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LEGAL ALERT

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Georgia Supreme Court Rejects Right to Appeal Denial of Arbitration Motion

The Georgia Supreme Court held last week that an order denying a motion to compel arbitration is not directly appealable by a party seeking to enforce an arbitration provision. *American General Financial Services v. Jape*, 2012 WL 4475691 (Ga. Sup. Ct. Oct. 1, 2012). With the *Jape* decision, Georgia joins a growing number of states—including Arizona, Louisiana, Maryland, Massachusetts, and Oregon—that have ruled that the direct appeal provision of the Federal Arbitration Act (FAA), 9 U.S.C. § 16(a)(1)(B), does not preempt state procedural rules restricting interlocutory appeals. Click here for the opinion.

In these states, parties therefore face the prospect of litigating their claims in a judicial forum, through trial and final judgment, and only then having a right to appeal an order denying a motion to compel arbitration. Recognizing the potential for delay and inefficiency that its decision creates, the *Jape* court urged Georgia trial courts to certify for immediate review orders denying a motion to compel arbitration. This encouragement, however, may be of little help to parties in forums biased against arbitration.

In *Jape*, American General Financial Services filed suit to recover money due under a loan agreement. The borrower counterclaimed for breach of contract, and American General moved to compel arbitration of only the borrower's counterclaim. The trial court denied the motion to compel. Pursuant to Georgia's interlocutory appeal statute, O.C.G.A. § 5-6-34(b), American General requested certification by the trial court of an immediate appeal, which the trial court also denied. On direct appeal to the Georgia Court of Appeals, the Court of Appeals held that it was without jurisdiction to hear the appeal, given American General's failure to receive certification from the trial court pursuant to the interlocutory appeal statute.

The Georgia Supreme Court granted American General's petition for certiorari. Justice Hugh Thompson's opinion for the Court held that the FAA's direct appeal provision does not preempt Georgia's interlocutory appeal statute. Georgia's interlocutory appeal statute does not "stand[] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the FAA. *Jape*, 2012 WL 4475691, at *2 (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). *Jape* distinguished between state laws that either altogether prohibit arbitration of certain kinds of cases (*e.g.*, class actions) or require some form of judicial resolution prior to arbitration (*e.g.*, wage disputes), on the one hand, and state *procedural* rules that apply with equal force to arbitration and non-arbitration proceedings alike, taking a neutral stance toward the purposes and objectives of the FAA, on the other hand. In making this distinction, the Georgia Supreme Court relied on dicta from *Volt Information Sciences v. Board of Trustees of Leland Stanford Junior University*, in which the U.S. Supreme Court noted that its prior FAA preemption decisions did not involve the *procedural* provisions of the FAA—provisions that, on their face, apply only to proceedings filed in federal court. 489 U.S. 468, 477 n.6 (1989); *see also* 9 U.S.C. § 3 (providing a right to stay proceedings "brought in any of the courts of the United States"). *Jape* also cited an earlier Georgia Court of Appeals decision on the preemption question, *American General Financial Services v. Vereen*, which held that, "prior to final judgment," an order denying a motion to compel arbitration is not appealable. 639 S.E.2d 598, 600 (Ga. Ct. App. 2006). *Vereen* had found that the FAA's direct appeal provision did not preempt Georgia's interlocutory appeal statute because, while denial of an interlocutory appeal may cause some delay, "such delay is not tantamount to the failure to enforce valid arbitration agreements contrary to congressional objectives." *Id.* Decisions from other states, the Supreme Court also observed, agree with this view. *S. Cal. Edison Co. v. Peabody W. Coal Co.*, 977

P.2d 769 (Ariz. 1999); *Saavedra v. Dealmaker Dev.*, 8 So. 3d 758 (La. Ct. App. 2009); *Bush v. Paragon Prop.*, 997 P.2d 882 (Or. Ct. App. 2000); *Wells v. Chevy Chase Bank*, 768 A.2d 620 (Md. Ct. App. 2001).

Because the interlocutory appeal statute applies equally to *all* non-final orders, *i.e.*, "it does not discriminate between appeals involving arbitration agreements and those involving the enforcement of any other agreement," *Jape* found no conflict between the statute and the FAA policy of enforcing arbitration agreements. *Jape*, 2012 WL 4475691, at *3. The Court did recognize the potential for "unnecessary expense and delay" when a trial court denies certification of an interlocutory appeal of a motion to compel arbitration. *Id.* at *5 n.3. To mitigate this potential for delay, the Court urged trial courts to certify such appeals, "except in the clearest of cases." *Id.*

Justice David Nahmias, with whom Justice Keith Blackwell joined, wrote separately and would have resolved the issue based on the *jurisdictional* nature of the interlocutory appeal statute. Without compliance with O.C.G.A. § 5-6-34(b), the Georgia Court of Appeals is without jurisdiction to hear an appeal of an order denying a motion to compel arbitration. Forcing Georgia courts to hear such appeals, through preemption by the FAA, thus raises federalism questions "significant enough to counsel a finding that FAA § 16 was not intended to trump O.C.G.A. § 5-6-34(b)." *Id.* at *6 (Nahmias, J., concurring). Such concerns are heightened when, as with the interlocutory appeal statute, the state law is neutral toward the objectives expressed in the federal law.

Justice Nahmias also predicted greater availability of interlocutory appeals given the Court's "firm direction" to trial courts to certify orders denying motions to compel. After *Jape*, however, the only way to ensure the right to a direct appeal is to be in federal district court. The case underscores the risks facing lenders who file collection actions in state courts while hoping to enforce arbitration provisions. One way to address these risks would be for the Georgia General Assembly to enact a right of direct appeal.

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