SECURITIES ARBITRATION ALERT 2022-34 (9/8/22)

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LAW SCHOOL CLINICS AND PROFS URGE PASSAGE OF *INVESTOR JUSTICE ACT*. *A coalition of 28 law school investor advocacy clinic directors and professors have written to Congress urging it to pass* the Investor Justice Act. The **August 25** letter to sponsor Sen. **Catherine Cortez Masto** (D-NV) was signed by nine clinics and 19 individual law professors. It urges passage of S.4657, the *Investor Justice Act of 2022*.

Bills Would Provide Continuing Clinic Funding

Continuing funding for law school investor advocacy clinics has for years been an issue. Start-up funding is typically defrayed by the FINRA Investor Education Foundation or a state. These sources tend to dry up after a few years, and some clinics have closed due to lack of continuing funding. That may no longer be the case if the bills are enacted. We covered in SAA 2022-22 (Jun. 9) a companion bill introduced in the House by Rep. **Mike Quigley** (D-IL) on **June 1.** H.R. 7923 – the *Investor Justice Act* – which would: "amend the Securities Exchange Act of 1934 to establish a grant program to fund qualified investor advocacy clinics, and for other purposes." The House text provides: "The Commission, acting through the Investor Advocate, may make grants, on a competitive basis, to qualified investor advocacy clinics in accordance with this paragraph." After establishing eligibility criteria (e.g., the clinic: "provides or will provide free representation to investors with claims of less than $100,000 …"), the bill states: "A qualified investor advocacy clinic awarded a grant … may only use grant funds for the development, *expansion, or continuation* of the qualified investor advocacy clinic"(emphasis added). Aggregate yearly grants are capped at $5 million, and individual clinic grants at $150,000. Multi-year grants are permitted for up to three years. The federal share cannot exceed 50%, and there is an accounting requirement. The identical Senate text may be found here.

Letter Urges Passage

The collection of several clinic directors and law professors – including your publisher – write: "The Investor Justice Act will expand these critical resources for investors nationwide by creating an ongoing, matching grant program at the SEC, administered by the Office of the Investor Advocate. Specifically, the bill proposes to amend the Securities Act of 1934 to provide grant authority to the SEC to give yearly matching grants of up to $150,000 to qualified investor advocacy clinics that provide legal and educational services to small claim investors. The grants could be used to open new clinics, expand existing clinics, or provide resources to ensure existing clinics' continued operation. The Investor Justice Act will allow for the establishment and maintenance of clinics in underserved communities because they can rely on continued funding if the clinic provides legal representation and educational services. If passed, the Investor Justice Act would significantly improve access to justice for investors who need legal representation, help them understand whether they have been victimized, and, if so, assist them in recovering their losses."

SEC's Gensler Seems Supportive

In prepared remarks before the 2022 SEC *Investor Advocacy Clinic Summit* last **March**, SEC Chair **Gary Gensler** said: "The law school clinics participating in this Summit are important partners in our work. To provide a little history, in 1997, then-SEC Chairman Arthur Levitt announced an initiative to give small investors, dealing with fraud, an avenue to find excellent legal representation.[] At the time, Chairman Levitt stated that 'small investors get much-needed legal assistance, and students gain valuable learning experience.'[] He called the idea of these clinics a 'win-win proposition.'[] To date, clinics like the ones you are involved with have formally represented hundreds of

investors and recovered millions of dollars on their behalf.[] This summit affirms what Chairman Levitt understood so well: For investor advocacy clinics like yours, your wholesale involvement helps our agency protect investors" (footnotes omitted). Also, the **June 9** SEC Investor Advisory Committee meeting Agenda had this item: "Discussion of a Recommendation on Funding Investor Advocacy Clinics.")
*(ed: *The bills as of now have just a handful of co-sponsors. **As reported in SAA 2022-33 (Sep. 1), the SEC Historical Society will be hosting a virtual program,* Securities Arbitration Clinics: Commemorating 25 Years of Law Students Aiding Investors*, on September 14 between noon and 1:30 pm Eastern. Confirmed panelists include: Jill Gross, Senior Associate Dean for Academic Affairs and Law Operations, Professor of Law, Elisabeth Haub School of Law, Pace University, and Former Director, Pace Investor Rights Clinic; Barbara Black, Professor Emerita and Founder, Pace Securities Arbitration Clinic; Christine Lazaro, Professor of Clinical Legal Education, Director, Securities Arbitration Clinic, St. John's University School of Law; Paul Radvany, Clinical Professor of Law, and Director, Securities Arbitration Clinic, Fordham Law School; and Bruce Sanders, Supervising Attorney & Adjunct Professor of Law, Investor Justice & Education Clinic, Howard University School of Law. This free program is open to the public, and registration is not required. It can be accessed via the society's Web page, www.sechistorical.org.)*
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MORE ON AMENDED AAA COMMERCIAL RULES. ***Just as we were putting SAA 2022-33 (Sep. 1) to bed came word that the AAA had revised its* Commercial Arbitration Rules and Mediation Procedures*, effective September 1. We ran a Short Brief in # 33, and promised a more thorough analysis in this* Alert**. We draw heavily from an **August 29** email to panelists from Vice President for Panel Relations **Cindy Rumney**, as well as AAA's posted summary of the key changes.

Why the Changes?
"The amended AAA *Commercial Rules and Mediation Procedures*, effective September 1, 2022, represents a two-year endeavor by an internal AAA working group, with contributions from the AAA's case-management and administrative groups, party surveys, arbitrators, and the Law and Practice and LCC Committees of the AAA-ICDR® Council.[] The amended rules standardize important longstanding AAA practices—confidentiality, consideration of consolidation/joinder motions, and civility—as well as revise rules to further promote efficiency, reflect advances in technology, and include where appropriate discussions regarding cybersecurity."

New Sections
New rules include (*ed: repeated* verbatim):
- **Consolidation:** AAA's first-ever commercial rule for the consolidation of existing arbitrations or the joinder of additional parties
- **Confidentiality**: Captures the long-standing requirements of the *Code of Ethics for Arbitrators* by including a commitment to the confidentiality of arbitration in the Rules

- **Conduct of parties and their representatives**: Specifically incorporates into the Rules the AAA's expectations of civility and professionalism of all participants in arbitrations
- **Providing arbitrators with the authority to interpret awards**: Draws upon the recently adopted ICDR article that allows the arbitrator to explain the award on a party's motion
- **The importance of cybersecurity, privacy, and data protection**: Reflects the weight that the AAA places on cybersecurity and recommends that data protection be discussed in the preliminary hearing.

Other Changes Worth Noting

Other key amendments include (*ed: repeated* verbatim):

- Expanding arbitral authority to determine the method of proceedings
- Building on lessons learned from the COVID-19 pandemic, certain Rules now give the arbitrator the express authority to compel the use of video or electronic means for some or all of the hearing.)
- Adjusting the dollar thresholds for application of the Expedited Procedures and Large, Complex Commercial Disputes Procedures
- Strengthening limitations on motion practice and discovery in the Expedited Procedures
- Updating the rule on stenographic records to include a broader definition of transcription
- Increasing the dollar threshold for a three-arbitrator panel.

*(ed: *These are the first substantial amendments in several years. As far as we can tell, the last amendments were in October 2013. **We assume they were effective for cases filed on and after September 1. ***Click here for a detailed, section-by-section, analysis of the key changes.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH JULY: CUSTOMER AND INDUSTRY ARBITRATION CLAIMS ARE STILL DOWN, BUT HAVE STABILIZED. MEDIATION FILINGS ARE STILL STRONG, BUT ARE SLOWING DOWN. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **July**, with most trends persisting. We offer these headlines: 1) overall arbitration filings through July – 1,474 cases – are down 18%; 2) cumulative customer claims declined by 23%; and 3) industry arbitration filings are down 9%. All three percentages are unchanged from **June,** to us indicating that – at least for a month – the arbitration filing declines have stabilized. Pending arbitration cases stand at 3,236, a decline of 108 from June. Overall arbitration turnaround times were 17.9 months, with hearing cases now taking 20.1 months (both figures are slight increases from the past three months). There are now 8,486 DRS arbitrators, 4,085 public and 4,401 non-public. Mediation cases continue to run well ahead of 2021, but have slowed down a bit. There were a cumulative 527 mediation cases in agreement, a 101% increase (but down from **May**'s torrid plus 137% pace). The mediation settlement rate remains very high at 89%.

*(ed: *As reported previously, Breach of Reg BI made it into the "Top 15 Controversy Types in Customer Arbitrations" with 81 claims, ranking this category number 13. **Hearing processing times ticked up a bit again for the third month in a row, after decreasing earlier this year. We will continue to keep an eye on this one, since we continue to wonder if the resumption of in-person hearings in August 2021 is somehow linked to this stat. Common sense tells us it is easier to schedule and attend virtual hearings, than those conducted in-person. ***Past year stats can be found here.)*
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SAVE THE DATES: PIABA'S ANNUAL MEETING STARTS OCTOBER 25. The PIABA Annual Meeting will take place virtually and in-person **October 25 – 28** in San Antonio, Texas. Says the program description: "In keeping with health and safety concerns, PIABA will present the Securities Law Seminar virtually and the PIABA Annual Meeting will be presented virtually and in-person. To accommodate all time zones, five sessions will be presented during the Securities Law Seminar. Four or five sessions will be hosted each day of the Annual Meeting with two breakout session options presented during these presentations." There are three discrete events as follows: Securities Law Seminar (October 25); PIABA Annual Meeting (October 26 – 28); and PIABA Board Meeting (October 28). The program brochure is here; outgoing PIABA President **Mike Edmiston** will be moderating *Review of FINRA DR Activities & Developments in 2022*, with FINRA faculty members **Richard Berry; Carolann Gemski;** and **Laura McNamire**. Registration may be done online and CLE credits are available.
*(ed: *The in-person programs will take place at the JW Marriott -San Antonio Hill Country, 23808 Resort Parkway, San Antonio, TX 78261. **Registration fee amounts depend on the attendee's status and whether they are attending virtually or in person. ***The Annual Business Meeting and some break-out sessions may be designated as 'closed' (open to PIABA members only).)*
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THIRD CIRCUIT DECLINES TO ENFORCE ARBITRATION CLAUSE AGAINST A NON-SIGNATORY. It is hornbook law that a signatory to a broad predispute arbitration agreement ("PDAA") is bound by its terms under the Federal Arbitration Act, and that sometimes such an arbitration agreement can be enforced by or against a non-signatory via equitable estoppel. That broad topic was at issue in *Abdurahman v. Prospect CCMC LLC,* No. 20-3466 (3rd Cir. Jul. 28, 2022), where the Court was asked to decide whether an employee who did not sign an arbitration agreement with her employer could be compelled to arbitrate statutory claims against the employer based on a PDAA she signed with a related entity. "No," says a unanimous Third Circuit. We will let the Court's words speak for themselves: "Three corporations, comprised of two siblings, Crozer Chester Medical Center ('CCMC') and Prospect Health Access Network ('Prospect'), and a parent, Crozer Keystone Health System ('Crozer Keystone'), entered into several agreements with emergency medicine resident Dr. Dina Abdurahman, including an employment contract between Abdurahman and CCMC. Sophisticated entities, the corporations drafted the forms and designated the

counterparties. Abdurahman's termination led her to sue CCMC, and CCMC promptly moved to arbitrate. Except Abdurahman signed an arbitration agreement with Prospect, not CCMC. A case of scrivener's error, savvy separation, or something in between? We need not solve that riddle because the arbitration agreement with Prospect cannot stretch to govern Abdurahman's employment with CCMC." Why not? Says the Court: "All agree that Prospect, not CCMC, signed the arbitration agreement with Abdurahman. Even so, CCMC argues that it should be able to enforce the agreement for two reasons: agency principles and equitable estoppel. Neither succeeds…. That is, some flavor of estoppel should connect CCMC to Prospect and, once created, should also create a fresh contractual duty for Abdurahman. We see no reason to depart from standard estoppel principles, a list that does not include the configuration, and the contracts, here."
(ed: No surprise. The Court's reference to the drafters as "sophisticated entities" was a spoiler.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Rodgers v. United Services Automotive Association*, No. 21-50606 (5th Cir. Jul. 8, 2022) (per curiam)**: "Rodgers points to three violations under § 10(a)(1). He argues that the award must be vacated as procured by undue means because USAA's counsel coached Redmond via text message in her deposition, Redmond did not sign her deposition transcript, and USAA allegedly withheld records from Documentum. But a party alleging that an arbitration award was procured through undue means 'must demonstrate that the improper behavior was . . . not discoverable by due diligence before or during the arbitration hearing.' All three of these issues were either discovered or discoverable at the time of the arbitration hearing. First, Rodgers and his counsel did discover the alleged coaching at the time and worked to rectify it. Second, they could have readily noticed that the deposition transcript was not signed. Third, they learned of the Documentum database on September 16, 2020, four months prior to the hearing. Thus, they could have investigated, and indeed did investigate, whether USAA had produced everything relevant within that database. It follows that Rodgers does not show any undiscoverable improper behavior to support his § 10(a)(1) claims" (citation omitted; ellipse in original).

***Caremark, LLC v. Chickasaw Nation*, No. 21-16209 (9th Cir. Aug. 9, 2022)**: "The Chickasaw Nation and five pharmacies that it owns and operates (collectively, 'the Nation') appeal from a district court's order compelling arbitration of the Nation's dispute with Caremark and Caremark affiliates (collectively, 'Caremark'). The district court explained that, in light of a clause in the parties' contract delegating to the arbitrator the authority to resolve threshold issues regarding the scope and enforceability of the arbitration provision, the Nation's arguments that its claims are not arbitrable must be resolved by the arbitrator. We affirm." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Bridgecrest Acceptance Corp. v. Jones*, No. SC99269 (Mo. Jul. 12, 2022) (en banc)**: "In two separate cases, Bridgecrest Acceptance Corporation sought a deficiency

judgment in circuit court against consumers who had defaulted on car payments. In both cases, the consumers brought counterclaims against Bridgecrest, alleging unlawful and deceptive business practices. Bridgecrest moved to dismiss or stay the consumers' counterclaims and compel the matters to arbitration pursuant to an arbitration agreement the consumers signed. The circuit court overruled Bridgecrest's motions. On appeal, this Court reverses the circuit court's rulings and finds the arbitration agreement legally valid, conscionable, and not precluded by collateral estoppel. These cases are remanded for further proceedings consistent with this opinion."

***Petri v. Raymond James*, FINRA ID No. 21-02665 (Boca Raton, FL, Jul. 22, 2022)**: "A Panel explains in detail its reasoning for granting Respondent broker-dealer's Pre-Hearing Motion to Dismiss with prejudice pursuant to FINRA Rule 12200, finding that the customer in this case cannot compel arbitration as he had no client relationship with the Respondent broker-dealer." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***IFS Liquidation Trust v. Wakefield*, FINRA ID No. 22-00910 (Chicago, IL, Aug. 16, 2022)**: "In the Statement of Claim, Claimant alleged that IFS Securities Inc. ('IFS') was forced to cease operations as a broker dealer as a direct result of trading losses in Treasury securities suffered as a direct result of the fraudulent and dishonest actions of Respondent. Claimant also alleged that Respondent is liable for indemnification for claims by third parties in the IFS bankruptcy estate…. Respondent is liable for and shall pay to Claimant the sum of $57,000,000.00 in compensatory damages."
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Shirlow, Esmé & Alarcon, Maria José Alarcon, *Interview with our Editors: Shane Spelliscy, Chair of UNCITRAL Working Group III on Investor-State Dispute Settlement Reform*, Kluwer Arbitration Blog (Aug. 24, 2022): "In 2017, the United Nations Commission on International Trade Law (UNCITRAL) initiated a consultative process to consider procedural reform options for investor-State dispute settlement (ISDS). Kluwer Arbitration Blog ran a series on UNCITRAL's reform work in 2020, highlighting several subjects under consideration by Working Group III (WGIII).[] To get first-hand insights into the current status of this reform process, we have invited Shane Spelliscy, in his capacity as Chair of UNCITRAL's WGIII, to discuss the Group's work on ISDS reform. Mr. Spelliscy has extensive experience in ISDS. He has been lead counsel for Canada in a number of ISDS cases, has been Canada's representative at UNCITRAL since 2008, and since 2017 has acted as Chair of WGIII. Currently, he is also the Director-General and Senior General Counsel of the Canadian Government's Trade Law Bureau."

***Brokerage Defrauded into the Ground Wins $57M from Indicted Executive*, Financial Planning (Aug. 29, 2022)**: "A former executive at a defunct brokerage that accused him of 'fraudulent and dishonest actions' that ran it out of business must pay the firm $57 million. IFS Securities, an Atlanta-based brokerage currently in Chapter 11 bankruptcy

reorganization proceedings, won the Aug. 16 award in FINRA arbitration against … a fixed-income securities trader and registered representative at IFS", (link to award in original). (*ed: See our coverage elsewhere in this* Alert.)

Ex-Citi Broker Accused of Spoofing Wins $725K Arb Award, **Financial Advisor IQ (Aug. 30, 2022)**: "A Financial Industry Regulatory Authority [Panel] has order Citigroup to pay more than $725,00 in compensatory damages to one of its former brokers accused of spoofing.[] Last week, the Finra arbitration panel ordered the firm to pay Salant $107,619.50 for cancelled deferred cash and stock benefits. The panel also ordered he be paid a cash bonus of $617,763.82 attributable to his employment in 2014. The ruling offered no explanation of the decision."

On the Radar with FINRA: Remote Offices, Expungements, Customer Account Transfers, Digital Signature Forgeries**, Bates Research (Aug. 30, 2022)**: "FINRA remained active this summer with a series of important proposed rule changes and risk-related compliance reminders. Here's a summary to keep you up to date."

SEC Charges Advisory Firm and Executives with Devising an Elaborate Scheme to Defraud Clients out of More Than $75 Million**, www.sec.gov (Aug. 30, 2022)**: "The Securities and Exchange Commission today charged two North Carolina-based executives, Gregory E. Lindberg and Christopher Herwig, and their Malta-based registered investment adviser, Standard Advisory Services Limited, for defrauding clients out of more than $75 million through undisclosed transactions that benefited themselves and their companies."

Finra Dings Broker Who Coached His Colleagues Without Firm's OK**, AdvisorHub (Sep. 2, 2022)**: "Colleagues of a former broker who was selling them on his coaching services may have gotten a free lesson in what not to do.[] The Financial Industry Regulatory Authority has levied a three-month suspension and $5,000 fine against the former Thrivent Investment Management broker who had made about $28,000 coaching his fellow advisors without the firm's approval."

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DID YOU KNOW?

A NICE HISTORY OF COMMERCIAL ARBITRATION. The *Alert* loves arbitration history, so when we come across a nice treatment of the subject, we pass it along. Thus, we heartily recommend: *A Brief History of Arbitration in the United States*, by Steven Certilman (2010). This delightful piece is a great read that takes readers from colonial to modern times.

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