

JAN 17 2012

No. 42217-4

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON,
DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

JAMES RIVER INSURANCE COMPANY,

Appellant.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
12 JAN 23 AM 10:40
BY [Signature] CLERK

BRIEF OF RESPONDENT

Attorneys for Respondent:

ROBERT M. McKENNA, Attorney General

A. Richard Dykstra, WSBA #5114
Special Assistant Attorney General
FRIEDMAN | RUBIN
601 Union Street, Suite 3100
Seattle WA 98101-1374
(206) 388-3475

Richard A. Fraser, III, WSBA #37577
Robert A. Hyde, WSBA #33593
Assistant Attorneys General
ATTORNEY GENERAL OF WASHINGTON
Torts Division,
800 Fifth Avenue, Suite 2000
Seattle WA 98104-3188
(206) 464-7352

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 JAN 17 PM 3:01

Table of Contents

	<u>Page</u>
I. Introduction.....	1
II. Issues Pertaining to Assignments of Error.....	4
III. Counter-Statement of the Case	5
IV. Argument.....	5
A. The arbitration clauses are unenforceable because they violate RCW 48.18.200.....	5
1. Rules of Statutory Construction.....	5
2. Washington’s First Insurance Code.....	6
3. James River’s binding arbitration endorsements violate RCW 48.18.200	8
a. Prior to the enactment of the predecessor to RCW 18.48.200 in 1911, Washington made few distinctions between “statutory” and “common law” arbitration proceedings.	11
b. In adopting the 1911 predecessor to RCW 48.18.200, our courts made no distinction between statutory and common law arbitration, rather barring <i>all</i> clauses that would deprive our state’s courts of “the jurisdiction of action against the insurer.”	15
c. Though our courts ruled that common law arbitration had been displaced in 1916, that decision did not change the view that arbitration proceedings, be they statutory or common law, deprive courts of jurisdiction of action.	16
d. Our legislature’s revisions to the arbitration statutes in 1943 and 1947 show no intent to allow binding arbitration of claims against insurers	18
e. The 1947 enactment of RCW 48.18.200 shows no intent to allow extra-judicial dispute resolution beyond that which the legislature attempted to enact in 1911	20
f. The published authority since 1947 confirms that an insurer may not force a Washington insured into binding arbitration.....	21

g.	Other jurisdictions have adopted similarly worded statutes to prohibit binding arbitration clauses in insurance policies.....	26
h.	The trial court in this case correctly analyzed the legislative intent behind the enactment of RCW 48.18.200	32
B.	The arbitration clauses are unenforceable because Washington law requires that an unauthorized (surplus lines) insurer “shall be sued, upon any cause of action arising in this state under any contract issued by it as a surplus lines contract, in the superior court of the county in which the cause of action arose” and requires the insurer to submit to this jurisdiction.....	39
C.	The Federal Arbitration Act cannot preempt the application of these Washington insurance code provisions because the McCarran-Ferguson Act shields all state insurance regulations from federal preemption.....	43
D.	Even setting RCW 48.18.200 and RCW 48.15.150 aside, genuine issues of material fact remain as to whether the non-disclosed arbitration endorsements ever became a part of the insurance contracts.....	47
V.	Conclusion.....	48
	CERTIFICATE OF SERVICE	50
	APPENDIX A	
	APPENDIX B	
	APPENDIX C	

Table of Authorities

	<u>Page</u>
<u>CASES</u>	
<i>Allen v. Pacheo</i> , 71 P.3d 375 (Colo. 2003).....	45
<i>All-Rite Contracting Co. v. Omey</i> , 27 Wn.2d 898, 181 P.2d 636 (1947).....	18
<i>American Bankers Ins. Co. of Florida v. Inman</i> , 436 F.3d 490 (5 th Cir. 2006).....	45
<i>American Cont'l Ins. Co. v. Steen</i> , 151 Wn.2d 512, 91 P.3d 864 (2004).....	6, 43
<i>American Health and Life Ins. v. Heyward</i> , 272 F.Supp. 2d 578 (D.S.C. 2003)	45
<i>Berrocales v. Superior Court of Puerto Rico</i> , 102 D.P.R. 224, 1974 WL 36882 (P.R.).....	27
<i>Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1</i> , 124 Wn.2d 816, 881 P.2d 986 (1994).....	28
<i>Bloomer v. Todd</i> , 3 Wn. Terr. 599, 19 P. 135, 1 L.R.A. 111 (1888)	6
<i>Boeing Co. v. Agricultural Ins. Co.</i> , 2005 WL 2276770 (W.D. Wash. 2005)	31
<i>Brenner v. Leake</i> , 46 Wn. App. 852, 732 P.2d 1031 (1987)	6
<i>Broom v. Morgan Stanley DW Inc.</i> , 169 Wn.2d 231, 236 P.3d 182 (2010).....	10
<i>Clinic Orthopaedics, LLC, v. Regence Blue Shield</i> , 157 Wn.2d 290, 138 P.3d 936 (2005).....	4
<i>Continental Ins. Co. v. Equity Residential Prop.</i> , 565 S.E. 2d 603 (Ga. App. 2002).....	45
<i>Cueroni v. Coburnville Garage</i> , 52 N.E.2d 16 (Mass. 1943)	36
<i>Dickie Mfg. Co. v. Sound Construction & Eng'g Co.</i> , 92 Wn. 318-319, 159 P. 129 (1916).....	17, 33, 36
<i>DiMercurio v. Sphere Drake Ins. PLC</i> , 202 F.3d 71 (1st Cir. 2000).....	30, 31, 46

<i>Erection Co. v. Dep't of Labor & Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993)	41
<i>Fisher Flouring Mills, Co. v. US</i> , 17 F.2d 232 (9th Cir. 1927).....	18
<i>Garr v. Gomez</i> , 9 Wend. 649 (N.Y. 1832)	22
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001).....	28, 29, 31
<i>Gord v. F.S. Harmon</i> , 188 Wash. 134, 61 P.2d 1294 (1936).....	18
<i>Greyhound Corp. v. Division 1384, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Amer.</i> , 44 Wn.2d 808, 271 P.2d 689 (1954).....	19, 31
<i>In re O'Rourke Bros.</i> , 136 Wash. 490, 240 P. 673 (1925)	18
<i>Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett</i> , 146 Wn.2d 29, 42 P.3d 1265 (2002).....	10
<i>Jordan v. Lobe</i> , 34 Wn. 42, 74 P. 817 (1904).....	15
<i>Keesling v. Western Fire Ins. Co. of Fort Scott, Kansas</i> , 10 Wn. App. 841, 520 P.2d 622 (1974).....	21, 22
<i>Kruger Clinic Orthopaedics, LLC v. Regence BlueShield</i> , 157 Wn.2d 290, 138 P.3d 936 (2006).....	4, 23- 25, 27, 31, 44, 46
<i>Linn v. Reid</i> , 114 Wn. 609, 196 P. 13 (1921).....	6
<i>Macaluso v. Watson</i> , 171 So.2d 755 (1965).....	26, 27
<i>Marina Cove Condominium Owners Ass'n v. Isabella Estates</i> , 109 Wn. App. 230, 34 P.3d 870 (2001).....	24
<i>Martin v. Vasant</i> , 99 Wn. 106, 168 P. 990 (1917).....	17, 18, 22
<i>McKnight v. Chicago Title Ins. Co., Inc.</i> , 358 F.3d 854 (11th Cir. 2004).....	45
<i>Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co. Inc.</i> , 969 F.2d 931 (10th Cir. 1992)	45
<i>Pagarigan v. Superior Court</i> , 102 Cal. App. 4 th 1121, 126 Cal. Rptr. 2d 124 (2d Dist. 2002)	45
<i>Price v. Farmers Ins. Co. of Wash.</i> , 133 Wn.2d 490, 946 P.2d 388 (1997)	28

<i>Randall v. American Fire Ins. Co. of Philadelphia</i> , 25 P. 953 (Mont. 1891)	22
<i>Rayner v. Neff</i> , 110 Wn. App. 860, 43 P.3d 35, 37 (2002)	6
<i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 782, 225 P.3d 313 (2009)	24
<i>School Dist. No. 1 of Silver Bow County v. Globe & Republic Ins. Co. of America</i> , 404 P.2d 889 (Mont. 1965)	22
<i>School Dist. No. 5 of Snohomish County v. Sage</i> , 13 Wn. 352, 43 P. 341 (1896)	13
<i>SEC v. National Securities, Inc.</i> , 393 U.S. 453 (1969)	44
<i>Standard Sec. Life Ins. Co. v. West</i> , 267 F.3d 821 (8th Cir. 2001)	45, 46
<i>Tacoma Ry. & Motor Co. v. Cummings</i> , 5 Wn. 206, 210, 31 P. 747 (1892)	13
<i>Thorgaard Plumbing & Heating Co. v. County of King</i> , 71 Wn.2d 126, 426 P.2d 828 (1967)	10, 33
<i>Townsend v. Quadrant Corp.</i> , Wash. Supreme Ct. No. 84422-4, at *6 (Jan. 5, 2012)	48
<i>United States Department of Treasury v. Fabe</i> , 508 U.S. 491 (1993)	44
<i>Verbeek Properties, LLC v. GreenCo Environmental, Inc.</i> , 159 Wn. App. 82, 246 P.3d 205 (2010)	25
<i>Washington State Liquor Control Board v. Washington State Personnel</i> , 88 Wn.2d 368, 561 P.2d 195 (1977)	32

WASHINGTON STATUTES

RCW 18.48.200	11
RCW 4.12.025(3)	42
RCW 48.01.030	7, 20, 44
RCW 48.05.215	3, 39
RCW 48.05.220	42, 43
RCW 48.15.020(1)	39
RCW 48.15.040	39
RCW 48.15.150	1, 2, 3, 34, 40, 43-48

RCW 48.15.150(1)	3, 41, 43
RCW 48.15.150(2)	42
RCW 48.18.200	<i>passim</i>
RCW 48.18.200(1)(b)	9, 16, 21, 33, 36
RCW 7.04	23
RCW 7.04A	23

WASHINGTON SESSION LAWS

Laws of 1911, ch. 47, § 1	6, 7
Laws of 2011, ch. 47, § 9(1)	40
Code of 1881, Rem. Rev. Stat. § 420	11
Laws of 2005, ch. 433, § 50	23
Laws of 1911, ch. 47, § 75	41
Laws of 1943, ch. 138 § 1	19
Laws of 1869, ch. 20, § 266	11
Laws of 1947, ch. 79, § 15.15	41
Laws of 1911, ch 49, §75	42
Laws of 1911, ch. 49, § 13 ½	42

WASHINGTON REGULATIONS

WAC 284-43-322(4)	23
-------------------------	----

COURT RULES

RAP 2.5(a)	35
------------------	----

FEDERAL STATUTES

15 U.S.C. § 1012(b)	44
---------------------------	----

MASSACHUSETTS SESSION LAWS

Mass. Acts, 1907, Chap. 576, § 29	16
---	----

OTHER AUTHORITIES

15 <i>Couch on Ins.</i> , Sec. 209:4 (3rd. Ed. 2010)	22
J.L. Longaker, <i>History of Insurance Law</i> , 30 Univ. of Kansas City Law Review, 54 (1962)	7
Sullivan, William A., <i>Insurance Code of the State of Washington</i> , at § 30 (1937)	20
Uniform Arbitration Act (1943)	31

I. Introduction

Washington first adopted statutes to regulate insurance policies sold to Washington residents over 100 years ago. Among the provisions adopted as part of the 1911 Insurance Code, and revised and reenacted in the 1947 Insurance Code, are the two primary statutes at issue in this appeal. RCW 48.18.200 is a consumer protection statute that prohibits insurers from requiring an insurance policy to be construed according to the law of any other state or from including any provision “depriving the courts of this state of jurisdiction of action against the insurer.” RCW 48.15.150 further protects Washington insureds by providing that unauthorized (i.e., surplus lines) insurers “shall” be sued in the state’s Superior Courts. The trial court correctly recognized that these statutes were intended to provide an important protection to Washington insureds:

Reading those two sections as a whole and giving meaning to all of the language therein I conclude that the intent of the Legislature expressed therein is to protect insureds in this state and to assure their right to proceed in courts of this state when they have a claim against the insurer, the issuer of the policy.

On appeal, James River makes no attempt to read these statutes as a whole and seeks instead to divorce them from the context of the protective insurance codes in which they were

enacted. James River's primary argument is the simplistic notion that RCW 48.18.200 cannot apply because it does not use the word "arbitration." But, as recognized by the trial court, a legislature trying to broadly protect an insured's right to have their disputes resolved in the courts of this state would speak in broad terms:

[N]either statute [RCW 48.18.200 or RCW 48.15.150] contains the word "arbitration." That does not surprise me. If the intent of the Legislature here, as reflected in the language itself, is to assure residents or persons residing in the state the opportunity to have disputes against their insurers resolved in the courts of this state, it's not surprising that the word "arbitration" is not used. Arbitration is just one device by which an insurer might seek to limit access to Washington courts, so a broader description of the Legislature's intent to assure that access is not surprising.^[1]

For the first time on appeal, James River challenges the trial court's reasoned decision by attempting to argue a distinction between "common law arbitration" and "statutory arbitration." In essence, James River argues that because "statutory" arbitration eventually supplanted "common law" arbitration in Washington, the legislature intended to prohibit only those policies that required "common law" arbitration. This is not supported by the record or common sense. The statutes at issue here have never distinguished between "common law" and "statutory" arbitration.

¹ RP at 37.

They apply broadly to all insurance contracts that purport to deprive our state's courts of "the jurisdiction of action against the insurer," regardless of the method.

RCW 48.15.150 also independently invalidates any contractual provision that would require submission of claims to arbitration. That statute, which was also enacted in 1911 and strengthened in 1947, mandates that causes of action against unauthorized "surplus lines" insurers be brought in the full light of a superior court proceeding: "An unauthorized insurer *shall* be sued, upon any cause of action arising in this state under any contract issued by it as a surplus line contract, pursuant to this chapter, in the superior court of the county in which the cause of action arose." See former RCW 48.15.150(1). James River, an unauthorized Virginia insurer, is required to submit to this jurisdiction. RCW 48.05.215. This Court should reject the explicit request by James River to render RCW 48.15.150 a wholly superfluous venue provision.

This Court should also reject James River's argument that the statutes at issue are preempted by the Federal Arbitration Act. No such preemption is possible because, as the Washington

Supreme Court recently recognized² (and as widely recognized in other jurisdictions), statutes that void binding arbitration clauses in insurance policies are regulations of the business of insurance. The trial court correctly concluded that such statutes are protected from FAA preemption by the federal McCarran-Ferguson Act.

This Court should affirm the trial court and remand for litigation, in Thurston County Superior Court, of WSDOT's insurance coverage and bad faith claims against James River. James River should not be allowed to hide its practices from the open courts and judicial review of the State of Washington.

II. Issues Pertaining to Assignments of Error

1. Would the arbitration clause that James River seeks to enforce deprive our state's courts of "the jurisdiction of action against the insurer," as that phrase was understood by our legislature in 1911 and 1947?
2. Does a clause that requires binding, non-reviewable arbitration of a dispute between a Washington insured and an unauthorized (surplus lines) insurer violate the statute that mandates that "an unauthorized insurer *shall be sued in the superior court* of the county in which the cause of action arose" for such disputes?
3. Do Washington statutes that bar binding and binding arbitration proceedings in insurance coverage disputes constitute the regulation of the business of insurance sufficient to trigger the protections of the McCarran-Ferguson Act's reverse preemption doctrine, as our Supreme Court held in *Kruger Clinic Orthopaedics, LLC, v. Regence Blue Shield*, 157 Wn.2d 290, 138 P.3d 936 (2005)?

² *Kruger Clinic Orthopaedics, LLC v. Regence BlueShield*, 157 Wn.2d 290, 138 P.3d 936 (2006).

4. Setting aside the Washington statutes that make the purportedly binding arbitration endorsements illegal, would remand for arbitration be premature when there is a material factual dispute about whether the endorsements in question ever became part of the insurance contract?

III. Counter-Statement of the Case

With one exception, WSDOT does not dispute the factual summary provided in the Brief of Appellant. WSDOT does dispute the assertion that this Court may “assume” that “the arbitration clauses applied to WSDOT.”³ As explained in § IV(D) *infra*, the arbitration clauses relied upon by James River were not disclosed to WSDOT when the insurance policies were purchased. Thus, should this Court determine that the arbitration endorsements at issue are enforceable, disputed factual issues remain as to whether the arbitration endorsements ever actually became part of the insurance contract between James River and WSDOT.

IV. Argument

A. The arbitration clauses are unenforceable because they violate RCW 48.18.200.

1. Rules of Statutory Construction.

This case primarily raises issues of statutory construction of two statutes contained in the Washington Insurance Code. As is

³ Brief of Appellant at 3.

always the case, courts must give statutes the meaning the legislature intended. To determine legislative intent, courts must construe statutes as a whole, trying to give effect to all the language and to harmonize all provisions. *See, e.g., Rayner v. Neff*, 110 Wn. App. 860, 863, 43 P.3d 35, 37 (2002).

Because the statutes in this case are 101 years old, this Court must focus on the legislature's intent "at the time of enactment of the statute." *Brenner v. Leake*, 46 Wn. App. 852, 854, 732 P.2d 1031 (1987); *Accord Linn v. Reid*, 114 Wn. 609, 621, 196 P. 13 (1921); *Bloomer v. Todd*, 3 Wn. Terr. 599, 615, 19 P. 135, 1 L.R.A. 111 (1888). Interpreting courts must also interpret statutes in a way that avoids rendering any statutory provision superfluous. *See American Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2004) (holding that all of the words in the 1947 insurance code "have meaning," and "are not superfluous").

2. Washington's First Insurance Code.

Washington adopted its first insurance code in 1911.⁴ Our Legislature's intent to protect the buying public from overreaching insurers is evident therein. For example, § 1 of the 1911 Code provided in part that the business of insurance:

⁴ The various insurance code provisions are attached as Appendix A (1911) and Appendix C (1947).

. . . is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive and misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured and their representatives shall rest the burden of maintaining proper practices in said business.

Laws of 1911, Ch. 47, §1. This provision became the basis for the “statement of public interest” now codified at RCW 48.01.030.⁵

This declaration emphasized the public character of the business of insurance and rejected the view that insurance was only a matter of private contract.⁶

In fact, the 1911 Code even clarified that certain insurance policy provisions would be unenforceable regardless of the language used by the insurance company. Section 30 of that Code, entitled “Policy Provisions Voided,” stated:

⁵ “The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, their providers, and their representatives rests the duty of preserving inviolate the integrity of insurance.” RCW 48.01.030.

⁶ One commentator long ago noted:

Perhaps no other business affects the public as intimately as does the insurance business, and so it is therefore subject to stringent regulation. This regulation in the United States began over one hundred years ago when several states established insurance departments. . . . In the early days the public was considered “fair game” and the companies imposed so many hardships on unwary policyholders that it is no surprise the statute books are filled with laws intended to protect the buying public.

J.L. Longnaker, *History of Insurance Law*, 30 Univ. of Kansas City Law Review, 54 (1962).

No domestic, foreign, or alien insurance company transacting business in this state, shall hereafter make, issue or deliver herein, any policy of contract of insurance, except policies or contracts of ocean marine insurance, containing any condition, stipulation, or agreement, requiring such contract of insurance to be construed according to the laws of any other state or country, or depriving the courts of this state of the jurisdiction of action against such company to a period of less than one year from the time when the cause of action accrues; and any such condition, stipulation, or agreement shall be void, and such policy shall be binding upon the company having issued it.⁷

Sections 1 and 30 of our original Code demonstrate the legislature's intent, since 1911, to protect Washington insureds from any insurance company that drafts its policies to unfairly restrict judicial remedies.

3. James River's binding arbitration endorsements violate RCW 48.18.200.

Section 30 of our original Code was amended in 1947 and is now codified at RCW 48.18.200. That amendment expanded the protections of Washington insureds by voiding *any* policy provision that attempted to deprive Washington courts of "jurisdiction of action":

(1) No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement

⁷ This section was amended in 1947 to become the current RCW 48.18.200,

(a) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or

(b) depriving the courts of this state of the jurisdiction of action against the insurer; or

(c) limiting right of action against the insurer to a period of less than one year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insurance, such limitation shall not be to a period of less than one year from the date of the loss.

(2) Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

Although each of these independent requirements is relevant to an analysis of the James River endorsements, the subsection that specifically invalidates those endorsements is RCW 48.18.200(1)(b).

Understanding subsection (1)(b) requires a review of both the legislative history and statutory context for that provision and its key phrase: “jurisdiction of action against the insurer.” James River does not dispute the ambiguous nature of the term “jurisdiction.”⁸

⁸ Brief of Appellant at 10 (citing *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 78 (1st Cir. 2000)).

Nor could James River dispute that the term “action” is context-sensitive, at least where arbitration is concerned. See *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 243-244, 236 P.3d 182 (2010) (“our cases together teach that we should examine the purpose of the statute before us to determine whether ‘action’ includes arbitral proceedings in a given context”; holding, in statute of limitations context, that an arbitration is not an “action” that must be commenced within a given period); *Thorgaard Plumbing & Heating Co. v. County of King*, 71 Wn.2d 126, 130, 132, 426 P.2d 828 (1967) (holding, in a claim filing statute designed to provide notice of a claim, that an agreed arbitration is not an “action” that would require notice), and *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 36–37, 39–40, 42 P.3d 1265 (2002) (holding that, in an attorney fee statute, an arbitration *is* an “action” from which prevailing worker is entitled to attorney fees).

Though the *Broom* line of cases are not particularly applicable here, they show just how much the statutory context and legislative history matter in interpreting the phrase “jurisdiction of action” as used in RCW 48.18.200. That language cannot be read in isolation, and out of context, as James River urges by its singular focus on the word “jurisdiction.” Rather, the critical phrase –

“depriving the courts of this state of the jurisdiction of action against the insurer” – must be read in context. That is, it must be read (1) with an understanding of the development of statutory and common law arbitration in our state, (2) as part of a section that prohibits insurance companies from drafting even unambiguous provisions that preclude Washington courts from having authority to enforce an insured’s claims under Washington law, and (3) as part of a Code designed to prevent insurers from imposing hardships or inequity on unwary consumers.

a. Prior to the enactment of the predecessor to RCW 18.48.200 in 1911, Washington made few distinctions between “statutory” and “common law” arbitration proceedings.

Washington has, since its earliest days, regulated arbitration proceedings by statute.⁹ See Laws of 1869, Ch. 20, § 266; see *also* Code of 1881, Rem. Rev. Stat. § 420. That statute provided, among other things, that parties with disputes were allowed to “submit their difference to the award or umpirage of any person or persons mutually selected.” *Id.*

On its face, the 1869 arbitration statute provided for extensive judicial review of arbitrations. For instance, the statute

⁹ See CP 337-621 (Dykstra Declaration) at Exhibit F (Session Laws for Washington Arbitration Statutes).

provided that parties could “except” to an arbitration award by arguing to the superior court that the arbitrator had “committed an error in fact or law[.]” *Id.* at § 270. Upon deciding that “the arbitrators have committed error in fact or law,” the superior court ostensibly had the authority to “refer the cause back to said arbitrators.” *Id.* at § 271.

Despite this expansive language, our courts early on applied common law arbitration principles to impose severe limits on judicial review of arbitration awards. For instance, in 1896, our Supreme Court held that an arbitrator’s award could not be vacated unless the legal or factual error appeared on the face of the award:

The legislature has provided that arbitrators shall have power to decide both the law and the fact that may be involved in the cause submitted to them (Code Proc. § 430); *and that is the common-law rule*, upon a general submission, unless the arbitrators are restricted by the agreement to submit (Morse, Arb. p. 296). The legislature has also provided, as we have seen, that awards may be set aside for error in fact or law; but, *inasmuch as there is no provision in the statute requiring arbitrators to file or preserve the evidence received upon the hearing, it would seem to follow that the errors which will sustain an exception to an award on the ground indicated must be discovered by an examination of the award alone*. If it was the intention of the legislature to require the court, upon hearing exceptions taken to awards, to examine the evidence submitted to the arbitrators, or, in other words, to try the cause de novo, it is but reasonable to presume that they would have so

declared. And, in the absence of such provision, we think we are justified in adopting the rule *announced in many well-considered cases*, and which we believe is subject to but few exceptions, viz. that the errors and mistakes contemplated by the statute must appear on the face of the award, or, at least, in some paper delivered with it.

School Dist. No. 5 of Snohomish County v. Sage, 13 Wn. 352, 355-357, 43 P. 341 (1896) (emphasis added). The *Sage* court also applied common law principles to hold that statutory arbitrators were not even strictly bound to apply the law:

As to matters of law, arbitrators, unless restricted by the agreement to submit, are not bound, in all cases, to follow the strict rules of law governing the courts, but may decide in accordance with their views of the equitable rights of the parties. . . . [E]ven where arbitrators are required to decide according to the strict rules of law, if the error complained of is not plain, or if the point of law is a doubtful one, it has been held by respectable authority that their decision will not be interfered with on account of error in law. Morse, Arb. p. 314.

Id. at 359, 360.

Likewise, it was clear by 1892 that statutory arbitrations deprived the courts of power they would otherwise possess. See *Tacoma Ry. & Motor Co. v. Cummings*, 5 Wn. 206, 208, 210, 31 P. 747 (1892). The *Tacoma Railway* court examined the circumstances in which the superior court would have “full jurisdiction of the controversy to proceed to a final determination.”

Id. at 210. The court held that the superior court would have such “full jurisdiction” if “the arbitration had failed.” Likewise, the *Tacoma Railway* court explained that the filing of the arbitration award would serve to “give” the superior court jurisdiction over a dispute subject to an arbitration agreement:

the law having provided that the filing of such award with the written agreement to submit the same to arbitration *should give the court jurisdiction of the persons of the parties to the arbitration, and of the subject-matter of the controversy*, every one entering into such an arbitration must be held to have consented thereto.

Id. Thus, in the understanding of our courts in 1892, a superior court would have no subject matter or personal jurisdiction to hear a dispute that was subject to the arbitration statute until the award and arbitration agreement were filed. And, as shown by the *Sage* court in 1896, the superior court’s authority to review such an award was extremely limited.

Further, before the 1911 enactment of RCW 48.18.200’s predecessor, no Washington decision had yet held that common law arbitration had been displaced by the Washington arbitration statute. In fact, the Washington Supreme Court, in 1904, declared it “immaterial” whether an arbitration was statutory or common law:

Whether this agreement was a statutory contract or a common-law contract is immaterial in this case, because it was a good and binding contract in either event, and, like other contracts entered into upon good and sufficient consideration, should be performed according to its terms. Under the statute, as well as under the common law, the parties were at liberty to agree upon such conditions as they desired, and it was the duty of the arbitrators to determine the cause 'agreeably to the terms of the submission.' Section 5104, Ballinger's Ann. Codes & St.

Jordan v. Lobe, 34 Wn. 42, 74 P. 817 (1904).

- b. **In adopting the 1911 predecessor to RCW 48.18.200, our courts made no distinction between statutory and common law arbitration, rather barring *all* clauses that would deprive our state's courts of "the jurisdiction of action against the insurer."**

Section 30 of our state's 1911 Insurance Code contained slightly differently wording than the current version of RCW 48.18.200 (enacted in 1947). That earlier version, apparently due to a draftsman's error,¹⁰ omitted the language that now clearly voids

¹⁰ In a 1937 publication, our State's insurance commissioner noted that the original codification of § 30 of the Insurance Code (now RCW 48.18.200) in 1911 had omitted language "apparently by mistake." See Sullivan, William A., *Insurance Code of the State of Washington*, at § 30 (1937). Specifically, Mr. Sullivan stated: "This section as passed, apparently by mistake omitted, after the words 'against such company' and before the words 'to a period,' the following: 'Or limiting the right of action against such company.'" See Appendix B. Thus, Mr. Sullivan believed that the relevant portion of the original 1911 version of § 30 of Washington's insurance code was meant to have been functionally the same as § 29 of the 1907 revision to the Massachusetts insurance code, which provided: "No foreign or domestic insurance company or association transacting business in this commonwealth shall make, issue, or deliver therein any policy or contract of insurance containing any condition, stipulation or agreement *depriving the courts of this commonwealth of jurisdiction of actions against such*

agreements “depriving our courts of the jurisdiction of action against the insurer.” It appears that such a requirement was intended by our legislature in the 1911 code.¹¹ And the intended language made no distinction between “common law” or “statutory” procedures that deprive courts of jurisdiction.

Thus, there has never been language in the Insurance Code to support the implied exception for statutory arbitrations that James River alleges is fundamental to RCW 48.18.200(1)(b). This is true whether this Court considers the statutory context of the 1911 predecessor to RCW 48.18.200 or the current version of that statute, enacted in 1947.

- c. **Though our courts ruled that common law arbitration had been displaced in 1916, that decision did not change the view that arbitration proceedings, be they statutory or common law, deprive courts of jurisdiction of action.**

It was after the 1911 enactment of RCW 48.18.200’s predecessor that Washington courts began to clarify the difference between a “statutory” arbitration and a “common law” arbitration proceeding. *See Dickie Mfg. Co. v. Sound Construction & Eng’g*

companies or associations, or limiting the time for commencing actions against such companies or associations to a period of less than two years from the time when the cause of action accrues; and any such condition, stipulation or agreement shall be void.” Mass. Acts, 1907, Chap. 576, § 29 (emphasis added).

¹¹ *Id.*

Co., 92 Wn. 318-319, 159 P. 129 (1916). In *Dickie*, the plaintiff had chosen not to follow the procedures set out in the arbitration statute for having an arbitration award modified. Instead, he brought a separate, untimely petition to have the award declared void, proceeding on the theory that the arbitration procedure he had participated in “was no statutory arbitration” but rather a revocable “common-law arbitration.” *Id.* at 318-319. The Supreme Court held that, because our state’s arbitration statute was “so complete,” it was “plain” that “common-law arbitration was excluded by our statute.” *Id.* at 319.

In reaching this holding, the *Dickie* court cited the *Tacoma Railway* case to note the limited nature of a superior court’s jurisdiction over an agreement subject to arbitration: “The [arbitration] board is a preliminary, voluntarily created tribunal or referee, and the jurisdiction of the superior court is first to be exerted in a revisory capacity and only when appealed to by exceptions.” *Id.* at 321.

The year after *Dickie*, the Washington Supreme Court was called upon to analyze the difference between arbitration and “appraisal”. *Martin v. Vansant*, 99 Wn. 106, 108, 168 P. 990 (1917). Without making any reference to the arbitration statute, the

Martin court cited authority from around the country to show that appraisal, *unlike an arbitration*, was not objectionable on the ground that it deprived a court of jurisdiction. *Id.* (holding that an award of an appraiser “is not an award of arbitrators properly so called where the fact to be ascertained is a mere incident of a contract, *and its settlement by third persons serves to assist the court rather than to oust it of its lawful jurisdiction*”) (emphasis added).

Numerous cases, from 1911 to 1947, addressed the requirements for arbitrations in Washington.¹² Notably, not one of those cases involved an insurance company seeking to compel arbitration of a coverage dispute or an insured or insurer seeking to confirm the decision of an arbitrator arising from an insurance coverage dispute.

d. Our legislature’s revisions to the arbitration statutes in 1943 and 1947 show no intent to allow binding arbitration of claims against insurers.

In 1943, the legislature significantly revised its arbitration statutes. See Laws of 1943, ch. 138, §§ 1 to 22. Gone was the pretense that superior courts could review arbitrators’ awards for

¹² See, e.g., *Martin v. Vansant*, 99 Wn. 106, 168 P. 990 (1917), *In re O’Rourke Bros.*, 136 Wash. 490, 240 P. 673 (1925), *Fisher Flouring Mills, Co. v. US*, 17 F.2d 232 (9th Cir. 1927), *Gord v. F.S. Harmon*, 188 Wash. 134, 61 P.2d 1294 (1936), *All-Rite Contracting Co. v. Omev*, 27 Wn.2d 898, 181 P.2d 636 (1947).

any “error in fact or law.” Rather, only certain narrow and extreme grounds would justify vacation of an arbitrator’s award under the 1943 act: e.g., “corruption, fraud or other undue means.” *Id.* at § 16.

But this new arbitration act was not universal in application. Rather, the 1943 act did not apply to agreements “between employers and employees or between employers and associations of employees.” Laws of 1943, ch. 138 § 1. Directly applicable to this case, the new law also provided that arbitration agreements would be considered unenforceable “upon such grounds as exist in law or equity for the revocation of any agreement.” *Id.* If an agreement to arbitrate was void because it violated a statute, the agreement could not be enforced. The new law did not assert any right, on behalf of insurers, to binding arbitration of insurance coverage disputes.

In 1947, the legislature fine-tuned the employment agreement exception to the 1943 arbitration act. *Greyhound Corp. v. Division 1384, Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Amer.*, 44 Wn.2d 808, 811-812, 271 P.2d 689 (1954). The “purpose of the 1947 amendment was to remove the doubts” about whether the preexisting clauses [in collective bargaining agreements] would have effect. *Id.* The 1947

amendment did not address the issue of whether an insurer could include a clause in an insurance policy that would require binding arbitration of coverage disputes.

e. The 1947 enactment of RCW 48.18.200 shows no intent to allow extra-judicial dispute resolution beyond that which the legislature attempted to enact in 1911.

Four years after the 1943 revisions to the arbitration statute, the legislature also overhauled its insurance code. Among the changes, RCW 48.01.030 was reworded to emphasize the “public interest” in the insurance business. With respect to RCW 48.18.200, the legislature confirmed what Insurance Commissioner Sullivan had written in 1937¹³ by enacting the language that had been mistakenly omitted in 1911. The remaining language of former § 30 was re-organized to clarify the several types of insurance contract provisions that were impermissible. Thus, even though our Supreme Court had repeatedly addressed the issue of common law arbitration during the time between 1911 and 1947, and even though our legislature had enacted large scale revisions to the arbitration statute in 1943 and 1947, our legislature chose in 1947 to reaffirm what it had attempted to enact in 1911:

¹³ See *supra* note 12.

agreements that deprive courts of the jurisdiction of action against an insurer are void. That statute has not been modified since.

f. The published authority since 1947 confirms that an insurer may not force a Washington insured into binding arbitration.

Since 1947, only one Washington case has interpreted RCW 48.18.200(1)(b): *Keesling v. Western Fire Ins. Co. of Fort Scott, Kansas*, 10 Wn. App. 841, 520 P.2d 622 (1974). The *Keesling* case turned on the differences between “arbitration” and “appraisal.” There the insurance policy barred the insured from bringing any suit on the policy “unless all the requirements of this policy have been complied with.” *Id.* at 842-843. One of those requirements was a clause that required disagreements as to the actual cash value of a loss to be decided by appraisers selected by the parties. If the parties’ appraisers could not agree on an actual cash value, an umpire would be selected to decide the dispute. *Id.* at 842. The *Keesling* court held that this appraisal provision did not violate RCW 48.18.200(1)(b). *Id.* at 845. But in upholding this appraisal limitation, the court distinguished *arbitration* provisions:

[A] provision in a contract requiring all Differences or controversies arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration, *will not be allowed to interfere with or bar the litigation of such controversies when brought into*

court. To enforce such provisions would be to allow parties to barter away the jurisdiction of courts to determine the rights of parties and redress their wrongs. *Therefore such provisions are disregarded, as against public policy.* But many of the same eminent authorities hold that a provision in a contract requiring that the Value or Quantity of a thing which might be involved in a controversy thereunder be ascertained and determined by arbitration, or in some other possible and reasonable manner, does not oust the jurisdiction of the courts, but only requires a certain character of evidence of a fact in controversy.

Id. at 846 (emphasis added) (quoting *School Dist. No. 1 of Silver Bow County v. Globe & Republic Ins. Co. of America*, 404 P.2d 889, 892 (Mont. 1965) (quoting from *Randall v. American Fire Ins. Co. of Philadelphia*, 25 P. 953 (Mont. 1891))).

As the *Martin v. Vansant* court showed in 1917, our courts have long recognized the distinction between “arbitration” and “appraisal.” *Martin*, 99 Wn. at. 108 (adopting and quoting, among others, rule stated in *Garr v. Gomez*, 9 Wend. 649 (N.Y. 1832). See also 15 *Couch on Ins.*, Sec. 209:4 (3rd. Ed. 2010) (“Appraisal calls for the mere determination of a particular fact or set of facts. In the insurance context, appraisal is most often used to determine the amount of the loss sustained under a property insurance policy. Arbitration is a more far-reaching proceeding, by which the parties agree to have a neutral person or persons resolve a disputed matter.”). Thus, *Keesling’s* approval of appraisal cannot be

deemed an approval of *arbitration* of a dispute under an insurance policy.

However, the Washington Supreme Court did recently analyze a statute that applies to binding arbitration endorsements *in the insurance context*. See *Kruger Clinic Orthopaedics, LLC, v. Regence Blue Shield*, 157 Wn.2d 290, 138 P.3d 936 (2005). *Kruger* analyzed the viability of arbitration clauses in agreements between insurers and health care providers who were seeking compensation for services provided to insured patients. After a dispute over payment arose, the providers sued the insurers in superior court, and the insurers asked the superior court to compel binding arbitration. An insurance regulation voided any contractual provision that required arbitration of disputes between the insurers and providers “to the exclusion of judicial remedies”. See WAC 284-43-322(4). The insurers argued that their arbitration clauses were consistent with that requirement because the providers could seek limited judicial review of the eventual arbitration award under the former Washington Arbitration Act.¹⁴ Noting that review under

¹⁴ The case was brought prior to the repeal of RCW 7.04 and enactment of RCW 7.04A. See Laws of 2005, ch. 433, § 50.

that act was limited to the face of the award,¹⁵ the Supreme Court rejected the insurers' argument: "We hold that the arbitration provisions at issue in these consolidated cases violate the ... regulation by requiring binding arbitration and allowing only the limited judicial review permitted under the WAA." *Id.* at 306; see also *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 109 Wn. App. 230, 34 P.3d 870 (2001) (binding arbitration clause invalid under statute that preserved parties' rights to enforce statutory rights "by judicial proceeding"), *abrogated on other grounds by Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 782, 225 P.3d 313 (2009).

James River's attempt to distinguish *Kruger* was properly rejected by the trial court. As the trial court noted, the phrase "exclusion of judicial remedies" is the modern equivalent of the phrase "depriving ... of the jurisdiction of action":

Under modern jurisprudence, arbitration clauses are not viewed as depriving a court of its jurisdiction, but rather as an agreement to exclude judicial remedies. So if the Legislature was crafting a statute to accomplish the very same result as it accomplished with the statute in 1947, it might very well change the language of Section .200 to declare that: "(1) No insurance contract . . . Shall contain any condition, stipulation, or agreement (b) excluding judicial

¹⁵ The "vacation" and "modification" portions of the former and current statutes are without significant difference. Compare former RCW 7.04.160-170 (2004) with RCW 7.04A.230-240 (2011).

remedies for an action against the insurer" and that "(2) Any such condition, stipulation, or agreement in violation of this section shall be void."

If that was the language, then the decision in *Kruger Clinic Orthopedics* would be exactly on point. It is not, because the language in the two statutes that we're dealing with is different. But I think the principles are applicable. And, I have followed the result in *Kruger* because it is persuasive authority, if not exactly binding precedent.

Rather than address the issue head on, James River simply asserts that *Kruger* applies "only in the context of the health care laws it addressed."¹⁶ But the authority cited for that proposition, *Verbeek*, does not so limit *Kruger*. *Verbeek* did not analyze *Kruger* at all: it was a waiver case involving an indisputably valid arbitration agreement. The *Verbeek* court mentioned *Kruger* only to say (correctly) that it was inapplicable: "[*Kruger*] is not on point, as it addressed a situation in which a statute expressly precluded the use of binding nonjudicial dispute resolution measures." *Id.* at 92. RCW 48.18.200, like the *Kruger* regulations, expressly precludes the use of insurance agreements that deprive our courts of "the jurisdiction of action against the insurer." *Kruger* is on point here.

¹⁶ Brief of Appellant at 23-24 (citing *Verbeek Properties, LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 246 P.3d 205 (2010)).

g. Other jurisdictions have adopted similarly worded statutes to prohibit binding arbitration clauses in insurance policies.

In *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act*, 11 Conn. Ins. L.J. 254, 271 (n. 67) (2005), professor Susan Randall notes that nearly one third of states have provisions prohibiting binding arbitration of insurance disputes, with several jurisdictions using the same “depriving the courts of jurisdiction of action” language used by Washington:

Almost a third of the states and two United States territories currently regulate arbitration of insurance disputes. Those provisions generally appear in two types of state statutes. First, some state arbitration acts provide, like the FAA, that arbitration agreements are valid, enforceable and irrevocable, but specifically exempt insurance contracts from the statute’s scope. . . . Second, some state insurance codes provide that insurance policies issued or delivered in the state may not contain any provision which deprives the state’s courts of jurisdiction against the insurer.

Professor Randall cites the following jurisdictions as having insurance code provisions voiding binding arbitration provisions: Hawaii, Louisiana, Maine, Massachusetts, Virginia, Washington, Puerto Rico and the U.S. Virgin Islands.

The Louisiana Court of Appeal analyzed one of those provisions in *Macaluso v. Watson*, 171 So.2d 755 (1965). The *Macaluso* court analyzed a statute that was materially identical to

RCW 48.18.200. The court's analysis was similar to that in *Kruger*, focusing on the limitation of judicial remedies that an arbitration would entail to hold a binding arbitration clause void:

That the arbitration agreement above quoted has the effect of "(d)epri[ving] the courts of this state of the jurisdiction of action against the insurer" admits of no argument. It unequivocally provides that the issue of liability as well as quantum be submitted to arbitration in accordance with the rules of the American Arbitration Association and that the parties "each agree to consider itself (themselves) bound and to be bound by any award made by the arbitrators." It provides further that "judgment upon the award rendered by the arbitrators may be entered in any court having jurisdiction thereof." *Thus the function of the court is limited to that of a sheriff or enforcement officer to execute the award, whether or not it is in agreement with it.*

Macaluso, 171 So.2d at 757 (emphasis added). See also *Berrocales v. Superior Court of Puerto Rico*, 102 D.P.R. 224, 1974 WL 36882 (P.R.) (same). Given the broad language of RCW 48.18.200, this Court cannot be limited to the role of a sheriff by the James River endorsements.

Moreover, James River has again failed to cite *any* Washington case to support its opinion that its endorsements do not deprive our state's courts of jurisdiction of action against James River. Rather, just as it did below, James River simply makes the broad claim on appeal that "the courts of this state routinely enforce

arbitration provisions in insurance contracts.”¹⁷ But James River has cited no actual Washington case in which a Washington insured was forced to submit to binding arbitration of a cause of action against his or her insurer.

James River has instead relied on two Washington cases that did not address the issue of whether an insured may invoke RCW 48.18.200 to avoid a binding arbitration clause: *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001); and *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 946 P.2d 388 (1997). In fact, in *Godfrey*, the party seeking to enforce the arbitration provision was actually *the insured*. Those cases thus provide little support for James River’s appellate argument. See *Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 824, 881 P.2d 986 (1994) (“In cases where a legal theory is not discussed in the opinion, that case is not controlling on a future case where the legal theory is properly raised.”).

Regardless, the *Price* case does help illustrate the meaning of phrase “jurisdiction of action” as used in RCW 48.18.200. The *Price* court explained that a superior court’s jurisdiction in an

¹⁷ Brief of Appellant at 21.

arbitration confirmation proceeding is not jurisdiction to decide “an original action”:

Although a party may apply to the court to confirm an arbitration award, *that is not the same as bringing an original action to obtain a monetary judgment.* A confirmation action is no more than a motion for an order to render judgment on the award previously made by the arbitrators pursuant to contract. If the court does not modify, vacate, or correct the award, the court exercises *a mere ministerial duty* to reduce the award to judgment.

Id. at 497 (emphasis added) (citations omitted).

Price is inconsistent with James River’s representation that courts have “substantial statutory power over arbitration proceedings.”¹⁸ Rather, the *Price* court repeatedly described a superior court’s jurisdiction as having been *limited* by the nature of the statutory arbitration confirmation proceeding. *See, e.g., id.* at 498 (“When or if the arbitration award is brought to the superior court for confirmation, *the jurisdiction of the superior court is limited* by the nature of the special statutory proceeding to resolve only those questions properly submitted to the arbitrators and costs.”) (emphasis added). *Price* and *Godfrey* support the premise that forcing an insurance consumer to submit to binding arbitration of a coverage dispute would deprive our state’s courts of “the jurisdiction of action against the insurer.”

¹⁸ Brief of Appellant at 9.

James River next attempts to work around this authority, and the impact of the words “the jurisdiction of action against the insurer,” by citing *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 79 (1st Cir. 2000). *DiMercurio* is not on point, however, because of the critical difference in the order of adoption of arbitration statutes in Massachusetts. The *DiMercurio* court acknowledged that for nearly 100 years, the “depriving a court of jurisdiction” language was understood in Massachusetts to apply to contracts requiring binding arbitration. However, in 1960 the Massachusetts legislature adopted the Uniform Arbitration Act. The *DiMercurio* court held this adoption impliedly repealed the state’s prohibition on binding arbitration provisions in insurance policies.

James River does not ask this court to apply the disfavored “implied repeal” doctrine. Nor could James River responsibly do so because, in Washington, the 1947 Insurance Code’s specific amendments to RCW 48.18.200 occurred four years *after* the Washington legislature adopted the Uniform Arbitration Act. Thus, the legislature acted to clarify and reiterate the longstanding prohibition against binding arbitration clauses for insurance coverage disputes. The order of adoption of our relevant provision (1947) and the Uniform Arbitration Act (1943) demonstrates that the

Arbitration Act was not intended to impliedly repeal the Insurance Code provision. *DiMercurio* is not persuasive.

James River also relies on the unpublished and non-binding federal district court ruling in *Boeing Co. v. Agricultural Ins. Co.*, 2005 WL 2276770 (W.D. Wash. 2005).¹⁹ In that case, a trial court ruled that a requirement of binding arbitration was not void under RCW 48.18.200, relying on *Price, Godfrey, and DiMercurio*. That trial court did not have, as the trial court in this case did, the guidance of *Kruger's* analysis of arbitration provisions that deprive a party of "judicial remedies." Moreover, as explained below,²⁰ it does not appear that the parties in that case provided the court with the full statutory history behind our state's Insurance Code or arbitration statutes. For this reason, in the briefing below, even James River explicitly declined to rely on the *Boeing* court's "analysis of the legislative history."²¹

This Court should do the same. As explained in *Greyhound*, the relatively minor 1947 change to the arbitration statutes had nothing to do with the arbitrability of insurance coverage disputes.

¹⁹ See CP 337-621 (Dykstra Declaration) at Exhibit E (Ruling from *Boeing* Case); CP 337-621 (Dykstra Declaration) at Exhibit D (prior versions of insurance code).

²⁰ See CP 312-336 (WSDOT's Motion to Bar Initiation of Arbitration Proceedings) at § IV(C).

²¹ CP 660 n.6 (James River Opposition to WSDOT's Motion to Bar Initiation of Arbitration Proceedings).

It was a wholly different legislative project from the changes to the insurance code. It is the intent of our legislature in adopting our *insurance codes* in 1911 and 1947 that best indicates the meaning of the phrase “jurisdiction of action.” To hold otherwise would be to hold the relatively minor changes to the 1947 arbitration act an implicit repeal of the 1947 changes to the insurance code.²²

h. The trial court in this case correctly analyzed the legislative intent behind the enactment of RCW 48.18.200.

James River repeatedly chides the trial court by saying the trial court “misconstrued the statutory history behind” RCW 48.18.200 and had a “misunderstanding of how Washington courts viewed arbitration and their effects on courts’ jurisdiction.” Those attacks are unfair, particularly when the arguments James River makes on appeal bear no resemblance to the arguments it made with respect to RCW 48.18.200 below.²³

²² As noted, even James River has been unwilling to make an implicit repeal argument. Repeals by implication “are not favored in law.” *Washington State Liquor Control Board v. Washington State Personnel*, 88 Wn.2d 368, 373, 561 P.2d 195 (1977) (no implicit repeal “unless the two acts are so clearly inconsistent with and repugnant to each other they cannot, by fair and reasonable construction, be reconciled and both given effect”). The Insurance Code and Arbitration Act are not repugnant to each other. They are easily reconcilable via the Arbitration Act’s exemption for arbitration agreements that are unenforceable “upon such grounds as exist in law”. RCW 48.18.200(1)(b) is one such ground.

²³ Sections 5(A)(1)-(2) of the Brief of Appellant are entirely new arguments that James River chose, for whatever reason, not to make to the trial court. In fact,

More importantly, James River fails to address the many valid observations made by the trial court in its oral ruling. For instance, the trial court pointed out that James River was reading RCW 48.18.200 too narrowly:

It is important in reading the section as a whole that more than just the word "jurisdiction" be considered. Instead, the entire phrase "jurisdiction of action against the insurer" is the appropriate reading of that subsection in order to give meaning to the entire section.^[24]

James River has still offered no reading that would give effect to the full phrase "the jurisdiction of action against the insurer" as used in RCW 48.18.200(1)(b). That absence is glaring, given the *Price* court's declaration that a party's application to the superior court for confirmation of an arbitration award "is not the same as bringing an original action to obtain a monetary judgment," but rather a "mere ministerial duty to reduce the award to judgment." And *Price's* description is consistent with the view of statutory arbitration in *Dickie*, to the effect that the jurisdiction of the superior court, in a statutory arbitration proceeding, "is first to be exerted in a revisory capacity and only when appealed to by exceptions." *Dickie*, 92. Wn. at 321; see also *Thorgaard*, 71 Wn.2d at 132 ("that a party to

the words "common law arbitration" appear nowhere in any pleading or oral remark of James River before the trial court.

²⁴ RP at 36.

the arbitration may apply to the court for confirmation of the award is not to be equated with the bringing of an Action ... It is no more than a motion for an order to enforce an award of compensation already made by the arbitrators ... the court has a mere ministerial duty of entering judgment on the award.”).

James River also makes much of the simplistic observation that the statutes at issue do not use the word “arbitration.”²⁵ However, as noted by the trial court, a legislature trying to implement a broad protection of an insured’s right to judicial resolution would speak in broad terms:

[N]either statute [RCW 48.18.200 or RCW 48.15.150] contains the word "arbitration." That does not surprise me. If the intent of the Legislature here, as reflected in the language itself, is to assure residents or persons residing in the state the opportunity to have disputes against their insurers resolved in the courts of this state, it's not surprising that the word "arbitration" is not used. Arbitration is just one device by which an insurer might seek to limit access to Washington courts, so a broader description of the Legislature's intent to assure that access is not surprising.^[26]

Rather than respond to these straightforward observations, James River makes new legislative history arguments that focus on the distinction between statutory arbitration procedures and

²⁵ See Brief of Appellant at 8 (“The plain language of RCW 48.18.200 contains no reference to arbitration, much less a prohibition on binding arbitration in insurance policies.”).

²⁶ RP at 37.

common law arbitration procedures. Thus, James River appears to (now) have no dispute that a *common law* arbitration clause would have invoked the protections of RCW 48.18.200. It is only *statutory* arbitration, according to James River, that escapes the operation of this statute. Though this Court need not even address this new argument, see RAP 2.5(a), James River's new analysis is flawed.

First, James River's statutory/common law distinction is nowhere to be found in the language or in the history of RCW 48.18.200. Had the legislature sought to impose such a subtle distinction – one that James River itself failed to articulate until this appeal – it would have done so explicitly. Such an odd²⁷ and specific legislative goal would have implemented by specific language, i.e., “No insurance contract ... shall contain any condition, stipulation, or agreement ... *requiring non-statutory arbitration* of actions against the insurer.” Instead, the legislature spoke broadly, using the 1947 equivalent of the modern phrase “exclusion of judicial remedies”: “any condition ... depriving the courts of this state of the jurisdiction of action against the insurer.”

²⁷ As explained below, there is no reason to believe that the legislature would have sought to protect insurance *consumers* from common law arbitration, which was non-binding and revocable. Voiding *statutory* arbitration would provide much greater due process rights to insurance consumers.

Second, if the legislature's only goal was to prevent *common law* arbitrations in Washington, the *Dickie* case accomplished that goal in 1916. Given the *Dickie* holding, and the many cases that repeated that holding between 1916 and 1947, the legislature should not have felt the need to amend the 1911 enactment in 1947 if James River's interpretation is correct. That the legislature did feel the need to add the omitted language in 1947 suggests that RCW 48.18.200(1)(b) is (and originally was) designed to apply beyond mere common law arbitration.

Third, given the doctrine of revocability associated with common law arbitrations, an agreement for common law arbitration would actually be less harmful to insureds than a statutory arbitration. Unlike the statutory arbitration procedures described in the *Sage* case in 1896, common law arbitrations were not binding prior to the announcement of the award. In view of the obvious legislative intent to protect insurance consumers, it makes little sense to suggest that the legislature sought to prevent *only* the less onerous form of arbitration, common law arbitration, in its insurance codes of 1911 and 1947.

Finally, James River's new "common law arbitration" focus begs the question of what, in the view of James River, RCW 48.18.200 was intended to bar. That statute requires the application of Washington law, the "jurisdiction of action against the insurer" for Washington courts, and a limitations period for any "right of action against the insurer" of at least one year "from the time when the cause of action accrues." *Id.* But if binding arbitration is permissible, James River's interpretation would provide no assurance that the arbitration proceeding itself take place in our state. No language in RCW 48.18.200, under James River's interpretation, would support such a requirement. If James River's interpretation is accepted, the same legislature that required Washington law and protected Washington jurisdiction would have had no problem with non-reviewable arbitrations that take place in other states. Such a conclusion makes little sense.²⁸

²⁸ While James River will argue that these are unrealistic hypothetical situations, the actual language of their own policies offers no protection against these kinds of abuses. The policies contain no provision (1) requiring the arbitrator to apply Washington law in resolving the disputes, or (2) requiring that the arbitration proceeding take place in Washington. CP 250-280 (OCP Policy); CP 281-311 (Excess Policy). James River's principal place of business is Richmond, Virginia.

Moreover, the policies in this case also purport to protect James River from any potential extra-contractual liability (such as liability for the bad faith alleged in this case).²⁹ If the arbitrator were to enforce that clause, that determination would also be non-reviewable by a purely ministerial Washington confirming court. Thus, the James River policies can, if this Court accepts the James River interpretation of RCW 48.18.200, succeed in removing from Washington courts the jurisdiction of action against the insurer for extra-contractual claims. Access to Washington courts helps assure the protection of Washington law to Washington insureds. To read out of the statute the right to access Washington courts could undercut the right to apply Washington law by leaving the substance of the proceedings unreviewable.

The James River interpretation is self-serving and farfetched. The trial court's interpretation harmonizes all of the language in the various statutes and gives effect to the insurance consumer protection purpose of those statutes. That interpretation also gives effect to the meaning that would have been attached to

²⁹ See CP 257 (OCP Policy: "We will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable Limit of Insurance."); see also CP 299 (Excess Policy: "We will not be liable for damages that are not payable under the terms of this policy or that are in excess of the applicable Limit of Insurance.").

the language in question by the legislatures in 1911 and 1947. This Court should affirm the trial court's ruling.

B. The arbitration clauses are unenforceable because Washington law requires that an unauthorized (surplus lines) insurer "shall be sued, upon any cause of action arising in this state under any contract issued by it as a surplus lines contract, in the superior court of the county in which the cause of action arose" and requires the insurer to submit to this jurisdiction.

Surplus lines insurance is insurance provided by an insurer "that is not licensed to transact business within the state where the risk is located." Black's Law Dictionary, (9th Ed. 2009) ("insurance"). James River admits that, as a surplus lines insurer,³⁰ it is not "authorized" by the insurance commissioner to "solicit insurance business in this state or transact insurance business in this state." RCW 48.15.020(1). Rather, James River may sell insurance only if that insurance is procured through a bonded "surplus lines broker." RCW 48.15.040. And James River must submit "itself to the jurisdiction of the courts of this state in any action, suit or proceeding instituted by or on behalf of an insured." RCW 48.05.215(1).

³⁰ See ¶2 of James River's Answer to Plaintiff's Amended Complaint.

In addition to these protections, the legislature has also provided that surplus lines insurers may not hide the claims against them from judicial scrutiny: “An unauthorized insurer *shall be sued*, upon *any cause of action* arising in this state under any contract issued by it as a surplus line contract, pursuant to this chapter, in the superior court of the county in which the cause of action arose.” Former RCW 48.15.150(1) (effective until July 22, 2011) (emphasis added).³¹ Because unauthorized insurers like James River must be sued in superior court, and James River must submit itself to the jurisdiction of such courts, WSDOT’s claim cannot properly be dismissed for arbitration.

The development of this provision, RCW 48.15.150, tracks closely the development of RCW 48.18.200. Both statutes had their first appearance in the 1911 insurance code. Both statutes were then revised in the 1947 insurance code. With respect to RCW 48.15.150, the 1947 revision changed the statute from a merely permissive statute to one that required that suits be brought

³¹ The version of the statute that became effective on July 22, 2011, provides: “For any cause of action arising in this state under any contract issued as a surplus line contract under this chapter, an unauthorized insurer must be sued in the superior court of the county in which the cause of action arose.” Laws of 2011, Ch. 47, § 9(1) (S.B. No. 5213).

via lawsuit in superior court. Thus, in 1911, the predecessor to RCW 48.15.150 provided:

Every company making insurance under the provisions of this section, shall be deemed and held to be doing business in this state as an unlicensed company and *may be sued* upon any cause of action, arising under any policy of insurance so issued and delivered by it, in the superior court of the county where the agent who registered or delivered such policy resides, or transacts business, by the service of summons and complaint made upon such agent for such company.

Laws of 1911, ch.49 § 75 (emphasis added). In 1947, the permissive “may” became a mandatory “shall”:

An unauthorized insurer *shall be sued*, upon any cause of action arising in this state under any contract issued by it as a surplus line contract, pursuant to this article, in the superior court of the county in which the cause of action arose.

Laws of 1947, ch. 79, § 15.15 (emphasis added). “The Legislature’s use of *both* the word ‘may’ and ‘shall’ in [the same provision] indicates it intended the two words to have different meanings: ‘may’ being directory while ‘shall’ being mandatory.” *Erection Co. v. Dep’t of Labor & Indus.*, 121 Wn.2d 513, 519, 852 P.2d 288 (1993).

The language in RCW 48.15.150(1) cannot be dismissed as a mere venue provision, as James River argues. Another section of the insurance code is already devoted to assigning venue in

insurance cases, and a third statute already assigns venue for claims arising from suits arising from agreements with foreign corporations. RCW 48.05.220; RCW 4.12.025(3). Nor should this Court accept James River's claim that this is simply an instance where the legislature adopted redundant provisions by "the numerous additions and revisions the code received over the course of more than sixty years."³² The original 1911 Insurance Code contained both the predecessor of RCW 48.05.220, entitled "Venue of Action on Insurance Policy" which was specifically applicable to suits against any "domestic company" as well as an "alien or foreign company" (Laws of 1911, Ch. 49, § 13 ½) as well as the predecessor of RCW 48.15.150(2) dealing with suits against "unauthorized insurers" (Laws of 1911, Ch 49, §75). The inclusion of two separate provisions was continued as part of the 1947 Insurance Code reforms. Both of these Codes were authored by the Insurance Commissioner's office, who certainly understood how its various provisions interrelated. This cannot be explained as a case of a legislator proposing an amendment to one provision of the code without being aware of another provision of the code dealing with the same subject. Since both provisions were enacted

³² Brief of Appellant, page 27.

together, on two occasions, as part of a comprehensive code applicable to insurance, it is especially important for this Court to adopt an interpretation that gives meaning to every part of the statute. All of the words in the 1947 insurance code “have meaning” and “are not superfluous.” *American Cont’l Ins. Co. v. Steen*, 151 Wn.2d 512, 521, 91 P.3d 864 (2004).

Reading the “shall be sued” language in former RCW 48.15.150(1) as merely setting *venue* would render either RCW 48.15.150(1) or RCW 48.05.220 superfluous. Such a reading is improper and must be rejected.

C. **The Federal Arbitration Act cannot preempt the application of these Washington insurance code provisions because the McCarran-Ferguson Act shields all state insurance regulations from federal preemption.**

When Congress enacted the McCarran-Ferguson Act in 1945, states were given the authority to regulate the business of insurance without the interference of federal preemption:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: Provided, That ... [the federal antitrust statutes] shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012(b). Statutes “aimed at protecting or regulating this relationship [between insurer and insured], directly or indirectly, are laws regulating the ‘business of insurance.’ ” *Kruger*, 157 Wn.2d at 301 (quoting *United States Department of Treasury v. Fabe*, 508 U.S. 491, 501 (1993)) (modification in *Kruger*).

Both RCW 48.18.200 and former RCW 48.15.150 regulate the “business of insurance.” See *SEC v. National Securities, Inc.*, 393 U.S. 453, 460 (1969) (“The relationship between insurer and insured, *the type of policy which could be issued*, its reliability, interpretation, and *enforcement*—these were the core of the ‘business of insurance.’ it is clear where the focus was—it was on the relationship between the insurance company and the policyholder.”) (emphasis added). Specifically, RCW 48.18.200 regulates the “type of policy which could be issued” in Washington, and former RCW 48.15.150 regulated the “enforcement” of a surplus lines policy. Both statutes were adopted as part of Washington’s insurance code, which is designed explicitly to regulate “the business of insurance.” See RCW 48.01.030.

The *Kruger* case shows just how protective the McCarran-Ferguson “shield” is. See *Kruger*, 157 Wn.2d at 302. In *Kruger*, the anti-arbitration laws in question did not even involve the

insurance contract itself. Rather, the contracts at issue were the reimbursement contracts between the health care providers and the insurers. Even so, the Supreme Court held that the anti-arbitration laws were shielded from preemption under the Federal Arbitration Act by McCarran-Ferguson: “In regulating the carrier-provider relationship, RCW 48.43.055 and WAC 284-43-322 protect, at least indirectly, the promises that carriers make to their insureds in their subscriber agreements.” *Id.* RCW 48.18.200 and RCW 48.15.150 regulate the insurer-insured relationship much more directly. Those laws are core regulations of “the business of insurance,” and they are protected from preemption by McCarran-Ferguson.

Numerous courts from other jurisdictions³³ have likewise concluded that state anti-arbitration statutes are, in the insurance context, shielded from FAA preemption by McCarran-Ferguson. Some of those cases do not even concern statutes in the state’s insurance code, but rather statutes barring arbitration of insurance

See, e.g., Allen v. Pacheo, 71 P.3d 375 (Colo. 2003); *American Health and Life Ins. v. Heyward*, 272 F.Supp. 2d 578 (D.S.C. 2003); *Continental Ins. Co. v. Equity Residential Prop.*, 565 S.E. 2d 603 (Ga. App. 2002); *Pagarigan v. Superior Court*, 102 Cal. App. 4th 1121, 126 Cal. Rptr. 2d 124 (2d Dist. 2002); *American Bankers Ins. Co. of Florida v. Inman*, 436 F.3d 490 (5th Cir. 2006); *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821 (8th Cir. 2001); *Mutual Reinsurance Bureau v. Great Plains Mut. Ins. Co. Inc.*, 969 F.2d 931 (10th Cir. 1992); *McKnight v. Chicago Title Ins. Co., Inc.*, 358 F.3d 854 (11th Cir. 2004). *See generally*, Randell, *Mandatory Arbitration in Insurance Disputes: Inverse Preemption of the Federal Arbitration Act* 11 Conn. Ins. L. J. 253 (2005).

disputes that are contained in the state's arbitration code.³⁴ Regardless, each anti-arbitration statute was held, for the purpose of McCarran-Ferguson, to be a regulation of the business of insurance and not preempted by the Federal Arbitration Act.

It appears that James River has now abandoned the argument it made below, that this Court must analyze the "*Pireno* factors" to determine whether RCW 48.18.200 or RCW 48.15.150 regulate the business of insurance. However, to the extent such a "*Pireno* response" is necessary, WSDOT incorporates the arguments made on the topic in its opposition to James River's motion for summary judgment³⁵ and its reply in support of its motion to bar the initiation of arbitration proceedings.³⁶

It likewise appears that James River has abandoned its attempt to distinguish *Kruger*. In fact, both of the cases relied upon by James River in its appellate briefing – *Boeing* and *DiMercurio* – are non-binding non-Washington cases that were decided before *Kruger*. *Kruger* is controlling authority on this issue: regulations that require binding arbitration of insurance coverage disputes are

³⁴ See, e.g., *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821 (8th Cir. 2001).

³⁵ CP 631-638 (WSDOT's Opposition to James River's Motion for Summary Judgment) at § IV(A)(2).

³⁶ CP 1119-1120 (WSDOT's Reply in Support of Motion to Bar Initiation of Arbitration Proceedings) at § I(C).

shielded from preemption by McCarran-Ferguson. James River's repeated citations to the FAA are of no avail. This case must proceed in Thurston County Superior Court.

D. Even setting RCW 48.18.200 and RCW 48.15.150 aside, genuine issues of material fact remain as to whether the non-disclosed arbitration endorsements ever became a part of the insurance contracts.

Throughout this litigation, WSDOT has denied that the binding arbitration endorsements relied upon by James River ever became a part of the policies in question. In short, and as explained in full in the briefing below, those arbitration clauses were not part of the coverage bargained for by WSDOT. Moreover, James River failed to ensure that the arbitration endorsements in question were ever delivered to WSDOT before the underlying coverage dispute arose.³⁷

The trial court reserved ruling on this issue because its conclusion that the purported endorsements were illegal rendered the issue moot.³⁸ Thus, even if this Court decides that binding arbitration endorsements are permissible under RCW 48.18.200 and RCW 48.15.150, the appropriate remedy would be remand to

³⁷ See CP 623-625, 638-640 (WSDOT Opposition to James River Motion for Summary Judgment at §§ II, IV(B)-(C)).

³⁸ Report of Proceedings at 3-4.

the trial court to decide the issue of whether the purported endorsements ever actually became a part of the insurance contract between WSDOT and James River. That issue is appropriately devoted to the trial court, and not an arbitrator, because it relates specifically to the arbitration endorsements and not the insurance contract as a whole. *See Townsend v. Quadrant Corp.*, Wash. Supreme Ct. No. 84422-4, at *6 (Jan. 5, 2012) (citing *McKee v. AT&T Corp.*, 164 Wn.2d 372, 394, 191 P.3d 845 (2008)).

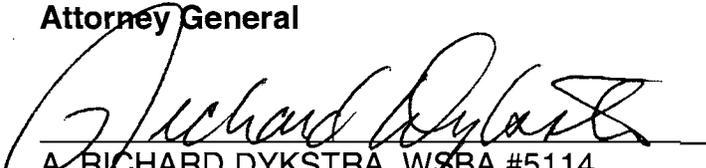
V. Conclusion

If given effect, endorsements like those of James River would deprive Washington's insurance consumers of the right to judicial resolution, in a Washington superior court and under Washington law, of all causes of action against their insurers—even unauthorized insurers. For that reason, the endorsements are unenforceable under RCW 48.18.200 and RCW 48.15.150. These statutes are shielded from preemption by the McCarran-Ferguson Act. And James River has not yet shown that the arbitration endorsements on which they rely ever became part of the insurance agreements in this case. This Court should affirm the trial court and reject James River's request for an order requiring

binding arbitration of the insurance coverage and bad faith disputes.

Dated this 17th day of January, 2012.

ROBERT M. McKENNA
Attorney General



A. RICHARD DYKSTRA, WSBA #5114
Special Assistant Attorney General

FRIEDMAN | RUBIN
601 Union Street, Suite 3100
Seattle WA 98101-1374
(206) 388-3475



RICHARD A. FRASER, III, WSBA #37577 *per tele phone authority*
ROBERT A. HYDE, WSBA #33593
Assistant Attorneys General

ATTORNEY GENERAL OF WASHINGTON
Torts Division
800 Fifth Avenue, Suite 2000
Seattle WA 98104-3188
(206) 464-7352

Attorneys for Plaintiff Washington State
Department of Transportation

CERTIFICATE OF SERVICE

I certify that on January 17, 2012, a true and correct copy of the foregoing document was served on the following:

Kara R. Masters
Skellenger Bender PS
1301 5th Ave, Suite 3401
Seattle, WA 98101

Joseph D. Hampton
Betts, Patterson & Mines, PS
701 Pike Street, Suite 1400
Seattle, WA 98101

Philip J. Skuda
Attorney at Law
P.O. Box 22472
Seattle, WA 98122

Robert A. Hyde
Richard A. Fraser, III
Washington State Attorney General
800 5th Ave., Suite 2000
Seattle, WA 98104

COURT OF APPEALS
DIVISION II
12 JAN 23 AM 10:40
STATE OF WASHINGTON
BY MS
DEPUTY

Dated this 17th day of January, 2012, at Seattle, Washington.



Nori Skretta

APPENDIX A

1911 Insurance Code

Sections 1, 30 and 75

CHAPTER 49.

[S. S. B. 6.]

INSURANCE CODE.

AN ACT to provide an Insurance Code for the State of Washington, to regulate the organization and government of insurance companies and insurance business, to provide penalties for the violation of the provisions of this act, to provide for an Insurance Commissioner and define his duties, and to repeal all existing laws in relation thereto. [Repealing all former acts.]

Be it enacted by the Legislature of the State of Washington:

ARTICLE I.

GENERAL PROVISIONS.

SECTION 1. *Insurance Defined.*

Within the intent of this act the business of apportioning and distributing losses arising from specified causes among all those who apply and are accepted to receive the benefits of such service, is public in character and requires that all those having to do with it shall at all times be actuated by good faith in everything pertaining thereto; shall abstain from deceptive or misleading practices, and shall keep, observe, and practice the principles of law and equity in all matters pertaining to such business. Upon the insurer, the insured, and their representatives shall rest the burden of maintaining proper practices in said business. Defining insurance.

Insurance is a contract whereby one party called the "insurer," for a consideration, undertakes to pay money or its equivalent, or to do an act valuable to another party called the "insured," or to his "beneficiary," upon the happening of the hazard or peril insured against, whereby the party insured or his beneficiary suffers loss or injury.

SEC. 2. *Terms Defined.*

The terms "company," "corporation," or "insurance company" or "insurance corporation," in this act, unless the context otherwise requires, includes all corporations, associations, partnerships, or individuals engaged as insurers in the business of insurance.

No such company shall make any agreement with any of its officers, trustees, or salaried employees, whereby it agrees that for any service rendered, or to be rendered, they shall receive any salary, compensation, or emolument that will extend beyond a period of five years from the date of such agreement; nor shall it pay any pension whatsoever.

No pen-
sion paid.

SEC. 28. *Vouchers for Expenditures.*

No domestic insurance company shall make any disbursement of twenty-five dollars or more, unless the sum be evidenced by a voucher, signed by or on behalf of the person, firm, or corporation receiving the money, and accordingly describing the consideration for the payment, if the same be for services and disbursements, setting forth the service rendered and an itemized statement of the disbursements made, and if it be in connection with any matter pending before any legislature or public body, or before any department, or officer of any government, accordingly describing in addition the nature of the matter, and of the interest of such corporation or organization therein, or, if such a voucher cannot be obtained by an affidavit stating the reason for not obtaining such voucher, and setting forth the particulars above mentioned.

Payments
by voucher.

SEC. 29. *Business Authorized.*

No domestic insurance company shall transact any business other than that specified in its articles of incorporation, and no foreign or alien insurance company, admitted to transact business in this state under the provisions of this act, shall transact any other kind of business than that which it has been authorized to transact.

Transact
authorized
business.

SEC. 30. *Policy Provisions Voided.*

No domestic, foreign, or alien insurance company transacting business in this state, shall hereafter make, issue, or deliver herein, any policy or contract of insurance, except policies or contracts of ocean marine insurance, containing any condition, stipulation, or agreement, requiring such contract of insurance to be construed according to the laws of any other state or country, or depriving the courts of this state of the jurisdiction of action against such com-

Relating
to policy
provisions.

pany to a period of less than one year from the time when the cause of action accrues; and any such condition, stipulation, or agreement shall be void, and such policy shall be binding upon the company having issued it.

SEC. 31. *Policy—Application—Contract.*

Every contract of insurance shall be construed according to the terms and conditions of the policy, except where the contract is made pursuant to a written application therefor, and such written application is intended to be made a part of the insurance contract, and the insurance company making such insurance contract, unless as otherwise provided by this act, shall deliver a copy of such application with the policy to the assured, and thereupon such application shall become a part of the insurance contract, and failing so to do it shall not be made a part of the insurance contract.

SEC. 32. *Combination and Agreements Prohibited.*

If any insurance company authorized to transact business in this state, or any agent or representative thereof, shall, either within or outside of this state, directly or indirectly, enter into any contract, understanding, or combination, with any other insurance company, or any agent or representatives thereof, for the purpose of controlling the rates to be charged for insuring any risk, or class or classes of risks, in this state, the commissioner shall forthwith revoke its license, and those of its agents, and no renewal of the licenses shall be granted until after the expiration of three years from the date of final revocation.

SEC. 33. *Rebates Prohibited.*

No insurance company, by itself or any other party, and no licensed insurance agent, solicitor, or broker, personally or by any other party, shall offer, promise, allow, give, set off, or pay, directly or indirectly, any rebate of, or part of, the premium payable on the policy, or on any policy, or agent's commission thereon, or earnings, profit, dividends, or other benefit founded, arising, accruing or to accrue thereon, or therefrom, or any other valuable consideration or inducement to or for insurance, on any risk in

have been filed in the office of the insurance commissioner. The services of such rating bureau shall be available, equally and ratably in proportion to the service rendered, to any and all insurance companies, agents, brokers, and property owners.

Each rating bureau shall keep an accurate and complete record of all work performed by it, which record must show all receipts and disbursements, and be open at all times to the inspection and examination of the commissioner, his deputy, or examiner.

No rating bureau operating under the provisions of this act shall, directly or indirectly, examine, stamp, or pass upon any "daily report" of policies issued by any company on property located within this state.

Not to pass
on daily
report.

Any person or party who knowingly violates any provision of this or the preceding section shall be punished by a fine of not less than fifty dollars nor more than five hundred dollars.

SEC. 75. *Unauthorized Companies—Agents—Surplus Line—Service.*

The commissioner, in consideration of the yearly payment of one hundred dollars, and the furnishing of a bond as hereinafter provided, may issue to any citizen in this state, not exceeding fifty in any one city, a license revocable at any time, permitting the party named in such license to place or effect insurance upon risks located in this state with insurance companies not licensed to do business in this state. No person, firm, or corporation, shall place, procure or effect insurance upon any risk located in this state in any company not licensed to do business in this state, or place, procure, or effect insurance in any marine risk destined for or departing from any port in this state, until such person, firm, or corporation shall have first procured a license from the commissioner as provided in this section, and has furnished a bond to the State of Washington in the penal sum of not less than five hundred dollars nor more than two thousand dollars, the amount thereof to be fixed by the commissioner, with

Unauthorized
companies.

Bond to
state.

sureties thereon to be approved by the commissioner, conditioned that he or it will conduct such business in accordance with the provisions of this section, and will pay to the state treasurer through the insurance commissioner's office the taxes provided by this section. Every such agent must keep a true and complete record of the business transacted by him, showing: First, The exact amount of such insurance; second, the gross premiums charged therefor; third, the return premium paid thereon; fourth, the rate of premium charged for such insurance upon the different items of the property; fifth, the date of such insurance and terms thereof; sixth, the name and address of the company making such insurance; seventh, the name and address of the assured, and a brief and general description of the property insured, where located, and if a marine risk, the name of the ship, vessel, boat, or craft, and voyage covered by such insurance; and such other facts and information as the commissioner may direct and require; which record shall at all times be open and subject to the inspection and examination of the commissioner, his deputy, or examiner.

Record of
business.

Every policy procured and delivered under the provisions of this section shall have stamped upon it and be initialed by the agent clearing the same in this state, the following: "This policy is registered and delivered at, Washington, this day of, 19 . . ., under the provisions of section seventy-five of chapter, of the Session Laws of the State of Washington for nineteen hundred eleven."

Policy
registered.

Every agent who places, procures, effects, or delivers any insurance or insurance policy, as provided in this section, shall annually on or before the fifteenth day of February in each year, make and file with the commissioner a verified statement upon a form to be prescribed and furnished by the commissioner, which shall exhibit the true amount of all such business transacted by such agent during the year ending on the thirty-first day of December next preceding the making of such annual statement, showing the gross amount of each kind of insurance, the

gross premiums charged for such insurance, the aggregate amount of returned premiums paid to the insured, the amount of the net premiums, and such other facts and information as the commissioner may prescribe and require.

The commissioner shall file a copy of such verified statement with the state treasurer, and the agent making such statement shall pay to the state treasurer, through the commissioner's office, the same tax that is required of admitted companies, which tax shall be due and payable on the first day of March succeeding the filing of such statement.

Statement
filed with
treasurer.

Before any insurance, except marine insurance, shall be procured or affected, under or by virtue of said license, there shall be executed by such licensed agent and by the party or his authorized agent desiring insurance, an affidavit which shall be filed with the commissioner within thirty days after the procuring of such insurance. Such affidavit shall set forth that the party desiring insurance is, after diligent effort, unable to procure the insurance required to protect the property owned or controlled by him, from the companies licensed to transact business in this state. Every company making insurance under the provisions of this section, shall be deemed and held to be doing business in this state as an unlicensed company, and may be sued upon any cause of action, arising under any policy of insurance so issued and delivered by it, in the superior court of the county where the agent who registered or delivered such policy resides, or transacts business, by the service of summons and complaint made upon such agent for such company. Any such agent, being served with summons and complaint in any such cause, shall forthwith mail such summons and complaint, or a true and complete copy thereof, by registered letter with proper postage affixed, properly addressed to the company sued, and such company shall have forty days from the date of the service of such summons and complaint upon said agent in which to plead, answer or defend any

Affidavit
executed.

such cause; upon service of summons and complaint being had upon such agent for such company the court in which such action is begun shall be deemed to have duly acquired jurisdiction in *personam* of the defendant company so served.

Penalty
\$25.00.

Every such agent who fails or refuses to make and file said annual statement, and to pay the taxes required to be paid thereon, prior to the first day of April after such tax is due, shall be liable for a fine of twenty-five dollars for each day of said delinquency, beginning with the first day of April, and said tax may be collected by distraint, or such tax and such fine may be recovered by an action, to be instituted by the commissioner, in the name of the state, the attorney general representing him, in any court of competent jurisdiction, and the fine, when so collected, shall be paid to the state treasurer, and placed to the credit of the general fund. If any such agent shall fail to make and file said annual statement and pay the said taxes, or shall refuse to allow the commissioner to inspect and examine his records of the business transacted by him, pursuant to this section, or keep such records in manner as required by the commissioner, or shall refuse or neglect to immediately notify the insurance company for whom he has placed, registered, or delivered a policy, of the commencement of any action or proceeding in any court in this state against such company, the license of such agent shall be immediately revoked by the commissioner, and no license shall be issued to such agent within one year from the date of such revocation, nor until all taxes and fines are paid and the commissioner shall be satisfied that full compliance with the provisions of this section will be had.

May revoke
licensc.

SEC. 76. *Business to Be Placed with Solvent Companies—Penalties.*

Every agent, or broker, transacting business under the provisions of the preceding section shall ascertain the financial condition of each company before he procures a policy of insurance from or places any insurance with such company. Any such agent, or broker, who shall

APPENDIX B

Sullivan, Insurance Code of the
State of Washington 1937
Section 30

INSURANCE CODE

OF THE

STATE OF WASHINGTON

1937

PUBLISHED BY
WILLIAM A. SULLIVAN
State Insurance Commissioner

1937
STATE PRINTING PLANT
OLYMPIA

Sec. 28. Vouchers for Expenditures.

(§ 7072 R. R. S.; § 2935 P. C.)

No domestic insurance company shall make any disbursement of twenty-five dollars or more, unless the sum be evidenced by a voucher, signed by or on behalf of the person, firm, or corporation receiving the money, and accordingly describing the consideration for the payment, if the same be for services and disbursements, setting forth the service rendered and an itemized statement of the disbursements made, and if it be in connection with any matter pending before any legislature or public body, or before any department, or officer of any government, accordingly describing in addition the nature of the matter, and of the interest of such corporation or organization therein, or, if such a voucher cannot be obtained by an affidavit stating the reason for not obtaining such voucher, and setting forth the particulars above mentioned. (L. 1911, Ch. 49, p. 194, § 28.)

Vouchers required.

Sec. 29. Business Authorized.

(§ 7073 R. R. S.; § 2936 P. C.)

No domestic insurance company shall transact any business other than that specified in its articles of incorporation, and no foreign or alien insurance company, admitted to transact business in this state under the provisions of this act, shall transact any other kind of business than that which it has been authorized to transact. (L. 1911, Ch. 49, p. 194, § 29.)

Business not authorized prohibited.

Sec. 30. Policy Provisions Voided.

(§ 7074 R. R. S.; § 2937 P. C.)

No domestic, foreign, or alien insurance company transacting business in this state, shall hereafter make, issue, or deliver herein, any policy or contract of insurance, except policies or contracts of ocean marine insurance, containing any condition, stipulation, or agreement, requiring such contract of insurance to be construed according to the laws of any other state or country, or depriving the courts of this state of the jurisdiction of action against such company, [or limiting the right of action against such company] to a period of less than one year from the time when the cause of action accrues; and any such condition, stipulation, or agreement shall be void, and such policy shall be binding upon the company having issued it. (L. 1911, Ch. 49, p. 194, § 30.)

Prohibited policy provisions.

This section as passed, apparently by mistake omitted, after the words "against such company" and before the words "to a period," the following: Or limiting the right of action against such company.

A policy providing that an action on the policy shall be commenced within one year from the date of the loss, is a valid contract of limitation. *Hefner v. Great American Insurance Company*, 128 Wash. 390, 218 P. 306.

An action on a life insurance policy is barred by the statute of limitations where a claim therefor has been made and the beneficiary given oral notice of the rejection of the claim more than six years prior to the commencement of the action. *Walker v. Metropolitan Life Insurance Co.*, Wash. 616, 333 P. 694.

APPENDIX C

1947 Insurance Code

Sections 01.03, 15.15, and 18.20

CHAPTER 79.

[S. B. 47.]

INSURANCE CODE.

AN ACT to provide an Insurance Code for the State of Washington; to regulate insurance companies and the insurance business; to provide for an Insurance Commissioner; to establish the office of State Fire Marshal; to provide penalties for the violation of the provisions of this act; to repeal certain existing laws and to amend section 73 of chapter 49, Laws of 1911 as last amended by section 1 of chapter 103, Laws of 1939.

Be it enacted by the Legislature of the State of Washington:

ARTICLE ONE

INITIAL PROVISIONS

SECTION .01.01 *Short Title:* This act constitutes the insurance code. Short title.

SEC. .01.02 *Scope of Code:* All insurance and insurance transactions in this state, or affecting subjects located wholly or in part or to be performed within this state, and all persons having to do therewith are governed by this code. Scope of code.

SEC. .01.03 *Public Interest:* The business of insurance is one affected by the public interest, requiring that all persons be actuated by good faith, abstain from deception, and practice honesty and equity in all insurance matters. Upon the insurer, the insured, and their representatives rests the duty of preserving inviolate the integrity of insurance. Public interest.

SEC. .01.04 *"Insurance" Defined:* Insurance is a contract whereby one undertakes to indemnify another or pay a specified amount upon determinable contingencies. "Insurance" defined.

SEC. .01.05 *"Insurer" Defined:* "Insurer" as used in this code includes every person engaged in the business of making contracts of insurance, other than a fraternal benefit society. A reciprocal or inter-insurance exchange is an "insurer" as used in this code. "Insurer" defined.

(3) for any of the causes for which a general broker's license may be revoked.

2. The Commissioner may suspend or revoke any such license whenever he deems suspension or revocation to be for the best interests of the people of this state. Discretionary revocation.

3. The procedures provided by this code for the suspension or revocation of general brokers' licenses shall be applicable to suspension or revocation of a surplus line broker's license. Procedure.

4. No broker whose license has been so revoked or suspended shall again be so licensed within one (1) year thereafter, nor until any fines or delinquent taxes owing by him have been paid. Re-licensing.

Sec. .15.15 Legal Process Against Surplus Line Insurer: 1. An unauthorized insurer shall be sued, upon any cause of action arising in this state under any contract issued by it as a surplus line contract, pursuant to this article, in the superior court of the county in which the cause of action arose. Legal process against surplus line insurer.

2. Service of legal process against the insurer may be made in any such action by service upon the Commissioner. The Commissioner shall forthwith mail the documents of process served, or a true copy thereof, to the person designated by the insurer in the policy for the purpose by prepaid registered mail with return receipt requested. The insurer shall have forty (40) days from the date of service upon the Commissioner within which to plead, answer, or otherwise defend the action. Upon service of process upon the Commissioner in accordance with this provision, the court shall be deemed to have jurisdiction in *personam* of the insurer. Service upon Commissioner.

3. An unauthorized insurer issuing such policy shall be deemed thereby to have authorized service of process against it in the manner and to the effect as provided in this section. Any such policy shall Deemed to have authorized service.

contain a provision stating the substance of this section, and designating the person to whom the Commissioner shall mail process as provided in paragraph two of this section.

Exemptions.
This article
not ap-
plicable to
reinsurance.

SEC. .15.16 *Exemptions:* 1. The provisions of this article controlling the placing of insurance with unauthorized insurers shall not apply to reinsurance or to the following insurances when so placed by licensed agents or brokers of this state:

This article
not ap-
plicable to
these
insurances.

(1) Ocean marine and foreign trade insurances.
(2) Insurance on subjects located, resident, or to be performed wholly outside of this state, or on vehicles or aircraft owned and principally garaged outside this state.

(3) Insurance on property or operation of railroads engaged in interstate commerce.

(4) Insurance of aircraft owned or operated by manufacturers of aircraft, or of aircraft operated in schedule interstate flight, or cargo of such aircraft, or against liability, other than Workmen's Compensation and employer's liability, arising out of the ownership, maintenance or use of such aircraft.

Agents and
brokers to
keep and
preserve
records.

2. Agents and brokers so placing any such insurance with an unauthorized insurer shall keep a full and true record of each such coverage in detail as required of surplus line insurance under this article. The record shall be preserved for not less than five (5) years from the effective date of the insurance and shall be kept available in this state and open to the examination of the Commissioner. The agent or broker shall furnish to the Commissioner at his request and on forms as designated and furnished by him a report of all such coverages so placed in a designated calendar year.

Records of
insureds.

SEC. .15.17 *Records of Insureds:* Every person for whom insurance has been placed with an unauthorized insurer pursuant to or in violation of this

the insurer in consideration for an insurance contract is deemed part of the premium.

Stated premium must include all charges.

SEC. .18.18 *Stated Premium Must Include All Charges:* 1. The premium stated in the policy shall be inclusive of all fees, charges, premiums, or other consideration charged for the insurance or for the procurement thereof.

No other charges permitted.

2. No insurer or its officer, employee, agent, solicitor, or other representative shall charge or receive any fee, compensation, or consideration for insurance which is not included in the premium specified in the policy.

Penalty.

3. Each violation of this section is a gross misdemeanor.

Modification must be part of the contract.

SEC. .18.19 *Must Contain Entire Contract:* No agreement in conflict with, modifying, or extending any contract of insurance shall be valid unless in writing and made a part of the policy.

Unlawful provisions.

SEC. .18.20 *Limiting Actions, Jurisdiction:* 1. No insurance contract delivered or issued for delivery in this state and covering subjects located, resident, or to be performed in this state, shall contain any condition, stipulation, or agreement

Construction.

(1) requiring it to be construed according to the laws of any other state or country except as necessary to meet the requirements of the motor vehicle financial responsibility laws of such other state or country; or

Jurisdiction.

(2) depriving the courts of this state of the jurisdiction of action against the insurer; or

Limitation of action.

(3) limiting right of action against the insurer to a period of less than one (1) year from the time when the cause of action accrues in connection with all insurances other than property and marine and transportation insurances. In contracts of property insurance, or of marine and transportation insur-

ance, such limitation shall not be to a period of less than one (1) year from the date of the loss.

2. Any such condition, stipulation, or agreement in violation of this section shall be void, but such voiding shall not affect the validity of the other provisions of the contract.

Such agreements are void.

SEC. .18.21 *Execution of Policies:* 1. Every insurance contract shall be executed in the name of and on behalf of the insurer by its officer, employee, or representative duly authorized by the insurer.

Execution of policies.

2. A facsimile signature of any such executing officer, employee, or representative may be used in lieu of an original signature.

Facsimile signature.

3. No insurance contract heretofore or hereafter issued and which is otherwise valid shall be rendered invalid by reason of the apparent execution thereof on behalf of the insurer by the imprinted facsimile signature of any individual not authorized so to execute as of the date of the policy, if the policy is countersigned with the original signature of an individual then so authorized to countersign.

When unauthorized facsimile signature immaterial.

SEC. .18.23 *Duration of Binders:* 1. A "binder" is used to bind insurance temporarily pending the issuance of the policy. No binder shall be valid beyond the issuance of the policy as to which it was given, or beyond ninety (90) days from its effective date, whichever period is the shorter.

"Binder."

Duration.

2. If the policy has not been issued a binder may be extended or renewed beyond such ninety (90) days upon the Commissioner's written approval, or in accordance with such rules and regulations relative thereto as the Commissioner may promulgate.

Extension.

SEC. .18.24 *Liability of Agents on Binder:* The Commissioner may suspend or revoke the license of any agent issuing or purporting to issue any binder as to any insurer named therein as to which he is not then authorized so to bind.

Liability of agents on binder.