



SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2023-24 (6/22/23)

George H. Friedman, Editor-in-Chief

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- *SEC Prepping AI Rules for Brokerages*, Financial Advisor IQ (Jun. 14, 2023)

DID YOU KNOW?

- AAA has a Webpage Dedicated to ADR Clause Drafting

SQUIBS: IN-DEPTH ANALYSIS

MEDIATION POWER: COURT ORDERS 3M CEO/BOARD CHAIR TO PARTICIPATE IN MEDIATION. *The judge managing a complex multi-party litigation has directed senior management of 3M to appear personally at a mediation session.* Astute mediators often have on their checklist being sure participants have authority to settle. In that spirit we note the Order issued recently by Judge **M. Casey**

Rodgers in *In re 3M Combat Arms Earplug Products Liability Litigation*, No. 3:19-md-02885-MCR-HTC (N.D. Fla. May 19, 2023), which we repeat essentially in its entirety:

Leadership, at its most effective, requires adaptability—a recognition that as the nature and demands of a situation develop and change so too must a leader’s stewardship approach and actions, in order to accomplish organizational goals. Many situations do not require the leader’s presence or input; indeed, there are times when his presence may impede progress. Other times, successful leadership occurs through delegation of responsibility to achieve certain goals to others. Sometimes, however, neither one’s absence nor a proxy will do. Sometimes, the nature and demands of a situation are far-reaching and consequential enough that the leader must be in the room. This is one of those times.

Formal mediation was reinstated for the MDL and Minnesota CAEv2 cases against 3M Company on May 2, 2023, and negotiations toward a global resolution are ongoing. Although these are encouraging developments, the mediation discussions have progressed to a critical juncture where the most senior party representative leaders must be present. Accordingly, every member of Plaintiffs’ Settlement Committee must personally attend the next mediation. For 3M, Chief Executive Officer and Chairman of the Board Michael F. Roman must personally attend, and listen and engage directly with the mediators, so that his reports to the Board of Directors regarding the potential for global resolution of these cases are properly informed by firsthand knowledge of the current state of the negotiations. The next mediation session is scheduled for May 25-26, 2023 at the United States District Court, One North Palafox Street, Pensacola, Florida. All participants must meet and confer with each other and the mediators to discuss settlement, and negotiate in good faith.

(ed: *Wow! **Email us at Help@SecArbAlert.com for a copy.)

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

HOUSE PASSES SENIOR SECURITY ACT. The House on **June 5** passed by voice vote the *Senior Security Act* – [H.R. 2593](#) – which had been introduced **April 13** by Rep. **Josh Gottheimer** (D-NJ). The [bill](#) establishes an SEC Senior Investor Task Force to: “(A) identify challenges that senior investors encounter, including problems associated with financial exploitation and cognitive decline; (B) identify areas in which senior investors would benefit from changes in the regulations of the Commission or the rules of self-regulatory organizations; (C) coordinate, as appropriate, with other offices within the Commission, other taskforces that may be established within the Commission, self-regulatory organizations, and the Elder Justice Coordinating Council; and (D) consult, as appropriate, with State securities and law enforcement authorities, State insurance regulators, and other Federal agencies.” The Task Force must report to Congress every two years.

*(ed: *For more info, see the [Committee Report](#). **This is the type of bill that cuts across party lines. We predict swift Senate passage ([S. 955](#)) and Presidential approval. ***An Alert h/t to Editorial Board member Rick Ryder, Esq, for alerting us to this development.)*
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HOUSE BILL WOULD AMEND FAA TO BAR AGE DISCRIMINATION

PDAAS. A new bill -- [H.R. 4120](#) – was introduced in the House on **June 14** to amend the Federal Arbitration Act (“FAA”): “with respect to arbitration of disputes involving age discrimination. What makes this an unusual development is that the as yet unnamed bill was introduced by a *Republican*, Rep. **Nancy Mace** (SC).

(ed: We will analyze the bill’s text when it is made available, but bipartisan support to us suggests a good chance at enactment, similar to the March 2022 enactment of the [Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021](#)

(“EFASASHA”), which the President signed into law on March 3. As we have reported many times, EFASASHA expressly amended the FAA to make predispute arbitration agreements and class action waivers voidable at the option of the victim. The new law has been codified as FAA [Chapter 4](#). It consists of [§ 401](#) (definitions) and [§ 402](#) (no validity or enforceability).)

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NEW STUDENT BORROWER DEFENSE RULES GO INTO EFFECT JULY 1:

ARBITRATION IMPACTED. New student *Borrower Defense to Repayment [regulations](#)* impacting arbitration go into effect **July 1**. As described in a [factsheet](#):

Borrower defense claims should be a backstop, not a first stop, for borrowers cheated by their school. To that end, the final rule continues the policies in the proposed rule that give borrowers a way to have their day in court. It prohibits institutions that participate in the Direct Loan Program from requiring borrowers to agree to mandatory pre-dispute arbitration agreements and/or requiring them to waive the ability to participate in a class-action lawsuit with respect to a borrower defense claim. These institutions similarly cannot compel students to go through an internal dispute resolution process before contacting the accreditor or government agency about their complaint.[] The final rule also requires institutions to disclose the use of arbitration and to provide the Department with certain arbitral records and judicial records connected with any borrower defense claim filed against the school, increasing transparency and providing the Department with more information to investigate schools engaged in possible wrongdoing. The Department will publish these records in a central database.

(ed: The rule was announced in an October 31, 2022 [press release](#), Education Department Releases Final Regulations to Expand and Improve Targeted Debt Relief Programs.)

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SEC’S INVESTOR ADVISORY COMMITTEE MEETS VIRTUALLY TODAY.

NO ARBITRATION OR MEDIATION ITEMS ON THE AGENDA. The SEC’s [Investor Advisory Committee](#) (“IAC”) will be meeting virtually today (June 22). There

are no dispute resolution items on the [Agenda](#), but there will be: “Discussion of a Recommendation Regarding the Oversight of Investment Advisers.” Recall that the **March 2** meeting had a panel on this subject and featured: [Natasha Greiner](#), Deputy Director, Division of Examinations; and National Associate Director, Investment Adviser/Investment Company (IA/IC) Examination Program, U.S. Securities and Exchange Commission; [Karen Barr](#), President and CEO, Investment Adviser Association; [Stephen Brey](#), Michigan Licensing and Regulatory Affairs; and [Micah Hauptman](#), Director of Investor Protection, Consumer Federation of America. The moderator was: [Paul Roye](#), Retired Senior Vice President, Capital Research and Management Company.

*(ed: *The minutes of the March 2 meeting are not yet posted. **The IAC meeting will be Webcast starting at 10 a.m. Eastern on the Commission’s Website at www.sec.gov.*

****For further info, “and to ascertain what, if any, matters have been added, deleted or postponed,” contact Vanessa A. Countryman at 202-551-5400.)*

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CALIFORNIA SUPREME COURT HEARS ORAL ARGUMENT IN PAGA-RELATED CASE. We reported in SAA 2022-30 (Aug. 4) that the California Supreme Court in **July 2022** agreed to [review](#) the appellate court holding in [Adolph v. Uber Technologies, Inc.](#), No. G059860 (Calif. Ct. App. 4 2022), a case we covered in the “Quick Takes” section of SAA 2022-15 (Apr. 21). The *Adolph* Court had held: “Uber contends on appeal that the initial question of whether Adolph is an employee—who may bring a representative PAGA [California’s Private Attorney General Act] 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.” Oral argument took place **May 9** and can be [viewed here](#). As our readers know, the United States Supreme Court in **June 2022** [held](#) 8-1 in [Viking River Cruises, Inc. v. Moriana](#), 142 S. Ct. 1906, that PAGA was in part preempted by the Federal Arbitration Act, insofar as PAGA allowed employees to evade bilateral predispute arbitration agreements.

*(ed: *The case is docket No. S274671. **A decision is expected in August. Our take is this one is headed to SCOTUS either way.)*

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[QUICK TAKES: CASES AND AWARDS WORTH READING](#)

[NextEra Energy Global Holdings B.V. v. Kingdom of Spain](#), No. 19-cv-01618 (D.D.C. **Feb. 15, 2023**): “Accordingly, the court will ENJOIN Spain: (1) from seeking an interlocutory decree or any other relief in the Dutch Action or in other Dutch proceedings requiring NextEra to suspend, hold in abeyance, or withdraw any proceedings before this Court, or that otherwise interferes with, obstructs, or delays resolution of NextEra’s Petition to Confirm the Award; (2) from pursuing any other foreign litigation that interferes with, obstructs, or delays resolution of NextEra’s Petition to Confirm the Award; and (3) to withdraw its requests for relief in the Dutch Action requiring NextEra to suspend, hold in abeyance or withdraw proceedings before this Court, including

without limitation, at pages 31-33 of the Dutch Writ, Claims (A) through (D) and (L) through (P).”

***City of Portsmouth Police Commission/Department v. Portsmouth Ranking Officers Association, NEPBA, Local 220*, No. 2021-0511 (NH Jun. 7, 2023):** Although a labor case, this decision is worth noting: “As relevant to this appeal, an arbitral award may be vacated for a plain mistake of law if the arbitrator ‘clearly misapplied the law to the facts’ ... We conclude that, because, as after-acquired evidence, the Probate Decision was not used to justify Goodwin’s termination, but only to mitigate his remedy, the arbitrator misapplied the law to the facts when she treated the Probate Decision as a second ground for Goodwin’s termination and determined that he was entitled to *Loudermill* protections on that basis. Put simply, the arbitrator erred when she determined that the City violated Goodwin’s due process rights and relied on that legal conclusion as an extraordinary equitable circumstance. We further conclude that the City has shown that the arbitrator, by relying in part on an erroneous legal conclusion, committed an error of law that prevented her ‘free and fair exercise of judgment’ regarding the backpay award. Accordingly, the trial court also erred when it found that the arbitrator did not commit plain mistake” (citations omitted).

***Weissman v Revel Transit, Inc.*, 2023 NY Slip Op 02956 (N.Y. App. Div. 1st Dep’t. Jun. 1, 2023):** “Plaintiff commenced this action alleging that he was injured when an electric moped, leased through defendant’s website via his mobile device, allegedly malfunctioned. Defendant moved to compel arbitration, asserting that plaintiff agreed to be bound by the terms of the ‘Revel Rental Agreement, Waiver of Liability, and Release’ and the ‘Terms of Use,’ which included a requirement to arbitrate disputes.... Although plaintiff may have elected not to use the hyperlinks to view the agreement or terms of service, he was on inquiry notice and thus bound by their respective mandatory arbitration provisions upon his completion of the registration process (*see Starke v Squaretrade, Inc.*, 913 F3d 279, 289 [2d Cir 2019]; *Meyer v Uber Tech, Inc.*, 868 F3d 66, 75 [2d Cir 2017]; *cf. Castro v Jem Leasing, LLC* (214 AD3d 475 [1st Dept 2023] [the defendant failed to establish that its then-current app was a valid clickwrap agreement that put the plaintiff on inquiry notice of contract terms]).”

***Willoughby v. Oppenheimer & Company*, FINRA No. 21-03115 (Orlando, FL, May 4, 2023):** In this selling away case, Respondent broker-dealer is held liable to a group of customers for nearly \$14 million in damages (inclusive of \$6.9 million in punitive damages). The Panel found the broker-dealer was grossly negligent in its failure to supervise four of its employees by allowing them to operate a Ponzi scheme out of its Atlanta, Georgia office. The customers are also awarded attorney fees and costs to be determined by a court of competent jurisdiction. *Provided courtesy of SAC’s ARBchek facility* (www.arbchek.com).

***Elnaey v. Fidelity Brokerage*, FINRA ID No. 22-01565 (New York, NY, May 1, 2023):** An All-Public Panel grants Respondent’s Prehearing Motions to Dismiss pursuant to FINRA Rule 12504(a)(6)(C) (Fidelity Respondents) and FINRA Rule 12206 (Six-year

Eligibility Rule) (Vanguard Marketing) and orders the customer to pay \$500 as a monetary sanction for his non-compliance with their orders regarding the production of discovery. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Hutchens, Neal H. and Fernandez, Frank and Edmondson, Macey, [State Law and Protecting Students from Predatory For-Profit Colleges and Universities](#) (May 18, 2023). **EDUCATION LAW REPORTER (May 18, 2023):** “The federal role in the oversight of for-profit higher education has received much attention from scholars, policy advocates, and the media, but state law also provides an important area for protecting students from potential abuses by predatory for-profit colleges and universities. In this article, we focus on ways state laws and regulations may seek to deter for-profit schools from committing fraud, misleading students, or engaging in untruthful practices to entice students to enroll in courses or degree programs. Using a pair of cases from Minnesota, we outline how general state consumer protection laws can form a basis to protect students, either by actions from a state agency or official or through private lawsuits by students. We also consider legislation from three states that seek to address predatory actions in higher education, with one of the states (California) having a statutory scheme that also encompasses not-for-profit colleges and two of the states (Maryland and Massachusetts) having enacted legislation that is specifically focused on regulating for-profit higher education. In the conclusion, we distill recommendations from state-level legal standards that states can consider to protect students from predatory for-profit colleges and universities.” (*ed: See our coverage of this topic [elsewhere](#) in this Alert.*)

[Update on Legislation Seeking ADR Reform: Race Discrimination Arbitration Bar Proposed, CPR Speaks \(Jun. 8, 2023\)](#): “While arbitration may provide a relatively fast, cost-effective alternative to litigation, its potential to entrench pre-existing power imbalances has inspired legislative efforts to rein in the reach of the [Federal Arbitration Act](#).... More recently, Congress proposed a further carve-out: invalidation of mandatory arbitration clauses in racial discrimination cases. Early last month, U.S. Rep. Colin Allred, D., Texas, and U.S. Sen. Cory Booker, D., N.J., introduced [the Ending Forced Arbitration of Race Discrimination Act](#), which gives individuals asserting racial discrimination the option to file suit in court even if they had agreed to arbitration before the claims arose.”

[SEC Unveils New Public Service Campaign Encouraging Older Investors to Never Stop Learning, www.sec.gov \(Jun. 12, 2023\)](#): “The Securities and Exchange Commission’s Office of Investor Education and Advocacy (OIEA) today unveiled a public service campaign that encourages older investors to never stop learning when it comes to protecting their hard-earned money and investing for their future. The campaign features a new TV spot, ‘Never Stop Learning,’ which is available in English and Spanish, and four informational videos about caregivers, trusted contacts, protecting investors’ retirement money, and the red flags of investment fraud.”

[Finra Spanks Schwab with \\$350,000 Fine Over Disclosures on ETNs,](#)

InvestmentNews (Jun. 13, 2023): “The Financial Industry Regulatory Authority Inc. last week fined Charles Schwab & Co. Inc. \$350,000 for failing to fully disclose information about exchange-traded notes to thousands of customers over a period of almost five years.[] From January 2016 to December 2020, Schwab sent trade confirmations to 765,000 clients that did not disclose that the exchange-traded notes were callable and that early redemption of the notes could affect their yields. As a result, Schwab violated industry rules around disclosure.”

[1st Cir. Rejects Debt Collector’s Appeal from Order Denying Motion to Compel Arbitration,](#)

Lexology (Jun. 13, 2023): “The U.S. Court of Appeals for the First Circuit [in *Powers v. Receivables Performance Management, LLC*] recently dismissed an appeal in a putative class action removed from Massachusetts state court to federal trial court concerning a motion to compel arbitration, holding that the order was not a final decision and was not within an exception that would permit interlocutory review.”

[SEC Prepping AI Rules for Brokerages,](#) **Financial Advisor IQ (Jun. 14, 2023):** “The Securities and Exchange Commission plans to bring new rules regarding the use of artificial intelligence by brokerages, according to news reports.[] The agency said on Tuesday that it could introduce a plan for addressing conflict-of-interest issues associated with AI, as well as predictive data analytics and machine learning, as soon as October, Bloomberg writes, citing the SEC’s semiannual rule-writing agenda that covers dozens of regulatory plans.”

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[DID YOU KNOW?](#)

AAA HAS A WEBPAGE DEDICATED TO ADR CLAUSE DRAFTING. The American Arbitration Association has a [Webpage](#) dedicated to ADR clause drafting. The AAA has also: “developed the [ClauseBuilder](#)® online tool—a simple, self-guided process--to assist individuals and organizations in developing clear and effective arbitration and mediation agreements,” and offers a series of [videos](#) on the topic.

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