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STATE OF WASHINGTON

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No. 82311-1

BY RONALD R. CARPENTIER

IN THE 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 INCORPORATED and KIMBERLY ANNE
BLINDHEIM,

Petitioners.

SUPPLEMENTAL BRIEF OF RESPONDENTS BROOM

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I. INTRODUCTION

Respondents the Brooms are the adult children of John R. (“Dick”) Broom. As claimants below in arbitration, the Brooms assert claims for losses resulting from mismanagement of their deceased father’s investment account. Those claims were dismissed by the arbitrators on statute of limitations grounds. The King County Superior Court set aside the award because application of the statute of limitations in arbitration is an error on the face of the award, and sent the matter back for a new arbitration. Division One of the Court of Appeals affirmed. *Broom v. Morgan Stanley DW, Inc.*, 2008 WL 4053440 (Div. 1).

Virtually every securities brokerage agreement in the United States is subject to an arbitration clause, formerly under the NASD, now the Financial Industry Regulatory Authority (“FINRA”).¹ It is no secret that these panels are more industry friendly than the average jury.² But there is a *quid pro quo*: a quick, non-technical process. By affirming, this Court can keep alive the promise made by Securities Industry Association President Marc E. Lackritz in his 2005 testimony to Congress:

Aggrieved customers get what so many say they really want: their “day in court.” . . . The more streamlined process of arbitration, as compared with the many procedural . . . obstacles

¹ B. Zoltowski, *Restoring Investor Confidence: Uniformity in Securities Arbitration in Deciding Motions to Dismiss Before a Hearing on the Merits*, 58 Syracuse L.Rev. 375, 376, 379, 381 (2008) (hereinafter “Restoring Investor Confidence”).

² *Id.* at 388 (noting “apparent broker favoritism” on NASD/FINRA panels).

that must be overcome by a plaintiff in a court case, means that nearly every case brought in arbitration . . . goes to a full merits hearing. . . .

This is in sharp contrast to court proceedings, where a significant percentage of claims are dismissed on pre-hearing motions to dismiss or for summary judgment. Many of these dismissals are on what may be described as technical or procedural grounds. This includes . . . **statute of limitations bars**. . . .

CP 168-69 (emphasis added).

After the recent financial meltdown, it is more important than ever that the law protect the promise made by the Securities Industry to Congress and consumers that NASD/FINRA arbitration will remain a non-technical process that reaches the merits of the dispute. Accordingly, this Court should AFFIRM.

II. ISSUES ON REVIEW

1. Should the rule of *Thorgaard* and *City of Auburn* that statutes of limitation do not apply in arbitration continue as Washington law?
2. Should the many cases establishing “error on the face of the award” as a proper narrow standard of review of arbitration decisions in Washington be overruled? Does it make sense to do this in the last case arising under the 1943 Washington Arbitration Act (“WAA”)?

III. STATEMENT OF THE CASE

The Brooms point this Court to the neutral Statement in Division One’s opinion, *Broom v. MSDW*, *supra*, 2008 WL 4053440 at *1-2.

IV. ARGUMENT

A. This Court Should Re-Affirm the Rule that the Statute of Limitations Does Not Apply to Arbitration

1. *Thoregaard and City of Auburn Made Sound Law that Should Not Be Overruled*

In 1967, this Court held that arbitration is not an “action” or “lawsuit” to which non-claim statutes apply. *Thorgaard Plumbing & Heating Co., Inc. v. County of King*, 71 Wn.2d 126, 130-32, 426 P.2d 828 (1967). *Thorgaard* explained that it was not necessary to file a claim within 90 days of injury to have a valid arbitration against the County, because arbitration is not an “action” or a “lawsuit”:

It is clear that by using the word ‘action’ in the [non-claim statute] the legislature had a *lawsuit* in mind. . . .

If one intends to bring an action (e.g., a lawsuit) against a county, he must do so in the manner provided by RCW 36.45.010. **However, this has nothing to do with a statutory arbitration proceeding. . . .**

RCW 7.04 et seq. provides a means by which disputants may dispose of controversies **other than by an action in court**. They may resort to arbitration.

An arbitration proceeding is not had in a court of justice. It is not founded on the filing of a claim or complaint as they are generally understood. The very purpose of arbitration is to *avoid* the courts insofar as the resolution of the dispute is concerned. *Son Shipping Co. v. DeFosse & Tanghe*, 199 F.2d 687 (2d Cir. 1952). It is a substitute forum designed to reach *settlement* of controversies, by extrajudicial means, *before* they reach the stage of an *action* in court.

Thorgaard, supra, 71 Wn.2d at 130 (boldface added; italics in original).

Thorgaard is supported by the statutory language of both the Washington arbitration statutes, and statutes of limitation. *Thorgaard* relied upon former RCW 7.04.030 of the WAA – which requires a court in which an action subject to arbitration is pending to order a stay in favor of arbitration – to hold that “RCW 7.04.030 makes it clear that there is a difference between an action and an arbitration proceeding” *Thorgaard, supra*, 71 Wn.2d at 131-32. The Court of Appeals correctly held that the WAA governs this arbitration because it was commenced prior to January 1, 2006, *Broom v. MSDW, supra*, 2008 WL 4053440 at *2 n.2, and therefore this holding directly applies here.

The Revised Uniform Arbitration Act (“RUAA”) scrupulously refers to arbitration as a “proceeding,” not an “action” or a “suit,” RCW 7.04A.040(1), .070(2), .080(1), .090(1), .100, .110, .120(1), .150, .160, .180, .190(2), .200, .220, .230, distinguishes between a “judicial proceeding” and an “arbitration proceeding,” RCW 7.04A.060(4), .070(5), (6), .140(4), and between an “arbitration proceeding” and a “civil action.” RCW 7.04A.080(2). Indeed, the RUAA states: “All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding **as if the controversy were the subject of a civil action** in this state.” RCW 7.04A.170(6) (emphasis

added); *see also*, .210(1), (2), (3). By these provisions, the Legislature clearly recognized that arbitrations are not “judicial proceedings” or “civil actions,” and that in the absence of positive law, the procedures applicable to civil actions **do not apply to arbitrations**. Significantly, the Legislature did not choose to amend the WAA or RUAA (or ch. 4.16, RCW), to make statutes of limitation applicable in arbitration.³

The general Washington statutes of limitation bar “actions,” not “arbitration proceedings.” RCW 4.16.005 (“Except as otherwise provided in this chapter, . . . **actions** can only be commenced within the periods provided in this chapter after the cause of action has accrued.”). The specific limitation applicable to securities claims provides that “[n]o person may **sue** under this section more than three years after” certain specified events. RCW 21.20.430(4)(b). Under *Thorgaard*, arbitration is neither an “action” nor a “lawsuit” for purposes of technical time limitation statutes, *Thorgaard, supra*, 71 Wn.2d at 130, and therefore *Thorgaard* is consistent with the applicable statutes, and the Superior Court and Division One properly applied it.

³ *Cf., e.g.*, McKinney’s CPLR 7502(b) (NY), which provides that if “the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration” The very existence of such statutes recognizes the necessity of an express statute to apply statutes of limitations to private arbitrations.

In *City of Auburn v. King County*, 114 Wn.2d 447, 788 P.2d 534 (1990), a significant dispute between multiple municipalities and the County in which review was granted review because of “the case’s public importance,” *id.* at 450, this Court felt the rule to be so basic and clear that it rejected the municipalities’ RCW 4.16.130 statute of limitations defense with a single line: “The trial court correctly concluded that the statute of limitations by its language does not apply to arbitration.” *Id.*

“The Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (*quoting, Friends of Snoqualmie v. King Cty. Boundary Rev. Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). Even though the rule that statutory limitations on “actions” or “suits” do not govern in arbitration has been in force since 1967, and was reiterated in 1990, the Legislature has not amended the general statutes of limitations, Ch. 4.16, RCW, the securities act statute of limitation, RCW 21.20.430(4)(b), or the WAA or RUAA, to expressly provide that they apply to arbitrations. The rule of *Thorgaard* has worked well for over forty years, and there is no good cause to change it.

Instead, because “statutory language has remained unchanged,” the rule against overruling clear precedents applies here.

The post-arbitration proceeding in Superior Court for confirmation or vacatur of an arbitration award is not an “action” either; instead, it is treated as a civil motion. RCW 7.04A.220, .230(1), (2); *Davidson v. Hermesen, supra*, 135 Wn.2d at 127; *Thorgaard, supra*, 71 Wn.2d at 132. Similarly, this Court recently held that “the limited judicial review under the WAA” does not constitute “judicial remedies” within the meaning of an insurance regulation. *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 157 Wn.2d 290, 304-05, 138 P.3d 936 (2006). All this carefully constructed precedent would be called into question by a ruling in favor of Petitioner Morgan Stanley.

The view of *Thorgaard* and *City of Auburn* that arbitration is the opposite of a judicial action is the general rule:

The full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment, **and since arbitration is not a judicial proceeding**, we held that the statute does not apply to arbitration awards.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222 (1985) (italics in original; bold added). Many other decisions are in accord with our rule that the statute of limitations does not apply in arbitration.⁴

Against all this, Morgan Stanley relies upon *International Ass'n of Firefighters v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), a case involving attorneys' fees under a wage statute, to claim that arbitration constitutes an "action" **in the context of statutes of limitations**. All that *Firefighters* held is that whether an arbitration is deemed a judicial action depends on the **legal context in which the question arises**:

⁴ *Son Shipping v. DeFosse & Tanghe*, *supra*, 199 F.2d at 689 (cited in *Thorgaard*) ("arbitration is not within the term 'suit' as used in" the 1-year limitation on suit contained in COGSA); *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 172 (S.D. Ohio 1993, *aff'd*, 43 F.3d 1076 (6th Cir.), *cert. den.*, 516 U.S. 906 (1995) ("statute of limitations . . . bar[s] an action at law, not arbitration"); *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.*, 197 A.2d 83, 84 (Conn. 1963) ("Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitations."); *Carpenter v. Pomerantz*, 36 Mass. App. 627, 634 N.E.2d 587, 590 (1994) ("As used in statutes of limitation, the word 'action' has been consistently construed to pertain to court proceedings."); *State Bd. of Retirement v. Woodard*, 446 Mass. 698, 847 N.E.2d 298, 304 (2006) (same); *Lewiston FF Assn. v. City of Lewiston*, 354 A.2d 154, 167 (Me. 1976) ("Arbitration is not an action at law and the statute [of limitations] is not, therefore, an automatic bar to . . . recovery"); *Peggy Rose Rev. Trust v. Eppich*, 640 N.W.2d 601, 608 (Minn. 2002) ("arbitration is not the bringing of an action under any of our statutes of limitation"); *Har-Mar v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751, 754-55 (Minn. 1974) ("Based upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term 'action,' we . . . hold that [the statute of limitations] was not intended to bar arbitration of [claim] . . . solely because such claim would be barred if asserted in an action in court."). It has also been held that arbitration is not an "action" for various other purposes, *see, e.g., Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 173 Cal. App.4th 1040, 93 Cal. Rptr.3d 457, 464-65 (May 6, 2009) (arbitration not an "action" for purposes of authorizing the filing of a lis pendens); *Dayco Corp. v. Fred T. Roberts & Co.*, 192 Conn. 497, 472 A.2d 780, 784 (1984) (arbitration "is not an action for the purposes" of statute requiring insertion of partners names in process); *Miele v. Prudential-Bache Securities, Inc.*, 656 S.E.2d 470, 473 (Fl. 1995) ("In light of

In determining whether an arbitration is an exercise of a judicial function, we have noted that “[a]rbitration has been viewed as both nonjudicial or the exercise of a judicial function depending upon the context of the question.” [*Grays Harbor Cty. v. Williamson*, 96 Wn.2d 147 at 152, 634 P.2d 296 (1981)]. For example, in the context of due process, arbitration must meet the same requirements as a traditional judicial action. *Id.* at 152-53, 634 P.2d 296. **But when dealing with the nature of arbitration itself, “it has been deemed a substitute for judicial action.”** *Id.* at 153, 634 P.2d 296 (citing *Thorgaard*, 71 Wn.2d at 131-32, 426 P.2d 828).

Firefighters, supra, 146 Wn.2d at 37-38 (emphasis added). The context in which the issue arose in *Firefighters* was whether fees would be awarded under RCW 49.48.030 to a union that successfully recovered unpaid wages for two employees. *Id.* at 32-34. In light of the fact that RCW 49.48.030 is a remedial statute liberally construed to benefit employees, *id.* at 35, the legal context was very different in *Firefighters* than in *Thorgaard* (non-claim statute) or *City of Auburn* (statute of limitation), and very different from this case (statute of limitation), so a different result was reached. *Id.* at 40-41. Nothing in *Firefighters* states or implies that it constitutes an overruling or even a limitation on *Thorgaard’s* or *City of Auburn’s* holding in the context of *time limits on claims*.⁵ Because the context here is exactly like the context in

arbitration's status as an alternative to the court system,” court won’t apply statute requiring 40% of punitive damages be paid to the state to arbitration proceedings).

⁵ MSDW’s argument is premised on *sub silentio* overruling of Supreme Court precedent, which is contrary to this Court’s policy. *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999).

Thoregaard and *City of Auburn*, Division One correctly applied *Thoregaard* and *City of Auburn* to find that this arbitration was not a judicial action or lawsuit for limitation purposes.⁶

Both this Court and the Legislature are well committed to the distinction between a claim in arbitration and a judicial action or lawsuit. There is no basis in law to overrule *Thoregaard* or *City of Auburn*.

2. Public Policy Favors the *Thoregaard* Rule

Morgan Stanley argued that Division One’s Opinion “undermines the important policy in favor of relieving parties of the burden of facing stale and untimely claims.” Pet.Rev. at 9. This is not accurate. The parties remain free to select a limitation period in their agreement to arbitrate, and such a contractual limitation is consistent with the purpose of arbitration to enforce only the contractual procedure chosen by the parties for resolution of their dispute. *Son Shipping v. DeFosse & Tanghe*, *supra*, 199 F.2d at 689; *Statutes of Limitations in Arbitration*, *supra*, 14 PIABA Bar Jrnl. at 27. Morgan Stanley’s argument also ignores the plain

⁶ Morgan Stanley cited *McKee v. AT&T Corp.*, 191 P.3d 845 (2008), for its statement that arbitrators should apply “appropriate statutes of limitations . . .” *Id.* at 857. *McKee* is crucially distinguishable because the limitation period at issue was not a statutory limitation, but a **contractual limitation** that incorporated and shortened the regular statutory provision. *Id.* at 849. We have consistently maintained that contractual periods are generally enforceable, so long as they are not unconscionable under the standards examined in *McKee*. *Id.* at 849-51. Only if the parties contractually agree that a particular statute of limitations will apply does it constitute an “appropriate” statute of limitation under *McKee*, and an “applicable” statute of limitation under NASD Rule

evidence of record that the parties here agreed to apply former NASD Rule 10304(a), which provides that “[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.” CP 455. Thus, the parties to this very case set a six-year limit on claims, and the courts must presume that they were the best judges of “stale” claims in this context.⁷

Morgan Stanley has also argued that Division One’s Opinion “calls into question” the application in arbitration of numerous substantive statutory remedies, including recovery of attorneys fees. Pet.Rev. at 10. This argument was rejected in the seminal case, *Thorgaard*, where this Court distinguished between a “right of action” and a “cause of action”:

A ‘right of action’ is not synonymous with ‘cause of action’ It is a right to enforce a ‘cause of action’ by suit. A ‘right of action’ is the right to pursue a Judicial remedy. A ‘cause of action’ is based on the substantive law of legal liability.

Thorgaard, supra, 71 Wn.2d at 132 n.5. The plaintiff is entitled to his/her substantive “cause of action,” including attorneys fees if available under

10304. J. Long, *Re-Thinking the Application of Statutes of Limitations in Arbitration*, 14 PIABA Bar. Jnl. 6, 10, 27 (2007) (“Statutes of Limitations in Arbitration”).

⁷ Morgan Stanley relied below on the provision of former NASD Rule 10304(c) which stated that “[t]his rule shall not extend applicable statutes of limitations” to argue that the 3-year limit under Washington law applies. But under clear Washington law the limitation periods set forth in ch. 4.16 and 21.20 RCW are not “applicable” statutes of limitations, and therefore Morgan Stanley’s argument is fatally flawed.

the law, regardless of whether his/her “right of action” is pursued in a court of law or in arbitration.⁸

The *Thorgaard* distinction is well-established in Federal law. The mere fact that causes of action are created by statute does not prevent them from being arbitrated. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985); accord, e.g., *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991); *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 590, 681 P.2d 253 (1984). But while substantive statutory rights are preserved in arbitration, a party who agrees to arbitration cannot expect to carry over the same procedural rules:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for **the simplicity, informality, and expedition of arbitration.**

Mitsubishi Motors, supra, 473 U.S. at 628 (emphasis added). There is no offense to public policy when technical defenses such as the statute of limitations are lost on the road to arbitration; indeed, the public policy in favor of arbitration is served:

[Arbitration] is in a forum selected by the parties in lieu of a court of justice. The object is to avoid, what some feel to be, the

⁸ Despite the longstanding rule of *Thorgaard*, Division 3 had no difficulty finding that State statutory claims under the CPA were fully arbitrable under the WAA. *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 456-57, 45 P.3d 594 (2002).

formalities, the delay, the expense and vexation of ordinary litigation.

Thorgaard, supra, 71 Wn.2d at 132. **Because the statute of limitations is itself a potential vexatious formality**, the rule of *Thorgaard* and *City of Auburn* accords with the policy of arbitration to avoid technicalities.

Finally, Morgan Stanley's argument is completely undermined by its own favorite case, *Firefighters, supra*, 146 Wn.2d 29, which allows recovery of statutory attorneys fees in arbitration by holding that whether arbitration is or is not an "action" depends on the context. *Id.* at 37-38.

With the advent of IRAs, 401Ks, and similar retirement-investment vehicles, "half of all U.S. households own equities." *Restoring Investor Confidence, supra*, 58 Syracuse L.Rev. at 377. As already noted, NASD/FINRA arbitration is mandated by virtually all brokerage agreements in the United States. *Id.* at 376, 379, 381; *see*, <http://www.finra.org/AboutFINRA/index.htm>. It is a contract of adhesion. Investors crucially rely upon the promise of a simple, informal dispute resolution mechanism that will give them a hearing on the merits. Nonetheless, scorched earth litigation tactics are sharply on the rise in securities arbitration. "According to arbitration awards rendered by the NASD and NYSE [since merged into FINFRA], motions filed by respondents in arbitration proceedings in those fora quadrupled from

1996 to 2001.” C. Austen, *Having Their Cake and Eating it Too: Motion Practice and the Mongrelization of SRO Arbitration*, 1383 *PLI/Corporate* 99, 102 (2003).⁹ “A 2006 study . . . reports that the probability of dismissal, pursuant to a pre-trial motion, in the period 1993-1995 was 19.4% and climbed to 40.3% in the 2003-2005 period.” *Restoring Investor Confidence, supra*, 58 *Syracuse L.Rev.* at 388.

In 2006, only 18% of arbitration claims were decided after a hearing on the merits. The granting of a pre-discovery motion is a very serious issue because it bars an investor from seeking judicial relief in most cases. . . . What began as a fast and economical process for a customer to find justice has “evolved into a costly extended adversarial proceeding dominated by trial lawyers and the usual litigation tactics.” As stated by David S. Ruder, former chairman of the SEC and former member of the NASD Arbitration Policy Task Force, “the increasingly litigious nature of securities arbitration has gradually eroded the advantages of SRO arbitration.”

Id. at 386-87 (footnotes omitted; quoting, G. Morgenson, *Is This Game Already Over?* *N.Y. Times*, June 18, 2006, § 3, at 10; & P. Foley, *NASD Arbitration of Investor Claims*, 7 *N.C. Banking Inst.* 239, 247 (2003)).

Thoregaard was both of its time and ahead of its time to emphasize that arbitration’s “object is to *avoid* . . . the formalities, the delay, the expense and vexation of ordinary litigation.” *Thorgaard, supra*, 71 *Wn.2d* at 132 (emphasis in original). If this longstanding

⁹ “SRO” refers to the “self-regulatory organizations” created by the Securities Exchange Act of 1934, including NASD/FINRA. *Restoring Investor Confidence, supra*, 58 *Syracuse L.Rev.* at 378.

policy is to prevail, this Court should re-affirm the rule of *Thorgaard* that the statute of limitations does not apply in the arbitration forum.

B. This Court Should Not Overrule 80 Years of Precedent Supporting Review for Error on the Face of the Award

Washington Courts have reviewed arbitrator's decisions for over eighty years based on the following narrow, deferential standard:

Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts, and, unless **the award on its face shows their adoption of an erroneous rule, or mistake in applying the law**, the award will not be vacated or modified.

Northern State Construction Co. v. Banchemo, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963) (emphasis added).¹⁰

Morgan Stanley does not point to any real problem with the workings of this rule – nor could it, in light of the fact that it perfectly balances the judiciary's deep respect for the arbitration process, with the necessity of protecting parties against dispute resolution which is facially

¹⁰ *Accord, e.g., Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998); *Davidson v. Hermsen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995); *Thorgaard Plumbing & Heating Co., Inc. v. County of King*, 71 Wn.2d 126, 134, 426 P.2d 828 (1967); *Puget Sound Bridge & Dredging Co. v. Lake Washington Shipyards*, 1 Wn.2d 401, 409, 96 P.2d 257 (1939); *Carey v. Herrick*, 146 Wash. 283, 292-93, 263 P. 190 (1928); *McGinnity v. Autonation, Inc.*, 202 P.3d 1009, 1012 (2009); *Morrell v. Wedbush Morgan Securities, Inc.*, 143 Wn. App. 473, 485, 178 P.3d 387 (2008); *Beroth v. Appollo College, Inc.*, 135 Wn. App. 551, 559, 145 P.3d 386 (2006); *Kenneth W. Brooks Trust A v. Pacific Media, LLC*, 111 Wn. App. 393, 396, 44 P.3d 938 (2003); *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32 P.3d 289 (2001); *Federated Ins. Co. v. Estate of Norberg*, 101 Wn. App. 113, 123-24, 4 P.3d 844 (2000); *Expert Drywall, Inc. v. Ellis-Don Constr., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997); *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990) (and cases cited therein).

illegal. Instead, Morgan Stanley asserts that *dicta* in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003), had the effect of overruling eighty years of precedent *sub silentio*. This facially incredible assertion was completely and unanswerably refuted by Division One in its opinion in this case, *Broom v. MSDW, supra*, 2008 WL 4053440 at *3, and we cannot improve on what the Court of Appeals said. We refer the Court to Division One’s opinion, which we will briefly summarize.

Malted Mousse – a decision addressing mandatory arbitration, not private contractual arbitration – stated that in *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), “we” recognized that the “error on the face of the law” standard was based on a repealed statute. *Malted Mousse, supra*, 150 Wn.2d at 526-27 (emphasis added). As Division One explained, “only four concurring justices in *Boyd* took that view,” but “[t]he *Boyd* majority . . . equated the ‘exceeded their powers’ language [WAA 7.04.160(4); RUAA 7.04A.230(1)(d)] with the error of law standard and reaffirmed prior case law employing that standard.” *Broom, supra*. Division One continued:

The *Malted Mousse* court also overlooked the Supreme Court’s own post-*Boyd* decisions recognizing the majority holding in *Boyd*. *Davidson v. Hermsen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (citing *Boyd* for rule that “[i]n the absence of an error of law on the face of the award, the arbitrator’s award will not be vacated or modified”); *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (reading *Boyd* as holding

that “[u]nless the face of the arbitration award shows an error of law, the award will not be modified by the court.”).

Broom, supra, at *3. Division One wraps up its analysis by noting that this Court has a policy against overruling cases *sub silentio*, and that the statements regarding private arbitration made in a mandatory arbitration case are “non-binding *dicta*.” *Id.*

Once again, “[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Riehl v. Foodmaker, supra*, 152 Wn.2d at 147. This Court has been interpreting the 1943 WAA’s provision permitting vacation of an award if the arbitrator “exceed[ed] his powers” as encompassing the error on the face of the award standard since the 1963 decision in *Northern State v. Banchemo, supra*, quoted above. Not only has the Legislature taken no steps to abrogate this rule, but in completely revising the Arbitration Act with enactment of the RUAA in 2005, it carried forward the exact “exceeded the arbitrator’s powers” statutory language on which the “error on the face of the award” rule has been based since 1963. *Compare* former RCW 7.04.160(4), *with*, RUAA 7.04A.230(1)(d). Clearly, the

Legislature is content with this Court's longstanding interpretation of the Arbitration Act, which strongly counsels against overruling it.¹¹

Even if it could be said that the standard of review was tightened by enactment of the RUAA, however, that would not in any way affect this case. Because the arbitration was commenced prior to January 1, 2006, this case is governed by the WAA, not the RUAA. CP 9; RCW 7.04A.900.¹² This is probably the last case ever to come before this Court under the WAA, and it makes no sense to overrule case law from 1963 – 2005 in order to lay down a rule of interpretation under the WAA that will never be applied again. Anything this Court might say here about the meaning of the RUAA would be *dicta*, and therefore not binding in a future case. *Malted Mousse, supra*, 150 Wn.2d at 531.

The “error of law” standard is consistent with Washington’s strong policy favoring arbitration, because it is a strictly narrow standard of review that respects the arbitrator’s role as judge of the law and facts, accords “substantial finality” to the award, and only results in vacatur in

¹¹ The legislative history of the RUAA shows that no change was intended to the error on face of the award standard. The Senate Bill Report states: “To a great extent, the provisions of the current Chapter 7.04 RCW are reorganized and retained. There are a few changes however.” ER 452. It then details those few changes, **with no mention of any intent to narrow judicial review.** ER 452-53. If the Legislature had intended to abrogate the longstanding “error of law” standard, there would be some mention of this major change in the legislative history, but there is none. ER 447-53. Indeed, the only mention of a change in the judicial standard for vacating an award **liberalizes** it by eliminating the need to show prejudice in certain cases. ER 453.

¹² Morgan Stanley agrees. *Brief of Appellants* at 22.

the rare case of a prejudicial total failure to apply the correct legal standard which is manifest on the face of the award.¹³ The “error of law” standard as applied in Washington rarely results in vacatur of awards, and does not unnecessarily intrude into the sphere properly entrusted to the arbitrators. Rather, it strikes a necessary balance between respecting the sanctity of arbitration, and protecting parties against the absolute whim or caprice of the arbitrator. On the other hand, Morgan Stanley’s proposed rule, under which the courts must close their eyes to blatant lawlessness on the face of an arbitration award, would undermine public confidence in arbitration, thus making it a less viable alternative to the Courts at a time when judicial budgets are strapped to the breaking point.¹⁴

¹³ E.g., *Davidson, supra*, 135 Wn.2d at 118; *Boyd, supra*, 127 Wn.2d at 263; *MacLean Townhomes v. Am. States Ins.*, 138 Wn. App. 186, 189, 156 P.3d 278 (2007); *Brooks Trust, supra*, 111 Wn. App. at 396; *Federated Ins., supra*, 101 Wn. App. at 123-24. Morgan Stanley abandoned in its Petition the argument made below that the error was not manifest on the face of this Award, accurately conceding that the Award reflects dismissal based on statute of limitations. Pet.Rev. 4-5 (citing CP 10).

¹⁴ Morgan Stanley may rely upon *Hall Street Assocs. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), in which the U.S. Supreme Court abandoned decades of precedent under the “manifest disregard of the law” standard, in favor of strict construction of the FAA statutory grounds for review. This unwise decision is not binding here:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under **state statutory or common law, for example, where judicial review of different scope is arguable.** But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

Hall Street v. Mattel, supra, 128 S.Ct. at 1406 (emphasis added).

Without the minimal check provided by the “error of law on the face of the award” standard, justice would suffer.

FINRA arbitrators are not required to be trained in the law . . . [T]he only requirements to become a FINRA arbitrator are five years of full-time business or professional experience, passing the application process, paying a fee, attending a four-hour training course, and passing a test upon completion of the course. . . . [A] mere four hours of training ill equips arbitrators with the skills necessary to handle . . . complicated motion practices . . .

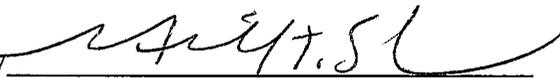
Restoring Investor Confidence, supra, 58 Syracuse L.Rev. at 387-88.

IV. CONCLUSION

Securities arbitrators need to keep to their traditional role: deciding a claim on the equities after hearing the merits. This Court’s decision to affirm will *protect* the arbitration process so it can continue to serve the public interest.

Dated at Seattle, WA, this 15th day of June, 2009.

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

[CT. APP. DOCKET No. 60115-6-1]

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INCORPORATED AND
KIMBERLY ANNE BLINDHEIM,

Petitioners.

CERTIFICATE OF SERVICE

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Dianne Reeves declares as follows:

I am over the age of 18 and not a party to the within action. That on the 15th day of June, 2009, I deposited in the U.S. mail, postage pre-paid, Supplemental Brief of Respondents Broom and this Certificate of Service to the following:

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I declare under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Dated at Seattle, Washington on the 15 day of June, 2009.


Dianne Reeves