

The Iowa State Bar Association's eCommerce & Intellectual Property Law Sections presents

2017 Intellectual Property Law & eCommerce Seminar

Implementing an Electronic Contract Program: John Deere Financial US Equipment Financing



8:30– 9:00 am

Presented By

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Implementing an Electronic Contract Program

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This is not legal advice and the opinions expressed are those of the authors and do not necessarily reflect the views of Deere & Company and its affiliates.

1. Background

- a. Customers and retailers are demanding electronic transaction solutions
- b. Must design electronic transaction processes that fits your company structure and the markets it serves
- c. Vendor selection is critical
- d. Must comply with all applicable state and federal electronic transaction laws
- e. Timeline
 - i. 1997: NCCUSL appoints a uniform electronic transactions act (UETA) committee
 - ii. 1999: NCCUSL provides UETA to the states
 - iii. 2000: 37 states adopt UETA, but 19 make significant changes, including Iowa
 - iv. 2000: federal ESIGN law adopted (15 USC ch. 96)
 - v. 2000: UCC electronic chattel paper provisions proposed
 - vi. 2004: Iowa adopts UETA, without significant variation (Iowa Code ch. 554D)
 - vii. 2017: 45 states have adopted UETA without significant variations.

2. Legal landscape

- a. ESIGN reverse preemption
 - i. ESIGN preempts inconsistent state laws unless the state has adopted UETA without significant variations.
- b. Scope limitations of ESIGN
 - i. Wills, codicils and trust
 - ii. Other state specific exceptions
- c. Legal requirements
 - i. There must be a single authoritative copy of the electronic contract – UCC 9-105, UETA 118(a)
 - ii. The electronic original is unique, identifiable and unalterable – UCC 9-105; UETA 118(a)
 - iii. The electronic original contract identifies the secured party as the assignee of the contract – UCC 9 – 105; UETA 118(b)
 - iv. The electronic original is communicated to and maintained by the secured party or its designated custodian – UCC 9 – 105; UETA 118(c)
 - v. Copies or revisions that add or change an identified assignee of the electronic original can be made only with the participation of the secured party – UCC 9-15; UETA 118(d)

- vi. Copies of the electronic original can be made only with the participation of the secured party – UCC 9-105; UETA 118(d)
- vii. Each copy of the electronic original, and any copy of a copy, is readily identifiable as a copy that is not the electronic original – UETA 118(e); UCC 9-105
- viii. Any revision of the electronic original is readily identifiable as an authorized or unauthorized revision – UCC 9-105; UETA 118(f)
- ix. If the account is paid off, the secured party must, within 10 days after receiving a request from the debtor, communicate the electronic original to the debtor or its designated custodian – UCC 9-317
- x. Parties must agree to conduct transactions by electronic means, by affirmative consent – UETA 106; ESIGN 101(b)
- xi. Consent must be conspicuous and visually separate - ESIGN 101(b), for consumer transactions
- xii. Consent must be in a manner that reasonably demonstrates that the consumer can access the electronic document – ESIGN 101(b) for consumer transactions
- xiii. Must notify of obligation to notify us of email address change. This notice must be conspicuous and visually separate – ESIGN 101(b) for consumer accounts
- xiv. Notice of right to receive a paper copy and any related fees – ESIGN 101 (b) for consumer transactions
- xv. Provide a statement of hardware and software requirements if specific hardware or software is required. This notice must be conspicuous and visually separate – ESIGN 101(b) for consumer transactions
- xvi. If changes in required hardware or software creates material risks that the customer will not be able to access and retain those electronic records, notice of the new hardware and software requirements, the right to withdraw the consent to use and acceptance of electronic records (without a fee or penalty) and new consent from the customer is required - ESIGN 101(b) for consumer accounts
- xvii. Must notify of right to withdraw consent to do business electronically and must give us an address if that consent is withdrawn. Notice must be conspicuous and visually separate - ESIGN 101(b) for consumer accounts
- xviii. The electronic record must be capable of review and retention and printing by the customer using a specified software and hardware when the customer consents to electronic transactions – ESIGN 101(b) for consumer transactions
- xix. Required notices must be capable of retention by the recipient at the time of receipt – UETA 110
- xx. The electronic record must (a) accurately reflect the account information; and (b) remain accessible for later reference – UETA 114; ESIGN 101(d) for consumer transactions

- xxi. Encryption – UCC 9-105; UETA 118(a) require an unalterable copy
 - xxii. All transactions must be time and date stamped – UCC 9-105; UETA 118(a) require an identifiable electronic original
 - xxiii. Tamper proof electronic document – UCC 9-105; UETA 118(d)
 - xxiv. Tamper proof audit trail – UCC 9-105 and UETA 118(a) require an identifiable electronic original
 - xxv. Record of transfers of ownership in custody – UCC 9-105; UETA 118 (c)
 - xxvi. Must destroy the electronic original when you create paper original document – UCC 9-105 requires that only one original exist
 - xxvii. Required notices must be capable of retention by the recipient at the time of receipt - UETA 110
- d. Admissibility as evidence: Like a paper contract, an electronic contract is admissible as evidence under the Federal Rules of Evidence or corresponding state evidence rules, if it is:
- i. Relevant – FRE 401
 - ii. Authentic – FRE 901(a)
 - iii. Within the business records exception to hearsay – FRE 1001(3)
 - iv. Admissible as an authentic copy – FRE 1001(3)
 - v. Its probative value outweighs any danger of unfair prejudice – FRE 403

See Lorraine v. Markel American Insurance Company, 241 FRD (Dist. Maryland, 2007) at 538.

- e. What did not change
- i. Document content requirements
 - ii. Document delivery timing requirements
 - iii. Specific disclosure requirements
 - iv. The risks in paper contracting processes

3. Dealer / Retailer Needs

- a. Increased retailer trade areas
- b. Increased physical distance between customers and retailers
- c. Retailer need to gain the efficiencies of electronic documents
 - i. printing
 - ii. mailing
 - iii. document storage
 - iv. document security
 - v. document delivery
 - vi. document errors

4. The Technology

- a. The need for an electronic contract vault
- b. The need for a “paper out” process
- c. The need for a reliable accepted scalable vendor
 - i. Transaction volume
 - ii. Geographically

- d. The vendor(s) must meet all of the legal requirements

5. Putting the pieces together

- a. The switch to electronic contracts requires extensive changes in internal procedures for you, participating retailers and customers
- b. You won't get it right the first time; the process has to be adaptable
- c. The commitment of participating dealers and customers is crucial
- d. Securitization of electronic contract receivables creates many additional hurdles; including
 - i. investor approval
 - ii. investor counsel approval
 - iii. securitization counsel approval
 - iv. rating agency approval
- e. Collection of electronic contracts
 - i. Give your collection vendors the tools they need to explain and defend your electronic contract process
 - ii. You have a stake in their doing that right

6. Next steps – off-line signing

- a. Completing the electronic signature process in an environment where there is no Wi-Fi connection
- b. Signing documents are then placed in the electronic contracts system once a Wi-Fi connection is available
- c. Challenges include the ability to review the document and sign on a mobile device

7. Next steps - remote signing

- a. This is what retailers and customers want - the convenience of signing from their home or business
- b. How do you prevent fraud - an imposter signing in place of your real customer
- c. How do you prevent repudiation - the customer signs up and then later denies they signed and demands that you prove they signed
- d. How do you create a remote signing process that works
 - i. Prevents fraud
 - ii. Gives you the proof to counter any repudiation attempts
 - 1. Other customer behavior that is inconsistent with their signature denials can create presumptions of contract validity. E.g.
 - a. receipts of the benefits of the contract
 - b. payments from the customer
 - c. receipt of account correspondence without objection
 - d. see Burcham v. Expedia, Inc. 209 WL 586513 (E. D. Wash. 2009)
 - iii. Verifies the identity of the signer quickly
 - iv. Has a minimal number of false negatives - where the real customer is rejected by the identity verification process

1. Is the identity verification process built to work for customers that are not in your main customer base. E.g. Not suburban homeowners

8. Best practices

- a. Cross functional vendor due diligence and selection team
- b. Create comprehensive legal and operational specifications
- c. Create and maintain detailed process maps
- d. Adequate training of all users

Implementing an Electronic Contract Program: John Deere Financial US Equipment Financing



Speakers

John Hughes – Agribusiness Account Manager

John Brown – Associate Chief Counsel, John Deere Financial

Both licensed Iowa attorneys

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Background

JDF US equipment financing

- @120K contracts per year
- @ \$8 B per year
- Dealer originated
- Booked in Johnston, Iowa



This presentation is limited to US
(Limited use of electronic contracts in Australia and Brazil)

Electronic Contract Path

1. Setting the Scene

2. Legal Landscape

3. Dealer Needs

4. The Technology

5. Putting the Pieces Together

6. Next Steps – Offline Signing

7. Next Steps – Remote Signing

8. Best Practices



Setting the Scene



Legal Landscape

How the US Law developed UETA and E-SIGN

- **1997:** National Conference of Commissioners on Uniform State Law (“NCCUSL”) appointed a Uniform Electronic Transactions Act (“UETA”) committee
- **1999:** That committee drafted UETA, which NCCUSL approved for submission to the states in 1999
- **1999 to June 2000:** 37 states adopted UETA, but 19, including Iowa, made significant changes
- **October 2000:** Federal Electronic Signatures in Global and National Commerce Act (“E-Sign”) adopted

Legal Landscape

How the US Law developed UETA and E-SIGN

- **2000:** UCC electronic chattel paper provisions proposed
- **2004** – Iowa passes UETA
- **2017-** 45 states have adopted UETA without significant variations (not CA, GA, IL, NY, and WA)

Legal Landscape

- National Conference of Commissioners on Uniform State Law (“NCCUSL”) created the Uniform Electronic Transactions Act (“UETA”)
- **October 2000** – Federal Electronic Signatures in Global and National Commerce Act (“E-SIGN”) adopted
- Reverse preemption - applies E-SIGN only if the state has not adopted UETA as proposed by NCCUSL
- E-SIGN preempted state e-commerce laws that:
 - Were not an adoption of the NCCUSL UETA text
 - Were inconsistent with the federal E-SIGN law; or
 - Had excessive exceptions
- UCC Electronic Chattel Paper provisions (9-105)

The Legal Foundation

Created a detailed list of all the legal requirements;

- Federal E-SIGN
- UETA
- UCC

Included all of those in the initial technical operational requirements

Included both commercial and consumer transaction requirements

What did not change?

Scope limits – excludes certain documents

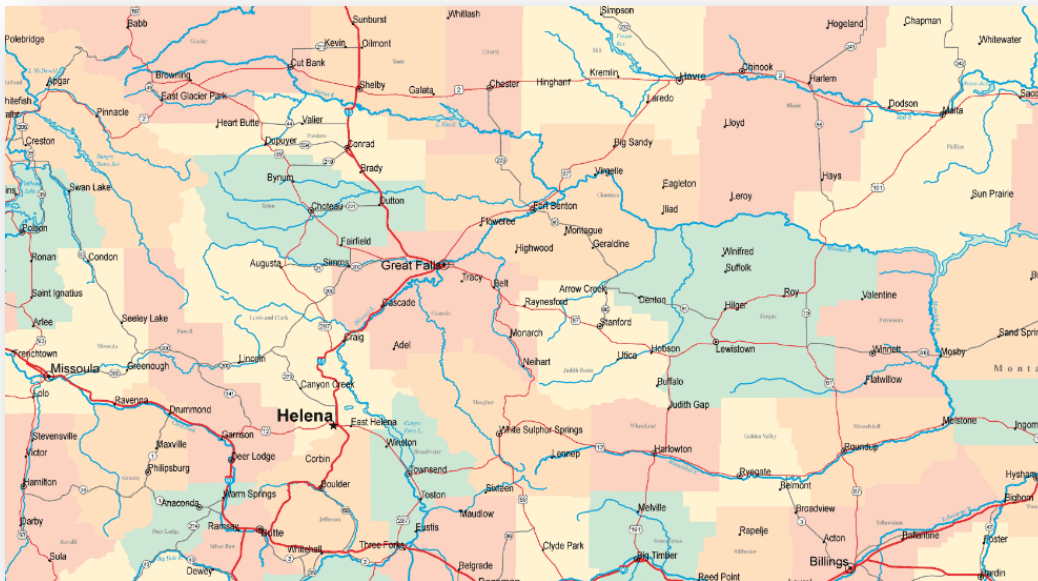
Other legal requirements

- Content
- Timing
- Disclosures



Dealer Needs

- Influential John Deere dealer request
- Growing distance between customer and dealer
- John Deere corporate support



Dealer Needs: Mutual Benefit

- Reduce Printing Costs
- Reduce Document Storage Costs
- Reduce Mailing Costs
- Streamline Processes
- Ease Of Doing Business (Fast, Easy Access To Credit)
- Reduce cycle time
- Fewer late-filed contracts
- Fewer returned contracts
- Fewer issues with customer mailing privacy

The Technology

- John Deere Financial online credit submissions in 2004 (Ceres)
- Electronic signature vendor selection
- Emphasis on offline availability and international support



The Technology: Reno, Nevada

- John Deere storage “vault” facility in Reno, Nevada
- UCC Compliance with authoritative original



The “Paper-Out” Process

Required for accounts:

- Sold to other lenders
- Sold to originating dealers
- When a judge insists on a paper original
- State requires a paper original marked “PAID” be sent to the customer at payoff

Needs to be authorized in the electronic contract

Involves the simultaneous destruction of the electronic original and creation of the new paper original



The Technology **DocuSign**

DocuSign's Vision: Empower anyone to sign anything, anywhere, anytime

- Met 99% of project team requirements
- Willing to develop offline solution w/ John Deere
- Compatible with current dealer Topaz eSignature investment
- Industry leader in customers, partners, users, revenues, market share, and across industries
- Most extensive global network
- Most legally robust eSignature solution



The Technology **DocuSign**

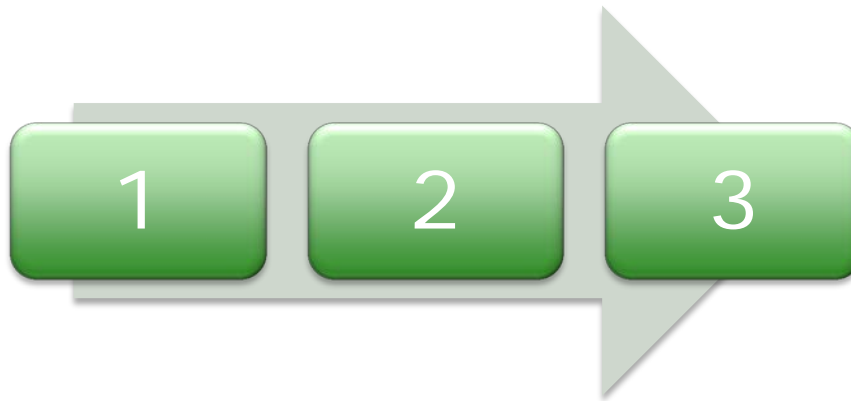
DocuSign meets high evidentiary standards:

- E-SIGN compliance warranty
- Admissibility – Best Evidence Rule
- Unassailable evidentiary support
- Chain of custody
- Third-party process
- DocuSign's proof is "better than paper"



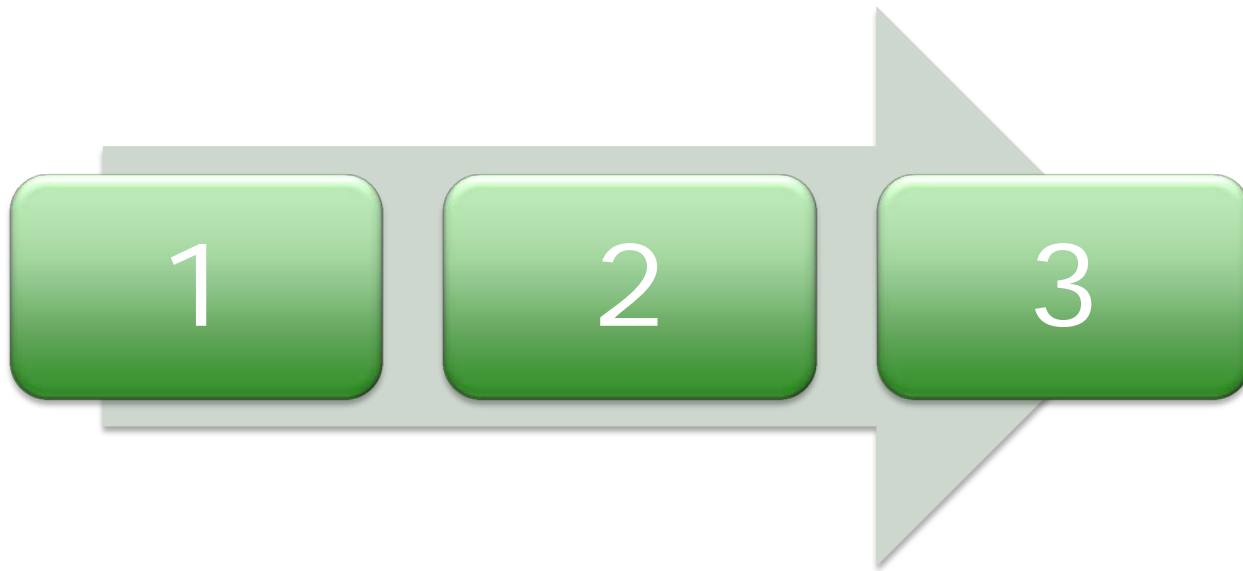
Putting the Pieces Together

- Developed internal procedures for contract acceptance and auditing
- Completed testing prior to launch
- Created dealer support materials to include flowcharts and online training module
- Participated in field visits to gather feedback



Putting the Pieces Together: Securitization

- The John Deere Financial team, and John Deere IT team, met with all major US credit rating agencies to review and obtain their approval of our electronic contract process
- Also completed a similar process with the Asset Backed Securities Investor attorneys



Collection of Electronic Contracts

CD-ROM for all US Collection law firms

- Review of E-SIGN, UETA and UCC
- Case law review
- Brief template
- Affidavit template



Putting the Pieces Together: Field Experience

- Benefited from strong dealer leadership for implementation
- Provided usage reporting to track progress
- Encouraged “reference” individuals and locations for momentum



Next Steps: Offline Signing

- Sign using DocuSign process on dealer pad or PC at any location with no Wi-Fi connection.
- Dealer employee present to verify identity and witness signature
- Signed contract submitted once dealer employee returns to dealership



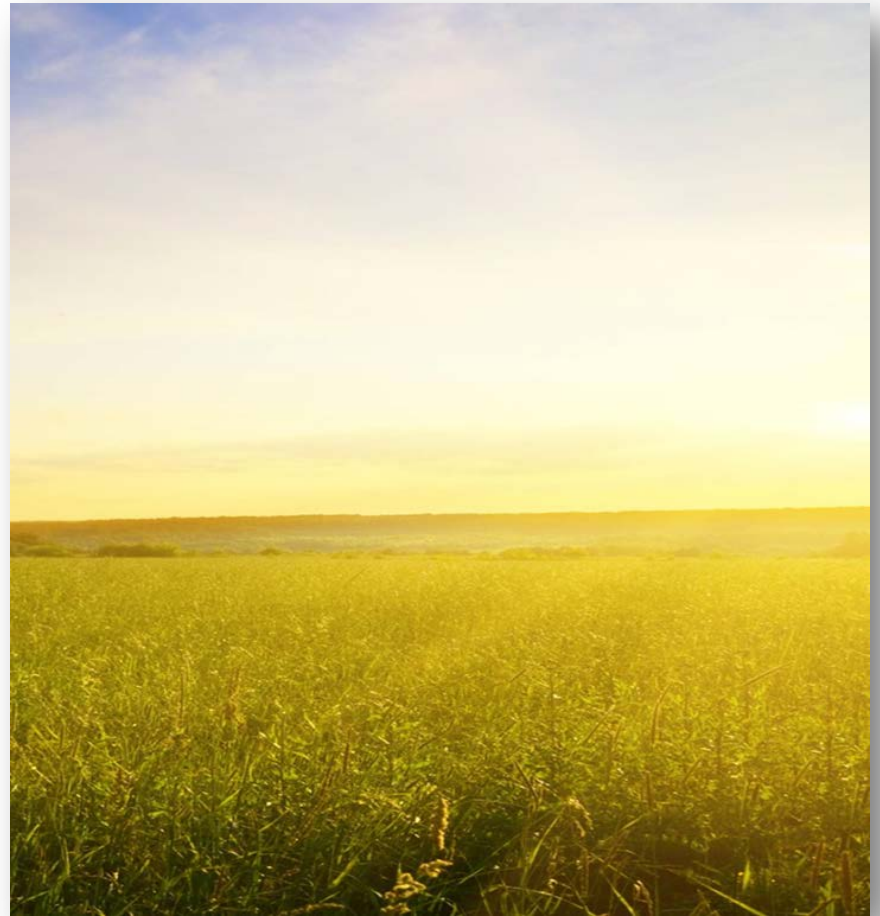
Next Steps: Remote Signature

Customer completes DocuSign process on customer pad or PC at any location

- No dealership employee verifies identity
- No dealer employee witnesses signing

Need to have a process that prevents:

- **fraud** (signature by an imposter); and
- **repudiation** (customer who signs later falsely claims they did not sign)



Next Steps: Remote Signature

Available Options

1. Knowledge based authentication questions

- using public records
- using credit bureau data
- using other information

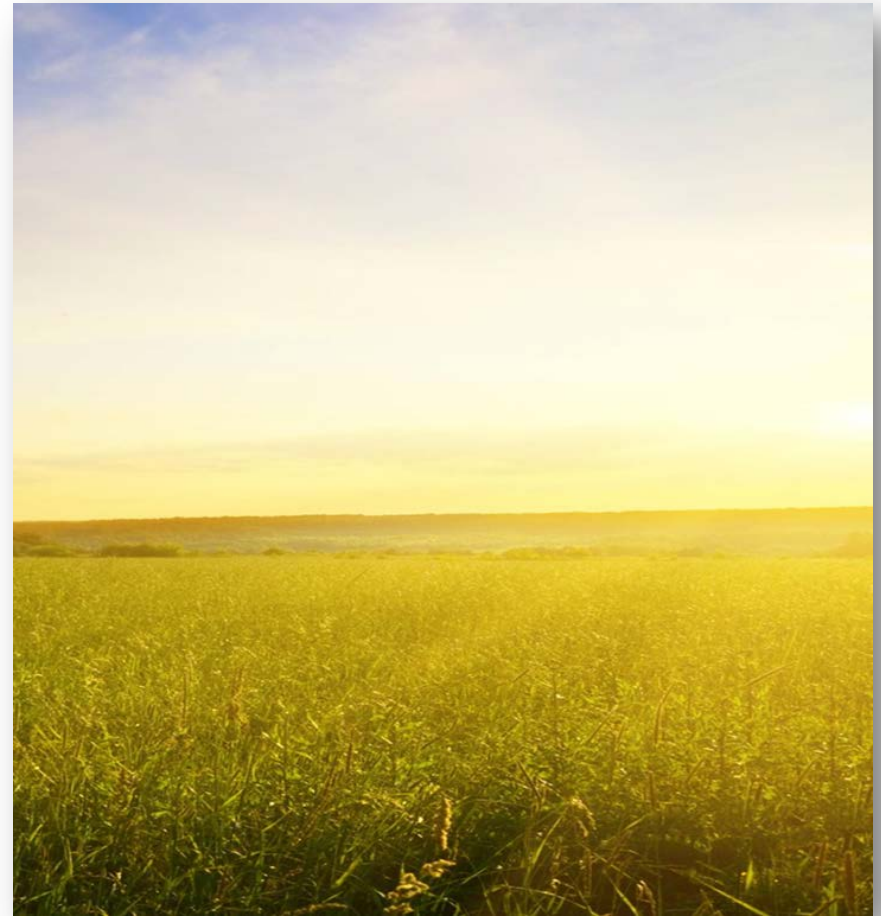
2. Passwords

3. Tokens or smart cards

4. Biometrics

- fingerprints
- voice
- iris scan

5. Security questions



Best Practices

- Cross-functional vendor selection team
- Comprehensive specifications
- Detailed process mapping
- Adequate training developed and delivered prior to launch (Internal and for originating dealers)
- Strong leadership buy-in—for dealers and company



Best Practices

- Reach out to other companies and other parts of your company with previous electronic contracts experience
- Coordinate with dealer on technology choice
- Confirm rollout in phases
- Be careful what you promise



Thank You