SECURITIES ARBITRATION ALERT 2021-31 (8/19/21)

George H. Friedman, Editor-in-Chief

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SQUIBS: IN-DEPTH ANALYSIS

MASSACHUSETTS UBER DRIVERS FACE ROADBLOCK WHILE ATTEMPTING TO AVOID ARBITRATION. ***The Court of Appeals for the Ninth Circuit holds that Uber Technologies Inc. drivers are not engaged in interstate commerce under a nationwide standard and must arbitrate their claims.*** *Capriole. v. Uber Technologies Inc.*, No. 20-16030 (9th Cir. Feb. 2, 2021), involves the issue of whether **Uber Technologies Inc.** ("Uber") drivers are engaged in foreign or interstate

commerce and thus are exempt from mandatory arbitration under the Federal Arbitration Act ("FAA") section 1.

Uber Technologies Inc. and the Arbitration Agreement

John Capriole, Martin El Koussa, and **Vladimir Leonidas** ("Plaintiffs") each signed Uber's 2015 Technology Services Agreement (the "2015 Agreement") when they signed up to become Uber drivers. The 2015 Agreement contained a mandatory predispute arbitration agreement ("PDAA") and specified that the provision was governed by the FAA. Under the arbitration provision, all disputes between Uber and Uber drivers were to be resolved via binding and final arbitration. The 2015 Agreement also contained a class action waiver limiting disputes in arbitration to individuals while preventing a class action. Plaintiffs each signed the 2015 Agreement and did not opt out of the arbitration provision within the permissible 30 days under the agreement.

In January 2020, Uber implemented a new agreement (the "Platform Access Agreement"), which contained a similar arbitration provision. John Capriole was the only Plaintiff who chose to opt out of the Platform Access Agreement; however, the District Court found that he was still bound by the PDAA in the 2015 Agreement. The Ninth Circuit upholds the District Court's decision because "any opt-out would not affect pre-existing agreements to arbitrate, including the 2015 Agreement."

Procedural History

In September 2019, Plaintiffs filed a putative class action in the District Court for the District of Massachusetts and requested a preliminary injunction to prevent Uber from classifying Uber drivers in Massachusetts as independent contractors. The Plaintiffs also sought an order directing "Uber to classify its drivers as employees and comply with Massachusetts wage laws." Plaintiffs claimed that Uber drivers in Massachusetts were employees under the state's "ABC" test. Plaintiffs also claimed that Uber's classification of its drivers as independent contractors violated state wage and hour law. As a result of the COVID-19 pandemic, Plaintiffs added claims for sick leave under Massachusetts Earned Sick Time Law.

Uber moved to "compel arbitration, stay proceedings pending arbitration, and transfer the case to the District Court for the Northern District of California pursuant to a forum selection clause in the Uber driver's agreements." The Massachusetts District Court denied Plaintiffs' request for a preliminary injunction and granted Uber's motion to transfer the action to California district court. Plaintiffs also filed an Emergency Motion for a Preliminary Injunction, which was also transferred to the California district court. The California district court denied Plaintiffs' request for a preliminary injunction and granted Uber's motion to compel arbitration.

The Scope of FAA Section 1

FAA section 1 exempts from the Act "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In determining whether the workers are engaged in interstate commerce, the Ninth Circuit

acknowledges that the inquiry is whether "the class of workers to which the complaining worker belonged engaged in interstate commerce." The court refused to limit its assessment to Uber drivers in Massachusetts. Instead, **Judge Kim McLane Wardlaw** states that the court "must assess the relevant 'class of workers' here, Uber drivers, at the *nationwide level*, rather than confine it to any limited geographic region" (emphasis added). The Ninth Circuit agreed with the District Court in *Osvatics v. Lyft, Inc.*, No. 20-cv-1426 (KBJ), 2021 WL 1601114 (D.D.C. Apr. 22, 2021), and noted that it is unlikely that Congress wanted the section 1 exemption to vary by geographical region. The court also noted that using a narrow geographical approach instead of a nationwide approach would create uncertainty and doubt in employment contracts. Additionally, focusing on a nationwide class of workers conforms with previous cases because courts "have been confronted only with a putative *nationwide* class of workers."

Uber Drivers Are Not Nationally Engaged in Interstate Commerce
The Ninth Circuit rejects Plaintiffs' argument that Uber drivers are workers engaged in interstate commerce. Plaintiffs' argument focused on "the fact that Uber drivers sometimes cross state lines or pick up and drop off passengers at airports." However, the Ninth Circuit notes that in *In re Grice*, 974 F.3d 950 (9th Cir. 2020), it held that rideshare drivers who pick up and drop off passengers at airports are not engaged in interstate commerce. Additionally, the court states that Uber drivers are less like the taxicabs in *United States v. Yellowcab Co.*, 332 U.S. 218 (1947), which provided exclusive transportation between rail stations and more like the local taxicabs. Furthermore, the Ninth Circuit acknowledges that its decision is consistent with the Third Circuit's decision in *Singh v. Uber Technologies Inc.*, 939 F.3d 210 (3d Cir. 2019) because *Singh* did not hold that Uber drivers "categorically fall within the exception" and instead stands "for the proposition that any interstate commerce exemption inquiry must focus on the district court's factual findings regarding the extent of interstate work." Here, the District Court found that "[o]nly 2.5% of all trips fulfilled using the Uber Rides marketplace in the United States between 2015 and 2019 . . . started and ended in different states" and that "only 10.1% of all trips taken in the United States in 2019 began or ended at an airport." Thus, the Ninth Circuit holds that Uber drivers are not engaged in foreign or interstate commerce and do not fall withing the section 1 exemption.
*(ed: *This Squib was authored by Ruben Huertero, J.D. He is a recent graduate of St. John's University School of Law. **The Court also notes that the District Court did not err in refusing to resolve Plaintiffs' request for injunctive relief before deciding the motion to compel because the injunction would not preserve the status quo. ***The Ninth Circuit agreed with the district court that Plaintiffs' requested injunctive relief did not constitute a public injunctive relief, which is non-waivable under Massachusetts law.).*
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NOTE TO NINTH CIRCUIT ON CALIFORNIA AB-51 RULING: JUST CHECKING IN … ***The Ninth Circuit ruled in May on the validity of AB-5 -- California's "Gig Worker" protection law. But over eight months after hearing oral argument, there has been no decision by this Court on AB-51, which would restrict predispute arbitration clauses ("PDAA") in employment relationships.*** A divided Ninth

Circuit held on **April 28** that AB-5 – which established worker classification rules – was not preempted as to truckers by the *Federal Aviation Administration Authorization Act* (see *California Truck Ass'n v. Bonta*, No. 20-55106)). That news prompted us to wonder out loud in SAA 2021-17 (May 21) about when we might expect a decision soon from this Court on AB-51 -- a new California law facing a federal preemption challenge. Months later, the answer appears to have been: "not very soon."

California AB-51: A Review

We reported in SAA 2020-47 (Dec. 27, 2020), that the Ninth Circuit on **December 7, 2020**, had heard oral argument on a Federal Arbitration Act ("FAA") preemption challenge to AB-51. As reported in SAA 2020-05 (Feb. 5), the federal District Court in *Chamber of Commerce of the United States v. Becerra*, No. 2:19-at-01142 (E.D. Calif. 2019), issued a preliminary injunction staying the planned **January 1, 2020** implementation of California AB-51, pending final determination on the merits of a suit challenging the statute. The law would have essentially banned mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes. The statute also provides that an employer can't: "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver. There are both civil and criminal penalties for violations, but the law has some carve-outs seemingly included to avoid FAA and federal securities acts preemption. The Plaintiffs were seeking declaratory and injunctive relief -- based on FAA preemption -- to block effectiveness of AB-51.

Preliminary Injunction Issued, Appeal Filed

After temporarily restraining California from enforcing the law, the District Court in a Minute Order issued **January 31, 2020,** granted in full the request for a preliminary injunction enjoining California from enforcing the new law. District Court Judge **Kimberly Mueller**'s 36-page Opinion found that the Plaintiffs were likely to prevail on their FAA preemption arguments and would suffer irreparable harm in the interim. The State then appealed to the Ninth Circuit in **February 2020,** and filed its brief in May. The core argument in the 66-page brief? "The district court abused its discretion, committing legal error, by assuming the Federal Arbitration Act (FAA) and its preemption jurisprudence applied to the new sections of the California Labor Code and Government Code added by California Assembly Bill 51 (AB 51). But the two key substantive provisions of AB 51, Labor Code Section 432.6 subdivisions (a) and (b), do not prohibit parties from entering into arbitration agreements or prevent their enforcement. Instead, they regulate employer conduct, prohibiting actions by employers that require applicants or employees to waive rights as a condition of employment, and prohibiting discrimination, retaliation, and termination of employees that decline to enter into such waivers."

Oral Argument December 2020

The Ninth Circuit last December heard oral argument in *Chamber of Commerce of the US v. Becerra*, No. 20-15291. The Court posted in several formats audio and video recordings of the 43-minute oral argument. The Chamber's brief can be found here; the

State's here. The Panel that heard the appeal was: **Carlos Lucero** (Clinton appointee, sitting by designation), **William Fletcher** (Clinton), **Sandra Segal Ikuta** (G.W. Bush). Judge Ikuta also heard *California Trucking* and sided with the Majority.
*(ed: *Wonder what the holdup is? The law was to go into effect January 2020 and oral argument was held in December 2020. The decision will have a major impact on employers and employees. **As we said in #17, we don't read anything into what the AB-5 decision portends regarding a determination on AB-51 FAA preemption. ***We continue to see this one as eventually destined for SCOTUS no matter what happens at the Ninth Circuit. As we've said before, we're betting on the Plaintiffs. ****As reported previously, the U.S. Chamber has a Webpage dedicated to this case. *****We will continue to track this one.)*
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OREGON DISTRICT COURT DENIES MORGAN STANLEY'S REQUEST FOR A TRO AND PRELIMINARY INJUNCTION AGAINST EX-EMPLOYEE. ***While there may have been questionable conduct by the former Morgan Stanley employee, the "high bar" for injunctive relief was not met, the District Curt holds.*** *In Morgan Stanley Smith Barney, LLC v. Sevcik*, Case No. 1:21-cv-001120-AA (D. Or., Aug. 6, 2021), **Morgan Stanley** brought a suit against ex-broker, **Robert Sevcik**, alleging breach of contract and breach of the duty of loyalty. Sevcik was terminated on **July 12, 2021**, after Morgan Stanley discovered that he violated the terms of a revenue sharing agreement he signed when taking over a retiring broker's account. Sevcik's actions allegedly diverted "tens of thousands of dollars" away from the retired broker. Sevcik contends this was an "honest mistake" and, when confronted, offered to pay the lost income to the broker. After his termination, Morgan Stanley claimed that Sevcik disparaged the firm, retained client information, and solicited several clients to join him at his new firm, **D.A. Davidson**, in violation of the revenue sharing agreement and the firm's Code of Conduct. Sevcik denied these allegations, asserting that he never reached out to any clients and instead only responded to those clients that initiated contact with him. In those instances, he told them that he was switching to a new firm and explained the circumstances of his termination as he understood them. However, D.A. Davidson sent out a bulk mailing that it had hired Sevcik, which was received by at least one of Morgan Stanley's clients (that Sevcik agreed not to solicit).

"High Bar" for Injunctive Relief
While the court suggests that there may have been at least one violation by Sevcik, it noted that there is a high bar for issuing a TRO or preliminary injunction. In order to receive a preliminary injunction, it must be shown that (1) the plaintiff is likely to succeed on the merits, (2) irreparable harm will likely be suffered otherwise, (3) the balance of equities leans sharply towards the plaintiff, and (4) it is in the public interest. In the court's analysis, it does not believe that Morgan Stanley satisfied this burden. The court determined there is not enough evidence to show that Morgan Stanley would succeed on all its claims. While it believes there is a "substantial question" regarding the solicitation claim, Morgan Stanley did not provide enough evidence to show that client information was retained by Sevcik or that he breached the duty of loyalty. Additionally,

Morgan Stanley did not show that any clients had actually left to follow Sevcik, nor did it show that there was a likelihood, as opposed to a mere possibility, that it would suffer harm to its goodwill and reputation, either of which is required to show irreparable harm. Further, not only does the Court not believe the balance of equities tips sharply in Morgan Stanley's favor (even though the injunction would not bar Sevcik from working in the financial industry and allows him to communicate with clients who initiate contact), the Court also held that public interest does not favor either side.
*(ed: *This Squib was written by Eli Weingast, a recent graduate of St. John's University School of Law. **The court stated that the same legal standard governs both a TRO and preliminary injunction and, therefore, only discussed the legal theory in terms of approving a preliminary injunction.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

AAA TO OFFER IN-PERSON SKILLS TRAINING FOR MEDIATORS IN NYC THIS FALL. The American Arbitration Association will be conducting in-person, *Mediator Essentials: Skills for Facilitating Negotiated Agreements*, **September 28 - October 1** in New York City. The program brochure states: "This 32-hour course, provides a comprehensive immersion into the essential skills and knowledge required of all mediators. The standard curriculum provides the needed introductory training for practicing mediators and appeals to a variety of learning styles. Legal training and education or prior experience with mediation, while helpful, are not necessary to fully participate in and benefit from all the course has to offer. Through engaging dialogue, interactive exercises and simulated mediation facilitated by a faculty of experienced mediators, you'll acquire: vital knowledge about mediation theory, practice and techniques; and indispensable skills to mediate effectively." The training program is targeted to: "… anyone interested in the field of mediation. Legal training and education or prior experience with mediation, while helpful, are not necessary to fully participate in and benefit from all the course has to offer." Serving as faculty will be **Neil Carmichael** (AAA -- Charlotte, NC) and **Harold Coleman, Jr.** (Mediation.org, a Division of the AAA -- Los Angeles). CLE credit is available from California, New York and Pennsylvania. The program is also approved for 24 hours of Initial Mediation Training under Part 146 by the New York State Unified Court System's Office of ADR Program.
*(ed: *Registration, which closes September 24, is $1,695 for general admission and $1,495 for AAA panelists; the Session ID is 21MEDB002. **COVID-19 info will be emailed two weeks before the program. Attendees can get a full refund: "if, after receiving that email [they] would like to cancel [their] program registration." ***The event will take place at the AAA's midtown Manhattan offices at 150 East 42nd St, 17th Floor. ****Questions? Contact Michael Rodriguez at 877-250-0329 or by visiting CustomerService@AAAMediation.org.)*
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ANOTHER CALIFORNIA APPELLATE COURT SAYS *ISKANIAN* IS STILL GOOD LAW. We have reported many times on *Iskanian v. CLS Transportation Los Angeles, LLC*, 59 Cal.4th 348, 327 P.3d 129 (Calif. 2014), *cert. den.*, 135 S. Ct. 1155

(2015), where a divided 4-3 California Supreme Court – replete with partial concurrences and dissents – held that an employee could pursue claims against his employer under the California Private Attorneys General Act ("PAGA"), despite the existence of an arbitration agreement waiving such claims (see, for example, SAA 2015-01 and SAAs 2014-41 & -24)). But did the U.S. Supreme Court's subsequent decision in *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), holding that class or collective action waivers were enforceable under the Federal Arbitration Act, implicitly overrule *Iskanian?* We reported in SAA 2021-29 (Aug. 5) on *Winns v. Postmates Inc.*, No. A155717 (Calif. Ct. App. Dist. 1 Jul. 20, 2021), where a unanimous California Court of Appeal said: "Neither *Epic Systems* nor its progeny addressed the same PAGA waiver issue decided by *Iskanian*, and thus *Iskanian* continues to control the outcome of this appeal…. [T]he U.S. Supreme Court did not decide or consider whether a worker may waive a right to bring a *representative* action on behalf of a state government. Thus, the Court's reasoning in *Epic Systems* did not address the basis for our Supreme Court's decision in *Iskanian*, namely, that a PAGA action is not an individual dispute between private parties but an action brought on behalf of the state by an aggrieved worker designated by statute to be a proper representative of the state to bring such an action. Accordingly, *Epic Systems* did not consider the same issue concerning PAGA waivers decided in *Iskanian*, much less reach a contrary conclusion on that issue" (emphasis in original). Reaching the same conclusion is *Herrera v. Doctors Medical Center of Modesto, Inc.*, No. F080963 (Calif. Ct. App. 5 Aug. 5, 2021). Citing *Winns* among other cases, the unanimous Court rules: "We again interpret the California Supreme Court's decision in *Iskanian* …. to mean 'that PAGA *representative* claims for *civil penalties* are not subject to arbitration' under a predispute arbitration agreement…. The PAGA claims alleged in the former employees' complaint are owned by the state and are being pursued by the former employees as the state's agent or proxy. The arbitration agreements in question are not enforceable as to the PAGA claims because the state was not a party to, and did not ratify, any of those agreements. Also, after the former employees became representatives of the state, they did not agree to arbitrate the PAGA claims…. The trial court correctly applied this rule of law. Defendant's argument that arbitration is compelled by the Federal Arbitration Act (FAA; 9 U.S.C. § 1 et seq.) and federal preemption fails for similar reasons" (emphasis in original; citations omitted).
(ed: Makes sense to us again.)
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NEBRASKA SUPREME COURT: MOTION TO VACATE WAS FLIMSY BUT NOT FRIVOLOUS. *Omaha v. Professional Firefighters Ass'n*, 309 Neb. 918 (Aug. 6, 2021), is a labor case, but it's a state Supreme Court decision articulating the standard for assessing sanctions for a frivolous attempt to vacate an arbitration Award, so its worthy of coverage. Says the unanimous Court: "Finally, the City argues that the [State] district court erred by awarding the union attorney fees and court costs on the grounds that the City's attempt to vacate the arbitration award was frivolous under § 25-824(2). A frivolous action is one in which a litigant asserts a legal position wholly without merit; that is, the position is without rational argument based on law and evidence to support the litigant's position. *Seldin v. Estate of Silverman*, 305 Neb. 185, 939 N.W.2d 768 (2020).

We have said that the term 'frivolous' connotes an improper motive or legal position so wholly without merit as to be ridiculous. Id. Any doubt about whether a legal position is frivolous or taken in bad faith should be resolved in favor of the one whose legal position is in question…. Although we have found that the City's arguments that the arbitration award should have been vacated lacked merit, we disagree with the district court that the City's position was so lacking in merit to be deemed frivolous. We disagree with the district court that the City made frivolous claims of factual and legal error that were merely 'dressed up' as arguments that would allow the arbitration award to be vacated. Prior to this case, we had not explored what a party must show to demonstrate that an arbitrator exceeded his or her powers under the NUAA [Nebraska Uniform Arbitration Act] or whether an arbitration award governed by the NUAA could be vacated on the grounds that the arbitrator manifestly disregarded the law…. Resolving all doubts about the City's legal positions in its favor, as our standard requires, we find that the arguments made by the City that the arbitration award should be vacated, while not meritorious, were also not so unreasonable to be deemed frivolous."
(ed: As reported in SAA 2021-19 (May 20), SCOTUS on May 17 denied Certiorari *in* Seldin*, covered previously in SAA 2020-11 (Mar. 18). There, a unanimous Nebraska Supreme Court held that an arbitration Award cannot be challenged under the Federal Arbitration Act based on public policy violations.)*
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CPR'S LAW STUDENT INTERNSHIP APPLICATIONS NOW OPEN. CPR's Law Student Internship program is now open for applications. Says the Website notice: "Interns at CPR participate in the organization's research and activities to expose them to the organization's cutting-edge advocacy for the increased use of and development of commercial conflict resolution. CPR's work varies -- no intern will have the same experience. Typically interns conduct research and compose content for CPR's website, CLE courses, publications and articles. Interns also conduct background research for programs by CPR's Industry and Practice Committees, and for Institute-wide surveys and studies, where appropriate." The unpaid interns work either 10-12 hours a week (partial semester internship) or 37.5 hours per week (full semester internship).
*(ed: *Visit the CPR website for more information." **Applications for the Fall and Spring Semesters can be found here.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Sosa v. Onfido, Inc*., No. 21-1107 (7th Cir. Aug. 11, 2021)**: "The district court rejected each of Onfido's nonparty contract enforcement theories and denied Onfido's motion to compel individual arbitration. On the choice-of-law issue, it held that Onfido failed to establish that there was an outcome-determinative difference between Illinois and Washington law, and since Onfido articulated no difference between the two, it applied Illinois law -- the law of the forum state – to determine Onfido's right to enforce the arbitration clause. In so doing, the district court held that Onfido failed to establish that it was a third-party beneficiary of the Terms of Service or that it could otherwise enforce

the contract's arbitration provision either as an agent of OfferUp or on equitable estoppel grounds. We agree with the district court in all respects."

***Lim v. TForce Logistics, LLC*, No. 20-55564 (9th Cir. Aug. 12, 2021)**: "The panel affirmed the district court's denial of defendants' motion to compel arbitration of employment related claims on the grounds that the delegation clause and arbitration provision in the plaintiff's contract were unenforceable as unconscionable under California law…. The panel held that a delegation clause, requiring the arbitrator to determine the gateway issue of arbitrability, was unenforceable as to Lim because it was procedurally and substantively unconscionable. The panel held that the district court properly exercised its discretion by not severing the unconscionable provisions and enforcing what remained of the delegation clause." (*ed: quote is from the Court's summary*.)

***Rose v. Verizon Wireless Services, LLC*, No. ED109193 (Mo. Ct. App. Jun. 29, 2021)**: "The trial court correctly concluded that the Verizon Customer Agreement, set forth on Verizon's website and incorporated by reference into the receipt Plaintiff signed during a previous visit to a Verizon store, was a contract of adhesion. Missouri law provides that a contract of adhesion is unenforceable unless it comports with the reasonable expectations of the parties entering into the transaction. Because a reasonable party entering into a wireless telephone transaction would not expect that disputes involving the type of misconduct alleged in this case would be subject to mandatory arbitration, the Customer Agreement is unenforceable with respect to such a claim. The judgment below is therefore affirmed." (*ed: quote is from the Court's official summary*.)

***Fox v. Money Concepts Capital Corp*., FINRA ID No. 21-00029 (Charlotte, NC, Jul. 22, 2021)**: The Arbitrator granted Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule). The Customer's claim involved the purchase of a New York City Real Estate Investment Trust: "The Arbitrator finds that Respondent has unclean hands in this matter, but also finds that the eligibility rule applies. The instruments in question were purchased in May 2013 and December 2014, more than 6 years before the Statement of Claim was filed. Claimant was also contributorily negligent in the resultant losses incurred. Therefore, the Motion to Dismiss is granted but all forum fees, including Claimant's non-refundable filing fee, are assessed against Respondent." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Morgan Stanley Smith Barney LLC v. Satterfield*, FINRA ID No. 20-00360 (Washington, D.C., Aug. 5, 2021)**: An All-Public Panel directs that the firm's former AP pay compensatory damages of nearly $1.5 million on two promissory notes, post-termination interest of about $183,000, attorneys' fees and costs of $138,000, and interest at the rate of $239.59 per day from July 31, 2021 "until all sums due are fully paid." Denied completely are the AP's counterclaims, "including for unlawful discrimination and retaliation in violation of statutory law."
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Horton, David, *Pirate Arbitration*, 106 Minnesota Law Review ___ (forthcoming 2022): "The U.S. Supreme Court's expansion of the Federal Arbitration Act (FAA) has transformed the American civil justice system. In a series of controversial opinions, the Court has held that the FAA preempts state law, bars class actions, and empowers companies to delegate questions about the arbitration itself to arbitrators. For decades, critics have objected that forced arbitration dilutes consumers' and employees' rights. However, this Article explores a byproduct of the arbitration revolution that is arguably even more troubling. Recently, criminals, opportunists, and other shady entities have started exploiting the Court's FAA jurisprudence to accomplish goals that are illegal. The Article calls this practice 'pirate' arbitration. It discusses three examples: sham arbitration administrators that sell fraudulent awards, companies that obtain rulings from crooked arbitrators that have the same effect as illegal contracts, and payday lenders that mandate arbitration in a vacuum where no federal or state law applies. The Article then explains why this trend may become a serious problem. By creating a force field around arbitration clauses and awards, the Court has made it hard to regulate sophisticated arbitration-related scams. Finally, the Article proposes a novel approach for combatting pirate arbitration. It argues that these schemes do not actually involve 'arbitration' and thus do not fall within the safe harbor of the FAA."

***Ex-Morgan Stanley FA Ordered to Pay Back $1.5M Promissory Note*, Financial Advisor IQ (Aug. 10, 2021)**: "A Financial Industry Regulatory Authority arbitration panel has ordered a former large producer at Morgan Stanley to pay the firm more than $1.5 million in connection with a promissory note." (*ed: see our coverage in "Quick Takes.*")

***Missouri Court of Appeals Affirms Denial of Motion to Compel Arbitration Based on Contract of Adhesion*, Baker Sterchi Cowden & Rice LLC Blog Missouri Law (Aug. 10, 2021)**: "The Missouri Court of Appeals recently affirmed a trial court decision that denied Verizon's motion to compel arbitration. In *Rose v. Verizon Wireless Services, LLC*, the Court of Appeals held that an arbitration provision was not enforceable because the contract at issue was an unenforceable contract of adhesion and did not match the reasonable expectations of the parties." (*ed: see our coverage in "Quick Takes*.")

***SEC Issues Nearly $6 Million in Whistleblower Awards*, www.sec.gov (Aug. 10, 2021)**: "The Securities and Exchange Commission today announced awards of nearly $6 million to two whistleblowers who provided information and assistance in separate enforcement proceedings.[] In the first order, the SEC awarded more than $3.5 million to a whistleblower who reported valuable new information that caused the SEC to expand an existing investigation into a new geographic area. The whistleblower then provided supplemental information and assistance that helped the SEC bring the charges in the underlying enforcement action.[] In the second order, the SEC awarded more than $2.4 million to a whistleblower who alerted the SEC to previously unknown conduct,

prompting the opening of the investigation, and thereafter met with SEC staff, provided documents, and identified potential witnesses."

***Judge Denies Morgan Stanley's Bid to Handcuff Oregon Broker*, AdvisorHub (Aug. 11, 2021)**: "A fired Morgan Stanley broker in Medford, Oregon has prevailed in a hotly contested legal battle over a temporary restraining order blocking him from contacting his former customers at his new firm.[] Judge Ann Aiken in U.S. District Court in Oregon ruled that Morgan Stanley did not meet the high standards required to justify the issuance of a temporary restraining order, which is intended as an 'extraordinary remedy,' according to an August 6 opinion." (*ed: see our coverage elsewhere in this* Alert.)

***Email-fail, Counselor? Appeals Courts are in No Mood for Excuses*, Reuters (Aug. 13, 2021)**: "'This is a cautionary tale for every attorney who litigates in the era of e-filing.' That's how the 5th Circuit U.S. Court of Appeals kicked off a recent decision tossing a personal injury lawsuit after the plaintiff's lawyer missed a key deadline. The reason? An email notice from the court alerting the lawyer that opposing counsel had filed a motion for summary judgment was not routed to the lawyer's main inbox. Instead, it inexplicably went to an unmonitored "other" folder, where it sat, unread, until it was too late to respond."

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DID YOU KNOW?

FINRA ANNUAL MEETING IS SEPTEMBER 1. FINRA on **August 2** issued an Election Notice titled, *Notice of Annual Meeting of FINRA Firms and Election Proxy.* As described on the Authority's Website: "FINRA will conduct its Annual Meeting of firms on September 1, 2021. The purpose of the meeting is to elect individuals to fill one small firm seat, one mid-size firm seat and one large firm seat on the FINRA Board of Governors. Firms that are members of FINRA as of the close of business on July 30, 2021, are eligible to vote and will soon receive a reminder email containing instructions for how to vote."

*(ed: *The meeting will start at 10:00 a.m. eastern in the FINRA Visitors Center at 1735 K Street, NW, Washington, D.C. **We wonder if recent pandemic-related developments will compel a video option?*

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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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