

No. 60115-6-I

**COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON**

**MORGAN STANLEY DW INC., and KIMBERLY ANNE
BLINDHEIM,**

Appellants,

v.

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents.

BRIEF OF APPELLANTS

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INTRODUCTION

This case involves the judicial nullification of a carefully considered National Association of Securities Dealers (“NASD”) arbitration award subject to the Federal Arbitration Act (“FAA”), 9 U.S.C. § 1 *et seq.*

After carefully considering the parties’ submissions during oral argument and in seven separate briefs by the parties – including multiple motions for reconsideration by plaintiffs – the NASD arbitration panel concluded that certain of plaintiffs’ claims were barred by applicable statutes of limitation. Ignoring the FAA and disregarding its own lack of authority to review the arbitration award for legal error, the trial court substituted its judgment for that of the arbitration panel and vacated the arbitration award. The trial court’s vacatur order was based on the trial court’s erroneous conclusion that “in Washington, statutes of limitations do not bar a claimant from pursuing a claim submitted to arbitration.” CP 566.

If upheld, the trial court’s decision will have sweeping ramifications for litigants in the State of Washington in two equally troublesome ways. First, the trial court’s decision violates the policies of the FAA as articulated by the United States Supreme Court by permitting courts to interfere in the agreed-upon arbitration process and to refuse enforcement of an arbitration award merely because the courts disagree with the arbitrator’s legal conclusions. Second, in complete derogation of the expectation of parties to contracts which contain arbitration clauses,

the trial court's decision would allow parties to resuscitate stale and untimely claims in arbitration when such claims would clearly be barred by applicable statutes of limitation if brought in court. The trial court's order should be reversed.

ASSIGNMENTS OF ERROR

I. Assignments of Error

1. The trial court erred when it failed to confirm the properly rendered NASD arbitration award.

2. The trial court erred when it vacated the properly rendered NASD arbitration award for an alleged error of law which did not appear on the face of the award.

3. The trial court erred when it held that Washington's statutes of limitation are wholly inapplicable to claims brought in arbitration.

II. Issues Pertaining to Assignments of Error

1. Did the trial court err as a matter of law when it refused to confirm the Arbitration Panel's award ("the Award") when § 9 of the FAA states that a court "must" confirm unless grounds for vacatur prescribed in § 10 are present?

2. Did the trial court err as a matter of law when it reviewed the Award for an alleged error of law on the face of the award when the FAA contains only limited grounds for vacatur and does not permit judicial review for mere legal error?

3. In addition to bypassing the FAA, did the trial court err as a matter of law when it held that legal error on the face of an arbitration award is a legitimate ground for vacatur under Washington law when the Washington Supreme Court has stated otherwise?

4. If Washington's arbitration statute applies and permits vacatur for legal error on the face of an arbitration award, is such a state law preempted by conflicting provisions of the FAA?

5. If the trial court possessed authority to review for legal error on the face of the award, did the trial court err when it applied a blanket rule that statutes of limitation never apply in arbitration proceedings where the Washington Supreme Court in *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), held that arbitration proceedings may be judicial in nature and thus qualify as "actions" within the meaning of Washington statutes?

6. If the trial court possessed authority to review for legal error on the face of the award, did the trial court err when it reviewed materials other than the award itself?

7. Was any alleged legal error in the arbitration award apparent on the face of the award?

STATEMENT OF THE CASE

I. Nature of the Appeal

This is an appeal from the trial court's refusal to confirm an arbitration award. Instead of confirming the Award as legally required,

the trial court vacated the Award and remanded for a new arbitration hearing before a new arbitration panel. Appellants Morgan Stanley DW Inc.,¹ and Kimberly Blindheim (collectively “MSDW”), who prevailed in the original arbitration, timely filed their Notice of Appeal on June 7, 2007.

II. Statement of Facts

MSDW is a broker-dealer whose financial advisors provide investment recommendations to its customers. CP 2, 220. MSDW is a member of the National Association of Securities Dealers (“NASD”).² CP 18.

Dick Broom, the father of respondents Michael, Kevin and Andrea Broom (“the Brooms”), originally established numerous investment accounts, including an IRA account, at PaineWebber (now UBS Financial Services), where appellant Kimberly Blindheim acted as his financial advisor from 1998 forward. CP 19-20, 48. In June of 2000, Dick Broom transferred all of his investments accounts from PaineWebber to MSDW,

¹ Morgan Stanley DW Inc. merged with Morgan Stanley & Co. Incorporated on April 1, 2007. During the period at issue, the account giving rise to this claim was held and serviced by the former Morgan Stanley DW Inc. broker-dealer entity and was not held or serviced by Morgan Stanley & Co. Incorporated.

² The NASD recently merged with the New York Stock Exchange. The merged entity is known as Financial Industry Regulatory Authority (“FINRA”). During the period at issue, the arbitration claims were administered by the NASD.

when Blindheim began working at MSDW. CP 20, 48. Dick Broom died in August of 2002. CP 24, 48.

A. The Stale Claims Underlying the Brooms' NASD Arbitration Claim

On September 22, 2005, more than three years after their father's death, the Brooms filed a notice of claim to arbitrate with the NASD ("Statement of Claim").³ CP 18-45. The NASD has established an alternative dispute resolution program to quickly and efficiently adjudicate disputes arising among its members and/or the public. To facilitate this program, the NASD has adopted a Code of Arbitration Procedure, to which all parties to an arbitration proceeding agree to be bound. CP 510. It is undisputed in this case that Dick Broom and MSDW agreed to final and binding arbitration of any and all disputes between them involving his customer account with MSDW and that the NASD arbitration rules therefore properly govern adjudication of the current dispute between the Brooms and MSDW. CP 510.

In their Statement of Claim, the Brooms alleged that MSDW offered their father erroneous advice and made poor investment decisions on their father's behalf between June 27, 2000, when the account was transferred from PaineWebber to MSDW, and June 10, 2002. CP 20, 24. All of the alleged events giving rise to the claims occurred prior to Dick Broom's death in August 2002. CP 19; CP 512.

³ Although the Brooms denominated their pleading as a Notice of Claim, it is more appropriately called a Statement of Claim under NASD procedures and will be referred to as such in this brief.

The Brooms asserted nine separate claims, eight based on Washington law and one based on federal law. CP 24-30. The Washington law claims included the following: (1) negligence; (2) suitability; (3) violation of the Washington Securities Act, RCW 21.20.010 *et seq.*; (4) breach of fiduciary duty; (5) misrepresentation; (6) failure to supervise; (7) breach of contract; and (8) violation of Washington's Consumer Protection Act, RCW 19.86.010 *et seq.* CP 24-31. The Brooms also alleged that MSDW had "violated § 10(b) and Rule 10b-5 of the 1934 Federal Securities Exchange Act." CP 27.

The Brooms sought attorney fees in connection with each of their three statutory claims. CP 27, 30. Under the Washington Securities Act, the Brooms sought attorney fees under RCW 21.20.430(1) which provides statutory entitlement to such fees to any person who "may sue either at law or equity to recover the consideration paid for the security." Under the Washington Consumer Protection Act, the Brooms sought fees under RCW 19.86.090 which provides attorney fees to any person who brings a "civil action in superior court" to enjoin further violations or recover actual damages. CP 30. The Brooms also sought attorney fees under their 10b-5 claim. CP 27.⁴

⁴ Attorney fees are recoverable for violations of 10b-5 to any person "who may sue at law or in equity in any court of competent jurisdiction." 15 U.S.C. § 78r.

B. The NASD Arbitration Proceedings Resulted in a Lawfully Rendered Decision Dismissing the Brooms' Claims.

After filing of the Brooms' Statement of Claim, the parties participated in the selection of arbitrators pursuant to NASD rules and ultimately consented to the appointment of a panel of three arbitrators ("Arbitration Panel"). CP 437. The three individuals selected to comprise the Arbitration Panel were experienced, well-qualified, neutral arbitrators. CP 441-46. Two were lawyers and the third had worked in the securities industry since 1987. *Id.*

On December 16, 2005, MSDW filed its Answer denying all claims and raising various affirmative defenses. CP 57-72. One of MSDW's defenses was that each of the Brooms' claims were barred by applicable statutes of limitation. In addition, MSDW contended that the Brooms failed to state claims upon which relief could be granted on their Washington Consumer Protection Act claim and their state and federal securities act claims. CP 71.

MSDW simultaneously brought a motion to dismiss all of the Brooms claims based on statute of limitation and other legal grounds. CP 47-56. This motion properly recited that the NASD Code of Arbitration Procedure § 10304 "expressly instructs arbitrators to apply and enforce statutes of limitation***." CP 49. In addition, MSDW contended that the NASD Arbitrator's Training Manual specifically instructed arbitrators to dismiss arbitration claims if they fail "to comply with the state or federal statute of limitations deadline." CP 49.

On March 20, 2006, the Brooms filed a response to MSDW's motion to dismiss. Notably, the response did not contain any argument that statutes of limitation somehow did not apply in arbitration proceedings. CP 112-127. Instead, the response conceded that the Brooms' claims in arbitration were, in fact, "subject to" or "governed by" various applicable statutes of limitation. CP 117-18, 121.

Rather than contesting the Arbitration Panel's authority to dismiss stale claims or the general applicability of statutes of limitation in arbitration, the Brooms argued only that they had filed their arbitration claims in a timely manner under the applicable statutes. CP 113, 127. The Brooms' contention that they had timely filed their claims centered on issues such as accrual, discovery and alleged fraudulent concealment, issues which assumed the proper application of the various statutes of limitation which governed their claims. CP 117-127. MSDW filed a reply to the Brooms' opposition brief which rebutted these contentions and which set forth specific grounds upon which the Arbitration Panel should dismiss each of the causes of action contained in the Statement of Claim. CP 134-47.

The parties orally argued the motion to dismiss before the Arbitration Panel on April 7, 2006. The Arbitration Panel considered the parties' three briefs and various declarations. CP 149. On April 15, 2006, the Arbitration Panel, by way of its Order Partially Granting and Partially Denying Respondents' Motion to Dismiss Claimants' Statement of Claims, unanimously ruled that all of the Brooms' claims were barred by

the applicable statutes of limitation with the exception of the Washington Consumer Protection Act claim. CP 149-52.

After this Order was entered by the Arbitration Panel, the Brooms filed a Motion for Reconsideration of Order Re Statute of Limitation Issues. CP 154. This motion was filed on May 5, 2006. Again, the Brooms failed to argue that statutes of limitation did not apply in arbitration. CP 154-59. They again conceded the proper application of the statutes of limitation raised by MSDW by contending that the statutes, while applicable, were tolled by the “discovery” rule, alleged concealment by MSDW, and by equitable considerations. *Id.*

Six days after their motion for reconsideration was filed, the Brooms filed a Supplemental Memorandum in Support of Motion for Reconsideration of Dismissal Order. CP 161-170. In this supplemental memorandum, the Brooms argued for the first time that, in Washington, statutes of limitation simply did not apply in arbitrations. *Id.* Despite their allegations in the Statement of Claim that they were entitled to an award of attorney fees under statutes which applied to “lawsuits” and “actions,” the Brooms now argued that arbitrations were not “suits” or “actions” and therefore statutes of limitation were wholly inapplicable. CP 162. However, in so doing, they conceded that “the Federal Arbitration Act controls NASD arbitrations.” *Id.* (emphasis added).

MSDW filed a ten page brief opposing the Brooms’ motion for reconsideration. CP 172-82. In this brief, MSDW engaged in a lengthy refutation of the Brooms’ contention that statutes of limitation were

somehow not applicable in Washington. CP 175, 178-80. The Brooms countered with a 13 page “rebuttal” brief of their own, now emphasizing their new contention that statutes of limitation can never be applied in Washington arbitrations. CP 183-195.

At this point, the Arbitration Panel had before it seven briefs from the parties on the statute of limitations issue, totaling about 80 pages of exhaustive legal arguments. It also had presided over extensive hearings and oral argument. After deliberation, the Arbitration Panel denied the motion for reconsideration on June 9, 2006. CP 207.

In response, the Brooms tried again to avoid application of the statutes of limitation to their claims by filing, on June 26, 2006, yet another Motion for Reconsideration of Dismissal Re Statute of Limitations, this time based on their assertion that the applicable statutes of limitation had not accrued because their father had allegedly been incompetent prior to his death. CP 428-31. The Arbitration Panel denied this motion for reconsideration as well. CP 11.

The granting of MSDW’s motion to dismiss left only one claim remaining, the Brooms’ Consumer Protection Act claim. On May 23, 2006, while the Brooms’ first motion for reconsideration was pending before the Arbitration Panel, MSDW filed a separate motion to dismiss the Consumer Protection Act claim. CP 11. This motion was opposed by the Brooms and a separate oral argument was conducted before the Panel. *Id.*

On July 12, 2006, the Arbitration Panel issued its final Arbitration Award (“the Award”). CP 9-16. By a 2-to-1 vote, the Panel confirmed

that all claims were dismissed and resolved in favor of MSDW. CP 14-16. The Award states that the Panel had granted MSDW's motion to dismiss on all claims other than the Consumer Protection Act claim on May 1, 2006 "on the grounds that the claims were barred by applicable statutes of limitation." CP 10. The Award further states that the Panel considered all of the parties' briefing with regard to the Brooms' multiple motions for reconsideration of the May 1, 2006 order and that the motions were denied. CP 10. The Award also states that MSDW's motion to dismiss the Consumer Protection Act claim was granted. *Id.*

C. The Brooms' Superior Court Motion Pursuant to the RUAA to Nullify the Arbitration Award

After losing before the Arbitration Panel, the Brooms filed a Complaint and Motion to Vacate Arbitrate Award ("Complaint") with the King County Superior Court on October 5, 2006 under the purported authority of Washington's Revised Uniform Arbitration Act, RCW 7.04A.010 *et seq.* ("RUAA"). CP 1-4. In their Complaint, the Brooms alleged that their claims in arbitration had been "improperly dismissed based on statutes of limitation which simply didn't apply, because under clear Washington law the state's statute of limitations did not apply to claims submitted in arbitration." CP 2. In addition to submitting the Award itself, the Complaint included numerous exhibits in the form of the various motions and briefs filed by the parties in the arbitration proceeding with regard to the statute of limitations issue. CP 18-207. In its Motion to Vacate Arbitration Award filed simultaneously with the Complaint, the

Brooms contended that an “erroneous rule of law or mistaken application thereof” was a legitimate ground for vacatur under Washington law and that the Arbitration Panel’s award dismissing their claims on limitations grounds was erroneous. CP 210-11.

In its Answer, MSDW opposed vacatur of the Award, and instead sought confirmation under both the FAA and the RUAA. CP 223. In its separate motion to confirm the Award, MDSW specifically argued that the trial court should confirm the Award under section 9 of the FAA, 9 U.S.C. § 9. CP 532.

D. The Trial Court’s Review and Order Vacating the Arbitration Award

The trial court, without oral argument, granted the Brooms the relief they sought on May 11, 2007 by refusing to confirm the award and instead vacating it. CP 556-557. In its order, as drafted and proposed by the Brooms, the trial court recited that it had read the papers submitted by the parties and stated:

The Arbitration Award entered on July 12, 2006 in *Broom v. MSDW*, NASD Case No 05-05019 is hereby vacated because the NASD Arbitration Panel applied “an erroneous rule of law or mistaken application thereof.” RCW 7.04A.230. The Panel incorrectly concluded that plaintiffs’ claims were barred by the statute of limitations; however, in Washington, statutes of limitations do not bar a claimant from pursuing a claim submitted to arbitration.

CP 556 (emphasis added). The trial court then remanded the case to a new arbitration panel for a hearing on the merits. *Id.*

The May 11, 2007 order was clarified by the trial court on June 6, 2007. CP 588-589. The clarifying order granted MSDW's motion to confirm the Arbitrator's Award dismissing the Brooms' federal 10b-5 claim (on statute of limitations grounds) and the Washington Consumer Protection Act claim (on substantive grounds) but denied MSDW's motion to confirm the Award regarding the remaining claims. CP 588. With those clarifications, the May 11, 2007 order remained in full force and effect. CP 589. MSDW timely filed a Notice of Appeal of the May 11, 2007 and June 6, 2007 orders. CP 558-57.

E. Motion Practice Before This Court.

On July 13, 2007, the Brooms moved to dismiss this appeal. The parties thereupon briefed numerous issues for hearing on August 31, 2007. As a result of that briefing and oral argument, Commissioner Verellen denied the motion to dismiss the appeal. *Commissioner's Ruling*, September 24, 2007. Commissioner Verellen held that the "brokerage agreement which gave rise to this dispute did involve transactions that impact interstate commerce" and that the FAA therefore applied. *Id.* at p. 3. Commissioner Verellen further held that the trial court's order was immediately appealable under either the FAA or the RUAA's predecessor statute, the Washington Arbitration Act, 7.40 RCW (*repealed*) ("WAA"). *Id.* at p. 4. Commissioner Verellen held that the newly enacted RUAA, upon which the Brooms had filed their complaint and the superior court vacated the award, did not apply. *Id.* at p. 3. In addition, he granted a

stay of proceedings regarding the second arbitration hearing which the trial court had directed. *Id.* at p. 5. The Brooms did not file a motion to modify the Commissioner's ruling.

SUMMARY OF ARGUMENT

The trial court committed reversible error when it ignored the dictates of the FAA and substituted its own judgment for that of the Arbitration Panel on legal issues that had been exhaustively briefed and argued in the arbitration proceeding. By agreeing to submit their dispute to binding arbitration under NASD procedures, the parties bargained for a decision of the arbitrators on both factual and legal issues, not for a decision of the court. The trial court's decision to nullify the Arbitration Award upsets that bargain and is contrary to the well-established principle that arbitration awards are subject to an extraordinary degree of deference by the courts, which are not to interfere with the arbitral process, except to insure that certain basic requirements of procedural fairness and regularity have been met.

In this case, the trial court undermined these principles by purporting to review the Arbitration Award for legal error, a ground for judicial review which is unquestionably not permitted under the FAA's statutory provisions, absent agreement of the parties. The FAA requires that an extraordinary level of deference be afforded to an arbitration award. The FAA's provisions apply in both federal and state courts and control the outcome of this case under the Supremacy Clause. The trial

court's failure to even address the FAA was its first and perhaps most fundamental error.

Rather than addressing the preeminent federal law regarding arbitration, the trial court compounded its error when it ruled that Washington's current arbitration statute, the RUAA, authorized review of the arbitration award for legal error. However, as Commissioner Verellen of this Court has held, the RUAA clearly does not apply to this arbitration proceeding.

To the extent that any Washington statute applies here, it is the WAA, the predecessor statute to the RUAA which was in effect when the arbitration proceeding in this case was instituted. But the WAA, like the FAA, does not contain any provision which allows courts to review arbitration awards for legal error. Washington decisions which hold otherwise are based on a very old, now repealed, Washington arbitration statute which expressly allowed for legal error review. According to the Washington Supreme Court, these decisions are no longer valid. Properly viewed, the WAA, like the FAA, does not permit judicial review for legal error.

But if this Court were to hold otherwise, a state arbitration statute which is in direct conflict with the FAA regarding the scope of judicial review and which makes it easier to vacate arbitration awards would be preempted under the Supremacy Clause. A state law which allows for legal error review undermines two important policies of the FAA, the policy mandating strict enforcement of the parties' agreement to arbitrate

according to its terms and the policy in favor of the finality of arbitration awards.

The trial court's decision to review the Arbitration Award for legal error in contravention of both the parties' agreement for an arbitral, not judicial, interpretation of the law and the express terms of the FAA regarding acceptable grounds for vacatur warrant reversal and confirmation of the Award. However, even if this Court were to rule that review for legal error on the face of the award was an appropriate ground for review, the trial court erred because the Arbitration Panel did not commit legal error and the trial court, in any event, went well beyond the four corners of the award in conducting its review.

The Arbitration Panel, after substantial briefing and oral argument by the parties with regard to the application of statutes of limitation to the Brooms' claims in arbitration, ruled that all the claims were barred with the exception of the claim under the Washington Consumer Protection Act. This decision was legally correct. Contrary to the categorical view held by the trial court, Washington's statutes of limitation do apply to claims submitted to arbitration. This is especially true for claims submitted to NASD arbitrations under the FAA, which permit arbitrators to apply statutes of limitation.

If upheld, the trial court's ruling will have substantial impact on arbitration in the State of Washington and would also undermine the state's public policy against the prosecution of stale and untimely claims in litigation. It would also, if applied retroactively to preexisting contracts

with arbitration clauses, undermine the expectations of the parties to such contracts by eliminating defenses that the parties had reasonably expected and intended could be vindicated in arbitration. The Arbitration Panel committed no error of law. The trial court's order vacating the Award should be reversed and the NASD arbitration Award should be confirmed.

ARGUMENT

I. The Trial Court Erred When It Refused to Confirm, and Instead Vacated, the Arbitration Award Based on a Purported Error of Law.

The trial court overstepped its authority when it reviewed the Arbitration Award for legal error and thus upset the parties' reasonable expectations that the Arbitration Panel, and not a court, would have the final word on both factual and legal issues. The FAA controls and mandates confirmation of the Arbitration Award in this case because none of the statutory grounds for vacatur apply.

A. The Standard of Review.

The trial court's decision to vacate or confirm an arbitration award is subject to *de novo* review by the appellate court. *First Options v. Kaplan*, 514 U.S. 938, 947-48 (1995) (no "special" standard governs review of a trial court's decision to vacate or confirm an arbitration award; questions of law are decided *de novo*).

B. The FAA Prohibited The Trial Court From Vacating the Award on the Basis of an Error of Law.

1. The FAA Clearly Applies in this Case.

As Commissioner Verellen held in his ruling on the Brooms' motion to dismiss this appeal, the FAA applies to this proceeding. *Commissioner's Ruling*, p. 3 ("The FAA applies to disputes under agreements involving interstate commerce. The brokerage agreement which gave rise to this dispute did involve transactions that impact interstate commerce," *citing Satomi Owners Ass'n v. Satomi LLC*, 139 Wn. App. 175, 184-85, 159 P.3d 460 (2007)). The Brooms have conceded that the FAA applies to this dispute. CP 162.

The FAA broadly governs any "contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such a contract or transaction[.]" 9 U.S.C. § 2. Commerce is defined as "commerce among the several States or with foreign nations, or in any Territory of the United States***." 9 U.S.C. § 1. The FAA is to be given an expansive reading "within the full reach of the Commerce Clause." *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995).

There can be no question, and no party contests, that the brokerage agreement in this case involves transactions that impact interstate commerce. The Washington Supreme Court has held that the FAA

generally applies to brokerage agreements and mandates arbitration in accordance with the terms thereof. *Garmo v. Dean, Witter, Reynolds, Inc.*, 101 Wn.2d 585, 586, 681 P.2d 253 (1984) (“We hold that the federal arbitration act, 9 U.S.C. § 2 (1982)***mandates that all claims, either statutory or nonstatutory, arising under a written brokerage agreement, be settled by arbitration in accordance with the terms of the brokerage agreement.”). *See also Bensadoun v. Jobe-Riat*, 316 F.3d 171, 175 (2d Cir. 2003) (the FAA clearly applies to investment disputes between customers and broker-dealers).

Indeed, the FAA applies to all arbitration agreements “within the coverage of the Act.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). If an arbitration agreement is within the coverage of the FAA, the FAA’s provisions are applicable in state as well as federal courts. *Allied-Bruce Terminix Co. v. Dobson*, 513 U.S. 265, 272 (1995); *Southland Corp. v. Keating*, 465 U.S. 1, 14-16 (1984); 19 *Moore’s Federal Practice*, § 203.12 (Matthew Bender 3d ed.). Thus, the FAA’s rules governing the conduct of arbitration proceedings, including its provisions regarding judicial review and confirmation, apply in this state court case.

2. The FAA Mandates Confirmation of the Award.

Section 9 of the FAA unequivocally establishes that a court “must” grant a motion to confirm an arbitration award unless the award is vacated,

modified, or corrected on one of the grounds set forth in section 10. 9 U.S.C. §§ 9 and 10.⁵ It is uncontradicted that section 10 of the FAA contains an extremely narrow standard of review which clearly does not allow for vacatur upon a mere error of law.

“The decision of the arbitrator on matters agreed to be submitted to him is given considerable deference by the courts.” *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 456 (2003), citing *Major League Baseball Players Ass’n v. Garvey*, 532 U.S. 504, 509-10 (2001). See also *First Options*, 514 U.S. at 941 (the FAA requires that “a deferential standard” be “applied to arbitrators’ decisions on the merits”); *Coutee v. Barington*

⁵ **§ 9. Award of arbitrators; confirmation; jurisdiction; procedure.**

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration--

(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. §§ 9 and 10.

Capital Group, L.P., 336 F.3d 1128, 1132 (9th Cir. 2003) (review of the underlying arbitration award is “limited and highly deferential”); *French v. Merrill, Lynch, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986) (confirmation is required even in the face of “erroneous findings of fact or misinterpretations of law”).

The FAA enumerates limited grounds on which a court may vacate an arbitration award and “[n]either erroneous legal conclusions nor unsubstantiated factual findings justify federal court review of an arbitral award under the statute, which is unambiguous in this regard.” *Kyocera Corp. v. Prudential-Bach*, 341 F.3d 987, 994 (9th 2003) (emphasis added), cert. dismissed, 540 U.S. 1098 (2004). See also *Coast Trading Co. v. Pacific Molasses Co.*, 681 F.2d 1195, 1198 (9th Cir. 1982) (stating the rule that, although the arbitrator’s view of the law might be open to serious question, an award which is within the terms of the submission will not be set aside by a court for error either in law or fact).

Thus it is settled that legal error does not come within the grounds for vacatur prescribed in section 10 and thus the Award in this case was entitled to confirmation under the unambiguous dictates of section 9. The trial court erred when it ignored MSDW’s request to confirm the Award under the FAA and instead relied upon state law as putative justification for second-guessing the Arbitration Panel’s correct legal decision that the Brooms’ claims were barred by applicable statutes of limitation.

C. The Superior Court Erroneously Applied the RUAA.

In its Order Vacating Arbitration Award, the trial court cited RCW 7.04A.230, a section of the RUAA, in support of the proposition that the Arbitration Award was subject to vacatur “because the NASD Arbitration Panel applied ‘an erroneous rule of law or mistaken application thereof.’” CP 560. The trial court’s order in this regard is erroneous on its face because it is premised on the RUAA, an inapplicable statute, and vacates the Arbitration Award on a ground not present in the RUAA.⁶

This Court has held that the RUAA “on its face does not apply” to this proceeding. *Commissioner’s Ruling*, p. 3. That is because the RUAA, by its terms, does not “affect an action or proceeding commenced or right accrued prior to January 1, 2006.” RCW 7.04A.903. Here, the Brooms’ Notice of Claim was filed in September 2005. The claims at issue—already stale by the time the arbitration proceedings were commenced—accrued prior to June 2002. CP 19; CP 512. Therefore, the RUAA simply does not apply. The trial court committed legal error by applying the RUAA.

However, even if the RUAA was applicable, it does not provide the trial court with a basis to vacate the award. The RUAA does not permit vacatur of an arbitration award on grounds of legal error and the trial court’s citation of RCW 7.04A.230 as supporting legal error review is therefore wrong. The trial court’s citation notwithstanding, the words “an

⁶ Because the Brooms pled and argued that the RUAA applied, MSDW responded accordingly and argued its application in its opposition brief. CP 2, 210, 510-11.

erroneous rule of law or mistaken application thereof' do not appear anywhere in RCW 7.04A.230. RCW 7.04A.230 permits vacatur on only eight grounds.⁷ The Brooms did not allege the existence of any of these express statutory grounds for vacatur nor did the trial court find that any of these grounds applied. The permissible grounds for vacatur under RCW 7.04A.230 do not provide a basis to support the trial court's order vacating

⁷ RCW 7.04A.230(1) reads:

Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

- (a) The award was procured by corruption, fraud, or other undue means;
- (b) There was:
 - (i) Evident partiality by an arbitrator appointed as a neutral;
 - (ii) Corruption by an arbitrator appointed as a neutral; or
 - (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding.
- (c) An arbitrator refused to postpone a hearing upon a showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150 * * *.
- (d) An arbitrator exceeded the arbitrator's powers;
- (e) There was no agreement to arbitrate * * *; or
- (f) The arbitration was conducted without proper notice * * *.

the Arbitration Award in this case.⁸ The trial court's order vacating the Arbitration Award under this statute was clear error.⁹

D. The Superior Court's Vacatur Was Error Under the WAA, Which Predates the RUAA.

The Brooms will likely argue that, despite the inapplicability of the statute that the trial court expressly relied upon for its application of legal error review (RCW 7.04A.230), the trial court's order vacating the Arbitration Award can be affirmed based on the RUAA's predecessor statute (the WAA). However, the WAA also does not permit the vacation of an arbitration award on grounds of legal error. This is plain from the language of the statute and a 2003 en banc decision of the Washington Supreme Court addressing the issue. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003). Case law to the contrary was based on an anachronistic view inconsistent with the WAA and was properly laid to rest by the Washington Supreme Court.

⁸ The RUAA is modeled after the Uniform Arbitration Act ("UAA"). CP 448, 452. The prefatory comment to the UAA states that "minimal court involvement" was an underlying principle of the revised act and that the provision governing vacatur of awards was therefore limited. Nat'l Conference of Comm'rs on Uniform State Laws, *Uniform Arbitration Act*, prefatory note (2000). The Commissioners further noted that "there was strong reason to believe" that state laws allowing for vacatur beyond the limited grounds allowed by section 10 of the FAA would be preempted. *Id.*

⁹ The trial court ordered a rehearing before new arbitrators purportedly pursuant to RCW 7.04A.230(3). CP 556. This was also error, as the trial court is only authorized to order a rehearing under this provision if it vacates on a permissible ground, which it did not.

1. The WAA Does Not Permit Review for An Error of Law.

The WAA was enacted in 1943. It contains no provision authorizing vacatur for a mere error of law. Indeed, the language of the WAA, which is very similar to the FAA, does not provide for judicial review for an error of law.¹⁰

Although early cases interpreting the WAA purported to allow a trial court to vacate an arbitration award based on errors of law on the face of the award, *see, e.g., Northern State Constr. Co. v. Banchemo*, 63 Wn.2d

¹⁰ The WAA reads:

In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

- (1) Where the award was procured by corruption, fraud or other undue means.
- (2) Where there was evident partiality or corruption in the arbitrators or any of them.
- (3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any part have been prejudiced.
- (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.
- (5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).

An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.

RCW 7.40.160 (*repealed*).

245, 249-50, 386 P.2d 625 (1963), these cases are of dubious validity in light of the Washington Supreme Court's more recent and unanimous *en banc* decision in *Malted Mousse* that the error of law standard does not apply under the WAA. *Malted Mousse*, 150 Wn.2d at 526-27. In comparing private arbitration under the WAA with mandatory court-annexed arbitration, the *Malted Mousse* Court described WAA arbitration as follows:

When reviewing an arbitrator's decision, the court's review is limited to the grounds provided for in RCW 7.04.160 - .170. *See Barnett*, 119 Wn.2d at 156. In *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), we recognized that every case addressing a court's ability to reverse an arbitrator's error in law was based on a statute repealed by the current arbitration act, and that a reviewing court is limited to the statutory grounds. *Boyd*, 127 Wn.2d at 267-68.

Id. (emphasis added).

The analysis which the Court, sitting *en banc*, unanimously adopted is set forth in *Boyd v. Davis*, 127 Wn.2d 256, 266-70, 897 P.2d 1239 (1995) (*J. Utter, Concurring*).¹¹ Justice Utter's opinion demonstrated that the "error of law" standard applied by Washington courts was a vestige from the 1922 act that preceded the WAA and no longer reflected the state of the law in Washington. *Id.* at 266-67. The 1922 act provided expressly that the arbitrator's decision could be "excepted to" on the ground that the arbitrators "committed an error in fact

¹¹ Concurring with Justice Utter were Chief Justice Durham, and Justices Madsen and Talmadge. *Id.*

or law.” Rem. Comp. Stat. § 424 (1922). Justice Utter aptly noted that: “All cases adopting the ‘error of fact or law’ doctrine rely on the provisions of this [Rem. Comp. Stat. § 424 (1922)] repealed statute.” Justice Utter’s concurring opinion correctly recognized that the WAA never contained the error of law standard, but was misinterpreted due to “erroneous reliance on the language of a repealed statute.” *Id.* at 267.

The Washington Supreme Court’s citation and adoption of Justice Utter’s concurring opinion in its *Malted Mousse* decision leaves no doubt that the “error of law” standard is not contained in the WAA and that parties are strictly limited to the narrow standards of review which are expressly set forth in RCW 7.04.160. The trial court’s order in this case can thus not be upheld on the basis of the WAA.

E. Any State Law Permitting Review of An Arbitration Award For Legal Error Conflicts With the FAA and Is Preempted.

MSDW contends that it was entitled to confirmation under section 9 of the FAA because none of the standards for vacatur under section 10 were established by the Brooms. MSDW further contends that Washington arbitration law regarding judicial confirmation and vacatur do not appreciably differ from federal law and also does not authorize legal error review. However, if this Court were to hold that Washington arbitration law does permit legal error review under the circumstances of

this case, application of such a law to an arbitration proceeding which falls within the scope of the FAA is preempted.¹²

The FAA “contains no express pre-emptive provision, nor does it reflect a congressional intent to occupy the entire field of arbitration.” *Volt Info. Sciences, Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989). “But even when Congress has not completely displaced state regulation in an area, state law may nonetheless be preempted to the extent that it actually conflicts with federal law- that is, to the extent that it ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress.’” *Id.* See also *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (finding preempted a state statute which rendered agreements to arbitrate certain franchise claims unenforceable); *Perry v. Thomas*, 482 U.S. 483, 489-90 (1987) (finding preempted a state statute which rendered unenforceable private agreements to arbitrate certain wage collection claims); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, 513 U.S. 265, 274 (1995) (holding that FAA applied to termite contract involving interstate commerce in fact, and therefore state statute making pre-dispute arbitration agreements unenforceable could not apply); *Doctor’s Associates, Inc. v. Casarotto*, 517 U.S. 681, 686 (1996) (state law singling out arbitration agreements for disfavored treatment in contravention of the FAA was preempted). Thus,

¹² While the analysis regarding the application of state law would be different if the parties agreed in the arbitration agreement to incorporate Washington’s arbitration law as setting forth the rules and procedures for arbitration, the parties did not so agree in this case.

the preemption issue focuses on whether application of a conflicting state law “would undermine the goals and policies of the FAA.” *Volt*, 489 U.S. at 478.

Application of an “error of law” standard of review under the circumstances of this case would undermine the goals and policies of the FAA. While no Supreme Court decision expressly examines the preemptive force of sections 9 and 10 of the FAA in the face of conflicting state law, these provisions should be considered exclusive because they are central to achieving the goals of the FAA. By excluding legal error as a ground for judicial review of arbitration awards, Congress expressly and deliberately limited judicial review as a means to further the parties’ agreement for a final and binding arbitration award, to deter judicial intrusion in the arbitral process, and to encourage the enforcement of arbitration awards. The FAA’s purposes and objectives included overruling the judiciary’s longstanding refusal to enforce agreements to arbitrate. *Volt*, 489 U.S. at 478. When parties agree to a final and binding decision from an arbitrator on both factual and legal issues, Congress did not intend for their intentions to be frustrated by unwarranted judicial interference in that process. Such interference stands in direct conflict with sections 9 and 10 of the FAA.

Judicial review for legal error also directly conflicts with section 2 of the FAA. Section 2 states that “an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable***.” 9

U.S.C. § 2. Section 2 is the “centerpiece” of the FAA and its “primary substantive provision.” *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). Thus, where a party consents to an arbitral resolution of the dispute, this is what the party should get—not merely a non-final resolution to be subsequently reviewed and set aside by a court whenever the court disagrees with the arbitrator’s legal conclusions. Section 2 is undermined if courts are permitted to review an arbitration award for legal error when the parties have not agreed to such legal review. Section 2 requires that the parties’ agreement is to be enforced as written and, if the parties contract to have an arbitrator resolve its controversy rather than a court, that agreement must be honored.

Therefore, application of a state law that would permit a more rigorous judicial review of arbitration awards conflicts with the FAA’s purposes and objectives. Such a state law cannot be applied in light of the Supremacy Clause. *See Garmo*, 101 Wn.2d at 590 (Washington Supreme Court recognized preemptive force of FAA by which “Congress intended to foreclose state legislative attempts to undercut the enforceability of arbitration agreements”). Any attempt to expand the scope of judicial review of arbitration awards beyond that contemplated by the parties or required by federal law would undercut the enforceability of both arbitration agreements and arbitration awards. Such state legislative attempts in derogation of policies underlying the FAA are foreclosed. To

the extent that this Court finds that Washington law allows such review, it should find that it is preempted and cannot be applied in a case, such as this one, which is covered by the FAA.

II. The Trial Court Erred When It Held That Washington's Statutes of Limitation Do Not Apply to Claims Raised in Arbitration.

The trial court never should have reviewed the Arbitration Award for legal error because such intrusive judicial review was not authorized by either the FAA, or to the extent applicable, by state law. However, if this Court were to conclude otherwise, the trial court's order should nonetheless be reversed and the Arbitration Award confirmed for the following two separate and independent reasons: (i) affirmative defenses based on statutes of limitation are available in arbitration in this state (any argument to the contrary is wholly unsupported and arises from statements in inapposite cases that could never possibly have been intended to achieve the result urged by the Brooms and adopted by the trial court); and (ii) there was no legal error present on the face of the arbitrator's award.

A. Standard of Review

The trial court committed legal error when it held that Washington statutes of limitation are wholly inapplicable to claims that are submitted to arbitration. "This court reviews issues of statutory interpretation and claimed errors of law *de novo*." *City of Olympia v. Drebeck*, 156 Wn.2d 289, 295, 126 P.3d 802 (2006), citing *State v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). For pure legal questions such as those

present here, the appellate court may substitute its judgment for that of the decision-maker whose decision is under review. *Skamania County v. Columbia River Gorge Comm'n*, 144 Wn.2d 30, 42, 26 P.3d 241 (2001). To the extent that the propriety of the Arbitration Award was properly reviewed by the trial court, this Court must determine in its own judgment whether Washington's statutes of limitation simply have no application to the claims brought in arbitration by the Brooms.

B. The Statutes of Limitation at Issue.

The statutes of limitation at issue in this case are RCW 4.16.080(2)-(3)¹³ regarding the negligence, suitability and failure to supervise claims; alleged misrepresentation; alleged breach of fiduciary duty and alleged breach of non-written agreements; and RCW 21.20.430(4)(b)¹⁴ regarding violations of Washington's Securities Act.

¹³ **§ 4.16.080. Actions limited to three years**

The following actions shall be commenced within three years:

(2) An action for taking, detaining, or injuring personal property, including an action for the specific recovery thereof, or for any other injury to the person or rights of another not hereinafter enumerated;

(3) Except as provided in RCW 4.16.040(2), an action upon a contract or liability, express or implied, which is not in writing, and does not arise out of any written instrument.

¹⁴ **§ 21.20.430. Civil liabilities -- Survival, limitation of actions -- Waiver of chapter void -- Scierter**

(4) (b) No person may sue under this section more than three years after the contract of sale for any violation of the provisions of RCW 21.20.140 (1) or (2) or 21.20.180 through 21.20.230, or more than three years after a violation of the provisions of RCW 21.20.010, either was discovered by such person or would have been discovered by him or her in the exercise of reasonable care * * *.

CP 49, 51, 53-55.¹⁵ RCW 4.16.080 refers to time limitations for commencing “actions.” RCW 21.20.430(4) (b) states that “no person may sue under this section more than three years after a violation***.”

Other than the trial court below, no Washington court has held that the affirmative defense of statute of limitations is unavailable in arbitrations in the state of Washington. Statements to the contrary in Washington court opinions, if any can be said to exist, arose in inapposite cases where the question of the availability of a statute of limitations defense in arbitration was not addressed.

Those attempting to avoid the application of such defenses in arbitration attempt to draw a distinction between arbitrations and “actions.” However, the Washington Supreme Court has made clear that arbitrations are actions. To that end, Washington law establishes that the term “action” in Washington statutes can and does include arbitration proceedings. *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 40-41, 42 P.3d 1265 (2002). The Brooms themselves asserted their right to recover reasonable costs and attorneys’ fees only recoverable if such was the case, for example, under statutes such as the Washington Securities Act, RCW 21.20.430(1), and the Washington Consumer Protection Act, RCW 19.86.090, statutes which respectively limit

¹⁵ These statutes do not appear on the face of the award, but are within the record submitted to the trial court that included the parties’ briefing to the Arbitration Panel.

entitlement to such costs and fees to persons who “sue either at law or in equity” or who bring “a civil action in superior court.” CP 27, 30.

The Brooms thus presumed that their claims under these statutes, while raised in arbitration, qualified as a suit or action in which they could recover those items specified in the statute. This is consistent with MSDW’s position, and inconsistent with the Brooms’ current argument that an arbitration proceeding is not an “action” or “suit.”¹⁶

C. The Trial Court’s Blanket Ruling Was Incorrect.

In their Complaint and Motion to Vacate Arbitration Award, the Brooms alleged that the Arbitration Panel committed legal error by dismissing their claims “based on statutes of limitation which simply didn’t apply, because under clear Washington law the state’s statutes of limitations of limitations did not apply to claims submitted in arbitration.” CP 2. The Brooms’ legal theory was that Washington statutes of limitation applied only to court “actions” and therefore could have no application in arbitration which was intended to be a substitute for court litigation. CP 211-12, 215.

In support of this theory, the Brooms relied on two Washington cases, *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 426 P.2d 828 (1967), and *City of Auburn v. King County*, 114 Wn.2d 447,

¹⁶ Interestingly, the Brooms do not contest that the Arbitration Panel properly dismissed their federal securities law claim on the grounds that it was barred by an applicable federal statute of limitations. Thus, according to the Brooms, federal claims are treated in a less favorable manner, at least with regards to limitation periods, than state law claims in arbitrations conducted in the State of Washington.

788 P.2d 534 (1990). CP 212-15. Yet, as shown below, neither of these cases comes anywhere close to addressing the question presented here, namely, whether statutes of limitation defenses are available to defendants in NASD or other arbitration proceedings. Indeed, neither case involves assertions of a statute of limitations defense in arbitration. As such, any statement appearing in these inapposite cases regarding statutes of limitation and arbitrations should be given no weight or influence.

Moreover, the trial court's blanket ruling that "in Washington, statutes of limitation do not bar a claimant from pursuing a claim in arbitration" (CP 556), is inconsistent with the Washington Supreme Court's decision in *Fire Fighters*, in which the court held that arbitration proceedings could be considered "actions" within the meaning of Washington statutes. In that case, the Supreme Court limited *Thorgaard*, upon which the Brooms principally rely, to its specific facts. A careful analysis of *Thorgaard* and *Fire Fighters* can thus lead to only one valid conclusion: that the trial court's blanket rule that statutes of limitation are wholly inapplicable in arbitration was legally erroneous.

Arbitrators are permitted to apply state and federal statutes of limitation as a bar to claims brought in arbitration. *See, e.g., Mangan v. Owens Truckmen, Inc.*, 715 F. Supp. 436, 444 (E.D.N.Y. 1989) (finding that an arbitrator is not permitted to ignore the applicable time limitations and allow the arbitration to proceed based on "equitable considerations"). Neither *Thorgaard* nor *City of Auburn*, nor any other Washington case, holds that an arbitrator is prohibited from doing so.

In *Thorgaard*, the Washington Supreme Court considered the meaning of “action” in the application of RCW 36.45.010, a nonclaim statute which prescribed a method of claiming damages against a county government body. In *Thorgaard*, the contractor gave ample and timely notice to King County regarding its claim for damages. *Thorgaard*, 71 Wn.2d at 127. The parties thereafter arbitrated their dispute regarding delay damages and legal expenses arising from the construction project at issue. During the arbitration proceeding, King County did not question the timeliness of the claims or the adequacy of the notice given by the contractor. The arbitrator entered an award in favor of the contractor, which then moved to confirm the award in superior court. *Id.* at 127-28.

King County moved to dismiss the confirmation proceeding, arguing for the first time that the contractor had not complied with RCW 36.45.010—a nonclaim statute that requires a party seeking damages against a county’s governing body to present the claim to the board of county commissioners within ninety days of the damage as a condition to bringing an “action” on the claim. *Id.* at 129. The purpose of the special nonclaim statute was to put the county on notice prior to the filing of an action. RCW 36.45.010; see *Hall v. Niemer*, 97 Wn.2d 574, 583, 649 P.2d 98 (1982).

King County’s contention in *Thorgaard* was that the confirmation action brought pursuant to the WAA section on confirmation, RCW 7.04.150, should be dismissed because the plaintiff had not served a notice of claim upon it within 90 days of the alleged damage. *Id.* at 129. The

limited issue before the *Thorgaard* court was to resolve the “apparent conflict between a ‘nonclaim’ and ‘arbitration’ statute.” *Id.* at 130. No party ever argued that the arbitrator was unable to consider a statute of limitations defense to a cause of action prosecuted in an arbitration proceeding because no such issue was ever raised in the arbitration forum.

The *Thorgaard* court concluded that the nonclaim statute did not require notice of arbitration claims prior to the filing of a confirmation action under the WAA because arbitration itself was used to provide notice and resolve such controversies prior to litigation. *Id.* at 133.¹⁷ Thus, the failure to give technical notice aside from the arbitration demand could not be used as a means to dismiss a motion to confirm the arbitration award under the WAA, especially since such a motion only asked that the superior court comply with “a mere ministerial duty of entering judgment” on the arbitration award. *Id.* at 132.

The holding of *Thorgaard* is thus extremely narrow. Its holding is simply that an action to confirm an arbitration award under the WAA is not barred by the nonclaim statute since the county had notice of the claims against it by virtue of the arbitration proceeding, a proceeding which resolved the contractor’s claims on the merits. *Thorgaard* does not

¹⁷ This is precisely how the court in *Fire Fighters* viewed the holding in *Thorgaard* when it explained that “because the parties’ contract in *Thorgaard* provided for arbitration upon agreement by the parties, the county was already aware of the dispute.” *Fire Fighters*, 146 Wn.2d at 40.

address and cannot reasonably be construed as authority for the proposition that arbitrators are prohibited from applying statutes of limitations in arbitration proceedings conducted in the state of Washington, especially where, as here, the parties have agreed to rules for the conduct of the arbitration which permit such application.

In *Fire Fighters*, the Washington Supreme Court revisited its decision in *Thorgaard* and clarified its ruling to state that the term “action” includes arbitrations. *Fire Fighters*, 146 Wn.2d at 39-41. The court in *Fire Fighters* properly limited the holding of *Thorgaard* to the nonclaim statute at issue and refused to “import the definition of ‘action’ from *Thorgaard*” to the statutory scheme regarding wage collection, which was before it. *Fire Fighters*, 146 Wn.2d at 39. Other courts have similarly noted that the decision in *Thorgaard* was limited to the specific statutory scheme at issue in that case and have refused to extend the ruling into a broader context. *See Chem. Processors v. Port of Seattle*, 67 Wn. App. 74, 78 n.3, 834 P.2d 88 (1992) (“*Thorgaard* did not address the issue of attorney's fees and explicitly limited its construction of the word “action” to the county non-claim statute (RCW 36.45.030)” (emphasis added)).

The court in *Fire Fighters* made clear that the holding of *Thorgaard* was extremely limited, stating:

[I]t is improper to import the definition of “action” from *Thorgaard* because *Thorgaard* addressed completely different statutory schemes.
* * * * *

Because the statutory scheme at issue in *Thorgaard* serves a different purpose than the statutory scheme at issue here, we find that *Thorgaard's* definition of “action” does not control. In *Thorgaard*, the court was construing the apparent conflict between a nonclaim and the arbitration statute.

See id. at 39-40. The Supreme Court then went on to explain that term “action” may include arbitration proceedings:

American jurisprudence defines ‘action’ as ‘a judicial proceeding in which one asserts a right or seeks redress for a wrong.’ As discussed above, this court has held that “arbitration” may be judicial in nature depending on the circumstances. Thus, nothing in the ‘plain language’ of ‘action’ prevents us from interpreting it to include arbitration proceedings.

See id. at 40-41 (citations omitted, emphasis added). Thus, Washington law establishes that, despite *Thorgaard*, the term “action” can and does include arbitration proceedings. *Fire Fighters*, 146 Wn.2d at 40-41; *see also Hitter v. Bellevue Sch. Dist. No. 405*, 66 Wn. App. 391, 399, 832 P.2d 130 (1992) (term “action” in wage collection statute includes arbitration).¹⁸

¹⁸ *Fire Fighters* also negates the *City of Auburn* case upon which the Brooms have also relied. In *City of Auburn*, the city refused to arbitrate a dispute with King County and the County responded by filing an action for declaratory judgment and a writ of mandamus. *City of Auburn*, 114 Wn.2d at 479. The city argued that the catch-all, two year statute of limitations, RCW 4.16.130, restricted the County’s right to pursue an arbitration proceeding brought pursuant to a specific statute, RCW 70.05.145. RCW 70.05.145 is a special statutory provision pertaining only to dispute resolution of health care payments by a city. The Court simply concluded that the catch-all provision of RCW 4.16.130 did not bar a demand for this special type of arbitration under RCW 70.05.145. *Id.* at

The holding of *Fire Fighters*, by its terms, should also apply to statutes of limitation.¹⁹ The trial court's blanket statement that arbitrations can never qualify as "actions" for purposes of Washington statutes is at odds with *Fire Fighters* and leads to absurd results. For instance, under the trial court's interpretation, the plaintiff in *Fire Fighters* would be entitled to attorney fees for prevailing in an "action" for unpaid wages, but there would be no statutory time bar for such "actions" filed in arbitration. Such a result would clearly be at variance with legislative intent.

The better view is that arbitrations should, absent legislative intent to the contrary, be considered "actions" or "suits" under Washington statutory provisions, including statutes of limitation. This is especially true with regards to NASD arbitrations which are sufficiently "judicial in nature" to warrant application of statutes of limitation.²⁰ The NASD Code

451. The decision does not hold that arbitrators can not apply statutes of limitations to bar causes of action prosecuted in arbitration.

¹⁹ In *Pasco Educ. Ass'n v. Pasco Sch. Dist.*, 27 Wn. App. 147, 151, 615 P.2d 1357 (1980), as amended 622 P.2d 915 (1981), the Court of Appeals assumed without deciding that statutes of limitation would apply to claims raised in arbitration. The Court, however, found that the statute of limitation did not apply to the circumstances because the grievance involved a continuing contract violation. *Id.* ("We find no merit in the district's argument that arbitration is precluded by the 6-year statute of limitations -- RCW 4.16.040(2). This statute does not operate as a bar to arbitration because the grievance is a continuing one."),

²⁰ For example, in NASD proceedings a statement of claim and answer are filed, discovery is conducted pursuant to NASD guidelines, motion practice often takes place and, if the case proceeds to a full evidentiary hearing, each side delivers opening statements, followed by direct and cross-examinations of percipient and sometimes expert witnesses, closing statements, leading to deliberations by the panel of arbitrators and, absent

of Arbitration Procedure § 10304, which the parties concede applies to their agreement to arbitrate, expressly directs arbitrators to apply and enforce statutes of limitation. The Arbitration Award itself demonstrates the formality and orderliness of the proceeding to determine the Brooms' asserted rights and application for redress. The extensive briefing submitted to the qualified arbitrators further demonstrates that the arbitration was an "action" to which the statutes of limitation apply. Section 7 of the FAA enumerates the powers of arbitrators to summon witnesses much like a judge. 9 U.S.C. § 7. The format and substance of an NASD arbitration proceeding pursuant to the FAA is clearly judicial in nature, fully supporting the application of the statutes of limitation attendant to the Brooms' state law claims.

The fact that both the FAA and Washington's arbitration statutes authorize enforcement of agreements to arbitrate statutory claims, including claims intended to provide protection to employees and consumers, also clearly argues in favor of treating arbitrations as "actions." Thus, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991), the Supreme Court held that "statutory claims may be the subject of an arbitration agreement, enforceable pursuant to the FAA," but that, by agreeing to arbitrate a statutory claim, "a party does not forgo the substantive rights afforded by the statute; it only submits their resolution in an arbitral, rather than a judicial, forum." *See also Tjart v. Smith*

a request for further briefing by the panel, issuance of a written award. NASD Code of Arbitration, § 10000 *et seq.*

Barney, Inc., 107 Wn. App. 885, 899, 28 P.3d 823 (2001). If substantive rights which are created by statutes that use the term “action” do not apply in arbitration proceedings, these substantive rights could be put at risk. Construing the term “action” to include arbitration proceedings eliminates these risks and insures that arbitration of statutory claims is consistent with fundamental fairness and due process.²¹ It also insures that defendants who may have the right to recover attorney fees or interpose legal defenses based on statutes which apply to “actions” generally are not deprived of their statutory rights as well.

In essence, the Brooms urge this Court to adopt an across-the-board rule declaring that Washington’s statutes of limitations and arbitration of claims are incompatible. To the contrary, both statutes of limitations and arbitrations function to resolve claims in Washington in an expeditious and economical manner. Thus, Washington’s public policy favors the application of statute of limitations to arbitrations.

Washington courts have consistently confirmed Washington’s strong public policy in favor of arbitration. *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992) (policy goals of arbitration are to avoid “the formalities, the delay, the expense and vexation of ordinary

²¹ In fact, arbitration agreements which purport to shorten applicable statutes of limitation may be found unconscionable. *See, Adler v. Fred Lind Manor*, 153 Wn.2d 331, 356-59, 103 P.3d 773 (2004) (in holding that shortened limitation periods in the arbitration agreement were unconscionable and could be severed, the Washington Supreme Court strongly implied that the applicable statute of limitation otherwise applied).

litigation.”); *Kenneth W. Brooks Trust v. Pac. Media, LLC*, 111 Wn. App. 393, 400, 44 P.3d 938 (2002) (same); *Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (“We begin our analysis by noting the strong public policy in this state favoring arbitration of disputes. Among other things, arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation.” (internal citation omitted)).

Likewise, Washington has a strong public policy in favor of protecting parties against stale, untimely claims through application of statutes of limitations. The “policy behind statutes of limitation is ‘protection of the defendant, and the courts, from litigation of stale claims where plaintiffs have slept on their rights and evidence may have been lost or witnesses’ memories faded.’” *Douchette v. Bethel Sch. Dist. No. 403*, 117 Wn.2d 805, 813, 818 P.2d 1362 (1991) (citations omitted); *see also Crisman v. Crisman*, 85 Wn. App. 15, 19, 931 P.2d 163 (1997). As a result of these concerns, courts require injured parties to assert their claims within the applicable limitation period if the injured party knows of or should know, by exercise of due diligence, all of the facts necessary to establish the elements of their claim. *See In re Estates of Hibbard*, 118 Wn.2d 737, 743 n.15 (1992).

These two principles—favoring arbitration and statutes of limitations—are not incompatible. Instead, they serve to efficiently and expeditiously resolve valid, timely claims. Early, efficient resolution of

disputes serves the interests of all parties. A California court explained the importance and application of these two interests as follows:

The application of the statute of limitations by the arbitrators is necessary because of the practical consequences which would arise if they were not required to abide by the statute. It is conceivable that by agreeing to submit all controversies to arbitration a defendant might be held answerable for a claim accruing twenty years prior to the commencement of the arbitration proceedings. This would encourage the institution of fraudulent and stale claims, when all witnesses were dead, all proper documents lost, and most facts obscured by lapse of time and memory. Furthermore, if the arbitrators are not bound by the statute of limitations, the contracting parties in effect would be agreeing to waive their rights to the statute at the inception of the contract. This is contrary to public policy and would probably be considered invalid in the majority of jurisdictions.

Lockhart-Mummery v. Kaiser Foundation Hospitals, 103 Cal. App. 3d 891, 895-96, 163 Cal. Rptr. 325 (Cal. App. 2d Dist. 1980) (emphasis added).

The trial court's blanket holding that statutes of limitation do not apply in arbitration undermines Washington's public policies favoring arbitrations and statutes of limitations.

Moreover, there is no reason to believe that, through passage of either the WAA or the RUAA, the Legislature intended to carve out an exception whereby statutes of limitation do not apply to claims brought in arbitration. Both statutes permit parties to submit to arbitration "any existing or subsequent controversy" between the parties. RCW 7.04A.070. *See also* RCW 7.04.010 ("any controversy which may be the subject of an action existing between them* * *, or * * * thereafter arising

between them. * * *”). Both statutes would therefore permit parties who are already litigating the claims between them in a court “action” to agree, in mid-course, to submit the claims to final and binding arbitration. Under these circumstances, according to the trial court’s ruling, statutes of limitation otherwise applicable to those claims would no longer apply once the parties leave the courthouse for the arbitration hearing room. Nothing in Washington’s arbitration law suggests such an absurd result.

D. The Arbitration Award Contains No Error Evident on the Face of the Award.

If this Court were to apply an “error of law” standard under the WAA despite the Washington Supreme Court’s decision in *Malted Mousse*, any error of law must nevertheless appear on “the face of the arbitral award alone.” *Boyd v. Davis*, 127 Wn.2d at 263. This requirement is not met in this case. It is only through examination of the underlying briefing and accompanying documents that the trial court could determine the nature of the Arbitration Panel’s decision and which statutes of limitation are at issue.

The Award never identifies the statutes of limitation upon which the Brooms’ claims were dismissed. *See* CP 9-16. The Award states generally that MSDW filed a Motion to Dismiss on December 16, 2005. CP 10. It does not state the grounds for the Motion. It recites the extensive briefing history, but none of the arguments or law. *Id.* The Award then states:

On May 1, 2006, the Panel issued an Order granting Respondents' Motion to Dismiss as to all claims, with the exception of Claimants' claim for violation of the Washington Consumer Protection Act, on the grounds that the claims were barred by applicable statutes of limitation.

CP 10. Thus, while the award does verify that the claims are barred by the statutes of limitation, it neither reveals the statutes at issue nor does it demonstrate that the Brooms' contested the general applicability of the statutes as opposed to issues such as discovery, accrual and tolling.

The Brooms' Complaint and Motion to Vacate Arbitration Award filed with the superior court was supported by all of the briefing submitted to the Arbitration Panel, CP 1-207, a clear indicator that the motion went beyond the face of the Award. While the Award states briefly that "the Claimants" filed a Supplemental Memorandum in Support of Motion for Reconsideration of Dismissal Order on May 11, 2006, CP 10, nowhere does the Award demonstrate that the Brooms argued that statutes of limitation do not apply in arbitration proceedings. The briefing reveals that the Brooms raised this argument for the first time in their second brief supporting a motion for reconsideration of the Arbitration Panel's order dismissing their claims, CP 161-170. The face of the Award at issue is thus an insufficient basis upon which to conclude that the Arbitration Panel made an error of law. Therefore, this Court should reverse the trial court's order vacating the arbitration award, even if the WAA permits legal error review.

CONCLUSION

This Court should reverse the trial court's order and confirm the properly rendered Arbitration Award for two compelling reasons: (1) the trial court was without authority under either federal or state law to review the award for errors of law; and (2) the Arbitration Panel committed no legal error because Washington's statutes of limitation apply to claims brought in arbitration.

If the trial court's decision is allowed to stand, the benefits of arbitration will be severely compromised because litigants will be deprived of their reasonable expectation that the arbitral award for which they bargained will truly be final and immune from intrusive review by the judiciary. In addition, parties to arbitration agreements will find that they have exposed themselves to stale and outdated claims that they would not have to defend if brought in court merely because they sought a streamlined and efficient method to resolve their disputes. This Court should act to protect the strong public policies in favor of arbitration and against stale and outdated stale by deciding in favor of MSDW.

Respectfully submitted this 17th day of December, 2007.

SCHWABE, WILLIAMSON & WYATT,
P.C.

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CERTIFICATE OF FILING

I HEREBY CERTIFY that on December 17, 2007, I filed the foregoing **BRIEF OF APPELLANTS** by mailing the original and one copy by regular United States mail with postage prepaid to the following address:

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CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of December, 2007, I caused to be served the foregoing **BRIEF OF APPELLANTS** Morgan Stanley DW Inc. and Kimberly Anne Blindheim on the following by United States first-class mail with postage prepaid:

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