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Treatment of Time-Share Interests Under the Bankruptcy Code

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NOTES

Treatment of Time-Share Interests
Under the Bankruptcy Code

INTRODUCTION

Time-sharing is an innovative form of property "ownership" borrowed from
the computer industry. As the name implies, it is a method of creating multiple interests in a single piece of property by temporarily dividing its use among as many as fifty purchasers. Each purchaser acquires the right to occupy the property during his "use period," a recurring block of time lasting one to four weeks per year; title to the time-share property, usually a resort condominium, may either be retained by the developer or conveyed jointly to the purchasers.

Time-shared ownership represents a significant and growing segment of the resort condominium industry. Conceived in Europe in the late 1950's and early 1960's, time-sharing is a relative latecomer to the American real estate market, making its debut in the 1970's. Since that time, its use has proliferated. The number of time-share owners in America in 1976 was 40,000, in 1978 was more than 200,000, and by 1980 was over 300,000. Current estimates place the number of time-share resorts near 1,000 and the number of time-share owners at over 500,000.

The growth of time-sharing is attributable, no doubt, to the advantages it offers both the developer and the purchaser. For the developer, time-sharing offers an alternative way to market resort condominiums which, although in increasing demand, have become too expensive for many prospective buyers. By selling temporal units of occupancy, the time-share developer can substantially lower the purchase price of resort housing and still increase overall profit.

Time-sharing is also appealing to the purchaser; he can enjoy using a resort condominium while significantly reducing the cost of his investment, since he only pays for the time during which he actually occupies the unit.

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5. Comment, Fourth Dimension, supra note 1, at 182-83. The author explains that although marketing costs for time-shares are higher than for conventional resort condominiums, these higher costs are more than offset by higher aggregate sales prices. Id. at 183 n.13. As an example, a time-share developer may find as many as 50 buyers for a single condominium unit. To cover his higher marketing costs, the developer may charge the 50 buyers a total of $300,000 for a unit that he could sell profitably to a single buyer for only $100,000. Temptations That You Should Resist, Money, Dec. 1983, at 100.
6. Time-shared ownership has other desirable characteristics. It provides guaranteed resort accommodations at a predetermined price, thus providing a hedge against inflation. In addition,
Despite these obvious advantages, time-share developers or purchasers can become entangled in bankruptcy, making it necessary to determine their rights and obligations under the Bankruptcy Code. Section 365 of the Bankruptcy Code permits the trustee to assume or reject executory contracts and unexpired leases. However, section 365 also provides nondebtor parties with certain safeguards not found elsewhere in the Bankruptcy Code. This Note examines how the terminology of section 365 should be applied to time-share interests. Specifically, this Note addresses the following issues:

1) Under what circumstances is a contract to purchase a time-share estate an executory contract? 2) Should the purchaser of a time-share estate be protected under section 365(i)? 3) Is a time-share license a lease under section 365? Typically, courts have looked to real property law to decide these issues. It is the thesis of this Note that using conventional real property law terminology to decide whether unconventional time-share interests fall within the terms of section 365 is improper, and leads to results which may frustrate Congress' purpose in enacting that provision. However, when time-share interests are analyzed in light of the policies behind section 365 and the Bankruptcy Code, it is possible to reach conclusions which are consistent with the purpose of section 365. This Note proceeds by examining the mechanics of section 365. Then, section 365 is applied to the two forms of time-share interests: time-share estates and time-share licenses.

I. The Mechanics of Section 365

Section 365 applies to two categories of obligations: executory contracts and unexpired leases. Although the terms executory contract and unexpired

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owning a time-share estate may include interest and real estate deductions, equity buildup, and the possibility of making a profit upon resale. Most plans also provide the benefit of an exchange program which permits time-share owners to swap their occupancy period with owners of time-shares in other resort areas in other states or countries. See, Eastman, supra note 2, at 153; Comment, Legal Challenges to Time Sharing Ownership, supra note 4, at 427-28. 7. 11 U.S.C. §§ 101-151326 (Supp. V 1981).
8. Section 365(a) provides:
   Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.
9. Julis, Classifying Rights and Interests Under the Bankruptcy Code, 55 AM. BANKR. L.J. 223, 247 (1981). Because § 365 contains safeguards and limitations not found elsewhere in the Code, courts should not permit an 'end run' around these safeguards by allowing the trustee to 'reject' the contract under § 554 or 'assume' the contract under § 541. See id. at n.57.
10. This Note does not attempt to deal with the whole of the Bankruptcy Code, but confines itself to § 365 since it will be the primary battleground of time-share bankruptcy litigation. This Note also does not deal extensively with the mechanics of time-sharing, which have received thorough discussion elsewhere. See generally Eastman, supra note 2; Gray, Pioneer the Concept of Time-Sharing Ownership, 48 St. John's L. Rev. 1196 (1974); Liebman, Can Condominium Time-Sharing Work? 3 REAL ESTATE REV., Fall 1973, at 40; Comment, Legal Challenges to Time-Sharing Ownership, supra note 4; Comment, Fourth Dimension, supra note 1.
11. Section 365(a), supra note 8.
lease both denote an obligation which has not been fully performed, the two categories are not coterminous, each having different criteria which must be satisfied before section 365 becomes applicable. Thus, the initial step in applying section 365 to time-sharing is to determine whether the particular time-share interest falls within the scope of either of these two categories.

Once it is determined that section 365 is applicable, section 365 confers on the trustee the power to assume or reject the executory contract or unexpired lease. At common law, the trustee's power to assume or reject executory contracts and unexpired leases grew out of his power to abandon burdensome property. This power is continued under the Bankruptcy Code for the complementary purpose of acting for the benefit of the estate. Generally, if the trustee assumes the contract or lease, he must accept its burdens as well as its benefits. On the other hand, rejecting the contract relieves the trustee from performing further under the contract, but gives the nondebtor party a claim against the debtor's estate. Hence, section 365 requires the trustee to engage in a cost/benefit analysis, weighing the value of the remaining performance by the other party against the cost to the estate of the unperformed obligation of the debtor.

In addition, section 365 contains protective provisions which embody Congress' intent to safeguard the interests of certain nondebtors in situations where the trustee's assumption or rejection may produce harsh results. The trustee's decision to assume or reject an executory contract or unexpired lease may trigger one of these protective provisions, thereby limiting the power of the trustee to act for the benefit of the estate. In the time-sharing context, applying these protective provisions would significantly affect the trustee's cost/benefit analysis. While these provisions still permit the trustee to assume or reject the contract, they would give the time-share purchaser rights which would greatly increase the cost to the estate of rejecting the contract. Often

12. See infra notes 30-32 & 137-39 and accompanying text.
13. The debtor-in-possession under § 1107 of the Bankruptcy Code exercises the rights and powers of the chapter 11 trustee with certain exceptions, and therefore may reject executory contracts and unexpired leases under § 365. This Note uses the term "trustee" with the understanding that in chapter 11, in most cases, it would be the debtor-in-possession who would exercise the power conferred by § 365.
14. Section 365(a), supra note 8.
16. See Jenson v. Continental Fin. Corp., 591 F.2d 477, 481 (Bankr. 8th Cir. 1979) (the power to reject executory contracts "is to be exercised in situations where the estate will be benefited . . . .").
17. See Blue Cross of Western Pa. v. Monsour Medical Center (In re Monsour Medical Center), 8 Bankr. 605, 613 (Bankr. W.D. Pa. 1981). See also Collier, supra note 15, ¶ 365.01[1].
19. See infra notes 78-82 & 141-46 and accompanying text.
20. See Julis, supra note 9, at 247.
this additional protection will come at such a high cost that the trustee will be forced to assume a contract that, but for the applicability of these provisions, he would have rejected. Such a result is not undesirable, so long as it is the result Congress intended. Time-share purchasers, however, may not necessarily be the type of nondebtors Congress intended to protect by enacting the protective provisions of section 365. Moreover, protecting time-share purchasers may conflict with other, more general bankruptcy policies, policies which section 365 was intended to implement. Proper application of section 365, therefore, requires analyzing time-share interests in light of the policies behind section 365 and the Bankruptcy Code.

II. THE DISTINCTION BETWEEN TIME-SHARE ESTATES AND TIME-SHARE LICENSES

The two forms of time-share interests—time-share estates and time-share licenses—differ significantly from each other.23 The term “time-share estate” is a generic phrase describing a property interest whereby fee simple ownership is combined with a right to use the time-share unit during an annually recurring period of time.24 Thus, the purchaser of a time-share estate actually

22. See infra note 118 and accompanying text.
23. For a discussion of the differences between time-share estates and time-share licenses see Royal Aloha Partners v. Real Estate Div. 59 Or. App. 564, 651 P.2d 1350 (1982) (holding that time-share licenses were not covered by statute which gave Real Estate Division authority to make rules concerning fee time-sharing interests).
24. See Comment, Legal Challenges to Time-Sharing Ownership, supra note 4, at 425. See also Eastman, supra note 2, at 152.

Under the Uniform Real Estate Time-Share Act, a time-share estate is defined as “a right to occupy a unit or any of several units during [5] or more separated time periods over a period of at least [5] years, including renewal options, coupled with a freehold estate or an estate for years in a time-share property or a specified portion thereof.” Section 1-102, reprinted in P. ROHAN & M. RESKIN, CONDOMINIUM LAW AND PRACTICE § 17C.02[7] (1982).

There are many methods of creating time-share estates. See Davis, Time-Sharing Ownership—Legal and Practical Problems, 48 ST. JOHN’S L. REV. 1183, 1183 (1974). Nevertheless, there are two primary methods of creating this form of time-share interest: time-span estates and interval ownership. The time-span estate involves the use of a tenancy in common coupled with restrictive covenants. Under this method, the developer conveys two distinct property interests: a percentage interest in the time-share unit which the purchaser takes as a tenant in common with other purchasers, and an undivided interest in the common areas. The unit is divided into use periods by means of a simultaneously executed supplementary declaration of covenants and restrictions. This declaration is necessary to limit the common law rights of tenants in common to possess the unit at all times; through the declaration the purchaser’s right of occupancy is restricted to the time period he/she purchased.

The second type of time-share estate, the interval estate, is conceptually more difficult. Rather than owning the unit as tenants in common, the interval owner actually purchases fee title for the period he is in possession. Interval ownership is comprised of an estate for years with a remainder in fee simple owned as tenants in common with other purchasers. The estate for years is a period of one week to a month which recurs for a specified number of years. At the expiration of that time, the parties are free to partition their unit or reinstate their interval arrangement
owns the property jointly with other purchasers, with his right of exclusive possession limited to the "use period" specified in the contract.\textsuperscript{25} By contrast, a time-share license is merely a possessory interest which is not combined with fee simple ownership;\textsuperscript{26} the purchaser has the exclusive right to use the property for the time specified in the contract, but does not acquire title to the property. In addition, many time-share licenses only guarantee a general type of accommodations at a resort condominium, not a specific unit.\textsuperscript{27}

This difference between a time-share estate and a time-share license affects how section 365 is applied. A time-share estate, being an ownership interest, cannot be classified as an unexpired lease, and therefore will come within the scope of section 365 only if it satisfies the criteria for an executory contract. On the other hand, since a time-share license is merely a possessory interest, it could conceivably satisfy the criteria of either an executory contract or unexpired lease. The protective provisions of section 365 also apply differently to time-share estates and time-share licenses. Section 365 offers special protection to, among others, purchasers and lessees of real property.\textsuperscript{28} A time-share estate involves a transfer of title; therefore, the purchaser of a time-share estate could potentially derive protection from provisions in section 365 which offer special protection to purchasers of real property. The purchaser of a time-share license, however, merely purchases a right to use the property, not the property itself, and will only be given special protection under section 365 if his interest is classified as a lease. Because of the significant differences between these two time-share interests, they are analyzed separately under section 365.

\textsuperscript{25} Because the essence of the time-share estate is that the purchaser acquires fee simple ownership, this form of time-sharing has some advantages over time-share licenses. For the purchaser, the opportunity to build equity in the property provides a hedge against inflation, and promotes pride in ownership. See supra note 6. Time-share developers benefit as well; purchasers generally must find complete financing and take over the responsibilities of ownership, giving developers a quick return on their investment without long-term management obligations. See P. Rohan & M. Reskin, supra note 24, § 17C.02.

\textsuperscript{26} See Uniform Real Estate Time-Share Act, § 1-102, \textit{reprinted in} P. Rohan & M. Reskin, supra note 24, § 17C.02\textsuperscript{[7]}.

\textsuperscript{27} Since the purchasers do not receive an ownership interest, time-share licenses are less expensive than time-share estates. See infra note 114. Yet, the time-share license guarantees the purchaser luxury resort accommodations for a specified period of time for years in advance, at a predetermined cost. For these reasons, time-share licenses represent a growing segment of the time-share market. It is estimated that over 60% of the time-share interests being sold are time-share licenses. Burek, \textit{Uniform Real Estate Time-Share Act}, 14 \textit{Real Prop., Prob. & Tr. J.} 683, 683 (Winter 1979). For a discussion of the advantages and limitations of time-share licenses see also, Davis, supra note 24, at 1184-85.

\textsuperscript{28} See infra notes 78-82 & 141-46 and accompanying text.
III. The Application of Section 365 to Time-Share Estates

A. The Time-Share Estate and the Trustee's Power to Assume or Reject Executory Contracts

1. The Meaning of an Executory Contract Under Section 365

As stated above, the trustee will have the power to assume or reject a contract to purchase a time-share estate only if the conveyance satisfies the criteria of an executory contract. The term "executory" as applied to a contract is equivocal. Under state law, as long as any part of a contract remains unperformed, the contract is executory. In the bankruptcy context, however, it has a different and more limited meaning. According to the legislative history of section 365:

Though there is no precise definition of what contracts are executory, it generally includes contracts on which performance remains due to some extent on both sides. A note is not usually an executory contract if the only performance that remains is repayment. Performance on one side of the contract would have been completed and the contract is no longer executory.

This portion of the legislative history is derived from an article written by Professor Countryman. According to the commentator, an executory contract is "a contract under which the obligation of both the bankrupt and the other party to the contract are so far unperformed that the failure of either to complete performance would constitute a material breach excusing the performance of the other."

Consistent with the policy of section 365(a), the Countryman definition of an executory contract is intended to encompass all contracts where the power to assume or reject may benefit the estate. When material performance does not remain due on both sides, the only effect of the trustee assuming or re-

29. See supra text following note 27.
30. Professor Williston has stated: "All contracts to a greater or lesser extent are executory. When they cease to be so they cease to be contracts." 1 S. WILLISTON, CONTRACTS § 14 (3d ed. 1957).
31. COLIER, supra note 15, ¶ 365.01[2].
34. Id. at 460.
35. Julis, supra note 9, at 252. Professor Countryman stated:
the concept of the "executory contract" in bankruptcy should be defined in light of the purpose for which the trustee is given the option to assume or reject. Similar to his general power to abandon or accept other property, this is an option to be exercised when it will benefit the estate. A fortiori, it should not extend to situations where the only effect of its exercise would be to prejudice other creditors of the estate.
Countryman, supra note 33, at 450-52.
jecting the contract is either to elevate a pre-petition claim to a first priority administrative expense or to prejudice the claims of other creditors. However, when the criteria of the definition are satisfied, assumption or rejection of the contract may benefit the estate, and the trustee should be permitted to exercise the power conferred by section 365.

The Countryman definition, requiring material unperformed obligations on both sides, has been adopted by most courts as the test for whether a contract is an executory contract under section 365. For example, in the case of In re the Record Company, the debtor sought to reject a contract to purchase a business and to assume its debts. At the time it filed bankruptcy the debtor was still obligated to pay the seller $10,000 of the purchase price as well as the business debt it had assumed. Relying on the Countryman definition, the court ruled that this obligation, standing by itself, was not sufficient for the contract to be an executory contract; however, since other material performance was also due by the seller, the contract was deemed to be an executory contract.

A similar approach was taken by the court in the case of Burger King Corp. v. Rovine Corp. In that case the debtor had entered into a franchise agreement which it sought to reject. Although the debtor franchisee had paid the franchise fee in full, it was still obligated to make royalty payments to the nondebtor and to abide by a covenant not to compete. The franchisor argued that the contract was not executory since it had fully performed its obligations by granting the franchise. The court rejected this argument,

36. Julis, supra note 9, at 252. According to Professor Countryman, if the creditor has fully performed, rejection would be pointless, because “the estate has whatever benefit it can obtain . . . and . . . rejection would neither add to nor detract from the creditor’s claim or the estate’s liability.” Countryman, supra note 33, at 451. Similarly, assumption would only result in converting the debtor’s obligation into a first priority administrative expense. On the other hand, if the debtor has fully performed, assumption would add nothing to his right to performance and rejection would not give the creditor a claim against the estate. Id. at 451-60.


39. Id. at 78,393.

40. Id. at 78,393-94.

41. The performance still due by seller included not competing for two years within a fifty mile radius of the debtor’s stores, using its best efforts to obtain extensions for the trade debt assumed by the debtor, granting the debtor access to the seller’s corporate records, and providing the debtor with an itemized bill of sale. Id. at 78,394.

42. 6 Bankr. 661 (Bankr. W.D. Tenn. 1980).

43. Id. at 662.

44. Id. at 665.

45. Id.
holding that the franchise agreement was an executory contract because the franchisor was still obligated to maintain the reputation of the franchise and to make available to the franchisee certain other services of the company.6

Recently, however, the wisdom of relying solely on the Countryman definition to sort out all contracts where assumption or rejection will benefit the estate has been questioned. For example, one commentator has argued that using a definitional approach to determine whether a contract can be assumed or rejected is too restrictive, since it fails to encompass all contracts which should be assumed or rejected under section 365. Instead, the author proposes flexible guidelines for determining whether a contract is executory.7

Several courts also have declined to follow a strict definitional approach. In the case of In re The Brethren’s Home,8 the debtor, an operator of a retirement home, sought to reject contracts obligating it to provide lifetime care for its residents.9 Under the contracts, the residents had fully performed their obligations by making a lump sum payment.10 Nevertheless, the court held that these contracts were executory and could be rejected.11 The court reasoned that “the dialogue concerning whether or not contracts are ‘executory’ has often been more a matter of symbolic logic than the functional effect in practical application.”12 The court then adopted a functional, rather than definitional, approach whereby it balanced the various rights and interests involved.13

The court likewise refused to rely solely on the Countryman definition in In re Booth.14 In that case, the debtor, a broker and dealer in real estate, contracted to purchase land under a land contract.15 Under the contract, the debtor made a $1,100 downpayment on the purchase price of $97,200, with the balance payable over time with interest; the sellers were to convey title upon payment in full.16 The sellers sought to require the debtor to assume or reject the contract pursuant to section 365(d)(2), and the debtor demurred, arguing that the land contract was not an executory contract.17 The court, in an extensive opinion by Judge Mabey, held that where the debtor is a vendee under a land contract, the contract should be classified as a lien, not as an executory contract.18 Although the contract would have satisfied the criteria

46. Id. at 665-66.
47. See generally, Julis, supra note 9.
49. Id. at 661.
50. Id. at 659.
51. Id. at 665.
52. Id. at 662.
53. Id.
55. Id. at 54.
56. Id.
57. Id.
58. Id. at 64. The same conclusion was reached under similar facts in the case of In re Cox, 10 BANKR. CR. DEC. (CRR) 481 (Bankr. D. Idaho 1983). In Cox, the debtor was also a purchaser under a land contract. The court, relying on the reasoning of Judge Mabey, held that
of the Countryman definition, the court refused to be bound by the form of the transaction; instead, the court examined the consequences of applying section 365 to a vendee under a land contract and concluded that classifying the contract as a lien would better effectuate the policies of section 365.

These departures from a strict definitional approach are not without merit, for they seek to effectuate the purpose of section 365(a): to permit the trustee to assume advantageous contracts and to reject burdensome ones. Nevertheless, using general guidelines to determine whether a contract is executory is more cumbersome and less precise than relying on the Countryman definition. Moreover, Congress implicitly, if not explicitly, sanctioned a definitional approach by adopting the Countryman definition in the legislative history of section 365. Finally, it will be shown that, at least in the time-sharing context, the Countryman definition succeeds in identifying the situations where assumption or rejection of the time-share contract will benefit the estate. For these reasons, the Countryman definition will be applied to determine under what circumstances a contract to purchase a time-share estate is an executory contract.

2. Application of the Countryman Definition to Time-Share Estates

With time-share estates, the executory nature of the contract, i.e. whether material obligations remain unperformed on both sides, will depend primarily on the type of financing involved. Developers may not have sufficient financial resources to finance the purchaser on their own. This may be especially true in the case of a newly-constructed resort which must generate sufficient cash flow to cover its construction mortgage. Therefore, in the majority of cases, the developer will require that the purchaser obtain financing through outside sources. Under these circumstances, the obligation of both parties

the contract was essentially a security device, the functional equivalent of a mortgage, which the trustee was not required to accept or reject under § 365. Id. at 482.
59. 19 Bankr. at 54. The court recognized that its decision went against the weight of authority, since most commentators and courts have assumed that a land contract is an executory contract. Id. at n.3. See cases cited infra note 76.
60. Id. at 57.
61. Id.
62. Id. at 58-61. Section 365, according to the court, is intended to effectuate the following policies: enlarging the value of the estate, furthering the rehabilitation of the debtor, and providing adequate protection of creditors. Id. The court reasoned that treating the land contract as a lien would enlarge the value of the estate, because "forfeiture and the loss of equity are prevented." Id. at 58. Treating the contract as a lien would further the policy of rehabilitating the debtor since no administrative costs will be incurred in curing a default or providing adequate assurance of performance, and the debt may also be dealt with in the debtor's plan. Id. at 60. Finally, creditors would still receive adequate protection if the contract is treated as a lien because the right to hold the title as security is still protected even though the right to payment is suspended. Id. at 61.
63. See supra note 32 and accompanying text.
64. See infra notes 75-76 and accompanying text.
65. See supra note 25.
will be performed at the closing when the purchaser pays the purchase price and the developer conveys title to the property. When bankruptcy occurs subsequent to the closing, no material performance will remain due, and the contract will not be executory.\cite{66}

In addition, there can be contracts which are neither fully performed nor executory within the Countryman definition at the time of bankruptcy. This possibility can occur, for example, under the financing arrangement used by Interval Incorporated, a developer of time-share condominiums in North Carolina.\cite{67} According to the terms of their sale agreement, the purchaser is required to make an initial down-payment, and an additional payment into escrow, with the balance to be financed by monthly installments of principal and interest.\cite{68} The purchaser receives title before the purchase price has been paid, and the developer retains a security interest in the time-share estate.\cite{69} Once this developer has conveyed title, it would appear he has no further obligations to perform.\cite{70} The contract, therefore, would not be executory and could be neither assumed nor rejected under section 365.\cite{71}

There are situations, however, where the obligations of both parties will remain materially unperformed. Some developers, especially those gradually converting a conventional condominium into time-shares, may have sufficient financial resources to finance the purchaser themselves, provided they receive a large down-payment coupled with a short payout period. These developers may choose to sell the unit on a land contract basis, retaining title to the premises until the purchase price is paid in full.

As another example, one developer of condominiums in the Bahamas uses both a mortgage and installment payments in financing the purchase price.\cite{72} According to the terms of the purchase agreement, a purchaser may elect to pay the purchase price in full or make a down payment of 30\% of the purchase price. Upon making the down payment the purchaser may either obtain a mortgage for the balance or begin making monthly installment payments. The purchaser is entitled to use the unit for the use period which he pur-

\begin{footnotes}
\footnote{66. Eastman, \textit{supra} note 2, at 157 states that “nearly all condominium statutes require a lapse in the time between the delivery of documents, the signing of a purchase agreement, and the closing of the sale.” Therefore, even when time-share estates are financed with a mortgage, there may be a period of time where there will be material performance due on both sides.}
\footnote{67. P. Rohan \& M. Reskin, \textit{supra} note 24, \S 17C.01[3].}
\footnote{68. Id.}
\footnote{69. Id.}
\footnote{70. In most time-share estates, maintenance and service will be provided by a separate management association. Sometimes, however, the developer may be the manager of the association either permanently or for a transitional period ranging from several months to several years. Nevertheless, even where the developer continues as the manager of the association, the management agreement would be separate from the purchase agreement; therefore, the developer’s management obligations should not affect whether the purchase agreement is executory.}
\footnote{71. Julis, \textit{supra} note 9 states, “[w]hen section 365 is not brought into play, the debtor’s remaining obligations under a contract, if any, cannot be assumed by the estate. Consequently, there will be a breach of the contract . . . .” Id. at 249.}
\footnote{72. P. Rohan \& M. Reskin, \textit{supra} note 24, \S 17C.02[5].}
\end{footnotes}
chased provided he has made his down payment and he is not in default on his installment payments. A closing will be scheduled at which time title will be conveyed and the purchaser will pay the remaining balance financed by a mortgage payable over a period of three years. When time-share estates are so financed and bankruptcy occurs prior to the closing, the contracts are executory. Material performance remains due by both parties: the purchaser to pay the balance of the purchase price and the developer to convey good title.

If the Countryman definition is functioning properly, the estate should benefit from assuming or rejecting the above contracts which the definition labels "executory." Further analysis of one possible scenario indicates that the definition does indeed function properly in the time-sharing context. Consider, for example, a situation where the purchaser of a time-share estate pays $15,000 and is to pay the $90,000 balance on closing, but bankruptcy occurs before the closing date. Where the developer is the debtor, the estate may benefit by assuming or rejecting the contract. If the contract is assumed, the trustee can enforce payment of the purchase price; if the contract is rejected, the estate may be able to reclaim the time-share unit, perhaps selling it at a better price. Conversely, where the purchaser files bankruptcy either assuming or rejecting this contract may also benefit the estate. Assuming an advantageous contract would require the developer to convey title upon payment of the purchase price; rejecting a burdensome contract may prevent squandering the assets of the estate to the detriment of other creditors. Thus, the Countryman definition properly labels this as an executory contract.

73. Id.
74. Countryman, supra note 33, at 469 states: "Certainly a contract under which the vendee still owes a material part of the purchase price and the vendor has not transferred title, and is not obligated to do so until that price is fully paid, is an executory contract." See generally, Countryman, supra note 33, at 463-73; see also Epling, Treatment of Land Sales Contracts Under the New Bankruptcy Code, 56 AM. BANKR. L.J. 55, 58 (1982) ("Section 365(j)(1) assumes that the trustee may reject all such land sale contracts, but goes on to provide absolute protections for the vendee in possession of the property.") (emphasis in original).

It would be possible to distinguish between time-share contracts where the debtor is a vendee and those where the debtor is a vendor, treating only the latter as executory contracts, as the court did in In re Booth. See supra notes 54-62 and accompanying text. The major problem with this approach is that it leads to anomalous results. It is beyond dispute that where the debtor is the vendor under a land contract financing arrangement, the contract is an executory contract which can be assumed or rejected. Indeed, any other result would make §§ 365(i) and (j) superfluous, since they were enacted for the very purpose of protecting nondonor vendees in the event the debtor's trustee rejected the executory land contract. See infra notes 98-102 and accompanying text. It would be incongruous to conclude that this same transaction is not an executory contract merely because the debtor is the vendee rather than the vendor. As noted by the court in In re Booth, the Countryman definition may, in some situations, elevate form over substance. Booth, 19 Bankr. at 57. Nevertheless, absent a specific provision protecting debtor vendees, it is better to treat all land contract arrangements as executory than having the application of § 365 turn on the less substantial factor of whether the debtor is buying or selling the time-share interest.

75. See supra notes 35-36 and accompanying text.
76. This hypothetical is based on the facts in the case of In re New York Investors Mut. Group, Inc., 143 F. Supp. 51 (Bankr. S.D.N.Y. 1956). In that case the vendor filed bankruptcy after
Of course, no matter which party files bankruptcy, specific factors affecting the cost/benefit analysis will determine whether the trustee assumes or rejects the time-share contract. For example, the trustee must weigh the market value of the asset, the burden of performing under the contract, and the cost of rejecting the contract, including the additional cost imposed by any applicable protective provisions. Here, however, we are concerned not with the outcome of the trustee's decision, but with whether he has the power to make a decision at all. Using the Countryman definition, time-share contracts where the purchase price has not been paid and title has not been conveyed are executory contracts. Since assuming or rejecting such contracts will benefit the estate, these contracts should be subject to the trustee's decision-making power under section 365(a).

B. The Time-Share Estate and the Protective Provisions of Section 365

1. The Protective Provisions Relevant to Time-Share Estates

In addition to permitting the trustee to assume or reject executory contracts and unexpired leases, section 365 provides the nondebtor with certain protections and safeguards which were not available under its predecessor, section 70b of the Bankruptcy Act. In the time-sharing context, the protective provisions of section 365 are potentially applicable only to purchasers in the event the developer files bankruptcy. Assuming, therefore, that the trustee is permitted to reject an executory time-share contract, it is necessary to determine whether any of these protective provisions are triggered to safeguard the interests of the purchaser of the time-share estate.

One such protective provision which may be available to time-share purchasers is section 365(i). According to this provision, if the trustee rejects the vendee had made a downpayment and before the closing took place. The court held that the purchaser did not have the right to compel specific performance against the trustee. Moreover, since the purchaser's title was merely equitable, it was subject to the right of the trustee to reject or assume the executory contract. See also Gulf Petroleum, S.A. v. Collazo, 316 F.2d 257 (Bankr. 1st Cir. 1963), holding that the contract was executory where the bankrupt agreed to sell land and the contract provided that the amounts paid by the vendee should be held in escrow until the closing date and should be returned to the vendee if the closing did not take place for any reasons but the vendee's default. The contract was a contract for the purchase of land, not an option, and could be rejected if bankruptcy intervened prior to the closing; In re Swindle, 188 F. Supp. 601 (Bankr. D. Or. 1960) (both land contract and escrow agreement treated as executory). The Commission on the Bankruptcy Laws of the United States, which submitted the tentative draft of the Bankruptcy Code to Congress, gave decisions like In re New York Investors Mut. Group, Inc. explicit approval. REPORT OF THE COMMISSION ON BANKRUPTCY LAWS OF THE UNITED STATES pt. II, H.R. Doc. No. 137, 93d Cong., 1st Sess. 157 (1973) [hereinafter cited as BANKRUPTCY COMMISSION REPORT].

77. Act of June 22, 1938, ch. 575, § 70(b), 52 Stat. 840 (repealed 1978). These provisions are the result of an awareness on the part of Congress of certain situations where rejection of the contract may result in an unduly harsh burden on the nondebtor party. See infra text accompanying notes 98-112.

78. Section 365(i) reads as follows:

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real
a contract for the sale of real property, a purchaser in possession of the property has the option to remain in possession. If he remains in possession, he must continue to make the payments required by the contract. He may, however, offset any damages occurring after the rejection that are caused by the debtor’s nonperformance of any obligation against those payments. The trustee must convey title to the purchaser upon payment of the purchase price, but he has no other obligations or liability under the contract.

Under another protective provision, section 365(j), the purchaser of real property also has the option to terminate his contract. If the purchaser exercises this option he is granted a lien to secure the payments already made under the contract. Section 365(j) is also applicable to contracts for the sale of real property where the buyer is not in possession. Such purchasers are likewise granted a lien to secure payments already made under the contract.

If applicable sections 365(i) and 365(j) can provide important protection to a time-share purchaser whose contract is rejected. Under section 365(i), the purchaser of the time-share estate can remain in possession and take advantage of any appreciation in the value of his property. If the fair market value of his property will exceed the purchase price, he can pay the purchase price, receive title, and sell his interest for a profit. If section 365(i) is not applicable, he will be relegated to receiving a lien under section 365(j). Section 365(j), however, also offers the purchaser of real property protection not available to other purchasers. The lien granted under section 365(j) protects the purchaser of real property under a rejected contract from being left with only an unsecured claim against the estate.

Despite the importance of these provisions to time-share purchasers—and

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79. Section 365(j) reads as follows:
(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

80. Section 365(j), supra note 79.


82. Fogel, supra note 15, at 387.
to other creditors whose claims will be affected by the purchaser's possession—sections 365(i) and 365(j) do not explicitly state whether they apply to contracts to purchase time-share estates. This is not surprising since time-sharing was in its infancy when the Bankruptcy Code was enacted in 1978.\textsuperscript{83} Senator Dole, however, has recently proposed an amendment to the Code which would specifically protect time-share purchasers.\textsuperscript{84} According to the proposed legislation, section 365(i) would be amended explicitly to include the sale of time-share interests, thereby giving time-share purchasers the right to either remain in possession or terminate their contracts.\textsuperscript{85} If this amendment is enacted, the application of sections 365(i) and 365(j) to time-share interests will be straightforward, leaving little room for judicial interpretation. The merits of such legislation, however, are debatable,\textsuperscript{86} and passage of the time-share amendments may be delayed for some time.\textsuperscript{87} In the meantime, therefore, courts must apply the statute's current, and somewhat equivocal, terminology in determining whether time-share purchasers are entitled to special protection under section 365(i) or 365(j).


In order for a time-share contract to fall within the terms of either section 365(i) or 365(j) it must first of all involve the sale of real property.\textsuperscript{88} This requirement is significant in that it excludes from these provisions all time-share interests where title remains in the seller.\textsuperscript{89} Thus, purchasers of time-share licenses must look to other provisions to safeguard their interests.\textsuperscript{90} The purchaser of a time-share estate, however, acquires more than a right to use a piece of property for a specified period of time; he also acquires title to the property upon performance of his obligations. Moreover, that title represents a bona fide interest in real property. According to the Uniform Real Estate Time Share Act, a time-share estate constitutes for all purposes a separate estate in real property having all the character and incidents of

\textsuperscript{83} See supra notes 1-2 and accompanying text.
\textsuperscript{85} If enacted, section 365(i)(1) would be amended to read as follows:
If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a time-share interest under a time-share plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain in possession of such real property or time share interest.
\textsuperscript{86} This Note concludes that the proposed legislation conflicts with bankruptcy policy. See infra discussion beginning with note 98.
\textsuperscript{87} Congress is currently preoccupied with trying to save the bankruptcy courts from total collapse following the Supreme Court's decision in Northern Pipeline Constr. Co. v. Marathon Pipe Line Co., 458 U.S. 50 (1982). As a result, it is unlikely that Congress will be focusing its attention on the time-share amendment in the near future.
\textsuperscript{88} Sections 365(i) and (j) supra notes 78-79.
\textsuperscript{89} It also excludes from §§ 365(i) and (j) all time-share contracts involving personal property.
\textsuperscript{90} See infra text beginning with note 136 for discussion of provisions in § 365 relevant to time-share licenses.
such an estate at common law. Reduced to its essentials, the time-share estate is merely a method of permitting multiple ownership of an estate in real property by apportioning use among its owners. Although it is divided into periods of use, the estate remains an interest in real property. As such it can be alienated or encumbered, its deed can be recorded, and its owner taxed. Thus, while it represents an unconventional form of ownership, a contract to sell a time-share estate does constitute a sale of real property. Therefore, at a minimum, the purchaser of a time-share estate should be protected with a lien under 365(i) if his contract is rejected by the trustee.

Rather than securing his interest with a lien, however, a purchaser may desire to complete his performance and receive title to the property pursuant to section 365(i). The availability of this additional protection depends on whether the purchaser of a time-share estate is “in possession” within the meaning of 365(i). Since the Bankruptcy Code does not define the phrase “in possession,” one possibility is to define possession in accordance with state property law. The possession of land, under conventional property analysis, involves two elements: the exertion of physical control over the land and the intent to exclude others from possession. The exact nature of physical control depends on the nature of the property interests involved. The purchaser of a time-share estate has the enforceable right to exclusive possession of the unit for the period of time he purchased. This right, although limited in duration, is of the same character as the possessory rights enjoyed by a sole owner of a condominium. Moreover, since resort condominiums are typically used only seasonally, the purchaser’s periodic, exclusive use may be sufficient to demonstrate his control over the property. Thus, under traditional property law analysis a time-share purchaser should probably be regarded as “in possession” under section 365(i).

The problem with analysis along these lines is that it determines the meaning of section 365(i) without regard for the purposes for which it was enacted. The fact that a time-share purchaser is deemed to be in possession under property law does not mean it is the type of possession section 365(i) was intended to protect. Therefore, the meaning of possession should be applied to time-sharing in light of the policy behind section 365(i) in particular and the Bankruptcy Code in general.

91. P. Rohan & M. Reskin, supra note 24, § 1-103.
92. Id. See generally P. Rohan & M. Reskin, supra note 24, § 17C.01.
93. A purchaser in possession obviously bears no resemblance to a debtor-in-possession under § 1107; thus, the case law under that section is inapposite in defining the meaning of possession under § 365.
94. Restatement of Property § 7 comment 1 (1936).
95. Id.
96. See supra note 24 and accompanying text.
97. A similar approach was used by the court in Summit Land Co. v. Allen (In re Summit Land Co.), 13 Bankr. 310 (Bankr. D. Utah 1981). According to the court: “Where possible, the Code should be given a federal meaning. This permits uniformity in a national bankruptcy system; it promotes exegesis in line with bankruptcy policies. Construing ‘in possession’ according to the abstract, sometimes rarified, and frequently arcane concepts of state property law is therefore inappropriate.” Id. at 317 (emphasis in original).
The legislative history sheds some light on the type of property interests section 365(i) was intended to protect. According to both the House and Senate reports, this section was intended to give a purchaser of real property under a land installment sales contract protection similar to that afforded to lessees.\(^9\) Thus, one concern of Congress appears to have been the fact that while a lessor's bankruptcy could not deprive the lessee of his estate,\(^9\) a purchaser's equity under an installment land contract was subject to forfeiture.

Another purpose behind section 365(i) is elucidated by the report of the Commission on the Bankruptcy Laws of the United States. The Commission's report states that their suggested revision of the Bankruptcy Act would protect "a consumer who is purchasing a residence under a long-term land sales contract not passing title until the full purchase price has been paid."\(^100\) The Commission's report exhibits an intention to protect persons having a long-term obligation to purchase a residence. This rationale was derived from a paper submitted to the Commission.\(^101\) A purchaser under an installment land contract, according to the commentator:

> is likely to be the buyer of a home or farm or small business who has adjusted to a new location. Very often, especially in the case of a residential buyer, he will be poor. Modern American bankruptcy policy certainly places as high a value on relieving the poor from the consequences of their own and others in providence as in doing perfect justice between creditors.\(^102\)

The meaning of this legislative history was applied to an interesting use of time-share ownership in the case of *Summit Land Co. v. Allen*.\(^103\) The debtor, Summit Land Co., was marketing interests in a recreational park on a land sale contract basis. These interests granted the purchaser a perpetual but nonexclusive right to use the park for recreational purposes.\(^104\) When insufficient sales forced the debtor into bankruptcy, it sought to reject the contracts pursuant to section 365. This raised the issue of whether the purchasers were "in possession," and, therefore, protected under section 365(i). Relying primarily on its analysis of the legislative history, the court held that the purchasers were not in possession under section 365(i).\(^105\) The court

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99. Former § 70b of the Bankruptcy Act provided in part: "Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any covenant therein by the trustee of the lessor does not deprive the lessee of his estate." See supra note 77.

100. Bankruptcy Commission Report, supra note 76, part II, at 158.


102. Id. at 484.


104. Id. at 311-12. Under the project instrument, a management association was created to maintain the park. Each purchaser had the right to use the park for recreational activities such as hunting, fishing, hiking, and camping. No structure other than a tent for camping could be erected by the members. The park was used primarily on weekends and vacations, but use was not limited to any specific period of time and had to be shared with all other members. Id.

105. Id. at 318.
discovered a congressional "concern for buyers whose connection with the land is in fee simple, not fractionated, and is more productive and long-term than speculative and short-term. Congress intended to prevent the forfeiture of investment gains by the poor rather than to create investment opportunities for the rich."  

Under the facts in *Summit*, reliance on legislative intent was sufficient to enable the court to reach the proper conclusion. Time-share estates present a more difficult question. Although the legislative history is a necessary component of the analysis, it is not sufficiently defined to determine whether time-share estates should be protected by section 365(i). The equivocal nature of the legislative history can be seen in the differing ways it can be interpreted, and the conflicting conclusions which result when applied to time-share estates. The court in *Summit* plausibly concluded that the primary purpose of section 365(i) was to protect a particular class of purchaser: consumers investing their life savings in residences. This leads to the conclusion that Congress did not intend to protect fractional ownership for investment or recreational purposes. This would also exclude time-share estates since they are invariably purchased for recreational purposes.

On the other hand, the legislative history can be read as indicating an intent to protect purchasers who enter into a certain type of transaction. Thus, according to one commentator:

> It seems obvious, . . . that the draftsmen were thinking of the typical installment sale where the purchaser is in possession of the property under a contract for a deed for that property. The draftsmen apparently believed that this was the only type of case where a purchaser would have made

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106. *Id.*

107. In *Summit*, since the use of each purchaser was shared and non-exclusive, the buyer had not so much a possessory interest as a "recreational use" permit. *Id.* at 311. Since § 365(i) was intended to protect possessory interests, *Summit* is an easy case. Not so for time-share estates. Here the purchaser has the exclusive right to possess a specific unit of property for his use period. This exclusive possessory interest is more akin to the type of possession contemplated by § 365(i).

108. The difficulty of discerning legislative intent is not confined to this provision of the Bankruptcy Code. Discussing the difficulty of discovering legislative intent one commentator noted:

> There is a limited and oblique manner by which one might adduce a philosophy of some aspects of bankruptcy law from the end products—acts of Congress—of a long series of different starts, compromises, trade-offs in several directions, covert interests—most or many of which may be unknown—and just hidden possibilities often due to mistakes, probably more often the result of being unable to foresee possible and sometimes even likely results and ignoring what from that perspective seemed aberrant, even if possible, judicial interpretations.


109. Another problem with relying solely on legislative intent is that it may prove too much. While Congress may have primarily desired to protect poor persons purchasing a home, § 365(i) is certainly broad enough to encompass many other transactions. For example, not all persons purchasing a home under a land sale contract are poor. Moreover, focusing on purchasers for residential purposes excludes land contracts to purchase a vacation cottage on the lake or a "second home" in Vail. But, there does not appear to be any reason to exclude these transactions from § 365(i).
enough of a commitment to the purchase to justify enforcement of the agreement in accordance with its original terms.\textsuperscript{110}

This too is a plausible reading of the legislative intent. By drafting section 365(i) in terms of land sale contracts,\textsuperscript{111} Congress sought to include those transactions where a purchaser would have a substantial amount of equity tied up in the contract.\textsuperscript{112}

This analysis would seem to cut in favor of including time-share estates within the meaning of section 365(i). The installment purchaser of a time-share estate makes payments in reliance upon ultimately being the owner of his property interest.\textsuperscript{113} The chance to acquire an equity interest in real property is part of the bundle of rights for which the purchaser of a time-share estate bargains.\textsuperscript{114} This includes both the intangible satisfaction of ownership and the chance to make a profit on resale.\textsuperscript{115} According to the legislative history, one of the purposes of section 365(i) was to protect these legitimate expectations of purchasers of real property.\textsuperscript{116} Thus it could be argued that where time-share estates are financed by a land sale contract, the purchaser would have a property interest which Congress sought to protect.\textsuperscript{117}

This analysis of the legislative history of section 365(i) suggests that determining legislative purpose is a necessary step in applying section 365(i) to time-share estates. This legislative history reveals an intent to protect a certain type of purchaser and a particular type of transaction from harsh forfeiture caused by the rejection of an executory contract. The legislative history, however, is not sufficiently clear by itself to set the parameters of section 365(i). Specifically, reliance on either of the discernible congressional purposes may lead to inconsistent conclusions regarding the applicability of section 365(i).


\textsuperscript{111} See § 365(i), supra note 78.

\textsuperscript{112} There also appears to be a concern on the part of Congress to protect consumers and businesses from being displaced by the seller's bankruptcy. See BANKRUPTCY COMMISSION REPORT, supra note 76, pt. I, at 199; pt. II, at 158.

\textsuperscript{113} Thus, his expectations are similar to those of the purchaser under a conventional land contract who, according to one commentator, has made his payments in reliance on a particular asset belonging to the vendor; and this justifies full preservation of his right to the property in the event of the vendor's bankruptcy. See Lacy, supra note 101, at 483-84.

\textsuperscript{114} Since the purchaser of a time-share estate is not paying merely for a use period of limited duration, but fee ownership, his ownership interest will be reflected in a higher purchase price than that paid for a time-share license. However, the purchaser of a time-share estate anticipates that this higher initial cost will be more than offset by the chance to build equity in the unit and perhaps sell it at a profit.

\textsuperscript{115} Because resort condominiums have a limited useful life, the likelihood of making a profit is questionable. See Note, New Ideas in the Vacation Home Market, 48 St. John's L. Rev. 1203, 1222 n.97 (1974); Temptations That You Should Resist, Money, Dec. 1983, at 100. Nevertheless, this is probably an expectation of many purchasers of time-share estates.

\textsuperscript{116} See supra notes 98-102 and accompanying text.

\textsuperscript{117} This reading of § 365(i) would exclude from its terms all time-share estates which are financed by a mortgage, but which are executory because the closing has not yet taken place. Lacy, supra note 101, at 484 refers to these contracts as "really executory" contracts, which should be treated differently than land sale contracts. The language of § 365(i) (referring to continued payments and delivering of title according to the terms of the contract) indicates an intention to limit the scope of § 365(i) to real property sold by a land sale contract. See § 365(i), supra note 78.
to time-share estates. Moreover, relying solely on legislative intent in a context unforeseen by the draftsmen may lead to results inconsistent with the policies behind the Bankruptcy Code. Thus, an examination of these policies is appropriate.

According to one commentator:

[T]he Bankruptcy Code is designed to achieve three fundamental goals. The first is to provide the debtor with a fresh start. The second is to maximize the value of the debtor's property either on a liquidation or going concern basis. The third goal is to afford fair treatment of creditors, shareholders and others with rights and interests in the debtor or his property.\(^{118}\)

By granting the debtor a discharge from his debts and exempting certain property from creditors' claims, the Bankruptcy Code guarantees every debtor a fresh start, irrespective of whether nondebtor parties receive special protection under section 365(i). However, the other two goals of the Bankruptcy Code—maximizing the value of the debtor's estate and the fair treatment of all creditors—may be frustrated by applying section 365(i) to time-share purchasers.

Maximizing the value of the debtor's estate works to the advantage of all creditors.\(^{119}\) The larger the pie, the bigger the slice which can be distributed to satisfy the claims against the estate. Maximizing the value of a bankrupt time-share development may require selling the entire development to another party. Or, the estate may benefit most by converting the time-share units into conventional condominiums. But, if section 365(i) is applicable to time-share estates, these options may be foreclosed, decreasing the value of the debtor's estate. If the time-share purchaser remains in possession, the trustee will be bound by the terms of the contract,\(^{120}\) and a valuable asset will be unavailable for resale. The estate will receive the payments due under the contract; however, the present value of these payments may be significantly less than the amount which could be received if the entire unit were sold.\(^{121}\) By contrast, if the purchaser is not permitted to remain in possession, the estate could dispose of the asset quickly, providing additional revenue to satisfy creditors' claims.

Section 365(i), however, was intended to impose limits on the power of the trustee to act for the benefit of the estate.\(^{122}\) One could argue, therefore, that time-share purchasers should be given the same protection as purchasers of conventional property interests who are permitted to remain in possession even though it will frequently decrease the value of the debtor's estate.

\(^{118}\) Julis, \textit{supra} note 9, at 223.

\(^{119}\) Maximizing the value of the debtor's estate can be regarded as the initial step necessary to paying the claims of creditors. \textit{See} Savoy Record Co. \textit{v.} Mercury Record Corp., 108 F. Supp. 957, 959 (Bankr. D.N.J. 1952) (the court notes that converting the assets of the bankrupt into cash is for the purpose of distribution to creditors).

\(^{120}\) Fogel, \textit{supra} note 15, at 386-87.

\(^{121}\) This is not an unlikely possibility since the estate will expend some of its limited assets to sell the use periods which were terminated pursuant to \$ 365(j). Moreover, the prospects of selling these use periods at a favorable price are not bright when the development is saddled with the stigma of bankruptcy.

\(^{122}\) \textit{See} \textit{supra} note 20 and accompanying text.
The major difficulty with this argument is that protecting time-share purchasers under section 365(i) imposes much greater costs on the estate than allowing other purchasers of real property to remain in possession. Since time-sharing involves multiple use, a time-shared unit would be subject to numerous ownership interests. If section 365(i) were applicable, each purchaser would have the option to either remain in possession or treat his contract as terminated. The value of the time-share property, however, would be significantly reduced if some purchasers remained in possession while others terminated their contracts. Such a scenario is not unlikely and would preclude the trustee from selling the unit as a conventional condominium free from all time-share interests. Instead, the trustee would be thrust into the resort condominium market, having the burden of finding new purchasers for the use periods where the contracts were terminated. Thus, allowing the purchaser of a time-share estate to remain in possession would significantly hinder the opportunity of the estate to free itself of burdensome obligations.

In addition, the purchaser will have the right under 365(i) to offset the amount of damage caused by rejection against the payments due under the contract. In a time-share development, the amount of this offset could be substantial. Since each purchaser has the option to terminate his contract, there may be only a handful of purchasers remaining to share the cost of maintaining the unit. This additional cost could arguably be offset against the contract payments. As a result, although the unit may be a valuable asset it may provide little income for the debtor's estate.

Finally, for the trustee to properly exercise his power to assume or reject executory contracts for the benefit of the estate, he must be able to predict the consequences of his action. A cost/benefit analysis is not possible unless the consequences of assumption or rejection are known in advance. But, if each purchaser of a time-share estate is given the option to either remain in possession or terminate the contract, the benefit of rejecting the contract will be speculative. When faced with such uncertainty, the trustee may assume contracts, even when the value of the debtor's estate is diminished as a result. In the absence of a clear intent in the legislative history to protect time-share

123. Section 365(i), supra note 78.
124. Since each purchaser has a separate ownership interest there would appear to be no reason why one purchaser should be bound by the decision of another to terminate his contract. However, because allowing each purchaser to make an independent choice about whether to remain in possession may adversely affect the management of the unit, it may be advisable for time-share purchasers to confer upon the management association the power to exercise the option on behalf of all the members, in the event of the developer's insolvency.
125. Section 365(i), supra note 78.
126. The argument would be that the increased maintenance cost borne by those purchasers who choose to remain in possession is the direct result of the developer's bankruptcy. This argument may not be persuasive since the maintenance costs would have remained the same but for the fact that the other time-share purchasers chose to terminate their possession. Of course, if the developer also functions as manager of the unit and he rejects his management obligations, the purchasers would have a stronger argument for offsetting the maintenance costs against their payments under the land contract.
estates, these costs militate against protecting time-share purchasers under section 365(i).

Protecting time-share purchasers under section 365(i) will also affect whether other creditors are treated equitably. Section 365(i) singles out one group of creditors, purchasers in possession of real property, and gives them preferred status over other creditors. But if section 365(i) is not applicable to time-share estates, the purchaser who is not “in possession” is not left with an unsecured claim. He can still fall back on section 365(j) and take a lien for the full amount of the payments already made. Thus, the question is whether the time-share purchaser should receive more protection than secured creditors.

There are good reasons to protect most purchasers in possession of real property; if they cannot remain in possession, they may be displaced from their home or lose business property necessary to sustain a living. Moreover, many of these purchasers will be consumers who will be less able to bear the risk of loss than other secured creditors. Finally, the purchaser who is not permitted to remain in possession must forfeit the benefit of his bargain, receiving a lien instead.

Nevertheless, time-share purchasers do not present a strong case for special priority under section 365(i). First, their possession is limited to the right to use a resort condominium for a few weeks each year; loss of this possession would not result in them being displaced from their homes or losing their business—the kind of harsh consequences Congress sought to avoid by enacting section 365(i). Indeed, the time-share purchaser can reinvest the proceeds from his claim in similar time-share property without any disruption in his daily affairs. In addition, time-share estates are purchased primarily for their recreational value, with the possibility of making a profit upon resale being a secondary, and speculative, consideration. Thus, the time-share purchaser loses very little by receiving a lien rather than the right of continued

127. See supra notes 78-81 and accompanying text.
128. Under former § 70(b), supra note 77, the purchaser under a land contract was left with an unsecured claim. This produced inequitable results since a mortgagor’s possession was not disturbed by the mortgagee’s bankruptcy. See Cournyman, supra note 33, at 471-73. Section 365(i) was intended to avoid this disparate treatment which results from the mere fact that in the land contract sale title has not passed, permitting the vendor to reject the contract.
129. One commentator has noted, “equity favors the vendee who is willing to meet his contract obligations. Allowing a greater profit than originally contemplated simply to benefit the creditors, at the expense of a non-breaching vendee, is unjust.” Note, Bankruptcy and the Land Sale Contract, 23 Case W. Res. L.J. 393, 410 (1972). Another commentator states that the vendee of realty is treated differently because real property is unique but personalty is not. Silverstein, Rejection of Executory Contracts in Bankruptcy and Reorganization, 31 U. Chi. L. Rev. 467, 478 (1964).
132. See supra text accompanying note 81.
133. See supra note 112.
134. See supra note 115.
possession. By contrast, as was discussed above, allowing the purchaser to remain in possession will significantly affect the amount of assets which are available for distribution to other secured creditors, creditors who likewise deserve protection under the Bankruptcy Code. Absent a strong reason to protect the purchaser's right to possession, it is more equitable to grant the purchaser a lien to secure prior payments than allowing him to remain in possession under 365(i).

In summary, the legislative history is helpful in identifying the type of interests section 365(i) was intended to protect. It is not sufficiently clear, however, to determine whether time-share estates should fall within the scope of section 365(i). Yet, analyzing the applicability of section 365(i) to time-share estates in light of the policies of the Bankruptcy Code makes clear that time-share estates should not fall within the protection of 365(i). Instead, if the trustee rejects the executory contract, the purchaser of the time-share estate should receive a lien for the payments he has made pursuant to 365(i).

IV. THE APPLICATION OF SECTION 365 TO TIME-SHARE LICENSES

A. The Provisions in Section 365 Relevant to Time-Share Licenses.

As was discussed above, the purchaser of a time-share license merely acquires the right to use a resort condominium for a specified period of time each year; as a result, a time-share license, unlike a time-share estate, could potentially be classified as either an executory contract or an unexpired lease. Classifying a contract to purchase a time-share license as a lease, however, significantly alters its treatment under section 365. First, if a time-share license is not a lease, it can be rejected only if it satisfies the Countryman definition of an executory contract. If, on the other hand, the time-share license is a lease, the trustee can assume or reject the lease as long as it is unexpired, regardless of whether material obligations remain unperformed on both sides. In addition, if a time-share license is treated as an executory contract, the

135. See supra notes 120-26 and accompanying text.
136. See supra notes 21-24 and accompanying text.
137. Some courts have failed to distinguish leases from executory contracts. For example, in the case of Fisher v. City of Huntington Beach (In re The Huntington Ltd.), 654 F.2d 578, 587 n.13 (Bankr. 9th Cir. 1981), the court states that if a lease is unexpired at the date of filing it is an executory contract and it continues in effect unless specifically rejected. This analysis blurs the fact that "executory contract" is a term of art in bankruptcy law, having a meaning independent of the term "unexpired lease." See supra notes 31-34 and accompanying text.
138. See Kearny Mesa Crossroads v. Acorn Inv. (In re Acorn Inv.), 8 Bankr. 506, 510 (Bankr. S.D. Cal. 1981) (holding that "a lease which has been terminated prior to the filing of a chapter 11 petition has 'expired,' or ceased to be executory, within the meaning of § 365 of the Code").
139. COLLIER, supra note 15, ¶ 365.09, at 365-44 states that "section 365 continues the practice under the Act of subjecting unexpired leases to rejection whether or not the leases are executory." See also Rhode Island Hosp. Trust Nat'l. Bank v. Elliott Leases Cars, Inc. (In re Elliott Leases Cars, Inc.), 20 Bankr. 893, 896 (Bankr. D. R.I. 1982) (holding that even if the leases are not executory the trustee could reject them under § 365 if they are unexpired).
trustee's rejection of the contract will not trigger any protective provisions in section 365; thus, rejection will leave the purchaser with an unsecured claim against the estate.\textsuperscript{144} By contrast, if a time-share license is a lease, the purchaser will be entitled to the special protection afforded lessees under section 365(h).\textsuperscript{144}

Under this provision, if the trustee decides that an unexpired lease is burdensome,\textsuperscript{142} and chooses to reject it, the lessee can then treat the lease as terminated and abandon the premises without any liability.\textsuperscript{143} The lessee also has the option to remain in possession for the balance of his lease including all renewal terms enforceable by the tenant. If the lessee elects to remain in possession, he may offset against his future rent all damages caused by the rejection of the lease.\textsuperscript{144} However, the amount of the offset is limited to the amount of rent due, and damages based on rejection cannot be asserted as a claim against the estate.\textsuperscript{145} Thus, classification of a time-share license as a lease would obviate the need to determine whether the contract is executory. It would also permit the time-share purchaser to remain in possession for the balance of his contract, rather than being relegated to an unsecured claim for the amount of his previous payments.\textsuperscript{146} In applying section 365 to time-share licenses, therefore, the crucial issue is whether a time-share "license" constitutes a lease under section 365.\textsuperscript{147}

\textsuperscript{140} See generally Julis, supra note 9, at 248-49.

\textsuperscript{141} Section 365(h) reads as follows:

\textsuperscript{142} In the past, some courts have held that an executory contract or unexpired lease could be rejected only if it was burdensome. See, e.g., In re Jackson Brewing Co., 567 F.2d 618 (Bankr. 5th Cir. 1978); In re Minges, 602 F.2d 38 (Bankr. 2d Cir. 1979); other courts have held that it is sufficient if it is shown that rejection will benefit the estate. See, e.g., Group of Institutional Inv. v. Chicago, Milwaukee, St. Paul & Pac. R. Co., 318 U.S. 523 (1943); In re Tilco, Inc., 558 F.2d 1369 (Bankr. 10th Cir. 1977). \textit{Collier, supra} note 15, \textsuperscript{143} 365.03 states that the latter view, known as the "business judgment test," is the prevailing standard used by most courts.

\textsuperscript{143} \textit{Collier, supra} note 15, \textsuperscript{144} 365.09, at 365-46 states that in many cases terminating the lease and abandoning possession "may be the only viable alternative since ... other executory covenants may be rejected."

\textsuperscript{144} Since the lessor is no longer obligated to perform his lease covenants or to provide services, the lessee is permitted to offset this loss against his rent payments.

\textsuperscript{145} Section 365(h), supra note 141. See also Fogel, supra note 15, at 382-83; \textit{Collier, supra} note 15, \textsuperscript{146} 365.09.

\textsuperscript{146} Part of the rationale for not disturbing the lessee's possession may also be the recognition that the alternative would mean leaving the lessee with an unsecured claim for his damages.

\textsuperscript{147} As with time-share estates, an amendment to the Bankruptcy Code has been proposed which would clarify the treatment of time-share licenses. See supra notes 84-87. If the proposed
B. Analysis of Time-Share Licenses as Leases Under Section 365

The term "lease" is not defined in the Bankruptcy Code. In resolving whether a contract is a lease most courts look to state property law.\(^{148}\) Under the law of real property, the distinction which must be drawn is between a license and a lease. Whether the time-share agreement is a lease or not will depend, initially, on whether the contract between the parties indicates an intention to create a landlord and tenant relationship.\(^{149}\) The terms used in the agreement are not dispositive of whether it is a lease of a license, although they are relevant in determining the intention of the parties.\(^{150}\) If the contract legislation is enacted, purchasers of time-share licenses would be protected under § 365(h) along with lessees by amending that section to read as follows:

(h)(1) If the trustee rejects an unexpired lease of real property of the debtor under which the debtor is the lessor, or a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller, the lessee or timeshare interest purchaser under such lease or timeshare plan may treat such lease or timeshare plan as terminated by such rejection, where the disaffirmance by the trustee amounts to such a breach as would entitle the lessee or timeshare interest purchaser to treat such lease as terminated by virtue of its own terms, applicable nonbankruptcy law, or other agreements the lessee or timeshare interest purchaser has made with other parties; or, in the alternative, the lessee or timeshare interest purchaser may remain in possession of the leasehold or timeshare interest under any lease or timeshare plan the term of which has commenced for the balance of such term and for any renewal or extension of such term that is enforceable by such lessee or timeshare interest purchaser under applicable nonbankruptcy law.

(2) If such lessee or timeshare interest purchaser remains in possession as provided in paragraph (a) of this subsection, such lessee or timeshare interest purchaser may offset against the rent reserved under such lease or moneys due for such timeshare interest for the balance of the term after the date of the rejection of such lease or timeshare interest, and any such renewal or extension thereof, any damages occurring after such date caused by the nonperformance of any obligation of the debtor under such lease or timeshare plan after such date, but such lessee or timeshare interest purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset.

By allowing the purchaser of a time-share license to remain in possession, the proposed amendment would avoid the harsh alternative under the present language of § 365: relegating the purchaser to an unsecured claim against the estate. This Note contends, however, that the amendment goes too far in its protection, since allowing time-share purchasers to remain in possession will frustrate other policies of the Bankruptcy Code. See infra discussion beginning at note 168. If Congress wants to protect time-share purchasers whose contracts are rejected under § 365 a better approach would be to grant all such purchasers a lien to secure any payments already made under the time-share contract. This would adequately protect time-share purchasers without adversely affecting the value of the estate or the claims of secured creditors.


confers exclusive possession as against the whole world of a definite space for a specific period of time it is a lease. But, if the contract merely confers a privilege to use or occupy the premises under the owner it is a license. These definitions, however, are easier to formulate than to apply, as is apparent by the conflicting decisions reached by the courts which have addressed the issue of whether a time-share license is a lease.

In the case of Sombrero Reef Club, Inc. v. Allman the debtor-in-possession, an operator of a resort condominium, sought to reject the time-share agreements under section 365 of the Bankruptcy Code. Under these agreements, each member paid a down-payment and a yearly fee for the right to use a certain type of accommodations for one week per year for a period of 30 years. They could make reservations up to one year in advance, but were not entitled to designate a particular room. Arguing that the agreements were leases, the purchaser sought to remain in possession under section 365(h). In holding that the agreements were not leases, the court found it decisive that the members did not have the right to use any particular rooms for a specific period of time. Moreover, the court reasoned that "although leases vary as to the degree of services provided by the landlord, the services and facilities here were such a substantial part of each contract that they appear to be something other than leases of real property." The same conclusion was reached in State Department of Commerce, Division of Real Estate v. Carriage House Associates, a case deciding whether vacation licenses were leases subject to regulation by the Real Estate Division. As in Sombrero, the licenses gave the purchasers the right to use a condominium suite of a particular type for a one week period during a designated season of the year; specific suites or dates could not be reserved. Unlike Sombrero, the duration of the contract was indefinite, extending for a period of not less than forty but not more than sixty years. The court held that the vacation license was "a mere contractual right which fails to achieve the status of an interest in real property." Using real property law analysis, the court reasoned that the vacation license was not a license because it was

153. 18 Bankr. 612 (Bankr. S.D. Fla. 1982).
154. Id. at 614.
155. Id.
156. Id. at 617.
157. Id. at 619. The court also noted that the time-share agreements did not indicate an intention to create a landlord and tenant relationship. Id.
158. Id. (emphasis in original).
160. Id. at 709, 585 P.2d at 1338.
161. Id. at 709, 585 P.2d at 1339.
transferable and irrevocable; nor was it a lease since it was "not definite as to its duration or description of the property involved." 162

This reasoning was found unpersuasive under similar facts, however, in the case of Cal-Am Corp. v. Department of Real Estate. 163 In Cal-Am Corp., the issue again was whether the Department of Real Estate could regulate the marketing of membership interests. Noting that the membership interest contained the right to exclusive possession of the unit during the member's annual use period, the court held that the contract was a lease. 164 This exclusive right of possession was not diminished by the fact the club retained the right to designate which unit would be available and to furnish hotel-type services. 165

This limited treatment of time-share licenses by the courts demonstrates the difficulty of determining whether they should be treated as leases or licenses. The elasticity of real property terminology makes it possible to fit time-share licenses into either category. If one focuses on the fact that a membership does not convey the right to designate any particular unit or date, it is difficult to distinguish the time-share license from a contract guaranteeing hotel reservations on specified terms. On the other hand, focusing on the exclusive possession requirement, the time-share license is indistinguishable from a conventional leasehold interest in a resort condominium. In both cases the occupant's possession is exclusive, despite the owner's obligation to provide hotel-type services. Moreover, even though the members cannot designate a particular unit on a particular date, they are guaranteed the use of a certain type of unit for a specified period of time each year. Apart from the interval nature of the possession, the contract is very similar to a conventional lease.

In resolving this ambiguity, the fact that the hotel services are an essential element of the time-share purchaser's right of possession argues fairly decisively against construing a time-share license as a lease. As the court noted in Sombrero, the value of the time-share purchaser's possession depends almost entirely on the accompanying hotel services; 166 by contrast, in a true lease the right of possession, not the services provided under the lease, constitutes the essential element of the bargain. This reasoning, while not compelling, does perhaps make it more plausible to conclude that a time-share license should not be considered a lease under section 365(h). Nevertheless, it must be recognized that analysis under real property law permits only a tentative, somewhat arbitrary, conclusion. As one court noted when speaking of a time-share license, "[i]t's an anomaly. It doesn't fit neatly into any nice legal terminology." 167 However, the conclusion that a time-share license should not be considered a lease under section 365(h) is reinforced when time-share licenses

162. Id.
164. Id. at 457, 163 Cal. Rptr. at 732.
165. Id. at 457-58, 163 Cal. Rptr. at 732.
166. See supra note 150 and accompanying text.
are considered in light of the policies of section 365(h) and the Bankruptcy Code.

The legislative history of section 365(h) is of limited help in determining how section 365(h) should be applied to time-share licenses because section 365(h) does not represent a change in policy so much as a refinement in terminology. Under former section 70(b) of the Bankruptcy Act, the trustee was similarly permitted to assume or reject an unexpired lease. In order to protect the rights of lessees, that section also provided that "[u]nless a lease of real property expressly otherwise provides, a rejection of the lease or any covenant therein by the trustee of the lessor does not deprive the lessee of his estate." As the legislative history points out, however, a judicial consensus of what it meant to deprive the lessee of his estate failed to emerge. Therefore, when Congress enacted section 365, it carried forward the policy that "the tenant will not be deprived of his estate for the term for which he bargained;" however, the terminology was revised to deal more directly with the outcome of the lessor's rejection. This legislative history indicates an intent on the part of Congress to simplify the treatment of leases in bankruptcy. Rather than having the lessee's rights depend on whether he has a vested estate distinct from executory covenants, section 365 provides that the lessee may simply "remain in possession." Yet, under both the former and current sections, the primary concern of Congress was to ensure that the lessee's possession would not be disturbed by the lessor's bankruptcy.

169. Section 70(b), supra note 77.
172. See Collier, supra note 15, ¶ 365.09, at 365-46. See also Bankruptcy Commission Report, supra note 76, pt. II, at 157 which states that the proposed revision of former § 70b: obviates the need to distinguish between leased covenants that are part of the "estate" of the lease and those that are not. As a result, the court is not invited to reform the lease agreement entered by the parties. Instead the lessor's trustee, or the debtor in possession, is called upon to compare the negative value of the unprofitable lease with the remaining value of the leased property. If the outcome shows a negative value, he should abandon the leased property to the lessee.
173. The fact that § 365(h) permits the lessee to "remain in possession" indicates an implied condition that the lessee must have been in possession prior to the rejection of the lease. This was the way § 365(h) was construed in the case of In re Marina Enter., Inc., 14 Bankr. 327, 334 (Bankr. S.D. Fla. 1981) (holding that the phrase "may remain in possession" in § 365(h)(1) "... implies continuation of existing possession on the part of the lessee"). See also, Sombredo Reef Club, Inc. v. Allman (In re Sombredo Reef Club, Inc.), 18 Bankr. 612, 618-19 (Bankr. S.D. Fla. 1982) (dictum) where the court states that § 365(h) implied the necessity of possession; however, because of notions of constructive possession and agency the court did not rule that time-share licenses were not leases on the basis of the implied possession requirement.
Unlike the protective provisions dealing with the sale of real property, the legislative history of section 365(h) does not reveal an intent to protect a certain type of lessee or a certain type of lease transaction; rather, Congress apparently intended that the protections of section 365(h) would be triggered by the rejection of any contract which qualifies as a lease under real property law. In the case of time-share licenses, however, this legislative history ultimately leads us down a circular path, since the question it presents, whether a time-share license is a lease, is the very question real property law cannot answer. Courts, therefore, should look further, examining general bankruptcy policy to determine whether time-share licenses are the type of transactions section 365(h) was intended to protect.

Permitting the purchaser of a time-share license to remain in possession under section 365(h) will conflict with the bankruptcy policy of maximizing the value of the debtor's estate. Indeed, there is an inevitable tension between this more general bankruptcy policy and the specific protection afforded lessees by section 365(h). Nevertheless, in the case of a conventional lease, the lessee's possession can be protected without significantly reducing the value of the debtor's estate because rejection of the lease does not relieve the lessee of his obligation to pay rent. Thus, even though section 365(h) prevents the trustee from negotiating a better lease, the estate will receive a steady stream of income, presumably representing the fair market rental of the property. The lessee will of course be able to offset damages caused by the rejection; however, in most cases the rental payments under a conventional lease will far exceed the lessee's right of offset.

By contrast, if the purchaser of a time-share interest is permitted to remain in possession, the value of the estate will be significantly impaired. First, the "typical" time-share license may extend for a period of forty to sixty years. As a result, the time-share unit would be unavailable for a period of time far exceeding the point where it could be liquidated for the benefit of creditors or contribute to a successful reorganization. Moreover, since these units may

175. See supra notes 98-112 and accompanying text.  
176. In fact, since the trustee's obligations under the lease are often not significant, the trustee will usually assume the lease and administer the rental payments as positive assets of the estate. See Creedon & Zinman, supra note 170, at 1392, 1415; McLaughlin, Amendment of the Bankruptcy Act, 40 Harv. L. Rev. 583, 608 (1927). See also Collier, supra note 15, § 365.09, at 365-43.  
177. Under most leases the landlord's obligations will be minimal, limited to supplying utilities and maintenance. The monthly rent, therefore, would be much greater than the lessee's right of offset due to the landlord's abandonment of the lease. See McLaughlin, supra note 176, at 609. It is because of these minimal obligations that most leases are not rejected. See supra note 176.  
178. See P. Rohan & M. Reskin, supra note 24, § 17C.02[6]. See also Cal-Am Corp. v. Dept. of Real Estate, 104 Cal. App. 3d 453, 163 Cal. Rptr. 729 (Cal. Ct. App. 1980); State Dept. of Commerce, Div. of Real Estate v. Carriage House Assocs., 94 Nev. 707, 585 P.2d 1337 (Nev. 1978). There are, of course, conventional leases, such as ground leases, which also extend for a long period of time; however, lessees under such leases often make large capital improvements which increase the value of the debtor's estate. See Creedon & Zinman, supra note 170, at 1392; Krasnowiecki, supra note 110, at 366-67; Silverstein, supra note 129, at 484. By contrast, the time-share member uses the property for recreational purposes, without contributing to its value.
be the only assets in the time-share developer’s bankrupt estate, the opportunity for the trustee to accomplish a successful reorganization or liquidation would not merely be impaired; it would be frustrated completely.

Second, treating a time-share license as a lease would conflict with the purpose for which the lease is rejected: to abandon burdensome obligations.179 Under section 365(h) each lessee is entitled to either remain in possession or terminate the lease.180 A time-share unit, however, may have as many as fifty “lessees,” each with the opportunity to remain in possession or terminate the contract. Some time-share purchasers, no doubt, will choose to terminate their contracts.181 Since these time-share interests are of no value to the estate so long as other members remain in possession, the trustee will be forced to find new buyers for the terminated contracts. Finding new buyers, however, means incurring additional marketing and transaction costs, draining the estate of valuable assets.182 Under these circumstances, the trustee’s power to reject burdensome obligations would be illusory; rejection of the “leases” would neither free the unit for other use nor relieve the estate of further obligations.

Finally, as the court noted in Sombrero, the time-share purchaser does not just bargain for the right of possession; mere possession of a resort condominium for a week would be of little value apart from the hotel services also included in the contract.183 But once the contract is rejected, the developer will be free from the obligation to provide these services in the future. The time-share purchaser’s remedy is to offset the cost of obtaining these hotel services against his annual membership fee.184 Since the value of these services comprises such a large portion of the time-share agreement, the damages may totally offset the purchaser’s future obligations.185 Unlike a conventional lease, therefore, the debtor’s estate will probably not derive any income from the time-share unit for the duration of the contract. Thus, protecting the time-share purchaser’s possession would come at an exorbitant cost to the debtor’s estate. At the same time, the value of his possession is minimal apart from the debtor’s continued performance. These factors indicate that a time-share license should not be considered a lease under section 365(h).

In addition, classifying a time-share license as a lease will have an impact

180. Section 365(h), supra note 141.
181. Because the debtor will no longer be obligated to provide the hotel services necessary to make the purchaser’s use enjoyable, the yearly membership fee may easily exceed the value of remaining in possession of a bankrupt time-share development. See supra note 143.
182. Moreover, using the assets of the estate to sell the terminated use periods may adversely affect the claims of other creditors.
184. Section 365(h), supra note 141.
185. Indeed, the transaction costs of fifty purchasers trying to negotiate the upkeep of a time-share unit without the benefit of a management association would likely be so high that they might better choose to terminate the contract. Fogel supra note 15, at 384, argues that in the face of such enormous costs attributable to the debtor’s rejection, the lessee might argue that the court should withhold approval of the rejection, since it amounts to a constructive eviction.
on the bankruptcy policy of providing equitable treatment of all creditors. If a time-share license is regarded as a lease under section 365(h) the time-share purchaser would enjoy special priority; he would not have to stand in line with other creditors but could remain in possession and offset his damages directly. On the other hand, if the time-share license is not a lease, the trustee will be able to reject the contract if it is executory. Since material performance generally will remain due on both sides—the purchaser's obligation to pay the annual membership fee and the developer's to provide hotel services—the trustee will be able to reject the contract. Rejection of the contract will leave the time-share purchaser with an unsecured claim against the estate.

Because the provisions of section 365 force a choice between either allowing the purchaser to remain in possession or leaving him with only an unsecured claim, achieving equitable treatment of all creditors is more difficult with time-share licenses than with time-share estates. Relocating the purchaser of a time-share license to an unsecured claim arguably produces harsh results. Most time-share contracts require a large down payment in addition to yearly membership dues. As a result, when bankruptcy occurs the purchasers will often forfeit funds far exceeding the value received under the contract, thereby providing a windfall to the estate. In addition, it seems harsh to allow the burden of bankruptcy to fall on one group of creditors, especially where those creditors are consumers, “not businesses with the ability to spread the burden

186. See § 365(h), supra note 141.
187. For a discussion of the test for an executory contract and cases applying that test, see supra notes 30-46 and accompanying text.
188. Most purchasers of time-share licenses will make a down payment, and will have a continuing obligation to pay annual membership fees. The developer/owner will be obligated to provide hotel-type services. (Thus, time-share licenses are different from time-share estates where hotel services are provided through a management association.) Since material performance will remain due on both sides, time-share licenses will usually be executory contracts. There may be some contracts where the yearly membership fee is so small relative to the down payment that it will not constitute a material obligation. In such cases, the contract can neither be assumed nor rejected under § 365. For analysis of whether a time-share license is an executory contract see In re Sombrero Reef Club, Inc., 18 Bankr. at 616-17 (holding that the developer's obligation to provide hotel-type services and the purchaser's obligation to pay an annual membership fee were material obligations sufficient to make the time-share agreement an executory contract).
189. Section 365 does not force this difficult choice with time-share estates because even if the purchaser is not permitted to remain in possession, his prior payments are secured by a lien pursuant to § 365(j). See supra notes 127-28 and accompanying text. As a result, with time-share estates the purchaser can be protected with only a minimal impact on the claims of other creditors.
190. See supra note 188.
191. The time-share deposits would provide the estate with assets which unsecured creditors did not rely on in extending the debtor credit. As one commentator has noted, “Allowing a greater profit than originally contemplated simply to benefit the creditors, at the expense of a non-breaching vendee, is unjust.” Note, Bankruptcy and the Land Sale Contract, supra note 129, at 410. This same logic would apply to time-share purchasers who must forfeit large down payments for the benefit of the estate, even though they are willing to carry out their obligations.
of bad debt to customers." If the debtor is allowed to stay in possession of a valuable asset of the estate, the burden of bankruptcy will again fall on one group of creditors, the debtor's secured creditors who are deprived of their security.

Although these competing interests are fairly evenly balanced, two factors tip the scale against affording purchasers of time-share licenses the special priority of section 365(h). First, the debtor's bankruptcy will not cause the time-share purchaser to be displaced from his home or to lose his business; he will merely forfeit the right to use a resort condominium for a few weeks each year. Second, the priorities of the Bankruptcy Code should protect the legitimate expectations of creditors who deal with the debtor. Secured creditors of the time-share developer, banks and finance companies, rely on security interests when extending credit to the time-share developer. Most time-share purchasers extend credit to the developer without bargaining for security interests in case of default. Therefore, giving the time-share purchaser special protection under section 365(h) would be inequitable to creditors who relied on their priority status in the event of the debtor's bankruptcy.

In summary, under the law of real property it is only possible to reach a somewhat arbitrary conclusion that time-share license is not a lease. However, examining time-share licenses in light of the purposes of the Bankruptcy Code reinforces the conclusion that a time-share license should not be considered a lease under section 365. Instead, since material unperformed obligations will usually remain due on both sides, the trustee should be able to either assume or reject the time-share license as an executory contract.

CONCLUSION

As the growth of time-sharing continues it will become increasingly important for Bankruptcy Courts to develop a methodology for applying section 365 to time-share interests. The methodology advocated by this Note is to analyze time-share interests in light of the policies behind section 365 and the Bankruptcy Code. Applying this analysis to time-share estates, this Note concludes that a trustee should be permitted to assume or reject time-share contracts where material obligations remain unperformed on both sides. And if the trustee elects to reject a contract to purchase a time-share estate, the purchaser should be granted a lien under section 365(j), rather than being

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193. See supra text accompanying notes 178-85.

194. See Lacy, supra note 101, at 482 who states that under the bankruptcy laws, "[o]ne who deals with a future bankrupt in reliance on his general credit—meaning his ability to pay money, perform services, and acquire property—is liable to be cut off with a provable claim; one who deals in the expectation of acquiring a particular asset is protected."
permitted to remain in possession of the time-share unit. In the case of time-
share licenses, this Note concludes that the time-share contract should not
be considered a lease under section 365. Accordingly, the trustee will be per-
mitted to assume or reject the contract if it satisfies the Countryman defini-
tion of an executory contract. In addition, in the event the trustee chooses
to reject the contract, the purchaser will not be entitled to the special protec-
tion afforded lessees under section 365(h); instead, the purchaser of a time-
share license will receive an unsecured claim against the debtor's estate.

Bankruptcies involving the application of section 365 to time-share interests
are hard cases; courts, unable to fit time-sharing neatly into conventional legal
terminology, are called upon to balance the competing interests of time-share
purchasers and other creditors in a win-lose situation. Hard cases, however,
do not always make bad law. If time-share interests are analyzed in light of
the policies of section 365 and the Bankruptcy Code, it is possible to reach
conclusions which are not only good law, but which further the policies em-
bodyed in the Bankruptcy Code.

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