

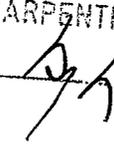
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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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

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MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INCORPORATED and KIMBERLY ANNE  
BLINDHEIM,

Petitioners.

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**RESPONDENTS BROOMS' ANSWER TO AMICUS BRIEFS OF  
ASSOCIATED GENERAL CONTRACTORS AND SECURITIES  
INDUSTRY & FINANCIAL MARKETS ASSOCIATION**

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ORIGINAL

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**I. “ERROR OF LAW ON THE FACE OF THE AWARD”  
SHOULD NOT BE OVERRULED**

**A. The “Error of Law on the Face of the Award” Standard is a  
Narrow Review Standard that Causes No Harm**

“The doctrine of stare decisis ‘requires a clear showing that an established rule is incorrect and harmful before it is abandoned.’” *State v. Devin*, 158 Wn.2d 157, 161, 142 P.3d 599 (2006) (quoting, *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)); accord, e.g., *City of Federal Way v. Koenig*, 217 P.3d 1172, 1174 (2009). The principal argument to show **harm** made by both Associated General Contractors (“AGC”) and the Securities Industry and Financial Markets Association (“Securities Industry”) is that use of the “error on the face of the award” standard of review will result in torrents of post-award litigation, and will undermine the purposes of efficiency and finality in arbitration. AGC warns that failure to overrule the long line of cases stretching 47 years from *Northern State Construction Co. v. Banchemo*, 63 Wn.2d 245, 386 P.2d 625 (1963) to *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995) to *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) “would basically mean that arbitration proceedings, instead of being a quick and easy method of obtaining . . . [dispute] resolution . . . , would be merely a necessary step in the course of litigation causing delay and expense and settling nothing finally.” *AGC Br.* at 4; accord, *id.* at 2-3.

Securities Industry, apparently believing that the Court of Appeals established a new standard instead of upholding the standard applied under the WAA since 1963, warns that “the Court of Appeals’ ruling threatens to dramatically increase the prevalence of post-award litigation” as well as lead to “forum shopping.” *Securities Industry Br.* at 3, 5. These highly speculative arguments are **contrary to actual fact**, as demonstrated by the long Washington experience with this standard of review.

We have reviewed all Washington state appellate decisions (published and unpublished, including the *Broom* case at bar) that have applied the error of law on the face of the award standard to motions to vacate or modify arbitration awards over the last 20 years (1990-2009).<sup>1</sup> The results demonstrate that even among the cases that were questionable enough to motivate the parties to appeal, review based on error of law on the face of the award only rarely results in vacation of the award:

Vacated based on error of law on face:	4
Not vacated or modified by trial court, affirmed on appeal:	32
Vacated in tr. ct., reversed on appeal (final result – not vacated):	4

Thus, over the last 20 years, the arbitrator’s award determined the outcome in **36 of the 40** Washington appellate cases applying the error of

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<sup>1</sup> A list of the 20 years of cases is attached as Appendix A to this Brief. We included unpublished decisions because we are not citing the cases for precedential value, but for statistical significance.

law on the face of the award standard. Only **4 awards in 20 years** were vacated in appellate cases (including unpublished decisions). This is fact, not lawyer's argument or speculation, demonstrating that the "error of law on the face of the award" standard as applied in Washington **does not do harm, and should therefore not be overruled.**

The facts demonstrate the "error of law on the face of the award" is a narrow standard of review, which does not threaten to make the arbitrator's award a mere prelude to further litigation. As applied by the Washington courts:

Limiting judicial review to the face of the award is a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions. *Davidson v. Henson*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). In deciding a motion to vacate, a court will not review the merits of the case, and ordinarily will not consider the evidence weighed by the arbitrators. *Davidson*, 135 Wn.2d at 119, 954 P.2d 1327. Because the statute does not require arbitrators to file or preserve the evidence they receive, a court can review an alleged error only if it appears on the face of the award.

*Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 123-24, 4 P.3d 844 (2000).

Despite this high level of judicial deference to arbitration, there are rare instances when the arbitrator's ruling should not be the final word. That is why the legislature has, at least since the 1943 WAA, permitted Courts to vacate the award when "the arbitrators exceeded their powers,"

WAA former RCW 7.04.160(4) (currently RCW 7.04A.230(d)), and why Washington courts have consistently interpreted this “exceeding authority” statutory provision to permit review for an error on the face of the award. *E.g.*, *Boyd v. Davis, supra*, 127 Wn.2d at 263; *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32 P.3d 289 (2001). For example, sometimes the arbitrators conscientiously grapple with a difficult legal issue, and choose to put their resolution of that issue on the face of the award because they want a “second opinion” from the courts. *E.g.*, *Federated Servs. Ins. v. Estate of Norberg, supra*, 101 Wn. App. at 124; *WSAJ Br.* at 15-16. If Amicus AGC and Securities Industry were to have their way, this would no longer be permitted.

Under the rationale of *Carey v. Herrick*, the Courts presume that the arbitrator intends to follow the law, and that if he/she fails to do so, then the award is not as intended. *Carey v. Herrick*, 146 Wash. 286, 292, 263 Pac. 190 (1928). But regardless of a particular arbitrator’s actual intent, arbitrators are not absolute monarchs, czars, or dictators. They are not legally entitled to disregard the law as they would, for example, by awarding punitive damages in Washington where punitive damages are not allowed by law.<sup>2</sup> *McGinnity v. Autonation, Inc.*, 149 Wn. App. 277,

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<sup>2</sup> That they have the *power* to do this by not placing the ruling in their award does not create the *legal right* to disregard the law, any more than the juror engaged in jury nullification has the right to disregard the instructions given by the Court.

282, 202 P.3d 1009 (2009); *Federated Servs. Ins. v. Estate of Norberg*, *supra*, 101 Wn. App. at 124; *Kennewick Ed'n Ass'n v. Kennewick School Dist. No. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (Div. 3 1983). Nor are they free to change the very nature of the arbitration proceeding by importing procedures applicable to actions at law that the legislature has not chosen to make applicable in arbitration. *See, Resp. Supp. Br.* at 4-5; *WSAJ Br.* at 8-9. To do so disregards the fundamental distinction between an *arbitration* and an *action* created by the statutory language of both the WAA and the RUAA. *Thorgaard Plumbing & Heating Co., Inc. v. County of King*, 71 Wn.2d 126, 131-32, 426 P.2d 828 (1967) (quoting former RCW 7.04.010, .030); *see also, Resp. Supp. Br.* at 4-5; *WSAJ Br.* at 8-9.

Amici's radical argument that this Court should abandon 47 years of Washington jurisprudence under the WAA in the absence of any demonstrated harm also founders on the probability that their own proposed solution would do more harm than good. An inflexible rule jettisoning Washington's limited review on the face of the award cannot accommodate the reality that every system of dispute resolution needs a safety valve – some small measure of meaningful review directed to substance. This is required first, simply to satisfy the legislative command that arbitration awards be subject to confirmation or vacation

for exceeding authority, and second, to achieve the basic requisites of justice. The fundamental problem with the position of Amici AGC and Securities Industry is that their proposed change in settled Washington law would tie the hands of the courts to such an extreme that arbitration could become a zone of lawlessness. That is in nobody's interest – not consumers who seek redress from unscrupulous or untrained brokers, or corporations that seek to limit damages to what the law allows. *See, e.g., Federated Servs. Ins. v. Estate of Norberg, supra*, 101 Wn. App. at 124 (arbitration award that allowed damages for loss of probable future inheritance, contrary to law, vacated on motion of defendant insurer).

**B. The Established Rule is not “Incorrect” or “Antiquated”**

Amici AGC and Securities Industry both point to the concurrence of Justice Utter in *Boyd v. Davis, supra*, to argue that the “error on the face of the award” standard is incorrectly based on repetition without analysis of a statutory standard that has since been repealed. *AGC Br.* at 6-7; *Securities Industry Br.* at 12. In fact, by re-enacting the “exceeding authority” statutory language in the 2006 RUAA, which carries with it this Court's “error on the face of the award” construction, the legislature

demonstrated its approval of this standard of review, so any statutory change it made in 1943 is irrelevant.<sup>3</sup>

Furthermore, it is significant that Justice Utter's argument was rejected by the Majority in *Boyd*, which held that "error of law on the face of the award" is the appropriate standard of review under the statutory authority to vacate decisions exceeding the arbitrator's authority. *Boyd v. Davis, supra*, 127 Wn.2d at 263. This Court has continued to apply the "error of law on the face of the award" standard since *Boyd*, despite the full airing of the "repealed statutory standard" argument in that case. *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998); *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Repeating the same arguments already considered in prior governing authority does not constitute a showing of "incorrect and harmful" for purposes of overcoming *stare decisis*. *Federal Way v. Koenig, supra*, 217 P.3d at 1174; *Brutsche v. City of Kent*, 164 Wn.2d 664, 682, 193 P.3d 110 (2008).

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<sup>3</sup> Legislative approval of the "error of law on the face of the award" standard in 2006 is also a key reason that this Court should not follow California's example, cited by AGC, of judicial abandonment of this standard of review. *See, AGC Br.* at 8-9. The change of law in California has forced parties to provide for error of law review in their arbitration agreements, which the California Supreme Court upheld in 2008. *Cable Connection, Inc. v. DirectTV, Inc.*, 44 Cal.4<sup>th</sup> 1334, 190 P.3d 586 (2008). The problem with this approach is that it only serves the interests of sophisticated parties who have the bargaining power to insist on changes in the arbitration agreement, while leaving consumers at the mercy of corporate contracts of adhesion.

Citing the U.S. Supreme Court's recent decision in *Hall Street Assocs. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008), Amicus Securities Industry invites this Court to align itself with the alleged "national movement to eliminate antiquated non-statutory bases for vacatur . . . ." *Securities Industry Br.* at 4. This sounds enticing – few courts want to be left behind the march of "progress." But there is nothing "antiquated" about the "error on the face of the award" standard that is, by judicial construction, a part of review for "exceeding the arbitrator's powers" as fully as if it had been written into the original statutory language. *Johnson v. Morris*, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976); *WSAJ Br.* at 17-18. As noted above, in 2006, knowing full well the construction put on this language by the Courts, the Washington legislature re-enacted this statutory language unchanged, RCW 7.04A.230(1)(d), and without any legislative history suggesting an intent to change the long line of authority interpreting it to mean "error of law on the face of the award." CP 447-53; *see also, Br. of Resp. (Ct. App.)* at 41-42; *Resp. Supp. Br.* at 18 n.11. This standard of review is as modern as the RUAA of 2006, since that it when it was last approved by the legislature. *See, Federal Way v. Koenig, supra*, 217 P.3d at 1175 ("This court presumes that the legislature is aware of judicial interpretations of its enactments and takes

its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision.”).<sup>4</sup>

Just as not all change is “progress,” the Supreme Court’s *dicta* in *Hall Street* which casts doubt on the continued validity of the Federal “manifest disregard of law” standard, is an unworkable overreaction based on profound distrust of the judgment and discretion of the lower courts.<sup>5</sup> Fortunately, here in the other Washington, we have clear evidence that our courts can handle narrow review of arbitration awards.

Most (if not all) attorneys in practice today were educated to understand that arbitration must be respected by the courts. It has been nearly a century since the time when courts too readily set aside arbitration awards. We will never return to those days – but in this case we run the risk that our reaction to that time will be so extreme that we will choke off the benefits of arbitration by setting it totally beyond the

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<sup>4</sup> Securities Industry argues that the legislature had no need to amend the “exceeding authority” language of the WAA when it enacted the RUAA because it already did not expressly state “error of law on the face of the award” as a ground for vacating. *Securities Industry Br.* at 11-12. This argument ignores the line of authority represented by *Koenig* and *Johnson v. Morris, supra*, because the statutes in those cases did not expressly contain the judicial construction either. Securities Industry forgets that “[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state that construction operates as if it were originally written into it.” *Johnson v. Morris, supra*, 87 Wn.2d at 927.

<sup>5</sup> Interestingly, the Second Circuit has held that the “manifest disregard of law” Federal standard of review survives *Hall Street*. *Stolt-Neilson, SA v. AnimalFeeds Intern. Corp.*, 548 F.3d 85, 94-96 (2d Cir. 2008).

reach of review. The moderate approach Washington has long used better protects the sanctity of arbitration, and the rights of all who use it.

**II. STATUTES OF LIMITATION ARE NOT APPLICABLE IN ARBITRATION ABSENT AGREEMENT OF THE PARTIES OR CHANGE OF LAW BY THE LEGISLATURE**

**A. Washington Law is Settled that Statutes of Limitation Do Not Apply in Arbitration**

Securities Industry misrepresents this Court's authorities in an effort to contend that *Thorgaard* and *City of Auburn* do not hold that statutory time limits on "actions" or "suits" do not apply in arbitration. Relying on *International Ass'n of Firefighters v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), Securities Industry incorrectly asserts that this is a question of first impression. *Securities Industry Br.* at 2, 3, 13, 13-14 n.6. We have fully briefed this issue and will not rehash all the details here. *Resp. Supp. Br.* at 3-10; *see also, WSAJ Br.* at 11-13. But certain dispositive points cannot be avoided:

- *Thorgaard* holds that statutes requiring presenting of damages claims to the county within 90 days and providing that no "action shall be maintained" until the claim has been presented, RCW 36.45.010, .030, do not bar an arbitration of a claim not timely presented because arbitration under the WAA is not an "action" within the meaning of these statutes. *Id.* at 129 n.2, 130-33.

- The reasoning in *Thorgaard* appears applicable to all time limits on “actions” and “suits,” because it shows that the language of the WAA distinguishes arbitration from a judicial “action,” and it relies on the purpose of arbitration to provide an alternative forum “to avoid . . . the formalities, the delay, the expense and vexation of ordinary litigation.” *Id.* at 131-32.
- *City of Auburn* held that RCW 4.16.130, a two-year limitation on the time for filing “[a]n action for relief not otherwise provided for . . . ,” “by its language does not apply to arbitration.” *City of Auburn, supra*, 114 Wn.2d at 450. Contrary to the hair-splitting arguments asserted by Securities Industry at pages 13-14 of its brief, this holding, combined with the reasoning of *Thorgaard*, precludes application of statutory limitations on judicial actions in arbitration.
- *Firefighters* does not purport to overrule *Thorgaard*, but instead relies upon it to hold that whether arbitration is deemed an “action” or not depends on the context in which the issue arises, and that labor grievance arbitration is an “action” within the context of recovery of attorney’s fees under the wage action statute, RCW 49.48.030. *Firefighters, supra*, 146 Wn.2d at 34, 36-41.

*Thorgaard*, *City of Auburn*, and *Firefighters*, are easily harmonized: in the context of time limits, arbitration is not an “action”; in the context of the wage statute attorneys’ fee provision, labor arbitration is an “action”.<sup>6</sup> *Firefighters* itself sheds significant light on a workable test:

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

*Firefighters*, *supra*, 146 Wn.2d at 37-38 (emphasis added). As *Thorgaard* makes clear, the imposition of judicial time limitations – “the formalities, the delay, the expense and vexation of ordinary litigation,” *Thorgaard*, *supra*, 71 Wn.2d at 132 – on the streamlined arbitration process, threatens to **undermine the nature of arbitration itself**. Therefore, in this context (which is the same as the context in our case but very different from the *Firefighters* context of recovery of attorneys fees), arbitration is not an “action,” and statutory time limits not specifically incorporated into the Arbitration Act cannot apply.

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<sup>6</sup> This answers the charge that Brooms are inconsistently seeking attorneys fees under a statute permitting recovery of fees in a lawsuit. RCW 21.20.430(1).

**B. Securities' Industry's Argument for "Harm" is Flawed**

With *Thorgaard* and *City of Auburn* establishing the existing Washington rule against application of the statute of limitations in WAA arbitration, the issue is whether the challengers have made a clear showing that this rule is both incorrect and harmful. *Koenig, supra*, 217 P.3d at 1174; *Riehl, supra*, 152 Wn.2d at 147. No one, including Securities Industry, has even attempted to refute the statutory exegesis begun in *Thorgaard* and expanded by Respondents and Amicus WSAJ, which shows that judicial "actions" and arbitration "proceedings" are treated differently by the language of the statutes, *Resp. Supp. Br.* at 4-5; *WSAJ Br.* at 8-9, and therefore there is no basis to conclude that *Thorgaard* and *City of Auburn* are "incorrect."

On the issue of harm, Amicus Securities Industry argues that "a cornerstone of the arbitration process is that participants are provided an equal opportunity to pursue the substantive claims and defenses that are available in court," and while conceding that "statutes of limitations are both substantive and procedural' in nature," Securities Industry contends that they must apply in arbitration to ensure fairness to parties presented with stale claims. *Securities Industry Br.* at 14-15. Both the premise and the conclusion of this argument are mistaken.

First, *Thorgaard* and *City of Auburn* make it clear that parties have no right to the same defenses in arbitration that they might have had in court. As stated by this Court in *Thorgaard*:

While arbitration is similar to a judicial inquiry in that witnesses are called and evidence is considered, the standards of judicial conduct and efficiency to which a panel of arbitrators will be held are markedly different from those resting by law and tradition upon judicial officers. *Northern State Const. Co. v. Banchemo*, 63 Wn.2d 245, 386 P.2d 625 (1963). The proceeding is in a forum selected by the parties in lieu of a court of justice. The object is to *avoid*, what some feel to be, the formalities, the delay, the expense and vexation of ordinary litigation. *Son Shipping Co. v. De Fosse & Tanghe*, *supra* [199 F.2d 687 (2d Cir. 1952) (COGSA statute of limitations does not apply in arbitration)]. **It depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute.**

*Thorgaard*, *supra*, 71 Wn.2d at 132 (italics in original; boldface added).

In this case, neither the contract between the parties nor the arbitration statute provide for application of the general tort or Washington Securities Act statutes of limitations. The contract between the parties does not incorporate any statutory limitation, but does incorporate a NASD rule that sets an outer repose period of six years.<sup>7</sup> NASD Rule

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<sup>7</sup> Significantly, Securities Industry does not claim (as Petitioner claimed) that former NASD Rule 10304(c) incorporates the statute of limitations, but only that it “contemplates” that statutes of limitations may apply. *Securities Industry Br.* at 19. By its plain language – “[t]his rule shall not extend applicable statutes of limitations,” former Rule 10304(c) – this rule obviously does **not contemplate** application of statutes of limitations that are **not applicable**. Furthermore, although we are not required to distinguish Securities Industry’s citation to *Knight v. Merrill Lynch, Pierce, Fenner & Smith*, 2009 WL 3368439 (9<sup>th</sup> Cir.) because it lacks precedential value, Ninth Cir. Rule 36-3(a), nonetheless this point furnishes a basis for distinction: while the

10304(a), CP 455; *Resp. Supp. Br.* at 10-11 & 11 n.7; *Opinion*, No. 60115-6-I at 10-11 (Div. 1 2008); *see also*, *PIABA Br.* at 3-5. The WAA (like the RUAA) incorporates specified judicial procedures to apply in arbitration, **but not any statute of limitations.** *See, e.g.*, former RCW 7.04.040(1) (service), .110 (subpoenas), .120 (depositions), .130 (interim relief); RCW 7.04A.170(6), .210(1), (2), (3); *Resp. Supp. Br.* at 4-5; *WSAJ Br.* at 8-9.

The legislature could have amended RCW 4.16.005 after *Thorgaard* and *City of Auburn* to expressly apply statutory limitations to arbitration, but chose not to, so these decisions should be upheld under the doctrine of *stare decisis*. *Riehl, supra*, 152 Wn.2d at 147. Thus, for example, the New York statute expressly provides that “[i]f . . . the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration.” McKinney’s CPLR § 7502(b). If a comparable change is to be made to the Washington statutes of limitation, it should be done by the legislature, not the courts.

It follows that Securities Industry’s premise – that the judicial defense of statute of limitations should necessarily apply in arbitration – is flawed. Arbitration is intended to be a simpler and more direct route to a

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statute of limitation may be “applicable” under California law, it is not “applicable” under Washington law. *Thorgaard, supra*, 71 Wn.2d at 130-32; *City of Auburn, supra*, 114 Wn.2d at 450.

hearing on the merits than litigation, and therefore not all the same defenses will necessarily apply. Neither the agreement of the parties nor the Arbitration Act provides for application of the statute of limitations, and without authority in one or the other it is beyond the authority of the arbitrator to apply a statute of limitations.

Securities Industry contends, however, that the mixed “substantive / procedural” nature of the statutory limitations defense means that it must be enforceable in arbitration, just as other substantive rights of action are enforceable in arbitration. *Securities Industry Br.* at 14, 16. This fails to account for the fundamental nature of a statute of limitations. A statute of limitation does not operate to extinguish the underlying obligation or claim; rather, it merely bars the bringing of an “action” upon the claim. *Opitz v. Hayden*, 17 Wn.2d 347, 372-73, 135 P.2d 819 (1943); *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 138-39, 157 P.3d 415 (Div. 3 2007); *Jordan v. Bergsma*, 63 Wn. App. 825, 828, 822 P.2d 319 (Div. 1, 1992). A “statute of limitation does not create vested property rights . . . [n]or does a statute of limitations provide a means for acquiring affirmative relief.” *Bellevue School Dist. v. Brazier Const. Co.*, 100 Wn.2d 776, 675 P.2d 232 (1984). “The statute runs against the remedy only, not against the right.” *Opitz, supra*, at 373. Where the parties have contractually provided for

arbitration as an alternative remedy to litigation in the courts, the statute of limitations is immaterial.

As *Thorgaard* makes clear, “[a] ‘right of action’ is not synonymous with ‘cause of action.’ It is a right to enforce a ‘cause of action’ by suit. A ‘right of action’ is the right to pursue a *judicial* remedy. A ‘cause of action’ is based on the substantive law of legal liability.” *Thorgaard, supra*, 71 Wn.2d at 132 n.5. The Brooms have every right to pursue their causes of action in arbitration, which continue to exist even if they have lost their right of action in court.

The rest of the Securities Industry’s “harm” argument fares no better, because it is based on the plainly incorrect argument that “[w]ithout access to statutes of limitation, respondents in arbitration are left with no means to dispose of patently stale claims in disputes where their ability to defend themselves has been compromised by the loss of evidence, witnesses, or memories.” *Securities Industry Br.* at 17. The parties to an arbitration are in the driver’s seat – if they want to apply a statute of limitations, they may agree to do so in their arbitration agreement. Significantly, **the parties in this case did so** by incorporating the six-year time limit for filing arbitration of former Rule 10304(a). CP 455. That agreement balanced the interest in avoidance of stale claims with the

interest in adequate time to pursue investigation and settlement, and the courts should not be in the business of re-writing the parties' agreement.

Despite the Securities Industry's shrill cries that the statute of limitations is a "critical safeguard for justice," *Securities Industry Br.* at 20, in the absence of agreement there is nothing particularly fair or just about grafting a potentially dispositive condition to an action in court onto a consensual non-judicial dispute resolution system that the financial industry promised Congress would reach the merits.<sup>8</sup> Nor is there anything particularly fair or just about dismissing the Broom family's claims for mishandling of their father's account based on a three-year limitation period applicable in court, when the parties agreed to a six-year period under former Rule 10304(a). CP 455.

Amicus AGC's model Arbitration Agreement provides that disputes between the contractor and subcontractor shall be submitted to arbitration "in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association . . ." *AGC Br., Appendix 1*

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<sup>8</sup> Marshalling the erroneous statistic that 43% of FINRA cases since 2005 that did not settle resulted in damages for the Claimant, Securities Industry asserts that its system provides a level playing field for all. *Securities Industry Br.* at 10-11. Examination of the data at the cited page of FINRA's website disproves this assertion. From 2005-2008 (the last year with complete numbers), 25,357 cases were closed, minus 14,730 settled and 2,240 withdrawn, leaving 8,387 cases closed other than by settlement or withdrawal. Of these, only 1,556 resulted in damages to the Claimant, which is 18.55%, not 43%. [www.finra.org/arbitrationmediation/aboutfinradr/statistics/](http://www.finra.org/arbitrationmediation/aboutfinradr/statistics/) With odds like this to overcome, consumers should at least get their promised "hearing on the merits."

¶ U(2). The applicable AAA Construction Industry Arbitration Rule provides as follows:

(a) Filing of a Demand: Arbitration under an arbitration provision in a contract shall be initiated in the following manner:

(i) The initiating party ("the claimant") shall, **within the time period, if any, specified in the contract(s)**, file with the AAA a demand for arbitration . . .

*AAA Const. Ind. Arb. Rules* ¶ R-4(a)(i) (emphasis added).<sup>9</sup> Thus, AGC already recommends to its members exactly the approach required by *Thorgaard* and *City of Auburn* of leaving limitations to the agreement of the parties. Furthermore, no less of an authority than the American Arbitration Association supports this approach in its model rules. Therefore, it cannot seriously be contended that the rule of *Thorgaard* and *City of Auburn* is mistaken or harmful, and this Court should not change it.

### III. CONCLUSION

There is nothing incorrect or harmful about the established Washington law that arbitrator's decisions may in narrow circumstances, after great deference is given to the arbitrator, be vacated for error of law on the face of the award. Nor is there anything incorrect or harmful about the established Washington law that the WAA and the agreement of the parties determine the procedures to apply in arbitration, which is not an

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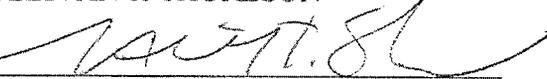
<sup>9</sup> <http://www.adr.org/sp.asp?id=22004#r4>

action subject to general time limits created for judicial proceedings. The legislature has long acquiesced in these rules, and *stare decisis* strongly counsels that they be retained.

Securities arbitrators need to keep to their traditional role of deciding claims on the merits. This Court's decision to affirm will *protect* the arbitration process so it can continue to serve the public interest.

Dated at Seattle, WA, this 15<sup>th</sup> day of January, 2010.

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## **APPENDIX A**

20 Years of “Error of Law on the Face of the Award”

*Veldheer v. Premier Communities, Inc.*, 151 Wash.App. 1060, 2009 WL 2601951 (Div. 2, 2009) (unpublished) – Not vacated

*Matthew W. Smith Co. v. Chill*, 151 Wash.App. 1059, 2009 WL 2601977 (Div. 2, 2009) (unpublished) – Not vacated

*In re Marriage of Hamilton*, 2009 WL 2220630 (Div. 1, 2009) (unpublished) – Not vacated

*SS Construction, Inc. v. ADC Properties, LLC*, 151 Wn. App. 247, 211 P.3d 415 (Div. 2, 2009) – Not vacated

*McGinnity v. Autonation, Inc.*, 149 Wn. App. 277, 202 P.3d 1009 (Div. 3, 2009) – Not vacated

*Sacotte Construction, Inc. v. Taluswood Townhomes, LLC*, 149 Wash.App. 1009, 2009 WL 502418 (Div. 1, 2009) (unpublished) – Not vacated

*Bach v. Parrish*, 147 Wn. App. 1014, 2008 WL 4767480 (Div. 1 2008) – Not vacated.

*Broom v. Morgan Stanley*, 146 Wash.App. 1043, 2008 WL 4053440 (Div 1 2008) – Vacated.

*Timi Const., Inc. v. Powell Bonney Lake, LLC*; 143 Wash.App. 1041, 2008 WL 714276 (Div 2) – Not modified.

*Morrell v. Wedbush Securities, Inc.*, 143 Wash.App. 473, 178 P.3d 387 (Div. 2 2008) – Trial court modification reversed – therefore, in final outcome, applied narrowly and original award NOT VACATED.

*Hudson Co., Inc. v. King*, 140 Wash.App. 1024, 2007 WL 2482150 (Div. 2 2007) – Not vacated.

*RCSH Bellevue, LLC v. Sellen Construction, Inc.*, 137 Wash.App. 1028, 2007 WL 678649 (Div. 1 2007) – Not vacated.

*Postema Enterprises v. Lyle*, 136 Wash.App. 1041, 2007 WL 97161 (Div. 1 2007) – Not vacated.

*Beroth v. Appollo College, Inc.*, 135 Wash.App. 551, 145 P.3d 386 (Div. 3 2006) – Not vacated.

*Mock v. Cook*, 134 Wash.App. 1058, 2006 WL 2578284 (Div. 3 2006) – Not vacated.

*Manson Const. Co. v. King County Real Estate Services Division*, 130 Wash.App. 1009, 2005 WL 2722844 (Div. 1 2005) – Tr. Ct order vacating is REVERSED – so Not vacated.

*Rokan Partners v. HTK Management, LLC*, 113 Wash.App. 1028, 2002 WL 2017262 (Div. 1 2002) – Not vacated.

*Boden v. Gregory*, 112 Wash.App. 1055, 2002 WL 1797497 (Div. 1 2002) – Not vacated.

*Evenson v. Athena Assurance Co.*, 111 Wash.App. 1033, 2002 WL 927114 (Div. 3 2002) – Not vacated

*Moll v. Smith*, 108 Wash.App. 1022, 2001 WL 1122456 (Div. 1 2001) – Not vacated.

*Tolson v. Allstate Ins. Co.*, 108 Wash.App. 495, 32 P.3d 289 (Div. 1 2001) – VACATED (by Court of Appeals – rev'ing tr ct).

*Digital Broadcast Corp. v. Advantage Cable Television LLC*, 105 Wash.App. 1040, 2001 WL 320899 (Div. 1 2001) – Not vacated

*Federated Services Ins. Co. v. Estate of Norberg*, 101 Wash.App. 119, 4 P.3d 844 (Div. 1 2000) – VACATED

*Future Shop, Inc. v. Blume*, 100 Wash.App. 1032, 2000 WL 426457 (Div. 1 2000) – Not vacated.

*NW Pacific Mortgage Co., Inc. v. Trepus*, (Div. 1, 2000) – Not vacated.

*Mike's Painting, Inc. v. Carter Welsh, Inc.*, 95 Wn. App. 64, 975 P.2d 532 (Div. 3 1999) - Not modified

*Noss v. Klecka*, 94 Wash.App. 1019, 1999 WL 106916 (Div. 1 1999) – Not modified

*SD Deacon Corp. v. Roundup Co.*, 93 Wash.App. 1050, 1999 WL 7728 (Div 2 1999) – Not vacated

*Parsons v. Rose*, 91 Wash.App. 1055, 1998 WL 403984 (Div. 1 1998) – Not vacated

*Vancouver School Dist. No. 37 v. Columbia River Mental Health Services*, 91 Wash.App. 1053, 1998 WL 401101 (Div. 2 1998) – Not vacated

*Davidson v. Hensen*, 135 Wash.2d 112, 954 P.2d 1327 (SCt 1998) – Not vacated

*Smith v. State Farm Mut. Auto Ins. Co.*, 89 Wash.App. 1035, 1998 WL 83035 (Div. 2 1998) – Not vacated

*The Equity Group, Inc. v. Hidden*, 88 Wash.App. 148, 943 P.2d 1167 (Div. 2 1997) – Not vacated

*Hansen v. Shim*, 87 Wash.App. 538, 943 P.2d 322 (Div. 1 1997) – Not vacated

*Dang v. Reliance Ins. Co.*, 85 Wash.App. 1057, 1997 WL 159391 (Div. 1 1997) – Not vacated

*Phillips Building Co., Inc. v. An*, 81 Wash.App. 696, 915 P.2d 1146 (Div. 2 1996) – Not vacated

*In re Arbitration of Fortin*, 82 Wash.App. 74, 914 P.2d 1209 (Div. 2 1996) – Trial court vacated; Reversed – so Not vacated

*Boyd v. Davis*, 127 Wash.2d 256, 897 P.2d 1239 (SCt 1995) – Trial court vacated; reversed on appeal – Not vacated

*ML Park Place Corp. v. Hedreen*, 71 Wash.App. 727, 862 P.2d 602 (Div. 1 1994) – Not vacated

*Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wash.App. 813, 790 P.2d 228 (Div. 1 1990) – VACATED

TOTALS:

Not vacated/modified (tr ct & on appeal) – 32

Vacated by tr ct – Rev'd on appeal – 4

Vacated – 4

Therefore “error of law on face of award” resulted in 36 NOT VACATED, 4 VACATED