SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-41 (11/2/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

- **PIABA Issues Updated Expungement Report**
- **FINRA DRS Posts Stats Through September. Still a Strong Year, But Filings are Definitely Slowing Down a Bit**

SHORT BRIEFS:

- **Reminder: Comments Due November 3 on FINRA's Proposed Changes to Non-Attorney Rep Rule**
- **Ketchum Prize to Former AARP Leader Doug Shadel**
- **SCOTUS Won't Review ERISA Case**
- **District Court: Class Action Waiver Not in Arbitration Agreement is Unenforceable**

QUICK TAKES:

- ***FCM Investments, LLC v. Grove Pham, LLC*, No. D080801 (Calif. Ct. App. 1 Oct. 7, 2023)**
- ***In re Uber Technologies Wage and Hour Cases,* No. A166355 (Calif. Ct. App. 1 Sep. 29, 2023)**
- ***PriorityOne Bank v. Folkes,* 2022-CA-00429-SCT (Miss. Oct. 5, 2023)**
- ***Fayssoux v. SW Financial*, FINRA ID No. 22-01195 (Columbia, SC, Aug. 30, 2023)**
- ***Trowbridge v. Kestra Investment*, FINRA ID No. 22-02757 (Birmingham, AL, Sep. 1, 2023)**

ARTICLES OF INTEREST:

- ***The Future of Mass Arbitration*, 20:7 TODAY'S GENERAL COUNSEL 14 (Oct. 2023)**
- ***New California Law Limits Stays of Proceedings Pending the Appeal of the Denial of a Petition to Compel Arbitration,* Fenwick Blog (Oct. 17, 2023)**
- ***Broker's Churning Led to $2.2M in Losses for Clients, $2.2M in Commissions: Finra*,**
- **AdvisorHub (Oct. 20, 2023)**
- ***Former SEC Chair to Join CFP Board of Directors,* FA Magazine (Oct. 20, 2023)**
- ***PIABA: Broker Expungement is Still Too Easy*, Wealth Management (Oct. 24, 2023)**

DID YOU KNOW?

- **FINRA Website Gathers Info on Filing Regulatory Complaints**

SQUIBS: IN-DEPTH ANALYSIS

PIABA ISSUES UPDATED EXPUNGEMENT REPORT. ***On the heels of the October 16 effective date of a number of rule amendments affecting the expungement of customer dispute information, PIABA and its foundation have issued an updated report on expunging customer dispute information from the Central Records Depository ("CRD").*** As we reported in SAA 2023-15 (Apr. 20), the SEC approved the final version of SR-FINRA-2022-024, which makes substantial reforms to the process for expunging customer dispute information from brokers' CRD records and profoundly limits the ability of brokers to seek such relief in the first place. When FINRA issued Regulatory Notice 23-12, setting the **October 16** effective date for the rule changes, we described which cases will be governed by the new rules and the numerous ways these

rules will limit brokers' opportunities to request expungement through FINRA arbitration (see SAA 2023-31 (Aug. 17)). The main set of rules applicable to expungements under the new regime are: Rule 12800(d)-(f), which applies to expungement requests during simplified arbitrations of customer-initiated cases (involving $50,000 in damages or less); 2) Rule 12805, which applies to expungement of other customer-initiated arbitrations (more than $50,000 in, or an unspecified amount of, damages); and 3) Rules 13805 and 13806, which apply to "straight-in" expungement proceedings, those initiated by brokers for the purpose of expunging customer complaints. See our **October 11** feature article detailing the changes.

Updated Report

PIABA announced via an **October 24** Press Release publication of a 29-page Study, *2023 Updated Study of FINRA Expungements: A New Hope to Protect the Integrity of the Public Record.* The report updates prior studies conducted in 2012, 2019, and 2021. The Release leads with these findings (*ed: repeated* verbatim; *bulleted format added)*:

- Requests for the expungement of customer complaints against their investment brokers were granted at an astonishing rate of 90% according to a new report on FINRA arbitration awards released by two nonprofits, The PIABA Foundation and PIABA (Public Investors Advocate Bar Association).
- The new study is the third report since 2019 and updates their analysis, which now covers 8 ½ years of arbitration awards issued by FINRA arbitrators in "straight-in" cases, a term to describe a type of expungement request where brokers file arbitrations against their own brokerage firm requesting expungement of customer complaints. Historically, the requests went unopposed because no one was present to challenge the request.
- Consistent with its previous reports, the new report reviewed data from January 2019 to August 31, 2023 and found that expungements were granted approximately 90% of the time. Out of 2506 awards issued in that time period, expungements were granted in 2259 "straight-in" cases.
- Brokerage firms continued their practice of not opposing brokers' expungement requests in 92% of cases, likely because they have an incentive to erase customer complaints as well.

Core Observations

The core conclusions (*ed: repeated* verbatim):

> PIABA and the Foundation have conducted multiple studies analyzing FINRA's expungement awards for over a decade and the results are clear. The studies have had a positive influence on improving the process.
>
> The data unquestionably leads to the conclusion that the most effective way to reduce the rate of expungements of valid customer complaints being granted is to stop the practice of arbitrators deciding expungement based on one-sided presentations of evidence. FINRA's new expungement rules are a significant

improvement to the expungement process, particularly for straight-in expungement cases.

PIABA and the Foundation are hopeful that the changes will provide a meaningful opportunity for state securities regulators and aggrieved investors to participate and present evidence opposing invalid expungement requests.

The attorneys who represent investors in FINRA arbitration, including the PIABA's membership and those who work with the PIABA Foundation, are also stakeholders in the outcome of expungement requests, because the integrity of their clients' claims and the integrity of FINRA's arbitration forum hang in the balance. One-sided and misleading, and/or incomplete presentations of facts and law by brokers and their firms to chair-qualified arbitrators in straight-in expungements risks leading the arbitrator pool to believe that many, if not most, customers and lawyers representing customers make false complaints. This permanently damages the fundamental fairness of FINRA's arbitration process in future customer arbitrations.

As a result, PIABA and Foundation volunteers should have a meaningful role in improving what has been a broken system. It is our hope that by continuing to study this issue, volunteering our time representing investors through the *pro bono* expungement program, and helping state securities regulators effectively and efficiently participate in FINRA's straight-in expungement arbitration, PIABA and the Foundation can do our part to improve the process to protect the integrity of the regulatory record.

(ed: We'll keep watch for a FINRA reaction.)

return to top

FINRA DRS POSTS STATS THROUGH SEPTEMBER. STILL A STRONG YEAR, BUT FILINGS ARE DEFINITELY SLOWING DOWN A BIT. ***FINRA Dispute Resolution Services ("DRS") has posted case statistics through September, with trends continuing to show a comparatively strong year in arbitration filings – especially industry cases – and a continued drop-off in mediations.*** We offer these headlines at the year's three-quarter mark: 1) overall arbitration filings through September – 2,443 cases – are up 25% for the year (was plus 27% in **August)**; 2) cumulative customer claims increased 14% (was plus 15% last month); 3) industry arbitration filings were up 43% (stat was up 48% in August); and 4) the long-term decline in mediation cases continues, although it appears to be levelling off. There were 262 new arbitrations filed in September, compared to 267 new cases in August.

Continued Decline in Mediation

There were 498 mediation cases in agreement, a 22% decrease from 2022. Although this stat ticked up last month, it has mostly been declining steadily in recent months, and is way down from May 2022's torrid plus 137% pace. The mediation settlement rate was steady at 85%.

Potpourri
Overall arbitration turnaround times were 15.2 months (a slight decrease), with hearing cases now taking 18.2 months (also a slight decrease). There are now 8,401 DRS arbitrators, 4,106 public and 4,295 non-public. This stat was up across the board last month. Pending cases stand at 3,332, down 24 from August.
*(ed: *If the trend holds, the 2,443 arbitrations filed through September straight-lines to about 3,260 yearly arbitration filings, still a decent year by recent measures. Last year there were 2,671 arbitration case filings. The all-time high-water mark was in 2003, when that post tech-wreck figure was 8,945 cases. **Past year stats can be found here.)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

REMINDER: COMMENTS DUE NOVEMBER 3 ON FINRA'S PROPOSED CHANGES TO NON-ATTORNEY REP RULE. We reported in SAA 2023-40 (Oct. 26) that FINRA's proposal to amend the non-attorney representation rules had been published in the *Federal Register* on **October 13** (Vol. 88, No. 197. P. 71051). This is a friendly reminder that comments are due **November 3** on SR-FINRA-2023-013, *Proposed Rule Change to Amend the Codes of Arbitration Procedure and Code of Mediation Procedure to Revise and Restate the Qualifications for Representatives in Arbitrations and Mediations.* Comments can be filed using this link. Commenters can also send an email to rule-comments@sec.gov. Paper comments should be sent in triplicate to: Secretary, Securities and Exchange Commission, 100 F Street NE, Washington, DC 20549–1090. All submissions should refer to File Number SR–FINRA–2023–013.
(ed: We imagine there will be many comments!)
return to top

KETCHUM PRIZE TO FORMER AARP LEADER DOUG SHADEL. The FINRA Foundation announced via an **October 4** Press Release that the 2023 Ketchum Prize had been awarded to retired AARP official **Doug Shadel**. Says the Release: "The FINRA Investor Education Foundation (FINRA Foundation) today awarded Doug Shadel, Ph.D., the 2023 Ketchum Prize—its highest honor—in recognition of his outstanding service and research on protecting consumers, particularly vulnerable Americans.[] Shadel is one of the nation's foremost experts on financial fraud, having dedicated the past 30 years to safeguarding consumers, especially older people, through fraud investigation, research and education. Until his recent retirement, Shadel spent two decades at the helm of AARP Washington in Seattle. He also served as the strategy director for AARP's Fraud Watch Network, which is now one of AARP's most visible and valued initiatives to educate and protect its 38 million members. While at AARP, Shadel also developed fraud education curriculum that has been used throughout the U.S. for more than a decade."
(ed: The Ketchum Prize: "honors FINRA's former chairman and CEO Richard 'Rick' Ketchum, who retired in 2016 following three decades of distinguished leadership in securities regulation." Ketchum also served as chairman of the FINRA Foundation.)
return to top

SCOTUS WON'T REVIEW ERISA CASE. The Supreme Court has declined to review one of the arbitration-centric cases referenced in SAA 2023-36 (Sep. 21) and our recent blog post, *First Monday in October Coming Soon: Some Arbitration-Centric Cases Worth Following.* The case is *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…. The Court should grant this petition to review and reverse the Tenth Circuit's decision below and answer the important federal question presented here in the affirmative: Nothing in ERISA precludes individual arbitration." SCOTUS denies *Certiorari* in its **October 10** Order List (page 3).
*(ed: *Although we are not shocked, a* Cert. *grant would not have surprised us. This issue has been around for a while. **The case below is* Harrison v. Envision Management Holding, Inc., *59 F.4th 1090 (10th Cir. Feb. 9, 2023).)*
return to top

DISTRICT COURT: CLASS ACTION WAIVER NOT IN ARBITRATION AGREEMENT IS UNENFORCEABLE. Because the class action waiver was not associated with a predispute arbitration agreement, the Federal Arbitration Act ("FAA") could not be invoked and the free-standing class action waiver was barred by state law, the Court holds in *Metcalfe v. Grieco Hyundai LLC*, No. A. 22-378-JJM-LDA (D.R.I. Oct. 3, 2023). Says the Court: "The question presented is: does a class action waiver in a car leasing agreement that does not contain an arbitration clause violate Rhode Island public policy, to wit, the Rhode Island Deceptive Trade Practices Act, R.I. Gen. Laws § 6-13.1-5.2, such that it is unenforceable?" And the holding: "the DTPA provides that consumers can 'bring an action on behalf of themselves *and other similarly injured and situated* persons to recover damages.' R.I. Gen. Laws § 6-13.1-5.2(b) (emphasis added). Because the DTPA explicitly allows collective actions, the class action waiver provision in the Leasing Agreement is unenforceable as against public policy in Rhode Island." And what of possible FAA preemption? A footnote adds: "This is not a case of a class action waiver that is part of an arbitration clause. Therefore, the Federal Arbitration Act is not implicated here."
(ed: Seems right. If the FAA is inapplicable, the state law would govern, we think.)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***FCM Investments, LLC v. Grove Pham, LLC*, No. D080801 (Calif. Ct. App. 1 Oct. 7, 2023)**: "Phuong's decades of living in the United States, savvy business dealings, and unspecified past role as an interpreter do not permit a reasonable, nonspeculative inference that her decision to use an interpreter in this high-stakes commercial arbitration proceedings was a deceptive ploy. In concluding otherwise without any elucidation of supporting facts, the award raises an impression of possible bias. We have no difficulty concluding on our record that the Phams's rights were substantially prejudiced by possible arbitrator bias, compelling an order vacating the award (§ 1286.2, subd. (a)(3))."

(*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***In re Uber Technologies Wage and Hour Cases*, No. A166355 (Calif. Ct. App. 1 Sep. 29, 2023)**: "In these coordinated proceedings, defendants Uber and Lyft appeal after the trial court denied their motions to compel arbitration of claims brought against them in civil enforcement actions by the People of the State of California (the People) and by the Labor Commissioner through the Division of Labor Standards Enforcement (DLSE). We conclude the court correctly denied the motions because the People and the Labor Commissioner are not parties to the arbitration agreements invoked by Uber and Lyft. We therefore affirm" (footnotes omitted).

***PriorityOne Bank v. Folkes*, 2022-CA-00429-SCT (Miss. Oct. 5, 2023)**: "On the specific circumstances before us, we agree with Folkes that PriorityOne waived any right it may have had to compel arbitration by substantially participating in litigation and that Folkes is bound by her representation to this Court that the amended chancery complaint did not and was not intended to add discrete claims to her chancery action. Much remains undetermined in this case…. [, b]ut with none of those questions squarely before this Court, we affirm the chancellor's denial of PriorityOne's motion to compel arbitration. By participating extensively in litigation to the point of filing a motion for summary judgment, PriorityOne waived any right to arbitrate Folkes's equitable chancery court claim that the foreclosure was made in bad faith and should be set aside. Folkes is bound by her representation to this Court that the amended complaint was not intended to add discrete causes of action."

***Fayssoux v. SW Financial*, FINRA ID No. 22-01195 (Columbia, SC, Aug. 30, 2023)**: In this large-dollar case, a Panel holds a now expelled member firm liable to a customer for over $3.1 million in damages (inclusive of $500,000 in punitive damages pursuant to case law), after finding that: the firm churned the customer's account; failed to conduct due diligence; and allegedly invested in unsuitable and unauthorized stocks on margin, thus disregarding the customer's best interest. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Trowbridge v. Kestra Investment*, FINRA ID No. 22-02757 (Birmingham, AL, Sep. 1, 2023)**: An Arbitrator explains in great length why he has decided to grant two registered reps' requests for expungement of a total of six customer complaints from their CRD records, after finding that the requests were not time-barred under FINRA Rule 13206 (the Six-year Eligibility Rule for Industry Disputes). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

***The Future of Mass Arbitration*, 20:7 TODAY'S GENERAL COUNSEL 14 (Oct. 2023)**: "What is mass arbitration? The AAA has a long history of administering large-scale individual cases. They include insurance-related disputes, disputes arising from financial

crises like the Great Recession as well as cases related to asbestos-related personal injuries. Mass arbitration has emerged as a way of resolving a large number of individual claims. The AAA defines mass arbitration as arbitrations with 25 or more similar demands for arbitration. They are filed against or on behalf of the same party or related parties, with the representation for those parties consistent or coordinated across all of the cases. The AAA's Mass Arbitration rules will apply when our definition of mass arbitration is met and either the AAA's employment and workplace fee schedule or the consumer fee schedule applies to the arbitrations, or by party agreement."

***New California Law Limits Stays of Proceedings Pending the Appeal of the Denial of a Petition to Compel Arbitration*, Fenwick Blog (Oct. 17, 2023)**: "On October 10, 2023, California Gov. Gavin Newsom signed CA Senate Bill 365 (SB 365), set to go into effect in 2024. This bill gives state court judges the discretion to move forward with litigation in trial court while an appeal of a denial of a petition to compel arbitration is pending. This law comes in the wake of the recent U.S. Supreme Court decision in *Coinbase v. Bielski* (outlined in our prior publication linked here). In *Coinbase*, the Supreme Court resolved a circuit split and held that district court proceedings should automatically be stayed pending the appeal of a denial of a motion to compel arbitration."

***Broker's Churning Led to $2.2M in Losses for Clients, $2.2M in Commissions: Finra*, AdvisorHub (Oct. 20, 2023)**: "A veteran broker in California generated $2.22 million in losses and $2.24 million in commissions for him and his firm by excessively trading accounts over two and a half years, according to an October 17 complaint from the Financial Industry Regulatory Authority."

***Former SEC Chair to Join CFP Board of Directors*, FA Magazine (Oct. 20, 2023)**: "The Certified Financial Planning Board announced that a former SEC chair and two advisors have been elected to its board of directors with three-year terms to begin on January 1.[] Former SEC Chairman Elisse Walter, in addition to Malik Lee and Linda Leitz, will be the third board class eligible to be re-elected by the board for a second three-year term, the release noted.[] Walter served as chair of the U.S. Securities and Exchange Commission from 2012-2013. She was appointed as a commissioner by President George W. Bush in 2008. Before her appointment as an SEC commissioner, Walter served as senior executive vice president for regulatory policy and programs with the Financial Industry Regulatory Authority. She held the same position at NASD before its consolidation with NYSE Member Regulation in 2007, the board said. She coordinated policy issues across Finra and oversaw several departments, including investment company regulation, member education and training, investor education and emerging regulatory issues. Walter also served on the board of directors of the Finra investor education foundation."

***PIABA: Broker Expungement is Still Too Easy*, Wealth Management (Oct. 24, 2023)**: "The Financial Industry Regulatory Authority arbitrators grant "straight-in" expungement requests 90% of the time, according to an updated study released Tuesday by the Public Investors Advocate Bar Association. The study comes just one week after a new FINRA

rule took effect, which makes it easier for state regulators to oppose expungement. PIABA believes the rule contains significant improvements to the expungement process." (*ed: See our coverage elsewhere in this Alert.)*
return to top

DID YOU KNOW?

FINRA WEBSITE GATHERS INFO ON FILING REGULATORY COMPLAINTS. Our readers and followers know that aggrieved investors can file an arbitration to recover their losses. But did you know investors can also file regulatory complaints? FINRA gathers this info on its complaint page, which has links to file a complaint with FINRA and several other agencies.
return to top

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Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
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