SECURITIES ARBITRATION ALERT 2024-04 (1/25/24)

George H. Friedman, Editor-in-Chief

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- ***UBS Financial v. Pirnie*, FINRA ID No. 12-02231 (Boston, MA, Nov. 30, 2023)**
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SQUIBS: IN-DEPTH ANALYSIS

SIXTH CIRCUIT: MANIFEST DISREGARD OF THE LAW MIGHT STILL BE A VALID GROUND FOR AWARD VACATUR, BUT NOT IN THIS CASE. ***Once again, a federal court reiterates that manifest disregard of the law is still an arguable basis for vacating an arbitration award but, also once again, fails to find that it justifies vacating the particular Award before it.*** Ever since the U.S. Supreme Court held in *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576 (2008) that section 10 of the Federal Arbitration Act contains the exclusive grounds for vacating an arbitration award, the doctrine that manifest disregard of the law is one of those grounds has been on life support, honored more in the breach than the observance. The latest opinion to treat the

doctrine as at least possibly good law, but to find it inapplicable in the case before it, is *Buck v. Compton*, No. 23-5092/23-5095 (6th Cir. Dec. 20, 2023), which affirms the lower court's refusal to vacate a FINRA Award, *Compton v. Merrill Lynch Pierce Fenner & Smith, Inc.*, FINRA ID No. 20-02468 (Memphis, TN, May 6, 2022 ("the Award").

Arbitration, Award and Confirmation

After Merrill Lynch broker Thomas Joseph Buck was fired and pled guilty to securities fraud, he admitted that customer Janice J. Compton was one of his victims. Compton brought a FINRA arbitration against both Merrill Lynch and Buck, alleging violations of the federal RICO statute and its Indiana state equivalent, among other causes of action. Before the hearing, Compton settled against Merrill Lynch for $5.5 million and received an additional $946,868 from the SEC Victim's Fund. The three-member arbitration Panel held Buck liable to Compton for the following amounts: "1…. [T]he sum of $770,269.00 in compensatory damages.[] 2…. [I]nterest on the well-managed damages amount of $5,812,948.80, which represents 80% of the overall loss value of the accounts requested by Claimant, at the rate of 8% per annum from March 25, 2018, through and including March 25, 2022. The total interest awarded is $1,860,144.00. Please note that the Panel is not awarding the well-managed damages amount of $5,812,948.80. It is only basing its interest calculations on the amount of well-managed damages.[] 3…. [T]he sum of $2,310,806.00 in treble damages pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).[] 4…. [T]he sum of $2,585,232.00 in attorneys' fees pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2).[] 5…. [T]he sum of $2,585,232.00 in attorneys' fees pursuant to 18 U.S.C. 1964(c) - the Racketeer Influenced and Corrupt Organization Act, and the Indiana Corrupt Business Influence Act (Indiana Code Ann. § 35-45-6-2)." The federal district court, in *Buck v. Compton*, No. 2:22-mc-00017-JTF-tmp (W.D. Tenn. Jan. 3, 2023), denied Buck's motion to vacate and granted Compton's petition to confirm the Award, but did not address Compton's requests for pre- and post-judgment interest. Both parties appealed, Buck the denial of his motion to vacate and Compton the denial of her requests for interest. Compton also moved for sanctions in the Court of Appeals.

What is Manifest Disregard?

While recognizing that it recently stated in dicta that manifest disregard of the law "is 'part and parcel of' § 10(a)(4)," the Court nevertheless declares: "Even assuming the standard survives *Hall Street*, Buck's claims of legal error do not amount to manifest disregard of the law." It explains: "To prove that arbitrators manifestly disregarded the law, the party moving for vacatur must prove two elements: '(1) the applicable legal principle is clearly defined and not subject to reasonable debate; and (2) the arbitrators refused to heed that legal principle.'[] The first element requires that the relevant law be 'clearly defined and not subject to reasonable debate.'… Consequently, the challenging party cannot meet this element by citing to only non-controlling authorities….[] The second element asks whether the arbitrators 'refused to heed' the clearly defined legal principle or 'consciously chose[] not to apply it.'… There must be evidence that, during

the arbitration proceedings, 'one of the parties clearly stated the law and the arbitrators expressly chose not to follow it.'…[] Because this element requires proof of conscious refusal to follow the law, evidence of the arbitrators' reasoning is key. After all, '[a]rbitrators are not required to explain their decisions. If they choose not to do so, it is all but impossible to determine whether they acted with manifest disregard for the law.'"

No Manifest Disregard Here

With those principles in mind, the Court turns to Buck's five claims: (1) Compton was not entitled to damages against Buck under the federal Racketeering and Corrupt Organizations (RICO) statute because he was never criminally convicted of fraud against her; (2) the Panel ignored the two-year statute of limitations for awarding damages under the Indiana Corrupt Business Influences Act (ICBIA); (3) the arbitration was ineligible under FINRA Rule 12206(a), which declares that arbitrations must be brought within six years after the "occurrence or event giving rise to the [claim];" (4) the Panel awarded quadruple damages rather than the treble damages permitted by the RICO and ICBIA statutes by awarding treble damages in addition to compensatory damages; and (5) the Panel awarded the interest on well-managed damages but not the damages themselves, although it may not legally award interest without a corresponding monetary judgment. The first three claims fail, the Court holds, because the relevant law is not clearly defined or undebatable enough. For instance, Rule 12206(a) might be tolled by ongoing fraud or Compton's inability to discovery the fraud. The fourth contention fails because Buck "forfeited this argument by failing to include it in his motion to vacate" and the Court finds an absence of factors justifying consideration of the claim in spite of the forfeiture. Finally, the fifth claim fails not only because of the lack of definite law, but because the Panel's failure to explain its reasoning prevents the Court from finding that the Panel didn't have another, valid basis for the interest award. The Court therefore affirms the denial of the vacatur motion and the confirmation of the Award.

Sanctions and Additional Interest?

Despite rejecting every one of Buck's manifest disregard claims, the Court denies Compton's motion for sanctions because, it finds: "Buck's appeal presented several unresolved questions" and is therefore not frivolous. However, it remands to the district court: "'with instructions to support an award or denial of prejudgment interest with findings of fact incorporating its reasons for its decision'…[] As for post-judgment interest, federal law controls, and post-judgment interest is mandatory under 28 U.S.C. § 1961(a). We similarly can remand for entry of an award of post-judgment interest."
*(ed: *An Alert h/t to SAA Editorial Advisor Board David E. Robbins, Esq. of Kaufmann Gildin & Robbins LLP in New York for alerting us to this decision. **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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END OF THE ROAD FOR CALIFORNIA'S AB-51. REALLY THIS TIME. ***The parties have stipulated that California's AB-51 will not be enforced, thus officially ending this saga***. We reported in SAA 2023-08 (Feb. 23) that a divided Ninth Circuit Panel held in *Chamber of Commerce of the United States v. Bonta*, 62 F.4th 473 (9th Cir. Feb. 15, 2023), that California's AB-51 was preempted by the Federal Arbitration Act. Enacted in 2019, AB-51 was a law that among other things restricted predispute arbitration clauses in employment relationships. Said the majority: "We therefore conclude that the approach adopted by the Supreme Court in *Casarotto* and *Kindred Nursing* for determining whether the FAA preempts a state rule limiting the ability of parties to form arbitration agreements applies to state rules that prevent parties from entering into arbitration agreements in the first place…. We agree with our sister circuits that the FAA preempts a state rule that discriminates against arbitration by discouraging or prohibiting the formation of an arbitration agreement." In sum: "AB 51's deterrence of an employer's willingness to enter into an arbitration agreement is antithetical to the FAA's 'liberal federal policy favoring arbitration agreements.'… Because the FAA's purpose is to further Congress's policy of encouraging arbitration, and AB 51 stands as an obstacle to that purpose, AB 51 is therefore preempted."

AB-51 in a Nutshell

The law provided: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, require any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act [FEHA] (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation…. An employer shall not threaten, retaliate or discriminate against, or terminate any applicant for employment or any employee because of the refusal to consent to the waiver of any right, forum, or procedure…." There were also criminal penalties for violations: "It is an unlawful employment practice for an employer to violate [the law]…. Any person violating this article is guilty of a misdemeanor."

The Real End

The case was remanded to the Eastern District of California, which on **January 1** issued a stipulated permanent injunction in No. 2:19-cv-02456-KJM-DB, enjoining California from enforcing the law. The Order also awards $822,496 to the Plaintiffs for attorneys' fees and expenses. The injunction reads that the State is enjoined: "from enforcing sections 432.6(a), (b), and (c) of the California Labor Code where the alleged 'waiver of any right, forum, or procedure' is the entry into an arbitration agreement that is covered by the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ('FAA'); and … from enforcing section 12953 of the California Government Code where the alleged violation of 'Section 432.6 of the Labor Code' is the entry into an arbitration agreement that is covered by the FAA." *(ed: *We are confident this one is truly over. **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

FINRA LAUNCHES PLACEMENT PROGRAM FOR RECENT LAW GRADS. The FINRA Enforcement Department recently announced the launch of its Honors Program: "a two-year rotational program open to recent law school graduates and attorneys concluding clerkships. These full-time positions, made available in any FINRA location, offer the opportunity to do sophisticated legal work to protect investors and the financial markets." Honors Associates will (*ed: reformatted but otherwise repeated* verbatim):

- develop specialized knowledge of the financial industry and securities laws;
- gain substantive legal experience in investigating, litigating, writing, and other legal skills;
- work closely with attorney and investigator colleagues;
- rotate through Enforcement's various groups (for example, Enforcement Legal, Investigations and the Office of Counsel to the Head of Enforcement);
- participate in a robust legal, financial, regulatory and leadership training, and a mentorship program; and
- grow a professional network through meaningful opportunities to work and learn with colleagues across the organization.

FINRA adds that this program is: "an excellent opportunity for recent graduates to (*ed: reformatted but otherwise repeated* verbatim):

- put their education to practical use;
- gain a better understanding of the practice of law;
- develop their skills and knowledge; and
- perform meaningful work that will have a positive impact on investors and the financial markets.

FINRA adds that the Authority: "values diversity and inclusion, is an equal opportunity and affirmative action employer and encourages students with diverse backgrounds to apply. Participants who successfully complete the two-year program may be eligible to transition into other positions with FINRA where they will have continued opportunities to learn, grow and develop their career."
(ed: FINRA is currently accepting online applications.)
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FINRA ANNUAL CONFERENCE SET FOR MAY IN WASHINGTON. FINRA's *Annual Conference* will take place **May 14 – 16** virtually and in person in Washington, D.C. Says the Website: "FINRA's premier event—the Annual Conference provides the opportunity for practitioners, peers and regulators to exchange ideas on today's most timely compliance and regulatory topics. The conference offers a broad range of topics including regulatory compliance, risk management, crypto asset developments, trends and threats in financial crimes and the evolution of branch office inspections, among others." The agenda is not yet published.

*(ed: *In-person registration ranges from $495 for small firm members to $1,995 for non-members, with group discounts available. Virtual fees range from $275 for government agency registrants to $500 for non-members. In-person conference fees: "include attendance to all sessions and conference materials, scheduled breakfast, lunches and receptions.")*
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REMINDER: NY CITY BAR ANNUAL SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 7. The Association of the Bar of the City of New York will be holding its annual *Securities Litigation & Enforcement Institute 2024* on **February 7** from 9 am to 5 pm, in person. The program description states: "This full-day program will provide a comprehensive overview of recent trends, developments and cutting-edge issues in securities litigation, regulation and enforcement. The panels will include prominent securities litigators, senior in-house counsel at major financial institutions, representatives of the SEC and corporations, and nationally recognized trial lawyers…. This year our keynote speaker will be **Lori W. Will**, Vice Chancellor of the Delaware Court of Chancery, who has already written groundbreaking opinions such as that in the *MultiPlan* case, which applied an entire fairness standard." The program boasts an impressive agenda and faculty, and offers CLE credit from California, New Jersey, New York, and Pennsylvania.
*(ed: *The program will be held at the Association, 42 West 44th Street in Manhattan. **Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Tournai v. CSAA Insurance Exchange*, No. A167666 (Calif. Ct. App. 2 Jan. 11, 2024)**: "After plaintiff Kathryn Tornai filed a lawsuit against her insurance company for breach of contract and bad faith, defendant insurance company filed a motion to compel arbitration of her underinsured motorist claim. The motion was made pursuant to a provision in plaintiff's automobile policy, which, as mandated by Insurance Code section 11580.2, subdivision (f), requires the parties to arbitrate any dispute over entitlement to recover damages caused by an uninsured or underinsured motorist or the amount of damages. The trial court denied the motion, and defendant appeals. We conclude that the denial was error, and we reverse" (footnotes omitted).

***Paul v. Rockpoint Group, LLC*, No. 2018-0907-JTL (Del. Ch. Ct. Jan. 9, 2024)**: "Finally, the appraiser cannot consider the extrinsic evidence that the management company has attempted to submit. The appraiser's job is to value the plaintiff's interest using valuation techniques. The management entity must submit a redacted report to the appraiser that eliminates the legal arguments and extrinsic evidence from the submission. The plaintiff will take the first crack at redacting the offending material. If the parties cannot agree on redactions, then the plaintiff will file a motion asking the court to address that issue."

***Logan v. RedMed, LLC*, No. 2022-CA-00669-SCT (Miss. Jan. 14, 2024) (en banc)**: "All parties to all of the above-described civil actions attended a mediation at the Lafayette County Courthouse on July 8, 2021. The issue for us today is what, if anything, resulted from the mediation. RedMed believed there was an enforceable settlement agreement, and Logan believed the mediation created only a framework for further negotiations. On October 1, 2021, the circuit court granted RedMed's Motion to Enforce Settlement. Logan now appeals, claiming the trial court erred by finding a binding settlement agreement. Because the proposed settlement agreement lacks material terms required by Mississippi contract law, and therefore no meeting of the minds occurred, we reverse."

***UBS Financial v. Pirnie*, FINRA ID No. 12-02231 (Boston, MA, Nov. 30, 2023)**: A non-appearing registered rep is held liable for the amounts due and owing pursuant to the seven promissory note agreements he executed as part of his employment with Claimant broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Freedlund v. Northwestern Mutual*, FINRA ID No. 23-00312 (Los Angeles, CA Dec. 4, 2023)**: After denying Respondent broker-dealer's Motion for Directed Verdict, the Panel holds it liable to Claimant for compensatory damages relating to her online account. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Erwin J. Shustak, *Recent Amendments to California Business and Professions Code Section 16600: Sharper Teeth for a Potent Statute and a Serious Trap for Unwary Employers,* Shustak Reynolds & Partners, P.C. News, (Jan. 10, 2024): "On January 1st, California ushered in a new era of employee freedom by enacting two new bills amending California's Business and Professions Code §16600 - SB 699 and AB 1076. Both laws, which took effect January 1, 2024, significantly reformed California's public policy and long standing, anti-noncompete law, considered to be one of the broadest, right to compete statutes in the country. At the heart of this transformation lies the novel California Business and Professions Code Section 16600 ('BPC §16600'), originally adopted in 1872 as Civil Code Section 1673.

"The changes fortify and add serious teeth to California's well-established public policy fostering the right to compete by employees and independent contractors. The legislature imposed an affirmative notice requirement on all companies to notify current, and many former employees/independent contractors that those agreements they signed, which contain prohibited, anti-compete provisions, are void and unenforceable. The new amendments impose financial burdens, including legal fees, civil penalties, and other consequences, on companies that do not follow the new directives, which must be followed, and notices given to current and many former employees/independent contractors by February 14, 2024.

"This article discusses the history of BPC §16600 and the two new legislative enactments that add considerable teeth with the two new sections of the existing law, BPC §§16600.1 and 16600.5. We explore below the intricacies of these new amendments, their key elements, target audiences, and their impact on existing anti-competitive regulations in California. We also provide a "call to action" by companies that require their current or former employees/independent contractors to sign agreements containing offending, anti-compete provisions."

***BDs Still Not Complying with Some Basic Reg BI Requirements*, Financial Advisor IQ (Jan. 10, 2024)**: "Regulation Best Interest has been in effect more than three years, and broker-dealers are still not complying with some of its basic requirements, according to the Financial Industry Regulatory Authority.[] Reg BI requires broker-dealers to file customer-relationship disclosures that are tailored to their companies' business models and client portfolios, but many such companies fail to do so, the self-regulatory organization stated Tuesday in its 2024 Annual Regulatory Oversight Report."

***Mass Arbitration in 7th Circuit: Wallrich v. Samsung,* Arbitration by Stephen Ware Blog (Jan. 10, 2024)**: "The Seventh Circuit will soon hear argument in a mass arbitration case which has attracted amicus briefs from leading organizations on each side of civil justice issues, including the U.S. Chamber of Commerce and the plaintiffs' trial lawyers organization, the American Association for Justice. The case is *Wallrich et al v. Samsung Electronics America, Inc. et al*."

***SEC Charges Morgan Stanley and Former Executive Pawan Passi with Fraud in Block Trading Business*, www.sec.gov (Jan. 12, 2024)**: "The Securities and Exchange Commission today charged investment banking giant Morgan Stanley & Co. LLC and the former head of its equity syndicate desk, Pawan Passi, with a multi-year fraud involving the disclosure of confidential information about the sale of large quantities of stock known as "block trades." The SEC also charged Morgan Stanley with failing to enforce its policies concerning the misuse of material non-public information related to block trades."

***Why New DOL Fiduciary Rule Is Not a "Rehash" of 2016*, ThinkAdvisor (Jan. 12, 2024)**: "As the architect of the Labor Department's 2016 fiduciary rule, Phyllis Borzi is no stranger to controversy.[] Borzi, the former head of Labor's Employee Benefits Security Administration under President Barack Obama, faced a barrage of criticism as she crafted the department's 2016 rule, which was eventually struck down by the U.S. Court of Appeals for the 5th Circuit — a case that many independent legal experts, and Borzi, believe was wrongly decided.[] In an interview, Borzi explained to me why she believes the current Labor officials' job in writing the 2023 fiduciary rule 'was both easier and harder' than she and others at Labor faced in crafting the 2016 rule."

***J.P. Morgan to Pay $18 Million for Violating Whistleblower Protection Rule*,www.sec.gov (Jan. 16, 2024)**: "The Securities and Exchange Commission today announced settled charges against J.P. Morgan Securities LLC (JPMS) for impeding

hundreds of advisory clients and brokerage customers from reporting potential securities law violations to the SEC. JPMS agreed to pay an $18 million civil penalty to settle the charges.[] According to the SEC's order, from March 2020 through July 2023, JPMS regularly asked retail clients to sign confidential release agreements if they had been issued a credit or settlement from the firm of more than $1,000. The agreements required the clients to keep confidential the settlement, all underlying facts relating to the settlement, and all information relating to the account at issue. In addition, even though the agreements permitted clients to respond to SEC inquiries, they did not permit clients to voluntarily contact the SEC."

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DID YOU KNOW?

AAA POSTS NEW MISSION, VISION AND VALUES. The AAA recently posted on its landing page *New Mission, Vision and Values* (*ed: reformatted but otherwise repeated* verbatim): "**Our Mission**: To lead the world in providing innovative measures to prevent, mitigate, and resolve disputes fairly and efficiently. **Our Vision**: Advancing a future where fair, efficient, respectful, and collaborative conflict resolution is accessible to all. **Our Values**:

- We lead with integrity.
- We know the process matters.
- We provide exceptional service.
- We educate and solve problems.
- We innovate and improve continuously.
- We collaborate and embrace differences.

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Send any messages or inquiries to: George@SecArbAlert.com

Editor's Note & Disclaimer: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

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