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Comment

***761 LOOKING TO PURCHASE A HOME? BUYER BEWARE: NOT EVEN THE TEXAS DTPA CAN FULLY PREVENT HOMEBUILDERS FROM UTILIZING BINDING ARBITRATION**[Michael P. Jones \[FNa1\]](#)

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I. Introduction

Texas has looked favorably on the use of arbitration as a means to resolve disputes, at least since the formation of the state's first constitution in 1845. [FN1] The state's public policy favors resolving legal disputes through such voluntary settlement procedures. [FN2] Texas looks so favorably upon binding arbitration because it is thought to provide a “speedy and inexpensive final disposition of matters” by using an arbitrator of the parties' choice. [FN3] The United States Supreme Court in *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.* effectively expanded arbitration to consumer disputes, leading to the rampant use of arbitration provisions in consumer agreements, *762 including credit card agreements, bank accounts, retail purchase agreements, and (most important to the discussion of this Comment) home purchase contracts. [FN4] The drastic increase of arbitration provisions contained in consumer agreements has evolved even further into the use of binding, pre-dispute arbitration agreements. [FN5] Unlike traditional agreements to mediate or arbitrate a claim once a dispute arises, these pre-dispute arbitration agreements are buried within the fine print of home purchase contracts before any dispute even arises. [FN6]

Pre-dispute binding arbitration agreements found their way into home purchase contracts as early as 1979. [FN7] While these agreements to arbitrate were initially found in the context of warranty dispute issues, they can now encompass even the most trivial breach of contract claims. [FN8] The Texas Supreme Court, in what seems to be in stark contrast to the state's public policy of promoting voluntary settlement agreements, has explicitly upheld pre-dispute binding arbitration agreements. [FN9] The court reasoned that pre-dispute arbitration agreements do not lead to the purchaser relinquishing any rights, but merely substitute the dispute forum. [FN10]

At the same time, through the use of the Texas Deceptive Trade Practices Act (DTPA), Texas has sought to “protect consumers against false, misleading, and deceptive business practices, unconscionable actions, and breaches of warranty.” [FN11] To further protect consumers, Texas courts have held that the DTPA must be *763 liberally construed to protect consumers against deceptive business practices. [FN12] Intended as a true consumer shield, the DTPA awards attorney's costs and fees to all prevailing plaintiffs; additionally, those consumers who can show an intentional violation may receive up to three times the amount of their economic and mental anguish damages. [FN13] The consumer protection provided by offering both attorney's fees and up to three times damages is extraordinary, especially when compared to a state such as New Jersey, which only offers a refund of money paid for violations of deceptive practices. [FN14]

The widespread use of pre-dispute binding arbitration clauses in consumer contracts and particularly in new home purchase contracts has become a highly contested issue in both the legal and academic worlds. [FN15] A new home purchase traditionally involves a substantial sum of money, usually drawn from a couple's life savings, and almost always involves a recourse mortgage lien that can affect the purchaser's credit. [FN16] If a homeowner later finds latent defects that affect the habitability of the home, they expect to have legal recourse. [FN17] Large numbers of homeowners seek such recourse by filing lawsuits only to find out that a pre-dispute binding arbitration clause lies buried in their purchase

contract. [FN18]

As a result, these distraught homeowners are ordered by judges to submit to arbitration under the contracts that were signed at the time of purchase. [FN19] This process was viewed as so one-sided that U.S. Representative Charles Gonzalez (D-Texas) unsuccessfully attempted to pass a bill intending to give home purchasers equal footing by removing binding arbitration agreements as a condition precedent to entering into a contract for the purchase of a new home. [FN20] Despite the *764 remarkably strong consumer protection that the DTPA offers and the inherent unfairness that binding arbitration agreements pose, the DTPA will not always allow an injured homebuyer to circumvent the pre-dispute binding arbitration clause found in their home purchase contract.

This Comment focuses on how the DTPA can help a homeowner circumvent the binding arbitration process if they later find that they unknowingly agreed to a pre-dispute binding arbitration agreement. This Comment will also explore alternative ways that an injured homebuyer can proceed directly to court without utilizing binding arbitration. Part II of this Comment discusses, generally, what arbitration is, the difference between pre-dispute and post-dispute arbitration agreements, some of the arguments for why binding arbitration is unfair, and how the Federal Arbitration Act (FAA) applies to Texas law.

Part III of this Comment goes into detail about the Texas DTPA, the history surrounding the formation of the DTPA and the protections the DTPA offers consumers. This section will discuss the various ways the DTPA may be able to help an injured homebuyer circumvent the binding arbitration process. Part IV of this Comment will explore alternative ways that a homebuyer can circumvent binding arbitration without the help of the DTPA. This Comment concludes with a recommendation to all lawmakers and judges alike, modeled on Charles Gonzalez's H.B 5033, that pre-dispute binding arbitration agreements have no place in home purchase contracts.

II. Arbitration at its Fundamental Level

A. What is Arbitration?

Although arbitration has only recently come into the public eye, its roots lie in the first English settlement in North America, where settlers utilized “an alternative form of dispute resolution in order to avoid the high cost and complexity associated with the courts.” [FN21] As time progressed and society sought a less costly alternative to litigation, forms of alternative dispute resolution evolved. [FN22] At its most basic level, arbitration is a “binding, non-Article III resolution of a *765 dispute between parties.” [FN23] Arbitration is generally defined as:

involv[ing] the submission of the dispute to a third party who renders a decision after hearing arguments and reviewing evidence. It is less formal and less complex and often can be concluded more quickly than court proceedings. In its most common form, Binding Arbitration, the parties select the arbitrator and are bound by the decision, either by prior agreement or by statute. . . .

The financial burdens, time constraints, and overcrowding of court dockets associated with litigation have continued to motivate Americans to find alternative forms of dispute resolution such as arbitration. [FN24]

The predominant motivating factor for the use of binding arbitration contracts is that the process, on its face, appears to be fair and impartial, and is theoretically designed to save both time and money. [FN25]

B. Pre-Dispute vs. Post-Dispute Arbitration Agreements

When evaluating the fairness of an agreement to arbitrate, it is important to note the distinction between a post-dispute agreement to arbitrate and a pre-dispute agreement to arbitrate. A post-dispute arbitration, which will not be addressed in much detail in this Comment, is a “contract[] to arbitrate a particular dispute that has already arisen between the parties.” [FN26] Post-dispute arbitration agreements have received relatively little criticism because they are an acceptable means to contractually resolve a dispute amongst parties. [FN27] Post-dispute arbitration agreements are often formed by parties who have already proceeded with the early stages of litigation. [FN28] For example, if A sues B for breach of contract, A faces the possibility of extensive legal costs--spent over a drawn out period of time--to recover his expectation under the contract. A could approach B and the two could come to a mutually agreeable decision to submit their claim to arbitration. Such an agreement is not viewed as being *766 inherently unfair because both parties were able to evaluate their positions and mutually agree to arbitrate. [FN29]

In contrast, the majority of the criticism surrounding arbitration contracts is aimed at pre-dispute arbitration contracts. [FN30] “A pre-dispute arbitration agreement is any contract containing a clause obligating the parties to arbitrate, rather than litigate, disputes arising out of or relating to the contract.” [FN31] Essentially, a party is agreeing to give up their right to sue before any dispute ever arises. The distinction between the two forms of arbitration agreements is an important one because there is very little criticism regarding post-dispute arbitration agreements for the above-mentioned reasons. [FN32] Also, it is important to note the fact that pre-dispute arbitration agreements were largely unenforceable until the enactment of the FAA and other modern arbitration statutes in the 1920s. [FN33] Pre-dispute arbitration agreements were viewed as unenforceable because:

[i]t was . . . perceived by at least some courts that the existence of genuine mutual assent was suspect when parties agreed to arbitrate a future dispute, and that a dispute resolution clause could be a trap for the unwary. As one court put it: “[b]y first making the contract[,] and then declaring who should construe it, the strong could oppress the weak, and in effect so nullify the law as to secure the enforcement of contracts usurious, illegal, immoral, or contrary to public policy.” [FN34]

Unlike parties to a pre-dispute arbitration agreement, parties to a post-dispute arbitration agreement are more likely to have been advised (perhaps by their attorneys) of any effect that such a process may have on their legal rights. [FN35]

A pre-dispute binding arbitration agreement is merely part of a much larger contract. “The consumer is probably less attentive to the arbitration clause than to other contract terms, such as the price of the *767 [home]” or the terms of their mortgage. [FN36] Additionally, unlike parties signing a post-dispute arbitration agreement, parties to a pre-dispute arbitration agreement are unlikely to have been advised by a lawyer. [FN37] These pre-dispute binding arbitration agreements appear unfair to the public and have captured much of the debate amongst today's legal scholars. [FN38]

c. Arguments for Why Pre-Dispute Binding Arbitration is Unfair

The brunt of the public's opinion that arbitration is unfair arises from pre-dispute binding arbitration agreements contained in consumer contracts. [FN39] The public views these binding agreements as “contracts of adhesion” because the individual is forced to arbitrate and cannot opt out of arbitration if a dispute arises. [FN40] The other criticisms of pre-dispute binding arbitration have to do with its procedural aspects. [FN41]

The limited discovery that is available in arbitration is just one procedural aspect that consumers argue is unfair. [FN42] First, consumers who seek to hold a builder accountable for defects in workmanship often find themselves unable to prove their case fully due to the limited scope of discovery available in arbitration proceedings. [FN43] Without the

opportunity to seek information from the builder, homeowners are unable to fully prove their claims and thus do not prevail on the merits. [FN44] If a homebuyer were allowed to conduct expansive discovery--similar to the discovery allowed in litigation--in preparation for an arbitration proceeding, they would have a greater likelihood of finding concrete evidence that a homebuilder is at fault. [FN45] *Perry Homes v. Cull* supports this inference. [FN46]

*768 In *Perry Homes*, the Culls--a married retired couple--purchased a home from Perry builders for \$233,750 in 1996. [FN47] The home had major structural and framing defects, which caused the home's appraised value to drop to only \$41,000 by 2001. [FN48] The homeowners sued the warranty company and were asked to engage in arbitration. [FN49] At first, the homeowners declined to arbitrate their claims. [FN50] They later decided to arbitrate and were awarded \$800,000, which included the purchase price of their home, \$200,000 for mental anguish, \$200,000 in exemplary damages, and \$110,000 in attorney's fees. [FN51] The builder was able to have the award overturned because, before the homeowners agreed to arbitrate their claims, they benefited from taking depositions and getting extensive discovery information in preparation for trial litigation. [FN52] It is not surprising that corporations see limited discovery as a major advantage because they do not have to give out any information that could ultimately show fault. [FN53]

Second, consumers complain that pre-dispute arbitration is unfair because they cannot present their case to a jury of their peers. [FN54] Again, corporations see a non-jury trial as a tremendous benefit to them because juries may be more likely to side with individuals over corporations. [FN55] If a consumer were able to bring their claim to open court, they would be randomly assigned a judge and, if demanded, would be assigned a random jury of their peers. [FN56]

In contrast, in arbitration proceedings there are various ways in which arbiters are ultimately selected. [FN57] The most typical method, which is employed by the American Arbitration Association, involves a list of prospective arbiters being circulated to the aggrieved parties. [FN58] The parties are then free to strike objectionable arbiters and rank the remaining members in order of preference. [FN59] The member with the *769 highest ranking is ultimately chosen as the arbiter. [FN60] This hierarchical selection procedure promotes fierce competition amongst arbiters: arbiters will want to continue to be chosen and therefore are motivated to make favorable decisions to the party who appears before them most often. [FN61] The homebuilder is more likely to be the repeat customer and therefore will possess greater knowledge as to which arbiter is more likely to render a favorable ruling. [FN62]

Third, critics cite the binding aspect of arbitration as unfair. [FN63] Binding arbitration generally does not provide a right of appeal, and legal error does not provide grounds for vacating an arbitral award. [FN64] Typically, arbitration will not provide either party with a right to appeal the decision or award of an arbiter. [FN65] Although the builder could contract and "agree to an appellate arbitral tribunal, such agreements are exceedingly rare." [FN66] The only possible judicial review is in enforcement actions-- after the arbiter's award has been handed down--when the party against whom an award has been granted refuses to comply with the award. [FN67] Nevertheless, there is very minimal review of the award, and even gross legal errors will not constitute grounds for vacating an arbitral award. [FN68] Such limited review reiterates and emphasizes the problem of selecting arbiters who are "repeat customers" of the builders--these arbiters have no incentive to follow the law because it is unlikely that their ruling or award will be overturned on appeal. [FN69]

"Fourth, class relief generally is unavailable in [an] arbitration [setting]." [FN70] Corporations are therefore insulated from liability "for claims that cannot economically be brought on an individual basis." [FN71] For example, if a major homebuilder neglects to provide double-paned windows when such windows were promised, all affected homeowners are left to arbitrate on an individual level. [FN72] The unavailability of class relief will often preclude homeowners from *770 seeking legal relief because costs of arbitration are large when compared to the relatively small damages sought. [FN73]

Fifth, increasingly high costs are another unfair aspect of arbitration. [FN74] Although low costs initially motivated the establishment of arbitration as a means of alternate dispute resolution, fees have now become an impediment keeping homeowners from seeking relief. [FN75] Generally, the party bringing the arbitration claim must pay the fees up front--a significantly larger cost than the typical filing fee that would be paid to file a complaint in court. [FN76] Further, arbitration clauses often specify the location where the arbitration proceeding is to be held; for example, at the builder's corporate headquarters. [FN77] Relating to the idea that these are often multi-national builders, some arbitration clauses can require an injured homeowner to travel a substantial distance just to arbitrate their claim. [FN78]

Consider the following to help illustrate these "unfair" aspects of arbitration. Suppose a Houston homebuyer purchases a home and unknowingly agrees to submit all claims arising under the contract or warranty to binding arbitration. Further suppose the binding arbitration clause specifies that any arbitration will be conducted in Dallas, Texas--the builder's corporate headquarters. After living in his home for a few months, the homebuyer notices that his slab has a crack in it, and estimates suggest that it will cost \$5,000 to repair. The homebuyer has tried to get the builder to repair the damage, but the builder refuses. As logic would dictate, buyer files a small claim action. To buyer's horror and surprise, the small claim action is immediately dismissed and arbitration is compelled.

The homebuyer receives a list in the mail of potential arbiters. He sees that Andy Arbiter, a Yale Law graduate, is a partner at one of the most prestigious Dallas law firms and has presided over 1,000 arbitration hearings. With these facts in mind, the homebuyer ranks Andy as his first choice. Unbeknownst to the homebuyer, Andy has heard one hundred cases where the builder was a party. The majority of these cases were decided in the builder's favor, and so, understandably, the builder also ranks Andy as his first choice. The *771 homebuyer must now drive 400 miles to Dallas, put himself up in a hotel, and pre-pay all costs of arbitration--which could potentially be as high as his damages--only to face a probable unfavorable ruling. While this hypothetical is as cynical as they come, it is helpful in illustrating the unfair factors of arbitration that can quickly become stacked against an injured homebuyer.

D. The FAA and its Application in Texas

The FAA "makes arbitration agreements . . . in contracts 'evidencing a transaction involving commerce' enforceable." [FN79] The FAA applies to any contract that involves "commerce" and its primary purpose "is to require the courts to compel arbitration when the parties have so provided in their contract." [FN80] The FAA states that an agreement to submit to arbitration shall be "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." [FN81] Further, Texas courts have held that the FAA preempts the application of the DTPA's non-waiver provision, thus eliminating one of the DTPA's strongest safeguards. [FN82]

A contract may involve "commerce" if it involves (1) the location of headquarters in another state, (2) the manufacture of components in a different state, (3) the transportation of goods across state lines, or (4) billings prepared in another state. [FN83] In *Anglin v. Tipps*, "commerce" was found when materials to be used for construction were transported across state lines and billings for the job were prepared out-of-state. [FN84] In today's home purchase market, where large master planned communities are often built by national corporations such as D.R. Horton, Pulte Homes, K.B. Homes, and Lennar, "commerce" is likely to be found, thus invoking the FAA, because materials are likely to be transported across state lines and billings for *772 construction jobs are likely to be prepared out-of-state. [FN85] Unfortunately for Texans, this means that the DTPA's non-waiver provision is preempted by the federal statute.

III. The Texas Deceptive Trade Practices Act

A. Brief History of the DTPA

Enacted in 1973, the DTPA was thought to be a major accomplishment, protecting consumers from “[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce.” [FN86] The DTPA created a private cause of action for consumers that provided for statutory treble damages. [FN87] Although the exact origins of the DTPA remain unclear, “the language of the . . . DTPA was derived from at least three sources: prior Texas consumer law, a California statute, and bits and pieces of one or more uniform laws.” [FN88]

The DTPA’s “laundry list” contains twenty-seven subsections that define various acts that constitute false, misleading, or deceptive acts. [FN89] These subsections and the DTPA as a whole must be liberally construed “to protect consumers against false, misleading, and deceptive business practices . . . and breaches of warranty and to provide efficient and economical procedures to secure such protection.” [FN90] The statutory language of the DTPA provides that “[a] consumer may maintain an action where any of the following [actions] constitute a producing cause of economic damages or damages for mental anguish.” [FN91] Thus, the determination of whether the DTPA is available as a remedy hinges on whether the injured party is a consumer. [FN92]

*773 B. Remedies that the DTPA Offers Consumers

The Texas DTPA offers stronger consumer protection when compared to other states. [FN93] A consumer who prevails under the DTPA may obtain: (1) attorney’s fees and costs; plus (2) economic damages; plus (3) mental anguish damages if the conduct of the defendant was committed knowingly; plus (4) additional damages of up to three times economic damages if the conduct was committed knowingly, or up to three times economic damages and mental anguish damages if the conduct was committed intentionally; and/or (5) an order enjoining such acts; and/or (6) any other relief the court deems proper. [FN94]

For example, a DTPA claim arises if Sally Homeowner finds mold damage in her home that Bob Builder failed to remedy, without disclosing the damage to Sally. Because the violation involved intentional concealment, Sally would receive attorney’s fees and could receive up to three times her economic and mental anguish damages. Allowing for recovery of attorney’s fees and costs provides for a greater incentive for a single injured homeowner to litigate her claim. [FN95] Additionally, the possibility of a large damage award provides an incentive for homebuilders to be honest in their representations. [FN96] If homebuilders face a possible award of attorney’s fees, court costs, and up to triple economic and mental anguish damages, they might certainly think twice about violating the DTPA.

The DTPA further provides that waiver of its protection is contrary to public policy, thus any attempted waiver is, generally, “unenforceable and void.” [FN97] However, waiver of DTPA protection is possible if certain stringent requirements are met: (1) the waiver must be in writing and signed by the consumer; (2) the consumer cannot be in a significantly disparate bargaining position; (3) the consumer must be represented by legal counsel in seeking or acquiring the goods or services; (4) the waiver must be “conspicuous and in bold-face type of *774 at least [ten] points in size”; (5) identified by the heading “waiver of consumer rights”; and (6) in substantially the following form: “I waive my rights under the Deceptive Trade Practices-Consumer Protection Act . . . a law that gives consumers special rights and protections. After consultation with an attorney of my own selection, I voluntarily consent to this waiver.” [FN98] Waiving rights under the DTPA is very difficult, if not impossible. Although satisfaction of the six stringent safeguards can ultimately allow waiver, the individual effectuating the waiver would have presumably received independent advice from an attorney.

Homebuyers are consumers under the DTPA and, thus, often look to its protections when they experience problems

with their new homes. [FN99] However, if a homeowner's purchase has anything to do with “commerce,” the FAA preempts the DTPA's strong presumption against waiver, and the consumer is left with no DTPA protection. [FN100] In practice, the home purchase contract can simply state, in small inconspicuous letters, that the consumer is waiving any and all claims arising under the DTPA.

IV. Traditional Contractual Protections Available to Consumers

A. Unconscionability

Because an agreement to arbitrate is contractual in nature, “a party may revoke an arbitration agreement only on a ground that exists at law or in equity for the revocation of a contract.” [FN101] Under Texas law, “a court may not enforce an agreement to arbitrate if the court finds [that] the agreement was unconscionable at the time the agreement was made.” [FN102] Although unconscionability is a defense to an arbitration agreement, the burden of proving unconscionability is placed solely on the opposing party because the law favors arbitration. [FN103] To prevail on a claim of unconscionability, the proponent must show that the clause is “so one-sided that it is *775 unconscionable under the circumstances existing when the parties made the contract.” [FN104] There are two potential types of unconscionability that a consumer may argue: (1) procedural unconscionability; and (2) substantive unconscionability. [FN105]

1. Procedural Unconscionability

“[P]rocedural unconscionability refers to the circumstances surrounding [the] adoption of the arbitration provision.” [FN106] Upon first glance, it appears that a homeowner might be able to easily show procedural unconscionability because the arbitration provision is generally contained in small print buried within the contract and usually has not been fully explained to the buyer. However, to prove procedural unconscionability, the consumer must show more than small print or lack of comprehension. [FN107] For example, in *In re Halliburton*, an agreement to arbitrate was found to be enforceable even though the employee claimed that he did not understand the concept or meaning of arbitration. [FN108]

Further, in *Palm Harbor Homes, Inc. v. McCoy*, an arbitration provision was found to be enforceable despite the homeowners' claims that they did not know what the arbitration agreement was. [FN109] In that case, the mobile home salesman told the homebuyers that the arbitration agreement “was part of the paperwork they had to sign to obtain financing for their mobile home.” [FN110] Although the homebuyers had not pleaded unconscionability, the court, in dicta, stated that holding such a transaction unconscionable would negate the public policy in favor of arbitration. [FN111]

Although these cases seem inherently unfair--not knowing what arbitration is, or being told that it must be signed to complete the purchase-- the Texas Supreme Court is unwilling to find procedural unconscionability absent extraordinary circumstances. [FN112] Absent fraud, misrepresentation, or deceit, courts will hold a party to a contract bound by the terms of the contract the party signed, regardless of *776 whether they read it or understood what it meant. [FN113] Rather, procedural unconscionability will only act as a safeguard if “surprise [or] oppression” is present, and not just when one party is in a less advantageous bargaining position. [FN114]

When determining whether an arbitration clause constitutes a “surprise” courts seem to look for how the text of the clause compares to the rest of the contract. [FN115] In *Fraass Surgical Manufacturing Co. v. United States*, the Court of Claims found that because the clause at issue was the same print and size as the rest of the contract, there was no surprise present. [FN116] The Fraass court concluded that failure to read a contract does not render the clause a surprise. [FN117] When determining whether an agreement to arbitrate is oppressive, courts look to whether the aggrieved party had no

choice but to accept the clause. [FN118] In *Wade v. Austin*, one party argued that their contract was oppressive because “they were forced to accept all of the terms.” [FN119] The court found this argument to be unpersuasive because the party had numerous alternatives aside from entering into the specific contract at issue. [FN120]

And so, although procedural unconscionability remains a defense to the enforcement of an arbitration contract, proving procedural unconscionability in the context of home construction might not be possible. [FN121] It seems likely that the oppression prong of procedural unconscionability might be difficult to prove because all the other party needs to show is that there were alternatives to entering into the contract. [FN122] And although agreements to arbitrate are becoming increasingly popular amongst homebuilders, *Wade* would seem to suggest that all homebuilders require the buyer to agree to arbitration before oppression could even possibly be shown. [FN123] Even then, in promoting the state's public policy in favor of arbitration, a court might go so far as to say that no person has a right to own a home, and *777 suggest that alternative forms of living arrangements, such as apartments, are often arbitration-clause free. [FN124] It seems procedural unconscionability will be of little help in the context of home purchase contracts unless the conditions governing the formation of the contract are particularly egregious. [FN125]

2. Substantive Unconscionability

On a fundamental level, substantive unconscionability looks at whether the arbitration provision itself is unconscionable. [FN126] The test for whether something is substantively unconscionable is whether “given the parties' general commercial background and the commercial needs of the particular trade or case, the clause involved is so one-sided that it is unconscionable under the circumstances existing when the parties made the contract.” [FN127] The Texas Supreme Court has said that there is nothing inherently unconscionable about arbitration agreements. [FN128]

In *In re Palm Harbor Homes, Inc.*, the buyers argued that the arbitration provision contained in their mobile home purchase contract was substantively unconscionable because it only bound them to arbitrate with the manufacturer, without binding the manufacturer to arbitrate with them, and because it was a contract of adhesion. [FN129] The court dismissed both of these arguments as insufficient in showing substantive unconscionability, but some attention should be directed towards their reasoning for why the non-mutually binding arbitration provision was not unconscionable. [FN130]

The *Palm Harbor Homes* court, in addressing the non-mutually binding arbitration provision, avoided determining whether or not such a provision could be unconscionable. [FN131] Instead, in a one-paragraph explanation the court noted that there are certain circumstances when a party to an arbitration agreement “may be compelled to arbitrate claims with a nonparty if the controversy arises *778 from a contract containing an arbitration clause.” [FN132] In *Grigson v. Creative Artists Agency*, the Fifth Circuit Court of Appeals held that principles of equitable estoppel allow a nonsignatory to compel arbitration when a signatory must rely on the contract with the arbitration provision in asserting its claims or when the claims against the nonsignatory are interwoven with the claims against a signatory. [FN133] The Texas Supreme Court subsequently adopted this view in *In re Weekley Homes*, holding that equitable estoppel may require a nonparty to an arbitration agreement to arbitrate with a party.” [FN134]

Although the *Palm Harbor Homes* court did a commendable job on detailing the authority stating that a nonparty may be forced to arbitrate under an arbitration clause, it did not address whether the arbitration clause at issue was one of those instances. [FN135] Therefore, it seems that even if a party would be able to show that they must submit to arbitration--while the builder would not under any circumstances be required to do the same--such an argument alone is insufficient to show substantive unconscionability. [FN136]

Various other theories of substantive unconscionability have similarly failed to pass muster with Texas courts. Re-

cently, in *In re Fleetwood Homes of Texas*, the Texas Supreme Court found that the restrictive limits on discovery are not substantively unconscionable. [FN137] The court quickly dismissed this argument stating that “limited discovery is one of arbitration's ‘most distinctive features.’” [FN138] Additionally, since *Palm Harbor Homes*, courts have continued to hold that, although arbitration provisions may have the characteristics of being a contract of adhesion, they are not necessarily unconscionable. [FN139]

B. Fraud

Under Texas law, agreements to arbitrate can be declared invalid if a party to the contract can prove fraud. [FN140] The burden of proving fraud as grounds to invalidate an arbitration provision falls on the *779 party opposing the contract. [FN141] In order to prove fraud, the homebuyer must show that:

(1) [the defendant] made a material representation that was false; (2) [the defendant] knew the representation was false or made it recklessly as a positive assertion without any knowledge of its truth; (3) [the defendant] intended to induce [the other party] to act upon the representation; and (4) [the other party] actually and justifiably relied upon the representation and thereby suffered injury. [FN142]

Asserting fraud must specifically refer to the arbitration agreement itself, as opposed to the contract as a whole. [FN143]

While there are no Texas cases that are factually on point, cases in other jurisdictions show that proving fraud as grounds for invalidating an agreement to arbitrate will be difficult. [FN144] In *Oakwood Mobile Homes, Inc. v. Barger*, a mobile home salesman represented that the agreement to arbitrate was “for insurance purposes” only. [FN145] In reality, the agreement that the buyer was signing was a binding arbitration agreement that he agreed to without ever knowing about its existence. [FN146] The court ultimately found that the statement was not fraudulent because the buyer was not entitled to reasonably rely on statements made by the salesman. [FN147] The court reiterated that “[i]f the purchaser blindly trusts, where he should not, and closes his eyes where ordinary diligence requires him to see, he is willingly deceived, and the maxim applies, ‘volenti non fit injuria.’” [FN148]

In *Oakwood*, all the elements of fraud were met except for “justifiable reliance,” and the court upheld the agreement to arbitrate. [FN149] This case unfortunately acts as a sword cutting through any hopes of arguing fraud as a basis for invalidating an arbitration provision. Under *Oakwood*, if a homebuyer asks a seller what the arbitration provision is, the seller is free to lie to his heart's content and tell the buyer that the arbitration provision is for insurance purposes, that it's legal “mumbo jumbo,” or that it is never enforced. [FN150] Courts expect the often under-educated consumer, who is frequently *780 at a disadvantaged bargaining position, to possess the skills of an attorney. Despite a salesman's contentions to the contrary, buyers are charged with a duty to truly understand the full mechanics of everything they are signing. [FN151]

Although fraud remains a valid legal defense and accepted grounds for invalidating an arbitration provision, it is clear from *Oakwood* that it will be nearly impossible to plead with any success. [FN152]

V. Conclusion

Although the early roots of arbitration show that it was formulated to avoid the high costs and complexities of traditional litigation, [FN153] arbitration has evolved into what many consumers deem to be unfair. It wasn't until the 1920s, with the passage of the FAA and similar statutory arbitration schemes, that arbitration as it currently stands began to de-

velop. [FN154] The use of pre-dispute arbitration agreements has proliferated through the entire consumer market due to such consumer-unfriendly characteristics as limited discovery, its binding nature, the ability to re-select favorable arbitrators, and the lack of class relief. [FN155]

Notwithstanding the inherent unfairness that accompanies the use of binding arbitration contracts, Texas has the DTPA, a strong procedural safeguard that was enacted to protect consumers from false, misleading, and deceptive acts. [FN156] Waiver under the DTPA is all but impossible under normal circumstances, absent the satisfaction of numerous procedural safeguards. [FN157] However, because the FAA is Federal Law, it pre-empts the DTPA and its iron-clad non-waiver provision. [FN158] Because of all the benefits that arbitration provides to homebuilders, the prevalence of pre-dispute binding arbitration clauses in home purchase contracts will definitely not cease in the foreseeable future, absent congressional intervention. Congressional *781 action on the national level is crucial because without it the FAA will continue to preempt some of the DTPA's strongest consumer safeguards. Although consumers are left free to argue traditional contractual defenses, the likelihood for success of such defenses is low. [FN159]

Unsuspecting homebuyers are left with few, and largely ineffective, legal arguments. The strongest of all protections is to argue procedural and/or structural unconscionability, which would invalidate the builder's pre-dispute binding arbitration agreement. [FN160] Under the DTPA, a homebuyer can also argue that misrepresentation existed in the formation of the contract, thus invalidating the binding arbitration clause. [FN161] Additionally, as the current law stands, homebuyers can argue that their home contract does not involve "commerce," therefore nullifying application of the FAA. [FN162] If the FAA does not preempt the DTPA, then the DTPA's non-waiver provision kicks into effect and the consumer is free to litigate their claim in open court. [FN163]

However, with more and more homes being built by large developers, the FAA will likely govern arbitration provisions in many home purchase contracts. As noted by U.S. Representative Charles Gonzales: pre-dispute binding arbitration clauses have no place in home purchase contracts. [FN164] Often, injured homebuyers are left with grossly inadequate remedies at law as a result of such pre-dispute arbitration clauses. [FN165] At the same time, a large number of homebuilders are national corporations with great effect on interstate commerce. [FN166] As a result, the FAA is triggered and blocks much of the DTPA's consumer protection. Now is the time we need legislative *782 action on the federal level. Without it, home buyers in many states will be alerted for the first time that they must submit to arbitration provisions after they have already invested money in their homes.

[FN1]. *Jack B. Anglin Co., v. Tipps*, 842 S.W.2d 266, 268 (Tex. 1992); see *Tex. Civ. Prac. & Rem. Code Ann. §154.002* (Vernon 2005) (stating that it is Texas's state policy to encourage the peaceable resolution of disputes through voluntary settlement procedures).

[FN2]. *Anglin*, 842 S.W.2d at 268.

[FN3]. *Id.* (quoting *Alderman v. Alderman*, 296 S.W.2d 312, 315 (Tex. Civ. App.--San Antonio 1956, writ ref'd)).

[FN4]. See 460 U.S. 1, 24 (1983); Adolfo Pesquera, *Big Problems in the Little Print*, *San Antonio Express-News*, Aug. 4, 2002, at 1K.

[FN5]. See Janet Elliott, *Arbitration Could Prove Costly for Homeowners*, *Houston Chron.*, May 15, 2002, at A28.

[FN6]. Stephen J. Ware, *Consumer Arbitration as Exceptional Consumer Law* (with a Contractualist Reply to Carrington & Haagen), 29 *McGeorge L. Rev.* 195, 198-200 (1998).

[FN7]. See generally [In re Kaufman and Broad, Inc.](#), 93 F.T.C. 235 (1979) (finding Kaufman and Broad had made misrepresentations of fact and employed deceptive trade practices in the advertising, sale, and construction of consumer housing. The FTC noted that numerous clauses in the sales contract contained arbitration clauses); [In re Trammell](#), 246 S.W.3d 815, 826 (Tex. App.--Dallas 2008, no pet.) (stating that “a party to a contract containing an arbitration clause [can seek] to compel arbitration of its breach of contract claim against the other contracting party”).

[FN8]. See [Kaufman and Broad](#), 93 F.T.C. 235; Mace E. Gunter, Note, [Can Warrantors Make an End Run? The Magnuson-Moss Act and Mandatory Arbitration in Written Warranties](#), 34 Ga. L. Rev. 1483, 1485 (2000) (stating that “as early as 1995, a federal district court...had foreseen the potential use of written warranties to harbor binding arbitration clauses”).

[FN9]. [In re Am. Homestar of Lancaster, Inc.](#), 50 S.W.3d 480, 485 (Tex. 2001).

[FN10]. See *id.*

[FN11]. [Tex. Bus. & Com. Code Ann. § 17.44](#) (Vernon 2002).

[FN12]. [Joseph v. PPG Indus.](#), 674 S.W.2d 862, 865 (Tex. App.--Austin 1984, writ ref'd n.r.e.).

[FN13]. [Tex. Bus. & Com. Code Ann. § 17.50\(b\)\(1\), \(d\)](#) (Vernon 2002 & Supp. 2009).

[FN14]. [N.J. Stat. Ann. § 56:8-2.11](#) (West 2001).

[FN15]. See Christopher R. Drahozal, “Unfair” Arbitration Clauses, 2001 U. Ill. L. Rev. 695, 695-99 (2001).

[FN16]. See Joe Crews, Unwary Home Buyer Could Pay Twice, *Daytona Beach News-Journal*, Sept. 19, 1999, at 1F.

[FN17]. See Elliott, *supra* note 5, at A28 (stating that a distraught homeowner whose home became infested with mold and chemical contamination had been ordered by a judge to submit to arbitration under the contract that was signed at the time they purchased their home).

[FN18]. See Pesquera, *supra* note 4, at 1K.

[FN19]. See Elliott, *supra* note 5, at A28 (stating that “owners of mold-infested homes looking for their day in court [found] that they must instead submit to an arbitration process than can be costly”).

[FN20]. See H.R. 5033, 106th Cong. 1 (2d Sess. 2000); Pesquera, *supra* note 4, at 1K.

[FN21]. Nicole Karas, Comment, [EEOC v. Luce and the Mandatory Arbitration Agreement](#), 53 DePaul L. Rev. 67, 70 (2003).

[FN22]. *Id.*

[FN23]. John P. Tomaszewski, [The Enforceability of Adhesive Arbitration Clauses in International Software Licenses](#), 3 J. Tech L. & Pol'y 4, para 5 (1997), <http://grove.ufl.edu/~techlaw/vol3/issue1/tomaszewski.html>.

[FN24]. Karas, *supra* note 21, at 70-71 (quoting Katherine V.W. Stone, *Private Justice: The Law of Alternative Dispute Resolution 5-6* (2000)) (alteration in original) (footnote omitted).

[FN25]. Id.

[FN26]. Ware, *supra* note 6, at 198.

[FN27]. See *id.*

[FN28]. See *id.*

[FN29]. See *id.*

[FN30]. See Ware, *supra* note 6, at 198.

[FN31]. Id.

[FN32]. See *id.*; see also [Winchek v. Am. Exp. Travel Related Servs. Co.](#), 232 S.W.3d 197, 202 (Tex. App.--Houston [1st Dist.] 2007, no pet.) (noting that parties create a binding agreement “when the following elements are present: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding”).

[FN33]. Ware, *supra* note 6, at 198.

[FN34]. Paul D. Carrington & Paul H. Haagen, [Contract and Jurisdiction](#), 1996 Sup. Ct. Rev. 331, 340 (1996) (quoting [Parsons v. Ambos](#), 48 S.E. 696, 697 (Ga. 1904)).

[FN35]. See Ware, *supra* note 6, at 198-99.

[FN36]. Id. at 199.

[FN37]. Id.

[FN38]. See Elliott, *supra* note 5, at A28 (stating that a homeowner is opposed to arbitration because of costly fees and the fact that “any wrongdoing by the builder won't be exposed to the public”).

[FN39]. See [Drahozal](#), *supra* note 15, at 705.

[FN40]. Id.

[FN41]. Id.

[FN42]. Id.

[FN43]. See *id.*

[FN44]. See *id.* at 710.

[FN45]. See Janet Elliott, [Court Tosses Award Against Perry Homes](#), *Houston Chron.*, May 3, 2008, at B6 [hereinafter Elliott, *Court Tosses Award*].

[FN46]. See 258 S.W.3d 580, 584-85 (Tex. 2008).

[FN47]. *Id.* at 584.

[FN48]. *Id.* at 585; Elliott, Court Tosses Award, *supra* note 45, at B6.

[FN49]. Perry Homes, 258 S.W.3d at 585.

[FN50]. *Id.*

[FN51]. *Id.*

[FN52]. *Id.* at 593, 596, 601.

[FN53]. See Drahozal, *supra* note 15, at 705.

[FN54]. *Id.* at 709.

[FN55]. *Id.*

[FN56]. See *id.* at 708-09 (“Several legal commentators argue that predispute arbitration clauses are unconstitutional waivers of the Seventh Amendment right to a jury trial, and thus are unenforceable.” (footnote omitted)).

[FN57]. *Id.* at 708.

[FN58]. *Id.* at 709.

[FN59]. *Id.*

[FN60]. *Id.*

[FN61]. See *id.*

[FN62]. See *id.* at 710 (stating that corporations are more likely to return to arbitration than individuals).

[FN63]. *Id.* at 705.

[FN64]. *Id.* at 705, 710.

[FN65]. *Id.* at 710.

[FN66]. *Id.*

[FN67]. See *id.*

[FN68]. *Id.*

[FN69]. *Id.* at 710-11.

[FN70]. *Id.* at 711.

[FN71]. *Id.* at 712.

[FN72]. See *id.*

[FN73]. See Jean R. Sternlight, *As Mandatory Binding Arbitration Meets the Class Action, Will the Class Action Survive?*, 42 *Wm. & Mary L. Rev.* 1, 57-59 (2000) (citing *In re Knepp*, 229 B.R. 821, 842 (Bankr. N.D. Ala. 1999)).

[FN74]. Drahozal, *supra* note 15, at 713.

[FN75]. See *id.*

[FN76]. *Id.*

[FN77]. *Id.* at 717.

[FN78]. *Id.*

[FN79]. 4 *Am. Jur. 2d Alternative Dispute Resolution* § 17 (2007) (quoting Federal Arbitration Act, 9 U.S.C. § 2 (2006)).

[FN80]. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 269, 271 (Tex. 1992).

[FN81]. 9 U.S.C. § 2.

[FN82]. *Anglin*, 842 S.W.2d at 271; see also *Tex. Bus. & Com. Code Ann.* § 17.42(a) (Vernon 2002) (providing that any waiver by a consumer of the provisions of the DTPA is contrary to public policy and unenforceable and void, unless three stringent procedural safeguards are present: “(1) the waiver is in writing and is signed by the consumer; (2) the consumer is not in a significantly disparate bargaining position; and (3) the consumer is represented by legal counsel in seeking or acquiring the goods or services.”).

[FN83]. *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 791 n.6 (Tex. App.--Houston [14th Dist.] 2007, *pet. denied*) (citing *Stewart Title Guar., Co. v. Mack*, 945 S.W.2d 330, 333 (Tex. App.--Houston [1st Dist.] 1997, *writ dismissed w.o.j.*)).

[FN84]. 842 S.W.2d at 270.

[FN85]. See *id.*

[FN86]. James W. Paulsen, *Lenders and the Texas DTPA: A Step Back from the Brink*, 48 *SMU L. Rev.* 487, 493-94 (1995); *Tex. Bus. & Com. Code Ann.* § 17.46(a) (Vernon 2002 & Supp. 2009).

[FN87]. Paulsen, *supra* note 86, at 494.

[FN88]. *Id.* (footnote omitted).

[FN89]. See *Tex. Bus. & Com. Code Ann.* § 17.46(b).

[FN90]. *Id.* § 17.44(a) (Vernon 2002).

[FN91]. *Id.* § 17.50(a) (Vernon 2002 & Supp. 2009).

[FN92]. See *id.*

[FN93]. See [N.J. Stat. Ann. § 56:8-2.11](#) (allowing recovery of up to the price paid, with no provision for attorney's fees or court costs).

[FN94]. [Tex. Bus. & Com. Code Ann. § 17.50\(b\)](#).

[FN95]. [Tracker Marine, L.P. v. Ogle](#), 108 S.W.3d 349, 361 (Tex. App.-- Houston [14th Dist.] 2003, no pet.).

[FN96]. [Lone Star Ford, Inc. v. Hill](#), 879 S.W.2d 116, 124 (Tex. App.-- Houston [14th Dist.] 1994, no writ) (holding that the “rationale underlying [the court's] conclusion is based upon several considerations, keeping in mind that the DTPA must be liberally construed to protect consumers, to encourage them to seek redress, and to deter deceptive practices”).

[FN97]. [Tex. Bus. & Com. Code Ann. § 17.42\(a\)](#) (Vernon 2002).

[FN98]. [Id. § 17.42\(a\), \(c\)](#).

[FN99]. See [Emerald Texas, Inc. v. Peel](#), 920 S.W.2d 398, 400 (Tex. App.-- Houston [1st Dist.] 1996, no writ).

[FN100]. [Jack B. Anglin Co. v. Tipps](#), 842 S.W.2d 266, 269-71 (Tex. 1992).

[FN101]. [TMI, Inc. v Brooks](#), 225 S.W.3d 783, 792 (Tex. App.--Houston [14th Dist.] 2007, pet. denied).

[FN102]. [Tex. Civ. Prac. & Rem. Code Ann. § 171.022](#) (Vernon 2005).

[FN103]. [TMI](#), 225 S.W.3d at 792.

[FN104]. [In re FirstMerit Bank](#), 52 S.W.3d 749, 757 (Tex. 2001) (emphasis added).

[FN105]. [TMI](#), 225 S.W.3d at 792.

[FN106]. [In re Palm Harbor Homes, Inc.](#), 195 S.W.3d 672, 677 (Tex. 2006).

[FN107]. See [id.](#)

[FN108]. 80 S.W.3d 566, 568-69 (Tex. 2002).

[FN109]. 944 S.W.2d 716, 722-23 (Tex. App.--Fort Worth 1997, no writ).

[FN110]. [Id.](#) at 723.

[FN111]. [Id.](#) at 723 n.8.

[FN112]. See [In re Palm Harbor Homes](#), 195 S.W.3d at 679.

[FN113]. [Id.](#)

[FN114]. [Id.](#)

[FN115]. [Fraass Surgical Mfg. Co. v. United States](#), 571 F.2d 34, 40 (Ct. Cl. 1978).

[FN116]. [Id.](#)

[FN117]. *Id.*

[FN118]. *Wade v. Austin*, 524 S.W.2d 79, 86 (Tex. Civ. App.--Texarkana 1975, no writ).

[FN119]. *Id.* at 87.

[FN120]. *Id.*

[FN121]. See *In re Palm Harbor Homes, Inc.*, 195 S.W.3d 672, 679 (Tex. 2006) (stating that in order to prevail, a home-buyer must show either surprise or oppression and not just a lack of comprehension).

[FN122]. *Wade*, 524 S.W.2d at 87.

[FN123]. See *id.*

[FN124]. See *Palm Harbor Homes, Inc. v. McCoy*, 944 S.W.2d 716, 723 n.8 (Tex. App.--Fort Worth 1997, no writ.) (stating that Texas's public policy favoring arbitration might override other concerns).

[FN125]. See *In re Palm Harbor Homes*, 195 S.W.2d at 678-79 (stating that even contracts of adhesion are not per se unconscionable. Unconscionability is enforced to prevent oppression and surprise, not just mere instances of unequal bargaining positions).

[FN126]. *Id.* at 677.

[FN127]. *In re First Merit Bank*, 52 S.W.3d 749, 757 (Tex. 2001).

[FN128]. *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 608 (Tex. 2005).

[FN129]. 195 S.W.3d at 678.

[FN130]. *Id.*

[FN131]. *Id.*

[FN132]. *Id.*

[FN133]. 210 F.3d 524, 527-28 (5th Cir. 2000).

[FN134]. 180 S.W.3d 127, 130 (Tex. 2005).

[FN135]. *In re Palm Harbor Homes*, 195 S.W.3d at 678.

[FN136]. *Id.*

[FN137]. 257 S.W.3d 692, 695 (Tex. 2008).

[FN138]. *Id.* (quoting *Perry Homes v. Cull*, 258 S.W.3d 580, 599 (Tex. 2008)).

[FN139]. *In re MHI P'ship*, No. 14-07-00851-CV, 2008 WL 2262157, at *3 (Tex. App.--Houston [14th Dist.] May 29, 2008, no pet.) (mem. op.).

[FN140]. See *In re Poly-America, L.P.*, 262 S.W.3d 337, 348 (Tex. 2008).

[FN141]. *Id.*

[FN142]. *Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 577 (Tex. 2001).

[FN143]. *In re FirstMerit Bank*, 52 S.W.3d 749, 756 (Tex. 2001).

[FN144]. See *Oakwood Mobile Homes, Inc. v. Barger*, 773 So. 2d 454, 460-61 (Ala. 2000).

[FN145]. *Id.* at 460.

[FN146]. *Id.*

[FN147]. *Id.* at 461.

[FN148]. *Munroe v. Pritchett*, 16 Ala. 785, 789 (Ala. 1849).

[FN149]. See 773 So. 2d at 461.

[FN150]. See *id.*

[FN151]. See *id.*

[FN152]. See *id.*

[FN153]. See *Karas*, supra note 21, at 70 (stating that arbitration was first used as an alternative to litigation because it avoided the high costs and complexities that were associated with litigation).

[FN154]. See *Ware*, supra note 6, at 198 (stating that until the passage of the FAA, pre-dispute arbitration agreements were unenforceable).

[FN155]. See supra Section II.C (describing the various aspects of arbitration that can be viewed as unfair towards consumers).

[FN156]. See *Paulsen*, supra note 86, at 493-94 (discussing the history of the DTPA and the protections it is supposed to offer to consumers).

[FN157]. *Tex. Bus. & Com. Code Ann. §17.42* (Vernon 2002).

[FN158]. *Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 271 (Tex. 1992).

[FN159]. See *In re Poly-America, L.P.*, 262 S.W.3d 337, 347 (Tex. 2008). (holding that notwithstanding the FAA, a consumer is free to argue contractual defenses under Texas law to invalidate an arbitration provision).

[FN160]. See *Tex. Civ. Prac. & Rem. Code Ann. § 171.022* (Vernon 2005).

[FN161]. *Decision Control Sys. v. Pers. Cost Control, Inc.*, 787 S.W.2d 98, 100 (Tex. App.--Dallas 1990, no writ).

[FN162]. *TMI, Inc. v. Brooks*, 225 S.W.3d 783, 791 n.6 (Tex. App.--Houston [14th Dist.] 2007, pet. denied).

[FN163]. Id.

[FN164]. See H.R. 5033, 106th Cong. (2d Sess. 2000).

[FN165]. Alan Scott Rau, [Federal Common Law and Arbitral Power](#), 8 Nev. L.J. 169, 211 n.132 (2007) (stating that parties to an arbitration agreement can create an arbitration provision that ultimately provides inadequate remedies).

[FN166]. See [Jack B. Anglin Co. v. Tipps](#), 842 S.W.2d 266, 270 (Tex. 1992) (stating that because these large homebuilders are likely to purchase and/or ship construction materials across state lines and prepare and send billing documents across state lines, they will be found to involve “commerce” under the FAA).

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