SECURITIES ARBITRATION ALERT

SECURITIES ARBITRATION ALERT 2024-01 (1/4/24)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **AAA Had Over Half a Million Cases Filed This Year**

WE ARE BACK: LOTS GOING ON, INCLUDING A NEW FEATURE ARTICLE.

We are back after a quarterly break, and the news, court decisions and awards have been piling up in our absence. We kick off the year with a new feature article authored by your publisher and editor-in-chief, SEC Investor Advocate Recommends Halt on RIA Arbitration Clause Use. *In it, he offers a promised analysis of an SEC Office of the Investor Advocate report recommending that predispute arbitration agreement ("PDAA") use by investment advisers be studied and that in the meantime PDAA use be*

suspended. The report also raises serious concerns about PDAAs calling for administration by private ADR providers. We also noted a new "manifest disregard" decision, Buck v. Compton*, No. 2:22-mc-00017 (6th Cir. Dec. 20, 2023), which we will cover in a future* Alert. *And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, a jam-packed new issue of the* Alert.

FEATURE ARTICLE

SEC INVESTOR ADVOCATE RECOMMENDS HALT ON RIA ARBITRATION CLAUSE USE. ***The SEC Office of the Investor Advocate has issued a report recommending that predispute arbitration agreement ("PDAA") use by investment advisers be studied and that in the meantime PDAA use be suspended. The report also raises serious concerns about PDAAs calling for administration by private ADR providers.*** The report was announced in a **December 5** press release, *SEC Office of the Investor Advocate Publishes Its Policy Recommendations on Mandatory Arbitration and Registered Index-Linked Annuities Research*. The Report on Activities for the fiscal year 2023 to Congress empresses serious concerns about PDAA use in advisory agreements: "With regard to mandatory arbitration clauses, we are concerned that a number of characteristics of these clauses in advisory agreements are not in the best interest of retail investors. We make a number of recommendations to help promote a fairer, more balanced framework for arbitrations between advisers and their retail clients. In light of our concerns, we also strongly encourage investors to learn about the differences between arbitration and litigation, and to ask appropriate questions of their advisers where mandatory arbitration clauses are included in advisory agreements." *Read more*.
(ed: George H. Friedman, the article's author, is Publisher and Editor-in-Chief of the Securities Arbitration Alert *and an ADR consultant, and retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held from 1998. He also serves as non-executive Board Chair of Arbitration Resolution Services. He is an Adjunct Professor of Law at Fordham Law School. He holds a B.A. from Queens College, a J.D. from Rutgers Law School, and is a Certified Regulatory and Compliance Professional. He is admitted to practice in New Jersey and New York, several U.S. District Courts, and the United States Supreme Court.)*
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SQUIBS: IN-DEPTH ANALYSIS

FINRA DRS POSTS STATS THROUGH NOVEMBER. ARBITRATION FILINGS STILL UP, BUT SLOWING DOWN. ***FINRA Dispute Resolution Services ("DRS") has posted case statistics through November, with trends continuing to show a comparatively strong year in arbitration filings – especially industry cases – and a bit of a recovery in mediations.*** We offer these headlines at the year's eleven-month mark: 1) overall arbitration filings through **November** – 3,159 cases – are up 30% for the year (was plus 34% in **October)**; 2) cumulative customer claims increased 12% (was the same last month); 3) industry arbitration filings were up 63% (this stat was up 72% in October); and 4) mediation cases rebounded a bit. There were 230 new arbitrations filed in November, compared to 486 new cases in October. As we've pointed out before,

the DRS forum is quickly becoming dominated by industry cases; almost half (46%) of this year's arbitration filings are industry disputes.

Continued Decline in Mediation
There were a cumulative 596 mediation cases in agreement, a 17% decrease from 2022. Although this stat ticked up in September and November, it has mostly been declining over the long term. This stat is way down from **May 2022**'s torrid plus 137% pace. The mediation settlement rate was steady at 85%.

Potpourri
Overall arbitration turnaround times were 14.8 months (a slight decrease), with hearing cases now taking 17.8 months (also a slight decrease). There are now 8,332 DRS arbitrators, 4,121 public and 4,211 non-public. The non-public and overall stats slipped a bit last month. Pending cases stand at 3,457, down 37 from October.
*(ed: *If the trend holds, the 3,159 arbitrations filed through November straight-lines to about 3,500 yearly arbitration filings, still a decent year by recent measures. Last year there were 2,671 arbitration case filings for the entire year. The all-time high-water mark was in 2003, when that post tech-wreck figure was 8,945 cases. **Past year stats can be found here.)*
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CFPB PLANS TO ISSUE FINAL NONBANK REGISTRY RULE IN MARCH. ***The CFPB's recently released Fall rulemaking agenda shows that the agency plans to issue in March its final rule on a registry for nonbanks.***

Proposed Rule on National Registry …
As reported in SAA 2023-04 (Jan. 26), the Bureau last **January** 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.

Final Rule Expected in March

The CFPB's 2023 Fall Rulemaking Agenda lists at the "Final Rule Stage" the *Registry of Supervised Nonbank That Use Form Contracts to Impose Terms And Conditions That Seek To Waive Or Limit Consumer Legal Protections*, No. 3170-AB14. The description reads: "On February 1, 2023, the CFPB filed a proposed a rule that would require certain supervised nonbank entities to register with the CFPB and provide information about their use of certain terms and conditions in standard-form contracts for consumer financial products or services that seek to waive or limit consumer rights or legal protections. In particular, the proposed rule would collect information on these standard terms and conditions used in form contracts that are not subject to negotiation. Under the proposal, the CFPB would establish a publicly accessible registry that identifies registrants and, subject to applicable law, publish information that registrants submit to the registry about their use of covered terms and conditions." The Agenda states that the final rule is expected in **March.**

(ed: We will continue to track this one.)

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

NEARLY 100 DEMOCRATIC LAWMAKERS URGE CFPB TO ACT ON MANDATORY ARBITRATION. Some 93 Democratic members of Congress sent a **December 13** letter to Consumer Financial Protection Bureau ("CFPB") Director **Rohit Chopra**, supporting the pending Petition for Rulemaking that would ban mandatory predispute consumer arbitration agreements. Announced in a press release, the letter states: "Consumers must be given a meaningful opportunity to choose how to proceed when disputes arise. Take-it-or-leave-it terms and conditions imposed in a consumer contract, through use of a product, or by signing up for a service does not allow that opportunity. Restoring consumers' ability to make the choice about how they wish to exercise their rights is important for a fair, stable, and robust financial marketplace. Given the recent findings on the lack of understanding and awareness of forced arbitration, coupled with the worsening corporate tactics stemming from forced arbitration, we urge the Bureau to issue a rule addressing forced arbitration. We also encourage other federal agencies to consider actions to rein in corporate abuse of fine print traps like forced arbitration provisions." As reported in SAA 2023-36 (Sep. 21), a coalition of leading consumer advocacy groups filed a Petition for Rulemaking on **September 13** urging the CFPB to promulgate a rule giving financial consumers the option to arbitrate after a dispute arises. Specifically, they: "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."
(ed: Of course, as the December 18 Ballard Spahr Consumer Finance Monitor Blog notes, "442 Congress members did NOT join anti-arbitration letter to CFPB.")
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NY GOVERNOR VETOES ANTI-NON-COMPETE AGREEMENT BILL. New York Governor **Kathy Hochul** has vetoed a bill that would have banned non-compete agreements in employment. Specifically, the Governor on **December 23** vetoed S3100A, which aimed to prohibit: "non-compete agreements and certain restrictive covenants; [and] authorize[] covered individuals to bring a civil action in a court of competent jurisdiction against any employer or persons alleged to have violated such prohibition." Her veto message explains: "I continue to recognize the urgent need to restrict non-compete agreements for middle-class and low-wage workers, and am open to future legislation that achieves the right balance." She indicated that she would support a bill that carved out "highly compensated talent."
(ed: A "highly compensated talent" exception would definitely impact the securities industry.)
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REQUEST FOR *EN BANC* REVIEW IN *COINBASE*. We covered in SAA 2023-48 (Dec. 21) *Bielski v. Coinbase, Inc.*, No. 22-15566 (9th Cir. Dec. 5, 2023). Although the Court agreed that the lower court had sufficient grounds to challenge the unconscionability of a delegation clause, it nevertheless reversed the decision invalidating the clause: "It is undisputed," the Court explained, "that only Coinbase's users must engage in the pre-arbitration dispute resolution process, giving Coinbase a 'free peek' at users' potential claims without affording users that same opportunity. But we do not find these pre-arbitration procedures to be overly harsh or unfairly one-sided…. Here, a lack of mutuality in the delegation provision, combined with the pre-arbitration dispute resolution process establishes, at most, a low level of substantive unconscionability.[] Ultimately, we hold that the delegation provision's low levels of procedural and substantive unconscionability fail to tip the scales to render the provision unconscionable and therefore unenforceable. Therefore, the district court erred in refusing to enforce the delegation provision." Now comes word that Bielski on **December 19** filed a Petition for Panel Rehearing and Rehearing *En Banc.* Says the Petition: "Because the panel opinion overlooked or misapprehended points of California unconscionability law, this Court should grant the petition for panel rehearing. Alternatively, because the case presents an issue of exceptional importance and the panel opinion conflicts with *Pokorny* [*v. Quixtar, Inc*., 601 F.3d 987 (9th Cir. 2010)], the Court should grant the petition for rehearing en banc."
*(ed: *We'll keep an eye on this one. **Email us at Help@SecArbAlert.com for a copy. ***An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this development.)*
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ROBBINS' *SAPM* GETS NEW SUPPLEMENT. RELEASE 27 BRINGS FRESH UPDATES AND NEW MATERIAL. We just finished paging through the new supplement to **David E. Robbins'** *Securities Arbitration Procedures Manual ("SAPM").* The *SAPM* – a true *tour de force* – is now well over three decades in the making, starting publication in 1990 and continually updated by the author and practitioner over the years, as the practice evolves and new rules and procedures adjust to an ever-changing landscape. Author Robbins, a long-time member of the SAA Board of Editors, has chronicled securities arbitration's modern history and participated at the center of events and developments that have shaped it. This latest supplement is published by Lexis Nexis/Matthew Bender as "Release 27" and according to the author: "This new 2023 Release—for the 34th year of this book—updates and expands analyses of federal and state court decisions that impact securities arbitrations and mediations. Approximately 550 pages of text are added and revised, including comprehensive sections on over 30 years of petitions to vacate and confirm arbitration Awards (over 400 decisions), FINRA's new Expungement Rules, the precedential value of arbitration Awards, the impact of the bankruptcy law on securities arbitration Awards, the SEC's analysis of Registered Investment Adviser arbitrations, bond cases and proven techniques to best present your case to the arbitrators."
*(ed: *What has set SAPM apart and has made it the enduring leader in its field has been the dedicated efforts of its author to update and revise the book every year without fail and to inform those updates and revisions with the practical knowledge and observations of a versatile and respected practitioner. To us, David Robbins occupies a special place of honor in the field of securities arbitration. **The two-volume SAPM, which is approximately 4,000 pages long, is available in both print form and as an e-book (Library of Congress Card Number: 2004615234; ISBNs: 978-0-327-16188-2 (print); 978-0-327-16800-3 (eBook)). For more information, go to the Lexis/Nexis Store. ***Cite as: [Vol. no.] David E. Robbins,* Securities Arbitration Procedure Manual *§ [sec. no.] (Matthew Bender 2023).)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Halperin Revocable Living Trust v. Schwab, Inc.*, No. 22-2748-cv (2d Cir. Nov. 29, 2023)**: "Here, the Trust has failed to demonstrate that the [FINRA] Panel's decisions with respect to discovery rendered the arbitration proceeding fundamentally unfair. To the contrary, after considering numerous discovery motions by the Trust to compel discovery (including hearing oral argument on some of these motions), the Panel directed Schwab to produce certain data and documents requested by the Trust. In total, Schwab produced over 5,500 documents to the Trust across 14 different document productions. The Panel also conducted an in-person arbitration hearing over five days, during which the Trust called three witnesses and presented evidence and arguments in support of its claim that the alleged interruptions on the Schwab internet platform caused its losses."

***Bedgood v. Wyndham Vacation Resorts, Inc*., No. 22-11504 (11th Cir. Dec. 19, 2023)**: "The principal question here is whether, having seemingly stymied the purchasers' efforts to arbitrate, Resorts and its co-defendants can now prevent them from litigating on the

ground that their agreements require arbitration. For reasons we'll explain, we hold as follows: (1) The three purchasers who originally sought to arbitrate their claims against Resorts, only to see their petitions rejected on account of Resorts' noncompliance with AAA policies, may proceed to litigation; and (2) three other purchasers who never formally submitted their claims against Resorts to the AAA, but whose agreements with Resorts contained identical arbitration provisions, may likewise proceed to litigation; but (3) two purchasers who had an agreement with different Wyndham-related entities must return to the district court for further consideration of the Federal Arbitration Act's applicability to their dispute."

***Crossroads Mgmt., LLC v. Ridgway*, No. 101,329-9 (Wash. Dec. 21, 2023)**: "We affirm the Court of Appeals and hold that the Lewises failed to properly request a trial de novo because they did not personally sign the request as required by the court rule and the arbitration statute. Because the sole means to appeal following an adverse arbitration award is through a trial de novo, the Lewises cannot independently appeal the adverse summary judgment order. We reverse the lower courts' attorney fees awards, which failed to consider all of the statutory grounds under which fees may be awarded, and remand to the trial court for further consideration of both parties' fee requests."

***Gatlin v. Merrill Lynch*, FINRA ID No. 22-01778 (Dallas, TX, Nov. 17, 2023)**: A customer alleging that a Transfer of Death document was incorrectly executed and that the Estate's funds were misappropriated, and requesting over $6.3 million in damages, loses her case against Respondent broker-dealer and registered rep (her son). *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***LaNeave v. Synergy Investment*, FINRA ID No. 23-00404 (Richmond, VA, Nov. 14, 2023)**: An Arbitrator explains why he has decided to grant Claimant broker's request for reformation of his Form U5 record, after finding that the broker was mistreated by his supervisor and that his termination from employment was improper. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Barton Legum, *Applicable Law in Investment Treaty Arbitration*, The Investment Treaty Arbitration Review - Edition 8 (Jul. 21, 2023): "At first glance, the determination of the applicable law in resolving disputes, particularly in investment treaty arbitration, is a straightforward matter; however, as foreign investment is regulated by both international law and domestic law, the issue becomes more complex. Investments involve a variety of transactions governed by the host state's local laws and regulations, including administrative, commercial, corporate, tax, real estate, labour, financial and foreign exchange laws, as well as other legal systems that govern different areas. Nevertheless, there are several substantive international laws that protect foreign investors, primarily through bilateral investment treaties (BITs) and multilateral treaties. Additionally, customary international law, encompassing aspects of state responsibility, is also relevant. The applicable law in investment treaty arbitration, therefore, has two

planes: international law, including the treaty itself, and the domestic law of the host state."

***Despite Historic Pay Discrimination Settlement, Little Has Changed for Women on Wall Street*, Capital & Main (Dec. 18, 2023)**: "Seven months after a historic settlement between Goldman Sachs and a group of women who sued the financial giant for pay discrimination, not much seems to have changed on Wall Street. As part of the $215 million deal, approved on Nov. 7 by U.S. District Court Judge Analisa Torres, the firm will pay about 2,800 women who worked in Goldman's investment banking, investment management and securities divisions from as early as 2002 to 2023."

***Lawmakers Seek Improved Consumer Protections from CFPB*, DS News (Dec. 18, 2023)**: "Sen. Elizabeth Warren, a member of the Senate Banking, Housing, and Urban Affairs Committee, and Rep. Hank Johnson are leading 91 U.S. lawmakers in a letter to the Consumer Financial Protection Bureau (CFPB) asking the Bureau to protect consumers by conducting a rulemaking on forced arbitration for financial products and services." (*ed: See our coverage elsewhere in this* Alert.)

***Finra Orders Brokerage, Former Rep to Pay $1 Million for Bad Private Placements*, InvestmentNews (Dec. 20, 2023)** "Finra arbitrators ordered a brokerage and one of its former registered representatives to pay $1 million to an elderly couple for investments inappropriate investments in private securities.[] In an arbitration claim filed in March 2021, Arthur and Edna Sitelman alleged that Independent Financial Group and its then-broker … committed fraud, elder abuse, breach of contract and fiduciary duty, and violated state and federal securities laws and Finra rules in relation to investment recommendations involving direct placement programs, according to the Dec. 14 arbitration award. The Sitelmans were the claimants individually and as representatives for Arthur Sitelman IRA, The Good Daughter LLC and Faraway Assets LLC."

***Employment Stress Leads to Boost in Arbitration Cases*, InvestmentNews (Dec. 21, 2023)**: "Brokerage industry employment transitions – job cuts and the movement of registered representatives to other firms and independent channels – likely has led to a spike of industry-related arbitration cases.[] In an analysis of Finra arbitration statistics through October, the Securities Arbitration Alert notes that the 2,929 cases filed since the beginning of the year are a 34% increase over the same period last year. Of the new cases, industry arbitrations were up 72%, while customer arbitrations were up 12%. 'What's behind the industry surge in case filings? In brief: employment-related matters,' George Friedman, editor of the publication, wrote in a Dec. 6 blog post."

***Second Circuit Affirms Schwab Victory in FINRA Arbitration*, JDSupra (Dec. 21, 2023)**: "The Second Circuit Court of Appeals recently affirmed a decision confirming an arbitration award in favor of Charles Schwab & Co. over allegations of discovery abuses that purportedly rendered the arbitration proceeding unfair…. *Evan K. Halperin Revocable Living Trust v. Charles Schwab & Co.*, No. 22-2748 (2d Cir. Nov. 29, 2023)." (*ed: See our coverage elsewhere in this* Alert.)

***Arbitration in the Fifth - November 2023*, Lexology (Dec. 27, 2023)**: "November 2023 opinions from the courts within the Fifth Circuit include the Eastern District of Louisiana's *Baker Hughes Saudi Arabia Co. Ltd. v. Dynamic Indus., Inc*. which considers a motion to compel arbitration with the abolished Dubai International Financial Center as well as the District's latest additions to its growing collection of opinions addressing motions to compel arbitration of insurance coverage related claims. The Northern District of Mississippi and the Southern and Western Districts of Texas considered arguments where parties waived arbitration."
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DID YOU KNOW?

AAA HAD OVER HALF A MILLION CASES FILED THIS YEAR. According to a banner on the American Arbitration Association's landing page, this institution ended the year with 555,304 cases filed (through **December 26).** AAA has administered 7,944,274 cases since its founding in **1926**.
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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.*

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