

# THE CONSUMERS RIGHT TO A TRIAL BY JURY

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**Should the Texas legislature enact a procedural statute to protect unwary and unwitting small consumers against the involuntary, unknowing, and unintelligent relinquishment of their constitutional right to a trial by jury?**

## A. Scope of the Article

Our primary goal in writing this paper is to call attention to a growing problem in Texas, the steady erosion of one of our most valued constitutional rights, the individual's right to a trial by jury. In essence, we hope to show the manner in which some business interests are taking advantage of small consumers through the routine inclusion of mandatory pre-dispute jury waiver provisions in consumer contracts.

In this paper we do not propose to add to the wealth of written materials discussing mandatory pre-dispute arbitration agreements. Neither do we propose to interject our views into the ongoing debate about the relative benefits and disadvantages of such non-judicial processes when compared to our traditional judicial system. In this article, we will focus our discussion on the question of whether the Texas legislature should enact procedural rules to help courts protect unwary and unwitting small consumers against the involuntary and unintentional loss of their constitutional right to a trial by jury.

## B. The Typical Consumer Transaction

In most business transactions involving individual consumers, the consumer selects the goods or services desired and is given a standard form statement reflecting the cost of the items or services being purchased or leased and the manner of payment. Usually, the consumer will not be afforded a meaningful

opportunity to read through the standard form contract, much less the chance to negotiate the terms of the agreement. Also, while most standard form contracts will contain some type of a mandatory pre-dispute jury waiver provision, it rarely happens that the consumer is made aware of the existence of the waiver provision or the legal consequences of accepting the contract with the waiver provision in it. It is not surprising, therefore, that many consumers do not learn of the existence of the jury waiver provision or its consequences until after a dispute has arisen.

## C. Unwary Consumers and Contracts of Adhesion

Obviously, it would be better practice for consumers to be made aware of the existence of a unilaterally imposed mandatory pre-dispute jury waiver provision, and be given the opportunity to negotiate its terms before the transaction is concluded. That is not how the system works, however, and in a typical consumer transaction the jury waiver provision is contained within a standard form "contract of adhesion," which has been specifically designed to give the consumer one choice and one choice only – either accept the contract with the jury waiver provision included or reject it in its entirety and lose the opportunity to acquire the desired goods or services. These one-sided contracts, which are unilaterally imposed on the consumer by a much stronger and powerful commercial entity, place the small consumers between the proverbial "rock and a hard place" with no realistic choice other than the acceptance of the stronger party's terms. In such a transaction, the "stronger party engages in a form of overreaching that becomes oppressive and overwhelming to the weaker party" Thomas E. Carbonneau, *Arbitration in a Nutshell* 174 (2007).

## D. A Typical Small Consumer Scenario

Obviously, the unilateral imposition of pre-dispute mandatory jury waiver provisions in a contract of adhesion creates an “unlevel playing field” that gives the stronger party a definite advantage in controlling the outcome of the process. As an example of how this can work in practice, consider the hypothetical case of two senior consumers, George and Yolanda Smith who were living in a self-built trailer home on Galveston Island when Hurricane Ike hit the Texas coast in late summer 2008:

Shortly before Hurricane Ike hit Galveston Island, George and Yolanda decided to visit her sister in Houston, and fortunately were not at their trailer house when the full force of the storm came ashore. Several days later, after the hurricane had moved inland, the Smiths returned home to find nothing other than the concrete pier and beam foundation. Because George had been laid off his refinery job the previous year, the Smiths were unable to obtain financing to rebuild their house and decided instead to buy a reconditioned trailer home, which George could “fix up” on days he had no outside work. After several trips to Houston and surrounding towns, George finally located a suitable trailer home “on sale” for \$4,500 at the Crow’s Nest Trailer Company in southeast Houston. According to the Crow’s Nest salesman the home had only one prior owner, a retiree from Chicago, who had lived in the house only when he made business trips to Houston. George had just enough cash to make a \$2,700 down payment plus \$300 in closing costs, and he verbally agreed to pay the balance over an 18 month period. At the conclusion of this discussion, George asked the salesman if he could get a copy of the sales contract so his cousin, a young lawyer in Baytown, could “look it over” before he signed it.

The Crow’s Nest salesman, after searching through his desk, produced a rumpled sheaf of papers and said it was his only copy of the sales agreement. Actually, he explained, it was simply a copy of the company’s “Dispute Resolution Protocol” which set out the manner in which disputes would be resolved in the event of any future disagreement. He said it was strictly against company policy to allow a copy of the protocol agreement to be removed from the company’s premises, but that there was no need for

the Smith’s or their attorney to read it because the company would not allow any changes to be made in its printed terms. He further explained that the protocol agreement was simply referred to in the company’s standard form Sales Agreement, which set forth the specific price and terms of payment the Smith’s had agreed to orally. He advised George and Yolanda that if they wanted to take advantage of the low sale price, they needed to produce a “good” check for \$3,000, along with their signatures and initials on the Sales Agreement and Dispute Resolution Protocol. He warned George and Yolanda that the sales transaction was being offered on a “take it or leave it” basis and that the Smiths needed to close the deal quickly if they really wanted to buy the house. The Smith’s, obviously shaken, asked the salesman if they could come back with their cousin the “next day” so he could look at the papers. The salesman replied that if the Smiths did not close the deal before leaving the premises, there would be no assurance the house would still be available for the same price, adding that this is their best and probably their only chance to take advantage of the “good deal” being offered to them. Panicked, the Smith’s gave the salesman their check for the down payment and signed and initialed the Sales Agreement and the copy of the Dispute Resolution Protocol.

In the weeks following the closing, the Smiths had great difficulty in persuading Crow’s Nest to deliver the trailer house to Galveston so the utilities could be connected. Then, two days after the house was delivered, it rained continuously for two days and a torrent of rain water came through holes in the leaky roof—soaking their carpet, window drapes, and clothes hanging in the closet. Next, the plumbing system failed to function, allowing black sewer water to back up in the bathroom toilets and leaking raw sewage under the house. Finally, the plywood paneling in the interior walls and ceilings emitted noxious formaldehyde fumes, causing mild to severe pulmonary reactions for anyone coming into the house.

In an effort to rectify these problems, the Smith’s cousin first sought to contact the Crow’s Nest executive offices and learned to his dismay that their nearest company office was in Dalhart, Texas. He next tried without success to contact their corporate counsel and was told that no single individual per-

formed legal services for the company. Finally, he sent a registered letter to the Dalhart, Texas address, explaining his clients' claims and asking that the transaction be rescinded and his clients' money returned. After several weeks passed without any response to this letter, he filed suit against Crow's Nest in the County Court at Law of Galveston County. Within a few weeks, he received an unsigned copy of a motion filed on behalf of Crow's Nest seeking to stay the litigation and to compel arbitration before "Central USA Arbitration, Inc." at its offices in Dalhart, Texas. Attached to the motion was a photocopy of a printed form entitled "Retail Sales Agreement," evidently signed and initialed by the Smiths, designating Crow's Nest as the "Manufacturer's Retail Sales Agent," and naming the Smiths as purchasers. The Sales Agreement itself consisted of two pages, which set out the down payment and specified how the balance of the purchase price would be paid. Attached was a copy of the Dispute Resolution Protocol, printed in ten-point font and sixty-seven pages in length. On page fifty-seven of the document appears a provision in fourteen-point font (all capital type) wherein the purchasers agreed to arbitrate "any and all claims" asserted against the retailer or the manufacturer, Dalhart Mobile Homes, arising out of the sales transaction and also agreed to "relinquish all rights, constitutional and otherwise, to a trial by jury."

In their written response to the respondent's Motion to Compel Arbitration, the Smiths submitted a "Verified Answer and Motion to Abate" in which they stated under oath that they were "inexperienced in business matters" and were barely able to subsist on their small monthly social security payments, food stamps, and the meager income George was able to earn through his sporadic home repair jobs. The Smiths further explained that the small tract of land on which they had been living was in fact owned by Yolanda's mother and that they (the Smiths) had never purchased anything of value except for a used pickup truck George had bought from his brother. The Smiths also stated that they had never been allowed to read the Dispute Resolution Protocol (which contained the jury waiver provision) and that they did not know and had never been made aware of the provision which purported to waive their right to a jury trial. They further testified in their statements that they would never have con-

sented to the sales agreement form if they had known it incorporated by reference a provision purporting to waive their right to a trial by jury. In a separate sworn affidavit, the Smith's minister, a long-time friend of their family, confirmed the factual accuracy of their statements and added that both Yolanda and George had dropped out of school before completing the fifth grade, and that George was barely able to read and understand any writing because of a chronic dyslexic condition.

In the months following the institution of litigation, the Smith's cousin, who was providing his legal services pro bono, made repeated phone calls and sent numerous e-mail letters to Crow's Nest counsel requesting repair of the defects in the trailer home. Although the Crow's Nest office continuously promised to "inspect and repair" any defects in the trailer home, nothing has ever been done. The problems with the house have actually gotten worse, and the Galveston County Health Department has strongly recommended that the Smiths move to other living quarters.

Finally, in an effort to obtain judicial relief, the Smiths' attorney asked for an early setting of the respondent's motion to compel. The Court Coordinator refused to set a hearing, however, because of the court's policy requiring a pre-hearing mediation. Finally, after an abortive mediation procedure conducted by a court-designated mediation service (which allowed Crow's Nest's company representative and counsel to participate by telephone), the Smith's attorney was able to secure a hearing date on the respondent's motion to compel.

At the hearing on the Motion to Compel, the judge stated that she was inclined to accept Crows Nest's allegations even though the affidavit was made on "information and belief" and probably would be deemed legally insufficient to support a motion for summary judgment. The judge also noted that the arbitration agreement appeared to be a classic "contract of adhesion," but she said she felt obligated to enforce its provisions because of the "overwhelming weight" of state and federal decisions that strongly favored the use of arbitration. Further, she observed, the Smiths faced a "nearly insurmountable burden" of proving that the arbitration agreement, including the jury waiver provision,

was invalid and unenforceable. The judge noted in this regard that she had carefully read the arbitration provision in the Crow's Nest sales contract and said she rejected, as irrelevant, the claimants' contention that the three-page provision, all in fourteen-point font capital letters, was actually harder to read than nineteen-point font printed form agreement. The judge also commented that she was not impressed by the Smith's argument that the manufacturer's "opt-out" provision in the arbitration clause, which gave the retail manufacturer the unilateral right to "opt-out" of the arbitration agreement, rendered the entire arbitration clause invalid for want of mutuality of obligations. She also said she found no merit to the Smith's argument that the arbitration clause, which required the parties to arbitrate before the service company selected arbitrator in Dalhart, Texas, was so onerous as to render the arbitration agreement procedurally unfair. Before entering a written order on her ruling, she further observed that the Smiths had failed to meet their burden of proving by competent and admissible evidence that they lacked the education and business experience to make a "voluntary, knowing and intelligent" decision about waiving their constitutional right to a trial by jury.

What is our likely reaction as lawyers and dispute resolution professionals on reading about the Smith's experience? Do we feel the Smiths got pretty much what they deserved? Was their problem simply the result of their own lack of diligence in failing to insist that they be able to read the jury waiver provision? What procedural changes, if any, might help small consumers, particularly those with limited education, business experience, and financial resources, protect themselves against the unintended loss of their constitutional right to a trial by jury? Finally, in today's cynical world, is the right to a jury trial really all that important?

### **E. The Consumer's Right to a Trial by Jury**

Texas has long recognized the importance of the individual's constitutional right to a trial by jury in both criminal and civil proceedings. *See White v. White*, 196 S.W. 508 (Tex. 1917). Although this important right may be relinquished or "waived" by a party's express contractual agreement, the courts have held that the waiver agreement must be voluntary and evidenced by "knowing and intelligent acts

done with full awareness of the legal consequences" because the right to a trial by jury is afforded the same protections as other constitutional rights." *In re Prudential Ins. Co. of America*, 148 S.W.3d 124, 143 (Tex. 2004).

Pre-dispute mandatory jury waivers have become commonplace in a wide variety of consumer transactions, ranging from personal banking and credit card services to the purchase of vehicles and mobile homes. These jury waiver provisions are frequently contained within the terms of a larger "contract of adhesion," which is presented to the consumer on a "take-it-or-leave it" basis in a manner that prevents careful reading and understanding. Because of the oppressive nature of such unilaterally imposed agreements, the consumer is often led to believe that there is no realistic choice to be made other than to accept the contract in the form presented. Under such circumstances it can hardly be contended that the consumer's acquiescence in the jury waiver agreement was voluntary and the result of a knowing, and intelligent act.

### **F. Is There Hope for the Small Consumer?**

As illustrated by the example above, the realities of pre-dispute mandatory arbitration, as currently employed in consumer transactions, differed sharply from the idealized process of dispute resolution that is less expensive, more efficient, and more flexible than formal litigation. Fortunately, from the standpoint of the small consumer, there appears to be increasing interest among the legal profession, consumer advocate groups, and responsible business interests to develop some constructive solutions to this growing problem. There are also several recent "happenings" that give rise to some optimism about the future:

#### **1. The Proposed Federal Arbitration Fairness Act**

Over the past several years, there has been a considerable amount of activity focused on the enactment of legislation, and particularly on the Arbitration Fairness Act, which is currently being debated in the

United States Congress. In essence, this Act would prohibit the enforcement of mandatory pre-dispute arbitration provisions in all consumer, employee, and civil rights disputes. Those who support this Act argue that mandatory arbitration provisions should not be forced on consumers against their will, and contend that the arbitration process should be limited to sophisticated parties who have agreed upon that alternative means for resolving their dispute. Those who oppose the proposed fairness statute argue that arbitration usually gives a consumer benefits that would not be available in the traditional judicial system and contend that it would be contrary to the consumers' best interests to eliminate such procedures in their entirety.

## 2. Recent Texas Supreme Court Decisions

There is also some positive indication, highlighted by two relatively recent decisions of the Texas Supreme Court, that the legal and business communities are gaining greater awareness of this problem and recognize the need to protect the individual consumer's constitutional right to a trial by jury.

In the *Prudential* decision, 148 S.W.3d 124, 143 (Tex. 2004), the Texas Supreme Court held that a pre-dispute jury waiver provision is contractually enforceable only if it meets the constitutionally mandated standards announced by the United States Supreme Court in *Brady v. United States*, 397 U.S. 742, 748 (1970) requiring that "waivers of constitutional rights must not only be voluntary but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences." In announcing this rule, the Court expressly noted that "some parties" would attempt to take unfair advantage of others through the use of their superior bargaining position, sophistication, or other leverage to extract a (jury) waiver agreement from the "reluctant or unwitting." But, said the Court, agreement so obtained would not be enforced by Texas courts.

The Texas Supreme Court's holding in *Prudential* tends to confirm earlier rulings of the Court that have recognized the importance of an individual's constitutional right to a trial by jury. The holding also seems to suggest the likelihood of the Court's

favorable consideration of a procedural rule that would give the trial court guidance in determining whether a pre-dispute mandatory jury trial waiver provision in a consumer contract of adhesion agreement is voluntary and also was done knowingly and intelligently with sufficient awareness of the relevant circumstances and likely consequences.

A subsequent Texas Supreme Court decision, *In re Morgan Stanley & Co., Inc.*, 293 S.W.3d 182 (Tex. 2009), also bears upon the contract formation issue. In that case, the Court was faced with the question of whether the trial court or the arbitrator should decide whether the party resisting mandatory arbitration had the mental capacity to give her consent to the arbitration agreement. After reviewing the case law attending the enforcement of arbitration agreements, including the applicability of the FAA, that the presumption in favor of arbitration arises only after the party seeking to compel arbitration demonstrates that a valid arbitration agreement exists. The defense of mental incapacity created a "gateway" issue for the trial court, rather than the arbitrator, concerning the question of whether an agreement to arbitrate was ever formed.

In its *Morgan Stanley* opinion, the Court indicated its approval of the reasoning of two well-respected Texas professors, Stephen K. Huber and Alan Scott Rau, and concluded that when an arbitration contract is silent about whether the arbitrator or the court is to determine whether a particular party is bound by the agreement, the question must be decided by the court, rather than the arbitrator, which may properly consider any claim at all that necessarily calls an agreement to arbitrate into question. Assuming that the Texas Supreme Court has accurately predicted how the United States Supreme Court ultimately will decide this question, it seems likely that, under the Court's holding in *Morgan Stanley*, any "gateway" issue such as whether a jury trial waiver was made voluntarily, knowingly, and intelligently, must be considered a "threshold" question going to the *formation* of the contract and therefore must be decided by the court rather than the arbitrator.

## G. A State Legislative Option

While we can readily appreciate the advantages to be gained by legislative action at the federal level, we feel that it may also be possible to enact viable legislation at the state level. In essence the legislation we propose would not in any way limit or restrict the statutory scope of the FAA; it would simply provide a procedural outline for the conduct of hearings on motions to enforce pre-dispute mandatory jury waiver provisions contained in contracts of adhesion. As explained more specifically below, this proposed statute would simply require that in an action involving a “small consumer” the party seeking a court order to enforce a pre-dispute mandatory jury waiver provision contained in a contract of adhesion, would have to show, as a condition to obtaining such court order, that the waiver agreement is voluntary and also was done with a knowing and intelligent understanding of the consequences of such acts. Thus, the thrust of the proposed legislative rules is focused on the gateway issues that relate to the threshold question of whether a binding agreement was ever formed.

### 1. “Contract Formation” Issues

In deciding the issue of whether a consumer’s constitutionally protected right to a trial by jury has been effectively waived, a trial court’s charged with deciding that ultimate issue would first need to determine, as a “gateway” question, whether the parties actually entered into a binding contract. In making that threshold determination, the trial court would be required to decide two closely related sub-questions:

- a. Was the consumer’s contractual waiver of a jury trial a voluntary act?
- b. Was the waiver the result of the consumer’s knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences?

Neither the state courts nor the legislature have yet promulgated any specific procedural rules to guide the trial courts in hearing and determining these issues. It seems likely, however, that the parties’ evidentiary presentations would be focused on factual questions such as the following:

- a. At the time the contract was purportedly formed was the consumer a mentally competent adult?
- b. Did the consumer have the ability to read and understand the English language?
- c. What was the consumer’s level of education, experience, and business sophistication?
- d. Was the consumer misled, tricked, or otherwise wrongfully induced to acquiesce in the inclusion of the jury waiver provision in the contract of adhesion?
- e. Was the contract of adhesion, including the jury waiver provision, presented to the consumer on a “take-it-or-leave-it basis”?
- f. Did the consumer, before the contract was concluded, have reasonable access to legal or other professional advice regarding the consequences of acquiescing in the contract terms as presented?
- g. Was the consumer permitted to read the contract terms, or to have another person read and explain the terms, before the contract was concluded?
- h. Was the consumer denied a meaningful opportunity to negotiate the terms of the jury waiver provision?

Based on the foregoing inquiries and other relevant information the Texas legislature should be able to enact procedural rules for the hearing and determination of motions seeking enforcement of jury waiver provisions in cases involving small consumers. With the acknowledgment that we lack the experience and skills to draft such legislation, we submit the following draft of such a procedural statute for purposes of discussion. It should be noted that the proposed procedural rules do not cover matters such as the allocation of costs and attorneys fees, nor do they contain a provision relating to the review of the court’s ruling by appeal or by mandamus.

## DISCUSSION DRAFT

### Procedural Rules for Courts Hearing Motions to Enforce Mandatory Pre-Dispute Jury Waiver Provisions in Small Consumer Disputes

#### DEFINITIONS

**Small Consumer:** An adult mentally competent person (other than an incorporated entity) who purchases, leases, or otherwise acquires for money, credit or other valuable consideration any personal property, goods, or services having an aggregate value of \$50,000 or less.

**Contract of Adhesion:** A written contract or binding memorandum of agreement between a merchant, manufacturer, lessor, or creditor of personal property, goods, or services, on the one hand, and an individual consumer, on the other, which is presented to the consumer on a “take-it-or-leave-it” basis and in a manner that gives the consumer no meaningful opportunity to do other than accept or reject the contract terms as presented.

**Pre-dispute Jury Waiver Agreement:** Any written agreement, contract provision, or memorandum of understanding purporting to waive or relinquish the constitutional right of an individual consumer to a trial by jury in any subsequent civil action related to a dispute arising out of a contract of adhesion to which such consumer gave his or her consent.

#### POLICY AND GUIDELINES

**Section 1: Policy of this State:** It is the policy of this State that a pre-dispute jury waiver agreement, as that term is defined herein, shall be enforceable by a court having jurisdiction over the matter only upon the verified motion of the party seeking judicial enforcement of such waiver agreement and proof showing that the consumer voluntarily, knowingly, and intelligently executed or consented to such agreement with full understanding of the consequences of such act.

**Section 2: Motion for Judicial Enforcement:** A party seeking a judgment for enforcement of a pre-dispute jury trial waiver agreement, as herein pro-

vided, shall submit a written verified motion to the court in which the case is pending stating under oath the facts and circumstances showing that the party purportedly executing or consenting to such waiver agreement did so voluntarily, knowingly, and with a full understanding of the consequences of such act. The party against whom such judgment of enforcement is sought may thereafter, within 30 days following the filing of such motion, file with said court a verified response to such motion stating under oath the facts and circumstances submitted in denial of the sworn allegations of fact set forth in the verified motion for enforcement.

**Section 3: Summary Determination of Motion:** A court hearing a party’s verified motion for enforcement of a pre-dispute jury trial waiver agreement and any verified response to said motion shall hear and determine such matters upon the same standards as applicable to a summary judgment proceeding in any civil action. If the court concludes that the movant is entitled, as a matter of law, to such a summary order of enforcement, it shall enter an appropriate order granting said motion for enforcement; otherwise, the court will proceed to hear and determine any relevant factual issues related to such matter as provided below.

**Section 4: Factual Hearing and Determination:** Unless the court grants a party’s motion for a summary order for enforcement, as provided above, either party may request a factual hearing on the issues presented by such motion and by any responsive motion submitted by the other party. At such a hearing, the court will receive and consider all relevant evidence submitted by either party on the issues of (1) whether the party against whom enforcement is sought did, in fact, consent to the terms of the jury waiver provision; (2) whether such consent, if given, was voluntarily, knowingly, and intelligently done with full knowledge of the consequences of the act. The party seeking to enforce such jury waiver agreement shall bear the burden of proof on such issues; provided that the court may consider, as prima facie proof of the consumer’s informed consent to such agreement, evidence showing that: (a) the consumer’s signature is appended to the original agreement; (b) the jury waiver agreement was conspicuously located within the contract and its terms clearly legible in the English language;

(c) the consumer was an adult and mentally competent person able to read the English language at the time of giving consent to the agreement; or (d) that the terms of the agreement were adequately explained to the consumer by competent legal counsel at or prior to the time such consent was given.

## H. Preemptive Application of the Federal Arbitration Act

We recognize that there may be legitimate concern, particularly among experienced practitioners and scholars in the field of arbitration, about whether procedural rules such as those suggested might survive the preemptive application of the Federal Arbitration Act. We believe, however, that such rules would not likely trigger such preemptive intervention for the following two principal reasons:

First, the proposed procedural rules would be applicable to all “small consumer” contracts containing a constitutionally protected jury waiver provision, not just contracts that contain an agreement to arbitrate. Thus, the proposed statute does not single out arbitration agreements for different treatment than other consumer contracts.

Second, the proposed rules simply suggest a procedural format for courts to follow in deciding whether a jury waiver agreement was ever formed. Until it is determined that a contract actually exists, no presumption favoring arbitration arises. Thus, the proposed rules would not produce a result inconsistent with the objective of the federal statute, and there is no justifiable basis for the preemptive application of the Federal Arbitration Act.

## I. Conclusion

The widespread use of pre-dispute mandatory jury waiver provisions in consumer contracts of adhesion has resulted in many small consumers being compelled to accept such waiver provisions involuntarily and without an informed understanding of the legal consequences. This places the consumer at a decided disadvantage in dealing with any dispute that later arises. To prevent this obvious abuse of our judicial system, we should work cooperatively with the courts and the state legislature to develop procedural rules that will help protect small consumers against the involuntary, unknowing and unintelligent waiver of their constitutional right to a trial by jury.

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