SECURITIES ARBITRATION ALERT 2021-16 (4/29/21)

George H. Friedman, Editor-in-Chief

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- ***J.P. Morgan Quickly Secures TRO Against Five Bank Brokers Who Joined LPL*, AdvisorHub (Apr. 23, 2021)**

DID YOU KNOW?

- **AAA Releases Discovery in Arbitration Guide**

A NEW FEATURE ARTICLE AND ICYMI. *We're delighted to publish a new feature article,* Supreme Court Declines to Engage in the Interpretation of "Engaged in Commerce," *covering the Circuit Court split over whether the Federal Arbitration Act's section 1 exemption requires that workers be engaged in moving goods or people in interstate commerce or whether being part of the flow or stream of commerce is sufficient. With a* Certiorari *Petition pending, author Ruben Huertero urges SCOTUS not*

to miss the opportunity to resolve the split. Also, in case you missed it, we published SAA 2021-15 as a special issue dedicated to the where the major ADR institutions stand today on pandemic-related impacts and their plans going forward. The headline? Things sure have changed, and some new things will be carried forward. We've turned this special Alert *into a blog post,* COVID-19's Continued Impact on ADR Providers: The Key Institutions Update Us on Plans for the Future.

FEATURE ARTICLE

SUPREME COURT DECLINES TO ENGAGE IN THE INTERPRETATION OF "ENGAGED IN COMMERCE", *by Ruben Huertero.* It is hornbook law that the Federal Arbitration Act ("FAA") enforces predispute arbitration agreements involving just a hint of interstate commerce. Section 1, however, has a carveout providing: "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." The limited exception contained in section 1 has created a circuit split on the standard to use when determining whether an employee falls under the exemption's residual clause. On February 22, 2021, the Supreme Court for the time being refused to resolve the issue by denying *Certiorari* in *Amazon.com, Inc. v. Rittman,* No. 20-622. The Court's avoidance in resolving the conflicting views will lead to further disparities between the Circuit Courts. Currently, some circuits require that the class of workers actually be involved in the moving of goods or people across national or state borders. Alternatively, other circuits focus on the employer's business and do not require that the worker actually cross borders. Instead, these circuits focus on whether the worker is within the flow or stream of commerce. This feature article examines the current state of the law and concludes by urging the Court to resolve the split. *Read more…*
(ed: Ruben Huertero is a 3L at St. John's University School of Law. He is the Executive Research Editor of the New York International Law Review *and Associate Managing Editor of the* Commercial Division Online Law Report *at St. John's. He is a member of the New York State Bar Association Dispute Resolution Section Securities Dispute Committee and the Hispanic National Bar Association. The author thanks and acknowledges Professor Christine Lazaro, Director of the Securities Arbitration Clinic and Professor of Clinical Legal Education at St. John's School of Law, for her assistance in the preparation of this article.)*
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SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTS STATS THROUGH MARCH: CUSTOMER CLAIMS COME ROARING BACK WHILE INDUSTRY CLAIMS PLUMMET. ***FINRA Dispute Resolution Services ("DRS") posted case statistics through March with the overall case filing decline unchanged from February, but with a major shift in the underlying details.*** In brief, the headlines are: 1) overall arbitration filings through the first quarter – 774 cases – are down 18%, the same as in February; 2) customer claims are now *up* 6%; 3) industry disputes are almost halved, down 45%; and 4) for the seventh month in a row, pending cases declined and the backlog is almost gone. Overall arbitration turnaround times were 13.5 months, with hearing cases now taking 17.0 months.

Virtual Arbitration, Mediation and Miscellany

There were just 105 mediation cases in agreement, a 29% decrease. The settlement rate remains high at 80% (it had been 81% in February). There are now 8,283 DRS arbitrators, 3,915 public and 4,368 non-public. Perhaps of greater interest in the current climate, FINRA's "Virtual Arbitration Hearings" category shows that, since FINRA started cancelling in-person hearings a year ago, 263 cases were conducted with one or more hearings via Zoom (104 customer and 159 industry cases). There were 255 joint motions for virtual hearings (89 customer and 166 industry cases). As reported in SAA 2021-10 (Mar. 18), DRS in March 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*.

Pending Cases Backlog is Almost Gone

We had reported earlier that pending cases were growing in the wake of the onset of the pandemic and in-person hearing cancellations. We've also reported more recently that parties and counsel appear to have grown more familiar with virtual hearings and that, as a result, the pending cases backlog has been shrinking. As of March, it's almost gone. As the chart below shows, the last seven months have shown *reductions* in pending cases, reflecting a 546 case decline from last year's cumulative high water mark of 5,415 open cases in August, leaving a cumulative increase (Cum Inc) of only 88 since last March.

Month	Open cases	Change	Cum Inc
Aug 2020	5,415	353	634
Sep 2020	5,392	-23	611
Oct 2020	5,304	-88	523
Nov 2020	5,205	-99	424
Dec 2020	5,138	-67	357
Jan 2021	5,047	-91	266
Feb 2021	4,998	-49	217
Mar 2021	4,869	-129	88

Margin Debt Continues to Grow

We said in SAA 2021-13 (Apr. 15): "We'll be keeping an eye on the 'Margin Calls' Controversy Type on FINRA's monthly report. Through February, there were 20 such cases, up from 7 in 2020." The March stats show there were 34 cases, up from 8 in 2020. The total margin call cases through the quarter are already half the 68 reported for all of 2020. And total customer margin debt now stands at nearly $823 billion, up another $9 billion from February. Lastly, *Reuters* on **April 26** ran a story, *Goldman Sachs Watching Total Margin Loans After Archegos Fund Blowup – Executive*, reporting that the bank's

President and Chief Operating Officer **John Waldron** had said the firm was: "monitoring the total amount of loans borrowed on margin after the collapse of investment fund Archegos Capital Management last month …."
*(ed: *The bump in customer claims is certainly worth watching, although we caution that one month does not constitute a trend. **The cratering of industry filings is a sharp contrast to 2020, when they were up a robust 31%. ***Our theory remains that, with the resumption of in-person hearings still remaining an elusive goal, more parties are coming to embrace the virtues of virtual hearings. ****The National Futures Association posted its 1Q stats, which show only 5 cases (4 customer), compared to 49 for all of 2020. *****Our friend Rick Ryder will analyze the AAA's quarterly stats after they are released.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

PIABA TO FINRA: RESUME IN-PERSON HEARINGS. Just as we were finalizing this week's issue came word that PIABA had sent to FINRA an **April 26** letter urging the authority to resume in-person hearings. The letter, which was announced in a Press Release, also covered other issues related to the current suspension of in-person hearings. We will elaborate on our reporting in this week's "Extra."
(ed: The letter also notes that some courts and ADR providers have resumed in-person hearings at least partially.)
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FINRA ISSUES REG NOTICE ON "DO'S AND DON'TS" ON PDAA USE IN CUSTOMER AGREEMENTS. FINRA has issued a Regulatory Notice reminding industry parties of the proper use of predispute arbitration agreements in customer account contracts. Regulatory Notice 21-16, *FINRA Reminds Members About Requirements When Using Predispute Arbitration Agreements for Customer Accounts*, was issued on **April 21**. Why issue the Notice? "FINRA has become aware that customer agreements used by some member firms contain provisions that do not comply with FINRA rules. Member firms with customer agreements that include provisions that do not comply with FINRA rules should take prompt steps to ensure that their customer agreements fully comply with FINRA rules. Failing to comply with FINRA rules related to customer agreements may subject member firms to disciplinary action. This Notice provides examples of provisions in customer agreements that do not comply with FINRA rules …." We will analyze the Reg Notice in the next *Alert*.
(ed: Spoiler alert: The Reg Notice, which is also available in PDF format, contains some pretty strong admonitions.)
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DEMOCRATS INTRODUCE BILL BANNING NURSDING HOME PDAAS.
We've reported many times that House and Senate Democrats have introduced several anti-mandatory predispute arbitration agreement ("PDAA") bills so far this year. The new bills seek to amend the Federal Arbitration Act ("FAA"), specific statutes like Dodd-Frank, or a combination. We just reported in SAA 2021-14 (Apr. 22) that the *Investor*

Choice Act of 2021 was reintroduced **April 15** by Sen. **Jeff Merkley** (D-OR) and by Rep. **Bill Foster** (D-IL). That iteration of the ICA – H.R. 2620 and S. 1171 – is essentially the same as the one introduced in the last Congress in that it would amend the FAA, the *Securities Exchange Act of 1934,* and the *Investment Adviser Act of 1940,* to ban the use of mandatory PDAAs by broker-dealers and investment advisers and guarantee class action participation. We've also predicted that more bills targeting specific federal statutes would be introduced, mostly because an overhaul of the FAA would be difficult and also because SCOTUS has made clear that a federal statute expressly banning PDAAs will trump the FAA. As if to prove the point, Rep. **Linda Sánchez** (D-CA) on **April 22** introduced -- H.R. 2812 -- the *Fairness in Nursing Home Arbitration Act*. The text states that the bill's purpose is to: "amend titles XVIII and XIX of the *Social Security Act* to prohibit skilled nursing facilities and nursing facilities from using pre-dispute arbitration agreements with respect to residents of those facilities under the Medicare and Medicaid programs, and for other purposes." The bill would also have arbitrability issues decided by courts, rather than by arbitrators via delegation. It would be retroactive, "without regard to whether the agreement was made prior to or after the effective date.…" As far as we can tell, there's no Senate analogue at this point.
*(ed: *The bill was announced in a Press Release. **As we've opined several times, we continue to think that retroactive nullification of existing PDAAs invites legal challenges based on the Takings Clause of the Fifth Amendment.)*
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***HENRY SCHEIN II* UPDATE: THE PARTIES SETTLE VIA MEDIATION**. One of the *Alert*'s favorite activities is following up on cases we've covered in the past. In that spirit, we report that the long-running antitrust dispute between Henry Schein, Inc. and Archer and White Sales, Inc. has been settled. Recall that, as we reported in SAA 2021-03 (Jan. 28), the Supreme Court reversed in a summary dismissal its decision to grant *Certiorari* in its second look at *Henry Schein, Inc. v. Archer and White Sales, Inc*., No. 19-963 (*Henry Schein II*), despite having heard oral argument in **December 2020**. Specifically, SCOTUS walked back its decision to hear *Henry Schein II* in a one-line *per curiam* Order issued **January 25**: "The writ of certiorari is dismissed as improvidently granted." As to what it all meant, we said in #03: "We endorse the views expressed in the **January 25** CPR blog: "The immediate effect is that respondent Archer and White Sales sees a big win: It will get the determination of whether its long-running case over a medical equipment contract dispute is to be arbitrated made by a judge, not an arbitrator. A Fifth U.S. Circuit Court of Appeals decision now stands. See *Archer & Archer & White Sales, Inc. v. Henry Schein, Inc*., 935 F.3d 274 (5th Cir. 2019) …." We'll never know where the District Court would have landed in *Archer and White Sales, Inc. v. Henry Schein*, No. 2:12-CV-00572-JRG (E.D. Tex.), because the parties on **April 23** notified the Court that they had settled the matter via mediation: "[The parties] file this joint motion seeking a stay of all current case deadlines to permit the parties to finalize the settlement of this matter and the dismissal of claims." The Court granted the joint motion three days later.
*(ed: *Mediation to the rescue! **So much for speedy conflict resolution: the original antitrust suit was filed in 2012! ***The April 27 CPR Blog has a nice analysis of the*

entire Henry Schein *saga. ****For a copy of the joint motion or the Court's order granting it, email us at Help@SecArbAlert.com.)*
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PARTIES JOCKEY FOR POSITION WHILE SCOTUS PONDERS WHETHER TO GRANT *CERT.* ON WHETHER 28 USC SECTION 1782 PROVIDES FOR DISCOVERY IN AID OF PRIVATE, FOREIGN, COMMERCIAL ARBITRATION. As reported in SAA 2021-11 (Mar. 25), the Supreme Court has agreed to resolve a major split on whether 28 U.S.C. § 1782 provides for discovery in aid of private, foreign, commercial arbitration or only covers cases administered by governmental arbitration forums. Specifically, the Court on **March 22** granted the *Certiorari* Petition in a Seventh Circuit case, *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company,* No. 20-794 (see page 1 of the Order List). We also reported in #11 that the same underlying arbitration case had yielded a different result in *Servotronics, Inc. v. The Boeing Co. and Rolls-Royce PLC*, 954 F.3d 209 (4th Cir. Mar. 30, 2020), where, in a case involving a private commercial arbitration being held in England under Chartered Institute of Arbitrators Rules, the Court *upheld* a District Court decision ordering discovery from three Boeing employees residing in South Carolina. While SCOTUS is deciding whether to resolve the Circuit Court split on this issue (the Fourth and Sixth Circuits have held that 28U.S.C. §1782(a) is applicable to private commercial arbitral tribunals, while the Second, Fifth, Seventh Circuits limit its applicability to governmental arbitration tribunals), the parties continue to fight. What's going on? Servotronics is seeking to enforce discovery orders in the Fourth Circuit, while Rolls-Royce argues that these efforts should be stayed pending a determination from SCOTUS on *Certiorari*. On **April 20,** Rolls-Royce petitioned SCOTUS to stay the District Court's order authorizing discovery subpoenas pending the High Court's ruling: "A stay is necessary to preserve the status quo while this Court considers the underlying legal issue in the parties' dispute over the scope of section 1782(a), and to prevent irreparable harm." As requested by **Chief Justice John G. Roberts**, Servotronics replied to the Petition on **April 23,** prompting a response from Rolls-Royce. The Court on **April 27** summarily denied the motion for a stay.
(ed: The new filing is No. 20A160.)
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DIVIDED SIXTH CIRCUIT: AFTER-ADDED PDAA VIOLATED IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING. Although the deposit agreement permitted the bank to make unilateral changes, adding an arbitration clause was not permissible for two reasons, a divided Sixth Circuit holds in *Sevier County Schools Federal Credit Union v. Branch Banking & Trust Co.,* No. 20-5174 (6th Cir. Mar. 5, 2021): "The first reason … is because BB&T provided the Plaintiffs with no opt-out opportunity. This left the Plaintiffs with no choice other than to acquiesce to the new arbitration provision or to close their high-yield savings accounts. And closing their accounts is a totally unreasonable option because doing so would obviate the very essence of the Plaintiffs' accounts -- the promise of a perpetual 6.5% annual interest rate." The majority also found that: "the purported imposition of the arbitration provision

would violate the common law's implied covenant of good faith and fair dealing." How so? "BB&T did not act reasonably when it added the arbitration provision years after the Plaintiffs' accounts were established … thus violating the implied covenant of good faith and fair dealing in its attempt to use the original change-of-terms provision to force the Plaintiffs to arbitrate." Judge **Griffin** dissents: "Because plaintiffs assented to this arbitration agreement, and because it is neither adhesive nor unconscionable …."
*(ed: *As far as we can recollect, this was the first time we had seen a court invalidate an after-added arbitration clause because the dominant party violated the implied covenant of good faith and fair dealing. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision. ***For a contrary view, see* In re National Football League's Sunday Ticket Antitrust Litigation*, No. L 15-2668 PSG (JEMx) (C.D. Calif. Apr. 20, 2021), where the Court rejected an implied covenant of good faith and fair dealing argument regarding an after-added PDAA: "In sum, because the changes in the 2017 version of Plaintiffs' agreements did not deprive them of their reasonable expectations under the pre-dispute agreements, DirecTV did not violate the implied covenant of good faith and fair dealing.")*
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APPLYING A REASONABLENESS STANDARD, CALIFORNIA COURT FINDS SUFFICIENT DISCLOSURES BY JAMS AND ARBITRATOR. Under California's arbitration statute, an award can be vacated where the arbitrator "failed to disclose . . . a ground for disqualification." (Code Civ. Proc., § 1286.2, subd. (a)(6)(A)). The sufficiency of disclosures by JAMS and its Arbitrator were at issue in *Speier v. The Advantage Fund LLC*, No. G059216 (Calif. Ct. App. 3 Apr. 19. 2021). We'll let the unanimous Court's words speak for themselves: "Appellant contends the arbitrator failed to make required disclosures. Appellant does not contend the arbitrator was actually biased. The sole basis for the appeal is the argument the arbitrator did not disclose information that could cause a reasonable person aware of the facts to entertain a doubt that the arbitrator would be able to be impartial. The arbitration involved claims by a former investment fund manager and his former employers, namely, the investment funds. All parties were sophisticated and engaged in a business -- not consumer -- dispute. Both the fund manager and the investment funds were represented by large law firms -- Alston & Bird for the fund manager and O'Melveny & Myers for the investment funds. Both law firms were frequent users of the services of the ADR provider, JAMS; they each had 245 matters before JAMS in the five-year period preceding this arbitration. We explain in detail in this opinion how the arbitrator and JAMS made extensive prearbitration disclosures. The motion to vacate was based on the sole ground that the arbitrator did not disclose the extent of JAMS's 'business relationship' with O'Melveny & Myers and the arbitrator's ownership interest in JAMS (not more than 0.1 percent of total revenue in a given year). Based on the facts and circumstances shown by this record, and applying the analytical framework we discuss, we hold that the arbitrator's and JAMS's disclosures were sufficient, and the arbitrator was not required to disclose more information about the extent of JAMS's business with O'Melveny & Myers, or the arbitrator's own ownership interest in JAMS. There is no issue of a repeat party or lawyer

being favored over a non-repeat party or lawyer; the parties in this business dispute are sophisticated; and the law firms were both frequent users of JAMS to the same extent." *(ed: *The Court stressed that this was not a consumer case, and also that, even though the law might not require disclosures, expansive disclosure is always a wise choice. **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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QUICK TAKES: CASES AND AWARDS WORTH READING

***Zoller v. GCA Advisors, LLC*, No. 20-15595 (9th Cir. Apr. 14, 2021)**: "The district court here agreed with Zoller that the knowing waiver standard applies and reasoned that the agreement's reference to the FINRA rules indicated the way arbitration would be conducted rather than the matters subject to arbitration…. We reverse the district court's denial of GCA's motion to compel arbitration [at FINRA] of Zoller's statutory employment discrimination and civil rights claims because employment disputes are encompassed by the arbitration provisions, and she knowingly waived her right to a judicial forum. We remand these claims to the district court with the direction that all claims be sent to arbitration and the case be dismissed without prejudice." (*ed: an* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Roark v. Keystate Homes L.L.C.*, 2021-Ohio-707 (Ohio Ct. App. Mar. 11, 2021):** "In this case, there is an agreement in writing for arbitration. Appellants do not dispute that they agreed to the arbitration clause within the contract, and they do not claim that the arbitration clause is procedurally or substantively unconscionable. Rather, they claim that the contract between the parties was canceled. The Supreme Court of Ohio has recognized that an arbitration clause is essentially a 'contract within a contract' that is not affected by an alleged failure of the contract in which it is contained. Therefore, despite any alleged cancellation of the contract in which the arbitration clause was contained, the arbitration clause remained enforceable" (citations omitted).

***Bolet Alvarez v. Santander Securities*, FINRA No. #16-02338 (San Juan, PR, Mar. 26, 2021)**: An All-Public Panel granted with prejudice the broker-dealer's Pre-Hearing Motion to Dismiss pursuant to Rule 12212(c) for failure to comply with the Panel's Orders. The latter pertained to the production of power of attorneys authorizing an Executor to act on behalf of the Claimant in this case, as he is now deceased. (*ed: Provided courtesy of SAC's ARBchek facility, www.arbchek.com*.)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Morrow, Rebecca, *Taxing Employers for Imposing Mandatory Arbitration, Class Action Waiver, and Nondisclosure of Dispute Provisions*, 74 SMU L. Rev. 59 (Apr. 23, 2021): "Employers impose coercive dispute resolution terms on their employees more frequently, more broadly, and with greater legal success than ever before. Recent survey data indicates that mandatory employment arbitration provisions bind more than 60

million American workers—over half of the U.S. private-sector nonunion workforce. Employment class action waivers bind nearly 25 million American workers.... While harming more than 60 million American workers, coercive employment dispute resolution terms do something else -- something that tax law enforcers historically and currently ignore. They enrich the employers who impose them. They give employers a new, valuable intangible asset that the employers did not have before. For the employers who impose them, coercive employment dispute resolution terms are an accession to wealth, clearly realized, and in the employer's control. They are income to the employer, and they should be taxed as such."

***FINRA Arbitration or Class Action Lawsuits? The Path to Take*, MakTech Blog (Apr. 20, 2021):** "As an investor, noticing that your account made losses while at the hands of an advisor or broker might lead you to consider taking legal action. While pursuing the legal proceedings, you'll notice that you have two options: making a class action lawsuit or seeking FINRA securities arbitration."

***Sixth Circuit Refuses To Enforce Unilateral Changes To Arbitration Provision,* Mondaq.com (Apr. 20, 2021)**: "While the United States Supreme Court has made clear that class action waivers in arbitration clauses can be enforced, plaintiffs' counsel continue to find creative ways to challenge these types of arbitration agreements. Last month, in a 2-1 decision, a three-judge panel of the U.S. Court of Appeals for the Sixth Circuit reversed a district court victory for Branch Banking & Trust (the 'Bank') and ruled that the Bank could not compel arbitration of its customers' putative class action because the Bank's unilateral changes to its terms and conditions were insufficient to create an enforceable arbitration agreement." (*ed: see our coverage elsewhere in this* Alert.)

***Client Arbitration Choice Bill Facing Uphill Fight to Passage*, Financial Planning (Apr. 22, 2021)**: "A new bill recently re-introduced in Congress would give wealth management clients the choice of pursuing any claims against firms in court or through arbitration. At least 12 Democratic members of the House and Senate have signed on as co-sponsors of the Investor Choice Act — introduced April 15 by Rep. Bill Foster of Illinois and Sen. Jeff Merkley of Oregon. The legislation would ban provisions of brokerage and RIA customer contracts requiring clients to pursue any damages or other legal claims through arbitration. Lobbyists and trade groups are lining up on either side of the bill…. In the absence of industry advocacy or Republican votes, passage of the bill -- a longtime piece of legislation that's been introduced regularly for roughly the past decade or so -- is 'going to be difficult,' says Christine Lazaro, a PIABA board member and the director of the Securities Arbitration Clinic at the St. John's University School."

***FINRA Warns BDs on Arbitration Agreements*, ThinkAdvisor (Apr. 23, 2021)**: The Financial Industry Regulatory Authority is warning broker-dealers to get their predispute arbitration agreements for customer accounts in order as some firms' customer agreements run afoul of FINRA rules. In just-released *Regulatory Notice 21-16*, FINRA states that it has recently become aware of customer agreements used by broker-dealers

that contain provisions that do not comply with FINRA rules. Problematic provisions included failure to properly highlight the arbitration clause and explain the consequences to customers; attempts to force customers to hold the firm harmless, thus preventing them from bringing claims against the firm; and attempts to restrict customers from claiming certain types of damages." (*ed: see our coverage elsewhere in this* Alert.)

***J.P. Morgan Quickly Secures TRO Against Five Bank Brokers Who Joined LPL*, AdvisorHub (Apr. 23, 2021)**: "J.P. Morgan Securities has obtained a temporary restraining order blocking five former Chase Bank branch advisors in the Chicago suburbs who left earlier this month for LPL Financial from soliciting the bank's customers.... Under the Financial Industry Regulatory Authority's dispute resolution procedures, the TRO entitles JPMorgan to an expedited hearing schedule in a parallel arbitration case seeking damages and a permanent injunction. The brokers have filed a motion to terminate or stay the federal case in favor of arbitration, according to court documents."

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DID YOU KNOW?

AAA RELEASES DISCOVERY IN ARBITRATION GUIDE. FINRA for years has had a *Discovery Guide* that among other things establishes lists of presumptively discoverable materials. But did you know that the American Arbitration Association ("AAA") recently published *Discovery Best Practices for Construction Arbitration: Recommendations for AAA Construction Advocates and Arbitrators*? The seven-page *Best Practices,* which were: "… developed in conjunction with the AAA's National Construction Dispute Resolution Committee ('NCDRC'), advocates, arbitrators and construction industry professionals, are intended to educate advocates and arbitrators to better manage pre-hearing exchanges of information in construction disputes. They are recommended for use in all construction cases administered by the AAA under the *Construction Industry Arbitration Rules* or *Commercial Arbitration Rules* (Rules)." The AAA also adds that: "It is incumbent on the arbitrators and parties to understand that these best practices are not intended to replace the Rules, and to the extent possible, references to the applicable Rules are provided." The *Best Practices* offer sound, succinct practice pointers on: document exchanges; site inspections; e-discovery; depositions; discovery disputes; sanctions; and third-party discovery.

*(ed: *Kudos to the AAA! This is really helpful guidance. **The April 12 Pierce Atwood LLP Blog has a nice analysis,* Highlights from the AAA's New Publication on Discovery Best Practices*.)*

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