eSignature and ePayment News and Trends

Achieving Digital Transformation and Securing Digital Assets

ESIGNATURE AND EPAYMENT NEWS AND TRENDS

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A fact of business today is that customers – both consumers and other businesses – and employees expect to transact digitally. To remain competitive, companies find themselves increasing their efforts to digitally transform their businesses.

Successfully implementing this transformation requires careful planning to ensure regulatory compliance, a smooth integration with existing business technology and a positive customer experience.

This edition includes reports on state regulatory activities, fresh judicial precedent and other important news.

For related information regarding blockchain and digital assets, please see our monthly bulletin Blockchain and Digital Assets News and Trends.

REGULATORY DEVELOPMENTS

FEDERAL

Electronic communications

CFPB finalizes debt collection rules and addresses use of electronic communications: On October 30, 2020, the CFPB finalized its rule implementing the Fair Debt Collection Practices Act (FDCPA). The rule, in part, clarifies how the FDCPA, which was passed in 1977, applies to newer communication technologies such as email and text messages. For example, the rule requires debt collectors who communicate electronically to offer the consumer a reasonable and simple method to opt out of such communications at a specific email address or telephone number. The rule also provides that consumers may, if the debt collector communicates electronically, use that medium of electronic communications to place a cease communication request or notify the debt collector that they refuse to pay the debt.

STATE

Money transmission

Florida regulator rejects request for an "agent of the payee" exemption: On September 29, 2020, the Florida Office of Financial Regulation (OFR) issued a Declaratory Statement stating that the petitioner was not exempt from licensure under Florida's money transmission statute as an agent of an exempt entity when it engaged in payment processing activities. The petitioner requested a declaratory statement from the OFR that it was not engaged in money transmission when it operated as a data processor and when it operated as a payment processor. Regarding operating as a data processor, the petitioner stated that "it creates daily transaction files and instructions which it submits to a federal or state chartered financial institution." The OFR said that such activity did not require licensure so long as the petitioner only transmits payment instruction data or information. Regarding payment processing, the petitioner stated that all such functions are done as an agent of the payee within scope of its agreements with merchants. The OFR said Florida law establishes certain exemptions from licensure and that an agent of an exempt entity is not included. It added that "[t]o include 'agent' within the class of exempt entities would require" the OFR to modify the statute and that "[a]gencies 'may not insert words or phrases in that statute or supply an omission that to all appearances was not in the minds of the legislators when the law was enacted.'" Therefore, the OFR concluded, the petitioner requires a license as a money transmitter for its payment processing activities so long as the petitioner receives funds which it then transmits to other persons.

Remote online notarization

Pennsylvania, Hawaii and Missouri join RON states:

- On October 29, Pennsylvania enacted HB2370, adopting remote online notarization in the state, effective immediately.
- On September 15, Hawaii enacted SB2275, updating the state's notarial laws to conform to the Revised Uniform Law on Notarial Acts (2018), including adopting RON in the state effective January 1, 2021.
- On July 6, Missouri enacted HB1655, authorizing the use of RON for acknowledgements and jurats. The law became effective August 30, 2020.
- These three states join the following states which have adopted some form of RON: Alaska, Arizona, Colorado, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wisconsin.

CASE LAW

FEDERAL

Court finds no private right of action under ESIGN: In *Grays v. Auto Mart USA*, 2020 WL 6266830 (D. Colo. Oct. 26, 2020), the court found that ESIGN, by itself, did not provide the plaintiff with a private right of action against the defendant. The plaintiff alleged that the defendant violated ESIGN by failing to advise on the right to receive paper rather than electronic copies and on her right to withdraw consent to receive records in electronic form. In addressing this allegation, the court stated that ESIGN does not provide for a private right of remedy; instead, if some provision of another law requires the defendant to provide the plaintiff with certain information "in writing," then the defendant would need to show compliance with ESIGN's consumer consent provisions. Failure to comply would then subject the defendant to the penalties under whichever law required the "writing." The court concluded that ESIGN does not provide a stand-alone remedy.

ESIGN would not preempt state law allowing for charges for paper copies at the outset of a relationship: In *Santoro v. State Farm Mutual Automobile Insurance Company*, 2020 WL 6586630 (S.D. N.Y. Nov. 9, 2020), the plaintiff alleged that the defendant violated New York law by charging a fee to receive paper billing statement. The court held that

the relevant New York statute allowed such charges. The plaintiff then argued that ESIGN preempted such charges. The court did not go into detail about *why* the plaintiff made such an argument, and while the court noted that it did not need to reach this issue, the court stated that ESIGN "is silent about charging a fee for paper records from the outset (as opposed to after consent to electronic notification has been given)." The court noted that if it had needed to decide the issue, it would not regard ESIGN as expressly preempting the relevant state law.

Controversy over whether email constitutes a signed writing leads court to both deny injunction stopping sale and to deny motion to dismiss: In *Halabu Holdings v. Old National Bancorp*, 2020 WL 6417110 (E.D. Mich. Oct. 28, 2020), the court was asked to (1) rule on a motion by the plaintiff for a temporary restraining order and preliminary injunction to prevent the defendant from selling a piece of commercial property and (2) rule on a motion by the defendant to dismiss the case. As background, the defendant sought to sell a commercial property and entered into negotiations with the plaintiff. During the negotiations, the defendant's vice president sent an email to the plaintiff's realtor that read, "Thank you my friend. I will continue to work on your behalf." The defendant's vice president did not type his name on the end of the email. Instead, an automatically generated email signature block was applied.

Regarding the plaintiff's motion, the court determined that a factfinder would not likely find that an email sent by the defendant's vice president constituted a signed writing under Michigan's statute of frauds because the email did not manifest the necessary intent required to assent to the agreement. The plaintiff alleged that this email contained a valid electronic signature; therefore, the defendant should be enjoined from selling the property to another party. In analyzing both Michigan's statute of frauds and its Uniform Electronic Transactions Act, the court held that the plaintiff was not likely to prevail on the merits of its claim because a factfinder would likely conclude that the supposed signature was not a "signature" because the vice president did not have required intent to sign and because the defendant did not manifest an intent to complete the transaction by electronic means. Therefore, the court denied the plaintiff's motion for a temporary restraining order and preliminary injunction.

Regarding the defendant's motion, however, the court stated that the plaintiff's arguments were more persuasive under the standard of review for a motion to dismiss than under the standard applicable to a motion for a temporary restraining order and preliminary injunction. Even though the arguments were substantially the same – the defendant argued that the contract failed under the statute of frauds because it lacked a valid signature – the complaint sufficiently alleged facts that could form the basis for relief under Michigan law, and the court denied the defendant's motion to dismiss.

Emails and text messages not sufficient to show "meeting of the minds" under Florida's statute of frauds: In *Taxinet, Corp. v. Leon*, 2020 WL 6882205 (S.D. Fla., Nov. 24, 2020), the court granted the defendant's motion for summary judgment because the combination of emails and text messages sent and received do not establish the "writing" requirement in Florida's statute of frauds for a joint venture agreement. Specifically, the court found that the aggregate of emails and text messages did not contain all the required elements for a joint venture agreement, thus the plaintiff failed to show that a "meeting of the minds" occurred.

Court denies motion to compel arbitration:

- In *Sinclair v. Wireless Advocates*, 2020 WL 6679192 (Nov. 12, 2020), the court stated that the defendant bears the burden of proving the existence of an agreement to arbitrate. Here, the court noted that issues abounded regarding the existence of an arbitration agreement: lack of any agreement containing the plaintiff's signature, absence of any system-generated receipt confirming the plaintiff's completion or acknowledgment; an unexplained date discrepancy in the defendant's only internal record purporting to reflect the plaintiff's acceptance of the agreement; and circumstances surrounding the timing of when the defendant introduced the agreement in relation to the plaintiff's hire date. Therefore, the court stated that until the contract formation issue is resolved, the court has no authority to compel arbitration.
- In *Snow v. Eventbrite, Inc.*, 2020 WL 6135990 (N.D. Cal. Oct. 19, 2020), the court denied the defendant's motion to compel arbitration against three plaintiffs, in large part because the defendant only provided "exemplary" images of how the sign-up messages appeared and not how the sign-up screens looked to each plaintiff when they allegedly agreed to the arbitration provision. The court stated that "[i]t is strange (at best) that [the defendant] does not simply show the sign-in wrap agreements as they existed on the dates of the plaintiffs' sign-ups and purchases." Further, the defendant had three separate online methods in which the plaintiffs accessed the defendant's services – a desktop webpage, a mobile webpage, and a mobile app – and each method had a stand-alone sign-up page and purchasing process, meaning that there are six separate terms of service that a user can agree to at any time. In addition to the defendant failing to provide screenshots of the screens in use when the plaintiffs used the defendant's services, the

court noted that the mobile app sign-up page is distinct. The court stated that the terms of service link for the mobile app – even though it was a blue hyperlink – was overall inconspicuous. Specifically, the court noted that the buttons immediately above were brightly colored and contrasted starkly with the dark background, while the terms of service link was small and with dark text against a black background. Therefore, while the court noted that other of the defendant's sign-up or purchase screens may have shown assent if the defendant could have demonstrated when such pages were in use, the mobile app screen would have not demonstrated such assent because of its layout.

Court upholds arbitration agreement entered into electronically:

- In *Pettersen v. Volcano Corp.*, 2020 WL 6323937 (E.D. N.Y. Sep. 8, 2020), the court held that the plaintiff had agreed to the arbitration clause despite the plaintiff's contention that her computer lacked the technical capability to access the onboarding documents. The court stated that the plaintiff did not foreclose her ability to have used a different computer. Further, the plaintiff acknowledged responding to an email from Human Resources in which she did not mention any technical problems and stated that she would complete the new hire forms shortly. Five days later, her electronic signature appeared on the arbitration agreement. Further, the plaintiff was aware that the defendant had the ability to arbitrate employment disputes and therefore agreed to the policy when she began and continued to work for defendant.
- In *Brody v. Culturesource, Inc.*, 2020 WL 6562089 (E.D. Mich. Nov. 9, 2020), the court found that the plaintiff agreed to the arbitration provision when electronically signing it because a blanket denial, without more evidence, is not sufficient to show that she did not assent.
- In *Williams v. Kelly Services Global, LLC*, 2020 WL 6882609 (M.D. Fla. Oct. 19, 2020), the court found that the plaintiff agreed to the arbitration agreement when she logged onto the registration site and, upon filling out the forms, clicked an acknowledgment box. At the end of the process, the plaintiff then applied her electronic signature to all forms simultaneously. This completed her registration and submitted her application to the defendant.

COMING EVENTS

Learn about coming events in the ESRA Digital 2020 Education Series, including webinars on mortgage eclosings, remote online notarization, and digital transformation in automotive selling and lending.

RECENT PUBLICATIONS

The MBA Compliance Essentials Remote Online Notarization State Surveys, developed by DLA Piper, provides a comprehensive look at RON requirements in each state that has enacted RON legislation. These fully editable surveys are organized by category of requirements, including registration, technology, seal and signature, certificates of RON acts, journal, authentication, session, recording, and additional requirements. Companies can purchase the full package which includes surveys for all states that have enacted RON legislation along with a matrix summarizing state requirements, or companies can purchase information about individual states as needed. Read more.

Margo H.K. Tank recently published an article in *CoinTelegraph* titled "Blockchain regulation: Speedbumps, roadblocks and superhighways."

For more information

Please visit our Coronavirus Resource Center and subscribe to our mailing list to receive alerts, webinar invitations and other publications to help you navigate this challenging time.

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