



# Allen Financial Insurance Group

## **Is an “E-Signature” Legally Enforceable?**

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In today's fast-paced environment, either as a businessperson or a consumer, decisions are made with the aid of email and the fax machine instantaneously. Must business be slowed in order to wait for the original signed contract, agreement, or instrument which is needed to close a loan or contract for services or products? In an ever-increasing majority of cases, the answer today is “no.”

In June of 2000, Congress passed the Electronic Signatures in Global and National Commerce Act (“E-SIGN”) to facilitate the purchase of goods and services over the Internet between consumers and sellers. The Act does exclude certain transactions already governed by other specialized areas of the law. These include wills, family law, adoption, divorce, court proceedings, product recalls, health plan and utility cancellation or termination, residential eviction notices, and required documents for the transport or handling of hazardous, toxic, or dangerous materials. However, the Act also provides that there is no requirement for the use of e-signatures except by government agencies.

The Act defines an “electronic signature” as “an electronic sound, symbol, or process attached to, or associated with, a contract or other record and adopted by a person with the intent to sign a record.”

## **What is the Difference between an Electronic Signature and a Digital Signature?**

Whereas an electronic or e-signature embodies everything defined above that one would normally intend just as he or she would when signing their name to a paper document using a pen, the e-signature also contains a separate component not found in the manual signature: the digital signature . Because documents transmitted over the Internet containing personal information and the authority one’s “signature” grants those receiving it, it is advisable for those entering into such transactions to encrypt their signature with special software. This encryption tool is what is known as the digital signature, and serves to secure and verify the authenticity of the data or signed record. While these terms are commonly used interchangeably, they mean different things. While there should always be a digital signature present in the e-signature, a digital signature alone does not embody the intent to enter into an agreement, and cannot legally bind the signee.

## **Electronic Signatures are Legally Binding for Most Transactions.**

For the majority of transactions, E-SIGN dispenses with the formalities requiring a hand-written signature. E-SIGN permits you and a seller of products or services to agree to substitute a faxed signature, a mouse-click on the box marked “I accept,” or even acceptance over the phone for your hand-written signature, thus binding you both legally to the agreement between you. Under the Act all of these forms of consent are “electronic signatures” and satisfy any federal or state laws requiring a hand-written signature or paper record. So long as a court will read such forms of assent as an intent to be bound (which it usually will), the agreement will be binding. Savvy consumers will recognize that by agreeing to such terms it will be wise from that point forward to check their email often for any notices that may arrive only by email rather than by snail mail.

The Act in essence authorizes any transaction constituting business or commercial conduct with or among consumers. With the exceptions noted above, the Act applies to virtually any transaction involving the sale, leasing, licensing, exchanging or other distribution of both real property and personal property. Even real estate agreements can and often do contain language holding the agreement to be enforceable either by an “original or faxed signature.” Moreover, E-SIGN covers transactions affecting commerce between states or between the U.S. and foreign nations, thereby dispensing with inconsistent laws from state to state on the issue and providing for uniformity of enforcement.

Traditional contract law has made certain kinds of contracts unenforceable without a writing that is personally signed by the party against whom a claim on the contract has been brought. This is known as the “Statute of Frauds,” and it was created to protect innocent people from being victimized by others falsely claiming they had an oral agreement when in fact they had nothing. The E-Signature Act allows you to “contract around” the Statute of Frauds without a personally-signed writing, but this also means you cannot claim later that you didn’t sign.

So if it becomes necessary for a party to enforce its rights will a facsimile signature be enforced by the courts? In about 30 states this question has been answered by the adoption of legislation allowing the introduction into evidence of a facsimile or electronic signature for disputes involving transactions concluded in the ordinary course of business, whether there is an original signature or not.

### **Illinois Adopts E-Signature Law**

Illinois has adopted such an act, the Electronic Commerce Security Act, 5 ILCS 175/1 et seq (the “Act”), which became law in 1998. The purpose of the Act is, among other things, “[t]o facilitate and promote electronic commerce, by eliminating barriers resulting from uncertainties over writing and signature requirements.” Modeled on E-SIGN, it presumably covers all the forms of electronic signatures covered under the federal law, including faxed signatures. Nevertheless, the lack of case law in Illinois in the 15 years since the Act’s passage suggests it is wise for parties to express in writing the parties’ intent that facsimile signatures shall be deemed to be of the same force and effect as an original executed document. Lacking any conflicting statutory or case law on the issue, the parties’ agreement in a contract should buttress the enforceability of a facsimile signature. Illinois is one of only three states that have not passed the state acts known as the Uniform Electronic Transaction Act (UETA), which are similar to the Illinois law but not identical to it.

The federal rules of evidence will allow the introduction of facsimile signatures in cases where the federal courts have jurisdiction. Moreover, because the E-Signature Act covers commerce between states, its enforceability should override differences between state laws and statutes. But other legal questions remain unsettled. For instance, if a document is signed in a state which has adopted the UETA and the document is faxed to Illinois where the UETA is not in force but the Illinois Electronic Commerce Security Act is, what will the effect be upon enforceability? The question will likely be settled by a decision as to whether the entire contract or transaction is governed by Illinois law.

### **Enforceability of Mandatory Arbitration and Waiver Clauses in an Online Agreement**

A landmark United States Supreme Court case in 2010, *AT&T Mobility LLC v. Concepción*, has initiated a sweeping and powerful shift in the landscape of consumer service adhesion contracts (the sort of voluminous

contracts nobody bothers to read). In dozens of cases following *Concepción*, mandatory arbitration clauses waiving the right to a jury trial and class action have been upheld in everything from cell phone service to auto sales and even employment agreements. The public policies of virtually all states overwhelmingly favor arbitration as an efficient and expeditious form of dispute resolution.

In *Concepción*, AT&T charged tens of thousands of customers over \$30.00 in sales tax on phones it advertised as free. The class action was dismissed because the High Court held that the mandatory arbitration clause waiving the plaintiffs' right to a jury trial and to class action was enforceable. Since *Concepción*, employment contracts with mandatory arbitration clauses waiving rights to a jury trial and class action have been found fully enforceable to deny claimants their benefits and lost wages based on deceptive or inaccurate terms involving employment in nightclubs, department stores, and bus companies.

In 2012, the New York Southern District Court enforced Facebook's "Clickwrap" agreement for terms of use against a user whose account the social media service disabled, allegedly without justification and for discriminatory purposes, holding that by clicking his mouse at "accept" he agreed to all terms of use. This is but a baby-step away from arguing mandatory arbitration is a "clickwrap" agreement as well. It is likely if not probable that given current trends, corporate entities and service providers such as those mentioned above will add or may have already added such mandatory arbitration clauses and waivers to their online agreements. It is incumbent upon consumers and small business owners to carefully examine the agreements they are entering into for such clauses before clicking "yes."

Form contracts and purchase orders should be reviewed for the appropriate language and an evaluation of whether the contract would be controlled by Illinois or another state's law. In addition, to protect yourself when entering into such contracts, you or your firm should install software that will "time stamp" the dates on which electronic documents are generated in the system and are transmitted to others. Depending on the nature of the transaction, for example, the date and time a document was first sent or generated on the system may have as much or more legal force than the date and time of receipt by the other party. In ensuring that e-signed documents are enforceable in harmony with the desires of the parties, you will want to make sure that you are confident in the reliability of the electronic means being used to ship or transfer monies or services over the Web in terms of their legal force.