LRBa2190

2003 DRAFTING REQUEST

Senate Amendment (SA-SB404)

Received: **02/12/2004**

Received By: **jkuesel**

Wanted: **Soon**

Identical to LRB:

For: **Ted Kanavas (608) 266-9174**

By/Representing: **Jeremy Shepherd**

This file may be shown to any legislator: **NO**

Drafter: **jkuesel**

May Contact:

Addl. Drafters:

Subject: **Trade Regulation - electron com**
State Govt - miscellaneous

Extra Copies: **RPN, RNK, RAC - 1**
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Submit via email: **YES**

Requester's email: **Sen.Kanavas@legis.state.wi.us**

Carbon copy (CC:) to:

Pre Topic:

No specific pre topic given

Topic:

SA to SB-404

Instructions:

Per AA 1.

Drafting History:

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DNJ 25

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2003 – 2004 LEGISLATURE

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JTK:kmg:rs

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SENATE AMENDMENT ,

TO 2003 SENATE BILL 404

At the locations indicated, amend the bill as follows:

1. Page 1, line 7: after "records" insert "and granting rule–making authority".

2. Page 12, line 1: delete the material beginning with that line and ending with page 13, line 6.

3. Page 14, line 20: after that line insert:

"**SECTION 10t.** 137.05 (title) of the statutes is renumbered 137.25 (title).".

4. Page 14, line 21: after "137.25" insert "(1)".

5. Page 14, line 22: delete that line and substitute:

"137.25 **(1)**".

6. Page 14, line 23: delete "**units**.".

7. Page 22, line 7: delete "If" and substitute "Except as provided in sub. (6), if".

8. Page 22, line 22: delete "If" and substitute "Except as provided in sub. (6), if".

9. Page 23, line 1: delete "A record" and substitute "(a) Except as provided in sub. (6), a record".

10. Page 23, line 3: delete "subsection" and substitute "paragraph".

11. Page 23, line 5: after that line insert:

"(b) A governmental unit that has custody of a record is also further subject to the retention requirements for public records of state agencies, and the records of the University of Wisconsin Hospitals and Clinics Authority established under ss. 16.61, and 16.611 and the retention requirements for documents of local governmental units established under s. 16.612.

(7) The public records board may promulgate rules prescribing standards consistent with this subchapter for retention of records by state agencies, the University of Wisconsin Hospitals and Clinics Authority and local governmental units.".

12. Page 23, line 6: delete "**(7)**" and substitute "**(8)**".

13. Page 27, line 6: after that line insert:

"**SECTION 13m.** 137.25 (2) of the statutes is created to read:

137.25 **(2)** The department of administration shall promulgate rules concerning the use of electronic records and electronic signatures by governmental units, which shall govern the use of electronic records or signatures by governmental units, unless otherwise provided by law. The rules shall include standards regarding the receipt of electronic records or electronic signatures that promote consistency and interoperability with other standards adopted by other governmental units of

this state and other states and the federal government and nongovernmental persons interacting with governmental units of this state. The standards may include alternative provisions if warranted to meet particular applications.".

14. Page 27, line 15: delete the material beginning with that line and ending with page 29, line 6, and substitute:

"**SECTION 15am.** 224.30 (2) of the statutes is repealed.".

15. Page 30, line 16: delete lines 16 to 19 and substitute:

"**SECTION 21m. Nonstatutory provisions.**

(1) Using the procedure under section 227.24 of the statutes, the department of administration may promulgate emergency rules under section 137.25 (2) of the statutes, as created by this act, for the period before the effective date of permanent rules initially promulgated under section 137.25 (2) of the statutes, as created by this act, but not to exceed the period authorized under section 227.24 (1) (c) and (2) of the statutes. Notwithstanding section 227.24 (1) (a), (2) (b), and (3) of the statutes, the department is not required to provide evidence that promulgating a rule under this subsection as an emergency rule is necessary for the preservation of the public peace, health, safety, or welfare and is not required to provide a finding of emergency for a rule promulgated under this subsection.

SECTION 22m. Initial applicability.

(1) The treatment of sections 137.01 (3) (a) and (4) (a) and (b), 137.04, 137.05 (title), 137.06, 137.11 to 137.24, 137.25 (2), 889.29 (1), 910.01 (1), 910.02, and 910.03, subchapters I (title) and II (title) of chapter 137, and chapter 137 (title) of the statutes and the renumbering and amendment of section 137.05 of the statutes first apply to

electronic records or electronic signatures that are created, generated, sent, communicated, received, or initially stored on the effective date of this subsection.".

(END)

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2. With the exception of the treatments discussed below, ~~this draft~~ SB-404 attempts to avoid preemption under the primary electronic commerce provisions of the federal Electronic Signatures in Global and National Commerce Act, commonly known as "E–sign." See p. 3 and ff. of the analysis for a discussion of the primary electronic commerce provisions of E–sign and p. 5 and ff. of the analysis for a discussion of preemption issues. E–sign contains two methods of avoiding preemption. One method, which is established under 15 USC 7002 (a) (1), is to enact a law that constitutes UETA. The treatment of proposed ~~ss. 137.01 (4) (a), 137.12 (2m) (d) and (f), and~~ 137.20 (6) (b) and (7) in this draft was not included in the recommended version of UETA. This treatment

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may make this draft something other than "an enactment of [UETA] as approved and recommended for enactment in all the [states]" and, thus may take the bill out from under the first exemption from preemption under 15 USC 7002 (a) (1).

If the bill does not qualify for the first exemption from preemption, it may still qualify for the second exemption from preemption, which is established under 15 USC 7002 (a) (2). However, this second exemption is much more difficult to apply. The second exemption permits the state to enact laws that modify, limit, or supersede certain provisions of E–sign, as long as the laws specify alternative procedures or requirements for the use or acceptance of electronic records or signatures to establish the legal effect of contracts or other records. Among other things, the alternative procedures or requirements must be consistent with Titles I and II of E–sign. As outlined below, it is difficult to predict how a court would apply this exemption and, as a result, it is difficult to predict whether and to what extent this version of the draft would qualify for this exemption from preemption.

There are three primary interpretations of the manner in which the second exemption from preemption is intended to apply when a state enacts substantive provisions that are not uniform with the recommended version of UETA. Until a court rules on the issue, there is no way of knowing which interpretation will apply. Under the most literal interpretation, a court would be required to treat the state enactment as a coherent whole, rather than separately analyze individual statutes created in the enactment. As noted above, it is possible that this version of the draft would not qualify as an enactment of UETA as approved and recommended for enactment in all the states. Under this interpretation, as a result, the entire enactment would be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign and would have no legal effect.

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Under a second interpretation, a court would be required to analyze the individual statutes created in the draft, rather than treat the enactment as a coherent whole. Under this interpretation, all specific provisions that are uniform with UETA would be exempt from preemption under 15 USC 7002 (a) (1). The non–uniform provisions in proposed ~~ss. 137.01 (4) (a), 137.12 (2m) (a), (e), and (g) and~~ 137.20 (6) (b) and (7) would be analyzed separately under 15 USC 7002 (a) (2) to determine if the provisions are exempt from preemption under that section. Under this interpretation, the six provisions would likely be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign.

Under a third interpretation, a court would treat the state enactment in different ways for different purposes. The court would first be required to treat the draft as a coherent whole in determining if, under 15 USC 7002 (a) (1), the law qualifies as an enactment of UETA. If the law is not an enactment of UETA, then the court would be required to analyze each individual statute, including a statute that *is* uniform with a UETA provision, under 15 USC 7002 (a) (2) to determine if the statute is exempt from preemption under that section. Under this interpretation proposed ~~ss. 137.01 (4) (a), 137.12 (2m) (a) and (g), and~~ 137.20 (6) (b) and (7) would likely be preempted as inconsistent with E–sign Titles I and II. In addition, any other provision that is

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inconsistent with E–sign Titles I and II would likely be preempted, even if the provision is uniform with a UETA provision.

Because it is so difficult to predict how a court would apply the second exemption from preemption, you may want to avoid any treatment of ~~ss. 137.01 (4) (a), 137.12 (2m) (a) and (g), and~~ 137.20 (6) (b), (7) and (8) that may trigger the preemption analysis under the second exemption.

JTK

DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRBa2190/1dn
JTK:kg:jf

February 16, 2004

With the exception of the treatments discussed below, SB–404 attempts to avoid preemption under the primary electronic commerce provisions of the federal Electronic Signatures in Global and National Commerce Act, commonly known as "E–sign." See p. 3 and ff. of the analysis for a discussion of the primary electronic commerce provisions of E–sign and p. 5 and ff. of the analysis for a discussion of preemption issues. E–sign contains two methods of avoiding preemption. One method, which is established under 15 USC 7002 (a) (1), is to enact a law that constitutes UETA. The treatment of proposed s. 137.20 (6) (b) and (7) in this draft was not included in the recommended version of UETA. This treatment may make this draft something other than "an enactment of [UETA] as approved and recommended for enactment in all the [states]" and, thus may take the bill out from under the first exemption from preemption under 15 USC 7002 (a) (1).

If the bill does not qualify for the first exemption from preemption, it may still qualify for the second exemption from preemption, which is established under 15 USC 7002 (a) (2). However, this second exemption is much more difficult to apply. The second exemption permits the state to enact laws that modify, limit, or supersede certain provisions of E–sign, as long as the laws specify alternative procedures or requirements for the use or acceptance of electronic records or signatures to establish the legal effect of contracts or other records. Among other things, the alternative procedures or requirements must be consistent with Titles I and II of E–sign. As outlined below, it is difficult to predict how a court would apply this exemption and, as a result, it is difficult to predict whether and to what extent this version of the draft would qualify for this exemption from preemption.

There are three primary interpretations of the manner in which the second exemption from preemption is intended to apply when a state enacts substantive provisions that are not uniform with the recommended version of UETA. Until a court rules on the issue, there is no way of knowing which interpretation will apply. Under the most literal interpretation, a court would be required to treat the state enactment as a coherent whole, rather than separately analyze individual statutes created in the enactment. As noted above, it is possible that this version of the draft would not qualify as an enactment of UETA as approved and recommended for enactment in all the states. Under this interpretation, as a result, the entire enactment would be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign and would have no legal effect.

Under a second interpretation, a court would be required to analyze the individual statutes created in the draft, rather than treat the enactment as a coherent whole. Under this interpretation, all specific provisions that are uniform with UETA would be exempt from preemption under 15 USC 7002 (a) (1). The non–uniform provisions in proposed s. 137.20 (6) (b) and (7) would be analyzed separately under 15 USC 7002 (a) (2) to determine if the provisions are exempt from preemption under that section. Under this interpretation, the six provisions would likely be preempted under 15 USC 7002 (a) (2) as inconsistent with Titles I and II of E–sign.

Under a third interpretation, a court would treat the state enactment in different ways for different purposes. The court would first be required to treat the draft as a coherent whole in determining if, under 15 USC 7002 (a) (1), the law qualifies as an enactment of UETA. If the law is not an enactment of UETA, then the court would be required to analyze each individual statute, including a statute that *is* uniform with a UETA provision, under 15 USC 7002 (a) (2) to determine if the statute is exempt from preemption under that section. Under this interpretation proposed s. 137.20 (6) (b) and (7) would likely be preempted as inconsistent with E–sign Titles I and II. In addition, any other provision that is inconsistent with E–sign Titles I and II would likely be preempted, even if the provision is uniform with a UETA provision.

Because it is so difficult to predict how a court would apply the second exemption from preemption, you may want to avoid any treatment of s. 137.20 (6) (b) and (7) that may trigger the preemption analysis under the second exemption.

Jeffery T. Kuesel
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