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## COMMERCE AND TRADE

### ***Electronic Signatures and Records: Permit the Use of Electronic Signatures and Records Even When a Statute, Regulation, or Other Rule of Law Specifies a Non-Electronic Type of Signature or Record***

CODE SECTIONS:	O.C.G.A. §§ 10-12-2, -4 (amended)
BILL NUMBER:	SB 24
ACT NUMBER:	301
GEORGIA LAWS:	2001 Ga. Laws 983
SUMMARY:	The Act attempts to prevent the federal Electronic Signatures in Global and National Commerce Act (15 U.S.C.S. sections 7001, et seq., and 47 U.S.C.S. section 231) from preempting state law by expressing legislative findings and intent that previous Georgia digital signature legislation was consistent with federal law. Additionally, the Act allows all departments in the Georgia state government to use their best judgment in providing for the efficiencies that result from the use of electronic signature equivalents without having to affirmatively change thousands of specific references in the code to non-electronic signatures or records.
EFFECTIVE DATE:	July 1, 2001

#### *History*

On June 30, 2000, President Clinton signed into law the federal Electronic Signatures in Global and National Commerce Act,<sup>1</sup> with the stated purpose of facilitating “the use of electronic records and signatures in interstate or foreign commerce.”<sup>2</sup> Georgia had already demonstrated leadership in this area, spearheaded by David Rabin of Morris, Manning & Martin, LLP, who with others formed the Georgia

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1. Pub. L. No. 106-229, 114 Stat. 464 (2000) (codified in scattered sections of 15 U.S.C.).

2. *Id.*

Digital Signature Task Force and drafted a digital signature bill that was offered by Senator James Tysinger during the 1996 legislative session.<sup>3</sup> This bill was tabled, but a simpler bill, “the goal of which [was] to promote the use of electronic media by government and commerce,”<sup>4</sup> with the stated purpose of “[allowing] the use of electronic records and signatures when written records and signatures [had] previously been required,”<sup>5</sup> became law on April 22, 1997.

However, a troubling question remained for states across the nation which were grappling with the issue of evolving electronic transactions.<sup>6</sup> With the speed of technological innovation, how would one define an electronic signature in such a way as to promote innovation without requiring government to constantly reevaluate the evolving nature of electronic transactions?<sup>7</sup> Georgia continued to be a leader in this area. Richard Keck, of the Georgia Electronic Commerce Association and a lawyer at Troutman Sanders, LLP, proposed the astoundingly simple idea that an electronic signature was really no different than any other signature—really nothing more than an “electronic” mark with intended legal consequences.<sup>8</sup>

Acting on these ideas in 1999, Senators Robert Lamutt of the 21st District, Michael Polak of the 42nd District, and others introduced and passed SB 62 into law—“revolutioniz[ing] the way that people defined digital transactions.”<sup>9</sup> “The next year the federal government adopted our format and definitions in the federal Electronic Signatures in Global and National Commerce Act [E-Sign].<sup>10</sup> With this piece of the puzzle in place, Senators Lamutt and Polak turned their attention to some “apprehension that many [state] department heads [had] about the new capabilities made available to them via SB 62.”<sup>11</sup> SB 24 was intended to address these issues.

SB 24, sponsored by Senators Robert Lamutt of the 21st District, Michael Polak of the 42nd District, and others, was a modified version of proposed amendments drafted by Richard Keck and Charles Pellissier of the Georgia Electronic Commerce Association and Troutman

3. See *Review of Selected 1997 Georgia Legislation*, 14 GA. ST. U. L. REV. 25, 25-26 (1997).

4. *Id.* at 25.

5. *Id.*

6. Letter from Senator Robert Lamutt, to Kelli Dutrow, Editor-in-Chief, *Georgia State University Law Review* 1 (Oct. 11, 2001) (on file with the *Georgia State University Law Review*).

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.* at 1-2.

11. *Id.* at 2.

Sanders, LLP, and Winchel “Todd” Vincent, of Georgia State University.<sup>12</sup> The bill addressed two concerns. First, “there [had] been some question of the reliability of [the] previous e-signature legislation being used to supersede existing code with electronic equivalents.”<sup>13</sup> “[SB] 24 was introduced to comply with the federal requirement that all states adopt the national e-signature standard, and to allow all departments in the state government to use their best judgment in providing for the efficiencies that will come from the use of e-signatures.”<sup>14</sup> Section 2 of the bill “allows for government to use those equivalents without changing the thousands of references to specific code.”<sup>15</sup> Second, section 1 of the bill was a response “to the preemption provision of the federal E-Sign Act.”<sup>16</sup> “Section one presumably attempts to prevent E-Sign from preempting the state law by declaring that the state law is consistent with E-Sign.”<sup>17</sup> As Senator Lamutt explained, “since the national legislation was based upon our previous Georgia digital signature legislation, we wanted to reiterate that Georgia’s existing Code is consistent with the Federal Code.”<sup>18</sup>

## *SB 24*

### *Introduction*

Senators Robert Lamutt of the 21st District, Michael Polak of the 42nd District, Don Thomas of the 54th District, Sonny Perdue of the 18th District, and Jeff Mullis of the 53rd District sponsored SB 24.<sup>19</sup> After introduction on the Senate floor on January 11, 2001,<sup>20</sup> the Senate President assigned the bill to the Senate Defense, Science, and Technology Committee, which favorably reported the bill, as substituted.<sup>21</sup> The Senate adopted the Committee substitute and passed

12. See E-CT-Filing Project, *Electronic Records & Signatures*, at <http://gsulaw.gsu.edu/gsuccp> (last visited Apr. 22, 2001).

13. Electronic Mail Interview with Sen. Robert Lamutt, Senate District No. 21 (Apr. 6, 2001) [hereinafter Lamutt Interview].

14. *Id.*

15. *Id.*

16. Electronic Mail Interview with Mark Budnitz, Professor of Law, Georgia State University (Apr. 4, 2001) [hereinafter Budnitz Interview].

17. *Id.*

18. Lamutt Interview, *supra* note 14.

19. See SB 24, as introduced, 2001 Ga. Gen. Assem.

20. See Audio Recording of Senate Proceedings, Jan. 11, 2001, at <http://www.state.ga.us/services/leg/audio/2001archive.html> [hereinafter Senate Audio]; State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

21. See State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

the bill unanimously on January 26, 2001.<sup>22</sup> The bill was introduced on the House floor on January 29, 2001,<sup>23</sup> and the House assigned the bill to its Judiciary Committee, which offered its own substitute and favorably reported the bill on February 15, 2001.<sup>24</sup> The House adopted the Judiciary Committee substitute and passed the bill unanimously on March 8, 2001.<sup>25</sup> The bill returned to the Senate on March 13, 2001, and the Senate voted unanimously to agree to the House version.<sup>26</sup> The General Assembly forwarded the bill to Governor Roy Barnes on April 6, 2001.<sup>27</sup> The Governor signed the bill into law on April 27, 2001.<sup>28</sup>

*Consideration by the Senate Defense, Science, and Technology Committee*

Following introduction, the Senate assigned the bill to its Defense, Science, and Technology Committee.<sup>29</sup> The Committee favorably reported the bill, as substituted, on January 24, 2001.<sup>30</sup> As introduced, the bill would only have addressed the concern over “reliability of [the] previous e-signature being used to supersede existing code with electronic equivalents”<sup>31</sup> by amending Code section 10-12-4, adding a new subsection (k) that provided for the use of electronic records and electronic signatures in circumstances “otherwise governed by such statute, regulation, or other rule of law, unless such statute, regulation, or other rule of law expressly refers to and limits the application of [the] chapter.”<sup>32</sup> The Defense, Science and Technology Committee substitute placed the amendment to Code section 10-12-4 in section 2 of the bill and added a new section 1 which amended Code section 10-12-2,

22. See Georgia Senate Voting Record, SB 24 (Jan. 26, 2001); State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

23. See Audio Recording of House Proceedings, Jan. 29, 2001, at <http://www.state.ga.us/services/leg/audio/2001archive.html> [hereinafter House Audio]; State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

24. See State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

25. See Georgia House of Representatives Voting Record, SB 24 (Mar. 8, 2001); State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

26. See Georgia Senate Voting Record, SB 24 (Mar. 13, 2001); State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

27. See State of Georgia Final Composite Status Sheet, SB 24 Mar. 21, 2001.

28. See 2001 Ga. Laws 983, § 3, at 984.

29. See State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

30. See *id.*

31. See Lamutt Interview, *supra* note 14.

32. SB 24, as introduced, 2001 Ga. Gen. Assem.

adding a new subsection (b), reaffirming the General Assembly's intent "that the provisions of this chapter not be preempted by the federal Electronic Signatures in Global and National Commerce Act, P. L. No. 106-229, 114 Stat. 464 (2000), in accordance with the exemption to preemption provided by paragraph (2) of subsection (a) of section 102 of said federal act."<sup>33</sup>

### *Senate Passage*

The Senate adopted the committee substitute and unanimously passed SB 24 on January 26, 2001.<sup>34</sup>

### *Consideration by the House Judiciary Committee*

The House Judiciary Committee fine-tuned the anti-preemption language in section one of the Senate committee's substitute, reaffirming the General Assembly's findings that the chapter is "consistent with the Electronic Signatures in Global and National Commerce Act (15 U.S.C.S. sections 7001, et seq., and 47 U.S.C.S. section 231) as contemplated in section 7002 (a)(2)(A) thereof and therefore continues to have the full force of law"<sup>35</sup> as well as reaffirming the General Assembly's intent "that this chapter continue to have the full force of law."<sup>36</sup> The referenced federal preemption provisions require that "such alternative procedures or requirements are consistent" with the Title<sup>37</sup> and that

such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures.<sup>38</sup>

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33. SB 24 (SCS), 2001 Ga. Gen. Assem. *Compare* SB 24, as introduced, 2001 Ga. Gen. Assem., *with* SB 24 (SCS), 2001 Ga. Gen. Assem.

34. *See* Georgia Senate Voting Record, SB 24 (Jan. 26, 2001); State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

35. SB 24 (HCS), 2001 Ga. Gen. Assem. *Compare* SB 24 (SCS), 2001 Ga. Gen. Assem., *with* SB 24 (HCS), 2001 Ga. Gen. Assem.

36. SB 24 (HCS), 2001 Ga. Gen. Assem. *Compare* SB 24 (SCS), 2001 Ga. Gen. Assem., *with* SB 24 (HCS), 2001 Ga. Gen. Assem.

37. Electronic Signatures in Global and National Commerce Act, Pub. L. No. 106-229, 114 Stat. 464, § 102 (a)(2)(A)(i) (2000) (codified in scattered sections of 15 U.S.C.).

38. *Id.* § 102 (a)(2)(A)(ii).

There remain very real questions regarding whether a mere declaration that the law is consistent is enough to prevent preemption.<sup>39</sup> Nevertheless, the Committee favorably reported the bill as substituted.<sup>40</sup>

### *House Passage*

The House adopted the Committee substitute and unanimously passed SB 24 on March 8, 2001.<sup>41</sup> Shortly thereafter, the Senate voted unanimously to agree to the House substitute<sup>42</sup> and the bill was forwarded to Governor Roy Barnes on April 6, 2001.<sup>43</sup> The Governor signed the bill into law on April 27, 2001.<sup>44</sup>

### *The Act*

The Act amends Code section 10-12-2, relating to construction, by “designating the existing provisions thereof as subsection (a) and adding a new subsection (b)”<sup>45</sup> that “finds that this chapter is consistent with the Electronic Signatures in Global and National Commerce Act (15 U.S.C.S. Sections 7001, et seq., and 47 U.S.C.S. Section 231) as contemplated in Section 7002 (a)(2)(A),”<sup>46</sup> and reaffirms the General Assembly’s intent that this Code chapter “continues to have the full force of law.”<sup>47</sup> The Act also amends Code section 10-12-4 by adding a new subsection (k)<sup>48</sup> that addresses the “reliability of [the] previous e-signature legislation being used to supersede existing code with electronic equivalents,”<sup>49</sup> by requiring that statutes which specify a particular type of record or signature other than an electronic record or

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39. See Budnitz Interview, *supra* note 17.

40. See State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

41. See Georgia House of Representatives Voting Record, SB 24 (Mar. 8, 2001); State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

42. See Georgia Senate Voting Record, SB 24 (Mar. 13, 2001); State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

43. See State of Georgia Final Composite Status Sheet, SB 24, Mar. 21, 2001.

44. See 2001 Ga. Laws 983, § 3, at 984.

45. *Id.*

46. O.C.G.A. § 10-12-2(a)-(b) (Supp. 2001). Compare 1997 Ga. Laws 1052, § 1, at 1052 (formerly found at O.C.G.A. § 10-12-2(a) (Supp. 2000)), with O.C.G.A. § 10-12-2(a-b) (Supp. 2001).

47. O.C.G.A. § 10-12-2(a)-(b) (Supp. 2001). Compare 1997 Ga. Laws 1052, § 1, at 1052 (formerly found at O.C.G.A. § 10-12-2(a) (Supp. 2000)), with O.C.G.A. § 10-12-2(a-b) (Supp. 2001).

48. See 2001 Ga. Laws 983, § 2, at 983.

49. Lamutt Interview, *supra* note 14.

signature specifically reference the amended chapter and expressly limit its application,<sup>50</sup> an action which essentially repeals thousands of Code sections without the need for explicit reference.

*Gregory Todd Jones*<sup>51</sup>

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50. Compare 1999 Ga. Laws 323, § 1, at 323 (formerly found at O.C.G.A. § 10-12-4(a)-(j) (Supp. 2000)), with O.C.G.A. § 10-12-2(a)-(k) (Supp. 2001).

51. The author would like to offer particular appreciation to Professor Mark Budnitz and Richard Keck who significantly shaped his understanding of this new law. The author also expresses gratitude to Senators Robert Lamutt and Michael Polak for taking the time to discuss the nature of their bill.