On Wednesday, April 10, 2019, at the ARDA World Convention in Orlando, two longtime timeshare industry attorneys, Anthony Polvino of Taylor English Duma LLP and Rob Webb of Baker & Hostetler LLP, met to debate several of the major legal issues that form the foundation for, and that shape and challenge, today’s timeshare industry and timeshare products.

The debate was moderated by Jason Gamel, SVP Legal at Wyndham Destinations, Inc., who has more recently taken the helm as ARDA’s CEO and President. Jason explained that the purpose of the program was to present the audience with both sides of each of these legal issues for their consideration, and that the presenters would in the process be required to argue positions in this debate that they would rarely or never take in the ordinary course of their practices as developer and industry advocates. Furthermore, in order to make the
program more interesting (and entertaining), the moderator would randomly assign the pro and con positions on each issue, and might even require the presenters to switch positions mid-argument.

There were fourteen industry issues discussed during the program, presented here with their major pro and con positions in no particular order of importance:

1. To deed or not to deed: right-to-use timeshare plans are superior to deeded timeshare plans.
   **PRO:** Right-to-use plans don’t require owners’ associations or judicial foreclosure of mortgage or assessment liens. These plans give owners what they want (use rights) and not what they don’t (management input and control).
   **CON:** Right-to-use plans impose unfavorable federal and state tax consequences and regulatory consequences on developers, and expose purchasers to significantly greater risk should the developer fail financially.

2. Developers should not “disable” features of their timeshare products so that resale purchasers cannot acquire those features from resale sellers.
   **PRO:** Purchasers in the secondary (resale) market should receive the same timeshare product features and benefits as purchasers from the developer receive; otherwise, resale purchasers become second class members, and the overall value of the timeshare product is diminished.
   **CON:** Resale purchasers are only entitled to receive the timeshare product features and benefits that “run with the land.” State laws prevent some benefits from being assigned to resale purchasers. If you want all of the features and benefits provided by a
developer, buy from the developer.

3. Timeshare management fees should be capped by statute.
   **PRO:** Timeshare management fees are getting too expensive relative to the value provided. Increasing levels of timeshare assessments are one of the industry’s biggest challenges.
   **CON:** The marketplace will determine the appropriate levels of timeshare management fees. Different managers and management contracts provide different benefits and quality of management services to timeshare purchasers, and a statutory management fee cap would discourage competition to provide these benefits and services.

4. Rental platforms like Airbnb hurt the timeshare industry.
   **PRO:** Airbnb and similar platforms are attracting leisure travel customers away from the timeshare industry without providing the consumer protections and product integrity of timeshare products, and in many cases without complying with transient occupancy, zoning, and health/safety laws.
   **CON:** Forty years ago, timeshare was a disruptor to the resort hotel industry. Timeshare products should adapt to provide their customers with the flexibility offered by these online platforms.

5. ARDA should advocate for a federal timeshare law.
   **PRO:** A federal timeshare law that pre-empts state timeshare laws would be a boon to the industry, providing a single legal compliance standard for developers, lenders, managers and consumers.
   **CON:** A federal timeshare law that does not pre-empt state timeshare laws (think: federal and state securities laws) would create another layer of compliance bureaucracy for an industry that doesn’t need any more regulation.
6. Resale and transfer legislation promoted by the industry has helped to curb the activities of bad actors.

**PRO:** These disclosure and substantive laws have helped consumers better understand their options and risks when being solicited for resale or transfer services and have reduced the number of “Viking ship” assetless entities being used to take title to timeshare interests.

**CON:** These laws have broad exceptions for practicing attorneys, which have led to the rise of scurrilous exit attorney solicitations that cause even greater problems for the industry.

7. A resale broker licensed in her home state should also be required to be licensed in every state in which she does business.

**PRO:** Residents of a given state deserve the protections afforded by the real estate licensure laws of that state, particularly with regard to timeshare interests located in that state, regardless of where a resale broker dealing in those interests is located.

**CON:** If the resale broker does not physically enter a given state, but only deals with residents of that state and timeshare interests located in that state via Internet, U.S. Mail or telephone solicitations or communications, the regulatory protections of the resale broker’s home state licensing authority are more than adequate to protect consumers and resale product integrity. Requiring duplicative state licensure is an unnecessary and unreasonable burden on interstate commerce.

8. ARDA should advocate for timeshare industry de-regulation so that the industry can continue to grow.

**PRO:** Enough with the laws! The timeshare industry has matured, such that the costs of doing business for developers and sellers should be reduced by reducing or eliminating state timeshare
regulation.

**CON:** Bad players, who only want to prey on consumers’ vacation dreams without providing any value or substance to them, would be emboldened by deregulation and would cause serious legal and public relations issues for established developers. Regulation creates both legal and criminal risks for this fraudulent activity and protects timeshare consumers and timeshare product integrity.

9. Developers have an obligation to support the growth of a robust timeshare secondary market.

**PRO:** Timeshare is inherently a transferable product, which is the reason most state laws make timeshare resale purchasers jointly and severally liable with their resale sellers for unpaid product assessments. Without a viable secondary (resale) market for timeshare interests, timeshare owners/members who no longer want their products have few ways to get rid of them and are hampered by that statutory liability.

**CON:** Timeshare products offered by reputable developers and maintained by strong managers already have a viable secondary market, and these developers and managers cannot be held responsible for encouraging the transfer of timeshare interests that are poorly maintained or that have simply outlived their usefulness and demand. Laws permitting the termination and dissolution of these older, fully depreciated timeshare projects should be adopted or strengthened.

10. Salaried salespeople are less likely to commit sales abuses than commissioned salespeople.

**PRO:** If salespeople are paid the same regardless of how many timeshare interests they sell, they will be less likely to apply high
pressure or to misrepresent their products, and consumers will enjoy the sales process more.

**CON:** If salespeople are paid the same regardless of how many timeshare interests they sell, why should talented salespeople sell timeshare when there are many other, more lucrative opportunities for them? Because timeshare is not a sought good but is rather a good that must be sold, developers need skilled salespeople to help them achieve volume and control sales costs, and commissions provide an important way for developers to sort the skilled from the unskilled.

11. Timeshare salespeople should not be required to have real estate licenses.

**PRO:** Timeshare salespeople do not sell for multiple developers, or directly solicit the public, or work for real estate brokers who sell multiple kinds of real estate. Developers are legally responsible for the acts or omissions of their salespeople and train those salespeople, and consumers clearly understand whose interests these sales agents are representing, so the reasons for and purposes behind requiring a real estate license for timeshare salespeople are simply not present.

**CON:** Real estate licensure laws provide for education and discipline for licensees, and these two purposes/benefits are sufficient to justify the imposition of general real estate licensure requirements on timeshare salespeople.

12. Multisite timeshare plans are superior to single-site plans linked by an exchange.

**PRO:** Multisite timeshare plans have a mandatory central reservation system that links the component sites or participating resorts in the plan. Multisite laws provide important disclosures
and regulation of these reservation systems, resulting in greater consumer protection and product integrity. **CON:** Single site resorts joined by a voluntary exchange network operated by an exchange company provide all of the flexibility necessary for timeshare consumers to enjoy their products, and this is the structure that made the timeshare industry so successful. Multisite regulations are unnecessary and do not provide significant incremental consumer protection.

13. Developers should not accept trade-ins of competitors’ inventory. **PRO:** Just like the trade-in of an existing car for the purchase of a new car helps the automobile business function more effectively, the trade-in of a timeshare interest for the purchase of a new timeshare interest provides flexibility and exit options for timeshare owners. **CON:** But a viable market exists for used cars, which means that cars traded in will end up in the hands of paying owners. The absence of a viable resale market for many timeshare interests means that trade-ins of those interests could exacerbate the consequences for the resorts and other owners of traded-in interests if those interests are subsequently cast away in Viking ships or other assetless entities.

14. Developers should be obligated to take back timeshare interests from owners/members who no longer want them. **PRO:** If developers will not support a viable secondary market for their timeshare products, and if timeshare purchasers are statutorily liable for timeshare plan assessments until they successfully transfer them, at some point in time the purchasers should be able to give their interests back to their developers or owners’ associations in order to cut off that assessment liability.
**CON:** This might make sense at some point in time for right-to-use, contract-based timeshares, where the developer maintains the underlying ownership and control of the timeshare asset throughout the timeshare plan term, but there are serious adverse tax and accounting implications of requiring developers of asset-backed timeshare interests to take these interests back.

The audience for The Great Debate appeared to enjoy the presentation, and Jason closed the program with a suggestion that ARDA might try this format again at a future conference.

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