SECURITIES ARBITRATION ALERT 2021-48 (12/23/21)

George H. Friedman, Editor-in-Chief

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- ***Hitorq, LLC v. TCC Veterinary Services, Inc*., 2021 UT 69 (Dec. 16, 2021)**
- ***Hertel Trust v. Sandlapper Securities,* FINRA ID No. 20-01124 (Boca Raton, FL, Nov. 16, 2021)**
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DID YOU KNOW?

- **FINRA Issued $57M in Fines in 2020**

ALERT! NO *ALERT* THE NEXT TWO WEEKS, AND OTHER DOINGS. *It's the end of another calendar quarter, so we will be taking our customary break in publishing the* Securities Arbitration Alert *as the year comes to a close. We plan on a two-week hiatus this time around, as we prepare for some changes next year (more about that in January). To help readers pass the time, we have consolidated our recent SCOTUS coverage into a new feature article,* After a Lull in 2021, A Busy Year Ahead Arbitration-wise for SCOTUS. *Speaking of busy High Courts, we also cover in this issue the somewhat rare instance of three State Supreme Courts – Georgia, Kentucky, and Utah – issuing nearly simultaneous decisions involving arbitration.*

Speaking of next year, we're pleased to announce that, despite inflationary pressures, our pricing for 2022 is unchanged for the weekly online Alert*: **Individual** -- $480 a year (48 issues).**Group** -- $480 for first subscriber and $100 for each additional (a librarian forwarding the* Alert *to another inhouse recipients counts as one subscriber). More details for renewing and new subscribers will be sent in January.*

Look for the next edition of the SAA *in your e-mailbox the week of January 10. In the meantime, follow us @SecArbAlert and sign up for updates on our weekly blog posts. Or take a look at our publisher and Editor-in-Chief George Friedman's 2014 blog post,* On the 1st day of Christmas/Chanukah/Kwanzaa, My True Love Gave to me … A New Form of ADR, *which has aged well*.

Our heartfelt thanks to the SAA Editorial Advisory Board
and to Harry Jacobowitz, Esq. for their many contributions this year.
Happy holidays and a happy new year!

FEATURE ARTICLE

AFTER A LULL IN 2021, A BUSY YEAR AHEAD ARBITRATION-WISE FOR SCOTUS, *by George H. Friedman*. We entered 2021 with SCOTUS poised to again rule on delegation after hearing oral argument late in 2020. Later in the year, the Court agreed to hear two more arbitration-centric cases. The result for these three cases? Two oral

arguments were held, but there was a "never mind" from the Court after one of them. And the third case? Another "never mind" right before argument, but from the parties this time. As we head into 2022, we find ourselves: 1) awaiting a decision in the one live case that was argued; and 2) looking forward to oral arguments in *four* cases where SCOTUS granted *Certiorari* this fall. To tie this all together, we've consolidated in this feature article our past coverage in the *Alert.* *Read more*…
(ed: George H. Friedman, Publisher and Editor-in-Chief of the online Securities Arbitration Alert *and an ADR consultant, 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 Chairman of the Board of Directors of Arbitration Resolution Services. He is an Adjunct Professor of Law at Fordham Law School, and is also a member of the AAA's national roster of arbitrators.)*
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SQUIBS: IN-DEPTH ANALYSIS

MINI-SURVEY: SENIORS REACH HEARING AND AWARD ONLY MARGINALLY MORE QUICKLY THAN CUSTOMERS AS A WHOLE IN FINRA ARBITRATIONS. ***FINRA intends to codify its program to expedite administration of cases involving senior or seriously ill parties. As promised, we commissioned a survey on the program's effectiveness, which reveals that the voluntary program has been marginally effective.*** In SAA 2021-45 (Dec. 2), we reported that FINRA Dispute Resolution Services ("DRS") was considering a rule change designed to codify and thereby increase the effectiveness of a special program created in **2004** to expedite the arbitration process for senior or seriously ill parties. While Arbitrators and staff have been trained to speed these cases along, one drawback has always been that the *Codes of Arbitration Procedure* don't permit staff or arbitrators to shorten any timeframe in the rules without consent of the parties. The proposed change would address that problem. This welcome news made us wonder how well the current program has worked, so we commissioned a survey.

Survey Methodology
Unfortunately, it's rare for an Award to mention when the arbitration process is being expedited. Instead, for the purposes of conducting a mini-survey on this issue, we isolated FINRA customer-member Awards identifying elder abuse as a cause of action or a claimant as elderly.* To make it most likely that the arbitrations were brought by and primarily on behalf of the elderly customers, rather than their estates, guardians, attorneys-in-fact, younger family members or other proxies, we limited the set of cases to those in which only one or two customers brought the claim in their individual capacities. Finally, we limited ourselves to Awards decided on the merits after an evidentiary hearing. For both Awards in cases with one or two claimants (totaling 66) and those in cases with only one claimant (49), we determined the median number of days from the filing date to the first hearing and the median number of days from the filing date to the issuance of the Award (turnaround time). By way of comparison, we calculated the same statistics for all FINRA customer-member Awards issued after a hearing on the merits from **August 2007** through **November 2021** (3,997).

Survey Says?
Our results show that the program only slightly improved case processing times. Median turnaround times were 463 days for senior customer Awards with one claimant, 470 days for those with one or two claimants, and 496 days for customers in general. Median times from filing to hearing were 419 days for elderly customer Awards with one claimant, 423 days for those with no more than two claimants and 453 days for customers in general. In short, while senior customers did tend to get to hearing and decision sooner than other customers, the advantage was slight. Even single elderly customers were able to shave only 8% off the time to hearing and 5% off the time to Award. Please note, however, that we can't say how much time the expedited arbitration program actually saved, since we don't know how many of these elderly claimants took advantage of it.
*(ed: *We limited our focus to cases involving seniors since there were a statistically insignificant number of cases identifying seriously ill parties. These results – albeit based on a small sample size – to us underscores the wisdom of the proposed rule change. **Recent FINRA Awards identify when they are part of special procedures. If FINRA adopts the proposed expedited procedure rule and reports which Awards are subject to it, we will be in a better position to determine its effectiveness. ***For those interested in the technicalities of how we calculated the median number of days in sets with an even number of Awards, we can use the turnaround time for the set of 66 Awards with either one or two (presumably elderly) claimants as an example: we ordered them from smallest to largest turnaround times and then chose the relevant number in the 33rd Award. ****The data was provided courtesy of SAC's Award database, which provides detailed information on securities arbitration Awards over the past 30+ years. *****The foregoing survey was conducted and this write-up was prepared by Harry A. Jacobowitz, President of HAJ Research and Writing LLC. Mr. Jacobowitz, a member of the Pennsylvania bar, and his firm perform legal research and writing for attorneys and handle substantive searches of SAC's Award database. He can be contacted at harryjacobowitz@optimum.net.)*
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UNANIMOUS KENTUCKY SUPREME COURT: VARIABLE ANNUITY IS NOT AN INSURANCE PRODUCT, BUT A FIXED ANNUITY IS. PDAA IN THE LATTER IS THEREFORE UNENFORCEABLE. ***While the arbitration agreement in a variable annuity was enforceable because the investment was a security, once the annuitant converted the product to a fixed annuity it became an insurance product and the PDAA was not enforceable, a unanimous Kentucky Supreme Court holds***. The virtually unlimited reach of Federal Arbitration Act ("FAA") preemption can be checked by a contrary federal statute, such as the McCarran-Ferguson Act, 15 U.S.C. § 1012(b). The Act protects State laws regulating the business of insurance from federal preemption, in effect "reverse-preempting" the FAA: "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance…."

The Core Issue: Security or Insurance?
The Act was at issue in *Legacy Consulting Group, LLC v. Gutzman*, No. 2020-SC-0288-DG (Ky. Dec. 16, 2021), a case involving a predispute arbitration agreement ("PDAA") in a variable annuity that was converted to a fixed annuity. What was the issue? The unanimous Court says: "If the investment product which Ms. McGaughey selected, with the advice of Legacy Consulting and Money Concepts, was 'insurance,' which under KRS 304-1.030 includes a fixed payment annuity, then the arbitration agreement is unenforceable. KRS 417.050(2); see also *Ernst & Young, LLP v. Clark*, 323 S.W.3d 682, 688 (Ky. 2010) (stating that the McCarran-Ferguson Act, 15 U.S.C. § 1012(b), 'establishes a doctrine of "reverse preemption" that expressly exempts from federal preemption state statutes enacted to regulate insurance, leaving the regulation of insurance to the individual state[]'). Conversely, if the investment product was a security, including a variable rate annuity, then the arbitration agreement applies" (brackets in original).

Fixed Annuity is an Insurance Product
What applies here? The Court continues: "The annuity in this case was initially set up as a variable rate annuity. Under case law, that initial investment was not insurance, but rather a security. The issue, however, in this case is whether, following the Income Date, when Ms. McGaughey elected a fixed income annuity, did the annuity become insurance? The question seems to answer itself…. In this case, her investment in December 2015 was insurance. As a result, KRS 417.050(2) provides that the arbitration provision is unenforceable."
(ed: Seems right to us, and we can't see SCOTUS being interested in reviewing a unanimous State Supreme Court holding interpreting and applying State law. Also, as described in this issue's Feature Article, SCOTUS has a pretty full arbitration plate right now!)
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ARBITRATORS FIND FIRM LIABLE FOR NEGLIGENT SUPERVISION BUT ORDER EXPUNGEMENT FOR "UNNAMED" BROKER. ***Although Credit Suisse is held liable for negligent supervision, the Arbitrators nonetheless recommend expungement of the claimant's broker's record (who was "unnamed" in the sense that he was not named as a party in the underlying arbitration).*** The unanimous Award by an All-Public Panel in *Marmaduke v. Credit Suisse Securities (USA) LLC*, FINRA ID No. 18-02720 (Boca Raton, NY, Dec. 9, 2021), is a bit of a head-scratcher. How so? The Panel finds Credit Suisse liable for negligent supervision to the tune of $150,000 (Claimant had sought damages: "in a range between $975,523.00 and $8,024,714.00 to be determined by the Panel"). No relief was awarded for: "Claimant's remaining counts of breach of fiduciary duty, negligence, fraud, breach of contract, and violation of Section 10(b) of the Securities Exchange Act and rule 10b-5 of the Securities and Exchange Commission." Yet, the Arbitrators recommend expungement of the complaint from the rep's CRD record, an unusual situation even when the broker isn't named as a

respondent, finding that: "the claim, allegation, or information is factually impossible or clearly erroneous."

Expungement Recommendation Explained
In a thoroughly explained Award, the Panel says: "The preponderance of the evidence from Claimant, the Unnamed Party … and other witnesses, shows that Claimant had a history of investing in bonds, money markets, etc. and that he repeatedly rejected Unnamed Party[]'s suggestions of various combinations of lower risk investments. Claimant says that he was averse to the risks involved in equities, bonds, etc., but he was adamant in his demand for returns than were higher than the low-risk securities like bonds, money markets, etc. Claimant's demands for alternatives were reinforced by his strong opinions regarding the alleged weakness of the American economy and the Dollar in particular. Claimant emphasized his desire for offshore investments as a hedge against America's financial future. To that end, he investigated and made a South American investment after making trips to Panama and South America.

"The testimony and emails also reveal Claimant feared that the United States was falling behind the Chinese economy. The evidence shows that Claimant was interested in China as a hedge against America's weak future before Unnamed Party … recommended the alternative investment in the Chinese economy. Claimant made a short-term investment in gold but rejected precious metals as an alternative investment. Retrospectively, Claimant acknowledged that he was wrong, and Unnamed Party …was right about the current American economy. Respondent's exhibits show that Unnamed Party … provided Claimant with extensive information regarding the alternative investments at issue; his only complaint against Unnamed Party[] was that he did not break it down and make it clear enough to prevent him from making the alternative investments, which appears to be a classic case of buyer's regret.

"Based upon the evidence before the Panel and the testimony regarding Unnamed Party[]'s clean record over an extended career, the Panel has granted the request for expungement."

Some Conjecture
At first blush, we thought the Award was logically inconsistent. While we recognized that the bulk of the compensatory damages claims were denied, we initially found it hard to see how the Panel could find CS liable for negligently supervising the unnamed rep while at the same time recommending expungement. But after thinking about it, we're not so sure. This language in the Award is instructive: "In considering expungement, the Panel relied on the following evidence: the testimony of Claimant and other witnesses for Respondent, especially the Branch Manager, regarding management's supervision of Claimant's account, or lack thereof …." In this case, the unnamed rep also had a willful client and a clean record going for him.
*(ed: *As we said up front, this is just conjecture. **The "Unnamed Party" was, of course, identified by name in the Award; otherwise, it wouldn't be possible for FINRA to*

*execute the expungement recommendation, but we saw no need to mention that name here. ***We invite readers to share their thoughts at George@SecArbAlert.com.)*
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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

CFPB PUBLISHES FALL 2021 AGENDA. NO MENTION OF ARBITRATION. The Consumer Financial Protection Bureau ("CFPB") recently published its Fall 2021 Rulemaking Agenda, and neither it nor the preamble references arbitration. This is the first such agenda prepared by the Biden administration CFPB. Recall that the Bureau under the Obama administration aggressively exercised its authority under *Dodd-Frank* § 1028(b) to restrict, eliminate, or set conditions for use of predispute arbitration agreements in consumer financial services relationships. This was embodied by a 2017 regulation that would have: 1) permitted predispute arbitration agreements in contracts for consumer financial goods and services; 2) banned class action waivers in PDAAs; and 3) required regulated financial institutions to file customer claims and awards data with the CFPB, which the Bureau intended to publish in redacted form. Later that year, the CFPB's arbitration rule was retroactively nullified, when President Trump signed into law H.J. Res. 111, a Joint Disapproval and Nullification Resolution. Congress had exercised its authority under the *Congressional Review Act*, 5 USC §§ 801 *et seq*., which allows Congress to legislatively nullify any regulation within 60 legislative/session days of its publication.
(ed: Our take? The Biden CFPB has bigger fish to fry this year than expending political capital trying to resurrect the Rule.)
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GAO: SEC COULD DO A BETTER JOB WITH FINRA OVERSIGHT. Although arbitration is barely mentioned (*ed: just three passing references*), a **December 15** Government Accountability Office ("GAO") Report concludes that the SEC could do a better job supervising FINRA. Says *Securities Regulation: SEC Could Take Further Actions to Help Achieve Its FINRA Oversight Goals*, GAO-22-105367: "SEC has several opportunities to leverage information obtained from its reviews of FINRA to inform its FINRA oversight goals. Currently, SEC's performance measures … for FINRA oversight are task-oriented (such as conducting meetings) and do not reflect leading practices (such as being outcome-oriented and providing useful information for decision-making). SEC's program for overseeing FINRA also does not have documented policies and procedures for determining which findings and any associated corrective actions to track, or for identifying and communicating the significance of findings from its oversight of FINRA to internal stakeholders and to FINRA. By establishing such measures, policies, and procedures, SEC would gain information that would allow it to better monitor and assess the impact of its reviews of FINRA, better evaluate FINRA responses, and more clearly communicate concerns to FINRA…. GAO is recommending SEC establish performance measures for FINRA oversight that reflect leading practices, and policies and procedures for tracking, identifying, and communicating the significance of examination findings. SEC generally agreed with these recommendations."

*(ed: *A one-page "highlights" here. **There have in the past been several GAO reviews of FINRA's dispute resolution program.)*
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ONLINE COLLECTIBLE TRADING PLATFORM USES AN AAA PDAA. Rally, an online trading platform, uses a predispute arbitration agreement ("PDAA") found in its terms and conditions, calling for the AAA's *Commercial Arbitration Rules* and containing a class action waiver. What is Rally and how does it work? The FAQ states that Rally: "allows people to invest in premium quality collectible assets through a simple mobile app and website. Our team of experts hand selects each investment opportunity and we acquire the assets. They are then securitized -- turned into equity shares -- and made available to investors, who can create custom diversified portfolios by holding stakes in multiple assets and asset classes." What exactly do users own and how are trades effectuated? The FAQ says: "All of the assets are owned by our subsidiary company, RSE Collection, LLC or RSE Archive, LLC. When you invest in an asset, you become a shareholder in a specific sub-company that owns a specific asset." OK, but what's being purchased? "Rally only offers securities that are regulated by the U.S. Securities & Exchange Commission (the 'SEC') to protect our investors…. Important Note: At this time our securities are offered for sale through a registered broker-dealer (and member of FINRA & SIPC) that is licensed in all 50 U.S. states.... Rally Rd. is not a broker-dealer. Securities are offered to investors through registered broker-dealers and members of FINRA & SIPC, with which Rally Rd. has partnered." And, last, which specific entity offers this secondary trading? "All secondary market trading is offered through Dalmore Group, LLC, a member of the Financial Industry Regulatory Authority (FINRA) and the Securities Investor Protection Corporation (SIPC)" (link added).
*(ed: *Interesting concept. **While the Rally PDAA calls for AAA arbitration, any FINRA member executing trades is of course bound to arbitrate customer disputes under FINRA Rule 12200. ***While the PDAA calls for the AAA's* Commercial Arbitration Rules, *we are pretty sure the Association would treat any investor disputes as consumer cases subject to those Rules. ****In the interest of full disclosure, note that, in order to poke around, we opened a Rally account. No trades have been made and the account has not been funded.)*
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CALIFORNIA AB-51 UPDATE: CALIFORNIA RESPONDS TO CHALLENGERS' MOTION FOR *EN BANC* REHEARING. We reported in SAA 2021-40 (Oct. 28) that the challengers had moved for rehearing *en banc* in *Chamber of Commerce of the United States v. Bonta*, No. 20-15291 (9th Cir. Sep. 15, 2021). As reported in SAA 2021-36 (Sep. 23), a split Ninth Circuit in *Chamber of Commerce* ruled on the validity of California AB-51 – a law that restricts predispute arbitration clauses ("PDAA") in employment relationships. The divided Court held that the mandatory PDAA use preclusions in the new law withstand Federal Arbitration Act ("FAA") preemption scrutiny, but the criminal and civil penalties for mandatory PDAA use do not. Recall that our prescient editorial note in #36 was: "We continue to see this one as destined for SCOTUS, with perhaps a petition for *en banc* review along the way." On

October 20, the Chamber and the other challengers filed the expected motion for *en banc* review. We last reported that a response was due **November 11**. As reported in SAA 2021-44 (Nov. 25), the Court, however, on **November 10** granted unopposed motions by Bonta (in his official capacity as the California Attorney General); and the other Appellants to extend the time to file an opposition to **December 10**. We can now report that the State and other Respondents filed their response in a timely manner. The thrust of the argument, as expressed in the Brief (*ed: repeated essentially* verbatim): 1) the Panel decision respects the FAA and Supreme Court precedent; 2) the Panel decision creates no intra- or inter-Circuit conflict; and 3) there is no special need to review this decision. *(ed: *We continue to think there's a good shot the motion will succeed. **Next would appear to be oral argument. ***In the meantime, several* Amicus *Briefs have been filed by groups such as the: California Restaurant Association; Civil Justice Association of California; Employers Group; and Restaurant Law Center. ****Email us at Help@SecArbAlert.com for a copy of the responsive pleading.)*
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SAVE THE DATE: NY CITY BAR ANNUAL SECURITIES & ENFORCEMENT INSTITUTE IS FEBRUARY 9. The Association of the Bar of the City of New York will be holding its *10th Annual Securities & Enforcement Institute* in-person in midtown Manhattan on **February 9**. The program description states: "Currently, one of the most important and interesting areas of securities related activity is a discussion of what is likely to result from the change of administration from Jay Clayton as head of the SEC to **Garry Gensler**. Our keynote speaker will be **Steven Peiken**, the former Co-Head of Enforcement of the SEC in the prior administration, who will discuss his reaction to Mr. Gensler's announced agenda." Returning as Co-chairs are **Brad S. Karp**, Paul, Weiss, Rifkind, Wharton & Garrison LLP, and **Gregory A. Markel**, Seyfarth Shaw LLP. The program offers CLE credit from California, Connecticut, New Jersey, New York, and Pennsylvania.
*(ed: *Last year, this program was delivered via two half-day Webinars due to the pandemic. **The event will be held from 9 a.m. to 5 p.m. at the Association's headquarters, 42 West 44th Street. ***Registration ranges from $249 for government/nonprofit/academic/judiciary who are Association members to $649 for nonmembers and can be done online.)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Goodwin v. Comerica Bank, N.A.*, No. A160909 (Calif. Ct. App. 1 Dec. 15, 2021)**: "Mark Goodwin appeals two concurrent orders denying his petition to confirm an arbitration award and granting Comerica Bank's (the bank) petition to vacate the award on the ground that the arbitrator made a material omission or misrepresentation in his disclosure of prior cases involving the parties' lawyers. (See Code Civ. Proc. § 1281.9.) The disclosure described a prior case involving Goodwin's lawyers as 'settled prior to final award' without disclosing that the case had settled after the arbitrator issued an interim award in favor of the client of Goodwin's lawyer. On appeal, the parties debate whether section 1281.9 required the arbitrator to disclose the interim award and whether

the omission was sufficiently material to require vacation of the award. We need not decide those questions because the bank forfeited any right to disqualify the arbitrator on that basis by failing to file a notice of disqualification within 15 days of discovering that omission." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Adventure Motorsports Reinsurance, Ltd. v. Interstate National Dealer Services, Inc.*, No. S21G0015, S21G0008 (Ga. Dec. 13, 2021)**: "We granted these petitions for a writ of certiorari to consider whether the Court of Appeals erred in reversing the trial court's order confirming an arbitration award against Interstate National Dealer Services, Inc. ('INDS'), in favor of Southern Mountain Adventures, LLC ('Dealer'), and Adventure Motorsports Reinsurance Ltd. ('Reinsurer')…. We conclude that the Court of Appeals erred in reversing the confirmation of the award on the basis that the arbitrator manifestly disregarded the law in rendering the award. In Case No. S21G0015, we therefore reverse the Court of Appeals' decision reversing the order confirming the arbitration award on that basis, and we remand for resolution of INDS's argument that the arbitrator overstepped his authority in making the award. In Case No. S21G0008, we vacate the Court of Appeals' decision dismissing as moot Dealer and Reinsurer's appeal from the trial court's failure to enforce a delayed payment penalty provided in the arbitration award, and we remand for reconsideration of that issue" (citation omitted).

***Hitorq, LLC v. TCC Veterinary Services, Inc.*, 2021 UT 69 (Dec. 16, 2021)**: "Doctors Lisa Pasquarello, Tyler Stiens, and John Artz owned and operated a veterinary clinic in Park City. Together they formed a limited liability company for their clinic and adopted an operating agreement that contained an arbitration clause. After a few years, Dr. Pasquarello sought to sell her portion of the practice to Dr. Artz through an oral agreement. When the sale failed, she brought suit against Dr. Artz for various claims, including breach of contract and breach of the covenant of good faith and fair dealing. She also sought dissolution of the practice. Based on its interpretation of the arbitration clause in the operating agreement, the district court compelled arbitration, concluding that the claims fell under the scope of the clause. Dr. Pasquarello appealed, arguing that the arbitration clause covers only disputes regarding the enforcement or interpretation of the operating agreement and that her claims concern only the oral contract and the statutory remedy of dissolution. The court of appeals affirmed the district court. Because each of Dr. Pasquarello's claims relates to enforcement or interpretation of the operating agreement, we also affirm."

***Hertel Trust v. Sandlapper Securities*, FINRA ID No. 20-01124 (Boca Raton, FL, Nov. 16, 2021)**: A customer trust alleging breach of contract with respect to investments in GPB Automotive Portfolio LP and GPB Waste Management LP is awarded $155,187.50 in compensatory damages against Respondent broker-dealer, plus $50,000 in attorney fees as a monetary sanction pursuant to FINRA Rule 12212(a). This Rule provides: "The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel." *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Barnes v. WFG Investments*, FINRA ID No. 21-00966 (Birmingham, AL, Nov. 17, 2021)**: In this small claims arbitration that proceeded pursuant to Rule 12800 of the *Code of Arbitration Procedure*, a customer asserting that his retirement savings were overly concentrated in risky and unsuitable investments loses his case against two Respondent broker-dealers and a registered representative. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

R. Macey-Dare, *Pseudo-Expert Witnesses and the 'Spartacus Effect'* (Dec. 7, 2021):
"At the end of Stanley Kubrik's 1960 classic 'swords and sandals' epic Spartacus, the eponymous hero becomes cornered, together with his entourage of slaves, by Crassus and the Roman army. In a now-legendary closing scene, Crassus, played by Laurence Olivier, demands to know 'Who is Spartacus?...' 'I am Spartacus' calls out the film's star Kirk Douglas. Then after a short pause "No, I am Spartacus… I am Spartacus… I am Spartacus...' shouts one supporting Extra after another, each springing to his feet in turn. Faced with this sea of potential Spartacuses, and unable to identify the real one, Crassus follows his optimal strategy, namely crucifying all these slaves along the Appian Way, and the film ends on this poignant religious note.

"Cutting forward to the present day and the world of legal not military disputes, in complex commercial litigation and arbitration cases, the legal experts are typically joined by expert witnesses who are meant to guide the court or tribunal on their expert informed technical analysis. As most such cases involve estimates of valuation, damages, loss and interest, purported expert valuation witnesses are almost always chosen and involved, to assist.... But here is the conundrum- when expert witnesses may or may not have special expertise then how can this best be ascertained by clients and lawyers who lack that expertise themselves, but just know that they will need it for their case? .... Thus the choice of experts for complex commercial and arbitration cases covering valuation, damages, loss and interest is typically based on the purported experts' own marketing materials and their own marketing investments selection as evaluated by non-expert lawyers and their clients.... There is a better solution of course, which is to use an established proven independent expert in the field to locate and identify the real expert witnesses from the crowd for a given case and to be able to say 'These are the real experts, you need to hire' and then independently monitor and check the chosen expert's performance and quality as the case proceeds."

***Attorney Fired for Taking Parental Leave Must Arbitrate Discrimination and Termination Claims*, Lexology (Dec. 13, 2021)**: "A Maine attorney allegedly fired for taking parental leave must take his case to arbitration. A First Circuit judge decided that the language of an offer letter to the attorney required arbitration of his discrimination and wrongful termination claims."

***JPMorgan Ordered to Pay Client $4M Over Unsuitable Investments*, Financial Advisor IQ (Dec. 13, 2021)**: "A Financial Industry Regulatory Authority arbitration panel has ordered JPMorgan to pay millions of dollars in damages to a client who accused the firm of putting her money into unsuitable investments.[] In May 2020, [investor] accused the firm of breach of contract, breach of fiduciary duty, failure to supervise, violation of state laws and of the Consumer Protection and Deceptive Trade Practices Act, among other infractions, in connection with the trading of "unsuitable securities" in [investor's] account, according to an award document published last week."

***Ex-Broker Charged With Murder Now Faces Finra Bar*, FA Magazine (Dec. 14, 2021)**: "A former long-time broker who has been indicted on capital murder, wire fraud and Ponzi scheme charges is now facing sanctions from the Financial Industry Regulatory Authority (Finra) for failing to respond to their investigation.[]Finra said it began its investigation into [broker] for allegedly engaging in undisclosed outside business activities and private securities transactions after he was terminated by Parkland Securities, where he had been a broker since 2002.[]By the time Finra began sending requests for information to [broker], he was in the Bowie County Correctional Center in Texarkana, Texas, on the murder and securities fraud indictments. While at least one request was hand-delivered to [broker], he did not answer, which is a violation of Finra rules, the regulator said."

***Finra Orders RBC to Pay $1 Million Over Junk Bond Oversight Failures*, AdvisorHub (Dec. 16, 2021)**: "The Financial Industry Regulatory Authority rang up RBC Wealth Management-U.S. for more than $1 million in fines and restitution over its alleged failure to properly monitor clients' accounts for overconcentration in high-yield or 'junk' bonds.[]From July 2013 through June 2016, the firm failed to maintain an adequate system for supervising its representatives' recommendations and sales of high-yield corporate and municipal bonds, according to a letter of acceptance, waiver and consent finalized on Wednesday. As a result, the Minneapolis, Minnesota-based firm failed to flag for review more than 100 client accounts with conservative investment profiles – including a 100-year-old customer – for 'potentially unsuitable concentration levels,' Finra said."

***U.S. Senate Unanimously Confirms Behnam as Chairman*, www.cftc.gov (Dec. 16, 2021)**: "The U..S. Senate last night voted unanimously to confirm Rostin Behnam as Chairman of the U.S. Commodity Futures Trading Commission. Behnam has served as Acting Chairman since January." (*ed: He was a Trump appointee*.)

***Voices: Investor Protection Requires Access to Representation*, by Professors Nicole Iannarone Christine Lazaro, Financial Planning (Dec. 16, 2021)**: "Despite their bad fortune, these investors were lucky in one respect: they all lived in New York, the only state in the country where there are six law school investor advocacy clinics that provide free legal advice and representation. In each of these cases, a clinic investigated the investors' complaints. If the clinic found wrongdoing, it explained the options and helped the investors obtain redress. If the clinic did not find wrongdoing, it explained what

happened and why there was not a legal claim. If the investors lived in California, Texas, Georgia, or any of 41 other states, they would not have been so lucky: there are 44 states in the country where investors have no access to free legal advice through such a clinic." (*ed: Prof. Lazaro is a member of the* SAA*'s Editorial Advisory Board*.)

***Is the End Near? Supreme Court Set to Rule on Whether California's PAGA Law Runs Afoul of the Federal Arbitration Act*, JD Supra (Dec. 17, 2021):** "On December 15th, the Supreme Court agreed to hear *Viking River Cruises Inc. v. Angie Moriana*, which centers on Viking's efforts to enforce an arbitration agreement in which Moriana agreed to arbitrate 'any dispute' arising from her Viking employment and further agreed that the arbitration would be bilateral, i.e. with no 'class, collective, representative or private attorney general action' asserted. In short, Viking is asking the Supreme Court to enforce the arbitration agreements signed by their employees in full. This would preclude their employees' ability to avail themselves of the procedural mechanism created by PAGA which allows employees' to do the state's bidding and that, in many wage and hour cases, drastically increases the settlement value of both individual and class/collective claims. A decision in Viking's favor would be a significant victory for California employers who favor the use of arbitration agreements. And, regardless of the outcome, the Supreme Court's decision will certainly instruct other states on the future of PAGA-like laws."
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DID YOU KNOW?

FINRA ISSUED $57M IN FINES IN 2020. Our readers know that FINRA Dispute Resolution Services is one means by which firms are compelled to make investors whole, but did you know that, according to *Report on Use of 2020 Fine Monies* (May 27, 2021), FINRA issued $57 million in fines in 2020? And, there were $90.2 million in fines-eligible expenditures last year? How was the shortfall resolved? Says the Authority: "Because the total of fines-eligible expenditures exceeded the amount of fines issued in 2020, the balance of $33.2 million was funded from FINRA's reserves and excess operating results."
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