

# E-Signatures and Title Insurance

Justin Lischak Earley

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# Why Care About E-Signatures?

- **FHA says:**
  - “As of December 31, 2014, FHA will accept electronic signatures *on the note . . . .*” (emphasis supplied). See FHA Mortgagee Letter 2014-03 (30 Jan. 2014).
- **The CFPB says:**
  - “[E-closing] solutions have the potential to reduce errors, limit surprises, lessen anxiety, and create more time and opportunity for consumers to understand their mortgage and make more informed decisions.” See CFPB “Mortgage Closings Today” Report.

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# Why Care About E-Signatures?

- 2006 ALTA Owner's Policy – loss or damage by reason of a defect in the Title caused by:
  - “forgery, fraud . . . or impersonation” CR 2(a)(i)
  - “a document affecting Title not properly . . . executed” CR 2(a)(iii)
  - “failure to perform those acts necessary to create a document by electronic means authorized by law” CR 2(a)(iv)

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# Why Care About E-Signatures?

- 2006 ALTA Loan Policy – all the same covered risks as the Owner's Policy as to the Title, plus similar provisions regarding invalidity or unenforceability of the Insured Mortgage.



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# Why Care About E-Signatures?

Also: Don't end up like these guys!



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# Why Care About E-Signatures?

- Getting it right is a competitive advantage in a tight market.
- Getting it wrong is a recipe for unhappy customers and unhappy underwriters.



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# The Path to the E-Closing?

- Achieving the “all electronic closing” requires three things:
  - Electronic documents
  - Electronic signatures on electronic documents
  - Electronic recording of electronically-signed electronic documents
- Fundamental distinction: In-person versus “remote” / “virtual.”
- What do you mean by “e-Closing”?

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# Legal Framework

- Under both federal and state law, an electronic signature *is a signature*:
  - Federal E-SIGN Act: “[A] signature . . . relating to [any transaction in or affecting interstate or foreign commerce] may not be denied legal effect, validity, or enforceability solely because it is in electronic form.” 15 U.S.C. § 7001(a)(1).
  - State adoption of UETA: “A . . . signature may not be denied legal effect or enforceability solely because the . . . signature is in electronic form.” Uniform Electronic Transactions Act, § 7(a).
  - Three “non-uniform” states: NY, WA, & IL

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# Legal Framework

- Some documents are exempt from E-SIGN and UETA. Some examples:
  - Wills, codicils, and testamentary documents
  - Adoption, divorce, family law documents
  - Court orders or notices
  - Loan default and foreclosure-related documents
  - Governmental agency documents
  - And others!

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# Legal Framework

- But just because it's "a signature" doesn't make it reliable! The following things are also "signatures" under common law – would you rely on them?

- An "X" marked on the document
- A wax seal from a family-crest signet ring
- A bite mark from the signatory's teeth



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# The AAA's of E-Signatures

- In the e-signature world, we judge reliability by three key analyses:
  - Authentication
  - Attribution
  - Anti-repudiation
- Key Distinction: “In person” vs. “remote” e-signatures. “Remote” presents greater risks:
  - You cannot practically observe the signatory’s behavior
  - Legal uncertainty involving the “remote notary” and other witnesses

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# Know Your Deal, Know Your Doc

- “Signature neutrality”?
- Impact of closing instructions?
- Overriding question:  
“How much proof do I need  
on these facts?”
- Meet Jane Doe



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# Know Your Deal, Know Your Doc

- Increasing levels of scrutiny
  - Merely procedural document (e.g., IRS W-9)?
  - Procedural document that affects escrow processes (e.g., escrow instructions)?
  - Procedural document that affects escrowed funds (e.g., wiring instructions)?
  - Unrecorded document affecting title (e.g., lease)?
  - Recorded document affecting title (e.g., deed / mortgage)?
  - Is the document one of the ones that E-SIGN and UETA do not immunize from challenge as unenforceable because electronic (e.g., wills, codicils, etc.)?

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# Authentication

**How do we know it was really Jane Doe that showed up / logged in?**



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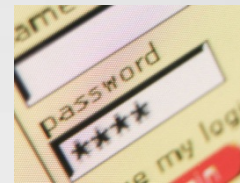
# Authentication

- Three basic means of authentication:

- What someone **possesses**



- What someone **knows**



- What someone **is**



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# Authentication

- What someone possesses
  - Sometimes called “credentials” or “tokens”
  - Examples: Driver’s license, passport, identification badge
  - Can be stolen, altered, or “faked”
  - Can also be of varying strength, even if valid



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# Authentication

- What someone knows
  - Most common form is the password or “shared secret”
  - Another form is “out of wallet questioning.” (“Which of the following has been your address within the last five years?”)
  - Can be compromised by accidental or voluntary (social media!) disclosure of information, or by interception or hacking / cracking



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# Authentication

- What someone is
  - Sometimes called “biometric identification”
  - Examples: Fingerprint scans, voice recognition, retina scans, DNA scans
  - Very strong but very expensive – and nothing is perfectly secure!



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# Authentication

- Other points to consider:
  - Multiple authentication “layers” or “factors”?
  - History with the user?
  - Reliable third party (e.g., notary) in the picture?
  - Is the user acting in a representative capacity on behalf of another person or entity?

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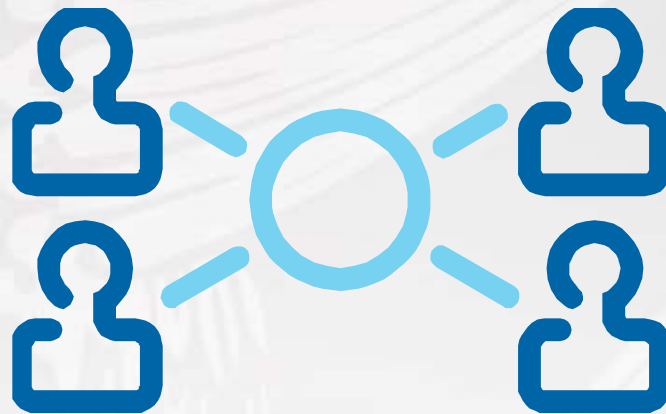
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# Attribution

**How do we associate the alleged Jane Doe signature with the person we authenticated at log-in as being Jane Doe?**



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# Attribution

- Things to consider:
  - At the time of the signature:
    - Audit trail capture?
    - Computer-generated vs. holographic signature?
  - After the signature: Anti-tampering / security measures?



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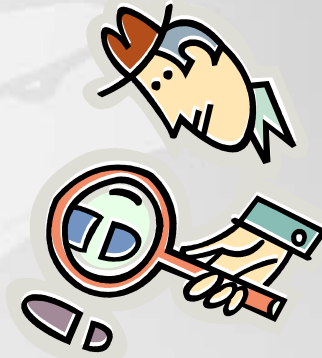
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# Attribution (Cont.)

- Audit trails:
  - Time / date / location information
  - Transaction replication:
    - Document version controls?
    - Replay of “script” that signatory experienced?
    - Actual recording of the signature event?



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# Attribution

## Computer-generated vs. Holographic Signatures

/s/ John Hancock

VS.



*Which one is harder to fake?*

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# Anti-repudiation

**How do we prove that Jane Doe really meant to e-sign the document?**



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# Anti-repudiation

- Main types of anti-repudiation problems:
  - Accidental signing
  - Involuntary signing
  - Uninformed signing



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# Anti-repudiation

- Some types of “accidental signing” anti-repudiation measures:
  - Required scroll-down
  - Click-box that the signatory has read and reviewed
  - Time tracking how long the signatory viewed the document
  - “Are you sure?” messages and indicators



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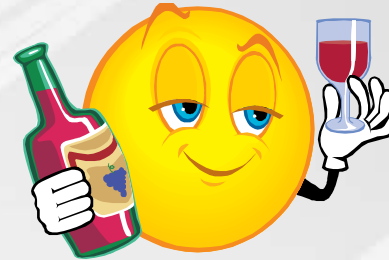
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# Anti-repudiation

- Some types of “involuntary signing” anti-repudiation measures:
  - Lack of capacity problems—incompetency, intoxication, emotional instability, etc.:
    - “Logic test” measures
    - Re-authentication
    - Scientific measurements
- But...very difficult to detect coercion, blackmail, etc.



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# Anti-repudiation

- Some types of “uninformed signing” anti-repudiation measures:
  - Initialing or “mini-signing” of pages or key sections
  - Reminders / Acknowledgments
  - Even quiz games!



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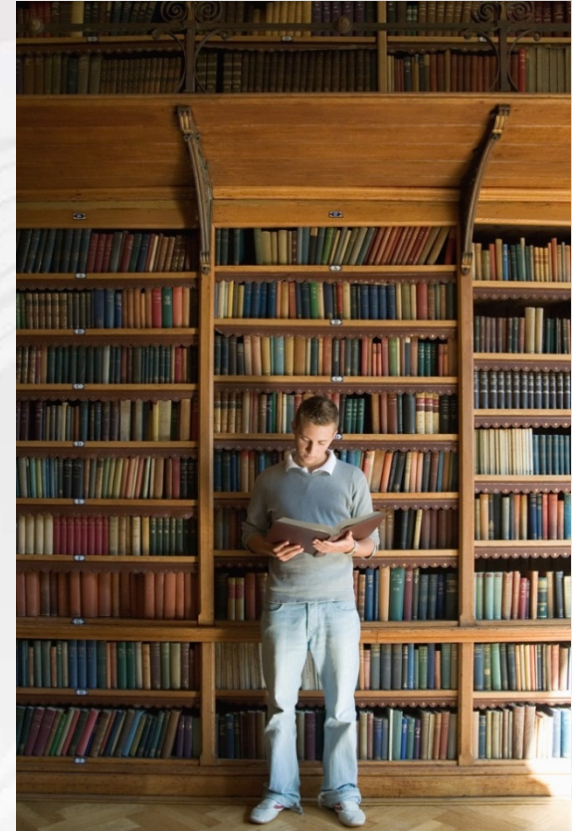
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# Data Archiving and Retrieval

- The data and the process are your witnesses – can you get them when you need them?
- Two options:
  - A vendor stores the data
  - You store the data



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# Data Archiving and Retrieval

- If vendor or another third party stores the data:
  - Financial stability of the third party?
  - Storage protocol:
    - How long does the third party store the data?
    - Can you choose the storage time frame or do they?
  - Safety of the third party's storage systems:
    - Safe from natural and human hazards?
    - Secure from hacking / data theft?

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# Data Archiving and Retrieval

- If you store the data, can you do so on your own systems without the need for the e-signature vendor to assist with:
  - Retrieving the data?
  - Understanding the data?
  - Explaining the data to third parties (courts, regulators, etc.)?
- If not, who will be around and obligated to help you with those things?

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# Legal / Regulatory

- Counterparty risk:
  - What is the financial stability of the e-signature vendor?
  - What is the reputation of the e-signature vendor?
  - VHS or Beta problem...



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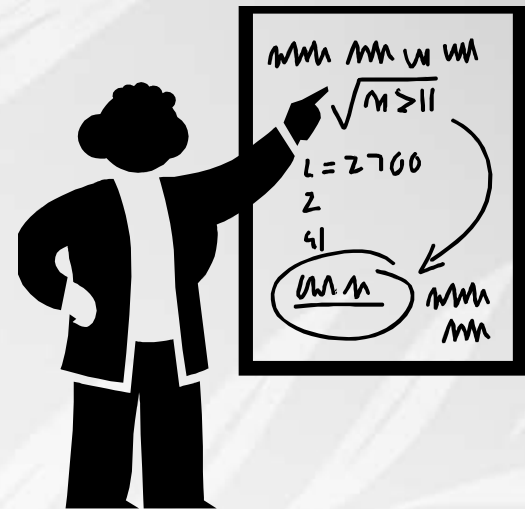
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# Legal / Regulatory

- Is the e-signature vendor obligated (contractually or otherwise) to provide a testifying party / technical assistance for:
  - Regulatory / underwriter audits?
  - Lawsuits in which someone must defend against challenges to the e-signature?



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# Conclusion

- “Facts animate legal principles. / Know your deal.”
- Use your instincts and ask questions.
- Remember the AAA’s and be prepared to explain how you got comfortable with them:
  - Authentication
  - Attribution
  - Anti-repudiation



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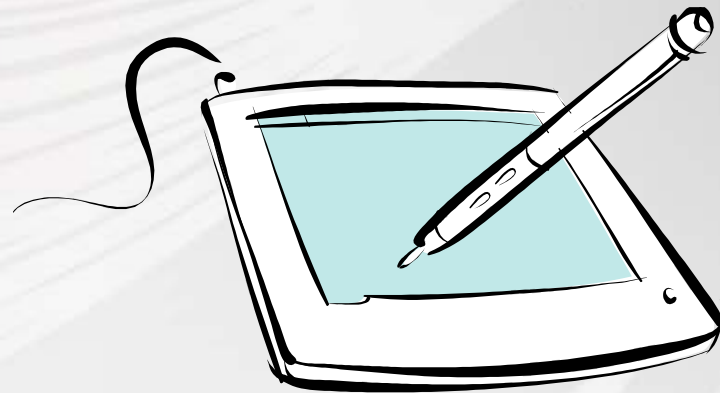
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# Panel Discussion



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