IN THE SUPREME COURT OF FLORIDA

No. 81,467

DOM MIELE and SHIRLEY MIELE,
Petitioners - Appellants,

v.

PRUDENTIAL-BACHE, ET AL.,
Respondents - Appellees.

ON CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE ELEVENTH CIRCUIT
No. 92-2334
USDC No. 91-150-CIV-FTM-15D

INITIAL BRIEF OF APPELLANTS

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April 8, 1993

STATEMENT REGARDING ORAL ARGUMENT

This appeal has been referred to this Court because "[t]his case involves an important issue of Florida law that is determinative of this case, but unanswered by controlling precedent of the Supreme Court of Florida: whether that provision of the Florida Tort Reform and Insurance Act providing for the division of punitive damage awards between the recovering plaintiff and the State of Florida applies to arbitration awards." *Miele v. Prudential-Bache Securities*, 986 F.2d 459 (11th Cir. 1993). "Because resolution of this issue is of great concern to parties choosing to arbitrate or litigate in the State of Florida," *id.*, the issue is one which merits oral argument which will be beneficial to this Court. Accordingly, Appellants urge this Court to hear argument on this certified question.

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I. STATEMENT OF JURISDICTION

This appeal is from an order and judgment of the United States District Court for the Middle District Court of Florida purporting to confirm an arbitration award. That order was appealed to (and is currently pending before) the United States Court of Appeals for the Eleventh Circuit which has jurisdiction pursuant to 28 U.S.C. §1291. That court certified the question now before this Court as one of great public importance and, accordingly, this Court has jurisdiction pursuant to FLA. APP. CIV. P. 9.150 entitled "Discretionary Proceedings to Review Certified Questions from Federal Courts."

II. STATEMENT OF ISSUES

The following question has been certified by the Court of Appeals for review by this Court:

DOES FLA. STAT. §768.73 APPLY TO ARBITRATION AWARDS?

III. STATEMENT OF THE CASE AND OF THE FACTS

A. Statement of Course of Proceedings in Federal Court

Appellants Dom and Shirley Miele (the "Mieles" or the "Appellants") maintained an investment brokerage account with Appellees Prudential-Bache Securities, Roger Jones and Doug Haas ("Appellees") for many years in Naples, Florida. After discovery by the Mieles of apparent fraud and mismanagement regarding their brokerage firm account, the parties submitted their claims to arbitration pursuant to a contract containing a pre-dispute arbitration agreement. After a hearing on the merits, an arbitration award was rendered on June 7, 1991. The award provided for the payment of substantial compensatory and punitive damages to the Mieles by Appellees. (Motion (Petition) to Confirm Award of Arbitrators, at p.2 and Exhibit B, Docket No. 1).[1]

Upon receipt of the award, the Mieles filed a Federal Arbitration Act ("FAA") petition in the United States District Court for the Middle District of Florida on June 13, 1991 seeking to have the award confirmed. (Docket No. 1). Subsequent to this filing, Appellees paid a portion of the award which was accepted by the Mieles with the written understanding that it represented only a partial payment and did not amount to a waiver of the Mieles' right to fully enforce the award in the FAA proceeding. On July 29, 1991, the Appellees' responded to the Mieles' petition and represented to the district court that the award had been fully paid and that the issues raised in the petition were moot. (Docket No. 9).

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[1] Record references will be made either directly to the District Court Docket Sheet included in the Record Excerpts, *e.g.*, (Docket No. _____), or, for greater convenience, by naming the record item and also referencing the Docket Sheet, *e.g.*, (Motion for Leave to File Reply, at _____, Docket No. _____). The certified record was forwarded to this Court by the Clerk of the United States Court of Appeals on March 19, 1993.

Contrary to the Appellees' representations in responding to the Mieles' petition to confirm their arbitration award, Appellees had in fact failed and refused to pay the Mieles' award in full even though they had been on notice of the terms of the award since early June, 1991. Appellees contended, however, that the Mieles' award had been paid in full based on their erroneous interpretation of the calculation of the punitive damages awarded the Mieles by the arbitrators and also their argument that FLA. STAT. §768.73, and more particularly subsection (2) of that statute, is applicable to private contractual dispute resolution mechanisms such as arbitration. (Respondents' Response to Claimants' Petition to Confirm Award of Arbitrators, at p.2, Docket No. 9). Section 768.73(2) provides in part[2]:

> In any ***civil action***, an award of punitive damages shall be payable as follows:
>
> (a) Forty percent of the award shall be payable to the claimant.
>
> (b) If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

(Emphasis added).

Notably, despite their purported reliance on §768.73(2), Appellees took no steps to pay the State its supposed statutory share of the punitive damages nor did Appellees seek to interplead the State. Instead, Appellees simply continued to withhold the funds, obviously to their own benefit. Indeed, even as of the date of the filing of this brief with this Court, there

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[2]Section 768.73(2) has since been amended to provide for 35% of a punitive damage award obtained in certain civil actions to be paid to the State of Florida. 1992 Fla. Laws ch. 92-85, §2.

is nothing in the record to indicate that the State of Florida has any knowledge of these proceedings.

On December 16, 1991, the Mieles moved the district court for an order confirming the award of the arbitrators and stated in their supporting memorandum of law the reasons why Appellees' contention that the award had already been paid in full had no basis in either law or fact. (Docket No. 11). On the same date, the Mieles also sought oral argument on their motion. (Docket No. 12).

On January 27, 1992, Appellees filed a memorandum opposing the Mieles' request for oral argument and their motion for an order confirming the arbitration award. Because Appellees' memorandum contained misstatements of both law and fact, the Mieles moved for leave to file a reply on February 4, 1992. (Docket No. 17). This motion was never ruled upon by the district court.

On March 10, 1992, without hearing oral argument, the district court entered an order on the Mieles' petition which purported to confirm the award but which provided for payment of a portion of the award to the State, a non-party to either the arbitration agreement, the arbitration hearing or the district court proceedings. (Docket No. 18). The district court, while seemingly recognizing that the construction and constitutionality of FLA. STAT. §768.73(2) as applied to arbitrations and arbitration awards raised issues of first impression, held with almost no analysis that the statute applied to arbitration awards and then declined to reach the constitutional issue on the ground that a case was already pending before this Court concerning that question. Although the district court did not cite the case to which it referred, that case, *Gordon v. State of Florida,* 585 So.2d 1033 (Fla. 3d DCA 1991), *aff'd,* 608 So.2d 800 (Fla.

1992), has nothing to do with arbitration awards or the relationship §768.73(2) bears to arbitration proceedings. Subsequent to the district court decision in the instant case, this Court affirmed the lower court's decision in *Gordon* and, in its opinion, made no reference to arbitration awards or proceedings.

As a result of the district court's order, the Mieles have been paid only a fraction of the punitive damages to which they are entitled. In applying §768.73(2) to the arbitration, the district court required Appellees to pay into the court's registry a substantial portion of the punitive damages awarded to the Mieles by the arbitrators pending the decision of this Court in *Gordon* on the constitutionality of the statute as applied to civil actions but *not* arbitrations. The order allowed either party to seek disbursement of funds held in the court registry subsequent to the *Gordon* decision; however, as of this date, no party has sought to do so and, of course, the State is still not a party to these proceedings.

The Mieles moved for clarification and/or to amend the judgment on March 20, 1992. The district court subsequently granted the Mieles' motion and ordered Appellees to pay into the court registry pre-judgment interest at the rate of 12% per annum on the portion of the punitive damages award being held. The court further ordered that post-judgment interest was to be paid on that same sum from March 10, 1992 through April 3, 1992. This appeal to the Court of Appeals was filed thereafter on April 6, 1992. (Docket No. 23).

Oral argument was held before the United States Court of Appeals on February 2, 1993. Thereafter, on March 19, 1993, that court certified to this Court only the following narrow question: "Does FLA. STAT. §768.73 apply to arbitration awards?" *Miele slip op.* at 1330.

While the Mieles believe that the Court of Appeals need not reach that issue in order to provide them with the relief they seek[3], only this narrow issue will be addressed in this brief.

B. Statement of Facts

1. The contractual relationship between the Mieles and Appellees

The Mieles are residents of Naples, Florida where they have lived in the same home since 1974. Mr. Miele retired in 1971 and Mrs. Miele has been a housewife for her entire life. In 1985, the Mieles established an investment account with Appellee Prudential-Bache Securities, Inc. The Mieles' contract with Appellees provided for arbitration of any controversy arising out of or related to the account.

Although the Mieles carefully explained to Appellees that they could afford no loss of principal and that their additional investment objective was to generate a safe and regular stream of income, Appellees ignored the Mieles' stated and actual objectives. Over a period of approximately four years, the Mieles' life savings (which began in the form of a portfolio consisting almost entirely of investment grade securities) ultimately ended up as part of a portfolio entirely made up of unrated or non-investment grade securities.

Once the Mieles discovered how they had unknowingly been put at risk and had suffered substantial unrealized losses, they sought reimbursement from Appellees but were refused.

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[3] For example, the Mieles have argued that, assuming arguendo that the statute does apply to arbitrations, the arbitration award itself is clear and unambiguous and must be confirmed even in the event it contains an error of law or fact. *E.g.*, *Robbins v. Day*, 954 F.2d 679, 683 (11th Cir. 1992) ("The statute does not allow an arbitration award to be vacated solely on the basis of error of law or interpretation but requires something more, . . ."); *Booth v. Hume Publishing, Inc.*, 902 F.2d 925 (11th Cir. 1990) ("Most importantly, the Federal Arbitration Act expresses a presumption that arbitration awards will be confirmed. Section 9 of the Act provides that if the parties have agreed to judicial confirmation of the award, then '*the court must grant such an order* [confirming the award] unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of the title.' 9 U.S.C. §9 (1970) (emphasis added)." *Booth* at 932; *See also French v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 784 F.2d 902, 906 (9th Cir. 1986). The Court of Appeals has reserved consideration of these and other issues pending review by this Court of the certified question. *Miele slip op.* at 1329, n.2.

Accordingly, the Mieles and Appellees arbitrated the Mieles' claims (pursuant to their contract) before a panel of arbitrators under the auspices of the American Arbitration Association (the "AAA"). (Motion (Petition) to Confirm Award of Arbitrators and all Exhibits thereto, Docket No. 1).

2. The arbitration award

On June 7, 1991, the arbitrators found the Appellees liable to the Mieles and an arbitration award (the "Award") was entered in favor of the Mieles. In addition to compensatory damages for the Mieles' losses, the Award provides by its plain terms for punitive damages in the amount of two times compensatory damages totalling $533,309.58. Appellees, however, have only paid $106,661.91 of the punitive damages awarded to the Mieles. (Respondents' Response to Claimants' Petition to Confirm Award of Arbitrators, at Exhibit C attached thereto, Docket No. 9).

3. The Appellees' failure and refusal to pay the award in full

As they represented to the district court, the Appellees did forward two checks to the Mieles' counsel under cover of a letter dated June 27, 1991, purportedly in full payment of the Award. (Respondents' Response to Claimants' Petition to Confirm Award of Arbitrators, at Exhibit C attached thereto, Docket No. 9). In violation of the plain language in the Award, Appellees arbitrarily chose to make one of the two checks sent to the Mieles' counsel payable to the State of Florida General Revenue Fund despite the fact that the State was neither a party to the arbitration nor named as a participant in or beneficiary of the Award. That check, in the amount of $159,992.87, supposedly represented 60% of the Mieles' punitive damages and was presumably directed to the State of Florida General Revenue Fund pursuant to FLA. STAT.

§768.73(2) which provides for splitting punitive damages between the State and Appellants when such damages are rendered in civil actions tried before juries in the public court system.

Upon receiving the two checks from Appellees, counsel for the Mieles promptly contacted Appellees' counsel and pointed out that the bulk of the Mieles' Award remained unpaid. (Motion for an Order Confirming the Award of Arbitrators, at p. 4-5, Docket No. 10). The Mieles' counsel followed this initial contact with a letter dated July 8, 1991, stating:

> I have received and thank you for the partial payment on behalf of your employer in connection with the arbitration award recently obtained by my clients. As discussed recently by phone, our acceptance of your partial payment is without prejudice to our right to collect the remaining unpaid balance of the award. After giving full credit to Prudential for the $376,141.71 recently received, a balance of $423,822.66 remains unpaid together with interest.

(Motion for an Order Confirming the Award of Arbitrators, at Exhibit B, Docket No. 10).

Later that same month, the Mieles' counsel (who had been awaiting Appellees' instructions) returned to Appellees at their request the check made payable to the State and also advised Appellees' counsel that §768.73(2) had been found unconstitutional by one court and, in any event, did not apply to awards rendered by an arbitration panel. (Motion for an Order Confirming the Award of Arbitrators, at Exhibit C, Docket No. 10).

Appellees never disputed in writing either the arithmetical calculation of the Award stated in the Mieles' counsel's July 8 letter or the inapplicability of §768.73(2) to arbitration proceedings until serving their so-called response to the Mieles' petition to confirm on July 29, 1991. In their response, Appellees belatedly sought to justify their failure to pay the Mieles' Award in full by erroneously calculating the amount owed as well as unilaterally attempting to

impose §768.73(2) upon the Award yet, inexplicably, failing to interplead the State as a party to these proceedings. (Docket No. 9).

With the Mieles' award remaining unsatisfied by the Appellees, the Mieles sought confirmation of the award in order to ultimately obtain payment. In the Court of Appeals, the Mieles sought to reverse the district court's order and to compel Appellees to fulfill their obligations to the Mieles by order confirming the Award according to its plain terms. The Court of Appeals is looking to this Court for guidance in this area of statutory construction.

C. Statement of Standard of Review

Although the standard of review applicable to the Court of Appeals is of course not applicable in these discretionary proceedings before this Court, it is helpful for this Court to recognize that the Court of Appeals may review the district court's order *de novo*. The opinion of this Court in connection with its discretionary review of the Court of Appeals' certified question will assist in that *de novo* review.

The errors committed by the district court in this case involve that court's determination and application of state law, *i.e.*, FLA. STAT. §768.73(2), to an arbitration award in the context of a Federal Arbitration Act proceeding. As such, the Court of Appeals may review the district court's order *de novo*. *See, e.g., Salve Regina College v. Russell,* 111 S.Ct. 1217, 1221, 113 L. Ed.2d 190, 198 (1991) ("We conclude that a court of appeals should review *de novo* a district court's determination of state law."); *see also Marchese v. Shearson Hayden Stone,* 734 F. 2d 414, 422 (9th Cir. 1984) ("The district court's interpretation of an arbitrator's decision is a question of law, subject to *de novo* review.")

The Court of Appeals also recently held in *Robbins v. Day,* 954 F.2d 679 (11th Cir. 1992), that there are two standards of review for a district court's order deciding a motion to vacate an arbitration award. According to *Robbins,* a decision *denying* a motion to vacate an arbitration award will be reviewed only for abuse of discretion, while a decision *granting* such a motion is reviewable *de novo* in order "to protect the integrity of the arbitration process." 954 F.2d at 682. Adopting the reasoning of the *Robbins* court, it is clear *de novo* review is required here because the district court so departed from the plain terms of the Mieles' award in confirming that the court's decision amounted to a *de facto* partial vacatur.

IV. SUMMARY OF ARGUMENT

Arbitration is a highly favored alternative means of resolving disputes which generally has its origin in private contractual agreements. As such, awards issued by arbitrators *must* be confirmed according to their plain terms by federal and state courts in FAA or Florida Arbitration Code proceedings unless a party challenges the award as allowed in Sections 10 and 11 of the FAA or comparable provisions of state law. Indeed, even where an arbitration award may result from an error in fact or law, federal courts are without power to interfere with the decision of the parties' privately chosen fact finders. Despite this universally accepted proposition which both supports private contracts and provides for alternative dispute resolution mechanisms independent of the judicial system, the district court decided *not* to enforce the Award at issue in this appeal in accordance with its plain terms. For a variety of reasons, the court erred in fundamental ways. However, only the issue concerning the applicability of FLA. STAT. §768.73 will be argued here.

The district court erroneously applied a section of Florida's Tort Reform and Insurance Act of 1986 to the Mieles' non-judicial and contractually based arbitration proceeding. That Act provides for the apportionment of punitive damages between the state and plaintiffs in ***civil actions*** tried in ***court*** before ***juries***. The statute was adopted in response to a perceived need to control inexperienced and emotional jurors and to prevent "runaway" jury verdicts which were thought to limit the ability of citizens in Florida to obtain liability insurance. The objectives of that statute are furthered by use of alternative dispute resolution vehicles, including arbitration. Application of that statute to arbitration will have precisely the opposite - and unintended - effect of discouraging its use.

For example, arbitrators are experienced business persons, not inexperienced and emotional jurors. They are chosen precisely for that reason[4] and the underlying concern for tort reform is not only non-existent in the arbitration process, but the arbitration process itself is a means of furthering tort reform and eliminating "runaway" jury verdicts by eliminating the jury. Moreover, Florida courts have consistently made bright line distinctions between the terms "civil action" and "arbitration" and the legislature is presumed to have been aware of these distinctions at the time the tort reform legislation was adopted. The legislature's careful choice of words results in the plain conclusion that the statute is not applicable to arbitrations at all. Indeed, the only Florida court found to have addressed this issue has succinctly held precisely that and found the entire statute to be inapplicable to an arbitration award.

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[4] For example, the *Securities Arbitration Rules* of the American Arbitration Association (which applied to the instant arbitration) specifically require that at least one arbitrator will be appointed to securities panels who is "affiliated with the securities industry." American Arbitration Association, *Securities Arbitration Rules*, Rule 13.

Finally, to the extent that Florida's tort reform legislation may be found applicable to an arbitration award, such application in the arbitration process unconstitutionally impairs Appellants' contract rights. The arbitration contract between the Appellants and Appellees was entered into prior to the effective date of Florida's tort reform legislation and any attempted retroactive application would result in further unconstitutional interference with pre-existing contract rights between the parties to this appeal and an impermissible impairment of the obligations of contract. More generally, the holder of an arbitration award (unlike the holder of a punitive damages judgment) has a vested property and contract right which, even in the absence of a judicial confirmation, is an enforceable contract right.

Accordingly, this Court should answer the certified question in the negative, thereby giving full recognition to the existence of the contract between the parties and the intentional and clear differences between the arbitration process (created and controlled by contract) and the judicial system (including the legislative concern arising out of perceived runaway jury verdicts).

V. ARGUMENT AND CITATIONS

A. Section 768.73(2) Applies Only to "Civil Actions" and Has No Application to the Mieles' Arbitration Award

As the settled law favoring narrow and summary review and prompt confirmation of arbitration awards makes clear, the district court should have confirmed the Mieles' Award according to its terms.[5] However, the district court concluded that §768.73 was intended to

[5] *Supra*, n. 3. In addition, the National Association of Securities Dealers' Board of Governors' Resolution directs member firms and persons associated with member firms *to pay arbitration awards in the exact dollar* (continued...)

interfere with or curtail contractually based alternative dispute resolution mechanisms like arbitration. To the contrary, this section of Florida's Tort Reform and Insurance Act of 1986 was prompted by perceived "runaway" *jury* verdicts and was designed to blunt the impetus for trying punitive damages claims to *juries* in *court*.

Significantly, the legislative history of §768.73(2) betrays no intention on the part of the legislature to extend limitations on punitive damages to arbitrations which, by their very nature, are part of the tort reform solution rather than the problem. In support, the preamble to Chapter 86-160, Laws of Florida (which created the Tort Reform and Insurance Act) expresses several concerns which compel the conclusion that §768.73(2) was not intended by the legislature to be imposed upon an arbitration award. For example, the preamble states that "the people of Florida are concerned with the increased "***cost of litigation***" and that "it is the sense of the Legislature that if the present crisis is not abated, many persons who are subject to ***civil actions*** will be unable to purchase liability insurance." *See* Chapter 86-160, Laws of Florida, at p.698.

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[5](...continued)
amount stated in the award immediately upon receipt:

> It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Article III, Section 1 of the Rules of Fair Practice for a member or a person associated with a member to ... fail to honor an award of arbitrators properly rendered pursuant to the Uniform Code of Arbitration under the auspices of the National Association of Securities Dealers, Inc., the New York, American, Boston, Cincinnati, Midwest, Pacific or Philadelphia Stock Exchanges, the Chicago Board Options Exchange, the Municipal Securities Rulemaking Board, or pursuant to the rules applicable to the arbitration of securities disputes before the American Arbitration Association, where a timely motion has not been made to vacate or modify such award pursuant to applicable law.
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> *All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award.* ... Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

In view of these express legislative concerns, it is obvious that the various statutes such as §768.73(2) codified by the Tort Reform and Insurance Act were not meant to impact arbitration, a means of dispute resolution which has repeatedly been praised by the courts as a highly favored and less costly alternative to litigation. *See Booth v. Hume Publishing, supra,* 902 F.2d at 932 ("'[T]he purpose of the Federal Arbitration Act was. . . to provide parties with an alternative method for dispute resolution that would be speedier and less costly than litigation'."); *Intracoastal Ventures Corp. v. Safeco Insurance Company of America,* 540 So.2d 162, 164 (Fla. 4th DCA 1989) ("[p]ublic policy favors arbitration as an alternative to litigation.").

The plain language of §768.73(2) and related sections of the Tort Reform and Insurance Act is conclusive on the question of whether the legislature meant to extend §768.73(2) to arbitration awards. Certainly, "[w]hen a court interprets the meaning of a statute, it must first look to the plain language of the statute itself." *Gormin v. Brown-Forman Corp.*, 744 F. Supp. 1100, 1102-03 (M.D. Fla. 1990), *rev'd on other grounds*, 963 F.2d 323 (11th Cir. 1992); *see also Jones v. Metropolitan Atlanta Rapid Transit Authority,* 681 F.2d 1376, 1378 (11th Cir. 1982) ("The starting point for the interpretation of a statute is the language of the act itself. . . . Normally, a court will interpret a statute in a manner consistent with the plain meaning of the statutory language.") *In re Order On Prosecution Of Criminal Appeals By the Tenth Judicial Circuit Public Defender,* 561 So. 2d 1130, 1137 (Fla. 1990) ("The best evidence of the intent of the legislature is generally the plain meaning of the statute.").

Section 768.73 reads in total:

768.73. Punitive damages; limitation

(1)(a) In any ***civil action*** based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct, the judgment for the total amount of punitive damages awarded to a claimant shall not exceed three times the amount of compensatory damages awarded to each person entitled thereto by the trier of fact, except as provided in paragraph (b). However, this subsection does not apply to any class action.

(b) If any award for punitive damages exceeds the limitation specified in paragraph (a), the award is presumed to be excessive and the defendant shall be entitled to ***remittitur*** of the amount in excess of the limitation unless the claimant demonstrates to the ***court*** by clear and convincing evidence that the award is not excessive in light of the facts and circumstances which were presented to the trier of fact.

(c) This subsection is not intended to prohibit an appropriate ***court*** from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) In any ***civil action***, an award of punitive damages shall be payable as follows:

(a) Forty percent of the award shall be payable to the claimant.

(b) If the ***cause of action*** was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund created in s. 409.2662; otherwise, 60 percent of the award shall be payable to the General Revenue Fund.

(3) In the event that the full amount of punitive damages awarded cannot be collected, the claimant and the other recipient designated pursuant to paragraph (2)(b) shall be each entitled to a proportional share of the punitive damages collected.

> (4) Claimant's attorney's fees, if payable from the judgment, shall, to the extent that they are based on the punitive damages, be calculated based only on the portion of the judgment payable to the claimant as provided in subsection (2). Nothing herein shall be interpreted as limiting the payment of attorney's fees based upon the award of damages other than punitive damages.
>
> (5) The ***jury*** shall not be instructed, nor shall it be informed as to the provisions of this action.

(Emphasis added).

Clearly, the legislature only contemplated ***civil suits*** tried in a ***court*** before a ***jury*** when it enacted §768.73. Subsection (5) specifically refers to ***"[t]he jury"***; subsection (1)(a) limits the applicability of the statute as a whole to ***"any civil action"***; similarly, in subsection (2), the subsection specifically at issue in this confirmation proceeding, the language again makes clear that the stated limitation on punitive damages only applies in a ***civil action***. In addition, there are repeated references to the ***"court"*** and also a reference to the entitlement of a defendant to ***"remittitur."*** Courts are not involved in arbitrations, juries play no part in arbitrations and the concept of a "remittitur" is unknown in the context of an arbitration award.[6]

The language in §768.73 limiting the statute's ambit to civil actions is dispositive of whether that statute applies to arbitration awards. Indeed, the statute is in derogation of the

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[6] Language in related statutory sections of the Tort Reform and Insurance Act drives home the point that the legislature was expressly and solely concerned with civil actions to be tried before juries -- not arbitrations and arbitration awards. For example, §768.72 limits the "pleading" of punitive damages in "civil action[s]" and references the "rules of civil procedure" and "discovery", while §768.74 entitled "Remittitur and additur" states in subsection (6):

> It is the intent of the Legislature to vest the ***trial courts*** of this state with the discretionary authority to review the amounts of damages awarded by a trier of fact in light of a standard of excessiveness or inadequacy. The Legislature recognizes that the reasonable actions of a ***jury*** are a fundamental precept of American jurisprudence and that such actions should be disturbed or modified with caution and discretion. However, it is further recognized that a review by the ***courts*** in accord with the standards set forth in this section provides an additional element of soundness and logic to our ***judicial system*** and is in the best interests of the citizens of this state. (Emphasis added).

common law rule on punitive damages and must be narrowly construed according to its express language which nowhere refers to arbitration. *See, e.g., Carlisle v. Game & Fresh Water Fish Commission,* 354 So.2d 362, 364 (Fla. 1978) ("'Statutes in derogation of the common law are to be construed strictly, however. They will not be interpreted to displace the common law further than is clearly necessary. Rather, the courts will infer that such a statute was not intended to make any alteration other than was specified and plainly pronounced.'") (quoting 30 FLA. JUR. *Statutes,* Sec. 130).

Very recently, and subsequent to the decision of the district court below, a Florida trial court applied this "plain language" analysis to §768.73(2) in holding that the statute was not applicable in contractually based arbitration proceedings. In the case in question, *Dean Witter Reynolds, Inc. v. Duncan*, No. 92-1309, *slip op.* (Fla. Cir. Ct. 13th Jud. Dist. July 16, 1992), just as in the case at bar, an investor was awarded punitive damages against a brokerage firm and others in an arbitration required by a contract between the parties. Rather than paying the punitive damages, the brokerage firm filed an interpleader action (unlike the brokerage firm in this appeal) and joined the State of Florida General Fund. In ordering all punitive damages disbursed to the investor, the court reasoned:

> Section 768.73, Florida Statutes (1989), requiring payment of sixty percent of a punitive damage award in any civil action to an appropriate state fund is not applicable to the punitive damage award in the arbitration proceeding between the parties, Dean Witter Reynolds, Inc., and Lillian Duncan. ***That proceeding was a private one based on contract between the said parties and as such was neither a "civil action" nor a "cause of action" as those phrases are used or contemplated in Section 768.73(2), Florida Statutes.*** The arbitration proceeding was not initiated concurrent with or as a result of civil litigation and is before the

> Court now only because, subsequent to the proceeding and award, Plaintiff chose to file this interpleader action.

(Emphasis added).

Similarly, confronted with an analogous statutory construction question in *Allstate Insurance Co. v. Collier*, 428 So.2d 379 (Fla. 4th DCA 1983), the court refused to extend party joinder requirements in civil actions for personal injuries to arbitration proceedings initiated pursuant to an insurance contract. At issue was statutory language requiring that "in any action" brought pursuant to Florida's uninsured motorist statute, all claims arising out of the plaintiff's injuries had to be brought together. In reaching its holding, the court observed:

> Because this statute constitutes a deviation from the common law rule allowing claims to be brought separately, we are obligated to narrowly construe its provisions so as to take away as few rights as possible consistent with the language of the statute and its apparent purpose.
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> * * *
>
> In our view section 627.7403 was enacted to mandate joinder of all personal injury claims in a single tort action at law. While we might agree that it would be sound policy to extend the requirement for joinder in civil actions for personal injuries to arbitration proceedings on contractual uninsured motorist claims, we simply do not have authority to do so.

Id. at 381.

The rule of statutory construction followed in *Allstate Insurance v. Collier* compels this Court to confine application of §768.73(2) to "civil actions" in accordance with the plain and unambiguous language of the statue. Thus, the statute can have no bearing on the amount owed by Appellees to the Mieles on the arbitration award.

Apart from the obvious legislative intent behind §768.73(2), the plain and ordinary meaning of the term "civil action" clearly contemplates a proceeding in court before a judicial officer. The following definitions from BLACK'S LAW DICTIONARY are instructive:

> **Action**. . . . term in its usual legal sense means a suit brought in a *court*; a formal complaint within the jurisdiction of a *court of law*. (Citation omitted). The legal and formal demand of one's right from another person or party made and insisted on in a *court of justice*. An ordinary proceeding in a *court of justice* by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense. It includes all the formal proceedings in a *court of justice* attendant upon the demand of a right made by one person of another in such *court*, including an *adjudication* upon the right and its enforcement or denial by the *court*.
>
> See also Case (*Cases and controversies*); Cause of action; Civil action; Collusive action; Counterclaim; Cross claim; Direct action; Forms of action; Penal action; Petitory action; Plenary action; Proceeding; Suit; Transitory action.
>
> BLACK'S LAW DICTIONARY 26 (5th ed. 1979) (Emphasis added).

The definition of "action" continues for another full page in BLACK'S LAW DICTIONARY. However, no purpose would be served by continuing to quote that definition. In every instance, a *court* of law or equity is unequivocally contemplated. The word "arbitration" never appears and is not implied in any sense. "Civil action" is defined as an "action" which is "brought to enforce, redress or protect private rights." In defining "civil action" as an "action," the judicial connotation and denotation is clear. They are distinctly *judicial* terms.

In sharp contrast, the definition of "arbitration" contains no hint of a "court" but, instead, specifically states that arbitration is an arrangement to be used "instead of carrying [a dispute] to established *tribunals* of justice . . . ". The complete definition is as follows:

> **Arbitration.** The reference of a dispute to an impartial (third) person chosen by the parties to the dispute who agree in advance to abide by the arbitrator's award issued after a hearing at which both parties have an opportunity to be heard.
>
> An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, *instead of carrying it to established tribunals of justice*, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. (Citation omitted). Such arbitration provisions are common in union collective bargaining agreements.
>
> The majority of the states have adopted the Uniform Arbitration Act.
>
> A major body offering arbitration services is the American Arbitration Association.
>
> See also Conciliation; Mediation; Reference.
>
> BLACK'S LAW DICTIONARY 96 (5th ed. 1979) (Emphasis added).

Without question, courts, commentators and BLACK'S LAW DICTIONARY all refer to "arbitration" and "civil action" in the disjunctive. That is, they are in no way synonymous and the legislature clearly knew and understood this fact in enacting §768.73.

Similarly, federal and state rules of procedure provide that "there shall be one form of action... known as 'civil action'," Fed. R. Civ. P. 2 and 3 and Fla. R. Civ. P. 1.040, and 1.050, and also provide that civil actions are commenced by filing a complaint. Indeed, Florida Rule of Civil Procedure 1.110(d) and Federal Rule of Civil Procedure 8(c) provide that "arbitration and award" is an affirmative defense to a civil action. Certainly, courts uniformly view "civil actions" and "arbitrations" as mutually exclusive proceedings.[7]

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[7] In a comprehensive Westlaw search, Appellants were unable to locate any Florida decision which referred both to "arbitration" and "civil action" in which the two concepts were discussed other than purely in the disjunctive. In other words, Florida courts regularly refer to both arbitration and civil action as constituting entirely (continued...)

In *Thorgaard Plumbing & Heating Co. v. County of King*, 426 P.2d 828 (Wash. 1967), the Washington Supreme Court explained at length the meaning of the terms "action" and "civil action" as used in a statute and distinguished those terms from the term "arbitration" or "arbitration proceeding":

> An *action* is a prosection *in a court* for the enforcement or protection of private rights and redress of private wrongs. *Ginzberg v. Wyman*, 272 Mass. 499, 172 N.E. 614 (1930); *Muirhead v. Johnson*, 232 Minn. 408, 46 N.W. 2d 502 (1951); *City of Madison v. Frank Lloyd Wright Foundation*, 20 Wis. 2d 361, 122 N.W. 2d 409 (1963); *Brooks v. Ulanet*, 116 V.t. 49, 68 A. 2d 701 (1949). It is clear that by using the word "action" in the foregoing section the legislature had a *lawsuit* in mind.
>
> * * *
>
> An arbitration proceeding is not had in a court of justice. It is not founded in the filing of a claim or complaint as they are generally understood. The very purpose of arbitration is to *avoid* the courts insofar as the resolution of the dispute is concerned. *Son Shipping Co., v. De Fosse & Tanghe*, 199 F.2d 687 (2 Cir. 1952). It is a substitute forum designed to reach *settlement* of controversies, by extrajudicial means, *before* they reach the stage of an *action* in court.
>
> * * *
>
> [A]rbitration is a substitute for, rather than a mere prelude to, litigation.

Id. at 832-33 (emphasis in original).

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[7](...continued)
separate legal proceedings and in no way being even remotely synonymous. *See, e.g., Wallen v. Department of Professional Regulation*, 568 So.2d 975(Fla. 3rd DCA 1990) (real estate broker violated law by "failing to timely institute *either arbitration or civil action*") (Emphasis added); *Rudolph v. Miami Dolphins, Ltd.*, 447 So.2d 284, 292(Fla. 1st DCA 1983) (held that employees had certain contractual rights with their employer where employees were free to pursue "either by the stipulated grievance procedure, *arbitration, or by civil action in a court of law.*") (Emphasis added); and *Collier Land Corporation v. Royal Palm Beach Realty, Inc.*, 338 So.2d 859, 860 (Fla. 3rd DCA 1976)(where contract existed providing for submission of controversies to arbitration, "further proceedings in the *civil action* [must] be stayed pending the outcome of the *arbitration.*") (Emphasis added).

The Supreme Court of Connecticut, in *Dayco Corp. v. Fred T. Roberts and Co.*, 472 A.2d 780 (Conn. 1984), also conclusively held that references to "actions" and "civil actions" or even "suits" in statutes simply do not encompass "arbitrations" or "arbitration proceedings". In a decision involving, as here, a contract providing for submission of "any controversy" to arbitration before the American Arbitration Association, the court held:

> Sections 52-112 and 52-57(d) pertain to "actions." "In a general sense the word 'action' means the lawful demand of one's right in a court of justice; and in this sense it may be said to include any proceeding in such a court for the purpose of obtaining such redress as the law provides." *Waterbury Blank Book Mfg. Co. v. Hurlburt*, 73 Conn. 715, 717, 49 A. 198 (1901). In *Skidmore, Owings, & Merrill v. Connecticut General Life Ins. Co.*, 25 Conn. Sup. 76, 1976 A. 2d 83 (1963), the court discussed whether an arbitration proceeding was an action for the purposes of the Statute of Limitations, General Statutes § 52-584. In a thoughtful and thorough analysis the court opined that arbitration proceedings do not occur in court, indeed that their very purpose is "'to avoid the formalities, the delay, the expense and vexation of ordinary litigation.' In re *Curtis-Castle Arbitration, 64 Conn. 501, 511, 30 A. 769 (1894)." Id.*, 25 Conn.Sup. 84, 197 A.2d 83. It further noted that these proceedings are not governed by our rules of procedure. *Id.*, 85, 197 A.2d 83; *In re Curtis-Castle Arbitration,* supra. It looked to other jurisdictions which have held that arbitration proceedings were not actions. *Temple v. Riverland Co.*, 228 S.W. 605, (Tex.Civ.App.1921); *Son Shipping Co. v. De Fosse & Tanghe,* 199 F.2d 687 (2d Cir. 1952). Finally, the court concluded that an arbitration proceeding is not an action within the meaning of that word as used in the Statute of Limitations. *Id.*, 25 Conn.Supp. 83, 197 A.2d 83.
>
> Similarly, we conclude that an arbitration proceeding is not an action for the purposes of §§52-112 and 52-57(d). **The proceeding at issue was a contractual matter** in which the parties agreed that "[a]ny controversy or claim arising out of or relating to [the agreement between the plaintiff and the Roberts Co.] . . . shall be settled by arbitration in accordance with the Rules of the American Arbitration Association. . ." These rules are less formal than the rules governing proceedings in court. See Commercial Arbitration Rules, American Arbitration Association (1975); 5

> Am.Jr.2d, Arbitration and Award § 110. The arbitration was presided over by a member of the American Arbitration Association and not by a judge. Hence §§ 52-112 and 52-57(d) did not govern that proceeding.

Id. at 783-84 (emphasis added).

The decisions in *Thorgaard* and *Dayco* fully illustrate the many fundamental distinctions between "arbitrations" and "civil actions": arbitration is a matter of contract, while a civil action is wholly subject to legislative and judicial regulation; arbitration is informal in nature and is presided over by individuals and organizations selected by the parties rather than a judicial officer; arbitration takes place in a variety of settings, *e.g.*, offices or hotels, while civil actions are prosecuted in court; and fact finders in arbitration are generally persons with expertise in particular fields who are compensated for their time by the parties, whereas fact finders in civil actions are generally jurors drawn from a broad and undifferentiated pool of citizens in the community. In view of §768.73(2)'s express application solely to "civil actions," these basic definitional distinctions between "arbitrations" and "civil actions" preclude extension of the statute to arbitrations or arbitration awards. Accordingly, the district court erred by not concluding that §768.73 applied to the Mieles' Award and by not confirming the Award as rendered by the arbitrators.

B. Application of Section 768.73 to Arbitration Awards Would Result in a Fundamental Change in the Way that Arbitrations are Conducted and Would Impose Judicial Supervision, Oversight and Review in Impermissible and Impractical Ways

A careful reading of all of Chapter 768 makes clear that the legislature intended that the courts in Florida carefully scrutinize any punitive damages awarded in *court* by *juries*. The following are several examples of the kinds of judicial review which would be required in order

to apply this statute to arbitrations and, without exaggeration, such application would result in elimination of arbitration as a viable alternative (separate and distinct) from litigation.

1. Section 768.73 has no application, even in court, to any case where punitive damages may be based upon common law fraud or other claims not expressly designated in the statute; application of this section to arbitration would require a specific finding of fact and conclusion of law in every award rendered by every arbitration panel.

Assuming arguendo that §768.73 does apply to arbitration and arbitration awards, the statute, by its express terms, cannot be applied to limit punitive damages where such damages may be based upon claims other than those designated in the statute. In pertinent part, subsection (1)(a) of the statute states that the statute's operative effect is limited to punitive damages awarded in "civil actions . . . based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty that involves willful, wanton, or gross misconduct". FLA. STAT. §768.73(1)(a). Obviously, the legislature intended not to disturb common law or other statutory principles governing punitive damages based upon common law fraud or other claims not expressly designated in the statute.

As the Mieles' Statement of Claim in arbitration shows, their claims against Appellees included, *inter alia*, claims of common law fraud, breach of fiduciary duty, civil theft under FLA. STAT. §772.11, and state and federal securities fraud. None of these claims were made subject to §768.73 by the legislature. Accordingly, even if the Mieles had pursued their claims in a civil action filed in court, they would be entitled to all of the punitive damages they recovered. *See, e.g.*, *Scheidt v. Klein*, 956 F.2d 963, 970 (10th Cir. 1992) ("The present action for common law fraud does not appear to fall within the specifically delimited scope of §768.73(1), which restricts the permissible amount of punitive damages only in 'civil action[s]

based on negligence, strict liability, products liability, misconduct in commercial transactions, professional liability, or breach of warranty'. . . ."); *Alamo Rent-A-Car, Inc. v. Mancusi*, 589 So. 2d 1010 (Fla. 4th DCA 1992) *on rehearing,* 609 So.2d 177 (Fla. 4th DCA 1992), *jurisdiction accepted*, 613 So.2d 1 (Fla. 1993) ("There is no indication from the plain meaning of §768.73 that the legislature intended the intentional tort of malicious prosecution to be included among those civil actions for which punitive damages are limited under this statute.")

Given that the punitive damages limitations clearly do not apply to all types of civil actions, to apply this statute fairly to arbitrations would require that arbitrators provide detailed findings of fact and conclusions of law in order to determine under which theories a claimant prevailed. Such a requirement would constitute a radical departure from the present practice in arbitration where, as the United States Court of Appeals for the Eleventh Circuit has recently held, "It is well settled that arbitrators are not required to explain an arbitration award and that their silence cannot be used to infer a grounds for vacating the award." *Robbins v. Day*, 954 F.2d 679, 684 (11th Cir. 1992).

In the case at bar, while it seems clear that the arbitrators found a violation of the Florida Securities and Investor Protection Act by awarding attorneys' fees to the Appellants, the award itself is silent as to the legal basis for its decision just as was the award in *Robbins.* The award simply provides as follows:

> WE, THE UNDERSIGNED ARBITRATORS, having been designated in accordance with the Arbitration Agreement entered into by the above-named Parties, and date unknown and having been duly sworn and having duly heard the proofs and allegations of the Parties, AWARD as follows:

The Claimants Dom and Shirley Miele, shall recover from Respondents Prudential-Bache Securities, Inc., Roger A. Jones and Doug Haas, the following sums:

Compensatory Damages	$162,879.00
Attorney Fees	$ 84,442.70
Costs	$ 19,333.09
Punitive Damages	$266,654.79 x 2 =
Total Award	$533,309.58

By awarding attorneys' fees and presumably finding liability under the Florida Securities and Investor Protection Act, it seems likely that securities fraud was found to have been committed. In that event, §768.73(1) would be inapplicable to any award of punitive damages regardless of whether that award occurred in a court or in arbitration. In this case, no party moved for any vacatur or modification of the award in the district court, nor did any party request any clarification from the arbitrators or the American Arbitration Association. Thus, it is far too late to attempt to superimpose a judicial or other interpretation on the unmodified arbitration award.

The practical difficulties inherent in attempting to apply the Tort Reform Act to arbitration awards are obvious. Arbitration is favored because it is, or is supposed to be, simple, efficient, informal and speedy. This begs an entirely different question, *i.e.*, could the Florida legislature, even it if so desired, impose on arbitrations conducted pursuant to the Federal Arbitration Act rules of procedure, evidence or other formal requirements? The answer is surely not. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed. 2d 1424 (1960); *Robbins*, 954 F.2d at 684. By formally requiring findings of fact and conclusions of law, all of these laudable objectives are lost and

arbitration will no longer function as a "'prompt, economical and adequate'" method of dispute resolution for those who agree to it. *A.G. Edwards v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992), *citing Rodriquez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 479-80, 481, 109 S.Ct. 1917, 1919-20, 1920, 104 L.Ed.2d 526 (1989).

2. Section 768.73(b) entitles a defendant to remittitur of "excessive" punitive damages awards; even assuming courts had the authority to review arbitration awards for this purpose, such review is impossible given the current informality of the proceedings and no requirement to keep a record in arbitration.

Once again, this subsection of Florida's Tort Reform Act provides for close judicial scrutiny of punitive damages awards in order to determine whether they are "excessive." The statute presumes such judgments may be excessive in some circumstances, at which time a plaintiff assumes the burden of proving ". . . to the *court* . . ." that such a judgment is reasonable. In the absence of proof, a *court* shall order remittitur of the "excessive" portion of the punitive damage award.

"Remittitur" is a concept foreign to arbitration and known only to courts. Thus, it seems clear that this statute was not intended to apply to arbitrations. Indeed, nothing could be less fair than to require a plaintiff to prove that an arbitration award including punitive damages is not "excessive" in the eyes of a reviewing court, charged with perfunctory confirmation responsibilities under the Federal Arbitration Act, in a forum where no formal rules of evidence or procedure are utilized and where no formal record is required to be maintained. *Robbins*, 954 F.2d at 685 ("An arbitrator enjoys wide latitude in conducting an arbitration hearing. Arbitration proceedings are not constrained by formal rules of procedure or evidence.")

Similarly, under §768.74, a *"court"* is entitled to determine the reasonableness of *any* award of punitive damages, including one that may be less than three times the amount of compensatory damages (and therefore not within the burden shifting provisions of §768.73(1)(b) which may result in an automatic remittitur). Here again, it would be impossible for a reviewing court to determine "reasonableness" on the limited record which is such an important part of the efficiency sought in arbitration proceedings. Equally important, under existing law, a reviewing court's function in confirming or vacating an arbitration award is extremely limited:

> After arbitration is complete, judicial review of the arbitration process and of the amount of the award is narrowly limited. *Diapulse Corp.*, 626 F.2d at 1110. *See also Amicizia Societa Navegazione v. Chilean Nitrate and Iodine Sales Corp.*, 274 F.2d 805, 808 (2d Cir.) ("[T]he court's function in confirming or vacating an arbitration award is severely limited. If it were otherwise, the ostensible purpose for resort to arbitration, i.e. avoidance of litigation, would be frustrated.") *cert. denied*, 363 U.S. 843, 80 S.Ct. 1612, 4 L.Ed.2d 1727 (1960). *Cf. Protective Life Ins. Corp. v. Lincoln National Life Ins. Corp.*, 873 F.2d 281, 282 (11th Cir. 1989) (construing §4 of the Act, which provides for judicially compelled arbitration to "narrowly circumscribe []" the power of the federal courts).
>
> *Booth*, 902 F.2d at 925.

If §768.73 does apply to arbitrations, then it appears that a record will become mandatory such that a reviewing court will in essence allow a party a plenary review of the entire case in order to determine the reasonableness of any award of punitive damages. In addition, it logically follows that formal rules of evidence and procedure not currently required in arbitration must be introduced so that the reviewing court would have a proper frame of reference for determining what is reasonable and fair in accordance with its own experience. Once again, such an intrusion into the arbitration process is not only prohibited by current case law and

statute, but ". . . the ostensible purpose for resort to arbitration, i.e., avoidance of litigation, would be frustrated." *Booth*, 902 F.2d at 925. It would mean "[p]anels of arbitrators wishing to avoid relitigation would be forced to state the reasons for their decisions in direct contradiction of the universally accepted rule that a statement of reasons is not required and arbitrators are presumed to have relied on permissible grounds . . . ." *A.G. Edwards v. McCollough*, 967 F.2d 1401, 1403 (9th Cir. 1992) relying on *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 598, 80 S.Ct. 1358, 1361, 4 L.Ed.2d 1424 (1960) (arbitrators are not required to state the reasons for their decisions). Certainly, the Florida legislature intended no such result in enacting this statute.

C. It is Clear that the Only Beneficiary of the Application of §768.73 to Arbitration Awards is the Securities Industry; Neither Claimants, the State of Florida or the Public will Benefit by Such Application.

Arbitrations are entirely creatures of contract. As such, they are private mechanisms agreed to in advance by parties to a private contract. Prior, during and subsequent to any given arbitration, the state will have no idea that any claim for punitive damages has been submitted to any arbitration forum. Similarly, there is no mechanism for joining the State of Florida in an arbitration for interpleader type purposes or for allowing a non-party to a contract to stake a claim to any portion of any arbitration award which may be entered, including an award for punitive damages.

It takes little imagination to accurately conclude what the objectives of the Appellees are in this matter. After all, one thing is certain: the total arbitration award will be paid by the Appellees *to someone*. Why, then, have the Appellees so vigorously defended these appeals, continuing to this Court? The answer is clear.

If claimants such as Mr. and Mrs. Miele succeed in recovering an arbitration award which includes an element of punitive damages, at the time of rendition of the award, it is private and the state has no information regarding it. Knowing that a portion of the punitive damages would be required to be paid to the state, the brokerage firm will contact the claimant and attempt to negotiate for the payment of a lesser amount in exchange for a consensual vacatur of the award and a concurrent settlement of all claims. The inevitable result: the brokerage firm saves money, the brokerage firm customer recovers less than the total amount of the award - and the state receives nothing.

There is no flaw in this logic. As the Appellees argued below, no judicial resources are involved through the point of such consensual vacatur and settlement. The Appellees have argued in this case that the filing by them of the confirmation petition in the district court resulted in the use of judicial resources which, somehow, should impact on whether §768.73 applies to this arbitration.[8] While the argument must fail, it highlights the brokerage industry's intent to save money at the expense of brokerage firm customers and, perhaps, the public, by

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[8] A civil action is defined in the Federal Rules of Civil Procedure as being "commenced by filing a complaint with the court." Fed. R. Civ. P. 3. By contrast, a confirmation proceeding may be initiated in the district court simply *by applying for an order* in the district court. *See* 9 U.S.C. §9. In other words, a confirmation proceeding under Section 9 of the FAA is initiated by a motion, *i.e.*, an application for an order, not by a complaint. In fact, 9 U.S.C. §6 expressly provides as follows: "Any application to the court hereunder [i.e., the FAA] shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

Even aside from this definitional difference between a proceeding initiated by motion and an action commenced by filing of a complaint and service of process, which plainly establishes the limited scope of a confirmation proceeding in contradistinction to a civil action, it is clear that confirmation of an arbitration award is a summary proceeding that merely converts an already final arbitration award into a judgment of the court for purposes of collection. The confirmation proceeding itself has nothing to do with the substantive right in the award which has already accrued as a result of the arbitrators' binding decision. *Marion Manufacturing Co. v. Long*, 588 F.2d 538, 542 (6th Cir. 1978); *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 176 (2d Cir. 1984).

negotiating private settlements of private arbitration awards resulting from private arbitration hearings pursuant to private pre-dispute arbitration agreements. The added bonus: the brokerage firm obtains a confidentiality stipulation in the vacatur and settlement agreement and thereby assures that other customers do not find out what happened to one customer which resulted in a punitive damage award.

Surely, the legislature intended no such result. Even apart from the staggering practical difficulties in attempting to apply this statute to the arbitration process and to arbitration awards, it is clear that doing so would benefit only the brokerage firm industry and would in no way benefit the state or the public. The statute does not, and cannot, apply to arbitrations.

D. Splitting Punitive Damages between the Mieles and the State Would Effect an Unconstitutional Taking of the Mieles' Private Property and also Unconstitutionally Impair their Contract Rights

1. Application of §768.73(2) to the Mieles' Arbitration Award would effect an unconstitutional taking of their private property

In *Gordon,* the intermediate appellate court and this Court held §768.73(2) constitutional as applied to a judgment resulting from a jury trial on the grounds that there is no constitutionally protected right to punitive damages and that the statute bears a rational relationship to a legitimate legislative objective, i.e., controlling excessive and irrational jury awards in court. Of course, the distinction in the analysis in *Gordon* is the narrow focus on whether the legislature can constitutionally limit recovery of punitive damages, rather than on the invasion by the state of a vested property right of a party owning an award as a result of a contractually agreed upon process. The confirmation proceeding itself has nothing to do with the substantive right in an arbitration award which has already accrued as a result of the

arbitrators' binding decision. As the Sixth Circuit held in *Marion Manufacturing Co. v. Long*, 588 F.2d 538 (6th Cir. 1978):

> We think it clear that our opinion mandates that the rights and obligations of the parties must be set as of...the date of the arbitration award. In other words, a court's judgment confirming an arbitration award must reflect what would have happened had the parties immediately complied with the award instead of going to court.

Id. at 542.

In the same vein, the Second Circuit has recognized that an arbitration award is an enforceable contract right even where it remains unconfirmed:

> First, the confirmation of an arbitration award is a summary proceeding that merely makes what is already a final arbitration award a judgment of the court. *See* M. Domke, *The Law and Practice of Commercial Arbitration* §37.02 (1968). The award need not actually be confirmed by a court to be valid. An unconfirmed award is a contract right that may be used as the basis for a cause of action, *E.A. Bromund Co. v. Exportadors Affonso de Albuquerque,* 110 F.Supp. 502, 502-03 (S.D.N.Y. 1953); 3 Fed. Proc. L.Ed. §4:93.

Florasynth, Inc. v. Pickholz, 750 F.2d 171, 176 (2d Cir. 1984).

Further, and dispositive in the case before this Court, *Gordon* was decided in the context of a *civil action* tried by jury rather than an *arbitration* where experienced business persons decide the outcome. As such, neither §768.73(2)'s interference with and impairment of contractual rights and obligations nor the invasion by the state of a claimant's vested private property right in a contractually originated, nonjudicial and private arbitration award are addressed in the *Gordon* decision. Thus, the constitutional issues raised in this case are clearly distinct from those addressed by this Court in *Gordon*.

The Colorado Supreme Court held in *Kirk v. Denver Publishing Co.*, 818 P. 2d 262 (Colo. 1991) (a decision not followed by this Court in *Gordon*), that a Colorado statute that was almost identical in its operation to §768.73(2) was unconstitutional. The Colorado statute provided in pertinent part:

> One-third of all reasonable [exemplary] damages collected pursuant to this section shall be paid into the state's general fund. The remaining two-thirds of such damages collected shall be left to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

Colo. Rev. Stat. § 13-21-102(4) (1987).

The Colorado Supreme Court found that such a statute "effectuate[d] a forced taking of the judgment creditor's property interest in the judgment and [did] so in a manner and to a degree unrelated to any constitutionally permissible governmental interest served by the taking and, therefore, violat[ed] the federal and state constitutional proscriptions against the taking of private property without just compensation." *Kirk*, at 263-64.

This Court rejected the logic and conclusions of the Colorado Supreme Court in determining in *Gordon* that §768.73 is constitutional as applied to a judgment resulting from a jury trial. While there may in Florida be no constitutionally protected right to punitive damages, the bundle of rights resulting from a private contract, including a contract for arbitration pursuant to the Federal Arbitration Act, are recognizable and protectable private property rights. *See Florasynth, Inc.*, 750 F.2d at 176. As such, there is a sharp distinction between an inchoate right to punitive damages and a binding, final arbitration award owned by a party at a time prior to any state, judge or jury ever becoming aware of the dispute. *Id.* This distinction leads to the

different conclusion that, if §768.73 is applicable to arbitration awards, its application is unconstitutional.

2. Any apportionment of the Mieles' punitive damages to the State under §768.73(2) would unconstitutionally interfere with their contract rights and effect an unconstitutional impairment of obligations of contract

While §768.73(2) has been held by this Court to be constitutional in the context of "civil actions," its unconstitutionality seems clear in the context of claims first originating in contract and ultimately embodied in an arbitration award. A critical distinction between a "civil action" and an "arbitration" is that arbitration "is a matter of contract". *United Paperworkers International Union v. The International Paper Co.*, 920 F. 2d 852, 855 (11th Cir. 1991). This distinction alone renders application of §768.73(2) to arbitrations unconstitutional.

When the Mieles and Appellees agreed in 1985 (*prior* to the effective date of §768.73) to arbitrate disputes arising out of or related to the Mieles' account with Appellees, all parties were exercising their right to contract and created certain obligations as a result of the exercise of those rights. In particular, *the Mieles and Appellees became bound to abide by any decision rendered by the arbitrators in the selected arbitration forum.* In this case, that forum was the American Arbitration Association ("AAA"). Rule 43 of the AAA *Securities Arbitration Rules* states in pertinent part:

> The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including but not limited to, specific performance of a contract.

The Eleventh Circuit has made clear that Rule 43 empowers arbitrators to award punitive damages. *Bonar v. Dean Witter Reynolds, Inc.*, 835 F.2d 1378, 1387 (11th Cir. 1988). Indeed,

the Appellees admitted in their response to the Mieles' petition in the district court that the award was properly rendered.

Given the terms of the parties' agreement to arbitrate under the AAA *Securities Arbitration Rules* and in view of *Bonar, supra*, any apportionment of the Mieles' arbitration Award with the State of Florida or any nonparty to the Award would unconstitutionally interfere with the Mieles' contract rights and impair the contractual obligations of the Mieles' and Appellees. In relevant part, the United States Constitution provides in article I, § 10:

> No State shall. . . pass any. . . Law impairing the Obligation of Contracts. . . .

Similarly, the Florida Constitution states in article I, § 10:

> No. . . law impairing the obligation of contracts shall be passed.

The Eighth Circuit, in *Whirlpool Corp. v. Ritter*, 929 F.2d 1318 (8th Cir. 1991), undertook a comprehensive analysis of a contract clause question under the United States Constitution. Applying this same analysis to §768.73(2) compels the conclusion that the statute would violate the contract clauses of the United States and Florida Constitutions even in the unlikely event the statute was otherwise found applicable to arbitration proceedings.

In *Whirlpool*, the court was concerned with a statute nullifying the contract rights of former spouses under life insurance policies upon the death of the insured even when the former spouse remained the named beneficiary of the policy. Suit had been brought by a former spouse attacking application of the statute to contracts existing prior to the enactment of the statute. At the threshold, the Eighth Circuit observed:

> Our analysis under the contract clause must begin by ascertaining whether a contractual obligation has been substantially impaired. *Allied Structural Steel Co., V. Spannaus*, 438 U.S.234, 244, 98 S.

> Ct. 2716, 2722, 57 L.Ed. 2d 727 (1978). "Minimal alteration of contractual obligations may end the inquiry at its first change. Severe impairment, on the other hand, will push the inquiry to a careful examination of the nature and the purpose of the state legislation. *Id* at 245, 98 S. Ct. 2723 (footnote omitted). In determining the degree to which an obligation has been impaired, we must be mindful that the contract clause is designed to "enable individuals to order their personal and business affairs according to their particular needs and interests. Once arranged, those rights and obligations are binding under the law, and the parties are entitled to rely on them." *Id.* ***The obligations protected by the clause, include [ ] not only the expressed terms [of the contract] but also the contemporaneous state law pertaining to the interpretation and enforcement."*** *United States Trust Co. v. New Jersey*, 431 U.S. 1, 19-20 n. 17, 97 S.Ct. 1505, 1516 n.17, 52 L.Ed. 2d 92 (1977).

Id. at 1322 (emphasis added).

Concluding that the statute worked a significant impairment of the original contractual rights and obligations of the parties, the court next determined "whether this alteration of contractual obligations is designed to solve a general social or economic problem and whether it does so in a manner that is both reasonable and appropriate." *Id.* While recognizing that the state legislature had a purpose in mind that was beneficial to the welfare of its citizens, i.e., anticipating that insureds would often fail to change beneficiaries following a divorce simply out of inadvertence, the court nevertheless stressed that the law in question also directly altered "the obligations and expectations of the contracting parties." *Id.* at 1323. Upon consideration, the court held the statute simply did not meet the test of being "'reasonable. . . and of a character appropriate to the public purpose justifying its adoption,'" at least to the extent it applied to pre-existing contracts. *Id.* (quoting *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244 (1978)). The court also noted the "profound difference between changing the law directly governing contracts yet to be made and changing the law directly governing contracts that have

already been made." *Id.* at n. 6, 1323-24. The same profound difference exists in this case.

With respect to §768.73(2) and the Mieles' arbitration Award, the Mieles never contracted for involvement of the State of Florida or a court in deciding the terms and conditions of any arbitration award resulting from controversies with the Appellees. Rather, the Mieles agreed with Appellees (in form and substance prepared by Appellees and universally imposed on brokerage firm customers) *prior* to the enactment of §768.73(2) that disputes related to or arising out of their account would be finally resolved by arbitration.[9] Thus, application of that statute to the Mieles' arbitration Award profoundly impairs their pre-existing contract rights and expectations.

Moving to the second step of the constitutional inquiry under the contract clause, i.e., the purpose and reasonableness of §768.73(2), it is clear that the legislature was concerned with lessening the costs of *civil actions* and limiting excessive *jury* verdicts in order to address a perceived liability insurance crisis in Florida. While this purpose can be described as designed to solve a general societal concern, *see Whirlpool* at 1322-23, it cannot justify application of §768.73(2) to the Mieles' arbitration Award rendered pursuant to their pre-existing contract with Appellees. Indeed, to the extent the legislature sought to reduce the costs of litigation and the impact of those costs on the availability of liability insurance, arbitration is specifically designed to address precisely the same concerns. Any invasion of the province of an arbitration panel and the parties' reliance upon the finality and the integrity of an arbitration award by applying a

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[9] Section 768.73 initially had an effective date of July 1, 1986 and was subsequently amended. The Mieles' agreement with the Respondent, as noted earlier, was entered into in 1985.

statute meant for civil actions would have the contrary effect of harming a process intended to cure the same perceived problems as the statute.

Section 768.73(2) also cannot be constitutionally applied to arbitration proceedings on the assumption that it merely diminishes the remedies and not the substantive rights of the Mieles. This Court rejected just such an argument in *State ex rel Payson v. Chillingworth*, 165 So. 264 (1936). In that case, bondholders challenged a court order based upon a state statute requiring the bondholders to file a verified statement of all persons with ownership interests in the bonds in question as a condition precedent to maintaining a suit against the political subdivision that had issued the bond. In finding such a condition to be an unconstitutional interference with the bondholders contract rights, this Court held:

> It is a well-established rule that the Legislature may not under the guise of modifying a remedy impair the obligation of a contract. 12 C.J. 1067; *W.B. Worthen Co. v. Kavanaugh*, 295 U.S. 56, 55 S/Ct/ 555, 79 L.Ed. 1298, 97 A.L.R. 905. *See, also; Green v. Biddle*, 8 Wheat. 1, 5 L.Ed. 547; *McCracken v. Hayward*, 2 How. 608, 612, 11 L.Ed. 397. In the *McCracken* Case the Supreme Court of The United States, amongst other things, said:
>
> > "If any subsequent law affect to diminish the duty, or to impair the right, it necessarily bears on the obligation of the contract, in favor of one party, to the injury of the other; hence any law, which in its operation amounts to a denial or obstruction of the rights accruing by a contract, though professing to act only on the remedy, is directly obnoxious to the prohibition of the Constitution."

Id. at 266; *see also Gans v. Miller Brewing Co.*, 560 So.2d 281, 283 (Fla. 4th DCA 1990) ("virtually no degree of contract impairment has been tolerated in this state").

Accordingly, this statute cannot be constitutionally applied to the Award obtained by the Mieles pursuant to their contract with the Appellees which, even when unconfirmed, ". . . is a

contract right . . .". *Florasynth, Inc.*, 750 F.2d at 176. Thus, this Court should confirm for the Court of Appeals that §768.73 does *not* apply to arbitrations and, in particular, does not apply to the award rendered in the present case. As a result, the Court of Appeals should thereafter vacate the district court's order and require that court to confirm the award as rendered and require full payment of the Award to the Mieles.

VI. CONCLUSION

FLA. STAT. §768.73 does not apply to arbitrations, arbitration awards or the arbitration process. This is apparent from the conscious use by the legislature of terms known only in court and foreign in arbitration, including *"civil action", "remittitur", "additur", "jury", "court", "litigation"*, and so forth. Similarly, the legislative intent speaks only to the concern resulting from courts and juries in the State of Florida. Continuing with a practical consideration of what would result from an application of this statute to arbitration, including the imposition of formalities which the arbitration process is neither designed for nor could withstand, all inevitably lead to the same conclusion. The certified question of "Does FLA. STAT. §768.73 apply to arbitration awards?" should be answered "No."

Dated: Naples, Florida
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Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Appellants has been sent via Federal Express delivery this 12 day of April, 1993 to John D. Boykin, Esq., Boose, Casey, Ciklin, Lubitz, Martens, McBane & O'Connell, Northbridge Tower - 19th Floor, 515 North Flagler Drive, West Palm Beach, Florida 33401.

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