

THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Beaufort Division

Patrick Michael Duffy, Senior U.S. District Judge

Appellate Case No. 2016-001765

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S.C. SUPREME COURT

Paula Fullbright and Mark Fullbright Plaintiffs,

v.

Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc. ... Defendant.

DEFENDANT'S BRIEF

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CERTIFIED QUESTIONS

- I. Does the South Carolina Real Estate Commission have exclusive jurisdiction to determine whether a violation of the Vacation Timeshare Act has occurred?

- II. Is the Commission's determination of a violation of the Vacation Timeshare Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Act?

- III. Are the Commission's determinations as to whether the Vacation Timeshare Act was violated binding on the courts of the Judicial Branch?

STATEMENT OF THE CASE

This matter arose out of a lawsuit commenced in the United States District Court for the District of South Carolina, Beaufort Division¹, by counsel for Plaintiffs, regarding the sale by Defendant (“Spinnaker”), and the purchase by Plaintiffs, of a leasehold timeshare interest in South Carolina. Spinnaker has been involved in the development, management and sale of timeshare resort properties located in Hilton Head Island, South Carolina since the 1990’s. While Spinnaker and its related entities have been so involved in numerous resort properties located on Hilton Head Island, and elsewhere, it is Spinnaker’s resort property called Bluewater by Spinnaker, located on Hilton Head Island, which is the subject matter of this lawsuit. Taken together, the business activities of Spinnaker, and its related entities, have had, and continue to have, a large and important part in the economy of Hilton Head Island, bringing owners, visitors and tourists with multi-million dollar impacts on the local economy, including the construction industry, and providing work for numerous individuals and companies in the Beaufort County area.

More specifically on June 24, 2014 Plaintiffs and Spinnaker entered into a written "Membership and Lease Agreement" for a lease of a timeshare interest in a Timeshare Plan called "Bluewater by Spinnaker" located in the Town of Hilton Head Island, Beaufort County, South Carolina.

¹ Paula Fullbright and Mark Fullbright v. Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc., Civil Action No. 9:15-cv-1476-PMD.

Plaintiffs sued Spinnaker as the promoter of the Timeshare Plan called “Bluewater by Spinnaker”, asserting that Plaintiffs have a right to sue Spinnaker for Spinnaker's alleged violation of the South Carolina Timeshare Act ("Timeshare Act") for having sold an interest in Bluewater by Spinnaker to Plaintiffs and others, when, allegedly, the Timeshare Plan for Bluewater by Spinnaker had not been first registered with the South Carolina Real Estate Commission (“Commission”) pursuant to S.C. Code Ann. § 27-32-20 (2003). All of Plaintiffs' legal theories against Spinnaker rest on the Plaintiffs' allegation that Spinnaker’s Timeshare Plan for Bluewater by Spinnaker was not registered as a timeshare plan with the Commission at the times that the Plaintiffs and others purchased interests therein.

Plaintiffs' action was brought as a class action suit only. Plaintiffs’ remaining causes of action, based on the alleged “non-registration” status following the dismissal by the trial court’s Order of the Plaintiffs’ class action claim for alleged violation of South Carolina Unfair Trade Practices Act, are these: (1) first cause of action, for violation of S.C. Code Ann. § 27-32-20 (2003) (of the South Carolina Vacation Timesharing Plan Act), seeking rescission of the purchase (lease) contract(s) of the Plaintiffs in Bluewater by Spinnaker; and (2) third cause of action, for a declaratory judgment that no valid or binding contract exists between the parties due to the Defendant’s alleged violation of the South Carolina Vacation Timesharing Plan Act.

Notably, none of these surviving causes of action seek any remedy outside of the remedy – rescission and refund – that could be or could have been provided by the Commission. S.C. Code Ann. § 27-32-120(C) (2003). There is, therefore,

no need for judicial or jury intervention to determine a damages claim. The Commission has all of the tools it needs fully to resolve Plaintiffs' surviving legal issues.

In support of Plaintiffs' assertions and allegations, they attached to their Complaint² and to their Amended Complaint³ an Exhibit A, and referenced it in their Brief herein, entitled "Order of Registration concerning the Bluewater by Spinnaker Timeshare Plan", dated September 2, 2014, arguing, in part, that the Bluewater by Spinnaker Timeshare Plan did not obtain its "Initial Registration" from the South Carolina Real Estate Commission ("Commission") until September 2, 2014.

However, the Plaintiffs omitted from their Statement of the Case the related facts that the Commission, by decision made at its meeting on August 20, 2014⁴ determined that the Timeshare Plan registration for Bluewater by Spinnaker had actually been completed and effective as of March 15, 2006, and remains so. That decision of the Commission, under date of September 15, 2015, was documented in an Order by the Commission.⁵ The Commission's determination on August 20,

² Trial Court Dkt. No. 1., ¶ 14

³ Trial Court Dkt. No. 7, ¶13-15, 17

⁴ At its August 20, 2015 hearings, the Commission considered three separate timeshare plans of Spinnaker and determined that the registration of two of those plans, including Bluewater by Spinnaker, were effective in 2006, by statute, and accepted renewal license fee payments; for the third of those plans, the Commission accepted renewal license fee payments. The Commission made no findings, conclusions or determinations of any violations by Spinnaker of the South Carolina Timeshare Act.

⁵ See Trial Court Dkt. 35-1, copy of Commission's Order attached to Memorandum of Defendant Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc. in Support of its Second Motion to Dismiss the Amended Complaint.

2015 removes the only ground asserted by the Plaintiffs for the maintenance of this lawsuit.⁶

Nevertheless, the Plaintiffs have not moved to amend or supplement their Amended Complaint so as to bring to the courts' attention the decision on August 20, 2015 of the Commission, or that Order. Also, the Plaintiffs have not moved to dismiss this lawsuit.

However, it is noted that the Plaintiffs, or at least one of them, filed an appeal to the South Carolina Administrative Law Court ("ALC"), from the decision of the Commission made on August 20, 2015 and documented on September 15, 2015, by way of a Request for Contested Case Hearing. However, since no Plaintiff became or attempted to become a party to the proceedings heard and decided by the Commission on August 20, 2015, one or more of the Plaintiffs also filed a motion to intervene before the ALC, at this late stage, so that he/she or they could try to appeal the decision of the Commission regarding the Timeshare Plan registration of Bluewater by Spinnaker. That motion was denied and the ALC dismissed Plaintiffs' appeal.

Timeshare sellers must register vacation timeshare plans with the Commission before selling vacation timeshare interests in South Carolina. The Commission has the sole authority to review, approve, modify and/or revoke vacation timeshare plans offered for sale in South Carolina. By statute, a vacation timeshare plan in South Carolina may be approved by the Commission in only one of two ways:

⁶ The record of the Commission's proceedings on August 20, 2015 are available online at <http://www.llr.state.sc.us/POL/REC/Minutes/August%2019.%202015.pdf>

1. Affirmative determination of the Commission that the registration requirements of the South Carolina Timeshare Act have been met, S.C. Code Ann. § 27-32-190(A)(2) (2003); or
2. Failure of the Commission to enter an order of rejection of a timeshare plan registration application within thirty days from the date of submission of the plan application to the Commission, S.C. Code Ann. § 27-32-190(A)(2) (2003), whereupon the “plan is considered registered . . .”.

The Commission determined⁷ that a vacation timesharing plan registration application for Bluewater by Spinnaker was submitted to the Commission on February 14, 2006; that the Commission did not timely enter an order of registration or an order of rejection; that since an order of rejection was not issued by the Commission within thirty days after February 14, 2006, the Bluewater by Spinnaker vacation timesharing plan was properly considered registered by the Commission with an effective date of March 15, 2006.

Thus, in the instant case, the Plaintiffs seek to attack the registration status of Spinnaker’s Bluewater by Spinnaker’s vacation timesharing plan in spite of the determination by the Commission that the Bluewater by Spinnaker Timeshare Plan was registered in accordance with statute more than ten years ago, as confirmed by the Commission.

⁷ Order of the South Carolina Real Estate Commission, dated September 15, 2015, at page two (see footnote 5 above).

The certified questions herein are all aspects of the question of the exclusivity of the authority of the Executive Branch, through the South Carolina Real Estate Commission, to make determinations of vacation timeshare plan registrations, and related issues of fee payments, document compliance with statute, and licensing. These issues have never been judicially addressed in South Carolina and, therefore, the parties moved that the District Court certify such questions to this Court, and it issued its Order of Certification.⁸

STANDARD OF REVIEW

This Court applies the following standard of review when considering certified questions of law:

In answering a certified question raising a novel question of law, this Court is free to decide the question based on its assessment of which answer and reasoning would best comport with the law and public policies of the state as well as the Court's sense of law, justice, and right.

McCullough v. Goodrich & Pennington Mortg. Fund, Inc., 373 S.C. 43, 47, 644 S.E.2d 43, 46 (2007) (citing *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 157, 628 S.E.2d 475, 477 (2006)).

ARGUMENT

I. The South Carolina Real Estate Commission (Commission) has exclusive jurisdiction to determine whether a violation of the Vacation Timeshare Act (Timeshare Act) has occurred.

This Court should hold that the Commission has exclusive jurisdiction to determine whether a violation of the Timeshare Act has occurred, for the following reasons:

- A. The administrative structure created by the Timeshare Act vests solely the Commission with broad authority to regulate the timeshare industry.**

⁸ Trial Court Dkt. 44

When “determining whether the Legislature has given another entity exclusive jurisdiction over a case, a court must look to the relevant statute.” *Rainey v. Haley*, 404 S.C. 320, 323, 745 S.E.2d 81, 83 (2013) (quoting *Dema v. Tenet Physician Servs.-Hilton Head, Inc.*, 383 S.C. 115, 121, 678 S.E.2d 430, 433 (2009)). In the South Carolina timeshare industry, the only relevant regulatory statute is the Timeshare Act. The Timeshare Act grants to the Commission exclusive jurisdiction over the administrative and regulatory aspects of the sale of timeshares. S.C. Code Ann. § 27-32-130 (2003) states, “The Real Estate Commission is responsible for the enforcement and implementation of the [Timeshare Act] and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under” the Act.

Under the Timeshare Act, the Commission serves many critical functions that the General Assembly has determined are necessary for “the economic health and continued stability of the vacation timeshare industry” in this State. S.C. Code Ann. § 27-32-405(M) (2006).

In this case, the only regulatory activity at issue is the Commission’s determination(s) regarding the status of registration of timeshare plans.

It is notable that the only entity with the authority to register a timeshare plan is the Commission. The Timeshare Act states, “A vacation timeshare plan for sale or offered for sale in this State must be registered with the South Carolina Real Estate Commission . . .” S.C. Code Ann. § 27-32-190(A) (2003); *see also* S.C. Code Ann. § 27-32-20(1) (2003).

Thus, before interests in a timeshare plan in South Carolina can be sold, the timeshare plan must be registered with the Commission. This registration process requires that the timeshare plan and materials used in connection therewith “be submitted to the [Commission] for its review and approval.” S.C. Code Ann. §§ 27-32-190(A) (2003) and -405(K) (2006). Once a vacation timeshare plan application for registration has been submitted to the Commission, by statute, in South Carolina it may be approved by the Commission in only one of two ways:

1. Affirmative determination of the Commission that the registration requirements of the South Carolina Timeshare Act have been met, S.C. Code Ann. § 27-32-190(A)(2) (2003); or
2. Failure of the Commission to enter an order of rejection of a timeshare plan registration application within thirty days from the date of submission of the plan application to the Commission, S.C. Code Ann. § 27-32-190(A)(2) (2003), whereupon the “plan is considered registered . . .”.

It is also notable that the Commission’s regulatory mandate does not end when the Commission initially registers a timeshare plan. Thereafter, sellers are required to seek prior written approval of the Commission before making a substantial change in the plan of development and sale of timeshare interests. S.C. Code Ann. § 27-32-190(B)(5)(c) (2003). The General Assembly has also given the Commission broad and exclusive authority to register and regulate persons selling interests in timeshare plans. S.C. Code Ann. §§ 27-32-180 (2003) (addressing registration of persons engaging in the sale of interests in timeshare plans); § 27-

32-190(B) (2003) (setting forth the Commission's exclusive authority in investigating and disciplining Timeshare Act violations).

The Commission has very broad, and logically, exclusive authority to register and discipline sellers and timeshare plan registrants, and this includes, *inter alia*, the investigation of alleged Timeshare Act violations, the issuance of cease and desist orders, and the revocation (and resulting de-registration) of a timeshare plan's registration. S.C. Code Ann. §§ 27-32-120, -190(B), -190(B)(7) (2003). Neither the Timeshare Act, nor any other law, grants such authority to any other entity within the Legislative Branch, the Judicial Branch, or the Executive Branch of the Government of South Carolina.

In the instant case, the Commission, in and after its hearing on August 20, 2015, did not determine any Timeshare Act violations by Spinnaker for its Bluewater by Spinnaker resort, nor did it issue any cease and desist orders, nor did it revoke the registration thereof, and neither has it done so at any other time.

The South Carolina General Assembly entrusted the Commission with broad, exclusive authority to regulate the timeshare industry. This clearly shows that the General Assembly intended to grant the Commission exclusive authority to determine whether the Timeshare Act has been violated. This exclusive authority is necessary because of the uncertainty and chaos that would be the necessary result if the Commission, the Administrative Law Court, and/or courts of the Judicial Branch, were all operating independently and authorized to reach inconsistent determinations regarding the same or similar Timeshare Act issues of registration, etc., even, at times, in the same or similar cases involving the same or similar

parties. The economic health and continued stability of South Carolina's timeshare industry depends upon the expertise, institutional knowledge, and consistency of decisions that only the Commission can provide. S.C. Code Ann. § 27-32-405(M) (2006). To interpret the Timeshare Act in a manner that would permit the various state and federal courts and arbitrators to determine whether a violation of the Timeshare Act has occurred improperly subjects Commission-regulated persons to inconsistent determinations, thereby adversely affecting the continued stability of South Carolina's timeshare industry including the many property rights of timeshare owners and lenders.

The Timeshare Act does not empower purchasers to forum shop in order to launch collateral attacks regarding the sufficiency of Commission-scrutinized registrations, practices, procedures, and approved timeshare plan documents in the trial courts and other tribunals.

The Timeshare Act does not give purchasers the right to prosecute alleged violations of the Act, since only LLR has that authority under the Timeshare Act. S.C. Code Ann. § 27-32-130 (2003). Instead, S.C. Code Ann. § 27-32-130 (2003), of the Timeshare Act, allows a purchaser "to bring a private action to enforce the provisions of [the Timeshare Act]". The only reasonable interpretation is that this privilege exists in order to allow a purchaser to carry out, if necessary, the findings and conclusions of the Commission by bringing a civil action based on Timeshare Act violations once they have already determined by the Commission to have occurred. Any other interpretation renders the statutory method in South Carolina for the regulation of the timeshare industry to be mooted by a bewildering array of

inconsistent, disparate, regulatory decisions by magistrate's courts, circuit courts, appellate courts, federal courts, arbitrators, the Commission and the ALC. It is hard to conceive of a result more de-stabilizing to the whole timeshare industry in South Carolina, and its lenders, purchasers for value, employees and workers.

B. The South Carolina Administrative Law Court (ALC) has also determined that the Commission has exclusive jurisdiction over certain claims.

The South Carolina opinion that comes closest to dealing with the issue of the exclusivity of the jurisdiction of the Commission in timeshare plan regulatory issues is the Administrative Law Court's *Tench* case⁹. Mr. Tench filed a complaint with the Commission alleging fraud and mismanagement of a timeshare project but alleged no violations of the Timeshare Act. The Commission determined that the complaint presented no violations of the Timeshare Act and the ALC held that it lacked jurisdiction for the allegations made, and relief sought, in Mr. Tench's complaint. By *dictum*, the ALC noted that it (and the Commission) would have jurisdiction over the matters covered by S.C. Code Ann. § 27-32-190 (2003), which includes registration of timeshare plans. From *Tench*, we see the perspective of the ALC that the Timeshare Act provides that registration of a vacation timeshare plan is of an administrative, ministerial, and/or disciplinary nature, and within the exclusive jurisdiction of the Commission. See also S.C. Code Ann. §§ 27-32-120 (A) (2003) and -190 (2003).

C. The Timeshare Act provides a statutory basis for timeshare purchasers to bring a private action for violation of the Timeshare Act through the Vacation Timeshare Recovery Fund.

⁹ *Tench v. S.C. Dept. of Labor, Licensing and Regulation*, No. 98-ALJ-11-0041-JJ, 1998 WL 320770 at *1 (S.C. ALC, May 27, 1998)

The broad administrative structure of the Timeshare Act provides a mechanism for the resolution of purchaser disputes through the Vacation Timeshare Recovery Fund (“Fund”). S.C. Code Ann. §§ 27-32-200 – 230 (2003). These provisions create an arbitration process by which timeshare purchasers can recover monetary damages.

“A person aggrieved by the conduct of a registrant or licensee” can initiate an arbitration proceeding to recover from the Fund if her or his claim is based on a specific violation of the Timeshare Act. S.C. Code Ann. § 27-32-210(1) (2003). A Fund applicant must demonstrate that he or she has made a demand upon the timeshare registrant for recovery and been denied. S.C. Code Ann. § 27-32-210(2) (2003). The application for recovery must be made within one year of the loss. S.C. Code Ann. § 27-32-210(4) (2003). Plaintiffs made no such claim.

Such a claim is to be submitted to the statutorily-created Board of Arbitrators, which has the authority to determine if a violation has occurred. The Board of Arbitrators’ decision is final and binding. S.C. Code Ann. § 27-32-230(A) (2003). If the Fund makes a payment to a Fund applicant, the registration of the registrant is automatically revoked and the registrant is not eligible for re-registration until all amounts paid by the Fund are refunded. S.C. Code Ann. § 27-32-230(B) (2003).

A South Carolina bankruptcy court has examined the effect of arbitration pursuant to the Fund on the bankruptcy court’s jurisdiction and concluded that the bankruptcy court did not have jurisdiction over a timeshare dispute. *In re Internationale Resort & Beach Club*, 36 B.R. 189, 190–91 (Bankr. D.S.C. 1983).

The Internationale Resort and Beach Club (Internationale) filed Chapter 11 bankruptcy. While Internationale was in bankruptcy, the Caldwells filed a claim with the Fund, alleging that Internationale had violated S.C. Code Ann. § 27-32-100 (2003) of the Timeshare Act, which addresses matters to be disclosed in the timeshare interest purchase contract. *Id.* The bankruptcy trustee sought to remove the Fund claim to the bankruptcy court. *Id.* The bankruptcy court held that it did not have jurisdiction over the Fund claim, reasoning that the arbitration proceeding under the Fund did not meet the requirements for removal under the Bankruptcy Code 28 U.S.C. § 1471(a) or (b). *Id.*

The bankruptcy court went on to consider whether it would have jurisdiction if the requirements of 28 U.S.C. § 1471(a) were met. The court still found it would not have jurisdiction because:

it is evident that the South Carolina Real Estate Commission is a Unit of the Government of South Carolina (§§ 40–57–50 and 27–32–130, South Carolina Code.) § 27–32–130 places on the Commission the responsibility for the enforcement and implementation of Chapter 32 of Title 27, including the responsibility to grant and suspend licenses to sell or lease Timeshare Units in the State of South Carolina. It is this Title and Chapter which includes the sections establishing the recovery fund and the procedures for recovery from the fund, including the revocation of the license of the offending seller (§§ 27–32–200 through 27–32–230). In proceeding with this claim, the Real Estate Commission is clearly acting to enforce the powers and responsibilities granted it as a Governmental Unit of the State.

Id. at 193.

Although the scope of the Commission’s exclusive jurisdiction has not been addressed by South Carolina’s judicial courts, the bankruptcy court’s decision in *Internationale* and the ALC’s order in *Tench* suggest that, at a minimum, the Commission’s exclusive jurisdiction includes administrative, ministerial, and/or

matters of a disciplinary nature, to include all matters related to registration of a vacation timeshare plan.

D. The separation of powers doctrine requires that exclusive jurisdiction over alleged Timeshare Act violations be vested in the Commission.

The General Assembly's assignment of broad regulatory authority to the Commission, an administrative body of the Executive Branch of Government, is consistent with the doctrine of separation of powers as set forth in South Carolina's Constitution. *See* S.C. Const. art. I § 8; S.C. Const. art. III § 1; S.C. Const. art. IV § 1; S.C. Const. art. IV § 15; S.C. Const. art. V § 1.

This Court has examined the separation of powers between the judicial and executive branches of government in an analogous case, *State ex rel. McLeod v. Yonce*, 274 S.C. 81, 84, 261 S.E.2d 303, 304–05 (1979). In *Yonce*, the Chief Justice appointed a circuit court judge to preside over the Public Service Commission. *Id.* The Attorney General sought to have the arrangement declared an unconstitutional violation of the separation of powers doctrine. *Id.* This Court explained the separation of powers doctrine as follows:

One of the prime reasons for separation of powers is the desirability of spreading out the authority for the operation of the government. It prevents the concentration of power in the hands of too few, and provides a system of checks and balances. The legislative department makes the laws; the executive department carries the laws into effect, and the judicial department interprets and declares the laws.

Id. at 84, 261 S.E. 2d at 304-305. The Court further explained:

Under a republican government such as ours, sovereignty lies in the people. This sovereignty is delegated by the people under the Constitution to the three departments of government, executive, judicial and legislative, which are co-ordinate and independent, and it must follow that each is supreme as to matters within its own

sphere of action, subject alone to the limitations, checks and balances provided in the Constitution. This general rule is easy to state, but some difficulty arises in its application.

Id. at 81, 85–86, 261 S.E.2d at 305 (quoting *State ex rel Rawlinson v. Ansel*, 76 S.C. 395, 57 S.E. 185 (1907)).

A violation of separation of powers occurs “where one department of government attempts to exercise powers exclusively delegated to another.” *Id.* This Court determined that permitting a circuit court judge to preside over the Public Service Commission was unconstitutional because, while some overlap among the branches of government is tolerated, the degree of involvement of the circuit court in matters delegated to the Public Service Commission was impermissible. *Id.*

And so it is in this case. Here, Plaintiffs are essentially requesting that the judicial branch be permitted to take the place of the Commission to look behind the Commission’s decisions in administrative and regulatory matters for which the Commission has the specific knowledge and ability. Such action crosses the line of permissible overlap between the branches of government and violates the separation of powers doctrine.

Plaintiffs base their argument upon language in the Timeshare Act that they contend creates a private right of action, purportedly allowing them to bring their claims alleging Timeshare Act violations in the trial courts. S.C. Code Ann. § 27-32-130 (2003) states:

The Real Estate Commission is responsible for the enforcement and implementation of this chapter and the Department of Labor, Licensing and Regulation, at the request of the Real Estate Commission, shall prosecute a violation under this chapter. The commission shall promulgate regulations for the implementation of

this chapter, subject to the State Administrative Procedures Act. The provisions of this section do not limit the right of a purchaser or lessee to bring a private action to enforce the provisions of this chapter.

To the extent a private right of action exists, it must be reconciled with the conclusion above that only the Commission (or LLR if the Commission so requests) has authority to prosecute a violation under the Timeshare Act; register timeshare plans; revoke a registration; approve or disapprove the form of statutorily-required documents in the timeshare purchase transaction; and discipline registrants for violations of the Timeshare Act.

The only reconciliation that is consistent with the doctrine of separation of powers, and which is coincident with the statutory mechanism set forth in the Timeshare Act, including the Recovery Fund and Board of Arbitrators, is through a determination by this Court that the Commission has the exclusive authority to determine if and when a timeshare plan was registered, or its registration revoked, and the date(s) thereof. Any other result invites chaos to a highly-regulated industry, negatively impacting all sectors of public interest in South Carolina.

E. Subject matter jurisdiction is a matter distinct from the existence of a private right of action.

Subject matter jurisdiction is the power of a court to hear and determine cases of the general class to which the proceedings belong. *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 678 S.E.2d 430, 433 (S.C. 2009). It “represents the extent to which a court can rule on the conduct of persons or the status of things.” *Carlsbad Tech., Inc., v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009). Conversely, “inquiries about whether the statute at issue confers a cause of action

encompassing a particular plaintiff's claim go, not to subject-matter jurisdiction, but rather to the merits." *District of Columbia Nurses Assoc. v. Brown*, --- F. Supp. 3d ---, 2016 WL 29252, at *2 (D.D.C. Jan. 4, 2016) ((internal alterations and quotation marks omitted) (quoting *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S.Ct., 1377, 1387 (2014)); *Verizon Maryland, Inc. v. Public Serv. Com'n of Maryland*, 535 U.S. 635, 644 (2002) ("Indeed, [the statute] does not even mention subject-matter jurisdiction, but reads like the conferral of a private right of action."); *cf. Dema*, 678 S.E.2d at 120–21 (holding the trial court had subject matter jurisdiction over case even though the Certificate of Need Act did not create private right of action).¹⁰ Thus, if a conflict between subject matter jurisdiction and the existence of a private right of action exists, the determination on subject matter jurisdiction must control.

F. The courts lack subject matter jurisdiction because Plaintiffs cannot demonstrate the existence of causation, a necessary prerequisite to standing.

Subject matter jurisdiction also requires a demonstration of standing as a prerequisite. Although there is no authority in South Carolina addressing this proposition, our Fourth Circuit sister state of North Carolina has directly addressed this issue in *Am. Oil Co. v. AAN Real Estate, LLC*, 232 N.C. App. 524, 526, 754 S.E.2d 844, 846 (2014) ("Without standing, the courts of this State lack subject matter jurisdiction to hear a party's claims."). A necessary element of standing is

¹⁰ The Supreme Court has "on occasion referred to [the inquiry of whether a party has a cause of action] as 'statutory standing' but has recognized that that label too, is misleading, since the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the court's statutory or constitutional power to adjudicate the case." *Lexmark Intern.*, 134 S.Ct. at 1387 n. 4.

“a causal connection must exist between the injury and the challenged conduct.” *Carnival Corp. v. Historic Ansonborough Neighborhood Ass'n*, 407 S.C. 67, 75, 753 S.E.2d 846, 850 (2014). Thus, Plaintiffs must demonstrate some causal connection between the Timeshare Act violations they allege, as to registration of Bluewater by Spinnaker, and the losses they allege to have sustained. If they are unable to establish this causal connection, they lack standing. If Plaintiffs lack standing, the courts of this State cannot have subject matter jurisdiction of Plaintiffs’ claims.

Here, the courts do not have subject matter jurisdiction to rule on the registration of Bluewater by Spinnaker’s Timeshare Plan. Moreover, the courts do not have subject matter jurisdiction to determine whether a registrant or licensee has violated the provisions of the Timeshare Act, which is a purely disciplinary determination. Accordingly, there can be no private right of action in the judicial courts for the same determinations.

Based upon the regulatory framework created by the Timeshare Act, this Court should hold that the Commission (and/or LLR and the ALC) has (have) exclusive jurisdiction to make determinations regarding whether a violation of the Timeshare Act has occurred, including the Commission’s authority to make determinations regarding the registration status of timeshare plans. Such a decision would “best comport with the law and public policies of the state.” *McCullough*, 373 S.C. at 47, 644 S.E.2d at 46.

II. The Commission’s determination of a violation of the Timeshare Act is a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Act.

To the extent, if at all, that this Court determines a judicial court may have subject matter jurisdiction over the registration claims at issue in this case, this Court should hold that the Commission must make a determination of a violation of the Timeshare Act as a condition precedent to a party bringing “a private action to enforce the provisions of [the Timeshare Act].” S.C. Code Ann. § 27-32-130 (2003).

The requirement of an administrative determination as a condition precedent is examined in this Court’s decision in *Dema v. Tenet Physician Services-Hilton Head, Inc.*, 383 S.C. 115, 678 S.E.2d 430 (2009). *Dema* addressed the South Carolina Department of Health and Environmental Control’s (DHEC) exclusive authority to make determinations regarding whether a violation of the Certificate of Need (“CON”) Act had occurred. In *Dema*, the trial court dismissed an administrative law matter for lack of subject matter jurisdiction, finding DHEC had exclusive jurisdiction to determine whether a violation of the CON Act had occurred. *Id.* at 121, 678 S.E.2d at 433; S.C. Code Ann. § 44-7-140 (1998) (providing that “[DHEC] is designated the sole state agency for control and administration of the granting of Certificates of Need and licensure of health facilities . . . under this article.”). This Court reversed the trial court, holding that, although DHEC had exclusive jurisdiction to determine whether a violation of the CON Act occurred, it did not have subject matter jurisdiction to hear civil claims for damages resulting from those violations. *Id.* The “control and administration” language of the CON Act and the “enforcement and implementation” language of the Timeshare Act, S.C. Code Ann. § 27-32-130 (2003), are conceptually the same.

Accordingly, where the General Assembly has granted authority to an administrative body for “control and administration” or “enforcement and implementation,” that administrative body should have exclusive jurisdiction over those matters.

In this case, Plaintiffs ultimately seek a judicial determination that Spinnaker violated the provisions of the Timeshare Act by having sold Plaintiffs timeshare interests with an unregistered timeshare plan. However, Plaintiffs do not allege that the Commission—the sole administrative body with the authority to make determinations concerning whether a violation of the Timeshare Act has occurred—has determined the alleged violations actually occurred and, in fact, Plaintiffs have declined to acknowledge or plead that the Commission has already made findings, conclusions and determinations contrary to the allegations of Plaintiffs in the instant case.

Following the view of the *Dema* court, that the trial court had jurisdiction to hear civil claims for damages resulting from violations of the CON Act, when DHEC had already determined the defendants had committed such violations, a judicial court may have jurisdiction, subject to the Recovery Fund provisions of the Timeshare Act, over claims brought by a timeshare owner to enforce a Commission determination that the alleged Timeshare Act violations had occurred, such as claims that the timeshare plan was unregistered when the timeshare owner purchased her or his timeshare.

Reading S.C. Code Ann. §§ 27-32-120 and -130 (2003) together demonstrates that, as in *Dema*, a determination of a violation by the Commission

would be a condition precedent to a purchaser (here, the Plaintiffs) initiating and maintaining a private action for recovery under the Timeshare Act, to the extent any such right of action otherwise exists.

III. The Commission's determinations as to whether the Act was violated are binding on the courts of the Judicial Branch.

This Court should hold that the Commission's determinations as to whether the Act was violated are binding on the courts of the Judicial Branch. The most important reason for this is the fact that regulated persons and entities must have confidence that they can rely upon the final determinations of their regulators. This promotes the stability, uniformity, and finality necessary for regulated industries to conduct business.

It is also important for the decisions of the Commission to be binding upon the courts of the Judicial Branch for the protection of the thousands of other individuals who have purchased timeshare interests from Defendants and who own those interests still. Timeshare plans are a form of a horizontal property regime in which "the purchaser receives an ownership interest in real property and the right to use accommodations or facilities, or both, for a period or periods of time during a given year, but not necessarily for consecutive years, which extends for a period of more than one year." S.C. Code Ann. § 27-32-10(7) (2003). Timeshare interests are interests in real estate. *Id.* Not only do the timeshare sellers rely upon the Commission's determinations, but so do the owners of timeshare interests in Spinnaker's "vacation timeshare ownership plans." S.C. Code Ann. § 27-32-10(7) (2003), as do, most certainly, the lenders therein. Calling into doubt the validity of Plaintiffs' purchases threatens the existence and value of the interests owned by

thousands of individuals other than Plaintiffs, not only in Bluewater by Spinnaker but also in all other timeshare plans.

A. Other regulated industries could be negatively affected by a ruling that the Commission does not have exclusive jurisdiction to determine violations of the Timeshare Act.

The need for confidence in the determinations of administrative bodies is illustrated by the filed rate doctrine, the seminal case of which in South Carolina is *Edge v. State Farm Mut. Auto. Ins. Co.*, 366 S.C. 511, 517, 623 S.E.2d 387, 391 (2005). In *Edge*, this Court explained the filed rate doctrine as follows:

“The filed rate doctrine stands for the proposition that because an administrative agency is vested with the authority to determine what rate is just and reasonable, courts should not adjudicate what a reasonable rate might be in a collateral lawsuit.” *Amundson & Assocs. Art Studio v. Nat'l Council on Comp. Ins.*, 26 Kan.App.2d 489, 988 P.2d 1208, 1213 (1999). Many courts have held the rationale underlying the federal filed rate doctrine applies equally to regulations by state agencies. *See e.g. Wegoland, Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2nd Cir.1994). The filed rate doctrine bars only collateral attacks brought by private parties and not direct reviews in ratemaking cases or actions brought by a governmental agency. *Commonwealth v. Anthem Ins. Cos., Inc.*, 8 S.W.3d 48, 53–4 (Ky.Ct.App.1999).

Id. at 517, 623 S.E.2d at 391. This Court went on to explain the policy reasons underpinning the filed rate doctrine.

We find the policy reasons behind the filed rate doctrine persuasive. The filed rate doctrine preserves the stability, uniformity, and finality inherent in rates filed with the regulatory agency and what has been determined to be a reasonable rate by that agency. *Cullum v. Seagull Mid-South, Inc.*, 322 Ark. 190, 907 S.W.2d 741, 745 (1995).

Id. at 519, 623 S.E.2d at 392. The same policy reasons apply here: stability, uniformity, and finality.

The impact of a decision by this Court regarding the finality of determinations by the Commission on matters of registration could have ripple effects outside the timeshare industry. There are numerous other industries regulated by particular South Carolina administrative bodies. A decision by this Court permitting Plaintiffs to call into question earlier determinations by the Commission could open the floodgates for litigants to ignore the regulatory authority of other administrative bodies. This could have dire consequences on the economy of South Carolina, including in the insurance industry {see S.C. Code Ann. §§ 38-5-10, *et seq.* (1993, 2001)) and the banking industry (see S.C. Code Ann. §§ 34-1-80, *et seq.* (1998, 2010)).

B. The Commission has primary jurisdiction over review of alleged violations of the Timeshare Act.

Further, and alternative, authority for finding Commission determinations to be binding on the courts is found in the doctrine of primary jurisdiction. The doctrine of primary jurisdiction dates back to the United States Supreme Court's 1907 decision in *Texas and Pacific Railway Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), and has been frequently employed by the Supreme Court, the lower federal courts, and courts of other states. The South Carolina Court of Appeals has recognized and applied the doctrine in *Med. Univ. of S. Carolina v. Taylor*, 294 S.C. 99, 362 S.E.2d 881 (Ct. App. 1987), where it held that the circuit court erred by not refraining from granting declaratory and injunctive relief in a case where a pivotal issue was being considered by the administrative agency. *Id.* at 105, 362 S.E. 2d at 884-85. Under the primary jurisdiction doctrine, "courts may route the threshold decision as to certain issues to the agency charged with primary

responsibility for governmental supervision or control of the particular industry or activity involved.” *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68 (1970). In *United States v. Western Pacific Railroad Company*, 352 U.S. 59 (1956), the Supreme Court offered the following exposition of the doctrine:

[L]ike the rule requiring exhaustion of administrative remedies, [“primary jurisdiction”] is concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties. “Exhaustion” applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course. “Primary jurisdiction,” on the other hand, applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

Id. at 63–64.

“A court should delay forging ahead when there is a likelihood that agency action may render a complex fact pattern simple or a lengthy judicial proceeding short. . . . [It] should avail itself of the agency's aid in gathering facts and marshalling them into a meaningful pattern.” *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 60 (2d Cir. 1994). According to the Supreme Court in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1973), “where the regulatory regime is administered by an agency, the . . . court will stay its hand to permit institution of administrative proceedings if they are likely to make a meaningful contribution to the resolution of [the] law-suit.” *Id.* at 306.

Here, determination of the registration status of Spinnaker's timeshare plan lies squarely within the Commission's competence. This Court should recognize the exclusive and/or primary jurisdiction of the Commission. This is not only because "the construction of a statute by those charged with its execution should be followed," *CBS v. FCC*, 453 U.S. 367, 392 (1981), but also because, otherwise, the uniformity of the regulatory scheme for the timeshare industry in this state would be immeasurably disturbed.

[Remainder of page left blank intentionally, Conclusion appears on next page.]

CONCLUSION

Based upon the foregoing, Defendant, Spinnaker, reiterates its position that the Commission has exclusive jurisdiction to determine whether violations of the Timeshare Act have occurred, including matters of registration. To the extent this Court would find that the Commission does not have exclusive jurisdiction to make such determinations, a ruling by the Commission on whether or not a violation had occurred should be a condition precedent to bringing a private action in the judicial courts. Finally, any decisions of the Commission should be recognized, either under the doctrine of exclusive jurisdiction or the doctrine of primary jurisdiction, as binding on the judicial courts because of the necessity for stability, uniformity, and finality.



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THE STATE OF SOUTH CAROLINA
In The Supreme Court

CERTIFIED QUESTIONS FROM THE UNITED STATES
DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA
Beaufort Division

Patrick Michael Duffy, Senior U.S. District Judge

Appellate Case No. 2016-001765

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Paula Fullbright and Mark Fullbright Plaintiffs,

v.

Spinnaker Resorts, Inc. d/b/a Spinnaker Resorts South Carolina, Inc. ... Defendant.

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR, if and to the extent that Rule 211(b), SCACR applies.

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PROOF OF SERVICE


I certify that I have served the Defendant’s Brief, Affidavit of Compliance with Rule 211(b), and Proof of Service, by depositing a copy of each in the United States Mail, postage prepaid, on November 18, 2016, addressed to:

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