Federal Reverse Preemption of Uninsured and Underinsured Motorist Coverage Offering in the Digital Age: E-SIGN and UETA Have Not Had A Significant Impact On State Offering Or Rejection Requirements

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Federal Reverse Preemption of Uninsured and Underinsured Motorist Coverage Offering in the Digital Age: E-SIGN and UETA Have Not Had A Significant Impact On State Offering Or Rejection Requirements

Steven Plitt, Daniel Maldonado & John Wittwer

INTRODUCTION

The insurance industry is much different today than it was when States first enacted uninsured and underinsured offer/rejection statutes. The insurance agent’s role in selling insurance products to potential customers changed dramatically over the years. Agents used to be a customer’s only contact with the insurance industry when purchasing a policy. “However, due to a maturing market’s slower growth in the property and casualty insurance areas, and the impact of increasing costs in doing business through agents, insurance companies are now seeking new ways to

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spur profitability.\(^2\) To address this slower growth, insurance companies sought alternative, cheaper means to offer insurance policies to potential consumers, including selling policies directly to consumers via the Internet or maintain national call centers where consumers purchase a policy by utilizing toll-free telephone numbers rather than a local insurance agent.\(^3\) Today, the Internet and other new technologies, as well as the modern "direct writer" business model, have gained immense popularity. Large insurers began to increasingly use many different channels to sell insurance. In the mid-to late-1990s businesses began offering products on the Internet, and consumers were soon clamoring for online functionality for their insurance needs.\(^4\) In a survey conducted around the year 2000, “45% of computer-owning households reported they rarely or never visited an agent or broker in person.”\(^5\)

With the continued growth of internet-based and telephonic-based consumer transactions, the need for the physical presence of a consumer with salesman during the purchase transaction has rapidly diminished. Specifically, in the insurance context, insurance companies have increasingly opted into using online or telephonic insurance sales transactions rather than using independent and captive insurance agents.\(^6\) Consumers enjoy the benefit of quoting and issuing binding insurance contracts within the boundaries of their own home. In light of technological developments arising from the modern digital Internet era, Congress enacted the Electronic Signatures in Global and National Commerce Act ("E-SIGN") as an attempt to encourage the continued expansion of electronic commerce and to clarify the legal status of electronic records and signatures.\(^7\)

E-SIGN generally gives legal effect to electronic records and electronic signatures and puts them on equal footing with traditional paper records and signatures.\(^8\) Moreover, E-SIGN seeks to harmonize differing state laws on the issue of electronic records and signatures by applying the Supremacy Clause of the United States Constitution to preempt state law provisions that deviated from the Uniform Electronic Transactions Act ("UETA")\(^9\) and those provisions that were


\(^3\) Id. ("In response, insurance companies have begun to provide consumers with additional access points for sales, such as the Internet. They are also trying to expand their direct insurance sales through toll-free telephone numbers.").


\(^5\) Id. at 839.


\(^7\) See H.R. REP. NO. 106-341(II), at 3 (1999); see also 15 U.S.C. §§ 7001-06 (2000). It was Congress' intent for E-SIGN to apply to the business of insurance. Id. at § 7001(h)(i).

\(^8\) Id. at § 7001(a).

\(^9\) UNIF. ELEC. TRANSACTIONS ACT (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 1999). UETA is one of several uniform laws proposed by the National Conference of
inconsistent with E-SIGN.\textsuperscript{10} However, the enactment of E-SIGN has created splits between courts in different jurisdictions, some of which have completely disregarded E-SIGN’s preemptive effect as the supreme federal law of the land.

As of 2014, forty-seven states, including all United States territories, have adopted the UETA.\textsuperscript{11} While each respective state-adopted UETA statute encourages electronic consumer transactions, the state-by-state inconsistencies of defining an electronic record or a signature, coupled with federal-state preemption, make these varying state statutes ripe for judicial adjudication as it applies to particular insurance transactions, among others. For example, many states have enacted uninsured (“UM”) and underinsured (“UIM”) written offer/rejection requirements, and many states require an insurer to provide a “written offer notice” of UM/UIM coverage to the insured.\textsuperscript{12} UM/UIM written offer requirements


\textsuperscript{11} See infra note 86 and Part III.

\textsuperscript{12} See ARIZ. REV. STAT. ANN. § 20–259.01(A) & (B) (Westlaw through 2015 Reg. Sess.) (requiring an insurer to provide “written notice offer” of underinsured and uninsured motorist coverage to the named insured); ARK. CODE. ANN. § 23–89–209(a)(1) (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess.) (providing that private passenger automobile liability insurance cannot be sold without the insured being offered the opportunity to purchase uninsured motorist coverage and allowing written rejection of that coverage); COLO. REV. STAT. ANN. § 10–4–609(2) (West, Westlaw through First Reg. Sess. 2015 Gen. Assemb.) (stating, “[b]efore the policy is issued or renewed, the insurer shall offer the named insured the right to obtain uninsured motorist coverage in an amount equal to the insured’s bodily injury liability limits.”) (emphasis added); CONN. GEN. STAT. ANN. § 38a–336(a)(1)(A) (West, Westlaw through 2015 Reg. Sess. and June Spec. Sess.) (requiring automobile liability insurance policies to include uninsured and underinsured motorist coverage); DEL. CODE ANN. tit. 18, § 3902(a)(1) (West, Westlaw through 80 Laws 2015, ch. 193) (requiring the provision of uninsured motorist coverage but allowing for the rejection of such coverage in writing); FLA. STAT. ANN. § 627.727(1) (West, Westlaw through ch. 232 (end) 2015 Reg. Sess. and Sp. A. Sess.) (requiring uninsured motorist coverage in policies except when the insured has made written rejection of such coverage for all insureds under the policy). \textit{But see} Union Am. Ins. Co. v. Cabrera, 721 So. 2d 313, 314 (Fla. Dist. Ct. App. 1998) (“The statute requires a written rejection. However, under the case law it is also permissible for an insurer to avoid the statutorily required UM coverage if it proves that the named insured orally waived the statutory requirement of a written rejection by knowingly selecting a lesser limit or by knowingly rejecting UM coverage.”) (emphasis added) (citations, quotations, and alterations omitted); Liberty Mut. Ins. Co. v. LexHord, 691 So. 2d 1164, 1168 n.3 (Fla. Dist. Ct. App. 1997) (“[T]he company still has the right to prove ‘that the named insured orally waived the statutory requirement of a written rejection by knowingly selecting a lesser limit or by knowingly rejecting UM...
obligate insurance providers to make offers of coverage in writing to customers that compensates for bodily injury in the event that an offending tortfeasor's insurance is inadequate to cover this damage. Issues arise when the state's interpretation of a written offer/rejection requirement conflicts with the federal definition of electronic record or signature. A significant issue that has arisen is whether a digitally recorded telephone conversation constitutes a written offer notice pursuant to UETA or E-SIGN.

This article will discuss the significance of various states’ UM/UIM written notice requirements. In Part I, the authors will discuss how various states’ notice requirements also contain retention and attachment requirements. Part II will discuss the rise of E-SIGN and how it directly applies within the insurance context. In Part III, the authors will discuss the numerous states that have enacted a version of the UETA. The Arizona Court of Appeals and New Mexico Supreme Court have confronted UM/UIM notice requirements as applied using electronic means—specifically, whether a digitally recorded telephone conversation constitutes written notice (Arizona) and whether a drop down menu on a webpage offering an insured UM/UIM coverage constitutes written notice (New Mexico). These examples are addressed in Part IV. A thorough discussion and analysis of E-SIGN as applied to insurance UM/UIM written notice requirements is found in Part V. This section addresses why courts should enforce digital telephonic recordings of UM/UIM offerings and why these telephonic recordings comply with both E-SIGN and UETA. Lastly, the authors conclude by summarizing the important role E-SIGN and the UETA play in the insurance context around the United States.

I. JURISDICTIONAL SURVEY OF UM/UIM NOTICE REQUIREMENT

The thorny interplay between E-SIGN and state insurance regulations is further complicated, in part, by the lack of uniformity in state UM/UIM “written notice” requirements. There are four variations of offering requirements for UM/UIM coverage: (1) mandatory inclusion of UM/UIM in the policy; (2) mandatory inclusion of UM or UIM coverage unless specifically rejected; (3) no obligation to offer UM coverage; and (4) mandatory offering. Those jurisdictions where UM/UIM is mandatorily included in the policy include: Illinois, Kansas, Minnesota, Missouri, New York, North Dakota, South Carolina, and


17 KAN. STAT. ANN. § 40-284(a) (West, Westlaw through 2015 Reg. Sess.).

18 MINN. STAT. ANN. § 65B.49, subdiv. 1 (West, Westlaw through 2015 First Spec. Sess.).

19 New York, North Dakota, South Carolina,
Wisconsin.23 Those jurisdictions that mandatorily require the inclusion of UM and/or UIM coverage unless specifically rejected include: Alabama,24 Indiana,25 Kentucky,26 Montana,27 New Mexico,28 Oklahoma,29 Pennsylvania,30 and Wyoming.31 Those jurisdictions where there is no obligation to offer UM/UIM coverage include Michigan32 and Ohio.33 There are some jurisdictions where a mandatory offer of UM/UIM coverage must be made, including: Arizona,34

20 N.Y. INS. LAW § 3420(0)(1) (McKinney, Westlaw through L.2015).
21 N.D. CENT. CODE ANN. § 26.1-40-15.2(1) (West, Westlaw through Ch. 484 (end) of the 2015 Reg. Sess.)
23 WIS. STAT. ANN. § 632.32(4) (West, Westlaw through 2015 Act 60).
24 ALA. CODE § 32-7-25(a) (Westlaw through Act 2015-559 of 2015 Reg., First, and Second Spec. Sess.).
25 IND. CODE ANN. § 27-7-5-2(a)-(b) (West, Westlaw through 2015 First Reg. Sess.).
26 KY. REV. STAT. ANN. §§ 304.20-020, 39-050(2), 39-320(2) (West, Westlaw through the end of the 2015 Reg. Sess.) (requiring UM must be provided in amount of minimum statutory limit unless rejected in writing, while UIM coverage does not have to be offered and must only be provided if requested).
27 MONT. CODE ANN. § 33-23-201(1) & (2) (West, Westlaw through the 2015 Sess.) (requiring that UM must be provided in amount of minimum statutory limit up to maximum amounts equal to liability limits unless rejected in writing); Stutzman v. Safeco Ins. Co. of Am., 945 P.2d 32, 37 (Mont. 1997) (noting that UIM coverage is optional under the Montana Motor Vehicle Safety Responsibility Act).
28 N.M. STAT. ANN. § 66-5-301 (West, Westlaw through the end of the First Spec. Sess. of the 53nd Leg. (2015)) (requiring UM and UIM to be provided in amount of minimum statutory limit up to maximum amounts equal to liability limits unless rejected in writing).
29 OKLA. STAT. tit. 36, § 3636(A)–(C), (G) (West, Westlaw through Chapter 399 (end) of the First Sess. of the 55th Leg. (2015)) (requiring UM/UIM must be provided in amount of minimum statutory limit and offered up to the maximum amounts equal to the liability limits unless rejected in writing by the insured).
30 75 PA. STAT. AND CONS. STAT. §§ 1731(a)–(b) (West, Westlaw through 2015 Reg. Sess. Acts 1 to 51) (requiring mandatory offer of statutorily determined sums unless rejected in writing); id. at § 1734 (allowing for lower limits of coverage).
31 WYO. STAT. ANN. § 31-10-101 (West, Westlaw through the 2015 Gen. Sess.) (requiring UM must be provided in amount of minimum statutory limit unless rejected by the insured—there are no similar UIM requirements).
32 Michigan courts have held that "[s]ince the repeal of M.C.L.A. § 500.3010; M.S.A. § 24.13010, by 1972 P.A. 345, an insurer is not required to provide (or a motorist to have) a statutorily mandated minimum amount of uninsured motorist coverage." Gardner v. Ins. Co. of N. Am., 266 N.W.2d 474, 475 (Mich. Ct. App. 1978).
34 ARIZ. REV. STAT. ANN. § 20-259.01(A)–(B) (Westlaw through the First Reg. Session of the Fifty-Second Leg.) (requiring that insurers offer UM/UIM coverage equal to liability limits of policy but providing that insured is free to reject).
Arkansas,\textsuperscript{35} Colorado,\textsuperscript{36} Florida,\textsuperscript{37} Idaho,\textsuperscript{38} Illinois,\textsuperscript{39} Iowa,\textsuperscript{40} South Carolina,\textsuperscript{41} Utah,\textsuperscript{42} and Wisconsin.\textsuperscript{43}

An invalid rejection may result in differing legal consequences depending on the jurisdiction. In some states, for example, an invalid rejection results in UM/UIM coverage being imputed into the policy at the amount of the statutory minimum liability coverage required by the state's Financial Responsibility Act. Those states that require an imputation of the statutory minimum of UM/UIM coverage include: Alabama,\textsuperscript{44} Arkansas,\textsuperscript{45} Iowa,\textsuperscript{46} Kentucky,\textsuperscript{47} and Oklahoma.\textsuperscript{48} In other states, an invalid rejection results in imputation of UM/UIM limits up to the bodily injury limits of the policy selected by the named insured even if it is higher than the statutory minimum. The states that impute the bodily injury limit to UM/UIM coverage include: Arizona,\textsuperscript{49} Florida,\textsuperscript{50} Illinois,\textsuperscript{51} Indiana,\textsuperscript{52} Kansas,\textsuperscript{53} Pennsylvania,\textsuperscript{54} and South Carolina.\textsuperscript{55}
There are also various legal consequences if the insurer does not offer UM/UIM coverage in the first instance. For example, UM/UIM statutes or corresponding case law may create such UM/UIM coverage in the policy by operation of law. A majority of jurisdictions explicitly require through their UM/UIM statutes or through judicial interpretation of such statutes that the insured reject UM and/or UIM coverage in writing. Thirty-two states require that

50 See Lumbermen’s Mut. Cas. Co. v. Beaver, 355 So. 2d 441, 443 (Fla. Dist. Ct. App. 1978) (holding that UM coverage is included unless correctly rejected).

51 Wood v. Nat’l Liab. & Fire Ins. Co., 755 N.E.2d 1044, 1047 (Ill. App. Ct. 2001) ("It logically follows that, if the insurer does not obtain the UM/UIM rejection at the time the policy issued, the UM/UIM limits must equal the bodily injury liability limits.")


54 Nat’l Union Fire Ins. Co v. Irex Corp., 713 A.2d 1145, 1150–51 (Pa. Super. Ct. 1998) (noting that because rejection was not valid under Pennsylvania’s UM/UIM statute, rejection was void and UM/UIM coverage must be provided equal to the bodily injury liability limits set forth in the policy).


the insured affirmatively reject UM/UIM coverage in writing for the rejection to be valid.\textsuperscript{38} Nine states require an insurer to make a written offer of UM/UIM


\textit{Alabama}: ALA. CODE § 32–7–23(a) (Westlaw through Act 2015–520 of the 2015 Reg. and 1st Spec. Sess.) (emphasis added); Universal Underwriters Ins. Co. v. Thompson, 776 So. 2d 81, 83 (Ala. 2000) ("To be legally effective, the named insured’s rejection must be in writing.") (emphasis added); \textit{Thomas}, 337 So. 2d at 369 ("Eagle’s purported verbal rejection prior to executing the policy, and not evidenced by a writing contained in or coordinate with the policy, is invalid.") (emphasis added); see also Naramore, 950 So. 2d at 1142 ("Alabama’s uninsured-motorist statute, § 32-7-23(a), Ala. Code 1975, provides that the named insured shall have the right to reject [uninsured/uninsured-motorist] coverage in writing.") (emphasis added). \textit{Alaska}: ALASKA STAT. ANN. §§ 21.89.020(c), 28.22.201(a)(3), 28.20.445(c) (West, Westlaw through the 2015 1st Reg. Sess. and Second Spec. Sess. of the 29th Leg.). \textit{Arkansas}: ARK. CODE ANN. §§ 23–89–403(a)(2), –209(a)(1) (West, Westlaw through 2015 Reg. Sess. and 2015 1st Ex. Sess. of the 90th Arkansas Gen. Assembly). \textit{California}: CAL. INS. CODE § 11580.2 (West, Westlaw through urgency legislation through Ch. 807 of the 2015 Reg. Sess. and Ch. 1 of the 2015–16 2nd Ex. Sess.); see also Smith v. State Farm Mut. Auto. Ins. Co., 113 Cal. Rptr. 2d 399, 406 (Cal. Ct. App. 2001) ("Section 11580.2, subdivision (a), thus authorizes three-and only three-means by which uninsured motorist coverage can be entirely deleted, or modified and mandates the specific language that is to be used in any written agreement providing for such waiver or modification.") (emphasis added); Dufresne v. Elite Ins. Co., 103 Cal. Rptr. 347, 350–53 (Cal. Ct. App. 1972) (holding that UM coverage was \textit{not} "effectively deleted by agreement set out in application form" and signed by someone in broker’s office "on behalf of insured pursuant to oral authorization," where insured had never seen purported deletion agreement or been apprised of its terms (emphasis added)). It is important to note that under California’s UM/UIM statute, "[a]n uninsured motor vehicle includes an uninsured motor vehicle." \textit{CAL. INS. CODE} § 11580.2(a)(2) (Westlaw). \textit{Colorado}: COLO. REV. STAT. ANN. § 10–4–609(1)(a) (West, Westlaw through the First Reg. Sess. of the 70th Gen. Assembly). \textit{Connecticut}: See CONN. GEN. STAT. ANN. § 38a–336(a)(2) (West, Westlaw current with enactments from the 2015 Reg. Sess. and the June Spec. Sess.). \textit{Delaware}: DEL. CODE ANN. tit. 18, § 3902(a)(1) (West, Westlaw through 80 Laws 2015, ch. 193). \textit{Florida}: FLA. STAT. ANN. § 627.727(1) (West, Westlaw through Ch. 232 (End) of the 2015 First Reg. Sess. and Sp. A Sess. of the Twenty–Fourth Leg.). \textit{But see} Union Am. Ins. Co. v. Cabrera, 721 So. 2d 313, 314 (Fla. Dist. Ct. App. 1998) ("The statute requires a written rejection. . . . However, under the case law it is also permissible for an insurer to ‘avoid the statutorily required [UM] coverage if it proves that the named insured orally waived the statutory requirement of a written rejection by knowingly selecting a lesser limit or by knowingly rejecting UM coverage.’") (emphasis added) (quoting Chmieloski v. Nat’l Union Fire Ins. Co., 563 So. 2d 164, 166 (Fla. Dist. Ct. App. 1990); Libery Mut. Ins. Co. v. Ledford, 691 So. 2d 1164, 1166 n.3 (Fla. Dist. Ct. App. 1997) ("[T]he company still has the right to prove that the named insured orally waived the statutory requirement of a written rejection by knowingly selecting a lesser limit or by knowingly rejecting UM coverage.") (emphasis added) (quoting Chmieloski v. Nat’l Union Fire Ins. Co., 563 So. 2d 164, 166 (Fla. Dist. Ct. App. 1990)); Teachers Ins. Co. v. Bollman, 617 So. 2d 817, 818 (Fla. Dist. Ct. App. 1993) (holding that knowingly rejected stacked uninsured motorist coverage where insured, after discussing rates for stacked uninsured
motorist coverage with her agent, directed memorandum to agent instructing him to change automobile policies from stacked coverage to unstacked coverage "as discussed last week on the telephone," even though written rejection was not on statutorily prescribed form.


**Hawaii:** HAW. REV. STAT. ANN. § 431:10C-301 (West, Westlaw through Act 243 [End] of the 2015 Reg. Sess.).

**Idaho:** IDAHO CODE ANN. § 41-2502(2) (West, Westlaw through end of the 2015 First Reg. and First Ex. Sess. of the 63rd Leg.). The Idaho Legislature sought to amend the Idaho UM/UIM statute. The Idaho house bill's statement of purpose provides the following:

> This legislation amends Idaho Code (41-2502 and 41-2503) to define the term "underinsured motorist coverage" and require that certain motor vehicle liability insurance policies issued in Idaho include underinsured motorist coverage. This legislation also allows a named insured to reject, in writing or electronically, underinsured motorist coverage. Finally, this proposal will require the insurance carrier to provide the named insured a summary statement, approved by the Director of the Idaho Department of Insurance, explaining uninsured and underinsured motorist coverages and different forms of underinsured motorist coverage offered by insurers in Idaho.


**Illinois:** 215 ILL. COMP. STAT. ANN. 5/143a-2 (West, Westlaw through P.A. 99-482, with the exception of P.A. 99-480, of the 2015 Reg. Sess.).

**Indiana:** IND. CODE ANN. § 27-7-5-2 (West, Westlaw through 2015 First Reg. Sess. of the 119th Gen. Assembly (Legs.).

**Iowa:** IOWA CODE ANN. § 516A.1 (West, Westlaw through end of the 2015 Reg. Sess.).

**Kansas:** KAN. STAT. ANN. § 40-284(c) (West, Westlaw through laws enacted during the 2015 Reg. Sess. of the Kansas Leg.).

**Kentucky:** KY. REV. STAT. ANN. § 304.20-020(1) (West, Westlaw through the end of the 2015 Reg. Sess.)

**Louisiana:** See LA. STAT. ANN. § 22:1295(1)(b) (Westlaw through the 2014 Reg. Sess.); Horstmann v. Drake, 420 So. 2d 473, 474-75 (La. Ct. App. 1982) ("We therefore conclude the testimony offered by Continental to show a verbal agreement to purchase less uninsured motorist coverage would be inimmaterial.") (emphasis added).

**Maine:** ME. REV. STAT. ANN. tit. 24-a, § 2902(2) (Westlaw through the 2015 First Reg. Sess. of the 127th Leg.).

**Maryland:** MD. CODE ANN., INS. § 19-510 (West, Westlaw through the 2015 Reg. Sess. of the Gen. Assemb. (including UIM within "UM"). It is important to note that "UM" includes UIM. Id. § 19-509.

**Nevada:** See NEV. REV. STAT. ANN. § 690B.020(1) (West, Westlaw through June 30, 2015).

**New Hampshire:** N.H. REV. STAT. ANN. § 264:15(l) (Westlaw through Chapter 276 (End) of the 2015 Reg. Sess.).

**New Jersey:** See N.J. STAT. ANN. § 39:6A-23(e) (West, Westlaw through L.2015, ch. 115 and J.R. No. 7) (providing that written rejection is "prima facie evidence of the named insured's . . . rejection"). Unlike UM coverage, however, there is no mandatory floor for UIM coverage, and "an insurer need only offer UIM coverage as an option to the named insured." Selective Ins. Co. of Am. v. Hojnoski, 722 A.2d 118, 121 (N.J. Super. Ct. App. Div. 1998) (emphasis added) (citations omitted).
coverage.59 Seventeen states require the use of a special form or other specific visual requirement in the context of an offer and/or rejection of UM/UIM coverage.60

New Mexico: Marckstadt v. Lockheed Martin Corp., 228 P.3d 462, 464–65, 467–70, 474 (N.M. 2009); see N.M. STAT. ANN. § 66-5-301(C) (West, Westlaw through the end of the First Spec. Sess. of the 52nd Leg.).

Oklahoma: OKLA. STAT. ANN. tit. 36, § 3636(G) (West, Westlaw through Chapter 399 (End) of the First Sess. of the 55th Leg.).


Rhode Island: 27 R.I. GEN. LAWS ANN. § 27-7-2.1(b) (West, Westlaw through chapter 285 of the Jan. 2015 Sess.).


Texas: TEX. INS. CODE ANN. § 1952.101(c) (West, Westlaw through the end of the 2015 Reg. Sess. of the 84th Leg.); see also Howard, 933 S.W.2d at 215–20 ("Because every policy of insurance in this State, absent a written rejection, includes UM/UIM coverage by operation of law, that result ensues without regard to the intent of parties to insurance contract."); Emp'rs Cas. Co. v. Sloan, 565 S.W.2d 580, 583–84 (Tex. Civ. App. 1978) ("We conclude that an oral rejection was ineffective to preclude uninsured motorist coverage.") (emphasis added).

Utah: UTAH CODE ANN. §§ 31a-22-305(5)(a), -305.3(3) (West, Westlaw through 2015 First Spec. Sess.).


West Virginia: See W. VA. CODE ANN. § 33-6-31d(a) (West, Westlaw through the 2015 Reg. Sess.).

59 These states include: Arizona, Maryland, Nevada, New Jersey, New York, North Carolina, South Carolina, West Virginia, and Wisconsin.

Arizona: ARIZ. REV. STAT. ANN. § 20-259.01(A)–(B) (Westlaw through the First Reg. Sess. of the Fifty-Second Leg.); Maryland: § 19-510(c) (Westlaw). Again, it is important to note that "UM" includes UIM. Id. at § 509. Nevada: See NEV. REV. STAT. ANN. § 682B.145(2) (West, Westlaw through all 2015 legis. effective through June 30, 2015); New Jersey: N.J. STAT. ANN. §§ 17:28-1.1, -1.9, 39:6A-23 (West, Westlaw through L.2015, c. 120, J.R. No. 7); New York: N.Y. INS. LAW § 3420(f)(2)(A)–(B) (West, Westlaw through L.2016, chapter 1); N.Y. COMP. CODES R. & REGS. tit. 11, § 60-2.3 (Westlaw changes received from the New York B. Drafting Commission through May 27, 2016). North Carolina: N.C. GEN. STAT. ANN. § 20-279.21(m) (West, Westlaw through Chapter 266 of the 2015 Reg. Sess. of the Gen. Assemb.); see generally Nationwide Mut. Ins. Co. v. Burgdoff, 698 S.E.2d 500 (N.C. Ct. App. 2010) (holding that summary judgment was inappropriate because the determination of whether the written offer requirements of North Carolina law had been met in such a case was a question best suited for a jury);


West Virginia: See W. VA. CODE ANN. § 33-6-31d (West, Westlaw through 2016 Reg. Sess.);

Wisconsin: WIS. STAT. ANN. § 632.32(4)(d), (4m)(b)–(d) (West, Westlaw through 2015 Act 60).

60 These states include: Connecticut, Florida, Hawaii, Louisiana, Maine, Maryland, Nevada, New Jersey, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, Virginia, and West Virginia. CONN. STAT. ANN. § 38a-336(a)(2) (Westlaw); FLA. STAT. ANN. § 627.727(1) (Westlaw); HAW. REV. STAT. ANN. § 431:10C-301 (Westlaw); LA. STAT. ANN. § 22:1295(1)(a) (Westlaw); ME. REV. STAT. ANN. tit. 24-a, § 2902(2) (Westlaw); MD. CODE ANN., INS. § 19-510(d)
Ten states require the insured’s signature to effectuate the choice of coverage. So far, only three states (Florida, Mississippi, and South Carolina) have allowed oral waiver of their statutory “writing” requirements for UM/UIM offer and/or rejection.

II. THE ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT

In 1999, Congress passed the Gramm-Leach-Bliley Act, which eliminated significant barriers that had previously prevented banks from engaging in insurance activities. Commentators speculated after the passage of the Gramm-Leach-Bliley Act that the insurance industry was “under assault” from banks and other segments of the financial services industry. This competitive pressure, along with the growth of the Internet, “undermine[d] the role of the independent agents that previously were responsible for the delivery of much of the insurance products sold in America.” Consequently, many insurers began shifting from an “agency” business model to a “direct writer” model. Direct writers are insurance companies

(Westlaw); NEV. REV. STAT. ANN. § 690B.020(1) (Westlaw); N.J. STAT. ANN. § 39-6A-23 (Westlaw); OKLA. STAT. ANN. tit. 36, § 3636(G) (Westlaw); OR. REV. STAT. ANN. § 742.502 (Westlaw); 75 PA. STAT. AND CONS. STAT. ANN. § 1731 (Westlaw); 27 R.I. GEN. LAWS ANN. § 27-7-2.1(a) (Westlaw); TENN. CODE ANN. § 56-7-1201(a)(2), (b) (Westlaw); UTAH CODE ANN. §§ 31a-22-305(5)(a), -305.3(3) (Westlaw); VA. CODE ANN. §§ 38.2-2206, -2202 (West, Westlaw through End of the 2015 Reg. Sess.); W. VA. CODE ANN. § 33-6-31d (Westlaw).

These states include: Connecticut, Hawaii, Iowa, Louisiana, New Jersey, Oregon, Pennsylvania, Rhode Island, Utah, and West Virginia. CONN. GEN. STAT. ANN. § 38a-336 (Westlaw); HAW. REV. STAT. ANN. § 431:10C-301 (Westlaw); IOWA CODE ANN. § 516A.1 (West, Westlaw through end of the 2015 Reg. Sess.); LA. STAT. ANN. § 22:1295(1) (Westlaw); N.J. STAT. ANN. § 39:6A-23 (Westlaw); OR. REV. STAT. ANN. § 742.502(b)(b) (Westlaw); 75 PA. STAT. AND CONS. STAT. ANN. § 1731 (Westlaw); 27 R.I. GEN. LAWS ANN. § 27-7-2.1(a) (Westlaw); UTAH CODE ANN. §§ 31a-22-305(4)(a), -305.3(3) (Westlaw); W. VA. CODE ANN. § 33-6-31d (Westlaw).


South Carolina: Grinnell Corp., 698 S.E.2d at 798–99 (citing Wannamaker, 354 S.E.2d 555); accord Ray, 698 S.E.2d at 212.


See, e.g., Jerry W. Markham, Banking Regulation: Its History and Future, 4 N.C. BANKING INST. 221, 274 (2000).

See id.

See Vartanian, supra note 3 at 837 (describing early efforts by Progressive to underwrite auto insurance risks and issue binders in minutes over the Internet); Markham, supra note 64, at 275 ("Allstate Insurance Company announced in November of 1999 that it would be selling car and home insurance directly to consumers through the Internet and over the telephone."); Freeman & Eggert, supra note 1 at 420 ("With the development of the Internet and e-commerce, many insurance companies anticipate soliciting potential policyholders online directly through their properly licensed
that sell directly to the public using exclusive agents or their own employees, for example, by telephone or via the Internet.\textsuperscript{68}

One commentator explained the cost advantages that direct writers gained by “cutting out the middleman” and utilizing mass media, including telephones, to issue policies:

“Agency system insurers” have traditionally solicited business through intermediaries, such as company agency forces, independent agents, managing general agents, and brokers. Intermediaries typically earn commissions that are charged to the insurer at policy inception as “acquisition costs.” These costs typically constitute a significant portion of an agency system insurer’s policy expenses. “Direct writers,” in contrast to agency system insurers, mass-market and issue policies directly to insureds (through mass media such as television, telephone, and the mail) without the use of intermediaries.\textsuperscript{69}

In addition to cost factors, niche insurance companies such as USAA and GEICO were able to access specific populations, and “therefore, did not ever really need independent or exclusive insurance agents to obtain their customers.”\textsuperscript{70} This was yet another competitive force that gave rise to the trend toward direct writers.

Furthermore, the direct writer system gained a foothold because it was a speedier way of doing business. For example, “[f]or many personal lines insurance transactions, underwriting and policy issuance can occur almost instantaneously online.”\textsuperscript{71} Obviously, telephone transactions provide many of these same speed advantages.\textsuperscript{72} As the direct writer system became pervasive, independent insurance agents expressed concern that they “may be headed the way of the milkman.”\textsuperscript{73}

\textsuperscript{68} Vartanian, supra note 3, at 836.

\textsuperscript{69} Id. (citations omitted).

\textsuperscript{70} Freeman \& Eggert, supra note 1 at 420–21; see also 20th Century Ins. Co. v. Garamendi, 878 P.2d 566, 591 (Cal. 1994) (noting that 20th Century Insurance Company “is a direct writer of insurance, and therefore d[id] not employ or utilize captive or independent agents”).

\textsuperscript{71} Vartanian, supra note 3, at 837; see also John L. Romaker \& Virgil B. Prieto, Expectations Lost: Bank of the West v. Superior Court Places the Fox in Charge of the Henhouse, 29 CAL. W. L. REV. 83, 135 (1992) (noting that insurance policies are purchased over the telephone).

\textsuperscript{72} Richard T. Choi, Mutual Funds and the Internet: Current Industry Practice, the New E-Signature Law, and Recent SEC Pronouncements, in INVESTMENT MANAGEMENT REGULATION (2000), LEXIS SF33 ALI-ABA 25, 44-45 (noting that “[i]n today’s markets, where speed is a priority, significant matters often are communicated telephonically,” and that “business can be transacted as effectively over the telephone today as it can in paper”).

\textsuperscript{73} John R. Wilke \& Leslie Scism, Under the Gun: Insurance Agents Fight an Intrusion by Banks, But Other Perils Loom, WALL ST. J., Aug. 8, 1995, at A1. This new trend is not limited to the insurance industry. Similar technological advancement has spread to every aspect of life. The courts have also recognized and adopted new technologies. For example, electronic filing is mandatory in the federal court system and in some state court cases as well. Electronic courtroom displays are becoming more prevalent. See Samuel H. Solomon \& Suzan Flam, Admissibility of Digital Exhibits in Litigation, in ELECTRONIC RECORDS MANAGEMENT AND DIGITAL DISCOVERY: PRACTICAL CONSIDERATIONS FOR LEGAL, TECHNICAL, AND OPERATIONAL SUCCESS (2006) LEXIS SM057 ALI-ABA 419; Robert V. Alvarado, Jr. \& Mark S. Wapnick, Telephonic Court Appearances: Reduce Litigation Costs
Congress' enactment of E-SIGN in 2000 was the result of the growth of e-commerce throughout the United States.\(^74\) E-SIGN was enacted in order to facilitate the uniform use of electronic records and signatures in e-commerce.\(^75\) E-SIGN provides in relevant part:

Notwithstanding any statute, regulation, or other rule of law (other than this subchapter and subchapter II of this chapter), 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.\(^76\)

The Act also provides the following definitions for the terms "electronic" and "electronic record": "The term "electronic" means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities . . . . The term "electronic record" means a contract or other record created, generated, sent, communicated, received, or stored by electronic means."\(^77\) This broad definition is technology-neutral and is intended to encompass a wide range of electronic recordings, including telephonic recordings as well as any digitally recorded transaction from the Internet. Commentators have explained that after the passage of UETA, electronic records became the equivalent of paper records.\(^78\)

\(^{74}\) 145 CONG. REC. S14,881 (daily ed. Nov. 19, 1999) (finding that the growth of e-commerce in the private sector is in the national interest); \textit{id.} at S14,882 (statement of Sen. Lott that e-commerce "is a significant driving force behind our nation's robust and expanding economy").


\(^{78}\) David E. Ewan, John A. Richards & Margo H. K. Tank, \textit{It's the Message, Not the Medium! Electronic Record and Electronic Signature Rules Preserve Existing Focus of the Law on Content, Not Medium of Recorded Land Title Instruments}, 60 BUS. LAW. 1487, 1491 (2005) ("[The Uniform Electronic Transactions Act, or UETA'] accomplishes this goal by making electronic records . . .

\textit{The Easy Way}, AM. BANKR. INST. J., May 2006, at 34, 34 (discussing status conferences and oral arguments, which can now be conducted telephonically); Helen W. Gunnarsson, \textit{Making an Electronic Record: Good Reviews for Digital Recording}, 94 J.T.I., B.J., Feb. 2006, at 72, 74 (discussing movement by Courts across the country from stenographic to digital recording of courtroom proceedings and increased trustworthiness and reliability being the major benefits of this technological shift and noting that "[j]udges who preside over hearings that are electronically recorded . . . give the system high marks . . . [Several judges agree that] the best thing about electronic recording is that it's '100 percent accurate'—even more so than live court reporters, who are required to pass a test with 98 percent accuracy to become certified.").
As discussed in more detail in Section IV(C), since the passing of E-SIGN, courts and administrative agencies have approved insurers’ use of voice recordings as an equivalent to a writing. For example, in 2004, the Office of General Counsel, representing the view of the New York State Insurance Department, issued an Official Opinion confirming that “a life insurance agent may have an applicant sign a life insurance application by the entry of their social security number into an interactive voice response (IVR) system using a telephone keypad[.]”79 The Opinion stated that both E-SIGN and New York’s Electronic Signature and Records Act support the “use and acceptance of electronic signatures and electronic records in commercial transactions, and confirm their legal validity.”80

The Supremacy Clause of the United States Constitution provides that where states and the federal government pass legislation on the same subject matter, the federal law is supreme and the conflicting state law is void.81 Therefore, E-SIGN preempts any state UM/UIM offer/rejection statute to the extent that the statute purports to invalidate an offer made or stored in electronic form. It is true that the McCarran-Ferguson Act generally established a form of “inverse preemption,” letting state law prevail over general federal rules that do not specifically relate to the business of insurance.82 However, Congress specifically intended E-SIGN to apply to the business of insurance and that E-SIGN would preempt all states laws to the contrary, noting that “[i]t is the specific intent of the Congress that this subchapter and subchapter II of this chapter apply to the business of insurance.”83

III. A JURISDICTIONAL SUMMARY OF THE UNIFORM ELECTRONIC TRANSACTIONS ACT AS ADOPTED IN THE STATES

E-SIGN provides a limited scenario through which a State can avoid federal preemption by either adopting the official version of UETA or by enacting alternative statutory provisions that are consistent with E-SIGN and that are technology-neutral.84 The relevant E-SIGN section states:

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80 Id.
81 See U.S. CONST. art. VI, cl. 2; see also McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 406 (1819).
85 15 U.S.C. § 7002(a)(1)–(2) (2012). If such alternative statutory provisions are enacted or adopted after June 30, 2000, they also must make specific reference to E-SIGN. See id. § (a)(2)(B).
A State statute, regulation, or other rule of law may modify, limit, or supersede the provisions of section 7001 of this title with respect to State law only if such statute, regulation, or rule of law—

(1) constitutes an enactment or adoption of the Uniform Electronic Transactions Act as approved and recommended for enactment in all the States by the National Conference of Commissioners on Uniform State Laws in 1999, except that any exception to the scope of such Act enacted by a State under section 3(b)(4) of such Act shall be preempted to the extent such exception is inconsistent with this subchapter or subchapter II of this chapter, or would not be permitted under paragraph (2)(A)(ii) of this subsection; or

(2)(A) specifies the alternative procedures or requirements for the use or acceptance (or both) of electronic records or electronic signatures to establish the legal effect, validity, or enforceability of contracts or other records, if—

(i) such alternative procedures or requirements are consistent with this subchapter and subchapter II of this chapter, and

(ii) such alternative procedures or requirements do not require, or accord greater legal status or effect to, the implementation or application of a specific technology or technical specification for performing the functions of creating, storing, generating, receiving, communicating, or authenticating electronic records or electronic signatures, and

(B) if enacted or adopted after June 30, 2000, makes specific reference to this chapter.\(^66\)

Consistent with E-SIGN's preemption provision, forty-seven states have adopted some version of UETA.\(^67\) The remaining three states—Illinois, New York,


and Washington—have enacted separate statutes relating to electronic transactions. A number of states made substantive changes (beyond renumbering and the like), such that those statutes no longer constitute the official version of UETA that was approved and recommended by the NCCUSL in 1999.

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Although E-SIGN allows states to adopt UETA, a state may not “circumvent [E-SIGN] through the imposition of nonelectronic delivery methods under Section 8(b)(2) of [UETA].”90 UETA § 8 is a savings provision for laws that provide for the means of delivering or displaying information and which are not affected by UETA:

(b) If a law other than this [Act] requires a record (i) to be posted or displayed in a certain manner, (ii) to be sent, communicated, or transmitted by a specified method, or (iii) to contain information that is formatted in a certain manner, the following rules apply:

(1) The record must be posted or displayed in the manner specified in the other law.
(2) Except as otherwise provided in subsection (d)(2), the record must be sent, communicated, or transmitted by the method specified in the other law.

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(d) A requirement under a law other than this [Act] to send, communicate, or transmit a record by [first-class mail, postage prepaid] [regular United States mail], may be varied by agreement to the extent permitted by the other law.91

Thus, states may not use E-SIGN’s preemption provision as “a loop-hole that allows them to replace existing requirements for ‘written’ records with new mailing or physical delivery requirements that would make the use of electronic records impracticable.”92 Implicit in 15 U.S.C. § 7002(c) is that “states that have not adopted official UETA also may not use laws requiring a particular method of physical delivery to preclude the use of electronic delivery methods.”93

These statutes raise interesting questions in the context of UM/UIM written offer and rejection requirements. How far may a state go in enacting legislation that requires an offer of UM/UIM coverage to be “delivered” or “displayed” in visual formats? May a jurisdiction insert an extra requirement into its enactment of UETA that electronically recorded conversations must be “provided” to the recipient, or would such a requirement violate E-SIGN’s anti-circumvention clause? For example, Arizona has interpreted its UIM statute to require that written notice be provided to the insured, such that a recorded phone call did not

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92 Wittie & Winn, supra note 88, at 333.
93 Id.
qualify as a valid offer.\textsuperscript{94} In a footnote and without analysis, the Arizona Court of Appeals arguably created a problematic new loop-hole in E-SIGN and Arizona’s Electronic Transactions Act ("AETA"), stating that "[e]ven if the electronic recording at issue qualifies as a ‘writing’ in other contexts, neither it nor any other type of written notice was \textit{provided} to the insured" where the insured had only received oral notice.\textsuperscript{95} Such a requirement could make telephonic or Internet UM/UIM offerings burdensome and impractical and undermine E-SIGN’s purpose of fostering electronic commerce. Any State-mandated requirement that violates E-SIGN anti-circumvention clause is likely void \textit{ab initio}.

In addition, as discussed in the comments to UETA, E-SIGN and its state law equivalents are “intended to apply to all records and signatures created, used and stored by any medium which permits the information \textit{to be retrieved in perceivable form}.\textsuperscript{96} Telephonic recordings satisfy this requirement. Based upon the authors’ experience, insurance carriers typically maintain a call recording platform that records all inbound calls into the carrier as well as select outbound calls. When a customer calls a carrier’s 800 number, the telephone call is routed to a call center. When the call recording platform is sent a telephone call, data from the carrier’s call routing system triggers a call record that captures meta-data about that particular call. The system’s call logging devices begin to record audio as soon as it hears sound on the phone circuits associated with the system. The typical procedure is that the telephone call is then delivered to a customer service representative. The information for each call record typically includes, among other items, the telephone number the customer dialed from, the telephone number called, the date and time of the call as well as the policy number entered by the customer. In most situations, the customer service representative inputs additional information in the carrier’s quoting system such as the customer’s name, the name of the agent, and when an insurance quote was provided. When the telephone call is completed, the system is sent a message to close the call record and the call audio is stored on the call recording device’s hard drive.

After a period of time, carriers will archive all call recordings and typically retain these archives for a period of ten years or more depending on the carrier’s individual retention practices. The call record can be retrieved by inputting identifying information inputted into the system automatically or manually by the customer service representative. Most systems, however, do not allow the call record to be altered or edited. The call record can then be retrieved and reviewed, for example, if there is a dispute over whether the insured accepted or rejected UM/UIM coverage or if there is a dispute over the amount of UM/UIM coverage selected. Clearly, the ability to retrieve and perceive the recorded conversation satisfies E-SIGN and UETA. In fact, the comments to UETA provide that even

\textsuperscript{94} See infra Part IV.


\textsuperscript{96} UNIF. ELEC. TRANSACTIONS ACT § 2, cmt. 4 (emphasis added).
audio and video tape recordings constitute electronic records. In light of the clear statutory language and legislative history, digital recording of telephone calls should be given legal effect similar to the legal effect given to audio and video tape recordings.

IV. EXAMPLES

Notwithstanding the broad reach of E-SIGN and UETA, only a few jurisdictions have addressed these Acts within the context of UM/UIM insurance coverage offerings. The Arizona Court of Appeals found that Arizona’s mandatory written offer requirement for UM/UIM coverage was not in any way displaced by E-SIGN or Arizona’s version of UETA, ignoring federal preemption. On the other hand, the New Mexico Supreme Court specifically acknowledged E-SIGN and UETA as potentially applicable in the UM/UIM context, but found that the digitally recorded transaction did not comply with New Mexico’s mandatory UM/UIM rejection statute because the insured’s digitally recorded rejection was not attached, physically, to the policy as required by New Mexico statute. New Mexico’s UM/UIM rejection statute is different from Arizona’s statute in that it contains a requirement of physical attachment that was not addressed in E-SIGN or UETA. Finally, the Idaho Legislature expressly recognized E-SIGN and UETA in the UM/UIM context and specifically stated the application of both are applicable to UM/UIM offerings within the UM/UIM offering statute. Each of these approaches is discussed below, though ultimately, the Idaho legislative approach should be the standard used by state legislatures to avoid any question regarding federal preemption.

A. Arizona

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97 An "electronic record" is

a subset of the broader defined term "record." It is any record created, used or stored in a medium other than paper (see definition of electronic). . . . Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.

UNIF. ELEC. TRANSACTIONS ACT § 2, cmt. 6 (emphasis added).

98 See generally Palomera-Ruiz, 231 P.3d 384.


100 Compare N.M. CODE R. 13.12.3.9 (2015), with ARIZ. REV. STAT. ANN. § 20-259.01 (Westlaw current through the First Reg. Sess. of the 52nd Leg.).

101 IDAHO CODE ANN. § 41-2502(2) (West, Westlaw current through the end of the 2015 First Reg. and First Ex. Sess. of the 63rd Leg.).
Arizona's UM/UIM offer statute is section 20-259.01(B) of the Arizona Revised Statutes.\(^{102}\) A 1981 amendment to the statute originally required that insurers offer UM/UIM coverage by written notice.\(^{103}\) Section 20-259.01 of the Arizona Revised Statutes has had a written notice requirement in one form or another for nearly thirty-five years. The Arizona Supreme Court determined that the intent of the legislature in enacting this section was "to guarantee that responsible drivers will have an opportunity to protect themselves and their loved ones as they would others.\(^{104}\) This intent requires "that all persons who purchase automobile liability insurance be offered in writing the option to purchase additional . . . UIM coverage in limits up to those they choose for their bodily injury liability coverage.\(^{105}\) The insurer must "offer such coverage in a way reasonably calculated to bring to the insured's attention that which is being offered.\(^{106}\) Arizona's UM/UIM statute does not require insurers to explain UM/UIM coverage to insureds.\(^{107}\) Instead, "the insurer need only make the written offer."\(^{108}\) "A.R.S. § 20-259.01 further requires

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\(^{102}\) It provides, in part, that:

Every insurer writing automobile liability or motor vehicle liability policies shall also make available to the named insured thereunder and shall by written notice offer the insured and at the request of the insured shall include within the policy underinsured motorist coverage which extends to and covers all persons insured under the policy, in limits not less than the liability limits for bodily injury or death contained within the policy.

ARIZ. REV. STAT. ANN. § 20-259.01(B) (Westlaw) (emphasis added).


\(^{105}\) State Farm Mut. Auto. Ins. Co. v. Ash, 888 P.2d 1354, 1359 (Ariz. Ct. App. 1994); see also DeCiancio, supra note 102, at 484–85 ("With the mandatory offer intact, the courts will likely hold that the legislature targeted these coverages so that consumers could make informed decisions on whether to purchase, and in what amounts, protection for their families against irresponsible drivers.").


\(^{108}\) Ash, 888 P.2d at 1360.
an insurer to provide an applicant with a selection form containing the written notice and offer of the two coverages [UM and UIM].

In a case decided in 1995, before the Internet was pervasive and before Congress enacted E-SIGN, the Arizona Supreme Court held that the written notice requirement "is the only sure and uniform way to avoid credibility contests over whether such an offer was actually made." Thus, the purpose of the written offer requirement is simply to ensure that the offer is made. When an insurer utilizes an electronic record, there is no credibility contest because the written notice (in the form of the electronic record whether via a telephonic recording or via the Internet) proves that the insurer made the necessary UM/UIM offer to the insured.

In a leading Arizona case, the Arizona Court of Appeals determined whether a recording of a telephone conversation concerning uninsured motorist coverage constituted written notice as required by state law. In Palomera-Ruiz, the president of a business sought a quote for a commercial insurance policy with Progressive Insurance Company ("Progressive") over a recorded phone call. The insured initially requested one million dollars in UM and UIM coverage. However, as an effort to reduce the company's six-month policy premium, the insured elected to reduce the one million dollar coverage to one hundred thousand. The insured, however, elected to keep the liability limits of one million dollars. The insured procured the commercial policy and continued to renew the UM/UIM coverage at one hundred thousand dollars. Five years after the commercial policy was procured, Jose Palomera-Ruiz ("Palomera-Ruiz") sustained fatal injuries following an accident while sitting as a passenger in the insured's company's utility van. At the trial court during coverage litigation over the amount of UM/UIM coverage available, Palomera-Ruiz's estate challenged whether the telephone conversation with Progressive's agent and the insured constituted a written offer of UM/UIM coverage as required by Arizona law.

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109 See Ariz. Dep't of Ins., Regulatory Bulletin 2003-10 (July 15, 2003). The 2003 amendment to the A.R.S. § 20-259.01 added a sentence stating: "The completion of such form is not required where the insured purchases such coverage in an amount equal to the limits for the bodily injury or death contained in the policy." H.B. 2151, 46th Leg., 1st Reg. Sess. (Ariz. 2003). The phrase "such form" refers to the sample form provided by the Arizona Department of Insurance ("DOI"). The DOI form is merely an exemplar. Insurers are free to use their own form, or to use no form at all. Indeed, the July 15, 2003 regulatory bulletin even uses the words "sample form" when referring to the DOI exemplar. Ariz. Dep't of Ins., Regulatory Bulletin 2003-10 (July 15, 2003).


112 Id. at 385. The insured sought a commercial liability policy for his company Giant Electric Corporation ("Giant"). Id.

113 Id.

114 See id. at 386.

115 Id.

116 Id. at 386.

117 Id.; see also discussion regarding Arizona UM/UIM requirements infra Part II. Palomera-Ruiz's estate challenged the validity of the written offer because in many states, the failure of an insurer to
The trial court concluded that the telephonic conversation failed to meet the requirements. The Arizona Court of Appeals affirmed the trial court's decision. The court rejected Progressive's argument that the statute's written notice requirement should be interpreted liberally, and thus, a telephonic conversation satisfied the intent of the statute. Accordingly, because there was nothing in the legislative history of the Uninsured Motorist Act that supported the legislative intent that the term "written notice" require something other than actual notice, the court held that the plain meaning of "written notice" required that the offer be communicated in writing and that Progressive failed in providing written notice of the UM/UIM offer. As a result, the full liability limit of the policy was available as UM/UIM coverage notwithstanding the insured's digitally recorded verbal selection of lower UM/UIM coverage.

Prior to the Palomera-Ruiz decision there was never a requirement in Arizona's UM/UIM statute that the insurer physically "provide" the consumer with a contemporaneously retainable copy of the UM/UIM offer. The operative verb in Arizona's UM/UIM statute is "offer," not "provide." The Arizona Supreme Court had previously held that the meaning of "offer" in the UM/UIM statute was "[t]o bring to or before; to present for acceptance or rejection; to hold out or proffer; to make a proposal to; to exhibit something that may be taken or received or not." This is exactly what Progressive did during the telephone call with the insured in Palomera-Ruiz.

provide a written offer results in the UM/UIM coverage being imputed into the insured's policy with limits equal to the liability limits. See Warford v. State Farm Mut. Auto. Ins. Co., 69 F.3d 860, 862 (8th Cir. 1995); Ins. Co. of N. Am. v. Santa Cruz, 800 P.2d 585, 588 (Ariz. 1990); Shelter Mut. Ins. Co. v. Bough, 834 S.W.2d 637, 639 (Ark. 1992); Thompson v. Budget Rent-A-Car Sys., 940 P.2d 987, 990 (Colo. App. 1996) (citing, among other cases, Moon v. Guarantee Ins. Co., 764 P.2d 1331 (Okla. 1988)); see also Plitt, supra note 5, at 43. Thus, if the telephonic conversation failed to meet the statutory requirements of "written offer," the commercial policy would include one million dollars in UM/UIM coverage as opposed to one hundred thousand.

118 Palomera-Ruiz, 231 P.3d at 386.
119 Id. at 388.
120 Id. at 387–88.
121 Id. Additionally, the court highlighted how the Legislature repeatedly amended the Arizona UM/UIM statute, with each amendment leaving the "written notice" section unchanged. Id. at 388; see also Sawyer v. Mills, 295 S.W.3d 79 (Ky. 2009) (holding that an employer's recorded promise of paying employee a lump sum working bonus of $1,065,00 failed to meet the writing and signature requirement for purposes of the statute of frauds and that although a recorded conversation may be electronic under E-SIGN, the employer's voice did not constitute an electronic signature for lack of intent to sign the record).
122 Palomera-Ruiz, 231 P.3d at 388.
123 ARIZ. REV. STAT. ANN. § 20-259.01(B) (Westlaw through First Reg. Sess. of the Fifty-Second Leg.) (requiring that an insurer "shall by written notice offer the insured" UM/UIM coverage up to the liability limits).
124 Tallent v. Nat'l Gen. Ins. Co., 915 P.2d 665, 666–67 (Ariz. 1996) (en banc) (quoting BLACK'S LAW DICTIONARY 1081 (6th ed. 1990)); cf. JOSEPH M. PERILLO, CORBIN ON CONTRACTS § 1.11 (revised ed. 1993) ("An offer is an expression by one party of assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express assent to the same
The Arizona courts circumvented E-SIGN by judicially inserting a new requirement—one not included in the UM/UIM statute—that Progressive should have “provided” the proper electronically recorded telephone conversation to Mr. Thompson. The Arizona court’s additional requirement is contrary to 15 U.S.C. § 7002(c) because this newly-created physical delivery requirement is being used by Arizona to limit, preclude, or negate proper electronic transactions. Furthermore, properly interpreted, UETA, like E-SIGN, preempts all state laws that purport to require a writing. Arizona’s AETA provides in relevant part:

A. A record or signature in electronic form cannot be denied legal effect and enforceability solely because the record or signature is in electronic form.

B. A contract formed by an electronic record cannot be denied legal effect and enforceability solely because an electronic record was used in its formation.

C. An electronic record satisfies any law that requires a record to be in writing.125

AETA’s definition of “electronic record” and “electronic” are nearly identical to E-SIGN’s definitions.126 Under these broad definitions, the recorded phone call in Palomera-Ruiz was clearly “electronic.” To further clarify the matter, Comment 4 to section 2 of UETA explains that “electronic” includes biological, chemical, as well as electromagnetic media.127 Comment 6 to section 2 of UETA also provides that even audio and video tape recordings constitute electronic records.128

While not all technologies listed [in UETA § 2] are technically “electronic” in nature (e.g., optical fiber technology), the term “electronic” is the most descriptive term available to describe the majority of current technologies. For example, the development of biological and chemical processes for communication and storage of data, while not specifically mentioned in the definition, are included within the technical definition because such processes operate on electromagnetic impulses. However, whether a particular technology may be characterized as technically “electronic,” i.e., operates on electromagnetic impulses, should not be determinative of whether records and signatures created, used and stored by means of a particular technology are covered by this Act. This Act is intended to apply to all records and signatures created, used and stored by any medium which permits the information to be retrieved in perceivable form.


125 In its relevant part, it reads:
In addition, the Arizona Legislature stated that AETA should be construed and applied to:

1. Facilitate electronic transactions consistent with other applicable law.

2. Be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices.

3. Effectuate its general purpose to make uniform the law of this state with respect to the subject of this chapter for intrastate, interstate and international transactions.\textsuperscript{129}

Thus, AETA is similar to and consistent with E-SIGN. Rather than modifying each and every statute in Arizona containing an “in writing” or “written” requirement, the Arizona Legislature enacted a statute that had a global effect on and modified all Arizona laws, including section 20-259.01(B) of the Arizona Revised Statutes.\textsuperscript{130} The Arizona Legislature wanted all Arizona laws to reflect the digital age and allow for electronic transactions, including telephonic and internet transactions. AETA provides that “an electronic record satisfies any law that requires a record to be in writing.”\textsuperscript{131}

Importantly, the Arizona Legislature could have exempted Arizona’s UM/UIM statute from the scope of AETA, but it chose not to. Section 3 of UETA lists three specific areas of law that are exempt from its scope and allows States that adopt the model act to exempt other laws as well.\textsuperscript{132} However, the Arizona Legislature

\textsuperscript{6} "Electronic record." An electronic record is a subset of the broader defined term "record." It is any record created, used or stored in a medium other than paper (see definition of electronic) . . . .

Accordingly information stored on a computer hard drive or floppy disc, facsimiles, voice mail messages, messages on a telephone answering machine, audio and video tape recordings, among other records, all would be electronic records under this Act.

\textsuperscript{129} ARIZ. REV. STAT. ANN. § 44-7006 (Westlaw current through First Reg. Sess. of the Fifty-Second Leg.). “Electronic record’ means a record that is created, generated, sent, communicated, received or stored by electronic means.” Id. § 44-7002(7). “Electronic’ means relating to technology that has electrical, digital, magnetic, wireless, optical or electromagnetic capabilities or similar capabilities.” Id. § 44-7002(5).

\textsuperscript{130} See id. § 44-7006(1).

\textsuperscript{131} Id. § 44-7007(C) (emphasis added).

\textsuperscript{132} The Act provides in pertinent part:

(b) This [Act] does not apply to a transaction to the extent it is governed by:

(1) a law governing the creation and execution of wills, codicils, or testamentary trusts;
(2) [The Uniform Commercial Code other than Sections 1-107 and 1-206, Article 2, and Article 2A];
(3) [the Uniform Computer Information Transactions Act]; and
(4) [other laws, if any, identified by State].

UNIF. ELEC. TRANSACTIONS ACT, § 3 (emphasis added).
enacted only the first two exceptions and declined to create new exceptions, including declining to adopt a specific exception for the UM/UIM statute. The legislature's decision to allow for only two exceptions implied that AETA does apply to Arizona's UM/UIM statute.

Consequently, both E-SIGN and AETA invalidate section 20-259.01(B) of the Arizona Revised Statutes to the extent that section 20-259.01(B) purports to require an offer of UM/UIM coverage in paper form. The Prefatory Notes to UETA lend support for the proposition that the electronic offer made to Giant Electric in *Palomera-Ruiz* should have been given legal effect:

> The need for certainty as to the scope and applicability of this Act is critical, and makes any sort of a broad, general exception based on notions of inconsistency with existing writing and signature requirements unwise at best. The uncertainty inherent in leaving the applicability of the Act to judicial construction of this Act with other laws is unacceptable if electronic transactions are to be facilitated.

The Arizona Court of Appeals' decision is contrary to the foregoing expression of legislative intent and, by extension, contrary to the intent of Congress in allowing states to avoid preemption by adopting UETA. Rather than modifying each and every statute containing an "in writing" or "written" requirement, Congress enacted E-SIGN and allowed states to adopt UETA (or alternative statutes consistent with E-SIGN) in order to achieve a uniform global effect on and modification of all state and federal laws, including statutes like section 20-259.01(B). Consequently, the UM/UIM written offer requirement under

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133 See *ARIZ. REV. STAT. ANN.* § 44-7003(B) (Westlaw current through First Reg. Sess. of the Fifty-Second Leg.).

134 Similar to UM/UIM offer/rejection statutes, states have enacted statutes of frauds that also contain an "in writing" requirement. See, e.g., *id.* § 44-101. The statute of frauds requires that certain enumerated agreements or promises be in writing and signed by the party charged. Some jurisdictions have addressed whether an electronic recording of a telephonic conversation constitutes a "writing" for the purposes of the statute of frauds. Several have held that a tape recorded conversation satisfies the statute of frauds. See, e.g., *Londono v. City of Gainesville*, 768 F.2d 1223, 1227-28 n.4 (11th Cir. 1985) ("[T]he tape recording of the City Commission's action at the meeting satisfies the statute of frauds requirement of a signed writing."); *Ellis Canning Co. v. Bernstein*, 348 F. Supp. 1212, 1228 (D. Colo. 1972) (holding that tape recorded oral contract satisfied "writing" requirement of statute of frauds); *Friedman v. Clark*, 248 A.2d 867, 870 (Md. 1969) ("[T]estimony recorded in open court will, under appropriate circumstances, take the case out of the Statute [of frauds]."); cf. *People v. Avila*, 770 P.2d 1330, 1332 (Colo. App. 1988) (finding recording on computer disk was a "writing" for purposes for forgery statute). Although not directly applicable, the statute of frauds also lends support for the contention that the electronic recording of an UM/UIM offer satisfies the "writing requirement" of UM/UIM offer/rejection statute and should be given legal effect.

135 *UNIF. ELEC. TRANSACTIONS ACT*, Prefatory Note (A).

136 See 146 CONG. REC. S5,224 (daily ed. June 15, 2000) (statement of Sen. Abraham) ("[T]he central purpose of this legislation is to establish a nation-wide baseline for the legal certainty of electronic signatures and records. . . . I believe that the eventual adoption of UETA by all 50 states in a manner consistent with the version reported by NCCUSL will provide the same national uniformity which is established in the Federal legislation."); see also *ARIZ. REV. STAT. ANN.* §§ 44-7006(3)
Arizona law can be made and/or stored by electronic means because it still satisfies the statute's requirement of evidence that the insured accepted or rejected UM/UIM coverage. To the extent the Arizona courts impermissibly legislated a judicial exception for Arizona's UM/UIM statute, AETA is not the official version of UETA and is preempted by virtue of 15 U.S.C. § 7002(a)(1).137

The United States Supreme Court has never examined the degree to which E-SIGN preempts non-conforming versions of UETA such as AETA, or more particularly, whether E-SIGN preempts such statutes in whole or only in part.138 Indeed, E-SIGN's highly unusual preemption scheme has been a source of confusion for courts and commentators alike.139

B. New Mexico

The New Mexico Supreme Court addressed electronic signatures and the requirement of a signed writing in the context of UM/UIM coverage offerings in

137 See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843 n.9 (1984) ("The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." (citations omitted)).


139 See, e.g., Naldi v. Grunberg, 908 N.Y.S.2d 639, 649 n.13 (N.Y. App. Div. 2010) ("Determining which law [E-SIGN or New York's Electronic Signature and Records Act] applies to particular transactions has caused confusion in the business community and thereby has an inhibiting effect on the expansion of electronic commerce in New York.") (emphasis added) (citing S. Mem. in Support of S.B. 7289A, Ch. 314, 2002 McKinney's Session Laws of N.Y., at 1881); Matthew G. Dore, Preemption Questions Relating to E-SIGN and IUETA, 6 IOWA. PRAC. § 33:26, Westlaw (database updated 2015) ("[T]here are obvious questions [about] whether [Iowa's adoption of UETA] is preempted in whole or in part. E-Sign includes an express provision regarding preemption that makes this analysis particularly difficult.") (emphasis added); Wittle & Winn, supra note 91 at 340 ("[T]he complex and ambiguous preemption rules in E-SIGN are likely to remain a source of confusion for some time for the state and federal agencies that are subject to them.") (emphasis added); Jamie A. Splinter, Comment, Does E-SIGN Preempt the Illinois Electronic Commerce Security Act?, 27 S. ILL. U. L.J. 129, 160 (2002) ("[T]here is uncertainty about whether a court will find the Illinois Act preempted by E-SIGN.") (emphasis added).
Jordan v. Allstate Insurance.\textsuperscript{140} The court in Jordan held that the selection of insurance coverage from "pull-down menus" on a website does qualify as a written rejection of UM/UIM coverage.\textsuperscript{141} In Jordan, Diana Lucero purchased her insurance through Progressive Halcyon Insurance Company's ["Progressive Halcyon"] website. Progressive Halcyon's website use[d] customer-entered information to suggest an insurance package, which the customer could alter using "pull-down menus." In her online application, Diane Lucero clicked on liability limits of $50,000 per person. While Progressive Halcyon's suggested packages provide[ing] default UM/UIM coverage equal to the liability limits, customers [could] purchase lesser amounts of UM/UIM coverage by using a pull-down menu. Diana Lucero [selected and] clicked on the minimum amount of UM/UIM coverage available, $25,000 per person.\textsuperscript{142}

Some time after the policy was purchased, "Consuelo Lucero, who was covered by the Progressive Halcyon policy, was injured in an accident with an uninsured motorist. Progressive paid Consuelo Lucero $50,000 in UM/UIM benefits, computed by stacking $25,000 for each of three cars, from which the other driver's $25,000 policy coverage was deducted."\textsuperscript{143}

Under New Mexico law, "[t]he named insured shall have the right to reject uninsured motorist coverage."\textsuperscript{144} In addition, "[t]he rejection of the provisions covering damage caused by an uninsured or unknown motor vehicle as required \textit{in writing} by the provisions of Section 66-5-301 NMSA 1978 must be endorsed, attached, stamped or otherwise made a part of the policy of bodily injury and property damage insurance."\textsuperscript{145} In making its decision in Jordan, the New Mexico Supreme Court explained the import of the foregoing requirements as follows:

UM/UIM coverage equal to the liability limits is the default coverage unless an insurer (1) offers the insured UM/UIM coverage equal to the policy's liability limits, (2) provides premium costs corresponding to the available levels of UM/UIM coverage, (3) obtains a \textit{written rejection} of UM/UIM coverage equal to the liability limits, and (4) makes that rejection a part of the policy that is delivered to the insured.\textsuperscript{146}

The Jordan court concluded that this constituted a rejection of coverage in writing, "recognizing that in the twenty-first century actively selecting an amount

\textsuperscript{140} Jordan v. Allstate Ins. Co., 245 P.3d 1214 (N.M. 2010).
\textsuperscript{141} \textit{Id.} at 1224.
\textsuperscript{142} \textit{Id.} at 1218.
\textsuperscript{143} \textit{Id.} at 1219.
\textsuperscript{144} N.M. \textsc{Stat. Ann.} § 66-5-301(C) (West, Westlaw current through the end of the First Spec. Sess. of the 52nd Leg.).
\textsuperscript{145} N.M. \textsc{Code R.} § 13.12.3.9 (2015) (emphasis added).
\textsuperscript{146} Jordan, 245 P.3d at 1223 (emphasis added).
of UM/UIM coverage on an insurance website constitutes a ‘writing.’\textsuperscript{147} The \textit{Jordan} court praised Progressive Halcyon for its “commendable system of offering meaningful choices to its insureds.”\textsuperscript{148} Nevertheless, the Court held that full compliance with the requirements of the law was not achieved and that the attempted rejection of coverage was invalid because Diana Lucero’s rejection was not “endorsed, attached, stamped or otherwise made a part of the policy” as required by Regulation 13.12.3.9 of the New Mexico Administrative Code.\textsuperscript{149} More significantly for present purposes, the New Mexico Supreme Court failed to address E-SIGN or federal preemption, offering only the following explanation:

Progressive points to the short paragraph at the end of its forty-nine page fine-print policy, which “expressly integrated” the insured’s application and declarations pages into the policy. Incorporating an on-line application into an insurance policy via buried language toward the end of a generic forty-nine page policy does not allow for meaningful reconsideration of the decision to reject coverage. Insureds are only bound to make such examination of such documents as would be reasonable under the circumstances. . . Nothing in the application, declarations pages, or policy provided Diana Lucero evidence of her rejection for later reference or reflection. Furthermore, it is not established in the record before us whether Progressive Halcyon actually delivered the policy and declarations pages to the insured. Progressive Halcyon should have delivered a policy that expressly alerted Ms. Lucero to the fact that she had rejected a portion of the UM/UIM coverage to which she was entitled.\textsuperscript{150}

\section*{C. Idaho}

Idaho is the only state that specifically enacted a UM/UIM statute that allows for an electronic rejection of an offer to the insured.\textsuperscript{151} The relevant statute, Section 41-2502 of the Idaho Code, provides in pertinent part:

\begin{quote}
(2) A named insured shall have the right to reject either or both uninsured motorist coverage or underinsured motorist coverage, which rejection must be in writing or in an electronic record as authorized by the uniform electronic transactions act, chapter 50, title 28, Idaho Code, and such rejection shall be effective as to all other insureds and named insureds; and after which such rejected coverage need not be provided in or supplemental to a renewal or replacement policy issued by the same insurer or an affiliate of that insurer.\textsuperscript{152}
\end{quote}

When the Idaho Legislature amended its UM/UIM statute in 2008, the Idaho House Bill contained a statement of purpose, which provided in relevant part:

\begin{quote}
Id. at 1224 (citing Marckstadt v. Lockheed Martin Corp., 228 P.3d 462, 470–71 (N.M. 2009) (quoting \textit{Writing}, BLACK’S LAW DICTIONARY (9th ed. 2009) (a writing is “[a]ny intentional recording of words that may be viewed or heard with or without mechanical aids”)).
\end{quote}

\textsuperscript{147} \textit{Id.} at 1224–25 (quoting N.M. CODE § 13.12.3.9).

\textsuperscript{148} \textit{Id.} (citations and quotations omitted).

\textsuperscript{149} See IDAHO CODE ANN. § 41-2502 (West, Westlaw current through end of the 2015 First Reg. and First Ex. Sess. of the 63rd Leg.).

\textsuperscript{150} \textit{Id.} (emphasis added).
This legislation amends Idaho Code (41-2502 and 41-2503) to define the term "underinsured motorist coverage" and require that certain motor vehicle liability insurance policies issued in Idaho include underinsured motorist coverage. This legislation also allows a named insured to reject, in writing or electronically, underinsured motorist coverage. Finally, this proposal will require the insurance carrier to provide the named insured a summary statement, approved by the Director of the Idaho Department of Insurance, explaining uninsured and underinsured motorist coverages and different forms of underinsured motorist coverage offered by insurers in Idaho.\textsuperscript{153}

The Idaho Legislature's Statement of Purpose, however, gave little insight into its rationale for specifically modifying its UM/UIM statute when its version of UETA would accomplish that as a matter of course. Nevertheless, it appears that the Idaho Legislature wanted to clearly resolve the issue, especially in light of the confusing preemption scheme previously discussed.

Accordingly, in the context of UM/UIM coverage selection, electronic records are a "commendable system" in New Mexico and Idaho, while they are unenforceable in Arizona. In addition, the decisions of the New Mexico and Arizona courts are inconsistent in both their results and their reasoning. Further, both of these states refuse to acknowledge the preemptive effect of E-SIGN on their respective UM/UIM statutes.

\textbf{D. Courts and Administrative Agencies}

Courts and administrative agencies nationwide have come to conflicting conclusions regarding the validity and enforceability of electronic records of oral communications. In \textit{In re Marriage of Takusagawa}, the Kansas Court of Appeals held that the statute of frauds did not prevent the enforcement of an oral divorce settlement, which involved the transfer of interests in land.\textsuperscript{154} The court reasoned that the agreement and the wife's oral assent thereto were recited orally and on the record in open court:

Kansas' adoption in 2000 of the Uniform Electronic Transactions Act (UETA), probably makes Mieko's in-court statement the legal equivalent of a written signature for purposes of the statute of frauds. The record does not disclose the type of equipment used by the court reporter, but it would be quite rare today for a court reporter's equipment not to at least require electricity. The UETA deems records generated by electronic means, including the use of electrical or digital magnetic capabilities, to be electronic records. The UETA also deems any electronic sound or symbol "adopted by a person with the intent to sign the record" to be an "electronic signature." The UETA then provides that when a law requires a record or a signature to be in writing, an electronic record or signature will satisfy the law. Thus, assuming that the court reporter's equipment was


\textsuperscript{154} \textit{In re Marriage of Takusagawa}, 166 P.3d 440, 446–47 (Kan. Ct. App. 2007).
consistent with modern practice, it would appear that the electronic capture of Mieko's oral assent that this was the agreement would satisfy the statute of frauds. No more is needed to show that Mieko made or adopted the agreement.155

Various administrative agencies have also embraced the validity of oral communications as electronic records. In response to an inquiry from the Mississippi Secretary of State, the Mississippi Attorney General issued an opinion stating "a voice record created or adopted by a person may constitute an 'electronic signature' under UETA within the context of a computer generated document in an Internet application.156 The Nevada Division of Insurance listed its telephone number as one of the possible "addresses" to which a petitioner may validly submit a "written request ... by electronic means" for a hearing with the Appeals Panel for Industrial Insurance.157 In New York, the Office of General Counsel, representing the view of the State Insurance Department, issued an official opinion that a life insurance agent may "have an applicant sign a life insurance application by the entry of their social security number into an interactive voice response (IVR) system using a telephone keypad."158 The opinion stated that "[b]oth federal E-SIGN and [New York's Electronic Signature and Records Act] authorize the use and acceptance of electronic signatures and electronic records in commercial transactions, and confirm their legal validity.159 Likewise, the Attorney General of Ohio issued an official opinion concluding that "an audio tape recording of a meeting of a board of township trustees that is created by the township fiscal officer for the purpose of taking notes to create an accurate record of the meeting ... is a public record," where the term "record" is statutorily defined to include electronic records.160

By contrast, in Sawyer v. Mills, the Supreme Court of Kentucky held that the statute of frauds applied and barred enforcement of an employer's oral agreement to pay his employee a $1,065,000 bonus.161 The court held that E-SIGN did not preempt the statute of frauds' writing requirement, notwithstanding the presence of an audio tape recording of the subject conversation between the employee and her

155 Id. (emphasis added) (citations omitted); see also Londono v. City of Gainesville, 768 F.2d 1223, 1227–28 n.4 (11th Cir. 1985) ("[T]he tape recording of the City Commission's action at the meeting satisfies the statute of frauds requirement of a signed writing;"); Ellis Canning Co. v. Bernstein, 348 F. Supp. 1212, 1228 (D. Colo. 1972) (holding that tape recorded oral contract satisfied "writing" requirement of statute of frauds); Friedman v. Clark, 248 A.2d 867, 870 (Md. 1969) (concluding that "[t]estimony recorded in open court will, under appropriate circumstances, take case out of the Statute [of frauds]."); cf. People v. Avila, 770 P.2d 1330, 1332 (Colo. App. 1988) (finding recording on computer disk was a "writing" for purposes for forgery statute).


159 Id.


161 Sawyer v. Mills, 295 S.W.3d 79 (Ky. 2009).
employer. The Supreme Court of Alabama reached a similar result in Parker v. Williams, holding that the statute of frauds applied to an alleged guarantee of a loan, despite the fact that the oral agreement was apparently captured on audio tape. The Alabama court failed to even acknowledge E-SIGN or Alabama's enactment of UETA.

The results in Sawyer and Parker are similar to the Arizona court's refusal to recognize the validity of electronic records of oral communications in Palomera Ruiz. As of now, there are no guideposts that provide necessary guidance to businesses and to courts and agencies at the state and federal level, regarding the enforceability of electronic records of oral communications.

V. ANALYSIS OF E-SIGN, UETA AND STATE SPECIFIC ETA'S IN THE UM/UIM COVERAGE OFFERING CONTEXT

It is clear that Congress, in enacting E-SIGN, intended to reverse preempt the McCarran-Ferguson Act by stating in E-SIGN that it applied to the business of insurance. This was an effective preemption of state insurance regulatory requirements. Both E-SIGN and UETA enhance the regulatory purpose behind requiring either the mandatory offering or rejection of UM/UIM benefits. Under the various mandatory offering and rejection state statutes there exists an evidentiary credibility issue as to whether the written offer that was shown to the insured or the insured's rejection of the coverage needs to be preserved in some specific form. As an example, in Arizona, the insurance company is only required to make the mandatory offering in writing. Preservation of the written offer is not required by statute and therefore can be the subject of credibility contests over whether the offer was actually made even though it was in writing. This failing does not usually exist in situations where the insurer utilizes an electronic record because under E-SIGN and UETA the digital record is usually preserved.

The Comments to UETA indicate that there was a concern about the storage costs and space needed to store billions of documents of various business transactions. Accordingly, E-SIGN and UETA were enacted in part to facilitate the development of electronic systems that will permit the storage of an electronic equivalent of a written record and at the same time reduce costs and increase efficiency while ensuring safety of such records. UETA reflects this public policy by defining "electronic record" as "a record created, generated, sent, communicated,

162 See id. at 87–88.
163 See Parker v. Williams, 977 So. 2d 476, 480–81 (Ala. 2007).
164 See id.
165 UNIF. ELEC. TRANSACTION ACT § 16, cmt. 1 (NAT’L CONFERENCE OF COMM’RS ON UNIF. STATE LAWS 1999).
166 Id. (noting that “natural disasters can wreak havoc on the ability to meet legal requirements for retaining, retrieving and delivering paper instruments.”).
retrieved, or stored by electronic means. 167 Thus, E-SIGN and UETA are intended to apply to any record that would allow the storage of information by any medium so long as the system permits the information to be retrieved in perceivable form. 168

UETA explicitly acknowledges that electronic systems permit the retention of digital copies that reflect the integrity of the originals. 169 E-SIGN and UETA, however, do not address how long such electronic records should be stored. It makes sense that, notwithstanding any lack of legislative clarity on this issue, states should adopt the typical principles currently utilized by businesses in storing their electronic records. Most business have a seven to ten-year retention period. At a minimum, carriers should be required to retain electronic records of any UM/UIM offerings for at least seven years. This should allow the retention of any digital UM/UIM offerings beyond the six-year statute of limitation period that is typical for any breach of contract claim that the insured may have against the carrier for failing to offer or incorrectly offering UM/UIM coverages. 170

Even when there is a document preserving the written offer, credibility issues may still exist as to what was said during the insurance purchase transaction. This can occur in those jurisdictions that adopt the modern view of the reasonable expectation doctrine. However, where the purchase transaction is digitally recorded, like in those situations where the transaction is part of a digitally recorded telephone conversation, there will be a contemporaneous record of what actually was stated by the insurer and insured during the transaction to guide in the application of the reasonable expectation doctrine, if necessary.

In those jurisdictions that require a mandatory rejection, the rejection could also be preserved as required by E-SIGN and UETA. In jurisdictions like New Mexico, which require the rejection to be attached to the policy or made part of the policy, the attachment requirement can be accomplished by an incorporation by reference with a statement indicating in the policy that a copy of the rejection can be provided upon request. However, it would be economically impractical to require the insurer to provide a digital recording of the telephone conversation for each policy issued. Because under E-SIGN and UETA the digital recording will be preserved, in those cases where a dispute exists as to whether UM/UIM coverage was purchased by the insured can be satisfactorily resolved by requiring coverage unless the insurer can come forward with a digital recording of the rejection.

The benefit of E-SIGN and UETA lies in encouraging digital preservation. Digital preservation is an enhancement over most state UM/UIM mandatory offering or rejection statutes because the offer or rejection will be available. Where

167 Id. § 2(7). This is also reflected in the 15 U.S.C. § 7006(4) (2000) definition of electronic record as "a contract or other record created, generated, sent, communicated, received, or stored by electronic means."
168 UNIF. ELEC. TRANSACTION ACT § 2, cmt. 4.
169 Id. § 16, cmt. 1.
extrinsic or parol evidence of the transaction is permitted, E-SIGN and UETA can provide a contemporaneous digitally recorded verbal record for telephonic transactions of the actual verbal transaction, which will eliminate "he said/she said" disputes. However, federal preemption does not resolve the mandatory requirement that the rejection be attached to the actual insurance policy that may be required in states like New Mexico. E-SIGN and UETA simply do not address the attachment requirement, allowing for a loophole to exist regarding complete federal preemption of the subject.

States have approached the implementation of E-SIGN and UETA in different ways. As an example, on one end of the spectrum is Arizona's attempt to globally implement its AETA by stating that: "[a]n electronic record satisfies any law that requires a record to be in writing." On the other end of the spectrum, Idaho provides a clearer example of legislative intent by focusing its UM/UIM rejection law by directly tethering its UM/UIM rejection law to UETA. The Idaho approach avoids confusion regarding federal preemption. At the heart of state offering/rejection requirements is the paternalistic goal that the public at large would want UM/UIM coverage if made aware of the availability of such coverage. Unlike liability coverage, which protects third parties, UM/UIM coverage is purchased to protect the insured from third parties who do not have liability or have purchased low liability limits—usually at state minimums. Why would an insured protect third parties more than the insured would protect themselves and their families? This core question becomes even more resonant when it is understood how cheap and affordable UM/UIM coverage

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171 See ARIZ. REV. STAT. ANN. § 44-7007(C) (Westlaw through First Reg. Sess. of the 52nd Leg.) (emphasis added).  
172 IDAHO CODE ANN. § 41-2502(2) (West, Westlaw through the end of the 2015 First Reg. and First Ex. Sess. of the 63rd Legis.) ("A named insured shall have the right to reject either or both uninsured motorist coverage or underinsured motorist coverage, which rejection must be in writing or in an electronic record as authorized by the uniform electronic transfers act.") (emphasis added).  
173 See Wilks v. Manobianco, 352 P.3d. 912 (Ariz. 2015). In Wilks, the insured claimed that the agent failed to procure UIM coverage that she orally requested. Id. at 914. The insured had previously procured a policy with State Farm that had UM and UIM coverage. Id. She left State Farm, procured another auto policy with another carrier, and then decided to switch back to State Farm again. Id. The insured informed the agent that she wanted "the exact same coverage that [she] had previously, full coverage." Id. The agent failed to review the previous coverage and instead filled out a DOI-approved form such that UIM coverage was rejected, which the insured signed. Id. The agent argued that the "safe harbor" provision of Arizona's UM/UIM statute, which made the selection or rejection of UM/UIM coverage valid and applicable to all insureds if an insured signs a DOI-approved form, also applied to agents and barred any common law negligence claim against the agent. Id. The Arizona Supreme Court rejected this contention because the statutory language only provided a "safe harbor" to insurers and not agents. Id. at 915. The court reasoned that the "safe harbor" eliminated any factual questions of whether the insurer offered UM/UIM coverage and did not bar any factual inquiries related to other types of alleged negligence or wrongdoing; namely, whether the agent honored the insured's request for UM/UIM coverage or whether the agent breached a duty to procure UM/UIM coverage. Id. at 915–16. The court also held that any issue regarding comparative fault because the insured failed to read the DOI-approved form was for the jury to decide. Id. at 916.
vis-à-vis liability insurance. UM/UIM is underwritten demographically where a flat rate is charged at a fraction of the cost for liability insurance.174 Written UM/UIM offer/rejection requirements act as a prompt to the consumer during the purchase of insurance facilitating discussion of what UM/UIM coverage is and its low cost. When this occurs, the presumption is that the insured would purchase the coverage. In states like Arizona (mandatory offer in writing) and New Mexico (mandatory rejection attached to the policy) confirmation proof of the offer is central to the goal that insureds be informed of UM/UIM coverage increasing the likelihood of purchase. E-SIGN and UETA complements this goal because the electronic record preserves the relevant purchase transaction, which is digitally stored as an “electronic record.”

CONCLUSION

The modern insurance purchase is increasingly taking place telephonically or electronically. Two things need to take place to refine E-SIGN and UETA for UM/UIM purchases. First, each state should complete Congressional intent for reverse preemption. Here, the approach of the Idaho State Legislature works best. For states like Arizona, each state’s iteration of a UM/UIM statute should state that the offer must be in writing “or electronically” made. For states like New Mexico, the UM/UIM statutes should allow rejection “electronically” with digital preservation in lieu of physical attachment to the policy. Second, E-SIGN and UETA should require preservation of the digital record. There should be a specific preservation time period. A seven-year preservation period should be the minimum time period utilized. These modifications will substantially advance the public policy goal of having UM/UIM coverage available for purchase in the modern digital era.

174 See, e.g., Maryalene LaPonsie, Uninsured and Underinsured Motorist Coverage, INSURANCE.COM (Dec. 17, 2015), http://www.insurance.com/auto-insurance/coverage/uninsured-underinsured-motorist-coverage.html#uninsured3 (“UM/UIM insurance costs approximately 5% of your annual auto insurance premium.”). For obvious reasons an insurance company does not use standard underwriting information regarding its insured (age, prior accidents, credit scoring, vehicle type) when underwriting UM/UIM simply because the tortfeasor is unknown at the time the policy is purchased. Insurers look at the losses that historically have taken place within the demographic area where the insured’s vehicle is garaged.