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Spencer Hale

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**REAL PROPERTY E-CONVEYANCES AND E-RECORDINGS:
THE SOLUTION OR CAUSE OF MORTGAGE FRAUD?**

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I. Introduction

The idea of an electronic land conveyance or title recording having the same validity as a written document is a fairly new legal reality. With the framework created by the enactment and passage of new federal and state legislation, the past eight years have been monumental in the real property industry. There have been more advancements and changes to the recording and mortgage system during the last eight years than we have seen in the last four centuries.¹ For the most part, the professionals in the industry have anticipated and appreciated the changes that are taking place as electronic recording and mortgages become more common place. Transactions that before could take months are now started and finished in a few hours. Additionally, the costs of the transactions are decreasing. However, concern permeates this electronic revolution. There is a fear that because of the increasing number of cases of identity theft and the ease with which some computer hackers can obtain sensitive information, the use of electronic recording and mortgages would open the door to an increased amount of fraud committed in the industry.

This paper will discuss the foundational pieces of legislation that have promoted this electronic movement within the real property industry. It will then analyze the types of fraud that can occur in recording and mortgage transactions and the parties responsible for such

¹ Dale A. Whitman, *Digital Recording of Real Estate Conveyances*, 32 J. MARSHALL L. REV. 227, 228-29 (1999). Up until the year 2000 technological advances made on impact on registration processes in two respects. First, indices were beginning to be alphabetized by computer and electronically accessible. Second, rather than copying records by hand, most counties were preserving documents by photocopying or microfilm

fraud. After identifying the types of land fraud, there will then be a discussion as to any connections that electronic transactions have to such fraud. After determining the relationship between the electronic transactions and land fraud, this article will then analyze whether electronic transactions really improve the real property industry.

II. The Electronic Revolution

Until the year 2000, technological advances had little fundamental effect on the recording system. For the most part the system continued to provide information in the same way as the first primitive American system, developed in 1620, in the Massachusetts Bay Colony. It merely provided searchers with an alphabetical index to documents and the documents themselves.² This stagnant nature of the real property industry changed nine years ago when one of the corner stone acts to the real property electronic boom was being prepared. As the final details of the Uniform Electronic Transaction Act (UETA) were coming to fruition, many scholars and professionals in the industry, while anticipating the advantages as well as the pitfalls of such an electronic overhaul, pushed for states to modernize their current systems for recording land and mortgage conveyances.³ In advocating this new model legislation it was the hope of some that the states would not only adopt this new piece of legislation, but would make further statutory changes to facilitate the dawning of a new era in land conveyances and recordings.⁴

A. The UETA

or microfiche photography. *Id.*

² *Id.*

³ *Id.* at 233-34; Sanu K. Thomas, Note, *The Protection and Promotion of E-Commerce: Should There Be a Global Regulatory Scheme for Digital Signatures?*, 22 FORDHAM INT'L L.F. 1002, 1002 (1999).

⁴ Whitman, *supra* note 1, at 233-34.

The most basic anatomy of mortgage creation consists of two steps.⁵ The first consists of reducing the lien on the property and all of the related terms and conditions to writing.⁶ Second, the grantor must express the intent to authenticate the writing with a signature.⁷ But while the technology has long been available to be able to complete both steps electronically,⁸ debate and confusion reigned over whether the electronic completion of these transactions could be legally upheld.⁹ The promulgations of the UETA in 1999¹⁰ marked the creation of the first model legislation provided for the state governments that would allow both steps of mortgage creation to be legally completed through electronic means.¹¹ In addition to providing legal validity to the electronic mortgage, the UETA also made electronic recording legal in some states,¹² but most importantly, this uniform act laid the ground work for future legislation.

The UETA provides that "a record or signature may not be denied legal effect or enforceability solely because it is in electronic form."¹³ It further gives legal validity to transactions using electronic records in its formation.¹⁴ The third fundamental principle of

⁵ JAMES BRYCE CLARK AND MAURA B. O'CONNOR, AN OVERVIEW OF ELECTRONIC MORTGAGE ORIGINATION AND RECORDING ISSUES 169, 173 (PLI Real Estate Law & Practice, Course Handbook Series No. N0-00CB, 2003).

⁶ *Id.*

⁷ *Id.*

⁸ Sam Stonefield, *Electronic Real Estate Documents: Context, Unresolved Cost-Benefit Issues and a Recommended Decisional Process*, 24 W. NEW ENG. L. REV. 205, 206 (2002).

⁹ Robert A. Wittie & Jane K. Winn, Survey, *Electronic Records and Signatures Under the Federal E-Sign Legislation and the UETA*, 56 BUS. LAW. 293, 294 (2000).

¹⁰ Unif. Law Comm'rs, Summary: Uniform Electronic Transactions Act, http://www.nccusl.org/Update/uniformact_summaries/uniformacts-s-ueta.asp (last visited Mar. 12, 2009) [hereinafter Summary]

¹¹ *Id.*; Whitman, *supra* note 1, at 265.

¹² Summary, *supra* note 10; Whitman, *supra* note 1, at 265.

¹³ UNIF. ELECTRONIC TRANSACTIONS ACT § 7(a) (1999). While the language of the UETA is general and applies to all electronic transactions, this paper will be referring specifically to the affects it has on e-mortgages and e-recording.

¹⁴ *Id.* § 7(b).

the UETA allows electronic records and signatures to satisfy the law when written records and signatures are required by law.¹⁵ The purpose is not to create a new system of laws and requirements for electronic transactions and documents, but rather to remove the legal barriers that previously prevented electronic transactions.¹⁶ The underlying rules and laws affecting contracts and transactions remain unchanged by the UETA.¹⁷

The UETA defines an electronic signature as "an identifying symbol, sound, process, or encryption of a record in whole or in part, executed or adopted by a person."¹⁸ This definition does not require any encryption or security procedure for electronic signatures, so, under a strict reading of the UETA, one's name in typed form at the bottom of a mortgage or land recording document would suffice as a signature.¹⁹ The UETA's omission of a minimum security requirement is rather peculiar especially considering that the major fear surrounding electronic mortgages and recording is due to identity theft and security. This lack of a security requirement, however, does not prevent states or even corporations from enforcing their own requirements of security.²⁰

Because the security issue is left to be solved primarily by state and corporate regulations, the UETA probably helps to yield more security for consumers than if it did include a minimum standard or supported a specific technology. Technology is constantly

¹⁵ *Id.* § 7(c) & (d).

¹⁶ *Id.* at Prefatory Note (2002) (main volume).

¹⁷ *Id.*

¹⁸ Whitman, *supra* note 1, at 265; UNIF. ELECTRONIC TRANSACTIONS ACT § 2(8).

¹⁹ UNIF. ELECTRONIC TRANSACTIONS ACT § 2(8). Including one's name at the end of an email and pressing send constituted the UCC requirement of authentication of the document under the Electronic Transactions Act. *Int'l Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F. Supp. 2d 863, 873 (W.D. Mo. 2005). A typed signature on the signature line of a document created on company letterhead and attached to an e-mail between the merchandiser and seller constituted a valid signature. *Bazak Intern. Corp. v. Tarrant Apparel Group*, 378 F. Supp. 2d 377, 386 (S.C.N.Y. 2005). The major issue in determining the validity of an electronic signature is the signer's intent. *See* UNIF. ELECTRONIC TRANSACTIONS ACT § 2(8) cmt. 3, 4.

²⁰ Whitman, *supra* note 1, at 265; *see* Carrie A. O'Brien, Note, *E-SIGN: Will the New Law Increase Internet*

adapting and improving. This evolution of technology creates a uniquely quick product-life-cycle for each new advancement. In today's electronic world once a new improvement in internet security hits the market it does not take long for an even safer product to arrive and replace the new, yet outdated, improvement. One of the reasons why the life cycle for security technology is so short is because once a new type of security is presented and utilized in the open market, "hackers," who are in search for sensitive information to use for fraud or other illegal purposes, begin designing ways to penetrate the security. Therefore, electronic security technology not only has to fight the market forces, but also the potential criminal forces that too would make a past product outdated.

Some assume that since the banks and market participants in the real estate industry have the most to lose from fraud and the widespread concern over the security of an electronic transaction, then they, under the forces of a free market, would necessarily create a high industry standard of security to protect consumers and businesses from fraud in real estate transactions.²¹ This industry standard would be free to evolve with new technological advances, and ideally, banks and other businesses capitalizing from the benefits of e-mortgages and e-recording would make considerable investments in the advancement of more secure technologies. Such has been the case in the title registration industry as evidenced by the creation and success of PRIA.²²

However, had the writers of the UETA adopted a security standard or a specific type of electronic signature and document then this may have produced a level of security that

Security Allowing Online Mortgage Lending to Become Routine?, 5 N.C. BANKING INST. 523, 541 (2001).

²¹ O'Brien, *supra* note 20, at 541-42.

²² David E. Ewan & Mark Ladd, *Race to the (Virtual) Courthouse: How Standards Drive Electronic Recording of Real Property Documents*, 22 FEB PROB. & PROP. 8, 12-13 (2008).

was stagnant and unable to adapt to the needs of the consumers.²³ Even prior to the UETA, Utah enacted electronic contracting law that adopted a specific type of electronic signature because at the time it was understood that it provided the greatest security.²⁴ However, with time, the security of the electronic signature named in Utah's legislation deteriorated with respect to the surrounding circumstances.²⁵ While having a standard would not prevent corporations or states from adopting more secure standards as technology improves,²⁶ it could act as a protection from litigation for companies who may be negligent in their pursuit of improving security.²⁷

Another relevant characteristic of the UETA is the element of intent necessary to ascend to an electronic contract. By defining an electronic signature as some symbol or byte or sound executed or adopted by a person, a greater importance is placed on the signor's intent to be bound by the electronic document rather than the actual act of signing.²⁸ This is a shift from the simple traditional requirement of a wet ink signature. The importance that the UETA places on the requirement of a signature is not on having an autograph or a specific squiggle or symbol, but rather if some form of recognition was used with an *intent* to be bound.²⁹

Moreover, since an electronic record constitutes valid documentation under the UETA, any correspondence through e-mail that contains the necessary elements for a

²³ Wittie & Winn, *supra* note 9, at 295.

²⁴ *Id.*

²⁵ *Id.* Utah was one of the first to adopt the UETA in 2000, which replaced their outdated electronic contracting law. UNIF. ELECTRONIC TRANSACTIONS ACT References and Annotations (1999).

²⁶ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 4 cmt. e.

²⁷ *Id.*

²⁸ Ewan & Ladd, *supra* note 22, at 13.

²⁹ UNIF. ELECTRONIC TRANSACTIONS ACT § 2(8).

specific contract could potentially be legally binding on the parties to the correspondence. However, stating that a "record ... may not be denied legal validity based *only* on the fact that it is in an electronic form,"³⁰ further emphasizes the dispositive nature of intent that the UETA places in electronic contract formation. This language supports the idea that intent is required for a party to assent to an electronic transaction because while it prevents the court from deeming a contract invalid on the sole factor that it was electronic in its conception, it does not absolutely prevent a court from considering how the electronic quality of the contract combined with other factors might tend to negate a party's ascension to the contract.

The UETA, currently adopted by forty-six states,³¹ does not require the use of electronic documents in real estate transactions, but it does authorize their use.³² This allows for companies and consumers to choose between traditional paper documents and the modern electronic documents without any standardized penalty. The permissive nature of the UETA, rather than imposing a requirement, allows businesses to switch to electronic real estate transactions when they are ready. This is preferable to a requirement because the initial cost of developing and setting up the electronic infrastructure for e-mortgages and e-recording is expensive³³ and not every company is in the financial position to instigate such a procedural overhaul. Since the UETA is permissive in its legitimizing of electronic documents and

³⁰ *Id.* § 7(b).

³¹ Uniform Law Comm'rs, A Few Facts About the Uniform Electronic Transactions Act, http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Mar. 12, 2009) [hereinafter A Few Facts]. The District of Columbia and Puerto Rico have also adopted the UETA. Georgia, Illinois, Indiana, and Washington have still not adopted the Act. *Id.* Minnesota, after adopting the UETA as a whole has since gone back and amended its legislation to exclude real estate documents from its application. Derek Witte, *Avoiding the Un-Real Estate Deal: Has the UETA Gone Too Far?* 35 J. MARSHALL L. REV. 311, 329 (2002).

³² Whitman, *supra* note 1, at 265.

³³ *Id.* at 261.

signatures, companies may plan and decide for themselves when they can initiate the conversion process within their business structure.

B. E-Sign

A year after the UETA was promulgated, Bill Clinton signed into federal law the Electronic Signature in Global and National Commerce Act (E-Sign),³⁴ with the hope of encouraging state legislatures to adopt the UETA.³⁵ Once E-sign was enacted, even if a state had not already adopted the UETA or similar legislation, electronic signatures and documents were granted legal effect.³⁶ This meant that for the first time in many states a mortgage transaction could be completed electronically and have the same validity as a traditional paper transaction.³⁷ This new federal legislation created great excitement among financial institutions, title companies, and state recording offices. It was easy to see the enormous cost benefits that would be enjoyed by all those who participated in the real property industries.³⁸

The primary purpose of E-Sign is similar to the UETA. Just as the UETA grants legal affect to electronic documents and signatures, E-Sign states signatures, contracts and other transactions affecting interstate and foreign commerce “may not be denied legal effect, validity, or enforceability solely because it is in electronic form.”³⁹ Furthermore, an electronic signature is defined the same in both acts.⁴⁰

³⁴ O'Brien, *supra* note 20, at 523.

³⁵ H.R. REP. NO. 106-341, pt. 2, at 13 (1999); *see* Electronic Signatures in Global and National Commerce Act of 2000 (E-SIGN), 15 U.S.C. § 7002 (2006).

³⁶ O'Brien, *supra* note 20, at 523-24.

³⁷ *Id.* at 529-30.

³⁸ *Id.* at 533.

³⁹ E-Sign, 15 U.S.C. § 7001(a)(1).

⁴⁰ *Id.* § 7006(5); UNIF. ELECTRONIC TRANSACTIONS ACT § 2(8) (1999).

While E-Sign contains much of the same language as the UETA, there are some major differences between the two. Even as both acts place a greater importance on the intent of the signor to be bound, only the UETA clarifies the issue as to whom the signature will be attributed.⁴¹ While under E-Sign the issue of attribution could be inferred from the intent to assent to the terms of the document, the UETA clearly spells out how attribution is determined. In section 9, the UETA says that an electronic signature is attributed to a person if it was the act of the person.⁴² While proving the act of a person will still require timely litigation to determine the signor's execution from the surrounding circumstances,⁴³ the language of the UETA is still more clear and determinant than E-Sign with respect to attribution.

Unlike the UETA, E-Sign excludes notices of foreclosure under a mortgage or lease from being legally valid in the form of an electronic document.⁴⁴ This means that under E-Sign an electronic mortgage may be the subject of a foreclosure proceeding, and can further be deeded away electronically at the close of the foreclosure sale, but the notices to the proper parties must be made using the traditional paper documents.⁴⁵

The UETA also provides an option to correct or disregard inadvertent changes or errors in electronic contracts.⁴⁶ This can be seen as a significant advantage for those who make careless mistakes when completing contracts. For instance, in an automated transaction, if a buyer intends to pay \$150,000 for a piece of property, but by mistake enters

⁴¹ Patricia Brumfield Fry, *Why Enact UETA? The Role of UETA After E-Sign*, <http://www.nccusl.org/Update/Docs/Why%20Enact%20UETA.asp> (last visited Mar. 12, 2009).

⁴² UNIF. ELECTRONIC TRANSACTIONS ACT § 9.

⁴³ Fry, *supra* note 41.

⁴⁴ E-Sign, 15 U.S.C. § 7003(b)(2).

⁴⁵ Ewan & Ladd, *supra* note 22, at 14.

⁴⁶ UNIF. ELECTRONIC TRANSACTIONS ACT § 10.

\$1,500,000, section 10 of the UETA provides a means whereby the buyer may avoid the affect of the contract to pay \$1,500,000 if the buyer was not given a chance to correct the mistake. On the contrary, E-Sign does not address situations in which mistakes are made.

The UETA is a much more determinative act. It further clarifies legal consequences to specific actions that E-Sign otherwise leaves open ended. E-Sign leaves a lot of unanswered questions that would require thousands of dollars in litigation to determine an outcome. The specifications in the UETA create a more defined picture of what is required for electronic mortgage transactions to satisfy the relevant statute of limitations.

E-Sign does provide consumers with an additional right that is not found in the UETA. Under E-Sign a consumer must give informed consent to the use of electronic documents and signatures before they may be used in any dealings with the consumer.⁴⁷ While this might first seem to give added security to consumers,⁴⁸ just requiring informed consent to be able to use electronic documents instead of paper documents falls far short of serving as security. Requiring consumer consent does not change whether a transaction is secure or not. All it does is provide the consumer with the option of using the old-fashioned, but familiar paper documents or venturing into the electronic revolution and using a speedier process.⁴⁹

It has been suggested that the consumer consent requirement of E-Sign empowers the consumer to withhold his or her consent until the mortgage company uses a specific technology that the consumer feels is safer.⁵⁰ However, this is not a practical reality because

⁴⁷ E-Sign, 15 U.S.C. § 7001(c).

⁴⁸ O'Brien, *supra* note 20, at 527.

⁴⁹ An interesting question that is beyond the scope of this paper is if the informed consent provision in E-Sign would still apply when the UETA preempts E-Sign as authorized in § 7002.

⁵⁰ Wittie & Winn, *supra* note 9, at 300.

most consumers will not realize the difference between each type of electronic signature, nor would their withholding of consent cause the mortgage company to incorporate a different technology than is otherwise used as the company standard. The mortgage and recording companies who now incorporate electronic transactions into their daily business have already spent countless hours and dollars to determine the most appropriate technology to use in order to provide the maximum protection and convenience to their customers. The cost of incorporating a new technology is so great that it would not be as profitable for a mortgage company, and would greatly increase the cost to the consumer, if such a huge infrastructural change were to be made in a mortgage company's transactional procedures to provide a choice to the few consumers who might know enough about each technology that they could make an informed and meaningful decision as to which one they would prefer.

Furthermore, E-Sign's rule of consumer consent is a negative rule that says that a consumer is not required to use or accept an electronic mortgage or recording unless consent is given.⁵¹ Therefore, it is possible for a mortgage company to carry out an electronic transaction with a consumer absent consent, so long as the consumer does not object to completing the transaction through electronic means.⁵² This is because even though an electronic transaction is not *required* absent consumer consent, the electronic transaction is not *precluded* absent the consumer's consent either.⁵³ Moreover, the consumer's consent can be inferred by his or her actions.⁵⁴ Therefore, even the mere use of electronic means to carry out the transaction or the exhibition of any other behavior consistent with acceptance of an

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

electronic transaction would prove that the consumer impliedly consented and intended to complete the transaction electronically.⁵⁵

While E-Sign has dedicated more words within its statute to provide for consumer consent, the practical differences in applying E-Sign's provisions, as opposed to the UETA, for an e-mortgage will likely be small or nonexistent.⁵⁶ This is because the UETA requires that each of the parties to the electronic transaction must have agreed to use electronic means to conduct the transaction.⁵⁷ While the UETA is not as explicit in its statutory language, the Official Comments of the UETA indicate that the "critical element" to finding that a party agreed to use an electronic mortgage is "the intent of a party to conduct a transaction electronically," and such intent may be "determined from the context and surrounding circumstances, including the parties' conduct."⁵⁸ Therefore, with regard to consent, both the UETA and E-Sign would be applied similarly.

C. The URPERA

The ability to search a real estate title electronically greatly reduces the time and expense of searches. However, electronic title searches have not yet progressed very far because, until recently, many states had statutes that required conveyance documents to be written on paper with an original signature before they could be recorded.⁵⁹ Therefore, many recorders' offices do not allow electronic documents to be recorded in the public record.⁶⁰ The UETA and E-Sign were not sufficient to address this problem in some states because the

⁵⁵ *Id.*

⁵⁶ Wittie & Winn, *supra* note 9, at 300.

⁵⁷ UNIF. ELECTRONIC TRANSACTIONS ACT § 5(b) (1999)

⁵⁸ *Id.* § 5(b). cmt. 3, 4.

⁵⁹ Ann M. Burkhart, *Real Estate Practice in the Twenty-First Century*, 72 MO. L. REV. 1031, 1072 (2007).

⁶⁰ *Id.*

state laws had recording requirements of written paper documents. Such clauses were statute of fraud provisions that had to be specifically addressed and changed, which neither the UETA nor E-Sign had done.⁶¹ In addition, the UETA and E-Sign only addressed "transactions," and many states did not classify recording land documents in the county registry as a transaction.⁶² Another problem with the conversion to electronic recording is that the recording system consists solely of compiling and organizing old documents for future reference and the vast number of these antiquated documents and initial investment for converting all those documents to a format that is available online is costly and time consuming.⁶³

To eliminate the problem of state laws prohibiting the acceptance of electronic documents for recording, the National Conference of Commissioners on Uniform State Laws created the Uniform Real Property Electronic Recording Act (URPERA).⁶⁴ This model act is quickly being accepted by the states. Currently, 20 states have enacted the URPERA.⁶⁵ This is a sharp increase from the six states that had adopted it as of a year ago.⁶⁶ Moreover, five more states are currently considering the bill this year.⁶⁷ While the initial cost and time investment is expensive, title searches and state governments are finding that in the long run electronic records make title examination and the storing of records more cost efficient.⁶⁸

⁶¹ UNIF. ELECTRONIC TRANSACTIONS ACT prefatory note.

⁶² Wittie & Winn, *supra* note 9, at 300.

⁶³ Burkhart, *supra* note 59, at 1070.

⁶⁴ UNIF. ELECTRONIC TRANSACTIONS ACT prefatory note.

⁶⁵ A Few Facts, *supra* note 31.

⁶⁶ Burkhart, *supra* note 59, at 1072.

⁶⁷ A Few Facts, *supra* note 31.

⁶⁸ Burkhart, *supra* note 59, at 1073.

In addition to bridging the gap between state laws that require paper documents and the UETA which gives legal validity to electronic documents, the URPERA has two other far reaching goals.⁶⁹ It provides standards for recording offices to follow to facilitate the most effective use of electronic recording.⁷⁰ It also requires state wide standards to be set for recording offices in each county.⁷¹ By unifying the standards in each county in a state, the URPERA sets the ground work for future efforts of states to unify the records of each county recording office into one single state wide database⁷² that would be accessible from any off-sight location.⁷³

The utilization of electronic records is making title examination easier and more efficient because the public records are available off-site and enable more sophisticated searches.⁷⁴ Traditionally, using written documents, title searches consisted of creating a chain of title to determine the quality of title held by the party wishing to convey real estate. Because of the traditional structural organization of the paper documents, for the most part a chain of title could only be discovered through successive grantors. However, as counties are converting their records to an electronic database these documents can now be indexed by grantees and the specific property as well. By providing the ability to perform title searches through grantees or through the specific property, many of the past problems created by late, early or non-recorded deeds can be solved.

⁶⁹ Uniform Law Comm'rs, Why States Should Adopt the Uniform Real Property Electronic Recording Act, http://www.nccusl.org/Update/uniformact_why/uniformacts-why-urpera.asp (last visited Mar. 12, 2009) [hereinafter Adopt the URPERA]. Some scholars are of the opinion that the UETA is sufficient, absent the URPERA, to allow recording offices to accept electronic records for recording. Ewan & Ladd, *supra* note 22, at 14. *But see* Op. Cal. Atty. Gen. No. 02-112 (Sept. 4, 2002).

⁷⁰ Adopt the URPERA, *supra* note 69.

⁷¹ *Id.*

⁷² Whitman, *supra* note 1, at 265.

⁷³ Burkhart, *supra* note 59, at 1073.

Furthermore, the process for recording documents electronically is, on average, faster than the old-fashioned way.⁷⁵ When documents are ready for recording, the clerk for the title company or law office logs onto the e-recording company's web site. The clerk then scans the documents and sends them electronically to the county recorder's office. The electronic document is then placed in the appropriate recording queue until the county recorder's staff reviews and verifies that the document meets the legal standard. If approved, the electronic document is electronically stamped and recorded and available to view on the recorder's web site immediately. If the document is not approved then the entity which filed the document is promptly advised electronically.⁷⁶

There are essentially three levels of electronic documents that are prepared and recorded in the public land records.⁷⁷ On the first level, the document is prepared on paper and signed using wet ink.⁷⁸ This physical document is then taken to the recorder's office where it is scanned and placed in the database.⁷⁹ The second is prepared in the same way, but in addition to the paper document the necessary data used to create an index entry is also delivered with the document.⁸⁰ While the recorder still must take the time to scan the document into the database, this second model of electronic documents helps to save the recorder's time from having to create the index entry because the document already has one. The third starts in electronic form, is signed electronically, acknowledged electronically,

⁷⁴ *Id.*

⁷⁵ David W. Moore, *Serving Today's E-Consumers*, TITLE NEWS, July/Aug. 2006, available at http://www.alta.org/publications/titlenews/06/04_04.cfm.

⁷⁶ *Id.*

⁷⁷ Ewan & Ladd, *supra* note 22, at 9.

⁷⁸ *Id.*

⁷⁹ *Id.* at 10.

⁸⁰ *Id.*

transmitted electronically, and returned electronically.⁸¹ This third type is never converted to paper form.⁸² Moreover, since the document is purely electronic the information needed to create the index entry is imbedded in the document⁸³ thereby saving the recorder's time once again.

This legal framework of the UETA, E-Sign and the URPERA has sparked an electronic revolution. The landmark event occurred in 2000 when this country's first truly paperless real estate transaction was completed in Florida in less than five minutes.⁸⁴ It far eclipses the effect that any past technological advancement has had on the industry.⁸⁵ Title and escrow companies are now able to provide services outside of their local regions and compete on a much larger economic scale.⁸⁶ However, this revolution is still young, and while the UETA, E-Sign, and the URPERA *authorize* the use of electronic signatures and documents in place of paper documents and wet-ink signatures, they do not mandate anyone to use electronic documents and signatures.⁸⁷ Therefore, the majority of the country still does not use them. As of 2003 only 554 of 3600 registries were publicly available on the Internet.⁸⁸ Only 271 of these counties out of 3600 (7.5%) even accept electronic documents

⁸¹ *Id.*

⁸² *Id.*

⁸³ Ewan & Ladd, *supra* note 22, at 10.

⁸⁴ Ellen Scheppe, County Recorders' Track to E-Recording, TITLE NEWS, July/Aug. 2002, *available at* http://www.alta.org/publications/titlenews/02/04_01.cfm; Lew Sichelman, *Paperless Mortgage and New Home Closing Takes Place in Florida*, REALTY TIMES, July 27, 2000, http://realtytimes.com/rtpages/20000727_paperlesstrans.htm.

⁸⁵ Moore, *supra* note 75. The development of faxes and e-mails have reduced the need for delivery services. *Id.*

⁸⁶ *Id.*

⁸⁷ O'Brien, *supra* note 20, at 527.

⁸⁸ François Brochu, *The Internet's Effect on the Practice of Real Property Law: A North American Perspective*, J. INFO., L. & TECH., Dec. 15, 2003, http://www2.warwick.ac.uk/fac/soc/law/elj/jilt/2003_2/brochu/. This does not take into account the many registries that are available on private local area networks such as St. Louis, Minnesota. *Id.*

for recording.⁸⁹ As of 2007 only 8.5% of residential mortgage loans were completed online, but this is expected to increase to 15% by the year 2009.⁹⁰ But while these numbers are relatively low, paperless processing is fast becoming the norm and customers are demanding more.⁹¹

III. Mortgage Fraud

Even though e-signatures are becoming more widely used in online lending, there are still some unanswered questions regarding their security.⁹² Furthermore, increasing news about loan fraud and identity theft helps to foster doubts and delay the progress of electronic mortgages.⁹³ This fear is not isolated to the use of e-signatures, but there is also a fear that online displays of publicly recorded documents would aid potential criminals by providing templates of actual wet-ink signatures that could be used to create forgeries of traditional signatures.⁹⁴

Mortgage fraud is on the rise, so much so that recent initiatives to combat mortgage fraud involve efforts from federal and state governments as well as state regulators.⁹⁵ Mortgage fraud is defined as making a material misstatement, misrepresentation or omission in a loan application that a lender or underwriter relies upon to fund, purchase or insure a loan.⁹⁶ It is becoming a common occurrence to read in the news of a new mortgage fraud

⁸⁹ Prop. Recorders Indus. Ass'n, List of Counties eRecording, <http://www.pria.us/CommitteeDocs/eRecordingCountiesList.pdf> (last visited Mar. 12, 2009).

⁹⁰ Burkhart, *supra* note 59, at 1069.

⁹¹ Moore, *supra* note 75.

⁹² O'Brien, *supra* note 20, at 539.

⁹³ Moore, *supra* note 75.

⁹⁴ Letter from William C. Thompson, Jr., to Governor David A. Patterson, RE: Program Bill No. 44 (A.10817/S.8143) (June 16, 2008), *available at* http://www.comptroller.nyc.gov/press/pdfs/06-16-08_Paterson-Foreclosure.pdf.

⁹⁵ *Mortgage Fraud: On the Rise*, REAL EST. L. REP., May 2006, at 6.

⁹⁶ *Id.*

heist that has been uncovered and is being prosecuted.⁹⁷ Mortgage fraud is perpetuated either to enable individuals to obtain real estate that they would otherwise be unable to purchase, or it is used to procure obscene profits.⁹⁸

Fraud for property can take form in three general ways. One way fraud for property is committed is when the borrower represents to the lender that the borrower will occupy the property so that the lender will offer a lower interest rate.⁹⁹ However, the borrower actually has no intent of occupying the home, but instead rents or attempts to rent it out.¹⁰⁰ Loan servicing staffs are discovering now that many of the defaulting loans are from applicants who stated an intent to occupy, but never did.¹⁰¹

A second scenario in which fraud for property is committed is when the buyer, undisclosed to the lender, borrows the down payment from the seller.¹⁰² The lender then loans the purchase money to the buyer who, after closing on the home, begins making a monthly mortgage payment to the lender and another payment to the seller.¹⁰³ This often results in a buyer who is high risk and would not otherwise qualify for both loans, overextending him or herself. Therefore, the risk of default increases for both payments.

⁹⁷ Tribune Staff, *State Orders Two Mortgage Firms Closed*, CHICAGO TRIBUNE, Nov. 25, 2008, at C22; Vanessa Blum, *Home Insecurity: Although the Housing Market Has Slumped, Mortgage Fraud Is Thriving. New Victims Are Owners Fighting Foreclosure*, SUN SENTINEL (Fort Lauderdale, Fla.), Nov. 23, 2008, at 1A; Anthony M. Destefano, *Sixteen Arrested in Mortgage Schemes*, NEWSDAY (Melville, N.Y.), Nov. 20, 2008, at A14; Snowe, *Whitehouse Introduce Bill to Strengthen FBI Investigations of White-Collar Crimes*, STATE NEWS SERV., Nov. 19, 2008.

⁹⁸ Carole Bullion, *Recognizing Mortgage Fraud*, TITLE NEWS, Mar./Apr. 2008, at 16.

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ MERLE SHARICK, JENNIFER BUTTS, MICHELLE DONAHUE & NICK LARSON, MORTGAGE ASSET RESEARCH INST., TENTH PERIODIC MORTGAGE FRAUD CASE REPORT TO THE MORTGAGE BANKERS ASSOCIATION 2 (2008) [hereinafter TENTH PERIODIC REPORT].

¹⁰² Bullion, *supra* note 98, at 16.

¹⁰³ *Id.*

Though fraud for property is still considered true mortgage fraud, it is not as damaging to lenders or the economy as fraud for profit.¹⁰⁴ This is true, partly because fraud for property makes up only 20% of all mortgage fraud,¹⁰⁵ but also because fraud for property does not necessarily result in a loss to lenders. While there is a higher risk that the perpetrator of fraud for property will default and ultimately cause a loss to the lender, the risk is not absolute. The perpetrator of fraud for property could still perform his duties on the loan without any blemish and ultimately pay back every penny of the loan.

Fraud for profit makes up the remaining 80% of mortgage fraud cases and can have catastrophic results.¹⁰⁶ It causes default rates to soar, leaving lenders with enormous financial losses. Homebuyers are stuck with homes they can neither refinance nor sell, and communities are left with a profusion of vacancies.¹⁰⁷ Many of these schemes take the form of fraudulent qualifications, flipping, or having two sets of settlement statements. Interestingly though, most fraud schemes for profit require cooperation or oversight by real estate professionals.¹⁰⁸ Sometimes even mortgage professionals do not understand the rules of mortgage lending as they attempt to perform their jobs.¹⁰⁹ In Florida, a mortgage company officer submitted two applications to a lender in the secondary lender market.¹¹⁰ The applications were for the same loan and had identical information except that the second

¹⁰⁴ *Id.*

¹⁰⁵ *Mortgage Fraud: On the Rise*, *supra* note 95.

¹⁰⁶ Bullion, *supra* note 98, at 17.

¹⁰⁷ *Id.*

¹⁰⁸ WILLIAM H. MATTHEWS, MERLE SHARICK, ERIN E. OMBA, CATHERINE B. MONTERO & D. JAMES CROFT, MORTGAGE ASSET RESEARCH INST., SEVENTH PERIODIC MORTGAGE FRAUD CASE REPORT TO THE MORTGAGE BANKERS ASSOCIATION 9 (2005) [hereinafter SEVENTH PERIODIC REPORT].

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

application stated an income greater than the previous application.¹¹¹ When the officer was questioned on the discrepancy he replied that he thought it was permissible to claim an inflated income if it was necessary to bring the ratios into compliance.¹¹²

The most general and widely abused type of defrauding that occurs to obtain profit is when a buyer's qualifications are misrepresented, such as employment history, income verification, credit reports, and bank balances.¹¹³ This is done so that the buyer will be approved for a loan.¹¹⁴ This misrepresentation can be made solely by the buyer, but often is coupled with the misrepresentation by a real estate agent or a mortgage broker.¹¹⁵ Sometimes these schemes incorporate asset rentals, which are companies that transfer money into a buyer's account so that the balance temporarily shows that the buyer has the assets to qualify for the loan.¹¹⁶ Fraudulent misrepresentations are often coupled with other types of fraudulent schemes which in turn make it difficult to initially spot the misrepresentation.¹¹⁷

Another type of mortgage fraud for profit can occur when a house is "flipped."¹¹⁸ Flipping consists of buying a home cheaply and then turning around and selling it for a profit. While not all forms of flipping are necessarily fraudulent, when it is coupled with a fraudulently inflated appraisal, it is illegal and can result in substantial financial losses for the buyer and the financial institution.¹¹⁹ In instances of fraudulent flipping, the perpetrator has usually set up the second transaction to sell to the unsuspecting buyer even before the first

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Bullion, *supra* note 98, at 17.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ SEVENTH PERIODIC REPORT, *supra* note 108, at 9.

¹¹⁸ Bullion, *supra* note 98, at 17.

transaction to initially buy the property has closed.¹²⁰ The perpetrator then uses the money from the second transaction to purchase the land in the first transaction.¹²¹ There are other instances as discovered in Ohio where nine real estate investors and title agents were involved in a flipping ring where they bought property and then used fabricated appraisals to sell the properties only a week later for values up to twice the purchase price.¹²²

Fraud for profit can also take the form of the seller and buyer creating two sets of settlement statements.¹²³ The first settlement statement is prepared with the actual sales price and then given to the seller to sign.¹²⁴ The second settlement statement however contains a price much higher than the actual sales price.¹²⁵ This second settlement statement is then given to the lender so that the buyer may take out a loan much larger than the sales price.¹²⁶ After the sale closes the excess funds are then distributed between the conspirators.¹²⁷ This scheme defrauds the lender because after the deal closes the lender does not have a fully secured mortgage on the loan. Therefore, if the buyer later defaults on the mortgage, the lender does not have full recourse to satisfy the debt.

Mortgage fraud is fast becoming the largest white collar crime in America.¹²⁸ It is used by companies and individuals when they are desperate to "maintain lifestyles,

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² SEVENTH PERIODIC REPORT, *supra* note 108, at 9.

¹²³ Bullion, *supra* note 98, at 17.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 16.

livelihoods and bottom lines."¹²⁹ A problem that lenders have is that not every discovered instance of fraud is worth rectifying in litigation. All too often the cost of the time that is put into investigating and then paying the legal fees is equal too or greater than the amount lost by the lender - especially when the fraud was for property. Moreover, even when the damages outweigh the cost of litigation, often the perpetrators are not solvent enough to repay the damages that could be won. In the aggregate, these unlitigable cases amount to millions of dollars lost by lenders.

IV. Relationship Between E-Mortgages, E-Recording and Land Fraud

To date there have been no reports of forged or altered electronic documents with respect to e-recording.¹³⁰ This does not mean that security is not an important issue in relation to e-recordings. The fear and concern that is so pervasive among the general public is ample evidence that security has great importance with respect to e-recordings.¹³¹ However, it is an issue that is being addressed and satisfied within the e-recording industry.¹³² The fear factor in e-recording has provided an excellent motivation for the Property Records Industry Association (PRIA) to anticipate possible breaches in security and establish standards that would prevent such breaches. These standards are some of the primary reasons why e-recording has been so reliable and trustworthy over the last 10 years.¹³³

Fears that e-recorded documents containing copies of consumers' wet ink signatures are also available online for potential criminals to copy and forge, can also be eliminated as

¹²⁹ TENTH PERIODIC REPORT, *supra* note 101, at 10.

¹³⁰ Ewan & Ladd, *supra* note 22, at 14.

¹³¹ *Id.*; Whitman, *supra* note 1, at 256; O'Brien, *supra* note 20, at 539.

¹³² Ewan & Ladd, *supra* note 22, at 14.

¹³³ *Id.*

e-recording becomes even more common place and people start using encrypted digital signatures on the real estate documents that are recorded. This would eliminate the fear of having public postings of signatures online. Moreover, the speed by which a document is recorded reduces the chance that the document could be intercepted and altered.¹³⁴

But while the electronic overhaul of recording has enjoyed sufficient security, the mortgage industry has continued to suffer through an ever increasing epidemic of fraud.¹³⁵ Fortunately, this epidemic does not seem to have a positive correlation with the implementation of electronic mortgages. In fact, Georgia, one of the four states that have not enacted the UETA, became the highest ranked state for mortgage fraud in the year 2003.¹³⁶ In this same year, forty-four states had already passed the UETA, forty of which had been accepting electronic mortgages since 2001.¹³⁷

Additionally, Minnesota, who originally adopted the UETA in 2000¹³⁸ amended their legislation to exclude real estate transactions from its application.¹³⁹ Coincidentally, in the years 2002 and 2003 Minnesota had such a low number of reports, that its mortgage fraud index was not even included in national figures.¹⁴⁰ However, since having excluded real estate documents from the application of the UETA, Minnesota has climbed into one of the top ten states for reported mortgage fraud.¹⁴¹

¹³⁴ Whitman, *supra* note 1, at 265.

¹³⁵ See *supra* text accompanying notes 92-129.

¹³⁶ TENTH PERIODIC REPORT, *supra* note 101, at 2.

¹³⁷ UNIF. ELECTRONIC TRANSACTIONS ACT References and Annotations, Table of Jurisdictions Wherein Act Has Been Adopted (1999).

¹³⁸ *Id.*

¹³⁹ Witte, *supra* note 32, at 329.

¹⁴⁰ MERLE SHARICK, JENNIFER BUTTS, MICHELLE DONAHUE, NICK LARSON & D. JAMES CROFT, MORTGAGE ASSET RESEARCH INST., NINTH PERIODIC MORTGAGE FRAUD CASE REPORT TO THE MORTGAGE BANKERS ASSOCIATION 7 (2007).

¹⁴¹ *Id.*

Moreover, in the case of South Carolina there appears to be a negative correlation between mortgage fraud and electronic mortgages. In the year 2002, South Carolina was second only to Georgia in the amount of mortgage fraud per mortgage transaction.¹⁴² However, since it passed the UETA and began allowing e-mortgages, South Carolina has consistently seen its occurrences of mortgage fraud drop.¹⁴³ As of 2005, only two years after enacting the UETA, South Carolina had dropped to nineteenth among the states for mortgage fraud.¹⁴⁴

The three cases of Georgia,¹⁴⁵ Minnesota, and South Carolina, are not telling of the relationship between mortgage fraud and e-mortgages. One just has to look at the cases of California, Nevada, and Virginia to find cases where mortgage fraud steadily has increased since the passage of the UETA.¹⁴⁶ What these cases do demonstrate is that, even if electronic real estate transactions do not provide more security than paper transactions, they certainly do not provide less. This negates the legitimacy of the fear factor that has been a major force against the transition into the electronic revolution.

Furthermore, even though the relationship between real estate transactions and fraud is not as determinative as a positive or negative correlation between e-mortgages and mortgage fraud, e-mortgages still have an effect on fraud. There is no doubt that allowing land recordings and mortgages to go digital helps to speed the process of real estate

¹⁴² MERLE SHARICK, JENNIFER BUTTS, MICHELLE DONAHUE, NICK LARSON & D. JAMES CROFT, MORTGAGE ASSET RESEARCH INST., EIGHTH PERIODIC MORTGAGE FRAUD CASE REPORT TO THE MORTGAGE BANKERS ASSOCIATION 4 (2006).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ Georgia still has not passed the UETA, but since 2003 their fraud has dropped with respect to the rest of the states. This may have more to do with their recent enactment and enforcement of anti-mortgage fraud legislation than electronic transactions. *See Mortgage Fraud: On the Rise*, *supra* note 95.

¹⁴⁶ TENTH PERIODIC REPORT, *supra* note 101, at 4.

transactions.¹⁴⁷ This means that when a single perpetrator of fraud is able remain undetected in his or her illegal behavior, then a larger amount of fraud violations may be committed. Therefore, electronic transactions can facilitate criminals in committing a greater amount of fraud before they are caught. However, this does not mean that technology is the enemy.¹⁴⁸

This is because of the advent of identity risk management and data validation services which helps to verify the borrower, vendor, and employees before the credit approval process even begins.¹⁴⁹ One reason these validation services have not worked as efficiently in the past is because of subprime lending. In subprime lending the amount of information gathered to help identify the borrower was reduced, but in order for this technology to work as efficiently as possible it is necessary to obtain all of a borrower's financial information.¹⁵⁰ However, as subprime lending has quickly become a thing of the past, moving to e-mortgages in conjunction with the use of identity risk management technology should prove beneficial and eliminate fraud for property. This will not have much affect on fraud for profit, because fraud for profit is a white collar crime perpetuated by real estate insiders. It will continue despite the use of e-mortgages or paper mortgages.

V. Conclusion: Do the Benefits of E-Mortgages and E-Recordings Outweigh the Costs?

The benefits that come with electronic mortgages and electronic recording are faster service and additional security protections against fraud for property. While electronic transactions have not, as of yet, provided an end to fraud for profit, they do provide electronic signatures which impose more complex security barriers that make it harder for

¹⁴⁷ *Id.* at 2

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*; see *Interthinx Identifies Potential Collusion in Mortgage Applications*, VERTICALNEWS.COM, Nov. 24, 2008, <http://investment.verticalnews.com/articles/1192581.html>.

¹⁵⁰ TENTH PERIODIC REPORT, *supra* note 101, at 2.

criminals to duplicate the e-signature. While these barriers are penetrable, a conversion to electronic real estate transactions opens up a vastly unexplored field of technology that can be used to continuously improve the security of e-signatures. It may appear that this electronic conversion would simply reduce transactional security to a mere technological rat race between those working to increase security and the criminals who seek to penetrate it. However, the field of electronic security does provide answers and create further protection for real estate transactions that previously were unavailable. Furthermore, it is of considerable importance that there has been no reduction in the security of real estate transactions since the implementation of the Electronic Revolution.

The most common concern with respect to the recent legislative advancements of e-mortgages and e-recording is that if someone is able to duplicate and steal an individual's electronic signature then the same could do serious financial harm to the individual who was robbed of the e-signature and to numerous lenders before the fraudulent mortgages and conveyances perpetuated through the use of the stolen e-signature were finally detected. However, signature duplication has been a concern even prior to e-mortgages and e-recordings. Identity thieves, absent the use of e-mortgages and e-conveyances, can and do steal social security numbers and forge signatures in order to perpetuate mortgage fraud. This common act of fraud results in the same amount of damage to individuals and lenders under the traditional paper and ink system that governs the real estate market. Therefore, the answer to the security concerns of electronic real estate transactions is not to eliminate them, rather the answer is to embrace the Electronic Revolution and continue creating technological safeguards that will further ensure the safety of individuals, lenders, and the industry as a whole.

Because the security of real estate transactions is not diminished at any level as the industry converts to electronic signatures and documents, the only cost of the electronic conversion is the initial monetary investment that must be made. While this cost is great, it is greatly outweighed by the vast savings in time and money that occurs because of the speed with which electronic mortgages and recordings are completed and the elimination of the cost of paper and travel. These benefits allow for a relatively quick recovery of the initial cost of converting the industry to a technological based system and would thereafter only yield future monetary profits.