

# THE DALLAS BAR ASSOCIATION REAL PROPERTY SECTION LUNCH

## “TEXAS ELECTRONIC TRANSACTIONS ACT AND REAL ESTATE CONTRACTS”

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1. **General discussion topic:** the applicability of the Uniform Electronic Transactions Act [Chapt. 322, TBCC, formerly Chapt. 43] to real estate contracts. With permission of the author, we will use Jim Wiedemer’s article, “Drafting Disasters Regarding Electronic Documents,” 2002 Advanced Real Estate Drafting Course, as the basis of our discussion.

2. Why do we have the Texas Electronic Transactions Act [“ETA”]? What is the Federal e-sign law, the Electronic Signatures in Global and National Commerce Act?

3. What does the ETA do?

a. Definitions.

Agreement: the bargain of the parties found in the language or inferred from the circumstances.

Electronic: electrical, digital, magnetic, wireless, optical, or similar capabilities.

Electronic Record: any data stored electronically. Think of this as “paper.”

Electronic Signature: an electronic sound, symbol, or process, attached to or logically associated with, and executed with an intent to sign the electronic record. Think of this as a “blue ink signature.”

Transaction: an action or set of actions between two or more persons.

b. Scope/ Exclusions [§322.003]. The ETA affirmatively applies to everything, but does **not** apply to: wills or the UCC [**except** 1.107, 1.206, Chapters 2 and 2A]. **Big Point:** part (d) says any transaction governed by the ETA is still subject to applicable substantive law.

c. Effective Date [§322.004]. Applies to electronic records after 1/1/2002.

d. Use of Records [§322.005]. **Very important section.**

Part (a), the ETA does not require electronic records/ signatures. It is the agreement of the parties to agree to the ETA that controls.

Part (b), you can agree, disagree, or vary the agreement to use electronic records by agreement. The “agreement” is determined by the context and circumstances, including conduct.

- Note 3 says that in order to facilitate electronic transactions, the circumstances cannot be limited to a “full fledged” contract to use electronics.

- Note 4 gives several examples of “agreements” to do business electronically. Merely handing out a business card with an email is not, by itself, conclusive. But ordering a book online would infer an agreement to do business electronically.

- Note 5 opens the door to allow the circumstances to negate the intent to use electronic records.

Part (c), from Note 6, provides that once a transaction has started and e-commerce applies, you cannot amend the contract in the middle of the transaction to remove e-commerce. However, for the purposes of the next transaction, a party may refuse to continue doing business electronically.

Part (d) is an “*essential*” provision of the ETA. It clarifies that while the ETA validates an electronic record [i.e., a paper contract] and an electronic signature [i.e., a blue ink manually signed name], you still have to meet the underlying legal requirements for the contract formation. For example, a real estate contract must contain a legal description.

e. Construction of the ETA [§322.006]. Broad, broad broad, and when in doubt opt for the broader of the two choices.

f. Legal Recognition [§322.007]. This is the section that says “electronic” is paper and over-rides the statute of frauds.

g. Notarization [§322.011]. A notary may be in the room and type his/her name as notary and *voila*, it is notarized! See the two examples in the comments.

h. Admissibility [§322.013]. Electronic records are admissible, subject to evidentiary rules.

i. Transferable Records [§322.016]. These are the special rules for a promissory note.

j. State Rules [§322.017]. These are the provisions for doing business with the State.

4. How many think the ETA only applies to third party, signature encryption contracts handled by an intermediary?

a. Is an email with a name on the bottom a “legal blue ink” signature under Texas law?

b. Do you need a clause in a contract “authorizing” electronic documents [i.e., a pdf is the same as an original?].

c. If two [or more in a series] emails contain all essential terms of a contract, and names, is it a valid contract?

d. Same facts, but the emails are about a sale of real property, does it meet the statute of frauds?

e. Same facts, but the message was left on a voice mail?

f. What is a signature? For example, most clients don’t know the real name of the LP that actually holds title to the Shopping Center. Same facts, but the signature on the bottom of the owner/ seller is “Jim Wallenstein, President, Diamond Realty Company.” But the legal owner of the Center is “Preston/ Forest SC, LLC.” Was it signed?

5. Special considerations.

a. Adding a “draft” as a watermark to e-documents. For example, suppose a client sends a contract in Word, intending it as a draft [in her mind] but without any limitation in the email, is it a signed offer?

b. Adding a general disclaimer to the email footer to deny electronic signature?

Example from Kevin [I found this on a broker’s email]: [Last line] “The Sender disavows any intention to create an agreement or an electronic signature by means of this transmission.”

Example from Jim: “This communication does not constitute an intention by the sender to conduct a transaction or make any agreement or contract by electronic means. Nothing contained herein or in any attached electronic file shall satisfy the requirements for a writing, nor constitute a contract or electronic signature, as those terms are defined in or contemplated by the Electronic Signatures In Global And National Commerce, 15 U. S. C. §§ 7001 et seq. or any version of the Uniform Electronic Transaction Act adopted by any state or any other statute governing electronic transactions.”

Alternate footer: “Neither this e-mail communication nor any attachment to this e-mail will be contractual in any manner; provided, however, that if this message or an attached legal document contains the word "contract," "agreement," "agreed" or a similar word or words in its title and clearly states its contractual nature, then this message or such legal document will be deemed contractual to the extent so clearly stated.”

c. Stamp “void” or “draft” on pdf images. For example, a Release was signed and held in escrow by an attorney. He circulated it with a very clear email that the Release was not being published or released, it was being distributed for verification only. But the image was clean.

d. Make it a habit to clean out or delete the long string of lower emails to avoid possible agreements.

e. Adding a negation of electronic amendments to the contract, except for actual signed paper that is scanned as an image. For example, under standard loan documents, suppose a borrower sends a sad-sack email whining about problems, casually mentioning wanting a 1% rate on the loan, and making friendly chit-chat about life. The banker reads it quickly and casually replies "OK" really just meaning OK I read your email. Was the loan just modified?

Comment from Phil Weller: "I have one client that includes a provision in its contracts that expressly states it may not be executed electronically nor may it be amended by email or electronically."

f. SMU/ Condo mediation emails case. Can two emails between lawyers in litigation inadvertently constitute a Rule 11 agreement, binding on clients?

g. Have you warned any clients about the risk of e-contracts?

h. Engagement Letter Disclosure. Some law firms are adding the following as a disclosure/ permission to use emails:

"The Firm will communicate with *Client* and with others by electronic mail. Such communications will not be encrypted. Although interception of such communications by a third party would constitute a violation of federal law, the Firm can offer no assurance that such interception will not occur. The Firm will abide by any instructions *Client* may give us concerning electronic mail communications; in the absence of such instructions, the Firm will use its own judgment regarding the advisability of using such means of communication."

i. E-Signature Agreement. Consider using an "E-Signature Agreement" when a client cannot print, sign and scan a document. For example, send an email with the pdf [or, an Electronic Record] attached with this message:

"We have attached a pdf image of [Insert name of document, e.g. Release of Earnest Money] for your signature. Pursuant to the Uniform Electronic Transactions Act as adopted by the State of Texas, you affirm to us that you agree with the terms thereof and by your affirmative response to this email, you are executing the document and intending to attach your Electronic Signature to it. Furthermore you acknowledge that we can rely on your email response as your signature. Your affirmative response will be a contract under Texas law."

6. Wiedemer's Examples.

a. Certain consumer limitations for electronic notice of default, foreclosure, etc.

b. Statutory notice requirements are not over-ridden by ETA. For example, real estate foreclosure notices must be sent by certified mail. If a notice must be conspicuous or bold, then the email must also comply.

c. Using the ETA to create electronic notes.

d. Very broad authorizations / or the corollary, limit the impact?

e. Electronic checks.

f. Authorizing email notices.

g. Limitations on business with the State of Texas.

7. Etcetera<sup>1</sup>.

a. Real Estate Forms Manual. Only includes a brief reference to the act [§2.72].

b. *Brooks v. Metiscan Technologies, Inc.*, 2009 WL 3087258 (Tex. App.-Dallas, 2009) (employment case where parties disputed whether there was a binding settlement).

**Facts:** Brooks made a claim for deferred compensation against the company. The parties met with counsel and reached an oral agreement. Following the meeting the company's lawyer sent a confirming email as a "summary term sheet" [court's words]. The employee's lawyer responded by email with some comments/ objections. Then the company's lawyer sent a settlement agreement, marked for "review and comment." In the end, the parties broke off the negotiations and the employee filed suit to enforce the email settlement agreement.

**Trial Court's Ruling:** The trial court granted the company's MSJ and found: (1) the agreement lacked material terms and was not a contract; (2) the subsequent actions showed the agreement did not contain the essential elements; (3) the email did not contain an electronic signature; and (4) the employee's attorney's email response was a counter-offer.

**Dallas Appellate Court.** The appellate court addressed the first point of appeal and concluded that the trial court correctly held that the memo/ email exchanges did not contain all essential terms and therefore was not a contract. The appellate court's finding precluded any further discussion of the appellate points, including the issue of whether an email contained an "electronic signature."

#### **Issues.**

1. Whether they hold up on not, any party can allege that two or more emails constitute an enforceable agreement.

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<sup>1</sup> I would like to express my appreciation to a new associate of Bracewell & Giuliani, Kason Kerr, for his assistance in researching the case law for this paper.

2. We have no guidance regarding the trial court's reasoning regarding the "electronic signature."

3. The courts will look at all circumstances to determine whether the parties overall actions reflect a binding contract.

c. *In re Marriage of Takusagawa*, 166 P.3d 440 (Kan. App. Ct. 2007) (divorce case where the court was justifying its decision to enforce a divorce decree based on the husband's oral assent) [Citations/ footnotes omitted].

"Several additional considerations reinforce our conclusion that the statute of frauds is no bar to enforcement of this agreement. First, Kansas' adoption in 2000 of the Uniform Electronic Transactions Act, probably makes Mieko's in-court statement the legal equivalent of a written signature for purposes of the statute of frauds. The record does not disclose the type of equipment used by the court reporter, but it would be quite rare today for a court reporter's equipment not to at least require electricity. The UETA deems records generated by electronic means, including the use of electrical or digital magnetic capabilities, to be electronic records. The UETA also deems any electronic sound or symbol "adopted by a person with the intent to sign the record" to be an "electronic signature." The UETA then provides that when a law requires a record or a signature to be in writing, an electronic record or signature will satisfy the law. Thus, assuming that the court reporter's equipment was consistent with modern practice, it would appear that the electronic capture of Mieko's oral assent that this was the agreement would satisfy the statute of frauds. No more [evidence] is needed to show that Mieko made or adopted the agreement."

**Issue.** With the court's willingness to use a voice recorded court reporter's transcription as a valid record/ signature, suppose someone surreptitiously records a meeting, can that be a contract?

d. *Peruta v. Outback Steakhouse of Florida, Inc.*, 913 A.2d 1160 (Conn. Super. 2006) (employment case where waiters sued employers claiming they were underpaid) [Citations/ footnotes omitted].

"During his testimony, Scacca was shown what was there described as a "Connecticut Department of Labor Wage and Workplace Standards Division Tip Statement." As the defendant points out, this sample form, which the plaintiffs claim Outback Steakhouse should have been using, misstates the law. Scacca's testimony was that he had not seen the form before, which is not an admission of a violation. He then went on to testify that employees declared their tips in the computer when they clocked out daily and filled out a "checkout form" not otherwise there identified. The defendant asserts that this process of logging in constitutes a "signed statement" under the Connecticut Uniform Electronic Transactions Act. Whether such entries constitute a "signature" under the Connecticut Uniform Electronic Transactions Act is a question of law to be decided by the court at trial since statutory interpretation is a court function. Nor is the testimony of either Kadow or Lancaster helpful to the plaintiffs on this point. The excerpted testimony from Kadow establishes only that

the state department of labor website form (the so-called "tip credit statement") was not one he had seen before. That portion of Lancaster's testimony to which the plaintiffs direct the court establishes only that a "check-out form" was used by employees to acknowledge tips received. Thus, the court has not been provided with any "admission" which may be offered as generalized proof."

**Issue.** Can employee notes in a computer as part of the job become an electronic record/ signature and therefor an admission in a trial? What if someone makes an entry into their outlook calendar?

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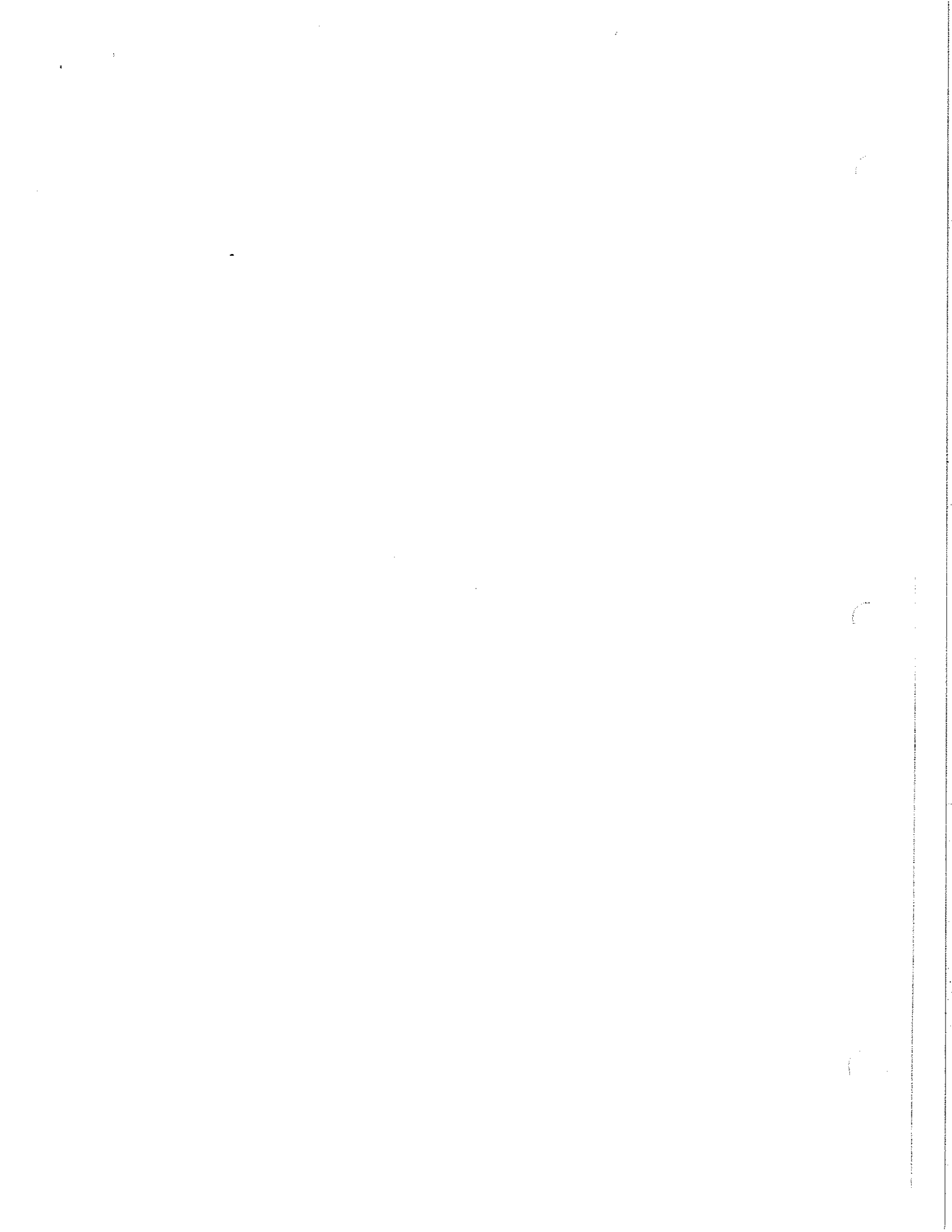
**DRAFTING DISASTERS REGARDING  
ELECTRONIC DOCUMENTS**

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**CHAPTER 22**





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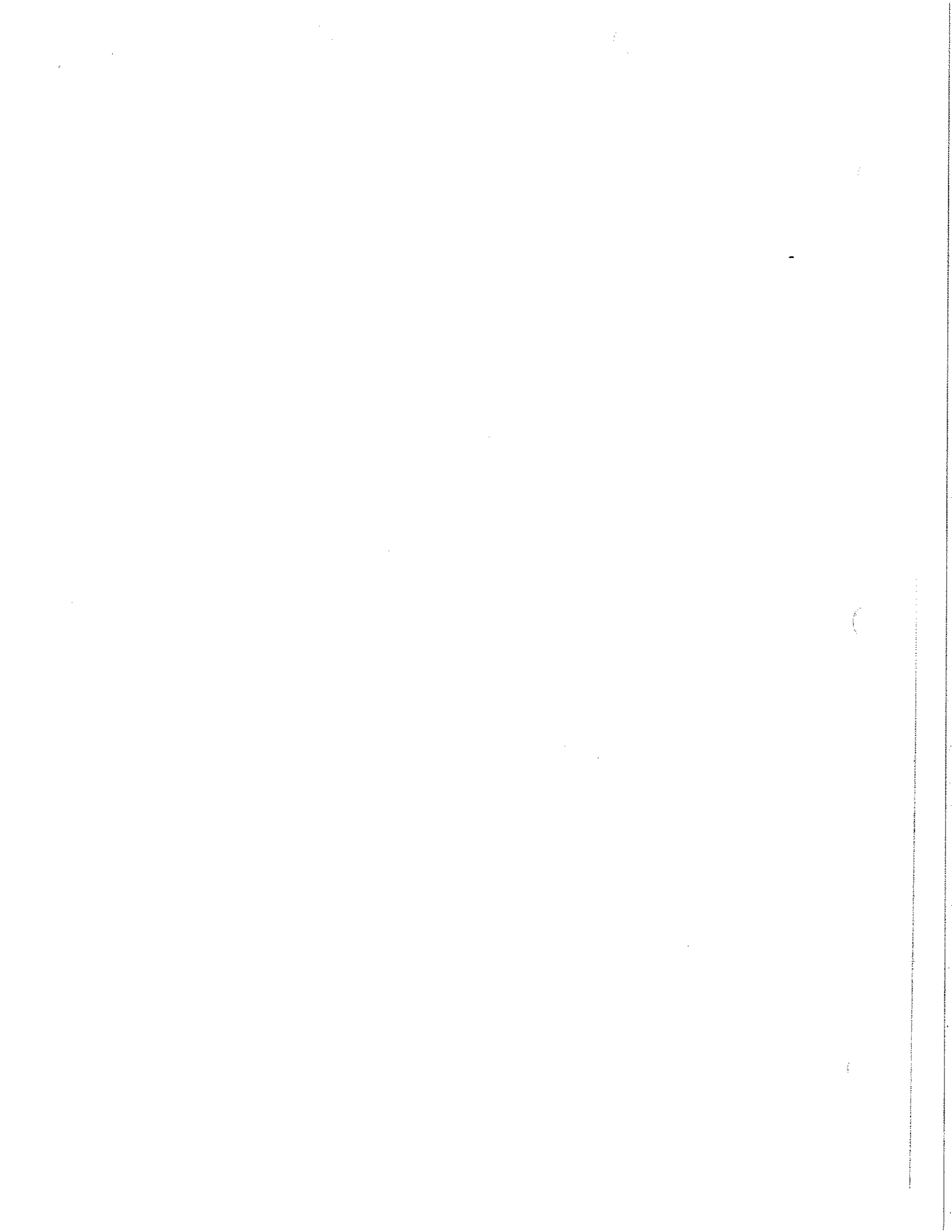
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## I. DRAFTING DISASTERS REGARDING ELECTRONIC DOCUMENTS

The future may see more and more closings done electronically. Future real estate contracts may be done electronically. Recording is likely to be done electronically and the time when we will see it in Texas is near. In as little as two years, title companies in major cities are likely to begin recording transactions electronically. New laws permitting electronic transactions have passed. In this context, attorneys who prepare real estate documents, including contracts, leases, and deeds may not be able to ignore electronic considerations much longer. A number of drafting mistakes concerning real estate documents to be produced electronically are possible.

## II. BACKGROUND - THE TEXAS UNIFORM ELECTRONIC TRANSACTIONS ACT (U.E.T.A.) AND THE FEDERAL E-SIGN LAW APPLY TO REAL ESTATE

Many potential drafting disasters revolve around applying the provisions of new laws on electronic transactions to Texas real estate transactions. Two key laws passed recently:

- (1) the Federal e-sign law, the Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001 and 7003 which passed Congress and was signed into law with an electronic pen on June 30, 2000, and
- (2) the new Texas Uniform Electronic Transactions Act (U.E.T.A.), found as Texas Business & Commerce Code, Sec. 43, which passed the Texas Legislature on May 24, 2001, and was signed into law in June. The Texas U.E.T.A. took effect for transactions occurring after January 1, 2002. (SB 393).

The Federal e-sign law pre-empts state laws to the contrary regarding contract formation and effect by electronic means, but it also provides that if a state passes the U.E.T.A., (Uniform Electronic Transactions Act), then the Federal e-sign law will no longer control electronic transactions, and the state U.E.T.A. will. Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sec. 7002, Section 102). In order for a state U.E.T.A. law to trump the Federal e-sign law, the state's version must provide substantially the same rights as the U.E.T.A. *Id* The Texas law is close to the national U.E.T.A., except for consumer protection provisions, which are also found in the Federal e-sign law. Some argue it may be struck down as non-standard, but until that actually happens, U.E.T.A. is the law in Texas for electronic transactions in real estate. In any event, if the Texas U.E.T.A. fails in court, the Federal e-sign law would spring back into control, with provisions that are similar to the U.E.T.A. See Patricia Brumfield Fry, "A

Preliminary Analysis of Federal and State Electronic Commerce Laws", U.L.C. available on the web at:

[www.nccusl.org/nccusl/uniformact\\_articles](http://www.nccusl.org/nccusl/uniformact_articles)

(Ms. Fry Chairs the Committee that wrote the U.E.T.A.)

U.E.T.A. governs not only leases and contracts, but instruments of conveyance and title clearance as well, such as deeds and releases. The U.E.T.A. committee's Draft Prefatory Note and Comments issued 12-13-99, indicate that real estate documents were squarely intended by the drafters of U.E.T.A. to be covered by the U.E.T.A.

"For example, real estate transactions were considered potentially troublesome because of the need to file a deed or other instrument for protection against third parties. Since the efficacy of a real estate purchase contract, or even a deed, between the parties is not affected by any sort of filing, the question was raised why these transactions should not be validated by this Act if done via an electronic medium. No sound reason was found. Filing requirements fall within Sections 17-19 on government records. An exclusion of all real estate transactions would be particularly unwarranted in the event that a state chose to convert to an electronic recording system, as many have for Article 9 financing statement filings under the Uniform Commercial Code."

If future Texas real estate transactions become heavily electronic, the Texas U.E.T.A. will become increasingly important.

## III ELECTRONIC DRAFTING DISASTERS - A SHORT LIST

Based on the new U.E.T.A. a number of potential drafting can arise. Here are seven types of provisions that may have trouble:

- (1) provisions that ignore the Texas U.E.T.A.'s proscription on electronic notices in certain consumer transactions;
- (2) provisions that send notices electronically despite the fact that U.E.T.A. does not override statutes requiring the use of a specific communications medium;
- (3) creating an electronic promissory note by ordinary means when it must meet U.E.T.A.'s special transferable record rules;
- (4) engaging in electronic negotiations that may imply consent to contract electronically under U.E.T.A.;
- (5) using U.E.T.A. based provisions in certain U.C.C. and other transactions that are excluded from U.E.T.A. coverage;

- (6) sending electronic notices for contracts without recognizing the effect U.E.T.A. has on such notices;
- (7) engaging in electronic transactions with state agencies without following the special rules U.E.T.A. allows them to create.

#### IV. KEY DRAFTING ERRORS

##### A. Drafting Disaster 1: Ignoring the Texas U.E.T.A.'s Proscription on Electronic Notices in Certain Consumer Transactions

###### EXAMPLE OF ERROR:

NOTICES: All notices from one party to the other must be in writing and are effective when mailed to, hand delivered at, or e-mailed to:

John Jay Zellar 1210 Homewoods Houston, Tx 77002 zellar@internet.com	Mary Kay Beier 1500 Turtle Creek Dallas, Tx 77301 mkbr@wonder.com
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###### ANALYSIS

IF THE ABOVE DOCUMENT DEALS WITH A PRINCIPAL RESIDENCE FOR A LOAN OR A LEASE THE ABOVE E-MAIL PROVISION IS INVALID for default, acceleration, repossession, foreclosure or eviction; only mail and hand delivery would be effective.

Texas U.E.T.A. has exceptions for certain consumer notices concerning a principal residence. These don't apply to commercial situations. The Texas U.E.T.A. consumer-friendly paper notice requirements include notices to cancel utilities, and in particular, notices concerning:

default,  
acceleration,  
repossession,  
foreclosure, or  
eviction

arising out of a credit agreement on a primary residence, or a rental agreement on a primary residence. These must be in paper for the time being, they can't be electronic under the Texas U.E.T.A. In contrast, electronic notice addresses for an earnest money contract on a principal residence would be effective. FAX notices may be a form of electronic notice which may not be valid in the above described consumer credit or rental situation. Here is the special Texas U.E.T.A. provision on consumer notices:

" SECTION 6. (a) Notwithstanding Section 43.019, Business and Commerce Code, as added by this Act, Chapter 43, Business & Commerce Code, Chapter 43, Business & Commerce Code, as added by this Act, does not modify, limit, or supersede the provisions of Section 101(c) or Section 103(b), Electronic Signatures in Global and National Commerce Act (15 U.S.C. Sections 7001 and 7003), as amended from time to time,

and specifically does not authorize the electronic delivery of any notice of the type described by Section 103(b) Electronic Signatures in Global and National Commerce Act (15 U.S.C. Section 7003, as amended from time to time, including:

- (1) any notice of:
  - (a) the cancellation or termination of utility services (including water, heat, and power);
  - (b) default, acceleration, repossession, foreclosure, or eviction, or the right to cure, under a credit agreement secured by, or a rental agreement for, a primary residence of an individual;" SECTION 6(a)(1)(A-B), Chapter 43, Texas Business and Commerce Code.

The Federal e-sign law includes the same consumer protection provisions, but the standard U.E.T.A. does not, so the Texas Legislature added them. However, if Federal (under e-sign) and Texas state agencies (under U.E.T.A.) find, in the future, that the consumer protection laws above are unnecessary to protect the public, they may override them through rule making. A report from the U.S. Justice Department for this purpose is due out in 2003.

##### B. Drafting Disaster 2: Clause to Authorize Notice by Electronic Means When a Statute Requires a Specific Medium of Communication

EXAMPLE OF ERROR: A Commercial Deed of Trust Provision states:

"All notices under this deed of trust, required by law to be in writing, including, but not limited to any demand letters, notices of default, and notices of sale may be given by electronic means."

###### ANALYSIS

Although the Texas U.E.T.A. clearly indicates that when a writing or signature is required by statute, an electronic form will satisfy the requirement, the Texas U.E.T.A. also clearly states that when an existing statute requires a particular mode of communication, that method must still be used and the Texas U.E.T.A. does not override such requirements.

In the case of a Texas deed of trust foreclosure, Section 51.002 of the Property Code specifically requires notice to be given by certified mail. Strangely, the statute does not specifically mention return receipt requested, although, of course, everyone does it that way, preferably with a proof of mailing.

(b) Notice of the sale, which must include a statement of the earliest time at which the sale will begin, must be given at least 21 days before the date of the sale:

- (3) by the holder of the debt to which the power of sale is related serving written

notice of the sale by certified mail on each debtor who, according to the records of the holder of the debt, is obligated to pay the debt." TEX. PROP. CODE ANN. Sec. 51.002(b)(3) (Vernon 1995).

If existing statutes require a specific medium, that must be used. In contrast, if the statute had merely said that a notice must be in writing and signed, then an electronic writing and an electronic signature would satisfy the requirement under the U.E.T.A. As part of one of the few changes to the U.E.T.A. standard text itself, the Texas U.E.T.A. does not allow statutory requirements to use the mail to be varied by agreement. TEX. BUS. & COM. CODE Sec. 43.008(d).

**STATUTORY FORMATS FOR TYPE SIZE AND CONSPICUOUSNESS ARE UNAFFECTED BY U.E.T.A.**

U.E.T.A. does not overturn statutory requirements calling for notices to be conspicuous or in 10 point type, or in a certain position relative to the signature line. The record must be posted, displayed, communicated, transmitted, and contain information formatted in the manner specified in other laws. TEX. BUS. & COM. CODE Sec. 43.008(a)-(b) These requirements may not be varied by agreement. *Id.* at (d). Fulfilling these requirements in an electronic context may be either easier or harder - causing text to be displayed "conspicuously" in an electronic document on a C.R.T. screen may involve some technical matters, as may type size requirements. Even so, they must be met, although the environment is electronic in nature.

**C. Drafting Disaster 3: Creating an Electronic Promissory Note by Ordinary Means When it must Meet U.E.T.A.'s Special Transferable Record Rules**

**EXAMPLE OF ERROR:**

"The parties agree that this promissory note may be created on a computer as an electronic record with an electronic signature."

**ANALYSIS**

The problem here is that under the Texas U.E.T.A. the parties to an electronic promissory note must expressly agree that it is a "transferable record" whose characteristics and requirements are carefully specified and distinguished from an ordinary "electronic record" in the Uniform Electronic Transactions Act. Merely stating that it may be created as an electronic record on an electronic computer is inadequate to do the job.

The requirements to create a proper electronic note, or more accurately, a "transferable record" are found in Section 16 of the U.E.T.A., which appears in the Texas U.E.T.A. as section 43.016

**Section 16 Summary - "Transferable Records" Defined**

16(a) A transferable record is:

- 1 a document that would be a UCC-3 note if it were in writing;
2. the issuer of the electronic record has expressly agreed is a transferable record

Merely creating an electronic record is not enough. A "transferable record" created electronically must be able to be bought, sold, traded and modified electronically just like a paper note, necessitating special U.E.T.A. rules to effect negotiability electronically. U.E.T.A.'s section 16 adapts paper note rules to electronic forms; it is not an easy process. According to the U.E.T.A.'s Draft Prefatory Notes:

"Paper negotiable instruments are unique in the fact that a tangible token - a piece of paper - actually embodies intangible rights and obligations. The extreme difficulty of creating a unique electronic token which embodies the singular attributes of a paper negotiable document or instrument, dictates that the rules relating to negotiable documents and instruments may not be simply amended to allow the use of an electronic record for the requisite paper writing."

Consider some of the key characteristics of paper notes, as used in a real estate transaction. Only one original instrument is created, which should be held by the lender. Endorsements to new owners appear on the instrument. Xerox copies are distinguishable as lacking a true ink signature. Mutually agreed modifications to the original note should appear on the original. Section 16 of the U.E.T.A. mimics paper note rules electronically.

A key concept in U.E.T.A.'s handling of notes is "control" over an electronic transferable record. Control of a transferable record under the U.E.T.A. substitutes for possession of a paper note. The key benefit of the control system is to reliably establish the identity of the person to whom payment is due. Section 16(c), which was based on Section 105 of Revised Article 9 requires transferable records to be unique, identifiable, and except as specifically permitted, unalterable. An "authoritative copy" must: (1) identify the person claiming control, (2) be maintained by the person claiming control or a designee, and (3) be unalterable except with the permission of the person claiming control. The later requirement applies to endorsements, cancellation, and other matters that would appear on the face of a paper instrument. The requirements also apply to modification of the substantive terms of the note, which require both the consent of the person claiming control and the maker.



Section 16 Summary - Laws On Negotiating "Transferable Records" (buying, selling, trading electronic notes)

- (b) A person has control of a "transferable record" if a system employed to show transfers reliably shows a person as the one to whom a transferrable record was issued or transferred.
- (c) The system that handles "transferable records" must have the following attributes:
  1. A single authoritative copy of the transferable record exists which is unique, identifiable, and except as provided in 4, 5, and 6, unalterable
  2. The authoritative copy identifies the person in control (holder) either as the first person it was issued to or the last person it was transferred to
  3. The authoritative copy is communicated to and maintained by the person in control (holder) or a designated custodian
  4. Copies or strikeouts or interlineations of the authoritative copy can be made only with the consent of the person in control (holder)
  5. Extra copies beyond the original authoritative copy are identifiable as mere copies
  6. Revisions of the authoritative copy are identifiable as authorized or unauthorized

A person who has control over a transferable record would be the functional equivalent of a holder and have the same rights. If the person acquired control under circumstances that would meet the tests for holder in due course status, the person in control would have HIDC status and defenses. This will facilitate the use of such "transferable records" in sales to note aggregators in a secondary mortgage loan market.

In practice, control requirements will often be met by using a "trusted third party registry system". These exist under Article 8 of the U.C.C. for such things as cotton warehouse receipts. The MERS system for FNMA secondary market notes can also serve such a function. In a free market, any number of commercial entities are bound to spring up which can handle such functions. The third party will maintain control in accordance with section 16 requirements for the benefit of the person or entity that owns the rights under a "transferable record."

Section 16(f) of the U.E.T.A. gives the person against whom enforcement of a transferable record is sought the right to receive reasonable evidence that a

person or entity is in fact in control of the transferable record. TEX. BUS. & COM. CODE Sec. 43.016(f). Such proof would include access to the authoritative copy of the transferable record and related business records sufficient to discover the terms of the transferable record and establish the identity of the person in control. *Id.* Such rights may be very useful in a real estate context, not only by the person against whom enforcement is sought, but potentially by title companies. A system of electronic notes may at long last provide an efficient mechanism for tracking who holds an electronic note (is in control of a transferable record) and therefore establish who holds the lien rights associated with the transferable record.

Electronic notes are thought to be less susceptible to destruction by fires, natural disasters, or terrorist action. However, due to the special requirements of transferable records, implementing these protective systems may not be simple technologically. Man made problems, such as bank failures, have caused significant title problems in the past when it could not be established who held a note and its associated lien against a property to the satisfaction of a title company. Electronic notes could have been helpful in such times.

Unless the note can be electronic, there may not be as much point to electronic closings involving electronic deeds and electronic deeds of trust. Without an electronic note as part of the documents suite, it may be pointless to do the other parts of the transaction electronically, including recording. Electronic recording of a note may be difficult because of the need to maintain control. Some attorneys record the note along with a deed of trust, other attorneys do not, so this practice will have to be reviewed, probably with an eye to not recording the note. Electronic recording looms increasingly large on the Texas horizon.

#### D. Drafting Disaster 4: Very Broad Authorizations for Electronic Contracts and Notices

##### EXAMPLE OF ERROR:

"This agreement may be entered into through any electronic means, including, but not limited to an exchange of FAX'd contracts with no follow up ink originals, an exchange of e-mails in which a party types their name at the bottom of the e-mail to indicate assent to the contract sent as an e-mail attachment, the acceptance of e-mailed attached contracts by oral assent delivered on the other party's recorded voice mail, all of which may be done without prior notice or an explicit agreement in the documents to contract electronically or to select a particular form of technology."

##### ANALYSIS

This clause looks like a total drafting disaster, but the disturbing part of it is: THIS CLAUSE MAY EFFECTIVELY BE IN YOUR DRAFTS OF REAL ESTATE DOCUMENTS ALREADY SINCE 1/1/02 EVEN IF IT'S NOT WRITTEN. It is worth

considering how the U.E.T.A. provides for entry into enforceable electronic contracts. U.E.T.A. is specifically designed to override the statute of frauds in terms of requiring paper. The statute of frauds, found in Texas law as Sec. 26.01 of the Business and Commerce Code, dates back to the original English Statute of Frauds passed in 1677. (29 Chas II). Texas law is almost a xerox copy of the older statute. TEX. BUS. & COM CODE Sec. 26.01. The Statute of Frauds requires real estate contracts to be in writing and signed. What the U.E.T.A. provides is that an electronic writing or signature may be substitute for a paper one. Section 7, U.E.T.A.; TEX. BUS. & COM CODE Sec. 43.007(a)-(d).

- (c) If a law requires a record to be in writing, an electronic record satisfies the law.
- (d) If a law requires a signature, an electronic signature satisfies the law." *Id.*

A record or signature may not be denied legal effect solely because it is in electronic form. *Id.* at (a).

A key concept of the U.E.T.A. is to be technologically neutral. The U.E.T.A. does not want to favor one brand or even one type of technology over another. Texans are given the legal freedom to choose their form of technology - or to choose not to use it at all. The U.E.T.A. does not however, provide that one must put affirmative clauses in a contract to authorize the use of computer technology. The use of such technology, and it's legal effect in creating a contract, may be either explicitly defined, or implied from the facts and circumstances.

#### 1. Facts and Circumstances Test

The U.E.T.A. envisions voluntary entry into electronic real estate contracts and instruments. However, the manifestation of consent need not be explicit. Conduct in a transaction may show an intent to contract electronically. Using e-mail for contract negotiations and as an address for notices under the contract may make you a party to an electronic contract. Be careful what you e-mail - you may create a contract. Here's what the Texas U.E.T.A. says:

"Sec. 43.005(b) This chapter applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." TEX. BUS. & COM CODE Sec. 43.005(b).

The authors of the U.E.T.A. put out Draft Comments which have not been officially adopted by NCCUSL, but since these comments were written by the same committee members that wrote the main U.E.T.A., it is certainly an indication of their intent on what U.E.T.A. is to do. It may be one of the better guides available on the U.E.T.A. until court decisions begin to interpret and apply the U.E.T.A. to real life situations.

The U.E.T.A. has been passed in other states, but it is a very recent uniform law and few court decisions have arisen. The Draft Commentary on the U.E.T.A. concerning the formation of electronic contracts by facts and circumstances is eye-popping.

SECTION 5 Draft Comments, No. 3. (Pertaining to section 5 of the Texas U.E.T.A., *Id.*) "3. If this Act is to serve to facilitate electronic transactions, it must be applicable under circumstances not rising to a full fledged contract to use electronics. While absolute certainty can be accomplished by obtaining an explicit contract before relying on electronic transactions, such an explicit contract should not be necessary before one may feel safe in conducting transactions electronically. Indeed, such a requirement would itself be an unreasonable barrier to electronic commerce, at odds with the fundamental purpose of this Act. Accordingly, the requisite agreement, express or implied, must be determined from all available circumstances and evidence."

At least two major groups of electronic technologies may trigger a facts and circumstances consent to an electronic transaction: (1) facsimile transmissions; and (2) e-mail exchanges.

#### A. Facsimile Transmissions

Facsimile transmissions (Hereinafter: FAX) have been in heavy use for some years. The usual procedure is to negotiate a real estate contract or lease through FAXed instruments, which may be mutually signed, then follow up with a "snail mailed" original mutually signed in ink. Older cases validate contracts by telegram, an early form of electronic consent. The vast increase in FAXes over the years has always raised the troubling question of whether a FAX contract is valid or not. What if the "snail mail" original never arrives, is never signed, or worse, a party, after signing a FAX contract later refuses to sign it as an original? The question of whether the FAX version is valid may have to be answered. Since January 1, 2002, the answer is easy, although there is still no court decision yet, the U.E.T.A. almost certainly validates FAX contracts.

A FAX is an electronic record with an electronic signature. U.E.T.A. states: "Electronic record means a record created, generated, sent, communicated, received, or stored by electronic means." An "Electronic signature" means an 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." U.E.T.A. Section 2 Definitions. TEX. BUS. & COM. CODE Sec. 43.002(7)-(8). Electronic means relating to technology having electrical, digital, magnetic, wifeless, optical, electromagnetic or similar capabilities. FAXes are electronic and the record and signature match the U.E.T.A. test. U.E.T.A. Draft Commentary certainly assumes the validity of FAX contracts in, for example, a closing transaction.

The following is part of Draft Commentary on U.E.T.A.'s Section 2's Definition 12 of "Transaction" (underlined portion by author)

"Other Transaction types may include:

4. The closing of a business purchase transaction via facsimile transmission of documents or even electronic mail. In such a transaction, all parties may participate through electronic conferencing technologies. At the appointed time all electronic records are executed electronically and transmitted to the other party. In such a case, the electronic records and electronic signatures are validated under this Act, obviating the need for 'in person' closings."

One significant Texas case squarely addresses the issue of the statute of frauds and a FAX contract, the Birenbaum case, Birenbaum, M.D. v. Option Care, Inc., 971 S.W.2d 497 (Tex. App.--Dallas 1997, no writ) ("Birenbaum"). In Birenbaum, the issue was placing a signed "post it" note on top of a FAX to transmit it and one side argued that the "post it" signature constituted consent to the terms of the instrument; the court disagreed and threw out the contract. However, the Court never said anything about FAX contracts being inherently invalid. Id. After reviewing 119 cases, current Texas case law neither denies nor validates FAXes as a means to contract. U.E.T.A. controls. After January 1, 2002, FAX contracts should be considered valid.

Section 4 of the U.E.T.A. makes it clear that the U.E.T.A. applies to any electronic record or electronic signature created, generated, sent, communicated, or received on or after the effective date of the act. (January 1, 2002 for Texas) As a result, even without an explicit contractual authorization to use FAXes to enter into a contract, such as a "FAX Rider", the facts and circumstances test of U.E.T.A. would imply consent to enter into an electronic contract. TEX. BUS. & COM. CODE Sec. 43.004.

#### B. E-mail Exchanges

The question arises on whether or not the U.E.T.A. authorizes contract formation by a mutual exchange of e-mails. The Draft Commentary not only suggests this is possible, but gives two illustrations, as follows:

##### "Illustration 1:

A sends the following e-mail to B:  
'I hereby offer to buy widgets from you, delivery next Tuesday. /s/ A.'

B responds with the following e-mail:  
'I accept your offer to buy widgets for delivery next Tuesday. /s/ B.'

The e-mails may not be denied effect solely because they are electronic. In addition, the e-mails do qualify as records under the Statute of

Frauds. However, because there is no quantity stated in either record, the parties' agreement would be unenforceable under existing UCC Section 2-201(1)."

##### "Illustration 2:

A sends the following e-mail to B:  
'I hereby offer to buy 100 widgets for \$1,000, delivery next Tuesday. /s/ A.'

B responds with the following e-mail:  
'I accept your offer to purchase 100 widgets for \$1,000, delivery next Tuesday. /s/ B.'

In this case the analysis is the same as in Illustration 1 except that here the records otherwise satisfy the requirements of UCC Section 2-201(1). The transaction may not be denied legal effect solely because there is not a pen and ink 'writing' or 'signature.'

The U.E.T.A. does not put real estate contracts or documents on a different footing than other contracts or documents. Real estate could be just as easily specified as Widgets; U.E.T.A.'s law is the same for both situations. The real estate e-mail may be much more elaborate. It could include multi-page word processor format attachments. Such real estate negotiation e-mails would qualify as an electronic record. The more troubling issue might be: what constitutes a signature in an e-mail situation? One would prefer an electronic signature done with established technologies, such as P.K.I., Public Key Infrastructure, (encryption) or signature dynamics, (signature pad system) but neither appears essential. According to U.E.T.A. commentary, just a typed name at the bottom of the e-mail may be sufficient.

Part of U.E.T.A. Draft Commentary on Section 2, Definition 7 "Electronic Signature".

"A digital signature using public key encryption technology would qualify as an electronic signature, as would the mere inclusion of one's name as part of an e-mail message - so long as in each case the signer executed or adopted the symbol with the intent to sign."

If a typed name was put in an e-mail with the intent to consent to an electronic contract, U.E.T.A.'s commentary suggests it may serve as a signature for the electronic e-mail record with which it is associated. An exchange of e-mails without the typed name or some other manifestation of consent that was logically associated with the e-mail would probably be insufficient to support a contract.

It is important to note the U.E.T.A. has a specific attribution requirement concerning signatures. The U.E.T.A. provides:

- (a) an electronic record or electronic signature is attributable to a person if it was the act of the person. 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 whom the electronic record or electronic signature was attributable." TEX. BUS. & COM. CODE Sec. 43.009(a).

Hacker A fraudulently obtains victim B's e-mail access password and types B's name to the bottom of an e-mailed contract, creating an unwanted contract for B. If these facts can be shown in court, the scenario fails U.E.T.A.'s attribution requirement and B is not obligated under the contract. However, B may be put to proof in court to show what happened. Under U.E.T.A.'s provisions, B's case would benefit in court if B could show good computer security procedures. *Id.* A quick recommendation: in the age of U.E.T.A., guard e-mail passwords carefully. Conventional fraud and other laws will also help in this situation.

## 2. Most Conventional Contract Law Still Applies in a U.E.T.A. Context

The Texas U.E.T.A. provides in "Sec. 43.003. SCOPE

(d) A transaction subject to this chapter is also subject to other applicable substantive law." TEX. BUS. & COM. CODE Sec. 43.003(d).

Conventional contract law on the formation of contracts largely applies to electronic contracts, including such doctrines as unconscionability, fraud, duress, mistake, competent parties, legal purpose, and consideration. Offer and acceptance procedures have been revised somewhat under the U.E.T.A., since they may be done electronically, but the fundamental requirement that an offer made must match to its acceptance still remains. There must still be a "meeting of the minds" encompassing agreement on all the material terms of the contract. What's changed is the option to substitute electronics for paper.

## 3. Opting out of Electronic Contracts

Some parties may wish to opt out of electronic medium. U.E.T.A. contemplates that parties may simply choose not to contract electronically. As a drafting matter, an attempt to waive that right is ineffective under U.E.T.A.

U.E.T.A. Section 5(c) "A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection may not be waived by agreement." TEX. BUS. & COM. CODE Sec. 43.005(c).

If parties decide not to enter into a contract by electronic means, they should put that explicitly in their contract, or in any other document that is not intended to be done by electronic means. It would be advisable to put similar disclaimers of a consent to electronic contracts in the e-mails and other electronic communications associated with a given transaction. Parties should be cautious about any conduct that may suggest an intent to contract electronically. If the

parties do not want to contract by facsimile transmissions, then they too should include such a waiver. Parties are also free to pick one technology and use it.

The concept of the U.E.T.A. is that parties should be free to enter into, or not to enter into, electronic agreements. However, the facts and circumstances test for determining entry is so broad it risks trapping parties into an electronic contract through an accidental appearance of circumstances that may be difficult to deny, but do not truly reflect that party's conscious consent. Attorneys must advise their clients carefully on such matters.

## E. Drafting Disaster 5: Checks May Not Be Created Electronically under the U.E.T.A EXAMPLE OF ERROR:

"The earnest money shall be paid by an electronic negotiable draft drawn on Buyer's bank and transmitted to the title company in accordance with the requirements of the U.E.T.A."

### ANALYSIS

Most transactions covered by the U.C.C., except Sales in Article 2 are excluded from the general application of the U.E.T.A. The Federal Reserve kept a careful watch on the drafting of the U.E.T.A. to make sure that checks and related instruments covered by U.C.C. Articles 3 and 4 were excluded from the U.E.T.A. to avoid a negative impact on the national payment system.

Be careful where you step with electronic contracts. Some transaction types are covered by the blanket Uniform Electronic Transactions Act and others aren't. It doesn't apply to everything and has listed exclusions.

U.C.C. Article 9 transactions are excluded from the application of the U.E.T.A. because they are covered in the revised Article 9 itself. However, to the extent a landlord's lien is excluded from the coverage of Article 9 it could be created electronically under U.E.T.A. rules. Here's the full set of exclusions in the Texas U.E.T.A.:

"Sec. 43.003. SCOPE.

- (a) Except as otherwise provided in Subsection (b), this chapter applies to electronic records and electronic signatures relating to a transaction.
- (b) This chapter does not apply to a transaction to the extent that it is governed by:
  - (1) a law governing the creation and execution of wills, codicils, or testamentary trusts; or
  - (2) the Uniform Commercial Code, other than Section 1.107 and 1.206 and Chapters 2 and 2A.
- (c) This chapter applies to an electronic record or electronic signature otherwise excluded from the application of this chapter under Subsection (b) when used for a transaction

subject to a law other than those specified in Subsection (b).

- (d) A transaction subject to this chapter is also subject to other applicable substantive law."

Texas U.E.T.A.; TEX. BUS. & COM. CODE Sec. 43.003.

**F. Drafting Disaster 6: Failing to Consider E-mail as a Commercially Reasonable Means of Giving Notice**  
EXAMPLE OF ERROR:

"Notices may be sent by commercially reasonable means to the Buyer at the Buyer's place of business at:

XYZ Corporation  
1218 Smith St.  
Houston, TX 77002  
FAX: (713) 661-3838"

**ANALYSIS**

The first problem with this clause is that it could include e-mail, since e-mail is arguably common enough to qualify as a commercially reasonable means to deliver notice, even though the parties may not have intended to use it and didn't list an e-mail address. The law of U.E.T.A. supports this argument that e-mail may be used under this clause by putting the use of electronic means to send an "electronic record" to a party to a transaction on the same legal footing with paper notices. TEX. BUS. & COM. CODE Sec. 43.015. If the representatives of XYZ presented a business card with an e-mail address, if e-mails were used during negotiations, and the company regularly does business on the net, then there may be a consent to conduct transactions electronically. This is particularly so if a FAX address is included, since that is a form of electronic communication. Computer generated FAXes can be sent like e-mails to a FAX address.

The second problem, if this clause stands alone, is that it does not specify which e-mail address may be used for the buyer. "Unless otherwise expressly provided in the electronic record or agreed between sender and recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business." SECTION 15(d) If the buyer has several e-mail addresses, and none is specified for use in the agreement, the notice e-mail may be sent to the e-mail address that has the closest relation to the underlying transaction. SECTION 15(d)(1). If the Buyer has no regular business e-mail address at all, it may be sent to the Buyer's residence. SECTION 15(d)(2).

The third problem is that the e-mail notice is effective, even if the Buyer never opens the e-mail. U.E.T.A. Sec. 15(e) "An electronic record is received under subsection (b) even if no individual is aware of its receipt." Draft Commentary: pg 38, Sec. 15, comment 5. "Receipt occurs when the record reaches the designated system whether or not the recipient

ever retrieves the record." (The same rule would apply to a certified letter which was never opened). The parties may want to modify the "notice whether opened or not" rule by drafting provisions in an agreement to require a response to an e-mail notice. Since some parties, who may be on vacation in Colorado or Mexico, set up their computer system to respond automatically to e-mails with a standard message, or a "thank you" or a joke, draft provisions requiring an intelligent response, if that can be defined, may be a priority. If an internet address is specified for notices in a business contract, then it may create an implied obligation to maintain e-mail equipment that is compatible with the other party's, to operate it in a commercially reasonable manner, and to develop procedures to timely open and respond to legal notice e-mails. Consider: e-mails may be locked up by a personal code and inaccessible to persons in the office when the party is gone. In contrast, office procedures may require the opening of certified mail letters. Lawyers or businesses with dealings on the internet should review procedures for opening e-mails, particularly when key persons are out of town.

The fourth and perhaps most galling problem is that if the notice cannot be opened and displayed in a readable format by the recipient's computer, the question arises as to whether or not the e-mail notice may still be considered to have been given in accordance with the contract. Under U.E.T.A., an electronic record is sent when it is properly addressed to a system the intended recipient has designated for the purpose of receiving electronic records and from which the recipient can retrieve the electronic record and is in a form capable of being processed by that system, and enters an a system outside the control of the sender or enters a region of the system the recipient controls. TEX. BUS. & COM. CODE Sec. 43.015. A key here is that the transmission must be "in form capable of being processed by that system". TEX. BUS. & COM. CODE Sec. 43.015(b)(2).

Such situations could generate a serious fact question if the e-mail reached the recipient's computer and appeared as an e-mail, but the recipient failed to update their server series and a later version e-mail couldn't be opened by an earlier version e-mail. Or perhaps an attachment with a later version of Word or Word Perfect hits a computer which has only an earlier version of the software. If such equipment can't handle it, is the sender responsible, or should the recipient have updated the software and it's the recipient's fault for not being able to open the e-mails? In an era when business staff personnel may be incompetent with computers and managers who may hate the net and never use it, it could be a serious question as to whether the sender's e-mail met the test of "a form capable of being processed by that system" if the recipient competently operated it. U.E.T.A. provides, in Section 10, that if the parties have agreed to use security procedures to detect errors, and one party used them and the other didn't, and if the party that failed to use them could have avoided the problem by using them, then the party that did comply can back out of the contract. TEX. BUS. & COM CODE Sec. 43.010(1).

Finally, Section 10 of the U.E.T.A., unlike the Federal e-sign bill it often parallels (and this is a key difference) allows for error correction of electronic mistakes using the traditional legal doctrines of "mistake." TEX. BUS. & COM. CODE Sec. 43.010(3).

An additional problem is posed for internet notices, are they considered given when sent or when received? The U.E.T.A. defines what sent means and what received means, but which controls is something the parties may still wish to address by specific provisions in their documents. It is uncertain whether the mailbox rule applies in an electronic context, given the lack of case law. However, some commentators argue rules like the old "mailbox rule" have no application to electronic contracts because they are essentially instantaneous, unlike the mail. Larry Zanger, "Electronic Contracts: Some of the Basics" MBC Publication (2000).

#### G. Drafting Disaster 7: Attempting to Use Regular Electronic Means to Contract with the State of Texas

##### EXAMPLE OF ERROR:

"This contract with the State of Texas may be done electronically by any electronic means commonly used in Texas for contractual purposes."

##### ANALYSIS

The difficulty with this provision is that it ignores the fact that contracts with state entities in Texas must use only certain technologies, which is permitted by U.E.T.A. The technologies in Texas have already been defined by regulations issued through the Texas Department of Information Resources in 1998, long before the U.E.T.A. passed. State agencies, by TDIR regulations, are authorized to accept in official state business, only certain electronic record and signature technologies - basically P.K.I. (Public Key Infrastructure) and signature dynamics, which is true in many states besides Texas. see T.A.C. Title 1, Sec. 201.14 - Digital Signatures. Currently three state agencies accept such records and signatures, the University of Texas, the Texas Dept. of Transportation, and the Dept. of Information Resources. see the Standards Review and Recommendation Publication SRRPUB13 Version 2.5 2000729, revised 4/24/01 on "Digital Signatures and Public Key Infrastructure Guidelines - Agency Implementation Status." The two major classes of technologies that are acceptable to state agencies by regulation are P.K.I. and Signature Dynamics. See T.A.C. Title 1, Sec. 201.14(e) on "List of Acceptable Technologies" which provides:

"(1) The technology known as Public Key Cryptography is an acceptable technology for use by state agencies, provided that the digital signature is created consistent with the following: " (and gives an extensive list of requirements.)

"(2) The technology known as 'Signature Dynamics' is an acceptable technology for use by state agencies provided that the signature is created consistent with the following provisions: " (and gives an extensive list of requirements.)

These technologies and similar definitions and requirements are found in many states besides Texas.

#### 1. Recording

Recording of electronic documents is coming, and the laws to allow it have been in place for many years. Regulations through the Texas Department of Information Resources have been issued to facilitate electronic recording. It's just a matter of time before County Clerks in Texas, probably starting in major cities, are set up to do so. Electronic recording laws are optional in the standard U.E.T.A. for a state to adopt, but Texas has chosen to allow electronic recording. The authorizing statutes, however, are found in the Local Government Code, Sec. 195. A detailed analysis of these procedures is beyond the scope of this paper.

#### 2. Using State Defined Technologies in Private Contracts

Private parties may well consider using technologies that are defined by the State of Texas as acceptable in official transactions. A provision could be put in a contract to adopt or reference the state defined technologies. The U.E.T.A. allows parties to select a technology, and exclude others. This may be another way of bypassing some of the problems the "facts and circumstances" test for entering into an electronic contract may create. The U.E.T.A. gives weight to allowing the parties to choose their technology and by doing so, avoid implied choices of inferior technologies.

#### V. CONCLUSIONS

Although drafting disasters focuses on what can go wrong with an electronic transaction, it is worth noting that there may be many positive aspects to using electronic documents instead of paper ones. For example, if a document is prepared with signature dynamics technology, it may ultimately become unnecessary to initial every strike-out and interlineation, as we absolutely must do today with paper documents. An electronic document, once signed with good software, could lock down the entire contract, no matter how many pages, instantly, with all strikeouts and additions, and prove positively that the one signature at the end was for the whole document exactly as written, with all changes. Some of these packages actually allow hand written changes (done through the signature pad) to be made to a word-processed document, but once signed, it's locked "as is" for everything and can't be changed without a new signature. A similar procedure may ultimately eliminate the need to initial each page as well. Electronic contracts can be signed on a "laptop" computer if a lightweight and inexpensive signature pad is plugged into it. With internet communications,

they can be signed reliably by multiple parties located anywhere in the world. Once signed, they can be at the title company almost instantly.

Texas real estate lawyers must ultimately master the preparation and handling of real estate documents in a manner that complies the requirements of the Texas Uniform Electronic Transactions Act. Although there may be some reluctance to spend much time to acquire the knowledge and skills to handle real estate transactions electronically until the market demand for it is heavier, that time may not be far off, particularly if title companies begin to close and record electronically. Like so many things in the computer age, it will probably happen sooner than we imagine.