



Monday, October 19
2:30 pm–4:00 pm

1103 The Impact of the Modern Age on Contract Law

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Assistant General Counsel
Pactiv Corporation

Daniel Harper
Vice President, Corporate Counsel
Océ North America, Inc.

James Markowski
Attorney

Faculty Biographies

Deirdre C. Brekke

Deirdre C. Brekke is assistant general counsel for Pactiv Corporation, which is headquartered in Lake Forest, Illinois. Pactiv is a leading manufacturer of food packaging and related products, including the Hefty® brand line of consumer products. Ms. Brekke's responsibilities include serving as divisional counsel to the specialty products division, managing the legal matters related to the procurement, real estate, treasury and information technology functions and handling other law department projects, including spearheading the task of updating and implementing the records retention policy and process at the company.

Prior to joining Pactiv, Ms. Brekke spent five years with Cardean Learning Group LLC (formerly UNext.com LLC), an online education company, serving during the last two years as general counsel and sole in-house attorney. Her in-house career has also included senior positions in the legal departments of Moore Corporation Limited, Sears, Roebuck & Co. and Monsanto Company.

Ms. Brekke graduated with a BA from Emory University and received her JD from the University of Georgia School of Law.

Daniel Harper

Dan Harper is vice president, corporate counsel and secretary for Océ North America, Inc. in Chicago. He provides general legal guidance and counsel to the North American operations of Océ N.V. a Dutch company the stock of which trades on the Amsterdam Stock Exchange. His responsibilities at Océ include counseling on commercial transactions, employment matters, internal investigations, litigation, corporate policy and procedure, intellectual property, software licensing, technology and marketing.

Prior to joining Océ, Mr. Harper was senior counsel at Spiegel, Inc. where he provided legal guidance to the information technology and iMedia groups for the corporate parent as well as the Eddie Bauer, Spiegel Catalog and Newport News subsidiaries. He also managed the Spiegel Group intellectual property portfolio, negotiated and drafted commercial transactions, managed litigation and was the chairman of the Spiegel Group Corporate Privacy Committee. Prior to Spiegel, Mr. Harper was in private practice with the law firm of Carey, Filter, White & Boland in Chicago where he divided his time between litigation and transactional work.

Mr. Harper is a member of the board of directors of the Chicago chapter of ACC and a former secretary of ACC's Information Technology and eCommerce Committee. He serves on the board of directors of Seeds of Grace, a non-denominational charity benefitting women and children in rural Kenya and is active in the Chicago Executive Forum.

He received a BA from Villanova University and is a graduate of DePaul University College of Law.

James Markowski

James Markowski was formerly managing director and group counsel for the financial services business unit of BearingPoint, Inc. He was the chief lawyer for the business unit and responsible for all of the business unit's legal matters including drafting, negotiating and closing complex business transactions domestically and internationally. BearingPoint was a global technology and systems integration company that was spun off from KPMG, LLP.

Prior to BearingPoint, Mr. Markowski was an assistant general counsel at KPMG LLP and responsible for managing securities and accountants' liability litigation across the United States. He had been in private practice at Shea & Gould; Tory's; and Skadden, Arps.

Mr. Markowski has been active in his community local community affairs, and is currently a member of the Town of Pound Ridge Office of Emergency Management.

Mr. Markowski graduated from Georgetown's Law School, where he was an editor of the Georgetown Law Journal and has an undergraduate degree from New York University's Stern School of Business.

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Twenty-First Century Contracting

- What is a “contract” under today’s law and what is needed to prove and enforce one?
- How do you apply pre-modern law to modern digital and electronic communication methods?
- Practical tips on managing digital contracting processes and avoiding disputes and risks

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Contract Elements (Have not changed):

- Offer/Acceptance
- Consideration
- Mutuality

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The Old Rules Still Apply


Q: Is there a fundamental change in contract law because of the digital age?

A: NO!

The Traditional contract rules apply to contracts on paper and in cyberspace. The progression from paper to digital is not unlike going from parchment to paper. By the way - the Federal Rules of Civil Procedure include electronically stored data as “documents”.

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While contract law hasn't changed much for the last 200 plus years, communications and media have changed well beyond what judges and lawyers could have anticipated during this time.

Email, Websites, Electronic Data Interchange (EDI), FAX machines, electronic signatures

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Issues - peculiar to "digital" contracting

- Contract formation
- Creation and use of standard contract forms
- Battle of the forms – is it different today than it was 200 years ago?
- What's the difference between "click-through," "shrink-wrap," and "browse-wrap" agreements? Are they enforceable and when can we use them?
- Training employees on contracting procedures
- Archiving/managing digital agreements

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"A verbal contract isn't worth the paper it's written on"

--Samuel Goldwyn,
Co-Founder of MGM Studios

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To paraphrase Mr. Goldwyn, we will be talking today about whether an email exchange or a click of "I accept" to make a contract is worth the paper it's "written" on.

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Contract Formation

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Statute of Frauds

- Law goes back to 1677—
"An Act for the Prevention of Frauds and Perjuries"
- Currently codified into various laws in all states

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Today – “Statutes” of Frauds Apply to:

- Sale of Goods in excess of \$5000 (UCC 2-201)
- Contract that cannot be performed and completed in less than one year
- Contracts in respect of marriage
- Contracts for the sale of land
- Contracts of Suretyship (promises to pay the debts of another)

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Statute of Frauds Required:

- A “written” document (as we will see, emails and even website pages might count)
- The writing must identify the subject matter of the contract
- It must provide the “essential terms” of the agreement
- In the “old days” - must be “signed” by both parties (as we will see, today many forms of acknowledgment can be considered to be a “signature”)

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UCC 2-201


(810 ILCS 5/2-201) (from Ch. 26, par. 2-201)

Sec. 2-201. Formal requirements; statute of frauds.

(1) Except as otherwise provided in this Section a contract for the sale of goods for the price of \$500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

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2003 Amendments to UCC 2-201

§ 2-201. Formal Requirements; Statute of Frauds.
 (1) A contract for the sale of goods for the price of \$5,000 or more is not enforceable by way of action or defense unless there is some record sufficient to indicate that a contract has been made between the parties and signed by the party against which enforcement is sought or by the party's authorized agent or broker. A record is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this subsection beyond the quantity of goods shown in the record.

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What does the UCC Statute of Frauds require?


Sale of goods:

- There must be a "writing" (new UCC uses "record" to include electronic communications)
- Quantity
- Description of the good
- "Signed" by the party to be bound.

? Price--Not required!!!
 ? Both Parties signatures—Not required!!!

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UCC 2-201—Business to Business

Illinois:
 2) Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

2003 Version:
 (2) Between merchants if within a reasonable time a record in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against the recipient unless notice of objection to its contents is given in a record within 10 days after it is received.

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UCC Formalities are not very formal

Most cases—

- No signature required
- No price term required
- No paper is required!

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Uniform Electronic Transactions Act (UETA)

Adopted by 45 states and the District of Columbia

Key provisions require that electronic agreements and electronic signatures on agreements cannot be held invalid merely because they are electronic.

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Electronic Signatures in Global and National Commerce Act*

"Notwithstanding any statute, regulation, or other rule of law, with respect to any transaction in or affecting interstate or foreign commerce-

(1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and

(2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

*15 USC Sec 7001 et seq

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Relation of the Federal Act to Consumer Law

If the law requires that information relating to a consumer transaction be provided to a consumer in writing, an electronic record can be used to provide such information if a host of requirements are met, including the following:

1. The consumer affirmatively consents to such use and does not withdraw the consent;
2. The consumer, prior to consenting, is provided a clear and conspicuous statement containing a menu of required items, including a statement informing the consumer of the option to have the record provided on paper or in non-electronic form, and the right of the consumer to withdraw the consent to have the record provided in electronic form;
3. The consumer, prior to consenting, is provided with a statement of the hardware and software requirements for access to and retention of the electronic records and consents electronically, or confirms his or her consent electronically, in a manner that reasonably demonstrates that the consumer can access information in the electronic form that will be used to provide the information that is the subject of the consent.

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Creation and Use of Standard Contract Forms

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Contract Evolution

- Lawyers (and clients) use and re-use forms over and over, changing them ever so slightly, or completely re-writing them.
- How do we ensure that the changes made by clients (and lawyers) meet the goals of the company, among them – the business objectives of the particular deal and the reduction of exposure to risk?
 - The folks who administer a project should be given the freedom to modify contract the requirements and specifications.
 - However, the contract must not be so easy to modify that what seems to be insignificant electronic communications between these respective parties results in inadvertent yet significant alterations to the agreement.

Employees must be trained to understand the email and web usage could modify the contract and job specifications.

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Create your Own Forms and Templates

- For simple vendor contracts – use simple attachments covering issues important to you
- Insurance and Indemnification Rider
- Sales Agreement

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What????

- The terms and conditions found at: <http://www.mytermsapplyandtheycanchnageatanymoment.com> apply to this transaction.
- Print the terms and conditions found on the website – review them, revise them if need be.
- At the end of the day, make sure that a hardcopy (or unchangeable softcopy – pdf- is attached to the contract as an exhibit.

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The "New" Media

- Paper Forms—still used (bills of lading)
- EDI
- Email—consider the context—can you rely on it?
- Websites—Do you agree with the terms and conditions on your homepage? (have you ever really looked at it?)

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New types of Electronic “Contracts”

- “Click-through”—must click “I accept” to advance to the goodies
- “Shrink-wrap”—applies automatically if you open the package
- “Browse-wrap”—legalese found in a link on many websites

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Battle of the Forms—or “My data beats your data”

- Pre-UCC or non-sale of goods—no contract formed—terms of offer and acceptance had to mirror each other
- Under 1960's version UCC—question of formation/“knockout rule”
- 2003 proposal to change UCC 2 would eliminate the traps—who goes first no longer matters

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May become the contract prevention provision—the New Knock-Out Rule:

When one party insists in that party's record that its own terms are a condition to contract formation, if that party does not subsequently perform or otherwise acknowledge the existence of a contract, if the other party does not agree to such terms, the record's insistence on its own terms will keep a contract from being formed....

—Official Comments UCC 2003 Amendments

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Contract Creation/Approval Process

CONTRACT MANAGEMENT PROCESS results in

- Cost Savings
- Efficiency
- Risk Mitigation
- Quality Improvement

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Contract Creation/Approval Process

Contract Policy will lay out:

- Approval protocol
 - Risk level
 - Length of contract
 - Value of contract
 - Subject matter
- Contract Workflow—who decides to make a sale and who captures decisions about sourcing/pricing?
- Electronic options

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Consider the Contract "Value Matrix"

- Focus High-Value resources on High Risk/ Strategic Advantage-producing contracts
- Low Risk/Low Benefit contracts can be standardized
- Medium Risk/Medium Benefit contracts managed by paralegal/contracting resources

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In all cases – LEGAL review required!

- BUT, Small Law Departments do not have time/ desire to review all contracts individually--the form (and perhaps changes within certain parameters) are given Legal pre-approval
- Segment types of recurring standard contracts that do not require individual review (snow removal, landscaping, consulting agreements, customer sales agreements, software license, insurance and indemnification riders).

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Training Employees on Contract Creation/Approval Process

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Characteristics of a Good Policy

- Simple - complexity leads to uncertainty; uncertainty leads to disputes
- Make clear that the elements of a contract must be satisfied
- Acceptance must be unequivocal ("sounds good", "I expect this agreeable", etc. may be too ambiguous) I ACCEPT
- Approval regime must be clearly set forth
- Who can sign? See company by-laws for contracting authority
- Reliable process for maintaining a record
- Use of "Masters" and "Schedules" to manage risk

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Compliance

SEC Staff Accounting Bulletin 101 requires (among other things), "evidence of a contract"

Auditors like signed contracts on paper.

If emails is permitted to be used as a vehicle to contract, then the company must define the parameters fur use of email – and publish this to potential contracting parties.

In the absence of a written company policy, auditors will likely require an opinion of counsel that email(s) constitute a binding contract.

The integrity of the email contracts must be maintained.
(Follow up with formal contract on paper with an ink signature?)

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Employees responsible for entering into formal relationships must be trained to understand basic contract principles.

All employees must be sensitized/socialized to the fact that even email exchanges may rise to the level of a legally binding contract.

Will electronic contracting be used?

Will emails be used to create or modify contracts?

Authorizations – Approvals

Legal review? Any non-standard email contract should be reviewed by legal.

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Avoidance of Risk

- Every employee with an email account has the potential to bind the company
- Can't train EVERY employee so - focus on employees dealing with customers and vendors
 - Sales
 - Purchasing
 - IT
 - Marketing
- Services - Service companies should provide the same training to all employees delivering services directly to the customer
 - Repairmen
 - Service Technicians
 - Installers
 - Delivery persons

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DO NOT:

- Assume email is sufficient notice – read the contract
- Assume that receipt of an email is countersigning a document – read the contract
- Assume that opening is reading an email
- Assume emails from senior management are “special”
- Say there is good news that is not

See: [Campbell v. General Dynamics](#)

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International Laws Dealing with Electronic Age of Agreements

- UN Convention on the International Sale of Goods (CISG)
- United Nations Convention on the Use of Electronic Communications in International Contracts
- EU Directive on Electronic Signatures
- Other countries laws

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Going International and Cross Border:

United Nations Convention on the Use of Electronic Communications in International Contracts (not yet relevant; not the law anywhere)

1999 EU Directive on Electronic Signatures (too technical and too complex for “simple county lawyers” to deal with)

Electronic Signature Law of the People’s Republic of China (the Communists are the best Capitalists in the Modern Age)

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United Nations Convention on the Use of Electronic Communications in International Contracts

- Limited to business to business transactions cross border transactions
- Only 17 countries have **signed**: Honduras, The Republic of Korea, Central African Republic, China, Colombia, Iran (Islamic Republic of), Lebanon, Madagascar, Montenegro, Panama, Paraguay, Philippines, Russian Federation, Saudi Arabia, Senegal, Sierra Leone, Singapore, Sri Lanka
- BUT: **Not** ratified in any country and not enacted into law in any country
- The basic idea is, like US law, electronic form it self is not a basis for invalidating contracts, digital documents get the same status as paper

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1999 EU Directive on Electronic Signatures

- Establishes framework for member states to enact implementing legislation
- Promotes interoperability of electronic-signature products
- Applies to consumer and business transactions
- Does not address transactions between EU and non-EU entities

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Very technical:

Electronic Signature means data in electronic form which are attached to or logically associated with other electronic data and which serve as a method of authentication

Advanced Electronic Signature means an electronic signature which meets the following requirements:

- it is uniquely linked to the signatory
- it is capable of identifying the signatory
- it is created using means that the signatory can maintain under his sole control
- it is linked to the data to which it relates in such a manner that any subsequent change of the data is detectable

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System is based on "Certification" issued by "certification service providers" that are "accredited under a voluntary accreditation scheme" who issues "qualified certificates" that are an "attestation which links signature-verification data to a person and confirms the identity of that person" verifying the electronic signature of "a person who holds a signature-creation device".

Civil law countries, most of the EU, have historically had complex – by common law standards – rules for signing contracts, e.g., manual ink signatures, notarizing signatures.

What do you do?

- Go the old fashioned way: contracts on paper signed by human beings.
- Check with local counsel on formalities for signing and requirements for valid contracts

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Electronic Signature Law of the People's Republic of China

- Straight forward
- Easy to understand
- Flexible

Parties can opt for the simple email exchanges allowed under US and NY law

Parties can opt for a technical complex approach that is embodied in the EU Directive

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Archiving/Managing Digital Agreements

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How do we eliminate the clutter when we can't even see it?

- Electronic Filing systems
- Use your ERP system
- Home-grown solutions vs. off-the shelf or custom applications

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Record Retention

- Remember to manage destruction as well as creation of contracts

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ACC Extras

Supplemental resources available on www.acc.com

The Basics of Contract Law.

Program Material. June 2008

<http://www.acc.com/legalresources/resource.cfm?show=144301>

Differences Between Civil Law and Common Law Countries in Drafting and
Negotiating International Contracts.

Program Material. October 2008

<http://www.acc.com/legalresources/resource.cfm?show=154771>

Guide to Reviewing Contracts.

Quick Reference. March 2008

<http://www.acc.com/legalresources/resource.cfm?show=16457>

Please note, these additional resources are provided by the Association of Corporate
Counsel and not by the faculty of this session.