

# **E-Signature, E-Contract, and Remote Notarization: Regulatory Developments and Recent Enforceability Decisions**

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Today's faculty features:

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# E-SIGNATURE, E-CONTRACT, AND REMOTE NOTARIZATION: REGULATORY DEVELOPMENTS



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**August 4, 2022**  
1:00 PM – 2:30 PM



# ABOUT THE SPEAKERS



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Robert S. Cohen is a partner of the firm where he Co-Chairs the firm's Litigation practice group, serves as Chair of its Equipment Leasing and Transportation Finance group and is a member of its Covid Litigation Task Force group. With over 30 years of experience in all facets of the equipment leasing and asset based lending industries, Bob devotes his practice to commercial litigation, creditors' rights, corporate transactions, bankruptcy and cybersecurity related matters. He has particular experience in the documentation of financial transactions, electronic signatures, enforcement of equipment leases and secured loans, as well as the negotiation of workouts and resolutions. He earned his J.D. from Hofstra University School of Law.

# ELECTRONIC SIGNATURES

**e-Signature refers to many things but conceptually it refers to:**

How documents are electronically:

- Signed
- Stored
- Managed

# ELECTRONIC DOCUMENTS ARE ENFORCEABLE

- **Electronic Signatures in Global and National Commerce Act (E-SIGN)**
  - Electronic signatures used in transactions that are in or affecting interstate or foreign commerce cannot be denied validity solely because an electronic signature was used.
  - Defines electronic signature as "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." E-SIGN § 106.
  - Excludes certain transactions including: estate planning, laws governing family matters and most UCC transactions. E-SIGN § 7003. Applicable to UCC Articles 2, 2A , Article 3 (loans secured by real property). E-SIGN § 7021.
  - UCC provides explicit authority for the enforceability of electronic signatures for Article 5, Article 8 and Article 9 transactions.

# ELECTRONIC DOCUMENTS ARE ENFORCEABLE

- Uniform Electronic Transactions Act (UETA)
  - 48 states have adopted the UETA (Illinois and New York have not).
  - Declares that electronic signatures have the same legal effect as traditional written signatures for certain transactions.
  - Defines electronic signature as "an electronic sound, symbol, or process that is both attached to or logically associated with a contract and executed or adopted with the intent to sign the record."
  - Only applies to transactions where each party has agreed to conduct the transaction electronically. Courts consider the totality of the circumstances and the parties' conduct.
  - Silent as to provisions necessary to ensure the integrity and/or authenticity of electronic records.

# ENFORCEABILITY

## **Electronic Documents are Open to the Same Challenges and Risks as Paper Contracts:**

- Was the document signed?
- Who signed the document?
- Which document was signed?

# ADOPTION

## Benefits:

- Efficiency
- Customer Convenience
- It's the Future

# ADOPTION

## **A Proper Electronic Signature Platform Is Not Simply PDF Signatures**

- Process of electronically signing, storing and managing distinguishes them from photocopies or scans.
- E-signature platforms use front-end vendor to authenticate and verify identity of person who signed.

# PERFECTION OF CHATTEL PAPER

- For paper based chattel that is electronically signed by both obligor and lender (obligee), it is advisable to include language that obligor's electronic signature plus the lender's wet ink signature equals sole original for purposes of perfection under UCC.
- Official Comment No. 4 to UCC 9-330 provides that parties may agree only one counterpart is original for purposes of taking possession of original.

# ELECTRONIC CHATTEL

- Compliance with UCC 9-105 needed to create and control electronic chattel. Many confuse electronic signing with electronic chattel.
- Electronic Chattel may be electronically signed by both parties in transaction and stored in an electronic vault.
- The process of e-vaulting a document within a secure, trusted environment fulfills UCC requirements for uniqueness and negotiability of the document as a digital financial asset.

# ADOPTION

## **The proper development and implementation of an e-Signature program will:**

- have advantages over the traditional ink or "wet" signatures (which are often overlooked); and
- reduce the risk of forgery and fraud.

# Converting Ink Original Into Electronic Document (and vice-a-versa)

- Original paper document (not scan or copy) can be converted into electronic version in compliance with UCC 9-105.
- When converting into electronic chattel, critical that original paper chattel be destroyed (or permanently marked to indicate that it is not authoritative copy).
- Conversely, when converting electronic chattel into paper document, electronic chattel must be destroyed.

# OPERATIONS

## HOW DOES THE SIGNING PROCESS WORK?



# AUTHENTICATION METHODS

## Frontline Verification

### ID Verification

- First and Last Name
- Email
- Call Cell with Password
- IP Address

## Additional Verification

### Picture Capture Via Device

### Voice Recording

### SMS: Text Verify

### Questions – User Defined

- SS Last 4 Digits
- Previous Address
- Drivers License #
- Etc



# CUSTOMER VERIFIES IDENTITY

## The “Out of the Wallet” Test

### ID Check - Identification Questions

These questions are being generated as a means of an identity check requested by the document sender. None of this information is provided to the document sender or to anyone except you.

Which of the following addresses have you ever been associated with?

- 4004 North Monitor Avenue    8502 Elm Street  
 5341 South Drexel Avenue    9828 Keeler Avenue  
 6494 Fairmount Avenue    I have never been associated with any of these addresses

Which of the following vehicles have you ever owned or leased?

- 1997 Oldsmobile LSS    2003 Buick Rendezvous  
 1999 Pontiac Grand Am SE    2007 Ford Mustang  
 2001 Mercedes-Benz SLK Class SLK320    I have never been associated with any of these vehicles

In which of the following housing complexes or communities have you ever lived or owned property?

- Gross Milwaukee Ave Sub Of Pts B1    Springfield  
 Hollyvilla    Walnut Hills  
 Quail Hollow Add    I have never been associated with any of these communities

Which of the following people have you known?

- Carlos Ochoa    Esmeralda Rosario  
 Cecil Carlos    Felix Jimenez  
 Christina Valenzuela    I do not know ANY of the people listed

# CUSTOMER SIGNS AGREEMENT

**START**

Envelope ID: 72C62A9B-6B71-4621-93B6-56044B1D4D4A

**GSG FINANCIAL**  
 GSG FINANCIAL LLC • 53 W 36<sup>th</sup> Street, Suite 701, New York, NY 10018  
 Telephone: 212.602.1183 • Fax: 203.549.0476

DEMONSTRATION DOCUMENT ONLY  
 PROVIDED BY ONLINE SIGNING SERVICE  
 1301 2nd Ave, Suite 2000 • Seattle • Washington 98101 • (206) 219-0200  
 www.gsg.com

## LEASE AGREEMENT

**Lease # 12345-001**

Dear Customer: This Lease Agreement ("Lease") is written in simple and easy-to-read language. Please read this Lease thoroughly and feel free to ask us any questions you may have about it. The words **YOU** and **YOUR** refer to the Lessee. The words **WE**, **US** and **OUR** refer to the Lessor, GSG Financial LLC, a Connecticut limited liability company.

**Customer & Billing Contact Information**

Lessee Full Legal Name  
 ABC Financial LLC

Contact Person \_\_\_\_\_ Contact Phone No. 123-456-7890 Federal Tax ID # \_\_\_\_\_ State of Org. NY

Company Address  
 123 Main Street, City, NY 12345

Equipment Location  
 123 Main Street, City, NY 12345

**Equipment Description** Complete Equipment Location *only if different from company address*

Quantity	Manufacturer	Model Number	Description	Serial Number
1	Konica Minolta	Bizhub 3350	Copier	

**Term/Lease Payment Schedule**

Term (Months)	Security Deposit/Advance Payment (Check One Only)	Lease End Purchase Option	Base Monthly Lease Payment*
60	<input checked="" type="checkbox"/> Security Deposit(s): _____ <input type="checkbox"/> Advance Payment(s): _____	<input checked="" type="checkbox"/> FMV (defined in Section 17) <input type="checkbox"/> \$1.00 <input type="checkbox"/> Other: _____	500.00 <small>* Plus Applicable Taxes—See Section 11</small>

The first monthly payment will be due on the first of the month following the Delivery & Acceptance Date together with interim rent for the period between the Delivery & Acceptance date and the Commencement Date at the daily rate equal to 1/30<sup>th</sup> of the monthly rental. The Commencement Date shall be the first day of the month in the month following the Installation Date, unless the Installation date is the first day of the month in which case the Commencement Date shall be the date of Installation. Additional monthly payments will be due on the same day of each following month. All payments and other amounts due or to become due at the time and in the amounts set forth in the Lease, unless otherwise notified, shall be remitted to us at: **GSG Financial LLC, PO Box 87618, Department #2071, Chicago, IL 60680-0618.**

**Terms/Conditions**

**IMPORTANT: NEITHER THE SUPPLIER NOR ANY SALESPERSON ARE OUR AGENT. THEY HAVE NO AUTHORITY TO SPEAK ON OUR BEHALF OR MAKE ANY CHANGES TO THIS LEASE. THEIR STATEMENTS WILL NOT AFFECT YOUR RIGHTS OR OBLIGATIONS UNDER THIS LEASE.**

**1. LEASE AGREEMENT; PAYMENTS:** We agree to lease to you and you agree to lease from us the equipment listed above or identified in any attached Equipment Schedule ("Equipment Schedule"), together with all replacements, parts, attachments, accessories and substitutions therefore ("Equipment"). You promise to pay us the Lease payments according to the terms of the Payment Schedule shown above or any Equipment Schedule hereto, plus all other charges (see Sections 4, 9, 11, 13, 16, and 17). Continued on Page 2

**Lessee Authorized Signature** **THIS LEASE MAY NOT BE CANCELED**

Authorized Signature \_\_\_\_\_ Date: 3/29/2016 Print Name: Jessica  
 Sign  
 Title: President

**Personal Guaranty**

I or **ME** means Guarantor(s) and **YOU** or **YOUR** means Lessor. I have read and understand this Lease and expressly agree to its terms, conditions, consents and waivers. If Lessee defaults by failing to pay or perform any obligation under this Lease then I agree to pay or perform all such obligations to you in accordance with this Lease. I waive any notice of any default or modifications or alterations which may be made by you and the Lessee, and any defenses which I may have against enforcement of this Guaranty based upon suretyship principles or the impairment of any collateral security for this Lease. I will reimburse you for all expenses and attorney fees you incur in enforcing any of your rights against the Lessee or me. **I CONSENT TO THE STATE OF JURISDICTION OR THE JURISDICTION OF OUR SUCCESSORS OR ASSIGNS, JURISDICTION OVER MY PERSON, ANY VENUE IN THE STATE OF YOUR CHOOSING AND WAIVE TRIAL BY JURY IN ANY MATTER RELATING TO THIS LEASE, GUARANTY OR THE EQUIPMENT.**

Personal Guarantor	DO NOT INCLUDE TITLE	Date	Personal Guarantor	DO NOT INCLUDE TITLE	Date
<input checked="" type="checkbox"/>			<input checked="" type="checkbox"/>		
Print Name	Social Security Number		Print Name	Social Security Number	

# TRACK THE STATUS



**Envelope Status: In Process**

[Hide Completed](#)

Envelope Subject: Please Sign this document: LEASE DOCS -001.pdf

Pages: 6

-  1. Sent by Jessica | 3/7/2016 2:19:56 PM PT
-  2. Signed by Cate | 3/7/2016 2:21:18 PM PT
-  3. Signed by Gabriella | 3/7/2016 2:21:32 PM PT | Signed in Location
-  4. Next to sign Jessica

# STORAGE

## **E-Vault and Chattel:**

- What to do with the electronically signed document?
- Records Management and Control of Chattel Paper
- Controls Environment

# ELECTRONIC VAULT

Workspace ▶ Transaction Search Results New Transaction | Save As Collection | Save Search

Previous **1** Next
Show  entries

Envelope Subject	Creation Date	Status	Vault ID
Please Sign this docum...	03/29/2016 04:38:34 PM EDT	Signed Envelope	1166987
Please Sign this docum...	03/29/2016 04:30:40 PM EDT	Signed Envelope	1166976
LEASE DOCUMENTATION: G...	03/22/2016 04:02:48 PM EDT	Signed Envelope	1163302
Please Sign this docum...	03/22/2016 03:23:16 PM EDT	Signed Envelope	1163276
Please Sign this docum...	03/10/2016 03:50:58 PM EST	Signed Envelope	1156165
Please Sign: GSG SAMP...	03/10/2016 03:23:37 PM EST	Signed Envelope	1156120
Please Sign this docum...	03/10/2016 12:58:51 PM EST	Signed Envelope	1155661
Please Sign this docum...	03/08/2016 05:01:30 PM EST	Signed Envelope	1153884
Please Sign this docum...	03/08/2016 09:09:54 AM EST	Signed Envelope	1153098
Please Sign this docum...	03/07/2016 10:57:01 AM EST	Signed Envelope	1150105

Please Sign this document... Actions ▾

Documents: New Document

- Summary Complete ▾
- LEASE DOCU... eDeposit Comple... ▾

Properties:

Vault ID 1166987  
 Creation Date 03/29/2016 04:38:34 PM EDT  
 Status Signed Envelope  
 Container Default Container  
 Permissions Permissions

Custom Fields:

ENVELOPE\_ID 72c62a9b-6b71-4621-93b6-56044b1d4d4a

Description:

72c62a9b-6b71-4621-93b6-56044b1d4d4a

Comments:

Add Comment

# WHY ELECTRONIC SIGNATURES?

Increased  
Security

Compliance

Lower Costs

Customer  
Satisfaction

# OBTAINING A PAPER "ORIGINAL"

Original Request ✕

\* denotes required field

<b>Information</b>		Size: 87.62KB
*Name of Request:	TEST #2 (Summary)	
*Approver:	Jessie ▼	<input type="checkbox"/> Notify
Electronic Original Retention:	Keep A Copy ▼	

**Purpose Of Request**

**Send Alert**

**OK** **Cancel**

# E-SIGNATURE DOCUMENTS REDUCING FORGERY & FRAUD

Forgery ("I never signed the document")

Unauthorized alteration ("That is not the document I signed")

# E-SIGNATURE DOCUMENTS REDUCING FORGERY & FRAUD

If a traditional "wet" or ink signature is challenged, you only have a document which was purportedly executed.

At best, you have a witness and/or notary to verify the signature.

## **Results:**

- Discovery, handwriting experts, expert testimony and trial
- Increased legal expenses
- Increased pressure to settle the case on less favorable terms

# E-SIGNATURE DOCUMENTS REDUCING FORGERY & FRAUD

## **If an electronically signed document is challenged, you have much more:**

- The entire signing process is memorialized (review of the documents, assent to their terms and verified signature)
- Multiple verifications of signer's identity
- Multiple verifications that the signer expressed an intent to be bound
- Reduced risk of forgery/fraud
- Reduced risk that forgery will be asserted as a spurious defense

# E-SIGNATURE DOCUMENTS REDUCING FORGERY & FRAUD

## Results:

### Increased likelihood that:

- You can prevail on a Motion for Summary Judgment or Trial
- Legal costs will be reduced
- A favorable settlement can be reached



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# E-Sign

Aaron Kouhoupt, Member, Cleveland



# E-Sign

- 15 U.S.C. 7001, *et seq.*
- Creates national framework for electronic commerce, applies to “transactions”
- Validates the use of electronic
  - » Signatures
  - » Records
- Preempts state law other than UETA as published
- Technology neutral
- Overlays substantive law



# E-Sign

- E-Sign contains consumer protections regarding mandatory disclosures. Where a statute, regulation, or other rule of law require that information relating to a transaction be provided to a consumer in writing, the disclosure may be made in electronic form only if the consumer consents electronically in advance, and certain other conditions are met.



# E-Sign

- Affirmative consent
  - » Consumer must affirmatively consent to the use of electronic records, and must not have withdrawn consent
- Demonstrate access
  - » Provide the consumer with a statement of the hardware and software requirements needed to access and retain electronic record



# Consent Process

- Consumer must be informed of:
  - » Right to get contracts in paper form
  - » Right to withdraw consent, together with consequences
  - » Whether consent applies to:
    - only the particular transaction; or
    - all records regarding the relationship



# Consent Process

- Consumer disclosures (cont.)
  - » Procedures to use to withdraw consent and update contact information
  - » How, after consent, consumer may obtain paper copies and fee charged
  - » Hardware/software requirements for access to and retention of records



# Other Electronic Contract Issues

- Consumer consent must demonstrate that consumer can access info in electronic form (“Demonstrative Consent”)
- Questions:
  - » Is email good enough?
  - » What kind of computer and software is necessary (Adobe Reader)?
  - » Is a mere acknowledgement of this sufficient?



# Other Electronic Contract Issues

- In-person demonstration and consent
  - » Demonstration of ability to view
  - » Demonstration of ability to retain
  - » Ability to access after customer leaves place of business
  - » Trailing notices



# E-Sign Record Retention

E-Sign also contains records retention standards.

- » If a law or regulation requires the retention of records for a particular transaction, the retention requirement may be met by retaining an electronic record, provided certain conditions are met.
- » One requirement is that the record remain capable of being reproduced for later reference.



# UETA v E-Sign

- UETA is a state law that has been adopted by most states in a mostly uniform version.
- UETA like E-Sign provides that a record or signature may not be denied legal effect simply because it is in electronic form.
- UETA allows, but does not require parties to conduct business electronically.
- UETA specifically states that it applies to transactions “between parties each of which has agreed to conduct transactions by electronic means.”



# Compare E-Sign and UETA

- Like UETA:
  - » E-Sign adopts the rule permitting electronic originals
  - » Adopts the special retention and accessibility rules for records required for later reference (in modified form)
  - » Adopts rules on notarization
  - » Adopts the rules for electronic agents

# Compare E-Sign and UETA

- E-sign makes preservation explicit, wherein it is only implicit in UETA
  - » substantive legal rights and obligations
  - » content and timing of consumer disclosure
  - » any rule concerning the proximity or physical location of any warning, notice, or disclosure
- Unlike UETA, E-Sign
  - » Adopts specific standards for consumer consent to use electronic records and signatures for notices and disclosures
  - » Permits substitution of electronic delivery of consumer disclosures, if delivery includes acknowledgement of receipt, for other delivery requirements

# Compare E-Sign and UETA

- Unlike UETA, E-Sign (cont.)
  - » Excludes recordings of oral communications from definition of electronic record for purposes of consumer notices and disclosures
  - » Expressly limits regulatory authority to impede or obstruct effective use of the statute
  - » No variation by agreement
  - » Omits default rules for
    - Establishing when electronic record is sent or received

# E-Sign and Federal Preemption

- Federal Preemption
  - » State may supersede requirements of Section 101 with
    - Adoption of the Official Text of the UETA (before or after E-Sign enactment)
    - Adoption of another statute, or any regulation (under UETA, E-Sign or otherwise), that is
      - + Consistent with E-Sign Act Titles I and II
      - + Does not favor a specific technology (except for rules governing procurement)
      - + If enacted after E-Sign, make specific reference to E-Sign Act



# UETA AND ATTRIBUTION

- Following E-Sign; UETA procedures demonstrate that a document was signed
- But unlike E-Sign; UETA leaves open the question as to who signed the documents
- Good practice: Use of validation information
  - SSN Match
  - Credit Report
  - Out-of-wallet question
- But no method is perfect



# UETA and Attribution

- Proof that it's the customer's signature may be made by any means, including surrounding circumstances and efficacy of agreed-upon security procedure
- Burden is on person seeking to enforce the signature
- Burden is not high but some evidence is required

# Sample Application Process: Pre-qualifications

## “Check Your Rate”

- Permissible Purpose Required for Soft Credit Pull

 Credit transaction involving the consumer

 Legitimate business need

 Written Instruction: “I authorize....”



# The Application Process: The Credit Application

- The Equal Credit Opportunity Act/Regulation B does not require credit applications to be in writing BUT:
  - » State and federal disclosures that must be provided “in writing”
  - » Declined apps: Regulation B permits electronic delivery of adverse action notices subject to E-Sign



# The Application Process: Abandoned Apps

- Applicant begins application but exits page
- Lender captures some information—personal and contact information
- Want to call applicant and encourage completion?
  - » Marketing purpose + autodialer = TCPA Express Prior Written Consent



# The Application Process: Abandoned Apps & TCPA

- Telemarketing: call promotes property, goods, or services
- Prior express written consent: signed agreement in writing clearly authorizing the seller to send solicitations using an automatic telephone dialing system or prerecorded voices to a designated phone number
- Signature requirement can be met by an electronic or digital signature if federal and state law allow



# GLBA Privacy Policy

- Initial and Annual Notices must be provided so that consumers “can reasonably be expected to receive actual notice in writing or, if the consumer agrees, electronically”



# Regulation Z and Risk-Based Pricing Disclosures

- The Truth in Lending Act/Regulation Z permits disclosures to be provided in electronic form, subject to compliance with E-Sign
- Regulation V states that risk-based pricing disclosures can be provided in electronic form (without referencing E-Sign)



# Document Delivery Methods

- Timing rules provided by state or federal law still apply
- Sending PDFs attached to an (unencrypted?) email
- Sending email with embedded links to a secure portal
- What if the consumer never opens the email?



# Certain Exemptions

- Both E-Sign and UETA contain specific provisions that allow government agencies to govern their electronic communications by express regulation. UETA specifically includes exemptions for state regulatory and government agencies.

# Certain Exemptions

## » E-Sign

- Federal and state regulatory agencies responsible for rulemaking may interpret the consumer provisions of E-Sign by way of rules, orders and regulations.
- Federal regulatory agencies may exempt specific categories or types of records from E-Sign's consumer consent requirement if the exemption is necessary to eliminate a substantial burden on electronic commerce and will not risk the consumer's material risk of harm

# Exemption - Example

- IRS Regulation allows electronic notifications and elections under certain conditions.
  - » Substantially follow E-Sign disclosure requirements but *stand apart* from E-Sign
    - Affirmative consent for electronic delivery
    - No less understandable than paper
      - + Alerts of significance
      - + Identifies subject matter
      - + Understandable access instructions
    - Those requiring written form must meet consent requirements or be exempt from them
      - + Including the provision of a required disclosure statement prior to receiving affirmative consent, which may not be provided orally.



# Remote Online Notarization

- Remote Online Notarization (“RON”) requires a state by state analysis until there is federal legislation
  - » Note – On July 28, 2022 the U.S. House passed (336-90) the Secure Notarization Act of 2021 which includes national standards for Remote Online Notarization.
- To date, approximately 41 states have enacted laws allowing RON (some of which stemmed from COVID Pandemic and have not been made permanent)



# Remote Online Notarization

- State laws vary but have some general themes:
  - » The notary must register with the state
  - » Online notarization will utilize technology to verify the “signers” identity as well as the use of electronic storage, data privacy requirements and electronic seals/signatures
- Some state RON laws apply to cross-border online notarization while others are limited to in-state notarization only
- Some states requires the notary to be located in the state while others allow the notary to be out of state

# Questions?

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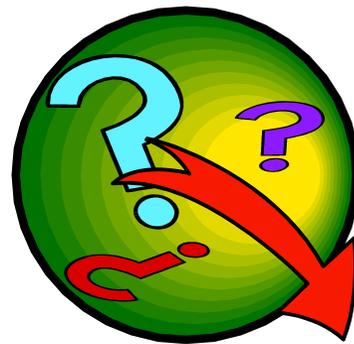
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