SECURITIES ARBITRATION ALERT 2023-13 (3/30/23)

George H. Friedman, Editor-in-Chief

SQUIBS:

SHORT BRIEFS:

QUICK TAKES:

- ***Forest v. Spizzirri,* No. 22-16051 (9th Cir. Mar. 16, 2023)**
- ***Speerly v. General Motors LLC*, No. 19-11044 (E.D. Mich. Mar. 20, 2023)**
- ***Castro v Jem Leasing, LLC,* 2023 NY Slip Op 01255 (App. Div., 1st Dept. Mar. 14, 2023)**
- ***Garrette v. First Allied*, FINRA ID No. 22-00358 (Tampa, FL, Feb. 14, 2023)**
- ***Vitarelli v. E*Trade Securities*, FINRA ID No. 22-00243 (San Francisco, CA, Feb. 17, 2023)**

ARTICLES OF INTEREST:

- **Tan, Albert, *Balancing Act: Third-Party Funding in International Arbitration – A Brief Outlook* (August 1, 2021)**
- ***Consumer Advocates Take Aim at Chamber's New Mass Arbitration Report,* Ballard Spahr Blog (Mar. 17, 2023):**
- ***Finra Exec Says 1,000 Reg BI Exams Are On Tap for 2023*, FA Magazine (Mar. 17, 2023)**
- ***Supreme Court Hears Arguments in Coinbase Arbitration Case,* Axios (Mar. 21, 2023)**
- ***Finra Benches NY Broker for Shoddy Note-taking on Client Calls,* Financial Advisor IQ (Mar. 22, 2023)**
- ***SEC Charges Three Sales Agents at StraightPath Venture Partners With Fraud and Unregistered Broker Activity*, www.sec.gov (Mar. 23, 2023)**

DID YOU KNOW?

- **FINRA has a Webpage Devoted to Arbitrator Disclosure**

ALERT! NO *ALERT* NEXT WEEK. *It's the end of another calendar quarter, so we will be taking our customary break in publishing the* Securities Arbitration Alert *as the quarter comes to a close. Look for the next edition of the* SAA *in your e-mailbox April 13. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts.*

Best Wishes for a Joyous Easter, a Happy Passover, and a Meaningful Ramadan!

SQUIBS: IN-DEPTH ANALYSIS

HOUSE COMMITTEE DISCUSSES CFPB'S PROPOSED ARBITRATION CLAUSE AND CLASS ACTION WAIVER REGISTRY. ***A recent House subcommittee hearing reviewing the performance of the Consumer Financial***

Protection Bureau ("CFPB" or "Bureau") among other topics discussed the Bureau's efforts to create an arbitration clause registry. Specifically, the House Financial Services Committee Subcommittee on Financial Institutions and Monetary Policy held a **March 9** hearing, *Consumer Financial Protection Bureau: Ripe for Reform*. One of the topics discussed was the CFPB's proposed new rule seeking information from nonbanks on, among other things, arbitration and class action waivers.

Rule on Registry Introduced …
Recall that, as reported in SAA 2023-04 (Jan. 26), the Bureau on **January 12** announced via press release that it had filed a rule proposal: "to establish a public registry of supervised nonbanks' terms and conditions in 'take it or leave it' form contracts that claim to waive or limit consumer rights and protections, like bankruptcy rights, liability amounts, or complaint rights…. Under the proposed rule, nonbanks subject to the CFPB's supervisory jurisdiction would need to submit information on terms and conditions in form contracts they use that seek to waive or limit individuals' rights and other legal protections. That information would be posted in a registry that will be open to the public, including to other consumer financial protection enforcers."

… And Covers Mandatory Arbitration Agreements and Class Action Waivers
Any ambiguity about whether the proposed rule covered mandatory predispute arbitration agreements and class action waivers was resolved in the affirmative. Says the release: "Under the proposal, the CFPB would seek information on contract terms and conditions seeking to waive any constitutional, statutory, or common law legal protection, right, or defense; restrict the ability of consumers to complain; limit the time or place for consumers to bring legal actions; limit liability amounts; *waive class action rights; and impose arbitration provisions*. Both company information and information about the use of the terms and conditions would be published" (emphasis added).

Topic of Discussion at Subcommittee Hearing
Among the witnesses at the Subcommittee hearing was **William M. Himpler**, the CEO of the American Financial Services Association ("AFSA"), who said in his prepared testimony: "In 2017, the CFPB finalized a rule that would eliminate pre-dispute arbitration agreements. Congress overturned the rule using its authority under the Congressional Review Act (CRA). As Congress has made clear, when a rule is overturned under the CRA, an agency is prohibited from doing anything 'substantially similar.'[] Despite the prohibition, the CFPB continues to pursue the elimination of arbitration, this time by proposing a nonbank registry where finance companies and others would be required to register certain terms and conditions, such as arbitration agreements and other beneficial agreements with consumers, that the Bureau would post in a public registry. This public registry is an attempt to: (1) shame companies out of using lawful arbitration agreements, and (2) give plaintiffs' attorneys a roster of companies to sue. As House Financial Services Chairman Patrick McHenry (R-NC) said: 'This is another attempt by Director Chopra to unilaterally expand the CFPB's authority beyond Congress' intent and to mandate what Democrats were unable to legislate. This proposed registry of terms and conditions will facilitate the naming and shaming of firms

to empower progressive activists. Requiring nonbank financial firms to register publicly with the Bureau is unprecedented—no other industry is required to make public such detailed contract information'" (footnote omitted).
*(ed: *We're sure there is more to come on this proposal. **Not to be sticklers, but the nullified 2017 rule did not: "eliminate pre-dispute arbitration agreements." It banned class action waivers. ***The 2.5 hour hearing is recorded in a video.)*
return to top

LATEST *NEUTRAL CORNER* FROM FINRA DISPUTE RESOLUTION SERVICES HITS THE ELECTRONIC NEWSSTAND. ***FINRA Dispute Resolution Services ("DRS") has posted the latest edition of* The Neutral Corner *newsletter for arbitrators and mediators ("TNC"), on the Authority's Website***. We present essentially *verbatim* the table of contents of Volume 2023-1:

Mission Statement

Update on Lowenstein Recommendations (by Shannon Bond)

FINRA Dispute Resolution Services (DRS) and FINRA News

- Arbitration Case Filings and Trends
- Proposed Rule Change to Amend the Codes of Arbitration Procedure to Make Various Clarifying and Technical Changes
- Proposed Rule Change to Amend the Codes of Arbitration Procedure to Modify the Current Process Relating to the Expungement of Customer Dispute Information
- COVID-19 Impact on Arbitration and Mediation Hearings
- Virtual Arbitration Hearing Statistics
- Now Available: 2022 Arbitrator and Mediator Diversity Statistics
- Updated Arbitrator Resource Guide for Virtual Hearings and New Pro Se User Guide for Zoom Hearings
- Prehearing Conferences by Zoom
- Arbitrator and Party Experience Survey Enhancements
- Register for the DR Portal Today (include resources for help with registration/password)
- Update to Business Mileage Rate
- 2023 American Bar Association Dispute Resolution Spring Conference
- 2023 FINRA Annual Conference

Mediation Update

- Mediation Case Filings and Trends
- Mediation List Process and Disclosure Updates
- FINRA's Mediation Program for Small Arbitration Claims
- Mediator Training Opportunities
- Become a FINRA Mediator

Questions and Answers

- Dissenting Arbitrators

Education and Training

- 2022 Neutral Workshop: DR Portal and Tips for Efficient Hearings
- Expungement Training Link

Quarterly Arbitrator Disclosure Reminder

Directory

FINRA Offices

(ed: TNC *is a wonderful resource not only for arbitrators and mediators, but parties as well. Past issues can be found here.)*

return to top

SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA DRS POSTS STATS THROUGH FEBRUARY: STILL A STRONG START TO THE YEAR. FINRA Dispute Resolution Services ("DRS") has posted case statistics through **February**, with recent trends continuing to show a strong start to the year in arbitration filings and a slowdown in mediations. We offer these headlines: 1) overall arbitration filings through February – 457 cases – are up 20% for the year (was plus 24% in January); 2) cumulative customer claims increased 34% (was plus 35% last month); and 3) industry arbitration filings were up 2% (was plus 10% in January). The fact that all three case filing figures have again improved over the previous month indicates to us that – for the eighth month in a row – arbitration filings have definitely rebounded. Overall arbitration turnaround times were 18.4 months (a slight increase), with hearing cases now taking 22.3 months (a slight decline). There were just 118 mediation cases in agreement, a 23% decrease from 2022. This stat had been declining steadily in recent months, and although February showed a modest improvement from January, mediations are way down from May 2022's torrid plus 137% pace. The mediation settlement rate improved to a more historically consistent 83% (it was 76% in January). There are now 8,218 DRS arbitrators, 3,987 public and 4,231 non-public; all categories improved slightly last month. Pending cases stand at 3,069, unchanged from January.

*(ed: *We still caution readers that data from two months do not yet constitute a trend. **Past year stats can be found here.)*

return to top

ATTENTION FINANCIAL ADVISORS: *INVESTMENTNEWS* WANTS YOUR OPINION. The publication *InvestmentNews* on **March 22** solicited financial advisers to take part in an online survey: "to study how the industry is managing its time and resources. The valuable insights from this survey will be part of a special report from InvestmentNews Research later this year." Click here to participate.

*(ed: *The term* "financial advisers*" [sic] is not defined. **Participants: "will be entered for the chance to win one of five $50 Amazon gift cards at the conclusion of the study."*
return to top

HUH? NO PRIVACY OR CONFIDENTIALITY AT AAA OR JAMS ARBITRATIONS? We thought we were hearing things at last week's oral argument in *Coinbase, Inc. v. Bielski*, No. 22-105 (*ed: the audio is here and the transcript can be found here*). Specifically, there was a puzzling exchange (transcript page 78) between **Justice Sotomayor** and one of the attorneys, where it was asserted that AAA and JAMS arbitrations were open to the public and there was no presumption of confidentiality:

> JUSTICE SOTOMAYOR: I think arbitration is not necessarily public. It generally isn't.
>
> COUNSEL: I've arbitrated many cases. There is no presumption of confidentiality under AAA or JAMS rules. All of my arbitrations are public.
>
> JUSTICE SOTOMAYOR: I do agree with you, counsel, that -- that there's no confidentiality requirement outside of the terms of the agreement.

We point out that the AAA *Commercial Arbitration Rules* state in Rule R-45(a): "Unless otherwise required by applicable law, court order, or the parties' agreement, the AAA and the arbitrator shall keep confidential all matters relating to the arbitration or the award." Likewise, Rule R-26 provides: "The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary." Similarly, the JAMS *Comprehensive Arbitration Rules & Procedures* provide in Rule 26 (Confidentiality and Privacy): "(a) JAMS and the Arbitrator shall maintain the confidential nature of the Arbitration proceeding and the Award, including the Hearing, except as necessary in connection with a judicial challenge to or enforcement of an Award, or unless otherwise required by law or judicial decision…. (c) Subject to the discretion of the Arbitrator or agreement of the Parties, any person having a direct interest in the Arbitration may attend the Arbitration Hearing. The Arbitrator may exclude any non-Party from any part of a Hearing."
(ed: Your law prof publisher shouted a correction at his computer during the livestream, but evidently they didn't hear it. He usually reserves this behavior for sporting events. For the record, Mrs. Friedman has pointed out many times over the years that shouting at the TV is an ineffective means of communication.)
return to top

QUICK TAKES: CASES AND AWARDS WORTH READING

***Forest v. Spizzirri*, No. 22-16051 (9th Cir. Mar. 16, 2023)**: "The sole question before us is whether the Federal Arbitration Act ('FAA') requires a district court to stay a lawsuit pending arbitration, or whether a district court has discretion to dismiss when all claims are subject to arbitration. Although the plain text of the FAA appears to mandate a stay pending arbitration upon application of a party, binding precedent establishes that district

courts may dismiss suits when, as here, all claims are subject to arbitration." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision*.)

***Speerly v. General Motors LLC*, No. 19-11044 (E.D. Mich. Mar. 20, 2023)**: "The defendant argues that certification is precluded because an unidentified but substantial minority of absent class members may have bought their vehicles under purchase agreements that included arbitration clauses. That argument is ineffective at this stage of the case, however, because the defendant has waived any right to compel arbitration by engaging in this litigation and seeking dispositive rulings from the Court on the plaintiffs' claims — some of which were forthcoming in its favor…. 'The Supreme Court recently held "prejudice is not a condition of finding that a party waived its right to compel arbitration under the Federal Arbitration Act." So the test for waiver now has only two elements. Thus, 'a party waives its contractual right to arbitration if it [1] knew of the right; [and] [2] acted inconsistently with that right.'"

***Castro v Jem Leasing, LLC*, 2023 NY Slip Op 01255 (App. Div., 1st Dept. Mar. 14, 2023)**: "Order, Supreme Court, Bronx County (Bianka Perez, J.), entered January 26, 2022, which granted plaintiff's motion to stay arbitration and denied the cross motion of defendants Zwolf-NY, LLC and UBER Technologies, Inc. (together, Uber) to stay litigation pending arbitration of the dispute, unanimously affirmed, without costs.[] Although plaintiff moved to stay arbitration of her personal injury claim more than 20 days after Uber served notice of its intent to arbitrate (CPLR 7503[c]), her motion comes within the limited exception allowing an otherwise untimely motion to be considered when 'its basis is that the parties never agreed to arbitrate, as distinct from situations in which there is an arbitration agreement which is nevertheless claimed to be invalid or unenforceable because its conditions have not been complied with' (*Matter of Matarasso [Continental Cas. Co.]*, 56 NY2d 264, 266 [1982])."

***Garrette v. First Allied*, FINRA ID No. 22-00358 (Tampa, FL, Feb. 14, 2023)**: An All-Public Panel grants, without prejudice, Respondent broker-dealer's Prehearing Motion to Dismiss pursuant to FINRA Rule 12206 (Six-year Eligibility Rule), finding that the date of purchase of the subject alternative investments occurred more than 6 years prior to the filing of the Statement of Claim. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Vitarelli v. E*Trade Securities*, FINRA ID No. 22-00243 (San Francisco, CA, Feb. 17, 2023)**: In this small claims case, a customer alleging that Respondent broker-dealer violated the Electronic Funds Transfer Act by transferring her account to another broker-dealer, is awarded damages, including attorney fees, pursuant to Section 15 U.S.C. 1693m(a)(3) of the EFTA. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

return to top

ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Tan, Albert, ***Balancing Act: Third-Party Funding in International Arbitration – A Brief Outlook*** **(August 1, 2021)**: "In an endeavour to illuminate the multifaceted dimensions of TPF [third-party funding] in international arbitration, this paper embarks on a meticulous and comprehensive exploration of the subject. Drawing upon a wealth of case studies, jurisprudence, and precedents, this paper delves into the legal frameworks governing TPF, scrutinizes the ethical quandaries that arise in the context of funded disputes, and assesses the practical implications of TPF for the conduct of international arbitration proceedings. By dissecting the complex interplay between TPF and the broader international arbitration ecosystem, this paper seeks to provide a compelling and authoritative analysis of a subject that will indubitably continue to shape the contours of global dispute resolution in the years to come."

Consumer Advocates Take Aim at Chamber's New Mass Arbitration Report**, Ballard Spahr Blog (Mar. 17, 2023)**: "The U.S. Chamber of Commerce's recent publication of an 80-page report titled 'Mass Arbitration Shakedown: Coercing Unjustified Settlements' has fanned the flames on an already heated debate between consumer advocates and industry lawyers over the propriety of mass arbitrations."

Finra Exec Says 1,000 Reg BI Exams Are On Tap for 2023**, FA Magazine (Mar. 17, 2023)**: "The Financial Industry Regulatory Authority is planning to complete at least 1,000 Regulation Best Interest exams of broker dealers by year's end, a Finra enforcement executive said at Sifma's Compliance and Legal Conference yesterday.[] That will mean that by year end just under one-third of Finra's 3,300 member firms will be examined for compliance with Reg BI, the Securities and Exchange Commission's retail advice rule, which went into effect on June 30, 2020, according to Bill St. Louis, executive vice president and head of Finra's National Cause and Financial Crimes Detection Program."

Supreme Court Hears Arguments in Coinbase Arbitration Case, **Axios (Mar. 21, 2023)**: "**Why it matters:** The eventual ruling in the case brought by Coinbase, a crypto exchange, will have much broader implications — a bellwether case that could mark a new era for consumer protection across the business landscape, experts tell Axios.[] **Catch up fast:** The issue at the core is a rule called the Federal Arbitration Act (FAA), which for a century has protected businesses from the expense and risk of going to court to settle customer disputes.

- 'Arbitration clauses' are found in all sorts of user contracts, sometimes coupled with another that bars class-action suits.
- They're intended to compel customer disputes to be handled through-closed-doors resolution outside of the court system.

A lower court denied Coinbase's attempts to enforce arbitration against a pair of customer lawsuits, and the U.S. Court of Appeals for the Ninth Circuit denied the company's motions to stay the hearings — or hit pause — while it considers an appeal."

***Finra Benches NY Broker for Shoddy Note-taking on Client Calls*, Financial Advisor IQ (Mar. 22, 2023)**: "The Financial Industry Regulatory Authority this week sidelined a Mineola, New York–based broker for issues related to his documentation of telephone meetings with clients.[] The industry's self-regulatory agency suspended … a 24-year industry veteran for two months for recording inaccurate details of four customer calls, according to a Monday-filed letter of settlement. The notes at issue, compiled between 2019 and 2020, violated Finra's Rule 2010, requiring brokers act with 'high standards of commercial honor,' according to the self-regulator."

***SEC Charges Three Sales Agents at StraightPath Venture Partners With Fraud and Unregistered Broker Activity*, www.sec.gov (Mar. 23, 2023)**: "The Securities and Exchange Commission today charged Scott Hollender, Gabriel Migliano, Jr., and Frank Vecchio for selling interests in shares of pre-IPO companies on behalf of StraightPath Venture Partners LLC, despite not being registered broker-dealers, and for misleading investors about the fees associated with those investments. The Commission previously charged StraightPath Venture Partners, StraightPath Management LLC, and its four principals in May 2022 in connection with a $410 million fraud."
return to top

DID YOU KNOW?

FINRA HAS A WEBPAGE DEVOTED TO ARBITRATOR DISCLOSURE. Our readers know that arbitrator disclosure is a fundamental feature of arbitration. It's not surprising that FINRA Dispute Resolution Services ("DRS") has a Webpage, https://www.finra.org/arbitration-mediation/arbitrator-disclosure, dedicated entirely to the topic. Here, DRS has put under one roof an extensively-linked wealth of information on arbitrator disclosure.
return to top

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.*

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