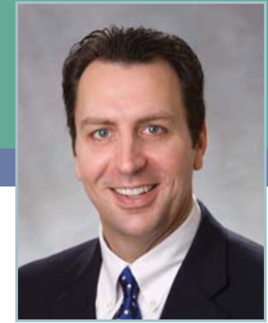
Andrew M. Fisher and Kurt Gruber



Florida Legislature Takes Action on Transient Accommodation Tax Issue

That whooshing noise you heard on July 1st of this year was the sound of a whole lot of people from Miami to Parsippany—as well as from every timeshare/shared ownership project in Florida—letting out their collectively held breath.

On that date, Florida House Bill 61 ("HB 61") (approved by Governor Crist, Chapter 2009-133) became effective, and Florida's tax laws were amended to clarify that the use by an owner or an owner's guest of a timeshare accommodation located at the owner's timeshare resort (or located at another resort and obtained through an exchange program) is not subject to Florida's sales and tourist development taxes. Obtaining passage of HB 61 was the culmination of years of effort by ARDA-Florida to navigate difficult tax waters, while fending off local governments strapped for revenue, wrestling special interest groups with competing agendas, and cajoling legislators and various revenue authorities. ARDA-Florida nearly pulled off the victory during last year's 2008 legislative session, only to have its bill fall prey to a last minute logjam, caused in part by the failure of the on-line travel providers, who were initially forced onto the bill to deal with their own tax issues.

The result was well worth the wait. By specifically recognizing that timeshare owners should not be taxed for using the product that they bought and for which they already pay high taxes in the form of ad valorem assessments, the Florida legislature has again stepped up to the challenge, despite difficult economic times, and recognized the importance of the timeshare industry to Florida. The hope is that Florida will continue to act as the bellwether state for the industry, and that other states will look to Florida law as a model for the proper taxation of timeshare interests.

In addition to clarifying the laws governing state and local taxes that relate to timeshare activity, HB 61 also allows sellers of timeshare interests to offer debt cancellation products and amends certain portions of the Florida Vacation Plan and Timesharing Act ("Chapter 721") with respect to the definition of "facility;" the disclosure required to be included in the public offering statement concerning timeshare assessments; and the requirements regarding disclosures to be given by timeshare resale service providers listing or advertising a timeshare interest for resale.

HB 61: Tax Clarification Provisions

By way of background, in Florida, local county governments have the authority to levy and impose the following three major taxes on transient rental activity: (1) a tourist development tax, which is primarily used by a county to promote and advertise tourism although may be used for other purposes specified in the statute (see §125.0104, Florida Statutes); (2) a tourist impact tax, in which half of the amount collected is transferred to the land authority to purchase property in the area of critical state concern, and the other half is used by the county to offset the loss of ad valorem taxes due to the purchase of such property (see §125.0108, Florida Statutes); and (3) a convention development tax, which is primarily used to promote and advertise tourism in relation to public-owned convention centers in the county (see §212.0305, Florida Statutes). In addition to these local taxes, the Florida Department of Revenue has the authority to levy and collect a tax on all transient rentals (see §212.03, Florida Statutes).

As previously noted, the industry benefit from HB 61's provisions lie in the recognition that certain transactions are now clearly not subject to these transient rental taxes. Specifically, HB 61 states that the taxes would not be due for the following: (1) the occupancy of an accommodation of a timeshare plan or multi-site timeshare plan by an owner or a non-paying owner's guest; (2) an exchange transaction in an exchange program; or (3) a membership or transaction fee paid by a timeshare owner that merely provides for the opportunity to go through an exchange program. Even though it is a well-accepted legal principle that the government cannot read the right to tax an activity into the law, when the law does not spell it out, ARDA-Florida recognized the need to firmly and completely foreclose the possibility that an adverse interpretation of, or simple amendment to, the existing law could result in taxation of timeshare owner use or exchange, with catastrophic implications for the industry.

In return for obtaining clarity on the treatment of timeshare owner use and exchange of timeshare accommodations, it was necessary for ARDA-Florida to agree to clarification of what timeshare activity would be subject to these transient rental taxes. The three areas that are identified in HB 61 for inclusion of transient rental taxes are sales of timeshare licenses (the right to use a timeshare accommodation, not coupled with an interest in the underlying property), transient rentals of timeshare accommodations, and the sale of regulated short-term products.

With respect to timeshare licenses, HB 61 states that consideration paid for the purchase of a license in a timeshare

plan is to be treated as rent subject to the tourist development tax. With respect to rentals of these accommodations, while it was a generally accepted practice for many timeshare projects to pay taxes, the issue was not free from doubt. Consequently, HB 61 clarifies that timeshare resort rentals are subject to tourist development tax, tourist impact tax, convention development tax, and the transient rentals tax, by specifically listing rental of timeshare accommodations as a category of transient rental activity.

Perhaps the most significant key to the taxation portion of the legislation was clarification of the treatment of regulated short-term products. A regulated short-term product is a contractual right to use a timeshare plan's accommodations, in which the contract (1) is executed in Florida on the same day that the prospective purchaser receives an offer to acquire an interest in a timeshare plan but does not execute a purchase contract after attending a sales presentation; and (2) provides that all or a portion of the consideration paid will be applied to or credited against the price of a future purchase of a timeshare interest, or that the cost of a future purchase of a timeshare interest will be fixed or locked in at a specified price (§721.05 (32), Florida Statutes).

What prompted the clarification of the law? Broward County audited resorts owned by Fairfield Resorts, Inc. (now Wyndham Vacation Resorts), and decided that the "one-time inspection privilege packages" offered to prospective purchasers of timeshare interests should have been assessed with the county's tourist development tax (*Broward County v. Fairfield Resorts, Inc.*, 946 So.2d 1144 [Fla. 4th DCA 2006]). The Fourth DCA affirmed the lower court and held that "the plain meaning of §125.0104(3)(a) provides the answer to the riddle," that timeshare or inspection privilege packages are simply not included in the provisions of the statute.

As a result of the revenue uproar created by the ruling in the *Broward v. Fairfield* case, and in order to obtain relief in other tax areas, HB 61 provides that the transient rental taxes will be due and payable on the last day of occupancy on the consideration paid for the stay acquired, as part of the regulated short-term product executed in Florida—unless the consideration paid is applied toward the purchase of a timeshare estate (a right to use a timeshare accommodation, coupled with an interest in the underlying property).

As a final note, the application of the amendments in HB 61 to the tourist development tax, tourist impact tax, convention development tax, and the transient rentals tax are specifically intended to be clarifying and remedial in nature and do not provide a basis for assessments of tax or tax refunds for periods prior to July 1, 2009.

Debt Cancellation

Debt cancellation products include loans, leases, or retail installment contract terms (or modifications to such instruments), pursuant to which a creditor agrees to cancel or suspend all or part of a customer's obligation to make payments upon the occurrence of specified events. The creditor may, in turn, purchase insurance from a third party to offset the risk of financial loss from the use of debt cancellation products by consumers.

Under Florida law, the term "casualty insurance" includes debt cancellation products and therefore, would ordinarily mean that any person offering the debt cancellation product would need to comply with the rigorous requirements imposed on persons who offer insurance (see §624.605(1)(r), Florida Statutes). HB 61 expands the list of entities authorized to offer debt cancellation products without deeming those products to be insurance to include the sellers of timeshare interests as well as the parents, subsidiaries, or affiliated entities of the sellers. It is hoped that by allowing debt cancellation products to be made more readily available to timeshare consumers, more consumers will be comfortable in making a purchase decision.

Chapter 721 Amendments

In addition to tackling taxes and debt cancellation products, HB 61 amends Chapter 721 in three different areas. Not all of these amendments were placed in the bill at the request of ARDA-Florida, and while these amendments may not appear significant on the surface, they do touch on important aspects of the regulation of timeshare products.

The first amendment to Chapter 721 made by HB 61 is to the definition of the term "facility" in §721.05(17) (Florida Statutes), and it specifies that only those amenities made available to purchasers of a timeshare plan that are "permanent" are governed by Chapter 721. This means that provisions, such as the requirement to provide facilities to purchasers either free and clear of any encumbrances or with protections for continued purchaser access (i.e., executed, delivered, and recorded non-disturbance and subordination arrangements), will not apply to non-permanent amenities. The apparent intent of this change is to provide developers with the tools to remain competitive, by permitting the offering of different shorter term experiences and options within a timeshare accommodation that may not fit the concept of a traditional timeshare facility—and therefore, not need to meet the same level of regulation specs.

In addition to amending the definition of facility, HB 61 provides that starting July 1, 2009, every public offering statement must contain a statement that the owner's obligation to pay timeshare assessments continues for as long as the owner owns the timeshare interest, and that a person who inherits a timeshare interest will be responsible for paying those assessments (see §721.07(5)(ii), Florida Statutes). Inclusion of these disclosures will arguably assist timeshare consumers to purchase with full knowledge of the financial obligations associated with ownership of a timeshare interest.

The third amendment to Chapter 721 requires timeshare resale service providers to give certain information relating to the advertising, listing, or sale

of the timeshare interest to owners looking to list or advertise such interests for resale. This information includes the following: (a) fees or costs that the timeshare interest owner or any other person must pay to the resale service provider or any third party; (b) when such fees or costs are due; and (c) the ratio or percentage of the number of listings of timeshare interests for sale versus the number of timeshare interests sold by the resale service provider for each of the previous two calendar years (see §721.20(9), Florida Statutes). Failure to disclose this information in writing constitutes an unfair and deceptive trade practice pursuant to Chapter 501, Florida Statutes. Further, any contract entered into in violation of this law is void, and the purchaser is entitled to a full refund of any moneys paid to the resale service provider. The effect of these new provisions are to provide timeshare owners that want to resell their timeshare interests with the right to obtain important information affecting the decision to enter into a listing or advertising agreement with a resale service provider.

SB 2226

It should be noted that in addition to obtaining the passage of HB 61, ARDA-Florida also got involved in the passage of SB 2226 (approved by Governor Crist, Chapter 2009-241), Florida's bill that implements the minimum standards of The Secure and Fair Enforcement for Mortgage Licensing Act of 2008 ("S.A.F.E.") (Title V of the federal Housing and Economic Recovery Act). In particular, ARDA-Florida was able to add to the bill an exemption for a person involved solely in the extension of credit relating to the purchase of a timeshare plan. Consequently, the sellers of timeshare plans extending credit for the purchase of a timeshare interest are exempt from Parts I, II, and II of Chapter 494, Florida Statutes, regarding mortgage brokerage and mortgage lending licensure requirements. **D**

Andrew M. Fisher is an associate and Kurt Gruber is a hospitality partner in the Orlando office of Baker Hostetler. Both have practices that focus on the development of vacation ownership projects and related areas of the hospitality industry. Their e-mail addresses are ***afisher@bakerlaw.com*** *and* ***kgruber@bakerlaw.com****.*

Don't go it alone — put our expertise to work for you.

Meridian Financial Services = Collections At No Cost To You

Meridian Financial Services is a sophisticated third-party collection agency able to service whole and partial portfolios. With Meridian, you can:

- Lower Bad Debt
- Increase Cash Flow
- Keep Loans In Good Standing
- Reduce Write-Offs
- Bring Association Dues Current
- Avoid Foreclosures
- And More

Meridian, a subsidiary of Interval Resort & Financial Services, is a veteran of the vacation ownership industry. We understand the impact of bad debt, as well as the importance of keeping your owners' accounts current, and preserving their confidence in the purchase decision.

To learn, at no cost, how Meridian can work for you, please contact:
Greg Sheperd, president, at 866.294.7120, extension 106, or by e-mail at gsheperd@merid.com
Marc Coleman, account executive, at 866.294.7120, extension 126, or by e-mail at mcoleman@merid.com

MERIDIAN Financial Services
financial risk management