

SB754 SD1

Measure Title: RELATING TO TIME SHARING.

Report Title: Time Sharing; Time Share; Short-term Product; Right to Cancel; Purchasers; Developers; Bond; Letter of Credit

Description: Provides cancellation rights to persons who contract to buy a short-term product in Hawaii. Allows disbursement of purchasers' funds to a developer; provided that the developer first posts a bond, letter of credit, or other financial assurance. (SD1)

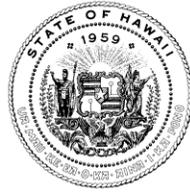
Companion: [HB271](#)

Package: None

Current Referral: TSI, CPN

Introducer(s): BAKER, KIDANI, NISHIHARA, English, Ihara, Kahele, Keith-Agaran, Riviere, Taniguchi, Wakai

<u>Sort by Date</u>		Status Text
1/23/2015	S	Introduced.
1/26/2015	S	Passed First Reading.
1/28/2015	S	Referred to TSI, CPN.
1/30/2015	S	The committee(s) on TSI has scheduled a public hearing on 02-04-15 2:45PM in conference room 225.
2/4/2015	S	The committee(s) on TSI recommend(s) that the measure be PASSED, WITH AMENDMENTS. The votes in TSI were as follows: 4 Aye(s): Senator(s) Kahele, English, Taniguchi, Tokuda; Aye(s) with reservations: none ; 0 No(es): none; and 1 Excused: Senator(s) Slom.
2/9/2015	S	Reported from TSI (Stand. Com. Rep. No. 57) with recommendation of passage on Second Reading, as amended (SD 1) and referral to CPN.
2/9/2015	S	Report adopted; Passed Second Reading, as amended (SD 1) and referred to CPN.
2/20/2015	S	The committee(s) on CPN will hold a public decision making on 02-26-15 9:30AM in conference room 229.



DAVID Y. IGE
GOVERNOR

SHAN S. TSUTSUI
LT. GOVERNOR

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**PRESENTATION OF
DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS
REGULATED INDUSTRIES COMPLAINTS OFFICE**

**TO THE SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION**

**TWENTY-EIGHTH STATE LEGISLATURE
REGULAR SESSION, 2015**

**THURSDAY, FEBRUARY 26, 2015
9:30 A.M.**

**WRITTEN TESTIMONY ONLY
ON
SENATE BILL NO. 754 S.D.1
RELATING TO TIME SHARING**

**TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND TO THE HONORABLE BRIAN T. TANIGUCHI, VICE CHAIR,
AND MEMBERS OF THE COMMITTEE:**

The Department of Commerce and Consumer Affairs ("Department") appreciates the opportunity to testify on Senate Bill No. 754 S.D.1, Relating to Time Sharing. My name is Daria Loy-Goto, Complaints and Enforcement Officer for the Department's Regulated Industries Complaints Office ("RICO"). RICO offers the following comments on the bill.

Senate Bill No. 754 S.D.1 grants cancellation rights to persons who contract to purchase short-term products in Hawaii. The bill also allows disbursement of purchasers' funds to a developer under certain conditions.

RICO defers to the Department's Time Share Program on the issues of cancellation rights and disbursement of funds, but offers the following comments on enforcement of the new section that gives cancellation rights to purchasers of short-term products in Hawaii:

1. RICO's role in enforcing the new section relating to the sale of short-term products is unclear. Senate Bill No. 754 S.D.1 specifies that a short-term product shall not constitute a time share interest. As such, none of the consumer protection provisions currently available in Chapter 514E, Hawaii Revised Statutes ("HRS"), would apply or be available to RICO as the enforcing agency.

2. RICO's enforcement role also is ambiguous because the bill allows an action to be brought, presumably by the buyer, for violation of the new section within a certain amount of time. Thus, it is unclear whether RICO is intended to have any authority to enforce the new section.

3. Senate Bill No. 754 S.D.1 also exempts the offer or sale of short-term products by an employee or agent of the developer or affiliate from the provisions of the travel agency law, Chapter 468L, HRS. RICO believes "agent" could encompass an independent third party contracting with the developer or affiliate, and as such, would be functioning as an intermediary subject to Chapter 468L, HRS.

Testimony on Senate Bill No. 754 S.D.1

February 26, 2015

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RICO is aware that the Department's Time Share Administrator has been working with the proponent of the bill on amendments that would address the Department's concerns.

Thank you for the opportunity to testify on Senate Bill No. 754 S.D.1. I will be happy to answer any questions the members of the Committee may have.



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**PRESENTATION OF THE
PROFESSIONAL AND VOCATIONAL LICENSING DIVISION**

TO THE SENATE COMMITTEE ON
COMMERCE AND CONSUMER PROTECTION

TWENTY-EIGHTH LEGISLATURE
Regular Session of 2015

Thursday, February 26, 2015
9:30 a.m.

WRITTEN COMMENTS ONLY

TESTIMONY ON SENATE BILL NO. 754, S.D. 1, RELATING TO TIME SHARING.

TO THE HONORABLE ROSALYN H. BAKER, CHAIR,
AND MEMBERS OF THE COMMITTEE:

My name is Lori Beth Van Cantfort, Time Share Administrator of the Professional and Vocational Licensing Division ("PVL"), testifying on behalf of the Department of Commerce and Consumer Affairs ("Department"). For the reasons set forth below, the Department has strong concerns with aspects of this bill as drafted, and asks for further opportunity to develop this legislation with interested stakeholders to ensure the measure contains adequate consumer protections.

Senate Bill No. 754, S.D.1, seeks to (1) provide purchasers with a 7-day rescission right when purchasing "short-term products", and (2) allow time share developers to take purchasers' funds out of escrow prior to closing and prior to completion of the time share project, as long as the developer posts a surety bond or irrevocable letter of credit.

The Department has been in discussions with the proponent of this bill, but there are still concerns as to the level of consumer protection provided by various provisions of this measure.

In practice, short-term products are sold to consumers who decide not to purchase a time share interest. These consumers are then offered to purchase a short stay at a time share property to be used sometime in the future. When they return to vacation at the property, they are solicited to purchase a time share interest again. If they decide to purchase a time share interest at that time, the price they paid for the short-term product is applied towards their time share purchase. Currently, Hawaii Revised Statutes ("HRS") Chapter 514E only provides a 7-day rescission right for the sale of a time share interest. The rescission right does not apply to sales of short-term products. However, many consumers assume the 7-day rescission right applies to their purchase of a short-term product because the short-term product is being sold to them to solicit a time share sale. Some developers already offer a rescission right for short-term products which further confuses consumers because they believe all developers offer a rescission right. Although we support providing a statutory 7-day rescission right

for short-term products to reduce confusion and provide better consumer protection, we have concerns with the definition of "short-term products", which may include short-term time share plans, which should not be exempt from other provisions of HRS Chapter 514E.

The Department also has serious concerns about allowing developers to post a surety bond or irrevocable letter of credit instead of requiring purchasers' funds remain in escrow prior to closing. The Department questions the level of consumer protection provided by a surety bond and how difficult it will be for consumers to collect on a surety bond when they are entitled to a refund. Developers will be able to take consumers' funds without providing the Department with any proof that the project will be built (e.g., construction contract, performance/completion bond, proof of sufficient funds to complete the project) and use the funds for any purpose. Developers will not be required to use the funds for construction purposes. The Department is concerned that this provision would seriously disadvantage consumers by decreasing the availability/collectability of funds that would otherwise be held in escrow, now leaving consumers to try to recover from surety companies.

The House companion measure, House Bill No. 271, H.D.1, was heard on February 23, 2015, by the House Committee on Consumer Protection & Commerce. Decision making was deferred until March 4, 2015, to give the parties more time work on the bill.

Testimony on Senate Bill No. 754, S.D.1
Thursday, February 26, 2015
Page 4

The Department would appreciate the opportunity to continue working with the Committee and proponents of this measure to develop appropriate legislation with sufficient consumer protections included.

Thank you for this opportunity to provide testimony on Senate Bill No. 754, S.D.1.

CHARLES E. PEAR, JR.
ATTORNEY AT LAW

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February 25, 2015

Sen. Rosalyn H. Baker, Chair
Sen. Brian T. Taniguchi, Vice-Chair
Members of the Senate Committee on
Commerce and Consumer Protection
Twenty-Eighth Legislature
Regular Session, 2015

Re: S.B. 754, SD 1
Hearing on February 26, 2015, 9:30 a.m.
Conference Room 229

Dear Chair, Vice Chair and Members of the Committee:

My name is Charles Pear. I am appearing as legislative counsel for ARDA Hawaii.

ARDA Hawaii supports the bill. ARDA is currently working with the DCCA on some technical amendments to the bill.

Last summer, representatives of the Department of Commerce and Consumer Affairs met with representatives of the American Resort Development Association to discuss regulatory issues relating to the time share industry in Hawaii. This legislation is an outgrowth of those discussions.

1. Short-Term Products.

Part of this legislation deals with short-term products, an area that is not currently regulated in the State of Hawaii.

Some people who attend a time share sales presentation would like to have the opportunity to stay in a time share project before they decide whether to make a purchase. Short-term products are intended to allow a potential time share buyer to stay in a time share resort on a trial basis. If the buyer decides to proceed with a purchase, some or all of the amount paid by the buyer for the short-term product typically is credited toward the purchase price of the time share interest.

In some states, certain disclosures must be given to prospective short-term product buyers. In addition, the buyers have a right to rescind a contract to purchase a short-term product for a certain number of days after they sign their contract.

ARDA is prepared to support the provisions of the bill regulating short-term products in recognition of the fact that streamlining the timeshare regulatory environment in Hawaii will require ongoing cooperation and give-and-take between the DCCA and the industry.

2. Escrow Bonds.

In 1982, at the request of the Chairperson of the House Consumer Protection Committee, I drafted comprehensive legislation regulating the financial structure of time share plans and establishing escrow requirements governing the sale of time share interests.

The 1982 amendment requires that the developer establish an escrow account in Hawaii¹ pursuant to a separate written escrow agreement between the developer and an escrow agent.² All funds received from the buyers must be deposited in the escrow account until closing.³

Funds may be released from escrow prior to closing if the buyer cancels his or her purchase during the 7-day rescission period or if the contract is otherwise terminated in accordance with its terms.

Buyers' funds may also be used to pay the costs of constructing and developing a time share project if certain conditions are met.⁴ Those conditions include a requirement that the developer deposit the following with the Director of the Department of Commerce and Consumer Affairs:

- a copy of the executed construction contract;
- a statement showing the costs to complete the project, including the costs to furnish the time share units;
- evidence satisfactory to the Director that there are sufficient funds to pay the costs of constructing, furnishing and completing the project (whether from buyers' funds, the developer's funds, or loan proceeds);
- a copy of executed performance and labor and material payment bonds.

If the foregoing requirements are met, then the buyer's funds may be disbursed to pay the costs of construction (to the extent completed) and the cost of purchasing furnishings and fixtures for the time share units. The Act also permits disbursement of buyers' funds to pay

¹ §514E-16(b), H.R.S.

² §514E-16(c), H.R.S.

³ §514E-16(a), H.R.S.; Rule 16-106-34(c)(1), H.A.R.

⁴ §514E-17(a)(4), H.R.S.

architectural, engineering, interior design, finance, and legal fees. And buyers' funds may be disbursed to pay "other incidental expenses of constructing the time share units or developing the time share plan", although the nature of such expenses is not defined by the Act.

The legislative history is instructive insofar as it indicates the intended purpose of this section:

* * * Subsection (4) parallels section 514A-67 of the Horizontal Property Act which permits the disbursement of buyers funds to pay the costs of construction. A developer will not be permitted to use buyers funds for construction until he files a copy of the executed construction contract and a copy of the executed performance and labor and material payment bonds insuring that all amounts due under the construction contract, including change orders up to 10%, and all other costs of construction will be paid.⁵

Under §514A-67 of the Hawaii condominium law (now Section 514B-92, H.R.S.), buyers' funds may be disbursed to pay the costs of construction (to the extent completed) and also to pay architectural, engineering, finance, and legal fees. (The condominium law does not permit disbursements for furnishings or for interior design fees.) The statute also permits disbursement of purchasers' funds to pay "other incidental expenses of the condominium".

These measures are intended to ensure that the project will be constructed. However, none of these measures protect the buyers' right to a refund in other circumstances. For example:

- If the developer defaults under its construction loan, the lender can foreclose on the project and acquire title free of the rights of the buyers – even though the buyers' funds may have been used to help pay the cost of constructing the project.
- If the developer fails to complete construction *on time*, buyers may have a right to cancel but there may be no money for escrow to refund.
- If there are material differences between the project as represented and the project as actually constructed, buyers have a right to a refund but there may be no money available to be refunded.

In the market downturn of 2007 – 2008, many condominium unit purchasers sought to cancel their sales contracts and obtain a refund of their deposits. My firm was involved in buyer remorse lawsuits covering more than 100 units.

⁵ Conf. Com. Rep. No. 52-82 on H.B. No. 3078-82, 1982 Senate Journal, page 901.

In those cases, construction of the condominium had been completed. Buyers asserted, however, that they were entitled to rescind their purchases for various reasons. We advised the buyers and their counsel that, while they may have claims to rescind their purchases, all of the buyers' deposits had been used to pay construction costs, so there was no money in escrow to refund.

This bill proposes to authorize developers to withdraw funds from escrow upon posting an escrow bond. An escrow bond assures that buyers will receive any refund to which they become entitled. With an escrow bond, buyers can get a refund of their deposits if the lender forecloses, if the developer fails to complete construction, if the developer does not finish construction on time, or if the project is materially different than promised.

This concept is currently used in Florida. ARDA Florida's legislative counsel reports that the Florida regulators have never had to call an escrow bond.

Of course, a bond is only as good as the company that issues it. But buyers funds held in escrow are deposited in a bank. But bonding companies sometimes have higher credit ratings than the banks used to hold funds in escrow. For example, consider these ratings of prominent bonding companies by Moody's:

Federal Insurance Company (Chubb)	Aa2/Stable
Zurich Insurance Company	Aa3/Stable
Traveler's Casualty and Surety Company	Aa2/Stable
Westchester Fire Insurance Company (ACE)	A1/Stable

as compared to the ratings by Moody's of prominent local and national banks:

J.P. Morgan Chase & Co.	A3/ Stable
Bank of America	Baa2/Stable
CitiGroup	Baa2/Stable
Wells Fargo	Aa3/Stable
Bank of Hawaii	Aa3/Stable
First Hawaiian Bank	A2

In addition, bonding programs provide a prequalification process that, in the case of an escrow bond, benefits the buyers. Issuance of a bond means that the bonding company has completed a thorough underwrite on the financial wherewithal of the developer and expects the developer to perform its obligations. By contrast, a bank merely accepts and holds the deposits.

In short, under the current system of releasing funds for construction, consumers could potentially get a half-complete project with a litigating developer and lender. The project could

never be built and consumers could even lose their funds entirely in the case of an eventual liquidation of the project. An escrow bond can help to avoid this.

3. Other Revisions and Updates.

The bill updates certain provisions of Chapter 514B to be consistent with current practice.

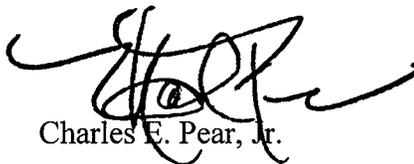
For example, the bill proposes to amend the definition of "notice of time share plan" to delete the requirement that the notice identify the initial use period for each time share interest and the name of the initial purchaser of the time share interest.

When the notice of time share plan concept was introduced in the 1982 legislation, a time share buyer typically purchased the right to use a specific unit for a particular week or "use period." Now, many time share buyers purchase an allotment of "points," which are like frequent flyer miles - you can use them to go a lot of different places, but the number of points required may differ depending on the destination that you choose. As a result, it is no longer practical to identify the use period of a time share interest.

Thank you for your kind consideration of this legislation. I would be happy to take any questions if you think that I may be of some small assistance.

Very truly yours,

MCCORRISTON MILLER MUKAI MACKINNON LLP



Charles E. Pear, Jr.

CEP:kn



February 26, 2015

TO: COMMITTEE ON COMMERCE AND CONSUMER PROTECTION
Senator Rosalyn Baker, Chair
Senator Brian T. Taniguchi, Vice Chair

FR: Henry Perez, President
American Resort Development Association

RE: S.B. 754 SD1 Relating to Time Sharing.
Position: Support

Dear Chair Baker, Vice Chair Taniguchi and members,

The American Resort Development Association (ARDA) Hawaii, the local chapter of the national timeshare trade association, supports SB754 SD1, a bill Relating to Time Sharing. This bill provides additional consumer protection measures for purchasers of timeshares in Hawaii.

The first provision would establish cancellation rights for purchasers of short-term timeshare products. In our discussions with the DCCA Timeshare Administrator, she identified the sale of these products as a concern. In an effort to improve our industry, we agreed to support legislation to provide a cancellation right for the purchase of short-term products. Although not all of our members offer these products, as an association, we support this effort to increase consumer confidence.

The rest of the bill amends current law to allow for the use of escrow bonds. Under current law, when a buyer purchases a timeshare that is in the development stage, the purchase funds may be placed in escrow and disbursed to the developer to cover construction costs. If the developer defaults, because of the use of subordination clauses in the purchase contract, the buyer's rights are subordinated to the rights of the construction lender. The lender may foreclose and acquire title to the project free of any claims of the buyers. This leaves the buyers without recourse to recover their purchase funds.

To overcome this disadvantage to purchasers of incomplete projects, other states have adopted laws permitting a timeshare developer to use buyer's deposits upon posting a bond or other financial assurance. This provides buyers with a remedy in the event a developer fails to complete construction or defaults on the construction loan. We believe similar protections in Hawaii will serve the consumers well.

ARDA is engaged in discussions with the Department of Commerce and Consumer Affairs (DCCA) and remains hopeful that we will be able to come up with agreeable language very soon.

Thank you for the opportunity to submit testimony in support of SB754 SD1.



9002 San Marco Court
Orlando, Florida 32819
(407) 418-7271

February 26, 2015

To: Honorable Rosalyn Baker, Chair
Honorable Brian Taniguchi, Vice Chair
Senate Committee on Commerce and Consumer Protection

RE: **SB 754 SD1 – Relating to Time Sharing – In Support**
Conference Room 229; 9:30 AM

Chair Baker, Vice Chair Taniguchi and members of the committee:

Starwood Vacation Ownership (“Starwood”) appreciates the opportunity to offer testimony in support of SB 754 SD1. This measure permits the use of purchaser funds upon the posting of a letter of credit, bond or other financial assurance and provides enhanced consumer protection by regulating the sale and offer of timeshare short-term products. This measure ensures proper disclosure, and a recession period is given to the consumer purchasing a short term product and continues the modernization of Hawaii’s timeshare act.

Permitting funds to be withdrawn from escrow upon the posting of a letter of credit, bond or other financial assurance is beneficial to developers by assisting with cash flow in large resort construction projects, which often take two to three years to complete. It is beneficial to consumers because it guarantees them a refund of all purchase funds if the project is not timely completed. Currently, purchaser funds may be released to reimburse a developer for construction expenditures. This procedure could result in an incomplete project and insufficient funds remaining to complete the project.

For over two years, the industry has worked with the Department of Commerce and Consumer Affairs (DCCA) on this measure. There have been numerous meetings where industry leaders have travelled to Hawaii to meet staff members in person to discuss the merits of this valuable bill. Several modifications have been made as a result of working with DCCA, in order to address the comments and suggestions of the department. It is our understanding that there are no outstanding requests to further alter this measure. We strongly ask for your support of SB 754 SD1 as it enhances consumer protection while encouraging the development of new accommodations in Hawaii.

Thank you for the opportunity to testify on SB 754 SD1.

Robin Suarez
Vice President/General Counsel
Starwood Vacation Ownership

**Comments of
Gary M. Slovin / Mihoko Ito
on behalf of
Wyndham Vacation Ownership**

DATE: February 25, 2015

TO: Senator Roz Baker
Chair, Committee on Commerce and Consumer Protection
Submitted Via CPNtestimony@capitol.hawaii.gov

RE: **S.B. 754, S.D.1 - Relating to Time Sharing**
Hearing Date: Thursday, February 26, 2015 at 9:30 a.m.
Conference Room 229

Dear Chair Baker and Members of the Committee,

We submit this testimony on behalf of Wyndham Vacation Ownership. Wyndham offers individual consumers and business-to-business customers a broad suite of hospitality products and services through its portfolio of world-renowned brands. Wyndham Vacation Ownership has a substantial presence in Hawaii through its Wyndham Vacation Resorts and WorldMark by Wyndham brands.

Wyndham **strongly supports** S.B. 754, S.D.1, which provides a seven day right of cancellation to purchasers of short-term time share products, and allows disbursement of purchasers' funds from escrow to a developer, provided that the developer first posts a bond, letter of credit or other financial assurance to an unaffiliated third party.

Under current Hawaii law, a developer that constructs a time share project must hold a time share buyer's funds in escrow after the seven-day cancellation period has passed, the project is completed, and closing has occurred. There is only one limited circumstance when the developer may remove funds from escrow, and that process is labor and time intensive for both the developer and the DCCA. This means that a significant amount of money – potentially tens of millions of dollars – could remain in escrow for months at a time. S.B. 754, S.D.1 would protect these funds with a third party assurance, give the consumer ample protection if the project was not completed, and would grant the developer access to funds to apply to construction costs.

Gary M. Slovin
Mihoko E. Ito
C. Mike Kido
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This approach has been implemented in Florida and many other jurisdictions around the United States, and has been demonstrated to benefit both time share developers and time share purchasers. If the developer fails to complete a construction project, the consumer is entitled to a refund of funds where the developer is no longer able to provide one.

In addition, the seven day right of cancellation provided to purchasers of short-term time share products provides consumers the opportunity to explore the time share experience on a trial basis, with the benefit of cancellation after a reasonable amount of time.

Wyndham notes that stakeholders have been discussing this measure to try to reach agreement, and respectfully asks the Committee to move the bill forward to allow the discussions to continue.

For the above reasons, we support S.B. 754, S.D.1 and ask for the Committee's favorable consideration of this bill. Thank you for the opportunity to submit these comments.