

The Electronic Signatures Act Requirements

The Electronic Signatures in Global and National Commerce Act¹ (the “Electronic Signature Act” or the “Act”) gives electronic contracts the same legal status as written agreements and sets a uniform legal standard for electronic signatures and records. The Act does not mandate electronic signatures or records. It simply ensures that transactions in the electronic marketplace are as enforceable as those created with paper and pen. The Electronic Signature Act took effect on October 1, 2000, except that any federal or state requirement that a record be retained becomes effective on March 1, 2001.

This memorandum provides an overview of the legislation and outlines its significance for firms that do business over the Internet. It is divided into three parts. Part I provides an overview of the provisions included in the new Act. Part II outlines its overall significance. And Part III outlines several issues of particular concern to insurance agents and brokers.

I. WHAT THE LEGISLATION SAYS

The Electronic Signature Act essentially applies traditional notions of contract law to the Internet. The legislative goal was to promote electronic commerce by providing a national framework for electronic signatures and transactions. The Act includes a provision that makes clear that all of its provisions apply with full-force to the business of insurance (thus preempting State “wet-signature” laws and other similar requirements) and because it includes a special provision that protects insurance producers from potential liability if they are following an insurer’s e-commerce procedures and something goes awry.

An “electronic signature” is defined as an electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.² As a general matter, the Act:

- (1) applies to all transactions if the consumer affirmatively consents to the use of electronic procedures unless the transaction is specifically excluded under the Terms of the Act itself;
- (2) permits the use of an electronic signature in any transaction if both parties consent to the usage;

¹ 17 U.S.C. § 7001 et seq.

² While the legislation also has been called “digital signature” legislation, a digital signature is merely a type of electronic signature that is based on public key cryptography. See Section II, “What Does the Legislation Mean,” for a more thorough discussion of different types of electronic signatures.

- (3) dictates that any document in electronic form or executed with an electronic signature is fully enforceable;
- (4) sets forth electronic record retention requirements;
- (5) provides that electronic records are fully admissible in any legal proceeding; and
- (6) includes an extensive set of preemption provisions.

The rest of this section is a provision-by-provision analysis of the Act.

A. Title I: Electronic Records and Signatures in Commerce

Title I of the Act provides that the validity or enforceability of a signature, contract, or other record relating to a transaction may not be denied solely because it is in electronic form. Similarly, any contract that bears such an electronic signature or uses an electronic record may not be denied legal validity or enforceability solely because it is sent over the Internet. The Electronic Signatures Act works in the following way. **If any law – such as certain contract laws or a statutory provision such as the Gramm-Leach-Bliley Act notice requirement – requires that information relating to a transaction be provided to a consumer in writing, Title I of the Electronic Signatures Act allows the use of an electronic record to satisfy this legal requirement, but only if the consumer affirmatively consents to such a use.**

To ensure a consumer's legitimate consent, a business must provide the consumer with a clear and conspicuous statement informing the consumer of this right or option, as well as the right to withdraw consent. Businesses must also provide consumers with a statement of the hardware and software requirements for access to and retention of the electronic records. The consent, or confirmation of the consent, then must be made electronically, to ensure that the consumer can indeed access the electronic record – for example, by sending an e-mail that requires a response by e-mail. (Failure of the consumer to do so, however, will not affect the validity or enforceability of the contract.) The business also must provide future information to the consumer about any updates to the hardware or software needed to access the electronic record.

The Act also provides that, if a law requires that a contract or other record relating to a transaction be retained – including in its original form – an electronic record will satisfy this record retention requirement. Such an electronic record must be available to all persons who are legally entitled to access, in a form that can be accurately reproduced. In addition, any law that requires the retention of a check will be satisfied by an electronic record of the information on the front and back of the check.

Where a law requires that a contract be in writing, an electronic record may be invalid or unenforceable if it is not in a form that can be retained and reproduced for later reference. A law requiring that a signature to a transaction be notarized, acknowledged, verified, or made under oath will be satisfied if the electronic signature of a person authorized to perform such an act – together with all other information legally required to be included – is attached to or logically associated with the signature or record.

Title I of the Act generally preempts state laws that would contradict the legislation. However, there are exceptions. State preemption is permitted where a state has adopted the Uniform Electronic Transactions Act (“UETA”), as approved by the National Conference of Commissioners on Uniform State Laws (“NCCUSL”). The provisions included in the Electronic Signature Act are virtually identical to the analogous UETA provisions but the UETA provisions are much more extensive in certain respects. In addition, state preemption would be permitted where the state specifies alternative procedures or requirements for the use/acceptance of electronic signatures and records that are consistent with Title I of the Electronic Signature Act. The overall impact of these preemption provisions is to ensure that States can take jurisdiction over enforcing the electronic signature regime established by the Act and that they are permitted to flesh that regime out in certain respects but States are not permitted to implement any law or regulation that would alter the application of the provisions of the federal act in any way.

The Act also includes a specific insurance provision that makes clear that its terms apply to the business of insurance. This effectively means that any state requirement that would not recognize the validity of an electronic signature or of an electronic record (such as a “wet signature” law that requires an in-person signature) is preempted.

The only exceptions to the requirements under Title I – *i.e.*, where electronic contracts or records do not suffice – are for contracts or records involving:

- notice of a cancellation or termination of utility services or health or life insurance benefits (excluding annuities);
- the creation or execution of wills, codicils, or trusts under state law;
- adoption, divorce or other family-law matters under state law;
- transactions subject to the Uniform Commercial Code, with the notable exception of Articles 2 (applicable to sales) and 2A (applicable to leases);
- notice of a default, repossession, foreclosure, eviction, or right to cure action under a credit agreement secured by or a rental agreement for a primary residence of an individual;

- notice of the recall of a product, or material failure of a product that risks endangering health or safety, or any document required to accompany the handling of hazardous materials.

B. Title II: Transferable Records

Title II of the Act defines “transferable record” as an electronic record that (1) would be a note under UCC Article 3 (applicable to negotiable instruments) if the electronic record were in writing, (2) the issuer of the electronic record has expressly agreed is a transferable record, and (3) relates to a loan secured by real property. The legislation provides that such a transferable record may be executed using an electronic signature.

C. Title III: Promotion of International Electronic Commerce

Title III of the Act requires that the Secretary of Commerce promote the acceptance, on a global basis, of electronic signatures in a manner consistent with Title I. These efforts are to be in accordance with the certain principles, including but not limited to permitting parties to a transaction to determine the appropriate authentication technologies and implementation models for their transactions.

II. WHAT THE LEGISLATION MEANS IN GENERAL

Many contracts do not require a signature to be enforceable. Businesses recognize, however, that even in cases in which a “wet signature” is not required, it is nevertheless useful for proving and enforcing the terms of a contract against the parties who agreed to it. Due to the fact that a growing number of transactions now occur online, a legal debate has arisen in recent years over the validity of electronic contracts and the enforceability of electronic signatures.

The Electronic Signature Act resolves this debate by authorizing the creation of electronic contracts, as well as the use of electronic records relating to such agreements. In the process, it provides uniform national standards for the use of electronic signatures, which have grown in use and importance over the past few years. The most promising electronic-signature technology comes in the form of “digital signatures,” which use public key cryptography. This involves two related keys: a unique “private key” for the user, which encrypts the information; and a corresponding “public key” which unlocks the information and verifies the user’s identity. Other currently popular types of electronic signatures include clickwrap signatures (e.g., an “I accept” button on a website), passwords, and biometric signatures (e.g., voice prints and fingerprints).

As noted above, the Electronic Signature Act and the NCCUSL’s UETA have comparable provisions. This is not coincidental. The former is designed, in fact, only to be an inter-

im law until UETA is established in all 50 states. UETA has been adopted by 17 states thus far, including Arizona, California, Florida, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Minnesota, Nebraska, Oklahoma, Pennsylvania, South Dakota, Utah, and Virginia. At least a dozen other state legislatures are expected to pass UETA this year, including those in Alabama, Colorado, Delaware, Hawaii, Michigan, New Jersey, North Carolina, Ohio, Rhode Island, Vermont, and West Virginia, as well as the District of Columbia.

At the same time, Congress envisioned a transition period in which some states would have an electronic signature law on their books and others would not. Thus, Congress enacted the Electronic Signature Act to ensure a predictable legal regime for electronic signatures nationwide, preempting any state law inconsistent with UETA. As Congress has observed, "Once the States enact uniform standards consistent with those of UETA, the standards prescribed in this legislation will cease to govern."³

The Senate Report also expresses the view that the basic premise of the bill – that a record or signature may not be denied legal effect or enforceability solely because it is in electronic form, and that a contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation – was meant to apply to "any commercial transaction affecting interstate commerce."⁴ Significantly, while most UCC transactions are expressly excepted, the legislation applies to transactions covered by UCC Articles 2 and 2A – that is, sales and lease transactions, because it is in the area of sales, licenses and leases that electronic commerce is occurring to its greatest extent today. Thus, most commercial transactions that companies might perform online now can be contracted over the Internet.

It is important to note that neither the federal legislation nor UETA attempt to create a new system of legal rules for the e-marketplace. They simply strive to ensure that an electronic signature has the same legal status as a manual signature, and that an electronic record of a transaction has the same legal status as a paper record.

III. WHAT THE LEGISLATION MEANS FOR INSURANCE PRODUCERS

Before the final passage of the Act, IIAA, NAIFA and PIA had expressed concern that the Act may have inadvertently imposed liability on insurance producers who were using an insurer's electronic procedures to process a transaction on behalf of an insured or potential

³ S. Report 106-131, at 2 (1999).

⁴ Id. at 6.

insured. This concern arose because both the Act (as well as UETA) contemplates that the parties to a contract may use any electronic mechanism that they see fit to execute that contract. The core problem is that agents are not parties to the contract (and, especially in the insurance context, the only consumer mechanism for voicing dissent from using an electronic signature procedure is to buy a different policy). Agents (and insurance consumers) will therefore be required to use whatever electronic signature procedure insurers dictate but agents/brokers may still be required to assume liability for any shortcomings in those procedure under a variety of hypothetical scenarios.

Although such liability problems arise to some extent under UETA as well, they could have been especially acute under the Act because the Act fails to address a number of important issues of contract formation that are addressed under UETA. UETA contains, for example, specific provisions that address data corruption and contract formation issues that were omitted from the Act. When contract negotiations began to take place through the mails during the 16th Century, a number of cases were litigated regarding when a contract offer was made and when an acceptance took place (the so-called "mail box" rules). Although such issues have long been settled in the mail context, they are novel issues in the internet context and UETA attempts to address them; the failure of the Act to address these issues could result in much uncertainty on such questions and that uncertainty could have translated into a liability concern for insurance agents and brokers.

In response to the concerns expressed by IIAA, NAIFA and PIA, Congress added a special "Insurance Agents and Brokers" provision that shields insurance producers who are acting under the direction of a party that enters into a contract by means of any electronic record or electronic signature from any liability for a deficiency in the electronic procedures that were used if –

- (1) the producer did not engage in negligent, reckless or intentional tortious conduct;
- (2) the producer was not involved in the development of the electronic procedures; and
- (3) the producer did not deviate from the procedures.

The overall impact of this provision is to ensure that a producer that is acting at the direction of an insurer (or other party) will not be held liable if any problem arises that is related to the use of those procedures. For example, if a data transmission is corrupted for any reason, the agent should not be held liable for any damages caused by that corruption provided that the agent followed the dictated procedures and was not otherwise negligent. To ensure that agents may not be said to have been "negligent" or to have engaged in other

tortious conduct, they may want to consider establishing verification procedures that confirm both the receipt of submitted applications or other materials and the contents of those materials. Both could be accomplished by, for example, ensuring that policies that are issued in response to the submission are reviewed to ensure that they reflect the terms that were being requested.