Tech Ties That Bind

Digital shortcuts can be legally binding or a trip wire that blasts a real estate transaction to smithereens.

By Lisa Boswell and Stratton Constantinides

From text messages concerning real estate deals to the use of electronic signatures in binding transactions, real estate professionals are waist-deep in digital communications. But are these "smart" shortcuts exposing agents and brokers to professional liability allegations that tech-effected contracts are not valid?

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Generally, the elements of any legally binding contractual agreement include (1) an offer, (2) an acceptance, (3) consideration and (4) no defenses. In most jurisdictions, the essential factual elements necessary to prove contract formation are: (1) clear contractual terms that are definite and certain between the parties; (2) an agreement between the parties to exchange something of value; and (3) agreement between the parties as to the terms of the contract.

E-signatures became a matter of federal law in 2000 when Congress passed the Electronic Signatures in Global and National Commerce Act (E-Sign Act) in order to "facilitate the use of electronic records and electronic signatures in interstate and foreign commerce by ensuring the validity and legal effect of contracts entered into electronically." The Federal Deposit Insurance Corporation's Compliance Examination Manual indicates that the E-Sign Act allows "the use of electronic records to satisfy any statute, regulation, or rule of law requiring that such information be provided in writing if the consumer has affirmatively consented to such use and has not withdrawn such consent."

From the Bench

Carrier Wins in Condo D&O Case

The Texas Supreme Court in February reversed a Court of Appeals ruling in *Great American Insurance Company v. Robert Primo*, finding that a written assignment of rights created a succession of interest and an insured vs. insured contest, which was excluded from coverage under a condominium association's D&O policy. The decision prevented Primo from recouping defense and attorney costs from the condo association's insurer, Great American.

Primo, a former treasurer and director on the board of a condo association, Briar Green, wrote himself two checks totaling over $100,000. The association filed a claim with its fidelity insurer, Travelers Casualty & Surety, and Travelers paid in exchange for a written assignment of all of Briar Green's rights and claims against Primo for the loss. "Travelers, standing in the shoes of [the condo association] then sued Primo to recover the funds.," the Supreme Court wrote. Primo sought defense coverage under the condo association's D&O policy from Great American, asserting his status as an insured former director, but was denied.

Primo sued Great American for defense costs and attorneys fees. Great American moved for summary judgment, saying it didn't owe a duty to defend because the action fell under the insured vs. insured exclusion contained in the applicable D&O policy since Travelers received written assignment of rights. The Supreme Court, in its upholding of the trial court's decision, noted that: "Under the court of appeals' interpretation, an insured under a D&O policy need only assign its rights in any claim against another insured to a third party and the [insured vs. insured] exclusion no longer applies."

Commercial Realty Giants Settle D&O Lawsuit

CBRE and Colliers have settled a poaching lawsuit that pitted Nashville's largest real estate brokerage firm against one of its top competitors. CBRE, in December, sued Colliers, its CEO Janet Miller and a broker, James Compton, who left CBRE in November, allegedly taking proprietary information with him. As evidence, CBRE produced an email transacted via Compton's CBRE email address from Collier's CEO that said, "Download all your files from CBRE system...bring to office so IT can upload the files...," according to the complaint. Documents allegedly included email lists and an exclusive listing contract that was rebranded to the new firm. Compton was also allegedly lining up sales agreements with new clients for Colliers while still under the employ of CBRE. Details of the settlement, announced in June, were not public by press time. CBRE requested return of all data and documents, injunctions against the use of such property, a ban on Compton's work with CBRE clients, and monetary recompense and penalties. ■

The National Conference of Commissioners on Uniform State Laws' model law, the Uniform Electronic Transactions Act (UETA), has been adopted in some form by 47 states as well as the District of Columbia, Puerto Rico and the U.S. Virgin Islands. UETA provides that "when a law requires either a writing or a signature, an electronic record or an electronic signature can satisfy that requirement when the parties to the transaction have agreed to proceed electronically." Because UETA is not federal law and serves only as a model, state laws may vary, though most versions generally mirror UETA as constructed.

Under E-Sign and UETA, the general requirements for an e-signature to be recognized are: (1) intent to sign, (2) consent to do business electronically, (3) association of the signature with the record, and (4) record retention. Both laws provide that a contract, signature or record shall not be denied legal effect solely because it is in electronic form or because an e-signature or record was used in its formation.

Case Law

A number of recent cases highlight some of the potential difficulties in the integration of technology and legally binding transactions.

In *Ruiz v. Moss Bros. Auto Group, Inc.*, the California Court of Appeal held that the defendant failed to prove that the plaintiff's electronic signature on an employment contract was in fact authenticated as the e-signature of the plaintiff. The court based its decision in part on the language of California Civil Code Section 1633.9, a direct adaptation from Section 9 of UETA, which states: "(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable."

In *Scott v. Five Star Development, Inc.*, the Arizona Court of Appeals held that "[a] person may be deemed to have consented to electronic communications [as a means to contracting] via ongoing participation in such communications or by primary use of that medium." However, the court also held that, where the "parties initially corresponded by email but then began to exchange draft written agreements for traditional signature," the parties established an intent not to use an electronic signature for the final agreement. In interpreting Texas's similarly constructed UETA statute, the Texas Court of Appeals reaffirmed a trial court's finding that sellers of real property intended to conduct transactions electronically pursuant to the context and surrounding circumstances of negotiations.

In the federal context, the U.S. District Court in Connecticut held in *Whinfield v. Capitas Distributors, Inc.* that a supervisor's agreement to pay additional commission not included in the original employment contract during an email exchange satisfied the CUETA requirements for electronic signatures.

In *J.B.B. Investment Partners, Ltd. v. Fair*, a California case concerning an alleged contract between parties in connection with a settlement agreement, the court held that merely printing one's name at the end of an email did not establish an "electronic signature" absent clear evidence of an intent to be bound to the agreement. While the court acknowledged that a "printed name or some other symbol might, under specific circumstances, be a signature under UETA" and that "courts in other jurisdictions that have adopted a version of UETA have concluded that names typed at the end of emails *can* be electronic signatures," it held in this case that the simple typing of Fair's name at the end of the email was insufficient under Cal UETA to bind Fair to the alleged agreement.

State of Mind

Various State Approaches to UETA

New York adopted the Electronic Signatures and Records Act (ESRA) in 1999, which permits an electronic signature to be used "in lieu of a signature affixed by hand" and says that the "use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand." **California** has adopted a modified version (Cal UETA) which made electronically created and/or executed contracts, subject to certain exclusions, the legal equivalent of written contracts. The **Connecticut** UETA (CUETA) states that "a record or signature may not be denied legal effect or enforceability solely because the signature is in electronic form" and further gives legal requirements for attribution of an electronic signature to a person, which include an assessment of the context and surrounding circumstances at the time of the creation of the electronic signature.

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Establish Clarity

Entities that intend to rely on electronic signatures in the execution of a binding contractual agreement must take steps to establish clear intent to formalize the given agreement and conduct the given transaction electronically. Many services have been made available to parties intending to conduct business transactions and formalize contractual agreements electronically, most notable of which are DocuSign, eSign+, Adobe EcoSign, and Authentisign. In an effort to satisfy the legal requirements of electronic signatures in legally binding transactions, DocuSign provides the following services: (1) content control, (2) secure signatures, (3) authentication of signers, (4) notice of e-contracting, (5) audit trail elements, (6) intent, and (7) user determination of "authoritative copy" options. These services are intended to overcome some of the legal obstacles set forth by increased legislation and regulation governing the widespread use of electronic signatures in business transactions.

The real estate industry has also started to implement these tools in the context of real estate transactions. The use of digital contracts and electronic signatures gives purchasers of real property an opportunity to review purchase agreements on their own time and allows a thorough review of contractual provisions outside of the presence of an escrow officer, real estate agent or other agent of sale. Further, due to the voluminous nature of real estate contracts, conducting this type of business by electronic means allows the real estate industry to take on a more eco-friendly identity.

However, there are certain concerns. Parties must consider privacy with respect to personal information communicated during negotiations and the transmission of contractual agreements. Additionally, the potential for fraud still exists; therefore, the parties must employ authentication services that use secure signatures and identification markers in the execution of real estate contracts. Parties must also consider the lack of uniformity between state laws with regard to UETA and other legislation governing electronic transactions. This can create issues with interstate and international real estate transactions.

What About Texting

Texting during purchase, sale negotiations and transactions is another issue of note. Though many states have not implemented limitations on the use of informal digital media in real estate transactions, some have—with conflicting results.

In *St. John's Holdings, LLC v. Two Electronics LLC*, the Massachusetts Land Court found that a text message can sufficiently constitute a writing under the Statute of Frauds to bind a party to an agreement to sell real property. The court considered numerous factors, including intent of the parties, existence of signature, lack of disclaimer, and meeting of the minds between the parties. In reaching its decision, the court dismissed the defendant's notion that a contract must be formal to be enforceable. This ruling illustrates that real estate transactions, although subject to many legal requirements, can still be binding even in the absence of a formal agreement.

California has dealt with text messaging in real estate transactions by amending its Statute of Frauds legislation. In 2015, the state legislature passed A.B. 2136, codified as California Civil Code Section 1624(d), which states that an "electronic message of an ephemeral nature that is not designed to be retained or to create a permanent record, including, but not limited to, a text message or instant message format communication, is insufficient under this title to constitute a contract to convey real property, in the absence of a written confirmation that conforms to" a specified requirement of existing law. This statute serves as a necessary delineation between the binding nature of formal agreements and the use of technology in negotiating and executing such agreements.

It's imperative to know the laws regarding the various digital options real estate professionals and clients may employ. Texting may be treated differently from email, which may be different from e-signature. Be clear. Authenticate. Establish the intent to transact digitally. And keep an audit trail. You can transact via 21st century methods. Just do it methodically and in accordance with the laws of your jurisdiction. ■

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Insurer Dodges Settlement Accusing Insured of Dirty Dealing

Novant Health filed suits in state and federal court against two insurers this June for denying coverage for a $32 million settlement it agreed to in an ERISA class action case in which employees claimed the company's retirement plan paid excessive fees. The insurers filed a counterclaim, and one, Chubb, accused Novant of "unjustly enrich[ing] itself" with money from its retirement plans. The insurers paid only a combined $8 million out of an aggregate $25 million in coverage, so Novant sued both for breach of contract. Though the settlement included no admission of wrongdoing, Chubb says in its counterclaim that the health company's payment to a longtime professional partner for education and enrollment services "far exceeded the value of [the company's] services." Novant says in a statement, "The insurer's claims are simply untrue." ■

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