SECURITIES ARBITRATION ALERT 2022-41 (11/3/22)

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ARTICLES OF INTEREST:

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- ***Raymond James Agrees To Pay $1.15M Penalty For Supervisory Lapses,* FA Magazine (Oct. 24, 2022)**
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DID YOU KNOW?

- **A Nice "Commercial Arbitration 101" Primer**

COMING NEXT WEEK, A NEW FEATURE ARTICLE. *Appearing in next week's* Alert *will be a new feature article authored by PIABA, "Arbitration of Investor Claims in an Industry-Sponsored Forum - A Look Back at 20 Years of Lessons." The co-authors, Courtney Werning, Jorge Riera, Dave Neuman, and Mike Edmiston, did an incredibly thorough job researching, writing, and analyzing securities arbitration history. Those looking for a detailed, yet succinct history of securities arbitration need look no further than next week's* Alert.

SQUIBS: IN-DEPTH ANALYSIS

FINRA EXTENDS SEC'S TIME TO ACT ON PROPOSED EXPUNGEMENT RULE CHANGES. ***FINRA has extended to November 11 the SEC's time to act on the Authority's proposed changes to the expungement process.*** We reported in SAA 2022-30 (Aug. 4) that FINRA staff had followed up on Board approval to file a new expungement rule. Specifically, FINRA on **August 1** filed with the SEC SR-FINRA-2022-024, *Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process relating to the Expungement of Customer Dispute Information.* The introduction to the massive rule filing would amend the *Codes*: "to impose requirements on expungement requests (a) filed by an associated person during an investment-related, customer-initiated arbitration ('customer arbitration'), or filed 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')."

***Federal Register* Publication and Comments**

We later reported in SAA 2022-32 (Aug. 18) that *Federal Register* publication occurred on **August 15** (Vol. 87, No. 156, P. 50170), and that comments were due **September 6**. Last, we analyzed in SAA 2022-35 (Sep. 15) the over 40 comment letters that were posted on the SEC's Website. The institutional comment letters – including those from PIABA, NASAA, and SIFMA – were mostly supportive, but suggested further improvements. Individual industry commenters, however, mostly panned the proposed rule changes and the expungement process in general (see our analysis in the **September 14** Blog post, *Institutional Comments, Mostly Supportive But with All Suggesting Further Modifications, on FINRA's Proposed Expungement Changes. Individual Industry Commenters Uniformly Oppose the Rule*).

Extension Given to SEC by FINRA

We had thought it most likely that staff would return to the National Arbitration and Mediation Committee or the Board with changes resulting from the comments received. Then, FINRA would respond to the comments. While there has not yet been a FINRA response to the comments, the Authority on **September 27** extended until **November 11** the SEC's time to act on the rule filing. No explanation is given in Associate General Counsel **Mignon McLemore**'s filing.

Impact of SEC Comment Due Date "Do-Over"?

We reported in SAA 2022-39 (Oct. 20) that the SEC, citing technical issues, on **October 7** issued a proposed order reopening past comment letter due dates on several Commission rulemaking releases and filings (see also a Press Release, *SEC Reopens Comment Periods for Several Rulemaking Releases Due to Technological Error in Receiving Certain Comments*). Additional comments on the affected releases were to be filed within 14 days after publication of the reopening release in the *Federal Register.* That took place with the **October 18** publication of Vol. 87, No. 200, P. 63016, which established a **November 1** due date. While none of the impacted Commission filings listed in the Release involved arbitration, the Order adds: "The technological error also

may have affected certain comments with respect to the following SRO matters. The Commission will evaluate any comments resubmitted with respect to these matters and consider whether further action is warranted." It then lists several SRO rule filings, including SR-FINRA-2022-024. Whether this rule filing is impacted thus remains to be seen.
(ed: As we've said before, this is a complex topic, so better right than rushed.)
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SCOTUS DECLINES TO REVIEW CASE INVOLVING FINRA AWARD. ***The Supreme Court on October 31 denied* Certiorari *in* Caputo v. Wells Fargo, *No. 22-265, a case involving a FINRA Award.*** We analyzed in SAA 2022-19 (May 19) the underlying Third Circuit decision, *Caputo v. Wells Fargo Advisors, LLC*, No. 20-3059 (3rd Cir. May 9, 2022), *reh'g den. Jun. 17*. There, a unanimous Court held that, even if a FINRA Panel's Award was legally erroneous, this alone did not meet the stringent standard for a finding of "manifest disregard of the law."

Facts Below
Wells Fargo succeeded in a FINRA arbitration brought to recover the $1,663,529.71 balance on a discharged adviser's promissory note. Respondent Caputo then sought without success to vacate the Award (*ed: see the case of the same name, No. 3:19-cv-17204-FLW-LHG (D. N.J. 2020)*), and this appeal followed. The issues? "Caputo argues that the award should be vacated because it violates public policy and is in manifest disregard of law. He also argues that it should be vacated because the arbitration panel exceeded its authority and excluded certain evidence." After rejecting the exceeding authority and public policy challenges, the Third Circuit says this about "manifest disregard": "Even if the FINRA arbitration panel got it wrong, it is hard to see how this would be more than legal error, as required to vacate an arbitration award under the manifest disregard doctrine. Further, despite Caputo's assertions to the contrary, there is no evidence in the record that Wells Fargo urged the FINRA arbitration panel to disregard the law. The arbitrators' decisions to cut off the cross-examination of certain witnesses and rule in favor of Wells Fargo do not support the inference that the FINRA arbitration panel disregarded the law such that they exceeded their authority."

Issues in *Cert.* Petition
The **September 15** *Certiorari* Petition in *Caputo v. Wells Fargo*, No. 22-265, presented these issues:

> 1. Whether this Court's public policy exception is inapplicable to an arbitral award enforcing contractual provisions that are expressly illegal, void, and unenforceable under applicable statutes, on the supposition that such statutes do not embody sufficiently well-defined and dominant public policy.
> 2. Whether this Court's public policy exception to judicial deference toward arbitral awards is displaced by a deferential manifest-disregard-of-law standard of judicial review where, as here, the public policy issue was presented to the arbitrators.

3. Whether this Court's public policy exception is applicable under the FAA in light of *Hall Street Associates v. Mattel*, 552 U.S. 576 (2008) (holding that grounds set out in the FAA for vacating arbitral awards are exclusive), as to which lower courts are split.

As usual, SCOTUS provides no explanation.

*(ed: *The case appears on page 3 of the October 31 Order List. **The FINRA case is FINRA ID No. 15-0204 (Newark, NJ, Jul. 26, 2019). ***We had thought the Court might want to take up issue # 3.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA LAUNCHES MACHINE-READABLE RULEBOOK. FINRA on **October 21** announced that it: "has launched a machine-readable rulebook initiative designed to enhance firms' compliance efforts, reduce costs and aid in risk management." A Press Release, *FINRA Launches Machine-Readable Rulebook Initiative*, states: "FINRA developed the machine-readable rulebook through the creation of an embedded taxonomy—a method of classifying and categorizing a hierarchy of key terms and concepts—that was applied or 'tagged' to the 40 most frequently viewed FINRA rules. The taxonomy allows users to apply an enhanced search feature to find specific content by starting with a broad topic and then narrowing down to more specific topics through sub-categories and combinations of multiple terms.[] As part of this initiative, FINRA has created a prototype of a rulebook search tool—the FINRA Rulebook Search Tool™ (FIRST™). This enhanced search feature is designed to help users, including market participants and members of the public alike, to efficiently identify potentially relevant FINRA rules and their associated requirements using the taxonomy terms. FINRA has launched the FIRST search feature through a user interface on the FINRA website." The 40 FINRA rules tagged as part of the initiative are: 1210, 1220, 1230, 1240, 2010, 2040, 2090, 2111, 2122, 2210, 2231, 2241, 2360, 3110, 3120, 3130, 3210, 3220, 3240, 3270, 3280, 3310, 4140, 4160, 4210, 4311, 4370, 4511, 4512, 4513, 4530, 4570, 5110, 5121, 5123, 5130, 5131, 5310, 8210, and 8312. The dispute resolution rules series is not on the list.

(ed: FINRA via a Special Notice is seeking comments through December 20.)

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FINRA INVESTOR ED FOUNDATION ANNOUNCES MILITARY SPOUSE FELLOWSHIPS. The FINRA Investor Education Foundation and the Association for Financial Counseling and Planning Education® (AFCPE®) announced in an **October 5** Press Release that they had awarded 2022 Military Spouse Fellowships to 45 military spouses throughout the U.S. and abroad. According to the Release, the fellowship recipients: "representing more than 40 bases globally, will receive free training and assessment to earn their Accredited Financial Counselor® (AFC®) designation, which can help kickstart a career in financial empowerment and improve their own financial capability. The AFC is a comprehensive life-cycle financial education, providing the knowledge and skills to assist clients in complex financial decision-making." FINRA Foundation President **Gerri Walsh** said: "The pandemic and high inflation have created

financial hardships and uncertainty for many Americans, including military families. Our Fellows provide expert financial counseling and education to minimize financial distress and disruptions for service members and their families. The fellowship also allows military spouses to advance in portable, rewarding careers in communities around the globe."
*(ed: *Kudos! **The names of the selected spouse fellows are available here.)*
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HALLOWEEEN TREAT: SEC AWARDS MORE THAN $10 MILLION TO WHISTLEBLOWER. The SEC announced in an **October 31** Press Release: "an award of more than $10 million to a whistleblower who provided information and assistance that significantly contributed to a successful SEC enforcement action.[] The whistleblower provided important documents and met twice with Enforcement staff. The charges in the covered action had a close nexus with the whistleblower's allegations, which were critical to the underlying investigation." Payments to whistleblowers: "are made out of an investor protection fund, established by Congress, which is financed entirely through monetary sanctions paid to the SEC by securities law violators. No money has been taken or withheld from harmed investors to pay whistleblower awards."
(ed: Whistleblower awards: "can range from 10 to 30 percent of the money collected when the monetary sanctions exceed $1 million.")
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Villareal v. LAD-T, LLC,* No. B313681 (Calif. Ct. App. 2 Oct. 20, 2022)**: "LAD-T, LLC, dba Toyota of Downtown Los Angeles (LAD-T), and its parent company Lithia Motors Inc. (Lithia; collectively, defendants) appeal from an order denying their motion to compel arbitration of Albert Villareal's claims brought under the California Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.). Defendants contend the trial court erred in finding Business and Professions Code section 17918 barred them from enforcing an arbitration agreement made in the name of an unregistered fictitious business, DT Los Angeles Toyota. The trial court did not err. Section 17918 bars a party that regularly transacts business in California for profit under a fictitious business name from maintaining an action on a contract until a fictitious business name statement is filed. Substantial evidence supports the trial court's finding LAD-T was transacting business as DT Los Angeles Toyota. Although section 17918 is most commonly applied to prevent a plaintiff from maintaining an action on a contract in the name of the fictitious business, we conclude it also applies to bar a party from maintaining a motion to compel arbitration because the motion is in essence a suit in equity to compel performance of a contract—the arbitration agreement" (footnotes omitted).

***AIG Specialty Ins. Co. v Mobil Corp*., 2022 NY Slip Op 33508(U) (Sup. Ct., NY Cty. Oct. 14, 2022)**: "With respect to the arbitration in which the parties must participate, the provisions provide that the parties shall try to agree and if they cannot agree to a forum, then the forum will be decided for them. To save the time and expense of making another application, the Court will decide the forum now. Unless the parties agree to a different

forum within 45 days, and because respondent did not object to petitioner's suggestion of JAMS, an organization chock full of experienced arbitrators, the Court finds the parties must apply to JAMS for the arbitration."

Chilutti v. Uber technologies, Inc., **2022 PA Super 172 (Oct. 12, 2024)**: "[W]hen Appellants filed the negligence lawsuit, Uber, Raiser-PA LLC, Raiser, LLC, (collectively, Uber Appellees) moved to compel arbitration, asserting that the couple's conduct on the company's website and application, when they registered for the ridesharing service, signified that they agreed to be bound by the mandatory arbitration provision found in the hyperlinked terms and conditions, thereby relinquishing their right to a jury trial. The trial court granted the petition, determining the parties had not been forced out of court. In doing so, the court failed to consider that important and protected constitutional right. Because we conclude that Appellants are legally entitled to relief, we reverse the trial court's order granting Uber Appellees' petition. We further opine that Appellants demonstrated there was a lack of a valid agreement to arbitrate; therefore, they are entitled to invoke their constitutional right to a jury trial. Accordingly, we reverse and remand for further proceedings."

Kestra Investment Services LLC v. Hegener**, FINRA ID No. 21-02367 (Tampa, FL, Sep. 22, 2022)**: Claimant broker-dealer prevails on its case relating to the amount due and owing on a promissory note agreement. The Arbitrator denies Respondent broker's Counterclaim with prejudice, after finding that he did not present evidence that he was entitled to reimbursement of expenses he incurred during the COVID pandemic as a result of his employment with Claimant. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

Aspiration Financial LLC v. Eugene**, FINRA ID No. 22-00836 (New Orleans, LA, Sep. 28, 2022)**: An Arbitrator explains why he decided to deny without prejudice the Claimant broker-dealer's case against a non-appearing customer, after finding said customer was not properly served with the Statement of Claim despite numerous attempts. The Arbitrator also ruled that Claimant broker-dealer may re-file its case should it locate Respondent. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Chaisse, Julien and Sejko, Dini, *Investor-State Arbitration Distorted: When the Claimant Is a State,* Law and the Economics (2016): "Investments from emerging economies have increased since the beginning of the century and notably a large proportion of the flows of foreign direct investment (FDI) coming from emerging economies is executed by State-Owned Enterprises (SOEs) and Sovereign Wealth Funds (SWFs) both typical contemporary forms of State Controlled Entities (SCEs). Such trend that has been further reinforced since 2008/2009 and SCE's investment activism has reflected into a systemic shift that has transformed State capitalism into a key feature of contemporary global economy. At the time, investment arbitration, which was designed to allow foreign private investors to sue sovereign States, has transformed since host

States can now be judged at the initiative of another State owning enterprises making investments. The thesis of this chapter is that the international regime for foreign investment, which includes both substantive rules and arbitration principles, is gradually adjusting to the emergence of SCEs in the investment sphere."

***Raymond James Agrees To Pay $1.15M Penalty For Supervisory Lapses*, FA Magazine (Oct. 24, 2022)**: "Raymond James has agreed to pay $1.15 million to settle charges of supervisory failures of its two brokerage units that in one case led to a commission scheme by father-son team that overcharged customers, according to the Financial Industry Regulatory Authority.[] Raymond James Financial Services (RJFS), the firm's independent channel and Raymond James & Associates (RJA), the employee advisor channel, also were censured by the regulator.[] According to the Finra letter of acceptance, waiver and consent (AWC), from at least January 2012 through April 2018, RJFS failed to heed multiple red flags that the two registered representatives were excessively charging commission to seven of their institutional customers."

***Try as they Might, State Courts Cannot Override the FAA in Enforcing Online Arbitration Agreement*s, Ballard Spahr Consumer Finance Monitor Blog (Oct. 24, 2022)**: "The fact that the Pennsylvania constitution makes the right to a jury trial 'inviolate,' as *Chilutti* stressed, does not displace federal arbitration law. The Supreme Court has instructed that state courts 'must abide by the FAA, which is "the supreme Law of the Land," U. S. Const., Art. VI, cl. 2, and by the opinions of this Court interpreting that law.' Accordingly, the FAA imposes limits on efforts by state courts to 'pushback' on the enforcement of arbitration agreements in online contracts."

***It Gets BIgger: FINRA Joins the SEC In Bringing Reg BI Enforcement Actions*, Mintz.com Blog (Oct. 25, 2022)**: "It's official: Reg BI is no longer an idle tool in FINRA's arsenal. In its first disciplinary action related to Regulation Best Interest ('Reg BI'), the Financial Regulatory Authority ('FINRA') levied a $5,000 fine and a six-month suspension for excessive trading, charging that a broker caused a client to pay tens of thousands of dollars in commissions to the broker.[] This action stems from the Securities and Exchange Commission's ('SEC') enactment of Reg BI, which went into effect in June 2020 but remained dormant for almost two years. In June 2020, the SEC finally brought its first enforcement action alleging violations of Reg BI, charging Western International Securities Inc. and five of its registered representatives with violating the rule by recommending and selling highly-speculative 'L' bonds."

***Lights Out? Fifth Circuit Finds CFPB's Funding Mechanism Unconstitutional*, JDSupra (Oct. 25, 2022)**: "On October 19, 2022, the Fifth Circuit sent shock waves through the financial world, ruling that the Consumer Financial Protection Bureau's ('CFPB' or the 'Bureau') independent funding structure violates the U.S. Constitution's Appropriations Clause. Based on this separation-of-powers violation, the court struck down the CFPB's 2017 Payday Lending Rule (the 'Payday Rule'), and through its reasoning called into question literally every action the Bureau has ever taken. Indeed, the court's reasoning makes it unclear how the CFPB can even keep its lights on, as every

ongoing activity of the Bureau requires funding, and that funding has been held constitutionally invalid."

***FINRA Changes Arbitrator Selection as Wells Fargo Case Enters Possible State Supreme Court Appeal*, Financial Planning (Oct. 26, 2022)**: "FINRA is making changes to its arbitrator selection process amid a potential appeal of back-and-forth court rulings in a Wells Fargo case that once saw a state court lambast the wirehouse and the regulator.[] FINRA has created a public dashboard displaying the status of seven recommendations an outside law firm made earlier this year after a Georgia state court ruled in February that Wells Fargo Clearing Services and its attorney had 'committed fraud on the arbitration panel' in the case pressed by clients Brian Leggett and Bryson Holdings. Wells Fargo prevailed in its appeal of the lower court's decision in August. Leggett is now seeking a review by the state Supreme Court. In the underlying FINRA arbitration award from 2019, Wells Fargo had won $83,600. The rules require confirmation of awards in court after the decision by panels in FINRA's forum." (*ed: See our coverage elsewhere in this* Alert.*)*

***BuzzFeed Can Block Worker Arbitration Claims Over IPO Snafu*, Bloomberg Law (Oct. 28, 2022)**: "A judge said BuzzFeed Inc. can block arbitration demands from employees who claim the company bungled its initial-public offering and wrongfully denied workers the chance to sell their shares before the stock crashed in value.[] New York-based BuzzFeed, which went public last year, has the legal right to bar workers from having their allegations reviewed by American Arbitration Association officials, Delaware Chancery Court Judge Morgan Zurn ruled Friday.[] Current and former BuzzFeed workers can't force the company 'to arbitrate under a provision to which they are not bound without inflicting irreparable harm upon' the company, Zurn said…."
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DID YOU KNOW?

A NICE "COMMERCIAL ARBITRATION 101" PRIMER. For *pro se* parties seeking basic info on the commercial arbitration process (or counsel wishing to educate clients), we recommend the free ABA publication, *Benefits of Arbitration for Commercial Disputes*. Although it's a bit dated, the nine-page pamphlet covers the essentials in a clear, "Plain English" format.
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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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