

Where's The E-Sign? A Primer On Electronic Signature Laws

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During last few years, approximately 23 states passed seemingly favorable, pro e-commerce insurance laws, primarily at the behest of the personal lines property and casualty insurance industry, namely new state insurance code statutes that allow an insurer to deliver an insurance policy to a policyholder simply by posting an electronic version of the policy's content on the insurer's website as well as delivery by email (insurance code policy e-delivery laws).[1] While these new laws seek to establish further improvement toward moving away from paper-based insurance company operations, and the anachronistic clinging to paper for an intangible product or service, adoption of many of these new laws may not have fully considered the impact of, or their relationship to, existing federal and state-based electronic signature and transaction laws which provide the foundation for electronic delivery of documents required to be provided in writing, such as insurance policies. Essentially, some of these new laws by and large bypassed the fundamental electronic signature and transaction laws, raising questions about the effects of their interplay with the insurance code policy e-delivery laws.



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Electronic Signatures and Transactions Laws Backdrop

In 2000, Congress adopted the federal Electronic Signatures in Global and National Commerce Act (ESIGN).[2] ESIGN is somewhat of a misnomer as besides providing that an electronic signature cannot be denied effect solely on its electronic nature, ESIGN also permits an electronically delivered "record" to satisfy the requirement under another law that a document be delivered in writing, regardless of whether the document requires a signature.[3] ESIGN expressly provides that it applies to the business of insurance.[4] The use of an electronic signature on, and electronic delivery of, a contract cannot be foisted on a customer as this means of transacting business is voluntary and must be agreed upon between the parties transacting business.[5] ESIGN also allows records, including originals of records, required to be retained under another law to be retained in electronic form.[6] So, ESIGN actually authorizes three electronic concepts: (1) e-signatures, (2) e-delivery and (3) e-record retention.



ESIGN also provides for its reverse preemption by state-based law.[7] Specifically, the Uniform Electronic

Transaction Act (UETA)[8], a state electronic signature and transaction law promulgated by National Conference of Commissioners on Uniform State Laws in 1999, if not materially altered when adopted by a state, supersedes ESIGN. Since 2000, 47 states (and the District of Columbia) have adopted UETA, which also embraces e-signatures, e-delivery and e-record retention very similarly to ESIGN, and thus, UETA is the prevailing law governing these matters. While not expressly stating so, UETA also applies to the insurance business.

All state insurance codes require an insurer to deliver in written form insurance policies it issues to policyholders, and in order for an insurer to rely upon the representations made by an applicant in an insurance application and for it to become part of the insurance contract, a copy of the insurance application must be attached to the insurance policy delivered to the policyholder. So, under UETA, with the consent of a purchaser of insurance an insurer is permitted to deliver an insurance policy to the purchaser in electronic form. The term “electronic” is broadly defined as “relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities,”[9] and thus includes the posting of a record on a website and delivery of an electronic version of an insurance policy by email.

Policy Website Delivery Laws

The insurance code policy e-delivery laws are relatively straightforward. The vast majority of these laws apply only to personal lines property and casualty insurance (e.g., auto and homeowner’s insurance), but a few of them also apply to commercial property and casualty insurance and life insurance. Generally, they authorize an insurer to satisfy the insurer’s requirement to deliver a written insurance policy to the policyholder in one of three ways:

1. with prior consent of the insurance purchaser, by email as an attachment sent to an email address provided by the purchaser to the insurer (email attachment delivery);
2. with prior consent of the insurance purchaser, email sent to an email address provided by the purchaser to the insurer with a hyperlink contained in the email to a secure website of the insurer (email hyperlink to secure website delivery); and
3. by posting the form of the policy and its endorsements on the insurer’s website but without any personally identifying information about the policyholder; provided that the insurer delivers to the policyholder a written declarations page for the policy via the normal means by which the insurer communicates with the policyholder, which practically means by mailing a paper form of the declarations page to the policyholder (website delivery). However, the electronically posted policy form must remain easily accessible by the policyholder on the insurer’s website during the term of the policy, and the policyholder must be able to print and save the electronically posted policy form using computer applications which are widely available on the internet and usable at no cost, as well as obtain from the insurer a paper copy of the policy at no cost to the policyholder. Also, the insurer must archive all expired insurance policies and endorsements posted on its website and make them available to policyholders upon their request for at least five years after expiration.

Relationship between Insurance Code Policy E-Delivery Laws and UETA/ESIGN

The email attachment delivery and email hyperlink to secure website delivery methods do not present any compatibility issues with UETA or, where applicable, ESIGN. Indeed, these two methods of electronically delivering an insurance policy can be, and have been, used under UETA and ESIGN without

resort to the insurance code policy e-delivery laws. However, for the insurance code policy e-delivery laws to avoid being preempted by ESIGN, they must comport with ESIGN's limited ability afforded to states for their adoption of e-delivery laws that deviate from UETA. Furthermore, the viability of the website delivery method under ESIGN raises a number of questions, particularly where an insurance purchaser's prior consent to receiving policy delivery by website posting is not required.

ESIGN permits a state to modify, limit or supersede the provisions of ESIGN only if a state statute, regulation or rule of law (1) constitutes an enactment UETA Act, except that any exception to the scope of a state's enactment of UETA is preempted to the extent such exception is inconsistent with ESIGN or (2) specifies alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity or enforceability of contracts, if such alternative procedures or requirements are (a) consistent with ESIGN, (b) do not require, or accord greater legal status or effect to, the use of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating or authenticating electronic records or electronic signatures and, (c) if enacted after ESIGN, makes specific reference to ESIGN (ESIGN's state alternative procedures authorization).[10]

A number of these insurance code policy e-delivery laws expressly state that they are not to be construed to limit the applicability of the state's enactment of UETA.[11] Further, given the broad preemption provisions of ESIGN and its applicability to the business of insurance, even in the absence of such an express reference to UETA in a state's insurance code policy e-delivery law, to the extent a state's insurance code policy e-delivery law is considered to modify, limit or supersede ESIGN, then that insurance code policy e-delivery law is likely to be preempted.[12] However, one way for such insurance code policy e-delivery laws to survive any preemption from ESIGN is to view them as being supplemental to the state's enactment of UETA, or otherwise akin to a safe harbor provision which does not upset the UETA apple cart. The implication is that an insurer which has an e-delivery process compliant with UETA, which is otherwise not preempted by ESIGN in any respect, can point to the state's enactment of UETA as authority for that e-delivery process, even if that process does not also comply fully with the state's insurance code policy e-delivery law. Alternatively, an insurer can follow an e-delivery process consistent with the insurance code policy e-delivery laws and point to those laws, rather than the applicable enactments of UETA, as authority for the permissibility of its e-delivery process.

Insurance Code Policy E-Delivery Laws References to ESIGN and UETA

As stated above, the insurance code policy e-delivery laws must expressly reference ESIGN to pass muster under ESIGN's state alternative procedures authorization. Unfortunately, the insurance code policy e-delivery laws are not consistent in their references to ESIGN. Some insurance code policy e-delivery laws properly reference ESIGN[13], others reference both ESIGN and UETA but also provide that if there is a conflict between the state's enactment of UETA and insurance code policy e-delivery law, the latter controls[14], and finally some insurance code policy e-delivery laws only reference their respective enactments of UETA but not ESIGN, or neither UETA nor ESIGN[15]. In the latter case, ESIGN may preempt these insurance code policy e-delivery laws; but, if the state has enacted UETA, UETA still applies and enables insurers to use the mail attachment delivery and email hyperlink to secure website delivery methods. However, the website delivery method has its own separate set of issues as discussed below.

Website Delivery Concerns

Non-consensual process: The primary issue with the website delivery method authorized by the

insurance code policy delivery laws is the fact that they do not require the prior consent of an insurance purchaser and an insurer can unilaterally choose to deliver an insurance policy by website delivery, even if an insurance purchaser does not have access to the insurer's website. One of the hallmark tenants of both UETA and ESIGN is that engagement in an electronic transaction is a consensual matter between both the transacting parties (insurer and insurance purchaser here). On the other hand, states are permitted to relax their laws as to when a document is required to be provided in writing. These website delivery laws appear to be exactly that: laws eliminating the requirement for certain documents to be provided in writing in narrowly defined circumstances. Viewed in the light, the website delivery method does not run afoul of either UETA or ESIGN by allowing an insurer to deliver an insurance policy via the insurer's website without obtaining a policyholder's consent to receive delivery in that manner. Stated another way, arguably the website delivery method is not, in and of itself, an electronic delivery method within the meaning of UETA or ESIGN and is simply its own method, combined paper declarations page and specimen form e-posting, of delivering an insurance policy.

Effects of paper-based declarations page: The website delivery method appears to contemplate that policyholders will receive a paper declarations page in addition to the website-posted electronic specimen insurance policy form since the assumption in passing the insurance code policy delivery laws likely was that the then normal means by which the insurer communicates with the policyholder was through postal service mailed paper; although if the normal means by which the insurer communicates with the policyholder is electronic, an insurer should be able to deliver a declarations page electronically (or course, with the requisite consent from the purchaser as required by ESIGN and UETA) when using the website delivery method (e-delivery of a declarations page is already permissible under UETA and ESIGN anyway). Normally, an insurance declaration page forms part of the insurance contract (similar to an insurance application that is attached to an insurance policy). However, the website delivery of an insurance policy appears to result in a hybrid form of an insurance policy where it is comprised in substantial part of an electronic form, the specimen insurance policy form posted on the insurer's website, and in part in paper form, the paper declarations mailed to the policyholder or perhaps delivered personally by the writing insurance agent to the policyholder. In these narrowly defined circumstances, the applicable insurance codes, in effect, are permitting a writing (the paper declarations page provided to the policyholder) to incorporate by reference an electronic record (the specimen policy posted on the insurer's website). Furthermore, it is unclear exactly when an insurance policy is deemed to have been delivered to the policyholder by the insurer under the website delivery method; which could be when the policyholder receives the paper declarations page, assuming the electronic specimen insurance policy form is posted on the insurer's website before the policyholder's receipt of the paper declarations page. On the other hand, if the electronic specimen insurance policy form is posted on the insurer's website after the policyholder's receipt of the paper declarations page, then perhaps the policy is deemed to have been delivered to the policyholder when the insurer posts the electronic specimen insurance policy form on its website. In either case, the website delivery method does not require that a policyholder actually visit an insurer's website and view the electronic specimen insurance policy form is posted thereon, which could render inapplicable the basic contract rule that a party to a contract is deemed to have read the contract into which the party has entered.

Insurance Code Policy E-Delivery Laws Nuggets

Notwithstanding the concerns regarding the website delivery method, some of the insurance code delivery laws also contain some favorable provisions for insurers. A few of the insurance code delivery laws authorize insurers to provide premium discounts to policyholders that receive e-delivery of the insurance policies.[16] The ability to provide such discounts to e-commerce friendly customers has long been a concern to insurers that such discounts would violate the anti-discrimination provisions found in

state insurance code's unfair trade practices acts, which prohibit (unfair) discrimination in the pricing of insurance premiums to insureds within the same risk classification. In addition, some of the insurance code delivery laws provide that e-delivery of an insurance policy thereunder satisfies a requirement under an insurance code or regulation that an insurance policy be delivered by a specified means of postal mail, such as first class or certified postal mail.[17]

In conclusion, while the insurance code policy e-delivery laws are no doubt well intentioned, they raise some regulatory compliance and enforceability questions for insurers that deliver insurance policies using the website delivery method. The property and casualty insurance industry should carefully evaluate making changes to these laws to eliminate such questions, and the commercial property and casualty and life and health segments of the insurance industry should consider expanding these laws to include their insurance products.

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[1] See e.g., C.R.S. § 10-1-137 12; Fla. Stat. § 627.421; O.C.G.A. § 33-24-14; K.S.A. § 40-5804; and 36 Okl. St. § 712.

[2] Pub.L. 106–229, 114 Stat. 464, enacted June 30, 2000, codified at 15 U.S.C. ch. 96.

[3] 15.U.S.C. § 7001(a)(1) and (c).

[4] 15.U.S.C. § 7001(i).

[5] 15.U.S.C. § 7001(b)(2).

[6] 15.U.S.C. § 7001(d).

[7] 15.U.S.C. § 7002(a).

[8] Uniform Electronic Transactions Act (1999), Unif. Law Comm'n.

[9] Uniform Electronic Transactions Act 2(5)(1999), Unif. Law Comm'n.

[10] 15.U.S.C. § 7002(a)(2).

[11] See e.g., O.C.G.A. § 33-24-14(c).

[12] 15.U.S.C. § 7002(a).

[13] See e.g., C.R.S. § 10-1-137 12(a); K.S.A. § 40-5804(m); Minn. Stat. 60A.139 Subd. 12. and Va. Code Ann. § 38.2-325 A.

[14] See e.g., C.R.S. § 10-1-137 12(b).

[15] See e.g., A.R.S. § 20-240; Fla. Stat. § 627.421; R.S. Mo. §§ 379.011 and 379.012.

[16] See e.g., 215 Ill. § 5/143.33 and Mo. § 379.011.

[17] See e.g. K.S.A. § 40-5804(b); Minn. Stat. 60A.139 Subd. 3.