

Electronic Signatures and Records: Legal Year in Review

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Agenda

- Emerging Issues
 - Accepting Third-Party Electronically Signed Documents
 - Net Impression
 - Attribution and Relying on an eMail Address
 - Reasonable Reliance Unplugged
 - Biometrics as an Attribution Method
- Developments
 - Blockchain and Smart Contracts
 - Remote Online Notarization



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Emerging Issue: Accepting Third-Party Electronically Signed Documents

- Companies look to accept documents that have been signed using third party processes and then presented to the company for acceptance and reliance. Three general categories --
 - Electronic documents that have been signed using a third party's electronic signature process but that are delivered electronically with a "flattened" electronic signature -- that is, without certain metadata (e.g., descriptive, structural and administrative);
 - Electronic documents that have been signed using a third party's electronic signature process, but have been flattened by being printed out, and delivered to the company on paper or sent by facsimile; and
 - Electronic documents that have been signed using a third party's electronic signature process and delivered electronically with "dynamic" attributes, including metadata about the signing process and the integrity of the document.





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Emerging Issue: Accepting Third-Party Electronically Signed Documents

- Procedures and training
 - Eligibility and acceptance criteria to address the “key risks”
 - May vary by document type
 - May vary by transaction size or liability exposure
- Acceptance procedures
 - Acceptable platforms/formats
 - Training for intake employees
 - What to look for:
 - Stare-and-compare
 - Inspection of metadata
 - Inspection of accompanying audit logs
- Reps and warranties or certification
- Retention of transmittal communications





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Emerging Issue: Net Impression

- Guiding principle: do no harm – use the electronic medium to enhance, not obscure, effective delivery
- Unfair and Deceptive Acts and Practices
- Case illustration:
 - *Consumer Financial Protection Bureau v. TCF National Bank*, Memorandum Opinion and Order, Civ. No. 17-166 (US Dist. Ct. Minn. (September 8, 2017))
- Key takeaway: When presenting materials electronically, need to not only ensure strict compliance with disclosure requirements, but must evaluate the “net impression” the process makes on the customer



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Emerging Issue: Attribution and Relying on an eMail Address

- Many electronic signature transactions start with an email invitation with a link to the documents to be reviewed and signed
- The invitation email may be forwarded by the recipient, and the link activated by someone else – who proceeds to sign the documents, using the name of the email addressee, without authorization
- So, even if the email address is included in the audit trail, it may not provide evidence of the signer's identity sufficient for attribution of the signature, if the signer disputes the signature – See *IO Moonwalkers v. Bank of America*
- Options
 - Two-factor authentication for the signer (use of call-back or OTP)
 - KBA test (mostly useful for consumer transactions)
 - Agreement for reliance on stated identity of signer, based on delivery of documents to authorized email address, in corporate resolutions/authorizations
 - Use of biometrics





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Emerging Issue: Reasonable Reliance Unplugged

- Legal sufficiency vs. attribution
- Attribution must be proven
- Authority must be established
- Case illustrations:
 - *Mansour v. Kmart Corp., Inc.*, 2018 WL 3575062 (D. Md. July 2018)
 - *Stonewall of Woodstock Corp v. Stardust 11TS, LLC and Oliver Block*, 2018 WL 3805823 (2018)
- Key takeaways:
 - When issuing credentials or relying on their use by a third party, have clear agreement that credentials must be kept secure.
 - Internally, ensure that policies prohibit a sharing of credentials, and ensure that employee/customer credentials cannot be accessed by anyone else.
 - Think about requiring dual factor authentication





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Emerging Issue: Biometrics

- Two potential methods for using biometrics
 - “Before the fact” authentication – using a known biometric measurement to authenticate the signer
 - “After the fact” authentication – taking a biometric measurement at the time of signing, and then comparing to the signer’s biometric data if the signature is disputed later
- Illustrations
 - Before the fact – Apple Pay
 - After the fact
 - *American Family Life Assurance Co. of Columbus v. Biles*
 - Capturing a voice or video recording at the time of signing
- State Biometric Laws



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2018 Developments

- Are ESIGN and UETA sufficient for blockchain and smart contracts?
 - States seeking to amend state UETAs, and doing so inconsistently, raising the risk that certain technologies may be legal in one state but another.
 - HR 7002 – proposed amendment to ESIGN.
- Remote Online Notarization





Key Resources*

- **SPeRS** *Standards and Procedures for Electronic Records and Signatures*
- *The Law of Electronic Signatures*, 2018 Edition, Thomson Reuters Publishing
- *Enabled by Lenders, Embraced by Borrowers, Enforced by the Courts: What You Need to Know About eNotes*, MERSCORP Holdings, Inc. (2017)
- *Electronic Retail Installment Sales Contracts in California*, The Review of Banking & Financial Services, Vol. 33, No.12 (December 2017)
- *It's the Message, Not the Medium!*, The Business Lawyer, Vol. 60, No. 4 (2005)
- *Special Considerations For Perfection Opinions Covering Electronic Chattel Paper As Collateral*, Journal of Equipment Lease Financing (Spring 2015)
- *Smart Contracts Legal Primer*, Chamber of Digital Commerce (2018)
- *eSignature and ePayment News and Trends*, monthly newsletter from DLA Piper—available at www.dlapiper.com under *Insights* and at the DLA Piper LinkedIn Page

*Please contact presenters for access to Resources





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Questions?

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