SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2022-31 (8/11/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

EXPANDED COVERAGE: UNANIMOUS GEORGIA COURT OF APPEALS TOSSES TRIAL COURT'S AWARD VACATUR IN "RIGGED PANELS" CASE.

As we reported in SAA 2022-30 (Aug. 4), the Georgia Court of Appeals "unvacated" the Award in the Wells Fargo "rigged panels" case. Here is our promised expanded coverage. The *Alert*'s readers are very familiar with this saga, which we've covered extensively and blogged about on February 2, 9, 25, and 29. To review, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super. Jan. 25, 2022), found that the FINRA potential arbitrator list preparation process had been compromised. Wells appealed on **April 4**, and

in a unanimous decision, the Georgia Court of Appeals reinstated the Award in *Wells Fargo Clearing Services, LLC v. Leggett*, No. A22A1149 (Ga. Ct. App. Aug. 2, 2022).

Award and Attempt to Vacate

We covered in SAA 2019-30 (Aug. 7) the Award in *Leggett v. Wells Fargo Clearing Services, LLC*, FINRA ID No. 17-01077 (Atlanta, GA, Aug. 1, 2019), where the All-Public Panel: 1) denied the investors' $1.2 million claim; 2) assessed $51,000 in costs and all forum fees against the investors; and 3) recommended expungement. The investors moved to vacate in **October 2019**, asserting several acts of party, arbitrator, and FINRA arbitration forum misconduct. This one generated the most attention (*ed: footnotes omitted*):

> *First,* Wells Fargo rigged the arbitrator selection process in direct violation of the FINRA Code of Arbitration Procedure, denying the Investors' of their contractual right to a neutral, computer generated list of potential arbitrators…. Rather than ranking and striking pursuant to the Code, on July 10, 2017, counsel for Wells Fargo submitted a letter to FINRA insisting that one of the proposed arbitrators on the list of potential arbitrators be removed from the computer generated list on the ground that he harbored personal bias against Wells Fargo' s lead counsel…

The Trial Court Essentially Agrees

Judge **Belinda E. Edwards** vacated the Award in what might be considered a primer on the basic FAA grounds for vacating an award (i.e., fraud, arbitrator bias, arbitrator misconduct in not hearing relevant or material evidence or failing to grant a reasonable postponement request; or the panel exceeding authority). Although the Trial Court found these bases for vacating the Award, Judge Edwards weighed in on interference with the Neutral List Selection System with some scathing verbiage:

> The Court's factual review of the record evidence leads to its finding that Wells Fargo and its counsel manipulated the FINRA arbitrator selection process in violation of the FINRA Code of Arbitration Procedure, denying the Investors' their contractual right to a neutral, computer-generated list of potential arbitrators. Wells Fargo and its counsel, Terry Weiss, admit that FINRA provides any client Terry Weiss represents with a subset of arbitrators in which certain arbitrators (at least three, but perhaps more) are removed from the list Wells Fargo agreed, by contract, to provide to the Investors in the event of a dispute. Permitting one lawyer to secretly red line the neutral list makes the list anything but neutral, and calls into question the entire fairness of the arbitral forum.

Post-Decision History

The Trial Court's decision prompted: 1) subsequent calls by PIABA for Congressional and SEC investigations; 2) a denial from Wells and a vow to appeal; 3) a **February 9** letter to FINRA from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) demanding answers by **February 23**; 4) a **February 18** Press Release from FINRA announcing that the Authority had retained the Lowenstein Sandler law firm to conduct an independent review; 5) news reports in *FA Magazine* and *ThinkAdvisor* in late **February** of a coming appeal by Wells; 6) a FINRA reply to Sen. Warren and Rep.

Porter in a **February 21** letter from CEO and President **Robert W. Cook**; 7) as reported in SAA 2022-10 (Mar. 17), a **March 7** follow-up letter from Sen. Warren and Rep. Porter that was announced in a Press Release and posed several questions and demanded a response by **March 22**; and 8) an **April 4** appeal by Wells in the Georgia Court of Appeals. The thrust of the appeal? Although there were several allegedly erroneous bases for vacating the Award asserted by Judge Edwards, the appeal says as to the "rigged panel" issue: "By signing the draft order written and submitted by Leggett's counsel, the trial court vacated the Award notwithstanding that the factual findings in its Order are false and wholly unsupported by the record. If this Court does not reverse, the trial court will have effectively deprived WFA of the benefit of the written contractual bargain that it had struck with Leggett. Consistent with the Congressional mandate in the FAA and the case law construing it, the parties freely bargained to resolve their disputes in an arbitration that would not be second guessed in court. The trial court's legal errors destroyed that bargain -- thus undermining the well-established policy in favor of both arbitration and freedom of contract."

The FINRA Investigation Report is Issued: No Wrongdoing …

Meanwhile, FINRA on **June 29** released the 37-page *Report of the Independent Review of FINRA's Dispute Resolution Services – Arbitrator Selection Process*, which was announced in a corporate Press Release and a separate statement from the Audit Committee. The investigation was directed by **Christopher Gerold**, a partner in Lowenstein's Securities Litigation and Corporate Investigations & Integrity Practice Groups. Mr. Gerold is past Chief of the New Jersey Bureau of Securities and served as President of the NASAA. After discussing methodology – "Lowenstein conducted 29 interviews; examined more than 150,000 documents, emails, and telephone records; reviewed the FINRA Dispute Resolution Services (DRS) arbitrator database system; and listened to recordings of relevant arbitration proceedings" – and the operation of the Neutral List Selection System, the Report concludes there were no irregularities:

> After careful consideration of the evidence obtained during the investigation, Lowenstein does not believe that there was any agreement between Weiss and FINRA regarding the panels for Weiss's cases. All current and former FINRA personnel who could conceivably have been a part of such an agreement were interviewed and denied the agreement's existence, noting that it would be contrary to DRS's culture of neutrality. Lowenstein found them all to be credible. Likewise, no documentary evidence – including any emails or other material – suggested in any way that such an agreement existed…. The only evidence that such an agreement existed was the July 13, 2017 Letter, which Weiss emphatically disclaimed meant that there was a secret agreement during the course of this investigation and in other forums.

… But There Can Be Improvements

The Report concluded with recommendations for improvement, the core ones being (*ed: presented* verbatim *from the Release*):

- Implementing ongoing, mandatory training for staff;

• Requiring written explanations, upon a party's request, of approval or denial of a causal challenge to the selection of an arbitrator or an arbitrator removal by the DRS Director for cause;
• Conducting an updated external procedural review of the arbitrator selection algorithm to determine if it is still the most effective means for creating random, computer-generated arbitrator lists; and
• Updating the DRS Manual and rules to clarify staff roles and procedures, and to ensure consistency and transparency.

FINRA's management accepted all recommendations.

Georgia Court of Appeals "Unvacates" the Award

The unanimous **August 2** decision of the Georgia Court of Appeals rejects all bases upon which Judge Edwards vacated the Award. As to "secret deals" between FINRA and Wells' then-attorney Terry Weiss, the Court says: Nothing indicates that Wells Fargo 'manipulated' the arbitrator pool. It simply asked that [Arbitrator] Pinckney be removed under FINRA Rule 12407. We fail to see how the Director's decision to grant that request — which was made after all parties had a chance to address the issue — constituted manipulation by Wells Fargo.[] Although the investors claim that a 'secret agreement' existed between FINRA and Weiss to automatically exclude the *Postell* arbitrators from any arbitrator list generated on a case involving Weiss, there is no evidence that such agreement was at play here, given Pinckney's inclusion on the initial list. Even if an agreement exists, the investors have not shown that it impacted this arbitration."

Reactions

Reactions were swift in coming. An **August 4** *Barron's* article reports that a Wells spokesperson said: "We are pleased with today's court ruling which overturned the court's erroneous judgment and found in our favor…. We were always confident in the merits of our appeal and are pleased that the Georgia Court of Appeals completely validated our position." PIABA President **Mike Edmiston** said in an **August 2** *FinancialPlanning* story: "[The decision reflects] a presumption that arbitrator decisions are to be given great weight and respect…. An arbitrator is not required to follow the law. This is what the parties contract for. Call it rough justice." We did not come across a comment from FINRA, the investors, or Mr. Weiss.

*(ed: *As we said before, we're not surprised. **Dare we say it? Barring further appeals, this might be the end of this one, save for follow-up on the recommendations in the independent investigator's Report.)*

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UPDATE: SCIENTOLOGY SEEKS SCOTUS REVIEW OF PDAA NON-ENFORCEMENT. ***The Church of Scientology is seeking SCOTUS review of California court rulings declining to enforce a predispute arbitration agreement ("PDAA") with a congregant who had left the Church***. We hate to say we told you so, but we told you so. First, a review:

- We reported in the "Short Briefs" section of SAA 2022-03 (Jan. 27) on *Bixler v. Superior Court (Church of Scientology)*, No. B310559 (Calif. Ct. App. 2 Jan.19, 2021). There, the California Court of Appeal said:

  "The trial court granted the motion to compel, and petitioners sought writ relief. We issued an order to show cause, and now grant the petition. Individuals have a First Amendment right to leave a religion. We hold that once petitioners had terminated their affiliation with the Church, they were not bound to its dispute resolution procedures to resolve the claims at issue here, which are based on alleged tortious conduct occurring after their separation from the Church and do not implicate resolution of ecclesiastical issues. We issue a writ directing the trial court to vacate its order compelling arbitration and instead to deny the motion."
- As reported in SAA 2022-05 (Feb. 10), the Church on **February 3** petitioned for a rehearing. The 40+ page filing asserted several bases for the Petition. Here's part of the introduction:

  "This Court became the ***first in the nation*** to hold that 'freely executed' religious agreements cannot be enforced over the First Amendment objections of a party who claims to be a 'non-believer.' This holding adopts a distinct rule concerning the enforcement of religious arbitration agreements that discriminates against religions and violates the Federal Arbitration Act ('FAA'). The Opinion contains numerous other unbriefed issues, mistakes of law, and misstatements of fact, all of which require rehearing" (emphasis in original).
- We reported in SAA 2022-17 (May 5) that, following denial of the rehearing request, the California Supreme Court on **April 20** denied a Petition for Review of the decision. A docket entry says: "The petition for review is denied. The requests for an order directing publication of the opinion are denied."

A *Certiorari* Petition Seemed Inevitable to Us

We said in our editorial comment to # 17: "We suspect this won't be the end of it, which means SCOTUS is the next stop." Affirming our prediction, the Church on **July 19** filed a *Cert.* Petition presenting this arbitration-related question: "Where a parishioner freely executes a religious arbitration agreement with her church, does the First Amendment prohibit enforcement of the agreement if the parishioner leaves the faith?"

*(ed: *The SCOTUS case is Church of Scientology International v. Bixler, No. 22-60. **A second issue raised is: "Does the First Amendment restrict the terms on which a Church may accept members into its faith?" ***We normally would deem these issues too one-off to result in a* Cert. *grant, but we're not so sure. The Court might want to take on the First Amendment issues.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND. The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up-to-date on recent NFA initiatives, events, and resources that investors

may find helpful. In the third *Newsletter* of **2022**, distributed under a summary email dated **August 3**, NFA lists several highlights which we explore in the order presented: **Investor Education** reports on: *Military Consumer Month*, which was **July**; and a CFTC Customer Advisory: *Eight Things You Should Know Before Trading Forex*. The **Investor Protection** section contains information on: *RED List: CFTC Adds More Unregistered Foreign Entities;* and an SEC Investor Alert: *Watch Out for Fake COVID-19 Claims When Investing.* As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; 3) a link to past issues of the *Newsletter* and 4) a subscription form.
*(ed: *Another informative issue. **The enforcement actions database allows searches by subject matter, such as arbitration. ***Stats may be found here; for 2021, NFA had just 22 arbitration cases filed – 19 investor and 3 intra-industry. YTD 2022 stats are not posted.)*
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NINTH CIRCUIT: DISTRICT COURT HAD JURISDICTION UNDER THE *UN CONVENTION* TO ENFORCE ARBITRATOR SUBPOENA. The *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("Convention") establishes both subject matter jurisdiction and venue for a District Court to enforce an Arbitrator-issued subpoena, the Ninth Circuit holds in *Jones Day v. Orrick, Herrington & Sutcliffe, LLP*, No. 21-16642 (9th Cir. Aug. 1, 2022). The Court notes at the onset that: "Unlike Chapter One of the FAA, which governs domestic arbitral disputes and does not include a jurisdictional provision, Chapter Two of the FAA includes a jurisdictional provision, 9 U.S.C. § 203, which provides federal district courts with original jurisdiction over 'action[s] or proceeding[s] falling under the Convention'" (brackets in original). But, while the Court finds it clear that enforcing an arbitration agreement or award falls under the *Convention*: "we must decide whether an action to enforce an arbitral summons issued by the arbitrator in an ongoing international arbitration under the Convention also 'falls under the Convention.'" The Ninth Circuit: "join[s] our sister circuits in holding that (1) if the underlying arbitration agreement or award falls under the Convention, and (2) the action or proceeding relates to that agreement or award, then the federal district court has jurisdiction over the action or proceeding." As to in *which* district court the enforcement action may be brought, the Court holds: "Section 204 of the FAA provides that where the arbitration agreement designates a 'place of arbitration' in the United States, an action or proceeding may be brought in the district embracing the place of arbitration. However, where, as here, that federal district court lacks personal jurisdiction over the party against whom enforcement is sought, we hold that the action may be brought in any district court deemed appropriate under the general venue statute, 28 U.S.C. § 1391, because § 204 supplements, rather than supplants other venue rules."
(ed: A nice primer on FAA chapter 2 and federal jurisdiction.)
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SAN DIEGO NOT BOUND BY INSTACART SHOPPERS' ARBITRATION AGREEMENT. Much like the EEOC in the landmark 2002 Supreme Court decision in *Wafflehouse*, the San Diego City Attorney was not bound to arbitrate statutory claims asserted on behalf of Instacart shoppers. San Diego had brought an enforcement action on behalf of California against Maplebear (D/B/A Instacart), under the California *Unfair Competition Law*. In their complaint, the People: "alleged that Instacart unlawfully misclassified its employees as independent contractors in order to deny workers employee protections, harming its alleged employees and the public at large through a loss of significant payroll tax revenue, and giving Instacart an unfair advantage against its competitors." In response, Instacart asserted that: "the City is bound by the [predispute arbitration] agreements because it is, in effect, representing, or seeking to validate the individual employment law rights of, the Shoppers." A unanimous Court finds to the contrary in *California v. Maplebear Inc.*, No. D079209A (Calif. Ct. App. 4 Jul. 28, 2022): "[T]he City is not attempting to circumvent or evade an applicable arbitration agreement between Instacart and its Shoppers. Rather, it is exercising its authority to enforce state law on behalf of the People of California. Instacart's claim that the trial court created a new categorical exemption to mandatory arbitration for private claims brought by a public prosecutor is a distortion of the court's order. The fundamental premise of the FAA is to ensure that agreements to arbitrate stand on equal footing to all contracts. However, the policy favoring arbitration does not apply when the parties have not agreed to arbitrate. As in *Waffle House,* here there is no private claim and the City 'does not stand in the employee's shoes' for the purposes of this case…. Rather, the City is acting in its capacity as a public prosecutor exercising its traditional police powers." *(ed: *Seems right to us. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Dina Abdurahman v. Prospect CCMC LLC*, Nos. 20-3459, 20-3466 (3rd Cir. Jul. 28, 2022)**: "Three corporations, comprised of two siblings, Crozer Chester Medical Center ('CCMC') and Prospect Health Access Network ('Prospect'), and a parent, Crozer Keystone Health System ('Crozer Keystone'), entered into several agreements with emergency medicine resident Dr. Dina Abdurahman, including an employment contract between Abdurahman and CCMC. Sophisticated entities, the corporations drafted the forms and designated the counterparties. Abdurahman's termination led her to sue CCMC, and CCMC promptly moved to arbitrate. Except Abdurahman signed an arbitration agreement with Prospect, not CCMC. A case of scrivener's error, savvy separation, or something in between? We need not solve that riddle because the arbitration agreement with Prospect cannot stretch to govern Abdurahman's employment with CCMC. So we will affirm the decision of the District Court denying the motion to compel arbitration."

***Owners Insurance Company v. Fidelity & Deposit Company*, No. 21-2950 (8th Cir. Jul. 22, 2022)**: "This case is about a construction project gone wrong. After disputes arose between a general contractor and two of its subcontractors, an arbitrator awarded

the subcontractors money for the labor and material they had provided the general contractor along with associated costs, attorneys' fees, interest, and other sums. The general contractor declared bankruptcy before paying up, and the surety company that issued a bond guaranteeing the subcontractors would be paid tendered amounts representing only the part of the awards that compensated for labor and material (and some interest). But the subcontractors (or in one case, the subcontractor's assignee) wanted the whole of the awards and sued in federal court to get it. The district court sided with the surety and granted it summary judgment. We hold that the court erred, and so we reverse and remand."

***Brawerman v. Loeb & Loeb LLP*, No. B305802 (Calif. Ct. App. 2 Aug. 3, 2022)**: "We are asked to consider whether the trial court erred in confirming an arbitration award where the obligation to arbitrate arose from a provision in a law firm retainer agreement and one of the several law firm attorneys that rendered legal services pursuant to the retainer agreement did so in violation of California's attorney licensing requirements. There was no error. *Birbrower, Montalbano, Condon & Frank v. Superior Court* (1998) 17 Cal.4th 119 (*Birbrower*) dictates that the unlicensed attorney's illegal practice of law pursuant to the retainer agreement does not render the entire retainer agreement illegal. *Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 30 (*Moncharsh*) holds that an arbitration provision is severable from an agreement that is not entirely illegal (unless the arbitration provision itself is illegal). There is no claim here of any illegality in the retainer agreement's arbitration provision. Accordingly, we affirm" *(links to cases added by the* Alert).

***Prielipp v. Liberty Partners*, FINRA ID No. 21-00889 (Detroit, MI, Jun. 28, 2022)**: After the Customer conceded that his claims were filed outside the applicable statute of limitations, the Panel granted the remaining Respondents' Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule), and dismissed the customer's claims: "On May 16, 2022, the Panel heard oral arguments on the Motion to Dismiss, at which time Claimant conceded that the Statement of Claim was filed outside the six (6) year eligibility rule and, accordingly, withdrew its objections to the Motion to Dismiss. Thus, as stated during the pre-hearing conference on May 16, 2022, the Motion is granted." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Muccio v. MML Investor Services*, FINRA ID No. 21-02537 (Boston, MA, Jun. 30, 2022)**: A Sole Public Arbitrator denies a broker's request for reformation of alleged defamatory information from appearing on his Form U5 record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Cubitt, Beth, Webb, Tom & MacMillan, Victoria, *Virtual Reality: Are Remote Hearings Too Risky?* Clyde & Co Blog (Jul. 28, 2022): "In early 2020, businesses around the globe ushered in a new era of remote working practically overnight. This included tribunals and courts switching to remote hearings on a scale never attempted

before. Given the cross-border nature of international arbitration, remote hearings became especially important in international arbitration.[] With the world now learning to live with COVID and seeking the 'new normal', this article examines the rapid transition to remote arbitration hearings and whether there could be any knock-on effects for the enforceability of arbitral awards.[] We do not expect arbitration practitioners and tribunals to turn their back, once the pandemic subsides, on the cost savings and efficiencies that remote hearings offer. Remote hearings (either fully remote or partial/hybrid hearings) will remain a popular option and suitable for many disputes. Parties will, however, need to consider how to safeguard the fairness and enforceability of each arbitration to ensure that use of remote technology does not create additional legal risk."

FINRA Seeks to Rein In a Common Expungement Tactic, **ThinkAdvisor (Aug. 1, 2022)**: "The Financial Industry Regulatory Authority has filed a rule proposal to modify a 'straight-in expungement,' a tactic FINRA says presents inherent difficulties as such requests are granted at a higher rate than other types of expungement requests. FINRA's plan must be approved by the Securities and Exchange Commission."

SEC Charges Eleven Individuals in $300 Million Crypto Pyramid Scheme**, www.sec.gov (Aug. 1, 2022)**: "The Securities and Exchange Commission today charged 11 individuals for their roles in creating and promoting Forsage, a fraudulent crypto pyramid and Ponzi scheme that raised more than $300 million from millions of retail investors worldwide, including in the United States. Those charged include the four founders of Forsage, who were last known to be living in Russia, the Republic of Georgia, and Indonesia, as well as three U.S.-based promoters engaged by the founders to endorse Forsage on its website and social media platforms, and several members of the so-called Crypto Crusaders—the largest promotional group for the scheme that operated in the United States from at least five different states."

Robinhood's Crypto Division Fined $30 Million by New York Financial Regulator**, www.CNBC.com (Aug. 2, 2022)**: "The New York State Department of Financial Services announced on Tuesday it has issued a $30 million penalty against Robinhood's crypto division.[] NYDFS, the government branch that's responsible for regulating financial services and products, alleged that Robinhood Crypto's anti-money laundering and cybersecurity program was inadequately staffed and did not have sufficient resources to address risks. It also alleged Robinhood's crypto division failed to timely transition from a manual transaction monitoring system to one more adequate for its user size and transaction volume."

Wells Fargo Wins Appeal of 'Secret Agreement' Case, Arbitration Award Reinstated**, Barron's (Aug. 4, 2022)**: "A Georgia appeals court reversed a lower court's decision in a controversial Wells Fargo arbitration that attracted widespread attention because it alleged that a Wells Fargo attorney had a secret agreement with industry self-regulator Finra to bar certain arbitrators from hearing his cases.[] The appeals court's Aug. 2 decision comes a month after Finra released a report that cleared itself of any

involvement in an alleged agreement with attorney Terry Weiss who represented Wells Fargo in the arbitration against an aggrieved investor." (ed: *See our coverage elsewhere in this* Alert.)
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DID YOU KNOW?

BENJAMIN FRANKLIN WAS A BIG FAN OF ARBITRATION. From time to time, we report here on the surprising level of support for arbitration from our nation's founders. We recently came across a quote from **Benjamin Franklin** that was too good not to pass along. We're not sure when or where these words were uttered, but the quote is: "When will mankind be convinced and agree to settle their difficulties by arbitration?" Truer words were never spoken.
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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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