E-Sigs: As Bad as E-Cigs?

By: Deborah Brouwer and Anna Kozak, *Nemeth Bonnette Brouwer PC*

Executive Summary

Electronic signatures are increasingly common as society relies more on e-commerce and electronic communication. Anticipating this reliance, Michigan and the federal legislature enacted laws in 2000 recognizing the validity of electronic signatures. While electronic signatures add convenience to many aspects of everyday life, they also present issues regarding authentication, especially in early stages of litigation. As a result, where a party attempts to rely on an electronic signature when seeking an early resolution of a lawsuit, challenges to the authenticity of the electronic signature have become an effective strategy for delaying dismissal. Developing case law suggests that wet signatures are less vulnerable to such challenges because a party's wet signature is uniquely their own, whereas electronic signatures lack similar distinctive characteristics. Consequently, entities that take advantage of electronic signing may want to reconsider exactly what documents they choose to have signed electronically, the electronic signing procedures utilized to guarantee the identity of the signor, and whether they should require wet signatures on documents that could be important in future litigation.

Authentication Issues with Electronic Signatures.

In a rare moment of combined government foresight and action, Michigan and the federal legislatures enacted laws in October 2000 recognizing the validity of electronic signatures. At that time, the general public's access to the internet had become increasingly common, and it had become apparent that electronic contracting and signing were the future. Rather than resisting the inevitable—a world of digital commerce and contracting—Congress enacted the United States Electronic Signatures in Global and National Commerce Act (ESIGN), giving legal effect to what are typically referred to as electronic signatures.[1] Shortly thereafter, many states implemented the National Conference of Commissioners on Uniform State Laws' (NCCUSL) model law, the Uniform Electronic Transactions Act (UETA), which complemented and expanded upon the ESIGN Act.[2]

ESIGN and many of its state counterparts permit a wide range of signing methods. However, not all these methods render an electronic signature easily attributable to the signor. Issues with electronic signatures thus can arise where a party seeks to enforce a contract provision, or where ascertaining the validity of a signature would result in the early resolution of litigation. Consequently, challenges to the authenticity of electronic signatures may obstruct early resolution and prolong litigation that is otherwise ripe for early resolution.

Relevant Statutes Pertaining to Electronic Signatures

ESIGN became effective on October 1, 2000.[3] Under ESIGN, "A signature…may not be denied legal effect, validity, or enforceability solely because it is in electronic form."[4] Similarly, a contract in electronic form may not be denied "legal effect, validity, or enforceability" due to its electronic form.[5] ESIGN provides that states may pass laws that modify, limit, or supersede the validity rules outlined in ESIGN's general rules of validity only if the state's rule "constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended…by the National Conference of Commissioners on Uniform State Laws." However, any state instituted rules inconsistent with ESIGN's e-signature rules are pre-empted by ESIGN.[6]

Anna Kozak is an Associate Attorney at Nemeth Law P.C., practicing exclusively management-side labor and employment law. She received her J.D. from Wayne State University Law School in 2020, and her M.A. in American Politics and Government from Wayne State University in 2021. She has experience representing and counseling clients in employment disputes, including allegations of race, gender, age, and religious discrimination.

Deborah Brouwer, has been an attorney since 1980, practices exclusively in labor and employment law, with particular experience in the defense of lawsuits against employers, including claims of race, age, religion, national origin, gender and disability discrimination, harassment and retaliation, as well as FLSA, FMLA and non-competition suits. She also provides harassment training and conducts discrimination and harassment investigations for employers. She has extensive experience in appearing before administrative agencies, including the EEOC, MDCR, MIOSHA, OSHA and the NLRB. She also appears frequently before the Michigan Court of Appeals and the Sixth Circuit Court of Appeals. Her email address is dbrouwer@ nemethlawpc.com.

In response, the NCCUSL developed the UETA. While similar to ESIGN, the UETA has been touted as a more "comprehensive" statutory scheme than that which ESIGN provides, including more robust definitions and ratifying the use of electronic signatures for intrastate transactions as well.[7] To date, 49 states, the District of Columbia, and the Virgin Islands have adopted the UETA, with only New York and Puerto Rico choosing to abstain.[8] While New York did not adopt the UETA, it did amend its Electronic Signatures and Records Act in 2002 to eliminate any conflicts with ESIGN.[9]

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Shortly after ESIGN's passage, Michigan adopted the UETA, and on October 16, 2000, the Michigan Uniform Electronic Transactions Act (MUETA) became effective. The MUETA mirrors the ESIGN act's language, establishing that an electronic signature "shall not be denied legal effect" due to its electronic form, and "[i]f the law requires a signature, an electronic signature satisfies the law."[10] Both the MUETA and the ESIGN Act define "electronic signature" as "an electronic sound, symbol, or process attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record."[11] Accordingly, the MUETA permits a broad range of methods by which a person can sign documents.

The MUETA anticipates authentication issues associated with electronic signatures and provides that an electronic signature is "attributable to a person if it is the act of the person."[12] Proving that a signature is the act of the person "may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic signature…was attributable."[13]

Thus, under ESIGN and MUETA, Michigan state and federal courts must recognize electronic signatures as legally valid. However, whether courts can truly treat electronic and wet signatures the same remains unclear due to the different methodologies employed when authenticating wet and electronic signatures. Specifically, where a party emphatically denies that an electronic signature is her own, counsel may face obstacles in proving to whom an electronic signature belongs.

Use of Affidavits to Create an Issue of Fact Regarding the Authenticity of E-Signatures

Recently, the Sixth Circuit Court of Appeals addressed the authenticity of electronic signatures at the summary-judgment stage. In *Boykin v Family Dollar Stores of Michigan, LLC.*,[14] the plaintiff alleged age and race discrimination. Family Dollar sought to compel arbitration. Family Dollar provided employees with virtual arbitration training that could be accessed only with an employee's unique username and password, at the end of which, employees are required to electronically review and sign an arbitration policy.[15] Family Dollar's records indicated that the plaintiff completed training, but it did not produce a signed copy of the arbitration agreement in response to the plaintiff's pre-suit request for his personnel records.[16] The plaintiff opposed the motion, filing one affidavit stating that he did not recall signing the arbitration agreement, and then filing another asserting that he "did not consent to, sign, acknowledge, or authorize any type of arbitration agreement…."[17] The district court concluded the plaintiff failed to establish a genuine dispute of material fact as to whether he had agreed to arbitration.[18]

The Sixth Circuit reversed, concluding that while "memory lapses do not create factual disputes that are genuine," an "'unequivocal denial" that takes the form of admissible 'evidence' can create a genuine issue of fact."[19] The court held that the plaintiff's denial created a factual dispute over whether he agreed to arbitrate his claims.

The Second Circuit Court of Appeals reached a similar result, relying in part on *Boykin.* In *Barrows v Brinker Restaurant Corporation*,[20] the plaintiff alleged various employment-law violations.[21] Brinker sought to compel arbitration, producing an arbitration agreement that appeared to be electronically signed by the plaintiff. The plaintiff claimed, however, that she had not signed the agreement, and attacked the security measures that Brinker had in place to ensure only the plaintiff could sign the document.[22] For an employee to access and sign the handbook, they had to set up an account using personal information, including their social security number and birthdate. Once the account was created, the employee could change his or her username and password.[23] The plaintiff asserted that she never created the account used to sign employment documents. She also pointed out that her employer possessed the personal information necessary to create an account on her behalf and may have electronically signed her name to the arbitration policy. The district court granted Brinker's motion to compel arbitration, reasoning that the plaintiff did not create a triable issue of fact.[24]

The Second Circuit reversed, concluding that the plaintiff's sworn declaration was sufficient to defeat the motion.[25] It further noted that, while the declaration alone was sufficient to create a triable issue of fact, the plaintiff also attacked the security measures in place. In response, the court observed that the personal information required to create an account was not "secure," because management had access to it.

In contrast, in *Reulbach v Life Time Fitness, Inc*, the Northern District of Ohio enforced an arbitration agreement despite the plaintiff's claim he did not sign the agreement. There, the plaintiff sued his employer for unpaid wages and

a hostile work environment due to age discrimination.[26] The defendant moved to compel arbitration supported by a declaration, stating that when employees logged into their employee portal, they were prompted to review and sign an arbitration agreement.[27] The declaration further indicated that the plaintiff signed the arbitration agreement on September 30, 2019. The plaintiff submitted an affidavit stating that he never signed the arbitration agreement, he was on medical leave at the time he allegedly signed the agreement, and he could not access the employee portal at home. The defendant responded with evidence that the plaintiff had logged into the employee portal three times on September 30, 2019—twice on his phone and once on his office desktop.[28] Further, the defendants submitted evidence showing that the plaintiff worked on September 30, 2019, producing records that he swiped his badge and entered time for teaching classes on that day.

Ultimately, the court held that the plaintiff's affidavit alone was insufficient to create a genuine issue of fact regarding whether he signed the agreement.[29] Although the opinion does not provide a robust analysis regarding the validity of electronic signatures or their authentication, the Court's opinion does not suggest that the plaintiff attempted to challenge the security measures in place with respect to ensuring the intended person signed the agreement. Further, even if the plaintiff had attempted to make this showing, it appears to have been sufficiently rebutted by the defendant's evidence that the plaintiff logged in from his phone—something the company would not have access to.

In *Boykin* and *Barrows*, the plaintiffs successfully created an issue of fact, avoiding early disposition of their cases, by denying that they had signed the arbitration agreements. While the court in *Reulbach* reached a different conclusion under similar facts, there, the defendant was able to successfully refute the plaintiff's assertion that he was not at work on the day the agreement was signed *and* that he could not access the employee portal from home to sign the agreement. Although it seems as if the plaintiffs in *Boykin* and *Barrows* defeated a motion to compel arbitration by proffering a simple denial that the electronic signatures at issue were their own, they took their argument one step further. In *Boykin*, the defendant's inability to produce a signed copy of the arbitration agreement in response to the plaintiff's pre-suit request coupled with the plaintiff's denial that he signed any such agreement rendered the defendant's arbitration claim unsustainable. Similarly, in *Barrows* the plaintiff raised questions about the sufficiency of the security measures in place in addition to her assertion she did not sign the agreement.

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What is challenging about electronic signatures is that counsel cannot simply ask a signor whether she recognizes the signature as her own. Further, where electronic signatures and employment paperwork are involved, it is not uncommon for employees to complete new-hire paperwork in one sitting. Thus, the employer's ability to ascertain whether an employee recognizes a document during a judicial proceeding may be hindered by the fact that an employee may not be able to recall each, and every document signed on a specific day. Though memory lapses are insufficient to create a genuine issue of fact, an employee who recalls some documents and not others may truly but mistakenly believe that she did not sign a particular document.

Even more concerning is that even where security measures are in place to ensure the identity of the signor, those measures can be challenged quite easily. Even the signor's submission of his or her social security number at the time of signing is insufficient to demonstrate the signature's authenticity if any other party has access to that personal information. This in turn presents an additional issue—how is a company to ensure an electronic signature is authentic if it cannot have access to the personal information submitted as a security measure to confirm that the information does in fact belong to the signing party? Unless a party witnesses the signor electronically signing documents or otherwise requires an electronic notary in the signing of documents executed electronically, it seems as though signors have may the upper hand when challenging the validity of their electronic signatures. Further, employers must collect various forms of personal identifying information at the outset of employment in order to properly withhold taxes from an employee and to comply with the I-9 verification process, rendering it challenging to create a security measure aimed at ensuring the signor's identity while simultaneously maintaining adequate security measures.

Evidence Used to Create a Question of Fact Regarding the Authenticity of Wet Signatures

Wet signatures, on the other hand, appear less susceptible to an "unequivocal denial" challenge to authenticity. In *Randall v TT of C Louisville, Inc.*, the Sixth Circuit Court of Appeals held that the plaintiff failed to create a material question of fact regarding his assent to an agreement to arbitrate.[30] There, the plaintiff alleged Truth in Lending Act violations. The defendants filed a motion to compel arbitration, producing two copies of an arbitration agreement.[31] The plaintiff asserted the signatures were forgeries, pointing to discrepancies between the signatures at issue, and those on other documents signed the same day as the arbitration agreement.[32]

The court rejected the plaintiff's challenge, holding that he failed to provide sufficient evidence to permit a

trier of fact to conclude the signatures on the arbitration agreement were not his authentic signatures because the plaintiff did not claim or suggest that the signatures in question differed from his authentic signature.[33]

In contrast, in *CitiFinancial Mortgage Company v Comerica Bank*, the plaintiff successfully challenged the authenticity of the mortgagor's signature on a loan payoff statement.[34] There, a mortgagor took out two mortgages on her home, one from the plaintiff and one from the defendant. The plaintiff filed an action to determine the order of priority. At her deposition, the mortgagor testified that she did not recognize her signature on the payoff statement, which the plaintiff allegedly had sent to the defendant after it was executed. However, she did admit that she could not "swear" that she did not sign the document, because she signed so many documents that day and could not recall all of them.[35] The defendant produced a handwriting expert, who testified that the signature on the payoff statement was inconsistent with the mortgagor's authenticated signatures, and it was highly probable the signature was an attempt to "simulate" the mortgagor's signature.[36] Both parties filed cross-motions for summary disposition. The court denied the plaintiff's motion and granted the defendant's motion. The plaintiff then appealed, asserting that the mortgagor's conflicting testimony created an issue of material fact.[37]

The Michigan Court of Appeals affirmed, concluding that the defendant met its burden by submitting the mortgagor's testimony that she did not recall signing the document or recognize the signature as her own, along with the handwriting expert's conclusion that the signature was probably a forgery.[38] The Court of Appeals noted that the plaintiff was required to offer *more* than conclusory allegations that the mortgagor's signature was genuine. Instead, the plaintiff needed to offer evidence that the signature was authentic.

Where wet signatures are concerned, it seems the courts are less susceptible to "unequivocal denials" as sufficient to create a genuine issue of material fact, especially where an authenticated signature is in the record. Instead, it appears that a party challenging the authenticity of a wet signature needs to compare the alleged forgery against authenticated versions of the signature. Even an unequivocal denial that a wet signature belongs to the signor is insufficient where the signor fails to allege the forgery differs from his authenticated signature.[39] Perhaps the opportunity to personally view an authenticated signature and compare it against an alleged forgery provides judges evidence more readily quantifiable than a name typed in "Times New Roman," and a dissertation on the security measures used to ensure the identity of the signor. Whatever the case may be, the nuances that exist between authenticating electronic signatures and wet signatures are worth paying attention to as the case law continues to develop.

Conclusion

Although electronic signatures have expedited the contracting process by allowing people to execute contracts remotely, expanding the accessibility of various goods and services, and likely saving a few trees, the process is not without its flaws. While electronic signatures may present more obstacles than wet signatures when it comes to authentication and early disposition, perhaps this added burden is the tradeoff we make for the ease e-signing brings to everyday life. Regardless, those who rely on electronic signatures should be particularly cognizant of the potential issues that accompany utilizing electronic signatures on documents tailored towards avoiding or obtaining early resolution in the event of litigation. Specifically, it may be worth reassessing the processes in place for signing documents related to the litigation process or avoidance thereof.

Endnotes

1 Meehan & Beard, *What Hath Congress Wrought: E-Sign, the UETA, and the Question of Preemption*, 37 Idaho L. Rev. 389, 390 (2001).

2 *Id.*

3 15 USC 7001.

4 *Id.*

5 *Id.*

6 15 USC 7002.

7 https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=97560e15-8b54-1237-70ca-683b36af5f43&forceDialog=0

8 Electronic Transactions Act - Uniform Law Commission (uniformlaws.org)

9 *Naldi v Grunberg*, 80 AD3d 1, 12; 908 NYS2d 639, 646 (2010).

10 MCL 450.837.

11 15 USC 7006; MCL 450.832.

12 MCL 450.839.

13 *Id.*

14 *Boykin v Family Dollar Stores of Mich, LLC*, 3 F4th 832, 840 (CA 6, 2021).

15 *Id.* at 836.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Barrows v Brinker Rest Corp*, 36 F4th 45 (CA 2, 2022).

21 *Id.*

22 *Id.* at 45.

23 *Id.*

24 *Id.*

25 *Id.* at 45.

26 *Reulbach v Life Time Fitness, Inc*, unpublished opinion and order of the United States District Court for the Northern District of Ohio, issued June 23, 2021 (Docket No. 1:21 CV 1013); 2021 WL 2581565, *3.

27 *Id.*

28 *Id.* at *4.

29 *Id.* at *5.

30 *Randall v TT of C Louisville, Inc*, unpublished memorandum opinion of the United States District Court for the Western District of Kentucky, issued February 15, 2022 (Docket No. 3:21-CV-00378); 2022 WL 468052, *9.

31 *Id.* at *3.

32 *Id.* at *7-8.

33 *Id.* at *9.

34 *Citifinancial Mortg Co, LLC v Comerica Bank*, unpublished per curiam opinion of the Court of Appeals, issued December 21, 2006 (Docket No. 270453); 2006 WL 3755230, *1.

35 *Id.* at *2.

36 *Id.*

37 *Id.* at *1.

38 *Id.* at *2.

39 *Randall*, *supra* at *8.