

## **Digital Pen**

The new electronic-signatures act applies not only to autographs but also to e-documents.

**By Daniel L. Jacobson**

On June 3, President Bill Clinton signed into law a bill that allows "electronic signatures" and electronically created and stored documents to have the same legal effect as actual signatures and actual documents. The bill (S761), which was sponsored by Sen. Spencer Abraham, R-Mich., uses the Interstate Commerce and Foreign Commerce clauses of the Constitution to make the law applicable to transactions that are "in or affecting interstate or foreign commerce."

The U.S. Supreme Court has liberally defined "interstate commerce" not only to allow Congress to govern commerce among the states, but also to govern much commerce that actually takes place intrastate. *United States v. Wrightwood Dairy Co.*, 314 U.S. 605 (1941). Congress has stretched the jurisdiction of the electronic-signature law as far as it is constitutionally feasible to stretch it. By its terms, the new law applies not only to interstate and foreign-commerce transactions, but also to transactions that affect interstate or foreign transactions. So, the law will have wide application.

The legislative history of the new law indicates that it was born out of need created by the growth of Internet commerce. A Senate committee report states: "Internet commerce has already been estimated at more than \$100 billion and is growing rapidly. But for the Internet to reach its potential and function as a substitute for traditional paper transactions, the public must trust the integrity and reliability of electronic commerce and be assured that consistent and predictable legal rules will govern electronic transactions." S. Rep. No. 106-131 (1999).

The Millennium Digital Commerce Act was a predecessor popular name to the law's final popular name, the Electronic Signatures in Global and National Commerce Act.

The new name may be misleading. The terms of the new law apply not only to signatures but also to the substantive contents of documents themselves. Also, as will be seen, the new law reaches far beyond Internet commerce.

The National Conference of Commissioners of Uniform State Laws has prepared a uniform state law on the subject of electronic signatures and documents. That law is called the Uniform Electronic Transactions Act. Until a state adopts the Uniform Electronic Transactions Act, or something substantially similar to it, the new federal law will pre-empt state law where appropriate to give electronic signatures and documents legal effect.

The national conference is the same group that first promulgated the Uniform Commercial Code. It was not until many years after the promulgation of that code that all 50 states had adopted it. With the Electronic Signatures in Global and National Commerce Act, Congress is attempting to get ahead of the states by putting the philosophy of the national conference-promulgated Uniform Electronic Transactions Act into effect as federal law. If a state chooses to adopt the Uniform Electronic Transactions Act or something similar to it, then the pre-emption effect of the Electronic Signatures in Global and National Commerce Act will fail as to that particular state. Thus, under the terms of the new law, a state can prevent the law's pre-emption effect only by adopting their own substantially similar electronic-signature law.

So, whether the rules come from the new Electronic Signatures in Global and National Commerce Act or from the Uniform Electronic Transactions Act as it may

be adopted by a particular state, electronic signatures and electronic documents are here to stay.

Therefore, a close analysis of the Electronic Signatures in Global and National Commerce Act is required to understand what "documents" may now look - or even sound - like.

The law states: "[A] signature, contract or other record relating to [a transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form," and "a contract relating to [a transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation."

California's general statute of frauds is found at Civil Code Section 1624, which states that certain contracts must be "in writing" (e.g., contracts for the sales of land). Now, the question of what "in writing" means has a federally provided broader answer than it had before. In transactions that are in or affecting interstate or foreign commerce, Congress has expanded the definition of "in writing" to include those documents and signatures that are electronically generated.

Under the new law, "[t]he term 'electronic' means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." In addition, "[t]he term 'electronic record' means a contract or other record created, generated, sent, communicated, received, or stored by electronic means."

So, generally, if the subject matter of a particular contract is in or affecting interstate or foreign commerce and that contract is created by "technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities," then that contract is "in writing," and statutes of frauds such as Civil Code Section 1624 will be satisfied.

The new law provides an additional definition for "signature" in the appropriate interstate or foreign-commerce cases: "The term '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."

Since the term "electronic" means "relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities," an "electronic signature" is a "sound, symbol, or process" composed by such means and "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." Such a "signature" will now be valid.

The law contains several notable exceptions to the use of electronic means to form documents and signatures. It does not apply to probate matters, family-law matters, certain portions of the Uniform Commercial Code, court documents, notices of cancellation of utility services, notices regarding the forfeiture of a primary residence, notices of health and safety-related recalls or documents required to accompany transportation or handling of pesticides or hazardous materials.

So, for instance, Probate Code Section 15206, which is a statute of frauds governing real property trusts, will still require a traditional writing and signature. On the other hand, the new law does apply to Article 2 of the Uniform Commercial Code. So, in California, Commercial Code Section 2201, which is a statute of frauds governing the sale of goods for the price of \$500 or more, will allow for electronic writings and signatures.

The new law has a special requirement for the dissemination of documents that are legally required to be given to a "consumer." A consumer is defined as "an individual who obtains, through a transaction, products or services which are used primarily for personal, family, or household purposes, and also means the legal representative of such an individual."

Consumer consent is required for the use of electronic records in such situations. Also, the new law specifies that "[a]n oral communication or a recording of an oral communication" will not suffice as an electronic record in the circumstance of legally required dissemination of documents to consumers.

A negotiable instrument that relates to a real property loan and that the issuer has agreed is a "transferable record" may be electronically executed if certain technical requirements for authentication are utilized.

An interesting question arises from the definitions provided by the new law. Will parties be able to create a "written" contract by using a tape recorder that uses a standard magnetic recording tape?

Boiling those definitions down to the terms that would be applicable to answer this question, the definitions provide: "Electronic" is defined as "relating to technology having ... magnetic capabilities." "Electronic record" is defined as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means." So, it would seem as if a magnetic tape would suffice as a writing.

"Electronic signature is defined as "an electronic sound ... 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." So, it appears as if it is possible to audibly sign an electronic document. Furthermore, the fact that an electronic "sound" is specifically allowed as a type of electronic signature, Congress must have anticipated and approved audibly recorded "writings."

Another interesting situation: One merchant e-mails another, "Please send me 50 barrels of widgets at a price of \$10 each. Joe Smith."

Is this a document that can be enforced under a statute of frauds? Electronic "means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities." E-mail is at least created by electricity. "Electronic record" is defined as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means." So, this hypothetical e-mail is an electrically created contract and, thus, must be afforded the same respect as that afforded to a paper contract.

But, has Joe Smith effectively "signed" this hypothetical contract? "The term 'electronic signature' means an electronic ... symbol ... 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." If Joe Smith's symbol is "Joe Smith," then this should suffice as a signature because that symbol is at the end of the e-mail and, thus, is logically associated with the contract; and Joe Smith apparently intended to sign the contract.

What will be fascinating to see is how problems of proof in this area are overcome. What if Lisa Jones wrote the e-mail and forged Joe Smith's name? One would hope that people will keep good records of their electronic transactions. That way when someone shows up with 50 barrels of unordered widgets, there will be testimony similar to the following: "I only e-mail from this address. I keep all of my e-mails. There are no e-mails regarding 50 barrels of widgets."

Generally the new law will become effective Oct. 1. However, with respect to records that must be retained pursuant to statute, it will not become effective until either March 1 or June 1 (depending on action or inaction by certain regulatory agencies). With respect to certain federal loans, it will not become effective until June 3. With respect to student loans, it will not become effective until the Education Department revises the promissory-note forms or June 3, whichever occurs first.

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