



**Office of the Attorney General  
State of Texas**

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ATTORNEY GENERAL

December 13, 1994

Mr. Jack W. Garison  
Executive Director  
Texas Department of Licensing  
and Regulation  
P.O. Box 12157  
Austin, Texas 78711

Letter Opinion No. 94-089

Re: Whether V.T.C.S. article 5221f, section 18(a) or section 17.42(a) of the Business and Commerce Code prohibits a consumer and retailer of a manufactured home from executing an agreement selecting binding arbitration in lieu of the courts as the forum for the resolution of all claims relating to the purchase and occupancy of the manufactured home and related question (RQ-627)

Dear Mr. Garison:

You have asked the following questions:

Does the execution of an arbitration agreement by a consumer and retailer selecting binding arbitration in lieu of the courts as the forum for the resolution of all claims relating to the purchase and occupancy of a manufactured home constitute a "waiver" in contravention of the provisions of TEX. REV. CIV. STATS. ANN. art. 5221f, § 18(a) or of TEX. BUS. & COM[M]. CODE ANN.[] § 17.42(a)?

Also, must the arbitration agreement meet the requirements of TEX. REV. CIV. STATS. ANN. art. 224 or can a written arbitration agreement be valid pursuant to common law?<sup>1</sup>

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<sup>1</sup>You have not provided us with a copy of an arbitration agreement selecting binding arbitration in lieu of the courts as the forum for the resolution of all claims relating to the purchase and occupancy of a manufactured home. Moreover, this office does not construe contracts. Attorney General Opinions JM-697 (1987) at 6; DM-192 (1992) at 10. Thus, we do not consider in this opinion whether a specific agreement to arbitrate contravenes V.T.C.S. article 5221f, section 18(a) or Business and Commerce Code section 17.42(a).

Furthermore, we consider in this opinion only the statutes about which you specifically ask. We do not consider whether an agreement between a manufacturer or a retailer of a manufactured home and the consumer requiring the parties to arbitrate disputes under the contract is enforceable under any other law. *See, e.g.*, 16 C.F.R. § 703.5(j) (providing that, in regard to warranty disputes involving consumer products, decision of informal dispute settlement procedure shall not be binding).

In general, arbitration is a contractual proceeding by which, in an effort to expedite finally disposing of the matters involved, the parties to a controversy voluntarily select an arbitrator or arbitrators to resolve the controversy instead of trying the case before a judicial tribunal. 7 TEX. JUR. 3D *Arbitration* § 1, at 8 (1980) (and cases cited therein). Thus, arbitration is “a substitute for, rather than a mere prelude to, litigation, and where an agreement provides for arbitration, that is the forum for a dispute, and not the court.” 6 C.J.S. *Arbitration* § 2, at 160-61 (1975). Courts in Texas encourage parties to settle disputes by arbitration, *see Manes v. Dallas Baptist College*, 638 S.W.2d 143, 145 (Tex. App.--Dallas 1982, writ ref'd n.r.e.); *Carpenter v. North River Ins. Co.*, 436 S.W.2d 549, 554 (Tex. Civ. App.--Houston [14th Dist.] 1968, writ ref'd n.r.e.); 7 TEX. JUR. 3D, *supra*, § 2, at 9, and will indulge any reasonable presumption to uphold arbitration proceedings. *Manes*, 638 S.W.2d at 145 (and sources cited therein); 7 TEX. JUR. 3D, *supra*, § 2, at 10. Your first question involves the interplay between two specific statutes, the Manufactured Housing Standards Act, V.T.C.S. article 5221f, and the Deceptive Trade Practices Act, Business and Commerce Code chapter 17, and the policy favoring arbitration agreements.

The legislature originally enacted V.T.C.S. article 5221f, the Manufactured Housing Standards Act (the “act”), in 1969<sup>2</sup> to remedy the problem created by the law’s failure to provide minimum legal standards for the manufacture and sale of mobile homes, which failure “imperils the health, safety, and welfare of the public who purchase such mobile homes.” *See* Acts 1969, 61st Leg., ch. 656, § 13, at 1954, 1957. While the 1969 enactment imposed certain standards for the manufacture of mobile homes and required all manufacturers and dealers of mobile homes to become licensed, *see id.* §§ 4, 5, at 1955, it did not provide consumers with any rights or any remedies for violations of the act. The legislature substantially amended V.T.C.S. article 5221f in 1975, *see* Acts 1975, 64th Leg., ch. 674, at 2036, to add “new provisions designed to protect consumers.” Senate Comm. on Human Resources, Bill Analysis, S.B. 397, 64th Leg. (1975). Thus, article 5221f provides not only for the adoption of minimum standards for the installation and construction of manufactured housing, V.T.C.S. art. 5221f, § 4(a); *see, e.g.*, 16 T.A.C. § 69.51; Tex. Dep’t of Licensing & Regulation, 18 Tex. Reg. 5550 (1993), *adopted* 18 T.A.C. 7924 (1993) (codified at 16 T.A.C. § 69.54); Tex. Dep’t of Licensing & Regulation, 18 Tex. Reg. 7925 (1993) (codified at 16 T.A.C. § 69.62); and for the certification of manufactured housing manufacturers, V.T.C.S. art. 5221f, § 7(a); *see also* 16 T.A.C. §§ 69.125(a); retailers, V.T.C.S. art. 5221f, § 7(b); *see also* 16 T.A.C. § 69.125(b); brokers, V.T.C.S. art. 5221f, § 7(c); *see also* 16 T.A.C. § 69.125(c); and rebuilders, V.T.C.S. art. 5221f, § 7(o); *see also* 16 T.A.C. § 69.125(d); but the statute also provides consumers with certain rights and remedies, *see* V.T.C.S. art. 5221f, §§ 13(e), 13A, 14(e)(1), (2), (3), (6).

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<sup>2</sup>Originally, the legislature titled article 5521f the “Uniform Standards Code for Mobile Homes.” *See* Acts 1969, 61st Leg., ch. 656, § 1, at 1954.

Section 18(a) of the act, about which you explicitly ask, provides that “[a]ny waiver by a consumer of the provisions of this article is contrary to public policy and is unenforceable and void.” You question whether this subsection prohibits the purchaser of a manufactured home and a retailer from executing an arbitration agreement that requires the parties to arbitrate any claims relating to the purchase and occupancy of a manufactured home instead of litigating the claims in a court of law.

Section 18(a) of the act is substantially identical to the nonwaiver provision (section 17.42(a)) of the Deceptive Trade Practices Act (the “DTPA”), Bus. & Comm. Code ch. 17, about which you also ask. Section 17.42(a) of the Business and Commerce Code states in pertinent part that “[a]ny waiver by a consumer of the provisions of this subchapter is contrary to public policy and is unenforceable and void.” The legislature originally enacted the DTPA in 1973, *see* Acts 1973, 73d Leg., ch. 143, § 1, at 322, for the purpose of striking “directly at the inequities now existing in consumer protection legislation”:

This bill would provide a means by which the consumer could sue and recover damages plus attorneys fees, if the consumer can adequately show that the Act has been violated. Under our system as it now stands, a suit can be filed by a consumer against a person or organization committing an act, but the consumer must prove common[-]law fraud. The present conditions provide only for the Attorney General’s office to bring in a restraining order and limits their ability to prosecute. The common[-]law remedy is not adequate for a consumer to recover the loss, thereby making this bill a major step in the direction of providing the consumer, through the Attorney General’s office, with the necessary tools for equitable recovery subject to, of course, a ruling in favor of the consumer.

House Comm. on Bus. & Industry, Bill Analysis, H.B. 417, 63d Leg. (1973); *see* The Texas Deceptive Trade Practice-Consumer Protection Act: Hearings on H.B. 417 Before the House Comm. on Bus. & Ind., 63d Leg. 33 (Feb. 27, 1973) (testimony of Joe Longley) (transcript available with House Video/Audio Services Office) (stating that “the whole thrust of the bill before this committee is to put into the bill private remedies where a consumer can go to his own personal attorney and enforce his consumer rights in court”). A witness speaking before the House Committee on Business and Industry specifically about the bill’s nonwaiver provision stated that the provision “is simply a matter of legislative intent to state that any waiver that a person might be entering into without his knowledge or under duress or possibly knowing that he had waived some consumer right, is . . . enforceable [sic] and void.” *Id.* at 38.

The plain language of the act and the DTPA, as well as their legislative histories, suggest a legislative intent to protect consumers from unscrupulous retail practices and to provide consumers remedies for violations of the two statutes. Neither the language nor

the legislative history definitively indicates that only a court may determine a consumer's right to a remedy. On the other hand, we are unable to say, based on the plain language of the statutes or their legislative history, that the converse is true, *i.e.*, that a consumer may have his or her right to a remedy determined in a nonjudicial forum.<sup>3</sup>

We found no judicial decisions considering whether an arbitration agreement is enforceable in actions brought under the act. However, we found several cases relating to arbitration of claims under the DTPA. Ultimately, Texas cases are inconclusive on this issue.<sup>4</sup> Courts have upheld contractual arbitration clauses and sent DTPA claims to

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<sup>3</sup>In 1993 Representative Uher introduced House Bill 845, which proposed to do two things. First, the bill proposed to except from the DTPA "a claim for damages caused by the negligent rendering of a professional service[,] the essence of which is the providing of advice, judgment, opinion, or similar professional skill . . . ." The bill proposed to define "professional service" to include, among other things, "service performed by a licensed architect, certified public accountant, lawyer, pharmacist, real estate broker, or professional engineer . . . ." Second, the bill proposed adding section 17.64 to the DTPA, to read as follows:

**Sec. 17.64. CHOICE OF LAW AND ARBITRATION.** The public policy of this state encourages the resolution of existing or future disputes, controversies, or claims through alternate dispute resolution procedures, including common-law and statutory arbitration. Notwithstanding Section 17.42 and Section 17.44 of this code or any other provision of this subchapter, this subchapter does not invalidate or void an otherwise enforceable contractual choice of law provision or an agreement to resolve by arbitration or other alternate dispute resolution procedure an existing or future dispute, controversy, or claim under this subchapter. An agreement to arbitrate shall be liberally construed in favor of arbitration. If a contract indicates that the parties intended to resolve by arbitration an existing or future dispute, controversy, or claim arising out of or relating to a transaction that is the basis for the consumer's dispute, controversy, or claim under this subchapter, the consumer's dispute, controversy, or claim under this subchapter that arises out of or relates to that transaction is subject to arbitration even though some or all of the dispute, controversy, or claim under this subchapter is ancillary to or arises independently of the transaction.

Most of the witnesses before the House Committee on Business and Industry testified in favor of the bill (7) or were shown as supporting the bill (11); only three witnesses testified in opposition.

House Bill 845 died in the House Calendars Committee. The legislative history does not indicate why the bill died. The rejection of an amendment to a statute does not control the construction of the statute. *City of Ingleside v. Johnson*, 537 S.W.2d 145, 153 (Tex. Civ. App.—Corpus Christi 1976, no writ) (citing 82 C.J.S. *Statutes* § 360); Attorney General Opinion JM-1102 (1989) at 8 (quoting *City of Ingleside*). *But see* Mark. L. Kincaid, *Rules of Judicial Construction—Making and Arguing the Law in DTPA Cases*, 23 TEX. TECH. L. REV. 687, 716-18 (1992).

<sup>4</sup>The United States Supreme Court has concluded in two cases that a statutory nonwaiver provision analogous to section 18(a) of the act and section 17.42 of the DTPA does not preclude the parties to a transaction from contracting to arbitrate any disputes that arise. In the first, *Mitsubishi*

arbitration where the Federal Arbitration Act compels arbitration, *see Marley v. Drexel Burnham Lambert, Inc.*, 566 F. Supp. 333, 335 (N.D. Tex. 1983); *Capital Income Properties—LXXX v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992); *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 270-71 (Tex. 1992); and where the DTPA claims are factually intertwined with claims subject to an agreement to arbitrate, *see Jack B. Anglin Co.*, 842

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(footnote continued)

*Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985), the United States Supreme Court considered in part whether the Federal Arbitration Act, 9 U.S.C. §§ 1-44, prohibited an agreement to arbitrate claims arising under the Sherman Act, 15 U.S.C. §§ 1-7. *Id.* at 616. The Court stated as follows:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration. We must assume that if Congress intended the substantive protection afforded by a given statute to include protection against waiver of the right to a judicial forum, that intention will be deducible from text or legislative history. [Citation omitted.] Having made the bargain to arbitrate, the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.

*Id.* at 628 (footnote added); *see Shearson/Amer. Express Inc. v. McMahon*, 482 U.S. 220, 239 (1987) (stating that, although court limited its holding in *Mitsubishi Motors Corp.* to international context, much of its reasoning is applicable in determining arbitrability of claim in domestic antitrust case). We note, however, that the Court in *Mitsubishi Motors Corp.* cautioned other courts to “remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds” for contract revocation. *Mitsubishi Motors Corp.*, 473 U.S. at 627.

In the second case, *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220 (1987), the United States Supreme Court considered in part whether a claim brought under the Securities Exchange Act of 1934, 15 U.S.C. ch. 2B, may be arbitrated in accordance with the terms of an arbitration agreement. *Id.* at 222. Section 29(a) of the Securities Exchange Act voids “any condition, stipulation, or provision binding any person to waive compliance with any provision of [the Act].” *Id.* at 227. The McMahons cited section 27 of the Securities Exchange Act, 15 U.S.C. § 78aa, which provides federal district courts with “exclusive jurisdiction of violations of this title . . . and of all suits in equity and actions at law brought to enforce any liability or duty created by this chapter” to argue that an agreement to waive this jurisdictional provision is unenforceable under section 29(a). *Id.* at 227-28. The Court responded to the McMahon’s argument:

What the antiwaiver provision of § 29(a) forbids is enforcement of agreements to waive “compliance” with the provisions of the statute. But § 27 itself does not impose any duty with which persons trading in securities must “comply.” By its terms, § 29(a) only prohibits waiver of the substantive obligations imposed by the Exchange Act. Because § 27 does not impose any statutory duties, its waiver does not constitute a waiver of “compliance with any provision” of the Exchange Act under § 29(a).

*Id.* at 228.

S.W.2d at 271 (dicta); *see also Merrill Lynch v. Wilson*, 805 S.W.2d 38, 39 (Tex. App.—El Paso 1991, no writ). Some courts have refused to compel arbitration of DTPA claims because the court concluded that the DTPA claims did not fall within the scope of the agreement. *See Hearthshire Braeswood Plaza Ltd. Partnership v. Bill Kelly Co.*, 849 S.W.2d 380, 391 (Tex. App.—Houston [14th Dist.] 1993, writ denied); *Decision Control Sys., Inc. v. Personnel Cost Control, Inc.*, 787 S.W.2d 98, 99 (Tex. App.—Dallas 1990, no writ).

One case seems particularly relevant to your inquiry. In *D. Wilson Construction Co. v. McAllen Independent School District*, 848 S.W.2d 226 (Tex. App.—Corpus Christi 1992, writ dismissed w.o.j.), the Texas Court of Appeals considered whether section 17.42(a) of the DTPA precludes the parties to a construction contract, a school district and a construction company, from including an arbitration clause in the contract. The construction company sought to compel arbitration to resolve a dispute under the contract, but the trial court refused to refer the matter to arbitration. *D. Wilson Constr. Co.*, 848 S.W.2d at 227.

The construction company relied on two statutes to compel arbitration: the Federal Arbitration Act and the Texas General Arbitration Act, title 10 V.T.C.S., part 1. *Id.* at 228. The court determined that it lacked jurisdiction to consider the Federal Arbitration Act claim; its review of the trial court's order thus was based solely on the application of the Texas General Arbitration Act. *Id.* The school district contended, among other things, that section 17.42 of the Business and Commerce Code bars arbitration of claims under the DTPA. The court of appeals responded:

We note initially that § 17.42 does prohibit the waiver of a party's DTPA cause of action. Section 17.50(a) of the DTPA broadly provides, "A consumer may maintain an action where any of the following constitute a producing cause of actual damages." Nowhere in the DTPA is arbitration precluded, however. Moreover, in *Merrill Lynch v. Wilson*, 805 S.W.2d 38, 40 (Tex. App.—El Paso 1991, no writ), the Court held that the plaintiff's DTPA claim was so interwoven into the contract that it could not stand alone; therefore, that claim was properly submitted to arbitration. The Court reasoned that an agreement to submit to arbitration "all controversies arising out of the contract" may encompass tort claims inextricably intertwined with the contract. *Id.* at 39; *accord* [ ] *Anglin*, 842 S.W.2d at 270-71.

The arbitration clause included in the Wilson/School District contract allows for the arbitration of any controversy or claim arising out of or relating to the agreement or the breach of it. The District's DTPA claim is based on Wilson's failure to perform the contract. It is encompassed within the broad language of the arbitration

agreement. See *Capital Income Properties—LXXX, Inc. v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (per curiam). We hold that submitting the claim to arbitration is not a violation of the DTPA no-waiver provision.

*Id.* at 231.

While *D. Wilson* may lead one to conclude that an arbitration agreement does not contravene the nonwaiver provisions in both the act and the DTPA, several factors may distinguish *D. Wilson* from a case involving the retailer of a manufactured home and a consumer. First, the court pointed out several times that people working for the school district had prepared the contract, but school district officials failed carefully to review the proposed contract and apparently missed the fact that the proposed contract contained an arbitration clause. *Id.* at 228, 229, 230. Moreover, despite the fact that the school district had prepared the contract, the school district accused the construction company of deceit and trickery in including the arbitration clause in the contract without discussing it. *Id.* at 230. The court stated, "The creation of the District's contract with Wilson is critical here." *Id.* at 229. Because of the unique facts and the court's emphasis on the critical nature of the school district's role in the creation of the contract, we believe that, in an action under the DTPA brought by a consumer who did not prepare the contract, a court might conclude that a similar arbitration clause violates the nonwaiver provision. Second, *D. Wilson* involved a contract between two businesses, not a contract between a business and one or two individuals. We believe that a court might not enforce an arbitration agreement in an action under the DTPA against a consumer who, without benefit of counsel, contracted with a corporate retailer represented by legal counsel.

Additionally, a court might find that, in an action brought under either the act or the DTPA, an arbitration agreement was enforceable under the Federal Arbitration Act, 9 U.S.C. ch. 1, and that the federal law preempted both the state statutes. We are unaware of a Texas case that has so held as a matter of law. Section 2 of the Federal Arbitration Act provides in pertinent part as follows:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, . . . , shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

Section 1 of the Federal Arbitration Act defines "commerce" to include interstate commerce.

The Texas Court of Appeals considered the scope of the word “commerce” in *Lost Creek Municipal Utility District v. Travis Industrial Painters*, 827 S.W.2d 103 (Tex. App.—Austin 1992, writ denied). The court stated as follows:

“[C]ommerce” under the Federal Arbitration Act must be broadly construed. *Snyder v. Smith*, 736 F.2d 409, 417 (7th Cir. 1984)[,] *cert. denied*, 469 U.S. 1037 . . . . It is not limited to interstate shipment of goods, but also includes all contracts relating to interstate commerce. *Prima Paint v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 401 n.7 . . . ; *Mesa Operating Ltd. Partnership v. Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 243 (5th Cir. 1986). Moreover, the amount of commerce considered in the contract need not be substantial. As long as a contract relates to interstate commerce, the Federal Arbitration Act is implicated. *Del E. Webb Const. v. Richardson Hosp. Auth.*, 823 F.2d 145, 148 (5th Cir. 1987). This standard implements the strong federal policy favoring arbitration. *Id.*

*Lost Creek Mun. Util. Dist.*, 827 S.W.2d at 105.

While the broad definition of “commerce” the Texas court has adopted suggests that a manufactured home transaction relates to commerce and that the Federal Arbitration Act thus preempts the act and the DTPA, the Texas Supreme Court’s statement in *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266 (Tex. 1992), makes us reluctant to so conclude. The *Anglin* Court concluded that the Federal Arbitration Act preempted application of the DTPA’s nonwaiver provision to prevent or restrict enforcement of an arbitration agreement. *Jack B. Anglin*, 842 S.W.2d at 271. The Court stated, “The parties to this arbitration agreement were of relatively equal bargaining strength. We do not foreclose the possibility of DTPA relief for a party establishing that an agreement to arbitrate was unconscionable and therefore unenforceable *as a matter of law.*” *Id.* at 271 n.9 (emphasis added).

In sum, the issue you raise is of great importance to the consumers and businesses of this state. Furthermore, the state of the law in this area is extremely unsettled.<sup>5</sup> We are unable to determine with any degree of certainty how a court might decide the particular issue you raise. Given the significance of the issue and the unsettled nature of the law, we

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<sup>5</sup>Nor did the treatises discussing the DTPA provide us with clear guidance. Compare RICHARD M. ALDERMAN, THE LAWYER’S GUIDE TO THE TEXAS DECEPTIVE TRADE PRACTICES ACT § 8.05, at 8-47 (1993) (stating that section 17.42 does not prohibit “a change in forum through the use of an arbitration clause”) with D. BRAGG ET AL., TEXAS CONSUMER LITIGATION § 2.07, at 35, 37, 54 (2d ed. 1983 & Supp. 1993) (stating that section 17.42 does not apply to certain proceedings under state or federal arbitration statutes and that “[t]he possibility of a ‘waiver’ of claims under the DTPA also arises in a transaction where there is an agreement to arbitrate di[s]putes”).



believe your question must be resolved by the legislature or the courts. For the same reasons, we do not believe that your question is amenable to the opinion process, and we very much doubt that an attorney general opinion on the matter ultimately would resolve this difficult issue. We therefore decline to answer your question.

**S U M M A R Y**

This office is unable to predict whether a court would conclude that an agreement between the retailer of a manufactured home and the purchaser selecting binding arbitration in lieu of the courts as the forum for resolution of all claims relating to the purchase and occupancy of the manufactured home violates V.T.C.S. article 5221f, section 18(a) or section 17.42(a) of the Business and Commerce Code. Additionally, we cannot predict whether a court might find that such an arbitration agreement is enforceable under the Federal Arbitration Act, 9 U.S.C. chapter 1.

Yours very truly,



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