SECURITIES ARBITRATION ALERT 2023-45 (11/30/23)

George H. Friedman, Editor-in-Chief

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- ***Wall Street Watchdog Floats Plan to Let Brokers Promise Future Results,* Financial Times (Nov. 18, 2023)**
- ***FINRA vs. SEC: How Do They Differ?*, Yahoo*!* Finance (Nov. 19, 2023)**
- ***DC Judge OKs $8M Award Against Equatorial Guinea*, Law360 (Nov. 21, 2023)**

DID YOU KNOW?

- **AAA Passes 500,000 Cases this Year**

SQUIBS: IN-DEPTH ANALYSIS

FEW COMMENTS, MOSTLY ALONG PARTY LINES, ON CONSUMER ADVOCATES' PETITION TO CFPB URGING IT TO WRITE RULE EMPOWERING CONSUMERS TO CHOOSE ARBITRATION POST-DISPUTE. ***The comment period closed recently on the Petition for Proposed Rulemaking filed by a coalition of leading consumer advocacy groups, urging the Consumer Financial Protection Bureau ("CFPB") to promulgate a rule allowing financial consumers the option to arbitrate after a dispute arises*. *Just 32 comments were filed, pretty much along expected party lines.*** As reported in SAA 2023-37 (Sep. 28), 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 14.** 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 New 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."

The CFPB's Website created petition docket No. CFPB-2023-00407-0001 here.

Comments Received

Comments were due by **November 14.** As of press time, there were just 32 comments, which broke along party lines. We excerpt below a few representative media posts:

Law Profs, Business Groups Spar Over Proposed Consumer Arbitration Ban, Reuters (Nov. 15): "If law professors' signatures carried authoritative weight, the U.S. Consumer Financial Protection Bureau would already be drafting a new rule to prohibit the companies it regulates from requiring consumers to agree to arbitrate potential claims in advance of any actual dispute.[] Nearly 170 law professors signed a Nov. 14 letter urging the CFPB to act on a rulemaking petition submitted to the agency in September by nine consumer advocacy groups, including Public Citizen, Public Justice, the American Association for Justice and Better Markets.... Of course, as you know, federal agency rulemaking is not as simple as doing what law professors recommend. You will therefore not be surprised to hear that the U.S. Chamber of Commerce, several trade groups for industries regulated by the CFPB, and the Ballard Spahr lawyer who pioneered class action waivers in arbitration provisions all submitted comment letters on Tuesday that exhort the CFPB to reject the proposed prohibition on mandatory pre-dispute arbitration clauses."

NAFCU, Trades Oppose Petition to Ban Arbitration, NAFCU Newsroom (Nov. 15): "NAFCU [National Association of Federal Credit Unions] joined with several other trade associations to voice opposition to a petition made to the CFPB that would require the bureau to pursue a rulemaking to ban pre-dispute arbitration provisions in contracts for consumer financial services…. The groups outlined several reasons for the bureau to deny the proposal, including:

- the 2017 Congressional Review Act (CRA) resolution that disapproved of the CFPB's arbitration rule prevents the bureau from promulgating a rule that is 'substantially the same';
- the bureau does not have statutory authority to promulgate the petitioned rule without conducting a study and demonstrating that "any regulation that it proposes is 'consistent with the study,' in addition to demonstrating that the regulation is 'in the public interest and for the protection of consumers'"; and
- the petition also contradicts the FAA and the Supreme Court's recognition 'that the FAA was designed to promote arbitration.'"

ABA, Trade Groups: CFPB has No Authority to Enact Rule Limiting Arbitration, ABA Banking Journal (Nov. 15): "The American Bankers Association this week, along with 13 other organizations, sent a joint letter to the CFPB urging the bureau to deny a recent petition for rulemaking to ban pre-dispute arbitration provisions in contracts for consumer financial services.[] Relying on protections enacted by Congress, 'numerous businesses, including many companies that provide financial products or services, have for decades resolved consumer disputes by arbitration rather than through costly and burdensome litigation in our overburdened court system,' the groups wrote, noting that arbitration reduces transaction costs and provides 'fair and efficient' dispute resolution." *(ed: *We're sure there is more to come on this proposal. Next is the Bureau's response. We see a proposed rule coming. **As we said before, 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 UNVEILS REDESIGNED DR WEBPAGE. LOOKS GOOD! FINRA recently launched a new and improved Dispute Resolution Webpage, featuring a clean layout, liberal use of graphics, better search capability, and a much more user-friendly interface. The new page also features a highlighted link to access the Dispute Resolution Portal. It leads with: "This section of FINRA.org is dedicated to helping investors and other FINRA constituents understand how to navigate our two Dispute Resolution Services of Arbitration and Mediation. Our goal is to provide appropriate guidance to help you resolve your dispute, as well as set realistic expectations regarding our Arbitration and Mediation processes —including timelines, fees and how to find an attorney." The new page, which can still be found at https://www.finra.org/arbitration-mediation, also displays nicely on mobile devices. There are several improvements, such as easy-to-find tabs and icons for core areas: "EXPERIENCED: 8,200+ well-qualified arbitrators drawn from diverse professions and cultural backgrounds; FAIR: Historically, approximately 75% of customer arbitration cases closed through settlement or paid damages; EFFECTIVE: 3,564 arbitration and mediation cases closed in 2022; EFFICIENT: The average FINRA arbitration case closes in just 15.7 months." Key links are now arranged clearly along the left margin. The DR area can be accessed directly using this link, or by clicking on a link the lower, right-hand corner of the FINRA home page.
*(ed: *Well done! **We participated in beta testing the new landing page, and are pleased to see that our suggestions were incorporated.)*
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FINRA PROPOSES RULE ALLOWING FUTURE PERFORMANCE PROJECTIONS. FINRA on **November 17** filed SR-FINRA-2023-016, *Proposed Rule Change to Amend FINRA Rule 2210 (Communications with the Public) to Permit Projections of Performance in Institutional Communications and Specified Communications to Qualified Purchasers*. The proposed rule change would: "amend

FINRA Rule 2210 (Communications with the Public). Currently, Rule 2210 prohibits projections of performance or targeted returns in member communications, subject to specified exceptions. The proposed rule change would allow a member to project the performance or provide a targeted return with respect to a security or asset allocation or other investment strategy in an institutional communication or a communication distributed solely to qualified purchasers as defined in the Investment Company Act of 1940 ('Investment Company Act') that promotes or recommends specified non-public offerings, subject to stringent conditions to ensure these projections are carefully derived from a sound basis" (footnote omitted).
*(ed: *Comments are due 21 days after publication in the* Federal Register. ***If approved, we suspect the rule would lead to more arbitrations.)*
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FAIR ACT A SLOW GO. The reintroduced *FAIR Act* – H.R. 2953 and S. 1376 – was announced in an **April 28** Press Release. The bill would: "(1) prohibit predispute arbitration agreements that force arbitration of future employment, consumer, antitrust, or civil rights disputes; and (2) prohibit agreements and practices that interfere with the right of individuals, workers, and small businesses to participate in a joint, class, or collective action related to an employment, consumer, antitrust, or civil rights dispute." There are just 96 cosponsors in the House and 37 in the Senate, and there are no Republicans in either group.
(ed: Unlike the last iteration of the FAIR Act, which passed in a Democratic-controlled chamber, we don't see the new bill passing the GOP-controlled House. The non-partisan www.govtrack.us gives the chances of enactment as between 2 and 6 percent.)
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SEVENTH CIRCUIT TO SAMSUNG: HOLD OFF ON PAYING MILLIONS IN MASS ARBITRATION FEES. We covered *Wallrich et al v. Samsung Electronics America, Inc.*, No. 22-C-5506 (N.D. Ill. Sep. 12, 2023), in the "Articles of Interest" section of SAA 2023-38 (Oct. 5): "Alleging violations of the Illinois Biometric Information Privacy Act (BIPA), approximately 50,000 Samsung customers filed individual arbitration demands with the American Arbitration Association (AAA) pursuant to an arbitration clause in Samsung's customer agreement. Samsung refused to pay its share of the AAA's administrative fees, totaling about $4 million, and the AAA closed the matters for lack of payment. The customers then petitioned the U.S. District Court for the Northern District of Illinois to compel arbitration. Although the court dismissed some of the petitioners without prejudice for improper venue, it granted the petition as to more than 35,000 petitioners and ordered Samsung to pay its share of the AAA's administrative fees so that the petitioners could arbitrate their claims" (see *Channeling Shakespeare, Court Orders Samsung to Pay Millions in Arbitration Fees*, Consumer Finance Blog (Sep. 13, 2023)). Now comes word that the Seventh Circuit has temporarily stayed the Order: "A U.S. appeals court has blocked for now a decision requiring Samsung Electronics to pay millions of dollars in administrative fees to initiate arbitration proceedings with consumers who claim the mobile device maker violated their privacy rights.[] In a brief ruling, the Chicago-based 7th U.S. Circuit Court of Appeals

paused the arbitration fee order and agreed to fast-track Samsung's appeal seeking to overturn it. Lawyers for the consumers suing Samsung had urged the court to allow the fee order to take effect" (see *US Court Blocks Order Requiring Samsung to Front Millions in Arbitration Fees*, Reuters (Nov. 9, 2023)). The Order in No. 23-2842 (7th Cir. Nov. 8, 2023) states: "The motion for a stay pending appeal is GRANTED. The district court's order dated September 12, 2023, is STAYED pending the resolution of this appeal and the issuance of this court's mandate. The motion to expedite also is GRANTED…. The parties' briefs must discuss in detail both this court's appellate jurisdiction (including the effect of *Green Tree Financial Corp. v. Randolph*, 531 U.S. 79 (2000)) and the district court's subject-matter jurisdiction (including the effect of *Vaden v. Discover Bank*, 556 U.S. 49 (2009), and 9 U.S.C. § 203)."
(ed: To say this case is being watched closely is an understatement.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Ferreira v. Uber Techs*., No. 23-cv-00518-JST (N.D. Cal. Nov. 3, 2023)**: "The parties agree that the Schleuder PAA and Portier PAA are valid agreements to arbitrate any disputes between Ferreira and Schleuder or Portier. The parties dispute, however, whether Defendants as non-signatories of the Schleuder PAA and Portier PAA have standing to compel Ferreira to arbitrate her FLSA claim. Specifically, the parties dispute whether (1) the question of whether Defendants have standing is one of arbitrability to be decided by the arbitrator; and (2) if the question of standing is one for the Court, whether Defendants constitute third party beneficiaries to the Schleuder PAA and the Portier PAA…. Accordingly, when a non-signatory seeks to enforce a clause that delegates the issue of arbitrability, 'the threshold issue of whether the delegation clause is even applicable to [the nonsignatory] must be decided by the Court.'[] Here, while Ferreira may have agreed to arbitrate arbitrability with Schleuder and Portier, there is not clear and unmistakable evidence that Ferreira agreed to do so with Rasier or Uber" (citations omitted). (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Reliance Health Care, Inc. v. Mitchell*, 2023 Ark. 165 (Nov. 16, 2023)**: "This is an interlocutory appeal of the Mississippi County Circuit Court's order certifying a class action. Because a majority of this court has granted a writ of certiorari in *Reliance Health Care, Inc. v. Mitchell,* No. CV-23-290, vacating the class-certification order because it was entered before an order on pending motions to compel arbitration, this appeal is dismissed as moot."

***RUAG Ammotec GmbH v. Archon Firearms, Inc*., 139 Nev. Adv. Op. No. 48 (Nov. 16, 2023)**: "It is clear from our caselaw that a nonsignatory to a contract containing an arbitration clause can be compelled to participate in arbitration under ordinary principles of agency and contract. We have yet to consider, however, whether that nonsignatory can be compelled to participate in arbitration by another nonsignatory. We conclude that, under circumstances where the nonsignatory seeking to compel arbitration demonstrates both the right to enforce the contract and that compelling another nonsignatory to

arbitration is warranted under standard principles of contract law or estoppel, compelling arbitration is appropriate."

***Gardiner v. Equitable Advisors*, FINRA ID No. 23-00332 (Baltimore, MD, Oct. 18, 2023)**: An Arbitrator grants Respondent broker-dealer's Prehearing Motion to Dismiss, pursuant to FINRA Rule 13206 (Six-year Eligibility Rule for Industry Disputes), Claimant's request for reformation of his Form U5 record, after finding the claim was not filed within the timeframe allotted under the rule. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Fluetsch v. Interactive Brokers*, FINRA ID No. 23-01599 (San Diego, CA, Oct. 24, 2023)**: An Arbitrator denies a customer's claims against Respondent broker-dealer, after finding that she failed to show how the broker-dealer has any liability or responsibility for her losses. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Jarrett, Maartin, *Aligning Legal Responsibility with Wrongfulness in the Calculation of Compensation in Investment-Treaty Disputes* (Kluwer Arbitration Blog (Nov. 17, 2023): "Readers with antennas tuned to the happenings of the reform process for investor-State dispute settlement at UNCITRAL will know that the topics of damages and causation are on the agenda. Indeed, at the last sessional meeting of Working Group III, draft provisions on damages and causation were discussed. These provisions might find their way into the treaty that (possibly) emerges from the reform process. One vision is to create a large multilateral treaty that would alter the existing investment treaties among its parties. Accordingly, this is a once-in-a-generation moment to change the rules on damages and causation, and to have such change apply to many future investor-State disputes. With that background, this blog post proposes new rules on damages and causation, which can be found in the concluding paragraph."

***Seventh Circuit Stays Order Requiring Samsung to Pay Millions in Arbitration Fees*, Ballard Spahr Blog (Nov. 16, 2023)**: "We previously blogged about an Illinois federal district court order requiring Samsung to pay about $4 million in arbitration fees in connection with 35,000 individual arbitration demands filed as part of a 'mass arbitration.' By way of update, Samsung is pursuing an appeal to the Seventh Circuit, which recently granted Samsung's motion for a stay of the district court's order pending appeal." (*ed: See our coverage elsewhere this this* Alert.)

***New DOL Proposal Portends "Balkanization" of Securities Laws: Stifel CEO*, Financial Advisor IQ (Nov. 17, 2023)**: "After the Department of Labor's latest stab at a fiduciary rule for retirement advice, Stifel Financial Chief Executive Officer Ron Kruszewski is wondering aloud where the industry pushback is.[] The longtime CEO of the St. Louis–based regional brokerage said during a conference last week that he was surprised about 'the somewhat muted reaction by the industry' to the rule's latest iteration, which was unveiled on Oct. 31."

Wall Street Watchdog Floats Plan to Let Brokers Promise Future Results**, Financial Times (Nov. 19, 2023)**: "Brokers would be able to market some investments with projections of future performance and promise targeted returns when they are working with institutional and wealthy individuals, under a rule proposed by an industry self-regulatory body.[] The rule change floated by Finra would mark a departure from a general ban on brokers promising specific outcomes when they sell securities. That has raised concerns among some investor advocates." (*ed: See our coverage elsewhere this this* Alert.)

FINRA vs. SEC: How Do They Differ?**, Yahoo*!* Finance (Nov. 19, 2023)**: "When it comes to regulating the financial system of the United States, two prominent entities often come into the spotlight: FINRA and the SEC. While the former is responsible for overseeing the activities of brokerage firms and registered brokers, the latter has broader authority and scope to protect investors by regulating securities markets. When working with a financial advisor, be sure their firm is registered with either the SEC or a state regulatory authority."

DC Judge OKs $8M Award Against Equatorial Guinea**, Law360 (Nov. 21, 2023)**: "A D.C. federal court on Friday enforced an approximately $8 million arbitral award issued to a Swiss company that was ousted from a contract to operate a hospital in Equatorial Guinea's largest city, ruling that he must defer to the arbitral panel's interpretation of an ambiguous arbitration clause." (*ed: Link to Opinion added by the* Alert.)

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DID YOU KNOW?

AAA PASSES CASES THIS YEAR. According to a banner on the American Arbitration Association's landing page, this institution has had 509,764 cases filed so far this year (through **November 26).** That figure straight-lines to over 550,000 cases by the year's end. AAA has administered 7,904,170 cases since its founding in **1926**.

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