SECURITIES ARBITRATION ALERT 2021-10 (3/18/21)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Over 6 Million Cases have Been Filed at AAA Since Its Founding**

SQUIBS: IN-DEPTH ANALYSIS

FAIR ACT PUBLISHED. IT'S PRETTY MUCH THE SAME AS THE LAST ITERATION. *The recently-introduced* Forced Arbitration Injustice Repeal (FAIR) Act *has been published and, as we suspected, it's very similar to the version passed by the House in the last Congress.* We reported in SAA 2021-06 (Feb. 18) that, as we had confidently predicted, the Democrats had reintroduced several bills to curb use of mandatory predispute arbitration agreements ("PDAA"). Among them was H.R. 963 – the *Forced Arbitration Injustice Repeal (FAIR) Act,* introduced **February 11** by Rep. **Henry "Hank" Johnson Jr.** of Georgia. We noted that bill texts for the most part had not yet been published, and promised more expansive coverage after that had occurred.

The *FAIR Act* was published recently, so we offer this analysis. The headline? If enacted it would ban mandatory arbitration for almost every conceivable transaction that's not a business-to-business or union-management matter.

A Refresher

This bill would amend the Federal Arbitration Act ("FAA") to eliminate mandatory PDAAs for disputes involving consumer, investor, employment (including independent contractors), and antitrust matters. It would cover brokers and investment advisers; bar class action/collective action waivers in or out of a PDAA; apply to "digital technology" disputes; reserve for court determination any arbitrability or delegation issues "irrespective of whether the agreement purported to delegate such determinations to an arbitrator;" and extend to a broad range of civil rights matters, including sexual harassment claims.

Specifics

We perused the bill's text and offer below excerpts of interest to our readers:

No PDAAs in Several Areas: "The purposes of this Act are to … prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes."

No Class Action Waivers: "[P]rohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute."

Broad Definition of Civil Rights Disputes: "[T]he term 'civil rights dispute' means a dispute … (A) arising from an alleged violation of (i) the Constitution of the United States or the constitution of a State; ii) any Federal, State, or local law that prohibits discrimination on the basis of race, sex, age, gender identity, sexual orientation, disability, religion, national origin, or any legally protected status in education, employment, credit, housing, public accommodations and facilities, voting, veterans or servicemembers, health care, or a program funded or conducted by the Federal Government or State government, including any law referred to or described in section 62(e) of the Internal Revenue Code of 1986, including parts of such law not explicitly referenced in such section but that relate to protecting individuals on any such basis; and (B) in which at least one party alleging a violation described in subparagraph (A) is one or more individuals (or their authorized representative), including one or more individuals seeking certification as a class under rule 23 of the Federal Rules of Civil Procedure or a comparable rule or provision of State law."

Broad Definition of Consumer Dispute: "[A] dispute between … (A) One or more individuals who seek or acquire real or personal property, services (including services related to digital technology), *securities or other investments*, money, or credit for personal, family, or household purposes including an individual or individuals who seek certification as a class under … the Federal Rules of Civil Procedure or a comparable rule

or provision of State law; and (B)(i) the seller or provider of such property, services, *securities or other investments*, money, or credit; or (ii) a third party involved in the selling, providing of, payment for, receipt or use of information about, or other relationship to any such property, services, securities or other investments, money, or credit" (emphasis added).

Broad Definition of Employment Dispute: "[A] dispute between one or more individuals (or their authorized representative) and a person arising out of or related to the work relationship or prospective work relationship between them, including a dispute regarding the terms of or payment for, advertising of, recruiting for, referring of, arranging for, or discipline or discharge in connection with, such work, regardless of whether the individual is or would be classified as an employee or an independent contractor with respect to such work, and including a dispute arising under any law referred to or described in section 62(e) of the Internal Revenue Code of 1986 … that relate to protecting individuals on any such basis, and including a dispute in which an individual or individuals seek certification as a class under … the Federal Rules of Civil Procedure or as a collective action under section 16(b) of the Fair Labor Standards Act, or a comparable rule or provision of State law." This is so: "regardless of whether such individuals are designated as employees or independent contractors for other purposes."

Courts Decide Arbitrability or Delegation: "The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator."

Labor Relations Carveout: "Nothing in this chapter shall apply to any arbitration provision in a contract between an employer and a labor organization or between labor organizations …" However, workers are permitted to seek: "judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom."

Existing Disputes Carveout: "Nothing in this Act, or the amendments made by this Act, shall be construed to prohibit the use of arbitration on a voluntary basis after the dispute arises."

Changes Would Apply to Existing PDAAs: "This Act, and the amendments made by this Act, shall take effect on the date of enactment of this Act and shall apply with respect to any dispute or claim that arises or accrues on or after such date."

Prospects in the House

The prospects for House passage seem very good in our view. First, the prior iteration of the Act passed the House in the last Congress. Although the Democrats' majority is

slimmer, we think there are enough votes for House passage this time around. Also, as we reported in SAA 2021-09 (Mar. 11), the *Protecting the Right to Organize (PRO) Act* – H.R. 842 – passed in the House of Representatives on **March 9** by a 225-206 mostly party-line vote that included five Republicans. This omnibus bill has a small provision (see pages 11-13 of the text) aimed at legislatively overruling *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), where SCOTUS held that the FAA permits employers to use arbitration clauses containing class action waivers, notwithstanding the *National Labor Relations Act*'s (*NLRA*) protections of workers' rights to act collectively. Specifically, the *PRO Act* would amend the *NLRA* to make it an unfair labor practice for *any* employer (not just those dealing with potential unionization) to use class action waivers, "notwithstanding" the Federal Arbitration Act. On the other hand, the current *FAIR Act* bill has only 165 co-sponsors, none of them Republicans, with 218 needed to pass.

Senate Prospects

While the Senate outcome is less certain, we think passage – with GOP support – is entirely possible, albeit with some changes. Why do we say this? Recall that we reported in SAA 2019-13 (Apr. 3) that the full Senate Judiciary Committee held an **April 2019** hearing titled "Arbitration in America." Based on the comments and questions from Committee members – including then-Chairman **Lindsey Graham** (R-SC) and former Chairman **Charles Grassley** (R-IA) – it seemed there was at least some Republican support for changes focused on arbitration fairness. For example, Chairman Graham said: "The problems we will hear about today bother me…. What's good for business is not necessarily good for individuals…. It bothers me that when you sign up for a product or service you are giving away your rights. For the rest of this year this Committee will take a long and hard look at how arbitration can be improved. We will try to find some middle ground. We will find a way forward…. There have to be fairness standards."
***We continue to think that retroactive nullification of existing PDAAs invites legal challenges based on the Fifth Amendment's Takings Clause. ***We will certainly keep our eye on this one!)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS CREATES STATS ON RESULTS OF ZOOM HEARINGS IN CUSTOMER CASES. "Sunlight is said to be the best of disinfectants." These words were uttered by Supreme Court Justice **Louis Brandeis** over one hundred years ago in an article titled, *What Publicity Can Do*. The thrust of the Justice's comment was that transparency leads to good behavior. With that theme in mind, we report that FINRA Dispute Resolution Services ("DRS") on **March 16** posted two new stats on its Website that allow users to gauge results in hearings conducted by Zoom: *Awards on the Merits of the Case with One or More Zoom Evidentiary Hearings* and *Awards on the Merits of the Case with In-Person Evidentiary Hearings* are both listed under the category: *"Result of Customer Claimant Arbitration Award Cases (Regular Hearing Only)*." Why the changes? In an exclusive interview with the *Alert*, DRS Executive VP and Director of Arbitration **Richard Berry** said: "We are always trying to add transparency to the

process. These new charts allow our forum's users to do their own comparisons and draw their own conclusions." As of now, in-person hearings are administratively postponed until **June 4**, and the Website states that none of the 69 DRS hearing locations: "demonstrate public health conditions that are consistent with CDC guidance for activities such as in-person hearings." It adds, however: "if all parties and arbitrators agree to proceed in-person based on their own assessment of public health conditions, the case may proceed provided that the in-person hearing participants comply with all applicable state and local orders related to the COVID-19 pandemic."
*(ed: *Kudos to FINRA for this nice effort at transparency! **While it's obviously very early, with very few cases reflected in the new stats, constituents will over time be able to draw their own conclusions from the data. Still, concerns that Zoom hearings offer an inferior form of dispute resolution appear at this stage to be unfounded.)*
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FINRA'S U4 E-SIGNATURE PROPOSAL WOULD ALSO COVER PDAA DISCLOSURE TO APS. FINRA on **February 23** filed with the SEC SR-FINRA-2021-003, *Proposed Rule Change to Permit Firms to File a Form U4 Based on an Electronically Signed Copy of the Form.* The Website description states the proposed rule change's purpose is: "to amend FINRA Rule 1010 (Electronic Filing Requirements for Uniform Forms) to permit firms to file a Form U4 (Uniform Application for Securities Industry Registration or Transfer) based on an electronically signed copy of the form." That the proposed change is driven by the COVID-19 pandemic is articulated throughout the proposal's text: "As noted above, FINRA has been amending its rules on an ongoing basis to permit the use of electronic signatures, and Rule 1010 is the last remaining rule that specifically requires a manual signature. In addition, the COVID-19 pandemic has amplified the need to permit the use of electronic signatures." FINRA also proposes to make a conforming amendment to Rule 2263 (Arbitration Disclosure to Associated Persons Signing or Acknowledging Form U4). This Rule requires a firm to provide APs with a written notice detailing the existence and features of the PDAA in the U4 when the AP is asked to execute a new or amended U4. The conforming change would eliminate the word "manually" from Rule 2263's opening paragraph: "A member shall provide an associated person with the following written statement whenever the associated person is asked, pursuant to FINRA Rule 1010, to [manually] sign an initial or amended Form U4, or otherwise provide written (which may be electronic) acknowledgment of an amendment to the Form U4 …."
*(ed: *Seems sensible to us. **The Commission Noticed the proposal on March 5. Comments will be due 21 days after* Federal Register *Publication.)*
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SENATE BANKING COMMITTEE APPROVES GENSLER AS SEC CHAIR. SEC Chair nominee **Gary Gensler** was approved by the Senate Banking Committee on **March 9.** The vote was 14-10, with all 12 Committee Democrats and two Republicans supporting the nomination. Recall that, as reported in SAA 2021-08 (Mar. 4), Mr. Gensler said at his **March 2** confirmation hearing that he was "open" to reconsidering the industry's use of binding mandatory arbitration for resolving customer disputes.

Although the topic was not addressed in either Chairman **Sherrod Brown's** (D-OH) opening statement or Mr. Gensler's prepared remarks, it came up in an interchange with Sen. **Elizabeth Warren** (D-MA), who asked: "Hypothetically, for example, if Robinhood cheated individual investors, hypothetically, should that company be able to use forced arbitration clauses to avoid getting sued and held accountable?" Mr. Gensler replied: "While arbitration has its place, it's also important that investors – or, in that case, customers – have an avenue to redress their claims in the courts." Dodd-Frank section 921 gives the SEC authority to limit or eliminate predispute arbitration agreements or set conditions for their use, but it has not done so.
*(ed: *Next stop is the full Senate. **The Warren-Gensler exchange starts around marker 01:44:30 of the archived confirmation hearing video. ***CFPB Director nominee Rohit Chopra didn't have such smooth sailing; the Banking Committee deadlocked 12-12, which means the nomination is advanced to the senate without Committee approval.)*
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$19 MILLION AWARD CHALLENGED IN PART BASED ON ALLEGEDLY SLEEPING, INATTENTIVE ARBITRATORS AT A ZOOM HEARING. We reported in SAA 2021-08 (Mar. 4) on *Schottenstein v. JP Morgan Securities, LLC*, FINRA ID No. 19-02053 (Boca Raton, FL Feb. 5, 2021), where the Respondent broker-dealer and two brokers are found liable on the claims of constructive fraud, misrepresentation, and elder abuse in violation of Chapter 415, Fla. Statutes. The trades were executed by her grandsons. Respondents were held liable to Claimants for compensatory damages and costs totaling nearly $19 million. The Claimants are also awarded rescission of their investment by the All-Public Panel. JP Morgan has already filed a cross-Motion to vacate, in *Schottenstein v. JP Morgan Securities, LLC*, No. 1:21-cv-20521-BB (S.D. Fla Mar. 8, 2021). Several bases are asserted in support of the challenge, two of which got our attention: "[I]n response to the Coronavirus Pandemic, the Panel, over Respondents' objections, ordered that the hearings be held by Zoom, rather than in person. No FINRA rule, however, authorizes a panel to make such an order, and doing so contravenes the scope of the parties' agreement to arbitrate. In addition, current Eleventh Circuit law that makes trial subpoenas in virtual arbitration hearings practically unenforceable, which deprived Respondents of key documents and witnesses at the hearing…. Finally, rather than giving these proceedings the attention they deserved, the panel instead texted, slept, and repeatedly wandered off camera. Thus, 'the arbitrators were guilty of . . . misbehavior by which the rights of [Respondents] have been prejudiced[.]' 9 U.S.C. § 10(a)(3)."
*(ed: *We'll certainly track this one. **On the first charge, recall that the* Alert*'s Editor-in-Chief George H. Friedman authored a Letter **from** the Editor:* Change the Code to Support Virtual Hearings *in the May 8, 2020 SAA Blog.*
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CLASSIC "CATCH-22": MEDIATOR'S POST-MEDIATION COMMUNICATIONS CONFIRMING SETTLEMENT NOT ADMISSIBLE IN LATER ACTION. Pretty much all training materials urge mediators to get at least a signed or clicked confirmation of basic settlement terms before the parties leave the room

– virtual or physical. The wisdom of this advice was demonstrated late last year in *Tuscany Custom Homes, LLC v. Westover*, 2020 COA 178 (Colo. App. Dec. 31, 2020). What happened? Simplifying the facts: 1) the parties appeared to have settled their pre-COVID, in-person mediation; 2) the settlement was not memorialized at the mediation because the Mediator had problems with his laptop; 3) immediately after he returned to his office the same day the Mediator sent the parties a detailed email confirming the terms of settlement, and asked counsel to review same; 4) after about a week of emails back and forth, the Mediator drafted and sent to the parties a formal settlement and asked that it be signed; 5) one side signed; the other declined; and 6) a breach of contract lawsuit followed. Could the Mediator's post-mediation communications confirming the settlement be admitted as evidence in the suit brought to enforce the alleged settlement? While the Trial Court admitted these communications, a unanimous Colorado Court of Appeals says: "No, because both the email and the draft settlement agreement constitute a confidential 'mediation communication' under Colorado law." Says the Court: "This appeal concerns the scope and application of the statutory protection for mediation communications, which renders a mediation communication generally inadmissible in a judicial proceeding. *See* § 13-22-307(2)-(3), C.R.S. 2020. Distinguishing *Yaekle v. Andrews*, 195 P.3d 1101 (Colo. 2008), in part, we conclude that this protection applies to a mediation communication as well as to evidence that discloses information concerning a mediation communication -- such as an unsigned, post-mediation writing offered to prove the existence and terms of an oral agreement reached during a mediation proceeding. Because such an unsigned writing is inadmissible, a party cannot prove the existence or terms of an agreement reached at mediation unless it is reduced to writing and fully executed or the party can present other, admissible evidence of the agreement." *(ed: *Underscores the wisdom, indeed! **Our guess is that FINRA would have used Rule 9554(a) to go after an industry party that engaged in in this behavior.)*
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REMINDER: NYSBA'S *ARBITRATION & MEDIATION 2021* PROGRAM IS MARCH 24. As reported in SAA 2021-05 (Feb. 11), the New York State Bar Association's Commercial and Federal Litigation and Dispute Resolution Sections will be conducting *Arbitration and Mediation 2021: Best Practices Working Through and Beyond COVID* on **March 24**. The day-long virtual event will focus on the major ADR providers' views on dispute resolution in the post-COVID era. The impressive faculty features speakers from major ADR organizations, such as: AAA; CPR; FINRA Dispute Resolution Services (**Jisook Lee** and **Chrystal Loyer**); and JAMS. CLE credit of 7.0 hours is available.
(ed: Registration is done online via the Webpage: $150 for Section members; $175 for NYSBA members; $275 for non-members. Renewing members or those joining get member pricing.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Aleksanian v. Uber Technologies, Inc.*, No. 1:19-cv-103 (S.D.N.Y. Mar. 9, 2021)**: New York City-area Uber drivers who routinely crossed state lines are not exempted by FAA

section 1: "Plaintiffs' alleged 'role in connecting passengers to international and interstate transportation hubs … does not support a finding that Uber drivers as a class engaged in interstate commerce. 'It would be one thing if [Uber's] focus were the service of transporting people to and from airports .... But [Uber] is, in essence, a technologically advanced taxicab company, allowing people to "hail" rides from its drivers from pretty much anywhere to pretty much anywhere'" (citing *Rogers v. Lyft, Inc.*, 452 F. Supp. 3d 904, 915 (N.D. Cal. 2020)). (*An SAA h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*) ***Aleksanian v. Uber Technologies, Inc Aleksanian v. Uber Technologies, Inc.***

***In re Copart, Inc.*, No. 19-1078 (Tex. Mar. 12, 2021) (*per curiam*)**: The Trial Court erred when it ordered discovery over the existence of an arbitration agreement: "Conclusory assertions regarding an arbitration agreement's validity and factual assertions that have no bearing on the arbitrability of the plaintiff's claims do not justify pre-arbitration discovery because such assertions provide no reasonable basis to conclude that discovery would aid the trial court in its determination. Here … Copart filed a motion to compel arbitration and attached a signed, authenticated arbitration agreement."

***Estate of Kalil v. Wells Fargo*, FINRA ID No. 20-01698 (Tucson, AZ, Feb. 19, 2021)**: - One Arbitrator provides a lengthy dissent explaining why he disagrees with his fellow Panelists regarding the denial of the customer's claim and the awarding of expungement for a Non-Party broker. (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com.*)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Chua, Eunice, *The Singapore Convention on Mediation and the New York Convention on Arbitration – Comparing Enforcement Mechanisms and Drawing Lessons for Asia* (March 11, 2021): **16(2) Asian International Arbitration Journal 113 (Mar. 11, 2021)**: "This article considers the enforcement mechanism for international mediated settlement agreements proposed by the Singapore Convention on Mediation and critically examines this mode of enforcement as against enforcement as an arbitral award in Asia, including through a hybrid process like Arb-Med-Arb. Similarities and differences between the New York Convention and the Singapore Convention on Mediation will be discussed and used to consider how Asian jurisdictions may respond to the Singapore Convention on Mediation and what lessons may be learnt from the arbitration context."

***Keep an Eye on These Bills If You Use or Are Considering Using a Mandatory Arbitration Provision*, Breazeale Sachse & Wilson LLP Blog (Mar. 4, 2021)**: "As you know, several pieces of federal legislation aimed at limiting or eliminating altogether mandatory arbitration in the employment setting have been proposed, and failed in the past several years. In fact, several states: California, New Jersey and New York, have all passed state laws prohibiting mandatory arbitration of employment disputes. The Biden administration is going to make another run at passing this legislation at the federal level,

and employers should stay abreast of the progress of these Bills. Two of the more comprehensive and high-profile Bills filed to date are the *FAIR Act* and the *PRO Act*."

***Ex-J.P. Morgan Brokers Seek to Vacate $19-Mln Award, Cite Napping Arbitrators on Zoom*, AdvisorHub (Mar. 9, 2021)**: "In a claim zeroing in on the fairness of virtual hearings, a pair of former J.P. Morgan Securities brokers have asked a court to nullify a high profile $19 million award issued last month by a Financial Industry Regulatory Authority arbitration panel. Brothers Evan A. Schottenstein and Avi E. Schottenstein filed a motion to vacate in U.S. District Court in the Southern District of Florida on Monday alleging that the arbitration process "broke down" over the 43 hearing sessions as the arbitrators dozed off, failed to address a potential conflict and declined to admit an allegedly key piece of video evidence." (*ed: see our coverage elsewhere in this* Alert.)

***Insisting on Live, In-person Arbitration Hearings During The Pandemic*, National Law Review (Mar. 9, 2021)**: "Throughout the coronavirus pandemic, parties to an arbitration agreement and arbitrators have grappled with the issue of the right to a live, in-person arbitration hearing. Is there a due process concern that flows from conducting remote proceedings over one side's insistence on in-person hearing? For example, parties' facility with presenting testimony and evidence remotely may be limited, arbitrators' technical proficiency may be lacking, and they may be uncomfortable with taking evidence remotely."

***FINRA Tackles the Problem of Repeat Offenders*, Investment Executive (Mar. 12, 2021)**: "Brokers with a history of misconduct and the firms that employ them are facing new measures from the U.S. Financial Industry Regulatory Authority (FINRA). FINRA has adopted a series of new rules designed to tackle the problem of serial offenders in the U.S. brokerage business and bolster investor protection. Among other things, the new rules allow the self-regulatory organization to impose restrictions on the activities of a firm or rep, as well as require heightened supervisory procedures for recidivist reps, when disciplinary proceedings are being appealed."
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DID YOU KNOW?

OVER 6 MILLION CASES HAVE BEEN FILED AT AAA SINCE ITS FOUNDING. The banner on the AAA's Website landing page states that 6,523,698 Cases have been filed with the Association since its founding in 1926. The AAA also reports that 77,537 cases have been resolved this year through **March 8**.
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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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