SECURITIES ARBITRATION ALERT 2023-42 (11/9/23)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

SCOTUS GRANTS *CERTIORARI* IN *SUSKI. The Supreme Court has granted* Certiorari *in another arbitration-related case.* *Coinbase v. Suski*, No. 23-3, was one of the arbitration-centric cases at SCOTUS referenced in SAA 2023-36 (Sep. 21) and in our recent blog post, *First Monday in October Coming Soon: Some Arbitration-Centric Cases Worth Following.*

Past Reporting
We reported as follows:

> 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."

New Petition
We further reported:

> 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."

Stealth *Cert.* Grant
The Court typically announces grants and denials in its weekly Order Lists, which are usually released on Tuesdays. Not so here. In a three-item Miscellaneous Order released Friday, **November 3,** SCOTUS grants *Certiorari* in *Suski*. As usual, there's no explanation.

Second this Term
As reported in SAA 2023-38 (Oct. 5), the Court granted *Certiorari* in *Bissonnette v. LePage Bakeries Park St. LLC*, No. 23-51, where the **July 17** Petition states: "The Federal Arbitration Act exempts the 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.' 9 U.S.C. § 1. The First and Seventh Circuits have held that this exemption applies to any member of a class of workers that is engaged in foreign or interstate commerce in the same way as seamen and railroad employees—that is, any worker 'actively engaged' in

the interstate transportation of goods. The Second and Eleventh Circuits have added an additional requirement: The worker's employer must also be in the 'transportation industry.' The question presented is: To be exempt from the Federal Arbitration Act, must a class of workers that is actively engaged in interstate transportation also be employed by a company in the transportation industry?"
(ed: We're not surprised.)
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TRICK OR TREAT: ON HALLOWEEN, DOL PROPOSES ERISA FIDUCIARY RULE. ***The Department of Labor's ("DOL") Employee Benefits Security Administration has proposed: "a new rule that would protect workers' retirement savings by updating the regulation defining a fiduciary under the Employee Retirement Income Security Act (ERISA)."*** As described on the DOL's dedicated Webpage: "The 'Retirement Security Rule: Definition of an Investment Advice Fiduciary' would affect how investors get advice on their job-based retirement accounts and other retirement savings plans and how investment advice providers must act if they have a conflict of interest…. The proposed rule and related proposed amendments to prohibited transaction exemptions (PTEs) detail when advice providers are acting in a fiduciary role under federal pension laws and explain the conditions they must follow to protect retirement investors." The proposal was announced in an **October 31** Press Release.

Details
The DOL observes that: "Many people who give investment advice and get paid for it are currently not considered investment advice fiduciaries under ERISA. Investment advice fiduciaries legally must follow strict rules of conduct.[] Under these proposals, investment advice fiduciaries would:

- give advice that is prudent and loyal.
- avoid misleading statements about conflicts of interest, fees, and investments.
- follow policies and procedures designed to ensure the advice given is in an investor's best interest.
- charge no more than is reasonable for their services.
- give investors basic information about any conflicts of interest."

Basis for the Proposed Rule
Says the DOL: "EBSA's mission is to protect the job-based retirement, health and other welfare plan benefits of America's workers and their families. Requiring investment advice providers to comply with fiduciary standards protects retirement investors from harmful conflicts of interest. Conflicts of interest can put an investment advice provider in the position of choosing between what's good for them and what's best for you. That could result in excess fees and/or lost investment returns that reduce a person's retirement savings.[] The existing definition is from 1975 and doesn't work in today's marketplace. Investors who are making decisions for their retirement accounts expect advice to be in their best interest — so, it should be."

Ample Support Materials
The Department provides substantial support materials, including: a Fact Sheet; a blog; and a video. There are also links to key documents: Proposed Retirement Security Rule; Proposed Amendment to PTE 2020-02; Proposed Amendment to PTE 84-24; and Proposed Amendment to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128.
(ed: All rules were published in the Federal Register *November 3 (Vol. 88, No. 212, P. 75890); comments are due January 24. Note:"The Department anticipates holding a public hearing approximately 45 days following the date of publication in the* Federal Register. *Specific information regarding the date, location, and submission of requests to testify will be published in the* Federal Register*.")*
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FINRA PANEL AWARDS MORE THAN $2 MILLION IN ATTORNEY FEES AND COSTS TO SUCCESSFUL RESPONDENTS. ***A multi-million dollar claim for "civil theft" under Florida law badly backfired when the FINRA panel of three public arbitrators held a group of customers liable for the respondents' defense fees and costs.***
The Award in question is *Chua v. INTL FC Stone Financial, Inc.*, FINRA ID No. 18-02134 (Miami, FL, Oct. 5, 2023). The Claimants were: "Lucy Chua and John Byrnes, as Trustees of the Yife Tien Irrevocable Dynasty Trust and Rocky Vista University, LLC" (it is unclear from the Award whether Chua and Byrnes brought their claims in part as trustees of the University or the latter was a separate claimant, but Yife Tien founded Rocky Vista University and is married to Chua). They filed this arbitration on **June 18, 2018** against three broker-dealers – INTL FCStone Financial Inc., Stifel Nicolaus & Co. Inc. and RBC Capital Markets LLC – and three individual brokers – Jandra Lubovich, Jon Cooper and Aaron Lupuloff.

Claims and Demands for Relief
The Amended Statement of Claim asserted causes of action for: "fraudulent misrepresentation and omissions; fraudulent inducement; conversion; civil theft; breach of fiduciary duty; failure to supervise; and breach of commercial honor and just and equitable principals of trade." More specifically, Claimants alleged: "that Respondents fraudulently sold to Claimants privately offered taxable revenue bonds, IREP Series 2014-A Bonds, misrepresenting and concealing numerous existing ongoing non-public financial and operating problems of the bond's issuer." Claimants requested $5,005,000 in compensatory damages, $15,015,000 in punitive damages, an equal amount in treble damages, rescission of the purchase agreement, declaratory judgment, attorney fees and costs.

Award for the Respondents
An all-public panel decided the case after 15 pre-hearing conferences and 55 evidentiary hearings. Claimants voluntarily dismissed RBC without prejudice before the first evidentiary hearing. During the hearings, the remaining Respondents made a motion for directed verdict, which the Panel granted as to four of the counts, while leaving the claim for civil theft in place. In the Award, the Panel denies the Claimants' remaining claims and grants expungement of the arbitration from the three individual respondents' Central

Registration Depository records. Most significantly, the Panel finds: "Respondents were the prevailing parties on the Civil Theft claim. The Panel has determined that, pursuant to the Florida Civil Theft Statute (F.S. §772.11), Respondents are entitled to recover their attorneys' fees and costs and that the claims in the Amended Statement of Claim are inextricably intertwined. Pursuant thereto, Claimants are jointly and severally liable for and shall pay to Respondents the sum of $1,800,000.00 in attorneys' fees and $294,024.51 in costs."

*(ed: *We question whether Respondents were entitled to this award. The relevant portion of F.S. §772.11 states: "**The defendant is entitled to recover reasonable attorney's fees and court costs in the trial and appellate courts upon a finding that the claimant raised a claim that was without substantial fact or legal support.**" However, the mere fact that the respondents prevailed on the civil theft claim does not necessarily mean that the claim was without substantial factual or legal support, and the panel here does not find that, for instance, the claimants presented no evidence or legal theory in support of a necessary element of their claim. See Island Travel & Tours Ltd. Co. v. MYR Independent, Inc., 307 S.E.3d 829, 831 (Fla. D.C.A., 3rd Dist., Sep. 2, 2020). However, this might not matter, given the narrowness of the grounds for successfully challenging an Award in Florida. Nevertheless, we won't be surprised if the claimants file a petition to vacate. **This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

BILLS INTRODUCED IN CONGRESS TO AMEND FAA REGARDING FOR-PROFIT COLLEGE ENROLLMENT AGREEMENTS. Bills have been introduced in the House and Senate to amend the Federal Arbitration Act ("FAA") so that it would not apply to student enrollment agreements used by for-profit colleges. The *Court Legal Access and Student Support (CLASS) Act*: "would enhance accountability for for-profit colleges and safeguard taxpayer dollars by prohibiting an institution of higher education from receiving Title IV federal student aid if the school's enrollment agreement requires mandatory arbitration or otherwise restricts students' ability to pursue claims against the school in court." Introduced **October 24** were H.R. 6039 by Rep. **Maxine Waters** (D-CA) and S. 3107 by Sen. **Richard Durbin** (D-IL). The bills were announced that day in a Press Release. The text provides as to the FAA: "Chapter 1 of title 9 of the United States Code (relating to the enforcement of arbitration agreements) shall not apply to an enrollment agreement made between a student and an institution of higher education. A different section states: "Section 487(a) of the Higher Education Act of 1965 (20 U.S.C. 1094(a)) is amended by adding at the end the following: 'The institution will not require any student to agree to, and will not enforce, any limitation or restriction (including a limitation or restriction on any available choice of applicable law, a jury trial, or venue) on the ability of a student to pursue a claim, individually or with others, against an institution in court.'"

*(ed: *There are just a handful of cosponsors – all Democrats. **The non-partisan www.govtrack.us Website gives the bills a 7 – 8% chance of enactment.)*
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ELEVENTH CIRCUIT: ORDER COMPELLING APPRAISAL AND STAYING ACTION PENDING APPRAISAL NOT IMMEDIATELY APPEALABLE UNDER FAA. The facts in *Positano Place at Naples I Condominium Association, Inc. v. Empire Indemnity Insurance Company*, No, 22-11059 (11th Cir. Oct. 22, 2023), are straight-forward: "These appeals are about a pending insurance contract dispute between Positano Place at Naples I Condominium Association, Inc., and Empire Indemnity Insurance Company, which issued an insurance policy (the 'Policy') to Positano for coverage of five buildings that Positano owns in Naples, Florida. Following Hurricane Irma, Positano filed a first-party claim for property insurance benefits under the Policy, claiming that Hurricane Irma damaged its property and that the damage was covered by the Policy. After Empire investigated Positano's claim, Empire determined that there was coverage as to only three of the five buildings covered by the Policy but disagreed as to the amount of the loss. In response, Positano sought to invoke appraisal based on the Policy's appraisal provision." And the procedural history: "When Empire did not respond to Positano's appraisal demand, Positano sued Empire in Florida state court, and Empire removed the case to federal court based on diversity jurisdiction. Following removal, Positano moved to compel appraisal and to stay the case pending the resolution of the appraisal proceedings, which Empire opposed. The magistrate judge issued a report recommending that the district court grant Positano's motion, and, over Empire's objection, the district court ordered the parties to appraisal and stayed the proceedings pending appraisal. Empire timely appealed the district court's order." And the holding: "After careful review, and with the benefit of oral argument, we conclude that the district court's order compelling appraisal and staying the proceedings pending appraisal is an interlocutory order that is not immediately appealable under 28 U.S.C. § 1292(a)(1). We also conclude that the order compelling appraisal and staying the action pending appraisal is not immediately appealable under the Federal Arbitration Act ('FAA'). Accordingly, for the reasons stated below, we dismiss the appeal for lack of appellate jurisdiction." *(ed: This vacates the Court's May 31 Opinion, and substitutes it with this one. We covered it as a "Quick Take" in SAA 2023-23 (Jun. 15).)*
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SEC, MSRB, AND FINRA TO HOLD DECEMBER VIRTUAL COMPLIANCE OUTREACH PROGRAM. The Securities and Exchange Commission, Municipal Securities Rulemaking Board ("MSRB"), and FINRA announced jointly via a **September 29** Press Release that registration is now open for a free **December 27** virtual Compliance Outreach Program for municipal market professionals. Says the Release: "The program will provide municipal market participants an opportunity to hear from staff of the SEC, MSRB, and FINRA on timely regulatory and compliance matters for municipal advisors and dealers. Panel topics will include a discussion of compliance concerns of small dealer and municipal advisor firms, credit rating agency compliance concerns including rules of the road for municipal market participants, unregistered

municipal advisory and dealer activity, pricing compliance, and a forward look at regulatory and enforcement priorities."
*(ed: *The Webcast, which is open to the public, will take place from 10:30 a.m. to 4:30 p.m. ET. **Registration is done online.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Breadeaux's Pisa, LLC v. Beckman Bros. Ltd*., No. 22-2835 (8th Cir. Oct. 16, 2023)**: "Dismissing the action after the denial of the preliminary injunction and seeking arbitration may well have been permitted by the district court, but Breadeaux mediated and waited until the district court overruled its discovery objections. Breadeaux defends its delay in moving to stay by pointing out that the Agreement required it to first mediate before filing for arbitration. However, the mediation provision specifically excludes 'matters for which the Franchisor believes it necessary to seek equitable relief.' Because Breadeaux's claims are not referable to arbitration, and even if the claims were referable, Breadeaux defaulted and its motion for stay under 9 U.S.C. § 3 was properly denied."

***Fama v. Opportunity Financial LLC*, No. 3:23-cv-05477-BAT (W.D. Wa. (Oct. 10, 2023)**: "Plaintiff does not contend she could not read the Note due to the font size or due to any technical glitches. Plaintiff testified she read portions of the Note on her telephone but chose not to read beyond the payment schedule. Although Plaintiff states she would not have understood the importance or applicability of the Arbitration Clause even if she had read it, this does not make the Note procedurally unconscionable. The key inquiry is if Plaintiff lacked a meaningful choice and there is no evidence that she did. There was no demand that Plaintiff sign the Note immediately or that she could not have contacted counsel or OppFi if she had any questions or concerns about the terms of the Note. Plaintiff completed the loan application remotely using her telephone and in fact, signed seven materially identical notes in a similar manner over a three-year period – all of which indicates Plaintiff had reasonable opportunities to consider the terms of the Note and the Arbitration Clause."

***Land v. IU Credit Union*, No. 23S-CP-00115 (Ind. Oct. 24, 2023)**: "A basic tenet of American contract law holds that 'an offeror is master of his offer.' However, the offeror's control over the form of acceptance may be limited to protect the offeree's contractual freedom. One such limitation arises when the offeror purports to dictate acceptance by the offeree's silence or inaction. While silence or inaction may, in exceptional circumstances, constitute acceptance, we find no such circumstances here. We thus reverse the trial court and remand for further proceedings consistent with this opinion" (footnotes omitted).

***Castiglione v. Morgan Stanley*, FINRA ID No. 22-02842 (New York, NY,** Sep. 13, 2023): An All-Public Panel grants Respondent broker-dealer's and registered rep's Pre-Hearing Motion to Dismiss after finding that the Claimants case is time-barred by the applicable statutes of limitations under FINRA Rule 12206 (Six-year Eligibility Rule). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Oney v. Moloney Securities*, FINRA ID No. 23-01198 (Seattle, WA, Sep. 13, 2023)**: In this small claims arbitration, an Arbitrator explains why he has decided to deny two customers' claims, after finding that they failed to meet their burden of proof to establish damage or injury. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Robbins, David E., *Precedential Value of FINRA Arbitration Awards,* 30:3 PIABA BAR JOURNAL 1 (2023): "Wouldn't you like FINRA arbitrators to be influenced by prior FINRA Awards that involve the same parties, investments, investment strategies and issues as in your case, instead of receiving the typical FINRA Award that offers no insight into the arbitrators' rationale? As a securities arbitration practitioner for decades, I certainly would….This article will explain why reasoned or explained FINRA Awards should be mandatory—whether requested or not by the parties—or, in the alternative, if such Awards are requested by at least one of the parties prior to the hearing. This article will answer these questions:

A. How Have Courts Ruled on The Subject?
B. How Applicable are Collateral Estoppel and *Res Judicata* to Arbitration Awards?
C. What Insights Can We Learn from Law Professors Who Have Studied the Subject?
D. It is Possible That Under FINRA Rules, Previous FINRA Awards Can Have a Real Influence on Subsequent FINRA Panels?"

(ed: Email the author at drobbins@kaufmanngildin.com for a copy.)

***OppFi Hat Trick: Third Federal Court Upholds Arbitration Clause*, Ballard Spahr Blog (Oct. 26, 2023)**: **"**Earlier this month, in *Fama v. Opportunity Financial LLC*, a Magistrate Judge of the federal district court for the Western District of Washington held that the arbitration provision in OppFi's installment loan agreement is enforceable and rejected the plaintiff's contentions that the provision is substantively and procedurally unconscionable. This is the third federal district court decision—out of four putative class actions filed to date against OppFi by the same plaintiff's counsel stating the same claims—to compel arbitration of the named plaintiff's individual claims." (*ed: See our coverage elsewhere in this* Alert.)

***Another Rep Challenges FINRA's Constitutionality*, Wealth Management (Oct. 30, 2023)**: "The Financial Industry Regulatory Authority responded this week in its legal conflict with Alpine Securities, a case that threatens the constitutionality of its enforcement powers (and by extension, the organization as a whole).[] But while the self-regulatory organization made the case it worked within the bounds of the law, another registered rep facing FINRA disciplinary charges is trying to use Alpine's success to halt his own enforcement proceedings."

***DOL to Unveil Fiduciary Rule Tuesday, Open Comment Period: Reports*, Financial Advisor IQ (Oct. 30, 2023)**: "The Department of Labor is expected to release its controversial new fiduciary rule for public comment on Tuesday [October 31], according to news reports.[] The DOL submitted the new rule for review by the Office of Management and Budget in early September, and that review process typically lasts several weeks, though it's limited to 90 days."

***In FINRA's "Existential" Legal Fight, Help Comes from the DOJ*, Reuters (Oct. 30, 2023)**: "The private securities industry regulator FINRA is getting help from the U.S. Justice Department as it tries to ward off what it acknowledges to be an 'existential threat' to its authority to police U.S. brokers and dealers.[] Both FINRA, which is formally known as The Financial Industry Regulatory Authority, and the DOJ filed briefs last week at the District of Columbia U.S. Circuit Court of Appeals, arguing that FINRA's private regulation of the securities industry breaches neither the U.S. Constitution's Appointments Clause nor the constitutional doctrine that the federal government cannot delegate its power to unsupervised private groups."

***DOL's Fiduciary Rule Proposal Would Extend ERISA's Reach*, Law360 (Nov. 1, 2023)**: "The U.S. Department of Labor unveiled a proposal Tuesday to expand which investment advisers are subject to the Employee Retirement Income Security Act's strict conflict-of-interest standards, five years after the Fifth Circuit killed the agency's prior attempt to define who qualifies as an ERISA fiduciary."
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DID YOU KNOW?

AAA CONDUCTS ELECTIONS. In the spirit of our elections this week, did you know that, in addition to hundreds of thousands of arbitrations, the AAA conducts elections? Says the AAA Website: "Experienced AAA election experts provide impartial, accurate, cost-effective, and timely election administration to public and private organizations, from ballot preparation to tabulation and results certification (which is produced within 24 hours). The AAA oversees approximately 250 elections per year…. Clients include labor unions, guilds, corporations, not-for-profit entities, credit unions, co-operative and condominium associations, universities and educational organizations, and federal, state, and local governments." The Association also has *Election Arbitration Rules*.
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