IN THE SUPREME COURT OF FLORIDA

CASE NO. SC11–2513
L.T. CASE NO. 2D10-2144
L.T. CASE NO. 07-0080-CA

RAYMOND JAMES FINANCIAL SERVICES, INC.,
PETITIONER,

v.

BARBARA J. PHILLIPS, ET AL.,
RESPONDENT.

AMICUS CURIAE BRIEF OF THE MIAMI INTERNATIONAL ARBITRATION SOCIETY

IN SUPPORT OF THE POSITION OF THE PETITIONER,
RAYMOND JAMES FINANCIAL SERVICES, INC.

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PREFACE

The Miami International Arbitration Society (the "MIAS") submit this amicus curiae brief with a motion under Florida Rule of Appellate Procedure 9.370(a) for leave of the Court to file it. As stated in the rule 9.370(a) motion, the MIAS respectfully requests the Court deem the amicus curiae brief filed when it grants the motion.

INTEREST OF AMICUS[1]

The MIAS promotes international arbitration and mediation as well as parties selecting Miami and Florida as the situs for international arbitration proceedings related to resolving transborder commercial and investment disputes. Comprised of arbitrators, practitioners, and law firms, the MIAS membership includes former Florida appellate judges, world-renown arbitrators and practitioners, and academics. The MIAS works to maintain and enhance the extensive infrastructure developed to encourage parties engaging in international arbitration to select Miami, Florida as the venue by (1) supporting legislation in Florida and the United States aimed at promoting international arbitration, (2) assisting Florida universities in delivering academic programs involving international arbitration, (3) hosting international arbitration conferences in Florida, (4) attracting distinguished members of the international arbitration

[1] As required under Florida Rule of Appellate Procedure 9.370(b), the MIAS states its respective interests in the appeal submitted to the Court.

community to speak at conferences in Florida, and (5) providing training and legal education to its members on the latest developments in international arbitration. The MIAS also provides a forum for the international arbitration community to exchange ideas and information.

In sum, the MIAS advocates to ensure Miami and Florida continue to become the most viable and attractive venue for parties to resolve disputes through international arbitration. As part of its advocacy, the MIAS seeks to ensure Florida law remains stable, and the results in arbitration remain predictable such that applying Florida law in state or federal court would yield the same result. Decreasing uncertainty would therefore foster parties choosing Florida as the venue and law governing their arbitration, domestic or international.

The MIAS believes the district court opinion decreases stability and predictability. The district court's decision is inconsistent with this Court's precedent, decisions from the Second District Court of Appeal, decisions from other districts, and federal arbitration law. If the decision stands, then it will discourage parties from choosing Florida as a viable and attractive venue for international arbitrations.

SUMMARY OF THE ARGUMENT

The Second District Court of Appeal decided Florida's statutes of limitation do not apply in arbitration proceedings by narrowly construing the terms used in

the statute. In reaching its conclusion, the district court receded from several existing tenets regarding statutory construction, and, in particular, those construing statutes in light of Florida and federal public policy favoring arbitration. But, the court also certified the following question:

> Does section 95.011, Florida Statutes apply to arbitration when the parties have not expressly included a provision in their arbitration agreement stating that it is applicable?

The parties are providing the Court with argument regarding many issues surrounding the decision, but the MIAS submits three overarching reasons why the lower tribunal erred, and why this Court should answer the certified question in the affirmative.

First, the district court erred because its interpretation of the terms "action" and "proceeding" are inconsistent with standing law interpreting similar words used in Florida Statutes. Florida courts have interpreted words like "action" and "proceeding" in such a way as to protect parties' right to arbitrate their disputes. Florida policy mandates courts interpret Florida Statutes to favor arbitration. But the district court's opinion means Florida law parties will have fewer defenses at their disposal when they submit disputes arbitration than when they submit them in court. Such an arbitrary distinction is wrong, and contrary to Florida public policy.

Second, federal arbitration law – binding on Florida courts under the Supremacy Clause – has made clear over the past several years that state law must

put arbitration agreements on an equal footing whit other contracts. The opinion on review calls into question whether a court may interpret a statute in a manner such that Florida treats arbitration agreements differently than contracts without arbitration agreements. Establishing such a construction triggers federal preemption, which mandates interpreting the statute no less favorably than applying it to a contract having no arbitration agreement.

Third, the district court's decision has added uncertainty as to the scope of claims falling within standard arbitration clauses. Parties face less predictability when entering into an arbitration because statutory claims using the terms "action," "civil action," "court," or "proceeding" may no longer be arbitrable. And draftspersons must attempt, albeit in vain, to cover each potential statutory claim or defense in which those terms arise.

The Court should reverse the opinion of the Second District Court of Appeal, interpret either the terms "action" or "proceeding" to include resolving disputes through arbitration, and find Florida's statutes of limitation apply in arbitration, regardless whether the arbitration agreement specifically invokes Florida Statutes chapter 95.

In short, this Court should answer the certified question in the affirmative.

ARGUMENT

Although the district court certified a question for the Court, the issues that led to the question relate to statutory interpretation, and therefore, this amici curiae brief addresses issues presented in the opinion.

Arbitration provisions are common, and courts favor their use. Seifert v. U.S. Home Corp., 750 So. 2d 633, 636 (Fla. 1999); Orkin Exterminating Co. v. Petsch, 872 So. 2d 259, 263 (Fla. 2d DCA 2004). When parties agree to submit their dispute to an arbitrator as opposed to a judge, they merely substitute one decision-maker for another. Hialeah Auto., LLC v. Basulto, 22 So. 3d 586, 588 (Fla. 3d DCA 2009).

For contracts involving intra-state disputes, that decision is protected by the Florida Arbitration Code ("FAC"). Fla. Stat. §§ 682.01 et seq. For disputes involving interstate and international commerce, that decision is protected by the Federal Arbitration Act ("FAA"). 9 U.S.C. § 1 et seq. Under the FAC and the FAA, courts should resolve all doubts relating to arbitration in favor of arbitration rather than against it. Pierce v. J.W. Charles-Bush Sec., Inc., 603 So. 2d 625, 628 (Fla. 4th DCA 1992); see also Roe v. Amica Mut. Ins. Co., 533 So. 2d 279, 281 (Fla.1988); see also Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 25 (1991).

I. The District Court of Appeal Erred Because Florida Long Ago Decided the Words "Action" or "Cause of Action" or "Court" in Statutes Do Not Prevent Parties from Arbitrating Their Statutory Rights.

Florida Statutes section 682.02 confirms that contracting parties have the right to arbitrate any controversy arising between them, which includes the right to arbitrate civil remedies created by various Florida statutes. See, e.g., Flyer Printing Co., Inc. v. Hill, 805 So. 2d 829, 831 (Fla. 2d DCA 2001) (citing Gilmer, 500 U.S. 20); see also e.g., Fonte v. AT&T Wireless Servs., Inc., 903 So. 2d 1019, 1023-24 (Fla. 4th DCA 2005); Petsch, 872 So. 2d 259, 261 (Fla. 2d DCA 2004). Florida has been consistent with federal law in recognizing "parties may agree to arbitrate statutory claims . . . so long as the agreement furnishes an adequate mechanism for vindicating the claimant's statutory rights." Flyer Printing, 805 So. 2d at 831 (citing Gilmer, 500 U.S. at 20). Unless the legislature states unambiguously it intended to prevent parties from submitting a statutory claim to arbitration, the court should consider the statutory claim is arbitrable. Petsch, 872 So. 2d at 261. Thus, even the Second District Court of Appeal has interpreted Florida statutes that create rights of action as subject to arbitration unless the legislature has stated otherwise. See id.

Under the FAA, "contractually required arbitration of claims satisfies the statutory prescription of civil liability in a court." See CompuCredit Corp. v. Greenwood, 132 S. Ct. 665, 671 (2012) (citing Gilmer, 500 U.S. at 28). Using

terms such as "action," "class action," and "court" do not refer exclusively to judicial proceedings and also can include arbitrations. Id. at 671; Gilmer, 500 U.S. at 28 (enforcing an arbitration agreement despite language in the Age Discrimination and Employment Act of 1967 (ADEA) stating the aggrieved person "may bring a civil action in any court of competent jurisdiction"); Shearson/Am. Exp., Inc. v. McMahon, 482 U.S. 220 (1987) (enforcing an arbitration agreement dealing with the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C §1964(c)); Mitsubishi Motors Corp Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) (enforcing an arbitration agreement covering claims under the Clayton Act, 15 US.C. §15(a)).

In the case at bar, the court found section 95.011 is not an available defense in arbitration because the statute states it governs a "civil action or proceeding," but does not state specifically it applies in arbitration. Opinion at 9-10. That finding is inconsistent with case law interpreting identical terms in other Florida statutes finding the rights created thereunder are arbitrable. Florida law requires courts begin the arbitrability analysis from the presumption that, absent an express legislative intent to exclude statutory claims from arbitration, parties may arbitrate their statutory rights. Petsch, 872 So. 2d at 261.

For instance, Florida Statutes section 760.11(5), provides: "[i]n any civil action, the court may issue an order prohibiting the discriminatory practice and

providing affirmative relief from the effects of the practice, including back pay." (Emphasis added). Despite using the terms "civil action" and "court," Florida allows parties to arbitrate claims under section 760.11(5). Flyer Printing Co., Inc., 805 So. 2d at 831. Unlike section 760.11(5), section 95.011 does not refer to the specific venue "court" to describe a limited scope of the venue contemplated under the statute. But even using the term "court" under section 760.11(5) has not caused Florida courts to interpret the statute as preventing arbitration when parties have agreed to arbitrate the claims.

Similarly, Florida Statutes section 501.2105(2) states "[i]n any action brought by a person who has suffered a loss as a result of a violation of this part, such person may recover actual damages, plus attorney's fees and court costs as provided in s. 501.2105." Fla. Stat. § 501.211 (emphasis added). Claims under section 501.211(2) are also arbitrable. Petsch, 872 So. 2d at 261. It is indisputable the Second District Court of Appeal has not limited the term "action" to prevent parties from arbitrating disputes arising under section 501.211(2) so long as the disputes fall within the scope of the parties' arbitration agreement.

The Legislature has employed the words "actions," or "causes of action," or "actions in court" to describe how a party may avail itself of any remedy stated in Florida statutes. See, e.g., Fla. Stat. §§ 760.11, 501.211. And Florida courts have held claims under these statutes are arbitrable. Flyer Printing Co., Inc., 805 So. 2d

at 831; Petsch, 872 So. 2d at 261. It is, therefore, inconsistent to hold the same terms are construed differently for statutory defenses. Moreover, if the Legislature intended to limit the term "action" in section 95.011 to mean only a civil court proceeding, and to exclude arbitration, the Legislature would have used the more narrow phrase "judicial actions" it used in Florida Statute section 186.509, or the phrase "civil court action" it used in Florida Statute section 489.129 (11)(a)(4).

Even if arbitrations are not "actions," which they are, they would be "proceedings."[2] This Court long ago decided arbitrations are "proceedings:" "an arbitration proceeding, even though informal in nature, is nonetheless a judicial, or quasi-judicial, procedure; and it is universally held that in arbitration proceedings, as in all judicial proceedings, persons whose rights and obligations are affected thereby have an absolute right to be heard and to present their evidence." Cassara v. Wofford, 55 So. 2d 102, 106 (Fla. 1951). And within the Second District Court of Appeal, arbitrations are proceedings. See e.g., Kidwell v. General Motors Corp., 975 So. 2d 503, 505 (Fla. 2d DCA 2007); Tassinari v. Loyer, 189 So. 2d 651, 653 (Fla. 2d DCA 1966).

In 2010, the Florida Legislature took action on the topic of arbitration, and its 2010 amendment to the Florida International Commercial Arbitration Act

[2] Rules governing statutory construction require interpreting the word "action" differently from "proceeding" otherwise the terms are redundant. Thus, if this Court found that arbitration is not an "action," despite the cases holding otherwise, it still should find arbitration is a "proceeding."

(Florida Statutes §§ 684.0001 et seq. (2011)), it specifically referred to arbitration as an "arbitral proceeding." Fla. Stat. § 684.0009; see also Fla. Stat. §§ 684.0035 ("Hearings and Written Proceedings"); 684.0039 ("Termination of Proceedings"). Thus, the Florida Legislature has set the policy in Florida, arbitrations are "proceedings."

In the opinion below, the district court receded from the long-settled conclusion arbitrations are "proceedings." It also departed from the consistent findings that statutory claims are arbitrable even when the statute refers to a specific procedure for obtaining a remedy, and defines it as an "action" (i.e., a court or administrative hearing). The district court's new stance creates an arbitrary difference between the statutes of limitation defenses a party may use for claims in court versus claims in arbitration. Interpreting section 95.011 differently for arbitration than for other litigation defeats Florida's policy favoring arbitration.

Citing the reasoning of courts in other jurisdictions interpreting their own states' laws, the district court reasoned the legislature knew chapter 682 existed for several decades at the time it amended chapter 95, and therefore, had the opportunity to amend the provisions of chapter 95 to include arbitration within its scope. Opinion at 9 (citing Broom v. Morgan Stanley DW Inc, 169 Wash. 2d 231, 244, 236 P.3d 182, 188 (2010)). The Broom court stated "'[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,' and so absent a

legislative change, we presume that the legislature approves of our interpretation." 169 Wash. 2d 231 at 244. Taking its guidance from Broom, the court reasoned section 95.011 does not expressly state that it applies in arbitration, and, therefore, the trial court correctly interpreted an ambiguous arbitration agreement by resolving doubts against the drafter. See Opinion at 12.

Stating the maxim to construe contracts against the drafter should have been unremarkable, but here it takes on new significance because the rule cuts against the legislative intent under Florida Statutes Chapters 682 and 684, which require courts construe contracts in *favor* of arbitration. The Legislature already had required courts resolve all doubts in favor of arbitration because Florida's stated policy is to enforce agreements to arbitrate. See Petsch, 872 So. 2d at 261; see also Pierce, 603 So. 2d 625. The Legislature did not intend for Florida courts to pick certain statutory claims as arbitrable and decide statutory defenses are not. Only now, according to the district court, the terms "action" and "proceeding" have two meanings – one for claims and one for defenses.

Thus, claimants in arbitration have broader statutory rights than do respondents, who have lost an important statutory defenses. In other words, the statutory defenses unavailable to respondents in arbitration remain applicable for defendants in court. The district court should have relied on its own published

authority holding statutorily created rights – whether they create claims or defenses – are part of the substantive law in Florida.

The district court's decision is inconsistent with its interpretation of other Florida Statutes, as well as that of other Florida courts. Therefore, the Court should answer the certified question in the affirmative, and reverse the decision below.

II. The District Court of Appeal Erred Because the Federal Arbitration Act Imposes on Florida an Obligation to Interpret Its Statutes Consistent with the National Policy Favoring Arbitration and Not Discriminate Against Arbitration.

Even if Florida law did not protect parties' right to arbitrate the statutes of limitations defenses, federal law nevertheless establishes parties in arbitration have no fewer rights than parties in judicial actions; each is able to take advantage of a statute of limitations defense. Congress enacted the FAA in response to judicial hostility to arbitration. See AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011). The FAA creates a national policy favoring of arbitration by, among other things, declaring valid, irrevocable, and enforceable arbitration agreements arising out of commercial transactions. See generally Southland Corp., v. Keating, 465 U.S. 1 (1983). "[A]rbitration agreements must be placed on an equal footing with other contracts." Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 443 (2006).

The FAA not only supplies a procedural framework for federal courts, but also federal substantive law, which governs federal and state courts. Preston v. Ferrer, 552 U.S. 346, 349 (2008). The national policy favoring arbitration results in the FAA displacing state law that contradicts it, or FAA preemption. See Allied-Bruce Terminix Co., Inc. v. Dobson, 513 U.S. 265, 280 (1995). State laws or judicial rules singling out arbitration agreements, and subjecting them to suspect status are unenforceable. See, e.g., Doctor's Assocs. Inc. v. Casarotto, 517 U.S. 681, 687 (1996). The FAA reaches all state law when the contract involves commerce. See Concepcion, 131 S. Ct. 1740. In Concepcion, the FAA preempted state law holding unconscionable class arbitration waivers stated in consumer contracts. See generally id. "Requiring the availability of class wide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA." Id. at 1748.

In West Virginia, FAA preemption barred the state from prohibiting "pre-dispute agreements to arbitrate personal-injury or wrongful–death claims against nursing homes [as] a categorical rule prohibiting arbitration of a particular type of claim[, and] contrary to the terms and coverage of the FAA." Marmet Health Care Center v. Brown, 132 S. Ct. 1201, 1203-1204 (2012). FAA preemption also reaches state law seeking to confer exclusive jurisdiction on state panels to decide disputes, which would defeat the parties' arbitration agreement: "when parties

agree to arbitrate all questions arising under a contract, state laws lodging primary jurisdiction in another forum, whether judicial or administrative, are superseded by the FAA." Preston, 552 U.S. at 349-350.

It should be beyond controversy that the case at bar involves commerce under the FAA. Therefore, the FAA would govern the Court's decision for any state law contradicting the national policy favoring arbitration. Here, the district court interpreted section 95.011 without regard for FAA section 2, and limited the terms "action" or "proceeding" to exclude arbitration. The breadth of authority in Florida and federal courts on FAA preemption should have guided the district court to interpret the terms "action" and "proceeding" to include the statute of limitations defenses under section 95.011 as part of the law applicable to the parties' dispute. Deciding otherwise runs afoul of the FAA.

The error in the opinion thus triggers the FAA preemption. Because there is federal preemption, the Court should interpret section 95.011 in light of federal law. Consistent with the strong federal policy favoring arbitration, the Court should therefore answer the certified question in the affirmative.

III. The District Court's Interpretation Injects Greater Uncertainty and Decreases Predictability in Drafting and Enforcing Arbitration Agreements.

Arbitration agreements drafted prior to the district court's decision are now subject to greater uncertainty regarding what claims Florida law has extinguished

because typical agreements state the governing substantive law without specifying which particular law applies. Therefore, there may be several thousand potential arbitration claims – precluded under Florida's statute of limitations – now revived by the district court. Parties who previously had agreed to arbitrate their disputes now must face the unending threat a claim will commence in arbitration without regard for the statute of limitations.

The district court's opinion will also cause greater uncertainty for parties when they draft forum selection and choice of law clauses under Florida law. Drafting arbitration agreements now involves a far more costly, complex, and unpredictable analysis. Contracting parties must attempt to capture in the contract every claim or defense they intend to arbitrate considering all statutes using the words "action" or "proceeding" to ensure the new interpretation does not result in the parties' losing significant substantive rights in arbitration when that never was intended. Undergoing such an exhaustive analysis discourages parties from (1) entering into arbitration agreements, and (2) arbitrating their disputes.

The district court decision has created uncertainty for parties who have entered into arbitration agreements, which negates the policy stated by Congress and Florida favoring arbitration as a process for parties to resolve their disputes. Till now, Florida courts have enforced that policy. The Court therefore should answer the certified question affirmatively, and reverse the district court holding

that the terms "action" and "proceeding" under in section 95.011 are not broad enough to include arbitration.

CONCLUSION

Based on the foregoing, the Miami International Arbitration Society respectfully request the Court answer the certified question in the affirmative, reverse the Second District Court of Appeal, interpret either the terms "action" or "proceeding" to include resolving disputes through arbitration, and find Florida Statute section 95.011 applies to Florida arbitrations together with the rest of Florida substantive law whenever Florida law applies.

Respectfully submitted this 13th day of April, 2012 by

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CERTIFICATE OF SERVICE

I hereby certify that on April 18th, 2012, I certify that the foregoing document was served on the 13th day of April, 2012, on all counsel of record or pro se parties identified on the below Service List.

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