

# E-Sign Language

by Jack Harari

**T**he digital revolution was squashed in its infancy, ushering in a resurgence of eight-tracks and phonographs; an ice age has befallen the dot-com era; and the Internet was a hoax. Right.

Although some might enjoy this doomsday scenario, the fact remains that computer technology pervades every facet of the human experience, from how we manage personal relationships to how we conduct complex business transactions. One manifestation of this symbolic shift occurred on June 30, 2000, when former President Clinton enacted Senate Bill 761 using an encoded smart card.

The law is entitled the *Electronic Signatures in Global and National Commerce Act*, and is commonly referred to as E-Sign. Some predict that E-Sign will save the insurance industry upward of \$1 billion annually. A survey conducted by GigaLaw.com suggests that approximately 75 percent of businesses polled use, or plan to use, electronic signatures.

**Some predict that E-Sign will save billions of dollars annually, but the ways and means of the law must first be determined on a state-by-state basis.**

But companies still cannot disregard state laws, such as the *Uniform Electronic Transactions Act* (UETA). UETA is a model set of laws that states are free to accept, reject or alter. To date, twenty-seven states have adopted the act in some form, while sixteen other states and the District of Columbia have introduced it into legislative session. Inherent tension exists between E-Sign and UETA because Congress, while wanting to create uniform e-signature laws, is sensitive to usurping areas traditionally governed by state law, such as contracts.

The preemption provisions of E-Sign are complex. Generally speaking, state e-signature laws may be overridden by E-Sign if they are inconsistent with UETA. In many states, E-Sign and UETA may coexist, making it necessary to understand both.

Four provisions of E-Sign are of particular importance to the insurance industry. First, E-Sign states that "it is the specific intent of the Congress that this title apply to the business of insurance."

Second, E-Sign states that insurance agents or brokers acting under the direction of a party that enters into a contract by means of an electronic signature "may not be

held liable for any deficiency in the electronic procedures agreed to by the parties" if the agent or broker: (1) has not engaged in negligent, reckless or intentionally malicious conduct; (2) was not involved in the development or establishment of such electronic procedures; and (3) did not deviate from such procedures.

The third provision of significance is the consumer protection provision. This will likely suffer the most scrutiny, with organizations such as the American Insurance Association arguing for less burdensome language and consumer protection organizations fighting for more restrictive language. Under E-Sign, a consumer must affirmatively consent to the use of electronic signatures but has the right to withdraw that consent at any time. Prior to consenting, the consumer must be provided with a number of written disclosures, including a "clear and conspicuous statement" informing the consumer of: (1) the right to have the record available in nonelectronic form; and (2) the right to withdraw consent and any consequences of that withdrawal. These strong consumer protection clauses will have great impact on personal lines of insurance conducted over the Internet.

The fourth provision of E-Sign that impacts the insurance industry is the section on specific exemptions. E-Sign will not apply to contracts or records relating to: (1) the creation and execution of wills, codicils or testamentary trusts; (2) laws governing adoption, divorce or other matters of family law or (3) major portions of the Uniform Commercial Code. Additionally, E-Sign will not apply to notices of cancellation or termination of health insurance benefits or life insurance benefits (excluding annuities).

Though already enacted into law, E-Sign is a work-in-progress. Under E-Sign, the secretary of commerce is required to conduct a number of inquiries with the general public, consumer representatives and e-commerce businesses regarding certain specific provisions of the law, and is required to submit a report to Congress outlining the results.

Many organizations, including the American Insurance Association and the American Council of Life Insurers, have already submitted comments with recommendations for changes to E-Sign. A lot has to happen before this law does what it is designed to do, but it will be a strong comment on the state of things to come if the secretary of commerce's office submits its findings in electronic form. RA

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Jack Harari, Esq., ("Rules & Regulations," p. 61) is a partner of New York-based Weidenbaum & Harari, LLP. His writing has appeared in many magazines, including *Institutional Investor* and *Image*. (lawyers@whfirm.com)