E-MAIL EXCHANGES CAN CREATE BINDING OBLIGATIONS

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Am I bound by what I write in an e-mail? Can I rely on an exchange of e-mails as evidence of a contract? Answers to these questions are becoming increasingly clear as courts are relying on electronic transaction legislation, applying principles of contract formation, and concluding that e-mails create binding contracts. Therefore, parties should be mindful of what they write in e-mails to avoid inadvertent contractual obligations.

Legal Landscape

Legislation passed more than a decade ago validates electronic transactions and contracts formed electronically. In 1999, the New York State Legislature passed the Electronic Signatures and Records Act, and in 2000, Congress passed similar federal legislation called the Electronic Signatures in Global and National Commerce Act. In general, these statutes provide that contracts will not be denied legal effect solely because they are created or stored electronically.

Although this legislation is on the books, courts must still look to contract formation principles to determine whether a series of e-mails creates a binding contract. In doing so, courts look to see if one party made an offer, whether that offer was accepted by the other party, and whether there was intent to be bound by the e-mailing parties, which the courts call a "meeting of the minds." If a court finds the foregoing elements within a series of e-mails and concludes that the terms of the agreement are reasonably certain, the court is likely to hold that the e-mail exchange is a binding contract.

In New York, one example of a case where the court found an e-mail exchange to be binding is *Stevens v. Publicis S.A.*, 50 A.D.3d 253 (N.Y. App. Div. 2008). In *Stevens*, it was held that a series of e-mails constituted an amendment to an employment agreement even though the employment agreement contained a provision requiring all amendments to be in writing and signed by the parties. The court concluded that the series of e-mails exchanged between the parties constituted the requisite writing, and by both parties typing their names at the bottom of their respective e-mails, the amendment was signed by both parties as required under the contract.

Attorneys

Kenneth Friedman

Practices & Industries

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More recently, a New York court concluded that e-mails can satisfy the statute of frauds, which requires, among other things, contracts for conveyances of real property to be in "writing" and "subscribed" by the party to be charged. In *Naldi v. Grunberg*, 80 A.D.3d 1 (N.Y. App. Div. 2010), the court concluded that the writing and signing requirements of the statute of frauds should be construed to include records of electronic communications (which includes e-mails) and electronic signatures. Applying contract formation principles, however, the court went on to hold that even though the e-mails would satisfy the statute of frauds, the e-mails did not constitute a binding contract because there was no evidence of a "meeting of the minds."

Practice Points

Now that it is becoming increasingly clear that e-mails can create binding obligations, it is important to keep a few practice points in mind before you hit send:

- Consider whether the series of e-mails contains the requisite contract formation principles (i.e., offer, acceptance, and intent to be bound).
- Consider using qualifying language in your e-mails, which will help clarify that you do not intend to be bound (e.g., "subject to further negotiations").

Conclusion

Above all, it is important to be aware that e-mail, although a relatively informal method of communication, can create or modify a contract.

For more information, please contact:

Kenneth P. Friedman
716.848.1279
kfriedma@hodgsonruss.com