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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

CERTIFIED QUESTIONS
United States District Court for the District of South Carolina

Patrick Michael Duffy, Senior U.S. District Judge

Appellate Case No. 2016-001766

Paul Chenard and Rebecca Chenard, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
d/b/a Coral Resorts and Sunrise Vacation Properties, Ltd.,
d/b/a Coral Resorts, Defendants.

James Nichols and Irene Nichols, Plaintiffs,

v.

Hilton Head Island Development Company, LLC,
Sunrise Vacation Properties, Ltd., Sherri J. Smith,
Patrick Budnick, and Robert Lauderman, Defendants.

v.

Linda Renchkovsky, Plaintiff,

v.

Coral Resorts, LLC, and Sunrise Vacation Properties
Ltd., d/b/a Coral Resorts, Defendants.

Robert Curry, Jr. and Monica R. Curry, Plaintiffs,

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David Watson and Sheldon Stanhope, Defendants.

**BRIEF OF AMICUS CURIAE MYRTLE BEACH
AREA CHAMBER OF COMMERCE**

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STATEMENT OF THE ISSUES ON APPEAL

The United States District Court for the District of South Carolina has requested that this Court answer the following certified questions:

1. Does the South Carolina Real Estate Commission (the Commission) have exclusive jurisdiction to determine whether a violation of the South Carolina Vacation Time Sharing Plans Act (the Act) has occurred?
2. Is the Commission's determination of a violation of the Act a condition precedent to a purchaser bringing a private cause of action to enforce the provisions of the Act?
3. Are the Commission's determinations as to whether the act was violated binding on courts of the Judicial Branch?

AMICUS CURIAE PARTY

Founded in 1938, the Myrtle Beach Area Chamber of Commerce ("the Chamber") is a South Carolina tax-exempt, 501(c)(6) organization that represents the interests of businesses in the Myrtle Beach area. The Chamber currently represents more than 2,700 businesses with more than 46,000 employees. The Chamber's mission and purpose is to promote, protect and improve the business community of the Myrtle Beach and Grand Strand area.

STATEMENT OF THE CASE

The Chamber agrees with, and joins in, the Statement of the Case that appears in the Final Brief of Coral Resorts, LLC, Hilton Head Island Development Company, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, Sheldon Stanhope and Robert Lauderman.

STANDARD OF REVIEW

“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).

ARGUMENT

By enacting the South Carolina Vacation Time Sharing Act¹ (“the Act”), the General Assembly established a regulatory scheme for the vacation timeshare industry in South Carolina. As a necessary part of that system, the legislature granted significant – and exclusive – authority to the Real Estate Commission (“the Commission”) to oversee and govern the vacation timeshare industry. An in depth examination of the Act is beyond the scope of this amicus curiae brief, but even a cursory glance at the Act demonstrates the nature and scope of the Commission’s powers.²

For example, section 27-32-20 gives the Commission the sole authority (and, correspondingly, the duty) to approve or disapprove proposed timesharing plans. This is tantamount to an ability to authorize timeshare sellers to conduct business, as an approved timesharing plan is a prerequisite to selling timeshares in this state. S.C. Code §27-32-20. In addition, and perhaps more significantly in terms of the present appeal, the

¹ S.C. Code §27-32-10, *et seq.*

² The Chambers concurs with the legal analysis of the Act that appears in the Final Brief of Coral Resorts, LLC, Hilton Head Island Development Company, LLC, Sunrise Vacation Properties, Ltd., Sherri J. Smith, David Watson, Sheldon Stanhope and Robert Lauderman. For the sake of space, and respecting the more limited nature of an amicus curiae brief, the Chamber will not attempt to repeat that full analysis here.

Act charges the Commission with investigating and determining potential violations of the Act's provisions by timeshare sellers. S.C. Code §27-32-120. Again, the Act does not grant that specific authority to any other agency or governmental entity. Thus, the General Assembly has given the Commission exclusive jurisdiction to decide whether or not timeshare sellers have violated the Act.³

The Chamber supports the interpretation and application of the Act asserted by the Defendants in the underlying actions. As briefly discussed above, the Chamber submits that the Defendants' interpretation of the Act is correct and is the only logical way to read the Act as a whole. In addition, accepting the Plaintiffs' interpretation of the Act would harm and destabilize not only the vacation timeshare industry, but also other businesses in the Grand Strand that rely on that industry. Such a ruling by this Court could also negatively affect other types of real estate contracts by way of extension.

The Chamber is not aware of any precedent or history of timeshare purchasers or lessees bringing legal actions asking courts to determine the validity of sellers' timeshare plans. Instead, it appears the Commission has always held sole jurisdiction to make that determination, both according to the terms of the Act and in practice. This system is both fair and preferable because it puts the decision on the adequacy of timeshare plans in the hands of a regulatory entity that specializes in making those types of determinations. The

³ Although §27-32-130 states that purchasers and lessees have the ability "to bring a private action to enforce the provisions of this chapter," this provision merely gives those parties the ability to seek remedies in the courts for violations as determined by the Commission. Nothing in this section gives courts the ability to determine, in the first instance, whether a violation of the Act has occurred. Having expressly given that authority to the Commission, the General Assembly surely did not take it away with this general statement. The only logical way to harmonize this section with the more specific provisions of sections 27-32-20 and 27-32-120 is to conclude that purchasers and lessees can seek relief in the courts for violations of the Act only after the Commission has determined that such violations occurred.

decision-makers on the Commission are well versed in the requirements for timeshare plans, and they know when proposed plans are adequate under the prevailing standards and when they are not. The Commission members can therefore make those types of decisions without the amounts of time, effort and study that would be necessary for a judge coming to the issue cold. Indeed, this is precisely the reason why there is a longstanding policy of courts deferring to regulatory agencies such as the Commission on matters within those agencies' purview.

This system also promotes uniformity of decisions on issues such as the validity of timeshare plans and the approval of certain required documents, as the Commission is the only entity that makes them. Although individual members of the Commission may change over time, the institutional memory of the Commission remains. This allows the Commission to be consistent in its decisions, which, in turn, creates a sense of predictability. As a result, sellers of timeshares can operate within a system of established guidelines, knowing from past experience that certain forms and practices will pass muster with the Commission. The sellers also know that other forms and practices are not approved, and the sellers must avoid them to remain in the Commission's good graces.

The new system urged by the Plaintiffs in these actions would disrupt the vacation timeshare industry by creating a sense of uncertainty. If courts were permitted to second-guess and set aside the Commission's decisions on matters such as approval and registration of timeshare plans and documents, timeshare sellers could never be sure of their product's viability. While some judges might defer to the Commission's prior rulings, others might not. This could lead to the same plans and documents being found

both proper and improper, depending on the forum, the venue or even just the individual judge making the decision. Sellers would have no clear way of knowing where they stood for any particular timeshare development.

This uncertainty would extend beyond the initial approval of timeshare plans and documents. Even if the Commission approved the plan and accompanying documents, a timeshare seller could never be sure about the enforceability of its contracts with timeshare purchasers. If the Plaintiffs prevail, a purchaser could, even years after the formation of the contract, seek to have a court declare the contract void. This would obviously hamper a seller's attempts to enforce the contract in cases of a purchaser's default, and it would inject a significantly increased element of risk into the sale of timeshares. The current system protects against such risk and uncertainty, and there is no legitimate reason to change it.

In addition, timeshare sellers would not be the only ones to experience hardships and uncertainty under the Plaintiffs' interpretation of the Act. As the Defendants note in their Final Brief, timeshare purchasers become part of the development's association of owners. In that capacity, they pay annual fees and assessments to fund the upkeep of the property and the development's common areas. All owners are supposed to share those fees, but if it becomes easier to launch collateral attacks on the validity of the purchase contracts, more purchasers could seek to get out of those contracts. As a result, the lower number of owners who continue to honor and abide by their contracts would bear all of the common expenses. The amount of the annual fees and assessments would increase – in some cases substantially – and this risk could make potential purchasers warier of buying timeshares. Thus, the Plaintiffs' proposed reading of the Act would harm a type

of business that is a vital part of South Carolina's tourism industry, particularly along the Grand Strand.

Even a slightly negative effect on the timeshare industry would have repercussions on other businesses that rely on the tourist trade. Obviously timeshares are not the only accommodations for tourists visiting South Carolina's coast (or other regions of the state). But there can be no doubt that a significant number of visitors to South Carolina own or lease timeshares. Reducing that number would hurt the business not only of timeshare sellers, but also restaurants, shops, golf courses and other entertainment venues in those areas.

The Plaintiffs will no doubt argue that these concerns are merely alarmist, "slippery slope" arguments that the Court should disregard. It is true that no one can predict the exact nature and extent of the damage to tourism that would result from the Plaintiffs' interpretation of the Act. Yet, it would be naïve to suggest that there would be no harmful impact, and the risk of even a relatively small hit to such an important part of this state's economy should make the Court wary of the Plaintiffs' position.

This is especially true when the Act and the common law already provide adequate protections and remedies to timeshare purchasers. The Act gives the Commission the exclusive authority and jurisdiction to determine when timeshare sellers have violated their statutory duties, and it further allows for penalties against sellers for such violations. To the extent the Commission or its proxies do not seek those penalties, the Act gives purchasers the right to prosecute actions for statutory violations that the Commission has already determined to exist. In other words, the Act does not give purchasers the right to seek a judicial determination that a violation occurred, but it does

give them the right to seek remedies as a result of violations found by the Commission. Furthermore, the common law provides numerous potential causes of action for wronged purchasers, as these Plaintiffs' pleadings demonstrate. Given these sufficient protections for timeshare purchasers both in the Act and in the common law, there is no need and no justification for the kind of vastly increased access to the courts that the Plaintiffs are requesting.

The Plaintiffs' position, if accepted, would create uncertainty and instability in the timeshare industry. It would call all timeshare sales into question – even those made pursuant to Commission-approved timeshare plans – because sellers would have no guarantee that purchasers would not later seek to attack the validity of the sales contracts in court. As discussed above, this would negatively impact the timeshare industry and would, in turn, have a detrimental effect on tourism in areas where timeshares are common. All businesses that rely on tourism would suffer, and the general economies of those areas would diminish. This result is not only undesirable, but also unnecessary under a correct application of the Act.

The Defendants' interpretation of the Act eliminates uncertainty for timeshare sellers by keeping the authority for overseeing the industry in the Commission, where the General Assembly intended it to be. The Commission evaluates timeshare plans and forms, and once those things have been approved, timeshare sellers can operate with the confidence that the courts will not later second-guess the Commission. The sellers can, in short, sell their product with the knowledge that the resulting contracts will be valid and enforceable. This provides security to the timeshare industry, while also ensuring that timeshare sellers are subject to oversight by the Commission.

At the same time, the Defendants' position does not take away any legal remedies for timeshare purchasers whose rights have been violated. Once the Commission has found that a seller has violated its statutory duties in some particular, the buyer can use that finding of a violation as the basis for a legal claim against the seller. The purchaser also has options under the common law, assuming the seller's conduct satisfies the elements of one or more cause of action. Thus, there is no credible basis for arguing that the Defendant's position leaves timeshare sellers unprotected or unable to enforce their rights.

Ultimately, the Defendant's position – which is simply an accurate reading of the Act – balances the interests of timeshare sellers (and the tourism industry that it affects) and the rights of buyers. This result best serves the public as a whole. It promotes tourism, on which so many in this state depend, but it also protects individuals who enter into timeshare contracts. The Plaintiffs cannot make a similar claim about their position, and therefore, the Court should reject it.

In addition, a ruling for the Plaintiffs in this appeal would establish a precedent that could arguably affect other types of real estate contracts. Any real estate contracts made pursuant to statutory schemes providing for regulatory oversight could be the targets of collateral attacks in the courts. For example, purchasers could argue that a decision in this case would extend to sales of subdivided lands approved by the Commission under the Uniform Land Sales Practice Act.⁴ More inventive plaintiffs might also seek to set aside deals by attacking the Commission's decisions regarding the licensure of real estate brokers, brokers-in-charge or salespersons. *See* S.C. Code Ann.

⁴ S.C. Code Ann. §27-29-10, *et seq.*

§§40-57-60, 40-57-110. While these scenarios might seem farfetched at first glance, future litigants could argue they were logical extensions of any decision giving courts the ability to disregard determinations that the legislature intended the Commission to make.

This is the larger point that should not be lost in the specific facts of the present cases. The broader issue is not just whether timeshare buyers can challenge sales made pursuant to Commission-approved plans and documents. It also whether, in a general sense, the courts will respect the decisions of a regulatory agency created by the General Assembly to oversee and govern certain matters related to real estate in South Carolina. If the courts do not respect those decisions, it will lead to the uncertainty and related problems discussed above, and many South Carolina businesses will suffer, with the Grand Strand area taking a significant part of that hit.

CONCLUSION

The Defendants' positions in response the certified questions properly balance the interests of timeshare sellers, timeshare purchasers, the larger business community, and the general public. Timeshare sellers have the stability of knowing they can rely on determinations made by the Commission on things such as proper timeshare plans, registration and documents. Timeshare purchasers have adequate protections and remedies, both under the Act (once the Commission has found violations of its provisions) and under the common law. The business community, particularly in coastal areas, continues to benefit from the timeshare industry, which supports the tourist trade upon which many businesses rely. The Plaintiffs' arguments, on the other hand, create a new remedy for timeshare purchasers while ignoring the intent of the legislature and the legitimate interests of the state's vital tourism industry. Therefore, the Court should

accept the position asserted by the Defendants in these actions and answer all of the certified questions in the affirmative.

Respectfully submitted,



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PROOF OF SERVICE

The undersigned, an attorney in this matter for amicus curiae Myrtle Beach Area Chamber of Commerce, certifies that I have this **26th day of January, 2017**, served copies of the **Brief of Amicus Curiae Myrtle Beach Area Chamber of Commerce** upon all other counsel of record by causing them to be deposited in the U.S. mail with sufficient postage, addressed to:

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