November 21, 2011

Are Your E-mails Binding Contracts?

The constant use of e-mails in daily business transactions can obscure our appreciation of the unintended effects of this form of "writing." This article addresses the issues to be aware of in e-mail communications in connection with real estate transactions, particularly whether and when an informal e-mail or reply can be construed as forming a binding contract, which is an important issue to be considered in all types of business transactions.

Electronic Transactions Statutes

In 2000, the U.S. Congress passed the Electronic Signatures in Global and National Commerce Act (E-SIGN).[1] following suit, most states passed corresponding electronic transactions acts in the early 2000s, with some states passing these laws prior to 2000 and others passing such laws several years later. All states now have some form of electronic transactions act. The Connecticut Uniform Electronic Transactions Act (CUETA) went into effect October 1, 2002.

E-SIGN provides that a signature, contract or record to any interstate or foreign transaction may not be denied legal effect, validity or enforceability solely because it is in electronic form or an electronic record or electronic signature was used in its formation. [2] E-SIGN specifically pre-empts state laws that are inconsistent with it, while exempting certain contracts or records from its purview, including wills, codicils, trusts and matters in family law (see E-SIGNfor a complete list). [3]

CUETA and E-SIGN

CUETA seeks to "not supersede, modify or limit the provisions of [E-SIGN]."[4] It uses language similar to E-SIGN's regarding the validity of a contract, signature or record in electronic form and further clarifies that where the law requires a writing or signature, an electronic form satisfies such law. In fact, it specifically asserts a purpose of "facilitat[ing] electronic transactions" and seeks "[t]o be consistent with... the continued expansion of such practices" by effectuating a "general purpose to make uniform the law with respect to the subject ...inclusive, among states enacting such law[s]."[5]

Statute of Frauds and the Courts

In real estate transactions, state statute of frauds legislation requires that a writing, signed by the party or the agent of the party to be charged, evidence the sale of real property or any interest in or concerning real property. While E-SIGN and the state-specific electronic transaction statutes do not specifically define a "writing" pursuant to the statute of frauds, courts analyzing this issue have focused not on whether an e-mail is sufficiently a writing (this usually being summarily assumed or a brief reference to the electronic statutes made), but rather whether the elements of contract formation are present.[6] Courts have accepted e-mails as a writing and the typed signature at the end of the e-mail as a sufficient signature for the purposes of the statute of frauds, even where the e-mail was composed prior to electronic transaction legislation.[7] Whether an e-mail with no typed signature but simply an automatic signature block or a reply message containing neither would be determined to sufficiently contain a "signature" is less clear.[8]

In determining whether an e-mail or e-mails formed a contract, courts scrutinize whether the e-mail contains the essential terms, whether it shows a final offer and acceptance with the intent to be bound and not merely a continuing negotiation, and whether it comes from the party to be charged.[9] Essential terms for the sale of real property include the parties, a clear description of the subject property and the terms of payment, including a basis for determining the total purchase price.[10] In determining whether a writing shows an intent to be bound, courts look at the language used, circumstances surrounding the transaction and the purpose of the parties.[11] Courts have held that a series of writings, including a series of e-mails, may be read together to satisfy the writing requirement, so long as the series when read together contain all essential terms of a

contract and the intent to be bound.[12] Significantly, one federal court has held that not all documents must be signed, so long as their contents clearly show that they are related.[13]

Under certain circumstances, agents such as brokers or attorneys also have the ability to form contracts through e-mail. In such a situation, courts consider the same factors mentioned above while also analyzing the agent's authority to bind the principal.[14] Even in the absence of an express authority, an agent's e-mail has the same potentially binding effect, particularly where the principal is copied on the e-mail and fails to negate the agent's authority.

As demonstrated by the case law, courts, including Connecticut courts, regard an e-mail as a "writing" sufficient to satisfy the statute of frauds. Courts appear ready to regard the typed signature at the end of an e-mail as a "signature" with the intent to authenticate. An informal reply e-mail containing no typed signature may, nonetheless, be taken together with the sum of documents and e-mails, particularly an e-mail chain, that contain the essential terms and requisite signatures. Therefore, e-mails negotiating real estate transactions have the potential to create a binding contract where one may not have been intended.

Best Practices

When composing or responding to e-mails, it is important to consider whether the e-mail or a series of e-mails could be construed as forming a contract - specifically, whether such e-mails contain an offer or acceptance with the intent to be bound and the essential terms described above and whether a typed signature, including just the automatic signature block, appears at the end of the e-mail. Policies and practices emphasizing the use of contingencies and qualifiers in e-mails can prevent the creation of unintentional contracts. For example, phrases such as "subject to further negotiations," "subject to client approval," "not binding until fully executed by client," or "contingent upon receipt of fully executed copy and deposit" specifically demonstrate an intent *not* to be bound. Conversely, summary responses such as "correct," "accepted," or "agreed" should be avoided, because these can be construed as acceptance, especially in situations where previous e-mails contain the essential terms and the requisite signatures. While e-mail communications now occur as a matter of course, parties must be cognizant of unintended consequences.

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[1] 15 U.S.C.S. 7001-7006 (2011).

[2] *Id*. at 7001(a).

[3] *Id*. at 7002 and 7003.

[4] Conn. Gen. Stat. 1-286 (2011).

[5] *Id*. at 1-271 (2011). Courts have provided a similar reasoning in enforcing contracts formed through e-mail. *Naldi v. Grunberg*, 80 A.D.3d 1, 11-12 (N.Y. App. Div. 1st Dep't 2010) (citing the legislative intent of encouraging electronic commerce of the New York Electronic Signatures and Records Act adopted in 1999).

[6] *Elec. Wholesalers, Inc. v. M.J.B. Corp.*, 99 Conn. App. 294, 304 (App. Ct. 2007) (referencing the e-mail and accepting it as a writing with no analysis); *Naldi*, 80 A.D.3d at 3 (holding that an e-mail will satisfy the statute of frauds so long as its contents and subscription meet all requirements of the governing statute); *Shattuck v. Klotzbach*, No. 01-1109A, 2001 Mass. Super. Lexis 642, at *4-6 (Super. Ct. Dec. 11, 2001) (e-mails assumed to be a writing with no analysis provided).

[7] *Naldi*, 80 A.D.3d at 12-13 (concluding that even in the absence of any statutes, a "writing" and "subscribed" should be construed to include, respectively, e-mail and electronic signatures); *Shattuck*, 2001 Mass. Super. Lexis 642, at *6 (typewritten signature at the end of an e-mail indicates the intent to authenticate).

[8] *See Naldi*, 80 A.D.3d at 16 (refusing to reach the question of whether the automatic signature block would qualify as intentional subscription); *Shattuck*, 2001 Mass. Super. Lexis 642, at *7 (discussing that a typewritten signature is intentionally and deliberatively typed); *Fedder Dev. Corp. v. FB Hagerstown, LLC*, 181 Fed. Appx. 384, 389 (4th Cir. 2006) (refusing to reach the question of whether the automatic signature block would qualify as a "signature").

[9] *Cmty. Baptist Church v. Pine Brook Sch., Inc.*, No. NNHCV095032172S, Conn. Super. Lexis 3497, at *4-5 (Super Ct. Dec. 28, 2009); *Naldi*, 80 A.D.3d at 3.

[10] *Cmty. Baptist Church,* 2009 Conn. Super. Lexis 3497, at *5.

[11] *Cmty. Baptist Church,* 2009 Conn. Super. Lexis 3497, at *4-9 (concluding no contract had been formed as each party had conditioned the contract on the fulfilling of certain conditions that were never met); *Fedder Dev. Corp.*, 181 Fed. Appx. at 389 (concluding no contract had been formed, as the contract was expressly conditioned on receipt of signed agreement and deposit).

[12] *Elec. Wholesalers, Inc.*, 99 Conn. App. at 302-03 (a series of related writings containing the essential terms and conditions may, taken together, satisfy the statute of frauds); *Shattuck*, 2001 Mass. Super. Lexis 642, at *9 (multiple writings satisfy the statute of frauds if when read together they contain all material terms and are authenticated).

[13] *Toghiyany v. Amerigas Propane, Inc.*, 309 F.3d 1088, 1091 (8th Cir. 2002) (stating that only one document needs to be signed so long as the others are significantly related to it). *See also Elec. Wholesalers, Inc.*, 99 Conn. App. at 302-03 (whether a mixture of signed and unsigned writing may be taken together to establish a contract depends on the circumstances of each case).

[14] *See Am. Iron & Metal Co. v. U.S. Ferrous Trading Div.*, No. 3:06cv01538, 2007 U.S. Dist. Lexis 27847, at *18 (D. Conn. Apr. 13, 2007) (both the sender's and recipient's e-mails were readily identifiable as agents of the parties); *Co-Options, Inc. v. News Am. Mktg. Instore*, No. X01CV000163095S, 2002 Conn. Super. Lexis 613 at *15-16 (Super. Ct. Feb. 27, 2002) (contract held binding where agent sent e-mail confirming essential terms of contract and principal copied on e-mail message failed to negate agent's authority); *Fedder Dev. Corp.*