

The Consumer Finance Podcast x Payments Pros – Point-of-Sale Finance Series:
Getting E-SIGN and UETA Right in Electronic Contracting

Host: Chris Willis

Guest: Jason Cover, Taylor Gess

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Chris Willis (00:05):

Welcome to [The Consumer Finance Podcast](#). I'm Chris Willis, the co-leader of Troutman Pepper Locke's Consumer Financial Services Regulatory Practice. And today's episode is another in our continuing series about point-of-sale finance, where we're gonna be talking about the importance and provisions related to electronic contracting. But before we jump into that topic, let me remind you to visit and subscribe to our blogs, [TroutmanFinancialServices.com](#) and [ConsumerFinancialServicesLawMonitor.com](#). And don't forget about all of our other great podcasts, [The Crypto Exchange](#), the [FCRA Focus](#), [Payments Pros](#), and [Moving the Metal](#). Those are all available on all popular podcast platforms. And speaking of those platforms, if you like this podcast, let us know. Leave us a review on your platform of choice and tell us how we're doing. Now, as I said, today we're doing another of our point-of-sale financing installments, which have been very popular with you as the audience. And today we're gonna be talking about electronic contracting in point-of-sale finance. And joining me to talk about that are two very familiar voices that you've heard on many of the point-of-sale episodes, Jason Cover and Taylor Gess. Jason, Taylor, thanks again for being on the podcast. I'm sure this is gonna be a great discussion.

Jason Cover (01:14):

Thanks, Chris.

Taylor Gess (01:15):

Yeah, thanks, Chris.

Chris Willis (01:16):

So, Jason, let's just start off, and this question may have a self-evident answer, but let's start with it anyway. Why is electronic contracting important in the context of point-of-sale finance?

Jason Cover (01:28):

Chris, I kind of have two points here, I guess. One, in the modern world, almost all contracts are done electronically, or a vast majority of them, at least in our practice. You don't see a lot of clients these days saying, "Hey, we're gonna print out a piece of paper at the register and have somebody sign the TILA disclosures," and all of those fun things. So thinking about how you're contracting electronically and the laws that apply to that contract is really important. And then another reason we wanted to do this podcast is because I think we've found that clients

generally are confused by the laws that apply to electronic contracting. I see a lot of clients thinking, "I need an E-SIGN consent to send a marketing message by email," or things of that nature. And there are laws like CAN-SPAM or the TCPA that apply to certain types of communications, but it doesn't necessarily apply to just general electronic communications or things of that nature. So it's a little bit nuanced, and I've found that clients try to bucket things under just the E-SIGN hood or just the CAN-SPAM hood or things of that nature. And we wanted to elaborate that on a bit today.

Chris Willis (02:32):

All right, we're gonna penetrate that mystery today with your and Taylor's help. So thank you very much for doing it. So, Taylor, let's start with you on sort of the state law front. Obviously, there are state laws that apply to electronic contracting, electronic transactions, and it would be great if you would introduce the audience to those.

Taylor Gess (02:49):

Sure, Chris. So, on the state law front, the Uniform Electronic Transactions Act, or UETA as we call it, was approved by the Uniform Law Commission and recommended for enactment in 1999. And so Jason's gonna talk about the federal law analog, E-SIGN, in a little bit. And the UETA enactment was actually prior to E-SIGN. And the goal of enacting UETA was to kind of address the shifting times in the digital age and remove the barriers to the use of electronic records and signatures in everyday transactions and just kind of modernize contract law a bit. And at its core, UETA provides that electronic records and signatures have the same validity as written or wet-ink records and signatures.

Taylor Gess (03:43):

And this applies, kind of as Jason hinted at earlier, when another law like maybe EFTA or TILA or the TCPA requires a paper writing or some sort of wet signature. And UETA just provides that framework for using those electronic signatures and records in those transactions. There are certain exceptions where UETA doesn't apply, but not really in the consumer finance space, more so when there are laws governing wills or certain family law matters that we're not really gonna get into today. And I think it's also important to note, Chris, that some form of UETA, maybe not the Uniform Law Commission form, but some form of UETA has been adopted in nearly every state except New York and maybe one or two other states.

Jason Cover (04:33):

I think it is down to just New York now, Taylor. Washington went through a little weird phase where they repealed their non-UETA Electronic Records Act and then had nothing for a year or two. And then finally, I think they were the last one other than New York that hadn't fully adopted UETA. But yes, there's some outliers, and you could also have non-uniform UETA implementations too. So if you're really in the weeds on the state issue, that might be something you want to run down as well.

Taylor Gess (04:58):

Yes, definitely. And that preemption of when the non-uniform UETA is preempted by E-SIGN is definitely a complicated thing to consider. So UETA, as far as consumer consent provisions, it does not have the same type of consumer consent requirements that E-SIGN does. Instead, UETA just really generally requires agreement that the parties are choosing to contract or store records electronically.

Chris Willis (05:26):

Got it. Thanks, Taylor. Well, you teased E-SIGN quite a few times during your discussion of the state UETA laws. So Jason, let me turn to you. Tell us a little bit about E-SIGN, its background, and how it affects point-of-sale finance transactions.

Jason Cover (05:41):

Yeah, Chris. So it's the Electronic Signatures in Global and National Commerce Act, or what everyone calls it, E-SIGN or the E-SIGN Act. And not to be confused, I see clients saying E-SIGN and mean that like an electronic signature. This is the E-SIGN Act, which is an actual federal law. And this is coming on the heels of the UETA implementations and the same concern that Taylor mentioned. So UETA is like 1999. I think most states started enacting it around then. And then E-SIGN followed in 2000. And again, it was sort of amazingly foresightful, I guess would be the word I would use way back then. I guess I'm old enough to date myself. I wasn't contracting online at that point. You were still doing most things in paper or mailing them in. I don't think there was a lot of e-commerce, but it was just starting.

Jason Cover (06:29):

So it really sets a framework for that. And in my mind, there's kind of two propositions that are very similar to UETA. So the first proposition is just because a record or a signature or a document is electronic has nothing to do with its validity, right? So it kind of overrides any law to the contrary that would say that you can't contract electronically and gives a good framework of saying, as a matter of law, these things are good, or they can be. Taylor will get into this later, but just because it's electronic is not a grounds to overrule any of these things. So that's kind of one of the first things I see clients get confused about, right? You just have this base framework through E-SIGN without doing anything else purporting to the validity of these documents standing alone.

Jason Cover (07:16):

And then similar to what Taylor mentioned with UETA, there are these additional requirements for consumer contracts in Section 7001(c) of E-SIGN. And this is like the E-SIGN disclosure that you see when you sign up for recurring payments or get a loan online. It's that little blue ribbon sometimes in electronic documentation software that you click before you get to proceed and click all the boxes. And this is kind of like a rote disclosure required by E-SIGN way back in 2000 because they thought maybe folks wouldn't really understand what they were agreeing to or how electronic documents work. So 26 years later, perhaps this is a little bit dated, but it is

there and it is a requirement. And to Taylor's point, this is kind of the magic language or consent that allows a federal or state law requirement to have a disclosure provided in writing be provided electronically in writing. So that's the thing we recommend to all of our clients at the very beginning of an application process. The first thing you do, the first thing you get the consumer to agree to should be this, because it is a bit of a magic wand that allows for everything to proceed after that fact.

Jason Cover (08:27):

And then the other nifty thing that E-SIGN does is creates a preemption over state law. So there was concern while all the states were running around doing their own things before UETA had kind of materialized into 49 states, that you'd have conflicting electronic commerce laws across the nation. I think this is somewhat similar to what's going on with AI and crypto and all of these other fun things right now. Congress wanted to avoid a hodgepodge of electronic contracting statutes and create a uniform presumption of validity and how to contract with consumers on a 50-state basis. So that was the other driving force. And as Taylor noted, that preemption analysis can get very, very, very tricky. But the vast majority of our clients sort of take the position, "Okay, I got E-SIGN consent and that should, generally speaking, be good enough across the board."

Chris Willis (09:18):

So thanks for that description, Jason. At the end of the day though, Taylor, from a practical standpoint, what does all this mean for a point-of-sale lender?

Taylor Gess (09:27):

Sure, Chris. So the laws, both E-SIGN and UETA, stand for this idea that just because a contract, signature, or record is in electronic form, that does not mean it is invalid. But on the flip side, it also doesn't mean that that's automatically valid, right? That we're basically left with those first-year law school contracts class type principles as to what makes a binding contract and the UDAP principles that we are always talking about in the consumer finance space. So I think an easy example, right, is many federal and state laws require clear and conspicuous disclosure of information. Think about TILA and Reg Z, for example. And here E-SIGN and UETA allow those disclosures to be given electronically if properly consented to by the consumer. But the disclosures still need to be given in a consumer experience that allows the consumer to understand what they're agreeing to, right? What that electronic signature is manifesting consent to. So whether that's on a website that's displayed on a computer, or on a mobile phone, or through a mobile application, the consumer needs to have that clear and conspicuous notice of what's being disclosed, if that's what the federal or state law underlying the disclosure requirement requires.

Taylor Gess (10:41):

And I think in practice, that really just gets us to the kind of general electronic contracting principles like making sure important disclosures are not submerged or that the font size, color, and typeface are displayed in a way that's prominent and proximate. And we also want the disclosure to be easy to find and understand, right? We generally want to try to avoid things like

having required information behind hyperlink one, and hyperlink one contains hyperlink two, and without the consumer clicking on the second hyperlink they may or may not know exists, they wouldn't see that information?

Taylor Gess (11:17):

Another common example that we talk to clients about is if the electronic signature is clicking on a button? We want that button on its face to represent words that show that there's a manifestation of consent, rnt shenanigans and make sure that the consumer is the person that's actually navigating the flow and the person that's seeing all of the disclosures and the person that's actually providing that manifestation of consent that creates the binding contract. And so, all of those things I think about as general principles of contract law and ways to mitigate UDAP risks that are applied to the electronic contract setting rather than the types of requirements that are imposed directly under E-SIGN or UETA.

Jason Cover (12:12):

Taylor, those are all great points. And Chris, just to kind of elaborate? If this was a written contract, someone could certainly say, "Well, that's not my signature," right? And then you get the forensics expert in to see whether that matches their handwriting. It's the same thing here where you need to think about all of those, as Taylor noted, that first-year contract law class you took, all those principles still apply. E-SIGN and UETA don't remove them. You still need to think about validly formed contracts and who signed what and how. So it is not a panacea to walk away from all of that, for better or for worse.

Chris Willis (13:18):

Yeah, that makes good sense, Jason.

Jason Cover (13:23):

Chris, one other important point that E-SIGN and UETA can't solve for is if a statute requires delivery in a certain fashion, like three-day overnight mail or certified mail. E-SIGN and UETA can't override a delivery mechanism. So another thing to be careful of, and I think that comes a lot more in the collections world and things of that nature. And I don't do a lot of mortgage work, but I'm sure it comes up there. But you do need to be careful if a statute says, "Hey, you've got to send this by a certain type of delivery method, not just in writing." E-SIGN and UETA don't necessarily solve for that issue either.

Chris Willis (13:29):

Yeah, that makes good sense, Jason. Thanks for pointing that out. Let's close it out, Jason, by letting me ask you one final question, which is: Are there any technological developments on the horizon that may be relevant for electronic contracting in the future as we may see it develop over the next few years?

Jason Cover (13:34):

That's an interesting question, Chris. A couple years ago, there was an amendment to E-SIGN to sort of streamline some of the 7001(c) consumer requirements. And I think the idea there was like, "Hey, everyone's pretty freaking comfortable with how to do things online at this point. It's not 2000 anymore." It ultimately didn't go anywhere, but I think it will be interesting to see whether any movements under federal or state law pop up again to sort of streamline some of the 7001(c) consent requirements. And then another really interesting thing that I've been observing here, given the increase in agentic AI commerce, is that both E-SIGN and UETA have this concept of an electronic agent. And if you read it, it sounds a lot like an AI agent.

Jason Cover (14:22):

So E-SIGN's version says, "An electronic agent means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part without review or action by an individual at the time of the action or response." And then UETA has a bunch of really, really, really interesting commentary if you look at the original version of UETA, and it sort of gets right to the point and talks about things that sound exactly like contracting through agentic AI. I'm very interested in how folks are going to use those UETA and E-SIGN provisions here as agentic AI commerce is increasingly adopted and how that might come in the future. So definitely something to keep an eye on, whether those provisions might change as well, right? Maybe legislatures will revise those as necessary as we all gain more experience with those types of processes.

Chris Willis (15:14):

It's really amazing, Jason, that these statutes, which are not that recent, seem to have been so prescient as to have language in them that almost directly anticipates, probably unintentionally, I have to say, an agentic AI experience.

Jason Cover (15:29):

It's somewhat shocking, particularly if you read... I've read a lot of the legislative history of E-SIGN. These are like 70-year-old senators at the time talking through this thing, and it's very clear that they don't understand e-commerce in 2000. So to your point, it is quite amazing that they were that far forward-thinking.

Chris Willis (15:46):

Yeah. Well, this has been a really interesting discussion, and I'm certain that it's been valuable to our listeners as well. So Taylor and Jason, thanks for having this discussion with me today. And of course, thanks to our audience for listening in as well. As I told you at the beginning of the show, don't forget to visit and subscribe to our blogs, [TroutmanFinancialServices.com](https://www.troutmanfinancialservices.com) and [ConsumerFinancialServicesLawMonitor.com](https://www.consumerfinancialserviceslawmonitor.com). And while you're at it, why don't you go ahead and visit us online at [troutman.com](https://www.troutman.com) and add yourself to our Consumer Financial Services email list? That way, we can send you copies of the alerts and advisories that we release from time to time, as well as invitations to our occasional industry-only webinars. And of course, watch your

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