2014) whether an out-of-state purchaser is subject to the rescission period of their state of residence, or the rescission period of the state where the timeshare purchase was made. [See Appendix I for a list of state cancellation or "cooling off" periods.]

In order to make it difficult for a prospective buyer to cancel a timeshare contract, a common practice was to have a prospective buyer sign a "cancellation waiver" in return for an alleged reduction in price or to require the prospective buyer to pay a penalty if the sale is cancelled. However, a waiver is not legally enforceable anywhere in the United States or in Mexico as a "violation of public policy."

Many timeshare owners complain about the annual maintenance fee or about the passive and perhaps subservient role of the time share Board of Directors (Singh and Horowitz, 2006) and argue that the increasing cost of timeshares and accompanying maintenance and exchange fees, are rising faster than hotel rates in the same areas. However, this is a practical rather than legal argument.

Conclusions and Observations

Whatever the form of property ownership selected by a prospective buyer, there are always significant advantages and disadvantages. In considering both condominium and coop ownership, it is certainly true that each provides the buyer with the opportunity to enjoy the benefits of home ownership; however, there are also drawbacks that must be considered.

On the positive side, condominium and coop ownership relieves individual owners of the major responsibility of maintenance and repair of the project. No longer will the owner have to trudge out in the cold to shovel snow, or wilt in the summer sun to cut the grass—or be responsible for purchasing and maintaining the snow blower or the lawn mower. All of these responsibilities and costs incident to home ownership have become the tasks of the management or homeowners association and the elected members of the board of directors. Major expenses are now shared by all unit owners, reducing the burden on individual owners.

In addition, condo and coop ownership provides advantages over a leasing or rental option in terms of stability. These forms are often the only practical way for "urban homesteaders" to afford to live in otherwise prohibitively expensive neighborhoods in a single-family ownership setting—even if these options are available.

On the negative side, condo and coop ownership is beset with restrictions on the conduct and actions of owners.

The Board may attempt to restrict pet ownership, certain types of activities, visitations and guests, the type of cable and TV services, and noise. In some cases, the Board may require its approval before a unit may be sold. In cases where investors outnumber on-site owners, decisions of the majority may favor the majority of non-resident investors at the expense of resident owners.

Fees are often a major point of contention. Unit owners are often called upon to pay fees for required maintenance and needed improvements—for example, for an aging roof—or for services they neither use nor want—or even contribute towards any shortfall if some of the homeowners fall behind or are seriously delinquent. Fees may exceed the rate of inflation and may place older owners at a disadvantage in relation to their expendable incomes. Financing may also provide unique challenges. Since 2009, the Federal Housing Administration (FHA) announced that it would only insure condominium loans where at least 50% of the units are "owner occupied and where 30% of the units were already sold.

In terms of "interval ownership," a common theme of owners who are dissatisfied with their ownership experience is that they have been the victim of a fraud of some sort. Some of the complaints may be those of "buyers' remorse." However there are some legitimate complaints, namely those revolving around statements made by timeshare promoters relating to timeshare as "excellent investments" with significant tax advantages; ease of rentals or vacation property transfers; "no problem" re-sales; perpetual ownership; the availability of "great discounts" on airfares, cruises, hotels, or tours; and the validity of cancellation rights.

One thing is certain: Before entering into a contract for the purchase of any of these forms of ownership, considerable study is in order, so that the prospective buyer will enter into the transaction with "eyes wide open."

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Appendix I

Timeshare Rescission Cancellation Periods by State

Alabama – No data available

Alaska – 15 days

Arkansas – 5 days

Arizona – 7 days

California – 7 days

Colorado – 5 days

Connecticut – 3 days

Delaware – 3 days

District of Columbia – No data available

Florida – 10 days

Georgia – 7 days (business)

Hawaii – 7 days

Idaho – No data available

Illinois – 5 days

Indiana – 3 days (business)

Iowa – 5 days

Kentucky – 5 days (business)

Louisiana – 7 days

Maine – 10 days

Maryland – 10 days

Massachusetts – 3 days

Michigan – 5 days

Minnesota – 5 days

Mississippi – 7 days

Missouri – 7 days (business)

Montana – 7 days

Nevada – 5 days

New Hampshire – 5 days

New Jersey – 7 days

New Mexico – 7 days

New York – 7 days

North Carolina – 5 days

North Dakota – No data available

Ohio – 3 days

Oklahoma – No data available

Oregon – 5 days

Pennsylvania – 5 days

Rhode Island – 5 days (business)

South Carolina – 5 days

South Dakota – 7 days

Tennessee – 10 days

Texas – 5 days

Utah – 5 days

Vermont – 3 days

Virginia – 7 days

Washington – 7 days

West Virginia – 10 days

Wisconsin – 5 days (business)

Wyoming – No data available

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