Recent developments in the United States regarding electronic signatures

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Just in time for the millennium, President Clinton signed into law the Federal Electronic Signatures in Global and National Commerce Act ("ESIGN"), codified at 15 U.S.C. §§ 7001 et seq. ESIGN's proponents claimed it would sweep away the barriers to electronic transactions, and lead to widespread adoption of electronic signatures. Perhaps the biggest story regarding electronic signatures coming out of the United States right now is what has not happened as a result of ESIGN. ESIGN has not lead to the expected surge in the use of digital signatures, or the mass conversion of paper files to electronic files, as those millennial proponents predicted. Rather such moves have been slow, sporadic, and quite often, stuck. Two competing stories may give some insight as to why.

As a first example, consider health care records. The Health Insurance Portability and Access Act ("HIPAA") proposed that digital signatures would become a standard part of health care records (63 Fed. Reg. 4326869 (Aug.12, 1998)). Enactment of ESIGN was expected to cement that result. However, due to confusion over implementation and a fear of fixed standards, the final HIPAA security rule omitted any electronic signature requirement (45 C.F.R. 164.312). Confusion regarding exactly what should be required for such signatures, despite the passage of ESIGN, has delayed implementation of an electronic signature standard for the purposes of health care records.

Instead, the new HIPAA rules (45 C.F.R.164.312 - Technical Safeguards) require health care providers only to implement:

- Technical policies and procedures (including encryption, decryption and automatic logoff) for access control on systems that maintain health care records. These systems must allow for unique user identification and include an emergency access procedure for obtaining necessary health care records during an emergency (however, that unique user identification does not need to be a digital signature).
- Transmission security, including: Integrity controls to ensure that electronically transmitted health care records are not improperly modified without detection, and encryption, if and when necessary. Covered entities now must determine how to protect health care records "in a manner commensurate with the associated risk"; Policies and procedures to protect health care records from improper alteration or destruction to ensure data integrity and person or entity authentication, although again, digital signatures are not specifically required.

Thus, despite two federal acts (HIPAA and ESIGN) meant to encourage adoption of digital signatures as a standard operating practice when dealing with electronic health care records, little progress toward that goal has actually been made.

On the other hand, ESIGN explicitly exempted "court orders or notices, or official court documents (including briefs, pleadings, and other writings) required to be executed in connection with court proceedings." (15 U.S.C. § 7003(b)(1)). Nonetheless, the United States Supreme Court had already amended the Federal Rules of Civil Procedure in 1996 to allow local courts to experiment with electronic filing (Fed.R.Civ.P. 5(e)). In June 2003, the United States District Court for the Western District of Washington became one of the first district courts to begin that experiment.[1] Practitioners in the Western District of Washington may sign up to receive a court-issued password, which, along with their user login, serves as their signature for all purposes under the Federal Rules of Civil Procedure. Generally, documents are submitted in Adobe Acrobat .pdf format. The court has issued detailed procedures to cover such issues as service, multiple signatures, confidential records, and the effect of technical failure, which procedures are available on its web site.

Similarly, the King County Superior Court (which encompasses Seattle and neighbouring cities within its jurisdiction), is moving aggressively to allow for

[1] See http://www.wawd.uscourts.gov/ last viewed on 2 March 2004.

electronic filing of documents, including use of electronic signatures by judges, attorneys, and litigants to authenticate and verify filings. The State Supreme Court greased the wheels for such an experiment by enacting General Rule 30 on September 1, 2003.[2] General Rule 30 allows for, but does not require, electronic filing. However, it does mandate that "an electronic document has the same legal effect as a paper document" (GR 30.3). For purposes of authentication, GR 30.5 lays out the following guidelines:

a) the person must first receive a court-approved password and personal identification number,
b) that password and PIN must be used in conjunction with any electronic filing to create a presumption that the person who owns the password and PIN actually signed the document,
c) declarations and affidavits may also be so electronically signed, and
d) the electronic signature shall have the same effect as an ordinary signature.

The King County Clerk's Office is now working towards implementing the technology to allow King County to be the first trial court in the state (and one of the first state courts in the nation) fully to accept electronic filing. The King County Superior Court has also been working closely with the National Center for State Courts to make its implementation a national model for courts across the United States. Part of this model will include allowing judges to have their own electronic signatures to sign electronic orders. Although the state's funding crisis has slowed down implementation, Barbara Miner of the King County Superior Court Clerk's Office expects that implementation of electronic filing for the court will nonetheless be completed by this year.[3]

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Two federal court cases are also of interest regarding the use of electronic signatures in commerce. One deals obliquely with the admissibility of electronic documents and the significance to be given to a standardized electronic signature on an e-mail.[4] The second deals with the novel concept of service of original process by e-mail - an issue that is likely to arise more often in the arena of electronic commerce with the advent of virtual ecompanies.[5]

In the *Sealand* case, Sealand sued Lozen for money owed under a shipping contract, and Lozen counterclaimed for breach of contract and for cargo loss and damage allegedly resulting from Sealand's failure to timely deliver the shipment at issue. After the parties settled Sealand's claims, the district court dismissed Lozen's counterclaims on Sealand's motion for summary judgment, and Lozen appealed. The case involves some interesting discussion of electronic bills of lading in conjunction with paper bills of lading, which is not particularly germane to the subject matter of this journal. Of interest, however, was the court's discussion of the evidentiary effect of an electronic signature line on an e-mail. The evidentiary issue involved whether an internal Sealand e-mail, which was forwarded by another Sealand employee to Lozen, constituted the statement of a party-opponent, such that it would not be hearsay under Federal Rules of Evidence 801(d)(2)(D). As hearsay cannot be used as evidence, proving that a statement is the statement of a party-opponent is vital for admissibility purposes. The trial court excluded the evidence on the ground that the internal e-mail did not present evidence itself as indicating the identity or job title of the employee who wrote it (presumably because, when it was forwarded by the second employee, the original e-mail signature was cut off, although the opinion fails to explain this). The appellate court reversed the court of first instance, 285 F.3d at 821:

> Exhibit 4 [the e-mail at issue] is an admission by a party-opponent. The original e-mail, an internal company memorandum, closes with an electronic "signature" attesting that the message was authored by "Mike Jacques," Sealand's "Rail Reefer Services Coordinator" at the time the e-mail was written. The original e-mail also appears to concern a matter within the scope of Jacques' employment.

The court found that, when the second employee forwarded that e-mail to Lozen, she essentially adopted the statements of the first employee, thus making the entire email stream an admission of a party-opponent, and admissible for any purpose. Essentially, the signature line acted to selfauthenticate the e-mail for purposes of admissibility.

The case of *Rio Properties* may be one of the first cases in which original service of a summons and complaint was allowed to be accomplished via an e-mail. There, the plaintiff Rio Properties brought a trademark infringement suit against a Costa Rican entity whose only mailing address turned out to be a courier service (which was not

[2] Available at http://www.courts.wa.gov/courtrules/.
[3] More on this program is available at http://www.metrokc.gov/kcscc/ecr/ecrsum.html.
[4] *Sea-land Service, Inc. v. Lozen International, L.L.C.*, 285 F.3d 808 (9th Cir. 2002).
[5] *Rio Properties, Inc. v. Rio International Interlink,* 284 F.3d 1007 (9th Cir. 2002).

authorized to accept service of process) and whose only other address was an e-mail account listed on its website. Thus, there was literally no physical address at which the defendant could be served. American due process principles require that a defendant receive personal service in order for the court to assert jurisdiction. However, with respect to foreign business entities, Federal Rule of Civil Procedure Rule 4(f)(3) permits service "by .. means not prohibited by international agreement as may be directed by the court." Relying on Rule 4(f), Rio sought and obtained an order allowing it to serve a copy of the summons and complaint - which begins the lawsuit and invokes the court's jurisdiction - via e-mail to the defendant's e-mail address, which was e-mail@betrio.com. Although the defendant appeared in the lawsuit, it ultimately had a default judgment entered against it as a result of numerous violations of court orders. On appeal, it claimed the court had no jurisdiction, as it was never properly served. The appellate court acknowledged, 284 F.3d at 101:

> [T]hat we tread upon untrodden ground. The parties cite no authority condoning service of process over the Internet or via e-mail, and our own investigation has unearthed no decisions by the United States Courts of Appeals dealing with service of process by e-mail and only one case anywhere in the federal courts. Despite this dearth of authority, however, we do not labor long in reaching our decision. Considering the facts presented by this case, we conclude not only that service by e-mail was proper - that is, reasonably calculated to apprise RII of the pendency of the action and afford it an opportunity to respond - but in this case, it was the method of service most likely to reach RII.

The court was particularly persuaded by the evidence that the defendant seemed to have structured its business dealings such that it could only be contacted via its e-mail address. Nonetheless, the court also issued a warning that such e-mail service is to be the exception, not the rule, and pointed out some of the problems inherent in such service, in which electronic signatures (or the lack thereof) loomed large, 284 F.3d at 1019:

> Despite our endorsement of service of process by e-mail in this case, we are cognizant of its limitations. In most instances, there is no way to confirm receipt of an e-mail message. Limited use of electronic signatures could present problems in complying with the verification requirements of Rule 4(a) and Rule 11, both of which require an attorney's signature on original pleadings, and system compatibility problems may lead to controversies over whether an exhibit or attachment was actually received. Accordingly, we leave it to the discretion of the district court to balance limitations of e-mail service against its benefits in any particular case.

Having found that service was properly effected, the court quickly disposed of the defendant's jurisdictional and other substantive issues.

As discussed above, the United States District Court for the Western District of Washington believes it has adequately addressed the Ninth Circuit's concerns regarding the verification requirements of the Federal Rules of Civil Procedure. Nonetheless, it is ironic that the courts, which were explicitly exempted from ESIGN, have moved further towards the goal of purely paperless transactions than many of the industries that originally clamored for ESIGN's enactment. Once again, the law of unintended consequences prevails. ■

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