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Supreme Court No. 80480-0
Court of Appeals No. 56265-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION, a Washington Non-Profit
Corporation,

Respondent

v.

SATOMI, LLC, a Washington Limited Liability Company,

Petitioner.

ANSWER TO AMICUS MASTER BUILDERS ASSOCIATION'S
BRIEF IN SUPPORT OF PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondent is Satomi Owners Association, a nonprofit corporation whose members are the current owners of the 85 units at the Satomi Condominiums in Bellevue, Washington ("Association").

II. COURT OF APPEALS DECISION

Petitioner Satomi, LLC seeks review of the Court of Appeals' June 11, 2007 decision in *Satomi Owners Association v. Satomi, LLC*, --- Wn. App. ---, 159 P.3d 460 (2007). Amicus Master Builders Association supports this review.

III. ISSUES PRESENTED FOR REVIEW

Is the provision for judicial enforcement of the Washington Condominium Act preempted by the Federal Arbitration Act when the contract containing the arbitration clause is a Limited Warranty agreement relating to the local purchase of a Washington condominium?

IV. STATEMENT OF THE CASE

The Association has detailed the relevant facts of the case subject to the petition in its Answer to Petition for Review. It therefore incorporates by references and relies upon those same facts for this Answer in addition to the following.

MBA states that the Condo Act contains an "anti-arbitration" provision. When the Satomi case was originally filed, the Condo Act did

provide for judicial review of claims brought under its warranties¹ presumably because, as a consumer protection statute, the legislature intended that its terms not be waived by subsequent adhesion contracts.² Subsequently, however, the Condo Act was amended to allow for enforcement through non-binding arbitration, a scheme that was carefully crafted specifically for construction defect actions by a task force of industry representatives appointed for that purpose.³ Thus, the Condo Act is far from anti-arbitration; it provides an arbitration scheme drafted to provide fairness to both parties, rather than allowing enforcement of one-sided binding arbitration provisions drafted by developer's counsel and contained in adhesion contracts that are part of the purchase and sale of a condominium in Washington State.

¹ Prior to the 2005 amendments, RCW 64.34.100(2) read as follows: "Except as otherwise provided in chapter 64.34 RCW, any right or obligation declared by this chapter is enforceable by judicial proceeding."

² See RCW 64.34.030 ("Except as expressly provided in this chapter, provisions of this chapter may not be varied by agreement, and rights conferred by this chapter may not be waived")

³ See SESSB 5536, Sec. 8, 58th Leg. (Wash. 2004) (attached hereto as Appendix A).

V. ARGUMENT

Under RAP 13.4(b), a petition for review will be accepted by the Supreme Court *only if* the Court of Appeals decision is in conflict with a decision of the Supreme Court or of another Court of Appeals decision, if it involves a significant question of law under the State or Federal Constitutions, or if it involves an issue of substantial public interest.

First, MBA incorrectly characterizes this case as one involving a significant dispute of Constitutional law – federal preemption. But there is no dispute that federal law preempts state law *where it applies*. The issue here is whether the Federal Arbitration Act (FAA) applies. That issue is one of application of the facts to the law and therefore, accepting this case will not settle any dispute of Constitutional magnitude.

Second, because the analysis is fact-based, there is no actual conflict between the Court of Appeals decision here and any other case in which this Court held that federal law has preempted state law. The law of preemption has been applied uniformly in Washington, but the facts dictated varying results. Applying the same law to different facts may create varying results, but that does not mean that the cases are in conflict.

Finally, for the reasons stated in the Association's Answer to Petition for Review, the public interest is not served by review of this case.

A. The Case Does Not Involve a Dispute of Constitutional Law.

MBA argues that this Court should accept review because "As a Matter of Fundamental Constitutional Law, The State Condominium Act's

Anti-Arbitration Provision is Preempted by the Federal Arbitration Act.”⁴ First, there is no dispute that, *where it applies*, the FAA will preempt the Condo Act. The Court of Appeals agreed. “Where it applies, the FAA preempts state law, prohibiting application of state statutes that invalidate arbitration agreements.”⁵ Thus, the Constitutional issue of preemption is not in dispute. What *is* in dispute is whether, under the particular facts of this case, the FAA applies. Thus, MBA is in error when it states that the primary legal issue is whether the Condo Act is preempted by the FAA in general.⁶ This makes the case an issue of *application* of a federal statutory law, not interpretation of Constitutional law.

MBA demonstrates this misunderstanding, claiming that the history of broad interpretation of the commerce clause somehow means that the Courts have rejected or ignored the black letter law of the FAA itself, which mandates focus upon the contract containing the arbitration clause:

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction. . . . shall be valid, irrevocable, and enforceable, save

⁴ See *Brief in Support of Petition for Review (filed by the Amicus below, Master Builders Association of King and Snohomish Counties) (“MBA Brief”)*, p. 9.

⁵ *Satomi Owners Association v. Satomi, LLC*, --- Wn. App. ---, 159 P.3d 460, 464 (2007).

⁶ *MBA Brief*, p. 2. Nor does the legal question “affect the validity of a State statutory provision” as MBA claims (*id.* at pp. 2, 18.) because preemption does not render contradictory state laws void, especially where, under factual circumstances such as those here, the FAA will not apply and therefore, the Condo Acts judicial enforcement provision is valid *and* enforceable.

upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. MBA appears to misconstrue the interstate commerce test under the FAA, blurring the distinction between applying the commerce clause broadly and the specific requirement of the statute that the *contract containing the arbitration clause* be the focus of the analysis. While there is no doubt that the “involving commerce” is interpreted broadly, that does not mean that a court may apply the FAA when any aspect of the case involves interstate commerce. The cases cited by MBA for this proposition do not so hold, nor would any court be able to hold that *under all circumstances*, the FAA preempts the Condo Act because the contract containing the arbitration clause may differ from case to case. Whether the FAA preempts the Condo Act *in all cases* is not before this Court. At most, this Court could resolve, as the Court of Appeals did, whether a Limited Warranty provided to condominium purchasers in Washington sufficiently evidences interstate commerce for the FAA to preempt the Condo Act.

To clarify, there are essentially two ways in which a contract can evidence interstate commerce under the FAA, but both depend upon an analysis on the contract containing the arbitration clause. The first is to show that the contract in question has some specific effect upon interstate commerce. *Basura*⁷, *Marina Cove*⁸ and various other cases from outside

⁷ *Basura v. U.S. Home Corp.*, 98 Cal. App. 4th 1205 (2002).

⁸ *Marina Cove Condominium Owners Ass'n v. Isabella States*, 109 Wn. App. 230, 236, 34 P.3d 870 (2001).

this jurisdiction discussing the multi-state nature of the parties or their marketing fall into this category.

The second way to analyze interstate commerce under the FAA is to see whether the subject matter of the contract containing the arbitration clause evidences a general practice that, in the aggregate, would bear on interstate commerce in a *substantial way*.

*Citizens Bank*⁹ is the seminal case demonstrating the second way that the FAA may apply. In *Citizen's Bank*, the subject of the contract in dispute – debt restructuring – was “in the aggregate” an economic activity subject to federal control. Therefore, the subject matter *of the contract containing the arbitration clause* affected interstate commerce in a “substantial way.”¹⁰ In support of its finding that the debt-restructuring agreement substantially affected interstate commerce, the Court cited Alafabco’s business and obtainment of loans throughout the southeastern United States, the fact that the debt-restructuring agreement was secured by out-of-state inventory, and finally, the “magnitude of the impact on interstate commerce caused by the particular economic transactions in which the parties were engaged . . .”¹¹

⁹ *Citizen's Bank v. Alafabco*, 539 U.S. 52, 56-57, 123 S.Ct. 2037, 156 L. Ed. 2d 46 (2003).

¹⁰ *Id.* at 57.

¹¹ *Id.* at 57-58.

Neither *Citizen's Bank* nor other cases cited by MBA¹² stand for the proposition urged by MBA – that the court may disregard the contract containing the arbitration clause and focus instead upon whether any aspect of the case implicates interstate commerce in a nominal way. Either the contract containing the arbitration clause specifically evidences a transaction involving interstate commerce *or* the subject matter of the contract would, in the aggregate, affect interstate commerce in a *substantial way*. Here, the Court of Appeals correctly made this distinction:

Where the issue is federal regulation of the business itself – for example, enforcement of the rights of employees to nondiscriminatory and healthy workplaces – the “transaction” involves the internal operation of the business, and its use of materials shipped in interstate commerce is enough to characterize that business as affecting commerce for the purposes of the FAA. . . . Where the issue is a private dispute, however, the analysis must identify the transaction involving interstate commerce.

Satomi, 159 P.3d at 468. The Court of Appeals simply used the term “private dispute” to describe the first way of identifying involvement of

¹² MBA cites *Allied Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 282, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) for the proposition that the FAA applies to a termite extermination agreement where defendants used materials from out of state. But whether the contract sufficiently implicated interstate commerce was not at issue in the case. The crux of *Allied Bruce* was the court’s adoption of a “commerce in fact” interpretation over the “contemplation of the parties” test. *Id.* The court did not analyze whether the contract did, in fact, evidence a transaction involving affect interstate, pointing out the parties *did not contest* that the contract involved interstate commerce in fact.

interstate commerce. Under the “private dispute” prong, the origin of the materials of the condominium and other facts repeated by MBA in its briefing are simply irrelevant.

Applying the *Citizen's Bank* test, the proponent of arbitration would have to argue that the Limited Warranty relating solely to obligations of the Washington developer regarding Washington real estate demonstrates an economic activity that, in the aggregate, would substantially affect interstate commerce. Again, the issue is application of the facts to the language of the FAA, not whether, in all cases, the FAA preempts the Condo Act.

Thus, the primary issue in this case was not Constitutional (whether the FAA preempts the Condo Act implicating the Constitution's supremacy clause), but simply one of application of the particular facts of this case to the law to see whether the FAA applies. The Court of Appeals understood this distinction. Given this, review is not warranted under the Constitutional issue prong of RAP 13.4(b)(3).

B. The Case Does not Conflict With Other Washington Cases of This Court.

The same misunderstanding of the issue contributes to MBA's misguided statement that this case conflicts with others by this Court holding that the FAA preempts state law. In support of its argument on this prong, MBA merely recites the broad policy that arbitration is favored and that the FAA preempts state law. Again, this is not disputed.

The Court of Appeals acknowledged preemption where the FAA applies, but held that it did not apply when the contract at issue is a Limited Warranty relating to Washington real estate. Each of the cases cited by MBA in support of this basis for review essentially held that *the contracts in those cases* were subject to the FAA because they were of the type that, in the aggregate, would substantially affect interstate commerce under the *Citizens Bank* analysis. See, *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 681 P.2d 253 (1984) (interstate brokerage agreement); *Allison v. Medicab Intern., Inc.*, 92 Wn.2d 199, 597 P.2d 380 (1979) (interstate franchise agreement).

The substantive law in these cases is the same of that applied by the Court of Appeals in *Satomi*. The differing outcomes are based upon the application of the particular facts (specifically, the type of contract involved). Just because the court reached a different conclusion here (that the FAA did not apply) does not mean that it conflicts with other cases in which this Court held that the FAA did apply. Thus, there is no conflict supporting review under RAP 13.4(b)(1).¹³

C. The Public Interest Is Not Served by Accepting Review.

In its Answer to the Petition for Review, the Association argued that it would be contrary to public policy to accept review of this case.¹⁴ That argument will not be repeated here. However, MBA does argue that

¹³ In fact, as argued in the Association's Answer to *Satomi*, LLC's petition for review, this case is entirely consistent with prior law. See *Satomi Owners Association's Answer to Petition for Review*, pp. 3-4.

¹⁴ *Satomi Owners Association's Answer to Petition for Review*, p. 4.

the Court of Appeals' decision somehow creates a "two track" system that "compels binding arbitration for only a subset of condominium claims."¹⁵ But the Court of Appeals decision does not "compel binding arbitration," the one-sided clauses developers write into the adhesion sales contracts do. As in any civil action, various causes of action may apply to a single set of circumstances. As a consumer protective statute, the Condo Act provides that claims brought under its provisions shall be subject to judicial review *or* to the arbitration provisions recently enacted in RCW 64.55. Nothing prevents the parties from agreeing at the time of the dispute to have all or none of the claims resolved in arbitration of some sort. Thus, it is developers' insistence upon *binding* arbitration that creates the two-track system. Therefore, the need to correct a so-called two-track system is illusory and cannot support review.

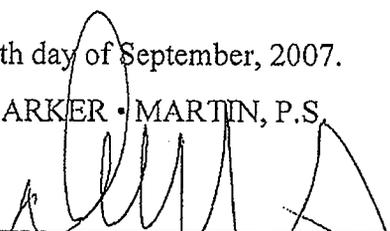
VI. CONCLUSION

This case does not squarely present a Constitutional issue, but instead demonstrates that the particular facts in a case involving the FAA is what determines the outcome, not disagreement with the concept of federal preemption. For the same reasons, there is no actual conflict with other cases in this jurisdiction. Finally, the public interest would not be served by review. Based on the above, none of the three prongs of RAP 13.4 support review and therefore, the petition should be denied.

¹⁵ *MBA Brief*, p. 16.

Respectfully submitted this 19th day of September, 2007.

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Appendix A

1 first made enters into possession if a possessory interest was conveyed
2 or the date of acceptance of the instrument of conveyance if a
3 nonpossessory interest was conveyed; and

4 (b) As to each common element, at the latest of (i) the date the
5 first unit in the condominium was conveyed to a bona fide purchaser,
6 (ii) the date the common element was completed, or (iii) the date the
7 common element was added to the condominium.

8 (3) If a warranty of quality explicitly extends to future
9 performance or duration of any improvement or component of the
10 condominium, the cause of action accrues at the time the breach is
11 discovered or at the end of the period for which the warranty
12 explicitly extends, whichever is earlier.

13 (4) If a written notice of claim is served under RCW 64.50.020
14 within the time prescribed for the filing of an action under this
15 chapter, the statutes of limitation in this chapter and any applicable
16 statutes of repose for construction-related claims are tolled until
17 sixty days after the period of time during which the filing of an
18 action is barred under RCW 64.50.020.

19 (5) Nothing in this section affects the time for filing a claim
20 under chapter 64.-- RCW (sections 101 through 2002 of this act).

21 NEW SECTION. Sec. 8. (1) A committee is established to study:

22 (a) The required use of independent third-party inspections of
23 residential condominiums as a way to reduce the problem of water
24 penetration in residential condominiums; and

25 (b) The use of arbitration or other forms of alternative dispute
26 resolution to resolve disputes involving alleged breaches of implied or
27 express warranties under chapter 64.34 RCW.

28 (2) The committee consists of the following members who shall be
29 persons with experience and expertise in condominium law or condominium
30 construction:

31 (a) A member, who shall be the chair of the committee, to be
32 appointed by the governor;

33 (b) Three members to be appointed by the majority leader of the
34 senate; and

35 (c) Three members to be appointed by the speaker of the house of
36 representatives.

37 (3) The committee shall:

1 (a) Examine the problem of water penetration of condominiums and
2 the efficacy of requiring independent third-party inspections of
3 condominiums, including plan inspection and inspection during
4 construction, as a way to reduce the problem of water penetration;

5 (b) Examine issues relating to alternative dispute resolution,
6 including but not limited to:

7 (i) When and how the decision to use alternative dispute resolution
8 is made;

9 (ii) The procedures to be used in an alternative dispute
10 resolution;

11 (iii) The nature of the right of appeal from an alternative dispute
12 resolution decision; and

13 (iv) The allocation of costs and fees associated with an
14 alternative dispute resolution proceeding or appeal;

15 (c) Deliver to the judiciary committees of the senate and house of
16 representatives, not later than December 31, 2004, a report of the
17 findings and conclusions of the committee, and any proposed legislation
18 implementing third-party water penetration inspections or providing for
19 alternative dispute resolution for warranty issues.

20 Sec. 9. RCW 64.34.020 and 1992 c 220 s 2 are each amended to read
21 as follows:

22 In the declaration and bylaws, unless specifically provided
23 otherwise or the context requires otherwise, and in this chapter:

24 (1) "Affiliate (~~of a declarant~~)" means any person who controls,
25 is controlled by, or is under common control with (~~a declarant~~) the
26 referenced person. A person "controls" (~~a declarant~~) another person
27 if the person: (a) Is a general partner, officer, director, or
28 employer of the (~~declarant~~) referenced person; (b) directly or
29 indirectly or acting in concert with one or more other persons, or
30 through one or more subsidiaries, owns, controls, holds with power to
31 vote, or holds proxies representing, more than twenty percent of the
32 voting interest in the (~~declarant~~) referenced person; (c) controls in
33 any manner the election of a majority of the directors of the
34 (~~declarant~~) referenced person; or (d) has contributed more than
35 twenty percent of the capital of the (~~declarant~~) referenced person.
36 A person "is controlled by" (~~a declarant~~) another person if the
37 (~~declarant~~) other person: (i) Is a general partner, officer,