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The Multi-Million Dollar E-mail:
Electronic Contracts in the Digital Age

By: Douglas W. Clayton

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How easy is it to enter into a binding written legal agreement nowadays? About as easy as clicking "send" on an e-mail. The ease of entering into an electronic contract has made our lives more convenient and more dangerous. Let me explain.

General Rule – No Written Agreement Necessary

The general rule for contracting in Texas has always been that no formal written agreement is necessary to create most kinds of binding legal agreements. A contract can arise by oral agreement – with or without a handshake. Generally, for a contract to be enforceable, it requires only that the contracts meet very basic requirements, such as (1) an offer and an acceptance of the offer, (2) a "meeting of the minds" of the parties regarding the key terms of the agreement, (3) an exchange of consideration, and (4) absence of fraud, duress, mistake, forgery, unconscionability or other barriers to contract.

Exceptions to General Rule – Statute of Frauds and Uniform Commercial Code

Texas law recognizes some exceptions to the general rule, however. Some types of agreements must be in writing and signed by the party against whom enforcement is sought to be enforceable under Texas law. Perhaps this is because lawmakers felt that certain agreements were too important or too easily prone to fraud or mistake to rely upon oral agreements. For example, the Texas Statute of Frauds identifies categories of agreements that must be in writing and signed to be enforceable, such as (1) a promise by one person to answer for the debt another person; (2) an agreement made on consideration of marriage; (3) a contract for the sale of real estate, including oil and gas interests; and (4) an agreement which is not to be performed within one year, including a real estate lease. Another example is in the Uniform Commercial Code (UCC), which requires contracts for the sale of goods of $500 or more be in writing to be enforced.

Uniform Electronic Transactions Act

If you read the Statute of Frauds or the UCC, you might think that all of the agreements described in the previous paragraph must be in writing on a piece of paper and signed with a ballpoint pen. But in 2001, Texas adopted the Uniform Electronic Transactions Act (UETA). Under UETA,

parties are permitted to satisfy the requirement that an agreement be in writing and signed by entering into an agreement electronically. And parties may "sign" electronic documents by any sound, symbol or process logically associated with the electronic agreement, such as clicking a box labeled "I Accept" on a website. To be enforceable under UETA, both parties to an electronic transaction must agree to conduct business electronically. Electronic records must be capable of being retained and accessed for later reference.

Pitfall of Electronic Contracting

One of the pitfalls of using electronic communications, such as e-mail, is the possibility that a party might accidently enter into a binding legal agreement via e-mail. While UETA is clear that a party cannot be bound to an electronic contract unless the party agreed to conduct a transaction by electronic means, it is less clear how a party can indicate that the party does (or does not) wish to conduct a transaction electronically. For example, one might be surprised to learn that one of the official comments to the model UETA statute, the model on which the Texas UETA was based, notes that it might be reasonable for a recipient of a business card which includes a business e-mail address to infer that the individual handing out the card has agreed to conduct business electronically.

Recent Texas Case

A recent court case, *2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc.*, which was decided by a Texas state appeals court in Houston, illustrates the danger of negotiating the terms of a business transaction over e-mail. In that case, the trial court analyzed a series of e-mail messages between two oil and gas companies and concluded that the e-mails collectively constituted a binding legal agreement to revive and amend their existing participation agreement. The e-mails including statements such as:

- "I agree in principle, but need to have this interest flow directly back to me."
- "[i]f you are in agreement in principle, then I'm assuming we can work out the mechanics."
- "That will work. I will call before the day is over and give you an exact time."
- "Yes, has been my final answer. I will give you the final date ASAP."
- "As I told you before, I intend on being involved in the drilling program."

The trial court initially awarded one of the parties over $10 million in damages for the other party's breach of the alleged electronic agreement. That trial court verdict was later overturned on appeal when the appellate court reached the opposite conclusion, finding that the evidence was legally insufficient to support the jury's conclusion that an electronic agreement existed. Regardless of the ultimate legal resolution of this particular case, it should serve as a reminder of how easily an e-mail might be alleged to represent a binding legal agreement

Conclusion

Especially when discussing the terms of a potential business transactions, one should be careful in their use of e-mail and other electronic communications to make clear whether they do (or do not) intend to enter into an electronic transaction. When in doubt, one should consider adding a disclaimer to e-mails and other electronic communications specifically stating either (1) one's desire and intent to enter into an electronic transaction under UETA, or (2) one's desire and intent NOT to enter into an any electronic agreement under UETA or otherwise, and that any definitive agreement may only be by means of a writing on paper signed by each of the parties.

Doug Clayton is a partner in the Corporate and Securities Practice Group of Cantey Hanger LLP. He is a graduate of Harvard Law School and Texas Tech University. Doug focuses his practice on mergers and acquisitions, corporate finance, securities offerings, and other business transactions. For more information call 817-877-2890 or visit www.canteyhanger.com or Doug's blog at www.NorthTexasSECLawyer.com.