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## Article 2A and the Legislative Process

Howard J. Swibel

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## Article 2A and the Legislative Process\*

Howard J. Swibel

MARK LEIPOLD: Mr. Swibel is experienced both in corporate transactions and litigation. He has served for many years as an Illinois Commissioner to the National Conference of Commissioners on Uniform State Laws and as a trustee of the Uniform Law Foundation. He is presently serving as Chairman of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, the first Illinoisan to achieve that distinction in over thirty years. He received both his *Artium Baccalaureatus* and his *Juris Doctorate* degrees from Harvard University in 1972 and 1975. It is with great pleasure that I introduce Mr. Howard Swibel.

HOWARD J. SWIBEL: Nice to see you all. Anybody wants to come closer, that's fine. There's room. I hardly see you back there.

I have been privileged to serve Illinois at the National Conference of Commissioners on Uniform State Laws since 1976. Officially, I represent the democratic leader of the Illinois Senate. We actually have nine commissioners from Illinois. All of us serve pro bono. We're not compensated for our service.

And I was elected a year and a half ago as Chairman of the Executive Committee of the National Conference, and unless there's a recall petition, I will be elected president of the conference this August, the first person since Albert Jenner to be honored from Illinois in that capacity.

And I also had the distinction in 1987 of being one of the members of the committee which drafted Article 2A of the U.C.C. I also was on the committee that drafted Article 8 of the U.C.C., and I've been active with the conference and I'm familiar with its activities.

My partner, Barry Chatz, who was here this morning, suggested that instead of getting into the technical minutia, that I perhaps should also give you some background. I know that we've got a mixture of people

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\* This is an edited version of the transcript from the fifth panel at the DEPAUL BUSINESS AND COMMERCIAL LAW JOURNAL SYMPOSIUM, *Out with the Old, In with the New? Articles 2 and 2A of the Uniform Commercial Code*, held on April 7, 2005.

who are early in the practice or may be even students, as well as people from around the country who are very experienced.

You'd be surprised how little people know about the National Conference and its procedures. You might be aware that it was founded in New York State in the 1880s — no, actually 1890s because a number of practitioners were concerned that the growing federal government would occupy the field of commercial law. Everything would be federalized, and they thought that that was a negative development. So these people came together and said, "Well, we ought to get the states to band together." It clearly is in the interest of commerce, for there to be uniformity so that companies that are doing business across state lines don't encounter obstacles and conflicts which make it expensive and burdensome to do business. So, they formed the National Conference of Commissioners on Uniform State Laws. All fifty states are members, as well as the territories. The state governments finance the operation. The headquarters are in a small office here in Chicago. We have a professional staff which includes legislative — technically they're not lobbyists, but, in effect, that's what they are — and they support the work of the commissioners.

Commissioners like Professor White try to promote the legislation in their home states as they contact local legislators or the Governor's Office, the Attorney General's Office, the Secretary of State's Office, and they recommend that the products of the National Conference get introduced.

We have had, over the course of our history, literally thousands of laws enacted in the fifty states, and these range from the Interstate Enforcement of Child Support Laws,<sup>1</sup> Uniform Act on Parentage,<sup>2</sup> Uniform Trusts Act,<sup>3</sup> Uniform Probate Code,<sup>4</sup> and the Uniform Partnership Act.<sup>5</sup> I was on the committee that drafted the Revised Uniform Partnership Act,<sup>6</sup> which I'm proud to say is now the law in thirty-six states and it's growing every year, the Uniform Limited Partnership Act,<sup>7</sup> which is a new product. Illinois was actually the first state in the country to have all three, the Uniform Limited Liability Com-

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1. See, e.g., UNIF. INTERSTATE FAMILY SUPPORT ACT §§ 101-905, 9 U.L.A. 303 (1996).

2. UNIF. ACT ON PARENTAGE §§ 101-905, 9B U.L.A.299 (2000).

3. UNIF. TRUSTS ACT §§ 1-25, 7C U.L.A. 442 (1937).

4. UNIF. PROBATE CODE , 8 U.L.A. 9 (1969).

5. UNIF. P'SHIP ACT §§ 1-43, 6 U.L.A. 373 (1914).

6. REVISED UNIF. P'SHIP ACT §§ 101-1211, 6 U.L.A. 58 (1997).

7. UNIF. LTD. P'SHIP ACT §§ 101-1207, 6A U.L.A. 9 (2001).

pany Act,<sup>8</sup> the Uniform Limited Partnership Act,<sup>9</sup> and the Revised Uniform Partnership Act,<sup>10</sup> enacted.

And, of course, you're here, though, to talk about the U.C.C. Articles 2 and Article 2A. The legislative process can be quick, and it also can be very ponderous. Article 9 was a stunningly successful enactment process for us. Within a two-year period, we got every jurisdiction to enact Article 9.

And you've heard some negative comments or projections made earlier today about Article 2 and Article 2A. We don't think things are quite as gloomy, but we're not in the business of handicapping. This is not a horse race type situation where we're betting, and we are going to test the waters and we're going to test market.

Currently Article 2 and Article 2A have been introduced in the Kansas and Nevada legislatures. They are currently before the Judiciary Committee in the House in Kansas and in the Senate in Nevada. We carefully selected those states. I assume there's nobody from the news media here, so I don't expect to be quoted directly. But we picked states where we have a good environment, fair environment for uniform laws, where we think that we are not going to deal with a well-organized opposition easily mobilized against us.

As you know, politics is a complicated process, and you've heard about the failed efforts for the first round of the revised Article 2. And, of course, that created a negative impression in people's minds. Professor Nimmer, you know, was the reporter that was the principal draftsman for our first effort in Article 2, and we had to change entirely that effort. We replaced Professor Nimmer. We brought in a different reporter. We also reconstituted the committee.

We found that, and you know this as practitioners, it's very difficult to learn a new set of statutory language, and people learn to work with statutory phrases. We've learned this in the Uniform Partnership Act,<sup>11</sup> which goes back to 1914, and the Securities Act,<sup>12</sup> which goes back fifty years. A new set of eyes comes in and looks at the language and says, "Well, that doesn't make sense. That's an inelegant or awkward sentence. Why don't we rephrase it? We don't want to change the meaning. The meaning will remain exactly the same, but we'll

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8. UNIF. LTD. LIAB. CO. ACT §§ 101-1206, 6A U.L.A. 560 (1996).

9. UNIF. LTD. P'SHIP ACT §§ 101-1207, 6A U.L.A. 9 (2001).

10. REVISED UNIF. P'SHIP ACT §§ 101-1211, 6 U.L.A. 58 (1997).

11. UNIF. P'SHIP ACT §§ 1-43, 6 U.L.A. 373 (1914).

12. UNIF. SEC. ACT §§ 101-807, 7C U.L.A. 7 (1985) (amended 1988).

state it in a clearer, better way, better syntax, better grammar." Well, it may be that the practitioners are accustomed to the existing language. The courts have already interpreted that language. There's nothing to be gained by making it more elegant. That was one of the problems with our first effort to revise Article 2, is that there was a complete restructuring being proposed, renumbering, reordering of sections. The Bar Associations and other organizations like the Commercial League who looked at this said, "What are we doing this for? This is confusing and are we actually changing policy here in these sections, or are we not?"

Those of you who have looked at uniform laws have noted that there are comments attached to the so-called official version promulgated by our organization. Those comments are very helpful in trying to understand what the drafter's intent is. The problem is that in many states those comments are not part of the statutory process. They are not approved by the legislature, and a court in a state really may be discouraged or believe that it's not appropriate to even make reference to those comments. So, we, at the National Conference, have to rely upon the statutory language.

Another background circumstance which you may or may not have heard about today is our unsuccessful attempt with the Uniform Computer Information Transactions Act,<sup>13</sup> ("UCITA"). This was an attempt to deal with computer software. It has been enacted in only two states. It created a great deal of controversy.

In part, this came apart because people said, "Well, how are we going to deal with shrink wrap context?" If you order your software, it comes in a package and you open the package and then there's an announcement that says, "By ripping the plastic cellophane cover, you have now accepted this contract of adhesion." Of course, they don't call it that, but all this small print is now in it.

**AUDIENCE MEMBER:** It would be easier if they did.

**HOWARD J. SWIBEL:** So, of course, so how do we deal with this? How does this fit into the statutory framework or the common law? Shrink wrap didn't exist in the past. And so they said, "There ought to be a law."

When people say, "There ought to be a law." That's when we perk up, and we created a committee. But it got very controversial. Public interest groups and librarians thought that we were too deferential to

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13. UNIF. COMPUTER INFO. TRANSACTIONS ACT §§ 101-905, 7 U.L.A. 200 (2000).

the software industry and not consumer oriented enough, and that project went nowhere.

But some of the same issues of boundary drawing affect Article 2 and Article 2A, by implication, the definition of the scope. So what's a good when you buy a computer with imbedded software? If it's on the hard drive, if it's in a disk, is any of this covered by Article 2? These are ongoing issues which were hard fought when we did Article 2 and Article 2A. And these are issues where there's significant disagreement.

We are in a joint venture situation with respect to the U.C.C., which distinguishes it from all the other projects that we do. As I said, we do projects in real estate. We do projects in family law. We do projects in commercial law, in litigation, but with respect to the U.C.C., our — you'll excuse the word — partner is the American Law Institute.

The American Law Institute is an elite, prestigious organization which, unlike our organization, is accountable to no one. We are three hundred fifty lawyers, men and women like me, who are judges, state legislators, in-house general counsel or private practitioners. And we are chosen by the governors or the legislative leaders of the fifty states.

The American Law Institute is a self-appointing organization of lawyers from around the country, many of whom are academics, many of them are in private practice, and it's a self-perpetuating successful and brilliant organization whose principal product is the restatement of law, restatement of contracts, restatement of torts. That's what they publish.

But when it comes to the U.C.C., they work with us, and there were significant differences between some of the American Law Institute representatives and some of the NCCUSL representatives with respect to these projects. Some of those disagreements linger today and are an overhang which clouds the enactment process for Article 2 and 2A.

When we first promulgated the Revised Uniform Partnership Act,<sup>14</sup> there were many who said that the Uniform Partnership Act was so venerable and people weren't going to want to get rid of it. There's no ground swell. You don't see people picketing, demanding a new Partnership Act, but it takes time to educate, including forums like

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14. REVISED UNIF. P'SHIP ACT §§ 101-1211, 6 U.L.A. 58 (1997).

today where you are to be commended for coming here to learn about this and to try to separate myth from reality.

The Article 2 and Article 2A products that came out in 2003 were balanced, and they were the result of a very methodical process. We have had people from the federal government. We've had a lobbyist who appears in Congress all the time tell us that our legislative process is superior to anything they've ever seen.

In what way is it superior? Our meetings are truly open meetings. They're not widely attended, but people can come. Anybody can come and observe the process. We go line by line. We take the text of the statute, and we go section by section, and there are about eight or ten of us commissioners and then anywhere from five to thirty or forty outside observers. Those outside observers include official representatives from the American Bar Association and any interest groups.

When we did the Article 2A, for example, we had the automobile leasing industry represented. We had the bankers, American Banking Association. We had finance companies. And they could come and they could raise their hand and they could ask any questions. They could make any proposals. They could submit orally or in writing.

We have academic support, usually in the form of a person who is the principal draftsman, and we debate. And when we come there and we sit, we are not Democrats, we are not Republicans. Those of us in private practice usually are representing lenders or other business entities. But when we come and sit as commissioners we are representing the public interest, and it's our job to do what we think is best.

Oftentimes, and in the course of Article 2 and Article 2A, there are also consumer representatives. That could be the Consumer Federation, the Consumers Union. They also have whole bureaucracies with the in-house lawyers, and they come, and we try to hash it out.

So it's an interesting process. It usually takes about three to five years to draft a uniform law. The committees usually meet two to four times in a twelve-month period. Those meetings, like the one that I'm going to attend tomorrow at the hotel, will begin at 8:30 or 9:00 in the morning on a Friday, go until 5:00 in the evening, meet all day Saturday and Sunday morning until noon. And in any one weekend, we have about, well, anywhere from two to four committees operating in separate meeting rooms.

So I wanted to give you a bit of an overview. As I said, we are not throwing in the towel on Article 2 and Article 2A. We think in the process there are improvements that are made. One of the realities of the legislative process is that if you have an interest group that feels strongly in support, then you've got a built-in impetus and momentum.

Next, with respect to the Uniform Securities Act,<sup>15</sup> the Securities Industry Association and the State Securities Commissioners both support the Act. And as a result, we are getting legislative activity on the Securities Act in a number of places. Our big opposition there is the banks because, as you know, as a result of the reorganization of the banking laws, the banks are now in the securities business. Their position is, "We don't want to be regulated by anybody but the federal bank regulators" with whom they're somewhat cozy. And we say, "Well, that's true. And when you're doing banking, you should be regulated by the banking regulators, but when you're selling stock, you ought to at least be subjected to the anti-fraud provisions of the Securities Act." And they say "No, no, no. We only know one set of regulators. We don't want to learn too many phone numbers." I'm sorry. That's kind of making a joke, but it's a very serious problem, and they go into the legislators and they say the world will come to an end if this happens, and we've got to negotiate individual provisions.

You know, here, there is not a built-in constituency which is pounding the table. The banking industry, the commercial lawyers, they're not jumping up and down saying, "This has to happen." If you actually sit down with people and say, well, don't you agree that this clarifies the law; this deals with an ambiguity that was observed in court decisions; this deals with updating the law to make it more technologically up-to-date, wouldn't you agree that's a positive? They'll say yes. But is it actually compelling to them? Not necessarily. They may also say yes, but we had to give up something here. There's this particular provision we don't like, or there's this particular provision that's untested, and we're concerned it might be interpreted the wrong way. So that's why there is some doubt. The jury is still out as to whether or not this is going to be a viable project. We have spent a lot of time and money. Of course, our people are working basically pro bono. I'm talking about tens of thousands of dollars in free time, plus we have the committee meetings because we, the Conference, do pay for the commissioners to fly from around the country to attend these meet-

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15. UNIF. SEC. ACT §§ 101-807, 7C U.L.A. 7 (1985) (amended 1988).



ings and stay in hotels. We get very good deals. Don't worry. We're not going to waste taxpayers' money, so the verdict is not in yet.

Another interesting piece of it is that we're increasingly being approached by other countries to look at what we're doing on the commercial law basis. We are working very closely now with counterparts in Canada and Mexico. We're also being asked to participate in United Nations affiliated organizations, which are drafting treaties or which are trying to deal with laws. In Iraq for example, they might want to put in the U.C.C. Take something closer to home. We are working now with the Native American Indians to develop a tribal code which would be basically a mirror of the commercial code.

What happens when a — and, of course, this is not as big a problem in Illinois, but some of you may be from states where there are significant Indian reservations. If an Indian drives into town in the state and leases the automobile and drives back into the reservation, what are the rights of the leasing company? Well, even if that state has Article 2A old or Article 2A new, guess what? There's a federal pre-emption which says that the state laws cannot apply on the reservation, so it makes many mainstream American businesses reluctant to deal with the Indians. Yes, there are casinos being built. Yes, there are big resort complexes. Those things are heavily lawyered, and people don't know exactly what's going to happen if anything goes wrong. So there's a lot of work that is being done in the commercial law area. And, as somebody suggested earlier, that we're out of the commercial law business, the U.C.C. revision business, let's visit this again and you'll see that's not true.

**AUDIENCE MEMBER:** Howard, I have a question. I've seen it a little bit in Article 9 and a little bit in revised Article 2 and Article 2A. Some critics would say it's legislation by comment; that comments now seem to be trying to direct an approach.

Could you comment on that, is it just that the comments are fresh now and that it's always been that way, or has there been a philosophical change within the NCCUSL process?

**HOWARD J. SWIBEL:** Well, this debate goes on all the time. Do we put it in the statute, or do we try to deal with it in comments?

You have to really look at the specific case to answer the question, and the challenge for us is to make the statutory language clear enough so that it can be interpreted and understood without relying on the comment. Particularly with the Commercial Code, there's a history of very detailed comments with illustrations and examples.

Practitioners have told us that they welcome those examples, that those are helpful, and a lot of time goes into editing the comments and restyling the comments. And, in fact, there have been big debates over the comments, even between us and the American Law Institute, as to maybe the comment is, in effect, steering a result that we should leave to the courts.

So it's a complex problem, especially because in many states those comments have no weight at all. Usually a Supreme Court of a state will look up NCCUSL's comments, even if it's not voted upon by the legislature of that state, and will take it into consideration in a way that if you were researching a Congressional enactment, you would look at a House or Senate report but —

AUDIENCE MEMBER: Well, clearly, the comments have always had more weight than looking at legislative history. I mean, speaking as a commercial lawyer, I mean, it may not be the statute, but it's always had — at least as a practitioner, I've listened to those a lot harder than whether, you know, my Senator from my town in Illinois or whatever is commenting on, in part because of the people involved.

HOWARD J. SWIBEL: Yes. They take those comments very seriously.

AUDIENCE MEMBER: I mean, I hear you say that there's no constituency that is sort of chanting Article 2 and Article 2A.

Have you guys been through this process before? I mean, does a constituency arise at some point? I'm going to ask you to handicap it, just a sense of what the process is, what will I see, and what kind of things am I looking at? Is there going to be somebody that says maybe this does make sense at some point?

HOWARD J. SWIBEL: It's an education process.

What's also going on out there is that there are wise people at the American Law Institute who believe that some of the questions that should be resolved through Article 2 and Article 2A must be resolved, and that if they're not going to be resolved through the statutes that it ought to be resolved through some kind of a publication by the American Law Institute which sheds light on some of the issues that have caused conflicts among court decisions, et cetera.

And so when you talk about constituency, part of our job is to identify the constituencies, to go to some of these interest groups, and to try to enlist them in the effort, and that is being done. As I said, we're using Kansas and Nevada as test cases.

Credibility can be shaped over time, so you can have somebody say, "Okay. It's never been enacted. This thing is a loser. It's not going to go anywhere." Then you start having legislatures vote on it and governors sign it, and then you can go to another state and say, "Well, it's already been enacted." And you go through the process, and you separate the rumor and the gossip and the misinformation, and you put it under the microscope and say, "Well, what's wrong with this? And what are your comments?" And we do often find that it's necessary to make amendments in particular states on particular issues.

If you think of the number of different policy judgments that are reflected in a uniform law, Article 2A probably has hundreds of policy decisions that are reflected. If you have to compromise on a couple, you still may achieve something very significant with hundreds of other issues. So, again, politics is the art of the possible, and we are interested in enactments.

For us, as an organization, to say, "Well, we've drafted a whole lot of great laws" doesn't mean very much unless people enact them. So we keep a score card. Every month our staff sends us a listing. And I can tell you that, you know, you tell me your state and I'll tell you what's going on now.

I saw somebody from Alabama. Alabama right now is considering the Uniform Prudent Investor Act,<sup>16</sup> the Uniform Securities Act,<sup>17</sup> the Uniform Trusts Act,<sup>18</sup> and the Uniform Trust Code<sup>19</sup> is in your Senate in the third reading.

Georgia? I'm sorry. Georgia, Atlanta, Georgia. Sorry about that. No introductions yet in Georgia this year. But, you know, we've got activity going on in virtually every state. We've already got several enactments. Article 1 of the U.C.C. and Articles 3 and 4 were enacted in Arkansas this year, and we expect other U.C.C. enactments in other states.

**AUDIENCE MEMBER:** What about the — I mean, we've always talked about it in — you know, talked about it as individual lawyers and individual states.

You know, the other side of that would be — and we've seen it more and more — is the national issues, the national legislation. You know, if you look at the history of commercial law as we know it, we

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16. UNIF. PRUDENT INVESTOR ACT §§ 1-16 (1994).

17. UNIF. SEC. ACT §§ 101-807, 7C U.L.A. 7 (1985) (amended 1988).

18. UNIF. TRUSTS ACT §§ 1-25, 7C U.L.A. 442 (1937).

19. UNIF. TRUST CODE §§ 101-1106 (2004) (amended 2005).

understand why it's a series of individual laws in individual states. Those distinctions probably in part because of what this has done have eroded over time. The differences between states are not as great as they once were.

Do you see a potential of national commercial law in some form or, you know, baby step type issues? I mean, is there something out there that I, as a practitioner, will see?

HOWARD J. SWIBEL: This is an ongoing debate.

AUDIENCE MEMBER: At least I'm getting the right debate.

HOWARD J. SWIBEL: And you get a lot of turnover. We have, in our organization, I think eighty.

How many years have you been a commissioner?

JAMES J. WHITE: Not eighty.

HOWARD J. SWIBEL: Are you a life member yet?

JAMES J. WHITE: No, no. I've been a commissioner for, I don't know, less than ten years.

HOWARD J. SWIBEL: Okay. After twenty years, Commissioner White would be eligible for life membership, which means that even if his governor doesn't want to reappoint him, he can stay on. We've got eighty out of three hundred fifty people right now, I think, who are life members of our organization.

In Congress, as you know, you have people like Strom Thurmond and Robert Byrd, fifty to forty years, whatever it is, but there is a lot of turnover.

So you have people come on the scene who say, "There ought to be a national sales tax," or, "There ought to be national internet regulations." And so there are people who come along and say, "Yeah, we ought to make it national law."

Again, what we get from the industry folks is that they are more comfortable fighting the battles state by state. As a general statement, they don't support having the federal government take over.

Go ahead.

JAMES J. WHITE: There are a couple of other answers to that question.

I mean, Article 3 and Article 4 are gradually being grabbed by the Federal Reserve. They keep passing Federal Reserve regulations and

they are — for example, so-called Check 21 is a big change that we would have liked to have done. So, there is an example where the feds are really, through an agency, are taking it.

“Why do you have NCCUSL?” For example when a foreign student comes from Germany he will say “What is this? This is the stupidest thing I ever saw.” The German will not understand why we do not enact things like the UCC in our federal legislature.

But one reason for state uniform laws — and this is something Howard might be too discrete to say, but this is something I would say — Teddy Kennedy doesn't get to change it. Everyday some Congressman or Senator who has got a lot of influence has the power to change the Bankruptcy Act, and every other federal statute. When someone gets a big judgment against the New York Times or the Chicago Tribune, all of a sudden Congress acts to protect its friends. That is not possible if the law is made by the state legislatures.

If you have to change fifty laws, the law is hard to change. So one of the virtues, in my view — as a conservative advocate of the U.C.C. — is that it is very stable and extremely hard to change once you get it. And, of course, that is one of the reasons, Howard, why we can't get the damned amended Article 2 adopted — why we're having trouble getting the new things through, too, right? The opponents realize that once a uniform law is adopted by the states, they will not be able to change that law.

HOWARD J. SWIBEL: Change threatens people. And you're absolutely right; it's an education process. But that's actually the basis of our government, federalism, a balance between the federal and the state. There's clearly a role.

Take the Uniform Securities Act.<sup>20</sup> We had the Securities and Exchange Commission (“SEC”) sitting at the table. They didn't want us to go away. They don't actually have the time or the money to enforce everything. They're going against what they call the big boys, but there are boiler room operations. Where they're doing fraudulent telephoning. That's intrastate, that's not even touched by the SEC direction because they don't have the resources. They're very happy to have a state network of securities administrators enforcing state securities laws.

So I think it's an ongoing battle. As you say, the banking is evolving, but we think that there is an ongoing need for state law.

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20. UNIF. SEC. ACT §§ 101-807, 7C U.L.A. 7 (1985) (amended 1988).

JAMES J. WHITE: The other thing you ought to tell them, Howard, is median enactment of all the proposals since 1910 by the commissioners is zero, right? That is, more than half of the things we have proposed have not been adopted in a single state.

The very first thing the commissioners did was a law which the Catholics proposed. Apparently, there are more Catholics in New York than in New Jersey. The Catholic hierarchy in New York didn't like people going across the river to New Jersey to get divorced. So, the first law the commissioners proposed was one that would have disallowed or limited divorces out of the residents' state. I think only Wisconsin passed that law. New York did not.

HOWARD J. SWIBEL: That is a fact that I never actually heard. I've got to check to see if that's true.

JAMES J. WHITE: Wait a minute, Howard. Are you challenging me? Are you saying that's not true?

HOWARD J. SWIBEL: It sounds interesting.

JAMES J. WHITE: Well, I wrote an article about it. You can read it some time.

HOWARD J. SWIBEL: Then it must be true.

AUDIENCE MEMBER: In terms of getting any uniform law passed or regardless of what it is, when you say there's no constituency really pressing for it is that it falls in the category, for example, in the U.C.C. of "if it ain't broke, don't fix it." That is to say, it's working, and as you say, people don't like change.

But by way of example, Article 2A sailed through. Why? Because financial leases have come into being case law and just about every single state had allowed them to come into play, but there was inconsistency of uniformity, and that was a problem and was interfering with good commerce.

So there was, if you will, a compelling reason to do it. And I think the problem with the revisions to Article 2, just based on what Professor White spoke on earlier, getting back to the comment part of it, I seem to recall, and I can tell you later who my contract professor was. You might have heard of him. He would go back and talk about the statement of contract and the commentaries. That's how I learned — never mind the U.C.C., When I was in law school, we just dealt with Restatement of Contract First and Second, and all that yummie stuff. And my law school professor brought it around and said that's how the whole concept of U.C.C. was developed in terms of how they were

going about, whether they were having a debate about, what was the major law, the majority rule and the minority rule. They used the comments to be the glue. And knowing full well that the case law was going to be different in different states and that the statutory scheme would be different in different states. And I can't remember. There's a whole bunch of statutes that they have choice A, choice B, and choice C for either the warranty section or some other section, I can't remember. It was a long time ago.

But I think the problem is that with regard to reforming Article 2, it's so vast in terms of all of its parameters that most states are saying, "But what's the problem? What's wrong? You know, why is what you're doing so necessary to do?" And I think the concern is, for legislatures, that once you start opening it up a little bit, where do you turn it off? It's sort of like opening Pandora's box. I think that makes it very, very hard, never mind the concept of change.

HOWARD J. SWIBEL: The legislators generally — and, again, I characterize this as a generalization subject to exception — don't study the details of the legislation. What they look for is who's going to take the position against it. Is it going to cost me any votes? Or, conversely, is it going to gain me any votes? They don't know that in advance. It gets introduced and then they get contacted by people who care about it.

The reason we're doing this test marking in Kansas and Nevada is we think that when push comes to shove it may not be as bad as some pundits are predicting, that, in fact, people are not going to feel strongly about it in a negative way and that we can point out — and I've got a list of things and maybe they were mentioned today already, of improvements.

I mean, you start with the most obvious, which is the electronic issues where we've tried to take a whole bunch of uniform acts and get rid of the idea of signing paper and make it clear that you can authenticate through electronic means because you do want it clear that contracts are enforceable and are valid by use of electronics.

Then you find out that over the years we have learned that there are some gaps. There are some issues that are not completely closed by Article 2A, where you could fine-tune it. It would be better. Again, you ask if it is broken. It's broken in the sense that it is not as good as it could be. So in that sense it's broken.

AUDIENCE MEMBER: That doesn't make it broken. That just makes it imperfect. I think that's the problem. That's the challenge.

HOWARD J. SWIBEL: Correct.

AUDIENCE MEMBER: I mean, there's always been technical changes to bills after we pass them and all that good stuff, but I think that the thing is people say, "well, it's working the way it is, but we don't really have the time to spend on this. We've got too many other things, budgets and all this other stuff," and it's hard for them to say, "we'll spend the time that they have for what they consider are for more pressing issues." That's the other thing you're facing right now, especially, as I said, when there's something in place. I think that's what makes it a difficult sale.

HOWARD J. SWIBEL: You're right. As I say, the proof will be in the pudding, and not every state — you mentioned the corporations committee. The reference is to perhaps a committee of the Bar.

AUDIENCE MEMBER: No. You know, whatever the committee is getting assigned for the legislation.

HOWARD J. SWIBEL: The reason I mention this is that the practice varies from state to state. In some states, there's a law revision commission. They automatically send it to a Bar, a State Bar Association Committee.

Here in Illinois, the Illinois State Bar Association would never be sent something by the Illinois legislation. But in some states that's automatically where it would go for study.

So, again, the process varies. And, yes, you're absolutely right, some people of a big committee might get bogged down, but we're going to try to move the process along. And, again, it may not be a barn burner. It may not be a table pounder, but if it, in fact, is an improvement, then people should raise their hand and vote on it.

AUDIENCE MEMBER: I guess what I'm getting to is if you go back to how the U.C.C. was originally passed. Two of the first states to pass it were California and New York. That made a big difference in the ability of other states to go along with it because these were the two states with diverging views on most issues that were comparably discussed, and if they could both pass it, then it was easy for the rest of the states.

Nothing personal, but what you guys are doing with this is you're going after very weak sisters, and sort of like doing very small stepping-stones and hoping that it's going to gather some momentum. I think that's just a very, very much more challenging way to go, a much harder way to go about it. It's just going to make it less likely.



Going to Kansas and Nevada, is like getting Wisconsin to pass the divorce law. No one's going to really care.

HOWARD J. SWIBEL: Again, I'm not going to be argumentative, but our experience shows that we don't need to repeat the pattern that you just described of starting with California and New York. Partnership law, for example, we've got thirty-six states. I do not believe that New York has passed it yet. We've got a lot of other examples where we don't get California right off the bat. California has a slower process. They have a very complicated review procedure involving outside groups. So what worked in another generation or five generations ago may not, in fact, be relevant today.

AUDIENCE MEMBER: I think, Howard, when you're looking over your introduction, you can see that committee lawyers are like purring cats. And I think many of these legislation issues are similar.

For me, from our perspective, it's interesting that we've got this tension going on and we've got at least a dialogue on in some of these issues. All in all, I think it helps us all.

Anybody else have any questions?

AUDIENCE MEMBER: When you submitted the proposed legislation to those two state legislatures, did you send policy statements with them as to why they were improvements?

HOWARD J. SWIBEL: Absolutely. In fact, I have copies of some of those materials today. I didn't want to go into the specific details because I thought you might be a little weary at the end of the day, but we identified, you know, specific sections. We identified six specific subjects that we thought were, quote, "the important improvements." One had to do with the electronics. The second had to do with the effect of certificates of title. There's a gap, apparently, under the existing Article 2A because it says a certificate of title has to be either surrendered, or four months later the goods have to leave the state or something. Article 2A fills that gap. Article 2A contains a warranty against interference, which adds to the warranty against interference, a colorable claim to, or interest in, the goods which will unreasonably expose the lessee to litigation, so it expands the warranty of interference.

The issue of liquidated damages, if the lessee is insolvent, that issue has changed to conform with what people are actually doing in the real world. The damages upon lessor's breach of contract are more

particularly and expressly provided. And then, finally, the lessor's remedies upon lessee's breach of contract are also elaborated upon.

So these are described as improvements, and, yes, we do provide a kit with the package that we give to the legislators to try to translate this into plain language because, admittedly, this is complicated and esoteric. As law students we glazed over. You can imagine what a legislature, many of whom are not lawyers, when they look at this stuff they think that it's in a different language. So we have a public relations staff which tries to turn this into something that's somewhat understandable. Yeah, why would I vote for this? Oh, yeah, I see that there's actually something positive being done here.

So the answer is yes, and if you give me your card, I'll be glad to get you copies of those materials.

MARK LEIPOLD: Any other questions?

HOWARD J. SWIBEL: And if you want to testify in its favor, that would be good, too.

MARK LEIPOLD: Howard, I have to say that this has been a real pleasure, the opportunity to shine a little light on an area of great importance to commercial attorneys.

I know it is not a secret society of great legal minds, but the National Conference of Commissioners on Uniform State Laws is often perceived by attorneys as sort of a secret fraternity of the leading legal thinkers. It is has been a real pleasure to have you take the time and shed some light on the often misunderstood workings of NCCUSL.

On behalf the audience, the DePaul University College of Law, the Commercial Law League of America and myself, thank you for appearing today and sharing your thoughts and observations.

HOWARD J. SWIBEL: Thank you very much.

