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Electronic-signatures are commonly used in real estate transactions, but what are the implications

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Electronic signatures are commonly used in real estate transactions, but what precisely constitutes an “electronic signature” and what are the implications of using one in a transaction?

Electronic Signatures under UETA and ESIGN

Congress passed the Electronic Signatures in Global and National Commerce Act, known as ESIGN, in 2000 to not only permit, but also to “promote electronic commerce by providing a consistent national framework for electronic signatures and transactions.” ESIGN encouraged the adoption of The Uniform Electronic Transactions Act (UETA) by U.S. states and the District of Columbia. Currently 49 jurisdictions have adopted some form of UETA with the exception of New York, Washington, and Illinois.

Under UETA and ESIGN, the term “electronic signature” is broad and technologically neutral. “Electronic signature” is defined under both acts as “an electronic sound, symbol, or process attached to or logically associated with a

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record and executed or adopted by a person with the intent to sign the record.” Interpreted examples of electronic signatures have ranged from a traditional ink signature transmitted by facsimile to providing unique biometric identifiers, such as a fingerprint, voice print, or even retinal scan.

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Application to Real Estate Transactions

Electronic signatures provide several benefits to transactional

attorneys and their clients: convenience, speed, and reduced costs. Instead of overnight delivery of paper signatures, practitioners may fax or e-mail counterparty signatures to close a deal. As UETA makes clear, there are no unique characteristics to contracts relating to real estate that affect the enforceability of electronic signatures. Accordingly, it is in the discretion of the parties to a real estate transaction to choose the extent to which electronic signatures are binding. The enforceability of electronic signatures under UETA is merely a default which the parties may opt out of, if they choose, in favor of paper signatures.

For deeds, mortgages and certain other real estate documents to be effective against third parties, state law generally requires recording with a governmental office. Government recording systems typically require paper instruments to include notarized, manual signatures. Although some states are experimenting with electronic filing systems, until such systems

become widespread, parties should use a paper instrument and manual signature for recording purposes.

Implications

Although electronic signatures are sufficient for the creation of legally valid and binding records and contracts, attributing an electronic signature to a specific party is left open to other law and factual circumstances. For example, in the litigation context, if the authenticity of an electronic signature is in dispute, the party seeking to enforce the signature will be required to prove that the signature was signed by the party against whom enforcement is sought. Therefore, while ESIGN and UETA made electronic signatures the functional equivalent of handwritten signatures, electronic signatures are arguably more vulnerable to misappropriation, as compared to notarized signatures. Parties accepting and relying on electronic signatures need to be satisfied that those signatures are sufficiently verifiable. Use of digital authentication methods, such as passwords, PINs, and even voice capturing, which are all offered by e-commerce providers, can increase one’s confidence that the principal on the other side of the transaction did, in fact, execute the contract.

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