

Electronic Signatures and Contracts



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Thomas R. Fawkes & Brian J. Jackiw
Goldstein & McClintock LLP



Goldstein & McClintock LLP, Attorneys at Law • 208 South LaSalle Street, Suite 1750, Chicago, Illinois 60604

Phone: (312) 337-7700 • Fax: (312) 277-2305 • www.restructuringshop.com

Agenda

- Governing Law and related issues
- What are Electronic Contracts and Electronic Signatures?
- Methods
- Disputes
- Takeaways

General Principles of Contract Law

- Before we delve into the enforceability of electronic signatures, we must first examine a threshold question: what does “contract” mean?
 - Noun: a legally binding agreement between two or more parties; or the writing or document containing such an agreement
 - Verb: the act of contemplating, negotiating and finalizing the terms of an agreement
- We could not live without contracts – they form the foundation of our business and personal lives. Everywhere we look, we have contracts – both implied and explicit.

Contracts

- Implied contracts

- A contract agreed by non-verbal conduct rather than explicit words or writings
- Routinely used in everyday transactions; for instance, when you go to the doctor, it is implied that the doctor will provide treatment in exchange for payment of the bill
- Generally, implied contracts have same legal force as express contracts; however, there are exceptions

- Express contracts

- Contract agreed to orally or in writing
- Includes most of the routine and non-ordinary transactions entered into by businesses on a routine basis
- Certain express contracts are only enforceable in writing under state statutes of frauds

Contracts

- What are the elements of a legally binding contract?
 - Offer and acceptance (meeting of the minds)
 - Intention to be legally bound (this is presumed in commercial agreements)
 - Consideration (payment, act, or forbearance to act)

Statute of Frauds

- Requirement that certain types of contracts be in writing
 - \$500 or more
 - One year timeframe
 - Marriage
 - Will
 - Real Estate

Electronic Contracts

- In the digital age, parties have begun to rely heavily – and in some cases, exclusively – on contracts that are partially or completely digital. Are these contracts enforceable?
- Two types of contracts beyond a paper contract:
 - Hybrid contract; and
 - E-contract.
- Hybrid Contract – paper contract that references terms and conditions a company may retain on its website.
- E-Contract is an entirely electronic contract – both via internet/web-based, or via e-mail and word document, though never printed out.

Is this Electronic Contract Enforceable?

- To answer this question, we must first answer these four questions:
 - Does the law allow this transaction to be conducted electronically?
 - Have the parties consented to contracting electronically?
 - Has a valid form of electronic signature been used?
 - Are copies of the transactional documents available to all parties?
- So long as these questions are answered in the affirmative, it is highly likely that the contract is enforceable under applicable law.

Governing Law

- Two primary statutes govern the validity and enforceability of e-contracts and e-signatures
 - Electronic Signatures in Global and National Commerce Act or the “E-Sign Act” 15 U.S.C. § 96 et seq. - October 2000
 - Uniform Electronic Transactions Act (UETA)
- Congressional Intent was to provide that a signature, contract, or other record cannot be denied legal effect because it is in electronic form

Governing Law

- E-Sign Act
 - Governs all interstate and foreign commerce
 - An electronic signature is an “electronic sound, symbol or process, attached to or logically associated with a contract or other record and executed or adopted by a person with the intent to sign the record.” *See UETA and E-Sign*
 - E-Sign Act suggested that all states adopt the UETA to harmonize state laws.

Governing Law

- E-Sign Act
 - Act generally supersedes pre-existing requirements that a record be kept on paper if that record is generated in a business, consumer or commercial transaction.
 - If a statute/regulation/rule of law requires that a contract or other record be retained, it can be met by keeping an electronic copy, remaining accessible to all persons who are entitled to access.

Governing Law

- UETA –
 - Generally governs business, commercial, and government affairs
 - Not for use between family members or non-profit institutions
 - All states except Illinois, New York, and Washington have adopted the UETA, but each state has some version of E-contract law
 - Does not apply to UCC governed transactions, with the exception of waiver or renunciation of a claim; statute of frauds; sale of goods; or lease of goods
 - Use is *strictly voluntary*: UETA applies only to transactions in which each party has agreed by some means to conduct them electronically

Elements of an E-Contract

- Same elements as a paper contract
- Parties **MUST** consent to using electronic forms/signatures.
 - Congressional intent is to give the broadest interpretation of consent.
 - An e-mail address on a business card is consent.
 - Can be limited to business issues – i.e. multiple e-mail addresses
- Intent to make E-Sign and UETA applicable

Retention Issues

- E-Sign and UETA both provide that if records pertaining to an electronic transaction are not preserved in a form that can be retained and reproduced by all parties to the contract, the contract is not enforceable.
- Accordingly, businesses looking to conduct business electronically should ensure that they have the technological capability to store, and permit retrieval of, electronic records, and may seek to back-up such records (whether internally or on the cloud).

E-Contract Caselaw is Not Black and White

- As a general matter, courts have held that e-contracts and e-signatures are enforceable.
- However, when courts have not enforced e-contracts, it has not been because the contracts were electronic – but because of a failure to meet basic contract elements.
- A few examples of court holdings illustrate that gray areas abound:



Case Law Examples

- A contract or other record relating to the transaction shall not be denied legal effect merely because it is in electronic form. (*Cloud Corp. v. Hasbro*, 314 F.3d 289, 295 (7th Cir. 2002)).
- “[W]e conclude...that the sender’s name on an e-mail satisfies the signature requirement of the statute of frauds.” *Id.* at 296.
- Signature is better than just a typed name, but not required. Ok to include electronic copy of handwritten signature in an e-mail and therefore, its absence does not create a suspicion of forgery or other fraud (though acknowledges copy of e-signature could be fraud). *Id.* at 296.

Case Law Examples

- E-mails satisfy the writing and signature requirements of the statute of frauds. *Central Illinois Light*, 235 F. Supp. 2d 916, 919.
- “I conclude that e-mails are sufficient under Maine law to meet the requirements of section 51[signature requirement]. *Roger Edwards, LLC v. Fiddes & Son, Ltd.*, 245 F. Supp. 2d 251, 261 (D. Maine 2003).

Case Law Examples

- Electronic records or signatures such as e-mails are sufficient to document contracts and acknowledge signatures. Several papers may be taken together to form the writing if they plainly relate to the same transaction. *Casazza v. Kiser*, 313 F.3d 414, 419 (8th Cir. 2002); *see also Supervalu, Inc. v. Quality Farms, Inc.* 2005 WL 2475751 (D. Minn. 2005).
- “Electronic signature at issue was not ‘executed or adopted by a person with the intent to sign the record.’” *Buckles Management, LLC v. Investordigs, LLC*, 728 F.Supp.2d 1145, 1151 (D. Colo. 2010).

Benefits of E-Contracts

- Can be available to customers at any time;
- Reduced costs of mailings, storage, organization;
- E-contracts can be convenient;
- Easy to enter into and can automate certain features;
- Can charge more for paper contract if paper requested by customer; and
- Easy to compile multiple unused versions.



Drawbacks of E-Contracts

- Oftentimes, transactions are faceless (fraud, lack of connection to iron out issues, lack of personal touch);
- Who is signing what? Authority;
- Must give option for paper;
- Provide requirements to view and consent (software requirements) and upon changing terms and/or conditions, must give all customers opt-out and it must be penalty free (no cost).

Methods of E-Signatures

- Voice on Answering Machine
- Click-Thru/Clickwrap
- Signature Pads
- Bio-Metrics
- Digital Signatures
- Name on an e-mail
- Letterhead on e-mail
- Shattuck v. Klotzbach – typed name at end of e-mail shows party's intent.
- E-mail “signature” may not even be necessary. Oftentimes, intent to enter into contract is inferred from language of e-mail.

Ultimately, courts look to whether the parties to the contract intended to bind themselves electronically.

Clickwrap

- Terms and Conditions of contract are displayed.
- User agrees to concrete set of terms and conditions, potentially one at a time; or
- User can select specifics via drop down menus, icons, buttons, etc...
- After each set of selections, user clicks an “I Agree” button.
- Set of clicks are attributable to one individual (IP address or history of conduct desirous).
- IP address is more scientific than handwriting analysis.
- Authority to act?
- Delaware has enforced clickwrap contracts (*Newell Rubbermaid Inc. v. Storm* (March 2014)).

Digital E-Signatures - Cryptographic

- PKI – Public Key Infrastructure
 - Requires authorized users
 - Pre-electronic contract/signature contract and agreement.
 - Prevents fraud
 - (Verisign/Docusign)
- XML
 - Internet based
 - Allows for signature on parts of document
 - Still being developed and not as widely accepted as PKI

Disputes over Electronic Signatures

- Not yet to cryptography – without actual signatures, how do we know the transaction is complete?
- Reasonable likelihood of authenticity is standard.
- Did the e-mail / communication make it to an inbox? The right inbox?
- Sent to a particular person's intention?
- E-mail address agreed to?
- Is it spam? Reasonable person standard

Takeaways

- Credit Apps – include e-mail addresses, names of those who can bind company.
- Agreement that electronic contracts are okay
- What is the industry standard? Parties standard?
- Proper verification over the internet (check boxes).
- Authentication in court – from writer or someone who saw the writer or context/metadata.
- Non-repudiation service (asymmetric cryptography with Certification Authority).

Presenter Contact Information



Thomas Fawkes | Partner

- E-mail: tomf@goldmclaw.com
- Phone: (312) 219-6702
- Twitter: @ThomasFawkesBK



Brian J. Jackiw | Partner

- E-mail: brianj@goldmclaw.com
- Phone: (312) 219-6703
- Twitter: @BrianJackiw

Questions or Comments?

