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# **ESIGN & THE UETA – CONSISTENCIES, CONFLICTS AND FEDERAL PREEMPTION**

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# The Federal ESIGN Act

- ♦ Like the UETA...

Adopts UETA definitions of

- ♦ Electronic
- ♦ Electronic Agent (non-material language variation)
- ♦ Electronic Record
- ♦ Electronic Signature (non-material language variation)
- ♦ Information
- ♦ Person
- ♦ Record
- ♦ Transaction (with additional language)
- ♦ [See § 106]

# The Federal ESIGN Act

- ◆ Like the UETA...

- Adopts (in restated form) the three pillars of the UETA [See § 101(a)]

- Adopts “Opt-in” rule [See § 101(b)(2)]

- Adopts preservation of formatting requirements [See § 101(b)(1)]

- Adopts record & check retention rules (with added specificity) [See § 101(d)]

# The Federal ESIGN Act

- ♦ Like the UETA...

- Adopts the rule permitting electronic originals [See § 101(d)(3)]

- Adopts the special retention and accessibility rules for records required for later reference (in modified form) [See § 101(e)]

- Adopts the rules on notarization

- Adopts the rules for electronic agents (in modified form) [See § 101(h)]

# The Federal ESIGN Act

- ♦ Like the UETA...

Adopts the exceptions for

- ♦ Wills, codicils and testamentary trusts
- ♦ Articles 3 through 9 of the UCC

Grants regulators authority to determine when and if government documents will be filed electronically, and to specify formats and other requirements [See § 104(a)]

Grants regulators authority to establish record retention requirements for records required to be available for government inspection, review or audit [See § 104(b)(3)]



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# The Federal ESIGN Act

- ◆ Makes explicit (implicit in UETA)...

- Preservation of substantive legal rights and obligations [See § 101(b)(1)]

- Preservation of content and timing of consumer disclosures [See § 101(c)(2)(A)]

- Preservation of any rule concerning the proximity or physical location of any warning, notice or disclosure [See § 101(f)]



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# The Federal ESIGN Act

- ◆ Makes explicit (implicit in UETA)...
  - Application to insurance laws [See § 101(i)]
  - Authority of regulators to establish interpretive rules within substantive jurisdiction [See § 104(b)(1)]



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# The Federal ESIGN Act

- ◆ Unlike the UETA...

- Adopts specific standards for consumer consent to use electronic records and signatures for notices and disclosures [See § 101(c)(1)]

- Permits substitution of electronic delivery of consumer disclosures, if delivery includes acknowledgment of receipt, for other delivery requirements [See § 101(c)(2)(B)]

# The Federal ESIGN Act

- ◆ Unlike the UETA...

Excludes recordings of oral communications from definition of electronic record for purposes of consumer notices and disclosures [See 101(c)(6)]

Adds additional exclusions and exemptions from statute [See § 102]

- ◆ Legal rules governing adoption, divorce, and other matters of family law
- ◆ Court documents requiring execution in connection with court proceedings
- ◆ Notice of utility termination, default or foreclosure under mortgage or lease, termination of health or life insurance, and product recalls and safety notices
- ◆ Notices that accompany transportation or handling of hazardous materials, pesticides, and other toxic materials

# The Federal ESIGN Act

- ◆ Unlike the UETA...

Expressly limits regulatory authority to impede or obstruct effective use of the statute [See §§ 102(c), 104(b)(2), 104(c)]

Limits Transferable Records to promissory notes secured by an interest in real property [See § 201(a)(1)(C)]

No variation by agreement

Omits default rules for

- ◆ Establishing when electronic record is sent or received
- ◆ Liability for transmission errors
- ◆ Evidence rule

# The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

Statute's application is "limited" to commercial (including consumer) and business transactions in or affecting interstate or foreign commerce [See § 101(a)]

Limitation is based on breadth of Interstate Commerce Clause in Constitution

Any interstate nexus should be sufficient

- ♦ Use of interstate communications (telephone, internet, cellular phone systems)
- ♦ Involvement of federally insured or regulated institution
- ♦ Use of products created, sold, leased or licensed by out-of-state vendors

# The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

State may supercede requirements of Section 101 with

- ♦ Adoption of the Official Text of the UETA (before or after ESIGN enactment)
- ♦ Adoption of another statute, or any regulation (under UETA, ESIGN or otherwise), that is
  - Consistent with ESIGN Act Titles I and II
  - Does not favor a specific technology (except for rules governing procurement)
  - If enacted after ESIGN, make specific reference to ESIGN Act
- ♦ [See § 102]

# The Federal ESIGN Act

- ◆ Federal Preemption – a closer look

Four potential interpretations of exception for states enacting UETA

- ◆ Official Text or nothing – any non-uniform amendments invalidate entire statute
- ◆ Official Text survives – any non-uniform amendment is invalid
- ◆ Official Text survives if consistent – Entire statute must be evaluated for consistency with ESIGN
- ◆ Official text plus consistent provisions – Provisions from UETA Official Text survive, plus non-uniform amendments okay if consistent with ESIGN

# The Federal ESIGN Act

- ♦ Federal Preemption – a closer look

What constitutes a statute or regulation

“consistent” with Title I and Title II of ESIGN?

- ♦ Consistent -- Having agreement with itself or something else;...compatible;...not contradictory.  
Black’s Law Dictionary, 4th Edition

- ♦ ESIGN Objectives

- Baseline uniformity
- Broadest possible scope
- Technology neutrality
- Minimal intrusions into freedom of contract
- Strict limits on regulatory barriers
- Deference to UETA

# The Federal ESIGN Act

- ◆ Federal Preemption – a closer look

State can establish rules governing filing of records without regard to ESIGN

ESIGN Consumer consent requirements and retention and access rules only apply to transactions if underlying statute or rule of law requires a writing

- ◆ UCITA
- ◆ Proposed amendments to UCC Articles 2 and 2A
- ◆ Other state statutes?



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## Example -- The Kentucky UETA

- ◆ Excludes from the UETA any “law governing the conveyance of any interest in real property”

- ◆ Defaults to ESIGN

Nothing in ESIGN prevents state from adopting statute with consistent rules, but narrower scope than ESIGN

But...that means that ESIGN covers all transactions in interstate commerce excluded from state law



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## Example -- The Kentucky UETA

- ♦ Excludes any “law governing the creation or transfer of any negotiable instrument or any instrument establishing title or an interest in title.”
- ♦ Doesn’t impact transferable record provisions in UETA

Transferable record is a legal construct unto itself that borrows from negotiable instruments law

No need to default to ESIGN

## Example -- The Kentucky UETA

- ♦ Kentucky preserves permissive UETA consumer consent rules
- ♦ But...Changes to Official Text means UETA enactment not complete
- ♦ Does this mean ESIGN consumer consent disclosure requirements apply under “consistency rule”?

Probably moot –

- ♦ Presence of federal notices and disclosures ubiquitous
- ♦ ESIGN applies to real estate conveyances in Kentucky
- ♦ Most system designers are designing multi-jurisdiction systems – differentiation not efficient

## Example -- The Kentucky UETA

- ♦ Government Agency – “an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.”
- ♦ Each governmental agency “in compliance with standards established by the governor's office for technology, shall determine whether, and the extent to which, it will send and accept electronic records and electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.”



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## Example -- The Kentucky UETA

- ♦ “The governor's office for technology, giving due consideration to security, may specify the manner and format in which the electronic records must be created, generated, sent, communicated, received, and stored and the systems established for those purposes.”
- ♦ “If electronic records must be signed by electronic means, each governmental agency, giving due consideration to security, may specify the type of electronic signature required, the manner and format in which the electronic signature must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process”



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## Other Examples

- ♦ North Carolina addition of non-uniform ESIGN Consent to the UETA
- ♦ New York non-uniform statute with restrictive definition of signature
- ♦ West Virginia requirement of notice to obligor before obligation to new transferee on electronic note becomes enforceable



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# The Federal ESIGN Act and the UETA – An Analytical Model

- ♦ Adopt the ESIGN Act as the baseline

Assume that all ESIGN restrictions and exclusions will apply, even in UETA jurisdictions

- ♦ Consumer consent rules
- ♦ No variation of ESIGN or equivalent UETA rules by agreement
- ♦ Additional exclusions
- ♦ Record retention rules

Assume all consistent UETA provisions not covered by ESIGN survive, but build them, or variations by agreement, into system rules anyway



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# The Federal ESIGN Act and the UETA – An Analytical Model

- ♦ Look to UETA Official Comments, and Congressional Record at time of ESIGN adoption in House and Senate, for interpretive rules
- ♦ When interpreting ambiguous provisions, ask if interpretation serves purpose of statute and meets “common sense” test