SECURITIES ARBITRATION ALERT 2021-38 (10/14/21)

George H. Friedman, Editor-in-Chief

SQUIBS:

- NASAA Proposes Model Rules to Address Unpaid Awards and Fines
- AAA Stats, 2d Qtr. 2021: Consumer & Employment Case Information Updates
- Joining Virginia, Ohio is the Latest State to Take on Mandatory Investment Adviser Arbitration. FAA Preemption Battle Next?

SHORT BRIEFS:

- Twelfth Annual Securities Dispute Resolution Triathlon – Virtually This Year – is October 16-17
- The Other Shoe Drops: Departing CFTC Commissioner Berkovitz Named SEC GC
- In a Case of First Impression, Eleventh Circuit Holds that Award Must Be Promptly Opposed in Response to a Confirmation Action, Even Though FAA's Three-Month Period for Moving to Vacate Has Not Yet Expired
- Once Again, a Missouri Court Holds that FAA Section 5 Can't Be Used to Appoint a Replacement When the Named ADR Provider is Unavailable to Administer Dispute

QUICK TAKES:

- ***Banc of California, National Association v. Superior Court of Los Angeles County,*** **No. B310190 (Calif. Ct. App. 2 Sep. 27, 2021)**
- ***Caballero v. Premier Care Simi Valley, LLC,*** **No. B308126 (Calif. Ct. App. 2 Sep. 28, 2021)**
- ***Skaf v. Wyoming Cardiopulmonary Services, P.C.*****, 2021 WY 105 (Wyo. Sep. 27, 2021)**
- ***Scott v. Merrill Lynch, Pierce, Fenner & Smith Inc.,*** **FINRA ID No. 20-03101 (Seattle, WA, Sep. 10, 2021)**
- ***Wilgus Family Survivors Trust v. NewBridge Securities Corp.*****, FINRA ID No. 19-03145 (San Diego, CA, Sep. 10, 2021)**

ARTICLES OF INTEREST:

- **Bates Research Group,** ***NASAA Reviews Senior Financial Protections - Uncovers Deficiencies in Policies to Protect Seniors; Promotes Diversity, Equity, Inclusion Goals*** **(Sep. 30, 2021)**
- ***CFPB Should Disregard Professor Sovern's Advice to Try to Regulate Arbitration (Again),*** **Ballard Spahr LLP Blog (Oct. 4, 2021)**
- ***Morgan Stanley FA Wins Expungement of 20-Year-Old Customer Disputes,*** **Financial Advisor IQ (Oct. 5, 2021)**
- ***Trouble With a Broker? Don't Assume a Payout Is Coming,*** **MoneyTalksNews (Oct. 5, 2021)**
- ***The End of Forced Arbitration?*** **American Prospect (Oct. 6)**
- ***Schwab Requires All RIA Clients To Get Expansive $1 Million E&O Policy,*** **Financial Advisor Magazine (Oct. 7, 2021)**

DID YOU KNOW?

- **George Washington's Will Called for Arbitration**

SQUIBS: IN-DEPTH ANALYSIS

NASAA PROPOSES MODEL RULES TO ADDRESS UNPAID AWARDS AND FINES. ***The North American Securities Administrators Association ("NASAA") has***

released for public comment draft model rules to address the lingering problem of unpaid fines and arbitration awards. Just as we were putting SAA 2021-37 (Oct. 7) to bed, NASAA issued an **October 5** Press Release, *NASAA Seeks Public Comment on Proposed Model Rules to Combat Unpaid Arbitration Awards and Fines*. Here is the promised analysis for this week's *Alert*.

The Proposal in a Nutshell

The proposed Model Rules are intended: "to provide member jurisdictions with an additional tool to address unpaid Financial Industry Regulatory Authority ("FINRA") arbitration awards by broker-dealers, agents, investment advisers, and investment adviser representatives. Ultimately, the Model Rules will serve as bases for enforcement actions related to unpaid awards and allow member jurisdictions to prevent the registration of firms and individuals, whether as broker-dealers, agents, investment advisers, or investment adviser representatives, if the firm or individual has outstanding FINRA arbitration awards or other regulatory obligations."

As we said in #37, these are the headlines (*ed: repeated* verbatim): "Specifically, the Model Rules would add the following provisions to the existing rules on dishonest or unethical business practices by broker-dealers, agents, investment advisers and investment-adviser representatives:

- Failing to satisfy an arbitration award resulting from a client or customer-initiated arbitration,
- Attempting to avoid payment of any client or customer-initiated arbitration; or,
- Failing to satisfy the terms of any order resulting from a regulatory action taken against the registrant.

The 11-page proposal has much background information as well as proposed language for regulatory changes.

Dovetails with Recent PIABA Proposal

The NASAA report and proposal dovetails nicely with recent efforts by PIABA to address unpaid awards. As also reported in #37, PIABA on **September 29** issued its third report in over five years contending the problem of unpaid FINRA awards is getting worse, not better. The Report, *FINRA Arbitration's Persistent Unpaid Award Problem*, was announced in a Press Release, *PIABA - 30% of 2020 FINRA Arbitration Awards Went Unpaid*, and via a 24-minute Zoom event. The headlines? "The percentage of unpaid customer awards in FINRA arbitration cases increased to nearly 30% and the percentage of unpaid award dollars rose to 24%, according to the Public Investors Advocate Bar Association's (PIABA) new report on unpaid FINRA arbitration awards. PIABA's first report on the topic was published in 2016, and the new update illustrates how the lack of improvement on this critical issue for American investors reflects FINRA's refusal to solve the problem…. In short, the problem is not improving since PIABA's initial 2016 Report." The PIABA Report also contained concrete suggestions for statutory and regulatory changes, including creation of an unpaid awards fund.
(ed: Comments – in electronic form only– are due November 4. Email comments to NASAA at NASAAComments@nasaa.org with a cc: to the Project Group Chairs, Kristen

Standifer(kstandifer@dfi.wa.gov), Patrick Costello (patrick.costello@sec.state.ma.us), and Stephen Brey (breys@michigan.gov).)
return to top

AAA STATS, 2d QTR. 2021: CONSUMER & EMPLOYMENT CASE INFORMATION UPDATES. ***AAA Award Data is updated quarterly by the American Arbitration Association. This analysis of the latest update is provided by Rick Ryder, President of Securities Arbitration Commentator, Inc., and by SAC's* ARBchek.com *- securities arbitration's first arbitrator evaluation service***. The latest quarterly report from American Arbitration Association adds nearly 4,000 new consumer and employment cases to the Association's online statistical collection. AAA's "Consumer and Employment Arbitration Statistics," which now reports data on approximately 140,000 arbitration matters that were closed by AAA between 2004 and the present, takes a different approach to Award disclosure than FINRA. AAA does not release the Awards themselves, although the Consumer Arbitration Rules permit the staff to do so; instead, the staff posts detailed information about each case -- more than 30 different fields of information -- released in an Excel format. That means the user cannot access the single arbitrator's reasoning or her explanation of the Award, if one is provided, but it also means that the data that is provided extends well beyond a bare-bones Award and is easily sorted and manipulated.

All C&E Cases Covered
Unlike FINRA, AAA reports data on *all* of its closed consumer and employment cases, whether they resulted in an arbitral decision, were dismissed, settled, withdrawn or administratively terminated. As arbitrators are commonly appointed before cases settle, one's review of an arbitrator's history of service sweeps more broadly than a search of FINRA arbitration Awards. While settled cases reveal nothing about how the arbitrator would have voted, settled cases do disclose Award information that can assist in networking with relevant counsel and spotting potential arbitral conflicts. Of the 131,823 matters detailed in SAC's AAA database, more than half reveal arbitral appointments, whereas just 27% of the whole are categorized as "Awarded."

Overall -- from 2004 to present -- 36% of all listed cases indicate a settlement; just looking at the last five years, settlements account for 63% of the listed cases. Some 28,512 of the 45,048 cases closed by AAA in the five-year period from July 1, 2016 to June 30, 2021 settled, while the percentage of cases reaching an arbitral decision dropped 13% (5,826/45,048). So, the percentage of "Settled" cases practically doubled and "Awarded" matters halved. In the latest quarter (2Q '21), 55% of the listed cases (2,143/3,880) resulted in settlements and 11% (432/3,880) in decisions by arbitrators. The remainder of the cases were disposed of via withdrawals (18%), dismissals (3%) and administrative terminations (13%). These terms are more precisely defined by AAA, along with a score of other Chart terms, in a published "Report Legend" on the Association's Website.

Reviewing the Most Recent Quarter
The great bulk of the cases closed in the second quarter of 2021 relate to Consumer-type disputes; Employer or Employment disputes comprise the rest and are almost universally initiated by the employee. In the "Financial Services" field, Consumer cases predominate. One can identify some RIAs and brokerage houses in the listings, but, by far, the most common industry disputants are banks, mortgage companies, credit card services, and the like. Fewer than 5% of the 1,083 "Financial Services" disputes were commenced by employees; consumers initiated 1,034 of the 1,083 arbitral disputes. That's 27% of the cases listed, which signifies that "Financial Services" disputes are a significant part of the Consumer & Employment caseload at AAA. In the first quarter, "Financial Services" cases had an even more robust 40% presence.

Not Class, But *Mass* Arbitration
The number of "Financial Services" cases falls, at 1,083, between the 1,671 in the first quarter and the 627 cases in the last quarter of 2020. As we found in our review of the first quarter's AAA statistics, when we detected a large group of concluded cases against H&R Block, indicia of mass arbitrations are unmistakable. Often, in these instances, an attempt at class litigation in the courts has been defeated by the defense, only to have class counsel counter with a flood of individual arbitration case filings. In the H&R Block cases, the firm of Keller Lenkner settled about 1,000 cases this way. In this quarter, some 200 cases against TurboTax were resolved together and with the same counsel representing all Claimants. We saw one other such example, involving about 70 Claimants and a firm called Consumer Fraud Legal Services, LLC, representing Claimants. All of these mass arbitration cases were listed as "Withdrawn."

After settlements, administrative terminations and withdrawals, not much was left. Just 66 of the "Financial Services" disputes (6%) were fully adjudicated -- five employment matters and 61 disputes initiated by consumers. Even then, the number of actual cases was even smaller -- more like 56 -- because AAA creates a new line on its statistical worksheet for each Claimant and, if there's a counterclaim, for that Respondent party as well. In essence, the case listings represent individual *disposition*s, as opposed to individual matters. What really surprised us, though, was that, of this small percentage of "Financial Services" cases going to decision, only 17 dispositions -- or 14 individual cases -- ended with a favorable decision for the Consumer. That's a "win" rate of just 25% (14/56).

Awards Amid COVID
It's helpful to remember that AAA had been acting under a hearing moratorium, so there may be a far larger number of claims awaiting an arbitral determination than in normal times. As to these 56 "Financial Services" Awards that did issue, the dollar-size of the consumer claims varied from a hundred dollars to $10 million. Most were small -- all but a handful would merit simplified claims treatment at FINRA. Despite the small size of some claims, only 11 instances of *pro* se representation were noted; one *pro* se Claimant sought $700,000 from Santander Consumer USA, Inc. The Arbitrator non-suited that

claim in a single document only proceeding and granted an apparent counterclaim (but still assessed Santander with the $1,500 fee).

About the Arbitrators and Their Fees
Arbitrator fees imposed were, for the most part, either $1,500 or $2,500, with three that fell between $25,000 and $30,000. All awarded amounts to the prevailing consumer parties were quite modest, with the exception of one award of about $850,000, which included $141,000 in attorney fees. AAA's data only reveals information about the Consumer's representation. Here, the Claimant's attorney is listed as David Silver, Silver Miller, Florida. A single Arbitrator, Theodore J. Folkman, Esq., was appointed to the case about three months after filing and, within a period of 16 months, issued his decision on the merits and charged his fees of $9,750 entirely to the Respondent, Polonex, LLC. We saw no instances of fee allocations to the Consumer in any of the Awarded matters.

We counted the number of individual arbitrators; in the past, we've found that AAA generally appoints few arbitrators to more than one or two cases. In this set, some 56 single arbitrators covered the 61 "Awarded" matters. AAA policy favors lawyers as arbitrators and that rule holds as to this group. As we observed in our previous coverage, AAA's roster differs dramatically in philosophy and policy from the FINRA neutral roster and that approach promises different dynamics in the pre-hearing management and hearing sides of the case. We counted 16 of the arbitrators as women by name.
*(R. Ryder: *Take a look for yourself at AAA's* Consumer Arbitration Statistics. *Caveat: the downloadable Report contains data for the most recent five-year period only. **While the majority of the cases involves non-securities disputes, considerable arbitrator overlap exists between FINRA and AAA, making this an excellent secondary source of arbitral activity when performing FINRA arbitrator evaluations. Importantly, checking for AAA Awards provides an alternative to simply striking a candidate who has no FINRA Awards. If you happen to have a AAA dispute, your appointed arbitrator's C&E case history can lead to a wealth of information that will inform your tactical decisions. ***SAC has the earlier reports on file going back to 2005 and provides Arbitrator Summary Reports in both Excel and PDF formats for a very low fee.)*
return to top

JOINING VIRGINIA, OHIO IS THE LATEST STATE TO TAKE ON MANDATORY INVESTMENT ADVISER ARBITRATION. FAA PREEMPTION BATTLE NEXT? ***September 30 ushered in the effectiveness of amendments to Ohio's Administrative Code impacting investment advisers***. Among the changes to chapter 1301:6-3-15.1 (Adviser Books and Records Requirements) is the following: "(I) Investment advisory contracts and compensation. (1) No investment adviser licensed or required to be licensed under Chapter 1707 of the Revised Code shall, directly or indirectly, enter into, extend, or renew any investment advisory contract, or in any way perform any investment advisory contract if such contract … (d) Requires mandatory arbitration of disputes."

Questions Answered
SAA Editorial Board member **Ross P. Tulman**, principal of the Trade Investment Analysis Group, posed to Ohio authorities questions: "relating to the change in books and records requirements – specifically the provision that prohibits use of mandatory arbitration clauses in advisory agreements." He received a response from **Anne M. Followell**, Licensing Chief of the Ohio Department of Commerce Division of Securities. The questions and answers are repeated essentially *verbatim* below:

> **Q. Does the prohibition apply to federally registered advisors doing business with Ohio residents**?
>
> A: The answer is "No." Federally-registered advisers are regulated by federal law, so the principle of preemption renders Ohio unable to impose new requirements on them. Further, the text of OAC 1301:6-3-15.1 applies to "licensed" investment advisers, which federal advisers are not.
>
> **Q: Does the prohibition apply to Ohio state registered advisors doing business with residents of other states?**
>
> A: The answer is "Yes." The rule applies to Ohio licensed IAs and governs the books, records, and practices of Ohio-licensed IAs. The only possible issue that could arise is if the state of residence of the customer has a law that is directly in conflict to the Ohio law. There would then have to be a legal analysis as to which law governs.

Déjà Vu All Over Again
Recall that, as reported in SAA 2019-35 (Sep. 11), a Virginia Division of Securities and Retail Franchising Rule banning State-covered investment advisers from using predispute arbitration agreements in customer contracts went into effect in **September 2019**. The Commonwealth added a new subsection F to the Dishonest or Unethical Practices section of Chapter 80 to prohibit mandatory arbitration clauses in investment advisory contracts. The amended language provides: "For purposes of the section, any mandatory arbitration provision in an advisory contract shall be prohibited."
(*ed: *Our take? Although states are primary regulators of RIAs with assets under management of less than $100 million, we still see a Federal Arbitration Act ("FAA") preemption risk because the new Ohio rule singles out PDAAs for disadvantaged treatment, thereby frustrating the Act's goals. Thus, the State's recognition of FAA preemption at least as to federally-registered advisors who contract with clients in Ohio. But what about Ohio-registered RIAs with out-of-state clients? Seems that they are clearly engaged in interstate commerce. Time will tell. **Our thanks to Ms. Followell and a hearty* Alert *h/t to Mr. Tulman!)*
return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

TWELFTH ANNUAL SECURITIES DISPUTE RESOLUTION TRIATHLON – VIRTUALLY THIS YEAR – IS OCTOBER 16 - 17. Seems like only yesterday we were reporting the results of the *2019 Securities Dispute Resolution Triathlon*, but this event is back after a pandemic-induced two-year hiatus. Specifically, the 2021 version of this formerly annual event will take place **October 16-17**. The format: "Out of concern for everyone's health and well-being and the uncertainty about emerging COVID variants, FINRA and St. John's have decided that the 2021 Triathlon will be virtual. The Triathlon has become an annual tradition, and we expect to capture the essence of this tradition virtually." The Triathlon, which has its own Webpage, is a joint initiative of the Hugh L. Carey Center for Dispute Resolution of St. John's University School of Law and FINRA: "The Triathlon is a competition where student teams from participating law schools will have an opportunity to demonstrate their advocacy skills in negotiation, mediation and arbitration of a securities dispute." Attorneys and FINRA neutrals were invited to serve as judges in this annual event. Attorneys who serve as judges during the Triathlon will receive CLE credit by the law school.
*(ed: *The event will take place via Zoom. **Questions about competition logistics should be sent to Iris Diaz at diazi@stjohns.edu. For general information, visit the Triathlon Website at https://www.stjohns.edu/law/about/places/hugh-l-carey-center-dispute-resolution.)*
return to top

THE OTHER SHOE DROPS: DEPARTING CFTC COMMISSIONER BERKOVITZ NAMED SEC GC. We reported in SAA 2021-35 (Sep. 16) that Commodity Futures Trading Commission ("CFTC") member **Dan Berkovitz** (Democrat), announced on **September 9** that he will leave the CFTC on **October 15**. His stated reason? "To everything there is a season, and now is a time for me to turn to other challenges." One of the new challenges turns out to be serving as the SEC's new General Counsel effective **November 1**, a **September 28** Press Release announces. Current GC **John Coates** will: "leave the agency in October and return to teaching at Harvard University. Michael Conley, currently the SEC's Solicitor, will serve as Acting General Counsel upon Coates's departure until Berkovitz joins the agency." As we said in #35, Mr. Berkovitz's departure leaves only two members in the five-member CFTC: Acting Chair **Rostin Behnam** (Democrat) and Republican **Dawn DeBerry Stump**. Republican Commissioner **Brian Quintenz** departed in **August** and former Chairman **Heath Tarbert** (Democrat) earlier this year. The Commission: "consists of five commissioners appointed by the President, with the advice and consent of the Senate, to serve staggered five-year terms. The President, with the consent of the Senate, designates one of the commissioners to serve as Chairman. No more than three commissioners at any one time may be from the same political party."
*(ed: *We wish Mr. Berkovitz well. **CFTC Commissioner bios may be found here. ***As we said before, there's no word so far on replacements, but we implore the President to get on with filling the vacancies.)*
return to top

IN A CASE OF FIRST IMPRESSION, ELEVENTH CIRCUIT HOLDS THAT AWARD MUST BE PROMPTLY OPPOSED IN RESPONSE TO A CONFIRMATION ACTION, EVEN THOUGH FAA'S THREE-MONTH PERIOD FOR MOVING TO VACATE HAS NOT YET EXPIRED. Federal Arbitration Act ("FAA") section 12 provides that a motion to vacate an arbitration award must be filed within three months. Section 9, however, allows a prevailing party one year to move to confirm. What happens when the winner very quickly moves to confirm? Must the opposing party raise objections to confirmation before the three-month period has elapsed? "Yes," says a unanimous Eleventh Circuit in *McLaurin v. The Terminix International Co, LP*, No. 20-12904 (11th Cir. Sep. 17, 2021): "This appeal raises a question of first impression about dueling motions to confirm and vacate arbitration awards under the Federal Arbitration Act. An arbitrator awarded money damages in favor of Ann McLaurin and Lynne Fitzgerald and against the Terminix International Company LP and Terminix International, Inc. After winning the arbitration, McLaurin and Fitzgerald quickly filed a motion to confirm with the district court. The district court ordered Terminix to respond, but Terminix opted to forego any substantive opposition to the motion. Instead, it asserted what it believed was its procedural right to file a separate motion to vacate any time within three months. At the end of the three-month period, Terminix filed its motion to vacate. The district court granted the motion to confirm as substantively unopposed and struck the motion to vacate as untimely. We affirm the district court's order granting the motion to confirm. We also conclude that the district court did not abuse its discretion when it struck Terminix's later-filed motion and thereby declined to rule on its merits." The Court also offered guidance on how these situations should be handled in the future: "We recommend that, when faced with a motion to confirm filed within three months of an arbitration award, district courts enter a briefing schedule that sets simultaneous deadlines for the losing party to file an opposition to the motion to confirm, if any, and to file a motion to vacate, modify, or correct, if any. This practice will prevent similar disputes from arising in the future."
(ed: This reminds us of FINRA Rule 9554 disciplinary proceeding against industry parties not paying arbitration awards. One of the defenses is that a motion to vacate has been filed and is pending. FINRA's requirement that awards be paid (or MTVs filed) within 30 days effectively shortens the FAA's three-month time to move to vacate.)
return to top

ONCE AGAIN, A MISSOURI COURT HOLDS THAT FAA SECTION 5 CAN'T BE USED TO APPOINT A REPLACEMENT WHEN THE NAMED ADR PROVIDER IS UNAVAILABLE TO ADMINISTER DISPUTE. At issue in *Car Credit, Inc. v. Pitts*, No. WD84054 (Mo. Ct. App. Aug. 24, 2021), is whether a replacement arbitration forum could be designated by the Court under Federal Arbitration Act ("FAA") section 5, where the named ADR forum – National Arbitration Forum ("NAF") – declined to handle the cases because it had signed a consent decree with Minnesota in 2009 agreeing not to administer consumer arbitrations. A unanimous Missouri Court of Appeals holds that arbitration by NAF – the sole ADR provider referenced in the arbitration agreement – or under its rules was integral to the arbitration agreement, which thus couldn't be enforced because NAF was no longer available to

administer the case. Accordingly, the AAA Arbitrator exceeded authority by accepting jurisdiction and rendering an Award, and the Trial Court erred by confirming it. "Here, the parties agreed to arbitrate disputes before – but only before – NAF, and thus any other arbitration organization lacked power to hear their disputes…. Pitts's agreement twice specified the parties' sole chosen forum by stating that 'the Arbitration Organization shall be the National Arbitration Forum' and that 'the Arbitration Organization is the National Arbitration Forum.' And similar to the *Hunter** agreement, Pitts's agreement also specified that disputes would be resolved by the NAF rules then in effect.... For the reasons described above, the AAA arbitrator had no power to arbitrate this dispute; thus he exceeded his power in doing so and the award he rendered must be vacated pursuant to 9 U.S.C. § 10(a)(4)."
(*ed: **"Hunter" is* A-1 Premium Acceptance, Inc. v. Hunter, *557 S.W.3d 923 (Mo. 2018) (*en banc*), a case we covered in SAA 2018-40 (Oct. 24). The U.S. Supreme Court in March 2019 declined without explanation to grant* Certiorari. ***There remains a significant split in the state and federal courts. See also our April 2016 blog post discussing the split. ****We're with the "allow forum replacement under FAA section 5" camp; why else was FAA section 5 written? *****Given the split and SCOTUS' apparent disinclination to address it, the drafting lesson appears to be: "Name more than one ADR provider and/or specifically cite Section 5, if you want to ensure the right to arbitrate is preserved.")*
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Banc of California, National Association v. Superior Court of Los Angeles County*, No. B310190 (Calif. Ct. App. 2 Sep. 27, 2021)**: "Banc seeks a writ of mandate compelling the trial court to vacate its order granting Holdings's petition to compel arbitration. Banc asserts the trial court erred in relying on the Supreme Court's decision in *Henry Schein, Inc. v. Archer and White Sales, Inc.* (2019) ___ U.S. ___ [139 S.Ct. 524, 529] (*Schein*), which held that where an arbitration clause contains a delegation provision, the arbitrator should decide the threshold issue of arbitrability even if the argued basis for arbitration is 'wholly groundless.' We agree with Banc. In *Schein*, the court considered who should decide whether the parties' dispute arising from a specific contract with an arbitration clause was arbitrable; here, the question on Holdings's petition to compel arbitration was whether the parties agreed to arbitrate their dispute over the loan documents, which did not have arbitration clauses, a question the court must decide in the first instance. We grant the petition." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Caballero v. Premier Care Simi Valley, LLC*, No. B308126 (Calif. Ct. App. 2 Sep. 28, 2021)**: "In denying Premier Care's petition to compel arbitration, the trial court found it had failed to sufficiently inform Caballero of the Arbitration Agreement's contents. The record, however, does not support this finding. A party who does not understand English sufficiently to comprehend the contents of a contract in that language is required to 'have . . . it read or explained to him" (*Ramos v. Westlake Services LLC* (2015) 242 Cal.App.4th 674, 687 (Ramos).) The record confirms that Caballero signed the

Arbitration Agreement notwithstanding his limited English skills and that neither Caballero nor any family member provided evidence of the circumstances surrounding the signing. The Premier Care representative, Stacy Elstein, also had no specific recollection of the transaction. Hence, there is no evidence that Caballero either requested assistance in understanding the document or was prevented from obtaining such assistance…. In the absence of any evidence that Caballero communicated his inability to read the Arbitration Agreement prior to signing it, the petition to compel arbitration should have been granted. We reverse."

***Skaf v. Wyoming Cardiopulmonary Services, P.C.*., 2021 WY 105 (Wyo. Sep. 27, 2021)**: "Dr. Michel Skaf is a cardiologist who signed an agreement not to compete when he became a shareholder in Wyoming Cardiopulmonary Services (WCS). He appeals from the entry of a judgment confirming an arbitration award for breach of the agreement, and a second judgment requiring additional payment. The Arbitration Panel (the Panel) concluded that the parties' non-compete agreement was enforceable if modified significantly. Before awarding damages, the Panel reformed the provision prohibiting medical services, modified the geographical scope of the agreement, and rewrote the clause allowing Dr. Skaf to practice medicine at the Wyoming Medical Center. The district court confirmed the Panel's decision, entered a total judgment of $221,000 in favor of WCS, and denied WCS' request for an injunction…. WCS' motion to dismiss for lack of standing is denied. We also deny WCS' motion to dismiss based on waiver and decline to declare covenants not to compete between physicians necessarily violate public policy. Finally, we find the Panel made a manifest error of law and reverse the confirmation."

***Scott v. Merrill Lynch, Pierce, Fenner & Smith Inc*., FINRA ID No. 20-03101 (Seattle, WA, Sep. 10, 2021)**: An Arbitrator denies a broker's request for expungement of two customer complaints from appearing on his CRD record. Pursuant to Rule 13203, the Director of FINRA denied the use of the FINRA forum with respect to the broker's request for expungement of a third complaint, finding that the complaint was the subject of a previous expungement request that was denied by another Panel. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Wilgus Family Survivors Trust v. NewBridge Securities Corp*., FINRA ID No. 19-03145 (San Diego, CA, Sep. 10, 2021)**: An All-Public Panel grants Respondent broker-dealer's request for a Directed Verdict with prejudice pursuant to Rule 12504(b) (not involved with the security, account, or conduct in dispute). The customer's claims involved the purchase of REITs. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Bates Research Group, *NASAA Reviews Senior Financial Protections - Uncovers Deficiencies in Policies to Protect Seniors; Promotes Diversity, Equity, Inclusion Goals* (Sep. 30, 2021): "In September 2021, NASAA published two reports that have

implications for the protection of senior investors, including an analysis of the status of NASAA's *Model Act to Protect Vulnerable Adults from Financial Exploitation* by states that have adopted it or parts of it and a presentation of coordinated examination results of investment adviser firms by state securities regulators, which found 'serious deficiencies' in policies and procedures to protect seniors, among other findings. The reports offer suggestions to improve supervision and compliance in order to strengthen protections for vulnerable adults. NASAA also issued a recent member approved statement on diversity, equity and inclusion ('DEI') defining DEI and establishes DEI goals both for the association and its members. In this article, Bates takes a closer look at these recent developments and what it means for your firm and clients."

***CFPB Should Disregard Professor Sovern's Advice to Try to Regulate Arbitration (Again)*, Ballard Spahr LLP Blog (Oct. 4, 2021)**: "In a recent 'open letter' to newly confirmed CFPB Director Rohit Chopra, Professor Jeff Sovern asks the agency not to forget about 'arbitration' as it implements its regulatory agenda. He argues that '[p]re-dispute arbitration clauses remain a serious limit on consumer protection' and can even 'blow up their lives.' That's poor advice, Professor Sovern, and hyperbole is no substitute for facts. The CFPB's earlier attempt to regulate consumer arbitration took five years and was ultimately unsuccessful, in large part because its 728-page empirical study of consumer arbitration, completed in March 2015, showed that arbitration is faster and less expensive than class action litigation and results in greater recoveries for consumers. In particular, the CFPB found, consumers who prevailed in an individual arbitration recovered an average of $5,389, and the entire arbitration process was concluded in an average of 2-7 months. By contrast, consumers who received cash payments in class action settlements got a paltry $32.35 on average after waiting for up to two years, while their lawyers recovered a staggering $424,495,451. The CFPB further concluded that arbitration is not per se harmful to consumers or the general public, and it has even encouraged its own employees to use alternative dispute resolution to resolve workplace disputes because it provides 'faster and less contentious results' as well as 'confidentiality.'"

***Morgan Stanley FA Wins Expungement of 20-Year-Old Customer Disputes*, Financial Advisor IQ (Oct. 5, 2021):** "A Financial Industry Regulatory Authority public arbitrator has given the green light for the expungement of several customer disputes from a Morgan Stanley financial advisor's record…. The sole public arbitrator, Jane Carney, wrote that [broker] was no longer employed with B. Riley when the settlements were made, wasn't included in the settlement discussions, didn't have access to the settlement agreements and didn't contribute to the settlements. [] Carney relied on a 1999 letter from the in-house attorney for Morgan Stanley to the New York Stock Exchange, a July 2021 letter of affirmation by the in-house attorney for Morgan Stanley and notes and recorded testimony from [broker], according to the award document."

***Trouble With a Broker? Don't Assume a Payout Is Coming*, MoneyTalksNews (Oct. 5, 2021)**: "If you believe your broker or brokerage firm has harmed you financially, don't automatically expect to be compensated — even if you are granted an arbitration award,

according to a new report from a bar association whose members represent claimants.[] Around 30% of arbitration awards from rulings by the Financial Industry Regulatory Authority (FINRA) were unpaid in 2020, the Public Investors Advocate Bar Association (PIABA) says."

The End of Forced Arbitration? **American Prospect (Oct. 6)**: "It sounds like a scene from an out-of-touch political miniseries, but over the summer, six lawmakers -- from both parties and both houses of Congress -- introduced a bill seeking to prevent companies from forcing arbitration of sexual harassment and assault claims.[] It was the latest in a string of developments that has several veterans in the arbitration field wondering if the tide finally has turned in favor of Americans who have lost their rights to take employment, investment, and consumer claims to court after they sign take-it-or-leave-it arbitration agreements.[] With a newfound movement of sexual harassment and discrimination victims, advocates, and innovative legal experts forcing the issue, several high-profile tech companies have dropped their requirement that sexual harassment cases be heard behind closed doors. Amazon even ended arbitration for customer complaints. And numerous legislative and administrative efforts are pushing to go even further."

Schwab Requires All RIA Clients To Get Expansive $1 Million E&O Policy**, Financial Advisor Magazine (Oct. 7, 2021)**: "Advisors using Schwab as a custodian will now be required to show proof that they have a $1 million errors & omissions (E&O) insurance policy, according to an email the financial services giant sent out yesterday. 'Each firm needs to have an aggregate minimum of at least $1 million of coverage,' said Schwab, adding that the firm has seen 'an uptick in risks' [] The Schwab directive also requires advisors to obtain and maintain coverage for 'social engineering, theft by hacker incidents, and theft by employee (if applicable),' according to a copy of the email obtained by *Financial Advisor* magazine."
return to top

DID YOU KNOW?

GEORGE WASHINGTON'S WILL CALLED FOR ARBITRATION. ADR practitioners know that arbitration in the United States goes way back, but did you know that George Washington's Will (July 1799) provided for arbitration to resolve his heirs' disputes? Here's what it says: " I hope and trust that no disputes will arise concerning [my will]; but if, contrary to expectation, the case should be otherwise … my will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; -- two to be chosen by the disputants -- each having the choice of one -- and the third by those two -- which three men thus chosen, shall unfettered by Law, or legal constructions, declare their sense of the Testator's intention ... and shall be binding as if issued by the U.S. Supreme Court." (*ed: We're guessing that our first Chief Executive would today provide for "individuals" to serve as arbitrators.*)
return to top

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.*

Mail to: 194 Carlton Terrace, Teaneck, NJ 07666
T: 917-841-0521
Web: www.SecArbAlert.com
Blog: www.sacarbalert.com/blog/; Twitter: @SecArbAlert