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HOLLMAN DEJONG & LAING S.C.

ELECTRONIC SIGNATURES: THE LAW IS CATCHING UP

Electronic signatures are alluring to time-pressed clients who are closing deals all over the city, the state, the country and the world. But are electronic signatures enforceable? Can you enforce an agreement when the only "signature" you received was the other party's typed name at the bottom of an email or a text? How about when your only copy of the other party's signature is a pdf?

For decades now, people have attempted to enter into agreements through purely electronic means, but the law has been slow to guarantee that these purely electronic agreements would be enforceable in court. Recently, though, the law has started catching up by enforcing certain electronic signatures and agreements.

State and Federal Electronic Signature Laws

There are two primary laws that govern electronic signatures. The first is the federal Electronic Signatures in Global and National Commerce Act ("E-SIGN"). The second is the Uniform Electronic Transactions Act ("UETA"), which has been adopted in some form by 47 states, including Wisconsin ("WI UETA"). Illinois, New York and Washington have not adopted UETA, but they have adopted their own electronic transaction laws.

How Do the Laws Work in Practice?

E-SIGN and UETA were each enacted to ensure that electronic records and signatures are not denied legal effect solely because of their electronic form. But what does that mean in practice and in court?

First, an "electronic signature" means any "electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record." This means that pdf copies of signatures, typed names at the bottom of emails or texts, and personal access codes are some of the many items that can qualify as electronic signatures.

Now, let's say that you have taken another party to court to enforce an agreement signed electronically. The opposing attorney's first argument may be that her client's electronic

signature is not enforceable. In that case, the court will have to determine whether the two parties *agreed* to conduct the transaction electronically. This agreement may have come in the form of an expressly written document or it may have been implied contextually over the course of negotiations.

This is really at the heart of the Wisconsin law: can the court find that the parties expressly or implicitly agreed to accept electronic signatures?

Obviously, it is better to express this agreement in writing. Otherwise, a good litigator will fight the validity of the contract, which will increase court costs and fees. Therefore, parties should include in their agreements a clause that expressly states that the parties agreed to accept electronic signatures.

What Does Wisconsin's Electronic Signature Law Say?

Wisconsin law states that the following three requirements must be met before WI UETA will apply to an electronic record:

1. The subject matter of the electronic record must not fall within WI UETA's list of prohibited subject matters (see below);

2. The parties must agree to use electronic records; and

3. The electronic record must be capable of retention at the time it is received.

What is a "Prohibited Subject Matter" Under WI UETA?

WI UETA generally applies to all electronic records unless WI UETA or another statute expressly prohibits the use of an electronic format. Examples of specific areas where WI UETA does not help to enforce an electronic record include the following:

1. The creation of wills or testamentary trusts;

2. Certain agreements governed by the Wisconsin Uniform Commercial Code;

3. Records governed by any law relating to adoption, divorce, or family law matters;

4. Notices provided by a court;

5. Court orders;

6. Official court documents (*e.g*. briefs and pleadings);

7. Certain notices (*e.g*. termination of utility services, termination of health or life

insurance benefits, product recalls, foreclosure, or eviction);

8. Consumer disclosures governed by E-SIGN; and

9. Records subject to a law that expressly prohibits the use of an electronic format.

What Constitutes an “Agreement” Under WI UETA?

As discussed earlier in this article, WI UETA does not apply unless the parties both agree to conduct the transaction via electronic means. Again, this is at the heart of the law: both parties must express an agreement to conduct the transaction electronically, either in writing or in the context of their negotiations. Of these two options, the most secure way is to express agreement in writing within the actual contract.

When in Doubt, Contact Your Attorney

Of course, this is a simplified description of the laws governing electronic signatures. There are also requirements related to consumer documents, technology, storage of the electronic documents and even security measures. However, the bottom line is that the law is finally catching up to the real-world demands of today’s business transactions.

If you have any questions, please contact O’Neil Cannon at 414-276-5000.