SECURITIES ARBITRATION ALERT 2020-48 (12/24/20)

George H. Friedman, Editor-in-Chief

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- ***HRSA Publishes Long-Awaited 340B Program Administrative Dispute Resolution Procedures*, Lexology (Dec. 14, 2020)**
- ***Morgan Stanley Loses Appeal of $3.3 Million Award*, InvestmentNews (Dec. 15, 2020)**
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- ***DOL May be Too Late with Final Fiduciary Rule*, InvestmentNews (Dec. 16, 2020)**
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DID YOU KNOW?

- **FTC Also Investigates Financial Frauds**

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ALERT! NO *ALERT* NEXT TWO WEEKS, AND OTHER DOINGS. *It's the end of another calendar quarter, so we will be taking our customary break in publishing the* Securities Arbitration Alert *as the year comes to a close. We plan on a two-week hiatus this time around, as we prepare for some changes next year. As a result, this week's* Alert *is not quite a year-end double issue but it's significantly heftier than usual.*

We had hoped that the next feature article, set for release in SAA 2021-01 (Jan.14), was going to be your publisher's annual "predictions" piece. But that would be difficult, given that control of the Senate won't be decided until January 5 at the earliest, and things like federal judicial and agency head appointments and Congressional regulatory nullifications must be approved by that body.

Speaking of next year, here as promised is some basic subscription pricing information for the weekly online Alert*: Individual -- $480 a year (48 issues); Group -- $480 for first subscriber and $100 for each additional. Current subscribers will receive the* Alert *free of charge through February, with yearly renewals effective March 1. More details for renewing and new subscribers will be posted in January.*

Look for the next edition of the SAA *in your e-mailbox the week of January 11 [. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts. Or take a look at our publisher and Editor-in-Chief George Friedman's 2014 blog post,* On the 1st day of Christmas/Chanukah/Kwanzaa, My True Love Gave to me…A New Form of ADR, *that has aged well*.

Happy holidays and happy new year!

SQUIBS: IN-DEPTH ANALYSIS

SEC APPROVES CHAIR HONORARIA INCREASES. ***The SEC has approved a FINRA proposal increasing certain Chairperson honoraria***. We reported in SAA 2019-48 (Dec. 18) that FINRA's Board of Governors in **December 2019** authorized staff to submit a rule filing with the SEC increasing certain Chairperson honoraria. As reported in SAA 2020-39 (Oct. 21), FINRA on **October 16** filed with the SEC SR-FINRA-2020-035, *Notice of Filing of a Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees.* What were the specifics? As described in the Approval Order, the proposed rule change would amend the customer and industry *Codes* to: "(1) increase the additional hearing day honorarium Chairs receive for each hearing on the merits from $125 to $250 and; (2) create a new $125 Chair honorarium for each prehearing conference in which the Chair participates. Under the proposed rule change, these increases would be funded primarily by certain increases to the member surcharge and process fees for claims of more than $250,000 or claims for non-monetary or unspecified damages. The proposed rule change would also increase filing fees and hearing session fees for customers, associated persons and members bringing claims of more than $500,000 or claims for nonmonetary or unspecified damage."

One Comment and Swift Approval
The proposal was published in the *Federal Register* on **October 26,** yielding just one comment – supportive – from **Steven B. Caruso, Esq**. After being granted an extension to act by the end of the year, the Commission swiftly approved the Rule filing on **December 17.** The Order, which contains several charts showing the fee increases, validates FINRA's *raison d'être* for the changes: "The Commission acknowledges FINRA's concern that fewer Chair-eligible arbitrators may be taking on the additional burdens of being on the Chair roster due to insufficient compensation. The Commission believes that increasing the amount that FINRA compensates its Chair-eligible arbitrators may incentivize them to take on the additional training and responsibilities associated with the position. Consequently, FINRA may be able to recruit new, and retain current, Chairs for its roster, potentially alleviating the shortage of Chairs in certain locations and the concomitant negative impact (e.g., dissatisfied parties and scheduling delays)" (footnote omitted).

Customer Fee Increase Not a Problem
We had previously expressed concerns that the Customer fee increase part of the proposal might be subject to enhanced scrutiny by the Commission, but those fears were misplaced. Says the Approval Order: "… FINRA designed the arbitration fee structure to distribute much of the increased costs of the forum to member firms that are parties to an arbitration proceeding and to parties associated with large claims or non-monetary or unspecified claims. The Commission believes that this proposed distribution of fees will help keep the FINRA arbitration forum accessible. Otherwise, the Commission believes that increasing fees on claimants with small claims could discourage retail investors from bringing their claims. Accordingly, the proposed allocation of the fee increases will help ensure that FINRA's arbitration forum remains accessible and affordable to parties" (footnote omitted).
*(ed: *As we said after the Board's action, this is good news. $850 a day – $600 for two hearing sessions plus $250 – is decent compensation, and the "extra" for IPHCs is fair. **Next is Approval Order publication in the* Federal Register *and a FINRA Regulatory Notice setting the effective date. We're guessing the Authority will try for January 1 and that effectiveness will be "hearings held" versus "cases filed" but one never knows.)*
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A FUNNY THING HAPPENED ON THE WAY TO EXPUNGEMENT RULE APPROVAL: SEC IS WEIGHING DISAPPROVAL. ***The SEC on December 18 issued a notice indicating potential disapproval of FINRA Dispute Resolution Service's ("DRS") proposed rule establishing a special panel for expungement requests and making other changes.*** We reported in SAA 2020-36 (Sep. 23) that, FINRA on **September 22, 2020** filed SR-FINRA-2020-030, *Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests.* As discussed in SAAs 2020-37 (Oct. 7) & -36 (Sep. 23): "The proposed rule change, which incorporated comments and suggestions received on Regulatory Notice 17-42, would amend the *Codes* to: "(1) impose requirements on expungement requests (a) filed during an investment-related, customer initiated arbitration ('customer arbitration') by an associated person, or by a party to the customer arbitration on-behalf-of an associated person ('on-behalf-of request'), or (b) filed by an associated person separate from a customer arbitration ('straight-in request'); (2) establish a roster of arbitrators with enhanced training and experience from which a three-person panel would be randomly selected to decide straight-in requests; (3) establish procedural requirements for expungement hearings; and (4) codify and update the best practices of the *Notice to Arbitrators and Parties on Expanded Expungement Guidance* (*Guidance*) that arbitrators and parties must follow. In addition, the proposed rule change would amend the *Customer Code* to specify procedures for requesting expungement of customer dispute information arising from simplified arbitrations. The proposed rule change would also amend the *Codes* to establish requirements for notifying state securities regulators and customers of expungement requests" (footnote omitted). The SEC published the proposed rule in the *Federal Register* on **October 1** (Vol. 85, No. 191, P. 62142). Just seven comments were posted as of the comment period's close. Most were supportive, but almost all suggested significant improvements. We analyzed in SAA 2020-40 (Oct. 29) some representative institutional comments. We encouraged readers to consult the letters for more details and specifics, given space limitations.

DRS Amends the Filing

DRS responded to comments on **December 18** in a 20-page letter from Assistant General Counsel Mignon McLemore. While urging approval, FINRA agreed to several amendments, which we repeat below essentially *verbatim*:

- FINRA has determined to amend proposed Rule 13805(b)(1) to require that the associated person serve the customers with the statement of claim within 10 days of filing the statement of claim with FINRA and any answer within 10 days of filing each answer with FINRA…. Where the customer does not actively participate in the expungement request, or the matter also involves issues unrelated to expungement, imposing the additional requirement of providing all other documents filed in the proceeding in all circumstances could be unnecessarily burdensome on the associated person.

- FINRA has determined to amend proposed Rule 13805(b)(2) to provide that the Director will notify these customers of the time, date and place of any prehearing conferences using the customers' current address provided by the party seeking expungement.

- FINRA has also determined to amend proposed Rule 13805(c)(3)(A) to clarify that the customer is entitled to appear at prehearing conferences. FINRA will continue to consider customer participation in expungement hearings, including ways to further encourage customer participation (footnote omitted).

- Proposed Rule 13805(c)(4) would be amended to clarify that all parties from investment-related, customer-initiated arbitrations or civil litigations, and customers whose customer complaints gave rise to the customer dispute information that is a subject of the expungement request shall have the right to be represented at the prehearing conferences.

SEC's Notice
Also on December 18 the Commission issued Release No. 34-90734, *Notice of Filing of Amendment No. 1 and Order Instituting Proceedings to Determine Whether to Approve or Disapprove the Proposed Rule Change, as modified by Amendment No. 1, to Amend the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests.* The purpose? "To solicit comments on Amendment No. 1 from interested persons and to institute proceedings to determine whether to approve or disapprove the Proposed Rule Change, as modified by Amendment No. 1." What's the concern? While somewhat vague, the Notice says: "Institution of proceedings is appropriate at this time in view of the legal and policy issues raised by the Proposed Rule Change, as modified by Amendment No.1." The Notice adds, however, that institution of proceedings: "does not indicate that the Commission has reached any conclusions with respect to the Proposed Rule Change …." Comments are due 21 days after publication in the *Federal Register*, with rebuttal comments due 35 days thereafter.
(ed: In our experience and that of other experienced practitioners we've consulted, this is very rare to say the least. Even as to SRO rulemaking generally, disapproval proceedings have been scant – although it does happen. Of course, disapproval proceedings are not necessary if the staff can negotiate with the SRO to submit a rule change that the Commission can accept. In our view, something has changed in the mix here. Either the Commission is stepping back from that polite interaction approach generally, in a move to become more hands on, or the staff could not get what they wanted here (or were perhaps in disagreement) and stepped back to let the Commission decide the issue. An unusual occurrence any way you slice it.)
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ELEVENTH CIRCUIT UPHOLDS $3 MILLION SANCTION FINRA AWARD AGAINST MORGAN STANLEY. ***(This analysis is authored by SAA Editorial Board member Robert Pearce, a Securities Arbitration Lawyer at the Law Offices of Robert Wayne Pearce, P.A. The words that follow are his, lightly edited.) In an unpublished*** **per curiam** ***Opinion, the Eleventh Circuit, has affirmed unanimously a Southern District of Florida decision confirming a FINRA Award of over $3 million in sanctions against Morgan Stanley.*** Briefly stated, the Petitioners were residents of Puerto Rico who filed sales practice claims arising out of their Morgan Stanley's advisors recommendation and over-concentration of the investments in Puerto Rico bonds and closed-end funds using securities-backed loans. The arbitration Panel's stated compensatory damage Award in *Litovich-Quintana and Torres v. Morgan Stanley Smith Barney, LLC*, FINRA ID 17-01908 (Miami, FL July 16, 2019), was relatively small ($261,420.63 in compensatory damages), compared to the $3 million sanction for violating the Arbitrators' discovery orders. The District Court, in a case we covered in

SAA 2020-14 (Apr. 15), denied Morgan Stanley's Motion to vacate the Award (see No. 1:19-cv-22977-MGC (S.D. Fla. Oct. 1, 2019)), and this appeal followed.

Motion to Vacate

Morgan Stanley argued "evident partiality" by the Arbitrators and that they "exceeded their powers" in ordering sanctions as their statutory bases for vacatur of the Award. The District Court had rejected those two arguments and found expressly that "the sanctions award was compensatory rather than punitive." In so doing, the District Court relied upon the Panel's reasoning for the monetary sanctions; that is, "the negative effect that [MSSB's] noncompliance with the Panel's Orders had on its efforts to achieve a fair arbitration hearing" and "the extreme prejudice [MSSB's] failure of compliance caused [Petitioners'] counsel in preparing their case and asserting their claims without the documents which the panel deemed were highly relevant to the dispute in question, the central figure of which was the terminated employee whose related documents were being withheld." Notably, the $3 million in sanctions was relatively close to the actual alleged compensatory damages, attorney's fees and interest that Petitioners requested the Panel awarded them in the arbitration.

The Appeal

Notwithstanding, Morgan Stanley appealed to the Eleventh Circuit seeking to reverse the District Court's findings that there was no "evident partiality" and that the Panel had not "exceeded its powers." The unanimous Court in *Torres v. Morgan Stanley Smith, Barney, LLC*, No. 20-11535 (11th Cir. Dec. 10, 2020) (*per curiam*)(unpublished), rejects both arguments, holding that Morgan Stanley failed to establish a statutory basis for vacating an arbitration Award under the Federal Arbitration Act.

Issue on Appeal: Evident Partiality

Morgan Stanley had contended that two of the Arbitrators demonstrated: "evident partiality" because they purportedly knew of, but failed to disclose information which would have led Morgan Stanley to believe there was a potential conflict of interest in selecting them as Arbitrators. However, the Eleventh Circuit found the Arbitrators made sufficient disclosures and that what Morgan Stanley contended should have been disclosed was: 1) false; 2) gave rise to "no reasonable impression of partiality;" and/or 3) could not "conclude that an objective reasonable person would believe the potential conflict existed."

Issue on Appeal: Exceeding Powers

The Eleventh Circuit then turned its attention to the "exceeded powers" argument and reminded Morgan Stanley of its ruling in *Gherardi v. Citigroup Global Markets, Inc*., 975 F. 3d 1232, 1236-38 (11th Cir. 2020), a case covered in SAA 2020-36 (Sep. 23): "When parties agree to arbitrate their disputes, they 'opt out of the court system' and, thus, have limited avenue for relief in federal court." The Court noted its jurisdiction was limited to making sure the arbitration agreement gave the Panel authority to reach the issues it resolved and that the agreement in this case expressly incorporated: "FINRA By-Laws, Rules, and Code of Arbitration Procedure," and that Morgan Stanley had agreed to

be bound by same. Further, that the Arbitrators' power to impose sanctions under FINRA's *Code of arbitration Procedure* was undisputed. The Court also rejected Morgan Stanley's argument that the sanctions was prohibited by "applicable law." In that regard, it stated: "Whether the Panel applied its rules consistent with 'applicable law' or in an arbitrary manner are legal questions that are beyond the limited scope of our judicial review."
(ed: The vacatur fever has been prevalent in the Puerto Rico arbitration cases resulting in big Awards to investors. It's time the big wire-houses honor the rules they pushed upon investors and remember they opted-out of the court system for their own brand of justice in every case -- not only when the vote goes their way!)
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*****THIS JUST IN: LATEST *NEUTRAL CORNER* FROM FINRA DISPUTE RESOLUTION SERVICES HITS THE ELECTRONIC NEWSSTAND.** ***Just as we were putting together this year-end issue of the*** **Alert** ***came word that FINRA Dispute Resolution Services' ("DRS") The Neutral Corner newsletter for arbitrators and mediators ("TNC"), was posted on the Authority's Website.*** Time doesn't permit a full analysis, and we didn't want this story to hold until we resume publication next year, so we present below essentially *verbatim* the table of contents:

Feature Article

- *Court Upholds Panel's Authority to Order a Virtual Arbitration Hearing*, by Brianna Akerley, Case Administrator, FINRA Dispute Resolution Services, Midwest Regional Office

FINRA Dispute Resolution Services and FINRA News

- COVID-19 Hearing Postponements and Virtual Hearings
- Virtual Arbitration Hearing Statistics
- Case Filings and Trends
- 2020 Demographic Survey
- FINRA Opens Jersey City Hearing Location and Closes Newark Hearing Location
- Register for the DR Portal Today
- Updates to Oath of Arbitrator
- SEC Rule Approvals
  - Proposed Amendments to the Codes of Arbitration Procedure to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees
  - Proposed Rule Change to Amend FINRA Rules to Reflect Name Changes to Two FINRA Departments: the Office of Dispute Resolution and the Department of Registration and Disclosure
- SEC Rule Filings
  - Proposed Amendments to the Codes of Arbitration Procedure to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees

- Proposed Amendments to the Codes of Arbitration Procedure Relating to Requests to Expunge Customer Dispute Information, Including Creating a Special Arbitrator Roster to Decide Certain Expungement Requests

Mediation Update

- Expansion of FINRA's Mediation Program for Small Arbitration Claims
- Mediation Case Filings and Trends
- Keep It Current
- Mediator Training Opportunities
- Become a FINRA Mediator

Education and Training

- Arbitrator Training Videos for Virtual Hearings
- FINRA Virtual Conference Panels: Practical Tips & What's New in Arbitration Procedures

*(ed: *Constituents should note the closure of the Newark hearing location, and arbitrators should be aware of the updated Oath form, which adds a question about social media. ***This issue is also available in PDF format. ****TNC is a wonderful resource not only for arbitrators and mediators, but parties as well. Past issues can be found here.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH NOVEMBER: MORE OF THE SAME.
FINRA Dispute Resolution Services ("DRS") posted case statistics through **November**, with most numbers slowly returning to near-normal during this abnormal year. We'll save our usual exhaustive analysis for the year-end stats, but in brief the headlines are: 1) while overall arbitration filings through November are still up at 5%, customer claims continue to remain way down (-15%) but have increased slightly for the third month in a row; 2) industry disputes remain up significantly (38%) but have cooled off from the year's earlier torrid pace; 3) industry case filings for the year are still about half (48%) of customer arbitration filings; and 4) for the third month in a row pending cases declined. Overall arbitration average turnaround times were 14.7 months, with hearing cases taking 14.6 months. There were 376 mediation cases in agreement, a 31% decrease. The settlement rate remains extremely high at 84%. There are now 8,090 DRS arbitrators, 3,798 public and 4,292 non-public. Last, FINRA's new "Virtual Arbitration Hearings" category shows that through November: 124 cases were conducted with one or more hearings via Zoom (51 customer and 73 industry cases). There were 136 joint motions for virtual hearings (43 customer and 93 industry cases).
*(ed: *With customer claims up – albeit slightly – for the third month in a row, are we seeing the beginning of "Corona Crash" customer case filings? Time will tell. **As the chart below shows, the last three months have shown reductions in pending cases, reflecting a 200+ case decline from the year's cumulative high water mark of 5,415 open cases. Our theory remains that, with the resumption of in-person hearings remaining an*

elusive goal, and with a second wave of the pandemic clearly here, more parties are coming to embrace the virtues of virtual hearings.)

Month	Open cases	Change	Cum
Mar	4,781	-	-
Apr	4,824	43	43
May	4,897	73	116
June	4,958	61	177
July	5,062	104	281
August	5,415	353	634
Sep	5,392	-23	611
Oct	5,304	-88	523
Nov	5,205	-99	424

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GOODBYE OCIE, HELLO DOE. The new year is bringing in a name change at the SEC, which on **December 18** issued *Statement on the Renaming of the Office of Compliance Inspections and Examinations to the Division of Examinations*. Why the change? Say the Commissioners: "This year marks 25 years since the creation of the SEC's Office of Compliance Inspections and Examinations (OCIE). Since its inception, OCIE has grown – in both number (over 1,000) and percentage (23%) of SEC employees – to represent the second largest office or division at the SEC, second in size only to the Division of Enforcement. In that time, OCIE has greatly increased the effectiveness of the Commission's compliance and examination function. OCIE's presence and engagement has promoted a strong culture of compliance within the financial services industry. To better reflect these important contributions and its overall role at the Commission, starting today, OCIE will be renamed the 'Division of Examinations' (the Division). The SEC's five Commissioners unanimously support this decision."
(ed: Makes sense.)
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FINAL DOL FIDUCIARY RULE RELEASED. GOES INTO EFFECT 60 DAYS AFTER *FEDERAL REGISTER* PUBLICATION. We analyzed in SAA 2020-30 (Aug. 12) the thousands of comments received on the Department of Labor's ("DOL") proposed fiduciary standard rule for those offering retirement investment advice – *Improving Investment Advice for Workers & Retirees* – that was published in the *Federal Register* on **July 7** (85 FR 40834; Vol. 85, No. 130, P. 40834). The exemption, which is harmonized with the SEC's *Regulation Best Interest*, allows Investment Advice Fiduciaries to engage in certain prohibited transactions that would otherwise be disallowed under ERISA and the Internal Revenue Code (see our analysis in SAA 2020-25 (Jul. 8)). Recall that the over 6,000 comments received prompted the agency to hold

virtual public hearings in early **September**. Most recently, we reported in SAA 2020-45 (Dec. 3) that the Department on **November 24** submitted the Final Rule to the Office of Management and Budget for final review. We can now report that the DOL on **December 15** released the nearly 300-page Final Rule**,** which will be effective 60 days after *Federal Register* publication.
*(ed: *Recall that the DOL's old Rule was invalidated by the Fifth Circuit in* Chamber of Commerce of the United States v. Department of Labor, *885 F.3d 360 (5th Cir.),* en banc review denied *(2018). **The Final Rule's long-term fate is unclear since it will become effective after Inauguration Day.)*
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REMINDER: CALIFORNIA'S CFPB GOES ONLINE JANUARY 1. AGAIN, THERE'S A CARVEOUT FOR SEC AND FEDERAL PREEMPTION AND NO MENTION OF ARBITRATION. Here's a friendly reminder that the *California Consumer Financial Protection Law* ("*CCFPL*") becomes effective **January 1, 2021**. As reported in SAA 2020-38 (Oct. 14), California Governor **Gavin Newsom** on **September 25** signed into law the *CCFPL*, which effectively creates the State's version of the federal Consumer Financial Protection Bureau – the California Department of Financial Protection and Innovation. The most recent legislative analysis states: "This bill seeks to reorganize and rename the Department of Business Oversight (DBO), to clarify DBO's authority to enforce provisions of the federal Dodd-Frank Wall Street Consumer Financial Protection Act of 2010 over existing licensees, to protect consumers from unlawful, unfair, deceptive, or abusive acts or practices, and to expand DBO's jurisdiction to cover currently unlicensed persons that offer or provide consumer financial products and services in California." As for potential federal preemption, the *CCFPL* expressly carves out from coverage: "services relating to securities provided by a person regulated by the Securities Exchange Commission or a person regulated by a state securities commission, but only to the extent that such person acts in a regulated capacity …." And an overarching provision in section 90005(f) states that the definition of "covered person" applies "to the extent not preempted by federal law…." There is also no mention whatsoever of arbitration. The State has issued a Factsheet on the new law.
*(ed: *As we said before, it's a bit odd that FINRA is not mentioned, but the carveout for SEC-regulated entities likely embraces those the Authority regulates. **While we eschew a detailed analysis, the* Alert *recommends these resources:* CFPB California Style: The California Consumer Financial Protection Law Brings More Providers of Consumer Financial Products and Services Into the Regulatory Tent, *Morrison Foerster Client Alert (Sep. 1, 2020);* California's Mini-CFPB: Its Powers and Enforcement Implications, *Stroock Special Bulletin (Sep. 9, 2020). ***An* SAA *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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SIXTH CIRCUIT: LOOK TO AMOUNT CLAIMED -- NOT AWARDED -- TO DETERMINE IF "MATTER IN CONTROVERSY" REQUIREMENT IS MET FOR DIVERSITY JURISDICTION. The Federal Arbitration Act ("FAA") does not confer independent federal question jurisdiction. Thus, to establish diversity jurisdiction

for vacating an Award, the challenger must meet two requirements of [28 U.S.C. 1332(a)](): 1) complete diversity of citizenship between the disputing parties; and 2) the "matter in controversy" exceeds $75,000. Suppose there is clear diversity of citizenship but the Award in question was $0 because the claim was denied? Is there diversity jurisdiction? That was the precise scenario in *Hale v. Morgan Stanley Smith Barney LLC*, No. 20-3412 (6th Cir. Dec. 15, 2020), where the sole JAMS Arbitrator denied completely financial adviser Hale's $14 million plus claim against his employer, Morgan Stanley. The District Court never reached the merits of Hale's Petition to vacate, finding that the $0 Award deprived it of diversity jurisdiction. On appeal, a unanimous Sixth Circuit reverses, finding that the "matter in controversy" was Hale's multi-million dollar claim against his employer, not the zero dollar Award: "Accordingly, in actions where a party seeks to vacate a $0 arbitration award pursuant to § 10 of the FAA, courts should look to the complaint for purposes of assessing whether § 1332(a)'s jurisdictional amount in controversy requirement has been met…. In his complaint, Hale sought to vacate the $0 award, arguing that the arbitrator should have awarded him almost $15 million in damages -- certainly more than the amount necessary to satisfy § 1332(a). Therefore, the minimum amount in controversy was met, and the district court had the subject-matter jurisdiction necessary to adjudicate Hale's claims." In a footnote, the Court adds: "This is especially true when it is considered that plaintiffs, like Hale, are presumably seeking vacation of an arbitration award in order to reenter arbitration."
*(ed: *We're with the Court. We think the thrust of 28 U.S.C. 1332(a) is to deny federal jurisdiction for relatively minor claims. Nearly $15 million is not minor! **The Opinion does not say who administered the arbitration, but we found the Award in PACER. Email Help@SecArbAlert.com for a copy of the explained Award in* Richard "Rip" P. Hale v. Morgan Stanley, *JAMS ID 1340015454 (Chicago, IL May 3, 2019).)*
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NOW, *THAT'S* A "FUTURE DISPUTES CLAUSE." NINTH CIRCUIT UPHOLDS ORDER COMPELLING ARBITRATION OF DISPUTE ARISING OUT OF 1992 CONTRACT. It is a core concept that arbitration agreements fall into two basic types: 1) predispute arbitration agreements ("PDAA"), sometimes referred to as "future disputes" clauses; and 2) agreements to submit existing disputes to arbitration. We know courts are duty bound to compel arbitration of disputes arising out of a broad PDAA, but does that hold forever? "Could be," says a unanimous Ninth Circuit. The contract containing the PDAA in question in *Optimum Productions v. Home Box Office*, No. 19-56222 (9th Cir. Dec. 14, 2020) (memorandum) (unpublished), was signed and executed in 1992. Among other things, the contract, in the Court's words, had "stringent confidentiality provisions …either during or after" HBO's contact with **Michael Jackson** prohibiting HBO from disclosing: "any information relating to … [the] personal life of" Mr. Jackson. HBO also agreed that it would not: "make any disparaging remarks concerning" Mr. Jackson. Fast forward to the present time, where Mr. Jackson's estate contended that HBO disparaged Mr. Jackson: "by airing a 'documentary' that (falsely) claims that Jackson was abusing children …." The District Court compelled arbitration, and the Ninth Circuit affirms: "An arbitration clause can still bind the parties, even if the parties fully

performed the contract years ago.... HBO does *not* dispute the *existence* of a valid agreement, the included arbitration provision, or the incorporated confidentiality provision, but rather the 'continuing validity' of the agreement and the arbitration provision..... While HBO attempts to use a tautology that a 'fully performed [contract] … no longer imposes enforceable obligations,' the latter does not follow from the former. The contract contained a broad arbitration clause that covers claims that HBO disparaged Jackson in violation of ongoing confidentiality obligations" (brackets and emphasis in original).
(ed: An SAA *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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CALIFORNIA APPELLATE COURT: HERE'S LANGUAGE THAT'S *NOT* CLEAR AND UNMISTAKABLE EVIDENCE OF DELEGATION. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938 (1995), and its progeny establish that questions of arbitrability are for courts to decide, absent "clear and unmistakable" evidence that the parties intended to delegate these issues to arbitrators. SCOTUS thus far has not established "magic language" but that doesn't stop courts from providing examples of verbiage that *doesn't* meet the *First Options* standard. A case in point is *Sandoval-Ryan v. Oleander Holdings*, No. C089486 (Calif. Ct. App. 3 Dec. 7, 2020). The nursing home admission agreement contained a predispute arbitration agreement containing this language: "The parties understand that, except as provided below, any claim other than a claim for medical malpractice, arising out of the provision of services by the Facility, the admission agreement, *the validity, interpretation, construction, performance and enforcement thereof*, or which allege wrongful death or violations of the Elder Abuse and Dependent Adult Civil Protection Act, or the Unfair Competition Act, or which seek an award of punitive damages or attorneys' fees, *will be determined by submission to neutral arbitration* as provided by California law, and not by a lawsuit or court process …." (emphasis added by the Court). Did this language do the trick? "No," says a unanimous *Sandoval* Court: "Defendants argue clear and unmistakable delegation of threshold arbitrability questions to resolution by the arbitrator, pointing to specific language in the arbitration agreement, a portion of which we have italicized …. Citing the emphasized language, defendants argue that the arbitration agreement 'expressly provided that the parties should submit the issue of its validity, interpretation, and enforceability to the arbitrator.' But we do not read the emphasized language that way; instead, it is clear to us that the phrase 'the validity, interpretation, construction, performance and enforcement thereof' references *the admission agreement* rather than the arbitration agreement" (emphasis in original).
(ed: As we say all the time, "when in doubt, spell it out.")
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ROBBINS *SAPM* MANUAL GETS NEW SUPPLEMENT: RELEASE 24 BRINGS FRESH UPDATES AND NEW MATERIAL, WITH AN EMPHASIS ON COVID-INDUCED CHANGES. We just finished paging through the new supplement to **David E. Robbins'** *Securities Arbitration Procedures Manual ("SAPM").* The *SAPM* – a true

tour de force – is now 30 years in the making, starting publication in 1990 and continually updating by the author and practitioner over the years, as the practice evolves and new rules and procedures adjust to an ever-changing landscape. Author Robbins, a long-time member of our Board of Editors, has chronicled securities arbitration's modern history and participated at the center of events and developments that have shaped it. This latest supplement is published by Lexis Nexis/Matthew Bender as "Release 24" and according to the "Highlights" explanation on the top page of the thick set of looseleaf pages, it aims primarily to "update and expand analyses of federal and state court decisions that impact securities arbitrations and mediations." Author Robbins adds, in this regard, "I don't just tell you *what* the cases say, I suggest ways you can use the holdings of those cases as standards for your cases." He stresses, though, in his Introduction to the Release: "I have added and supplemented many subjects, adding and editing over 150 pages of text, despite working remotely most of the year due to the COVID-19 virus, which also had a significant impact on FINRA in-person arbitrations; they were suspended nationwide most of the year…. Nevertheless, while restrictions were placed on the practice of securities arbitration, important court decisions were issued that are presented in this edition…." Indeed, much of the update is devoted to the unprecedented impact on securities arbitration caused by the pandemic. An entire new chapter, *FINRA in the Time of the Coronavirus,* leads with: "Practitioners, arbitrators and mediators have learned to respect the administration of FINRA's nationwide arbitration and mediation program. Based on its desire to safeguard the health of all those who participate in its dispute resolution programs, FINRA suspended most 2020 in-person hearings and encouraged parties to take part in FINRA's Zoom platform. FINRA set forth guidance for virtual hearings. While most practitioners still prefer in-person arbitration hearings, many are pleased with Zoom mediations. FINRA published the following notices to its constituents on its virtual hearing programs…."
*(ed: *What has set SAPM apart and has made it the enduring leader in its field has been the dedicated efforts of its author to update and revise the book every year without fail and to inform those updates and revisions with the practical knowledge and observations of a versatile and respected practitioner. To us, David Robbins occupies a special place of honor in the field of securities arbitration.**The two-volume SAPM, which is approximately 4,000 pages long, is available in both print form and as an e-book (Library of Congress Card Number: 2004615234; ISBNs: 978-0-327-16188-2 (print) and 978-0-327-16800-3 (eBook). For more information, go to the Lexis/Nexis Store.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Garcia v. KND Development*, No. B301929 (Calif. Ct. App. 4 Dec. 15, 2020)**:
"Substantial evidence supported the trial court's conclusion that appellants failed to meet their burden to establish the existence of an enforceable arbitration agreement. In reaching that conclusion, the court relied on generally applicable law conditioning the validity of an arbitration agreement executed by a purported agent – like any other contract executed by a purported agent – on an adequate evidentiary showing that the agreement falls within the scope of authority, if any, conferred by the principal. The court

did not apply this law in a fashion disfavoring arbitration contracts, and thus did not violate the FAA."

The Chemours Company v. DowDuPont Inc**., No. 147, 2020 (Del. Dec. 15, 2020)**: An express delegation provision in a PDAA was to be enforced, a unanimous Delaware Supreme Court holds: "[A]fter careful consideration of the parties' briefs and the record on appeal, we find it evident that the final judgment of the Court of Chancery should be affirmed on the basis of and for the reasons stated in its March 30, 2020 memorandum opinion [in *The Chemours Company v. DowDupont Inc.*, No. 2019-0351-SG (Del. Ch. Mar. 30, 2020)]."

Jakab v. Morgan Stanley Smith Barney LLC**, FINRA ID No. 19-02692 (Baltimore, MD Nov. 25, 2020)**: An All-public Panel majority denies a customer's claim that her broker (not named as an individual respondent in the case) failed to advise her of the tax consequences of an investment and recommends expungement to the broker, finding that the broker "adequately apprised Claimant of the substantial tax consequences of his recommendation and that the customer's "actions after the sale were not consistent with her claim….." A dissenting Public Arbitrator disagrees with both conclusions and asserts that he would have awarded damages to the customer and denied expungement to the broker. *Submitted by Harry Jacobowitz, Esq. (harryjacobowitz@optimum.net).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Golann, Dwight, *If You Build It Will They Come? An Empirical Study of the Voluntary Use of Mediation, and Its Implications*, Cardozo Journal of Conflict Resolution (forthcoming): "A generation ago American litigants did not often go to mediation voluntarily. Advocates of the process predicted, however, that as disputants became more familiar with mediation, they would opt to use it more often. But is this true? Virtually no data exists about how often litigants voluntarily choose to mediate legal disputes, whether mediation use varies in different kinds of cases, and what motivates litigants' decisions whether to mediate or not. This article presents information gathered from lawyers in 175 cases. The study focused on the most common types of litigation in courts of general jurisdiction, tort and contract cases, and also complex litigation."

HRSA Publishes Long-Awaited 340B Program Administrative Dispute Resolution Procedures**, Lexology (Dec. 14, 2020)**: "The U.S. Health Resources and Services Administration (HRSA) recently released a draft final rule (Final Rule) that establishes a binding administrative dispute resolution (ADR) process concerning drug costs under the Federal 340B Drug Discount Program (340B Program). As per its terms, the Final Rule will be formally published on Dec. 13, 2020 and will take effect on Jan. 13, 2021. The Final Rule comes after a nearly 10-year wait for HRSA to establish an ADR process as required under 42 U.S.C. § 256b (the 340B Program Statute)."

***Morgan Stanley Loses Appeal of $3.3 Million Award*, InvestmentNews (Dec. 15, 2020)**: "Morgan Stanley last Thursday was dealt one more blow in its effort to overturn a 2019 Finra arbitration panel decision that ordered the firm to pay $3.3 million to investors in a Puerto Rico bond case, most of it because the firm allegedly concealed evidence in a hearing. Plaintiff's attorneys routinely grumble that broker-dealers can be far from forthcoming in turning over documents during arbitration, dragging their feet during discovery. This claim, and the large award, highlights the issue." *(ed: see our coverage elsewhere in this* Alert.*)*

***Understanding a New Supreme Court's Impact on Consumers, Savers and Investors*, Kiplinger (Dec. 15, 2020)**: "Decisions by the Supreme Court have a direct impact on consumers, savers and investors, and a president's ability to act without Congress. We often think only of landmark Supreme Court cases affecting social policy or balancing the president's and Congress' differences, but the Supreme Court also plays a significant role in businesses' relationships with their employees and customers, requiring arbitration over disputes and limiting opportunities for class action lawsuits and whistleblower protections."

***DOL May be Too Late with Final Fiduciary Rule*, InvestmentNews (Dec. 16, 2020)**: "The Department of Labor released a final regulation Tuesday to reform investment advice rules for retirement accounts, but the measure may be short-lived because it's coming out within weeks of the Biden administration taking power.... The effective date of the rule is 60 days after it is published in the *Federal Register*, which could occur in a few days. That window ensures the measure won't go into effect until after President-elect Joe Biden is inaugurated on Jan. 20." *(ed: see our coverage elsewhere in this* Alert.*)*

***FINRA Sanctions Transamerica Financial Advisors, Inc. $8.8 Million for Supervisory Violations Related to Variable Annuities, Mutual Funds and 529 Plans*, www.finra.org (Dec. 21, 2020)**: "FINRA announced today that Transamerica Financial Advisors, Inc. (TFA) has agreed to pay approximately $4.4 million in restitution to approximately 2,400 customers for failing to supervise its registered representatives' recommendations of three different products - variable annuities, mutual funds, and 529 plans. FINRA also fined TFA $4.4 million."
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DID YOU KNOW?

FTC ALSO INVESTIGATES FINANCIAL FRAUDS. Our readers know that FINRA, the SEC, and the States investigate financial fraud, but did you know the Federal Trade Commission ("FTC") does as well? In fact, last fall the agency launched a new Website, www.ReportFraud.ftc.gov, that includes a link for filing complaints and a searchable FAQ. The Website was announced in an **October** Press Release. The FTC recently issued is annual Report to Congress on protecting seniors.
(ed: Reports on potential scams can also be phoned in at 1-877-FTC-HELP (382-4357).)
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