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These e-Matters Case Summaries analyze some of the latest cases relating to electronic signatures that our clients may find of interest. For additional information, please contact any member of the e-Matters Team.

Binding Employees to Contracts or Other Agreements

Employment agreement terms were modified by emails between contract parties because email authors' typed names at the end of each email containing contract modifications signified intent to authenticate content of the emails. In *Stevens v. Publicis*, 854 N.Y.S.2d 690 (App. Div. 2008), the Court denied summary judgment to Plaintiff (Stevens), trying to enforce the original terms of his employment agreement, holding that a series of emails that modified the terms of the original employment agreement and containing typed signatures of both parties to the original agreement constituted signed writings that modified that employment agreement — an agreement which required all modifications to be signed by the parties.

The dispute at issue arose in March 2001, when Arthur H. Stevens was removed from his post as CEO of Defendant (Publicis-Dialog) due to the company's poor performance. Prior to this removal, Stevens had an employment agreement that provided for certain payments to him. Subsequently, Mr. Stevens exchanged a series of emails with Bob Bloom, the chairman of Publicis USA, in which Mr. Bloom offered, in an email, to keep Mr. Stevens with the company if Mr. Stevens spent 70 percent of his time developing business, 20 percent cultivating former clients and 10 percent managing business operations. Mr. Bloom's typed name appeared at the bottom of that email message. Mr. Stevens responded to Mr. Bloom with an email accepting Mr. Bloom's offer and containing Mr. Stevens's typed name at the bottom of the email. Mr. Bloom responded to this acceptance with an email stating, in part, "I am thrilled with your decision." This email also bore Mr. Bloom's name at the bottom of the message.

Mr. Stevens later sued his employer to enforce the terms of his initial employment contract. The Court held that the **typed name of the Defendant's then-chairman and CEO, Mr. Bloom, at the end of the email, and Plaintiff's response, containing his typed name at the end of the email, constituted "signed writings"** and satisfied § 13(d) of Plaintiff's employ-

ment agreement, which required any modification be signed by the parties. *Id.* The Court also held that "the emails from Plaintiff constitute 'signed writings' within the meaning of the statute of frauds, since Plaintiff's name at the end of his email signified his intent to authenticate the contents." *Id.*

Electronically signed contract was enforceable despite one party claiming not to have read it prior to signing it where there was no evidence of fraud or duress, where both parties manifested assent to the contract terms, and where the disputing party had ample time to review, print, and save the contract, and expand the screen in which it was viewed. *Verizon Communications, Inc. v. Pizzirani*, 2006 U.S. Dist. LEXIS 81688 (E.D. Pa. Nov. 7, 2006). Plaintiff (Verizon) sought enforcement of a 12-month non-competition restrictive covenant that was contained in "Award Agreements" delivered by email to the Defendant (Pizzirani), Plaintiff's employee. The Defendant was a highly compensated executive, and sought to leave his job to work for Verizon's competitor.

Defendant was a recipient of Verizon's incentive program that constituted of "Award Agreements." The terms of this incentive program were revised in 2005 to contain a non-competition restrictive covenant that prohibited Defendant, for a period of 12 months after the termination of his employment, from engaging in competitive activities, as defined in the Awards Agreements. In early 2005, and again in 2006, Defendant received emails from Verizon's human resources department advising him in bolded language as follows:

As you access your award online, it is important that you read and understand the terms and conditions of the Award Agreements. When accepting your award online, you acknowledge that you have read both the Award Agreements and Plan document, including the terms [and] conditions regarding vesting, restrictive covenants and the provisions concerning award payouts.

On March 17, 2005, Defendant clicked on the "I ACKNOWLEDGE" button on the bottom of the email whereby he acknowledged that he understood that in accepting such award, he would be bound by the Award Agreements, including their restrictive covenants. However, in 2006, when receiving a sec-

ond email with the above-quoted language, Defendant did not click on the “I ACKNOWLEDGE” button, prompting a representative of the human resources department to contact Defendant regarding his failure to acknowledge the terms of the Award Agreements. In response, Defendant drafted and sent the following email to an employee in the human resources department: “John I will read and agree to the terms and conditions of the award agreement and Plan documents.” After such certification that he understood the terms of the awards, Defendant was able to access the agreement online. According to the Court, Defendant, by using an online electronic review and acceptance process, “expressly accepted these covenants on multiple occasions.” In his defense, Defendant did not contest that he had executed the Award Agreements by electronic signature, but instead **claimed that he did not read the contracts prior to electronically signing them** and asserted that he was completely unaware of the restrictive covenants until October 2006.

In a decision governed by New York law, the District Court held that the non-compete provision was enforceable and that Defendant could not accept the offer of employment from Verizon’s competitor. The Court noted that **under “New York law, a valid contract is formed by manifestation of assent, including checking a box or clicking a button on a computer screen[.]”** Furthermore, New York case law holds that the **parties are bound by contracts they sign regardless of whether the party reads the contract so long as the other party does not commit fraud, duress or some other wrongful act.** Defendant claims that Verizon failed to notify him that they had revised the Award Agreements to include a non-competition clause. The Court, however, held that the Defendant had a reasonable opportunity to know the essential terms and character of the agreements, Verizon encouraged Defendant to read them and that Defendant was adequately warned by email that, through his acceptance, Defendant certified that he had read and agreed to be bound by the agreements and their restrictive

covenants. Lastly, in order to execute the agreements on his computer, Defendant was required to click on a box on his computer screen acknowledging that he had read and understood the documents.

As further evidence in Verizon’s favor, the Court found it compelling that the **Defendant was under no time pressure to read and sign the agreements** because he had more than a month to read and electronically sign the documents. The Defendant complained that he was only able to view the document in a small box on the computer screen, but Verizon demonstrated that **Defendant had the ability to print the agreements, save them to his hard drive or expand the default size viewing screen.** The Defendant also had a personal incentive to read the agreements as they represented hundreds of thousands of dollars of additional compensation for him. Because Verizon went to great lengths to ensure that its employees understood the importance of reading the documents, the Court found little evidence that Verizon intended to misrepresent the terms of the Award Agreements. The Defendant, however, made direct misrepresentations by certifying that he had read and understood the Award Agreements when he had in fact done neither.

Arbitration provision in electronically completed employment application was enforceable where employee affirmatively selected that “Yes,” she agreed to arbitrate disputes with employer. *Bell v. Hollywood Entm’t Corp.*, 2006 Ohio App. LEXIS 3950 (Aug. 3, 2006). Plaintiff (Bell) sued Defendant (Hollywood) for hostile work environment, sexual harassment and civil battery. In the employment application process, Plaintiff completed her application electronically. As a condition to her employment, she was required to agree to submit all claims to arbitration. The electronic application process could have been done at a kiosk or over the Internet through the Defendant’s website. The Court found that **Plaintiff had agreed to arbitration because she received the information about arbitration and evidenced that she read and understood the terms of the agreement.**

Specifically, in the electronic application, Plaintiff was informed of the arbitration requirement because the application posed a series of questions regarding arbitration. “After initial disclosures and consents required by the Electronic Signature in

...under “New York law, a valid contract is formed by manifestation of assent, including checking a box or clicking a button on a computer screen[.]”

Global and National Commerce Act ... and the Fair Credit Reporting Act,” Plaintiff was presented with a screen that informed her that all claims would be submitted to arbitration pursuant to Defendant’s Employment Issue Resolution Program (“EIRP”). If Plaintiff wanted to read a summary of the EIRP Rules or wanted to review an entire copy of the rules, Plaintiff was directed to access another website link. The screen required Plaintiff to either acknowledge or deny that she knew how to access such link. **The next screen asked Plaintiff whether she agreed to arbitrate any and all disputes with Defendant and she was required to choose “yes” or “no.”** Because **Plaintiff selected “yes,” the Court found that Plaintiff confirmed her agreement to arbitrate any employment-related disputes.** Further, Plaintiff confirmed that she knew how to access Defendant’s website to obtain the complete arbitration policy (even though there was no apparent evidence she actually reviewed such policy).

According to the Court, “Federal and Ohio law both authorize the use of electronic signatures and deem such signatures binding.”

Quoting *Campbell v. General Dynamics*, the Court noted that a “signature may not be denied legal effect or enforceability solely because it is in electronic form ... [and a] contract may not be denied legal effect or enforceability because an electronic record was used in its formation.” Further, the Court stated that “[w]hether she read the paperwork or disregarded the paperwork, she signed the papers stating that she agreed to the terms of the EIRP in order to be hired.” **The Court affirmed the lower Court’s decision to compel arbitration because Plaintiff “had the legal capacity to contract, signed the agreement and was sufficiently informed regarding the program.** She was informed on how to obtain additional information, confirmed that she understood how to obtain additional information, and knowingly and voluntarily consented to arbitrate her employment claims against” Defendant.

Arbitration provision deemed unenforceable where email to employees from employer did not specify that continued employment constituted waiver of right to judicial forum for dispute resolution. In *Campbell v. Gen. Dynamics Gov’t Sys. Corp.*, 2005 U.S. App. LEXIS 9360 (1st Cir. May 23, 2005), the U.S. First Circuit Court of Appeals refused to enforce an employer’s arbitration policy. In this case, the employer sent an email to all of its employees to announce a change in policy such that all workplace disputes would be subject to arbitration. The actual policy and the revised employee handbook could be examined by the employees by accessing links at the bottom of the email.

The *General Dynamics* Court held that the employer’s email did not constitute sufficient notice to Plaintiff that his continued employment would constitute a waiver of his right to access a judicial forum. The Court found the employer’s notice insufficient for a number of reasons. First, **the employer failed to elicit a response or acknowledgment from its employees that he or she had read the email** by requiring the employees to acknowledge receipt or to click a box on a computer screen. Second, **the employer did not follow its typical pro-**

cedure used to communicate to its employees regarding significant changes in the terms of their employment by memorializing such significant changes in writing, requiring the employee’s “wet ink” signature and placing the signed writing in the employee’s personnel folder. The substance of the **email also failed to state directly that the policy contained an arbitration provision that would waive the employee’s right to a judicial forum and failed to place the employee on inquiry notice that the policy had contractual significance.** Consequently, “a reasonable employee could read the



email announcement and conclude that the Policy presented an optional alternative to litigation rather than a mandatory replacement for it.” Delivering a clear and explicit message in contractual language to employees will greatly assist an employer in demonstrating that its employees had notice of such a policy. The lesson of *General Dynamics* is that because of ESIGN, an **“email, properly couched, can be an appropriate medium for forming an arbitration agreement.”**

Application of ESIGN, UETA or State Equivalents

Alleged contract whose terms were agreed to by email was unenforceable where the parties did not agree to conduct transactions by electronic means and historically signed contracts in wet ink after agreeing to contract terms by email. *EPCO Carbondioxide Products, Inc. v. JP Morgan*

Chase Bank, NA, 2005 U.S. Dist. LEXIS 43707 (W.D. La. June 6, 2005), *rev’d and remanded* by 467 F.3d 466 (5th Cir. October 6, 2006). Plaintiff (EPCO) sued Defendant (Chase) for refusal to renew certain letters of credit. In one of its allegations, EPCO claimed that Chase made a written offer to EPCO to restructure its debts and extend a letter of credit. EPCO alleged that Chase “accepted” such offer and created a “binding agreement” electronically (by email) as permitted by Louisiana’s Uniform Electronic Transaction Act (“UETA”).

According to the District Court, Louisiana’s UETA allows an electronic signature to satisfy the signature requirements of all but several exempted areas of the law and the commercial loan transactions present in this case did not appear to be excluded, although transactions governed by Title 10 of the Revised States (Commercial Laws) are explicitly excluded. UETA will apply only to “transactions between parties, each of which has agreed to conduct transactions by electronic means.” Chase asserted that EPCO failed to plead that (a) EPCO accepted the offer by email, and (b) Chase agreed to conduct business by electronic means.

In the lower Court decision, the Western District of Louisiana granted Chase’s motion to dismiss EPCO’s complaint with prejudice and found that EPCO was required to plead the existence of the written agreement signed by the creditor and debtor. According to the District Court, in order to satisfy the writing and signature requirements of UETA, Plaintiff was further required to plead that both Plaintiff and Defendant agreed to conduct transactions by electronic means, but since Plaintiff failed to do so, such claims were dismissed for failure to state a claim.

The U.S. Court of Appeals for the Fifth Circuit reversed and remanded this case in order to permit EPCO to present additional evidence regarding whether acceptance was in the form necessary to satisfy the Credit Agreement Statute either by submitting evidence that the agreement with Chase was written and signed or proof that

EPCO submitted its acceptance of the offer from Chase electronically and that both parties had agreed to conduct business electronically. Because neither factual scenario was foreclosed by Plaintiff's pleadings, the 5th Circuit held that dismissal by the District Court was improper. In its decision, the 5th Circuit noted that UETA "allows an electronic signature to satisfy the signature requirements for most legal documents ... [and] applies only to transactions between parties who have 'agreed to conduct transactions by electronic means.'"

On remand, the Court found in favor of the Defendant and held that the **alleged contract formed by electronic mail was not enforceable because the credit agreement was not signed either conventionally or electronically.** 2007 LEXIS 33719 (W.D. La. May 8, 2007) First, Defendant's email was a counteroffer that was rejected by Plaintiff. Second, **Plaintiff failed to produce sufficient evidence that the parties agreed to conduct business electronically.** Historically, the parties would negotiate by email and telephone, but then reduce the agreement to a written document signed by both parties in "wet ink." Therefore, the parties did not agree to transact business electronically, did not reach an agreement and did not sign their agreement in accordance with past practices.

ESIGN does not apply where Electronic Funds Transfer Act does not require periodic account statements to be "in writing." *Collins v. Missouri Electric Cooperatives Employee Credit Union*, 2006 U.S. Dist. LEXIS 57116 (July 26, 2006). Plaintiff (Collins) alleged that he never agreed to receive electronic statements from Defendant, his credit union, and that he did not authorize his ex-girlfriend to use his bank card while he was incarcerated. According to Defendant, Plaintiff sent him an email electing to receive electronic statements. Plaintiff did not recall doing so, but presented no evidence to the contrary. Plaintiff sued Defendant for failure to deliver periodic statements, unauthorized transfers from his bank account and failure to investigate such unauthorized transfers pursuant to The Electronic Funds Transfer Act ("EFTA"). Plaintiff also

alleged that Defendant failed to satisfy ESIGN's consumer disclosure requirements. However, because EFTA does not require periodic account statements to be "in writing," ESIGN did not apply.

What Does or Does Not Constitute an Electronic Signature

Court enforced electronic signature of the FINRA Form U-4. *Mead v. Moloney Securities Co., Inc.*, 2008 Mo. App. LEXIS 1675 (December 9, 2008). Plaintiffs unsuccessfully claimed that the mandatory arbitration provision in the FINRA Form U-4 was unenforceable against them because the Defendant failed to sign (electronically or otherwise) the arbitration provision sections of Form U-4, requiring a separate signature from other parts of the Form, even though, as the Court determined, the Defendants electronically signed other provisions of the Form. (The FINRA Form U-4 is a form by which representatives of broker-dealers, investment advisers or issuers of securities become registered with self-regulatory organizations – in this case, the organization now known as the Financial Industry Regulatory Authority, and appropriate jurisdictions.) The Court determined that an electronic signature is valid for purposes of forming a binding and enforceable arbitration agreement, and that one party was not required to inform the other of its intent to electronically file the Form. The Court further held that the party seeking to enforce an arbitration agreement need not have signed it because one party accepted the other party's performance, thereby giving validity to the instrument at issue. For companies developing electronic signature processes, including such processes for regulatory and similar forms, this case underscores the importance of making the electronic signature process clear from the user's perspective, especially in the context of forms that must be signed by the same party in multiple places.

Court enforced electronic signature of an insurance policy application. *Long v. Time Ins. Corp.* 2008 U.S. Dist. LEXIS 79212, 572 F. Supp. 2d 907. Plaintiff (i.e., the insured) applied for and was issued a short-term

medical insurance policy. The producer's assistant prepared the electronic insurance application, based on the verbal answers provided by the insured. The insured was asked to review and approve the information in the application, followed by a request to permit the insured's electronic signature to be affixed to the application. In the presence of the insured, the producer's assistant typed the insured's name on the signature line, as she was authorized by the insured to do. The record is clear that **the insured reviewed the completed application before the signature process was completed.**

ESIGN does not apply where Electronic Funds Transfer Act does not require periodic account statements to be "in writing."

The following text appeared directly above the insured's electronic signature: "The undersigned applicant and the agent acknowledge... that the applicant has read, or has had read to him, the completed application. The applicant realizes that any false statement or misrepresentation in the application may result in claim denial or contract rescission...."

The policy was issued based on an application dated March 1, 2004. In August of 2004, the insured underwent surgery for a heart condition and later submitted a claim under the policy for the medical expenses. The insurer denied coverage after finding that insured had been treated for a heart condition within the five years prior to applying for the insurance. The insured failed to disclose that prior treatment, despite being asked about any prior treatment on the insurance application.

The estate of the insured made a number of tort, or extra-contractual, claims, includ-

ing filing a complaint with the Ohio Department of Insurance, all of which were denied by the Department and the Court. Among the Court's holdings under Ohio law are the following:

- “An individual will be viewed as having ratified the answers on an insurance application if the individual signs the application.”
- **“Furthermore, an insurance applicant’s signature and assent that the statements contained in the application are correct serves, as a matter of law, as his adoption of the statements notwithstanding a claimed failure to review the application.”**
- **“Having signed the application, the individual adopts and ratifies all statements appearing above the signature regardless of whether he specifically provided answers.”**
- “Similarly, once the insurance policy is issued and has been accepted by the insured, he is presumed to know the policy’s contents and is bound by its terms.”
- “In the event an insured provides a correct answer to the agent who records a false answer without the insured’s knowledge, the insured has a duty to report the falsity upon discovery.”
- “As applied here, even if [the producer’s assistant] incorrectly typed ‘No’ in response to [the medical question in controversy], [the insured] ratified that false statement by authorizing his signature and accepting the Policy as issued.”

Electronically prepared traffic ticket with the police officer’s pre-printed signature was deemed valid because personally printing and serving the ticket by the officer constituted the officer’s acknowledgement of the accuracy of the information on the ticket. In *State of New York v. Patanian*, 2008 N.Y. Misc. LEXIS 2668, Defendant, who was charged with driving a motor vehicle above a certain blood alcohol count, claimed the charging documents were deficient because

the electronic signature of the police officer was not properly validated in the simplified traffic information. The Defendant argued that “while the simplified traffic information sets forth the words ‘Affirmed under penalty of perjury’ and then the pre-printed signature of Trooper Burns, the affirmation is ineffective because no actual signature is physically made and no other act suggesting some other acknowledgment or affirmation was made.” The Court noted:

The authority for electronic signature rests in Electronic Signatures and Records Act, (“ESRA”) as set forth in section 304 of the State Technology Law. Subdivision 2 of section 304 (STL) in part reads as follows: “an electronic signature may be used by a person in lieu of a signature affixed by hand. The use of an electronic signature shall have the same validity and effect as the use of a signature affixed by hand.”



The Court looked at the statutes and compared a paper ticket with an electronic ticket. The Court noted that the statute required that the electronic ticket substantially conform with the requirements of the paper ticket, but it was unclear whether the lack of an affirmation invalidated the simplified traffic information. This electronic signature was a pre-programmed signature, but the **Courts have accepted electronically pre-signed tickets in cases where it was accompanied by a verified supporting deposition issued simultaneously.**

In this case, the Court found that the police officer used a TRACX system within his vehicle to fill out the uniform traffic ticket and that there were **no allegations that a third party aided in the process or helped prepare the traffic ticket. Thus, by both printing and serving the uniform traffic ticket bearing his signature, the police officer acknowledged as accurate the information on the ticket. The Court found that no additional step by which the police officer would formally affirm the ticket was necessary because it would be redundant.** The Court quoted the Electronic Signatures and Records Act and held that the electronic signature will have the “same validity and effect as one handwritten.” The Court found no language under the statute exists specific to any timing of the signature.

The Court thus upheld the use of the police officer’s electronic signature under the circumstances because “the officer met all requirements under the Electronic Signature and Records Act by preparing the simplified traffic and information personally and thereafter printing them and immediately serving the same to the Defendant allegedly at the time of the arrest. As a result, no further or additional authentication was required.

Under Wisconsin UETA, an agreement originally in paper form can be amended by a party using email. In *Sims v. Stapleton Realty, Ltd.*, 2007 Wisc. App. LEXIS 741 (August 23, 2007), the Court of Appeals of Wisconsin found that the parties had effectively amended a real estate listing contract by email. The Sims had entered into a listing contract with Stapleton Realty, Ltd. (“Stapleton”) whereby the parties agreed that a 5 percent commission would be earned by Stapleton if during the term of the contract the “seller sells or accepts an offer for the sale of the property or a purchaser is procured ‘at the price and on the same terms set forth in this Listing and in the standard provisions of the current WB-11 residential offer to purchase form even if Seller does not accept this purchaser’s offer.’” Seven days prior to the end of the contract term, the seller received an offer that was equal to \$14,000 less than the list price.

The seller countered with contractual changes and a price that was equal to \$7,000 less than the list price. The buyer then accepted some of the contractual changes, but not all. The seller sent an email to Stapleton seeking to lower the commission to 4.25 percent so that he would net the same amount had the purchase price been equal to the list price. He indicated that he would accept the buyer's

...evidence of the agreement is in writing, subscribed by the party whom the agreement is offered or by that party's attorney."

terms if the realtor would reduce the commission. In a number of emails exchanged with the realtor, he criticized the realtor's performance, but also said "Yes, you found a potential buyer and are entitled to be compensated for that." This sentiment was repeated by Sims in another email sent the next day. After Sims and Stapleton signed an amendment changing the commission (but not term of the initial contract), the buyer withdrew her offer. Sims later contacted the buyer to indicate that he was willing to sell based on the terms of an earlier offer and the buyer accepted.

After the closing, although \$20,000 was paid to Stapleton as a commission, Sims later sought the return of the commission on the grounds that Stapleton had breached various duties in the listing contract and was not entitled to the commission since a buyer had not been procured prior to the end of the contract term. Stapleton counterclaimed for payment of the full commission and asserted that the emails between the parties constituted a written document under Wisconsin's Uniform

Electronic Transactions Act ("UETA") such that Sims had agreed that Stapleton was entitled to the commission for the buyer's offer. Because Sims's emails acknowledging Stapleton's right to receive a commission occurred after the term of the listing contract, the Court found that "Sims, in a signed writing, extended the time period in the initial listing contract from May 31 to June 2, 2004." Furthermore, the offer accepted by Sims on June 15, 2004 "was precisely the one that was on the table when he wrote Stapleton that she was entitled to a commission[.]" Pursuant to these findings, the Court found that the listing contract was not void and that Sims had waived the time restriction by email. Accordingly, the Appellate Court reversed and remanded the Trial Court with instructions that Sims's complaint seeking the return of \$20,000 be dismissed and that a judgment in favor of Stapleton for the remaining commission be entered.

Under Michigan UETA, parties can reach a legally binding agreement by email. If a law other than an electronic signature law requires extra steps for an electronic record or electronic signature to be effective (eg., certain placement of a signature or method of delivery), that other law must also be complied with. In *Kloian v. Domino's Pizza, LLC*, 733 N.W.2d 766 (Mich. App. Dec. 28, 2006), the Court of Appeals of Michigan affirmed the lower Court's finding that the parties' attorneys had reached an enforceable settlement agreement through a series of email exchanges. Plaintiff, a landlord, sued his tenant for owed rent, holdover rent, taxes, insurance, and other amounts. Before the scheduled trial date, Defendant's attorney sent an email to Plaintiff's attorney with an offer of settlement whereby Defendant would pay \$48,000 in exchange for a release of all of Plaintiff's claims. Plaintiff's attorney replied as follows: "I confirmed with Mr. Kloian that he will accept the payment of \$48,000 in [ex]change for a dismissal with prejudice of all claims and a release as [sic, of] all possible claims." Subsequently, Defendant's attorney responded by email: "Domino's accepts your offer..." The attorneys then exchanged settlement documents by email. Plaintiff's

attorney found the documents to be in order, but asked for a mutual release of claims. In response, Defendant's attorney responded by email that he had the check and his client's agreement to a mutual release, but needed to further revise the documents to accommodate Plaintiff's attorney's request. Subsequently, Defendant moved to enforce the settlement agreement, but Plaintiff refused to sign it. The Trial Court found the parties had entered into a binding settlement agreement during the email exchanges between the attorneys when Defendant's attorney stated that "Domino's accepts your offer..."

On appeal, Plaintiff asserted that the parties had not reached an agreement on essential terms, but the Appellate Court disagreed. Noting that attorneys have the authority to settle a lawsuit on behalf of their clients, the Court found that **Plaintiff's email to Defendant constituted a valid settlement offer and Defendant's email response was an acceptance of such offer because "[D]efendant expressed the intent to be bound by [P]laintiff's offer and all the legal consequences flowing from the offer."** The Court further found a clear meeting of the minds on the essential terms of the agreement between the parties.

Plaintiff further asserted that the settlement agreement did not comply with the Michigan statute of frauds. Specifically, MCR § 2.507(G) provides that "an agreement or consent between the parties or their attorneys respecting the proceedings in an action, subsequently denied by either party, is not binding unless it was made in open court, or unless **evidence of the agreement is in writing, subscribed by the party whom the agreement is offered or by that party's attorney.**" The Court noted that "subscribed" was not defined by the relevant statute, but the dictionary defined it to mean "to append, as one's signature, at the bottom of a document or the like; sign." Although Michigan's Uniform Electronic Transactions Act ("UETA") clearly permitted the use of an electronic signature when applicable law required a signature, the relevant statute in this case required a "writing,

subscribed,” which the Court found must be treated differently from a signature. Subsequently, the Appellate Court found the original settlement agreement to be enforceable since both attorneys typed, or appended, their names at the bottom of their email messages. However, **because Plaintiff’s attorney, when requesting a mutual release by email, did not similarly type his name at the bottom of the email, but only had his name at the top of the email, the modification to the settlement agreement was not enforceable** because it did not satisfy MCR § 2.507(G) as **he had not subscribed his name at the bottom of the email.**

Transmitting the text of an agreement through a company’s email account does not constitute an electronic signature of that agreement by the company. *Poly USA, Inc. v. Trex Co., Inc.*, W.D. Va. No. 5:05-CV-0031 (March 1, 2006). Plaintiff alleged fraud and unjust enrichment, claiming that the parties reached an oral settlement regarding their dispute on May 24, 2004, which was then memorialized when the Defendant’s representative emailed the settlement agreement to Plaintiff’s president, and which was later signed by Plaintiff’s president. Defendant countered that no settlement was reached and that the agreement was only a draft proposal sent in connection with ongoing negotiations. The District Court held that the communications between the parties did not constitute an enforceable settlement agreement.

The facts relate to Plaintiff’s July, 2003 sale to Defendant of over one million pounds of raw plastic material used by Defendant in its manufacturing operation. After the relationship deteriorated, the parties began negotiating a settlement upon which Plaintiff would continue to do business with Defendant if a certain amount of money was paid by Defendant. In connection with such discussions, a manager of Defendant emailed a settlement agreement to Plaintiff’s president with a note in the email stating: “Read and give me a call.” Defendant had not signed the document and asserted later that it was sent for discussion, not execution. Although the Court ultimately agreed with Defendant, Plaintiff asserted in its initial

support brief, but did not later pursue at the hearing or briefing, that Defendant had “signed” the settlement agreement by sending it through Defendant’s email account. The District Court, however, found that **“the use of a [Defendant’s] Trex email account to send an email does not necessarily constitute an electronic signature under 15 U.S.C. § 7006 and, moreover, that Trex did not intend to electronically sign the emailed document by sending it from a Trex email account.** Thus, the May 28 emailed document was not binding.”

Consumer Disclosure Issues

Challenge of facts surrounding an alleged consumer contract highlights the importance of creating and retaining a complete record of the transaction that results in an electronically signed contract. *Wike v. Vertrue, Inc.*, 2007 U.S. Dist. LEXIS 19843 (M. D. Tenn. March 20, 2007) – Plaintiff (Margaret Wike) brought a class action suit on behalf of herself and other similarly situated persons allegedly harmed by the “unlawful and deceptive ‘membership billing’ practices” of Defendant (Vertrue, Inc.). Defendant’s business involved the sale of over 20 membership programs ranging in price from approximately \$169.95 to \$199.95 that purportedly gave “consumers exclusive, members-only access to discounts on various consumer goods and services.” However, the same discounts are widely available to the public free of charge through unsolicited direct mailings, periodicals, local retailers, the Internet and newspapers. Among other deceptive practices, Defendant’s representatives allegedly used various methods to disregard or obstruct customers’ attempts to contact Defendant, cancel memberships and remove unauthorized or questionable charges from their credit card bills and bank accounts. Furthermore, Defendant frequently marketed its membership programs under the name of a non-affiliated partner, but would not include the partner’s name or membership fulfillment materials or billing statements, which would cause confusion as to the actual source of the membership and nature of subsequent charges.

Plaintiff noticed unauthorized charges on her bank statement and contacted Defendant repeatedly to cancel her membership. Defendant repeatedly refused to comply and continued to charge Plaintiff’s account. Once Plaintiff filed the lawsuit, however, Defendant fully credited Plaintiff’s accounts for all of the unauthorized charges.



Defendant presented evidence that Plaintiff purchased two of its membership programs. In her first purchase, Plaintiff clicked on a banner on an AOL website, which then directed Plaintiff to one of Defendant’s websites where Plaintiff purchased the program by providing her MasterCard number. Defendant alleged that Plaintiff purchased a second program by placing a telephone call to AOL, and a representative of AOL then transferred her to a marketing company retained by Defendant after Plaintiff expressed interest in Defendant’s program. Plaintiff’s acceptance of Defendant’s membership, which included a free \$50 Wal-Mart gift card, was captured on audiotape, a written transcript of which was provided to the Court by Defendant. As explained to Plaintiff on the phone, Plaintiff’s Visa card would be charged regularly for the second program. Plaintiff countered that she did not agree to purchase such membership program and that she had called AOL for technical assistance and was offered the gift card as gratitude for her patience. **Plaintiff alleged that the entire call with the marketer was not recorded intentionally.** Plaintiff later discovered an unauthorized charge on her bank statement and called the phone number related to such charge to request a refund.

Plaintiff made a claim under both the Tennessee Consumer Protection Act and Electronic Fund Transfer Act, 15 U.S.C. 1693 et seq. ("EFTA"), alleging that Defendant made unauthorized electronic fund transfers in connection with the purchase of Plaintiff's membership program. EFTA was deemed to apply because Plaintiff's Visa card was a debit card through which electronic fund transfers covered by EFTA occurred. Defendant claimed the charges were "preauthorized electronic fund transfers" authorized by Plaintiff with an electronic signature in a recorded phone conversation under E-SIGN, which satisfied EFTA's requirement for a written authorization. The Court, however, denied Defendant's motion for summary judgment. In its ruling, the Court held that the "incomplete and disputed factual record does not permit the Court to rule on these intricate legal questions at the present time."



Challenge to validity of an alleged consumer contract underscores the importance of providing full disclosures of offer terms prior to a consumer's signature of the alleged contract. *Labajo v. Best Buy Stores, et al.*, 2007 U.S. Dist. LEXIS 21868 (S.D.N.Y. March 15, 2007) – Plaintiff (Christina Labajo) brought a class action lawsuit against Defendant (Best Buy Stores, Time Inc., et. al) on behalf of herself and all other consumers who were improperly charged for magazine subscriptions after purchasing merchandise at Best Buy stores.

On October 29, 2004, Plaintiff purchased certain merchandise from Best Buy with her

debit card and was told by the clerk she was eligible for a free magazine subscription. Plaintiff accepted the offer, signed a computer pad at the register to complete the transaction and received the free eight issues of the magazine. The subscription was automatically renewed and Plaintiff's debit card was charged three times for a total of \$70.50. Neither the computer pad nor the store clerk informed Plaintiff that she would be charged after eight issues unless she cancelled the subscription. The receipt, however, contained the following language:

I authorize Best Buy to give my credit or debit card to SI and SI to charge my card for the initial and six month renewal terms NO RISK: If within 8 issues you do not want the magazine, simply call Sports Illustrated at 1-800-284-8800 or go online to: www.sicustomerservice.com and you will NOT be charged.

Plaintiff was also provided with a brochure describing the offer terms in the bag containing the purchased merchandise.

Defendant also alleged that the electronic signature pad used by Plaintiff to complete the transaction notified Plaintiff of the terms of the promotion, but this claim was disputed by Plaintiff. Defendant alleged that the electronic signature pad contained the following language: "Yes! Sign me up for Sports Illustrated's issue trial offer with automatic renewal. I authorize Best Buy to give my credit or debit card to SI and SI to charge my card for the initial and six month renewal terms." The Defendant, however, did not produce evidence showing Plaintiff's signature created by the signature pad on the same document with such authorizing language.

After Plaintiff's bank account was debited twice, Plaintiff contacted Defendant to cancel the subscription. Although Defendant's representative agreed to do so, Plaintiff's account was charged a third time. Plaintiff repeatedly requested a refund from Defendant, but no refund was given.

The Court dismissed Plaintiff's claims for negligence, breach of warranty and unfair competition, but allowed Plaintiff to proceed with her claims for breach of contract and unjust enrichment. In refusing to grant Defendant's motion for summary judgment with respect to Plaintiff's claim for breach of contract, the Court noted that further evidence was required to determine whether Plaintiff signed the signature pad containing the promotion disclosure. The primary issue with respect to this claim relates not to whether an electronic signature could be valid, but whether Plaintiff signed the electronic signature pad containing the disclosure and whether Plaintiff received information about the terms of the agreement prior to signing the alleged agreement.

Voice Signatures

Although a valid electronic signature can be created over the phone using an IVR process, contract principles (such as unconscionability) can render an electronic contract unenforceable. Evidencing increasing acceptance of electronic signatures by Federal Courts, the Ninth Circuit in *Shroyer v. New Cingular Wireless Serv., Inc.*, 2007 U.S. App. LEXIS 1950 (9th Cir. Aug. 17, 2007), held that a class arbitration waiver contained in New Cingular Wireless Service Inc.'s standard contract for phone services, effectively agreed to over the phone using an IVR process, was unconscionable and unenforceable. Although the Court found that Plaintiff consumers had effectively executed the agreements using an electronic signature over the telephone, applicable contract law rendered such agreements unenforceable.

This case arose following the 2004 merger of AT&T Corp. ("AT&T") and Cingular Wireless, LLC that created the new New Cingular Wireless Services, Inc. ("Cingular"). In this class action, Plaintiffs alleged that service deteriorated significantly following the merger. Shroyer, in particular, complained about his service and, upon receipt of his complaint, AT&T informed him that his service would improve if he signed a new contract with Cingular. Thus, Shroyer trans-

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ferred his two cellular phone service accounts from AT&T to Cingular on January 2, 2005 by entering into new agreements with Cingular over the telephone. Similar to the other class members, Shroyer "executed an electronic signature over the telephone to assent to the terms" of the Cingular agreements. Specifically, Shroyer, and the other class members, "selected the answer 'Yes' in response to the statement 'You agree to the terms as stated in the Wireless Service Agreement and terms of service.'"

The form contract to which Shroyer signed and agreed to over the telephone was an agreement that incorporated Cingular's Terms and Conditions Booklet by reference. By agreeing to the terms of the agreement, Plaintiffs purportedly agreed to be bound by the binding arbitration clause contained in the booklet. Such arbitration clause also contained a class action waiver. Pursuant to such clause, the district Court granted Cingular's motion to compel arbitration and dismiss the action with prejudice. The Ninth Circuit, however, reversed and found that under California law the class arbitration waiver at issue was both procedurally and substantively unconscionable and unenforceable under the test set forth in *Discover Bank v. Superior Court of Los Angeles*, 36 Cal 4th 148 (Cal. 2005). As in *Discover*, Cingular's contract was both a consumer contract and a contract of adhesion. Furthermore, the invalidation of such contract was not preempted by the Federal Arbitration Act.

Statute of Frauds

An email is "signed" for purposes of the statute of frauds if a party's name clearly appears in the email as the sender, and there is no question as to the source and authenticity of the email. In *JSO Assoc. Inc. v. Price*, 2008 N.Y. Misc. LEXIS 2227 (Nassau Co. 2008), an issue arose of whether Defendant was liable for a broker's commission to Plaintiff. The Court was presented with various emails which required an interpretation of whether Defendant impliedly hired Plaintiff as a business broker. The Court concluded that, based on the emails, supplemented by extrinsic evidence, the Defendant was a party to the broker's agreement. The Court then had to consider whether the memorandum encompassed within the emails was signed. Defendant's name appeared in the email address at the top of the email but the email was otherwise unsigned.

This case thus presented the issue of whether the statute of frauds had been satisfied since the statute of frauds required "a writing at the end of the memorandum." The Court noted that earlier cases discussing the issue were decided in a "different technological era, when small and home computers had not even entered the public imagination. Moreover, the requirements of a signature at the bottom was to minimize the opportunity for fraudulent additions to the memorandum, a practice which is not feasible with electronic communication."

The Court also noted that "electronic signatures" on such formal documents as tax returns or SEC filings have now become commonplace. The Court said that the law is still developing as to how the statute of frauds will be satisfied for "less formal types of electronic communication, such as email and instant messaging." The Court nevertheless found it must look for assurance as to "the source of the email and authority of the person who sent it."

The holding of the Court was significant: "The Court holds that **where there is no question as to the source and authenticity of an email, the email is 'signed' for purposes of the statute of frauds if [D]efendant's name clearly appears in the email as the sender.**"