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George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **A Nice Compilation of State ADR Laws**

WHAT A BUSY WEEK! *We had planned all along to publish a day later this week due to the Monday national holiday. It's a good thing we did, as Thursday brought a major event: the imminent signing into law by the President of the* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act¸ *amending the federal Arbitration act for the first time in decades. Oh, and FINRA earlier announced that it retained an outside law firm to conduct an independent investigation of the "rigged panels" flap. Because of these unprecedented events, we are taking two unusual steps. First, we have no squibs this week. Instead, we will be publishing in full a feature article on the new statute. Other than that, not much going on in our neck of the woods!*

FEATURE ARTICLE

ENDING FORCED ARBITRATION OF SEXUAL ASSAULT AND SEXUAL HARASSMENT ACT TO BECOME LAW

by George H. Friedman
SAA Publisher and Editor-in-Chief

President Biden has will soon sign into law the* Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act. *It will become effective immediately.

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 Constitution provides that the President has ten days from "presentment" of the approved bill (not including Sundays and holidays or the day or presentment), so we assume **President Biden** will act soon. His approval is a foregone conclusion since the President has issued a **February 2** statement supporting the legislation). World events we are sure have impacted this approval process, and even if he doesn't act in time, the bill will become law.

The Basics: What You Need to Know

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)). Here are the main elements of the new law:

Amends the FAA: The new law avoids any questions about conflicts between the Federal Arbitration Act ("FAA") and other federal statutes by amending the FAA itself. The core changes are in a new Chapter 4, titled *Arbitration of Disputes Involving Sexual Assault and Sexual Harassment*.

Employee/Class Rep Right to Invalidate PDAAs: It is important to note that the new law does *not* ban predispute arbitration agreements ("PDAA") or class action waivers covering sexual assault or harassment claims. The statute instead gives the employee or class/collective representative the right to opt out of PDAAs by invalidating them after a dispute arises. Specifically, the new law (see, e.g., the House text) provides:

> "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). *(ed: we added the italics; more on that later*).

Arbitrability Issues Are for the Court: As to arbitrability, the *Act* removes any ambiguity about who and how such issues are decided:

> "An issue as to whether this chapter applies with respect to a dispute shall be determined under Federal law. The applicability of this chapter to an agreement to arbitrate and the validity and enforceability of an agreement to which this chapter applies shall be determined by a court, rather than an arbitrator, irrespective of whether the party resisting arbitration challenges the arbitration agreement specifically or in conjunction with other terms of the contract containing such agreement, and irrespective of whether the agreement purports to delegate such determinations to an arbitrator."

Retroactive Application: 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: we added the italics; more on that directly below*).

Impact on Securities Arbitration

The new law definitely affects securities arbitrations, since the *Act* amended the FAA. We think the impact at FINRA will be in two main areas: 1) opting out; and 2) intertwining.

Opting Out: We suggest that FINRA will need to amend the *Industry Code* and its administrative procedures to accommodate the *Act's* PDAA opt-out provisions. How so? For example, Rule 13204 essentially provides that the FINRA forum does not do class or collective arbitrations, and that employees may opt out of arbitration to participate in a class or collective action. A good model to address this aspect of the *Act* is Rule 13204(a)(4), which provides: "A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until … The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any." Another model is *Customer Code* Rule 12202(a), which allows customers to opt out of arbitration with defunct firms, and go to court: "A claim by or against a member or an associated person who is inactive at the time the claim is filed is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises."

Intertwining: FINRA will need to address the intertwining issues identified above. A good model to emulate is the approach taken with statutory employment discrimination claims. In 1999, the Authority rolled out a rule change focused on an associated person's obligation to arbitrate statutory employment discrimination disputes at the FINRA dispute resolution forum pursuant to the Form U-4 agreement. As a result of this change, the Form U-4 and the *Code* no longer required that an associated person arbitrate statutory employment discrimination claims. The employee and firm could, however, enter into a PDAA that required arbitration of all employment disputes, including statutory discrimination claims. The *Act* now gives the employee the option of taking to

court a subset of statutory employment discrimination claims – i.e., sexual harassment or assault – irrespective of the existence of a PDAA. We suggest that the *Industry Code* will need to address this, in a manner similar to the procedure laid out in Rule 13803. There, the Respondent has the right to require *all* intertwined claims – arbitrable and non-arbitrable – to be heard in court.

Disruptive Potential

As enacted, the new law raises many questions in our view. The language we italicized in the statute sections quoted above may prove to be problematic, since the *Act* alternatively refers to "cases" and "disputes or claims." In any event, courts or ADR provider rules will need to address bifurcation and intertwining. For example, what if in an existing employment arbitration, a claim is later added asserting sexual harassment or assault: is the dispute bifurcated, with the former remining in arbitration and the latter going to court? The same question applies when a new arbitration is filed with intertwined claims. Are claims to be bifurcated between court and arbitration? It also seems that the employee would be locked in to arbitration once they sign the submission agreement (a post-dispute agreement to arbitrate). Does that mean FINRA has an obligation to warn the employee when a case is filed? What if there is no submission agreement? Can the employee go all the way through the arbitration and just before an award is rendered decide they want covered claims to go to court?

What About the Other Bills Targeting Mandatory PDAAs? Generally No Enactments

We have reported episodically on efforts afoot in Congress to regulate, limit, or ban, mandatory predispute arbitration agreement use or enforcement in certain situations (see for example our **December 2021** blog post, *Legislative Update: The Latest from Congress*.) Does the enactment of the new law mean the dominos will fall with the passage of these other bills? While the new law clearly gives these bills some momentum, we don't think it translates to large-scale enactments. Why not? We see the *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act* as one-off in that it involved a sensitive issue that cut across party lines. We just don't sense that with all but one of the other bills, at least as to garnering the ten Republican Senate votes needed to advance the legislation.

For Example, the *FAIR Act*

Recall that we reported in SAA 2021-06 (Feb. 18) that Democrats had reintroduced several bills to curb use of mandatory predispute arbitration agreements ("PDAA"). Among them was H.R. 963 – the *Forced Arbitration Injustice Repeal (FAIR) Act* – introduced **February 11** by Rep. **Henry "Hank" Johnson Jr.** of Georgia. If enacted it would ban mandatory arbitration for almost every conceivable transaction that's not a business-to-business or union-management matter. Specifically, this bill would amend the FAA to eliminate mandatory predispute arbitration agreements for disputes involving consumer, investor, employment (including independent contractors), and antitrust matters. It would cover brokers and investment advisers; bar class action/collective action waivers in or out of a PDAA; apply to "digital technology" disputes; reserve for court

determination any arbitrability or delegation issues "irrespective of whether the agreement purported to delegate such determinations to an arbitrator;" and extend to a broad range of civil rights matters, including sexual harassment claims. We reviewed the bill's text and offered a detailed analysis in SAA 2021-10 (Mar. 18) and our blog. The proposed *FAIR Act* seems to be inexorably moving toward at least House passage; it already has 202 cosponsors (all but one are Democrats), with 218 votes needed for passage. The companion Senate bill – S. 505 – has been stuck at 39 cosponsors (all Democrats) since **March 1.** While we think the *FAIR Act* will eventually pass the House – as it did in the last Congress – we don't see this attempt to amend the FAA to invalidate a broad swath of PDAAs passing the Senate (same as last time).

One Big Possible Exception: the *Investor Choice Act*

As reported in SAA 2021-43 (Nov. 18), the House Financial Services Committee in **November 2021** passed the *Investor Choice Act of 2021* ("*ICA*") by a party-line vote of 27-23. As we reported in SAA 2021-14 (Apr. 22), the *ICA* was reintroduced **April 2021** by Sen. **Jeff Merkley** (D-OR) and by Rep. **Bill Foster** (D-IL). The Committee action was announced in a Press Release, *Committee Passes Legislation to Protect Retail Investors from Predatory Practices and Promote Fair Hiring Opportunities.* This iteration of the *ICA* – H.R. 2620 and S. 1171 – is essentially the same as the old one introduced in the last Congress in that it would amend the FAA, the *Securities Exchange Act of 1934*, and the *Investment Adviser Act of 1940*, to ban the use of mandatory predispute agreements by broker-dealers and investment advisers and guarantee class action participation. Specifically, the bills would declare it unlawful for BDs, funding portals, municipal securities dealers, or investment advisers: "to enter into, modify, or extend an agreement with customers or clients of that entity with respect to a future dispute between the parties that:

> (1) mandates arbitration for that dispute;
> (2) restricts, limits, or conditions the ability of a customer or client of that entity to select or designate a forum for resolution of that dispute; or
> (3) restricts, limits, or conditions the ability of a customer or client of that entity to pursue a claim relating to that dispute in an individual or representative capacity or on a class action or consolidated basis."

The *ICA* also retains a section amending the *Securities Act of 1933* to state: "A security may not be registered with the Commission if the issuer, in its bylaws, registration statement, or other governing documents mandates arbitration for any disputes between the issuer and the shareholders of the issuer." If enacted, the changes would be retroactive, rendering void existing non-conforming arbitration agreements. Pending arbitrations would not be impacted.

We think that, with FINRA's recent "rigged panels" troubles (*ed: see our reporting elsewhere in this* Alert), there may be bipartisan traction for at least the choice-of-ADR-forum provision in the *ICA*. Also, *Dodd-Frank* section 921 gives the SEC authority to limit or eliminate PDAAs or set conditions for their use, but it has not done so. The swirl of activity surrounding the panels accusation may prompt the Commission to do something about investor choice of forum.

Summing Up
In sum: 1) employees/class reps can opt out of PDAAs 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) the "cases" and "disputes/claims" ambiguity 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; 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;" and 6) the *Investor Choice Act* may show new life.
*(ed: *Not to brag, but we predicted this outcome several times. One 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." And we said in # -05:"[The Act] 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." **We continue to think that allowing retroactive nullification of existing PDAAs invites legal challenges based on the Constitution's Takings Clause.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

SHOES KEEP DROPPING: FINRA TO CONDUCT INDEPENDENT REVIEW OF "RIGGED PANELS" ACCUSATION. In the wake 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, subsequent calls by PIABA for Congressional and SEC investigations, and a **February 9** letter to FINRA from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) demanding answers by **February 23**, FINRA has agreed to conduct an independent investigation. A **February 18** Press Release, *FINRA Hires Firm to Conduct Independent Review of Arbitrator Selection Process,* announces that the Authority: "has hired the Lowenstein Sandler law firm to conduct an independent review of how FINRA Dispute Resolution Services (DRS) complied with its rules, policies and procedures for arbitrator selection in an arbitration proceeding whose award was recently vacated by an Atlanta Superior Court judge…. Christopher Gerold, a partner in Lowenstein's Securities Litigation and Corporate Investigations & Integrity Practice Groups, will lead the independent review and report the firm's findings directly to the Audit Committee of FINRA's Board of Governors. Prior to joining Lowenstein in January, Gerold was Chief of the New Jersey Bureau of Securities from 2017 to 2021 and served as President of the North American Securities Administrators Association" (link to bio added by the *Alert*). No specific timetable is mentioned, but the release uses the term "coming months."
*(ed: *This step to us was inevitable. **The SEC shoe has not yet dropped, but we are sure it will. ***See our past coverage in SAAs 2022-06 (Feb. 17), -05 (Feb. 10) & -04 (Feb. 3), and our related blog posts of February 9 and February 2.)*
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FOURTH CIRCUIT: DODD-FRANK BARS PDAAS FOR HOME EQUITY LINE OF CREDIT DISPUTES. Supreme Court jurisprudence holds that, unless a competing federal statute *specifically and expressly* bars arbitration, the Federal Arbitration Act's ("FAA") presumption of arbitration agreement validity and enforcement will trump application of that statute to restrict arbitration (see, for example, *Gilmer v. Interstate/Johnson Lane Corp*., 500 U.S. 20 (1991), *CompuCredit Corp. v. Greenwood*, 565 U.S. 95 (2012), and *Epic Systems Corp. v. Lewis*, 137 S. Ct. 809 (2018)). *Dodd-Frank* section 1414 bans outright predispute arbitration agreements ("PDAA") in residential mortgage contracts, by providing in the Truth-in-Lending Act, 15 U.S.C. § 1639c(e): "No residential mortgage loan and no extension of credit under an open end consumer credit plan secured by the principal dwelling of the consumer may include terms which require arbitration or any other nonjudicial procedure as the method for resolving any controversy or settling any claims arising out of the transaction." What, then, happens when a home equity line of credit (HELOC") contains a PDAA? The arbitration agreement is not enforceable against the debtor because Dodd-Frank specifically bans PDAAs, says the Fourth Circuit in *Lyons v. PNC Bank, N.A*., No. 21-1058 (4th Cir. Feb. 15, 2022): "The plain language of § 1639c(e)(3) is clear and unambiguous: a consumer cannot be prevented from bringing a TILA action in federal district court by a provision in an agreement 'relate[d] to' a residential mortgage loan—like a HELOC…. Given the unambiguous language of § 1639c(e)(3), it is implausible that Congress did not intend the provision to prohibit pre-dispute arbitration agreements…. Because we find that § 1639c(e)(3) of the Dodd-Frank Act precludes pre-dispute agreements requiring the arbitration of claims related to residential mortgage loans and that the arbitration agreement relevant to this appeal was not formed until after the effective date of § 1639c(e)(3), we find that PNC may not compel arbitration of Mr. Lyons's claims as to both the 2010 Account and the 2014 Account."
*(ed: *Seems right. **Judge Quattlebaum concurs in part and dissents. ***The facts were a bit murky; we cleaned them up to focus on the main holding.)*
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CALIFORNIA AB-51 UPDATE: NINTH CIRCUIT DEFERS CONSIDERING PETITION FOR REHEARING *EN BANC* UNTIL SCOTUS RULES ON *VIKING RIVER*. We reported in SAA 2021-40 (Oct. 28) that the challengers had moved for rehearing *en banc* in *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (9th Cir. Sep. 15, 2021). As reported in SAA 2021-36 (Sep. 23), a split Ninth Circuit in *Chamber of Commerce* ruled on the validity of California AB-51 – a law that restricts predispute arbitration clauses ("PDAA") in employment relationships. The divided Court held that the mandatory PDAA use preclusions in the new law withstand Federal Arbitration Act ("FAA") preemption scrutiny, but the criminal and civil penalties for mandatory PDAA use do not. Recall that our prescient editorial note in #36 was: "We continue to see this one as destined for SCOTUS, with perhaps a petition for *en banc* review along the way." On **October 20**, the Chamber and the other challengers filed the expected motion for *en banc* review. We later reported in SAA 2021-48 (Dec. 23) that the State and other Respondents filed their response on **December 10**. The thrust of the argument, as expressed in the Brief (*ed: repeated essentially* verbatim): 1) the Panel

decision respects the FAA and Supreme Court precedent; 2) the Panel decision creates no intra- or inter-Circuit conflict; and 3) there is no special need to review this decision. With the issue joined, where do things now stand? On **February 14,** a majority of the Ninth Circuit panel *sua sponte* issued an Order deferring consideration of the Petition until after the Supreme Court decides *Viking River Cruises, Inc. v. Moriana*, No. 20-1573, set for argument **March 30**. The question presented in the granted **May 2021** Petition for *Certiorari* 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."
*(ed: *Huh? We are with dissenter Ikuta, who contends that* Viking River*: "does not raise issues relevant to this appeal." Yes, both cases generally involve FAA preemption of State laws impacting arbitration and employment, but still…. **We continue to think there's a good shot the Petition will succeed at some point. ***Email us at Help@SecArbAlert.com for a copy of the Order.)*
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NJ APPELLATE COURT HOLDS THAT FAA PREEMPTS NJ LAW BANNING PDAAS COVERING SEXUAL HARASSMENT AND DISCRIMINATION. The New Jersey Appellate Division Court in a case of first impression holds in *Antonucci v. Curvature Newco, Inc*., No. A-1983-20 (N.J. App. Div. Feb. 15, 2022) (not for publication), that New Jersey's *Law Against Discrimination* ("*LAD*") -- effectively banning predispute arbitration agreements ("PDAA") covering sexual harassment and discrimination claims -- is preempted by the Federal Arbitration Act ("FAA"). We reported in SAA 2019-12 (Mar. 20) that New Jersey Governor **Phil Murphy** in **March 2019** signed into law bills that appeared to also bar PDAAs, because section 1(a) – codified later as N.J. Stat. § 10:5-12.7 – provides: "A provision in any employment contract that waives any substantive *or procedural* right or remedy relating to a claim of discrimination, retaliation, or harassment shall be deemed against public policy and unenforceable" (emphasis added). And section 1(b) adds: "No right or remedy under the 'Law Against Discrimination,' 12 P.L.1945, c.169 (C.10:5-1 *et seq*.) or any other statute or case law shall be prospectively waived." The *Antonucci* Court agrees with our read of the law and finds that the FAA as it existed before *Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act*, preempts it: "Section 12.7 does not expressly use the term 'arbitration,' nor does it expressly state that it applies to agreements to arbitrate. Nevertheless, applied to an arbitration agreement in the employment context, the plain language of Section 12.7 of LAD prohibits all pre-dispute agreements if those agreements prospectively waive the right to file a court action for a LAD claim.... The waiver of the right to go to court and receive a jury trial is one of the primary objectives or 'defining features' of an arbitration agreement.... Accordingly, we conclude that the FAA pre-empts Section 12.7 when applied to prevent arbitration called for in an agreement governed by the FAA."
(ed: Of course, Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act, *renders this decision is essentially moot.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Kirk v. Ratner*, No. B309880 (Calif. Ct. App. 2 Feb. 10, 2022)**: Facts: "Following a telephonic hearing, an emergency arbitrator, appointed pursuant to the JAMS rules identified in the settlement agreement, issued a temporary restraining order prohibiting Kirk, Newton, Cowan and Marshall from disclosing any confidential information as defined in the settlement agreement and from filing a lawsuit in any court against the executives, and ordered Kirk, Newton, Cowan and Marshall to show cause on July 6, 2020 why a preliminary injunction containing the same prohibitions should not issue." Ruling: "Because the emergency arbitrator's ruling was not an 'award' within the meaning of Code of Civil Procedure section 1283.4, the court dismissed the petition for lack of jurisdiction. For the same reason, we dismiss Kirk and Marshall's appeal as taken from a nonappealable order" (footnotes omitted; link added by the *Alert*). (ed: *An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Noah's Ark Processors v. UniFirst Corp.*, 310 Neb. 896 (Feb. 11, 2022)**: "Noah's Ark Processors, LLC (Noah's), notified UniFirst Corporation (UniFirst) that it was terminating their business agreement. Pursuant to an arbitration clause, UniFirst commenced an arbitration proceeding against Noah's seeking damages. Noah's sought a declaration in district court that because Noah's was not a signatory to the agreement, Noah's was not bound by the agreement or the arbitration provision. Following a bench trial, the court dismissed the complaint of Noah's, determined that Noah's was equitably estopped from contesting that it is bound by the agreement and arbitration provision, and directed Noah's to participate in arbitration. Noah's appeals. The appeal is without merit. We affirm."

***Kaufman v RELX Inc.*, 2022 NY Slip Op 30025(U) (Sup. Ct. N.Y. Cty. Jan. 6, 2022)**: "Plaintiff has made no allegations tending to support the possibility of unconscionability in regard to the arbitration clause. As a practicing attorney, plaintiff must have at least some familiarity with contracts. Although he is a senior citizen, there is nothing in the motion papers suggesting that he has any difficulty with his cognitive ability. The fact that he had trouble finding the agreement online and figuring out how to sign it does not mean that he lacked the opportunity to read and/or the ability to understand it. A person's failure to read what he is signing does not made a contract unenforceable…. Nothing indicates that the arbitration clause in the April 2020 Agreement, which is also in the March 2019 Agreement, was hidden from plaintiff. Nor does he allege that the terms of the arbitration provision unreasonably favored LexisNexis." (*ed: The Court applied Ohio law, per the parties' choice-of-law agreement*.)

***Hager v. Nevin*, FINRA ID No. 20-00983 (Minneapolis, MN, Jan. 25, 2022)**: A group of customers alleging that they were placed in high commission alternative investments that were not in line with their growth objective lose their case against Respondent broker-dealers and a registered representative. One Respondent broker-dealer is granted its Motion for Directed Verdict after the Panel finds that said customers did not meet

their burden of proof against this Respondent. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Sachs v. Boucher*, FINRA ID No. 21-00550 (Providence, RI, Jan. 25, 2022)**: A majority public Panel explains why it has decided to grant with prejudice two Respondent brokers' Pre-Hearing Motion to Dismiss pursuant to FINRA Rule 12504 subparagraph (a)(6)(C) (Res Judicata). The headers from the explanation (*ed: repeated* verbatim): 1. Claimant Previously Brought Multiple Claims regarding the Same Dispute; 2. The Current Claim and the Prior Matters Are Against the Same Party; and 3. The Prior Matters Were Fully and Finally Adjudicated on the Merits and Were Memorialized in an Award or Decision. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

D. Horton, *Forced Remote Arbitration*, Cornell Law Review, Vol. 108 (Feb. 15, 2022). "This Article shines light on these issues by conducting an empirical study of forced remote arbitration. It analyzes 70,150 recent filings and reaches three main conclusions. First, since July 2020, roughly 67% of all evidentiary hearings have been held virtually. Even though this figure will likely decline as the pandemic recedes, online arbitration has become entrenched. Second, plaintiffs who participate in virtual proceedings generally win less often and recover lower damage awards than individuals who arbitrate in person. This 'remote penalty' exists in some settings even after controlling for variables such as claim type, pro se status, and the experience of the defendant, the lawyers, and the arbitrators. Third, even though proponents of forced remote arbitration contend that it streamlines cases, the data only partially support this claim. Some remote modes, such as documents-only proceedings, seem to save time and money, while others, like video hearings, do not. Finally, the Article explains how its findings can help lawmakers and judges regulate and monitor forced remote arbitration."

***Senate Passes Bill Curbing Arbitration of Workplace Sexual Harassment Claims: Could More FAA Exceptions Follow?* Ballard Spahr LLP Consumer Finance Monitor Blog (Feb. 16, 2022)**: "Although this new legislation does not directly impact arbitration agreements used by consumer financial services companies, those companies need to remain alert. On the one hand, this may simply be the latest in a series of congressional enactments that have created narrow exceptions to the FAA…. On the other hand, this may encourage some in Congress to continue to press for more sweeping legislation that would prohibit the use of predispute arbitration agreements with class action waivers in all consumer contracts. Only time will tell whether consumer financial services companies just dodged a bullet, or whether a broader fusillade is on the way." (*ed: See our coverage elsewhere in this* Alert.)

***N.J. Bias Arbitration Ban Invalid When at Odds With Federal Law*, Bloomberg Law (Feb. 16, 2022)**: "New Jersey's 2019 amendment of the state's anti-bias law to ban agreements requiring workers to arbitrate discrimination claims is preempted when it

conflicts with the Federal Arbitration Act, a state appeals court ruled in a case of first impression." (*ed: See our coverage elsewhere in this* Alert.)

***Firms Get More Power to Protect Seniors from Exploitation*, Financial Advisor IQ (Feb. 17, 2022)**: **"**The Financial Industry Regulatory Authority has amended its senior investor protection rule to give financial firms more power on placing holds on suspicious transactions, and making those holds almost twice as long, in light of comments it received in 2020." (*ed: See Regulatory Notice 22-05*.)

***FINRA Orders Review of Wells Fargo Arb Ruling That Was Struck Down in Court*, ThinkAdvisor (Feb. 18, 2021):** "The Financial Industry Regulatory Authority is ordering an independent review of an arbitration decision in favor of Wells Fargo that was thrown out in court when a judge found that the wirehouse had manipulated the arbitrator selection process, the regulator said Friday.[]FINRA says it has hired the Lowenstein Sandler law firm to review how FINRA Dispute Resolution Services complied with its rules, policies and procedures for arbitrator selection in the proceeding, in which a panel denied an investor's claim against Wells Fargo." (*ed: See our coverage elsewhere in this* Alert.)
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DID YOU KNOW?

A NICE COMPILATION OF STATE ADR LAWS. Cornell Law School's Legal Information Institute maintains a free Webpage compiling state laws dealing with alternative dispute resolution. The alphabetical list also has links to each statute. See https://www.law.cornell.edu/wex/table_alternative_dispute_resolution/.
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