MR. NEWMAN: I think we're going to have to go to Marc right now. I'm sorry. You may have seen Curtis Sliwa of the Guardian Angels on Channel 1. Marc has brought some props here today. I don't know if you can see these, but there's some figures on the test in front of him, so go ahead, Marc.

MR. GOLDSTEIN: Well, the promised topic for today, and I might have brought a crystal ball, but I couldn't find a snow globe with Judge Garland inside it so we brought the court as it was. The Republican appointees on the right with Justice Scalia, may he rest in peace, and not being able to find any donkeys, we have buffaloes as proxies for the liberal wing of the Supreme Court of the United States, and our topic today is a little bit of both review and forecast as to how Justice Garland or another to the right or left of him, depending on how the political winds blow over the next several months, might affect arbitration jurisprudence or some of

it in the Supreme Court of the United States. And so, well, which jurisprudence shall we think about? Well, I decided today that we will think about all your favorite recent 5 to 4 Supreme Court arbitration decisions of the last several years, recent years, and those are all, the three of them we will talk about, authored by our friend, may he rest in peace, Justice Scalia. The first of them is?

MEMBER: Concepcion.

MR. GOLDSTEIN: The first is Rent-A-Center versus Jackson. Some of you may think of this as your favorite and will remember that Rent-A-Center versus Jackson, which actually dates from 2010 and precedes Justice Kagan going on the court, it was an employment discrimination case where plaintiff raised unconscionability of the arbitration agreement as a ground for non-enforcement, but the catch to the arbitration clause said that any issues going to the formation, enforceability, et cetera, of the arbitration agreement are

for the arbitrator. So the defendant relies on that clause to say the district court shouldn't decide unconscionability, the arbitrator should, and the plaintiff says, well, unconscionability negates assent to the arbitration agreement, itself, and assent, as we've talked about so many times over, is a gateway issue and ought to be decided by the court.

So the district court agrees with the plaintiff and the circuit court agrees with the defendant, and the defendant says "Well, here we are and this is the First Options case; isn't it? That language in the text of the agreement clearly and unmistakably delegates formation of the contract issues and enforceability of the contract issues to the arbitrator. It's for the arbitrator to decide.

And the Supreme Court of the United States, 5 to 4, with Justice Scalia leading the way, decides the case on severability grounds. How does severability get into this, you may ask. Well, it was a riff on

severability, if you will, because it was in effect saying, well, the severability principle, as it once was originally, was if the attack on the arbitration clause is the entire agreement was induced by fraud, the entire commercial agreement was induced by fraud, we're not going to let the district court decide whether the arbitration agreement is induced by fraud because in doing so, the district court would decide the merits of the whole case. That was Prima Paint way back in the 60's. And so that was what we all thought severability was for 45 years, and then lo and behold comes the five-justice majority in Rent-A-Center and it says severability can be applied to the arbitration clause, itself. So if you want to keep the issue from the court and give it to the arbitrator, if you want to keep the issue from the arbitrator, and not have it in the court, the attack has to be not on the arbitration clause, but on the delegation to the arbitrator of certain

issues within the arbitration clause. So severability, says Justice Scalia, applies not only to commercial agreement versus arbitration agreement, but to arbitration agreement as a whole as opposed to a delegation clause within it.

And when we talked about Rent-A-Center originally, it was sort of foreign language when we were talking about the delegation clause. Nobody even heard that nomenclature before.

So you had on the other side the intellectual progenitor, we will say for purposes of today, to Justice Kagan, which was Justice Stevens, saying in his own words, this is nuts, that severability for 45 years meant the whole commercial agreement versus the arbitration clause and that made sense, and now you're just vamping and creating something out of whole cloth that has nothing to do with severability as we know it, and this is in fact anti-arbitration, because it's sending to the arbitrator, rather than the district

court, what is really a fundamental issue of whether there was meaningful assent to the arbitration clause. And, of course, the liberal wing, everybody was lined up, Justice Sotomayor and Justice Breyer and Justice Ginsburg all in a row.

So there you have it. Justice Scalia leaves the scene, so for today's purposes, Rent-A-Center is back to 4-4. Where would Justice Garland come in on that remains to be seen, but we're going to go over two more cases from the Supreme Court of the United States and then we will talk about what Justice Garland has decided on arbitration jurisprudence in the second case. Who said Concepcion?

MEMBER: I did.

MR. GOLDSTEIN: Concepcion, so this might be some of your favorites, Scalia authored and another 5 - 4, and in case you forgot the unforgettable Concepcion case, this was about a California state law rule called the Discover Bank Rule that said when a class action waiver provision is

involved, whether in arbitration or in litigation, and it operates as a device to allow companies to deprive large numbers of consumers of relatively small amounts of money, because of the prohibitive cost of individual litigation of the amounts in dispute, then the waiver is unconscionable and makes the agreement to arbitrate unenforceable on what California courts considered to be a ground -- we're talking Section 2 of the FAA language -- ground for revocation of any contract. Unconscionability, that's what we all used to think, was that unconscionability was a neutral principle of contract non-enforcement, but that was before the Concepcion case.

So this turns out to be a preemption case because it was about a state law rule of unconscionability, but arguably the political undercurrents of unconscionability were behind the dividing line of the court because arguably a liberal justice would look at

unconscionability as a consent issue, as one about reinvesting people with limited means and limited influence with a degree of choice. And a more conservative philosopher, legal or social policy philosopher, might view unconscionability as a redistributive doctrine along with however many other redistributive doctrines, and that's sort of anathema if you're a philosophical conservative and maybe that really underlies a lot of this.

So where we ended up in Concepcion was a sort of reformulation of what preemption means by Justice Scalia using the phrase, "A rule of state law that stands as an obstacle to the accomplishment of the FAA's objectives." And of course he then went back into the history of what the FAA was all about and concluded that in 1925, one of the FAA's objectives was not merely to enforce the terms of arbitration agreement, but to enforce a regime of arbitrations that involved streamlined and efficient proceedings. Streamlined and

efficient proceedings.

And then the reason we talked about Concepcion so much at lunches like this in another context was that Justice Scalia, to prove his point that it wasn't -- that this violated the FAA, trashed arbitration and trashed arbitrators. None of you were equipped to handle class actions, it wasn't what you did for a living, it was too complicated for you, and you were going to do it wrong, and the proceedings would take forever, and it was just awful, and it was contrary to Congress' intent to have streamlined proceedings even if it was in the arbitration agreement, and so that was the rule. And that was what these five elephants over here have said in Concepcion, and Concepcion has had obviously a significant influence in the way corporations have structured agreements to arbitrate to avoid having collective proceedings brought.

Now, the liberal block in that case led by Justice Breyer writing the dissent,

and with everyone else lined up with him, said essentially, and I'm simplifying obviously, because it's 1:46, that revocation of any contract meant revocation of some contracts other than arbitration agreements. That the rule of state law is not arbitration-hostile if it would have the same effect on other types of contracts. And he basically said that Discover Bank Rule would apply equally to a class action waiver in a forum selection clause that said we're going to arbitrate in the State Court of California or in the Central District of California and therefore, it wasn't an arbitration specific arbitration-hostile kind of clause and he went on to say that obviously the attack on arbitrators and arbitration efficacy in class actions was overstated and the AAA had a pretty good record with it, et cetera, et cetera.

So that's what Concepcion did for us and now we take away Justice Scalia and we're back to 4-, 4 and we will think about

where our friend Justice Garland would come into the mix.

One more case, 5-4, Scalia authored. Who knows the name of it?

MR. SILLS: American Express.

MR. GOLDSTEIN: Ten points for Bob Sills. The American Express - Italian Colors case the last of the three we will talk about, the most recent, 2013, with Justice Scalia writing for the five-person majority, Justice Kagan now writing for the liberal block, and this again had unconscionability underlying it, but it really triggered conflicting federal policies between enforcement of the arbitration agreement, on the one hand, and effective enforcement of federal statutory rights on the other.

This was an anti-trust case and the restaurants, if you will, that had merchant agreements with AMEX said that the class action waiver prohibits us from effectively pursuing an anti-trust case in arbitration if we can't have a class arbitration

because nobody who individually has a claim for a few hundred dollars is going to spend a million dollars to hire FDI Consulting to do an economist's report, you just can't do it, and so when you have an arbitration clause that bars collective action, bars class action, bars consolidation, bars joint action, effectively, among claimants, then we can't do it. And under the so-called effective vindication federal law common law principle of effective vindication of a federal statutory right, -- anti-trust laws would be a good example -- this is no good.

So the five-person majority says, well, wait a minute. The effective vindication principle only protects you from barriers to commencing your claim effectively, from filing your claim in court. The effective vindication principle, says Justice Scalia, with four colleagues in tow, doesn't guarantee you the effective prosecution of your case. It's not a rule that says you need the

tools to win. We only can't take out of your hands the tools to file. If it were a million dollar filing fee, says Justice Scalia, that would violate effective vindication, but the fact that you have a million dollar cost to have FDI Consulting do an expert report, tough. I'm not just saying tough to make this cool. This is what Justice Kagan writes, the position railing against this view of things, Justice Kagan writes "The view of the five-person majority is 'tough,'" and she goes on from there to say that there's no practical difference between a rule about a filing fee of a million dollars and a barrier to paying an expert a million dollars. So there you have the third case 5 to 4, Justice Scalia goes away. We hear things about Judge Garland having general pro business leanings, but does that put him in the camp of the restaurants or in the camp of the credit card provider? Well, let's talk a little bit about Justice Garland.

So I think I'll talk very briefly only about maybe two or three cases from Justice Garland, and we found out, with a little bit of research, that in 2012 Justice Garland was a non-author member of a three-judge panel that held, and this was sort of an FSIA case, that the state-owned Corporation of Liberia was entitled to due process rights and therefore could object on grounds of personal jurisdiction to an award enforcement proceeding, and we all remember that there was some debate about whether a foreign government like a state of the union, whether or not it was a person under the due process clause, and if a foreign government isn't a person, it doesn't have the ability to object on grounds of personal jurisdiction and the FSIA would be conclusive as to jurisdiction in an award enforcement case, but this case turned on whether the state-owned company, beyond being an agency of instrumentality, was in fact sufficiently separate to be regarded as a corporate entity that could

invoke objections to personal jurisdiction under the due process clause. And Justice Garland was part of a unanimous panel in saying that it could.

Now, some of you may have attended a presentation that the authors or the rapporteurs of the restatement gave a few weeks ago on the subject of enforcement or not in the United States courts of awards that have been vacated abroad, and one of the cases discussed by George Bermann and Kathy Rogers in that session was a D.C. case called TermoRio that involved an ICC arbitration held in Colombia that was against the Colombian government and its electrical utility arm, that at the end of several years of arbitration, resulted in an award against the Colombian government which was promptly vacated by the Colombian courts. And Judge Garland was on the panel that unanimously ruled, in terms that I think many American lawyers would regard as regrettable, that the district court was obliged, obliged under the New York

Convention, to respect the Colombian court's annulment, and that the consequence of the Colombian court having annulled the award was that the award did not any longer exist to be enforced. And even today, it makes Arthur sleepless at night. Right? Very unfortunate, and what is most remarkable about TermoRio, and I think I read the opinion twice looking for it, you cannot find in the D.C. Circuit's opinion a discussion of the grounds on which the Colombian competent court set aside the award. I think if you dig into the record, what you find, and I know this also from another case I had involving Colombia, is that it is against public policy in Colombia to arbitrate under any set of rules other than the Rules of the Bogota Chamber of Commerce, so an ICC arbitration was doomed from the outset. It was a heads you win, tails you lose situation.

The government of Colombia arbitrated under the ICC rules. If it won the case, then it could chest thump, if you will,

that they're international and they're a member state of the New York Convention and look what we did, and if they lost, they go to court the next day, which they did on December 23rd, two days after the award was entered on effectively Christmas Eve eve, to file the annulment. If we lose, we will go annul it and it violates Colombian public policy. But there's no discussion of those terms and so no discussion by a panel that included Judge Garland of whether it was appropriate for a United States court to consider whether there had been a brazen and irregular violation of the domestic law of Colombia, which after all included the New York Convention and an obligation to enforce an arbitration agreement according to its terms.

So that's TermoRio, and those of us who are watching to see what the Second Circuit does with two cases on the same theme that are pending, the Pemex case and the Thai-Lao Lignite case, long awaited decisions from the Second Circuit, one of

which is inevitably going to generate a cert petition. That issue could come to the Supreme Court of the United States and it would be interesting to see how that affects Judge Garland.

I want to tell you one more case very quickly and it involves friends of ours and the Government of Belize. You know Belize. It's somewhere down there and there's a little bit of coral. So friends of ours, Benno Kimmelman and Dana MacGrath, represent and represented an entity that bought telecoms properties in a privatization by the Belize Government and they ended up in a dispute with a London LCIA arbitration clause when the Belize Government disavowed the agreement.

So they went and they arbitrated in London and they got an award and Benno and Dana went to enforce it in the United States and the Government of Belize went to its own courts and got an anti-enforcement injunction that under Belize law entails potentially criminal consequences. And so

that was the end of Benno's plans to go and take a snorkeling vacation because he really wanted to stay out of a Belize jail.

But in the most interesting decision that came before the D.C. Circuit, the district court in Washington granted a stay of enforcement of the award under the New York Convention pending the ultimate resolution of these anti-junction proceedings in the Belize court, and to the credit of the panel on which Justice Garland sat, and maybe with a little bit of redemption for the position he took in TermoRio, the circuit court in D.C. said "Wait a minute. What is the Belize court doing? The seat of the arbitration is London, and if anybody wants to set aside an award, they have to go to London. The Belize court, even though the Government of Belize, has no jurisdiction to do anything except maybe confirm the court as a court of secondary jurisdiction, but they certainly can't get involved in questions of its enforceability elsewhere."

So that stay was reversed on the grounds that there was no legitimate basis for it, mainly saying no legitimate basis under the New York Convention because the Belize court is not the forum court, and so there was a reversal there.

All that said, with the exception of the criticism of the TermoRio, which is not directly attributable to Judge Garland because he didn't write the opinion, the D.C. Circuit Court opinions that he has been subscribed to seem to reflect a faithful and non-partisan, if you will, application of principles of international arbitration law, and if he were on the Court, we can speculate with that kind of information. That's my presentation.

MR. NEWMAN: Thank you very much. I think we're finished for the day. The next meeting is May 24th. Jennifer Permesly will be speaking on Argentine investment treaty cases.

(Time noted: 2:00 p.m.)