IN THE SUPREME COURT OF FLORIDA

RAYMOND JAMES FINANCIAL SERVICES, INC.,

Petitioner,

vs.

BARBARA J. PHILLIPS, etc., *et al.*,

Respondents.

_______________________________________/

Case No. SC11-2513
Lower Case No. 2D10-2144, 07-0080-CA

INITIAL BRIEF OF PETITIONER

On appeal from the District Court of Appeal, Second District of Florida

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PRELIMINARY STATEMENT

Raymond James Financial Services, Inc., will be referred to herein as "Petitioner" or "RJFS." Barbara J. Phillips, Jennifer L. Phillips, and Margaret K. Camp will be referred to collectively as "Respondents."[1] Citations to Petitioner's Appendix will be "(V_T_)," referring to the volume number ("V_") followed by the tab number ("T_") and, as necessary, specific exhibits or page numbers.[2]

I. STATEMENT OF THE CASE AND FACTS

Respondents are former securities account holders with RJFS. (V1T1 ¶9) Each executed written Client Agreements that required any disputes with RJFS to be submitted to the National Association of Securities Dealers, Inc.'s (n/k/a the Financial Industry Regulatory Authority or "FINRA") arbitration program. (V1T1 Ex. H) Pursuant to these agreements, on November 29, 2005, Respondents filed a Statement of Claim with the FINRA arbitration tribunal against RJFS. (V1T1 Ex. A) The Statement of Claim asserted claims for negligence, breach of fiduciary duty, violations of federal securities law, and statutory fraud under Florida's Securities and Investor Protection Act, Fla. Stat. § 517 ("Chapter 517"). (V1T1 Ex. A) RJFS responded by filing a "Motion to Dismiss, Answer, Defenses to the

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[1] This case originated in arbitration. Respondents were Claimants in the arbitration proceeding below and Plaintiffs in the court proceeding below.

[2] Petitioner has submitted contemporaneously with its Initial Brief an Appendix consisting of two volumes and 20 tabs pursuant to Fla. R. App. P. 9.120(f).

Statement of Claim, and Counter-claim." (V1T1 Ex. B) In the Motion to Dismiss, RJFS asserted that the arbitration claims were barred by the applicable statute of limitations. (V1T1 Ex. B) The arbitration panel appointed to adjudicate the dispute set RJFS's Motion to Dismiss for hearing, stating the hearing would be "a half-day evidentiary hearing limited to the issue of whether the claims are barred by statutes of limitations." (V1T1 Ex. E)

The Client Agreements executed by Respondents state in part they "[s]hall be construed, interpreted and the rights of the Parties shall be determined in accordance with the internal laws of the State of Florida …." and "the determination of whether any [ ] claim was timely filed shall be by a court having jurisdiction, upon application by either party." (V1T1 Ex. H) On January 10, 2007, Respondents invoked the latter provision and filed a Complaint in Collier County Circuit Court ("Circuit Court") seeking a declaratory judgment that Florida's statute of limitations ("Chapter 95") did not apply to arbitration proceedings. (V1T1) Respondents did not request declaratory relief regarding the federal statute of limitations that governs their federal securities claims. (V1T1) After a hearing on March 31, 2010, the Circuit Court granted Respondents' "Motion for Declaratory Judgment" reasoning that in *Miele v. Prudential-Bache Securities, Inc.*, 656 So. 2d 470 (Fla. 1995), this Court ruled arbitrations were not "actions" or "proceedings." (V2T11)

RJFS timely appealed to the Second District Court of Appeal (the "District Court"). (V2T12) RJFS argued that Chapter 95 is, on its face, applicable to arbitration proceedings and, regardless, the Parties' contract incorporated Chapter 95. (V2T13; V2T16) Among other things, RJFS argued that the public policy underlying statutes of limitations applies equally to claims made in arbitration and that the Circuit Court's reliance on *Miele* was misplaced in light of the Legislature's response to that holding. (V2T13) RJFS also argued that the Circuit Court's order resulted in an involuntary waiver of protected property rights and that the judicial limitation of the term "proceeding" constituted an abrogation of legislative power. (V2T16)

Oral argument was held before the District Court on January 26, 2011. On November 16, 2011, a split District Court affirmed the Circuit Court's ruling. (V2T18) Although noting the Circuit Court incorrectly relied on *Miele,* inasmuch as that case did not interpret the term "proceeding," the District Court ultimately held that "arbitrations are not 'actions' or 'proceedings' for purposes of section 95.011." (V2T18 pp.2, 9) In reaching that decision, the District Court concluded that RJFS did not "expressly include the Florida statutes of limitations in the contract." (V2T18 p. 12) Accordingly, the District Court looked at the language of Section 95.011, found that it did not "convey a clear and definite meaning" (V2T18 p.6), and eventually concluded that the term "proceeding" in Chapter

95.011 means "a court proceeding" only, not arbitration. (V2T18 p.10) Associate Judge Raiden concurred and Chief Judge Kelly dissented without opinion. (V2T18 p.13) The District Court certified the following question as one of great public importance:

> 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?

This Court possesses jurisdiction pursuant to Fla. R. App. P. 9.030(a)(2)(A)(v).

II. SUMMARY OF ARGUMENT

This case involves a novel interpretation of an unambiguous statute. That interpretation not only violates the Supremacy Clause of the United States Constitution and individual constitutional rights, it is irreconcilable with binding law, and creates patently absurd results. For the first time in Florida's judicial history, a District Court has held that the terms "civil actions" and "proceedings" as used in Chapter 95 do not encompass arbitration proceedings, and so, Florida's statute of limitations does not apply to claims pursued in an arbitral forum unless the parties "expressly include" the statute in their arbitration agreement. Further, according to the District Court, agreeing to include the "laws of the State of Florida" is insufficient even though binding precedent dictates that agreements like the one at issue include the determination of statute of limitations defenses.

Legislative intent is the polestar of statutory construction. The District Court erred by looking beyond the clear and unambiguous language of the statute. Nonetheless, once the District Court concluded Chapter 95 was ambiguous, because the word "arbitration" was not contained in the statute, it should have applied well-settled principles of statutory construction. It did not. Those principles, when correctly applied, reveal the Legislature's clear intent that Chapter 95 apply to claims made in arbitration.

Initially, courts are required to consider the legislative purpose of the enactment. The District Court's analysis ignored the legislative purpose underlying Chapter 95, which is to protect litigants from having to rely on faded memories or diminished evidence in the prosecution or defense of claims. The notion that the policy underlying Chapter 95 does not apply equally to claims brought in the arbitral forum is simply devoid of logic. Statutes of limitation are fundamental to our justice system, regardless of the forum in which the justice is carried out. By ignoring the intent and policy behind Chapter 95 and failing to employ other well-known principles of statutory construction, the District Court erred as a matter of law.

More troubling, however, is that the District Court's interpretation leads to absurd outcomes the Legislature never intended and ultimately renders the statute unconstitutional. The District Court's interpretation of Chapter 95 operates as an

involuntary waiver of protected property rights, and no rational basis exists for the deprivation. Additionally, if correct, the District Court's analysis means the Legislature intended to revoke the benefits and protections of Chapter 95 when parties choose to arbitrate their disputes. Such an interpretation directly conflicts with the Federal Arbitration Act and federal policy favoring arbitration.

Finally, the District Court's interpretation is inconsistent with (and renders meaningless) a vast body of law, including prior opinions of the Second District Court of Appeal as well as this Court's opinion in *O'Keefe Architects, Inc. v. CED Constr. Partners, Ltd.*, 994 So. 2d 181 (Fla. 2006). Reversal is therefore required.

III. STANDARD OF REVIEW

Whether Chapter 95 applies to arbitration proceedings is a question of statutory interpretation requiring a *de novo* review. *Bennett v. St. Vincent's Med. Ctr., Inc.*, 71 So. 3d 828, 837 (Fla. 2011), *reh'g denied* (Sept. 22, 2011); *Allstate Ins. Co. v. Holy Cross Hosp., Inc.*, 961 So. 2d 328, 331 (Fla. 2007). Likewise, the issue of whether the District Court properly interpreted the Parties' arbitration agreement is a matter of contract interpretation that is reviewed *de novo*. *O'Keefe Architects, Inc.*, 944 So. 2d at 185 ("[W]hether O'Keefe's statute of limitations defense is subject to arbitration is a matter of contract interpretation that is reviewed de novo."); *Engle Homes, Inc. v. Jones,* 870 So. 2d 908, 910 (Fla. 4th DCA 2004); *Hirshenson v. Spaccio,* 800 So. 2d 670, 674 (Fla. 5th DCA 2001).

IV. ARGUMENT

A. Rules Of Statutory Construction Are Applied Only When A Statute Is Ambiguous, And Chapter 95 Is Not Ambiguous.

When interpreting a statute, the court's task is to give effect to legislative intent by first looking at the actual statutory language. *Belanger v. The Salvation Army*, 556 F.3d 1153, 1155 (11th Cir. 2009); *Donato v. Am. Tele. and Telegraph Co.*, 767 So. 2d 1146, 1150 (Fla. 2000); *City of Tampa v. Thatcher Glass Corp.*, 445 So. 2d 578 (Fla. 1984). Unless a statute is unclear or ambiguous, courts should not look behind the statute's plain language for legislative intent or resort to rules of statutory construction. *Belanger*, 556 F.3d at 1155. Here, the language in Chapter 95 is clear and unambiguous, and applies to arbitration proceedings.

Section 95.011 governs the applicability of Florida's statute of limitations:

> [a] civil action **or proceeding, called an 'action' in this chapter** … shall be barred unless begun within the time prescribed in this chapter or, if a different time is prescribed elsewhere in these statutes, within the time prescribed elsewhere.

Id. (emphasis added). A plain reading of the statute indicates that any reference to an "action" throughout Chapter 95 shall include all "civil actions" or "proceedings." The terms "civil action" and "proceeding" are not defined in Chapter 95. When a term is undefined, courts apply the term's plain and ordinary meaning by referencing a dictionary. *Rollins v. Pizzarelli*, 761 So. 2d 294, 298 (Fla. 2000); *Green v. State*, 604 So. 2d 471, 473 (Fla. 1992).

The District Court relied on the 8th edition of Black's Law Dictionary to define the terms "civil action" and "proceeding." (V2T18 p.5) The 8th edition, which post dates the passage of Chapter 95 but was not current when the District Court entered its ruling, defines those terms as follows:

> *Civil action at law*: [a] civil suit stating a legal cause of action and seeking only a legal remedy.
>
> *Proceeding*: (2) [A]ny procedural means for seeking redress from a tribunal or administrative agency. … (4) The business conducted by a court or other official body; a hearing.

Black's Law Dictionary, 31, 1241 (Bryan A. Garner ed., 8th ed., West 2004). (V2T18 p.5) Even under the edition of Black's Law Dictionary used by the District Court, arbitration falls squarely within the definition of both these terms.

Arbitration is merely an alternative forum to court – a procedural means for seeking redress from a tribunal, which is defined under the same version of Black's Law Dictionary as "[a] court or other adjudicatory body." *Black's Law Dictionary* at 1544 (emphasis added); *Miele*, 656 So. 2d at 473 ("Arbitration is an alternative to the court system …."); *Shearson/Am. Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987)(referring to "arbitration tribunals"); *Carnival Corp. v. Booth,* 946 So. 2d 1112, 1115 (Fla. 3d DCA 2006)("An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause ….")(citing *Scherk v. Alberto-Culver Co.,* 417 U.S. 506 (1974)). Likewise, arbitration is the exercise or business of conducting a judicial function by an official, or panel of

officials, and culminates in a hearing. *Cassara v. Wofford*, 55 So. 2d 102, 105 (Fla. 1951)("The law is well-settled that arbitrators exercise judicial functions; and, while not *eo nomine* judges, they are in fact judicial officers."). Therefore, arbitration falls squarely within the plain meaning of the clear and unambiguous terms "civil action" and "proceeding."

The District Court, however, determined that since neither the dictionary definition of "civil action" or "proceeding" explicitly includes the word "arbitration," those terms "do not convey a clear and definite meaning." (V2T18 p.6) This was error. There is no principle of statutory construction that states a term is unclear or indefinite unless its dictionary definition explicitly includes a particular synonym identified by the court. In fact, courts frequently interpret the dictionary definition of a term to *encompass* other meanings or synonyms, even if a particular word is not explicitly referenced.[3] *See e.g*., *Thatcher Glass Corp.,* 445

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[3] In addition to a dictionary, courts may refer to other case law when interpreting the plain meaning of statutory language. *State v. Mitro*, 700 So. 2d 643, 645 (Fla. 1997)("In the absence of a statutory definition, resort may be had to case law or related statutory provisions which define the term."). As the District Court recognized, there are no other Florida opinions interpreting "or proceeding" in Chapter 95 (V2T18 p.9); however, it is telling that Florida courts regularly refer to arbitrations as "arbitration *proceedings*." *See Dadeland Depot, Inc. v. St. Paul Fire and Marine Ins*., 945 So. 2d 1216, 1235-46 (Fla. 2006) ("at the time of the arbitration proceeding … during an arbitration proceeding …."); *Lloyds Underwriters v. Netterstrom*, 17 So. 2d 732, 736 (Fla. 1st DCA 2009)("[i]n an arbitration proceeding …."); *Green Tree Servicing, LLC v. McLeod*, 15 So. 2d 682, 691 (Fla. 2d DCA 2009)("[e]njoin an arbitration proceeding … discovery in arbitration proceedings"); *Gencom Group v. Garcia Stromberg, LLC*, 34 So. 3d

So. 2d at 580 (dictionary definition of "fuel" encompassed natural gas even though the term "natural gas" was not explicitly stated in the definition); *State v. Cohen*, 696 So. 2d 435, 437 (Fla. 4th DCA 1997)(dictionary definition of "representation" encompassed a computer image even though the term "computer image" was not explicitly included in the definition).

The District Court, therefore, erred when it looked beyond the plain language of Chapter 95. That error might have been overcome had it subsequently applied the well-settled principles of statutory construction. By failing to do so, the District Court predictably arrived at an incorrect conclusion.

B. Assuming *Arguendo* That Chapter 95 Is Ambiguous, The District Court Was Required To Apply Well-Settled Principles Of Statutory Construction And Failed To Do So.

1. The District Court erred when it analyzed Section 95.011 in isolation.

Courts "do not look at only one portion of the statute in isolation but [ ] review the entire statute to determine intent …. We give effect to all statutory provisions and construe related provisions in harmony with each other." *Sch. Bd. of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1234 (Fla. 2009); *Rollins*, 761 So. 2d at 298 (It is axiomatic that "[s]tatutes must be read

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170, 171 (Fla. 3d DCA 2010)("[s]tay an arbitration proceeding …."); *Dorestin v. Hollywood Imports, Inc.*, 2010 WL 3154848, *3 (Fla. 4th DCA 2010)("[i]n an arbitration proceeding ...."); *Shaw v. St. Farm Fire & Cas. Co.*, 37 So. 3d 329, 339 (Fla. 5th DCA 2010)("[i]nstituted arbitration proceedings ....").

together to ascertain their meaning."). Courts "must give full effect to all statutory provisions" and "avoid readings that would render part of the statute meaningless." *Gomez v. Vill. of Pinecrest,* 41 So. 3d 180, 185 (Fla. 2010); *Heart of Adoptions, Inc. v. J.A.,* 963 So. 2d 189, 199 (Fla. 2007).

The District Court failed to consider Section 95.011 in the context of the statute as a whole and in harmony with the rest of the Chapter. As a consequence, its holding renders portions of the statute meaningless and leads to incongruous results. For instance, Section 95.03 states:

> Contracts shortening time. – Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than that provided by the applicable statute of limitations is void.

The Legislature intended to make void agreements shortening limitations periods. *Id.* By holding that Chapter 95 is not applicable to claims in arbitration, the prohibition in Section 95.03 and presumably the policy underlying it would likewise not apply. If that is true, then parties who agree to pursue their claims in arbitration lose the protection of Section 95.03 and the prohibition against shortening statutes of limitation. The prohibition is meaningless in the arbitral forum. *See e.g., WFTV, Inc. v. Wilken*, 675 So. 2d 674, 678 (Fla. 4th DCA 1996)(rejecting an interpretation that would render meaningless another statutory provision). The District Court's holding removes any proscription against shortening limitations periods or even eliminating them. The Legislature clearly

did not intend this incongruous result. By explicitly prohibiting the contractual shortening of Chapter 95's limitation periods in connection with "actions arising out of the contract," the Legislature obviously intended Chapter 95 apply in all instances, including arbitration.

Similarly problematical is the impact on Section 95.11(4)(e), which is the limitations provision governing claims made under Chapter 517, the Florida Securities and Investor Protection Act. That section states:

> Actions other than for recovery of real property shall be commenced as follows:
>
> * * *
>
> (4) WITHIN TWO YEARS.—
>
> * * *
>
> (e) An action founded upon a violation of any provision of chapter 517, with the period running from the time the facts giving rise to the cause of action were discovered or should have been discovered with the exercise of due diligence, but not more than 5 years from the date such violation occurred.

Fla. Stat. § 95.11(4)(e). The sole purpose of Chapter 517 is to provide redress for harm arising out of securities transactions. *See e.g., Merrill Lynch, Pierce, Fenner & Smith v. Byrne*, 320 So. 2d 436, 441 (Fla. 3d DCA 1975)(Chapter 517 was "[p]rimarily designed to protect the naïve and unsophisticated investor against unscrupulous dealers.")(internal citations omitted). Although such claims are by no means exclusively raised in the arbitral forum, mandatory arbitration clauses required by FINRA in all customer agreements result in the vast majority of private Chapter 517 claims being heard in arbitration. The limitations period applicable to

private claims for violations of Chapter 517 is set forth only in Section 95.11(4)(e). It is not contained in Chapter 517. The specific inclusion of the limitations period in Chapter 95 for violations of Chapter 517 at least suggests an interest to make Chapter 95 applicable in arbitration because those claims are regularly brought in arbitration pursuant to binding arbitration agreements FINRA member firms are obligated to include in client agreements for brokerage services.[4] The District Court's myopic analysis renders meaningless the limitations period that the Legislature enacted for Chapter 517 claims brought in arbitration proceedings. Reading Section 95.11 in accordance with the other sections of Chapter 95 demonstrates that the Legislature must have intended "civil action or proceedings" to encompass arbitration proceedings.

2. The District Court erred when it ignored the purpose behind the enactment of Chapter 95.

If statutory language is ambiguous, so as to require the court to invoke principles of statutory construction, the court should look to the purpose behind the enactment of the statute to ascertain legislative intent. *Barco v. Sch. Bd. of Pinellas County*, 975 So. 2d 1116, 1123 (Fla. 2008)("Consideration must be accorded not only to the literal and usual meaning of the words, but also to their meaning and effect on the objectives and purposes of the statute's enactment.")

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[4] *See e.g., Shearson/Am Exp., Inc.*, 482 U.S. at 222 (discussing pre-dispute arbitration agreements between brokerage firms and their customers and determining federal statutory claims are subject to arbitration).

(citing *Fla. Birth Related Neurological Injury Compen. Assn. v. Fla. Div. of Admin. Hearings*, 686 So. 2d 1349, 1354 (Fla. 1997)); *Rollins*, 761 So. 2d at 299 ("[L]egislative history may be helpful in ascertaining legislative intent."); *Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc.*, 693 So. 2d 602, 606 (Fla. 2d DCA 1997)(analyzing legislative intent behind enactment of FDUTPA).

The law is well-settled that statutes of limitations:

> [w]hich are found and approved in all systems of enlightened jurisprudence, represent a pervasive legislative judgment that it is unjust to fail to put the adversary on notice to defend within a specified period of time and that the right to be free of stale claims in time comes to prevail over the right to prosecute them.

United States v. Kubrick, 444 U.S. 111 (1979)(internal citation omitted). Statutes of limitations and repose protect litigants from "having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise." *Id.*; *Fla. Dept. of Health and Rehab. Services v. S.A.P.,* 835 So. 2d 1091, 1096 (Fla. 2003); *Arvelo v. Park Fin. of Broward, Inc.*, 15 So. 3d 660 (Fla. 3d DCA 2009)(Statutes of limitations ensure legal remedies are pursued before "time dilutes memories, witnesses move to greener pastures, and parties pitch out (or 'delete,' in the electronic age) old records.").

Accordingly, under any circumstances in which claims are made and required to be proven through testamentary or documentary evidence, the policy

underlying statutes of limitations is applicable. The arbitration process was established to allow participants an alternative forum to pursue substantive claims available in court. The conclusion that the Legislature intended to deprive parties who submit to arbitration the rights afforded under Chapter 95 is predicated on the misconception that arbitration is something more than just an alternative forum for dispute resolution. It is not. Arbitration is substantively identical to court litigation in terms of rights asserted and claims and defenses adjudicated. Stated differently, this Court must conclude that faded memories, diligence in pursuing claims, and the difficulty created by loss of evidence, death, disappearance of witnesses and documents, were unimportant to the Legislature if parties chose an expedited and less expensive method of resolving their disputes though arbitration. Yet, the majority's ruling ignored this point, never confronting why the legislative intent underlying Chapter 95 would not apply equally to claims made in arbitration. In fact, there is no discussion or analysis whatsoever on the legislative intent underlying Chapter 95 in the District Court's opinion. By ignoring this well-settled principle of statutory construction, the District Court erred as a matter of law.

3. <u>The District Court erred when it failed to give due consideration to the import of subsequently enacted legislation.</u>

The "[l]egislature is presumed to be acquainted with judicial decisions on the subject concerning which it subsequently enacts a statute." *Ford v. Wainwright,* 451 So. 2d 471, 475 (Fla. 1984). Courts should, therefore, consider subsequently enacted legislation when determining the meaning of a statute. *See State, ex rel. Szabo Food Servs., Inc. of NC v. Dickinson,* 286 So. 2d 529 (Fla. 1973); *Gay v. Canada Dry Bottling Co., Inc. of Fla.,* 59 So. 2d 788, 790 (Fla. 1952)("The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation."). Here, the District Court all but dismissed the Legislature's reaction to this Court's holding in *Miele*, which clearly demonstrated its intent that "civil action(s)" include arbitrations.

In *Miele*, this Court considered whether Fla. Stat. § 768.73 (1991), applied to arbitration awards. 656 So. 2d at 470. Miele had obtained an arbitration award that included punitive damages. *Id.* The defendant issued two checks in satisfaction of the award – one to Miele and one to the State of Florida – in accordance with the statutory requirement of Section 768.73. *Id.* at 471. The statute provided in relevant part that, "In any *civil action*, an award of punitive damages shall be payable as follows ...." Fla. Stat. § 768.73.[5]

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[5] Chapter 768, also known as the tort reform statute, required 40% of all

When interpreting the statute, this Court considered the plain language of Section 768.73, the fifth edition of *Black's Law Dictionary's* definition of the word "action," and the language of other provisions in Chapter 768. 656 So. 2d at 471-72. When looking at the definition of "action" contained in the then current *Black's Law Dictionary*, this Court concluded it pertained only to proceedings filed in court. *Id.* In doing so, this Court noted that Chapter 768 included a provision for "remittitur" unless the claimant demonstrated to the "court" that the award was not excessive, and that other references in the statute were "foreign to the arbitration process." *Id.* Based on these conclusions, the majority held that the Legislature did not intend Chapter 768 to apply in arbitration and said, "If the Legislature determines that arbitration proceedings should be subjected to the same punitive damage limitations as court actions, then it can so indicate." *Id.* at 473.

Notably, Justices Grimes, Overton and McDonald dissented based on a broader analysis, which considered the historical development of the phrase "civil action," and the flaws evident in the majority's conclusion. *Id.* One such flaw was the procedural anomaly resulting from cases that originate in court where Chapter 768 would apply and subsequently move to arbitration as compared with those originating in arbitration where 768 would not apply. *Id.* at 474. Justice Overton recognized that the Legislature could not have intended such an illogical result. *Id.*

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punitive damage awards be paid to the State or 60%, if the payment was the result of a personal injury or a wrongful death. Fla. Stat. § 768.73.

That result though, would be unavoidable based on the narrow definition of "civil action" adopted by the majority. *Id*. Justice Overton also urged a more pragmatic interpretation of the term "civil action" – taking into consideration the historical use of the phrase in prior versions of *Black's Law Dictionary* (3d ed. 1933). In the third edition, *Black's* defined civil actions to "include all actions which cannot be legally denominated 'criminal cases' and that are 'designed for the recovery and vindication of a civil right or redress of some civil wrong between adversary parties'." *Id.* Justice McDonald pointed out in his dissent the absence of any logical reason for treating punitive damages in an award rendered by a judge or jury different from one issued by an arbitrator. *Id.*

Subsequent amendment by the Legislature of Chapter 768 revealed both the legislative intent behind the statute as well as the validity of the dissenting Justices' analysis. *See* Fla. Stat. § 768.737 (1995). Section 768.737 made clear the Legislature's intent that the punitive damages provisions analyzed in *Miele* were applicable to arbitrations.[6] *Id*. (stating in relevant part "[w]here punitive damages

[6] Respondents argued that if the Legislature had wanted Chapter 95 to apply to arbitrations, it would have written the statute differently and stated "arbitrations *or arbitration claims* shall be commenced …." (V2T14 p.14) (emphasis in original). Respondents cited to *Miele* and quoted the majority's conclusion that: "If the legislature determines that arbitration proceedings should be subjected to the same punitive damages limitations as court actions, then it can so indicate." (V2T14 p.13) (citing *Miele*, 656 So. 2d at 473). Respondents relied on *Miele* but ignored the fact that, subsequent to the *Miele* decision, the Legislature did so indicate by enacting Section 768.737.

are available as a remedy in an arbitration proceeding, ss. 768.72, 768.725 and 768.73 apply."). Indeed, the language of Section 768.737 directly contradicts with *Miele's* holding. This act by the Legislature was a clear acceptance of the majority's invitation to "indicate" its disagreement with the majority's holding. *Jones v. ETS of New Orleans*, 793 So. 2d 912, 917 (Fla. 2001)("[T]he legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version."). Indeed, in the aftermath of the legislative response to *Miele*, the Fifth District Court of Appeal called *Miele* into doubt, noting, "It is clear that the Legislature's enactment of Section 768.737 indicates that the Legislature has a different view from that adopted by the Court in *Miele* regarding the issue whether arbitration proceedings are 'civil actions' within the meaning of Section 768.73." *Martin Daytona Corp. v. Strickland Constr. Services*, 941 So. 2d 1220, 1225 (Fla. 5th DCA 2006).

While the District Court did not quarrel with the outcome of *Martin Daytona* (V2T18 p.8), it characterized the subsequent enactment of Section 768.737 as nothing more than a legislative clarification of a statutory provision that was previously unclear.[7] The District Court reasoned that if the Legislature was

[7] However, when enacting Section 768.737, the House of Representatives Committee on Judiciary Analysis explicitly noted the *Miele* opinion in its conference reports so, clearly, the Legislature was aware of the opinion. *See* Fla. H. Jud. Comm., *Civil Actions (Litigation Reform)*: Analysis on Fla. HB 775, at 7 (February 12, 1999). Further, Section 26 of House Bill 775, which actually created

"concerned that the historic distinction between arbitrations and civil actions was leading to unjust results," it "could have gone much further" by amending Chapter 95 when it amended Chapter 768. The District Court's conclusion that the Legislature did not "go far enough" to make its intent clear merely by amending Chapter 768 is unreasonable given its contemporaneous acknowledgement that Chapter 95 was not at issue in *Miele*. (V2T18 p.6) The notion that it would have nonetheless contemplated amending Chapter 95 anyway does not follow. Chapter 95 was simply not on the Legislature's radar. Nor was, for instance, the question of whether Chapter 517 applies in arbitration proceedings or, for that matter, any of the numerous other statutes that contain the term "action" or "civil action."

Moreover, under the principle of construction formulated by the District Court, courts must wait until the statute at issue is amended in order to discern legislative intent. This is contrary to existing rules of construction – it renders meaningless the principle of statutory construction by which courts may rely on the language of other statutes to "interpret" legislative intent when the statute at issue is unclear. Therefore, the District Court's reliance on *Miele* and disregard of the Legislature's subsequent abrogation of that holding was error.

768.737, was *added* to the house bill after the committee issued its first report. *See* Fla. H. Jud. Comm., *Civil Actions (Litigation Reform)*: Final Analysis on Fla. HB 775, at 5, 18 (June 2, 1999). This confirms the Legislature enacted Section 768.737 specifically to abrogate the contrary holding in *Miele*.

4. <u>The District Court erred by construing Chapter 95 in a manner inconsistent with the Florida Arbitration Code.</u>

Another error by the District Court was the failure to interpret Chapter 95 in a manner that is consistent with other statutes. *See Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008)("The doctrine of *in pari materia* is a principle of statutory construction that requires that statutes relating to the same subject or object be construed together to harmonize the statutes and to give effect to the Legislature's intent."); *Heart of Adoptions, Inc.,* 963 So. 2d at 199 ("[r]elated statutory provisions must be read together to achieve a consistent whole ...."). When reaching its holding, the District Court reasoned the Legislature could have but did not include the term "arbitration" in Chapter 95 or defined "proceeding" in the statute to encompass arbitration proceedings. (V2T18 p.10). However, the Florida Legislature, in fact, refers to arbitrations as **"arbitration <u>proceedings</u>"** in the Florida Arbitration Code, which the District Court recognized was enacted in 1957, *prior* to Chapter 95. *See* Fla. Stat. § 682.03(4) ("[t]he court may stay an *arbitration proceeding* **....**"); Fla. Stat. § 682.07 ("A party has the right to be represented … at any *arbitration proceeding* …. A waiver thereof prior to the *proceeding* … is ineffective.") (emphasis added). (V2T18 p.10)

The District Court employed flawed logic when it concluded that since the Florida Arbitration Code pre-dated Chapter 95, the Legislature must not have intended Florida's statute of limitations to apply in arbitration. (V2T18 p.10) The

District Court ignored the fact that the Legislature *already* referred to arbitrations as "proceedings" when Chapter 95 was enacted and considered the plain and ordinary meaning of the word "proceeding" to encompass arbitration proceedings when it chose to include it in the statute. *Fla. Dept. of Envtl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1266 (Fla. 2008)("[t]o discern legislative intent, courts must consider … *the state of law already in existence on the statute.*") (emphasis in original); *Sheffield v. Davis*, 562 So. 2d 384, 386 (Fla. 2d DCA 1990)("[O]ne must assume that the legislature knew the plain and ordinary meanings of words when it chose to include them in a statute."). This inclusion in Chapter 95 of the term "proceeding," *in addition to* "civil action," could only have been intended to include arbitrations.

5. The District Court erred when it limited the express terms of Chapter 95.

Courts are "[p]recluded from construing an unambiguous statute in a way which would extend, *modify, or limit,* its express terms or its reasonable and obvious implications. To do so would be an abrogation of legislative power." *Donato,* 767 So. 2d at 1150-51 (emphasis added); *American Bankers Life Assur. Co. of Fla. v. Williams,* 212 So. 2d 777, 778 (Fla. 1st DCA 1968). Here, the District Court erred as a matter of law when it interpreted the term "proceeding" narrowly in order to exclude arbitrations from its ambit.

Had the Legislature wanted to limit the scope of the term "proceeding" to exclude arbitration proceedings, it could have inserted the word "court" or "judicial" in front of "proceeding," but did not. *Williams*, 212 So. 2d at 778 ("Had the legislature intended the statute to import a more specific and definite meaning, it could easily have chosen words to express any limitation it wished to impose."). Indeed, analysis of the District Court's reasoning exposes a critical flaw. On one hand, the District Court concludes that the failure to specifically use the term "arbitration" demonstrates a desire to exclude it. Then, at the same time, the District Court *inserts* the word "court" before "proceeding," significantly rewriting the statute, in order to reach an otherwise unsupported conclusion. By construing the term "proceeding" narrowly to mean a "court proceeding" and limit the statute's scope, the District Court erred as a matter of law. *Cohen*, 696 So. 2d at 438-39 ("To read these qualifying terms into the statute … would be to rewrite the statute and to limit its terms in a manner contrary to its plain meaning."). (V2T18 p.10)

Further, a basic principle of statutory interpretation is that statutes should be construed "so as to avoid rendering superfluous" any statutory language. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63 (2002) ; *Survivors Charter Schools, Inc.,* 3 So. 3d at 1233. (It is an "elementary principle of statutory construction that significance and effect must be given to every word, phrase, sentence, and part of

the statute … words in a statute should not be construed as mere surplusage."). By interpreting the term "civil action" as "limited to proceedings filed in court" (V2T18 p.7) and the term "proceeding" to mean only "court proceedings," the District Court has rendered the phrase "or proceeding" simultaneously redundant *and* superfluous. Stated otherwise, under the District Court's interpretation, the term "civil action" means court proceedings and the term "proceeding" likewise means court proceedings. This reasoning is unsound and inconsistent with established principles of statutory construction. Reversal is therefore required.

6. Reliance on conclusions reached by courts in other states interpreting entirely different statutory language was misplaced.

While it may be instructive to refer to other courts' statutory interpretations, such comparisons have limited value when the statute at issue is unique. *See e.g., Spartan Industries, Inc. v. Starkey*, 271 Minn. 496 (Minn. 1965)("The dispute involves a very close question of statutory interpretation not previously decided and made more difficult by comparison of the unique language [ ], with similar provisions of other states which are relatively uniform in wording and substance."); *OCA v. Christie*, 415 F.Supp.2d 115, 128 (D. Conn. 2006)("The cases from other states make for problematic comparisons because they involve statutes and modes of statutory interpretation that are different from those found in Connecticut."); *Stone v. State*, 43 Md.App.329, 332 (Md. Spec. App. 1979)

(Observing that the issue was one of first impression and noting different results had been reached in other states, largely as a product of statutory interpretation.).

The District Court stated it is "[i]n agreement with the opinion recently expressed by the Washington Supreme Court in Broom" (V2T18 p.12), a 5-to-4 split-ruling that concluded "arbitration proceedings" are not "actions" under Washington's statute of limitations.[8] *Broom v. Morgan Stanley DW Inc*., 2010 WL 2853917, *7 (Wash. 2010) (Madsen, Owens, Fairhurst and Johnson, LL. Dissenting). Unfortunately, the District Court failed to recognize that Washington's statute of limitations differs materially from Chapter 95 in that it relates only to "actions." *Id*. Respondents likewise ignored this distinction below when they cited to statutes from other jurisdictions, all of which are limited to "suits," "actions" or "civil actions," and thus differ materially from Chapter 95.[9]

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[8] The Washington State House of Representatives recently passed by unanimous vote a Bill to amend Washington's arbitration code to state "[a] claim sought to be arbitrated is subject to the same limitation of time for the commencement of actions as if the claim had been asserted in court." H. 2449, 62d Leg., 2012 Reg. Sess. (Wash. 2012). The Bill is currently awaiting approval by the state Senate.

[9] *See* Wash. Rev. Code Ann. § 4.16.005 (West 2010) ("*[A]ctions* can only be commenced within ...."); Conn. Gen. Stat. Ann. §§ 52-577, 52-576 (West 2010) (referring only to "action(s)"); Tex. Limitations of Personal Actions Code Ann. § 16.004(a) (West 2010)("A person must bring *suit* on the following *actions* ...."); Ohio Rev. Code Ann. § 2305.03 (West 2010)("[a] *civil action* may be commenced ..."); Ariz. Rev. Stat. § 12-550 (West 2010)(referring only to "actions"); Mich. Comp. Laws Ann. § 600.5807 (West 2010)(referring only to "actions"); N.C. Gen. Stat. Ann. § 1-15 (West 2010)("*Civil actions* can only be commenced ..."); Mass. Gen. Laws. Ann. Ch. 260 § 2 (West 2010)(referring only to "actions"); 14 Me.

(V2T14 pp.26-31) Similarly, the District Court erred by relying on those states' statutes that expressly include the term "arbitration" in their limitations provisions because those statutes also materially differ. New York's and Georgia's statutes of limitations explicitly permit arbitrators to determine whether claims are time-barred.[10]

One statute the District Court seemingly ignored altogether was the one most analogous to Chapter 95. Pennsylvania's statute of limitations states:

> (a) General rule. – An action, ***proceeding*** or appeal must be commenced within the time specified in or pursuant to this chapter unless, in the case of a ***civil action or proceeding***, a different time is provided ….

42 Pa. Consol. Stat. Ann. § 5501 (West 2010) ("Pa. Chapter 55")(emphasis added). Like Chapter 95, Pa. Chapter 55 applies to "civil action(s) or proceeding(s)." *Id.*[11] In *Dailey v. LeggMason Wood Walker, Inc.*, 2009 WL 4782151 (W.D. Pa. 2009),

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Rev. Stat. Ann. § 752 (West 2010)("All *civil actions* shall be commenced …"); Minn. Stat. Ann. § 541.05 (West 2010)("the following *actions* shall be commenced …").

[10] *See* N.Y. Arbitration Law § 7502(b) (West 2010)("[A] party may assert the limitation as a bar to the arbitration on an application to the court …. The failure to assert such bar by such application shall not preclude its assertion before the arbitrators …."); Ga. Code Ann. § 9-9-5(b) (same).

[11] Unlike Chapter 95, Pa. Chapter 55 does not reference "civil actions or proceedings" collectively as "actions." Rather, the entire phrase "civil action or proceeding" is referenced repeatedly throughout Pa. Chapter 55. *See e.g.*, 42 Pa. Consol. Stat. Ann. §§ 5501(a), 5521(c), 5522(a)(1)-(3), (b).

the court considered a FINRA panel's dismissal of time-barred claims under Pa. Chapter 55. When confirming the award, the Court stated:

> Although Plaintiff insists that statutes of limitations do not apply to arbitration cases, the law is to the contrary … the arbitration panel's decision was well supported in the law.

Id. at *3 (Relying on Fourth Circuit case law, FINRA/NASD materials, and "a plethora of FINRA/NASD arbitration awards dismissing claims based on statutes of limitations"). Pennsylvania state courts have also determined Pa. Chapter 55 is applicable in arbitration proceedings. *See Keeler v. Dept. of Trans*., 56 Pa. Cmwlth. 236, 238 (Pa. Cmmw. 1981)("The Act establishes a 12-year statute of limitations for certain disputes … and states in pertinent part: No action ***(including arbitration proceedings)*** whether in contract, in tort, or otherwise to recover damages ….")(insertion in original)(emphasis added); *Boyle v. State Farm Mutual Auto. Ins. Co.*, 310 Pa. Super. 10, 23 (Pa. Super. 1983)(confirming panel's award that applied Pa. Chapter 55 and determined the arbitration claims were timely). Accordingly, courts construing statutes of limitations ***analogous*** to Chapter 95 hold they apply in arbitration proceedings. To the extent it looked to the courts of other states for guidance, the District Court should at least have considered Pennsylvania's statute since it was the one most analogous to the statute of limitations it was charged with interpreting. Instead, the District Court

focused on statutes so materially different from Chapter 95 that the opinions interpreting them are virtually meaningless for purposes of this Court's analysis.

7. The District Court erred when it invoked a statutory construction of Chapter 95 that renders it unconstitutional.

If a statute is susceptible to more than one reasonable construction, courts must choose an interpretation that avoids raising constitutional problems. *Fla. Bar v. Sibley,* 995 So. 2d 346, 350 (Fla. 2008)("[C]ourts have a duty to construe a statute in such a way as to avoid conflict with the Constitution."); *State v. Presidential Women's Center*, 937 So. 2d 114 (Fla. 2006)("[W]hen two constructions of a statute are possible, one of which is of questionable constitutionality, the statute must be construed so as to avoid any violation…."); *State v. Lick*, 390 So. 2d 52, 53 (Fla. 1980)("[E]ven where the statute is reasonably susceptible of two interpretations, one of which would render it invalid and the other valid, we must adopt the constitutional construction."); *Dept. of Children and Families v. D.B.D.*, 42 So. 3d 916, 920 (Fla. 4th DCA 2010)(Courts have a "duty to interpret a statute so that it withstands constitutional scrutiny.").

Further, when a statute may be interpreted to abridge long-held individual rights, courts will not interpret the statute to make the change unless the legislature clearly stated its intent to do so. *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge*, 36 U.S. 420, 650 (1837)(The Legislature's acts

"[o]ught never to be so construed, as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit no doubt, and to show a clear design to effect the object."); *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001)(Courts "[w]ill not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.").

To construe Chapter 95 as inapplicable to claims in arbitration creates an involuntary waiver of long-held, vested property rights despite the absence of any legislative intention to do so. By contrast, the correct interpretation of Chapter 95 –that it applies to claims made in arbitration proceedings– creates no constitutional problems and is aligned with the policies underlying the passage of Chapter 95.

C. The District Court's Interpretation Of Chapter 95 Renders The Statute Unconstitutional.

1. Depriving RJFS of the property rights created by Chapter 95 without a rational basis for doing so is violative of its due process rights.

The right to due process of law encompasses both procedural and substantive due process. *Haire v. Fla. Dept. of Agri. and Consumer Services,* 870 So. 2d 774, 781 (2004); Fla. Const. art. I, § 9. Substantive due process protects "the full panoply of individual rights from unwarranted encroachment by the government." *Id*. Procedural due process ensures fair treatment through proper administration of justice where substantive rights are at issue by requiring fair notice and a reasonable opportunity to be heard. *Id*. at 787. Once "the defense of

the statute of limitations has accrued, it is protected as a property interest just as the plaintiff's right to commence an action is a valid and protected property interest." *Wiley v. Roof*, 641, So. 2d 66, 68 (Fla. 1994). A statute of limitations defense may only be "knowingly, intelligently and voluntarily" waived. *Tucker v. State*, 459 So. 2d 306, 309 (Fla. 1984); *Rembert v. State*, 476 So. 2d 721, 722 (Fla. 1st DCA 1985)(same); *Pritchett v. Kerr*, 354 So. 2d 972 (Fla. 1st DCA 1978).

To the extent Chapter 95 is no longer available to parties in arbitration, it violates RJFS's due process rights under Article I, Section 9 of the Florida Constitution because it deprives it of an affirmative defense and thus operates as an involuntary waiver of a protected right. *Agency for Health Care Admin v. Assoc. Ind. of Fla., Inc.*, 678 So. 2d 1239, 1251 (Fla. 1996)(Recognizing that "any abolition of an affirmative defense must satisfy the notions of fairness dictated by our due process jurisprudence."). The test to determine whether a statute violates due process rights is whether it "bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety or general welfare and is not discriminatory, arbitrary, or oppressive." *Chicago Title Ins. v. Butler*, 770 So. 2d 1210, 1215 (Fla. 2009); *Haire,* 870 So. 2d at 782; *B.S. v. State*, 862 So. 2d 15, 19 (Fla. 2d DCA 2003).

Although the District Court's interpretation of Chapter 95 deprives RJFS of a protected property right, none of the criteria necessary to sustain that deprivation

exist. It furthers no interest in the protection of the health, safety, morals or general welfare of the public and, in fact, is contrary to the purpose and policy behind statutes of limitations. Simply put, there is no legitimate governmental interest in treating litigants differently by affording certain rights to those whose dispute is filed in court and depriving others of the same rights merely because the dispute is filed in an arbitral forum.[12]

2. Federal law preempts the District Court's construction of Chapter 95 in that it interferes with the accomplishment and execution of the full purposes and objectives of Congress and the Federal Arbitration Act.

Under the Supremacy Clause, a federal law may expressly or impliedly preempt state law. *West Fla. Regl. Med. Center, Inc. v. See*, 2012 WL 87282, *13 (Fla. 2012). A state law is impliedly preempted if it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *AT&T Mobility LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *State v. Harden,* 873 So. 2d 352 (Fla. 3d DCA 2004), *aff'd,* 938 So. 2d 480 (Fla. 2006). In any preemption case, the court's task is to determine whether the state law is consistent with the "structure and purpose of the [federal] statute as a whole" by "looking to

[12] Chapter 95, as interpreted, likewise violates the equal protection clause. Fla. Const. art. 1 § 2; *see Lasky v. State Farm Ins. Co.*, 296 So. 2d 9, 18 (Fla. 1974)("In order to comply with the requirements of the Equal Protection clause, statutory classifications must be reasonable and non-arbitrary, and all persons in the same class must be treated alike.").

the provisions of the whole law, and to its object and policy." *Harden,* 938 So. 2d at 486. Further, the general presumption that exists against preemption is not implicated when the area of law analyzed is subject to significant federal presence. *770 PPR, LLC v. TJCV Land Trust*, 30 So. 2d 613, 617 (Fla. 4th DCA 2010).

The Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*., was "enacted pursuant to the commerce clause of the United States Constitution and supersedes inconsistent state law." *Cassedy v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 751 So. 2d 143, 146 (Fla. 1st DCA 2000); *see Concepcion,* 131 S.Ct. at 1748. Under the FAA:

> [A] contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract … or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract … shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2. The FAA applies to every arbitration contract "involving interstate commerce." *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003); *Perry v. Thomas*, 482 U.S. 483, 490 (1987); *Hialeah Automotive, LLC v. Basulto*, 22 So. 3d 586, 589 (Fla. 3d DCA 2009). Indisputably, arbitration agreements between broker-dealers and their clients are contracts that "involve interstate commerce" and, accordingly, the FAA applies to the Parties' contract. *See e.g., McMahon*, 482 U.S. at 225 (applying FAA when analyzing claims brought in arbitration pursuant to agreement in contract for securities brokerage services). Further, the

law surrounding arbitration agreements that involve interstate commerce is subject to a significant federal presence – specifically, the FAA. *Perry*, 482 U.S. at 489 ("The effect of [9 U.S.C. § 2] is to create a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.") Therefore, the general presumption that exists against preemption is not implicated in this case. *TJCV Land Trust*, 30 So. 2d at 617.

The FAA "[w]as intended to reverse centuries of judicial hostility to arbitration agreements by placing arbitration agreements upon the same footing as other contracts" and it "establishes a federal policy favoring arbitration." *McMahon*¸ 482 U.S. at 225 (internal citations omitted); *Concepcion*, 131 S.Ct. at 1745. This liberal federal policy favoring arbitration of disputes is "notwith-standing any state substantive or procedural policies to the contrary." *Concepcion,* 131 S.Ct. at 1749. The FAA mandates that "[t]he court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement." 9 U.S.C. § 4. The obligation of courts under the FAA to enforce arbitration agreements in accordance with their terms is not diminished when parties raise claims founded on statutory rights. *McMahon*¸ 482 U.S. at 225 (holding that statutory claims under federal securities laws and RICO are arbitrable). It logically follows that the federal policy favoring arbitration applies equally to statutory claims *and* statutory defenses. *Id*. Indeed, federal courts are

clear that neither the arbitrators' lack of formal judicial instruction on the law nor the streamlined procedures of arbitration entail any consequential restriction on substantive rights. *Id*. at 231. Therefore, "[w]hen a state law prohibits outright the arbitration of a particular type of claim, the analysis is straightforward: The conflicting rule is displaced by the FAA." *Concepcion,* 131 S.Ct. at 1747. Additionally, when a rule of law is applied in "a fashion that disfavors arbitration," it "creates a scheme inconsistent with the FAA" and is likewise preempted. *Id.*

The District Court erred when it held that the only way parties in arbitration may obtain rights afforded by Chapter 95 is through the "express inclusion" of the statute in a contractual agreement to arbitrate. The requirement imposed by the District Court not only prohibits assertion of a statutory defense in arbitration, it conflicts with the FAA by creating a scheme that disfavors arbitration. The District Court's ruling stands as an obstacle to the congressional objectives underlying the FAA – that arbitration be liberally favored – by creating, in the first place, a chilling effect on the desirability of arbitration as an alternative forum for resolving disputes. The District Court's ruling has created critical uncertainty as to what claims and defenses contracting parties are actually *giving up* when they agree to arbitrate. If parties now must "expressly include" Chapter 95 in their agreements in order for it to apply, what other substantive claims and defenses must they "expressly include" in order to prevent against involuntary waiver of

those rights? Under the District Court's analysis, the answer is – anything that does not expressly contemplate "arbitration" in its statutory terms. Contracting parties will not want to arbitrate claims arising from their contracts in the face of such uncertainty. And, no one will want to agree to arbitrate in Florida knowing they will be subject to claims and, therefore, potential liability in perpetuity in the absence of the protections afforded by Chapter 95.

Further, when concluding the Parties did not expressly include Chapter 95, the District Court reasoned "any doubts are properly resolved against the drafter." (V2T18 p.12) That conclusion, however, failed to recognize that doubts or ambiguities in an arbitration agreement must be resolved in favor of arbitration. *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983)(any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."); *Perdido Key Island Resort Dev., L.L.P. v. Regions Bank*, 2012 WL 104464, *2 (Fla. 1st DCA 2012)(applying "the rule of maximum breadth so that arbitration clauses are given the 'broadest possible interpretation in order to accomplish the purpose of resolving controversies out of court'."); *Grektorp v. City Towers of Florida, Inc.*, 644 So. 2d 613, 614 (Fla. 2d DCA 1994). Because the District Court's ruling stands as an obstacle to the congressional objectives underlying the FAA and policy favoring arbitration, reversal is required.

D. The District Court's Holding Leads To Absurd Results The Legislature Would Never Have Intended.

Courts are not to interpret a statute in a manner that results in absurd consequences. *ContractPoint Florida Parks, LLC*, 986 So. 2d at 1270 ("We have long held that the Court should not interpret a statute in a matter resulting in unreasonable, harsh, or absurd consequences."); *State v. Burris*, 875 So. 2d 408, 410 (Fla. 2004)(A statute's plain and ordinary meaning controls only if it does not lead to unreasonable, absurd, or untenable results.). The District Court's interpretation of Chapter 95 leads to absurd consequences and paradoxes that the Legislature clearly did not intend.

1. Concluding parties in arbitration are entitled only to the legal protections and rights expressly included in a contract leads to absurd results.

If the District Court's reasoning is correct, no statute applies in arbitration, unless the statute specifically says it does. Instead, parties must "expressly include" in their contract each provision of the state's substantive law if they want it to fall within the scope of their agreement.[13] From a practical standpoint, how do parties comply with that rule? The District Court has essentially held it is insufficient for parties to state "Florida law applies" in order to incorporate Chapter 95 because Chapter 95 is inapplicable under Florida law. (V2T18 p.12)

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[13] *But see, Von Hoffman v. City of Quincy*, 71 U.S. 535 (1866)("[T]he laws which subsist at the time and place of making of a contract, … enter into and form a part of it as if they were expressly referred to and incorporated in its terms.").

Must the parties then expressly list all Florida statutes they wish to bring within the scope of their agreement in order to preserve those rights for arbitration? Does that mean, in the absence of "express inclusion," the parties may only arbitrate common law claims but must raise statutory claims in court? Or, must the common law claims also be expressly included in the agreement? These questions illustrate the absurdity resulting from the District Court's "express inclusion" rule.

2. The District Court's holding eliminates claims under the Florida Securities and Investor Protection Act in arbitration.

The Parties in this case are directly affected by the absurd consequence discussed above. Respondents below asserted a claim under Chapter 517 including a claim for attorney's fees. (V1T1 Ex. A p.23). They did so despite the fact that the statute permits only "actions" for rescission and "actions" for damages. *See* Fla. Stat. §§ 517.211(3), (4). Applying the District Court's reasoning, claims pursuant to Chapter 517 are no longer viable in arbitration unless the Parties "expressly include" the statute in their arbitration contract. Eliminating the applicability of Chapter 517 when the vast majority of claims made under it are brought in arbitration is patently absurd. The very purpose of that statute is to protect the public from harm in connection with the sale of securities. *Edwards v. Trulis*, 212 So. 2d 893, 895 (Fla. 1st DCA 1968); *Byrne*, 320 So. 2d at 441; *O'Neill v. State*, 336 So. 2d 699, 700 (Fla. 4th DCA 1976). It is inconceivable that the

Legislature intended to provide the rights and benefits of Chapter 517 to parties in "court actions" or "court proceedings" only, absent express inclusion of those rights in their arbitration contract.

Expressly including Chapter 517 would create a different yet equally troublesome scenario. Arbitrators in that case would be free to adjudicate the substantive Chapter 517 claims but would be unable to apply the limitations period governing those claims because it is set forth in Chapter 95. The argument that Chapter 517 creates some substantive rights that remain available in arbitration proceedings, while other substantive rights are stripped away (like the right to assert the limitations provision governing such claims), merely because of the forum in which they are raised, is clearly inconsistent with what the Legislature intended and defies common sense. To permit relief made available by statute but deny RJFS the benefit of a corresponding statutory defense is the sort of harsh and absurd result the judiciary has proscribed and, more fundamentally, is patently contrary to legislative intent.

3. <u>The contemporaneous elimination of Sections 95.011 and 95.03 in arbitration creates an irreconcilable conundrum.</u>

The District Court's holding not only renders Section 95.03[14] meaningless in the arbitral forum, it presents an irreconcilable conundrum. If correct, this Court

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[14] Fla. Stat. § 95.03 ("Any provision in a contract fixing the period of time within which an action arising out of the contract may be begun at a time less than

must now conclude the Legislature intended arbitration claims to remain viable *ad infinitum* and, at the same time, that it intended to allow the unrestricted shortening of limitations periods, even to the point that the filing of a timely claim might be made impossible. These two diametrically opposed concepts cannot be harmonized.

4. The District Court's construction of Chapter 95 precipitates inconsistent application of federal and state statutes of limitations.

Federal and state statutes of limitations share identical legislative intent and policy – to prevent the filing of stale claims once memory has faded and evidence has disappeared. Common law and state and federal statutory claims are regularly raised in arbitration. As a general rule, Chapter 95 does not apply to federal claims, which are governed by federal limitations periods. Arbitrators may presumably continue to dismiss untimely federal claims.[15] They would, however, continue to hear stale state law claims. Such an absurd result could not be either what the state or federal legislatures intended.

Here, the Respondents raised claims under Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78(j), and corresponding SEC Rule 10b-5 as well as common law and state statutory claims. (V1T1 Ex. A. pp.17-18, 22) They

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that provided by the applicable statute of limitations is void."); *see supra*, IV.B.1.

[15] Finding otherwise — that is, that the District Court's decision implicates a prohibition on the application of federal statutes of limitations — would violate the Supremacy Clause of the United States Constitution. *See supra* C.2.

did not, however, seek declaratory relief from the Circuit Court regarding the application of the federal statute of limitations to their federal claims. (V1T1 p.6) Thus, if and when the arbitration proceeding resumes, the Parties will undoubtedly assert that argument (*i.e.*, that the federal claims are time-barred) and nothing will prevent the arbitrators from applying the federal limitations period (or federal statute of repose) to Rule 10b-5 claims.[16] Thus, an inconsistent application of state and federal statutes of limitations will likely arise in this very proceeding if this Court affirms.

Another anomaly is inevitable. "[W]hen Congress has failed to provide a statute of limitations for a federal cause of action, a court 'borrows' or 'absorbs' the local time limitation most analogous to the case at hand." *Gilbertson*, 501 U.S. at 355 (1991) (discussing state-borrowing doctrine); *Harrison v. Digital Health Plan*, 183 F.3d 1235, 1238 (11th Cir. 1999)("There is a longstanding presumption that state law will be the source of the missing federal limitations period."). In such cases, "[t]he court is nonetheless applying federal law" because "[i]n borrowing the state statute of limitations to impose a time limitation on the federal cause of action, the federal court is 'closing the gap' left by Congress in order to

[16] Claims for violations of Rule 10b-5 must be commenced within one year after discovery of facts constituting the violation and no later than three years of the violation. *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991); *Fischler v. AmSouth Bancorporation*, 971 F. Supp. 533, 536 (M.D. Fla. 1997).

fashion a body of federal common law to supplement the federal statutory cause of action." *Harrison*, 183 F.3d at 1238-39. Thus, when federal claims are raised in Florida arbitration proceedings, and those claims carry no specific limitations period, the state-borrowing doctrine requires application of the most analogous limitations period in Chapter 95.[17] *Id*. In such cases, arbitrators will be forced to apply Chapter 95 notwithstanding its "inapplicability" in arbitration. *Harrison*, 183 F.3d at 1238-39. The Legislature could not have intended this absurd result.[18]

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[17] Limited exceptions to the state borrowing doctrine exist. *Gilbertson*, 501 U.S. at 356. One such exception is "when a rule found elsewhere in federal law clearly provides a closer analogy than available state statutes, and when the federal policies at stake and the practicalities of litigation make that rule a significantly more appropriate vehicle for interstitial lawmaking." *Id*.

[18] Limitations periods from Chapter 95 are regularly borrowed and applied to certain claims under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §1001, *et seq*., since the federal statute does not provide a limitations period. *See e.g*., *Hoover v. Bank of Am. Corp*., 386 F. Supp. 2d 1326, 1333 (M.D. Fla. 2003); *Gray v. Greyhound Ret. and Disability Trust*, 730 F.Supp. 415, 419 (M.D. Fla. 1990); *Watson v. Paul Revere Life Ins. Co*., 2011 WL 5025120, *3 (S.D. Fla. 2011). Because ERISA claims are regularly raised in arbitration proceedings, application of the state-borrowing doctrine to determine the timeliness of those claims will lead to an absurd result in light of the District Court's ruling. *See e.g*., *In re LaManna* (NASD 99-01062 April 15, 2004); *In re Schroeder* (NASD 05-04208 August 8, 2006); *In re Fornell*, (FINRA 10-02526 January 7, 2012); *In re Babylon Repair Service, Inc*. (FINRA 09-06877 January 11, 2012).

E. The District Court's Holding Is Contrary To Binding Precedent.

1. The laws subsisting at the time and place of contracting form a part of the contract as though expressly incorporated therein and, regardless, the Parties incorporated Chapter 95 in their contract.

Parties may determine the scope of their agreements and "agree to limit the issues subject to arbitration." *Concepcion,* 131 S.Ct. at 1748; *Baycare Health System, Inc. v. Agency for Health Care Admin.*, 940 So. 2d 563 (Fla. 2d DCA 2006); *Refinery Employees Union of Lake Charles Area v. Continental Oil Co.*, 268 F.2d 447, 453 (5th Cir. 1959)("[P]arties are free to bargain as to the width of the coverage of an arbitration clause…."). Indeed, "[n]othing prevents a party from ***excluding*** statutory claims from the scope of an agreement to arbitrate." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc*. 473 U.S. 614, 628 (1985)(emphasis added). However, "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Id.*; *McMahon*, 482 U.S. at 229.

Unless the parties agree to exclude substantive law from their contract, the laws that subsist at the time of making the contract enter into and form the contract as if expressly incorporated therein. *Von Hoffman*, 71 U.S. at 550; *County Commiss. of Columbia County v. King*, 13 Fla. 451, 475 (Fla. 1869); *see also*, *Bd. of Pub. Instr. of Dade County v. Town of Bay Harbor Islands*, 81 So. 2d 637, 643

(Fla. 1955)("The Constitution and laws of this State are a part of every contract."). Therefore, absent a specific exclusion in the arbitration agreement of Chapter 95, the statute of limitations will apply as a matter of law. *See Marschel v. Dean Witter Reynolds, Inc.,* 609 So. 2d 718, 721 (Fla. 2d DCA 1992). This well-settled principle is consistent with the federal policy resolving all doubts as to the scope of an arbitration agreement in favor of arbitration. *Concepcion,* 131 S.Ct. at 1745.

The Client Agreements at issue in this matter specifically state:

> (d) Nothing in this agreement shall be deemed to limit or waive the application of any relevant state or federal statute of limitation, repose or other time bar. Any claim made by either party to the agreement which is time barred for any reason shall not be eligible for arbitration.
>
> * * *

(V1T1 Ex. H) The agreement does <u>not</u> exclude any substantive statutory law from its scope. On the contrary, it affirmatively <u>preserves</u> the statute of limitations so that there can be no misconception. Indeed, reading the contract as a whole,[19] the Parties' intent that Chapter 95 would apply to the arbitration proceeding is indisputable:

> This agreement and any accounts opened hereunder shall be construed, interpreted and the rights of the Parties shall be determined in accordance with the internal laws of the State of Florida ….

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[19] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 59 (1995) (Reading the Parties' contractual provisions separately and then as a whole to determine whether they agreed to exclude punitive damages claims from arbitration.).

(V1T1 Ex. H) Therefore, even if substantive law were not already incorporated as a matter of law, the Parties' contract removes any doubt, clearly stating that it shall be construed, interpreted and the *rights of the Parties* shall be governed by Florida law. *Id*. Under Florida law, statutes of limitations are substantive and not merely procedural law. *Fulton County Admin. v. Sullivan*, 753 So. 2d 549, 553 (Fla. 1999)("[S]tatutes are to be treated as substantive law…."); *Merkle v. Robinson*, 737 So. 2d 540, 541 (Fla. 1999). Given that Chapter 95 is substantive, that it is included in the contract as a matter of law, that the contract specifically states that all statutes of limitations are preserved, and that statutory claims form a part of the action, the District Court's conclusion lacks both legal and factual support.[20] Indeed, the Parties' broad arbitration agreement does not specifically exclude Chapter 95 and, therefore, resolving any ambiguities in favor of arbitration, it applies as a matter of law. *See Mastrobuono*, 514 U.S. at 62. Accordingly, the District Court erred by creating an "express inclusion" rule rather than recognizing

[20] The Parties' contract also states that "[t]he determination of whether any such claim was timely filed shall be by a court having jurisdiction, upon application by either party." (V1T1 Ex. H) This provision merely provides the Parties with an option to apply to a court to determine whether the claims raised in the arbitration proceeding were timely, as Respondents did in the proceeding below. It answers *who* will decide whether the arbitration claims are time-barred in the event that a statute of limitations defense is raised and is irrelevant to whether Chapter 95 applies to the claims in the first place.

that the substantive laws existing at the time and making of the contract were inherently part of the contract as though set forth expressly therein.

2. <u>The District Court's ruling is contrary to binding precedent.</u>

The District Court's novel interpretation of Chapter 95 effectively renders meaningless a vast body of law, including this Court's opinion in *O'Keefe Architects.* 944 So. 2d 181. For years, this Court and every District Court of Appeal has analyzed whether judges or arbitrators should decide if arbitration claims are timely filed. *See e.g., id*; *Alderman v. City of Jacksonville*, 902 So. 2d 885 (Fla. 1st DCA 2005); *Marschel*, 609 So. 2d at 718; *Xerox Corp. v. Smartech Doc. Mgt., Inc.*, 979 So. 2d 957 (Fla. 3d DCA 2007); *Pembroke Indus. Park Partn. v. Jazayri Const., Inc.*, 682 So. 2d 226 (Fla. 3d DCA 1996); *Thenet v. Jenne*, 968 So. 2d 46 (Fla. 4th DCA 2007); *Victor v. Dean Witter Reynolds, Inc.*, 606 So. 2d 681 (Fla 5th DCA 1992).[21] These decisions demonstrate the fatal flaw in the District Court's conclusion: *who* decides whether claims are time-barred would be irrelevant if statutes of limitations did not apply as a matter of law.

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[21] *See also*, *The Hillier Group, Inc. v. Torcon, Inc.*, 932 So. 2d 449, 456 (Fla. 2d DCA 2006); *Stinson-Head, Inc. v. City of Sanibel*, 661 So. 2d 119 (Fla. 2d DCA 1995); *Wylie v. Inv. Mgmt. & Research Inc.*, 629 So. 2d 898, 900 (Fla. 4th DCA 1993), *overruled on other grounds*, 771 So. 2d 1143 (Fla. 2000); *Premier Real Estate Holdings, LLC v. Butch*, 24 So. 3d 708, 712 (Fla. 4th DCA 2009); *Hubbard Const. Co. v. Jacobs Civil, Inc.*, 969 So. 2d 1069, 1072 (Fla. 5th DCA 2007); *CED Const., Inc. v. Kaiser-Taulbee Assoc., Inc.*, 816 So. 2d 813 (Fla. 5th DCA 2002).

In *O'Keefe,* this Court decided whether a statute of limitations defense was subject to arbitration when the agreement provided, "[c]laims, disputes or other matters arising out of or relating to the contract are to be decided by arbitration" and "[a] demand for arbitration cannot be made when institution of legal or equitable proceedings based on the underlying claim would be barred by the applicable statute of limitations." *Id*. This Court determined that the statutes of limitations defense was to be adjudicated by the arbitrators and held "a broad agreement to arbitrate, such as the one at issue in this case, includes the determination of statute of limitations defenses." *Id.* at 188. Chapter 95 necessarily applies in arbitration for this Court's holding in *O'Keefe* to make any sense. Otherwise, this Court would never have reached the question of who decides the timeliness issue – it would have merely held, as did the Circuit Court below, that Chapter 95 did not apply to arbitrations and so the issue is moot.

Further, the *O'Keefe* contract did not "expressly include" Chapter 95, yet this Court held that arbitrators would decide whether claims were timely brought under Chapter 95. *Id*. The District Court's holding that the language in the Parties' contract was insufficient to meet the "explicit inclusion" requirement it created cannot be reconciled with *O'Keefe's* holding. Indeed, the District Court's reasoning that the Parties' broad "one-size-fits all" clause was insufficient to include Florida's statute of limitations is directly inconsistent with *O'Keefe's*

holding that "a broad agreement to arbitrate, such as the one at issue in this case, includes the determination of statute of limitations defenses." *Id.*; *see also*, *City of Sanibel*, 661 So. 2d at 119 (Parties' broad arbitration provision required arbitration on all issues related to the contract including statute of limitations defense); *Marschel*, 609 So. 2d at 718 (finding that, under a broad arbitration clause stating that any controversy would be resolved by arbitration, statute of limitations issues would be determined by arbitrators in accordance with that agreement).

Moreover, the arbitration agreement analyzed in *O'Keefe* was very similar to the Parties' contract here. The *O'Keefe* contract stated:

> Claims, disputes or other matters in question between the parties to this Agreement arising out of or relating to this Agreement or breach thereof shall be subject to and decided by arbitration …. A demand for arbitration shall be made within a reasonable time after the claim, dispute or other matter in question has arisen. In no event shall the demand for arbitration be made after the date when the institution of legal or equitable proceedings based on such claim, dispute or other matter in question would be barred by the applicable statutes of limitations.

Id. at 182; *see also*, *City of Sanibel*, 661 So. 2d at 120 (Second DCA analyzed virtually identical arbitration agreement as *O'Keefe* and held statutes of limitations defense was subject to arbitration). Similarly, the Parties' contract here states:

> This agreement and any accounts opened hereunder shall be construed, interpreted and the rights of the Parties shall be determined in accordance with the Internal laws of the State of Florida …. Nothing in this agreement shall be deemed to limit or waive the application of any relevant state or federal statute of limitation, repose or other time bar. Any claim made by either party to this agreement

> which is time barred for any reason shall not be eligible for arbitration.

(V1T1 Ex. H) The *O'Keefe* agreement references "applicable statutes of limitations," the Parties' contract here references "the application of any relevant state or federal statute of limitation …." If the contract at issue fails to meet the District Court's requirement, then so did the contract in *O'Keefe*. Unable to harmonize its ruling with the *O'Keefe* opinion, the District Court merely announced that "the parties' contractual arbitration provision [in *O'Keefe*] was quite specific …." (V2T18 p.11) That conclusion, however, is unsupported. The *O'Keefe* agreement is no more specific than the arbitration agreement here – in fact, it is even less so since the Parties' arbitration agreement is explicitly governed by Florida law. Accordingly, the holding below is irreconcilable with *O'Keefe.*

Likewise, the District Court's ruling is inconsistent with its prior rulings in *Marschel* and *City of Sanibel.* In *City of Sanibel*, the Second District Court of Appeals analyzed an agreement identical to that in *O'Keefe* and held:

> Broad contract language should be given effect because parties are free to limit the scope of their agreement to arbitrate or to designate that specific issues, such as statute of limitations questions or other time bar defenses, will not be arbitrable. Based on the plain language of its broad arbitration clause and specific exclusion, we conclude that [Appellant] agreed to arbitrate all issues relating to its contract … including the statute of limitations defense.

661 So. 2d at 120. The fact that the Parties' contract in this instance relegated the decision to a court of competent jurisdiction does not change the analysis in any

material way. The issue of timeliness is only relevant if Chapter 95 applies to claims in arbitration and this Court and the Second District Court of Appeal have consistently found that it does. The conflict created by the District Court's holding with binding precedent requires reversal.

V. CONCLUSION

For the foregoing reasons, this Court must reverse the order rendered by the District Court below and answer the question presented in the affirmative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of Petitioner's Initial Brief has been furnished to **Robert J. Pearl, Esquire**, The Pearl Law Firm, P.A., 7400 Tamiami Trail N., Suite 101, Naples, FL 34108, *attorney for Respondents*; and to **Bradford D. Kaufman, Esq., Joseph C. Coates, III, Esq.,** and **Jason Michael Fedo, Esq.**, Greenberg Traurig, LLP, 777 South Flagler Drive, Suite 300 East, West Palm Beach, FL 33401, *attorneys for the Securities Industry and Financial Markets Association*, by Email and U.S. Mail on April 6, 2012.

____
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the foregoing Initial Brief of Petitioner complies with the font requirements of Rule 9.100(l), FRAP.

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