

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Regulated Industries

BILL: CS/SB 818

INTRODUCER: Senator Hutson

SUBJECT: Timeshares

DATE: March 9, 2017

REVISED: _____

| | ANALYST | STAFF DIRECTOR | REFERENCE | ACTION |
|----|---------|----------------|-----------|---------------|
| 1. | Kraemer | McSwain | RI | Fav/CS |
| 2. | | | JU | |
| 3. | | | RC | |

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Technical Changes

I. Summary:

CS/SB 818 amends to ch. 721, F.S. the Florida Vacation Plan and Timesharing Act (act), which establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers. The bill:

- Revises the term “interestholder” with respect to a multisite timeshare plan governed by Part II of the act;
- Revises requirements for instruments that establish or govern a component site property regime, including the requirement to issue or provide certain documents to creditors;
- Revises requirements for terminations of timeshare plans;
- Revises requirements for extensions of timeshare plans, which apply to all timeshare properties in the state;
- Allows reasonable termination expenses to be paid pro rata by owners of former timeshare properties; and
- Amends requirements for voting upon an extension of a term of a timeshare plan, including meeting notices, voter eligibility, proxies, and quorum requirements.

The bill has no fiscal impact on state government. See Section V, Fiscal Impact Statement.

The bill is effective upon becoming law.

II. Present Situation:

A timeshare interest is a form of ownership of real and personal property.¹ In a timeshare, multiple parties hold the right to use a condominium unit or a cooperative unit. Each owner of a timeshare interest is allotted a period of time (typically one week) during which the owner has the exclusive right to use the property.

The Florida Vacation Plan and Timesharing Act, ch. 721, F.S., establishes requirements for the creation, sale, exchange, promotion, and operation of timeshare plans, including requirements for full and fair disclosure to purchasers and prospective purchasers.² Chapter 721, F.S., applies to all timeshare plans consisting of more than seven timeshare periods over a period of at least three years in which the accommodations and facilities are located within this state or offered within this state.³ Part I of ch. 721, F.S., relates to vacation plans and timesharing, and Part II of ch. 721, F.S., relates to multisite vacation and timeshare plans that are also known as vacation clubs.

According to information provided by the American Resort Development Association (ARDA), Florida had the greatest number of the 1,527 timeshare resorts in the United States in 2015.⁴

Definitions

A timeshare plan is any arrangement, plan, scheme, or similar device, other than an exchange program, whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, where a purchaser, for consideration, receives ownership rights in or a right to use accommodations and facilities, if any, for a period of time less than a full year during any given year, but not necessarily for consecutive years.⁵ The term includes both personal property timeshare and real property timeshare plans.⁶

Each timeshare plan must have a managing entity that must be the developer, a separate manager or management firm, or an owners' association. The managing entity operates or maintains the timeshare plan.⁷

A timeshare unit is an accommodation of a timeshare plan which is divided into timeshare periods or a condominium unit in which timeshare estates have been created.⁸

A "timeshare estate" is a right to occupy a timeshare unit, coupled with a freehold estate or an estate for years with a future interest in a timeshare property or a specified portion thereof.⁹ The

¹ See s. 721.05(36), F.S.

² Section 721.02(2) and (3), F.S.

³ Section 721.03, F.S.

⁴ See <http://www.arda.org/arda/news-information/default.aspx?id=5575&libID=5594> (last visited Mar. 3, 2017).

⁵ Section 721.05(39), F.S.

⁶ A "personal property timeshare plan," is a timeshare plan in which the accommodations are comprised of personal property that is not permanently affixed to real property; and a "real property timeshare plan," is a timeshare plan in which the accommodations of the timeshare plan are comprised of or permanently affixed to real property.

⁷ Section 721.13(1)(a), F.S. The duties of a managing entity are detailed in s. 721.13(3), F.S.

⁸ See ss. 721.05(41) and 718.103(26), F.S.

⁹ Section 721.05(34), F.S.

term also includes an interest in a condominium unit, a cooperative unit, or a trust. Whether the term includes both direct and indirect interests in trusts is not specified. An example of an indirect interest in a trust is the interest of a trust beneficiary's spouse or other dependent. A "timeshare license" is the right to occupy a timeshare unit, which right is not a personal property timeshare interest or a timeshare estate.¹⁰ A "timeshare interest" is a timeshare estate, a personal property timeshare interest, or a timeshare license.¹¹

Multisite Timeshare Plans

A "multisite timeshare plan" is any method, arrangement, or procedure by which a purchaser obtains a recurring right to use and occupy accommodations or facilities of more than one component site through use of a reservation system.¹² The reservation system requires purchasers to compete with other purchases in the same multisite timeshare plan.¹³ There are two different types of multisite timeshare plans, nonspecific and specific.

A "nonspecific multisite timeshare plan" is a multisite timeshare plan *containing timeshare licenses or personal property timeshare interests*, in which a purchaser receives a right to use all of the accommodations and facilities, if any, of the multisite timeshare plan through the reservation system, but no specific right to use any particular accommodations and facilities for the remaining term of the multisite timeshare plan in the event that the reservation system is terminated for any reason prior to the expiration of the term of the multisite timeshare plan.¹⁴

A "specific multisite timeshare plan" is a multisite timeshare plan *containing timeshare licenses or personal property timeshare interests*, in which a purchaser receives a specific right to use accommodations and facilities, if any, at one component site of a multisite timeshare plan, together with use rights in the other accommodations and facilities of the multisite timeshare plan created by or acquired through the reservation system.¹⁵

Substitutions and Deletions for Multisite Timeshare Plans

Section 721.552(2), F.S., permits substitutions of accommodations and facilities for nonspecific multisite timeshare plans that are "substantially similar" to the existing accommodations and facilities. Substitutions are limited to no more than 25 percent of the available accommodations at a given component site per year. Before a substitution occurs, notice must be provided to all the purchasers of the timeshare plan. However, under limited circumstances, a managing entity may substitute all accommodations in a given year if a written plan of substitution has been provided to each purchaser of the timeshare plan and approved by a majority of purchasers and a majority of the board of administration.¹⁶

Section 721.52(7), F.S., defines a "specific multisite timeshare plan" to mean:

¹⁰ Section 721.05(37), F.S.

¹¹ Section 721.05(36), F.S.

¹² Section 721.52(4), F.S. The purchaser may or may not be able to elect to stop participating in the multisite timeshare plan.

¹³ Section 721.52(6), F.S.

¹⁴ Section 721.52(5), F.S.

¹⁵ Section 721.52(7), F.S.

¹⁶ Section 721.552(2), F.S.

“a multisite timeshare plan *containing timeshare licenses or personal property timeshare interests*, with respect to which a purchaser receives a specific right to use accommodations and facilities, if any, at one component site of a multisite timeshare plan, together with use rights in the other accommodations and facilities of the multisite timeshare plan created by or acquired through the reservation system.” [Emphasis added.]

According to the American Resort Development Association (ARDA),¹⁷ which represents the vacation ownership and resort development industries (timeshares), there has been a recent development in nonspecific timeshare *estate* plans in which the purchaser receives a timeshare estate in a trust and one in a specific component site and such may not be clearly consistent with definitions for specific and nonspecific multisite timeshare plans.

A timeshare plan developer must file a public offering statement and the required exhibits with the Division of Florida Condominiums, Timeshares, and Mobile Homes (division) within the Department of Business and Professional Regulation, prior to offering the timeshare plan to the public.¹⁸

For each timeshare plan, the developer must provide for a managing entity, which must be the developer, a separate manager or management firm, or an owners' association.¹⁹ The public offering statement must include an estimated operating budget for the timeshare plan and a schedule of the purchaser's expenses to be paid to the timeshare plan and the managing entity.²⁰ A common expense to be paid to the managing entity is a reserve for deferred maintenance and capital expenditures.

III. Effect of Proposed Changes:

SB 818 revises the term “interestholder” in s. 721.05, (21), F.S., to exclude certain persons that have interests in a multisite timeshare plan that has a component site that is also part of a single-site timeshare plan, condominium, or other property regime (component site property regime). Those excluded as interestholders in a multisite timeshare plan with a component site property regime (the non-interestholders), unless the timeshare interest, timeshare unit, or other unit is “specifically subject to, or otherwise dedicated to, the multisite timeshare plan,” are:

- A developer;
- An owner of the underlying fee or personal property;
- A mortgagee, judgment creditor, or other lienor; or
- Any other person having an interest in or lien or encumbrance against a timeshare interest in a single-site timeshare plan, or an interest in or lien or encumbrance against a timeshare unit or other unit in a condominium or property regime. (Emphasis added.)

¹⁷ For more information about ARDA, see <http://www.arda.org/who-we-are/default.aspx> (last visited Mar. 3, 2017).

¹⁸ Section 721.07, F.S.

¹⁹ Section 721.13(1)(a), F.S. The duties of a managing entity are detailed in s. 721.13(3), F.S.,

²⁰ Section 721.07(5)(t)3., F.S.

The bill expresses legislative intent that the revision of the term “interestholder” is a clarification of existing law; those who are interestholders under current law are described nearly identically to those proposed to be classified as non-interestholders:

- A developer;
- An owner of the underlying fee or personal property;
- A mortgagee, judgment creditor, or other lienor; or
- Any other person having an interest in or lien or encumbrance against a timeshare interest in a single-site timeshare plan, or an interest in or lien or encumbrance against the accommodations or facilities of the timeshare plan. (Emphasis added.)

The revision to the term “interestholder” creates a distinction between persons based on the type of timeshare plan they have developed, owned, provided financing for, are owed monies by, or against which they have an interest, lien, or encumbrance. This distinction impacts voting and other rights related to timeshare plans.

The bill amends s. 721.08, F.S., concerning escrow accounts, non-disturbance instruments, alternate security arrangements, and transfer of legal title; the bill expresses legislative intent that the revision is a clarification of existing law.

For a component site property regime, certain documents that establish or govern a component site property regime are deemed not to be an encumbrance²¹ under ch. 721, F.S., the Florida Vacation Plan and Timesharing Act (act), including a:

- Timeshare instrument;
- Declaration of condominium; or
- Other instrument.

The bill provides that a document that establishes or governs a component site property regime, in addition to not being an encumbrance, does not create a requirement for a “nondisturbance and notice to creditors instrument” under s. 721.08, F.S. For each accommodation or facility of a multisite timeshare plan involving a component site property regime, a “subordination and notice to creditors instrument” is not required from the managing entity, owners’ association, or any other person. Under current law, the developer of such accommodation or facility must provide the division evidence that each interestholder has executed and recorded a subordination and notice to creditors instrument in the public records where the accommodation or facility is located.²²

The bill amends s. 721.125, F.S., which currently relates to the extension and termination of timeshare plans, so that the section will deal only with the termination of timeshare plans. If the timeshare property is managed by an owners’ association that is separate from any underlying condominium, cooperative, or homeowners’ association, termination of a timeshare plan does not change the corporate status of the owners’ association.

²¹ The term “encumbrance” is defined in ch. 679, F.S., Uniform Commercial Code: Secured Transactions, as a right in real property, other than an ownership interest, including mortgages and other liens. *See* s. 679.1021(1)(ff), F.S.

²² *See* s. 721.53(1), F.S.

However, under the bill, the owners' association existence continues only for these limited purposes:

- Concluding its affairs;
- Prosecuting and defending actions by or against it;
- Collecting and discharging obligations;
- Disposing of and conveying its property;
- Collecting and dividing its assets; and
- Otherwise complying with s. 721.125(3), F.S.

After termination of a timeshare plan, the bill provides that the board of administration of the owners' association (board) serves as the termination trustee. In that fiduciary capacity, the board may bring a partition action²³ on behalf of the tenants in common²⁴ in each former timeshare property or may sell the former timeshare property in any manner and to any person approved by a majority of all the tenants in common. The termination trustee also has all other powers reasonably necessary to accomplish the partition or sale, including the power to maintain the property while the partition action or sale is pending, and must adopt reasonable procedures to implement the partition or sale and comply with these requirements.

The bill provides that all reasonable expenses incurred by the termination trustee relating to the performance of the trustee's duties, including reasonable fees of attorneys and other professionals, must be paid by the tenants in common, in proportion to their ownership interests. Many timeshare plans do not address the handling of costs of termination.²⁵

Additionally, the bill provides that termination of a timeshare plan in a timeshare condominium or timeshare cooperative, when the underlying condominium or cooperative is not simultaneously terminated, requires the designation of a voting representative for the unit, and the filing of a voting certificate with the underlying condominium or cooperative association. The designation is made by a majority of the tenants in common in each former timeshare unit who are present and voting in person or by proxy at a meeting of such tenants in common. The meeting is conducted by the termination trustee or by the board of administration of the condominium or cooperative association if such association managed the former timeshare property. The voting representative may vote on all matters at meetings of the condominium or cooperative association, including termination of the condominium or cooperative.

The bill creates s. 721.1255, F.S., to separately address extensions of timeshare plans,²⁶ and expresses legislative intent, including that:

- Most older timeshare properties in Florida are based on a condominium structure, and the termination dates set forth in the timeshare instruments for those properties are approaching.

²³ The term "partition" is used in ch. 64, F.S., for the dividing of interests in real and personal property by a court, or if partition cannot be made without prejudice to the owners, by a court-ordered sale at public auction to the highest bidder. *See* ss. 64.051, 64.071, and 64.091, F.S.

²⁴ The term "tenants in common" is a type of simultaneous ownership of real property by two or more parties. *See* <http://legal-dictionary.thefreedictionary.com/tenancy+in+common> (last visited Mar. 3, 2017).

²⁵ Conversation with representatives of the American Resort Development Association (ARDA)(Mar. 3, 2017).

²⁶ All provisions within s. 721.125, F.S., which address the extension of timeshare plans, are deleted in the bill.

- Many older timeshare properties located in Florida have been well-maintained, and continue to be financially supported, used, and enjoyed by their owners, exchangers, guests, renters, and others.
- To preserve the continued use, enjoyment, tax values, and overall viability of these timeshare properties, the public policy of Florida requires the creation of a statutory method to enable the owners of these timeshare properties to extend the terms of their timeshare plans, notwithstanding contrary provisions in their timeshare instruments which may create uncertainty for purchasers, prospective purchasers, and lenders, and which may discourage the ongoing maintenance, refurbishment, and improvement of these timeshare properties.

The bill revises the minimum required vote and the eligibility of voting interests required for an extension of a term of a timeshare plan. Unless the timeshare instrument specifically provides a lower percentage, the vote or written consent, or both, *of at least 66 percent of all eligible voting interests present in person or by proxy at a duly noticed, called, and constituted meeting of the owners' association* is required. (Currently, the requirement under s. 721.125(1), F.S., is that 60 percent of all voting interests must authorize an extension of a timeshare plan, unless the timeshare instrument provides otherwise.) The bill provides that the meeting of the owners' association may be held "at any time." The bill provides that if the term of a timeshare plan is extended, all rights, privileges, duties, and obligations created under applicable law or the timeshare instrument continue in full force to the same extent as if the extended termination date of the timeshare plan were the original termination date of the timeshare plan.

The bill revises the quorum requirements for a vote to extend the term of a timeshare plan. Unless the timeshare instrument specifically provides for a lower quorum, the quorum for the owners' association meeting is 50 percent of all eligible voting interests in the timeshare plan. Under current law, unless the articles of incorporation, the bylaws, or the provisions of ch. 721, F.S. provide for a higher quorum requirement, the percentage of voting interests required to make decisions and to constitute a quorum for a members' meeting of a timeshare condominium²⁷ or owners' association is 15 percent of the voting interests.

The bill provides that a proxy for a vote to extend a timeshare plan pursuant to this section may be valid for a period of up to three years and is revocable unless it states that it is irrevocable. The duration and revocability of proxies for voting on matters respecting timeshare plans are not addressed in current law.

The bill provides that the board of administration of the owners' association may determine that any person or entity holding a voting interest who is delinquent in the payment of more than two years of assessments is ineligible to vote on any extension of the timeshare plan unless the delinquency is paid in full before the vote.

The bill restricts the effectiveness of a proposed extension for a component site of a multisite timeshare plan located in Florida. If an extension vote or consent is proposed for such a component site, the extension is effective only if the extension is approved by the person

²⁷ A "timeshare condominium" is a timeshare plan that is subject to the provisions of both ch. 718, F.S., regulating condominiums, and ch. 721, F.S., regulating vacation and timeshare plans.

authorized to make additions or substitutions of accommodations and facilities pursuant to the timeshare instrument.

The revised procedures for extension of timeshare plans apply to all timeshare properties in Florida. Under current law, unless the timeshare instrument provides otherwise, the provisions relating to extensions or terminations of timeshare plans²⁸ apply only to a timeshare plan in existence for at least 25 years as of the effective date of the termination or extension vote or consent, or both, of *60 percent of all voting interests* in the timeshare plan. The vote or written consent may extend or terminate the timeshare plan at any time.²⁹

The bill takes effect upon becoming a law.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The Department of Business and Professional Regulation (DBPR) notes there is no fiscal impact to the private sector.³⁰

C. Government Sector Impact:

The Department of Business and Professional Regulation (DBPR) notes there is no fiscal impact to state government.³¹

²⁸ See s. 721.125(3), F.S.

²⁹ See s. 721.151(1), F.S.

³⁰ See 2017 Agency Legislative Bill Analysis (AGENCY: Department of Business and Professional Regulation) for SB 818, dated March 2, 2017 (on file with Senate Committee on Regulated Industries) at page 4.

³¹ *Id.*

VI. Technical Deficiencies:

Section 4 of the bill creates s. 721.1255(2)(d), F.S., which provides that the board of administration of the owners' association may determine that a person holding a voting interest who is delinquent in paying more than two years of assessments is ineligible to vote on an extension of the timeshare plan, unless the delinquency is paid in full "before the vote." The bill does not address the timing and method for handling of payments to eliminate such a deficiency. See lines 192-197.

VII. Related Issues:

The bill revises provisions affecting persons who have or may have an interest in or a lien or encumbrance against a timeshare interest, or other unit that is subject to a timeshare plan and provisions related to the termination of existing timeshare plans. Therefore, these provisions may implicate constitutional concerns relating to impairment of contract.³²

In *Pomponio v. Claridge of Pompano Condominium, Inc.*,³³ the Florida Supreme court stated that some degree of flexibility has developed over the last century in interpreting the contract clause in order to ameliorate the harshness of the original rigid application used by the United States Supreme Court. The Florida Supreme Court invalidated a statute, as an unconstitutional impairment of contract, which required the deposit of rent into a court registry during litigation involving obligations under a contract lease. The court set forth several factors to be considered in balancing whether a state law has in fact operated as a substantial impairment of a contractual relationship, stating "[t]he severity of the impairment measures the height of the hurdle the state legislation must clear."³⁴

The court stated that if there is minimal alteration of contractual obligations, the inquiry may end at its first stage. Severe impairment pushes the inquiry into a careful examination of the nature and purpose of the state legislation. The factors to be considered are whether:

- The law was enacted to deal with a broad, generalized economic or social problem;
- The law operates in an area that was already subject to state regulation at the time the contract was entered into; and
- The effect on the contractual relationships is temporary, or whether it is severe, permanent, immediate, and retroactive.³⁵

In *United States Fidelity & Guaranty Co. v. Department of Insurance*,³⁶ the Florida Supreme Court followed *Pomponio* and said that the method requires a balancing of a person's interest to not have his or her contracts impaired, with the state's interest in exercising its legitimate police power. The court adopted the method used by the U.S. Supreme Court, in which the threshold

³² Article I, s. 10, U.S. Constitution and Art. I, s. 10, Fla. Const.

³³ *Pomponio v. Claridge of Pompano Condominium, Inc.*, 378 So. 2d 774, 776 (Fla. 1979).

³⁴ *Pomponio*, 378 So. 2d at 779.

³⁵ *Id.*

³⁶ *United States Fidelity & Guaranty Co. v. Department of Insurance*, 453 So. 2d 1355 (Fla. 1984).

inquiry is “whether the state law has, in fact, operated as a substantial impairment of a contractual relationship.”³⁷ The severity of the impairment increases the level of scrutiny.

Relevant to the extent of the impairment is whether the industry the complaining party had entered had been regulated in the past because if the party was already subject to regulation when the contract was entered, then it is understood that it would be subject to further legislation upon the same topic.³⁸ If the state regulation constitutes a substantial impairment, the state must have a significant and legitimate public purpose³⁹ and any adjustment of the rights and responsibilities of the contracting parties must be appropriate to the public purpose justifying the legislation.⁴⁰

Furthermore, although retroactive application of a law may be constitutional in certain situations,⁴¹ in 2011, the Florida Supreme Court unanimously held, in *Cohn v. The Grand Condominium Association, Inc.*,⁴² that by changing the distribution of voting power between residential owners and other owners in a mixed-use condominium, the retroactive application of the law at issue altered the rights of the unit owners in contravention of their contractual agreement and impaired the obligation of contract as applied.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 721.05, 721.08, and 721.125.

This bill creates section 721.1255 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Regulated Industries on March 8, 2017:

The committee substitute:

- Clarifies, for certain multisite timeshare plans that have a component site that is part of a single-site timeshare plan or condominium or other property, the parties who:
 - Are “interestholders” in the multisite timeshare plan, i.e. all timeshare interests, timeshare units, or other units specifically subject to the multisite timeshare plan; and
 - Are not “interestholders” in the multisite timeshare plan, i.e. developers; owners of the underlying land or personal property; mortgage lenders, judgment creditors,

³⁷ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (quoting *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978)).

³⁸ *Id.* (citing *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13).

³⁹ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1360 (citing *U.S. Trust Co. of New York v. New Jersey*, 431 U.S. 1, 22 (1977)).

⁴⁰ *United States Fidelity & Guaranty Co.*, 453 So. 2d at 1361.

⁴¹ *Century Village, Inc. v. Wellington*, 361 So. 2d 128 (Fla. 1978).

⁴² *Cohn*, 62 So.3d. 1120, 1122 (Fla. 2011).

or lienholders; or any other persons with an interest, lien, or encumbrance in a single site timeshare plan, condominium, or other property;

- Clarifies that certain documents are not encumbrances, and do not create a requirement for certain notices to creditors; and
- Requires a vote to extend the term of a timeshare plan take place at a duly *noticed* meeting.

B. Amendments:

None.