SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2022-01 (1/13/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Full Year 2021 Back Issues of the *Alert* are Now Live on Our Website**

WE ARE WE ARE BACK: SO MUCH HAPPENING, INCLUDING A NEW FEATURE ARTICLE! *We are back after a two-week year-end break, and the news, court decisions, articles, and Awards have been piling up in our absence. So, this issue is a bit heftier than usual. For those who missed it during the holiday rush, we wrapped up 2021 with a new feature article,* After a Lull in 2021, a Busy Year Ahead Arbitration-wise for SCOTUS, *by the* Alert*'s publisher and Editor-in-Chief, George Friedman. In it, he reviews the four arbitration-centric cases the Supreme Court has decided to review this Term – a first – as well as a fifth case where oral argument has been concluded and a decision is pending. Also, during our break we posted all 2021 back issues of the* Alert*. And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the* Alert*!*
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SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTS STATS THROUGH NOVEMBER: OVERALL ARBITRATION FILINGS CONTINUE TO DECLINE, BUT MEDIATIONS ARE STILL SKYROCKETING. ***FINRA Dispute Resolution Services ("DRS") posted case statistics through the end of November, with overall arbitration case filing trends continuing from prior months, and with mediations continuing a meteoric rise***. In brief, the headlines are: 1) overall arbitration filings through **November** – 2,712 cases – are down 25% (they had been down a near-equal 26% in **October**); 2) cumulative customer claims remain down 5% from **2020**; 3) industry disputes remain way down at minus 47%; 4) for the fifteenth month in a row, pending arbitration cases declined; and 5) mediation cases continue to surge. Overall arbitration turnaround times were 15.3 months, with hearing cases now taking 17.8 months. Also, there are now 8,269 DRS arbitrators, 3,974 public and 4,295 non-public.

Speaking of Mediation

There were 562 mediation cases in agreement through November, a significant 49% increase over 2020 (and an improvement from October's already impressive plus 47%). With 49 mediations entered for November, this is the fourth month in a row with a significant increase in monthly and cumulative mediation filings. Recall that, as reported in SAA 2021-46 (Dec. 9), Director of Arbitration **Rick Berry** attributed the dramatic increase to: the return to in-person hearings; ending waiver of postponement fees for all cases (September 2021); comfort at being in person after inauguration of DRS's mandatory vaccination policy; growing use of Zoom for mediations; and the return of Mediation Settlement Month. The strong settlement rate also continues, with nine out of ten mediation cases (88%) continuing to result in a settlement.

Pending Cases Continue to Decline

For months after the pandemic's onset in March 2020, the pending cases stat built up to a high of 5,415 open cases in August 2020. The last fifteen months, however, have each experienced declines in pending cases, reflecting a 1,361-case reduction from last year's high water mark. Closed cases are up 18% this year, while pending cases are down 22%. Again, kudos to FINRA DRS for eliminating the backlog.

Checking in on Virtual Hearings
It's been a while since we reported on the virtual hearing stats. Cumulative FINRA "Virtual Arbitration Hearings" thru November: 589 arbitration cases have conducted one or more hearings via Zoom (243 customer cases and 346 industry cases). There were 467 total joint motions for virtual hearings (192 in customer cases and 275 in industry cases). While the **August 2, 2021** return of in-person hearings at FINRA DRS will continue to erode use of virtual hearings, we don't see this option ever going away entirely. Recall that our **January 2021** feature article, *A Funny Thing Happened on the Way to a Quiet Year in ADR: How a Pandemic Accelerated Profound, Lasting Changes,* predicted this development: "[V]ideo hearings are here to stay: Having been exposed to the time and money benefits of online ADR and video hearings, some participants will never return to traditional case administration or in-person hearings in every arbitration or mediation…. Not every case will be a Zoom candidate. We see a hybrid, with some cases remaining all-virtual (think smaller, single-arbitrator cases), and others having at least some arbitrators, counsel, or witnesses participating remotely, especially those in a high-risk group. Mind you, virtual hearings are not a panacea, and resistance in some quarters will persist ('I want to be there to see witness faces;' 'the case is too complicated;' 'I want to be sure the witness is not being coached'), but virtual hearings for at least parts of cases will eventually become the new normal."
*(ed: *Overall and hearing processing times have ticked up a bit the past few months. We again wonder if the resumption of in-person hearings in August is somehow linked to it, given that it is easier to schedule and attend virtual hearings than those conducted in-person. **For those readers wondering about the whereabouts of our usual quarterly analysis of the AAA's consumer stats, the 3Q 2021 stats were only recently posted. Given where we are in the calendar, we decided to wait for the year-end database to be posted.)*
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UPON FURTHER REVIEW, GOLDMAN SACHS SAYS IT'S STICKING WITH EMPLOYMENT ARBITRATION POLICY. ***Six months after agreeing to review its mandatory employment arbitration policy, Goldman Sachs concludes that arbitration is here to stay.*** We reported in SAA 2021-22 (Jun. 10) that Goldman Sachs was rethinking predispute arbitration agreement ("PDAA") use in the employment realm. Specifically, the firm on **June 4** announced that it was yielding to a shareholder proposal that it review the firm's employment arbitration policy. *Goldman Sachs Issues Statement on Arbitration Policy Review*, states: "We are appreciative of the dialogue we have had with our shareholders in recent months on the issue of employee arbitration. Providing our employees a safe and inclusive workplace that is free of discrimination and harassment is among our highest priorities. In consideration of the feedback we have received, as well as the results of the recent shareholder vote at our Annual Meeting, we believe it is appropriate to undertake a review to assess this issue comprehensively. We look forward to sharing further information with our shareholders once this review is completed." The review is now completed, and the five-page **December 2021** *Goldman Sachs' Report on Review of Arbitration Program* concludes that arbitration is the way to go.

Scope and Methodology
Goldman's Board retained Steptoe & Johnson LLP ("Steptoe"), to: advise on whether Goldman Sachs' arbitration program negatively impacts employees' ability to seek redress of discrimination or harassment and whether the confidential nature of arbitration proceedings increases the prevalence of workplace misconduct." Steptoe in turn engaged Professor **Samuel Estreicher**, Director of New York University School of Law's Center for Labor and Employment Law and Co-Director of the Institute of Judicial Administration, to assist. Steptoe and Prof. Estreicher: "conducted a comprehensive review of Goldman Sachs' arbitration program covering a period of approximately six years."

Findings: Arbitration Policy is Not Harmful …
Based on the review, the Board: "has determined that, for Goldman Sachs, arbitration remains the better way to resolve disputes between employees and the firm. Importantly, as described further below, the firm's review established that the general concerns raised about the use of arbitration agreements are not applicable to Goldman Sachs' arbitration program or experience." How so? Continues the *Report:* "There is no indication the current program is negatively impacting employees' ability to seek redress of alleged discrimination or harassment, or that it is increasing the prevalence of discrimination or harassment in the workplace. There also is no sign Goldman Sachs' arbitration program is in any way being used to cover up incidents of discrimination or harassment, protect perpetrators or encourage recidivism."

… But Changes are Coming
"Nevertheless, the firm takes seriously the shareholder concerns, which are genuine and strongly held. Accordingly, the Board has directed management to institute enhancements to the firm's arbitration program for the purpose of further increasing transparency and accountability including: (1) regular reporting to the Board on sexual harassment matters; (2) regular periodic assessments of the firm's arbitration program; and (3) waiving confidentiality of arbitration decisions on sexual harassment claims at the option of the employee." The *Report* offers this elaboration: "Namely, the General Counsel will report to the Board on any material complaints of sexual harassment. The firm also will undertake a periodic assessment of the arbitration program, which will include analyses of arbitration experiences and litigations brought by employees since the December 2021 prior review, as well as a report to the Board on the assessment, and recommendations of program enhancements, or a recommendation to change the program if warranted. Finally, while the firm believes that the confidentiality of arbitration proceedings benefits all parties, employees who assert a claim of sexual harassment in an arbitration will have the option to waive confidentiality as to the arbitration decision on the claim in the event it will not already be made public under the applicable forum rules" (footnotes omitted).
*(ed: *Kudos to Goldman for following through on its commitment to evaluate its employment arbitration policies and to share the results. **The waiver of confidentiality aspect is interesting.)*
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IS YET ANOTHER *CERT.* GRANT IN THE OFFING? ***With four arbitration-centric cases already slated for review this Term, and one*** **Certiorari** ***Petition awaiting imminent disposition, is SCOTUS about to take up yet another arbitration-related case? Stay tuned.*** As described in our recent feature article, *After a Lull in 2021, a Busy Year Ahead Arbitration-wise for SCOTUS*, 2021:48 SEC. ARB. ALERT 1 (Dec. 23, 2021), the Supreme Court is already set to review four cases involving arbitration, and other *Certiorari* Petitions are pending. We reported in SAA 2021-45 (Dec. 2) that a Petition for *Certiorari* was filed last **September** in *Certiorari* in *Branch Banking and Trust Company v. Sevier County Schools Federal Credit Union,* No. 21-365, presenting this question: "Whether the Federal Arbitration Act displaces a state common-law rule forbidding companies from adding an arbitration requirement to their standard form contract with customers unless the contract already includes a dispute-resolution clause." We covered the case below in SAA 2021-16 (Apr. 29), where a divided Sixth Circuit held in *Sevier County Schools Federal Credit Union v. Branch Banking & Trust Co.*, 990 F.3d 470 (6th Cir. Mar. 5, 2021), that, although the deposit agreement permitted the bank to make unilateral changes, adding an arbitration clause was not permissible. The majority found that: "the purported imposition of the arbitration provision would violate the common law's implied covenant of good faith and fair dealing." Judge **Griffin** dissented: "Because plaintiffs assented to this arbitration agreement, and because it is neither adhesive nor unconscionable …." The Petition was set for consideration at the Court's **January 7** conference, but alas the **January 10** Order List is devoid of any reference to the case.

Surprise! Here Comes Another One

As has been the Court's practice lately, arbitration-related cases seem to feature their own Miscellaneous Orders, and *Treppa v. Hengle,* No. 21A237 was no exception. What happened here? We covered in the "Quick Takes" section of SAA 2021-45 (Dec. 2) *Hengle v. Treppa*, No. 20-1062, 2021 WL 5312780 (4th Cir. Nov. 16, 2021). The Court's words tell the story; first, the facts: "The named plaintiffs in this case, all Virginia consumers, received short-term loans from online lenders affiliated with a federally recognized Native American tribe. Eventually the borrowers defaulted and brought a putative class action against tribal officials and two non-members affiliated with the tribal lenders to avoid repaying their debts, which they alleged violated Virginia and federal law. The defendants moved to compel arbitration under the terms of the loan agreements and to dismiss the complaint on various grounds." Next, the holdings: "The district court denied the motions to compel arbitration and, with one significant exception relevant here, denied the motions to dismiss. Four of those rulings are now before us in this interlocutory appeal. First, the district court found the arbitration provision unenforceable as a prospective waiver of the borrowers' federal rights. Second, the district court denied the tribal officials' motion to dismiss the claims against them on the ground of tribal sovereign immunity. Third, the district court held the loan agreements' choice of tribal law unenforceable as a violation of Virginia's strong public policy against unregulated lending of usurious loans. Fourth, the district court dismissed the federal claim against the tribal officials, ruling that the Racketeer Influenced and Corrupt Organizations Act (RICO) does not authorize private plaintiffs to sue for injunctive relief. For the reasons

explained below, we affirm all four rulings on appeal." So, the underlying lawsuit was back before the District Court, in *Hengle v. Asner,* No. 3:19-cv-00250-DJN (E.D. Va.).

No Stay Right Now

On **December 10** Treppa and the other lenders filed an Application for a Stay Pending the Filing and Distribution of a Petition for a Writ of *Certiorari.* The Petitioners promise that a *Certiorari* Petition will soon be filed and assume that the Court will grant it: "As it has done in similar cases, the Court should grant a stay because it is likely to grant certiorari to resolve this circuit conflict and reverse the Fourth Circuit's opinion. See *Henry Schein, Inc. v. Archer & White Sales, Inc*., No. 19A766; *Henry Schein, Inc. v. Archer & White Sales, Inc*., No. 17A859.... The Court is also likely to reverse the Fourth Circuit. *Henry Schein* and *Rent-A-Center* establish that delegation clauses must be enforced, unless the opponent of arbitration can show that the delegation clause specifically is defective. Although the Fourth Circuit nominally applied this principle, it sapped it of any real force by permitting a disputed interpretation of a general choice-of-law provision to override the delegation clause...." The Petitioners' irreparable injury argument asserted that: "Applicants would be forced to engage in costly litigation procedures -- including class action discovery -- that arbitration streamlines to the benefit of all parties. This Court has granted stays for this precise reason before and it should do the same here." In a **January 10** Miscellaneous Order, the Court states: "The application for stay presented to The Chief Justice and by him referred to the Court is denied." *(ed: *We're not sure how to read the Court's action here. As usual, there's no explanation. Time will tell. **We'll keep tracking* Branch Bank. ****We notice that the Court will be issuing decisions on January 13. Wonder if one of them will be* Badgerow v. Walters*, No. 20-1143,which was argued November 2021. Recall that the Court reviewed* Badgerow v. Walters*, 975 F.3d 469 (5th Cir. 2020), a case we analyzed in SAA 2020-36 (Sep. 23). In the underlying case, the Fifth Circuit held that the District Court was correct when it applied the "look through" standard to determine that it could remove a state court action to vacate an Award. The issue identified for review in the granted Petition for* Certiorari*: "Whether federal courts have subject-matter jurisdiction to confirm or vacate an arbitration award under Sections 9 and 10 of the FAA where the only basis for jurisdiction is that the underlying dispute involved a federal question.")*

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ILLINOIS APPELLATE COURT CONFIRMS $11 MILLION DEFAMATION AWARD FOR U5 FILING. ***One of the dangers of arbitration is that the avenues for judicial review of an Award that goes disastrously against you are limited, a lesson UBS Financial Services Inc. recently learned the hard way. Another lesson it learned is that it could face serious damages for "defamatory" Form U5s***. UBS fired Mark Munizzi, a supervisory officer, and filed a Form U5 alleging that Mr. Munizzi: "failed to adequately supervise employees in association with the risks of an uncovered options strategy in employee and employee related accounts and … gave varied responses during the review." Mr. Munizzi filed an arbitration claim and the resulting Award, *Munizzi v. UBS Financial Services Inc.*, FINRA ID No. 18-02179 (Chicago, IL, Dec. 11, 2019), recommended expungement: "based on the defamatory nature of the information" and

awarded more than $11 million in compensatory and punitive damages, attorney fees and costs.

No Public Ground to Attack Non-Labor Awards
The Cook County Circuit Court confirmed the award and rejected UBS' petition to vacate. UBS appealed to the First District Court of Appeals, which affirms in *Munizzi v. UBS Financial Services Inc.*, No. 19 CH 14398, 2021 IL App (1st) 201237 (Ill. App. Ct, 1st Dist., Nov. 19, 2021). UBS had argued that: 1) the arbitration award contravenes a public policy in favor of protecting the investing public through U5 disclosures; 2) the arbitrators' findings contradicted the undisputed facts of the case; and 3) the award of punitive damages was excessive and against public policy. The Illinois Arbitration Act, the Court finds, only permits vacating an arbitration award for violating a public policy in collective bargaining contexts, which doesn't apply here.

And There's Insufficient Proof, Anyway
Moreover, even if the public policy exception did apply, the Court explains: "The arbitration panel recommended the expungement of the reason for termination and termination explanation on the form U5 'based on the defamatory nature of the information.'… Thus, the arbitration award reflects that the arbitration panel found that UBS made false statements about Mr. Munizzi. Therefore, the disclosures on the form U5 were neither 'frank' nor 'accurate.' There is no public policy favoring false or defamatory disclosures by employers." In response to the other two arguments, the Court states: "UBS has forfeited any argument that the arbitrators' factual findings were not supported by the record because UBS failed to supply this court with a complete record of the arbitration hearing…. The arbitrators' statement in this case that the punitive damages were awarded pursuant to *Republic Tobacco Co. v. N. Alt. Trading Co.*, 381 F.3d 717 (7th Cir. 2004), reflects the arbitrators' understanding that punitive damages are available when there is proof of actual malice and defeats UBS's argument that the arbitrators failed to find such proof in the case before them."
*(ed: *The phrase "based on the defamatory nature of the information" is a "boiler plate" phrase that appears in many U5 reformation awards because using this language authorizes FINRA to execute the reformation without the need for a court order. It's not necessarily intended to be a finding that the reformation is the result of intentional falsity, although the word "defamatory" can be so interpreted. **We can provide the aforementioned documents to interested subscribers upon request. Email us at Help@SecArbAlert.com. *** This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net. ****We will continue to track this case, and if the Illinois Supreme Court renders an opinion, we will report it to you.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

COMMISSIONER ROISMAN TO DEPART SEC IN JANUARY. SEC Commissioner **Elad L. Roisman** (Republican) announced on **December 20** that he will be leaving the SEC at the end of **January.** His statement says: "Today, I sent a letter to President Biden, informing him that I intend to resign my position by the end of January. Serving the American people as a Commissioner and an Acting Chairman of this agency has been the greatest privilege of my professional life. It has been the utmost honor to work alongside my extraordinary SEC colleagues, who care deeply about investors and our markets. Over the next several weeks, I remain committed to working with my fellow Commissioners and the SEC's incredible staff to further our mission of protecting investors, maintaining fair, orderly, and efficient markets, and facilitating capital formation." Mr. Roisman has been a Commissioner since **2018** and is former Chief Counsel of the Senate Banking Committee. The remaining Commissioners on the roster are: **Gary Gensler** (Chair); **Caroline Crenshaw** (Democrat); **Allison Herren Lee** (Democrat); and **Hester M. Peirce** (Republican).
*(ed: *Chair Gensler also issued a statement that added: "While we didn't always agree on policy matters, I've come to rely on his judgment and expertise, and I have enjoyed a positive working relationship with him." **No word yet on possible replacements.)*
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FINAL, ENACTED *NATIONAL DEFENSE AUTHORIZATION ACT* DROPS ANTI-ARBITRATION PROVISIONS. The *National Defense Authorization Act* ("*NDAA*") for FY 2022 does not contain anti-arbitration provisions that had appeared in earlier House versions. S. 1605, which was signed into law by **President Biden** on **December 27** dropped House language enhancing restrictions on arbitration contained in both the *Servicemembers Civil Relief Act* ("*SCRA*"), and the *Military Lending Act* ("*MLA*"). The latter is a George W. Bush-era statute that, among other things, bans use or enforcement of mandatory predispute arbitration agreements ("PDAA") in certain loans made to active-duty military. The now-dropped language would have amended this aspect of the *MLA* to include loans made before active duty commenced. The *SCRA* protects active-duty servicemembers from a wide range of adverse civil legal proceedings. The omitted verbiage would have provided: "whenever a contract with a servicemember, or a servicemember and the servicemember's spouse jointly, provides for the use of arbitration to resolve a controversy subject to a provision of this Act and arising out of or relating to such contract, arbitration may be used to settle such controversy only if, after such controversy arises, all parties to such controversy consent in writing to use arbitration to settle such controversy."
(ed: We don't expect this is the end of the effort. The fight to limit PDAA use involving servicemembers will now shift to efforts to amend these statutes or the FAA or both.)
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ANOTHER "NEVER MIND" AT SCOTUS, AS PARTIES DISMISS A *CERTIORARI* PETITION SET FOR CONFERENCE. Our readers know all about *Servotronics, Inc. v. Rolls-Royce PLC and the Boeing Company*, No. 20-794. As we reported in SAA 2021-34 (Sep. 9), just a month out from the scheduled **October 5** oral

argument, Servotronics notified the Supreme Court that the parties were dismissing the Petition for *Certiorari*. The Court in **March 2021** had agreed to resolve a major Circuit Court 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. As Yogi Berra would say, it's déjà vu all over again as the parties in *HRB Tax Group v. Snarr*, No. 20-1570, on **December 9** notified the Court that they had stipulated to dismiss the previously-filed *Certiorari* Petition just a day before the case was set for review at the Court's **December 10** conference. The question presented was: "… whether California's public-policy rule declining to enforce agreements for individualized arbitration whenever a plaintiff seeks a public injunction is preempted by the FAA." The Petition had sought review of *Snarr v. HRB Tax Group*, No. 19-17441 (9th Cir. 2020), a case involving a challenge to the validity of California's so-called *McGill* Rule – which denies enforcement of a contractual provision that waives the right to public injunctive relief.
*(ed: *No reason for the withdrawal was given. **20 U.S.C. § 1782 is back before SCOTUS. As reported in SAA 2021-47 (Dec. 16), the Court in a December 10 Miscellaneous Order granted* Certiorari in two cases, ZF Automotive US, Inc. v. Luxshare, Ltd., *No. 21-401*, and AlixPartners LLP v. The Fund for Protection of Investors' Rights in Foreign States, *No. 21-518, and immediately consolidated them.)*
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NINTH CIRCUIT AGAIN GOES WITH THE FLOW ON FAA SECTION 1 AND INTERSTATE COMMERCE, BUT SOUTHWEST *CERT*. GRANT WILL ULTIMATELY RESOLVE THE ISSUE. Federal Arbitration Act ("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 *New Prime, Inc. v. Oliveira*, 139 S. Ct. 532 (2019), SCOTUS held unanimously that the FAA exempts from coverage independent contractors – i.e., not just "employees" – engaged in interstate commerce. As we have reported many times, though, there is a clear Circuit Court split on whether the FAA section 1 exemption embraces only workers actually moving goods or people in interstate commerce (Fifth, Seventh, and Eleventh Circuits) or is to be construed more broadly to cover those who are part of the "flow" or "stream" of interstate commerce (First and Ninth Circuits). Remaining consistent, a unanimous Ninth Circuit sticks to the "stream" or "flow" of interstate commerce doctrine in *Carmona v. Domino's Pizza, LLC*, No. 21-55009 (9th Cir. Dec. 23, 2021). What were the facts? Says the Opinion: "Domino's sells pizza to the public primarily through franchisees. Domino's buys various goods, such as mushrooms, that are used by its franchisees in making pizzas, from suppliers outside of California. Those goods are then delivered by third parties to the Domino's Southern California Supply Chain Center ('Supply Center'). At the Supply Center, Domino's employees reapportion, weigh, package, and otherwise prepare the goods to be sent to franchisees. Domino's franchisees in Southern California order the goods either online or by calling the Supply Center, and the plaintiff drivers ('D&S drivers'), who are employees of Domino's, then deliver the goods to the franchisees." Crossing state lines was not part of the drivers' job.

(ed: As reported in SAA 2021-47 (Dec. 16), SCOTUS in a December 10 Miscellaneous Order granted Certiorari *in* Southwest Airlines Co. v. Saxon, *No. 21-309. The question presented in the August 23 Petition is: "Whether workers who load or unload goods from vehicles that travel in interstate commerce, but do not physically transport such goods themselves, are interstate 'transportation workers' exempt from the Federal Arbitration Act." In the case below,* Saxon v. Southwest Airlines Co.*, 993 F.3d 492 (7th Cir. Mar. 31, 2021),* motion to stay mandate den. *(Apr. 23, 2021), the worker was: "a ramp supervisor who manages and assists workers loading and unloading airplane cargo for Southwest Airlines Company.")*
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FINRA ARBITRATION IS CONDUCTED AS A DEFAULT PROCEEDING, BROKER DOESN'T APPEAR, BUT CUSTOMER LOSES. *Customer Code of Arbitration Procedure* Rule 12801 provides: "A claimant may request default proceedings against any respondent that falls within one of the following categories and fails to file an answer within the time provided by the Code: (1) A member whose membership has been terminated, suspended, canceled, or revoked; (2) A member that has been expelled or barred from FINRA; (3) A member that is otherwise defunct; or; (4) An associated person whose registration is revoked, cancelled, or suspended, who has been expelled or barred from FINRA, or whose registration has been terminated, regardless of the number of days since termination." The arbitration underlying *Caswell v. Fawcett*, FINRA ID No. 21-02302 (Des Moines, IA, Dec. 1, 2021), proceeded under Rule 12801 (the Respondent-broker had been barred by FINRA, according to his BrokerCheck Report), after the sole Public Arbitrator determined that Respondent: "was served with the Claim Notification letter dated April 5, 2021 by regular mail and FedEx mail, as evidenced by the FedEx tracking information available online, and the Overdue Notice (including the Statement of Claim) dated May 26, 2021 by regular and Fed Ex mail, as evidenced by the Fed Ex tracking information available online. The Claim Notification letter notified Respondent that FINRA rules require parties to use the online DR Portal on a mandatory basis (except prose investors) and that failure to register for the DR Portal will prevent the submission of pleadings, selection of arbitrators, and receipt of notification relating to case information and deadlines. Respondent failed to register for the DR Portal." The broker made no appearance. Despite all this, the Arbitrator denies without explanation the customer's claims: "related to Claimant's allegation that Respondent failed to adhere to basic duties when opening, administering, and supervising Claimant's brokerage accounts."
(ed: Here's a proposal: the Customer Code *should be amended to require a brief explanation from the Arbitrator in these circumstances.)*
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REMINDER: ANNUAL CITY BAR ASSOCIATION'S SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 9. Reminder: as reported in SAA 2021-48 (Dec. 23), the Association of the Bar of the City of New York will be holding its *10th Annual Securities & Enforcement Institute* via live Webcast on **February 9**. Sign up here. The program description states: "Currently, one of the most important and

interesting areas of securities related activity is a discussion of what is likely to result from the change of administration from Jay Clayton as head of the SEC to **Gary Gensler**. Our keynote speaker will be **Steven Peiken**, the former Co-Head of Enforcement of the SEC in the prior administration, who will discuss his reaction to Mr. Gensler's announced agenda." Returning as Co-chairs are **Brad S. Karp**, Paul, Weiss, Rifkind, Wharton & Garrison LLP, and **Gregory A. Markel**, Seyfarth Shaw LLP. Rounding out the faculty are: **George Canellos**, former Co-Director of the SEC's Division of Enforcement; **Ray DiCamillo**; Professor **Joseph Grundfest**; **Kevin LaCroix**, editor and author of the *D&O Diary*; **Laura Posner**, Chair of the Association's Securities Litigation Committee; **Leo Strine**, former Chief Justice of the Supreme Court of Delaware; and **Sanjay Wadhwa**, Deputy SEC Head of Enforcement. The program offers CLE credit from California, Connecticut, New Jersey, New York, and Pennsylvania.
*(ed: *Last year, this program was delivered via two half-day Webinars. **Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)*
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DEADLINES COMING UP FOR TWO CPR AWARDS. Deadlines are fast approaching for two awards bestowed by CPR. Applications for the *James F. Henry Award* are due Tuesday, **January 18**. The *Award*: "named for CPR's founder, recognizes outstanding achievement by individuals for distinguished, sustained contributions to the field of ADR. Candidates will be evaluated for leadership, innovation and sustaining commitment to the field." Submissions for the *Award for Outstanding Contribution to Diversity in ADR* are due Friday, **January 21**. This award: "recognizes a person or organization who has contributed significantly to diversity in the alternative dispute resolution field." Submissions are: "reviewed by a panel consisting of past winners, along with CPR's Co-Chairs of the National Task Force on Diversity and CPR's President." The winners of both awards will be announced at CPR's Annual Meeting on **March 2**.
(ed: Nominations for either award, which should be in PDF or Word format, should be sent by email to Helena Tavares Erickson, Esq., SVP, Dispute Resolution Services & Corporate Secretary, at: herickson@cpradr.org. Include a cover letter with the applicant's name, address, telephone and fax number, and email address.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Ahlstrom v. DHI Mortgage Co.*, No. 20-15114 (9th Cir. Dec. 29, 2021)**: "The panel held that it is well-established that some 'gateway' issues pertaining to an arbitration agreement, such as issues of validity and arbitrability, can be delegated to an arbitrator by agreement. Agreeing with other circuits, the panel held, however, that parties may not agree to delegate issues of formation to an arbitrator. []The panel further held that the MAA did not constitute a properly formed agreement between the plaintiff and D.R. Horton, with which the plaintiff had no employment relationship. The panel concluded that the MAA, as drafted, described a relationship between the plaintiff and D.R. Horton that did not exist, and thus did not constitute a properly formed agreement to arbitrate" (*ed: excerpted from the Court's summary).*

***Duncan v. International Markets Live, Inc*., No. 20-3392 (11th Cir. Dec. 10, 2021) (*per curiam*)**: "Viewing the record in the light most favorable to Duncan, the district court found that material facts remain in dispute as to whether the parties agreed to arbitrate.[] The next step should have been to hold a trial. See 9 U.S.C. § 4…. Because [FAA] § 4 mandates that a trial be held to determine whether the parties entered a valid arbitration agreement, we remand this matter to the district court for further proceedings. See *Jin [v. Parsons Corp.]*, 966 F.3d at 827 (explaining that the arbitrability of a dispute is a 'gateway' issue and that 'the parties are entitled to have the correct venue—court or arbitration—established at the outset')."

***Consumer Financial Protection Bureau v. The National Collegiate Master Student Loan Trusts*, No. 1:17-cv-01323-SB (D. Del. Dec. 13, 2021)**: "Sometimes litigation is a moving target. Legal rules can change while the parties are battling it out. Earlier this year, the National Collegiate Student Loan Trusts successfully argued that the Consumer Financial Protection Bureau's suit against them was untimely. This Court dismissed the case without prejudice, relying on then prevailing precedent. But then the Supreme Court announced a new rule. And the CFPB renewed its suit. Applying the new rule, at least on the complaint before me, this case is timely. Plus, the Trusts say the CFPB lacks authority to sue them because they are not 'covered persons' under the Consumer Financial Protection Act. But they 'engaged in' servicing loans and collecting debt through their contractors, so they fall within the statute. I must thus let the CFPB's case proceed."

***Garcia v. Expert Staffing West*, No. B307371 (Calif. Ct. App. 2 Dec. 29, 2021)**: "Respondent Roseana Garcia had an employment agreement with her former employers, appellants Essential Seasons and Cool-Pak, LLC. The agreement did not include an arbitration clause. After that employment ended, Garcia applied for work with appellant Expert Staffing West. As a part of her application for employment with Expert Staffing West, Garcia agreed to submit all disputes between them to arbitration. Her application was rejected.[] Garcia later joined an existing class action for wage and hour violations against all three appellants. She based her claims on her prior employment by Essential Seasons and Cool-Pak. The issue presented here is whether the arbitration agreement between Garcia and Expert Staffing West applies to disputes arising between Garcia and her former employers. We conclude that the arbitration clause between a job applicant and her prospective employer does not apply to disputes between the applicant and her former employers based on the existence of a business relationship between the prospective employer and the applicant's past employers." *(ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Drummond v. Bonaventure of Lacey*, No. 54273-1-II (Wash. Ct. App. II Dec. 14, 2021)**: "Bonaventure argues that the trial court erred when it concluded that RCW 70.129.105 prohibited Bonaventure's arbitration agreement with Raymond and when it denied Bonaventure's motion to stay the beneficiaries' claim. The Estate responds that the arbitration agreement was prohibited because RCW 70.129.105 prohibits assisted

living facilities from requesting that a resident waive a right set forth in chapter 70.129 RCW, and the right to a jury trial is set forth in RCW 70.129.005. We conclude that RCW 70.129.005 does not set forth the right to a jury trial and therefore cannot be used as grounds to argue that RCW 70.129.105 prohibits Bonaventure's arbitration agreement with Raymond.… [Also], the Estate asks us to adopt an interpretation of the statute that would create a preemption problem under the FAA and *Kindred*, which would in turn violate the supremacy clause. If there is an alternative, we cannot choose an interpretation that renders a statute unconstitutional" (footnotes omitted; links added).

***Cohen v. Prudential Investment Management Services LLC*, FINRA ID No. 20-04071 (New York, NY, Nov. 24, 2021)**: A Majority-Public Panel explains why it has decided to deny a broker's request for reformation of his Form U5 record, finding that the information listed was not inaccurate, misleading, or defamatory in nature: "The Panel finds, and Claimant acknowledges, that the information he seeks to expunge is accurate. The Panel determined that the information is not misleading, nor is it defamatory or erroneous. The Panel also notes that the acts that led to Claimant's termination formed a pattern of repeated and regular behavior that ended only when he was confronted with it.... The Panel finds that it serves FINRA's purpose of maintaining the integrity of its reporting system for the benefit of the public to deny Claimant's request for expungement. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Abas v. Cetera Advisor Networks LLC*, FINRA ID No. 19-01231 (Los Angeles, CA, Dec. 1, 2021)**: A broker alleging that Respondent broker-dealer interfered with his book of business by blocking the transfer of his clients' investment accounts loses his case, is held liable for the amount due and owing on a promissory note, and is ordered to pay the Respondent broker-dealer $3,825 in monetary sanctions for discovery violations. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

S. Denis, M. L. Kozora, M. Li, and J. Sokobin, *The Selection of Claims in Securities Arbitration for Settlement: A Text-Based Analysis*, FINRA Office of the Chief Economist (Dec. 31, 2021): "This [59-page] paper develops text-based measures of case strength and similarity using Statements of Claims filed in securities arbitration concerning investments in Puerto Rico municipal bonds to predict arbitration outcomes. We find that stronger customer claims and claims more similar to previous claims are more likely to settle than result in an award. These claims are also associated with higher total customer payout, including both settlements and awards. Our findings offer unique insights into the role of settlements as an alternative method of dispute resolution, and the selection bias associated with claims which result in an award."

And from the summary: "Arbitration is an important way for customers to resolve securities disputes with industry parties. Our study suggests that securities arbitration helps facilitate settlements between parties and recompenses claimants based on the merits. For example, the ability of customers to evidence the liability of industry parties

positively relates to the payout they receive. In addition, parties are more likely to settle a claim and forego an award when it is more beneficial for the industry party to settle or the parties are better able to negotiate a settlement amount. In general, the findings also suggest that cases that settle may share different characteristics from those cases that instead result in an award. As all prior studies on securities arbitration concern cases that result in an award, our research suggests that inferences made from just those cases may be subject to a severe selection bias."

***The Chief Justice's 2021 Year-End Report*, U.S. Supreme Court (Jan. 3, 2022)**.

***Finra Arb Panel Denies $500K Claim Over UBS In-House Options Strategy*, Financial Advisor IQ (Jan. 4, 2022)**: "UBS has prevailed in yet another arbitration claim related to alleged unsuitability of one of its in-house investment strategies…. [T]he arbitrators also denied the Farrells' claims, writing that the YES investment 'was not unsuitable.' UBS' YES program has been the target of several arbitration claims. Arbitrators have gone both ways, In some cases ruling in favor of the company and dismissing the claims. Some panels, however, have ordered UBS to pay hundreds of thousands of dollars and denied the firm's expungement requests." See: *Farrell et al v. UBS Financial Services Inc*., FINRA ID No. 19-02728 (Dallas, TX, Dec. 30, 2021): "The claim, allegation, or information is factually impossible or clearly erroneous. The Panel has made the above Rule 2080 finding based on the following reasons: The investment was not unsuitable. It was adequately explained to the customer. There were no misrepresentations and there were no omissions that would have changed the outcome of the case."

***Credit Suisse Ordered to Pay $10M+ to Brokers Over Deferred Pay*, Financial Advisor IQ (Jan. 5, 2022)**: "A Financial Industry Regulatory Authority arbitration panel has ordered Credit Suisse to pay millions of dollars in a claim brought by several former brokers who accused the firm of breaching its obligation to them when it exited its U.S. brokerage business in 2015…. In all, the brokers eventually sought between around $6.7 million and $6.4 million in compensatory damages, between $3.7 million and $4.0 million in interest and approximately $1.2 million in lawyers' fees, Finra says." See: *Prezzano et al v. Credit Suisse Securities (USA) LLC*, FINRA ID No. 19-02974 (Los Angeles, CA, Dec. 23, 2021).

***FINRA Panel Slams Credit Suisse for Failing to Pay Deferred Comp to Ex-Brokers*, ThinkAdvisor (Jan. 6, 2022)**: "A Financial Industry Regulatory Authority arbitration panel ruled that Credit Suisse must pay a group of seven former brokers of the firm a total of $5.2 million in compensatory damages, plus interest, legal fees and other costs.[] The company's ex-brokers had alleged the firm breached its obligations to them by not paying deferred compensation after Credit Suisse shut down its U.S. brokerage business in 2015.[] The FINRA panel, made up of two public arbitrators and one industry arbitrator, ordered the firm to pay, in addition to the compensatory damages, 10% interest on those damages for each year since their dates of departure from Credit Suisse in 2015.[] The firm must also pay $1.1 million in attorneys' fees, over $120,000 in hearing session fees, and $86,000 in other costs, according to the decision that was posted on

FINRA's website on Dec. 23." See: *Prezzano et al v. Credit Suisse Securities (USA) LLC*, FINRA ID No. 19-02974 (Los Angeles, CA, Dec. 23, 2021).

***SEC Awards Over $13 Million To Whistleblower*, www.sec.gov (Jan. 6, 2022**): "The Securities and Exchange Commission today announced an award of more than $13 million to a whistleblower whose information and assistance prompted the opening of an investigation and significantly contributed to the success of an SEC enforcement action.[] The whistleblower promptly alerted SEC staff to an ongoing fraud and provided extensive assistance to SEC staff by meeting in person and helping the staff understand the mechanics of the fraudulent scheme. The whistleblower's information also helped the Commission obtain emergency relief to minimize investor losses."
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DID YOU KNOW?

FULL YEAR 2021 BACK ISSUES OF THE *ALERT* ARE NOW LIVE ON OUR WEBSITE. During our end-of-year hiatus we posted back issues of the *Alert* for 2021. They are available free of charge here or at https://secarbalert.com/wp-content/uploads/2022/01/SAA-Back-Issues-2021-FULL-YEAR.pdf.
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