

No. 42217-4

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,  
Department of Transportation,

Respondent,

v.

JAMES RIVER INSURANCE COMPANY,

Appellant.

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STATE OF WASHINGTON  
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REPLY BRIEF OF APPELLANT

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## **I. INTRODUCTION**

In its response brief, Respondent Washington State Department of Transportation (“WSDOT”) does the only thing it can under the circumstances and the facts of this case: grasp at straws. Despite the fact that the two statutes at issue here—RCW 48.15.150 and RCW 48.18.200—make no mention of arbitration or otherwise restrict an insured’s ability to seek alternative dispute resolution, WSDOT claims that the statutes reverse preempt the Federal Arbitration Act (FAA) by way of the McCarran-Ferguson Act. In order to make this claim, WSDOT resorts to creative and illogical arguments, including that the term “jurisdiction of action” has a separate meaning from the word “jurisdiction”; that the legislature’s failure to show an intent to allow arbitration somehow means that the legislature intended not to allow it; and that so-called “anti-arbitration statutes” from other jurisdictions, which contain no similarities to the language of the two Washington statutes and all of which explicitly bar arbitration, give this Court the authority to decide that our statutes reverse preempt Washington’s long-held “strong presumption in favor of arbitration.”<sup>1</sup>

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<sup>1</sup> *Verbeek Prop., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 86, 246 P.3d 205 (2010).

No Washington cases have held that arbitration clauses in insurance contracts are barred, save for one case (to which WSDOT clings) that involves health care insurance and a completely different set of statutes and regulations. Incidentally, in that case, *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*,<sup>2</sup> the Court did *not* hold that arbitration was barred—indeed, the statutes at issue there explicitly allow arbitration—but that the arbitration clause contained in the specific insurance contract at issue in that case violated the statute and regulation.<sup>3</sup> Indeed, no cases have discussed the two statutes at issue in this case in relation to arbitration at all, very likely because the two statutes do not mention arbitration and do not in any way relate to arbitration.

WSDOT’s last-ditch argument, that it never received the arbitration clauses making them invalid, is a red herring. The party opposing arbitration has the burden of proving that the arbitration clause is “inapplicable or unenforceable.”<sup>4</sup> WSDOT presented no evidence to the trial court in support of its contention, even in the face of substantial evidence to the contrary.<sup>5</sup> And although WSDOT is the named insured, it is so only because it directed Scarsella Brothers, Inc. (“Scarsella”) to

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<sup>2</sup> 157 Wn.2d 290, 138 P.3d 936 (2006).

<sup>3</sup> *Id.* at 305.

<sup>4</sup> *Verbeek*, 159 Wn. App. at 86-87.

<sup>5</sup> *See infra*, Part II.G.

procure insurance on its behalf. As such, WSDOT never “bargained” for any particular policy provisions or changes in coverage from those agreed between James River and Scarsella. It cannot now claim a lack of advance knowledge of the arbitration endorsement.

For all these reasons, and as detailed below, the Court must reverse the trial court’s unfounded determination that RCW 48.15.150 and RCW 48.18.200 reverse preempt the FAA and its order denying James River’s arbitration demand. The Court need not remand this case back to the trial court for further proceedings; rather, it may order that the case go directly to arbitration according to the provisions of the insurance policy.

## II. ARGUMENT

### A. WSDOT illogically distinguishes “jurisdiction” from “jurisdiction of action” without support.

In an attempt to sidestep clear precedent stating that arbitration clauses do not take disputes outside the jurisdiction of the courts, WSDOT has created an unusual and unsupported argument that “jurisdiction” is different than “jurisdiction of action.”<sup>6</sup>

WSDOT claims that, since the phrase “jurisdiction of action” was used in the 1911 Insurance Code, and used again in RCW 48.18.200 (adopted in 1947), the legislature intended it to mean something different

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<sup>6</sup> Resp. Br. at 9-11.

than jurisdiction.<sup>7</sup> But a search of Washington case law for the term “jurisdiction of action” produces no results. In other words, going back as far as 1911, there is no support for WSDOT’s claim that “jurisdiction of action” is distinguishable from “jurisdiction.”

What is abundantly clear from the case law is that there is a presumption in favor of arbitration in Washington state.<sup>8</sup> It is equally clear that arbitration does not remove controversies from the jurisdiction of the courts.<sup>9</sup> Because this is so, an arbitration provision in a surplus line insurance contract does not violate RCW 48.18.200(1)(b) because such a provision does not “depriv[e] the courts of this state of the jurisdiction of action against the insurer.”<sup>10</sup>

**B. WSDOT argues legislative intent inconsistently and incorrectly throughout its brief.**

- 1. The fact that a revision to the arbitration statute “show[s] no intent to allow binding arbitration of claims against insurers”<sup>11</sup> does not show an intent *not* to allow arbitration of such claims.**

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<sup>7</sup> *Id.* at 6-8.

<sup>8</sup> *Godfrey v. Hartford Casualty Ins. Co.*, 142 Wn.2d 885, 891-92, 16 P.3d 617 (2001); *Verbeek Props., LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87, 246 P.3d 205 (2010).

<sup>9</sup> RCW 7.04A.260; *Godfrey*, 142 Wn.2d at 896; *Dickie Mfg. Co. v. Sound Constr. & Eng’g Co.*, 92 Wash. 316, 319, 321, 159 P. 129 (1916); *Everett Shipyard, Inc. v. Puget Sound Envtl. Corp.*, 155 Wn. App. 761, 231 P.3d 200 (2010)).

<sup>10</sup> RCW 48.18.200(1)(b).

<sup>11</sup> Resp. Br. at 18.

WSDOT seems to argue that the legislature's failure to explicitly allow arbitration for insurance disputes when adopting the Uniform Arbitration Act somehow means that the legislature intended to bar such dispute resolution. WSDOT argues that "[t]he new law did not assert any right, on behalf of insurers, to binding arbitration of insurance coverage disputes."<sup>12</sup> It apparently further argues that the legislature's failure to "address the issue of whether an insurer could include a clause in an insurance policy that would require binding arbitration"<sup>13</sup> when amending the Arbitration Act in 1947 supports this alleged bar.

But under this logic, the Act would start out applying to no one, unless and until the Act explicitly mentioned a particular group or type of dispute. Indeed, WSDOT admits that the Arbitration Act "was not universal in application."<sup>14</sup> The 1943 version of the Arbitration Act explicitly exempted "agreements 'between employers and employees or between employers and associations of employees.'"<sup>15</sup> The Act did not include such an exception for insurance contracts in 1943, nor was an

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<sup>12</sup> *Id.* at 19.

<sup>13</sup> *Id.* at 20.

<sup>14</sup> *Id.* at 19.

<sup>15</sup> *Id.* (quoting Laws of 1943, ch.138 § 1).

insurance exemption added in 1947, when the legislature “fine-tuned the employment agreement exception to the 1943 arbitration act.”<sup>16</sup>

As stated by the U.S. District Court for the Western District of Washington in *Boeing v. Agricultural Insurance Company*, “[t]his omission is telling.”<sup>17</sup> “Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*—specific inclusions exclude implication.”<sup>18</sup> The fact that the legislature chose to exclude employment agreements from the Arbitration Act shows that it intentionally did not exclude insurance contracts from the Act.

**2. WSDOT similarly argues that the 1947 enactment of RCW 48.18.200 does not allow arbitration because it does not explicitly “show[] [an] intent to allow.”<sup>19</sup>**

In a similar argument, WSDOT claims that the legislature’s 1947 enactment of RCW 48.18.200 “shows no intent to allow extra-judicial dispute resolution beyond that which the legislature attempted to enact in 1911.”<sup>20</sup> As with the Arbitration Act, WSDOT attempts to create a

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<sup>16</sup> *Id.* at 19.

<sup>17</sup> 2005 WL 2276770 at \*3 (W.D. Wash.).

<sup>18</sup> *Jacobsen v. Dept. of Labor & Indus.*, 127 Wn. App. 384, 110 P.3d 253 (2005) (quoting *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)).

<sup>19</sup> Resp. Br. at 20.

<sup>20</sup> *Id.*

positive out of a negative. But the fact that the legislature did not display an “intent to allow” arbitration when enacting 48.18.200 does not support an argument that the legislature intended *not* to allow arbitration.

WSDOT also makes much of the fact that the 1947 enactment of RCW 48.18.200 followed many years of case law addressing common law arbitration, in addition to the enactment of “large scale revisions to the arbitration statute in 1943 and 1947.”<sup>21</sup> WSDOT claims that this shows an intent not to allow arbitration in insurance disputes.<sup>22</sup> But if barring arbitration were the legislature’s true intent, surely it would have explicitly stated in RCW 48.18.200 that arbitration is not allowed. To the contrary, RCW 48.18.200 does not mention arbitration.

**3. WSDOT contends that the 1947 enactment of RCW 48.18.200 clarifies Washington’s “longstanding prohibition” against arbitration for insurance disputes, even though there has been no such prohibition and the statute does not mention arbitration.**

WSDOT claims that the 1947 amendment of RCW 48.18.200 constituted an act by the legislature “to clarify and reiterate the longstanding prohibition against binding arbitration clauses for insurance coverage disputes.”<sup>23</sup> This argument defies logic for two reasons: First,

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<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 20-21.

<sup>23</sup> *Id.* at 30.

WSDOT does not provide any support for its statement that there has been a “longstanding prohibition” against arbitration clauses for insurance coverage disputes, and, indeed, no support exists. And second, as stated above, if the legislature sought to reiterate such a prohibition in the wake of the adoption of the Uniform Arbitration Act, the legislature could have explicitly stated in the amended RCW 48.18.200—or elsewhere—that the Arbitration Act did not apply to insurance disputes. To the contrary, and as argued by James River repeatedly, the Insurance Code does not state anywhere that arbitration is prohibited.

**C. Neither *Keesling* nor *Kruger* support WSDOT’s position.**

In support of its argument that 48.18.200 bars arbitration, WSDOT cites to *Keesling v. Western Fire Insurance Co.*<sup>24</sup> There are three problems with WSDOT’s reliance on *Keesling*: (1) *Keesling* involved an appraisal, not an arbitration; (2) the quotation WSDOT relies upon to support its claim that arbitration “allow[s] parties to barter away the jurisdiction of courts” is from an 1891 Montana case, *Randall v. American Fire Insurance Co. of Philadelphia*,<sup>25</sup> and is not explicitly adopted by the *Keesling* court; and (3) WSDOT fails to mention that another case cited by

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<sup>24</sup> 10 Wn. App. 841, 520 P.2d 622 (1974).

<sup>25</sup> 25 P. 953 (Mont. 1891).

the *Keesling* court, *Davis v. Atlas Assurance Co.*,<sup>26</sup> supports the use of arbitration in insurance disputes.

WSDOT also relies on *Kruger* to support its argument that insurance contracts cannot include arbitration clauses.<sup>27</sup> But the language of RCW 48.18.200 was not at issue in *Kruger*. Rather, that case involved health care insurance and an entirely different statute and regulation. In *Kruger*, the statute specifically allowed for nonbinding mediation,<sup>28</sup> but a related regulation stated that “[c]arriers may not require alternative dispute resolution *to the exclusion of judicial remedies*; however, carriers may require alternative dispute resolution *prior to judicial remedies*.”<sup>29</sup> The Court held that the insurance policy provisions, which required arbitration to be binding, were a violation of that statute and regulation.<sup>30</sup>

In the case before this Court, we have different statutes and different arbitration provisions. The holding in *Kruger* is not binding, because it was based on whether the arbitration provisions at issue in *that* case violated the statute and regulation at issue in *that* case. Here, and

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<sup>26</sup> 16 Wash. 232, 47 P. 436, 47 P. 885 (1896).

<sup>27</sup> Resp. Br. at 23-25 (discussing *Kruger*, 157 Wn.2d 290).

<sup>28</sup> *Kruger*, 157 Wn.2d at 298 (quoting RCW 48.43.05).

<sup>29</sup> *Id.* (quoting WAC 284-43-322(4)) (emphasis in original).

<sup>30</sup> *Id.* at 305.

contrary to WSDOT's claims,<sup>31</sup> we have no statute or regulation barring binding arbitration. Though WSDOT claims that the terms "exclusion of judicial remedies" and "depriving . . . of the jurisdiction of action" are the same,<sup>32</sup> WSDOT cites to no support for this claim. And unlike RCW 48.18.200, the statute in *Kruger* specifically allows nonbinding arbitration, showing that the term "exclusion of judicial remedies" is referring to the types of arbitration allowed under the statute and regulation. By comparison, arbitration is not mentioned in RCW 48.18.200 at all.

**D. WSDOT addresses the doctrine of implied repeal, even though James River makes no such argument in its opening brief.**

Strangely, WSDOT makes much of the fact that *DiMercurio v. Sphere Drake Insurance PLC*,<sup>33</sup> cited in James River's opening brief, involved an implied repeal of the state's prohibition on binding arbitration due to Massachusetts' subsequent adoption of the Uniform Arbitration Act.<sup>34</sup> WSDOT admits that James River does not argue implied repeal in its opening brief, but goes on to state that James River could not have made such an argument because Washington amended RCW 48.18.200

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<sup>31</sup> Resp. Br. at 25.

<sup>32</sup> *Id.* at 24.

<sup>33</sup> 202 F.3d 71 (1st Cir. 2000).

<sup>34</sup> Resp. Br. at 30-31.

four years after it adopted the Uniform Arbitration Act.<sup>35</sup> James River does not dispute this, and does not attempt to argue implied repeal. Indeed, James River does not believe repeal or other invalidation of RCW 48.18.200 is necessary, because the statute does not prohibit arbitration.

**E. James River does not argue a statutory/common law distinction as claimed in WSDOT's brief.**

WSDOT argues that “James River appears to (now) have no dispute that a common law arbitration clause would have invoked the protections of RCW 48.18.200. It is only statutory arbitration, according to James River, that escapes the operation of this statute.”<sup>36</sup>

This is a strange argument. First, James River made no such common law arbitration versus statutory arbitration argument in its opening brief, nor does it attempt to make such an argument now. Thus, WSDOT's claim that the Court need not consider this argument since it is raised for the first time on appeal<sup>37</sup> is erroneous. The Court need not consider the argument because it was never made.

Second, common law arbitration was abolished in Washington state long before RCW 48.18.200 was enacted.<sup>38</sup> Any “distinction”

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<sup>35</sup> *Id.* at 30.

<sup>36</sup> *Id.* at 35.

<sup>37</sup> *Id.*

<sup>38</sup> *Dickie*, 92 Wash. at 319.

between common law and statutory arbitration in James River’s opening brief refers only to a change over time in the legislative and judicial view of arbitration. The legislature did not need to make a distinction between common law and statutory arbitration when enacting RCW 48.18.200 because, in addition to the fact that the statute does not concern arbitration, common law arbitration no longer existed in Washington at that time.

WSDOT also argues that “[h]ad the legislature sought to impose such a subtle distinction [between statutory and common law arbitration] . . . it would have done so explicitly.”<sup>39</sup> James River notes the contradiction in WSDOT’s arguments here: Though WSDOT believes the legislature would have explicitly made *this* distinction, it does not believe the legislature would have explicitly exempted insurance disputes when adopting the Arbitration Act had it intended to do so, or that it would have explicitly stated in RCW 48.18.200 its alleged intent to bar arbitration clauses in insurance contracts.<sup>40</sup>

**F. James River and WSDOT agree that the FAA should not invalidate the Washington statutes at issue here, but that does not mean this dispute should not be arbitrated.**

James River agrees with WSDOT that the FAA should not preempt the application of RCW 48.18.200 and 48.15.150. But unlike WSDOT,

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<sup>39</sup> Resp. Br. at 35.

<sup>40</sup> See *supra*, Part I.B.

James River does not reach the McCarran-Ferguson Act or reverse preemption to make this determination. Rather, James River argues that the Washington statutes do not bar arbitration and therefore are not in conflict with the FAA. Furthermore, even if these statutes did conflict with the FAA, neither RCW 48.15.150 nor 48.18.200 “regulat[e] the business of insurance,” and therefore McCarran-Ferguson is not triggered.

**1. Reverse preemption of the FAA is not necessary because RCW 48.15.150 does not bar arbitration in insurance disputes.**

WSDOT’s claim that reverse preemption is required is based on its incorrect interpretation of RCW 48.15.150 to mean that all action against a surplus lines insurer must come in the form of a lawsuit.<sup>41</sup> WSDOT claims that RCW 48.15.150 therefore acts as an “anti-arbitration statute.”<sup>42</sup> But WSDOT’s interpretation fails to square with the plain language and context of the statute. RCW 48.15.150 requires that surplus lines insurers “shall be sued, upon any cause of action arising in this state . . . in the superior court of the county in which the cause of action arose.” James River notes that this language is almost identical to the language in RCW 48.05.220, entitled “Venue of actions against insurer”: “Suit upon causes of action . . . shall be brought in the county where the cause of action

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<sup>41</sup> Br. of App. at 40.

<sup>42</sup> Resp. Br. at 45.

arose.” James River also points out that the title of the statute, “Legal process against surplus line insurers,” shows its true intent to regulate venue. Contrary to WSDOT’s insistence, RCW 48.15.150 is most definitely a venue statute.

RCW 48.15.150 contains two important aspects of venue. First is location: *If* a suit is brought against a surplus lines insurer, the suit must be brought in the county where the cause of action arose. The second aspect is the choice of court *within* the appropriate county, namely, the superior court. This second aspect is important, because at the time the statute was first adopted, the only alternative to the superior court was the justice court, presided over by a justice of the peace.<sup>43</sup> These justice courts—as well as their successors, our modern county district courts—were not and are not courts of record.<sup>44</sup> In fact, justice court justices of the peace were not originally required to be attorneys at law.<sup>45</sup> Moreover, courts which are not courts of record have never been empowered to entertain declaratory judgment actions, a common method of resolving contract disputes.<sup>46</sup> Therefore, when RCW 48.15.150 restricts suits

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<sup>43</sup> WA. CONST. art. IV, § 1.

<sup>44</sup> See Title II RCW (listing the Washington Supreme Court, Courts of Appeals, and Superior Courts as courts of record).

<sup>45</sup> WA. CONST. art IV, §17; see RCW 3.34.060(2) (first requiring bar admission as a qualification of office in 1961).

<sup>46</sup> RCW 7.24.010, 030.

against surplus lines insurers to superior courts, it is requiring that these suits be brought before a court of record, because the legislature has deemed that those courts are best equipped to fairly and competently adjudicate such disputes.

WSDOT's tortured interpretation of RCW 48.15.150 is further highlighted by the recent amendment of the statute. In 2011, the legislature amended RCW 48.15.150 in order to modernize its language.<sup>47</sup> Effective as of July 22, 2011, RCW 48.15.150 now states the following: "For any cause of action arising in this state under any contract issued as a surplus line contract under this chapter, an unauthorized insurer must be sued in the superior court of the county in which the cause of action arose."<sup>48</sup> In other words, and just as James River has consistently interpreted the statute, *if* a surplus lines insurer is sued, *then* the suit must be brought in the superior court in the appropriate county. The 2011 amendment shows the legislature's true intent in enacting RCW 48.15.150.

WSDOT points to cases from other jurisdiction that have "likewise concluded that state anti-arbitration statutes are, in the insurance context,

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<sup>47</sup> Senate Bill Report, SB 5213; 2011 Wash. Session Laws, Laws of 2011, Ch. 47 § 9(1).

<sup>48</sup> RCW 48.15.150 (effective July 22, 2011).

shielded from FAA preemption by McCarran-Ferguson.”<sup>49</sup> But, as stated above, we do not have an anti-arbitration statute at issue in this case. And none of the out-of-state cases cited by WSDOT support its claim that RCW 48.15.150 is an “anti-arbitration” statute, as opposed to a venue statute. Indeed, one of the cases cited by WSDOT involves a statute that explicitly allows arbitration.<sup>50</sup> Other cases cited by WSDOT involve statutes that, unlike RCW 48.15.150, use clear language to bar arbitration from insurance contracts.<sup>51</sup>

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<sup>49</sup> Resp. Br. at 45 & n.33.

<sup>50</sup> *Allen v. Pacheco*, 71 P.3d 375, 381 (Colo. 2003) (requiring HMOs “to include specific notice language, in ten-point, bold-faced type, of any arbitration agreement contained within the health insurance contract”).

<sup>51</sup> See *Am. Health & Life Ins. v. Heyward*, 272 F.Supp. 2d 578 (D.S.C. 2003) (including a provision within the South Carolina Uniform Arbitration Act that “[t]his chapter however shall not apply to . . . any insured or beneficiary under any insurance policy or annuity contract”); *Cont’l Ins. Co. v. Equity Residential Prop.*, 565 S.E.2d 603, 604 (Ga. App. 2002) (“This part shall apply to all disputes in which the parties thereto have agreed in writing to arbitrate and shall provide the exclusive means by which agreements to arbitrate disputes can be enforced, except the following, to which this part shall not apply . . . (3) Any contract of insurance.”); *Pagarigan v. Superior Court*, 126 Cal. Rptr. 2d 124, 131-32 (2002) (health care insurance statute that rather required arbitration clauses be clearly displayed for subscribers); *Am. Bankers Ins. Co. v. Inman*, 436 F.3d 490 (5th Cir. 2006) (uninsured motorist coverage statute which provided that “[n]o such endorsement or provisions shall contain a provision requiring arbitration of any claim arising under any such endorsement or provisions”); *Standard Sec. Life Ins. Co. v. West*, 267 F.3d 821, 823 (8th Cir. 2001) (Missouri Arbitration Act declared that “an arbitration ‘provision in a written contract, *except contracts of insurance* and contracts of adhesion . . . is valid, enforceable and irrevocable”); *Mut. Reinsurance Bureau v. Great Plains Mut. Ins. Co., Inc.*, 969 F.2d 931, 932 (10th Cir. 1992) (statute providing that “[a] written agreement to submit any existing controversy to arbitration . . . *other than a contract of insurance* . . . is valid, enforceable and irrevocable”); *McKnight v. Chicago Title Ins. Co.*, 358 F.3d 854, 857 (11th Cir. 2004) (concerning the Georgia Arbitration Act also considered in *Cont’l Ins. Co.*, 565 S.E.2d at 604, *supra*).

None of the cases cited by WSDOT involve statutory language similar to RCW 48.15.150, either alone or in conjunction with RCW 48.18.200. Therefore, WSDOT has failed to show that the Washington statutes are “anti-arbitration” statutes, and cannot show that either statute is in any way “invalidate[d], impair[ed], or supersede[d]” by the FAA.<sup>52</sup>

**2. Neither of the Washington statutes at issue regulate the business of insurance, therefore McCarran-Ferguson is not triggered.**

In *Union Labor Life Ins. Co. v. Pireno*,<sup>53</sup> the U.S. Supreme Court restated criteria, previously outlined in *Royal Drug*, for determining whether activities constitute the “business of insurance”:

[F]irst, whether the practice has the effect of transferring or spreading a policyholder’s risk; second, whether the practice is an integral part of the policy relationship between the insurer and the insured; third, whether the practice is limited to entities within the insurance industry.<sup>[54]</sup>

While the Supreme Court, in *United States Department of Treasury v. Fabe*,<sup>55</sup> later distinguished this three-part test as being applicable only to the phrase “business of insurance” within the antitrust portion of § 1012(b)

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<sup>52</sup> 15 U.S.C. § 1012(b).

<sup>53</sup> 458 U.S. 119, 102 S.Ct. 3002, 73 L.Ed.2d 647 (1982).

<sup>54</sup> *Id.* at 129 (citing *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)).

<sup>55</sup> 508 U.S. 491, 113 S.Ct. 2202, 124 L.Ed.2d 449 (1993).

and not the broader phrase “enacted . . . for the purpose of regulating the business of insurance,”<sup>56</sup> this distinction is inconsequential to this case.

First, as at least one U.S. Circuit Court of Appeals and the dissent in *Fabe* have noted, it is unclear how broadly the *Fabe* holding extends.<sup>57</sup> And second—and as further outlined below—even the criteria superficially mentioned in *Fabe* for non-antitrust laws show that the statutes here do not meet the McCarran-Ferguson test. According to *Fabe*, the test is whether the state statute is ““aimed at protecting or regulating [the relationship between insurer and insured], directly or indirectly”” and “furthers the interests of policyholders.”<sup>58</sup> Whether under the *Pireno* three-part test or *Fabe*’s apparent “relationship” test, RCW 48.15.150 and RCW 48.18.200 are not statutes “enacted . . . for the purpose of regulating the business of insurance.” As such, McCarran-Ferguson is not triggered, and the FAA maintains its federal preemption power.

WSDOT claims that because RCW 48.15.150 and RCW 48.18.200 “were adopted as part of Washington’s insurance code,” the statutes

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<sup>56</sup> *Id.* at 504-05.

<sup>57</sup> *Int’l Ins. Co. v. Duryee*, 96 F.3d 837, 839 (6th Cir. 1996); *see also Fabe*, 508 U.S. at 511 (Kennedy, J., dissenting) (“Under the majority’s reasoning . . . any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance.”). Indeed, the *Fabe* Court does not explicitly hold that the three *Pireno* criteria are inapplicable to non-antitrust statutes. *Fabe*, 508 U.S. at 502-04.

<sup>58</sup> *Fabe*, 508 U.S. at 501-02 (quoting *Sec. & Exch. Comm’n v. Nat’l Sec., Inc.*, 393 U.S. 453, 460, 89 S.Ct. 564, 21 L.Ed.2d 668 (1969)).

automatically meet the McCarran-Ferguson requirement that they regulate the business of insurance.<sup>59</sup> But Washington case law has held to the contrary. In *Kruger*, the Washington Supreme Court specifically stated: “[W]e emphasize that we are not holding that ‘any law which redounds to the benefit of policyholders is, *ipso facto*, a law enacted to regulate the business of insurance.’”<sup>60</sup> Further, the U.S. Supreme Court has held that the McCarran-Ferguson Act does not “make the States supreme in regulating all activities of insurance companies . . . only when they are engaged in the ‘business of insurance’ does the statute apply.”<sup>61</sup>

WSDOT also claims that the statutes at issue in this case “regulate the insurer-insured relationship much more directly” than the statute and regulation in *Kruger*.<sup>62</sup> But WSDOT fails to provide any support for this statement. Looking at the statute and regulation at issue in *Kruger*, and comparing them to RCW 48.15.150 and RCW 48.18.200, it is difficult to see how WSDOT came to this conclusion. The statute in *Kruger* specifically requires insurers to “file with the commissioner its procedures for review and adjudication of complaints initiated by health care

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<sup>59</sup> Resp. Br. at 44.

<sup>60</sup> *Kruger*, 157 Wn.2d at 302 (quoting *Fabe*, 508 U.S. at 511 (Kennedy, J., dissenting)).

<sup>61</sup> *Sec. & Exch. Comm’n*, 393 U.S. at 459-60.

<sup>62</sup> Resp. Br. at 45.

providers,” and further limits the procedures to “a fair review.”<sup>63</sup> It then outlines how an insurer must ensure a fair review, including timelines for granting or rejecting requests for review.<sup>64</sup> Finally, it outlines the procedure for submitting a complaint to nonbinding mediation.<sup>65</sup>

RCW 48.18.200, by contrast, simply states: “No insurance contract . . . shall contain any condition, stipulation, or agreement . . . (b) depriving the courts of this state of the jurisdiction of action against the insurer.”

RCW 48.15.150(1) states: “For any cause of action arising in this state under any contract issued as a surplus like contract under this chapter, an unauthorized insurer must be sued in the superior court of the county in which the cause of action arose.” These statutes—one prohibiting a requirement for suit outside Washington and one explaining venue—do not regulate the business of insurance because they do not concern “[t]he relationship between insurer and insured.”<sup>66</sup> They certainly do not regulate that relationship more closely than the statute and regulation in *Kruger*, as WSDOT alleges.

Rather, the statutes at issue here were not enacted “for the purpose of regulating the business of insurance” but for “the parochial purpose of

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<sup>63</sup> *Kruger*, 157 Wn.2d at 298.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 298-99.

<sup>66</sup> *Sec. & Exch. Comm’n*, 393 U.S. at 459-60.

regulating a foreign insurer's choice of forum.”<sup>67</sup> As stated in *Duryee*, removal of disputes and choice of forum are not integral parts of the policy relationship.<sup>68</sup> Not only does the plain language of these statutes show that they merely regulate venue and jurisdiction, the United States Supreme Court has held that arbitration agreements themselves are forum-selection provisions.<sup>69</sup> Therefore, even if the Court determines that the two statutes at issue here somehow relate to arbitration, the McCarran-Ferguson Act does not reverse preempt the FAA because statutes regulating choice of forum do not regulate the business of insurance.

**G. WSDOT's argument that it was not given the arbitration endorsements is irrelevant and does not affect the endorsements' enforceability by this Court.**

WSDOT's claim that the “binding arbitration endorsements relied upon by James River” did not become a part of WSDOT's insurance policies<sup>70</sup> is simply wrong and a distraction. WSDOT claims that “James River failed to ensure that the arbitration endorsements in question were ever delivered to WSDOT before the underlying coverage dispute arose,”

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<sup>67</sup> *Duryee*, 96 F.3d at 840 (holding that the McCarran-Ferguson Act did not reverse preempt the federal removal statute because choice of forum is not integral to the policy relationship between insurer and insured).

<sup>68</sup> *Id.* at 839-40.

<sup>69</sup> *Preston v. Ferrer*, 552 U.S. 346, 359, 128 S.Ct. 978, L.Ed.2d 917 (2008) (holding that by agreeing to arbitrate the parties do not alter their substantive rights, they merely “submit[] to their resolution in an arbitral . . . forum”) (quotation marks omitted).

<sup>70</sup> Resp. Br. at 47.

in an effort to convince this Court that it must remand the case to the trial court for further proceedings rather than instructing the trial court to refer it directly to arbitration.<sup>71</sup> But first, this Court may decide the issue of arbitrability without remanding to the trial court. And second, this argument is misleading because WSDOT was not even involved in the procurement of the policies; rather, Scarsella was, pursuant to WSDOT's own specifications.

Arbitrability is a question of law this Court reviews *de novo*.<sup>72</sup> Furthermore, “[a]n order denying a motion to compel arbitration may be appealed as a matter of right, and the order is reviewed *de novo*.”<sup>73</sup> The fact that the trial court did not rule on this issue is irrelevant because this Court would consider the issue of arbitrability *de novo* even in the event the trial court had made such a ruling.

There is a strong presumption in favor of arbitration.<sup>74</sup> “Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an

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<sup>71</sup> *Id.*

<sup>72</sup> *Mount Adams Sch. Dist. v. Cook*, 113 Wn. App. 472, 477 54 P.3d 1213 (2002); *see also Rimov v. Schultz*, 162 Wn. App. 274, 253 P.3d 462 (2011) (wherein the Court of Appeals reviewed the written record “to determine whether the agreement of the parties fell within” the Washington Uniform Arbitration Act).

<sup>73</sup> 25 WASHINGTON PRACTICE, CONTRACT LAW AND PRACTICE § 5:15 (citing *Verbeek*, 159 Wn. App. at 86); *see also Kruger*, 157 Wn.2d at 298.

<sup>74</sup> *Verbeek*, 159 Wn. App. at 87.

allegation of waiver, delay, or a like defense to arbitrability.”<sup>75</sup>

Furthermore, “[t]he party opposing arbitration bears the burden of showing the arbitration clause is inapplicable or unenforceable.”<sup>76</sup>

WSDOT claims it did not receive notice of the arbitration provisions of the insurance policies.<sup>77</sup> It alleges that the arbitration endorsements did not “bec[ome] a part of the policies in question” and that they were “not part of the coverage bargained for by WSDOT.”<sup>78</sup> But this is simply not true, as supported by the facts presented to the trial court. (See CP 184, 189, 194, 199, 259, 301.) WSDOT presented no evidence that it did not receive the policy language, and therefore did not meet its burden. Indeed, in its First Amended Complaint for Declaratory Judgment, WSDOT acknowledged the existence of arbitration endorsements in both the primary and excess policies. (CP 20-21 ¶¶ 8, 12; see also CP 61 (wherein WSDOT admits in its Answer to Defendant’s Counterclaim that the policies were issued on April 4, 2008, and that the policies “contained the arbitration provisions”).)

But in any event, it is irrelevant whether WSDOT received copies of the arbitration provisions, since WSDOT contracted with Scarsella to

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 86-87.

<sup>77</sup> Resp. Br. at 5.

<sup>78</sup> Resp. Br. at 47.

the effect that Scarsella would obtain the insurance, and WSDOT's own specifications did not prohibit an arbitration clause. (CP 132-3, 165.) Accordingly, Scarsella's application materials did not mention any such prohibition, either. (CP 153-9). WSDOT never "bargained for" any coverage by James River; Scarsella did. WSDOT, having granted Scarsella responsibility for obtaining insurance, and not further defining the terms of such coverage, is in no position to complain over the policies that Scarsella obtained.<sup>79</sup>

### III. CONCLUSION

WSDOT required insurance for a project, and required its contractor, Scarsella, to obtain it. Scarsella sought out that insurance from James River, and James River repeatedly advised that it would issue the insurance, with arbitration endorsements. Scarsella agreed to those terms, and James River issued the policies, with the endorsements. Now, years later, WSDOT wants the courts to excise part of the policies.

Arbitration has long been favored in Federal and Washington State law. It is universally recognized as an efficient and economic way to resolve disputes. The binding arbitration endorsements at issue here are no less a part of the contracts of insurance than the insuring agreements

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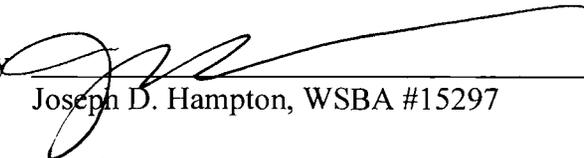
<sup>79</sup> The only substantive direction WSDOT gave was that policy form CG 0009, naming WSDOT as insured, should be used. (CP 132.) The form was used, and WSDOT was named. (CP 252, 263.)

themselves. James River wrote this insurance with these endorsements, and was and is entitled to rely upon them. No law in this state voids those provisions, and the McCarran-Ferguson Act does not prohibit their enforcement. In fact, Federal law, in the form of the Federal Arbitration Act, requires their enforcement.

For the reasons stated in James River's opening brief, and because, as shown here, WSDOT's arguments are not well-taken, James River requests that the trial court's order denying James River's arbitration demand be reversed and that the parties be ordered to arbitrate in accordance with the policies' terms.

DATED: February 16<sup>th</sup>, 2012.

BETTS PATTERSON & MINES, P.S.

By 

Joseph D. Hampton, WSBA #15297

Attorney for Appellant James River Insurance  
Company

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 16, 2012, a true and correct copy of the foregoing document was served on the following:

A. Richard Dykstra Friedman Rubin 601 Union St., Ste. 3100 Seattle, WA 98101-1374	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Hand Email
Robert A. Hyde Richard A. Fraser, III Office of the Attorney General 800 Fifth Ave., Ste. 2000 Seattle, WA 98104-3188	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Hand Email
Kara R. Masters Skellenger Bender PS 1301 Fifth Ave., Ste. 3401 Seattle, WA 98101-2630	<input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Hand Email

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CLERK OF SUPERIOR COURT  
JENNIFER L. HARRIS

Dated this 16th day of February, 2012, at Seattle, Washington.

  
Autumn Pounds