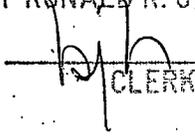


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SUPREME COURT OF THE STATE OF WASHINGTON

[Ct. App. Docket No. 60115-6-I]

MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM,

Respondents,

v.

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

Petitioners.

**PETITIONERS' ANSWER TO AMICUS BRIEFS FILED BY
WASHINGTON STATE ASSOCIATION FOR JUSTICE
FOUNDATION AND PUBLIC INVESTORS ARBITRATION BAR
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FILED AS
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I. INTRODUCTION

Petitioners Morgan Stanley DW Inc. and Kimberly Anne Blindheim (collectively, "MS" or "Defendants") respectfully submit, pursuant to RAP 10.2(g), their answer to the amicus briefs filed in support of Michael Broom, Kevin Broom and Andrea Broom ("the Brooms") by the Washington State Association for Justice Foundation ("WSAJ") and the Public Investors Arbitration Bar Association ("PIABA").

II. ARGUMENT

WSAJ and PIABA advance an outmoded view of arbitration that would make Washington courts unique among the federal courts and those of the other 49 states by permitting judges to second-guess arbitrators due to any legal error discernable from the face of the arbitration award. In doing so, they do not contest that review for "legal error on the face of the award" is based on a long repealed Washington statute and undermines the essential virtues of arbitration: that disputes be decided expeditiously, efficiently and with finality. Instead, they promote a substitution of the courts' judgment on legal issues for that of the arbitrators, an unduly suspicious and paternalistic approach which has been routinely rejected by the courts and which has the negative effect of rendering arbitration a mere prelude to time-consuming and expensive court litigation.

WSAJ and PIABA seek to further undermine the benefits of arbitration and discourage its use by advocating in favor of denying to arbitrators the authority to determine the application of Washington statutes of limitation. To this end, PIABA offers a misleading interpretation of the NASD and FINRA rules that is both incorrect and also ignores the policy considerations and law that dictate that the arbitration panel, and not the courts, interpret and apply the arbitration rules applicable to the case before it.¹

A. Review for Legal Error Undermines the Benefits of Arbitration.

The briefs of WSAJ and PIABA are notable for what they do not argue. They do not attempt to contest the historical analysis of Washington arbitration law contained in MS's Supplemental Brief, in which it is established that Justice Utter's concurring analysis in *Boyd v. Davis*, 127 Wn. 2d 256, 267-68, 954 P.2d 1327 (1988), was undoubtedly correct: judicial review for error on the face of the award is a relic from an arbitration statute which was repealed when Washington adopted its first modern arbitration statute in 1943. Supplemental Brief of Petitioners, pp.

¹ It should be noted that, under FINRA's current rules, Defendants could not file a pre-hearing dispositive motion based on statutes of limitation or otherwise cause a claim to be dismissed based on such statutes until the conclusion of the claimant's case-in-chief. See Rule 12504(a)(6), FINRA Code of Arbitration Procedure for Customer Disputes. Thus, the suggestion by WSAJ and PIABA that giving arbitrators the right to apply statutes of limitation in FINRA arbitrations will result in the summary disposition of meritorious claims is unfounded. All such claims will be subject to a hearing on the merits. *Id.*

6-11. In fact, PIABA concedes that the phrase “error of law” was removed from the Washington arbitration act “many years ago.” PIABA Amicus Brief, p. 9.²

Similarly, neither WSAJ nor PIABA contests that Washington has a “strong public policy” in favor of arbitration precisely because arbitration is expeditious, economical, and eases court congestion. *Davidson v. Henson*, 135 Wn. 2d 112, 118, 954 P.2d 1327 (1998). They also do not refute MS’s contention herein that any form of judicial review that is beyond the express provisions of Washington’s arbitration statute undermines arbitration because it renders arbitration a “mere prelude” to court litigation. Petitioners Supplemental Brief, p. 13. *See Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn. 2d 885, 892, 16 P.3d 617 (2001) (this Court recognized that arbitration was a “final alternative” to, not a “mere prelude” to, court litigation).

Rather than face the consequences of their position—that review for mere legal error undermines the efficiency, expediency and finality of arbitration—WSAJ and PIABA focus on insuring the absolute correctness of the arbitrator’s rulings by advocating for more rigorous court review.

² In contravention of the rule that a change in statutory language is presumed to have meaning, PIABA argues that the vacatur provisions of the WAA were intended to carry forward legal error review. PIABA Amicus Brief, p. 9. No legislative history or factual or legal analysis is offered to justify this unsupported contention.

But this interest, although not trivial, does not outweigh arbitration's signal virtues. Thus, even when parties to arbitration agreements expressly agree to broad unfettered legal error review, such agreements are not enforced by the courts. *See Hall Street Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 128 S. Ct. 1396, 1404, 170 L. Ed. 2d 254 (2008) (parties' agreement for broad legal error review is unenforceable because the FAA standards for vacatur are exclusive and legal error is not among the statutory grounds); *Godfrey*, 142 Wn. 2d at 897 (parties' agreement for *de novo* review of arbitration award is unenforceable under the WAA because "[a]rbitration is intended to be final"); *Barnett v. Hicks*, 119 Wn. 2d 151, 161, 829 P.2d 1087 (1992) (parties' agreement to permit legal error review by court is unenforceable under WAA because parties may not stipulate to "boundaries of review" which exceed the grounds enumerated in RCW 7.04.160).

The focus of WSAJ and PIABA on the absolute legal correctness of arbitral awards appears rooted in their belief that arbitrators will be unable or unwilling to apply the law. *See* PIABA Brief, p. 11 (referring to arbitrators "who do not apply the law") and p. 14 (stating that FINRA arbitrators may sometimes lack "legal knowledge and ability to apply legal concepts"). However, the United States Supreme Court has ruled that courts must reject "generalized attacks" that "rest on 'suspicion of

arbitration.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct 513, 148 L. Ed. 2d 373 (2000). In light of Washington’s strong public policy preference in favor of arbitration as a means of dispute resolution, Washington courts should follow this lead.

The suspicions of amici are, in any event, not well-founded. Courts have recognized in numerous cases that arbitrators possess the skills and abilities to fairly and efficiently dispose of even the most complex statutory and non-statutory claims, including those involving securities laws. *See, e.g., Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 480, 109 S.Ct. 1917, 104 L. Ed. 2d 526 (1989) (Supreme Court overruled its decision in *Wilko v. Swan*, 346 U.S. 427, 74 S. Ct. 182, 98 L. Ed. 168 (1953), which rested on “judicial hostility to arbitration,” and held that arbitrators could adequately decide claims under the Securities Act of 1933); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 231-35, 107 S.Ct 2332, 96 L. Ed. 2d 185 (1987) (Supreme Court rejected claims that arbitrators did not have “competence” to decide claims under the Securities Act of 1934 or that NASD procedures were inadequate); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 633, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985) (arbitration panels are competent to handle complicated antitrust

claims); *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 343, 103 P.3d 773 (2004) (arbitrators may decide statutory claims of discrimination).³

The suspicion of, and hostility to, arbitration harbored by WSAJ and PIABA cause them to conclude that broad legal error review is needed to check the alleged tendency of arbitrators to either ignore or misunderstand the law. This well-worn argument has been tried and rejected under the FAA and should be similarly rejected under Washington's arbitration law. For example, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30-32, 111 S. Ct. 1647, 14 L. Ed. 2d 26 (1991), the party opposing arbitration asserted that resolution of his statutory claims could not be trusted to arbitrators because "judicial review of arbitration decisions is too limited." *Gilmer*, 500 U.S. at 32 n.2. However, the Supreme Court held, that "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute" at issue in the case. *Id.* (quoting *McMahon*, 482 U.S. at 232).

It is clear under federal law that the "necessarily limited" judicial review permitted by the FAA does not include review for mere legal error.

³ PIABA's attack on the FINRA arbitration process is also based on mere suspicion of arbitration and must fail. See PIABA Brief, pp. 12-14 (attacking adequacy of discovery and qualifications of arbitrators). Similar attacks have been rejected by the United States Supreme Court. See, e.g., *Gilmer v. Interstate/Jonson Lane Corp.*, 500 U.S. 20, 30-32, 111 S. Ct. 1647, 14 L. Ed. 2d 26 (1991) (Supreme Court rejected attacks on competence

See Hall Street, 128 S. Ct. at 1405 (FAA substantiates a “national policy favoring arbitration with just the limited review needed to maintain arbitration’s essential virtue of resolving disputes straightaway” and does not permit “full-bore legal” appeals). Rather, the only conceivable legal error review permitted under federal law would be for “manifest disregard of the law,” a standard which is in legal doubt, but which, in any event, is extremely narrow and would not permit vacatur merely where the court disagrees with the arbitrator’s legal conclusions whether they are on or outside the face of the award. Supplemental Brief of Petitioners, pp. 12-13.

WSAJ and PIABA recognize that the “legal error on the face of the award” standard applied by the Court of Appeals in this case is much broader and more expansive than “manifest disregard of the law” and therefore each tries to place upon it a limiting gloss. For instance, WSAJ contends that legal error review results in vacatur only when “there is a palpable misunderstanding of a legal issue that the arbitrators considered outcome determinative.” WSAJ Brief, p. 18. PIABA, on the other hand, appears to limit application of the standard of review to securities arbitrations which “involve special considerations” and only when there is

of arbitrators and lack of discovery).

“serious” arbitral error. PIABA Brief, pp. 9-10.⁴ Both amici appear to have constructed these limitations out of thin air as they appear in no statute or Washington case.⁵ It is telling that, even while urging this Court to apply legal error review, amici feel compelled to excuse its extraordinarily broad reach by constructing limitations upon it.

In reality, the standard of review as described by the Court of Appeals’ decision applies whenever there is any legal error which can be gleaned from an analysis of the face of the award and is not limited in any of the ways suggested by amici. The standard as stated appears on its face to include harmless legal error or prejudicial legal error. It includes error regarding legal issues of first impression or regarding doubtful legal points as well as legal issues that are well-established.⁶ It includes negligent error as well as willful disregard of clearly applicable law.⁷

⁴ PIABA offers no statutory or other authority for the unsupported notion that securities arbitration should be treated differently than other types of arbitrations. Surely, neither the WAA nor the FAA makes any such distinction.

⁵ WSAJ’s reliance on *Carey v. Herrick*, 146 Wash. 283, 292, 263 P. 190 (1928), is misplaced as that case involved Idaho’s common law of arbitration. Washington “does not permit or recognize common law arbitration” as arbitration under Washington’s code of arbitration is “exclusively statutory.” *Godfrey*, 142 Wn. 2d at 893-94.

⁶ For example, suppose divisions of the Washington Court of Appeals held conflicting views on a legal issue and the arbitrator followed a holding that was later reversed by this Court. Under the “legal error on the face of the award” standard as currently applied, the arbitrator’s reliance on the rejected decision would constitute grounds for vacatur. However, as originally formulated under the prior repealed Washington arbitration statute, an award could not be vacated for an error regarding a “doubtful” point of law. *School Dist. No. 5, Snohomish Cty. v. Sage*, 13 Wn. 352, 360, 43 P. 341 (1896).

⁷ While this case involves a brokerage firm which saw its victory in arbitration

As such, review for legal error on the face of the award goes well beyond any standard for review of arbitration awards recognized by the federal courts under the FAA or by any of the other 49 states.⁸ This Court should correct the mistake which was made in 1963 when it decided in *Northern State Constr. Co v. Banchemo*, 83 Wn. 2d 245, 386 P.2d 625 (1963) without discussion, that a repealed standard of review taken from a pre-modern arbitration statute somehow survived despite the fact that the text supporting its application had been excised.⁹ This standard of review

challenged in court, it could just as easily have been a successful claimant who won a hard fought arbitration victory but spent five years litigating in court to protect it.

⁸ Washington alone applies the non-statutory error of law standard of review for any legal error. Courts in two other states have used the “error of law” phrase in reviewing arbitration awards, but each applied it sparingly and with a higher level of scrutiny than Washington courts. See *Department of Transp. v. Maine State Employees Ass’n, SEIU Local 1989*, 727 A.2d 896, 898-99 (Me. 1999) (in considering whether a labor arbitration award contravened public policy, court stated that “the arbitrator erred as a matter of law and exceeded his powers,” but court relied for this holding on *Westbrook School Committee v. Westbrook Teachers Ass’n*, 404 A.2d 204, 209 (Me. 1979), which concluded that “an award will be vacated only if the arbitrator’s award evidences ‘manifest disregard’ for the terms of the contract”); *Dohariyos v. Detrex Corp.*, 217 Mich. App. 171, 175-76; 550 N.W. 2d 608 (Mich. 1996) (court imposed a higher “error of law” standard, requiring that the error be “so material or so substantial as to have governed the award, and the error must be one but for which the award would have been substantially otherwise”). All remaining states have rejected mere legal error (although some apply manifest disregard of the law) as a basis for vacating arbitration awards.

⁹ Noting the Court of Appeals’ ruling that Defendants waived their argument that the FAA preempted the “legal error on the face” standard, PIABA states that preemption is not an issue. PIABA Brief, p. 3 n. 4. But PIABA nevertheless argues that the “better reasoned cases” hold that state law should prevail. *Id.* While Defendants did not raise preemption in their Petition for Review, there is substantial authority that a state law which, in conflict with the FAA, permits vacatur in a case involving interstate commerce where federal law would call for confirmation is preempted under the Supremacy Clause. See, e.g., *Jacada v. Int’l Mktg. Strategies, Inc.*, 401 F.3d 701, 710 (6th Cir. 2005), overruled on other grounds by *Hall Street*, 552 U.S. 576 (2008) (court refused to allow Michigan’s more searching review of an arbitration award because it conflicted with the

undermines the benefits of arbitration and should be abandoned as incorrect and harmful.¹⁰ See *City of Federal Way v. Koenig*, 167 Wn. 2d 341, 346, 217 P.3d 1172 (2009) (where this Court's prior interpretation of a statute is erroneous and harmful, it may be abandoned).

B. Arbitrators Are Not Prohibited From Applying Statutes of Limitation.

WSAJ and PIABA contend that the arbitration award in this case evidences legal error on its face merely because the arbitration panel dismissed the Brooms' state law claims based on Washington statutes of

FAA's policy favoring arbitral authority and discretion); *M & L Power Serv. Inc. v. American Networks Int'l*, 44 F. Supp. 2d 134, 142, (Dist. R.I. 1999) ("FAA only preempts state law to the extent that said state law provides lesser protection for arbitration agreements and awards than does federal law"). Interpreting the WAA to permit broad judicial review for legal error thus conflicts with the FAA's extremely limited grounds. See *Satomi Owners Assoc. v. Satomi LLC*, __ Wn. 2d __, __ P.3d __, 2009 WL 4985689 (December 24, 2009) (recognizing that Washington laws that conflict with the FAA are preempted). Because any interpretation of a statute which raises serious constitutional concerns should be avoided, this Court should consider the fact that permitting broad legal error review raises these concerns, running headlong into conflicting provisions of the FAA. See *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500, 99 S. Ct. 1313, 59 L. Ed. 2d 533 (1979) (a statute "ought not to be construed to violate the Constitution if any other possible construction remains available"); *Gruen v. Tax Comm'n*, 35 Wn. 2d 1, 6, 211 P. 2d 651 (1949), *overruled on other grounds*, *Washington State Finance Committee v. Martin*, 62 Wn. 2d 645, 384 P. 2d 833 (1963) (where a statute is open to two constructions, one which will render it constitutional, and the other unconstitutional, the former construction should be adopted).

¹⁰ WSAJ contends that arbitrators are given the chance to determine the extent to which their awards may be reviewed under the "legal error on the face of the award" standard. WSAJ Brief, pp. 15-16. However, WSAJ fails to explain how hiding the legal reasoning justifying an award to "insulate the award from scrutiny" serves any legitimate public purpose. *Id.* at 16. And the notion that arbitrators include their legal reasoning in an award to "expose [their] determination to judicial review" does not reflect the realities of the arbitration process. *Id.*

limitations.¹¹ Neither WSAJ nor PIABA (nor the Brooms for that matter) have identified a single Washington case or applicable NASD or FINRA rule that supports this conclusion. Nor has anyone demonstrated that MS agreed to give up important substantive time-based defenses by agreeing to resolve its disputes in arbitration. Instead, WSAJ and PIABA mistakenly rely on decisions involving a defendant's refusal to arbitrate at all based on a statute of limitation (in contrast to the facts of this case, where the defendant voluntarily proceeded to arbitration and then prevailed with the arbitrator on a statute of limitations defense).

WSAJ and PIABA advance slightly different arguments. WSAJ contends that, unless the parties "agree upon governing time limits or incorporate a limitations period or periods into their arbitration agreement," the only statute of limitations that may apply to bar the initiation of arbitration proceedings is the six-year statute of limitations applicable to written contracts, RCW 4.16.040(1). WSAJ Brief, p. 10. PIABA, on the other hand, focuses on the application of NASD Rule 10304, arguing that this rule does not serve to incorporate statutes of limitation into the arbitration agreement. PIABA Brief, pp. 2-3. Each argument is wrong.

¹¹ Curiously, no party has contested in this case the authority of the arbitration panel to dismiss the Brooms' federal claims based on federal statutes of limitation.

No one disputes that the parties in this case agreed to arbitrate under the NASD Rules. Nothing in those rules provides that statutes of limitation will not apply. To the contrary, NASD Rule 10304(c) incorporates federal and state statutes of limitation applicable to the claims being advanced in arbitration. Supplemental Brief of Petitioners, pp. 19-20. The parties' agreement to arbitrate is therefore not silent as to the application of statutes of limitations.

However, even if the parties' agreement were truly silent, this does not mean that arbitrators have no authority to apply statutes of limitation or equitable doctrines such as laches to deny stale and untimely claims. Neither WSAJ nor PIABA cite any cases in which courts have held that arbitrators lack this authority. The cases they cite involve either defendants who refuse to proceed to arbitration at all based on statutes of limitation or attempts to defend against motions to confirm arbitration awards. See *Davidson v. Hensen*, 135 Wn. 2d 112, 126-127, 954 P.2d 1327 (1998) (noncompliance with contractor registration statute is not defense to confirmation proceeding because confirmation proceeding is not an "action"); *City of Auburn v. King County*, 114 Wn. 2d 447, 788 P.2d 534 (1990) (city's attempt to justify refusal to proceed with arbitration based on statute of limitations rejected); *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn. 2d 126, 426 P.2d 828 (1967) (court

upheld confirmation of an arbitration award despite the county's assertion that claimant had failed to meet the requirements of a nonclaim statute); *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 689 (2d Cir. 1952) (party's refusal to proceed to arbitration based on statute of limitation rejected).

This case does not involve a refusal by MS to arbitrate the Brooms claims nor does it involve resistance to the confirmation of an arbitration award based on a statute of limitation. As such, too much is made of the question whether an arbitration proceeding can be deemed an "action" under Washington law. Regardless of whether an arbitration can be deemed an "action," and this Court has said that it can in *Int'l Ass'n of Firefighters v. Everett*, 146 Wn. 2d 29, 42 P.3d 1265 (2002),¹² the question of whether arbitrators have the authority to apply limitation periods to claims advanced in arbitration is one that the United States Supreme Court has answered affirmatively. Thus, in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L. Ed 2d 491 (2002), the Supreme Court was faced squarely with the question whether

¹² WSAJ contends that the *Fire Fighters* case is distinguishable because it involved a labor arbitration that is excepted from the WAA's coverage. WSAJ Brief, p. 11. However, in discussing the essential attributes of arbitration, the Court discussed both labor and commercial arbitrations interchangeably. See *Fire Fighters*, 146 Wn. 2d at 37-38 (in discussing whether arbitration is judicial or non-judicial, the court cited both a labor case and non-labor cases). Nothing in *Fire Fighters* supports the notion that only labor arbitrations can be deemed "actions" under Washington law.

NASD Rule 10304 could be used as a defense to proceeding to arbitration at all or whether its application was an issue for the arbitrators. The Court held that the “applicability of the NASD time limit rule is a matter presumptively for the arbitrator, not for the judge.” *Id.* at 85. This Court should follow the lead of the Supreme Court in *Howsam* and reject any *per se* rule that arbitrators have no authority to interpret or apply time limits, including those set forth in federal or state statutes of limitation.

C. NASD and FINRA Rulemaking History Supports Application of Statutes of Limitation.

As noted above, NASD Rule 10304 expressly incorporates statutes of limitation and contemplates their application in arbitration. As recognized by the Supreme Court in *Howsam*, the interpretation of this rule is for the arbitrator and not the courts. PIABA argues, however, based on “the subsequent history of Rule 10304,” that it was never intended to incorporate statutes of limitations. PIABA Brief, p. 3. Even if this issue was for the court to decide in derogation of the arbitration panel’s interpretation to the contrary, PIABA is wrong in its analysis.

As set forth in prior briefing, NASD Rule 10304 (which was in effect during the relevant time period) expressly stated that the NASD’s six-year eligibility rule “shall not extend applicable statutes of limitations.” PIABA attempts to overcome this express reference to the

application of statutes of limitation by pointing to the newly enacted FINRA Rule 12206 (which supplements the above-quoted language with additional language providing that “time limits for the filing of the claim in court will be tolled” while a claimant is pursuing arbitration).¹³

To be clear, nothing in Rule 12206 (or any other FINRA rule) states that statutes of limitation do not apply in arbitration. Moreover, to the extent that there is any ambiguity in the meaning or intent of the FINRA rules, such issues must be resolved by the arbitrators hearing the case, not a court that is far removed from the proceeding. *Howsam*, 537 U.S. at 85 (“the NASD arbitrators, comparatively more expert about the meaning of their own rule, are comparatively better able to interpret and to apply it.”).

FINRA’s own discussion of the third-party commentary on its new dispositive motion rules (including Rule 12206) expressly addressed the viability of statutes of limitations defenses in arbitration. Specifically, when Rule 12206 and related rules were adopted (thus limiting motions to

¹³ PIABA’s reference to events that occurred in May of 2006 (PIABA Brief, pp. 4-5) regarding an amendment to FINRA Rule 12206 illustrates the folly of permitting courts to second-guess the arbitration panel about the meaning of NASD Rule 10304 because, in April of 2006, the panel had already dismissed the Brooms’ claims as untimely. CP 149-52. To second-guess arbitrators regarding events and arguments actually made known to them is not in accordance with the modern law of arbitration. To second-guess arbitrators based on events which had not yet occurred and arguments which were not made to the arbitrators when they first rendered their decision brings judicial review to an unprecedented level.

dismiss to just three grounds, six-year eligibility, prior settlement, or a party's lack of any involvement in the alleged wrongdoing), FINRA stated as follows:

Twenty-nine commenters, who oppose the proposal, argue that the three exceptions for prehearing motions to dismiss are too narrow and exclude certain situations in which such motions would be appropriate. These commenters suggest that FINRA expand the proposed rule to include the following exceptions: clearing brokers, senior executives, statutes of limitation; and legal impossibility exceptions, such as defamation for statements made on required forms (which some courts have held are protected by an absolute privilege) and the doctrine of *res judicata* *

* *

FINRA has considered these comments, and concluded that expanding the exceptions to the rule would negate its intent, which is to have clear, easily definable standards that do not involve fact-intensive issues. FINRA believes that the suggested additional exceptions would require fact-based determinations and, thus, would be inappropriate for dismissal before claimants have presented their case. Although these exceptions would be inappropriate for prehearing dismissal, FINRA notes that a party would be permitted to file a motion addressing these issues at the conclusion of claimant's case-in-chief.

<http://www.finra.org/web/groups/industry/@ip/@reg/@rulfil/documents/rulefilings/p116990.pdf> (at 4-5) (emphasis added).

Accordingly, FINRA itself has expressly recognized that motions to dismiss based on defenses such as statutes of limitation can be presented under the newly adopted rules—but at a later time in the

proceeding after the claimant rests his or her case. Any contrary argument based on the rule-making history is baseless.

PIABA also cites to the Ruder Report in a vain attempt to support its argument that statutes of limitation historically were not authorized in NASD and FINRA arbitration. A review of the Ruder Report, however, lends no support to PIABA's position. The Ruder Report was published as a result of increasing confusion over the NASD's six-year eligibility rule (then Rule 10304). Fed. Sec. L. Rep. (CCH) P. 85,735 at 12 (January 1996). The Report noted that because the eligibility rule and statutes of limitation both serve the function of eliminating stale claims, the eligibility rule was largely redundant and could be done away with if the NASD adopted new express procedures for "early resolution of statutes of limitation issues in arbitration." *Id.* at 14 (emphasis added).

Nothing in the Report suggests that statutory time bars previously could not be applied. Rather, the Report urged new procedures to mandate that statutes of limitation be applied earlier and more frequently. Indeed, the Ruder Report's express language makes clear that statutes of limitation were fair game even before its proposals were made (and would remain relevant even if new procedures for summary dismissal were not adopted):

The arbitrators must maintain the discretion to determine the fairest and most efficient means to decide statute of limitations and other dispositive motions. Nevertheless,

we urge that the arbitrators consider dispositive motions to dismiss as early as practicable in the process, as frequently is done in civil litigation.

Id. at 15 (emphasis added). Accordingly, PIABA's assertion that the industry has "long understood that securities arbitrators are not authorized to apply substantive statutes of limitation" finds no support in the Ruder Report. PIABA Brief, p. 6.

PIABA also makes a misleading argument in response to the amicus curiae brief submitted by SIFMA.¹⁴ PIABA argues that SIFMA has taken inconsistent positions by presenting policy arguments in favor of statutes of limitation in this action after previously arguing to Congress "that the absence of statutes of limitations in securities arbitrations made it fair in part because its rules do not apply statutes of limitations to bar customer claims." PIABA Brief, p. 8. This assertion is not supported by the facts.

Although PIABA relies on the testimony of Marc E. Liackritz to Congress in 2005, nothing in that testimony states that statutes of limitation do not apply in arbitration. *See*

<http://www.sifma.org/legislative/testimony/archives/Lackritz3-17-05.html>.

¹⁴ While SIFMA is an organization composed of securities professionals whose business is to serve public investors and ensure the successful operation of the markets, PIABA is a group of securities claimants' attorneys whose sole business is to prosecute the kinds of claims that could be dismissed as untimely under applicable statutes of limitation.

In fact, PIABA's brief selectively quotes and mischaracterizes Mr. Lackritz's testimony, which merely states that due to less stringent rules in arbitration, cases that are routinely dismissed in court are "more likely" to go to a final hearing in arbitration.¹⁵ The mere fact that more cases are dismissed in court (where litigants are subject to more stringent pleading standards and strictly enforced dispositive motion practice) does not mean that defenses such as statutes of limitation do not apply and cannot be used as the basis for dismissal or denial of claims in arbitration.

As a result, SIFMA's positions have been consistent. The overarching point of Mr. Lackritz's testimony—that arbitration should be an efficient means of final dispute resolution—is in perfect accord with the briefs of both MS and SIFMA, which argue that further recognition of the outmoded non-statutory "error of law" standard frustrates the goals of expediency, efficiency and finality.

PIABA's contention that NASD Rule 10304 does not permit

¹⁵ Specifically, the relevant testimony (without PIABA's use of ellipses) is as follows:

In addition to the efficiency and fairness benefits described above, parties who utilize arbitration are far more likely to have their claims aired in a full hearing, and decided on the merits, rather than won or lost on technicalities. This is in sharp contrast to court proceedings, where a significant percentage of claims are dismissed on pre-hearing motions to dismiss or for summary judgment. Many of these dismissals are on what may be described as technical, or procedural, grounds. This includes dismissals for pleading failures, jurisdictional deficiencies, and statutes of limitations bars.

<http://www.sifma.org/legislative/testimony/archives/Lackritz3-17->

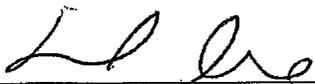
arbitrators to apply statutes of limitation in arbitration is wrong. However, it was not within the province of the courts to determine whether PIABA's view or SIFMA's view of the meaning of the rule is correct. This question was for the arbitration panel and they correctly concluded, after considering the parties' extensive briefing on the issue, that the NASD Rules did incorporate federal and state statutes of limitation.

III. CONCLUSION

This Court should reverse the Court of Appeals decision to vacate the arbitration award and should instead confirm the award in its entirety.

Respectfully submitted this 19th day of January, 2010.

SCHWABE, WILLIAMSON & WYATT, P.C.

By: 

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05.html at 4 (emphasis added).

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I hereby certify that on the 19th day of January, 2010, I caused to be served by deposit in the United States Mail, postage prepaid, the foregoing **PETITIONERS' ANSWER TO AMICUS BRIEFS FILED BY WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AND PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION** of Morgan Stanley DW Inc. and Kimberly Anne Blindheim on the following:

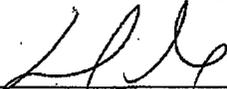
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