# TIMESCAMMING: CURBING PREDATORY TIMESHARE SALES TACTICS & RESALE SCAMS DIRECTED AT THE ELDERLY

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*The U.S. timeshare industry is an enormous and growing national industry. This should not come as a surprise, as timeshare plans can theoretically provide consumers with a cheaper alternative to owning a vacation home or condominium. Unfortunately, there is also a link between the timeshare industry and elder financial abuse. The elderly continue to be taken advantage of and pressured into timeshare sales for which they do not, or cannot, understand the full consequences of. Further, the elderly have become prime targets for complex resale scams. This Note advocates that the elderly, given their prominence in the timeshare industry and vulnerability to financial abuse, are in greater need of protection from predatory timeshare sales tactics and resale scams. In order to combat such abuse, the Note advocates for a national timeshare law which would: (1) provide seniors exploring the timeshare market with an additional timeframe to review a public report on the desired timeshare before being able to sign the contract, (2) provide education about both the status of the secondary market for timeshares and timeshare resale fraud through an annual information package, and (3) ensure that all forms of timeshare ownership are covered.*

## I. Introduction

In 2012, seventy-eight year-old Nancy Adams was swept up in a sales pitch from a timeshare resort developer who had offered her and her sister a free weekend at one of its properties in South Carolina.[1] Without thinking much of it, the sisters accepted the proposition and

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1. Doug Shadel, *Time-Share Bandits*, AARP (May 18, 2017), https://www.aarp.org/money/scams-fraud/info-2017/timeshare-scams-how-they-work.html.

following their free weekend stay, they agreed to purchase a standard, week-long timeshare at the resort.[2] Over the next few years, the sisters used the timeshare unit for their specified week and applied their accumulated "points" to stay at a separate location owned by the same resort company.[3] But after several expensive "upgrades" to their membership, their total investment in the timeshare ballooned to more than $20,000 after only two years.[4] The expenses had become too burdensome and the sisters wanted to sell.[5]

Ms. Adams, a retired bank teller, posted a listing for their timeshare on a timeshare resale and exchange website and within a week, was bombarded with phone calls from 1-800 numbers with offers to buy her timeshare.[6] For months, she smartly ignored these calls until a man named "Kevin" from "International Marketing Solutions" called from a Florida area code.[7] Kevin informed Adams that he was representing a couple from Montréal who wanted to buy the timeshare and provided Adams with their contact information.[8] When Adams called, a woman confirmed everything Kevin had said, expressed her eagerness to buy, and a deal quickly came together.[9] Adams received documents via fax that were already signed by the buyers and proceeded to write a check for $2,250, to be refunded later, to set up escrow and title services.[10] However, Adams never received the payment for her timeshare, never received notice of a title transfer, and never heard from "Kevin" again.[11] She had been scammed.

Ms. Adams' story, unfortunately, is not a rare occurrence. The elderly are frequent targets of predatory timeshare sales practices and resale scams.[12] Elder financial abuse is a common problem in our society and the elderly are disproportionately the most targeted victims of

2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. Lisa Weintraub Schifferle, *Timeshare Resale Scheme Preyed on Older Adults*, FED. TRADE COMM'N CONSUMER INFO. (May 22, 2018), https://www.consumer.ftc.gov/blog/2018/05/timeshare-resale-scheme-preyed-older-adults.

fraud.[13] Elder financial abuse and fraud can take many different forms, many of which tend to be committed by trusted individuals such as family members, caretakers, and friends.[14] However, there are thousands of cases each year of older citizens being scammed by complete strangers.[15]

This should not come as a surprise, as the elderly are generally more susceptible to financial fraud and abuse for a number of reasons.[16] Senior citizens are more likely to have excellent credit and own their own homes, are generally more polite and trusting, have difficulty saying "no," and are less likely to report fraud because they do not know who to report it to.[17] Further, elderly victims may not report abuse because they are concerned that their relatives may think that they no longer possess the mental capacity to care for their own finances.[18] Finally, age often corresponds with cognitive deterioration and many elderly individuals may experience memory loss, dementia, or other health issues that diminish or impair their judgement.[19]

The link between elder financial abuse and the timeshare industry is the direct result of resort developers targeting the "affluent subsection of the baby boomer population."[20] In the latest annual timeshare report from the American Resort Development Association ("ARDA"), the trade association and lobbying body for the timeshare industry,[21] it was reported that the average age of U.S. timeshare owners is forty-

13. *Elder Abuse and The Wyndham Timeshare Lawsuit*, TIMESHARE.LAW (Feb. 6, 2018) [hereinafter *Elder Abuse and the Wyndham Timeshare Lawsuit*], https://timeshare.lawyer/wyndham-timeshare-lawsuit-elder-abuse/.

14. *See id.*

15. *See id.*

16. Wayne Bell, *TIPS FOR CALIFORNIA SENIORS TO AVOID "TARGETED" REAL ESTATE FRAUDS*, CAL. BUREAU OF REAL EST. (Sept. 5, 2014), https://www.dre.ca.gov/files/pdf/ca/2014/CalBRE%20Tips%20for%20Seniors%20to%20Avoid%20Real%20Estate%20Fraud.pdf.

17. *Id.*

18. *Id.*

19. *Id.*

20. *See* Diamond Resorts International, Inc., Annual Report (Form 10-K) (Feb. 29, 2016) [hereinafter Diamond 10-K 2015], available at https://www.sec.gov/Archives/edgar/data/1566897/000156689716000080/diamondresorts-12312015x10k.htm ("We believe a majority of our customers are between 45 and 65 years old. The baby boomer generation is the single largest population segment in the U.S. and Europe and is our key target market. With the premium resorts in our network and the broad range of benefits that we offer, we believe we are well-positioned to target an affluent subsection of the baby boomer population.").

21. *About Us*, AM. RESORT DEV. ASS'N, https://www.arda.org/about-us (last visited Nov. 6, 2021).

four.[22] Estimates "based upon what public timeshare companies say about their ownership base,"[23] however, indicate that the average age of timeshare owners is, in reality, significantly higher at fifty-five, while an enormous thirty percent of owners are over the age of sixty-five.[24] Further, these estimates suggest that half of all new sales go to existing owners, a trend which would logically place the average age of timeshare ownership higher than the ARDA reports.[25] Regardless of the true average age of the U.S. timeshare owner, the elderly continue to play a prominent role in this major U.S. commercial industry.[26]

This Note advocates that the elderly, given their prominence in the timeshare industry and vulnerability to financial abuse, are in greater need of legal protection from predatory timeshare sales tactics and resale scams. Section II of this Note provides background information on timeshares in the United States: Subsection II(A) provides a general overview of timeshare mechanics, the U.S. timeshare industry, and the benefits and drawbacks of ownership. Subsection II(B) discusses predatory timeshare sales practices and timeshare resale scams that are primarily designed to defraud the elderly out of their hard-earned savings. Section III analyzes the state timeshare laws of Florida and California, two states that play a disproportionately important role in the U.S. timeshare industry. Section III will also examine the ARDA's Code of Ethics, which is the timeshare industry's attempt to self-regulate its members' sales practices. Finally, Section IV will recommend how the U.S. timeshare industry can be improved through the creation of a national timeshare law—The Federal Timeshare and Vacation Plan Act ("FTVPA")—which would (1) provide seniors exploring the timeshare market with an additional timeframe to review a public report on the desired timeshare before being able to sign the contract, (2) provide for education about both the status of the secondary market

22. *The U.S. Timeshare Industry: By the Numbers*, AM. RESORT DEV. ASS'N [hereinafter *By the Numbers*], https://www.arda.org/news-communications/timeshare-industry-basics/us-timeshare-industry-numbers (last visited Nov. 6, 2021).

23. *See 2018 Timeshare Industry Statistics And What It Means For Owners,* COAL. TO REFORM TIMESHARE (Sept. 17, 2019) [hereinafter *2018 Timeshare Stats*], https://reformtimeshare.org/newsroom/2018-timeshare-industry-statistics-and-what-it-means-for-owners/.

24. *See id.*

25. *See id.*; Diamond 10-K 2015, *supra* note 20.

26. *See Protecting Older Consumers*, FED. TRADE COMM'N [hereinafter *Protecting Older Consumers*], https://www.ftc.gov/system/files/documents/reports/protecting-older-consumers-2017-2018-report-congress-federal-trade-commission/protecting_older_consumers_-_ftc_report_10-18-18.pdf (last visited Nov. 6, 2021).

for timeshares and timeshare resale fraud through an annual information package, and (3) ensure that newer "points system" timeshares are covered by the Act.

# II. Background

## A. Timeshares & the U.S. Timeshare Industry

Timeshare plans vary tremendously depending on factors such as ownership interest type, resort developer, location, and individual sales contract.[27] Thus, timeshare ownership can be confusing to elderly purchasers.[28] This is especially the case for those who may be experiencing memory loss, dementia, or other health issues that diminish or impair their ability to understand the full consequences of timeshare ownership.[29] This Subsection aims to clarify timeshare ownership by introducing the mechanics of various types of timeshares and ownership interests, the timeshare industry in the United States, and the benefits and drawbacks of timeshare ownership.

### 1. TIMESHARE MECHANICS

A timeshare is a resort or vacation property split into shared or fractional ownership with ownership allotments usually expressed in weekly increments.[30] According to the ARDA, "timesharing" is defined as shared ownership of a vacation property, which may or may not include a real property interest.[31] Generally, a timeshare allows owners to own an increment of time in which they can use their shared ownership; these increments are normally one week but vary by developer and resort.[32] Put simply, a timeshare owner shares a unit with others, but each technically "owns" an assigned period of time.[33]

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27. *See, e.g.*, *Timeshares and Vacation Plans*, FED. TRADE COMM'N [hereinafter *Timeshares and Vacation Plans*], https://www.consumer.ftc.gov/articles/0073-timeshares-and-vacation-plans (last visited Nov. 6, 2021).

28. *See id.*

29. *See* Bell, *supra* note 16.

30. Mia Reid, *What Is A Timeshare And How Does It Work?*, TIMESHARESONLY (Sept. 17, 2021), https://www.timesharesonly.com/blog/what-is-a-timeshare-and-how-does-it-work/.

31. *See Timeshare Terminology,* AM. RESORT DEV. ASS'N, https://www.arda.org/news-communications/timeshare-industry-basics/timeshare-terminology (last visited Nov. 6, 2021).

32. *See* Reid, *supra* note 30.

33. *See id.*

Timeshare plans also vary tremendously in terms of mechanics and structure. The Federal Trade Commission's ("FTC") Consumer Information website makes a distinction between "deeded timeshares" and non-deeded "right-to-use resort timeshares/vacation plans," although both fall under the general "timeshare" umbrella definition.[34]

In a *deeded timeshare* ownership structure, the consumer purchases a specific unit for a specific period of time, often a week.[35] This means that the purchaser receives the deed to that unit for one week, and therefore, each unit has fifty-two deeds.[36] The timeshare deed owner has a real property interest and can own the vacation unit for the rest of his or her life, depending on the contract.[37] As it is a real property interest, deeded timeshares are usually alienable and inheritable, meaning the owner has the right to sell it and pass it on to his or her heirs.[38] Thus, an owner of a deeded timeshare buys the right to use a specific unit at a specific time every year, and may rent, sell, or exchange the timeshare unit.[39]

Unless the property was bought outright, the deeded timeshare owner is responsible for paying the monthly mortgage and an annual maintenance fee while property taxes may be extra.[40] Additionally, the unit owner and the other timeshare owners collectively own the resort property, meaning they have voting rights and therefore have a say in how the resort is run.[41] Theoretically, this would also include setting the maintenance fees.[42] The owners share in the use and upkeep of the units and of the common grounds of the resort property, elect officers, control the expenses, and select the resort management company.[43] A homeowners' association ("HOA") usually handles management of the resort.[44]

34. *See Timeshares and Vacation Plans*, *supra* note 27. *But see Timeshare Terminology*, *supra* note 31.
35. *Deeded Timeshare vs. Right To Use: Who Wins?*, PRIMO MGMT. GRP. (Dec. 5, 2018) [hereinafter PRIMO], https://pmanagementgroup.com/deeded-timeshare-vs-right-to-use/.
36. *See id.*
37. *See Timeshares and Vacation Plans*, *supra* note 27.
38. *See id.*
39. *See id.*
40. *See id.*
41. *See* PRIMO, *supra* note 35.
42. *See id.*
43. *See id.*
44. *See id.*

In the United States, the majority of timeshare contracts are deeded rather than non-deeded.[45] This is likely the case because, due to the fact that the deed is alienable and inheritable, the original resort developer would not be responsible for reselling the timeshare on the secondary market; instead, all they need to do is look to collect fees from the next generation.[46] As will be explained in Subsection II(B), however, selling a deeded timeshare on the secondary market can prove to be a substantial burden on an owner and expose the owner to resale fraud.[47]

In a non-deeded, *resort timeshare plan*, a developer owns the resort, which is made up of condominiums or units.[48] Typically, a condo or unit is divided into "intervals" which the consumer purchases the "right to use" for a specific number of years, typically between ten and fifty years.[49] While intervals are usually week-long, they also can take the form of points in a points system, which is discussed below.[50] In a non-deeded timeshare plan, the specific unit the consumer uses at the resort may not be the same each year.[51] In addition to the price for the right to use an interval, the consumer pays an annual maintenance fee that is likely to increase each year.[52] Since the developer continues to own the resort or condominium, the consumer owns a personal property interest, rather than a real property interest in the property, thus making it unalienable and uninheritable.[53]

Most resort timeshares today are owned by large corporations like Wyndham, Marriott, Hilton, Hyatt, Diamond, and Disney.[54] These "hospitality brands" offer a travel-club style of membership for owners, which claim to provide flexibility and customization for their vacation

45. *DEEDED VS NON DEEDED TIMESHARES*, TIMESHARE CONSUMER ADVISOR (Jan. 29, 2018), http://timeshareconsumeradvisor.com/deeded-vs-non-deeded-timeshares/#.

46. *See id.*

47. *See* Barbara Booth, *Why inheriting that beautiful timeshare can bust your wallet*, CNBC, https://www.cnbc.com/2018/02/05/how-to-offload-an-unwanted-timeshare.html (last updated Feb. 8, 2018); *see also* Caryn Baird, *Timeshare resellers rarely deliver on promises, usually escape punishment, Times analysis shows*, TAMPA BAY TIMES (Mar. 5, 2012), https://www.tampabay.com/news/business/realestate/timeshare-resellers-rarely-deliver-on-promises-usually-escape-punishment/1218177/.

48. *See Timeshares and Vacation Plans*, *supra* note 27.

49. *Id.*

50. *Id.*

51. *See id.*

52. *Id.*

53. *See id.*

54. *See* Reid, *supra* note 30.

owners.[55] Further, these brands are also all a part of the ARDA, whose Code of Ethics is purportedly enforced amongst its 500 resort developer members.[56] Overall, there are over 1,500 timeshare resorts across the United States and this number continues to grow.[57]

In a *points-based vacation plan* ("points system"), the consumer buys a certain number of points and exchanges them for the right to use an interval at one or more resorts.[58] The number of points needed to use an interval varies according to the length of the stay, size of the unit, location of the resort, and when the consumer wants to use it.[59] The major industry players have recently trended towards using points-based systems.[60] While these resort developers claim that "points" are functionally equivalent to consumer-friendly flexible deeds, in reality, these points have no intrinsic value because they can't be resold. In effect, this makes the timeshare memberships that were purchased for tens or hundreds of thousands of dollars essentially worthless on the resale market.[61] Some consumers also claim that the concept of "points" may be intentionally confusing to the elderly.[62]

**2. THE U.S. TIMESHARE INDUSTRY**

Timeshares and fractional ownership systems originated in Europe in the 1960s and the concept quickly caught on and grew in the United States throughout the following decades with the advent of timeshare exchange companies.[63] In 1969, the ARDA was founded to promote the growth and development of the timeshare industry in the United States and now has nearly 500 corporate members, including the major industry players: Wyndham, Marriott, Hilton, Hyatt,

55. *Id.*
56. *Id.*
57. *See Timeshares and Vacation Plans*, *supra* note 27.
58. *Id.*
59. *Id.*
60. Amy Martyn, *Diamond Resorts still can't explain why it sold $250,000 worth of timeshare points to an 88-year-old*, CONSUMERAFFAIRS (Mar. 29, 2019), https://www.consumeraffairs.com/news/diamond-resorts-still-cant-explain-why-it-sold-250000-worth-of-timeshare-points-to-an-88-year-old-032919.html.
61. *See id.*
62. *Id.*; Gretchen Morgenson, *The Timeshare Hard Sell Comes Roaring Back*, N.Y. TIMES (Jan. 22, 2016) [hereinafter Morgenson, *Hard Sell*], https://www.nytimes.com/2016/01/24/business/diamond-resorts-accused-of-using-hard-sell-to-push-time-shares.html.
63. *A Brief History of Timeshare*, BAY TREE SOLUTIONS [hereinafter *Brief History*], https://www.baytreesolutions.com/brief-history-of-timeshare (last visited Nov. 6, 2021).

Diamond, and Disney.[64] Today, the ARDA continues to serve as the powerful lobbying body of the timeshare industry.[65]

Despite crashing in the 2008 financial collapse,[66] the U.S. timeshare industry is an enormous and growing national industry.[67] As of 2019, research shows nine consecutive years of growth, with the industry breaking $10 billion in sales revenue in 2019.[68] This is more than a twenty-six percent increase since 2014.[69] The timeshare industry is worth approximately $10.2 billion to the U.S. economy, which is greater than American staples such as Major League Baseball ($9 billion in revenue) and the music industry ($8 billion in revenue).[70] Overall, over 9.6 million Americans own at least one form of a timeshare, with an average interval value of $21,455.[71] As one would expect, the majority of timeshares are located in warmer vacation spots: California, Arizona, South Carolina, Hawaii, Texas, and, of course, Florida.[72] Florida was the birthplace of the timeshare industry in the U.S. and is currently home to roughly one-third of the entire nation's timeshares.[73] This should not come as a surprise as over four million people over the age of sixty-five reside in Florida, making up over twenty percent of the state's population.[74]

### 3. TIMESHARE BENEFITS

Although the industry has found itself on the receiving end of much criticism and many jokes,[75] there are numerous benefits to owning a timeshare. Timesharing can present an appealing alternative to

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64. *See id.*; Reid, *supra* note 30.
65. *See Brief History*, *supra* note 63.
66. *See* Morgenson, *Hard Sell*, *supra* note 62.
67. *See By the Number, supra* note 22; *see also Timeshare Industry in U.S. Sees Eighth Straight Year of Growth,* AM. RESORT DEV. ASSOC. (June 2018), https://www.arda.org/timeshare-industry-us-sees-eighth-straight-year-growth.
68. *See By the Numbers*, supra note 22.
69. *Id.*
70. *Id.*
71. *Id.*
72. *See 2018 Timeshare Stats*, *supra* note 23.
73. *See id.*
74. *See* Christine L. Himes & Lillian Kildruff, *Which U.S. States Have the Oldest Populations?*, PRB (Mar. 16, 2019), https://www.prb.org/which-us-states-are-the-oldest.
75. *See* Ron Kelemen, *Buying a Timeshare: The Pros and Cons*, FORBES (Sept. 16, 2014, 5:08 PM), https://www.forbes.com/sites/nextavenue/2014/09/16/buying-a-timeshare-the-pros-and-cons/#66de0ac91098.

owning a vacation home or renting a hotel room.[76] Unlike a vacation home, which may remain vacant part of the year, the owner of a timeshare or a vacation rental plan can theoretically only pay for what he or she needs.[77] This means that during the times in which the timeshare owner is not presently occupying the premises, he or she usually does not pay for the upkeep, maintenance, or other expenses related to the property.[78] By owning a timeshare, one could, conceivably, affordably live in a more expensive and desirable property.[79] Likewise, the value and affordability can be greater than booking one-off vacations year to year.[80] Further, owning a timeshare provides a guaranteed and consistent vacation arrangement,[81] which, for many of our nation's elderly who are adverse to change, can be very attractive.[82]

There are other potential benefits to timeshare ownership that are circumstantial and dependent on the timeshare plan's contract. A timeshare owner may be able to trade times and locations with other timeshare owners in the event that the owner would prefer to travel somewhere new.[83] While some resorts allow owners to rent out their blocks of time, few people choose to rent off of the secondary market and online timeshare exchange services will charge for their matchmaking services.[84] Finally, an owner might enjoy letting friends or family use the timeshare for free or offer it at a charity auction.[85] In the last year, the average timeshare occupancy was at 80.2 percent nationwide; which is actually higher than hotel occupancy at an average of 66.2 percent.[86] Broken down, forty-four percent of occupants were owners or owners' guests, fourteen percent were exchange guests, seventeen percent were renters, and six percent were marketing guests.[87]

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76. *See id.*
77. *See id.*
78. *See id.*
79. *See id.*
80. *See* 9 *Top Advantages of Timeshare Ownership All Vacationers Should Know*, SELLMYTIMESHARENOW (Nov. 7, 2019), https://www.sellmytimesharenow.com/blog/9-top-advantages-of-timeshare-ownership-all-vacationers-should-know/.
81. *See* Kelemen, *supra* note 75.
82. *See id.*; Nicholas Westerhoff, *Set in Our Ways: Why Change Is So Hard*, SCI. AM. (Dec. 1, 2008), https://www.scientificamerican.com/article/set-in-our-ways/.
83. *See* Kelemen, *supra* note 75.
84. *See id.*
85. *See id.*
86. *See By the Numbers*, *supra* note 22.
87. *Id.*

#### 4. TIMESHARE DRAWBACKS

While there can be positives to owning a timeshare, there will certainly be numerous drawbacks. Unlike owning a vacation home or condominium, a timeshare will always cost the purchaser more than he is able to resell it for and is highly illiquid.[88] As such, the FTC strictly warns against considering purchasing a timeshare as an investment.[89] Moreover, if an owner successfully resells the timeshare, but at a loss, the Internal Revenue Service ("IRS") will not let the owner claim a capital loss as would be the case with other investments and real property.[90]

Another expensive drawback of timeshare ownership is the unexpected fees.[91] While timeshare owners, as mentioned, can expect to pay for routine maintenance, taxes and utilities, other expenses, such as "special assessment" fees, may blindside an owner.[92] Timeshares located near the beach or other natural disaster-prone areas, for example, will likely have corresponding fees in order to cover property repairs post-disaster.[93] Additionally, the owner can be randomly hit for other repairs, upgrades, and anything else a resort deems necessary.[94]

By far the greatest drawback to timeshare ownership is the difficulty of reselling a timeshare on the secondary market. This is the case for two reasons. The first is that purchasers are far more likely to buy a new timeshare rather than one off the secondary market.[95] Largely as a result of the major timeshare industry players' marketing power, it is nearly impossible for private resellers to get prospective buyers' attention.[96] While these industry titans can and will spend thousands of dollars to find new buyers, a private reseller likely does not have the resources to directly compete.[97] Most sellers are limited to advertising their timeshares in timeshare newsletters, timeshare resale websites,

88. *See* Keleman, *supra* note 75; *Timeshares and Vacation Plans*, *supra* note 27.
89. *See* Timeshares and Vacation Plans, *supra* note 27.
90. *See* Keleman, *supra* note 75.
91. *See id.*
92. Marian White, *The Pros and Cons of Owning a Timeshare Property*, MOVING.COM (July 03, 2018), https://www.moving.com/tips/the-pros-and-cons-of-owning-a-timeshare/.
93. *See id.*
94. *See id.*
95. Cynthia Myers, *Problems with Selling Timeshares*, SFGATE, https://homeguides.sfgate.com/problems-selling-timeshares-51730.html (last visited Nov. 6, 2021).
96. *See id.*
97. *See id.*

through timeshare reselling advertisers—also known as "resale service providers"[98]—and even at the resort itself.[99] Second, as a result of the first issue, the resale market is flooded.[100] Even if an owner can resell it, it will be at a loss.[101]

The lack of an active secondary market is a genuine problem that plagues the timeshare industry. Although some timeshare resort developers offer consumers a limited ability to "deed-back" their timeshare to the resort,[102] those who do not have this option and who do not go through a timeshare resale agency—due to a lack of knowledge, trust, or otherwise—end up attempting to sell their timeshares on websites such as eBay or Craigslist for as little as one dollar.[103] Moreover, some owners have even resorted to paying someone to rid them of their unwanted timeshare.[104]

To further add to the issue of selling on the secondary market, the ARDA's annual industry report fails to mention the secondary market and this report is only available for nonmember purchase for the extraordinary price of $500.[105] The Coalition to Reform Timeshare ("the Coalition")—a group of "individuals and organizations dedicated to reforming the timeshare industry"[106]—suggest that secondary market figures intentionally are omitted as the numbers would indicate that new timeshares are sold at inflated prices and their value subsequently plummets upon resale.[107] Regardless of whether the Coalition's claim of intent is true, the ARDA's lack of transparency on the status of the secondary market leaves much to be desired and implies a lack of direction in how to solve these issues. This secondary market issue is only an issue for deeded timeshare owners as non-deeded timeshare owners do not have a real property interest in their vacation and cannot sell or pass-down their interest.[108] The issue of reselling on the secondary

98. *See* FLA. STAT. § 721.205 (2021).
99. *See id.*
100. *See* Kelemen, *supra* note 75.
101. *See Timeshares and Vacation Plans*, *supra* note 27.
102. *See* Booth, *supra* note 47.
103. Baird, *supra* note 47.
104. *See id.*
105. *See Financial Performance 2020: A Survey of Timeshare & Vacation Ownership Companies*, AM. RESORT DEV. ASS'N, (June 30, 2020), https://www.arda.org/financial-performance-2020-survey-timeshare-vacation-ownership-companies.
106. *The Timeshare Industry Needs Reform*, COAL. TO REFORM TIMESHARE, https://reformtimeshare.org/home-old2/ (last visited Nov. 6, 2021).
107. *See 2018 Timeshare Stats*, *supra* note 23.
108. *See* Martyn, *supra* note 60.

market, however, represents a significant stain on the entire timeshare industry.

## B. Predatory Timeshare Sales Tactics & Resale Scams

Two major issues currently surrounding the U.S. timeshare industry will be discussed in this subsection. The first is the continuation of the longstanding practice of high-pressure sales techniques and schemes which are specifically designed to prey on the elderly. While persuasive sales techniques are not necessarily illegal, elderly victims continue to be taken advantage of and pressured into timeshare sales for which they do not, or cannot, understand the full consequences of ownership.[109] Second, due to the lack of a functional secondary market for timeshares, the elderly have become prime targets for complex resale scams.[110]

### 1. WHY THE ELDERLY?

There are several reasons why the elderly are targeted for predatory timeshare sales techniques, timeshare fraud, and financial fraud generally. The first reason is wealth concentration.[111] People over fifty years old control over seventy percent of the nation's wealth[112] and

109. *See, e.g.*, Williams v. Wyndham Vacation Ownership, No. 13-CV-05088-WHO, 2014 WL 457835 (N.D. Cal. Jan. 31, 2014); Gretchen Morgenson, *'My Soul Feels Taller': A Whistle-Blower's $20 Million Vindication*, N.Y. TIMES (Nov. 25, 2016) [hereinafter Morgenson, *Whistleblower*], https://www.nytimes.com/2016/11/25/business/my-soul-feels-taller-a-whistle-blowers-20-million-vindication.html?_r=0.

110. *See, e.g.*, *Leader of Timeshare Resale Fraud Scam Targeting Elderly Victims Sentenced to Five Years in Prison For $3.37 Million in Losses*, U.S. ATT'Y OFF. DIST. OF NEV. (Feb. 27, 2019) [hereinafter DIST. OF NEV.], https://www.justice.gov/usao-nv/pr/leader-timeshare-resale-fraud-scam-targeting-elderly-victims-sentenced-five-years-prison.

111. Randal Wolverton, *Investment fraud schemes targeting senior citizens*, AICPA, https://www.aicpa.org/content/dam/aicpa/membership/downloadabledocuments/state-society-toolkit/201906/q2-2018-investment-fraud-wolverton.pdf (last visited Nov. 6 2021) (noting that "[t]hese vast sums [of wealth accumulated by the elderly] have attracted highly sophisticated organized crime groups, unethical or corrupt broker/dealers and investment advisers, and unethical family members and caregivers.").

112. *Protect the Elderly from Financial Exploitation*, AM. BANKERS ASS'N, https://www.aba.com/advocacy/community-programs/consumer-resources/protect-your-money/elderly-financial-abuse#:~:text=What%20Is%20Elder%20Financial%20Abuse,should%20be%20on%20the%20alert (last visited Nov. 6, 2021).

have a median net worth of more than $241,000.[113] Moreover, when compared to their younger cohorts, senior citizens are more likely to have excellent credit and own their own homes.[114]

Second, the elderly are more likely to be trusting of complete strangers.[115] MIT and UCLA studies—in which people of different generations were shown faces of strangers and asked whether they could be trusted—revealed that seniors gave the highest number of "trustworthy" answers, even for faces that gathered a high response of "untrustworthy" by younger participants.[116] Further, the elderly participants exhibited less activity in their anterior insula—the section of the brain which supports interoceptive awareness or "gut feeling"—while viewing the faces deemed "untrustworthy" by younger participants.[117] Additionally, those who were raised in the wake of the Second World War (the "Baby Boomers"), have a harder time saying "no" than younger generations.[118] These studies thus, collectively suggest that seniors may not identify a potential risk as readily, such as an untrustworthy person, and may fall victim to fraud more easily.[119]

Third, research also suggests that older adults are significantly worse at making decisions related to their personal finances.[120] A Boston College study indicated that a person's financial literacy test scores decline by one percent every year over the age of sixty.[121] Another study found that although the capacity to make financial decisions may decline with age, an individual's confidence to do so did not.[122] The result is that many seniors likely remain unaware of their vulnerability.[123] Moreover, seniors may, consciously or subconsciously, neglect their diminished ability to conduct their finances due to fears of losing their financial independence or appearing weak or incompetent in the eyes of their family.[124]

113. *A Complete Guide to Elder Financial Abuse*, MEDICAREADVANTAGE.COM [hereinafter *Guide to Elder Financial Abuse*], https://www.medicareadvantage.com/complete-guide-to-elder-financial-abuse (last visited Nov. 6, 2021).
114. *See* Bell, *supra* note 16.
115. *See Guide to Elder Financial Abuse*, *supra* note 113.
116. *See id.*
117. *See id.*
118. *See* Bell, *supra* note 16.
119. *See Guide to Elder Financial Abuse*, *supra* note 113.
120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.*
124. *See* Bell, *supra* note 16.

In sum, seniors make up a significant size of the timeshare market,[125] on average have accumulated more wealth, are more trusting of other people, and are not as adept at making financial decisions as they once were, but unfortunately are confident in their ability to do so.[126] For these reasons, the elderly are extremely vulnerable to both predatory timeshare sales techniques and resale fraud schemes.

### 2. PREDATORY TIMESHARE SALES TACTICS

The first timeshare-related issue facing the elderly is the longstanding and notorious practice of timeshares salespeople subjecting the elderly to high-pressure sales tactics. High-pressure sales techniques and resort presentations have long been hallmarks of the U.S. timeshare industry.[127] In a typical timeshare "hard sell," the timeshare salesperson offers the victim incentives, such as free tours, car rentals, gift cards, mini vacations, and extended stays in exchange for the simple attendance of a presentation.[128] In doing so, the salesperson or resort company lures the victim into a glitzy sales presentation, where a carefully orchestrated sales pitch ensures that those attending the presentation leave having signed a timeshare contract and paid a down payment.[129] With the growth of the timeshare industry in the past decade and the rise of multi-billion-dollar timeshare resort companies, high-pressure sales practices have cost individual victim purchasers hundreds of thousands of dollars.[130] Unfortunately, these high-pressure sales schemes are designed to prey on the elderly.[131]

One timeshare resort company that has made headlines for their widespread and continuous abusive sales practices towards the elderly is: Diamond Resorts International, a $2.2 billion timeshare resort company with over 400 properties across the globe.[132] In a 2016 incident, a timeshare owner in California was told that a $100 gift card would be hers if she attended a presentation by Diamond Resorts, who owned

125. *See By the Numbers*, *supra* note 22; *2018 Timeshare Stats*, *supra* note 23; Diamond 10-K 2015, *supra* note 20.
126. *See, e.g.*, Booth, *supra* note 47.
127. *See* Morgenson, *Hard Sell*, *supra* note 62.
128. *See id.*; *Beware: The Carefully Crafted Timeshare Sales Pitch*, MEDIUM (Jan. 12, 2018) [hereinafter *Beware*], https://medium.com/@bmbb/beware-the-carefully-crafted-timeshare-sales-pitch-5df0e191dddb.
129. *See* Morgenson, *Hard Sell*, *supra* note 62; *Beware*, *supra* note 128.
130. *See* Morgenson, *Hard Sell*, *supra* note 62.
131. *See id.*
132. Martyn, *supra* note 60.

the property she was staying at.[133] She accepted and for five hours Diamond representatives pushed her to give up both of her timeshare deeds and upgrade to their membership points system.[134] With the upgrade and membership in Diamond's ownership points system, they said, she would keep her maintenance costs low and could use her points at other resorts in the company's network.[135] Despite continuously declining to pay the Diamond representatives the $30,000 they were asking for, the Diamond representatives, undeterred, suggested that she ask her children to pay for the upgrade.[136] Eventually, she was let go and learned that the representatives had been so certain that she would agree to the offer that they had charged her credit card-on-file for the down payment, even though she had not given approval.[137]

It is not only Diamond Resorts, however, that have made the headlines for such techniques. In 2016, Patricia Williams, a former-Wyndham Resorts employee who was fired for exposing fraudulent sales of timeshares to the elderly, won a $20-million dollar verdict in the Northern District of California.[138] At trial, Williams' team presented evidence that Wyndham employees engaged in high pressure sales tactics involving deliberate lies and misrepresentations to get older timeshare owners to buy more timeshare points.[139] Employees would also falsely tell customers that Wyndham would buy back their ownership stakes or points if they no longer wanted them.[140] These sales practices included encouraging Wyndham employees to "tell them any frigging thing" to make a sale so long as the employee did not put it in writing.[141] Further, and similar to the Diamond Resorts incident, credit card accounts were opened for buyers without their knowledge and approval.[142]

133. Morgenson, *Hard Sell*, *supra* note 62.
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *See* Williams v. Wyndham Vacation Ownership, No. 13-CV-05088-WHO, 2014 WL 457835 (N.D. Cal. Jan. 31, 2014); Morgenson, *Whistleblower*, *supra* note 109.
139. *See* Morgenson, *Whistleblower*, *supra* note 109.
140. *Id.*
141. *Id.*
142. *Id.*

### 3. TIMESHARE RESALE SCAMS

A second issue is the prevalence of complex timeshare resale scams that prey on elderly individuals who are attempting to resell their unwanted timeshares on the secondary market. If an owner is no longer able to afford their timeshare, has grown tired of the location or accommodations, or otherwise needs to sell, the owner is likely going to have to sell their timeshare on the resale market.[143] As a result of the flooded secondary market, however, opportunities to resell a timeshare are scarce.[144] To be clear, timeshare resale is a legitimate business and for a fee, resale advertisement companies will advertise an owner's timeshare in publications or online.[145] Buyers and sellers, however, are usually on their own to actually strike a deal and transfer the timeshare's deed.[146] Unfortunately, timeshare scammers not only are aware of the flooded secondary market, but also, are aware that many resellers are desperate to offload due to financial difficulties.[147] Thus, resellers, especially elderly resellers, are the prime targets of timeshare resale scams and fraud.[148]

Resale scams can take many forms, but typically, a victim is either contacted over the phone or is mailed a document asking the victim to call a toll-free phone number.[149] In luring the victim, scammers often impersonate real estate professionals or attorneys, or assure the victim that they work for a timeshare resale advertising business that carries a generic business-sounding name.[150] Once the victim calls, they are assured that there is a buyer ready to purchase the timeshare or that the phony timeshare reseller business can otherwise resell it.[151] Scammers will create an urgency in the sale; stressing the importance of selling the timeshare quickly or the window of opportunity will disappear.[152] As the scammer explains, all the victim needs to do is pay an upfront fee—

143. *See* Booth, *supra* note 47; Kelemen, *supra* note 74.
144. *See* Booth, *supra* note 47; Kelemen, *supra* note 74.
145. *See* Baird, *supra* note 47.
146. *Id.*
147. *Id.*
148. *See Elder Abuse And The Wyndham Timeshare Lawsuit, supra* note 13.
149. *See id.*
150. *See, e.g.*, DIST. OF NEV., *supra* note 110.
151. *See* Catherine Fredman, *Timeshare resale scams: Look for these warning signs to detect fraud*, CONSUMER REPORTS (June 13, 2015, 8:00 AM), https://www.consumerreports.org/cro/news/2015/06/timeshare-resale-scams/index.htm.
152. *Timeshare Frauds Against the Elderly*, HG.ORG LEGAL RES. [hereinafter *Timeshare Frauds Against the Elderly*], https://www.hg.org/legal-articles/timeshare-frauds-against-the-elderly-46533 (last visited Nov. 6, 2021).

usually via a wire transfer—to cover closing costs, services, taxes, timeshare maintenance or other fees.[153] After the money is wired, no sale, rental, or purchase is completed and the scammer disappears with thousands of dollars.[154] Ms. Adams' story is an example of this type of impersonal, back-end scam.[155]

The scam doesn't always stop there, however. Sometimes, a second fraudulent business may then contact the victim and offer to help recover the money lost in the first scam for yet another fee.[156] As with the first scam, no money is ever recovered, and a victim's frantic telephone calls and emails go unanswered.[157]

Unfortunately, timeshare resale scams have evolved and may involve a third layer! At this tertiary level, a scammer posing as a contact or official from a state's Attorney General's office or other state agency gets in touch with the victim.[158] The scammer tells the victim that they are calling on behalf of the state or consumer division dedicated to timeshare consumer advocacy or they may even claim to be with a subdivision working with the FTC.[159] The scammers offer compensation for any fees lost to other timeshare resale scam companies or perhaps claim to be able to repatriate cash that has been paid in the past to the parent timeshare or vacation ownership company that the consumer originally purchased the timeshare from.[160] Thus, a timeshare owner conceivably can fall victim to the same resale scammers three times!

Many such timeshare resale scams are also greater in scope than one might expect. In 2012, for example, twenty conspirators devised and participated in a telemarketing scam to defraud more than 1,000 timeshare owners out of more than $3.3 million dollars.[161] The scammers used false identities, operated under false or inactive companies, and even, leased office spaces across the country to make the resale scam appear facially legitimate.[162] Using voice-over-internet phone systems, they were able to use telephone numbers that made it appear that

153. *Id.*
154. *Id.*
155. *See* Shadel, *supra* note 1.
156. *See Timeshare Frauds against the Elderly*, *supra* note 152.
157. *Id.*
158. *Common Timeshare Resale Scams*, WESTGATE RESORTS, https://www.westgateresorts.com/legacy/timeshare-resale-scams/ (last visited Nov. 6, 2021).
159. *Id.*
160. *Id.*
161. *See* DIST. OF NEV., *supra* note 110.
162. *See id.*

they were calling from the location of the fake front company.[163] Callers pretended to be in a distant office, used the internet to track the weather and local news in the location of the fake front company, and invited victims to view the leased building on mapping websites.[164] The conspirators created websites with materially false and misleading information to include customer testimonials, company officers, and press releases.[165] Given how intricate and elaborate these timeshare schemes can be, it is no wonder that so many elderly individuals fall victim.

## III. Analysis

Without protective legislation, an elderly victim of predatory timeshare sales practices would only have common law contract defenses as legal remedies for the wrongdoing.[166] Alleging common law fraudulent misrepresentation would require that the victim prove that there was an intentional misrepresentation or non-disclosure when there was a duty to disclose a material fact.[167] Alleging that the signatory to the contract was mentally incapacitated at the signing of the contract would require examination of the victim by two licensed physicians, each certifying that the physician has examined the individual and has concluded that, "by . . . progressive or intermittent physical or mental deterioration . . . the individual had, at the date of the examination, become incapacitated to act rationally and prudently in his or her own financial best interest."[168] Either way, without protective

163. *Id.*
164. *Id.*
165. *Id.*
166. *See*, *e.g.*, HTP, Ltd. v. Lineas Aereas Costarricenses, S.A., 685 So. 2d 1238, 1239 (Fla. 1996) ("[O]ne who has been fraudulently induced into a contract may. . . sue for damages for the fraud. When this happens and the defrauding party also refuses to perform the contract as it stands, he commits a second wrong, and a separate and distinct cause of action arises for the breach of contract.") (quoting Bankers Tr. Co. v. Pac. Emps. Ins. Co., 282 F. 2d 106, 110 (9th Cir. 1960)).
167. *See generally* GEICO Gen. Ins. Co. v. Hoy, 136 So. 3d 647 (Fla. Dist. Ct. App. 2013).
168. *See* 9A Fla. Jur. Forms Legal & Bus. § 34:365(A)(2) (defining "incapacity" as: "[D]uly executed and acknowledged written certificates of two licensed physicians, each certifying that the physician has examined the individual and has concluded that, by reason of accident, physical or mental illness, progressive or intermittent physical or mental deterioration, or other similar cause, the individual had, at the date of the examination, become *incapacitated to act rationally and prudently in his or her own financial best interests* or is incapable of performing the duties under this trust." (emphasis added)).

legislation, it would be an uphill battle for a victim to have their timeshare sales contract voided due to evidentiary burdens.[169]

Every state has enacted civil and criminal legislation to address consumer fraud and elder physical and financial abuse generally.[170] Further, the FTC has enforcement capabilities to protect against consumer fraud and has issued enforcement actions against timeshare resale scammers.[171] When it comes to state timeshare-specific preventative legislation, however, the degree of variability in specificity and breadth of coverage is rather large.[172] Generally, as with all consumer anti-fraud legislation,[173] the keys to thorough legislation are: (1) to increase transparency in the sales process through mandatory disclosures in order to prevent such fraud and (2) create civil liability as recourse for those hurt by wrongdoing.[174] This Section evaluates the effectiveness of the timeshare acts of Florida and California, two states that play an enormous role in the U.S. timeshare industry. Additionally, this Section evaluates the ARDA's Code of Ethics: the timeshare industry's "attempt" to self-regulate its member's sales practices.

### A. Legislative Approaches to Curbing Predatory Timeshare Sales Practices & Resale Scams

Legislation can provide elderly timeshare purchasers with adequate consumer protections against predatory timeshare practices. This can be accomplished through requiring mandatory disclosures during the sales process, creating an un-waivable recission period for

169. *See., e.g.*, Weizhong Zheng v. Vacation Network, Inc., 468 S.W.3d 180, 186 (Tex. App. 2015) (reversing trial court's dismissal of claim based on violations of the Texas Timeshare Act while upholding trial court's dismissal of claim for fraudulent inducement because plaintiff failed "to identify what false representations were allegedly made, or what material facts were allegedly concealed or undisclosed.").

170. *See State Elder Abuse Statutes*, U.S. DEP'T OF JUST., https://www.justice.gov/elderjustice/elder-justice-statutes-0 (last visited Nov. 6, 2021); Physical and Financial Abuse of the Elderly, 50 STATE STATUTORY SURVEYS: FAMILY LAW: ADULT CARE [hereinafter 50 STATE: ELDER ABUSE]; *see, e.g.*, FLA. STAT. § 825.103 (2021).

171. *See* Federal Trade Commission Act, 15 U.S.C. §§ 45(a)(1), 53; Judgment and Final Order, FTC v. Info. Mgmt. Forum, Inc., No. 6:12-cv-00986-JA-KRS, (M.D. Fla. 2013), available at https://www.ftc.gov/enforcement/cases-proceedings/122-3105/information-management-forum-inc-et-al.

172. *See* 50 STATE: ELDER ABUSE, *supra* note 170.

173. *See, e.g.*, Boynton Waterways Inv. Assocs., LLC v. Bezkorovainijs, 82 So. 3d 924 (Fla. Dist. Ct. App. 2011) (discussing how the focus of antifraud legislation, in this case the Interstate Land Sales Full Disclosure Act, "is preventing fraud through the disclosure of pertinent information.").

174. *See* 50 STATE: ELDER ABUSE, *supra* note 170.

timeshare purchasers, and other required contractual provisions. It is difficult, if not impossible, however, to create legislative protections against timeshare resale scams due to the impersonal nature of such fraud. Both Florida's and California's timeshare acts are indicative of this.

**1. THE FLORIDA VACATION PLAN AND TIMESHARING ACT**

Florida is in a unique position when it comes to combatting predatory timeshare sales practices and resale fraud due to both the high number and percentage of the state's population being over the age sixty-five and its role in the U.S. timeshare industry.[175] In 2013, the Florida legislature amended the 2004 Florida Vacation Plan and Timesharing Act ("The Florida Timeshare Act") to include provisions tailored to combat both predatory timeshare sales practices and secondary market resale fraud.[176] The Florida Timeshare Act was designed with several broad purposes in mind: to give statutory recognition to real and personal property timeshare plans; establish procedures for the creation, sale, exchange, promotion, and operation of timeshare plans; provide full and fair disclosure for prospective purchasers; and require fair and full disclosure of terms, conditions, and services, by resale service providers.[177] Because the tourism industry plays a significant role in Florida's economy,[178] the Florida legislature recognized that it needed to strike a balance between protecting elderly timeshare owners various forms of timeshare fraud and allowing the industry to continue to flourish.[179]

Although it does not include any elder-specific protections or provisions,[180] the Florida Timeshare Act does a fairly effective job of protecting elderly timeshare owners against predatory timeshare sales practices and does so in several ways. First, prior to offering any timeshare plan, the developer must submit a filed public offering statement to the Florida Division of Florida Condominiums, Timeshares,

175. *2018 Timeshare Stats*, *supra* note 23; *see* Himes & Kildruff, *supra* note 74.

176. *See* FLA. STAT. § 721.02(6) (2021); *Timeshare Resale Fraud*, FLA. OFF. OF THE ATT'Y GEN. [hereinafter *Timeshare Resale Fraud,* FLA. AG], https://www.myfloridalegal.com/timeshares (last visited Nov. 6, 2021).

177. FLA. STAT. § 721.02(1)–(5) (2021).

178. *See id.*; FLA. STAT. § 721.02(6) (2021) ("[T]he tourism industry in this state is a vital part of the state's economy . . . the sale, promotion, and use of timeshare plans is an emerging, dynamic segment of the tourism industry.").

179. *Id.*

180. *See generally id.* § 721.

and Mobile Homes of the Department of Business and Professional Regulation ("the division") for approval; until the division approves such filing, any contract regarding the sale of that timeshare plan is subject to cancellation.[181]

Second, the Florida Timeshare Act requires mandatory disclosures for all sale and resale contracts.[182] Contracts for the purchase of timeshare interests must be in writing and recorded in the public records.[183] The contract must state the initial purchase price and disclosure of estimated annual assessment fees (or the previous year's fees),[184] the estimated date of the construction of each accommodation or facility promised to be completed, which has not yet been completed at the date of the estimated closing date,[185] an explanation of how the timeshare developer apportioned common expenses and ownership of the common elements,[186] and a brief description of the nature and duration of the timeshare interest being sold, including whether the interests is a real or personal property interest.[187] Timeshare resale contracts have additional requirements, including a statement that no fee, cost, or other compensation is to be paid to the reseller until all promised timeshare interest transfer services have been performed; the delivery of the deed and disclosure of the full contact information of the transferee;[188] and a form statement, which indicates that the transferor acknowledges that the reseller has provided him or her with all of the relevant legal documents.[189]

Third, the Florida Act establishes licensing and disclosure requirements for timeshare sellers and resellers.[190] Any seller of a timeshare plan must be a licensed real estate broker, broker associate, or sales associate.[191] Further, it is unlawful for any real estate broker, broker associate, or sales associate to collect any advance fee for the listing of either a deeded or personal property timeshare.[192]

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181. *See id.* §§ 721.05(11), 721.07.
182. *See id.* §§ 721.06–.065, 721.17–.205.
183. *Id.* § 721.17(1).
184. *Id.* § 721.06(d).
185. *Id.* § 721.06(e).
186. *Id.* § 721.06(d).
187. *Id.* § 721.06(f).
188. *Id.* § 721.17(3)(b)(1), (3).
189. *Id.* § 721.17(3)(b)(4).
190. *See id.* § 721.20.
191. *Id.* § 721.20(1).
192. *Id.* § 721.20(6).

Fourth, the Florida Timeshare Act establishes a requirement that, before entering into a resale transfer agreement, a timeshare reseller must establish an escrow account with an independent escro-agent.[194] The escrow agent has a statutorily imposed fiduciary duty to the timeshare reseller and must be either a member of the Florida Bar, a licensed real estate broker, or a licensed Florida title insurer, provided that they are in good standing at the relevant institution.[195] The requirement that the funds to be deposited in escrow provides protection for all parties to the transaction by ensuring that no funds or property will be transferred until every escrow term and condition have been met.[196] Therefore, the timeshare buyer has the power to stop the sale if a contract term or condition is not met.[197]

Finally, the Florida Timeshare Act requires all sale and resale contracts contain un-waivable ten-day cancelation clauses (also called a recission period).[198] A purchaser of a timeshare from a developer may cancel their sales contract without any penalty or obligation within ten calendar days after signing the contract, and this fact must be included as a form statement in the sales contract.[199] The contract must include a statement that the seller will refund the entire purchase upon receipt of a cancellation request,[200] and the purchaser is guaranteed a refund within twenty days of cancelation.[201] As mentioned in Subsection II(B), sales practices that place elderly buyers in a position of vulnerability or unequal bargaining power are common in the industry.[202] Thus, legal provisions which allow a victim to back-out of an agreement if he or she feels that there was overreaching or wrongdoing during the contractual bargaining process are necessary. Thus, the un-waivable ten-day cancellation clause requirement is, perhaps, the most important of the consumer protections provided in the Act. In situations such as the 2016 Diamond Resorts incident mentioned in Section II(B)(2), when the elderly victim is aware that he or she is in a position of vulnerability,

194. *Id.* § 719.62(7); § 721.17(3)(c)(1).

195. *See id.*

196. *See* Lucas Martin, *Escrow* § 22 28 AM. JUR. 2D (2020) (discussing contractual and fiduciary duties of an escrow agent); Kirsten Demshki, *The Role of Escrow Accounts in Real Estate Transactions*, PENNYMAC (July 20, 2017), https://www.pennymac.com/blog/the-role-of-escrow-real-estate-transactions.

197. *Id.*

198. *See* FLA. STAT. § 721.06(1)(g)(3).

199. *Id.*

200. *Id.* § 721.06(1)(i).

201. *Id.* § 721.205(2)(f)(3).

202. *See* Morgenson, *Hard Sell*, *supra* note 62.

but was either too polite or scared to force her way out of the scenario[203] and signs a contract, the buyer would be able to cancel this contract when he or she felt safe to do so.

The Florida Timeshare Act also contains provisions directly geared towards protecting against *some* types of resale scams. More specifically, it appears that the legislature imagined a situation in which a scam artist poses as a resale agent and misleads a timeshare owner into thinking that they have someone waiting in the wings wanting to buy the victim's unwanted timeshare.[204] Once the fees have been paid, the scam artists claim that they were simply offering advertising services for the upfront money paid, and no buyer ever materializes.[205]

The Florida Timeshare Act attempts to prevent this in several ways. Perhaps most importantly, the Act restricts the abilities of timeshare resale service providers by making it illegal for such providers to state or imply that the advertiser will provide or assist in providing *any type of direct sales or resale brokerage services* other than the advertising of the consumer's timeshare.[206] Further, the resale service provider may not state or imply to a consumer that the timeshare interest has a specific resale value.[207] By restricting the capabilities of resale service providers, the informed consumer using such services theoretically would know exactly what services were being provided. Thus, if a resale service provider was insisting that they could find someone willing to buy the timeshare, especially for a set price, then an informed consumer would know that they were likely dealing with a scam artist.

Second, the Act provides further transparency related to the sales process. Resale service providers are not allowed to claim that there is a buyer interested in the owner's timeshare without providing the potential buyer's name, address, and telephone number.[208] Similarly, the resale service provider may not mislead a customer as to the success rate of the advertiser's sales.[209]

203. *Id.*
204. *See Timeshare Resale Fraud*, FLA. AG, *supra* note 176; Amy Loftsgordon, *Florida Timeshare Foreclosure and Right to Cancel Laws*, NOLO, https://www.nolo.com/legal-encyclopedia/florida-timeshare-foreclosure-right-cancel-laws.html (last visited Nov. 6, 2021).
205. Loftsgordon, *supra* note 204; *see Timeshare Resale Fraud*, FLA. AG, *supra* note 176.
206. FLA. STAT. § 721.205(2)(a).
207. *Id.* § 721.205(2)(d).
208. *Id.* § 721.205(2)(b).
209. *Id.* § 721.205(2)(c).

Third, before collecting fees greater than $75 or engaging in any resale advertising activities, timeshare resale advertisers must obtain a written contract to provide services that is signed by the timeshare owner.[210] As mentioned earlier, the timeshare owner can cancel any signed contract with a timeshare resale advertiser within ten days and, if cancelled, the timeshare resale advertiser must provide a full refund to the timeshare owner in twenty days (or within five days after receipt of funds from the cleared check, whichever is later).[211]

In terms of purchaser civil remedies for violations of the Florida Timeshare Act generally, the Act provides that an action for damages or for injunctive or declaratory relief for a violation may be brought by any purchaser or home-owners association ("HOA") against the developer, seller, escrow agent, or the managing entity.[212] If a timeshare resale advertiser violates the resale-specific provisions, it can be penalized up to $15,000 per violation by the Florida Office of the Attorney General.[213] Further, any unfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts would violate Florida's Deceptive and Unfair Trade Practices Act and result in additional fines up to $10,000 ($15,000 if the victim is over sixty-five).[214]

#### 2. THE CALIFORNIA VACATION OWNERSHIP AND TIME-SHARE ACT

As with Florida, California has passed legislation designed to provide transparency in the timeshare sales business to curb predatory timeshare sales practices.[215] Generally, California's Vacation Ownership and Time-share Act of 2004 ("The California Timeshare Act") is similar to the Florida Timeshare Act, but with different approaches to transparency and the method for mandatory disclosure requirements. As with Florida timeshare purchasers, purchasers of California timeshares have an un-waivable contractual right to cancel their

210. *Id.* § 721.205(2)(e).
211. *See id.* § 721.06(1)(g)(3).
212. *Id.* § 721.21.
213. *Timeshare Resale Fraud,* FLA. AG, *supra* note 176; *see id.* § 721.205.
214. *See* FLA. STAT. § 501.204 (2017), FLA. STAT. § 501.2075 (2001), FLA. STAT. § 501.2077 (2013); *Consumer Protection Division*, FLA. OFF. OF THE ATT'Y GEN., https://www.myfloridalegal.com/pages.nsf/Main/18A7753257FE439085256CC9004EC4F7 (last visited Nov. 6, 2021).
215. *See* CAL. BUS. & PROF. CODE § 11211(a)–(d) (West 2005) ("[T]he tourism industry in this state is a vital part of the state's economy. . . the sale, promotion, and use of time-share plans is an emerging, distinct segment of the tourism industry.") (using language identical to that found in FLA. STAT. § 721.02(6)).

timeshare within seven days of purchase ("the recission period").[216] Developers are also required to place all funds received for the purchase contract into escrow through the duration of the recission period.[217]

Unlike in Florida, where mandatory disclosures concerning information related to the property are all required to be included in the sales contract, in California, the developer must disclose all relevant information in a "public report," which has been previously filed with the California Department of Real Estate ("DRE").[218] Although Florida also requires the filing of such a report, in California, the public report must be presented to prospective purchasers prior to the sale.[219] The developer, or a licensed sales agent, also must give the purchaser a receipt to be signed indicating that the purchaser received and read the public report.[220] Although the method of disclosure is different, the substantive information required to be disclosed is materially the same.[221]

Where the California Timeshare Act falls short of the Florida Timeshare Act is in legislation specifically targeted towards resale fraud. While California's Business Code requires that anyone who collects or contracts for an upfront fee for sale or resale of a timeshare property must be a licensed real estate broker,[222] there is not much in the way of restricting the capabilities of timeshare resale advertisers, as is the case with the Florida Timeshare Act.[223]

In reality, however, this gap in California's legislation may not matter much. While the Florida Timeshare Act's resale provisions would theoretically provide welcomed transparency for consumers looking to *advertise* their timeshares, attempting to combat *all* forms of timeshare resale scams though legislation and regulation may simply be a futile effort due to the mechanics and nature of other forms of resale scams.[224] As discussed earlier, many timeshare resale scam artists

216. *Id.* § 11238.
217. *Id.* § 11243(a).
218. *Id.* § 11234.
219. *Id.*
220. *Id.*
221. *Compare* CAL. BUS. & PROF. CODE §§ 11226 (West 2006), 11234 (West 2005), *with* FLA. STAT. § 721.06.
222. CAL. BUS. & PROF. CODE § 10146 (West 2009).
223. *See* FLA. STAT. §721.205 (2021).
224. *See* Fredman, *supra* note 151; Grace Ordonez, et al., *Timeshare Obligations, Regulations, and Challenges* (Mar. 3, 2020), NAT'L ASSOC. OF ATT'YS GEN., https://www.naag.org/attorney-general-journal/timeshare-obligations-regulations-and-challenges/; *Avoid Timeshare Resale Scams*, OFF. OF MINN. ATT'Y GEN., https://www.ag.state.mn.us/consumer/Publications/TimeShareResaleScams.asp (last visited

have developed clever ways of appearing to be legitimate businesses complying with the law by assuming the identities of real licensed brokers and brokerage services.[225]

Thus, the harsh reality is that, in the case of timeshare resale scams, it is difficult, if not impossible, to create preventative legislation. It is simply up to the consumer to realize that they are being scammed.

## B. ARDA's Code of Ethics

The ARDA Code of Ethics—the timeshare industry's attempt to self-regulate its members' sales practices—lacks the specificity to be an effective regulatory weapon. Further, while the Code does outline a disciplinary process for members who are found to have violated the Code, there is no evidence to suggest that the ARDA has ever suspended or terminated a high-profile member, despite decades of successful lawsuits against such members for predatory sales practices and fraud.[226]

As mentioned earlier, the ARDA is the trade association and lobbying body for the timeshare industry and comprises over 500 timeshare development companies that represent ninety-five percent of the U.S. timeshare industry.[227] Although based in Washington, D.C., the ARDA is a non-profit, non-governmental entity, but nonetheless, serves to "educate policymakers and forge relationships so that the industry is properly recognized as a key sector of the hospitality industry."[228] In order to maintain the appearance that it is "committed to the highest standards of ethics in the resort community for the benefit of the public," the ARDA has adopted a Code of Ethics all members must adhere to.[229] One could be forgiven, however, for believing that the

Nov. 6, 2021) (explaining that many timeshare scammers go to great lengths to appear credible, such as by creating websites and having official-looking documents).

225. *See* Fredman, *supra* note 151.

226. *See id*; *See Don't Fall for Deception, Pressure and Traps Disguised as Vacations*, BETTER BUS. BUREAU, https://www.bbb.org/article/news-releases/18149-dont-fall-for-deception-pressure-and-traps-disguised-as-vacations-a-better-business-bureau-study-of-the-missouri-timeshare-vacation-club-industry (last visited Nov. 6, 2021).

227. *See About Us*, *supra* note 21.

228. *Advocacy*, AM. RESORT DEV. ASS'N, https://www.arda.org/advocacy (last visited Nov. 6, 2021).

229. *Ethics Code of the American Resort Development Association*, AM. RESORT DEV. ASS'N, (Apr. 7, 2014), §§ I, III(A)(1) [hereinafter *Ethics Code*], https://www.arda.org/sites/default/files/media/file/CodeofEthicsFinal040714.pdf.

Code of Ethics is little more than an intentionally toothless publicity stunt.

The Code of Ethics requires its members to adhere to minimal ethics standards.[230] The Code states that members must comply with applicable law, but if the Code's requirements are more stringent than the applicable law, members are to follow the Code.[231] The Code's requirements, however, are open-ended and do not require disclosure of specific items.[232] Rather, members must provide "[p]rovide fair, meaningful and effective disclosure" to the consumer "regarding the timeshare interest" and "products offered contemporaneously with the [timeshare interest], including exchange programs, incidental benefits, financing, short-term products, and exit programs."[233] Further, while members are required to provide an un-waivable recission period for all sales contracts, the Code does not specify how long such the recission period must be.[234] This theoretically opens the door to meaningless one-day recission periods should applicable state law not require longer.[235]

The Code outlines the ability for a member to bring a cause of action against a member for which it believes to not be in compliance with the Code.[236] The Administrator (an appointed ARDA staff member) would preside over the case and, alongside an appointed Ethics Committee, determine whether a member had violated the Code.[237] The Code empowers the Administrator and Committee to issue sanctions, including probation, suspension, and termination of the member's the ARDA membership.[238]

There is scant—if any—evidence, however, to suggest that the ARDA has ever exercised its suspension or termination powers against a notable member despite decades of successful lawsuits against members such as Diamond and Wyndham.[239] Rather, it appears that the

230. *See id.*
231. *See id.*
232. *See id.* § III(A)(3)(a)–(c).
233. *Id.*
234. *See id.* § III(A)(7).
235. *See, e.g.*, Williams v. Wyndham Vacation Ownership, No. 13-CV-05088-WHO, 2014 WL 457835 (N.D. Cal. Jan. 31, 2014).
236. *See Ethics Code*, *supra* note 229, at § IV(B)(1).
237. *See id.* at § IV(D)(5).
238. *Id.*
239. *See, e.g.*, Williams, 2014 WL 457835; Martyn, *supra* note 60.

ARDA turns a blind eye to its members' predatory practices.[240] Wyndham, for example, took home twelve awards at the 2017 ARDA Awards Gala; a year which included a high-profile, $20 million verdict against the company for firing a sales associate who had exposed systematic abusive sales practices which targeted the elderly.[241] A Code of Ethics means little if those that enact it choose not to enforce it and this is clearly, and unfortunately, the case with the ARDA.

## IV. Recommendation

Several conclusions can be drawn from the preceding analysis. First, carefully crafted legislation can provide elderly consumers with adequate protections against predatory timeshare sales practices. This is done mainly through requiring certain disclosures at the point of sale and requiring an un-waivable recission period, which would allow a timeshare owner to back out of a sale within ten days of signing a contract.[242] Second, most timeshare resale fraud is, due to the impersonal nature of such fraud, difficult to prevent via legislation and, thus, it is simply up to the consumer to know when he or she is vulnerable to such fraud.

This Recommendation proposes a federal timeshare law: "The Federal Timeshare and Vacation Plan Act" ("FTVPA" or "Act"), which would be based off the Florida Timeshare and Vacation Plan Act, but with several important tweaks. Like the law it is based on, the FTVPA would look to strike a balance between providing consumers with necessary protections against predatory sales practices and resale fraud, while also allowing the timeshare industry to continue to play an important role in the national economy.[243]

Although the FTVPA would not be entirely elder-specific, it would standardize timeshare disclosure and recission obligations for timeshare sales contracts, providing necessary transparency for the timeshare industry's elderly consumer base. The FTVPA would be functionally similar to the Fair Housing Act of 1968 ("FHA") in the

240. *See Wyndham Vacation Ownership Recognized with 12 ARDA Awards*, THE TIMESHARE AUTHORITY (Apr. 7, 2017), https://www.thetimeshareauthority.com/2017/04/07/wyndham-vacation-ownership-recognized-12-arda-awards/ [hereinafter *ARDA Awards*]; Williams, 2014 WL 457835; Morgenson, *Whistleblower*, *supra* note 109.

241. *See ARDA Awards*, *supra* note 240; Morgenson, *Whistleblower*, *supra* note 109.

242. *See, e.g.*, FLA. STAT. § 721.20 (2013).

243. *See* FLA. STAT. § 721.02 (2012).

sense that it would create point of sale procedures in order to protect a distinct and vulnerable group of consumers from targeted abuse.[244] Further, the FTVPA would make use of the United States Department of Housing and Urban Development ("HUD"), the department created by the FHA,[245] to facilitate and enforce the provisions of the Act. More specifically, the FTVPA would: (1) provide seniors exploring the timeshare market with an additional timeframe to review a public report on the desired timeshare before being able to sign the contract, (2) provide for education about both the status of the secondary market for timeshares and timeshare resale fraud through an annual information package, and (3) ensure that newer "points system" timeshares are covered by the Act.

## A. Preliminary Constitutional Considerations

As with any proposed piece of federal legislation, there are constitutionality boxes that must be ticked. First, Congress must have the authority to pass such legislation.[246] Such authority would come from Congress's broad lawmaking power under the "Commerce Clause" of Article I, Section 8.[247] The Supreme Court has held that activity falls under congressional authority if it has a "substantial economic effect" on interstate commerce.[248] Although most real estate law tends to be state law due to the unmoving nature of real property,[249] timeshare ownership is different as it, by nature, often involves owning a timeshare in a state different than the purchaser's domicile (i.e., interstate).[250] When

244. *See Fair Housing: Equal Opportunity for All*, U.S. DEP'T OF HOUS. & URB. DEV. (2011) [hereinafter FAIR HOUSING], https://www.hud.gov/sites/documents/FHEO_BOOKLET_ENG.PDF.

245. *See id.*

246. *See generally* U.S. CONST. art. I.

247. *See* U.S. CONST. art. I § 8 ("The Congress shall have Power . . . to regulate commerce with foreign nations, and among the several states, and with the Indian tribes.").

248. *See* United States v. Lopez, 514 U.S. 549, 557, (1995); *see also* N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 37, (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.").

249. *See Real Estate Law*, JUSTIA, https://www.justia.com/real-estate/ (last visited Nov. 6, 2021).

250. *See Stroman Realty Inc.v. Antt: Timeshare Company's Interstate Marketing Efforts Upheld*, NAT'L ASS'N OF REALTORS (Nov. 1, 2005), https://www.nar.realtor/legal-case-summaries/stroman-realty-inc-v-antt-timeshare-companys-interstate-

one considers that the timeshare industry is a growing national industry creating $10 billion in annual revenue from consumers purchasing timeshares in other states,[251] this should be sufficient to qualify as having a "significant economic impact"[252] on interstate commerce.

Second, there would need to be a "legitimate purpose" for any federal provision that would discriminate based on age.[253] Age is not a "suspect classification" and thus, must pass only rational basis review to avoid being struck down under the Fifth Amendment.[254] Third, the FTVPA would not be able to require state governments or programs to enforce or participate in its execution as "the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."[255]

## B. The FTVPA

### 1. THE PUBLIC REPORT SYSTEM

The FTVPA's first alteration from the Florida Timeshare Act would be to adopt the California Timeshare Act's "public report" system, but then modify it to function on a federal level. Under the California Timeshare Act, a developer must disclose all information material to a specific timeshare plan in a "public report," which is filed with the DRE.[256] Although Florida also requires the filing of such a report,[257] in California, the public report must be presented, by the developer, to prospective purchasers prior to the sale either in-person or digitally.[258] The purchaser also must sign a form for the developer indicating that the purchaser received and read the public report before being able to purchase the timeshare plan or product.[259]

marketing-efforts-upheld; Mia Reid, *10 (Great) Reasons Why People Buy Timeshares*, TIMESHARESONLY, https://www.timesharesonly.com/blog/why-do-people-buy-timeshares/; Curtis Berger, *Timesharing in the United States*, 38 AM. J. COMPAR. L. (1990) 131, 131–51, https://doi.org/10.2307/840537.

251. *See By the Numbers*, *supra* note 22.

252. *See id.*; *Economic Impact Analysis*, GREYHILL ADVISORS, http://www.greyhilladvisors.com/economic-impact (last visited Nov. 6, 2021).

253. *See* Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 310–14 (1976).

254. *See id.*

255. *See* Printz v. United States, 521 U.S. 898, 925–28 (1997).

256. CAL. BUS. & PROF. CODE § 11234 (Deering 2021).

257. *See* FLA. STAT. § 721.07 (LexisNexis 2021).

258. CAL. BUS. & PROF. CODE § 11234 (Deering 2021).

259. *Id.*

To adapt this reporting system to a federal level, two adjustments would need to be made. First, the FTVPA would not be able to require state government entities, such as the DRE, to facilitate a public report filing system due to constitutional limits on federal power.[260] Therefore, there would need to be a substitute federal administrative entity. Rather than create a new agency, the FTVPA would create a division within HUD to facilitate the public report filing system. HUD is "the agency responsible for national policy and programs that address [the nation's] housing needs, [improving] and [developing] the nation's communities, and [enforcing] fair housing laws."[261] As a primary goal of the FTVPA would be to provide protections for the nation's elderly against predatory timeshare practices and resale scams, it should fit within HUD's purview and would thus, make it the ideal candidate.[262]

Second, the FTVPA would introduce an un-waivable ten-day "public report review period" for prospective timeshare purchasers over the age of sixty-five. The review period would begin from the point at which the prospective purchaser receives the report from the developer and would grant the purchaser a window in which he or she would ideally be able to consult a family member, attorney, financial advisor, or other trusted individual concerning the contents of the public report and the consequences of ownership.[263] Only after the ten-day review period has passed and the prospective purchaser has signed a form indicating that he or she has read the report, may the prospective purchaser sign a sales contract. This review period is an effective complement to the ten-day recission period and negates the possibility that a predatory salesperson would rush the elderly purchaser through reading and signing off on the report immediately and without fully understanding the consequences of ownership.[264]

There is a legitimate purpose for requiring the review period only for those over the age of sixty-five. Elderly consumers are the target demographic for timeshare resort developers and predatory sales practices and are in need of specific protections during the sales process to prevent such abuse.[265] The FTVPA, however, would assume that

260. *See Printz*, 521 U.S. at 925–28.
261. *Questions and Answers About HUD*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/about/qaintro (last visited Nov. 6, 2021).
262. *See id.*
263. *Id.*
264. *See, e.g.*, Martyn, *supra* note 60.
265. *See* Diamond 10-K 2015, *supra* note 20; Morgenson, *Whistleblower*, *supra* note 109; Morgenson, *Hard Sell*, *supra* note 62.

younger generations of consumers have greater accessibility to information[266] and can research timeshare ownership prior to the sales process, can more readily read a situation in which they could be taken advantage of,[267] and are likely more willing to say "no."[268] To require those who are not specific targets of predatory timeshare sales tactics to have to wait ten days before signing the sales contract would be overly paternalistic, especially considering consumers under sixty-five would still have the ten-day recission period at their disposal. Thus, this review period system effectively strikes a balance between unjustly discriminating against the elderly and being overly paternalistic.

#### 2. TIMESHARE SECONDARY MARKET & RESALE SCAM ANNUAL INFORMATION PACKAGE

While the FTC does investigate reports of timeshare resale scams and has reached hefty settlements with scammers,[269] there is little in the way of *preventing* such fraud.[270] Thus, unfortunately, it has simply been up to the consumer to realize that he or she is being scammed.[271] Therefore, those exploring the timeshare market need to be informed about both the state of the secondary market and the dangers of timeshare secondary market resale fraud. Under the FTVPA, this necessary consumer education would be accomplished through requiring disclosure of such information as an "information package" addendum to the public report.

Information on the timeshare secondary market is difficult to find and whatever is available online may be difficult to analyze due to the lack of condensed information and figures.[272] Further, the ARDA's annual report on the timeshare industry conveniently leaves out any information on the status of the secondary market—information that

266. *See, e.g.*, Kate Conger & Erin Griffith, *As Life Moves Online, an Older Generation Faces a Digital Divide*, N.Y. TIMES (Mar. 27, 2020), https://www.nytimes.com/2020/03/27/technology/virus-older-generation-digital-divide.html (discussing how seniors face a digital gap).

267. *See Guide to Elder Financial Abuse*, *supra* note 113; Bell, *supra* note 16.

268. *See Guide to Elder Financial Abuse*, *supra* note 113; Bell, *supra* note 16.

269. *See* 15 U.S.C. § 53 (1994); FTC v. Info. Mgmt. F., Inc., No. 6:12-cv-00986-JA-KRS (M.D. Fla. Aug. 30, 2013), available at https://www.ftc.gov/enforcement/cases-proceedings/122-3105/information-management-forum-inc-et-al; *see, e.g.*, Barbara Peterson, *Trouble in Timeshare Paradise*, CONSUMER REPORTS (Dec. 19, 2019), https://www.consumerreports.org/vacations/trouble-in-paradise-timeshares/.

270. *See* Peterson, *supra* note 269.

271. *See id.*

272. *See 2018 Timeshare Stats*, *supra* note 23.

would indicate that member resort developers sell over-priced timeshares whose value collapse immediately upon first sale.[273]

Instead of relying on the ARDA to produce information on the secondary market, the FTVPA would again call upon the newly created timeshare-specific division of HUD to research and provide the necessary information in an annual information package. The information package would include, but not necessarily be limited to, the number of new timeshares sold, the number of used timeshares sold, the average price of new timeshare, and the average depreciation of a timeshare one, two, three, four, five, and ten years after sale. These figures would be type- and market-specific. For example, a consumer looking to purchase a two-bedroom, week-long timeshare in Arizona would be given specific information on two-bedroom timeshares in Arizona. In terms of resale fraud information, the package would include descriptions of common resale scams, things to look out for when looking to resell an unwanted timeshare, and summaries of enforcement actions undertaken within the past five years.

The FTVPA would require the information package be presented to a prospective purchaser as an addendum to the timeshare-specific public report. Like the public report, the prospective purchaser would need to sign a form indicating he or she has read the information package before being able to purchase the timeshare plan or product.

A possible argument against the information package is that by revealing the truth about the values of timeshares over time and the risk of timeshare resale fraud, the timeshare industry would be severely harmed. In other words, the Act would not be striking the balance it sets out to. This concern is misplaced. Regardless of whether the market is for securities, real estate, or otherwise, disclosure provides the public with the information necessary to make informed financial decisions.[274] That added transparency naturally builds trust in the industry and leads to greater investment in the long term.[275] Markets and businesses that build their foundations on deceit do not last.[276] Thus, while such disclosure would undoubtably lose sales, the industry should not have

273. *See id.*
274. *See* Andrew A. Schwartz, *Mandatory Disclosure in Primary Markets*, 2019 UTAH L. REV. 1069, 1073 (2020).
275. *See id.*; Mike Kappel, *Transparency in Business: 5 Ways To Build Trust*, FORBES, https://www.forbes.com/sites/mikekappel/2019/04/03/transparency-in-business-5-ways-to-build-trust/?sh=6964081e6149 (last visited Nov. 6, 2021).
276. *See* Kappel, *supra* note 275.

expected to be able to last forever when its base is predatory schemes and a significant lack of transparency.

**3. POINTS SYSTEMS**

The second alteration from the Florida Timeshare Act to the FTVPA would be to ensure that "points systems" are covered by the FTVPA. As stated in Section III, points systems are becoming increasingly popular amongst resort developers.[277] The timeshare industry claims that points are no different than deeds, but provide consumers with extra flexibility.[278] A skeptic of the timeshare industry, however, would conclude that resort developers have turned to points systems either to intentionally confuse elderly consumers through the introduction of an alien, quasi-currency system[279] or an attempt to evade current timeshare legislation by selling the consumer a product that falls outside of legislative definitions of a "timeshare" or "timeshare plan."[280] Unfortunately, the answer may be both and thus, any proposed legislation must ensure that points systems fall within the scope of the law.

The Florida and California Timeshare Acts, for example, use the same definition for "timeshare plan": "any arrangement, plan, scheme, or similar device . . . whether by membership, agreement, tenancy in common, sale, lease, deed, rental agreement, license, or right-to-use agreement or by any other means, whereby a purchaser . . . receives *ownership rights in or a right to use accommodations, and facilities . . . .* "[281] As points systems do convey, via a personal property interest, the right to use a resort's accommodations,[282] the acts likely cover them without ever explicitly saying so.

Specific language in the FTVPA, however, would certainly be preferred. This would come in the form of a new definition in the "definitions" section of the statute which would define "points systems" as: "A points system is a timeshare plan in which a developer, or other seller of a timeshare plan, sells the purchaser "points" or a functional equivalent, which may be exchanged for the right to use the developer's accommodations, facilities, or other products related to a timeshare interest or resort." The inclusion of the "functional equivalent" language

277. *See* Martyn, *supra* note 60.
278. *See id.*
279. *See id.*
280. *See* FLA. STAT. § 721.07(5)(e)(4) (LexisNexis 2021).
281. *See* FLA. STAT. § 721.05(39) (emphasis added).
282. *See Timeshares and Vacation Plans*, *supra* note 27.

is important, as it covers other potentially confusing ownership systems that timeshare resort developers could, and will likely, create in the future.

**4. ENFORCEMENT**

Like the Florida act it would be based on, the FTVPA would provide civil recourse for damages or injunctive or declaratory relief for violations of the FTVPA.[283] Likewise, the fines for violating the resale-specific provisions would be similarly adopted from the Florida Timeshare Act.[284] Due to the same constitutional limitations on federal power over state governments discussed above,[285] the FTVPA would not be able to require state offices, such as state offices of the Attorney General, to investigate claims of FTVPA violations or enforce the Act if necessary. At the federal level then, HUD would be selected as the new enforcement agency. HUD is responsible for enforcing the Fair Housing Act through investigations into violation claims and charging violators when necessary.[286] Therefore, as HUD would already be facilitating the FTVPA's public report system and does similar work in enforcing the FHA, it would be the ideal enforcement agency for the FTVPA.

In enforcing the FTVPA, HUD would conduct similar investigations into claims of FTVPA violations as it does for claims of FHA violations. After an individual reports a possible violation and submits a formal complaint (either online, over the phone, or by email), HUD would assign one or more investigators to investigate the allegations made and provide the party against whom the complaint has been filed proper notice and an opportunity to respond to the complaint.[287] HUD would then gather evidence, likely interview the relevant parties and witnesses.[288]

283. FLA. STAT. § 721.21 (West 2021).
284. *See* FLA. STAT. §§ 501.2075, 501.2077(2)–(3) (LexisNexis 2021) (emphasis added).
285. *See* Printz v. United States, 521 U.S. 898, 25–28 (1997) ("[T]he Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs.").
286. *See* FAIR HOUSING, *supra* note 244, at i.; *Fair Housing Enforcement Activity*, U.S. DEP'T OF HOUS. & URB. DEV., https://www.hud.gov/program_offices/fair_housing_equal_opp/enforcement (last visited Nov. 6, 2021).
287. *See Learn About the FHEO Complaint and Investigation Process*, U.S. DEP'T OF HOUS. & URB. DEV, https://www.hud.gov/program_offices/fair_housing_equal_opp/complaint-process (last visited Nov. 11, 2021).
288. *See id.*

Following the conclusion of the investigation, HUD would send a written report to the person who submitted the claim, including a determination as to whether reasonable cause exists to believe that there was a violation.[289] If the claimant wishes to pursue a federal civil action, HUD must refer the case to the U.S. Department of Justice ("DOJ") for enforcement.[290] The DOJ would then file a civil lawsuit on the complainant's behalf in the U.S. District Court in the district in which the FTVPA violation allegedly occurred.[291]

## V. Conclusion

The U.S. timeshare industry is an enormous and growing national industry.[292] This should not necessarily come as a surprise, as timeshare plans can theoretically provide consumers with a cheaper alternative to owning a vacation home or condo.[293] While there can certainly be positives to owning a timeshare, such as cheaper up-front costs and consistency,[294] there are also drawbacks, such as hidden fees and the difficulty of selling an unwanted timeshare on the flooded secondary market.[295]

Unfortunately, there is also a link between the timeshare industry and elder financial abuse, which is the direct result of timeshare resort developers targeting the affluent subsection of the Baby Boomer population.[296] Such abuse typically takes one of two forms. The first is the continuation of the longstanding practice of high-pressure sales techniques and schemes which are specifically designed to prey on the elderly.[297] While persuasive sales techniques are not necessarily illegal, elderly victims continue to be taken advantage of and pressured into timeshare sales for which they do not, or cannot, understand the full consequences of.[298] Second, due to the lack of a functional secondary

289. *See id.*
290. *See id.*
291. *See id.*
292. *See By the Numbers*, *supra* note 22.
293. *See Keleman*, *supra* note 75.
294. *Id.*
295. *Id.*
296. *See* Martyn, *supra* note 60; Diamond 10-K 2015, *supra* note 20.
297. *See, e.g.*, Morgenson, *Whistleblower*, *supra* note 109.
298. *See, e.g.*, Williams v. Wyndham Vacation Ownership, No. 13-CV-05088-WHO, 2014 WL 457835, at *1 (N.D. Cal. Jan. 31, 2014); Morgenson, *Whistleblower*, *supra* note 109.

market for timeshares, the elderly have become prime targets for complex resale scams.[299]

Legislation, such as Florida and California's Timeshare Acts, can protect consumers from predatory sales tactics by requiring certain disclosures at the point of sale and requiring an un-waivable recission period, which would allow a timeshare owner to back out of a sale within ten days of signing a contract.[300] Educating consumers, especially elderly consumers, about the consequences and dangers of timeshare resale fraud is key.

Combatting predatory timeshare sales practices and resale fraud can be best accomplished through the creation of a national timeshare law—the FTVPA. Using the Florida Timeshare Act as a template, the FTVPA would standardize timeshare purchase procedures and utilize HUD to facilitate and enforce the Act. Specifically, the Act would: (1) provide seniors exploring the timeshare market with an additional timeframe to review a public report on the desired timeshare before being able to sign the contract, (2) provide for education about both the status of the secondary market for timeshares and timeshare resale fraud through an annual information package, and (3) ensure that newer "points system" timeshares are covered by the Act.

299. *See, e.g.*, DIST. OF NEV., *supra* note 110.
300. *See, e.g.*, FLA. STAT. § 721.07(2)(d)(1) (LexisNexis 2021).