By Stephen Gibson[1]

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***Arbitrability of Class Actions*: Overruling *In re Wood*, unless the parties clearly and unmistakably agree otherwise, it is for the courts and not the arbitrator to decide whether a bilateral arbitration agreement also requires arbitration of class-action claims.**

In 2004, the Texas Supreme Court in *In re Wood* held that arbitrators were authorized to decide arbitrability of class action claims if the parties to a two-party arbitration clause broadly agreed to submit "all disputes arising out of the agreement" to the arbitrator. In other words, without some proviso expressing otherwise, broad but non-specific "all disputes" language in a two-party arbitration agreement created a presumption the parties also agreed to allow the *arbitrator* to decide whether class claims should be resolved in arbitration. In *Robinson v. Home Owners Management Enterprises, Inc.*, the court overruled *In re Wood*.

In a unanimous opinion by Justice Guzman, the court ruled that agreements must be "clear and unmistakable" to delegate to the arbitrator the ability to decide the "gateway" question of arbitrability of class actions under the Federal Arbitration Act. Agreements that merely contain broad general language that does not explicitly delegate to the arbitrator class-action arbitrability is ineffective to allow arbitrators to decide the issue. Instead, arbitrability must be decided by the courts as part of its role of enforcing the agreement of the parties about the authority of the arbitrator to decide their disputes.

As a general rule, courts decide validity and scope of an arbitration agreement unless the parties permitted the arbitrator to decide these issues. Whether the parties effectively delegated that question to the arbitrator "is an issue for *judicial* determination [of the meaning of their agreement] unless the[y do so] *clearly and unmistakably*…." In *Robinson*, the court applied this reasoning to hold that unless the agreement met this test, it should and *would* not be presumed that "all disputes" or similarly broad categories would include class-action claims for two reasons.

Generalities in a two-party agreement is not sufficient to compel the parties to permit an arbitrator to decide issues they reasonably expected a judge to resolve. First, application to class-actions claims "implicates whether a presently binding and enforceable agreement to arbitrate exists [for] class member." Second, class-action arbitration is so fundamentally different from bilateral arbitration that it implicates the type of controversy the parties agreed to submit to arbitration." The nature of resolving class claims is so contrary to the methodology and alacrity of arbitrating bilateral disputes that the court deemed it impermissible to "assume that the parties would want [class-action] … questions to be arbitrated" and too hard to believe that defendants would "bet the company with no effective means of review."[2]

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[1] By focusing on the defendants' concerns about the lack of review for class-based claims, did the court reveal an unstated belief that class-based claims may not be equally important to the claimants? The entire rationale of class-based claims is to provide a remedy when litigation is otherwise economically inefficient for the individual claimant. That, however, does not transform the need to make a defendant answer for its liabilities of lesser gravity than the ramifications for a defendant when such is necessary to achieve justice.

Thus, unless the contract clearly says otherwise, arbitrability of class claims is a question for the court to decide, not the arbitrator. A contract that merely contains broad language that does not specifically address class arbitrability is essentially silent on the issue. Courts cannot infer consent from silence or ambiguity. Assent must be clear and unmistakable. Accordingly, the presumption to be applied is that the parties did not delegate to the arbitrator the decision whether the agreement includes class-action claims unless it so says.

The opinion goes to some length to explain the contrary result in the now-overruled *Wood* decision. The opinion explains that when *Wood* was decided, there was a decision from the U.S. Supreme suggesting that under the FAA broadly worded arbitration agreements should be interpreted in favor of arbitrability. After *Wood* was decided, the Supreme Court clarified that the whether such language was sufficient to require arbitration of class claims had not been resolved by the earlier decision. Thereafter, the Circuit Courts overwhelmingly concluded that broad language standing alone was not sufficient under the FAA to require what was, effectively, a presumption that phrases like "all disputes" were intended to delegate to the arbitrator the decision over whether the parties had agreed to arbitrate class claims. *Robinson* brings Texas jurisprudence in line with these decisions. It presumably – there's that word again – applies to the Texas analog of the FAA.

***Sanctions*: A trial court abuses its discretion when it orders the payment of monetary sanctions before the sanctioned party has the opportunity to perfect an appeal and suspend enforcement of the sanctions order if payment of the sanction could effectively foreclose access to the courts.**

Nearly thirty years ago, *Braden v. Downey* held payment of monetary sanctions must be deferred until an appealable judgment is signed if (1) the sanctioned party contends immediate payment would impair access to the courts and (2) the trial court does not promptly hold a hearing and make express written findings to the contrary. *In re Stephen Casey* was a mandamus proceeding to direct a trial court to vacate a monetary sanctions order entered against an attorney-litigant without satisfying the *Braden* test.

In *Casey*, the sanctioned litigant predicated his mandamus petition on the denial of a motion to sever the sanctions decree from the judgment on the merits so that he could obtain immediate appellate review. In a sworn declaration, Casey claimed that deferring payment was necessary to ensure both he and his clients are able to access the courts to continue the litigation and to seek meaningful appellate review of the sanctions order. This claim was supported by specific evidence of inability to pay due to the closure of his law office and lack of current income.

In a *per curiam* opinion, the Supreme Court of Texas ruled that appellate review was adequate to review the propriety of the sanctions award, but it directed the trial court to modify the sanctions order to defer payment until final judgment is rendered, allowing Casey "an opportunity to appeal *before* such sanctions must be paid." (Emphasis added). The opinion explained that the general rule is that monetary sanctions can be addressed on appeal, but if the "magnitude of monetary sanctions made payable before rendition of an appealable order could have a 'preclusive effect on … access to the courts'" it 'should not ordinarily be used to dispose of litigation.'"

In deciding whether mandamus relief is appropriate, the court balances the trial court's discretion to impose monetary sanctions against ensuring that requiring prepayment does not "significantly impair 'a party's willingness or ability to continue the litigation." Casey showed his inability to pay the sanctions and that prepayment would imperil his ability to represent his interests, could cause immediate and palpable harm to his claims, and could disrupt proceedings in the trial court with respect to his clients.

The opinion was carefully limited, however. It reserved judgment on whether it would apply when the sanctions were directed against an attorney that was not also a litigant.