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E-Sign versus State Electronic Signature Laws: The Electronic Statutory Battleground

Adam R. Smart

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I. INTRODUCTION

The Electronic Signatures in Global and National Commerce Act (E-Sign)\(^1\) was adopted by Congress on June 16, 2000, and signed by President Clinton on June 30, 2000.\(^2\) On its effective date, October 1, 2000, the Act created a standard across the United States for legal recognition of electronic signatures.\(^3\) Despite the availability of the Uniform Electronic Transactions Act (UETA) and its adoption in many states,\(^4\) Congress adopted E-Sign because of dual concerns about the continued adoption of divergent state laws governing electronic signatures and records and uncertainty about the time it would take to enact UETA in all of the states.\(^5\)

This Note will briefly examine electronic signatures\(^6\) and the history of traditional signature requirements.\(^7\) The Note will then present overviews of E-Sign\(^8\) and UETA.\(^9\) Next, the Note will focus on the impact of E-Sign on the electronic signature and record laws in the representative state schemes of North
Carolina, California, and New York. Finally, the Note will discuss E-Sign's general impact in the near future.

II. ELECTRONIC SIGNATURES

A. Definition

In general terms, an electronic signature is any "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." This definition is extremely broad and is highly inclusive of different technologies.

B. Technology Issues

One specific type of electronic technology, a digital signature, is an encrypted electronic signature. Digital signature technologies normally incorporate public key infrastructure

10. See infra Part V.C.1—2.
11. See infra Part V.D.1—2.
12. See infra Part VI.A—C.
13. See infra Parts VII., VIII.
15. Tom Melling, Digital Signatures vs. Electronic Signatures, E-BUSINESS ADVISOR, Apr. 1, 2000, LEXIS, News Library, EBUSAD File. The types of possible electronic signatures are limited only by the imagination of the parties contracting, possibly including such methods as a simple typed symbol, a digitized handwritten signature, an electronic sound, clickwraps (such as a button stating “I accept” that can be clicked on), pass codes, voice prints, retinal scans, fingerprints, or any combination of these methods. Id.
16. William A. Tanenbaum, Paperless Contracts Are Here: State Electronic Signatures and Records Act, Enabling Regulations Have Taken Effect, N.Y. L.J., Apr. 24, 2000, at S10. Encryption technology is the use of mathematical algorithms in order to encrypt, or disguise, the text or original form of the data to be transferred so that it cannot be accessed without either the knowledge of what process was used to encrypt the data or the appropriate decryption key. Id. The algorithms are often very complex, resulting in strong security, making the encryption very difficult to undo without the appropriate decryption key. Id.
technology (PKI). This technology enables the parties to a transaction to verify that the sent document has not been altered and has been signed by the party purporting to sign the document.

For institutions, such as banks, seeking to deploy digital

17. Id. Each party involved in a transaction using PKI technology has both a public key and a private key. Id. The public key is published in a directory available to third parties, while the private key is known solely by the holder of that key. Id. In order to make the process work, the party sending the document would use its private key to sign and encrypt the document. Id. The encrypted document would then be sent to the recipient party who would use the public key of the sender to decrypt the document. Id. To ensure that the individual's signature on the electronic document is actually that of the individual who sent the document, third parties are often used for verification purposes. Id. These third parties, usually known as certification authorities, generate the keys used by companies or individuals; therefore, they are able to verify that the key used is actually that of the correct party. Id. This authorization process prevents the use of fake keys to impersonate another individual or entity. Id.

18. Melling, supra note 15. While this method adds security, the use of a certificate authority, normally an integral part of the digital signature process, adds transactional costs. Id. If a bank decides to incorporate digital signature technologies, it must also decide whether or not to operate its own certificate authority for its customers. BANK TECH. GROUP, FED. DEPOSIT INS. CORP., BULLETIN ON DIGITAL SIGNATURES, at http://www.fdic.gov/regulations/information/files/banktechbulletin.html (Sept. 30, 2000). Zions Bancorp, Bank of America Corp., and Wachovia Corp. are some of the large banks have already begun acting as certificate authorities in some capacity. They're Bullish on Digital Certificates, AM. BANKER, Dec. 27, 2000, at 1. A Wells Fargo & Co. pilot program is allowing a trial group of commercial customers to use digital certificates to authenticate certain types of transactions and plans to extend the program to all commercial customers within a year. Carol Power, E-Sign Law Gives Equality to E-Signatures, AM. BANKER, Oct. 12, 2000, at 14A. Financial institutions are being looked to as the best potential candidates for serving as certificate authorities because they already possess the trust required to serve such a role. Lavonne Kuykendall, Consumer Use of Digital Signatures Still Far Off, AM. BANKER, Nov. 21, 2000, at 1. The advantages of certificate authority operation are that it establishes bank customer identity, increases potential customer retention, provides for community outreach, and the technology is relatively inexpensive to implement. BANK TECH. GROUP, supra. The disadvantages are that the standards are still changing, operation would cause additional expenses due to a need for more hardware facilities and a diligent security structure, it would require more technical expertise, and potential new liabilities for the bank are created. Id. However, incorporation of digital signature technology could save money for banks that in the long run would eclipse the costs of implementing and operating the technology by allowing for electronic archival storage instead of huge file cabinets to store paper documents. Lavonne Kuykendall, Embrace E-Signatures Quickly, Banks Urged, AM. BANKER, Dec. 12, 2000, at 13. Secure electronic storage vaults in which customers could store important electronic documents could be another source of revenue for banks. Id. See Carrie O'Brien, Note, E-Sign: Will the New Law Increase Internet Security Allowing Online Mortgage Lending to Become Routine?, 5 N.C. BANKING INST., 525 (2001).
signature technology, several considerations must be weighed. In addition, the different types of technologies available vary in the amount of security they provide to users. The weakest security provided is through simple methods such as passwords, personal identification numbers, or other "shared secret" methods. Biometric signatures, incorporating physical attributes of the signor into the signature, offer more security than the "shared secret" methods. The most secure individual method is a digital signature. A combination of

19. BANK TECH. GROUP, supra note 18.
20. Id. Institutions should be sure to conduct a thorough due diligence on any vendor of digital technologies the institution may engage. Id.
21. Melling, supra note 15. The United States Office of Management and Budget analyzed this issue in regards to federal agencies ranking the security levels of the technologies as set out above. Id.
22. Id. "Shared secrets" methods involve a system whereby both parties are the only two privy to the "secret." Because there is no other safeguard of the secret such as encryption or the like, its success relies on guarding the secrecy of the method between the parties to the transaction. Id. The use of such measures, though inexpensive to implement, also seems self-defeating in the pre-contract stage since by their nature they normally require a pre-existing contract between the parties using them. See id.
23. Id. Biometric technologies—retinal scans, voice prints, and fingerprints—require the use of a special peripheral device for each computer, such as a retinal scanner, adding another complication and making such signature technologies less practical for large scale implementation. Id. See generally, Robyn Moo-Young, Note, "Eyeing" The Future: Surviving The Criticisms Of Biometric Authentication, 5 N.C. Banking Inst, 5 N.C. BANKING INST., 421 (2001) (further discussing biometric technologies).
digital signatures with biometric technologies would likely provide the most security.\(^{25}\)

### III. Historical View

#### A. Statute of Frauds

The major obstacle to the widespread recognition of electronic commerce, signatures, and records has been the Statute of Frauds.\(^{26}\) The Statute of Frauds provides that certain types of contracts, such as a contract for the sale of goods for $500 or more, must be in writing and signed by the party to be charged in order to be enforceable against that party.\(^{27}\) In every jurisdiction where the Statute of Frauds remains in force, the question of how to reconcile electronic records with it must be answered.\(^{28}\) Three proposals have been advanced: 1) leave the decision to the judiciary; 2) repeal the Statute of Frauds; or 3) amend the

\(^{25}\) See Melling, supra note 15. The added complications and cost implications for implementing a combination of signature technologies would probably be a deterrent for many users from attempting such an approach. See id.


\(^{27}\) Robertson, supra note 26, at 789; U.C.C. § 2-201(1) (1977). The Statute of Frauds in the U.C.C., a standard form of the statute in the United States, provides that "a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought." U.C.C. § 2-201(1) (1977). The statute does not call for the enforcement of all contracts signed and in writing; it simply creates a condition that must be satisfied before the courts will even consider enforcing a contract. Pompian, supra note 26, at 1453. Two justifications are normally given for the Statute of Frauds: 1) efficiency, since use of the courts will be reduced if no signed writing can be produced, and 2) protectionism, setting up barriers to exploitation of the legal system by unscrupulous parties (although a critique of the Statute has been that it encourages promisors to hide behind its protection when most useful). Id. at 1452-60. For further discussion of the history of the Statute of Frauds see generally Pompian, supra note 26.

\(^{28}\) See generally Pompian, supra note 26.

\(^{29}\) Robertson, supra note 26, at 790. There is a background of case law on non-
Statute of Frauds to recognize electronic signatures and records as legally effective.\textsuperscript{31} If determination of the validity of electronic signatures were left to the judiciary, the process of determination would develop on a case-by-case basis, taking a substantial period of time to create a body of law on the subject.\textsuperscript{32} The Statute of Frauds is also unlikely to be repealed in the United States any time in the near future.\textsuperscript{33} Thus, amending the Statute of Frauds to include electronic records and signatures is the most feasible option.\textsuperscript{34}

\textsuperscript{30} Robertson, supra note 26, at 809.

\textsuperscript{31} Id. at 815.

\textsuperscript{32} Id. at 809. Such a process would not produce results quickly enough to resolve the uncertainty surrounding the issue given the pressing need for certainty. Id.

\textsuperscript{33} Id. There are a couple of reasons why the Statute of Frauds will not be repealed: 1) the U.C.C. drafting process has reaffirmed the necessity for some form of the Statute of Frauds in both contracts for the Sale of Goods and especially in contracts dealing with information licensing (the U.C.C. drafting committee had been long opposed to the Statute of Frauds, but this sudden reversal removed one of the stronger proponents of the statute's repeal); and 2) while setting up exceptions to the Statute of Frauds, \textit{no individual state} has repealed the statute in its entirety. Id. at 809-10 (emphasis added).

\textsuperscript{34} See id. See also supra note 26 and accompanying text (discussing the Statute of Frauds). Indeed, this has been the approach generally taken in the United States. See infra notes 35-43.
B. Approaches to Amending the Law

Two schools of thought originally surrounded the movement for law reform in regard to electronic commerce and communication. The first school focused on law revision. The second school focused on technology implementation. The two schools brought significantly different approaches to the question of what legal effect should be given to uses of electronic methods to sign or authenticate electronic records.

In 1995, Utah became the first state to take an affirmative stance on the issue, passing a statute granting legal recognition to digital signatures. The technology-based approach Utah chose promotes a highly regulatory and prescriptive standard granting legal enforceability only to digital signatures. In contrast, legislation enacted by California took the other approach, adopting a technology-neutral law, leaving technology decisions to the parties in the market.

In an endeavor to prevent further

36. Id. The law revisionist school focused on existent legal structures and principles in an attempt to apply them to and justify the legal recognition of transactions entered into electronically. Id. Most of the changes that took place under this view were simply general substantive revisions of commercial law to accommodate electronic commerce. Id. at 597. The goals of this movement have been to remain technology neutral, to remove barriers to electronic commerce, and to treat electronic records the same as paper records. Id. at 601. This school leaves technology decisions up to the market to determine. Id.
37. Id. at 597. The technology movement focused on particular technologies and their implementation. Id. The underlying ideology of the technology movement is that the specific technology (i.e. digital signatures) offers substantial benefits to electronic commerce and therefore legislation should be tailored to secure those benefits by codifying them into law. Id. at 601.
38. Id. at 602.
39. UTAH CODE ANN. §§ 46-3-101 to -602 (1996); Boss, supra note 35, at 600.
41. CAL. CIV. CODE §§ 1633.1-1633.17 (West 2000). See also infra notes 153-207 and accompanying text.
42. Boss, supra note 35, at 603. This approach has been the approach gathering the most support in the United States. Id. See, e.g., infra notes 44-201 and accompanying text.
divergence of the law governing electronic signature and records that would result in impedance of interstate electronic commerce, the drafting processes for both UETA and E-Sign began.

IV. E-SIGN

A. General Provisions

The major effect of E-Sign is that "with respect to any transaction in or affecting interstate or foreign commerce—a signature, contract, or other record relating to a transaction will not be denied legal effect, validity, or enforceability solely because it is in electronic form." This provision has two limiting factors: 1) it only affects records or signatures relating to transactions, and 2) it applies only to those "transactions in or affecting interstate or foreign commerce." In addition, E-Sign prohibits the use of an electronic record if the record cannot be retained and

43. See supra notes 26-42 and accompanying text.
45. Id. § 101(a), 15 U.S.C.A. § 7001(a). "The term 'transaction' means an action or set of actions relating to the conduct of business, consumer, or commercial affairs between two or more persons..." Id. § 106(13), 15 U.S.C.A. § 7006(13). It is unclear whether charitable, religious, or non-profit matters will be considered "transactions" under this limited definition. Letter from Edward C. Winslow III, Attorney, Brooks, Pierce, McLendon, Humphrey, & Leonard, LLP, and Matthew G. Bibbens, to Paul H. Stock, Executive Vice President and Counsel, N.C. Bankers Association 6 (July 3, 2000) (on file with the N.C. BANKING INST.) [hereinafter July Winslow Letter]. "Governmental" affairs were intentionally excluded from this definition; therefore, records generated for governmental purposes only are not subject to E-Sign. 146 CONG. REc. S5221 (daily ed. June 15, 2000) (statement by Sen. Leahy); 146 CONG. REc. H4357 (daily ed. June 14, 2000) (statement by Rep. Dingell).
46. E-Sign § 101(a), 15 U.S.C.A. § 7001(a). There are varying views on what is in or affecting interstate commerce, leaving a role for state legislation such as UETA. Edward C. Winslow, III, Overviews of E-Sign and NCUETA, Lecture at the North Carolina Bar Association CLE: Electronic Documents and Signatures in North Carolina: The New Federal and North Carolina Laws (Oct. 26, 2000) (notes from lecture on file with N.C. BANKING INST.) [hereinafter CLE Notes]. Although Congress has interpreted the standard very broadly, so as to include almost everything, state courts do not necessarily hold that view. Id.
accurately reproduced.\textsuperscript{47} One of the other noteworthy aspects of E-Sign is that it is "technology neutral," setting up no minimal requirements for security or confirmation purposes, essentially allowing the parties to a transaction to determine the technologies to be used.\textsuperscript{48}

E-Sign has several explicit exceptions to its scope.\textsuperscript{49} Some of these excluded areas are records or contracts governed by the laws of wills, codicils, and testamentary trusts;\textsuperscript{50} the U.C.C., except for sections 1-107\textsuperscript{51} and 1-206,\textsuperscript{52} Article 2,\textsuperscript{53} and Article 2A;\textsuperscript{54} and notices of foreclosure or eviction.\textsuperscript{55}

\begin{itemize}
\item \textsuperscript{47} Id. § 101(e), 15 U.S.C.A. § 7001(e).
\item \textsuperscript{48} Id. § 106(5), 15 U.S.C.A. § 7006(5). See also supra note 14. Congress recognized that some technologies are more secure than others, but believed that consumers and business must be free to choose the appropriate technology for their transactions given its nature and the need for assurances. 146 CONG. REC. H4360 (daily ed. June 14, 2000) (statement by Rep. Tauzin); 146 CONG. REC. S5223 (daily ed. June 15, 2000) (statement by Sen. Leahy). Some argue that a government mandate is required for widespread adoption of electronic signatures. Deborah Bach, E-Sign Law Leaves Dizzying Leeway, Lawyer Says, AM. BANKER, Dec. 20, 2000, at 11 (U.S. Bancorp Piper Jaffray predicts one will be issued in three years). Although not currently required to use them, many businesses that desire a high security standard are already beginning to incorporate digital signatures into their business models. See Power, supra note 18, at 14A. Wells Fargo & Co., Ameritrade Holding Corp., and Bank One Corp. are all in the process of implementing digital signature technologies into their operations. Id. It is likely for now that the use of digital signature technologies will only be seen in high-dollar transaction areas due to the cost of setting up the infrastructure required for large scale use. Industry Likes E-Signatures, But Unsure on Infrastructure, AM. BANKER, Sept. 29, 2000, at 10.
\item \textsuperscript{49} E-Sign § 103, 15 U.S.C.A. § 7003.
B. Consumer Protections

E-Sign does not require a person or entity to use or accept electronic records or signatures. However, if a party conducting a transaction with a consumer desires an electronic signature or record to be legally effective, the consumer must affirmatively consent to the use of such method. Before the consent will be held valid, a host of requirements must be fulfilled.

First, the retailer must inform the consumer of the right to revoke consent, the scope of the consent, and the right of the consumer to request


57. E-Sign § 101(c)(1)(A), 15 U.S.C.A. § 7001(c)(1)(A). Consumer transactions do not include business-to-business transactions, allowing business to bypass the consumer protections when dealing with each other. 146 CONG. REC. S5224 (daily edition June 15, 2000) (statement by Sen. Abraham). The consumer must also not have withdrawn that consent (the original consent is not permanent). E-Sign § 101(c)(1)(A), 15 U.S.C.A. § 7001(c)(1)(A). However, federal regulatory agencies may in special circumstances, and by following certain procedures, exempt specified records from the consent requirement if it is “necessary to remove a substantial burden to electronic commerce and will not increase the material risk of harm to consumers.” Id. § 104(d)(1), 15 U.S.C.A. § 7004(d)(1). See, e.g., id. § 104(d)(2), 15 U.S.C.A. § 7004(d)(2) (setting out an initial example of such a process relating to the Securities and Exchange Commission). The ability of state agencies to exempt records from the consent requirements was explicitly rejected by Congress. 146 CONG. REC. S5222 (daily ed. June 15, 2000) (statement by Sen. Leahy). There is some inconsistency as to how strict the standard should be in relation to this federal agency power. Id. There is strong support for the ability of federal regulators to remove the restrictions imposed by E-Sign by those who feel some of the restrictions and regulations will quickly prove to be unnecessary. 146 CONG. REC. S5226 (daily ed. June 15, 2000) (statement by Sen. Gramm).

a paper record. Second, the consumer must be able to access the 
records electronically. Note that the failure to satisfy the 
consumer consent provisions of E-Sign does not invalidate the 
underlying contract. E-Sign does not affect the consent or 
disclosure requirements imposed by any other law or statute; it 
merely places these additional requirements on the person using 
the electronic record.

rules on electronic notices to consumers for all agreements made with new or existing 
customers on or after October 1, 2000 to deliver information electronically. Notice 
of Consumer Consent Requirements Applicable to the Electronic Delivery of 
Inst. Letter 72-2000). The new rules require that before consent can be given the 
consumer must be provided certain information: 1) any right or option available to 
receive a disclosure in paper form and the procedures to do so; 2) whether the 
consent applies to only a particular transaction or to a range of transactions; 3) the 
right to withdraw consent, the process for doing so, and the consequences or fees for 
doing so; and 4) the hardware and software requirements to access and retain the 
electronic information. Id.

60. E-Sign § 101(c)(1)(C), 15 U.S.C.A. § 7001(c)(1)(C). If the requirements 
change to electronically access or retain the record or records in question, the consumer must be informed of the new requirements and must be able to meet these 
new requirements to ensure continued validity of the consent. Id. § 101(c)(1)(D), 15 
U.S.C.A. § 7001(c)(1)(D). The requirement that the consumer's consent be 
electronic or be confirmed electronically in a manner that reasonably demonstrates 
the consumer's ability to access the electronic formats to which they consent is not 
intended to be burdensome. 146 CONG. REC. H4352 (daily ed. June 14, 2000) 
(statement by Rep. Billey). This consent could be accomplished in many ways, with 
one particular example being an e-mail response confirming that the necessary 
attachments to an e-mail could be opened by the consumer. 146 CONG. REC. H4352 
June 16, 2000) (statement by Sen. Abraham). Some argue that this consent 
requirement is too stringent and should be lessened. 146 CONG. REC. H4349 (daily 
consumer consent demonstration is that many consumers lack the technological 
knowledge to completely understand the technical specifications of their computer, 
especially more likely if consent is given by the consumer away from the computer 
she normally uses. 146 CONG. REC. H4358 (daily ed. June 14, 2000) (statement by 
Sarbanes).

would rest on the normal principles of contract law as applicable in the pertinent 
district. 146 CONG. REC. S5220 (daily ed. June 15, 2000) (statement by Sen. Leahy). However, a company could not rely on the validity of an electronic record if 
the consumer consent provisions were not satisfied. Id. This provision is only 
intended to apply to electronic records, and it does not provide another basis to 
(statement by Sen. Sarbanes).

62. Electronic Signatures in Global and National Commerce Act of 2000 (E-
While these consumer protections were put in place to ensure fraud prevention, they could play a strong role in frustrating E-Sign's goal of expanding electronic commerce.\textsuperscript{63}

C. Preemption Provisions

To what extent does E-Sign preempt state law?\textsuperscript{64} E-Sign grants states the power to "modify, limit, or supersede the provisions of [E-Sign] section 101 \textit{with respect to state law}" in certain situations.\textsuperscript{65} However, E-Sign confines this power to specifically authorized methods.\textsuperscript{66} E-Sign allows a state to enact its own electronic signature and records law without fear of preemption.\textsuperscript{67} However, a state can only be completely certain no preemption will take place if its version is identical to the UETA approved by the National Conference of Commissioners on Uniform State Laws (NCCUSL).\textsuperscript{68} A state can also "modify, limit,
or supersede” E-Sign by implementing an alternative law that sets out the procedures for use and acceptance of electronic records and signatures as long as the procedures are consistent with the provisions of E-Sign and do not require or prefer the use of a specific technology in the process. If a non-UETA approach is taken by a state after the enactment of E-Sign, that law must make specific reference to E-Sign.

These preemption provisions come as the result of a delicate balancing act by a Congress wanting to remove barriers to electronic commerce by promoting uniformity on one hand, while wanting to minimize preemption of state laws, especially UETA, on the other. In order to ensure further uniformity, E-Sign gives preferential treatment to the passage of UETA by specifically naming UETA as one of the exemptions to preemption.

A major question of preemption arises when a state adopts...
UETA, but not in the exact form set forth by the NCCUSL. There is a question of whether the consistency standard set out by section 102 of E-Sign apply to only the non-conforming provisions, or does it apply to the entire version of UETA? There are three possible readings of this provision of E-Sign: 1) inconsistent non-uniform provisions are invalid, but the remainder of the provisions would survive; 2) if any non-uniform provision is included, each provision (whether a UETA provision or not) must then be examined for consistency under subsection (a)(2); or 3) any non-uniform provision fails, whether or not it would pass the consistency test.

The first reading of the provision would work effectively if a state adopted UETA with only a few minor additions or changes. However, problems could arise if a state adopted only a few provisions of UETA and substituted alternative provisions to round out its own electronic records and signatures law. The second reading, subjecting every non-conforming provision of a modified UETA to the consistency test, would more likely ensure the principles originally conceived by the passage of E-Sign. The third reading that any non-uniform provision fails regardless of the consistency test does not seem like a logical reading of the statute. However,
until there is judicial review of the matter or regulatory clarification,\textsuperscript{8} it may be impossible to determine with certainty what the outcome would be in a state that has enacted a non-uniform UETA.\textsuperscript{82}

V. Uniform Electronic Transactions Act

A. Legal Effect

The NCCUSL,\textsuperscript{83} recognizing the pressing need for uniformity between the states, adopted the UETA on July 29, 1999.\textsuperscript{84} The main purpose of the UETA is set out in section 7: the medium in which a signature, record, or contract is created or presented is irrelevant to its legal significance.\textsuperscript{85} More explicitly, section 7 provides that a record, signature, or contract will not be denied legal effect or enforceability solely because it is in or incorporates an electronic form; furthermore, if the law requires either a record to be in writing or a signature, an electronic form of that record or signature satisfies the law.\textsuperscript{86} The remainder of the UETA serves to qualify, explain, and define the application of

\textsuperscript{28} See Uniform Electronic Transactions Act (UETA) (1999) § 7 cmt. 1 (1999). Section 7 is substantially the same as the analogous provision in E-Sign. Whittie, supra note 5, at 298.

\textsuperscript{29} UETA § 7.
these principles.  

B. Scope

The UETA applies to electronic records and signatures only as they relate to a transaction. 88 "Transactions," according to the UETA, include actions between people for business, commercial, or governmental purposes. 89 The UETA sets out particular exceptions to what transactions are covered, 90 including transactions governed by the law of wills, codicils or testamentary trusts; 91 a transaction governed by the UCC excepting sections 1-107, 1-206, Article 2 and Article 2A; 92 and transactions governed by the Uniform Computer Information Transactions Act (UCITA). 93 The determination of whether an electronic record or signature is or is not covered by the UETA could change with the specific context of its use. 94 Beyond the initial purpose of the UETA (to remove barriers to the electronic signing and retention of documents), the Act defers to existing substantive law to

87. Id. §§ 2 to 3.
88. Id. § 3. It is noteworthy that subsections (c) and (d) only apply to the requirement for a record to be in writing or signed and does not address any additional requirements imposed by the law on a record. See UETA § 7 cmt. 3.
89. UETA § 2 cmt. 12. Unilateral acts do not constitute transactions under the UETA. Id. Therefore, the UETA does not cover acts such as wills, trusts, or healthcare powers of attorney that do not involve another person. Id. However, the UETA does cover all electronic records related to a transaction, so many records not constituting a transaction on their own terms would be covered. See id. Despite this implicit distinction, the drafters saw fit to include "transactions" if they are covered by "a law governing the creation of wills, codicils, or testamentary trusts" in the exceptions to the initial scope of the UETA. Id. § 3(b)(1).
90. UETA § 3(b).
91. UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA) § 3(b)(1) (1999).
92. Id. § 3(b)(2). Transactions covered by the U.C.C. are excluded, except for the enumerated sections, because the revision of Articles 5, 8, and 9 encompassed considerations of electronic process. Id. § 3 cmt. 5. See supra notes 51-54.
93. UETA § 3(b)(3). The UCITA exclusion is based on the premise that the drafting process of UCITA already incorporated consideration of electronic contracting. See UETA § 3 cmt. 5. North Carolina has not adopted UCITA. CLE Notes, supra note 46.
94. UETA § 3(c). For example, a real estate transaction, as far as it relates to a transaction between two parties would conceivably be covered by UETA. See id. However to the extent the transaction concerns third parties, i.e., filing of a deed with the registrar of deeds, it would not be covered by UETA (that is, of course, unless the states adopt an electronic deed filing system). See id.
determine the questions of the validity of the signature.\textsuperscript{95} The UETA has been enacted in one form or another in at least twenty-three states.\textsuperscript{96} Adoption of the Act is also under consideration in at least ten other jurisdictions.\textsuperscript{97} Such a rapid legislative pace is in accord with the goal of E-Sign to facilitate the enactment of uniform state laws governing electronic records and signatures.\textsuperscript{98}

\textbf{C. Post-E-Sign Enactments of UETA: The North Carolina Example}

Given the special treatment spelled out in E-Sign for states that enact UETA as adopted by the NCCUSL,\textsuperscript{99} the states that have not enacted electronic signature and record laws as of the enactment of E-Sign\textsuperscript{100} most likely will find adoption of UETA more attractive than creating their own laws, thereby avoiding the consistency test of section 102 of E-Sign.\textsuperscript{101} Soon after the enactment of E-Sign, North Carolina enacted its own law governing electronic signatures, adopting a version of UETA on July 12, 2000.\textsuperscript{102}

\textsuperscript{95} See Prefatory Note to UETA. The existing substantive laws of contracts remain intact after the enactment of UETA. See id.

\textsuperscript{96} Carol A. Kunze, \textit{What's Happening to UETA in the States}, at http://www.utaonline.com/hapsate.html (last modified Feb. 6, 2001) (created for UETA Online). Twenty-three states have enacted UETA: Arizona, California, Delaware, Florida, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Maine, Maryland, Michigan, Minnesota, Nebraska, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Utah, and Virginia. Id.

\textsuperscript{97} Id. Ten states are considering UETA: Arkansas, Connecticut, Mississippi, Montana, New Jersey, New Mexico, North Dakota, Oregon, Texas, and Vermont. Id.

\textsuperscript{98} See supra notes 72-73 and accompanying text.


\textsuperscript{100} See supra note 96 and accompanying text.

\textsuperscript{101} See E-Sign § 102(a), 15 U.S.C.A. § 7002(a).

There are several differences between the North Carolina Uniform Electronic Transactions Act (NC-UETA) and the UETA as adopted by NCCUSL. As mandated by section 102(a)(2)(B) of E-Sign, NC-UETA, since it is not a uniform adoption of UETA, includes a specific reference to E-Sign. In determining the extent to which E-Sign will preempt NC-UETA, this Note will use two different approaches to analyze the preemption effect. The first approach subjects only the provisions of NC-UETA that are not identical to the provisions in UETA to the consistency test of section 102 of E-Sign, leaving those provisions that are identical intact. The second approach subjects every provision of NC-UETA to the consistency test of section 102 of E-Sign even if the provision is identical to a corresponding provision in UETA.

1. Non-Uniform Provisions Examined Under the Consistency Test

Under the first approach, only those provisions inconsistent with UETA will be examined under the consistency standard of section 102 of E-Sign—the remainder of the provisions will not undergo preemption by E-Sign. There are several major differences between UETA and NC-UETA: 1) an additional exclusion to the scope; 2) variance in the provisions on notarization and acknowledgment of records; 3) qualifying language in the major provision; 4) the sending and receipt of
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electronic records; the consumer consent rules; and 6) the exclusion of provisions dealing with government agencies’ use of electronic records.

Though NC-UETA tracks the UETA in its scope, the General Statutes of North Carolina, section 66-308.2(b)(3) adds one more exclusion to the North Carolina version of the Act by excluding Article 11A of Chapter 66 of the General Statutes (the Electronic Commerce in Government Act). The Electronic Commerce in Government Act authorizes all public agencies to accept electronic signatures. This addition appears to be consistent with the provisions of E-Sign, given the exclusions granted to similar government areas in the federal act.

A closely linked difference in NC-UETA concerns notarization and acknowledgment of records in the context of the government. This indirect variation comes as a result of the

113. See infra notes 126-133 and accompanying text.
114. See infra notes 134-136 and accompanying text.
115. See infra notes 137-138 and accompanying text.
116. N.C. GEN. STAT. § 66-308.2(b)(3) (2000). See also Winslow Article, supra note 102, at 3. North Carolina has not adopted UCITA and therefore does not recognize it as an exclusion to its scope. CLE Notes, supra note 46. However, some of the principles that underlie UETA’s recognition of the UCITA seem to justify the non-preemption of exclusion of the Electronic Commerce in Government Act. See supra notes 93-95 and accompanying text. The remainder of the exceptions to scope found in NC-UETA are consistent with those found in E-Sign and therefore would not need to face preemption. See August Winslow Letter, supra note 102, at 4-5.
117. N.C. GEN. STAT. § 66-58.4(a). The Electronic Commerce in Government Act sets a higher technological standard than NC-UETA and E-Sign, requiring certification of the signature and the ability to tell if it has been altered. N.C. GEN. STAT. § 66-58.5(a)(2) (stating that if the data has been altered, the signature must be invalidated).
118. See Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 104, 15 U.S.C.A. § 7094 (West Supp. 2000) (establishing its applicability to federal and state governments). This provision is consistent with the decision not to include UETA sections 17 through 19, which deal with government agencies. See infra notes 137-138 and accompanying text.
119. N.C. GEN. STAT. § 66-308.10. See also August Winslow Letter, supra note 102, at 9. The National Notary Association has taken a position in regards to electronic notarization consisting of three goals: 1) maintaining the fundamental principles of notarization regardless of changes in technology; 2) personal presence before a notary still required; and 3) training and certification for notaries must be strengthened to stress the new technologies in use. NATIONAL NOTARY ASSOCIATION, A POSITION ON DIGITAL SIGNATURE LAWS AND NOTARIZATION, 5-6 (2000) (on file with the N.C. BANKING INST.). The National Notary Association does recognize that reliable technologies may become available to allow for “personal presence” through audiovisual links or the like. Id. at 6.
exclusion of commerce with the government from the scope of NC-UETA. The pertinent provision of the Electronic Commerce in Government Act states signatures "that require attestation by a notary public may not be in the form of an electronic signature." The question of preemption under this section is tied closely to the scope analysis.

The key provision of NC-UETA, section 66-308.6 of the North Carolina General Statutes, though substantially the same as UETA section 7, includes qualifying language following subsections (c) and (d). The qualifying language tacked onto the ends of subsections (c) and (d) is: "provided it complies with the provisions of this Article." It is unclear whether such qualifying language would result in a preemption of this provision of NC-UETA.

Another place that NC-UETA differs from UETA is under the provision governing the sending and receiving of electronic records. NC-UETA includes a special rule for consumer transactions governing the receipt of electronic records not present in the UETA. Under NC-UETA, the record must be received in a manner that the sender reasonably believes the recipient can

120. N.C. GEN. STAT. § 66-308.2(b)(3). See also August Winslow Letter, supra note 102, at 9. The Electronic Commerce in Government Act controls this aspect of notarization. N.C. GEN. STAT. § 66-58.4(b).
122. See N.C. GEN. STAT. § 66-308.2(b)(3). If the scope provision was preempted by E-Sign then there would be no issue under section 66-308.10 of the North Carolina General Statute because the section follows UETA and the exclusion comes solely from the scope provision of NC-UETA. See supra notes 116-118 and accompanying text; N.C. GEN. STAT. § 66-308.10. E-Sign does not preempt procurement laws, so if the Electronic Commerce in Government Act is interpreted as a procurement law then it would be likely to stand. August Winslow Letter, supra note 102, at 10.
123. August Winslow Letter, supra note 102, at 6.
124. N.C. GEN. STAT. § 66-308.6(c)-(d).
125. The qualifying language seems superfluous. See N.C. GEN. STAT. § 66-308.6. In order for an electronic signature or record to be valid, the implication is that it would have to comply with the authorizing provisions of the Act. See id. However, there could be some sort of unanticipated interaction between the remainder of the provisions of NC-UETA, especially if many provisions differ from the uniform UETA, that would result in the qualifying language creating an inconsistency with E-Sign—preempting sections 66-308.6(c) & (d) of the North Carolina General Statutes. See id.
126. N.C. GEN. STAT. § 66-308.14(e). See also August Winslow Letter, supra note 102, at 11.
127. August Winslow Letter, supra note 102, at 11.
open in order to be officially received. Though it is unclear if such a provision will be sustained, there are two arguments for not preempting the provision: 1) E-Sign does not address this particular issue, and 2) this provision is consistent with the high level of consumer protection offered by E-Sign.

NC-UETA makes one more change to this section, negating the subsection of UETA providing that an electronic record is received even if no individual is aware of its receipt. E-Sign does not include this provision either; therefore, it is difficult to envision how such an exclusion could be found to be inconsistent with E-Sign.

One clear way that NC-UETA differs from UETA is that it includes the consumer consent rule found in E-Sign but not in UETA. The consumer consent rule in NC-UETA is closely modeled on provisions in E-Sign, but goes further than E-Sign by requiring that a written contract be given to a consumer who uses the seller's electronic equipment provided by the seller to contract or consent. E-Sign addressed consumer consent issues but did


129. The argument can be made that E-Sign does not address this issue, so NC-UETA may not be inconsistent with any provision of E-Sign addressing this particular issue. Wittie & Wynn, supra note 5, at 331.

130. See, e.g., E-Sign § 101(c)(1)(C), 15 U.S.C.A. § 7001(c)(1)(C) (requiring that the consumer be able to reasonably demonstrate that the consumer can access the information).

131. August Winslow Letter, supra note 102, at 12.

132. Id. at 11.


135. Compare E-Sign § 101(c), 15 U.S.C.A. § 7001(c), with N.C. Gen. Stat. § 66-308.16(d) (illustrating that the North Carolina statute is more protective of
not include a requirement of a written contract, probably rendering this provision in NC-UETA inconsistent with E-Sign.\footnote{136}

The final difference between the provisions of UETA and NC-UETA is the exclusion of the sections dealing with electronic records: retention, distribution, acceptance, and consistency in reference to governmental agencies.\footnote{137} According to the official comment to the UETA, these sections are optional for states to adopt and their exclusion does not have a detrimental effect on the uniformity of the enactment.\footnote{138}

2. Each Provision Examined Under the Consistency Test\footnote{139}

The second approach\footnote{140} to the preemption analysis of NC-UETA requires each provision of NC-UETA to be examined under the consistency test set out in E-Sign.\footnote{141} For example, NC-UETA is consistent with E-Sign in not requiring the use of electronic records or signatures.\footnote{142} However, section 66-308.4 of NC-UETA includes a provision\footnote{143} clearly inconsistent with E-Sign, which allows statutory rules in NC-UETA to vary by agreement, unless specifically prohibited by NC-UETA.\footnote{144} Another prime

137. \textsc{Uniform Electronic Transactions Act} (UETA) §§ 17-19 (1999); August Winslow Letter, \textit{supra} note 102, at 15.
138. UETA §§ 17-19 legislative note regarding adoption. Under section 102(a)(1) of E-Sign these three sections are therefore irrelevant to the analysis. E-Sign § 102(a)(1), 15 U.S.C.A. § 7002(a)(1); UETA §§ 17-19 legislative note regarding adoption.
139. The analysis in “approach one” covers those provisions not identical to provisions in UETA; and therefore, the analysis of those particular provisions, obviously necessary in an analysis of each provision, will be referenced in “approach one” instead of repeating the identical analysis for those provisions in “approach two.” \textit{See supra} notes 109-138 and accompanying text.
140. \textit{See supra} notes 76, 79 and accompanying text.
144. August Winslow Letter, \textit{supra} note 102, at 6; Edward C. Winslow, III, \textit{Overviews of E-Sign and NCUETA}, Lecture at the North Carolina Bar Association
provision for preemption by E-Sign is the section of NC-UETA specifying that if any other law requires a record to be sent or transmitted in a certain matter, it must be done in that manner. E-Sign does not permit a state to circumvent E-Sign by imposing non-electronic delivery methods, a distinct possibility opened by NC-UETA in referencing other laws outside of the Act.

In another example, attribution and effect of electronic records and signatures is an area directly addressed by NC-UETA but not by E-Sign. Additional areas covered by NC-UETA will not likely be preempted, because they are either outside the realm covered by E-Sign and therefore cannot be deemed inconsistent, or they merely attempt to codify existing principles of law in

CLE: Electronic Documents and Signatures in North Carolina: The New Federal and North Carolina Laws (Oct. 26, 2000) (notes from lecture on file with N.C. Banking Inst.). Although NC-UETA prevents modification of agreements concerning consumer protections, such agreements could create potential problems in other sections of NC-UETA. See N.C. Gen. Stat. § 66-308.16(a). “The requirements of this section may not be varied by agreement of the parties.” Id.

145. N.C. Gen. Stat. § 66-308.7(b). See also August Winslow Letter, supra note 102, at 7.

146. See E-Sign § 102(c), 15 U.S.C.A. § 7002(c). By requiring other laws to be followed, some of which may require non-electronic transmission this subsection of E-Sign would be violated. 146 Cong. Rec. S5224 (daily ed. June 15, 2000) (statement of Sen. Abraham). “Any attempt by a State to use 8(b)(2) to violate the spirit of this Act should be treated as an effort to circumvent and thus be void.” 146 Cong. Rec. H4354 (daily ed. June 14, 2000) (statement of Rep. Bliley). However, if the delivery methods required were electronic and do not require paper form delivery or if there is an electronic alternative to the non-electronic delivery method imposed, the action by a state to impose delivery requirements would appear to be safe. 146 Cong. Rec. H4358 (daily ed. June 14, 2000) (statement by Rep. Dingell); 146 Cong. Rec. S5222 (daily ed. June 15, 2000) (statement of Sen. Leahy). There is some concern as to how this issue will be addressed in relation to federal delivery requirements and state delivery requirements in jurisdictions that do not enact the UETA since E-Sign is silent on the question. 146 Cong. Rec. S5222 (daily ed. June 15, 2000) (statement by Sen. Leahy). “[B]ecause repeal and preemption by implication are disfavored, a court or agency interpreting the legislation could reasonably conclude that these Federal and State delivery requirements remain in full force and effect.” Id. However, the legislature had no intent that E-Sign be read to give effect to such delivery requirements. Id.

relation to an electronic environment. Two other NC-UETA provisions supplemental to E-Sign concern errors or changes in an electronic record occurring during a transmission, and the admissibility of electronic records or signatures as evidence in a "proceeding."

The extent to which E-Sign will preempt NC-UETA depends heavily upon which interpretation the courts take when analyzing section 102 of E-Sign. Different results could occur from one preemption approach as compared to the other.

D. Pre-E-Sign Enactments of UETA: The California Example

This section examines how a pre-E-Sign enactment of UETA will fare by analyzing California’s version of UETA (CA-UETA). On September 16, 1999, California became the first state to enact an electronic signatures law incorporating the provisions of UETA. CA-UETA, though similar to UETA, is not identical. However, since CA-UETA was enacted well

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149. N.C. GEN. STAT. § 66-308.9. This section allocates burdens and faults if errors or changes occur, giving more certainty to the parties conducting the transaction in case of an error. See id. As a fall back measure, the section applies "other law, including the law of mistake," if the other subsections do not apply. N.C. GEN. STAT. § 66-308.9(3).

150. N.C. GEN. STAT. § 66-308.12. "The statute does not relieve parties from establishing the foundation required by the rules of evidence for admission of electronic records in federal or state courts." August Winslow Letter, supra note 102, at 10. The term "proceeding" used in the statute is not defined. Id.

151. See supra notes 74-82 and accompanying text.

152. See supra notes 109-150 and accompanying text.


154. 1999 Cal. Stat. 820. The bill was introduced February 25, 1999 by Senators Sher and Bowen. Id. The bill was passed in the Assembly September 7, 1999 and in the Senate September 9, 1999. Id. On September 16, 1999 the governor signed the bill into law and it was filed with the Secretary of State. Id.


157. See supra notes 154-155 and accompanying text.
before E-Sign, the requirement to specifically reference E-Sign in the act does not apply. In order to examine the preemption effect E-Sign will have on CA-UETA, the varying approaches to the consistency test of E-Sign must again be used. The first approach subjects only the provisions of CA-UETA that are not identical to the provisions in UETA to the consistency test of section 102 of E-Sign, leaving those provisions that are identical intact. The second approach would subject every provision of CA-UETA to the consistency test of section 102 of E-Sign, even if the provision is identical to a corresponding provision in UETA.

1. Non-Uniform Provisions Examined
   Under the Consistency Test

   First, only the portions of CA-UETA that are not uniform with UETA will be subjected to the consistency test of E-Sign. The major differences between UETA and CA-UETA are 1) the definition of electronic signatures; 2) additional exclusions to the scope of CA-UETA; 3) the addition of a provision addressing standard form consumer consent contracts; and 4) electronic records and signatures in reference to statements signed under the penalty of perjury.

   A discrepancy between UETA and CA-UETA occurs in the definition of electronic signatures, in which CA-UETA adds the word "electronic" each time before the word "record" appears. While such a change may seem unimportant, it could

158. See supra notes 1-3 and accompanying text.
161. See supra notes 109-152 and accompanying text.
162. See supra notes 76-78 and accompanying text.
163. See supra notes 76, 79 and accompanying text.
165. See infra notes 169-173 and accompanying text.
166. See infra notes 174-182 and accompanying text.
167. See infra notes 183-185 and accompanying text.
168. See infra notes 186-187 and accompanying text.
169. Compare CAL. CIV. CODE § 1633.2(h) (West 2000) with UNIFORM ELECTRONIC TRANSACTIONS ACT § 2(8) (1999); "Electronic signature" means an
limit the scope of electronic signature application compared to that under E-Sign and UETA's definitions of "record" and "electronic record." Since the definition of "electronic signature" under CA-UETA is inconsistent with E-Sign, it is likely that the additional words will be purged by the preemption provision of E-Sign.

In comparison with UETA, the exclusion section of California's UETA is riddled with discrepancies. California's UETA accepts UETA's invitation to insert other exceptions into the act. E-Sign deals directly with this sort of exception and would likely preempt this addition by the California legislature. CA-UETA also inserts an additional section of exclusions to the exclusions laid out by UETA. The preemptive effect of these

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172. See supra note 169.
174. Compare CAL. CIV. CODE § 1633.3, with UETA § 3.
175. UETA § 3(b)(4).
176. See CAL. CIV. CODE § 1633.3(b)(4).
178. See CAL. CIV. CODE § 1633.3(c). This section includes a long list of particular exclusions to the act. Id. For example, CA-UETA does not apply to certain other sections of the California Code: 1) transactions described in section 17511.5 of the Business and Professions Code (telephonic sales transactions); 2) Section 3071.5 of the Civil Code (release of an owners interest in a vehicle subject to a lien); 3) Section 18608 of the Financial Code (notice of cancellation of insurance policy); 4) Section 22328 of the Financial Code (notice required to be sent by U.S. mail for repossession of an automobile with a lien attached); 5) Section 1358.15 of the Health and Safety Code (notice requirement of modification of Medicare supplement contracts); 6) Section 10127.7 of the Insurance Code (notice requirement and policy for returning a
additions will be on a case-by-case basis, since some are in line with those types of transactions excluded in E-Sign.\textsuperscript{179} The final difference in the exclusion section involves a section in CA-UETA that spells out the ability of previously excluded transactions still to be conducted electronically if other applicable law allows such a method.\textsuperscript{180} This section seems to expand upon the previous two subsections, combining the ideas expressed in them to explicitly set out the implications that arise from them.\textsuperscript{181} Since the previous two subsections are in line with the E-Sign, the subsection in question would appear to be as well.\textsuperscript{182}

Like UETA, CA-UETA does not require the use of electronic records or signatures.\textsuperscript{183} However CA-UETA goes beyond UETA by addressing the use of standard form contracts in obtaining the consent to conduct transactions electronically.\textsuperscript{184} It seems such a protection has the same underlying goal of those protections found in E-Sign: to prevent a more sophisticated individual or entity from taking advantage of those less sophisticated by trickery or misdirection.\textsuperscript{185}

\textsuperscript{179} Compare, e.g., E-Sign § 103(b)(2), 15 U.S.C.A. § 7003(b)(2) with CAL. PUB. UTIL. CODE § 779.1 (Deering 2000).

\textsuperscript{180} CAL. CIV. CODE § 1633.3(f). For example, some courts are allowing the use of electronic court records. See supra note 50. For example, the Tenth Circuit Court of Appeals allows electronic signatures to serve as original signatures for briefs, motions, and other papers. 10TH CIR. R. 46.5(C).

\textsuperscript{181} See CAL. CIV. CODE § 1633.3(d) (allowing a transaction coming under exclusions in previously existing law to come under the act when used for a transaction not under the rubric of those exclusions); CAL. CIV. CODE § 1633.3(e) ("A transaction subject to this title is also subject to other applicable substantive law.").

\textsuperscript{182} UNIFORM ELECTRONIC TRANSACTIONS ACT § 3(c)-(d) (1999).

\textsuperscript{183} CAL. CIV. CODE § 1633.5(a).

\textsuperscript{184} CAL. CIV. CODE § 1633.5(b). It appears from the statute that a standard form contract can be used to obtain consent from another party in a couple of situations: 1) if the contract is in electronic form; or 2) if in non-electronic form, the sole purpose of the contract is to authorize a transaction by electronic means. \textit{Id}.

\textsuperscript{185} See supra notes 56-63 and accompanying text. An unscrupulous party could use a standard form contract incorporating many terms and bury the consent to electronic transaction provision somewhere within the other terms. \textit{Id}. 
CA-UETA includes a section setting forth the requirements for electronic records and signatures in reference to statements signed under penalty of perjury.\textsuperscript{186} Though not included in UETA, E-Sign's general acceptance of electronic records and signatures and its deference to existing substantive law would most likely include statements signed under penalty of perjury by implication.\textsuperscript{187}

A new bill has been introduced in the California senate that would make various changes to the current CA-UETA if passed.\textsuperscript{188} In its current form, the bill addresses all four of the major differences discussed above and brings them in line with UETA.\textsuperscript{189} Whether the bill makes its way through the California legislature or not, the message is clear: California is attempting to amend its version of UETA to come within the guidelines set out by E-Sign.\textsuperscript{190}

2. Each Provision Examined Under Consistency Test\textsuperscript{191}

Under the second approach, each provision of CA-UETA

\textsuperscript{186} CAL. CIV. CODE § 1633.11(b).
\textsuperscript{188} S. 97 (Ca. 2001). Senator Sher introduced the bill on January 18, 2001. Id. The bill would repeal the current CA-UETA and replace it. Id.
\textsuperscript{189} Id. Section 1633.2(8) of the new bill, which corresponds to section 1633.2(h) of the current CA-UETA removes the word "electronic" that appears before the word "record" in the definition of "electronic signature." Compare CAL. CIV. CODE § 1633.2(h) with S. 97 (Ca. 2001). The new bill also addresses the exclusions problem with the current CA-UETA by removing the exclusions CA-UETA includes in section 1633.3 beyond the ones laid out in UETA. Compare CAL. CIV. CODE § 1633.3 with S. 97 (Ca. 2001). In addition the new bill removes the provision found in section 1633.5(b) of the current CA-UETA that concerns the use of standard form contracts in obtaining consumer consent. Compare CAL. CIV. CODE § 1633.5(b) with S. 97 (Ca. 2001). Finally, the new bill removes the section found in the current CA-UETA, concerning electronic records and signatures in reference to statements signed under penalty of perjury. Compare CAL. CIV. CODE § 1633.11(b) with S. 97 (Ca. 2001).
\textsuperscript{191} The analysis in "approach one" covers those provisions not identical to provisions in UETA and therefore the analysis of those particular provisions, obviously necessary in an analysis of each provision, will be referenced in "approach one" instead of repeating the identical analysis for those provisions in "approach two." See supra notes 164-190 and accompanying text.
must be analyzed under the consistency test set out in E-Sign.192 Some of the provisions in CA-UETA taken directly from UETA still seem likely to be preempted by E-Sign,193 while preemption of a few provisions is questionable.194

One likely target of preemption by E-Sign is the provision in CA-UETA allowing for variance by agreement of any provision, except those specified unalterable.195 Another possible provision that could face preemption is the subsection of CA-UETA specifying that other laws requiring a record to be displayed, sent, or transmitted in a certain manner shall apply.196 E-Sign does not allow imposition of non-electronic delivery methods by a state in an effort to circumvent the federal law.197 The reference to laws outside of CA-UETA could conceivably include laws that require non-electronic delivery of a record, which in most circumstances would be in direct violation of the provisions of E-Sign.198

However, a few provisions of CA-UETA are less likely to be preempted by E-Sign.199 CA-UETA, unlike E-Sign, specifically sets out rules for attribution of records.200 CA-UETA lays down standards for when a record is deemed sent and when a record is deemed received while E-Sign leaves such questions to the existing law in this area.201 Though not in E-Sign, the attribution provisions

193. See infra notes 195-198 and accompanying text.
194. See infra notes 199-205 and accompanying text.
195. See CAL. CIVIL CODE § 1633.5(d) (West 2000). Though such a provision would be more likely to promote adaptation by parties to better facilitate the use of electronic records and signatures, it runs counter to the protectionist view taken by E-Sign. See generally Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) §§101-401, 15 U.S.C.A. §§ 7001-7031 (West Supp. 2000); CLE Notes, supra note 46.
196. CAL. CIV. CODE § 1633.8(b).
198. However, in some circumstances the laws requiring a specific method of display, delivery, or transmission of the record could come within the transactions already excluded from the scope of E-Sign, such as transactions involving wills and codicils. E-Sign § 103(a)(1), 15 U.S.C.A. § 7003(a)(1).
199. CAL. CIV. CODE §§ 1633.13, 1633.15.
200. CAL. CIV. CODE § 1633.15.
of CA-UETA are not likely to be preempted, since the thrust of the section is to apply the existing law in an electronic environment. CA-UETA also includes a provision on the use of evidence of a record or signature in an electronic form. This provision would be consistent with E-Sign in that it is another codification of the principle that electronic signatures or records will not be denied legal effect simply because they are in electronic form. Additionally, the argument could be made that both the attribution provision and the evidentiary provision are consistent with E-Sign since the provisions cover subject areas not addressed by E-Sign.

As was the case in analyzing North Carolina’s version of the UETA, the extent to which E-Sign will preempt CA-UETA depends upon the approach the courts will take in interpreting section 102 of E-Sign. However, once a few courts begin interpreting section 102 of E-Sign, other jurisdictions should be able to predict the outcome if a question arises about the consistency of E-Sign and UETA enactments.

VI. Non-UETA Electronic Signature Laws

A. The New York Example

On August 5, 1999, the New York Legislature passed the Electronic Signatures and Records Act (ESRA), and Governor Pataki signed it into law on September 29, 1999. The Act was an

202. See supra note 147.
203. CAL. CIV. CODE § 1633.13. This section’s only purpose is to ensure that the evidence will not be excluded for the sole sake of being in electronic form. Id. The section does not change the requirements of the rules of evidence for admissibility of evidence. See supra note 150.
205. Wittie & Wynn, supra note 5, at 331.
206. See supra notes 74-82, 151-152 and accompanying text.
207. See supra notes 96-98 and accompanying text (discussing the wide adoption of UETA by the states).
attempt by the New York legislature to balance the differences found in electronic signature and record bills in other states. The New York Legislature recognized that, in order to achieve this balance, the legislation needed to be broad in scope, enunciate clear standards, be flexible, be reflective, and protect individuals.

B. Preemption of ESRA

Since ESRA is not a uniform enactment of UETA, the E-Sign consistency test must be used. One of the main conflicts between E-Sign and ESRA is the amount of freedom given to the parties to determine the technologies used in a transaction.
Under ESRA, an “electronic signature” is:

An electronic identifier, including without limitation a digital signature, which is unique to the person using it, capable of verification, under the sole control of the person using it, attached to or associated with data in such a manner that authenticates the attachment of the signature to particular data and the integrity of such data transmitted, and intended by the party using it to have the same force and effect as the use of a signature affixed by hand.\(^2\)

This approach is a much higher standard than that promulgated by E-Sign.\(^2\) The standard set by ESRA addresses the specific concerns that electronic documents are more difficult to verify than standard paper based documents in several aspects: 1) whether the document was intended to be authorized; 2) whether the individual is actually the party that made the agreement; and 3) whether the contract has been altered in some way.\(^2\) Whereas, “lowest-common-denominator”\(^2\) approach taken by E-Sign leaves the worry over these concerns to the individuals and entities employing electronic records and signatures.\(^2\) The impact of E-Sign on the more stringent requirements of ESRA will be to simplify and reduce the costs of executing online contracts in New York if the parties choose to

\(\text{on New York Law, N.Y. L.J., Aug. 8, 2000, at 3.}\)

\(218.\) N.Y. STATE TECH. L. § 102(3).

\(219.\) See Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 106(5), 15 U.S.C.A. § 7006(5) (West Supp. 2000) (“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.”).

\(220.\) Raysman & Brown, supra note 217, at 3.

\(221.\) Id. This approach allows a simple typed initial to be valid as an electronic signature, but also permits something as technologically advanced as biometric-encryption combinations. Id.

\(222.\) Id. While reducing security requirements in general, the parties involved in the transaction are not likely to use a technology that is not secure enough for their taste. Id. The lack of technological requirements opens the door to individuals who do not desire or could not afford to implement one of the more secure technologies associated with electronic signatures and transactions. See id.
take advantage of the leeway granted by the legislation. 223

Another area that may be subject to preemption is the section on consumer protection. 224 However, E-Sign provides that it will not preempt the consumer protection laws of the states; in a sense, E-Sign works to supplement the consumer protection laws in New York and other states. 225 Both E-Sign and ESRA make the use of electronic signatures and records a voluntary decision, but E-Sign creates consent requirements to be applied if a party chooses to use electronic signatures or records. 226 Both E-Sign and ESRA exclude certain types of documents from the general rule allowing documents to be recorded electronically. 227 The exclusions E-Sign and ESRA share are limited to contracts relating to wills, codicils, testamentary trusts, and recordable conveyances, such as deeds. 228 E-Sign lays out a host of other exemptions from the general rule beyond those named in ESRA, such as family law documents and court orders, notices, and official documents. 229 With the passage of E-Sign, these additional

223. Id. at 6. The preemption of the minimum requirements set out by ESRA should make it less costly for banks, insurance companies, and securities firms to conduct online transactions. Id. Under the ESRA scheme, consumers might be excluded from the electronic market altogether if they do not have sufficient technology to meet the requirements. See id. The reduced technological requirements increase access to electronic transactions, while still permitting individuals to use the highly secure technology if they so desire. See id.


This title does not limit, alter, or otherwise affect any requirement imposed by statute, regulation, or rule of law relating to the rights and obligations of persons under such statute, regulation, or rule of law other than a requirement that contracts or other records be written, signed, or in other nonelectronic form.

Id. This leaves for example, statutes governing fraud or unfair and deceptive trade practices intact in New York or any other state with such laws. Raysman & Brown, supra note 217, at 6.

226. Raysman & Brown, supra note 217, at 6. See also supra notes 56-63 and accompanying text.


229. E-Sign § 103(b), 15 U.S.C.A. § 7003(b). These exemptions include notices of termination of utility service, health insurance, or life insurance; notices of recall; notices involving credit or rental agreements for a primary residence; and documents required to accompany hazardous materials during their transportation. Id. See also
consumer protections now become consumer protections in the state of New York.  

C. The Electronic Facilitator

In order to better facilitate the implementation of ESRA, the Act authorizes the state Office for Technology (OFT) to be the electronic facilitator and to administer the Act. The ESRA authorizes the OFT to promulgate any rule necessary for its timely implementation. In order to meet the goals set out by ESRA, the OFT enacted emergency rules to ensure that the implementation of ESRA would go as smoothly as possible.

The emergency rules enacted by the OFT were designed to establish standards and procedures governing electronic signatures and records. The emergency rules fulfill this function by setting out definitions beyond those originally incorporated in ESRA. In addition to these definitions, the rules set out the standards for recognition of an electronic signature under ESRA. However,

supra notes 49-55 and accompanying text.

231. N.Y. STATE TECH. L. § 103; see also supra note 213 (defining “Electronic Facilitator”).
234. March Emergency Rule, supra note 232, at 24. The emergency rule enactment bypassed the normal notice of proposed rulemaking requirements of the State Administrative Procedure Act, because its immediate enactment was imperative for ESRA’s benefits to be realized. Id. However, public input was received at every stage of the drafting process of the emergency rule and the public will have further opportunity to shape the rules, because a notice of proposed rulemaking will be submitted for formal adoption of a rule during the effective period of the emergency rule. Id.
235. N.Y. COMP. CODES R. & REGS. tit. 9, § 540.1(A). The rules are designed to instill confidence in the use of electronic records and signatures. N.Y. COMP. CODES R. & REGS. tit. 9, § 540.1(B). Flexibility is also built into the rules by permitting the use of any technologies that could be authorized by any other federal or state electronic record and signature act. N.Y. COMP. CODES R. & REGS. tit. 9, § 540.1(C).
236. N.Y. COMP. CODES R. & REGS. tit. 9, § 540.2. The rules define “certificate,” “certificate authority,” “data,” “electronic signatory,” “government entity,” “material change,” and “person.” Id.
237. N.Y. COMP. CODES R. & REGS. tit. 9, § 540.4. The rule expands the definitions of “electronic signatures” and “electronic records” in ESRA into a statutory form for further clarification. Compare N.Y. COMP. CODES R. & REGS. tit.
these rules do not alleviate the dangers of preemption by E-Sign presented by the original enactment of ESRA.\footnote{238} Despite these possible preemption problems, and the power of the OFT to amend the rules to better facilitate the implementation of ESRA, the emergency rules originally enacted on March 28, 2000\footnote{239} have been readopted, as originally set forth, after the passage of E-Sign.\footnote{240} The OFT intends to adopt the provisions of the emergency rule as permanent rules on December 1, 2000, making it less likely that ESRA will be able to escape the preemption effects of E-Sign by modifying its terms through amendments by the OFT.\footnote{241}

\section*{VII. The Future}

Will E-Sign promote uniformity among the states?\footnote{242} Thus far, at least twenty-three states have passed the UETA in some form and at least ten other states are considering passing UETA.\footnote{243} Since the passage of E-Sign, Delaware, Hawaii, Michigan, North Carolina, and Rhode Island have passed versions of UETA.\footnote{244} In addition, the California legislature is considering a bill that would modify its current version of UETA and bring it more in line with the NCCUSL adopted UETA.\footnote{245} Although none of the versions of UETA passed by or under the consideration of state legislatures since the enactment of E-Sign are strict uniform enactments of the NCCUSL-adopted UETA, the differences do not mean that E-

\begin{footnotes}
\footnotetext[238]{9, \S 540.4, \textit{with N.Y. STATE TECH. L.} \S 102 (Consol. 2000).}
\footnotetext[239]{\textit{See supra} notes 216-230 and accompanying text.}
\footnotetext[240]{\textit{March Emergency Rule}, \textit{supra} note 232, at 24.}
\footnotetext[241]{\textit{Id. at} 21.}
\footnotetext[243]{\textit{See supra} note 96. Ten states are considering UETA: Arkansas, Connecticut, Mississippi, Montana, New Jersey, New Mexico, North Dakota, Oregon, Texas, and Vermont. Kunze, \textit{supra} note 96.}
\footnotetext[245]{S. 97 (Ca. 2001). \textit{See also} \textit{supra} notes 188-190 and accompanying text.}
\end{footnotes}
Sign is failing to promote uniformity. In fact, Michigan's version of UETA is almost identical to the NCCUSL's version of UETA, the version currently under consideration by the legislature in New Jersey is almost identical to the uniform version. In addition, many of the versions of UETA adopted or currently under consideration differ only slightly from the uniform UETA. While, as this Note has indicated, it is important to understand how E-Sign could interact with non-uniform enactments of UETA, the enactment of UETA in so many jurisdictions indicates that the first steps are being taken towards uniformity between the states.

Throughout Congress' endeavors to achieve the goal of uniformity across the states, preservation of state sovereignty looms in the background. Though contract law has traditionally been state law, the pressing need for a standard across the states resulted in action by the federal government. Congress viewed allowing the states to adopt their own electronic signature and records acts, within certain restrictions, as an adequate protection of state sovereignty.

246. Baker & McKenzie, supra note 244.
247. Id.
248. Id.
249. David E. Brown, Jr., State Variations in the Uniform Electronic Transactions Act, 5 ELECTRONIC BANKING L. & COM. REP. 1, 3 (2000). Idaho, Kentucky, Minnesota, Oklahoma, Rhode Island, and South Dakota have adopted versions of UETA that are nearly identical to the version adopted by the NCCUSL. Id.
250. See supra notes 64-82 and accompanying text (discussing preemption provision of E-Sign).
252. 146 CONG. REC. S5223 (daily ed. June 15, 2000) (statement of Sen. Abraham) ("It will likely take three to four years for all the states to enact the UETA."). "That is a long time in the high-technology sector—far too long to permit, when this Congress possesses the ability to bridge the gap." Id. The numbers related to internet revenue and sales also indicate a need for immediate action. See 146 CONG. REC. H4359 (daily ed. June 14, 2000) (statement of Rep. Davis) (stating that revenue generated from the internet increased sixty-two percent in 1999, totaling $524 billion). According to Forrester Research, consumer spending on the internet could reach $185 billion by 2003. 146 CONG. REC. S5217 (daily ed. June 15, 2000) (statement of Sen. McCain) (emphasis added).
253. 146 CONG. REC. S5224 (daily ed. June 15, 2000) (statement of Sen. Abraham). The protection of state sovereignty was a crucial issue for many of the legislators during the legislative process:

In the field of commercial law, the states had a similar experience with the UCC. Thus, I saw no reason to prevent the states from
characterized as a gap filler until the states can uniformly step in with their own laws, it is not clear whether such an argument will appease pundits of state sovereignty.\textsuperscript{254}

VIII. CONCLUSION

With the emergence of the Internet and e-commerce, the way many people conduct transactions has moved from primarily face-to-face to a larger proportion of electronic transactions.\textsuperscript{255} In order to provide assurances to members of this new economy, there must be a legal framework that recognizes the electronic transactions taking place all over the country and the world.\textsuperscript{256} While many jurisdictions have attempted to address this need, the results often vary from one state to the next.\textsuperscript{257} In the borderless world of the Internet, the need for uniformity of law is one of the prime considerations that prompted both the NCCUSL and Congress to begin working on laws that would promote the necessary uniformity.\textsuperscript{258}

The UETA, while seen by many as the way to achieve a national framework for recognition of electronic signatures and records, will take some time to implement.\textsuperscript{259} Congress enacted E-Sign as a gap filler in order to provide uniformity and certainty while UETA makes its way through the states.\textsuperscript{260} The federal law

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\textsuperscript{256} In order to provide assurances to members of this new economy, there must be a legal framework that recognizes the electronic transactions taking place all over the country and the world.

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adhering to the same process with respect to digital signatures. I made it clear to Senator Abraham that I would not support the bill—in fact, that I would seek to block its passage—if the legislation did not preserve the autonomy of the states to adopt the model law that they were considering. I also sought to make sure states were able to adopt the model law in a manner consistent with their consumer protection laws.

146 CONG. REC. S5227 (daily ed. June 15, 2000) (statement of Sen. Hollings); See also supra notes 64-73 and accompanying text.


255. See supra note 252 and accompanying text.

256. See supra notes 24, 252 and accompanying text.

257. See, e.g., supra notes 39-43 and accompanying text.

258. Sen. Spencer Abraham, What features of an e-sign bill will most effectively impact on e-commerce?, ROLL CALL, Mar 27, 2000. See also supra note 72 and accompanying text.

259. Wittie & Wynn, supra note 5, at 325.

260. See supra note 252 and accompanying text.
sets a standard across all fifty states when dealing with electronic records and signatures in interstate commerce.\textsuperscript{261} However, if the state laws already in place come into play, E-Sign could initially cause uncertainty and confusion, not the uniformity and reliability E-Sign was intended to foster.\textsuperscript{262}

There are several different effects the preemption provisions of E-Sign could have on state electronic record and signature laws.\textsuperscript{263} Unless the state law is a uniform enactment of UETA, the consistency test of section 102(a)(2) of E-Sign must be applied to the state law.\textsuperscript{264} While the possible effects in each state can be hypothesized, the exact results cannot be predicted with certainty until a court or administrative agency makes determinations of the preemption effect.\textsuperscript{265} Until the uniformity E-Sign intended to create is actually reached, insecurity and confusion will likely frustrate the goals of electronic signature laws.\textsuperscript{266}

ADAM R. SMART


\textsuperscript{262} \textit{See supra} notes 99-241 and accompanying text.

\textsuperscript{263} \textit{See supra} notes 64-82 and accompanying text.

\textsuperscript{264} E-Sign § 102(a), 15 U.S.C.A. § 7002(a).

\textsuperscript{265} \textit{See supra} notes 99-241 and accompanying text.

\textsuperscript{266} \textit{See id.}