E-commerce and you

How e-mail and other online technology impact contract issues **Interviewed by Troy Sympson**

E-commerce is here to stay, and it's easy to see why — transacting business online offers near-instant communication and the ability to retain all correspondence in an easily storable and retrievable digital form.

However, with those abilities come special considerations. For example, does an e-mail meet the procedural or formal requirements of a contract? After all, most of us think of a contract as a paper document that is signed in ink by the parties involved. Can this "signing" be done online?

"A company that conducts a substantial — or even a small — portion of its business via e-mail would do well to carefully consider whether it is properly documenting all of its transactions," says Courtney D. Tedrowe, a partner with Novack and Macey LLP.

Smart Business spoke with Tedrowe about how doing business online affects contract issues and about some things you may need to consider.

Has the advent of e-mail as a means of transacting business changed the law regarding what is needed to form a contract?

No, the fundamental elements of contract formation remain the same. In general, there must be an offer, an acceptance of that offer, mutuality and then consideration given by each side. However, although these fundamental contract elements remain unchanged, the media used in contract formation have changed radically over the past few decades.

Now that business is conducted through e-mail, instant messaging and Web sites, the law has been forced to adapt old rules to these new practical commercial realities. For example, there are many laws — some ancient — that require contracts to be in writing and signed by one or all parties to the contract. The law has been grappling with the question of whether and to what extent e-mail confirmations or e-mail chains are sufficient 'writings,' and whether they contain valid signatures.

What is a situation in which this would be an issue?

One major example is the Statute of Frauds, which exists in some form in all 50 states and which requires that certain contracts be, among other things, in writing and signed by the party to be bound by the contract. Ordinarily, the Statute of Frauds requires a signed writing when the contract is for a sale of goods for a price in excess of a certain amount, when it cannot be completed within the year, when it relates to marriage, when it is a contract for the sale of real estate or when it creates a surety obligation.

Courtney D. Tedrowe
Partner
Novack and Macey LLP

If your contract falls within one of these five categories, then it is highly likely that a signed writing is necessary for that contract to be enforceable.

Assuming a signed writing is required, do e-mails and other electronic media satisfy these requirements?

Courts have found, with some exceptions, that e-mails and other electronic media can satisfy writing requirements. Interestingly, although the UCC defines a 'writing' as 'printing, typewriting or any intentional reduction to tangible form,' in the majority of cases, courts have had little difficulty overcoming the word 'tangible' and have concluded that electronic records are writings.

The signature requirement has proven to be more problematic, however, and deserves special attention. In cases in which a signature is required and the communication is electronic, courts frequently examine whether there is sufficient evidence that the party intentionally and deliberately typed or caused his or her name to be affixed to the specific electronic document at issue.

Courts are much more likely to find that the signature requirement has been satisfied in cases in which, for instance, the sender actually typed his or her name into the document, rather than in those in which the party's name was generated by some preset automatic process, such as by a fax machine header.

Are there state or federal laws that specifically address the issue of the validity of electronic writings or signatures?

There are both federal and state statutes that may apply and, where they are applicable, they take much of the guesswork out of this issue. The federal statute is the Electronic Signatures In Global and National Commerce Act (ESIGN). The uniform state statute is the Uniform Electronic Transactions Act (UETA).

ESIGN, which applies to transactions in foreign and interstate commerce, establishes as a basic core principle that, subject to listed exceptions, electronic signatures and records cannot be denied legal effect solely because they are in electronic format, as opposed to being on paper. The concept of an electronic signature here is very broad, for it is defined as '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 intent to sign the record.' Thus, where ESIGN applies, and the forgoing definition is satisfied, it could resolve any question regarding the status of an electronic writing or signature.

Where not pre-empted by ESIGN, the UETA (which has been adopted by 48 states to date) also provides that electronic agreements and electronic signatures on agreements cannot be held invalid merely because they are in electronic form. Moreover, like ESIGN, because the UETA applies to 'electronic records and electronic signatures relating to a transaction,' its reach is far broader than the writing and signature requirements of the Statute of Frauds.

There is a crucial restriction on UETA's application, however, which may prove to limit its usefulness. Namely, the UETA applies only where the parties involved agree in advance that they will conduct transactions through electronic means. Accordingly, if you wish to take advantage of the UETA's protections, you must obtain such an agreement. <<

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