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"We talked, we emailed, but we never signed anything."

By Kevin Zeller

As lawyers, we often ask clients if they have already reached an agreement with a party with whom they are negotiating. The client's response is often similar to the above statement. The client assumes that because they never signed a tangible, paper contract, the parties do not have a binding agreement. Unfortunately, that is often not the case.

For centuries, courts all over the world have required that certain types of agreements be evidenced by more than a conversation, and that the agreement be reduced to written form in order to be enforceable. In the United States, this concept became known as the "statute of frauds." Most, if not all states recognize some sort of statue of frauds. Missouri has a typical statute of frauds framework, requiring that contracts involving marriage, guarantees of debt, real estate, and sales of goods governed by the Uniform Commercial Code,[1] must be memorialized in writing and signed by the party against whom enforcement is sought.

In the mid-90's, the rise of e-mail caused many questions for lawyers and lay-persons alike, regarding just what constituted "writing" and "signatures" for purposes of the statute of frauds. In response, most states enacted some form of the Uniform Electronic Transactions Act (the "UETA") in the early 2000's.[2] The UETA states that where any statute requires that an agreement be signed, an electronic signature is sufficient. Further, the UETA states that if the parties have agreed to conduct a transaction by electronic means, (i) a contract shall not be denied enforceability solely because an electronic record was used in its formation, and (ii) if a law requires a person to deliver information in writing, the requirement is satisfied if the information is sent in an electronic record. Despite the UETA, lawyers and judges still were not sure if e-mail discussions, negotiations, term sheets, and the like could be construed as a signed and written agreement under the statute of frauds.

Throughout the early 2000's, a number of courts held that, despite the UETA, e-mails did not constitute a written contract.[3] Over the last six or seven years, that has begun to change. In 2005, the Western Missouri U.S. District Court in *International Casings Group v. Premium Standard Farms*,[4] made the following important findings: (i) a string of e-mails between negotiating parties could be read to infer an agreement to conduct a transaction by electronic means, (ii) the e-mails could be read together to locate

[1] This is not an exhaustive list of agreements or documents that must be in writing under Missouri law.

[2] At the time of this writing, it appears that 49 states have adopted some form of the UETA.

[3] It must be pointed out that many of these courts reached their conclusions due to other contract law issues, such as a lack of meeting of the minds, failure to state key elements of the agreement, or clear indications the e-mails were "negotiation."

[4] 358 F.Supp.2d 863(W.D. Mo. 2005).

all the essential terms of the contract, and (iii) simply hitting "send" from an e-mail address containing the name of the sender constitutes a "signature" for purposes of the UETA and the statute of frauds.[5]

In *Crestwood Shops, L.L.C. v. Hilkene and Churchill in Crestwood, L.L.C.*, the Missouri Court of Appeals implicitly ratified the *International Casings Group* ruling in holding that an e-mail offering to terminate a lease, followed by acceptance of the termination via a reply e-mail, satisfied the statute of frauds. The interesting thing about this case is that the lease contained the following language:

> "Except as otherwise expressly provided herein, no subsequent alteration, amendment, change or addition to this Lease ... shall be binding upon Landlord or Tenant unless reduced to writing and signed by them.
>
> This Lease ... shall not be amended or modified except by a formal written instrument executed by both parties."

Hilkene, who desired the e-mails not be enforced and the lease continue, argued that because of the lease language above, the UETA was not applicable because the parties did not agree to transact electronically. The court disagreed and held that parties' actions subsequent to signing the lease clearly showed an agreement and intent to transact via e-mail, and that the e-mails were a written instrument that satisfied the statute of frauds under the UETA.

These cases both show that e-mail negotiations can create a valid contract, the e-mails will be considered a "written medium," and that one might be found to have "signed" simply by sending the e-mail. More importantly, the *Crestwood Shops* case makes clear that a tangible, paper contract, can be amended via an e-mail conversation, even if the original contract required any such amendment to be in "writing and signed."

This is not a new issue and is not solely a Missouri issue; in recent years, an increasing number of national commentators and other state courts have begun to reach conclusions similar to those reached by the Missouri courts.[6] Nonetheless, many clients, realtors, even other attorneys, still seem to be unaware of the implications of the UETA and the related court rulings. If you frequently negotiate contracts on behalf of clients, your company, or yourself, you need to be aware of these issues, particularly as communication further evolves from e-mail into text messages, instant messages, "tweets," Facebook messages, and LinkedIn messages. It is not time to stop communicating electronically. As long as you are aware, there are easy ways to protect yourself. If you would like to know more, do not hesitate to contact a Dysart Taylor attorney.

Kevin Zeller is an associate attorney at Dysart Taylor and focuses on assisting businesses with all aspects of contractual, transactional and real estate representation, as well as helping families with estate planning needs.

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[5] The court made this ruling, even while acknowledging that some of the e-mails did not contain a typed name at the bottom of the e-mail.

[6] Most recently, see *Naldi v. Grunberg*, 908 N.Y.S.2d 639 (N.Y. Ct. App. 1st Dept. 2010).