

WHEN IS TRUMP TRUMPED?

THE McCARRAN-FERGUSON ACT AND THE GEORGIA AND U.S. ARBITRATION LAWS

Under Section 9-9-2(c)(3) of the Georgia Arbitration Code (OCGA 9-9-1 et seq.), covenants to arbitrate contained in insurance contracts are not enforceable under the enforcement provisions of the Georgia Arbitration Code.

The Georgia Court of Appeals in the case of Continental Insurance Co. v. Equity Residential Properties, decided May 20, 2002, had the opportunity to consider the impact of Federal law on this carve out from enforceability.

Continental's insured sued Continental alleging that Continental had breached the insurance policy issued to the insured. Because the policy contained a covenant providing that arbitration was the exclusive means of resolving disputes, Continental asked the trial court to stay the suit and compel arbitration.

The Georgia Court of Appeals, in affirming the trial court's denial of Continental's motions, first determined that the Georgia Arbitration Code governs over the policy's choice of Illinois law because the Georgia Arbitration Code is one of procedure.

The Court then considered the Federal Arbitration Act's impact on this carve out. In essence, the Federal Arbitration Act preempts all state laws that invalidate arbitration agreements in regard to matters involving interstate commerce. The Court held that

although the matter did involve interstate commerce and although the Federal Arbitration Act would ordinarily preempt Georgia's carve outs from enforceability of certain kinds of covenants to arbitrate, it did not do so in the case of the insurance contract carve out because of the McCarran-Ferguson Act which preempts all "Acts of Congress" that would impair any law enacted by any state for the purpose of regulating the insurance business except those Acts of Congress that specifically relate to the insurance business.

After making this analysis of the law, the Georgia Court of Appeals ruled that Georgia's carve out from the enforcement provisions of the Georgia Arbitration Code of covenants to arbitrate contained in insurance policies is a law enacted for the purpose of regulating insurance within the meaning of the McCarran-Ferguson Act. Therefore the arbitration provision of Continental's insurance policy was made unenforceable by the Georgia Arbitration Code. In other words, the contractual provision for arbitration was trumped by the Georgia Arbitration Code, which in turn was trumped by the Federal Arbitration Act which in turn was trumped by the McCarran-Ferguson Act.

Although the court's analysis is not at all surprising, it is, however, a lesson for young lawyers (and perhaps for older lawyers as well) and that is that one should not stop with the clear answer one finds in the contract, nor with the new clear answer next found in the Georgia Code, nor with the new, new clear answer next found in a Federal statute until one is satisfied that there just cannot be any other new answers.

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