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Annual Meeting Legal Review



NIXON PEABODY



Contract Issues that Occur with Membership Contracts

1) Material Term

- › Definition
- › With membership contracts, length is one of the biggest problems. Three generations? Problems with that. Re-drafted – 20 year terms with renewal solely at the option of member for \$1.00. Date certain.
- › [Note in contract provisions that you want your reciprocals to be separate and ancillary. Never want the loss of reciprocal or problem while traveling – not under your control – to be constituted as a material breach and thereby allowing termination of the home resort membership.]

Contract Issues that Occur with Membership Contracts (cont'd)

2) Misrepresentation

- › A false assertion of fact or concealment of facts
- › Where there is a fraudulent misrepresentation or an innocent misrepresentation as to the material terms of a contract, the contract is voidable (at the request of the other party) if the misrepresentation induced the other party to enter into the contract
- › Where there is misrepresentation as to the nature of the contract (e.g., A tells B “this is merely a lease agreement” when it is really a purchase and sale agreement), the contract is void

Contract Issues that Occur with Membership Contracts (cont'd)

3) Unconscionability

- › A court is empowered to refuse to enforce all or part of an agreement when one of the following scenarios occur:
- › Unfair surprise and/or oppressive terms at the time the agreement was made; or
- › Note: This can include print/type which is too small to be reasonably understood by its reader
- › A consumer lease induced through unconscionable conduct markets (even if no provision of the le

Contract Issues that Occur with Membership Contracts (cont'd)

4) Adhesion Contracts

- › An adhesion contract is a contract prepared by a party in a stronger position and signed by the party in the weaker position who has no option to change the terms of the agreement before signing
 - Adhesion contracts do not allow for negotiation and are offered on a “take-it or leave-it basis”
- › While these contracts are generally enforceable, if no reasonable party would agree to the terms contained in the adhesion contract, courts will hold the agreement unconscionable
- › Example: An unenforceable contract of adhesion may exist where a document is signed, and then a full list of terms and conditions is subsequently supplied to the consumer

Contract Issues that Occur with Membership Contracts (cont'd)

5) Ambiguity

- › There will be no contract if:
 - Parties use a material term that is open to at least two reasonable interpretations;
 - Each party attaches different meaning to the term; and
 - Neither party knows, or has reason to know, the term is subject to at least two reasonable interpretations
 - If one party knows of the ambiguity, the agreement will be legally enforceable with the terms as understood by the innocent party

Contract Issues that Occur with Membership Contracts (cont'd)

6) Mutual Mistake

- › There will be no contract if both parties are mistaken as to a basic assumption of fact, which has the effect of materially altering the agreement
- › Two Common Scenarios:
 - If the mistake is about what something is, this is material and basic
 - Example: A contracts to sell B a painting for \$50,000. Both believe that it is a genuine Andy Warhol, but it is really a replica.
 - If the mistake is about what something is worth, this is not material and basic
 - Example: The painting referenced above is authentic, but is really worth only \$1,000, not the \$50,000 that both A and B believed

Contract Issues that Occur with Membership Contracts (cont'd)

- 7) Unilateral Mistake (a mistake by only one of the parties)
- › Courts are reluctant to allow a party to avoid a contract for a mistake made by only one of the parties to an agreement
 - Exceptions:
 - If a unilateral mistake is obvious to the other party, then the contract may be avoided by the mistaken party
 - If a unilateral mistake is discovered before there has been significant reliance by the other party, the contract may be avoided

Contract Issues that Occur with Membership Contracts (cont'd)

8) Truth in Lending (15 USC 1601 et seq.)

› Overview

- The Truth in Lending Act (the “Act”) is designed to promote the informed use of consumer credit, requiring disclosure of its terms (APR and finance charge) and various costs/fees
 - Standardized disclosure of the fees associated with borrowing can allow the consumer to compare a variety of scenarios consistently
- The main purpose of the Act is to enable consumers to make informed decisions when evaluating credit alternatives

Contract Issues that Occur with Membership Contracts (cont'd)

(Truth in Lending – Regulations)

- › The Regulations implementing the Act and are codified at 12 C.F.R 226, and organized as follows:
 - Part A – Overview
 - Part B – Open End Credit*
 - E.g.: A Credit Card
 - Part C – Closed-End Credit*
 - E.g.: A home mortgage or car loan
 - Part D – Miscellaneous
 - This Part contains rules for oral disclosure, record retention, conflict with state law, state exemptions and rate limitation
 - Part E – Special Rules for Certain Home Mortgage Transactions
 - Part F – Special Rules for Private Education Loans
 - Part G – Special Rules Applicable to Credit Card Accounts and Open-End Credit Offered to College Students

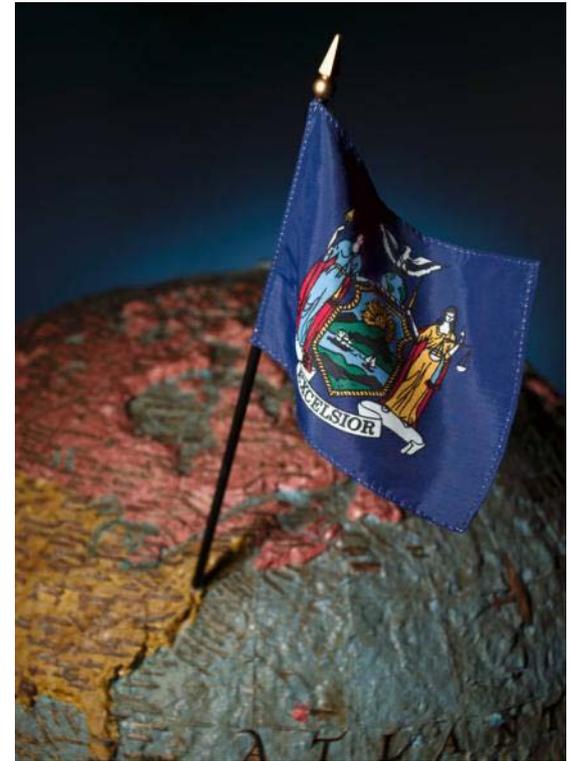
Contract Issues that Occur with Membership Contracts (cont'd)

(Truth in Lending – Penalties)

- › Both civil and criminal penalties exist for violations of the Act
 - Creditors can be held liable for violating the disclosure terms of the Act even if the consumer did not sustain injury from the violation (unless the creditor corrects the error within 60 days of notification or proves that the error was unintentional)
- › There is a one year statute of limitations in which to commence a suit under the Act
 - The court may award the actual damages, attorney's fees, court costs, and statutory damages
- › Willful violations of the Act can result in criminal charges (15 USC 1611)

Contract Issues that Occur with Membership Contracts (cont'd)

- 9) Sale of Real Property Interests?
 - › New York – Offering Plan (License) (All Seasons case)
 - › Reserved sites



New York Legislation

- Member tried to get out of contract because moving out of area, but had a “three generation” contract. Instead of going to the courts, she went to a state assemblyman. Assemblyman found it to be outrageous, and proposed new legislation. The new legislation would allow consumer to cancel if the resort:
 - › Failed to provide services and programs is obligated to provide to the member;
 - › Moves 500 miles away;
 - › Moves to an adult care facility;
 - › “Physical inability to use the resort”.

New York Legislation (cont'd)

- After lobbying efforts, the new act was revised, and is now one that the industry welcomes for a couple reasons:
 - › The situations which permitted the consumer to cancel are now so tightly and narrowly drafted as to simply be so rare as to not be a concern.
 - › By legislatively setting forth the specific reasons for which a consumer may cancel, it implicitly means that a consumer may not cancel for any other reason.

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