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Assignment: *Preliminary Summary of the Electronic Signatures in Global and National Commerce Act*

Date: September 5, 2000

Background

On June 30, 2000 President Clinton signed into law the Electronic Signatures in Global and National Commerce Act.¹ The Act was inspired by Congress' recognition of rapidly changing high technology and the growing importance of electronic commerce.² Specifically, the Act establishes a national standard for electronic records, signatures and contracts whereby an electronic signature ("e-signature") can substitute for an individual's actual signing. As a result, any signature, contract or record relating to a transaction cannot be denied legal effect simply because it is in electronic form.

Even though the democratic and republican members of both Houses engaged in heated debate over the specifics of the E-Signatures Act, the bill ultimately received bipartisan support. This overwhelming support might be attributed to the Act's success in protecting consumers without placing excessive burdens on e-businesses and corporations. Yet, even though the Act contains many consumer protections, the Act does fail in appropriately shielding the consumer from dangerous mis-steps. In addition, the Act raises important legal and policy issues related to states rights and traditional concepts of contract-making.

¹ Pub. L. No. 106-229.

² 145 Cong. Rec. H11732-02 (debating H.R. 1714, the original e-signature legislation).

Areas of Criticism and Debate in the E-Signatures Act

I. Consumer Protections

The Act deliberately attempts to provide the consumer with the opportunity to make an informed choice in deciding whether to use an electronic signature. The statute requires, among other things, that the consumer consent to using an e-signature and that the consumer be informed as to the necessary software with which to contract electronically. The consumer must also be apprised of his right to stop using the electronic form and continue contracting in paper form. It is also significant that the law excludes a number of documents from the use of electronic means including: probate matters, family-law matters, notices of cancellation of utility services, notices regarding the forfeiture of a primary residence, and notices related to health and safety matters. Notably, all of the above excluded documents are commonly considered as essential to an individual's physical and material well-being.

Despite these important protections, the statute fails to specifically address or suggest the preferred technologies for e-signatures that should be employed in creating the software for a valid e-signature. Instead, an electronic signature "means 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." The difficulty with this broad definition of an electronic signature is that, in the rush to corner the e-signature market, many individuals might sell e-signature technology that can be easily hacked or stolen. As a consequence, a person can become very vulnerable to if their signature, and ultimately identity, is stolen. Similarly, unlike word processing systems, flaws in e-signature software might not simply cause the temporary computer

freeze or computer crash freeze; instead a flaw could conceivably cause an individual's assets to be permanently frozen or absconded.

II. Preemption

By implementing a federal standard to provide for electronic signatures and contracts, Congress intended to ensure greater uniformity in the arena of electronic commerce. However, the Act's provisions relating to electronic signatures, contracts and records preempt state law in all transactions related to or involving interstate or foreign commerce. Moreover, the Act limits states by only allowing them to modify the Act by adopting the Uniform Electronic Transactions Act (UETA), which was formed by the National Conference of Commissioners of Uniform State Laws (NCCUSL), or by adopting state legislation that is technology neutral and is consistent with the Act.

While it appears that the federal government may be acting within its constitutional rights in preempting existing state laws, the propriety of such an action might be called into question. First, since the Act covers "any transaction in or affecting interstate or foreign commerce," the Act will conceivably include transactions that have a weak interstate affiliation and are primarily intrastate. This reality will inevitably be of concern to those who believe that it is necessary to preserve state rights as much as possible in order to enable the expression of the unique culture and ethic of a respective state. Because the process of forming a contract can be conceived as a very personal act that emerges from customs and traditions, it might be deemed inappropriate to deny a state the opportunity to create a broad-based e-signature law that reflects that particular state's values and traditions regarding contract formation.

III. The Laws of Contract Formation

In explaining the purpose of having parties to a contract sign the actual document that signifies the bargain's terms, the court in Pillans v. Van Mierop, 3 Burr. 1663 (1765) notes that promises "reduced to writing, is a sufficient guard against surprise." That is because a writing can be assumed to reflect that an individual has engaged in "deliberation" and "attention and reflection." Hence, a signed document indicates that the signer has recognized and evaluated the gravity of the obligations that he has accepted upon himself.

Today, recent litigation involving shrink-wrap packaging reflects the carelessness that many have towards the warranties and disclaimers that are attached to purchased goods. Similarly, it is not unusual for individuals to download software or other products from the internet while clicking through the host of limitations on liability that producers have placed on their products. As people have become accustomed to instantaneously purchasing and receiving products without a traditional writing, much of the public has become neglectful in carefully reading the disclaimers that appear on packaging. As this attitude becomes increasingly prevalent and as e-signature use proliferates, it is possible that individuals will enter into contract agreements without the proper reflection which a physical writing is believed to indicate. Arguably, many individuals need to be reminded of the significance and deliberation which contracting requires. Otherwise, as e-signatures increasingly becoming simple to use, the impulsiveness which e-shopping lends itself to could result in causing many people to fall into severe financial distress.