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Electronic Signatures Getting Off to a Troubled Start in Real Estate Transactions

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On June 30, 2000, President Clinton signed the Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229 ("E-SIGN") and merged real estate law onto the ever-crowded information super highway. E-SIGN permits the use and confirms the enforceability of electronic signatures and electronic records for the conducting of interstate commerce. While intended as a vehicle for streamlining business transactions in order to make them quicker, more convenient and less expensive, this new law will, in the short term, generate more questions than answers. The questions multiply in connection with its applicability to real estate law, grounded on the statute of frauds, which requires all transactions to be in writing and signed by the party to be charged, and built on the tradition of original notarized signatures on deeds, mortgages and related instruments.

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E-SIGN will become effective October 1, 2000. On that day it will pre-empt any inconsistent state law. It does not force parties to use electronic signatures or records. Rather, it prevents the denial of the validity of signatures and records merely because they exist in electronic form. Simply stated, E-SIGN equates a signature formed by electrons and maintained in an electronic format with a traditional ink signature affixed to paper.

What Is A Signature?

Since the devil is often in the details, it is fitting to begin our investigation with the definition of a "signature." Merriam Webster states it is "the act of signing one's name" or "the name of a person written with his or her own hand." Case law and statutes treat a signature more broadly to encompass any mark or impression made as a means of executing a document. E-SIGN's definition expands the concept even further to include 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". E-SIGN §106(5).

While the move to paperless transactions is the intent of E-SIGN, which also establishes the validity of electronic contracts, there are several

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concepts from paper transactions that remain. First, in order for an electronic signature to be deemed valid, it must be held in a form capable of being retained and accurately reproduced for later reference by all parties or persons who are entitled to retain the record. E-SIGN §101(e). Second, where a signature needs to be notarized, the electronic signature may be notarized in a traditional pen and ink manner or by the electronic signature of the person authorized to perform that act. E-SIGN §101(g).

E-SIGN creates several important distinctions and exceptions to its own rule that accepts electronic signatures in place of ink. For example, E-SIGN validates electronic signatures on mortgages and credit agreements for primary residences of individuals only where the use of an electronic signature is consented to by the consumer. E-SIGN §101(c)(1)(A). On the other hand, E-SIGN expressly does not validate electronically signed default, right to cure, acceleration, repossession, foreclosure or eviction notices in consumer transactions. E-SIGN §103(b)(2)(B). Similarly, E-SIGN does not compel states to accept pleadings, court orders and notices utilizing electronic signatures. E-SIGN §103(b)(1). Nor does E-SIGN compel the recognition of electronic records or signatures in family law matters, including divorce and adoption procedures and the creation of wills and testamentary trusts. E-SIGN §103(a)(1).

Brave New World

At first blush to someone older than 16, the concept of being bound to a legally enforceable document by the use of an electronic signature seems Orwellian at best. However, the concept of an electronic signature finds root in the basic tenets of established contract law. As defined in Black's Law Dictionary, a signature is the "act of putting one's name at the end of an instrument to attest its validity." The definition continues that a signature "may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached." Similarly, New York General Construction Law §46 establishes that a signature includes "any memorandum, mark or sign, written, printed, stamped, photographed, engraved or otherwise placed on an instrument or writing..." Thus, pre-E-SIGN legal concepts make it clear that a traditional "signature" goes far beyond putting pen to paper. Any act of endorsement or execution that manifests one's intent to be bound by a document can be deemed a signature.

Case law has enlarged the concept of what constitutes a signature. For example, it is not necessary to write or sign one's own name as a signature. Any figure or a mark (classically the letter "X") may be used in lieu of one's proper name. *David v. Williamsburgh City Fire Insurance Co.,* 83 NY 265 (N.Y. 1880). A signature does not have to be handwritten. The stamping of one's name with a rubber stamp at the end of a contract of sale for real property is a valid signature. *Landeker v. Co-op Building Bank,* 71 Misc. 517, 130 NYS 780 (N.Y. Sup. 1911). Also, a signature may be typewritten or lithographed if so adopted by the signatory. *Brooklyn City R.R. v. City of New York,* 139 Misc. 691, 248 NYS 196 (2d Dept. 1930). Accordingly, electronic signatures are a natural evolution of established execution techniques. In our opinion, the ability to sign a document electronically is already embodied in existing law. Thus, E-SIGN merely removes any uncertainty that an electronic signature is valid and binding.

To the contrary, E-SIGN's impact on the notarization of documents could be wide reaching. An acknowledgement, which is required for the recording of a document, has been defined to be the act of one who has executed a document appearing before an officer or court and declaring the signature to be his. *Linderman v. Axford,* 38 A.D. 488, 56 N.Y.S. 456 (2d Dept. 1899). There are two distinct elements that comprise an acknowledgement; viz., the signer's oral acknowledgement before an authorized officer, and the written certificate by such officer that the oral acknowledgement was made. *In re Will of Frutiger,* 62 Misc. 2d 163, 308 N.Y.S.2d 692 (3d Dept. 1970). The components of an acknowledgement are both the attestation of the signatory

before the officer taking the signature, and the officer's written certification that the signatory signed the document. New York Real Property Law §298(1).

Well, Not That New

Has E-SIGN changed the way signatures will be acknowledged? Section 101(g) of E-SIGN states that any notary, acknowledgement or verification requirement will be deemed satisfied if the "electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable statute, regulation, or rule of law, is attached to or logically associated with the signature or record." Thus, it appears that no change was intended by E-SIGN. It does not obviate any requirement of state law. Rather, it merely authorizes the notary to certify the acknowledgment of the signature electronically.

In ordinary practice, the signer personally appears before the notary to subscribe the document in his presence or to acknowledge his signature. Does E-SIGN eliminate the need for the notary to be present when the signer's electronic signature is made and actually witness each keystroke or card swipe that produces it? What if the notary witnesses that event from another location? Will E-SIGN's validation of electronic signatures enable the notary to certify that signature as though the signer was in his presence?

It has been held that an acknowledgement is valid even if made after the signature is subscribed. *Londin v. Londin,* 100 Misc. 2d 965, 420 N.Y.S.2d 326 (N.Y. Sup. 1979). Thus, where a testatrix subscribed her name in the absence of any witnesses, but later showed her signature to the attesting witnesses and acknowledged that the signature was hers; the will was deemed duly acknowledged. *In re Goettel's Will,* 184 Misc. 155, 55 N.Y.S.2d 61 (N.Y. Sup. 1944). Accordingly, the notary does not have to witness the actual signing of the document. It is sufficient if the signer orally attests to the notary that the signature is his. *In re Will of Frutiger,* supra. However, a personal appearance before the notary to make such an attestation is required for a valid certification. *In re Napolis,* 169 A.D. 469, 155 N.Y.S. 416 (1 Dept. 1915). New York Real Property Law §309-a establishes the requirement for eyeball-to-eyeball contact. It prescribes that the form of certificate to be used for the acknowledgement of real estate instruments state "before me, the undersigned, *personally appeared* _____" (emphasis added). It is axiomatic that an instrument signed electronically in one location cannot be acknowledged in another place, unless the signer makes an attestation to the notary face-to-face.

Changes Along the Way

An interesting possibility which E-SIGN does not address is whether with the advancement of technology, will the visual confirmation of the acknowledgement through a web-cam or other telecommunication device make it possible to avoid the requirement for actual physical presence? Case law has yet to address the question whether a notary may certify a signature that has been attested to by means of visual and audio communication between remote locations. Is the term "personally appeared" limited to a tangible physical presence?

Taken a step further, will the technology that enables positive identification and authentication of a signature by electronic means eliminate the need for public notaries entirely? Certainly, encryption technology, passwords, smart cards and signature verification services can eliminate all uncertainty as to the genuineness of a signature.

What they cannot do, however, is confirm that the signer "intended" that his unquestionably genuine electronic signature be used for the purpose of executing a contract. Because, Section 106(5) of E-SIGN requires an "intent to sign the record" for one's electronic signature to be binding, how will the recipient of an authentic electronic signature know whether the signer had the requisite "intent"?

Must the recipient of an electronic signature wonder whether it is merely the result of an inquisitive 13-year-old who thinks his father needs to lease a beach house? E-SIGN offers no guidance on this issue. Similarly, E-SIGN does not address what will happen when unauthorized persons affix genuine signatures? The consequence of this uncertainty is unfortunate. If every electronic signature must be examined to be sure that its use is authorized and intended, the purpose of E-SIGN, to raise the speed limit of commerce, will surely be defeated.

In contrast, the recipient of a handwritten signature doesn't ordinarily inquire whether the person signing the instrument intended to be bound by it. Once the recipient is satisfied that the inked signature is genuine, the contract is final. Paradoxically, commerce appears to be streamlined when the technologically impaired signature method is employed.

These problems, among others, are being hotly investigated and debated by every lender, title insurer and bar association committee. With E-SIGN's effective date less than three months away, answers must be provided quickly.

E-SIGN will also undoubtedly create substantial problems for recording officers. Starting on October 1, 2000, they will have to deal with the influx of thousands of documents submitted for recording that they would have otherwise rejected on their face for failure to have original signatures. They have little time to develop an adequate system for receiving and processing these documents. Alas, states are all but powerless to avoid compliance. E-SIGN specifically pre-empts state law and prohibits states from re-imposing any requirement that a record be in a tangible printed or paper form, absent a compelling government interest relating to law enforcement or a threat to national security. E-SIGN §104(b)(3)(B)(i).

Despite its origins in common law and statute, E-SIGN creates a great deal of uncertainty. Ironically, President Clinton signed the bill into law twice: first with a felt tip pen and again by means of an electronic signature. He acknowledged that he was forced to do this because there was a substantial question under the Constitution whether the President could sign a law into effect electronically. I am reminded that the "best laid schemes o' mice and men..." ■

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