UETA & E-Sign-Contract Formation & Enforcement - What Law Governs a "Goods" Transaction?

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BARRY CHATZ: If I can say one thing before we get started with the next panelist, this is the perfect intersection of DePaul University’s law school and commercial law league to bring about this type of discussion which has the practical effect of talking about how lawyers will be able to protect their clients, as well as the intellectual discussion that we’ve just listened to.

Lawrence Brown is here to talk about UETA and E-Sign. I think that’s the perfect transition from what we just listened to for the last hour or so.

Mr. Brown’s practice involves state and federal trial and appellate matters concerning commercial transactions, business torts, bankruptcy, trade regulation and corporate governance. He’s participated in the drafting of a treatise of the law of the European Economic Community. He’s involved in the Uniform Laws Committee with the Commercial Law League. We’re pleased to have him here, and I look forward to his comments.

Thank you.

LAWRENCE C. BROWN: My perspective as a speaker will be different than Professor White’s because my background is in trial work.

One of the things that I noticed when I was preparing for this presentation is that it seems that revised Article 2 was taking an entirely different perspective on preservation of the Uniform Commercial Code against outside intrusions by statute. If you were to take a look at revised 2-108 and my materials, if they are available, I go into this matter in some detail.

You’re going to find that Article 2, in its deference provisions, inverts the policy of Article 1. And one of the important things we’re going to be talking about here today is how, in fact, Article 2 in its revised form is becoming a default statute in that, if no other provisions apply from non-Article 2 law, then Article 2 will control. It’s a

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very different concept for myself, as a trial lawyer and as a draftsman, because I've always thought, except in the consumer realm under the present 2-102 that Article 2 should be paramount, and it isn't.

Now, to try to save some time, I'm going to start by saying that uniform electronic contracting statute — the UETA referred to this morning (Uniform Electronic Transactions Act) was issued in its final form in 1999. Forty states have adopted it, and if you have my materials in front of you, I call attention to footnote sixteen and caution you that the states adopting UETA have not necessarily adopted the final 1999 draft as its drafters intended.

I come from New York. New York did not adopt UETA. There are three other states that do not have any form of UETA, those being Alaska, Georgia and Washington. States that have adopted the act in a form variant from the final 1999 form are Arizona, California, Illinois, Indiana, Nevada, New Mexico and Virginia.

Legislation that's almost the same as UETA 1999 final draft — and you've got to read these statutes line-for-line as they're adopted — was enacted in the District of Columbia, North Dakota, Oklahoma, South Dakota and Tennessee. The remaining states have adopted the UETA 1999 final draft.

Now you ask why am I bringing this up? Let's take a look at the E-Sign law. E-Sign is a pre-emptive federal statute for electronic contracting. There were two ways a state can opt out of E-Sign. One is to adopt the 1999 UETA final draft. Whatever state you're in, you should inquire whether your state has adopted that final 1999 draft.

A little later in this presentation, I'm going to discuss preemption problems and some of the issues that have arisen in case law because there has to be a line-by-line harmonization between the form of UETA that's been adopted in a particular state and the E-Sign law. You should be cautioned that E-Sign, although allowing a state to opt out of substantial parts of E-Sign by adoption of the UETA final draft, still prevails concerning certain consumer notice protection issues. If you think that preemption is not going to occur because the UETA has been adopted under E-Sign, this is only true as to the E-Sign provisions which permit opt out.

Now what I'd like to do is interrelate what I'm presenting this morning with the contract formation process under present Article 2 and revised Article 2 as it's been proposed.

As you probably know as commercial lawyers and students, 2-204 and 2-206 are the present U.C.C. contract formation provisions. 2-206 concerns more or less offer and acceptance and when it has been determined that an offer has been made in a form that can be accepted.
Revised Article 2 carries those rules over, modifying them slightly to allow for electronic contracting, except for a provision that's been moved over from 2-207. And I'm sorry Professor White's still not here because —

JAMES J. WHITE: I am here.

LAWRENCE C. BROWN: Oh, you are here. I'm sorry.

You wrote in an article in the 2004 symposium on freedom of contract in Wisconsin Law Review about this particular provision, and it's been moved over from 2-207 to 2-206. It's the new revised 2-206(3), which is a disguised version of the knockout rule. And by that, what is meant is that an offer and acceptance do not have to be a mirror image of each other, but if there are central or critical terms that are alike, the acceptance of the offer will have been deemed to occur as to those terms.

Insofar as what is proposed with respect to 2-204 and 2-206 in the electronic contracting area, they treat electronic transactions the same as they do nonelectronic transactions, but there are complications introduced as the result of certain other provisions addressing the electronic contracting process itself.

If one addresses UETA's coverage, compared with the focus of E-Sign, UETA focuses on parties who consent or agree to do business electronically. That's a different concept than that of E-Sign. E-Sign deals with interstate commerce and transactions affecting it. And that literally means that almost any consumer transaction that could be considered to have an impact in interstate commerce is going to be affected by E-Sign, regardless of consent. That's not true of UETA. Unless you have consent by a party to deal with another party through an electronic media, UETA's scope indicates that UETA will not apply, and you will either have to resort to E-Sign or some other rules to determine whether or not the parties have made an enforceable contract.

I could not find any case law which addressed the issue of absence of consent to electronically contract, but that gap will probably have to be addressed by the courts if not legislatively dealt with.

UETA and E-Sign both have provisions to facilitate electronic contracting. They have similarities, but there are significant differences.

If you have my materials, I'm on page nine at B1. UETA was adopted before E-Sign. E-Sign adopts UETA's legal recognition of electronic records, signatures and contracts; the materials set forth cites after each of these points. Neither statute requires a person to use electronic media to enter into an agreement. Both statutes' re-
cord retention rules are satisfied through electronic means, which accurately store and reflect information in the records.

E-Sign utilizes UETA definitions of electronic record, information, person, record and uses different language with similar meaning for the definitions of electronic agent, electronic system and transaction. It’s important you know each of these definitions because you’ve got to determine whether or not the rules in each of these statutes have been complied with in the context of the definitions. They each permit electronic originals and have retention and accessibility rules for records acquired for later reference, notarization rules and rules addressed to an electronic agent’s acts, such as in the case of a click-through process’ operation for attribution of intent to contract by a party entering into a transaction. These statutes do not apply to U.C.C. Articles 3 through 9, nor to Article 1, except for Sections 1-107 and 1-206.

It’s necessary to recognize the dissimilarities in UETA and E-Sign because there are going to be default situations as a result of the gaps between the statutes’ coverages. E-Sign requires the obtaining of consumer consent to use of electronic means to deliver any required information in a transaction. It prescribes the procedure for obtaining that consent to the use of electronic means to deliver that information. It disqualifies oral communications or recordings from being electronic records for the purpose of consumer notices and disclosure, and it prohibits the exercise of regulatory authority to circumvent E-Sign’s provisions. It contains exceptions to coverage beyond those of UETA, as well as certain exceptions to coverage provided for by UETA.

E-Sign does not contain default rules specifying when an electronic record was sent or received. UETA does. It also does not contain default rules on the effect of errors and changes in transmissions and the admission of electronic records into evidence. E-Sign does provide specific preservation of the protection of other consumer laws concerning the content or timing of any disclosure or record to be provided to a consumer, as well as the protection of other laws other than a requirement that documents or contracts be written, signed or in non-electronic form.

One of the major differences between E-Sign and UETA is that UETA deals with issues of evidence, as well as the processes for electronic contracting. You can find yourself in a situation under UETA where, in fact, if certain events do not occur, a contract is going to be unenforceable. That’s why I disagree with comments in the statutory comments under UETA that it’s not intended to affect the substantive
law of contract. I don't think that's true. It becomes problematical when you have a transaction that is not enforceable because you can't prove it up pursuant to the provisions of UETA.

Also in terms of E-Sign and UETA, we have to look at preemption considerations. E-Sign applies to all business and consumer transactions in interstate commerce, and the nexus with commerce can be at just about any level. I've cited Wickard v. Filburn, which is probably the broadest penetration of the interstate commerce power, and you can easily argue that any transaction with a vendor, and particularly in electronic commerce that's across state lines and uses wire or mail, is going to be covered by the E-Sign statute.

The UETA final draft of 1999, as I mentioned before, is one of the safe harbor opt outs from E-Sign. The only cautionary notes are that the opt-out provision refers to the 1999 UETA final draft, and that there are provisions of E-Sign that cannot be avoided. Those are the consumer disclosure provisions in subchapters one and two. If you do have a UETA statute in your state, you have to analyze it for compliance with E-Sign subchapters one and two concerning consumer disclosures. Despite the existence of the opt-out provision, one must comply with both laws.

There is a second way to opt out of E-Sign; the adoption of a non-UETA compliant statute. This is what has been attempted in revised Article 2. The method used is to state that the statute does not override or attempt to override E-Sign subchapters one and two, the consumer protective provisions. The statute may not favor a specific technology or technical specification concerning functions involved in use of electronic records or signatures, and if enacted after E-Sign, which was adopted June 30, 2000, must make specific reference to the E-Sign Act.

As I indicated, revised Article 2 uses this non-UETA approach. The preemption provisions require a practitioner to determine, in the context of a matter within E-Sign's scope, the extent to which and whether a state laws pre-empts it. The statutory language in E-Sign sections one and two suggests there are four categories of statutes that one can confront.

First, where the 1999 UETA final draft has been adopted, this effects an opt out from the pre-emption requirements, save that the consumer disclosure rules of E-Sign apply.

The second category is where state has adopted the UETA 1999 final draft but with changes or amendments.

The third is where the state adopts laws or regulations that meet the requirements of E-Sign's non-UETA opt out.

The fourth is where the state adopts laws or regulations concerning electronic systems or records that have legal effects similar to E-Sign and UETA, as through enforcement of electronic records and agreements, but otherwise deviate from both statutes. An example is New York’s law where New York doesn’t adopt UETA or attempt to opt out of E-Sign but, instead, tries to harmonize its statutes and cases arising thereunder with the federal E-Sign provisions.\(^4\)

And as I think I have indicated in the materials, adoption of law consistent with E-Sign will allow a state to opt out, but whenever you have a situation where a state has altered the UETA 1999 final draft, you're going to have to check for the consistency of that amendment with the E-Sign provisions.

The preemption question is significant for these reasons. You have to evaluate whether UETA or alternative state law or regulations limit, modify or supersede the requirements of E-Sign, except for the consumer protective provisions because, while E-Sign violations in and of themselves do not necessarily mean a contract can’t be enforced, they are one of the considerations a court will undertake in evaluating whether you do have an enforceable agreement consistent with applicable state laws.

As no state has adopted revised Article 2, you have to refer to UETA, where adopted. I think Professor White mentioned this. You have to refer to UETA if the state has it, and harmonize it with present Article 2. In fact, that’s what New Jersey’s statutory commission has recommended. I’ve placed a notation to a state report in this paper that indicates how New Jersey has attempted to do that. In New Jersey, they’ve advised against adopting revised Article 2 as redundant if the reason that revised Article 2 is being adopted is to facilitate electronic contracting in that state.

I’d like to turn next, if I could, to the scope of revised Article 2, choice of law issues in both electronic and non-electronic contracting.

The scope of revised Article 2 concerning transactions focuses on the definition of goods. We’re all familiar with the goods and services issues that have been addressed in litigation under the present Article

2. However, the drafters in revised Article 2 specifically define goods as not including information.\(^5\) That was an intentional omission which evolved with the discussions for adoption of UCITA, The Uniform Computer Information Transactions Act, as described in the drafters’ comments. The exclusion creates problems because it will require case by case analysis of the composition of an item being sold. “Information” is separately defined in revised 2-103(1)(m) as including computer programs, software and computer information.\(^6\)

In defining goods as excluding information, the drafters also opted out of endorsing or rejecting particular approaches for determining applicability of revised Article 2. There is a lesson in those comments, and that lesson is that you may, in opting out of Article 2 for part or all of a transaction, lose the benefits of Article 2 in terms of its liberal contract formation, interpretation and enforcement provisions.

The drafters, in describing analysis of a transaction, gave examples of Article 2 application focusing on transactions that had mixed characteristics. The first one involves goods predominant in the transaction. The second involves goods being the source of the dispute, although not predominant in the transaction, and the third being goods integrated with information.

Non-application of Article 2 involves nongoods being predominant, nongoods being the source of the dispute, though goods were predominant, and an integrated product containing goods.

The final category involved the division of a transaction into its elements with Article 2 only applying to the goods. I’ve cited a case from the Western District of Tennessee that has addressed the problem of analyzing goods and non-goods in a transaction and what the implications are for non-applicability of Article 2 in the event one decides to opt out of all or part of the transaction from Article 2.

Points (2) and (4) in the proposed comments to Revised Article 2-102, when read with the definition of goods, should be a cause for concern for draftsmen as well as litigators.

Whether and to what extent Article 2 applies is going to determine, in material part, the tactical approach to a case because you’re going to have a choice, when you’re dealing with Article 2 and non-Article 2 law, which best benefits your client. The same point applies to the drafting of agreements. You have a situation where you not only have a choice of what state’s law is going to apply, you’re presented with an opportunity as to whether you’re going to opt out of Article 2 or not

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by defining the content of your transaction. It's also important to realize the difference between applicability of Article 2 and other rules in terms of dealing with the subject matter. There are evidence implications, including the parol evidence rule, as the common law parol evidence rule is stricter. You have different issues concerning statutes of limitation and the remedies that are available.

Revised 2-108,\(^7\) provides us another opportunity to deal with the issue of whether Article 2 applies or not; revised 2-108 is a new proposed statute. Initially, the present Article 2 provides deference to consumer statutes, but does not refer to case law or regulations in the context of deference.

Revised 2-108,\(^8\) presents an entirely new statutory matrix when you're concerned with how to opt out of Article 2 because the transaction definition provides us with an entirely different set of analytical rules than those used under the present statute.

Revised 2-108 has its genesis in the present U.C.C. Section 2A-104(1).\(^9\) It provides in part that a transaction subject to revised Article 2 is also subject to any rule of law that establishes a different rule for consumers.\(^10\)

Revised 2-108 further provides that, for the purposes of Article 2, failure to comply with the non-Article 2 law has only the effects specified in that law.\(^11\) There are two points to recognize on this opt out provision for different rules for consumers. The definition of the term "rule of law" is expansive. It includes not only statutes as in the present law, but it also extends to administrative rules properly promulgated under the applicable statute and "final" court decisions.

Trial lawyers particularly will appreciate a case cited from the Texas Supreme Court that concerns injury to a consumer from supply of electrical power. The trial court, after extensive hearings, made a determination that the U.C.C. didn't apply in terms of unconscionability and barred damages in a personal injury action.

The intermediate appellate court reversed the trial court; it determined the U.C.C. applied and directed the case should go forward, with the consumer able to take advantage of the unconscionability ban on limitation of damages in Article 2 of the U.C.C.

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\(^7\) U.C.C. § 2-208 (2005).
\(^8\) Id.
\(^11\) Id.
The Texas Supreme Court reversed and stated the U.C.C. didn't apply to the transaction, and even if it did, found there had to be deference to the utility scheme for regulation in the State of Texas.

One can only wonder what would have happened if the consumer that had lost in the intermediate appellate court and didn't have the money to appeal. A "final court" decision is one that's no longer susceptible to appeal. I can't imagine, in terms of the Revised Article 2 definition of a "rule of law", the impact upon certainty in a statute where one has to consider as "final" all decisions that aren't appealed which are contrary to or in favor of your client's position. One would literally have to research every case, hopefully all that are reported, to determine what the "rule of law" was in a particular jurisdiction in situations where the consumer rules are different and/or law other then Article 2 applied in part or in whole.

Also problematical in revised Article 2 is that it also defers to any other law that governs in the event of a conflict with revised Article 2 in application to a transaction, as provided in revised 2-108(2).12

Although the present Article 2 specifically defers to consumer protection statutes, the proposed subordination to decisions presumably implicates common law. I'm suggesting this extends beyond judicial decisions concerning statutes, and includes common law. This goes far beyond the Article 2 deference to consumer statutes.

Please also note that in the proposed comment to 2-108 in paragraph four, the drafters admit that federal and state consumer laws vary from transaction to transaction and from state to state,13 suggesting we not only have to determine what state the transaction is in and what the "rule of law" is, but that the analysis is going to be on a transaction-by-transaction basis.

To the extent of their application, non-revised Article 2 laws would control. In the event there's a conflict in the consumer context in any portion of a transaction, you're opted out of Article 2, possibly for contract formation, possibly for remedies, such as the type of remedies that Professor White was addressing before. One may not have those liberal remedies that the U.C.C. provides. You may be limited by state law. The revised Article 2 statutory change does not promise that a more liberal statute is going to apply. One may be opted out into a much stricter regimen, and I don't see that that's been recognized in terms of the liberalization for protection of consumers.

In the consumer transaction context, there is a different issue raised by the inclusion of judicial decisions, and that is where you have a diminishing prospect for obtaining uniformity in consumer commerce. This is detrimental. You have a situation where the choice of law provisions are as referred to by Professor White, in revised Article 1. One not only has a deferral to consumer statutes, but also choice of law problems as to the choice of law in the state were the consumer resides, requiring one to analyze transactions with reference to deferral and choice of law considerations.

There is another provision concerning deference under revised Article 2, and that's revised 2-108(1)(c), and I'm on page 17 of the materials. Revised 2-108(1)(c) involves the commercial realm as well as consumer matters. Revised 2-108(1)(c) provides a preemptive effect for all state statutes covering a transaction also subject to revised Article 2. The result of the statute is the creation of parallel statutory schemes.

The scope of a statute’s preemptive effect is said to vary with the particular statute in question in its comparison to revised Article 2. The drafters caution, in their comments, the scope and effect of statutes must be assessed on a state-by-state basis. The proposed comment doesn’t explain why 2-108(1)(c) is limited to statutes, as distinguished from the broader rule of law term used with respect to consumer transactions. If one believes that statutes are to be implemented through judicial decision, as well as an administrative regulation, one has to ask why the drafters chose a narrower route under 2-108(c). They really don’t explain their choice.

In terms of remedies, there's also deference in the revised Article 2 concerning remedies. Revised 2-108(3) provides failure to comply with a non-revised Article 2 statute has only the effect prescribed in that statute. If you have a controlling statute that’s not in Article 2 and that law is breached, you only have the remedy or the consequence provided for in that law. You’re totally out of Article 2 for those purposes. Therefore, if you have more liberal remedies provided by Article 2, you have to ask whether you want that non-Article 2 law to apply and, if so, how to go about getting Article 2 to apply, depending on the advantages of each statute.

Revised, 2-108(3) presumably limits the effect of statutory breach to remedies and defenses set forth in that statute. Adding to the lack of

17. Id.
clarity is the phrase at the beginning of the comment concerning 2-108(3), “Assuming a conflict.” All these rules apply only if there’s a conflict, so determining a conflict’s existence is where one starts. The question that I would put to you would be, if you had a choice in drafting — and we’ve heard Professor White speak about drafting — how would you write around this type of statute? You would literally not only have to write with attention to revised Article 2, you would have to take into account all statutes with which revised Article 2 conflicted in any state in which you wanted to do business, and analyze the conflicts with reference to the various parts of a transaction.

Note that in terms of the examples and the effects specified in the proposed comment to 2-108(3), one is unenforceability for failure to obtain a license under a state licensing statute and the second is a limitation in statute for liability for sales of non-merchantable blood under a blood shield law. The lesson from that is, of course, that you can have a limitation of remedies or your contract may be entirely precluded from enforcement, so the dissection of transactions into their parts by the statute is something that practitioners have to be aware of.

In terms of analyzing the statute for non-revised Article 2 applicable law for consumer situations, a practitioner has to analyze all rules of law from non-revised Article 2 sources applicable to agreement formation, performance, enforcement of contract rights and obligations. In the commercial field, this would be limited to statutes only. This analysis would also be affected by any enforceable choice of law provisions in the party’s contract, assuming that the choice for law itself was not mandated by statutes applicable to the subject matter of the contract or based on other applicable criteria.

You recall Professor White referred to the choice of law change that was proposed in revised Article 1, and is not being adopted in most states. I suggest the reason that it’s not being adopted is it will create mayhem in terms of the consumer transactional activity both in e-commerce and in non-e-commerce transactions.

I think that practitioners have to evaluate of the effect of these statutes on the right of parties to contract. What’s happening in terms of revised Article 2-108 is that there are a number of opt outs from revised Article 2 that create drafting problems, particularly in the field of consumer transactions. In states such as New York where you have non-UCC statutes that apply to particular types of transactions, we have to ask ourselves, “what’s the impact on vendors in electronic

commerce and their customers who are not knowledgeable about the effect of applicable law on their agreements? Are parties passively agreeing to terms that they don’t intend to apply to their agreements?” The question applies both in commercial and noncommercial situations.

What do we do when we don’t know what the substance of the transaction is until the rule of law is determined? And by that I mean if you have to bring a case to enforce a contract and you’re representing a consumer, you won’t know what the applicable law is until you look at all the “final” decisions in a jurisdiction. He who has the “final” court decision, wins in that case. That’s very unsettling for a trial lawyer and the draftsmen, particularly when the highest courts of the jurisdiction have not ruled on the specific matter being addressed. One also has to ask if parties are going to find themselves under obligations they never affirmatively intended to assume or subject themselves to in a particular context.

Next, I’d like to talk about revised Article 2’s relationship to E-Sign and UETA. Revised Article 2 employs a non-UETA opting out of E-Sign. States adopting UETA to avoid E-Sign preemption can do so provided there are no exceptions to UETA’s scope that would violate E-Sign. However, we’ve got to remember that with Rule 2-108(4) it applies only to transactions under revised Article 2.19 This suggests that opting out of revised Article 2 requires, in the e-commerce situation, reference to other means for complying with E-Sign.

You remember Professor White speaking earlier about the E-Sign provisions in revised Article 1. Well, here we have revised Article 2 with its own specific transactional opting out of the E-Sign pre-emption. This creates two issues. It begs the problem of what law applies where there is deference to non-revised Article 2 law. As I indicated earlier, you have an issue that when revised Article 2 does not apply you will have to make a reference to a default law, the initial query being whether your state has a version of UETA or a non-UETA scheme that properly opts out of E-Sign. Otherwise, you have to evaluate the applicability of E-Sign, of UETA and of the state law to determine the applicable rules for an electronic contract.

There are problems with revised Article 2 other than those involving deference and opt outs. It uses certain definitions from UETA for electronic, electronic agent, electronic record and record. Other terms such as automated transaction and electronic signature are not included.

Revised 2-103(1)(p) defines sign — and you heard Professor White refer to the difference in the definitions between Article 1 and Article 2 before — as taking certain types of actions with present intent to authenticate or adopt a record, a definition not having a parallel in either UETA or E-Sign, but describing an act resulting in attribution under UETA’s section nine closely resembling that of electronic signature as defined in E-Sign. It also omits certain UETA defined terms. One has to ask in this context whether revised Article 2-108(4) actually is an effective opt out from E-Sign. I’m not sure it is. I haven’t seen any commentary on it. I know there were complaints from certain industrial organizations that they thought there hadn’t been an effective opt out of E-Sign, but since no state has adopted the law, there has been no evaluation in a litigated context what the result would be.

I agree, as Professor White has also indicated, that those states that have adopted UETA already have an effective means for accommodating electronic transactions. As I indicated before, New Jersey intends to harmonize the present Article 2 with UETA, and it’s been indicated in the New Jersey commission report, which I cite to in my materials, that they don’t think they’re going to adopt revised Article 2 because of all the problems with it.

I’d like to move on to revised Article 2 and the proposed changes in the parol evidence rule, Revised 2-202 and the tie-in to revised 2-207. The parol evidence rule is one of those two basic rules of common law which was developed to preserve the substance of writings the parties executed, thereby protecting written records against modification through concurrent or previously existing oral activity, the use of which was sought to modify the writing. The traditional non-U.C.C. parol evidence rule requires two elements to be present to apply the rule.

First, the final written agreement has got to be an integrated agreement by which it is meant that the agreement represents the entire understanding between the parties to the transaction. This is often said to be satisfied when the contract appears complete on its face. The second element is that the written contract’s language must be clear and unambiguous. U.C.C. 2-202, the present parol evidence rule under Article 2, modifies the traditional parol evidence rule. In addressing the traditional two-part test, the Article 2 revision drafters rejected assumptions that the final writing on some matters is under-

stood as the final agreement on all matters. The agreement's language would be interpreted with reference to the rules of construction of existing law rather than using a contextual analysis, with a determination of ambiguity in agreement language required to admit evidence of course of dealing, usage of trade or course of performance. The modifications of the common law parol evidence rule were not stated in the statute in the U.C.C. but were relegated to the official comment explaining why the statutory language rejects certain requirements and assumptions of the common law. The rejection is tacit. The drafters of revised Article 2 acknowledge that the exception to common law rule will not extend beyond its express terms, such that unless specifically addressed by statute, the common law rule applies.

U.C.C. 2-202(a), our present statute, authorizes admitting the use of course of dealing, usage of trade, or course of performance to explain or supplement agreements unless carefully negated through drafting. The allowing of such acts by the parties to explore or supplement an agreement is because such acts represent elements of contracting that parties have taken for granted.

However, the proposed revised Section 2-202 goes further and it includes a detailed expression of principles for the application of revised Article 2's parol evidence rule. Those principles are carefully drawn to preserve and incorporate the course of performance, course of dealing or usage of trade into agreements. The drafters state in these rules — and it's important they be understood because they are modifications to the common law, that if you're going to desire to stay within Article 2 so you can prove your case, even if the written record is complete and exclusive, it can be supplemented by applicable course of performance, course of dealing, or usage of trade unless those sources are carefully negated by a term in the written record. If the record is final, complete and exclusive, it can not be supplemented by evidence drawn from other sources, even if they are consistent with the record. It's important to understand what that means. What the drafters are telling you is that if, in fact, you have a tightly drawn contract with merger and integration clauses, you will not be able to introduce evidence concerning the interpretation or construction of that agreement except with those three types of evidence that the Code preserves. It's important that you understand that because the contract is then only going to be what is in the writing.

The strength of the statutory assumption in the parol evidence rule is such that unless specifically negated, course of performance, course

23. Id.
of dealing and usage of trade become elements of the contract, not means of its explanation or supplementation. One has to understand the difference between integrations and total integrations. Whereas a total integration excludes evidence of consistent terms, you have to proceed under this new proposed statute beyond a total integration clause and specifically bar use of course of dealing, usage of trade and course of performance if you do not want them considered in interpretation of the contract. This requires a sentence that clearly states the bar in your agreements; this is a novel concept.

Revised 2-202’s applications are distinguished from more stringent common law rules in that parol evidence use will depend on whether and to what extent revised Article 2 would apply to a transaction.

My review of the authorities causes me to believe that creation of written material for use in electronic commerce should be no different from that applicable to nonelectronic commerce provided that attention is paid to UETA and other applicable statutes for the requirements concerning enforceable transactions.

Statutes such as UETA may prevent enforcement of agreements that would otherwise satisfy the parol evidence rules of the present Article 2 and revised Article 2. UETA has a provision that requires two steps to be taken for an enforceable transaction. First, a vendor must not do anything to inhibit the party with whom it does business from receiving and retaining a record that can be reproduced accurately for any purposes including reference thereafter. If for some reason, you are the sender of a communication to a party with whom you are transacting business and somehow prevent that party from preserving that record, there may be a problem proving that transaction in a court of law because UETA makes that record unenforceable. So for those of you that are in UETA states, you have to consider that provision. There are evidentiary problems and there are substantive contract law rule problems proving up an electronic transaction in that context. It should be noted that while UETA’s record preservation protections are express in consumer transactions, the law is so broad that it may be argued applicable to commercial transactions.

A related question that you should ask is: who’s responsible for ensuring that the recipient has a system that can preserve the records? That’s left to the courts. The drafters of UETA dodged that bullet. They indicated that the sender should be prepared, however, to prove that it transmitted through electronic media specific information and that a record was made that was susceptible to retention by a party receiving it in the ordinary course of business.
Another subject I'd like to address is the incorporation of a knock-out rule through the parol evidence rule in revised Section 2-202. That's a new provision that appears, unfortunately, only in the drafters comments. I wish the drafters would put changes in the statute's text. There's a general rule in common law jurisdictions that acts which are in derogation of common law are supposed to be strictly construed. Now, if you're dealing with that situation, why would you place policy in legislative comments as the drafters in revised Section 2-202 did with the banishing of the rule of nonambiguity to permit the introduction of evidence? If the drafters wanted to place the knock-out rule in the parol evidence provisions of the new statute, they should have just done so.

Instead, the drafters took the knockout rule from 2-207\textsuperscript{24} and, in their comments to revised Section 2-202 stated that for parol evidence purposes a contract created under the knockout rule would satisfy the parol evidence rule. The knockout rule says that if you and I exchange terms, the policy of the U.C.C. favoring the finding of an agreement will presume that to the extent our material exchanged terms conform, a contract will be deemed to exist to the extent of the conforming terms, plus gap fillers as necessary.\textsuperscript{25} Parties may be left with a deal that they didn't intend to make on the terms that were found. An interesting concept is introduced when a knockout rule analysis forms an agreement that will be treated as an integration for parol evidence rule purposes. We can only ask the question of how one uses the parol evidence rule's principals to modify an agreement crafted by a court out of the parties' conforming terms.

An integration states the parties agree on mutually acceptable terms and that forms the basis of their contract. For parol evidence rule purposes, we've taken the knockout rule out of 2-207. We've created a contract out of those terms which the parties have in common and now we're saying, for parol evidence purposes, that created contract will be the operative agreement going forward, and the parol evidence rule governs proof of additional consistent terms.

I don't know how many of you practice trial law, but I wouldn't want to have to explain to a judge that I had the court create a contract under 2-207, under consistent terms that the parties exchanged, but not all the terms, and then that we were going to use this agreement, apply the parol evidence rule going forward, to attempt to prove up additional terms that each side thought were in the agree-

\textsuperscript{24} U.C.C. §2-207(3) (2005).

\textsuperscript{25} Id.
ment. I assume the trial courts would have problems with that situation, but until somebody adopts the proposed version of the parol evidence rule, we won't know what will happen.

Reconciliation of the proposed knockout rule and parol evidence rules is important in the area of electronic commerce. You have what have been called the rolling contract problems, on which the drafters didn't take a stand in revised 2-207. The rolling contract situations present in a situation that Professor White was alluding to were where you have terms that are presented in response to which I click, “I agree” in an electronic transaction. Let's say you order a computer from Dell and read all the transaction terms presented on the screen. You don’t want to be bound to something that you didn’t want to agree to. You find yourself in a situation where the goods come and the terms are materially different than the general terms that you read on the screen.

Now, when is the contract formed? Is the contract formed when you click-through, or is the contract formed when you receive the goods and do not return them? There’s a Seventh Circuit case, ProCD v. Zeidenberg, 26 which attempts to deal with that issue and also attempts to deal with the issue of what would have happened if the court dealt with it as a split goods transaction and tried to apply non-Article 2 law.

The issue with a rolling contract is if you get a computer in a box and it has terms different than the terms you clicked on when you said “I agree,” is when the contract is made and what are the terms?

The knockout rule, in terms of its application really wouldn't apply. The question is what are the terms of the agreement in the first place? Do you have an agreement when you keep the goods?

In one case the Seventh Circuit said once you held onto the goods for thirty days, you accepted all the terms, including those that came with the box. There's a competing series of cases that say no, that, there has to be a manifestation of intent, and if that occurs at the front end when you click, “I agree,” that's the contract.

Now I leave it to you to consider what happens in electronic contracting when you have rolling contract issues and the drafters say, “we'll leave it to the courts.” Well, here, I've got a revised statute that says I'm out of Article 2 because I've got different consumer rules. I'm out of Article 2 if I have parallel statutes. I don't understand what the drafters are trying to do. What are they trying to accomplish?

26. 86 F.3d 1447 (7th Cir. 1996).
If we want contract formation rules that are liberalized and rules under revised Article 2 to apply, then we ought to say so when these items come before your state legislatures. We ought to talk about them in our bar associations because sooner or later we’re all going to find ourselves either drafting agreements or enforcing them in courts in situations we never contemplated because we have situations where, by statute, the drafters have said Article 2 doesn’t apply. We have to understand that what has happened here is that revised Article 2 is slowly becoming a default statute, particularly in the consumer realm, and that’s going to cause a lot of difficulty in electronic commerce because you never know what the contract is and what law is going to apply to it until a dispute occurs. In the goods, non-goods situation, as well as the opt-out statutory provisions, the commercial world is affected as well.

In terms of the knockout rule — and I want to continue with this comparison of revised Rule 2-202 and 2-207 — a mutual intention integrated is presumed for terms with respect to which the confirmatory records of the parties agree. I’m on page 27, of the materials for those of you who are following. I have little idea why the drafters placed the knockout rule provision in the proposed comment to revised 2-202. It is an adoption of the substantive rule in revised 2-207(b) with 2-207 to be applied solely to define the terms of the contract subject to 2-202. Preferably, the drafters should have stated in the text of revised Section 2-202 that mutual integration of terms is presumed for terms as to which the parties’ confirming records agree. This would provide a clear statement of the effect of revised Section 2-202 upon agreements created through knockout rule application, corresponding to the revised section 2-207(b) provision expressing the relationships between the two statutes.

2-207 itself provides that the terms of the contract are supplied by three categories of terms in the conjunctive, those being terms which appear in both parties’ records (confirmatory memoranda), written or oral terms to which the parties agree and gap fillers provided by the U.C.C. or Article 2.27

The application of revised 2-207 subject to revised 2-202 creates various issues, even with the comfort of presumption of mutual intent to integrate for parol evidence rule purposes. The knockout rule’s application extends only to the striking of conflicting terms and substituting a gap filler as necessary, but does not otherwise apply concerning

other means of establishing the existence of additional terms or the acceptance of terms by performance.

The impact of revised Section 2-202 upon revised Section 2-207 needs to be respected in an approach to a dispute. If you're going to rely on the knockout rule in a case, you have to remember that only statutory gap fillers may be used with the mutually agreed terms to determine the agreement contract. You cannot establish additional terms by performance unless referable to a preexisting agreement. The drafters warn you about the limitations inherent in revised Section 2-207, but they don't warn you about the consequences of it. The consequences of it are that the parties may be left with a contract they didn't make.

The application of knockout rule under revised Section 2-202 is only one of the issues concerning the statutes' interaction. The questions presented by parties' oral response to writings, writings in response to oral communications and performance or other action in response to oral or written communications considered in determining the content of the agreement and what the parol evidence rule permits proved in the first instance are left for disposition on a case-by-case basis. Professor White's article in the 2004 Wisconsin Law Review Symposium, Freedom from Contract, addresses the problems courts are going to have resolving such issues because revised Section 2-202 and 2-207 do not mesh well.

Finally, I'd like to address the change to the parol evidence rule concerning statutory provisions regarding ambiguity. The revision of Section 2-207 has Section 202 creating greater potential for litigation, particularly with the adoption of the proposed knockout rule that reflects a policy favoring creation of contracts. The parties are going to be forced, under revised 2-202, to recognize knockout terms as potentially precluding additional terms because of the operation of Section 2-207. And by that I'm simply saying that because the operation of the knockout rule is limited to gap fillers that are provided by statute and mutual terms, one is going to be precluded from taking advantage of the liberalized parol evidence rule.

Thank you for your attention. If there are any questions, I will try to answer them now.
