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Be Careful What You E-Mail; E-Mail As A Binding Contract In A Technological Age

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Although most believe e-mails cannot bind parties to a "deal," preferring instead to think that only pen and paper can form a contract, New Jersey's law and that of its neighboring states, begs to differ. In today's business climate companies are not above claiming a contract was formed by the mere exchange of e-mail, and in some cases they may be right.

We've all been there before. It's late in the day and we're exchanging e-mail about the terms of a deal. If in the context of a lease negotiation, maybe we're focusing on the space to be leased, the rent to be paid, etc. We all assume that a formal (i.e., paper) lease will be prepared at a later date and a subsequent round of negotiations will take place as to its terms. Unfortunately, the law treats our e-mail exchange just as it would any other offer and acceptance. The courts look past the form of the exchange to the content of the e-mail. If you have offer and acceptance, and all of the material terms of a deal, you may have a valid enforceable contract even if you intend to "formalize" the agreement in a paper lease.

Discussion of the Law

The fact that we think of e-mail as being a quick, less formal way to communicate, is not the focus of a judicial inquiry into whether an e-mail exchange created a contract. Instead, courts focus on the content of the exchange as seen through the lens of traditional contract analysis. For instance, in ***Miken v. Hind***, a 2009 unpublished decision from the New Jersey Appellate Division, the court analyzed the exchange of e-mail and found no contract because the parties had not agreed on all of the essential terms of the proposal they were discussing. Similarly, in ***Malloy v. Intercall***, a 2010 unpublished New Jersey District Court case, the court found that the e-mail exchange did not form a contract because the proposed terms discussed were not sufficiently definite – they lacked discussion of the proposed contract duration. In a 2006 unpublished New Jersey District Court case, *K-Tronik v. Vossloh-Schwabe*, the e-mails did not form a contract because they didn't include a discussion of price. What's clear from the analysis in each of the above cases is that the focus was on the content of the communication rather than its form.

E-mail exchanges can create a binding contract even if the parties intend to memorialize their agreement in a subsequent paper writing. The Third Circuit in a 2010 opinion, ***California Sun Tanning v. Electric Beach***, relying on Pennsylvania law, found that an exchange of e-mails about a franchise proposal constituted a binding contract because it contained all the material terms of a deal, even though the parties intended to "formalize" their agreement at a later time in a paper writing. That the parties intended to memorialize any agreement in a subsequent signed writing was not enough as the court found there to be no evidence that the parties "believed that the enforceability of any agreement would be contingent upon the execution of a writing memorializing its terms." A similar conclusion about the binding effects of e-mail exchanges, even in the face of the parties' contemplation to "formalize" their agreement in a later writing, was found by the New Jersey District Court in 2011, in ***Tangible Value v. Town Sports International Holdings***. There, the court analogized the e-mail exchange to any other "informal agreement," which the court noted under

New Jersey law could bind the parties unless there was a clear intent to be bound only upon the execution of the subsequent signed writing.

A 2010 decision from the Second Circuit, ***Rubenstein v. Clark & Green***, distinguished between an e-mail exchange creating a formal contract versus a binding "preliminary" agreement. In *Rubenstein*, the parties exchanged numerous and detailed e-mails concerning architectural services to be provided by Clark & Green for plaintiffs. The court rejected the claim that the e-mails constituted a binding contract because the parties had expressed the intent to be bound only by a subsequent formal paper contract that they would execute. As to whether the e-mails could constitute a binding "preliminary" agreement under New York law, the court developed a four part test: "(1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing."

Finally, at least one court has held that an e-mail is a "writing" within the meaning of the statute of frauds. A 2010 decision of New York's Supreme Court, Appellate Division, ***Naldi v. Grunberg***, found that an e-mail would satisfy the requirements of New York's Stature of Frauds, which generally requires certain transactions be in written form.

Practical Tips

To help reduce the likelihood of being called into court someday about an exchange of e-mail you had with your counterpart to a transaction, or to help you prevail if you are called into court by a disgruntled adversary who wants to claim a deal, there are several practical steps you can take. First, you and your adversary should make it clear, in a paper writing or an e-mail exchange, that there is no agreement, whatsoever, until a formal written document is prepared and duly signed by both parties. Second, consider adding to your e-mail signature a statement such as this:

> "To the extent this e-mail discusses the terms of a proposed contract, this e-mail is not intended to bind the party sending the e-mail or its principal to a contract, which contract is expressly understood to be formed only upon the subsequent negotiation of a formal written document, duly agreed-to and signed (via handwriting) by both respective parties."

As you may have noticed from the recent dates of the above cases, the law is just beginning to address the prevalence of e-mail in our lives and the application of the old legal standards to the new technology. The law is generally many years if not a decade behind technological advancements. It is anticipated that as society continues to develop new technologies, like text messaging, the law will slowly evolve as well.

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