

Analyzing the Applicability of
Statutes of Limitations in Arbitration

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I. INTRODUCTION

Arbitration is a private dispute resolution process used by parties as an alternative to resolving disputes in court.¹ The traditional theory is that parties contract for arbitration to avoid the higher costs and longer delays of litigation.² In order to achieve these goals, parties to arbitration greatly curtail, or even forego, many of the procedural safeguards of litigation,³ including motion practice,⁴ broad discovery,⁵ and appellate review.⁶ At the same time, parties do

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1. See, e.g., *Caley v. Gulfstream Aerospace Corp.*, 428 F.3d 1359, 1367 (11th Cir. 2005) ("The purpose of the FAA was 'to relieve congestion in the courts and to provide parties with an alternative method for dispute resolution that is speedier and less costly than litigation.'") (citation omitted).

2. See, e.g., Linda R. Hirshman, *The Second Arbitration Trilogy: The Federalization of Arbitration Law*, 71 VA. L. REV. 1305, 1311 (1985) ("Business pressure to cut through the delay and expense of litigation with enforceable arbitration agreements eventually led legislatures to reverse the common-law doctrines hostile to arbitration."); H.R. REP. NO. 68-96, at 2 (1924) ("It is practically appropriate that the [legislation should be enacted] at this time when there is so much agitation against the costliness and delays of litigation. These matters can be largely eliminated by agreements for arbitration, if arbitration agreements are made valid and enforceable."); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 221 (1985) (describing the two goals of the Federal Arbitration Act as "enforcement of private agreements and *encouragement of efficient and speedy dispute resolution*") (emphasis added); see also Di Jiang-Schuerger, *Perfect Arbitration = Arbitration + Litigation?*, 4 HARV. NEGOT. L. REV. 231, 246 (1999) ("The general advantages of arbitration include privacy and confidentiality, flexibility in choosing the decision maker, promptness of resolution, possibility of lower cost, and possibility of a more just result. The other reason that many parties choose arbitration rather than litigation is the finality of the arbitral award.").

3. See Jason W. Burge & Lara K. Richards, *Defining "Customer": A Survey of Who Can Demand FINRA Arbitration*, 74 LA. L. REV. 173, 185-88 (2013) (discussing the "procedural differences between FINRA arbitration and litigation that would inform a customer's choice of whether to demand arbitration").

4. See AM. ARBITRATION ASS'N, *FINRA Seeks Limits on Motions to Dismiss*, DISP. RESOL. J., Nov. 2007-Jan. 2008, at 8 ("The Financial Industry Regulatory Authority (FINRA) has proposed a new rule to limit the use of pre-hearing dispositive motions in securities arbitration."); see also Albert G. Ferris & W. Lee Biddle, *The Use of Dispositive Motions in Arbitration*, DISP. RESOL. J., Aug.-Oct. 2007, at 17, 19-20 (discussing rules on dispositive motions in various arbitral forums).

5. See W. Scott Simpson & Omer Kesikli, *The Contours of Arbitration Discovery*, 67 ALA. LAW. 280 (2006) ("[The benefits of arbitration] come with significant trade-offs as

not generally expect that arbitration will be conducted without any regard for background substantive law; “manifest disregard for the law” remains a ground for reversing arbitration awards in many jurisdictions.⁷

There is considerable dispute over whether statutes of limitations defenses are among the procedural safeguards that are potentially lost when parties choose arbitration, or whether they are substantive rights that should apply regardless of the dispute resolution forum.⁸ Various courts around the country have held that statutes of limitations do not apply to arbitrations.⁹ At the same time, practitioners’ responses to those decisions suggest that some parties often view statutes of limitations as a substantive legal right of a defendant to avoid defending stale claims.¹⁰

In the spring and summer of 2013, legislation passed by the Washington Legislature and a decision by the Florida Supreme Court illuminated the growing debate over whether statutes of limitations apply in arbitration. In April, the Washington State Legislature passed a bill legislatively establishing the same principle, by effectively overturning the Washington Supreme Court’s decision in 2010, *Broom v. Morgan Stanley D.W. Inc.*,¹¹ which held that

well—the primary one being limited discovery. Unlike litigation under the *Federal Rules of Civil Procedure*, discovery in arbitration can be very limited. Discovery devices such as interrogatories, requests for admissions and mental examinations are generally not employed in arbitration.”) (emphasis in original).

6. See, e.g., Christopher D. Kratovil, *Judicial Review of Arbitration Awards in the Fifth Circuit*, 38 ST. MARY’S L.J. 471, 476 (2007) (“The commencement of the confirmation process opens the ‘extraordinarily narrow’ window for judicial review of arbitration awards. The challenge to the arbitration award is made by opposing the motion to confirm and by filing a motion to vacate. The district court then conducts an ‘exceedingly deferential’ review of the arbitrator’s award to determine if there is any legal basis for vacating it.”); Sarah Rudolph Cole, *Revising the FAA to Permit Expanded Judicial Review of Arbitration Awards*, 8 NEV. L.J. 214, 216-17 (2007) (“Under section 10(a) [of the FAA], a court may reverse an arbitral award only under very limited circumstances. Limited review was initially perceived as a benefit of the arbitral process, enhancing decision-making efficiency as well as insuring that the arbitrator, often an expert in the subject matter of the dispute, was able to render a final decision that a judge, who is ignorant of industry customs, would not disturb.”).

7. See MyLinda K. Sims & Richard A. Bales, *Much Ado About Nothing: The Future of Manifest Disregard After Hall Street*, 62 S.C. L. REV. 407, 424-30 (2010) (surveying circuits that allow judicial review of arbitral awards for manifest disregard of the law); Michael H. LeRoy, *Are Arbitrators Above the Law? The “Manifest Disregard of the Law” Standard*, 52 B.C. L. REV. 137, 158-69 (2011) (surveying circuits as to whether they have adopted the manifest disregard standard).

8. See *infra* Parts III-V.

9. See *infra* Part III(C).

10. See *infra* notes 34-36 and accompanying text.

11. See *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182, 188 (Wash. 2010).

Washington's statutes of limitations did not apply in arbitration.¹² Similarly, in May, the Florida Supreme Court in *Raymond James Financial Services, Inc. v. Phillips* reversed a lower court and held that, under state law, Florida's statutes of limitations apply to arbitration.¹³ While the Washington legislation and the *Raymond James* decision represent a movement to apply statutes of limitations in arbitration, other courts have moved in the opposite direction.¹⁴ Confusion about the applicability of statutes of limitations in arbitration causes difficulties for attorneys drafting contracts, parties evaluating potential claims, and arbitrators attempting to resolve disputes.

Our article explores the confusion regarding this issue and attempts to reconcile the disparate views on this subject. Part II examines three arbitral forums—the American Arbitration Association (AAA), JAMS (formerly Judicial Arbitration and Mediation Services, Inc.), and the Financial Industry Regulatory Authority (FINRA)—and their respective approaches to applying statutes of limitations in their arbitrations. Part III surveys when statutes of limitations apply in arbitration across three scenarios: (A) express provisions in state law, such as in New York and Georgia; (B) agreement of the parties by contract; and (C) implicit provisions in state law. Part IV explores the Washington Supreme Court's decision in *Broom v. Morgan Stanley* and the Washington Legislature's reaction to that decision. Part V similarly analyzes the Florida Supreme Court's *Raymond James* opinion. Part VI concludes by arguing that arbitrators should not assume that statutes of limitations apply in arbitration, absent express language in the parties' agreement or explicit direction from state statutes, in light of courts' treatment of the issue as one of statutory interpretation.

II. STATUTES OF LIMITATIONS IN ARBITRAL FORUMS

Statutes of limitations are “the set of legislatively and judicially created legal rules . . . that determine whether a claim is time-barred.”¹⁵ The touted benefits of statutes of limitations include the certainty they give to the parties, the peace of mind provided to defendants, the minimization of the deterioration

12. See *infra* Part IV; *HB 1065 – 2013-14*, WASH. STATE LEG. (March. 3, 2014, 2:52 PM), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1065&year=2013>.

13. See *infra* Part V; *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 187 (Fla. 2013).

14. See *infra* Part III(C).

15. Tyler T. Ochoa & Andrew J. Wistrich, *The Puzzling Purposes of Statutes of Limitation*, 28 PAC. L.J. 453, 454 (1997); see also Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 609-10 (2008) (“A statute of limitation sets a deadline by which a claimant must file a lawsuit. If the deadline is missed, the right to a decision on the merits and eligibility for a remedy are forfeited.”).

of evidence and memories, and encouragement that parties promptly act on their rights.¹⁶ “The statute of limitations is a statute of repose, designed to protect the citizens from stale and vexatious claims, and to make an end to the possibility of litigation after the lapse of a reasonable time.”¹⁷ There is, of course, a necessary conflict between a need to bar claims after a certain time period and a desire for justice regardless of timeliness.¹⁸ This conflict is heightened in the context of arbitration, because of confusion surrounding whether these limitations, which are specifically designed to corral and streamline proceedings in a court of law, should apply in a private arbitral forum.¹⁹ As the AAA notes when discussing procedural differences between court and arbitration:

Courts have fixed rules of procedure regulating most aspects of a case. Arbitration is a creature of contract, enabling the parties to tailor the process to fit their needs and bypass litigation procedures. If you do

16. Walker v. Armco Steel Corp., 446 U.S. 740, 751 (1980) (“The statute of limitations establishes a deadline after which the defendant may legitimately have peace of mind.”); Order of R.R. Telegraphers v. Ry. Express Agency, 321 U.S. 342, 348-49 (1944) (“Statutes of limitation, like the equitable doctrine of laches, in their conclusive effects are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.”).

17. Guar. Trust Co. v. United States, 304 U.S. 126, 136 (1938).

18. Ochoa & Wistrich, *supra* note 15, at 454-55 (“The limitation system is the product of the interplay between two competing sets of policies: those supporting the extinguishment of untimely claims and those encouraging the resolution of all claims, whether timely or untimely, on their substantive merits.”); O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 476 (1897) (“[W]hat is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time?”).

19. See, e.g., Samuel B. Edwards, *From the Lone Star State: Overcoming Statute of Limitation Defenses in Securities Arbitration*, 12 PIABA B.J. 6, 8 (2005) (“Arbitration is considered to be an equitable forum in which a panel has great latitude to ignore harsh legal strictures in order to achieve justice and fairness. As a result, applying absolute deadlines to filing claims is seemingly inconsistent with arbitration itself.”); David E. Robbins, *Calling All Arbitrators: Reclaim Control of the Arbitration Process – The Courts Let You*, DISP. RESOL. J., Feb.-Apr. 2005, at 9, 9 (“Arbitration has been billed as the cost-effective, expeditious alternative to commercial litigation. It has, however, to a large extent, become a costly, dilatory and unpredictable melding of litigation and arbitration, primarily due to the parties’ representatives who are responsible for grafting the implements of litigation onto the much simpler system of arbitration.”).

not take advantage of this critical distinction, you may well be relegated to a more cumbersome and costly proceeding.²⁰

Within state or federal court, there is no doubt that statutes of limitations apply, but there is unclear direction regarding whether they are applicable in arbitration. Part of this confusion stems from the fact that most of the large arbitral forums—the AAA, JAMS, and FINRA—do not provide an explicit rule in their respective codes of procedure dictating whether arbitrators are to apply statutes of limitations.²¹ Of the major arbitral forums, only the National Arbitration Forum expressly incorporates statutes of limitations in its rules.²² This part discusses the relative silence regarding the issue within the procedural rules of AAA, JAMS, and FINRA arbitrations, which has led to divergent interpretations by arbitrators and courts, as will be discussed in latter parts.

A. *American Arbitration Association*

The AAA is a not-for-profit organization founded in 1926 after the passage of the Federal Arbitration Act (FAA) “with the specific goal of helping to implement arbitration as an out-of-court solution to resolving disputes.”²³ The AAA bills itself as “the recognized global leader in [alternative dispute resolution],”²⁴ handling disputes ranging from commercial to construction to labor and employment.²⁵

In addition to administering arbitrations, the AAA provides educational resources to the public in an effort to aid in the proliferation of Alternative Dispute Resolution (ADR) as an alternative to court proceedings.²⁶ The AAA offers a standard arbitration clause that contract drafters may incorporate into

20. DAVID L. EVANS & INDIA JOHNSON, THE TOP 10 WAYS TO MAKE ARBITRATION FASTER AND MORE COST EFFECTIVE 3, (Am. Arbitration Ass’n ed.) available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_025844 (last visited Mar. 3, 2014).

21. See *infra* notes 23-63 and accompanying text.

22. See NAT’L ARBITRATION FORUM, CODE OF PROCEDURE 16 r.10(A) (Aug. 1, 2008), available at <http://www.adrforum.com/users/naf/resources/CodeofProcedure2008-print2.pdf> (“No Claim may be brought after the passage of time which would preclude a Claim regarding the same or similar subject matter being commenced in court.”).

23. AAA *Mission and Principles*, AM. ARBITRATION ASS’N, <http://www.adr.org/aaa/faces/s/about/mission> (last visited Mar. 3, 2014).

24. *Alternative Dispute Resolution ClauseBuilder Tool*, AM. ARBITRATION ASS’N, http://www.clausebuilder.org/cb/faces/index?_afLoop=6148385019802522&_afWindowMode=0&_adf.ctrl-state=aipvedask_72 (last visited Mar. 3, 2014).

25. *Areas of Expertise*, AM. ARBITRATION ASS’N, <http://www.adr.org/aaa/faces/aoe> (last visited Mar. 3, 2014).

26. See *Education & Resources*, AM. ARBITRATION ASS’N, <http://www.adr.org/aaa/faces/educationresources> (last visited Mar. 3, 2014).

their contracts, but notably, the arbitration clause does not contain reference to statutes of limitations,²⁷ nor does AAA's "ClauseBuilder" program specifically allow an arbitration clause "drafter" to select that the limitations will apply.²⁸ Additionally, AAA's guide for drafting an arbitration clause only mentions the concept of statutes of limitations in the context of whether they will be tolled should the parties engage in mediation; it does not address whether they should expressly apply to the claims filed in arbitration.²⁹

Much like the silence in its suggested arbitral clauses, AAA provides varying guidance in its rules on the issue of statutes of limitations depending upon the type of dispute. AAA's Employment Arbitration Rules and Mediation Procedures explicitly provide that the initiation of the arbitration must be done "within the time limit established by the applicable statute of limitations."³⁰ In contrast, the Commercial Arbitration Rules and Mediation Procedures do not contain an express reference regarding whether statutes of limitations apply in the arbitral forum.³¹ Rule 4 governs the filing requirements for a claim in AAA in commercial disputes.³² Subsection C addresses the timeliness of filing the demand for arbitration:

(c) It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as *any time requirements associated with the filing*. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.³³

27. AM. ARBITRATION ASS'N, COMMERCIAL ARBITRATION RULES AND MEDIATION PROCEDURES 8 (Oct. 1, 2013), *available at* http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B0ca392e9-4c3a-4b99-b952-fe5cda3bfb0d%7D_AAA_Commercial_Rules_Single_Page_Web_Version_-_FINAL_Saved_Edits.pdf [hereinafter AAA COMMERCIAL RULES]; *see also* AM. ARBITRATION ASS'N, DRAFTING DISPUTE RESOLUTION CLAUSES: A PRACTICAL GUIDE 10 (2013), *available at* http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_002540 [hereinafter AAA DRAFTING].

28. *Alternative Dispute Resolution ClauseBuilder Tool*, *supra* note 24.

29. *See* AAA DRAFTING, *supra* note 27, at 34.

30. AM. ARBITRATION ASS'N, EMPLOYMENT ARBITRATION RULES AND MEDIATION PROCEDURES 11 r.4(d) (Nov. 1, 2009), *available at* http://www.adr.org/cs/groups/lee/documents/document/dgdf/mda0/~edisp/adrstg_004366~2.pdf.

31. *See* AAA COMMERCIAL RULES, *supra* note 27, at 11. The Home Construction Rules are similar. *See* AM. ARBITRATION ASS'N, HOME CONSTRUCTION ARBITRATION RULES AND MEDIATION PROCEDURES 30-31 (2010), *available at* http://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_008056&revision=latestreleased.

32. AAA COMMERCIAL RULES, *supra* note 27, at 11-12.

33. *Id.* at 11 (emphasis added).

Although AAA does not explicitly reference time limitations in the commercial dispute context, the organization recently amended its rules to allow for dispositive motions, potentially allowing for motions on statutes of limitations.³⁴ AAA passed the rule because “[p]arties to commercial arbitrations indicated that they wanted a provision in the Rules that reflected current practice regarding the permissibility of dispositive motions in arbitration, and the circumstances under which they might be considered.”³⁵

Practitioners praised the rule change as empowering arbitrators to rule on these types of motions, including on statutes of limitations issues.³⁶ Lawyers touted the new rule as “ensuring that motions aimed at streamlining the process or avoiding costly hearings are entertained,”³⁷ and noted that Rule 33 “provide[s] the litigator with valuable pre-hearing remedies, including dispositive relief akin to summary judgment or demurrer.”³⁸ As commentators have noted, however, arbitrators are still reluctant to grant these dispositive motions for a variety of reasons.³⁹

34. See *id.* at 22 (“The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.”).

35. See AM. ARBITRATION ASS’N, SUMMARY OF CHANGES: COMMERCIAL ARBITRATION RULES 4, (Oct. 1, 2013) available at http://images.go.adr.org/Web/AmericanArbitrationAssociation/%7B9ac03162-02f3-4948-98a1-ee2d342bf36a%7D_AAA_CommRules_SummaryChanges_Web.pdf.

36. See, e.g., Christopher Lovrien et al., *American Arbitration Association Issues Revisions to Commercial Arbitration Rules*, JONES DAY (Sept. 2013), <http://www.jonesday.com/american-arbitration-association-issues-revisions-to-commercial-arbitration-rules-09-25-2013> (“The prior version of the AAA rules was silent on the question of whether the arbitrator could hear summary judgment-type motions, and many argued that the arbitrator had no such authority. The new rule is a welcome change, even if it was a long time coming The arbitrator’s authority and willingness to decide meritorious motions will save time and money for all involved.”).

37. *Alert Memorandum: AAA Launches Revised Arbitration Rules*, CLEARY GOTTlieb (Sept. 17, 2013), <http://www.cgsh.com/files/News/656888cf-cee4-492a-8455-134fca3685da/Presentation/NewsAttachment/18295812-ef19-4cc4-85b8-17195ec7eee0/AAA%20Launches%20Revised%20Arbitration%20Rules.pdf>.

38. *Litigation Advisory: New Tools for Litigators: American Arbitration Association Revises Commercial Arbitration Rules*, MCKENNA LONG & ALDRIDGE LLP (Oct. 14, 2013), http://www.mckennalong.com/media/library/2222_New%20Tools%20for%20Litigators%20-%20American%20Arbitration%20Association%20Revises%20Commercial%20Arbitration%20Rules.pdf.

39. See, e.g., Edna Sussman & Solomon Eber, *Reflections on the Use of Dispositive Motions in Arbitration*, N.Y. DISP. RESOL. LAW, Spring 2011, at 28, 28 (“[I]t is generally believed that arbitrators have been reluctant to hear and grant dispositive motions. This hesitation can be caused by several concerns: many major arbitration rules lack explicit rules authorizing arbitrators to entertain dispositive motions; summary disposition of a case may

B. *JAMS*

JAMS bills itself as “the largest private alternative dispute resolution . . . provider in the world. With its prestigious panel of neutrals, JAMS specializes in mediating and arbitrating complex, multi-party, business/commercial cases—those in which the choice of neutral is crucial.”⁴⁰ Over 12,000 business and commercial arbitrations are handled in JAMS each year around the world.⁴¹

Like AAA, the JAMS Comprehensive Arbitration Rules and Procedures do not expressly mention whether statutes of limitations will apply if a dispute is filed in arbitration.⁴² Similarly, the standard arbitration clause that JAMS promotes does not expressly reference whether statutes of limitations will apply in the arbitral forum⁴³:

JAMS Standard Arbitration Clause for Domestic Commercial Contracts

Any dispute, claim or controversy arising out of or relating to this Agreement or the breach, termination, enforcement, interpretation or validity thereof, including the determination of the scope or applicability of this agreement to arbitrate, shall be determined by arbitration in [insert the desired place of arbitration] before [one/three] arbitrator(s). The arbitration shall be administered by JAMS pursuant to its Comprehensive Arbitration Rules and Procedures [and in accordance with the Expedited Procedures in those Rules] [or pursuant to JAMS’ Streamlined Arbitration Rules and Procedures]. Judgment on the Award may be entered in any court having jurisdiction. This

render the resulting award vulnerable to challenges before courts; the absence of the right of appeal in arbitration creates a hesitation to abbreviate the process and raises concerns about the appearance of justice, or lack thereof, in a truncated proceeding.”).

40. *JAMS Fact Sheet*, JAMS (July 2013), <http://www.jamsadr.com/files/Uploads/Documents/Corporate-Fact-Sheet.pdf>. JAMS previously was an acronym for Judicial Arbitration and Mediation Services, Inc., but subsequently shortened its name. *See About the JAMS Name*, JAMS, <http://www.jamsadr.com/about-the-jams-name/> (last visited Mar. 3, 2014).

41. *JAMS Fact Sheet*, *supra* note 40.

42. *See* JAMS, JAMS COMPREHENSIVE ARBITRATION RULES AND PROCEDURES (2010), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_comprehensive_arbitration_rules-2010.pdf [hereinafter *JAMS Rules*].

43. *See* JAMS, JAMS CLAUSE WORKBOOK 2 (2011), *available at* <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>.

clause shall not preclude parties from seeking provisional remedies in aid of arbitration from a court of appropriate jurisdiction.⁴⁴

JAMS recognizes that statutes of limitations arguments might arise in defending claims, however, and JAMS Rule 18 allows arbitrators to hear dispositive motions.⁴⁵ In informal guidance, the organization has further suggested that such motions could address statutes of limitations. The organization notes, “[D]ispositive motions can sometimes enhance the efficiency of the arbitration process if directed to discrete legal issues, such as statute of limitations or defenses based on clear contractual provisions. In such circumstances, an appropriately framed dispositive motion can eliminate the need for expensive and time consuming discovery.”⁴⁶

C. *Financial Industry Regulatory Authority*

FINRA is “the largest independent regulator for all securities firms doing business in the United States.”⁴⁷ It is “dedicated to investor protection and market integrity through effective and efficient regulation of the securities industry” by various functions ranging from writing and enforcing its rules, to bringing disciplinary actions, to providing education for investors.⁴⁸ Another valuable function FINRA performs is providing an arbitral forum for the resolution of disputes involving the securities industry and its customers.⁴⁹

44. *Id.* JAMS stresses, though, that the “clauses may be modified to tailor the arbitration process to meet the parties’ individual needs.” *JAMS Rules*, *supra* note 42, at 2.

45. *See JAMS Rules*, *supra* note 42, at 22 (“The Arbitrator may permit any Party to file a Motion for Summary Disposition of a particular claim or issue, either by agreement of all interested Parties or at the request of one Party, provided other interested Parties have reasonable notice to the request.”).

46. JAMS, JAMS RECOMMENDED ARBITRATION DISCOVERY PROTOCOLS FOR DOMESTIC, COMMERCIAL CASES 7 (2010), *available at* http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS_Arbitration_Discovery_Protocols.pdf; JAMS, JAMS CLAUSE WORKBOOK 8 (2011), *available at* <http://www.jamsadr.com/files/Uploads/Documents/JAMS-Rules/JAMS-ADR-Clauses.pdf>.

47. *News Release: FINRA Releases Enhanced Version of BrokerCheck*, FINRA (Nov. 12, 2013), <http://www.finra.org/Newsroom/NewsReleases/2013/P383596>.

48. *About FINRA*, FINRA, <http://www.finra.org/AboutFINRA/> (last visited Mar. 3, 2014).

49. *What We Do*, FINRA, <http://www.finra.org/AboutFINRA/WhatWeDo/> (last visited Mar. 3, 2014) (“Our dispute resolution forum is the largest in the country for the securities industry, handling nearly 100 percent of securities-related arbitrations and mediations from more than 70 hearing locations—including at least one in all 50 states, London and Puerto Rico.”).

Several thousand claims are filed in FINRA arbitration each year, including 5,680 in 2010; 4,729 in 2011; 4,299 in 2012; and 3,714 in 2013.⁵⁰

FINRA provides separate sets of rules for claims that involve only industry members (“Industry Code”)⁵¹ and claims that are between a customer and an industry member (“Customer Code”).⁵² Both codes contain an eligibility rule which establishes the time limitations for filing a claim in FINRA.⁵³ Customer Code Rule 12206 states, “No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.”⁵⁴ The rule expressly provides that it “does not extend applicable statutes of limitations,” although it does not expressly state whether statutes of limitations are to apply to the arbitration.⁵⁵ No other FINRA rule in either the Customer Code or Industry Code expressly provides that statutes of limitations apply to claims, although FINRA and the U.S. Securities and Exchange Commission (SEC) warn potential claimants that these time limitations may be applicable.⁵⁶

50. See *Dispute Resolution Statistics*, FINRA, <http://www.finra.org/arbitrationandmediation/finradisputeresolution/additionalresources/statistic> (last visited Mar. 3, 2014).

51. See *Code of Arbitration Procedure for Industry Disputes*, FINRA, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4193 (last visited Mar. 3, 2014) [hereinafter *Industry Code*].

52. See *Code of Arbitration Procedure for Customer Disputes*, FINRA, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4096 (last visited Mar. 3, 2014) [hereinafter *Customer Code*].

53. See *Industry Code* FINRA R. 13206, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4209; *Customer Code*, FINRA R. 12206 available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4112.

54. *Customer Code*, FINRA R. 12206(a) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4112. The Industry Code’s version of the eligibility rule is identical. See *Industry Code*, FINRA R. 13206(a) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4209.

55. *Customer Code*, FINRA R. 12206(c) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4112; see also *Industry Code*, FINRA R. 13206(c) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4209.

56. See *Filing a Claim Frequently Asked Questions (FAQ)*, FINRA, <http://www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/FAQ/P123917> (last visited Mar. 3, 2014) (“To determine whether any statute of limitations may apply to your case, and to discuss your rights and remedies, we suggest that you contact an attorney.”); see also *Arbitration*, SEC (Aug. 20, 2013), <http://www.sec.gov/answers/arbproc.htm>.

FINRA discourages motions to dismiss prior to the conclusion of a party's case in chief,⁵⁷ and only allows for these types of dispositive motions in three instances: (1) when they are based on failure to meet the six-year eligibility rule under Rules 12206 and 13206; (2) when they are based on a failure to comply with the rules or an arbitration panel's ruling; and (3) when they concern allegations of discovery abuse.⁵⁸ Importantly, FINRA and the SEC have explicitly rejected allowing dispositive motions on the issue of statutes of limitations prior to the conclusion of the plaintiff's case.⁵⁹ As the SEC noted in a 2008 release, FINRA purposely left issues regarding statutes of limitations out of the motions to dismiss on eligibility because statutes of limitations vary from state to state and among causes of action, whereas the eligibility rule is uniform.⁶⁰ In addition, the SEC noted the fact-based inquiry necessary to decide dispositive motions on statutes of limitations:

Further, FINRA responded that it did not include applicable statutes of limitation in the eligibility exception because such issues involve fact-based determinations, depend on the law of the applicable jurisdiction, and depend on the type of claims alleged. FINRA noted that, in some jurisdictions, courts have found that statutes of limitations do not apply to arbitration proceedings. For these reasons, FINRA stated that it would be inappropriate to include an exception for prehearing motions to dismiss on statute of limitations grounds, and thus, declined to amend the proposal to include them in the eligibility exception.⁶¹

Although FINRA arbitrators are not expressly required to consider statutes of limitations under FINRA rules, arbitrators routinely rule on the issue,

57. *Customer Code*, FINRA R. 12504(a)(1) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377; *Industry Code*, FINRA R. 13504(a)(1) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7378; see also Order Approving Proposed Rule Change, Exchange Act, Exchange Act Release No. 34-59189, 94 SEC Docket 3205, at 8 (Dec. 31, 2008) [hereinafter *SEC Release*] ("The proposal would clarify that motions to dismiss a claim prior to the conclusion of a party's case in chief are discouraged in arbitration. FINRA stated that it believes that parties have the right to a hearing in arbitration, and only in certain very limited circumstances should that right be challenged.").

58. See *Customer Code*, FINRA R. 12504(c)-(e) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7377; *Industry Code*, *supra* note 51, § 13504(c)-(e) available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=7378.

59. See *SEC Release*, *supra* note 57, at 24-25.

60. *Id.* at 25.

61. *Id.*

sometimes holding that they are applicable and thus denying relief for the claimants,⁶² but other times refusing to apply them to the arbitration.⁶³

III. WHEN STATUTES OF LIMITATIONS APPLY IN ARBITRATION

There are generally three instances where statutes of limitations have been deemed to apply to arbitrations: (1) when state statutes expressly provide; (2) when the parties expressly incorporate statutes of limitations into the arbitration agreement; and (3) when courts or arbitrators interpret state statutes to imply that statutes of limitations are applicable in arbitrations.

A. *State Statutes Expressly Provide*

The first circumstance where statutes of limitations apply to arbitration is when state statutes expressly provide for their application.⁶⁴ Currently only three states—Georgia, New York, and Washington—have statutes that explicitly bar a claim from being brought in arbitration if the claim would be barred in court.⁶⁵

The New York statute reads:

§ 7502. Applications to the court; venue; statutes of limitation; provisional remedies

62. See *Daniel v. Allstate Fin. Servs., LLC*, 2013 FINRA Arb. LEXIS 4, at *3 (2013) (Vaughan, Arb.); *Flautt v. Morgan Keegan & Co.*, 2012 FINRA Arb. LEXIS 117, at *11 (2012) (Stewart, Arb.); *Healthright Partners, LP v. Lincoln Fin. Advisors Corp.*, 2010 FINRA Arb. LEXIS 1067, at *4 (2010) (Lawrence, Arb.); see also *Shah v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 2008 NASD Arb. LEXIS 528, at *4-5 (2008) (Belles, Arb.); *Busse v. D.A. Davidson & Co.*, 2008 NASD Arb. LEXIS 501, at *2 (2008) (Plock, Arb.).

63. See, e.g., *Golubev v. Perrin, Holden & Davenport Capital Corp.*, 2013 FINRA Arb. LEXIS 176, at *2 (2013) (Fanelli, Arb.); *Dale v. Morgan Keegan & Co.*, 2012 FINRA Arb. LEXIS 1188, at *5-6 (2012) (Wright, Arb.); *C & H Props., Inc. v. Morgan Keegan & Co.*, 2012 FINRA Arb. LEXIS 723, at *14-16 (2012) (Quinn, Arb.); *Spivey v. Edward D. Jones & Co.*, 2009 FINRA Arb. LEXIS 789, at *3 (2009) (Oberdank, Arb.).

64. See GA. CODE ANN. § 9-9-5 (Supp. 2012); N.Y. C.P.L.R. 7502(b) (McKINNEY Supp. 2013); WASH. REV. CODE. § 7.04A.090(3) (Supp. 2013).

65. See GA. CODE ANN. § 9-9-5; N.Y. C.P.L.R. 7502(b); WASH. REV. CODE § 7.04A.090(3). In 2013, the Washington Legislature passed an amendment to the Washington Uniform Arbitration Act providing that statutes of limitations would apply in arbitration. This law went into effect on July 28, 2013. *HB 1065 – 2013-14*, WASHINGTON STATE LEGISLATURE (Feb. 15, 2014, 2:44 PM), <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1065&year=2013#videos>. The passage of this amendment, and the Washington Supreme Court decision that was the catalyst for the amendment, will be discussed in detail in Part V.

....

(b) Limitation of time. If, at the time that a demand for arbitration was made or a notice of intention to arbitrate was served, the claim sought to be arbitrated would have been barred by limitation of time had it been asserted in a court of the state, a party may assert the limitation as a bar to the arbitration on an application to the court as provided in section 7503 or subdivision (b) of section 7511.⁶⁶

Similarly, the Georgia statute states:

9-9-5. Limitation of time as bar to arbitration.

(a) If a claim sought to be arbitrated would be barred by limitation of time had the claim sought to be arbitrated been asserted in court, a party may apply to the court to stay arbitration or to vacate the award, as provided in this part. The court has discretion in deciding whether to apply the bar. A party waives the right to raise limitation of time as a bar to arbitration in an application to stay arbitration by that party's participation in the arbitration.⁶⁷

Interestingly, both statutes provide that that if a party fails to raise the statute of limitations issue in court, the party may still assert this argument in the arbitration.⁶⁸ Notably, however, the statutes state that arbitrators are given the sole judgment to apply the time limitations in the arbitral forum, and importantly, if an arbitration panel declines to apply the statute of limitation to the claims asserted before it, this does not constitute grounds for vacating or modifying the award.⁶⁹

66. N.Y. C.P.L.R. 7502(b).

67. GA. CODE ANN. § 9-9-5. Strictly speaking, Georgia's statute does not specifically state that statutes of limitations apply in arbitration, but rather provides a procedure by which parties who believe they are defending time-barred claims in arbitration may apply to a court for a stay of arbitration, which the court has discretion whether to grant. § 9-9-5(a). In fact, such an application must be made prior to participating in the arbitration, or else any judicial complaints about time bars will be waived, although the party can still assert a statute of limitation in the arbitration, to be ruled upon at the arbitrators' sole discretion. § 9-9-5. New York's statute provides that a party that believes it is defending a time barred claim may apply to court, and the court will apply the statute of limitation "as a bar to the arbitration." N.Y. C.P.L.R. 7502(b). Accordingly, New York's statute is much clearer that statutes of limitations will prevent parties from arbitrating stale claims.

68. N.Y. C.P.L.R. 7502(b); GA. CODE ANN. § 9-9-5(b). The recently passed amendment to Washington's arbitration code does not include a similar provision. WASH. REV. CODE § 7.04A.090(3).

69. GA. CODE ANN. § 9-9-5(b); N.Y. C.P.L.R. 7502(b).

The benefit to the parties of incorporating a governing law clause into an arbitration agreement that expressly refers to these time limitation statutes is that these statutes provide certainty to the parties that the timeliness of the claims will be an available defense.⁷⁰ Indeed, practitioners often urge for the passage of legislation in other states to address this issue and provide the finality as has been accomplished in New York, Georgia, and Washington.⁷¹

B. *Agreement of the Parties*

The second instance under which statutes of limitations apply in arbitration is when the parties expressly agree through contract. Unless prohibited by public policy, parties may include explicit reference in their arbitration agreement that the statute of limitation for a particular state, or another agreed-upon time limitation, will apply to the contract.⁷² This ensures that the statutes of limitations are applied to the arbitration, providing certainty to the contracting parties.⁷³

70. See, e.g., *Skidmore, Owings & Merrill v. Conn. Gen. Life Ins. Co.*, 197 A.2d 83, 88 (Conn. Super. Ct. 1963) (“[T]here appears to be no sound reason, in the absence of an express statutory provision, for including an arbitration proceeding within the type of actions intended to be encompassed within the bar of the Statute of Limitations.”).

71. See, e.g., Craig P. Miller & Laura Danysh, *The Enforceability and Applicability of a Statute of Limitations in Arbitration*, 32 FRANCHISE L.J. 26, 30 (2012) (encouraging the inclusion of explicit reference to statutes of limitations in arbitration agreement and noting, “Including such language in an arbitration provision is prudent until appropriate legislation is enacted that specifically states that proceedings that would otherwise be time barred in court are similarly barred in arbitration”); David A. Weintraub, *When Do Statutes of Limitations Apply in Arbitration?*, 81 FLA. B.J. 25, 28 (2007) (“In order to eliminate the risk of having to defend against claims that one would ordinarily believe are time barred, this author recommends the enactment of appropriate legislation providing that proceedings that would otherwise be barred in court also be barred in arbitration.”).

72. Edward J. Underhill, *Statutes of Limitation and Arbitration: Limiting Your Client’s Exposure*, 101 ILL. B.J. 244, 244 (2013) (“Contrary to what many lawyers think, it’s not safe to assume general statutes of limitation automatically apply to Illinois arbitration claims. That’s why you should consider including a clause limiting your client’s exposure in your arbitration agreements.”). Some states provide explicit statutory limits on the ability of parties to contract for time limits on claims, in particular if the contractual limitations would shorten the time period for asserting claims. See, e.g., FLA. STAT. § 95.03 (Supp. 2013) (“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.”).

73. See Miller & Danysh, *supra* note 71, at 30 (“To avoid the risk that a statute of limitations would not be applied in arbitration, the [arbitration agreement] should expressly incorporate the statute of limitations.”); Janet P. Jakubowicz & J. Curtis McCubbin, *Why Kentucky’s Statutes of Limitations Should Apply to Claims Raised in Arbitration*, Ky. BENCH & B., Mar. 2011, at 14, 16 (“[P]arties should consider specifying in their arbitration contracts

The absence of such clauses, much to the surprise of the parties to such contracts, may lead to an arbitral ruling that statutes of limitations do not apply to the parties' dispute. This often unintended result can be avoided by the simple inclusion of a contractual provision identifying the limitations that will govern any future dispute.⁷⁴

Indeed, courts have noted in deciding issues relating to the application of statutes of limitations in arbitration that parties may freely contract to apply them.⁷⁵ As the United States Court of Appeals for the Second Circuit reasoned in rejecting a request to apply statutes of limitations to a dispute:

We are aware that the time within which arbitration may be demanded may be of great importance to the parties who have by contract agreed to have their differences so determined But unless they see fit to condition their agreement by an express time limitation, a demand within a reasonable time, as here, is not barred.⁷⁶

which statutes of limitations will govern their future disputes or specify a time limit to bring certain claims so far as to eliminate the risk of having to defend against claims that one would ordinarily believe are time barred.”); Ronald N. Ricketts, *The Application of Statutes of Limitations in Arbitration*, GABLE GOTWALS (May 12, 2011), http://gablelaw.com/news_resources/2011/The%20Application%20of%20Statutes%20of%20Limitations%20in%20Arbitration_ricketts.html (“[I]t is important in Oklahoma to draft an arbitration clause that specifically provides for the application of a statute of limitation.”); D. Kyle Deak, *Arbitration: Have You Thought About the Consequences? Statutes of Limitation and Arbitration: The Antagonistic Interplay*, THE RESOURCE (Feb. 2012), <http://www.ncada.org/ResourceArchives/Feb2012/ResourceDeakArbitrationFeb2012.pdf> (“[C]ounsel [should] include language in the arbitration agreement specifically adopting the applicable state statute of limitation, or set out a contractual statute of limitation for enforcing the contract at issue.”).

74. See Weintraub, *supra* note 71, at 25.

75. See, e.g., *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 172-73 (S.D. Ohio 1993), *aff'd*, 43 F.3d 1076 (6th Cir. 1995) (“[The parties] could have lawfully incorporated . . . either an express limitation on claims or incorporated a statute of limitations by reference, but they did not do so.”); *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182, 188 (Wash. 2010) (“If desired, parties may agree contractually to the applicability of state statutes of limitations, in which case those limits would be applied by the arbitral panel. But here, no such agreement existed.”); *Carpenter v. Pomerantz*, 634 N.E.2d 587, 589 (Mass. App. Ct. 1994) (“Neither the agreement nor the rules of the American Arbitration Association, made applicable to the agreement by the arbitration clause, provide that a demand for arbitration must be made within any specified time.”).

76. *Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 689 (2d Cir. 1952).

The benefit of contractually stating that time limitations will apply to claims asserted in arbitration is that it takes the decision of whether they apply out of the courts' and arbitrators' hands.⁷⁷

C. *Statutes of Limitations Implied by State Statute*

Absent express language in either state statute or the arbitration agreement itself, a third instance in which statutes of limitations may apply to arbitral forums is when arbitrators or courts rule that the state's statutory language implicitly allows the application. In examining the issue, courts will look to the express language of the statutes in question to examine whether an arbitration fits within the statutes' scope.⁷⁸

In *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, for instance, the Minnesota Supreme Court declined to apply a six-year Minnesota statute of limitations period to a contract dispute between the parties that was governed by an arbitration agreement.⁷⁹ The court noted that the statute at issue in the dispute—section 541.05—specifically mentioned the bringing of “actions”⁸⁰ and state statute defined “action” as “any proceeding in any court of this state.”⁸¹ As the court reasoned,

The few Minnesota cases which have attempted a common-law definition of the term “action” have restricted it to “the prosecution in a court of justice of some demand or assertion of right by one person against another.” . . . It thus appears that [the statute], both by statutory

77. See *Cameron v. Griffith*, 370 S.E.2d 704, 704-05 (N.C. Ct. App. 1988) (“The parties’ contract does not limit the period in which arbitration can be demanded and no statute or court decision of this State of which we are aware does so either Since the contract in this case contains no such stipulation, we conclude that the claimant’s right to an arbitration hearing was not barred by the statute of limitations.”) (citations omitted).

78. See, e.g., *Pomerantz*, 634 N.E.2d at 590 (“We think, however, that the limitation period provided for in [the statute] is inapplicable to demands for arbitration. The pertinent language of that statute reads: ‘Actions of contract . . . shall, except as otherwise provided, be commenced only within six years next after the cause of action accrues.’ As used in statutes of limitation, the word ‘action’ has been consistently construed to pertain to court proceedings.”) (omission in original); *Griffith*, 370 S.E.2d at 704 (“[B]y its terms the limitations period stated in [the statute] applies only to an ‘action,’ which is a ‘judicial proceeding’ . . . and an arbitration is neither an ‘action’ nor a ‘judicial proceeding,’ but a non-judicial, out-of-court proceeding which makes an action or judicial proceeding unnecessary.”) (internal citation omitted).

79. 218 N.W.2d 751, 753 (Minn. 1974).

80. *Id.* at 754. The statute reads, in relevant part: “[T]he following actions shall be commenced within six years: (1) upon a contract or other obligation, express or implied, as to which no other limitation is expressly prescribed.” MINN. STAT. § 541.05(1) (2013).

81. MINN. STAT. § 645.45(2) (2013).

definition and at common law, was intended to be confined to judicial proceedings.⁸²

The court also stressed “the special, nonjudicial nature of arbitration proceedings” as additional support for refusing to bar the Thorsens’ claim in arbitration merely because the action would be barred in court.⁸³

Numerous courts across the nation have also reached similar decisions when determining whether arbitration is an “action,” and therefore, subject to the state statute of limitations that restricts the bringing of “actions.”⁸⁴ In rejecting the implication that an “action” encompasses arbitration, courts often note the difference between the arbitral and court forums.⁸⁵ As the Superior Court of Connecticut reasoned:

Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitation. Arbitration is an arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to the established tribunals of justice; and is intended to avoid the formalities, the delay, the expense, and vexation of ordinary litigation.⁸⁶

Notably, courts have also ruled that arbitrations are not “suits” as that term applies to a statute of limitations analysis,⁸⁷ and have also held that the term “action” does not encompass “arbitration” in contexts outside of statute of limitations issues.⁸⁸ Determining whether state statute implies that statutes of

82. *Har-Mar*, 218 N.W.2d at 754 (internal citation omitted).

83. *Id.* at 755.

84. *See, e.g.,* *Lewiston Firefighters Ass’n v. City of Lewiston*, 354 A.2d 154, 167 (Me. 1976) (“Arbitration is not an action at law and the statute is not, therefore, an automatic bar to the Firefighters’ recovery.”); *Shafnacker v. Raymond James & Assocs., Inc.*, 683 N.E.2d 662, 666 (Mass. 1997) (“This statute does not aid the plaintiff’s cause because the filing of a claim for arbitration is not an ‘action’ within the meaning of [the statute].”).

85. *See, e.g., Skidmore*, 197 A.2d at 87.

86. *Id.* (quoting *In re Curtis*, 30 A. 769, 770 (Conn. 1894) (internal quotation mark omitted)).

87. *See Son Shipping*, 199 F.2d at 689 (“It is true that the demand was not made within the one year limitation upon suits, contained in [the statute], but there is, nevertheless, no time bar because arbitration is not within the term ‘suit’ as used in that statute. Instead, it is the performance of a contract providing for the resolution of controversy without suit.”).

88. *See Manhattan Loft, LLC v. Mercury Liquors, Inc.*, 93 Cal. Rptr. 3d 457, 464-65 (Ct. App. 2009); *Moore v. Omnicare, Inc.*, 118 P.3d 141, 153 (Idaho 2005) (Eismann, J., concurring) (stating that attorney’s fees were not available in arbitration under the statute because “[t]he arbitration panel was neither a court nor a judge, and the arbitration proceedings were not a civil action. A civil action is commenced by filing a complaint with

limitations are applicable in arbitration is obviously a subjective—and perhaps controversial—endeavor. It was at the center of action taken by the Washington State Legislature as well as a recent Florida Supreme Court decision, as will be discussed in the next two parts.

IV. THE *BROOM* DECISION AND THE WASHINGTON STATE LEGISLATURE'S REACTION

In 2010, the Washington Supreme Court handed down a controversial decision when it vacated an arbitration panel's ruling that had dismissed claims under the theory that the claims were barred by state statutes of limitations.⁸⁹ In *Broom v. Morgan Stanley*, the court ruled that arbitrators did not have the authority to apply statutes of limitations because this was contrary to state law.⁹⁰ The court's decision led to swift action by the Washington State Legislature, which passed an amendment to the Washington Arbitration Act in 2013, explicitly stating that statutes of limitations apply in the context of arbitrations.⁹¹ The court's decision and the Washington legislature's reaction are examined in the following sections.

A. *Broom v. Morgan Stanley*

1. Lower Court Decisions

In *Broom*, two children of a deceased investor, Dick Broom, filed a statement of claim in September 2005 against Morgan Stanley alleging negligence, failure to make suitable investment recommendations, and various other claims in connection with the handling of their father's investment portfolio.⁹² Mr. Broom had kept a retirement investment account with Paine Webber in the late 1990s and early 2000s, and when his broker moved to Morgan Stanley in June 2000, Mr. Broom transferred his accounts with the

the court"); *Pathman Constr. Co. v. Knox Cnty. Hosp. Ass'n*, 326 N.E.2d 844, 854 (Ind. Ct. App. 1975) ("[T]o broaden the scope of 'action' to include any dispute seems unrealistic, especially in light of the consideration above that one purpose of arbitration is to reduce litigation. The term 'action' in its usual sense, at least its usual legal sense, means a suit brought in court, a formal complaint within the jurisdiction of a court of law." (emphasis omitted)); *Kent Cnty. Deputy Sheriff's Ass'n v. Kent Cnty. Sheriff*, 616 N.W.2d 677, 683 n.18 (Mich. 2000) ("[A]rbitration is not a 'civil action.'").

89. See *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182, 183 (Wash. 2010).

90. *Id.* at 188.

91. WASH. REV. CODE § 7.04A.090(3) (Supp. 2013).

92. *Broom*, 236 P.3d at 183.

broker.⁹³ The account had decreased in value while at Paine Webber, and continued to decline in value until Mr. Broom died in 2002.⁹⁴ Broom's children were the beneficiaries of his accounts, and they subsequently filed the claim in the National Association of Securities Dealers (NASD) arbitral forum under the parties' arbitration agreement.⁹⁵

Unlike *Raymond James*, which will be discussed below, the Brooms' arbitration agreement did not specifically address statutes of limitations nor explicitly state whether statutes of limitations issues would be decided by an arbitrator or a court.⁹⁶ Instead, the parties' agreement was governed by NASD Rules, specifically Rule 10304.⁹⁷ As previously discussed in Part II, this eligibility rule provided that no claim could be brought in arbitration "where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy."⁹⁸ The rule also provided that it "shall not extend applicable statutes of limitations."⁹⁹ Importantly, Rule 10304 stated that the panel was given authority to determine "any questions regarding the eligibility of a claim under this Rule."¹⁰⁰

Morgan Stanley moved to dismiss the claims, relying in part on the theory that state statutes of limitations barred the claims.¹⁰¹ The arbitration panel ruled in Morgan Stanley's favor in 2006, finding that all but one claim was barred by state statutes of limitations.¹⁰² Morgan Stanley then moved to dismiss the remaining claim before the arbitration panel, and the Brooms moved for reconsideration.¹⁰³ The arbitration panel dismissed the remaining claim and denied the motion for reconsideration.¹⁰⁴

93. *Id.* at 183.

94. *Id.*

95. *Id.*

96. *See infra* Part V.

97. *Broom*, 236 P.3d at 186-87. The NASD was the predecessor of FINRA, and NASD Rule 10304 is statutorily nearly identical to FINRA Rule 12206, which was discussed in Part II(C). *See Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 172 (2d Cir. 2011) ("FINRA was created in 2007 through a consolidation of the National Association of Securities Dealers, Inc. ("NASD")—a self-regulatory organization registered under the Securities Exchange Act of 1934 ("1934 Act")—and the regulatory arm of the New York Stock Exchange Group, Inc.").

98. *Broom*, 236 P.3d at 186; *see also Industry Code*, *supra* note 51, § 10304(a).

99. *Broom*, 236 P.3d at 186; *see also Industry Code*, *supra* note 51, § 10304(c).

100. *Industry Code*, *supra* note 51, § 10304(a); *see also Broom*, 236 P.3d at 186.

101. *Broom*, 236 P.3d at 183.

102. *Id.* at 183-84.

103. *Id.* at 184.

104. *Id.*; *see also Broom v. Morgan Stanley DW Inc.*, No. 05-05019, 2006 WL 2084989, at *2 (N.A.S.D. July 12, 2006).

The Brooms then turned to a Washington trial court for relief, filing a complaint to vacate the arbitration award.¹⁰⁵ They argued that because state statutes of limitations do not apply to arbitration, the arbitration award was legally erroneous on its face.¹⁰⁶ Specifically, the Brooms argued that the governing statute providing for time limitations at issue in their case—section 4.16.005—was inapplicable to arbitration because the statute mentioned the bringing of “actions” and not “arbitrations.”¹⁰⁷ The trial court found in favor of the Brooms and vacated the award.¹⁰⁸

The court of appeals affirmed, holding that the lower court “correctly interpreted Washington law,” and that the “rules governing the parties’ arbitration proceeding did not allow the arbitrators to apply statutes of limitation that were not applicable to those proceedings.”¹⁰⁹ In reaching its holding, the court of appeals analyzed three Washington Supreme Court decisions that illuminated the actions-versus-arbitration distinction.¹¹⁰ In *Thorgaard Plumbing & Heating Co. v. County of King*, the court decided whether a filing requirement that applied to county non-claim suits also applied to arbitrations.¹¹¹ In rejecting the application of the statute of limitations to the arbitration, the *Thorgaard* court noted the language of the statutes in question, which explicitly referred to the bringing of “actions”:

An action is a prosecution in a court for the enforcement or protection of private rights and the redress of private wrongs. It is clear that by using the word “action” in the foregoing section the legislature had a lawsuit in mind. . . .

Thus the legislature has prescribed the conditions under which a county may be sued. If one intends to bring an action (e.g., a lawsuit) against a county, he must do so in the manner provided by RCW

105. *Broom*, 236 P.3d at 184.

106. *Id.*

107. *Id.* at 187-88; *see also* WASH. REV. CODE § 4.16.005 (2013) (“Commencement of actions. Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.”).

108. *Broom*, 236 P.3d at 184.

109. *Broom v. Morgan Stanley DW Inc.*, No. 60115-6-I, 2008 WL 4053440, at *1 (Wash. Ct. App. Sept. 2, 2008).

110. *Id.* at *4.

111. 426 P.2d 828, 832 (Wash. 1967).

36.45.010. However, this has nothing to do with a statutory arbitration proceeding.¹¹²

Thus, the *Thorgaard* court held that the nonclaim statute “is not intended to control the settlement of controversies in which a valid contract to arbitrate is in force,” and therefore, the arbitral claim was not barred by statute of limitations.¹¹³

The *Broom* appellate court also took direction from *City of Auburn v. King County*, which again analyzed the applicability of statutes of limitations in arbitration.¹¹⁴ In that case, the Washington Supreme Court held that the state statute at issue—section 4.16.130—did not apply to arbitration “by its language.”¹¹⁵ The appellate court reasoned that “*Auburn* [was] an extension of *Thorgaard*’s reasoning to statutes of limitation” because both decisions distinguished between the “action” language of the statutes and the bringing of arbitrations.¹¹⁶

Last, the *Broom* appellate court considered the scope of a final case, *International Ass’n of Fire Fighters v. City of Everett*, which Morgan Stanley argued undermined the *Thorgaard* and *City of Auburn* decisions.¹¹⁷ In *Fire Fighters*, a labor union and two of its members filed a complaint in state court against the City, seeking to recover attorney’s fees after the union prevailed in arbitration.¹¹⁸ The City argued that the fees were not recoverable in an arbitral forum because the statute in question specifically refers to recovery of fees in actions, and arbitrations were not actions under the Court’s holding in

112. *Id.* (citations omitted) (emphasis in original). As the court noted: “RCW 36.45.010 requires the filing of ‘All *claims* for damages . . . within ninety days from the date that the damage occurred . . .’ RCW 36.45.030 provides that no ‘*action* shall be maintained on any *claim* for damages until it has been presented to the board of county commissioners . . . but such *action* (e.g. on the claim for damages) must be commenced within three months . . .’” *Id.* (alteration and emphasis in original). The court also noted that its interpretation regarding the term “action”: “This is consistent with RCW 4.04.020, which provides: There shall be . . . but one form of *action* for the enforcement or protection of private rights and the redress of private wrongs, which shall be called a civil *action*.” *Id.* (alteration and emphasis in original).

113. *Thorgaard*, 426 P.2d at 834.

114. 788 P.2d 534, 536 (Wash. 1990).

115. *Id.*; see also WASH. REV. CODE § 4.16.130 (2013) (“Action for relief not otherwise provided for. An action for relief not hereinbefore provided for, shall be commenced within two years after the cause of action shall have accrued.”).

116. *Broom v. Morgan Stanley DW Inc.*, No. 60115-6-I, 2008 WL 4053440, at *4 (Wash. Ct. App. Sept. 2, 2008).

117. *Id.*

118. *Int’l Ass’n of Fire Fighters, Local 46 v. City of Everett*, 42 P.3d 1265, 1266 (Wash. 2002).

Thorgaard.¹¹⁹ The Washington Supreme Court rejected this argument, noting the different purposes of the statutes at issue:

Because the statutory scheme at issue in *Thorgaard* serves a different purpose than the statutory scheme at issue here, we find that *Thorgaard*'s definition of "action" does not control. In *Thorgaard*, the court was construing the apparent conflict between a nonclaim and the arbitration statute. The purpose behind the nonclaim statute is to put the county on notice of an impending action. However, because the parties' contract in *Thorgaard* provided for arbitration upon agreement by the parties, the county was already aware of the dispute. In contrast, this case involves employees' rights to ensure payment of wages or salary owed.¹²⁰

The *Broom* appellate court, in turn, interpreted the *Fire Fighters* opinion as carving out a small exception and noted instead that *Thorgaard* and *Auburn* "remain[ed] good law and support[ed] the superior court's conclusion that Washington statutes of limitations do not bar claims in arbitration proceedings."¹²¹

In addition to its analysis of statutory construction and purpose, the *Broom* appellate court also analyzed the NASD's Rule 10304 in reaching its holding, and determined that the rule did not expressly incorporate statutes of limitations.¹²² As the court wrote:

[T]he subsequent history of [Rule 10304] suggests that it is simply a warning that the six-year limit for arbitrations does not extend "applicable statutes of limitation" *in court actions*. But even assuming it addresses the arbitrators' authority, it does not confer authority to apply statutes of limitation that are not "applicable." A statute is "applicable" either by virtue of the substantive law applied, in this case Washington law, or the arbitration agreement. Neither basis for applying the relevant statutes of limitation is established in this case.¹²³

The appellate court thus held that the lower court properly vacated the arbitration.¹²⁴ Morgan Stanley petitioned for review in the Washington Supreme Court; the court granted review.¹²⁵

119. *Id.* at 1267-68 (citing WASH. REV. CODE § 49.48.030 (2013)).

120. *Fire Fighters*, 42 P.3d at 1270 (citations omitted).

121. *Broom*, 2008 WL 4053440, at *4.

122. *Id.* at *5.

123. *Id.* (citations omitted).

124. *Id.*

125. *Broom v. Morgan Stanley DW Inc.*, 205 P.3d 132 (Wash. 2009).

2. Supreme Court Decision

The Washington Supreme Court upheld the lower courts' decisions and held that "[t]he arbitrators exceeded their powers by applying statutes of limitations inapplicable to arbitral proceedings."¹²⁶ In reaching its decision, the court first noted that the parties' arbitration agreement "did not explicitly state" that the statutes of limitations would apply to the arbitration.¹²⁷ Therefore, the court had to determine whether the arbitrators correctly applied the time limitations in the absence of a clear directive from the parties' agreement.¹²⁸

In concluding that the arbitrators exceeded their powers, the court noted its holdings in *Thorgaard* and *Auburn*, which demonstrated the importance of parsing a statute's language and intent to reach a determination.¹²⁹ The court stressed that the statute at issue in *Broom* referred only to "actions" and did not mention arbitrations.¹³⁰ Importantly, the court also noted that the state's arbitration acts—the Washington Arbitration Act (WAA) and the Revised Uniform Arbitration Act of 2000 (RUAA)—both made clear distinctions between arbitrations and actions in court.¹³¹ As the court stated:

Further, in the arbitration statute before us, the legislature chose its statutory language carefully to distinguish between arbitrations and judicial proceedings. In this case, as in *Thorgaard*, the parties' arbitration was governed by the WAA. Throughout the WAA, the legislature refers to arbitration variously as "arbitration," "hearing," or "proceeding," and to lawsuits as "civil actions," "actions," or "suits." The legislature maintained the distinction between the two types of proceedings in the RUAA, carefully referring to arbitrations as "arbitration proceedings" and to lawsuits as "judicial proceedings" or "civil actions." Nowhere in either act does the legislature refer to an arbitration as an "action." Nor does either act make state statutes of limitations applicable to arbitrations. This legislatively created distinction suggests that the legislature did not intend for arbitrations governed by the WAA and the RUAA to be deemed equivalent to judicial "actions."¹³²

126. *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182, 188 (Wash. 2010).

127. *Id.* at 186.

128. *Id.*

129. *Id.* at 187 ("[O]ur cases together teach that we should examine the purpose of the statute before us to determine whether 'action' includes arbitral proceedings in a given context.").

130. *Id.* at 188.

131. *Id.*

132. *Id.* (citations omitted).

The court reasoned that “[t]he legislature’s carefully chosen language, as well as its apparent approval of our statutory interpretation in *City of Auburn*, suggests that we have interpreted these statutes as intended.”¹³³ Even though the court recognized the arbitrators’ authority and autonomy to conduct the arbitration, the court noted that the panel could not violate state law.¹³⁴ The court thus held that “[b]ecause, under our cases, state statutes of limitations may not apply to arbitrations absent the parties’ agreement, the arbitrators were not authorized to apply those limits to the Brooms’ claims.”¹³⁵

In making its ruling, the court discussed the state legislature’s power to amend the statute to either clarify that “actions” encompassed arbitration or to state explicitly that statutes of limitations were applicable in arbitral forums.¹³⁶

The legislature’s carefully chosen language, as well as its apparent approval of our statutory interpretation in *City of Auburn*, suggests that we have interpreted these statutes as intended. As we noted above, “[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. In the *absence of a clear statement to the contrary* by the Washington legislature, we thus read the statutory language and our own precedent to conclude that arbitration is not an “action” subject to state statutes of limitations in these circumstances.¹³⁷

The Washington Legislature would soon make a “clear statement to the contrary”¹³⁸ regarding the *Broom* decision.

B. *The Washington Legislature Reacts to Broom*

The *Broom* decision immediately sent off waves of panic in the Washington legal community, which worried that the decision would lead to a

133. *Id.*

134. *Id.* (“Although arbitrators are empowered to interpret the NASD Code, their interpretations may not violate state law. And though arbitrators have the discretion to interpret section 10304 as they see fit, that discretion is bounded by Washington’s case law and statutes.”)

135. *Id.*

136. *Id.*

137. *Id.* (emphasis added) (citation omitted). Justice Madsen wrote a vocal dissent, arguing that the majority ignored the fact that the parties had agreed to submit all time limitations issues to the arbitrators, who had the power to decide whether or not statutes of limitation applied to the claims. *See id.* at 189 (Madsen, J., dissenting).

138. *Id.* at 188.

massive onslaught of new filings on old claims in disputes extending well beyond the securities industry.¹³⁹ As one law firm warned on its website:

The Washington Supreme Court recently decided that statutes of limitation do not apply in arbitrations unless the parties expressly agree. This means stale claims subject to arbitration may now be brought years—even decades—after they were otherwise considered time-barred. In light of the decision, companies and individuals alike should review their contracts and form agreements used on a repetitive basis, which may contain arbitration clauses, to determine whether old claims might still be brought by or against them. Many of these contracts and form agreements will need to be revised.¹⁴⁰

Legal scholars across the nation also debated the impact of the decision on future arbitrations in their own states.¹⁴¹ In Washington, opponents of the *Broom* decision mobilized and began to seek relief from the state legislature. Two groups in particular—the Associated General Contractors of Washington, which had written an amicus brief in support of the respondents in *Broom*, and the Alternative Dispute Resolution Section of the Washington State Bar

139. See, e.g., *Washington Supreme Court Holds Statutes of Limitations Do Not Apply to Arbitration Proceedings*, LANE POWELL (July 23, 2010), <http://www.lane-powell.com/10196/washington-supreme-court-holds-statutes-of-limitations-do-not-apply-to-arbitration-proceeding/> (“Although *Broom* is a securities case, the decision is likely to have wider application to any contract that has an arbitration clause.”); Douglas Reiser, *WA Supreme Court: State Statutes of Limitation Do Not Apply in Arbitration*, THE BUILDERS COUNSEL BLOG (July 26, 2010), <http://www.builderscounsel.com/2010/07/wa-supreme-court-state-statutes-of-limitation-do-not-apply-in-arbitration/> (“The ruling perhaps creates an opening for claimants who have arbitration clauses, but thought their claims had expired.”); *Development Law Group Legal Update: Washington Court Holds Statutes of Limitations Don’t Apply to Arbitration*, STOEL RIVES (Aug. 9, 2010), <http://www.stoel.com/showalert.aspx?Show=6946> (“[T]he full impact of the [*Broom*] decision remains to be seen.”).

140. Stephanie Bernsten & John Davis, *Washington Supreme Court: Statutes of Limitation Do Not Apply in Arbitration*, SCHWABEBLOG (Aug. 12, 2010), <http://www.schwabeblog.com/2010/page/2/>.

141. See Edward J. Underhill, *Statutes of Limitation and Arbitration: Limiting Your Client’s Exposure*, 101 ILL. B.J. 244, 245 (2013) (“[C]ourts through-out the country . . . have consistently held the expiration of a statute of limitation is neither an automatic bar to claims asserted in arbitration nor a proper basis for a party to refuse to arbitrate a claim. Whether the Illinois Supreme Court is likely to follow the reasoning of the California, Washington, and Florida courts may depend upon the similarity between the controlling Illinois statutes and those reviewed by courts outside of Illinois.”) (citations omitted). Naila S. Awan, *Recent Development: Broom v. Morgan Stanley DW, Inc.*, 26 OHIO ST. J. ON DISP. RESOL. 753, 758-59 (2011) (discussing the potential ramifications of the *Broom* decision).

Association (ADR Section)—urged the legislature to right the wrong created by *Broom*.¹⁴²

On Jan. 14, 2013, an amendment to Washington’s Uniform Arbitration Act (UAA), explicitly stating that statutes of limitations would apply in arbitration, was first read in the Washington House of Representatives.¹⁴³ In introducing his bill, Representative Roger Goodman explained that he had worked with the ADR Section on a larger project to update and revise Washington’s UAA.¹⁴⁴ Representative Goodman explained that he had spoken to a friend from the ADR Section who had “commented with horror” on the *Broom* decision.¹⁴⁵ Although Representative Goodman hoped for a larger overhaul of the UAA in the future, he stated that the statute of limitations amendment in his bill that he was presenting before the committee was “one little fix we want to get done now.”¹⁴⁶

The ADR Section was also very vocal during testimony about the need for the amendment.¹⁴⁷ Paul McVicker, a representative of the group, stated that the ADR Section had come to a consensus in support of the bill¹⁴⁸: “Because we promote the informed use and best practices of ADR procedures, it makes sense that an ADR procedure such as arbitration, conform [sic] to court procedures and statutory requirements and limitations as well.”¹⁴⁹ McVicker criticized the *Broom* decision, claiming that the decision raised the possibility of “unequal treatment of people in similar situations.”¹⁵⁰ In contrast, he said the amendment would be in the interest of best practices. On March 18, 2013, Representative Goodman again testified in support of the bill, this time before the Senate’s Committee on Law and Justice. Representative Goodman again

142. Brief for Associated General Contractors of Washington as Amicus Curiae Supporting Petitioner, *Broom v. Morgan Stanley DW Inc.*, 236 P.3d 182 (Wash. 2010) (No. 82311-1). Wa. H.R. B. Rep., 2013 Reg. Sess. H.B. 1065 (noting that representatives from both groups testified in support of the bill).

143. *HB 1065 – 2013-14*, WASHINGTON STATE LEGISLATURE (last updated Feb. 26, 2014, 7:07 PM) <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1065&year=2013> (providing a full history of the bill’s movement through the Washington Legislature).

144. *Addressing the Applicability of Statutes of Limitation in Arbitration Proceedings: Hearing on H.B. 1065 before the H. Comm. on the Judiciary*, 2013 Leg., First Reg. Sess. (Wash. 2013) http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013011081 (statement of Richard Goodman, Rep., 45th Leg. District) (5:36 – 7:40).

145. *Id.*

146. *Id.*

147. *Id.* (statement of Paul McVicker, Chair, Alternative Dispute Resolution Section, Washington State Bar Association) (9:07 – 11:45).

148. *Id.*

149. *Id.*

150. *Id.*

voiced the need for the amendment to cure the *Broom* decision. As Goodman stated, under the Washington Supreme Court's *Broom* decision, "if the claim is barred by the statute of limitations, which would allow for arbitration where it wouldn't allow for another cause of action, and that would be inconsistent."¹⁵¹

At no point in this bill's history was there any testimony against it, and the bill was unanimously passed in Washington's bicameral legislature.¹⁵² On May 1, 2013, the Governor of Washington signed into law a bill amending the Washington UAA to state that statutes of limitations apply to arbitration.¹⁵³ The law went into effect on July 28, 2013, adding the crucial section 3 to the statute: "7.04A.090. Initiation of arbitration. . . . (3) A claim sought to be arbitrated is subject to the same limitations of time for the commencement of actions as if the claim had been asserted in a court."¹⁵⁴ By passing the legislation, the Washington legislature ensured that the decision of whether to apply statutes of limitations in arbitration was taken out of arbitrators' hands.

V. IN *RAYMOND JAMES*, THE FLORIDA SUPREME COURT INTERPRETED FLORIDA'S STATUTES OF LIMITATIONS TO APPLY TO ARBITRATIONS

In May 2013, the Florida Supreme Court resolved an issue of first impression under Florida law, upon certification from Florida's Second District Court of Appeal to be a question of "great public importance": Do Florida's statutes of limitations apply to arbitration?¹⁵⁵ In this part, we will review the facts behind the dispute and its path to the Florida Supreme Court, and how the Florida Supreme Court ultimately answered the above question in the affirmative.

151. *Addressing the Applicability of Statutes of Limitation in Arbitration Proceedings: Hearing on H.B. 1065 before the S. Comm. on Law and Justice*, 2013 Leg., First Reg. Sess. (Wash. 2013) http://www.tvw.org/index.php?option=com_tvwplayer&eventID=2013031053 (statement of Richard Goodman, Rep., 45th Leg. District) (19:28-19:37)

152. *HB 1065 – 2013-14*, WASHINGTON STATE LEGISLATURE (Dec. 30, 2013, 9:59 PM) <http://apps.leg.wa.gov/billinfo/summary.aspx?bill=1065&year=2013> (providing a full history of the bill's movement through the Washington Legislature).

153. WASH. REV. CODE § 7.04A.090 (2013).

154. WASH. REV. CODE § 7.04A.090(3) (2013). The initial portion of the statute was unchanged by the amendment. *See* § 7.04A.090(1)-(2).

155. *Raymond James Fin. Servs., Inc. v. Phillips*, 126 So. 3d 186, 187 (Fla. 2013) ("[T]he Second District certified a question of great public importance, which we rephrase as follows: DOES SECTION 95.011, FLORIDA STATUTES, APPLY TO ARBITRATION?"). Section 95.011 is the "Applicability" section of Florida's statutory chapter on Limitations of Actions. *See* FLA. STAT. § 95.011 (2013).

A. *Background Facts*

Between mid-1999 and early-2000, five investors opened investment accounts with a Raymond James branch manager in Naples, Florida.¹⁵⁶ As part of their account opening documentation, they signed an arbitration clause providing that any dispute “will be resolved by arbitration,” with the following additional language about statutes of limitations¹⁵⁷:

(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 this agreement which is time barred for any reason shall not be eligible for arbitration. The determination of whether any such claim was timely filed shall be by a court having jurisdiction, upon application by either party.¹⁵⁸

Per the investors’ allegations, their assets were invested in non-diversified, high-risk equities concentrated in the technology sector, which was inconsistent with their investment objectives, and as a result they experienced substantial losses.¹⁵⁹ In 2005, they filed a demand for arbitration, asserting claims of negligence, breach of fiduciary duty, violations of federal and state securities laws, as well as negligent failure to supervise on the part of Raymond James.¹⁶⁰

156. *Raymond James Fin. Servs., Inc.*, 126 So. 3d at 188.

157. *Id.*

158. *Id.* at 188-89. In *Howsam v. Dean Witter Reynolds, Inc.*, the United States Supreme Court approved of prior precedent holding that “in the absence of an agreement to the contrary, . . . issues of procedural arbitrability, *i.e.*, whether prerequisites such as *time limits*, notice, laches, estoppel, and other conditions precedent to an obligation to arbitrate have been met, are for the arbitrators to decide.” 537 U.S. 79, 85 (2002) (emphasis by the Court) (quoting Uniform Arbitration Act § 6 cmt. 2 (2000), available at http://www.uniformlaws.org/shared/docs/arbitration/arbitration_final_00.pdf). Accordingly, but for the language in the parties’ agreement providing for court determination of whether statutes of limitations apply, this issue would have been resolved by the arbitrators.

159. *Raymond James Fin. Servs., Inc.*, 126 So. 3d at 189.

160. *See id.*; *Raymond James Fin. Servs., Inc. v. Phillips*, 110 So. 3d 908, 909 (Fla. Dist. Ct. App. 2011), *decision quashed*, 126 So. 3d 186 (Fla. 2013) (“The Account Holders’ grievances may briefly be summarized as claims of negligence; misconduct, including breaches of fiduciary duty; and state and federal securities violations.”). The final claim, failure to supervise, is a violation of NASD Conduct Rule 3010. Courts have consistently held that there is no private right of action for violations of exchange rules. *See Ammon Wenger, See No Evil, Hear No Evil, Don’t Get Sued: Should A Private Cause of Action Exist for A Violation of NASD Conduct Rule 3010?*, 74 FORDHAM L. REV. 303, 319-326 (2005) (surveying cases); *Colonial Realty Corp. v. Bache & Co.*, 358 F.2d 178, 182 (2d Cir. 1966) (“We find little reason to believe that by requiring exchanges and dealers’ associations to include such provisions in their rules Congress meant to impose a new legal standard on

Raymond James filed a motion in the arbitration alleging that the claims were time-barred under Florida Statutes, section 95.11 and chapter 517, because they were filed over four years after the last of the unsuitable investments were purchased.¹⁶¹ The investors responded by asserting their right to have the matter resolved by a court, and filed a complaint in Florida state court.¹⁶²

B. *Lower Court Decisions*

The trial court found that Florida's statutes of limitations do not apply in arbitration,¹⁶³ relying on the Florida Supreme Court's decision in *Miele v. Prudential-Bache Securities, Inc.*¹⁶⁴ *Miele* concerned another securities arbitration, in which a panel had awarded punitive damages in favor of the claimant.¹⁶⁵ Pursuant to Florida law at the time, any award of punitive damages had to be split between the claimant and Florida's "General Revenue Fund."¹⁶⁶ Following the confirmation of the award, Prudential paid sixty percent of the punitive damages award into the General Revenue Fund, and the claimant appealed, arguing that the punitive damages splitting statute should not apply to arbitral awards.¹⁶⁷

The issue turned on whether an arbitration was a "civil action" under the Florida statute, and the court concluded that it was not.¹⁶⁸ First, the court considered the context and looked at the punitive damages splitting statute as a whole, noting that various parts of it referred to remittitur and juries, which are

members different from that long recognized by state law."). Accordingly, this claim was likely only cognizable in arbitration.

161. *Raymond James Fin. Servs., Inc.*, 126 So. 3d at 189; FLA. STAT. § 95.11(3)(a) (2013) (provides that any action founded on negligence must be brought within four years).

162. *Raymond James Fin. Servs., Inc.*, 126 So. 3d at 189.

163. *Id.* ("The trial court agreed and granted declaratory judgment in favor of the investors.").

164. 656 So. 2d 470, 473 (Fla. 1995).

165. *Id.* at 471.

166. FLA. STAT. §768.73 (1991) ("(2) In any civil action, an award of punitive damages shall be payable as follows: (a) Forty percent of the award shall be payable to the claimant. (b) If the cause of action was based on personal injury or wrongful death, 60 percent of the award shall be payable to the Public Medical Assistance Trust Fund; otherwise, 60 percent of the award shall be payable to the General Revenue Fund."). The purpose of this provision was "to allot to the public weal a portion of damages designed to deter future harm to the public and to discourage punitive damage claims by making them less remunerative to the claimant and the claimant's attorney." *Gordon v. State*, 608 So. 2d 800, 802 (Fla. 1992).

167. *Miele*, 656 So. 2d at 471.

168. *Id.* at 473.

plainly not applicable to arbitration.¹⁶⁹ Second, the court looked at the plain meaning of “action” as defined by legal dictionaries, finding that “Black’s definition of ‘action’ clearly contemplates a proceeding filed in a court.”¹⁷⁰ Finally, the court considered the policy behind the statute, and concluded that there was “no clear legislative intent that the statute apply to arbitration proceedings.”¹⁷¹ In particular, the court in *Miele* noted that “arbitration is a favored means of dispute resolution . . . and limited review is necessary to prevent arbitration from becoming merely an added preliminary step to judicial resolution rather than a true alternative.”¹⁷² In light of the status of arbitration as an alternative, the court concluded that it is not clear that the same legislative objectives that justify restricting punitive damages in court apply to arbitration, and therefore a clearer statement of intent would be necessary from the legislature before the court would apply the punitive-damages-splitting statute to an arbitration award.¹⁷³ The *Raymond James* trial court concluded that, just as the court in *Miele* found that arbitration was not a civil action for the purposes of restrictions on punitive damages, arbitration was also not an action or proceeding for the purposes of statutes of limitations.¹⁷⁴

On appeal in *Raymond James*, the district court of appeal held that *Miele* was not the governing law because the applicability of the punitive damages statute differed significantly from the statute of limitations statute.¹⁷⁵ Whereas the punitive damages statute applied by its terms only to civil actions, the statute of limitations sections applied to a “civil action or proceeding,” both of which are defined as “action” within the statutory chapter on limitations.¹⁷⁶ Thus, while the question whether an arbitration was a “civil action” was

169. *Id.* at 472 (“There is no provision for a remittitur or a jury in arbitration proceedings. . . . When viewed within this context, the term ‘civil action’ in section 768.73 clearly refers to an action filed in a court of this state and does not include an arbitration proceeding.”).

170. *Id.* at 472 (citing *Black’s Law Dictionary* 26 (5th ed. 1979)).

171. *Id.* at 473.

172. *Id.* (citations omitted).

173. *Id.*

174. *Raymond James Fin. Servs., Inc. v. Phillips*, 110 So. 3d 908, 909 (Fla. Dist. Ct. App. 2011), *decision quashed*, 126 So. 3d 186 (Fla. 2013).

175. *Id.* at 912 (“We acknowledge that the trial court incorrectly relied on the *Miele* decision when it stated that *Miele* determined arbitrations are not ‘proceedings.’”).

176. See FLA. STAT. § 95.011 (2013) (“A civil action or proceeding, called ‘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.”).

resolved by *Miele*, the issue of whether an arbitration was a “civil proceeding” was not.¹⁷⁷

Nonetheless, upon review the district court of appeal concluded that a proceeding, as used in the statute, did not encompass arbitration and thus statutes of limitations did not apply. The court noted first that the legislature did not specifically mention “arbitrations” in the section outlining applicability of statutes of limitations, despite the fact that Florida’s arbitration code was already extant and several other states expressly reference arbitration in their statutes of limitations.¹⁷⁸ The court then distinguished a case cited by Raymond James as providing only that the parties were free to contract for statutes of limitations to be applied by the arbitrators.¹⁷⁹ Since the client agreement that Raymond James drafted did not specify whether statutes of limitations apply and appeared to be a nationwide form, the contract would be construed against the drafter, and statutes of limitations would not apply.¹⁸⁰

Reaction to the district court of appeal’s opinion from some commentators was decidedly negative.¹⁸¹

C. Florida Supreme Court

Although it concluded that statutes of limitations do not apply in arbitration, the district court of appeal certified its decision to the Florida Supreme Court as a “question of great public importance.”¹⁸² And reflecting its

177. *Raymond James Fin. Servs., Inc.*, 110 So. 3d at 909 (“There is nothing in *Miele* or any decisions subsequent to *Miele* which deals with the interpretation of the term ‘proceeding.’”).

178. *Id.* at 913 (citing Weintraub, *supra* note 71, at 25, for the proposition that New York and Georgia have statutes that specifically reference arbitration).

179. *See Raymond James Fin. Servs., Inc.*, 110 So. 3d at 913 (citing O’Keefe Architects, Inc. v. CED Construction Partners, Ltd., 944 So. 2d 181, 184 (Fla. 2006)). By comparison, the arbitration agreement in *O’Keefe* provided “In no event shall the demand for arbitration be made after the date when institution of legal or equitable proceedings based on such claim . . . would be barred by the applicable statutes of limitations,” a much clearer indication that statutes of limitations were to apply. *Id.*

180. *Id.* at 913-14.

181. *See, e.g.,* Juan Ramirez, Jr., *Arbitrations in Florida: A Tale of Two Courts*, 25 ST. THOMAS L. REV. 43, 71-72 (2012) (“The district court decision is illustrative of the judicial hostility to arbitration, that such an event as an arbitration cannot be considered a ‘proceeding.’ . . . [T]he case demonstrates how courts undermine arbitrations as a legitimate and enforceable method of resolving disputes.”).

182. Such a certification is one of six grounds for the Florida Supreme Court’s exercise of discretionary jurisdiction. *See* Fla. R. App. P. 9.030(a)(2)(A)(v).

importance, the supreme court's discretionary review attracted several amicus filings.¹⁸³

The Florida Supreme Court began its analysis in *Raymond James* at the same place as the district court of appeal, confronting the question of whether “an arbitration proceeding is a ‘civil action or proceeding’—terms that [the statute] does not expressly define.”¹⁸⁴ As in *Miele*, one of the court's first steps was to turn to the dictionary definition of the terms, and here, the Florida Supreme Court noted that Black's defined “‘proceeding’ as ‘[a]ny procedural means for seeking redress from a tribunal or agency.’”¹⁸⁵ Focusing on the word “tribunal,” which Black's defines as “[a] court or *other adjudicatory* body,” the court noted that “[a]rbitration is clearly within the meaning of the term adjudication” and “an arbitrator would fall under the definition of an adjudicator.”¹⁸⁶ The court then turned to the context of the statute, and noted that the legislature chose the phrase “civil action or proceeding.”¹⁸⁷ Because civil actions are limited to court cases, the addition of the word “proceeding” would be meaningless if that provision were also limited to court proceedings, it would be mere surplusage.¹⁸⁸ Further, the next statutory section in the chapter provides that contract provisions shortening the time for a civil action or proceeding to be brought are void.¹⁸⁹ This section would be easily defeated if it did not apply to arbitrations because parties could easily agree to such provisions in their arbitration agreements. Finally, the court noted that the legislature routinely uses the phrase “arbitration proceeding” in various statutes, suggesting that the legislature understood arbitration to be a proceeding.¹⁹⁰

The court also looked at the statute's legislative history and purpose. Prior to the time the relevant section was passed, the next statutory section

183. Perhaps most interesting was a filing by the Florida Association of Realtors, which noted that complicated arbitration agreements are certainly not universal in arbitration. See Brief for Florida Ass'n of Realtors d/b/a Florida Realtors as Amici Curiae Supporting Petitioners at 8, *Raymond James Financial Services, Inc., v. Phillips*, 126 So. 3d 186 (Fla. 2013) (No. SC11-2513). The problem identified by this amici was that “[i]f a simple arbitration clause does not necessarily include all substantive rights the parties would have in court, then reaching an effective arbitration agreement becomes a more costly process,” and a substantial part of the advantage of arbitration is lost. *Id.* at 9.

184. *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186, 190 (Fla. 2013).

185. *Id.* at 191 (citing Black's Law Dictionary 34 (9th ed. 2009)).

186. *Id.* (citing Black's Law Dictionary 47, 1646 (9th ed. 2009)).

187. *Id.*

188. *Id.*

189. *Id.* (citing FLA. STAT. § 95.03 (2013)).

190. *Id.* at 192.

prohibiting shortening limitations periods applied only to suits.¹⁹¹ Thus, the expansion of both sections to “civil actions or proceedings” suggested “an intent to expand the term beyond just those actions occurring in a judicial proceeding.”¹⁹² In regards to purpose, the court found that the purposes of statutes of limitations—“protect[ing] defendants from unfair surprise and stale claims”—are equally “present in an arbitration proceeding.”¹⁹³ The court found that interpreting the statute so that statutes of limitations would only apply to judicial actions, and not to arbitration, would be contrary to parties’ implicit desire in selecting arbitration to “resolve disputes efficiently, quickly, and inexpensively. Interpreting the statute in this manner would permit parties to wait to bring an arbitration claim until documents or witnesses are difficult to locate—a situation that would significantly increase the time, effort, and expense to resolve a dispute.”¹⁹⁴ For all those reasons, the court found that Florida statutes of limitations do apply in arbitration, because an arbitration is a “proceeding” as that term is used in the Florida statutes applying statutes of limitations.¹⁹⁵

Although the Florida Supreme Court in *Raymond James* spoke briefly about policy and statutory purpose, the foundation of its opinion was based on “well-settled principles of statutory construction,” examining the Florida statutes of limitations to determine whether the Florida legislature had concluded they should apply to arbitrations under Florida law.¹⁹⁶ This is despite the request from Raymond James and several amici for a much broader holding, that arbitration and the FAA require that all substantive rights present in litigation be available in arbitration.¹⁹⁷ To the contrary, but for a short

191. *Id.*

192. *Id.*

193. *Id.* at 192-93 (citations omitted).

194. *Id.* at 193.

195. *Id.*

196. *Id.* at 188.

197. See Initial Brief of Petitioner at 34 *Raymond James Financial Services, Inc. v. Phillips*, 126 So. 3d 186 (Fla. 2013) (No. SC11-2513) (“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.”); Brief for Florida Securities Dealer Ass’n et al. as Amici Curiae Supporting Petitioners, *Raymond James Fin. Servs., Inc.*, 126 So. 3d 186 (Fla. 2013) (No. SC11-2513) (“The [Supreme Court’s] decision in *Mastrobuono* is straightforward in its significance: states may not penalize parties to an arbitration agreement by denying them a remedy available in court.”); The Securities Industry and Financial

recognition of the policy argument that stale claims are also prejudicial to defendants in arbitration, the court's rationale suggests that the application of statutes of limitations in arbitration requires an examination of the relevant statute to see if it was intended to apply to arbitration.¹⁹⁸ Accordingly, nothing in the *Raymond James* decision suggests that statutes of limitations should necessarily apply in arbitration in states with different statutory language, and nothing in the *Raymond James* opinion is necessarily in conflict with the Washington Supreme Court's decision in *Broom*.

VI. CONCLUSION

The Washington legislature's response to *Broom* and the Florida Supreme Court's decision in *Raymond James* both demonstrate that the issue of whether statutes of limitations apply in arbitration is still very much in flux. For arbitrations in states where there has not yet been a decision directly on point, what can be drawn from these two court opinions and the Washington legislature's response is that statutes of limitations do not necessarily apply in arbitration. As with many legal issues, determining the application of statutes of limitations in arbitration presents an issue of "statutory construction."¹⁹⁹

Arbitrators resolving a statute of limitation defense should undertake a two-step analysis. First, they must analyze whether the statute of limitation applies to arbitration, looking initially at whether there is a clear statement by the state legislature or courts, or an explicit reference in the parties' contract. Absent an express directive from the legislature, the courts, or the parties, arbitrators should then review the text of the relevant statute and determine whether the legislature intended that statute to apply to arbitrations conducted under private contract, as opposed to court proceedings. Second, if the arbitrators conclude that the statute of limitation at issue applies to arbitrations, the arbitrators must then proceed to consider whether the claim is barred.

Markets Ass'n's Amicus Curiae Brief In Support of Petitioner at 12 *Raymond James Fin. Servs., Inc.*, 126 So. 3d 186 (Fla. 2013) (No. SC11-2513) ("The success of arbitration is dependent on the (correct) assumption that a party's substantive rights in arbitration—including defenses based on statutes of limitation—are the same as he or she would have in court.").

198. *Raymond James Fin. Servs., Inc.*, 126 So. 3d 186, 190 (Fla. 2013) ("The primary rule of statutory construction is to give effect to legislative intent, which is the polestar that guides the court in statutory construction. In answering a statutory interpretation question, this Court must begin with the actual language used in the statute because legislative intent is determined first and foremost from the statute's text.") (internal citations omitted).

199. *Id.* at 189.

The issue of whether statutes of limitations apply in arbitration is obviously uncertain, as our analysis has shown. The only way for parties drafting arbitration clauses to be certain these time limitations will apply is to specifically incorporate a reference to the applicability of statutes of limitations into their arbitration agreement. Absent such contractual specificity, parties to a dispute should be wary of assuming that potentially stale claims will be subject to a valid statute of limitations defense.²⁰⁰

200. Even without an applicable statute of limitations, truly stale claims asserted in arbitration could still be subject to a defense of laches. *See* 30A C.J.S. Equity § 138 (2011) (“Laches is a defense in equity, has existed as such since the beginning of equity, and exists independently of statutes of limitation.”); 30A C.J.S. Equity § 143 (2011) (“[U]nless a statute of limitations is by its terms applicable or is applied by analogy, there is no fixed period within which a person must assert his or her claim or be barred by laches. The length of time depends on the circumstances of the particular case and is ordinarily a matter within the trial court’s discretion. . . . [M]ere delay or lapse of time alone will not establish laches. The doctrine of laches applies where there has been such delay as to render enforcement of the asserted right inequitable.”).