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E-Sign Works: How the Legal System Got Electronic Contracting Laws Right

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Here is some good news from the legal system: electronic signatures, electronic records and remote contracting work. This is largely due to the success of the federal Electronic Signatures in Global and National Commerce Act (E-SIGN), the universal state adoption of the Uniform Electronic Transactions Act (UETA) or an analog statute, and the ready acceptance by the courts of these laws.

E-SIGN and UETA were developed at the turn of the millennium with high hopes, but initially were little tested in court. In recent years, these laws have emerged from a surge of cases with flags flying.

Yes, there are a few trouble spots worth keeping an eye on, including practical problems with remote attestation of documents and the fundamental question of attribution of electronic signatures to a specific human being.

But there is much more to celebrate, as it looks like the legal system got it right with a practical legal regime that enables widespread and confident adoption of remote contracting and electronic records as a fundamental way that business is done.

PRIMER ON ESIGN AND UETA

To trace the development of E-SIGN and UETA, we'll have to go back to the last millennium. Back in 1999, when Y2K was a somewhat legitimate worry, the National Conference of Commissioners on Uniform State Laws (NCCUSL) approved UETA.[1] UETA provides that signatures and records may not be denied legal effect because they are in an electronic form, and that contracts likewise may not be denied legal effect because an electronic record was used in its formation.

The model UETA does not impose any consumer disclosure requirements, but it does require the parties to agree to conduct transactions electronically. Today, 49 states and Washington, D.C. have adopted versions of UETA. New York is the only remaining holdout after Illinois and Washington adopted their own versions of UETA over the last two years. However, New York's Electronic Signatures and Records Act similarly makes electronic signatures and contracts enforceable.

Not to be outdone, Congress passed E-SIGN in 2000.[2] E-SIGN gives validity to electronic signatures, records, and contracts, but unlike the model UETA, it imposes consumer disclosure and consent obligations. E-SIGN governs interstate and foreign transactions, but it also can preempt state electronic signature laws that deviate

from the model UETA.

THE COURTS AND E-SIGN/UETA

Generally, courts rarely decline to enforce a contract negotiated or signed electronically unless there is some additional element that calls the formation of the agreement into question. When courts evaluate the validity of electronic contracts and signatures, there are typically four issues that arise:

(1) Does the signer have sufficient *notice* of the terms of the agreement?

(2) Has the signer sufficiently *assented* to those terms?

(3) Is the electronic signature sufficiently *authenticated* so as to preclude potential claims of fraud?

(4) Did the signer *agree to transact electronically*?

1. Notice

An established principle of contract law is that courts will not uphold contracts if the signer did not have sufficient notice of the terms of the agreement.

Electronic contracts and application processes, which often include hyperlinks and scrollable boxes, present many more opportunities for insufficient notice — and that's before considering whether the hyperlinks must be accessed or scrollable boxes must be fully scrolled before continuing in the agreement or application process.

Courts generally classify four kinds of online agreements:

- browsewrap,
- clickwrap,
- scrollwrap, and
- sign-in-wrap.[3]

As with lengthy printed terms and conditions agreements handed directly to a consumer, these online agreements typically provide sufficient notice as long as the user's attention is drawn to the relevant provisions.

For example, a federal district court found in 2018 that a browsewrap agreement did not provide sufficient notice for the user when the terms of the agreement appeared in a pop-up window, required significant scrolling, and did not have to be viewed in order to download a particular online game.[4]

On the other hand, another federal district court found that a signinwrap agreement provided sufficient notice when a user was required to affirmatively click a button stating that the user agreed to the website's terms of use.[5]

Agreements that do not give adequate notification that the user is assenting to legally binding agreements — for example, that fail to draw the user's attention to an arbitration provision — may not be upheld.[6] However, courts have generally dismissed claims that the signer could not read or understand the terms of an agreement when such terms were displayed on a phone screen.[7]

2. Assent

Not surprisingly, courts will not enforce electronic contracts that do not clearly demonstrate that the signer assented or agreed to the terms, as opposed to merely acknowledging them. While courts have generally held that mere acknowledgement of the terms is not sufficient for assent, acknowledgement plus an additional action could constitute assent.

For example, a New Jersey state court found that an agreement was not enforceable when the user was only required to click a button "acknowledging" the policy.[8] However, a federal district court found that, even where an employee only acknowledged an arbitration agreement, the employee's continued employment constituted assent to the terms sufficient to enforce the agreement.[9]

3. Signature and Authentication

A key facet of E-SIGN and UETA is to give to electronic signatures the same validity bestowed upon in-writing "wet" signatures. As a result, courts will typically consider an electronic signature to be the equivalent of a wet signature as long as there is no indication of fraud or that some other person signed.[10]

Many actions may constitute an electronic signature, including:

- clicking a box that reads "YES, I AGREE";
- choosing to use an app where it's disclosed that use constitutes agreement to certain terms;
- sending an email with the signer's name in the "from" line or at the bottom of an email;
- sending a text message responding to a marketing campaign; and
- responding to an automated phone system.[11]

Regardless of whether the above methods constitute a signature, the signature must still be "authenticated," meaning it must be associated with the alleged signer. Several courts have addressed situations in which a party used a unique login and password to access and agree to documents, with many courts validating the signature.[12]

This is further evidenced by a 2020 case in federal district court where the court held that an arbitration agreement was validly signed with merely a typewritten name. In this case, the signer had to enter a personally-created password known only to them to access the document to be signed.[13]

However, not all courts will validate a signature as properly authenticated when purely based on the existence of a login/password system.[14]

In some jurisdictions, a plaintiff's sworn affidavit asserting that he/she did not sign the agreement is enough to defeat summary judgment, especially if the defendant does not have a sufficiently robust audit trail in place to document what the alleged signer would have seen at the time of signing.[15] Courts will not uphold an agreement if there is any indication that a login/password system or any other identification system may not be secure.[16]

4. Agreement to transact electronically

The model UETA applies to transactions in which the parties merely agree to conduct the transaction electronically. In business to business transactions, and many kinds of business to consumer transactions, courts will typically presume that parties agreed to conduct their transaction electronically as long as the person purposefully used the Internet or another electronic medium in some way.

The use of an online portal, initiating a registration process online, completing new hire paperwork online, and even adding one's name to a series of text messages have all been found to be sufficient evidence of an agreement to conduct business electronically.[17] However, emails discussing a separate written agreement or voicemails received by a go-between broker may not be sufficient to satisfy the court that the parties agreed to conduct the transaction electronically.[18]

It is worth noting that the special consent and disclosure requirements of E-SIGN apply to some types of transactions with consumers in most states, but they are only required when electronic communications are being used to satisfy a specific writing requirement under federal or state consumer protection laws.

In some circumstances where there is not a writing requirement, such as an arbitration agreement or a simple sale of goods or services without financing, the special consumer consent and disclosure may not be necessary.

Parties should check their state versions of UETA, closely scrub their use case for any writing requirements, and to be sure to supply the consumer disclosure and obtain the special form of consent when required.

COMPLICATIONS WITH E-SIGN AND UETA

We've noted that E-SIGN and UETA operate as intended for their primary purpose of providing validity for electronic signatures, contracts, and records. In doing so, however, we do not mean to imply that E-SIGN and UETA are perfect, because they are not. There are several areas of electronic contracting that remain legal compliance headaches, either despite of or because of E-SIGN and UETA.

One such area is attribution of the signature to the signer. Issues with attribution of signatures existed long before electronic contracting. The idea that a party to a transaction may dispute that the signature on a contract or agreement is theirs is not new or novel. The advent of electronic contracting did not remove this concern.

As noted above, courts will typically hold valid a properly authenticated signature. However, a party seeking to enforce an electronic signature must have the proper mechanisms in place to authenticate the signature.

These mechanisms should be able to counter claims by the signer that they did not sign the agreement and can include components such as only permitting signature through use of a unique password or website accessible only by the signer or sending the signer a code via email or SMS to enter as part of the signing process.

Another area that has caused its fair share of angst is the consumer disclosure and consent requirement. The disclosures themselves aren't all that arduous. However, the consumer must consent, or confirm their consent, 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. This requirement is very much a product of its time.

In 2000, the idea that consumers would be able to enter into transactions on their cell phone was not even a thought. We're talking pre-iPod when this was written. Now, with so many different ways to transact, it can be difficult to determine whether a consumer's consent reasonably demonstrates that they can access the necessary documents.[19]

Issues in the electronic contracting process are not confined solely to ESIGN and UETA. Remote notarization laws in individual states carry with them their own unique requirements, and the proliferation of such laws has accelerated in the wake of the COVID-19 pandemic.

FINAL THOUGHTS

It's rare in the legal system to look at a set of laws and say that they accomplished their primary purpose with great success, but that is exactly what E-SIGN and UETA have done. We know that not everyone is thrilled with having to provide disclosures or authenticate signatures.

However, after over 20 years with E-SIGN and UETA, we are not aware of any signatures, records, or contracts being denied legal effect by courts solely because they are in an electronic form. It's hard to find too much fault in a 100% success rate.

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[1] For a copy of the model UETA, please see https://www.uniformlaws.org/viewdocument/final-act-no-comments-27.

[2] *See* 15 U.S.C.A. §§ 7001 *et seq.*

[3] *See Berkson v. Gogo LLC*, 97 F. Supp. 3d 359, 394-95 (E.D.N.Y. 2015). Browsewrap exists where the online host dictates that assent is given merely by using the site. Clickwrap refers to the assent process by which a user must click "I agree," but not necessarily view the contract to which she is assenting. Scrollwrap requires users to physically scroll through an internet agreement and click on a separate "I agree" button in order to assent to the terms and conditions of the host website. Sign-in-wrap couples assent to the terms of a website with signing up for use of the site's services…

[4] *Benson v. Double Down Interactive, LLC*, No. 2:18-cv-00525-RBL, , at *9 (W.D. Wash. Nov. 13, 2018).

[5] *Bernardino v. Barnes & Noble Booksellers, Inc.*, No. 17-CV-04570 (LAK) (KHP), , at *16, *24 (S.D.N.Y. Nov. 20, 2017). The court calls Barnes & Nobles' agreement a "checkout-wrap" agreement because it appears as the last step in a transaction, rather than the first, but the principle is the same. *Id.* at *8.

[6] *Gilgar v. Pub. Storage*, No. B288270, , at *20 (Cal. Ct. App. Feb. 20, 2019).

[7] *See O'Connor v Uber Technologies, Inc.*, 150 F. Supp.3d 1095 (N.D. Cal. Dec. 10, 2015), *rev'd on other grounds*, 904 F.3d 1087 (Sept. 25, 2018) (finding that there was a valid agreement to arbitrate, despite plaintiff's claims that the agreement was presented on "a tiny iPhone screen); *Meyer v. Uber Technologies, Inc.*, 868 F.3d 66 (2d Cir., Aug. 17, 2017) (finding an internet contract valid where notice of the agreement's terms were reasonably conspicuous and manifestation of assent was unambiguous as a matter of law); *Fenton v. Criterion Worldwide*, 18 Civ. 10224 (ER), (S.D.N.Y. March 27, 2020) (finding that failure to read an arbitration agreement due to a small phone screen size does not invalidate agreement where party electronically signed agreement).

[8] *Dugan v. Best Buy*, No. A-1897-16T4, , at *7 (N.J. Super. Ct. App. Div. May 31, 2017). The agreement was not enforceable where the user was only required to click a button labelled "I acknowledge." The court said it would have been enforceable if the language "I acknowledge and agree to the terms of the policy" had been used. *Id.*

[9] *Hall v. Pac. Sunwear Stores*, No. 15-cv-14220, , at *15 (E.D. Mich. Apr. 6, 2016).

[10] *Delgado v. Ross Stores*, No. BC660982, 2017 Cal. Super. LEXIS 7916, at *9 (Sept. 25, 2017) (granting motion to compel arbitration because an electronic signature is the equivalent of a wet signature under UETA statutory language).

[11] *O'Callaghan v. Uber Corp. of Cal.*, , at *7 n. 9 (S.D.N.Y. July 5, 2018) (This Court finds that by clicking "YES, I AGREE," [plaintiff] electronically signed the operative agreements.); *Acaley v. Vimeo*, 464 F. Supp.3d 959 (N.D. Ill June 1, 2020) (holding that the statement "By continuing I agree to the terms" would place a reasonable person on notice that there were terms and conditions connected to their continued use of the app); *Khoury v. Tomlinson*, 518 S.W.3d 568, 579 (Tex. App. 2017) (holding that a signature block constitutes a signature); *Keycorp v. Holland*, No. 3:16-CV-1948-D, 2017 U.S. Dist. LEXIS 118583, at *9 (N.D. Tex. July 5, 2017) (same); *Winner v. Kohl's Dep't Stores, Inc.*, No. CV 16-1541, (E.D. Pa. Aug. 17, 2017) (finding that text messages in response to a promotion with disclosed terms and conditions constituted agreement to those terms); *Blatt v. Capital One Auto Fin., Inc.*, 237 F. Supp. 3d 688, 692 (M.D. Tenn. 2017) (finding that pressing "1" in response to a telephone prompt where the prompt disclosed that pressing "1" signaled agreement constituted a valid electronic signature).

[12] *See, e.g., Hall v. Pac. Sunwear Stores*, No. 15-cv-14220, , at *14 (E.D. Mich. Apr. 6, 2016) (access to employee system and assent to employment forms sufficient to show agreement); *Lasseigne v. Sterling Jewelers, Inc.*, No. 16-16925, , at *17 (E.D. La. May 5, 2017) (testimony regarding normal onboarding process sufficient to stay claim pending arbitration); *Taft v. Henley*, No. SACV 15-1658-JLS (JCGx), , at *8 (C.D. Cal. Mar. 2, 2016) (unique identifiers used during onboarding sufficient to uphold arbitration agreement).

[13] *Randle v. Conduent*, (W.D.N.Y. Apr. 17, 2020).

[14] *Smith v. Rent-a-Center, Inc.*, No. 1:18-CV-01351, , at *19 (E.D. Cal. Mar. 20, 2019) (denying motion to compel arbitration when defendant summarily asserted that plaintiff electronically signed an arbitration agreement without sufficient evidence of context and timing).

[15] *Alorica v. Tovar*, No. 08-18-00008-CV, , at *17 (Tex. App. Nov. 26, 2018) (affirming the trial court's finding that two sets of login and password requirements were insufficient evidence to grant summary judgment motion when plaintiff asserted that she did not have notice of or sign an arbitration agreement and defendant did not provide evidence of an actual two-factor authentication system).

[16] *Langley v. Penske Motor Grp.*, No. B275610, , at *12 (Cal. Ct. App. Dec. 19, 2017) (affirming a denial of motion to compel arbitration when there was credible evidence of a back door into the employee system such that managers could potentially have signed agreement on behalf of the employee).

[17] *Beatty v. Esurance*, No. 1:16CV91, , at *5 (N.D. W. Va. July 17, 2018) (finding that activities such as creating an online account and completing an online application constituted consent to electronic contracting); *Progressive v. Corekin*, No. DKC 16-1340, , at *9 (D. Md. Sept. 18, 2017) (same); *Stover-Davis v. Aetna*, No. 1:15-cv-1938-BAM, , at *12 (E.D. Cal. May 12, 2016) (finding that plaintiff validly signed employee handbook when they acknowledged reviewing the handbook that was accessed using plaintiff's unique ID and password); *St. Johns Holdings v. Two Elec.*, No. 16 MISC 000090 (RBF), , at *24 (Mass. Land Ct. Apr. 14, 2016) (Typing their names at the end of certain messages containing material terms, but declining to do so for more informal discussions, is indicative that the parties chose to be bound by those signed communications.).

[18] *Mitchell v. Mitchell*, No. 03-17-00318-CV, , at *18 (Tex. App. Feb. 16, 2018); *Dilonell v. Chandler*, No. B282634, , at *15 (Cal. Ct. App. Oct. 24, 2018).

[19] The Taskforce on Federal Consumer Financial Law agreed with this assessment, recommending in its January 2021 report to the Consumer Financial Protection Bureau (CFPB) that Congress should eliminate the reasonable demonstration requirement or, pending Congressional action, the CFPB should clarify what constitutes "reasonable demonstration." Taskforce on Federal Consumer Finance Law Report, Volume II 48-49 (January 2021), *available at* https://files.consumerfinance.gov/f/documents/cfpb_taskforce-federal-consumer-financial-law_report-volume-2_2022-01_amended.pdf.