SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-12 (3/23/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **SCOTUS Hears Oral Argument in *Coinbase***
- **FINRA Foundation and Others Release New Investor Survey**

SHORT BRIEFS:

- **FINRA Board Met in Person Earlier This Month. No Dispute Resolution Items were on the Agenda**
- **More Arbitration Bills Introduced in Congress**
- **Back to the Future! Policy Paper Recommends Elimination of List Selection**

QUICK TAKES:

- ***White v. Samsung Electronics America*, No. 22-1162 (3rd Cir. Mar. 7, 2023)**
- ***Piplack v. In-N-Out Burgers,* No. G061098 (Calif. Ct. App. 4 Mar. 7, 2023)**
- ***Bierig-Kiejdan v. Kiejdan*, No. A-2945-20 (N.J. Super. App. Div. Feb. 16, 2023)**
- ***Medeiros v. Centaurus Financial,* FINRA ID No. 22-01019 (Tampa, FL, Feb. 22, 2023)**
- ***Carroll v. LPL Financial,* FINRA ID No.22-00025 (Hartford, CT, Feb. 24, 2023)**

ARTICLES OF INTEREST:

- **Spitko, E. Gary, *Arbitration Secrecy,* CORNELL LAW REVIEW, Vol. 109, No. 1 (2023 forthcoming)**
- ***No Escape From Wild Stock Swings Amid SVB, Fed Outlook*, Yahoo*!* Finance - Bloomberg (Mar. 12, 2023)**
- ***New Investors Are Now More Likely To Seek Out Advisors, Survey Finds,* FA Magazine (Mar. 13, 2023)**
- ***SEC Asks SCOTUS to Review Fifth Circuit Decision with Implications for CFPB's Use of Administrative Law Judges,* Ballard Spahr Blog (Mar. 14, 2023)**
- ***FINRA Tip Leads to Repayments on Defaulted Florida Bridge Bonds*, Bond Buyer (Mar. 16, 2023)**
- ***House Subcommittee Discusses Proposals to Reform CFPB*, Lexology (Mar. 16, 2023)**

DID YOU KNOW?

- **SCOTUS Oral Arguments are Livestreamed**

SQUIBS: IN-DEPTH ANALYSIS

SCOTUS HEARS ORAL ARGUMENT IN *COINBASE*. *The Supreme Court heard oral argument this week in* Coinbase, Inc. v. Bielski*, No. 22-105.* As reported in SAAs 2023-11 (Mar. 16) and -07 (Feb. 16) the Supreme Court on **March 21** heard the oral argument in C*oinbase.* It was the second case heard that morning. The audio is here and the transcript can be found here.

***Certiorari* Petition**

As reported in SAA 2023-47 (Dec. 15), the Court's **December 9, 2022** Order List granted *Certiorari* in the case. The issue in this matter is a technical one, as described in the **July 2022** Petition: "Under § 16(a) of the Federal Arbitration Act, when a district court denies a motion to compel arbitration, the party seeking arbitration may file an

immediate interlocutory appeal. This Court has held that an appeal 'divests the district court of its control over those aspects of the case involved in the appeal.' *Griggs v. Provident Consumer Disc. Co*., 459 U.S. 56, 58 (1982) (per curiam).[] The question presented is: "Does a non-frivolous appeal of the denial of a motion to compel arbitration oust a district court's jurisdiction to proceed with litigation pending appeal, as the Third, Fourth, Seventh, Tenth, Eleventh and D.C. Circuits have held, or does the district court retain discretion to proceed with litigation while the appeal is pending, as the Second, Fifth, and Ninth Circuits have held?" (links added by the *Alert*).

Case Below

We covered in SAA 2022-17 (May 5) the trial court decision below, *Bielski v. Coinbase, Inc.*, No. C21-07478, 2022 WL 1062049 (N.D. Cal. Apr. 8, 2022). There, the District Court, applying California contract law, held that the predispute arbitration agreement covering the case before it was both substantively and procedurally unconscionable. The subsequent District Court and Ninth Circuit decisions declining to stay the case pending the appeal are unreported. We covered the case in detail in SAA 2023-11 (Mar. 16), and in a **March 14** blog post, *Reminder: Oral Argument in Coinbase is March 21. What You Need to Know*.

The Oral Argument

With a full complement of Justices, the oral argument in this consolidated case was audio livestreamed via the SCOTUS Website. The Court's March 6 Order List on page 2 denied Respondents' unopposed motion for divided argument. The discussion focused squarely on the intent of FAA section 16, with several references to *Griggs* and occasional references to "Timbuktu." Coinbase's counsel **Neal Kumar Katyal** asserted that the statute assumes a stay of the underlying District Court cases. He argued that allowing the District Court to proceed would result in the "toothpaste being out of the tube" with respect to aspects such as discovery and undue settlement pressure. The Court's pro-arbitration wing was relatively quiet, with the bulk of the questions coming from **Justices Kagan** and **Sotomayor** (although **Justice Thomas** was atypically active). A key theme of these Justices was that, if Congress intended FAA section 16(a) to provide an automatic stay, it would have said so directly. **Hassan Ali Zavareei**, Counsel for the Suski Respondents, led with: "Congress means what it says and says what it means," echoing the sentiments of the liberal wing Justices. For a comprehensive "chapter-and-verse" analysis, we recommend that readers peruse these **March 21** posts: *Coinbase Argues an Arbitration Case in U.S. Supreme Court as Crypto Makes Its Debut* (CoinDesk); *U.S. Supreme Court Divided Over Coinbase Arbitration Dispute* (Reuters); *Supreme Court Hears Arguments in Coinbase Arbitration Case* (Axios); and *Today's #SCOTUS Arguments: When Is an Arbitration Appeal Stay Really a Stay?* (CPR Speaks). *(ed: *Amicus *Briefs aplenty were filed in this case and may be found here. **The Court's Website posts audio recordings and transcripts the same day as arguments. ***There was a puzzling exchange (transcript page 78) where it was asserted that AAA and JAMS arbitrations were open to the public and there was no presumption of confidentiality. We point out that the AAA* Commercial Arbitration Rules *state in Rule R-45(a): "Unless otherwise required by applicable law, court order, or the parties' agreement, the AAA*

*and the arbitrator shall keep confidential all matters relating to the arbitration or the award." Likewise, Rule R-26 provides: "The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." ****We're not willing to hazard a prediction as to where the Court will land, although to us the pro-arbitration wing seemed sympathetic to Coinbase's arguments.)*
return to top

FINRA FOUNDATION AND OTHERS RELEASE NEW INVESTOR SURVEY. ***The FINRA Investor Education Foundation, the NORC at the University of Chicago, and the SEC have published the results of a new investor survey that follows up on a 2020 survey***. *Where Are They Now? Following Up With the New Investors of 2020* (March 2023) was co-authored by **Angela Fontes** and **Katheryn Meagher** (NORC); **Brian Mulford** and **Adam Bloomfield** (SEC); and **Robert Ganem**, **Olivia Valdes**, and **Gary Mottola** (FINRA Investor Foundation). It is 12 pages long and contains several graphs.

Key Findings
The report has seven key findings, excerpted *verbatim* below. Footnotes are omitted:
1. Most are still investing. The majority (78.9 percent) of investors (both New Investors and Experienced Investors) who opened new accounts in early 2020 are still in the market two years later, suggesting that the observed expansion of investors in 2020 was not merely a temporary uptick related to the pandemic or market conditions, but a durable rise in the investing population.
2. Investing knowledge is low but increased slightly since 2020. Subjective knowledge, wherein investors were asked to rate their overall knowledge of investing, did not significantly increase or decrease since first measured. However, investors' objective investing knowledge, as measured by a five-item quiz, increased modestly from 2020.
3. Investors who initially cited learning to invest as a goal for opening their new accounts increased their investing knowledge. In 2020, many investors cited learning about investing as one of the goals for their new accounts (38.3 percent of New Investors; 34.1 percent of Experienced Investors). These investors' objective knowledge improved 21.5 percent, from a mean score of 1.44 correct responses out of five in 2020 to a score of 1.75 in 2022. Investors who did not list learning about investing as a goal for their account did not experience significant changes in their investing knowledge but had higher levels initially.
4. More New Investors have begun using financial professionals, and fewer are relying on personal research. When asked what information sources they use when making investment decisions, New Investors exhibited a shift away from the use of "other personal research" (down almost 10 percentage points compared to 2020) and a greater reliance on financial professionals (up 9.3 percentage points compared to 2020).
5. When it comes to digital engagement, investors strongly prefer platform features that allow them to learn about investing over features that offer entertainment. New in the 2022 survey was a series of questions related to the digital engagement features of investment platforms…. In general, investors (both New and Experienced) responded more positively to platform features that allowed them to learn (70 percent found it

helpful), customize or personalize the user interface (57 percent found it helpful) and receive free cryptocurrency or stock when opening an account (57 percent indicated that it enhances their experience).

6. More investors are holding cryptocurrency. In 2020, 14.1 percent of New Investors and 19.1 percent of Experienced Investors reported holding "alternative investments," including cryptocurrency, gold or hedge funds. In 2022, we asked about cryptocurrency holdings specifically and found that 28.1 percent of New Investors and 22.0 percent of Experienced Investors reported holding cryptocurrencies in their portfolios.

7. Investors' knowledge about cryptocurrency is low, but not as low as their knowledge about investing more generally. Study participants performed slightly better on a five-item quiz measuring cryptocurrency knowledge compared to the general investing knowledge quiz. On average, respondents answered 2.15 cryptocurrency questions correctly. This compares to an average of 1.71 correct responses on the general investing knowledge quiz.

Conclusion

Concludes the analysis: "Two years after our initial study, it appears that New Investors from 2020 are, for the most part, here to stay, despite the substantial market volatility experienced in 2022. For some, knowledge about investing is getting better, though there is still vast room for improvement. Many have added cryptocurrency to their portfolios and demonstrated a willingness to take on substantial investment risks. These New Investors state distinct preferences regarding the investing platforms they use. When investing, they seem more interested in learning than gaming, though they are hardly impervious to the lure of marketing incentives. With experience and modest gains in investing knowledge have come a greater reliance on financial professionals as information sources and a diminished reliance on personal research. Whether or not the pace of change in the retail sector continues unabated remains to be seen, but it does seem likely that the New Investor cohort from 2020 will both shape and be shaped by how America invests."

(ed: Very interesting. Wonder how the pandemic impacted the results?)

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MET IN PERSON EARLIER THIS MONTH. NO DISPUTE RESOLUTION ITEMS WERE ON THE AGENDA. FINRA's Board of Governors met in person **March 9 – 10**; there are no dispute resolution items on the published agenda. President and CEO **Robert W. Cook**'s post-meeting memo states: "FINRA's Board of Governors met on March 9 and 10, and it approved a proposal to shorten the securities settlement cycle from two business days after the trade date (T+2) to one (T+1) and approved the allocation of 2022 fine monies to various capital initiatives."

(ed: The schedule for the rest of 2023 is: May 17–18; July 12–13; September 13–14; and December 6–7.)

return to top

MORE ARBITRATION BILLS INTRODUCED IN CONGRESS. Our story in SAA 2023-09 (Mar. 2) about the paucity (14) of arbitration-related bills introduced so far in this Congress seems to have touched off a flurry of activity. As of press time, 22 arbitration-related bills have been sponsored, according to www.govtrack.us. As we said in # 09, not every bill has been introduced by a Democrat (Republicans have sponsored six), and not every bill is anti-arbitration (see, e.g., H.R. 636 -- the *Forest Litigation Reform Act of 2023*). As reported in SAA 2023-10 (Mar. 9), the *Forced Arbitration Injustice Repeal (FAIR) Act of 2019,* which was approved by a mostly party-line vote in the House of Representatives in the last Congress but died in the Senate, appears to have been reintroduced **February 1** by Rep. **Rashida Tlaib** (D-MI) as H.R. 697 - the *Justice for All Act of 2023* (*JFA*), with a greatly expanded scope. The 55-page text – which incorporates the old *FAIR Act* – reveals that, if enacted, the *JFA* would amend the Federal Arbitration Act and several other federal laws to eliminate mandatory predispute arbitration agreements and class action waivers for disputes involving "consumer, civil rights, employment, and antitrust." There are just 11 cosponsors – all Democrats – and the nonpartisan www.GovTrack.us Website gives the bill just a 3% chance of enactment. *(ed: As we opined in # 10, unlike the* FAIR Act*, which passed in a Democratic-controlled chamber, we don't see the* JFA *passing the GOP-controlled House.)*
return to top

BACK TO THE FUTURE! POLICY PAPER RECOMMENDS ELIMINATION OF LIST SELECTION. A newly-released research paper questions securities arbitration's fairness and, among other things, recommends that list selection be eliminated. *Tipping the Scales: Balancing Consumer Arbitration Cases*, was released **February 23** by the Stanford Institute for Economic Policy Research ("SIEPR"). The core findings? "1) Arbitration is often assumed to be fair and balanced. But brokerage firms often hold an advantage over consumers. 2) Random selection of arbitrators would increase consumer awards by about $60,000 on average. 3) Industry-friendly arbitrators are 50 percent more likely to be chosen from the arbitrator pool than their consumer-friendly counterparts because securities firms are sophisticated at eliminating consumer-friendly arbitrators." On list selection, SIEPR says: "The information and selection advantages securities firms have are substantial. We calculate that if arbitrators were selected randomly without the input from either party, consumer awards would increase by about $60,000 on average, compared with the current system. Approximately 60 percent of that effect comes because firms are better than consumers at striking arbitrators from a given arbitrator pool. We calculate that competition among arbitrators accounts for the remaining 40 percent.[] Ironically, we found that policies that are intended to benefit consumers — such as increasing arbitrator compensation or giving parties more choice — would benefit informed consumers but hurt the uninformed." What is an informed consumer? "Additional evidence reveals the advantage securities firms have is driven by their extensive experience with arbitration. This informational advantage by securities firms, we found, is substantially reduced when consumers are better informed, such as when they use an attorney who specializes in arbitration and is a member of the Public Investors Arbitration Bar Association (PIABA)."

*(ed: *Wonder if FINRA or SIFMA will respond? **We encourage readers with views on the report to submit a letter to the editor at Help@SecArbAlert.com. Our two cents worth? Eliminating list selection would be a step backward. ***The SIEPR Policy Brief is also available in PDF format.)*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***White v. Samsung Electronics America*, No. 22-1162 (3rd Cir. Mar. 7, 2023)**: "In this putative class action, the District Court for the District of New Jersey determined that defendant Samsung Electronics America, Inc. (Samsung) waived its right to arbitrate. Samsung appeals the District Court ruling, arguing that *Morgan v. Sundance, Inc*., 142 S. Ct. 1708 (2022), abrogated this Court's prejudice-based approach to analyzing waiver of arbitration rights and requires reversal. Because we conclude that Samsung waived its arbitration rights under *Morgan*, we will affirm the order of the District Court."

***Piplack v. In-N-Out Burgers*, No. G061098 (Calif. Ct. App. 4 Mar. 7, 2023)**: "Defendant In-N-Out Burgers appeals from the trial court's denial of its motion to compel arbitration of the claims of plaintiffs Tom Piplack and Donovan Sherrod for penalties under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.; PAGA). Defendant argues the recent decision of the United States Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) ___ U.S. ___ [142 S.Ct. 1906] (*Viking*), rendered while defendant's appeal was pending before this court, requires plaintiffs' individual PAGA claims to be arbitrated and all remaining representative claims dismissed for lack of standing. Plaintiffs contend the agreement does not require arbitration of individual PAGA claims, defendant waived its right to arbitration by participating in trial proceedings, plaintiff Sherrod is not bound by the arbitration agreement because he entered it before reaching the age of majority and disaffirmed it after reaching that age, and that plaintiffs have standing to pursue representative PAGA claims in court even if their individual claims are sent to arbitration.[] We conclude the arbitration agreements require individual PAGA claims to be arbitrated and defendant did not waive its right to compel arbitration. Accordingly, as to plaintiff Piplack, we reverse—his individual PAGA claim must be arbitrated. As to plaintiff Sherrod, we remand for the trial court to consider his arguments regarding disaffirmance in the first instance, as those arguments were not properly briefed or decided in the trial court because they were irrelevant under pre-*Viking* law."

***Bierig-Kiejdan v. Kiejdan*, No. A-2945-20 (N.J. Super. App. Div. Feb. 16, 2023)**: "Defendant Ralph Kiejdan appeals from a May 12, 2021 post-judgment Family Part order compelling the parties to return to arbitration to resolve the issue of securing plaintiff Susan Bierig-Kiejdan a Jewish divorce known as a 'get' from a Bet Din. We reverse, finding the parties did not agree to arbitrate post-judgment issues unless they entered into a new arbitration agreement following the entry of their final judgment of divorce (FJOD), which they did not agree to do" (footnote omitted).

***Medeiros v. Centaurus Financial*, FINRA ID No. 22-01019 (Tampa, FL, Feb. 22, 2023)**: In this selling away case, two customers (Joint Tenants), alleging that they were led to believe the securities they were investing in were safe, when in fact they were illiquid, are awarded damages against a non-appearing broker. The customers voluntarily dismissed with prejudice their claims against Respondent broker-dealer, as their claims related to activities and sales that occurred outside Respondent broker's employment with Centaurus Financial. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Carroll v. LPL Financial*, FINRA ID No.22-00025 (Hartford, CT, Feb. 24, 2023)**: Claimant broker loses his request for reformation of his Form U5 record for failure to: 1) appear at the hearing; and 2) meet his burden of proof. The broker is held liable to Respondent broker-dealer for the amounts due and owing pursuant to a promissory note and representative agreement. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Spitko, E. Gary, *Arbitration Secrecy*, CORNELL LAW REVIEW, Vol. 109, No. 1 (2023 forthcoming): "The Article's analysis begins by considering the nature of arbitration and the place of secrecy in the hierarchy of arbitral values. After reviewing the FAA's structure and legislative history, the folklore of arbitration, and the case law addressing encroachments upon arbitration secrecy, the Article concludes that secrecy is neither a fundamental attribute of arbitration nor a mere incidental aspect of arbitration. Rather, secrecy should be regarded as a secondary or intermediate attribute of arbitration. This Article's novel conclusion that arbitration has intermediate attributes suggests the need for an expanded framework for resolution of challenges to neutral arbitration regulation that allows for a more nuanced intermediate scrutiny. This Article proposes and defends such a framework. In the context of government infringements of arbitration secrecy, the framework would require the government to demonstrate that its infringement upon arbitration secrecy is reasonable in its inception and reasonable in its scope when measured against the parties' interest in arbitration secrecy."

***No Escape From Wild Stock Swings Amid SVB, Fed Outlook*, Yahoo! Finance - Bloomberg (Mar. 12, 2023)**: "Investors hoping for a reprieve from abrupt swings in technology stocks now are facing renewed crosscurrents from the collapse of Silicon Valley Bank.... The CBOE VIX Index of US stock market volatility posted its biggest spike since June on Thursday and continued to rise on Monday as signs of distress at Silicon Valley Bank spurred broader worries over the US banking sector's debt holdings. The gauge rose 18% or 3.5 points on Thursday and extended small gains on Monday. Stock market volatility has been low for the better part of the past six months as a rally in equities caused the VIX Index to fall as low as 17.87 points last month."

***New Investors Are Now More Likely To Seek Out Advisors, Survey Finds*, FA Magazine (Mar. 13, 2023)**: "New investors are now backing away from doing their own research and relying more on financial professionals after the 2022 market downturn,

according to the Finra Investor Education Foundation and its research partners at NORC at the University of Chicago found.[] The latest report, a follow-up from a similar study in 2020, found 33% of new investors are relying more on financial professionals, which is up from 23% in 2020. Also, the number of new investors who said they relied on their own research was down 10 percentage points. (*ed: See our coverage elsewhere in this* Alert.*)*

***SEC Asks SCOTUS to Review Fifth Circuit Decision with Implications for CFPB's Use of Administrative Law Judges*, Ballard Spahr Blog (Mar. 14, 2023)**: "The Securities and Exchange Commission (SEC) has filed a petition for certiorari with the U.S. Supreme Court seeking review of the Fifth Circuit's decision in *Jarkesy v. Securities and Exchange Commission*, a case with significant implications for the use of administrative law judges (ALJs) by federal agencies, including the CFPB.[] The underlying case in *Jarkesy* involved an SEC investigation that resulted in an administrative action against the petitioners in which the SEC alleged that the petitioners had committed securities fraud and sought both monetary and equitable relief. The petitioners then sued in the U.S. District Court for the District of Columbia to enjoin the proceedings, claiming violations of several constitutional rights. The district court, and subsequently the U.S. Court of Appeals for the D.C. Circuit, refused to issue an injunction, deciding that the district court had no jurisdiction and that the petitioners were required to continue the administrative proceeding and then appeal."

***FINRA Tip Leads to Repayments on Defaulted Florida Bridge Bonds*, Bond Buyer (Mar. 16, 2023): "**A call to the Financial Industry Regulatory Authority's senior help line led to dozens of brokers compensating investors who overpaid for defaulted Florida bridge bonds due to a complex and rarely used bond price calculating method.[] The complaint came in February 2021 from an investor who had bought Santa Rosa Bay Bridge Authority capital appreciation bonds. The bonds, which defaulted in 2011, had been trading at a lower price since 2013, when the issuer started making accelerated principal payments, FINRA said."

***House Subcommittee Discusses Proposals to Reform CFPB*, Lexology (Mar. 16, 2023)**: "On March 9, the House Financial Services Committee's Subcommittee on Financial Institutions and Monetary Policy held a hearing to discuss proposals that would alter the structure and authority of the CFPB. The subcommittee heard from several witnesses, including the CEO of the American Financial Services Association (AFSA), the Bureau's former deputy director, and the Minnesota attorney general…. In his prepared testimony, the AFSA CEO alleged several examples of regulatory overreach taken by the Bureau, including: (i) imposing limits on arbitration, despite the Bureau's own finding that arbitration benefits consumers …."

return to top

DID YOU KNOW?

SCOTUS ORAL ARGUMENTS ARE LIVESTREAMED. The oral argument this week in *Coinbase v. Bielski* was audio livestreamed via the SCOTUS Website. The Court's Website also posts audio recordings and transcripts the same day as arguments.
return to top

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