

## A Brave New World: The Electronic Signatures Act Takes Hold

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The days of physically signing, notarizing, copying, distributing and storing paper contracts and other documents theoretically are gone. On October 1, 2000, the Electronic Signatures in Global and National Commerce Act ("E-Sign Act") became law, giving the same legal effect, validity and enforceability to electronic signatures, contracts or other records as their paper counterparts. Practically speaking, uncertainty with the Act and with the relevant technology suggests that businesses will continue to contract in tangible forms for at least the near future. However, the E-Sign Act does pave the way for some businesses, namely those with numerous transactions of the same type, to save considerable time and expense by using the click of a mouse rather than a pen to paper in their day-to-day operations.

### Pros and Cons of the Act

Under the Act, businesses may benefit by being able to conduct their daily operations, from simple invoicing to large-scale transactions, without the expense of processing and storing the paper documents. Also, by converting to an electronic system, businesses subsequently will have a more organized means for document retention and retrieval. Embracing what the E-Sign Act has made possible may be best suited for companies with a large volume of simple transactions, such as those between a manufac-

turer and supplier, and for relatively new companies that are not dependant on an antiquated paper system.

However, the Act does come with possibly significant dangers and drawbacks. For example, given the ever-growing use of e-mail to conduct business, combined with the often informal nature of e-mail messaging, there is a danger of unknowingly entering into a contract or, perhaps worse, entering into a disadvantageous contract which has been covertly drafted by the other party with the aid of its counsel and in the absence of your counsel. Furthermore, the simple agreement among two parties to enter into contracts electronically may come with its own wealth of negotiations and agreements, not to mention the expense and disruption of implementing any new technology required to do so. Whether the possible time and cost

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### current events

what's in the news now

**Non-Compete Upheld Against Alter Ego Corporation:** New York's Appellate Division, First Department has upheld a non-compete agreement signed by one company against an alleged alter ego of that company. TNT Communications, Inc. ("TNT") entered into an agreement to perform services for Artech Information Systems, L.L.C. ("AIS"), which agreement contained a broad non-competition agreement. AIS alleged that TNT formed an alter ego company, Trilogy Communications, Inc. ("Trilogy"), in order to transfer AIS business to Trilogy in violation of the agreement. Finding that Trilogy was nothing more than an alter ego of TNT under both New York and Connecticut law, the Court imputed Trilogy's conduct to TNT, and declined to dismiss the pleading alleging that TNT had violated the non-compete agreement. *Artech Information Systems, LLC v. Tee*.

expended is worth the time and cost gained is the key question that each business must answer before jumping into the world of e-contracting. The E-Sign Act does not answer the question, but does place new possibilities into business' hands.

### The Act in Theory

The purpose of the E-Sign Act is to ensure that a signature, contract or other record is not invalidated solely because it is in electronic form. The Act applies to any transaction in or affecting interstate or foreign commerce with a few specific exceptions, such as any statute, regulation or other rule of law regarding wills, codicils, or testamentary trusts; family law matters; cancellation notices from a utility service; health or life insurance benefits; and product recalls that risk endangering health or safety. As demonstrated in this sample list, Congress clearly intended to keep documents of a personal nature or that are in the public interest in a tangible, written form. In the same vein, the E-Sign Act contains numerous consumer protections, such as mandatory consumer disclosures, notices, and affirmative

consent requirements, in an attempt to shield the consumer from unknowingly entering into binding agreements with sly solicitors.

### The Act in Practice

Other than these exceptions, companies are able, but not required, to conduct business electronically, provided that all of the parties to the transaction give their consent. But how does it work? Do companies need to purchase and install new and expensive hardware and software, and if so, will companies have to expend significant time and money to train their employees on the new system and the risks associated with such technology? The answer depends on the type of business or magnitude of transactions and, ultimately, on the level of security a business desires to place on the electronic transaction.

**Electronic Signatures.** A major component of the entire process is the "electronic signature," defined in the Act as "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 Act does not require the use of any specific language or technology to create the signature. Therefore, simply typing your name at the bottom of an e-mail or clicking on an "I accept" button at the bottom of an electronic document may suffice. To date, there are no published cases which discuss what does and does not constitute an "electronic signature" under the Act and as such, the term's boundaries are quite fuzzy. For this reason, businesses (which, unlike consumers, do not receive the protections outlined above) need to exercise caution in their electronic dealings with customers and suppliers when they do not wish to be contractually bound.

There are a myriad of possible cases in which one's "signature" may be added by mistake or even fraud. For example, one's "signature" may be accidentally

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### Accountants Not Liable for Fraud or Negligence in Connection with NASD Filings:

The New York Court of Appeals, in answering questions certified to it by the United States Court of Appeals for the Second Circuit, declined to hold an accounting firm liable for fraud and negligence in connection with its audits of now defunct brokerage firm A.R. Baron & Co. ("Baron"). BDO Seidman, LLP ("BDO") performed audits of Baron's financial statements for the purpose of Baron's annual filings with the National Association of Securities Dealers ("NASD"). The Securities Investor Protection Corporation ("SIPC") filed a complaint against BDO after Baron filed for bankruptcy, alleging that Baron's management team had committed fraud and violated criminal laws by manipulating the markets in certain stocks. SIPC claimed that, had BDO properly performed its audits, the NASD would have been informed of Baron's precarious financial situation earlier, and SIPC could have intervened earlier. The Court of Appeals dismissed the fraud claim, noting that SIPC had never actually reviewed BDO's audits, but rather relied upon the NASD's evaluation of the audits in failing to act sooner. Similarly, the Court found no evidence to support a claim that BDO was negligent as it had not evinced an understanding that SIPC would use its audits for any purpose. *Securities Investor Protection Corporation v. BDO Seidman, LLP.*

## e-contract pointers

### guidelines

- ✓ Decide on and implement the appropriate level of security for your e-contracts.
- ✓ Establish a company-wide policy on who can and cannot enter into electronic contracts, how to do so, and the types of permissible e-contracts.
- ✓ Disseminate the policy to all employees.
- ✓ Disseminate your e-contract policy to customers and/or vendors so as to limit their ability to claim that a contract was formed.

placed on an electronic document as an automatic function of one's e-mail system, or maliciously typed by an unauthorized employee or even a computer hacker. For security against such happenings on a low budget, the intended signer may make provisions for the addition of statements or a disclaimer along with the typed signature, such as "the above typed name represents my signature and my intention to sign the above agreement," that may only be added to the document with the use of a password known only to the signer. The other party to the contract should be alerted in advance that such a statement is a required part of any e-contract with your company. However, for significant transactions, such as those involving capital improvements or dollar amounts above a certain pre-determined level, businesses should seek to enter the world of "digital signatures," which as a type of "electronic signature" give companies the security that a large business transaction demands.

**Digital Signatures.** A "digital signature" is an encrypted code that is attached to an electronically transmitted message that identifies the sender and guarantees that the person sending the message really is who he or she claims to be. Although "digital signatures" are more complicated and expensive than the

previous "electronic signature" examples, their encrypted form provides what the standard "electronic signatures" lack: *confidentiality* (protection from unauthorized access to the document during transmission or storage); *authentication* (validation that the signature is from the intended signer); *integrity* (security that the document as received mirrors the document sent); and *non-repudiation* (inability of signer to deny his or her "signature"). Several companies have developed "digital signature" technology for the new e-business. For example, one such system allows users to transmit secured documents over an unsecured Internet with the aid of cryptographic keys, allowing the sender to encrypt the electronic message, which is in turn decoded by the receiver.

### Conclusion

Once the appropriate level of technology and training to use it is in place, companies can now contract without leaving the office, exchanging copies, and setting aside the requisite office space to store the documents. Most businesses, however, will not make such transformations immediately. For example, it is likely that at first, companies will install such systems, but still print, exchange and store contracts in order to alleviate fears of the unknown, completely evis-

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cerating the purpose of the E-Sign Act. But along with advances in technology — such as with “electronic filing,” which is spreading across state and federal courts as a means of filing and serving court documents at a fraction of the usual cost — the E-Sign Act, with its recognition of

the present and future importance of e-business, will save time and expense for those companies with voluminous transactions and the knowledge and courage to take the next step. ■



Mr. Siev and Ms. Phillips are with Anderson Kill & Olick's New York office.

## AKO corner

### notable decisions

**AKO Trial Victory in ERISA fiduciary case:** In a ruling with implications for pension fiduciaries and investment advisors, a Judge in the Southern District of New York found against John Hancock Mutual Life Insurance Company to the tune of an estimated \$60 million. In its post-trial ruling, the Court concluded that Hancock had violated its obligations under ERISA to a retirement plan originally created by the Sperry Rand Corporation. Specifically, the Court found that Hancock had breached its duty of loyalty to the pension plan (whose trustees were represented by AKO), and had engaged in numerous transactions which were prohibited under ERISA. AKO's client was awarded over \$19 million in damages, plus interest, attorneys' fees and costs, which could exceed \$60 million. AKO's client had also previously prevailed in an appeal to the United States Supreme Court in the case. *Harris Trust & Savings Bank v. John Hancock Mutual Life Ins. Co.*

**Multidistrict Litigation Panel Grants Consolidation:** AKO's clients, Frosty Bites Distribution, L.L.C. and its affiliated retailers, who were plaintiffs, defendants, and intervenors in seven separate patent and trade dress infringement actions throughout the United States, successfully moved the Judicial Panel on Multidistrict Litigation to transfer all seven actions to one Federal Judicial District for consolidated proceedings. The Panel's decision should greatly reduce the expenditure of time and money by AKO's clients in defending and prosecuting these actions. In re: Dippin' Dots, Inc. Patent Litigation

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