SECURITIES ARBITRATION ALERT 2024-11 (3/14/24)

George H. Friedman, Editor-in-Chief

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- ***Arbitration Agreements: The Pros/Cons of Arbitration and Tips for Drafting Enforceable Agreements*, Lexology California Labor & Employment Law Update (Feb. 28, 2024) [video]**
- ***Ninth Circuit Upholds Arbitration in Data Breach Case: A Reminder for Businesses on the Importance of Terms and Conditions*, JDSupra (Feb. 28, 2024)**
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DID YOU KNOW?

- **George Washington's Will Called for Arbitration**

A NEW FEATURE ARTICLE. *Appearing in this week's* Alert *is a new feature article authored by SAA Editorial Advisory Board member and the Founder and President of the Securities Arbitration Commentator, Inc. ("SAC") Richard ("Rick") P. Ryder, Esq.,* Seven Things You Should Know About the 2023 FINRA Stats Report. *In it, he offers a detailed, yet succinct and thought-provoking analysis of FINRA's 2023 dispute resolution stats. And we have our usual collection of Squibs, Short Briefs, Quick Takes, and Articles of Interest. In other words, another jam-packed new issue of the* Alert*!*

FEATURE ARTICLE

SEVEN THINGS YOU SHOULD KNOW ABOUT THE 2023 FINRA STATS REPORT, *by Richard ("Rick") P. Ryder, Esq.* FINRA's Dispute Resolution Services (FINRA-DR) issued its December (and year-end 2023) statistical report in late January. Our purpose here is to analyze that report with a view to making observations about the process, the forum, and future caseloads.

The article employs the editorial "we," but the views expressed about the report are mine alone. We use the statistics to project, surmise and predict, none of which is far from being an opinion, so a disclaimer seems appropriate when one rakes over the statistical "coals" that remain from this past year's program. "We" have engaged in that process and are prepared to shift from the raking phase to shoveling. With that said, here are our primary takeaways from our review — first in summary and then in detail.

1. *Case filings grew dramatically in 2023 in both the intra-industry and customer-related categories.*
2. *Industry claims acted as the primary driver of the growth and the stand-out claims were promissory-note and expungement-relief claims.*
3. *Customer claims have not changed much in their nature, but a shift in the type of products involved in the disputes suggests a change in case complexion.*
4. C*losed-case and turnaround-time statistics expose the impact that expungement cases are having on the forum's program.*
5. *FINRA-DR properly focuses special attention in its reports on customer Award outcomes and the statistical results provided help to shape tactics and presentations.*
6. *The mediation program may appear stressed in a quick review of the statistics, but a deeper analysis reveals the mediation process' important role in today's arbitration practice.*
7. *FINRA's terrific success in recruiting more arbitrators, particularly public arbitrators, prepares the program to handle a huge surge in cases, should it come. Read more…*

(ed: Richard "Rick" Ryder is the Founder and President, Securities Arbitration Commentator, Inc. (SAC), which owns ARBchek, an online facility for searching Arbitrators' Award histories. Mr. Ryder is a member of the SAA*'s editorial Advisory Board. He is also the former Editor and creator of the paper newsletter and online email service that this publication so ably succeeds.)*

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SQUIBS: IN-DEPTH ANALYSIS

NEW DOL FIDUCIARY RULE GOES TO OMB. ***The Department of Labor's ("DOL") proposed fiduciary rule has been finalized and sent to the Office of Management and Budget ("OMB") for review. We borrow heavily from our previous reporting***. As reported in SAA 2023-42 (Nov. 8), the DOL's Employee Benefits Security Administration proposed last fall: "a new rule that would protect workers' retirement savings by updating the regulation defining a fiduciary under the Employee Retirement Income Security Act (ERISA)." As described on the DOL's dedicated Webpage: "The

'Retirement Security Rule: Definition of an Investment Advice Fiduciary' would affect how investors get advice on their job-based retirement accounts and other retirement savings plans and how investment advice providers must act if they have a conflict of interest…. The proposed rule and related proposed amendments to prohibited transaction exemptions (PTEs) detail when advice providers are acting in a fiduciary role under federal pension laws and explain the conditions they must follow to protect retirement investors." The proposal was announced in an **October 2023** Press Release.

Details

The DOL observed that: "Many people who give investment advice and get paid for it are currently not considered investment advice fiduciaries under ERISA. Investment advice fiduciaries legally must follow strict rules of conduct.[] Under these proposals, investment advice fiduciaries would:

- give advice that is prudent and loyal.
- avoid misleading statements about conflicts of interest, fees, and investments.
- follow policies and procedures designed to ensure the advice given is in an investor's best interest.
- charge no more than is reasonable for their services.
- give investors basic information about any conflicts of interest."

The Department provided substantial support materials, including: a Fact Sheet; a blog; and a video. There are also links to key documents: Proposed Retirement Security Rule; Proposed Amendment to PTE 2020-02; Proposed Amendment to PTE 84-24; and Proposed Amendment to PTEs 75-1, 77-4, 80-83, 83-1, and 86-128.

Basis for the Proposed Rule

Said the DOL: "EBSA's mission is to protect the job-based retirement, health and other welfare plan benefits of America's workers and their families. Requiring investment advice providers to comply with fiduciary standards protects retirement investors from harmful conflicts of interest. Conflicts of interest can put an investment advice provider in the position of choosing between what's good for them and what's best for you. That could result in excess fees and/or lost investment returns that reduce a person's retirement savings.[] The existing definition is from 1975 and doesn't work in today's marketplace. Investors who are making decisions for their retirement accounts expect advice to be in their best interest — so, it should be."

Publication and Comments

All rules were published in the *Federal Register* **November 3, 2023** (Vol. 88, No. 212, P. 75890), with comments due **January 24**. *The Department held public hearings on* ***December 12 and 13****, as described in a* press release. *Here is the* agenda. *Over 19,000 comments were received.* In a 21-page **January 2** letter, Charles Schwab asserted that the rule is not necessary, costly, counterproductive, not authorized, and should be withdrawn.

Final Rule to OMB

The final rule was sent to OMB on **March 8** (RIN: 1210-AC02). According to media reports, OMB review typically takes 90 days.

*(ed: *An effective date has yet to be established. **We will track this one!)*
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DISSENT PROVIDES A PRIMER ON FAA PREEMPTION OF CALIFORNIA LAW. ***We cover a recent decision out of California not for the holding, but for the scathing dissent.*** Justice **John Shepard Wiley Jr**.'s dissent in *Hohenshelt v. Superior Court*, No. B327524 (Calif. Ct. App. 2 Feb. 27, 2024), offers an excellent primer on SCOTUS decisions on Federal Arbitration Act preemption of California law disadvantaging arbitration. We repeat below essentially *verbatim* its core (brackets and ellipses in original).

Statute in Question
Enacted in **2019,** 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. (§§ 1281.97, subd. (b)(1); 1281.98, subd. (b)(1).)"

Justice Wiley's Dissent
"By again putting arbitration on the chopping block, this statute invites a *seventh* reprimand from the Supreme Court of the United States. Recall the past six.

"Over and over again, with determined but unavailing persistence, the Supreme Court of the United States has rebuked California state law that continues to find new ways to disfavor arbitration.

"First, the high court held the Federal Arbitration Act set forth a federal policy favoring arbitration that was clear and in unmistakable conflict with California's 'requirement that litigants be provided a judicial forum for resolving wage disputes. Therefore, under the Supremacy Clause, the [California] statute must give way.' (*Perry v. Thomas* (1987) 482 U.S. 483, 491 [preempting California law].)

"Second, the high court held the Federal Arbitration Act preempted California state law referring certain disputes initially to an administrative agency. 'When parties agree to arbitrate all questions arising under a contract, the [Federal Arbitration Act] supersedes state laws lodging primary jurisdiction in another forum, whether judicial or administrative.' (*Preston v. Ferrer* (2008) 552 U.S. 346, 359; see also id. at pp. 349–350, 355–356.)

"Third, the high court's decision in *AT&T Mobility v. Concepcion* (2011) 563 U.S. 333, 337–338, 352 preempted California's rule that class-action waivers in arbitration agreements were unconscionable.

"Fourth, in *DIRECTV, Inc. v. Imburgia* (2015) 577 U.S. 47, the high court pointedly addressed California's continuing defiance of federal law. The 'Supremacy Clause forbids state courts to dissociate themselves from federal law because of disagreement with its content or a refusal to recognize the superior authority of its source. . . . The Federal Arbitration Act is a law of the United States, and Concepcion is an authoritative interpretation of that Act. Consequently, the judges of every State must follow it.' (Id. at p. 53 [preempting California law].)

"Fifth, the decision in *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. __ [139 S.Ct. 1407, 1414–1415] reversed the Ninth Circuit for applying a California state law requiring courts to construe ambiguities against the drafter, a rule that applied with peculiar force, said California law, in the case of a contract of adhesion, like the arbitration contract there at issue. The proper approach required the federal Act's default rule, which is that 'ambiguities about the scope of an arbitration agreement must be resolved in favor of arbitration.' (Id. at p. 1418.) The *Lamps Plus* decision thus preempted a California law disfavoring arbitration.

"Sixth, *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 662 preempted a California arbitration law that invalidated contractual waivers of the right to assert representative claims under California's Private Attorneys General Act. Federal law established an equal treatment principle: state courts may invalidate an arbitration agreement based on generally applicable contract defenses like fraud or unconscionability, but not on legal rules that apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue. (Id. at p. 649.)

"So, the federal arbitration preemption rule is simple. The Federal Arbitration Act preempts a state rule that 'singles out arbitration agreements for disfavored treatment.' (*Kindred Nursing Centers L.P. v. Clark* (2017) 581 U.S. 246, 248.)

"This California statute 'singles out arbitration agreements for disfavored treatment.' No other contracts are voided on a hair-trigger basis due to tardy performance. Only arbitration contracts face this firing squad. This statute thus is preempted.

"California cannot create a rule specific to the arbitration context that contravenes the arbitration on which the parties agreed. After six epistles, we should get the message." *(ed: *Well said! **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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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FOURTH CIRCUIT: FEDERAL JURISDICTION TO STAY LITIGATION DOES NOT CARRY THROUGH TO AWARD ENFORCEMENT. Although the district court had federal jurisdiction to stay litigation of an arbitrable matter, this did not translate to jurisdiction to enforce the eventual award, the court holds in *Smartsky Networks, LLC v. DAG Wireless, LTD.,* No. 22-1253 (4th Cir. Feb. 13, 2024). In

Badgerow v. Walters, 142 S.Ct. 1310 (2022), -- a case involving a FINRA award -- the Court ruled 8-1 that the "look through" doctrine does not apply to actions to confirm or vacate an arbitration award under sections 9 and 10 of the Federal Arbitration Act ("FAA"), even though it does for motions to compel arbitration under section 4. This guides the Fourth Circuit in *Smartsky*: "In *Badgerow*, the Supreme Court held that a federal district court faced with an application to enforce or vacate an arbitration award under Sections 9 or 10 of the Federal Arbitration Act, 9 U.S.C. §§ 1, et seq. (the 'FAA'), must have a basis for subject matter jurisdiction independent from the FAA and apparent on the face of the application. The Court further held that 'look-through' jurisdiction only applies to petitions to compel arbitration under Section 4 of the FAA, and that such jurisdiction is not available for Section 9 and 10 applications." As to the jurisdictional impact of the previous stay of ligation, the Court says: "*Badgerow* does not leave open the question of whether there is a distinction between freestanding applications and those filed after arbitration in a previously stayed action; it plainly holds that all Section 9 and 10 applications must have an independent jurisdictional basis clear on the face of the application. We decline to arrive at a different result merely because the district court here stayed the action pursuant to Section 3 rather than ordering arbitration under Section 4. *Badgerow* is clear. A district court's subject matter jurisdiction to adjudicate applications or petitions brought under one section of the FAA does not automatically extend to applications or petitions brought under a different section of the FAA. Accordingly, the district court did not have or 'retain' subject matter jurisdiction to adjudicate the Section 9 and 10 applications because it had subject matter jurisdiction to stay the action under Section 3."
(ed: Seems right.)
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SEC, NASAA, GEORGIA TO HOST LATE MARCH INVESTOR ROUNDTABLES. The SEC, NASAA, and the Georgia Secretary of State will be hosting two joint Investor Roundtables this month. One event will be hosted on **March 27** at the University of North Georgia and the other will be held **March 28** at Dalton State College. According to a recent announcement: "These public roundtables will be an opportunity for investors, regulators, and members of the investment community to share their experiences with SEC staff and discuss topics that are important to them, such as securities fraud and feedback on SEC rulemaking. These events are designed to listen to investors and better understand their needs in future policy and practice."
*(ed: *Questions may be submitted in advance to investorengagement@sec.gov. **This hybrid event will be Webcast on SEC.gov. ***For more info, see the event flyer or contact Adam Anicich, InvestorEngagement@sec.gov.)*
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SAVE THE DATES: ICC INTERNATIONAL ARBITRATION CONFERENCE IS DECEMBER 1 – 3. This year's 22nd *ICC Miami Conference on International Arbitration* will be held **December 1-3** at the Loews Miami Beach. Says the announcement: "Recognised as the leading event on arbitration and ADR for Latin America, this conference promises invaluable insights, featuring expert speakers and

engaging discussions on the latest trends and developments in the field within the Latin American context. The conference will also offer excellent potential for networking for professionals involved in international dispute resolution." The program is suitable for: practicing lawyers; corporate counsel; judges; arbitrators; mediators; and "business professionals and academics from around the world."
(ed: An ICC Institute of World Business Law advanced training will take place on December 1.)
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Jiajing (Beijing) Tourism Co. Ltd. v. AeroBalloon USA, Inc*., No. 23-1507 (1st Cir. Feb. 22, 2024)**: "Even a single fraudulent transfer is sufficient to create liability under Chapter 93A and thus give rise to an award of attorney's fees. See *Hopkins,* 750 N.E.2d at 948. And there has been no challenge to the amount of the fee award. Thus the appeal from the jury's Chapter 93A verdict on Count IV necessarily fails."

***Conti 11. Container Schiffarts-GMBH & Co. v. MSC Mediterranean Shipping Co. S.A.*, 91 F.4th 789 (5th Cir. 2024)**: "While agreeing with much of the district court's well-stated decision, we must reverse because we conclude the court lacked personal jurisdiction over MSC. We agree with the district court that, when assessing personal jurisdiction to confirm an award under the New York Convention, a court should consider contacts related to the underlying dispute-not only contacts related to the arbitration itself. That holding aligns us with every other circuit to have considered the issue. But we disagree with the district court that MSC waived its personal jurisdiction defense through its insurer's issuance of a letter of understanding that was expressly conditioned on MSC's reserving all litigation defenses. We also disagree that the sole forum contact, the loading of the tanks in New Orleans, conferred specific personal jurisdiction over MSC. That contact arose from the unilateral activities of other parties whose actions are not attributable to MSC."

***Jones v. Solgen Construction*, No. F085918 (Calif. Ct. App. 5 Feb. 26, 2024)**: "This case arises out of a business relationship between respondent Maryann Jones and appellants Solgen Construction, LLC ('Solgen') and GoodLeap, LLC ('GoodLeap') (or collectively 'appellants') involving the installation of home solar panels. The trial court denied Solgen's and GoodLeap's separate motions to compel arbitration. Appellants appeal the denial and contend that the trial court erred by: (1) concluding that no valid agreement to arbitrate existed or that appellants failed to meet their burden of demonstrating the existence of a valid arbitration agreement; (2) imposing improper burdens on appellants with respect to demonstrating the existence of an agreement to arbitrate; (3) failing to consider evidence that was properly presented as part of a reply; (4) improperly considering hearsay evidence; (5) failing to hold an evidentiary hearing; and (6) holding that Solgen's contract was unenforceable as unconscionable. We affirm."

***Tobon v. Fidelity Brokerage*, FINRA ID No. 22-02918 (Minneapolis, MN, Jan. 29, 2024)**: A customer alleging that fraud occurred when Respondent broker-dealers allowed

his relatives to execute five transfers out of his accounts is awarded compensatory damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Bhartiya v. TD Ameritrade*, FINRA ID No. 23-00573 (Tampa, FL, Jan. 31, 2024)**: An investor alleging unauthorized trading and seeking $20 million in compensatory damages loses his case, after an All-Public Panel finds that he failed to meet his burden of proof or to provide proof that he is entitled to economic damages. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Pit, Harm Mark, *Dispute Resolution in the EU: The EU Arbitration Convention and the Dispute Resolution Directive*, IBFD Doctoral Series, Vol. 42 (2018): "The resolution of international tax disputes is an important element of the OECD/G20 BEPS Project, and the outflow of this Project is likely to further accelerate the steady rising of these types of disputes. Within the European Union, there has, since 1990, already been a mechanism available to resolve transfer pricing disputes among Member States (disputes on the allocation of income between associated enterprises and on the attribution of profits to permanent establishments), namely the EU Arbitration Convention. Since its adoption, the Convention has been an important instrument in resolving these disputes. Furthermore, as from 2002, attempts have been made to improve the Convention's function via a Code of Conduct, which has been developed by the EU Joint Transfer Pricing Forum."

***Arbitration Agreements: The Pros/Cons of Arbitration and Tips for Drafting Enforceable Agreements*, Lexology California Labor & Employment Law Update (Feb. 28, 2024) [video]**

***Ninth Circuit Upholds Arbitration in Data Breach Case: A Reminder for Businesses on the Importance of Terms and Conditions*, JDSupra (Feb. 28, 2024)**: "In a recent ruling by the Ninth Circuit, a significant message was sent to businesses about the critical nature of employing clear and effective website terms and conditions incorporating an arbitration clause and class action waiver. The case of *Patrick v. Running Warehouse, LLC*, — F.4th —- (2024), stemmed from a data breach in October 2021, leading to the alleged exposure of consumers' personally identifiable information. The consumers' attempt to bring forward class actions for negligence, breach of contract, and other claims against the retailer was met with a motion to compel arbitration."

***SEC Summit Aims to Raise Awareness of Investor Law Clinics*, Wealth Management (Mar. 1, 2024)**: "The SEC holds its annual Investor Advocacy Clinic Summit this morning, in which students and professors from those clinics will join SEC staff to speak about providing free legal services to investors whose claims typically don't entice paid attorneys because of the relatively low dollar amounts involved."

***Ninth Circuit Affirms California Supreme Court's Take on Viking River*, JDSupra (Mar. 1, 2024):** "The Ninth U.S. Circuit Court of Appeals applied the California Supreme Court's interpretation of the U.S. Supreme Court's decision on the intersection of the Private Attorneys General Act (PAGA) claims and arbitration in *Viking River Cruises, Inc. v. Moriana*."

***When Should Investors Opt Out of Securities Class Actions*?, Mondaq (Mar. 1, 2024)**: "It is important to understand what your options are and what action may be required. In many cases, potential class members do not have to take any further action to reap the benefits of a class action settlement. However, in some cases, you may have to opt in or opt out of the settlement. For instance, some class action notices state that class members who wish to participate in the settlement must take some affirmative action, i.e., complete the required paperwork. Conversely, there are some cases where those who do not want to join the class action must take specific actions to preserve the right to file an individual suit."

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DID YOU KNOW?

GEORGE WASHINGTON'S WILL CALLED FOR ARBITRATION. With Presidents Day still in the recent past, we thought we would again share the fact that our nation's first President's Last Will and Testament called for arbitration to resolve disputes among his heirs. **George Washington's** July 1799 Will provided: "[M]y will and direction expressly is, that all disputes (if unhappily any should arise) shall be decided by three impartial and intelligent men, known for their probity and good understanding; -- two to be chosen by the disputants -- each having the choice of one -- and the third by those two -- which three men thus chosen, shall unfettered by Law, or legal constructions, declare their sense of the Testator's intention ... and shall be binding as if issued by the U.S. Supreme Court."

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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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