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NEW E-SIGNATURE LAW  
IMPACT ON B2B, B2C & B2G

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October 1, 2000 is approaching at a pulse-quicken pace for those interested in the Electronic Signatures in Global and National Commerce Act, Public Law No. 106-229 ("E-SIGN"). On that date, this sweeping new federal statute will preempt the patchwork of inconsistent and often conflicting electronic commerce legislation that currently exists in 44 States. Congress enacted E-SIGN to create a uniform nationwide legal standard intending to promote the use of the Internet for electronic commerce. As succinctly stated in a House Committee on Commerce report, "by removing the uncertainty over the legal effect, validity or enforceability of electronic signatures and records, electronic commerce will have the opportunity to reach its full potential." Committee on Commerce Report No. 106-341, 106th Cong., 1st Sess. p.8 (1999).

E-SIGN equates a signature formed by electrons and maintained in an electronic format with a traditional ink signature on paper. Under E-SIGN, electronic signatures will have the same legal effect as hand-written signatures and cannot be rejected simply because they

exist in electronic form. E-SIGN is expected to eradicate the lingering doubts and interstate squabbles over e-commerce, putting it firmly in the fast lane on the information super-highway. Pen and paper will become as obsolete as the quill and parchment. While not extinct, they will no longer be a required component of a legally enforceable contract.



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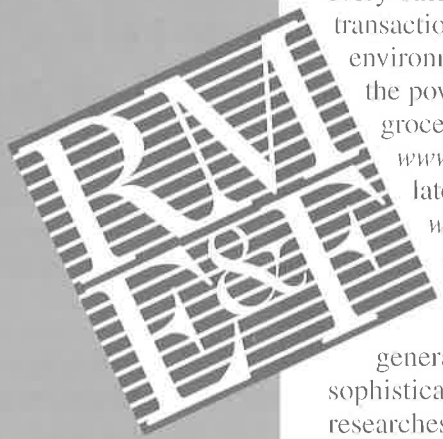


David P. Leno

Business-to-consumer transactions will undoubtedly make up the bulk of Internet e-commerce traffic. The advancing rate of current Internet sales is staggering. According to the Committee's report, consumers spent \$2.6 billion in online transactions in 1996. By 1998, this number jumped to \$32 billion *Id.* at p. 6. Clearly, consumers have accepted using the Internet to purchase books, CDs and airline tickets. However, with the dawn of E-SIGN, purchasing more expensive items and engaging in other electronic commerce becomes easier. Predictions abound that consumers will readily turn to the Internet to purchase

homes (*see www.realsearch.com*), "punch-in" at work (*see www.hours.com*), plan a funeral (*see www.funeralstodiefor.com* and *www.funerals.org*) and consummate nearly

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every other form of commercial transaction in a virtually paperless environment. Electronic signatures have the power to make shopping for groceries (*see [www.priceline.com](http://www.priceline.com) and [www.peapod.com](http://www.peapod.com)*) and reading the latest Stephen King novel (*see [www.stephenking.com](http://www.stephenking.com)*) a true shop at home experience.

Consumer transactions, while numerous and profitable, generally require minimal sophistication. The consumer first researches the desired product or service on the Internet and then makes a credit card purchase using a computer in place of a telephone, fax or mail. The transaction is discrete, convenient and one which the average consumer is familiar with. It is unlikely, in our judgment, that these will be profoundly benefited by E-SIGN. By comparison, business-to-business transactions, which can easily involve substantial sums and complicated agreements to be performed over time, could receive a much needed boost by the statute.

Electronic commerce in the business-to-business sector is in its infancy and its benefits are just beginning to be understood. Take, for example, the economic value that one of our clients, Hours.Com, has brought to the technical staffing industry. Temporary staffing and consulting companies help other businesses grow by supplying temporary consultants so that the businesses do not have to add full time employees to their payroll. In order for staffing companies to receive payment for services, they must compile timesheets from their employees, prepare and submit the calculated time to the client for approval and eventually generate an invoice. This process usually results in a 3 to 4 week lag between the time the staffing company pays its employee and the date it receives payment from its client. By using electronic signatures over the Internet, Hours.Com has shortened the process dramatically. Employees submit electronically signed timesheets and expense records to the client daily, which the client then approves by signing electronically. Upon receipt of the verified, electronically signed approval, an invoice is generated instantly and

submitted to the client's accounts payable department for payment. The process moves at Internet speed with the positive effects of enhancing cash flow, reducing the staffing company's float and easing the paperwork burden for all parties. E-SIGN eliminates any doubt that the electronic signatures and contracts used in these transactions are legal, valid, binding and enforceable, thereby giving this electronic commerce tool greater acceptability in the marketplace and creating real economic value.

Another lesser known area of electronic commerce which is just emerging from near obscurity is the business-to-government sector. A new or expanding business owner can access a government website (*e.g. [www.nys-permits.org](http://www.nys-permits.org) and [www.washingtondc.gov](http://www.washingtondc.gov)*) and by answering a series of relevant questions, can determine precisely which permits and licenses his business will need. A package of applications is then prepared and sent to the business owner, or the relevant applications can be downloaded over the Internet. A pilot program is being developed to enable permit applications to be filed on-line 24 hours a day, 7 days a week. One can hardly imagine a more user friendly one-stop shopping experience.

### **A Contract Must be Signed**

The common thread that weaves through all areas of e-commerce is the legal recognition of an electronic signature on a contract. The signing of a contract is ubiquitous. We hardly give the concept a second thought. This was not always the case. The Bible is filled with references to royal decrees and important scrolls that bear a "seal" – a wax impression denoting due execution. The "signet ring," which is used to make a personal impression in sealing wax, derives its name from function of *signing* documents. Common examples of seals are found on the yellowed Indentures that adorn the reception areas and conference rooms of law firms. Over time signatures in ink were accepted in place of the seal. This evolution eventually led to the abolition of the mandatory seal (in New York, by New York General Construction Law §44-a and New York Real Property Law §309), and

sealing wax has become a novelty store item. Even the casual observer will note that the process of executing a document has changed to fit the technology of the time. Therefore, it is no surprise that a new way to sign a document has been developed in the electronic age.

Today, contracts can be signed in many ways. 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." A signature may be written by hand, printed, stamped, typewritten, engraved, photographed, or cut from one instrument and attached. E-SIGN expands this definition to include any "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). Virtually, any act of endorsement or execution that can be recorded and which manifests one's intent to be bound by a document, can be deemed a signature.

### **Why a Signature?**

The essence of every contract is the mutual agreement of the parties. There can be no contract without this meeting of the minds. What every valid signature has in common is that it is a means of evidencing an intent to be bound. E-SIGN's expansive definition plainly states that an electronic signature is binding only if it is an "electronic sound, symbol or process attached to or logically associated with a contract or adopted by a person *with the intent to sign the record*" E-SIGN §106(5) (*emphasis added*). However, in this regard, *viz.*, evidencing an intent to be bound, E-SIGN appears to be very limited. The statute neither creates any presumption of validity nor does it provide a litmus test by which the requisite mental state or authenticity can be measured.

### **Authentic Signatures and the Intent to be Bound**

The problem is complex and twofold. First, the recipient of an electronic

signature needs to know that the signature is authentic, i.e., that the electronic symbol is the genuine signature of the person whose signature it purports to be. Obviously, if it is a forgery, it cannot be binding. Second, the recipient must have confidence that the signer affixed the signature electronically intending to be bound by the contract.

Congress assiduously avoided designating a precise authenticating technique; whether it be by typing one's name at the end of an e-mail, public-key/private-key encryption technology, a unique biometric identifier or other means. Since no technology or model for electronic signature has yet established itself as the market leader, Congress did not choose to favor any technology over the others. By remaining technology-neutral, Congress left the field open to the States and to the marketplace to establish the best means for authenticating a signature. When this issue is settled, there should be one or more universally accepted means for knowing that the signature is the signer's genuine mark and is not forged.

The more confounding problem is whether the signature was affixed with the requisite intent to be bound. Assume that I have adopted a genuine electronic signature which I have stored in my computer. Will a devious virus, a hacker or an inquisitive minor prod my desktop Judas to transmit this signature on an electronic contract I did not authorize? Under any of those circumstances, I could disavow the contract because the signature was not adopted by me "with the intent to sign the record".

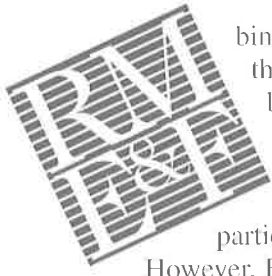
Every recipient of an electronic signature will face this issue on October 1, 2000. From and after that date, one will have to deal with the dilemma of whether to accept or reject the signature. However, does E-SIGN, with its core prohibitions against the denial of electronic signatures, allow the recipient to do this? We believe the answer is yes.

The Congressional Record is filled with testimony and reports that Congress plainly recognized that e-commerce depends on the ability to rely on the

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binding effect of an electronic signature. Implicit in this process is the recipient's confidence that the signature was intended to be binding. In a conclusory finding, the Committee report states that "An electronic signature, like a written signature, is a symbol that signifies intent — intent that varies depending on context, such as a signature on a contract shows intent that the parties agree to be bound by terms of that contract." *Id.* at p. 8.

However, E-SIGN does not mandate this conclusion or even establish a presumption of intent. Instead, it allows each recipient of a signature to judge both its authenticity and reliability. E-SIGN neither compels anyone to use electronic commerce nor does it deny anyone the right to determine the means for authenticating an electronic signature. It merely prohibits the denial of legal effect, validity or enforceability of a transaction solely because an electronic signature or electronic record was used in its formation. E-SIGN's protections are limited to challenges based only on the "electronic" quality of the signature. (See Conference Committee on the Millennium Digital Commerce Act, June 16, 2000, at p. 2). Challenges based on questions of authenticity are not proscribed.

In practical terms, the reconciliation of E-SIGN's related goals — encouraging electronic signatures and allowing technology to determine the standards for acceptance — will be problematic. On the one hand, the law promotes the universal acceptance of electronic signatures. On the other hand, the authenticity of those signatures is open to investigation and the signatures are ultimately capable of rejection based on the available technology and circumstances of the transactions. When viewed from this perspective, E-SIGN is not a strong enough initiative to effectively accomplish the desired expansion of e-commerce. The speed with which the States and the marketplace adopt uniform standards for authenticating electronic signatures will be more significant, as this technology will be the keystone to the expansion of e-commerce. This is the challenge that lies ahead. ■

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