SECURITIES ARBITRATION ALERT 2022-06 (2/17/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **GovTrack: A Great Way to Track Federal Legislation**

Happy Presidents Day!

From the *Alert* to our readers, all the best for this uniquely American holiday. For your three-day weekend reading, consider this *SAA* blog post from 2021 that has held up well.

The Presidents and Arbitration: From Washington to Biden: An Update

SQUIBS: IN-DEPTH ANALYSIS

THAT DIDN'T TAKE LONG: LAWMAKERS DEMAND ANSWERS FROM FINRA ON "RIGGED PANELS" ACCUSATION. ***On the heels of the decision by Fulton County Superior Court Judge Belinda E. Edwards in* Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), finding that the potential arbitrator list preparation process had been compromised, and subsequent calls by PIABA for Congressional and SEC investigations, two Democratic lawmakers have written to FINRA CEO Robert Cook demanding answers.*** We reported on this one in SAAs 2022-05 (Feb. 10) & -04 (Feb. 3). 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."

Long-Standing Concerns

In their **February 9** letter, Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) say: "We have a long public record of concerns about the wide-ranging and long-lasting pattern of illegal and abusive behavior by Wells Fargo. Similarly, we have long had concerns about FINRA's ability to effectively enforce rules against fraudulent and abusive behavior by brokers and dealers. And we have for years attempted to address the problems for consumers and workers caused by forced arbitration processes that limit their rights. This latest report brings all three problems into focus: it reveals troubling new allegations about the atrocious behavior of Wells Fargo, the inability of FINRA to effectively police the financial system, and the unfairness of the arbitration process" (footnotes omitted).

Answers Sought

The legislators go on to say that FINRA must address their concerns by answering a series of questions by **February 23** (*ed: repeated* verbatim):

(1) What was the specific process by which arbitrators were chosen in the *Wells Fargo vs. Brian Leggett/Bryson Holdings* case?

(2) Was this process consistent with FINRA's policies and precedents for choosing arbitrators?
(3) Does FINRA believe that this process was conducted in "a neutral, efficient and fair manner"?
(4) Did Wells Fargo's attorneys communicate with FINRA officials regarding the arbitrators that would be chosen – or not chosen – to hear this case? If so, what was the nature of these communications?
(5) Specifically, did Wells Fargo request that any arbitrators be removed from the list of those available to hear the case? If yes:

a. Which arbitrators did Wells Fargo request be removed?
b. Why did they make these requests?
c. How did FINRA respond to these requests?
d. Were the attorneys representing Mr. Leggett and Bryson Holdings given the same opportunity to strike arbitrators from this case? Did they avail themselves of this opportunity?

(6) Does FINRA notify the public of instances where arbitrators are struck from having the ability to hear an arbitration case? If so, how does the organization do so?
(7) Does FINRA believe the issues raised in this arbitration case "require a further regulatory review or response"?

Postscript: Wells Responds
According to a **February 10** *Barron's* story, *Lawmakers Want Answers From Finra on Alleged Secret Wells Fargo Arrangement*, Wells Fargo has weighed in: "We adamantly deny all of the allegations cited in this decision, which we believe are not supported by the facts or the extensive record. Finra has well-established rules for admitting arbitrators to its roster, and the process is fair to all parties. Wells Fargo Advisors followed this process, and both parties had the opportunity to make arguments regarding each of these issues to the arbitrators and to Finra." *(ed: *The SEC shoe has not yet dropped, but we are sure it will. **As we've said before, this is surely not the last of it.)*
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RAIDING AWARD FEATURES DUELING EXPLANATIONS OF SPLIT DECISION. ***A 35-page explained Award in a raiding case resulted in an award in excess of $18 million against the respondents, but includes a strenuous dissent from one of the arbitrators.*** Four of the six brokers in Stephens Inc.'s ("Stephens") Jonesboro, Ark. branch moved to rival brokerage Benjamin F. Edwards & Co. Inc. ("BEF") over a period of 11 months, resulting in the loss of more than 50% of the branch's production. Stephens brought a claim against BEF; its principal, Benjamin F. Edwards IV ("Edwards"); and the four departing brokers, Brian Erwin ("Erwin"), Timothy Fitzgerald ("Fitzgerald"), Jeffrey Green ("Green") and Malcolm Peeler ("Peeler"). The Award, *Stephens, Inc. v. Benjamin F. Edwards Co., Inc.*, FINRA ID No. 17-02378 (Memphis, TN, Jan. 21, 2022), resulted in a majority of the Panel awarding $10,970,000 in compensatory damages and $2,205,373 in attorney fees against all six respondents, $2 million each in punitive damages against BEF and Edwards, and $1 million in punitive

damages against Peeler. It also included nine pages of findings in support of the decision and an even longer 20-page dissenting opinion.

Panel Majority Says…
We won't detail the reasoning, but we will briefly summarize each side's decision, beginning with the majority. It viewed the broker's ostensible reasons for departure as pretextual and the time gap as an attempt to cover up the raid, and drew a negative inference from Erwin's and Peeler's destruction of some documents. The majority finds: BEF and Edwards liable for raiding. tortious interference and inducing the breach of fiduciary duties; BEF for violating the Protocol for Broker Recruiting; Peeler and Erwin (but not Green and Fitzgerald) for violating the non-solicitation clauses of their employment contracts; all four departing brokers for breaching their fiduciary duties to Stephens as regular employees (but not as officers, despite being titular vice presidents); and all respondents for conspiracy and misappropriation of trade secrets. Punitive damages are appropriate because the BEF, Edwards and Peeler "knew or should have known that, in light of surrounding circumstances, [their] conduct would naturally and probably result in injury and … continued the conduct in reckless disregard of the circumstances, from which malice may be inferred." However, the majority denies causes of action for business defamation and unjust enrichment, because of insufficient evidence, and unfair competition, deeming it: "subsumed by the other claims."

One Arbitrator Begs to Differ…
The dissenting Arbitrator agrees "that BEF engaged in aggressive recruiting to the point of reckless disregard to the effect the recruitment would have on Claimant" and Peeler violated his employment contract by soliciting other Stephens brokers. Nevertheless, she concludes, each of the departing brokers had their own reasons for dissatisfaction with Stephens that explained both their decision to leave and the 11-month gap in departures, independent of the raiding efforts, and there is insufficient evidence to prove the claim of pre-resignation solicitation of Stephens' customers. She declines to draw a negative inference from the destruction of documents because it happened before Stephens sent out preservation notices to the brokers. Therefore, she finds, even though Peeler breached his employment contract and BEF and Edwards tortiously interfered with that contract, Stephens suffered no damages as a result, and failed to meet its burden of proof on any other cause of action.
*(ed: *The Panel sanctioned the respondents for the spoliation of evidence referenced in both the majority and dissenting opinions. In addition to the negative inference, the Panel ordered them to pay Stephens' legal expenses incurred in connection with the motion and certain depositions. **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.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

CONGRESS PASSES *ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT*. PRESIDENT EXPECTED TO SIGN IT. Congress has passed the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*. It awaits **President Biden**'s expected signature and will became effective immediately upon enactment. We will prepare a full analysis once the *Act* becomes law, but we wanted to report the basics now. We reported in SAA 2021-29 (Aug. 5) that 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)). As reported in SAA 2022-05 (Feb. 10), the bill passed the House on **February 7** by a bipartisan vote of 335-97. We also reported in # -05 that Senate Leader **Schumer** promised a quick vote, and that came three days later when the Senate approved the bill by voice vote on **February 10**. The President had issued a **February 2** statement supporting the legislation, so his signature is a foregone conclusion.* In sum (see, e.g., the House text): 1) employees/class reps can opt out of predispute arbitration agreements and class action waivers in cases involving claims of sexual harassment or assault; 2) arbitrability is for the court, even if there's a delegation clause; 3) there is a "cases" and "disputes/claims" ambiguity that we think will lead to problems unless the *Act* is quickly cleaned up in this regard; 4) FINRA and other ADR institutions will need to address opting out and bifurcation; and 5) the law is effective immediately for: "any dispute or claim that arises or accrues on or after the date of enactment of this Act."
*(ed: *As of press time, there was no word on the White House Website about a bill signing ceremony.**This well-intended legislation in our view raises many questions about how it will work. Stay tuned for our comprehensive analysis in the next* Alert.*)*
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SEC PROPOSES CHANGES TO WHISTLEBLOWER PROGRAM. A **February 10** Press Release announces two proposed amendments to the Commission's whistleblower program: "The first proposed amendment concerns award claims for related actions that would be otherwise covered by an alternative whistleblower program. The second affirms the Commission's authority to consider the dollar amount of a potential award for the limited purpose of increasing an award but not to lower an award." Specifically (*ed: repeated essentially* verbatim):

- The proposed amendment to Rule 21F-3 would allow the Commission to pay whistleblower awards for certain actions brought by other entities, including designated federal agencies, in cases where those awards might otherwise be paid under the other entity's whistleblower program.
- The proposed amendments also would affirm the Commission's authority under Rule 21F-6 to consider the dollar amount of a potential award for the limited purpose of increasing the award amount, and it would eliminate the Commission's authority to consider the dollar amount of a potential award for the purpose of decreasing an award.

Further details are contained in a Factsheet.

*(ed: *We support any improvements to this successful investor protection measure. **The public comment period: "will remain open for 60 days following publication of the proposing release on the SEC's website or 30 days following publication of the proposing release in the* Federal Register*, whichever period is longer.")*
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***GREGG* CASE PENDING AT SCOTUS IS SCHEDULED FOR THE COURT'S FEBRUARY 18 CONFERENCE.** As reported in SAA 2021-37 (Oct. 7), still pending at the Supreme Court is a **September 2021** Petition for *Certiorari* seeking review of *Gregg v. Uber Technologies, Inc*., No. B302925 (Cal. Ct. App. 2 Apr. 21, 2021), *pet. for review den.*, No. S269000 (Cal. June 30, 2021). The issue presented in *Uber Technologies, Inc. v. Gregg*, No. 21-453 is: "Whether agreements calling for individual arbitration are enforceable under the Federal Arbitration Act with respect to claims asserted under the California Labor Code Private Attorneys General Act." The Petition relies heavily on intervening SCOTUS rulings, including *Epic Systems Corp. v. Lewis*, 138 S.Ct. 1612 (2018), holding that class or collective action waivers were enforceable under the Federal Arbitration Act. *Gregg* has been distributed for conference on **February 18**. Recall that we reported in SAA 2021-47 (Dec. 16) that SCOTUS had issued a **December 15** Miscellaneous Order granting *Certiorari* in *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, a case also involving PAGA. The question presented in the granted **May 10** Petition in *Viking River* is: "Whether the Federal Arbitration Act requires enforcement of a bilateral arbitration agreement providing that an employee cannot raise representative claims, including under PAGA." Petitioners seek review of *Moriana v. Viking River Cruises, Inc*., No. B297327 (Cal. Ct. App. 2020), *pet. for review den*., No. S265257 (Cal. 2020). As reported in SAA 2022-02 (Jan. 20), the parties in *Gregg* had agreed to hold up on the pending *Certiorari* Petition, pending the result in *Viking River* (see Gregg's **January 10** request to delay and the **January 12** response from Uber).
*(ed: *Again, we wonder whether SCOTUS will* sua sponte *follow our previous surmise and instead grant* Cert. *and consolidate* Gregg *with* Viking River*? Or will it accept the parties' agreement to hold the Petition in abeyance? Time will tell. **We'll track this one and report on it in a future* Alert.*)*
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"MANIFEST DISREGARD" HANGS ON BY A THREAD IN UTAH. A unanimous Utah Supreme Court holds in *Ahhmigo, LLC v. Synergy Co. of Utah, LLC*, 2022 UT 4 (Feb. 3, 2022), that "manifest disregard of the law" is available under Utah's arbitration statute, but barely. Interestingly, in affirming the lower court's denial of a motion to vacate, the Court doesn't decide the case on the merits, because the issue of manifest disregard was not preserved for appeal (Plaintiff had argued that the arbitrator: "failed to honor a stipulation the parties had purportedly struck"). Nonetheless, the Court decides to: "take the opportunity to express some qualms about the way we have talked about what it means for an arbitrator to manifestly disregard the law in hopes of prompting a robust discussion in a later case where the issue has been properly preserved." We let the Opinion speak for itself:

> "At the very least, even our limited application of the manifest disregard standard causes us to view with suspicion a standard that permits a party to ask a district court to vacate an award based upon what is, in essence, an argument that the arbitrator misapplied the law dressed up as an argument that the arbitrator disregarded the law.[]When a party voluntarily agrees to arbitrate, she agrees to forego the protections of a substantive judicial review of the merits of the arbitration decision. A party should not be able to participate in arbitration and then subject the resulting arbitration award to the review it rebuffed in the first place. After all, arbitration is, '[a]t its core, . . . supposed to be an alternative to litigation in a court of law, not a prelude to it.' UNIF. ARB. ACT § 23 cmt. B, 1 (UNIF. L. COMM'N 2000)" (ellipse in original; link added by *SAA*).

(ed: We think "manifest disregard" is on life support in general, and that SCOTUS, if given a chance, would administer a coup de grâce.*)*

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SAVE THE DATES: NYSBA LAW SCHOOL MEDIATION TOURNAMENT – IN PERSON – IS MARCH 18 - 19. The New York State Bar Association ("NYSBA") Dispute Resolution Section's *Annual Mediation Tournament 2022* will take place in-person in New York City on **March 18 – 19**. Says the NYSBA Website: "The Annual Mediation Tournament is a chance to display both mediation advocacy skills and mediator skills, allowing students to participate in both categories; in this Tournament, the students will serve as mediators as well as advocates. Open to students from all law schools or LLM programs." Cash prizes totaling $6,000 will be awarded as follows: 1st Place Team – $2,000; 2nd Place Team – $1,250; 3rd Place Team – $750; Mediation Advocate Award – $1,000; and Best Mediation Statement – $1,000.

*(ed: *The competition will take place at the American Arbitration Association, 150 East 42nd Street - 17th Floor, in Manhattan. **AAA neutrals interested in serving as a Preliminary Round Judge should email Leslie Berkoff at lberkoff@moritthock.com.)*

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QUICK TAKES: CASES AND AWARDS WORTH READING

***Bartlit Beck, LLP v. Okada*, No. 21-1633 (7th Cir. Feb. 8, 2022)**: "Although Okada had participated for over a year in the arbitral process that Bartlit Beck LLP, the law firm seeking to collect its fees, had initiated on July 27, 2018, his cooperation ended abruptly just days before an evidentiary hearing that had long been scheduled for Monday, October 28, 2019. The preceding Friday, Okada suddenly announced that he would not attend the hearing. The arbitrators ('the Panel') held him in default and proceeded based only on the written submissions from Bartlit Beck. After the Panel entered a final award in favor of Bartlit Beck, the firm petitioned the district court to confirm the award. Okada urged the court to vacate the award instead, on the ground that the proceeding was fundamentally unfair. The district court sided with Bartlit Beck and confirmed the award. We affirm."

***Rummel Klepper & Kahl, LLP v. Delaware River & Bay Authority*, 2022 WL 29831, No. 2020-0458-PAF (Del. Ch. Jan. 3, 2022)**: "[T]he Delaware Court of Chancery

granted the defendant's motion to compel arbitration and dismiss the action because it found that the applicability of a statute of repose was an issue of arbitrability that should be decided by the arbitrator. The court also held that the arbitration clause was enforceable despite the fact that it called for the executive director of the defendant to serve as the arbitrator between the parties. This decision highlights the fact that Delaware is a freedom-of-contract jurisdiction and Delaware courts regularly enforce agreements to arbitrate between parties." (*ed: quote is from the February 8 Reed Smith "Client Alert."*)

***Signal 88, LLC v. Lyconic, LLC*, 310 Neb. 824 (Feb. 4, 2022)**: A unanimous Court, applying the State's arbitration statute, holds that: "the district court erred in modifying rather than confirming the award and that the Court of Appeals, though correct in vacating the judgment, erred in finding the arbitrator's award to be ambiguous and erred in instructing that the matter be remanded to the arbitrator.[]Courts must give extreme deference to the arbitrator's conclusions; the standard of judicial review of arbitral awards is among the narrowest known to law.15 A court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one" (footnote omitted).

***NLT Holdings v. UBS Financial*, FINRA ID No. 19-00807 (Atlanta, GA, Jan. 21, 2022)**: A customer trust alleging unsuitability with respect to its placement in Respondent broker-dealer's Yield Enhancement strategy loses its case. Two Non-Party brokers are awarded expungement of this matter, despite the objection of the customer. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Wells Fargo v. Shelburne*, FINRA ID No. 19-01560 (Los Angeles, CA, Jan. 21, 2022)**: In this Set-Off Award, a broker is held liable to his former employer for the amounts due and owing pursuant to a promissory note, while said employer is liable on the counterclaim for compensatory damages. The Chair dissents with respect to the awarding of damages on the Counterclaim. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

***UBS Wins $950K Claw Back from FA Who Jumped to Merrill*, Financial Advisor IQ (Feb. 8, 2022)**: "A Financial Industry Regulatory Authority arbitration panel has ruled in favor of UBS in its claim for the repayment of promissory notes by its former financial advisor…. At the end of last month, the arbitrators ruled in favor of UBS, ordering [adviser] to pay the firm around $764,000 in principal and interest on all four promissory notes as well as around $182,000 in lawyers' fees, according to the award document. The arbitrators did not explain their reasoning." See *UBS Financial Services Inc. v. Margiottta*, FINRA ID No. 17-02495 (Los Angeles, CA, Jan. 21, 2022).

***Finra Finds Brokerages Fall Short on Reg BI Compliance*, InvestmentNews (Feb. 9, 2022)**: "Brokerages are failing to act in the best interests of their customers and aren't adequately addressing conflicts of interest in the first full year of operating under the new

broker standard of conduct, according to Finra.[]The Financial Industry Regulatory Authority Inc. outlined shortcomings it found during Regulation Best Interest compliance reviews in a 70-page report on its examination and risk monitoring program released Wednesday [February 9]."

***SEC Proposes to Enhance Private Fund Investor Protection*, www.sec.gov (Feb. 9, 2022)**: "The Securities and Exchange Commission today voted to propose new rules and amendments under the Investment Advisers Act of 1940 (Advisers Act) to enhance the regulation of private fund advisers and to protect private fund investors by increasing transparency, competition, and efficiency in the $18-trillion marketplace."

***Lawmakers Want Answers From Finra on Alleged Secret Wells Fargo Arrangement*, Barron's (Feb. 10, 2022)**: "Two Democratic lawmakers are posing questions to an important Wall Street regulator after a Georgia state judge ruled that an alleged secret agreement enabled Wells Fargo to tilt the arbitration process in its favor…. Sen. Elizabeth Warren of Massachusetts and Rep. Katie Porter of California called news reports detailing the judge's findings 'highly disturbing' in a letter to Finra CEO Robert Cook. Warren and Porter said the allegations 'raise serious questions' about the fairness of Finra arbitration. They asked Cook for details about the Wells Fargo arbitration case as well as whether Finra would investigate the matter." (*ed: See our coverage elsewhere*.)

***Senate Sends Bill Restricting Arbitration for Workplace Sexual Assault Victims for Biden's Signature*, CPR Blog (Feb. 10, 2022)**: "The U.S. Senate passed H.R. 4445, *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021*, this morning on a voice vote.[]The bill had bipartisan support in both legislative chambers and quickly cleared the 60-vote procedural step to advance in the Senate. The House had passed the bill on Monday by a vote of 335-97.[]President Biden has signaled he will sign the bill, which will take effect immediately….The *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* invalidates pre-dispute arbitration agreements and waivers of joint proceedings for individuals alleging conduct constituting a sexual harassment dispute or sexual assault. It effectively overrides employment contracts that require arbitration and allows all cases which include sexual assault or harassment claims to be resolved in court, despite the signed agreement containing an arbitration clause."
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DID YOU KNOW?

GOVTRACK: A GREAT WAY TO TRACK FEDERAL LEGISLATION. The recent pace of activity in Congress reminds us that a great resource for tracking federal legislation is the non-partisan www.GovTrack.us. This free service: "began in 2004 as a project to use technology to make the U.S. Congress more open and accessible…. [and is] the leading non-governmental source of legislative information and statistics." Users can sign up to get email alerts by bill name, number, or topic, or other parameters. The site will also notify users of coming hearings and votes, and has a wealth of other info.
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