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Supreme Court No. 80480-0
Consolidated with 80584-9 and 81083-4

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit
Corporation,

Respondent

v.

SATOMI, LLC, a Washington Limited Liability Company,

Petitioner.

ANSWER TO BRIEF OF AMICUS
PROFESSIONAL WARRANTY CORPORATION

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I. ISSUES ADDRESSED BY AMICUS PWC

Amicus Professional Warranty Corporation (“PWC”) raises three issues, two of which are central to this appeal and one of which is an entirely new issue raised for the first time in PWC’s brief and which applies only to the Pier at Leschi case: whether the Association is bound by a choice of law clause referencing the Federal Arbitration Act (“FAA”). The Pier at Leschi Condominium Owners Association and Satomi Owners Associations (“Associations”) object to hearing this issue, which is raised for the first time only weeks prior to oral argument.

The issues raised relating to the interstate commerce connections to the Home Buyer’s Limited Warranty booklet (“Limited Warranty Booklet”) and regarding the policy in favor of arbitration are primarily regurgitations of prior arguments raised by Appellants and answered by the Associations. Thus, they will be addressed only briefly.

II. ARGUMENT

A. The Contract in Which the Arbitration Clause Appears Must Implicate Interstate Commerce.

Much of PWC’s argument regarding interstate commerce merely repeats that of Appellant and other amicus, but PWC does cite a number of cases for the proposition that the arbitration clause in a competitor’s warranty program was enforceable “*because* the warranties were sold in interstate commerce, the parties were from different states, and/or the home was located in a state other than the domiciliary state of the

warranty company.”¹ Yet none of the cases cited support this broad statement.

*Rainwater*² merely held that in a contract between the parties, reference to the rules and regulations of the American Arbitration Association meant that those rules should apply. The case did not analyze whether the arbitration clause was enforceable at all. The only issue was whether the arbitration was supposed to be binding. This is not a choice of law or an FAA issue.

In *McKee*,³ the issue was whether, in a lawsuit between a homeowner and the warranty corporation, the arbitration clause was binding or not. As in *Rainwater*, the court held that it was binding because of the reference to the rules of the American Arbitration Association. *Neither of these cases analyzed the whether the FAA applied based on the interstate nature of the contracts.*

In *Kelley*,⁴ while the court cited the fact that the warranty corporation (“BSS”) was out of state, it was far more than a mere administrator of a program between in-state parties. As the court pointed out, “[t]he BSS warranty was an agreement between the Kelleys and BSS, and BSS is an out-of-state business.”⁵ In fact, the plaintiffs in that case had *purchased* the warranty directly from the warranty corporation, a

¹ Brief of Amicus Professional Warranty Corporation at p. 3 (emphasis added).

² *Rainwater v National Home Ins. Co.*, 944 F.2d 190 (4th Cir. 1991).

³ *McKee v. Home Buyers Warranty Corp. II*, 45 F. 3d 981 (5th Cir. 1995).

⁴ *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 550 N.W.2d 640 (1996).

⁵ *Id.* at 372.

transaction which evidenced interstate commerce. These are far different from the facts here where the agreement, if any, is between the homeowner and the “builder,” Pier at Leschi, LLC.⁶ PWC is not a party to the Limited Warranty. In fact, PWC specifically disclaims that it has any obligations under the Limited Warranty Booklet:

PWC’s sole responsibility is to administer this LIMITED WARRANTY on OUR behalf and as such PWC assumes no other liabilities in connection with this LIMITED WARRANTY. Under no condition or circumstance is PWC responsible for fulfilling any of OUR obligations under this LIMITED WARRANTY.

CP 394. The *Kelley* case did not depend upon the location of any third-party administrator as PWC argues here.

In fact, no case has held that the mere existence of an out-of-state third party warranty administrator brings a contract within the scope of the FAA when it would otherwise not be. Thus, the mere fact that PWC is a Virginia corporation should not convert an otherwise wholly local transaction into one covered by the FAA.

B. The Choice of Law Issue, Raised for the First Time on Appeal by Amicus, Cannot be Heard by this Court.

The Pier at Leschi matter has been on appeal since April 10, 2007. CP 623-24. This Court accepted review of the matter, consolidating it with the *Satomi* case on January 17, 2008. Yet now, less than 30 days prior to oral argument, PWC, represented by the same firm that represents

⁶ CP 387.

the Appellant Satomi, LLC in this matter, raises an issue never before raised or briefed by the parties in either this or the consolidated appeal: whether the parties are bound by the “choice of law” clause in the 12-page Limited Warranty Booklet. CP 387-98. It is a well-established rule that new issues may not be raised for the first time on appeal by amici curiae. *Harmon v. Department of Social and Health Services, State of Washington*, 134 Wn.2d 523, 951 P.2d 770 (1998); *Long v. Odell*, 60 Wn.2d 151, 154, 372 P.2d 548 (1962); *State v. Clark*, 124 Wn.2d 90, 101, 875 P.2d 613 (1994), *overruled on other grounds, State v. Catlett*, 133 Wn.2d 355, 361, 945 P.2d 700 (1997); *State v. Gonzalez*, 110 Wn.2d 738, 752 n. 2, 757 P.2d 925 (1988); *Coburn v. Seda*, 101 Wn.2d 270, 279, 677 P.2d 173 (1984); *Schuster v. Schuster*, 90 Wn.2d 626, 629, 585 P.2d 130 (1978).

There are numerous practical reasons why new issues cannot be raised upon appeal. One of the primary reasons is that there may be additional defenses that cannot be fairly argued on appeal due to the narrow record. In fact, in the present case, this issue cannot be fully adjudicated on appeal because the issue is complex and pulls into issues not decided by the superior courts in the consolidated cases, such as whether the Limited Warranty Booklet is a contract between the Association or its members and the Pier at Leschi, LLC, whether terms of the Limited Warranty Booklet apply to all disputes, and whether the Booklet’s terms are applicable or unconscionable.

A court is required to apply state law principles of contract interpretation even where an agreement may be within the scope of the FAA. *Powell v. Sphere Drake Ins. P.L.C.*, 97 Wn. App. 890, 892, 988 P.2d 12 (1999). The FAA specifically provides that arbitration agreements are to be enforced “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. In neither the *Satomi* nor the *Pier at Leschi* matter has any court addressed the issue of contractual defenses to the arbitration agreement or the document in which it is contained. Allowing review of the choice of law issue is completely inappropriate because it expands review far beyond the narrow issues appealed and would require this Court to exercise original jurisdiction over numerous state-law based contractual defenses.

Because the issue of whether the choice of law clause was never raised until now, the Association has not had sufficient opportunity to argue the numerous contract-based defenses it may have. To demonstrate the complexity of the issues, if and when the issue is properly raised, the Association would argue, *inter alia*: 1) the Limited Warranty Booklet is actually not a contract and does not apply to the present dispute; 2) the choice of law provision conflicts with other language in the Limited Warranty Booklet; and 3) the choice of law provision, unlike the arbitration provision, is an impermissible waiver of rights under the Washington Condominium Act that is not preempted by the FAA.

The Limited Warranty Booklet in the Pier at Leschi matter⁷ is not a contract between the Association or any of its members and Pier at Leschi, LLC because it was contained within the purchase and sale agreements. Like the arbitration provision itself, the choice of law provision appears nowhere in the Pier at Leschi purchase and sale agreements or in any other contract. It only appears in the PWC Limited Warranty Booklet, which was an attachment to the public offering statement for the Pier at Leschi, not a separate contract. CP 381-98. In fact, ether drafter of the Limited Warranty Booklet went to great lengths to ensure that the it would be treated separately from the sales contracts:

A. Separation of This LIMITED WARRANTY
From the Contract Of Sale.

This LIMITED WARRANTY is separate and independent of the contract between YOU and US for the construction and/or sale of YOUR HOME. The provisions of this Limited Warranty shall in no way be restricted or expanded by anything contained in the construction and/or sales contract between YOU and US.

CP 394. For whatever reason, when the document was drafted, the clear and express intent was that it should be separate from the purchase and sale agreement and be interpreted as such. This is consistent with the fact that arbitration is only referenced, not repeated, in the other sales documents. Thus, the Limited Warranty Booklet should not be viewed as

⁷ It is important to note at the outset that, as noted by amicus, only the Pier at Leschi documents contain a choice of law provision. The Satomi documents do not contain such a provision. *Brief of Amicus PWC* at p. 7.

an addendum dependent upon the other sales documents, but as a stand-alone document. The Association did not agree to be bound by this Limited Warranty.⁸ Nor is there any evidence in the record that any individual homeowners or Pier at Leschi, LLC signed the Booklet or agreed to be bound by its terms.

Second, if the choice of law issue had been properly raised before a court of original jurisdiction, the Association would have argued that of the choice of law clause is unenforceable because it conflicts with other language in the Limited Warranty Booklet. The very next sentence after the choice of law section cited by amicus states: “The award of the arbitrator shall be final and binding and may be entered as a judgment in any court of competent jurisdiction.” CP 393. Yet the procedural provisions of the FAA allow review of an arbitrator’s award for such things as “evident partiality” of the arbitrators and order a new hearing. 9 U.S.C. § 10. The FAA also contemplates revision of arbitration awards “where the arbitrators have awarded upon a matter not submitted to them” and allows reformation of arbitration awards. 9 U.S.C. § 11. Importantly, the FAA also allows for appeals from orders confirming or denying arbitration awards. 9 U.S.C. § 16. Thus, the clauses simply conflict. It is far beyond the scope of this appeal to consider which, if any, of the Limited Warranty Booklet’s terms are binding or unenforceable.

⁸ See The Pier at Leschi Condominium Owners Association’s Brief of Respondent, pp. 8-12.

Third, this new issue raises the question of whether the choice of law provision (if contained within a contract) is an impermissible waiver of rights under the Washington Condominium Act ("Condo Act"). As a consumer-protective statute, the Condo Act provides that its terms may not be waived or contracted away: "Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived." RCW 64.34.030. The Condo Act currently entitles associations to either judicial enforcement or arbitration under RCW 64.55. RCW 64.34.100(2). A choice of law provision that asserts that the FAA applies is clearly a waiver of the right to judicial enforcement or arbitration under RCW 64.55. Thus, it constitutes a waiver of rights under the Condo Act and is therefore invalid. While the FAA may apply to preempt the statute's provision for judicial enforcement to enforce an arbitration clause, that preemption does not extend to a choice of law provision.

In addition to the three issues briefly raised above, numerous other potential issues are raised with regard to the 11th hour introduction of this contractual interpretation issue. Because new issues cannot be raised on appeal by amicus, the Court should decline to hear this issue and reserve contractual interpretation and defense issue to the courts of original jurisdiction.

C. The State Arbitration Scheme for Construction Defect Cases Satisfies PWC's Policy Concerns.

In 2005, the Washington legislature adopted Chapter 64.55 RCW. The statute was the result of a collaborative effort between construction defect attorneys representing both homeowners and developers and other industry personnel appointed to a legislative task force to study the problem of construction defects in Washington and suggest revisions to existing law. The provisions of Chapter 64.55 RCW, which include mandatory discovery deadlines, mediation *and arbitration*, were carefully crafted to represent a balance between the interests of condominium owners and developers. The chapter applies only to construction defect actions in Washington.

Because the arbitration scheme was designed especially for construction defect actions, the Condo Act was revised contemporaneously with the adoption of RCW 64.55 to provide that the Condo Acts terms were subject either to judicial enforcement or the arbitration scheme provided in RCW 64.55. *See* RCW 64.34.110(2). The legislature was careful to ensure, however, that the right to judicial review remained so that not just any arbitration scheme would apply:

Except as otherwise provided in RCW 64.55.100 through 64.55.160 or chapter 64.35 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding. The arbitration proceedings provided for in RCW 64.55.100 through 64.55.160 shall be considered judicial proceedings for the purposes of this chapter.

RCW 64.34.100(2).

PWC restates the anachronistic misconception that arbitration is faster and cheaper than litigation. Regardless of the truth of such statements, the existence of a state arbitration scheme that has been tailored specifically to construction defect actions in Washington and that strikes a tenuous balance between homeowner and builder interests responds directly to such policy concerns.

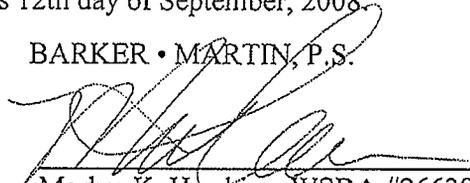
In fact, enforcing arbitration schemes like those found in the PWC Limited Warranty Booklet does extensive harm to the policies it purports to further. A quick glance at the Booklet shows that its intent is not to provide efficient and inexpensive resolution of defects, but to narrow the definition of defect and limit liability for its customers, the developers and builders and to cause greater expense to homeowners attempting to assert their rights. In sum, the policy considerations, to the extent that they are even applicable today, are adequately addressed by the state's construction defect arbitration scheme contained in RCW 64.55. Enforcing each individual builder's arbitration scheme does more harm to those considerations than good.

III. CONCLUSION

For the foregoing reasons, the Associations request that the Court decline to hear the issue of the applicability and enforceability of the choice of law clause contained in the Limited Warranty Booklet. The Associations further request that the Court find that the policies cited by amicus are better furthered by the arbitration scheme crafted specifically for Washington construction defect cases.

Respectfully submitted this 12th day of September, 2008.

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I, Ian McDonald, hereby certify and declare:

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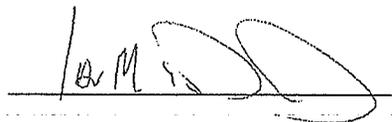
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Signed this 12th day of September, 2008 in Seattle, Washington



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