

ELECTRONIC SIGNATURES

COMMONWEALTH OF KENTUCKY ENVIRONMENTAL AND PUBLIC PROTECTION CABINET OFFICE OF INSURANCE

The following Advisory Opinion is to advise the reader of the current position of the Kentucky Office of Insurance (the “Office”) on the specified issue. The Advisory Opinion is not legally binding on either the Office or the reader.

Kentucky Office of Insurance Advisory Opinion 2006-09

**TO: ALL INSURERS AUTHORIZED TO TRANSACT BUSINESS IN KENTUCKY
THE INDEPENDENT INSURANCE AGENTS OF KENTUCKY, INC.
THE PROFESSIONAL INSURANCE AGENTS OF KENTUCKY
ALL AGENTS LICENSED TO TRANSACT BUSINESS IN KENTUCKY**

**FROM: JULIE MIX MCPEAK, EXECUTIVE DIRECTOR
KENTUCKY OFFICE OF INSURANCE**

RE: ELECTRONIC SIGNATURES

The Kentucky Office of Insurance (the “Office”) has received several inquiries regarding the interpretation of 806 KAR 12:070 Section 1 and how it applies to the use of electronic signatures. Such licensees cite 806 KAR 12:070 Section 1 as a potential problem because of the requirement that the soliciting agent witness the applicant’s signature.

806 KAR 12:070 Section 1 states the following:

Every application for life insurance solicited personally by an agent shall have the location where the application is signed and the applicant’s signature witnessed by the soliciting agent.

This regulation clearly requires an agent to witness the applicant’s signature on every application for life insurance that is personally solicited by such agent. The term “solicited personally by an agent” would apply to life insurance being solicited in person, by telephone, or even by e-mail directly from the agent. However, there are circumstances in which 806 KAR 12:070 would not apply. Direct response advertisements are those that are sent by mail as well as spam advertisements sent by e-mail from insurance carriers. These direct response applications would not have to comply with the requirement that the agent witness the applicant’s signature because they are solicitations from the company and not the agent.

KRS 369.101 to 369.120 is known as the Uniform Electronic Transactions Act (“UETA”). This legislation was adopted in response to the internet and electronic commerce becoming a daily part of most people’s lives. KRS 369.102(7) defines an “electronic record” as “a record created, generated, sent, communicated, received, or stored by electronic means.” In addition, KRS 369.102(8) defines an “electronic signature” as “an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.” These two definitions are very important in the context of UETA.

KRS 369.105(2) states the following:

KRS 369.101 to 369.120 applies only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties’ conduct.

If an insurance company decides to conduct electronic transactions, this would be permitted as long as the insurer and the insured both agree. If a dispute arose as to whether either of the parties agreed to conduct such a transaction, a court would look at the facts of the situation, the surrounding circumstances, and both parties’ specific actions to determine the intent of the parties, which is a significant factor in this analysis.

According to KRS 369.106(1), UETA must be construed and applied “to facilitate electronic transactions consistent with other applicable law.” Also, KRS 369.105(5) states that UETA and other applicable law will determine whether an electronic record or electronic signature has legal consequences. These two sections suggest that UETA deals with only the procedure of a transaction and the other substantive law will control and determine the legal effect of such transaction. Therefore, if an insurer conducts electronic transactions and uses electronic signatures, the Kentucky insurance statutes and regulations still apply. It is important for insurers to understand that even though the Kentucky Office of Insurance (“KOI”) would allow such transactions, KOI is not waiving any requirements created by the statutes and regulations.

KRS 369.109(1) states the following:

An electronic record or electronic signature is attributable to a person if it was the act of the person. 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.

“Security Procedure” is defined in KRS 369.102(14) as “a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record.” If a situation arose (for example, in a market conduct exam) in which the authenticity of the electronic record or electronic signature was in question, KOI would have the authority to require evidence to show the security procedure(s) used to determine the person to which the electronic record or electronic signature was attributable. The insurers would be held accountable for any failures in their security procedures.

Conclusion

In summary, KOI will allow an insurer to use electronic signatures under the following circumstances:

- (1) Both parties must agree to conduct such transaction by electronic means;
- (2) KRS 369.101 through KRS 369.120 do not negate the application of Kentucky statutes and regulations, such as 806 KAR 12:020, that may require actual signatures as opposed to electronic signatures. The insurer must comply with all insurance laws, confidentiality laws, and any other laws that would be applicable to the transaction, even if the affect of those laws dictate that an electronic signature cannot be utilized; and
- (3) If required, the insurer must be able to show that its security procedures are sufficient to verify that an electronic signature or record is that of a specific person and to assure that the information has not been altered in its transmission.

Any questions concerning these matters should be directed to Malinda Shepherd, Acting Director of the Life Division, Kentucky Office of Insurance at (502) 564-6071.

/s/ Julie Mix McPeak

Julie Mix McPeak, Executive Director
Kentucky Office of Insurance

August 15, 2006

Date