SECURITIES ARBITRATION ALERT 2022-05 (2/10/22)

George H. Friedman, Editor-in-Chief

SQUIBS:

SHORT BRIEFS:

QUICK TAKES:

ARTICLES OF INTEREST:

DID YOU KNOW?

SQUIBS: IN-DEPTH ANALYSIS

ANALYSIS: GEORGIA COURT VACATES FINRA AWARD ON SEVERAL BASES. ***Just as we were finalizing the last* Alert*, we learned that a Georgia Trial Court had vacated a FINRA Award based on multiple Federal Arbitration Act ("FAA") grounds. Here is the promised expanded analysis.*** We reported briefly on this one in SAA 2022-04 (Feb. 3), focusing mostly on the assertions that the potential arbitrator list preparation process had been compromised. Our coverage included: 1) PIABA's **February 2** Statement from President **Mike Edmiston** commenting on the

court decision and calling for Congress and the SEC to investigate FINRA's operation of its arbitration forum; and 2) FINRA's response that: "There has never been any agreement between FINRA Dispute Resolution Services and attorney Terry Weiss regarding appointment of arbitrators. Any assertions to that effect are false." This week we focus on the broader aspects of the case.

Award and Attempt to Vacate

We covered in SAA 2019-30 (Aug. 7) the underlying Award in *Leggett v. Wells Fargo Clearing Services, LLC*, FINRA ID No. 17-01077 (Atlanta, GA, Aug. 1, 2019), where the All-Public Panel: 1) denied the investors' $1.2 million claim; 2) assessed $51,000 in costs and all forum fees against the investors; and 3) recommended expungement (more on that part of the Award later). The investors moved to vacate in **October 2019**, asserting several acts of party, arbitrator and FINRA arbitration forum misconduct (*ed: repeated essentially* verbatim; *footnotes omitted; emphasis in original*):

First, Wells Fargo rigged the arbitrator selection process in direct violation of the FINRA Code of Arbitration Procedure, denying the Investors' of their contractual right to a neutral, computer generated list of potential arbitrators…. Rather than ranking and striking pursuant to the Code, on July 10, 2017, counsel for Wells Fargo submitted a letter to FINRA insisting that one of the proposed arbitrators on the list of potential arbitrators be removed from the computer generated list on the ground that he harbored personal bias against Wells Fargo' s lead counsel.

Second, the Arbitrators are guilty of misconduct for denying the Investors' request to postpone the hearing after Wells Fargo dumped thousands of pages of relevant documents on the eve of the hearing, well beyond the timeframe required by the FINRA Code of Arbitration Procedure and scheduling orders set forth by the Arbitrators. The Arbitrators provided no reasoning for their refusal to grant the Investors' request.

Third, the Arbitrators are guilty of misconduct for denying the Investors their statutory right to present testimony from their current stockbroker and cross-examine Wells Fargo's expert witness. At the hearing, Wells Fargo introduced evidence and elicited testimony relating to the Investors' investments and investment making decisions after they moved their accounts from Wells Fargo to Schwab. The Investors requested the Arbitrators hear evidence from the Investors' new stockbroker at Schwab after the Arbitrators permitted Wells Fargo to introduce testimony and documents pertaining to those accounts, and the witness indicated he was available to testify. Despite this, the Arbitrators refused to allow this witness to testify. The Arbitrators did permit Wells Fargo, on the other hand, to present an expert witness by telephone at the last minute who was never identified as a potential witness. Were this not enough, the Arbitrators severely restricted the cross examination of the expert, thus refusing to permit counsel for the Investors to fully cross-examine this surprise witness in violation of their statutory right to present evidence.

Fourth, Wells Fargo committed fraud on the arbitration panel by procuring perjured testimony, intentionally misrepresenting the record, and hiding and refusing to turn over a key document to the Investors until after the close of evidence.

Fifth, the Arbitrators exceeded their powers and manifestly disregarded the law by (1) awarding Wells Fargo $51,000.00 in costs in violation of FINRA's Code of Arbitration Procedure; and (2) purporting to impose hearing session fees against the Investors that far exceeded the hearing session fees permitted under the FINRA Code of Arbitration Procedure.

The Court Essentially Agrees

Fulton County Superior Court Judge **Belinda E. Edwards** vacates the Award in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022). In what might be considered a primer on the basic FAA grounds for vacating an award (i.e., fraud, arbitrator bias, arbitrator misconduct in not hearing relevant or material evidence or failing to grant a reasonable postponement request; or the panel exceeding authority), Judge Edwards writes:

> "Judicial review of arbitration awards, while limited in nature, ensure that the arbitration process is fundamentally fair to all parties involved. In this case (1) Wells Fargo and its counsel manipulated the arbitrator selection process; (2) the Arbitrators refused to postpone the hearing and provided no basis for their decision despite the Investors providing ample cause for postponement; (3) the Arbitrators denied the Investors their statutory right to present testimony from two relevant, noncumulative witnesses; (4) Wells Fargo witnesses and its counsel introduced perjured testimony, intentionally misrepresented the record, and refused to turn over a key document until after the close of evidence; and (5) the Arbitrators improperly and without legal justification imposed costs and fees on the Investors in violation of the contractual framework that bound the parties. The Court finds that each of these violations provides separate, independent grounds to vacate the Award in its entirety."

It Gets Curiouser and Curiouser

With apologies to Lewis Carroll and Alice, it appears that the brokers involved in the *Leggett* arbitration filed a separate – successful – petition in New York Supreme Court to confirm this same arbitration award and get the matter expunged from their CRD records. See *Pickett v. FINRA*, 2019 NY MISC Lexis 6582 (Sup. Ct., NY Cty). Your Publisher and Editor-in-Chief has been involved in the ADR world for decades, but he's never seen one quite like this. SAA Editorial Advisory Board member David E. Robbins of Kaufmann Gildin & Robbins LLP said: "I have analyzed court decisions on motions to vacate arbitration Awards for over 30 years and have never, ever read one like this, which was summarized by the court [see above]."

*(ed: *The New York State Supreme Court is a court of original jurisdiction. **Again, we wonder whether the Court sought input from FINRA. ***We reported last week that FINRA denied the allegations of a secret, unwritten understanding. Recent media reports say Well Fargo has done the same, and intends to appeal. ****Regarding proposed*

arbitrator lists compiled by the Neutral List Selection System, we've always been advocates of: "If you don't like 'em, strike 'em.")
return to top

PARTY FILES *CERTIORARI* REQUEST ON PREJUDICE REQUIREMENT FOR ARBITRATION RIGHTS WAIVER, BUT ASKS SCOTUS TO HOLD UP GRANTING IT PENDING OUTCOME OF *MORGAN V. SUNDANCE*. *With SCOTUS already set to review whether there must be a finding of prejudice to sustain a claim that the opposing party has waived its arbitration rights, a challenger in a case with similar facts has filed a Petition seeking* Certiorari *but asking the Court to hold the case in abeyance pending the outcome of the first case.* We reported in SAA 2021-43 (Nov. 18) that SCOTUS on **November 15** agreed to review *Morgan v. Sundance Inc*., 992 F.3d 711 (8th Cir. Mar. 30, 2021). The question presented in the **August 27** Petition for *Certiorari* in *Morgan v. Sundance, Inc*., No. 21-328, is: "Does the arbitration-specific requirement that the proponent of a contractual waiver defense prove prejudice violate this Court's instruction that lower courts must 'place arbitration agreements on an equal footing with other contracts?' [in] *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011)." The Petition notes that there is a multi-faceted split on the issue: "This Court should grant certiorari to resolve a longstanding circuit split on the question whether a party asserting waiver of the right to arbitrate through inconsistent litigation conduct must prove prejudice, and if so, how much. This question not only divides the federal courts of appeals, but divides federal courts from geographically co-located state courts of last resort …"

***Cert.* Sought in Similar Case …**
The Petition filed **January 18** in *International Energy Ventures Management, L.L.C., Petitioner v. United Energy Group, Ltd*. No. 21-1028, seeks review of *International Energy Ventures Management, L.L.C. v. United Energy Group, Limited*, 999 F.3d 257 (5th Cir. May 28, 2021). What happened below? Says the Petition: "The district court in this case found, as a factual matter, that Respondent did not suffer prejudice from Petitioner's failure to immediately press its right to arbitration. The court of appeals reversed. But instead of finding the district court committed clear error (the standard of review for factual findings) it simply announced that the district court's factual findings were due no deference, and that Respondent had suffered prejudice."

… But Let's Wait and See
Noting that resolution of the core issue will be impacted by SCOTUS' decision in *Morgan*, the Petitioner asks the Court to defer ruling on its *Cert*. application: "This Court is currently considering *Morgan v. Sundance*, No. 21-328, on the merits. That case squarely presents whether prejudice is part of the test for litigation conduct waiver in the context of an arbitration clause. Should the Court hold this petition pending the disposition of *Morgan*, and then grant, vacate, and remand in light of the standards for prejudice announced in that case?"

Sound Familiar?
Recall that we reported in SAA 2022-02 (Jan. 20) on a similar situation, where the parties in *Uber Technologies, Inc. v. Gregg*, No. 21-453 agreed to hold up on the pending *Certiorari* Petition. Specifically, Gregg filed a **January 10** request to delay, stating: "This case raises the question on which this Court granted certiorari on December 15, 2021, in *Viking River Cruises v. Moriana*, No. 20-1573, and the petition should be held pending the Court's disposition of that case. Specifically, both cases present the question whether the Federal Arbitration Act (FAA) preempts the California Supreme Court's holding in *Iskanian v. CLS Transportation Los Angeles, LLC*, 327 P.3d 129 (Cal. 2014), that the right to bring a representative action under California's Private Attorneys General Act, or PAGA, cannot be waived in a private agreement, including an arbitration agreement." And the **January 12** response from Uber: "Petitioners agree with Respondent that the Court should hold this petition pending resolution of *Viking River Cruises*. See Pet. 22 n.1 (stating that if this Court grants certiorari in *Viking River Cruises*, 'it should hold this petition until that action is resolved')."
*(ed: *We noticed that* Gregg *has been distributed for conference on February 18. We wonder whether SCOTUS will* sua sponte *follow our previous surmise and instead grant* Cert. *and consolidate the case with* Viking River*? Time will tell. **A response is due February 22 in* International Energy. *We're guessing the Respondents will agree.)*
return to top

AAA ARBITRATOR RESCINDS UNREGISTERED INVESTMENT. ***Most securities are required to be purchased through the services of FINRA member firms and their brokers or investment advisory firms and their agents. Thus, when a company sells securities to the investing public without going through them, it can result in rescission of the trade, as this AAA Award proves.*** The Award, *Glenn v. Legacy Energy*, AAA ID No. 01-20-0014-5763 (Jan. 7, 2022), was issued in an arbitration brought by disabled widow Darian Primrose Glenn against: 1) Legacy Energy, LLC ("Legacy"), from which she had purchased two promissory notes for a total of $346,000, purportedly used to finance oil and gas exploration; 2) Advantage Capital Holdings-1, LLC ("Advantage"), from which she purchased one promissory note for $100,000, purportedly used to finance commercial real estate operations; 3) two related companies that "played integral roles in the offer and sale of the promissory notes, Resolute Capital Partners, LLC ("Resolute") and Petro Rock Mineral Holdings, LLC ("Petro"); and 4) Gregory Minear ("Minear"), who "referred" Glenn to the companies.

The Arbitrator's Findings of Fact
Since the four respondent companies (collectively known as "the Entity Defendants" in the Award) did not present any witnesses, the sole Arbitrator relied on the testimony of Glenn, her son, and Minear, various exhibits introduced by the parties, and the pleadings and briefs of the parties. He found that: Minear: "was, in every meaningful, functional sense, a commissioned salesmen for the Entity Defendants, although he was unlicensed to sell securities" and "received no or virtually no training or supervision" in that role. Using a PowerPoint presentation provided by the Entity Defendants, Minear convinced Glenn to invest the bulk of her liquid assets in the promissory notes in 2018. Minear

filled out the application for Glenn, falsely representing that she was an accredited investor. She subsequently received a large packet of papers on the investments, which she never opened but handed over to a certified financial planner she consulted toward the end of the year. After that, Glenn demanded a refund of her investments, which the Entity Defendants refused.

The Arbitrator's Rulings on Liability

The Arbitrator finds that all of the promissory notes sold by Glenn: "were unlawful, unregistered securities under the Texas Securities Act, entitling Claimant to rescission, attorneys' fees and prejudgment interest…. [I]n addition to Legacy's liability for the first two notes and Advantage's liability under the third note, Resolute and Petro are jointly and several liable for all three notes as control persons, sellers, aider and abettors, co-conspirators and/or persons providing material assistance to the sales of securities." Finally, Minear: "undertook a duty to Claimant that he failed to faithfully fulfill. His false completion of her documents, specifically the investor questionnaires, placed Claimant into investments that were completely inappropriate for her circumstances. As a result of his breach of duty to Claimant, Minear was unjustly enriched in the amount of the commissions paid to him in connection with the sale of the three notes at issue herein." The Arbitrator also rejects the Entity Defendants' claim that Glenn's exclusive remedy under the note agreements is against Minear, because that limitation only applies to class actions and doesn't affect the statutory remedy under the Texas Securities Act; and because the agreements don't bind Glenn because she wasn't provided with them until after she made the investments. The Arbitrator declined to find the respondents liable for negligent and fraudulent misrepresentation or Minear liable for violation of the Texas Securities Act.

What Are the Damages?

In calculating the rescission damages for which the Entity Defendants are liable, the Arbitrator subtracts the income Glenn received from the amounts of her investments, plus prejudgment interest. As a result, the Arbitrator apportions the rescission damages to each Entity Defendant as follows: Legacy, $314,702; Advantage, $90,262; and Resolute and Petro, all $404,964. They are each liable for attorney fees equal to 30% of their share of rescission damages, and all four are liable for $10,995 in costs. Minear is separately liable for $32,915 in disgorgement damages. Glenn is entitled to recover $570,363 in all, plus $15,430 for reimbursement of forum costs incurred by Glenn.

*(*A SAA h/t to David Liebrader, Esq., The Law Offices of David Liebrader, Las Vegas, NV, who was Glenn's attorney, for alerting us to this Award. ** 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.)*

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

***ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT* PASSES HOUSE.** The House on **February 7** approved the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* by a bipartisan vote of 335-97. It has very good odds of enactment because ten Senate Republicans – enough to reach the 60-vote threshold – are cosponsors, and **President Biden** issued a statement stating he will sign the bill if it is passed by Congress. As reported in SAA 2021-29 (Aug. 5), the Act was reintroduced in the House (H.R. 4445 on **July 16** by Reps. **Cheri Bustos** (D-IL), and **Morgan Griffith** (R-VA)) and in the Senate (S. 2342 on **July 14** by Sens. **Kirsten Gillibrand** (D-NY) and **Lindsey Graham** (R-SC)). The bill would amend the Federal Arbitration Act to provide: "Notwithstanding any other provision of this title, at the election of the person alleging conduct constituting a sexual harassment dispute or sexual assault dispute, or the named representative of a class or in a collective action alleging such conduct, no predispute arbitration agreement or predispute joint-action waiver shall be valid or enforceable with respect to a case which is filed under Federal, Tribal, or State law" (see, e.g., the House text). Arbitrability issues are for the Court and if enacted the law would apply to: "any dispute or claim that arises or accrues on or after the date of enactment of this Act."
*(ed: *The next stop is the Senate, where leader Schumer promises a quick vote. **We continue to think that retroactive nullification of existing PDAAs invites legal challenges based on the Constitution's Takings Clause. ***We called this one; a past editorial comment said: "Although neither bill has many cosponsors right now, we continue to think these bipartisan bills have a really good shot at becoming law.")*
return to top

NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND. The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up-to-date on recent NFA initiatives, upcoming events, and resources that investors may find helpful. In the first *Newsletter* of **2022**, distributed under a summary email dated **January 25**, NFA lists several highlights which we explore in the order presented, excerpted essentially *verbatim*: **Investor Education** reports: *National Consumer Protection Week*: The Federal Trade Commission's (FTC) National Consumer Protection Week will take place from March 6 to March 12, 2022, with the goal of educating consumers on their rights and on making well-informed money decisions. To support this initiative, the FTC has free resources available for order and encourages the investing public to subscribe to its consumer alerts; and *Learn More About the Derivatives Markets*: Want to expand your knowledge of the derivatives markets? Futures Fundamentals is a one-stop educational resource designed to simplify and explain complex market topics. Through interactive features and rich content, the website explains the role of futures markets in everyday life and provides information on the derivatives industry as a whole. Futures Fundamentals is a collective effort that is made possible by a number of contributing organizations across the futures industry, including NFA, CME Group, FIA and the Institute for Financial Markets (IFM). The **Investor Protection** section states: *Top Ten New Year's Investing Resolutions*: The SEC has

compiled ten resolutions for investors to make as the new year begins. These resolutions can help investors be better informed about the different types of fraud and provide tips for conducting due diligence before investing; *Keep Your Personal Information Safe in the New Year*: Scammers and hackers are always looking for new ways to steal your personal information online. The FTC reminds the investing public that their lists of resolutions for 2022 should include "update my security software" and "protect my personal information"; and *FINRA's Red Flags of Fraud*: Knowing the important warning signs of financial fraud puts you in charge. To avoid becoming drawn into a scam, FINRA encourages investors to conduct due diligence before making investment decisions and educate themselves on how to spot potential scams. As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; 3) a link to past issues of the *Newsletter* and 4) a subscription form.
*(ed: *Another informative issue. **The enforcement actions database allows searches by subject matter, such as arbitration. ***Stats may be found here; for 2021, NFA had just 22 arbitration cases filed – 19 investor and 3 intra-industry.)*
return to top

UNANIMOUS EIGHTH CIRCUIT IN A SELLING AWAY CASE: PURPOSE OF FINRA RULE 12200 "IS NOT TO MAKE A BROKERAGE FIRM THE INSURER OF FAILED BUSINESS VENTURES." FINRA Rule 12000 requires firms to arbitrate disputes with "customers" where the dispute "arises in connection with the business activities" of the firm. Like most selling away cases where the parties are in disagreement over FINRA's authority to administer an arbitration, *Principal Securities, Inc. v. Agarwal*, No. 20-3312 (8th Cir. Jan. 31, 2022), required the Court to focus on the definitions of "customer" and "business activities." The underlying dispute concerned a business venture gone bad between the Agarwals and PSI broker Krohn. The District Court enjoined a FINRA arbitration against PSI started by the Agarwals, resulting in an appeal to the Eighth Circuit. A unanimous Court affirms, finding that, although there was a business relationship between the Agarwals and Krohn, there was not enough to support FINRA arbitration jurisdiction against PSI:

> "The information in the record makes plain that the Agarwals were business partners with Krohn (and others) ..... [But] the Agarwals have not pointed to evidence demonstrating Krohn provided investment advice or brokerage services during the Spotlight transaction. Nor has Dr. Agarwal pointed to evidence suggesting his decisions were influenced because he thought Krohn was advising him as a result of Krohn's association with PSI.... FINRA's purpose is not to make a brokerage firm the insurer of failed business ventures. The Agarwals, relying on their own knowledge and expertise, engaged in arms-length business transactions outside of Krohn's association with PSI that led purportedly to the loss of millions of dollars. The Agarwals cannot compel arbitration under FINRA Rule 12200 because they have failed to demonstrate that they were Krohn's customers -- that is, in a relationship with Krohn that was related directly to investment or brokerage services."

*(ed: *Seems right. **There is a Circuit split on the definition of "customer" that your Publisher and Editor-in-Chief wrote about in 2013. See,* Defining Who is a Customer in FINRA Arbitration: Time to Clear Things Up!, *published in the* Securities Arbitration Commentator.*)*
return to top

UPDATE: REHEARING SOUGHT IN SCIENTOLOGY CASE. We reported in the "Short Briefs" section of SAA 2022-03 (Jan. 27) on *Bixler v. Superior Court (Church of Scientology)*, No. B310559 (Calif. Ct. App. 2 Jan.19, 2021). There, the California Court of Appeal said: "The trial court granted the motion to compel, and petitioners sought writ relief. We issued an order to show cause, and now grant the petition. Individuals have a First Amendment right to leave a religion. We hold that once petitioners had terminated their affiliation with the Church, they were not bound to its dispute resolution procedures to resolve the claims at issue here, which are based on alleged tortious conduct occurring after their separation from the Church and do not implicate resolution of ecclesiastical issues. We issue a writ directing the trial court to vacate its order compelling arbitration and instead to deny the motion." We've learned that the church on **February 3** petitioned for a rehearing. The 40+ page filing asserts several bases for the Petition. Here's part of the introduction: "This Court became the ***first in the nation*** to hold that 'freely executed' religious agreements cannot be enforced over the First Amendment objections of a party who claims to be a 'non-believer.' This holding adopts a distinct rule concerning the enforcement of religious arbitration agreements that discriminates against religions and violates the Federal Arbitration Act ('FAA'). The Opinion contains numerous other unbriefed issues, mistakes of law, and misstatements of fact, all of which require rehearing" (emphasis in original).
(ed: We'll keep our eye on this one. We suspect this won't be the end of it.)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Samake v. Thunder Lube, Inc*., No. 21-102 (2d Cir. Jan. 27, 2022)**: "We hold that (i) the district court properly retained jurisdiction following the notice of dismissal to conduct a Cheeks review of any possible settlement of Samake's Fair Labor Standards Act claims; and (ii) the district court reasonably interpreted Samake's request to continue the litigation as a withdrawal of the notice of dismissal, and, in its discretion, deemed it withdrawn. Having thus determined that the district court deemed the notice of dismissal withdrawn on June 25, 2019, and therefore had jurisdiction to enter the order to compel arbitration on December 22, 2020, we conclude that Samake failed to take a timely appeal of the order deeming his notice of dismissal withdrawn, and that the order to stay and compel arbitration is an unappealable interlocutory order."

***Ahern v. Asset Management Consultants, Inc*., No. B309935 (Calif. Ct. App. 2 Feb. 2, 2022)**: "On appeal the Ahern parties contend arbitration should not have been compelled because the cotenancy agreement was void as an unlawful contract to provide services requiring a real estate broker's license, which BH & Sons did not (and could not) have, and, in any event, their investment fraud claims were outside the scope of that

agreement's arbitration provision. Ahern separately contends he was not a party to the cotenancy agreement and should not have been compelled to arbitrate his dispute with the BH parties. Even if arbitration was properly ordered, the Ahern parties argue, the award should have been vacated under Code of Civil Procedure section 1286.2, subdivision (a)(4) and (5), because the arbitrator exceeded his powers by applying a statute of limitations not authorized by California law and refusing to hear material evidence relating to the BH parties' limitations defense. We agree the Ahern parties' claims were not within the scope of the arbitration provision in the cotenancy agreement …." (link added by *SAA*). (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Larmel v. Metro North Commuter Railroad Co*., No. SC20535 (Conn. Feb. 8, 2022)**: With two dissents, the Majority holds: "This certified appeal requires us to consider whether a case that results in a judgment of the trial court in favor of the defendant following a plaintiff's failure to demand a trial de novo after an arbitration proceeding pursuant to General Statutes (Rev. to 2017) § 52-549z has been 'tried on its merits,' thus barring a subsequent action under the accidental failure of suit statute, General Statutes § 52-592(a). The Appellate Court's decision in the present case answered this question in the affirmative, and, as a result, that court remanded the case to the trial court with direction to render judgment in favor of the defendant, Metro North Commuter Railroad Company, on a claim of negligence brought by the plaintiff, Phyllis Larmel, that had previously been the subject of mandatory arbitration in a prior civil action …. In the present appeal, the plaintiff claims that her first action was never 'tried on its merits' because there was no formal trial in the first action and that, as a result, the Appellate Court's conclusion was in error. We disagree and, accordingly, affirm the judgment of the Appellate Court" (footnote and citation omitted; links added by *SAA*).

***Intellivest Securities v. Growth Capital*, FINRA ID No. 20-04057 (Atlanta, GA, Jan. 10, 2022)**: In this raiding case, a FINRA member firm is awarded over $900,000 in damages inclusive of punitive damages pursuant to O.C.G.A. Sections 51-12-5.1 and 10-1-763 against Respondent broker-dealer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Swanson v. Infinity Financial*, FINRA ID No. 20-04065 (Seattle, WA, Jan. 12, 2022)**: In this small claims arbitration, a customer alleging unsuitability with respect to the purchase of the Sierra Income real estate investment trust and seeking rescission, voluntarily dismisses his case with prejudice. The customer is ordered to pay Respondent broker-dealer attorney fees and costs as a monetary sanction for failure to comply with discovery requests. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

P. M. Bregante and M. Ossio, *What if Peru (or Another Country) Leaves the ICSID Convention? Possible Recourses for Investors Facing a Potential Change in the Game*, Kluwer Arbitration Blog (Feb. 5, 2022): "Before winning Peru's presidential race in

June 2021, Peruvian President Pedro Castillo vowed to withdraw Peru from the ICSID Convention and to renegotiate several of the country's Bilateral Investment Treaties ('BIT's'). According to the then-presidential candidate's government plan (chapter XXI), ICSID tribunals are biased and 'at the service of the multinational companies' in prejudice of the State's interests, and thus Peru should reconsider its situation.[] Despite the country's outstanding statistics, Peru has recently been inundated with claims, having been sued in 15 new ICSID cases since 2020. As these proceedings are still ongoing, it is impossible to gauge Peru's performance. However, last August, Peru enjoyed a new victory in the ICSID case *Hydrika v. Peru* over jurisdictional grounds, maintaining the country's legacy of favorable arbitral awards.[] Nevertheless, Peru's tumultuous political situation creates unpredictability as to whether the current President will ultimately withdraw from ICSID. If so, Peru would follow the path of other South American countries such as Bolivia, Ecuador (recently rejoined), and Venezuela. Under these circumstances, foreign investors might wonder what implications an ICSID withdrawal, or the potential termination and renegotiation of BIT's, could have on the international protection of their investments. This article explores some available recourses for investors who foresee its host state might change the rules of the game."

***Can You Have Confidentiality Requirements In Mandatory Arbitration Pacts?*, National Law Review (Feb. 1, 2022)**: "Many companies have mandatory arbitration programs that require employees to bring employment-related legal claims before an arbitrator instead of bringing them in court. When arbitration pacts are in place, most contain confidentiality requirements related to such proceedings. Employers who use these types of programs should be aware that the National Labor Relations Board (NLRB) is taking a fresh look at this issue and may decide to limit companies' ability to have confidentiality requirements in these agreements. According to a press release from the agency, the NLRB is inviting 'parties and amici to submit briefs addressing whether the Board should adopt a new legal standard to determine whether confidentiality requirements in a mandatory arbitration agreement violate Section 8(a)(1) of the National Labor Relations Act and other legal issues related to mandatory arbitration agreements.'" (*ed: We covered this matter in SAA 2022-03 (Jan. 27)*.)

***Brace for Impact: It's Going to be (Another) Busy Year for FINRA*, JDSupra (Feb. 1, 2022)**: "Scott Fitzgerald said, 'There are only the pursued, the pursuing, the busy, and the tired.' FINRA may be all of these in 2022, as FINRA CEO Robert Cook announced FINRA's laundry list of priorities during a SIFMA Q&A last week. Below are some of the highlights from his Q&A…. **Pandemic Producing Lasting Changes**: Mr. Cook explained that he expects that changes made during the pandemic will become permanent. *First*, FINRA will continue to conduct remote examinations of firms. While Mr. Cook expects there to be a return to on-site examinations, he believes the pandemic proves examinations don't "always need to be in person." *Second*, expect Zoom arbitrations to continue. To this end, FINRA has appointed a Zoom Arbitration Force to recommend and develop future processes. *Third*, FINRA will continue conducting its internal operations in a hybrid manner" (emphasis in original).

***FSI Says It Opposes Creation of Investor Arbitration Pool*, FA Magazine (Feb. 1, 2022)**: "The Financial Services Institute (FSI), the trade group representing independent financial services firms and advisors, said it opposes proposals to create an industry-funded pool of money to compensate investors whose arbitration awards go unpaid.[]FSI executives said at a media briefing today that they view the proposals by investor advocates to set up such a fund as unfair to companies that run honest businesses."

***Judge Rebukes Finra Arbitration in Vacating Wells Fargo Award,* AdvisorHub (Feb. 2, 2022)**: "In a rare decision overturning an arbitration award, a Georgia state court judge vacated a 2019 decision in which Wells Fargo successfully beat back an investor's $1.7 million damage claims over investment losses, according to an order in Fulton County Superior Court.[]Making the order more unusual, Judge Belinda E. Edwards based her ruling in part on grounds that the Financial Industry Regulatory Authority administrators had allowed Wells Fargo and an outside lawyer to "manipulate" the arbitrator selection process. A Finra dispute resolution director improperly granted Wells Fargo's request to strike two arbitrators, including one from a computer-generated 'neutral' list, as part of an unwritten side agreement between the regulator and Wells' lawyer." (*ed: We cover this case in SAA 2022-04 (Feb. 3) and elsewhere in this* Alert.)

***Arbitration Clause Could Quickly Derail the Brian Flores Lawsuit*, Yahoo!sports (Feb. 4, 2022)**: "The landmark lawsuit filed by Brian Flores against the NFL and three of its teams promises an inevitable trial in open court, featuring compelling testimony from and interrogation of persons like Roger Goodell, Stephen Ross, John Mara, John Elway, Bill Belichick, and more. Unless it doesn't.[]The NFL's first line of defense when defending against the Flores lawsuit inevitably will be that the case cannot be processed in court and that it must be resolved via arbitration."
return to top

DID YOU KNOW?

WILLIAM JENNINGS BRYAN, THE FIRST WORLD WAR, AND "COOLING-OFF TREATIES." Did you know that, in the days leading up to World War I, William Jennings Bryan created "Cooling-off Treaties" as a way to avert war? "These pacts, negotiated with thirty different countries, required both parties to refrain from war for one year while potentially explosive disputes were arbitrated (signers received a plowshare paperweight made from melted-down swords, taken from the biblical reference 'They shall beat their swords into plowshares')." Evidently, these treaties weren't very effective. Source: N. Lanctot, *The Approaching Storm*, p. 41 (Riverhead Books 2021).
return to top

Send any messages or inquiries to: George@SecArbAlert.com

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