SECURITIES ARBITRATION ALERT 2023-10 (3/9/23)

George H. Friedman, Editor-in-Chief

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- ***Gostev v. Skillz Platform, Inc*., No. A164407 (Calif. Ct. App. 1 Feb. 28, 2023)**
- ***Winter v. Craig Scott Capital*, FINRA ID No. 21-00721 (Oklahoma City, OK, Jan. 17, 2023)**
- ***Smith v. Provident Private Capital*, FINRA ID No. 20-01072 (Cleveland, OH, Jan. 19, 2023)**

ARTICLES OF INTEREST:

- **Seru, Amit, *Tipping the Scales: Balancing Consumer Arbitration Cases,* Stanford Institute for Economic Policy Research (SIEPR) (Feb. 2023)**
- ***CFPB Enters into $15 Million Settlement with Auto Lender*, JDSupra (Feb. 28, 2023)**
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- ***Ninth Circuit Decision in Live Nation and Ticketmaster's Favor Highlights Subtleties of Drafting Enforceable Arbitration Provisions*, Lexology (Mar. 2, 2023)**
- ***SEC Charges Silver Edge Financial and Equity Acquisition Company with Unregistered Broker-Dealer Activity Relating to Pre-IPO Funds*, www.sec.gov (Mar. 3, 2023)**

DID YOU KNOW?

- **FINRA DRS is Hiring**

SQUIBS: IN-DEPTH ANALYSIS

TENTH CIRCUIT: EFFECTIVE VINDICATION EXCEPTION INVALIDATES ARBITRATION AGREEMENT. ERISA ACTION ADVANCES IN COURT.

A U.S. Court of Appeals holds that the Supreme Court's effective vindication exception to the enforcement of arbitration agreements applies to an arbitration agreement that prevents a defined compensation retirement plan participant from pursuing plan-wide remedies. Robert Harrison, a participant in a defined contribution retirement plan of his former employer formed under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §1101 *et seq.*, sued the fiduciaries of the plan in federal court in

Colorado for allegedly enriching themselves at the plan's expense. Among other causes of action, he sought relief under § 1132(a)(2) of ERISA that could potentially benefit the plan as a whole. Defendants moved to compel plaintiff to arbitrate his claims on an individualized basis under the terms of an arbitration clause in the governing plan document that prohibited participants from pursuing claims on a collective or representative basis.

The Effective Vindication Exception

As SCOTUS noted in *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228, 235 (2013): "An arbitration clause will not be enforced if it prevents the effective vindication of federal statutory rights, however it achieves that result." Although the High Court has never actually applied this doctrine to prevent arbitration, the District Court relied on this principle to deny the motion on the ground that the arbitration clause precluded plan-wide relief permitted by ERISA. Defendants appealed, but the U.S. Court of Appeals affirms in *Harrison v. Envision Management Holding, Inc. Board of Directors*, No. 22-1098 (10th Cir. Feb. 9, 2023). The Court expounds: "The prohibition on class or collective actions, in our view, is not cause for invoking the effective vindication exception…. But the prohibition on a claimant proceeding in a representative capacity is potentially more problematic, at least where, as here, the claimant alleges that the named defendants violated fiduciary duties that resulted in plan-wide harm and not just harm to the claimant's own account and the claimant seeks relief under § 1132(a)(2)."

The Exception Applies Here

In the case before it, the Court explains, the portion of the arbitration clause that prohibits representative actions, Section 21.1(b) of the Plan Document (which the Court usually calls "Section 21(b)"): "is not problematic because it requires Harrison to arbitrate his claims, but rather because it purports to foreclose a number of remedies that were specifically authorized by Congress in the ERISA provisions cited by Harrison. Because Section 21(b), if enforced, would prevent Harrison from vindicating in the required arbitral forum the statutory causes of action listed in his complaint, we conclude that the effective vindication exception applies in this case." In other words: "It is not Section 21's prohibition on class actions that is problematic. Rather, it is Section 21's prohibition of any form of relief that would benefit anyone other than Harrison that directly conflicts with the statutory remedies available under 29 U.S.C. §§ 1109 and 1132(a)(2), (a)(3)."

No Statutory Conflicts

Defendants further contended that the District Court violated both ERISA and the FAA. In response to Defendants' argument that ERISA "requires that a plan document be enforced strictly according to its terms,'" the Court notes: "Nothing in ERISA states that a plan document can override statutory remedies that were afforded to claimants by Congress." In response to their argument, "that the Supreme Court's decision in *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), requires a clearly expressed congressional intention to override the FAA and forbid arbitration," the Court deems that decision: "inapposite because it involved an argument by the party opposing arbitration

that a different federal statute, i.e., the NLRA, conflicted with and effectively overrode the FAA…. Harrison is not arguing that the FAA and ERISA conflict in any way. Rather, he is arguing that the specific provisions of the arbitration section of the Plan effectively prevent him from vindicating statutory remedies that are outlined in ERISA."

The Entire Arbitration Agreement is Unenforceable
Finally, Section 21.1(b): "includes a non-severability clause that invalidates the entire arbitration agreement that reads as follows: 'In the event a court of competent jurisdiction were to find these requirements to be unenforceable or invalid, then the entire Arbitration Procedure . . . shall be rendered null and void in all respects.'… Because we agree with the district court that the remedies limitation contained in Section 21.1(b) prevents Harrison from effectively vindicating his statutory remedies, that means that the entire Arbitration Procedure outlined in Section 21 of the Plan is 'rendered null and void in all respects.' In other words, Defendants are precluded from arguing that Harrison is required to submit his claims to arbitration without the remedy limitations outlined in Section 21.1(b)."
*(*Seems right to us. **This Squib 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. Contacted him at harryjacobowitz@optimum.net.)*
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UPDATE: OPPENHEIMER FAILS IN ATTEMPT TO VACATE FINRA PANEL'S $36+ MILLION AWARD. ***Oppenheimer has failed to vacate a massive Award rendered against it by a FINRA Panel***. We borrow heavily from our past coverage, starting with our report in SAA 2022-35 (Sep. 15) that a Majority-Public FINRA Panel had hit Oppenheimer with a $36+ million Award. The arbitration arose out of losses suffered by several investors in a Ponzi scheme perpetrated by a former adviser. The claims asserted in *Robinson v. Oppenheimer & Co., Inc.*, FINRA ID No. 21-02234 (Atlanta, GA, Sep. 6, 2022), were for: "violations of FINRA Rules; negligence; breach of fiduciary duty; violation of the Georgia RICO statute; and breach of contract. The causes of action relate to Claimants' investments in Horizon Private Equity III." The Claimants were each awarded almost $5.7 million in compensatory damages and almost $11.4 million in punitive and more than $14.2 million in treble damages pursuant to Georgia's RICO statute – O,C.G.A. § 16-14-6(c) -- which provides: "Any person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages. Such person shall also recover attorneys' fees in the trial and appellate courts and costs of investigation and litigation reasonably incurred." The Award also included more than $5.3 million in attorney fees and $98,655 in costs.

Award Challenge Promised …
Our editorial comment in # 35 was: "According to media reports, Oppenheimer may challenge the Award." We later reported in SAA 2022-36 (Sep. 22) that, according to a **September 15, 2022** *InvestmentNews* story, this certainly appeared to be the case. The

article stated that the firm is alleging "evident partiality" by one of the arbitrators. The specifics? "[T]he lawyer for the eight claimants, some of whom had been in the service and went on to be airline pilots, shed light on the broker-dealer's claim of bias, saying that an attorney for Oppenheimer took issue with an informal conversation between one of the arbitrators, who had been in the military, and one of the investor claimants…. Oppenheimer wants to argue that the common military experience created a conflict because of the affinity that arose from that.'" The story added that Oppenheimer would shortly move to vacate the Award. This next step was referenced in the firm's **September 7, 2022** Form 8-K filed with the SEC: "Oppenheimer intends to move to vacate the award in federal court on a number of grounds, including, but not limited to, allowing the hearing to proceed without Mr. Woods and other key parties and witnesses; prematurely rendering an award for damages while a court-appointed receiver continues to collect assets on behalf of all impacted investors, including the Claimants; *issuing an award where there was evident partiality against Oppenheimer by one of the arbitrators;* and allowing the hearing to proceed when the claims were ineligible for arbitration under FINRA rules that relate to statutes of limitations" (emphasis added).

… Promise Fulfilled

Oppenheimer on **October 6, 2022** challenged the Award in the Georgia Superior Court, Dekalb County. The matter is *Oppenheimer & Co., Inc. v. Robinson*, and sought vacatur under Federal Arbitration Act ("FAA") section 10 and O.C.G.A. § 9-9-13, or modification under FAA section 11 and O.C.G.A. § 9-9-14. The Award and appeal were referenced in the firm's quarterly income statement.

Effort to Vacate Fails

A **January 30** Form 8-K reveals that the Court decided not to upset the Award: "In January 30, 2023, oral argument regarding Oppenheimer's motion to vacate and Claimant's motion to confirm was heard by a judge of the Superior Court who orally ruled to confirm the Robinson Award. Oppenheimer is considering appealing the Superior Court judge's ruling to the Georgia Court of Appeals.[] The Robinson Award was fully reserved for by Oppenheimer in the third quarter of 2022 including accrued interest through December 31, 2022."

*(ed: *We were only able to get the Motion to Vacate/Modify. No attachments were available on the FINRA Website. **An* Alert *h/t to* InvestmentNews*, which covered the case in a February 22 story. ***We will keep our eye on this one.)*

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SHORT BRIEFS: CONCISE NEWS YOU NEED TO KNOW

FINRA BOARD MEETS IN PERSON THIS WEEK. NO DISPUTE RESOLUTION ITEMS ON THE AGENDA. FINRA's Board of Governors is meeting in person **March 9 – 10**; there are no dispute resolution items on the published agenda. As usual, we will follow up after the meeting results are posted. The schedule for the rest of 2023 is: **May 17–18**; **July 12–13**; **September 13–14**; and **December 6–7**.)

(ed: We'll tweet any news as soon as we have it.)

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THE FAIR ACT IS BACK, WITH A NEW TITLE AND MORE STATUTES TO BE AMENDED. As reported in SAA 2023-09 (Mar. 2), the *Forced Arbitration Injustice Repeal (FAIR) Act of 2019,* which was approved by a mostly party-line vote in the House of Representatives in the last Congress but died in the Senate, appears to have been reintroduced **February 1** by Rep. **Rashida Tlaib** (D-MI) as H.R. 697 - the *Justice for All Act of 2023* (*JFA*), with a greatly expanded scope. The 55-page text – which incorporates the old *FAIR Act* – reveals that if enacted, the *JFA* would amend the Federal Arbitration Act and several other federal laws to eliminate mandatory predispute arbitration agreements and class action waivers for disputes involving "consumer, civil rights, employment, and antitrust." It definitely covers brokers and investment advisers; bars class action/collective action waivers in or out of a predispute arbitration agreement; extends to "digital technology" disputes; reserves for court determination any arbitrability or delegation issues "irrespective of whether the agreement purports to delegate such determinations to an arbitrator;" and clearly extends to sexual harassment claims. A long preamble states: "Recent court decisions, including *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), and *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), have interpreted the Federal Arbitration Act to broadly preempt rights and remedies established under substantive State and Federal law. As a result, these decisions have enabled business entities to avoid or nullify legal duties created by congressional enactment, resulting in millions of people in the United States being unable to vindicate their rights in State and Federal courts." The *JFA* would apply to claims made after the effective date.
*(ed: *There are just eight cosponsors – all Democrats. **The nonpartisan www.GovTrack.us Website gives the bill just a 3% chance of enactment. We agree. Unlike the* FAIR Act*, which passed in a Democratic-controlled chamber, we don't see the* JFA *passing the GOP-controlled House.)*
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SCOTUS GRANTS *CERTIORARI* IN FIFTH CIRCUIT DECISION HOLDING CFPB FUNDING METHOD UNCONSTITUTIONAL. The Supreme Court has granted *Certiorari* in *Community Financial Services Ass'n of America v. CFPB*, No. 21-50826 (5th Cir. Oct. 19, 2022), where a unanimous Fifth Circuit held that, although the Consumer Financial Protection Bureau ("CFPB") did not exceed its authority in promulgating the Payday Lending Rule, its funding method is unconstitutional. As reported in SAA 2022-40 (Oct. 27), the Court stated: "Congress's decision to abdicate its appropriations power under the Constitution, i.e., to cede its power of the purse to the Bureau, violates the Constitution's structural separation of powers. We thus reverse the judgment of the district court, render judgment in favor of the Plaintiffs, and vacate the Bureau's 2017 Payday Lending Rule." Our editorial comment in # 40 said: "We suspect a Petition for *en banc* review is next." As reported in SAA 2022-45 (Dec. 1), eschewing that route, the CFPB instead went right to the Supreme Court. Specifically, the Bureau on **November 14, 2022** filed a *Certiorari* Petition identifying this question: "Whether the court of appeals erred in holding that the statute providing funding to the Consumer Financial Protection Bureau (CFPB), 12 U.S.C. 5497, violates the Appropriations Clause,

U.S. Const. Art. I, § 9, Cl. 7, and in vacating a regulation promulgated at a time when the CFPB was receiving such funding."
*(ed: *The SCOTUS case is* Consumer Financial Protection Bureau v. Community Financial Services Association of America, Limited*, No. 22-448, and appears on page 1 of the February 27 Order List. It will be heard next Term. **We'll continue to follow this one!)*
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QUICK TAKES: CASES AND AWARDS WORTH READING

***Martinique Properties, LLC v. Certain Underwriters at Lloyd's of London*, No. 21-3561 (8th Cir. Mar. 1, 2023)**: "Martinique Properties argues that the appraisal award must be vacated because the appraisers 'used figures and measurements which are contrary to the actual conditions of the Property' and failed to 'consider certain buildings' and certain portions of a damaged roof when determining the appraisal award. These alleged errors, Martinique Properties argues, show that the appraisers were either 'guilty of misconduct,' 9 U.S.C. § 10(a)(3), or 'so imperfectly executed' their powers that 'a mutual, final, and definite award . . . was not made,' id. §10(a)(4)— two of the four grounds for vacating an award under the FAA. However, Martinique Properties has alleged only factual errors that challenge the merits of the appraisal award, and we 'have no authority to reconsider the merits of an arbitration award, even when the parties allege that the award rests on factual errors.'"

***Algo-Heyres v. Oxnard Manor LP*, No. B319601 (Calif. Ct. App. 6 (Feb. 28, 2023)**: "An arbitration agreement, like any contract, requires the mutual consent of the parties. Here, we consider whether respondent Cornelio Heyres, a resident at Oxnard Manor, a skilled nursing facility, had the capacity to consent to arbitrate and waive his right to a jury trial on claims for medical malpractice, elder abuse, and related torts. The answer is no. Probate Code sections 810 through 812 provide that a party lacks legal capacity to enter into a contract where deficits in the person's mental functioning significantly impair the ability to understand and appreciate the attendant consequences, risks, and benefits of the contract. Because respondent lacked legal capacity to enter into a contract, his arbitration agreement cannot be enforced." (*ed: An* Alert *h/t to Editorial Board member Peter R. Boutin, Esq., of Keesal, Young & Logan, for alerting us to this decision.*)

***Gostev v. Skillz Platform, Inc.*, No. A164407 (Calif. Ct. App. 1 (Feb. 28, 2023)**: "Defendant Skillz Platform, Inc. (Skillz) appeals from an order denying its petition to compel arbitration. Skillz contends the trial court erred, first, by not referring questions of arbitrability to arbitration and, second, by finding the arbitration agreement unconscionable…. Having catalogued the many ways the arbitration provision at issue is one-sided, unfair, and designed to discourage users from bringing claims against Skillz, we now conclude the trial court did not abuse its discretion in refusing to enforce it."

***Winter v. Craig Scott Capital*, FINRA ID No. 21-00721 (Oklahoma City, OK, Jan. 17, 2023)**: An Arbitrator dismisses Claimant customer's case, despite having granted him a Rule 12801 default judgment, because the Claimant failed to comply with the Arbitrator's

Order to produce additional information in this matter. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*

***Smith v. Provident Private Capital*, FINRA ID No. 20-01072 (Cleveland, OH, Jan. 19, 2023)**: A broker (acting in his capacity as a customer) alleges that Respondent broker (who happens to be his brother) misused funds that their deceased mother had entrusted to him to buy a home, instead of following her instruction to divide those funds equally between all three of her sons after her death,. Both Respondent broker and Respondent broker-dealer (which he is the principal owner of) are liable to Claimant and lose their Counterclaim alleging that Claimant misappropriated money that belonged to Respondents. *Provided courtesy of SAC's ARBchek facility (www.arbchek.com).*
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ARTICLES OF INTEREST: RECENT NEWS FROM THE ADR FRONT

Seru, Amit, *Tipping the Scales: Balancing Consumer Arbitration Cases*, Stanford Institute for Economic Policy Research (SIEPR) (Feb. 2023): "Arbitration is often assumed to be a fair and balanced — not to mention cheaper — alternative to civil lawsuits when it comes to adjudicating disputes between companies and either consumers or employees. But our detailed analysis shows that, at least when it comes to consumers and the securities industry, brokerage firms routinely hold a decisive and measurably unfair advantage over consumers.[] Using data from consumer arbitration cases in the securities industry over the past two decades, my coauthors Mark Egan, Gregor Matvos, and I found that securities firms hold information and selection advantages over consumers that result in more industry-friendly arbitration outcomes. And we've been able to measure the results of this pro-industry tilt in monetary terms (Egan, Matvos, and Seru, 2021)."

***CFPB Enters into $15 Million Settlement with Auto Lender*, JDSupra (Feb. 28, 2023)**: "On February 23, 2023, the Consumer Financial Protection Bureau (CFPB) announced that it entered into a consent order with an auto lender based in Georgia. The order resolves allegations that the lender engaged in unfair practices and predatory lending as to military families on auto title loans in violation of the Consumer Financial Protection Act (CFPA), 12 U.S.C. §§ 5531 and 5536, the Truth in Lending Act (TILA), 15 U.S.C. § 1601 et seq. and its implementing Regulation Z, 12 C.F.R. part 1026, and the Military Lending Act, 10 U.S.C. § 987 and its implementing regulation, 32 C.F.R. part 232. The order is the first against a nonbank lender in connection with title loans to military families."

***NFA Orders London, U.K. Firm GMG Brokers LTD and Two Employees to Pay Fines Totaling $350,000*, www.nfa.org (Mar. 1, 2023)**: "NFA has issued two Decisions against GMG Brokers LTD (GMG), an NFA Member introducing broker located in London, U.K., and its employees, Marco Saviozzi and Jason Terence Lyons, resolving charges brought against them by NFA's Business Conduct Committee (Committee or BCC). One Decision requires GMG to pay a $225,000 fine, with Saviozzi, a principal and associated person (AP) of GMG, sharing liability with the firm jointly and severally for

$50,000. The other Decision requires Lyons, an AP of GMG, to pay a $125,000 fine and to withdraw from NFA associate membership on or before May 1, 2023, and thereafter not apply for NFA membership, associate membership or principal status for 120 days."

***Ninth Circuit Decision in Live Nation and Ticketmaster's Favor Highlights Subtleties of Drafting Enforceable Arbitration Provisions,* Lexology (Mar. 2, 2023)**: "In *Oberstein v. Live Nation Ent. Inc*, No. 21-56200 (9th Cir. Feb. 13, 2023), the Ninth Circuit addressed the question of whether the arbitration and class action waiver clauses on Ticketmaster's and Live Nation's websites effectively prevented plaintiffs from bringing suit. Plaintiffs in the case sought to bring a class action lawsuit against Ticketmaster and Live Nation alleging as the basis for antitrust claims that the companies used their market power to charge above-market prices for concert tickets. Ticketmaster and Live Nation sought to compel the named plaintiffs to individual arbitration under the binding arbitration and class action waiver clauses in the terms of use on Ticketmaster's and Live Nation's websites."

***SEC Charges Silver Edge Financial and Equity Acquisition Company with Unregistered Broker-Dealer Activity Relating to Pre-IPO Funds*, www.sec.gov (Mar. 3, 2023)**: "The Securities and Exchange Commission today charged Silver Edge Financial LLC, Equity Acquisition Company Ltd. (EAC), the owners of both companies, and sales staff of Silver Edge Financial with unregistered broker-dealer activity relating to their sales of interests in shares of various pre-IPO companies."
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DID YOU KNOW?

FINRA DRS IS HIRING. We noticed recently that FINRA Dispute Resolution Services ("DRS") has several open positions posted on FINRA's job search portal, including Case Administrator spots. Use this link to search. There's a Dispute Resolution/Arbitration/Mediation box in the "Job Category" dropdown.
(ed: Wonder if the recent surge in DRS case filings is driving this?)
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Send any messages or inquiries to: George@SecArbAlert.com

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