

CUTTY'S CONTRACTS

This information is provided by the Consumer Protection Division of the Iowa Department of Justice to assist former Cutty's Campground members who have been sued in small claims court for debts purportedly owed. This memorandum is written in generic form to be used by numerous consumers against whom debt collection actions have been brought. While facts may differ from consumer to consumer, the contracts at issue and the basic facts are essentially the same. Debt collection lawsuits are being brought against dozens of consumers for past membership dues where these consumers have not used Cutty's campground for years. Many have not received bills for these dues, nor have they made any payments for more than ten years. These actions are not for purposes of collecting on the underlying contracts: these were paid in full, most many years ago. These collection actions are solely for purposes of membership dues.

I. Assuming There Were a Contractual Membership "Requirement," This Claim for "Past Due Membership" is Barred by the Statute of Limitations

As set out below, consumers have not contracted for lifetime obligations to pay membership dues to Cutty's. However, in most cases, it is not necessary for the Court to even consider the remaining issues, because these actions are clearly barred by the statute of limitations.

Iowa Code § 614.1(5) provides that actions on written contracts must be brought within ten years. Most of the Cutty's contracts were signed more than ten years ago. Because the present actions are to recover under the terms of a written contract, the actions are barred by Iowa Code § 614.1(5). Even assuming that the contracts were for some type of open account, Iowa

Code § 614.5 provides that the cause of action is deemed to have accrued on the date of the last item entered. Because many consumers have not paid any dues whatsoever for more than ten years, these actions are time barred even assuming a contract for an open account.

II. The Contracts Do Not Obligate the Consumers to Membership in Perpetuity

The underlying contracts at issue are installment purchase contracts of what is, in essence, a time-share at a campground. Though denominated “Real Estate Contract,” what is “purchased” is a 1/3000th undivided interest in Cutty’s campground. (See Contract). That undivided 1/3000th interest does not entitle the buyer to permanent occupancy, or even to a guaranteed camping spot at the campground. See Bylaws, Article II(C),

It is important to recognize that the alleged debt being sought in these cases is not the amount due under the purchase contract for the 1/3000th undivided interest in the property. That contract has long been fulfilled.

Rather, the purported debt which Cutty’s is suing for is membership dues allegedly in arrears for, in some cases, more than a decade. (In Cutty’s Des Moines Camping Club vs. Russell Blanchard, SC # 350741, Mr. Blanchard’s “real estate” contract is stamped “PAID” as of June, 1986. They have not used the campground for 12 years.)

The only contract which the consumers signed includes this provision:

By virtue of Buyer’s ownership of the undivided interest described herein, **Buyer is eligible for membership in the Club**. Buyer agrees to pay to the Club when due, all dues and assessments, required by or pursuant to the bylaws of the Club[Cutty’s Camping Club..] (Real Estate Contract, “Miscellaneous” ¶ b.)

That clause does not specify that membership is required for lifetime, or so long as the buyer owns the 1/3000th undivided interest in the “real estate.” The provision in the contract merely states that Buyer’s are eligible for membership. The reasonable construction is that, for buyers who chose to become and remain members, they pay the dues. (At best, the clause is

ambiguous, and any ambiguities in a contract are construed against the drafter. See, e.g. *Sears, Roebuck & Co. v. Poling*, 81 N.W.2d 462, 465 (Iowa 1957).

To read the clause otherwise would be to find that the contract commits a buyer indefinitely to membership in a camping club – even when relocation, infirmity, or any number of other reasons make it no longer a pasttime which the buyer can use and enjoy. (And these are buyers who have already paid several thousand dollars for the fractional interest, and are not asking for it back, even though they can no longer use the property.) The Iowa Supreme Court has stated that contracts must be quite explicit for them to embody perpetual obligation. “The courts are prone to hold against the theory that a contract infers a perpetuity of right or imposes a perpetuity of obligation....” *Lewis v. Minnesota Mutual Life Insurance Co.*, 37 N.W.2d 316, 320 (1949). The contract is far from explicit that membership is mandatory and of indefinite duration.

Even the bylaws are ambiguous. Under the terms of the by-laws, ownership of a 1/3000th undivided interest gives one a “voting membership” in the Club. (Bylaws, Article V, Section 2.¹) “Voting membership **shall terminate** when a member ...

(C) Fails to pay his dues or assessments as provided in Section 6.
... Termination of a Voting Membership **shall** constitute a forfeiture, abandonment, surrender, release and relinquishment of all interest of such terminated voting member and the Associate Memberships derivative thereof, in and to the Club and its Property, and such terminated voting member and the derivative Associate Memberships shall thereafter have no rights thereto or therein unless reinstated by the Board of Directors.

Article V, Section 5. (Emphasis Added.)

Article V, Section 6(a), in turn, specifies the membership dues. Section 6(b) says that

¹ If the interest is owned by a husband and wife, only one is the “voting member”

whenever a voting member fails to pay dues within 15 days after they are due, the club **shall** notify the member that he shall be deemed a delinquent member.

There are other provisions in the bylaws that provide that the Club may, but is not required to, buy back the 1/3000th undivided interest if a member is terminated for failure to pay dues. (Article VIII(A). This is not the issue here. These buyers are not asking the Club to buy back the 1/3000th undivided interest they paid several thousand dollars for. There is a provision that requires that memberships be paid up to date “at the time of a conveyance of such membership.” (Article VI(D).) These consumers are not seeking to convey their 1/3000th undivided interest.

The contract itself does not obligate these consumers to be members of a club in perpetuity, and the campground’s claim for past membership dues is not supported by the contract.

III. Efforts to Collect Time-Barred Consumer Debts Constitute Unfair and Deceptive Collection Practices

Though the statute of limitations is an affirmative defense, the passage of the time-bar is not a technicality. Such statutes and the related doctrine of laches reflect a policy that at a certain point, “the right to be free of stale claims in time comes to prevail over the right to prosecute them.” *Railroad Telegraphers v. Railway Express Agency*, 321 U.S.342, 349, 64 S. Ct. 582, 586, 88 L.Ed.788, 792. (1944).

In establishing that it is a violation of the federal Fair Debt Collection Practices Act² to

² The federal Fair Debt Collection Practices Act applies to those whose business has as its “principal purpose” the collection of debts or one who “regularly collects or attempts to collect directly or indirectly, debts owed or due or asserted to be owed or due another.” This definition includes attorneys whose practice includes regularly collecting debts. (A 1986 amendment to the FDCPA repealed an attorney exemption from the act.) See *Heinz v. Jenkins*,

attempt to collect on a time-barred debt, even where the statute of limitations is an affirmative defense, the court in the seminal case said:

As previously demonstrated, time-barred lawsuits are, absent tolling, unjust and unfair as a matter of public policy, and this is no less true in the consumer context. As with any defendant sued on a stale claim, the passage of time not only dulls the consumer's memory of the circumstances and validity of the debt, but heightens the probability that she will no longer have personal records detailing the status of the debt. Indeed, the unfairness of such conduct is particularly clear in the consumer context where courts have imposed a heightened standard of care – that sufficient to protect the least sophisticated consumer. Because few unsophisticated consumers would be aware that a statute of limitations could be used to defend against lawsuits based on stale debts, such consumers would unwittingly acquiesce to such lawsuits. And, even if the consumer realizes she can use time as a defense, she will more than likely still give in rather than fight the lawsuit because she must still expend energy and resources and subject herself to the embarrassment of going into court to present the defense; this is particularly true in light of the costs of attorneys today.

Kimber v. Federal Financial Corp., 668 F. Supp 1480, 1487 (M.D. Ala. 1987). The 8th Circuit recently declined to expand *Kimber*, but accepts its holding. The Eighth Circuit held that “in the absence of a threat of litigation or actual litigation, no violation of the FDCPA has occurred when a debt collector attempts to collect on a potentially time-barred debt that is otherwise valid.”

Freyermuth vs. Credit Bureau Services, 248 F.3d 767, 770 (8th Cir. 2001). This case is squarely within the *Kimber-Freyermuth* rule: there was the threat of litigation and actual litigation to collect these alleged debts past the statute of limitations, and thus a violation of the FDCPA.

Threatening litigation to collect debts for membership dues which, if they ever were contractually enforceable, have long been stale, is an “unfair and unconscionable” means to collect a debt in violation of 15 U.S.C. § 1692f, *Kimber, supra*, 668 F. Supp. at 1488, misrepresents the legal status of a debt, and uses deceptive means to collect a debt in violation of 15 U.S.C. §

1692e(2)(A) and (10), *Kimber, supra*, 668 F.Supp. At 1488-1489. The *Kimber* court specifically rejected the argument that it was not deceptive, because the statute of limitations bars only the remedy, not the underlying right. The court held that the standard is not that of a lawyer or a judge, but that of an unsophisticated consumer. *Id.* at 1489.

This is a “debt” within the meaning of the federal act: it is an “obligation or alleged obligation of a consumer to pay money arising out of a transaction in which the money, property, insurance, or services which are the subject of the transaction are primarily for personal, family, or household purposes, whether or not such obligation has been reduced to judgment.” 15 U.S.C. §1692a(5). See *Dorsey v. Morgan*, 760 F. Supp. 509 (D. Md. 1991) (campground membership); *Herbert v. Monterey Financial Services*, 863 F. Supp. 76 (D. Conn. 1994) (vacation time-share.) Unlike the Iowa fair debt collection practices act, there is no limitation that the debt arise out of a “credit” transaction. Compare 15 U.S.C. §1692a(5) (definition of debt, omitting any reference to credit); *Newman v. Boehm, Pearlstein & Bright, Ltd.* 119 F.3d 477 (7th Cir., 1997) (no credit requirement to be a covered debt under federal act); *Duffy v. Landberg*, 133 F.3d 1120, 1123 (8th Cir. 1998) (same) with Iowa Code § 537.7102(3)(“actual or alleged transaction arising out of a consumer credit transaction...or a transaction which would have been a consumer credit transaction if either a finance charge was made, if the obligation was not payable in installments.); *State v. NFO*, 278 N.W.2d 905 (Ia. 1979) (covered debts under state act must arise out of consumer credit transaction.)³

³ It is arguable that the contract which is the source of the purported obligation is in fact a consumer credit transaction within the meaning of Iowa law, though that is not a necessary finding for the arguments advanced. These are installment contracts, entered into for personal family, or household purposes. The ostensible reason for considering them to be outside the scope of the ICCC is that they purport to be “real estate contracts” with interest rates under 12%, which are explicitly excluded from the definition of “consumer credit sale” under the ICCC. See Iowa Code § 537.1301(12)(b)(2). However, it could be argued that a 1/3000th undivided interest

CONCLUSION

For the foregoing reasons, plaintiff's claims should fail.

is so *de minimus* as to fall outside that exclusion.