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Mr. Joe A. Garcia
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Texas Department of Housing and
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Post Office Box 12489
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Opinion No. KP-0258

Re: Whether an arbitration decision binds the
Manufactured Housing Division of the Texas
Department of Housing and Community Affairs
with respect to payment amounts under the
Manufactured Homeowner Consumer Claims
Program (RQ-0262-KP)

Dear Mr. Garcia:

You ask whether an arbitration decision binds the Manufactured Housing Division of the Texas Department of Housing and Community Affairs (“Division”) with respect to payment amounts under the Manufactured Homeowner Consumer Claims Program (“Program”).¹ The Program is part of Occupations Code chapter 1201, which is the Texas Manufactured Housing Standards Act (the “Act”). *See* TEX. OCC. CODE § 1201.001; *see also id.* §§ 1201.001–.611. The Act’s purpose includes encouraging the construction of housing for Texas residents and improving the general welfare and safety of purchasers of manufactured housing. *Id.* § 1201.002(b). The Act creates a licensing framework for manufacturers, retailers, brokers, rebuilders, and installers of manufactured homes. *See id.* §§ 1201.101, .103.

The Division administers the Program “to provide a remedy for damages resulting from prohibited conduct by a person licensed under” the Act. *Id.* § 1201.401(a). It is a limited remedy. Subsection 1201.404(a) limits the payment of claims to “actual damages resulting from an unsatisfied claim” against specified licensees if the claim results from a violation of one of the listed rules or statutes.² *Id.* § 1201.404(a); *see also id.* §§ 1201.401(b), .405(a), (c), (d) (all further limiting the types of payments allowed under the Program). To recover under the Program, a

¹*See* Letter from Mr. Joe A. Garcia, Exec. Dir., Tex. Dep’t of Hous. & Cmty. Affairs, Manufactured Hous. Div., to Honorable Ken Paxton, Tex. Att’y Gen. at 1 (Dec. 20, 2018), <https://www2.texasattorneygeneral.gov/opinion/requests-for-opinion-rqs> (“Request Letter”).

²Subsection 1201.404(a) lists the following rules or statutes for which a violation supports a payment from the Program: chapter 1201; a rule adopted by the director of the Division; the National Manufactured Housing Construction and Safety Standards Act of 1974; a rule or regulation of the United States Department of Housing and Urban Development; or subchapter E, chapter 17, of the Business and Commerce Code. TEX. OCC. CODE § 1201.404(a). Subchapter E, chapter 17, Business and Commerce Code, is the Deceptive Trade Practices-Consumer Protection Act. TEX. BUS. & COM. CODE § 17.41; *see also id.* §§ 17.41–.63.

consumer must file a written, sworn complaint on a specified form and within the statutory time period.³ *Id.* § 1201.406(a). The Division is not liable to a consumer if the Program does not have the money necessary to pay the actual damages. *Id.* § 1201.404(b). The Division, upon receipt of a verified complaint, must notify each appropriate licensee and their surety bond issuers. *Id.* § 1201.406(b)(1). The Division must also “investigate the claim and issue a preliminary determination” giving all parties “an opportunity to resolve the matter by agreement or to dispute the preliminary determination.” *Id.* § 1201.406(b)(2). The Act establishes when the preliminary determination becomes final. *See id.* §§ 1201.406(c), .407. It also provides for the payment of the finally determined claim to the consumer and, as a self-funding mechanism, for the reimbursement of the Program by the surety on a bond or from other security. *See id.* §§ 1201.404(a), .409(a). To determine the amount of actual damages to be paid to the consumer, the director of the Program “shall make an independent inquiry as to the damages actually incurred, unless the damages have been previously established through a contested trial.” *Id.* § 1201.405(e). The reference to a “contested trial” prompts your questions.

For context, you tell us the Division expects to receive numerous claims for payment against the Program based on allegations against a particular licensee. Request Letter at 2. You state that the Division previously investigated these claims and paid many, but found others to be for violations outside the jurisdiction of the Division. *Id.* You tell us, with regard to claims within the Division’s jurisdiction, that it agreed to accept arbitration proceedings in lieu of contested trials to determine the amount of actual damages. *See id.* However, you explain that the complaints found by the Division to be outside of the Program’s jurisdiction “are now being held in arbitration with the intention of seeking reimbursement from the Division,” regardless of the Division’s determination regarding sufficient evidence or jurisdiction over submitted claims. *Id.*

Counsel representing the numerous claimants informs us that he sought arbitration between the licensee and the individual claimants, which resulted in arbitration awards that have been approved by a district court and confirmed by a bankruptcy court.⁴ He claims that the judicial confirmation of the arbitration awards constitutes the establishment of damages through a “contested trial” and that, as a court order, the damages must be paid without any further determination by the Division that the associated claim falls within the Program’s jurisdiction and is supported by evidence.⁵ Thus, while your initial question is whether the underlying arbitration is a contested trial, the fundamental issue is whether the Program is bound by an arbitration award incorporated into a court judgment. *See id.* at 1–2.

Subsection 1201.405(e) provides that “[i]n determining the amount of actual damages . . . the director shall make an independent inquiry . . . unless the *damages* have been previously established through a contested trial.” TEX. OCC. CODE § 1201.405(e) (emphasis added). Chapter 1201 does not define “contested trial.” *See generally id.* § 1201.003 (“Definitions”). “A trial as

³The consumer complaint form can be found at: <https://www.tdca.state.tx.us/mh/docs/1010-complaint.pdf>.

⁴*See* Brief from Mr. Raúl Noriega, Tex. RioGrande Legal Aid, Inc. at 4–5 (Feb. 18, 2019) (on file with the Op. Comm.).

⁵*See* Request Letter attachment (email from Raul Noriega to Amy Jones (Dec. 19, 2018, 12:10 PM) (“Because contested arbitration takes the place of a contested trial, once the arbitration award is confirmed, [section] 1201.405(e) replaces the director’s authority to modify or deny the award of damages.”) (on file with the Op. Comm.).

commonly understood contemplates a judicial examination of all the issues of law and fact.” *Marrs. v. R.R. Comm’n*, 177 S.W.2d 941, 947 (Tex. 1944). The term “contested” indicates that the trial involves a disputed or challenged matter. *See* BLACK’S LAW DICTIONARY 386 (10th ed. 2014) (defining “contest” to mean “to litigate or call into question; challenge”); MERRIAM WEBSTER 250 (10th ed. 1993) (defining “contest” to mean “to make the subject of dispute, contention, or litigation”). The arbitration underlying the court’s judgment here is not a judicial examination but instead

a contractual proceeding by which . . . the parties to a controversy voluntarily select an arbitrator or arbitrators to resolve the controversy instead of trying the case before a judicial tribunal. Thus, an 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.”

Tex. Att’y Gen. LO-94-089 at 2 (discussing arbitration in the context of the Act) (citation omitted); *see IHS Acquisition No. 171, Inc. v. Beatty-Ortiz*, 387 S.W.3d 799, 806 (Tex. App.—El Paso 2012, no pet.) (“An agreement to arbitrate is a contract, the relation of the parties is contractual, and the rights and liabilities of the parties are controlled by the law of contracts.”); TEX. CIV. PRAC. & REM. CODE §§ 171.001 (referring to a written agreement to arbitrate), 171.021 (allowing a court to compel a party to arbitrate on a showing, in part, of an agreement to arbitrate). Accordingly, an arbitration is not a trial and thus not a “contested trial” for purposes of subsection 1201.405(e).

Under chapter 171 of the Civil Practice and Remedies Code, which governs arbitrations, an arbitration agreement complying with subsection 171.001 “confers jurisdiction on the court to enforce the agreement and to render judgment on an [arbitration] award.” TEX. CIV. PRAC. & REM. CODE § 171.081; *see also id.* § 171.082(a) (providing that filing an application for an order invokes the jurisdiction of the court). “Unless grounds are offered for vacating, modifying, or correcting an award under [specified subsections], the court . . . shall confirm the award.” *Id.* § 171.087. Then, “[o]n granting an order that confirms . . . an award, the court shall enter a judgment or decree conforming to the order. The judgment or decree may be enforced in the same manner as any other judgment or decree.” *Id.* § 171.092(a). Yet, despite the enforceability of a judicially confirmed arbitration, the judicial proceeding for the confirmation of an arbitration award does not involve a review of the merits of the claim at issue in the underlying arbitration. *See generally id.* §§ 171.001–.098; *see also Crossmark, Inc. v. Hazar*, 124 S.W.3d 422, 433 (Tex. App.—Dallas 2004, pet. denied) (recognizing that “the only issues involved in a proceeding to confirm an arbitration award are whether statutory, common law, or public policy grounds exist to vacate or modify the award[; t]hese are not the same issues as the issues on the merits involved in the underlying arbitration proceeding”). A judicial confirmation of an arbitration award is not contested and thus not a “contested trial” for purposes of subsection 1201.405(e). Accordingly, a court would likely conclude that neither an arbitration nor a judicial confirmation of an arbitration award issued as a judgment is a “contested trial” under subsection 1201.405(e).

Even were a court to conclude otherwise, chapter 1201 restricts the Program from paying a claim for a violation outside the listed rules and statutes. *See* TEX. OCC. CODE § 1201.404(a); *see also Allstate Ins. Co. v. Watson*, 876 S.W.2d 145, 147 (Tex. 1994) (noting that statutory list

without the language “includes, but is not limited to” is exclusive). Further, it requires a claim to be on a certain form and to be submitted by a specified date. *See* TEX. OCC. CODE § 1201.406(a). And it places verification of these matters with the director and the Division as administrators of the Program. *See id.* §§ 1201.401(a), .404(b). An arbitration award confirmed by a court cannot bind the Program for payment of a claim that is contrary to the statute providing for the Program. *See id.* §§ 1201.404(a) (listing specific provisions the violation of which support a claim), (b) (providing for the verification of claims by director), 1201.405(a) (limiting the amount of a claim to lesser of two amounts), (d) (excluding claims from specified causes of actions), (f) (limiting payment for specified damages other than actual damages). Instead, the contested trial in subsection 1201.405(e) is merely a method by which to establish the amount of actual damages designed to save the Division a redundant and expensive inquiry into actual damages.⁶ *See id.* § 1201.405(e). Moreover, the “contested trial” is not a judicial forum involving the Division and the Program and cannot bind the Division. *See Amstadt v. U.S. Brass Corp.*, 919 S.W.2d 644, 652 (Tex. 1996) (noting that “[g]enerally people are not bound by a judgment in a suit to which they were not parties”).

This conclusion does not prohibit the Division from utilizing a judicially confirmed arbitration award that concerns a claim within the scope of the Program as supporting evidence in determining actual damages. *See* TEX. OCC. CODE § 1201.405(e). As the director’s duty to make an independent determination is not assigned by the Legislature with such precision and certainty as to make the task ministerial, it is discretionary and for the director to decide what evidence to consider in making the determination. *See* Tex. Att’y Gen. Op. No. JC-0277 (2000) at 5 (“An act is ministerial when the law clearly spells out the duty to be performed . . . with such certainty that nothing is left to the exercise of discretion or judgment.” (quotations marks omitted)).

⁶SENATE RESEARCH CTR., Bill Analysis, Tex. S.B. 499, 83d Leg., R.S. (2013) (stating that “claims related to mobile home transactions are often decided in trials heard by judges and not by juries[; w]hen a homeowner wins a bench trial . . . against a . . . dealer, there is no reason for the manufactured housing division to undertake an inefficient and expensive inquiry into the same facts simply because the fact-finder at trial was a judge and not a jury”).

S U M M A R Y

The Manufactured Housing Division of the Department of Housing and Community Affairs administers the Manufactured Homeowner Consumer Claims Program ("Program"), provided for in Occupations Code chapter 1201, which provides relief to certain consumers of a manufactured housing licensee. In establishing damages for the consumers, subsection 1201.405(e) provides that the director of the Program shall make an independent inquiry into the amount of damages actually incurred, "unless the damages have been previously established through a contested trial." A court would likely conclude that neither an arbitration nor a judicial confirmation of an arbitration judgment is a "contested trial" within the scope of subsection 1201.405(e).

Subsection 1201.404(a) limits payments from the Program to violations of specified rules or statutes. Even were a judicially confirmed arbitration award to constitute a contested trial under subsection 1201.405(e), an arbitration judgment cannot bind the Program for payment of a claim that is outside the statutory limits of the Program. However, such an award could serve as supporting evidence for the director to consider in determining actual damages for a claim within the scope of the Program.

Very truly yours,



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