



Consumers are ready for e-signatures. Are brokers? Daniel Fabiano of Fasken Martineau DuMoulin LLP answers some common e-commerce questions

Sign on the Electronic Line

Electronic signatures, or e-signatures, are changing consumer expectations of service and convenience in many industries—including insurance. By capturing signatures electronically, through a secure webpage or software functionality, by typing a signature, clicking “I agree” or signing an electronic signing pad, organizations are realizing significant advantages over traditional paper and ink signatures. Brokers can take advantage of this technology not only to improve the customer experience, but to realize workflow efficiencies and cost savings and to improve their competitive position in an increasingly digital world. Recognizing the benefits of widespread industry adoption, the Centre for Study of Insurance Operations (CSIO) released an e-signatures advisory report to educate the broker channel about the laws governing e-signatures in Canada. Daniel Fabiano, the report’s author and

a partner in the Toronto office of Fasken Martineau DuMoulin LLP, answers some important questions surrounding e-commerce and e-signatures from a legal and best practices perspective.

Why invest in electronic commerce and e-signatures?

It has been estimated that 30 billion paper documents are copied or printed annually in the United States for signature. When you factor in the cost of copying, scanning, archiving, routing and retrieving, the estimation is that each paper signature costs \$6.50. Canada may not have as many documents, but there’s no reason why the cost per signature would be any different. Going paperless is a major efficiency initiative in many sectors, including the financial and insurance sector.

Electronic commerce, or e-commerce, and e-signatures can automate and expedite business processes, cut operational

costs, and improve efficiency and collaboration within an organization. It’s environmentally friendly and, contrary to the expectations of some, electronic commerce can address and enhance legal compliance—and, in fact, limit legal liability.

What laws govern e-signatures in Canada?

There are two categories of relevant law: insurance laws and e-commerce laws. Both kinds of law exist at the federal and provincial levels.

E-commerce laws have general application—meaning they apply to all sorts of commercial activity and business sectors, including insurance. E-commerce laws encompass electronic contracting and e-signatures, electronic delivery of documents, and retaining electronic records in place of paper records and establish standards for how such electronic measures can stand in place of traditional paper-based measures.

In the insurance sector, federal and provincial insurance laws also set the contours of e-commerce and overlay the e-commerce laws to define when e-signatures and other e-commerce activities are permitted. In some cases, these laws have been amended to specifically reference e-commerce activities, while the insurance laws are silent as to e-commerce in others. In some jurisdictions, paper documents are still required for some activities, like beneficiary designations, notices of cancellation or alterations to a policy. When designing an e-signature or e-commerce process, it is important to consider the parameters of these insurance laws to ensure that the process is compliant.

Do clients have a say in whether they use e-signatures?

Yes. Clients generally cannot be compelled to participate in e-signature regimes or e-delivery of records. No one can be compelled to use, provide or receive documents in electronic form. Consent is required.

Consent can be expressed verbally or in writing, or it can be implied through the conduct of the parties involved. When using electronic means to enter into or deliver contracts, the scope of consent should be

clear. It’s advisable to build a broad consent into the documentation itself. That way, by signing a document (whether in paper or electronic form) you have consent both to contract electronically and to deliver ongoing notices electronically.

What are the core requirements of any e-signatures implementation process?

When implementing an e-signatures process, one needs to focus on the three “Ts”:

Identity: Does the process ensure that the e-signature belongs to the person who is intended to sign the document, such that their identity is demonstrated or proved during that process?

Intention: Does the process show that the customer applied the e-signature with the intent to sign the document (that it wasn’t inadvertent or accidental)? In essence, did he or she know that the document was being signed when the e-signature was applied?

Integrity: Is the e-signature bound to the document so that any changes to the document can be detected? Tamper-proofing electronic records is essential to any e-signature process.

Although these three “Ts” are relevant for e-signatures, they are no different from the standards that may apply to manual/ink signatures on paper documents. The concern is that the person who signed the document will repudiate it sometime in the future.

How can brokers be confident that an e-signed document is enforceable?

The integrity of electronic records is critical to ensuring that they can be relied upon in the future (including if there is any challenge to the enforceability of a document). Part of integrity is ensuring that a document is stable throughout its lifecycle. This includes when the document is created and how it’s stored, accessed and transmitted, how copies are made, how it is archived and, ultimately, how it is destroyed. Integrity also involves detailed recordkeeping about modifications to a document, such as an audit trail

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showing how and when the document has been changed.

As an example, you’d want to record who’s accessing the document, the time and the reason for any changes, and who made those changes. That audit trail record would then become an integral part of the document, and would be attached to or affiliated with it in some way.

Can e-signatures be used where documentation is required “in writing”?

E-commerce laws generally allow an electronic document to stand in place of any other document that’s required “in writing,” as long as the document meets some

basic requirements. The main one is that the document is accessible for reference by the person who is to rely on it. Also, the document should be structured in the same way as the paper document. Remember, however, that e-commerce laws are subject to insurance laws, and so any limitations of your applicable insurance law must be kept in mind.

What are some “best practices” for adopting e-signatures?

Involve legal counsel, and technology and process experts, at the outset, rather than going through the process of designing a system, executing on that design and then realizing that there are problems.

Consider how documents will be delivered, keeping in mind that there are privacy laws and anti-spam laws that might apply. One example is how you will handle undelivered email. Often, email is used to provide a consumer with a copy of an electronic record. But what happens if the email address doesn’t work and you get a bounce back? Brokers should also

consider how electronic documents will be tracked, how they’ll be time-stamped and date-stamped, and how receipts will be handled.

Any e-signatures process should require the user to access the entire document before they sign it. It should also require the consumer to take some sort of action to sign electronically, and then inform the signer of how they signed the document and record the date, time, and the signature with the signed document in a tamper-proof manner.

What are some causes of resistance to adopting e-signatures?

A misapprehension of the legal landscape and concerns about legal compliance and security can cause some hesitation. The reality is that an e-commerce regime can enhance legal compliance and the security of records relative to a manual/ink signature on a paper document. The insurance industry can overcome resistance by becoming informed about what options are permitted (or, more aptly, what

few options are restricted).

With the introduction of e-signatures, would a carrier’s contract with its broker need to be amended?

An e-signature stands in place of a manual/ink signature on a paper document—they’re functionally equivalent. There’s no need for brokers and insurers to go back and amend their contracts to permit them to engage in e-commerce unless those contracts specifically require paper records or prohibit e-commerce in some way (which seems unlikely).

Where do you see e-signature technology heading in the next 10 to 15 years?

It’s going to take off in all sectors. Consider the last five years for consumer credit cards: we’re using PIN and chip cards now, not cards where manual/ink signatures are always required. Effectively, e-signatures will eliminate pen-and-paper signatures in the majority of transactions.

Do you think Canadian consumers are ready for e-signatures?

Not only are they ready, they’re encouraging and expecting e-commerce. We’re tapping through credit card transactions; we’re transacting more business online than ever. In a few years, the surprising thing will be if a business is using paper-based documents and manual/ink signatures.

How would you view an insurance brokerage that uses e-signatures?

Today, I might be impressed by sophisticated e-commerce processes. In three to four years, I will not be impressed; I will expect it. In five years, a broker that isn’t using e-commerce solutions might alarm me. One of the advantages of moving to e-commerce now is impressing a certain category of consumer before their expectations move well beyond a paper-based regime. **IB**

To learn more about e-signatures and to access the CSIO Advisory Report on eSignatures, visit: www.CSIO.com/eSignatures.

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