

No. 82311-1

SUPREME COURT OF THE STATE OF WASHINGTON

[CT APP. DOCKET No. 60115-6-I]

MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INC. and KIMBERLY ANNE
BLINDHEIM,

Petitioners.

**THE SECURITIES INDUSTRY AND FINANCIAL MARKETS
ASSOCIATION'S AMICUS CURIAE SUPPLEMENTAL BRIEF**

Ira D. Hammerman, Esq.
Kevin M. Carroll, Esq.
SECURITIES INDUSTRY AND
FINANCIAL MARKETS
ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005
(202) 962-7382

David Paltzik, Esq.
WSBA No. 25468
GREENBERG TRAUERIG, P.A.
2375 E. Camelback Road, Suite 700
Phoenix, AZ 85016
(602) 445-8263

Bradford D. Kaufman, Esq.
Jason M. Fedo, Esq.
GREENBERG TRAUERIG, P.A.
777 S. Flagler Drive, Suite 300 East
West Palm Beach, FL 33401
(561) 650-7900

FILED
SUPREME COURT
STATE OF WASHINGTON
2010 JAN -7 P 2:50
BY RONALD R. [unclear]

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	ii
I. INTEREST OF AMICUS CURIAE.....	1
II. ASSIGNMENTS OF ERROR.....	2
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	7
A. STRONG PUBLIC POLICY SUPPORTS LIMITED GROUNDS TO VACATE ARBITRATION AWARDS AND A CLARIFICATION THAT “ERROR OF LAW” IS NO LONGER A BASIS TO VACATE AN ARBITRATION AWARD IN WASHINGTON	7
B. STRONG PUBLIC POLICY SUPPORTS THE APPLICATION OF POTENTIALLY DISPOSITIVE STATUTES OF LIMITATION IN ARBITRATION.....	13
V. CONCLUSION	20

TABLE OF AUTHORITIES

	<u>Page</u>
Federal Cases	
<i>Gilmer v. Interstate/Johnson Lane Corp.</i> , 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991).....	6
<i>Hall Street Associates, L.L.C. v. Mattel, Inc.</i> , 552 U.S. 576, 128 S. Ct. 1396 (2008).....	4
<i>Howsam v. Dean Witter Reynolds, Inc.</i> , 537 U.S. 79, 85 (2002).....	19
<i>Knight v. Merrill, Pierce, Fenner & Smith</i> , 2009 WL 3368439, * (9 th Cir. 2009)	16
<i>McKee v. AT&T Corp.</i> , 191 P.3d 845, 2008 LEXIS 816, *23-24 (2008).....	15
<i>Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.</i> , 473 U.S. 614 (1985).....	6
<i>United States v. Kubrick</i> , 444 U.S. 111, 117 (1979).....	15
State Cases	
<i>Boyd v. Davis</i> , 127 Wn. 2d 256, 897 P.2d 1239 (1995).....	3, 7
<i>City of Auburn v. King County</i> , 114 Wn.2d 447, 788 P.2d 534 (1990).....	4
<i>Douchette v. Bethell Sch. Dist. No. 403</i> , 117 Wn.2d 805, 813, 818 P.2d 1362 (1991).....	15
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 892, 16 P.3d 617 (2001).....	8
<i>Int'l Assoc. of Fire Fighters, Local 46 v. City of Everett</i> 146 Wn.2d 29, 42 P.3d 1265 (2002).....	4

<i>Malted Mousse, Inc. v. Steinmetz</i> 150 Wn.2d 518, 79 P.3d 1154 (1995).....	4
<i>Stikes Woods Neighborhood Assoc. v. City of Lacey,</i> 124 Wn.2d 459, 466, 880 P.2d 25 (1994).....	14
<i>Thorgaard Plumbing & Heating Co. v. King County,</i> 71 Wn.2d 126, 426 P.2d 828 (1967).....	4

Federal Statutes

<i>Federal Arbitration Act, 9 U.S.C. § 1 et seq.</i>	8
<i>Securities Exchange Act of 1934, 15 U.S.C. § 78a et seq.</i>	1

State Statutes

<i>RCW 4.16.130</i>	14
<i>RCW 7.04.160-170</i>	4, 7
<i>RCW 7.04A.230</i>	10
<i>RCW 70.05.145</i>	14

Rules

<i>FINRA Rule 10304</i>	16, 19
<i>FINRA Rule 12206</i>	19
<i>FINRA Rule 12504</i>	18
<i>NASD Rule 10304</i>	18, 19

I. INTEREST OF AMICUS CURIAE

The Securities Industry and Financial Markets Association (“SIFMA”) brings together the shared interests of more than 600 securities firms, banks and asset managers locally and globally. Its associated firm, the Asia Securities Industry and Financial Markets Association, is based in Hong Kong. SIFMA’s mission is to champion policies and practices that benefit investors and issuers, expand and perfect global capital markets, and foster the development of new products and services. Fundamental to achieving this mission is earning, inspiring and upholding the public’s trust in the industry and the markets.

Although the case before the Court involves only a single arbitration proceeding, the Court of Appeals’ decision raises issues of national importance to the securities industry and to all participants in the arbitration process (whether or not related to the securities industry).¹ The National Association of Securities Dealers, Inc. or “NASD” (now known as the Financial Industry Regulatory Authority or “FINRA” after a 2007 merger) has enacted rules that require its member firms to arbitrate

¹ The highly regulated securities industry has established a national securities arbitration system which operates under the framework established by the Securities Exchange Act of 1934, 15 U.S.C. § 78a *et seq.* (the “Exchange Act”). The Exchange Act authorizes self-regulatory organizations (“SROs”) such as NASD Regulation, which administered the arbitration proceeding at issue in this dispute, to promulgate rules for arbitration subject to approval by the Securities Exchange Commission.

disputes at the customer's request. As a result, arbitration is the primary dispute resolution mechanism in the industry. Over 62,800 separate arbitrations were filed with FINRA and its predecessor NASD since 2000. See *FINRA Summary Arbitration Statistics November 2009*, available at <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/> (statistics through November 2009). For over 30 years, arbitration has delivered a timely, cost-effective and fair means of dispute resolution in the securities industry. See *SIFMA White Paper on Arbitration in the Securities Industry* (October 2007), available at <http://www.sifma.org/regulatory/pdf/arbitration-white-paper.pdf>.

The decision below, if left to stand, could materially impact arbitration on a national level by: (i) threatening the efficiency and finality of arbitration, (ii) permitting judicial reversal of arbitration awards for any legal error (even in cases, such as this one, that appear to be a case of first impression), and (iii) changing the fundamental rights of parties in arbitration by limiting arbitrators' ability to apply important statutes of limitation defenses to stale claims.

Accordingly, SIFMA has a significant interest in this action.

II. ASSIGNMENTS OF ERROR

1. The court below erred by applying "legal error on the face of the award" as a non-statutory ground for vacatur under Washington law.

2. The court below erred by creating an absolute bar prohibiting all arbitrators from applying any statute of limitations in arbitration.

III. STATEMENT OF THE CASE

By recognizing and applying the “legal error” standard and permitting parties to seek de novo judicial review of arbitrators’ legal determinations, the Court of Appeals’ ruling threatens to dramatically increase the prevalence of post-award litigation involving arbitration awards. Such a result would compromise the important goals of expediency and finality in the arbitration process. *Boyd v. Davis*, 127 Wn. 2d 256, 262, 897 P.2d 1239 (1995). Strong public policy dictates that arbitration be recognized as a substitute for (rather than a mere prelude to) court litigation.

The Court of Appeals decision is also problematic in that it applied this “legal error” standard to a case involving, at best, disputable legal issues (and by no measure the kind of obvious error that would require judicial intervention). Specifically, the Court of Appeals was forced to creatively interpret and distinguish two Washington Supreme Court decisions in order to support its holding that the arbitrators had committed an error of law.

First, the court applied the non-statutory “legal error” standard for vacatur despite the unanimous Supreme Court’s express guidance in *Malted Mousse, Inc. v. Steinmetz*, which provided that “[w]hen reviewing an arbitrator’s decision, the court’s review is limited to the grounds provided for in RCW 7.04.160-.170....” 150 Wn.2d 518, 526-27, 79 P.3d 1154 (1995) (“*Malted Mousse*”). The narrow scope of review addressed by *Malted Mousse* is entirely in line with a national movement to eliminate antiquated non-statutory bases for vacatur that have no support in current statutory scheme. See, e.g., *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008).

Second, the Court of Appeals held that the arbitrators made a clear error of law by applying the statutes of limitations in arbitration because such a proceeding is not an “action” as contemplated by the statutes. This portion of the court’s holding conflicts with the Supreme Court’s decision in *Int’l Assoc. of Fire Fighters, Local 46 v. City of Everett*, which held that “whether an arbitration is deemed a judicial ‘action’ depends on the legal context in which the question arises.” 146 Wn.2d 29, 42 P.3d 1265 (2002) (“*Fire Fighters*”).² There is no rational basis under *Fire Fighters* -- which

² In reaching its conclusion, the Court of Appeals relied on two pre-*Fire Fighters* decisions, *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 426 P.2d 828 (1967) (“*Thorgaard*”) and *City of Auburn v. King County*, 114 Wn.2d 447, 788 P.2d 534 (1990) (“*Auburn*”), for the proposition that statutes applying to “actions” cannot apply to

set forth a dynamic test that depends on a specific legal context -- to support the Court of Appeals' rigid *per se* rule precluding the application of statutes of limitation in arbitration (and overturning any such application as an error of law).

The Court of Appeals decision not only conflicted with recent decisions of the Supreme Court, but it also could result in highly undesirable consequences that undermine the advantages of arbitration as a dispute resolution mechanism. If left to stand, the Court of Appeals decision could open the door to dramatically increased post-award court litigation (and forum shopping in light of Washington's highly divergent view on the scope of review).

Finally, the Court of Appeals' holding improperly changes the fundamental rights of those who arbitrate. Parties such as the Brooms and Morgan Stanley agreed to arbitrate with an expectation that all of their claims and defenses could be adjudicated by the arbitrators. Although the Brooms' Brief has made several attempts to argue (wrongly) that the FINRA rules do not support statute of limitations defenses (they certainly do), the FINRA rules -- which were accepted by both the Brooms and Morgan Stanley in their agreement to arbitrate -- make express references

arbitration proceedings even though the subsequently decided *Fire Fighters* limited cases like *Thorgaard* and *Auburn* to their unique facts.

to statutes of limitation, and nothing in those rules prohibits the assertion of limitations defenses.

Courts in Washington and across the country have repeatedly held that arbitrators are capable of applying and deciding the most complex legal claims and defenses. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). The proliferation of arbitration is dependent on the (correct) assumption that a party's substantive rights in arbitration -- including defenses based on statutes of limitation -- are the same as he or she would have in court. The Court of Appeals decision would permit those with undeniably stale claims to avoid any time bar by simply filing in arbitration. There is no legal authority or rationale -- and nothing in the parties' contract or the FINRA Rules -- that could support the loss of such a potentially case-dispositive defense based on the fact that parties have submitted to arbitration.

Simply put, the arbitration process serves a vital function in the American dispute resolution system. That function requires arbitration proceedings to be efficient and awards to be final except in the most extraordinary cases. Moreover, arbitrators should be empowered to hear and decide all substantive issues that parties would have in court. The

Court of Appeals decision threatened these goals by erroneously recognizing “legal error” as a viable non-statutory ground for vacatur and applying that standard to create a *per se* rule that would preclude the application of statutes of limitation in all arbitrations.

IV. ARGUMENT³

A. **STRONG PUBLIC POLICY SUPPORTS LIMITED GROUNDS TO VACATE ARBITRATION AWARDS AND A CLARIFICATION THAT “ERROR OF LAW” IS NO LONGER A BASIS TO VACATE AN ARBITRATION AWARD IN WASHINGTON**

1) **Public Policy and Washington Law Support Very Limited Review of Arbitration Awards**

The Washington Supreme Court has followed a national trend that has limited the grounds to attack arbitration awards. Specifically, in *Malted Mousse* the Court limited the bases for vacatur to those contained within the statutes governing arbitration proceedings:

When reviewing an arbitrator’s decision, the court’s review is limited to the grounds provided for in RCW 7.04.160-.170. See Barnett, 119 Wn.2d at 156. In Boyd v. Davis, 127 Wn.2d 256, 897 P.2d 1239 (1995), we recognized that every case addressing a court’s ability to reverse an arbitrator’s error in law was based on a statute repealed by the current arbitration act, and that a reviewing court is limited to the statutory grounds. Boyd, 127 Wn.2d at 267.

150 Wn.2d at 526-27 (emphasis added).

³ Although SIFMA believes that the decision below conflicts with prior Supreme Court authority, in the interest of space SIFMA has focused its analysis in this Brief primarily the public policy considerations at hand.

The *Malted Mousse* decision is entirely consistent with the United States Supreme Court's most recent decision limiting the review of arbitration awards to those grounds provided by the controlling statutes. See *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396 (2008) ("*Hall Street*") (rejecting vacatur based on "just any legal error" and limiting review to those grounds provided for under the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* (the "FAA") where applicable).

The public policy of Washington strongly favors arbitration as a comparatively quick, efficient, and final means of dispute resolution. See *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001). This policy is consistent with the rulings of courts across the nation, including the Supreme Court of the United States. See, e.g., *Hall Street*, 128 S.Ct. at 1405 (recognizing "a national policy favoring arbitration with just the limited review needed to maintain arbitration's essential virtue of resolving disputes straightaway"). Washington courts have sought to avoid rulings that would compromise the finality of arbitration awards and render arbitration "a mere prelude" to post-arbitration judicial litigation. *Godfrey*, 142 Wn.2d at 892, 895-6; see also *Hall Street*, 128 S.Ct. at 1405. The judicial reluctance to interfere with final arbitration awards gives the parties what they contracted for: a determination by the arbitrators, not the courts.

2) The Court of Appeals Decision Frustrates the Purpose and Objectives of Arbitration

The Court of Appeals' decision threatens these policy goals by opening the door to *de novo* review of any arguable legal rulings on the face of an arbitration award, inevitably resulting in extensive additional costs and delays in the resolution of matters subject to arbitration. The "legal error" basis for vacatur undermines the authority of arbitrators to finally resolve all factual and legal issues submitted to them.

Additionally, it discourages arbitrators from offering written explanations of their decisions (which could open the door for a challenge).

Washington law clearly dictates that arbitration is intended as a "substitute" for court litigation, not simply a precursor. *See Thorgaard*, 71 Wn.2d at 130-32. The cost advantages and expediency of arbitration as a viable means of dispute resolution are defeated when parties cannot expect that their disputes will conclude with a final arbitration award (absent the extraordinary circumstances provided by the statutes permitting vacatur). Without this expectation, the unique role of arbitration is in large part lost.

Permitting a broad "legal error" review conflicts with and frustrates the Washington Supreme Court's sound decision in *Malted Mousse* (and other courts throughout the nation) to limit the bases for post-award challenges to those expressly provided by statute.

3) The Brooms' Policy Arguments In Support of Broad "Legal Error" Review Are Unavailing

In the face of the lengthy authority supporting limited review of arbitration awards, the Brooms have attempted to argue that a court's ability to correct legal error in arbitration is necessary to ensure fairness in the process. Specifically, the Brooms have suggested that arbitration features an uneven playing field because FINRA-appointed "panels are more industry friendly than the average jury," Brief at 1. Further, they have argued that "[w]ithout the minimal check provided by the 'error of law on the face of the award' standard, justice would suffer" because FINRA arbitrators (who are not required to be trained in the law) could presumably not correctly decide cases on their own. *Id.*, at 20.

Such arguments have been roundly and repeatedly rejected. To begin, there is nothing to support the Brooms' contention that the "deck is stacked" in arbitration. Indeed, arbitrator bias is directly addressed in the statutory bases for vacatur. *See* RCW 7.04A.230(1)(b). FINRA arbitrators are selected from a wide pool of trained individuals from diverse background, with direct participation from the parties in the selection process pursuant to the contracts that govern arbitration. Moreover, despite the fact that FINRA arbitration has no meaningful "weeding out" process to dispose of baseless cases (unlike dispositive

motion practice in court), over 75% of FINRA cases since 2005 settled, and over 43% of those that were not settled resulted in an award of damages to claimants. *See* [http://www.finra.org/Arbitration Mediation/AboutFINRADR/Statistics/](http://www.finra.org/Arbitration%20Mediation/AboutFINRADR/Statistics/). The objective facts defeat the Brooms' unsupported notion that the FINRA forum is "industry friendly."

The Brooms' suggestion that judicial review for errors of law is necessary because arbitrators cannot handle the complex issues arising in arbitration is likewise flawed.⁴ Time and again, courts have held that arbitrators are capable of handling the most complex legal issues. *See, e.g., Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985); *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991). Moreover, the country's highest courts have shown confidence in arbitrators even where there is no basis for any legal review of their decisions (let alone the near *de facto* review employed by the court below). *See Hall Street*, 552 U.S. 576. The Brooms' arguments in this regard fall flat.

Finally, the Brooms also argue that the Legislature should have expressly abrogated the "legal error" standard when enacting the Revised

⁴ It should be noted that the specific law review article cited in the Brooms' Brief related to whether arbitrators have skills "necessary to handle... complicated motion practices..." Brief at 20 (ellipses in Brief). As discussed below, even if this article were meaningful, its focus is on procedural motions rather than on ultimate decisions of fact and law.

Uniform Arbitration Act (“RUAA”) in 2005 if that were its intent. This argument, however, overlooks the fact that the “legal error” standard was non-statutory in nature and does not appear anywhere in the former Washington Arbitration Act (“WAA”) or current RUAA. As explained in both *Malted Mousse* and Petitioners’ Brief, an appropriate reading of the WAA is as repealing prior non-statutory grounds for vacatur such as “legal error.” 150 Wn. 2d at 527 (citing Justice Utter’s concurring opinion in *Boyd*, 127 Wn. 2d at 267-68). Because nothing in the statutes permits review based on legal error, there was no need for statutory abrogation.⁵

The Brooms have offered no compelling policy considerations to support the Court of Appeals decision, which seriously threatens the

⁵ The Brooms’ argument on this point raises an interesting issue relating to *stare decisis*. While the principle of *stare decisis* is compelling, it must give way where the prior decision of the Court is incorrect, in conflict with the plain language of the uniform acts upon which the statute is based, and harmful. Here, legal error review is clearly incorrect under *Boyd* concurrence and virtually every other decision under the various uniform arbitration acts across the country. As held in *Payne v. Tennessee*, 501 US 808 (1991): “*Stare decisis* is preferred because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Adhering to precedent is usually the wise policy, because in most matters it is more important that the applicable rule of law be settled than it be settled right. Nevertheless, when governing decisions are unworkable or are badly reasoned, the court has never felt constrained to follow precedent. *Stare decisis* is not an inexorable command; rather, it is a principle of policy and not a mechanical formula of adherence to the latest decision.” This notion has also been accepted in Washington courts. See, e.g., *City of Federal Way v. Koenig*, 167 Wn 2d 341, 217 P3d 1172 (2009) (applying an “incorrect and harmful” standard to *stare decisis* even where legislative acquiescence is apparent).

fundamental objectives of arbitration by permitting broad review of awards for any legal error.

B. STRONG PUBLIC POLICY SUPPORTS THE APPLICATION OF POTENTIALLY DISPOSITIVE STATUTES OF LIMITATION IN ARBITRATION

1) Arbitrators Should Be Able to Hear and Decide Defenses Based on Statutes of Limitations

The Washington Supreme Court has established a flexible rule for whether a statute relating to an “action” shall apply to an arbitration proceeding. *See Fire Fighters*, 146 Wn.2d 29 (“[W]hether an arbitration is deemed a judicial ‘action’ depends on the legal context in which the question arises.”). As *Fire Fighters* noted, “nothing in the ‘plain language’ of ‘action’ prevents us from interpreting it to include arbitration proceedings.” *Id.* at 41. Neither of the cases relied on by the court below, *Thorgaard* or *Auburn*, addressed the specific issues before the Court or provide a blanket rule as to the general applicability of statutes of limitation in arbitration proceedings.⁶

⁶ The Brooms’ Brief inaccurately contends that both *Thorgaard* and *Auburn* related to the applicability of statutes of limitation in arbitration. To the contrary, the *Thorgaard* case did not involve a statute of limitations at all. Rather, it involved a nonclaim statute that created a procedural hurdle before a lawsuit could be filed. The Court held that the hurdle (submitting a pre-suit claim) was not required before a party brought claims in arbitration. Those facts are substantially different than the present case, which involves a statute of limitations that provides a substantive, permanent bar on claims that are not timely asserted. The *Auburn* case also did not establish a blanket rule on the applicability of

A cornerstone of the arbitration process is that participants are provided an equal opportunity to pursue the substantive claims and defenses that are available in court. While procedural differences may exist between court and arbitration -- such as pleading standards or the requirement to submit a claim to a county commission that was addressed in *Thorgaard* -- substantive rights should be preserved.

Under Washington law, “statutes of limitations are both substantive and procedural” in nature. *See Stikes Woods Neighborhood Assoc. v. City of Lacey*, 124 Wn.2d 459, 466, 880 P.2d 25 (1994) (holding that the calculation of time under a statute of limitation was procedural).⁷

statutes of limitation in arbitration. Rather, it simply held that one specific type of claim -- a claim under RCW 70.05.145 relating to health care payments by a city -- was not subject to the two-year catch-all limitations period set forth in RCW 4.16.130. 114 Wn.2d at 451. Accordingly, the Court need not overturn *Thoregaard* or *Auburn*, it need only observe that they are limited to their highly unusual facts.

Moreover, *Fire Fighters* opened the door for the treatment of an arbitration proceeding as an “action” for purposes of applying a statute of limitations. Indeed, the application in the underlying dispute would appear particularly appropriate because the Brooms expressly asserted certain claims under statutes that authorize a party to bring an “action” yet seek to avoid the statutes of limitation for those very same statutory claims.

⁷ Many courts throughout the country have held that a statute of limitations provides a substantive right to a defendant. *See, e.g., Springman v. AIG Marketing, Inc.*, 523 F.3d 685, 688 (7th Cir. 2008) (“The statute of limitations, however, is a substantive defense”); *In re: Enterprise Mortg. Acceptance Co. LLC Sec. Litig.*, 391 F.3d 401, 409-10 (2d Cir. 2004); *Kopalchick v. Catholic Diocese of Richmond*, 645 S.E.2d

Statutes of limitations ensure fairness to parties that are confronted with stale claims. As the Supreme Court of the United States has held:

Statutes of limitations, which “are found and approved in all systems of enlightened jurisprudence,” represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that “the right to be free of stale claims in time comes to prevail over the right to prosecute them.”

These enactments are statutes of repose, and although affording plaintiffs what the legislature deems a reasonable time to present their claims, they protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise.

United States v. Kubrick, 444 U.S. 111, 117 (1979) (emphasis added) (citations omitted); *see also Douchette v. Bethell Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) (“The policy behind statutes of limitation is protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.”) (citation omitted).

The Washington Supreme Court has acknowledged that statutes of limitation are often applied in arbitrations. *See McKee v. AT&T Corp.*, 191 P.3d 845, 2008 LEXIS 816, *23-24 (2008) (“[A]rbitrations can (and

439, 441 (Va. 2007); *Batista v. Publix Supermarkets, Inc.*, 993 So. 2d 570, 571 (Fla. 1st DCA Oct. 22, 2008).

often should)... apply appropriate statutes of limitation....”⁸ Such a rule is consistent with the policy in favor of affording parties in arbitration to the “same cup of tea” that they would receive in court (at least on substantive issues).

Moreover, recent Ninth Circuit authority has likewise supported the application of statutes of limitations specifically in FINRA arbitrations -- under the very same rule (Rule 10304) at issue in this case. *See Knight v. Merrill, Pierce, Fenner & Smith*, 2009 WL 3368439, * (9th Cir. 2009) (“Section 10304(c) of the NASD Code of Arbitration specifically contemplates the application of state and federal statutes of limitations, and the arbitration panel correctly applied the California statutes of limitations to all of Knight’s claims.”).

Faith in the arbitration process depends upon the expectation that parties will have the same substantive rights if they choose to arbitrate rather than litigate in court. This expectation instructs the decision of whether parties will contract for arbitration. In this dispute, both the Brooms and the Petitioners agreed to arbitrate pursuant to FINRA rules,

⁸ Numerous federal courts have held that arbitrators must apply statutes of limitation. *See, e.g., Hasbro v. Amron*, 419 F. Supp. 2d 678, 689 (E.D. Pa. 2006) (vacating an award based on arbitrators failure to apply statute of limitations); *Pellegrino v. Auerbach*, 2006 WL 565643 (S.D.N.Y. 2006) (holding that “the issue of the statute of limitations is for the arbitrators to decide”).

which contemplate the application of statutes of limitation and provide no textual basis to preclude their use as a defense.

Without access to statutes of limitation, respondents in arbitration are left with no means to dispose of patently stale claims in disputes where their ability to defend themselves has been compromised by the loss of evidence, witnesses, or memories. The Court of Appeals' decision would summarily eliminate this fundamental defense against untimely claims from all arbitrations.

2) The Brooms' Policy Arguments Against the Application of Statutes of Limitation in Arbitration Are Unavailing

In their Brief, the Brooms have attempted to overcome the sound policy reasons for applying statutes of limitation in arbitration by arguing that: (i) FINRA has pushed to eliminate consideration of statutes of limitation in arbitration, Brooms' Brief at 1-2 and 13-14, (ii) FINRA has its own time-based rule (Rule 10304) that supplants statutes of limitations, *id.* at 10-11, and (iii) statutes of limitation are potential "vexatious formalities." *Id.* at 13. Each of these arguments fails.

First, nothing the Brooms have cited reflects an elimination of statutes of limitation defenses in FINRA arbitration. To the contrary, the authorities the Brooms cite relate exclusively (on their face) to a push to limit dispositive prehearing motions based on defenses such as statutes of

limitation (or failure to state a claim, or standing, or any other deficiency). See Brooms' Brief at 2 (quoting testimony relating to "prehearing motions to dismiss or for summary judgment") and at 14 (quoting an article stating "The granting of a pre-discovery motion is a very serious issue...."). The policy reason supporting the elimination of some prehearing motion practice in arbitration (i.e. efficiency) is the very same reason to limit the scope of judicial review of awards. While FINRA has adopted rules to preclude prehearing motions based on statutes of limitation, see FINRA Rule 12504 (eff. January 2009), nothing in those rules or their enacting documents precludes the presentation of statute of limitation defenses during the final hearing or in a motion to dismiss after the close of the claimant's case in chief.⁹

Second, the Brooms argue that FINRA already has a time limitation rule (NASD Rule 10304) that functions in place of statutes of limitation. The text of Rule 10304 not only fails to support this argument, it directly contradicts it. Rule 10304 is an "eligibility rule" that defines which claims are eligible to be arbitrated (as opposed to litigated in

⁹ Other arguments within the Brooms' Brief have conflated the propriety of threshold dispositive motions based on statutes of limitations with the ability of arbitrators to consider such defenses at any point in an arbitration. For example, at Footnote 4 of their Brief, the Brooms cite to numerous cases in which parties in arbitration went *to court* to attempt to put an end to the pending arbitration based on a statute of limitations. Such cases do not control here, where the defense was presented directly to arbitrators, who themselves decided the issue.

court).¹⁰ Indeed, as discussed in the Parties' Briefs in this matter, Rule 10304(c) expressly states that the remainder of that rule does not extend applicable statutes of limitations. With this text, the FINRA rules (which set forth the relevant terms of the Parties' agreement to arbitrate) expressly contemplate that statutes of limitation will be a consideration for the arbitrators. Moreover, to the extent that there is any dispute over the meaning of Rule 10304, that is an issue that should have been resolved by the arbitrators themselves, not the courts below. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 85 (2002) (the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.”).¹¹

Third, the notion that statutes of limitation can be cast aside as “vexatious formalities” is particularly troubling. The ability to assert time

¹⁰ NASD Rule 10304 was replaced by new FINRA Rule 12206. Under this rule, a claim that is ineligible for arbitration is not barred (as in the case of an untimely claim under a statute of limitations), but rather is simply referred to court, where the parties will litigate as if there were no arbitration agreement. FINRA Rule 12206(b).

¹¹ The Brooms have also argued that the parties are free to negotiate any other time limitation in their agreements. To the contrary, in the heavily regulated securities industry, the text of pre-dispute arbitration agreements is subject to FINRA and SEC review and approval. The notion that Morgan Stanley (and countless other entities that routinely arbitrate) could easily correct any consequence caused by the decision below by simply amending arbitration agreements fails because, among other things, (i) such amendment is not practicable and would take substantial time, and (ii) any amendment would not be retroactive, an issue that poses significant concern when the decision on appeal would allow all untimely claims for an infinite period to proceed without any hindrance from statutes of limitation.

defenses against stale claims is critical to the administration of justice. One can imagine any number of circumstances where a claimant advances claims in arbitration where the passage of time has left the respondent without key witnesses, documents, or other evidence. While there may be reasons to reject time-based defenses such as statutes of limitation, the power to hear and decide such defenses must be left to the arbitrators. *See Howsam*, 537 U.S. at 85. Where triggered, a statute of limitation is not at all a “vexatious formality” but, rather, a critical safeguard for justice.

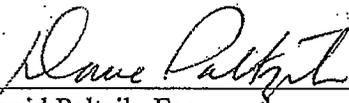
Because the Court of Appeals decision categorically eliminates the availability of limitations defenses -- where the FINRA rules provide no textual support for such exclusion (and in fact contemplate the applications of such statutes) -- it is a serious threat to justice and should be reversed.¹²

V. CONCLUSION

For the reasons set forth above, the Court of Appeals’ decision should be reversed because it was wrongly decided and could have a broad negative impact on the arbitration process by undermining the goals of finality and efficiency.

¹² Although the Court of Appeals decision is unpublished, it has already been cited in arbitration proceedings (which generally employ more lax procedural rules regarding authority) outside the state of Washington in opposition to defenses based on statutes of limitations. Without reversal, parties seeking to avoid time defenses will continue to use this decision in an attempt to prosecute stale claims.

Ira D. Hammerman, Esq.
Kevin M. Carroll, Esq.
SECURITIES INDUSTRY AND
FINANCIAL MARKETS
ASSOCIATION
1101 New York Avenue, NW
Washington, DC 20005
(202) 962-7382


David Paltzik, Esq.
WSBA No. 25468
GREENBERG TRAURIG, P.A.
2375 E. Camelback Road, Suite 700
Phoenix, AZ 85016
(602) 445-8263

Bradford D. Kaufman, Esq.
Jason M. Fedo, Esq.
GREENBERG TRAURIG, P.A.
777 S. Flagler Drive, Suite 300 East
West Palm Beach, FL 33401
(561) 650-7900

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 DEC 29 PM 12:53

BY RONALD R. CARPENTER

CERTIFICATE OF SERVICE

CLERK I HEREBY CERTIFY that on the 27th day of December, 2009, I

caused to be served by U. S. Mail the foregoing **SECURITIES**

INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S

AMICUS CURIAE SUPPLEMENTAL MEMORANDUM on the

following at the offices listed below:

Michael T Schein, Esq.
Kevin P. Sullivan, Esq.
SULLIVAN & THORESON
701 5th Avenue, Suite 4600
Seattle, WA 98104-7068

Michael T. Garone, Esq.
Thomas V. Dulcich, Esq.
SCHWABE, WILLIAMSON & WYATT, P.C.
1211 SW 5th Avenue, Suite 1700
Portland, OR 97204-3717

Stephanie P. Berntsen, Esq.
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 5th Avenue, Suite 3010
Seattle, WA 98101-2339

Lawrence H. Vance, Esq.
WINSTON & CASHATT
Bank of America Financial Center
601 W. Riverside, Suit 1900
Spokane, Washington 99201

