



Legal Counsel to the
Financial Services Industry

Electronic Signatures
and Records Law –
Updates for the
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Agenda

- **“I meant what I said and I said what I meant” – A review of the basic underpinnings in UETA and ESIGN.**
- **“Whither eNotarization” – the UETA drafters’ intent and current developments.**
- **“A New York State of Mind” – growing acceptance of electronic records in real estate purchase and sale transactions.**
- **“Halt, who clicks there?” -- The authentication conundrum in remote transactions.**
- **“Is it real, or is it Memorex?” -- Achieving third-party acceptance and reliance on electronically signed records.**

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I said what I meant and I meant what I said – Scope of the UETA and ESIGN

- **Applies to the use of electronic records and signatures in virtually any business-to-business or consumer transaction, unless specifically excluded**
 - UETA applies to state law
 - ESIGN applies to state and federal law
- **Primary exclusions:**
 - Wills, codicils and testamentary trusts
 - Funds transfers (covered by UCC Article 4A)
 - Letter of Credit (covered by UCC Revised Article 5)
 - Securities (covered by UCC Revised Article 8)
 - Security interests in goods and intangibles (covered by UCC Revised Article 9)
 - Software licensing laws (if State has adopted UCITA)
 - Most laws concerning checks

I said what I meant and I meant what I said – Scope of the UETA and ESIGN

- **ESIGN adds additional exclusions and exemptions**
 - Legal rules governing adoption, divorce, and other matters of family law
 - Court documents requiring execution in connection with court proceedings
 - Notice of utility termination, default or foreclosure under mortgage or lease, termination of health or life insurance, and product recalls and safety notices
 - Notices that accompany transportation or handling of hazardous materials, pesticides, and other toxic materials

I said what I meant and I meant what I said – Scope of the UETA and ESIGN

- **Included are:**
 - **Consumer protection laws**
 - **Laws governing real estate transactions (subject to special rules concerning documents to be filed of record)**
 - **Laws governing Insurance**
 - **Laws of agency**
 - **Laws covering powers of attorney**
 - **Laws requiring notarization of documents**
 - **Laws governing trusts (except testamentary trusts)**
 - **Laws concerning the submission of documents to, or issuance of documents by, government authorities (subject to special rules)**

I said what I meant and I meant what I said – Three Pillars of the UETA and E-SIGN

- **A record or signature may not be denied legal effect or enforceability solely because it is in electronic form**
- **If a law requires a record to be in writing, an electronic record satisfies the law**
- **If a law requires a signature, an electronic signature satisfies the law**

I said what I meant and I meant what I said – Notarization and Recording under UETA and ESIGN

- **UETA and ESIGN place focus on importance of ceremony, personal interaction and creation of notary record as primary true fraud prevention devices, and therefore both –**
- **Permit electronic notary signature**
- **Eliminate requirement for stamp or seal**
- **Preserve any other features of notarization required by state law**
 - **Personal appearance**
 - **Notary records**
 - **Confirmation of**
 - **Identity**
 - **Awareness**
 - **Freedom from Duress**
- **UETA and ESIGN both authorize, but don't require, recorders to accept electronic records.**

Whither eNotarization

- **Notarization serves three policy goals**
 - Provides additional level of confidence (but not certainty) concerning signer's identity
 - Protects against duress and lack of competence
 - Additional ceremony signals to signer that the signature is important and the document should be examined and understood
- **Key elements of notary process**
 - Controls on appointment as notary (vary significantly from state to state)
 - Use of physical token (stamp or seal) for notarization
 - Maintenance of notary records (most states)
 - Proof of identity (personally known or government issued ID)

Whither eNotarization

- **Limitations of notary process**
 - Full faith and credit – virtually all states will honor a notary acknowledgment from any other state that meets that other state’s requirements
 - Some states have relatively weak controls on who becomes a notary
 - Many notaries are not independent actors, but notarize documents on behalf of employers or as part of employer’s business
 - Physical token easy to obtain or simulate (blurred corporate seals have been used, as have “notary stamps” made using children’s “do it yourself” stamp pads – these have even been used by legitimate notaries).
 - Except for physical token, individual or functionary receiving notarized document has no way to determine validity of notarization

Whither eNotarization

- **In theory, UETA and ESIGN authorize electronic notarization without further state action**
- **16 states have eNotary laws**
- **Controversy over “remote” notarization**
 - **Special rule in Virginia**
 - **What does “personal appearance” mean?**
- **Even if electronic notarization allowed, electronic filing of notarized real estate records is a separate issue**

A New York State of Mind – Electronic Signatures in Real Property Transactions

**NYESRA
2000**

NY electronic signature law excludes “any conveyance or other instrument recordable under article 9 [Recording instruments affecting real property] of the real property law.”

**Informal NY
Attorney General
Opinion 2001-3**

“E-SIGN paves the way for private parties engaged in a [New York real property transaction to] conduct (by express mutual agreement) their transaction through the use of electronic records, but private parties...cannot ...perform recording functions...Under New York Law, that task falls squarely on the shoulders of recording officer...Given this circumstance, we believe E-SIGN [does not change applicable state law] which prohibits recording officers from accepting a filing that contains an electronic signature.”

**NYESRA
Amendments
2002**

New York legislature amends NYESRA to adopt the E-SIGN definition of Electronic Signature, in an effort to avoid full preemption of NYESRA by E-SIGN.

**Naldi v. Grunberg
2010**

Court holds that New York’s 2002 amendments to NYESRA incorporate the substantive provisions of E-SIGN, including coverage for transactions governing real property, into New York law.

**NY URPERA
Adopted 2012**

Formally eliminates NYESRA’s real property exception as of September 22, 2012. Authorizes NY Office of Technology to set standards for electronic recording.

A New York State of Mind – Meanwhile, in Florida and other states...

- **Controversy erupts over whether, under UETA, recorders may accept a scanned copy of a paper document for filing in states with a statutory “original instrument” rule**
- **UETA provides that any electronic copy of a scanned document is:**
 - **An electronic record**
 - **Legally equivalent to its paper counterpart, and**
 - **An “original” for purposes of any state law that requires an original to be presented or retained**
- **To qualify as an original, the scanned document must:**
 - **Accurately reflect the information in the document,**
 - **The document must be in its final form when scanned, and**
 - **The record must remain accessible for later reference**
- **UETA leaves decision to accept, or not accept, scanned documents for recording in the hands of recorders**
- **URPERA addresses and clarifies this issue by authorizing the use of scanned documents, establishing a procedure for creating state-wide standards for evaluation and acceptance, and addressing various ancillary issues**

Halt, Who Clicks There? – Authentication in Remote Transactions

- **Two types of “authentication” of identity**
 - Initial (“Is Fred really Fred”)
 - Returning (Usually via credential)
- **All current methods for initial authentication have limitations – examples:**
 - Self-assertion
 - Shared secret (last four digits of SSN, etc.)
 - Scanned copy of ID documents (driver’s license, passport)
 - Knowledge-based test

Halt, Who Clicks There? – Authentication in Remote Transactions

- **Credentials are only as good as:**
 - The initial authentication
 - The security of the issuance process
 - The user's protection of the credential
 - The user's resistance/ability to detect:
 - Social engineering attacks
 - Trojan horses
 - Man-in-the-middle attacks
 - ???

Halt, Who Clicks There? – Zulkiewski v. General American Life

Facts

Dr. Zulkiewski took out a \$250,000 life insurance policy from General American. Prior to the events in dispute, his mother was named as beneficiary on the policy.

Dr. Zulkiewski married his second wife.

General American permitted customers who enrolled in the company's eServices to change beneficiaries online. To prove identity and enroll in the service, the applicant was required to enter the policy number, and the insured's social security number, mother's maiden name, and an e-mail address. The applicant then chose a password and verified it. An email confirmation was sent to the insured.

Someone enrolled in the eService as Dr. Zulkiewski, providing all the proper information, and then changed the policy beneficiary to the second wife, electronically signing the beneficiary change form. A further email alert was sent to the Doctor's email address giving notice of the change. Shortly thereafter, Dr. Zulkiewski died.

Dr. Zulkiewski's mother sued to obtain the insurance proceeds, claiming that General American's security procedure was insufficient to prevent an unauthorized signature on the change form, and arguing that before the change could be enforced General American had to prove that the form was signed by Dr. Zulkiewski. His mother argued that the second wife or a "person unknown" could have passed the security procedure and signed the change form.

The wife filed an affidavit denying the allegations.

Court of Appeals of Michigan

The Marquette Circuit Court for the State of Michigan granted summary judgment for General American. On appeal, the Court of Appeals affirmed. The appellate court held:

- Under Michigan's UETA, an electronic signature may be attributed to a person by any reasonable means.
- In the case at hand, the following undisputed facts were sufficient to establish attribution:
 - the aggregate information required to enroll in the eService would be known to only a few people;
 - General American provided follow-up alerts to the Doctor's email address confirming the beneficiary change, and
 - the Doctor's widow presented an affidavit denying any involvement in the beneficiary change.
- The court observed that the Doctor's mother had offered no evidence that the widow or another person had signed the change form, but just "conjecture" that such a thing might have happened. The court held that idle conjecture was not enough to overcome the facts supporting attribution.

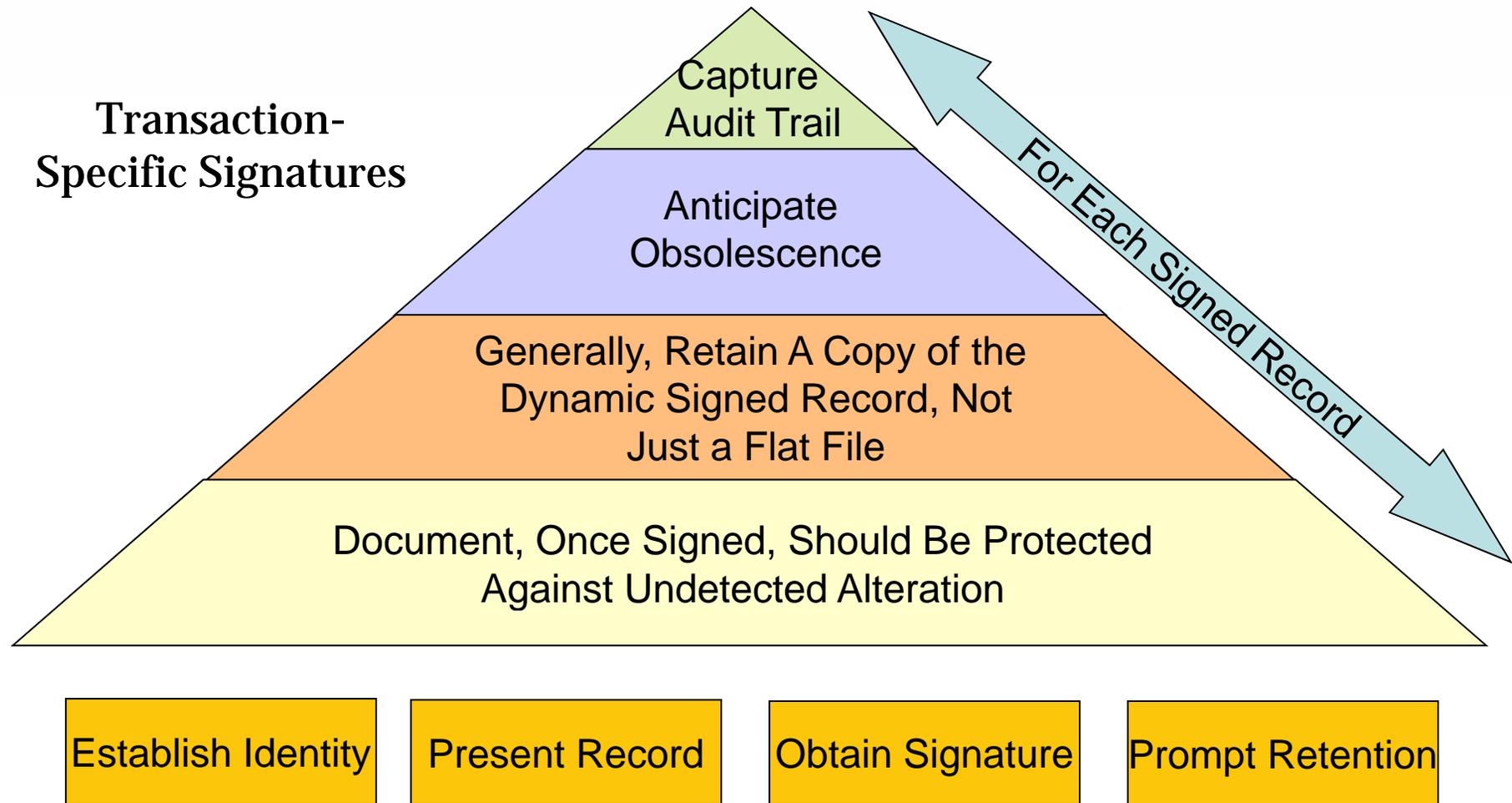
Halt, Who Clicks There? – NSTIC initiative

- **Administration establishes initiative for “National Strategy for Trusted Identities in Cyberspace” or NSTIC – April 2011**
- **Guiding Principles – Identity solutions will be:**
 - Privacy-Enhancing and Voluntary
 - Secure and Resilient
 - Interoperable
 - Cost-Effective and Easy To Use
- **Administration establishes National Program Office**
- **Steering Committee established – August 2012**

Halt, Who Clicks There? – NSTIC initiative

- **NSTIC Pilot Programs Selected – September 2012**
 - The American Association of Motor Vehicle Administrators
 - Criterion Systems
 - Daon, Inc.
 - Resilient Network Systems, Inc.
 - University Corporation for Advanced Internet Development (UCAID)
- **More pilot programs to be selected in 2013**
- **Supporters of NSTIC insist goal is *not* to create a “national ID card” – but not everyone has gotten the memo.**

Is it real, or is it Memorex? – Creating an enforceable signed electronic record



Is it real, or is it Memorex? – Creating an enforceable signed electronic record

- **Third parties are not required by ESIGN or UETA to agree to rely on electronically signed documents presented to them by others.**
- **Issues can include being confident that:**
 - **The record was effectively presented;**
 - **The signer knew they were signing the record;**
 - **The signer was given an opportunity to retain a copy;**
 - **The record was protected from undetected alteration after signing;**
 - **A satisfactory audit trail exists to establish attribution and can, if necessary, be accessed; and/or**
 - **The signed record can be successfully stored and maintained for its retention period by the recipient.**

Is it real, or is it Memorex? – Creating an enforceable signed electronic record

- **Possible solutions?**
 - For regular recipients of such documents, an “authorized vendor/platform” list?
 - Employee training to evaluate incoming documents?
- **Should there be a common standard to certify to, and if so, where do the standards come from?**
Some potential sources and participants:

