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

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 signatures⁶ and the history of traditional signature requirements.⁷ The Note will then present overviews of E-Sign⁸ 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

1. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign), Pub. L. No. 106-229, 114 Stat. 464 (to be codified at 15 U.S.C. §§ 7001-7031). *See also infra* notes 44-82 and accompanying text.

2. Carol A. Kunze, *What Happened to UETA in Congress*, at <http://www.uetaonline.com/hapcong.html> (last modified July 9, 2000) (created for UETA Online).

3. *Id.* E-Sign creates a uniform standard by preempting inconsistent state laws with a test outlined in section 102. *See infra* notes 64-82 and accompanying text. For a definition of “electronic signatures” *see infra* notes 14-15 and accompanying text.

4. UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA) (1999). *See infra* text accompanying notes 83-98.

5. Robert A. Wittie & Jane K. Winn, *Electronic Records and Signatures under the Federal E-SIGN Legislation and the UETA*, 56 BUS. LAW. 293, 296 (2000).

6. *See infra* Part II.A—B.

7. *See infra* Part III.A—B.

8. *See infra* Part IV.A—C.

9. *See infra* Part V.A—B.

Carolina,¹⁰ California,¹¹ and New York.¹² Finally, the Note will discuss E-Sign's general impact in the near future.¹³

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."¹⁴ This definition is extremely broad and is highly inclusive of different technologies.¹⁵

B. *Technology Issues*

One specific type of electronic technology, a digital signature, is an encrypted electronic signature.¹⁶ 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.

14. UETA § 2(8) (1999). The term "electronic signature" means "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." Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 106(5), 15 U.S.C.A. § 7006(5) (West Supp. 2000). The term "signed" means "any symbol executed or adopted by a party with present intention to authenticate a writing." U.C.C. § 1-201(39) (1977).

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 digitalized 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).¹⁷ 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.¹⁸

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.¹⁹ The institution must ensure that the technology is compatible with the institution's other systems.²⁰ In addition, the different types of technologies available vary in the amount of security they provide to users.²¹ The weakest security provided is through simple methods such as passwords, personal identification numbers, or other "shared secret" methods.²² Biometric signatures, incorporating physical attributes of the signor into the signature, offer more security than the "shared secret" methods.²³ The most secure individual method is a digital signature.²⁴ 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." *Id.* 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).

24. Melling, *supra* note 15. *See supra* notes 16-18 and accompanying text. The U.S. Department of Defense has chosen digital signatures as the standard for all of its business affairs. Melling, *supra* note 15. Foreign countries such as Germany, Argentina, Italy, and Malaysia have adopted legislation authorizing digital signatures as the only accepted method of electronic signatures. STEWART BAKER & MATTHEW YEO, THE INTERNET LAW AND POLICY FORUM, SURVEY OF INTERNATIONAL ELECTRONIC AND DIGITAL SIGNATURE INITIATIVES, at <http://www.ilpf.org/digsig/survey.htm> (last modified Sept. 24, 1999). However the United States wishes to encourage a technology-neutral legal standard in the world, feeling it would be the best legal framework for global electronic commerce. President's Remarks on Signing the Electronic Signatures in Global and National Commerce Act in Philadelphia, 36 WEEKLY COMP. PRES. DOC. 1561 (June 30, 2000). In order to encourage technology-neutral standards internationally, negotiations with the European Union are a top priority of the E-Sign legislation given the trend in Europe towards legal recognition of digital signatures only. 146 CONG. REC. H4356-7 (daily ed. June 14, 2000) (statement by Rep. Bliley). E-Sign directs the Secretary of Commerce to examine foreign laws that affect electronic signatures and records and to work to gain acceptance of electronic records and signatures internationally. 146 CONG. REC. H4360 (daily ed. June 14, 2000) (statement by Rep. Tauzin).

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;²⁹ 2) repeal the Statute of Frauds;³⁰ 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.*

26. R. J. Robertson, Jr., *Electronic Commerce on the Internet and the Statute of Frauds*, 49 S.C. L. REV. 787, 789 (1998). In 1677, England enacted the original Statute of Frauds. Shawn Pompian, Note, *Is the Statute of Frauds Ready for Electronic Contracting?*, 85 VA. L. REV. 1447, 1453 (1999). Parliament enacted the statute to ensure that contracts would not be enforced by the courts based solely on false testimony procured by plaintiffs. *Id.* Though repealed in England in 1953, here in the United States the Statute of Frauds is the law in one form or another in nearly all United States jurisdictions. *Id.* at 1448.

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.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.³² The Statute of Frauds is also unlikely to be repealed in the United States any time in the near future.³³ Thus, amending the Statute of Frauds to include electronic records and signatures is the most feasible option.³⁴

traditional writings which some argue support the notion that no revision of the laws is necessary for electronic signatures and records to be legally effective. *See id.* at 798-807. *See, e.g.,* Howley v. Whipple, 48 N.H. 487 (1869) (holding that a telegraph was a writing under the Statute of Frauds); Yaggy v. B.V.D. Co., 173 S.E.2d 496 (N.C. App. 1970) (holding typewritten name at end of telegram satisfied the signature requirement of the Statute of Frauds as long as the affixer intended to place his name upon the telegram for identity); Parma Tile Mosaic & Marble Co. v. Estate of Short, 663 N.E.2d 633 (N.Y. 1996) (implying that while the particular fax in question did not meet the signed writing requirement of the Statute of Frauds, a fax could satisfy the requirement if the necessary intent to sign was present); Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212 (D. Colo. 1972) (noting that a tape recorded agreement meets the requirements of the Statute of Frauds). *But see, e.g.,* Pike Indust. v. Middlebury Assoc., 398 A.2d 280 (Vt. 1979) (holding that a telegraph does not meet signature requirement of the Statute of Frauds); Department of Transp. v. Norris, 474 S.E.2d 216 (Ga. Ct. App. 1996), *rev'd sub nom.* Norris v. Georgia Dep't of Transp., 486 S.E.2d 826 (Ga. 1997) (holding that a fax does not fulfill the requirement that a notice be given in writing); Sonders v. Roosevelt, 476 N.Y.S.2d 331 (App. Div. 1984), *aff'd mem.*, 487 N.Y.S.2d 551 (1985) (holding recorded telephone conversation did not satisfy the writing requirement of the Statute of Frauds); Swink & Co. v. Carroll McEntee & McGinley, Inc., 584 S.W.2d 393 (Ark. 1979) (holding that a tape recording does not meet the signature requirement of the Statute of Frauds).

30. Robertson, *supra* note 26, at 809.

31. *Id.* at 815.

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.*

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, *no individual state* has repealed the statute in its entirety. *Id.* at 809-10 (emphasis added).

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.³⁵ The first school focused on law revision.³⁶ The second school focused on technology implementation.³⁷ 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.³⁸

In 1995, Utah became the first state to take an affirmative stance on the issue, passing a statute granting legal recognition to digital signatures.³⁹ The technology-based approach Utah chose promotes a highly regulatory and prescriptive standard granting legal enforceability only to digital signatures.⁴⁰ In contrast, legislation enacted by California⁴¹ took the other approach, adopting a technology-neutral law, leaving technology decisions to the parties in the market.⁴² In an endeavor to prevent further

35. Amelia H. Boss, *The Internet and the Law: Searching for Security in the Law of Economic Commerce*, 23 NOVA L. REV. 583, 596 (1999).

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.

40. Boss, *supra* note 35, at 602. Despite the Utah law, "technology specific" legislation has not taken off in the United States. *Id.* For a discussion of the Illinois Electronic Commerce Security Act compare Martin I. Behn, *The Illinois Electronic Commerce Security Act: Too Much Too Soon or Too Little Too Late?*, 24 S. ILL. U. L. J. 201 (2000), with R. J. Robertson, Jr., *The Illinois Electronic Commerce Security Act: A Response to Martin Behn*, 24 S. ILL. U. L. J. 473 (2000).

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.⁴³

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.”⁴⁴ This provision has two limiting factors: 1) it only affects records or signatures relating to transactions,⁴⁵ and 2) it applies only to those “transactions in or affecting interstate or foreign commerce.”⁴⁶ 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.

44. Electronic Signatures in Global and National Commerce Act (E-Sign) of 2000 §101(a), 15 U.S.C.A. § 7001(a) (West Supp. 2000). The statute does not affect any law other than the requirement that a record be written, signed, or in other non-electronic form. *Id.* § 101(b), 15 U.S.C.A. § 7001(b).

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.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.⁴⁸

E-Sign has several explicit exceptions to its scope.⁴⁹ Some of these excluded areas are records or contracts governed by the laws of wills, codicils, and testamentary trusts;⁵⁰ the U.C.C., except for sections 1-107⁵¹ and 1-206,⁵² Article 2,⁵³ and Article 2A;⁵⁴ and notices of foreclosure or eviction.⁵⁵

47. *Id.* § 101(e), 15 U.S.C.A. § 7001(e).

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.

49. E-Sign § 103, 15 U.S.C.A. § 7003.

50. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 103(a)(1), 15 U.S.C.A. § 7003(a)(1) (West Supp. 2000).

51. *Id.* § 103(a)(3), 15 U.S.C.A. § 7003(a)(3). Section 1-107 governs enforceability of a written, signed waiver after a breach. U.C.C. § 1-107 (1977).

52. E-Sign § 103(a)(3), 15 U.S.C.A. § 7003(a)(3). Section 1-206 sets out the Statute of Frauds requirement for sale of property for more than five thousand dollars. U.C.C. § 1-206 (1977).

53. E-Sign § 103(a)(3), 15 U.S.C.A. § 7003(a)(3). Article 2 governs the sale of goods. U.C.C. Article 2 (1977).

54. *Id.* § 103(a)(3), 15 U.S.C.A. § 7003(a)(3). Article 2A governs leases. U.C.C. Article 2A (1977).

55. *Id.* § 103(b)(2)(B), 15 U.S.C.A. § 7003(b)(2)(B). *See also* 146 CONG. REC. H4349 (daily ed. June 14, 2000) (statement by Rep. Markey). Records or contracts involved in divorce, adoption or other matters of family law are excluded from the scope of E-Sign. E-Sign § 103(a)(2), 15 U.S.C.A. § 7003(a)(2). E-Sign also excludes court orders and other official court documents. *Id.* § 103(b)(1), 15 U.S.C.A. § 7003(b)(1). *See also* 146 CONG. REC. H4349 (daily ed. June 14, 2000) (statement by Rep. Markey). Many courts have begun to accept electronic documents on their own initiative. July Winslow Letter, *supra* note 45, at 6. For example, the Tenth Circuit

B. Consumer Protections

E-Sign does not require a person or entity to use or accept electronic records or signatures.⁵⁶ 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.⁵⁷ Before the consent will be held valid, a host of requirements must be fulfilled.⁵⁸ 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

Court of Appeals allows electronic signatures to serve as original signatures for briefs, motions, and other papers. 10TH CIR. R. 46.5(C). In addition, notices of cancellation of utility services are exempted from E-Sign. E-Sign § 103(b)(2), 15 U.S.C.A. § 7003(b)(2). *See also* 146 CONG. REC. H4349 (daily ed. June 14, 2000) (statement by Rep. Markey). This exclusion is only intended to apply to essential services such as water, heat, and power. 146 CONG. REC. H4354 (daily ed. June 14, 2000) (statement by Rep. Bliley). Notice of cancellation of non-essential services such as cable or telephone services could be sent electronically. *Id.* Section 103(b)(2)(C) further excludes notices of termination of life or health insurance and notices of recalls of dangerous products. E-Sign § 103(b)(2)(C), 15 U.S.C.A. § 7003(b)(2)(C). The final exemption in section 103 applies to documents accompanying hazardous materials. *Id.* § 103(b)(3), 15 U.S.C.A. § 7003(b)(3).

56. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(b)(2), 15 U.S.C.A. § 7001(b)(2) (West Supp. 2000) *See also* 146 CONG. REC. H4351 (daily ed. June 14, 2000) (statement by Rep. Bliley). E-Sign does not seek to impose such requirements upon those individuals who still desire the paper method of contracting; it merely removes barriers to those who wish to do so. E-Sign § 101(b)(2), 15 U.S.C.A. § 7001(b)(2). An exception to this general rule concerns government agencies. *Id.* § 101(b)(2), 15 U.S.C.A. § 7001(b)(2).

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).

58. E-Sign § 101(c)(1)(B)-(C), 15 U.S.C.A. § 7001(c)(1)(B)-(C).

a paper record.⁵⁹ Second, the consumer must be able to access the records electronically.⁶⁰ Note that the failure to satisfy the consumer consent provisions of E-Sign does not invalidate the underlying contract.⁶¹ 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.⁶²

59. *Id.* § 101(c)(1)(B), 15 U.S.C.A. § 7001(c)(1)(B). E-Sign supercedes the FED 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 Consumer Disclosures*, [Volume 5] Fed. Banking L. Rep. (CCH) ¶ 60-733 (FDIC Fin. 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. Bliley). 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 (daily ed. June 14, 2000) (statement by Rep. Bliley); 146 CONG. REC. S5282 (daily ed. 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 ed. June 14, 2000) (statement by Rep. Dreier). The rationale extended for the 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 Rep. Dingell); 146 CONG. REC. S5230 (daily ed. June 15, 2000) (statement by Sen. Sarbanes).

61. E-Sign § 101(c)(3), 15 U.S.C.A. § 7001(c)(3). The validity of the contract would rest on the normal principles of contract law as applicable in the pertinent jurisdiction. 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 invalidate an electronic contract. 146 CONG. REC. S5230 (daily ed. June 15, 2000) (statement by Sen. Sarbanes).

62. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(c)(2)(A), 15 U.S.C.A. § 7001(c)(2)(A) (West Supp. 2000). *See also* 146

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.⁶³

C. Preemption Provisions

To what extent does E-Sign preempt state law?⁶⁴ E-Sign grants states the power to "modify, limit, or supersede the provisions of [E-Sign] section 101 *with respect to state law*" in certain situations.⁶⁵ However, E-Sign confines this power to specifically authorized methods.⁶⁶ E-Sign allows a state to enact its own electronic signature and records law without fear of preemption.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).⁶⁸ A state can also "modify, limit,

CONG. REC. H4360 (daily ed. June 14, 2000) (statement of Rep. Tauzin); 146 CONG. REC. S5221 (daily ed. June 15, 2000) (statement of Sen. Leahy); 146 CONG. REC. H4357 (daily ed. June 14, 2000) (statement by Rep. Dingell). A wrongdoer may not argue that by satisfying the requirements of E-Sign they are exempt from other anti-fraud laws. 146 CONG. REC. S5221 (daily ed. June 15, 2000) (statement of Sen. Leahy). Additionally, a consumer is always allowed to allege forgery or any other claim that would invalidate a signature in non-electric form. *Id.* For example, a transaction entered into electronically would still be subject to the applicable unfair and deceptive trade practices laws. 146 CONG. REC. H4357 (daily ed. June 14, 2000) (statement by Rep. Dingell).

63. 146 CONG. REC. S5219 (daily ed. June 15, 2000) (statement by Sen. Leahy). Some congressmen argue that if a series of steps must be taken to even allow electronic contracting, companies and individuals may decline to contract electronically, finding it too time consuming or difficult to follow the steps as compared to executing a traditional contract. *See* 146 CONG. REC. H4366 (daily ed. June 14, 2000) (statement by Rep. Conyers). There have been other criticisms of the consumer protections, namely, that they unfairly discriminate against electronic commerce. 146 CONG. REC. S5220 (daily ed. June 15, 2000) (statement by Sen. Leahy).

64. Section 102 of E-Sign is the provision that governs the answer to this question. *See* E-Sign § 102, 15 U.S.C.A. § 7002.

65. *Id.* § 102(a), 15 U.S.C.A. § 7002(a) (emphasis added). Federal writing and signature requirements are governed by E-Sign and cannot be affected by state laws. Wittie & Wynn, *supra* note 5, at 326. Before the state law needs to be examined, the determination of whether the transaction is in or affects interstate commerce must be made. *See supra* note 46 and accompanying text.

66. E-Sign § 102(a)(1)-(2), 15 U.S.C.A. § 7002(a)(1)-(2).

67. *Id.* § 102(a)(1), 15 U.S.C.A. § 7002(a)(1).

68. E-Sign § 102(a)(1)-(2), 15 U.S.C.A. § 7002(a)(1)-(2). The NCCUSL is an organization made up of over 300 lawyers, judges, and law professors from across the

or supersede⁶⁹ 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.⁷⁰ 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.⁷¹

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.⁷² 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.⁷³

A major question of preemption arises when a state adopts

United States assembled for the purpose of drafting uniform and model laws. NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, ABOUT US, at <http://www.nccusl.org/aboutus.htm> (last visited Feb. 28, 2001). The organization, in its 109th year, also strives to obtain legislative enactment of these uniform and model laws. *Id.* See also *infra* notes 251-54 and accompanying text (discussing the imposition of the federal government on state's law making ability).

69. E-Sign § 102(a), 15 U.S.C.A. § 7002(a).

70. *Id.* § 102(a)(2)(A), 15 U.S.C.A. § 7002(a)(2)(A). A state that enacted a non-uniform version of UETA would not be preempted to the extent that enactment met the requirements of section 102 (a) of E-Sign. 146 CONG. REC. H4353 (daily ed. June 14, 2000) (statement of Rep. Bliley). Section 102(a) of E-Sign would also apply to any laws enacted by a state to supplement or amend an enactment of UETA in an endeavor to get around the preemption provision. *Id.* The technology-neutral requirement is perhaps a redundancy, since a law that is not technology-neutral would appear on its face to be inconsistent with E-Sign. See generally Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign), 15 U.S.C.A. §§ 7001-7031 (West Supp. 2000).

71. E-Sign § 102(a)(2)(B), 15 U.S.C.A. § 7002(a)(2)(B).

72. 146 CONG. REC. S5224 (daily ed. June 15, 2000) (statement by Sen. Abraham); see also Wittie & Wynn, *supra* note 5, at 325.

73. E-Sign § 102(a)(1), 15 U.S.C.A. § 7002(a)(1). See also 146 CONG. REC. S5224 (daily ed. June 15, 2000) (statement by Sen. Abraham). The passage of E-Sign was seen by many as a necessary gap filler until the states could catch up with the pressing need of the technology sector to have some consistency and assurances that their transactions would be legally binding. 146 CONG. REC. S5223 (daily ed. June 15, 2000) (statement by Sen. Abraham). The explicit exception granted by E-Sign to states that adopt the official version of UETA was set out by Congress, because the UETA was already a known act and the enactment of UETA in all states would create a uniform national rule with substantially similar purposes and goals as E-Sign. Wittie & Wynn, *supra* note 5, at 325.

UETA, but not in the exact form set forth by the NCCUSL.⁷⁴ Does 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?⁷⁵ 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.⁷⁶

The first reading of the provision would work effectively if a state adopted UETA with only a few minor additions or changes.⁷⁷ 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.⁷⁸ The second reading, subjecting every non-conforming provision of a modified UETA to the consistency test, though a more time consuming analysis, would more likely ensure the principles originally conceived by the passage of E-Sign.⁷⁹ The third reading that any non-uniform provision fails regardless of the consistency test does not seem like a logical reading of the statute.⁸⁰ However,

74. See Wittie & Wynn, *supra* note 5, at 325; Patricia Brumfield Fry, *Federal Preemption and Electronic Commerce*, <http://www.nccusl.org/whatsnew-article3.htm> (last visited Feb. 28, 2001). A presumption is made that numbering, formatting, and other non-substantive changes would not affect a determination of whether a state's UETA was in the exact form of the NCCUSL-adopted UETA. Wittie & Wynn, *supra* note 5, at 329 n.185.

75. Wittie & Wynn, *supra* note 5, at 329. Even if a state enacts the model adopted by NCCUSL, if it incorporates exclusions other than those listed in UETA, as UETA suggests in section 3(b)(4), those exclusions must also pass the consistency test of section 102(a)(2)(A)(ii) of E-Sign. Fry, *supra* note 74.

76. Fry, *supra* note 74. There is an argument that the literal language of the Act indicates the second reading is the answer. *Id.*

77. Wittie & Wynn, *supra* note 5, at 330.

78. *Id.* One argument that has been advanced is that although Congress saw fit to allow preemption of E-Sign by the adoption of UETA, individual UETA provisions are not always consistent with E-Sign provisions. *Id.* By allowing states to pick and choose provisions from UETA, it would be possible for a state to construct a set of laws, though incorporating UETA provisions, that do not share the same principles and goals of E-Sign and UETA. *Id.*

79. *Id.* at 330-331 (arguing that this is the correct reading of section 102 of E-Sign).

80. *Id.* The fact that there is a consistency test available for alternate provisions suggests that the drafters expected the dual step test that would not even be

until there is judicial review of the matter or regulatory clarification,⁸¹ it may be impossible to determine with certainty what the outcome would be in a state that has enacted a non-uniform UETA.⁸²

V. UNIFORM ELECTRONIC TRANSACTIONS ACT

A. *Legal Effect*

The NCCUSL,⁸³ recognizing the pressing need for uniformity between the states, adopted the UETA on July 29, 1999.⁸⁴ 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.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.⁸⁶ The remainder of the UETA serves to qualify, explain, and define the application of

permitted by such a strict reading of the statute. *See* Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 102, 15 U.S.C.A. § 7002 (West Supp. 2000).

81. *Id.* §104, 15 U.S.C.A. § 7004(a).

82. Fry, *supra* note 74.

83. *See supra* note 68.

84. Whittie, *supra* note 5, at 296. The NCCUSL began drafting the UETA in 1997. *Id.* Before the final draft was adopted by the NCCUSL, it was considered section by section at two annual conferences. Carol A. Kunze, *Background*, at <http://www.webcom.com/legaled/ETAForum> (last modified July 29, 1999) (created for ETA Forum). Once approved by the drafting committee, the UETA was approved by a majority of the states attending the conference. *See id.* When drafting UETA, NCCUSL sought to incorporate several underlying principles: 1) application of the same legal standard to all transactions whether electronic or paper based; 2) technological neutrality; 3) minimalism; and 4) avoidance of regulation. Shea C. Meehan, Comment, *Consumer Protection Law and the Uniform Electronic Transactions Act (UETA): Why States Should Adopt UETA as Drafted*, 36 IDAHO L. REV. 563, 583 (2000).

85. 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.

86. UETA § 7.

these principles.⁸⁷

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.⁹⁵

The UETA has been enacted in one form or another in at least twenty-three states.⁹⁶ Adoption of the Act is also under consideration in at least ten other jurisdictions.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.⁹⁸

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,⁹⁹ the states that have not enacted electronic signature and record laws as of the enactment of E-Sign¹⁰⁰ 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.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, 2000.¹⁰²

95. See Prefatory Note to UETA. The existing substantive laws of contracts remain intact after the enactment of UETA. See *id.*

96. Carol A. Kunze, *What's Happening to UETA in the States*, at <http://www.jetaonline.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.*

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

98. See *supra* notes 72-73 and accompanying text.

99. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 102(a), 15 U.S.C.A. § 7002(a) (West Supp. 2000).

100. See *supra* note 96 and accompanying text.

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

102. 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* 3 (August 9, 2000) (on file with the N.C. BANKING INST.) [hereinafter August Winslow Letter]. The N.C. Legislature made quick work of this statute, with its introduction to the General Assembly on May 17, 2000. N.C. GEN. STAT. § 66-308 (2000). See also Ed Winslow, *Federal and State Statutes Authorize Electronic Signatures and Contracts*, 21 NOTES BEARING INTEREST, 1 (2000) [hereinafter Winslow Article].

There are several differences between the North Carolina Uniform Electronic Transactions Act (NC-UETA) and the UETA as adopted by NCCUSL.¹⁰³ As mandated by section 102(a)(2)(B) of E-Sign, NC-UETA,¹⁰⁴ since it is not a uniform adoption of UETA, includes a specific reference to E-Sign.¹⁰⁵ In determining the extent to which E-Sign will preempt NC-UETA, this Note will use two different approaches to analyze the preemption effect.¹⁰⁶ 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.¹⁰⁷ 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.¹⁰⁸

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.¹⁰⁹ There are several major differences between UETA and NC-UETA: 1) an additional exclusion to the scope;¹¹⁰ 2) variance in the provisions on notarization and acknowledgment of records;¹¹¹ 3) qualifying language in the major provision;¹¹² 4) the sending and receipt of

103. See generally August Winslow Letter, *supra* note 102.

104. N.C. GEN. STAT. §§ 66-308.1-308.17.

105. N.C. GEN. STAT. § 66-308.16(a). See also August Winslow Letter, *supra* note 102, at 3. This is the only reference to E-Sign in the NC-UETA. See N.C. GEN. STAT. §§ 66-308.1-308.17. This reference should satisfy the requirement of section 102(a)(2)(B) of E-Sign since the purpose of the E-Sign provision is to allow for ease of tracking action by the states with reference to electronic signature and record laws through research. 146 CONG. REC. H4354 (daily edition June 14, 2000) (statement by Rep. Bliley).

106. See *supra* notes 74-82 and accompanying text. It is likely that only judicial review or regulatory clarification will determine the appropriate analysis. See *id.*

107. See *supra* notes 76-78 and accompanying text.

108. See *supra* notes 76, 79 and accompanying text.

109. See *supra* notes 76-78 and accompanying text.

110. See *infra* notes 116-118 and accompanying text.

111. See *infra* notes 119-122 and accompanying text.

112. See *infra* notes 123-125 and accompanying text.

electronic records;¹¹³ 5) the consumer consent rules;¹¹⁴ and 6) the exclusion of provisions dealing with government agencies' use of electronic records.¹¹⁵

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).¹¹⁶ The Electronic Commerce in Government Act authorizes all public agencies to accept electronic signatures.¹¹⁷ This addition appears to be consistent with the provisions of E-Sign, given the exclusions granted to similar government areas in the federal act.¹¹⁸

A closely linked difference in NC-UETA concerns notarization and acknowledgment of records in the context of the government.¹¹⁹ 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. § 7004 (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.¹²⁰ 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.”¹²¹ The question of preemption under this section is tied closely to the scope analysis.¹²²

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).¹²³ The qualifying language tacked onto the ends of subsections (c) and (d) is: “provided it complies with the provisions of this Article.”¹²⁴ It is unclear whether such qualifying language would result in a preemption of this provision of NC-UETA.¹²⁵

Another place that NC-UETA differs from UETA is under the provision governing the sending and receiving of electronic records.¹²⁶ NC-UETA includes a special rule for consumer transactions governing the receipt of electronic records not present in the UETA.¹²⁷ 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).

121. N.C. GEN. STAT. § 66-58.4(b) (2000).

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.¹²⁸ 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,¹²⁹ and 2) this provision is consistent with the high level of consumer protection offered by E-Sign.¹³⁰

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.¹³¹ E-Sign does not include this provision either;¹³² therefore, it is difficult to envision how such an exclusion could be found to be inconsistent with E-Sign.¹³³

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.¹³⁴ 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.¹³⁵ E-Sign addressed consumer consent issues but did

128. N.C. GEN. STAT. § 66-308.14(e) (2000). Since not addressed by UETA, the analysis must turn to consistency with the principles of E-Sign. See *Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 102(a)(2)(A)*, 15 U.S.C.A. § 7002(a)(2)(A) (West Supp. 2000).

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.

133. See E-Sign § 102(a)(2)(A), 15 U.S.C.A. § 7002(a)(2)(A) (setting out the consistency standard). E-Sign leaves such sending and receiving matters to the substantive law already in place. See E-Sign § 101(b)(1), 15 U.S.C.A. § 7001(b)(1) (savings clause in E-Sign). Since this covers a subject area not addressed by E-Sign it should not be viewed as inconsistent. Wittie & Wynn, *supra* note 5, at 331.

134. *Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(c)*, 15 U.S.C.A. § 7001(c) (West Supp. 2000); N.C. GEN. STAT. § 66-308.16(c) (2000). See also August Winslow Letter, *supra* note 102, at 13. Section 66-308.16(a) is where E-Sign is referred to by NC-UETA as required by section 102(a)(2)(B) of E-Sign. N.C. GEN. STAT. § 66-308.16(a). Section 66-308.16(b) also incorporates the exclusions to the rule found in section 103(b)(2) of E-Sign. Compare E-Sign § 103(b), 15 U.S.C.A. § 7003(b), with N.C. GEN. STAT. § 66-308.16(b).

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.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.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.¹³⁸

2. Each Provision Examined Under the Consistency Test¹³⁹

The second approach¹⁴⁰ 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.¹⁴¹ For example, NC-UETA is consistent with E-Sign in not requiring the use of electronic records or signatures.¹⁴² However, section 66-308.4 of NC-UETA includes a provision¹⁴³ clearly inconsistent with E-Sign, which allows statutory rules in NC-UETA to vary by agreement, unless specifically prohibited by NC-UETA.¹⁴⁴ Another prime

consumers in this aspect).

136. E-Sign § 101(c), 15 U.S.C.A. § 7001(c).

137. UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA) §§ 17-19 (1999); August Winslow Letter, *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.” See *supra* notes 109-138 and accompanying text.

140. See *supra* notes 76, 79 and accompanying text.

141. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 102(a)(2)(A)(i), 15 U.S.C.A. § 7002(a)(2)(A)(i) (West Supp. 2000).

142. Compare E-Sign § 101(b)(2), 15 U.S.C.A. § 7002(a)(2)(A)(i), with N.C. GEN. STAT. § 66-308.4(a) (2000) (showing that neither statute imposes a requirement to use an electronic signature).

143. N.C. GEN. STAT. § 66-308.4(d).

144. August Winslow Letter, *supra* note 102, at 6; Edward C. Winslow, III, 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.¹⁴⁵

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.¹⁴⁶

In another example, attribution and effect of electronic records and signatures is an area directly addressed by NC-UETA but not by E-Sign.¹⁴⁷ 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.*

147. Compare Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(b)(1), 15 U.S.C.A. § 7001(b)(1) (West Supp. 2000), with N.C. GEN. STAT. § 66-308.8 (2000). E-Sign impliedly addresses this topic by deferring to existing law applying to the general realm of attribution and effect of records and signatures. E-Sign § 101(b)(1), 15 U.S.C.A. § 7001(b)(1) (savings clause). NC-UETA is merely attempting to apply these existing principles in an electronic environment. August Winslow Letter, *supra* note 102, at 8.

relation to an electronic environment.¹⁴⁸ Two other NC-UETA provisions supplemental to E-Sign concern errors or changes in an electronic record occurring during a transmission,¹⁴⁹ and the admissibility of electronic records or signatures as evidence in a “proceeding.”¹⁵⁰

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.¹⁵¹ Different results could occur from one preemption approach as compared to the other.¹⁵²

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).¹⁵³ On September 16, 1999,¹⁵⁴ California became the first state to enact an electronic signatures law incorporating the provisions of UETA.¹⁵⁵ CA-UETA, though similar to UETA, is not identical.¹⁵⁶ However, since CA-UETA¹⁵⁷ was enacted well

148. See E-Sign § 102(a)(1), 15 U.S.C.A. § 7002(a)(1). See also *supra* note 129.

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.

153. CAL. CIV. CODE §§ 1633.1-1633.17 (West 2000). See also *infra* notes 154-207 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.*

155. *Assembly Comm. on Judiciary, Comm. Report for 1999 Senate Bill No. 820*, 1999-2000 Reg. Sess. (Cal. 2000) (statement of Adam B. Schiff, Chairman of Judiciary Comm.). CA-UETA, sections 1633.1 to 1633.17 of the Cal. Civil Code, became effective on January 1, 2000. CAL. CIV. CODE § 1633.4 (West 2000).

156. *Assembly Comm. on Judiciary, Comm. Report for 1999 Senate Bill No. 820*, 1999-2000 Reg. Sess. (Cal. 2000) (statement of Adam B. Schiff, Chairman of Judiciary Comm.).

157. See *supra* notes 154-155 and accompanying text.

before E-Sign,¹⁵⁸ the requirement to specifically reference E-Sign in the act does not apply.¹⁵⁹ In order to examine the preemption effect E-Sign will have on CA-UETA, the varying approaches to the consistency test of E-Sign¹⁶⁰ must again be used.¹⁶¹ 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.¹⁶² 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.¹⁶³

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.¹⁶⁴ The major differences between UETA and CA-UETA are 1) the definition of electronic signatures;¹⁶⁵ 2) additional exclusions to the scope of CA-UETA;¹⁶⁶ 3) the addition of a provision addressing standard form consumer consent contracts;¹⁶⁷ and 4) electronic records and signatures in reference to statements signed under the penalty of perjury.¹⁶⁸

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.¹⁶⁹ While such a change may seem unimportant, it could

158. *See supra* notes 1-3 and accompanying text.

159. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 102(a)(2)(B), 15 U.S.C.A. § 7002(a)(2)(B) (West Supp. 2000).

160. *Id.* § 102(a)(2), 15 U.S.C.A. § 7002(a)(2).

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.

164. E-Sign § 102(a)(2), 15 U.S.C.A. § 7002(a)(2). *See also supra* notes 109-138 and accompanying text (analyzing NC-UETA using this test).

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"¹⁷⁰ and "electronic record."¹⁷¹ Since the definition of "electronic signature" under CA-UETA¹⁷² is inconsistent with E-Sign, it is likely that the additional words will be purged by the preemption provision of E-Sign.¹⁷³

In comparison with UETA, the exclusion section of California's UETA is riddled with discrepancies.¹⁷⁴ California's UETA accepts UETA's invitation¹⁷⁵ to insert other exceptions into the act.¹⁷⁶ E-Sign deals directly with this sort of exception and would likely preempt this addition by the California legislature.¹⁷⁷ CA-UETA also inserts an additional section of exclusions to the exclusions laid out by UETA.¹⁷⁸ The preemptive effect of these

electronic sound, symbol, or process attached to or logically associated with an *electronic* record and executed or adopted by a person with the intent to sign the *electronic* record." CAL. CIV. CODE § 1633.2(h) (emphasis added). Since the definition only requires the electronic signature to be logically associated with the electronic record, it could be imagined that an electronic signature could be logically associated with a non-electronic record, which would not be allowed under the CA-UETA. *Id.* For example, an electronic signature on an electronic document could be necessary for the validity of an integrated set of documents including other non-electronic documents—a concept not governed by CA-UETA under a strict reading of the definition of electronic signature. *See id.*

170. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 106(9), 15 U.S.C.A. § 7006(9) (West Supp. 2000); UETA § 2(13).

171. E-Sign § 106(4), 15 U.S.C.A. § 7006(4); UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA) § 2(7) (1999).

172. *See supra* note 169.

173. E-Sign § 102(a)(2), 15 U.S.C.A. § 7002(a)(2). The narrow definition is not consistent with the goal of E-Sign to facilitate the ease of contracting when the definition is limiting in its nature. *See* 146 CONG. REC. S5224 (daily ed. June 15, 2000) (statement by Sen. Abraham).

174. *Compare* CAL. CIV. CODE § 1633.3, *with* UETA § 3.

175. UETA § 3(b)(4).

176. *See* CAL. CIV. CODE § 1633.3(b)(4).

177. *See* Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 102(a)(1), 15 U.S.C.A. § 7002(a)(1) (West Supp. 2000).

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.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.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.¹⁸¹ Since the previous two subsections are in line with the E-Sign, the subsection in question would appear to be as well.¹⁸²

Like UETA, CA-UETA does not require the use of electronic records or signatures.¹⁸³ However CA-UETA goes beyond UETA by addressing the use of standard form contracts in obtaining the consent to conduct transactions electronically.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.¹⁸⁵

life insurance policy upon receipt to effect a cancellation); 7) Section 779.1 of the Public Utilities Code (notice requirement before termination of public utilities); and 8) Section 1162 of the Code of Civil Procedure (notice requirement in a summary proceeding for obtaining possession of real property in certain cases). *Id.* For a more thorough discussion of each of the particular statutory exclusions, see also Gail Hillebrand, *The California Exemptions to UETA*, Consumers Union, at <http://www.consumersunion.org/finance/9991wc00.htm> (Jan. 2000).

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).

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).

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.”).

182. UNIFORM ELECTRONIC TRANSACTIONS ACT § 3(c)-(d) (1999).

183. CAL. CIV. CODE § 1633.5(a).

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. *Id.*

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. *Id.*

CA-UETA includes a section setting forth the requirements for electronic records and signatures in reference to statements signed under penalty of perjury.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.¹⁸⁷

A new bill has been introduced in the California senate that would make various changes to the current CA-UETA if passed.¹⁸⁸ In its current form, the bill addresses all four of the major differences discussed above and brings them in line with UETA.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.¹⁹⁰

2. Each Provision Examined Under Consistency Test¹⁹¹

Under the second approach, each provision of CA-UETA

186. CAL. CIV. CODE § 1633.11(b).

187. See Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(a), 15 U.S.C.A. § 7001(a) (West Supp. 2000).

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.*

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).

190. See S. 97, 2001-2002 Leg., Reg. Sess. (Ca. 2001); E-Sign § 102(a), 15 U.S.C.A. § 7002(a).

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

192. E-Sign § 102(a)(2)(A)(i), 15 U.S.C.A. § 7002(a)(2)(A)(i). *See also supra* notes 140-152 and accompanying text (NC-UETA analyzed using this approach).

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).

197. E-Sign § 102(c), 15 U.S.C.A. § 7002(c).

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.

201. *Compare* E-Sign § 101(b)(1), 15 U.S.C.A. § 7001(b)(1), *with* 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.²⁰² CA-UETA also includes a provision on the use of evidence of a record or signature in an electronic form.²⁰³ 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.²⁰⁴ 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.²⁰⁵

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.²⁰⁶ 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.²⁰⁷

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),²⁰⁸ and Governor Pataki signed it into law on September 29, 1999.²⁰⁹ 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.

204. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(a), 15 U.S.C.A. § 7001(a) (West Supp. 2000).

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).

208. N.Y. STATE TECH. L. §§ 101-109 (Consol. 2000).

209. Mark Ustin & J. Kemp Hannon, *The New Electronic Signatures and Records Act*, N.Y. L.J., Oct. 26, 1999, at 5. In enacting ESRA, the New York legislature chose

attempt by the New York legislature to balance the differences found in electronic signature and record bills in other states.²¹⁰ The New York Legislature recognized that, in order to achieve this balance, the legislation needed to be broad in scope,²¹¹ enunciate clear standards,²¹² be flexible,²¹³ be reflective,²¹⁴ and protect individuals.²¹⁵

B. Preemption of ESRA

Since ESRA is not a uniform enactment of UETA, the E-Sign consistency test must be used.²¹⁶ 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.²¹⁷

not to use the UETA model in creating New York's electronic record and signature laws. *See generally* N.Y. STATE TECH. L. §§ 101-109.

210. Ustin & Hannon, *supra* note 209, at 5. There are three major goals of the Act: 1) to instill confidence in the public that electronic signatures and records will be given the same status as paper ones; 2) to create a legislative foundation for fair information technology regulation; and 3) to avoid unintended consequences from such legislation. *Id.*

211. *Id.* The legislation applies to both the public and private sectors as opposed to some state laws that only apply to government entities. *Id.* Of course with the passage of E-Sign, such limited scope statutes would be preempted for being inconsistent with the provisions of E-Sign. *See supra* notes 64-82 and accompanying text.

212. Ustin & Hannon, *supra* note 209, at 5. The ESRA seeks to avoid setting out too minimalist a statute that only authorizes electronic signatures and records with little guidance beyond that. *Id.* *See, e.g.,* N.Y. STATE TECH. L. § 102(2).

213. Ustin & Hannon, *supra* note 209, at 5. The statute attempts to be technology-neutral by not specifying particular technologies that can be used. *See generally* N.Y. STATE TECH. L. §§ 101-109. However, the definition of "electronic signature" appears to be implicitly exclusive of certain methods of electronic signatures that would be allowed by other electronic signature statutes. *Compare* Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 106(5), 15 U.S.C.A. § 7006(5) (West Supp. 2000), *with* N.Y. STATE TECH. L. § 102(2). Sections 103 and 104 of ESRA place authority in an "electronic facilitator," the Governor's Office for Technology, to regulate specific issues in relation to ESRA, allowing more responsiveness to external changes that would impact ESRA and its application. N.Y. STATE TECH. L. §§ 103-104; Ustin & Hannon, *supra* note 209, at 5. *See also infra* notes 231-241 and accompanying text.

214. Ustin & Hannon, *supra* note 209, at 5. ESRA requires the Governor's office for Technology to conduct two follow up reports to be given to the legislature and governor. *Id.*

215. *Id.* ESRA does not require individuals to use an electronic signature, unless otherwise required by law. N.Y. STATE TECH. L. § 109.

216. *See* E-Sign § 102(a)(2), 15 U.S.C.A. § 7002(a)(2).

217. Richard Raysman & Peter Brown, *The Impact of the New Federal E-Sign Act*

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.²¹⁸

This approach is a much higher standard than that promulgated by E-Sign.²¹⁹ 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.²²⁰ Whereas, “lowest-common-denominator”²²¹ approach taken by E-Sign leaves the worry over these concerns to the individuals and entities employing electronic records and signatures.²²² 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

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.*

224. N.Y. STATE TECH. L. §§ 105, 107-109. *See also* Raysman & Brown, *supra* note 217, at 6.

225. *See* Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(b)(1), 15 U.S.C.A. § 101(b)(1) (West Supp. 2000).

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.

227. E-Sign § 103, 15 U.S.C.A. § 7003; N.Y. STATE TECH. L. § 107.

228. Raysman & Brown, *supra* note 217, at 6.

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.²³⁰

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.²³¹ The ESRA authorizes the OFT to promulgate any rule necessary for its timely implementation.²³² In order to meet the goals set out by ESRA, the OFT enacted emergency rules²³³ to ensure that the implementation of ESRA would go as smoothly as possible.²³⁴

The emergency rules enacted by the OFT were designed to establish standards and procedures governing electronic signatures and records.²³⁵ The emergency rules fulfill this function by setting out definitions beyond those originally incorporated in ESRA.²³⁶ In addition to these definitions, the rules set out the standards for recognition of an electronic signature under ESRA.²³⁷ However,

supra notes 49-55 and accompanying text.

230. E-Sign § 102(a)(2)(A)(i), 15 U.S.C.A. § 7002(a)(2)(A)(i).

231. N.Y. STATE TECH. L. § 103; *see also supra* note 213 (defining "Electronic Facilitator").

232. Emergency Rule Making: Electronic Signatures and Records in New York State, 15 N.Y. St. Reg. 24, 24 (Office Tech. Mar. 2000) [hereinafter March Emergency Rule].

233. N.Y. COMP. CODES R. & REGS. tit. 9, § 540 (2000).

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.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, 2000²³⁹ have been readopted, as originally set forth, after the passage of E-Sign.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.²⁴¹

VII. THE FUTURE

Will E-Sign promote uniformity among the states?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.²⁴³ Since the passage of E-Sign, Delaware, Hawaii, Michigan, North Carolina, and Rhode Island have passed versions of UETA.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.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-

9, § 540.4, with N.Y. STATE TECH. L. § 102 (Consol. 2000).

238. See *supra* notes 216-230 and accompanying text.

239. March Emergency Rule, *supra* note 232, at 24.

240. See Emergency Rule Making: Electronic Signatures and Records in New York State, 42 N.Y. St. Reg. 19, 19 (Office Tech. Oct. 2000) [hereinafter October Emergency Rule]. The OFT readopted the emergency rules on October 3, 2000, several months after the passage of E-Sign. *Id.*

241. *Id.* at 21.

242. See 146 CONG. REC. S5223 (daily ed. June 15, 2000) (statement of Sen. Abraham).

243. See *supra* note 96. Ten states are considering UETA: Arkansas, Connecticut, Mississippi, Montana, New Jersey, New Mexico, North Dakota, Oregon, Texas, and Vermont. Kunze, *supra* note 96.

244. Baker & McKenzie, Global E-Commerce Law: Uniform Electronic Transactions Act (UETA) State-by-State Comparison Table, at <http://www.bmck.com/e-commerce/uetacomp.htm> (last modified Feb. 22, 2001).

245. S. 97 (Ca. 2001). See also *supra* notes 188-190 and accompanying text.

Sign is failing to promote uniformity.²⁴⁶ In fact, Michigan's version of UETA is almost identical to the NCCUSL's version of UETA;²⁴⁷ the version currently under consideration by the legislature in New Jersey is almost identical to the uniform version.²⁴⁸ In addition, many of the versions of UETA adopted or currently under consideration differ only slightly from the uniform UETA.²⁴⁹ 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.²⁵⁰

Throughout Congress' endeavors to achieve the goal of uniformity across the states, preservation of state sovereignty looms in the background.²⁵¹ Though contract law has traditionally been state law, the pressing need for a standard across the states resulted in action by the federal government.²⁵² Congress viewed allowing the states to adopt their own electronic signature and records acts, within certain restrictions, as an adequate protection of state sovereignty.²⁵³ Although the federal legislation has been

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).

251. *State Sovereignty in Question as Congress Moves on Federal E-Signature Legislation*, ELECTRONIC COM. NEWS, Jan. 10, 2000, 2000 WL 4447869.

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.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.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.²⁵⁶ While many jurisdictions have attempted to address this need, the results often vary from one state to the next.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.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.²⁵⁹ Congress enacted E-Sign as a gap filler in order to provide uniformity and certainty while UETA makes its way through the states.²⁶⁰ The federal law

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.

254. *See* 146 CONG. REC. S5224 (daily ed. June 15, 2000) (statement of Sen. Abraham); 146 CONG. REC. H4359 (daily ed. June 14, 2000) (statement of Rep. Moran).

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.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.²⁶²

There are several different effects the preemption provisions of E-Sign could have on state electronic record and signature laws.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.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.²⁶⁵ Until the uniformity E-Sign intended to create is actually reached, insecurity and confusion will likely frustrate the goals of electronic signature laws.²⁶⁶

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261. Electronic Signatures in Global and National Commerce Act of 2000 (E-Sign) § 101(a), 15 U.S.C.A. § 7001(a) (West Supp. 2000). *See also supra* notes 36-43, 72 and accompanying text.

262. *See supra* notes 99-241 and accompanying text.

263. *See supra* notes 64-82 and accompanying text.

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

265. *See supra* notes 99-241 and accompanying text.

266. *See id.*