# SECURITIES ARBITRATION ALERT 2022-46 (12/8/22)

***George H. Friedman, Editor-in-Chief***

**SQUIBS:**

- **SCOTUS Denies *Certiorari* in Another Case Involving Arbitration**
- **Judge's Interpretation of an Ambiguous Arbitration Agreement Survives, Despite Post-Decision Recusal for Conflict of Interest**
- **Losses from Covered Call Strategy Result in $11.7 Million Award**

**SHORT BRIEFS:**

- **FINRA Board Meets in Person Next Week. No Agenda Yet**
- **FINRA Issues Reg Notice on Pump-and-Dump Scheme Increase**
- **FINRA's DC HQ to Relocate**
- **Employer's Failure to Pay JAMS Administrative Fees Supports PDAA Non-Enforcement Per CA's Arbitration Statute**

**QUICK TAKES:**

- ***Jiangsu Beier Decoration Materials Co., Ltd. v. Angle World LLC*, No. 21-3143 (3d Cir. Nov. 3, 2022)**
- ***Hursh v. DST Systems, Inc.*, No. 21-3567 (8th Cir. Nov. 28, 2022)**
- ***Mountain Business Center, LLC v. Ford Road, LLC,* 2022 WY 147 (Nov. 23, 2022)**
- ***Gray v. Triad Advisors*, FINRA ID No. 22-00169 (Jacksonville, FL, Oct. 24, 2022)**
- ***Vidal v. Morgan Stanley*, FINRA ID No. 22-00086 (New York, NY, Oct. 24, 2022)**

**ARTICLES OF INTEREST:**

- **Gross, Jill, *The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?,* 12 PENN. ST. ARB. L. REV. 96 (2020)**
- ***Code is Not Law — Arbitration's Critical Role in Resolving Crypto Disputes*, Herbert Smith Freehills LLP Blog (Nov. 17, 2022)**
- ***Finra Bars Ex-JPMorgan Advisor at Heart of Multimillion-Dollar Client Disputes*, Barron's (Nov. 28, 2022)**
- ***Ninth Circuit to Decide for Whom the Bellwether Tolls in Test of Verizon's Mass Arbitration Provision,* Ballard Spahr Blog (Nov. 28, 2022)**
- ***CFPB and FTC File Amicus Brief on Servicemembers' Right to Sue Under the Military Lending Act,* JDSupra (Nov. 30, 2022)**

**DID YOU KNOW?**

- **Ben Franklin was an Arbitrator**

**LETTER TO THE EDITOR:**

- **On FINRA's Arbitrator and Mediator Panel Demographics, *by William D. Nelson***

## *SQUIBS: IN-DEPTH ANALYSIS*

**SCOTUS DENIES *CERTIORARI* IN ANOTHER CASE INVOLVING ARBITRATION**. ***Continuing a recent trend, the Supreme Court has again declined to review an arbitration-related case, this one involving delegation***. The Court's **December 5** Order List denies *Certiorari* in *Doe v. Airbnb, Inc*., No. 22-102, a case we

covered in SAA 2022-14 (Apr. 14). The question presented in the *Certiorari* Petition was: “If a form arbitration agreement provides that an arbitration, if it occurs, will be administered using a particular set of procedural rules, and those rules say an arbitrator has the power to rule on the arbitrability of a claim, is that enough, on its own, to establish ‘clear and unmistakable evidence’ of the contracting parties’ intent to have an arbitrator decide the question of arbitrability?”

**Case Below: Florida Supreme Court Finds Incorporation of AAA Rules is “Clear and Unmistakable” Evidence of Delegation**

It is well-established that arbitrability delegation must be demonstrated with “clear and unmistakable” evidence. In the case below, joining the list of courts holding that the parties’ incorporation of the AAA’s Rules creates such evidence was the Florida Supreme Court in *Airbnb v. Doe*, No. SC 20-1167 (Fla. Mar. 31, 2022). The case involved an online Airbnb rental agreement. Rule 7(a) of the AAA’s *Commercial Arbitration Rules* provides that the Arbitrator: “shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.”

Said the majority Opinion: “The Terms of Service incorporate the AAA Rules, and the express language in the AAA Rules empowers the arbitrator to decide arbitrability. Accordingly, consistent with the persuasive and unanimous federal circuit court precedent, we conclude that incorporation by reference of the AAA Rules that expressly delegate arbitrability determinations to an arbitrator clearly and unmistakably evidences the parties’ intent to empower an arbitrator to resolve questions of arbitrability.”

**Dissent**

Justice **Labarga** dissented: “Because the arbitrability provisions relied upon by the majority to reach its decision in this case were buried within voluminous pages of rules and policies incorporated only by reference in a clickwrap agreement, the parties’ agreement to defer the consequential decision of arbitrability to the arbitrator was anything but clear and unmistakable.”

**What Does it Mean?**

Seems to us this case means that consumers need to click through on embedded Terms of Service links if they are curious about the arbitration rules that have been incorporated by reference – or fail to do so at their peril. See this December 5 tweet from CPR’s *Alternatives.*

*(ed: *The* Alert *had concurred with the majority. **Our editorial comment in # 14 was: “Maybe SCOTUS will eventually take up this issue?” Maybe not.)*

*return to top*

**JUDGE’S INTERPRETATION OF AN AMBIGUOUS ARBITRATION AGREEMENT SURVIVES, DESPITE POST-DECISION RECUSAL FOR CONFLICT OF INTEREST.** ***A U.S. District Court judge, after issuing an order to compel arbitration, learned he had a conflict of interest and disqualified himself; yet, a***

***fellow district court judge and an appellate tribunal refused to vacate his order to compel arbitration of the dispute at issue.*** The Court of Appeals decision, *ExxonMobil Oil Co. v. TIG Ins. Co*. (2nd Cir. Aug. 12, 2022), while finding both parties' positions on the proper interpretation of the arbitration agreement problematic, agrees with Exxon that the agreement required binding arbitration, but reverses the court's award of pre-award interest in addition to the compensatory damages awarded by the arbitrators.

**The Arbitration Agreement and Disagreement**

The dispute involved an insurance coverage question. The insurance policy replaced its standardized binding arbitration agreement with an ADR Endorsement, which provided a three-step process for determining how to resolve disputes, summarizing this process as follows: "1. The Company or the Insured may request of the other in writing that the dispute be settled by an alternative dispute resolution ('ADR') process, selected according to the procedures described herein.[] 2. If the Company and the Insured agree to so proceed, they will jointly select an ADR process for settlement of the dispute.[] … 4. If the parties cannot agree on an ADR process within 90 days of the written request described in paragraph (1), the parties shall use binding arbitration." Shortly after TIG filed a lawsuit to resolve the issue, Exxon demanded binding arbitration and filed a motion to stay the litigation and compel its preferred means of redress. Exxon argued that the ADR Endorsement amounted to a binding arbitration agreement, while TIG took the position that its provisions were only triggered if the parties agreed to settle the matter by ADR.

**The Procedural Road to the Court of Appeals**

U.S. District Judge **Ramos** of the Southern District of New York ruled in favor of Exxon. The arbitration panel found in favor of Exxon and awarded it the policy limits of $25 million, but refused to award prejudgment interest because the policy prohibited the panel from awarding more than those limits. Judge Ramos rejected TIG's petition to vacate, confirmed the award and added prejudgment interest to it, citing New York statutory law. TIG appealed both rulings, but later limited its appeal to the arbitrability and prejudgment interest issues. While the appeal was pending, a reporter alerted Judge Ramos to the fact that he owned Exxon stock and the Judge disclosed that fact, prompting TIG to move to vacate the contested decisions. Judge **Vyskocil,** to whom the case was reassigned, reviewed Judge Ramos' decisions *de novo*, agreed with his reasoning, and held that his failure to recuse himself was harmless error, denying the motion to vacate Judge Ramos' decisions.

**Should the Court Have Compelled Arbitration?**

As an initial matter, the Court of Appeals affirms Judge Vyskocil's denial of TIG's motion to vacate. Since the issue of arbitrability hinges on contract interpretation, a legal issue considered *de novo* by four judges untainted by a conflict of interest (Judge Vyskocil and the appellate panel itself), it holds that there is no need to start from scratch. Turning to the merits, the Court explains: "Courts in New York avoid construing contracts in ways that 'would leave contractual clauses meaningless.'[] … [T]he problems for TIG arise in the first sentence of paragraph 4: 'If the parties cannot agree on

an ADR process within 90 days *of the written request* described in paragraph (1), the parties shall use binding arbitration.'… The natural meaning of this sentence is that the clock on arbitration starts ticking when one party requests ADR, regardless of whether the counterparty accedes to that request.[] Exxon's reading of the ADR Endorsement may have its challenges, but TIG's directly contradicts the plain language of paragraph 4. Faced with a choice between an interpretation that is difficult and another that is precluded by the text of the contract, we must adopt the former. We therefore hold that the ADR Endorsement functions as a binding arbitration agreement. When one party requests to settle a dispute via ADR, the parties have 90 days to choose the format. If they fail to do so, they must arbitrate" (italics in the original).

**The District Court Begs to Differ as to Prejudgment Interest**
Paragraph 6 of the ADR Endorsement provided: "that any decision, award, or agreed settlement made as a result of an ADR process shall be limited to the limits of liability of this Policy." Since the panel found that Exxon was entitled to the policy limits, it concluded that it lacked jurisdiction to award any additional amounts, including prejudgment interest. However, Judge Ramos held that New York courts were required to add prejudgment interest in contract cases and Judge Vyskocil agreed. The Court of Appeals agrees that post-award interest is mandatory under New York law, but takes a different view of pre-award interest: "Statutory pre-award interest is not required or available, however, where the parties' contract is 'sufficiently clear' that statutory interest was not 'contemplated by the parties at the time the contract was formed.'" Here, paragraph 6 clearly waived the parties' rights to pre-award interest if it increased the total award above the policy limits. It therefore remands the case to the district court with instructions to recalculate the prejudgment interest accordingly.
*(*Seems right. **The Second Circuit's ruling on the effect of Judge Ramos' recusal is unlikely to have an impact on how FINRA treats the post-award recusal of arbitrators. Courts don't have the authority to independently review the legal rulings of arbitrators, notwithstanding the manifest disregard of the law doctrine, and the new panel on remand will presumably be required to hold new hearings anyway. ***The Court's ruling on pre-award interest is also not likely to prevent New York courts from awarding prejudgment interest in most cases where the arbitrators do not, since FINRA rules and broker-dealer arbitration agreements don't waive that right. However, it might apply in a post-dispute agreement to limit the arbitrators' options as to how much and what types of damages they may award. ****This Squib was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net.)*
*return to top*

**LOSSES FROM COVERED CALL STRATEGY RESULTS IN $11.7 MILLION AWARD**. ***As widely reported in the media, Morgan Stanley has been ordered to pay two investors over $11 million arising out of use of a covered call strategy.*** Financial services media widely reported recently that Morgan Stanley had been ordered by a FINRA All-Public Panel to reimburse the Claimant (individually and in his capacity as

trustee) $11.7 million for losses arising out of Morgan Stanley's covered call strategy. See, for example, *Morgan Stanley Ordered to Pay $11.5 Million Over Covered Call Strategy*, InvestmentNews (Dec. 2, 2022). We analyze below *Nowak v. Morgan Stanley*, FINRA ID No. 21-02127 (Tampa, FL, Nov. 2, 2022).

**Claims Asserted**

In the Statement of Claim, Claimants asserted the following causes of action: "respondeat superior; negligence; breach of fiduciary duty; failure to supervise; breach of FINRA rules; breach of contract; fraud; unauthorized trading and breach of FINRA Rules 2010, 2020, and 3260; and violation of the Florida Securities and Investor Protection Act. The causes of action relate to Respondent's alleged covered call writing strategy resulting in large positions of technology stocks in Claimants' accounts, including but not limited to, Nvidia Corporation ('NVDA'), Tesla Motors ('TSLA'), Apple Computers ('AAPL'), Salesforce ('CRM'), Microsoft Corporation ('MSFT'), and other stocks being called away from Claimants' Trust Account."

**Answer**

In the Statement of Answer: "Respondent requested a denial of Claimants' claims in their entirety and of the relief sought in the Statement of Claim, and that this matter be expunged from Unnamed Party Craig Sherman Thistlethwaite's ('Thistlethwaite') Central Registration Depository ('CRD') records."

**Damages Sought**

At the hearing, Claimants requested: "lost opportunity damages due to the unauthorized sale of NVDA shares after December 14, 2018, in the amount of $14,334,224.39; lost opportunity damages due to the unsuitable sale of NVDA shares after December 14, 2018, in the amount of $16,344,936.18; the sale and buy-back of 40,000 NVDA shares in the amount of $2,010,088.53; damages for the unauthorized transactions of opening NVDA option contracts in the amount of $5,623,610.55; damages for the unauthorized transactions of opening AAPL option contracts in the amount of $201,982.44; damages for the unauthorized transactions of opening CRM option contracts in the amount of $228,492.60; damages for the unauthorized transactions of opening MSFT option contracts in the amount of $46,934.49; lost opportunity damages due to the unauthorized sale of securities in the amount of $275,815.52; lost opportunity damages due to the sale of 20,000 shares of NVDA on August 17, 2021, in the amount of $15,227,967.68; and Florida Statutes section 517.211 Statutory Interest at the rate of 4.25%."

**The Award**

The unanimous Panel finds Morgan Stanley liable for: $11,500,000 in compensatory damages; $157,656.81 in costs; and $400 ("which represents reimbursement of the non-refundable portion of the filing fee previously paid by Claimants to FINRA Dispute Resolution Services"). As for counsel fees: "Having proved a violation of Section 517.301, Florida Statutes, Claimant is the prevailing party. The Panel leaves it to a court of competent jurisdiction to determine whether to award attorneys' fees." Hearing session fees are assessed $2,300 jointly and severally to Claimants, and $26,450 to Respondent.

The request for an expungement recommendation on behalf of the unnamed broker is denied.
*(ed: According to a December 1 AdvisorHub story: "A Morgan Stanley spokesperson said the firm 'strongly disagrees with the award' and is evaluating its options, including whether it could ask a court to overturn the decision.")*
*return to top*

***SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW***

**FINRA BOARD MEETS IN PERSON NEXT WEEK. NO AGENDA YET**. FINRA's Board of Governors will meet in person **December 14 – 15**; thus far, there is no published agenda. As usual, we will follow up after the meeting results are posted. This will be the last meeting for **2022.** Next year's schedule is: **March 9–10; May 17–18; July 12–13; September 13–14;** and **December 6–7.**
*(ed: *We'll tweet any news as soon as we have it. **The original Board meeting schedule had this meeting on December 7-8 (see the Wayback Machine report from last September). For some reason, it was moved back a week.)*
*return to top*

**FINRA ISSUES REG NOTICE ON PUMP-AND-DUMP SCHEME INCREASE**. FINRA on **November 17** issued Regulatory Notice 22-25, *Heightened Threat of Fraud: FINRA Alerts Firms to Recent Trend in Small-Capitalization IPO.* Says the summary: "FINRA alerts members to an emerging threat to customers and members, where FINRA, NASDAQ and NYSE have observed initial public offerings (IPOs) for certain small capitalization (small-cap) issuers listed on U.S. stock exchanges that may be the subject of pump-and-dump-like schemes (sometimes referred to as 'ramp-and-dump' schemes in other jurisdictions). FINRA has observed significant unusual price increases on the day of or shortly after the IPOs of certain small-cap issuers, most of which involve issuers with operations in other countries. FINRA has concerns regarding potential nominee accounts that invest in the small-cap IPOs and subsequently engage in apparent manipulative limit order and trading activity. Some of the investors harmed by ramp-and-dump schemes appear to be victims of social media scams. This Notice addresses concerns similar to those previously raised in the Anti-Money Laundering sections of the 2022 and 2021 Reports on FINRA's Examination and Risk Monitoring Program" (footnote omitted).
*(ed: *We had not before seen the term "ramp-and-dump" used to describe this fraud. **The Reg Notice is available as a PDF. ***Wonder if this will result in more arbitrations?)*
*return to top*

**FINRA'S DC HQ OFFICE TO RELOCATE**. According to recent media reports, FINRA's Washington, D.C., headquarters will next year be relocating. The current building at 1735 K Street, N.W., which is owned by FINRA, is being sold and will be converted to luxury apartments. A **November 17** WTOP story says: "A group of developers, including D.C.-based Bernstein Management Corp., Bethesda-based Urban Atlantic and D.C.-based Placemakr have partnered to redevelop 1735 K St., NW, near the

Farragut Square Metro station, and will reposition the 12-story building as luxury apartments. They will be operated under the Placemakr Premier brand, which operates apartments with hotel-like amenities…. It is the soon-to-be former headquarters of the Financial Industry Regulatory Authority, which is relocating across the street to 1700 K St. next year."
*(ed: *Unconfirmed reports say the purchase price is $100 million. **FINRA also has Washington-area administrative offices in Rockville, Maryland.)*
*return to top*

**EMPLOYER'S FAILURE TO PAY JAMS ADMINISTRATIVE FEES SUPPORTS PDAA NON-ENFORCEMENT PER CA'S ARBITRATION STATUTE**. *De Leon v. Juanita's Foods*, No. B315394 (Calif. Ct. App. 2 Nov. 23, 2022), is one of those cases we like because the case's meaning can be adduced by quoting liberally from it. First, the applicable law: California Code of Civil Procedure sections 1281.97 and 1281.98: "provide that if a company or business that drafts an arbitration agreement does not pay its share of required arbitration fees or costs within 30 days after they are due, the company or business is in 'material breach' of the arbitration agreement. (Code Civ. Proc., §§ 1281.97, subd. (a)(1); 1281.98, subd. (a)(1). In the case of such a material breach, an employee or consumer can, among other things, withdraw his or her claim from arbitration and proceed in court. (§§ 1281.97, subd. (b)(1); 1281.98, subd. (b)(1).)" Next, the facts: "Following commencement of arbitration proceedings between appellant Juanita's Foods and respondent Kail De Leon, Juanita's Foods failed to pay its share of arbitration fees within 30 days after such fees were due. Based on that late payment, the trial court concluded that Juanita's Foods was in material breach of the parties' arbitration agreement and allowed De Leon to proceed with his claims against Juanita's Foods in court." The arguments? "Juanita's Foods argues that the trial court should have considered factors in addition to its late payment—for example, whether the late payment delayed arbitration proceedings or prejudiced De Leon—to determine the existence of a material breach of the arbitration agreement." And, the holding: "We conclude that the trial court correctly declined to consider these additional factors, and we affirm."
*(ed: *Seems right. **As we've said before, we don't see any FAA preemption issues with this law, since it fosters arbitration, rather than serving as an impediment. ***An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
*return to top*

***QUICK TAKES: CASES AND AWARDS WORTH READING***

***Jiangsu Beier Decoration Materials Co., Ltd. v. Angle World LLC*, No. 21-3143 (3d Cir. Nov. 3, 2022)**: "Appellant Jiangsu Beier Decoration Materials Co., Ltd. ('Jiangsu'), a China-based manufacturer, obtained an arbitration award in China against Appellee Angle World LLC ('Angle World'), a Pennsylvania-based distributor. Jiangsu seeks to enforce its foreign arbitration award in the United States, but Angle World claims that it never agreed to arbitrate. This case requires us to examine the Convention on the Recognition and Enforcement of Foreign Arbitral Awards …. The District Court dismissed Jiangsu's confirmation petition after determining that Jiangsu failed to prove

that Angle World agreed to arbitrate the parties' underlying dispute. For the reasons set forth herein, we will vacate the District Court's order of dismissal and remand this case for further proceedings. We take no position on the ultimate question of arbitrability."

***[Hursh v. DST Systems, Inc.](#)*, No. 21-3567 (8th Cir. Nov. 28, 2022)**: "*Badgerow* recognized that a [Federal Arbitration Act] Section 9 application may show an 'independent basis' of federal question jurisdiction under 28 U.S.C. § 1331 'if it alleges that federal law (beyond Section 9 or 10 itself) entitles the applicant to relief.' 142 S. Ct. at 1316. Thus, on appeal, faced with new jurisdictional uncertainty, Plaintiffs sing a new tune, arguing that the district court had federal question jurisdiction because their Section 9 motions to confirm and DST's motions to vacate 'implicate[d] significant federal issues,' a basis for federal question jurisdiction …. The significant federal issue alleged is 'dispute resolution relating to an ERISA Plan.' We disagree…. We conclude the district court lacks federal question subject matter jurisdiction under the FAA or 28 U.S.C. § 1331 and, in light of these factual uncertainties, we remand the consolidated cases for a determination of whether the court has subject matter diversity jurisdiction under 28 U.S.C. § 1332(a) in each case" (footnote omitted).

***Mountain Business Center, LLC v. Ford Road, LLC*, 2022 WY 147 (Nov. 23, 2022)**: "This appeal stems from an arbitration award involving a breach of a lease agreement. Mountain Business Center, LLC (MBC) won a $23,998 arbitration award against Fork Road, LLC (Fork Road). MBC appealed the award to the district court, arguing the arbitrator exceeded his authority by determining issues not submitted to him, and that he committed two manifest errors of law regarding the first-to-breach rule and determining which party prevailed for purposes of a fee award. The district court confirmed the award, holding the arbitrator's determinations were not manifest error and were within his authority. We affirm."

***Gray v. Triad Advisors*, FINRA ID No. 22-00169 (Jacksonville, FL, Oct. 24, 2022)**: An All-Public Panel grants Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 12206(a) (Six-year Eligibility Rule), thus denying the customer's request for rescission of his investments. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Vidal v. Morgan Stanley*, FINRA ID No. 22-00086 (New York, NY, Oct. 24, 2022)**: An Arbitrator explains why he has decided to deny a broker's request for reformation of his Form U5 record, finding that the "Yes" answers to the questions contained in it were accurate. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
*return to top*

***ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT***

**Gross, Jill, *The Final Frontier: Are Class Action Waivers in Broker-Dealer Employment Agreements Enforceable?*, 12 PENN. ST. ARB. L. REV. 96 (2020)**: "How would a court resolve a broker-dealer's action to enforce its class action waiver, which would require the court to disregard FINRA Rule 13204? The Supreme Court has

identified one exception to the FAA's mandate: if a 'contrary congressional command' displaces the FAA. Thus far, the Court has not had occasion to examine whether a class action waiver in a broker-dealer's employment agreement with an employee is enforceable under this exception. While the Court seems very supportive of these waivers, the securities industry is different. Securities arbitration is heavily regulated, and pronouncements by the SEC--when exercising power expressly delegated to it by Congress--make it clear that class actions in court should be preserved for both investors and broker-dealer employees.[] This article analyzes this issue and concludes that these class waivers are not enforceable."

***Code is Not Law — Arbitration's Critical Role in Resolving Crypto Disputes*, Herbert Smith Freehills LLP Blog (Nov. 17, 2022)**: "With the crypto market enduring its most significant test to date, we explore how arbitration has become the industry's go-to forum for solving complex disputes.[] Market volatility breeds disputes, and the 'Crypto Winter' is no exception. Crypto-related disputes are on the rise, and they can take many forms. From traditional disagreements about the meaning of a contract to technical disputes about the operation of particular networks, software or transactions — arbitration has established itself as a preferred forum."

***Finra Bars Ex-JPMorgan Advisor at Heart of Multimillion-Dollar Client Disputes*, Barron's (Nov. 28, 2022):** "Finra has barred a former J.P. Morgan Securities financial advisor who is the subject of multiple client complaints seeking tens of millions of dollars in damages.[] Finra barred Edward L. Turley, an advisor since 1988, for not responding to the industry self-regulator's requests for information, according to a Nov. 14 regulatory report. Turley accepted the ban without admitting or denying the charges, according to the report."

***Ninth Circuit to Decide for Whom the Bellwether Tolls in Test of Verizon's Mass Arbitration Provision*, Ballard Spahr Blog (Nov. 28, 2022)**: "An appeal pending in the U.S. Court of Appeals for the Ninth Circuit is poised to decide whether an arbitration agreement that requires mass arbitration disputes to be resolved by multiple rounds of bellwether arbitrations lawfully facilitates a quicker and more efficient resolution of the disputes than would be achieved by pursuing thousands of individual arbitrations—as appellant Verizon Wireless, Inc. contends—or whether it is substantively unconscionable because it effectively eliminates the claims of thousands of Verizon customers who are required to wait for up to 156 years for the bellwether arbitrations to conclude—as appellees assert and the district court found."

***CFPB and FTC File Amicus Brief on Servicemembers' Right to Sue Under the Military Lending Act*, JDSupra (Nov. 30, 2022)**: "On November 21, the Consumer Financial Protection Bureau (CFPB) and Federal Trade Commission (FTC) filed a joint amicus brief in *Louis v. Bluegreen Vacations Unlimited, Inc.*, No. 22-12217 (11th Cir.) regarding servicemembers' right to sue under the Military Lending Act (MLA).[] The plaintiffs in the case were both covered borrowers under the MLA when they obtained a loan to purchase a vacation timeshare and paid a 10% down payment of $1,150 in

addition to an administrative fee of $450. The plaintiffs allege the loan violates the MLA because it includes a mandatory arbitration provision, and there was no statement of the military annual percentage rate (MAPR). The MLA prohibits mandatory arbitration, 10 U.S.C. § 987(e), and the MLA requires that the MAPR must be stated before issuing a loan to a servicemember. 10 U.S.C. § 9877(c)(1)(A). The plaintiffs sought an order declaring the timeshare agreement void, rescission of the agreement, and restitution, as well as statutory, actual, and punitive damages."
*return to top*

## *DID YOU KNOW?*

**BEN FRANKLIN WAS AN ARBITRATOR**. **Ben Franklin's** biography states: "He was also much consulted by private persons about their affairs when any difficulty occurred, and frequently chosen an arbitrator between contending parties."
*return to top*

## *LETTER TO THE EDITOR*

*We always welcome comments on current items of interest. Past* Alerts *have covered FINRA's arbitrator and mediator panel demographics. Here's a letter from arbitration practitioner – and SAA Editorial Advisory Board Member – William D. Nelson, Esq., opining on this topic. We reply below:*

**Nelson**: I recently submitted an Arbitrator Ranking Form in an arbitration in which I am defending the respondent firm. The Colorado Arbitrator pool used to be robust. Sadly, that seems no longer to be the case and my sense is that this is a systemic problem with FINRA nationwide. My main concern is the age of the arbitrators. On the chairperson list, the ages ranged from 87 to 46 with the mean being 73. On the public list, the range was 84 to 47 with the mean being 60. The majority of the arbitrators on that list had no reported awards and nothing in their disclosures that stood out such that I would roll the dice and rank them in the top half. I don't want my arbitration to be someone's on the job training. The non-public list ranged from 82 to 52 with the mean being 65. Half of them had no reported awards and for those that did, the awards were quite old. My suspicion is that the lack of awards results from my friends on the Claimant's side reflexively striking the entire list of non-public arbitrators. That's a topic for another day.

All that said, I'm not sure what the solution is or that there is even a solution. It is a double-edged sword. I tend to shy away from people with no awards because it is harder to do due diligence on them. On the flipside, how do arbitrators get experience if I don't roll the dice and rank them in the top half? Part of me wants to go back to the old system when the NASD gave us the panel list and we had the limited ability to challenge. It was a bit of a crapshoot but I can probably count on one hand the number of bad panels I had and I represented clients in several hundred arbitrations during that period.

I became a NASD/NYSE/AMEX arbitrator in 1986 at the ripe old age of 31. I was an industry arbitrator by virtue of being in-house with a NYSE member firm. I served on panels with arbitrators older than me, arbitrators who were my age, and in some cases

arbitrators who were younger. The age demographic then is not what it is today and I think that the implementation of the arbitrator ranking process permanently skewed it.

FINRA's own data reflect that only 29% of the arbitrators are under the age of 60. My recent experience outlined above is clearly in line with that statistic. What, if anything, is FINRA doing to address this problem? I won't hold my breath.

**William D. Nelson**
Lewis Roca Rothgerber Christie, LLP

**SAA:** Interesting perspective. We'll invite FINRA Dispute Resolution Services to respond.
*return to top*

---

**Editorial Advisory Board**
**George H. Friedman**
*Editor-in-Chief*

**Peter R. Boutin**
*Keesal Young & Logan*

**Roger M. Deitz**
*Distinguished Neutral*
*CPR International*

**Paul J. Dubow**
*Arbitrator • Mediator*

**Constantine N. Katsoris**
*Fordham University*
*School of Law*

**Theodore A. Krebsbach**
*Davis Wright Tremaine*

**Christine Lazaro**
Professor of Law/
Clinic Director
*St. Johns Law School*

**Deborah Masucci**
*Independent Arbitrator*
*and Mediator*

**William D. Nelson**
*Lewis Roca Rothgerber*
*Christie LLP*

**Robert W. Pearce**
*Robert Wayne Pearce,*
*P.A.*

**David E. Robbins**
*Kaufmann Gildin &*
*Robbins LLP*

**Richard P. Ryder**
*President & Founder,*
*Securities Arbitration*
*Commentator*

**Ross P. Tulman**
*Trade Investment Analysis*
*Group*

**James D. Yellen**
*J. D. Yellen & Associates*

The Editorial Advisory Board functions in an advisory capacity to the Editor. Editorial decisions concerning the *Securities Arbitration Alert* are not the responsibility of the Board or its members; nor are the comments and opinions expressed in the newsletter necessarily the views of the Board, any individual Board member, or any organization with which they may be affiliated.

---

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

***Editor's Note & Disclaimer***: While we undertake considerable efforts to present information in this publication in a fair and accurate manner, we caution that readers should access referenced material themselves as the best source. Our analyses make liberal use of links, and we offer courtesy copies of materials not on the Internet. Similarly, readers should not rely solely upon our summaries in making legal decisions or consider our commentary to be rendering legal, accounting, or other professional advice or service. If legal advice or other expert assistance is required, the services of a competent professional person should be sought. — *adapted from the Declaration of Principles jointly adopted by a Committee of the American Bar Association and a Committee of Publishers and Associations.*

Copyright © 2022 Securities Arbitration Alert, LLC

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