



**ELECTRONIC SIGNATURES,  
ELECTRONIC CONTRACTS:  
WHERE TECHNOLOGY IS GOING**

Wanda Borges, Esq.  
Borges & Associates, LLC  
575 Underhill Blvd.  
Syosset, NY 11791  
516-677-8200 x 225  
[wborges@borgeslawllc.com](mailto:wborges@borgeslawllc.com)

Borges - E-signatures- 2018



**The Efficacy of Online/  
Electronic Credit Applications**

Borges - E-signatures- 2018

## **CREDIT APPLICATIONS SERVE MULTIPLE FUNCTIONS**

- **Source of Useful Information to evaluate prospect's credit**
- **Wealth of Useful Information that can be used to collect company's claim if a customer later hits financial straits**
- **Sets forth requisite legal information**
- **Can be a Binding Contract under the right circumstances**
- **Can grant a security interest**

**Borges – E-signatures- 2018**

## **INFORMATION ON POTENTIAL OR EXISTING CUSTOMER**

- **Precise Legal name of applicant**
- **Precise legal structure of the applicant**
  - **Corporation**
  - **Limited liability company**
  - **Partnership, limited partnership, or LLP**
  - **Sole proprietor**
- **Business Address(es) of applicant**
- **Ownership information**
- **Tax identification number**

**Borges – E-signatures- 2018**

## Legal Information to be Included


- **Equal Credit Opportunity Act**
- **Fair Credit Reporting Act**
- **Dodd-Frank Act**

Borges – E-signatures- 2018

## Important Terms and Conditions

- **Terms and Conditions that your company needs in place**
  - **May be on credit application**
  - **May be referenced on credit application to be found elsewhere such as a website**
- **Interest**
- **Attorney's fees and costs of collection**
- **Choice of Law**
- **Venue and Jurisdiction**


Borges – E-signatures- 2018



**PERFECTLY LEGITIMATE FOR THE EXCHANGE OF  
INFORMATION  
BUT  
NOT NECESSARILY A BINDING CONTRACT**

**Borges – E-signatures- 2018**

## **CREATING A BINDING CONTRACT**

- 
- **Rules regarding the Creation of a Binding Contract do NOT change because it is electronic**
  - **Minimum Requirements**
    - **an offer and acceptance**
    - **evidence of mutual assent**
    - **each party's capacity to enter into a contract**
    - **legality of the subject matter**
    - **consideration.**

**Borges – E-signatures- 2018**

## CREATING A BINDING CONTRACT

- In order for a contract to be binding, it should be in writing and it should be signed.
- The Uniform Commercial Code requires a sale of goods having a value in excess of \$500.00 to be in writing.
  - There is an exception for a normal course of business transaction between merchants.
- In the case of a credit application and the terms and conditions which may be included in that credit application, this is much more than simply a sale of goods.
  - Therefore, each of the minimum elements of a contract (see previous slide) must be met.
- The questionable element is whether or not there has been acceptance of the contract by the customer.
- A signature by a customer is the best evidence that the contract has been accepted.

Borges – E-signatures- 2018

## CREATING A BINDING CONTRACT IN THE ELECTRONIC AGE

Borges – E-signatures- 2018

## STATUTES RELATED TO ELECTRONIC TRANSACTIONS

- **E-Sign Act (Electronic Signatures in Global and National Commerce Act)**
  - October, 2000, an e-signature is permitted to form a binding contract
- **UCC (Uniform Commercial Code) – amended in 2001 to permit an electronic signature to security agreements.**
  - **Revised Article 9 provides for a security agreement to be authenticated instead of being signed.**
    - Authentication means to execute or otherwise adopt a symbol, or encrypt or similarly process a record in whole or in part, with intent of authenticating person to identify the person and adopt or accept a record.

**Borges – E-signatures- 2018**

## STATUTES RELATED TO ELECTRONIC TRANSACTIONS

- **UETA (Uniform Electronic Transactions Act)**
  - **Promulgated in 1999 by the Commissioners on Uniform Laws**
    - Adopted in all but 3 states [WA, NY, IL], and Puerto Rico
- **Four Fundamental Rules**
  - **A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.**
  - **A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.**
  - **Any law that requires a writing will be satisfied by an electronic record.**
  - **Any signature requirement in the law will be met if there is an electronic signature**

**Borges – E-signatures- 2018**

## STATUTES RELATED TO ELECTRONIC TRANSACTIONS

- **UNCITRAL stands for the United Nations Commission on International Trade Law**
- **UNCITRAL adopted the Model Law on Electronic Signatures in 2001 based on:**
  - The increased use of electronic authentication techniques as substitutes for handwritten signatures and other traditional authentication procedures has suggested the need for a specific legal framework to reduce uncertainty as to the legal effect that may result from the use of such modern techniques (which may be referred to generally as "electronic signatures").
  - The risk that diverging legislative approaches be taken in various countries with respect to electronic signatures calls for uniform legislative provisions to establish the basic rules of what is inherently an international phenomenon, where legal harmony as well as technical interoperability is a desirable objective.

Borges – E-signatures- 2018

## WHAT IS AN ELECTRONIC SIGNATURE

- **E-signature Legal Definition:**

An electronic sound, symbol, or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record" [15 USC 7006 §106(5)]
- **E-signature Layman's Definition:**

Some kind of electronic action that shows a person consents to something

Borges – E-signatures- 2018

## UNCITRAL

- **UNCITRAL Definition of Electronic Signature**
  - **Data in electronic form in, affixed to or logically associated with, a data message, which may be used to identify the signatory in relation to the data message and to indicate the signatory's approval of the information contained in the data message;**

**Borges – E-signatures- 2018**

## E-SIGNED CONTRACTS ARE ENFORCEABLE

- **"...Notwithstanding any statute, regulation, or other rule of law... with respect to any transaction in or affecting interstate or foreign commerce— (1) a signature, contract, or other record relating to such transaction may not be denied legal effect, validity, or enforceability solely because it is in electronic form; and (2) a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." 15USC 7006, Sec. 101(a).**

**Borges – E-signatures- 2018**



## LET'S TALK ABOUT LANGUAGE

One online credit application contains these words:

*"Applicant authorizes investigation of its credit to be used for all Creditor's business purposes. Customer agrees Creditor's Terms and Conditions of Sale shall govern all transactions using Creditor open account payment credit terms. Applicant agrees to pay all charges in full within the due date of the invoice and is responsible for all collection costs and attorney's fees.*

There is a link to the Creditor's Terms and Conditions of Sale which comprise two pages and include provisions for credit terms, interest, late fees, governing law and consent to jurisdiction.

**Borges – E-signatures- 2018**

## LET'S TALK ABOUT LANGUAGE

- This language is followed by a box to be checked as an "Agreement" and a box containing the initials of the credit applicant followed by this language *"By initialing this form you agree that all information is accurate to the best of your knowledge. Your initials serve as your signature."*
- This may or may not be enforceable in a court of law depending on numerous factors.

**Borges – E-signatures- 2018**

## **RULES OF EVIDENCE HAVE NOT CHANGED**

- **A copy is as good as an original, provided there is no dispute over the authenticity of the original.**
- **The problem in enforcing the contract intended to be created by the online/electronic signature will arise when the customer denies that the box was checked or that the initials belong to him or that the signature is his/hers**

**Borges – E-signatures- 2018**

## **HOW TO ACHIEVE THAT BINDING CONTRACT**

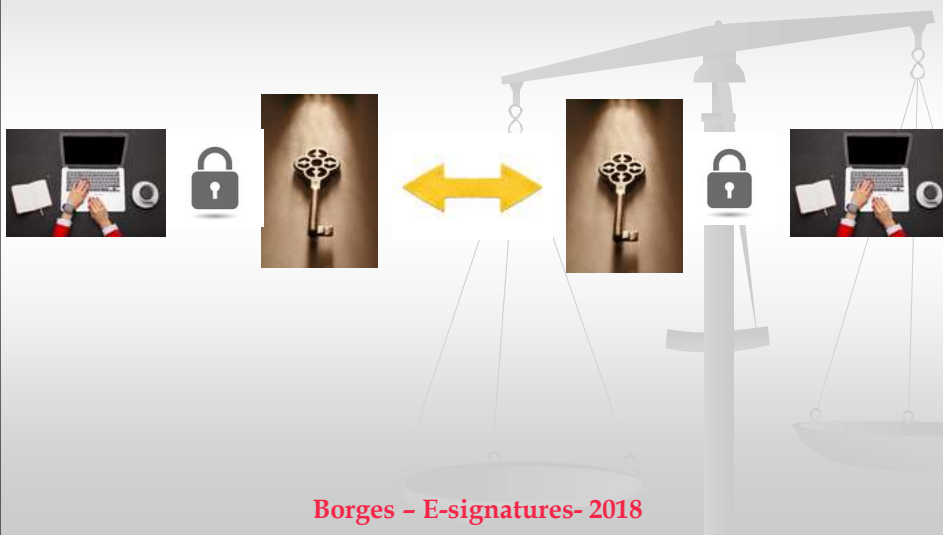
**Borges – E-signatures- 2018**

## PROTOCOLS NECESSARY

- Protocols necessary to truly establish an electronic signature are not often in place.
- Companies must have their IT departments set up encryption capabilities or other processes so that one computer absolutely knows who is the sender of the document (and signature).

Borges – E-signatures- 2018

## SYMMETRIC KEY CRYPTOGRAPHY



Borges – E-signatures- 2018

## **WHAT IS NOT AN ELECTRONIC SIGNATURE**

- A credit application given or sent to a proposed customer which is signed, scanned and emailed back to the credit department
- A credit application given or sent to a proposed customer which is signed and faxed back to the credit department
- A credit application downloaded from creditor's website and sent back by email or fax
- THESE MAY BE ACCEPTABLE SIGNATURE COPIES BUT THEY ARE NOT ELECTRONIC SIGNATURES

**Borges – E-signatures- 2018**

## **ADVANTAGES OF AN ELECTRONIC CREDIT APPLICATION**

- An electronic Credit Application expedites the credit approval/denial process
  - Customer can download credit application in minutes rather than wait for it to be delivered to it in person or other electronic means
  - Electronic communication regarding incomplete or improper credit application
  - Electronically stored for future use
  - Credit application
  - Resale certificate
  - Evidence of legal structure of customer

**Borges – E-signatures- 2018**

## DISCUSSION POINTS REGARDING AN ELECTRONIC CREDIT APPLICATION

- **LLC Operating Agreements**
  - Obtain a copy of the LLC Operating Agreement to validate who is authorized to sign a credit application
- **Personal Guarantees**
  - There will need to be a separate document for a personal guaranty
  - It can be electronically signed
    - Social Security Number can be hidden and only accessible by authorized people
  - Electronically signed personal guarantees **NOT** recommended by WB

Borges – E-signatures- 2018

## DISCUSSION POINTS REGARDING AN ELECTRONIC CREDIT APPLICATION

- **Legibility**
  - An attorney's bane is an illegible credit application
    - Collectability becomes problematic
    - Judges do not like having to have a "clean" unfilled application for reference
  - An electronic credit application will always be legible
- **Prompt Notification**
  - Sales personnel and the credit department can receive concurrent notification when credit application is complete
    - Credit departments might gain sales support easier than in the past

Borges – E-signatures- 2018

## DISCUSSION POINTS REGARDING AN ELECTRONIC CREDIT APPLICATION

- **Customizable**
  - Divisions can customize credit applications to suit their needs
- **Trade References**
- **Bank references**
- **Terms and Conditions**
  - Easily accessible to credit applicant

**Borges – E-signatures- 2018**

## HOW COURTS ARE LOOKING AT ELECTRONIC SIGNATURES

- **Meyer v. Uber (2017) (2<sup>nd</sup> Circuit Court of Appeals)**
  - Used Uber app more than 10 times
  - Brought a lawsuit claiming
    - Inconspicuous notice
    - Did not agree to Uber's terms & conditions of service
  - U.S. District Court agreed and said Meyer was not bound
  - 2<sup>nd</sup> Circuit Court of Appeals reversed
    - Registration Process for the Uber app contained several steps
    - One step required an Agreement that T&C's had been read and understood
      - Meyer claims not to have seen that part
    - Court held the agreement was binding and that courts around the country are recognizing that a "click" can be an agreement

**Borges – E-signatures- 2018**

## **A BADLY CONCEIVED ELECTRONIC SIGNATURE CAUSES A LOSS FOR BEST BUY**

### **■ Labajo vs. Best Buy Stores, L.P., 478 F.Supp.2d 523 (2007)**

- **Customers were asked to sign the credit card pad to get a “free” subscription to a magazine**
- **No clear explanation that that “free” subscription was only introductory**
- **Actual terms only appeared after signature was imposed**
- **Signature actually appeared on a separate area from the terms**

**Borges – E-signatures- 2018**

## **HOW COURTS ARE LOOKING AT ELECTRONIC SIGNATURES**

### **■ Sguoros v. Trans Union Corp. (2016) (7<sup>th</sup> Circuit)**

- **[t]here is nothing automatically offensive about such agreements, as long as the layout and language of the site give the user reasonable notice that a click will manifest assent to an agreement.**

**Borges – E-signatures- 2018**

## HOW COURTS ARE LOOKING AT ELECTRONIC SIGNATURES

- **Berkson v. Gogo (2015)(EDNY)**
  - Class action against a Wi-Fi provider
  - Claim was that website misled them into thinking they were purchasing 1 month and not a whole subscription
  - Court concluded electronic contract/signature is acceptable if:
    - A reasonably prudent user of a website has notice of the terms
    - User is encouraged by design and content to examine the terms through a hyperlink
    - The hyperlink is readily found and usable

**Borges – E-signatures- 2018**

## HOW COURTS ARE LOOKING AT ELECTRONIC SIGNATURES

- **Barwick v. Geico (Supreme Court of Arkansas 2011)**
  - An automobile insurance policy was obtained and signed electronically
  - Plaintiff waived the minimum medical coverage
  - Medical injuries were sustained which Geico would not cover
  - Plaintiff claimed the waiver was not binding because it was not "in writing" and Arkansas' statute required a "writing"
  - Case went to the Arkansas Supreme Court and the Court found the Arkansas statute provided for an electronic signature and said "*In our view, the meaning of section 25-32-107(c) could not be more straightforward when it states that 'if a law requires a record to be in writing, an electronic record satisfies the law.'*"

**Borges – E-signatures- 2018**



## ORIGINAL SIGNATURES MAY BE REQUIRED IN CERTAIN INSTANCES

- In re Mayfield (U.S. Bankruptcy Court; Eastern District of California)
  - Court concerned with the “ease with which a DocuSign affixation can be manipulated or forged.”
  - Possible for a debtor to deny “signing the document and claims his spouse, child, or roommate had access to his computer and could have clicked on the ‘sign here’ button.”
  - ESign Act applies to contracts, transactions BUT
    - Does not apply to “court orders or notices, or official court documents ... required to be executed in connection with court proceedings.”
  - DocuSign website acknowledges the Act “grants legal recognition to electronic signatures and records, if all parties to a contract choose to use electronic documents and to sign them electronically.”
    - A Bankruptcy Case is not a contract where the parties can agree to use electronic signatures

**Borges – E-signatures- 2018**

## WANDA BORGES

- *WANDA BORGES, the principal member of Borges & Associates, LLC., has been specializing in commercial insolvency practice and commercial litigation representing corporate clients throughout the United States for an excess of thirty years.*
- *She is admitted to practice before the courts of the State of New York and the United States District Court for the Southern, Eastern, Northern and Western Districts of New York, the United States District Court for the District of Connecticut, the United States District Court for the Eastern District of Michigan, the Second Circuit Court of Appeals and the Supreme Court of the United States. She is a member of several professional organizations, including the American Bar Association, American Bankruptcy Institute. As a member of the Commercial Law League of America, she is a Past President of the League, is a Past Chair of its Bankruptcy Section, is a past Chair of the Creditors’ Rights Section and currently serves on the Bankruptcy Section and Creditors’ Rights Section Executive Council She is the current Chair of the Board of Associate Editors for the Commercial Law World and other CLLA publications.*
- 

**Borges – E-signatures- 2018**

## WANDA BORGES

- *She is a regular lecturer for the National Association of Credit Management (NACM) and its various affiliates. She has prepared and continues to update courses on "Advanced Issues in Bankruptcy", "Basics in Bankruptcy", "Current Cases in Bankruptcy", "Creditor's Committees", "Credit and Collection Issues", Sarbanes-Oxley Act of 2002, "Litigation Issues" and "Antitrust Issues" which have been presented at past NACM Annual Credit Congresses and at trade credit association meetings. Even prior to the passage of the "Red Flags Rule", Ms. Borges worked with the NACM and the FTC to determine the applicability of the Rule to business creditors. Ms. Borges has prepared and presents seminars on the Red Flags compliance issues for the NACM, its various affiliates, corporations, collection agencies and various other organizations. Ms. Borges is a faculty member for the NACM's Graduate School of Credit and Financial Management at Dartmouth College. Ms. Borges has been a faculty member for the National Institute on Credit Management, a program jointly sponsored by the Commercial Law League of America and the National Association of Credit Management*

**Borges – E-signatures- 2018**

## WANDA BORGES

- *She has been a regular lecturer for the American Management Association on the Uniform Commercial Code and Fundamentals of Business Law for the Non-Lawyer, and for both the American Management Association, the Media Financial Management Association (formerly the Broadcast Cable Financial Management Association) and the Broadcast Cable Credit Association on Creditor's Rights in Commercial Litigation and Bankruptcy Matters. Additionally, she has presented seminars and webinars for the National Conference of Bankruptcy Judges, the American Bankruptcy Institute, The Commercial Law League of America, The International Association of Commercial Collectors, various local and national Bar Associations, Thomson West Publishing Company, the New York State Food Service Distributors Association and Riemer Reporting Service.*
- *Ms. Borges frequently presents live seminars, tele-seminars and webinars for various trade credit groups, many of whom are managed by NACM Affiliate Associations. Additionally, she has prepared and presented these educational programs for the American Automotive Leasing Association, the National Chemical Credit Association, the National Cement Trade Credit Group, the Health Industry Manufacturers Association, the Beauty and Barber Manufacturers Credit Association, the New Hampshire Association of Broadcasters and the Credit Association for Satellite History.*

**Borges – E-signatures- 2018**

## WANDA BORGES

- *She has served as the Managing Editor and still is one of the contributing authors of the Manual of Credit and Collection Laws published by the National Association of Credit Management and is a contributing author to its Principles of Business Credit. She is a member of NACM's Editorial Advisory Committee. She is an Associate Editor for the Commercial Law League of America's magazine "The Commercial Law World" and has contributed to the CLLA's Law Journal and the Bankruptcy Section Newsletter. Her treatise Hidden Liens: Who is Entitled to What? was published in the Fall, 1998 Edition of the Commercial Law Journal. She has authored Antitrust, Restraint of Trade and Unfair Competition: Myth Versus Reality, published by the NACM. Ms. Borges is the lead author and Editor-in-Chief of Enforcing Judgments and Collecting Debts in New York published by Thomson West Publishing Company and updated annually. She routinely publishes articles for the National Association of Credit Management "Business Credit" magazine and has published articles for its "Fraud Prevention News". Upon the passage of the BAPCPA in 2005, Ms. Borges prepared and presents educational programs on this new legislation and co-authored The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 – An Overhaul of U.S. Bankruptcy Law, published by the NACM.*

**Borges – E-signatures- 2018**

## WANDA BORGES

- *She has published articles for the Broadcast Cable Credit Association "Creditopic\$" and continues to publish articles for the "The Financial Manager" on Commercial Creditors' Rights in Bankruptcy, Bankruptcy issues generally, the FTC's Red Flags Rule, the ECOA and Regulation B, Electronic Invoicing, "Dot Com" Businesses, and on Advertiser/Agency Liability; and has prepared the "white paper" on the discontinuance of notarization of broadcast invoices. She is a co-author of the National Association of Broadcasters' book Out of the Red and into the Black, as well as the Broadcast Cable Credit Association's Credit & Collection Handbook. Ms. Borges has appeared as a guest on the Fox News Channel program, "Fox on Consumers", speaking on consumer bankruptcy exemptions. In February, 2010, Ms. Borges prepared and presented a program entitled "Avoiding Bankruptcy Pitfalls: Creditors' Rights and Professional Obligations in Bankruptcy Proceedings" for the Georgia Bar Association and the Institute of Continuing Legal Education in Georgia" which was televised live and telecasted to satellite locations throughout the State of Georgia.*

**Borges – E-signatures- 2018**

## WANDA BORGES

- *She has conducted "in-house" seminars on credit, collection, secured transactions and insolvency for corporate clients such as Agrium, Inc., Bristol-Myers Squibb, Burlington Industries, Inc., Cosmair, Inc., Doric Enterprises, Ferguson Enterprises, Inc., Ingram, Mars Incorporated, McKesson Corporation, Mobil Chemical Company, Multi-Arc Corp., Pfizer Inc., R.J. Reynolds Tobacco Company, Sandvik, Inc., Sharp Electronics Corporation, Simon & Schuster Corp., SONY Corporation, Southeastern Freight Lines, Inc., Stanley Works, Sumitomo Corporation and SunTrust Bank.*
- *She is a past Chair of the Board of Trustees of Mercy College and served as a member of that board for nine years. She has served on the board of Regents College, and has taught Business Law at Seton College in Westchester County, New York. She is a past Chair of the Broadcast Cable Financial Management Association.*

**Borges – E-signatures- 2018**

## WANDA BORGES

- *Ms. Borges actively participates in community events. She is a Leader of Song and has directed the Youth Music Ministry at her parish, Our Lady Star of the Sea. She remains a member of the Fairfield County Chorale for which she served as its president for the years 1995 through 1997, as a director and Executive Vice-President of the Fairfield County Chorale during the years 2012 through 2013 and is again a director on its Board of Directors for the upcoming years through 2020.*
- *She received the "Human Valor" Award by Noticias del Mundo, a New York based spanish-language newspaper in 1985, the Mercy College Alumni Association's "Professional Achievement" Award in 1991, honorary membership in Delta Mu Delta - The National Honor Society in Business Administration - in May, 1995 and in October, 1996, was awarded the Mercy College Trustee's Medal for outstanding dedication to her profession and alma mater. She is listed in Who's Who of American Women. In September, 2000 she was named one of the "50 Outstanding Alumni" of Mercy College. In February, 2001 she received the "Career Achievement Award" from the Broadcast Cable Credit Association. In May, 2004, she received the "Strength in Numbers Recognition Certificate" from the NACM. In December 2006, she was named one of "2006 Top25 Most Influential Collection Professionals" by Collection Advisor Magazine. Ms. Borges was recently inducted into Mercy College's Alumni Hall of Fame celebrating its 60<sup>th</sup> year in existence. In November, 2010, Ms. Borges received the "Robert E. Caine Award for Leadership" from the Commercial Law League of America. Ms. Borges has been included on the New York Super Lawyers – Metro Edition list (Bankruptcy & Creditor/Debtor Rights) each year since 2009. Ms. Borges received a "Woman of Distinction" Award from St. Catharine Academy in April, 2015.*

**Borges – E-signatures- 2018**