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Be Careful What You Type: The Evolving Role of Emails in Contract Litigation

With a few swift clicks of the keyboard, you just landed the deal of your career – a multi-year, multi-million dollar contract. The accomplishment feels electric, and congratulations from your coworkers abound. Unfortunately, the person on the other end of that email chain did not intend for you to land the deal, much to your dismay. The two of you had been negotiating via email for several weeks, and it seemed natural to seal the deal that way. But have you? Will your emails hold up under scrutiny from the board or, worse, a judge? And how could you have ensured your intent to contract was clear and that both of you were agreeable to contracting via email in the first place?

Contracting by email is nothing new to most general counsel. The E-Signature Act, applicable to interstate dealings, has been in effect since 2000, and many states and countries followed soon thereafter. What is new, however, is the increasing willingness with which courts are finding validity in contracts formed via email, often with parol evidence, from employees charged with the task to negotiate, but not necessarily sign, them.

Without proper checks and measures in place, you could find your company in court litigating over not just who meant what in an email, but whether a contract exists at all.

Signatures: From Pen and Paper to Keystrokes and Inboxes

The contract signature requirement is older than our U.S. common law. Beginning in 1677, and by some accounts earlier, with an act of English parliament, certain contracts were required to be in writing and signed by the party against whom enforcement was sought, in order to be enforceable.[1] These included contracts for marriage, for services that by their terms required performance for more than one year, agreements to transfer interests in real estate, wills and executor contracts, sureties and contracts for the sale of goods over a certain value, to name a few. Many states codified the rule.[2]

However, over time, a number of exceptions developed. In most states, only the material terms of a contract must be in writing. For the sale of goods, later codified in the Uniform Commercial Code, this means quantity, as all other terms can be determined using a reasonable "gap filler."[3] For services, this means the identification of the parties, the service and timing sufficient for a court to determine the parties' intent.[4] Thus, not all terms need be in writing or, if in writing, signed by either party.

A number of legal defenses also developed to match commercial realities. These include admission by the party opponent,[5] partial performance consistent with the terms of the alleged contract and promissory estoppel.[6] Additionally, between merchants – that is, parties charged with specialized knowledge and/or regularly dealing in the goods at issue – a letter of confirmation from one merchant to which the other, having reason to know of its contents, fails to object within a reasonable time (typically ten days).[8]

With the advancement of electronic communication, it was only natural for

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contract communication to advance electronically, as well. There is, interestingly, a long history of contracting electronically in the U.S. In fact, one of the very first means of negotiating was by morse code, another was via telegraph and telegram, and, when phone lines laced the country, it was only a matter of time before fax lines, and faxed signatures, were to follow.[9]

It seemed uncontroversial to the National Conference of Commissioners of Uniform State Laws, then, to codify what had been assumed – electronic signatures, like faxed signatures, are a mark intended to identify the sender and, thus, should be given the same effect.[10] E-SIGN went into effect in October 2000 to affirm that contracts with electronic signatures may not be denied legal effect.[11] The substantive contract law applies to the case, and the Act renders electronic signatures as good as ink ones.

The Conference proposed the UETA for states to enact, so that e-signature laws on the state level would be uniform. It works in unison with E-SIGN to bring contract formation into the modern area of transacting business by email. Perhaps this is why 47 states adopted the proposed law without significant changes, and the three that did not – New York, Washington and Illinois – adopted similar laws within a few years of E-SIGN's enactment.

Internationally, the United Nations Convention on Contracts for the International Sale of Goods (CISG), though eliminating the merchant's unilateral contract rule and certain parts of the "knockout" rule for contract formation, is largely in accord and exists between 83 countries, at least 56 of them without any changes.[12]

In all three of these Acts, the traditional signature is replaced with any mark, symbol or sound intended to identify the sender.[13]

Where terms are not in writing, the court can glean the parties' intent, objectively, from the parties' course of dealings, course of conduct and course of performance, as well as the term's common usage in the parties' trade or industry. What is not stated explicitly, the court can find implicitly – and therein lies the problem.

While an email signature may not have been controversial, what has become controversial is the sometimes slippery slope to contract formation with a click of "SEND."

Contract Formation: E-Mails, Ambiguities and the Court

The swiftness with which contracts form via email can come as a surprise to parties who negotiate via email – even more for companies that hold employees out as having the authority to negotiate but not necessarily "seal the deal." And even more when they commit to an agreement but disagree upon unstated, or nonessential, terms. Here enters the court.

- *No Physical Writing? No Problem: Alliance Laundry Systems, LLC v. Thyssenkrupp Materials, NA.*[14] In this case, a buyer and a seller negotiated for the sale of steel by email. When the company failed to deliver the product, the buyer sued. The seller claimed no contract had been formed because the parties had no physical writing and did not agree to transact business electronically, as they must under the UETA. The court viewed the parties' emails and concluded that, as a "practical matter," if "the parties reached an agreement electronically, they will likely also show that the parties agreed to conduct the transaction by electronic means." The UETA "authorizes parties 'to agree' to conduct transactions by email and directs courts determining whether parties have so agreed to consider the 'surrounding circumstances, including the parties' conduct." Thus, the court can view email negotiations to determine whether parties, by their conduct, agree to contract electronically and, if so, what they agreed to do.

- *Interpreting Emails: Dana Limited v Grede Holdings*, CI 14-3963, Lucas County Court of Common Pleas, Ohio. In this automotive case, the buyer and the seller disagreed whether

they contracted for the sale of certain parts to build axles, despite an email confirmation between them stating simply that the buyer agreed to the seller's attached, unsigned, proposal. In addition to arguing their email exchanges were not a "signed writing," an argument the court quickly rejected, the seller claimed the email exchanges lacked essential terms one would typically find in an automotive supply agreement. In turning to the email chains, spanning several months, the court concluded the parties contracted. The court also used their email discussion to interpret terms, such as payment productivity, that the seller alleged were ambiguous in their email confirmation. While the parol evidence rule would preclude evidence of a contemporaneous or prior oral agreement, the rule did not preclude parol and unsigned evidence to establish the parties' intent.

Similarly, UCC §2-202 ("Final Written Expression: Parol or Extrinsic Evidence") states that agreed terms may not be contradicted by evidence or any prior agreement or of a contemporaneous oral agreement, but they may be explained or supplemented (a) by course of dealing or usage of trade[15] or by course of performance[16] and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement. Those, too, the court can glean from emails.

- *"Subscribed" Writings: Kloian v. Domino's Pizza*.[17] A cautionary case, here the applicable substantive law required agreements to settle lawsuits to be "subscribed," meaning signed at the bottom. While the court found the parties had signed their settlement electronically, because the purported agreement lacked a signature at the bottom of the document for the party against whom enforcement was sought, the agreement was unenforceable. This case serves as a reminder that the substantive law of contracts controls – the E-SIGN Act, the UETA and its counterparts merely render electronic marks signatures for substantive law purposes.

Tips to Avoid Litigation

There are a number of things companies can do to avoid an unwanted result.

- First, appoint a project champion. This person's job is to oversee all aspects of contract formation, from negotiation to documentation to gathering the appropriate signatures. This person may be a member of the legal group, who works behind the scenes or out in front, or a member of the business group, who leads negotiations. The point is to make one person responsible for speaking on behalf of the company when it comes to the particular contract at hand – rather than a number of people, any one of whom may incidentally contract.

- Review your Standard Terms and Conditions. Many of these are carry-overs from years past, and they may not specify whether an electronic signature constitutes a signature. If they are silent, then emails suffice.

- Require counter-signed documents to avoid the merchant's confirmation rule.

- Similarly, recite in each and every offer and counter-offer the UCC "mirror image" acceptance rule.

- If you desire formality, opt out of electronic signature contracts and require ink signatures. Parties are free to do so.

- If ink signatures are too cumbersome and time consuming, consider a verification software, such as cryptography, that requires use of passwords and unique identifiers to affirm the person electronically signing is, in fact, that person. Cryptography is the science of securing information. It is most commonly associated with systems that scramble information and then unscramble it.[18]

- And, finally, issue a litigation hold letter immediately upon notice of a potential contract dispute.

Many of those emails can be used to prove the existence of a contract, if signed, or the meaning of terms otherwise ambiguous, signed or unsigned. As the Second Circuit said in *Apex Oil Co. v. Vanguard Oil & Service Co.*,[19] a fax signature case equally applicable to email signatures, "[W]e recognize that we are permitting a substantial transaction to be consummated on fragmentary conversation and documentation. However, it is the practice in many fields to transact business quickly and with a minimum of documentation… Parties doing business with each other in such circumstances take the risk that their conflicting versions of conversations will be resolved to their disfavor by a fact-finder whose findings, even if incorrect, are immune from appellate revision." The more thorough your saved evidence in support of your contract, the less risk your company takes of an unfavorable ruling.

Otherwise, what seemed to be an easy and efficient way to land that deal could turn into a cumbersome, laborious court battle arguing who meant what in an email. P

1 'Charles II, 1677: An Act for prevention of Frauds and Perjuryes.', Statutes of the Realm: volume 5: 1628-80 (1819), pp. 839-42.

2 Cosgigan Jr., George P. (1913). "The Date and Authorship of Statute of Frauds". *Harvard Law Review* 26: 329 at 334–42.

3 See, e.g., ORC 1302.07.

4 See, e.g., *Jag Imperial, LLC v. Literski*, 2012-Ohio-2863 (Ohio Ct. App., Hamilton County, June 27, 2012).

5 Restatement (Second) of Contracts § 128.

6 Restatement (Second) of Contracts § 129.

7 Restatement (Second) of Contracts § 139.

8 UCC 2-201(2).

9 Singleton, S. (March 17, 1999). *Privacy Issues In Federal Systems: A Constitutional Perspective*.

10 *Alliance Laundry Systems, LLC v. Thyssenkrupp Materials*, NA, 2008 U.S. Dist. LEXIS 58985 (E.D. Wisc. Aug. 5, 2008).

11 Public Law 106-229, June 30, 2000 .

12 See full text at http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

13 See, e.g., *International Casings Group, Inc. v. Premium Standard Farms, Inc.* (2005).

14 2008 U.S. Dist. LEXIS 58985 (E.D. Wisc. Aug. 5, 2008).

15 See also UCC § 1-205.

16 See also UCC § 2-208.

17 733 NW2d 766 (2006).

18 You can learn more at www.w3.org/Signature.

19 760 F.2d 417 (2d Cir. 1985).