SECURITIES ARBITRATION ALERT 2021-13 (4/15/21)

George H. Friedman, Editor-in-Chief

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DID YOU KNOW?

- **Did You Know? JAMS and CPR Offer Free ADR Clause Drafting Guides**

SQUIBS: IN-DEPTH ANALYSIS

MARGIN DEBT HITS AN ALL-TIME HIGH OF $814 MILLION. ***Margin debt in February grew to $814 million, up dramatically from a year ago. What this portends for arbitration remains to be seen.*** Several media outlets reported recently that investor margin debt as recorded by FINRA had grown to record highs. For example, the *Wall Street Journal* on **April 7** reported in an article titled *Investors Big and Small are Driving Stock Gains with Borrowed Money*: "As of late February, investors had borrowed a record $814 billion against their portfolios, according to data from the Financial Industry Regulatory Authority, Wall Street's self-regulatory arm. That was up 49% from one year

earlier, the fastest annual increase since 2007, during the frothy period before the 2008 financial crisis. Before that, the last time investor borrowings had grown so rapidly was during the dot-com bubble in 1999." In **March 2020,** the *Alert*'s publisher and Editor-in-Chief **George Friedman** and Securities Arbitration Commentator founder and President **Richard P. Ryder** co-authored a blog post, *What's Past is Prologue – All Over Again. What's Ahead for Arbitration Filings in the Wake of Recent Volatility*, that among other things discussed margin debt. With permission of the authors, we rely heavily on that writeup to update the numbers.

Margin History

Arbitration claims generally rely upon realized losses. If investors hold through a downturn and the market quickly recovers, potential losses evaporate. Margin trading increases the chances of realized losses in market declines because that's when margin calls test investors' resolve (and financial wherewithal). In a 2015 blog post, we quoted FINRA reports tagging total debit balances in customer accounts at $485.9 million at the end of January 2015. FINRA posts margin statistics on its Website *(ed: this is a great resource, and it lags less than in the past).* Margin debt, we know from past reports, had surpassed the half-trillion mark before (four months in 2014), but, by January 2015, debit balances in customers' securities margin accounts had subsided to $485.9 billion. That number hit a high of $668.9 billion in May 2018, during a time when the Dow Jones rose from about 18,000 to 24,000. A four-month, 9% downdraft from September to December 2018 shaved $100 billion off that high. During 2019, the Dow climbed fairly steadily -- almost 5,000 points -- closing above 28,000 at the end of the year, but margin debt rose only about 5% year-over-year to $579 billion. However, 2020 and early 2021 present an entirely different trend. With the Dow sitting at around 31,000 at the end of February, margin debt had grown from $562 million as 2020 dawned to $814 million at the end of February 2021. What might the staggering growth in margin mean in terms of future arbitration filings? The short answer is: "Not much as long as the capital markets keep going up, but if there are major, sustained declines, watch out below!"

Margin and Investor Claims

When the capital markets drop precipitously and then quickly rebound, margin customers may be sold out near the bottom, only to see the stock's price come all the way back a short time later. The usual arbitration claim is: "You [terrible, awful, evil, bad person]! You gave me a margin call when I was taking a lunch break, and sold me out 10 minutes later." This is exemplified in the extreme by the 36-minute long "Flash Crash" of May 6, 2010 … or that of 2015. The firms will point out that they really didn't have to give any notice and their actions were consistent with the account agreement and FINRA rules ("We gave you 10 minutes when we really could have given no notice"). Firms will also point out that, had they waited any longer, the losses would have been worse, possibly resulting in a margin deficit. Arbitrators often look to past practice.

Margin and Brokerage Firm Claims

When the markets suffer significant drops and *don't* recover, customers may end up with margin deficits. In other words, even taking into account the stocks sold off, the investor

still has a negative margin balance, with the firms saying: "So, after deducting the stocks we sold off to address your margin deficiency, you still have a debit balance of $50,000." Customers don't react well to this: "You [terrible, awful, evil, bad person]! You gave me a margin call when I was in the bathroom, and sold me out 10 minutes later. Go [engage in a physically impossible act]!"

Summing Up

Clearly, the growing margin numbers bear close watching. Interestingly, we haven't seen that much from the SEC or FINRA warning BDs to check their margin policies, etc. -- not like back in the earlier 2000s, when the regulators and consequently the BDs were on top of the market break in terms of margin control. However, the Commodity Futures Trading Commission did issue a Press Release on **April 6,** *New CFTC Customer Advisory Cautions the Public to Beware of Trading Based on Internet Hype,* warning about the risks of speculating in a frothy market.

(ed: We'll be keeping an eye on the "Margin Calls" Controversy Type on FINRA's monthly report. Through February, there were 20 such cases, up from 7 in 2020.)

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NINTH CIRCUIT AFTER REMAND TO RECONSIDER FROM SCOTUS: "THANKS, WE'RE GOOD." ***When SCOTUS vacates and remands a decision for reconsideration in light of an intervening Supreme Court holding, the Court is usually signaling: "When you made this decision you obviously didn't know where we would land on this issue. Now that you do, please fix this." And usually, the originating court takes the hint. Usually – but not always.*** We reported in SAA 2020-21 (Jun. 3) that the Supreme Court in **June 2020** held unanimously in *GE Energy Power Conversion France SAS v. Outokumpu Stainless USA LLC*, 140 S. Ct. 1637 (Jun. 20, 2020), that the equitable estoppel doctrine can be used by a non-signatory to compel a signatory to arbitrate under the *UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards* and the Federal Arbitration Act. The same question was presented in a **November 2019** Petition for *Certiorari* in *Shrinivas Sugandhalaya LLP v. Setty*, No. 19-623. As reported in SAA 2020-22 (Jun. 10), the Court on **June 8, 2020** summarily granted *Cert.,* vacated the Ninth Circuit's decision declining to compel arbitration in *Setty et al. v. Shrinivas Sugandhalaya*, No. 18-35573 (9th Cir. 2019) (unpublished), and remanded the matter "for further consideration in light of *GE Energy Power*…." (*ed: the case is listed on page 1 of the Order List*).

On Remand, Ninth Circuit Sticks to its Guns

On remand, a divided Ninth Circuit in *Setty v. Shrinivas Sugandhalaya LLP*, No. 18-35573 (9th Cir. Jan. 20, 2021), declines to apply equitable estoppel. While at first blush it might seem that the Circuit Court had thumbed its nose at SCOTUS, upon closer examination it did not. The majority does not quarrel with the High Court's holding that equitable estoppel *could* be applied in an international arbitration; it simply finds that the facts here *don't justify* the doctrine's application. After determining that U.S. -- as opposed to Indian -- law applies, the majority says: "'Equitable estoppel precludes a party from claiming the benefits of a contract while simultaneously attempting to avoid the

burdens that contract imposes.' In the arbitration context, the doctrine has generated various lines of cases, including one involving 'a nonsignatory seeking to compel a signatory to arbitrate its claims against the nonsignatory.' For equitable estoppel to apply, it is 'essential . . . that the subject matter of the dispute [is] intertwined with the contract providing for arbitration.' *Rajagopalan v. NoteWorld, LLC*, 718 F.3d 844, 847 (9th Cir. 2013). 'We have never previously allowed a non-signatory defendant to invoke equitable estoppel against a signatory plaintiff[.]' *Id*. SS Bangalore's claims against SS Mumbai are not clearly 'intertwined' with the Partnership Deed providing for arbitration." (citation omitted; ellipses and brackets in original).

Dissent: Majority Applies Wrong Country's Law
Judge **Carlos T. Bea** authored a lengthy dissent: "On remand from the Supreme Court, we are faced with the question of which equitable estoppel law governs an Indian company's motion to compel another Indian company and its Indian owner to arbitration based on an agreement entered into in India, signed by two Indian brothers (who own the Indian companies), and governing conduct in India. The majority holds that, not Indian, but U.S. federal common law governs the issue. I dissent. The Supreme Court and Ninth Circuit have time and again held that whichever background body of state contract law that governs the arbitration agreement also governs equitable estoppel claims to compel arbitration pursued under Chapter 1 of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 et seq. We should not hold differently here."
(ed: Unlike the situation in Doctor's Associates v. Casarotto*, 517 U.S. 681 (1996), where the Montana Supreme Court essentially declined to follow the SCOTUS holding that the FAA preempted a state law severely restricting PDAAs in franchise agreements, we don't see a similar conflict here.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

THIS JUST IN: SENATE CONFIRMS GENSLER AS SEC CHAIR. Just as we were putting this week's *Alert* together came word that the Senate on **April 14** confirmed **Gary Gensler** as SEC Chairman, by a mostly party line 53-45 vote. Recall that, as reported in SAA 2021-08 (Mar. 4), Mr. Gensler said at his **March 2** confirmation hearing that he was "open" to reconsidering the industry's use of binding mandatory arbitration for resolving customer disputes. Although the topic was not addressed in either Chairman **Sherrod Brown's** (D-OH) opening statement or Mr. Gensler's prepared remarks, it came up in an interchange with Sen. **Elizabeth Warren** (D-MA), who asked: "Hypothetically, for example, if Robinhood cheated individual investors, hypothetically, should that company be able to use forced arbitration clauses to avoid getting sued and held accountable?" Mr. Gensler replied: "While arbitration has its place, it's also important that investors – or, in that case, customers – have an avenue to redress their claims in the courts." *Dodd-Frank* section 921 gives the SEC authority to limit or eliminate predispute arbitration agreements or set conditions for their use, but it has not done so.
*(ed: *Three Republicans – Collins (ME), Grassley (IA),and Lummis (WY) – voted "yea." **Time will tell what this means for securities arbitration.)*
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REMINDER: CHAIR HONORARIA INCREASES ARE EFFECTIVE FOR CASES FILED APRIL 19. As reported in SAA 2021-06 (Feb. 18), increases in the FINRA chairperson honoraria are effective for cases filed on or after **April 19, 2021**. To review: we reported in SAA 2020-48 (Dec. 24) that the SEC on **December 17** approved *Notice of Filing of a Proposed Rule Change to Amend the FINRA Codes of Arbitration Procedure to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees* (SR-FINRA-2020-035). We later reported in SAA 2021-01 (Jan. 14) that the Approval Order was published in the *Federal Register* on **December 23** (Vol. 85, No. 247, P. 84053). We then reported in #06 that FINRA on **February 12** published Regulatory Notice 21-04, *FINRA Amends Arbitration Codes to Increase Arbitrator Chairperson Honoraria and Certain Arbitration Fees*, establishing the April 19 effectiveness date. The specifics? The Notice states: "FINRA has amended its Codes of Arbitration Procedure for Customer and Industry Disputes (Codes) to: (1) increase the additional hearing-day honorarium chairs receive for each hearing on the merits from $125 to $250 and (2) create a new $125 chair honorarium for each prehearing conference in which the chair participates. To fund the increase in payments to chairs, the amendments make minimal increases to certain arbitration fees" (footnote omitted).
(ed: As we've said before, this is really good news. $850 a day – $600 for two hearing sessions plus $250 – is decent compensation, and the "extra" for IPHCs is fair.)
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HOUSE GOP'S MCHENRY TO FINANCIAL SERVICES COMMITTEE CHAIR WATERS: "HOLD HEARINGS ON INVESTOR FRAUD." House Financial Services Committee Ranking Member **Patrick McHenry** (R-NC), has sent an **April 8** letter to Chair **Maxine Waters** (D-CA), urging her to hold hearings to investigate investor fraud. The letter, which was announced in a Press Release, *McHenry Urges Waters to Hold Hearing on Financial Fraud, Protecting Seniors & Everyday Investors*, states: "This Committee should do our part to stand up for everyday investors by more closely examining the various ways in which fraudsters, scammers, and hackers prey on American investors. I respectfully request that you schedule a hearing, or hold a series of hearings, on these important issues as soon as possible, and I look forward to working with you throughout the 117th Congress to protect Americans attempting to build wealth and save for the future."
(ed: Call us wide-eyed optimists, but one would think this is an issue that would generate bi-partisan support.)
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POSTMATES GIVES UP THE GHOST ON MASS ARBITRATIONS AAA FEE CHALLENGE. We reported several times on District Court cases resulting in Postmates being compelled to participate and pay fees in over 10,000 individual AAA consumer arbitrations involving the same issue -- whether Postmates improperly classified them as independent contractors, rather than employees. Postmates had sought to enjoin the arbitrations (and its obligation to pay massive administrative fees), contending that the cases amounted essentially to a *de facto* class arbitration which was prohibited by a class

action waiver in the arbitration agreement. Postmates then appealed two of these cases to the Eleventh and Ninth Circuits. In an **April 8** article, *Postmates, Couriers Agree To End Mass Arbitration Appeals*, Law360 reports: "Postmates has agreed to drop its attempts to appeal rulings in two cases that compelled the company to arbitrate with thousands of couriers who claimed misclassification as independent contractors, asking the Seventh Circuit and Ninth Circuit to dismiss each of the appeals. In two stipulated motions on Wednesday, Postmates did not specify why it was requesting the dismissals but indicated that the on-demand delivery company had come to an agreement with the couriers and would no longer fight the district court decisions to compel arbitration. The couriers signed off on the motions."
*(ed: *Wow. We are talking about millions in AAA fees and thousands of cases! **Query whether this means some sort of global settlement is in the offing? ***The Circuit Court cases are* McClenon v. Postmates, *No. 20-2577 (7th Cir.), and* Postmates LLC v. 10,356 Individuals, *No. 21-55052 (9th Cir.). We covered the latter in SAA 2021-05 (Feb. 11) when it was decided by the District Court. See* Postmates Inc. v. 10,356 Individuals, *No. CV 20-2783 (C.D. Calif. Jan. 19, 2021) (unpublished).)*
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OOPS! SCHWAB BRINGS ARBITRATION TO RECOVER OVER $1 MILLION MISTAKENLY SENT TO FORMER CLIENT. FINRA Arbitration filings are generally not made public, but the Complaint in *Charles Schwab & Co., Inc. v. Spadoni*, No. 2:21-cv-00635-JCZ-JVM (E.D. La. Mar. 30, 2021), is an exception to the rule. In this case, Schwab is seeking a *Writ of Sequestration* to protect its pending FINRA arbitration claim seeking return of $1,205,536.84 mistakenly sent to an ex-client. The allegations in the court papers filed by Schwab shed light on an unusual case, the crux of which is: 1) a computer glitch caused Schwab to mistakenly electronically submit the overpayment to Spadoni's Fidelity account (only $82.56 of the $1.2 million was properly transferred); 2) Spadoni refused to return the money, which is no longer available despite several efforts by Schwab to locate it; and 3) Schwab has been unable to establish contact with Spadoni. Schwab filed a FINRA arbitration alleging breach of contract and seeking return of the $1.2 million. The suit asks the Court to issue a *Writ of Sequestration* to stop Spadoni from dissipating the funds before a panel is constituted, thus rendering any eventual arbitration Award: "a hollow formality."
*(ed: *Schwab does the math and asserts that, under the timeframes in the* Code of Arbitration Procedure, *a panel will not be appointed for at least two months. **By comparison. Rule R-38 of the AAA's* Commercial Arbitration Rules *allows the Association to: "appoint a single emergency arbitrator designated to rule on emergency applications.")*
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REMINDER: FINRA'S VIRTUAL ANNUAL CONFERENCE SET FOR MAY. AWAITING AGENDA PUBLICATION. We reported in SAA 2021-02 (Jan. 21) that FINRA's Annual Conference has been set for **May 18 – 20** and will be conducted virtually. This event: "provides the opportunity for practitioners, peers and regulators to exchange ideas on timely compliance and regulatory topics. Nowhere else will you find

this unique combination of the highest-caliber speakers discussing issues that matter most for the financial services industry." We said in #02 that the Agenda had not yet posted, so we didn't know if there was a dispute resolution component. That's still the case as we go to press, but we've asked FINRA for an estimate on when this will happen.
(ed: Registration – greatly reduced from past in-person rates – ranges from $199 for government agency registrants to $399 for non-members, with group discounts available. Conference fees: "include access to the conference attendee hub, attendance to all sessions and conference materials." Registration is now open and can be done online.)
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SECURITIES EXPERTS ROUNDTABLE PUBLISHES ITS LATEST FREE NEWSLETTER. The latest issue of the Securities Experts Roundtable's ("SER") quarterly newsletter, *The Expert's Examiner* (*"TEE"*), covering **January – March 2021**, hit the electronic newsstand **April 8.** This *free*, link-rich publication, which can be found on the revamped Website's landing page ("newsletter" tab), offers a wealth of information on financial services arbitration and ADR in general. Among the regular features are: **Recent News from the Arbitration Front; Expert Opinions: What are the Courts (and Arbitrators) Thinking?; Heard Through the Regulatory Grapevine -- Comment Letters and Speeches;** and **Statistics, Events & Resources.** Content is provided by the Roundtable's members; the *Alert* is also a contributor. Signup is available online. 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."
*(ed: *The* TEE *is a wonderful resource for the arbitration bar. **Past issues are grouped here. ***Full disclosure:* SAA*'s publisher and editor-in-Chief George Friedman is an active member of the SER.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Jones v. Michaels Stores, Inc.*, No. 20-30428, 2021 WL 960490 (5th Cir. Mar. 15, 2021)**: "This appeal is an opportunity to emphasize at least one thing that we have directly resolved: 'manifest disregard of the law as an independent, nonstatutory ground for setting aside an award must be abandoned and rejected.' *Citigroup Glob. Mkts., Inc. v. Bacon*, 562 F.3d 349, 358 (5th Cir. 2009)."

***Hearn v. Comcast Cable Communications, LLC*, No.1:19-cv-01198-TWT (11th Cir. Apr. 5, 2021)**: "… Hearn filed a putative class action against Comcast Cable Communications LLC (Comcast), alleging that it had violated the Fair Credit Reporting Act (FCRA). Hearn claimed that when he called Comcast to inquire about pricing and services, a Comcast representative conducted a credit check and pulled his credit information without his permission. After Hearn brought this suit, Comcast moved to compel arbitration, citing the Federal Arbitration Act (FAA) and a prior Subscriber Agreement between Hearn and Comcast. The Subscriber Agreement contained an Arbitration Provision that broadly applied to 'any claim or controversy related to Comcast' and specified that it survived the termination of the Agreement. The district

court denied Comcast's motion to compel arbitration. Because we find that Hearn's FCRA claim relates to the Subscriber Agreement, we reverse the district court and remand for further proceedings."

***Sami v. Interactive Brokers*, FINRA ID No. 20-02897 (Los Angeles, CA, Mar. 8, 2021)**: In this small claims arbitration, an Arbitrator explains in detail why he has decided to deny a customer's $4,039 claim against Respondent broker-dealer, finding the case to be without merit. The customer's claim involved the use of debit and credit cards to purchase gift cards. (*ed: provided courtesy of SAC's ARBchek facility, www.arbchek.com*.)
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

George Wang, Faye F, *Online Dispute Resolution Simulation: Shaping the Curriculum for Digital Lawyering*, Series 2, Vol. 2 No. 2 Amicus Curiae p. 216-236 (March 1, 2021): "Online dispute resolution (ODR) simulation workshops are designed to provide students with a virtual learning environment that empowers our students to gain legal and digital skills for their readiness in future employment. Students are invited to act as complainants, opponents and arbitrators/mediators to resolve a real-life case in a team-based, student-centred and research-informed teaching and learning environment…. This article promotes the use of ODR simulation to effectively enhance students' learning experience, legal skills (i.e. critical thinking, legal reasoning, problem-solving skills) and digital skills. It puts ODR simulation into the context of the shift in teaching approaches in the digital age and explains how modern legal education can be shaped to prepare for digital lawyering."

***UBS Ordered to Pay Investors $371K in 'YES' Claim*, AdvisorHub (Apr. 6, 2021)**: "An arbitration panel has ordered UBS Wealth Management USA to pay nearly $371,000 to a pair of investors in Ohio who brought a claim over a long-running options strategy that went awry in volatile markets. The decision is the latest in a series of cases involving the Yield Enhancement Strategy (YES), an Iron Condor strategy that was developed and marketed internally by brokers. UBS has prevailed in six of the nine claims although a panel in March ordered the firm to pay $1 million to two clients in Denver who had brought a claim for negligence against UBS."

***Investors are Borrowing a Record Amount to Bolster their Stock Portfolios - and it's Raising Red Flags Reminiscent of the Period Before the Great Financial Crisis*, Market Insider (Apr. 8, 2021)**: "A record surge in margin debt is raising eyebrows as the stock market continues to surge to new all-time-highs. Investors borrowed $814 billion against their investment portfolios at the end of February, according to data from FINRA cited in a report in the *Wall Street Journal* on Thursday. That's a record high reading for margin debt, well above January's record of $799 billion. It's common for margin debt to rise and fall with the stock market, as increased portfolio values afford investors more leverage to take on from their brokers. But the record rise in margin debt is also one of the fastest on record." (*ed: see our coverage elsewhere in this* Alert.)

***Try Med-Arb as an Alternative to the Typical Alternative Dispute Resolution*, Lexology (Apr. 9, 2021)**: "*This article originally ran as a part of the ABA's Construction Litigation Practice Points.* An alternative to traditional alternative dispute resolution called med-arb, a combination of mediation and arbitration, should be strongly considered in small and uncomplicated case. Alternative dispute resolution in the construction context typically means arbitration and mediation. Dispute review boards and executive negotiations are some others, but those are far less frequently used. There are alternatives to traditional alternative dispute resolution (hi low arbitration, baseball arbitration, med-arbs, neutral case evaluation, and other creative variations of trying to figure out who gets what from whom). One such method that I would ask folks to consider is the med-arb, a combination of mediation and arbitration."

***Can You Waive Appellate Review of an Arbitration Award? The Fourth Circuit Says Yes*, Lexology (Apr. 12, 2021):** "Many arbitration agreements address the finality of any resulting award, with differing and sometimes vague language. A number of readers might assume that regardless of the agreement language, federal courts still retain jurisdiction to review awards under the Federal Arbitration Act, 9 U.S.C. § 10 (FAA). As a recent Fourth Circuit opinion reveals, the interpretation is a bit more complex than that."

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DID YOU KNOW?

DID YOU KNOW? JAMS AND CPR OFFER FREE ADR CLAUSE DRAFTING GUIDES. Our readers know that the AAA offers a free ADR clause drafting guide, ClauseBuilder™ system, and videos. But did you know that JAMS an CPR also have free clause drafting materials? JAMS makes available for download an eight-page *Guide to Drafting Dispute Resolution Clauses for Commercial Contracts*. And CPR publishes on its Website: *Model ADR Clauses*.

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