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Assignment: *Pathfinder*

Date: September 18, 2000

Legislative History

- I. *Electronic Signature: Hearing on H.R. 1714, The “Electronic Signatures in Global and Nation Commerce (E-Sign) Act” Before the House Judiciary Committee’s Subcomm. on Courts and Intellectual Property, 106th Cong. (Sept. 30, 1999) (statement of Howard Coble, Chairman, Subcommittee on Courts and Intellectual Property).*
 - A. States that industry representatives claim that the differences in state e-signature laws are an impediment to the growth of e-commerce because parties are unwilling to risk entering into a contract online without nationwide certainty regarding its legality.
 - B. Notes concerns that the E-Sign act is overly preemptive because it allows in action in federal court for an injunction against enforcement of a State statute that the Sec. of Commerce determines does not comply with the Act.
 - i. This concern remains in the current version in regards to states that have not adopted UETA.
- II. *Electronic Signature: Hearing on H.R. 1714, The “Electronic Signatures in Global and Nation Commerce (E-Sign) Act” Before the House Judiciary Committee’s Subcomm. on Courts and Intellectual Property, 106th Cong. (Sept. 30, 1999) (statement of Pamela Mead Sargent, National Conference of Commissioners on Uniform).*
 - A. Describes the principles that govern UETA.
 - B. Explains that UETA is designed to interact with existing state law and to provide consistency and predictability in conducting e-signature transactions.
 - C. In commenting on the original draft, argues that the bill inappropriately permits the Sec. of Commerce to bring an action against the states to enjoin the enforcement of the law on the grounds that to permit this would force the Sec. of Commerce to:
 - i. interpret the laws related to technology neutrality,
 - ii. exercise power against on part of the computer information industry on behalf of another, and
 - iii. section 102(b) [of the former version] does not address issues of court jurisdiction, choice of law or representation of the Commerce Department.
 - D. Mentions that UCITA’s requirements pertaining to authentication do not jive with the technology-neutral approach of the act.
 - E. Describes the still-present problem that since federal law controls, it is possible the every contract case involving a question of the validity and legal effect of an electronic signature and record inherently contains a federal question. This would invoke federal jurisdiction in areas where federal jurisdiction is currently not an issue.
- III. *Allowing Use of Electronic Signature Before the House Commerce Committee’s Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong.*

(June 9, 1999) (statement of Daniel Greenwood, Deputy General Counsel, Information Technology Division Commonwealth of Massachusetts).

- A. S.761 did not preempt state law other than to require legal effect of e-signatures. The National Governor's Association liked this.
- B. The Utah statute, while the first digital signature legislation in the world, already reflects outdated trends including the fact that the law is: regulatory since it empowers a state agency to license providers; technology specific in requiring PKI technology; promoting a specific business model of requiring digital certificates and trusted third parties; and reverses age-old evidentiary rules regarding proof of signatures by providing a presumption against the signature technology user.
- C. S.761, (unlike the current act), explains that the receiver of a signature is in the best position to judge the reliability of the authentication in the context of the value of the transaction and is most likely to have the relevant evidence that a signature was presented to them.
- D. State preemption should be discouraged since states are far more agile than the federal government in responding quickly to changing market conditions. States serve as important laboratories of innovation in the realm of public policy and law. A single federal law that grants legal equivalency for e-signatures would generate disruptions in areas of state law that having nothing to do with commerce, such as wills, trusts, powers of attorney, consumer protections, real estate deeds, negotiable instruments, notice requirements, elections law, hospital regulation and state criminal justice laws. However, the adoption of the states of many different laws has disrupted commerce. Therefore, it is necessary that states adopt UETA since it complements state laws and helps to create uniformity among the states.

IV. *Digital Signature and Electronic Commerce: Hearing on S.761, The Millenium Digital Commerce Act of 1999 Before the Senate Committee on Commerce, Science and Transportation, 106th Cong. (May 27, 1999) (statement of Harris N. Miller, President, Information Technology Association of America).*

- A. An ITAA study in April 1999 measured the perceptions of top executives from across the information technology industry and their customers. The study found that 62% of respondents believed lack of trust was the top overall barrier to e-commerce and that specific obstacles included privacy protection (60%), authentication (56%) and security (56%).
- B. Illustrates how S.761 will create legal trust and certainty in authentication techniques, creating efficiencies and reducing costs. His hypo: a major manufacturer is based in the U.S. with operations and dealers around the world. The company has created a site on the internet not only for its dealers but also for the hundreds of companies globally that perform repairs and do maintenance on these cars. The web site contains catalogue information- which is changing constantly and needs to be kept up to date-on what models are available at what cost, and the prices associated with all the various parts available for repairs. The web site is password protected but also requires dealers to authenticate the purchase of cars using a digital signature to verify the purchase. Such a system creates enormous efficiencies and reduces costs

by improving inventory management and reducing paperwork costs. It also improves the company's supply chain management, and allows the dealers to tell its customers what kinds of cars are available with what features and when they will be delivered.

- V. *Electronic Signature: Hearing on H.R. 1714, The "Electronic Signatures in Global and Nation Commerce (E-Sign) Act" Before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary*, 106th Cong. (Sept. 30, 1999) (statement of Andrew J. Pincus).
- A. Opposes making the bill applicable to governmental transactions out of concern that bill can be interpreted as requiring the government to accept electronic records in what ever form that is available to a person contracting with the government. Also believes that state preemption violates the principle of allowing state law to rule in the area of contract law.
 - B. Fearful that technology-neutrality is dangerous to the public interest since it conceivably permits very large transactions to be consummated through the use of inferior technology. Claims that some type of regulatory scheme for large private party transactions should be enacted. Minimum standards for computer security and interoperability are sometimes necessary. This is also true in the paper-based context.
 - C. Questions the intermediate section 101(b) [now expunged] for its failure to provide consumer protections by allowing states to deliver notices and disclosures electronically. (The current 101(c) rectifies this problem).
 - D. Finds that authorizing the Sec. of Commerce to bring actions to enjoin non-conforming state laws to be counterproductive. Absent this provision, the section (102) would be self-executing and enforceable in private litigation by parties affected by the non-conforming laws.
- VI. *Electronic Signature: Hearing on H.R. 1714, The "Electronic Signatures in Global and Nation Commerce (E-Sign) Act" Before the Subcomm. on Courts and Intellectual Property of the House Committee on the Judiciary*, 106th Cong. (Sept. 30, 1999) (statement of Ivan Fong, Deputy Associate Attorney General, Department of Justice).
- A. In transactions involving the government or a regulated entity, the bill does not address the extent to which the use of electronic processes may affect the availability of records; the usability, persuasiveness, and admissibility in court of information in electronic form; and other legal responsibilities that may arise from the electronic processing of information. The government needs to be protected from fraud.
 - B. Addresses the (since remedied) absence of record keeping requirements.
- VII. *Electronic Signature: Hearing on H.R. 1714, The "Electronic Signatures in Global and Nation Commerce (E-Sign) Act" Before the Subcomm. on Finance and Hazardous Materials of the House Commerce Committee*, 106th Cong. (June 24, 1999) (statement of M. Hardy Callcott, Senior Vice President and General Counsel, Charles Schwab & Co., Inc.).
- A. The bill gives confidence to brokers that electronic signatures will have the same legal effect as traditional paper-based communications and agreements

bearing a handwritten signature. The bill formally allows customers to fill out account applications and sign them electronically.

- B. The bill creates consistency in the face of current state laws that are inconsistent and contradictory in the realm of technology, authentication, certification, licensing, etc.
 - C. It took 9 years (from 1958-67) for the UCC to be adopted and even then Louisiana and D.C. did not adopt it entirely. Similarly, the Uniform Securities Act, first proposed in the 50s and revised in the 80s, still has failed to provide uniform state securities laws. The e-commerce industry cannot wait that long for UETA to be enacted.
- VIII. *Electronic Signature: Hearing on H.R. 1714, The "Electronic Signatures in Global and Nation Commerce (E-Sign) Act" Before the Subcomm. on Finance and Hazardous Materials of the House Commerce Committee , 106th Cong. (June 24, 1999) (statement of Michael Hogan, Senior Vice President and General Counsel, DLJ Direct, Inc.).*
- A. The bill will allow on-line processing of general customer agreements, IRS tax forms, the establishment of a margin account and/or option trading capability. Normally, all of these transactions had to be signed separately.
 - B. Until now, DLJ has taken the risk that click-through on-line agreements would be enforced. This bill now attests to their enforceability.
 - C. "Legal uncertainty is the antithesis of strong and efficient markets."
 - D. Advocates a national standard for digital signatures for apparent trust reasons.
- IX. *Electronic Signature: Hearing on H.R. 1714, The "Electronic Signatures in Global and Nation Commerce (E-Sign) Act" Before the Subcomm. on Finance and Hazardous Materials of the House Commerce Committee , 106th Cong. (June 24, 1999) (statement of Thomas C. Quick, President and Chief Operating Officer, Quick & Reilly/Fleet Securities., Inc.).*
- A. Raises concern that differing state laws will force companies to customize their services to meet the requirements of each state. This can have a disproportionate impact on smaller businesses by raising costs and making it difficult to serve customers on a cost-effective basis.
- X. *Electronic Signature: Hearing on H.R. 1714, The "Electronic Signatures in Global and Nation Commerce (E-Sign) Act" Before the Subcomm. on Finance and Hazardous Materials of the House Commerce Committee , 106th Cong. (June 24, 1999) (statement of Tom Bliley).*
- A. All June 24 testimony was to address Title 3 which addresses the use of electronic signatures and records in the security industry. The above speakers were all representatives of leading online brokers.
- XI. *Allowing Use of Electronic Signature Before the House Commerce Committee's Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (June 9, 1999) (statement of Andy Pincus, General Counsel, U.S. Dept. of Commerce).*
- A. Contends that the former Title II requirement that the Sec. of Commerce conduct a comprehensive inquiry to identify domestic and foreign impediments to commerce in e-signature products would require the Secretary to rely to heavily on information obtained from the private sector and other

countries. It is noteworthy that the current section 105 only requires the Secretary to investigate into the effectiveness of the delivery of electronic records and evaluate the difficulties and benefits that are provided to consumers.

- B. The former 201(b)(2)(D) does not state that in the absence of an agreement, electronic records and signatures should have the same legal status as their paper equivalents.
 - C. When the government is a party to a contract, it will not be able to remain technologically-neutral because it will have to choose one of competing authentication providers.
 - D. Does not believe that the lack of uniform state standards is an actual problem. One should not be overly concerned that it may take a number of years for states to adopt UETA.
 - E. Believes that injunctive authority given to the Sec. of Commerce could undermine confidence in the validity of State laws and regulations affecting e-commerce.
 - F. Does not like preempting state rights in general, i.e. only giving them two years with which to cooperate and adopt UETA.
- XII. *Allowing Use of Electronic Signature Before the House Commerce Committee's Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (June 9, 1999) (statement of Donald Upson, Secretary of Technology, Commonwealth of Virginia).*
- A. Electronic signatures should meet certain functional requirements. They must be: unique to the signor, capable of verification, under the signor's sole control, linked to the record in such a manner that it can be determined if any data contained in the record was changed subsequent to the electronic signature being affixed to the record, and created by a method appropriately reliable for the purpose for which the electronic signature was used. This does not necessarily discriminate for or against any particular technology.
- XIII. *Allowing Use of Electronic Signature Before the House Commerce Committee's Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (June 9, 1999) (statement of Jeffrey Skogen, Internet Market Manager, Ford Motor Credit Company).*
- XIV. *Allowing Use of Electronic Signature Before the House Commerce Committee's Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (June 9, 1999) (statement of John Seidlarz, President and Chief Executive Officer, IriScan).*
- A. Questions former 104(2) provision that calls an electronic signature as a signature in electronic form. Instead, proposes to that an electronic signature mean a "biometric or other sequence of data in electronic form." Note, the current law defines a signature as "an electronic sound, symbol or process . . ."
- XV. *Allowing Use of Electronic Signature Before the House Commerce Committee's Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (June 9, 1999) (statement of Christopher Curtis, Associate General Counsel, Capital One).*

- A. State laws are inconsistent and should be preempted by a uniform standard in order to prevent fraud through repudiation. Otherwise, a company will be unable to know how to behave when a single transaction takes place in many states and is subject to contradictory laws.
- XVI. *Allowing Use of Electronic Signature Before the House Commerce Committee's Subcomm. on Telecommunications, Trade and Consumer Protection, 106th Cong. (June 9, 1999) (statement of W.J. "Billy" Tauzin, Chairman, Subcomm. on Telecommunications, Trade and Consumer Protection.).*
- A. Envisioned the prior version of the bill as providing the Sec. of Commerce with guidance on promoting American principles of electronic signature law overseas. This would have been in order to protect American companies who use certain technologies from being discriminated against in the world market.

Articles related to E-Sign and UETA

- I. Patricia Brumfield Fry, *Analysis and Perspective: Electronic Authentication*, ELECTRONIC COMMERCE & LAW REPORT, July 12, 2000.
 - A. Thesis: UETA resolves many issues that E-SIGN fails to address. E-SIGN also leaves a lot of questions unanswered. Note that Fry was the chair of the Drafting Committee for UETA.
 - B. Questions that E-SIGN leaves open:
 - 1. What will happen to states that do not effect uniform enactment of UETA as required in § 102(a)(2) of E-SIGN?
 - C. Why UETA is more comprehensive than E-SIGN:
 - 1. E-SIGN is silent on whether electronic media can be used for evidentiary purposes while UETA § 13 specifies that electronic records cannot be denied admissibility solely because it is in electronic format.
 - 2. UETA § 9 states that the evidence can be used to show that an electronic signature is to be attributed to a person.
 - 3. UETA § 5(d) specifies that parties have the power to vary its agreed-to provisions by contract while E-SIGN confines itself to the legal effect, validity, and enforceability of electronic records and signatures.
 - 4. E-SIGN does not deal with question of when an electronic record is sent or received. UETA § 15 ties the determination of whether something has been sent or received to the communication systems used by the parties, and specifies that, unless otherwise agreed, they are sent or received from the parties' principal place of business or residence.
 - 5. E-SIGN does not contain provisions dealing with mistakes or errors in electronic communication. UETA § 10 contains specific provisions governing the effect of the failure to use an agreed security procedure.
 - 6. E-Sign focuses on regulating the manner of consumer assent to deal electronically, while UETA emphasizes how parties are to comply with State consumer protection rules. Also, E-Sign does not require

specific formatting or conspicuousness procedures so that obligatory disclosures are made evident. UETA § 8 does attempt to ensure that communications made to consumers are clear and delivered in a printable or retainable manner.

7. E-Sign § 101(d) requires that records be made accessible to all persons entitled to access them. UETA § 12 merely requires that the documents be made accessible for later reference.
8. UETA § 14 states that the use of electronic agents will not defeat the formation of contracts, i.e. clicking through can create an enforceable contract.
9. UETA §§ 17-19 allow States to gradually move towards adopting electronic technologies. Meanwhile, § 104(c), for instance, prohibits agencies from imposing or re-imposing requirements for printed or paper records.
10. E-Sign contains exclusions not found in UETA including court orders, utility termination and other cancellations, regulation governing adoption, divorce or other matters of family law.
11. E-Sign is unclear on how it will deal with states that are questionable technology-neutral, i.e., a state that gives certain types of signatures heightened legal effect while, at the same time, validating most types of e-signatures.

Statutes

- I. Uniform Electronic Transactions Act (1999).
- II. Original UETA Draft (called the Uniform Electronic Communication in Contractual Transactions Act) date April 10, 1997.

Law Review Articles

- I. John R. Austin, *The Law of Electronic Commerce and Digital Signatures: An Annotated Bibliography*, 17 J. Marshall J. Computer & Info. L. 1043 (1999).
 - A. A useful bibliography on issues related to signature protection. However, not entirely helpful for my purposes.
- II. W. Everett Lupton, *The Digital Signature: Your Identity by the Numbers*, 6 Rich, J. L. & Tech. 10 (1999).
 - A. Distinguishes between a digital signature-a secure signature that is sent using a crypto system and has function-and the many other types of electronic signatures.
 - B. Describes public key infrastructure technology and its role in creating a legally enforceable signature.
 - C. Surveys legislation related to e-signatures.
- III. Thomas J. Smedinghoff and Ruth Hill Bro, *Moving With Change: Electronic Signature Legislation as a Vehicle for Advancing E-Commerce*, 17 J. Marshall J. Computer & Info. L. 723 (1999).

- A. Similar in many ways to the Lupton article but more thoroughly delves into describing the different categories that e-signature legislation can be placed into.
- B. Like many other articles, discusses the importance of developing signatures that can provide the elements of: authenticity, integrity and non-repudiation.
- C. Discusses the proper role of technology neutrality (760-61).
- IV. Adam White Scoville, *Clear Signatures, Obscure Signs*, 17 Cardozo Arts & Ent LJ 345 (1999).
 - A. Discussion of e-signature technology
 - B. Addresses the potential difficulty in proving the authenticity of the signer and laments the lack of precedent involving secure authentication.
 - C. Surveys current proposals and statutes related to e-signature law.
 - D. Citing the California Gov't Code § 16.5 (note that CA adopted UETA), suggests that technology-neutrality could be promoted and provide security at the same time by requiring that a digital signature is valid only where "it is unique to the person using it, it is capable of verification, it is under the sole control of the person using it, and it is linked to data in such a manner that if the data are changed, the digital signature is invalidated." (376).
- V. Saami Zain, *Regulation of E-Commerce by Contract: Is it Fair to Consumers*, University of West Los Angeles Law Review (2000).
 - A. Writes that consumer protection on the internet is necessary since consumers are more easily susceptible to fraud and to unfair bargaining power.
- VI. Kalama M. Lui Kwan, *Recent Developments in Digital Signature Legislation and Electronic Commerce*, 14 Berkeley Tech. L.J. 463 (1999).
 - A. Describes how a digital signature works and discusses its potential utility.
 - B. Evaluates existing e-signature legislation and the problems that can arise due to incompatible technologies.
- VII. Lola L. Grabb, *Panel Report: Panel II: Issues of Formalities: The Formation and Validity of Electronic Agreements*, 17 Ariz. J. Int'l & Comp. Law 119 (2000)
 - A. Describes how PKI technology can be utilized so as to recreate the ceremony attached to contract signing.

Law Review Articles on UCITA

- I. David A. P. Neboyskey, *A Leap Forward: Why States Should Ratify the Uniform Computer Information Transactions Act*, 52 Fed. Comm. L.J. 793 (2000).
- II. Pratik A. Shah, *The Uniform Computer Information Transactions Act*,

Web-Sites

- I. *Summary, Uniform Electronic Transactions Act*, at http://www.nccusl.org/uniformact_summaries/uniformacts-s-ueta.htm
- II. C. Bradford Biddle, *Legislating Market Winners: Digital Signature Laws and the Electronic Commerce Marketplace*, at <http://www.w3journal.com/7/s3.biddle.wrap.html>
 - A. Argues that the open marketplace should determine how to authenticate digital signatures. However, the author expects that a closed public key

infrastructure system will be most successful in the end because it best allocates risk among interested e-commerce parties.

III. Forrester Research, Inc. *at* <http://www.forrester.com>

Cases

I. *In re: Realnetworks, Inc., Privacy Litigation*, 2000 WL 631341 (N.D. Ill., 2000).