THE SHIFTING CURRENTS OF ARBITRATION: THE SUPREME COURT OF TEXAS REVERSES COURSE, HOLDING THAT THE AVAILABILITY OF CLASS ARBITRATION IS FOR THE COURTS TO DECIDE

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In 2004, the Supreme Court of Texas first addressed the issue of whether an arbitrator or a judge decides if an arbitration agreement permits (or prohibits) class arbitration. [1] Purportedly following the lead of the U.S. Supreme Court in *Green Tree Financial Co. v. Bazzle*, [2] the Texas Court held then that arbitrators "should rule on class certification issues when the contracts at issue commit[] all disputes arising out of the agreement to the arbitrator." [3]

Recently, however, the Texas Supreme Court overruled its prior decision. In *Robinson v. Home Owners Management Enterprises, Inc.*, [4] the Court held that "arbitrability of class claims is a 'gateway' issue for the court unless the arbitration agreement 'clearly and unmistakably' expresses a contrary intent." [5] In doing so, the Court brought Texas jurisprudence in line with all of the federal circuit courts of appeal that have directly addressed the issue. [6] The *Robinson* Court also offered important guidance to lower courts, explaining that "an express contractual basis" is required before courts can find either an agreement to arbitrate on a class basis or an unmistakably clear delegation of authority to an arbitrator – neither silence nor ambiguity will suffice. [7]

CASE BACKGROUND

The plaintiffs, who had purchased a newly-constructed home, brought individual claims against defendant, a home-warranty company, seeking construction-defect related damages. [8] After defendant successfully moved to compel arbitration (over plaintiffs' objection), plaintiffs asserted factually-distinct putative class claims in the arbitration. [9] Defendant moved to strike the putative class claims as outside the scope of the arbitration agreement. [10] The arbitrator denied defendant's motion, but bifurcated the class from the individual claims, moving forward with the arbitration on the individual claims only. [11]

After the individual arbitration was completed but before the arbitrator issued a decision, defendant moved the trial court to clarify the issues referred to the arbitrator and, in the alternative, to strike the class claims from the arbitration. [12] The arbitrator subsequently issued a ruling in favor of plaintiffs on their individual claims, awarding them substantial damages, costs, and fees. [13] Plaintiffs thereafter requested that the trial court compel arbitration on their putative class claims pursuant to the applicable arbitration provisions. [14] The trial court refused to do so, concluding that (1) "the question of whether the parties agreed to class arbitration is a question of arbitrability for [the court]"; (2) "[t]he Parties did not 'clearly and unmistakably' provide that the arbitrator is to decide issues of arbitrability"; and (3) the arbitration agreement "does not permit class arbitration." [15]

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The Texas Court of Appeals agreed with the trial court's conclusions and expressly declined to follow the Texas Supreme Court's 2004 decision in *In re Wood*, which had held that class-related questions were for arbitrators, not courts, to decide. [16] Plaintiffs appealed to the Texas Supreme Court. [17]

THE TEXAS SUPREME COURT REVISITS THE "WHO DECIDES" QUESTION

Fifteen years earlier, the Supreme Court of Texas had ruled in *In re Wood* that "the arbitrator has the power to rule on class certification issues when the contract commits all disputes arising out of the agreement to the arbitrator." [18] As support for its decision, the Court "relied exclusively" on the U.S. Supreme Court's opinion in *Green Tree Financial Co. v. Bazzle*, which it construed as "settled law." [19] In *Robinson*, however, the Texas Court described its *In re Wood* ruling as "misplaced" and "an anachronism," expressly overruled *In re Wood*, and considered the "who decides" question anew. [20]

The Texas Supreme Court began by examining the significant shifts that have taken place in arbitration jurisprudence since 2004. [21] First, the U.S. Supreme Court has clarified that the *plurality* decision in *Bazzle* did not definitively answer the "who decides" question. [22] Second, the U.S. Supreme Court has strongly suggested that the availability of class arbitration "might be a question of arbitrability." [23] Third, every federal court of appeals that has considered the issue – the Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits – "has concluded that class arbitrability is for the courts to determine as a gateway matter absent clear and unmistakable language delegating arbitrability matters to the arbitrator." [24]

The Texas Supreme Court then turned to the reasoning underlying the analysis. [25] At its base, arbitration is a matter of contract, such that a court's primary duty is to enforce the parties' agreement as expressed in the applicable arbitration provisions. [26] Relatedly, a court must ensure that parties are not compelled to arbitrate disputes that they have not agreed to submit to arbitration. [27] Resolving disputes over the scope of parties' agreement to arbitrate – referred to as "questions of arbitrability" – are presumptively reserved for courts. [28]

Applying these fundamental principles of arbitration law, the Texas Supreme Court found that the question of whether an arbitration agreement reflects the parties' agreement to arbitrate on a class basis is just such an "arbitrability" question. [29] That is because the question of whether an agreement permits class arbitration (1) "invokes contract-formation issues because it implicates whether a presently binding and enforceable agreement to arbitrate exists as to each class member[,]" and (2) "class action arbitration is so fundamentally different from bilateral arbitration that it implicates the type of controversy the parties agreed to submit to arbitration." [30] The Court relied most heavily on the second rationale:

> Considering the obvious, structural, and fundamental differences between bilateral and class arbitration, which change the nature of arbitration altogether, we hold that the question of class arbitration is more akin to what type of controversy shall be arbitrated – a question for the courts – not a procedural question presumptively for the arbitrator. [31]

After *Robinson*, Texas law now clearly provides that the question of whether an arbitration agreement governed by the Federal Arbitration Act ("FAA") permits arbitration of class claims is presumptively for the courts, unless the parties' agreement "clearly and unmistakably" delegates the question to the arbitrator. [32]

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INTERPRETATION OF THE ARBITRATION AGREEMENT

Having decided the threshold "who decides" issue, the Texas Supreme Court turned to the four-corners of the arbitration agreement to answer the remaining questions of contract interpretation: (1) whether the agreement "clearly and unmistakably" delegated the class-arbitration question to the arbitrator; and (2) if the answer to the first question is "no," then whether the agreement permits class arbitration. [33]

In doing so, the Court offered important guidance to lower courts in Texas tasked with interpreting arbitration agreements. First, an arbitration agreement that is silent regarding the delegation of arbitrability issues "cannot speak . . . with unmistakable clarity" and thus will not defeat the presumption that the court decides class availability. [34] Although no "[m]agic words" are necessary to properly delegate such issues, some words regarding delegation are required. [35] Here, because the arbitration agreement at issue lacked even a single mention of delegation or arbitrating arbitrability issues, the Texas Supreme Court found that the court was empowered to answer whether the parties agreed to classwide arbitration. [36]

Second, an agreement that is silent or ambiguous as to the availability of class arbitration is insufficient to compel the parties to arbitrate their claims on a class basis. [37] Class arbitration is only appropriate where the agreement contains an "affirmative contractual basis;" it cannot be compelled based on a "mere inference." [38] The Court further instructed that "class arbitration must be *explicitly referenced*" in the agreement to support a finding that the parties agreed to class arbitration. Because the arbitration agreement at issue did "not reference class claims at all," the Court found "no affirmative contractual basis for concluding the parties agreed to classwide arbitration." [40]

CONCLUSION

In *Robinson*, the Supreme Court of Texas joined a long line of federal circuit courts of appeal that have declared the availability of class arbitration a threshold question of arbitrability that is presumptively for the courts, not arbitrators, to determine. [41] In doing so, the Court erased 15-years of contrary state-law precedent interpreting the FAA that had been largely discredited by decisions of the U.S. Supreme Court during that time period. The *Robinson* Court, moreover, has provided important guidance for lower courts in Texas that are tasked with interpreting arbitration agreements – neither silence nor ambiguity on class arbitration will suffice; class arbitration can be compelled only where it is "explicitly referenced" and has an "affirmative contractual basis." [42] How the lower courts will apply *Robinson* will be left to future cases. The *Robinson* Court, however, has likely left little room for class arbitration absent an express contractual authorization.

NOTES

[1] *In re* Wood, 140 S.W.3d 367, 368-69 (Tex. 2004).

[2] 539 U.S. 444 (2003).

[3] *Wood*, 140 S.W.3d at 368-69 (relying on the U.S. Supreme Court's plurality decision in *Bazzle*).

[4] Robinson v. Home Owners Mgmt. Enters., Inc., No. 18-0504, --- S.W.3d ---, 2019 WL 6223128, at *1-12 (Texas Nov. 22, 2019).

[5] *Id.* at *1, *5-9.

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[6] *See id.* at *7 & n.55; *see also* 20/20 Comm'cs Inc. v. Crawford, 930 F.3d 715, 718-19 (5th Cir. 2019); Herrington v. Waterstone Mortg. Corp., 907 F.3d 502, 506-11 (7th Cir. 2018); JPay, Inc. v. Kobel, 904 F.3d 923, 930-36 (11th Cir. 2018); Catamaran Corp. v. Towncrest Pharmacy, 864 F.3d 966, 972 (8th Cir. 2017); Del Webb Cmtys., Inc. v. Carlson, 817 F.3d 867, 873-77 (4th Cir. 2016); Opalinski v. Robert Half Int'l Inc., 761 F.3d 326, 331-35 (3d Cir. 2014); Eshagh v. Terminex Int'l Co., L.P., 588 F. App'x 703, 704 (9th Cir. 2014) (unpublished); Reed Elsevier, Inc. v. Crockett, 734 F.3d 594, 598-99 (6th Cir. 2013); *see also* Dish Network L.L.C. v. Ray, 900 F.3d 1240, 1245-56 (10th Cir. 2018) (assuming, without deciding, that whether an agreement authorizes class arbitration is a gateway arbitrability issue).

[7] *Robinson*, 2019 WL 6223128, at *1, *10-12 (relying on Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662 (2010) and Lamps Plus, Inc. v. Varela, --- U.S. ---, 139 S. Ct. 1407 (2019)).

[8] *See id.* at *1.

[9] *See id.* at *2.

[10] *See id.*

[11] *See id.*

[12] *See id.*

[13] *See id.*

[14] *See id.* at *3.

[15] *Id.*

[16] *See id.* (explaining that in "[a]ffirming the trial court's conclusion that availability of class arbitration is a gateway issue for the court, the appeals court declined to follow our *In re Wood* decision, which held that an arbitrator should rule on class certification issues when an arbitration agreement is governed by the FAA and the parties have agreed to submit all disputes arising out of the agreement ot the arbitrator.").

[17] *Id.* at *4.

[18] *Id.* at *5. (discussing *Wood*, 140 S.W.3d at 369-69 & n.1).

[19] *Id.* at *5-6.

[20] *See id.* at *6. Although it agreed with the Court of Appeals' underlying analysis, the Texas Supreme Court chastised the lower appeals court for failing to follow *In re Wood* because, as the Texas Supreme Court explained, it "was obligated to follow [*In re Wood*] as precedent until we overruled that decision." *Id.*

[21] *See id.* at *6-8.

[22] *See id.* at *7-8; *see also Lamps Plus*, 139 S. Ct. at 1417 n.4 ("This Court has not decided whether the availability of class arbitration is a so-called 'question of arbitrability,' which includes these gateway matters."); Oxford Health Plans LLC v. Sutter, 569 U.S. 654, 569 n.2 (2013) (noting that the Supreme Court had "made clear that [it] has not yet decided whether the availability of class arbitration is a question of arbitrability" and that it had "flagged" that the issue "might be a question of arbitrability"); *Stolt-Nielsen S.A*, 559 U.S. at 680 (explaining that in *Bazzle*, "no single rationale commanded a majority" and "only the plurality" decided that an arbitrator should decide the availability of class arbitration).

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[23] *Robinson*, 2019 WL 6223128, at *7 (quoting *Oxford Health Plans*, 569 U.S. at 569 n.2).

[24] *Id.*; *see also supra*, note 6.

[25] *See Robinson*, 2019 WL 6223128, at *7-8.

[26] *See id.* at *4-5, *7.

[27] *See id.* at *4.

[28] *See id.* at *4-5 (citing Howsam v. Dean Witter Reynolds, 537 U.S. 79, 83-84 (2002)).

[29] *Id.* at *7-10.

[30] *Id.* at *7.

[31] *Id.* at *9. (internal quotations and footnotes omitted).

[32] *See id.* at *1, *9-10.

[33] *See id.* at *10-13.

[34] *Id.* at *11 (internal quotations omitted).

[35] *Id.*

[36] *Id.*

[37] *Id.* at *12 (relying on the U.S. Supreme Court's decisions in *Stolt-Nielsen*, 559 U.S. at 687, and *Lamps Plus*, 139 S. Ct. at 1415).

[38] *Id.*

[39] *Id.* (emphasis added)

[40] *Id.*

[41] *See supra*, note 6.

[42] *See Robinson*, 2019 WL 6223128, at *12.

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