

Enforceability of Electronic Agreements

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Introduction

- Uniform Electronic Transactions Act
- Electronic Signature in Global and National Commerce Act

Uniform Electronic Transactions Act

- Purpose: To remove barriers to electronic commerce by validating and effectuating electronic records and signatures.
- It is NOT a general contracting statute
- Not adopted in Illinois, New York or Washington
- Includes most commercial contracts
- Excludes wills and trusts

Must Have Agreement to Conduct Transactions by Electronic Means

- Both parties must consent to using electronic means.
- Examples:
 - Actually using the means
 - Giving out a business card with an email address or fax number listed
 - Multiple email addresses
 - Not reasonable to infer someone has consented to be contacted at personal email for business negotiations
 - One person tells the other to confirm by email
 - If a buyer executes a form contract and in fine print, it includes a consent to receive notices electronically and buyer has never communicated with seller electronically, it is NOT an indication of a willingness to deal electronically
 - Normal contract policies apply to contract formation, intent, assent, etc.

Legal Recognition of Electronic Records

- A record of signature may not be denied legal effect or enforceability solely because it is electronic.
- If law requires writing, an electronic record satisfies requirement.
- If law requires a signature, an electronic signature satisfies the law.

What is an electronic “signature”?

- Electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the *intent* to sign the record
- Examples
 - Name in an email
 - Company’s name on a facsimile (conflicting cases)
 - Mouse click on a web page
 - Voice on an answering machine (digital)
 - Digital signature using public key encryption technology
- Key is INTENT

How to determine who to attribute signature to

- Normal rules of agency apply
- Employee must be authorized
- An electronic signature is attributable to a person, if it was the act of the person
- Examples
 - Person types his name on email
 - Authorized employee types company's name as part of an email
 - Company's computer is programmed to place orders

What if the communication was a mistake? Is it too late?

- If a person discovers a mistake in an electronic communication, it can be withdrawn.
- Three requirements to undo communication
 1. Notify other party that you did not intend to be bound by the electronic record
 2. Return any consideration received as a result of the mistake, AND
 3. The renegeing person must not have received a benefit from the other person

Steps to Prevent Opportunity for Buyer to Renege

- If a seller receives a re-confirmation, then the buyer cannot claim it made a mistake in sending the electronic communication
- Confirmation screen
 - After order is placed, have a final screen confirming, again, the terms of the order
- Confirmation email
 - After order is placed, send an email confirming terms of order
 - Even better if it requires the buyer to re-confirm by clicking on a web link or responding to the email

Electronic Signatures in Global and National Commerce Act (E-SIGN)

- Purpose: To regulate electronic transactions for interstate commerce involving states which have not adopted UETA
- To which states does E-SIGN apply?
 - Illinois
 - New York
 - Washington

How is E-Sign like UETA?

- UETA is much more comprehensive than E-SIGN
- Unaddressed items are addressed by state legislature and the courts
- Only trumps inconsistent state laws
- Illinois, New York, and Washington have each enacted their own version of an electronic transactions act.

Examples of differences between E-SIGN and UETA

- E-SIGN provides that states may not impose a law requiring paper copies to be kept
- UETA allows states to require paper copies
- E-SIGN allows automated transactions to be enforced, only when they are attributable to a person
- UETA allows transactions made by a computer program to be enforced without question
- UETA has a procedure for unwinding an unintended electronic communication. E-SIGN is silent on mistakes.

Case Law Applying E-SIGN

- Cases have found that click-wrap agreements are enforceable
- “click here” if you agree with terms.
 - Used for licensing purposes
 - Used to make internet purchases

Basic Laws of Contract

- Both laws defer to existing law on the existence and enforceability of a contract
- Most important thing to keep in mind when engaging in an electronic transaction is whether the basic elements of a contract exist

Three Basic Elements

- Offer
 - Must be specific- price, quantity, time, description of services, etc.
- Acceptance
 - Must accept offer as stated
 - If acceptance is conditional, then it is a counter offer
 - In the end, there must be mutual assent before a contract is formed
- Consideration
 - A mere promise to do something without payment or an exchange of value is often not enforceable as a contract

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Introduction

Contracting using electronic records and communications has overhauled the way business is done. The law has for the most part caught up with technology and recognizes communications made via email, fax, instant messaging, the internet and other electronic medium. Two federal statutes, the Uniform Electronic Transactions Act and the Electronic Signature In Global and National Commerce Act, have addressed electronic communications in an effort to enact uniform rules as to how such communications can be used to form enforceable agreements.

Uniform Electronic Transactions Act

Purpose: To remove barriers to electronic commerce by validating and effectuating electronic records and signatures.

- It is NOT a general contracting statute- general contract law still applies.
- Adopted by 47 states, Washington D.C. (not Illinois, New York or Washington)
- Includes most commercial contracts, but excludes certain contracts including wills and trusts.

Must have agreement to conduct transactions by electronic means.

- Before the electronic communication can help form an enforceable contract, both parties must consent to using electronic means.
- Examples:
 - Actually using the means. If a party sends a fax, email, IM, etc., it is deemed to have consented to the use of that form of communication, unless it explicitly states that it does not consent.

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- Giving out a business card with an email address or fax number listed- inference of consent to be contacted by email or fax.
- Multiple email addresses ex: personal, business, non-profit. It can be inferred that it a person consents to be contacted at the email address intended for the specified purpose, but not other purposes.
 - Not reasonable to infer someone has consented to be contacted at personal email for business negotiation, without a more specific consent.
- At a meeting, one person tells the other to confirm by email- explicit consent.
- If a buyer executes a form contract and in fine print, it includes a consent to receive notices electronically and buyer has never communicated with seller electronically, it is NOT and indication of a willingness to deal electronically
 - Normal contracting policies apply to contract formation, intent, assent, etc.

Legal recognition of electronic records. (Section 7 of UETA)

- A record or signature may not be denied legal effect or enforceability solely because it is electronic.
- If law requires a record to be in writing, an electronic record satisfies requirement.
 - Statute of Frauds.
- If law requires a signature, an electronic signature satisfies the law.

What is an electronic "signature"?

- Electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the *intent* to sign the record.
- Examples:
 - Name in an email.
 - Company's name on a facsimile (conflicting cases).
 - Mouse click on a web page.
 - Voice on an answering machine (digital).
 - Digital signature using public key encryption technology.
- Key is INTENT.

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How to determine who to attribute signature to.

- The normal rules of agency apply.
 - An employee must be authorized to act on a company's behalf.
- An electronic signature is attributable to a person, if it was the act of the person.
 - May be shown in any manner, include an exam of security procedures of company.
- Examples:
 - Person types his own name on email purchase order.
 - Authorized employee types company's name as part of email.
 - Company's computer is programmed to place orders.
 - Computer might be programmed to place orders as inventory drops below a certain level.

What if the communication was a mistake? Is it too late?

- If a person discovers a mistake in an electronic communication or simply did not intend to be bound, Section 10 of UETA allows the opportunity to correct error, if 3 requirements are met:
 1. Promptly notifying the other person of the error and that you did not intend to be bound by the electronic record;
 2. Take reasonable steps, including steps to conform to the other person's reasonable instructions, to return to the other person any consideration received as a result of the mistake; AND
 3. The reneging person must not have received a benefit from the other person.
- If you are the seller, you can prevent the opportunity for a buyer to renege.
 - The Confirmation Screen.
 - After order is placed, have a final screen confirming, again, the terms of the order.
 - The Confirmation Email.
 - After order is placed, send an email confirming terms of order.
 - Even better if it requires the buyer to re-confirm by clicking on a web link or responding to the email.
 - If a seller gets the re-confirmation, then the buyer cannot claim it made a mistake in sending the electronic communication.

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Electronic Signatures in Global and National Commerce Act (E-SIGN)

Purpose: To regulate electronic transactions for interstate commerce involving those states which have NOT adopted UETA.

To which states does E-SIGN apply?

- Illinois
- New York
- Washington

How is E-SIGN like UETA?

- It recognizes that electronic signatures and electronic records are as legally effective, valid and enforceable as manual signatures and paper writings.
- It recognizes that laws should be neutral as to specific technologies and means used to create records and signatures.
 - Should not prefer handwritten.
 - Should not prefer one technology- i.e. fax over email.
- It recognizes that the legal effect, validity and enforceability of a document may be denied if it is not retained in a manner that accurately reproduces the document and is accessible to parties in interest.
- It excludes certain contracts like wills and trusts, divorce agreements.

How is E-SIGN different from UETA?

- UETA is much more comprehensive than E-SIGN.
 - Many items addressed by UETA are not addressed at all by E-SIGN.
 - Unaddressed items will need to be addressed by state legislature or more likely by the courts.
- Examples of differences:
 - E-SIGN provides that states may not impose a law requiring paper copies to be kept when electronic copies of same documents can be stored. UETA allows states to require paper copies.
 - E-SIGN allows automated transactions to be enforced, only when they are attributable to the person to be bound. UETA allows transactions made by a computer program to be enforced without question.

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- UETA has a procedure for unwinding an unintended electronic communication. E-SIGN is silent on mistakes.

Case Law Applying E-SIGN

- Mostly dealing with “click wrap” agreements, finding them enforceable.

Basic Laws of Contract

Both federal laws defer to existing law on the existence and enforceability of a contract.

- Therefore, the most important thing to keep in mind when engaging in an electronic transaction is whether the basic elements of a contract exist.

Three Basic Elements

- Offer
 - Must be specific- price, quantity, time, description of services, etc.
- Acceptance
 - Must accept offer as stated.
 - If acceptance is conditional, then it is a counter offer.
 - Example: I accept your offer to sell me 30 widgets on a 60 day payment term, instead of 30 days.
 - The seller must now accept the changed term before it is a contract.
 - In the end, there must be mutual assent before a contract is formed.
- Consideration
 - A mere promise to do something without payment or an exchange of value is often not enforceable as a contract.