

HCLS Teleconference
Pitfalls and Possibilities: A Practical Approach to Managing Electronic Contracting
(March 22, 2006)

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1) Introduction

- a) What we intend to cover
 - i) Electronic Signatures in Global and National Commerce Act (“E-Sign”)
 - ii) Michigan’s enactment of the Uniform Electronic Transactions Act (“UETA”)
- b) What we will not cover
 - i) Health Insurance Portability & Accountability Act of 1996 (“HIPAA”) Standards for Electronic Transactions
 - ii) Uniform Computer Information Transactions Act (“UCITA”)

2) Materials in the Packet

- a) Statutes
 - i) E-Sign
 - ii) Michigan’s UETA
 - iii) Model UETA
- b) Selected caselaw
- c) Examples of approaches to electronic contracting
 - i) UM
 - ii) Verizon

3) Definitions (from technology perspective, health care attorney perspective, general contract attorney perspective, and statutory perspective)

4) E-Sign Act (15 U.S.C. § 7001 et seq.)

- a) Scope
- b) Key Provisions
 - i) Parity of electronic and “paper and ink” formats where “writing” required
 - (1) *Campbell v. General Dynamics Gov’t Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005)
 - (2) *In re Cafeteria Operators, L.P.*, 299 B.R. 411 (N.D. Tex. 2003)
 - ii) Voluntary nature of electronic contracting (except with respect to “a governmental agency with respect to a record other than a contract to which it is a party”)

- (1) *Prudential Ins. Co. v. Prusky*, --- F. Supp. 2d ----, 2005 WL 1715659 (E.D. Pa. July 22, 2005)

iii) Consumer consent requirements

- (1) Applicability
- (2) Consumer's ability to access electronic records
- (3) Conspicuous notice of certain rights and options (or lack thereof)
 - (a) *Cf. Campbell v. General Dynamics Gov't Sys. Corp.*, 407 F.3d 546 (1st Cir. 2005) (finding no waiver of right to bring suit under ADA where insufficient notice of purported waiver requirement)
 - (b) *Cf. Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2d Cir. 2002) (finding no consent to terms of software license agreement where no conspicuous notice of agreement or its terms)
- (4) Note: Failure to comply with consent requirements *does not*, in and of itself, invalidate electronic contract

iv) Record-keeping and retrievability of electronic records

c) Noteworthy Exceptions to Parity Provision

- i) Cancellation or termination of health insurance or benefits (or life insurance or benefits)
- ii) Product recalls or notices related to endangerment of health or safety
- iii) Cancellation or termination of utility services
- iv) Other exceptions (15 U.S.C. § 7003)
 - (1) Laws on adoption, divorce, or other family law matters
 - (2) Laws on wills, codicils, and testamentary trusts
 - (3) Court orders, notices, and other official court documents
 - (4) Default notices under mortgage loans or leases for primary residence
 - (5) Documents required in connection with the transportation of hazardous materials

5) Michigan's UETA (MCL § 450.831 et seq.)

a) Scope

- i) *Hepfinger v. White*, 2005 WL 2219445 (Mich. App. Ct. Sept. 13, 2005) (medical malpractice suit, and accompanying preparation of required affidavits of merit, did not constitute a "transaction")

b) Key Provisions

- i) Generally substantially similar to E-Sign provisions – for example:
 - (1) Parity

- (a) *International Casings Group, Inc. v. Premium Std. Farms, Inc.*, 358 F. Supp. 2d 863 (W.D. Mo. 2005)
 - (b) *Godfrey v. Fred Meyer Stores*, 124 P.3d 621 (Or. 2005) (Armstrong, J., concurring)
- (2) Voluntary nature of electronic contracting
 - (a) *Audi AG v. D'Amato*, 381 F. Supp. 2d 644 (E.D. Mich. 2005)
- ii) *But*, are areas where UETA provides greater detail or otherwise differs from E-Sign – for example:
 - (1) Applicability
 - (2) Judicial construction – based on consistency with “reasonable” practices for electronic contracting (MCL § 450.836(b))
 - (3) Attribution requirement
 - (a) *In re Piranha Inc.*, 83 Fed. Appx. 19 (5th Cir. 2003)
 - (4) Consent requirements
 - (a) No specific consumer notice/disclosure requirements
 - (b) Single transaction vs. class of transactions?
 - (5) Waiver of Act’s provisions through parties’ agreement, *except* provisions regarding:
 - (a) Withdrawal of consent
 - (b) Effect of errors in formation in electronic contract
 - (c) Time at which electronic record deemed sent or received (except as permitted by other law)

6) Special Contracting Issues

- a) Jurisdiction
 - i) *Khalil v. Chatham Coll.*, Civ. Action No. H-04-3093 (S.D. Tex. Aug. 5, 2005)
- b) Choice of law and forum selection
 - i) *Citicorp Vendor Fin., Inc. v. Trillium Eye Plastic Surgery, P.C.*, LC No. 03-002088-cz (Mich. Ct. App. Feb. 16, 2006)
- c) ADA issues
- d) Separately promulgated requirements for certain transactions
 - i) IRS
 - ii) Department of Education Loans
<http://ifap.ed.gov/dpccletters/attachments/gen0106Arevised.pdf>

7) Client Relation Process – How to Move to Electronic Transactions?

- a) For example, chart of activities to be conducted electronically

b) Risk analysis

8) **Q&A**