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E-SIGNATURES: WHAT TO DO IF YOU AND YOUR CLIENT CANNOT MEET- THE STATE OF THE LAW

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E-signature Issues in Louisiana

- Statutory framework authorizing e-signatures (Louisiana Uniform Electronic Transactions Act (UETA), La. Rev. Stat. Ann. § 9:2601, et seq.; passed in 2001)
- Exclusions from the Louisiana UETA
- Electronic Notarization and requirements for authentic acts
- Remote Online Notarization (“RON”) – Proclamation Number 37 JBE 2020 on RON; pending Louisiana legislation and recent Executive Orders from other states
- E-filing and the use of electronic signatures

Statutory Background for Use of E-signatures

- Louisiana Uniform Electronic Transactions Act (UETA), La. Rev. Stat. Ann. § 9:2601, et seq.; passed in 2001.
- Based on the Uniform Electronic Transactions Act (1999), National Conference of Commissioners on Uniform State Laws
- Adopted by 47 states
- Electronic Signatures in Global and National Commerce Act, 15 U.S.C. § 7001 et. seq (the “E-Sign Act”)

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2607. Legal recognition of electronic records, electronic signatures, and electronic contracts

- A. A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.
- B. A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.
- 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.

Comments:

(a) This Section sets forth the fundamental premise of this Chapter: namely, that the medium in which a record, signature, or agreement is created, presented or retained does not affect its legal significance. Subsections A and B of this Section are designed to eliminate the single element of medium as a reason to deny effect or enforceability to a record, signature, or agreement. The fact that the information is set forth in an electronic, as opposed to paper, record is irrelevant.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2603 Scope – does NOT apply to “the creation and execution of wills, codicils, or testamentary trusts”;

- Does not apply to the “extent [a transaction] it is governed by the provisions of Title 10 of the Louisiana Revised Statutes” – the comments indicate the Title 10 has its own provisions for electronic transactions such as check collections and electronic funds transfers;
- Does NOT apply to “a law governing adoption, divorce, or other matters of family law, with the exception of a temporary restraining order”;
- Various exclusions for cancellation or termination of utility services, evictions, rental agreements, cancellation or termination of health insurance and life insurance benefits, certain product recalls
- Documents relating to the transportation or handling of hazardous materials, pesticides, or other toxic or dangerous materials.
- Comments – “The scope of this Chapter is inherently limited by the fact that it only applies to transactions related to business, commercial, including consumer, and governmental matters.”

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2611 Notarization and acknowledgment

- “If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.”
- Comments: “This Section does not provide any guidance for how electronic notarization can be achieved.”

Louisiana Civil Code art. 1833 (Authentic act)

“An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed.”

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Eschete v. Eschete, 2012-2059 (La.App. 1 Cir. 2/27/14, 4-5); 142 So.3d 985 (Donation invalidated because of physical separation of notary and witness from person signing document)

"While the trial court appears to have accepted the testimony of Ms. Robichaux and Ms. Smith as credible and that they were, in fact, in an adjoining office with the door open with Ms. Robichaux on the phone and Ms. Smith making copies, the trial court found that 'the writing was not executed before Ms. Robichaux and that ... Mr. Eschete was not in the presence of Ms. Smith at the signing of the document.' Under these specific facts, we cannot conclude that the trial court erred in finding that the act did not meet the requirements of an authentic act as contemplated by LSA-C.C. art. 1833.1. Clearly, the physical separation prevented the notary and one of the witnesses from observing Mr. Eschete affix his signature onto the act of donation."

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Authentic Acts

- "An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title." Louisiana Civil Code art. 1835 (Authentic act constitutes full proof between parties and heirs)
- "A donation *inter vivos* shall be made by authentic act under the penalty of absolute nullity, unless otherwise expressly permitted by law." Louisiana Civil Code art. 1541 (Form required for donations)
- "Executory proceedings are those which are used to effect the seizure and sale of property, without previous citation and judgment, to enforce a mortgage or privilege thereon evidenced by an authentic act importing a confession of judgment, and in other cases allowed by law." Louisiana Code of Civil Procedure art. 2631 (Use of executory proceedings)
- Notarial testaments (Louisiana Civil Code Article 1576)

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

- **PROCLAMATION NUMBER 37 JBE 2020 – March 26, 2020**

A) [A Louisiana commissioned Notary] “ ... may perform notarization for an individual not in the physical presence of the notary public if:

- 1) the individual, any witnesses and the notary public can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization;
- 2) the notary public –
 - a) has reasonably identified the individual; **and**
 - b) either directly or through an agent: i) creates an audio and visual recording of the performance of the notarization, **and** ii) **retains such recording as a notarial record for at least 10 years** from the date of execution unless a law of the State requires a different period of retention, and if any laws of the State govern the content, retention, security, use, effect, and disclosure of such recording and any information contained therein such recording shall be subject thereto.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

- PROCLAMATION NUMBER 37 JBE 2020 – March 26, 2020
 - c) The person appearing, all witnesses and the Notary Public can affix their digital signatures to the act in a manner that renders any subsequent change or modification of the remote online notarial act to be evident.
 - B) If a State law requires an individual to appear personally before or be in the physical presence of a notary public at the time of a notarization that requirement shall be satisfied if the individual and the notary public are not in the physical presence of each other but can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization; except for the laws pertaining to testaments, trust instruments, donations inter vivos, matrimonial agreements, acts modifying, waiving or extinguishing an obligation of final spousal support and authentic acts.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

- **PROCLAMATION NUMBER 37 JBE 2020 – March 26, 2020**

C) During this emergency, the recorder (as used in La. C.C. Art 3344) **shall not refuse to record a tangible copy of an electronic record** on the ground that it does not bear the original signature of a person if a notary public or other officer before whom it was executed certifies that the tangible copy is an accurate copy of the electronic record.

Section 8. "... effective retroactively to the beginning on this emergency on Wednesday, March 11, 2020 to Monday, April 13, 2020, or as extended by any subsequent Proclamation, unless terminated sooner."

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

Opposing Views on Executive Order

Louisiana Appleseed – will help self-represented litigants, including individuals seeking protective orders, temporary restraining orders, in forma pauperis petitions, or successions. Bulletin available on Facebook page.

Louisiana Notary Association – 1) Absence of security and information privacy provisions; 2) absence of regulation of platforms; and 3) separation of powers issues. Position statement provided to Governor on March 29, 2020 requesting repeal of Section 6 of the Executive Order.

Title, mortgage, and real estate industry also have stake in outcome

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

Pending legislation

- House Bill No. 122, Rep. Gregory Miller, and House Bill No. 274, Rep. Raymond E. Garofalo, Jr.
- Both allow for remote online notarization
- Limitations – exempts wills, trusts, donations inter vivos, marital agreements, certain spousal support agreements
- Cannot be used for authentic acts
- Discusses the procedure for performing the online notarization
- Record maintenance – 10 years for electronic document and audio/visual recording

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

Other Executive Orders

New York – March 19, 2020 – “Any notarial act that is required under New York State law is authorized to be performed utilizing audio-video technology provided that the following conditions are met ...”; effective until April 18, 2020.

Iowa – March 22, 2020 – “... temporarily suspend[s] the regulatory provisions of Iowa Code ... to the extent that they require the physical presence of a testator, settlor, principal, witness, or other person, if the person is present in a manner in which the witness or other person can see and hear the acts by electronic means, such as video conference, Skype, Facetime, Zoom, or other means, whether or not recorded.”

Connecticut – March 23, 2020 – **“Remote Notarization.** Effective immediately and through June 23, 2020, unless modified, extended or terminated by me, all relevant state laws and regulations are hereby modified to permit any notarial act that is required under Connecticut law to be performed using an electronic device or process ...”

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

Other Executive Orders

Illinois – March 26, 2020 – "... the requirement that a person must 'appear before' a Notary Public commissioned under the laws of Illinois pursuant to the Illinois Notary Act, 5 ILCS 312/6-102, is satisfied if the Notary Public performs a remote notarization via two-way audio-video communication technology". Secretary of State has issued guidance.

Colorado – March 27, 2020 – "This Executive Order temporarily suspends the requirement to appear personally before notarial officers to perform notarizations, and authorizes the Secretary of State to promulgate and issue temporary emergency rules to permit notarial officers to perform remote notarizations." Effective for 30 days.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Online Notarization

Proposed Federal legislation - Securing and Enabling Commerce Using Remote and Electronic (SECURE) Notarization Act of 2020

- Senators Mark Warner and Kevin Cramer
- “To authorize and establish minimum standards for electronic and remote notarizations that occur in or affect interstate commerce, to require any Federal court located in a State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce, and to require any State to recognize notarizations performed by a notary public commissioned by another State when the notarization occurs in or affects interstate commerce or when the notarization was performed under or relates to a public act, record, or judicial proceeding of the State in which the notary public was commissioned.”

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Remote Swearing of Witnesses

Florida Supreme Court – Administrative Order – March 18, 2020 – “Notaries and other persons qualified to administer an oath in the State of Florida may swear a witness remotely by audio-video communication technology from a location within the State of Florida, provided they can positively identify the witness ...”

E-filing in Louisiana (Court status updates at www.lasc.org)

Orleans Parish – Remote Access System (March 27, 2020 – Clerk Chelsey Richard Napoleon announces FREE complimentary subscriptions to the Remote Access system including civil records and land records.)

Jefferson Parish – JeffNet (<https://www.courtonline.us/>) - video conferencing for all 24th JDC (Jefferson) judges Ascension, Calcasieu, Iberia, Jefferson Davis, Lafayette, Livingston, Plaquemines, Sabine, St. John the Baptist, St. Tammany, Tangipahoa, and Union Parishes - Odyssey E-File LA system
<https://louisiana.tylerhost.net/OfsWeb/>

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Electronic Wills

- **Florida** - Fla. Stat. Ann. § 732.523 (Self-proof of electronic will)
- **Arizona** - Ariz. Rev. Stat. Ann. § 14-2518 (Electronic will; requirements; interpretation)
- **Nevada** - Nev. Rev. Stat. Ann. § 133.085 (Electronic will)
- **Indiana** - Ind. Code Ann. § 29-1-21-1 (Chapter 21. Electronic Wills) "The purpose of this chapter is to provide rules for the valid execution, attestation, self-proving, and probate of wills that are prepared and signed electronically."
- Most, if not all, still have a physical presence requirement, but allow electronic signatures by testator, notary, and witnesses

Uniform Electronic Wills Act (drafted by the National Conference of Commissioners on Uniform State Laws, July 2019)

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2603.1 – Electronic applications for warrants and judicial records

- Section F allows person to sign an affidavit with an electronic signature

Op. Att'y Gen. No. 14-0187 (Jan. 9, 2015)

“Act 606 of the 2014 Regular Session authorizes judges to use electronic signatures when signing court orders, notices, official court documents, and other writings to be executed in connection with both civil and criminal proceedings, subject to the adoption of court rules establishing the method and ensuring the authenticity of such signatures. Accordingly, La. Atty. Gen. Op. No. 13-0158 is recalled.”

Hon. Scott U. Schlegel, Judge, Division “D”

24th Judicial District Court, Jefferson Parish

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2602 Definitions – “Electronic signature” – “no specific technology need be used to create a valid signature”;

- “one’s voice on an answering machine may suffice if the requisite intention is present”;
- “including one’s name as part of an electronic mail communication also may suffice, as may the firm name on the facsimile”

Preston Law Firm, L.L.C. v. Mariner Health Care Mgmt. Co., 622 F.3d 384 (5th Cir. 2010)

- Dispute over approximately \$2 million in legal fees; issue was whether emails sufficed for writing and signature requirements for binding settlement agreement on the payment of fees;
- Fifth Circuit held that a valid compromise was formed through email communications for settlement of the claim for legal fees; law firm sued under the open account statute and it was removed to federal court;
- “Where a writing and/or a signature is required to form a contract, an email will satisfy such requirement. See La.Rev.Stat. Ann. § 9:2607.” *Preston Law Firm*, 622 F.3d at 390.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Klebanoff v. Haberle, 43,102 (La.App. 2 Cir. 3/19/08); 978 So.2d 598

- "In the instant case, the parties' positions were clearly expressed in writings which are recognized under the La. Uniform Electronic Transactions Act, La. R.S. 9:2607. " *Klebanoff*, 978 So.2d at 605.
- Early case holding that e-mail communications qualify as "writings" sufficient for settlement purposes under UETA.

Williamson v. Bank of New York Mellon, 947 F.Supp.2d 704 (N.D. Tex.2013)

- Question of whether the parties entered into a settlement agreement with a series of emails between counsel
- Under Texas UETA, the series of emails qualified as a signed writing
- The court discussed the distinction between typing your name at the end of an email and automatically including a signature block
- The court wrote that an attorney's manually typed name qualified as an electronic signature under the UETA
- **Automatic signature blocks** – "McInnis's email client did not create a signature block of its own volition. Rather, McInnis must have generated his signature block at some point in the past. He then directed his email client to attach the signature block to his subsequent outgoing email. The Court concludes that these actions affirmatively show intent to sign the record as required by TUETA." *Williamson*, 947 F.Supp.2d at 710-711.
- Compares to signature on a telegram

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

"A number of other courts have similarly found that names typed at the end of emails can be signatures under various states' statutes of frauds and enactments of the Uniform Electronic Transactions Act ('UETA'), which is the source of TUETA. E.g., *Preston Law Firm, L.L.C. v. Mariner Health Care Mgmt. Co.*, 622 F.3d 384, 391 (5th Cir.2010) (affirming that '[e]mails can qualify as the signed writings needed to form contracts' under Louisiana's UETA); *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed.Cir.2005) (opining that inclusion of individual's name on email would be valid signature under California's UETA); *Cloud Corp. v. Hasbro, Inc.*, 314 F.3d 289, 295–96 (7th Cir.2002) (holding that 'the sender's name on an e-mail satisfies the signature requirement of the [Illinois] statute of frauds' and noting that it would be valid signature under federal Electronic Signatures in Global and National Commerce Act as well); *Adani Exps. Ltd. v. AMCI Exp. Corp.*, Civ. A. No. 05–304, 2007 WL 4298525, at *11 (W.D.Pa. Dec. 4, 2007) (finding email sufficient to meet requirements of Pennsylvania statute of frauds); *Roger Edwards, LLC. v. Fiddes & Son, Ltd.*, 245 F.Supp.2d 251, 261 (D.Me.2003), *aff'd in part, dismissed in part*, 387 F.3d 90 (1st Cir.2004) (same for Maine statute of frauds); *Waddle v. Elrod*, 367 S.W.3d 217, 228–29 (Tenn.2012) (same for Tennessee); *Williason v. Delsener*, 59 A.D.3d 291, 874 N.Y.S.2d 41 (N.Y.App.Div.2009) (same for New York); *see also Tricon Energy, Ltd. v. Vinmar Int'l, Ltd.*, No. 4:10–CV–05260, 2011 WL 4424802, at *11 (S.D.Tex. Sept. 21, 2011) (holding, without reference to TUETA, that two emails closing with typed names 'represent signed writings under the Texas UCC')."

Williamson v. Bank of New York Mellon, 947 F.Supp.2d 704, 710 (N.D. Tex.2013)

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2604 – Application – only applies to electronic records and signatures created after July 1, 2001;

- States specifically that it is adopting the UETA and addresses inconsistencies with the E-Sign

§ 2605 – Use of electronic records and electronic signatures

- applies only to transactions between parties, each of which has agreed to conduct transactions by electronic means
- Indicates that while some transactions may be made by electronic means, party may refuse to conduct other transactions by electronic means
- Gives examples of where it may be found the parties reached an agreement to conduct electronic transactions, even includes giving out a business card with an email address – May have implied that you are consenting to conduct business electronically

§ 2606 – Construction and Application – “to facilitate electronic transactions consistent with other applicable law” and eliminate barriers to electronic commerce and governmental transactions

- Statute is designed to “allow the courts to apply [the provisions] to new and unforeseen technologies and practices”;
- “As time progresses, it is anticipated that what is new and unforeseen today will be commonplace tomorrow”

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2608 Provision of information in writing; presentation of records

- If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement is satisfied if the information is provided, sent, or delivered in an electronic record capable of retention by the recipient at the time of receipt.
- Also addressed how to handle electronic information if other laws require that the information be “posted or displayed in a certain manner”
- “Savings provision” – other substantive laws not overridden

§ 2609 –Attribution and effect of electronic record and electronic signature

- “An electronic record or electronic signature is attributable to a person if it was the act of the person.”
- Created a considerable amount of litigation – parties arguing that they did not sign electronically.
- “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 record or electronic signature was attributable.”
- The effect of an electronic record or electronic signature attributed to a person is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the agreement of the parties, if any, and otherwise as provided by law.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

ATTRIBUTION CASES

Arbitration Agreements

Hill v. Hornbeck Offshore Servs., Inc., 799 F.Supp.2d 658 (E.D. La.2011)

- Incentive program where employee “electronically reviewed and signed” agreements that contained arbitration clauses
- Employee disputed whether the “clickwrap” agreement created a legally enforceable obligation to arbitrate.
- “Moreover, state law also gives legal effect to both electronic contracts and signatures. See La.Rev.Stat. § 9:2607. Therefore, in the absence of fraud, misrepresentation, or deceit, one is bound under Louisiana law to the terms of a contract, signed electronically or otherwise.” Hill, 799 F.Supp.2d at 661.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

ATTRIBUTION CASES

Uninsured Motorist Waivers

Bonck v. White, 2012-1522 (La.App. 4 Cir. 4/24/13, 6); 115 So.3d 651

- “No case exists in Louisiana that applies this statute [UETA] to a UMBI [uninsured/underinsured motorist bodily injury coverage] form.”
- Fourth Circuit held that statute does apply to insurance forms, including UMBI, based in part on an advisory letter from the acting Commissioner of Insurance that said electronic signatures are authorized in transacting the business of insurance in Louisiana.
- Plaintiff met the agent in Progressive's office and signed the application online in the office; when the dispute arose, Progressive produced a waiver form that was initialed and signed electronically by Plaintiff;
- Plaintiff denied she signed the waiver form, and argued that electronic signatures cannot be used in insurance policies; she also pointed out that her name was spelled with a “Y” rather than an “I”;
- The trial court granted the insurer’s MSJ, but the Fourth Circuit reversed, finding that genuine issues of material fact existed concerning whether Plaintiff actually signed the form electronically. An affidavit of Plaintiff showed that the form was completed four days after her actual visit to the office, and that all of her communications with the insurance company were in person four days earlier. Progressive’s affidavit only stated what was contained in the insurance company’s files.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

ATTRIBUTION CASES

Uninsured Motorist Waivers

Rapalo-Alfaro v. Lee, 2015-0209 (La.App. 4 Cir. 8/12/15); 173 So.3d 1174

- "Mr. Rapalo-Alfaro also asserted that Lloyd's motion should be denied because it failed to establish that the name, date, initials, and signature on the uninsured motorist rejection form—all of which were completed electronically—are attributable to him."
- Named Lloyds as a defendant and claimed he had UM coverage.
- Lloyd's filed MSJ supported by certified copy of the UM waiver electronically signed by plaintiff.
- Lloyds proved the signature by attaching a "digital signature acceptance confirmation" with plaintiff's electronic signature, a digital ID number associated with the signature, a box with his initials, and language confirming his electronic signature.
- Good background discussion on the burden of proof under UETA to prove electronic signatures.
- District Court granted MSJ for insurer, Fourth Circuit affirmed.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

ATTRIBUTION CASES

Uninsured Motorist Waivers

Weddborn v. Doe, 2015-1088 (La.App. 4 Cir. 5/4/16); 194 So.3d 80

- "While an electronic signature may be considered valid, the production of a UM rejection form, alone, is insufficient to establish that an insurer has borne its burden of proof on a motion for summary judgment, when there is a sworn statement by an insured denying that she executed the form. Such a statement creates, at the least, a credibility issue for which summary judgment is inappropriate." *Weddborn*, 194 So.3d at 88.
- *Practice tip:* These cases tend to turn on the affidavit of the insurance company. In the cases where the insurance company has been successful, they have provided an affidavit of the actual agent who participated in the application process, or an affidavit on the technical details of how they prove attribution; the insured has been successful where the insurer only provides an affidavit of an employee who reviewed the policy after the fact and merely stated what was in the insurance files.
- Affidavit of plaintiff was not simple denial, but stated specific facts such as they had completed and signed all forms by hand, met with the agents in person, and had not completed anything online.
- District Court granted insurer's MSJ; Fourth Circuit reversed.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

ATTRIBUTION CASES

Umbrella Insurer's MSJ

Whitehead v. Curole, 2018-1178 (La.App. 1 Cir. 5/9/19); 277 So.3d 409

- Plaintiff argued on summary judgment that the certified copy of the underwriting file was not admissible because it was signed electronically by the insurance company representative.
- First Circuit rejected the argument and said that the electronically signed letter was admissible under the UETA to certify the underwriting file and it was competent summary judgment evidence.
- "Thus, Ms. Horton's [the insurance company representative] electronically signed letter is admissible under the current version of LSA-R.S. 9:2603 to certify the underwriting file." *Whitehead*, 277 So.3d at 413.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

ATTRIBUTION CASES

Zulkiewski v. Am. Gen. Life Ins. Co., 299025, 2012 WL 2126068 (Mich. Ct. App. June 12, 2012)

- Dispute over life insurance proceeds; initially, first wife was named as beneficiary and parents were contingent beneficiaries; later changed to have parents as primary beneficiaries; then someone logged in, created an online account, and changed the beneficiary to the second wife as primary and parents as contingent beneficiaries.
- Insured dies; fight ensues between the new wife and the parents over the insurance proceeds.
- Interpleader filed against the parents after insurance company was sued by the second wife.
- Issue became the security procedures used to determine that the decedent had actually made the changes to the policy and the “efficacy of any security procedures” to respond to challenges to authenticity; not required, but one way to show attribution to the individual; American General submitted evidence of its safeguards, including personal information and policy information required to register and make changes online, and regular email and mail notifications confirming changes.
- The court ruled that American General submitted adequate information to show that they had proper safeguards in place, and that the parents could not establish that the changes were the result of fraud or that the changes were made by someone other than the decedent.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2610 Effect of change or error

- Addresses errors in person-to-person and person-to-automated system transactions
- Requires prompt notification and reasonable steps to notify other party of error

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2612 Retention of electronic records; originals

- If a law requires that a record be retained, the requirement is satisfied by retaining an electronic record of the information in the record which: (1) Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and, (2) Remains accessible for later reference.
 - Comments – “issue of technology obsolescence and the need to update and migrate information to developing systems”

§ 2613 Admissibility in evidence

- “In a proceeding, evidence of a record or signature may not be excluded solely because it is in electronic form.”

§ 2614 Automated transaction

- A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the actions of the electronic agents or the resulting terms and agreements.
- Comments – “This Section confirms that contracts can be formed by machines functioning as electronic agents for parties to a transaction.”
- Discusses validity of “I AGREE” buttons on internet transactions

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

§ 2615 Time and place of sending and receipt

- “Default rules” on determining when an electronic record is sent or received

§ 2616 Transferable records

- A “transferable record” means an electronic record that “would be a note as defined in R.S. 10:3-101 et seq. [UCC – Negotiable Instruments], or a document under R.S. 10:7-101 et seq. [UCC – Documents of Title], if the electronic record were in writing.”

§ 2617, 2618, and 2619 – Defers to state agencies to determine when, or if, they will convert to electronic records and transactions and grants authority to agencies to set standards.

§ 2620 – Provisions are severable

§ 2621 Certification of electronic records

- Online applications for state licenses or permits
- Allows governmental agency to accept an online certification from the applicant in lieu of the sworn application

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

Stringer v. Pablos, SA-16-CV-257-OG, 2020 WL 532937, (W.D. Tex. Jan. 30, 2020)

- “Defendants [Texas Secretary of State and Department of Public Safety] violated the National Voter Registration Act, 52 U.S.C. §§ 20503(a)(1), 20504(a), (c), (d), and (e), and 20507(a)(1)(A), and the Equal Protection Clause, U.S. Const. amend. XIV, § 1, by failing to permit simultaneous voter registration with online driver's license renewal and change-of-address transactions.”
- Court ordered Texas SOS and DPS “to establish procedures that treat each online driver's license renewal or change-of-address application as a simultaneous application for voter registration which must then be submitted to the Secretary of State.”
- “It is undisputed that the State of Texas already has preexisting electronically stored signatures for every person that uses the online service, and could use them for both driver's license and voter registration. Defendants already use electronically stored signatures for every in-person and mail driver's license-voter registration transaction, which makes their refusal to accept them in online transactions unexplainable.” *Stringer*, 2020 WL 532937 at *6.

LOUISIANA UNIFORM ELECTRONIC TRANSACTIONS ACT (UETA)

17 C.F.R. § 232.302 – Electronic signatures on submissions to the Securities and Exchange Commission

“ ... When used in connection with an electronic filing, the term ‘signature’ means an electronic entry in the form of a magnetic impulse or other form of computer data compilation of any letters or series of letters or characters comprising a name, executed, adopted or authorized as a signature.”

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E-SIGNATURES: WHAT TO DO IF YOU AND YOUR CLIENT CANNOT MEET- THE STATE OF THE LAW

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EXECUTIVE DEPARTMENT

PROCLAMATION NUMBER 37 JBE 2020

***ADDITIONAL MEASURES FOR COVID-19
PROVISIONS FOR FIRST-RESPONDER RULEMAKING,
LAW ENFORCEMENT REHIRING,
REHIRING OF RETIRED PUBLIC EMPLOYEES,
INSURANCE COMMISSIONER EMERGENCY AUTHORITY,
SHAREHOLDER MEETINGS, AND REMOTE NOTARIZATION***

WHEREAS, pursuant to the Louisiana Homeland Security and Emergency Assistance and Disaster Act, La. R.S. 29:721, *et seq.*, the Governor declared a public health emergency in Proclamation Number 25 JBE 2020 in response to the threat posed by COVID-19;

WHEREAS, on March 11, 2020, in Emergency Proclamation Number 25 JBE 2020, the Governor declared that a statewide public health emergency existed in the State of Louisiana because of COVID-19 and expressly empowered the Governor's Office of Homeland Security and Emergency Preparedness and the Secretary of the Department of Health and/or the State Health Officer to take all actions authorized under state law;

WHEREAS, on March 13, 2020, in Emergency Proclamation Number 27 JBE 2020, the Governor supplemented the measures taken in his declaration of a Public Health Emergency with additional restrictions and suspensions of deadlines and regulations in order to protect the health and safety of the public because of COVID-19;

WHEREAS, on March 13, 2020, in Emergency Proclamation Number 27 JBE 2020 and Emergency Proclamation 28 JBE 2020, the Governor supplemented the measures taken in his declaration of a public health emergency with additional restrictions and suspensions of deadlines and regulations in order to protect the health and safety of the public because of COVID-19;

WHEREAS, the order was further supplemented on March 14, 2020, March 16, 2020, March 19, 2020 and March 22, 2020 in order to protect the health and safety of the public because of the extraordinary threat posed by COVID-19;

WHEREAS, on March 16, 2020, in Emergency Proclamation Number 30 JBE 2020, the Governor supplemented the measures taken in his declaration of Public Health Emergency by providing all state agencies, boards and commissions, and local political subdivisions of the state to provide for attendance at essential governmental meetings via teleconference or video conference and to allow such attendance during the pendency of this emergency;

WHEREAS, in the days since the declaration of public health emergency, the COVID-19 outbreak in Louisiana has expanded significantly;

WHEREAS, the first responders of Louisiana are coming into direct contact with citizens who have COVID-19 or may have been exposed to COVID-19;

WHEREAS, first responders exposed to COVID-19 in quarantine are being required to use their paid sick leave, paid annual leave or paid compensatory leave;

WHEREAS, a large portion of the first responders are subject to the Municipal Fire and Police Civil Service laws of Louisiana;

WHEREAS, In accordance with R.S. 33:2497 and R.S. 33:2557, local Municipal Fire and Police Civil Services Boards have the authority to adopt rules relative to leaves of absences;

WHEREAS, the spread of the COVID-19 virus has adversely affected a substantial number of public safety personnel in the performance of their missions;

WHEREAS, in addition, the limitations on compensation for re-hiring retired deputies and corrections officers on a full-time basis have made filling the depleted ranks of law enforcement difficult;

WHEREAS, the various sheriffs of Louisiana have expressed an urgent need to re-hire retired deputies on a full-time basis to maintain their law enforcement missions;

WHEREAS, the spread of the COVIO-19 virus has adversely affected a substantial number of public employers, including but not limited to public health and safety agencies, in the performance of their missions;

WHEREAS, the limitations on hiring separated public employees on a contractual basis have made filling the depleted ranks of state agencies, including health and law enforcement impossible;

WHEREAS, the various state agencies have expressed an urgent need to utilize separated public employees to maintain and fulfill their missions;

WHEREAS, after declaration of a public health emergency, the Governor is authorized by La. R.S. 29:766(0)(1) to suspend the provisions of any regulatory statute prescribing procedures for the conducting of state business, or the orders, rules, or regulations of any state agency, if strict compliance with the provisions of any statute, order, rule, or regulation would in any way prevent, hinder, or delay necessary action in coping with the emergency;

WHEREAS, after declaration of a public health emergency, the Governor is authorized by La. R.S. 29:766(0)(3) to transfer the direction, personnel, or functions of state departments and agencies or units thereof for the purpose of performing or facilitating emergency services;

WHEREAS, to aid businesses of this state in navigating the crisis in a prompt manner, reducing their insurance premiums, and accounting for volatility in projections in a time of crisis, it is necessary to grant the Commissioner of Insurance authority to suspend provisions Title 22 of the Louisiana Revised Statutes of 1950 concerning commercial insurance policies;

WHEREAS, in addition to the restrictions previously ordered because of this emergency, it is necessary to temporarily suspend certain provisions of the Business Corporation Act to the extent they require meetings of shareholders to be noticed and/or held at a physical location;

WHEREAS, the suspension of certain provisions of the Business Corporation Act to the extent they require meetings of shareholders to be noticed and/or held at a physical location are necessary because of the propensity of the COVIO-19 virus to spread via personal interactions and because of physical contamination of property due to its ability to attach to surfaces for prolonged periods of time;

WHEREAS, due to the extraordinary threat posed by COVID-19 and to further support the stay at home order, in order to provide Louisiana citizens and business with a secure and safe method by which to execute important legal documents, the highly contagious nature of this threat necessitates that a notary public commissioned under the laws of the State of Louisiana may perform notarization

for an individual not in the physical presence of the notary public, subject to certain safeguards to ensure the integrity of the notarial process; and

WHEREAS, these measures are necessary to protect the health and safety of the people of Louisiana.

NOW THEREFORE, I, JOHN BEL EDWARDS, Governor of the State of Louisiana, by virtue of the authority vested by the Constitution and the laws of the State of Louisiana, do hereby order and direct as follows:

SECTION 1:

- A) In an effort to preserve the health and safety of the first responders, specifically the firefighters and police officers subject to the Municipal Fire and Police Civil Service System, all local Municipal Fire and Police Civil Service Boards are to meet to adopt emergency rules to provide for special COVID-19 leave rules.
- B) In order to quickly achieve these rule adoptions, the 30-day notice requirements for rule adoptions found in R.S. 33:2478 and R.S. 33:2538 are hereby suspended during the pendency of the declaration of public health emergency.
- C) Municipal Fire and Police Civil Service Boards shall post notice of the proposed emergency rule with the 24-hour public meeting notice provided in R.S. 42:19.
- D) Due to the Stay at Home Order issued by Proclamation Number 33 JBE 2020, all Municipal Fire and Police Civil Service Boards shall conduct a meeting by teleconference or video conference by Monday, March 30, 2020.

SECTION 2:

- A) The limitation on receipt of full retirement benefits by rehired retirees assigned to road patrol or corrections function only, under La. R.S. 11:2175(E) shall be suspended for the duration of this emergency. Any sheriff may rehire on a full-time basis any otherwise qualified retirees to road patrol or corrections functions only, without loss or suspension of retirement benefits to those rehired deputies, for the duration of the emergency.
- B) The Boards of Trustees of the Louisiana Sheriffs Pension and Relief Fund shall not be required to suspend benefits to retirees rehired as full-time employees covered by this proclamation.

SECTION 3:

Pursuant to La. R.S. 29:724(0)(1), the two-year limitation on public employees, following their separation from public service, contracting with their former agency as more fully set forth in La. R.S. 42:1121(8)(1) shall be suspended for the duration of this emergency. Any state agency may contract with any otherwise qualified separated employee to assist the state agency in the performance of their mission, as reasonably necessary, for the duration of the emergency.

SECTION 4:

- A) Commissioner of Insurance James J. Donelon shall have limited transfer of authority from the Governor to suspend provisions of any regulatory statute of Title 22 of the Louisiana Revised Statutes of 1950 concerning commercial insurance policies rated using auditable exposure bases, including but not limited to payroll, sales, enrollment, attendance, occupancy rates, square footage or any other basis now affected by the current public health emergency, to require when requested, mid-term audits, self-audits or other adjustments to rating bases, thereby reducing the associated premium and more accurately reflecting annual exposure projections. This does not waive an insurer's rights or responsibilities to perform a final audit at policy expiration.
- B) No provision in this proclamation shall relieve an insured who has a

claim caused by this public health emergency, or its aftermath, from compliance with the insured's obligation to provide information and cooperate in the claim adjustment process relative to such claim, or to pay insurance premiums upon termination of these provisions.

SECTION 5:

A) Subpart A of Part 7 of the Business Corporation Act, including without limitation, Subsection B of Section 1-701, subsection C of 1-702 and subsections A and E of Section 1-705 of the Business Corporation Act, is hereby suspended to the extent it requires meetings of shareholders to be noticed and held at a physical location in connection with any shareholder meeting that either (a) has a record date that falls during the Public Health emergency declared by Proclamation Number 25 JBE 2020 (or as extended by any subsequent Proclamation), (b) requires notice to be provided in connection therewith during the Public Health emergency declared by Proclamation Number 25 JBE 2020 (or as extended by any subsequent Proclamation) or (c) is scheduled to occur during the Public Health emergency declared by Proclamation Number 25 JBE 2020 (or as extended by any subsequent Proclamation).

B) This Proclamation shall remain in full force and effect with respect to any meeting duly called and convened in accordance with the Business Corporation Act and in reliance upon Section 1 hereof, notwithstanding the lapse or termination of this Proclamation.

SECTION 6:

A) During this emergency, a regularly commissioned notary public who holds a valid notarial commission in the state of Louisiana, including a person who is licensed to practice law and commissioned by the Secretary of State, may perform notarization for an individual not in the physical presence of the notary public if:

- 1) the individual, any witnesses and the notary public can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization;
- 2) the notary public -
 - a) has reasonably identified the individual; and
 - b) either directly or through an agent:
 - i) creates an audio and visual recording of the performance of the notarization, and
 - ii) retains such recording as a notarial record for at least 10 years from the date of execution unless a law of the State requires a different period of retention, and if any laws of the State govern the content, retention, security, use, effect, and disclosure of such recording and any information contained therein such recording shall be subject thereto.
 - c) The person appearing, all witnesses and the Notary Public can affix their digital signatures to the act in a manner that renders any subsequent change or modification of the remote online notarial act to be evident.

B) If a State law requires an individual to appear personally before or be in the physical presence of a notary public at the time of a notarization that requirement shall be satisfied if the individual and the notary public are not in the physical presence of each other but can communicate simultaneously by sight and sound through an electronic device or process at the time of the notarization; except for the laws pertaining to testaments, trust instruments, donations inter vivos, matrimonial agreements, acts modifying, waiving or extinguishing an obligation of final spousal support and authentic acts.

C) During this emergency, the recorder (as used in La. C.C. Art 3344) shall not refuse to record a tangible copy of an electronic record on the ground that it does not bear the original signature of a person if a notary public

or other officer before whom it was executed certifies that the tangible copy is an accurate copy of the electronic record.

SECTION 7:

The Governor's Office of Homeland Security and Emergency Preparedness is directed to ensure compliance with this order, and is empowered to exercise all authorities pursuant to La. R.S. 29:721, et seq., and La. R.S. 29:760, et seq.

SECTION 8:

Unless otherwise provided in this order, these provisions are effective retroactively to the beginning on this emergency on Wednesday, March 11, 2020 to Monday, April 13, 2020, or as extended by any subsequent Proclamation, unless terminated sooner.

IN WITNESS WHEREOF, I have set my hand officially and caused to be affixed the Great Seal of Louisiana in the City of Baton Rouge, on this 26th day of March, 2020 L J



GOVERNOR OF LOUISIANA

**ATTEST BY THE
SECRETARY OF STATE**

SECRETARY OF STATE



DISASTER RESPONSE & RECOVERY

A LOUISIANA APPLESEED BULLETIN FOR COMMUNITIES SERVING VULNERABLE POPULATIONS

REMOTE NOTARIAL ACTS MUST BE RECORDED

There are many options for video conferencing, however, not all platforms allow for recordings. Be sure your platform allows you to save the recording to your system to comply with the 10 year retention requirement in the proclamation.

FACETIME

Powered by Apple

Available for free to iPhone IOS users only

Recording saves to computer or mobile

[LINK](#)

GOTOMEETING

Powered by Google

Video conference recording available with the Enterprise subscription (\$25/mo)

Free until July 1, 2020.

Requires a Gmail account or GSuite

Recording automatically saves to the admin Google Drive and to the calendar event.

[LINK](#)

HANGOUTS MEET

Powered by LogMeIn

Video conference recording available through the Business subscription (\$16/mo)

Free for eligible organizations until June 2020.

Recording saves to a cloud

HIPPA Ready

[LINK](#)

SKYPE

Free

Video conference recording must be downloaded within 30 days

[LINK](#)

ZOOM

Video conference recording available through the Pro subscription (\$14.99/mo)

Recording saves to a cloud

[LINK](#)



Changes to Notary Regulations

PROCLAMATION NUMBER 37 JBE 2020

On March 26, 2020, Governor Edwards made significant changes to the rules governing notaries due to stay-at-home orders and business closures caused by COVID19. Both attorney-notaries and non-attorney notaries are now able to notarize documents remotely and without the presence of the individual requesting the service. This will dramatically impact self-represented litigants, particularly those who seek protective orders, temporary restraining orders, in forma pauperis petitions, or successions. For legal service providers serving low-income and vulnerable communities, the change may be life saving.



The ability to notarize documents remotely carries additional requirements, but will remove obstacles in accessing justice for domestic violence survivors, and families who have lost a loved one during the crisis. The following outlines the new rule promulgated in response to COVID19's impact on justice and is valid until April 13, 2020, unless otherwise extended by a subsequent proclamation by the governor.

- The Notary must 1) have reasonably identified the individual, 2) have directly or indirectly created an audio and visual recording of the notarization that must be retained for 10 years, unless required otherwise, and 3) be able to affix their digital signature in a way that any changes to the signature will be evident.
- Additionally, the proclamation does not extend to the following situations: testaments, trust instruments, donations inter vivos, matrimonial agreements, acts modifying, waiving or extinguishing an obligation of final spousal support, and authentic acts.
- Finally, clerk or other personnel cannot refuse to accept a remotely notarized act based on the lack of an original signature by the notary.

Low-income Individuals and vulnerable populations seeking a notarized document can contact Acadiana Legal Services, Southeast Louisiana Legal Services, Pro Bono Projects, local bar associations, and the Louisiana State Bar Association for help.

The proclamation does not apply to testaments, trust instruments, donations inter vivos, matrimonial agreements, acts modifying, waiving or extinguishing an obligation of final spousal support, and authentic acts.

Proclamation Number 37
JBE 2020