SECURITIES ARBITRATION COMMENTATOR

PUBLISHING SINCE 1988 (SEPT. '19) ISSN: 1041-3057

Surprise! Some of the Anti-Arbitration Bills Introduced in Congress this Year May Actually Become Law (One Already Has)

By George H. Friedman*

Over the past several years, many bills were introduced by Congressional Democrats to restrict mandatory predispute arbitration agreement ("PDAA") use. The 116th Congress has been no exception, especially with the Democrats controlling the House of Representtives. The new bills seek to amend the Federal Arbitration Act ("FAA"), specific statutes like Dodd-Frank, Sarbanes-Oxley, or the National Labor Relations Act, or combinations thereof.

To one extent or another, the bills aim to protect consumers – including investors – employees, civil rights claimants, servicemembers, and/or whistleblowers, from what is perceived to be an unfair arbitration process. Some bills ban PDAAs, while some create procedural safeguards. Finally, some are prospective, but most are retroactive by invalidating existing PDAAs. While past efforts to legislatively curb PDAA use have been fruitless, this year's crop in my view will not suffer entirely the same fate. In fact, as discussed below, a statute has already been enacted that limits mandatory PDAA use.

In this article, I cover in an organized manner the key bills that have been introduced, starting with the *FAIR Act* (this Congress' iteration of the dear, departed, *Arbitration Fairness Act*), or as I call it, "The AFA on Steroids"). I then segue to my predictions on what I think will happen, and close with what I suggest Congress actually do to effectuate meaningful change.

Investor Advocates Share Their Views

At the tail-end of June, the author and Rick Ryder, SAC's Editor-in-Chief, brought together for a wide-ranging discussion the then-current and future Presidents of PIABA,[2] Christine Lazaro and Samuel B. Edwards.[3] Among other subjects, the PIABA leaders addressed the several anti-arbitration bills pending in Congress. Prof. Lazaro responded: "We are seeing a lot more interest in arbitration-related legislation from this Congress than we have in the past. I think that increases the likelihood that we will see legislation passed. This is important in the securities field. Most consumers across the board don't understand that they're giving up fundamental rights

cont'd on page 3

***George H. Friedman** *is Editor-in-Chief the* Securities Arbitration Alert *and Chairman of the Board of Directors of Arbitration Resolution Services, Inc. An ADR consultant, he retired in 2013 as FINRA's Executive Vice President and Director of Arbitration, a position he held from 1998. In his extensive career, he previously held a variety of positions of responsibility at the American Arbitration Association, most recently as Senior Vice President. He is an Adjunct Professor of Law at Fordham Law School, and served as secretary of the Securities Industry Conference on Arbitration for over a decade. He is also a member of the AAA's national roster of arbitrators, several bar associations, and the Securities Experts Roundtable. 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 York, New Jersey, several U.S. District Courts, and the United States Supreme Court.*

INSIDE THIS ISSUE

Published 9/19

EDITOR'S UPDATE: For 30 years, SAC published the Securities Arbitration Commentator, Inc. as a paper newsletter. This year, we switched to a PDF version. What we've found over recent years is that we, as a publisher, are subject to the same forces, trends, and developments as the newspaper industry as a whole. We're a niche publication and, in that sense, we can escape for a time some global forces, like being overwhelmed by large legal publishers, but, over time, competition of a different nature gradually demands change and adjustments.

That "other" competition comes in the form of content availability and new lines of communication that supplant the need for some time-tested features. Last edition, we dropped SAC's long-time "Bulletin Board" column. People just do not need SAC anymore to keep track of their colleagues' comings and goings. The same is true, we've determined for the "Schedule of Events" feature. The Web and social media offer all the detail people need to know about events in which they may be interested; today, email solicitations and other postings saturate the likely audience far more heavily than the old direct-mail marketing ever did. Long story short, our "Calendar" and "Bulletin Board" features on the SAC Website have become our preferred vehicles for informing visitors about events and people movements in the dispute resolution business. These columns are no longer useful in the newsletter.

These are not *ad hoc* decisions, even though we may be rolling them out separately. We recognize the strategic need to move our communications online and we're planning for it. The weekly email publication, *Securities Arbitration Alert (SAA)*, which was originally intended to offer a two-tier subscription base and designed to appeal to a discrete group of subscribers who wanted to be "plugged-in" all the time, now has more subscribers than the newsletter-only audience. Put another way, what we call our "Preferred" subscription has become our "Standard" or regular subscription over time. In the coming year, we will be looking at the feasibility of offering both newsletter products (*SAA* & *SAC*) in an online/mobile format; ultimately, we expect to "migrate" to a Web-based platform that offers full versatility, greater coverage, and 24/7 access to both the online public and paid subscribers.

Through it all, we rely upon our SAA-SAC subscribers, for your loyalty and patience. As a niche publisher, we must employ our niche virtues -- direct communications with colleagues vs. "talking heads," meaningful dialogue vs. "sound bites," knowledge of subject (and, with it, analysis and commentary) vs. subjective knowledge -- to serve subscriber needs, while gradually, of necessity, adjusting to the communications environment at large. It's exciting and it's daunting.

Because we remain a niche publication, we sincerely need your support and guidance to maintain and to advance. Please write and call with your suggestions and comments. Thank you!

-- Rick Ryder

MANAGING EDITOR ..... **Richard P. Ryder**

SECURITIES ARBITRATION COMMENTATOR

Mailing Address: SAC, P.O. Box 112, Maplewood, N.J. 07040. Business Office: 45 Essex Street, Ste. 203, Millburn, NJ 07041. Tel: (973) 761-5880; 973-232-5698; 973-232-5032.

SUBSCRIPTION INFORMATION:

The Securities Arbitration Commentator is published 8 times per year and sells by annual subscription. Regular Subscription: $290; Preferred Subscription (with weekly e-mail Alerts): $590. Back issues of SAC are archived at www.sacarbitration.com > SBI-SAC (Search Back Issues-SAC). At SBI-SAC, subscribers may word-search and download PDF copies of past issues for free. Non-subscribers may search this database for $25 per download.

ANTI-ARB BILLS IN CONGRESS *cont'd from page 1*

when they open brokerage accounts. It's sort of the same theme as with investor expectations when dealing with a broker; there needs to be some support for recognizing that the investor's expectations are reasonable."

The Good, the Bad, and the Ugly

The bills in the chart below appear in descending order of importance to SAC's readers and followers. First up are bills that would impact financial services or customer arbitration, followed by employment-related bills and those protecting servicemembers and higher education students. Last are bills of specialized application. Links are provided to each bill. The chart lists: the bill's name; the bill numbers (*ed: some bills have been introduced in only one house of Congress*); the subject matter or protected group impacted; the statute(s) that would be amended; and what the proposed law would do, including whether application would be retroactive.[4] Note that I cover only bills I think are of interest to SAC's readers and followers and have avoided duplication. Why? A search of Congress.gov yielded over 100 bills introduced this year containing the word "arbitration" or variations. Also, not every bill is anti-arbitration. For example, the proposed *Protecting Patients from Surprise Medical Bills Act* (S. 1266; H.R. 3502) provides for a voluntary arbitration program for disputes over surprise medical bills. This information is accurate as of September 15, 2019.

LEGISLATIVE CHART

ANTI-ARBITRATION BILLS INTRODUCED IN THE 116TH CONGRESS -- WHAT YOU NEED TO KNOW

Area and Bill Name	Senate	House	Area(s)	Statute(s) Amended	Actions
Consumer/Financial					
Forced Arbitration Injustice Repeal (FAIR) Act	S. 610	H.R. 1423	consumer; employment; antitrust; civil rights	FAA	Bans PDAAs; Class action waivers (CAWs); delegation. Retroactive
Investor Choice Act[5]	---	---	securities (including IPOs) and RIA customers	Sec Exchange Act of 1934; Securities Act of 1933; Investment Advisers Act of 1940	Bans PDAAs; CAWs. Retroactive
Arbitration Fairness for Consumers Act	S. 630	No	consumer financial; securities	Dodd-Frank	Bans PDAAs; CAWs. Retroactive
Consumers First Act	No	H.R. 1500	consumer financial	Dodd-Frank	Reinstates CFPB's revoked "final rule governing forced arbitration, within 60 days of enactment." Retroactive
Restoring Statutory Rights and Interests of the States Act	S. 635	No	individuals and class reps and small businesses	FAA	Undoes SCOTUS' State law preemption and arbitrability decisions. Retroactive

cont'd on page 4

ANTI-ARB BILLS IN CONGRESS *cont'd from page 3*

Ending Forced Arbitration for Victims of Data Breaches Act	No	H.R. 327	Victims of data breaches	Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B))	Bans PDAAs. Retroactive
Municipal Securities Rulemaking Board Reform Act of 2019	S. 1236	No	MSRB structure	Sec Exchange Act of 1934	Bans mandatory PDAAs for customers. Silent on effectiveness.
Employment					
Taxpayer First Act (***Enacted 7/1)	No	H.R. 3151	employment; whistleblowers	Internal Revenue Code	Bans PDAAs covering whistleblowers to IRS. Retroactive
Ending Forced Arbitration of Sexual Harassment Act	No	H.R. 1443	employment; sexual harassment	FAA	Bans PDAAs of sexual discrimination disputes; delegation. Retroactive
Restoring Justice for Workers Act	S. 1491	H.R. 2749	employment	FAA; NLRA (undoes *Epic Systems*)	Bans PDAAs; CAWs. Retroactive
PCAOB Whistleblower Protection Act of 2019	No	H.R. 3625	employment; SOX whistleblowers	Sarbanes-Oxley Act (15 U.S.C. 7215)	Bans PDAAs covering SOX whistleblowers. Silent on effectiveness.
BE HEARD in the Workplace Act	S. 1082	H.R. 2148	employment; sexual harassment	FAA; NLRA (undoes *Epic Systems*)	Bans PDAAs; CAWs; creates a private right of action. Retroactive
Servicemembers					
National Defense Authorization Act for FY 2020 (***Passed both Houses)	S. 1790	H.R. 2500	servicemembers + families consumer + employment	Servicemembers Civil Relief Act	House version bans PDAAs; Senate does not
Justice for Servicemembers Act	S. 2459	H.R. 2750	servicemembers	FAA; Uniformed Services Employment and Reemployment Right Act; SCRA	Bans PDAAs; CAWs; allows only post-dispute agreements. Prospective

cont'd on page 5

ANTI-ARB BILLS IN CONGRESS *cont'd from page 4*

Higher Ed Students					
CLASS Act	S. 608	H.R. 1430	higher ed students	FAA; Higher Ed Act of 1965	Bans PDAAs; CAWs in student enrollment agreements. Prospective
PROTECT Students Act	S. 867	No	higher ed students	FAA	Bans PDAAs; CAWS in higher ed enrollment agreements. Retroactive
Justice for Student Borrowers Act	No	H.R. 3764	higher ed students	FAA	Bans PDAAs; CAWs in private education loans. Retroactive
Miscellaneous					
Safety Over Arbitration Act	S. 620	No	individuals; hazard to public health or safety	FAA	Bans PDAAs. Requires unsealed explained awards. Prospective

A Prediction

Many if not all of these bills will pass the Democrat-controlled House, and most if not all will go nowhere in the Republican-controlled Senate. And if by some quirk a bill passes the Senate, the President will veto it with no chance of an override.

But there are exceptions:

- Any proposed law perceived as protecting servicemembers will have bipartisan appeal, and President Trump, while generally pro-arbitration, clearly supports the military. And, the Senate version of the *Justice for Servicemembers Act* (S. 2459) introduced September 10 by Sen. Murkowski (R-AK) and co-sponsored by Sen. Graham (R-SC), is a clear harbinger of bi-partisan support..

- The *Ending Forced Arbitration of Sexual Harassment Act* has broad bipartisan support, and I don't think he President would risk a veto override heading into an election year.

- I now think the *FAIR Act* has a shot at becoming law, not necessarily as currently drafted but in a form that provides procedural protections to consumers and employees. Why do I say this? The House bill[6] passed on September 20 by a 225 – 186 vote – including two Republicans. Now it's off to the Senate where the outcome is less certain, but with passage not an impossibility (see immediately below). And a Presidential veto is in my view not a certainty either.

- Also, the full Senate Judiciary Committee held an April 2nd hearing titled "Arbitration in America." Based on the comments and questions from Committee members – including Chairman Lindsey Graham (R-SC) and former Chairman Charles Grassley (R-IA) – it seems there will be Republican support for some changes focused on procedural fairness. For example, Chairman Graham said: "The problems we will hear about today bother me…. What's good for business is not necessarily good for individuals…. It bothers me that when you sign up for a product or service you are giving away your rights. For the rest of this year this Committee will take a long and hard look at how arbitration can be improved. We will try to find some middle ground. We will find a way forward…. There have to be fairness standards."

A New Strategy?

Notice how the bills overlap in scope and coverage? Some seek broad amendments to the FAA, which is in my view quite ambitious and doomed to failure. It seems to me the fallback is to target specific federal statutes as well, given the very clear and well-established SCOTUS jurisprudence holding that the Federal Arbitration Act will prevail over another federal statute unless the latter expressly bars predispute arbitration agreements (see *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)). A good example of a federal law expressly bar-

cont'd on page 6

ANTI-ARB BILLS IN CONGRESS *cont'd from page 5*

ring PDAAs is Dodd-Frank, which in 18 U.S.C. §1514A(e)(2) bars enforcement by publicly-traded companies of PDAAs for whistleblower claims asserted under Sarbanes-Oxley. I suspect that the Democrats' strategy is to aim for amending the FAA, but to fall back to targeted amendments to discrete federal laws.[7]

Immediate Validation

Validating my suggestion that some of these anti-arbitration bills may become law is the *Taxpayer First Act* – H.R. 3151 – signed into law July 1 by President Trump. Nestled in the text of this omnibus bill is section 1405, which contains the following language: "**Nonenforceability of certain provisions waiving rights and remedies or requiring arbitration of disputes**: (A) Waiver of rights and remedies: The rights and remedies provided for in this subsection [whistleblower protection] may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. (B) Predispute arbitration agreements: No predispute arbitration agreement shall be valid or enforceable, if the agreement requires arbitration of a dispute arising under this subsection." When I first heard about the new law, I thought it might protect only IRS employees, but that's apparently not the case. Section 7623 of the Internal Revenue Code of 1986 is amended as follows: "(d) **Civil action to protect against retaliation cases: (1) Anti-retaliation whistleblower protection for employees:** *No employer, or any officer, employee, contractor, subcontractor, or agent of such employer, may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment (including through an act in the ordinary course of such employee's duties) in reprisal for any lawful act done by the employee …" blowing the whistle on IRS misconduct (emphasis added). Sure seems to cover any employer. The amendments "apply to disclosures made after the date of the enactment of this Act."*

Concerns Should be Addressed

I see many of the bills being well-intended but potentially troublesome overreactions to a legitimate concern. For example, I continue to think that retroactive nullification of existing PDAAs invites legal challenges based on the Constitution's Takings Clause.[8] And I chafe at the underlying assumption that arbitration is a bad thing. On the other hand, procedural protections and improvements are needed, in my view. For example, I believe it is unfair to require a consumer to agree to arbitration when a contract is signed as a condition of the dominant party providing goods or services. Ditto for employees. It's not that the arbitration process is unfair, assuming basic standards of procedural fairness are maintained. It's that *perceptions* of fairness require a choice for the weaker party.[9] Also, some of the arbitration systems imposed on consumers and employees – again not those of the established ADR providers – have aspects that are not fair. For example, requiring consumers to travel hundreds of miles for a hearing involving relatively small amounts of money is not fair. Allowing the dominant party to select a captive ADR provider isn't fair. Burying the arbitration agreement in the midst of a dense contract is not fair. There are better approaches, that: 1) address perceptions that it is not fair for a dominant party to force a consumer or employee to agree to a PDAA as a condition of obtaining goods or services or employment; and 2) ensure procedural fairness.

A Better Way?

Over five years ago I opined on this very subject; the points still ring true today. Here's my plan. At a very high level, I propose legislative fixes that provide:

- in a consumer contract, any predispute arbitration agreement must be separately signed or clicked by the consumer;
- a consumer cannot be denied goods or services if the consumer declines the arbitration option;
- in an employment contract that is not individually negotiated, any predispute arbitration agreement must be separately signed or clicked by the employee;
- a prospective or current employee cannot be denied employment if the employee declines the arbitration option;
- clear procedural fairness guidelines be followed in any consumer or employment arbitration[10]; and
- the law is prospective, applying to contracts entered into or revised after the effective date. This avoids Constitutional issues.

Conclusion

In the meantime, we should allow the legislative process to play out in a calm, measured way. I think this approach would garner bipartisan and even Presidential support as we head into an election year. In short, I think we need to think, and think carefully, before we act.

ENDNOTES

1 I analyzed the original batch introduced in a guest SAC Blog post, *Democrats Introduce Several Anti-Mandatory Arbitration Bills. What You Need To Know* (Mar. 22, 2019).

2 At the time of the session, PIABA stood for the Public Investors *Arbitration* Bar Association. However, at the July 2019 Board meeting the organization revised its name and mission statement to reflect a broader focus. PIABA now stands for the Public Investors *Advocate* Bar Association.

3 The discussion is summarized in a SAC Blog post, *Talking with PIABA's Leaders:*

cont'd on page 7

ANTI-ARB BILLS IN CONGRESS *cont'd from page 6*

Issues in the Current Year and the Year Ahead (Sep. 6, 2019). A feature article with the same name appears in 2019:4 SECURITIES ARBITRATION COMMENTATOR 1 (AUG. 2019).

4 For those looking for bill sponsors or current status, see the excellent analysis *Update: Legislatures on Invalidating Pre-Dispute Arbitration Agreements* prepared by Brooklyn Law student Andrew Garcia, published August 1, 2019 in the "CPR Institute Speaks" blog.

5 The Investor Choice Act is not yet introduced. I've linked to a "Discussion Draft." It's not clear what's holding up the proposed Act; it got lots of play in April 2019, including support from NASAA.

6 One substantive amendment was approved, adding: "Nothing in this act shall be construed to prohibit the use of arbitration on a voluntary basis when consent is given after the dispute arises."

7 But, if the FAA is to be amended, here's an idea: why not have an omnibus single bill containing all proposed FAA amendments instead of several different bills attempting this piecemeal?

8 U.S. CONST. ART. 5.

9 See Black, Barbara & Gross, Jill, *When Perceptions Changes Reality: an Empirical Study of Investors' Views on the Fairness of Securities Arbitration,* 2008 J. DISPUTE RES. 349 (2009), AVAILABLE AT HTTP://PAPERS.SSRN.COM/SOL3/PAPERS.CFM?ABSTRACT_ID=1118430##.

10 FINRA's Code of Arbitration Procedure is a good example.