

Subject State Board
Consumer Credit

Copy to _____



STATE OF KANSAS

Office of the Attorney General

State Capitol Bldg. (913) 296-2215 Topeka, Kansas 66612

VERN MILLER
Attorney General

October 16, 1974

Opinion No. 74-345

Mr. Lee B. Connell
Consumer Credit Commissioner
535 Kansas Avenue
Topeka, Kansas 66603

Dear Mr. Connell:

This office is in receipt of your letter of May 9, 1974, wherein you request an opinion of the legality of an arbitration agreement which members of the Wichita Better Business Bureau desire to use in connection with the sale to consumers of merchandise within the State of Kansas. Pertinent provisions of the arbitration agreement are as follows:

Seller and Buyer agree that, except as hereinafter provided, any claim or controversy arising out of the above and foregoing agreement shall be settled by arbitration under the Uniform Arbitration Act in accordance with the Arbitration Rules administered by the Wichita Better Business Bureau, said rules being entitled . . .

Any award issued by the arbitrators shall be binding on all parties hereto, their successors and assigns, including, but not limited to assignees of the Seller. It is specifically agreed that the arbitrators shall have authority to award any remedy or relief allowed by law, including the Kansas Uniform Consumer Credit Code or the Kansas Consumer Protection Act, to the full extent as permitted by law. Any right to obtain any relief not within the power of the arbitrator to award shall not be waived by this agreement, including, but not limited to, class and injunctive relief. The decision of the arbitrators shall be subject to judicial (court) review as provided by the Kansas Arbitration Act.

The principal area of concern with this arbitration agreement is its possible conflict with K.S.A. 1973 Supp. 50-625 and K.S.A. 1973 Supp. 16a-1-107 which statutes are contained in the Kansas Consumer Protection Act and the Uniform Consumer Credit Code respectively and which state in part:

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Waiver; agreement to forego rights; settlement of claims. (a) Except as otherwise provided in this act, a consumer may not waive or agree to forego rights or benefits under this act. . . [K.S.A. 1973 Supp. 50-625]

Waiver; agreement to forego rights; settlement of claims. (1) Except as otherwise provided in sections 1 through 131 [16a-1-101 through 16a-9-102] of this act, a consumer may not waive or agree to forego rights or benefits under such sections of this act. . . [K.S.A. 1973 Supp. 16a-1-107]

Of additional importance to this question is K.S.A. 1973 Supp. 5-401, a provision of the Kansas Arbitration Act passed by the 1973 Legislature which states in part:

"A written agreement to submit any existing controversy to arbitration or a provision in a written contract other than a contract of insurance or a contract between an employer and employees or between their respective representatives to submit to arbitration any controversy other than a claim in tort thereafter arising between the parties is valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract." (emphasis added)

This section shows a clear intention of the legislature to allow parties who enter into contracts to agree to arbitration of any controversy or claim. The enactment of K.S.A. 1973 Supp. 50-625 and K.S.A. 1973 Supp. 16a-1-108 evidences the legislative intent that the private remedies provided in the Uniform Consumer Credit Code and the Kansas Consumer Protection Act should not be defeated should consumers enter into any agreement to waive or forego such remedies.

The provisions of the arbitration agreement clearly provide that there is no attempt to alter or limit any remedies available to the consumer. In fact, the arbitration agreement states that remedies not within the power of the arbitrator to grant, which would include class actions and injunctive relief, are not waived. In its simplest form, the arbitration agreement provides for a change of forum where appropriate relief can be obtained.

The change of forum created by the arbitration agreement does not purport to affect the remedies protected by the cited sections of

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the Uniform Consumer Credit Code and the Kansas Consumer Protection Act. Additionally, the clear intent of K.S.A. 1973 Supp. 5-401 is to authorize and even encourage parties mutually to select an appropriate alternative forum to hear and decide any claim or controversy.

Since remedies available to consumers under the Uniform Consumer Credit Code and the Kansas Consumer Protection Act are not waived or foregone, use of the arbitration agreement would be binding upon the parties when properly executed.

I trust the above is in full response to your request. If I can be of further assistance, please advise.

Very truly yours,



VERN MILLER
Attorney General

VM:JVF:en