



**STATE OF NEW YORK  
INSURANCE DEPARTMENT**  
25 BEAVER STREET  
NEW YORK, NEW YORK 10004

David A. Paterson  
Governor

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The Office of General Counsel issued the following opinion on April 2, 2008, representing the position of the New York State Insurance Department.

**Re: Online Insurance Policy Delivery System**

**Questions Presented:**

1. Must an insurer that implements an online insurance policy delivery system obtain the consent of each insured before it can place the insured's insurance policies online, in lieu of issuing paper copies of the policies?
2. Is a printout of an electronic insurance policy admissible as evidence in a New York State court proceeding?

**Conclusions:**

1. Yes. Pursuant to New York State Electronic Signatures and Records Act ("ESRA") and the federal Electronic Signatures in Global and National Commerce Act ("E-Sign"), the use of electronic records and signatures is voluntary and no entity or person is required to use an electronic record or electronic signature unless otherwise provided by law. Accordingly, an insurer must obtain the consent of each insured before it can make the insured's insurance policies available online as electronic documents, in lieu of issuing paper copies.
2. Yes. A printout of an electronic insurance policy is admissible as evidence in a New York State court proceeding, as long as the court finds that the policy is a true and accurate representation of the electronic record.

**Facts:**

The inquirer reports that ABC Co.<sup>1</sup> has announced a new online policy delivery system pursuant to which insurance agents and policyholders will have access to policy documents and endorsements electronically through an online portal. The online portal also provides access to billing, claims reports, business lists and more. The electronic version would be in lieu of the insurer issuing a paper copy of the policy to the insured.

The inquirer referred to an OGC Opinion, dated August 31, 2007 (the "Opinion"), which states that an insurer may provide its insureds with the option of receiving their insurance policies, applicable forms, and premium bills electronically, via e-mail, instead of by hard copy sent through the mail. The Opinion further states that there is nothing in the Insurance Law or regulations promulgated thereunder that prohibit such transmissions, provided that the insured consents to such receipt.

**Analysis:**

New York State has enacted ESRA, N.Y. State Tech. Law §§ 301-309 (McKinney Supp. 2008), which establishes a legal framework for the conduct of electronic commerce in New York State and is consistent with the federal E-Sign, 15 U.S.C.A. §§ 7001-7031 (2008).<sup>2</sup>

Both E-Sign and ESRA authorize the use and acceptance of electronic signatures and electronic records in commercial transactions and confirm their legal validity. In 1999, the Insurance Department issued Circular Letter No. 33 (1999) (available at <http://www.ins.state.ny.us>), in which it advised that insurance transactions may be effected by electronic means since most existing provisions of the Insurance Law do not prescribe such activities. The Department encouraged insurers to carefully review ESRA and other laws, and to consider integrating electronic signatures and records into their operations in New York State.

However, neither ESRA nor E-SIGN obligates any person to accept the use of electronic records and signatures. ESRA especially provides that an entity or person is not required to use an electronic record or an electronic signature, unless otherwise provided by law. See State Tech. Law § 309. E-SIGN likewise states that: "This subchapter does not . . . require any person to agree to use or accept electronic records or electronic signatures, other than a governmental agency with respect to a record other than a contract to which it is a party." See 15 U.S.C.A. § 7001(b).

With respect to obtaining the consent of a consumer, 15 U.S.C.A. § 7001(c) provides in relevant part:

(c) Consumer disclosures

(1) Consent to electronic records

Notwithstanding subsection (a), if a statute, regulation, or other rule of law requires that information relating to a transaction or transactions in or affecting interstate or foreign commerce be provided or made available to a consumer in writing, the use of an electronic record to provide or make available (whichever is required) such information satisfies the requirement that such information be in writing if--

(A) the consumer has affirmatively consented to such use and has not withdrawn such consent;

B) the consumer, prior to consenting, is provided with a clear and conspicuous statement--

i) informing the consumer of (I) any right or option of the consumer to have the record provided or made available on paper or in nonelectronic form, and (II) the right of the consumer to withdraw the consent to have the record provided or made available in an electronic form and of any conditions, consequences (which may include termination of the parties' relationship), or fees in the event of such withdrawal . . .

The Department has previously opined that an insurer who seeks to transmit insurance policy forms to insureds by electronic means (specifically by e-mail) must obtain the consent of each insured to carry out the transaction electronically. See Office of General Counsel ("OGC") Opinion No. 05-11-28, dated November 23, 2005; OGC Op. No. 04-07-02, dated July 6, 2004; and OGC Op. No. 03-02-34, dated February 28, 2003. Accordingly, an insurer must obtain the consent of each policyholder before it can send an insurance policy electronically.

Here, the insurer is not transmitting the insurance policies to its insureds via e-mail, but is making the policies available as electronic documents through an online portal. However, that fact does not change the analysis. The insurer still must obtain the consent of each insured before it can place the insured's insurance policies online.

The inquirer's second question asks whether a printout of an electronic insurance policy is admissible as evidence in a New York State court proceeding.

State Technology Law § 305(3) provides that electronic records are given the same force and effect as records not produced by electronic means. State Technology Law § 304(2) further provides that the use of an electronic signature has the same validity and effect as the use of a signature affixed by hand. Section 7001(a) of the federal E-Sign law also provides that electronic records and signatures may not be denied legal effect, validity or enforceability solely because they are made electronically.

With respect to the admissibility of electronic records into evidence, State Technology Law § 306 provides:

In any legal proceeding where the provisions of the civil practice law and rules are applicable, an electronic record or electronic signature may be admitted into evidence pursuant to the provisions of article forty-five of the civil practice laws and rules . . . including, but not limited to section four thousand five hundred thirty-nine of such law and rules.

New York's Civil Practice Law and Rules (C.P.L.R.) § 4518 (McKinney Supp. 2008) governs the admissibility of business records. With respect to electronic records, the statute provides:

(a) [A]n electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

Accordingly, a printout of an electronic insurance policy is admissible as evidence in a New York State court proceeding, as long as the court finds the document to be a "true and accurate representation" of the electronic record.

For further information you may contact Associate Attorney Pascale Jean-Baptiste at the New York City Office.

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<sup>1</sup> ABC Co. writes commercial property/casualty, personal lines and professional liability insurance policies.

<sup>2</sup> E-Sign applies to transactions in or affecting interstate or foreign commerce, including the business of insurance. See 15 U.S.C.A. § 7001(a) and (i).