

## Client Alerts

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### Contractual Mutual Assent in an Email World

#### AUTHORS

Matthew T. McLaughlin

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*"Words, once spoken, can never be recalled."*

This sage guidance from Wentworth Dillon applies with equal force in the world of instant text communication where emails, once sent, can never be withdrawn. Lawyers and parties involved in negotiations of any stripe must be aware of recent and rapid changes to the law governing contract formation. With increasing frequency, courts are enforcing contracts created by the exchange of emails that are surprisingly informal and bear little indicia of having been signed or "subscribed." This commentary discusses a recent New York decision that broadcasts the sweeping changes that are afoot.

Legal education and practice remain rooted in the common expectation that parties to a contract have not committed to be bound until there is a signed or otherwise subscribed final agreement removing any doubt as to authenticity. Recent statutory shifts and judicial decisions have dramatically changed the landscape as seventeenth century doctrine collides with twenty-first century reality. Whereas courts formally required that certain types of agreements, such as settlement agreements, be evidenced by a written document signed by the parties, this cornerstone of contract law is eroding. Many courts, recognizing the rise of email as the main means of communication, hold that simply hitting "send" from an email address containing the name or "signature" block of the sender constitutes a subscription for the purpose of creating a binding agreement. This may have a noticeable effect on the language that lawyers place in and around their signature blocks. It will certainly have an effect on how lawyers negotiate settlement agreements by email.

A recent decision of the New York Appellate Division for the Second Department confirms that New York, like many sister states, follows the trend regarding the enforcement of agreements brokered in emails. In *Forcelli v. Gelco Corp.*, a claims agent for an insurance carrier negotiated with opposing counsel on the terms of a personal injury litigation settlement. These negotiations were conducted almost entirely by email. There appears to have been a meeting of the minds, a dollar amount was reached, and the claims agent happily concluded her email with "Thanks, Brenda Green." The carrier later reconsidered and argued that the Green email was not a binding settlement agreement. Against this tension, the Second Department confronted the question of whether, under **CPLR 2104**, the claims agent's act of typing her name at the end of an email constituted a "subscription" to the written statement required for an enforceable settlement agreement under New York law.

The Second Department in *Forcelli* surveyed existing New York law and found a strong foundation to build upon when enforcing agreements formed through emails. The First Department had held in *Williamson v. Delsener* that emails exchanged between parties containing their printed names in what we have come to call "signature blocks" constituted signed writings. Likewise, the Third Department in *Brighton Investment, Ltd. v. Harzvi*, agreed that an exchange of emails, without any formal act of signing, may give rise to an enforceable contract. The Second Department reasoned in *Forcelli* that because other courts had held that a mere automatic signature block in an email may constitute a subscription for a signature, therefore, where a party like Ms. Green has actually typed in her name, such an email message should be deemed a subscribed writing within the meaning of CPLR 2104, and so constitutes an enforceable agreement.

New York is not unique in its jurisprudence. The majority of states have adopted the **Uniform Electronic Transactions Act** (UETA), which provides that a "contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation" and that "[i]f a law requires a record to be in writing, an electronic record satisfies the law." Under the weight of UETA, diverse courts have held that emails, by virtue of the email signature block, or because the sender typed her name, or even because the name appears in the sender's "from" line, may create enforceable contracts under state law.

The days of signet rings, sealing wax, and now, even ink signatures, are past: one might be found to have signed or subscribed to an agreement by the seemingly inconsequential act of sending an email. Clients and attorneys who may still be unaware of the implications of this quickly evolving doctrine in contract law must be made aware that courts are finding final commitments and enforceable agreements in instances where, a decade ago, those same courts would deny the existence of an enforceable contract. Do not be surprised if we soon start seeing standard attorney signature blocks containing form disclaimers that the email is “not intended to and shall not constitute an electronic signature giving rise to a binding legal agreement,” or other leery words to that effect. Two decades ago, facsimile cover sheets began cautioning that the use of facsimile transmissions did not mean that the user agreed to legal service by facsimile. In the same manner, we should expect lawyers’ email signature blocks to contain caveats that the email shall not be binding unless the text language expresses that intention.