

Supreme Court of Texas Clarifies Class Arbitration Issues

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The Federal and Texas Rules of Civil Procedure both contain detailed rules addressing whether and how a lawsuit may proceed as a class action. When an arbitration agreement applies to a dispute, and one party seeks to proceed as a class action, additional questions must be answered: *First*, who decides whether the arbitration can proceed on a class basis—the court or the arbitrator? *Second*, can the arbitration proceed on a class basis, in light of the parties' arbitration agreement? The Supreme Court of Texas substantially clarified these two issues recently in *Robinson v. Home Owners Management Enterprises, Inc.*, 590 S.W.3d 518 (Tex. 2019). The upshot of *Robinson*, and U.S. Supreme Court decisions on the same issue, is that it will be quite difficult for consumers subject to an arbitration agreement to arbitrate on a class basis.

The Robinsons initially sued their home warranty company—HOME—on an individual basis for failing to promptly and properly correct construction defects. Over the Robinsons' opposition, the trial court sent the parties to arbitration because their agreement with HOME required "unresolved warranty issues" to be arbitrated. Shortly before the arbitration final hearing (the arbitration equivalent to a trial), the Robinsons sought to add class-action claims, alleging HOME routinely demanded overbroad releases as a precondition to fulfilling its warranty obligations. HOME objected to the arbitrator that class claims were not arbitrable. The arbitrator denied HOME's objections, but bifurcated the class claims from the Robinsons' individual claims.

In the trial court, HOME again raised the question of whether the Robinsons could proceed with their class claims in arbitration. The court first decided the court, not the arbitrator, should determine class arbitrability, because the parties had not clearly provided that the arbitrator should decide the issue in their arbitration agreement. The court then determined that the arbitration agreement did not permit class arbitration.

The trial court's decision on "who decides" class arbitrability ran counter to the Texas Supreme Court's 2004 decision in *In re Wood*, 140 S.W.3d 367 (Tex. 2004). In *Wood*, the Court determined that when an agreement submits all disputes to the arbitrator, the arbitrator, not the court, has the power to address class certification issues.

In *Robinson*, the Texas Supreme Court reconsidered *Wood*'s determination of who decides class arbitrability. *Wood* had read *Green Tree Financial Co. v. Bazzle*, a 2003 U.S. Supreme Court case, to require this issue to be submitted to the arbitrator. (U.S. Supreme Court cases were controlling here because the Federal Arbitration Act applied to this arbitration agreement.) But in later cases, the U.S. Supreme Court clarified

that *Bazzle* left the question open. Most courts to consider the issue after this clarification determined that unless the arbitration agreement contains “clear and unmistakable” language delegating the issue to the arbitrator, the question of class arbitrability goes to the court.

The Court in *Robinson* overruled *Wood* and held that class arbitrability is a question for the court *unless* it had been delegated to the arbitrator by agreement. Because the agreement between the Robinsons and HOME made no mention of delegating arbitrability issues to the arbitrator, the trial court correctly determined that it had to decide whether the arbitration could proceed on a class basis.

The Texas Supreme Court then turned to whether the trial court properly decided that arbitration could not proceed on a class basis. The U.S. Supreme Court has determined that an arbitration cannot proceed on a class basis unless the parties’ contract demonstrates that they agreed to do so. An agreement that is silent or ambiguous on class arbitration does not allow a court to compel arbitration on a class basis. This is because the significant differences between individual and class arbitration cast doubt on an agreement to arbitrate on a class basis. Therefore, for a court to order class arbitration, an agreement must expressly reference class arbitration. In *Robinson*, the agreement was silent on class arbitration, so the Texas Supreme Court concluded the parties had not agreed to arbitrate on a class basis.

Finding no help under their agreement, the Robinsons argued HOME’s conduct demonstrated its consent to class arbitration. The Robinsons focused on HOME’s decision to first object to class arbitration in the arbitration, only to re-raise the objections in the trial court after the arbitrator ruled against it. The Supreme Court disagreed, explaining that HOME consistently objected to both arbitration on a class basis and the arbitrator’s power to determine the issue. The Court emphasized that the Robinsons tried to add their class claims at the “eleventh hour,” so objecting to the arbitrator first was reasonable. A different result might obtain if it were feasible to present objections to class arbitration to the court in the first instance but a party failed to do so.