SECURITIES ARBITRATION ALERT 2023-37 (9/28/23)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **The League of Nations Lives On**

ALERT! THERE *WILL* BE AN *ALERT* NEXT WEEK. TOO MUCH GOING ON FOR A BREAK RIGHT NOW. Alert *readers know that we usually take a quarterly break in publishing the* Securities Arbitration Alert *at the end of each quarter. That would translate to next week's* Alert*. Given the recent pace of activity, however, we've decided to delay our customary break a few weeks. So, look for the* Alert *in your email inbox next week, as usual. One thing we know for sure: SCOTUS will re reconvene October 2, the first Monday in October.*

A MINI-FEATURE ARTICLE: CFPB WILL TAKE ON MANDATORY ARBITRATION: *We reported last issue that a coalition of leading consumer advocacy*

groups petitioned the Consumer Financial Protection Bureau ("CFPB") to promulgate a rule giving financial consumers the option to arbitrate after a dispute arises. The group filed the Petition for Rulemaking on September 13. The Bureau's initial response was positive. We noted that the CFPB's approach to arbitration has a rich history, and promised to cover the topic in detail in this Alert. *Our long squib/mini-feature article appears directly below.*

SQUIBS: IN-DEPTH ANALYSIS

CONSUMER ADVOCATES TO CFPB: WRITE RULE EMPOWERING CONSUMERS TO CHOOSE ARBITRATION POST-DISPUTE. ***A coalition of leading consumer advocacy groups has petitioned the Consumer Financial Protection Bureau ("CFPB") to promulgate a rule allowing financial consumers the option to arbitrate after a dispute arises***. The National Association of Consumer Advocates (NACA), Public Citizen, the American Association for Justice (AAJ), Public Justice, the National Consumer Law Center ("on behalf of our low income clients"), Consumer Federation of America (CFA), the UC Berkeley Center for Consumer Law & Economic Justice, Americans for Financial Reform, and Better Markets, Inc. (*ed: listed in the order in which they appear in the Petition*), filed the Petition for Rulemaking on **September 13.** Specifically, the groups: "petition the Bureau, with respect to protecting consumers and advancing the public interest, to promptly issue a rule addressing the use of mandatory pre-dispute arbitration (or forced arbitration) provisions in contracts between regulated entities and consumers of financial products or services that would allow the consumer to make a meaningful choice on whether to use arbitration after a dispute arises." Arbitration and the CFPB have a rich history, which we review by borrowing liberally from our past coverage.

Background

Recall that *Dodd-Frank* section 1028 directs the CFPB to study the use of predispute arbitration agreements ("PDAA") in contracts for consumer financial products and services, to later report to Congress, and to ban, limit or impose conditions on their use if such action: "is in the public interest and for the protection of consumers." *Alert* readers may recall that the CFPB did indeed issue the required report to Congress and later promulgated a rule banning class action waivers. However, before it became effective, the Final Rule was retroactively nullified in **November 2017**, when **President Trump** signed into law H.J. Res. 111, a *Joint Disapproval and Nullification Resolution* (see SAA 2017-41). Congress had exercised its authority under the *Congressional Review Act*, ("*CRA*"), 5 USC §§ 801 *et seq*., which allows that body to legislatively nullify any regulation within 60 legislative/session days of its publication. Under the *CRA*, a substantially similar reg cannot be reintroduced without the express permission of Congress. We provided a full history in an **October 2017** blog post, *"Arb Rule, We Hardly Knew Ye." CFPB Arbitration Rule Likely To Be No More (And Never Was).*

Recent History: Rule Proposed on National Registry …

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 It 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). As reported in SAA 2023-13 (May 30), 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.

Drivers for the Proposed Arbitration Rule

The Petition states that developments since 2017 demonstrate that a new rule is needed (*ed: bullets from the table of contents are repeated* verbatim): consumers' lack of awareness and understanding of forced arbitration's existence, meaning, and consequences; growth of additional constraints in forced arbitration provisions; changing terms to add forced arbitration after legal actions started in court; and use of credit monitoring contracts to end run federal regulations and impose forced arbitration clauses on Fair Credit Reporting Act claims.

Rule Would Pass CRA Muster, Advocates Say

The Petition addresses directly whether the proposed rule would run afoul of the CRA's prohibition against promulgation of a rule in "substantially the same form" as a previously disapproved one (absent express permission from Congress): "Here, the rule proposed by this petition would not be in 'substantially the same form' as the 2017 rule. The CFPB's 2017 arbitration rule prohibited class action bans in arbitration clauses and required reporting of certain arbitral records. By contrast, the rule proposed in this petition would not prohibit, or even address, class-action bans. Rather, it would give consumers the right to make the choice about dispute resolution after a dispute arises, thereby ensuring that consumers can make informed, meaningful choices at the most relevant time.[] Importantly, the Bureau's statutory authority to issue an arbitration rule remains unchanged."

CFPB's Initial Response
The Bureau responded almost immediately. As described in a **September 18** Ballard Spahr blog post, *CFPB Reacts Quickly and Favorably to Petition Submitted to it by Consumer Groups to Ban Pre-dispute Arbitration*: "Evan Weinberger of Bloomberg received the following response from the CFPB in response to Evan's request for comments on the filing of the Petition:

> "Americans are overwhelmed by increasingly lengthy, complex, and one-sided fine print in form contracts. The CFPB is focused on companies that use fine print to extract extra money, lock people into unwanted business relationships, gain advantages they could not obtain in fair and competitive markets, or circumvent the rule of law. For example, in January the CFPB proposed to create a public registry of nonbank financial companies that purport to limit consumer rights or protections in form contracts, including arbitration clauses.
>
> "We welcome participation in our rulemaking petition program, on the part of the consumer groups who filed this petition or any other members of the public. We are carefully considering the proposal relating to arbitration clauses, and will be opening a public docket and taking comment from the public on the proposal."

*(ed: *We're sure there is more to come on this proposal. We'll be on the lookout for any* Federal Register *activity. **We agree that this proposed rule would seem not to be in "substantially the same form" as a previously disapproved one, but time will tell. ***It would appear that, as required by* Dodd-Frank, *the CFPB would be required to do a new study and report thereafter to Congress.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MET MID-SEPTEMBER. NO DISPUTE RESOLUTION ITEMS WERE COVERED. FINRA's Board of Governors met in person **September 13–14**. As the results indicate, there were no dispute-resolution items addressed. Of note, however: "The Board also reaffirmed FINRA's Financial Guiding Principles, which guide how we manage our resources to achieve our critical mission. The guiding principles are an integral part of the heightened transparency regarding FINRA's finances, which also includes annual publications of FINRA's audited Annual Financial Report, Annual Budget Summary and Report on the Use of Fine Monies."
*(ed: *The results page also includes a short video. **The next and final meeting on this year's schedule is December 6–7.)*
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SEC RELEASES SEPTEMBER INVESTOR QUIZ. The SEC on **September 12** released its monthly Investor Quiz via its www.investor.gov Website. The ten-question "Back-to-School" quiz invites investors to: "test your knowledge on this question and others on investment fraud, steps you can take to protect your money …" The quiz keeps score and explains the correct response.

(ed: We found the quiz to be relatively easy and scored 100%, but we think the typical investor will be challenged by some of the scenarios.)
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CALIFORNIA'S ARBITRATION STATUTE ON UNPAID ARBITRATION FEES REQUIRES RECEIPT OF FUNDS WITHIN 30 DAYS. We covered in SAA 2022-46 (Dec. 8) *De Leon v. Juanita's Foods*, No. B315394 (Calif. Ct. App. 2 Nov. 23, 2022. Quoting the *De Leon* Court, 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." At issue in *Doe v. Superior Court (Na Hoku, Inc.)*, No. A167105 (Calif. Ct. App. 3 Sep. 8, 2023): does the statute allowing a consumer to evade an arbitration agreement if a business does not pay its share of arbitration fees within 30 days require that the funds be *received* or does placing a check in the mail suffice? "Yes and no" says the Court: "In this writ proceeding, we strictly enforce the 30-day grace period in section 1281.98(a)(1) and conclude fees and costs owed for a pending proceeding must be *received* by the arbitrator within 30 days after the due date. We do not find that the proverbial check in the mail constitutes payment and agree with petitioner that real parties' payment, received more than 30 days after the due date established by the arbitrator, was untimely. We therefore grant the writ petition" (emphasis in original).
*(ed: *The fees were due October 3. The check was mailed that day but not received until October 5. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*
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INDIVIDUAL'S PAGA CLAIM MUST BE ARBITRATED, BUT CLAIMS ASSERTED ON BEHALF OF OTHERS GO TO COURT. Following recent precedent, the Court holds in *Barrera v. Apple American Group LLC*, No. S165445 (Calif. Ct. App. 1 Aug. 31, 2023), that, under the California Private Attorney General Act ("PAGA"), Plaintiff's individual claims must be referred to arbitration under an arbitration clause, but representative claims asserted on behalf of others go to court. First the facts and procedural history: "Plaintiffs Mario Barrera and Francisco Varguez sued defendants—a nationwide restaurant chain—to recover civil penalties under the Private Attorneys General Act of 2004 (PAGA) (Lab. Code, § 2698 et seq.) for various Labor Code violations suffered by them and by other employees. Defendants moved to compel arbitration. The trial court denied the motion and defendants appealed" (footnote omitted). And the holding: "Based on *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. ___, [142 S.Ct. 1906] (*Viking River*) and the Federal Arbitration Act (FAA) (9 U.S.C. § 1 et seq.), we conclude the parties' agreements require arbitration of plaintiffs' PAGA claims that seek to recover civil penalties for Labor Code violations committed against plaintiffs. On an issue of California law that the California Supreme Court has

recently resolved, we conclude plaintiffs' PAGA claims that seek to recover civil penalties for Labor Code violations committed against employees other than plaintiffs may be pursued by plaintiffs in the trial court. (*Adolph v. Uber Technologies, Inc*. (2023) 14 Cal.5th 1104 (*Adolph*).)"
*(ed: *We covered* Adolph *in SAA 2023-28 (Jul. 27), and blogged about the case. **An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Shake Out, LLC v. Clearwater Construction, LLC*, No. 49637 (Idaho Sep. 8, 2023)**: "This appeal concerns the applicability and enforceability of an arbitration clause. Shake Out, LLC ('Shake Out'), entered into a contract with Clearwater Construction, LLC ('Clearwater'), to repair the building Shake Out's restaurant occupies. The relationship between the parties quickly deteriorated, resulting in Shake Out filing a lawsuit against Clearwater. The parties attempted to mediate their dispute but were unsuccessful. After the case had proceeded for some time, Clearwater sought to compel arbitration pursuant to the contract. Shake Out objected, asserting that Clearwater had waived its right to enforce the arbitration clause because it had participated in the litigation for almost ten months before seeking to compel arbitration. The district court concluded Clearwater had not waived its right to seek arbitration and entered an order compelling arbitration and staying the proceedings. For the reasons discussed below, we affirm."

***Stiffler v. Hydroblend, Inc.*, No. 49933 (Idaho Sep. 8, 2023)**: "This case concerns a wage claim dispute between Pat Stiffler and his previous employer, Hydroblend, Inc. After a dispute arose concerning incentive pay on an allegedly miscoded account, Stiffler filed a complaint for unpaid wages, breach of contract, retaliation, and wrongful termination. The proceedings culminated with two orders from the district court that (1) awarded summary judgment to Hydroblend concerning treble damages, (2) concluded multiple issues were governed by an arbitration provision in Stiffler's employment agreement, and (3) denied summary judgment where disputed facts remained at issue. Stiffler appeals the district court's decisions, arguing that he is entitled to treble damages on all wages under Idaho's Wage Claim Act, as well as severance pay under his 2019 employment contract. Stiffler also argues that the district court erred by compelling arbitration of some of his claims. For the following reasons, we affirm in part and reverse in part."

***ANUSA, LLC v. Shattenkirk*, No. 14-20-00446-CV, 2023 WL 5437714 (Tex. App Aug. 24, 2023)**: "To the extent the trial court denied the motion to compel arbitration because AutoNation failed to establish consent, it abused its discretion because it could not decide the issue without holding an evidentiary hearing. We sustain AutoNation's second issue…. We hold that a fact issue regarding whether Shattenkirk consented to the arbitration agreement by electronic signature must be resolved by evidentiary hearing. We reverse the trial court's order denying AutoNation's motion to compel arbitration and

remand to the trial court for proceedings consistent with this opinion" (footnotes and citation omitted).

***Lercher v. Citigroup Global*, FINRA ID No. 22-02915 (New York, NY, Aug. 11, 2023)**: An Arbitrator explains why she has decided to grant Respondent broker-dealer's Prehearing Motion to Dismiss Claimant registered rep's request for reformation of his Form U5 record, pursuant to the applicable statute of limitations (FINRA Rule 13206, Six-Year Eligibility Rule for Industry Disputes). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Nguyen v. TD Ameritrade*, FINRA ID No. 18-02917 (Tampa, FL, Aug. 11, 2023)**: Claimant is awarded $1.2 million in damages after alleging that his funds were misappropriated to satisfy the balance due on his account due to a margin liquidation. Respondent broker-dealer, however, prevails on its Third-party Claim for the amount due and owing from the liquidation to recover funds as a result of the debit balance. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Gore, Kiran Nasir and Karton, Joshua, *Checking the Boxes: Formal Validity of an Arbitration Agreement*, Kluwer Arbitration Blog (Sep. 7, 2023): "As experienced negotiators know, the process of contract negotiation can give rise to fruitful and long-lasting business relationships. The parties may meet several times to develop the precise terms of their agreements, through videoconferences, in conference rooms, or over dinner and drinks. But for many contracts, the parties' representatives never meet, limiting their negotiations to exchanges of standard forms, marked-up drafts, emails, chains of SMS messages, and even an emoji or two to ensure that the agreement reached reflects their intent.[] For the arbitration community, decisions like this one may have implications for the satisfaction of writing requirements for arbitration agreements. The formal validity of an arbitration agreement is a foundational issue expressly addressed by Articles II and V of the New York Convention, Article 7 of the UNCITRAL Model Law on International Commercial Arbitration, and most national arbitration laws."

***Employee E-Signatures in Arbitration Agreements Under Scrutiny*, Lexology (Sep. 8, 2023)**: "The Court of Appeals found that, although AutoNation proved that it has an electronic process for obtaining e-signatures from employees, it: (1) had not adequately proven in the trial court that Mr. Shattenkirk had actually executed electronically the arbitration agreement; and (2) had not adequately proven in the trial court that the security procedures associated with the electronic signature were sufficient to show that Mr. Shattenkirk actually provided the e-signature. The Court of Appeals further determined that both Texas law and the Federal Arbitration Act require an evidentiary hearing at the trial court level on the issue of whether Mr. Shattenkirk electronically executed the arbitration agreement—affidavits alone were not sufficient. Accordingly, the Court of Appeals reversed and remanded that issue to the trial court for an evidentiary hearing."

***Ninth Circuit Broadly Construes Exemption to Federal Arbitration Act*, Proskauer Rose LLP California Employment Law Update (Sep. 12, 2023)**: "The Ninth Circuit recently issued an opinion that signals some movement in the direction away from enforcing employment-related arbitration agreements.[] In *Miller v. Amazon.com,* Case No. 2:21-cv-00204-BJR, the Ninth Circuit affirmed the district court's order denying Amazon's motion to compel arbitration in a case brought by Amazon Flex delivery drivers who made last-leg deliveries of goods shipped from other states or countries to consumers, as well as tip-eligible deliveries of food, groceries, and packages stored locally. In the complaint, the plaintiffs alleged that Amazon violated state laws by failing to honor its promise that workers would receive 100% of the tips that customers added for deliveries of local goods."

***SEC Charges Creator of Stoner Cats Web Series for Unregistered Offering of NFTs*, www.sec.gov (Sep. 13, 2023)**: "The Securities and Exchange Commission today charged Stoner Cats 2 LLC (SC2) with conducting an unregistered offering of crypto asset securities in the form of purported non-fungible tokens (NFTs) that raised approximately $8 million from investors to finance an animated web series called Stoner Cats."

***Consumer Groups Ask CFPB to Take New Stab at Curbing Arbitration*, Bloomberg (Sep. 14, 2023)**: "Consumer advocates are pushing the Consumer Financial Protection Bureau to take another shot at restricting arbitration clauses in financial contracts.[] The National Association of Consumer Advocates, Public Citizen, the National Consumer Law Center, the Consumer Federation of America, and other consumer advocacy groups filed a petition Wednesday asking the CFPB to write a rule allowing consumers to choose whether a dispute with their financial services provider goes through the courts or through arbitration at the time the dispute arises."

***Federal Court Upholds Arbitral Award Despite Failures to Disclose Potential Bias*, Lexology (Sep. 14, 2023)**: "The Eleventh Circuit upheld an arbitral award last month despite the arbitrators' failure to make certain disclosures regarding potential sources of bias. The litigation involved a dispute between the Panama Canal Authority, the government agency responsible for the operation and management of the Panama Canal, and Grupo Unidos por el Canal, S.A., the contractor hired to construct the Panama Canal expansion. Complications with the project caused progress to be "severely delayed and disrupted," resulting in liability disputes between the parties."

***FINRA Dispute Resolution Update: Five Takeaways from a Busy Year*, JDSupra Sep. 25, 2023)**: "FINRA Dispute Resolution Services continues to update its rules and procedures to further its effort to operate the country's largest securities dispute resolution forum in a fair, efficient, and effective manner. The five most significant developments in the past year are (1) updates to the arbitrator selection process, (2) significant changes to the expungement process, (3) continued efforts to respond to COVID-19 developments, (4) an amendment to the Code of Arbitration Procedure for Industry Disputes to align it with the Ending Forced Arbitration of Sexual Assault and

Sexual Harassment Act of 2021, and (5) a significant number of procedural amendments with which practitioners should be familiar."
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DID YOU KNOW?

THE LEAGUE OF NATIONS LIVES ON. Readers who assumed that the League of Nations passed into history decades ago need to rethink their assumptions, at least as regards the League's offspring. Consider the International Institute for the Unification of Private Law ("UNIDROIT"): "Set up in 1926 as an auxiliary organ of the League of Nations, the Institute was, following the demise of the League, re-established in 1940 on the basis of a multilateral agreement, the UNIDROIT Statute." The organization promulgated the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"). What is the arbitration connection? As explained in a **September 14** Kluwer Arbitration Blog post: "Three decades since their first release in 1994, the UNIDROIT Principles have played multiple roles in international arbitration ... [including] the impressive line of arbitral awards that have referenced the UNIDROIT Principles."
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Send any messages or inquiries to: George@SecArbAlert.com

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