



American Insurance Association

**TESTIMONY
OF
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ON BEHALF OF
THE AMERICAN INSURANCE ASSOCIATION
ON ESIGN - ENCOURAGING THE USE OF ELECTRONIC SIGNATURES
IN THE FINANCIAL SERVICES INDUSTRY
BEFORE THE
SUBCOMMITTEE ON DOMESTIC MONETARY POLICY, TECHNOLOGY AND
ECONOMIC GROWTH OF THE HOUSE COMMITTEE ON FINANCIAL SERVICES
U.S. HOUSE OF REPRESENTATIVES**

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Thank you, Mr. Chairman, and other Members of the Domestic Monetary Policy, Technology, and Economic Growth Subcommittee, for providing me with an opportunity to testify before you today regarding the “Electronic Signatures in Global and National Commerce Act (“E-Sign”).”

My name is Christopher Roe, vice president – legal counsel at the Fireman’s Fund Insurance Company. Fireman’s Fund, established in 1863 in San Francisco, California, is among the nation’s top writers of property/casualty insurance writing over \$4 billion in gross premiums and employing over 8,000 people. My primary responsibilities include representing Fireman’s Fund in state insurance legislative and regulatory issues. During the past four years, I have helped shape Fireman’s Fund’s and AIA’s policies with regard to electronic commerce, financial privacy, and financial modernization.

I am pleased to appear before you today on behalf of the American Insurance Association (AIA) to discuss the Electronic Signatures in Global and National Commerce Act. The AIA is the principal trade association for property and casualty insurance companies, representing more than 370 major insurance companies which provide all lines of property and casualty insurance and write more than \$60 billion in annual premiums.

Overview

Because of its recent passage and more recent implementation, insurance companies have had limited, practical experience with the E-Sign law. In fact, the electronic records provisions of E-Sign, which are of great significance to the insurance industry, became effective only on March 1, 2001. As a result, insurance companies have only recently begun to establish pilot projects or roll out online insurance products that take advantage of this new law. We believe that more time is needed to test the workability of the E-Sign provisions before advocating specific changes to the Act.

Yet, the passage of E-Sign is an important ingredient to the evolution of e-commerce within the insurance industry and, in a more immediate context, completing online insurance transactions and meeting the online expectations of our customers. We believe that E-Sign, coupled with state passage of the Uniform Electronic Transaction Act (UETA), will ultimately allow insurers to better deliver speed, efficiency, and cost savings in future online insurance transactions. In particular, some of the advantages of E-Sign are already evident:

- E-Sign sets a *higher degree* of legal uniformity among the states than currently existed, which is more conducive to an online marketing strategy for the 50 states;
- E-Sign establishes a higher degree of predictability and stability in the states which allows insurers to more confidently provide their customers with the online services they are increasingly seeking; and

- E-Sign now allows customers to execute an online insurance transaction completely online.

Even with these immediate advantages, non-uniformity of UETA provisions among the states still remains a serious threat to the ability of insurers to most effectively deliver services online, and many questions remain regarding the legal interpretation of many of the provisions in E-Sign or UETA (UETA may reverse-preempt E-Sign). Absent complete adoption of a uniform UETA, we believe that regulatory action by the federal agencies in this area should help to address these unanswered questions, but this guidance will only be persuasive, not mandatory, to our state insurance regulators.

For insurance, uniformity of state laws is critical and the adoption of UETA, as adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL), provides this necessary uniformity. About 20 states have adopted an exact version of UETA as recommended by NCCUSL, and another 15 have adopted a UETA-styled version but with modifications. UETA essentially takes a “meeting of the minds” approach with regard to consumer consent; no consumer is forced to conduct business electronically. We believe that the consent provisions of UETA are workable for individuals and companies because they allow for flexibility in obtaining consent as new technologies evolve.

Insurers’ Need for Electronic Signatures and Records

The insurance industry is extremely paper intensive. Policy contracts and forms are used at every step in the insurance transaction, beginning with the application process, through the issuance of insurance binders and policies, to renewal and cancellation notices, and finally, to the submission of claims. Throughout a typical insurance transaction, numerous contracts, endorsements, and notices legally require a signature from the customer and the insurance company. Similarly, insurers must maintain this information in order to meet various record retention laws and requirements surrounding the rules of evidence.

The generation, use, and retention of these forms and documents in insurance transactions are regulated at the state level through a myriad of non-uniform restrictions on everything from delivery to recordkeeping. Most state insurance laws require several aspects of insurance transactions to be “in writing” and to meet certain delivery requirements such as “by mail” or “certified mail.” Of course, our complex state insurance codes were written before the advent of the Internet and these legal requirements do not easily transfer to an online environment.

In order to address these legal impediments, AIA and the broad insurance industry supported state passage of UETA, as approved by NCCUSL. Essentially, UETA overlays upon the state code and expressly allows electronic signatures and records to satisfy the requirements of a paper world. In addition, the National

Association of Insurance Commissioners (NAIC) and the National Conference of Insurance Legislators adopted resolutions in support of UETA. The industry, regulators, and state legislators alike were committed to a uniform law which, in theory, would bring greater certainty and permit a smooth transition for moving many insurance sales and account transactions to the online world, as requested by our customers.

Benefits of E-Sign to Insurers and Their Customers

Like many other businesses, the business of insurance is increasingly moving online but, because of legal uncertainties surrounding current state laws, this process has been slower than in other financial services sectors. Traditional insurers are working diligently to integrate e-commerce into their business models and responding to customer preferences for conducting business over the Internet. While many insurers are at different points in the evolution of e-commerce into their business operations, most national insurance companies are currently building and enhancing their websites to facilitate online sales, and some are engaged in actual online sales. Newer, non-traditional insurance aggregators are also competing and adding their own technology and Internet experiences to the mix. According to Conning & Company and other sources, online sales and lead generation by an Internet visit represents just 1% of today's premiums. Within the next few years, many in the industry believe that this number will explode. On the back end of the process, Forrester Research estimates that web-based claim technologies will annually save \$10 billion in industry claim expenses by 2003.

Without E-Sign and UETA, customers and their insurers could not close an insurance transaction online. Many customers naturally became discouraged after completing information for an insurance quote online and then not being able to finalize the transaction. Often, the customer would receive an e-mail that an agent would contact them in the next few days or that they would have to wait to receive a package in the mail to complete the process. E-Sign will help smooth this transition and allow us to meet customer expectations, including 24-hours-a-day service, greater efficiency and convenience, and cost savings.

My company, Fireman's Fund, believes annual savings of millions of dollars can be achieved if consumers sign policy applications and receive coverage notices and renewals online. Mailing expenditures alone cost Fireman's Fund \$8 million annually. By the end of the year, we expect to begin using electronic signatures and records in some of our commercial divisions.

Even insurers that are not transacting insurance online may find substantial cost savings through the electronic record retention provisions. While many states already allow insurers to retain paper records in other formats, such as microfilm or digital, non-uniform state laws represent a challenge for setting a national document retention strategy. Under E-Sign and UETA, insurers are now re-exploring the merits of electronic document retention.

The Need for Uniformity

In this new world of e-commerce, the Internet offers consumers the benefits of speed, efficiency, and cost savings in future insurance transactions. However, inconsistent and contradictory state laws can stifle these benefits and prevent customers from obtaining the conveniences that they expect on the Internet. Many companies, in having to comply with different and conflicting technology requirements or different procedures for obtaining consent, may decide that the Internet does not offer a cheaper and better alternative to other distribution mechanisms; or, they may focus their energies on those states with less friction costs, if the regulatory bar is set too high.

With the passage of E-Sign, we believe that no major legal barriers with regard to the state insurance code currently exist for online insurance transactions. Yet, the text of the insurance code may not reflect practices in the real world. Insurance regulation is famous for its “desk drawer rules” and like any statute, various provisions are open to subjective interpretation. The 50 state legislatures, regulators, and the courts will have some input on how E-Sign or UETA is interpreted. In response to concerns from the insurance industry, the NAIC is polling the insurance departments in order to determine whether any legal impediments still exist for insurance.

In addition, the NAIC recently adopted an e-commerce insurance bulletin that provides guidance on issues such as E-Sign, document retention, and format. Recently, Ohio was the first state to adopt the bulletin, and adoption by other states will demonstrate a commitment to uniformity and help to ease the concerns of insurers.

Yet, even with the constraints of E-Sign, state laws still deviate from federal law. Some non-uniform provisions were adopted before E-Sign, while other provisions, such as a prohibition on fees for paper copies in North Carolina, were adopted after passage. Remaining on the books in other states are more questionable provisions that impact infrastructure costs, such as legal presumptions for specific technologies. Few insurers want to be the legal test case for federal preemption of these laws.

State legislatures in 1999 began to adopt UETA, but many enacted the law with certain modifications, such as exclusions for various insurance transactions from the act or requiring specific technologies. For example, New York adopted a non-UETA definition for electronic signatures, and the New York Office for Technology issued regulations for identifying technologies that would meet the criteria of this non-UETA definition for an electronic signature. As a result, business plans became murky or delayed because of the concern that some technologies would not qualify. This process of favoring certain technologies is clearly preempted by E-Sign’s expressed standard of technology neutrality.

California became the “poster child” for such non-uniformity when it adopted its own version of UETA, but effectively prevented most insurance transactions from being completed online. Essentially, homeowners and automobile insurance consumers were

required to complete their transactions offline. We believe that these limitations of the California UETA are preempted by E-Sign, and a bill has been introduced in the California legislature to remedy the problem. Similarly, Hawaii adopted a provision that prevents a customer from making an online material change to the insurance contract, such as adding an additional driver to the automobile policy. In the last year, other state legislatures toyed with similar exclusions while some states were slow to take any action on UETA.

Recently, nine states have locked the E-Sign consent provisions into their state UETA. This scenario is ripe for creating an unlevel playing field between the financial sectors. Because these provisions are still untested, the Federal Trade Commission and the U.S. Secretary of Commerce were asked to examine the consumer consent provisions, and federal regulatory agencies were given the power to waive consumer consent provisions for a category or type of record. However, a similar regulatory waiver provision does not exist in these nine states, except for Texas.

While most other financial sectors receive uniform treatment from federal regulators with regard to online transactions, many insurers and agents fear that they have been saddled with inconsistent and conflicting state laws impacting the Internet. In particular, the life insurance industry contends that if state laws create additional burdens not imposed upon federally regulated entities, consumers will be more likely to direct their investment dollars to other financial sector web sites that are less cumbersome to use. Regulatory parity among the financial sectors may be further exacerbated if state regulators do not have the same regulatory flexibility enjoyed by the federal regulators.

Lack of Uniformity and Questions Relating to Consumer Consent

The AIA and Fireman's Fund support a process whereby the parties must consent to an electronic transaction, and the basic premise that no party should be *required* to enter into an electronic or non-electronic transaction. Businesses and consumers should be able to choose the type of transaction that best meets their needs. As a result, for businesses and consumers, E-Sign does not require any person to use or accept electronic records or electronic signatures.

Similarly, in those states that adopt UETA, businesses and consumers must agree to use electronic transactions. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct. UETA essentially takes a "meeting of the minds" approach with regard to consent.

E-Sign requires one more step regarding consent for consumer transactions by regulating the actual content of the notice and the procedures necessary for obtaining consent. Specifically, a seller can provide an electronic record to a consumer (i.e., those purchasing products for personal, family, or household purposes) only if the

seller: (1) obtains affirmative, electronic (but non-oral) consent from the consumer to receive electronic records; (2) provides the consumer with a statement of his rights to receive records on paper, including an indication of whether fees will be charged for receiving a paper copy; (3) provides the consumer with an indication of how he can withdraw consent, as well as the conditions and consequences of such withdrawal; and (4) provides the consumer with the hardware and software requirements for accessing and retaining electronic records.

Fundamentally, most of these procedures represent good business practices and should help to set proper expectations between the parties. On the other hand, several parts of the consent procedures raise questions. For example, E-Sign requires that the consent should “reasonably demonstrate” that the consumer can access or retain the electronic record. Yet, it is unclear how this test should be met. Some have argued that in an e-mail context, the “reasonably demonstrate” test is met if the consumer acknowledges by e-mail that the information in a PDF format can be accessed. Others argue that the consumer must actually open the PDF file, and the operation of consenting itself must acknowledge that the PDF file was opened. However, in the offline world we do not require consumers and businesses to prove that they opened their mail. And, creating a test for opening the document greatly complicates the design of the web site when an affirmative response from the consumer that the information can be accessed would seem to be sufficient.

Similarly, the E-Sign consent provisions provide the consumer with the right to withdraw consent to have the record provided or made available in an electronic form. Obviously, we strive to meet the needs of our consumers, but the right to withdraw has created a unilateral “right” for the consumer when coupled with other state insurance laws that severely restrict terminating coverage or surcharging the consumer. As a result, the act may impede the “virtual insurer” as a business model and limit the ability of insurers to use pricing to encourage business on the Internet. Once the consumer converts to paper, the “virtual insurer” will then be required to provide services to that customer in a manner contradictory to its business model. In addition, any insurer that used pricing as an incentive to attract online consumers may have to carry forward this price when the consumer moves to the offline world. In a larger sense, provisions like these have the effect of discouraging insurers from considering “virtual” business models and using price to attract business to their site.

Because of the complexity of the E-Sign consumer consent provisions, we understand that some insurers are more likely to start with commercial transactions and then move to consumer transactions as the level of comfort improves. Unfortunately, the untested provisions of E-Sign consent are already becoming embedded in state law.

AIA and Fireman’s Fund believes that UETA, as adopted by NCCUSL, provides a simpler approach with regard to consent. Whether the parties have consented to engage in an electronic transaction under UETA is determined by their actions and the surrounding facts and circumstances. Rather than regulating the manner of receiving

and accessing consent notices electronically, UETA §5 does not apply to electronic records where the parties to a transaction have not agreed to deal electronically. The finding of agreement is dependent on the context of the transaction and the parties conduct. About half the states have adopted a relatively pure version of UETA, and our experiences over the next year will provide insights on whether the simpler approach of UETA is superior.

Conclusion

In conclusion, we applaud the passage of E-Sign and the benefits it has brought to conducting insurance transactions over the Internet. E-Sign has brought a higher degree of uniformity to the law surrounding online insurance transactions. As a result, our consumers may now execute an online insurance transaction completely online, at their request.

Even though questions remain on such issues as “consumer consent,” the legal environment has vastly improved. We continue to support adoption of UETA in the states in order to maintain uniformity. In the meantime, non-uniformity, particularly for the business of insurance, still remains a nagging and unfortunate reality.

As this subcommittee and all of Congress mulls over the implementation of E-Sign provisions and other e-commerce issues, we urge you to take the following action:

- (1) Contact the NAIC and state insurance regulators to encourage the states to strive for the highest level of uniformity possible in implementing E-Sign or UETA so that insurance companies can have the highest level of confidence in delivering services to its customers online in a way that utilizes the best technology available.
- (2) Recognize that, in many policy/regulatory areas, but particularly in e-commerce, a strong federal preemption is vital in giving businesses greater certainty and confidence in using technology and the Internet to serve their customers.

In the next year, we will learn valuable insights on whether the E-Sign consent provisions are successful and whether UETA provides an equally effective and simpler approach to consent. We look forward to continuing to share those perspectives with you, as well as the FTC and U.S. Commerce Department.

Again, we appreciate having the opportunity to testify before you today and would be happy to answer any questions you may have.