TRANSCRIPT OF PANEL DISCUSSION

ARBITRATION IN 2017 -- WHERE IT IS HEADING

DANIEL P. MOYNIHAN U.S. COURTHOUSE

Ceremonial Courtroom

500 Pearl Street

New York, New York

Tuesday, March 7, 2017

6:00 p.m.

CHIEF JUDGE McMAHON: Good evening, everybody.

Welcome to the ceremonial courtroom; and, to those of you in the jury assembly room welcome down there on overflow.

I am Colleen McMahon. I am the chief judge of the Southern District of New York, and I am pleased to welcome you all to this really extraordinary program on arbitration and where it's going, which is being run jointly by our Court and the Second Circuit and the Labor and Employment Program at the ILR School at Cornell University.

We are very excited to have you all here. I am not going to say very much, except we're delighted and welcome. I assume you will all learn a lot, and I hope you do learn a lot. And if you like what you hear, I hope that you enjoy your life in arbitration; and if you have some doubts about what you hear, I would like to remind you about the alternative dispute resolution procedure where the judges are already paid for, the rule of law must be followed, and there is an appellate avenue in case you are dissatisfied with the result. You know, we're here. But arbitration seems to be the wave of the future.

I am going to turn the program over, but I should say thank you to a couple of people. First of all, Karen Milton.

Karen, are you still in the room? No, she's outside. Karen Milton from the Second Circuit, who's been extraordinarily helpful in putting this event together.

Ed Friedland, my district executive in the Southern

District of New York. Ed, are you in the room? Why is everyone who I'm thanking out of the room? There is Ed.

And Rebecca Price. Rebecca, are you in the room?

Yes. OK. Stand up, Rebecca.

(Applause)

CHIEF JUDGE McMAHON: The only person who got applause, our wonderful head of mediation. This is an extraordinary woman who runs an extraordinary program in this courthouse, and I know that a number of you here in the room are mediators with us. We are thrilled about that, and I hope that you will all continue to participate in that program. It's an extraordinary adjunct of the Court, and I note you will talk a little bit about mediation later on.

Having thanked the appropriate people, let me turn the podium over to Esta Bigler, who is the head of the Labor and Employment Relations Program at ILR Cornell here in New York City.

Esta.

MS. BIGLER: Thank you.

Thank you, Judge. It is an honor for me and the ILR School of Labor Employment Program to collaborate with the Southern District and with the Second Circuit. We have worked with Rebecca Price, whom you've just met, and the ADR program here in the past on educational programs, and now I will have the pleasure of working with Judge Berman, who I am proud to

say is a graduate of the ILR School.

I also want to say a special thank you to the Second Circuit and Karen Milton, the Circuit Executive, and her team for partnering with us on this program.

The ILR School, if you don't know, was founded in 1945 as a place where issues facing labor and management could be studied and problems solved with an emphasis on collective bargaining, which from my vantage point is a very unique form of dispute resolution.

Today at the ILR School we are the leading social science college, studying work, employment, labor policy, and practices. Our areas of expertise range from human resources to organizational behavior, labor relations and collective bargaining, economics, ADR, and, my favorite, law.

Our goal is always advancing the world of work in all of its various forms. The Labor and Employment Law Program convenes conferences and forums studying the relationship between social science research and labor and employment law in an effort to influence litigation, public policy, and social science.

Alternative dispute resolution has always been a cornerstone of ILR's work. Our Scheinman Institute On Conflict Resolution, named for an ILR alum and arbitrator Marty Scheinman, promotes, as does all of ILR, interdisciplinary research training, but at Scheinman they look exclusively at

dispute resolution, working with students, academics, neutrals and practitioners.

In the audience is the former Dean of the ILR School and now the faculty director of the Scheinman Institute, Professor Harry Katz, who came down from Ithaca for this event.

Harry.

(Applause)

MS. BIGLER: Labor arbitration has had a major impact on labor relations, and I think of labor arbitration as one of the purest forms of arbitration -- union attorneys and management attorneys picking arbitrators who understand the common law of the shop, sharing costs, interpreting the collective bargaining agreement, looking at the four corners of that CBA, where all the parties know each other and will see each other again.

As we know, this is not the case in nonunion employment and consumer arbitration. Today, we will explore the expansion of arbitration beyond the unionized or commercial between two large companies setting to the nonunion employment and consumer industries, including mandatory arbitration, which often precludes class or collective action.

One such set of cases to watch involves the National Labor Relations Act and clauses which require an employee as a condition of employment to not pursue class or collective claims in any form. The question is, does this violate the

right of employees to engage in protected concerted activity, and, therefore, is it an unfair labor practice? Also involved is whether employees are precluded from filing charges at the NLRB.

Murphy Oil and this line of cases will be heard by the Supreme Court next term. This case could have important implications for all nonunion employers and employees as well. Obviously it involves the relationship between the Federal Arbitration Act and the National Labor Relations Act.

Judge Berman, who I am pleased to be working with on this program, will talk a little bit about the FAA.

Judge Berman.

JUDGE BERMAN: Thank you.

(Applause)

JUDGE BERMAN: My first role tonight is to introduce this extraordinary panel that we have, which is I think the reason that you are all here.

We have had, as a direct result of having Ken Feinberg, Ted Wells, and Steve Younger as our panelists, over 525 registrants for this program. And I should say this first. Their résumés and their background are on the website of both the Second Circuit and the Southern District, and so I'm not going to go into where they went to school, etc., but I do want to say a little bit about each one.

Starting with Ken Feinberg, who is unique in the

American legal system, he is literally America's special master, America's mediator, America's arbitrator. I think it's really fair to say there is nobody like him in our system. So he's first off.

Ted Wells is second. He is on everybody's super lawyer list, best trial lawyer in the country list. Ted is cochair of Paul Weiss' litigation department.

And our third panelist is Steve Younger, who is a renowned and universally respected commercial litigator whose specialty is alternate dispute resolution. He's written widely on the subject. Steve's a partner at Patterson Belknap, and he's past president of the New York State Bar Association.

So, if you don't mind, before I go any further, if you would join me in welcoming that panel.

(Applause)

JUDGE BERMAN: I also have an agenda for this evening, which I have taken sufficient ribbing about from the panelists. I really prepared it for myself, so I would be up to speed with them or try to be up to speed with them. Then I made the mistake of distributing it to everybody on the panel, and I haven't heard the last word about that yet, but that agenda will endeavor to cover these topics:

First, we're going to hear from these terrific ADR, alternate dispute resolution, lawyers about some interesting cases that they have been involved in.

Then we are going to just spend a few minutes contrasting mediation with arbitration.

Then, if there's time, we will talk about some key issues in the field of arbitration, one of which is manifest disregard for the law. Another is how much deference do the courts owe to arbitrators and their decisions.

We will then talk about the topic that Esta is concerned with, and everybody ought to be at some level, and that is the mandatory arbitration clauses which have become ubiquitous in the United States in every form of agreement, not just in the commercial arrangement between two equal companies or equal-sized companies; also, the inclusion in those clauses of excluding class actions, shortening statutes of limitations, and in some instances limiting the amount of damages that can be awarded.

Then, finally, as I say, if time permits, we'll talk a little bit about the concept of evident partiality as it applies in arbitration.

Just let me spend a minute on some context that I think may be helpful as the discussion tonight progresses.

The point of reference that I want to talk about is the Federal Arbitration Act of 1925. It is a statute that many of you may not know too much about. It is referred to often as a modest statute, not very earth shattering when it was enacted in 1925. Its simple purpose was to give parties a court

mechanism and a court order so that they could enforce awards that they had received in arbitration.

That was an era when there was arbitration. Typically it was commercial arbitration between merchants. There was great antipathy in those days, some of it from the judiciary, to arbitration, so those awards that issued in arbitration cases the parties had a very difficult time enforcing them. So the FAA was enacted for that very and some would say limited purpose.

Since the 1980s, and particularly in the last ten years, through decisions of the United States Supreme Court, some would say that the FAA has been turned on its head, and some would also argue that the jurisprudence of the Supreme Court construing the FAA has been activist, which I think is not an unfair characterization.

What is typically meant by those criticisms, and lately there are more and more criticisms, the criticisms relate to the fact that the nowhere in the statute, in the language of the statute, or in the legislative history were there any support really for some of the decisions that have come down from the Supreme Court construing the FAA.

In particular, those are decisions that everybody recently points to, authored almost entirely by the late Justice Scalia in a series of decisions starting in 2010 where the votes were very close, 5-4 in one case, 5-3 in a case that

Justice Sotomayor recused herself because she had been involved in the case here in the Second Circuit.

The upshot of these decisions is rather dramatic. I think she was too polite to say it, but Colleen and I were talking before, this afternoon. One of the reasons that the courts have less litigation and less significant litigation -- this is an anecdotal comment of judges -- is all the cases go to arbitration, and they go to arbitration because the contracts have mandatory arbitration clauses, and so the disputes that are subject to those clauses are not permitted to be resolved in any other forum.

We will hear more about that. Esta is quite correct; the cases that have just been put over for the fall term that relate to labor arbitration are very significant. There are three of them. Two went one way, one went the other way. So they represent a circuit split.

It's thought that the reason the cases were put over to the fall term is in anticipation of there being a ninth justice on the Supreme Court. Because, as you know, these cases are contentious, and if there were a 4-4 split in the Supreme Court, then the decisions in the circuits below would prevail, and in these instances, those are conflicting decisions. The speculation is that, the hope is anyway that the Supreme Court will be at full capacity in the fall and able to give a clear resolution of these very significant cases.

That's it for me for now. We are going to move to the first topic that we talked about, which is some experiences that are fabulous that panelists have had in the field of arbitration.

Our first speaker is Ken Feinberg.

(Applause)

MR. FEINBERG: First of all, get the Berman memo, the Berman memo prepared over the last three months for this panel. It's worth its weight in gold if you are interested in the subject matter.

JUDGE BERMAN: You have to get the latest draft.

MR. FEINBERG: I can't tell you how to get it, but here it is. It's got every case going back to 17th century England, and it's valuable. That's first. If you know Berman, get a copy.

I'm here for three reasons:

The topic is very important today;

A chance for me personally to see so many old friends from Eastern and Southern Districts and other districts that are here in the audience that I haven't seen in a while, and it's good to say hello to everybody out there.

And the main reason is to thank Ms. Bigler and especially Judge Berman. You try saying "no" to Judge Berman about doing this.

You know what he does just before we start? Here's

what he does: "Ken, will you be on a panel with Ted Wells and Steve Younger?" Wow.

Then he calls Wells: "Will you be on a panel with Feinberg and Younger?"

Then he calls Younger: "Will you be on a panel with Feinberg and Wells?"

That's the way he achieves his objective. But I'm really glad to be here, and the topic is important.

He asked me to start off by explaining through example an arbitration that points out the benefits and drawbacks of arbitration. And I will give one example.

Arbitration is not my major priority. I do about -- I'm asked to do about six arbitrations a year. Four on average settle before the arbitration. Then there are two that actually result in arbitration, and those two, to my experience, are three-judge panels. I haven't done an arbitration where I'm the sole arbitrator. Usually I'm a party-appointed or the neutral arbitrator.

So I see the pros and cons of arbitration. The cons of arbitration, the negatives I see quite often. They take too long. They are too complex. You have lawyers involved in arbitration who are litigators and view the arbitration venue as another form of litigation. And if the arbitrators aren't prepared to make the arbitration more efficient, more cost effective, then you lose a lot of the benefits of arbitration,

because in theory I think arbitration is a wonderful alternative. I see more and more a decision on the part of the arbitrating parties to mediate first in the hope that they can quickly resolve the case without going to arbitration, because of the cost and the inefficiency of arbitration. It doesn't have to be that way, and I'm a big fan of arbitration, but those are the drawbacks.

Now, the best example of an arbitration that I was engaged in that showed the benefits of arbitration was the arbitration established by federal law to determine the fair market value of the Zapruder Kennedy assassination film, not the commercial value of the film. You can go buy a color DVD of the Zapruder film today for $29.95 or $9.95, blown up with all the color pictures, stock photos, the whole thing. No, no. Congress wanted the film itself, the black-and-white, eight-millimeter original film that Abe Zapruder accidentally took that day of the assassination.

They decided in the 1990s we better have that film before it's destroyed by time. We better get that film and put it in the National Archives. So Congress passed a law, and the law said: Zapruder family, you choose an arbitrator. Federal Government, Executive Branch, Department of Justice, you choose an arbitrator. And the two arbitrators will choose a third arbitrator, hold a hearing, and decide what eminent domain, what is the value of the film if it is going to be placed in

the National Archives; never again to be shown, but there it is in a hermetically sealed case, protected for all time.

The Zapruder family asked me to do it. The government appointed Walter Dellinger, the Solicitor General, to act as their arbitrator. And the third arbitrator we chose, some of you knew was the former chief judge of the Third Circuit in Philadelphia, Arlin Adams, who passed away about a year ago.

The three of us held an arbitration hearing, and we told the parties maximum two days each. Bring in your testimony. What's the value of that historical artifact? We'll give you two days if you need it, each side, no more. Call witnesses, but we are not going beyond four days. The rules of evidence do not apply. Present your case.

The government took I think a day and a quarter, and the Zapruder family took a day and a half, and we were done basically in three days and we rendered a decision.

Now, what was so interesting about that arbitration, and I learned a lot from that arbitration, the master of that arbitration was the lawyer for the Zapruder family, Bob Bennett, who used to be at the time at Skadden Arps. He has since left that firm.

Bennett knew exactly the two rules of arbitration that he wanted to follow in that particular arbitration: One, keep it simple. Keep it simple. Don't make it more complex than it has to be. And, second, don't overlawyer the arbitration.

It's a rather simple question for resolution. What is the film worth? There's no precedent for this, not really. What is a film of historical value of that horrible day in Dallas, what is it worth?

So, the government started, and they put on witnesses who were sort of haphazard. The government basically said, "Look, that film is not a Da Vinci painting. It's not some codex or some invention, the first telephone. It's a film. It's not something that you can hang on your wall in your house. It's probably worth about as much as a valuable Babe Ruth baseball or a Lou Gehrig baseball uniform, and maybe we'll compare it to Mark McGwire's bat where he hit his 500th home run, and maybe we will agree at the end of the day there's no real precedent. So we'll just say $2 million. Done. We rest."

Bennett, gets up and he says: "No, no. We've got witnesses."

And he called witnesses, very quick, from Sotheby's and Christie's:

"Gentleman, if you put this film on the open market, what would it be worth?

"Priceless. Priceless.

"Well, who would buy it?

"Who would buy it? Maybe the JFK Library would buy it, or the Lyndon Johnson Presidential Library. Maybe the

Sultan of Bahrain would buy it, but we're pretty confident if we were involved in an auction over this film, we could get $30 million or $40 million for this film.

"We rest."

That's it. Don't overlawyer it. That's it.

Well, we go into the back room, the three arbitrators:

"Mr. Feinberg," Arlin Adams said to me, "you represent the Zapruder family. You are an arbitrator. What do you say? Let's start the discussion.

"I heard them say $32 million. I mean, I'm looking at the evidence in the case. It's uncontroverted really. The government didn't challenge Sotheby's or cross-examine them. That's what they say. It's 32 million. That's pretty simple. 32 million.

"Mr. Dellinger, for the government, what do you say?

"Look. Come on. 32 million? A million. That's about right."

Well, there it is. 32 million and a million. By a vote of two to one the panel decided about -- you ready? $16 million.

That was it. Everybody went home. You can go down to the National Archives, and there's the film, and the Zapruders got their $16 million. The lesson you learn from this it seems to me is very -- two important lessons. The reason there's such criticism today about arbitration, and I criticize

arbitration, it takes too long. This one didn't. Three days of testimony, and we rendered a decision. And the decision was accepted. Everybody knew they had to get the film, and that was the law. They had passed a federal law specifically for this. It didn't take that long.

What Bennett did is he focused not on scattergun, let's bring in all sorts of different witness, two witnesses from competing auction houses agreeing on the value.

It just proved to be a perfect example, one of my favorites, of an arbitration that sort of corroborated the vision of arbitration as a prompt, creative, efficient, cost effective alternative to litigation. Bennett took off his litigation hat and put on his arbitration hat and was very effective in doing it.

(Applause)

JUDGE BERMAN: Ted Wells, can you top that?

MR. WELLS: I never try to top anything Ken does, because he is often my mediator, and I want to stay in his good graces.

I want to talk about two horror stories in terms of arbitration.

One case involves a litigation where there was supposed to be an ironclad arbitration clause involving a multinational insurance company that I represented against some of its employees. I was retained to represent that insurance

company in 2002. The case is still ongoing.

The second case I want to talk about involves a situation where I represented a multinational bank in an arbitration involving billions of dollars. We won the arbitration. We celebrated. We had champagne, big dinner. Got the arbitration award confirmed.

The other side took it to the Second Circuit, and before the Second Circuit could ever rule, the losing side filed a new arbitration claim with the same damn claims, which created all sorts of res judicata issues.

Let me talk about the insurance company case first. The insurance company -- and I am not going to use the names because we have so many people here, my client might get mad if I used their name -- but in 1999, a small plaintiffs' firm based in New York came to the insurance company and said, "We have 350 of your employees who have claims against the insurance company relating to sex discrimination, race discrimination, age discrimination, national origin discrimination."

The cases were not suited in any way for a class action, because they were all different and all over the place. But this plaintiffs' firm had a person on the inside who had assembled all of these workers who were upset, and they all came to the same firm and they all signed individual retainer agreements that plaintiff's firm would represent them, and they

would go to the insurance company and try to work out a settlement for each one of them.

So the insurance company, faced with 350 individual cases, said, "Well, we can't go to court. We'll be litigating this stuff in court for 15 years."

So they put together what they thought was a very common sense alternative dispute resolution system. They put a whole process together whereby each plaintiff would go to an ADR process, and if that didn't work, they would then go to a mediation process with the people from JAMS, and if that didn't work they would go to binding arbitration.

There was an ADR agreement signed by each of the 350 plaintiffs, and the agreement said that you would participate in this process and you would forgo any right to go to the state or federal court with respect to your claims, but you would have the potential to get uncapped damages. Any claim you could make in state or federal court you can make in that ADR process.

In fact, the insurance company said you don't need to pay your lawyer the one-third that you promised to pay. The insurance company said, as part of the incentive, we're going to pay your law firm.

That was all in the agreement that everybody signed. There was a separate agreement that caused all the problems whereby the insurance company gave $5 million up front to the

plaintiffs' firm as attorney's fees. They estimated that is what they would earn over time, but they needed some startup money to go into this process.

So they go into the process, 350 people. They have ADRs, some binding arbitration, 1999 to 2002. They settle all 350 claims.

Sounds like a pretty good deal. Arbitration worked, the ADR process worked, my client was happy, and I haven't even been retained yet.

Right after the arbitration closed, about five of the plaintiffs filed a lawsuit in New Jersey state court. They alleged that there had been a conspiracy between the insurance company and the plaintiffs' law firm. They said that the plaintiffs had no idea that $5 million was paid up front to the plaintiffs' law firm. They said that $5 million constituted a bribe. It wasn't a separate agreement. The plaintiffs' law firm had represented to the insurance company that everybody knew about it, but that was a question of fact.

I was retained in 2002 at that time to represent the insurance company in this alleged case involving a conspiracy. It was trying to blow up the whole ADR process that had taken place during the last four years.

There was arbitration clause that said any disputes involving the ADR process should go to arbitration. I went in the state court, I waived the clause around, and I told the

trial judge everything first has to be sealed, everything was supposed to be confidential, and everything has to be sent to arbitration. The state court judge agreed with me. He sealed everything. He said everything would go to arbitration.

They appealed to the New Jersey Appellate Division, and when I argued that case by now like three four years had passed, because these cases are coming in slowly. When I stood up to argue it, I knew I was in trouble from moment one, because the three judges, they read that broadly worded arbitration clause. They didn't give a doggone. They were concerned about attorney misconduct.

They thought that the insurance company had possibly sold the plaintiffs down the river by paying off that class action law firm, and that's what they wanted to focus on. You could see it from moment one. They didn't care about the federal law saying arbitration clauses should be widely construed. They were concerned about the possibility of attorney misconduct. They didn't like the notion that that type of claim would be sealed and litigated in private pursuant to the arbitration clause.

What they did, they didn't do what I call the traditional textual analysis and say it should be construed in favor of arbitration. They said, no, the issue of arbitrability is up to the courts, and in this case that involves a potential fraud, we think those plaintiffs never

intended to give up their rights to go to court based a claim that their own lawyers were part of a conspiracy to get them to give up their rights to go to court.

That opinion was issued in 2006. I then litigated it for another 11 years, because there's still one case left out of the 350 cases. But the lesson in that case is that judges will be concerned about the public policy implications of letting private parties enter into contracts whereby they give up their rights to their day in court.

In that case the judges really bent over backwards in my opinion because, again, they were concerned about the issue of attorney misconduct. Now, I ultimately brought Ken Feinberg in to help me try to mediate the cases, and Ken was able -- like I said, there were 350 individual cases. They almost sent us to a mass tort judge in Bergen County, New Jersey. They bring Ken in, and Ken was able to settle about half the cases.

But I would like to ask Ken a question, and Steve also. Do you think that as a matter of public policy that one could enter into an arbitration clause that says even with respect to claims of fraud against the attorneys who persuaded the clients to enter into the arbitration agreement, that still goes to the arbitrator, not to the judge? Do you have a view on that? I'm curious.

MR. FEINBERG: I don't think that you should be able to circumvent rules of fraud or whatever through some sort of

agreement with the client or with your lawyer. I think that that raises a whole other issue of public policy.

MR. WELLS: Steve?

MR. YOUNGER: It's in essence fraudulent inducement into the arbitration clause.

MR. WELLS: Right.

But there is a Supreme Court case that really says that if the parties want to enter into a contract that says even arbitrability goes to the arbitrator, then you can do that. That case did not involve one of fraud, but at least with respect to that threshold question of arbitrability, there is a Supreme Court case that says if you do it, and you do it in an express way, that is permissible. We haven't seen the case yet where it goes right to the issue of fraud and whether -- I mean, the point I'm trying to get to is whether there are certain public policy issues that are so serious that the courts will say under the FAA that just goes one step too far. That's one of the questions that is out there.

Let me talk briefly about the second case. The second case involved a financial institution that got an infusion from a foreign investor of $8 billion right before the financial crisis hit in 2008. The money came in right at the end of 2007, $8 billion. In 2008, that fall, we had the financial crisis. All the financial institutions in New York are in trouble, and the international investor, that $8 billion

investment is going down the tubes.

They sue. There is an arbitration clause that any disputes about the investment money would go to arbitration, international arbitration. They filed a lawsuit. They want their $8 billion back.

The financial services firm hires my firm, Paul Weiss. We have a 16-day arbitration. Before that it must be 18 months of discovery. We try the case and we win the case with zero damages on an $8 billion claim. Do you know how scary it is to go to verdict with $8 billion in play? I mean the notion of losing $8 billion.

We win the doggone case. Go into court to get it confirmed here in the Southern District. It is confirmed, and while the thing is on appeal they file, as I said in my opening comments, another arbitration claim. They just changed a couple of words and they filed it.

Now, none of us really were expert at how principles of res judicata apply in international arbitrations. What we found is nobody is an expert. There ain't much law on the subject.

We couldn't believe that they could do this, and so we go into the Southern District, and we file a motion for an injunction under the All Writs Act. We say we want an injunction that they can't file this new arbitration, and our core argument is they are attacking the confirmation order of

the federal district judge who had confirmed the arbitration.

The Southern District judge says: Good try, but the issues are res judicata. Go to the arbitrators. You have to go fight that in that arena.

We go to the Second Circuit. We say, You've got to protect the integrity of the confirmation order.

They say, No, we don't. Take that issue to arbitration.

I can't tell you about how the story ends because they go to arbitration and everything under the arbitration agreement is confidential. But in terms of the principles, if you take anything away from this conference today, I will tell you to the extent any of you are involved in international arbitrations, when your corporate partners are drafting those agreements in the first place and saying that there will be an arbitration and it's going to be governed by international rules, you need to put very strong language, specific language that deals with the issues of res judicata and what law is going to apply. Because I will tell you there's not much law at all as to how you apply res judicata in the international forum.

You better put New York law in there, saying substantive and procedural New York laws shall apply. That's easier said than done because we are the New York bank, but I will tell you when you are dealing with somebody who is in

China who is putting up $8 billion or who is in Russia and putting up $8 billion, they don't want to hear about New York law. They think there's something wrong with that, and they are going to get jammed. They may want this amorphous international law.

I will tell you, in a case that we won, within 90 days they had refiled and we had to go again. It is frightening.

Although we see this increase in arbitrations, especially because of the increase in international business transactions, where the foreign companies are actually afraid to go to court in the States because they think they will get hometowned in some way, there's so much uncertainty in terms of how these types of international arbitration agreements are going to play out that you've to be very concerned about what you are getting your client into and what you're getting into.

Thank you.

(Applause)

MR. YOUNGER: There is an old W.C. Fields line, don't follow children or an animal act. I think it's don't follow Ken Feinberg and Ken Wells. I just have to reinvent this one.

There are a lot of horror stories about arbitration. You heard a couple from Ted. I think the good stories don't get told as much.

I'm principally an advocate. I sometimes sit as an arbitrator. I'm going to tell one good story, but I think

there are a lot of those that happen every day of the week that don't get told. Then I'll tell my own horror story because there are horror stories about arbitration.

I was involved in an M&A arbitration years ago. Very often in M&A deals there are these liabilities nobody knew about when they closed the deal, and then you buy the company and you discover, Oh, they were doing that? They didn't tell me about that in due diligence. This was one of those sorts of cases.

There were two retired judges, one from our Court of Appeals here, one from Delaware, who called me an afternoon and said, "How would you like to be the chair?"

I kind of looked around and said, "Gee, how did you find me?"

But we quickly got to work. This case lasted a little under a year. I think in my normal world I can often get a hearing in less than a year, but typically in an arbitration it's a year to 18 months. I don't know many cases that are going to trial in our court system in a year to 18 months.

This is pretty typical of a major M&A deal that goes like this. Why is this? We had limited document discovery. We didn't chase down every last e-mail, etc., but the parties seemed to get what they wanted. We had a few rulings on discovery, nothing out of the ordinary. But we didn't have depositions. So it was trial in the old school. We used to

stand up in New York Supreme in front of a jury without having tried the whole thing in the pretrial order that you do in the Southern District today.

We had no dispositive motions. I know the federal judges here love their summary judgment motions. That is a joke.

We get right to the hearing. You don't deal with all of these motions. That's a downside, because you may have a case that you can get rid of on a motion that you are probably not going to get rid of without going to a hearing. Then within a year we had a decision. It wasn't a split the baby. We actually found there was no claim at all.

But the parties got justice. They didn't appeal. They took it home, and they lived with the result. I think that's what I see more often than not.

On the other hand, we have what I call our rogue arbitrations. And I am in -- actually, it probably sounds short compared to yours, Ted. This one has been going on for eight years. It is another M&A deal. My client was buying a subsidiary, so they thought, of an E-commerce business. Lo and behold, after they shook hands on the deal, a week later the other side said, "Hey, what deal?" They decided they didn't want to go forward with this thing at all.

So we picked a very good arbitrator. Actually, the arbitrator was suggested to us by the other side. I happen to

know the arbitrator, one of these world-class arbitrators.

About a year later, we split liability and damages. I don't think I'll ever do it again when you hear the end of this story.

We won on liability. It sounds good, right? A whole long hearing, put on our witnesses.

So now we go to schedule the damages hearing. The other side did what I think has become fairly typical when you lose an arbitration. They hired some forensic private investigative service to determine any connections that this arbitrator had with anybody whatsoever.

Lo and behold, my co-party's company had engaged this arbitrator, not him, but a completely different office of a thousand-lawyer firm for $25,000, $25,000 engagement the arbitrator never knew about. So, the next thing we know, there are motions to disqualify. He rules that there's no basis; the AAA rules there's no basis.

So then they go into court. By the way, they have actually brought criminal charges against this arbitrator, believe it or not -- in France, where it's not so hard to bring criminal charges.

They filed a bankruptcy in Guadaloupe. They've gotten three injunctions against this arbitration proceeding, all because of the conflict that the arbitrator knew nothing about it.

The case went all the way up to the French Supreme Court. They held the appearance of impropriety was such that this arbitration award is unenforceable.

We have been through three arbitrators, and eight years later we have yet to get a hearing on damages, and my client asks me when it will be. I can't tell him when.

What do I take from this? I think between two sophisticated parties who voluntarily want to be in arbitration, it can be quite good. It can be much better than an experience in the court system. It's a tradeoff. You've given up the right of appeal. You've given up the right of full discovery under the federal rules, but you can do it quickly under a good clause and with cooperative parties.

But with a party who doesn't want to be there or who wants to string it out, there are lots of tricks you can play to try to make it more difficult.

So, to me, the tradeoffs are the possibility of speed, although you can throw off speed, the possibility of getting an experienced neutral, someone who is a retired judge, as opposed to the members of the jury. The members of the jury tonight are more experienced than a lot of our juries, but you get a more experienced decision, someone who truly reads the agreement who may have expertise in the field.

A third thing, you know, Ted couldn't talk about his arbitration. Unless it goes to court, you get confidentiality,

which for a lot of businesses matters a lot.

What is that traded off against? Less discovery. So if you have a case that really you have to make out of the mouths and the files of the other side, it's harder to do that. If you have an aberrant result, less chance to get it upset, very narrow grounds to upset an award.

And, as one of my colleagues says, you get a game without any rules. Now, we have rules, but you don't have the same kind of Federal Rules of Evidence where you can kind of look at decisions and predict how an arbitrator is going to rule on procedural issues. So to me it means, if you are to do it, and many our clients want to, you want to make sure you have a very good clause, you have a clause that promotes speed, promotes economic justice, and you get a really good neutral, because if you don't have either of those you're more likely to have something that can go off the rails.

(Applause)

MS. BIGLER: Well, as Judge Berman pointed out, we have America's mediator here. So we certainly can't go forward without taking a look at mediation.

How is it different from arbitration?

What happens when the arbitrator perhaps starts with mediation as a first step, and where should that process be?

So I would like to ask Ken to come up and start the conversation.

MR. FEINBERG: We are now on page 2 of the Berman memo.

JUDGE BERMAN: Actually we are on page 5.

MR. FEINBERG: By the way, Ted mentioned international arbitration. I've done two. I don't know how many people have done international arbitration. Long hours: 10 to 3. Everybody wants to go to the theater. No one wants to start early. 10 to 3, it is not a bad gig. They go on for weeks, because you only do five hours a day. That includes lunch.

Now, mediation. My favorite. Mediation is not arbitration. It is informal. It is nonbinding. My favorite mediation is voluntary, because if somebody calls me and says we are in a dispute and we want you to help us settle, 85 percent of the way home if they called you and they want your help.

I'm not against mandatory mediation because mandatory mediation is an educational tool to explain to disputants that mediation is a valuable alternative to litigation that otherwise they would not be exposed to. So I can understand mandatory mediation, but don't ask me to do it, because it's a struggle. Whereas if the parties have already called you and it's informal and it's nonbinding, mediation is a favorite tool to resolve almost any type of dispute. I'll mediate just about any -- not divorce, those people are crazy. I won't get into a divorce mediation, but almost anything else I would be willing

to mediate the case, especially, as Steve points out, involving sophisticated parties, sophisticated parties, Fortune 500 companies that want this case resolved.

Make sure as the mediator that the parties are present, not the lawyers. The lawyers can be there. You want at a sophisticated mediation involving a lot of dollars the in-house people with authority to resolve the case. That's critical, because if it's a voluntary mediation and somebody in that company wants this case settled, make sure those people are there to help listen to the risks.

Also make sure when you choose your mediator -- there are two types of mediators generally in these types of sophisticated complex mediations. Do you want a relatively, what we call a passive mediator: "What do you think? What do you think? What do you think? Have you thought about this? Have you thought about that?"

Or, do you want a more active mediator: "What the hell are you talking about?"

So you have to choose. Believe me, different cases require different types of mediators, and the parties are pretty sophisticated in deciding who they want to call to be the mediator and what they really want to accomplish in that mediation.

Before I sit down and let others talk about mediation, there's another variation on this, of course, that has occupied

most of my attention for the last 15 years. That's not arbitration or specifically mediation, but it is these claims programs that we set up as an alternative to litigation -- the 9/11 Victim Compensation Fund, the BP Oil Spill Fund, the GM Ignition Switch Program, the Volkswagen recall case, the Boston Marathon One Fund Boston, the Orlando nightclub shootings six months ago, eight months ago, a year ago really, a year ago, where 49 people died, Sandy Hook Elementary School in Connecticut where all those first graders died.

Those aren't arbitration or mediation. In those programs policymakers decide: Let's just set up a worker's comp type compensation program. We don't want mediation or arbitration. We want a designed protocol that governs, so people can voluntarily file a claim, know what they're going to receive, take the money, and sign a release if it's an alternative to litigation.

Those programs are exceedingly rare, exceedingly rare, at least as alternatives to the tort system, exceedingly rare. I don't know of many like that.

The nonprofit foundation programs, the charitable contribution programs, Boston Marathon, Sandy Hook, Orlando, that's just private money. You can take that money -- you don't even sign a release, it is a gift -- turn around and hire a lawyer if you want.

So those two alternatives, I appreciate the

opportunity to at least put them on the radar screen for you.

There's arbitration, there's voluntary or mandated mediation, and then there's this unique sort of hybrid world of claims processing where you can voluntarily come in and take an award and either sign a release -- 9/11, BP, GM, Volkswagen, Agent Orange with Judge Weinstein -- or it's a gift because it's private money donated by the American people.

(Applause)

MS. BIGLER: Steve, could talk about the advocate's view of mediation?

MR. YOUNGER: First, mediation is extremely popular.

Just by a show of hands how many people in this room hate mediation? One half a hand.

You can hear your bad stories about arbitration, but you don't hear them about mediation. Why? Our clients love it, mostly because they are in the front seat.

So when a client comes to Ted or me and they say, "What's that jury going to do? How are they going to come out?" It's like, "Well, it could be this and it could be that."

They're used to running businesses, running businesses where they forecast their sales, and they're not used to saying, "What are people in a jury room going to say about how I run my business for the next ten years?"

But as an advocate it takes a much different kind of

advocacy. For us it was an advocacy that wasn't taught when we were in law school. It's a much more objective style in my book. There are places in the country that are no longer doing opening statements in mediation because lawyers would come in and kick each other in the shins, like they do in the courtroom, and it wouldn't work.

So, for me, when I talk to the client on the other side -- which is a rare opportunity, I mean, how often do you get to talk to the client on the other side? -- one of my favorite techniques is to say in a low voice, "I'm sure your lawyer told you A, B, or C," something I know the lawyer didn't tell them. You get a chance to really talk into that -- it's all about risk at the end of the day and help adjust their risk assessment.

You also have to be willing to make some concessions. I think in a mediation if you are willing to open up and say, "Yeah, I acknowledge this is a weakness for me," but then turn it around and say, "Here are my strengths and here is how I am going to turn that into a strength," you really earn a lot of credibility.

There's this talk about spin the mediator. I'm sure Ken gets spun all the time. I think it's real. Basically my strategy as an advocate is to do what I call the rope-a-dope. It's like, "Ken, you don't have a problem with me. It's the other guys. Here are the tools you are going to need to work

on the other side. And when it gets time to put that real number on the table, I'm not going to be the problem. We have to figure out how we work on the other side."

So I like to give the mediator lots of tools, particularly I think the most important part of mediation is what I call impasse breaking. You need to come up with creative options, different ways that -- nonmonetary solutions -- different ways that you can break the impasse.

Just a last point. I think picking the mediator is extremely important. Unlike an arbitration, where the arbitrator can decide your case, in mediation I want the other side to like the mediator. If they have confidence in the mediator when it comes to Ken going into them and saying, "You really have to settle this case," it's useful to me.

I describe mediators a little bit differently. I say there's evaluative and what we call the facilitative. Personally, I think most cases don't resolve because parties on the other side have a different risk assessment. If you are just going back and forth because you can't talk to each over, that doesn't do a lot for me.

I think most people want some form of evaluation, but not right up front. You don't want someone to say right up front, "You are going to lose." You know, "What have I been doing for the last couple of years in the court system?" You want a risk analysis, a decision tree, something to test, an

agent of reality that will test assumptions, because if my assumptions aren't tested and the other person's assumptions aren't tested, we are not going to move, because that's what really drives a settlement.

(Applause)

MS. BIGLER: Ted.

MR. WELLS: In terms of mediation, in the cases that I usually try at this stage of my life, which are what I'll call bend-a-company cases that used to involve at one stage, millions of dollars, then they became hundreds of millions of dollars, and now I haven't had a case that didn't involve billions of dollars in quite a while. That's how the stakes have changed over the years, because when those of you who are my age were coming up nobody had ever heard of a billion-dollar case. We just didn't hear about them. It didn't exist.

Now those types of cases are fairly common. I mean, you look at the big securities class actions, you look at the pharmaceutical work, you look at the mass torts, these are cases where billions of dollars are at stake.

As Steve said, your client is asking you continuously to handicap the results. As any of you know who are trial lawyers, that's a fool's errand, trying to predict what's going to happen in terms of a billion-dollar case when you don't know what the jury is going to look like.

I can tell you I can pick a jury on a Monday in the

courthouse and get one result. I can pick a different jury on a Wednesday and get another result. One day I look brilliant; the other day I look stupid. But really it's the luck of the draw on who was in the jury pool that particular day. So, when people start to ask me to handicap things, you do your best, but it's difficult.

What we do in mediation very often is try to pick a mediator who your client -- your client in these billion-dollar cases is very often comprised of the general counsel, the executive committee, and usually the board of a public company. These billion-dollar settlements in cases go up to the board level. You've got to pick somebody who is willing to evaluate the case and put his or her name behind a certain number or certain risk analysis.

So Ken as the dean of the mediators is always on the short list. Because if Ken Feinberg says your exposure is X and the spread is 2 to 4 billion dollars, that means something in the board room.

If I get my law school classmate Judge Faith Hochberg, who is now a mediator, that means something, because before she became a judge, she was the head the Securities Fraud Unit in the U.S. Attorney's Office. So, if I am in a securities case, I can say, "Look, this is what Faith thinks."

The same thing with Layn Phillips, a former federal judge. So, from my perspective, in most of the big cases I'm

involved in, I'm trying to select a mediator whose representation means something in the board room, because everybody, when you're writing these types of checks, knows that they are going to be questioned. If you are the GC, you are going to be questioned by the board. If you're the board, if you write a $2 billion settlement check, you may face derivative litigation. So then you want to be in a position in terms of the business judgment rule and protecting yourself in that follow-on litigation: "Well, I hired Ken Feinberg. He's the best mediator in the world, and this is what Ken Feinberg told us, and we settled within the range that Ken Feinberg selected."

It is a world where you're constantly trying to make sure that your decisions are based on some type of objective criteria, and that's why you try to select mediators, and very often the best mediators -- Ken is not a former federal judge, but that's why people hire so many federal judges, because you go in and you say I hired Judge X and Judge X had tried a hundred jury trials and this is what Judge X thinks the jury is going to do. That means something to the board.

Arbitration is a whole different animal in terms of selecting arbitrators, but in big-case litigation in terms of selecting mediators, it's a different selection process, and the person you are trying to select is somebody who has reputational credibility.

Thank you.

(Applause)

JUDGE BERMAN: I just want to mention, and I hope you take advantage of this, at approximately 7:40 this evening, we will be taking questions from all of you. I would like you to start thinking about if you have, because you will never have this opportunity again to have these three people with so much information and knowledge at your disposal.

You might ask yourselves, How does he know 7:40 is going to be the time for the question and answer?

The answer is that outline that they were giving me so much grief about has worked perfectly, and we are on schedule, give or take five minutes I would say. So think of any questions you might want to ask.

We are going to move now to substantive questions relating to the field of arbitration.

Ted Wells is first, and he's going to tell us about the concept of manifest disregard of the law, what it is, and how it fits into the field of arbitration.

MR. WELLS: This is the ugly part of the presentation, because I have to play, at the request of Judge Berman, law professor, because manifest disregard of the law is a rather technical legal concept. It is a concept that involves whether or not an arbitrator in reaching a decision has demonstrated what is termed a manifest disregard of the law.

Under the case law, if a reviewing judge who is asked to confirm an arbitration ruling decides that the arbitrator has demonstrated such a manifest disregard of the law, then the judge may choose to vacate the award. I mean, that's the concept. It is not the same as legal error. Arbitrators, in terms of legal error, their decisions are not reviewed in the way a district court judge's determination of an evidentiary ruling are in the Court of Appeals.

If a district judge rules parol evidence can be admitted, you take an appeal to the Second Circuit. The Second Circuit decides whether parol evidence should have been admitted. That's traditional federal court legal analysis.

In the world of arbitration, the arbitrator and the ruling are not subject to traditional legal error analysis. The only time the arbitrator is subject to that type of review is if the arbitrator has gone so far afield that the judge decides that the arbitrator has demonstrated what is called this manifest disregard of the law.

Now, if you look at the Federal Arbitration Act in terms of the grounds for vacating an arbitrator's award, it doesn't say anything about manifest disregard for the law. That phrase does not exist in the federal statute.

If you look at the federal statute, Section 10, what it says is a judge can vacate an award for four reasons, and only four. That's what's in the statute: One, where the award

was procured by corruption, fraud or undue means; two, where there was evident partiality or corruption; three, where the arbitrators were guilty of misconduct in refusing to postpone the hearing or in refusing to hear evidence or any other misbehavior by which the rights of any party have been prejudiced; or, four, where the arbitrators exceeded their powers or so imperfectly executed them that a neutral, final, and definite award upon the subject matter submitted was not made.

That's what is in the statute. This business about manifest disregard of the law is something that over the years federal judges latched onto in terms of their sense of what I will call judicial fairness. They made that almost a fifth element, and they basically ingrafted it to the statute.

For years there was a split in the circuits as to whether there was something independent called manifest disregard of the law, which was like a fifth element that could justify vacation of an award, or whether it was just a shorthand phrase for the arbitrator exceeding his or her powers or did something that was so arbitrary so it's really just a shorthand term for what was set forth in the statute.

Then in 2008, in a case called Hall Street, Justice Souter wrote a decision on behalf of the majority in the Supreme Court, and he said with respect to the reasons for which an arbitrator's award can be vacated, the reasons are

limited to the four reasons set forth by the United States Congress in the federal arbitration statute. In essence he said manifest disregard of the law is not one of those unless you want to read that as a shorthand term.

And later on, in 2010, there was a case Stolt-Nielsen, in which Justice Alito wrote in 2010, where he actually said whether manifest disregard of the law has been eliminated is an open question. I will just read to you what the justice wrote if I can find it here.

In footnote 3 Justice Alito writes, "We do not decide whether manifest disregard survives our decisions in Hall Street Associates as an independent ground for review or as a judicial gloss on the enumerated grounds for vacatur set forth in 9 U.S.C. Section 10."

So he says it is an open question whether it is independent or just a catchall for what's already there. But there is this ongoing debate as to what this term means. In the Second Circuit the case law is that it continues to be viewed as an independent ground.

Other circuits say it's just a gloss, because, again, Hall Street is not totally clear in terms of what a judge can do. Because in Hall Street the issue was the parties to the arbitration wanted to enter into an agreement that said, for purposes of getting the arbitration award reviewed, we want all errors of law to be reviewed by the district court. So they

wanted to set up their own really procedural framework.

What Justice Souter said is you don't have that power. Whether a federal judge has that power to ingraft that type of element as an independent grounds of vacatur, that's really an open question. That's what the Alito opinion said. This is an open question. It is more, in all candor, debated by the academics.

The lawyers continue to use it in their briefs, but what the lawyers are really doing is saying to the reviewing court who is being asked to not confirm the arbitration award, they're saying that the judge went so far afield, did something so wrong that it almost shocks the conscience, so that that person went beyond his or her powers. That is an ongoing debate, and whether or not you say it's shorthand for what's already there or it's independent, I don't think it really matters.

But in terms of how we litigate these issues of whether or not the award should be confirmed, it continues to be fair game to come in and say what the arbitrator did is not colorable. It is not a question of pure legal error, but the person just ignored the existing law.

There are cases that say you have to even show that there was a subjective intent to ignore it. So it's a very tough standard. But, again, it's basically at the end of the day saying to the reviewing district court judge, this is not

fair. This is so fundamentally wrong that you should not confirm that particular arbitration award.

Thank you.

(Applause)

JUDGE BERMAN: The next legal topic is a shorthand referred to as deference, and what deference does the court owe to the arbitrator and the arbitrator's decision.

MR. FEINBERG: That Stolt-Nielsen case that Ted refers to on manifest disregard, that was an arbitration in this courthouse. I was one of three arbitrators. The arbitrators ruled in Stolt-Nielsen two to one that the arbitration agreement permitted class certification of claims.

Judge Rakoff reversed the two-to-one arbitration decision and said he didn't read that contract among the parties to permit class certification of claims. The Second Circuit reversed Judge Rakoff two to one and said, no, the arbitrators have the right because there wasn't manifest disregard to certify a class in arbitration. And the Supreme Court ruled 5-3 manifest disregard and vacated the arbitration ability to certify the class. Maybe they're right, but it isn't manifest to many judges. I'll tell you that. It was pretty divided all the way up.

Maybe it's, well, what do nine people think is disregard? That's different. But manifest disregard, to this day you can't get two judges to agree on whether or not that

contract permitted class certification of claims -- not that I'm bitter or anything.

Now deference. Deference you know it's not -- partiality, the cousin of deference, what deference is owed the arbitrator or arbitrators. You know that's sports. That's Tom Brady -- ta-da. And that is next week in the Appellate Division First Department, big case involving the Baltimore Orioles and the telecasting rights of MASN and whether or not Major League Baseball set up a kangaroo court that guarantees the Orioles will lose that arbitration.

The NFL is a little bit different, but in both of these cases it really is the same three issues, isn't it, in sports?

One, how much authority do the parties delegate to the arbitrator?

I mean, it is a free country. If the Major League Baseball players, I mean, if the Baltimore Orioles and MASN want to agree on an arbitration policy, well, they agree to an arbitration policy. They didn't have to. The Orioles are pretty sophisticated, and Major League Baseball is pretty sophisticated.

If the NFL players and the NFL owners want to delegate to the commissioner all of this authority, well, they delegate this authority.

So issue number one in these cases involving evident

partiality is, well, what does the contract say?

Two, does the contract mean that the arbitrator can do whatever he or she wants? I mean, what are the limitations? Granted, there's a delegation. What are the limitations on that delegation? A, the arbitrator can basically do whatever he or she wants; B, no, there are limitations in due process, fairness, procedural rights. You can't just delegate a kangaroo court.

Now, in fairness to the Brady situation, as I read that, the argument in the Second Circuit, I mean, basically there was a great amount of delegation, and it was a fair process. Dissent in the Second Circuit: There was a great deal of delegation, and it wasn't a fair process. There you are, two to one. Brady didn't want to appeal and won the Super Bowl. I park my car on Harvard Yard, but still --

Now, baseball is to me -- I mean, there it is. You can read the briefs and the materials. I mean, to what extent is the whole thing a setup?

It's one thing to delegate great authority to Major League Baseball to rule on telecasting rights between the Nats in Washington and the Orioles in Baltimore. It's another thing if the evidence shows that the whole thing is simply a charade and that Major League Baseball has already decided the outcome.

So those are the issues. They are very fact driven I must say. I think everybody would agree that partiality can

cross the line.

Ted made a very effective argument in the Second Circuit that partiality didn't cross the line and he won. Jet fan judges maybe, but he won. He won.

In Major League Baseball who knows what is going to happen in the Appellate Division? But it's really a repeat, I think, of the Second Circuit argument over what constitutes partiality, extreme partiality, blatant partiality.

The Orioles are arguing next week that it is so blatant, don't you dare send it back to the same panel. It can't possibly be any different.

The Orioles are really arguing one step further than Brady. The Orioles are saying it is a setup. It's a rump panel where the evidence shows the result before they even take the evidence. Therefore, Appellate Division, send the case to a different panel, independent, the AAA, Noah Hanft, the Institute for Conflict Prevention. Send it somewhere where there will be a fair review of the evidence based admittedly on a broad delegation, and that is sort of the way these arguments will come down, as I see it, very fact specific.

(Applause)

MR. FEINBERG: Uh-oh.

JUDGE BERMAN: I am just wondering if there's not going to be one appellate court that gets it right, the Appellate Division, if they don't follow the Second Circuit.

The next topic, Steve Younger.

This is the topic that I referred to at the beginning and that Esta is very concerned about. This is the issue of expansive arbitration clauses. Not only do they say that arbitration is mandatory, but they do so to the exclusion of any other type of proceeding, most importantly class actions.

Steve Younger knows all about this stuff.

MR. YOUNGER: Essentially the issue is, Can arbitration be used to take away rights, particularly consumer rights? Corporate America some years ago figured out that they don't really like class actions. They figured that out a long time ago. Someone came up with a brilliant idea to say send these cases to arbitration.

Now, I will bet you that everybody in this room has an arbitration clause that you probably don't even know about. It's in your credit card agreement, it's in your bank account statement, it's in your stockbroker statement. Some of them, you know, once you actually figure it out may be a fair process. Some of them may be -- what do you call it? A kangaroo court.

This whole issue emanates from the FAA policy of being pro arbitration. So Congress said we enforce arbitration clauses, and the question is how far does that go.

We started with the Stolt-Nielsen case, as Ken mentioned, where the Supreme Court told us that class

arbitration is inconsistent with the FAA. So that means if we send you to arbitration, you are not going to get a class action. You are going to have to litigate these things case by case, and it may not be worth it to litigate over your $65 dry cleaning bill. Whereas, if you had tens of thousands of people, that $65 bill may be worth litigating over.

It then follows on in a series of cases -- and I think that someone mentioned that somehow Judge Scalia managed to write them all -- the DIRECTV case and ultimately Concepcion, which said that in essence the FAA preempts state law in this area. Somehow these all come out of California, but California would say it is unconscionable to get someone to waive their right to a class action and go to arbitration. The Supreme Court has said, whether that's unconscionable or not, it's going to arbitration, and the FAA is going to preempt that kind of a policy.

So what's left?

I think the main issue that's left is how fair this process is going to be, number one. There was a whole series of articles front page of the New York Times last year about people were being sent to Minnesota who may be from Kentucky, weren't going to go all the way to Minnesota to arbitrate over their $65 dry cleaning bill, and then arbitrating in front of somebody who was basically bought and paid for by the other side.

To me, if I'm setting one of these things up, one, I'm not going to make you travel halfway across country; two, I'm going to make sure the process is fair, because I think that's the sort of thing that is kind of procedural unfairness that could result in upsetting one of these awards.

The second issue, and this is going to go into the second trend, which is, how prominent is this clause? Is it something you could have known about? Is it in big print in your credit card statement, or is it buried somewhere where you won't see it?

There's a recent Second Circuit case, the Nicosia case, which I think highlights this, and this is what I call the clicking trend. When you go online and accept that new version of Microsoft windows, you click on the agreement, and it says click to the next page and you have agreed to arbitrate now.

What the Second Circuit said is that agreement is going to depend on how prominent that language was in these various screens that we try to click so fast so we can actually get to what it is that we want to see.

As Esta mentioned at the beginning, there's an open issue now of whether we can transport this into the labor sector. So the three cases the Court has in front of them are whether in the labor context can you require someone basically to give up their rights to litigate and go to court.

I was talking to Esta earlier. It's kind of ironic, because labor is one of those fields where arbitration has actually worked historically in a different context, a kind of traditional arbitration, what we call industrial justice. But it's morphed into the kind of cases that Judge Berman hears all the time, which are typically discrimination cases, and can you in essence move those cases into arbitration?

So where that has left us is really with a public policy issue. There are people who are concerned that, one, are you moving cases that ought to be in the court system into a private forum so that what is going to be left of our court system? Two, is what you get in these processes true justice?

So it's led to some regulatory pushback. We will see in the era of our new Apprentice president whether these things will hold up. But, for example, the CFPB has put out a rule to limit the use of some of these kinds of devices in the financial area.

There's a lot of concern about nursing homes. There was a case in our Appellate Division which enforced an arbitration clause for a nursing home patient. There's another case up in the Supreme Court which may go the other way.

FINRA, which handles a lot of the securities arbitrations, they've said, well, certain kinds of employment cases we don't think belong in FINRA.

I think we're still going to have that policy debate,

but the sum and substance is the Supreme Court, and I think we can probably sense where they're going to go with the labor case, is saying the FAA means what the FAA says. When you have an arbitration agreement, you go to arbitration.

(Applause)

JUDGE BERMAN: That case in the Supreme Court is a really big deal, because it's pretty clear from the Supreme Court jurisprudence and from these decisions that there is a split, and it is very likely that if there were only eight justices it would be a 4-4 kind of situation.

Just Monday one of my law clerks handed me an article on something called SCOTUSblog, which is a very sophisticated piece of business that analyzes the rulings and decisions and issues related and stemming from the Supreme Court, and it's called, "Judge Gorsuch's Arbitration Jurisprudence."

Read it for yourself, but the bottom line is that that fifth vote is very likely, according to the SCOTUSblog and according to Judge Gorsuch's rulings as a Court of Appeals judge, very likely is going to be not so favorable toward historical labor collective action, and probably, if you had to bet, the smart money would say it's a 5-4 decision in favor of mandatory arbitration and no concerted action. That's just what is said in the SCOTUSblog.

Steve, do you want to do evident partiality?

MR. YOUNGER: I think Ted already covered that.

JUDGE BERMAN: Anybody have any questions they want to pose to any members of the panel?

Steve Hoffman.

AUDIENCE MEMBER: I noticed when you talked about -- I can fill the room without a mic.

JUDGE BERMAN: They need to hear you downstairs.

AUDIENCE MEMBER: I'm sorry.

I noticed though when you talked about the factors that went into the choice of arbitrators, no one really emphasized the ability of the arbitrator to bring the parties together for an agreement -- I'm sorry, a mediator to bring the parties together for an agreement.

MR. FEINBERG: I think that's a very important characteristic of a good mediator. I think the mediators that the market calls on to mediate are mediators who at the end of the day have a track record that demonstrates success in getting the parties to yes, and I think nothing demonstrates that ability of a good mediator better than that track record showing that disputants, who may think they are far apart, unable to reach an accord, it's hopeless, and then after a couple of days of mediation they have reached an agreement. That's the best test I know of of an effective mediator.

MR. YOUNGER: I think it's two things.

One is someone who is very convincing. That's Ken. He's pretty convincing, right?

Two is persistent. They just don't give up. I think the average case settles whether in mediation or sometimes it's a couple of months later, but it was set in motion by the mediation.

JUDGE BERMAN: You're next, but I am going add two cents. I think there's something more to it than that. It's a certain confidence that people have in the mediator. Frankly, it is just no surprise that all of those matters that were discussed before, 9/11, pre-9/11, Katrina, BP oil spill, they all go to Ken Feinberg. There's a reason I think demonstrated actually here tonight. I think people think that they are really going to get a fair shake, and that's why they pick him. That is an indispensable characteristic of a mediator.

AUDIENCE MEMBER: A number of my colleagues at the ILR School have been doing research on the following question, and my question for you is, is this just nutty ivory tower work or should this or could this or does this matter to the justices or the court in their assessment of arbitration?

What my colleagues study is whether the decisions that arbitrators make are different from the decisions that judges make on comparable cases.

That's a very difficult social science question to answer, but it is potentially answerable through various methods or simulations, and there is research that is accumulating. It's hotly debated, like everything else in

academics.

The bottom line is the research tends to show that the decisions by arbitrators on cases like discrimination, where there's a clear win/lose, tend to be more favorable to the corporate sector. People don't win as high awards on discrimination charges in comparable cases.

But my question for you all is, does that matter; and if it doesn't matter, where do judges get their decisions about the virtues of arbitration from, and shouldn't that social science research question and answer matter to them?

Shouldn't we want to know whether the arbitrator decisions are different from what courts would do, and does that potentially make a difference to judges -- I am not a lawyer -- or do judges just ignore that kind of evidence?

MR. WELLS: What I would say is that, from the perspective of most corporate defendants, they are concerned about runaway jury verdicts and prejudice against corporations getting an objective hearing.

So a lot of corporations want to avoid, if at all possible, subjecting themselves to jury verdicts in situations where the plaintiff is viewed as the underdog.

I am not talking about situations of Citibank v. Wells Fargo. I'm talking about the cases where the employee is the plaintiff, these employment cases, or the consumer is the plaintiff.

What you are scared about is not just the finding of liability, but the damage award, and that's what makes a lot of companies want to go towards arbitration.

And, secondly, arbitration has the advantage of being secret. A lot of corporations don't want to talk about it, but to the extent there's a case being litigated about your employment practices, people are far more comfortable having those practices litigated in a confidential arbitration than in a public courtroom.

So it's not so much in my opinion about what the judges are deciding; it's more about the fear of the runaway jury verdict.

MR. FEINBERG: It's a very interesting question you pose. I'm thinking out loud here at this desk. I don't think I have ever engaged in a mediation or an arbitration involving discrimination, gender, race, etc., where the case didn't settle in the middle of the arbitration or as a result of mediation. I think that by the time parties get to me voluntarily they want resolution.

So I would be interested in that research involving a bottom-line difference between an arbitral finding determination and what a court would do versus, well, for the reasons Ted said, we didn't want to go to trial with a runaway jury and punitives and all of that, but during the third day of the arbitration we settled it anyway because we didn't like

what was happening and what those terms are and everything, confidential, whatever, I don't know. I am just saying I don't think I've ever gone to verdict in an arbitration or obviously a mediation where it didn't get resolved.

MR. YOUNGER: My own sense is that arbitrators do decide things differently at least than a jury does.

First, there's much greater attention to the words of the contract. There's much greater attention to the details that matter as opposed to just kind of rough justice, who's telling the truth. I think juries are very good at telling who's lying in front of them or who's done something that just doesn't smell right.

AAA has a study that kind of denies this split-the-baby approach. They purport to say in their arbitrations that arbitrators don't split the baby. I don't know that I actually agree with that.

I think if I am in front of a three-part panel I'm more likely to get a much more bounded result than I am in front of a jury. We have runaway arbitration verdicts, but you're less likely to get them.

I think the real question is, what does the client think? Because it's the client who needs to make an educated decision of whether they go to arbitration or not. I think it's less an issue for the court. In my world it's two sophisticated parties. Two sophisticated parties have chosen

to chart their own path, to go down the road of arbitration as opposed to court. They live with it, whether it is a different kind of justice or not.

JUDGE BERMAN: I'm somewhat familiar with the study that you are talking about. I don't know what the ultimate, or if there is an ultimate conclusion. It would certainly be interesting, but at the very end it's going to depend on what you are comparing.

So, for example, take employment discrimination or discrimination cases that we have. We know going in that those cases don't go to trial over 95 percent of the time. So it's a very, very small subset of cases that you are going to get a bottom line after a verdict, for example.

It's hard for me. I'm trying to think, well, what would I compare that 4 percent or 3 percent to, because just as in arbitration, most cases, either the court helps or it doesn't, the parties settle themselves.

So I don't know exactly what we are comparing, if you go to a case, for example, of discrimination that goes the ultimate step to a jury verdict, if that is comparable and to what stage of arbitration.

MR. WELLS: But you need to keep in mind the confidentiality piece, which is huge. If you take the Fox News Gretchen Carlson lawsuit against them, the case ultimately settled, but the big issue in the case was, she filed the

lawsuit in New Jersey, and her lawyer said that there was an arbitration clause between Carlson and Fox, but there wasn't an arbitration between Carlson and Ailes, and she wanted a public trial.

The case settled before that issue was reached, but that is a real hot topic nationally in terms of these sexual harassment cases, because the female plaintiffs are saying, "We had to sign those doggone arbitration clause as a condition of employment. You say we're sophisticated parties. Not really. The power dimension is so skewed that we're forced to sign away certain rights that if we really were sophisticated we would never do, because we know the leverage in those cases very often is the public allegation, so you don't want to sign that away."

But if you talk to the talent in the entertainment business, even the big talent is forced to sign that standard contract. So it's not just that final verdict on the money. It's that confidentiality piece, especially in these types of cases, where the tabloid media is going to put the allegations right on the front page. That's what the companies are concerned about from reputational perspective.

MR. FEINBERG: The perception of splitting the baby in mediation and arbitration is so prevalent that the mediator or the arbitrator quickly realizes that the parties are unwilling to propose their real demand or their real offer because of the

perception that you will end up in a voluntary process or in a mandated arbitration somewhere in the middle, and that encourages both sides to be unrealistic about their demands and their offers and their presence of damages and the response.

What I find a lot in mediation is the way you have to break through that perception is by force feeding the parties, by getting them to say something like, "Well, will you go to X if he will go to Y as an effort to do nothing more than get into the realm of what's doable on the merits?" So you'll try and just say to the parties, "You are at 8 zillion. Will you go to $150 million if and only if they'll go to $100 million or something like that?" I am just throwing out numbers.

But the whole purpose of that is to restructure the bargain so that you are now in a much narrower range, which is much more realistic in terms of ultimate expectation, and that is how you have to do it, because of that perception about splitting the baby, which is a problem.

MR. YOUNGER: By the way, you can do that in arbitration, too. We have bounded arbitration all the time. I had a major patent case where, if it had been in the court system, there would have been 40 lawyers on either side, because it was a billion dollars on one side and not just a zero, but losing a patent, having the patent invalidated.

We agreed to a structure where it was between 50 and 150 million dollars. Nobody is going to lose their patent,

nobody is going to have a billion-dollar award, and the client was happy having just five of us at the arbitration as opposed to 40 of us because there was less risk.

AUDIENCE MEMBER: Gentlemen, I would like to ask you the following generic question.

As we have talked, as you have spoken to us, regarding primarily arbitration and mediation, would you have any comment regarding the following:

Our fellow citizens outside this courthouse, do you believe there is any barrier, based on the following: As we sit here in this magnificent courtroom do you believe that to our fellow citizens they largely believe that, based on our history as a people, the vindication of their legal rights and remedies are largely going to occur in a courtroom, such as this, or any courtroom in public in the full light of the public and not in private conference rooms and spaces such as all of us here provide through the great services of the arbitrators and mediators, and that through these processes something that all of us as American citizens have come to expect as really our greatest accomplishments, do you think that is a barrier to what we are offering today?

MR. WELLS: I personally think the issue you are raising is one of bargaining power between the parties. If you have parties to an arbitration agreement that have equal bargaining power and the freedom to decide to enter into such

an agreement or not, that is in my opinion a fair system.

If, however, you have a system where you have one party in the position to dictate to the other party, that as a condition of getting a credit card or as a condition of getting a job you have to sign this contract that provides for mandatory arbitration, then the argument -- and it's a powerful argument -- is that's not fair, because you are asking that person to give up their right to go into a public courtroom and be heard in public about the allegation on the front end before anything has happened, and that person doesn't have the freedom to say no.

That's one of the reasons you see these class action cases tend to break down to party lines. Conservative Republican justices tend to go one way, and the democratic justices go another way because these are raising what I submit are fundamentally philosophical issues about access to the federal courts and about how the system should be structured.

When you look at these cases, there's a reason, as Judge Berman says, the Supreme Court blog is telling you in terms of these class action cases and how you interpret the National Labor Relations Act and how it interfaces with the FAA is going to be determined by whether or not they can get the fifth Republican conservative justice there, and that case is going to be 5-4. But these decisions are ultimately infused with politics and philosophy about how the court system should

work. I think your point is right on, but that's kind of part of the battle we're involved in in terms of how to set the rules.

JUDGE BERMAN: It's a great irony. What's happening here, this Supreme Court jurisprudence where we have been saying, a couple of us, that the horse has already left the barn, is as a result, everybody would say, of very activist judges, because these decisions nowhere can be found directly in the FAA or the Federal Arbitration Act statute, and they can't be found in the legislative history, and people have surmised that behind the elimination of class actions are probably business lawyers, big corporate lawyers who are opposed to class actions.

The irony further is that it is true that if you do a political assessment, it's the conservative, perhaps Republican, who is always saying that, no, we have to get back to construing the statute just as it's written, just on the words, and we are dead set opposed to activist judges. They have turned the Federal Arbitration Act upside down.

AUDIENCE MEMBER: As an ILR graduate who got into the labor relations field back in the early '70s, I found myself on the arbitration committee of the City Bar Association, and I heard an astonishing story from someone who did commercial arbitration who represented a number of firms that did business with the Soviet Union, and the Soviet Union had arbitration

done exclusively in the Soviet Union.

The reason was that they wanted American firms doing business with the Soviet Union, as egregious as the case may have been against the Soviet company, it was ruled in favor of the United States. Which brings me to one of my clients which has the arbitration provision that allows the head of the international union to be the arbitrator in disputes with local unions. It's a voluntary clause and management signs on to it, for the reason that in many, many cases the national president rules against locals, which creates a great deal of tension between the locals and the national union. But comes the day that the national president rules against an employee in the industry and the employer says, wait a minute, this is clearly a prejudiced tribunal that I agreed to get into, what should happen?

MR. FEINBERG: Hire Ted Wells.

JUDGE BERMAN: I think we are right on time. It's 8 o'clock.

A couple of things:

First of all, if you are here and getting CLE credit, you can check out right here outside this courtroom or back on the ground floor where you checked in.

Second, we would love to and we do invite you all to the eighth floor, room 850, for a brief casual cocktail.

Thank you very much.

(Applause)

(Adjourned)