

## DEEDED TIMESHARES – CONSEQUENCES AND REMEDIES

**1. Introduction.** It has been 20 years this summer (2009) since the author designed the legal structure for Trendwest's Club Esprit, which is now Wyndham's WorldMark, The Club. WorldMark has set the standard as the most efficient and practical legal structure for a timeshare without sacrificing member protection. It is a permanent, non-deeded interest carrying the same benefits and burdens as normal deeded fee ownership without the disadvantages, because it is a voting membership in the entity which owns the underlying real property.

It has been 12 years since the author wrote and ARDA published "Foreclosure, Steps for Foreclosing a Security Interest in a Right-To-Use Membership," ARDA "Developments," April/May 1997. This article is a sequel to that article. That article may be viewed on the author's website, [www.jrblawcorp.com](http://www.jrblawcorp.com).

The passage of time has brought much maturity and experience to the timeshare industry, especially in the area of non-deeded projects. The WorldMark model is now rightfully referred to as "non-deeded" to distinguish it from right-to-use or nonequity. Right-to-use has been formally defined as a term membership expiring at some point in time. "Nonequity" is the label given to a license in accommodations with no ownership rights or control, whether term or permanent. Although in its broad sense non-deeded timeshare interests come in many forms (nonequity, term, beneficial interest in a trust, or voting membership in an entity which owns fee title in the underlying real property), and they all avoid the consequences of deeded interests, the author prefers the permanent voting membership, or WorldMark, model, which has been described as "the functional equivalent of a deeded interest." (Richard F. Davis, Esq., ARDA Workshop "Ask the Attorneys," May 2004.)

With the passage of two decades we are also seeing the first generation of timeshare purchasers beginning to die, and mature timeshare associations are being left to struggle with the consequences of the legal structures put in place by now vanished developers.

**2. Foreclosure.** As discussed in the 1997 article the cost of deed foreclosures imposes an unnecessary burden which is now being borne by the associations. Research discloses that the average cost to individual members on an \$800 annual assessment is at least \$25 per year and can run as high as \$100 per year, or 3% to 13% of the annual budget. In jurisdictions without very efficient foreclosure procedures associations are faced with the financial inability to foreclose on deeded weeks.

A secured party with a lien on a non-deeded interest, whether the developer, lender, or association, may apply the strict foreclosure procedures of the Uniform Commercial Code, Section 9620, to take back the membership if the member is in default. This is basically sending a 20-day letter which states the default, demands payment, and proposes that the membership will be retained in complete satisfaction of the obligation if payment is not timely made. It is simple, quick and cheap. (In California this process cannot be applied to a partial foreclosure and deficiency judgment, but only to complete satisfaction of the obligation.)

**3. Ancillary Probate.** If the owner of deeded property dies as a resident of another state, there must be an ancillary probate in the state in which deeded real property is located. California has rather summary processes for dealing with real property worth under \$20,000 or under \$100,000, under certain circumstances, so the cost of an ancillary probate in California

may be as low as \$1,000 for a timeshare. In Florida it is at least \$2,500-\$4,000. Colorado doesn't require a court proceeding, but the process costs at least \$2,000. Unless the successors to the deceased timeshare owner are extremely enthusiastic about retaining the timeshare, they will be reluctant to pay several thousand dollars to obtain title to the timeshare. That leaves the association no alternative except foreclosure, since there is no one to provide a deed-in-lieu without the ancillary probate. A non-deeded interest is treated as personal property for probate purposes and is probated in the state of the decedent's residence with the rest of the estate.

**4. Personal Liability.** A person who owns a deeded fee interest in real property is personally liable for obligations that arise in connection with that property, such as injuries or damage that are not covered by insurance or environmental cleanup. Condominium owners have been sued for accidents in the common area, because a unit owner has fee title to an undivided interest in the common area. (*Ruoff v. Harbor Creek Community Assn.*, 10 Cal. App. 4<sup>th</sup> 1624, 13 Cal. Rptr. 2d 755, 1992) This could be very costly exposure for unsuspecting timeshare purchasers. Owning a non-deeded timeshare is like owning stock or membership in a business corporation or limited liability company. The personal assets of the owners are insulated from liabilities within the business or resort, that are not otherwise the personal liabilities of the owner.

## **5. Remedies.**

**5.1 Disclosure.** The consequences of deeded timeshare ownership are materially more adverse to consumers than with non-deeded ownership. Developers should therefore calculate and disclose the potential cost to the association and each nondefaulting owner of foreclosing deeded timeshares, depending on the location of the project or projects which are included in the association. There should also be disclosure of the prospective personal liability exposure for accidents, injuries, or environmental cleanup that goes along with deeded fee ownership.

**5.2 Developer Contribution.** An Association faced with the unnecessary burden of the cost of deed foreclosures may be able to seek contribution from the founding developer. At some point in the past 20 years the non-deeded legal structure became obviously viable, reliable and more desirable than the deeded fee structure. See "Legal Structure and Ownership of a Timeshare Project," ARDA "Developments," July 2006.

**5.3 Rental Program.** In locations where foreclosure costs are uneconomical the association must conduct an aggressive rental program, but then it gradually becomes a hotel operation. The alternative is that the assessments for active owners must increase inordinately, which accelerates the rate of defaults, and eventually the project must shut down, as has happened in several cases.

**5.4 Convert to Non-Deeded.** The author and others have advised associations to retain the deeded title to their properties as they foreclose on deeded interests and resell a non-deeded membership carrying the same rights and responsibilities. At least gradually the association's project will become a much more efficient legal model. In some cases it may not be necessary to amend the governing documents to change the manner of conveyance of the timeshare or fractional interest.

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