Marketing Resort Timeshares: The Rules of the Game

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MARKETING RESORT TIMESHARES: THE RULES OF THE GAME

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The resort timeshare industry is experiencing an unprecedented degree of growth and prosperity. In 1996, resort timeshare sales in the United States were over $2.1 billion1 with an average sales price of about $10,000.00 for each timeshare week.2 At that time, there were over 1.7 million families3 in this country that owned a vacation ownership product.4 Whether oceanfront, mountain property, or even within an urban setting, resort time-

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3 See TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 37; Lisa Bartleim, Tourism Development's New Wave Has An Old Name: Timeshare, DAILY BUS. REV., Aug. 1, 1997, at A5 (stating that in 1996, 1.8 million U.S. residents owned timeshare units).

4 Vacation ownership product includes two basic types of timesharing projects. In the first type consumers receive a fee interest, coupled with an exclusive but restricted right of occupancy. In the second type, consumers receive a lease, license or club membership that allows the person to use the property for a specific amount of time each year for a stated number of years. See Joseph F. Scalo, Timesharing in the 90's, PROB. & PROP., 22, 22 (1993) ("The term ‘vacation ownership’ rather than the more traditional ‘timesharing’ is now the industry vogue to more accurately reflect the changing nature of the product."); see also Ralph E. Stone, The Federal Trade Commission and Timeshare Resale Companies, 24 SUFFOLK U. L. REV. 49, 51 (1990) (same).

6 Vacation ownership products have recently been developed in large urban markets such as New York and Boston. In 1996, the 360-unit Manhattan Club was launched in New York City, which is the world's largest urban vacation ownership development. The Boston Custom House is another large urban vacation ownership development which has recently opened. See Anders, supra note 2, at 11H (discussing the Manhattan Club and Custom House Tower projects, as well as other urban timeshare projects that are attractive to developers and consumers); Larson, supra note 2, at H4 ("Urban time-share growth floundered during the real-estate downturn of the late 80's

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share may be one of the best uses of property in the vacation industry.6

Timeshare developers have high profit expectations. For example, rather than a single sale of a condominium unit, the sale of a vacation ownership or timeshare interest means potentially fifty-two interests sold in each unit.7 Timeshare developers seek to realize a profit margin roughly between 20% and 40% on these sales. Typically, 30% to 50% of revenues will be devoted to sales and marketing costs in order to achieve these high profit margins.8

With such profit potential, it was foreseeable that the public financing market would be attracted to the resort timeshare industry. In recent years, the timeshare resort industry has seen at least five companies go from privately held business enterprises to publicly held and traded companies.9 This transition has helped the industry in raising money to continue to grow in acquisitions, sales, and development.10 Additionally, not only has there been an increase in the involvement of the public market in the resort timeshare world, but there has also been a continued involvement by hotel companies, most of which have a natural affinity with the concepts of resort timesharing.11 Whether the players are small

6 See Kyle Hughes & John Machacek, State May Ease Time-Share Rules, DEMOCRAT & CHRON. (Rochester, N.Y.), Dec. 1, 1995, at 6B (stating that New York Attorney General Dennis Vacco planned to change state timeshare regulations to spur timeshare companies to develop in New York in order to benefit from the “huge [timeshare] industry”); see also Bartleim, supra note 3, at 1 (“Timeshare—when it sells—is widely considered the highest use for ownership properties.”).
7 See TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 5.
8 See id. at 31.
9 See id. at 6. Privately held companies which have gone public include: Signature Resorts, Inc.; Trend West; Vistana; Vacation Break U.S.A., Inc.; and Silverleaf Resorts, Inc. Additionally, two companies, Bluegreen Resorts, Inc. and Fairfield Communities, Inc., have already been operating as publicly held companies.
10 Hilton and Marriott are examples of large hotel companies involved in timeshare. “Hotel companies, operating in a hospitality industry that’s mature and expanding at only two (2) percent a year, got into time sharing because they needed a new way to expand market share and revenues.” Bartleim, supra note 3, at 1 (citing Jon Simon, partner for real estate and hospitality consulting at KPMG Peat Marwick in Miami); see also Debra Wishik Englander, Mickey Mouse Time-shares Worth A Look, 35 MONEY, Dec. 1, 1991, at 35, 36 (“Topnotch hoteliers such as Marriott, Hilton and Disney are stepping into the field and making time-shares a more credible option.”); Barbara Hetzer, Timeshares: Their Time Has Come, BUS. WK., Apr. 14, 1997, at 108,
entrepreneurs or major hotel chains and public companies, the industry is driven by its successful sales and marketing efforts.

I. TIMESHARE PRODUCTS

In the pursuit of sales and marketing success, the timeshare industry has "invented" a variety of timeshare products and marketing approaches, all for the ultimate goal of selling timeshare interests. There is the basic timeshare week offering generally referred to as a "fixed week." The fixed week, a traditional product of the resort timeshare offering, is a week of use in a resort facility recurring each year at the same time. The fixed week, as well as the floating week discussed below, may exist as a timeshare estate or a timeshare use. Before 1995, fixed timeshare weeks accounted for 85% of all timeshare sales.

More recently, the industry has rapidly moved towards a flexible use concept. The flexible use concept is a plan whereby a

108 (noting that Disney, Marriott, Hyatt, and Hilton offer timeshares).
12 JoAnne P. Stubblefield, Interval Ownership and Vacation Club Options, ALI-ABA 1181, 1186 (1995) ("Historically, timeshare programs have involved 52 one week use periods beginning on the first Saturday of each calendar year and lasting seven days, with each successive timeshare week beginning on successive Saturdays throughout the year."); Scalo, supra note 4, at 22 ("Most early timesharing projects were structured on a fixed time, fixed unit basis; the consumer vacationed during the same week and stayed in the same unit at the same project year after year.").
13 See Stubblefield, supra note 12, at 1186 ("If a purchasers' use rights are based on fixed time periods, each purchaser is assigned a specific week (e.g. Week No. 32) at the time of purchase and is entitled to exclusive occupancy of the accommodations during that particular week every year.").
14 See Carl H. Lisman & Carol A. Cluff, Time Sharing, ALI-ABA 381, 384 (1990) (defining a “time share estate” as “a right to occupy during separate time periods, coupled with a freehold estate or an estate for years”). The Illinois Real Estate Time-Share Act, for example, defines “time-share estate” as “any arrangement under which the purchaser receives a fee ownership interest in real property and the right to use the accommodations in a time-share project or unit for a specified period of less than one year on a recurring basis extending over more than three years.” 765 ILL. COMP. STAT. ANN. 100/3-15 (West 1993).
15 The Illinois Real Estate Time-Share Act, for example, defines a “[t]ime-share use” as “any arrangement, whether by lease, rental agreement, license, use agreement or other means, under which the purchaser receives a right to use an accommodation or unit in a time-share project or unit for a specified period of less than one year on a recurring basis extending over more than three years, but under which the purchaser does not receive a fee simple interest in any real property.” 765 ILL. COMP. STAT. ANN. 100/3-21 (West 1993).
16 See TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 1.
17 See Scalo, supra note 4, at 22. Scalo notes:
A 1990 study conducted by the Gallup Organization for the International Foundation for TimeSharing demonstrated that negative attitudes toward
timeshare purchaser acquires, for example, a week interval with
the flexibility of using that week interval either seasonally or at
any time during the year, subject to availability and proper reser-
vation.\textsuperscript{18} With the introduction of flexible use plans, the percent-
age of buyers acquiring fixed weeks had dropped to 28%.\textsuperscript{19} As of
1995, almost 50% of resorts were offering some form of flexible use
plan.\textsuperscript{20}

Another timeshare product is the split week, which provides
purchasers the opportunity to reserve the acquired vacation inter-
est for a time period less than a whole week.\textsuperscript{21} On the other hand,
if a purchaser prefers to acquire the full week but does not desire
to use the week every year, many timeshare developers have made
available the product commonly referred to as the biennial time-
share interest. The biennial timeshare interest is defined in the
industry as the use of the acquired timeshare week every other
year.\textsuperscript{22}

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\item timesharing emanated from a desire not to vacation in the same place at
the same time each year. To address this negative attitude, many develop-
ers structured timesharing projects on a floating or flexible time basis so
the consumer could vacation in the same or a different unit at the same
project during different times each year.
\item \textit{Id.}; \textit{see also} Lisman & Cluff, supra note 14, at 385 ("[P]urchasers seek flexibility to
vary their use and relief from the regularly repeating schedule. Not unsurprisingly,
accommodations have been made; and the variations are endless.").
\item \textit{See} Lisman & Cluff, supra note 14, at 385 ("Alternatives to the fixed recur-
ring period of time are based either on a rotational or seasonal schedule.").
\item \textit{See} TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 6.
\item For example, The Manhattan Club allows owners to “experience their ‘week’ in
individual days or groups of days whenever they desire during each 12-month cycle,
and won’t be locked into any specific week during their use period.” Temliak, supra
note 5, at 5; \textit{see also} TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 25 (stating that
in 1995, 21% of resorts offered seasonal floating time, 20% offered year round floating
time, and 6% offered points allowing expanded use).
\item \textit{See} Stubblefield, supra note 12, at 1187 (noting that “by splitting weeks, a de-
veloper can offer interests which entitle the purchaser to use of the accommodations
for only three or four days per year for approximately half the cost of a full week”); RCI
STUDY, supra note 1, at 5 (stating that 38.9% of resort timeshare projects in the United
States which currently have active marketing and sales programs offer a split week).
\item \textit{See} Stubblefield, supra note 12, at 1187 (“The purchaser of an odd/even year
interest would obtain the right to use the accommodations only during odd years or
only during even years; \ldots the purchaser would generally have only one-half of a
vote and pay only one-half of the maintenance fee charged to owners of consecutive
year interests.”); Scalo, supra note 4, at 22 (recognizing that “[s]ome projects have
interests structured with use periods occurring every other year. One owner may be
entitled to come during odd years and a second owner is entitled to come during
even years”).
\item Nationally, 12% of resorts offer a biennial timeshare interest. This percentage

If a purchaser wishes to acquire something more than merely a timeshare week, the timeshare industry has responded to that need as well with the fractional timeshare interest. This is defined in the resort industry as the offering of a vacation interval of more than a single week. This vacation product is actively being marketed by developers.

Whatever the product offered, whether a fixed week, floating week, split week, biennial week, or fractional timeshare interest, the exchange program has been commonly associated with the offering of a timeshare interest. The exchange program offering allows timeshare owners to take advantage of networking use throughout the world.

In addition to the exchange privilege which is arranged through an independent exchange program, timeshare developers also offer an internal exchange or network of use. This concept is prearranged among resorts that are owned or controlled by single developers. This concept was, to a large degree, a foundation for more recent offerings of club products, all of which open up the use of the acquired timeshare interest to a network of resorts.

Additionally, many developers offer bonus time to timeshare
purchasers when it is available. This allows purchasers to extend their timeshare use beyond their original purchase.  

II. TIMESHARE MARKETING

Whatever the timeshare product or enhancement introduced into the resort timeshare sale, the marketing of such products in the resort timeshare world has increasingly become an art and science unto itself. Marketing by way of promotional contests, popular in the late 1970s and early 1980s has, in many respects, given way to owner referral programs, in-house guest programs, off-premise contact solicitation, direct mail and telephone solicitation, and the concept of an entry level introductory product.

Each of the above is aimed at producing prospects for sales of the timeshare products themselves. It is these prospects that eventually become new timeshare owners. For example, the owner referral program seeks new prospects by obtaining the names of potentially interested persons from existing owners, or otherwise upgrading existing owners into a new resort timeshare product offering, usually from the same developer.  

The owner referral program often works in conjunction with the in-house guest program. This program identifies prospects from owners and then invites those prospects to be guests of the resort with the goal being that the satisfied guest will become a timeshare buyer. On the other hand, the off-premise contact solicitation does not rely on existing owners, but rather seeks to attract those vacationing in the area of the timeshare facility to a timeshare presentation.

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28 See RCI STUDY, supra note 1, at 5 (noting that 66.9% of developers offer bonus time).

29 See RCI STUDY, supra note 1, at 52; see also Shari Caudron, Right on Target, 245 INDUSTRY WK. 16 (1996). For example, Disney has a program called Sharing the Magic, whereby it sends recent timeshare purchasers a direct mail package explaining the referral process. A telemarketing specialist then calls the purchaser to follow up and to answer questions. A newsletter is also sent to timeshare members to encourage the referral process. When someone is successfully referred, the referring customer is rewarded with free stays and other gifts. See id.

30 See RCI STUDY, supra note 1, at 52 (stating that "[t]hree marketing programs are used by more than two-thirds of the active projects, including referrals (87.4 percent), in-house guests (renters or exchangers) (79.2 percent) and telemarketing (69.5 percent)"); Caudron, supra note 29, at 16 (discussing the process of referrals).

31 See Caudron, supra note 29, at 16 (discussing the use of a referral system whereby owners of timeshares refer new prospects, who are than invited to be guests of the resort).

32 Many sellers offer prizes to consumers who listen to a sales presentation. See Joel Sleed, FTC Has Tips for Timeshare Shoppers, SAN DIEGO UNION-TRIB., Feb.
The unbounded contact made through off-premise solicitations, however, has the potential of producing unqualified prospects. Therefore, direct mailing, in connection with telephone solicitation, which rely upon demographically selected individuals, is developing as more favored marketing approach. The entry level introductory product has recently made inroads into marketing plans. It offers the consumer a sample of what the timeshare experience might be by providing a singular use stay at a timeshare facility, which is occasionally coupled with the exchange experience.

Whatever the marketing plan, credible studies indicate that timeshare purchasers, ultimately, despite the checkered past of the timeshare industry, view the buying process as positive. Furthermore, a significant percentage are happy with their acquisition.

III. THE RULES OF THE MARKETING GAME

With all the upside potential, both to the timeshare developer

23, 1984, at C2, available in 1984 WL 2269750 (discussing the most common prizes, which include gold and jewels or free vacations); see also Carlo Wolff, Making Sunterra a Household Word, 54 LODGING HOSPITALITY 61 (1998) (explaining the strategy of off-premise contact); Tom Kelly, Details to Consider Before Investing in a Timeshare, SEATTLE TIMES, June 4, 1995, at G1, available in 1995 WL 5026008 (recognizing that one in five people who attend timeshare presentations buy a timeshare).

See RCI STUDY, supra note 1, at 52 (finding that “an increasingly larger proportion of active projects are using telemarketing [and] direct mail”); Adam Woods, Timeshare Company in Bid to Retain Members, PRECISION MARKETING, Aug. 31, 1998, at 6, available in 1998 WL 8681352 (stating that RCI, a timeshare exchange company, engaged in direct mail solicitation to encourage membership renewal).

In general, exchanges enable a timeshare owner to utilize a timeshare in a different area. See Paul Barron, The Louisiana Timeshare Act: An Analysis and Assessment, 58 Tul. L. Rev. 863, 868 (1984). Timeshare exchanges are a significant marketing strategy for the developer. See id. at 905; see also Jeremy Seal, The Holiday Swap Shop, TIMES (London), Mar. 16, 1996, at 2 (noting that owners can exchange timeshares all over the world); supra notes 24-28 and accompanying text (discussing exchange programs).

A majority of timeshare owners report the process of buying a timeshare as neutral or positive. See TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 46 (stating that 73.8% of timeshare owners would characterize the buying process as either “very positive” or “somewhat positive”).

See TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 3 (indicating that “[m]ore than three-quarters of timeshare owners say their lives have been very positively affected by the purchase of their vacation interest”). It is also interesting to note that the average cancellation rate is very low. See RCI STUDY, supra note 1, at 50 (finding that the average cancellation rate is 15%).
in terms of profit and to the consumer in terms of satisfaction with their acquisition, resort timeshare developers should be mindful of the rules of the marketing game. They need to engage in smart marketing which means being prepared, planning ahead, and knowing the rules. Successful sales closing percentages, based upon a faulty marketing plan are, quite obviously, a developer's house of cards. Failure to understand and follow the legal rules applicable to a particular marketing technique may only create the mirage of a successful sales program.37

In today's world, the rules applicable to a respective marketing plan are not always easily identified. Many resort timeshare marketing plans are nationwide, if not worldwide, in scope, thus multiplying the jurisdictional levels of regulations.38 A resort timeshare facility located in one state may seek prospects and advertise in another state, and either close the sale in their home state, or entice residents of the second state into the situs state where the timeshare facility is located.39 The various marketing concepts identified above each have their own separate legal rules and because of the nationwide marketing potential, the rules differ depending upon the number of jurisdictions in which the marketing plan has contact.40

With a simple marketing concept such as off-premise contact, where solicitors offer a gift if one accepts the tour invitation, legal rules which stem from the jurisdiction in which the off-premise solicitor is located generally govern. For example, when an off-

37 Failure to comply with statutory requirements may also expose the developer to liability. See LA. REV. STAT. ANN. § 9:1131.12(A)(1) (West 1991) (requiring that all marketing with respect to timeshares be substantiated, truthful, and not misleading); TEX. PROP. CODE ANN. § 221.031 (West 1995) (mandating that a developer disclose the purpose of timeshare solicitation before utilizing any marketing strategies).

38 Many resorts across the United States have marketing and sales programs. See RCI STUDY, supra note 1, at 3 (stating that "[i]t is estimated that 294 resort timeshare projects in the United States currently have active marketing and sales programs") (emphasis omitted); see also TIMESHARE INDUSTRY OVERVIEW, supra note 1, at 53 (stating that "11.9% of all [American] timeshare owners express some degree of interest in purchasing vacation ownership in a resort outside of the [United States]").

39 See Stubblefield, supra note 12, at 1193 (observing that in a majority of cases, timeshare developers rely heavily on consumers from other states to purchase timeshare interests).

40 A Louisiana statute requires the developer to file advertising material for a timeshare plan prior to use. See LA. REV. STAT. ANN. § 9:1131.12(B) (West 1991). In Florida, the statute is more explicit and requires the developer to file advertising material ten days prior to use. See FLA. STAT. ANN. § 721.11(1)(a) (West 1988).
premise solicitor contacts an individual on a beach in Florida and offers a gift in exchange for a tour of a timeshare facility, the licensing laws of the State of Florida will be applicable to the off-premise contact solicitor. The local jurisdiction may also regulate where an off-premise contact solicitor may actually engage in solicitation activities. Still another area of regulation concerning off-premise solicitation, and one which permeates any marketing plan, is the issue of discrimination. In at least one situation, the Justice Department has investigated whether an off-premise solicitation marketing plan discriminated against Hasidic Jews.

Like off-premise contact solicitation, referral marketing has several applicable rules, many of which are easily identified. An obvious question is whether the source referring a potential purchaser needs to obtain any particular license. In some jurisdictions, if the source making the referral is compensated and if the transaction is determined to involve real estate, then the party referring the prospect may need to have a real estate license. In some circumstances, if a person, acting as a referral agent, is not involved in actual negotiations or execution of documents and was involved only in the referral of one person to another, as long as

41 See FLA. STAT. ANN. § 721.20(2)(a) (West Supp. 1999) (requiring "each off-premises solicitor or other person who engages in the solicitation of prospective purchasers of units in a time-share plan [to] purchase a ... time-share occupational license").

42 For example, one ordinance makes it illegal to make an off-premise contact in the French Quarter in New Orleans for the purpose of soliciting a timeshare. See Timeshare Request Rejected, BATON ROUGE SUNDAY ADVOC., Sept. 29, 1985, at 4B, available in 1985 WL 4109943 (discussing the city ordinance which prohibits the distribution of timeshare advertising in the French Quarter).

43 See Maya Bell, 'Bandit' Airs Time-Shares' Dirty Laundry, ORLANDO SENTINEL TRIB., June 2, 1991, available in LEXIS, News Library, Orsent File (discussing the investigation by the Justice Department, and noting that a timeshare seller admitted discriminating against potential buyers in the past).

44 See Wolff, supra note 32, at 61 (discussing the process of off-premise contact solicitation).


46 See, e.g., MINN. STAT. ANN. § 82.19 (West Supp. 1999) (explaining that a referring party shall not accept compensation from a real estate broker if the amount paid exceeds $150); TEX. REV. CIV. STAT. ANN. art. 6573a (stating that it is unlawful for a person to act as a real estate broker without a license and defining a real estate broker as including someone who, for consideration, assists in the procurement of prospects); see also GA. CODE ANN. § 44-3-190 (Supp. 1998) (stating that it is unlawful to act as a sales agent without a license).
there is no fee charged and the number of transactions involved is limited, an exception from real estate licensing requirements may apply.\textsuperscript{47} The mere limiting of the number of referrals per year may be sufficient for an off-premises contact solicitor to avoid real estate licensing.\textsuperscript{48}

The entry level program has also raised some recent legal issues. Generally, in the entry level circumstance, a developer seeks to introduce a prospect to the resort timeshare concept by allowing a sampling of use, without the purchase of a timeshare interest. In concept, advertising for the entry level program is very similar to advertising related to the timeshare plan itself. More recently, however, in what has little foundation in statutory construction, several jurisdictions have examined whether the entry level product, itself, constitutes a timeshare offering.\textsuperscript{49} If this short term entry product is viewed as the timeshare product itself, the entire panoply of timeshare regulation would apply then to the offering of what truly is no more than an attempt to encourage the consumer to acquire a timeshare interest. This full array of timeshare protection would include, for example, registration requirements applicable to the short term product,\textsuperscript{50} escrow arrangements being employed for receipt of money for purchase of the short term product,\textsuperscript{51} delivery of an approved public offering statement,\textsuperscript{52} and

\textsuperscript{47} See, e.g., GA. CODE ANN. § 43-40-29(a)(9) (Supp. 1998) (listing the requirements for such an exemption).

\textsuperscript{48} See, e.g., FLA. STAT. ANN. § 721.20(2)(e) (West 1988) (exempting from the requirement of a real estate license any "purchaser who refers no more than 20 people to a developer per year or who otherwise provides testimonials on behalf of a developer").

\textsuperscript{49} See Second Workshop on Short-Term Products, FLORIDA ADMIN. WKLY (1997).

\textsuperscript{50} For examples of typical timeshare registration requirements, see ARK. CODE ANN. § 18-14-204(a) (Michie 1987); 765 ILL. COMP. STAT. ANN. 100/17 (West 1993); WASH. REV. CODE ANN. § 64.36.020 (West 1994); N.Y. COMP. CODES R. & REGS. tit. 13, § 24.1 (1995).

\textsuperscript{51} For examples of a statutory requirement of the establishment of an escrow account, see ALA. CODE § 34-27-55 (1997); FLA. STAT. ANN. § 721.08(1) (West Supp. 1999) (stating that a developer must establish an escrow account prior to filing a public offering statement); 765 ILL. COMP. STAT. ANN. 100/15 (West Supp. 1998) (requiring deposit in connection with timeshare to be deposited in escrow); TEX. PROP. CODE ANN. § 221.061 (West 1995) (requiring a developer to establish an escrow account in connection with proposed sales of timeshare interests).

\textsuperscript{52} For examples of the information required to be contained in a public offering statement, see D.C. CODE ANN. § 45-1864 (1996 & Supp. 1998); FLA. STAT. ANN. §721.07 (West Supp. 1999); GA. CODE ANN. § 44-3-172 (Supp. 1998); 765 ILL. COMP. STAT. ANN. 100/12 (West Supp. 1998); TEX. PROP. CODE ANN. § 221.032 (West 1995) (requiring information such as a description of the accommodations and the timeshare interests currently available).
the applicability of statutory rescission periods to the entry level product acquired. Viewing the entry level product as encouragement to be introduced to timeshare and thus advertisement, does not dispense with the foregoing requirements. It merely applies the foregoing protections to the ultimate acquisition of the timeshare interest itself, rather than the entry level product offered.

IV. DIRECT MAIL

Since the 1980s, the timeshare world has relied heavily upon direct mail solicitation. Much of the direct mail solicitation has traditionally been founded upon promotional contests and gift giveaways. Promotional contest and gift giveaway statutes exist in many states. For the most part, these statutes regulate many aspects of the promotional contest or gift giveaway. For example, it is not unusual for such a statute to require, within the direct mail promotion, disclosure of the odds and verifiable retail price of receiving a particular item. Obviously, in the case of a gift giveaway, odds would not be disclosed, since it is purely a gift. It is only in the promotional contest type of solicitation where there are odds of receiving one item or another, that the odds are required to be disclosed. In either case, however, whether it is a sweepstakes type offering or a gift giveaway offering, the verifi-

53 For examples of statutory rescission periods of timeshare purchases, see ALA. CODE § 34-27-55 (1997) (giving purchaser a five day right to cancellation); FLA. STAT. ANN. § 721.10(1) (West 1988) (giving purchaser right to cancel contract ten days after the date of sale or date on which purchaser received last of all documents); 765 ILL. COMP. STAT. ANN. 100/16 (West 1993) (giving purchaser right to cancel three days after receipt of public offering statement or execution of contract); TEX. PROP. CODE ANN. § 221.041 (West 1995) (stating that the purchaser has the right to cancel until 6 days after the contract is signed).


55 See, e.g., LA. REV. STAT. ANN. § 9:1131.12(G)(5)(d) (West 1991) (requiring the odds of receiving a particular prize to be disclosed if the number of items to be awarded is limited); MD. CODE ANN. REAL PROP. § 11A-119(d) (1998) (requiring disclosure of the retail value or merchandise or services offered as a prize); MO. REV. STAT. § 407.610(1)(5) (West 1990) (requiring disclosure of the suggested retail value of items promoted); TEX. PROP. CODE ANN. 221.031 (West 1998) (requiring promotional advertisements to include the odds of winning and a statement of the retail value of the gift or prize).
able retail price is usually required to be disclosed.\textsuperscript{56} In addition, many promotional contests or gift giveaway statutes require disclosure of the verifiable retail price of the premiums or gifts to be distributed.\textsuperscript{57} Many of the applicable statutes dictate how that price is to be determined.\textsuperscript{58} Other aspects regulated by gift giveaway and promotional contest statutes include, for example, disclosure of the identity of the sponsor and developer,\textsuperscript{59} disclosure of the geographical area in which the gift giveaway or promotional contest is being arranged,\textsuperscript{60} a prohibition of substitution of gifts, and regulations requiring the distribution of a gift or the identification of the sweepstakes prize immediately upon the participant traveling to a place of business.\textsuperscript{61}

In addition to resort timeshares, promotional contests and gift giveaways have also been used by many businesses.\textsuperscript{62} Many state states require the "actual retail value" to be disclosed when a consumer has a chance to receive or win an item of value. For example, R.I. GEN. LAWS § 42-61.1-3 (1993) (requiring the "actual retail value" to be no more than the promoters' "good faith estimate of the appraised retail value"); S.C. CODE ANN. § 37-15-40 (West Supp. 1998) (requiring that the retail price be disclosed when a consumer has a chance to receive or win an item of value); VA. CODE ANN. § 59.1-417.1 (Michie 1998) (requiring disclosure of the "actual retail price" of any "item or prize" offered in a solicitation for "sale or lease of goods, property or service").

\textsuperscript{56}See id.; see also R.I. GEN. LAWS § 42-61.1-3 (1993) (requiring the "actual retail value" to be no more than the promoters' "good faith estimate of the appraised retail value"); S.C. CODE ANN. § 37-15-40 (West Supp. 1998) (requiring that the retail price be disclosed when a consumer has a chance to receive or win an item of value); VA. CODE ANN. § 59.1-417.1 (Michie 1998) (requiring disclosure of the "actual retail price" of any "item or prize" offered in a solicitation for "sale or lease of goods, property or service").

\textsuperscript{57}See, e.g., ALA. CODE § 34-27-60 (1997) (declaring it a violation for a gift to be used in a promotion without full disclosure of the fair market value); ARK. CODE ANN. § 18-14-504 (Michie 1987) (making it unlawful to offer a gift without disclosing the retail price of the gift); FLA. STAT. ANN. § 509.508(4) (West 1997) (stating that the offeror must keep records for one year containing the information used to determine the retail price of the prize); MO. ANN. STAT. § 407.610(1)(5) (West 1990) (requiring the promotional materials contain the "suggested retail price" of the prize).

\textsuperscript{58}See, e.g., ALA. CODE § 34-27-60 (1997) (declaring it a violation for a gift to be used in a promotion without full disclosure of the fair market value); ARK. CODE ANN. § 18-14-504 (Michie 1987) (making it unlawful to offer a gift without disclosing the retail price of the gift); FLA. STAT. ANN. § 509.508(4) (West 1997) (stating that the offeror must keep records for one year containing the information used to determine the retail price of the prize); WIS. STAT. ANN. § 100.171 (West Supp. 1998) (stating that verifiable retail value is determined by the price at which a substantial number were sold at retail, or no more than three times the cost to the sponsor); WYO. STAT. ANN. § 40-12-201(a)(vi) (Michie 1997) (requiring the value to be either the price at which a substantial number of the prizes have been sold by a person other than the solicitor or "no more than one and five-tenths (1.5) times the amount the solicitor . . . paid for the prize").

\textsuperscript{59}See CONN. GEN. STAT. ANN. § 42-295(9) (West Supp. 1998) (stating that verifiable retail value is determined by value of item if sold or a similar item's market value, or no more than three times the cost to the sponsor); GA. CODE ANN. § 10-1-393(b)(16) (declaring that verifiable retail value is the price at which a substantial number were sold at retail, or no more than three times the cost to the sponsor); WIS. STAT. ANN. § 100.171 (West Supp. 1998) (stating that verifiable retail value is determined by the price if a substantial number were sold, or by no more than 1.5 times the cost to the sponsor); WYO. STAT. ANN. § 40-12-201(a)(vi) (Michie 1997) (requiring the value to be either the price at which "a substantial number of the prizes have been sold by a person other than the solicitor" or "no more than one and five-tenths (1.5) times the amount the solicitor . . . paid for the prize").

\textsuperscript{60}See, e.g., FLA. STAT. ANN. § 721.1115(b) (West 1988) (requiring address from where gift was obtained).

\textsuperscript{61}See, e.g., CONN. GEN. STAT. ANN. § 42-297 (West Supp. 1998) (requiring disclosure of all restrictions).

\textsuperscript{62}For examples of promotional contests used by Time magazine, see Haskell v.
statutes, however, require the disclosure of any conditions to the giving of the gift or identification of the prize, such as the common requirement that one take a tour of a timeshare as a prerequisite to receiving the gift. In many of the applicable statutes, the disclosure that the participant will be required or invited to attend a sales presentation is required to be disclosed in the solicitation in 10-point bold and conspicuous wording.

In addition to specific state statutory provisions related to direct mail, such as gift giveaways or promotional contests, general principles of deceptive trade practices under federal and state trade practice laws would also be applicable. The analysis with regard to any direct mail piece, whether it is a promotional contest, gift giveaway or otherwise, is founded upon the question of whether the direct mail piece contributes false, misleading, or deceptive advertising. The analysis involves whether "members of the public are likely to be deceived." While there is some debate as to how one is to evaluate whether a member of the public is likely to be deceived, it is generally construed on a federal basis that the evaluation of this claim must be from the vantage point of the "reasonable consumer." This concept of the "reasonable con-

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Time, Inc., 857 F. Supp. 1392, 1399 (E.D. Cal. 1994) (noting that sweepstakes have been a common part of Time’s advertising campaigns), and Freeman v. Time, Inc., 68 F.3d 285, 289 (9th Cir. 1995) (noting that Time’s “Million Dollar Dream Sweepstakes” were sent to millions of people).

See GA. CODE ANN. §10-1-393(b)(16) (prohibiting any misleading information about any prize); N.Y. GEN. BUS. LAW § 369-ee (McKinney 1996 & Supp. 1999) (requiring disclosure of all terms and conditions attached to a prize); TEX. PROP. CODE ANN. § 221.031 (West 1995) (requiring disclosure of complete rules of contest and claiming prizes).

See GA. CODE ANN. § 10-1-393(b)(16) (requiring conspicuous notice which is defined as “either a larger or bolder type than the adjacent and surrounding material”); HAW. REV. STAT. ANN. § 514E-11(3) (Michie Supp. 1998) (requiring written disclosure in at least ten-point bold type if attending a sales presentation is a prerequisite to receiving the gift); N.Y. GEN. BUS. LAW § 369-ee (1)(c) (McKinney 1996) (requiring conspicuous written disclosure of sales presentation attendance requirement); cf. LA. REV. STAT. ANN. § 51:1721(A)(1) (West Supp. 1999) (requiring “written disclosure” to make a written offer of a prize, if, in order to receive the prize, consumers are “given, invited, requested or submitted to a sales presentation”).

See, e.g., Encyclopaedia Britannica, Inc. v. FTC, 605 F.2d 964 (7th Cir. 1979) (holding that direct mail procedures were forms of deceptive trade practices); Commonwealth v. Telcom Directories, Inc., 806 S.W.2d 638 (Ky. 1991) (holding that state law against deceptive trade practices applies to direct mail).


Haskell, 857 F. Supp. at 1399 (concluding that since millions of residents receive the sweepstakes a reasonable person standard is appropriate); see also Freeman, 68
sumer" is consistent with federal court and Federal Trade Commission interpretations of Section 5 of the Federal Trade Commission Act. The Federal Trade Commission Act governs false advertising and deceptive trade practices. Many state statutes governing unfair business practices are modeled upon the Federal Trade Commission Act, and can be referred to as "mini federal trade commission acts." In particular, the Federal Trade Commission's 1983 Policy Statement expressly provides that its policy was to "examine the practice from the perspective of a consumer acting reasonably in the circumstances." This policy statement added "[t]he Commission believes that to be deceptive, the representation, omission or practice must be likely to mislead reasonable consumers under the circumstances. The test is whether the consumer's interpretation or reaction is reasonable."

While, quite clearly, there are some cases that, based on their facts, apply a standard less than that of the reasonable person, that is, the subjective standard, these cases generally are applicable to circumstances where the defined group affected by the advertisement is an infirm class. These cases should be distin-

F.3d at 289 (rejecting plaintiff's contention that an unwary customer standard should apply, and choosing instead a person of ordinary intelligence standard).

15 U.S.C. § 45(a)(1) (1994); see also FTC v. Pantron I Corp., 33 F.3d 1088, 1095 (9th Cir. 1994) (stating that reasonableness is an element of the three part test used by the Commission); FTC v. US Sales Corp., 785 F. Supp. 737, 747-48 (N.D. Ill. 1992) (holding that the FTC need only show that a reasonable customer would be likely to be misled).


Id.

See, e.g., United States v. Goodman, 984 F.2d 235, 239 (8th Cir. 1993) (stating that some gullible customers may need more protection); Haskell, 857 F. Supp. at 1399 (using the reasonable person standard in evaluating the Federal Trade Commission Act and stating that "unless particularly gullible consumers are targeted, a reasonable person may expect others to behave reasonably as well").
guished from those where the promotional advertising is distributed on a mass basis, thus not focused upon any one particular "infirm group" but rather the public at large. In furtherance of this, Federal Trade Commission decisions have recognized that while some people, because of ignorance or incomprehension, may be misled by even a scrupulously honest claim, the representation made in the advertisement "does not become 'false and deceptive' merely because it [would] be unreasonably misunderstood by an insignificant and unrepresentative segment of the class of persons to whom the representation is addressed."

Consistent with the analysis that direct mail, as any advertisement, should be viewed from the perspective of the reasonable person, it would appear that most courts would take into account that the average American has become familiar with direct mail advertising. In today's society, it would not appear disputable that the "reasonable person standard" has become inured to (and perhaps inundated with) the receipt of direct mail solicitations. Direct mail has become a major industry and the average consumer receives hundreds of direct mail pieces each year. Perhaps it is the case that most direct mail is trashed by the recipient. However, if the advertiser has done its job well, recipients of the direct mail piece will be attracted to it, thereby catching their interest. An advertiser, including a timeshare developer, who attracts a consumer to a solicitation through direct mail, whether it is by use of attractive colors and pictures or carefully thought out words, should establish some degree of legal protection by assuring that the reasonable person would not be misled by the solici-

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75 In re Kirchner, 63 FTC 1282, 1290 (1963) (holding that reliance on one's own subjective impressions places fault on the consumer, not the advertiser); see also Lamb v. United States Sales Corp., 390 S.E.2d 440, 441 (Ga. Ct. App. 1988) (deciding to find the existence of deceptive advertising) (citing Blum v. GMAC, 365 S.E.2d 474, 476 (Ga. Ct. App. 1988)).

76 See Goodman, 984 F.2d at 239 (noting that U.S. mail is constantly flooded with direct mail sweepstakes and advertising).

In the legal analysis of direct mail solicitations, not only is the reasonable person test to be employed but, advertisers, including timeshare developers, should not be put to the task of having to defend each and every word employed in the advertisement. Quite to the contrary, common sense tells the reasonable person to read the entire mail piece that they might receive and not to rely on a particular word out of context. In reading any such direct mail solicitation, a reasonable person should be presumed to possess a modicum of life experience and common sense.\(^7\) In furtherance of this conclusion, it is well established that "piecemeal" analysis of advertisements is improper. As the Third Circuit stated in *Beneficial Corp. v. FTC*,\(^7\) "the tendency of the advertising to deceive must be judged by viewing it as a whole, without emphasizing isolated words or phrases apart from their context."\(^8\) The FTC itself has stated that it needs to "evaluate the entire advertisement... in determining how reasonable consumers are likely to respond. Thus, in advertising, the Commission will examine 'the entire mosaic, rather than each tile separately.'\(^9\)

As the foregoing relates to direct mail sweepstakes promotions, again, it would appear that courts are persuaded that the entire solicitation, and not piecemeal individual words, should be reviewed. For example, in *In re D.L. Blair Corp.*,\(^8\) the FTC recognized that while perhaps some persons might merely glance at an advertisement and decide not to participate, if the agency was to concern itself with meaningful deceptive advertising cases, it

\(^7\) See *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 906 (2d Cir. 1993) (noting that in making determinations about the messages of advertisers, a fact-finder must look at the advertisement and apply common sense); see also *Peel v. Attorney Registration & Disciplinary Comm’n.*, 496 U.S. 91, 103 (1990) (asserting that "[w]e are satisfied that the consuming public understands that licenses—to drive cars, to operate radio stations, to sell liquor—are issued by governmental authorities and that a host of certificates—to commend job performance, to convey an educational degree, to commemorate a solo flight or a hole in one—are issued by private organizations"); *Kirchner*, 63 F.T.C. at 1290 ("Perhaps a few misguided souls believe, for example, that all 'Danish pastry' is made in Denmark. Is it, therefore, an actionable deception to advertise 'Danish pastry' when it is made in this country? Of course not.").

\(^8\) 542 F.2d 611 (3d Cir. 1976).

\(^9\) Id. at 617 (supporting the FTC's conclusion that an advertisement was misleading when read in its entirety).

\(^8\) Trade Reg. Rep. (CCH) ¶ 13,205, at 20,914 (1998) (quoting FTC v. Sterling Drug, Inc., 317 F.2d 669, 674 (2d Cir. 1963)).

\(^8\) 82 F.T.C. 234 (1973).
should not be concerned with that type of contingency. On the other hand, the agency found that "unless a person chose to participate in a sweepstakes he could not have been deceived to his detriment." With that said, the agency decided to put itself in the position of a person "who decided to participate in the contest" and it failed to see how such an individual could avoid reading the remaining part of the front side of the advertisement because he or she would have to read that passage to learn how to participate in the contest. Once again, the solicitation was analyzed in its entirety.

Courts, in an analysis of deceptive and misleading advertising principles, have gone on to confirm not only that the whole advertisement must be examined, but that the entire transaction should be analyzed. In *S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*, the plaintiff alleged that the defendant, a bank, represented to S.Q.K.F.C. that it would receive a loan without requiring any personal guarantees. This "no personal guarantee" representation was made both orally and in written proposals to the plaintiff. The written proposals contained conditions, however, which implied that personal guarantees may be required. The court stated that with respect to this factual scenario, a claim under the New York Deceptive Trade Practice law could rest on "[defendant's] initial representation that no individual guaranties would be required." However, the court further noted that a representative of the defendant "followed-up his initial statement that no guaranties would be required with written correspondence making it very clear that several conditions had to be met before [the defendant] could commit to any loan terms, including the potential needs for guaranties." This court, therefore, concluded that "[i]n the presence of these clear disclaimers, a reasonable

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83 See id. at 256.
84 Id.
85 Id.
86 See, e.g., Cleveland Home Improvement Council v. City of Bedford Heights, 682 N.E.2d 667, 669 (Ohio Ct. App. 1996) (stating that in a constitutional analysis of commercial speech, the court must not only determine that the advertising is not misleading, but must also determine that the transaction was not unlawful).
87 84 F.3d 629 (2d Cir. 1996).
88 See id. at 632.
89 See id.
90 N.Y. GEN. BUS. LAW § 349 (McKinney 1988).
91 Id. at 637.
92 Id.
consumer would not have been misled by [defendant’s] oral representation.” The solicitation was viewed as a whole.

Additionally, any direct mail solicitation must be compared with the concept of mere “puffery” or “puffing”. Puffing is not actionable under deceptive advertising laws. The general rule is that “puffing immunizes an advertisement from liability.” Whether an advertisement constitutes puffing can be determined by the court as a matter of law on a motion to dismiss. “Puffery is a general claim of superiority or exaggeration which is expressed in broad, vague or commendatory language . . . [and] is distinguishable from misdescription or false representations of specific characteristics of a product.” Puffery is not actionable as

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9 See, e.g., LA. REV. STAT. ANN. § 9:1131.12 (West 1991) (making no reference to vague, laudatory language when stating that timeshare advertisements must not contain false, misleading, or unsubstantiated statements, or predict specific increases in price); OR. REV. STAT. § 94.945 (1997) (referring only to false and misleading statements, and not mentioning puffing); TEX. PROP. CODE ANN. § 221.071 (West 1995) (failing to mention generalized or exaggerated statements when determining that a solicitor acts in a false or misleading way by failure to disclose or disclosure of a false fact); see also Cook, Perkiss and Liehe, Inc. v. Northern California Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990) (stating that “detailed or specific factual assertions are necessary” for a claim under false advertising laws); Sterling Drug, Inc. v. FTC, 741 F.2d 1146, 1150 (9th Cir. 1984) (recognizing puffery to be “claims [which] are either vague or highly subjective . . .”); Smith-Victor Corp. v. Sylvania Elec. Prods., Inc., 242 F. Supp. 302, 308 (N.D. Ill. 1965) (holding that “advertising which merely states in general terms that one product is superior is not actionable”).

6 See Cook, Perkiss and Liehe, Inc., 911 F.2d at 245; see also Stiffel Co. v. Westwood Lighting Group, 658 F. Supp. 1103, 1115 (D.N.J. 1987) (asserting that “[generally, advertising the advantages of a product, including claims of general superiority, constitutes puffing and is not actionable”); Toro Co. v. Textron, Inc., 499 F. Supp. 241, 253 n. 23 (D. Del. 1980) (asserting that a statement which is nothing more than puffing will not confer liability); Smith-Victor Corp., 242 F. Supp. at 308-09 (cautioning that although statements which merely claim superiority are not actionable, “statements which ascribe absolute qualities to the defendant’s product . . . could give rise to a legal liability if they were not true”).

7 Century 21 Real Estate Corp. v. Re/Max South County, 882 F. Supp. 915, 926 (C.D. Cal. 1994) (quoting Castrol, Inc. v. Pennzoil Co., 987 F.2d 939, 945 (3d Cir. 1993)); see also LensCrafters Inc. v. Vision World Inc., 943 F. Supp. 1481, 1489 (D. Minn. 1996) (discussing the distinction courts draw between statements of “specific or
false advertising because reasonable consumers know not to rely on generalized or even exaggerated statements as factual representations.\(^9\) As stated previously, the successful marketing of timeshare interests, particularly through direct mail solicitation, is aimed at catching a consumer’s eye and interest. In this sense, puffery is recognized as being non-actionable, because courts recognize that a function of advertising is to attract consumers.\(^9\)

V. TELEPHONE SOLICITATIONS

Recently, in the world of resort timeshare marketing, direct mail solicitations have dovetailed with telephone solicitations. In large part, this practice can be compared with the innovative use of a direct mail solicitation offering a mini-vacation or vacation package which may only be purchased through a return telephone call. Once the recipient of the direct mail solicitation makes the phone call, purchases the vacation and travels to the destination or location which is the object of the vacation, the off-premise contact solicitation, previously referred to, becomes involved.\(^10\) In this case, the off-premise contact solicitation is more controlled

absolute characteristics of a product ... and generalized statements of product superiority”); \(^{55}\) \textit{Stiffel Co.}, 658 F. Supp. at 1115 (finding statements not merely puffery where the information was claimed to come from testing, and did not merely state advantage or superiority).

\(^{55}\) See \textit{Alicke v. MCI Communications Corp.}, 111 F.3d 909, 912 (D.C. Cir. 1997) (finding statements not actionable, as it was unlikely that a reasonable person would rely on the statement); \textit{Cook, Perkiss and Liehe, Inc.}, 911 F.2d at 246 (agreeing with the lower court’s view that puffing is not actionable because it is not “reasonable to assert ... that a reasonable consumer would interpret this as a factual claim upon which he or she could rely”); \textit{Marcus v. AT & T Corp.}, 938 F. Supp. 1158, 1174 (S.D.N.Y. 1996) (dismissing claims because a reasonable person would not rely only on the statement made); \textit{Haskell}, 857 F. Supp. at 1399 (stating that “[a]dvertising that amounts to ‘mere’ puffery is not actionable because no reasonable consumer relies on puffery”).

\(^{59}\) See \textit{United States v. An Article... Consisting of 216 Individually Cartoned Bottles}, 409 F.2d 734, 741 (2d Cir. 1969) (discussing how some statements, over time, are “so associated with the familiar exaggerations of [the particular industry] that virtually everyone can be presumed to be capable of discounting them as puffery”); \textit{American Home Prods. Corp. v. Johnson & Johnson}, 654 F. Supp. 568, 580 (S.D.N.Y. 1987) (realizing that the “consuming public is conditioned to view such generalized comparisons with healthy skepticism”); \textit{Potamkin Cadillac Corp. v. Towne Cadillac Corp.}, 592 F. Supp. 801, 802 (S.D.N.Y. 1984) (declaring that it is “expected” for sellers “to extoll or even exaggerate the virtues of their product, or the advantages of buying from them”); \textit{State v. American TV & Appliance of Madison, Inc.}, 430 N.W.2d 709, 712 (Wis. 1988) (stating that puffing has been considered an acceptable advertising tactic).

\(^{10}\) \textit{See supra} note 32 and accompanying text (discussing off-premise contact solicitation).
and planned than mere solicitation in its widespread form of contact with whomever happens to be available. The off-premise contact solicitation provides the solicitor with a specified arrival date and time. As a result, the solicitor has an identified prospect who has proven to be interested in vacationing in the particular vacation area. Timeshare developers in that vacation area are interested in these identified prospects. Ultimately, the effect of direct mail and telephone solicitations is to bring together sellers with prospective purchasers.

The above circumstance certainly involves all the concepts of deceptive trade practice laws previously discussed, relating to promotional contests or gift giveaways. While the sale of the mini-vacation or vacation package does not constitute a gift giveaway, the solicitation must still comply with deceptive trade practice rules.

Timeshare developers and, independently, the industry trade group, the American Resort Development Association ("ARDA"), examined the practice of mailing solicitations to consumers regarding the purchase of possible vacation packages, which would ultimately be acquired by a consumer only by means of a return telephone call. When the vacation was taken, the consumer was either required or invited to attend a timeshare presentation. Agreements among timeshare developers and state regulators, and policies independently adopted by ARDA, summarize the rules of the vacation package offer for solicitation of timeshare interests. Timeshare developers, without any admission of prior wrongdoing, voluntarily agreed that in the sale of a vacation package, they would not misrepresent certain facts, either directly or

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101 See, e.g., supra Part IV for a general discussion of promotional contests and gift giveaways.
103 One fact that may not be misrepresented is the price of the vacation. "Unbundling" of any part of the cost of the vacation package as a port fee, charge or tax (unless the fee, charge or tax is imposed by and passed on to a governmental or quasi-governmental authority) is strictly prohibited. Also included were terms regarding accommodations, destinations, or other goods or services.

The developers promised not to represent that a consumer was selected as a winner, when in fact the enterprise is simply a promotional scheme to contact prospective customers. Additionally, they agreed not to state false limitations on the time limit within which they must accept the offer so as not to create a false sense of urgency.
by implication.\textsuperscript{104}

Consistent with the position accepted by timeshare developers summarized above, the Board of Directors of ARDA, on October 21, 1997, adopted by unanimous consent, vacation package interpreting guidelines of the ARDA Code of Standards and Ethics,\textsuperscript{105} evidencing its commitment to articulating the highest levels of ethics and professionalism. These guidelines instructed timeshare developers that any mandatory timeshare tour relating to the sale of a vacation package must be clearly disclosed to the purchaser according to applicable law.\textsuperscript{106} If the vacation package includes an optional or invitational timeshare tour, the tour need not be disclosed.\textsuperscript{107} This position is consistent with the voluntary agreements entered into by timeshare developers with various states. In addition, the ARDA Code of Standards and Ethics provides clear guidelines to timeshare developers concerning issues such as urgency, “winner” language, the purchase of the vacation message (as opposed to a giveaway), unbundling fees, and false affiliations, among other items.\textsuperscript{108}

Furthermore, the timeshare industry has adopted the standard that it is appropriate to disclose to the consumer that the vacation package is being purchased or sold (rather than constituting a gift or prize). The developer is required to disclose to the consumer the purpose of a required tour. Essentially, the developer must represent that the tour would be necessary to purchase

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The agreement also included terms indicating that a vacation was reserved for a consumer (by using a “reservation number”), using a “control number” (unless this identifier is in fact employed by the mailer for a specific business purpose). They also agreed to be forthright about the purpose of the offer (by not stating it is to promote tourism, regulate disbursement of vacation packages, or to generate word of mouth advertising unless the mailer has a realistic likelihood based on past experience of generating substantial business from consumer-to-consumer communications. It was also agreed that any stated percentage of satisfied customers would be based on reasonable, numerical substantiation. Finally, it was agreed to not imply a relationship with any government agency (either by referring to the documents as “registered”, or by citing the possibility of criminal penalties, or using names of fictitious agencies).

\textsuperscript{104} See Lefkowitz v. E.F.G. Baby Prods., Co., 340 N.Y.S.2d 39, 43-44 (App. Div. 1973) (determining whether there has been misrepresentation by implication by examining the impression the statement would make on the average consumer).

\textsuperscript{105} See ARDA Code, supra note 102, at 68-69.

\textsuperscript{106} See id.

\textsuperscript{107} See id. at 68.

\textsuperscript{108} See id. at 69 (prohibiting conveyance of false sense of urgency and use of “winner” language when, in fact, the consumer has not won anything).
the timeshare. It is important to note that the tour would be deemed required as part of the vacation package acquisition if either, (i) the consumer must participate in a tour in order to take advantage of the vacation package offer, or (ii) the tour is offered to the consumer in such a manner that it may reasonably lead a consumer to conclude that the failure to attend the tour would adversely affect the consumer receiving the vacation package as represented and/or result in a reduction of the level of services or goods which would otherwise be available to such consumer as part of the purchase.

VI. STATE AND FEDERAL GUIDELINES

One should be mindful of the requirements generally found in specific state statutes when soliciting by direct mail that results in a telephone inquiry to acquire a vacation package. It is also important to be aware of the Federal Telemarketing Consumer Fraud and Abuse Prevention Act and the applicable telemarketing sales rules adopted by the Federal Trade Commission.

Each state may have different statutes regulating what may, or may not, be said in direct mail solicitation. For example, in North Carolina, a solicitor may not represent that a person has won anything of value or is the winner of any contest unless certain conditions are first met. Use of any language that is in-

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109 See id. at 68-69.
110 See id.; see also FLA. STAT. ANN. § 721.111(7)(b) (West 1988) (stating that all requirements to be fulfilled in order to claim a vacation must be disclosed to the potential purchaser). But see ARDA Code, supra note 102, at 68 (refusing to extend the code provisions to transactions where a booth is set up for customers to independently approach, because there is no requirement of attendance at presentation).
111 See FLA. STAT. ANN. § 721.11(5) (West Supp. 1999) (requiring a disclosure that the purpose of the mailing is to solicit purchasers of timeshares to be prominently stated on advertising material, specifically hotel certificates); LA. REV. STAT. ANN. § 9:1131.12(G)(4)(g) (West 1998) (requiring “full disclosure” regarding conditions on the use of vacation certificates); TEX. PROP. CODE ANN. § 221.031 (West 1995) (mandating that an advertiser must disclose the purpose of solicitation before using a promotion to do so, as well as disclose all the rules and requirements linked with the promotion).
113 See 16 C.F.R. § 310.2 (1998) (defining telemarketing as any promotion designed to solicit purchases of goods or services by telephone); 16 C.F.R. § 310.3 (1998) (including as deceptive telemarketing the failure to disclose any requirements or restrictions involved with the promotion).
114 See N.C. GEN. STAT. § 75-32 (1994) (requiring that the following conditions be
tended to lead a reasonable person to believe that he or she has won a contest, including but not limited to language such as “Congratulations” or “You are entitled to receive,” are considered representations governed by the statute. Hence, in any direct mail piece in a state with a statute similar to the foregoing North Carolina statute, use of certain language or a representation that one has won something would be forbidden unless the solicitor meets the required conditions.

Many states also regulate the use of consumers being “specially selected.” In these states, it is generally understood that it is an unfair and deceptive trade practice to represent that a person has been specially selected in connection with the sale, lease, or solicitation of any property. An exception applies when the selection process is designed to reach a particular type of person and the solicitor uses a source other than telephone directories or purchased mail lists, and no more than 10% of those considered are actually selected. While these types of statutes are founded upon an effort to avoid deception, they fail to take into account that purchased mail lists themselves are a source of possible special selection. Essentially, the mail lists constitute refined information as to why one would be considered a good prospect, as

met: that the recipient of the prize must have been selected by a method in which no more than 10% of the names considered are selected as winners, the recipient of the prize must be given the prize without any obligation, and the prize must be delivered to the recipient at no expense to him within 10 days of the representation).

See id.

See S.C. CODE ANN. § 37-15-40 (West Supp. 1998) (requiring the solicitor to disclose the actual retail price of the prize, the actual number of prizes awarded and the odds of receipt before indicating a person is or could be a winner); TENN. CODE ANN. § 66-32-133(4) (1993) (making it unlawful for a solicitor to claim a person is part of a “select group” chosen if it is not true); W. VA. CODE § 46A-6D-4 (1998) (stating that all material conditions must be disclosed before there is a representation of a consumer’s eligibility to receive a prize).

The concept of “special selection” refers to promotional or solicitational materials sent to a consumer implying, directly or indirectly, that he or she has been particularly chosen from a larger group of individuals to receive a prize or gift.

See R.I. GEN. LAWS § 42-61.1-4 (1993) (preventing the use of the term “specially selected” or the use of language insinuating a special selection, unless “the selection process is designed to reach a particular type or types or persons”); VA. CODE ANN. § 55.1-418 (Michie 1998) (prohibiting the use of the words “specially selected” and also the use of such language that would make a reasonable person assume he had been specially selected to receive a solicitation); W. VA. CODE § 46A-6D-5 (1998) (mandating that the use of words indicating a person was specially chosen is prohibited unless a selective process was actually used).
compared to a poor prospect, for ultimate timeshare sales. The cost to a marketer of a mail list increases based upon the greater amount of "refinement." Clearly, individuals from respective prospect lists have been specially selected.

Another example of statutes which govern the mail solicitation would be those statutes which regulate or prohibit the use of an advertisement which simulates or resembles a negotiable instrument. In light of these statutes, any direct mail marketing of a vacation package should avoid the appearance of a negotiable instrument.

At least as significant as the rules set forth above, any timeshare developer marketing by direct mail sale of vacation packages resulting in an incoming telephone call from consumers, or otherwise producing prospects by outbound telephone calls, needs to understand the specific rules of the Telemarketing Sales Rule adopted by the Federal Trade Commission. The Telemarketing Sales Rule prohibits deceptive and abusive practices by telemarketers.

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119 See Dwyer v. American Express Co., 652 N.E.2d 1351, 1353 (Ill. App. Ct. 1995) (discussing credit card companies who rank their customers in six groups depending on their spending history, and then deliver this information to solicitors for targeted marketing); Shibley v. Time, Inc., 341 N.E.2d 337, 339 (Ohio Ct. App. 1975) (speaking of the sale of subscription lists so that direct mail solicitors can make inferences about whether a consumer is a good target for solicitations based on the materials to which they subscribe); Sandra Byrd Petersen, Note, Your Life as an Open Book: Has Technology Rendered Personal Privacy Virtually Obsolete?, 48 FED. COM. L.J. 163, 171 (1995) (discussing how personal information given for a legitimate purpose, such as applying for credit or insurance, is sold to solicitors in the form of mailing lists, which can be used to predict whether a consumer is likely to purchase their product).

120 See Robin Cobb, Finding the Right Doormat, MARKETING (U.K.), Sept. 25, 1997, at 514, available in 1997 WL 10027843 (stating that the more refined a mailing list is, the more likely the consumers named will respond, but it will also cost the solicitor more money to obtain); Brad Hoeschen, Search System Narrows List of Prospects, BUS. J. MILWAUKEE, Jan. 16, 1998, at 8, available in 1998 WL 984895 (discussing how a refined list will save solicitors money since they are not simply blanketing a city with mailings, however, this saving is balanced against a higher cost to the solicitor for a more refined list).


123 See id. § 310.3; id. § 310.4.
The telemarketing sales rules require the telemarketer to make certain affirmative disclosures before a customer makes a payment.\textsuperscript{124} The Federal Trade Commission went to great lengths to define payment with respect to credit cards.\textsuperscript{125} Specifically, the Federal Trade Commission addressed the ambiguity of when payment occurs in credit card transactions. For example, whether payment occurs the moment the consumer divulges his credit card number or when the credit card is actually processed.\textsuperscript{126} The Federal Trade Commission states that payment occurs when a customer divulges his or her credit card information.\textsuperscript{127} Therefore, "a telemarketer or seller who fails to provide the disclosures until the consumer's payment information is in hand violates the Rule."\textsuperscript{128}

The required disclosures by telemarketers include: (a) the total cost and quantity of the goods or services that are the subject of the sales offer, (b) all material restrictions, limitations or conditions to purchase, receive, or use the goods or services that are the subject of the sales offer, (c) disclosure of a seller's refund cancellation exchange or repurchase policies under certain circumstances (the rule requires disclosures of refund policies only if the seller or telemarketer makes a representation relating to such policy, or if there is a policy of not making refunds), and (d) disclosure of information in connection with prize promotions.\textsuperscript{129} The Federal Trade Commission is specific regarding what must be disclosed in any prize promotion.\textsuperscript{130} The Telemarketing Sales Rule can be violated by a seller or telemarketer as well as a person who provides substantial assistance to a rule violator when that person

\begin{thebibliography}{9}
\bibitem{124} See id. § 310.3.
\bibitem{126} See id.
\bibitem{127} See id.
\bibitem{128} Id.
\bibitem{129} See 16 C.F.R. § 310.3.
\bibitem{130} See id. The Telemarketing Sales Rule requires:

* In any prize promotion, the odds of being able to receive the prize, and if the odds are not calculable in advance, the factors used in calculating the odds; that no purchase or payment is required to win a prize or to participate in a prize promotion; and the no purchase/no payment method of participating in the prize promotion with either instructions on how to participate or an address or local or toll-free telephone number to which customers may write or call for information on how to participate; and . . . [a]ll material costs or conditions to receive or redeem a prize that is the subject of the prize promotion.*

\emph{Id.} A seller is also prohibited from misrepresenting "[a] seller's or telemarketer's affiliation with, or endorsement by, any government or third party organization." \emph{Id.}
knows or consciously avoids knowing of the violation. Examples of those who may be found within this category are those who (1) provide a list of contacts to a seller or telemarketer, (2) provide certificates or coupons which may later be redeemed for travel, or (3) provide scripts, advertising, brochures, promotional material or direct marketing pieces used in telemarketing. In outgoing telephone calls, the Telemarketing Sales Rule also requires all telemarketers to disclose the following four items in a prompt, clear and conspicuous manner: "(1) The identity of the seller; (2) That the purpose of the call is to sell goods or services; (3) The nature of the goods or services; and (4) That no purchase or payment is necessary to be able to win a prize or participate in a prize promotion if a prize promotion is offered." The telephone rules do not apply to [i] telephone calls in which the sale of goods is not completed and payment or authorization of payment is not required until after a face-to-face sales presentation; [ii] telephone calls initiated by a customer that are not the result of any solicitation by a seller or telemarketer; [iii] telephone calls initiated by a customer in response to an advertisement through any media, other than direct mail solicitations (with certain exceptions); and [iv] telephone calls initiated by a customer in response to direct mail solicitations that clearly and truthfully disclose all information, such as the total cost to purchase, all material restrictions, the refund policy existing and the disclosures referred to above relating to any prize promotion if a prize promotion exists. The Federal Trade Commission and the Attorney General of each state are authorized to enforce the telephone sales rules.

VI. ADDITIONAL APPLICABLE STATUTES

Due to the nature of the timeshare industry, developers must familiarize themselves with the statutes of other states. These statutes may require licensing and bonding as well as additional disclosures.

Washington, sellers of travel" laws exist. These sellers of travel laws ("SOT Laws") generally require a filing before one can commence selling travel in a respective state. A seller of travel is generally defined as a "person, firm, corporation, or business entity who offers for sale, directly or indirectly, ... prearranged travel, tourist-related services, or tour-guide services for individuals or groups, including, but not limited to, vacation or tour packages, or vacation certificates in exchange for a fee, commission, or other valuable consideration." Once a vacation seller meets the statutory definition, applications then need to be filed. The applications should include marketing pieces and confirmations of how the vacations will be fulfilled. Sometimes bonds must be filed in support of the agreement to classify the vacations as "sold."

Since direct mail solicitations often result in some form of telephone solicitation, telephone solicitors are required to comply with telephone solicitor licensing laws. For example, California, and Ohio all have telephone solicitors licensing
acts. Generally speaking, these statutes require telephone solicitors to be licensed pursuant to the state's licensing laws. These laws generally require telemarketers to submit written applications which disclose specific information to the applicable licensing division.

While most states require a seller of travel or telephone solicitor's license, other states require a solicitor of a mini vacation or vacation package to be a validly licensed travel agent. While this may exist, it is not necessarily generally required.

Despite the fact that the sale of the vacation package made through direct mail and telephone solicitation is not made face-to-face in the home of the consumer, there are jurisdictions where an in-home solicitation regulation or rescission period is applicable. For example, in People v. Toomey the California Court of Appeals held that telephone sales fall within the definition of "home solicitations" governed by the Home Solicitation Sales Act. This

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146 A solicitor may receive inbound telephone calls from consumers in response to direct mail solicitation or make outbound telephone calls to consumers who have indicated an interest in receiving information.

147 This information typically includes an applicant's social security number, business address, prior work history, experience as a telemarketer, criminal history, any parent or affiliated company, a list of all telephone numbers to used, and the appointment of an agent for service of process. For examples of disclosure requirements in a registration statute, see Alaska Stat. § 45.63.010(d) (Lexis 1998) (requiring telemarketers to file a notice of intent including information such as criminal convictions and administrative determinations of deceptive practices); Fla. Stat. Ann. § 559.928(1) (West 1997) (requiring telemarketers to disclose trade names, business locations and the names, addresses, phone numbers and social security numbers of its owners and corporate officers); Wash. Rev. Code § 19.138.110 (West Supp. 1999) (requiring names, addresses, and telephone numbers of sellers of travel along with proof of a valid business license).


150 The court stated that the purpose of the Home Solicitation Sales Act "was to protect consumers against the types of pressures that typically can arise when a salesman appears at a buyer's home." Id. at 650 (quoting Weatherall Aluminum Prods. Co. v. Scott, 139 Cal. Rptr. 329, 331 (Ct. App. 1977)). The court recognized that, under the facts of that case, "telephone solicitations do not result in an intimidating presence of the seller in the buyer's home to the extent found in a door-to-door sale; yet the same pressure to make an immediate decision arises from such solicitations" Id.; see also Alaska Stat. §45.02.350 (Lexis 1998) (defining a "door-to-door sale" as occurring "when the seller personally solicits the sale" and defining "personally" to mean "in person or by telephone"); Ark. Code Ann. §4-89-102(1)(c) (Michie 1996) (defining
case is distinguishable, however, from the usual direct mail solicitation, resulting in a telephone call from the consumer to the seller of the vacation because the consumer initiates telephone contact with the seller and, therefore, the same "pressure" which justified applying the Home Solicitation Sales Act in *Toomey* does not exist.

Akin to the home solicitation provisions discussed above, a state may require a solicitor to deliver to the consumer a notice of rescission of the acquisition of the vacation package. This is a byproduct of statutes which generally apply to in-home or telephone sales. For example, Vermont has a notification provision. In Vermont, the seller must furnish the consumer with a completed receipt or copy of any contract relating to the sale. The receipt or contract must include a detachable notice of cancellation. In addition, the notice should appear in at least ten point boldface type to clearly alert the purchaser of his right to cancel.

VII. CONCLUSION

With its potential for large profits, the timeshare industry is prospering like never before. The expansion of well-established hotel companies such as Hilton and Marriott, and public companies into the timeshare industry reflects its tremendous growth. Because of this potential for hefty profits, developers are spending more time and money on the marketing of timeshares. This, in turn, has led to the enactment of much legislation designed to protect consumers from potential marketing abuses. Timeshare developers need to be mindful of the myriad of marketing laws which presently exist in order to create the sound marketing program necessary to succeed in the timeshare industry.

"home solicitation sale" to include telephone calls to a consumer's residence); VT. STAT. ANN. tit. 9, § 2451a(d) (1993 & Supp. 1998).

151 See VT. STAT. ANN. tit. 9, § 2454(a) (1993) (establishing the purchasers right to rescind and cancel a purchase within three days).

152 See id.

153 See id.