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The Statute Of Frauds In The Digital Age

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Passed in 1677, the statute of frauds did not change for more than 300 years, rendering certain contracts unenforceable unless they were memorialized in writing and signed.

In recent years, as parties have increasingly transacted business via email and by other electronic means, courts recognized the need for an update. Emails are now considered signed writings that satisfy the statute of frauds, and electronic signatures receive full protection under the law. This article discusses the evolution of the statute's application to new technologies during the past 20 years.

History of the Statute of Frauds

Forty-eight states still enforce a version of the statute of frauds that is modeled after the English statute titled "A Statute for the Prevention of Frauds and Perjuries," which was enacted in the 17th century and repealed in 1954.[1] When the English statute was passed, perjury and the subornation of perjury had become widespread and serious problems.[2] Moreover, juries at that time decided cases on their own personal knowledge of the facts, rather than on the evidence introduced at trial, and a requirement that some contracts be "in writing, and signed by the party to be charged" placed a limitation on the jury's uncontrolled discretion.[3]

Beginning in the 1980s, technology began changing the way Americans conducted business, particularly the way in which parties exchanged documents. First, the fax machine became a fixture in American commerce, and, in the 1990s, email became a widely used mode of communication. The dot-com boom later brought innovative, technologically advanced contracts. By the 1990s, courts began confronting statute-of-fraud anachronisms in light of these new business practices and contracts.

Email and the Statute of Frauds in New York

New York passed General Obligations Law § 5-701 in 1994 to facilitate derivatives contracts negotiated over electronic exchanges. The statute provided that "tangible written text" or "any symbol" made with the "intent to authenticate" constitutes a signing that satisfies the statute of frauds.

Courts initially approached § 5-701 with caution. In Parma Tile v. Short, the New York Court of Appeals

held that the automatic imprinting of the sender's name in a fax transmission did not satisfy the statute of frauds.[4] The second department held the line in Page v. Muze, ruling that the existence of an email signature block, without more, does not satisfy the statute of frauds.[5]

The jurisprudence shifted in 2004, when the King's County Supreme Court held in Rosenfeld v. Zerneck that a sender's "act of typing his name" at the bottom of an email manifested his "intention to authenticate" for statute-of-frauds purposes under § 5-701.[6] In 2010, the first department ratified Rosenfeld, holding that "any uncertainty that existed in 1994 as to whether the record of an electronic communication satisfied the statute of frauds under New York state law has long since been resolved."[7] The Naldi court established the law of New York, and email communications are now recognized as signed writings under the statute of frauds.

Email and the Statute of Frauds in Florida

Florida's flexible approach to the signature requirement allowed for emails to be accepted as signed writings. Florida's statute of frauds, enacted in 1828, was designed to "intercept the frequency and success of actions based on nothing more than loose verbal statements or mere innuendos."[8]

Florida courts declined to prescribe a specific form for writings, holding that a note or memorandum "may take almost any form."[9] Unsigned settlement sheets, a telegram memorializing a prior agreement and even unsigned documents "aggregated" with a signed writing satisfy the statute of frauds in Florida.[10] Case law evolved differently from state to state; for instance, Florida's approach in Bader Bros. sharply differed from New York's approach in Parma Tile.

In 2000, Florida passed Fl. Stat. § 668.004, establishing that "an electronic signature may be used to sign a writing and shall have the same force and effect as a written signature." The U.S. District Court for the Southern District of Florida held that emails satisfy the statute of frauds under Florida Statute § 668.004 because emails dispel the concern that a fact finder would base a decision on "loose verbal statements or mere innuendos."[11] The same court declared the issue settled: "signed emails meet the writing requirement of the statute of frauds" in Florida, and a party opposing this principle does not take a "reasonable stand on an unsettled principle of law."[12]

Federal Law: UETA and ESIGN

In the 20 years since 1994, emails have achieved near universal acceptance as signed writings under the statute of frauds. Congress passed the Uniform Electronic Transactions Act (UETA) in 1999 and the Electronic Signatures in Global and National Commerce Act (ESIGN) in 2000.

Designed to eliminate a patchwork of inconsistent state laws, the National Conference of Commissioners on Uniform State Laws drafted UETA to be implemented by the states. ESIGN is the governing federal version of UETA, and 47 states have passed a version of UETA. The three states without an express version of UETA — Illinois, New York and Washington — have similar statutes in place governing electronic signatures.

UETA and ESIGN provide that a signature "may not be denied legal effect, validity, or enforceability solely because it is in electronic form." ESIGN also establishes that "a contract relating to such transaction may not be denied legal effect, validity, or enforceability solely because an electronic signature or electronic record was used in its formation." Under ESIGN, "e-mails constitute 'writings'" in transactions involving interstate commerce.[13] In addition to typed emails, courts recognize digital

images of handwritten signatures and clicks of an “I accept” button on an e-commerce site under ESIGN.[14]

A Look Forward

Electronic signatures, emails and digital authentications arguably provide superior evidentiary value and durability than their paper predecessors. Courts have correctly recognized that electronic records satisfy the evidentiary component that underpins the statute of frauds. The recent statutes and rulings have kept the spirit of the statute of frauds alive while facilitating the business community’s use of new technology.

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[1] DK Arena Inc. v. EB Acquisitions I LLC, 112 So. 2d 85, 92 (Fla. 2013) (citing Tate's Adm'r v. Jones' Ex'r, 16 Fla. 216, 240–41 (1877)) (citations omitted); and C.R. Klewin Inc. v. Flagship Props. Inc., 220 Conn. 569, 600 (1991).

[2] C.R. Klewin Inc. v. Flagship Props. Inc., 220 Conn. 569, 600 (1991).

[3] Id.

[4] Parma Tile v. Short, 640 N.Y.S.2d 477 (1996).

[5] Page v. Muze, 705 N.Y.S.2d 383 (App. Div. 2000).

[6] Rosenfeld v. Zerneck, 776 N.Y.S. 458 (Sup. Ct. 2004).

[7] Naldi v. Grunberg, 908 N.Y.S.2d 639, 645 (App. Div. 2010).

[8] Tanenbaum v. Biscayne Osteopathic Hosp. Inc., 190 So. 2d 777, 779 (Fla. 1966); Tate’s Adm’r v. Jones’ Ex’r, 16 Fla. 216 (1877).

[9] Kolski v. Kolski, 731 So.2d 169, 171 (Fla. Dist. Ct. App. 1999).

[10] Bader Bros. Transfer & Storage Inc. v. Campbell, 299 So.2d. 114, 115 (Fla. Dist. Ct. App. 1974); Heffernan v. Keith, 127 So.2d 903, 904 (Fla. Dist. Ct. App. 1961); Cook v. Theme Park Ventures Inc., 633 So.2d 468, 471 (Fla. Dist. Ct. App. 1994).

[11] U.S. Distributors Inc. v. Block, No. 09-21635-CIV, (S.D. Fla. Oct. 13, 2009).

[12] Hermosilla v. Coca-Cola Co., No. 10-21418-CIV, (S.D. Fla. July 15, 2011).

[13] In re Cafeteria Operators LP, 299 B.R. 411, 418 (Bankr. N.D. Tex. 2003).

[14] Litevich v. Prob. Ct., Dist. of West Haven, No. NNHCV126031579S, 2013 WL 2945055 (Conn. C.P. May 17, 2013).
