SECURITIES ARBITRATION ALERT 2023-36 (9/21/23)

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DID YOU KNOW?

- **UN Convention Turned 65 in June**

CFPB MAY TAKE ON MANDATORY ARBITRATION: *A coalition of leading consumer advocacy groups has petitioned the Consumer Financial Protection Bureau ("CFPB") to promulgate a rule giving financial consumers the option to arbitrate after a dispute arises. The group filed the Petition for Rulemaking on September 13. Specifically, they: "petition the Bureau, with respect to protecting consumers and advancing the public interest, to promptly issue a rule addressing the use of mandatory pre-dispute arbitration (or forced arbitration) provisions in contracts between regulated entities and consumers of financial products or services that would allow the consumer to make a meaningful choice on whether to use arbitration after a dispute arises." The Bureau's*

initial response was positive. Arbitration and the CFPB has a rich history, which we will cover in detail in the next Alert.

SQUIBS: IN-DEPTH ANALYSIS

FIRST MONDAY IN OCTOBER COMING SOON: SOME ARBITRATION-CENTRIC CASES WORTH FOLLOWING. ***The Supreme Court will be back in session on October 2. Here are some arbitration-centric cases worth tracking, as suggested by SCOTUSBlog.*** *Certiorari* Petitions this summer were filed in matters involving arbitration. We offer a primer on those cases worth following, as suggested in SCOTUSBlog's "Petitions We're Watching" section.

***Argent Trust Company v. Harrison*, No. 23-30**: The **July 7** Petition identifies the question presented in this case as: "Whether a participant in a plan governed by ERISA who asserts statutory claims under that statute can be compelled, pursuant to a binding arbitration provision, to submit his claims to individual arbitration."

***Coinbase v. Suski*, No. 23-3:** Recall that we reported in SAA 2023-25 (Jun. 29) and blogged on **June 23** that the Supreme Court had decided *Coinbase, Inc. v. Bielski*, No. 22-105, ruling mostly along ideological lines that courts must stay underlying litigation while an appeal of a denial of a motion to compel arbitration is pending. The 5-4 decision, which was released on June 23, was authored by Justice **Kavanaugh**. He was joined outright by Chief Justice **Roberts**, and Justices **Alito, Barrett**, and **Gorsuch**. Justice **Jackson** wrote a dissenting opinion, in which Justices **Kagan** and **Sotomayor** joined in full, and in which Justice **Thomas** joined for the most part. Buried in a footnote was this landmine: "The Court's judgment today pertains to respondent Abraham Bielski. The writ of certiorari as to respondents David Suski et al. is dismissed as improvidently granted." Back with a **June 23** *Certiorari* Petition are the Suski parties, who raise this issue: "Whether, where parties enter into an arbitration agreement with a delegation clause, an arbitrator or a court should decide whether that arbitration agreement is narrowed by a later contract that is silent as to arbitration and delegation."

***Smith v. Spirrizzi*, *No.* 22-1218**: The **June 14** Petition for *Certiorari* states: "This case presents a clear and intractable conflict regarding an important statutory question under the Federal Arbitration Act (FAA), 9 U.S.C. 1-16.[] The FAA establishes procedures for enforcing arbitration agreements in federal court. Under Section 3 of the Act, when a court finds a dispute subject to arbitration, the court 'shall on application of one of the parties *stay the trial of the action* until [the] arbitration' has concluded. 9 U.S.C. 3 (emphasis added).... The question presented is: Whether Section 3 of the FAA requires district courts to stay a lawsuit pending arbitration, or whether district courts have discretion to dismiss when all claims are subject to arbitration."

Also Worth Watching

***Law Offices of Crystal Moroney, P.C. v. Consumer Financial Protection Bureau*, No. 22-1233**: On **June 21**, Moroney filed a *Certiorari Petition* identifying this issue for review: "Whether the Consumer Financial Protection Agency's funding structure—which

imposes no meaningful constraints on the authority of the President or CFPB to choose the Bureau's amount of annual public funding—violates the Appropriations Clause, U.S. Const. Art. I, Sec. 9, Cl. 7, and renders unenforceable the CID [Civil Investigative Demand] issued in this case." Note that we reported in SAA 2023-10 (Mar. 9) that the Supreme Court had granted a Petition in No. 22-448, seeking review of *Community Financial Services Ass'n of America v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022). There, a unanimous Fifth Circuit held that the CFPB's funding method is unconstitutional. We see a *Cert*. grant coming in *Moroney*, which is set for consideration at the Court's **September 26** conference, and then the two cases being consolidated.

Conclusion
We're reasonably certain another *Cert.* grant is coming this Term. Time will certainly tell, but closing the loop on FAA section 3 ambiguity on court cases ordered into arbitration seems very likely. Likewise, the Court might be inclined to take on arbitration and ERISA.
(ed: We will be sure to track these cases.)
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NINTH CIRCUIT: "LAST MILE" AMAZON DRIVERS ARE EXEMPT FROM THE FAA. ***The Ninth Circuit holds unanimously that local Amazon drivers are part of the flow of interstate commerce, meaning they are exempt from the Federal Arbitration Act ("FAA").*** SCOTUS in *Southwest Airlines Co. v. Saxon*, 142 S.Ct. 1783 (2022), ruled unanimously that the FAA section 1 exemption of "workers engaged in foreign or interstate commerce" includes classes of workers who are part of the flow or stream of interstate commerce (here, airline baggage handlers), and that there is no FAA requirement that these individuals actually cross state lines. Left open was the issue of rideshare drivers or those who work as delivery drivers for companies such as Amazon, who don't cross state lines. Addressing this and related issues is *Miller v. Amazon.com, Inc.,* No. 21-36048 (9th Cir. Sep. 1, 2023). We quote liberally from the unanimous opinion.

Background
The case involved Amazon Flex delivery drivers: "making last-leg deliveries of goods shipped from other states or countries to consumers, as well as deliveries of food, groceries, and packages stored locally …. The Plaintiffs allege that Amazon failed to honor its promise that workers would receive 100% of the tips that customers added for tip-eligible deliveries, in violation of the Washington Consumer Protection Act and various other state consumer protection laws."

***Rittmann* is Still Good Law**
The Ninth Circuit held in *Rittmann v. Amazon.com, Inc*., 971 F.3d 904 (2020), *cert. denied*, 141 S.Ct. 1374 (2021), that: "Amazon Flex delivery drivers, like plaintiffs here, are workers engaged in interstate commerce because they deliver goods moving in interstate commerce to their final destination. Amazon argues that *Rittmann* is no longer good law after the Supreme Court's decision in *Southwest Airlines Co. v. Saxon*, which

held that airplane cargo workers were within a 'class of workers engaged in foreign or interstate commerce' even though they did not physically move goods across borders. But we recently held that *Rittman* remains binding precedent after *Saxon.* See *Carmona Mendoza v. Domino's Pizza, LLC*, 73 F.4th 1135 (9th Cir. 2023)" (some citations omitted).

Review of *Carmona*

We've in the past reported on *Carmona.* As reported in SAA 2022-40 (Oct. 27), the Supreme Court's **October 17, 2022** Order List seemingly buttoned up the open issue of FAA coverage in that case: "The petition for a writ of certiorari is granted. The judgment is vacated, and the case is remanded to the United States Court of Appeals for the Ninth Circuit for further consideration in light of *Southwest Airlines Co. v. Saxon*, 596 U. S. --- (2022)." As later reported in SAA 2023-29 (Aug. 3), the Ninth Circuit on remand stood by its original holding: "Our prior opinion held that the FAA exempted the claims in this case because the D&S drivers were part of a 'class of workers engaged in foreign or interstate commerce,' U.S.C. § 1; *Carmona*, 21 F.4th at 628. Although we noted that the 'nature of the business for which a class of workers performed their activities' was a 'critical factor' in the § 1 analysis, id. at 629 (cleaned up), we in the end focused heavily on what the class of workers to which the plaintiffs belonged actually did. Relying on *Rittmann*, we stressed that because 'the D&S drivers, like the Amazon package delivery drivers, transport [interstate] goods for the last leg to their final destinations,' they are engaged in interstate commerce under § 1. Id. at 630 (cleaned up). Nothing in *Saxon* undermines that reasoning" (footnote omitted). We also blogged on *Carmona* on **August 2** this year; see, *Ninth Circuit After SCOTUS Remand: Upon Further Review, We're Good with Our Original Decision*.

"Last Mile" Drivers are Exempt from FAA

Returning to *Miller*: "Amazon next argues that even if *Rittmann* remains good law, the drivers here are different from those in Rittmann because Amazon Flex drivers can schedule two types of delivery blocks: last-mile deliveries and tip-eligible local deliveries—and the latter do not involve interstate commerce. But this is the exact same class of workers we discussed in *Rittmann*: Amazon Flex delivery drivers who 'are engaged to deliver packages from out of state or out of the country, even if they also deliver food from local restaurants.' We concluded that these drivers are 'engaged in interstate commerce, even if that engagement also involves intrastate activities.' As the Supreme Court made clear in *Saxon*, the relevant question is what work 'the members of the class, as a whole, typically carry out,' which here includes last-mile deliveries" (citations omitted).

State Law Doesn't Help

"Finally, Amazon argues that even if Amazon Flex delivery drivers are exempt under the FAA, the arbitration provision should be enforced under state law. Again, *Rittmann* controls. In examining the identical 2016 Terms of Service that plaintiffs agreed to here, we held that no state law applies to the arbitration provision. Amazon argues that the 2019 and 2021 Terms of Service supersede the 2016 Terms of Service and require

enforcement of the arbitration provision under Delaware state law. Plaintiffs allege that the practices they challenge started in 2016 and ended in about August 2019, before the 2019 Terms of Service became effective. Therefore, according to plaintiffs, the modifications to the arbitration provision cannot apply to their claims. We agree. *Rittmann* controls, and Amazon cannot enforce the arbitration provision under state law" (footnote and citations omitted).
*(ed: *Seems that sooner or later SCOTUS will address the core issue of these drivers and the FAA. **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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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SEC RULE CHANGE EXPANDS FINRA'S REACH. The SEC on **August 23** adopted amendments to Rule 15b9-1 that had exempted certain firms from FINRA member registration. As announced in a Press Release: "The Securities and Exchange Commission today adopted rule amendments that narrow the exemption from Section 15(b)(8) of the Securities Exchange Act of 1934, which requires any broker or dealer registered with the Commission to become a member of a national securities association unless the broker or dealer effects transactions in securities solely on an exchange of which it is a member. The Financial Industry Regulatory Authority Inc. (FINRA) currently is the only registered national securities association." The Rule's introduction adds: "The amendments replace rule provisions that provide an exemption for proprietary trading with narrower exemptions from Association membership for any registered broker or dealer that is a member of a national securities exchange, carries no customer accounts, and effects transactions in securities otherwise than on a national securities exchange of which it is a member." According to a **September 7** *JDSupra* post: "With these amendments, the SEC eliminated a long-standing proprietary trading exclusion that had allowed certain proprietary trading firms, options market makers and other broker-dealers (a total of approximately 64 firms, according to the SEC's adopting release) to operate as broker-dealers without incurring the potential costs and burdens of FINRA membership. As a result, these firms will be required to become FINRA members within 365 days after the publication of the amended rules in the *Federal Register*." More details are explained in a Fact Sheet.
(ed: We expect this change will eventually translate to a few more cases at FINRA Dispute Resolution.)
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CALIFORNIA LEISLATURE PASSES BILL ON STAYS OF SUITS FOLLOWING DENIED MOTIONS TO COMPEL. When a party appeals a denied action to compel arbitration, the underlying litigation is usually stayed pending the appeal. The California Assembly on **September 7** passed and sent to the Governor on **September 13** SB-365, which would give the trial court discretion in this regard. The bill passed the Senate on **September 1**. Says the official summary (*ed: colors and striking are in the original*): "Existing law authorizes a party to appeal, among other things, an order dismissing or denying a petition to compel arbitration. Existing law generally stays

proceedings in the trial court on the judgment or order appealed from when the appeal is perfected, subject to specified exceptions. This bill would ~~additionally prohibit a trial court from staying proceedings~~ *provide that, notwithstanding the general rule described above, trial court proceedings would not be automatically stayed* during the pendency of an appeal of an order dismissing or denying a petition to compel arbitration." Section 1294 of the Code of Civil Procedure would be amended to read: " An aggrieved party may appeal from: (a) An order dismissing or denying a petition to compel arbitration. Notwithstanding Section 916, the perfecting of such an appeal shall not automatically stay any proceedings in the trial court during the pendency of the appeal." Of course, SCOTUS on **June 23** decided *Coinbase, Inc. v. Bielski*, No. 22-105, ruling mostly along ideological lines that, under the Federal Arbitration Act ("FAA"), courts must stay the underlying litigation while an appeal of a denial of a motion to compel arbitration is pending**.** The 5-4 decision was authored by Justice **Kavanaugh**. He was joined outright by Chief Justice **Roberts**, and Justices **Alito, Barrett**, and **Gorsuch**. Justice **Jackson** wrote a dissenting opinion, in which Justices **Kagan** and **Sotomayor** joined in full, and in which Justice **Thomas** joined for the most part.
*(ed: *We imagine the bill will be signed by the Governor. **We see preemption issues if the bill is enacted and applied to cases governed by the FAA.)*
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A CASE WORTH FOLLOWING: DC CIRCUIT HEARING CHALLENGE TO CONSTITUTIONALITY OF FINRA'S ENFORCEMENT FUNCTION. We suggest readers keep an eye on *Alpine Securities Corp. v. FINRA*, No. 23-5129 (D.C. Cir.), a case challenging the constitutionality of FINRA's enforcement function. Full details are contained in a **September 7** Reuters article, *As U.S. Securities Regulator FINRA Faces Constitutional Challenge, Bill Barr Calls for Defanging It.* The case is attracting significant attention. The Biden administration is supporting FINRA's position, while several *Amici* oppose it, as does former Attorney General **Bill Barr**. The government's core arguments are (*ed: repeated* verbatim): FINRA is a private corporation that functions subordinately to the SEC; and FINRA's private directors and executives are not "Officers of the United States" and are not subject to Constitutional appointment and removal requirements. The District Court rejected the challenge last **June.**
*(ed: *We're not sure how an adverse ruling would impact dispute resolution, but suffice it to say it would present a challenge! **Irrespective of the outcome, SCOTUS will no doubt be asked to get involved.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Yeh v. Superior Court of Contra Costa County*, No. A166537 (Calif. Ct. App. 4 Sep. 6, 2023)**: "Petitioners Jaquelyn Yeh and David Chin seek a writ of mandate compelling the superior court to reverse its order compelling to arbitration their action under the Song-Beverly Consumer Warranty Act (the Act) against real party in interest Mercedes-Benz USA, LLC (MBUSA). They contend that the trial court improperly compelled arbitration because MBUSA is not a party to their agreements with the vehicle dealer and their claims against MBUSA are not intertwined with those agreements. We agree and shall

direct the superior court to deny the motion to compel arbitration." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***AJZ Hauling, LLC v. TruNorth Warranty Program of N. America*, 2023-Ohio-3097 (Sep. 6, 2023)**: "We accepted this discretionary appeal filed by appellant, TruNorth Warranty Programs of North America ('TruNorth'), to determine whether res judicata requires appellee, AJZ's Hauling, L.L.C. ('AJZ's Hauling'), to arbitrate its claims against TruNorth pursuant to an arbitration provision in a TruNorth warranty and whether TruNorth is entitled to an evidentiary hearing under R.C. 2711.03 on its motion to compel arbitration. We hold that res judicata — specifically, issue preclusion—barred the trial court from considering the enforceability and validity of the arbitration provision in this case because that issue was previously adjudicated and no exception to res judicata applies here. Therefore, the claims filed by AJZ's Hauling against TruNorth are subject to arbitration, and we need not resolve whether TruNorth is entitled to an evidentiary hearing under R.C. 2711.03. We reverse the judgment of the Eighth District Court of Appeals, and we remand the cause to the trial court to enter an order granting TruNorth's motion to stay the proceedings and to compel arbitration."

***Alliance Auto Auction of Dallas, Inc. v. Lone Star Cleburne Autoplex, Inc.*, No. 22-0191 (Texas Sep. 1, 2023)**: "Contrary to the court of appeals' broad holding here, we held in *TotalEnergies* that, 'as a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties' disputes must be resolved through arbitration.' Moreover, 'the fact that the parties' arbitration agreement may cover only some disputes while carving out others does not affect the fact that the delegation agreement clearly and unmistakably requires the arbitrator to decide whether the present disputes must be resolved through arbitration.' In light of our holdings in *TotalEnergies*, the court of appeals' holding in this case — that arbitrability is always a 'gateway issue that courts must decide at the outset of litigation'— is incorrect."

***Jensen v. Equity Services*, FINRA No. 22-02086 (Portland, OR, Aug. 10, 2023):** An Arbitrator provides factual background as to why she has decided to grant Claimant broker's request for reformation of his Form U5 record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***K & S Trust v. Presidential Brokerage*, FINRA ID No. 19-02577 (Denver, CO, Aug. 10, 2023)**: After denying Respondents' Prehearing Motion to Dismiss pursuant to Rule 12504(a)(6)(B) and Rule 12206 (Six-year Eligibility Rule), the Panel denies the customer's case and imposes sanctions against the customer pursuant to FINRA Rule 12212(a) for delaying the production of documents in its possession during the course of the case. The Panel also awards Respondents their attorney fees. Respondent broker loses his request for expungement of this matter from his CRD record. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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Law, Sau Wai, *Banking and Finance Dispute Resolution in Hong Kong: The Suitability of Arbitration in Private Disputes*, 2023 ROUTLEDGE (Aug. 25, 2023): "This book examines the concept of 'naming, blaming, claiming' in the application of arbitration for private banking dispute resolution. The author focuses on examining this issue using Hong Kong as a case in point, blending theory and empirical evidence to unveil how disputes are resolved within the banking and finance industry, which will enable them to explore possible effective and efficient mechanisms to resolve financial disputes.[] The book offers a comprehensive review of the laws and regulations governing the private banking industry in Hong Kong and selected jurisdictions, as well as how they are implemented. It examines the clients' perceptions through an innovative methodology for empirical studies. Describing how clients react to the laws and regulations and the potential adverse impacts to the stability of the banking industry, the author identifies possible factors that could trigger another financial crisis. Synthesising his analysis, the author proposes newly discovered self-corrective mechanisms embedded among clients and concludes with policy recommendations."

***SEC Directs Equity Exchanges and FINRA to Improve Governance of Market Data Plans*, www.sec.gov (Sep. 1, 2023)**: "The Securities and Exchange Commission today issued an order directing the equity exchanges and the Financial Industry Regulatory Authority (FINRA) (the participants) to file a new national market system plan (NMS plan) to replace the three existing national market system plans that govern the public dissemination of real-time, consolidated equity market data for national market system stocks.[] The order follows a May 6, 2020, Commission order that was reviewed by the D.C. Circuit and, among other things, was upheld with respect to the Commission's requirements that the new plan allocate votes by exchange group and provide for an independent administrator."

***Finra Fines, Suspends Ex-LPL Broker Over Client Loan, Unauthorized Trades*, AdvisorHub (Sep. 6, 2023)**: "The Financial Industry Regulatory Authority fined and suspended a former LPL broker for allegedly borrowing from a customer and unauthorized trading, according to a letter of settlement finalized on Tuesday. [Broker], who logged 23 years in the industry and was based in Glastonbury, Connecticut, accepted a four-month suspension and $10,000 fine without admitting or denying the allegations.[] In July 2021, [he] borrowed $31,170 from the client, who was also his friend, although the broker's supervisor warned him that the loan would not be permitted, Finra said. [Broker] has not made any payments, but the customer has not complained, according to the letter."

***SEC Expands FINRA Oversight of Proprietary Trading Firms*, Schulte Roth + Xabel Blog (Sep. 6, 2023)**: "On Aug. 23, 2023, the US Securities and Exchange Commission adopted amendments to the Securities Exchange Act of 1934 ('Exchange Act') to require certain SEC-registered dealers that were previously exempt from national securities

association membership to register with the Financial Industry Regulatory Authority ('FINRA'). (*ed: See our coverage elsewhere in this* Alert.)

***Still Few, FINRA's Latest Reg BI Case Charges Firm with Overtrading*,**
FinancialPlanning (Sep. 6, 2023): "FINRA continues to dribble out cases with the still somewhat new Regular Best Interest conduct standard for broker-dealers, hitting a New Jersey-based firm with more than $700,000 in fines.[] The Financial Industry Regulatory Authority reached an agreement on Aug. 31 with Network 1 Financial Securities over allegations that the Red Bank, New Jersey-based firm had not established a reasonable supervisory system and had not properly responded to warning signs of excessive trading in client accounts. Among other things, the brokerage industry's self-regulator accused Network 1 of violating the care obligation of Regulation Best Interest, which requires brokers to use reasonable diligence and skill when making recommendations to clients."

***FINRA Wins Green Light for Overhaul of Arbitrator Selection System*,**
FinancialPlanning (Sep. 8, 2023): "Federal regulators gave their blessing Thursday [September 7]to a proposal to overhaul FINRA's procedures for striking arbitrators from the three-member panels that oversee many broker disciplinary and dispute cases.[] Among other things, the changes codify the Financial Industry Regulatory Authority's current practice of allowing arbitrators to be removed from the panels and replaced before an arbitration hearing begins. They also call on the director of dispute resolution services at the broker-dealer self-regulator to put in writing the reasons for accepting or rejecting a request to pull a certain panel member.[] Arbitrators can now be removed for having various conflicts of interest, such as having had previous dealings with a party in a given case."
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DID YOU KNOW?

UN CONVENTION TURNED 65 IN JUNE. Most ADR practitioners are familiar with the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ("New York Convention"), which has been adopted by 172 nations, including the United States when it enacted Chapter 2 of the Federal Arbitration Act in 1970. The Convention was promulgated **June 10, 1958**. The 65th anniversary was celebrated in late June.
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