SECURITIES ARBITRATION ALERT 2022-15 (4/21/22)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Everything You Ever Wanted to Know About SCOTUS**

SQUIBS: IN-DEPTH ANALYSIS

UPDATE ON FINRA "RIGGED PANELS" ACCUSATION: WE HAVE A COPY OF THE WELLS APPEAL. ***Wells Fargo has filed an appeal of the Trial Court's award vacatur in the FINRA "rigged panels" matter.*** The *Alert*'s readers are very familiar with this saga, which we've covered extensively and blogged about on February 2, 9, and 25. To review, Fulton County Superior Court Judge **Belinda E. Edwards** in *Leggett v. Wells Fargo Clearing Services, LLC*, No. 2019CV328949 (Ga. Super Jan. 25, 2022), found that the potential FINRA arbitrator list preparation process had been compromised.

Recent History
This prompted: 1) subsequent calls by PIABA for Congressional and SEC investigations; 2) a denial from Wells and a vow to appeal; 3) a **February 9** letter to FINRA from Sen. **Elizabeth Warren** (D-MA) and **Rep. Katie Porter** (D-CA) demanding answers by **February 23**; 4) a **February 18** Press Release from FINRA announcing that the Authority had retained the Lowenstein Sandler law firm to conduct an independent review; 5) news reports in *FA Magazine* and *ThinkAdvisor* in late **February** of a coming appeal by Wells; 6) a FINRA reply to Sen. Warren and Rep. Porter in a **February 21** letter from CEO and President **Robert W. Cook**; and 7) as reported in SAA 2022-10 (Mar. 17), a **March 7** letter from Sen. Warren and Rep. Porter that was announced in a Press Release. The legislators' latest letter posed several questions and demanded a response by **March 22.**

Wells Files An Appeal: No Basis to Vacate
Although we could find no evidence* that FINRA responded, we can update our coverage to furnish a link to *Wells Fargo Clearing Services, LLC v. Leggett*, No. A22A1149, the appeal filed **April 4** in Georgia Court of Appeals. The thrust of the appeal? Although there were several allegedly erroneous bases for vacating the Award asserted by Judge Edwards, the appeal says as to the "rigged panel" issue: "By signing the draft order written and submitted by Leggett's counsel, the trial court vacated the Award notwithstanding that the factual findings in its Order are false and wholly unsupported by the record. If this Court does not reverse, the trial court will have effectively deprived WFA of the benefit of the written contractual bargain that it had struck with Leggett. Consistent with the Congressional mandate in the FAA and the case law construing it, the parties freely bargained to resolve their disputes in an arbitration that would not be second guessed in court. The trial court's legal errors destroyed that bargain—thus undermining the well-established policy in favor of both arbitration and freedom of contract."
*(ed: *As we've said before, FINRA may have responded to the latest letter on this matter from Sen. Warren and Rep. Porter, be we've been unable to find any evidence of that on the FINRA or Congressional Websites or social media. We requested a status update from FINRA, which referred us to Sen. Warren and Rep. Porter. Inquiries to the legislators still remain unanswered as of press time. **This is by no means the end of it. It's just the latest chapter in what is sure to be a lengthy process.)*
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NINTH CIRCUIT DECLINES TO ENFORCE BROWSEWRAP TOS THAT DIDN'T CLEARLY ALERT USERS TO PDAA. *The lack of an affirmative action by the consumer to accept the browsewrap agreement's Terms of Service "TOS") doomed the PDAA therein.* Whether a predispute arbitration agreement ("PDAA") in Terms of Service ("TOS") in an online "browsewrap" agreement is enforceable under the Federal Arbitration Act depends largely on whether the TOS containing the PDAA were clearly noted on the Webpage such that the consumer had clear notice that they were bound to

arbitrate. The holding in *Berman v. Freedom Financial Network, LLC*, No 20-16900 (9th Cir. Apr. 5, 2022), is a primer on how *not* to provide clear notice.

District Court's Guidance on How Not to Have an Enforceable Browsewrap PDAA
We will let the Court's words in the case below, *Berman v. Freedom Financial Network, LLC*, 400 F.Supp.3d 964 (2019), and our coverage in SAA 2020-34 (Sep. 9), speak for themselves: "[T]he webpages do not conspicuously indicate to users that they are agreeing to the Terms and Conditions, including an agreement to mandatory arbitration. The webpages at Exhibits 1 and 3 to the … declaration do not include a specific affirmative means of indicating consent to the Terms & Conditions or arbitration clause. Similar to the website at issue in *Nguyen* [*v. Barnes & Noble Inc*., 763 F.3d 1171, 1178 (9th Cir. 2014)], while there is text including a hyperlink to the terms of the agreement located near a button the user must click to continue, there is no text that notifies users that they will be deemed to have agreed to these terms 'nor prompts them to take any affirmative action to demonstrate assent.' There is no tickbox or 'I agree' button for the Terms & Conditions. As in *Nguyen*, the hyperlink to them is only located in proximity to button with which the user must interact to continue. The 'This is correct, Continue!' and 'Continue' buttons plainly refer to the entry of other information on the page, not assent to the Terms & Conditions…. Although the user must interact with the page and click a button to continue using it, that click is completely divorced from an expression of assent to the Terms & Conditions or to mandatory arbitration. Further, the phrase 'I understand and agree to the Terms & Conditions which includes mandatory arbitration and Privacy Policy' is formatted in black font against a white background which is exceedingly small compared to the larger, more colorful and high-contrast fonts on the rest of the page, making it difficult to read on a large, high-resolution monitor, much less a mobile device. That the very small text providing the hyperlink to the Terms & Conditions also uses the words 'which includes mandatory arbitration' does not change the analysis since the website does not prompt affirmative assent to this statement" (citations and footnotes omitted).

The Ninth Circuit is on Board
A unanimous Ninth Circuit affirms the District Court: [from the official summary] "The panel held that unless the web operator can show that a consumer has actual knowledge of an arbitration agreement, an enforceable contract will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms. The panel concluded that defendants' webpages did not provide reasonably conspicuous notice because of the small font size and format and because the fact that a hyperlink was present was not readily apparent. The panel further concluded that by clicking on a large green 'continue' button, plaintiffs did not unambiguously manifest their assent to be bound by the terms and conditions."
*(ed: *As we've said before many times as to consumer PDAAs, "when in doubt, spell it out." **The case involved the consumers' suit for Telephone Communication Protection Act violations. ***Contrast this case with the holding in* Dohrmann v. Inuit, Inc.*, 823*

Fed.Appx. 482 (2020), where the majority enforced the TurboTax online PDAA. There, this language appeared immediately above the "Sign In" button: "By clicking Sign In, you agree to the Turbo Terms of Use, TurboTax Terms of Use, and have read and acknowledged our Privacy Statement.")
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

EMPLOYEE BOUND BY PDAA IN HANDBOOK, DISTRICT COURT HOLDS. *Taylor v. Eclipse Senior Living, Inc.*, No. 20cv190-LAB (WVG), (S.D. Calif. Apr. 1, 2022), is one of those nice decisions where the facts and holding can be deduced easily by quoting the Opinion. First, the facts and contentions: "Taylor first argues that she received the Agreement (contained in the Employee Handbook) and the accompanying Attestation Page separately, and that because the latter page allegedly did not reference any arbitration agreement, she did not consent to—and should not be bound by—the relevant arbitration provisions currently at issue. She does not dispute that prior to receiving and signing the Attestation Page, she was provided with a copy of the Associate Handbook, which includes the relevant arbitration provisions, and she declines to acknowledge that the Attestation Page she signed clearly states, 'DO NOT SIGN UNTIL YOU HAVE READ THE ABOVE ACKNOWLEDGEMENT AND AGREEMENT.' She appears to suggest instead that this language referred to a HIPAA agreement or other drug and alcohol policy documents she received along with the documents in question, not the arbitration Agreement." And the holding and rationale: "But this argument is unpersuasive, particularly where the Attestation Page does not even reference any HIPAA or drug and alcohol policies. Her failure to read or understand the terms to which she agreed is 'legally irrelevant' and does not invalidate her written assent to the contract…. Moreover, even if the Attestation Page failed to put Taylor on notice, her offer letter specifically informed her that her '[e]mployment . . . is conditioned upon [her] agreement to submit employment-related disputes to binding arbitration.' That provision further states that by signing and accepting the employment offer, Taylor 'agree[s] to the Company's standard Arbitration Agreement.' Taylor signed that offer letter on January 28, 2019. Where, as here, an offer letter expressly conditions employment on an agreement to arbitrate, the employee's signature amounts to acceptance of the agreement. Given the facts as alleged, Taylor cannot plausibly claim that she was not given sufficient notice of the arbitration term" (citation omitted; brackets in original). *(ed: *Seems right. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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AGENDA PUBLISHED FOR "HYBRID" FINRA ANNUAL CONFERENCE IN MAY. NO DISPUTE RESOLUTION PANELS. FINRA's *Annual Conference* will take place **May 16 – 18** and will be conducted both virtually and in person in Washington, D.C. Says the Website: "FINRA's premier event—the Annual Conference provides the opportunity for practitioners, peers and regulators to exchange ideas on today's most timely compliance and regulatory topics. The conference offers industry professionals a variety of sessions related to current trends in technology, cybersecurity,

risk management and much more." The Agenda is now published, and as far as we can tell, there are no panels featuring dispute resolution or with Dispute Resolution Services ("DRS") staff as faculty (although ADR might come up at *Compliance and Legal Trends*). Our guess is that some DRS personnel will be staffing the demos. The conference also features "Office Hours." Addressing lingering COVID-19 concerns: "FINRA will provide all attendees with their choice of color coded bracelets … to represent each attendee's choice of contact: Red – Greet from 6 feet; Yellow – Elbows only; Green – Handshakes and high-fives."
*(ed: *In-person registration ranges from $499 for small firm members to $2,195 for non-members, with group discounts available. Virtual attendance fees range from $199 for government agency registrants to $399 for non-members. In-person conference fees: "include attendance to all sessions and conference materials, scheduled breakfast, lunches and receptions. **We were a bit surprised not to see Director of Arbitration Rick Berry listed as a speaker.)*
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SAVE THE DATE: ABA'S ANNUAL ARBITRATION TRAINING INSTITUTE IS JUNE 1-3 IN CHICAGO – IN PERSON. The American Bar Association will be conducting its *15th Annual Arbitration Training Institute* **–** in person only **– June 1 to 3** at Loyola University Chicago School of Law in Chicago. Says the program brochure: "This two-day comprehensive training in advanced arbitration skills will be presented by nationally recognized experts. It will feature sessions on every stage of the arbitration process examined from the vantage point of neutrals, advocates, and in-house counsel. Plenary sessions will be coupled with small group break-out discussions to enhance learning and interaction with faculty and colleagues." The Web announcement lists these topics (*ed: repeated essentially* verbatim): Concurrent sessions on handling employment, international, construction, healthcare, and smaller cases in arbitration; a special plenary session on "Learning the Ropes from Case Managers" featuring experts from the AAA®, JAMS and CPR; an interactive ethics session; and a special plenary session on "Cases Not Worth Missing." There is a half-day pre-program on **June 1**: "that is dedicated to providing practical guidance for developing, managing and improving a successful career as an arbitrator."
*(ed: *CLE credit will be available from several jurisdictions. **Registration can be accomplished via the Webpage. Attendees can register for the June 1 half-day event or the June 2-3 program, or both. ***There will be no virtual presentations.)*
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UBER MUST PAY $91 MILLION IN AAA MASS ARBITRATION FEES. We have reported several times on court decisions that resulted in major corporate entities being compelled to participate and pay fees in mass individual AAA consumer arbitrations involving the same issue. *Uber Tech., Inc. v American Arbitration Assn., Inc.*, 2022 NY Slip Op 02503 (App. Div. 1st Dept. Apr. 14, 2022), is no exception. Here, Uber fails to get an order restraining the AAA from billing nearly $91 million in fees associated with 31,000 arbitration claims against Uber Eats. Following the death of George Floyd in June 2020, "Uber announced it would waive its delivery fee charged to customers for orders

placed at certain qualifying Black-owned restaurants from June 4, 2020 through December 1, 2020." The arbitration claims were asserted by Uber Easts customers who had during that time frame paid a delivery fee to a nonblack owned restaurant: "challeng[ing] the lawfulness of Uber's policy by claiming it constituted unlawful reverse race discrimination." In its unanimous decision denying Uber's application for an injunction, the Court finds little likelihood of success on the merits: "Uber failed to demonstrate AAA breached any agreed upon terms by failing to charge fees commensurate with its reasonable, actual costs. While Uber alleges that it, the claimants, and AAA are all bound by the CA [Consumer Arbitration] Rules and Consumer Due Process Protocol Statement of Principles (Protocol), neither of those documents requires AAA to charge reasonable fees related to its actual costs. Rather, the CA Rules repeatedly state AAA will charge fees as outlined in the attached fee schedule. The CA Rules also allow AAA to exercise sole discretion as to whether to apply the CA Rules, whether to interpret and apply the fee schedule to a particular case or cases, and whether to consider an alternative payment process for multiple case filings. The Protocol, while not explicitly mentioned in Uber's Terms of Use, has language regarding reasonableness of fees, but the sections referenced by Uber primarily deal with ensuring consumers receive due process and the impartiality of the arbitrators. Thus, it is unlikely Uber would succeed on its declaratory judgment breach of contract claim…. While Uber is trying to avoid paying the arbitration fees associated with 31,000 nearly identical cases, it made the business decision to preclude class, collective, or representative claims in its arbitration agreement with its consumers, and AAA's fees are directly attributable to that decision …."
(ed: We file this one under: "Be careful what you ask for.")
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Berman v. Freedom Financial Network, LLC*, No. 20-16900 (9th Cir. Apr. 5, 2022)**: [From the official summary] "The panel held that unless the web operator can show that a consumer has actual knowledge of an arbitration agreement, an enforceable contract will be found based on an inquiry notice theory only if: (1) the website provides reasonably conspicuous notice of the terms to which the consumer will be bound; and (2) the consumer takes some action, such as clicking a button or checking a box, that unambiguously manifests his or her assent to those terms. The panel concluded that defendants' webpages did not provide reasonably conspicuous notice because of the small font size and format and because the fact that a hyperlink was present was not readily apparent. The panel further concluded that by clicking on a large green 'continue' button, plaintiffs did not unambiguously manifest their assent to be bound by the terms and conditions." (*ed: See our coverage elsewhere in this* Alert.)

***Adolph v. Uber Technologies, Inc.*, No. G059860 (Calif. Ct. App. 4 Apr. 11, 2022)**: "Uber contends on appeal that the initial question of whether Adolph is an employee—who may bring a representative PAGA claim—or an independent contractor—who may not—must be determined in arbitration. We disagree. California case law is clear that the threshold issue of whether a plaintiff is an aggrieved employee in a PAGA case is not

subject to arbitration." (*An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Boyle v. Anderson*, No. 210382 (Va. Apr. 14, 2022)**: "This appeal calls upon us to decide the narrow question of whether the Virginia Uniform Arbitration Act, Code §§ 8.01-581.01 to -.016) ('VUAA') or the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ('FAA') compels enforcement of an arbitration clause in a trust. Both statutes require arbitration for contracts. The VUAA also compels arbitration for written agreements to submit a dispute to arbitration. We conclude that a trust is not a contract and, therefore, the VUAA and the FAA do not require arbitration on that basis. We further conclude that a beneficiary of a trust is not a party to an agreement to arbitrate and, therefore, the provision of the VUAA compelling arbitration when there exists a written agreement to arbitrate likewise does not apply. Accordingly, we will affirm the judgment of the circuit court." (*ed: Hmm. If the Court means that in every instance, a trust is not a contract, we see no FAA preemption issues. Not so for an arbitration-specific rule.*)

***Sun v. Interactive Brokers*, FINRA ID No. 21-01158 (Chicago, IL, Feb. 28, 2022)**: An Arbitrator explains why he granted Respondent broker-dealer's Prehearing Partial Motion to Dismiss pursuant to FINRA Rule 12504(a)(6)(A), finding that the customer released his claims by signing an agreement not to seek further compensation as it related to trades in one of his accounts. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Ramsey v. Morgan Stanley*, FINRA ID No. 21-01939 (Richmond, VA, Mar. 2, 2022)**: An Arbitrator explains in great detail why he has decided to grant Claimant broker's request for reformation of one termination disclosure from his Form U5 record and why he denied his request for reformation of another termination disclosure reported during his prior employment with Respondent broker-dealer Morgan Stanley. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Waibel, M., *The UK and the Development of Investor-State Dispute Settlement* (March 8, 2022), BRITISH YEARBOOK OF INTERNATIONAL LAW (Forthcoming): "The UK has made major contributions to the development of investor-state dispute settlement from 1920-2020. This essay shows that the UK contributed in three ways (1) law-making, both before and after the launch of its investment treaty programme [sic] in the early 1970s; (2) dispute settlement – with UK nationals as claimants, or through British nationals serving as arbitrator or counsel in investor-state arbitrations; and (3) scholarship by British scholars or by scholars in the UK. This contribution surveys how the UK contributed to international investment law (Section I) and investor-state arbitration (Section II) in broad strokes over the last hundred years."

***Wells Fargo Appeals Arb Ruling Struck Down in Court*, ThinkAdvisor (Apr. 11, 2022)**: "A Georgia judge erred in ruling that Wells Fargo manipulated the Financial Industry Regulatory Authority's arbitration selection process and the decision should be

reversed, according to an appeal filed by Wells Fargo Advisors.... In its April 4 complaint, filed in the Georgia Court of Appeals, Wells Fargo Advisors argues that the trial court 'vacated the Award notwithstanding that the factual findings in its Order are false and wholly unsupported by the record. If this Court does not reverse, the trial court will have effectively deprived WFA of the benefit of the written contractual bargain that it had struck with Leggett.'" (*ed: See our coverage elsewhere in this* Alert.)

***Ex-Morgan Stanley FA Ordered to Pay $3.1M Over Promissory Note*, Financial Advisor IQ (Apr. 12, 2022)**: "A Financial Industry Regulatory Authority arbitration panel has ruled in favor of Morgan Stanley in an arbitration dispute with one of its former financial advisors over a promissory note.... Last week, the Finra arbitration panel denied [FA's] claims and ordered him to pay Morgan Stanley around $3.1 million in compensatory damages, plus interest, Finra says."

***The Role of U.S. Federal Courts in Arbitration*, Lexology (Apr. 12, 2022)**: "Arbitration is often the preferred, if not contractually required, forum for resolving business disputes. This is primarily because of arbitration's perceived efficiencies in cost and time-to-resolution as compared to litigation in U.S. state or federal courts. Federal law has embraced arbitration through the Federal Arbitration Act ('FAA'), which, as interpreted by the U.S. Supreme Court, mandates the enforcement of pre-dispute arbitration agreements. This post concerns the U.S. Supreme Court's recent *Badgerow v. Walters* ruling implicating the role of federal courts in supervising the arbitration process."

***Ex-Voya Client Wants Firm to Pay Up Now that Broker has Fled Country*, FinancialPlanning (Apr. 13, 2022)**: "After 44 settlements adding up to more than $14 million in payments to clients of a barred financial advisor who has left the country, Voya Financial Advisors prevailed in one case.[] James 'Jim' Travis Flynn must pay [a] former client … compensatory damages of $322,990 for unsuitable and negligent 'high-risk, high-fee, illiquid investments' amounting to $3.5 million worth of non-traded alternative products, according to the April 4 decision by a Boca Raton, Florida-based FINRA arbitration panel. The arbitrators denied all of [her] claims against Voya, though, and she's now seeking to vacate the award in a Michigan state court."

***Update: Uber Loses AAA Fee Appeal Before New York State Court; N.D. Cal. Petitioners React*, LawStreet (Apr. 15, 2022)**: "According to a letter sent to Judge Richard Seeborg on Thursday, the petitioners seeking an order compelling Uber to pay arbitration fees it owes the American Arbitration Association (AAA), may not need the requested judicial intervention. The letter explains that a New York state appellate tribunal rejected Uber's bid to get out of paying the AAA fees it owes in connection with tens of thousands of racial discrimination claims brought by Uber Eats customers…. According to the letter, the 'New York Appellate Division, First Department, unanimously affirmed the state trial court's decision rejecting Uber's attempt to avoid the arbitration fees it bargained for in drafting its consumer arbitration agreement.' The letter further says that Uber will unlikely have any further recourse to appeal the interlocutory decision. Moreover, it points out that Uber represented to Judge Seeborg that if it lost the

New York appeal, it would 'meet its obligations and arbitrations will proceed.'" (*ed: See our coverage elsewhere in this* Alert.)
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DID YOU KNOW?

EVERYTHING YOU EVER WANTED TO KNOW ABOUT SCOTUS. The heavy focus on the Supreme Court these last few weeks prompts us to suggest that readers bookmark the Website of the Supreme Court Historical Society. This wonderful resource has a wealth of information about the Court, including a searchable database of current and past Justices. Check it out.
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