SECURITIES ARBITRATION ALERT 2021-24 (6/24/21)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **Some Firms Announce "Back to the Office" Plans and Vaccination Policies**
- **Kentucky Supreme Court Upholds An Arbitrator's Use of the Merger Doctrine Over a Statutory Challenge**

SHORT BRIEFS:

- **SCOTUS Again Denies *Cert.* Petition on FAA Applicability to Amazon Drivers**
- **AAA Posts Data on Case-related Pandemic Activities**
- **FINRA, NASAA, and SEC Team Up to Help Firms Address Elder Abuse**
- **Not a Late "April Fools" Prank: Bipartisan Pro-Arbitration Bill Passes the Senate in a Landslide**

QUICK TAKES:

- ***Hansen v. LMB Mortgage Services, Inc.*, No. 20-15272 (9th Cir. Jun. 11, 2021)**
- ***Remedial Construction Services, L.P. v. AECOM, Inc*., No. B303797 (Calif. Ct. App. 2 (Jun. 15, 2021)**
- ***McIsaac v. Foremost Insurance Company Grand Rapids, Michigan*, No. SCV-265433 (Calif. Ct. App. 1 May 19, 2021)**
- ***Mulvihill v. Kramer*, FINRA ID No. 20-03557 (Washington, DC, May 19, 2021)**
- ***Wagner v. Brokers International Financial Services, LLC*, FINRA ID No. 19-03556 (Indianapolis, IN, May 17, 2021)**

ARTICLES OF INTEREST:

- **Ghodoosi, Farshad and Sharif, Monica, *Justice in Arbitration: The Consumer Perspective*, International Journal of Conflict Management (May 27, 2021)**
- ***SEC, NASAA, and FINRA Offer Free Resource to Securities Firms to Assist in Detection, Prevention and Reporting of Financial Exploitation of Seniors*, www.sec.gov (Jun. 15)**
- ***3rd Circ. Says Tolling Rule Saves Valeant Investors' Claims*, Law360 Securities (Jun. 16, 2021)**
- ***Broker's Account Churning, Excessive Trades Cost Clients $2M, Finra Says*, Financial Advisor (Jun. 16, 2021)**
- ***Ninth Circuit Holds Arbitration Cannot Be Denied Where Consumer Denies Visiting Website -- Jury Trial Required*, Squire Patton Boggs Blog (Jun. 18, 2021)**
- ***UBS Alleges Arbitrator Bias, Asks Court to Toss $4.8-Mln P.R. Bond Award*, Advisor Hub (Jun. 21, 2021)**

DID YOU KNOW?

- **AAA Has Passed the 200,000 Case Filing Mark for 2021**

ALERT! NO *ALERT* NEXT WEEK. *It's the end of another calendar quarter, so we will be taking our customary break from publishing the* Securities Arbitration Alert *as the quarter comes to a close. Look for the next edition of the* SAA *in your e-mailbox the week of July 5. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts. Please stay safe and enjoy the upcoming holiday weekend.*

All the best for this truly American holiday!

SQUIBS: IN-DEPTH ANALYSIS

SOME FIRMS ANNOUNCE "BACK TO THE OFFICE" PLANS AND VACCINATION POLICIES. ***As the COVID-19 pandemic continues to wane in the United States, financial institutions have begun rolling out "back-to-the-office" plans, including vaccination status disclosure policies***. We reported in SAA 2021-23 (Jun. 17) that, with COVID-19 clearly in retreat in the U.S., and with many employers ramping up efforts to return employees to the workplace, the EEOC on **May 28** issued a Press Release offering updated guidance, *What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws*. Our editorial note said: "This guidance naturally impacts financial services firms – some of which have announced staff returns to the office – and for that matter FINRA, AAA, and other ADR providers." We can now confirm that some firms have begun communicating to employees their plans and policies on returning to the office.

Back-to-the-Office Plans Announced

According to several media sources*, these financial institutions have announced plans for staff returning to the workplace:

- *American Express*: **Labor Day** (three days a week; two via telecommuting). This "hybrid model" may become permanent in the U.S. in October.

- *Goldman Sachs*: **June 14.** Note that Goldman plans to relocate 100 positions from New York City to West Palm Beach, Florida.

- *JP Morgan Chase*: **May 17**. Limits capacity to 50 percent. Rest of staff by "mid-July." Goal is to permit 10 percent of the 200,000+ staff to telecommute.

- *Morgan Stanley*: **Labor Day**. Non-returning New York City staff may experience a pay cut.

Vaccination Disclosure Policies
As to vaccinations, *Financial Advisor IQ* reported on **June 16** that Bank of America, J.P. Morgan Chase, and Wells Fargo intend to *request* that returning staff voluntarily disclose their vaccination status. Goldman Sachs and Morgan Stanley will reportedly *require* disclosure. The EEOC's guidance in this regard states: "Federal EEO laws do not prevent an employer from requiring all employees physically entering the workplace to be vaccinated for COVID-19, so long as employers comply with the reasonable accommodation provisions of the ADA and Title VII of the Civil Rights Act of 1964 and other EEO considerations. Other laws, not in EEOC's jurisdiction, may place additional restrictions on employers." On the latter point, some states such as Florida, have enacted laws permitting employers to require that returning staff be vaccinated, but barring employers from requiring proof of vaccination.
*(ed: *For example, see: FoxNews (June 16); NY Post (June 15, focusing on New York City-based employees); and Reuters (June 14). **We assume that, as the EEOC requires, firms will acquiesce to reasonable accommodation requests from staff reluctant to return to the office for medical reasons. ***Here's an excellent resource from* US News *on state laws and policies on so-called "vaccination passports." ****We're still not sure when FINRA plans to announce its return-to-the-office policy or what it will be. NYSE staff started to return in mid-May. *****We are certain there will be more financial services firms joining the "back-to-the-office" movement as time goes by. We encourage readers to let us know if they have news in this area, at George@SecArbAlert.com.)*
return to top

KENTUCKY SUPREME COURT UPHOLDS AN ARBITRATOR'S USE OF THE MERGER DOCTRINE OVER A STATUTORY CHALLENGE. ***The Supreme Court of Kentucky upholds unanimously an Arbitrator's award despite a challenge on the grounds that KRS 324.360 overruled the merger doctrine* as applied***. In *Booth v K&D Builders, Inc.*, 2020-SC-0023-DG (KY Sup. CT 2020), homebuyer **Nicole Ribiero** ("Ribiero") bought a home from **K&D Builders** ("K&D") using a standard "Residential Sales Contract" ("contract") which included a requirement to arbitrate and mediate all disputes arising out of the transaction. Under *KRS 324.360*, K&D was required to provide disclosures about the condition of the property. The contract allowed Ribiero to void it if the disclosures were not delivered. K&D did not provide the required disclosures, however. Ribiero then hired an independent inspection report that disclosed certain deficiencies, but otherwise found the house "fundamentally sound." Ribiero closed on the house and did not void the contract notwithstanding that the disclosures were made.

Buyer Moves Out and Arbitration Follows
Ribiero moved out within five months, citing damage to the property. She then promptly filed arbitration for breach of contract and rescission. The Arbitrator heard an extensive amount of evidence and, after excluding testimonial evidence from Ribiero's expert geologist, found that there was no breach of contract and that Ribiero could not prevail under *KRS 324.360*. The Arbitrator determined that Ribiero's independent investigation revealed all defects that would have been disclosed to her, and therefore she had not

relied upon K&D's failure to disclose the defects. The Arbitrator also determined that the testimony to be offered by Ribiero's expert was not relevant.

Award "Unvacated"
Ribiero filed an unsuccessful petition to vacate the Award. The Court of Appeals reversed, however, finding that the adoption of *KRS 324.360* superseded the merger doctrine and therefore the Arbitrator exceeded his powers when he: 1) invalidated the statute; and 2) improperly denied the expert's testimony. The Supreme Court of Kentucky reverses, strongly disagreeing that *KRS 324.360* overrules the merger doctrine. First, the Court states that the merger doctrine does not conflict with *KRS 324.360* because the statute regulates sellers and brokers on the front end by providing remedies before closing. The only time *KRS 324.360* applies after closing is to impose sanctions on brokers and sellers or to support an exception to the merger doctrine. The Court upholds the Arbitrator's application of the merger doctrine, finding that a court may not vacate an Award because it merely disagrees with an Arbitrator's application of the law. Additionally, the Court states, the Arbitrator was correct in his application of the law when he found that no exception to the merger doctrine existed because K&D did not conceal defects and Ribiero was aware of all defects prior to closing. Ribiero knew of all the defects and therefore did not rely on K&D to disclose. She also had the option to void the contract after not receiving disclosure, which she chose not to exercise. Finally, the Court holds, the Arbitrator properly excluded the expert's testimony.
*(ed: *The Court states that: "The merger doctrine holds that all prior statements and agreements, both written and oral, are merged into the deed and the parties are bound by that instrument." **This Squib was authored by Hayes Favinger, a 3L at St. John's School of Law. He is an intern with the Securities Arbitration Clinic at St. John's.)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SCOTUS AGAIN DENIES *CERT.* PETITION ON FAA APPLICABILITY TO AMAZON DRIVERS. The Supreme Court on **June 21** denied *Certiorari* in *Waithaka v. Amazon.com, Inc.*, No. 19-1848 (1st Cir. Jul. 17, 2020), *petition for reh'g denied* (Sep. 1), a case we covered in SAA 2020-27 (Jul. 22). To review, there's a clear Circuit split on whether the Federal Arbitration Act's ("FAA") section 1 exemption embraces only workers actually moving goods or people in interstate commerce or is to be construed broadly to cover those who are part of the "flow" of interstate commerce. The *Waithaka* Court had held: "After close examination of the text and purpose of the statute and the relevant precedent, we now hold that the [FAA section 1] exemption encompasses the contracts of transportation workers who transport goods or people within the flow of interstate commerce, not simply those who physically cross state lines in the course of their work." Amazon's **January 29** Petition had identified this question: "Whether the Federal Arbitration Act's exemption for classes of workers engaged in foreign or interstate commerce, 9 U.S.C. 1, prevents the Act's application to local transportation workers who, as a class, are not engaged to transport goods or passengers across state or national boundaries." Recall that, as reported in SAA 2021-07 (Feb. 25), SCOTUS on **February 22** denied *Certiorari* in *Amazon.com, Inc. v. Rittmann,* No. 20-622. We had

reported in SAA 2020-42 (Nov. 12) on *Rittmann v. Amazon.com, Inc*., No. 19-35381 (9th Cir. Aug. 19, 2020), where a divided Ninth Circuit held that FAA section 1 exempted from coverage Amazon "last mile" drivers, who delivered goods that had moved in interstate commerce, even though the drivers did not cross state lines. The majority sided with those Circuits finding it sufficient that the goods have been part of the "stream" of interstate commerce.
*(ed: *The latest SCOTUS case is* Amazon.com, Inc. v. Waithaka, *No. 20-1077, appearing on page 4 of the Order List. **We were hoping SCOTUS would take on this significant split in the Circuits. ***For an in-depth analysis of the issue, see Huertero, Ruben,* Supreme Court Declines to Engage in the Interpretation of "Engaged in Commerce", *2021:15 SEC. ARB. ALERT 1 (Apr. 29, 2021.) ****The Court also denied* Cert. *in Grupo* Cementos de Chihuahua S.A.B. de C.V. v. Compañía de Inversiones Mercantiles S.A., *No. 20-1033, involving an international arbitration. The Tenth Circuit had upheld post-Award motions to be served by email on the U.S. counsel of a foreign party, pursuant to Federal Rule of Civil Procedure 4(f)(3).)*
return to top

AAA POSTS DATA ON CASE-RELATED PANDEMIC ACTIVITIES. The AAA has posted on its Website stats on various case administration metrics dating back to the start of the COVID-19 pandemic. The interactive *Virtual Events* page covers **March 1, 2020,** through **April 30, 2021,** and shows that there were 5,902 cases with a ""virtual event," broken down as follows: evidentiary hearing (8,429); mediation session (937); pre-mediation conference (105); preliminary hearing (1,015); and settlement conference (7). That's a total of 10,493 virtual events. The "Virtual Events By Month" chart reveals that usage increased one hundred fold over the course of the pandemic, from a low of 17 events in March 2020 to 1,779 in March 2021.
*(ed: *Kudos to AAA. **FINRA posts virtual hearing stats.)*
return to top

FINRA, NASAA, AND SEC TEAM UP TO HELP FIRMS ADDRESS ELDER ABUSE. By mutual **June 15** Press Releases, FINRA, NASAA, and the SEC announced: "a new resource intended to assist securities firms in implementing the training requirements of the *Senior Safe Act*." Explain the Releases, the *Act*, which was signed into law by President **Trump** in **May 2018**: "addresses barriers financial professionals face in reporting suspected senior financial exploitation or abuse to authorities. Specifically, the Act protects 'covered financial institutions' – which include investment advisers, broker-dealers, and transfer agents – and their eligible employees, affiliated persons, and associated persons from liability in any civil or administrative proceeding for reporting a case of potential exploitation of a senior citizen to a covered agency. The immunity established by the Act is provided on the condition that employees receive training on how to identify and report exploitative activity against seniors before making a report. In addition, reports of suspected exploitation must be made 'in good faith' and 'with reasonable care.' This immunity applies to both individuals and firms."
*(ed: *The training material is available at: https://www.finra.org/rules-guidance/key-topics/senior-investors; https://www.nasaa.org/industry-resources/senior-issues and*

*NASAA's Serve Our Seniors website at http://serveourseniors.org/about/industry; and at https://www.investor.gov/additional-resources/information/seniors. **The initiative was launched in recognition of World Elder Abuse Awareness Day. ***Kudos to all for this wonderful example of investor protection.)*
return to top

NOT A LATE "APRIL FOOLS" PRANK: BIPARTISAN PRO-ARBITRATION BILL PASSES THE SENATE IN A LANDSLIDE. Neither your eyes or your editor are playing tricks on you. The Senate on **June 8** passed S.1260 – the *United States Innovation and Competition Act* – by a 86-32 vote, after which the bill got a strong statement of support from **President Biden.** What's the catch? According to the text, section 3205 would state the sense of Congress to: "Support ASEAN [Association of Southeast Asian Nations] nations in addressing maritime and territorial disputes in a constructive manner and in pursuing claims through peaceful, diplomatic, and, as necessary, *legitimate regional and international arbitration mechanisms*, consistent with international law, including through the adoption of a code of conduct in the South China Sea that represents the interests of all parties and promotes peace and stability in the region …." (emphasis added). The bill in section 3230 would also express the sense of Congress to: "condemn[] the People's Republic of China for failing to abide by the 2016 Permanent Court of Arbitration ruling, despite the PRC's obligations as a state party to the United Nations Convention on the Law of the Sea." It would also establish U.S. policy: "that the PRC cannot lawfully assert a maritime claim vis-à-vis the Philippines in areas that the Permanent Court of Arbitration found to be in the Philippines' Exclusive Economic Zone (EEZ) or on its continental shelf …"
*(ed: *The bill is referring to a territorial water dispute involving China and the Philippines arbitrated pursuant to the* UN Convention on the Law of the Sea. *The case was decided in favor of the Philippines, but China has rejected the Award. **The nonpartisan www.govtrack.us Website gives the bill a 94% chance of enactment.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Hansen v. LMB Mortgage Services, Inc*., No. 20-15272 (9th Cir. Jun. 11, 2021)**: "The majority of our sister circuits that have considered this issue agree that [FAA] § 16 provides jurisdiction over all orders denying a motion to compel arbitration, even if they are nonfinal and the district court has reserved ruling on the merits…. Therefore, even though the district court's order merely removed the pending motion from its docket and did not resolve the question whether the arbitration provision in LMB's Terms of Use was binding, we conclude that we nevertheless have jurisdiction to consider LMB's appeal of this order" (footnotes and citations omitted).

***McIsaac v. Foremost Insurance Company Grand Rapids, Michigan*, No. SCV-265433 (Calif. Ct. App. 1 May 19, 2021)**: "[I]f an agreement to arbitrate a controversy exists, the trial court must order arbitration unless an exception applies. (Code Civ. Proc. §

1281.2.) Here, defendant filed a petition to compel arbitration supported by a declaration, showing that the parties had a written agreement to arbitrate the amount of UIM [Underinsured Motorist] damages and were unable to reach an agreement. Accordingly, defendant was entitled to an order granting the petition to compel arbitration of that limited issue."

***Remedial Construction Services, L.P. v. AECOM, Inc.*, No. B303797 (Calif. Ct. App. 2 (Jun. 15, 2021)**: "AECOM moved to compel arbitration based on an arbitration clause contained in a separate contract (the Prime Agreement) between AECOM and the property owner, Shell Oil Products US LLC and Shell Pipeline Company (collectively 'Shell' or 'Owner'). The Subcontract between RECON and AECOM incorporates the 151-page Prime Agreement, excerpts of which were marked as Exhibit M and attached as one of 37 exhibits to the Subcontract. The excerpts included the arbitration clause. The trial court denied AECOM's motion, concluding that '[t]he Subcontract does not evidence an intention, clear or otherwise, for arbitration of disputes between RECON and AECOM'. In the absence of a clear agreement to submit a dispute to arbitration, we will not infer a waiver of a party's jury trial rights…. The Subcontract's incorporation of a voluminous contract containing an arbitration agreement between other parties was insufficient to subject RECON to arbitration of its claims against AECOM" (footnote and citation omitted). (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Mulvihill v. Kramer*, FINRA ID No. 20-03557 (Washington, DC, May 19, 2021)**: An Arbitrator explains in detail why he has decided to grant a broker's Pre-Hearing Motion to Dismiss pursuant to Rule 12206 (Six-year Eligibility Rule). The customer's claims involved an alleged unsuitable investment in FSIC II: "[T]he record does not indicate that this investment rendered the Claimant's overall investment portfolio unsuitably risky or imbalanced. With regard to diversification, Respondent alleges that Claimant invested in FSIC II to diversify because BDCs have a low correlation with equity markets and interest rates. Nothing in the record refutes this assertion. Nothing in the record indicates that Respondent was negligent or breached his fiduciary duty to Claimant. The Claimant received a prospectus and had several weeks to consider it. Whether Claimant fully understood the product is unclear, but it was readily apparent that he was investing a significant sum in a single security, and Claimant's investment history indicates that he was sophisticated enough to understand that securities can suffer losses. Nothing in the record indicates that the FSIC II shares were a fundamentally unsound investment. In fact, it appears that they held their value until a global catastrophe, Covid-19, caused widespread economic distress." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Wagner v. Brokers International Financial Services, LLC*, FINRA ID No. 19-03556 (Indianapolis, IN, May 17, 2021**): A customer alleging that an unnamed party converted her funds for his own personal use by using an insurance brokerage firm as a front to have access to the funds with the alleged help of Respondent broker, is awarded nearly

$800,000 in compensatory damages. One Arbitrator in the All-Public Panel dissents without explanation. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).* *return to top*

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Ghodoosi, Farshad and Sharif, Monica, *Justice in Arbitration: The Consumer Perspective*, International Journal of Conflict Management (May 27, 2021): "Arbitration -- binding private third-party adjudication -- has been the primary legal way for resolution of consumer disputes. Consumers, however, rarely use arbitration to resolve their disputes while evidence suggests that their disputes remain unresolved. Contrary to the current prevailing emphasis on who's winning in arbitration, our study establishes that consumers believe that the court is more just than arbitration, regardless of the outcome. Our study further establishes that consumers' perceived poor legitimacy and lack of familiarity, not cost calculation, are what drive their justice perception."

***SEC, NASAA, and FINRA Offer Free Resource to Securities Firms to Assist in Detection, Prevention and Reporting of Financial Exploitation of Seniors*, www.sec.gov (Jun. 15)**: "In recognition of World Elder Abuse Awareness Day, the U.S. Securities and Exchange Commission (SEC), the North American Securities Administrators Association (NASAA), and the Financial Industry Regulatory Authority (FINRA) today announced a new resource intended to assist securities firms in implementing the training requirements of the Senior Safe Act." (*ed: see our coverage elsewhere in this* Alert.)

***3rd Circ. Says Tolling Rule Saves Valeant Investors' Claims*, Law360 Securities (Jun. 16, 2021)**: "The Third Circuit ruled Wednesday [June 16] that individual securities claims by Valeant Pharmaceuticals International Inc. investors may advance under the class action tolling rule established in the Supreme Court's landmark *American Pipe* decision, siding with circuit courts that found the time limit clock doesn't resume until litigants leave the class."

***Broker's Account Churning, Excessive Trades Cost Clients $2M, Finra Says*, Financial Advisor (Jun. 16, 2021)**: "A New York City broker has been administratively charged with a variety of activities that cost his clients nearly $2 million in excess fees and in lost investments, the Financial Industry Regulatory Authority announced today. [], a registered representative for Spartan Capital Securities in New York City who has been the subjective of multiple client complaints during his 20-year career, is being accused of churning accounts, misrepresenting his activities and making trades without his clients' permission, Finra said. The regulatory authority said it is seeking the return of [Rep's] ill-gotten gains."

***Ninth Circuit Holds Arbitration Cannot Be Denied Where Consumer Denies Visiting Website --Jury Trial Required*, Squire Patton Boggs Blog (Jun. 18, 2021)**: "At bottom Hansen reminds litigants and courts alike that the proper procedure in weighing a motion to compel arbitration is: i) first to assess whether a triable issue on the formation of a

contract containing an arbitration provision exists; and ii) if so, to try the issue. Arbitration cannot simply be denied when a question of fact exists." *ed: see our coverage elsewhere in this* Alert.)
return to top

UBS Alleges Arbitrator Bias, Asks Court to Toss $4.8-Mln P.R. Bond Award, **Advisor Hub (Jun. 21, 2021)**. "UBS Financial Services has gone to court in an effort to overturn a $4.8 million award in a Puerto Rico bonds dispute issued against the wirehouse in May by a divided panel of three Financial Industry Regulatory Authority arbitrators. The firm accused one of the two arbitrators who had ruled against it on the largest component of the award of 'seemingly intentionally' failing to disclose previous lawsuits he filed against large corporations, signaling a possible bias in favor of the claimants, according to a petition filed June 11 in U.S. District Court in Puerto Rico."
return to top

DID YOU KNOW?

AAA HAS PASSED THE 200,000 CASE FILING MARK FOR 2021. Did you know that the American Arbitration Association has as of **June 21** received 208,005 new arbitration filings in 2021? The stat is posted on the Association's landing page at www.adr.org.
return to top

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Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

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