SECURITIES ARBITRATION ALERT 2023-47 (12/14/23)

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- ***Robinson Nursing & Rehabilitation Center, LLC v. Phillips*, 2023 Ark. 175 (Nov. 30, 2023)**
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- ***Cordova Armijos v. Raymond James*, FINRA No. 18-02934 (Miami, FL, Nov. 1, 2023)**
- ***Foose v. Reames*, FINRA ID No.22-02483 (Columbus, OH, Nov. 3, 2023)**

ARTICLES OF INTEREST:

- **Lopez, Aristo, *ISDS Under the USMCA: The First Three Years at a Glance,* Kluwer Arbitration Blog (Nov. 25, 2023)**
- ***A Closer Look: Second Circuit Steps in to Reverse Decision Refusing to Enforce "Click-Wrap" Mandatory Arbitration Agreement,* Lexology (Nov. 29, 2023)**
- ***Democratic AGs Try to Drive a Truck Through Arbitration Act Exemption*, Cozen O'Connor State AG Report (Nov. 30, 2023)**
- ***Second Circuit Reverses District Court, Ruling that Website Interface Provided Reasonable Notice of Arbitration Agreement*, JDSupra (Dec. 1, 2023)**
- ***SIFMA Calls on NASAA to Withdraw Proposed Model Rule Revisions*, Financial Advisor IQ (Dec. 4, 2023)**
- ***House Votes to Override CFPB Small Business Lending Rule,* Ballard Spahr Blog (Dec. 5, 2023)**

DID YOU KNOW?

- **Securities Experts Roundtable has a Searchable Database**

******BREAKING NEWS:* SEC INVESTOR ADVOCATE RECOMMENDS TEMPORARY HALT TO RIA ARBITRATION CLAUSE USE.** *The SEC Office of the Investor Advocate has issued to Congress a Report on Activities for the Fiscal Year 2023. The report was announced in a December 5 press release, which states: "Notable highlights from the report include … [r]esearch findings about investment advisory agreements use of mandatory arbitration clauses including suggested approaches on combating abusive use of those clauses …." The headlines: 1) use of mandatory predispute arbitration agreements ("PDAAs") calling for private ADR providers can be harmful to investors and may violate the adviser's fiduciary duty to the client; 2) the*

FINRA dispute resolution forum provides superior investor protection; and 3) until the issue can be further studied, the report recommends a temporary halt to investment advisory agreement PDAA use (ed: in any forum, we think). We will cover this topic in depth in a future Alert.

SQUIBS: IN-DEPTH ANALYSIS

CONGRESS PASSES DISAPPROVAL RESOLUTION ON CFPB'S SMALL BUSINESS LENDING RULE. ***Congress has passed a resolution disapproving the Consumer Financial Protection Bureau's ("CFPB") Small Business Lending rule. President Biden is expected to veto it.*** The House on **December 1** passed by a 221-202 mostly party line vote S. J. Res. 32, a joint resolution: "[p]roviding for congressional disapproval under chapter 8 of title 5, United States Code, of the rule submitted by the Bureau of Consumer Financial Protection relating to Small Business Lending Under the Equal Credit Opportunity Act (Regulation B)." The resolution goes on to state that: "Congress disapproves the rule submitted by the Bureau of Consumer Financial Protection relating to Small Business Lending Under the Equal Credit Opportunity Act (Regulation B) (88 Fed. Reg. 35150 (May 31, 2023)), and such rule shall have no force or effect." The Senate passed the resolution on **October 18** by a vote of 53-44.

The Basics

The rule's summary provides: "The Consumer Financial Protection Bureau (CFPB or Bureau) is amending Regulation B to implement changes to the Equal Credit Opportunity Act (ECOA) made by section 1071 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act). Consistent with section 1071, covered financial institutions are required to collect and report to the CFPB data on applications for credit for small businesses, including those that are owned by women or minorities. The final rule also addresses the CFPB's approach to privacy interests and the publication of data; shielding certain demographic data from underwriters and other persons; recordkeeping requirements; enforcement provisions; and the rule's effective and compliance dates."

Past CFPB Rule Nullification

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"), 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).*

*(ed: *According to media reports, the President is expected to veto the resolution, and the votes are not there for an override. **Arbitration is not mentioned in the regulation.)* *return to top*

YET ANOTHER COURT FINDS THAT, UNLIKE THE FAA, THE UN CONVENTION IS NOT PREEMPTED BY THE MCCARRAN-FERGUSON ACT. ***The Eastern District of Virginia has joined a growing chorus of courts holding that the McCarran-Ferguson Act does not "reverse-preempt" the UN Convention***. The virtually unlimited reach of Federal Arbitration Act ("FAA") preemption can be checked by a contrary federal statute, such as the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Act protects state laws regulating the business of insurance from federal preemption, in effect "reverse-preempting" the FAA: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance …." But what if the arbitration-friendly federal statute is not the FAA but the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards ("UN Convention")? There is no reverse preemption by the Virginia law barring insurance arbitration, says the Court in *Keller North America, Inc. v. Certain Underwriters*, No. 4:23cv56 (E.D. Va. Aug. 15, 2023).

Treaty is Not a Law of Congress

Why? Because the UN Convention is a *treaty* and not an "Act of Congress" as defined by the statute: "As Defendants highlight … the Fourth Circuit squarely addressed this issue in ESAB Group v. Zurich. Much like Keller argues here, ESAB Group argued that South Carolina's bar on arbitration agreements in insurance contracts 'reversed preempted' the Convention pursuant to the McCarran-Ferguson Act. The Fourth Circuit disagreed, holding that 'the Convention Act [9 U.S.C. §§ 201-208], as implementing legislation of a treaty, does not fall within the scope of the McCarran Ferguson Act' because 'Supreme Court precedent dictates that the McCarran Ferguson Act is limited to legislation within the domestic realm, and prior precedent of the Fourth Circuit and sister circuits supports a narrow reading of the Act.' Therefore, in keeping with the Fourth Circuit's holding in ESAB Grp., this Court finds that the McCarran Ferguson Act does not authorize 'reverse preemption' of the Convention by § 38.2-312 of the Virginia Code" (citations omitted).

Past Cases with Same Result

We have in the past covered similar cases with similar outcomes. In SAA 2022-03 (Jan. 27), we reported that the Supreme Court had in **2022** declined to review *CLMS Management Services Limited Partnership v. Amwins Brokerage of Georgia, LLC*, 8 F.4th 1007 (9th Cir. 2021), a case of first impression we reported on in SAA 2021-33 (Sep. 2). There, the Ninth Circuit held: "Article II, Section 3 of the Convention on Recognition and Enforcement of Foreign Arbitral Awards is self-executing, and it requires enforcement of the parties' arbitration agreement. Because the Convention is not an 'Act of Congress' subject to reverse-preemption by the McCarran Ferguson Act, the district court correctly granted defendants' motion to compel arbitration." Also, we covered in SAA 2020-31 (Aug. 19) a case to the same effect, *J.B. Hunt Transport, Inc. v. Steadfast Insurance Co.*, 470 F. Supp. 3d 936 (W.D. Ark. 2020). That Court cited

with favor *McDonnel Group, L.L.C. v. Great Lakes Ins. SE, UK Branch*, 923 F.3d 427 (5th Cir. 2019), another case to the same effect we covered in SAA 2019-21 (May 29).
(ed: At this point, we would say this aspect of the law is well-settled.)
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MET IN PERSON LAST WEEK. NO DISPUTE RESOLUTION RULEMAKING ITEMS ON THE AGENDA. FINRA's Board of Governors met in person **December 6–7**; there were no dispute resolution rulemaking items on the Agenda. As usual, we will follow up after the meeting results are posted. This was the final meeting for 2023. The 2024 schedule is: March 6–7; May 8–9; July 24–25; September 18–19; and December 4–5.
(ed: We'll tweet any news as soon as we have it.)
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FAILURE TO QUALIFY AS CUSTOMER MEANS FINRA RULE 12200 CAN'T BE USED TO COMPEL ARBITRATION. After rejecting application of equitable estoppel or third-party beneficiary law, the Court in *Interactive Brokers LLC v. Delaporte*, No. 1:23-cv-05555 (S.D.N.Y. Oct. 13, 2023), holds that FINRA Rule 12200 is also of no avail for compelling arbitration. First, the facts: "On June 28, 2023, plaintiff Interactive Brokers LLC ('IBKR') filed this action against defendants … seeking to permanently enjoin defendants from proceeding with an arbitration they had commenced against plaintiff before the Financial Industry Regulatory Authority ('FINRA') …. Concurrently with the filing of the complaint, plaintiff moved for a preliminary injunction enjoining the arbitration." Next, the contentions: "Defendants contend that plaintiff must arbitrate this dispute before FINRA for two primary reasons. First, defendants argue that, although they did not sign the EIA Agreement that contains the arbitration clause at issue, they can compel arbitration as either third-party beneficiaries to the agreement or based on the theory of equitable estoppel. Second, and in the alternative, defendants claim that this dispute should be arbitrated before FINRA pursuant to FINRA Rule 12200." As to Rule 12200, the Court observes: "The Second Circuit has established a 'brightline rule' in determining the meaning of the term 'customer' for purposes of FINRA Rule 12200. A customer is defined as one 'who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member.'" Applying the Second Circuit rule, the Court: "finds that defendants have not established themselves as customers of IBKR or an associated person of IBKR for purposes of FINRA Rule 12200. Because defendants fail to satisfy prong two of Rule 12200, there is no need for the Court to address whether defendants have a basis to compel arbitration based on the alleged existence of a written agreement requiring arbitration pursuant to the FINRA Code. Accordingly, defendants also cannot compel IBKR to arbitrate under Rule 12200."
(ed: We agree.)
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NFA INVESTOR NEWSLETTER HITS THE ELECTRONIC NEWSSTAND. The National Futures Association ("NFA"), which operates a dispute resolution forum, issues a periodic *Investor Newsletter* aimed at commodity futures investors. It's designed to keep investors up to date on recent NFA initiatives, events, and resources that investors may find helpful. In the fourth *Newsletter* of **2023**, distributed under a summary email dated **November 28**, NFA lists several highlights which we explore in the order presented: **Investor Education** reports on: *Webinar: Recent Fraud Trends and Tips for Avoiding Them*: "As part of WIW [World Investor Week], NFA and the Commodity Futures Trading Commission (CFTC) held a free webinar entitled Recent Fraud Trends and Tips for Avoiding Them on October 5, 2023." Also covered: *Investor Bulletin: World Investor Week 2023*: "Financial Industry Regulatory Authority (FINRA), the CFTC, NFA, the Securities Investor Protection Corporation (SIPC) and the North American Securities Administrators Association (NASAA) published a bulletin offering investors tips to increase their resilience." The **Investor Protection** section contains two items: a FINRA Investor Insight, *Pretexting: Fact or Fiction?* and a NASAA Informed Investor Advisory, *Other People's Money Investment Scams*. As usual, the *Newsletter* signs off with a list of the quarter's enforcement actions, with links to final decisions in each, complaints that were issued, and final orders in registration cases. The *Newsletter* Webpage also contains: 1) a link to BASIC; 2) an online complaint form; 3) a link to past issues of the *Newsletter* and 4) a subscription form.
*(ed: *Another informative issue. **The enforcement actions database allows searches by subject matter, such as arbitration. ***Stats may be found here; for 2022, NFA had just 21 arbitration cases filed – 20 investor and 1 intra-industry.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***RSM Prod. Corp. v. Gaz Du Cameroun, S.A.*, No. 4:22-CV-03611 (S.D. Tex. Aug. 2, 2023)**: "In sum, this case involves a contract wherein one party is a Texas corporation, the contract is governed by Texas law, and the parties agreed to arbitrate in Texas. While perhaps any one of these taken alone might be lacking, taken together, they sufficiently 'indicate[] what future consequences [GdC] should have contemplated when it contracted with [RSM].' RSM has therefore shown that GdC has minimum contacts with Texas for purposes of establishing specific personal jurisdiction" (citation omitted).

***Robinson Nursing & Rehabilitation Center, LLC v. Phillips*, 2023 Ark. 175 (Nov. 30, 2023)**: "This is the fifth appeal before this court regarding a class-action suit brought against Robinson Nursing and Rehabilitation Center, LLC. The current appeal stems from two Pulaski County Circuit Court orders denying Appellant's 'Motion to Enforce Arbitration Agreements and to Compel Class Members with Arbitration Agreements to Submit Their Claims to Binding Arbitration.' This is the third appeal regarding the circuit court's orders on these motions. Because the circuit court's orders do not meet the requirements set forth by this court in *Phillips III* and *Phillips IV*, remand is necessary. Moreover, as discussed later in more detail, due to the circuit court's systematic failure to adhere to this court's instructions, the case shall be reassigned on remand. On remand and

reassignment, the circuit court is ordered to issue specific findings with respect to each arbitration agreement and resident at issue." (*ed: Ouch!*)

***Pagel v. Weikum*, 2023 ND 224 (Nov. 24, 2023)**: "Given that the arbitration clause is broad and not limited by any exceptions, we must 'defer to arbitration on any issues that touch on contract rights or contract performance,' including the parties' rights and performance obligations under the Agreement relating to contingency fees and the *Decker* litigation. We therefore conclude the district court misinterpreted the Agreement by finding the claims were not arbitrable and by denying the motion to compel arbitration of those claims" (citation and footnote omitted).

***Cordova Armijos v. Raymond James*, FINRA No. 18-02934 (Miami, FL, Nov. 1, 2023)**: An All-Public Panel explains in great detail why it has decided to deny a group of foreign investors' claims that they were victims of fraud relating to their investments in various real estate projects in Florida that were in financial peril. The Panel finds that the investors were unable to meet their burden of proof and did not establish competent evidence to prove such an allegation or any of their other claims asserted against Respondents. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com) (ed: See our coverage in SAA 2023-44 (Nov. 23)).*

***Foose v. Reames*, FINRA ID No.22-02483 (Columbus, OH, Nov. 3, 2023)**: An All-Public Panel explains why it has decided to deny a customer's case against Respondent broker, after finding that the customer failed to prove her claims or submit sufficient evidence that she is entitled to damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Lopez, Aristo, *ISDS Under the USMCA: The First Three Years at a Glance*, Kluwer Arbitration Blog (Nov. 25, 2023): "When the USMCA entered into force on 1 July 2020, the general view was that the agreement would limit the ability of investors to file investment arbitration claims because the new rules offered limited access to the ISDS mechanism compared with NAFTA. Furthermore, investors from Canada and the U.S. face an additional restriction as ISDS rules expired between the two countries after a three-year transition period that expired on 30 June 2023. As of that date, U.S. investors cannot file an ISDS claim against Canada, and Canadian investors cannot file an investment claim against the U.S. Regarding Mexico and Canada, the situation is similar with one distinction. Since Mexico and Canada are Contracting Parties to the CPTPP, investors from those countries still have access to ISDS."

***A Closer Look: Second Circuit Steps in to Reverse Decision Refusing to Enforce "Click-Wrap" Mandatory Arbitration Agreement*, Lexology (Nov. 29, 2023)**: "On November 3, the Second Circuit reversed a lower court decision denying a motion to compel arbitration in a putative class action against Klarna. See *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023). The decision offers guidance (and support) for

companies looking to enforce similar 'click-wrap' agreements with mandatory arbitration provisions."

***Democratic AGs Try to Drive a Truck Through Arbitration Act Exemption*, Cozen O'Connor State AG Report (Nov. 30, 2023)**: "A group of 16 Democratic AGs filed an amicus brief before the U.S. Supreme Court in *Bissonnette v. LePage Bakeries*, urging the reversal of a lower court's holding that truck drivers for non-transportation companies do not fall within an exemption to the Federal Arbitration Act (FAA)."

***Second Circuit Reverses District Court, Ruling that Website Interface Provided Reasonable Notice of Arbitration Agreement*, JDSupra (Dec. 1, 2023**): "In *Edmundson v. Klarna, Inc.*, 85 F.4th 695 (2d Cir. 2023), the Second Circuit recently analyzed a 'browsewrap'-like contract formation process, ruling that the consumer had reasonable notice of the terms containing the arbitration agreement and that she manifested her assent to those terms through her online transactional conduct. The panel reversed the district court's order denying the defendant's motion to compel arbitration while at the same time acknowledging that the defendant could have done a better job in terms of presenting its Internet terms of service."

***SIFMA Calls on NASAA to Withdraw Proposed Model Rule Revisions*, Financial Advisor IQ (Dec. 4, 2023)**: "The Securities Industry and Financial Markets Association has requested that the North American Securities Administrators Association withdraw its proposed revisions to its broker-dealer model rule.[] In a comment letter submitted Friday, Sifma asserted that the proposal directly conflicts with the Securities and Exchange Commission's Regulation Best Interest by redefining what constitutes a recommendation, by rewriting Reg BI's conflicts-of-interest obligation, and in the way it treats cash or non-cash compensation."

***House Votes to Override CFPB Small Business Lending Rule*, Ballard Spahr Blog (Dec. 5, 2023)**: "Last week, by a vote of 221-202, the House of Representatives voted to approve S.J. 32, the resolution introduced under the Congressional Review Act to override the CFPB's final Section 1071 small business lending rule (1071 Rule). The Senate voted to approve S.J. 32 in October 2023. President Biden is expected to veto the resolution and there is unlikely to be sufficient votes to override his veto." (*ed: See our coverage elsewhere in this* Alert.)
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DID YOU KNOW?

SECURITIES EXPERTS ROUNDTABLE HAS A SEARCHABLE DATABASE. The Securities Experts Roundtable ("SER") has a searchable database, available at https://securitiesexpert.org/member_search.php: "Search our members to find a financial expert with the skills and qualifications you need. Once you find the right person, please use the contact information in their profile to contact them directly. Alternatively, you can browse all our members instead of searching…. You can enter single words like 'Tax' or 'fraud'. Or you can enter phrases like 'Dispute Resolution and Litigation',

‘Suitability and Damages’ or ‘Broker Dealer Expert Witness’…. Enter as many words as you like and we will find our members whose profiles contain these words.”
*(ed: *The non-profit SER, which was founded in 1992, is: “a group of professionals with significant experience as testifying and consulting experts in securities, business and investment-related litigation.” **Full disclosure:* SAA*’s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
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